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Supreme Court of Texas.
Cooper Tire and Rubber Company, Petitioner,
v.
Oscar Mendez,05 Jr., et al., Respondents.
No. 04-1039.

January 24, 2006

Appearances:
Rosemarie Kanusky, Fulbright & Jaworski L.L.P., San Antonio, TX, for petitioner.
John J. McKetta III, Graves, Dougherty, Hearon & Moody, P.C., Austin, TX, for respondents.

Before:

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

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JUSTICE #1: We proceeded, Court is ready to hear argument in 04-1039 Cooper Tire & Rubber Company versus Oscar Mendez as noted.
JUSTICE #2: May it please the Court Mr. Mendez for the argument for petition, the petitioner [inaudible]

ORAL ARGUMENT OF ROSEMARIE KANUSKY ON BEHALF OF THE PETITIONER

MS. KANUSKY: May it please the Court, clear-- as I see it three primary issues here is dispositive in one way or the other as well as another issues that were raise on the brief that's why I intend to concentrate this morning charging that a legal institutions and the evidence to support consult defect finding which necessarily includes child who suspects her testimony.
JUSTICE #3: I'm curious as to why that order because that evidence review would precluded including into the other and to the informer.
MS. KANUSKY: Well, except that I think both of those points under the circumstances on this case will be rend this in court's. So I mean Texas won't allow or I can take them not about order the court with like-- they, they pretty much involved in all that same issues such as whether they own of second immunity faction on defect claim for-- The plaintiff's theory in this case from opening statement or even to pull

that on poor manner with closing argument was that the manufacturing defect in this case was wax that was illegibly placed on the belts about material as they went through certifies feathers and so keep that in mind when I talk about sounds as testimony. Now please ...

JUSTICE #1: When you say in your reply brief that there really arguing it intermittent defect at we had in ritually.

MS. KANUSKY: Yes. I think that's what the trial court submitted and -

JUSTICE #1: So you said-- but you say no was the wax and when you say no well know it might this indeterminate.

MS. KANUSKY: Well, no. What their arguing on appeal, I mean, well, it's not so such that they really arguing if that's what the trial court did and in the motion in the first part of commotion hearings. We argued that you have that the plaintiff has the burden of proof to conform was some deviation for specifications in order to get to the jury on manufacturing defect plan and they didn't that here, that in fact the specification were admitted in the evidence. The-- about Cooper gave up certain specification none of them were given to the expert they didn't review them and there is no testimony-- this is what I think is critical there were two other tires on the vehicle that were make by Cooper same model, make the same week at the same plant. So you had two week and two hours on the vehicle there is no comparison in any meaningful but with the subject tire versus the other one except suspect rising. The only difference was the subject tire had a nail hole and the other two did not. What the trial court submitted was the PJC submission for manufacturing defect and it simply say's that the defect is a the condition of the product that members at unreasonably dangerous. It doesn't require ...

JUSTICE #1: Was there any evidence of any defect other than the manufacturing defect.

MS. KANUSKY: Yes, there was some evidence found rex wagon. He testified that-- and an-- I don't, understand the tes-- I don't understand exactly what he was talking about but he said that you know that there were divine problems when match up the belts properly that, that is a design issues. He didn't want various of steel because his ports if you look out the cut, we got belt mate-- the belt material cut has steel cords running through it and paste in rubber and so he said when you cut it you don't want it so that there be witness in the spice. That he clearly said in testimony that we attach the letter reply a brief that, that was the design issue. There was no desired defect question submitted because there no testimony admitted on, on a say for alternative design. So-- and I think was-- what-- part of their arguments also was that a tire is defective if a trial I'm talk about that the tire's defective if it's fail's before our dispense on and that's, that's not supported by the evidence and most of the courts around the country have said that, that nothing more than accident or failure equals defect which entire cases can't base in so many things other than defect. One of which was present in the tire here can cause the tire to frail. In Texas we have three categories of defect each of those categories have different elements of ...

JUSTICE #3: Wasn't it clear that trial that the defect they were actual separation of the tire.

MS. KANUSKY: But your Honor, a tire separates for many many reasons.

JUSTICE #3: I, I understand but it was clear that the separation as what they were claiming cause the accident that there was no doubt of that court, law was.

