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Supreme Court of Texas.  
Whirlpool Corporation, Petitioner,  
v.  
Margarita Camacho, et al., Respondents.  
No. 08-0175.

March 10, 2009.

Appearances:  
Lynne Liberato, Haynes and Boone, LLP, Houston, TX, for  
petitioner.  
Kevin Dubose, Alexander Dubose Jones & Townsend LLP, Houston, TX,  
for respondents.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear  
argument in 08-0175 Whirlpool Corporate v. Margarita Camacho.

MARSHALL: May it please the Court, Ms. Liberato will [inaudible]  
for the Petitioner. Petition reserves 3 minutes for rebuttal.

#### ORAL ARGUMENT OF LYNNE LIBERATO ON BEHALF OF THE PETITIONER

ATTORNEY LYNNE LIBERATO: Good morning. May it please the Court,  
this is a products case in which the plaintiff failed to provide  
reliable evidence of a design defect, failed to present reliable  
evidence of an alternative, safer design and the manufacturer,  
Whirlpool, proved that the expert's theories were impossible. To set  
the scene, it's important to recall the steps that led to expert's  
opinion that a piece of lint smaller than the tip of your finger could  
cause this massive house fire. What the plaintiff's experts contend is  
that there is a tube called the lint transport tube that because it's  
corrugated that that caused lint to back up into a dryer cabinet,  
sucked up six inches into a heater box. As it went past a heating  
element to become ignited, passed through a screen, go into the drum of  
the dryer, there it circulated with, tumbled with those clothes for  
more than 10 minutes and then sometime later, caused the, fueled those  
T-shirts to the point where they ignited and created a fire intense  
enough that it could escape the drum, could cause this massive house

fire and at the same time not destroy the T-shirts. The difficulty in this case that the plaintiff's experts have is that there are numerous steps in the process to get to their conclusion that this tiny piece of lint could cause this massive fire.

JUSTICE DAVID M. MEDINA: Ms. Liberato, there is some evidence in a record from the CPSC reports, which, where your brief says is prejudicial, but what purpose do reports serve than other be prejudicial to one side or the other and there is some evidence of an alternative design. So why isn't that sufficient for the jury to make a decision.

ATTORNEY LYNNE LIBERATO: It's a good question and the answer is really a two-part question. Number one is that the evidence isn't reliable because it's not close enough to serve as a reliable basis to give the expert a foundation to be able to testify about this. But I think also it's important to step back and look at just what the CPSC report shows, what the other evidence that they say makes this expert's testimony reliable. Even if one accepts that that evidence is enough to make this testimony reliable, it only shows or could show that lint can burn, that if lint is targeted at another piece of lint, that it can cause another, you know, that piece of lint to ignite and then the other thing is that lint can accumulate in the dryer inside the dryer. That's all it shows. It doesn't show all of the other steps that have to take place. There's no evidence, for example, that a piece of lint this small can be sucked into the dryer box. There's no evidence that it can, that it won't self-extinguish. There's no evidence.

JUSTICE DAVID M. MEDINA: What weight, if any, does the evidence from the parents that were there and the witnesses to this fire they testified that there was fire coming from or around this dryer. Does that have any weight?

ATTORNEY LYNNE LIBERATO: It doesn't because it's lay testimony. But even assume, and a lay testimony can't be used to prove causation when it's necessary for there to be an expert, but, again, there's nothing inconsistent with that testimony with what our view is and that is that it is certainly possible, well actually we believe and our expert testified that the fire started in that area around the dryer. But the fact of the matter is that Ms. Camacho's testimony that the fire was coming from the dryer is still not sufficient to support the reliability of the incident.

JUSTICE DALE WAINWRIGHT: Lay testimony can provide facts that experts can base their opinions on, however. So if the lay testimony is that the fire was coming out of the drum of the dryer, couldn't an expert use that as a basis for an opinion?

ATTORNEY LYNNE LIBERATO: If he or she tests that. If, because even if there were fire coming out of the dryer, that's not enough to show there was a prior defect and there has, or design defect, what the claim is here. There has to be each part of the link in the chain and this is where there's an analytical gap, if we were applying an analytical gap test, that there are gaps in the theory that keep, that show that this expert's testimony isn't reliable.

JUSTICE HARRIET O'NEILL: You rely a lot on the testability and a lot of the briefing goes to the testability factor of the Robinson test, but how would you test this. How would you, I mean, the argument's made that you can't recreate a fire triangle in the same manner that was present, perhaps, on the day of the accident. How would you test it?

ATTORNEY LYNNE LIBERATO: Well the way that Whirlpool tested it. I think what the argument is, Judge, is that you can't recreate exactly

what happened under those exact circumstances and that's probably true in any situation, you're not going to be able to test it exactly, but you break down these steps and there are tests that can be performed on each one of these and, in fact, that's what Whirlpool did. Whirlpool tested lint and ignited it and showed that it self-extinguishes. It tested whether.

JUSTICE HARRIET O'NEILL: But wasn't there evidence in the CPSC report that shows that that may not be the case, that it cannot self-extinguish in some circumstances. I mean, each piece seems to find some support in the CPSC report. Each piece of the testing.

