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Supreme Court of Texas.
Bic Pen Corporation, Petitioner,
v.
Janace M. Carter, as Next Friend of Brittany Carter, Respondent.
No. 05-0835.

February 13, 2007.

Appearances:
Reagan W. Simpson, King & Spalding LLP, Houston TX, for petitioner.
Lisa Powell, Atlas & Hall, L.L.P., McAllen, Texas, for respondent.

Before:

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

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JUSTICE: The Court is now ready to hear argument 05-0835, BIC Pen Corporation versus Janace Carter, next friend of Brittany Carter.

COURT MARSHALL: May it please the Court. Mr. Simpson, argument for petitioner. Petitioners reserve five minutes for rebuttal.

MR. SIMPSON: Mr. Chief Justice Jefferson, Justices of the Court, may it please the Court. My name is Reagan Simpson, presenting arguments with the petitioner, BIC Pen Corporation. With me today is Harold Barcher, who was BIC's lead Trial Counsel and the trial in this case.

JUSTICE: Only to a presumably talked about, this issue I think is probably the most significant to begin with and as preemption doctrine could you sure you want to talk about that. So tell me why this is preempted.

MR. SIMPSON: This is preempted under the principles announced by the United States Supreme Court in the Geier versus American Honda case which the Court applied implied preemptions that a federal statute is not self defeating and if a State Law conflicts and with frustrate federal purposes then the State Law is impliedly preempted. In this particular case, there is a federal regulation that deals with disposable lighters promulgated under the Consumer Products Safety Act.

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It administered by the Consumer Product Safety Commission. The Commission has set forth certain requirements for disposable lighters such as the one in this case. Significantly, the federal policy is a balanced of interests. One of the interests is user friendliness recognizing that if lighters are too hard for adults to operate, they will not be used instead other alternatives will be used to light cigarettes or other things that are not yet-- did not have child resistance.

JUSTICE MEDINA: It can other lighters that were child resistant in this lighter question.

MR. SIMPSON: That's a very interesting question. And I believe Justice Medina that the evidence bears that out and that really is a policy in the entire causation argument that the other side presents in this case ' cause there is no basis for comparing tests of different lighters. This is a situation which the causation theory is based on a small portion of an overall test not designed to show causation. And actually the results of this small portion that test relied upon or odd with the general test and there is in fact no way to compare test one lighter to the other because there's no controls. There's no controls between one test and the other. In other words, there's not an assessment of psychological motor skill analysis done of the participants instead the children are selected it random between 42 and 51 months.

JUSTICE MEDINA: Do, do we and get to the causation issue of this, this whole various preempted.

MR. SIMPSON: We believe that the entire area is preempted both is to design in the manufacturing claims and goes to balancing of the federal interests that we want to have some child protection but we don't want things too hard and there's two factors that are in play here. One is the age of the child and we have Janace Carter, who's above the age and the other is a difficulty of off reading the lighter.

JUSTICE: And I-- that's an argument and that it make it is that when the federal standard is carefully set to balance, this interest. That it really it's not a minimum standard. It's just-- it's, it's something that, that's destruct if you're can anything more and your conflicting with the purpose of that standard but then how do you square the savings clause for that?

MR. SIMPSON: The savings clause, as discussed in the Geier case, there is two aspects in 15 USC 2074 which the savings clause and 2075 which is the preemption clause. And what the U.S Supreme Court is held is savings clause indicates at some common law actions are not preempted and that leads to implied preemption. You have to look at the particular product that should issue, the particular regulations determine of what the purpose of those is and determine whether or not the State Law impliedly then preempt or frustrates that the federal go. So you have to-- I think it's good to keep in mind that the savings clause is a general savings clause. And there are lot of products that are being regulated. In some situations, you have minimum standards, in some situations you do not -

JUSTICE: So you say ...

MR. SIMPSON: - so you always have to look at to predict the product.

JUSTICE: So you say, this is a situation where you don't have a minimum standard. And the savings clause doesn't really provide the claim. It doesn't say it is a floor.

MR. SIMPSON: That's right.

JUSTICE: Then, what do you do about the manufacturing defect

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claim? It's not-- that is any sort of balancing.

MR. SIMPSON: There are several things. First of all, I think that in this case, the manufacturing defect claim is essentially the same thing as a designed defect 'cause the only purpose for the manufacturing specifications is child resistance. So we are talking about the same thing. The second thing is manufacturing ...

