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Supreme Court of Texas.
Equistar Chemicals, L.P., Petitioner,
v.
Dresser-Rand Company, Respondent.
No. 04-0121.

November 25, 2005.

Appearances:
Claudia Wilson Frost (argued), Mayer, Brown, Rowe & Maw LLP, Houston, TX, for petitioner.
Thomas C. Wright (argued), Wright Brown & Close, LLP, Houston, for respondent.

Before:

Wallace B. Jefferson, Chief Justice, Don R. Willett, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Justices.

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COURT ATTENDANT: The Court is now ready to hear argument in 04-0121, Equistar Chemicals versus Dresser-Rand Company.
MS FROST: May it please the Court. Ms. Cluadia Frost will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CLAUDIA WILSON FROST ON BEHALF OF THE PETITIONER

MS. FROST: Mr. Chief Justice, may it please the Court. Good morning. The Court of Appeals decided a hypothetical case. We are here today asking this Court to decide the case that was actually tried. The Court of Appeals purported to enforce and interpret bargains between the parties that were not before it nor before the trial court. The Court of Appeals failed to, to enforce the fundamental agreement between the parties about how to try the case and what it was about. This Court should decide the case based on the agreements, the parties made about the case and how the case would be tried, what the issues were, what the claims were, where-- what the defenses were. The parties had no dispute about the simple facts. And that should control here. There was no dispute, whatsoever, between the parties about what the product was in this case. The product that was an issue in this case was the impeller, the 42 inch impeller, the Dresser-Rand supplied in

1996. It's simply beyond the date that anything else was at issue. The charge asked about the impeller, the charge asked whether it was the impeller was defectively designed. Whether the impeller was defectively marketed, whether the impeller was defectively manufactured, whether the impeller was unfit for the purpose for which it was intended. The parties argued to the jury about the impeller not just the claim of the defendant. There's simply no question. But the product in question before the Court was not in dispute and that is the impeller. Indeed, even the parties have strong motions. The once that the Court of Appeals concluded raised the economic loss rule somehow through the assertion of a no-evidence point. And now, second motion for JNOV that was never ruled on. But even they-- those motions refer to no-evidence of designed defect of the impeller, marketing defect of the impeller, manufacturing defect of the impeller. The economic loss rule was no more in this case either. It was not plead, it wasn't mentioned, it wasn't headed at. There was no suggestion, whatsoever, that the economic loss rule was implied here. Nor was there a dispute about whether there was an election of remedies. The Court of Appeals sua sponte held in Equistar to search of an election. An election of remedies as we know was an affirmative defense, it was never mentioned, it wasn't raised. There was no dispute between the parties that there was no election of remedies required here. First of all, no election of remedies would be required that if they weren't seeking inconsistent remedies. We were asserting separate causes of action because I'm having [inaudible] ...

JUSTICE: Ms. Frost, I'm interested in this components part of doctrine and if that is different or should've be different from a manufacturer supplies or replacement part versus a manufacturer's causation apart specifically for this type of equipment.

MS FROST: But-- your Honor, it depends entirely on the facts of the case.

JUSTICE: Well, how does it resolve your, your issue here?

MS FROST: Well, part of the economic loss rule and our opinion is not in the case so it doesn't really-- it shouldn't resolve our issue at all. It shouldn't be in case. The question was the product. It was the impeller and the impeller damaged other property and whether you apply the economic loss rule-- if, if you assume the economic loss rule is in the case, which we don't think it is. It was never raised, it was never put in it, in any way. But if you assume that it is, the question then becomes, "If the product definition is left alone," which even if the Court would have reached economic crossroad coclude it was in the case. The product definition was never raised. It was not before the Appellate Court. It was out of bounce to change by the Appellate Court. So if the product definition as to impeller, then the question becomes: Does the damage that the impeller cause to other property mean that Equistar can only recover damage to the other property in tort?