ATTORNEY LYNNE LIBERATO: It does not. The CPSC report, let me distinguish that in just a second, but let me directly answer the question of what the CPSC report shows and the steps that it doesn't take here. CPSC had a lint accumulation test and what that showed is that lint can accumulate in a dryer. The second thing was.

JUSTICE HARRIET O'NEILL: Okay and that's similar here because we have some evidence that lint accumulated in this dryer from a photograph.

ATTORNEY LYNNE LIBERATO: We do and Whirlpool doesn't dispute that it is possible and that probably likely that there will be some small amount of lint.

JUSTICE HARRIET O'NEILL: I just want as you break it down, I want to see if there's evidence in the record to support each piece.

ATTORNEY LYNNE LIBERATO: Sure, well if I may, if I could, I'll go step by step. So the first thing that has to happen is that this tiny piece of lint has to be sucked up six inches into the heater box and there's no test that shows that by the plaintiff's experts, but there are repeated tests by Whirlpool's experts to show that can happen. The next step in the process.

JUSTICE SCOTT A. BRISTER: The CPSC dryers were different so that doesn't establish one way or the other for this dryer.

ATTORNEY LYNNE LIBERATO: Well that's right, Judge, but I have to say, I'm just giving total benefit of the doubt to the CPSC report and you're absolutely right, it's a different dryer. It's a different configuration. There are disassembled pieces. It's horizontal. The test is done so that the lint's travelling horizontally rather than vertically. So it is very different, but in going back to the steps, what it, what has to happen next and once it gets sucked up, it has to go past the heating element and it is roaring past there in a millisecond and we have tests that show that can't happen. It can't, it cannot ignite because it's just plain moving too fast across that heating element. So there's no evidence to that effect. The CPSC report, going back to Judge Brister's comment, in that case the test is the lint is moving very slowly, half the speed, across and again as I said across the heating element and as I said [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Then why did the plaintiffs in their brief and citation to the record say that the report demonstrates the dryer's heater can turn airborne lint into embers that ignite material downstream?

ATTORNEY LYNNE LIBERATO: I think that's true.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay. I thought you just said that they, it was, it was going too fast to ignite.

ATTORNEY LYNNE LIBERATO: In our case, but that's the difference and that's part of the point is that there's the, why the CPSC report does not provide reliable evidence for their expert because in that case, it's moving so slowly as opposed to ours which is going twice as fast and ours is going up rather than across. So, yes, it shows that



that can happen, but it's lint igniting lint. It's a different configuration, different pieces from a different dryer.

JUSTICE SCOTT A. BRISTER: Not similar conditions is your position.

ATTORNEY LYNNE LIBERATO: Sorry?

JUSTICE SCOTT A. BRISTER: Not similar conditions is your position.

ATTORNEY LYNNE LIBERATO: Not similar conditions, not similar mechanics.

JUSTICE DAVID M. MEDINA: What about the expert's testimony that there were pieces of lint that he believed were found on or under the heating element on this particular dryer?

ATTORNEY LYNNE LIBERATO: Well he ended up recanting that on, oh on the Whirlpool dryer, that's correct. On the Whirlpool dryer. And that, this dryer was in an inferno and the house was burning.

JUSTICE PHIL JOHNSON: But if the lint is going by too fast, is his testimony some evidence that pieces of lint could become lodged in the dryer, in the heating element, I mean?

ATTORNEY LYNNE LIBERATO: There's no evidence. There's no evidence.

JUSTICE PHIL JOHNSON: But am I misreading the record or misremembering it where he, I thought there was reference that he testified in this dryer, the heating element had evidence of lint still in it that was burned.

ATTORNEY LYNNE LIBERATO: Not the heating element. The heating element didn't have lint.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY LYNNE LIBERATO: But that is a good jumping off point, Your Honor, to talk about the other pieces, the other steps that weren't proven by the plaintiffs because that's where we were last and the to me one of the most compelling just as a layperson is the fact that there's no test and it defies logic frankly, but putting that aside, I know that's not the test the Court considers, that these two T-shirts can tumble for more than 10 minutes, not extinguish this ember. There's no test that the plaintiff's experts undertook to show that. We showed that it could not happen and then that these T-shirts would fuel, could fuel the fire that would be strong enough and intense enough to escape the drum of the dryer, but not burn up the T-shirts.

JUSTICE DAVID M. MEDINA: No, there's some, excuse me, there's some discussion by one of the experts on for the Camacho's that he did some testing and he came up with a conclusion based on some testing and his common sense. How's that ever tested for reliability. How is some expert's common sense tested? How does that play here?

ATTORNEY LYNNE LIBERATO: Well, common sense to me is almost to envision-that.

JUSTICE DAVID M. MEDINA: Does speculation, conjecture?

ATTORNEY LYNNE LIBERATO: Say so is another way Judge Brister put it in an opinion that that's what common sense is, but then that's no evidence. I mean, what the cases require, they require testing. They require if it can be tested. This is scientific. This is test, this is testable. Whirlpool showed it was testable, but under any circumstance, there needs to be objective standards by which the experts base their opinions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is there in the evidence of burn patterns that show that the fire originated in the dryer's drum or not?

ATTORNEY LYNNE LIBERATO: No. Now the, the expert that testified, I'm trying to remember exactly what it was, but what our expert said is that there had to be burn patterns on the outside to show it escaped and there weren't. Also testified that it was commonly accepted that

the top half of the drum would be burned, but not the bottom half and so there wasn't reliable expert testimony by the plaintiff's experts.

