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Supreme Court of Texas.  
R.E. HAASE and PRH Investments, Inc., Petitioners,  
v.  
Joseph K. GLAZNER, Respondent.  
No. 00-1076.

September 19, 2001.

Appearances:  
Bradley R. Echols, Boon, Shaver, Echols & Coleman, Longview, TX,  
for Petitioner.  
John R. Mercy, Carter & Elliott, Texarkana, TX, for Respondents.

Before:

Thomas R. Phillips, Chief Justice, Priscilla R. Owen, Harriet  
O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L. Hecht,  
Deborah Hankinson, James A. Baker, Craig Enoch, Justices.

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JUSTICE: Thank you. Please be seated. The Court is ready to hear argument from petitioners in Haase v. Glazner.

SPEAKER: May it please the Court. Mr. Bradley Echols to present argument for the petitioners. Petitioners, reserved five minutes for rebuttal.

ORAL ARGUMENT OF BRADLEY R. ECHOLS ON BEHALF OF THE PETITIONER

MR. ECHOLS: May it please the Court, Counsel. Although the Honorable Texas [inaudible] court of appeals directly ruled among other things that certain letters have been written by Mr. Glazner, the respondent in this case and signed by Mr. Haase, my client, the petitioner, were -- did not constitute a contract and did not satisfy the Statute of Frauds. The Court erred in all due respects holding that Mr. Glazner could continue to seek his contract damages or the benefit of the bargained damages by asserting claims of fraud and fraudulent inducement.

There occur in three respects. First, the court of appeals failed to distinguish between a tort of fraud and a tort of fraudulent inducement by failing to require allegations and proof of an independent damage to the plaintiff in a fraud claim of which are not required in a fraudulent inducement claim, According to this Court's decision in Formosa.

The court of appeals also erred in holding that Glazner could assert a fraudulent inducement claim without -- without there being a contract, in the absence of a binding contract.

JUSTICE: So, are you saying there is a fraud claim, just not a fraudulent inducement claim?

MR. ECHOLS: Your Honor, what I'm saying is, in this particular case, there was no independent allegations of fraud. There was only, although the word fraud was used in this case, in the pleadings, in the underlying pleadings that the plaintiff stated a common law and statutory fraud, those were his allegations of fraud and the --

JUSTICE: Was -- I'm not sure I understand. Are you saying we decided based on the pleadings or ...

MR. ECHOLS: Well, partially based on the pleadings in this case. That's what the appellate court failed to look at. It's -- it's what -- part of is, the pleadings in this case simply stated there was common law and statutory fraud. That was the only allegation of fraud in this case other than that they claimed a fraudulent inducement --

JUSTICE: I thought -- I thought the pleadings though -- although they didn't state what they were, listed at least five different theories of fraud, from his future employment, a statement of opinion known to be false, false statements of facts, statement of opinion based on false statements, and then expression of opinion that is false by one claiming special knowledge.

MR. ECHOLS: Those -- those are all --

JUSTICE: So, those are all different theories of fraud. They're -- they're -- do you agree that there's more than one species of fraud?

MR. ECHOLS: I certainly agree, your Honor.

JUSTICE: Okay.

MR. ECHOLS: There's more than one species of fraud but the question, though, that was presented was -- the trial court ordered the plaintiff in this case to say, "Okay, hear these theories. What are your factual allegations with respect to fraud? What are the allegations and what are your damages with respect to your fraud claim?" And the plaintiff failed to replead.

JUSTICE: But you didn't move for summary judgment on that basis. With respect to fraud, you only moved that the plaintiff's fraud claims are barred by the statute of fraud with respect to fraud. That's the only grant I see in your motion.

MR. ECHOLS: Your Honor, the -- if that's the only pleading that we have [inaudible] --

JUSTICE: Well, but you didn't file a no evidence summary judgment because you filed a regular summary judgment motion and offered proof to the trial court.

MR. ECHOLS: We offered proof to the trial court that there was no fraud as best we could --

JUSTICE: Okay.

MR. ECHOLS: -- because there was no -- there was no pleadings regarding the fact, your Honor.

JUSTICE: I understand but I'm just trying to get the procedural framework of this. I see a pleading that has several different species, special exceptions were granted, order to the plaintiff to replead. The plaintiff didn't replead but you only moved for summary judgment with respect to the fraud claim on the grounds that the fraud claims are barred by the Statute of Frauds.

MR. ECHOLS: Right. Because the only ones that were pled were barred by the Statute of Frauds.

JUSTICE: But what about the misrepresentation of fact?

