ORAL ARGUMENT — 11/18/98
97-0648
HYUNDAI V. RODRIGUEZ

POWERS: The plaintiff in this case complains of the automobile in which she was riding was defective because it wasn't crashworthy. In question 3, the jury was asked, whether this car was defective, using the risk utility test that we used from *Turner*. The only complaint that the plaintiff has here is that the TC did not submit that question twice: once under strict tort liability, and once under breach of warranty.

What she wants here is two bites of the apple - the same apple. Her only complaint is that the TC didn't give her two bites at the same apple on the question of whether this automobile had a design defect.

ABBOTT: You agree that under some circumstances, two bites of that apple would be one?

POWERS: And that's the crux of the case, whether this really is the same apple here. And in some cases, breach of warranty is different than defect under the risk utility test. And that really is the crux of the case. Is it the same apple? We think it is the same apple here. And the reason is because it's a personal injury case.

ABBOTT: Why would the apple not be slightly different here, because the definition of defect would be slightly different?

POWERS: The definition of defect that comes out of the *Plas Tex* case, the wording is different, and we agree with that. And there's no doubt that defect is required under warranty. The wording of the instruction from the pattern jury charge and from the *Plas Tex* case is different. And that's what CA's seized on - different wording, and therefore, you need to submit that question twice.

And the reason that it is the same apple in this case, is that the CA overlooked that *Plas Tex,* a commercial law case, the question of whether the resins in a swimming pool laminate were effective enough to be useful.

There are other commercial law cases where the risk utility test frankly is not going to work. There could be a shipment of apples. The seller ships the apples, the buyer complains that they are off-color. They are the wrong size. They are slightly disfigured. There could be a shipment of carpeting - it's faded. In those commercial cases, the risk utility test simply will not work. If the jury were asked the risk utility test in a commercial law case, the jury would be confused. The jury would say: Well we're being asked whether the risk outweighs the utility. Well what's the risk? What's the risk of the discolored apples? In commercial law cases, the risk utility test simply won't work and *Plas Tex* recognized that. *Plas Tex* said: We need a definition of defect.

Risk utility can't work. We need something that is fit for commercial cases. And *Plas Tex* was absolutely correct in that circumstance.

In a personal injury case though, the only thing the plaintiff is complaining about, and that's true in this case, is the product is too dangerous. Here, too dangerous, because it's not crashworthy. When the claim is the product is too dangerous, there's only one way to determine whether the product is too dangerous. Does it have risks that outweigh its utility? Now we could use the consumer expectation test to ask whether it's too dangerous. But *Turner*, already made the decision, but the risk utility test is a better test than the consumer expectation test. But the commercial test won't work.

OWEN: For design defect?

POWERS: For design defects.

OWEN: Are you limiting this to design defect?

POWERS: That's correct. We're not asking the court to do anything in commercial cases to overrule *Plas Tex*. We're not asking the court to do anything that would upset other tests that are used in failure to warn or manufacturing...

HANKINSON: What is the effect on Mr. Power's if the second bite of the apple gives rise to different remedies for the plaintiff?

POWERS: Even if there are two causes of action, and there are different remedies, if there's a common element of those two causes of action, if the definition of 'defect' is the same as we say it should be in a personal injury case, it still might give rise to different remedies. But it's quite common to have two different causes of action with similar or common elements and we don't ask the common elements twice. For example: if there is a fair to warn claim, and a design defect claim in the same case, those are two different causes of action. We don't ask the damage question twice, the damages are the same, or the case that you all heard yesterday on the indemnity issue. The issue there was whether the defendant sold the product. That could be an issue common to a failure to warn claim, or a design defect claim. It wouldn't make sense if the facts raised the issue. The retailer says: We didn't sell this particular product. To ask that question twice just because there's a failure to warn claim and a design defect claim.

HANKINSON: Based on the submission of the issue as the jury answered it in this case, then could a plaintiff elect remedies under the DTPA absent a finding of breach of warranty by the jury? A plaintiff usually can submit their case to the jury and then elect their remedies after the jury answers the questions.

POWERS: Correct. And nothing we're asking the court to do today would change that.

HANKINSON: So had the jury answered 'yes' to this question, then what would have been the result if the plaintiff had wanted to pursue remedies under the DTPA since a breach of warranty claim does gives rise to a claim under the DTPA?