MS. KANUSKY: Well, that a separation they're, they're on experts agreed that simply because separated does not mean that there was a manufacturing defect of a tire. Everybody agreed with that the question is nobody, nobody disputed that it's separated. The dispute was, was the separation caused by manufacturing defect present at the time of manufacture three years before the accident or because of the puncture that was in it.

JUSTICE #3: Well, can you tell me what planned outlet may because your talking about the specifications but it also cannot conformed to planned output and the manufacturing defect. What is planned output?

MS. KANUSKY: Well, I think planned output if-- in, in their-- to me it was certain products planned output is the same thing specifications in for now the court said that well the fact that there's an-- there's pesticide in most tobacco leaves and therefore it most cigarettes still a manufacturing defect because manufacture didn't intend for it's cigarettes to have it there. This is the completely different problem in this case because waxes in intended ingredient of tires and it's undisputed that wax might breaks. So the simple fact that you find wax on the tire which is all that they found. Doesn't mean that it's defective ...

JUSTICE #3: I'm-- I understand the effect but I haven't read the record that my understanding is the complain is that in the vulcanization process the steel on the grabbers was defuse and that fusion doesn't happen it's a problem with the planned output.

MS. KANUSKY: That may be but however in Texas you've got to submit it you can't just submit the case at some bad defect because for example vulcanization, that occurs in a motor under pressure of the plant and high temperatures. The tire can-- could not fuse because the machine was broken and the temperature never got high enough that would be a manufacturing defect because it wasn't appeared to the specification. But it could also not appeared because the specification itself had two lower temperature and you have to decide which is which because if it's a design problem by statute they have to come up with an alternative curing spec.

JUSTICE #3: And you gave them the specifications they needed to make that determination?

MS. KANUSKY: Yes. And I, and I mean again here, the problem is in time to and for example were the planned output language also serve arises. There was no dispute in that case that there was contamination.

JUSTICE #1: You said that nobody disputes the belts separate does -

MS. KANUSKY: No.

JUSTICE #1: - and you agreed to that.

MS. KANUSKY: Yes, I agreed to that

JUSTICE #2: Did you see that the separation at least contributed to the role-over.

MS. KANUSKY: Well, in the same way I guess that if there been no if there been no separation I don't think it contri-- we don't consider it contributed super rule over because the testimony is that only a very, very small percentage of tire disablements lead to automobile accidents. Something between 95 to 99 percent of all tire disablements do not result in an accident, so that statistic to which the pliantiffs experts agreed. Means that they have to come forward evidence to show why this case was different.

JUSTICE #1: Does Cooper conceive that a nail puncture would not cause a properly manufactured tire to suffer belt separation?

MS. KANUSKY: It could not, I think that's-- I guess what saying,

I'm saying that it's not our position that all punctures always lead to drag down separation. They can also lead to blown outs.

JUSTICE #1: Does Cooper consider a, a properly manufactured tire of thirty thousand miles on it should not suffer belt separation?

MS. KANUSKY: I'm not use unqualified. I don't know that answer that because a tire that is properly manufactured, properly maintained doesn't get punctured, is it run under inflated should last. But the plain factor the matter here is this tire hadn't unrepaired nail hole and if you look at the expert testimony in this case they never-- they don't have an expert it's qualified to testify.

JUSTICE #1: That your stereo on why the belt separated as the nail puncture.

MS. KANUSKY: That's was the testimony of bar experts. I think most of the testimony was going to rebut. We don't have a burden to explain why it-- the threaded they have burden to demonstrate that it was due to manufacturing defect. If, if, if the standard is going to be in Texas that all tires have to last until they get down to that two thirty seconds or three thirty second, whatever is. Then what really get a have a situation when manufacture becomes an insurer his products which Texas as long as never recognize.

JUSTICE #1: What if the tire head, three miles on it was three minutes so.

MS. KANUSKY: Well, that's a different question because I thinking is-- as this Court noted a ...

JUSTICE #1: Let me us, let me ask a-- the question this way-- the tire were three minutes so have three miles on it. Would you still assert that their needs to the evidence of whether the specification, what the specification's were and whether they will comply with.

MS. KANUSKY: I think that is to your case that Section 3 of the restatement was design for, a virtually brand new product that fails under normal use. But you can't have an in determinant defect when you've already got something in the tire that dete-- the expert say good cost exactly what happened in this case that there-- there is testimony.