MR. ECHOLS: Your Honor, that goes --

JUSTICE: Are fraud claims based on misrepresentation of fact made with reckless disregard and that are detrimentally relied upon by a person that's --

MR. ECHOLS: Certainly, there could be but there's no -- there are no specific statements that amount to that --

JUSTICE: I understand that you're saying that that's the case if there's not any. But I'm just trying to get a hand of one procedurally where we are since we've got a summary judgment proceeding here that we've got to stick to the rules by.

MR. ECHOLS: Your Honor, and I agree with you. But I --

JUSTICE: So, tell me -- tell me how I get there with you in the face of those pleadings in a summary judgment motion that only relies upon the Statute of Frauds as a grant for granting summary judgment against the plaintiff on the fraud claim.

MR. ECHOLS: Well, with respect to the fraud claim, you Honor, I believe that there is a requirement under Friesenhahn case that a summary judgment can be based on the fact that the claimant failed to comply with the Court's order to --

JUSTICE: But don't you have to base your summary judgment motion on that? Don't you have to say as a grant of summary judgment, this is the reason why I'm entitled to summary judgment and you didn't do that.

MR. ECHOLS: Your Honor --

JUSTICE: So, what do we do with that?

MR. ECHOLS: Well, I don't think you have to, because I think under that scenario, if you said there are no pleadings, there are no factual allegations, there's nothing, there's no -- and the court says you got to put forth some factual allegations and put forth some damages. There's no way no you can't respond -- respond to that other than to say that the pleadings -- that there -- there is no -- you can offer your proof that you have in response to any claims of fraud, but there's no way that you can respond to every conceivable claim and rebut a conceivable --

JUSTICE: Can't you make [inaudible] purpose of a no evidence summary judgment motion?

MR. ECHOLS: Well, I think that no evidence deals with a different fact. No evidence is -- there's no evidence of these claims but a no -- these -- these claims are not even pled in terms of factual allegations. You don't need to go to --

JUSTICE: Did -- don't you either need to move for summary judgment or move to dismiss based on the pleadings and the failure to replead as a grant for dismissal?

MR. ECHOLS: Well, your Honor, I think you can move based on the pleadings as they stand and the Court can use that interpretation of the pleadings. If the party did not plead factual allegations that support its claims, I think that the Court can just disregard these claims.

JUSTICE: Did Glazner plead for damages other than contract damages or damages that would be measured by a breach of contract?

MR. ECHOLS: The -- there was no pleading other than for contract damages or for breach of contract damages and that's part of our -- that was also part of this request to the trial court that they set forth any other damages that they might have.

JUSTICE: Was there testimony in the summary judgment record of other damages aside from contract damages?

MR. ECHOLS: There are -- there is no testimony of any other damages outside the contract damages and, in fact, the -- the testimony

I've cited I believe -- the respondents stated that [inaudible] decision was loss profits or contract [inaudible]

JUSTICE: Wasn't there evidence of damages that were in response to reliance on representations made by your client? I thought that there were.

MR. ECHOLS: I don't believe that there was any evidence of any damages in that regard.

JUSTICE: Isn't there -- what is a reference to a contract advisement property?

MR. ECHOLS: Right.

JUSTICE: There's no -- there's no evidence of a -- some sort of down payment being made --

MR. ECHOLS: Your Honor, I believe what happened in that particular case and what the evidence was -- was that this -- that there was a down payment made and that was returned to this gentleman. In other words, that he -- when he didn't buy the property the down payment was returned to him. And that he did not suffer any damages as a result to that. I believe that was the testimony -- his underlying testimony in the case.

I don't believe there was any binding or any claim that he lost money because of that.

JUSTICE: Okay. I've got two things here. It says that plaintiff claims you contracted for an option to purchase land of which he intended to open a Whataburger franchise, is that correct?

MR. ECHOLS: Right. And I believe that' where the money was returned --

JUSTICE: And there's also a claim that he capitalized on his efforts that -- that your client capitalized on Glazner's efforts regarding demographics and potential profits and location, all the work that you would do in -- in preliminary to obtaining a franchise. Was that in the record?

MR. ECHOLS: Your Honor, if you recall in the underlying case, there was a claim made for -- by Mr. Glazner for unjust enrichment and -- and for [inaudible] which we believe those fall into -- that claim was made and the appellate court dealt with that and said -- and in the underlying case so that -- that is not at issue in this matter and I don't believe that there's any evidence that he was out-of-pocket any expenses as a result of that. He was maybe out-of-pocket sometime if these allegations were correct but at the same time, he was employed, he was working, my client at that time. So, -- but the appellate court in what is not [inaudible] appeal to this Court by -- by Glazner, had dealt with that issue and found that there was no unjust enrichment or no -- no [inaudible] there -- no merit to those claims.

