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Supreme Court of Texas
Kia Motors Corporation and Kia Motors America, Inc.

v.

Lawrence Ruiz (Individually and as Representative of the Estate of Andrea Ruiz), Shenequa Ruiz, Christopher Ruiz,
and Suzanna Ruiz

No. 11-0709

September 9, 2013

Oral Argument

Appearances:

Scott P. Stolley of Thompson & Knight LLP, Dallas, TX, for Petitioners.

Jeffrey S. Levinger of Levinger PC, Dallas, TX, for Respondents.

Before:

Justices Nathan L. Hecht, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, Debra H. Lehrmann, and John P. Devine.

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JUSTICE NATHAN L. HECHT: The Court is ready to hear argument in 11-0709 Kia Motors against Ruiz.

MARSHAL: May it please the Court, Mr. Scott Stolley will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF SCOTT P. STOLLEY ON BEHALF OF THE PETITIONERS

ATTORNEY SCOTT P. STOLLEY: May it please the Court, I am Scott Stolley and along with Kurt Curin, I represent Kia. There are three issues in this appeal. The first issue is the application of the government standards defense in the Section 82.008. Unfortunately, the court of appeals misconstrued this important tort reform statute and rewrote the text to make the statute effectively useless to regulatory compliant manufacturers like Kia. The second issue is the plaintiff's failure to prove a specific design defect. Their expert used a process of elimination resulting in him being unable to state specifically where the alleged design defect occurred or what the defect was.

JUSTICE DEBRA H. LEHRMANN: Wouldn't your argument result in a presumption of no liability in every design defect case involving injury from the, from a motor vehicle crash?

ATTORNEY SCOTT P. STOLLEY: Not necessarily, uh, Your Honor. Um, it wouldn't apply to manufacturing defect cases. Um, it wouldn't necessarily apply to warning cases, um, even in design defects.

JUSTICE DEBRA H. LEHRMANN: But, but aren't you arguing that the risk is injury from a crash basically?

ATTORNEY SCOTT P. STOLLEY: The risk of injury in this case was an occupant injury in a crash. Um, the applicable governing standard was FMVSS208, which is the standard for occupant protection from injury.

JUSTICE DEBRA H. LEHRMANN: Uh-huh.

ATTORNEY SCOTT P. STOLLEY: Um, particularly that standard specifies some airbags and, uh, has specifications for airbags and seatbelts and, and the aim there is to prevent secondary collisions within the automobile. In other words, occupants striking something within the automobile, such as the steering wheel, the dashboard, in this case they're claiming she struck the A-pillar. So this standard FMVSS208, specifically what it does it protects occupants from injury from secondary collisions.

JUSTICE DEBRA H. LEHRMANN: But you're--

JUSTICE PAUL W. GREEN: But that's assuming that they work, right?

ATTORNEY SCOTT P. STOLLEY: Uh.

JUSTICE PAUL W. GREEN: Can they just put in an airbag that doesn't work; that's not going to comply with the standard.

ATTORNEY SCOTT P. STOLLEY: It does comply with the standard.

JUSTICE PAUL W. GREEN: It does?

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ATTORNEY SCOTT P. STOLLEY: Um, the, the standard is written where the manufacturer tests one vehicle, um, because it's destructive testing. So you cannot run every vehicle through this particular test criteria. It, it can, once it passes that test, the exemplar vehicle passes that test, the vehicle design complies with the standard, um, and that's what 82.008 applies to. It protects the manufacturer when the design complies with, um, this, the federal safety standards.

JUSTICE EVA M. GUZMAN: Is the federal safety standard though, 208, uh, more accurately described as a performance standard, one, one that, um, establishes something different than design and I think what you alluded to earlier makes that clear. You can't test all the cars, but if the design was right, then you could glean from that that, that that the cars would meet performance standards because the design was correct.

ATTORNEY SCOTT P. STOLLEY: Correct. Yes, um, and this Court has said that the Federal Motor Vehicle Safety Standards are largely performance standards. Um, the Federal Government is not in the business of designing the intricacies of automobiles or any other product, uh, for the most part.

JUSTICE EVA M. GUZMAN: Can you meet then the Federal Performance Standards, but still have a defective design because you designed your vehicle defectively? A performance, can you meet a performance standard and still be defectively designed?

ATTORNEY SCOTT P. STOLLEY: Yes, but the, two, two things. This statute then immunizes, um, the manufacturer if they met the standard even if there is a design defect. Now, the plaintiff has the opportunity under 82.008b to, um, prove an exception. Once that happens, the immunity completely goes away and the plaintiff then has the opportunity to go to the jury and prove that design defect, Your Honor.

