ORAL ARGUMENT - 10/11/95
95-0382
FIRESTONE V. BARAJAS

MALONEY: Your honors I will simply refer to the petitioners as "Firestone." As the court is aware this appeal arises out of an accident which occurred back in November, 1989 when Jimmy Barajas, the son of the respondents, fatally injured himself while attempting to mount and inflate a mismatched 16" tire manufactured by the General Tire Co., then a defendant below, on a 16-1/2" wheel designed and manufactured and sold by the Kelsey Hayes Co.

GONZALEZ: Is there a settlement against other defendants?

MALONEY: Yes there was a settlement.

GONZALEZ: Does the record reflect the amounts?

MALONEY: Your honor I think that the terms of the settlement were confidential. On Dec. 17, 1992, in response to a Motion for Partial Summary Judgment filed by the plaintiffs, the respondents here, the trial court over no opposition from Kelsey Hayes found that Kelsey Hayes had manufactured the single-piece wheel involved in the incident. Immediately thereafter, the court granted Firestone's motion for summary judgment on all causes of action asserted against it. That was a relatively easy decision given the fact, and plaintiffs' argument in evidence, to the effect that Kelsey Hayes had manufactured and sold the wheel at issue.

SPECTOR: Was there any summary judgment proof of design?

MALONEY: Yes, there was substantial summary judgment proof of design most of which was put into evidence by the plaintiffs. That evidence and the only evidence which connects Firestone at all with the product at issue here, is that in 1957 Firestone obtained a patent on a tire/wheel combination for no particular size, and in fact for no particular taper. Rather the patent talked in terms of 12 - 20 degrees. That patent ultimately was given by Firestone royalty free to the industry; and of course the patent itself expired in 1974, after 15 years.

But the evidence established was that Firestone patented a concept. This was a concept which allowed the use of tubeless tires on single-piece wheels on large trucks. And it was first employed on large wheels. For example: In the exhibit before the court, the wheel on the left is 22-1/2" wheel. And it was this type of wheel that Firestone gave to Kelsey Hayes and to others to assist Kelsey Hayes in tooling up their own production. Each of these wheels have what's called a 15 degree taper. This wheel does not have a hump. This wheel has what are called bead humps. This is a Kelsey Hayes wheel. Similarly, the only severable component, and there may have been some confusion when the court below talked about components, the only severable component in a single-piece _____ is the disc, and that is the portion of the wheel which attaches to hub of the vehicle. In this case one of the distinctive features of the Kelsey Hayes wheels as opposed to those manufactured by the other manufacturers is their discs or riveted. And it was upon that feature or those other features that the plaintiff's expert testified that the wheel in question was the Kelsey Hayes wheel. It's a very distinctive design feature as is these _____ the existence of those bead humps.

ENOCH: Is it your position that unless the designer manufactures the product there is no product's liability for a design defect?

MALONEY: My position is two-fold. The lower court has created liability for a concept or an idea. And secondly...

ENOCH: Are you saying the CA specifically held that you are liable for concepts? or are you saying the way they've treated design what in effect they've done is hold you liable for concepts?

MALONEY: The latter your honor.

PHILLIPS: You are not arguing that Alm 1 is wrong?

MALONEY: No, your honor I am not. Of course Alm 1 is easily distinguished from this situation. In that case Alcoa designed and manufactured, and sold the machine, which in fact, installed the bottle caps which came off. We are much more distant.

OWEN: What if you are a designer but not a manufacturer assuming that there is a finding _____ that you design it, but you are not the manufacturer; what should the standard for liability be?

MALONEY: Firestone placed absolutely nothing in the stream of commerce. The product at issue was manufactured and sold by someone else. And it has been clear I think in this court's decisions in Armstrong, Golden that it is the product to which liability attaches.

HECHT: Well it placed the design in the stream of commerce.

MALONEY: We placed an idea. I am not sure that the liability for an idea I think would be a great expansion of the law.

HECHT: Suppose someone says, "well you know I would hate to be liable in product's liability for this design so I am going to form another company called the ABC Design Co., and they are going to come up with this design, and they don't have any assets, and so they don't need to worry about it. And then we are all going to use the design royalty free, and then if there is product liability for manufacturer we will worry about that. What is to keep somebody from avoiding design liability?

