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Supreme Court of Texas.
SSP Partners and Metro Novelties, Inc., Petitioners/Cross-Respondents,
v.
Gladstrong Investments (USA) Corporation, Respondent/Cross-Petitioner.
No. 05-0721.

March 20, 2007

Appearances:
Roger W. Hughes, for petitioner, Metro Novelties, Inc.
Jennifer Rebecca Henderson, for petitioner, SSP Partners.
Michael A. Choyke, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Texas Supreme Court Justices, en banc.

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 05- 0721, SSP Partners and Others versus Gladstrong Investments USA Corporation.

COURT MARSHAL: May it please the Court. Mr. Roger Hughes and Ms. Jennifer Henderson will present argument for the petitioners. Petitioners now reserves four minutes for rebuttal. Mr. Hughes will open the first eight minutes. Mr Hughes will present the rebuttal.

## ORAL ARGUMENT OF ROGER W. HUGHES ON BEHALF OF THE PETITIONER

MR. HUGHES: May it please the Court. I'm here on behalf of Metro Novelties. Ms. Henderson is here on behalf of SSP Partners. We intend today to focus on the statutory indemnity question. I with the Court's permission will focus on liability based on the apparent manufacturer doctrine. Ms. Henderson will focus on the question of liability under the single business enterprise doctrine. The trial court here denied retailer and the distributor common law and statutory indemnity against Gladstrong USA for a defective foreign-made product. Even though, under Federal Law, Gladstrong USA is deemed to be the manufacturer, it held itself out to be the manufacturer of this product.

JUSTICE O'NEILL: To whom?

MR. HUGHES: I'm sorry?

JUSTICE O'NEILL: To whom did it hold itself out as the manufacturer?

MR. HUGHES: It held itself out first to the world but second to the market exchange. Their prep ...

JUSTICE O'NEILL: How, how, how to the world. I mean the, my understanding of the argument that has been made that there needs to be consumer confusion in order for the apparent manufacturer doctrine to apply. Would you agree that there is no consumer confusion here?

MR. HUGHES: No. I wouldn't agree that, for, for two reasons. First, the basis for the doctrine is not actual confusion but potential confusion and secondly, Mr. Li clearly testify in his disposition that this was a business strategy on their part to make distributors think that they were the manufacturer.

JUSTICE O'NEILL: But, but who's the consumer here? Is there anything on the lighter that will indicate that USA was the manufacturer?

MR. HUGHES: Well, two things: First, the way it is marked. It says, WAX brand lighter on it. That's stamped on the metal part. And secondly, printed on it is the Gladstrong UPC number which is unique to Gladstrong. The WAX, the way these were marketed is that US only Gladstrong makes this kind of lighters. That is WAX brand. Second in the United States, the only people that can and do so sell these are exclusive importer and exclusive distributors which is Gladstrong USA. If you want a WAX brand lighter, you have to call their office. That's the only office that you can call.

JUSTICE O'NEILL: But you're, you're presuming that the consumer is the distributor. I mean, is that the one who purchases from the distributor and not the ultimate consumer deposit at the store.

MR. HUGHES: It's a-- I, I understand what the Court is saying but in this case, they're one and the same. The, the box that is, that is delivered to the store comes from them. It has their UPC, it has their brand name. I mean, the way it is marketed to everyone is that WAX is a Gladstrong product and it has their mark on it. And I can understand what the Court is saying as the consumer itself may not know whether it's a Gladstrong lighter or a Bic or Scripto but the purpose here is, of these whole tactic is to make the marketing chain, the people who buy from them, believed it's their product. That was Mr. Li's saying was he intended this strategy to induce the people who come to them to buy to think they were dealing with the manufacturer. So that they would think they were dealing ...

JUSTICE O'NEILL: Well, I guess-- but my question is, if, if you needed to show consumer confusion about the purchaser, the ultimate end users? If that were required element of the apparent manufacturer doctrine, would you lose?

MR. HUGHES: If for the consumer confusion.

JUSTICE O'NEILL: 'Cause understand your saying you don't need that but if you were to determine that you did need end user confusion, would you lose in this case on that theory?

MR. HUGHES: Perhaps on this record but the point is at that time it came up. They didn't make an issue of this. I mean, the, the apparent man--, pardon me, the way the jury statement articulates the rule, it is not necessarily that the consumer is in fact confused, but there is the potential for confusion. You don't have to prove it in fact because -

JUSTICE: So the statement makes clear.