POWERS: If the other elements of the DTPA could be met, and without addressing that particular issue, our claim is there is a single definition of 'defect' in a personal injury claim whether it's a warranty claim or a strict liability claim. And that ought to be the risk utility case. If the jury answers that 'yes', then the plaintiff if the plaintiff has pled a breach of warranty claim, then the plaintiff is entitled to whatever remedies the breach of warranty claim would give.

ENOCH: You say the issue here is was the product too dangerous. But it seems to me that I could sell an automobile with an air bag that says 'it will be safe for you to drive and will leave you without injury in a 10 mph frontal impact', and I have a 10 mph frontal impact, the air bag deploys, and I am injured. Now it seems to me there's a difference between it was unreasonably safe and the warranty that I bought this car because they said in a 10 mph frontal impact, I would be safe. But if it turned out not to be safe, but there's a separate question on whether although it was not safe was it unreasonably dangerous it seems to me those are separate questions.

POWERS: Absolutely. And we agree with that wholeheartedly.

ENOCH: So why can you say as a blanket rule that there ought to be only one design defect definition in personal injury cases?

POWERS: If there's a claim of express warranty or misrepresentation, if there are claims of factual wrong other than simply that the product was too dangerous without an express warranty or without a misrepresentation, that's why we say it's the same definition. Whether or not it's a commercial breach of warranty - implied warranty claim or a design defect claim...

ENOCH: So in your view, an implied warranty, a merchantability issue in a personal injury case could only be a 'too dangerous' claim?

POWERS: That's correct. If that's the only factual claim 'it's too dangerous,' then it does not make sense to have a separate definition and ask that question twice. And this question really is how to fit the commercial law and the personal injury law together. And the legislature has actually faced that issue. In sec. 82.005, which is now the definition of 'design defect,' with requirement of reasonable alternative that would prevent the accident without substantially - significant reducing the risk without substantially reducing the utility of the product. That definition of 'defect', by the way which does not apply to our case because we are a pre-1993 case, but when the legislature defined 'defect', when it got around to defining 'defect', the legislature applied 82.005 to personal injury cases, not commercial cases. The legislature recognized the personal injury definition does not work in commercial cases.

OWEN: Did it cross-reference the Texas Business & Commerce Code?

POWERS: It does. But, it says that definition of 'defect' is applicable to any personal injury case, whether or nor it is a breach of warranty claim, or a design defect claim. By the way, it would not apply if it was an express warranty claim. Express warranty, misrepresentation, fraud those are really factually separate claims. But the breach of implied warranty and merchantability is just a claim that is too dangerous just like the strict liability claim. And when the legislature confronted the definition of 'defect', it didn't see any reason to have a different definition of defect in a strict tort liability claim than it does in a breach of an implied warranty and merchantability claim.

BAKER: Is the bottom line then, that in this kind of case there is no cause of action for implied warranty of breach of merchantability?

POWERS: No, we agree there's a cause of action...

BAKER: In this kind of case, because if you say you can't submit what's it worth?

POWERS: We think it is submitted.

BAKER: But aren't there different damages?

POWERS: It could be submitted. The cause of action is there. It can be submitted. It may trigger extra remedies. The only thing we're saying is it has a common definition of defect. And *Plas Tex* isn't applicable because that's a commercial case. It has a common question of defect, so both causes of action with a common definition of defect, the question of defect should be asked once, not twice. Otherwise, it's inviting and...

BAKER: So a jury under 82.005 can' find that it wasn't unreasonably dangerous, but could find that it breached implied warranty?

POWERS: Well the legislature says, to make out a claim of defect even in a breach of implied warranty of merchantability claim, under 82.005 they have to meet the requirements of 82.005. They don't refer to the *Plas Tex* definition. So the legislature I think has made the conclusion that the same definition of defect should apply in a personal injury claim whether or not it is breach of an implied warranty, not express warranty.

BAKER: Doesn't that collapse the two causes of action even though they may just be distinctly separate into one claim if you can only define it one way?

POWERS: It collapses one element of the claim, the defect...

BAKER: Which is the deciding element, isn't it?