MALONEY: I actually thought of that in the middle of last night. I think that liability could be imposed then upon certainly the manufacturer and the retailer. They could then look back to the design. But the injured party should have no cause of action against an entity that did nothing more than come up with the idea, or an idea.

PHILLIPS: If they wanted to put all of their assets in that design company in other words to pay to a royalty of $100 million to make the design, then the manufacturer would go bare then there's an end to it?

MALONEY: Well of course the manufacturer and retailer would then look to that fund for those assets.

PHILLIPS: Not if they didn't have any assets themselves.

ENOCH: Mr. Maloney going back to my question it is your position that if you do not manufacture the product, then there is no liability for the design of the product?

MALONEY: I think it is critical that a product be put in the stream of commerce and it would

be that product, not simply a similar product, but that product which causes the injury I do think that that's a _____. I think that's what this court was saying in Armstrong.

OWEN: Well assuming that those are the facts, that someone designed a product, it was put into the stream of commerce, and didn't manufacture it, what is their duty if any? What's their liability?

MALONEY: Well certainly under Alm this court held that one could negligently design a product. And of course Alm _____ 2 negligence. There was no appeal of the product's liability cause of action. So one would assume that there would be a cause of action for negligent design. Of course in Alm the connection between the designer and the product at issue was in no matter as _____ as is the connection here. I mean here Firestone is such a _____ player...

HECHT: Would it make any difference in your case if this were licensed for a royalty?

MALONEY: I don't think it would be. There are cases in other jurisdictions directing themselves specifically to license _____ claiming that product's liability does not attach in those situations. But this court, and I don't believe any court in Texas has actually addressed that issue.

HECHT: In a license case _____ this product would never be in commerce, but for the license granted by the designer. Now why shouldn't the designer have product liability?

MALONEY: Well that's much like asking...take this for example: Mercedes Benz does not enforce any of its safety patents. Anyone is free to copycat any of their designs. Does that mean then that if Ford or GM copies a Mercedes design restraint system - airbag - employs it on their vehicle, that Mercedes is somehow liable? I don't think so. Because the manufacturer who develops the product is in the best position to determine whether or not the product is in fact a safe product. And he who achieves a profit from the product is in the best position to assume the risk of any damage done by the product. And those are fundamental _____ of the product's liability law.

ENOCH: So it's your view that if the designer does not manufacture the product that causes the injury, the designer is not liable under product's liability for the defective design?

MALONEY: Not to the injured party.

GONZALEZ: Mr. Maloney the CA in part _____ the decision, this is a summary judgment case, on the basis that you had failed to negate allegations from the plaintiff that you engaged in the business of introducing the wheel in question, or component part. What evidence you say is in the record that you negated this? or is this a critical issue?

MALONEY: Well I think it is an important issue. We didn't negate and put any part of this particular wheel into the stream of commerce. This wheel has no components, no severable components. This wheel was put in. It was manufactured and placed in the stream of commerce admittedly by Kelsey Hayes. Firestone had nothing to do with the injury producing product. I don't really understand the references in the CA's opinion, 2 components. I think they were perhaps simply confused. There is no severable component here other than the disc, which is of course not involved in the accident.

PHILLIPS: Might Kelsey-Hayes have a cause of action against Firestone for giving them an idea that resulted in the liability?

MALONEY: I don't believe so your honor because they modified the idea. They took the concept from us. But they added the humps. They created a completely different size. They put in their

own disc _____ as a _____ design feature.

HECHT: But those really don't affect the functioning of the wheel, or the circumstance that resulted in the accident in this case?

MALONEY: Well the bead humps certainly do affect the functioning of the wheel. They are there to prevent an underinflated tire from coming off, that's their purpose. And certainly one can see a situation in which a cause of action arises out of just that. Somehow what they did was they took an idea, they modified the idea, they produced their own wheel, they introduced it into the stream of commerce.

ENOCH: Could Kelsey...let's assume that the accident was caused, the experts all say caused simply because of the 15 degree flange on this rim, and Kelsey-Hayes says, it's undisputed we didn't design it.

