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Supreme Court of Texas.
New Texas Auto Auction Services, L.P. d/b/a/ Big H Auto Auction,
Petitioner,
v.
Graciela Gomez De Hernandez, et al., Respondents.
No. 06-0550.

October 17, 2007

Appearances:

Scott T. Clark, Harlingen, Texas, for petitioner.
Roger Wade Hughes, Harlingen, Texas, for petitioner.
Rebecca E. Hamilton, Dallas, Texas, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument
in 06- 0550. New Texas Auto versus Graciela De Hernandez.

COURT MARSHALL: May it please the Court. Mr. Clark and Mr. Hughes
will present argument for the petitioner. The petitioners have reserved
five minutes for rebuttal. Mr. Clark will open with the first ten
minutes and Mr. Clark will present the rebuttal.

ORAL ARGUMENT OF SCOTT T. CLARK ON BEHALF OF THE PETITIONER

MR. CLARK: May it please the Court. I'm going to address the
strict products liability issues, and my partner, Mr. Hughes, is going
to address the negligence issues during his portion. I'm going to refer
to my client as Big H Auto Auction. That's the name. We do business
under the name in the style as the New Texas Auto Auction. Big H Auto
Auction's business is providing a forum for commercial dealers to bring
vehicles to our auction and sell them to other commercial dealers
through our auctions. We provide auctioneering services and call bids
that allow those commercial dealers to sell their vehicles to other
commercial dealers. Only commercial dealers are allowed at our
auctions. The general public is not permitted to sell or buy at our
auctions. The vehicle involved in this case, like many others at our

auction, was sold "as is," which means, of course, that the seller is not making any representations about the quality or condition of the vehicle. The commercial dealers are allowed to inspect the vehicles before the auctions. Some of them bring mechanics. They can start the cars, they can test drive the cars to decide what they think about them before the auction was held.

JUSTICE BRISTER: Their selling "as is" wouldn't make any difference for product [inaudible]?

MR. CLARK: It doesn't make a difference. The only way it makes a difference is that there's often a discussion in the case law about what the buyers expectations are. And if a vehicle is sold as is, then there's [inaudible].

JUSTICE BRISTER: Product liability covers third parties if they get harmed in an explosion.

MR. CLARK: Yes.

JUSTICE BRISTER: They wouldn't be involved in-- that's [inaudible] discussions?

MR. CLARK: Yes, yes. Vehicles in all conditions are auctioned at Big H Auto Auction. Vehicles-- some vehicles have to be towed across the auction block because they're in such poor shape. A vehicle could have no engine and it could be auctioned. A vehicle could have no brakes and it could be auctioned. That's not because we're callous about the safety risks posed by a vehicle with no brakes, it's because the commercial dealers that come to our auction understand that these vehicles are being auctioned in all kinds of conditions. Some of them will need some work before they are road ready to be sold into the general public. There's a market for people to buy vehicles that need work, fix them up, and then sell them at a profit.

JUSTICE WILLETT: How significant is that the auctioneer here, your client, Big H, had title to the vehicle, owned it, and sold it?

MR. CLARK: Nothing typical auctioneer role but-- why, and that's actually what makes the difference that Big H's business is providing a service to the sellers and buyers that come to our auction. That's how we make our money. We charge a fee to the seller and the buyer for those services because in this one instance, due to unusual circumstances, we were very briefly on the title. That doesn't mean that our business is acquiring vehicles in our own name and we're going to sell those vehicles at a profit, and we're going to make our-- our business is going to be selling vehicles at a profit. Our business is providing auctioneering services to the sellers and buyers who come to our auctions.

JUSTICE JOHNSON: Could you remind me why, why Big H bought it back and was in the chain of title?

MR. CLARK: I will, your Honor. This vehicle was first auctioned on Thursday, October 12. There was a misunderstanding about the odometer reading and the buyer wasn't happy. So the buyer brought it back to -

JUSTICE JOHNSON: That's-- Big H did not own the vehicle -

MR. CLARK: No, we did not.

JUSTICE JOHNSON: - and own the title.