MR. HUGHES: - the actual, actual confusion is not-- it's, it's presume. You can't walk away, the, so to speak a conclusive estoppel

argument if you will.

JUSTICE: What, what would be the confusion to the ultimate consumer? They are getting a lighter. It serves as a functional purpose. It is not like they bought, wanted a Volvo and got a Ford.

MR. HUGHES: Well, the confusion is that the manufacturer, as, as a re-statement of what I said, the, the confusion is that the man, is that, the pro-- is that product is bought based on the implied representation of quality and the implied representation because it's my product. I stand behind it. Now that in fact, is what is being told to the distributing chain because that is the whole purpose of the stratagem and that's the purpose of putting it on the website. And so it's the plot, it's, it's not merely, some sort of breach with warranty theory. It's rather a theory that by putting your name behind the product. You're in-- you are putting-- you are somehow inducing people to buy the product.

CHIEF JUSTICE JEFFERSON: Is there any evidence that Gladstrong itself was the manufacturer of the lighter? Gladstrong USA was the manufacturer or not?

MR. HUGHES: In the loose sense of the word, one would say not, except because there is a federal statute that makes them the manufacturer because they are, they are the exclusive importer. The problem is that under the statute, we also include the word 'producer' which under some definitions includes one's who exhibits, brings forth or etc. So they ...

CHIEF JUSTICE JEFFERSON: Which could also be any interested retailer in the supply chain, I suppose.

MR. HUGHES: In this case, I would say not because they hold themselves out to be that way and the federal law makes them the manufacturer and I guess one would have to say, we have to take them, we have to work within the definition of, the way they work in the trade itself. They, you can't, both sides agree. You can't take these terms in the vacuum. You have to take them in the, in the way they are used to in the trade. And the trade, this producer would be the person who basically introduces the product to the entire market. And in that sense because they are and bringing it for the market which is the entire United States. They could be the producer but not say the second or third year ...

CHIEF JUSTICE JEFFERSON: But under that theory, wouldn't it be possible in another case for an importer who has, makes no representations about closeness with the manufacturer or holding themselves out as a manufacture that, that innocent importer would be an indemnitor under the common law or statutory indemnity?

MR. HUGHES: It would intend a, a closer question if you had an exclusive importer who is a manufacturer strictly because of the Federal CPSC statute but yet they made no attempt to exhibit the product or stimulate sales. I mean, if you had an importer who all they do is import. They, they don't show up in any exhibitions. They don't advertise. They are not listed on a website. Perhaps, that might be a closer question but here we have someone who is not merely an importer conduit. As Mr. Li said, they were created to do a marketing job and do what they do. The only way you can get them in the United States is to call them. There ...

JUSTICE: Is-- Please excuse me. Is, is 'producer' the only term in the definition of manufacturer under which Gladstrong USA falls? Is that your argument?

MR. HUGHES: For the purpose of the statute, I think that is the one that most closely applies, Justice.

JUSTICE: If it were proven that the Tianjin Sico manufactured all of these lighters, would your position change that Gladstrong USA is still the manufacturer?

MR. HUGHES: No, because in, is what we recognized in the Hudiburg (199 S.W.3d 249) and the other cases. There mayb several companies that qualifies as a manufacturer. For example, Gladstrong Hong Kong may qualify because they created the design and they superintended the fabrication. The evidence is they basically said, they told Tian-- if you believe their story, if you believe their story, they told Tianjin Sico how to make it. They gave it the design. They've said, you have to use our patented wheel and this is where you go to get it. And-- pardon me, they superintended in the sense that they checked out the molds for the parts, etc., etc. So you have the possibility that all three companies may qualify as manufacturers and then you'll have to do a fact-intensive analysis under, under Hudiburg to determine who is the one who may end up bearing the entire loss.

JUSTICE: Counsel, there some questions of counterfeit -

MR. HUGHES: I'm sorry?

JUSTICE: There are some questions of counterfeiting on these lighters. And as I understand, the lighter was completely destroyed?

MR. HUGHES: There were two lighters purchased out of the same box. One was destroyed one wasn't? Both of them-- and they both of them according to the witness were identical but as to counterfeiting question ...

JUSTICE: Do you have one of them left?

MR. HUGHES: Yes, it was Exhibit 2 of Castillo deposition and I think photographs were attached to both of our responses.

JUSTICE: They were different colors, weren't they?

MR. HUGHES: Yes. I think one was red and one was blue. The counterfeiting thing is basically is sheer speculation by Mr. Li. They said, we believe, we think they haven't got any proof of whatsoever that anybody is counterfeiting their lighters.