MALONEY: Firestone specified in the patent which is the record before you - 15 degrees. It was between 12 and 20 degrees for _____.

ENOCH: I am just saying under your theory unless the designer also manufactures it, then the design would not be an independent grounds of liability...I mean a designer doesn't have any sort of play in product's liability. Only a manufacturer has play in product's liability, and then design plays a factor if it happens to be the design by the manufacturer that caused the injury.

MALONEY: Yes, your honor. I mean this is an unusual situation. Usually you have the designer and manufacturer is one in the same. The fact here, that is the fact the designer and manufacturer is one of the same. But we have another original _____ of the concept who is removed from the process. The reasoner of the concept did not develop the wheel. They wouldn't have tested the wheel. They wouldn't develop the prototypes. All of that is done by the manufacturer. It is the manufacturer then that makes the decision to put it out.

HECHT: And it is your position that whenever that occurs, the person who does develops the concept is not liable in a strict product's liability?

MALONEY: Historically that's always been the case. Yes, that is my position. I think that is an unwarranted expansion. I think you know to adopt that position here would be to say that those ideas of Henry Fords that have been copied, modified in every vehicle in the world render the Ford Motor Co. liable every time there is a problem with another vehicle. I mean that is a huge expansion.

PHILLIPS: If Kelsey-Hayes had adopted your design without any change might you be liable of negligence under Alm?

MALONEY: I must admit I find Alm a difficult case. Because I am not quite sure why they said that. I think no, because again Alm I think there is a distinguishable. I think it is distinguishable factually, because there we did have the design, the manufacturing and retailer. I mean they had complete control over this particular process from beginning to end. And were in a perfect position to warn the ultimate consumer, or certainly to warn through an intermediator.

I think here while there might be liability for the design to the manufacturer, I can see that lawsuit. I think that the injured party has a claim against the retailer, the manufacturer. And other jurisdictions that I mentioned earlier and we cite these cases I think there are a couple out of New England talk specifically about licensors.

OWEN: In your brief you say that warnings were imprinted on the tire, and the wheel, and the other side disputes that in their brief. What is stated in the record on warnings

MALONEY: The photographs specifically at 006, of the supplemental transcript of proceedings you can see right beneath the general tire the legend warning: "Mount only on a 16 inch width rim."

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RESPONDENT

EDWARDS: May it please the court. One thing I would like to emphasize today is that we are dealing with a very unique fact situation. And I think that references to the likes of Mercedes Benz allowing their safety developments to go unpatented and available to any who choose to use them is quite distinguishable from a case such as this. This is not a case where we are asking that Ford Motor Co. be responsible or Henry Ford be held responsible for all automobiles that are ever manufactured. We are not asking that the Wright Bros. be held responsible for any airplane that has been manufactured.

HECHT: Where is the distinction and principle though?

EDWARDS: I think that it has to do with the amount and the quality of the involvement and participation and the utilization of the design.

HECHT: Well if Mercedes does design something that is very useful, and works really great, but has a problem with it as not unlike this wheel, and all the other car manufacturers copied it, wouldn't you be after Mercedes just like you are after Firestone here?

EDWARDS: No.

HECHT: Why not?

EDWARDS: Because as, and I forget the name of the case, it's the one out of the Houston court, I believe it's a French name...out of Beaumont I am sorry. That case talks about where when you have a designer whose design is copied without participation, without consent, and without knowledge, that in that situation product liability will not lie. But in this situation...

HECHT: The dumber the designer, the more off the hook he is?

EDWARDS: True. You know it has to do with the concept of duty. If I just go out and write an article, and I referred to the Boy Scout case, if I just go out and write an article and say you know if you used a 15 degree bead taper on a tire and a rim combination, that may be a good idea. It may be something that somebody wants to use. That's not very much participation in the design of this system. But if I am a rim manufacturer, and I am in a position to gain market share by having the rest of the industry copy my design, and I go out and...

PHILLIPS: They weren't gaining market share for their rims. They were gaining market share for their tires.

EDWARDS: No, they were manufacturing...Firestone's Steel Products was the company that gave the license in this case.

