

# IN THE SUPREME COURT OF TEXAS

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No. 95-1159

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UNIROYAL GOODRICH TIRE COMPANY, PETITIONER

v.

ROBERTO O. MARTINEZ AND JUANITA MARTINEZ,  
INDIVIDUALLY AND AS NEXT FRIENDS OF ROBERT MARTINEZ, JR.,  
AND JOHN MATHEW MARTINEZ, MINORS, RESPONDENTS

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ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

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Argued on October 2, 1996

JUSTICE HECHT, joined by JUSTICE ENOCH and JUSTICE BAKER, and by JUSTICE OWEN in all but Part II, dissenting.

The Court's revision of its opinion on rehearing requires a responsive revision in this dissent. The dissenting opinion issued July 3, 1998 is accordingly withdrawn, and this opinion substituted.

Having changed about a thousand tires in his life, Roberto Martinez admits he knew better than to lean over a tire while inflating it. Besides, he had seen the pictographic warning on the very tire he was changing which showed a worker being hurt by an exploding tire and warned: "NEVER stand, lean or reach over the assembly during inflation." Ignoring this warning and his own good sense, Martinez was leaning over the tire, inflating it, when it exploded in his face.

The 16" tire exploded because it would not fit the 16.5" wheel on which Martinez was trying to mount it. Martinez knew it was very dangerous to try to mount a 16" tire on a 16.5" wheel, and

he would never knowingly have tried to do it, but the size of the wheel was not marked where he could find it. He understood that his co-worker had taken a 16" tire off the wheel, and he was simply trying to put the same size tire back on. The Budd Company, which manufactured the wheel to Ford Motor Company's specifications, knew, as did Ford, that people sometimes try to mount 16" tires on 16.5" wheels, not realizing that tire and wheel are mismatched. To minimize the risk of such mistakes, Budd and Ford could have changed the design of the wheel to prevent mounting mismatched tires, but they did not do so. Budd could also have simply stamped the size in plain view on the outboard side of the wheel near the valve stem where it was almost sure to be seen, but it did not do that, either. Instead it encoded the size in small letters on the inboard side, where it was hard to find if the wheel was clean, and indecipherable if the wheel was dirty, as it was in this case.

Although a 16.5" wheel can be designed so that a 16" tire cannot be mounted on it, a 16" tire cannot be designed so that it cannot be mounted on a 16.5" wheel. A tire manufacturer's only options to reduce the risk of injury from attempting to mount a 16" tire on a 16.5" wheel are to place a warning on the tire or to design the bead wire so that it will withstand higher inflation pressure before exploding. The Uniroyal Goodrich Tire Company, which made the tire Martinez was using, chose to put a prominent, pictographic label on it, which, as I have said, Martinez actually saw but did not heed. Had he done so, he would not have been injured. In fact, according to the record, only one other person has ever claimed to have been injured attempting to mount a 16" tire with a warning label like Goodrich's on a 16.5" wheel, although thousands of labeled tires and more than thirty million 16.5" wheels have been manufactured in the past two decades.

Now as among Martinez, the wheel manufacturers, and Goodrich, how should responsibility for Martinez's accident be apportioned? The reader may be surprised at the answer in this case.

Martinez, though negligent by his own admission, is held to bear no responsibility for the accident. The wheel manufacturers, too, are held to be free of responsibility (they settled with Martinez before trial) although the undisputed testimony by both Martinez's and Goodrich's experts is that Budd and Ford defectively designed the wheel. Only Goodrich is held liable — and for providing a warning on the tire that would have prevented Martinez's accident altogether instead of redesigning the bead wire so that the accident would only have been less likely. This aberrant result flows from four serious flaws in the Court's opinion which, even more importantly, misstate the law that will be applied in other cases.

First, the Court holds that a product can be found to be defective whenever it could be more safely designed without substantially impairing its utility. This is not, and should not be, the law. As the *Restatement (Third) of Torts: Products Liability* advises, a “broad range of factors” besides the utility of a reasonable alternate design should be considered in determining whether its use is necessary to keep the product reasonably safe, including “the magnitude and probability of the foreseeable risks of harm [and] the instructions and warnings accompanying the product”.<sup>1</sup> When the undisputed evidence is that the magnitude and probability of a risk are low, an alternative design could reduce but not eliminate that risk, and the instructions and warnings given do eliminate the risk, the product should be determined not to be defective as a matter of law.

Second, the Court holds that whether a wheel is defectively designed “because its size is not clearly marked or because its design allows a mismatched tire to be placed on it” can be decided by “lay jurors, based on their own experience and common sense,” unaided by expert opinion.<sup>2</sup> It

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<sup>1</sup>R ESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. f, at 23 (1998).