MR. CLARK: It was bought to us by a company named Memorial Finance, and they own the vehicle. We put it through our auction, charge them our seller's fee for auctioning it off. There was a misunderstanding with regard to the odometer reading. The buyer wasn't happy. The buyer brought it back to us. Under our arbitration policy, it was decided that the seller would be allowed to keep their sale price so the seller could be happy. We would reimburse the buyer what they paid for it so that the buyer could be happy. And to facilitate

putting it back to our auction, we took the vehicle back on Monday the 16th. Tuesday is, is our biggest auction of the week. We auction approximately 800 vehicles on Tuesday. We took it back on Monday, put it back to the auction on Tuesday. We appeared on the title just for the purpose of facilitating it, putting it back through the auction. We took this vehicle back, put it in line with all the others that were going to be auctioned then it was auctioned the very next day. The vehicle then passed through a couple more hands before ending up in the hands of the plaintiff. They had an accident, brought a lawsuit which included the strict products liability claim.

JUSTICE WAINWRIGHT: [inaudible] let, let, let me back up-- back you up a little bit. In answer to Justice Willett's question about the Big H having title to the vehicle, whether that makes a difference, sounds like your answer is no, because that was a unique exception?

MR. CLARK: Yes. And because it's not Big H's business to acquire vehicles that we own and we're then going to sell.

JUSTICE WAINWRIGHT: Which means it was an exception.

MR. CLARK: Yes.

JUSTICE WAINWRIGHT: And that makes Big H's normal course of business.

MR. CLARK: Exactly.

JUSTICE WAINWRIGHT: So Big H did that half the time or on a common basis that would make a difference in terms of being a seller under 402(a).

MR. CLARK: Yes, it would because Section 402 what your Honor's referencing, attaches liability to those that are engaged in the business of selling a product. If that's what you do, we have these products and we sell them and that's how we make our money, then you're subject to strict liability. The restatement makes a distinction for those that provide services that assist others in selling products, which is what Big H does.

JUSTICE WAINWRIGHT: Do the commercial auto purchasers at, at the auction know which vehicles are in exception? Which one's Big H has title to and which one's Big H doesn't when they are put on the auction block?

MR. CLARK: I don't know if the record speaks to that. I would imagine most of them know that the way our system works is that commercial dealers bring vehicles to our auction because they are commercial dealers themselves and they understand that. The restatement doesn't require that the buyer understand whether it's an exceptional sale or not. It focuses on under what policies and under what circumstances should we attach the strict liability to a defendant. And if it's an occasional or exceptional sale outside the course of your usual business, then there's no strict liability. That's what the second restatement says and the third statement, even is more explicit about exempting sales facilitators.

JUSTICE MEDINA: How do, how do we analyze that? Do, does someone look at the financial records and-- or in the title records and come up to some analysis while this auctioneering company only takes title 20% of the time so it's okay or 49% of the time it's okay, and what's, what's the threshold level that the Court should look at?

MR. CLARK: I don't know that you need to determine a precise percentage. Above this percentage, then we're going to say we're liable, below it's not. I think it's more of just the totality of the evidence about what the company's business is. Now, with Big H, there's no question that our main business is assisting sales by others. It's rare that we would ever be in a situation like this where are name is

on the title. And Big H wasn't acting like an owner. We put our name on the title to facilitate resaling it and to provide customer service so our seller could be happy. They could keep the proceeds and wouldn't have to be disturbed. We could keep our buyer happy by reimbursing them their money. It was just-- to say that we were the owner really elevates formal [inaudible]. We took the vehicle for one day and put it back to the auction the very next day. The comment to the restatement says that strict liability is going to apply to those who enter into the business of supplying human beings with products. That's not what Big H does. Big H assist others who supply products.

JUSTICE HECHT: What do you do if introducing them to the stream of commerce, language?

MR. CLARK: That alone is not the test. If someone has any role in introducing something into the stream of commerce, that's not the test. That's not the test under restatement. That's not been the test under Texas law previously. The restatement says you have to be engaged in the business of providing a product. The third restatement is even more explicit, that those who facilitate sales are not liable because they're not providing a product. They're providing a service to those that facilitate sales.

CHIEF JUSTICE JEFFERSON: But we said in *Armstrong Rubber* that, although its phrased in terms of sellers, it was not necessary to that the defendant actually sell the product, but only that introduce the product into channels of commerce [inaudible].

MR. CLARK: Official -.

CHIEF JUSTICE JEFFERSON: Could you explain how do that didn't happen here at Big H?