PHILLIPS: And gave it away, and why...I mean I know it's not very important, but why did that get their market share?

EDWARDS: Because they knew back when they initially came out with this design and had it patented, they started to talk to the automobile industry, to the original equipment manufacturers about using this equipment. And the summary judgment evidence demonstrates that the original equipment manufacturers were not willing to 1) have a sole supplier (that is Firestone Steel Products) of a system that they are going to use on their vehicles; and 2) they were unwilling to pay royalty fees to other suppliers. Firestone recognizing that they had a head start on the rest of the industry decided to give the royalty free license because they knew that they were ahead of the rest of the industry and if the OEMs(?) would adopt this system, that they would be a step ahead, rather than have the OEMs(?) adopt some other system.

OWEN: The wheel as designed by Firestone is not a defective product is it? It's only because it might be confused with something else that makes it hazardous; is that correct?

EDWARDS: Well I think that it's the proposition that it is so readily and easily confused with another size rim, they look nearly identical, is what renders the design defective, because this particular design uses the low flange height. It is the low flange height on the 16-1/2" rim that allows a person to inadvertently place a 16" tire onto the rim.

OWEN: Would an adequate warning cure the defect?

EDWARDS: That is a very hard fought issue, whether or not an adequate warning would prevent any particular mismatch. I would only suggest to you that the language on the tire in this case cautioned not only on a 16" rim...

OWEN: Well I am not asking about any particular one. I am just saying if you had adequate warning on these types of wheels would that cure any defect or notify the hazard _____ which make it nondefective?

EDWARDS: Sure. Obviously we are outside the record a little bit. And my personal opinion I don't believe so. I don't think there is an adequate means for an on product warning.

OWEN: What duty is it that you would place then if it's not a duty to warn, what duty would you place on a designer of the wheel who does not manufacturer them? Under these circumstances where the product itself is not defective it is only because of the potential confusion. What's the duty that you are saying ought to be invoked?

EDWARDS: Well we obviously are getting onto issues that are outside of the record. So it is very difficult for me to comment directly about the evidence.

OWEN: These are legal issues.

EDWARDS: Well the duty to warn is more than the duty to place an on product warning.

OWEN: I am asking you what duty do you say this court should adopt under these circumstances?

EDWARDS: Well the duty is that a designer who has the participation, the level of participation that Firestone has in this design, has a duty to warn. Much like the case of Alm in which this court held that like a manufacturer a designer who designs a negligent design has a duty to warn.

OWEN: Any other duty besides a duty to warn?

EDWARDS: I don't know if there is anything else that you could reasonably expect them to do.

OWEN: If they are not the manufacturer, they are the designer, as a practical matter how are they in a position to warn? What would suffice as a warning from the perspective of the designer?

EDWARDS: And now you are starting to talk about adequacy of warning, and that is a very difficult issue in this type of mismatch case. Because it is a heated debate about what is an appropriate and adequate warning.

OWEN: But if you are not the manufacturer, that's my point, what duty do you put on the designer? How as a practical matter...

EDWARDS: You can public. You can use the electronic media to let people know that there are 16-1/2" rims out there that are identical in appearance to 16" rims that will accept 16" tires, and that if you put a 16" tire on it it is going to act just like it's on a 16" rim until you inflate it and it explodes. There are other means of warning outside of on product warnings. And I would also like to point out that we aren't necessarily talking about the same duty as between a manufacturer and a designer. And Justice Gonzalez I think in your opinion in the Alm case I think there was a discussion about there may be a different level of duty as between a designer and a manufacturer because they are in different positions.

OWEN: Are you saying that the designer has a duty to notify the using public as opposed to potential manufacturers; could you see a distinction there where the designer might meet a duty by warning the manufacturers opposed to the public?

EDWARDS: I think that would be appropriate. Yes. If I am a designer that is responsible for the promulgation throughout the industry, in this case the tire and wheel industry and the vehicle industry, if I am responsible for the promulgation of a defective design, why should I not have the duty to inform the people that are going to be using that design that there is a danger in its use that is hidden. And this is different...I suggest that there is a legal duty here because of the fact that Firestone promulgated and had such an active participation, an active role in the adoption of this system and of this 15 degree bead taper and low flange height, as an industry standard.