JUSTICE #1: And that being.

MS. KANUSKY: The nail hole.

JUSTICE #1: If there were no nail hole all the other facts were the same. How would that changed your argument.

MS. KANUSKY: I think there was also evidence of the tire being one hundred inflated in this case. And I guess I don't see that the court really should he can get to, to weighing this because this isn't a weighing issue in this case. The expert test-- none of the expert testimony in this case can survived either Robinson Demo Havner or the first was recent case PW versus Ramirez which I think id the closest to this.

JUSTICE #1: Let me ask you question for even more than about the charged ans-- well, I may be in time to agree with you that it should the clarify to refer to deviant from expect from specification or something like that. In a case where we just ask you about that Ridgway type case where the case was-- where the tire is brand new. It would be very hard to see that, that was a harmful error because everything else would rule back, tire will be granted that the tread kilo. But in any case I don't know if this was one but in a case where the evidence is not about design defect or marketing defect. It's not about anything but manufacturing defect. How is it harmful just the same manufacturing defect and not refer to deviation specifications or a planned output.

MS. KANUSKY: Because the testimony was not undisputed, not it

wasn't Torrington on the issue of whether or not there was in fact a deviation. And so a jury can find they might, they might just think of-- the condition is with it fail out. I don't think tire should fail when they still have tread on highway which what been argued on appeal.

JUSTICE #3: Well, but the question directs the juries attention to, to, what it wasn't the what it effective when it left the plant. So why were they not focus on output there, I mean, I, I understand at the question just said was there a long a tire cause the accident. It focuses the jury on when it left the plant.

MS. KANUSKY: But all three type but if you look at the PJC, the question for all three types of the defect focus the jury on the time at which she'd left the plant because that plant be-- it has to be defective at that time which is another problem with the idea of saying well ...

JUSTICE #1: Well, I think what, I think what the justice are giving at is, the jury was given and this two competing, you know, theories and maybe there are others but one-- the defense theory was that it was tire function that caused it and the other was that there's defect at a time that left the manufacturer. And can't we shouldn't we present at the jury throws based on and you can argued about the evidence but the jury chose the theory that says it was defective when it left manufacture which makes you are requested instruction not rather than to the also in that in this case. Makes it-- he would make it harmless error.

MS. KANUSKY: Well, this Court is said and, and that role-- that-- hasn't been argued so I apologized I can't remember the name of the case I can give it to the court but the court is said in several opinions including one involving submission of imp-- the improper or legally improper and legally proper theories that you can't present the jury pick the right one.

JUSTICE #1: Just still.

MS. KANUSKY: Just to.

JUSTICE #1: But there only-- but the question is, there only two here. I take you're point that it-- there was evidence of designed defect and marking defect. If you don't distinguish between the two and the charge, then there, there has-- I see your point that there's a problem that they could find marking defect when really they found designed defect but without finding that the predicate requirements, let's say for alternative but it does not in this case then [inaudible] that's the difficult.

MS. KANUSKY: Design defect is in the case we attached that testimony to the reply brief and, and it was came in and there it was. There was also argument that, that tire should last regardless of how they are treated until they're reconcile.

JUSTICE #2: Thank you counsel. The court is done to hear arguments from their staff.

ORAL ARGUMENT OF JOHN J. MCKETTA III ON BEHALF OF THE RESPONDENT

MR. MCKETTA: May it please the Court, Mr. Mcketta III, representing the argument from the trial. I would ask for a minute opportunity to talk about the planned output and during that time to suggest an area that can used this Court's advice of indictments. Without any change to the outcome of this Court. The planned output

that is supposed that one bought a Toyota and on driving apply a brief you can have feel accident because there was no break liner if the evidence where clear that Toyota's ordinarily or intended to have break liner. This showing of a variants or deviation from a planned output could occur without any specifications without any blue prints without any formulas without any designs staplers that is the proof of planned output and deviation from planned output can occur without any of defense, then were proposed in the tender in correct jury obstruction below.

JUSTICE #1: Is that in this case. Is that in this case?

MR. MCKETTA: The planned output?

JUSTICE #1: Yes.

MR. MCKETTA: Yes. We have in fact the most telling to me of the agreement parties about the intended planned output.

JUSTICE #1: Is it in footnote for the reply brief.