MR. CLARK: Because we're not supplying-- our business is not supplying a product. It doesn't matter whether the form of the transaction is a sale or a lease or some other form, what matter is, are you providing the product or are you providing a service to those who provide the product? Comment (g) to Section 20 of the third restatement is clear that those that facilitate sales don't provide a product and are not subject to strict liability. It explicitly mentions auctioneers as a party that facilitates sales and thus is not going to be strictly liable. I'm going to mention-- then the briefing, there's discussion of cases from several other states that have considered whether auctioneers are subject to strict liability and held that they've not. I'm going to mention just one other case because it's not in the briefing. It was decided earlier this year in Arizona, that's the *Antone* case. *Antone versus Greater Arizona Auto Auction* and the citation is 155 Pacific 3d 1074, a case very much like this one, an auto auction with a strict liability claim against them. And the Arizona Court decided the auto auction was not liable because it doesn't have a special relationship with the manufacturer. In contrast, Big H, were say, a Ford dealer. They're in a regular contact with Ford. Arguably, they have some leverage with Ford about design and manufacture of vehicles. Big H is not in that position. The Arizona Court also decided that the auction house is not liable because they're providing a service, not a good, as I've been saying. The fact that -

JUSTICE WAINWRIGHT: So, so you don't think-- I mean, we're here on the summary judgment, right?

MR. CLARK: Yes. Summary judgment.

JUSTICE WAINWRIGHT: You don't think that owning title to the vehicle for five days even raises a fact issue on the seller question, that it's conclusively established in your favor that Big H is not a seller?

MR. CLARK: Because it's not our business to be selling products that belong to us. This was an exceptional sale, which revoked the restatement in Texas case law say there's no strict liability for exceptional sales of that nature.

JUSTICE BRISTER: Is there a situation, do you think, where an auctioneer could be held strictly liable under the [inaudible]?

MR. CLARK: If the auction form was being used to sell products that belong to [inaudible], I'd say, if I have a Ford dealership and I decide, instead of negotiating with individual costumers, twice a month, I'm going to have an auction. And I'm going to sell all our vehicles by auction. The fact that-- the form of the transaction is an auction, that's not what matters. What matters is are you providing a product or are providing a service that assist others who are providing the product.

JUSTICE GREEN: So is that yes or no?

MR. CLARK: My answer is that an auctioneer could be liable if they're providing a product in addition to auctioning it. What which determined it is not the form of the transaction, whether it's a sale or a lease or it's an auction. It's what is the defendant's relationship to the product. Is it their product and they're making their money by providing this product? Or they're just providing auction services and their charging a fee for those services?

JUSTICE GREEN: Well, the answer, is it up? Depending on what the auctioneer does, it could possible be held strictly liable for product defect.

MR. CLARK: In most instances they won't because in most instances, an auctioneer is just providing a service and charging a fee for that service. If, in fact, the auction form is being used to provide a product, that's what matters, if they -

JUSTICE BRISTER: So if they, if they buy them and take the title and then sell them as auctioneer, that would be [inaudible].

MR. CLARK: If that's their regular business. That's how you do business as you acquire them in your own name and then sell them. But if that's a rare one-time thing like this, then the, the occasional sale doctrine applies. May you give the rest of my time to Mr. Hughes.

MR. HUGHES: May it please the Court. The critical problem with the negligence holding is that neither the plaintiff nor the Court of Appeals identified their correct test. Our position is the correct test is as follows, that there is no legal duty in negligence on the suppliers in the sale chain of a used product that is subject to a recall for a latent defects unless the supplier has-- has some knowledge of the recall, or if-- you know, if-- and if they do, then they have no reason to think that the, that the end user or the people to whom it's supplied won't learn of the recall in the same manner. The restatement sets up the duty, Section 388. We went under that standard because we, first, we do not qualify as a supplier, as that term is used. The second, the standard does not require the supplier to fix the product. The only thing that supplier is to do is to warn under two circumstances. One, the supplier has to have actual knowledge or actual-- have actual information that the product is subject to a risk if used as expected, and second, they must have no reason to know that the buyer or the user won't learn of it. And in this case, we establish that we didn't. The, the entirety of the record is we didn't know of the recall. They failed to establish anything to the contrary. And the, and the second is, that if you believe their evidence about the media publicity about the recall, which is what they're relying on. Then the same evidence shows that, if we knew because we red on the paper which

are people said that they didn't, they were unaware. But if that's going to be some evidence, then it boomerangs on them because we only have to tell what we know ...