ENOCH: Now the jury evidence is to the effect that there is confusion with the 16" rim. One of the arguments raised by Firestone is all they've talked about was a 22" rim. Are you saying that the defect and design is endemic to the whole system, or are you saying we found out when we put it on a 16-1/2" rim and this poses this problem?

EDWARDS: Well it originally started out...it's true that it started out...its original application was to the large truck tires. But then Firestone developed this 16-1/2" wheel, and there is some talk in the petitioner's application for writ of error about the duplex wheel, and that that was the wheel that they developed, and it wasn't this type of width of 6.0 or 6.75. And I believe if you will look at the deposition testimony of Robert Harold, that was I believe part of the plaintiff's response in motion for summary judgment, he testifies in his deposition that it was in fact Firestone that developed this 6.0 and 6.75 width in the 16-1/2" diameter. In other words this wheel. And in fact supplied Kelsey-Hayes with the rim portion, not the disc portion, but the rim portion of the first Kelsey-Hayes 16-1/2" wheels until Kelsey-Hayes could get geared up and tooled to start manufacturing their own rims. The rim portion as opposed to the disc portion.

OWEN: Can you think of any other duty you might impose other than you talked about electronic media, that a designer who doesn't manufacture to adequately warn potential users?

EDWARDS: You've got the print. Any type of mass...that the manufacturers and designers along the lines of Firestone day-in and day-out use the mass media, whether it be electronic print or otherwise to advertise their goods. They know how to get messages to the consumer public. They are experts at it. And there is no reason it seems to me that they should not, or that they cannot use that same expertise in getting this type of information to consumers.

And as to your question about is there any other duty? My only answer to you is I don't want to limit my answer to electronic media. I am just saying they have the means to communicate with the _____, and they should do so.

OWEN: What would you impose on a designer? That's what I was asking you. What standard would you have this court adopt, and what are the practical ramifications if you do that?

EDWARDS: I think the duty is if...first of all duty is going to be a question of law. So if this court holds that they had a duty to warn, this court will not be able up the floodgates to all designers, because we would be talking about a very fact specific instance here. I have been...ever since this appeal started I have been trying to come up with an analogy of a factually similar circumstance that is anything but absurd. And I can't come up with it because this is such a factually unique case. But in any event the lower courts could evaluate this court's decision to impose a duty in light of Firestone's participation in the design and development and promulgation of this particular wheel.

GONZALEZ: What is the legal principle you would have us write in this case?

EDWARDS: Well it would be a restatement in a sense of Alm in the sense that a designer like a manufacturer does have a duty to warn.

GONZALEZ: Across the board?

EDWARDS: Obviously it would be tied to the facts of this case. So it will not necessarily be across the board.

GONZALEZ: And then you talk about and make strong argument about the participation in this case so every designer would in necessity be in lawsuits because the level of participation would be a fact question to be decided by a trier of fact?

EDWARDS: No, I don't think it would be a fact question. I think that would still be a question for the judge. Because the question for the judge is whether or not there is a duty under the fact circumstances presented: is there a duty? You know this court decided Alm and said that designers can be held responsible for failing to warn of negligent design. And it did not open up the floodgates of litigation.

BAKER: Doesn't that argument presume that the product is defective? You don't get to a duty to warn until it's a bad product.

EDWARDS: Obviously you wouldn't have to warn if you've made your design and then you stuck it in your pocket and it was never manufactured.

BAKER: Aren't there lots of products that are designed that have absolutely no defects in them and everybody uses them with no problems. So you don't have a duty to warn until you have a defect is that right?

EDWARDS: That's true.

BAKER: And wouldn't the same thing be true in the negligence claim that you've also asserted?

EDWARDS: Yes. I think it is difficult to talk about negligence and not talk about strict liability and vice versa.

BAKER: Isn't your negligence claim based on the same 3 elements: somebody sold it; somebody manufactured it; and Firestone designed it. Therefore they are a proximate cause of this accident?

EDWARDS: That's true.

BAKER: As opposed to being strictly liable under that set of legal theories?