CHIEF JUSTICE JEFFERSON: Mr. Hughes your time has expired.

MR. HUGHES: Yes.

CHIEF JUSTICE JEFFERSON: We'll hear from Ms. Henderson.

MR. HUGHES: Thank you.

MS. HENDERSON: May it please the Court. My name is Jennifer Henderson and I'm here on behalf of the SSP Partners. I like to talk about the single business enterprise and its application to Chapter 82. I realized that this Court has heard arguments and is considering the single business enterprise in the PHC Minden case (235 S.W.3d 163). And in that case, both sides seem to agre critics of the single business enterprise that this Court did not adopt it because of its similarities to alter ego or because its elements are too imprecise or nebulous. Most critics say the same thing about the elements of alter ego and its variable application. I think it will help to recall the original purposes of limited corporate liability and alter ego to understand why the single business enterprise in its proper application will not dilute that. Of course, limited corporate liability was born as the way to encourage investment and the corporate America by average moral individuals without risks of losing their investment because of corporate decisions from which they are removed. Alter ego, the genesis of it was a recognition that there is some investors who abused that limited liability shield and they ought to be held accountable. So alter ego originally has it was created was the means of going vertically to a corporation to its shareholders for their acts. Single business enterprise however was not born to this same concern. Single

business enterprise and its original uses was more of a means of reaching out horizontally to another entity or individual who, because of the relationship between the two, ought to be held jointly liable for a debt. The earliest cases applying ...

JUSTICE: How do we-- The problem is the ought part. How do we know when it's ought to be?

MS. HENDERSON: Yes, your Honor.

JUSTICE: - Because with alter ego, the 'ought' is fraud.

MS. HENDERSON: That, that's correct. And ...

JUSTICE: So what is the 'ought' here?

MS. HENDERSON: Part of the problem is that the single business enterprise doctrine has been used in so many different ways, perhaps not consistent with its original purpose that there is a mixing of the two doctrines, but the earliest cases using single business enterprise, their -- the Paramount Petroleum case (712 S.W.2d 534) which relied upon the 1969 Murphy case (437 S.W.2d 272). What they're really doing is their finding th that two entities are not really acting as separate entities, they are acting as one, and that's the difference between single business enterprise and alter ego. Now the Court may say, well we have other theories such as joint venture or joint enterprise or some of those other theories that have already been accepted. Why can't you rely on those, but in a single business enterprise as it apply, you don't have the mutual or equal right of control like you would in a joint enterprise or joint venture. In a single business enterprise, you have one company that is really nothing more than an arm of another and that's what we have in this case. We have Gladstrong USA, which has no separate identity from Gladstrong Hong Kong ...

JUSTICE: But all, all subsidiaries are one arm of the other.

MS. HENDERSON: That's correct, your Honor. But usually as subsidiary has its own separate goals. It's trying to grow independently as a company, whereas in this case, Gladstrong USA does not have any separate business other than Gladstrong Hong Kong. They're not trying to make their own profit. They're not trying to grow independently of Hong Kong. It would be different if Gladstrong USA ...

JUSTICE: So you have your-- you can only have subsidiaries if there are in a different business from the parent.

MS. HENDERSON: Not necessarily, no. Of course, subsidiaries can be in the same business but usually they have their own separate cor ...

JUSTICE: In all kinds of regulations you got to have, you know, a local corporation to it, so with one corporation has subs in every 50 states that do its identical business and I send all the profits to the parent corporation every year, single business enterprise. You just can't do that.

MS. HENDERSON: I think that the, the problems is you have look at what goal you're trying to accomplish with the doctrine. You just can't look at the structure of the companies and decide whether it's single business enterprise ...

JUSTICE: But what, what's your goal? What-- when are you are going to invoke this?

MS. HENDERSON: Okay. Single business enterprise would be-- it is useful in the-- and it serves the purpose of what it was intended to serve when you have a company like Gladstrong Hong Kong, I'm sorry Gladstrong USA. They don't buy the lighters from Hong Kong. What they're doing is they are selling Hong Kong lighters. They are placing them into the stream of commerce taking in the money and funneling it straight back to Hong Kong. It is not as if they were purchasing them from Hong Kong and then re-selling them for a profit and both companies

are trying to, to grow independently of each other. That's why we have to rely upon it in this case because here you have an innocent retailer and distributor trying to collect indemnity. The manufacturer in China, and we, of course, alleged Hong Kong is the manufacturer, there is a US branch office here who has a separate corporate identity on paper, although that's a little bit murky 'cause based on Mr. Li's testimony, you can't really tell who owns this USA company. But in essence, they, they, they do nothing more than work for Hong Kong. In the context of Chapter 82 this makes sense because to be a manufacturer, it is not enough to simply process or formulate or fabricate the product. The second part of the definition required you to replace it into the stream of commerce.

