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Supreme Court of Texas.
Ford Motor Company, Petitioner,
v.
Tiburcio Ledesma, Jr., Respondent.
No. 05-0895.

February 14, 2007.

Appearances:
Craig A. Morgan, Attorney at Law, Thompson, Coe, Cousins & Irons, L.L.P., Austin, TX, for petitioner.
Stephen E. Garner, Stephen E. Garner, P.C., Houston, TX, for intervenor.
Andy Taylor, Andy Taylor and Associates, P.C., Houston, TX, for respondent.

Before:

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

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JUDGE: The Court is now ready to hear argument in 05-0895, Ford Motor Company versus Tiburcio Ledesma, Jr.

## ORAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF THE PETITIONER

MR. MORGAN: May it please the Court. Mr. Morgan, represent arguments for the petitioner. Petitioner wants to reserve three minutes for rebuttal. Good morning, your Honors. And Happy Valentines Day. I would like to move directly to the issues in this appeal the most effective jury's preview of the State. In this case, two critical parts of the Court's charge to the jury, both of which come from the PJC, did not correct when they state the law. This was the submission of the plaintiff's claim of manufacturing defect and adjustment issue on producing cause. And both of these, this charge and the PJC omits any mention of what the Court's hold of the essential elements of manufacturing defect and the producing cause. If the PJC which is not a source of law was treated here and is being treated throughout the State as the source of law on both of these points. This case exemplifies the problem. Despite being given briefs and specifically identifying the elements of the plaintiff's claim there being admitted,

citing authorities of the cases that holds those elements to be essential, both lower courts deferred that, the PJC. The Court of Appeals, in fact, never said that these submissions in the charge did include the essential elements and were, therefore, actually correct. Instead, it said they came from the PJC and no court had ever expressly held them to be wrong. That therefore, deferred in the PJC that can be ...

JUDGE: Assuming the-- Assuming you're right about all that. The only possible defect in this case was the manufacturing.

MR. MORGAN: Well, that seems ...

JUDGE: The jury, the jury caught any part of the plaintiff's testimony about defect. And there-- Yes, absolutely, would have had to related to opinion that [inaudible].

MR. MORGAN: Well, that's not actually correct, your Honor either factually or on the law. On the ma-- On the law-- On the facts, it's not true. The plaintiff suggested only a deviation from the design. There are only deviation from the manufacture-- from the, from the design was at fault. Their expert, Geert Aerts, suggested, in fact, that the design of the truck might be at fault. Suggested that he might, in fact, have a better way of designing the axle, leaf-spring connections so that it would not fall apart even if the nuts came off. He, furthermore, animently refused to say that a manufacturing defect met that there had to be a deviation between the design of the product-- of the truck. And the truck as it was produced. And instead, for the jury, several times that a design defect could be anytime the vehicle did not function as intended. Said that several times. And that in-- that was never corrected. Furthermore, as a matter of law and noted for the decision in this State, except the one below has solved that a plaintiff does not need to ask the jury if he has proven all elements of his cause of action. If he pursues only one of them.

JUDGE: In what respect did they present evidence other than the manufacturing defect that the vehicle didn't perform as it intended?

MR. MORGAN: Well, Geert Aerts, the plaintiff's expert, suggested that he could design-- that he could try for the better design for the, for the vehicle by coming up with the design for the axle, leaf-spring connection that would not come apart even if the nuts came loose and that can be found on five reporter's record, page 62. So there was a suggestion. The point-- But the point is that the jury was never told what a manufacturing defect actually is. And that's the problem. They were told instead if I direct the Court's attention to the petitioner's handouts for oral argument. They were told that manufacturing defect is any con-- next to last case in this-- and not showed. The question as to this was submitted to the jury which comes all as probative declaratory judgment. It's not the right as the question is for requested. And the most striking thing about the question that was actually submitted to the jury is that never actually says what a manufacturing defect is. That's the most striking thing. Now in-- And this is, this is out of the outset because in a designed defect case, we tell the jury what a design defect is. We tell them what the law requires for that to be a design defect. And then in negligence case, we tell the jury what the law requires for that to be negligence. And in misrepresentation case, we tell them let jury what the law requires, so there be a misrepresentation. And then after the findings those elements, we ask the jury if they've been improving. Neither that is done here. Is-- The jury instead is told that they confront in liability based upon a defect which is to find to be a condition of the product that renders it dangerous to an extent beyond that which would

be contemplated by the ordinary user.

JUDGE: Well, you were suggesting-- and again, assume that we agree with that, that the instruction was an error here, what, what I'm interested in and I think there's rosteruous. What other sorts of conditions that the plaintiff's based their case on this say that, that experts had a design defect or suggested the design [inaudible] ...