JUSTICE DALE WAINWRIGHT: Now Whirlpool as I understand it believes that the fire began under the floor of the laundry room.

ATTORNEY LYNNE LIBERATO: Right.

JUSTICE DALE WAINWRIGHT: And the plaintiffs say that the fire began in the dryer, exited the dryer and caused the fire that burned the trailer and killed them, the young man. If the fire began under the floor, I think there's, in the briefing, some citation to evidence that the bottom of the floor and this elevated trailer floor was burned more intensely than the top of the floor, the side that you would normally walk on in a trailer. I think I remember reading evidence about that. However, there was a 2-1/2 by 2-1/2 foot square that was not burned. I guess that was under the dryer as I understand it. If the fire began under the floor, wouldn't it burn that square as well? Now if the fire began on top of the floor, then the dryer would protect it, but if the fire began under the floor, I guess the dryer sitting in that square would provide some protection, but wouldn't there still be some burning in that square if the fire began under the floor?

ATTORNEY LYNNE LIBERATO: Well what the expert testified and actually what the evidence showed is that there was some ductwork underneath the dryer and that's what burned and what he testified is that ambient or radiant heat was what caused, the radiant heat is what burned the underneath side, burned both that ductwork and underneath the flooring so the top of the flooring wasn't burning so the evidence is consistent with coming from the bottom, but I think it's important, that's an important point that and as I know the Court knows, it's not our burden to show what the alternative explanation is and now from a juror's standpoint, juries are going to want to know if Whirlpool's product didn't do it, then what did.

JUSTICE NATHAN L. HECHT: So I'm wondering if the parties could agree that there were three, only three ways it remotely could happen and all three were short of equally unlikely. Where does that leave the jury?

ATTORNEY LYNNE LIBERATO: Well I think not the jury, I think the judge because the judge would be determining if the expert was reliable to testify, but.

JUSTICE NATHAN L. HECHT: But shouldn't you let it in? Shouldn't you let the evidence in if there's. There's A, B and C. Everybody agrees either it was gasoline under the floor, it was something else, it was an electrical outlet or extension cord or it was the dryer and everybody says well it's a very small chance it was any one of those. Doesn't the judge have to let it in?

ATTORNEY LYNNE LIBERATO: No, Your Honor, because the plaintiff has the burden to rule in not just rule out and that's kind of a similar circumstance. You don't, the cases in this area say you cannot just give these three options and, you know, sort of like, okay, jury, you pick. That before any evidence goes in that the plaintiff has the burden of showing that there is reliable evidence to support their theory of why in our case the dryer was designed [inaudible].

JUSTICE DON R. WILLETT: Let me clarify one thing. Are you saying that the plaintiff's experts should not have been allowed to take the stand at all to say anything or that what they said was simply amounted to no evidence?

ATTORNEY LYNNE LIBERATO: I'm saying that they shouldn't be allowed to take the stand at all and that it amounted or because it amounted to no evidence.

JUSTICE DAVID M. MEDINA: I'm sorry, does Texas recognize a negligence spoliation claim as you've asserted here?

ATTORNEY LYNNE LIBERATO: There is Court of Appeals authority for negligent spoliation, but, Judge, I think we have intentional spoliation because the evidence is and what the plaintiff's experts did is so reckless it rises to the level of intention.

JUSTICE NATHAN L. HECHT: Now whose duty is that? Is that the duty of the homeowner to notify all parties they think may be responsible? Is it the duty of an expert? Who has that burden?

ATTORNEY LYNNE LIBERATO: Well in this case, it's the duty of Counsel or the duty of the expert, but I think duty of Counsel who was hired immediately. The experts were hired within two days and an exemplar dryer was bought within 36 hours and so clearly, the dryer was the target almost from the start. So under the guidelines, the National Fire Association, National Fire Prevention Association guidelines, there's a duty to notify Whirlpool immediately once that they knew that they were a target. I mean, it's consistent with our jurisprudence, which is that you preserve evidence if there is an anticipation of litigation and certainly there was an anticipation of litigation.

JUSTICE DAVID M. MEDINA: Maybe we talk a little bit more about on that rebuttal and how that may have impacted your case.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counselor. The Court is now ready to hear argument from the Respondents.

MARSHALL: May it please the Court, Mr. Kevin Dubose will present argument on behalf of the Respondent.

ORAL ARGUMENT OF KEVIN DUBOSE ON BEHALF OF THE RESPONDENT

KEVIN DUBOSE: May it please the Court. The Court's analysis of this case should be driven by its most recent fire causation expert case, which was Mack Trucks v. Tomez decided three years ago. In that case, the expert on fire causation was excluded by the Trial Court and this Court held that that was not an abuse of discretion, but in its opinion, this Court pointed out several things that this expert should have done in order to present reliable testimony on fire causation.

CHIEF JUSTICE WALLACE B. JEFFERSON: Same expert right?

KEVIN DUBOSE: I'm sorry?

CHIEF JUSTICE WALLACE B. JEFFERSON: Same expert, right?

KEVIN DUBOSE: Same experts in this case?