JUSTICE: So in my understanding, in my understanding is there're many manufacturing claim is that even with the federal standard, even the 85 percent, the way it was manufactured, the controls don't even meet that standard. And so that would not be the same claim.

MR. SIMPSON: Well, one thing that remains the same is that if you enforce manufacturing defect claim in this case, you're still enforcing it to Janace-- with respect to Janace Carter, who is someone who is beyond the age that was not to be protected by the federal claim. So that is the problem that is still there for preemption on their standpoint. I submit to that the manufacturing specifications are part of this submission to the Consumer Product Safety Commission. So when you send in the report like plaintiffs exhibit 55(c) and 55(e) which is the two once that issued in this case. It lists to specification, it lists to performance test and the CPSC then approves the lighter when the lighter is in compliance. So it's not just a performance but it's also the specifications.

JUSTICE: What claims are not preempted? What claims where the savings clause say?

MR. SIMPSON: For instance, I've got a big lighter in my hand. I'm not doing anything with it and it blows up. It felt hard. I can say this lighter is made in compliance. It passed the test in all that but that would have nothing to do with the back that it just simply fell apart in my hands and blew up. That would be an example. And that's why you have to look at the particular claims that are being made to see whether vindicating those claims and upholding those claims would in fact frustrate federal policies. And the plaintiffs and we showed on I think in pages 24 to 26 and page 30 of our opening brief. The arguments that were made in the Trial Court below that, well, they're ought to be, every child are to be protected. Two out of a hundred are ought to be protected instead ten out of a hundred. Those kind of arguments are made squarely in the face and the final assault on the balancing interests that the federal government has struck realizing that there's two competing interests here that need to be balance.

JUSTICE: You talked couple of times about this child age and it's certainly high lightened brief that I recall correctly it was two months older than the guidelines. And you should look at these claims individually. You take that in consideration as well or just a bright line test in five years old when we meet the standards then in matter in which the faculties are.

MR. SIMPSON: In every regulation, you have bright line tests and we submit it's a bright line test in this case. The children who are tested are between 42 and 51 months of age. Janace Carter was 62 months of age at the time of this event. So he is beyond the group of children whoa re aimed at in this regulation for protection. And therefore, allowing this understand violates that federal principle. Let me talk about causation a minute because that's another reason for reversing an [inaudible]. I think there's preemption, causation, the interesting question whether Havner analysis applies in this case. I don't think it does because Havner analysis deals with issue of chance and limit that in chance from the cause of equation. We don't have a chance issue.

JUSTICE: What-- just before you go to causation, just one more

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question on preemption and assume we agree with respondents that there is and should be a presumption against preemption of, of these sorts of claims particularly when there's no expressed preemption that the Court has an obligation, State Court has an obligation to remand open the claims of this sort. What is your-- presuming there is a presumption against preemption, what is the strongest case? Is, is it Geier, Geier is your strongest case for as preempted here?

MR. SIMPSON: Your Honor, certainly the pronounced for the United States Supreme Court that would be applicable and very similar issues in Geier with you dealt with balancing of interests whether people wanted to use seatbelts, whether there's safety issues ...

JUSTICE: In Great Dane, we said that-- you know that presumption against preemption is more stronger than when the state exercises it's-- told him regarding health and safety.

MR. SIMPSON: Well, regardless of how strong the presumption is which is Chief Justice in this case, there are very carefully told that federal policy so that balancing these interests and, and if you look under the regulations and the comments that were made by the agency allow to debate on where to accept the acceptance criterion and should we use a 90 percent acceptance criterion that decided not to because there were safety concerns about putting it a bar too high and if you allow states to have different jurisdictions to as in this case argued that an 88 percent standard is a good standard and that is going to frustrate the federal objections and so for that reason, it should be preempted. Turning to the causation argument, in this case, the whole causation issue depends upon extrapolating from surrogate number five in the 1994 test. A test, a sub part of the test involving only 16 children when the CPSC ...

JUSTICE: That, that was not clear. That was not a test that BIC conduct it or that was conducted in this case.

MR. SIMPSON: It was conducted by the Millferd consulting company I believe Justice Hecht who had been retained about that to do the testing. It's not a testing by the federal government. It's a testing about contractor have to request to BIC.

JUSTICE: Well, there was a testing at the time the lighter was made?