MR. MORGAN: That's correct, your Honor.

JUDGE: What other possibilities might the jury have considered in answering this question I ask?

MR. MORGAN: Well, he suggested, for example, that there is definition of what a manufacturing defect is. This is the product didn't function as intended and it may have been that Ford did not intend for this axle, leaf-spring assembly to come apart if the axle hits occurred. Well, that's not what a manufacturing defect is. Well, whether the product, the product functions as intended is not what a manufacturing defect is. It cut bottom, your Honor. The problem is the same, this will be harmless error means that in certain factual situations, and plaintiff does not have to either prove an element that his cates-- case as a matter of law. Or get a jury finding on it.

JUDGE O'NEILL: We first have suppressing their evidence, am I correct?

MR. MORGAN: No, your Honor. We do not. Because we believe that this is a no evidence point. If the jury does not return a finding on an essential elements of the annulment of plaintiff's cause of action despite the, the defendant's request that it'd be submitted, that is a no evidence point and the proper remedies were reverse and render. This is a no evidence point. The plaintiff did not obtained a jury finding that there was a manufacturing defect in this vehicle as this-- as the Court's of this State to find the elements for that. Nor did they-- Nor did the, the jury returns finding on the producing cause as the Courts of the States' city elements are required. So those-- And for requested that all of the zones as be submitted and they were not. And plaintiff cannot contend that they were proving as a matter of law. That's the bottom line here. The plaintiff, he submits the cause of actions to the jury, has to either prove the elements of the cause of action as a matter of law or if the jury to return as finding on these elements. And neither of those happened here despite for subjection in Ford's request.

JUDGE: And a number of cases where we found trial error and corrected that, we've remanded thm.

MR. MORGAN: Your Honor, I don't believe any of those cases involve the complete mission of the elements of the plaintiff or the plaintiff's cause of action. The fact in the Saint Jude's Hospital versus Wolf case that were-- there was a reverse and render that case. That's a little scare because is-- was there, there are other issues involved. But in that case, one of the elements of the joint enterprise was not, not submitted and then the remedy was reverse and render. To put in the other cases where they're aren't, you know, just instructions. There are not-- They did not submit elements of the plaintiff's case that might be appropriate remedy. But not here.

JUDGE: But that ...

MR. MORGAN: This is harmless surprise. We had raised this in every turn. We told the trial judges exactly what was being left out. We cited authorities saying, "And these are the required elements from manufacturing defect." These were the required, and honestly they are required and they're not in the charge. At that point ...

JUDGE #2: What's that that you both stock up too far or if, if off

the center? As I understand it, [inaudible]. Brief explained about. Those both have to be a manufacturing ...

JUDGE: Well, if they're proven, they maybe. And if the jury had been properly asked, they might have so said. The problem is we do not know. They were not asked. And we have a right to either require the plaintiff to prove it as a matter of law which they cannot contend they do that or you got a jury finding.

JUDGE: Well, I mean, let's ...

JUDGE: I've been too hard on the plaintiff's here. They didn't just make up these instructions before. Twenty or 30 years and told by the State law, right?

MR. MORGAN: Well, that's the problem, your Honor.

JUDGE: And I'm-- So that naturally, if the problem is one head stock up higher than the other, and nobody argues that was the latest design used ...

MR. MORGAN: Well, your Honor, there was a dispute about whether that was a sign-- design defect. We-- Our expert testified that was an inspects. Both the existence of that, of that-- both the deviation from the design and the cause of this action or what-- how it disputed. Both of them were. The jury did not return a finding that there was a deviation between the design of this vehicle as-- and as prod-- from this vehicle axle leaf-spring connection as it was designed. And it has at least manufacture. Now the fact that is been in the Pattern Jury Charge for a long time, that's the problem. Because the Pattern Jury Charge is not entitled to deference. The committee that drafts, it is not a court. It is not a legislature.

JUDGE O'NEILL: If they drafted based on the place where it would have been ...

MR. MORGAN: They're suppose to, your Honor. But even the introductions says that they-- they have just to guide and then it could be mistaken.

JUDGE O'NEILL: But we have cases that set this out as the definition of the manufacturing defect.

MR. MORGAN: No, your Honor.

JUDGE O'NEILL: The cases that go about way.

MR. MORGAN: There is no a reported decision in this State that says that a manufacturing defect is, quote, a condition of the product that renders a dangerous to an extent beyond that was re-contemplated by the ordinary user. None. There is no reported decision in this State that defines manufacturing defect that way. None. It is only in the jury charge that we give the juries. There is no cause of action for a condition of the product but is dangerous to an extent beyond that which should be contemplated by the ordinary users. It's not any of the statutes. It's not any of the cases. It appears only in the charge that we give the jury.