With respect to that first error that we discussed that is the failing to distinguish between the fraud and fraudulent inducement claims, the Court found that -- the legal duty that they found in -- if you look at their opinion, the appellate court found the duty was -- that was alleged by Glazner was "the use of fraud to induce another into executing a contract." This, of course, is fraudulent inducement.

As the respondent correctly points out in his brief, he must allege a material misrepresentation and induce the party to do something and have damages resulting from that inducement in order to have a claim of fraud and as we pointed out earlier in his petition, Mr. Glazner failed to plead any facts supporting any of his elements and did not even identify he claimed misrepresentations. The only evidence that Glazner offered as we just discussed was evidence that he was -- he lost the benefit of the bargain in this particular case.

He didn't offer any evidence of any other damages. I think that --  
JUSTICE: Why would he have to do that if he didn't move for summary judgment on the ground that he had no compensable damages under the law. Why would he be required to offer contraverting proof with respect to the kind of damage he was claiming if he didn't move for summary judgment on that basis?

MR. ECHOLS: Well, your Honor, we did -- we did move for summary judgment on the basis had there not been a fraud claim, in order to prove fraud outside --

JUSTICE: You -- you moved on the basis that it was barred by the Statute of Frauds.

MR. ECHOLS: Right. Because there is no proof of any damages other than benefit-of-the-bargain damages and that there was no pleading of it and no proof of it. So, you have to tie the two together. The only damages that were alleged [inaudible] in proof of was the loss of profits or the contract --

JUSTICE: And that depended on whether or not the only fraud claim he asserted was a fraudulent inducement claim?

MR. ECHOLS: Well, that -- and that's our position.

JUSTICE: I know that's your position but if, in fact, there was another fraud claim based on a different theory than fraudulent inducement, then that argument doesn't hold [inaudible].

MR. ECHOLS: I believe that would be correct, your Honor.

JUSTICE: Do you -- I guess I'm a little bit confused. Do you assert that only fraudulent inducement claim is disposed of by the Statute of Frauds?

MR. ECHOLS: Your Honor, I guess it depends on how the Court views it. I think there's two ways to look at this. One is and I think the easier way probably is to analyze the claim based on whether a party is asserting contract damages and has a contract. In order -- with respect to fraudulent inducement claims, the very nature of that claim requires that there'd be a contract that was entered into between the parties. Without a binding contract, there can't be detrimental alliance or can't -- had been any damage.

In every case that we located and all the cases that have been cited where fraudulent inducement was upheld, there's always been a contract --

JUSTICE: Well, the issue -- maybe, I'm not making myself clear -- the question of the Statute of Frauds is that you do not have a binding contract.

MR. ECHOLS: Correct.

JUSTICE: And it seems to me that your cases say that you can't use fraud as an indirect way to accomplish what you couldn't do directly which is to enforce a contract that's contrary to the Statute of Frauds. Now, I understood you in answer to the earlier question to say, no, that's -- the Statute of Frauds depends -- only applies to fraudulent inducement. So, then my question is, so, what is your claim that fraud did apply?

MR. ECHOLS: Well, your Honor, again, I think -- the fraudulent -- the fraud claim if -- if by a fraud claim you are seeking benefit-of-the-bargain damages, if that's what you are seeking by virtue of your fraud claim, however you would characterize that, that the statute of limitations would apply in that particular scenario.

JUSTICE: You mean the Statute of Frauds?

MR. ECHOLS: The Statute of Frauds, I'm sorry, would apply in that particular scenario. It depends I believe on the damages that are being sought because if you are -- it's a situation where the policy of --

obviously of both the legislature and, I think, the legislature in [inaudible] the Statute of Frauds was based on common law. If you cannot prove your damages by contract, if it's so ambiguous, if their terms is so vague, all the things that, in fact, the appellate court found in this case, if you can't prove the benefit of the bargain, then you shouldn't be able to -- in order to satisfy a contract claim, you shouldn't be able to try to prove the benefit of bargain by alleging a fraud claim. So, it kinda depends on how you look at it. There are two sides of the same coin, I believe, that is, whether there is a contract or not, that's an easy way to deal with it. Whether they're seeking benefit of the bargain or the damages, it is a true test of whether the really setting forth the fraud claim or not setting forth the fraud claim.

JUSTICE: Any other questions? Thank you, Counsel.

MR. ECHOLS: Thank you.

SPEAKER: May it please the Court. Mr. John Mercy will present argument for the respondent.