CHIEF JUSTICE WALLACE B. JEFFERSON: As in Tamez.

KEVIN DUBOSE: No.

CHIEF JUSTICE WALLACE B. JEFFERSON: Different experts.

KEVIN DUBOSE: Different experts, Your Honor. I think his name was Elred, Elvron or something like that, had nothing to do with this case and in that case, this Court laid out five or six things that he should have done in order to provide reliable evidence. Each one of those things was done by the expert in this case. According to the Tamez decision, if that's what you have to do to be reliable, then this expert was reliable. The Court said in that case that he should have referred to studies and tests and in our case, the expert relied on the CPSC study and tests, tests that he did himself that Don Russell from Texas A&M did and also looked at Whirlpool tests.

JUSTICE HARRIET O'NEILL: Now I haven't read the entire CPSC study, but where in the study does it talk about the speed that precludes it from being sucked up into the dryer before it's extinguished?



KEVIN DUBOSE: It doesn't talk about the speed specifically, Your Honor. It says that the lint can be, can ignite either when it comes into contact with the heating element or with it's, I think it's within three inches of the heating element. So it doesn't have to actually land, collide with the heating element in order to ignite and they said, but they said that it could ignite and, of course, the other evidence we have of that is that in this case both the exemplar dryer and the Camacho's dryer had evidence of charred lint. So that's concrete, physical evidence that lint can ignite in and around the heating element.

JUSTICE HARRIET O'NEILL: Now the exemplar dryer, I didn't see anything in the record. How was that obtained? How was that chosen, the exemplar dryer?

KEVIN DUBOSE: I was wondering about that myself and I don't know except that our investigator somehow maybe he went to dealers in the area, but he somehow.

JUSTICE BRISTER: It was a heavily used dryer.

KEVIN DUBOSE: The exemplar dryer?

JUSTICE BRISTER: Right. It wasn't brand new.

KEVIN DUBOSE: No and neither was the Camacho's dryer and this dryer was and I don't know how he found it, but he somehow found the identical Easy Clean 100 dryer and obtained it.

JUSTICE SCOTT A. BRISTER: Was there evidence about other fires or claims of fires related to the Easy Clean 100 one way or the other?

KEVIN DUBOSE: There wasn't one way or the other and one of the things that Whirlpool says repeatedly in its brief is that we're not aware of any fires ever caused by lint ignition in an Easy Clean 100. Of course, they don't think this was one and if they took that attitude towards every lawsuit, they would always be able to say that.

JUSTICE SCOTT A. BRISTER: We just don't know.

KEVIN DUBOSE: We just don't know. And we didn't try to offer evidence because of this Court's decisions in other products cases saying the evidence of other failures by that product is not relevant. So there's no evidence one way or the other.

JUSTICE DALE WAINWRIGHT: Mr. Dubose, in the Petitioner's brief, Exhibit D, there's a photo it looks like of the back of a dryer with a rear panel removed. Is that the Easy Clean Dryer or an Easy Clean Dryer like the one at issue in this case?

KEVIN DUBOSE: I don't know, I would imagine it's either the Camacho's dryer or the Exemplar dryer, but I think it is an Easy Clean dryer.

JUSTICE DALE WAINWRIGHT: I'm having a hard time understanding what this piece of lint did to cause the fire. It went from a lint chute across a heater box. Can you just track with this diagram or one that you have that you think may be better what happened because I'm having a hard time following.

KEVIN DUBOSE: I can, Your Honor, and first of all, it's important to note that it wasn't necessarily one tiny piece of lint. It could have been multiple pieces of lint or embers and not, there's never any requirement [inaudible].

JUSTICE DALE WAINWRIGHT: What did the lint or family of lints do?

KEVIN DUBOSE: The lint came through the lint chute. The lint is generated by the dryer process in the drum. There's a lint chute it goes to, an exhaust system that's supposed to go out the back of the dryer.

JUSTICE DALE WAINWRIGHT: Okay.

KEVIN DUBOSE: There's evidence that lint sometimes leaks out of

the lint chute and goes into the back cabinet of the dryer, which is where the heating element is and because the Easy Clean 100 has an air ventilation system that they're very proud of, it causes lint to be airborne once it gets into that system. If it's in proximity to the heating element, then it ignites. It then migrates from there into the drum.

JUSTICE DALE WAINWRIGHT: Okay, let me stop you there. So lint comes from the dryer drum into the lint chute assembly?

KEVIN DUBOSE: Right.

JUSTICE DALE WAINWRIGHT: There's an exhaust vent there. It's supposed to come out there, but it may leak because the, there may be a space between the lint chute assembly and the back of the dryer.

KEVIN DUBOSE: Right.

JUSTICE DALE WAINWRIGHT: Then the lint goes in this case went up to the top of the heater box and into that heater box and was ignited, went back into the dryer drum and ignited the fire?

KEVIN DUBOSE: It didn't necessarily go into the heating element itself, but when it comes in proximity to it, it ignites and then it goes from there into the drum and ignites from there.

JUSTICE DALE WAINWRIGHT: Would the piece of lint have had to, in your theory, entered the heater box before going back into the drum of the dryer?

KEVIN DUBOSE: There's a cabinet on the back of the dryer and that entire thing is what we're referring to as the heater box, yes. It didn't have to enter the heating element itself.