JUSTICE DEBRA H. LEHRMANN: Let's go back to the standard. Isn't the federal standard at issue? Uh, wasn't that testing for a deployed airbag? In other words, it was not testing to determine whether or not an airbag will deploy; it was testing the performance of an airbag once deployed and in this case, that's not even what the issue was because the airbag never deployed and so how can a test, a standard that sets forth testing for a deployed airbag apply and allow this presumption to apply when, in fact, it had nothing to do with this injury?

ATTORNEY SCOTT P. STOLLEY: Well it did have everything to do with this injury because they're saying that the airbag that the standard requires would have saved her life. They're saying it would have protected her from injury, so there is a relationship between the standard and what they're alleging.

JUSTICE DEBRA H. LEHRMANN: What, what do you mean it would have protected her? It, certainly you're not saying it would have protected her if it didn't deploy.

ATTORNEY SCOTT P. STOLLEY: No, their argument if it did deploy she would not have suffered this injury [inaudible].

JUSTICE DEBRA H. LEHRMANN: But it didn't deploy.

ATTORNEY SCOTT P. STOLLEY: It did not deploy, uh, but in the standard, the model was tested running it into the barrier at 30 miles an hour. The airbag did deploy. The, uh, forces on the anthropomorphic dummy did comply with the criteria, so the design of the model vehicle passed. It met the Federal Motor Vehicle Safety Standard. Now-

JUSTICE DEBRA H. LEHRMANN: But I don't think you're answering my question. I understand that it passed, but it was a deployed airbag, that's what they were testing. They were testing, they were not testing to determine whether or not the electrical, uh, aspects of the car and other things that result in an airbag deploying would, in fact, work. There would be other tests to test for that and they weren't testing for that.

ATTORNEY SCOTT P. STOLLEY: The test was not run with, well, there were, there are tests run, uh, related to seatbelt safety.

JUSTICE DEBRA H. LEHRMANN: Sure, but this is a different issue.

ATTORNEY SCOTT P. STOLLEY: But under that scenario, Your Honor, then, um, 82.008 is largely a useless statute because these kinds of cases deal with failures in the field.

JUSTICE DEBRA H. LEHRMANN: Now wait; that's assuming that they're not testing to make sure that a deployed airbag is safe and surely there are times when a deployed airbag, for example, may not have enough air in it and so they're testing and these, theseummies or dummies, uh, actually are harmed after the crash because a deployed airbag was not sufficiently working. So they're not meaningless. They're, they're testing whether or not they work once they're deployed, right?

ATTORNEY SCOTT P. STOLLEY: Well, what, what I'm saying is meaningless is not the standard. What's meaningless then is 82.008 would never apply because these kinds of cases are, they always, all, all product liability cases involve some kind of failure. You could always use the word failure, um, in any type of accident and then that takes it all of a sudden out of 82.008 and the, and the defense never applies. That cannot be what the legislature intended.

JUSTICE DEBRA H. LEHRMANN: But it's failure of a deployed airbag, that's what it could mean, isn't that correct?

ATTORNEY SCOTT P. STOLLEY: I, I'm, I'm sorry; I'm not sure I follow that question, um but--

JUSTICE DEBRA H. LEHRMANN: The the, a defect in a deployed airbag being able to actually work.

ATTORNEY SCOTT P. STOLLEY: Okay, that then, that takes into one of the problems with, um, the court of appeals' analysis then is that that focuses on the defect rather than the risk of harm. 82.008 is written to apply when the, the design complies with a federal motor vehicle or a federal safety standard rather that governs the product risk

at issue. Here--

JUSTICE NATHAN L. HECHT: Let me ask you about that. Um, suppose, uh, again, just following up on Justice Guzman and Justice Lehrmann's questions, but to be very specific, if ahead of time, if, if we all knew that this airbag system had this problem, that the connectors would come loose or that there would be an open circuit, we knew that, there was no question about that, it would happen a certain amount of time, uh, a small amount, um, let's say a miniscule amount, but it would happen, would the agency applying standard 208 care whether that was true or not?

ATTORNEY SCOTT P. STOLLEY: Uh, the Federal Motor Vehicle?

JUSTICE NATHAN L. HECHT: Yes.

ATTORNEY SCOTT P. STOLLEY: Yes they would because there's all these, um, standards with respect to product recalls.

JUSTICE NATHAN L. HECHT: But no, no, in applying 208 if they knew that, would they say it passes 208 anyway?

ATTORNEY SCOTT P. STOLLEY: Um, they might, I'm not sure, Your Honor, because the test is--

JUSTICE NATHAN L. HECHT: It seems like they would.

ATTORNEY SCOTT P. STOLLEY: One, is one crash test. If, if you crash the vehicle and your airbag deploys, the forces that are measured are within the standard is it passes the test and, and they--

JUSTICE PHIL JOHNSON: If you changed the design, would you have to then, say next model year you change the design of how it, uh, actuates, you would have to run another test, I presume.