JUSTICE WILLETT: Ms. Henderson, why hasn't your client waived this corporate veil piercing argument?

MS. HENDERSON: Well, we plead, we plead single business enterprise and as well as, alter ego and several other doctrines. The problem is that after discovery was commenced in the case, we realized that we're not piercing vertically through Gladstrong Hong Kong. You know, we are trying to reach the shareholders of Gladstrong Hong Kong. We are saying that Gladstrong USA for all extensive purposes is the manufacturer. They are deemed the manufacturer under federal law. They were sued as the manufacturer by the Gladstrong-- by the plaintiffs in this case in both their original petition and their amendment petition, now for purposes of indemnity they come in and say 'We're not Hong Kong.' So when the ...

JUSTICE: And that's the reason why you did not seek indemnity from Gladstrong Hong Kong?

MS. HENDERSON: We did try to bring in Gladstrong Hong Kong.

JUSTICE: The trial judge denied it.

MS. HENDERSON: It was denied twice.

CHIEF JUSTICE JEFFERSON: Further questions? Thank you Ms. Henderson. The Court is now ready to hear argument from the respondent.

COURT MARSHAL: May it please the Court, Mr. Michael Choyke will present argument for respondent.

ORAL ARGUMENT OF MICHAEL A. CHOYKE ON BEHALF OF THE RESPONDENT

MR. CHOYKE: Mr. Chief Justice, may it please the Court. The apparent manufacturer doctrine has never been applied in any court in the country as far as we can tell to an indemnity claim and for good reason. Under the Texas statute, of course, there is nothing in the definition of manufacturer that includes the concept of an apparent manufacturer, somebody who holds themselves out as a manufacturer. Other states it have in enacting these indemnity statutes have provided for such addition and expansion to the definition of manufacturer. Texas deliberately chose not to do so and if that wasn't clear enough, the legislature in 2003 when they pass 82-003 of the Civil Practices and Remedies Code made it clear that a non-manufacturing seller cannot be held liable, unless the plaintiff can prove various things, none of which is that the seller held itself out as the manufacturer. So it's contrary to the policy, I mean, it is contrary to the statute and it's contrary to the policy of Texas.

JUSTICE O'NEILL: But what would be wrong with that? What will be wrong with-- because clearly Chapter 82 was designed to supplement to

common law. We agree with that. I mean, it says by same terms and what would be wrong if someone is putting a product out under a name that is confusing to the consumer and consumer relies on that name in light of the purposes Chapter 82 was designed to serve, which is to protect the innocent retailer against the manufacturer? What would be wrong, if the circumstances warranted it, with applying that doctrine here?

MR. CHOYKE: Your Honor, the purposes of the Chapter 82, the indemnity, the indemnity in general, the purposes are two fold. One, it is to ensure that the actual party who is responsible for the harm has the liability-- has law shifted to them. In that case, that is the manufacturer, not somebody else in the chain of distribution and again ...

JUSTICE O'NEILL: But if you're holding yourself out as the manufacturer, you're creating a confusion. If Sears puts its name on the washing machine you buy. Isn't getting the benefits of being perceived as being the manufacturer? Without happened to suffer the detriments vis-a-vis an innocent retailer.

MR. CHOYKE: Well, the question there then would be who is getting the benefit of that. In the case of where you're going to Sears and you're purchasing a washing machine that says, 'Sears' on it, the consumer has nothing to go on other than the product itself, and that's why the apparent manufacturer doctrine may be applicable in that case to hold Sears liable as though as the manufacturer. In this case, the distributor such as Circle K can contract with whoever they ...

JUSTICE O'NEILL: No, I, I understand, what I am questioning of-- your argument seems to be that the present Chapter 82 apparent manufacturer doesn't apply period. And my question is 'Why shouldn't it?' If 82 was designed supplement common law and I think you're telling me in the appropriate case in might.

MR. CHOYKE: Well, your Honor, I think it with the enactment of 82-003 the legislator has made it clear that apparent manufacturer is dead and gone, I mean it is an idea who's time has never come in the State of Texas because they deliberately said 'Here are the points.' Here are the grounds on which a non-manufacturing seller can be held viable in any case and nowhere in that statute did they say somebody holds themselves out as the manufacturer of a product. Now ...