JUSTICE PHIL JOHNSON: Wait a minute, say that again. Isn't there in the photograph as I understand, there's a covering over the heating element. It shows a cover. It doesn't show a heating element.

KEVIN DUBOSE: Right, that's what I'm saying because it wouldn't have to come up against the heating element itself if it's proximity to the heating element.

JUSTICE PHIL JOHNSON: If it's outside, if it's outside that metal covering.

KEVIN DUBOSE: Right.

JUSTICE PHIL JOHNSON: And protected from the heating element itself.

KEVIN DUBOSE: Right.

JUSTICE PHIL JOHNSON: There's testimony and evidence that that is enough to ignite it?

KEVIN DUBOSE: There is, Your Honor, and again it's.

JUSTICE PHIL JOHNSON: And then it would, even if it's outside the heating element, it can be blown into the drum?

KEVIN DUBOSE: That's right, Your Honor.

JUSTICE PHIL JOHNSON: Okay.

KEVIN DUBOSE: And the CPSC report indicated that if it's just within three inches of the heating element, the heat alone can cause it to ignite.

JUSTICE PHIL JOHNSON: So if it's outside the heating element, how does it, and it ignites there or it starts burning there, how then does it get from there into the drum?

KEVIN DUBOSE: There's a space between the back cabinet that flows to the drum and because the design of the Easy Clean 100, they constantly circulate air through the dryer. So it is then circulated, it ignites and then goes into the drum.

JUSTICE DALE WAINWRIGHT: Through what opening or through what item does the lint go from the back cover of the dryer back into the drum?

KEVIN DUBOSE: I can't tell you exactly, Your Honor, but I know



that there's an opening between the back cabinet and the drum and that's how the lint migrates.

JUSTICE PHIL JOHNSON: But it doesn't have to be blown in there by this fast-moving current of air that the Counsel's talking about, is that your position? It can just kind of migrate in there. It doesn't have to be blown in there through the air force?

KEVIN DUBOSE: The Easy Clean 100 dryer has a system that's circulates air throughout the dryer and that causes the lint to be airborne and to flow through the dryer system.

JUSTICE DAVID M. MEDINA: Were your experts able to duplicate this in any type of lab testing?

JUSTICE DAVID M. MEDINA: Or any other expert?

KEVIN DUBOSE: They did a lint ignition test. It wasn't identical to these conditions. The CPSC did test to show.

JUSTICE SCOTT A. BRISTER: But that was where they dropped lint on a heating element.

KEVIN DUBOSE: That's right.

JUSTICE SCOTT A. BRISTER: That's a little different.

KEVIN DUBOSE: That's right and what that shows is that when you drop it on the heating element, it actually comes into contact with it, but the CPSC report showed that it ignited within three inches of it. So you don't have to have actual contact.

JUSTICE SCOTT A. BRISTER: The speed it's moving past makes a difference.

KEVIN DUBOSE: It does and.

JUSTICE SCOTT A. BRISTER: If it goes faster than the speed of sound, it's not going to ignite.

KEVIN DUBOSE: It does make a difference, Your Honor, but there hasn't been any real qualification of what the outer limits are of that. My understanding of the Whirlpool testing, they're talking about the flow of air through the lint chute itself. According to Whirlpool's theory, there is no lint in the back cabinet at all. I don't know how you measure the speed of something that's not even supposed to be there, but it was back there and we know that again because we found burnt [inaudible].

JUSTICE SCOTT A. BRISTER: And then get to the part Ms. Liberato says is the hardest for her to understand. It's the embers tossing around with wet T-shirts and it ignites them, but doesn't really flame and then they, then it stops and then your client's, did she open the door and discover the flames or the flames were coming out when she walked into the laundry room?

KEVIN DUBOSE: She walked by the laundry room and opened the door and then walked away from the laundry room without looking inside.

JUSTICE SCOTT A. BRISTER: So it had no flames then?

KEVIN DUBOSE: Right and then shortly thereafter, she noticed smoke and then saw.

CHIEF JUSTICE WALLACE B. JEFFERSON: Shortly thereafter being how long? Was there evidence that the dryer was off for 30 minutes or something like that, is that correct?

KEVIN DUBOSE: There's not clear-cut evidence about that, Your Honor, and let me talk about that important, because that's important and I'm going to come back to your question, Justice Brister. The Whirlpool seizes upon a statement that Ms. Camacho apparently made to an investigator at some point that she thought she started the dryer at 10 o'clock. She said at trial she doesn't remember ever saying that, doesn't remember talking to someone. She didn't have a watch on that night. She has no idea of what time it was except that from the time

she opened the dryer until she smelled smoke, it was not very long.

JUSTICE WAINWRIGHT: Her husband said she started washing clothes at 10:30 PM, right?

KEVIN DUBOSE: Well not quite. It wasn't her husband. It was her son.

JUSTICE WAINWRIGHT: Her son, okay.

KEVIN DUBOSE: And what he said is I went to sleep at 10:30 and at that point, she had not started the washing.

JUSTICE SCOTT A. BRISTER: Now that's at trial right?

KEVIN DUBOSE: Right, yes, Your Honor.