POWERS: Often it is, but sometimes it won't be. For example: it may be that an implied warranty merchantability the defendant has to be a merchant. There are other requirements in the implied warranty of merchantability that would have to be met. And there are requirements in _____ that would have to be met.

BAKER: But your argument is, if they find 'no' based on the design defect, that clearly cuts them out of the merchantability _____ because of this single element?

POWERS: Just like if damage is an element of both causes of action a finding of no damage cuts them out of both. In other words, some times element with different causes of action have _____.

BAKER: That's an understandable consequences, you find no damages. But what you're talking about is negating the liability, because you can only submit one definition and it's the same in both cases.

POWERS: That is our position. And by the way, that is the position - the new restatement third of products liability, §2, comment N, addresses this exact point. It has a long comment. The *Plac* brief, the amicus brief has a copy of Comment N. By the way, that was the proposed final draft. Now it has become final and it's identical. It addresses the exact issue. And the new Restatement Third of Torts says, just like 82.005 said...

BAKER: Neither one of those apply to this case?

POWERS: But it still is reflected of the judgment that it does not make sense to have different definitions of defect under warranty and under strict tort liability when the only claim is it's too dangerous. You're asking the same question twice. And *Plas Tex* used a different wording of defect in a commercial case because too risky would confuse the jury, that there is no risk when the apples aren't...

ENOCH: Conceptionally wouldn't it be easier to simply say that in the context of implied warranty merchantability if your issue is safety of the product, safe to use, that the only warranty that's being made is that it's not unreasonably dangerous?

POWERS: Yes, absolutely. In other words, the same substantive rule applies. That is, the warranty is that it's not unduly dangerous and the only way to figure that out is risk utility. That's what the new Restatement of Third says, and the jury answered that question. The jury answered the question that this is not unreasonably dangerous in the risk utility sense, and that that should be conclusive on the breach of warranty, which is not doing away with breach of warranty. It's just saying the definition of breach of implied warranty of merchantability in a case where the claim is

it's too dangerous, not that it doesn't live up to express warranties or misrepresentations. Where the claim is that it is too dangerous, the risk utility test is the way that that ought to be submitted. And that is exactly the way the TC submitted it in this case.

OWEN: Given the legislative enactment since this case was tried, we're looking apparently at a fairly narrow group of cases historically to which this statute doesn't apply. Should we consider applying the broad premises you're asking us and hold that in these cases it's okay not to submit two issues, or should we just simply focus on harmful error in this case?

POWERS: I think in post-1993 cases, the result we're urging as a matter of common law is mandated by the statute. Now the statute changes *Turner* in some other ways, but the common definition is amended by the statute. And if the court were to point that out and point out that really it is asking the same question, and therefore, since the real question was answered, not asking the other wording was harmless, that's a way that the court can reverse the CA and affirm the TC.

OWEN: Just from a jurisprudential aspect, this case aside, should the court - why should we not look beyond a harmful error in this case and look at the broader issue of submission since we've got a statute that applies prospectively to 1993?

POWERS: I don't think the law prior to 1993 ever applied. What this court never did was intend to apply the commercial definition of 'defect' from *Plas Tex* as to personal injury cases. And I think it would be the soundest expressions of the jurisprudence of this state that the division is between personal injury cases and commercial cases. And by the way, chapter 33 does that as well. In ch. 33, a plaintiff's fall is defined by *Duncan* and by comparative fall in the personal injury case, even if it's a breach of implied warranty of merchantability claim. If it's a personal injury case, which is directly contrary to some of the comments in the code. So Texas jurisprudence, the 1993 statute, but even ch. 33, which is pre-1993, I think divides the world into personal injury cases and commercial cases. And so a decision in this case subsequently that this is not error would reflect that jurisprudence. But certainly the court could say, well it might have been error but it was harmless because in effect the standards are the same.

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RESPONDENT

GUTIERREZ: First of all, I felt that when I prepared to try the case of Rowena Rodriguez in Hidalgo county against Hyundai, that I would prosecute this claim under three different theories, which is: a negligence cause of action; a product's liability cause of action; and a warranty cause of action. I felt that I should be able to talk to a jury and explain to a jury and argue to a jury that there is a distinction between an unreasonably dangerous product as opposed to a product that is unfit and lacks something for adequacy. And maybe the best example is what was voiced a few minutes ago by the court concerning an air bag that might not necessarily be unreasonably dangerous, and therefore, defective.