CHIEF JUSTICE JEFFERSON: Two, two of those points you made though in the summary judgment, sort of contradicting, so it's like you say you didn't know and you say it was commonly known. Well, which is it?

MR. HUGHES: I think on the status of the record, they didn't prove that we did know because they're relying entirely on the publicity. The, the rule requires actual knowledge, not constructive notice. The-- if, if, however, it become some evidence, if you were to say those newspaper reports that we didn't read were some evidence, then they become common knowledge. And, and I understand that the, the distinction, but it has to do with the, with the rule itself. The rule says we have to have actual knowledge, not constructive notice. But then, you have to turn around and say, then we have to, we have to have some reason to think the seller-- pardon me, the, these people to whom it's supplied won't learn of it. Well, if it's the subject of the media publicity, and it's out there, then it's commonly known. And I see the red light on [inaudible]. Unless there are other questions, all I ask that the summary judgment be affirmed.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The Court is now ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Ms. Hamilton will present the argument for the respondent.

ORAL ARGUMENT OF REBECCA E. HAMILTON ON BEHALF OF THE RESPONDENT

MS. HAMILTON: May it please the Court. No one is here for respondents today to argue that auctioneers, as a general proposition, should be held strictly liable. That proposition is in the ordinary situation by traditional auctioneer that transcends plaintiffs-defendant's distinctions that enters the realm of common sense. Auctioneers are not, as a general proposition, selling products. And I want to make clear to the Court, we, in no way, espouse that position. The problem here is, and it can be encapsulated although not perfectly by any means, the time-honored legal maxim, bad cases make bad law. And by that, I don't mean bad case as in a nefarious sense. I mean in the sense in which the facts are less than clear-cut. If these were a straightforward case of an auctioneer facing strict liability for doing no more than calling bids on used cars, the Court could resolve it easily because, of course, as a general proposition, an auctioneer should not be held liable under that circumstance.

JUSTICE MEDINA: So what's the distinction here that [inaudible].

MS. HAMILTON: The distinction here-- and, and I can tell by the Court's questions is amply put forward already is, was Big H nothing more than an auctioneer? In other words, I think we can all agree that auctioneers don't have a status immunity from civil liability, for example, prosecutors and judges basically have absolute immunity. Auctioneers don't have that. The reason you would here find a difference is that the auctioneer here owned the car. And so then, the question becomes do they own it, really own it, or was it such a, a transitional, ephemeral ownership that they effectively really were an auctioneer.

JUSTICE MEDINA: That's your fact issue that would defeat them most

for summary judgment.

MS. HAMILTON: Correct, your Honor.

JUSTICE WAINWRIGHT: Let me see if I'm [inaudible] point of your position. You're saying this-- generally, auctioneers are not sellers under 402(a), do you agree with that general proposition?

MS. HAMILTON: I do, your Honor.

JUSTICE WAINWRIGHT: But you say this case is different. Is this case different because you say Big H is a seller or because in this transaction, Big H was a seller? Which are you arguing?

MS. HAMILTON: I'm arguing that in this case, Big H, in this transaction was a seller.

JUSTICE WAINWRIGHT: So under 402(a), you think a-- an auctioneer can be a seller for some transactions and not a seller for others?

MS. HAMILTON: Yes. And the reason I'm smiling is because it's-- like every attorney, I don't want to wait to find out I conceded my case. But I do agree with what you're saying and I guess -

JUSTICE WAINWRIGHT: Actually I'm just asking you what you're seeing.

MS. HAMILTON: I know. And, and I appreciate that, your Honor. Yes, I do agree with that. One of the justices here, and I'm sorry, I don't recall which, asked, is there ever a situation where an auctioneer could be held strictly liable. And Mr. Clark amply answered that and I-- it brought to mind a party-- who's no longer a party to the case on appeal named Houston Auction. And last night, I was reading some of the deposition excerpts. Houston Auction is an auction house that both sells and auctions cars. And I, I believe in their deposition, and it's not really pertinent, but they were delineating, say, 20%. They sell, 80% though auction. That's a very different case, but that's also a different case from here. Because here, our argument is that in this case, on these facts, Big H was a seller for purposes of 402(a) -

JUSTICE O'NEILL: How do you square that with the occasional sale exception?