ORAL ARGUMENT OF JOHN R. MERCY ON BEHALF OF THE RESPONDENT

MR. MERCY: May it please the Court. Good morning. This case, I think, is illustrative of an opportunity with the tendency to take a position by this Court that was fairly clear and extended to where this Court never intended to go. For most of Plastics dealt with these very arguments. The only difference between this case and most of Plastics case with regard to the fraud, the fraudulent inducement issues is the fact there's no written court finding or a contract in the end. Justice Hankinson is correct. The summary judgment in this case on the fraud claims was a, for lack of a better term, an old fashioned summary judgment, not enough, no evidence summary judgment.

MR. MERCY: It's interesting to note that they did move on our equitable claims on the basis that we didn't state the cause of action there and the court of appeals upheld that. They didn't do that with regard to the fraud claims. What they're trying to do is resurrect the argument that this Court first addressed in Graham v. Roder over 180 years ago which is the Economic Loss Rule which is the argument that if the damages are the same for the contract as they are for the fraud, then you're not entitled to recover.

JUSTICE: What damages other than benefit of bargain and breach of contract [inaudible].

MR. MERCY: Interestingly, here there are some additional damages. He -- I can list them by category, probably is the best way to do it. He has damages from the preparation and the obtaining of the lease on the particular piece of property including the payment of surveyors' fees in obtaining a survey. He also submitted loan applications to the SBA in anticipation that this deal going through. Those are in the record.

JUSTICE: You're seeking the out-of-pocket --

MR. MERCY: In addition to the benefit of the bargain.

JUSTICE: Did both of these, though, are out-of-pocket.

MR. MERCY: Yes, Sir.

JUSTICE: [inaudible]

MR. MERCY: Your Honor, that's not in the record.

JUSTICE: I mean, what damages are you claiming in connection with

the submission of the [inaudible]?

MR. MERCY: For preparation of it.

JUSTICE: Preparation of it?

MR. MERCY: Yes, ma'am. But this is a case where --

JUSTICE: Any other out-of-pocket damages?

MR. MERCY: No, not that are in the record. And what you have to keep in mind is at the stage where the summary judgment was filed in this case, basically there are the depositions of the two parties. There is a controverting affidavit filed by Mr. Glazner which does address this but not as -- it's not as specific on the damages because at that time the argument wasn't that the economic loss rule might [inaudible] from it. The argument was that --

JUSTICE: Are the benefit-of-bargain damages foreclosed by the Statute of Frauds?

MR. MERCY: No, your Honor, I don't believe so based on this Court's holding in Formosa and it -- whether it is a fraudulent inducement claim or whether it's a regular fraud claim, this Court addressed exactly that same issue and not once but twice and the opinion makes the same statement, which I think is very interesting because typically, this Court doesn't repeat itself in an opinion unless it means to emphasize it. But it says that the fraud claim can be based on a promise made with no intention of performing irrespective of whether the promise is later subsumed within a contract. Subsumed within a contract.

JUSTICE: What's the benefit then of the Statute of Frauds here if the plaintiff is allowed to pursue the same benefit then of the bargain damages that would be available in a breach of contract case? Which is not available here is the Statute of Frauds [inaudible]

MR. MERCY: This Court has held that there's an independent duty, essentially, a duty of honesty which is what raises separate and apart from the contract. This duty is to not make misrepresentations in attempting to obtain a contract.

JUSTICE: So most that they had -- the claim was the contract was entered into the subcontract [inaudible] under false impression and he was contractually bound to perform. He wouldn't have [inaudible] with that contract, he wouldn't have gone -- made all those [inaudible] different situation [inaudible]

MR. MERCY: Because there [inaudible] The problem we have here is my client is ready, willing, able, making preparation to enter into the contract. Just before it subsumed into a contract, the other side backs out, they know they were gonna back out from the beginning and then takes advantage of the preparation work that my client did in moving forth that contract.

JUSTICE: But under traditional fraud damages, you're only out-of-pocket [inaudible]

MR. MERCY: I'm sorry.

JUSTICE: Traditional fraud damages are only out-of-pocket [inaudible]

MR. MERCY: Correct.

JUSTICE: And you had no bargain [inaudible]

MR. MERCY: We had the potential for a bargaining. We can -- and this is a proof problem we may have when it goes back at summary judgment, though I don't think the Court was right in booting us out. A, because it wasn't raised; and B, because they didn't disprove it which they would've been required to enter a traditional summary judgment motion. It may be a proof of problem when we get back to the trial court as to what the amount of that is.

JUSTICE: If we had all the Texas law prior to Formosa, would you have a claim for benefit-of-the-bargain damages?

