ORAL ARGUMENT – 01/06/05
03-1189
DAIMLER CHRYSLER CORP. V. INMAN

BOUTROUS: This is an appeal from an order certifying a nationwide product liability class action alleging breach of warranty and seeking billions of dollars based on a theory that seatbelt buckles in certain Daimler Chrysler vehicles might some day in the future malfunction and fail to restrain passengers due to supposedly defective design.

While the CA set aside the certification order and remanded for a further review of choice of law issues, Daimler Chrysler was still aggrieved because it did not received the maximum relief to which it is entitled and which it sought below. We contend in particular that the class should have been decertified and the case dismissed because the class representatives lack standing to sue. Their vehicles have operated in the real world for many years precisely as warranted and intended.

O'NEILL: We're talking about a legal question, whether someone can recover for unmanifested defects. And how can we answer that question without knowing what law applies?

BOUTROUS: With respect to the standing question that is a question of Texas law.

O'NEILL: My understanding is the TC is going to now parse through the conflict of laws issues. We have said in Compaq that that is sort of an unresolved question in our CAs. Don't we have to see how TC's are going to break down the choice of law issues and decide what law it's going to apply before we can review that?

BOUTROUS: No. The standing question, the question of whether the named plaintiffs have suffered concrete particularized injury that would allow them to step into the Texas courts is a Texas law question. So the question of cognizable injury is a question of standing under Texas law. And under that test the plaintiffs don't meet it. They have not suffered the kind of concrete actual injury...

O'NEILL: It was a nationwide class. There is no class now. So how is a Texas court to decide the California purported class members what law applies?

BOUTROUS: We do think that on the choice of law issues as well, the court should simply decertify the class and not remand it. But putting that aside, again these plaintiffs purport to be representing not people from California, but they purport to be representing 10 million people from all over the country. Before they can come into court to do that, they have to prove that they have standing under Texas law. So the court doesn't need to consider anyone else except those plaintiffs.

O'NEILL: But you're not saying Texas would apply Texas law to a New York purported class member's claim?

BOUTROUS: No. But whoever comes into Texas courts must meet the Texas standing requirement. These plaintiffs are here seeking to come in to Texas courts...

O'NEILL: But I guess what I'm saying is, of course they have to meet Texas standing requirement. But to make that determination you have to look at what is state law on unmanifested defects.

BOUTROUS: No. I don't think so. That with respect to the injury inquiry this court must determine whether an unmanifested defect, where the plaintiffs have driven their cars for a combined 25 years...

O'NEILL: Under which law?

BOUTROUS: Under Texas law, whether that's an injury in fact under Texas law.

O'NEILL: What about purported class members who are not from Texas?

BOUTROUS: The court need not concern with those class members at this point because we're concerned with whether these plaintiffs have suffered and have been aggrieved by a wrong that caused them the injury sufficient to allow the standing in the Texas courts. So the court need not look at the choice of law questions. This is a Texas law question under the constitution and under the separation of powers doctrine in Texas.

The question in this court's cases in MD Anderson and Grizzle to make clear that a plaintiff who seeks to carry a case for a whole group of people must show that they suffered the cognizable injury that gives them the right to sue.

MEDINA: In this case, the plaintiffs have pled economic injury, that there is a manifest defect in the sense that these two belt buckles unbuckled. That's not what they bought. That's not what they thought they were buying and the warranty question claiming an economic loss because the product is not what was represented. Why isn't that an injury that's been pled which would support standing?

BOUTROUS: Actually they have not pled an economic injury. They pled and asked for cost of repair damages. But they skipped over the injury. They haven't shown that they have suffered a loss. Two of the plaintiffs, Mr. Wilkins and Mr. Castro, have never had their seatbelt released under any circumstances. One of them, Mr. Wilkins, drove his vehicle for 10 years, had no incident, and was in an accident and was restrained by his seatbelts. They had no problems with it. And they have jumped over, skipped over the injury inquiry and asked for cost of repair damages. Mr. Inman had two incidents over about an 8 year period, which he vaguely remembers. But neither of them were accidentally released in an accident. So they have not pled the kind of injury that's required under Texas law.