JUDGE: So up to what extension should of trial judge rely upon this declaratory judgment?

MR. MORGAN: He should not rely on it at all. Once the question arises about whether it's legally correct, it is not a source of law. If a dispute arises about whether the jury charge directly states the law, the PJC should be set aside and the judge should go to what the sources of law actually are which argue with decisions and the statutes.

JUDGE: How about your plaintiff by the trial court excluding the-- your expert? What was, what was that about and the spirit of preserve. But what was the he preserve?

MR. MORGAN: Oh, yes. There-- It was preserved, your Honor, that

pretrial hearing. And this is a reverse and remand point obviously. He was, he was an engineer who worked for, for many, many years, many decades. He was involved in designing leaf-spring, axle connection assemblies. And investigated for at least five to eight years, I think, failures of demonstrate. He was prepared to testify that the, that the-- that sort of damage that occurred to this leaf-spring assembly that was-- there was a found on the assembly after the accident it was not-- that was-- should be caused by the nuts coming loose but was instead, typical of a shearing at-- shearing forces of the-- though-- re-- of the right rear wheel of the-- from Ledesma's truck hearing hitting a left rear wheel of the Fire. And it also conducted an experiment with two exemplar vehicles, a Firebird and a Ford-- F350 to show that they could-- that, that could have happened and refute the contentions of the plaintiff's expert that it was impossible for those two wheels to contact. Both of them-- All that testimony was excluded because he was not in accident reconstructionist. He was not at-- I'll begin any testimony at all on causation of any sort. And that's-- It's not necessary, been actually a reconstructionist for somebody with that background experience to say, "This is not what happens. This is not the damage that occurs when nuts to come loose. This is a damage to the companies that happened of whether, whether is a severe shearing force." And that's what occurred here. That's a reverse and remand of point of course though all judge excluded them.

JUDGE: Where, where is the record that you just told me about what if called, I wouldn't say, "Who's that?"

MR. MORGAN: Let's in our brief, your Honor, it was a pretrial hearing of the admissibility of his testimony. It's a pretrial hearing –

JUDGE: Counsel ...

MR. MORGAN: - or -

JUDGE: - deposition attached ...

MR. MORGAN: - no, he testified. It, It-- And my recollection, is that he was at the pretrial hearing and testifies what he would said at-- in a, in a down rec-- you know.

JUDGE: After re-offer that [inaudible]?

MR. MORGAN: Well, I would contend, "No," because it was a finding on the admissibility before, you know, when it was-- it before that for, for a trial that ...

JUDGE: Or will then ...

JUDGE: Pretrial ruling certainly and a motion of lemony now preserve of anything ...

MR. MORGAN: Well, that was not a motion of lemony. It was a motion to exclude his testimony.

JUDGE: I recognized that.

JUDGE: The question is, "Why should a pretrial conference including somebody's testimony, reserve it, want a motion of lemony to death?"

MR. MORGAN: Well, that's just what the law says. Got a motion of lemony just add-- because a motion of lemony is now asking for exclusion. Technically speaking, it's asking for the parties to approach that's for ...

JUDGE: But what the law says, "You don't have to offer it again after pretrial conference."

MR. MORGAN: Well, it's cited in our brief. And I can't recall of then in our reply brief. Nemours cases have said that free-- pretrial hearing on the admission of fund to agree. Never exclude testimony clear of the error. And that's what was done here. I could trial

something in our brief if Court would like.

JUDGE: What's in your brief?

MR. MORGAN: The other issue I'd like to mention is to-- is the producing cause which is similarly defective and all those had been used for a long time. In fact, the only reason it is to continue is to be used is that-- it's in the PJC. But first, if asked the Court to break its last attempt. Exemption for last page here where our handouts-- Again, we have a definition that was given to the jury produces us but [inaudible] PJC. Detion-- Definition of four requested it. At least, definition of producing cause is not included with the cases said of the two essence relevance substantial factor and-- but for causation. Doesn't mentioned neither. Keep pages unanimously say that producing cause requires both which is-- which, which is what Ford asked the jury be instructed. Jury was not asked for the either of those was proven. Instead, they were given this mystically terrific face-- their phrase of efficient, exciting, or contributing cause. You know, let's be honest, your Honor. Nobody has any idea what a efficient or exciting cause is. There not seemed to be any reported decisions defining either term. In fact, it seems that whenever a Court of Appeals has had actually resell of the concept of producing cause, it may and can't be some on truck of efficient, exciting, and contributing. But there, piece and is on to say, "Well, what it really means is substantial factor and all of the fact which maybe sometimes was called or-- all right, but for causation." And then uprising as Ford wanted to apply. No one has any idea what this really means. It's a PJC. And in fact, they did not used this phrase. This is point.