<sup>2</sup> *Ante* at \_\_\_\_.

follows that a plaintiff, by offering no evidence other than his own lay opinion, could prove that a wheel was defectively designed — that is, that risks of harm were foreseeable, that there was a reasonable alternative design that would reduce and avoid them, and that the omission of the design rendered the product not reasonably safe. I doubt whether such lay testimony would support a judgment in any design defect case.<sup>3</sup> The record in this case proves that such evidence could not possibly support a judgment for Martinez.

Third, the Court holds that evidence of thirty-four other claims of injury over fifteen years from trying to mount 16" Goodrich tires on 16.5" wheels was admissible without proof that any of the claims were valid — some were undisputedly invalid — or that they arose out of accidents similar to Martinez's. A few weeks ago the Court held that evidence of anticipated or unpaid punitive damage claims is irrelevant and inadmissible to show punitive damage liability.<sup>4</sup> Today the Court holds that evidence of other claims — whether proven or not, and whether similar or not — is relevant and admissible to show liability. The Court also holds that an expert may testify that a product has caused serious injury and death when no basis at all has been shown for the statement.

Fourth, the Court holds that the district court's refusal to bifurcate the punitive damages part of the trial was harmless error because Martinez did not offer evidence of Goodrich's net worth. But while net worth evidence can unfairly prejudice the jury's consideration of liability issues, it is not the sole source of prejudice. Today's opinion undermines the bifurcation requirement of *Transportation Insurance Co. v. Moriel*.<sup>5</sup>

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<sup>3</sup> See *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 991 (5<sup>th</sup> Cir. 1997) (suggesting that expert testimony would be required in design defect cases).

<sup>4</sup> *Owens-Corning Fiberglas Corp. v. Malone*, \_\_\_ S.W.2d \_\_\_, \_\_\_ (Tex. 1998).

<sup>5</sup> 879 S.W.2d 10 (Tex. 1994).

Because I disagree with all these holdings, for reasons I now explain in more detail, I respectfully dissent.

## I

Comment j to Section 402A of the *Restatement (Second) of Torts* states:

Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.<sup>6</sup>

We have followed the first clause of comment j, but only to the extent of holding that a plaintiff is entitled to a rebuttable presumption that had he been adequately warned of the dangers of a product, he would have avoided injury, despite the fact that experience teaches that “it is not at all unusual for a person to fail to follow basic warnings and instructions.”<sup>7</sup> The presumption is merely a procedural device to obviate the necessity of plaintiff’s self-serving testimony that he would have heeded adequate warnings.<sup>8</sup> In making the presumption rebuttable we recognized that the first clause is not always true. Further, we have never followed the second clause of comment j, and now the *Restatement (Third) of Torts: Products Liability* has withdrawn comment j altogether as “unfortunate language” that “has elicited heavy criticism from a host of commentators.”<sup>9</sup> The Court’s firm rejection of comment j, which the Court has never adopted and the *Restatement* has now itself rejected, is perhaps beating a dead horse, but I agree that comment j does not correctly state what the law is or should be.

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<sup>6</sup>R ESTATEMENT (SECOND) OF TORTS § 402A, cmt. j, at 353 (1965).

<sup>7</sup> *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 358 (Tex. 1993); see *Magro v. Ragsdale Bros., Inc.*, 721 S.W.2d 832, 834 (Tex. 1986); *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 606 (Tex. 1972).

<sup>8</sup> *Saenz*, 873 S.W.2d at 359.

<sup>9</sup>R ESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, Reporters’ Note, cmt. 1, at 101 (1998).

Since it is human nature to disregard instructions, a rule that any product is reasonably safe as long as it bears an adequate warning of the risks of its use is not feasible. Such behavior, however, does not warrant the opposite rule that warnings are irrelevant in determining whether a product is reasonably safe. I agree with the Court that comment 1 to Section 2 of the *Restatement (Third) of Torts: Products Liability* now has it about right:

Reasonable designs and instructions or warnings both play important roles in the production and distribution of reasonably safe products. In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks. For example, instructions and warnings may be ineffective because users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings. However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. Warnings are not, however, a substitute for the provision of a reasonably safe design.<sup>10</sup>

I do not agree, however, that the Court correctly reads or follows comment 1. Comment 1 limits but does not foreclose the role of warnings in making products reasonably safe, even when there is a safer alternative design. The Court stresses the last sentence of comment 1 and brushes past the first sentence. Taken as a whole, the comment says, correctly, I think, that a safer alternative design that eliminates a risk is required over a warning that leaves a significant residuum of risk because product users may not get the warning, may be inattentive, or may not be motivated to heed the warning. The illustration accompanying comment 1 is of a worker whose foot is severed by a garbage truck's blade and compaction chamber when he loses his balance jumping onto the back of the truck.<sup>11</sup> A warning on the truck, "keep hands and feet away", does little to protect against a worker's foreseeable

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<sup>10</sup>RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. 1, at 33 (1998)(citation omitted).