MEDINA: So they clearly have pled breach of warranty?

BOUTROUS: They have alleged breach of warranty. Yes.

MEDINA: But you're just saying that they've alleged the wrong injury as a consequence of the breach of warranty, thereby cutting off their standing claim?

BOUTROUS: That's correct. They have not identified a type of injury recognized under Texas law that suffices to show the kind of concrete injury in fact that's required for standing. Their claims of defect are really completely disconnected from themselves. Their main argument is that the door jam sticker on the vehicle said that the vehicle complied with federal safety standards.

HECHT: How likely could it be that a defect was going to manifest but hadn't yet, and there be the kind of injury that you think these causes of action require?

BOUTROUS: I think the likelihood or risk get us into that territory of no injury. There are instances where someone who hasn't suffered personal injury may still be able to bring a case for breach of warranty. If they had thought they were buying a seat buckle that functioned differently and paid more but got a different Gen-3 buckle instead, that would be a different situation. Or if they had problems and gone out and gotten their vehicle fixed and spent money. But the mere risk, I think this court's decisions in the fear of injury area make this clear, and in our system of justice we wait until some sort of tangible concrete injury is suffered. There are other remedies if there is a risk of injury.

MEDINA: What about cases like the famous Ford Pinto case, or most recently these tire cases that allegedly caused rollovers. The injury hasn't - in those cases didn't necessarily manifest before something was done except for the Ford Pinto case. Once they knew there was a problem that there was a potential for a defect or the product was defective isn't that enough to suggest that it's reasonable that an injury could manifest at some later point in date just like in a toxic tort case, the exposure to all of these asbestos particles and the injury hasn't manifested. But based on some science there's enough science to conclude that at some point in the future there will be a manifestation of perhaps mesothelioma. And those plaintiffs are compensated.

BOUTROUS: Under product liability law generally there must be an injury. The product must malfunction and cause personal injury property damage or some economic loss. With a vehicle if someone has their vehicle, like Mr. Wilkins for example for 10 years, and it functions perfectly well - no problems, that stretches the concept of injury beyond the realm of anything that this court and most courts in the country have held. But there is a remedy. I think your getting at a point you know what do we do if there is a safety problem and people have not actually been injured. The remedy is 1) in an automobile ___ to go to the federal highway safety administration. There can be a recall. And in Texas under the DTPA the AG can file an action, can get an injunction precluding the sale or requiring actions to be taken. The motor vehicle board can enforce the motor vehicle code, to enforce an express warranty. So consumers are not left unprotected. And it takes me back

to the separation of powers point. That really falls in the realm of these agencies...

OWEN: What if we were to decide that this really isn't a standing issue, but it's more of a look at the merits. If we were to decide that how far could or should this court go in class actions in looking at the merits so that we don't spend a lot of resources litigating essentially frivolous claims?

BOUTROUS: I think that the court in this class action area where we are talking about individuals who are going to be proceeding through the whole court system with this huge case, that it is appropriate at least with respect to them and it does collapse back to the standing issue to a certain point on injury. But I think the court could say these plaintiffs have no valid claim. And some of the standing cases talk about this: the Grizzle case, where the court said a plaintiff to bring a class action must have a valid claim. If they don't have a valid claim, they cannot be the individuals who stand in court on behalf of others. So I think there is authority for that. The court wouldn't be deciding the merits of other people not before the court in that context. It would only be deciding whether these plaintiffs can bring a claim. And I believe State Farm v. Lopez, the court at least held out the possibility there that if the record was such that the court make a determination on the merits in the class certification stage it could do so.

OWEN: I think we are one of the first courts to have said that. How far should we go in looking at the merits before we allow TC to certify classes?

BOUTROUS: I believe if the focus is on whether the plaintiffs have a valid claim and whether they have been injured, then that's probably as far as the court needs to go here. Whether they have a viable legal claim that would be appropriate. And in the federal system for example, the Rivera court held this isn't a viable claim for warranty or product liability in finding no standing. That's how that court reached the question. So I think that's an appropriate framework to do it. But I think that in this context it is appropriate to look at whether the plaintiffs have a valid claim. But I think it ties back into the standing.