JUSTICE SCOTT A. BRISTER: And that's, to me this is one of the most troubling parts, what they told the investigators immediately after the fire was that the husband had boarded up the son's window and that it had been several hours after she opened it before flames started happening. Then we hire experts and we come to trial and all of that changes. Now that, in that kind of situation, we should, a court should be especially concerned about reliability and spoliation shouldn't we?

KEVIN DUBOSE: I think what that means when you have conflicting testimony like that.

JUSTICE SCOTT A. BRISTER: This isn't conflicting witnesses. This is the same people who told one story to the fire investigators and then after a suit was filed and their investigators come back and said what caused the fire, they changed their testimony. A court has to be concerned about that don't we?

KEVIN DUBOSE: And I think what the Court does is it allows the jury to hear both parts of that testimony and then they get to decide and, according to *City of Keller v. Wilson*, that's what you do when there's conflicting testimony, whether it's from the same witness or not, the jury gets to make that decision.

JUSTICE SCOTT A. BRISTER: Not always. A lot of times we don't allow witnesses to change the testimony. And there's policy reasons for that and especially when everything's been destroyed, moved around, etc., which may be the fireman's fault. It may not be your client's fault at all, but at some point don't we have to be concerned about this. We could just toss them all the to jury, of course, toss all credibility questions and we generally do, but when we're talking about millions and millions of dollars and testimony has changed this much, shouldn't, should there be any heightened reliability we require, shouldn't that factor in?

KEVIN DUBOSE: First of all, I don't think the testimony has changed that much. Most of the testimony was remarkably consistent. There was this difference between Ms. Camacho's testimony about the timing, but I think it would be a dangerous rule where you say when there's conflict, we're going to give binding, conclusive effect to an investigator's statement and that investigator never even testified. His statement was admitted into evidence, handwritten notes from his testimony, that gets conclusive effect and you disregard the sworn testimony of the witness.

JUSTICE DAVID M. MEDINA: And shouldn't there be some weight given to a person who's suffered this very traumatic event with the loss of a child and, of course, the loss of all these possessions and making statements in a very traumatic situation like that and then later on, for whatever reason, you have time to reflect on things and perhaps you recall things differently or more specifically. I mean certainly there has to be weight given to that.

KEVIN DUBOSE: I certainly think there is, Your Honor.

JUSTICE SCOTT A. BRISTER: That would wipe out the Excited Utterance Rule wouldn't it?

KEVIN DUBOSE: This wasn't an excited utterance. The Excited Utterance Rule has other policies behind it.

JUSTICE DAVID M. MEDINA: How does your client prevail if the CPSC report is excluded for whatever reason and relying only on the testimony of your expert who did some testing and looked at some other documents and then came to the conclusion that this was the cause of the fire based on that study and is common sense. How does that support the verdict?

KEVIN DUBOSE: Well, first of all, I don't think the CPSC report should be excluded and that's not really argued in the briefing before this Court. It was a test undertaken by an impartial government body before this fire ever occurred. It came about because concern about in 1998, there were 15,600 dryer fires thought to be attributable to lint ignition in this country. So they did a study of lint ignition. It's not some fanciful theory that our expert came up with. It's in this impartial government agency came up with this study. So I don't think it should be disregarded.

JUSTICE DALE WAINWRIGHT: I'm curious, how many of those 15,600 fires occurred in an Easy Clean dryer?

KEVIN DUBOSE: The report doesn't attempt to quantify that, Your Honor.

JUSTICE DALE WAINWRIGHT: Okay.

KEVIN DUBOSE: And we certainly aren't making that point, but our point.

JUSTICE DON R. WILLET: But your expert and no other expert has ever been able to replicate a fire in this model dryer.

KEVIN DUBOSE: Our expert has not in a complete dryer replicated this fire. That's exactly correct.

JUSTICE SCOTT A. BRISTER: Did he attempt, did he attempt to?

KEVIN DUBOSE: I don't know that he did any test using the complete dryer, but again I don't think that should be the standard because a lot of defective products have caused problems that can't always be replicated. If there was litigation about the Space Shuttle, for example, that had been tested many times. That O ring problem had never occurred and yet we know that that failed because of the heat factor.

JUSTICE SCOTT A. BRISTER: It's a little hard to do tests with a giant rocket. It's expensive before long.

KEVIN DUBOSE: It is.

JUSTICE SCOTT A. BRISTER: Whereas this case, your clients were, what was the, what did they ask the jury to award. The jury awarded \$14 million. They asked, I assume, more than that or.

KEVIN DUBOSE: I don't remember, Your Honor.

JUSTICE SCOTT A. BRISTER: So it's worth doing some testing given the amount of money involved and I'm interested in the argument, that does make sense to me that maybe so many coincidences have to happen that it'd be hard to replicate, but then if that's true, doesn't that reflect on the question of whether this was an unreasonably dangerous defect. If it's so hard you can never make it happen again in a test, how could it be unreasonably dangerous?

KEVIN DUBOSE: If it's a defect that can cause a problem of this nature and, again, it's not an isolated incident. Apparently these dryer fires are fairly common.

JUSTICE SCOTT A. BRISTER: I'm assuming at some point if there's a one in a billion chance or one in a trillion, one would have to say that's not unreasonably dangerous because it's just so rare.



KEVIN DUBOSE: I think that's right. If it's that remote.