MR. SIMPSON: It was-- testing that was done in October of 1994 and reported on in the exhibit 55(c) which I think was early '95 or maybe late '94.

JUSTICE: It was a testing that they used to pass the federal protocol.

MR. SIMPSON: It was a testing that BIC was required to engaged in, in order to have it's products approved. It's very detail regulations it says exactly what the test were supposed to do, what children are be selected in terms of age groups. It's very detail in the regulations.

JUSTICE: Confusing part to me was there were apparently five surrogates.

MR. SIMPSON: That's correct. Six ...

JUSTICE: And-- okay six. And there's an average taken of six surrogates. And if the average meets the protocol excess, that's okay.

MR. SIMPSON: Well, ...

JUSTICE: And the problem that the Court of Appeals had and the theory, that plaintiff had in the Trial Court was one of the surrogates was clearly out of compliance. And that by using the surrogate that was clearly out of compliance and understand you, you dispute the basis for the out of compliance. But presume that, that were a valid basis. That as seen in that way, I have a such a variable on the surrogates that

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into that in spare of kind of violating the federal protocol 'cause you could do that in a lot of lighters that would be the same as not child resistance.

MR. SIMPSON: Well, the use of surrogates and a number of surrogates is regulated by the CPSC and that's required to be done. And in fact, what the testimony is it tends to use surrogate at the lower end. So that really promotes state because you manufacture a little harm, you have a target, a little bit harm to that. So you read the test, something at the low in rather than to top in. I don't really understand the Court of Appeals discussion of wide variance. The reason that surrogate five is not relevant though it's because it's a test only-- a sub-test of only 16 children. And there is nothing to show whether the six who could light surrogate five that also have operated that doubted J-15, the J-25, the J-16 these other lighters. There's nothing to show because it's not statistically significant. In fact the CPSC itself rejected test with only 50 children. So if it rejected 50 children as a basis for making any regulation and statements of that lighters and it's certainly going to reject scrapolation of that of only 16 children. The same thing goes through with comparing the lighters because there's no control with. There's no way to tell whether the same hands of children tested the J-16 as supposed to J-26. And it's also clear that they are casing variations. Sometimes the modified J-26 will be 90 percent, sometimes it's 96 percent. There is no way that you can make statistically significant choices and analysis of the various test. It's simply a regulatory test that BIC complies with and it cannot be use as a basis for causation.

JUSTICE: But let me ask you this. The Court of Appeals said, at trial that plaintiff argued that BIC deliberately inserted lower performing surrogates such as surrogate five and the groups of lighters with better performances such as the three surrogates which now can operate from the testing of the J-26. And this allow BIC to meet the commissions protocol while still manufacturing lighters that are March and April and all sake for the none child resistance lighters. I understand you contest the factual support for that. That if that were the way that the company were meeting the federal protocol by having very low surrogates that clearly did not meet the standard balancing that out with absolutely hundred percent child resistant that at least the spirit of the protocol be violated.

MR. SIMPSON: Well, I don't believe so because again, if you set the surrogates at a low value and then manufactures something above that, that you've got sort of a safety march and that's the testimony this ...

JUSTICE: But how would you know if you manufacture above that if you destroy the manufacturing specifications.

MR. SIMPSON: Well, at the time we manufactured, you have the specifications available. This spoilation issue comes on only in this case years later in trying to deal with the evidence in this case. But at the time, there's certain internal targets maximum and minimums that manufacture to. And if you have surrogates at the lower end and they all pass in the overall test, then you know that you're manufacturing low harder and that you're certainly staying within the balance.

JUSTICE O'NEILL: But we don't know that in this case and there's no evidence.

MR. SIMPSON: And also pointed out Justice O'Neill that there is no argument given by the opposing experts that there is any failure I think this is in volumes seven, 66 and 136. There's no argument that they did not follow the protocol. There's some complain about the

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nature of the protocol that allow people to do. But I hardly think that, that's a basis for liability when the protocol has been followed. I see that my time is up and I reserve the rest of my time for rebuttal. Thank you.

JUSTICE: Thank you counsel. The Court is now ready to hear argument from the respondents.

COURT MARSHALL: May it please the Court. Ms. Powell will declare argument for the respondent.

