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Supreme Court of Texas.
Bic Pen Corporation, Petitioner,
v.
Janace M. Carter, as Next Friend of Brittany Carter, Cross-Petitioner and Respondent.
No. 09-0039.

March 23, 2010.

Appearances:

Reagan W. Simpson, King & Spalding LLP, Austin, TX, for petitioner.
Lisa D. Powell, Atlas & Hall, L.L.P., McAllen, TX, for cross-petitioner and respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Harriet O'Neill, Justice Dale Wainwright, Justice David M. Medina, Justice Phil Johnson, Justice Don R. Willett, Justice Eva Guzman. Justice Paul W. Green not sitting.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 09-0039, BIC Pen Corporation vs. Carter.

MARSHALL: May it please the Court, Mr. Simpson will present oral argument for Petitioner. The Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF THE PETITIONER

MR. REAGAN W. SIMPSON: May it please the Court, Mr. Chief Justice Jefferson, Members of the Court. Jonas Carter, age five years and two months, accidentally set his sister's dress on fire with a BIC lighter. Those facts do not raise any reasonable inference of an injury-causing product defect. The lighter did not malfunction; it produced a flame, as it was intended to do. A significant percentage of children under the age of five are expected and in fact intended to be able to operate child-resistant lighters, and child-resistant

lighters are not made resistant to children over the age of five. Turning first to the issue of causation in this case. The plaintiff contends that slightly higher sparkwheel and fork forces would have prevented this accident. But there is no expert testimony to that effect. Expert testimony is required in this case because you're dealing with very small forces that are outside the common knowledge of jurors, you're dealing with interrelationships between five design characteristics that are beyond the common knowledge of jurors, and in some regards you're dealing with counterintuitive facts. If you look at some of the data that's in this record, and I have provided the Court with some exhibits. If you turn to Exhibit 3 in the handout, it is a chart that we had as Appendix 15 to our brief. If you compare, for instance, Surrogate 4 to Surrogate 3 on that chart, you will see that there are lower values on Surrogate 3, but higher child resistance. The same is true in Surrogate 6 in comparing Surrogate 2.
JUSTICE DAVID M. MEDINA: Mr. Simpson?

MR. REAGAN W. SIMPSON: Yes?

JUSTICE DAVID M. MEDINA: Can we go into this Preemption issue? The last time the case was before us, the Court decided that the design of this lighter, of these type of lighters, that's preempted. What about the manufacturing defect in the manufacturing of these lighters?

MR. REAGAN W. SIMPSON: In this case, the manufacturing defect and the design coalesce, because the single intent of the manufacturer is to produce a lighter that meets the performance-based standards set by the Consumer Product Safety Commission.

JUSTICE DAVID M. MEDINA: So would that flow over to any product where the CPCS is involved and provides guidelines?

MR. REAGAN W. SIMPSON: It depends on the circumstances, and in this case we're talking about balancing. We're balancing competing interests. There's actually three interests that are being balanced. One is the safety to children, the other is user friendliness, so that people don't avoid disposable lighters and therefore don't take advantage of the fact that they're safer than nonchild-resistant lighters. And there's also cost, because if disposable lighters become too costly, then people won't buy them and you won't have that kind of protection. So when you have balancing of various factors, and you have lines you just have to draw, then that is something that is suitable for preemption. And in this case, for instance, the expert hired -- one of the experts hired by the plaintiff said at Volume VII of the record, page 93, Mr. Kitzes, that the CPSC standard is not unreasonable. So if the CPSC standard is not unreasonable, and you have to prove an unreasonably dangerous defect, then you go back to the CPSC 85 percent standard. And the same thing is true as far as the manufacturing defect is concerned. The question is whether the product deviates from specifications or planned output. The planned output, as Mr. Labrum and Mr. Adams testified is, a lighter that complies with the 85 percent standard of the Consumer Product Safety Commission. So in this case, we believe that they all coalesce so that this Court's decision that the design parameters are preempted by Federal Law also applies to the manufacturing defect, because there's been no proof in this case that the subject lighter would not have passed the CPSC standard. In fact, the plaintiffs had an expert, Mr. Givons, who came up with a test that was excluded by the Trial Court, so he was not able to testify to his opinion that it would not pass the CPSC standard.

JUSTICE DAVID M. MEDINA: And so you're saying that we address these on a case-by-case basis, depending on what the product is, and do this balancing test for every product where there are rules and regulations by the federal government? For example, vehicles have to meet certain standards by the federal government, which brings up this Toyota issue into mind. Let's say they met the -- the design was preempted and would get to the manufacturing of these alleged defective gas pedals, and so how would you we analyze something like that?