ATTORNEY SCOTT P. STOLLEY: Yes, I believe that is--

JUSTICE PHIL JOHNSON: To see if it runs. So basically what the one test does, it tests the design and the performance, kind of a package test.

ATTORNEY SCOTT P. STOLLEY: Yes.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY SCOTT P. STOLLEY: Yes. So, um, the biggest problem about the court of appeals' analysis has to do with what I mentioned earlier that the 82.008 applies to the product risk not to the specific defect whether it's in the circuitry, whether it's in the inflator, whether it's in the computer that controls it, wherever the defect is. If it passed

the standard that governs the risk, the defense is triggered and here the risk is an occupant striking something within the car. The vehicle passed that test. The legislature has decided that they don't want lay juries, um, who are ill equipped to make these kinds of technical decisions making inconsistent decisions about product safety, design, design of safe products, when the Federal Government has experts who have studied this problem, have promulgated a set of regulations. We want Texas manu, manufacturers in Texas to be, um, uh, subjected to a standard set of, of rules here rather than inconsistent results, um, and so--

JUSTICE DEBRA H. LEHRMANN: What if the allegation was that the cause of the harm was that the structure under the hood was too weak and there was a frontal collision and the occupant was injured, but it wasn't because the airbag was defective and it wasn't because of the seatbelts were defective, it was because the structure under the hood was defective. Under your argument, wouldn't the statute apply?

ATTORNEY SCOTT P. STOLLEY: Um, not necessarily because the product risk there is different, um, as I understand your hypothetical, um--

JUSTICE DEBRA H. LEHRMANN: In, in what way? Explain that.

ATTORNEY SCOTT P. STOLLEY: Well, I suppose, if, if the allegation of the plaintiff, which you have to read, um, not for its label, but for its substance, if the allegation is that because of something wrong in the frontend, uh, didn't meet a standard, and I'm not even sure there is such a standard, but if, if that's the hypothetical, um, and that caused the occupant to strike something within the car--

JUSTICE DEBRA H. LEHRMANN: That's my question.

ATTORNEY SCOTT P. STOLLEY: Um, then yes I think the, uh, the government standards defense would apply because the federal government has studied this problem and said this is how safe we believe automobiles need to be. This is technologically what's feasible, um, practically what's feasible and um--

JUSTICE DEBRA H. LEHRMANN: So under that argument, the test for whether or not the airbag, uh, is going to protect the public would apply to whether or not the structure of the car is appropriate. I'm, I'm not following how that could be.

ATTORNEY SCOTT P. STOLLEY: Well it could be if, if the allegation, it, it, it ties to the plaintiff allegation, which is under your hypothetical, she struck something within the car because of some problem with the frontend, um, and I suppose if there, well, if, if she struck the A-pillar because the front end was too weak, is, is that your hypothetical, something like that? Well, but the federal government has said this is what you need to do in making your car to protect the occupants from doing things, such as striking the A-pillar. You have to have an airbag and a, and a seatbelt that meets certain criteria. If you do that, that's as safe as you need to make the car from occupant injury. Um, I mean the federal government could make it, they could require each, um, car to be as safe as a tank. I mean they could go that far. You can design cars to protect against lots of different things, if you want to armor plate it, for example.

JUSTICE DEBRA H. LEHRMANN: Well, but this could go on. It wouldn't just necessarily be the structure of the car. It could be the brakes because maybe the brakes didn't, uh, slow down the car enough for the acceleration to, uh, be reduced to the amount that the, that the impact, uh, would have caused less harm. I mean it could go on to all.

ATTORNEY SCOTT P. STOLLEY: Well, but then we would, then we would be dealing with the brake standard, um, and not with the occupant [inaudible].

JUSTICE DEBRA H. LEHRMANN: Not necessarily. I'm, I'm talking about the, the failure of the brakes to reduce the acceleration resulting in the airbags not being adequate to protect the occupant.

JUSTICE PHIL JOHNSON: Counselor, excuse me for interrupting, but you had three points and you've not gotten to the second one yet, I guess, the proof of design defect.

ATTORNEY SCOTT P. STOLLEY: Yes, Your Honor.

JUSTICE PHIL JOHNSON: Briefly, I know you're about to run out of time. The third point I didn't even know that you got to set, to say what it was.

ATTORNEY SCOTT P. STOLLEY: The third point is, um, the erroneous admission of 432 dissimilar warranty claims as a proxy for liability proof.

JUSTICE PHIL JOHNSON: I think we can understand that, that one pretty well and, and very briefly, could you hit the high points on your proof of design defect argument?