ORAL ARGUMENT OF LISA POWELL ON BEHALF OF THE RESPONDENT

MS. POWELL: Good morning. My name is Lisa Powell, I'm here today on behalf of Brittany Carter along with Daniel Gerwoods and [inaudible] Schindler. The Court has indicated an issue-- an interest in the preemption arguments, I would like to begin with that today. We did not believe that any of the claims asserted by the plaintiffs in this case are preempted. First of all, although the existence of a savings clause maybe not be dispositive. It is certainly important to the analysis because this Court primary purpose of course, is to discern to attempt of congress. And when congress include an expressed savings clause in a statute ...

JUSTICE: Which they frequently ...

MS. POWELL: That is true. But in this case, you also have a savings clause along with one that only a minimum standard. If you take a look at a particular standards and I know that there had been some argument over this. But the particular standards involved in this statute unlike a number of other statutes that are addressed to the cases cited by BIC. This standard is clearly a minimum standard. The requirement in section 1210.3, indicates that disposable lighters shall be resistant to the sexual operation by at least 85 percent of the child test, child test panel. That type of language is very similar to the language evaluated by this Court in Great Dane case. In the Great Dane case, there was a motor vehicle safety standard that required that the trailer manufactures include at least again the same number, at least a certain number of reflective panels on these trailers. This Court in looking at that case and looking at preemption, noted that, that is a minimum standard. And that a state common law requirement require ...

JUSTICE: Well, but there's a big difference there because in that case putting additional lights I'm going to hurt a thing but in this case the federal government balance the interest of not making it too hard to lights so people wouldn't use matches which will be more dangerous. So there was a competing safety concern that favored the more user friendly side causing that minimum standard to come down.

MS. POWELL: We disagree that, that is a factor in this case for a couple of reasons. First of all, I think if you look at the actual language in the regulations, the primary concern was more whether or not it was technically or technologically feasible to go above 85 percent. BIC's demonstrated that it can. But in addition, the primary purpose ...

JUSTICE: I can note a hundred percent. I make, I make a lighter without fluid in it. And the kids will never be able to burn themselves out of that. But I wont sell it, right?

MS. POWELL: But you said ...

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JUSTICE: When the lighters in light.

MS. POWELL: But BIC itself has evaluated the efficacy of this lighter. We're not talking about some kind in the safety device that, that we're suggesting that BIC ought to try out. We are talking about lighters that BIC actually sent through the process or prove by the government and so what is.

JUSTICE: At what percent then should they have been manufactured, should they have tested what's this so.

MS. POWELL: It is our position that if BIC has demonstrated that it can manufacture lighters to 97 and 98 percent child resistance that, that is the standard that BIC that, that should be enforced in this case both on the design defect ...

JUSTICE: Let me question on that. If it's let say 98 percent and if your client is in the two then it's not defective. There is no design defect if it's 98 percent safe what kids on the ground.

MS. POWELL: Yes.

JUSTICE: So if your client is one of the people, the two percent then as a matter of law they've must loose even though they burn themselves or there's [inaudible] the case might be.

MS. POWELL: Well, assuming that there's no manufacturing, we-- I-- we would agree that we would not a design defect claim and if the lighter was protective to that level.

JUSTICE: So why ...

MS. POWELL: There might be a manufacturing defect claim or some other type of claim.

JUSTICE: But that's not and so that, that's a matter of law occurrence because you say 98 percent is safe than the other two percent is does have a look and I'm wondering what makes you more authoritative or the jury more authoritative to the CPSC.

MS. POWELL: Well, I believe that the CPSC clearly indicated that this was a minimum criteria and they indicated the desire to look at the common law would you take it a look the savings clause. Because the savings clause indicates that this chapter shall not relieved any person from liability at common law. Now, obviously we can't force to be a-- and do not claim a design defect beyond what is technologically feasible. But again BIC has demonstrated the feasibility of this. This is not some esoteric safety design. This is a design that BIC tested that the federal government approved. It's a loom difficult for BIC to argue that J-15 and J-25 or some held contrary to the federal governments purposes when the federal government approved those lighters and BIC sold that lighters. BIC made money off of those lighters. Our argument is merely that if you have a choice between living ten children of 100 it risk or living two children of 100 it risk. If the technologies there, you go-- you ought to go with saving this many children as possible. And we in fact that entirely ...

JUSTICE: Well, of course 'cause, 'cause you represent the kid. But neither you nor the CPC is in the business of selling these things, right? I mean this got to-- we've got to balance utility. That's a fact on product liability. We've got to balance [inaudible].

MS. POWELL: That's true BIC balance in the utility ...