JUSTICE SCOTT A. BRISTER: Well if you can't do it with lots of trying, how could it still be unreasonably dangerous?

KEVIN DUBOSE: Well certainly there's not kind of quantifications, but, again, unreasonably dangerous is something that we leave up to a jury. They get to decide how dangerous it is, how often it happens and they make that decision.

JUSTICE HARRIET O'NEILL: Let me touch on an aspect of this case that I think's particularly interesting and that is what you have to prove to show an alternative, safer design and the arguments been made that we should apply the same Robinson factors to expert testimony of a safer alternative design and there's some appeal to that. It seems awfully easy for somebody to say well, you should have put a glass tube, a smooth tube and without really testing the efficacy of that sort of fix and how do you answer that charge?

KEVIN DUBOSE: Your Honor, that exact argument was made before this Court in a case called GMC v. Sanchez in 1991 and there was an argument made that the safer alternative design in that case didn't have testing, didn't follow the Daubert standards and this Court, first of all, said that there was more to just this theory than just the expert's bald assurance/-assertion. He described the operation of the product, the proposed design that would make it safer and that his testimony about engineering principles underlying his proposed design supports his conclusion. But more importantly, the Court said that the plaintiffs did not have to build and test an automobile transmission to provide a safer alternative design.

JUSTICE HARRIET O'NEILL: I realize that. You don't have to duplicate it, but it does seem fairly easy in this situation to play armchair quarterback and kind of say, glass tube when their internal testing had shown that glass tubes have problems as well and I'm trying to figure out where that standard should be between perhaps Robinson and just bald assertions of an expert of something that might be apparently fixed, but that really after thousands and tens of thousands of tests doesn't work.

KEVIN DUBOSE: If it wasn't a glass tube, it was a smooth tube and the theory is really quite simple. This corrugated tube has.

JUSTICE HARRIET O'NEILL: No, I understand the supposed simplicity of the theory.

KEVIN DUBOSE: Right.

JUSTICE HARRIET O'NEILL: Which begs the question if it's so simple, surely they would have done it.

KEVIN DUBOSE: Well, in fact, they did do it and that's one of the things that helps the safer alternative design analysis. This is not some crazy idea. It's something that Whirlpool used to do. They changed their design, not because the tube was or was not accumulating lint, but because of a faulty connection at the transmission point, which is where the leak occurred.

JUSTICE PAUL W. GREEN: Which is why I don't understand why the corrugated design would be a better design. If the problem is that the lint leaks out into the cabinet, the corrugated design is what was designed to prevent that from happening. So that because it gives it a flexibility that the straight tube wouldn't have. So why would then if the problem is leaking lint into the cabinet of the dryer, why would you say that the straight tube would be a better design when it's been proved, at least by Whirlpool, that that doesn't end up in some leaking end of the cabinet.

KEVIN DUBOSE: Whirlpool's expert testified that that problem was

solved, not by the change of tube, but by a better connection, an extra bracket and a couple of screws. That solved the problem of leakage. So there's no testimony that they had any problem with the glass, the smooth tube being part of the leakage problem.

JUSTICE DALE WAINWRIGHT: Was the evidence of why they changed the tube to a smooth, to a corrugated tube then?

KEVIN DUBOSE: That's not really clear. They just said we used to do this. We had this leakage problem so we fixed that with the brackets and we changed the tube.

JUSTICE DAVID M. MEDINA: Mr. Dubose, before your time's up, can you touch on the spoliation issue and how that may impact this case?

KEVIN DUBOSE: I can, Your Honor. First of all, this is not a case of spoliation. Spoliation is where there's intentional destruction of evidence and that's not what happened.

JUSTICE DAVID M. MEDINA: There's an argument that it was so blatant you should have done this, that and the other, that the negligence rises, that negligence rises to a higher standard and it's almost the same as having an intentional conduct here and I can't see that from the record, so can you explain?

KEVIN DUBOSE: Right and it's, this is not a case where evidence was destroyed. The evidence was meticulously preserved. The real complaint here is that is about fire sight investigation protocol and that has never been recognized by any court in this state as a legal standard that requires you to invite every potential defendant to a fire scene before you do an investigation. Now in this case it's true that by the second day, we had identified Whirlpool as a possible defendant, but the experts said there were a number of other defendants. If you had a case where someone came home to a fire and they weren't there and didn't see it coming out of the dryer and you had multiple appliances in the house, would you have to invite every one of them before you do any scene investigation. But of course the other important thing about spoliation is there's no evidence that it hindered their experts at all. One of them was asked specifically if it precluded him from reaching conclusions. He said it didn't. None of the experts did so and there's case law in Trevino, the Court says sometimes in design defect cases, spoliation really doesn't impact your ability to defend against a design for defect. So I don't think there was any harm even there was spoliation and there wasn't spoliation.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Hecht.

JUSTICE NATHAN L. HECHT: Just quickly, the Petitioner says that it's undisputed that the ember circulated with the clothes in the drum and I know you dispute the timing and there's a question about that, but do you agree with that part?

KEVIN DUBOSE: I missed the point that was undisputed, that there were embers in the drum.

JUSTICE NATHAN L. HECHT: And circulated with the clothes for at least 10 minutes.