JUDGE: And you have argument about the first instruction if we were to find that, that definition given and then, and then from this Court. Would it, would it be at reversible error be submitted this case?

MR. MORGAN: No, your Honor, because the diff-- that, that, that this Court has used that phrase. But it is also said the two elements are producing cause and cause and effect. This efficient, exciting, and contributing cause does not tell the jury what it-- what, what the two elements are. Compared, for example, to the-- to PJC definition that makes ...

JUDGE: Did we, did we say and work that that was not aired to submit producing cause to find that way?

MR. MORGAN: I don't believe that's correct.

JUDGE: What was gozy?

MR. MORGAN: I don't believe that's correct, your Honor. If found that there was for evidence of producing cause in that case, I don't think the jury trial was the issue of that case. The fact is and nobody has a first clue of what this means. Efficient or exciting cause, and we are-- we expect the juries to find meaning in it. And it does not tell the juror-- the jury what the two essential elements are or asked them if either of them has been proved.

JUDGE: But substantial factor will make it all clear.

MR. MORGAN: No. Substantial factor and but for. Compared, for example, the definition of approximate cause. The only definition between-- the only difference legally between approximate cause and producing cause is foresee ability. He put the definition, and the PJC are producing cause. Next definition of approximate cause, it is impossible to figure that out. When you have legally, that's the only difference. I see my time has expired, your Honor. Thank you.

JUDGE: Thank you. The Court is ready to hear argument from the respondent.

ORAL ARGUMENT OF ANDY TAYLOR ON BEHALF OF THE RESPONDENT

MR. TAYLOR: May it please the Court. Mr. Taylor, represent argument for the respondent. Mr. Chief Justice and may it please the members of the Court. Ford objected to the instruction on the basis that it didn't include the word, "Manufacturing." One would think that if manufacturing's absence from that word and sentence was the problem that Ford would tender a substantially and correctly worded construction.

JUDGE: Of course, they don't have. But it's not ...

MR. TAYLOR: Beg and pardon, your Honor.

JUDGE: It's not their charge.

MR. TAYLOR: It's in ...

JUDGE: Not their charge to any jurors and they don't have to. They contend and object -

MR. TAYLOR: We contend ...

JUDGE: - they don't have to take.

MR. TAYLOR: Well, we contend that what they're griping about is not the question but rather the instruction. And under Rule 278, the instruction must be tendered in a substantially accurate form. That was the same matter that occurred in the Cooper case although this Court decided Cooper on other [inaudible] ...

JUDGE: Not to mean the instruction that says, "If it happened there in manufacturing." Right?

MR. TAYLOR: Correct. That ...

JUDGE: He has defect, could I mean-- could have been in the design. Could have been anytime the Court left. Best it could have or even be after class [inaudible] ...

MR. TAYLOR: Now, the Pattern Jury Charge which Judge Willett adopted here directs the jury's attention to the condition of the product when it left the possession of Ford. So there's no question whatsoever but that the jury could directly to consider now that there were something dangerous condition when it left the possession of Ford. Now, there are, at least, three reasons why this U-bolt assembly was defective. Number one, the legs of the U-bolt, do you think of a, a field goal on a football field, the legs of the U-bolt were not even but were unequal in length. That's the first defect. And ...

JUDGE: Is that? Is that late to the depth to the sockets?

MR. TAYLOR: It doesn't. The depth of the sockets question was a good trial counsel trying to crude a strong man and then knock it down for jury purposes. If they were ...

JUDGE: Then at-- if the torque nuts is to saying, "What are those who were made for a long ..."

MR. TAYLOR: What difference it makes is that whether it happened at the time or eventually prior to be accident. The unequal length in the U-bolt cause the assembly not to have the torqueing and the tower that it needed to hold it in place.

JUDGE: That's what I know. I know you say that and it's several pages in the brief that if-- that left only and say, "It's torqued down the water over a hundred and eighty-five pound of whatever it was." [inaudible] under that.

MR. TAYLOR: Ahm ...

JUDGE: So if then-- as making it as to other bolts and put honor

an insurance.