<sup>11</sup> *Id.*, illus. 14, at 33.

inadvertence or misstep in the usual discharge of his job. But the warning might well be adequate admonishment to the merely curious, even if the garbage truck could be designed to be safer, if the residuum of risk were insignificant. Even if the risk that a worker will lose his balance and slip is significant enough to warrant designing additional protections in the truck, the risk that someone will intentionally stick his hand in a place where it obviously may be hurt when he is effectively warned not to do so may not warrant design changes.

Section 2(b) of the *Restatement (Third) of Torts: Products Liability* states the applicable rule:

A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, *and* the omission of the alternative design renders the product not reasonably safe.<sup>12</sup>

There are two components to this rule: the possibility of a safer, reasonable alternative design, *and* a product that is not reasonably safe without that design. Both are required. Even if a reasonable alternative design would make a product safer, the product is not defective unless the omission of the design makes the product not reasonably safe. The comparison is not between the two designs, but between the product alternatively designed and the product including any warning. Comment f to Section 2 explains:

Subsection (b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. The relative advantages and

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<sup>12</sup>RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), at 14 (1998) (emphasis added).

disadvantages of the product as designed and as it alternatively could have been designed may also be considered.<sup>13</sup>

The Reporters' Note gives an example of how factors other than a safer alternative design affect the determination whether a product is defective:

Comment *f* lists among the factors a court may consider in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe the following: (1) magnitude and probability of the foreseeable risks of harm; (2) the instructions and warnings accompanying the product; and (3) the nature and strength of consumer expectations. A recent California case is in agreement. In *Hansen v. Sunnyside Products, Inc.*, 55 Cal. App. 4th 1497 (1997), the court held that in a claim alleging defective design of a household cleaner containing hydrofluoric acid, the availability of an alternative safer design was not dispositive of liability. The factfinder could consider the warnings on the bottle describing the danger of exposing a user's skin to the cleaner in risk-utility balancing to decide whether the product was unreasonably dangerous.<sup>14</sup>

*Hansen* explained its rationale as follows:

We do not think that the risk to the consumer of the design of many household products can be rationally evaluated without considering the product's warnings. Thus, for example, what is the risk of the design of a power saw, or other power tools or equipment, without considering the product's directions and warnings? We dare say that the risk would be astronomically, and irrationally, high. The same could be said about common garden pesticides, or even the household microwave oven. In our view, were we to ask jurors to evaluate the risks of the design of many household products without considering their directions or warnings, the practical result would be the withdrawal from the market of many useful products that are dangerous in the abstract but safe when used as directed.<sup>15</sup>

Another example the *Hansen* court might have picked is aerosol cans. Such cans are not defective merely because they could be redesigned so as not to explode if punctured or incinerated. A warning against such misuse ought to be sufficient.

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<sup>13</sup> *Id.* § 2, cmt. f, at 23 (citation omitted).

<sup>14</sup> *Id.* § 2, Reporters' Note, cmt. f, at 94.

<sup>15</sup> *Hansen v. Sunnyside Prods., Inc.*, 65 Cal. Rptr. 2d 266, 278 (Ct. App. 1997).

The Court protests that it has not disregarded the effect of warnings in determining whether the possibility of a safer alternative design makes a product defective but has merely left the matter to the jury. But the question remains: can any product be shown not to be defective as a matter of law if a reasonable alternative design could have avoided plaintiff's injury? The Court suggests no such possibility. The *Restatement* appears to contemplate that a product is not defective as a matter of law if the safer design does not eliminate the risks, or if the warning on the product does not leave a significant residuum of risk, as when "users of the product may not be adequately reached, may be likely to be inattentive, or may be insufficiently motivated to follow the instructions or heed the warnings."<sup>16</sup> The present case illustrates this rule. Concededly, the evidence favorable to Martinez shows that the Goodrich tire's bead wire can be redesigned, mostly to increase its strength, without significantly reducing the tire's utility or increasing the danger of blowouts at highway speeds. Such an alternative design is thus reasonable and safer. But it only reduces — it does not eliminate — the risk that a tire being mounted on a mismatched wheel will explode. The undisputed evidence in this case is that a 16" tire cannot be mounted on a 16.5" wheel, and that if the tire continues to be inflated in an effort to force it to seat on the wheel rim, it will explode. Redesigning the bead wire only means that the tire will withstand higher inflation pressure before exploding. Although there was evidence that the alternate design would prevent the tire from exploding at ordinary mounting pressures, nothing about the design precludes the person mounting the tire from continuing to increase the pressure in an effort to force it to seat on the rim. Because the risk of explosion cannot be eliminated, omission of the alternative design may not make the tire not reasonably safe under comment 1 of the *Restatement*.