MR. REAGAN W. SIMPSON: I think the analysis is on the preemption that if the, if there's a balancing between competing interests and the federal government has drawn the balance, then that is preempted, because otherwise you're going to have other people drawing different balances. And that's what happened in this case. There was argument that, "Well, why don't we protect children over five? Why don't we protect 98 percent instead of the 85 to 90 percent." And that was argued based on the Consumer

Expectancy Test, which ordinarily in a case like this would mean there's no liability because people expect that lighters are going to produce a flame. But when you have balancing of that sort, then the balancing preempts other types of balances that other people may draw. Now, there may be situations where there are, you have a floor rather than a ceiling, and there's no balancing involved, and a higher standard would not frustrate the federal objective. But if you make -- just as the Court held in the design case, if you apply a higher design, 98 percent, children age eight, then you have upset the federal balance. And the purpose is to draw a balance between the risks to children, which includes how often this product is going to be used, which depends on user-friendliness and costs.

JUSTICE DAVID M. MEDINA: Was Jonas' age really an issue here, the fact that it involved a child that may have had some disability?

MR. REAGAN W. SIMPSON: I don't think that that's an issue in this case because, again, the federal standard says, and sometimes you have to draw arbitrary lines in setting balances, the federal standard says, "below five," and actually the test is 42 to 51 months, I think is the children that are involved in the test. And the CPSC standard specifically says you should exclude from the test any children who are handicapped or have some unusual inability to operate the lighter. So not only is he not similar to the people who are tested, he's actually excluded by the regulations from being a part of this test. So there is no data in this case that would support any claim that the subject lighter would not pass the federal test. And whether you look at it at preemption standpoint or you look at it simply an unreasonable danger, the other side admitted that the 85 percent standard is not unreasonably dangerous. There was no proof that this particular lighter would not have passed the federal test.

JUSTICE HARRIET O'NEILL: Well, how do you factor in the destruction of evidence? I mean that seemed to factor into the court of appeals' analysis, the very proof that would be required to show whether you met the standard has been destroyed.

MR. REAGAN W. SIMPSON: Well, I disagree with that in this respect. That again, Mr. Labrum and Mr. Adams said, "Our planned output, our goal, our single goal, is to have a lighter that meets the federal standard." And I think what's happened in this case is the manufacturing specifications have been elevated to something that is a goal rather than a means to a goal. All that was destroyed, and if you look at DX-1 in Volume 28, it shows the control card that was not available. And it sets internal, maximum, minimums, average on that card, and that's what we're talking about. That relates to internal manufacturing specifications. It has nothing to do with unreasonable danger, it has nothing to with whether this lighter passes the CPSC test. All it has to do with the internal specifications, which we say are not controlling here because the planned output is a lighter that meets the federal standard.

JUSTICE DALE WAINWRIGHT: The argument has been made in the brief that the jury was permitted to infer that BIC did not comply with federal standards. Do you disagree with that?

MR. REAGAN W. SIMPSON: There's no room in this case for circumstantial evidence, and the reason -- and there are several reasons. One is you have -- and I think a lot of the circumstantial evidence that they argue really is sort of a very res ipsa, and as Justice Hecht pointed out in the Ford vs. Ridgeway case, you don't have res ipsa when you have, unless you have a situation where something is not going to occur ordinarily in the absence of a product defect. And here we have a product that's expected to be operated by a number of, by a significant percentage of children who are under the age of five. So for that reason, there is no room in this case for circumstantial evidence. It also depends upon expert testimony in this case. What is the effect of a 51-gram difference in force, a 38-gram difference in spark-wheel force, is something the jurors aren't going to know. And there's counterintuitive facts here. I pointed a couple of them out, but one thing I want to emphasize, and it's the last exhibit that I have, 4, it's excerpts from DX-191. DX-191 shows a test on a one-piece hood J-26 lighter with a square sparkwheel. The only reason for changing to a square-wire sparkwheel was to reduce sparkwheel force, because the round wire at the coil end created a high peak that would cause jamming. So the whole purpose of redesigning this, the sparkwheel wire was to reduce the sparkwheel force. In addition, they lowered the sparkwheel force, the bottom of it, and they started using the CPSC method used in the 1994 manual of the CPSC, to look only at maximum force. And despite all of that, with the same type of lighter, it still achieved the 90 percent rating that passed the CPSC test. So the

idea that somehow you can take 16 lighters out of one test, or one surrogate and 16 children, and extrapolate that into some concept that this lighter would not have passed the CPSC test simply doesn't work. And that's assuming some sort of one-to-one relationship between the ease of operation and the sparkwheel force. And the evidence simply doesn't support that, in fact contradicts that. And if you think about it, that's not all that surprising because the sparkwheel force depends upon the friction. Well, if you had no sparkwheel force, you would have no friction, you would have no spark. So there's an interrelationship between the amount of spark produced and the sparkwheel force. And all of these things are way beyond the ability of jurors to analyze in this case, and there was no expert testimony presented. The expert that they had was, in fact, excluded by the judge, and so they have no opinion testimony that this particular subject lighter would not have passed the CPSC standard, which this Court has held is preemptively enforced by federal law.

JUSTICE NATHAN L. HECHT: You say in your principal brief that there is no evidence of causation for many of the same reasons, quote-unquote, as no evidence that the lighter was unreasonably dangerous.