ATTORNEY SCOTT P. STOLLEY: Yes, um, five seconds. The, uh, the plaintiff's expert, uh, used the process of elimination, ultimately it narrowed down to the three connectors that are in the circuitry system. Um, he ignored one of those, uh, connectors and said it's got to be in one of the other two, I and he couldn't say which one and he couldn't say what the defect was in either of those connectors. He just compared them to other connectors and said they're not as robust, but he didn't establish that this, these defectors were unreasonably dangerous in design of some type um--

JUSTICE PHIL JOHNSON: In and of themselves. He just compared them.

ATTORNEY SCOTT P. STOLLEY: Yes.

JUSTICE PHIL JOHNSON: Thank you.

JUSTICE NATHAN L. HECHT: Thank you, Mr., any, uh, further questions? Thank you, Mr. Stolley. The Court will hear from the Respondent.

MARSHAL: May it please the Court, Mr. Jeffery Levinger will present argument for the Respondents.

ORAL ARGUMENT OF JEFFREY S. LEVINGER ON BEHALF OF THE RESPONDENTS

ATTORNEY JEFFREY S. LEVINGER: Thank you and may it please the Court, I think you can see that this was a difficult case for Kia to defend because you had a severe frontal head-on collision. The passenger airbag deployed, but the driver airbag did not deploy killing, uh, Ms. Ruiz, the driver, and I think under that circumstance you can see the difficulties they had in trying to make 82.008 fit the situation. Uh, at the outset, this Court does not need to distinguish, in my view, between a performance standard, uh, versus a design standard nor do you need to get into the legislative history nor do you need to look at whether the, uh, whether the standard governed a defect [inaudible].

JUSTICE DEBRA H. LEHRMANN: Let me ask you this, but we do have to look at *Wright* and in *Wright*, the product risk was the risk of injury and death occurring when a driver does not have a clear view of the rear. So why isn't the risk here of injury and death to the occupants when a mo, motor vehicle is involved in a crash? Can you kind of respond to that?

ATTORNEY JEFFREY S. LEVINGER: Well, what, what you're asking about, Your Honor, is the second element, which is is there a standard that governs the product risk and the product risk is defined in *Wright* and I think defined correctly was, uh, the risk of backing up with a blind spot. Likewise, the product risk here is the risk of an airbag not deploying in a crash. The failure of an airbag to deploy, that's the product risk. It's not occupant injury in a crash anymore than in the *Wright* case it was injury to pedestrian. If you look at page seven of their reply brief, at least seven times they use the phrase injury risk and I think that underscores the problem and the statutory language is not injury risk. It's, it's product risk and that's what we have here.

JUSTICE NATHAN L. HECHT: But the, uh--

ATTORNEY JEFFREY S. LEVINGER: The failure of an airbag to deploy.

JUSTICE NATHAN L. HECHT: But the airbag, um, is not required to deploy every single time under every single circumstance.

ATTORNEY JEFFREY S. LEVINGER: Right.

JUSTICE NATHAN L. HECHT: I mean you can build a car that way, but [inaudible].

ATTORNEY JEFFREY S. LEVINGER: That's correct, sure.

JUSTICE NATHAN L. HECHT: And so why doesn't 208, um, set the level of risk? So if, if you run into something and it deploys, that's all we're required.

ATTORNEY JEFFREY S. LEVINGER: Well, in this particular case, there was absolute agreement across the board that this in, that this collision was so severe that it had to trigger the bag and, and 208 says that you have to have, it gives the manufacturer free leeway to design the bag and the circuitry however it chooses to do so, but the standard says it has to activate in a crash when that's required. In this case, the crash required that bag to activate and it did not and that's why the first element of the statute is not met. We don't have a, we don't have compliance here. The, the product's design did not comply with the standard because it did not activate the crash.

JUSTICE NATHAN L. HECHT: Well, but it--

JUSTICE JEFFREY S. LEVINGER: It failed after it.

JUSTICE NATHAN L. HECHT: But it seems to me the flaw in that argument is it doesn't have to deploy every single time, isn't that right? You just said.

ATTORNEY JEFFREY S. LEVINGER: That's correct. In fact, there are instances where it shouldn't deploy.

JUSTICE NATHAN L. HECHT: So is this within that realm of risk? The federal government has come along and said well we can't injure near these perfectly, here's the risk; that's acceptable and just with 211 and you're backing over somebody, yes, that's going to happen. You know we could fix it where it didn't. People couldn't buy cars, uh, so this is an acceptable level of risk. Why isn't the same thing true of 208?