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<sup>16</sup>R ESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2, cmt. 1, at 33 (1998).

Nor was Goodrich's warning ineffective, another factor under comment 1. Goodrich's warning label showed a picture of a person being injured by an exploding tire and stated in bright colors:

## DANGER

NEVER MOUNT A 16"  
SIZE DIAMETER TIRE  
ON A 16.5" RIM.

Mounting a 16" tire on a 16.5" rim can cause severe injury or death. While it is possible to pass a 16" diameter tire over the lip or flange of a 16.5" size diameter rim, it cannot position itself against the rim flange. If an attempt is made to seat the bead by inflating the tire, the tire bead will break with explosive force.

...

NEVER inflate a tire which is lying on the floor or other flat surface. Always use a tire mounting machine with a hold-down device or safety cage or bolt to vehicle axle.

NEVER inflate to seat beads without using an extension hose with gauge and clip-on chuck.

NEVER stand, lean or reach over the assembly during inflation.

...

Failure to comply with these safety precautions can cause the bead to break and the assembly to burst with sufficient force to cause serious injury or death.

Martinez does not question the adequacy of the warning. It cautions not only against mismatching tires and wheels but against inflating tires in certain ways under *any* circumstances. The record in this case does not show that a warning against mismatching tires and wheels will not reach users. On the contrary, Martinez testified that he saw the warning on the tire, and anyway, he knew that it would be very dangerous to try to mount a 16" tire on a 16.5" wheel. As Martinez put it, "common

sense also tells you that where you have a mismatch you can get injured.” Martinez was not inattentive, as the garbage truck worker who lost his balance. He knew better than to lean over a tire — any tire — while inflating it. None of the reasons in comment I that warnings may be ineffective apply in this case.

Nor were the warnings impractical. Despite the fact that Martinez was not provided with any of the safety devices prescribed in the warning — a workable tire mounting machine, a cage, or an extension hose with gauge and clip-on chuck — and may not have been able to bolt the wheel back on the trailer from which it had been removed before mounting the tire, he could have avoided injury by simply not leaning over the tire while inflating it. Martinez testified as follows:

Q Now, I believe you have also testified, Roberto, that while you are inflating a tire you would not want to be leaning over the tire as you inflate it.

A No.

Q And by that I mean when you are airing it up during the mounting process you would want to lean away from it; would you not?

A Well, just don't get over it, you know, just be right beside it.

Q Why would you not want to be leaning over it?

A Because that's the way I was caught.

Q Okay. Do you feel it would be a safety consideration, to be safer to not be over the tire —

A Yes.

Q — while you're inflating it?

A Yes.

The inboard side of the tire, next to the ground, exploded. Martinez was injured when the wheel struck his head. The wheel also struck the roof of the shop overhead and dented it. Clearly, had Martinez not been leaning over the wheel, as he knew not to do and as the tire label warned against, the tire would not have struck his head.

Given the ease with which injury can be avoided, there is no evidence that redesigning the bead wire will eliminate a “significant residuum of risk” in the tire as designed with the warning label. In fact, Martinez’s own evidence is to the contrary. The record establishes that there has been only one other claimed injury caused by attempting to mount a 16" tire with a warning label on a 16.5" wheel. The record does not reflect whether that claim was ever proved. Thousands of 16" tires have been manufactured with warning labels; millions of 16.5" wheels have been manufactured without warning labels. Martinez’s evidence (which should not have been admitted) shows thirty-four claims against Goodrich for injuries caused by mismatching unlabeled 16" tires on 16.5" wheels. There has been one other claim involving a labeled tire. The tire industry should not be compelled to redesign bead wires to make tires harder to explode — or pay damages for failing to do so — simply because one or perhaps two mechanics over the years failed to follow directions or their own good sense.

From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.<sup>17</sup>

Thus, under comment l, there is no evidence that omission of the safer bead wire design made Goodrich’s tire not reasonably safe. The risk of explosion could not be eliminated, the warning was

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<sup>17</sup> *Id.* § 2, cmt. a, at 16.

clear, effective, and easy to follow, and thus no significant residuum of risk remained in the tire as designed with the warning label attached. In the Court's view, a product manufacturer may be liable for failing to make any feasible design change that does not significantly impair a product's utility, if only to prevent rare mishaps from conscious disregard of adequate warnings. That is all the evidence in this case shows. The Court appropriately rejects one extreme position — comment j to Section 402A of the *Restatement (Second) of Torts* — but then adopts the opposite and equally extreme position. In so doing, the Court swings toward strict liability.