MR. MCKETTA: The intended output is that the vulcanization process at the time of manufacturer was sufficient to achieve adhesion of the second belt and thread to the purpose. That is in everybody's testimony and Cooper even say's that is what all the expert agreed to and if there is a show that he later turn to whether the showing was made. If there's a showing that, that is the planned output that showing was made.

JUSTICE #3: How's that differ from design of specification's from the specification of self that there's no proof that the manufacture did not deviate from the specification just to planned output depends on the specification isn't that a design.

MR. MCKETTA: My point was the say it is not depend on the specification that is 99.99 percent of Cooper tires do not have a failure on the fusion. That if we have an as for model and somebody process indictment of enforcement poisoning. We don't need to look at what is the design standards. What is the blue print formula specifications if we prove that the plan output, non legal unfortunate of product existed at the time at that the plant. So the point is if one found that there was factually sufficient and legally sufficient evidence persuasive to injured. That this tire to when it left the plant, sale to have adhesion that is the that vulcanization process had fail to have a adhesion unlike all of the sister products. If the evidence were that, then just as the argument, just as the missing break liner, just as here. We would not need to have additional evidence of how did the argument get in if we could proved it happen in manufacture. How did the liner get missing if we prove that was not fact that time of ma-- manufacturer.

JUSTICE #1: How does your argument change if as a petitioner argue, there other agents acting on this product to call to and said I have problems.

MR. MCKETTA: Yes. And I think Ms. Malou is properly described that Section 3 of the restatement is not address here would be-- with the new tire, question that ask earlier and that there was evidence to rule out all other indicators but the important thing to me just as we arrive, is that there was directed of markers that indicate that at the time of manufacturer at least two things failed to occur which would two things would not appealed have there been adhesion during vulcanization. One is line mark, one is gassiness in the grass overlaying the steel hope that necessarily and could be copper sulfide process, black instead of being shiny or grassy.

JUSTICE #1: What evidence was there apart from the testimony that those two conditions show what they show. What evidence was there

independent the experts that said, "Oh, yes and-- these are markers for defect of law tire separation wire."

MR. MCKETTA: That is-- other that the pure say so of the expert. One is that there was an import demonstration showing how line markers can occur on unvulcanized rubber in way that do not unvulcanized. So one way was an important fusion. Another was a book, a book that is text book used for the last twenty-two years by police academy, by forensic scientist schools. There's a criticism is saying, mending name Mr. Sacks is criticized one aspect of that book concerning under deflation issues but that's in existence and is used in training. Now it happen, that it was written by the expert who say so just to have your testimony and yet did something that is used for a training purpose and has been a first and second issue from more to that case. So it's not a nearest say so admitted up for the purpose of this delegation and his testimony. This is one were we have a person who depth a career-- a reminder of the bee-keeper we don't need a aeronautical engineer to tell us how these behave that we have a bee-keeper was sufficient experience. This Court a description here we have the bee-keeper who has written the book and talk to classes and talk every police academy within the United Kingdom and-- I guess it's just England or Ireland. We have somebody who had decades of being entrusted by the leading the tire manufacture in England. His department was to analyze every return tire and determine what are the problem so we can do felony control. This is the person who has the hands on the law in the markers and wrote about and thought about it and people sign up for his-- but there is one criticism in the footnote and by Mr. SACHS about a part of the book but that was not change the concern of court, a gate keeper would have about Mrs. Mere say so.

JUSTICE #1: But he said-- Mr. Grogan said that there were some disagreement about which I coordinate ...

MR. MCKETTA: Did not, did not instead there were people among the tire manufacturers who disagreed but there is not a single published item that disagreed. We have text that she used by obvious police instructions that support his view. But Justice Sachs you have properly resided the testimony that that existed. If we could planned output as our, as our standard to look at and go back to the question on jury charge and if we pick planned output is our standard to look at and go to the evidence. I think we can walk through and see two things.

JUSTICE #1: Just a second. I'm sorry.