JUSTICE: But they, they say its supplements the common law and said, 'The common law has the apparent manufacturer doctrine.' The argument is ...

MR. CHOYKE: 8-- 82-002 says that, you know, it does not intend to encompass all areas of indemnity such as purely vicarious liability or parties contract by liability. I think though that the Court should in deciding what the common law is you should look through the policy as set forth by the legislature, and the legislature has made it clear that innocent, that innocent retailers including those who are upstream in the manu-- even those who may hold themselves out are not to be held liable for a defect in the product unless there are some basis for independent liability. Now, if a party can come forth, and bring some indications that they relied on a misrepresentation, and that therefore, they suffered harm as a result of that reliance, that would be a legitimate grounds potentially for some liability. Now, there's nothing about in this case. Now, SSP and Metro agreed that under the common law-- in common law indemnity that you are required to have-- that you, you required to establish a chain of distribution the party seeking indemnity and the party from whom you seek indemnity from, which can have a chain if there aren't any links, and there is no evidence in this record of any link between Gladstrong USA and SSP or

Metro. There is not one shred of evidence.

JUSTICE O'NEILL: But they couldn't get the lighter from anybody else could they? Now, could they get the lighter from anybody else?

MR CHOYKE: There is no evidence to suggest that that's the case, your Honor.

JUSTICE: There is not evidence that this is an exclusive distributor?

MR. CHOYKE: The evidence in this-- the only evidence in this case is the evidence from Ms. Li who says that 'She was told by the manufacturer that they were an exclusive distributor of the lighter.' There is no evidence that in fact, they were the exclusive distributor and there was ...

JUSTICE: That's pretty close.

MR CHOYKE: I'm sorry, you're Honor?

JUSTICE: That's pretty close, I think.

MR CHOYKE: Well, well ...

JUSTICE: The manufacturer tells you, you're the only seller. What else is there? How else would you prove it?

MR. CHOYKE: You can prove it by selling the SSP or Metro whom they purchased the lighters from. I mean, we're talking about a company that has hundreds of stores in the State of Texas. Certainly, they have records of who they purchased their products from and you need to establish that there are some connections between the purchase of the product and whom they purchased it from. I think we look back at in indemnity; generally, the indemnity is a policy that derives from the law of contracts. When it historically, you could not get indemnity unless there was an expressed contractual provision. Ultimately, indemnity became an applied contract were there were two parties who have contracted with each other and there was evidence that they contracted with each other, there were sort of an implied agreement that the party supplying the product will indemnify the party who is receiving the product. They would sort of stand behind the product.

JUSTICE: I think the Court understands all that but why isn't what the manufacturer told this lady ain't good enough?

MR. CHOYKE: Well, let me say ...

JUSTICE: Why isn't that some evidence?

MR CHOYKE: Let me step back a little bit to say ...

JUSTICE: I question you.

MR CHOYKES: - that the only evidence in this case has to do with Gladstrong Hong Kong. All of the representations, all the statements that they refer to in the record all have to do with Gladstrong Hong Kong only. There is ...

JUSTICE: Why would Gladstrong USA settle for $1.6 million dollars if they didn't distribute the lighter?

MR. CHOYKE: Your Honor, for the same reason that all parties settle lawsuits because they didn't want to take on the risks and they were down in the valley facing a 5-year-old child who was burned to death. I can't fault Gladstrong USA at all for settling these lawsuits.

JUSTICE: Well, $1.6 million dollars seems like a lot if you didn't sell the lighter.

MR. CHOYKE: Well, your Honor, again, you're dealing with risks and the re-- multitude of reasons why parties settle a lawsuits. I don't-- again, given the circumstances in this case, I certainly can't aault them for settling it even if I believe that they didn't have liability and I-- potentially, they didn't think so either.

JUSTICE: Counsel, did you say there's a list statement that the manufacturer said, Gladstrong Hong Kong was this-- was the sole

distributor or Gladstrong USA was the sole distributor?