## II

The evidence is undisputed that the wheel was defectively designed, and that the defect helped cause the accident. Martinez's expert testified:

Q And in your opinion the Budd wheel, Exhibit 2, is defective.

A Yes, sir.

Q And it was a cause of the accident.

A Yes, one of the causes.

Martinez's expert explained that a 16.5" wheel can be designed to prevent mounting a 16" tire, but that the tire cannot be designed to prevent attempts to mount it on the wheel. Moreover, the expert explained that stamping the size on the wheel in plain sight, as some wheel manufacturers do, would reduce the risk of mismatching. Martinez acknowledged that it "makes sense" that the size of the wheel be stamped on the outboard side near the valve stem where it can easily be seen. Martinez's co-worker also testified:

Q If when you were working with this wheel you had seen the number 16.5 you wouldn't have proceeded, would you?

A No, sir.

Q You knew based on your experience that you do not mix different sizes?

A No.

Q That's something every mechanic knows?

A Yes, sir.

Q If the wheel that you were working on had the warning . . . , "To avoid personal injury during mounting of tire to wheel mount only 16.5 inch diameter tire," you would not have proceeded because that would have told you that the wheel really was 16.5?

A Yes, sir.

The undisputed evidence is that Budd and Ford did not design their wheel to prevent 16" tires from being mounted on it, and did not stamp the size where it could be seen. Rather, the size was included in a string of numbers stamped on the inboard side of the tire that were hard to find and harder to decipher. The wheel Martinez was working on was so covered by caliche that it would have been virtually impossible to find the tire size.

Goodrich argues that the evidence conclusively establishes that the wheel rim was defectively designed and that the defective design was a cause of Martinez's injuries. The Court rejects this argument, using the rule that "opinion testimony, even when uncontroverted, does not bind the jury unless the subject matter is one for experts alone".<sup>18</sup> The Court concedes that "expert testimony was probably necessary to show the feasibility of the alternative rim design which would have prevented a mismatched tire from passing over the rim flange."<sup>19</sup> Thus, in the Court's view, with which I

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<sup>18</sup> *Ante* at \_\_\_\_.

<sup>19</sup> *Ante* at \_\_\_\_.

agree, the evidence establishes one component of defective design — the possibility of a safer, reasonable alternative rim design.<sup>20</sup> The second component — that the rim was not reasonably safe without the alternative design<sup>21</sup> — is not in this context, according to the Court, a matter for experts alone. Thus, the Court concludes, the evidence does not conclusively establish that the wheel rim was defectively designed. But the Court’s conclusion does not follow from its premise. That is, even if the jury was free to disregard expert testimony that the wheel rim was unreasonably dangerous as designed, including the testimony on Martinez’s own expert, *because the subject was not one for experts alone*, the matter may nevertheless be conclusively established by the evidence.

As a general rule, the testimony of a party or a witness who has an interest in the outcome of a suit cannot conclusively establish a matter but raises an issue of credibility on which the jury must pass.<sup>22</sup> But there are exceptions. Even summary judgment can be granted on “uncontroverted testimonial evidence of an interested witness . . . if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.”<sup>23</sup> As we explained in *Collora v. Navarro*:

First, the general rule governing the finality to be given to testimony of an interested witness is by no means an absolute one to be applied in a cut-and-dried fashion. Rather, it is flexible and its application must turn on the facts of each case. Certainly there will be cases where the credibility of an interested witness or party is so suspect that it must go to the jury, even though the testimony is uncontradicted. Then there will also be cases where the testimony of the witness is so clear that the jury should not be allowed to speculate as to his veracity. Between these two extremes lies a broad spectrum of possibilities. Our courts have recognized this in

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<sup>20</sup> See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(B), at 14 (1998).

<sup>21</sup> See *id.*

<sup>22</sup> *Collora v. Navarro*, 574 S.W.2d 65, 69 (Tex. 1978).

<sup>23</sup> EX. R. CIV. P. 166a(c).

the past by setting forth certain standards by which the rule and its exceptions are to be measured: Is the testimony clear, direct, and positive? Is it internally consistent? Is it contradicted or corroborated by other witnesses? Does the opposing party possess the means to verify or dispute the testimony? Does he have a way to test the witness' credibility? Obviously no one factor automatically can be dispositive in every case.<sup>24</sup>

*Collora* was a suit for partition of real property in which plaintiff claimed an interest as defendant's common law wife. Plaintiff testified that she and the defendant had agreed to be husband and wife — one of the elements of a common law marriage — and the evidence conclusively established the other elements. Defendant did not testify or offer evidence in rebuttal. The trial court directed a verdict for the plaintiff, based on her uncontradicted testimony. The court of civil appeals reversed, holding that the plaintiff's testimony did not conclusively establish the existence of an agreement to be husband and wife because the jury could have chosen not to believe her, and thus reasonable minds could differ over the conclusions to be drawn from her testimony.<sup>25</sup> This Court reversed the court of civil appeals, holding that the directed verdict was proper.