JUSTICE: Besides the fact that or beside your argument that the parties treated the impeller as a product-- part from there. What is it about the facts that make-- makes the impeller of the product in this situation? ' Cause it, it seems that it's-- you could easily imagine situations or the impeller was a part of the compressor. And the whole thing was the problem. What is it in your view, part from the way the case was tried, that's with the-- that makes the impeller a product separate from it.

MS FROST: Well, I think, your Honor, it's referring to the integrated parts type case, we're lack in Mid Continent or in any of the Admal% cases where the party's bargain has, has its object. The

provision of an integrated somewhat a vessel, a compressor or an engine, an airplane, any integrated part. If the object to the party's bargain is to sell an integrated product to the plaintiff, then the definition of the product will be determined by the object to the bargain. If it's a vessel, then ...

JUSTICE: Well, would, would it make any-- I mean, truly, the party's contemplated the whole compressor that will make ...

MS FROST: In 1975 that ...

JUSTICE: Yeah. But, but later, it just-- it seems like it just so happens that they continue to deal with each other on the re-- on the impeller in [inaudible] and they might have dealt with-- the Dresser might have gone to-- I mean, Equistar might have gone to other request.

MS. FROST: That's absolutely true.

JUSTICE: And then would that, would that make a difference here?

MS FROST: I don't think the issue of either supplier shouldn't matter. I think the issue is what is the object to the bargain. Here, we have passed on the engineer modified and denies special impellers they provided in 1996. This is not the sale of the compressor in 1996. This is the sale of a specific custom engineer part. It should not fall into the replacement parts exceptional or concept under the economic loss rule or under the component parts concept because it is not a component of an integrated part that was the object of the parties' bargain.

JUSTICE: Just, just out of curiosity, I, I didn't see in the briefs that, that the compressor have to be modified when the different kind of impeller was used -

MS FROST: The, the part ...

JUSTICE: - the 44 instead of 42.

MS FROST: The compressor was only modified with regard to its upgrade as far as I understand and the speed at which it should operate, when the 44-inch-- they made been at the adjustments but not on working it.

JUSTICE: Listen, that, that theory would have-- specially in that type of industry, they, they always, most of the time require for specialty of equipments, specialty component parts in that industry. But if you take that over to say, an automobile like one I have, a specialty part manufactured for my 1998 Cobra Mustang to make it go faster. You, you-- are you saying that we have a cause of action against the manufacturer that's specialty part as would any other individual who modifies use or vehicle?

MS FROST: Yes. You have cause of action against him and the warranty-- warrant to it. And the same reason. It-- depending on, depending on what the agreement was, depending on what the facts were. If, if I modified impeller,if, if the economic loss rule isn't involved. Assuming that it is and assuming that it's-- came towards the single royal rule or Mid Continent rule or East Riverw but-- it's the same that it's involved then you would-- find is to what in this situation in the way we have potentially. A warranty claim against the manufacturer of the modified part and you did recover damage if that's the product which it would be in that sort of thing. And then you would recover damages to the car and anything else that would have influence by the failure of that bargain on-- in Court or you could.

JUSTICE: Now go on and drive it at excessive speed, one and two and 18- wheeler. Those are tips of scale and cause of the explosion and-- so you could follow the line back to the manufacturer, the specialty part -

MS FROST: Well, again, -

JUSTICE: Perhaps ...

MS FROST: - you could use a compared analysis there of course, in your typical products liability and other constituent carrier responsibility analysis. It may apply the warranty-- applied warranty of the claims.

JUSTICE: Then, what, what is it the economic loss rule applies? Would the opinion from the Court of-- Court of Appeals that-- I'm trying to understand why you don't think it applies in this situation although the parties didn't raised it.

MS FROST: Well, it, it-- that's the principle where you can-- we don't think it applies is because it was not raised in rebuttal. And we believe that's in the nature of an ordinance or damages limitation and it needs to be raised. Party needs to be on notice about what the claims are that are that are being in sort of against it. And since there was no names, none whatsoever. And we believe that, that type of trial by or appeal by ambush should not be compliments. Then ambush don't permit it. That's the principle which we not believe this took place. Another reason we don't believe it in the case is because they know little is valid precedent we should meet . And the Signal Oil rule would have essentially prescribed the, the application of the economic loss rule in this case.