MS. HAMILTON: And, and I, I do want to address that, your Honor, because superficially, I think that has appeal. And I'd like delineate between two different issues there. The occasional seller exception, if-- as I understand it, was originally envisioned to address the situation. For example, your next-door neighbor at Christmas decides to sell pies and jams, okay. She's not a product seller. She's the lady next door that sells pies and jams. We don't want her to be subject to the product liability-- strict liability apparatus the legal system envisions. And I believe, that's all -

JUSTICE O'NEILL: I mean, why wouldn't that same concept apply though, across the Board, if really and truly, this is just an occasional, one-time, unique sale. And I-- my understanding is you don't really contest that, that they're not really in the business of taking title.

MS. HAMILTON: No, that I do contest. I'm sorry, your Honor. I have not been clear in, in that respect. In this case, if you back up in time, and this goes to the occasional seller issue, they are an-- they are not an occasional seller in this-- the sense I've just described the pie jam example. So then, the question is, if they normally auction and they almost never sell cars, are they an occasional seller? What that really goes to is, are they a seller at all, or is it just a one-time situation where title was basically passed so they could auction the car, and that's some of the cases they rely on. Well, no, that's not the case. Here, they were involved in a situation where they set back the odometer on a vehicle. And so an arbitrator was called in, and

instead of the person who had sold the car, originally, arbitrator said no, Big H, you have to take back this car because you reset the odometer. Therefore, you own it and now you are going to sell it. That was an arbitration policy and this is from their own briefing. Obviously, that is a scenario that is a regular part of their business. And the there are arbitration -

JUSTICE O'NEILL: Did they, did they profit from the product sale separate and apart from the auction fee?

MS. HAMILTON: There's no-- as, as I recall, and I'm sure Counsel will clarify this, because I recall there's no evidence about profit per se. As I recall, they have -

JUSTICE O'NEILL: Would you agree that-- could it be relevant if they made no profit from the sale of the product? And their profit was simply related to their typical auction fee. Would that be a factor that would be important in determining -

MS. HAMILTON: Yeah. I think it would, your Honor. And again, I'd like to stand back and just remind the couese of this is a summary judgment. And there was only one know evidence point, and that was on the expert that evidence issue. So they move for summary judgment, so if they want to say we're wearing our auction to your hat, then I think the evidence they need to proof forward it ...

JUSTICE O'NEILL: Let's just pretend we didn't even respond. The evidence they would need to put forward is we are only auctioneers. And then our burden would be to provide some evidence as legally sufficient to support a jury question. So then the question becomes, have they established that they're an occasional seller as a matter of law simply by saying we're auctioneers?

MS. HAMILTON: Well, I would argue. No, just on their own evidence because they've established they had title and that it wasn't-- as in the cases they relied upon where title was given to the auctioneer only to facilitate the auction, rather, title was imposed upon them because of their own conduct and it was their car. And if they did not sell it at auction, they suffered a loss because they now had a car they did not have before.

JUSTICE GREEN: Yeah, but, but the-- their, their taking the title had nothing to do with happened in this case.

MS. HAMILTON: You mean in terms of the sale--

JUSTICE GREEN: And I mean the odometer reading had nothing to do with the tire. And so it distracts me that you have a situation where-- but as you say, typically, an auctioneer would not be introducing products in the stream of commerce. And had the, had the odometer issue not come up, we wouldn't be here. But, but through the fortuitous occasion of the odometer matter, they would never have held the title at all. So why should that have any effect at all in this analysis?

MS. HAMILTON: Well, because-- with all due respect, I disagree, it's not fortuitous. I mean, they absolutely owned the car. This was not a situation where someone came to them and said, "I want you to auction my car." And they said [inaudible] the title.

JUSTICE GREEN: Well, I know, but from, from what I gather is an internal arbitration procedure that, that allowed the buyer in that instance to, to get the car back to the auctioneer -

MS. HAMILTON: Correct.

JUSTICE GREEN: - to resolve that dispute.

MS. HAMILTON: Correct.

JUSTICE GREEN: But none of that had anything to do with what happened in the case.

MS. HAMILTON: Not directly, no, your Honor, but with all due

respect, I think it did have to do with the case. In that the arbitrators didn't say, "Give the car back to the original seller." The arbitrator said, "It's going to the auctioneer." The auctioneer now owns this vehicle.

JUSTICE O'NEILL: But the purpose behind that requirement is, you know, if you're going to introduce products into the stream of commerce, there's some presumption that you have the ability to affect the design of the product. In other words, the dealer has to return cars or has problem with cars can, can have some effect on the manufacturing specifications design feature some input. And I think it's fairly clear that the reason behind the occasional sale doctrine is someone who bakes pies or jams or, or occasionally takes title for an accommodation to a customer doesn't have the ability to influence the design of the product. I mean, where is the purpose behind this exception served by your, your argument.