JUSTICE: Which CPSC necessarily need to do that. They don't care whether he sells or not, do they?

MS POWELL: Well, first of all again, I think the standards clearly a minimum standard. Besides which BIC balance utility and BIC marketed the J-15 and the J-25. Again, we're not talking about something that might or might not work. We're talking about a product that the federal government approved at that BIC marketed. And the choice here is do you

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or do you not protect the extra seven or eight kids out of a hundred. It's our argument that those children ought to be protected and that is fully consistent with the CPS purposes. When the CPSC has stated merely that the standards should be at least 85 percent and when the CPSC in the preliminary analysis indicates that the standard below will increase the minimum allowable child resistance of lighters to 85 percent.

JUSTICE: In your argument is premised on the fact that BIC is already, had already demonstrated that there was safer alternative, correct and that assumes theory that perhaps your expert came up with the design ...

MS. POWELL: That's correct. That's correct. Now, BIC wants to challenged the efficacy of the child safety test. We believe that those are something that the jury could look at after all, these were the test that BIC relies upon in order to market its cigarettes. In addition, the CPSC has indicated, has indicated that if a lease of efficacy of the test, the federal regulations state that the commission concludes that the result of the child panel test which again are very strictly controlled by the regulations. But the commission concludes that the result of the child panel test provide a reasonable approximation of the ability of children to operate lighters in the home which in turn should be directly reflected in the instance of fire started by children with, with lighters.

JUSTICE: If you could make a lighter, so that 98 children out of given hundred, some given hundred can operate it and why should still make one were none of that, 995 out of his house.

MS. POWELL: Well, if the plaintiffs could have proven that such a lighter existed, then perhaps you should have. But the evidence have talked ...

JUSTICE: Surely. The policy make a lighter, the policy make a lighter.

MS. POWELL: But the evidence at trial is that there is, there are lighters that will predict to 97 and 98 percent. The plaintiffs argument is merely that those lighters exist and they should, they should have been market it here rather than the J-26.

JUSTICE: Do you think it, do you think that the federal concerns that the harder you make it to operate the children, the harder to make it to operate for adults and therefore adults will use it than in something else [inaudible] or fires so there needs to be some balancing at some pointer or do you not [inaudible].

MS. POWELL: Well, that is obviously a concern, one of the concerns of the federal government had along with technological feasibility. But the, but the ...

JUSTICE: But I'm you talked about the evidence here. Do you think that's a valid concern.

MS. POWELL: No, I do not think that, that is a valid concern based upon the evidence here. BIC raised the issue with regard to the J-15 and BIC's arguments in that did go to the J-15 and not the J-25. That even in the J-15, there was no indication of being increase in any match fires or anything ...

JUSTICE: But again would have to prove that. I think that you look at the, the, the what the federal government looked at in setting these standards and it, one of the purposes of setting it to 85 was based on that problem out there. It seems to me like we can, we have to re-loan that federal design that would have to prove and I don't think he never prove that more [inaudible] so that would be an impossible.

MS. POWELL: I believe that the CPSC actually concluded however

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that the vast bulk of child safety fires were started with lighters. And I don't think if you look at the-- I believe that the federal governments primary concern with was, was with the feasibility. Even with regard to the possibility for switching, the, the only evidence or the only suggestion questioned that BIC had was with, was with the J-15 and even with that lighter there wasn't any indication of any increase in other types of match fire. And BIC's arguments didn't go to the J-25 which again was simply a smaller version of the J-26 which is a subject lighter an issue. Well, you know ...

JUSTICE: This made to the manufacturing defect claim. If, if, if were bound by the federal governments policy determination that if you try to get it out February '85 might that safety on the other end. We have to accept that. How do you, how do you get to the manufacturing defect claim was that not preempted.

MS. POWELL: Well, the plaintiffs had two theories for manufacturing defect. The first theory was that the lighter question was simply below even the CPSC standards. The second theory was that BIC ...

JUSTICE: Is not but as manufactured out of design.

MS. POWELL: As manufactured. The second theory that the plaintiffs had was that BIC was free to and did in fact adopt higher internal manufacturing specifications that were the manufacturing defect claim is a deviation from the producers own internal specifications. So there are two theories there. Let me examine the first one first. We believe that the data shows BIC's own test that even if you assumed that BIC's manufacturing specifications were at the very bottom of the CPSC standard which we don't think was correct. But even if you assume that the subject to lighter was below specification on full force and furthermore, for two-thirds of a rotation, enough to light the lighter twice. Janace would never had encountered a spark will force which is one of the key characteristics above 2.3 which was BIC's minimum for the spark will force in the criteria that they submitted to the CPSC.