JUSTICE: This is in the sentence, sentence in the Signal Oil is sort of difficult. And your answer to this inquiry example, that's in the response to your brief is well known rule is perfect. But, but since appeal are available perfect plant. It just, it just seems to me that, that sentence would lead to some awfully untoward results.

MS FROST: Your Honor, we, we submit that it's-- that, that the Court can certainly-- if the Court chooses to, to depart from Signal or determine that Signal doens't state the rule in decision here which is still focus on the backs of this case. In this case, the impeller is the product and the question is, "Was Equistar had a tort claim for damage to the impeller?" That if, if the Signal is upper grand, that's the issue.

JUSTICE: So even-- just to be clear, your position is even if the, the sentence in Signal is not the law, and that-- we could still argue about whether that, that provision of expert engineering services, that's a case different-- your-- you can win independently on the impeller being the product.

MS FROST: Yes. And we can, we can win if, if, we are litigating anyway by the economic loss rule as announced in the Continent whichever. It's only to win that our claim for damages to the impeller itself, the product itself toward in it. Which by the way, we believe they also had that's active depends in the part, it was supplied to us in '96 not in 1975 like the Court of Appeals evidences.

JUSTICE: And if that's the case, and that's the only claim we have on the impeller. But this-- the case have to be retried?

MS FROST: We don't believe the case needs to be retried on anything but damages. And that -

JUSTICE: It doesn't ...

MS FROST: - and that's-- with the Court of course, needs to reach our summary judgment, much which is not made. And at that point, the Court we believe under the Browning rationale and rules fif-- remand this case when we tried on damages only and in fact, and they tried on damages only in this case would be a-- particularly, appropriate based on the way in which the case was presented in the, in the trial court, the parties pleaded with the trial court to allow the issue of consequential damages and the limitation of liability to tell to the

jury and then as the Court chose to JNOV to do that so that the whole case would have been tried that the jury decided that instead the Court find to do that and now we find ourselves with the situation where we have an-- a liability finding and that's not in dispute anymore now that we haven't finish about damages.

JUSTICE: As a rule when liabilities contested issue now without pen-- damages were un-liquidated in the whole cases to come back. Do you think this is different?

MS FROST: We think this-- the Court can make the-- a big cause exception that the-- that was made in the Browning v. Lickey cases and other cases. But that's liability will be settled at this point and there's no jury confused in it. It's federal courts duties all the time. And that the, the issue could go back and the jury could be told where the Court could decide defendant's party's one way the jury-- the Court could decide that. Just-- but if parties wanted the jury to decide, they would be asked, they would be instructed if the, the parties have been found negligent and or libel stated to one and decided in.

JUSTICE: Does any rule or case require economic loss to be plead affirmatively like the limitations defense?

MS FROST: There's no case in Texas certainly, there's one lone case in Texas where the defendant refers to the economic loss as in affirmative defense. There were cases in Florida, one case in particular where the Court says that economic loss rule needs to be pleaded this affirmative defense. There are cases, your Honor, that say, "It should be raised in the, the trial court for-- and it cannot be raised for the first time in a motion for JNOV if the verdict, verdict was first made on that point or sometime during the trial."

JUSTICE: If the impeller were just as standard impeller, no special design, no special manufacturing, no consulting or engineering services provided, would your answer change?

MS FROST: It again, will depend on the object to the parties' bargain, your Honor. They did change. Yes.

JUSTICE: They bought compressor, the impeller malfunction they say, "Replace it with one another."

MS FROST: It could very well be different than that.

JUSTICE: So the unique character of the impeller place a factor in your answer?

MS FROST: It does. As, as to the fact that -

JUSTICE: Assuming it's unique.