MS. HAMILTON: I understand completely the Court's concern, and what I would say is that here, they were not an occasional seller and, and I'm not trying to evade the Court's question. They were not an occasional seller in that sense that they had no ability to impact the manufacture because for example, and I am going to read now to the Court from-- if I ever get my reading glasses on-- from the petition-- this is from their petition where they admit they are dealers. This is from the Texas transportation code. A licensed auto auctioneer does not engage in business as a dealer by selling vehicles at auction, if title does not pass to the auctioneer, who are auction a bit or on by licensed person and on the statutory dealers.

JUSTICE O'NEILL: Well, but again, it gets back to the occasional sale doctrine. If they are dealer in only a minor fraction of cases, then you're right about the question of not having influence over the design.

MS. HAMILTON: I understand what the Court is saying, but this was a summary judgment and we put forward evidence that at least in this instance, they did sell a car. They were a dealer. They did have a title.

JUSTICE BRISTER: So if a bank repossesses car, they take title. Are they, seller, liable to product liability to titles no good?

MS. HAMILTON: Again, in the record that I was looking at last night, I was reminded that there are banks that do that. There are even banks that have separate auction house on, so it depends on the transaction. It depends -

JUSTICE BRISTER: It's hard to imagine, you know, a repo-- a bank repo is one who [inaudible] engaged in the business of selling cars.

MS. HAMILTON: No, again, as I, I began, as a general proposition, no, I don't agree with -

JUSTICE BRISTER: But they would take title-- I mean, they-- that's what a repo is, they take title.

MS. HAMILTON: That's correct, your Honor.

JUSTICE BRISTER: So how are we going to distinguish them? If, if you're correct in this case, then the banks are going to be liable for car rollovers when they repo a bank and sell it, I don't know, to somebody at an auction.

MS. HAMILTON: The distinction I'd make between the bank repo company and a company like Big H is that Big H sells thousands of cars every week to dealers, for dealers -

JUSTICE BRISTER: Are they selling an auto-- how about an auto repair place? An auto repair place, an auto repairman has a lien on the auto if you don't pay the repair bills. Now, they have a lot of cars

that passed through there, but they're not really in the business of selling cars. They're in the business of repairing cars. And so if they repo cars and then unload them, then are also a product liability seller, then they become-- because they take title, they're in the business of selling of a product.

MS. HAMILTON: I, I think the statute [inaudible] 82.00 or 83.00, it talks about to be liable, you could be a seller engaged in the business of selling cars. I would say on the -

JUSTICE BRISTER: I'm just -

MS. HAMILTON: - limited [inaudible] that you give me, that's not the business of selling cars. Here, Big H, quite essentially, at least in terms of raising a -

JUSTICE BRISTER: But it seems to me the difference is banks and repair car places aren't selling cars but an auctioneer is. That contradicts your argument that auctioneers normally aren't in the business because now, you're arguing, well, but they really are.

MS. HAMILTON: I understand what the Court is saying and I have grappled with how to express this and I obviously have not done a good job but, but it goes back to the occasional -

JUSTICE BRISTER: Well, we're dealing with the statute that doesn't explain all these. Our, our restatement and general principles then explain these things, but -

MS. HAMILTON: Because I think the evidence to show whether or not you're a seller is different from the evidence to show whether you are in the business of selling cars. These guys sell cars all day, every day. Now, the difference is when they act as auctioneers, they're not selling their own cars. They're selling someone else's cars. But there are two issues here. One is, were they a seller? And I think, yes. The question then becomes were they an occasional seller? And you were asking what's relevant in determining what some-- whether someone is an occasional seller. Well, let's say, here, given that they have an arbitration process in place that requires them periodically to take cars back and sell them, but they did that were not an occasional seller.

JUSTICE WAINWRIGHT: The, the one, the one fact that keeps, you believe, petitioners from winning summary judgment is that Big H had title to the car for five days.

MS. HAMILTON: I wouldn't say that's the one fact, but that is a very [inaudible].

JUSTICE WAINWRIGHT: You've gone back to your point about being in the business of selling. And you say Big H sells thousand cars typically a, a week, which Big H says too.