MR. MCKETTA: No. [inaudible]. Most of you, have the recollection from your years as a trial judge, that their are often enthusiastic offers of truthful statements of the law. That your litigants would like to add the end to the charge opening the bounce a little bit this way or that way. That's not unusual experience and pattern jury charged was intended the balance though I do not claim that it is right nearly because it says so. But I want to test the feet's. If there is somebody using pattern jury, as somebody else wishes different language which can be permissible. There normally three things you would scrutinized as you reviewed that combat. You would scrutinize first under Rule 278 in the case of a definition, the only tender was a definition. It was not a trial an objection for missing element. The only thing here when you look at the charge conference was a, a playing that there should have been an additional definition, and the tender barred, Rule 278. Threshold one; was there a tender of a substantially accurate instruction. Tender, a question two; if there was, did the trial judge abused discretion in the client attempt. Question three; If there was a proper tender and an abusive discretions was an harmful error. Here

negative test number one; the tendered the instructions omitted ten output. The tender instructions was not an accurate statement of the law. The tender the instructions was contrary to the most recent tools Supreme Court opinion on that matter. Torrington and American Tobacco, and the tender the instructions was strategic. It intentionally left out, find out but why do we say it's strategic.

JUSTICE #1: We have the system as you know, right or wrong?

MR. MCKETTA: That jury submissions and charges are put together at the close the evidence when you have pretty good look at what got in and what in and what did not. Suppose I had a pretty good look and my opponent had put in most specifications and I can persuade the judge to say you must show a deviation from specifications, period. Left output or planned output. Strategically, I might be susceptible and trouble on review but strategically I may want to get that inaccurate statement of the law in charge so that I could argue, ladies and gentlemen, it was a tragedy for the Duran family and the Mendez family to lose their loved ones. Who put deeply regrets that but the judge has told you, you can only say yes if there was a deviation from the justification for these lawyers not the government justifications. That was strategic, strategic choice to abbreviate and only ask whether there was a deviation from blue prints or design standards period.

JUSTICE #1: Should jury be allowed to bring in outside to this is outside export importer dictionaries?

MR. MCKETTA: No. A jury should not be allowed to do that and just as the, the question here is where does on draw the line because the juror should not. If there were ever case were an outside source influence step and especially at the party, but if there were an outside source that influenced that, we have a mechanism. And it bounds to the public policy of where we draw the line in those mechanism to make sure that we can test that and find of the consequence and have a proper treatment and high level reviewable elsewhere. Let us suppose an examples. Suppose in jury deliberation,that was in a jury last September already mess-up and forgot to strike me. Suppose in jury deliberations, one to twelve people were just saying, "You know, I read in the dictionary that nego should mean such and such. Were all very clear that, that simply cannot be attack even though that's not what their supposed to be doing. Are you with me?" Supposed the juror came and said last night, I was at home looking in the dictionaries, and here's what I said, "Then again, is not something that our method allows a master been an exterior influence in non juror," saying, "By the way Mike, why don't you look at this dictionary definition and see what you think about." If there word non juror, exterior influence. Then Justice Medina that would something that the trial court could make. The trial court could make findings as to whether that had a harmful influence of the outcome. In the absence of request for findings that would be dealing to support the judgment but the policy choices of this Court. This Court had made a rejecting extensions to rules of, of what the jury testified. Choices this Court has made not liberalize and how many things could detect forecloses in our judgment forecloses as matter. If it hadn't been foreclose, there's a deemed finding problem that this trial judge did not find it. There's an harmful and frankly it putted the definition within the negligence. I-- as to one of those three items I offer to you the next time had the jury is probably because it is practically the same understand what he says.

JUSTICE #1: Tender would be corrected for that or find out?

MR. MCKETTA: Then, I think it would been then a correct tender, it

would not need-- it was require by the judge to accepted it as in any-- it simply definition of a term manufacturing defect. There is a pattern jury in definition of the word defect, and then the juror is advise use your ordinary understanding of language for undefying terms. The word manufacturing defect has the word manufacturing from the define term. One could understand a trial judge making the choice that I going to put to the end. I think in facts of this case that would be helpful balance of truthful statement of the law but you could also understand a trial judge sayings, I think in the fact of this case the word defect adequately defined that has to be time of manufactured, it has to be unreasonably dangerous and I don't have to also call of law and I don't have use extra synonyms that is a discretionary decision by a trial court. I think pattern jury is always available to reviewer but the sooner of that was error when it was not properly tender. To say that it was error when abusing discretion standard. To say that it was reversible but along prayerful render. When death is something that is not shown to have any harmful affect of the facts of this case I think would be improper but Mr. Chief Justice I think it is fair for trial judge to make a contrary decision and to put in from Torrington, from American Tobacco, from Ridgway, from Bridgestone Firestone, that praise. But it must say what planned output and that's concurrence that Ms. Justice O'Neill emphasize that planned output that they have a majority opinion of that, that the opinion of the court emphasize, you can offer make this findings by expecting the product.