GONZALEZ: So you're saying that the vehicle was defective, is that correct?

GUTIERREZ: I was arguing that the vehicle was defective. That is correct.

ABBOTT: How were you claiming that it was unfit in a way that it was not dangerously so?

GUTIERREZ: We were claiming that the roof structure was inadequate.

BAKER: What does that matter if it does not pose a danger? What does it matter with regard to your lawsuit if it does not pose a danger?

GUTIERREZ: We were claiming that the danger that it posed was that it caused injury to Rowena Rodriguez.

BAKER: Again, so if your claim is that it poses a danger, why would it not just fold into a product's liability claim?

GUTIERREZ: The claims were brought under products liability claims as well as warranty claims.

BAKER: I guess it's plain, the way I understand part of the argument of the other side of that is, that your warranty claim is based upon the product being dangerous, which is the same bases of the product's liability claim. In other words, the two claims have no real distinction here.

GUTIERREZ: I felt that under the definition, I would be able to argue to a jury that they did not have to find that the product was unreasonably dangerous so that my client could make a recovery, but that they could take perhaps a lesser standard which would be under the warranty claim in that it was unfit to the extent that it was inadequate and lacked something for adequacy as I understand that definition under the breach of an implied warranty merchantability. And therefore, I was unable to tell a jury and argue to a jury: you don't have to find this product to be unreasonably dangerous, but nevertheless, you can find this product to be unfit and still make an award. And I was not permitted to do that.

BAKER: What are your cases for the proposition that a breach of warranty is a lesser standard or easier standard to prove?

GUTIERREZ: There is no case that says that is's a lesser standard. *Garcia v. Texas Instruments*, however, recognizes that this is a viable claim; this is a cause of action that is recognized and this is...

PHILLIPS: I believe opposing counsel concedes that?

GUTIERREZ: Yes.

PHILLIPS: In other words, the statute of limitations are different; the recovery may be different. The question is what at the time that the law controlling this accident, on the law that controls on this case, what is the appropriate instruction on breach of implied warranty, and how is that different than the design defect?

LAWYER: The appropriate instruction with respect to the definition of an implied warranty of merchantability is exactly what I was saying, that the product was unfit to the extent that it lacks something necessary for adequacy. And I'm not sure that I'm reading the entire definition, but it is part of the transcript, and what was proposed to the TC and refused.

PHILLIPS: And you took that from the *Garcia* case?

LAWYER: No, we took that from the Texas pattern jury charge. Counsel for Hyundai is saying that the definition is the same. And if I understand his argument, then he is saying that the TC needs to instruct a jury. Now plaintiff has submitted two causes of action, in this case three: negligence; products liability; and breach of warranty. Now if you read the definition of 'defective design,' you will read that definition and just remember he's wanting this court to go back and direct the TC to instruct a jury that they should read both definitions to mean the same thing, and they don't, the plain language of the definition is totally different.

HANKINSON: Factually in this case, what did you want to argue to the jury made the vehicle unfit? What was the difference in the facts and the proof?

LAWYER: As far as the facts and the proof there really was no difference. The argument was I felt that I could argue that a jury, as I've stated before, could basically take a lesser standard, and I'm using that word lesser standard - I don't have a case that says there is a lesser standard, I'm saying that I should have been permitted to try my case and I was not permitted to try my case on a cause of action that I pled and that is recognized.

HANKINSON: You're now saying that you should have been allowed - the court should have instructed the jury on a legal definition. And what I want to know is what facts in evidence were you going to argue met the requirements of that legal definition in this case?

LAWYER: The lack of inadequate roof structure, the lack of inadequate restraint system, inadequate interior padding in the vehicle.

ENOCH: It seems to me that the implied warranty of merchantability really is a function of the reasonable expectations of the use of this product. It will do what people assume products should do for what it was designed for, which is travel. It seems to me that a person who buys an automobile recognizes there are inherent dangers in the automobile, and so that's part of this

merchantability. It seems to me to establish that's unfit for the purposes for which it was intended, you would have to say: In the area of safety, that it somehow is unreasonable; it somehow is beneath the expectations of the parties in this transaction. And once you determine that it's the unreasonableness of the danger that is posed, that you fall right into the defective definition under products liability, which is it's unreasonably dangerous how do you - what other standard under merchantability would you say the implied warranty carries?