MS FROST: - on this fact-- on this facts, we have a separate bargain here. We have the object to the bargain being the unique in parts as suppose to a-- an office show replacement part in a situation and we don't know what the bargain was. If the bargain was the same as in this case, the answer would probably be the same.

JUSTICE: So the compressor were purchased in 1995, there was no warrant from it. But Equistar came back and said, "Impellers not working anymore, we want to buy another one." With this compressor we bought last year, your answer would be the same or different?

MS FROST: If it were exactly like that and that was the ba-- object of the bargain, it would probably-- it could be different.

JUSTICE: Any further question? Thank you, Counsel. Court is ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Mr. Thomas Wright petition argument for the respondent.

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE RESPONDENT

MR. WRIGHT: May it please the Court. I think she'd already argue what I thought this case was about resolving the issue between Signal Oil and Mid Continent both about the United States Supreme Court's decision in East River searched over. But before I get to that, I want to say two things about what the respondent as either petitioner on-- as raised. She said twice. Equistar said twice that these impellers were provided in 1996, not true. Their own witness testified clearly why three of the impeller-- that these impellers were sold in 1988 and 1991, respectively. Further, the testimony is that only one of those impellers was trimmed from 44 inches to 42. And that was done before 1996. And the shut-pinning and coding was on before 1996. Why does that make a difference? This case was not brought until July of 2000. It's a very big difference on the warranty for-- warranty claims for the impeller if that's what is, is being pushed to here. And we show you one other thing. It was a very clever opening about parties' agreements. It is Equistar in this case that's trying to escape it's original affirm. We did not make any agreement on the problem or about what the product was. Equistar, it was a master of its own pleadings, pleaded that the compressor was defective. Yes, when it came time to ask the jury a question about the defect, before it focused the question on the particular part that everybody had been talking about. That's because why would we ask about the loader or the drive shaft revocation being defective when nobody had claimed that. So the jury will ask about the particular part the-- that, that was part of total product; that the parties have been discussing. And yes, when opposed why it wasn't profiled of course they attacked the burden. They attacked the answer to the questions the jury was asked. But we preserved our, our economic loss rule by making objections to the charge on the basis of no-evidence which were over ruled when the charge was submitted. By making a motion for reformation or modification of the judgment which was overruled and by operation of law and by the JNOV motion. All of those preserved there's no being warrant. This is a no-duty form. This is not an affirmative defense.

JUSTICE: Just to be clear though, is it true that the economic loss rule by that name was not mentioned in the trial court?

MR. WRIGHT: That's correct, your Honor. The ...

JUSTICE: Kind of a odd.

MR. WRIGHT: I'm sorry?

JUSTICE: Seems a little odd that would not mention ...

MR. WRIGHT: Yes, it seems a little odd but this Court has quite sale that a no-evidence point preserves no duty points in the Rocky Mountain Helicopters case and, and in the case about-- it's Edward R. Jones and company about Osterberg vers-- having no duty to as retain a minimal protest in response. And those cases, those points were raised by no-evidence on this. And this Court is held that, that is sufficient.

JUSTICE: Can we just simply ignore the statement that Justice Hecht had refer to earlier in Signal Oil about the economic loss rule and its application to them as a property other than the product itself?

MR. WRIGHT: Absolutely not. I think it's-- that-- this service to the bar to ignore statements that are inconsistent and needs to be taken on and that needs to be disavowed. And here's why, here is a rule

that Equistar is here promoted, that if you have damage to a product itself and that's all. We all agree that's a contract claim. But if there's damage to other property so as Equistar, you got a tort claim as well no matter how little property is damaged no matter what the Uniform Commercial Code says, and no matter what the parties contract says. So those are serious implication of the rule. Our rule makes a lot more sense and fits better with the legislature intent with the authorities from around the country in this ways. First of all, when the legislature in acted the Uniform Commercial Code, they meet for it to cover commercial transactions. And this is a primary example. The Uniform Commercial Code codifiers Judge Dee once said and at the sense of Fifth Circuit intended for parties to have some [inaudible] of bridging of contract and to internal listen to a tort case that away from. And his descent later became the law when the United States Supreme Court decided the East River case. So East River, Sarah Togah, the restatement refer the products liability Section 21 which we provided to the Court in September all support the rule we're talking about. Now what to do about Signal?