MR. REAGAN W. SIMPSON: Right.

JUSTICE NATHAN L. HECHT: But it seems like it's actually all the same reasons, not just many of them, and there's a sort of congruence there. But then you say later in the brief that, "There must be evidence that Jonas himself would not have been able to operate the lighter, but for the asserted deviations in the specifications." How could that ever -- why should that be the test?

MR. REAGAN W. SIMPSON: Well, that should be the test because you have to look as specifically this particular case. What would be the effect of having slightly higher sparkwheel forces and fork forces in this particular case?

JUSTICE NATHAN L. HECHT: But say that we knew that this lighter would not pass the 85 percent test. It would come in at, say, 80 percent. Then do you still have to prove, does the plaintiff still have to prove that Jonas would have been one of the 20 percent?

MR. REAGAN W. SIMPSON: I think you would still have to prove through expert testimony that this accident would not have happened but for that product defect. Because the requirement is that the product defect be causally related to this particular event.

JUSTICE NATHAN L. HECHT: But the defect, it seems to me, is in the increased risk. It doesn't really matter whether the sparkwheel force is what it should be one way or the other, as long as it still passes the 85 percent? That's the ultimate test.

MR. REAGAN W. SIMPSON: That's correct, that's correct.

JUSTICE NATHAN L. HECHT: And there may be some deviations here, as the surrogates show, but if it passes the 85 percent test, that's enough. But then why do you have to go further and prove that the plaintiff himself, if the risk is increased, why does the plaintiff have to go further and prove that he would have been in the group that got hurt and not in the group that didn't?

MR. REAGAN W. SIMPSON: Well, I think this goes to the issue that the amicus curiae also talk about. If you just have evidence of generalized increase of risk, is that enough for causation? And traditionally that has not been enough for causation, and they're trying to use in this case some Havner-type principles, but it's Havner without specific causation. So that's why that doesn't work in this particular case. You still have to have --

JUSTICE NATHAN L. HECHT: Well, there are two differences. Havner has the doubling of the risk as the threshold, here you have the 85 percent standard. But it seems to me that if you showed that the lighter would fail, if the expert testimony had not been excluded in this case, and there were evidence somehow or another, it seems to me it would be hard to get, but if there were evidence that it would not pass that test, and say even dramatically, it was 60 percent, wouldn't that be enough to show causation? You don't have to

go further and show that for some strange reason this child was better at mechanics, less better at mechanics? I mean it seems to me the Havner analysis applies, it's just that you're not comfortable with the threshold doubling argument that the Respondent makes?
MR. REAGAN W. SIMPSON: Well, I don't think it's a strange reason because, again, under the standard we're expecting that up to 15 percent of children can operate any child-resistant lighter.

JUSTICE NATHAN L. HECHT: Right.

MR. REAGAN W. SIMPSON: It's a design that makes it somewhat harder, so that parents will have an opportunity maybe to intervene, and plus parents already know to keep lighters away from children. I don't see any reason to suspend the burden of the proof on the plaintiff. It may be hard to prove, but I don't see any reason to suspend the burden of proof that the plaintiff has, particularly when you have a situation where the product operated as it was intended to operate. This is a product that's been designed to create a flame.

JUSTICE NATHAN L. HECHT: But it seems like it would be impossible. It seems like that if you had to prove not just that, the lighter would fail the 85 percent test, but that also this particular plaintiff would be able to operate it when he wouldn't otherwise because of the deviations. He would be in the 20 percent, but he wouldn't be in the 15 percent. He's in this gap. I don't see how the plaintiff could ever prove that.

MR. REAGAN W. SIMPSON: Well, in Calles vs. Scripto-Tokai, they did have an expert have an expert who testified that a four-year-old with an Aim-and-Flame would not have operated that if it had some child resistance. So I'm not saying it would be easy, Justice Hecht, to present that evidence, but I think evidence can be presented. Just like it's not easy to prove that it didn't pass or wouldn't pass the CPSC test. And Judge Estlinbaum said, "I'm not going to just be weighted to solely to what BIC's test is, but you've got to do more than Mr. Givons did to prove that." So I think I go back to when you have a product that operates as is intended, that has a known risk that everybody recognizes, and has to have that risk in order to operate, that you don't suspend the burden of proof and need to have some sort of expert testimony analysis that the defect would in fact, that the higher sparkwheel force or fork force would have prevented the accident.

CHIEF JUSTICE WALLACE B. JEFFERSON: The CPSC does not have manufacturing specifications for these lighters?

MR. REAGAN W. SIMPSON: No. It's a performance-based standard.

CHIEF JUSTICE WALLACE B. JEFFERSON: So how is it preempted? Doesn't there have to be some kind of direct conflict between a standard that the federal government adopted before there is preemption?