WAINWRIGHT: In your view what's the minimum that has to happen for there to be an injury in fact?

BOUTROUS: I think there are several possibilities. One would be if the plaintiffs - as I've said. _____ was buying one product. Here say they bargained for the Gen-4, the later model seatbelt buckle, paid more, and it turned out they got what they claim would be the less valuable buckle. They function in their claim less appropriately.

O'NEILL: That is their claim though isn't it?

BOUTROUS: No it's not.

O'NEILL: Their claim is not by that name, but their claim is we bargained for a seatbelt

that met federal safety standards and we got one that didn't.

BOUTROUS: Their claim is really that they wish the product was different and functioned better. The court said in General Motors v. Brewer was not a breach of warranty. What they claim is that they bought a vehicle that had these Gen-3 seatbelt buckles and that there's a sticker that claims that it complies with the federal safety standards. But they don't say that they looked at that sticker. They don't say that they relied on it.

WAINWRIGHT: Confining the topic on to the Gen-3 buckles. What at a minimum has to happen in your opinion for there to be an injury in fact?

BOUTROUS: At a minimum the plaintiffs would have either had to have spent money to fix the seatbelt, or if they had resold their vehicles and could prove that they had gotten less money because the purchaser said, I don't like this seatbelt. It doesn't look like it's as good as the one I want. And paid less. Or another possibility would be that if they had actually experienced problems, that they had been in an accident and the seatbelt had not functioned as intended in an accident. And it had rendered it unusable for example. If they could come forward with concrete proof that...

OWEN: So what if this case had been for injunctive relief. To ask that your client would replace all of these buckles, would we be in a different posture?

BOUTROUS: In that circumstance, I think we would have a preemption problem and an intrusion on the federal agency, NHTSA's, authority to recall vehicles. So I think that would create a different problem. But there are ample remedies for consumers. Under DTPA the plaintiff can get attorneys if they have a problem, if they have suffered some concrete injury. These plaintiffs were perfectly happy with their vehicles until they recruited literally in some cases off the street...

MEDINA: Well they were happy until they knew that there was a potential for a problem. I don't read everything about a vehicle that I drive.

JEFFERSON: That's the first thing you think about when you have kids in the backseat. If you hear that the seatbelt is not going to work, you don't want to drive that car anymore. Isn't that true?

BOUTROUS: I think that it is very important - seatbelts are a very important feature of the vehicle. They need to be thought of in the context of the entire restraint system. But as I said. There are things that could be done. The plaintiffs with all respect to their position in this case, if they had felt so strongly about this, then when they learned of this they would have fixed the seatbelt or done something if there really was the kind of imminent danger that they claim. But instead they've driven their vehicles and operated them in the exact same manner. I'm not at all minimizing the importance of safety in seatbelts. It's very important, but there are ways to address this problem.

WAINWRIGHT: Let's assume that at your home you become aware that the step leading to your

front door is defective. It hasn't broken. Nobody has been injured yet. But everyday you know that you and your kids and your wife are stepping on that defective step everyday, several times in order to go in to or come out of your house. Do you have a remedy? Are you injured, or do you have to wait till something happens? Or is that a different situation than what we are faced with today?

BOUTROUS: I think it's different first. But I would fix it. I would fix it. If I truly thought it was a concrete problem and injury, I would get it fixed to protect the family.

WAINWRIGHT: And then you would have a lawsuit for the repair?

BOUTROUS: No. That's not _____. They haven't fixed it. They continue to drive it.

O'NEILL: They want the cost to fix it. What if you can't afford to fix your step. Can you not recover to get the money to fix your step. It strikes me that's exactly what they are asking for.

BOUTROUS: If under J. Wainwright's hypothetical, if they had experienced problems - if the seatbelt had been causing them difficulties that made it unusable, or created difficulties for them and interfered with the operation of the vehicle - in J. Wainwright's hypothetical the house - you can't get into your house. That's not what happened.