JUSTICE: Counsel, if I might interrupt you for just a moment, your, your theories would allow or, or require submission of separate contract and separate tort theories with separate damage answers. Was that correct?

MR. WRIGHT: That's correct.

JUSTICE: Right. But now, in this case, so we only have, we have contract and tort findings according to Court of Appeals' opinion. But we only have one damage issue. Was there any op-- was there any request to objection which is the separation of the damages as to the tort in the contract?

MR. WRIGHT: Not in this case and I don't believe we needed one here because the charge very specifically said, "What those damages were."

JUSTICE: That-- But, but don't we go with that? This is not a Caspian problem in some manner where we, we don't know what damages are allocable to, to, to take it for finding?

MR. WRIGHT: Well, but, but we did know these are not soft damages that he jury could just tort. Additionally, we went through a very careful with the record and the cites in our brief about the proof of damages. And we could have answer everything but possibly $5,000 as main repair to the compressor itself. And that was certainly the focus of all the testimony. So it decided that well, you know, we should have taken this insignificant part out. I believe the Court have look at this and say, "There is no evidence to support that damages under, under the economic loss rule because 90-- 90.9 percent of it has to be with the compressor, of the product itself."

JUSTICE: Still and we've submit because it's another damages.

MR. WRIGHT: That means some evidence of damage of other ...

JUSTICE: So we get pass the legal sufficient's of point involved for some damages.

MR. WRIGHT: No. There's no evidence to support that number. There has to be evidence ...

JUSTICE: But there's some evidence to support some damages.

MR. WRIGHT: Yes. But that just gives you a remand. That does not mean there is a, a legally sufficient evidence to support the number of the jury found or has to be in support for that answer. And when you take out the damage to the compressor there was absolutely no-evidence to support that answer. Now ...

JUSTICE: You're about to say, how we deal with Signal?

MR. WRIGHT: I was about to leap-- leap around in answering your Honor's question. signal of course, did not apply the rule that it purports to state. It's not exactly clear but it is troublesome. Of course, it didn't apply the rule because the Court found there was no strict liability because of the causation finding or failure to find by the jury. The facts of that case are very different from our facts that damage to other property and to the product itself were about equal in value. The Court was not faced with what we have here, which is Judge Burstor putted in the Court of Appeals' opinion, "Just like a paperclip going down with the ship." It's the example we gave in, in the brake about the two cars, one has a pair of tennis shoes in it, the other doesn't, they're both are unwarranted, they're both burned out. Equistar says, "The owner of the car with the shoes in it, gets her car replaced." Because there's a pair of shoes in it, it doesn't make any sense. Signal OilL has not been followed by any Texas case. It preceded this United States Supreme Court opinion then of course the restatement, and so the Court do not have the opportunity to look at that. But if you really take Equistar's argument to it's logical conclusion, they're trying to do is-- why we submit Continent as well, 'cause the whole claim didn't fail in that Continent it was a boat, a boat's fail. So yes, the boat was sold originally with our client. But are they going to say, "Well, if the boat have been replaced then the plane goes down." And it's a different case.

JUSTICE: Well, it seems to me that, that's a pretty good argument. If you, if you make a-- specially product to improve or modify an original piece of equipment that, that can change th entire original intent of the designers, original intent of the buyers, ori-- original ten of the, of the sellers. It changes-- sometimes completely the entire product when, when something is modified during a specialty engineering process.