MS. HAMILTON: Yes.

JUSTICE WAINWRIGHT: You're looking at the restatement provision in our statute here in Texas about being engaged in the business of distributing or placing in the stream of commerce a product. If you read cases around the country, the purpose of making persons who are in the business of distributing products, sellers and subject to strict liability is that, as was alluded to earlier, these businesses develop some expertise in the product or-- and/or gain the ability to influence the design and, and the safety in manufacturing of the product, that type of thing. What's the evidence here that Big H was not just a conduit and didn't develop any expertise in autos? They didn't repair them, didn't make warranties on them because that's what Big H says. What's the evidence that they developed some expertise in cars rather than just being a pass-through?

MS. HAMILTON: Well, for what is worth, Big H does repair cars. It

does modify them. It has a-- this is in the deposition excerpts that were attached to the summary judgment. It does make modifications to cars. It has a, a green, yellow, red light system that goes. I believe to be "as is" issue, but rolled into the "as is" is-- for example, they, they will have cars that literally are towed on the block to be sold. They have other cars that they fix. Also, in the deposition excerpts, they deal extensively with dealers. In fact, I believe, the Houston Auction deponent whose deposition was attached, said he didn't even like to go to Big H Auctions because they were so dominated by dealers. So they do have, it's-- if, if what the Court is, is asking me, is there evidence of their interplay with the system of the stream of commerce such that they could affect design, that they could affect information the final consumer receives the two ends of attraction, t[inaudible] reaction from the beginning design to the end user. Yes, there's some evidence. It's certainly not overwhelming. We would not win a summary judgment as a matter of law, but there is evidence in the record there.

JUSTICE WAINWRIGHT: As I interpret Big H's briefing, it says to the extent there's any warranty or information about the vehicles, it only conveys that from the entity that is selling the car. That didn't make separate warranties or do separate inspection of the vehicles, and the lighting system only is intended to convey the information that Big H gets from the seller when it puts the car upon the block. You sound like you're suggesting that Big H obtained that information by its own inspection or due diligence in looking at the vehicle. Is that in the evidence?

MS. HAMILTON: I don't want to mislead the Court about that. I was looking at it last night. I believe it does conduct its own inspection, but I will-- if the Court will accept a letter brief, I'll verify that because I don't want to overstate that and I'm sure defense Counsel will correct if I'm wrong. But, you know, it's interesting that you brought that up because that's right. In this case, they made an express warranty because they were the seller, or as another thing they did in this case. Because they, they themselves say that when-- that we convey the warranties in the representations of the seller. Well, they were the seller here.

JUSTICE WILLETT: Does the record have any indication how frequently or infrequently Big H takes back cars and acquires title however, feadngly but there's nothing about that in the record.

MS. HAMILTON: Again, as I recall, there is no evidence either way in the record to that effect, your Honor.

JUSTICE GREEN: What was the form of the title in Big H? I mean, you say that the fact that they held title create the fact issue that would [inaudible] summary judgment [inaudible]. Was it a certificate of title, or was it just-- they agreed that they would hold title from the previous buyer, do you know?

MS. HAMILTON: It was a formal certificate of title. I was looking at it last night.

JUSTICE GREEN: Would it have make any difference?

MS. HAMILTON: Kind of hard to read, but there's a, a series of those. I think it goes someone-- I think Memorial Auto [inaudible] then back to them. [inaudible].

JUSTICE GREEN: Okay, so it was then a formal certificate of title.

MS. HAMILTON: Yes it was.

JUSTICE GREEN: Would it have mattered whether it was actual certificate of title or just some agreement to take the title back?

MS. HAMILTON: Would it have mattered? It would've mattered to the

extent that it's indicia of ownership. I come back to the two cases defense counsel cited in other jurisdictions where auctioneers were not held liable even though they held title. Probably, there was evidence in those cases that they held the title solely for the purpose of the auction. Whereas here, title was held not solely for the purpose of the auction because they actually own the vehicle. If Court has no further questions, I think I'll give the remainder of my time.

CHIEF JUSTICE JEFFERSON: Thank you very much, Counsel.

MS. HAMILTON: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Court will hear rebuttal.

REBUTTAL ARGUMENT OF SCOTT T. CLARK ON BEHALF OF PETITIONER

MR. CLARK: Our business is selling services, not cars.

JUSTICE O'NEILL: But what's the record evidence on that? Was there conclusive summary judgment evidence as to what percentage of your sales-- a record in this type of transaction?