MR. TAYLOR: It does make a difference because the uneven lengths is what caused the nuts eventually to loose it. We don't have to prove there was in a manufacturing defect case that the nuts were not at a hundred and eighty-five-foot pounds at the time that left the assembly line. That gets in the how or why it loosened. What we have to prove is that there is a defect in the manufacture of the product. And as I was saying, there are three. The first one is unequal legs. The second one is that-- and let me back up and say how this U-bolt is constructed. The first thing you do with this piece of long metal is you have to make sure you've got the spiral rings around it so that you can put and that on it. So that's the first thing that happens. Then it's red hot. And what they do is they clamp it in the middle right down the center so that there's a flattened portion. And then they lifted up like a football goal field. And so this part where my thumbs are is suppose to be flat and it's suppose to be centered. But in fact, the testimony is that was three quarters of an inch off center. Also, that because of the unequal lengths and the off center of the bottom, this clamping mechanism did not work as it was intended to be when it was manufactured. Now ...

JUDGE: But for him-- Let me make sure I'm clear on this. The petitioner says that the problem with this off center left are [inaudible], oh-- Was that it would ride into the axle case? And then from that-- forget that obviously loosing and then maybe that's will come off as soon as we credit. But if-- But there was-- there are distances and no evidence that there was any indentation in the axle case.

MR. TAYLOR: Thank you. The same issue was the Ford. That's a strong man. They're trying to say that we have a burden to prove that there was an indentation and that cause the nuts to loosen. We don't have to prove that the nuts were loose at the time that it left. All we have to prove is that the product wasn't manufactured either as specifications required or as planned output would expect. And to answer your question ...

JUDGE: Did you have to prove that that cause the thing to fall often?

MR. TAYLOR: Absolutely. And we had evidence that prior to the first collision of the funny act Firebird what happened. And let me explain on this U-bolt. Once it's been a assembled, it actually has nuts that come down on the four legs, and those nuts attached which called the spring plate. That spring plate has a circle in the middle. So in my hand, if you show a circle on this spring plate, there's suppose to be a center pin that goes on the circle. It's designed such that you're not going to have any touching of the nut that holds the center pin to the circumference of the center plate. It's not suppose to touch it all. What we found when we examine this product at the time of the collision, and thereafter, is that there had been trying tender marks throughout this circular area which was caused, according to the testimony, by that nut having a fatigue failure and moving around and wobbling around and hitting that circumference. And that circumference should not have any markings on it whatsoever if the product is working the way it's suppose to be manufactured. And so the three things we know whether wrong here is the unequal lengths, the fact that you don't have the center of the flatness correctly in the middle as three quarters of an inch off. And thirdly, what I haven't mentioned yet is that when the nuts on the assembly line go down, there was a differential of more than five millimeters between one nut which was

at, I believe, 13 millimeters and the other nut which was at ten and a half millimeters. Now, I want to make my point and bring it back it to breach to why there wasn't a correct tender of this submission by Ford. The specifications for this assembly are in the record, it's defendants Exhibit 16. The only specification that we know of in this document is that the legs of the football field goal of this U-bolt, the legs are suppose to be 228 millimeters plus or minus two. So it can be a lower 226 or a higher 230. There's nothing in the written specification about when the nuts are applied if there suppose to be even or not. There's nothing in the specification about the location of the flatness of the bottom of the U-bolt. There's nothing in the specification about how much differential is allowed if the U-bolt legs are different. And so those three things are what we call planned output. There is a difference between specifications and planned output. Let me give an example. We know when you but food out at Wendy's, for example. There suppose to be certain ingredients in that cheeseburger. We can look at the specifications to know exactly what the ingredients are. However, if you have one of these widely reported hall of cases where something foreign is in that hamburger like a finger or a mouse tail, you don't have to prove the specifications to know that the planned output for that cheeseburger according to all of the simply cheeseburgers out there as the case law suggest isn't what it was suppose to be. And so we know that there is an intellectual difference between failure to conform the planned output and failure to conform the specifications which is here. In defendant's Exhibit 16, we only have a specification of the one side of a leg. Not a specification or the rest. And so we know that planned output is part of this case. Now back to my point about why the instruction is not correctly worded. But ...

JUDGE: Because when you get there, I'm still not entirely firmed your answer to Justice's ex question about the nuts. Could a new U-bolt on a tight or something tightened down, do you want the two legs to be equal as it looks metrical? I think it's better. We probably both put on dozens or hundreds over years, its products or could not the basketball goal that it would be given whatever. But if they're tightened down so that the point is equal, what does it matter if one leg is, well, longer than the other? I know you said that it doesn't. I don't know if I heard your explanation. At least, it's not a convincing. Well, to me, yeah, because that right doesn't matter.

MR. TAYLOR: It matters ...

JUDGE: [inaudible] all tightened down equally.