EDWARDS: That's true.

BAKER: So the proof of one is the proof of the other, and the CA held that Firestone did not negate an essential element in both cases?

EDWARDS: That is correct. I think I am understanding you correctly about what the CA wrote.

BAKER: Yes.

EDWARDS: Yes, I do agree with that.

BAKER: What about the conspiracy claim? They also held that Firestone didn't negate some issue.

EDWARDS: I will say this on the conspiracy claim. I don't want to be so presumptuous as to tell this court what this court meant in the Triplex opinion in its footnote no. 2.

GONZALEZ: Conspiracy between _____ and negligence you don't understand that?

EDWARDS: The reason I don't understand it is because the court did not just say R.J. Reynolds is overruled. It limited it to the language that there cannot be a conspiracy to be negligence. And I went back and I reread R.J. Reynolds, and there was discussion in there about people coming together and behaving in a negligent fashion. And I think that this court went beyond that. All I am saying is I am not sure exactly what footnote no. 2 means. I would point out this however with respect to the conspiracy claim, Firestone in its motion for summary judgment in no way attempted to negate the conspiracy allegations that the plaintiffs make, that they consciously and knowingly engaged and combined with others to obscure and conceal information about this very danger.

GONZALEZ: What can they say except we didn't do it? What evidence is there?

EDWARDS: They could have brought forward an affidavit that said we didn't do it. But the fact of the matter is they moved for motion for summary judgment on the basis that they didn't sell this wheel, and that that took away any responsibility that they had under a civil conspiracy allegation.

BAKER: Well what about their argument that if the underlying strict liability or negligence

claim is negated as a matter of law how can you survive on a conspiracy standing alone because conspiracy is not a cause of action in and of itself?

EDWARDS: I would go back to, and again I am sorry I forget the name of the case, it's the Schlumberger case. And in the Schlumberger case they indicated that while it was shown that Schlumberger participated in the alleged conspiracy Schlumberger did not know of the injury to the other landowners. And therefore they could not be responsible because they didn't knowingly combine into the conspiracy with the knowledge about this injury to the other landowners.

BAKER: Well let me give you a hypothetical in this case. They argue there is no duty so that your negligence claim should fail because they showed as a matter of law there is no duty. So if that's the truth, except as being true, how can you then have a conspiracy to do something when there is no duty that you can conspire against

EDWARDS: Because I think Schlumberger can be interpreted to mean that if I, a person or a party, who has no duty to a particular party combined with other parties who do have a duty...

BAKER: That you become vicariously liable?

EDWARDS: That I become responsible through the civil conspiracy. I think that Schlumberger can be interpreted that way. I do think that Schlumberger does stand for that proposition because the reason that Schlumberger was held to not be responsible under civil conspiracy was because it didn't know of the danger or the injury to the other landowners. And in this case Firestone definitely knew when they put their lawyers ad hoc committee on products liability together to come up with a warning on how to deal with the promulgation of information on this danger, when they did that back in 1974 Firestone was already very much aware of mismatch accidents of this nature occurring.

SPECTOR: That's my question. Their design how does that contribute to an explosion?

EDWARDS: Well first of all it is the low flange height. It is very difficult to talk about it outside of technical terms and without a demonstration here, but I will try my best.

SPECTOR: You allege that it does contribute and it's uncontroverted that the manufacturer agrees that it had something to do with this accident?

EDWARDS: Yes. The low flange height feature makes the 16-1/2" diameter wheel. In diameter if you stood it on its edge, if you stood 2 16-1/2 and a 16 on edge, side by side, the 16" wheel would either be the same size or a little bit smaller than the 16-1/2 on its total outside diameter because of the low flange height. And again there is no contention by Firestone that our allegations of a defect, of what we say is a defect in this wheel, is not in fact a defect.

BAKER: They've strongly argued that because of the partial summary judgment in your client's favor that Kelsey-Hayes was the manufacturer and the seller, and that's a judicial admission that the only real issue in the case is the design question; do you agree with that?

EDWARDS: I agree that we are bound by the partial summary judgment that Kelsey-Hayes manufactured this wheel. And I don't think we should be heard to say that Firestone manufactured this wheel.