MR. WRIGHT: Well, that specialty process happened when they made the 44- inch impeller. That's the improvement. They wanted to im-- improve they're truthful. But this impellers had been turned back to the original. So these were no different from the original except for two things; it been shafting which is Court probably knows as bound barding a well [inaudible] and that's stronger and totally to protect that against to contaminants of Equistar added in its guess. Those, those kinds of shafting and coding are not claimed by anybody to be a cause of this problem. So ...

JUSTICE: But if we-- this is about the statement in Signal Oil that you still have to deal with the issue of whether the relevant product was in pound. Is that right or not?

MR. WRIGHT: Well,-- or the compressor.

JUSTICE: I think you, you have to deal with it in a circumstance, you have to know whether that was a, that was a product. But that is a legal question. The Court's have doubt with this in the Supreme Court and, and others have said that it's a legal determination whether the-- what is the product. And the reason that's a legal question is because it goes to the very core of this division between tort and contract law which is obviously a matter for the Court. We don't ask the jury for that somebody has a tort claim or contract claim or to resolve the contour wars that have been going on for some 40 years. So I believe we do still have to determine what the product is. Now, you know, down the line if some onboard will say the impeller is the product we still have an argument about consequential damages. And this, you know, those are-- has still been excluded by the contract on, which we won the summary judgment.

JUSTICE: Is there a separate stand alone warranty on the replacement impeller?

MR. WRIGHT: You mean an expressed warranty in this case? No, your Honor. There was no expressed warranty. And I don't believe ...

JUSTICE: Implied warranty.

MR. WRIGHT: I don't believe there should be, under the Uniform Commercial Code because this impeller does no good, by itself. This is not a product that could be used independently. If you say that every time a replacement part is put in a machine that contemplates a replacement parts, a new warranty kicks in, you're going to have a continues warranty that will never end. And that's not what the drafters of the code intend.

JUSTICE: But if-- and I realize that this, this are not the facts. But if the compressor was sold separately from the impeller, if the situation or such that you could pick them on different component parts to increase proof or to achieve other goals of the process, would each of those then be independent products or-- how would you view that?

MR. WRIGHT: Well, I-- it depends on the bargain people made and I think, your Honors, ...

JUSTICE: So your brief, what issue on that, that it result ...

MR. WRIGHT: The people make a separate bargain to sell things separately that could be used separately and once not a really replacement part inside something else. I think that can be separate. Now of course if you limit it to the impeller, then you still got everything else. There's other property and you might have a limitation on consequence on damages what we do, like I said in our ...

JUSTICE: But for example, a car, you, you wouldn't think the product is including the tires necessarily, because you go get the tires anywhere, probably you do all the course, in lack of the car.

MR. WRIGHT: Right. The ti-- the tires on the car are one example. The, you know, an internal part of the engine is probably closer to this case. And if everytime you take it in to the dealer, and I replaced, you know, a bough or something, you get to brand new warranty. That's going to be a lot of difference in both the parties have intended. And this could all be resolved by Equistar asking for bargaining for and buying an extended warrant.

JUSTICE: But you get a warranty on the new part, don't you? I think that the, the, the transmission in the place or something was wrong with that transmission. There's some implied warranty that when it's put into the car, it's going to do with what's intended to do but if it doesn't, aren't you entitled to the remedies for that.

MR. WRIGHT: Well, I think it would be. But I believe more often there's an expressed warranty. And I believe more often expressed warranty on a part was not going to be nearly the four years you would get of the original purchase, most things I've seen and shops trying to get my car repaired, they don't get me nearly that kind of warranty. But there could be an implied warranty on the transmission. But the question is, you know, whether you're going that into, you know,-- or we're just really talking about warranty law or we're talking about, you know, product liability law. In this case, these impellers were last modified touched by us before 1996 with the possible exception maybe we helped them install it in 1996 which happened by May in 1996 which is more than four-year before it suit as well.

JUSTICE: Their just trying one-- just to be clear. If the transmission in the car we've talked about overheated and destroyed the car, would you have a tort action against the transmission supplier for the damage done on the car?