JUSTICE #1: Mr. Mcketta, shall be back to the allege during this conduct?

MR. MCKETTA: Yes.

JUSTICE #1: If we disagree with you, if this Court finds that the dictionary was an outside influence -

MR. MCKETTA: Yes.

JUSTICE #1: - in permissible should be look at. What should this Court do? Should we send it back to the court of appeal or in the trial or what should be the remedy?

MR MCKETTA: Here three things that I, I, I know want to consider. The end of which would be a remand of court of appeals.

JUSTICE: I, I maybe mistaken on that. Let me walk to those things I think we want to look at first. The primary one would be, was there any harm by that conduct. In other words look at the so called outside influence and read the definitions and see the debt appear and the facts of this case to cause harm. That's ordinarily and balance of test that golden eagle says we treat as a finding of fact by the judge trial judge. The trial judge here was ask to reviewed that matter. And any deal findings as to harmfulness are ordinary deemed to support the judgment. I believe Mr. Justice whether been on the facts of this case. One would find, no outside influence but to your question that one found outside the influence. One would find no unfairness or a harm by that. If there were doubt by this Court that's really a fact finding will was there-- that would be a trial judge matter and I think that I have gone on and on with an answer ...

JUSTICE #1: The trial as here offered knows-- serve on the record, views on what he deny the motion for new trial ...

MR. MCKETTA: A new problem. I cannot say there were none but I, I cannot recall on the record.

JUSTICE #1: Do you agree that there is no record have been showing at any juror about in any different way based on in the introduction of this dictionary definition.

MR. MCKETTA: That's right but ordinarily you don't do that by

interviewing twelve jurors. Ordinary you do that by staying in the facts where case.

JUSTICE #1: Was this in a matter that was so influential to a highly contested man. That it needs refuge of-- each of the four trial judges done this many times and that is ordinarily a fact finding rather than a legal sufficiency of review that this Court ordinarily I would think would intervene.

MR. MCKETTA: In the event that court's brief.

MR. MCKETTA: I, I do just want to blow it out because if somebody shows whose going to ask about rights.

JUSTICE #3: Well, we'll request to those and ask case and may be able to catch and explain this as state accurately. A must you said that, that you had specifications sufficient to what argued to court of deviation.

MR. MCKETTA: She has explain that in a briefing. Our briefing said show us that in the record. I was not at the trial and have the benefit of the record but not the benefit of the recollection about discovered. So the record is not reflect to my reading what she says, but I do say even if we had the specs that was not the necessary for us to show them a deviation we'll find out. But our knowledge is mention last and mention a eight, eight page.

MR. MCKETTA: In volume 25.

JUSTICE #1: For a dozen pages are so starting it page four.

MR. MCKETTA: A chemist who would not be a good person that ask questions about tire repair but according to this-- the San Antonio Court that said he can't answer tire question would be a good person talked about fusion and chemical process that's in San Antonio Court decision. Three or twelve pages talks about his eight principles leading from the four learner's articles that he quotes by name the record is produced available, the record is proof or never chose to have their witnesses with them. There's nobody saying that he misapplied any of those principles of those four partners. And lines up eight principles talking about migration of lands and why it cannot be? That Cooper's theory that, that contaminant unnecessary for us to prove if planned output means end up on depletion which is more information about how that happened but unnecessary proof that the contaminant was in fact, wax that did not belong and did not migrate and he doesn't we'll see by looking at 20 carbon to 38 carbon chins and rates of migration and diffusion.

JUSTICE #1: This very sophisticated and I didn't throw right not mention in if [inaudible]. Thank you.

MR. MCKETTA: [inaudible] question. The question and the charged ask about manufacturing defect the definition and instruction refer only to defect.

JUSTICE #1: Correct.

MR. MCKETTA: So then according to your, the logic of your argument. The question couldn't excluded the word manufacturing it couldn't have banned here.