MR. MERCY: On which claim? Because --

JUSTICE: If the Formosa case wasn't there, would you have any other authority to get benefit of the bargain as opposed to out-of-pocket damages?

MR. MERCY: Sure, your Honor, and Formosa actually lists the cases going back, like I said, as far as *Graham v. Roder*, coming forward talking about the Economic Loss Rule and how it applies to fraud cases. So, yes, I think even if Formosa wasn't there, we would have our claim. The good thing is, Formosa's there and this Court did a very good job of reviewing the law and, basically, setting out what appears to be a fairly bright-line rule with regard to fraud cases.

JUSTICE: Is Formosa broader than simply referring to fraud in the inducement as opposed to fraud generally?

MR. MERCY: That's a good question and if you read it, it specifically talks about fraudulent inducement. I think that is -- I think the logic and reasoning can be applied to fraud cases. The reason it's limited, I think, is because the facts in that case, if it was a fraudulent inducement case.

JUSTICE: The fraudulent inducement is limited only to cases where contract was entered into, and fraud covers those circumstances where no contract was entered into. Then, does that play into a moral -- some clarification of how the Statute of Frauds affects certain causes of action and doesn't affect others. In other words, if you got the contract and you're induced into doing something that you would rather not, is not agreed to, that's one issue. If you get the contract, then fraud [inaudible] You changed your positions except that the Statute of Frauds say you can't enforce a contract unless it's in writing. You can't use fraud to get the damages that the contract would've, otherwise, entitled you to. But you could still get the out-of-pocket expenses up to the point that the contract is [inaudible] entered into.

MR. MERCY: I agree with you up till almost at the end. I think that you're right. Fraudulent inducement is there to protect you if you entered into a contract. Fraud is there to protect you if at the last minute they jerk the contract out from under you. I don't agree that we wouldn't be entitled to whatever we could show our loss was if it was the benefit of the bargain and their fraud theory.

MR. MERCY: I think that we would be entitled to attempt to prove that. Now, what -- whether those damages are capable of being proved or not is a difficult question based on the facts in this case.

JUSTICE: If they made an oral contract with you instead of no contract at all, you'd be barred?

MR. MERCY: No. Under a fraudulent inducement theory, it doesn't have to be a written contract. It can be a -- it has to be a binding contract, either oral or written. Now --

JUSTICE: So, they make a binding contract and breach it. There -- I mean, there's nothing left with the statute of frauds, is there? Unless your -- you make a contract of that, any prior negotiations or attempt of the other party to try to get you to get into the contract.

MR. MERCY: What -- What the policy is to promote honesty in negotiations.

JUSTICE: But if you don't -- if a -- if you don't have a binding contract, if an oral agreement is barred by the Statute of Frauds.

MR. MERCY: Correct.

JUSTICE: So, if that's the case --

MR. MERCY: [inaudible] to fraud.



JUSTICE: -- then you don't have a fraudulent inducement claim because, in fact, it is barred by the statute, do you agree with that?

MR. MERCY: Yes, your Honor.

JUSTICE: So, in fact, what you're left with is a fraudulent misrepresentation question and the question -- I mean, basic fraud --

MR. MERCY: A fraud case.

JUSTICE: -- misrepresentation and the question is what damages can you recover?

MR. MERCY: Correct.

JUSTICE: Right.

MR. MERCY: And part of the -- what you're struggling with is because the way this case was postured when it was tried or when it was [inaudible] actually was, we anticipated there being a contract. We thought --

JUSTICE: But is that the Statute of Frauds provision from [inaudible] the bargain. So, therefore, you can't prove the bargain [inaudible] because the statute won't let you do that part.

MR. MERCY: The statute won't let us recover under a contract theory for the benefit-of-the-bargain.

JUSTICE: They won't let you [inaudible] up the bargain -- will not let you [inaudible]

MR. MERCY: Correct. But that doesn't -- [inaudible] have to keep in mind that this Court has held, like I said, since going back to *Graham v. Roder* that if you can't prove it, you could prove up your economic damages which can include the benefit of the bargain. Now, like I said, it may be a proof problem at trial.

JUSTICE: Well, what's -- what's gonna give -- I -- Justice Hankinson [inaudible] I'm going to buy [inaudible] and I know that she doesn't know that I've got a [inaudible] ready -- a buyer ready, willing and able to pay me a lot more for that house as soon as I buy it [inaudible] resell it. That oral contract is unenforceable. She backs down, I sue her for the loss profit I would have derived on that transaction. [inaudible] prove that Statute of Frauds [inaudible] recover the -- a fraud hearing for those damages.