O'NEILL: Mr. Inman has. Now you dispute the circumstances under which that occurred, but he has alleged, My seatbelt did not latch properly.

BOUTROUS: He alleged two incidents. One, that he thinks he may have not latched it properly in the first place and it came loose in 1997.

O'NEILL: These are fact issues.

BOUTROUS: I'm not disputing what he said for these purposes. And he also said that he hit his seatbelt with a beverage cooler and it unlatched.

O'NEILL: So he has had injury because it hasn't worked as it was promised?

BOUTROUS: That's not an injury. And that's not the kind of accidental release that is discussed in the regulations. There is a letter that we've cited on page 15 of our brief from the NHTSA chief counsel that said that, the accidental release that is discussed there is accidental release in an accident. And that's not what happened here. And so that does not qualify for the type of injury that reduces the value. Finally, the plaintiffs haven't argued diminished value or loss of bargain. They've only asked for cost of repairs.

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RESPONDENT

EDWARDS: It was very interesting what I heard DaimlerChrysler say what is injury in fact. If they had expended money to fix it. At tab 9 of our brief, Mr. Inman's affidavit says that he took his car to the dealership and tried to get his buckles replaced and they told him they wouldn't do it. DaimlerChrysler also said that if they had actually experienced problems, and as already pointed out, Mr. Inman in that same affidavit and in his testimony explains how his buckle has come unlatched. And if it comes unlatched from simply opening up an ice chest and the lid bumping it, it goes right along with the history of these buckles unlatching due to elbows from the crash test dummies hitting it, from people hitting it with their elbows, from car child and safety seats...

HECHT: It looks like if it were that bad an agency would recall it.

EDWARDS: That may be. But that's not a question that has to be answered to determine whether or not Bill Inman has standing.

HECHT: Well the problem in these kind of cases is that we're about to have a massive piece of litigation and we don't know whether anybody cares outside the courtroom. We don't know whether any of these drivers care. We don't know whether they would spend so much as $3 to get this terrible problem fixed. Is there just no way to know whether this really is serious or something that's just been gemmed up by counsel?

EDWARDS: I would suggest first that it is serious. There are some 30 cases involving serious injury and death that have been filed.

MEDINA: Why hasn't there been a recall by NHTSA?

EDWARDS: That's a question to ask of NHTSA. And I can't answer that. I do know that the former general counsel for NHTSA is now representing DaimlerChrysler in Gen-3 class actions. And I also know that the current general counsel for NHTSA came from the general counsel's office of DaimlerChrysler. Unfortunately Bill Inman doesn't have anybody like that to speak for him at NHTSA.

MEDINA: Why does he have standing?

EDWARDS: That question is directed to NHTSA and it certainly should not influence whether or not Bill Inman has standing to bring his cause of action. DaimlerChrysler says that this is an appeal from a class order involving billions of dollars. In fact from Bill Inman's perspective this case is now his individual claim. This is Bill Inman's case. Because the CA already did away with the class order. There is no class order at this point. There is none. Bill Inman stands in this court by himself with the other two plaintiffs, not as a class representative anymore because there is no class order.

HECHT: The US SC has wrestled with this in some other context. But in the asbestos Metro North case, whatever it was, they said, Well if you've just been exposed to asbestos and there

is some possibility that you will develop cancer, but it's not high, possibility it's there, you have to wait until the cancer manifests itself. You can't use the exposure as a basis for the action for the cancer. Why isn't that sort of like this?

EDWARDS: It's a perfect example. You see if I go out and I buy some asbestos product and I use it myself and I get exposed to it and, then, I learn it might cause me cancer, I know that I can't bring a case and say, I'm afraid that you have caused me cancer with your product. On the other hand, if I go out and I buy an asbestos containing product and I'm going to give it to my employees to use for instance, and then I find that this product my cause my employees cancer, and that it's defective because it doesn't pass without objection in the industry or it doesn't conform with the label on the product that says that it doesn't contain asbestos, do I not then have an injury for receiving something that I didn't want, that I didn't buy, that was not part of my bargaining. Can't I take it back then to the seller and say, Look, you sold me something that is not as it was represented. Now it hasn't caused me or any of my employees personal injury. But if we use it it might.