MR CHOYKE: I believe her testimony, her testimony in that one instance covered both. Her testimony was that Gladstrong Hong Kong was told by Tianjin Sico that they were the exclusive distributor of the WAX lighter and so I think, I, I think that would be fair to carry down to Gladstrong USA because there isn't any evidence that Gladstrong USA received products other than from Gladstrong Hong Kong. But in any evident, the, the representations dealing with whether Gladstrong Hong Kong was the manufacturer and cannot be attributed to Gladstrong USA. Gladstrong Hong Kong is not a party to this case. As Ms. Henderson pointed out, they tried to get Gladstrong Hong Kong into the case because it was untimely the court-- the trial court denied their motions to join Gladstrong Hong Kong and there's been no appeal from that ruling. So to whatever extent Gladstrong Hong Kong, those claims may still be valid against them, they can certainly bring claims against Gladstrong Hong Kong, they can bring claims against the manufacturer and in fact, they sued the manufacturer brought third party claims against the Tianjin Sico. Those claims as of the time of the summary judgments were still pending and so there's not,-- there is need to bring the-- to expand single business enterprise or any other alter ego theory to get to Gladstrong USA. The purpose behind single business enterprise-- the, the core purpose behind it is when you have one party who has debts that it owes to the plaintiff but for whatever reasons, you can't get to that party, there you want to disregard the corporate formalities to be able to get to the assets of somebody else and there is no need for that doctrine here. Furthermore, there is no evidence in this case that Gladstrong USA and Gladstrong Hong Kong were operated or maintained as separate business entity which is the core evidence that you need to get to the single business enterprise theory. That's the whole purpose behind that doctrine. As this Court held the BMC Software evidence that there are shared directors, that they are shared employees, that they're-- even if they have the same accounting systems, that's no evidence that the two ent--corporate entities are not-- that you should not recognize the corporate separateness of those two entities.

JUSTICE: Wasn't there evidence that Gladstrong Hong Kong gave money to USA to reimburse the customers for the recall by the Consumer Product Safety Commission?

MR. CHOYKE: I, I believe that's correct your Honor and again, Gladstrong USA was an importer of these lighters was under the Consumer Product Safety Commission and Consumer Product Safety Act was responsible for pulling and issuing the recall. They did though and-- but the fact the Gladstrong Hong Kong reimbursed those expenses.

JUSTICE: And did USA hold itself out in filings with the UCC and with the Consumer Product Safety?

MR. CHOYKE: Not in Gladstrong USA, your Honor, Gladstrong Hong Kong. Again, the evidence there is only as the Gladstrong Hong Kong holding itself out and again, there is no confusion or reliance on the part of the consumers or even in this case on the part of SSP or Metro. There is no evidence that anybody at SSP or Metro ever referred to the website, referred to the UCC filings or had any base. In fact, there is no evidence that they bought these lighters from Gladstrong USA or from Gladstrong Hong Kong.

JUSTICE: Over there, what about their counter? What about the counterfeiting in the bootleg lighter questions [inaudible].

MR. CHOYKE: There was evidence, your Honor, that was raised that had to do with-- I believe it was for Mr. Li's testimony that there

have been reports of counterfeiting and there has been this other WAX lighters and again, it goes back to the notion that they were told that they were the exclusive distributor of these WAX lighters, but there was no evidence that would be sufficient to show this link. I mean you Honor, supposing I went out on the Sixth Street and I set up a card table somewhere where I was selling $10 watches it said, 'Rolex on it.' Now, somebody comes and buys the watch and they get injured as a result of it and they sue me. Now under SSP and Metro's theory ...

JUSTICE MEDINA: That's not a very good analogy you were talking about a very expensive watch being sold for $10. I think most people with common sense realized that's not a Rolex because we have here a lighter which were primarily look all the same quite frankly, you flick it, it lights, supposed to light, so you know, try to come up with a different analogy.

MR. CHOYKE: Well, even if it's for $1000, your Honor, the point is the mere fact that it has some, you know, in this -- in that hypothetical, the mere fact that it has some marking on it, that says, 'Rolex' on it and the fact that I, I then sold it to it, under their theory, I can bring an indemnity claim. I could find out who the distributor Rolex watches in the City of Austin and I can bring an indemnity claims against them and I get pass summary judgments. Even if there is no evidence that I ever had any interaction whatsoever with the Rolex distributor and that's not what the law effect should be because indemnity is based on the theory that there needs to be some, some link in the chain between the party that seeking indemnity and the party that's ultimately to be held responsible which should be the manufacturer and not anybody else up the chain.

JUSTICE: Is there is any serious dispute as to the origin on the lighter that caused the fire? I mean, you mentioned that there are two, two lighters, one is red and blue. Same lighter essentially that came from HK?