ATTORNEY JEFFREY S. LEVINGER: Well, what you're, it, actually that is in 208, Your Honor. What 208 addresses is forces in accelerations and equipment, that's what it says in the standard and what that means is when you've got a test and the car crashes into the frontal barrier at 30 miles an hour, the bag is supposed to deploy and there's supposed to be certain head injury criteria and so forth that shouldn't, the bag shouldn't come out too fast, it shouldn't come out too slow. In this particular case, as the court of appeals I think correctly noted, this case isn't about forces and accelerations. It's not about equipment. It's about a bag that failed to deploy when it should have deployed and in that sense, it did not comply with the standard and in that sense, the standard governed a product risk here. The product risk of the bag or the standard did not govern the product risk of the bag failing to deploy. Now you may ask well when would you have a standard, uh, that would govern a failure, a failure to deploy and I'll, I'll give you the answer to that.

Um, FMVSS109 is a good example of that and it's described in the *Trinado* case in the Fifth Circuit. That case involved a tire failure and 109 set forth failure standards. It set forth a permissible level at which a tire may fail based on strength tests and endurance testing. We have nothing like that in 208, nothing. There's nothing about failure testing, nothing about failure standards and that's why I say they didn't meet the second element. They didn't meet the element of showing that you have a standard that governs the product risk. Let me give you another example. We have the industry standard here that was testified to great length at trial. They call it the 69 standard. You can only have one failure in a million occurrences. If that industry standard were embedded in rule 208, I would say that we, we would have a standard that governs the product risk, but, again, that's no where in 208. 208 is a minimum standard that deals with forces and accelerations and, and equipment.

JUSTICE DEBRA H. LEHRMANN: Can we kind of get into the spreadsheet a little bit?

ATTORNEY JEFFREY S. LEVINGER: Sure.

JUSTICE DEBRA H. LEHRMANN: Are you maintaining that that entire spread sheet of warranty claims was admissible, uh, even the ones that did not involve the error code, error code 56? What is?

ATTORNEY JEFFREY S. LEVINGER: Right, I understand exactly what you're saying. The way in which, uh, the trial lawyer, Mr. Brown, relied on it was to simply emphasize the 63 code 56 entries on that spreadsheet. There were 63 attributable to this vehicle, the Spectra and then another four on the Sephia, which is the predecessor vehicle. That's all he relied upon. That's all he questioned their corporate representative, Ms. Cameron, about. Uh--

JUSTICE DEBRA H. LEHRMANN: Do you concede that those others probably shouldn't have been admissible?

ATTORNEY JEFFREY S. LEVINGER: Well, they probably--

JUSTICE DEBRA H. LEHRMANN: The court of appeals talks about this limiting instruction, which is kind of strange the way they [inaudible].

ATTORNEY JEFFREY S. LEVINGER: Well he offered, in fact, to redact the exhibit. Uh, that exhibit was prepared by them in response to his request for production I think number 30.

JUSTICE DEBRA H. LEHRMANN: Uh-huh.

ATTORNEY JEFFREY S. LEVINGER: And they handed that to him, it was very small, they blew it up. He actually offered to redact it and they never took him up on the offer because, in fact, they were employing a trial strategy to emphasize all of them and to show that, in fact, they reported all of them to the US government and the US government had never recalled the vehicle. So I think it was, it was consistent with their trial strategy not to redact it and not to request a limiting instruction. Now to be sure, they didn't want it to come in at all, but once it came in they had no interest whatsoever narrowing it down. The plaintiffs, on the other hand, limited just in code 56 in terms of their examination and in terms of their argument and, um, and the--

JUSTICE PHIL JOHNSON: Whether the if it's in evidence, it's in evidence. Jury goes in the jury room and they're not limited to what the lawyers argue.

ATTORNEY JEFFREY S. LEVINGER: Of course and that's--

JUSTICE PHIL JOHNSON: So, so the real question here seems like is trial strategy or, I mean, uh, or improper admission it seems like maybe.

ATTORNEY JEFFREY S. LEVINGER: Right and I think the court of appeals got it right in focusing on rule 105A.

They said there was never request by the, by Kia for a limited, limiting instruction so, therefore, if it's admissible for one purpose and I would argue that at least 63 of them were admissible because they're reasonably similar, then it comes in for all purposes because they never offered to redact or never took Mr. Brown up on his offer to redact and never, uh, requested a limiting instruction in any way. [inaudible].

JUSTICE DEBRA H. LEHRMANN: What about the, I'm sorry; go ahead.

ATTORNEY JEFFREY S. LEVINGER: No, it's, that's okay.

JUSTICE DEBRA H. LEHRMANN: What about the other evidence other than the spreadsheet? Let's say if you just take that aside then, then what other evidence supports your position?

JUSTICE DEBRA H. LEHRMANN: Are, are you asking about with respect to the, the evidence of the defect or?

JUSTICE DEBRA H. LEHRMANN: Uh-huh. Uh-huh.