JUSTICE: But the evidence of manufacturing defect is the lighter itself. There's nothing other than that.

MS. POWELL: Well, we-- I would dis-- that is certainly very a strong part of the evidence. But we would disagree that other evidence is not relevant. For example BIC's destroy them.

JUSTICE: I'm asking whether there was any evidence other than the lighter itself that there was a manufacturing defect.

MS. POWELL: No, given that BIC destroy this manufacturing specifications and that other data that would have existed at the time that the only evidence here was ...

JUSTICE: What do we deal with which way then that if your car, if your truck blows up, we said you just can't say that's product defect unless you were simply driving out of-- it was so close to the time of purchase that you're just driving out of the car dealers lot of them blows up, okay maybe we'll presume it's product defect. But if you given 50,000 miles, we can't presume the product defect that caused the truck blows up. Frankly, we can presume in this case from the back that the lighter after the fact we checked it and it looks defective that, that was some evidence of a-- that it was the same when it left the manufacturing claims.

MS. POWELL: Well, first of all I think that ridge way involved in expert who said he merely suspected that the electrical system was the cause of the fire. But here I don't think that there's been any argument that the lighter was in some fashion modified by Janace. I don't know how she would go about do that.

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JUSTICE: It was used.

MS. POWELL: Well, that's true but the lighter is supposed to protect children. That's, that's its function. A seatbelt in a car is supposed to protect the occupants even if those, even if those car has been driven for thousand miles. The purpose of the child resistant, a lighter is going to be used and the purpose of the child resistant criteria is to protect children. And we end, there's no indication here of any abuse or anything of sort that's never been argued.

JUSTICE: That's my point. I don't have to prove that there was no manufacturing defect. You have to prove there was. And your proof for that is look at the lighter.

MS. POWELL: Yes, and if you look at the lighter, even if you assumed that BIC's manufacturing criteria were at the low end. This lighter deviates. More importantly, we don't know what BIC's manufacturing specifications were because BIC after the suit was filed and after they received the document production request destroy the day that would have showed those manufacturing specifications were. We believe and the Trial Judge agree that the jury was therefore entitled to assume that BIC's actually manufacturing specifications were at the high end at least with the CPSC specifications. That is consistent with what BIC initially testify. Again, BIC's, BIC's view of its manufacturing specifications was a moving target to that trial. BIC's expert initially testified gave specifications that were identical to those in 55(c) which is the only lighter certification test for this particular type of J-26. Now, after BIC tested the lighter and bear in mind that its BIC's position that the lighter can only be tested on a very particular sophisticated in strawn machine and then only with BIC's proprietory fixtures which exist only at BIC impossibly the CPSC why you just can't go out and get this test just anywhere. You got basically BIC's position is you got have BIC to do it. After BIC did some test we got the result. BIC then wants to say, well, we think we're going to change our mind here. We really think these, these specifications over here or a manufacturing specifications and furthermore you can evaluate it because we tested it the wrong way. But if you take to assume that the manufacturing specifications or at the top of the CPSC specifications which we think is reasonable then this lighter tested low on every single one of the force criteria. Not only low but some 40 percent low. The testimony is that is unreasonably dangerous. We believe that the jury could reasonably conclude from that, from that evidence that this-- there was a manufacturing defect in this particular lighter.

JUSTICE: What if Janace had been eight.

MS. POWELL: Well, it's, it's a plaintiff theory that what is important here, fist of all he went eight. But what's important here is his developmental age. Here, he was only two, two months above the federal governments cutoff and the independent evidence was that he was operating some two, two and a half years below his chronological age. He had attention deficit disorder, hyper activity, difficulty with fine motor skills all of which would put him in the age range that would have been covered by this test.

JUSTICE: Then what if you have someone who is forty and inform in some way and the arguments made that they are-- they have some informative or someone who is 85 in a nursing hand. It has something and worked at that we then but then within the child safety standards. I mean this is become a factual dispute about informative or is the five years supposed to be a bright line federal state.