MR. TAYLOR: It matters a lot. And here's why. We're not saying in order to be successful in this case that the torquing at the time of manufacture was wrong. It may very well be that a hundred and eighty-five-foot pounds occurred on all four nuts. That is not essential to our case because that gets into the how or the why it became loose. What does matter is this. Let's assume that it was torqued exactly correctly. Had it been torqued correctly, one would not reasonably expect that it would come apart in the absence of some force causing it to break away. So the fact that it came apart raises the question of, "Well, what is it about that U-bolt assembly that caused it to come apart?" It's not because they didn't torque it correctly at the beginning, it's because the legs are uneven. It's because the bottom portion of the U-bolt is not flat and it's off center.

JUDGE: Well, let, let-- that reasoning is from the conclusion back to my question because Ford is going to tell you the reason is your, your client made into a car. And that's what caused it to come apart. Not that it was-- the legs were uneven to cause it to come apart. So

there are other potential reasons. I need to come-- you to come from the other direction, not conclusions of my question. But listen to my question, "Why does it matter about that length of the legs?" I still don't understand that.

MR. TAYLOR: Okay. But the, the last part of your question I would say that whether the collision cause the, the train to come out is purely a jury question. There was evidence that the jury could reasonably find that. You know what, this drive-train disengaged prior to the collision not as a result of the collision. And we were able to persuade the jury on that question. But getting to your-- the need of what you're asking me, we only-- we to demonstrate that the defective condition which I've given you three of them was the producing cause of why that U-bolt assembly came apart. What we know is that as far as the legs are concern, it didn't conformed to specifications. What we know is that because of the distance of the nut going down on the, on the four legs and the failure to be in the middle on the flattening bottom is that planned output what was not complied with. So we know that there was a defect. Now, when you get to the testimony, Mr. Ledesma said, "I heard something pop. And my car jumped up and down prior to hitting the funny act." So we know that some of them occurred before collision. What we also know from Geert Aertes, when you mentioned for a moment about him, he's a metallurgist. He's a mechanical engineer. He has lifted over a hundred and fifty leaf-wheel assemblies over the five to six-year pre-- prior of the trial. And he did worked for Rezzin International which is a company, south of the United States that makes 40 to 50 percent of all leaf-wheel assemblies in the United States. He has examined these and then a failure analysis for five different car manufacturers including Ford. And based on his experience and training, he said, "There would not be these triangular markings on the perimeter of the circle on the tight plate but for the fact that it was loose and it was vibrating." So Justice Wainwright, we don't need to prove that the looses and vibration which at the time of manufacturer, we simply need to prove that the defective manufacturing of this U-bolt caused the loosening and eventually failure.

JUDGE O'NEILL: Let me ask you about the charge were correct. Would you agree that if the question that Ford tendered or the instruction that Ford tendered, if it had said a manufacturing defect was a physical departure from the product's planned output that reduces unreasonably facts that would have been a better instruction?

MR. TAYLOR: Still incorrect. Let me tell you what I think would have been the legally corrected instruction. We should have followed what this Court said in Cooper, what this Court said in Ridgway, what this Court said in Torrington and American Tobacco, four things. Manufacturing defect arises when the product deviates in terms of its construction, its quality from specifications and planned output. Those were the four magic words that this Court has totally should repeatedly. Even-- As we say is in Cooper ...

JUDGE O'NEILL: Say, say you would agree then that's-- there's a problem in the jury charge. Well, ...

MR. TAYLOR: No.

JUDGE: And let's start with the charge -

JUDGE O'NEILL: Well, ...

JUDGE: - that's been submitted. And the jury found zero negligence on the best man, correct?

MR. TAYLOR: Correct.

JUDGE: So ...

JUDGE: And then, we're better conclude that matrix were called.

They didn't bow whatever argument for there was according force in the jury. So did juries arise in harmless error as this Court has cited Matrix and had that to be on in other cases. As and harmless error could submit this instruction which, as I understand, is given to the trial court as a guidance with these couple of cases.

MR. TAYLOR: It, it absolutely would be harmless error. And let me try that if I answer the two questions simultaneously. We're saying that the Pattern Jury Charge got the job done. It is correct not because it's just the Pattern Jury Charge but because it defines defect. My able opponent told you four minutes ago that there's no case in Texas that talks about the way the Pattern Jury Charge says, "And that's not true." Just look at the Cooper case. Justice Willett, writing from the majority after he cites what I just talked about construction quality, planned output specs. The very next sentence says what the Pattern Jury Charge says. And that's what this Court keeps doing. It talks about what it is and then it says right after words what the Pattern Jury Charge includes. The thing about the defect question, it's true that it doesn't define the word, "Manufacturing." That's true. But when you look at it side by side since you know defect loose a condition of the product that renders it unreasonably dangerous, then you just know that it means a manufacturing condition of the product that renders it unreasonably dangerous. So we think the Pattern Jury Charge gets it done. That charge tells the jury, "Hey, when you don't define a term giving its confident ordinary meaning."