MR. WRIGHT: Yes. If you-- assuming it's reasonably dangerous and -
JUSTICE: Right.
MR. WRIGHT: - probably would be. And then our, our theory is; if you have damage to other property, you're still going to have your tort claim. But why ...
JUSTICE: But you're saying the rest of the car is other property and the question is, "why isn't the compressor like the rest of the car in this case?"
MR. WRIGHT: Because the bargain of these companies was-- that this impeller would only be useful in-- and this compressor it was sold with that in there and this replacement parts were contemplated to come along. When you get a transmission, say, if you have the transmission and it burned up and then damage anything else. That's really have been more analogous with what this case involved. And they want to turn that into tort claim not only for the transmission but because it, it supports a little bit of the underside of the car. And a little bit of other property damage, which turns it into a tort claim, even though, you have that new transmission for five years and it's long out of where the warranty came for that. That's what we're talking about. Why do you flip the entire case into a tort case, on the strength of a little bit of other property damage?
JUSTICE: If the encharge question to the jury as-- if the compressor was defective rather than one of the impeller was effective. You wouldn't argue that was a erroneous charge, would you?
MR. WRIGHT: If I had been there and was making the charge of the actions, I would have been concerned about what else they were talking about. I usually try to get the charge to focus in-- on the particular part because then, down the road somebody could say, "Well, someone has mentioned in two sentences of this testimony that there might have been problem in some other part." And, you know,-- so but do I say now that, that was erroneous? No. I don't say, "Now it was erroneous or would have been erroneous to save the compressor."
JUSTICE: Your practice maybe different in how you would handle a charge but it wouldn't be erroneous to have compressor in there, instead of the impeller.
MR. WRIGHT: That's correct.
JUSTICE: Just as if there's a question about the defective wheels simply in a car, question usually to the jury is, "is the automobile defective?" And then they argued about the part in the car of whether that was defective.
MR. WRIGHT: It could be. But if the lawyers were concerned about it and the judge want it to there'll be no error and he's focusing the jury on what everybody's been talking about. And that doesn't constitutes definition of the product just to asking the jury, you know, the real fact to question.
JUSTICE: There are other potentially exposed divisions that the Court of Appeals didn't addressed. [inaudible] So we-- they either looked at those or send back to Court of Appeals.
MR. WRIGHT: Well, you can inform the Court of Appeals on the issue that it didn't addressed. And we have raised on its alternative grounds for affirmance other issues, session repose and other concepts like that, that, that could theoretically wipe the whole case out. But we're not asking to wipe the case out 'cause it would involved petitioner because we were satisfied with what the Court of Appeals did. But we can still raise those issues and, and a request to have a Court of Appeals affirm on the grounds. Like to briefly mention this negligence issue because it's critically important to charge which takes the jury

to consideration of evidence after January 1, 1996. The only thing that could have been done after 1996 according to the evidence was helping with the turn around that was in April-May of 1996. All the work on the impellers are already been done, the shafting, the coding, the the trimming. And they have been returned to Equistar. But because of that jury instruction, the only kind of negligence that Equistar could possibly have is a negligent undertaken of case. Then we undertook some further duty that-- and that until they argue that to the jury. They said, "Well, they were negligent and that they did not tell us about residence, this thing that's been hearing about for years. And they did not change the design." Well, those are undertaken kind of concepts. This Court held in Burlington versus Statesman that a global negligence charge does not submit undertaken because it lacks the elements and so they cannot prevail under negligence claim either. Of course, the economic loss rule as this Court is held in Sacrose and Barbers of the mining and Jim Walter Holmes bars, claims, and negligence when the damage that is done is the subject to the contract and, and the San Antonio Court that are similar opinion under Dennis Theory case saying exactly that. So we believe the negligence is out the-- all the tort claims are out because of the economic loss rule. We ask this Court to affirm, Court of Appeals and litigate Equistar to the contract we negotiated.

JUSTICE: Thank you, Mr. Wright.