The testimony of Martinez and his co-worker, as well as Martinez's expert witness, that the wheel rim was unreasonably dangerous was contrary to Martinez's interest in the case. It was to Martinez's benefit that the percentage responsibility for causing his injuries assigned to the wheel manufacturers be as low as possible, since he had already settled with them. Testimony that the wheel rim was defectively designed undercut Martinez's position that Goodrich alone was responsible. Because there was nothing to cast suspicion on Martinez's testimony or that of his co-worker and his expert witness concerning whether the wheel rim was unreasonably dangerous as

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<sup>24</sup> *Id.*

<sup>25</sup> *Navarro v. Collora*, 566 S.W.2d 304 (Tex. Civ. App.—Corpus Christi), *rev'd*, 574 S.W.2d 65 (Tex. 1978).

designed, the jury was bound by that testimony. Their testimony, contrary to Martinez's interest, was more like testimony by a disinterested witness. Professors William Powers, Jr. and Jack Ratliff have explained the considerations for determining whether a disinterested witness's testimony is binding on the jury:

Must the jury accept [the uncontradicted testimony by a disinterested witness]? That is, does such testimony, if uncontradicted, [conclusively establish a fact]? The prevailing and better view is that the reasonable minds test should apply here. If there is nothing to cast suspicion on the testimony — that is, if reasonable minds could not differ — then the jury must accept it. But, if the testimony is impeached, inconsistent, or otherwise suspect (even though not directly controverted) — that is, if reasonable minds might or might not accept it — then the jury may reject it. McDonald aptly observes that disinterested testimony is, in fact, treated much the same as interested testimony, except that courts are more inclined in the case of interested testimony to find suspicious circumstances that would allow the jury to reject it.<sup>26</sup>

Even without the testimony of Martinez, his co-worker, and his expert, the record establishes that the wheel rim was defectively designed. As already noted, the factors to be considered in determining whether a product is unreasonably dangerous include the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, the nature and strength of consumer expectations regarding the product, and the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed.<sup>27</sup> Concerning these factors: the risk of injury from mismounting a tire was the same for the defectively designed wheel rim as for the defectively designed tire; the wheel bore no warnings, as the tire did; consumer expectations were no different for the wheel than for the tire; and there was no evidence

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<sup>26</sup> William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence"*, 69 TEX. L. REV. 515, 524 (1991) (citing 3 R. McDONALD, TEXAS CIVIL PRACTICE § 11.28.6, at 209 (1984)). See 4 McDONALD TEXAS CIVIL PRACTICE § 21.58, at 149-151 (1992).

<sup>27</sup> R. ESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b), cmt. f, at 23 (1998) (emphasis added).

that the wheel rim design was advantageous or the alternate design disadvantageous. In sum, the evidence established that the tire was less dangerous than the wheel rim, because the tire at least had a warning label and the wheel had none.

The Court states that Martinez's expert's testimony that the wheel was defective was not evidence that it was unreasonably dangerous. But the expert was directed by Martinez's counsel to assume that "defect is defined by the Court as being unreasonably dangerous. The Court states that the expert's opinion was not conclusive, given the factors the jury was to balance. But the only factors the jury was instructed in the charge to consider were "the utility of the product and the risk involved in its use." Moreover, Martinez's expert testified that the defect in the wheel could have been remedied simply and without difficulty. Specifically, the expert testified as follows:

Q From the moment it came on the market the 16-1/2-inch rim could have been changed so that you couldn't get the wrong sized tire on it.

A I believe it could, yes.

Q The same thing is not true for the 16-inch tire. There is no way to design or alter the 16-inch tire so that somebody by mistake doesn't try to put it on a 16-1/2-inch wheel. That is true; isn't it?

A I don't know of a way to do it, no. I have not seen a way to do that.

Q In your view, if the wheel companies were going to come out with a new 16-1/2-inch size which actually looks somewhat smaller than the 16 they should have designed that new wheel in such a fashion that it looked very different from the old 16; isn't that correct?

A I would certainly recommend that, yes.

Q In your opinion, that could have been done.

A I think it could, yes.

Q That would not have been difficult to do.

A No; I can see where one could do it.