MR. MERCY: You probably can't, under the scenario you've given because there's not gonna be -- you probably don't have [inaudible]. The simple fact that she backed out --

JUSTICE: She promised me, she wouldn't. She [inaudible], she promised me she would signed on the [inaudible], we show up and she doesn't [inaudible].

MR. MERCY: You have -- you have a proof [inaudible].

JUSTICE: And I have -- I have -- and I've made preparations. I've had the attorneys fees. I've done the survey.

MR. MERCY: If you can meet your burden of proof, you could recover that if you can show that her fraud caused you to lose a sale that you would have had. Your situation where -- if you had an option contract or something, may be stronger.

MR. MERCY: A better situation is, you wanna build a house but you don't have any clue what you want in and so you engage a contractor to draw out plans for you and [inaudible] you had to do all of these stuff and he -- he goes through all these. You have no intention of having him build a house. He goes through all the effort, he designed your house. He designs around problems. He designs the interior and then you back out which you meant to do from the beginning. Now, is he entitled to recover the benefit of that bargain? Sure.

JUSTICE: Did you keep his plans or ever look at them?

MR. MERCY: If you used his plans in your new house, yeah. That

situation, you can show that you have -- he has lost the benefit of that bargain --

JUSTICE: [inaudible]

MR. MERCY: By your fraud.

JUSTICE: [inaudible] out-of-pocket or does he also get the profit he would have made had he built your house?

MR. MERCY: He can -- he can either one and it's put basically to an option of which one he wants to recover. See -- so, it becomes really a proof problem as to whether or not he can do it. In my scenario, I think, it's very, very clear that there is causative effect.

JUSTICE: So --

JUSTICE: But does that -- I'm sorry.

JUSTICE: Go ahead. [inaudible] where's the Statute of Fraud?

JUSTICE: Right. The statute of fraud is not just about honesty but about encouraging people to put these sorts of agreements in writing and then [inaudible] it sort of eliminates some of the proof problems.

MR. MERCY: What you're taking as a defense to a contract action in attempting to apply it to a tort by moving it from whether or not the contract is binding to the posture of whether it is a defense to a fraud action -- to your misrepresentations. And if you do that, you can never have fraud unless you put it in writing which is one of the problems that you run into when you're trying to switch --

JUSTICE: Well, you could have fraud but you just would be limited to noncontract damages, out-of-pocket expenses. You wouldn't get the benefit of the bargain which [inaudible] the fraud is all about.

MR. MERCY: But if -- if you apply this, they're asking, you don't do away with the damages, you do away with fraud.

JUSTICE: You give a [inaudible], don't you?

MR. MERCY: It's potential that you could -- which would limit you to out-of-pocket.

JUSTICE: What I mean if you weren't working on something else for that period of time, that may not be benefit-of-the-bargain. That may be [inaudible] out-of-pocket as well.

MR. MERCY: And what you're getting -- what you're talking about proof problems with the damages not whether you can recover but whether you can prove those damages to recover. You know in my contractor scenario --

JUSTICE: And that what -- and that what this case is about [inaudible]?

MR. MERCY: To a great extent, yes. Because what we --

JUSTICE: And there's an argument, as I understand the petitioner's says you're not entitled to out-of-pocket but it's not because -- theoretically, you're not, it's a proof in pleading problem [inaudible]

MR. MERCY: If that's how it was postured when it got to this Court, he might have an argument but that's not how the case is postured before this Court.

JUSTICE: Mr. Mercy, what -- in looking at the pleadings, looking to the responses of the summary judgment, it appears that Mr. Glazner has focused on what he really wants is the Whataburger stand. It is not clear that he has sought any claim for out-of-pocket expenses. Where is the posture of the summary judgment on that? Is there a claim in the pleadings in response for identified out-of-pocket expenses? Or are we -- or is court of appeals just sending it back because they just don't know what's being claimed?

MR. MERCY: There is not a specified amount in the pleadings.

JUSTICE: Is there a specified claim for out-of-pocket?

MR. MERCY: Not -- Not by that name. I think it's -- I think it is incorporated into the prayer and in the first amended complaint sufficient that they can recover. You know, that's not really the question whether our pleadings were sufficient at this point to entitle us to that recovery or not. But it's not --

JUSTICE: If the pleadings say here's my series of causes of action and the damages I claim were benefit of the bargain and the summary judgment says you can't get fraud under that claim. And the trial court, I guess, grants it and it goes to court of appeals. And the court of appeals reverse the summary judgment for having failed to dispose of a fraud claim that would be for out-of-pocket expenses. Am I --

MR. MERCY: I'm not sure what the question is, your Honor. I --

JUSTICE: If the claim is for benefit of the bargain and the allegation is fraud and the summary judgment is you can't get a fraud claim for a -- for benefit -- You can't get a fraud claim here. Then you -- and the trial court grants it and it goes to the court of appeals, is the summary judgment sufficient to have disposed of the claims in the trial court or did the summary judgment -- is the summary judgment deficient because there is a fraud claim that's recognized for out-of-pocket expenses?