ATTORNEY JEFFREY S. LEVINGER: Okay, the defect is an interesting issue because there was actually remarkable agreement between the parties on this one where they all agreed, for example, that, uh, the driver's, uh, airbag failed to deploy when it was supposed to deploy. They all agreed that you're not supposed to have a split deployment when one bag deploys and the other doesn't and they agreed that there's a problem when you do and they all agreed that there was an open circuit in the driver's side circuitry and they also agreed that it was not the ADU, that it was not the wiring, that it was not the ADU, um, excuse me, the clock spring and it was not the airbag module. So you had Mr. Mann, our expert, who got together with their experts and did extensive testing even stripping all the wiring harness out of the vehicle and he pinpointed it, he, he isolated the open circuit to two possible connectors, the one at the clock spring and the one at the, uh, the airbag module.

JUSTICE EVA M. GUZMAN: Did he have to identify which of those two connectors, uh, was the problem and, and if he didn't, then did he have to identify a specific defect within the connector to support his theory?

ATTORNEY JEFFREY S. LEVINGER: Right, well to answer your second question, Justice Guzman, he did identify a specific defect. I'll, I'll describe that in a moment.

JUSTICE EVA M. GUZMAN: Within the connector?

ATTORNEY JEFFREY S. LEVINGER: Yes, but, no, he did not need to differentiate between the two because they were similarly designed, uh, connectors and, and were flawed and defective for the exact same reason and, interestingly, until oral argument in the court of appeals, they never made the argument that he had to narrow it down further to one of those two connectors. It was always sufficient as best as I could tell their briefing that he had narrowed it down to the, to the clock spring connector and the airbag module connector, but they made the argument at oral argument and I think the court of appeals correctly said he didn't need to go any further because within a reasonable degree of engineering certainty, he identified the same essential defect in these connectors which were relatively

identical in their design.

JUSTICE EVA M. GUZMAN: Okay, so when you say flawed and defective for the same reason that is specifically the fact that he articulated that they were flawed and defective for the same [inaudible]?

ATTORNEY JEFFREY S. LEVINGER: Yes and, and, in general, what he was saying was that these two connectors are too flimsy, too flimsily designed to make a good electrical connection to maintain the certainty, uh, the electrical connection in the circuitry and he was very specific about it. He, he, they had in evidence and I would encourage the court to order these up from the court of appeals if you don't have them. You can actually see the real connectors, I think it's Plaintiff's Exhibit two and five and then you can compare it to the actual, uh, safer alternative designs that he identified the Packard connector and the VW connector and what he did was he compared them side by side and he said the Kia is a very, it's a single locking mechanism whereas the others had a double locking mechanism, the taps spread out on both sides, maintaining a more secure connection.

He said that the, um, that the Kia was made out of very thin plastic. He said that the others were more, more robust, heavier, uh, plastic. In fact, he said the Volkswagen glued together to maintain a safer, uh, secure connection. He said that the Kia had very small metal pins that were inadequate to secure a good metal-to-metal connection whereas he said the others had bigger pin surfaces, bigger metal surfaces to maintain that connection and then he said the Kia, uh, connectors, at least the clock spring connector plugged in right at the clock spring where there tended to be a lot of vibration because of the steering column.

Whereas he said the packer, uh, clock spring connector plugged in away from the, uh, uh, the clock spring thus getting it away from a lot of the vibration. So I think when you saw his or heard his analysis side by side of these two, you can see exactly what he was describing in terms of the defect in the Kia, but but actually that's not all. Uh, I mentioned a moment ago that the jury actually had the physical exhibits so I think this is important because in the *Ledesma* case the same comment was made. The jury had in front of it the U bolts so they could see what the manufacturing defect were there. Here, uh, the jury had, and I think this Court should get likewise, very telling when you see these connectors and you, and you can actually play with them and see the looseness of them and compare it to the safer alternative designs. Also, this was interesting. At the end of the trial, Kia did a demonstration of what they called the buck. The buck was a, was a cutaway version of the Spectra that they actually brought into the courtroom and they were trying to demonstrate up at the buck how it was possible allegedly for Mr. Ruiz to replace the radic in a way that might disconnect the, uh, uh, the connectors. Now, of course, the jury rejected that argument.

They assigned no negligence whatsoever to Mr. Ruiz and other evidence rebutted that possibility, but interestingly during the demonstration at the buck, they removed the, uh, steering column and as they did so, the connectors disconnected and the jury could audibly hear this click and then they would click them back and then as they put the steering column back on, they disconnected again and I think that, that demonstration at the buck inadvertently from their standpoint I think confirmed the defectiveness of these connectors, which according to Mr. Mann, were so flimsy that they just didn't maintain a good proper, uh, connection.