MS. POWELL: That's an issue I think it's not before the Court but

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I think that the key critical issue here is developmental age. I don't know that you could ever show that the 80-year old was substance-- substantively the same as a, as a-- you know three-year old. But the evidence here is that Janace fault he was two months above the, the criteria was tested and again, these were independent test not done in conjunction with this litigation. It was done in conjunction with the school work. The independent test show that he was operating some two, two and a half years below his chronological age. I point this merely that had BIC even evaluating it for five-year old, had BIC met the standard for five-year old Janace has also been protected.

JUSTICE: And you argue that on these facts that test really should be presented really should be child proof and not really child resistant.

MS. POWELL: No, your Honor. We are arguing eight regard to the design defect claim that it's demonstrated that BIC can manufacture lighters to 97 and 98 percent child resistant and that BIC ought to be required to do so. And should be liable for not doing so.

JUSTICE: But their base sort of proverse this is in it. And if you say that the better that can make them, they're going to be held at the higher standard. Then, this is sort of been incentive not to try other than that.

MS. POWELL: And then the alternative if you want to imply that type of reaction, the alternative I think would be the reverse incentive where BIC's incentive like their trying to do here is just to say which is although we told the federal government that this lighter was 97 and 98 percent child resistant as long as we can skimp by and find some interpretation of what we now think is our standard that it leads to 85 percent were okay. That allows for a damic down of the standard with a minimum-- with a form of 85 percent but I don't think that's what the government wanted. And I don't think that's good policy.

JUSTICE: He told them quickly, tell me really fast alternative, how does compliance with the federal standard not defeat that in balance necessary do justified ...

MS. POWELL: Well, first of all it's our argument that they did not comply with the federal standard. But in addition, you have this situation here where BIC intentionally shows to operate to fell a lighter that it knew had child resistant. If furthermore did so what we believe with very caviler attitude towards the actual testing of its products. Again, I think the evidence in the brief is that it automatically testing to show that the lighter is pretty that to operate. It doesn't bother with any of these automatic testing on child resistant features, the combination of all of that we believe is sufficient. Thank you.

JUSTICE: But just tell me quick, why you say it doesn't comply with federal standard? I thought everybody agreed that's 85 percent.

MS. POWELL: It is ...

JUSTICE: It's only about breaking it down in the surrogates that you say it doesn't meet.

MS. POWELL: It is our argument that if you have-- if a design and again let me differentiate between a design and manufacturing. If you have a design that allows for example the spark will to go two-thirds of the rotation without needing the 2.3 pounds which is what they specify that the federal government. That, that in effect is not meeting the CPSC requirements. And in addition, we're talking about the manufacturing defect were we're also arguing that is below the specifications. Thank you.

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JUSTICE: Ms. Powell, you mentioned when you started that the claims that your client pursued none of them in your opinion are preempted by the acts. Are there any claims in your opinion that the act preempts.

MS. POWELL: The act is certainly directed by its terms if you look at the language of the act and its reference to regulations. It's, it's aimed at states statutes in state regulations. And I think that's consistent with the U.S Supreme Courts analysis in this preempt sort of case. So certainly the act would preempt the State of Texas for example from passing a law that require a different standard or from some administrative agency from doing so. But the act looking at the terminology used is not preempt to common law claims, the comment-- the purpose of the common law is just this type of case to provide remedies for people who are injured and we believe that, that is not preempted.

JUSTICE: But the State of Texas qualified the claims that your clients pursuing, you believe they will be preempted?

MS. POWELL: I think that there would be at least a stronger argument in that case. But again, we're talking about common law and the U.S Supreme Court has itself along with this Court draw a distinction between common law claims and statutory claims. Thank you.

JUSTICE: You mention down three raising super version render one was preemption, two was causation and three, we cut you off before you ...

REBUTTAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF PETITIONER

MR. SIMPSON: Well, there's actually four. Three is Havner analysis doesn't apply because Havner met the analogy as assigned to eliminate chance from the cause of equation. I watch my car range as you cause for connection. In the cause of connection, in chance is not an issue here. The issue is the capabilities of the young boy and features of the lighter. Fourth is very interesting topic of unreasonable danger. And there's some different legal standards to talk about there. The [inaudible] set by statute risk utility. And we talked about the federal policy on risk utility and weighing that. On a manufacturing defect, as submitted in the charge, the unreasonable danger is consider expectancy. As Justice Hecht mentioned in Hernandez versus Tokay case consumer expectancy is lighters going to light. They're going to create a flame. So it's a different standard of unreasonable danger and we submitted this case that there is no basis for upholding liability on unreasonable danger that because this is a lighter. It met the federal standard, the 85 percent standard and a subject lighter itself met the specifications it was tested for. The only specifications it was tested for, it met. And there's no evidence about what would have happen if been tested for the 95 specifications 'cause the testing is different both as to fourth force and the spark will rotation force. So for those reasons, now it should be reversed and rendered.