MR. CHOYKE: There, you know, I, I don't know that I can answer that based on this record as to whether there's a dispute that the lighter that was in the, the fire itself was a-- you know the WAX lighter that was sold, that was sold at the Circle K. There may have been some issues raised in the trial court as to whether or not this lighter was the one that caused the fire as oppose to some other lighter because the fact that the lighter burned up in the fire. But I don't know that I can answer that questions, Justice Green, based on the records that before us here.

JUSTICE WAINWRIGHT: On the issue of consumer confusion. What about the argument that consumer confusion, consumer's perception may be important or is important to liability between the plaintiff and the liability of the defendant to the plaintiff. The consumer confusion is not really that important the argument goes when we're talking about indemnity between innocent seller and the manufacturer because what does consumer confusion have to do with that issue. What about that position?

MR. CHOYKE: Well, I think that's-- that pretty accurately State says that 'The concept that the parent manufacturer is built on the idea of consumer confusion.' That an individual consumer has nothing to go on other than the product itself and so therefore, if they are led to believe that a product is manufactured by , that washing machine is manufactured by Sears. They're going to rely on that name and they're going to purchase it based on that name. And so therefore, the apparent manufacturer doctrine goes, you should be able to hold Sears liable even though they're not the actual manufacturer because of the fact

that the consumer was potentially confused. In the case of an indemnity claim where a sophisticated seller such as Circle K or anybody who's in the chain of distribution knows where the source of their products are they can pick and choose who they, who they agree to purchase products from. And so therefore, there's no danger of confusion as to who the real manufacturer of. If they get a lighter that has a name on it, they'll know who they actually purchased that lighter from and so they won't have the danger of being confused as to who is the real manufacturer. In addition, unlike the plaintiff, in a straight -- in a consumer or the end user of the product, the seller or retailer or has the ability to upfront, contract, and receive indemnity through contract. Something is not available to the plaintiff in this case. Another thing that a consumer could or that a retailer or seller can do if they're concerned about foreign companies that they may not be able to attach jurisdiction to get indemnity they can choose not to carry foreign-made products. So these are options that are available to sellers and retailers which SSR and Metro did not take advantage of. And so they're asking the court to bail them out.

JUSTICE: In this global economy, how would one decide not to sell products not manufactured over seas? Seems like it's not a very easy thing to do?

MR. CHOYKE: Well, it may be difficult, your Honor, but I know that something that stores can do is a matter of policy. And in fact, I, I would suggest to you that given the current global-- given the current political climate that that might be something that they use as a marketing tool. If they think that that would be advantageous for whoever their potential consumers are. But again, that's something that they have available to given option which is not available to the consumer which is why ...

CHIEF JUSTICE JEFFERSON: Is, is there's something that precludes this Court? Is there a law or does Chapter 82 preclude this Court from adopting apparent manufacturer as an permissible tantamount indemnity scheme?

MR. CHOYKE: I believe that Chapter 82, that Chapter 82-003 expresses some clear legislative policy that many of non-selling manufacturer are not to be held liable in any event, under whether to the plaintiff or whether under the indemnity claim.

CHIEF JUSTICE JEFFERSON: Does that preclude this Court from adopting apparent manufacturer is an another way of reaching common law indemnity?

MR. CHOYKE: Your Honor, I don't know that I can say no but what it would result in is you would have this sliver of cases in which they were brought before the effective date of the 2003 Act in which for whatever reason limitations hasn't run yet. In which that common law doctrine would apply. I think it would be-- it would just be a, I think a waste of the court's resources to then potentially cause confusion in the Courts of Appeals and the trial court as to whether or not that doctrine applies or whether or not the statute applies. It makes a lot more sense for this Court to just follow the, the policy set forth by the legislature and conform the common law to that the two what I think the legislature has spoken with unmistakable clarity which is that non-manufacturing seller should not be held liable unless there's some, some basis for establishing that they are responsible for the harm that was caused in the product. And there's no evidence of that here with respect to Gladstrong USA certainly. And again, if there's a claim to bring against the manufacturer in this case, Tianjin Sico or even if there's a claim to be brought against Gladstrong Hong Kong. They

have(had) the opportunity to do that and that's where indemnity should lie.

JUSTICE: Wouldn't that the argument the upstream manufacturers distributors better able to protect themselves than downstream.