REBUTTAL ARGUMENT OF CLAUDIA WILSON FROST ON BEHALF OF PETITIONER

MS. FROST: I've a couple of things to point out and clarify and it's your view, wrap up arguments. The assertion that you submits about our pleadings vis avis of an overstatement; for example-- I'll just put the Court one example Dresser-Rand reach its duties by among other things designing and manufacturing defective impellers or the OB1 compressor. So any suggestion that you can raise the issue of what the product was being. The impeller in our pleadings was inappropriate form. The second is whether the impellers were provided in 1988-1991. The impellers were mo-- those impellers were not the impellers that failed. Those impellers were provided to Equistar but they were shafting, they were coded, they were trimmed, one was a 42, one was a 44.

JUSTICE: Same metal?

MS. FROST: Same metal, same metal.

JUSTICE: So it's the same but the other things were done.

MS. FROST: Other things were done too. And significantly, when the new impeller was put in the equipment in 1996, Dresser-Rand told us specifically, to run that impeller faster. We were told to run it faster not the maximum continuous operating speed which is referred to in the case but the operating speed was faster. They had ...

JUSTICE: But this is all at the request that the Equistar to increase in production.

MS. FROST: I beg your pardon ...

JUSTICE: This is all at the Equistar's request to increase their production.

MS. FROST: Absolutely.

JUSTICE: So as a means of doing that -

MS. FROST: Absolutely.

JUSTICE: - went it faster bigger impeller on that.
MS. FROST: Absolutely. Absolutely.
JUSTICE: So you asked them.
MS. FROST: Yes, they did.
JUSTICE: - to sign a system, existing compressor to, to increase the production.
MS FROST: That's right. It's just like if I took in my Mercedes, ten year old Mercedes Diesel and asked the Mercedes Dealer to make it run fast, faster. It's the same kind of thing. Yes. I would have asked for but otherwise I'm asking for something that was going to fill it. It was defective and that they should have tested and provide it reasonable assurance to me-- from the engineering stamport that it will say when it was of it which is what happened here. The ...
JUSTICE: Could you have, could you have my-- negotiating of warranty covered the same damages that you're seeking in tort?
MS FROST: We could have-- depending on what the parties' bargain wise they could have limited our warranty. We could have negotiated for our warranty too, should it?
JUSTICE: So why doesn't, why doesn't-- does not make this more in the nature a UCC type claim rather than the tort claim that the parties could have bargained before at the time, you know, that they ordered the impellers or modification of the impellers.
MS FROST: That's the, that' the, the, the fundamental issue here, your Honor, that's residing this case on the fact. Certainly, parties could bargain for certain types of special provisions in their contracts. But there's no evidence here that we did. In fact, the bargain we instruct was to get impellers that would have work. Those impellers-- we have a warranty claim for those impellers that's implied, there is no expressed warranty. We haven't implied warranty claim. And we also have a tort claim. And the question becomes-- going back to Signal and the Continent again, the question depends on Texas law. If what person-- stepping back one more step, is the economic loss rule in the case. We submitted it's not. If it is, what's the rule? Is it single or ...
JUSTICE: Well, what is-- this argue that the-- that evi--there was preserved by objecting to the charge in JNOV until July?
MS FROST: Well, but ...
JUSTICE: Why isn't that enough?
MS FROST: Your Honor, there isn't an objection-- the-- to the charge or to-- in a JNOV that says, "anything, whatsoever, about the economic loss rule is a no-evidence objection sufficient towards the economic loss rule." We submit no, it is not. It shouldn't be. It-- that happen to trial court had what your objection to what you say "No-evidence." And that's suppose the contract the economic loss rule inside the damages should be eliminated in the products and not impeller, that we should have to retried the whole case. No-evidence doesn't carry all the equipment or it doesn't should be. I guess my time is up?
JUSTICE: Thank you, Ms. Frost.
MS. FROST: Thank you, your Honor.
JUSTICE: That concludes the argument and the Court will not debrief [inaudible].
COURT ATTENDANT: All rise.

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