JUSTICE EVA M. GUZMAN: How does the record reflect the incident you just described is obviously for us to be able to measure it out? Does the record reflect that?

ATTORNEY JEFFERY S. LEVINGER: Right, well it's, it's the volume 13, pages 325 to 327 and they, they just noted it verbally on the record. They, they said, uh, you know, I, I can't remember the exact verbiage, but the gist of it was as we're taking off the steering column, you can hear it click; somebody noted that there was an audible click. So I think that's how you know. The comment was made that he didn't eliminate other possibilities. No, he, he eliminated, uh, all possible or plausible possibilities. He eliminated the ADU connector as being the problem. The ADU connector was a four-port, uh, connector and he said there's no problem with the design of this one cause it has a very robust locking device and it worked. Uh, it fired three out of the four safety devices it was intended to fire. The fourth port, which, which went out to the driver's side, they tested it. He found no problems and, and as I mentioned, he found that there was a very secure locking device. So we eliminated that. Now they make the argument that well he was also suppose to eliminate a manufacturing defect and my response to that is the manufacturing defect just isn't even a plausible explanation here because as I understand a manufacturing defect, it is where there's a deviation from an acceptable standard or specification.

Here they didn't have an acceptable standard or specification. There were none. There was nothing from which to deviate. The problem here was in the design of these connectors not that they had an excellent standard or specification from which there was a deviation. That was not the issue here. So my point is he eliminated plausible possibilities and wasn't required to eliminate implausible ones like the manufacturing defect and, finally, I'll just say that this case is very different from the cases they relied upon which involved vehicle fires or unintended acceleration or tire failures, things like that where there are a constellation of possible explanations as to why something fails many of which are benign. Tires fail because sometimes they're just old, but that's not true of, of an airbag. An airbag is encased within the vehicle. Uh, it's, it's there for one purpose and one purpose only and that's to deploy at that very moment when it has to and when it doesn't and when it kills somebody, uh, that's, that's the problem and that's the defect, uh, that distinguishes this case from all those other cases where you have a variety of possible explanations that, that may well be benign.

JUSTICE NATHAN L. HECHT: Under what circumstances do you think standard 208 could be a defense under Section 82.008?

ATTORNEY JEFFREY S. LEVINGER: Well, I, I think the best examples are the *Wright* case, uh, where the rear-view mirror did comply in all respects with FMVSS111, uh, the *Hamid* case out of the Houston court is another good example where the braking system did comply and there was no question about it. It did comply with FMVSS105 and 135. The allegation in both those cases was that, well, there should have been some additional, uh, safety device not called for by the regulations that made it defective. Uh, I think they were saying in, in *Wright* it was the addition of a rear sensing system or something to that effect. In *Hamid*, it was a brake, uh, uh, stability system, which weren't called for by the regulations and that was the problem in those cases. You have compliance, uh, the product complied with the standard, but they were arguing for something above and beyond the standard so I think that's a good, a good example.

JUSTICE NATHAN L. HECHT: But in your view, 208 could never be the defense, a defense of that standard?

ATTORNEY JEFFREY S. LEVINGER: Well--

JUSTICE NATHAN L. HECHT: Just unlike the other standards is your argument.

ATTORNEY JEFFREY S. LEVINGER: I, I think there are too many cases where 208 would provide them a rebuttable presumption. Now, of course, I think 208 is inadequate in many respects to, uh, to avoid risk to the public and we're starting to see some of these.

JUSTICE NATHAN L. HECHT: But suggest a situation where 208 could be a defense.

ATTORNEY JEFFREY S. LEVINGER: Um, it, it would be a situation where, uh, the bag deploys, but the argument is, uh, uh, it should have, an additional bag should have come out to provide more protection and you would say, well, 208 specifies the optional equipment that the manufacturer has to put in and 208 doesn't require that additional piece of equipment you're asking for or I suppose there could be a case where the argument is that the bag came out, but, uh, it injured the person nonetheless.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, is it your, do you believe that your position will allow plaintiffs to avoid the presumption of no liability by focusing on minute aspects of the design?

ATTORNEY JEFFREY S. LEVINGER: No. No, I know they accuse us of slicing and dicing, but I don't think we're doing that at all. We're, we're simply defining the product risk the right way. The product risk here is the failure of an airbag to deploy in a crash. It's not, you know, the, a neck injury where two vertebrae are fractured or something to that effect. We're not fracturing the case in that way. We're defining product risk the way it ought to be defined. In contrast, they're defining it so broadly, uh, to, number one, focus on injury risk not product risk and they define it so broadly that it, that 82.008 would apply in every single crash worthiness in this case and give them a presumption because we have probably 25 crash worthiness standards in the FMVSS and they define the product risk so broadly that, uh, that it would apply across the board in all of them because every one of those crash worthiness standards, of course, is intended to protect, you know, an occupant from an injury in a crash. So you can't define product risk that broadly.