MR. MERCY: There's a viable claim that wouldn't have been disposed of by the summary judgment the way that it was brought under your scenario which is our case. Except our case is a little bit --

JUSTICE: It could have that the claim below could -- have included out-of-pocket --

MR. MERCY: Correct.

JUSTICE: Even though that's what was pled for.

MR. MERCY: Correct.

MR. MERCY: And one of the things that make this case a little bit more difficult is the granting of the special exceptions requiring us to replead. Counsel at trial decided that he thought his pleading was sufficient and stood on them and they never challenged that.

MR. MERCY: So you have pleadings before you that I think are sufficient particularly on the fraud claim questionably on the fraudulent inducement claim. But -- that's one of the problems in the cases that come up but if you take the expansive reading and apply the statute of frauds, two fraud claims, and the fraudulent inducement claims, in essence, we'll do away with it, because you no longer will have an independent duty to be honest unless you finally end up in the contract.

JUSTICE: Let me ask you a question. If why -- I don't understand the connection between the benefit of the bargain which is implied in the agreement and a fraudulent misrepresentation claim in which the damages are measured by reliance. The actual amount [inaudible] amount of alliance.

JUSTICE: By definition, that's what we look to -- I am making fraudulent misrepresentation to you and all the other elements of liability are crude, your damage is the amount of [inaudible]. You and I have no bargain because we have no contract. Why would [inaudible] the bargain damages be recoverable then as opposed to and not measure the amount of actual reliance on my representation?

MR. MERCY: Maybe, the loose use of the term benefits the bargain. What you really [inaudible] are economic losses or out of pocket. If you can prove that the benefit of the bargain's part of the economic loss --

JUSTICE: But don't you have to prove its part of your detrimental

reliance?

MR. MERCY: It has that, because by detrimental reliance. Correct? Remember, we switched --

JUSTICE: Well, I understand. But if that's the case then I'm a little bit confused about the benefit-of-the-bargain claim that becomes part of your reliance [inaudible]. In other words, reliance -- if you typically look at the case law interpreting what reliance means that I did something or failed to do something as a result of your misrepresentation and that resulted in some damage that I can identify as a result of the action on Tucker [inaudible]. How do you fit benefit-of-the-bargain into that contract?

MR. MERCY: It may be a proof problem. In this scenario, I think it is. To be honest with this Court, I think we have a serious proof problem with benefit-of-the-bargain damages ultimately. At this point, that old --

JUSTICE: Can you take into scenario where it would within the contract [inaudible].

MR. MERCY: Out of my contract, the scenario is the closest one that I could come to --

JUSTICE: Why would the contractor -- did build this project [inaudible]. I can see all the time you're out and does your staff salary and overhead and all that and maybe whatever [inaudible] the profit you lost on the other job that you can show that you would have done but why [inaudible] this process just because they never intended [inaudible] to let you have it --

MR. MERCY: Because --

JUSTICE: -- the opportunity has.

MR. MERCY: Because your reliance on them entering into this contract has put you in a posture where you've lost it, theoretically, the ability to build [inaudible] during that time agreed --

JUSTICE: But that -- I already said that.

MR. MERCY: But --

JUSTICE: That's your out-of-pocket law but you lost the opportunity.

MR. MERCY: Right. But your economic loss could be the loss of this profit and you know, it's gonna clearly --

JUSTICE: [inaudible] contract and all [inaudible], really.

MR. MERCY: That's the closest I can come to a scenario where you can get it. That's why I say it, it maybe a proof problem.

JUSTICE: I don't [inaudible].

MR. MERCY: Possible.

JUSTICE: Any other questions? Thank you.

REBUTTAL ARGUMENT OF BRADLEY R. ECHOLS ON BEHALF OF THE PETITIONER

MR. ECHOLS: Your Honor, first let me address that last question. I think the scenario that was described by the counsel with regard to the architect of contracture situation is a classic [inaudible] or unjust enrichment claim and not [inaudible].

JUSTICE: Well, it could also be a fraud claim.

MR. ECHOLS: Wait --

JUSTICE: If you agree in this -- in that instance of the reliance damages would include the amount that he was out for all the work that he did to produce the plans plus any -- perhaps, any other missed

opportunity he had to take another job while he was working on this project for the person who made the misrepresentation. That would be all his reliance damage.