LAWYER: As I understand your honor, you believe that under the breach of implied warranty merchantability, we're still dealing with an unreasonably dangerous product.

ENOCH: I am trying to describe what is it that makes - the merchantability really has to do with here's a product's designed to perform a certain function, and the merchantability means it's going to perform that function. Encapsulate in that function is to get you from point A to point B.

LAWYER: And to protect you.

ENOCH: But there's a recognition that there is inherent danger because this moves. Now, does an implied warranty of merchantability mean that _____ evidence of the product is safe, or does implied warranty merchantability mean the product doesn't pose an unreasonable risk?

LAWYER: That it is fit, and not unfit. That it is adequate and not inadequate.

ENOCH: Yeah, but does fit mean it's safe, or does fit mean it doesn't pose an unreasonable risk? What does fit mean?

LAWYER: I don't know. It means what the definition says. It's hard for me to say what it means. All I can tell the court is that the definitions are totally different, and I use a lesser standard. I don't know if I'm using the correct language, but I say that I should be able to argue that to a jury, that they don't have to find the product to be unreasonably dangerous. They can only find the product unfit, and that was my argument, and that was what I should have been permitted to address the jury with, which I was not permitted to do, and which according to the law denied me a trial.

BAKER: What about the argument that the key issue is the same in both claims, and therefore, the answer in the defective context answers the same issue in the merchantability cause of action; and therefore, it's basically a superfluous submission when the definition is the same?

LAWYER: One of the arguments that was made by counsel was that it would only allow for inconsistency and that it was duplicative. And all I can tell the court, and your honor is, that it is not duplicative and it certainly would not be irreconcilable. And with respect to that argument, of course, it was addressed in the brief, and not addressed in argument. That actually would be premature because that never happened. The issue was never submitted to the jury. And I don't know

if we could actually say: Well he waives that complaint because he complained in the charge and he objected to that; whereas if he would have allowed it, and we don't know what the jury would answer, maybe he could come back and argue if the jury had answered in the affirmative. That's inconsistent. But if it's inconsistent, then according to a 5th circuit case, then we would be entitled to a new trial.

The CA addressed that and said: Rowena Rodriguez is entitled to a new trial because she was denied a trial, and the court refused to submit that issue, the issue of a breach of implied warranty of merchantability.

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REBUTTAL

PHILLIPS: Is the pattern jury charge wrong because it relies on *Plas Tex*?

POWERS: We think the pattern jury charge is correct for a commercial case. We think *Plas Tex* was correct for a commercial case. We don't think it's correct for a personal injury case. And to the extent that the jury pattern jury charge purports to apply to personal injury cases, we think it's wrong, and we think that it is reflected by the new restatement third. We think that's reflected by the judgment that the legislature made in 82.005, albeit, for cases after this case. But that there should not be a separate definition of defecting in a breach of warranty personal injury case from a 402(a) or product's liability personal injury case. So to that extent, yes, we think the pattern jury charge should not control in a personal injury rather than a commercial case.

A couple of things that were not argued. We are not arguing that the language in *Plas Tex* means the same thing as the language in *Turner*. We agree that it's different language. Now, I don't quite know what unfit means in a personal injury case other than as Justice Enoch suggested, it's too dangerous. And I don't know how to figure that out other than it's too high compared to the utility.

PHILLIPS: You cite a few federal circuit cases that you claim support your view. No other states that you've found have faced this issue?

POWER: I believe there are other, if not in the *Plac* brief, and I think it's on page 6 and 7. I'm not absolutely sure of that, but also in the footnote. I think there are about a dozen cases where the restatement...

PHILLIPS: I'm sorry. I was looking at petitioner's brief and not at your amicus brief.

POWERS: At *Plas's* amicus brief. Those cases are there. And there are state cases. And in fact, the only case for the contrary is *Denny*. That's a New York case. But in *Denny*, this goes back to the questions about could there be situations where there are different factual claims about

merchantability than defect under strict tort liability. And in *Denny*, the facts really were different. There was a different factual claim about off-road use in the implied warranty and merchantability and on-road use in the 402a claim. So there were really were different factual claims there. But other than *Denny*, every state even before the restatement came out says there should be a common definition of defect.