JUSTICE PAUL W. GREEN: So if you hit, if the airbag deploys and you hit the A-pillar anyway, you may, there may be some immunity involved in that.

ATTORNEY JEFFREY S. LEVINGER: Yes, well a rebuttable presumption because I think you could rebut it by saying, well, it's inadequate because the standards should have said XY and Z about A-pillar protection, but, yes, but when it doesn't deploy, that's, that your problem.

JUSTICE NATHAN L. HECHT: Any other questions? Thank you, Mr. Levinger. Mr. Stolley, I think you have five minutes.

JUSTICE EVA M. GUZMAN: Mr. Stolley, could you address Counsel's last point concerning the, um, broad application of the product risk and, and 208 not applying ever?

REBUTTAL ARGUMENT OF SCOTT P. STOLLEY ON BEHALF OF PETITIONERS

ATTORNEY SCOTT P. STOLLEY: Um, yes, the--

JUSTICE EVA M. GUZMAN: Or I'm sorry, applying in every single circumstance.

ATTORNEY SCOTT P. STOLLEY: Well, you have to look at the substance of the allegations in the case and the substance of what the regulation is trying to protect against and the risk is a risk of injury. It's, it's nice to say, as Counsel says, it's the product risk, but the risk is always some risk of injury; otherwise, you don't have a lawsuit. So you've got to look at the risk of injury the product, that the regulation is trying to protect against and here, it's occupant injury in a crash. It's occupants being tossed around a car and having a secondary collision within the car. If our government has said you've got seatbelts and airbags that meet these standards, then, um, then you've complied with the test; you've complied with the standards. Um, Counsel's argument is that it didn't comply cause it didn't deploy and that, that is the wrong way, that's an inaccurate way to look at 82.008 and the Federal Motor Vehicle Safety Standards. First of all, all the experts in the case agreed the car complied. The court of appeals agreed it was undisputed, but the car complied with 208, um, and the operative thing to look at is that the design complied at the time the car left the manufacturer's possession. That's what the FMVSS is about.

When your car leaves your possession, here's what it has to do and this design did that. 82.008 talks about the design complying. It doesn't talk about every unit in the field performing the way the standard says. It says your design has to perform the way the standard says. Um--

JUSTICE PHIL JOHNSON: Assuming that to be the case then, it all, it comes down to design defect or defect of manufacturing, negligence of manufacturing in a case like this.

ATTORNEY SCOTT P. STOLLEY: Uh, 82.008 only applies to design defects.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY SCOTT P. STOLLEY: Uh, it does not immunize manufacturers from manufacturing defects. Um, that's always an option for the plaintiff to try to prove. They didn't try to prove that in this case. That's one of the causes they failed to exclude, um, even though their own expert said, hey, this connector's got some play in it. That you would think would be a huge clue that, you know, I better look at this thing and see if it's not as secure as the design requires it to be. Um, so they didn't, they didn't, um, eliminate that as a possibility. Um, the test the Counsel talked about where they took the circuitry out of the car and they had this momentary "gremlin," um, did not include the third connector. That connector was not part of the circuitry when they did that test. So that test, that connector was never exonerated. It was never tested, um, and the fact that it wasn't tested doesn't exonerate it, um, but anyway back, back to the issue about compliance with the standard and, um, the word failure is such a loaded word in this context. Um, he talked about standard 109, which is a tire performance standard, which does have some language in it about, um, you know, how long your tires supposed to last under what conditions.

Um, uh, so you don't, the, the federal government has set a threshold for failure of tires. Uh, if you meet that threshold, your tire passes. Well, the same is true with respect to occupant protection from crashes. Um, if we didn't have seatbelts or airbags, um, probably every car would basically fail to protect an occupant from injury. The federal government says we don't want every car failing to protect occupants. We want some standard that says up to this threshold, you have to protect the occupants from injury and here's, here's what we, you need to do and you balance the risk and the utility, this is what the federal government requires, um, and, in fact, two of the cases that we've cited, the *Trinado* case and the *Idar* case, are both tire failure cases so they are cases where products met the federal standard yet they still failed in the field and all three courts that ruled on that case said 82.008 applies to this tire failure. The product didn't perform. It failed, but it still passed the standard when it left the manufacturer's possession and, therefore, um, 82.008 provided the tire manufacturer with immunity in that case. Um, so in closing, we ask the Court to reverse and render on the first two issues; on the third issue regarding the spreadsheet, we would ask you to reverse and remand it.

JUSTICE NATHAN L. HECHT: Thank you, Mr. Stolley. Case is submitted and the Court will take another brief recess.

MARSHAL: All rise.

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