MR. CLARK: That degree is specificity or a specific number of percentage, no. But our representative at our deposition was asked about that. And her testimony was that, but for these rare circumstances, we would never be on the title for a vehicle.

JUSTICE BRISTER: The world wouldn't collapse if you had to get insurance for this kind of liability. You could just roll them into your fees, right?

MR. CLARK: But there's a possibility that adding that to our fees would, would take out the margin that allows our business to function. This vehicle was sold to two more parties before it got to the final consumer. Our business and our market functions because we do these things, 800 vehicles in one day. If they're interested, they can inspect them before. If we have to insurer that every vehicle is road worthy, then that business can't continue as it does. And we can't sell vehicles that need to be fixed.

JUSTICE BRISTER: Again, but the idea of product liability is businesses need to spread the risk. In between some injured third party when something blows up and everybody goes in the chain of commerce, you only could be the ones that bear the risk of that, not by standard. And if your business can't bear that, then maybe we don't need that product. I mean, that was a whole-- right or wrong, that's where product liability came from and that could apply here.

MR. CLARK: And that could apply to any number of parties that have some remote connection to a vehicle. If you look at the cases in other jurisdictions that hold auctioneers are not liable, that's frequently considered, and those cases uniformly hold that that factor alone will not make you strictly liable, specially when you're not engaged in the business of providing the product. And also, when it's an occasional sale for you, that factor alone is not going to make you liable. And that is a particular problem for our business because we're selling some vehicles that are not fit to be driven on the road. We couldn't do that if we had liability for any defect.

JUSTICE O'NEILL: And what's the summary judgment evidence as to how often Big H inspects the vehicles.

MR. CLARK: We will do an inspection if it's requested by a customer in charge of fee for that inspection. It is not something that's done routinely.

JUSTICE MEDINA: [inaudible] is there some assertion that, perhaps, you do repairs and there's a red, yellow, green light with-- what's your response to all that?

MR. CLARK: I honestly don't recall whether we would do repair services, certainly not big part of our business. The issue about the yellow, green, and red lights, this vehicle was sold under a red light, which means, as is, no representations. A green light or a yellow light would convey something different about the seller's representations about the quality or the condition of the vehicle.

JUSTICE MEDINA: Would it make a difference if the auctioneer was in-- company was involved in repairing these vehicles even so slightly?

MR. CLARK: I don't see how it would because again, you're just providing a service. Maybe, someone brings a car to you and they want you to do some repair work and then sell it for them. That's just another service that you're providing. That doesn't mean that you are providing the product. And repair shops are not strictly liable because they touch the vehicle that later was sold.

JUSTICE MEDINA: They don't take title to it?

MR. CLARK: Yes. And obviously in this instance, us appearing on the title for something done for convenience to the extent that we might be considered an owner, it's an occasional sale for us. You know, I was thinking, someone could have a tow truck company and they have tow trucks. And after a while they want to sell their tow trucks. Well, that's obviously-- they're not in the business of selling tow trucks so that's an exceptional sale for them. Big H might have tow trucks that they use on their lot. If Big H puts one of their tow trucks through the auction, does that mean that Big H is going to be liable? But if a tow truck company sells theirs, they're not. The restatement says one of the examples of who's not strictly liable is someone who sells a used car to a dealer because you're not in the business of selling used cars. And I want to just-- I think Justice O'Neill had some questions about this transaction that I wanted to clear up. When this vehicle was first auctioned, and it belonged to Memorial Finance, we charged the seller a fee of \$140. We charged the buyer a fee of \$90. When we had to take it back and put it back through our auction again, it's sold for a lower price. Big H suffered a loss of \$900 on that second sale. We didn't profit at all on this. And that just also goes to show that this can't be our regular business because when something like this happens, we lose money. We make our money by charging for our services.

JUSTICE O'NEILL: Is that in the summary judgment [inaudible]?

MR. CLARK: It is, your Honor, yes, yes. Those numbers are in the summary judgment evidence. And we didn't roll back the odometer. There was some misunderstanding about it, but it's not because Big H did something we rolled on back the odometer. We generally don't touch the vehicles to that degree. So I'd ask that the opinion of the Court of Appeals be reversed and the summary judgment be affirmed.

CHIEF JUSTICE JEFFERSON: Any further questions?

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted and the Court will take a brief recess.