Q And it is further your opinion that once it occurred to the wheel companies that they had done something that was, in fact, causing a substantial problem, they then could have taken what they had and altered its configuration so that you couldn't get the wrong sized tire on it.

A In subsequent productions they could, yes.

Q And that could have been done by something as simple as filling in the well so that it wasn't quite so deep; is that a fair statement?

A That's one way to do it. There may be other ways to do it as well, but that's one way to do it.

Q Well, the one way that I just mentioned is one that you have specifically advocated yourself.

A I have done that myself, yes.

Q You not only did it, but you wrote a paper on it.

A Yes, sir.

The Court also states that the jury was free to speculate that marking the wheel size on the wheel itself might not have prevented Martinez's injury because the marking might have been covered by caliche or not seen by Martinez. But Martinez's expert's testified that if the size had been stamped in the drop center or the well of the wheel, it could not have been obscured. Specifically, the expert testified as follows:

Q Well, the language here where it says, quote, use only 16.5 tires, that was stamped on Kelsey-Hayes wheels starting at about 1980.

A Yes.

Q Exactly where you wanted it to be, near the valve hole.

A Well, I think, I think you are quoting me a little out of context. I said it wouldn't be a good idea, it would be a good idea for that to be there. But the best

place for it is in the drop center where there is more room for it and where it is not obstructed by dirt and paints.

\* \* \*

Q Okay. Let's be sure that we understand that in plain and simple English. It means, one, that in 1980 General Motors directed its supplier Kelsey-Hayes to stamp something near the valve hole and to place this warning in the well of every wheel it made after that.

A That is right.

Q And Ford never directed Budd to do anything until Budd stopped making the wheel in 1983.

A That's my recollection, yes.

Had the wheel size been stamped or labeled in the drop center or well of the wheel, it could not have been obscured, no matter how dirty the wheel became, and Martinez could not have missed it.

The evidence, including the testimony of Martinez's own expert, conclusively established that the wheel manufacturers bore some responsibility for Martinez's injuries. Since the evidence did not establish the precise percentage of responsibility attributable to the wheel manufacturers, Goodrich is entitled only to a new trial.

### III

Martinez offered, and the district court admitted in evidence, a list of thirty-four lawsuits against Goodrich involving claims for injuries suffered in attempting to mount 16" Goodrich tires on 16.5" wheels. Goodrich complains that Martinez never laid a predicate for admitting this evidence, showing the similarity of the other lawsuits to this one. The Court dismisses Goodrich's complaint in a sentence: "The absence of pictographic warnings on the tires does not render the

accidents so dissimilar as to preclude their admission, but merely goes to the weight of the evidence.”<sup>28</sup>

The Court has not met the substance of Goodrich’s argument. First, Goodrich argues that Martinez laid no predicate whatever for admission of the evidence. Martinez does not, and cannot, dispute this. The district court admitted the list of lawsuits based solely on the statement of Martinez’s counsel that the information had been produced by Goodrich in answer to an interrogatory in discovery. The interrogatory and answer were never offered in evidence (and are not in our record), nor was there any other proof to show the nature of the cases listed. A plaintiff who offers evidence of other accidents is “required to show that the earlier accidents occurred under reasonably similar but not necessarily identical circumstances.”<sup>29</sup> Martinez made no showing whatever. Thus, the Court holds that evidence of other claims may be admitted with no more predicate than counsel’s argument that the claims are similar to the case in which they are offered. This, of course, eviscerates any meaningful evidentiary standard.

Second, although Goodrich argued that the presence or absence of pictographic labels was a significant difference in claims of injury due to mismatch tires, that was not the only difference Goodrich claimed was significant. Other differences in the cases, according to Goodrich’s counsel, were how experienced the injured person was in changing tires, what safety equipment was available, what kind of tire was involved and whether it was radial or bias ply, and what the result was in the case. At least two of the cases were dismissed against Goodrich. The burden was not on

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<sup>28</sup> *Ante* at \_\_\_\_.

<sup>29</sup> *Missouri Pac. R.R. Co. v. Cooper*, 563 S.W.2d 233, 236 (Tex. 1978) (citing *Karr v. Panhandle & Santa Fe Ry. Co.* 262 S.W.2d 925, 928, 932 (Tex. 1953), and *Dallas Ry. & Terminal Co. v. Farnsworth*, 227 S.W.2d 1017, 1020 (Tex. 1950)).

Goodrich to show that the other cases were different; the burden was on Martinez to show that they were similar.<sup>30</sup> Nevertheless, Goodrich pointed out important differences to the court.