MR. REAGAN W. SIMPSON: Well, it goes back, again, to what you're looking at in this case, and what is the planned output. I think, again, there's been too much focus on manufacturing specifications. The planned output is a lighter that passes the federal tests, rather than specifications, because if you start getting into specifications, then you could have all sorts of ratcheting up that has nothing to do with the planned output. As I showed on Exhibit 191, they reduced sparkwheel force, they measured it by peak forces, maximum peak rather than average of peaks, and it still gets 90 percent. So the specifications don't drive this. It's a performance-based standard. The specifications are there to make sure that what you're producing is going to meet the performance-based standard. The CPSC has gone to BIC, has looked at their manufacturing facilities, has looked at the way they test lighters. They're the only manufacturer in the United States. It's not like they have to make appointments with people all over the country. And they have never said anything that is critical about the performance standard, BIC's compliance with it, the way it tests its lighters, the way it ensures that the lighters will meet the performance standard. But I think a lot of this case has gotten into looking at the manufacturing specifications, when really the issue is the planned output. What is the intent of the manufacturer, and the intent of the manufacturer is not to specifications, and not -- the CPSC doesn't even set specifications, but it says, "Your lighters must pass this 85 percent test."

JUSTICE PHIL JOHNSON: But doesn't this lighter not meet some of the manufacturing specifications that were designed to pass the test?

MR. REAGAN W. SIMPSON: Well, it gets into some very detailed facts, but we don't know that, Justice Johnson, because of the differing testing procedures. This lighter, the subject lighter was tested in accord with the 1997 specifications, which were changed. And as far as the fork force, in 1997 they were measuring it to gas, in 1995 they were measuring it to 1 millimeter, and gas may be less than 1 millimeter, so you can't make a direct comparison between the results that were obtained in the test that was done in 2003 and the 1995 specifications.

JUSTICE EVA GUZMAN: And if you had those records that BIC destroyed, would that, I guess, clarify some of the differences in the testing?

MR. REAGAN W. SIMPSON: No, because it has nothing to do with the subject lighter. We have the subject lighter; the subject lighter was available for testing and inspection. The plaintiffs could have asked for any other type of testing they wanted to be done on that lighter, but the control card, the computer backup on the control card is going to talk about the audit that was done for that particular week, and would show you minimum and maximum and average of what they were aiming for, their targets in their production, but it's not going to tell you anything about this particular subject lighter. And that's one of the reasons we thought that the spoliation structure was wrong. We're not arguing that today, but because it really has nothing to do with the key issue in this case, is the subject lighter defective and did it cause the accident.

JUSTICE DAVID M. MEDINA: Mr. Simpson, your response to the Chief's question on these guidelines that CPCS had for the design, but did not have the manufacturing of the product, it takes me back to the original line of questions. I mean it seems like any manufacturer of a product could hide under that theory, your response, that we met the guidelines required to design this product. We did the testing, let's say on a manufacturer that produces wall sockets. It's a real simple product to make, it has certain design features, and there's a lot of them for whatever reason -- "a lot" being a manufacturing lot -- that don't meet the requirements. But that company can say, you know, "We followed the CPCS design protocol and we met the testing. Five percent of them failed, and therefore everything is preempted. I mean how would a consumer ever go forward on a case of a defective product?

MR. REAGAN W. SIMPSON: Well, what's preempted is trying to take 16 children using one particular surrogate and extrapolating that into some sort of circumstantial evidence without any testimony by an expert on specific causation. So the court of appeals said, "Well, you shouldn't be able to preempt the design, and let somebody manufacture at a level that's not going to meet the design." But there's no evidence in this case that the subject lighter would not meet the 85 percent test. The expert that they hired to say that was excluded, and there is no evidence in this record that it would not have met the test, and under those circumstances, then there is no proof of an injury-causing defect because the defect relates to the performance standards.

JUSTICE DAVID M. MEDINA: So the answer is, if they can get an expert that passes the Trial Judge's, the gatekeeper of the evidence and all those good things, then they have a chance to forward?

MR. REAGAN W. SIMPSON: And I'm not saying it's easy in this case, to respond again to Justice Hecht's comments too. But there's no reason for suspending burdens of proof when you have a product that operates as it was intended to operate. There's no malfunction. The plaintiff should have the burden to prove not only the unreasonable danger, the product defect, but also causation resulting from the defect.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Simpson. The Court is ready now to hear argument from the Cross-Petitioner and Respondent.

MARSHALL: May it please the Court, Ms. Powell will present argument for the Cross-Petitioner Respondent.