KEVIN DUBOSE: That's probably true because the cool-down period and, of course, by that point in the dry cycle, we're not talking about wet clothes. We're talking about fairly dry clothes, but again the CPSC report proved that embers, that lint could ignite and migrate downstream and not only ignite other lint, but ignite clothing. In fact, in the CPSC report, they used terrycloth towels, which I think would be harder to catch fire than T-shirts and they found the lint ignited terrycloth towels downstream.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF LYNNE LIBERATO ON BEHALF OF PETITIONER

ATTORNEY LYNNE LIBERATO: May it please the Court, several things didn't come up, but one thing that I think would be [inaudible] the question on how the system worked. It sounds a little bit complicated, but it's a lot easier to understand when you look at the testimony [inaudible] and in the electronic brief that we filed, one of the first footnotes actually has diagrams supported by the testimony and the working, how it works isn't [inaudible] and it shows just what happens within the dryer and how the lint would travel and what the mechanics inside the dryer are. So, for example, Judge Wainwright asked how does the piece of lint get out of the heater box into the drum. It gets there through a screen and the reason the screen's important is that the screen is like, little holes in the screen are half inch and so we know and that's why their expert agrees and we know that the lint had to be so tiny. So.

JUSTICE SCOTT A. BRISTER: Is that the lint screen I clean out every time I?

ATTORNEY LYNNE LIBERATO: Pardon me?

JUSTICE SCOTT A. BRISTER: Is that the lint screen I have to clean out every time.

ATTORNEY LYNNE LIBERATO: Well, there's a lint basket at the other end of the process and that's what has to be cleaned out, Your Honor. I don't know how much laundry you do, but.

JUSTICE SCOTT A. BRISTER: You'd be surprised.

ATTORNEY LYNNE LIBERATO: Probably not, probably not, but yes, ultimately it's caught in a lint collection basket and that's shown in this process.

CHIEF JUSTICE WALLACE B. JEFFERSON: How much does the Plaintiff have to eliminate other possible causes of the fire or sources? Do they have to completely eliminate them if they say it's 60% likely that it was the dryer even though that they acknowledge that there were other possible causes, what's the standard there?

ATTORNEY LYNNE LIBERATO: Well they do have to eliminate other causes.

CHIEF JUSTICE WALLACE B. JEFFERSON: To a certainty or to what extent?

ATTORNEY LYNNE LIBERATO: I would say not to a certainty and I haven't thought this through entirely, but that they have to limit them to a reasonable amount, but that the more important thing than eliminating the other causes is to rule in what the cause is and that's our bigger complaint here. That there isn't enough reliable evidence to rule in causes even though we would say they didn't rule out the causes, but here you don't even get there and I know I'm not answering your question directly in a satisfactory way. I'm just not sure, but I do know that it has to be ruled in.

JUSTICE DON R. WILLETT: Let me try this one, Ms. Liberato. You seem to be arguing most kind of fervently that the testing, the examples given by their side are just too dissimilar from this, but how similar? How close do the examples have to be to your exact product for us to give them weight?

ATTORNEY LYNNE LIBERATO: I think they have to be substantially similar. That doesn't mean they have to be exact, but this particular, these particular tests are just not close enough. They don't fit, if you will, I would say substantially similar.



JUSTICE DON R. WILLETT: Can you define substantially similar?

ATTORNEY LYNNE LIBERATO: Close enough to make it reliable. I realize I'm going in circles, but here they're so far away and I know the Court needs to and that's part of its role is to set standards that imply, but in this case, they're just so far away, my goodness, the tests of on the CPSC holding the lint over the heater box is like roasting a marshmallow on a, over a bonfire. That's not what happened here. It's not even close, but I don't want to get lost in answering you all's questions in the fact that even if everything these tests they say are true that they present reliable evidence, that's still not enough because there's so many steps in the process for which the CPSC report, the exemplar dryer, the testimony of the lay witness, Ms. Camacho, still do not support that reliability. So we have no reliability on numerous of these steps and I'm not talking about one step or two steps or three steps. I'm talking about a bunch of steps for which there is absolutely zero evidence. It's not reliable or unreliable, but zero evidence to support those steps.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Liberato. Justice Johnson.

JUSTICE PHIL JOHNSON: Briefly, how was the alleged spoliation harmful to your client?

ATTORNEY LYNNE LIBERATO: It was harmful because it prevented us from being able to show alternative causes. I know we don't have that burden by doing it. They...

JUSTICE PHIL JOHNSON: And whose testimony or evidence do you rely on for that?

ATTORNEY LYNNE LIBERATO: Well, we rely on evidence that the T-shirts were tested and have gasoline in ...

JUSTICE PHIL JOHNSON: Does someone, does some witness for you testify that their investigation was impeded because of the alleged spoliation?

ATTORNEY LYNNE LIBERATO: Yes, Your Honor.

JUSTICE PHIL JOHNSON: Who is that?

ATTORNEY LYNNE LIBERATO: I believe that was Mr. Adams, John Adams. But I need, if I may add to that just real quickly, there is in the evidence and it's really dramatic again. It helps to have the, to click on the footnote that showed, not the footnote, but click on this evidence that it shows what the scene looked like when their experts were done, which has a lot going on and then whenever our experts there when it swept clean. Thank you for allowing me the extra time. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Liberato. That cause is submitted and the Court will now take a brief recess.

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