MR. CHOYKE: Well, I, I would disagree within on the facts on this case ' cause we're dealing with the very sophisticated retailer in Circle K stores. But that sort of there's an economic argument about pushing it upstream but fundamentally that the doctrine of indemnity, the purposes of indemnity are to place the loss on the party who is ultimately responsible. And that is the main manufacturer of the product. Not someone else who's upstream. I think the result of the policy like that is going to just lead to extra litigation because then each party of the upstream is going to be suing each other. In this case, we could potentially have five lawsuits. Plaintiff sues SSP, SSP sues Metro. Metro sues Gladstrong USA. Gladstrong USA sues Gladstrong Hong Kong, Gladstrong Hong Kong sues the Tianjin Sico. That doesn't seem to me to be sound policy. The policy should be let's place the loss on the party who is responsible for the loss, the true manufacturer of the product.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court will hear rebuttal.

JUSTICE WILLETT: Mr. Hughes, real quick. Looking at Chapter 82, is there any record evidence at all that Gladstrong USA was involved in helping assemble this lighter?

REBUTTAL ARGUMENT OF ROGER W. HUGHES ON BEHALF OF PETITIONER

MR. HUGHES: In the sense that-- I, I, I take the question to be did they assemble the lighter or fabricate it? No. That's if to say as they place the order and they act as the importers to get it through customs and then they go out and stimulate orders for it. And maybe assist in getting the product delivered. But in the sense of putting anything together? No. I would like to go back to the question about applying these definitions of the statute. Many other jurisdictions have completely preempted the common law with the statutory scheme. Federal courts in three of those jurisdictions had stated that The doctrine of the applied manufacturer will be applied to the definition of who is the manufacturer under those statute which is important because under many of those schemes as we have just done. The intermediate intercept retailers are all that out and essentially you're left with the statutory claim only against the manufacturers and soon you can get there. This problem is important to Texas because after 2003, the distribution chain will remain in the case if you have a foreign manufacturer who cannot be made subject to US jurisdiction. We didn't, we didn't get Hong Kong in this case even though Metro tried to bring them in within 30 or 40 days after it filed its Answer. The problem was it was on the eve of trial. And the trial court didn't want to disrupt the trial date. If you can't bring in Gladstrong Hong Kong because they are in Hong Kong and outside of the jurisdiction and you, know you, have the PHC Minden case before you now about whether you can attribute Gladstrong USA's contacts if all those fall in favor of Gladstrong Hong Kong, nobody will have to get to them. And we will be back to the question of then should Gladstrong USA be held liable as a manufacturer because it held itself out to be so. And therefore it's

still -

JUSTICE: You're not, you're not -

MR. HUGHES: - an important question.

JUSTICE: - You're not saying-- excuse me, Counsel. You're not saying that a companies is in a chain is taking away single business enterprise, alter ego, all that, the-- that ones you can reach, somebody at the top of the distribution chain before you get to the foreign manufacturer you should somehow be liable just because of that?

MR. HUGHES: Under the common law-- I think they would hold common law indemnity without regard to the apparent manufacturer. Under the statute, then you would have to use one of the common law doctrine such as single business enterprise or alter ego, if it's available or apparent manufacturer to hold them liable as a manufacturer assuming those documents apply.

JUSTICE: So it have to be through one of those devices?

MR. HUGHES: Yes, otherwise, simply being a distributor, no. Because the 82-03 is very clear. It does says, a seller who does not manufacture, it has to be let out unless and one of them, of course is, if we have a foreign manufacturer outside of the jurisdiction. So if all they do is distribute-- partly distribute it without manufacturing it then they would be out of the statute and you would need some other doctrine to attribute for them to become a manufacturer.

JUSTICE WAINWRIGHT: How do you respond to the contention that consumer confusion under the apparent manufacturer doctrine is not as important at least when we're talking about indemnity between manufacturer and the seller as it is where the plaintiff's liability-- plaintiff's ability to recover?

MR. HUGHES: Well, I think that's based on a, on a silent assumption that somehow distributors are, are, are sophisticated and not gullible and consumers are gullible and not sophisticated. But their entire business strategy was based on exactly the opposite assumption. Their business strategy was on, I use the word loosely, dooping, people into believing they were dealing direct with the manufacturer and thereby getting the cheapest price. That was their business strategy. I don't think that they would adopt it if they didn't think it would do good work. And in fact, their website advertises that they have 10 to 14 million dollars in sales. So I think we can, we can assume that distributors can be taken just as easily as the consumer. But again, I get back to that under the restatement it's the potential confusion not the fact of it that is, that it derives the doctrine. It's not an element. It's simply a policy justification for applying the doctrine in the first place.

CHIEF JUSTICE JEFFERSON: Other, other questions? Your time has expired, Counsel. Thank you. The cause is submitted and the Court will take a brief recess.

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