JUSTICE #1: Oh no. When I, then I argument purely justly as been right was often do but I meant to say was ...

MR. MCKETTA: The question ask but manufacture defect -

JUSTICE #1: Yes.

MR. MCKETTA:- the definition only defined a defects.

JUSTICE #1: And standard instruction tell the jurors, where a word has not been file? Use your common understanding of the term -

MR. MCKETTA: [inaudible].

JUSTICE #1: - the main factory is itself. Any question that bring

a dictionary for

MR. MCKETTA: [inaudible] and it was just [inaudible] they do not bring a dictionary effect.

MR. MCKETTA: So, so the jury gets it's understanding of how manufacturing defect is different from other types of defect case whether we're told that like what the record did as evidence have designed as well as a manufacturing defect where's the jury get to understanding of how manufacturing the effect is different from the general.

JUSTICE #1: From the charged-- from the instructions used commonly used words as you understand and the charges ...

MR. MCKETTA: And-- justices one like in the event when -

JUSTICE #1: Right. Just a second, from the charge.

MR. MCKETTA: I'm willing to answers the questions ...

JUSTICE #2: You said in your first answer was from the charges -

MR. MCKETTA: Yeah.

JUSTICE #1:- where in the charges doesn't explain to the jury how manufacturing defect is different from a general defect.

MR. MCKETTA: In a properly tendered extra definition of properly tendered extra definition according could ask the judge to give one more definition. If it is an accurate statement of the law. It is in my judgment not and abuse of discretion to view this on the find and there had been thousands and thousands of laws to stride. Left this instruction in ways that juries truly do which results that had been being unfair. But I'm not saying that it began the urge, I mean ...

JUSTICE #2: Let me, let me stop you there. So in this case -

MR. MCKETTA: - Yes.

JUSTICE #1: - with this charges -

MR. MCKETTA: Yes.

JUSTICE #1: - where does a jury get it's understanding of how manufacturing defect is different from the general from the defect?

JUSTICE #2: What they heard in this case?

MR. MCKETTA: Follower manufacturing is all what defect is a condition. It has to be conditioned existing at the time it left and causes reason pager and they heard both signs. Experts say that there should be adhesion. If the time of organization and divert many instances of tires that did not failed this supposed that tires is planned that output deviated from those of all the others and was a very easy cases present that that would be actual defect that was [inaudible] is talking about.

JUSTICE #1: And you could give me a list of a few other thing, I think or catch you up.

MR. MCKETTA: I think, I think you find allow me to please proceed to end up the statement. Thank you.

JUSTICE #1: Thank you, Mr. McKetta.

REBUTTAL ARGUMENT OF ROSEMARIE KANUSKY ON BEHALF OF PETITIONER

MS. KANUSKY: First, was get the way but the propriety of the instruction that I attend. Planned outlet simply was not part of this case there are number of reasons, first of there's no evidence at all that this tire differed-- the sisters tires that were on the vehicle and so expected the nail hole that's the only difference. Secondly, there's no evidence of deviation from any planned outlet as to the two

signing up there's-- planned about that was no failure-- there should be no failure at the fusion. What the experts all testify that could be cloth failure adhesion for variety of reasons. It can be like I said in, in that footnote that if, if the problem is that your curing machine didn't worked. That' when the machine worked should be different from it. If, if the, if the tire doesn't fuse in their works fused together because the curing specs doesn't have an output to put your time or pressure that a, that's a design defect. What they have to come up by statute with evidence of an alternative design and it gives very important because in Texas deviation for specification is an element of the manufacturing defect claim. Question doesn't submit the element. You can't assume it was there. Simply because there was some evidence to support. The jury doesn't know couldn't had to find it.

JUSTICE #2: Where is this Court held at it, it a deviation from spec is an essential element in the defect.

MS. KANUSKY: Because in the cases that differentiate between the different types of defect by definition, the manufacturing defect is a deviation from specifications or planned output. And I think the planned output language is just another way of saying specifications because whether you say a roach isn't supposed to be in an orange juice because it's not on the specs or the manufacture didn't intend that the roach to be in the orange juice. It says the same thing. So I, I, I, with respect-- I, I've always view the planned output languages is just another way of saying the same thing. And now as far as the -

JUSTICE #2: [inaudible] the questions. Thank you counsel, the trial was submitted and the agree. All rise.

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