ORAL ARGUMENT – 11-20-02
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PPG INDUSTRIES V. JMB/HOUSTON

HOLMAN: I would like to discuss two issues. First that, the treble damages should be reversed and rendered because JMB has no right to recover under the DTPA. And second, that the actual damages should be reversed and rendered because JMB's causes of action are barred by limitations as a matter of law.

PHILLIPS: It's not your argument that all DTPA is punitive and therefore doesn't provide. It's just the treble damage part.

HOLMAN: No. We believe that all of it is punitive and doesn't survive. I think that if you do any other kind of analysis, although - I can give you authority on why you could do that kind of piecemeal analysis. But I think if you do any other kind of analysis it is a piecemeal analysis and it doesn't comport with the purposes of the statute.

O'NEILL: But to go that way, we would have to find the whole purpose of the DTPA is punitive and it has no remedial aspect. Right?

HOLMAN: No. I think that the way that the courts have looked at it - and let me give you the argument how you could do a piecemeal on limitation. The Dearborn Stove case was a case in which there was a rent control act, and the argument was that the landlord have overcharged in the rent. The statute provided for a penalty of treble damages and attorney's fees. The tenant assigned his right to his company. The company that he worked for. The company sought to enforce the treble damages. This court said in 1951, well that's punitive, and that penalty is a personal right that doesn't survive, so it's not assignable, so you can't get your treble damages. However, the court did say in that case that they could get their actual damages.

The reason that I think with the DTPA that doesn't work is because the DTPA is a separate cause of action. If you throw out the punitive damages and the attorney's fees, you're left with a cause of action that's duplicative of the cause of action for breach of warranty.

PHILLIPS: In this particular case you say? All the laundry list is nothing?

HOLMAN: Well the laundry list is certainly something but it's duplicative of other causes of action that could be brought.

PHILLIPS: It wasn't sold that way back in my day.

OWEN: Do you agree that there was an assignment of cause of action for a preexisting

breach, not just the assignment of the warranty?

HOLMAN: Under their theory, yes.

OWEN: It looked like in your briefs you were just sort of assuming that there was an assignment, not just of the building and the warranties that went with the building, but the preexisting DTPA claim.

HOLMAN: We argued below that that wasn't the case, because in the contract itself, the contract that transfers the property from HCC to JMB, the contract says that the DTPA doesn't apply to this in anyway. And we cited cases that said that you have to have an express assignment of a cause of action. Because there was no express assignment they didn't transfer their DTPA cause of action.

OWEN: But you didn't make the argument here?

HOLMAN: No. We made the argument in the CA and it was held against us and we wanted to focus the court on the assignability. The assignability of the cause of action in this case depends on whether it's survivable. And it's not survivable because it was a personal punitive right that died with the person. The Dearborn Stove case says that. The Hackworth case says that.

Now the case that they use of course is the Thomes(?) case. And the Thomes case is a case in which the court held that it should survive. Now I attached to the brief a copy of a law review article in which the author has gone through a lengthy analysis comparing and contrasting all the cases. What he says about the Thomes case is that the Thomes case was a case where they were trying to stretch and shape the law in order to reach a certain result. If you look at the policy behind the DTPA, the policy is one to create a remedy that will be able to punish the wrongdoer. And Thomes was trying to find a way to protect the consumer.

ENOCH: I'm not at all sure the DTPA was designed to punish the wrongdoer. I thought the DTPA was to provide a cause of action in _____ consumer transaction where the amount in controversy may not be really enough to encourage the consumer to exercise their rights. They couldn't afford to. And one of the elements used to create the economic incentive to bring the claim was to treble the damages. It had a punitive aspect, but it really had an aspect that was to encourage consumers to vindicate their interest in court and to make the money worthwhile to prosecute.

HOLMAN: That's certainly one way of looking look at it.

ENOCH: So if that's the trend of the DTPA why wouldn't that be consistent with assignability of DTPA claims - I mean the whole purpose of it was to encourage a lawsuit. And so why should we not permit assignments in those circumstances because we're supposed to encourage lawsuits?

HOLMAN: The purpose of the DTPA was to protect the consumer. JMB is not a consumer. By their own admission they have more than $25 million in assets, and they could never be a consumer.

ENOCH: But that's changing the statute as the legislature started tweaking the statute to try and make it more closely focused on what they were attempting to do. But when this ostensibly the cause of action arose you're talking about a DTPA that didn't have that limitation on the _____ of the consumer.

HOLMAN: The author of the law review article tries to make the connection between remedial, which is what you're talking about, purposes and punitive purposes. And the test that he gives for remedial, and I think it's a workable test, is when there is providing compensation for the loss. Punitive on the other hand is when the wrongdoer is forced to pay more than the loss. Money in excess of the loss. That has according to the analysis of the cases that have discussed personal punitive rights and whether they can be assigned, that is how the courts have held. When you have to pay more than the loss that's a punitive requirement.

Now the way he described it, because we certainly acknowledge that there are many purposes in the DTPA, but he talked about it as being punitive with a remedial aspect. And the Hackworth court not only cited the Dearborn case but looked to some of this court's own cases. The Birchfield case for example looked at whether an exemplary damage remedy and a DTPA treble damage remedy were consistent. And they said no, because that's a double recovery of punitive damages. They focused on the damages as being punitive.

This court also addressed a similar situation in the Stewart Title v. Sterling case.