BAKER: By the same logic safe to say didn't sell it either?

EDWARDS: That is undisputed Firestone did not sell this wheel.

BAKER: So we are back to my premise there that the design issue that's the crux of the whole case is that right?

EDWARDS: Yes. The only problem that I have with their judicial admission discussion is that we never got a partial summary judgment or judicially admitted that Firestone did not participate in the design of this wheel.

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REBUTTAL

MALONEY: There may be some confusion. In 1957 when Firestone developed the concept of the single piece wheel, and the tubeless tire for trucks, that was a concept not limited to any particular size wheel. In fact the first wheels to which that concept was applied were very large wheels - 22-1/2" wheels, for large heavy trucks. That concept, that notion that has been employed in hundreds of millions of wheels in various sizes, the whole _____ of their complaint is basically that a 16" wheel and a 16-1/2" wheel look very similar. And you can slip a 16" tire over either one. There wasn't a 16-1/2" wheel in 1957. There wasn't a 16-1/2" wheel until sometime in the 70s.

BAKER: Did Firestone design that one?

MALONEY: Firestone designed what was known as a duplex, which was a very wide 16-1/2" wheel. And there is no mistaking...

BAKER: It's that the one you argue holds 2 tires at once?

MALONEY: Yes, this is completely different.

OWEN: What about the affidavit that he referred us to that said that Firestone did design a 16-1/2" wheel with a 6-3/4"...

MALONEY: Firestone did do that as did all the other manufacturers at various points in time. Firestone manufactured a dual application, that is 2 wheels side-by-side as opposed to this _____ where wheels were used in a single _____. Yes, various manufacturers did design different 16-1/2" wheels. And this wheel is different than the Firestone concept. It is a different design.

ENOCH: Well you say a different design. But that's not the relevance, and that's not relevant to your position, that Firestone did not manufacturer the rim that was a participant in the explosion, and that's your point?

MALONEY; That's one of 2 points. One point is that Firestone did not design the wheel that was employed in this accident. Firestone had a concept that was subsequently modified by various manufacturers in creating their own design.

ENOCH: But even if they had designed this wheel, they didn't manufacturer it?

MALONEY: Even if they had designed it Firestone did not introduce this wheel into the stream of commerce, nor any component of that wheel.

SPECTOR: Did tires that had tubes explode?

MALONEY: Yes. There are two basic types of problems. There are multi-piece truck wheels, which are wheels composed of more than 1 piece that are used with tube type tires. Tube type tires are too _____ to stretch over a single piece of configuration. It was only with this lower flange height and this whole notion that single piece wheels and tubeless tires seems to be _____ trucks in this country. They earlier had been made for cars but no one had come up a way to do it with trucks. Only with this concept, then modified different designs come out of it. Do we get single piece truck wheels and tubeless tires.

HECHT: But you don't think it would make any difference if you had a patent on this and you were charging a pretty handsome sum for other people to use, that you might have some liability under those circumstances when a manufacturer who just wished everybody well would not?

MALONEY: I think that certainly the fact that we gave it away moves us even farther from this case and it should move us completely away from liability. But I think even in that situation I have a great deal of difficulty with this court adopting a design liability theory in strict products liability where that designer doesn't put something into the stream of commerce.

HECHT: What can he put into the stream of commerce but the design?

MALONEY: Well of course products liability, and in fact negligence are grounded in acts in the physical world, not ideas. Liability for ideas I think there is a great _____. And I think it does have tremendous ramifications and opens up you know just worlds of litigation.

On the conspiracy theory, just to address Justice Baker's _____, it is of course true that a conspiracy in and of itself does not give rise to a cause of action. We did negate in the record before the trial court and the court of appeals negated an essential in each one of their causes of action without an act or omission which would give rise to an underlying wrong, then there can be no conspiracy nor liability for conspiracy.

HECHT: Opposing counsel says he cannot think of another analogy circumstance in the _____; can you?

MALONEY: Oh yes. I think the Mercedes analogy is a perfect one. I think the Ford analogy is a perfect one. I think the _____ court did a wonderful job with the Wright brothers and of the crash of a present day Boeing 767.