OWEN: Why don't you seek injunctive relief?

EDWARDS: That's a very good question and I expect that when we go back, we will seek - having been through this process and just being more exposed to it, I think that the UCC allows for a specific performance for instance. And I don't see any problem with going back and requesting specific performance especially in light of the fact that Bill Inman tried to go and get his buckles replaced and was told that he could not.

HECHT: But the concern is that as products are always being developed and some of them work better than what you've got and we had that in the Brewer case, how do you distinguish between that situation and a situation like this? This works and you say it doesn't minimize accidental release. Well it minimizes it to an extent. The question is how far?

EDWARDS: In many of these other products cases, like the Bronco II cases, the rollover type cases, the airbag cases, in most of those cases there was no allegation that those vehicles or those component parts would not pass without objection in the industry. That they did not fail to conform with labeling on the product. In this instance, it was from the beginning. Chrysler identified the safety test in which they were going to design these buckles. They said the criteria (this is the testimony from DaimlerChrysler engineers) that we were going to use on the Gen-3 buckle was the 40 millimeter ball test. And it doesn't pass the 40 millimeter ball test. So we're not talking about them learning somewhere down the road that the Gen-3 buckle could be made safer. They knew it when they made it. They also knew it when Allied Signal wrote them a letter and said you are rushing into this program, you're moving way too fast. If we are going to do it, we will make this buckle out of customer satisfaction, you being our customer. But you are going to have to hold us harmless for the risk that comes from it.

We've been talking an awful lot about injury. I want to emphasize when it

comes to a jurisdictional standing analysis that particularized injury has a very distinct meaning in the jurisprudence of this state, and in the federal courts as well. Particularized injury goes to the proposition of whether or not an individual as a plaintiff has some form of grievance different than the general public. For instance in the MD Anderson case, Mr. Novak could not show that he had some particularized injury different than the general public. Even though he had received a letter, he had sent no money. He was in the same shoes as anybody in the general public that says, You know they shouldn't have sent that type of letter out and I'm going to sue them because they shouldn't have done it. But our courts don't allow that, because they don't have a particularized injury different from the general public.

An in fact in the Polaris case out of Tyler, they quote a list of things that shows standing. One, they have sustained some direct injuries as a result of a wrongful act. There's a direct relationship between the alleged injury and the claim sought to be adjudicated. They have a personal stake in the controversy. This is interesting. The challenged action has caused them an injury in fact whether economic, recreational, environmental or otherwise. I'm don't know exactly what a recreational injury is, but I'm not aware of any remedy for it. But in that instance it's saying, We're not talking about whether or not you have a remedy for it. We're not talking about whether or not you meet the elements of a particular cause of action. We're talking about something else. And if you back on the history of that quote, you end up with a CA's decision from Corpus Christi in 1976. And they were talking about a particularized injury and they were talking about concrete injury and they were talking about these factors. And that case involved tenants suing a housing authority for illegal expenditures that the people who ran the housing authority shouldn't be making. The court's analysis in that case applied these factors and said these tenants do have standing, because if that money wasn't spent on paying these commissioners money that they shouldn't be paid, then perhaps their rents would be lower, perhaps that money could have been spent on the housing units themselves and made them better. And that was enough injury for those tenants to have standing.

But none of those tenants said we're here under the UCC claim seeking compensation. None of them said we're here on a negligence claim. None of them were saying give us money. But the appellate court in that case analyzed injury in that context, and they cited US SC cases. And the US SC does the same thing. Injury in the jurisdictional standing setting is not the same as injury for instance that you must have to bring a products liability case.

HECHT: What is your position in this case on whether the car has less value because of the seatbelt?

EDWARDS: I think with people who know about this seatbelt buckle that is has less value. It's an interesting point. Because to say that there is no injury in this case is to say that a defective safety device has as much economic value as a nondefective safety device.

HECHT: Well the argument is, you're not asking for damages for reduction in value because you can't prove it. All you're asking for is costs of repair. So I'm interested in your response to that.