JUDGE: But why wouldn't the jury, the reasonable person on the jury just is in time, do you think that a manufacturing defect was making something [inaudible] things are [inaudible]?

MR. TAYLOR: Well, we disagree that this case was submitted on two different theories. There was a design defect theory that was pled and abandoned before this trial ever began. The only evidence and the only question in this case was manufacturing defect.

JUDGE: Was in most cases-- of many cases, at least, at least, two defects or design defect also in marketing to reach [inaudible] 51 [inaudible]? Do you think it would be better to distinguish between the manufacturing defect given the four words that you viewed [inaudible] and to design defect or not?

MR. TAYLOR: You have that choice. This Court could so say. But think about the turned or decision in 1979, if you're going to do that, then you should apply it prospectively, shouldn't apply of this case. If you're going to apply it retroactively, it's harmless error because there's not a concern about the jury getting confused about design here. This was only manufacturing so it should be harmless error. But in the abstract, you could do that if you want to. Remember what they submitted. It was Section 2A of the restatement third. And they didn't use that Cooper standard. They use the standard that's never been adopted by anybody. And that's not correct to inject the word, "Design." They're actually doing the very thing to try to stay away from. We don't want the jury they claim to get confused between manufacturing and designing. And yet they, then, now use the word, "Design" in the very question they tender.

JUDGE #3: So we even talked it all today about expert liability or you use in the Cooper case. Cooper-- And the point of my case is lost because-- not because of anything involved in the charge but because we think that his expert unreliable. There were the spoken about that today but I'm asking you a question and it was on our minute that we have. If the Court or had been one of the experts below reliable, the metallurgist or the reconstructionist and the other one unreliable was

a very extend or was in the back or we ...

MR. TAYLOR: Yes. Still, still would affirm because of the Ledesma's testimony and the fact that there's no issue about the U-bolt being out of saying for specifications. Even if you threw everything else out, we still win. The only thing I want to quickly say to Justice Brister's earlier question about whether there was a waiver on Dan May. If you read that record, it's clears about that the Judge backed off his original decision. He first said, "You're not going to be allowed to go in causation." Then he backed off, and he said, "No. I'll let you talk about causation, Sir. But I'm going to allow cross examination on this stern report." Well, the stern report close that. They had an expert go out after Ledesma reported the incident on Alex [inaudible]. Finished answering your question, your Honor?

JUDGE #3: Oh, you're, you're ...

MR. TAYLOR: Thank you. Ledesma reported the accident. They send out an expert and he said in writing, "There's a defect here that cause the accident." They couldn't live with that. So they have to get their company Man., Mr. May, to testify. Then judge said, "If you're going to testify on causation, I'm going let him bring in the stern report." The lawyer asked for two minute break. They came back and they abandoned any attempt, whatsoever, to preserve error because they made a strategic choice not to go there. And that's not an error that should undo this judgment. So in summation, we would ask to affirm because the PJC is correct. And if you think it's correct, it's so harmless error and should not apply to undo the result here. Thank you.

JUDGE: Are there questions?

JUDGE #3: We had a question, Chief. Just the factual verification. Now, whent he axle detached in the back that cause the drive shaft to, to uncouple in the front, correct? Because that's down the way driving forward, the axle drive shaft digging to the pavement because the rear of the vehicle to rise. Is that right or the drive shaft detached in the back?

MR. TAYLOR: Well, you're, you're testing my knowledge. I didn't try this case. And I'm going based on what the record reflects. My belief is that the drive shaft unattached in the back not the front But I don't know a lot of that car.

JUDGE: But I-- Haven't that cause a vehicle going forward to rise in the back?

MR. TAYLOR: Right. I understand that, that, that the best I can answer from the record is that we've got five leaves in that assembly. The first leaf up here became unattached because that spring plate and the center pin broke. That disattachment allowed the wheel assembly or the drive shaft rather to come apart. It's so surprising how short it is. It didn't take much for to drive apart. And what's happening here is when you're going down just in lane then you're turning, there's all that pressure on the right dual wheel. And so that's in tripled for force coupled with what had happened in the loosening, cause of the pop, and then eventually to shear. And once that happened, the drive train fell and pronged into the pavement causing it to go up. So I believe the answer to your question is it's in the back not the front. But I maybe correct that I'm not an engineer. Thank you.

JUDGE: Mr. Morgan, do you know the answer to that question?

REBUTTAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF PETITIONER

MR. MORGAN: That the plaintiff's theory was at the-- Yes, I do, your Honor. I believe I do. The plaintiff's theory was at the-- that-- did your question is where it-- whether-- were ...

JUDGE: The drive shaft, did it come apart in the front digging to the pavement cause the vehicle to come forward?

MR. MORGAN: It was in the-- oh-- Yes. Exactly right. Your theory wasn't the-- that they-- he remained the test to the rear axle which must-- which-- and the rear axle moved to the rear on the right hand side, form the drive shaft out of the train-- out of the-- if had the transmission in the front.

JUDGE #3: But seems to be the only way that moving forward that drive shaft that caused the rear of the vehicle to ...

MR. MORGAN: Right. But that-- that's right. And there-- their three is that occurred before the collision and cause of it. To go through a few points very quickly, the response to Judge Brister's earlier question, the preservation error and down, and Dan May, his testimony is in-- is addressed in our reply brief on pages 23 to 24. My handout that we presented did correctly submit the definition of a manufacturing defect when substantially correct, correct form that suggested that there is some commonly held meaning of manufacturing defect is, is belied by the testimony of the plaintiff's theory and expert. And instead, fastly insisted but it could mean that the product didn't function as intended. He had no clue with the law of things, the manufacturing defect is-- What the law says the manufacturing defect is. And this is an engineer for a professional testifying expert into-- and prior liability cases. And he could-- he insisted that that's not what it is. And that's just wrong. Script-- The reference to urge of reliance from the scratches on the tight plate in the following places in the record, he conceives that those could have been also can cause by the accident itself. But he just didn't. If, if the centered bolt had not and still been there what he contends they were not at the time of the accident as a 5 RR 23 to 30 and 67 to 69. They-- The reference to the bargain that we are offered to get in the testimony of our expert if we agreed to the admission of a hearsay report from this kind, I mean stern. That's not a correct way to submit an expert's testimony. We've-- The Court-- The judge said, "Well, I will let your expert testify on causation. But in exchange for that, I'm going to allow in this stern report which contains hearsay because it reports what in mechanics supposedly told stern was it-- was the cause of the accident." But we objected on that. And that's not the kind of bargain you have to reach in order to get admissible testimony into the record.

JUDGE: It seems correct. But you know, just to say what would ask the question and about the Cooper case. Found it was, if this Court dose out plaintiff's experts -

JUDGE: - that the Court's -

JUDGE: - testimony that -

JUDGE: - brings here -

JUDGE: - brings here.

MR. MORGAN: I'm sorry, your Honor.

JUDGE: But the plaintiff still wins if those reports-- plaintiff's experts reports are dis-- disregarded with what your response to that.

MR. MORGAN: I don't see how that's possible, your Honor. I-- The only testimony about the cause of this accident, what caused it? They would link-- leaving wrong with the vehicle caused from the plaintiff's expert. The only under testimony they presented was from then Ledesma himself. He simply described how the accident happened. And unless this

Court has pass it that was three sets of equator then they got no evidence. Now, this it-- He used to be and he did it. His action was [inaudible] ...

JUDGE #3: And what the Court deemed to one of the experts reliable and one unreliable is the Court's-- and should we simply-- was the verdict expand? Did we send it back, do we render, or if we get another large if he's out of take but not the reconstruction as to vice versa. But in fact, that's what happened.

JUDGE: Where the, the key of the plaintiff's cases, Geert Aerts, he was an engineer. He was the only one who could-- who would, who would testify to present any evidence that would link the accident to this reported defect in the U-bolts. There, there are actually reconstructions as this one is simply the, simply the one he said, "Well, it was cause-- you know, by looking at this brief photographs that, that this is the-- what happened was it did, did drive shaft. There-- There's no dispute the drive shaft did come out." The question's planned. And he's, he's the one-- he's the only one provides any evidence that came it out before the accident and caused it. So the exclusion either one of them means that there, there-- there is, there's no evidence to comment the accident. So ...

JUDGE O'NEILL: What about the, what about the plaintiff's testimony that, that happened-- that's going to be experienced?

MR. MORGAN: Well, the only thing the plaintiff said was that he experienced a vehicle lurching the rear the virt-- vehicle lurching to the right as if someone had run into it. And it can lost control. But he'd not, he did not say that the drive shaft fell. When he got out later, what he wants in the accident was seek was, was completed. He saw the drive shaft did fall and but there's no dispute about that. Any other questions? But, your Honor, my time is ...

JUDGE: Thank you, Counsel. Here the case is submitted. And take a brief recess.

COURT ATTENDANT: All rise.

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