Third, the presence of pictographic labels may have been a significant distinction in the cases. Of the thirty-four on the list Martinez offered, only two involved pictographic labels. It may be that fewer accidents involved labeled tires because the labels were effective, or because fewer tires were manufactured with labels, or because labels had been used for only a short time, or perhaps for other reasons. Such arguments would go merely to the weight to be given the evidence, not its admissibility. But without any predicate at all offered by Martinez, it is impossible to say that the presence of the label was not significant.

Finally, admission of the list was extremely prejudicial to Goodrich. Martinez's counsel told the court before trial that "[i]n all these cases we keep talking about . . . they keep killing and injuring people". Martinez's counsel asked his own expert witness: "And some tire companies it only takes twenty-nine or thirty people to get killed or injured before they come to the conclusion that maybe they ought to change their bead." Martinez's counsel asked Goodrich's expert: "So how many people have you all killed?" Without any predicate whatever, Martinez's counsel was permitted to use the list of lawsuits to insinuate repeatedly that others had been injured or killed in circumstances similar to those in this case. This was plainly error.

The lawsuit list was not the only exhibit erroneously admitted. The district court also admitted a chart sponsored by Martinez's expert witness showing the history of changes in bead wire design. The Court's conclusion that "all the evidence contained on the chart was already in

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<sup>30</sup> *Id.*

evidence”<sup>31</sup> is simply false. There is absolutely no evidence of the very prejudicial reference on this time-line to “numerous 16/16.5 mismatch explosions resulting in serious injury or death.” It should go without saying that a party should not be permitted to assert repeatedly that an opponent’s product has killed and injured people without proof that it is actually so.

Only a few weeks ago the Court held in *Owens-Corning Fiberglas Corp. v. Malone* that evidence of anticipated or unpaid punitive damage claims is irrelevant and therefore inadmissible to show punitive damage liability.<sup>32</sup> If anticipated or unpaid punitive damage claims are not probative of punitive damage liability absent evidence of whether such claims have succeeded, I fail to see how actual damage claims are probative of liability for actual damages absent the same evidence. Today’s holding that evidence of other claims — whether proven or not, and whether similar or not — is relevant and admissible to show liability directly conflicts with our decision in *Owens-Corning* and essentially destroys any standard for admitting evidence of other claims.

#### IV

The Court holds that the district court erred in denying Goodrich’s motion to bifurcate the actual and punitive damages phases of the trial, but that the error was harmless because Martinez offered no evidence of Goodrich’s net worth and the evidence of other lawsuits against Goodrich was properly admitted. I have already shown that the list of lawsuits should not have been admitted without a predicate showing of similarity between each of the lawsuits and this case. But even if the list of other lawsuits was properly admitted, it alone required a bifurcation of the actual and punitive damage claims.

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<sup>31</sup> *Ante* at \_\_\_\_.

<sup>32</sup> \_\_\_\_ S.W.2d \_\_\_\_, \_\_\_\_ (Tex. 1998).

As the Court notes, “[i]n [*Transportation Insurance Co. v. Moriel*] we held that ‘a trial court, if presented with a timely motion, should bifurcate the determination of the amount of punitive damages from the remaining issues.’”<sup>33</sup> Although we reasoned in *Moriel* that evidence of a defendant’s net worth offered on a punitive damage claim could unfairly prejudice a defendant on plaintiff’s claim for actual damages, we did not suggest that net worth evidence was the only prejudice in trying actual and punitive damage claims together. In the present case, Martinez’s counsel’s repeated references to other claims against Goodrich were plainly intended to insinuate that if others had been injured trying to mount Goodrich’s 16" tires on 16.5" wheels, the tire was defective, and the defect caused Martinez’s injuries. The list of other lawsuits, even if properly admitted, unfairly prejudiced Goodrich on Martinez’s liability claim as much as evidence of its net worth would have.

The district court refused Goodrich’s motion to bifurcate the trial before evidence was offered and without regard to whether Martinez would offer evidence of net worth. The record shows that the district court refused to follow *Moriel* because Martinez did not want a bifurcated trial. The court’s error clearly prejudiced Goodrich.

\* \* \* \* \*

The record in this case shows that Goodrich’s tire including the warning label was not defectively designed as a matter of law. Even if that were not so, Goodrich is entitled to have its liability determined in a fair trial in which at least some responsibility for the accident is assigned to Martinez and the wheel manufacturers, evidence of other claims against Goodrich is excluded

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<sup>33</sup> *Ante* at \_\_\_ (quoting *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 30 (Tex. 1994)).

until a proper predicate is laid for its admission, and punitive damages are tried separately as required by *Moriel*. Because the Court denies Goodrich any relief, I respectfully dissent.

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Nathan L. Hecht  
Justice

Opinion delivered: October 15, 1998