EDWARDS: Nobility Homes, which is an interesting case that seems to not be talked about in any case that purports to apply Texas law in a breach of implied warranty case. And I'm thinking in particular In re Airbags and Martin v. Ford. Both of those federal district courts purported to apply Texas law and poured out some plaintiffs on an implied warrant basis without talking about Nobility Homes. This court decided Nobility Homes in 1976. And the question there was whether or not a person could recover economic loss, that is loss within the value of the product itself, no harm to other property, no physical harm. Can that type of loss be recovered under various causes of action? And J. Pope wrote the opinion and said in a 402(a) products liability case you can't recover. But in an implied warranty, breach of warranty case you can. And in a footnote he describes the difference between economic loss and consequential loss. And economic loss is a loss of value of the product itself. And he said one measure of that damage is cost of repair.

OWEN: Does the general rule of you get the lesser of the two apply here?

EDWARDS: There's an earlier opinion of this court that says you can get the greater of the two. But whether you're talking less or greater, you are entitled to plead and try to prove either one.

OWEN: I thought historically the rule on repair was you can't get the cost of repair if it exceeds the decrease in market value. So if decrease in market value is zero why would you be entitled to any damages? I thought historically you have to show that the cost of repair is not greater than the diminution in market value. It's a typical car accident case. I have a fender bender. And generally the measure of damages is the cost to repair but not if it exceeds the diminution in market value.

EDWARDS: Not if it exceeds the value of the product itself.

OWEN: I thought it was diminution in value.

EDWARDS: No. Because if I drive a junk car and somebody hits it and makes it a little more junk, I'm still entitled to have that dent pulled out if it's a dent that I don't want. Even if it's arguably...

OWEN: Maybe on your insurance, but I'm not sure that's true under general...

EDWARDS: I'm not aware of any case that puts that kind of a cap on those damages. Certainly under Nobility Homes this court wrote that cost of repair is a proper measure of damages for economic loss.

In our implied warrant allegations, we don't limit our allegation to not fit for its ordinary purpose, which is what many of the other so called no injury cases that DaimlerChrysler cites to. There are other parts to 2.314. The first part is, pass without objection in the trade. And the 6th and last one is conform to the promises or affirmations of fact made on the container or label. And we say that in this instance this vehicle has not passed without objection on the trade because it does

not meet the industry standards, the industry customs in terms of the testing that other companies use. Other companies - the record demonstrates that Ford and GM both use the ball test that they would not put this buckle in their cars because it doesn't meet their requirements. There is also evidence that it does not comply with the NHTSA standard which requires the seatbelt buckles minimize the possibility of accidental release. So we're saying not just that they are unfit for their ordinary purpose, but they don't pass without objection in the trade. Also they don't conform to the affirmations of fact and on the label. In this particular case there is a label on the car that says that it complies with all federal motor vehicle safety standards.

BRISTER: Why is this going to be an advisory opinion if the court's opinion below was remand, but do some more work on it, and the result in this case was to be to end it. Why would that be advisory? Wouldn't it be better to do all of these class action questions on the first interlocutory appeal?

EDWARDS: I think first and foremost that it is imperative to our system that we stay within the boundaries of the written law and the written rules.

BRISTER: You would agree with me. It would make no sense if a defendant comes up and says no trial plan, no choice of law analysis. For us to answer one and then send it back and then we'll take up another one next time. You should go ahead and say there is two problems here not just one.

EDWARDS: Perhaps. But I tell you. This court did exactly that in Compaq.

BRISTER: A lot of courts have done it. I don't disagree with that. But we're starting to get the second and third round now and we're starting to think whether we should keep doing it that way on these interlocutory appeals.

EDWARDS: There is a very good reason for doing it in this case. First of all, as this court pointed out in Compaq some of the other issues that this court addressed in its opinion and saying it needed to be addressed and the court below had not been developed in the courts below and let's send it back and let these things come back up the way they should so that we get input, we get involvement from the lower courts, from the parties, and from the TC and from the appellate courts. Which is a very good idea.