So we're not saying that the words mean the same thing. We're saying *Plas Tex* should be limited in commercial cases, the definition of defect should be the risk utility test, whatever the cause of action in a personal injury case.

ABBOTT: Let's assume I offer to sell you a car. And in doing so, I knowingly misrepresent that the car has an air bag, and you wanted an air bag, and you purchase the car. I have fraudulently induced you into buying that car when you think it has an air bag. That same fact scenario would give rise to it seems a fraud claim, and a DTPA claim. Using your construct, why would we not be required in the future to submit that as just a single question?

POWERS: Because the wrong there isn't that the product is unreasonably dangerous given the risk utility test. The wrong there is it doesn't comport to the representations.

ABBOTT: What I am saying is using that same construct why would we not then say: Well you don't get to submit a fraud claim and a DTPA claim because the same fact scenario results in the same arguable violation. While that is a misrepresentation concerning goods or services, which were untrue when made, why wouldn't we just instead of having two questions, one for fraud and one for DTPA, just have a single question and then break it out separately on causation later?

POWERS: The DTPA sometimes allows for misrepresentations that are _____. So the judgment of the legislature is that there really is a different _____ cause of action. If the DTPA claim, however, was fraudulent inducement, if that was the factual claim, they knowingly and fraudulently induced me into this contract, and that was a - would support a common law fraud claim and a DTPA claim our position would be the plaintiffs should be able to recover under both theories, elect the remedies, we wouldn't take away the two causes of action, but we would say: if there's a common element under the facts of the case, to both theories it does not make sense to ask the same question twice. That's the position we're taking. We think that's what's happening here. And there is nothing in the way this trial was conducted, the pleadings are identical under these two claims, the proof was identical under these two claims, the expert's opinions were identical under these two claims. So the possibility that may be in some claims or could be different factual allegations, that's not this case at all. Bt we would agree with that construct ____ reaching that result.

HANKINSON: So what does the charge look like? If the plaintiff wants to keep the possibility of electing remedies alive, what does the charge look like?

POWERS: The charge would require findings and with broad form and instructions on the requirements of the 402a claim, or the strict tort liability claim, and if it's in dispute, the other requirements of the breach of warranty claim or these goods is that merchantable wasn't sold by this salesperson.

HANKINSON: We don't really have a broad-form submission here. We would have to do more specific?

POWERS: We could have a broad-form submission. All we're saying is, the jury would be instructed under both claims: You must find that the product was defective. And the definition of 'defect' is, and we're saying the definition of defect should be the same in both claims. To the extent that there are other elements of the cause of action are different, the jury would be instructed on that. So I think this would be easy to submit. What's hard to submit in broad-form is where there are different wordings of the definition of defect. That's what's hard to submit.

ABBOTT: Isn't causation different than the two standards, and wasn't causation folded into the definition that was submitted concerning the product's claim?

POWERS: Yes. There was a global defect cause claim. And Justice Seerden in his dissent in the CA, I think does an excellent job addressing this point, the cause submission on the defect producing cause. If we're right, the definition of defect was correct for both causes of action. Then it was folded in with a producing cause combined submission. But since producing cause is clearly more expansive than proximate cause, which is the requirement under the Code - and let me just candidly say: I think the logic of our view that these are personal injury cases, I don't think there is any reason to use proximate cause under the Code in producing cause - for personal injury cases under 402a. I think it would simplify things if we used one view of causation there.

But, that doesn't come up in this case because they were asked - producing cause, that's clearly more expansive than proximate cause, so I know on producing cause entails a no on _____ cause.

ABBOTT: But it will come up in the next case where the defendant doesn't want to be tied under that more expansive view of causation and will want it broken out separately?

POWERS: Correct.

ABBOTT: So your jury charge is _____as one question and two causation questions, and then have separate damage questions?

POWERS: If the causation question cannot be folded into a global submission, then you would have to have separate submissions on the implied warranty and the strict tort liability with the different definitions of causation. And I will be candid. I think that unduly confuses the jury. I don't think the jury is going to come back and understand we're asking producing cause, we're asking proximate cause, I think that's a fair defined distinction. I think it's not worth the candle to confuse the jury with that. But if there are going to be different views of causation they would have to be given different submission.