ORAL ARGUMENT OF LISA D. POWELL ON BEHALF OF THE RESPONDENT

ATTORNEY LISA D. POWELL: Good morning. We are here today in a products liability suit arising from a fire that was started by Jonas Carter. Jonas was then five years and two months old, and he started the fire with a BIC J-26 lighter. His sister, Brittany, then six was severely burned over 55 percent of her body and suffered many painful months in the hospital undergoing treatment for those burns. The jury determined that the subject lighter, the lighter that was used to start the fire, had both manufacturing and design defects and awarded damages. We are here today in connection with the manufacturing defect claim. Let me first address some of the questions that I think have been addressed by -- raised by the Court earlier. Let me begin with preemption. First of all, I don't think that this is an issue that the Court needs to spend a whole lot of time on, because even BIC admits that if the lighter did not meet the CPSC specifications -- now hold for a minute on exactly what those are -- but even BIC admits that if the manufacturing defect is a parallel claim; that is one that the lighter did not meet the CPSC requirements, that that is not preempted and can be the basis for a manufacturing defect claim without any preemption issue. It's our contention that the plaintiffs have demonstrated evidence of that. Now, we think preemption doesn't go that far, and would allow the manufacturer to set higher standards, but let's take a look just at that type of claim. One issue that was raised is, well, it's just a question of whether they meet the 85 percent, but bear in mind that the Consumer Product Safety Commission sets the 85 percent standard, but how does the CPSC require the manufacturers to indicate that they get to that standard? Under the regulations, the manufacturers are required to provide to the CPSC a complete description of the child-resistant features, of the lighter design, and the related dimensions and forces. So that is how -- that is the evidence. BIC was required to certify to the CPSC the types of specifications and forces that were central to the child resistance of this particular lighter. BIC did so, and some of the key characteristics -- they identified five factors and the forces relating that were central to those five factors. And what we are arguing here today is that the lighter did not meet the specifications that even BIC indicated were central to child resistance. For example, the evidence at trial -- and then we're talking about BIC's, the test that BIC conducted on its own lighter. It wants to now challenge the test methodology, but bear in mind that BIC is the one that did this test and BIC shows the methodology on the 2003 test on this lighter. It's only after they did the test that they begin saying, "Well, we think we used the wrong methodology in testing it." But BIC is the one that choice the test. BIC's own evidence, of course, is equivocal on exactly how it was tested at the time of the production. But taking a look at the manufacturing result, the 1995 CPSC specifications for fork force, "fork" being the thing that presses down to release the gas, had to be between 400 to 600 grams. Set aside the issue of whether or not BIC's internal manufacturing standards were higher than that, and BIC doesn't even know at this point what its internal manufacturing standards were. But let's -- even assuming that those standards are merely what BIC certified to the CPSC is central to child resistance on this particular lighter, the 2003 test that BIC conducted showed that fork force was only 349 grams or some 12 to 13 percent below the minimum CPSC standard that BIC sent to the CPSC as being critical to child resistance. So this is a force-based lighter, and the forces involved therefore are critical to the child's ability to operate the lighter, that is to overcome the shield, press down on the fork and rotate the sparkwheel in order to operate the lighter. In addition, according to BIC and its certifications to the Consumer Product Safety Commission, the sparkwheel rotational force should have been a minimum of 2.3 pounds to 3.7 pounds. That's in BIC's certification to the CPSC. The subject lighter though, however, even on BIC's own tests, for two-thirds of a rotation, which is enough to strike the lighter and create a flames two times, never rose to 2.3 pounds, never got to the level that BIC's specified as a minimum for the central characteristic of sparkwheel rotational force.

JUSTICE DAVID M. MEDINA: Ms. Powell, excuse me. But what impact, if any, does the striking of your expert have on this case?

ATTORNEY LISA D. POWELL: I don't think it has any because I think we have other evidence.

JUSTICE DAVID M. MEDINA: Substantial evidence?

ATTORNEY LISA D. POWELL: Yes. Expert testimony is not always required. This Court has indicated that it can be required in some instances. In this case, however, there is expert testimony concerning the underlying facts. For example, BIC itself provides expert testimony in a sense of what the standards are, what the tolerances are, what the specifications are. That's what BIC provided to the CPSC. BIC did the test on its own lighter. All the jury has to do at this point is to look at the test and look at what BIC told the CPSC and say, "Look, this is 11 to 12 percent low on one of the key child-resistant factors, the fork force that BIC certified is critical, and the lighter never got to the minimum force on sparkwheel rotational force