The jurisdictional statutes that allow jurisdiction in this court that we are allegedly here on, it's supposed to be an appeal on a petition for review for the appeal of an interlocutory certification order. And there is no such order anymore.

BRISTER: But you're not giving up trying to get one?

EDWARDS: We're not here on our petition for review.

BRISTER: I know. But when you go back to the TC you are going to try again?

EDWARDS: Not necessarily.

BRISTER: I will concede if you stipulate you don't want a class action anymore this case is probably moot up here. You're not stipulation that.

EDWARDS: I'm not going to stipulate to that in its entirety. But in its current posture in this court, this is only Bill Inman's individual case. There is no class action.

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REBUTTAL

BOUTROUS: Mr. Inman testified at his deposition when asked, What kind of damages do you claim you have sustained personally? He said, none to this point. And then again he was asked what damages are you seeking for yourself in this case? And he said, none. I don't know how that can possibly give him standing to sue.

O'NEILL: But again it's difficult for me to understand this is an issue of standing as we've recognized that concept. And let's take Boyles v. Kerr, negligent infliction of emotional distress. No one disputed that the plaintiff there has experienced emotional distress. We just said there is no remedy for it. But we didn't decide it as a matter of standing. I'm having a hard time getting my arms around this threshold standing issue.

BOUTROUS: Here it comes together because their claim is defective as a matter of law because they have suffered no legally cognizable injury, which is the test for standing.

O'NEILL: Same as in Boyles v. Kerr, but we term that a standing question.

BOUTROUS: Because the court is looking at in the class action context, and because the court has said that standing is a fundamental prerequisite, this court and the federal courts do the same thing. They look at is as a standing issue. The Rivera court under the federal article 3 standing principles, did the same thing and said, We must determine whether this person has the right to be in court. And so it's treated as a standing issue. And it's crucial to determine that.

O'NEILL: But you would agree we've never treated it as a standing issue?

BOUTROUS: In the MD Anderson case, I believe the court did treat it as a standing issue.

O'NEILL: I mean that just strikes me as a different situation because there - I mean there had been no injury in a difference sense. Here you've got a plaintiff with what they're claiming are defective goods. Now whether it's ripened yet into an injury that may be another question. But to say that the failure for the law to purport a remedy at this point prevents you from having standing

just seems to be something - we've never gone that far before. Else how do avoid looking at the merits of every case and say if the case is merit less there is no standing.

BOUTROUS: This I think is a unique situation. Plaintiffs have suffered no injury but they want to bring this claim. Let me give you an example with the MD Anderson case. There the court found that because even though there may be false statements made, that plaintiff had not been defrauded, therefore, that plaintiff could not bring a class action. In this case, plaintiffs rely on this door jam sticker that refers to the NHTSA standards. But they don't claim that they ever saw it, that they relied on it. So they weren't injured by it. It's exactly like the MD Anderson situation. Maybe someone out there in the world can say they relied on that sticker and they were injured by it. But these are not the right plaintiffs to bring that claim. It's a classic standing issue.

O'NEILL: But we've never addressed failure to establish reliance on standing.

BOUTROUS: In the MD Anderson case that was built right in to the case. The court said you must show reliance on fraud. Plaintiff in that case said he wasn't going to show reliance, and the court held he hadn't been injured because he didn't show reliance and, therefore, he didn't have standing. And he couldn't bring a class action. So it's exactly the situation we have here.

Just to go back to the point on the NHTSA standards. The notion that this vehicle doesn't comply with the NHTSA standards is false. NHTSA has looked at this issue for many years. These vehicles have been on the road for 10 years. And the agency which enforces its own regulations has rejected by not finding or recalling these vehicle the argument that the vehicles don't comply.

The plaintiffs not in their live petition, not in their brief in this court, not in any of their briefs in the lower court have ever argued that the vehicle was worth less because it had this seatbelt. They have jumped over it and asked for the cost of repair. They have not shown that there's an injury. In Nobility Homes, I'm not sure why the plaintiffs cited to support them. I think it supports us. It says, cost of repairs, and measure of injury. Plaintiffs haven't shown injury, therefore, they have no standing. They are asking to alter the law.