MR. ECHOLS: Certainly, he could prove reliance damages --

JUSTICE: But with those --

MR. ECHOLS: But those are not --

JUSTICE: -- with those kinds of things [inaudible] reliance damages.

MR. ECHOLS: Certainly, but not the benefit of the bargain damages.

JUSTICE: I understand but what he could use -- in other words, he could lose -- he could recover the amount he may have gotten to doing another job, just knocking the man who would have gotten [inaudible] this job.

MR. ECHOLS: I'm not sure about the amount of doing another job. I think --

JUSTICE: He relied -- you know, he relied on -- he relied on the representations and get to build his house and I walked up, he said, "Will you build my house?" He said, "No because I already had [inaudible] the job."

MR. ECHOLS: Well, I think that that possibly could --

JUSTICE: Why else could he fail to take that job.

MR. ECHOLS: -- that possibly could be a measure [inaudible] where I'm thinking. The problem here would be [inaudible] the only thing that was pled in this case was benefit-of-the-bargain damages.

JUSTICE: Did you prove conclusively -- I understand your argument about the pleadings but did you prove conclusively he didn't have out-of-pocket expenses here?

MR. ECHOLS: Your Honor, I think there was no proof offered of any out-of-pocket expenses. I think the problem we face here --

JUSTICE: Yeah, but did you? I wanna ask again, "Did you prove conclusively that there were no out-of-pocket expenses and that he suffered a detrimental reliance [inaudible] --

MR. ECHOLS: I think we did because we asked him the question, "What damages do you have?" And he said, "Lost profits are my damages." Do you have any other out-of-pocket expenses and the answer was "no."

JUSTICE: Yeah.

MR. MERCY: And now he mentioned that he filed a loan act because he took some action but he had no expenses that he was [inaudible] as a result of that.

JUSTICE: Now, the pleadings dealt specifically prior for benefit-of-bargain or out-of-pocket and just plea for an amount that's within the jurisdictional limits of the Court. And that's the least the way I read [inaudible] or is there something else that I should be looking for?

MR. ECHOLS: Your Honor, I maybe mistaken in that regard as far as where the actual [inaudible] --

JUSTICE: And I understand [inaudible] accepted on that basis and your special exception was [inaudible] --

MR. ECHOLS: Right.

JUSTICE: -- the pleading that was on file for [inaudible] summary judgment [inaudible] did specify to measure damages.

MR. ECHOLS: I think the point is, that I think it is improper to put a burden on the defendant in a case like this and move for summary judgment on something he can't know about, something, -- we can't know if they're claiming out-of-pocket defense.

JUSTICE: I thought that's what a no-evidence summary judgment motion [inaudible] which still allowed you to shift that burden to the

other side.

MR. ECHOLS: It is if it's pled. But if you do not plead, there is no way to know you have to bring it up in summary judgment motion. I think the point with regard to the benefit-of-the-bargain inclusion here is that Formosa clearly stated and we don't disagree with the proposition that would -- in a fraudulent inducement scenario but you don't have to prove the independent injury or damages. We don't disagree with that. What Formosa did not do is address it all. The issue of Statute of Frauds had nothing to do precisely the problem.

JUSTICE: [inaudible] Isn't there an exception if there has been a detrimental alliance. Doesn't that [inaudible].

MR. ECHOLS: Your Honor, if it's pled and --

JUSTICE: And isn't that a problem here that we're wrapping -- if detrimental reliance was pled [inaudible] to have a statute of claims problem or we -- it wouldn't be taking about all these.

MR. MERCY: Right. If you can prove that you took substantial steps for the contract, there is an exception to the [inaudible] problems. It must be pled. In the face of the statute [inaudible] must be pled by the other party and if it is not pled in this case.

JUSTICE: If detrimental reliance were pled and it didn't have the [inaudible] problem then you could recover benefit-of-the-bargain then.

MR. ECHOLS: I think -- certainly, you could recover benefit-of-bargain damages in that scenario.

JUSTICE: So, if you don't then rise to the level of detrimental reliance to get to that statutory problem, I present your argument is it shouldn't be able to recover that spectrum [inaudible].

MR. ECHOLS: Exactly. Your Honor, I think that that the point was just been well made and the Court is well aware that essentially, what would happen if this -- if the respondent's arguments were to be adopted by this Court. It would be the end of the Statute of Frauds and I don't think that that -- all the plaintiff would have to do would be alleged like an allegation, [inaudible] allegation of fraud, in order to get around the statute problem. I don't think the Court [inaudible]. Thank you.

JUSTICE: Thank you. That concludes the argument and [inaudible] under recess.

SPEAKER: All rise.

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