for another key characteristic." At this point --
JUSTICE NATHAN L. HECHT: But what evidence is there, though, that that would have made it fail the test?
ATTORNEY LISA D. POWELL: I'm sorry?
JUSTICE NATHAN L. HECHT: What evidence is there that that, that those deviations would have caused the lighter to fail the 85 percent test?
ATTORNEY LISA D. POWELL: As I indicated initially, that is how the CPSC correlates the 85 percent to the actual production lighters.
JUSTICE NATHAN L. HECHT: Right. But when you look at the data, the data goes up and down, and it's a little bit different here, and the pass rates go up and down, and so you can't really tell. It's very hard to tell whether this little change or that little change made it fail the test.
ATTORNEY LISA D. POWELL: Well, first of all, part of the results that BIC wants to talk about, for example, their lighter that Mr. Simpson was talking about with the square wire is a different lighter. He's talking about comparisons from a different lighter design. That one not only had a different type of sparkwheel, it also had a different hood. So I don't think it's reasonable to compare. If you look at the tests that are done on this lighter, the BIC's surrogate lighter that comes closes to the subject lighter in terms of where the forces actually fell out was Surrogate 5. And that one --
JUSTICE NATHAN L. HECHT: It seems to me that when you reference Surrogate 5, you're essentially conceding we've got to find some evidence that something like this lighter won't pass the test?
ATTORNEY LISA D. POWELL: I think there's several bases upon which we're relying. Surrogate 5 is certainly one of them and is certainly a key one. But in addition, we simply have the evidence that the CPSC required BIC to tell it what tolerances are important to get to the 85 percent. That's what the regulation requires. BIC did that and there is evidence that this lighter is below the minimum specifications on two key characteristics, and significantly low. BIC wants to talk about milligrams or micrograms, but when you -- but that's true of all of the forces here. When you look at the percentages, fork force is -- there's evidence that it's 12 percent low, and there is evidence that on a second key characteristic, sparkwheel rotational force, you could strike it twice without ever getting to the minimum force that BIC certified as being critical. When you have those deviations, I think the jury under that testimony is entitled based upon common knowledge and common sense can conclude that in fact this particular lighter did contain a manufacturing defect.
JUSTICE EVA GUZMAN: That's not risk, though, of a general harm, and how is that -- how do you tie that into the likelihood that those deviations would cause a particular injury?
ATTORNEY LISA D. POWELL: Well, to get to the issue of do we need to show that Jonas himself would not have been able to operate it, that is simply an impossibility, if that's what BIC is going to require. There is simply no way to take Jonas back in time to when he was five years two months old before he had this experience, and retest him on some surrogate lighter. A, it's impossible to Jonas back in time, B, it would have been impossible for the plaintiffs to have the surrogate lighters to do the child test, because that involves BIC's proprietary parts and BIC's equipment. BIC contends that these lighters can only be tested on BIC's own proprietary fixtures. So that's an impossibility.
JUSTICE NATHAN L. HECHT: But it's not impossible to prove that it would fail the 85 percent test.
ATTORNEY LISA D. POWELL: I think we do that circumstantially by showing that it's below specifications.
JUSTICE NATHAN L. HECHT: But you don't -- but you begin by saying you don't think you have to prove that it would have failed the test. You can just say, "If it doesn't meet the specs, that's the end of the inquiry."
ATTORNEY LISA D. POWELL: The fact that it doesn't meet the specifications is evidence that it would -- I agree, yes, but, in addition, the fact that it doesn't meet the specifications is evidence that it would not meet the 85 percent, because those are the specifications that BIC sent to the CPSC and identified as being critical to meeting the 85 percent.
JUSTICE NATHAN L. HECHT: But if there's any gap there, between the failure to the meet the specs and unreasonably dangerous, the failure to meet the 85 percent test, something has got to bridge that gap, and what do you have besides Surrogate 5?
ATTORNEY LISA D. POWELL: Well, I think the fact that it's below specifications on those levels is sufficient.
JUSTICE NATHAN L. HECHT: Right, but --
ATTORNEY LISA D. POWELL: In addition, we would use Surrogate 5 and the spoliation instruction.

Bear in mind that BIC destroyed the evidence that would have shown us what its production results were at that time, what its failure rates were at that time, and more importantly perhaps, BIC destroyed the evidence that indicated what its actual tests were and what its production standards were. Theoretically, BIC could have been manufacturing, intending to manufacture to below the CPSC specifications. We don't know that. They did have evidence that would have shown it at the time, what the test methods were and what the manufacturing internal tolerances were. Those did exist, those are documents that even BIC admits are documents that it would rely upon to show the CPSC that it was meeting its document-retention policy and its obligation to do production testing, but BIC destroyed those, even though there was an outstanding production request for the documents.

JUSTICE PHIL JOHNSON: Counsel, in Havner, we talked about a doubling of the risk. Now, as to this lighter, and going back to some of the line of questioning of where we've been, as to this lighter is there any evidence that the lighter as manufactured, because you had the lighter, had any increased risk because of these manufacturing intolerances?

ATTORNEY LISA D. POWELL: I think there are several things that we can point to, Your Honor. First of all, Surrogate 5, the lighter that's closest to this, had a child-resistance rating of only about 67 percent, versus 90 percent for the test as a whole. That is almost a quadrupling of the risk, and we think that that would meet the Havner standard. Furthermore, simply looking at the significance of the deviations, remember that BIC certified the minimum forces that are necessary to get to child resistance. When you have a lighter that is, we believe, significantly low, on a lighter that is a force-based lighter, this lighter relies upon forces, and we believe that the jury could conclude from that testimony, combined with the psychological testimony concerning Jonas's ability, that Jonas would not have been able to operate the lighter. We do have expert testimony in this case, psychological testing and developmental testing done when Jonas was in school. This was not done for purposes of this litigation, it was done in connection with his school work, that said that when Jonas was eight he was operating at some two and a half years below his chronological age. In addition to that, he had Attention Deficit Disorder and was unlikely to continue to try to operate something that he could not immediately get. And yet, the evidence is here is that Jonas had managed -- had not previously played with lighters and yet managed to light this lighter on his first attempt.