JUSTICE: I'm just confused.

MR. SIMPSON: Sure.

JUSTICE: How do we know that it met the 90 for specifications.

MR. SIMPSON: It was submitted. They did testing is in TX 55(c) is a summation of here's the testing we did. We did it in compliance and it's 90 percent. And therefore it meets the standard.

JUSTICE: And we have those records.

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MR. SIMPSON: We have those records.

JUSTICE: What records were destroy that we can't, can't figure out what standard.

MR. SIMPSON: The only record destroyed deal with production testing in the 40 second week of 1997 which we say irrelevant because it doesn't matter what other lighters was tested at. What the other testing shows that the lighters 'cause we're talking about this particular lighter in this case.

JUSTICE MEDINA: What would be a policy, a document or intention policy that destroys documents that are question during litigation, I mean your, your client to make that determination in what's relevant and no relevant that seems, that bothers my question.

MR. SIMPSON: I understand, Justice Medina. The standard about the CPSC was three years. There's no confusion that testimony of there's overall standard TX 10 which is less than three years but then specific standards in CPSC which was TX 15. These documents destroyed more than three years after the [inaudible]. The question is whether or not because on notice of, of a manufacturing defect claim, our position spoilation is that the documents destroyed would not have shown anything. There's other documents that should manifest specifications and what other production tests could have done in making a difference. Let me direct the Courts attention.

JUSTICE: What is the making-- how would you know? How does everybody know? Who's making a determination other than one side.

MR. SIMPSON: I'm not sure I understand your question. As far as ...

JUSTICE MEDINA: When you said it would make any difference obviously the other side thought it might have a difference. Judge thought it might have a difference perhaps you wouldn't been discharged to the jury.

MR. SIMPSON: I understand Justice Medina, the-- our position is that the production testing on other lighter available for testing. So every lighter could have failed in a week, 40 second week of 1997 which he look at since we have available to as a subject lighter if can be tested. It should have been tested by the other side if they wanted to pursue this claim and try to prove causation but they didn't. Let me enclosing mention two exhibit. Plaintiffs exhibit 55(e) which is the test, one of the test much vaunted J-26 with the two-piece hood and square wires spark will vaunted by the Court of Appeal says an alternative say for alternative design. The testing on that was 90 percent. TX want 86-- 89 is another test of the same lighter with the two-piece hood and square piece spark will 96 percent. The testing is variant. So if you take the argument that it should be 96 percent which is the J-26 is it 90 or 96? Is it legal or is it not legal? The whole argument the other side makes puts too much into what the testing is. The testing is for regulatory purposes to look chief federal goes is not to prove causation is not controlled, it doesn't show causation for that reason. The Court should reverse and [inaudible].

JUSTICE: Counsel, remind me one more time with question can refer you even if it's been 98 percent. How do we know this show met? How do we know does far is actually would not happened -

MR. SIMPSON: That's always ...

JUSTICE: - to this particular person and this particular event.

MR. SIMPSON: That's always a question, Justice Johnson because Janace Carter made him within 15 percent that the federal government assumes can always operate any lighter.

JUSTICE: Remind me of the evidence in the record that goes to that

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issue.

MR. SIMPSON: The evidence in the record ...

JUSTICE: One way or the other.

MR. SIMPSON: I'm sorry. The evidence in the record as far as as 15 percent.

JUSTICE: That, that this action would have happened regardless of what the standard was.

MR. SIMPSON: I don't know the evidence shows that.

JUSTICE: That the action would not have happened.

MR. SIMPSON: What it is, is there's no evidence, there's no testimony by the expert. There's no direct testimony that this action would not have happened if you'd have slightly hard spark will forces or slightly hard full force because no expert was able to say that Janace Carter would not have been able to operate the lighter with those additional forces.

JUSTICE: There's no evidence -

MT. SIMPSON: There is no evidence.

JUSTICE: - in that possession. Any further question? The file is submitted and the Court will now take brief recess.

COURT MARSHALL: All rise.

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