JUSTICE DAVID M. MEDINA: So how is a manufacturer to consider all that? There has to be some bright line test, age, pick an age, whatever that's decided, and how does the manufacturer take into consideration all these other children, such as Jonas, or even children that have greater deficits and are able to somehow to make this product --

ATTORNEY LISA D. POWELL: Well, first of all --

JUSTICE DAVID M. MEDINA: -- to use, to be used as it was intended, which is to light?

ATTORNEY LISA D. POWELL: First of all, there's nothing in the Consumer Product Safety Act or the Lighter Amendments that indicate that manufacturers are somehow totally shielded from liability as to anyone over the age of five. All we're arguing here is that by analogy if BIC had made this lighter so that it would meet the CPSC standard, then it would also have protected Jonas. Jonas, admittedly, was two months older than the key group that the lighter was designed to protect, so technically he's in an unregulated area. Our argument by analogy here is that had BIC made the standard to meet the CPSC criteria, then Jonas who had very significant developmental delays and who had Attention Deficit Disorder would not have been able to operate this lighter. Again, we cannot -- it is impossible for us to test Jonas on that. It simply not possible to take Jonas back in time, you know, regress him before he was able to physically do this and to try to test him again. We can't do that. What we can show is that there is a significantly increased risk when you have a lighter of the specifications of the subject lighter. Because of that, we believe that we have provided evidence that does justify the jury findings. I'd like to take just a brief minute to review Carter's Conditional Petition for Review. The jury found that BIC acted with malice, and in connection with that, the judgment, as entered by the Trial Court, included an award of $750,000 in punitive damages. The Court of Appeals indicated that it felt that there was no evidence to support the jury's finding of malice. We believe that that is incorrect for several key reasons. First of all, the fact that there is an extreme degree of risk associated with lighters that are not child-proof is well known. That's what the government said, that's why we have these standards to begin with. BIC, we believe, did act with conscious indifference in the connection with the manufacture of this lighter. First, BIC was required to test its production lighters for child safety to make sure that the lighters that were rolling off its manufacturing line met at least the CPSC standards. BIC failed to do so. It failed to do production testing, a key child-safety characteristics. It did so for other things on appearance and the ability to produce a flame. It has some 60 automated tests for those things that it does on every single lighter that comes off its assembly

line. But BIC has no automated testing at all on child-safety characteristics. Indeed, BIC has no testing, automated or otherwise, on some of its child-safety tests. It has no production testing at all for fork force, automatic or otherwise. In its deposition testimony, and again, BIC's witnesses are sort of all over the board on what they did or did not do at the time that this lighter was made. But in deposition testimony BIC's witnesses testified that there was no production testing at all for sparkwheel rotational force. Now, they changed their mind at trial, one of a number of things that they changed their mind on at trial, and said, "Well, we do audit testing of 40 to 50 lighters a week for sparkwheel rotational force." Of course, BIC makes some four and a half million lighters a month, so it's a very miniscule amount that they actually test.
JUSTICE DAVID M. MEDINA: Ms. Powell, before you run out of time, is there any issue as to the charge and maybe a waiver by BIC for failing to object to the charge that's significant in the case?
ATTORNEY LISA D. POWELL: We have argued that the charge, that the -- in terms of the 85 percent, we've argued that's not included in the charge. We have argued that BIC is stuck with the charge that was submitted. They don't bring any objection before this Court to the charge as submitted. So that is another issue that we have raised. Returning briefly to Punitives. All of these things, taken especially with their destruction of evidence that deprived the plaintiffs of evidence of exactly what their manufacturing standards was, what their production was at the time, conceivably --
JUSTICE NATHAN L. HECHT: It's hard for me to see how that matters. I mean if you've got the lighter, what difference does it make that you don't have the tests on the run of lighters that were being produced at the time? It seems to me you've got it in your hand, you don't need all that, you don't need the evidence. If it's defective, that's the end of it.
ATTORNEY LISA D. POWELL: We need to know what the standards were, we need to know what their production methodology was.
JUSTICE NATHAN L. HECHT: Why?

ATTORNEY LISA D. POWELL: Because otherwise, how do we prove that it contained a manufacturing defect unless we know what their manufacturing standards was and how they tested.
JUSTICE NATHAN L. HECHT: If they're higher than the Commission standards, you think they apply instead of the Commission standards?
ATTORNEY LISA D. POWELL: That would be our argument, and again you have the issue of how it's tested. But beyond that, it's simply the attitude of BIC in regard to the punitive damages. It's the attitude of failing to test for child-safety features. They're required by law to do the testing. They don't do it. They have no automatic testing at all on child-safety features. They don't have any production testing at all for at least a couple of the child-safety features. And for that little that they did, they threw it away. They do some post-sale testing on some features. They know from that post-sale audit that some BICs get out of BIC's assembly line without, not meeting BIC's characteristics in other regards, even though they theoretically have gone through these hundred-percent tests. But BIC doesn't bother doing any testing at all for child-safety features post audit. Destroying the evidence we think does demonstrate a lack of concern on BIC's part. It was obligated to keep it under the law, it failed to do so. For all of these reasons, we would ask that the punitive damages be restored and the judgment otherwise be affirmed. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Powell.

REBUTTAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF PETITIONER

MR. REAGAN W. SIMPSON: That's why I included DX-191 in the handout, because this is a test of a one-piece hood sparkwheel guard lighter that's exactly the same as this lighter. It's not a two-piece hood, it's exactly the same, except that it says on page 4, the sparkwheel wire is changed. And the sparkwheel wire is changed to reduce sparkwheel forces because there was a peak force caused jamming in the roundwire sparkwheel. The specifications that applied to this were the 1997 specifications. The subject lighter was tested under the 1997 specifications and passed all those specifications. DX-191 shows 90 percent child resistance. DX-134 is a certification by the CPSC that this lighter that was tested meets the requirements. So if that doesn't conclusively prove that lower forces -- the fork force was reduced from .3 to .6. The subject lighter met that criteria too. So if that doesn't prove that the claimed deviations in this case don't make any difference as far as the 85 percent standard, then at the very least it shows that there's a fact issue and you need expert testimony to testify that this particular lighter would not have met the 85 percent

standard.
JUSTICE PHIL JOHNSON: What about their claim that only -- that BIC's proprietary materials and machines are the only real way to test this?
MR. REAGAN W. SIMPSON: Well, Judge Estlinbaum didn't buy that, I think is the way he said it. So he allowed the plaintiff to come up with some credible or relevant way to test and present evidence to the jury, but Mr. Givons was the only expert they proffered on the subject of whether this lighter would pass. And Judge, it was basically putting it in a vice and pulling on it with your hand, I believe. But anyway, Judge Estlinbaum said that wasn't relevant evidence, didn't meet any kind of standard, and so he excluded it. As far as the jury charge, that's an interesting question on the jury charge. The Consumer Expectancy Test was used, as I mentioned before, Justice Hecht, in the Hernandez case indicated that when you have a lighter in a manufacturing defect case, the Consumer Expectancy Test means you don't recover at all because we all expect lighters to operate. And the fact that Janace Carter testified that she knew lighters were dangerous. She put the lighter high away from her kids, her kids knew not to use lighters, but at the very least the Consumer Expectancy Test has to embrace the 85 percent standard. We're all deemed to know the law, how can a consumer expect anything more than the 85 percent standard that the CPSC adopted? What I think happened in this case, because the Trial Judge didn't hold that the design claim was preempted, they were free to argue, "Well, it ought to be 98 percent. It ought to be for children up to age 10." And so the Consumer Expectancy Test was used as a stricter standard in this particular case, because of the error, I think -- well, the error this Court found in not preempting the design case. But Consumer Expectancy could be argued to make this case a summary judgment case. At the very least, the Consumer Expectancy test can't be anything other than the CPSC test. That's why I say all roads in this case lead back to the 85 percent standard. And I believe that the plaintiff has it wrong, it's not the specifications that the CPSC specifies in order to get to the 85 percent, it's the 85 percent performance standard that is controlling. And to make sure that you're going to -- your lighters you produce are going to meet that standard, you've got to have within reasonable manufacturing tolerances, surrogates that are going to look like the thing that you've manufactured. And what DX-191 shows is that something with less sparkwheel rotation force, something with less fork force is going to pass the 90 percent standard. And that's exactly the test, the 1997 specifications, exactly the test that BIC used in testing the subject lighter. And there's nothing in the record indicating that the plaintiffs requested to BIC to do any other test, besides the test under the 1997 specifications. And for those reasons, there is no evidence to support the judgment. Turning very quickly to punitive damages. There's never been any evidence in this case that any BIC lighter has ever failed the 85 percent standard. There's no evidence in this case that the subject lighter would have failed the 85 percent standard. BIC does a hundred percent checks on its components. Not sampling, but a hundred percent checks. It has in production tests on shield force and shield movement, a hundred percent. It does audits, weekly audits on sparkwheel force and fork force. If you look at DX-35, it's a log book that shows that in fact they were doing those kind of tests in the 42nd week of 1997. The CPSC has many times comes to BIC's facility, the only facility that manufacturers this kind of lighter in the United States, hasn't issued any warnings, any violations, noted any problems. BIC has never seen in the production or audits that it's done, the testing, the examinations that it's done, anything that indicates to them that they are not meeting the 85 percent standard. So there is simply no evidence to support any award of punitive damages, and there's no evidence to support causation, unreasonable danger, and no evidence in this case to support product defect.
CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Simpson. The cause is submitted, and the Court will take a brief recess.
MARSHALL: All rise.
[End of Proceedings.]

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