ENOCH: Let's assume the damages are punitive. And the rationale is that that's a private cause of action and so we don't allow that to transfer. If we say that DTPA actions are not transferable or not assignable is that not inconsistent with the stated purpose of the DTPA which is to encourage lawsuits?

HOLMAN: I don't think the DTPA was to encourage lawsuits. It was to protect the consumer. And an assignee is not a consumer. An assignee is not the one that had the dealings with the defendant. An assignee is a stranger to the judgment. And the purpose of the DTPA was certainly not to protect strangers or to create a windfall recovery for them of treble damages.

HECHT: Are you arguing that this DTPA claim is not assignable or any DTPA claim is not assignable?

HOLMAN: Any DTPA claim is not assignable.

HECHT: Do you know if a fraud claim is assignable?

HOLMAN: A fraud claim is assignable.

HECHT: You can get punitive damages for fraud. How does that fit with your argument?

HOLMAN: The fraud claim first of all is not a statutorily created penalty. The fraud claim is a common law cause of action that the courts _____ survives.

HECHT: Well then let's take a Sherman(?) act claim. It's a statutory claim. It provides for trebling damages. Is it assignable?

HOLMAN: I don't know the answer to that.

HECHT: Assume that it is. How would that fit?

HOLMAN: The way that the courts do it, they first look to whether the statute has a survival provision. Whether it has a survival section.

HECHT: The Sherman Act does not.

HOLMAN: The Sherman act of course would be based on federal case law, and I don't know what the federal case law is with regard to the Sherman act. I know what the Texas case law is with regard to these kind of personal punitive causes of action. Going all the way back to Johnson v. Rolls(?) in 1904, and going to the Dearborn Stove case in 1951, this court has never allowed a personal punitive cause of action. One that allows the consumer to get a penalty to either survive or be assigned.

HECHT: It seems to me there's a difference between a punitive damage claim where the fact finder is going to set the amount of the damages, and a mandatory penalty claim like the insurance code with a 12% penalty or whatever it is, and this old statute that had a mandatory treble(?). Is there anything to that that if the penalty is mandatory it's more likely assignable than if it's not mandatory?

HOLMAN: I don't think either one works. And the reason I don't think so is because this court in the Haynes and ___ v. Bowser case said that you must conduct a Moriel review of any DTPA additional damages. That would be the mandatory treble or the additional damages. You have to do a Moriel review with the Krause(?) factors. Now how would that work with an assignee? One of the first Krause factors is compare the sensibilities of the parties. Who are you going to compare? Are you going to compare the little old lady, or are you going to compare the fortune 500 company to whom the cause of action was assigned.

HECHT: But without the _____ statute it's treble as a matter of law, right, or double or whatever it comes out to be?

HOLMAN: Correct. But it still has to be considered to be appropriate under a Moriel case and a Moriel type of analysis.

PHILLIPS: You're saying that in Hayes & Boone we did away with the automatic treble damages?

HOLMAN: No. In Hayes & Boone, the court said that you must conduct a Moriel review of DTPA additional damages.

PHILLIPS: Why don't you move to your limitations argument.

HOLMAN: The starting point for limitations is of course KPMG Peat Marwick. The reason that that's a starting point is because in that case, a 1999 case, this court talked about when the limitations begins for a DTPA claim. The court said that the limitations begins when you know or should have known of the wrongfully caused injury. Now in that case the plaintiff contended, Well it shouldn't begin until I know of all the separate wrongful acts that caused my injury. And the court rejected that.

OWEN: What about when you buy a car, and when you buy it the first year the water pump goes out. And the warranty is met. The dealer meets the warranty. Six months later the water pump goes out again. The dealer meets the warranty. And just beyond the warranty the water pump again fails. How would you characterize that when you've got things that go wrong with the car, either the same thing or different things?

HOLMAN: Fortunately we have a long line of authority dealing with that very issue in construction defect cases. In construction defects cases it begins when you first know that you have a serious problem. For example when you _____ your first leak it's not a problem. When you have multiple leaks in the house it's a problem. That's the _____ case. When you have a problem with a few feet of pipe in your sewer system, that's not a problem. When you have 50 feet of pipe in your sewer system that's a problem.

The courts have looked at these kind of cases, and there's a long line of authority, none of which was cited by the CA, which say that once you have a serious problem then you're under a duty to investigate. In this case over 3,000 of the 12,000 windows, undisputed, were replaced.

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RESPONDENT

GOLDEN: This is not a construction defect case. This is a case that involves the sale of separate, individually warranted goods. That was not an argument that was made. That's what PPG stated throughout the trial proceedings. There is no controversy about that. And there's also no controversy that there were no defects involved in the construction of the curtain wall, the

constructive part of the wall into which these individual units were placed. Nor PPG said is there any issue about the installation process or the glazing. This case does not involve construction defects. It involves the sale of goods. It involves claims under the DTPA and the Uniform Commercial Code.

Each of these units which PPG has described as a complex product, which PPG invented, which was new at the time it was sold to Houston Center, each of these units is installed one at a time. They were placed one at a time. And the testimony from PPG was that you expect to have failures in a high rise building. You may have a lot of failures from time to time, and that is absolutely not an indicator that you have an overall problem or will have problems in the future.

Now perhaps because these units are replaced one at a time and they are large, they are 10 feet tall, it takes a long time to pull out a window and replace it, perhaps that explains why PPG has erroneously indicated to the court that none of these units have been replaced. In fact the replacement project to replace every single one of these units has been ongoing for some time. It will continue for some time. Just as the replacement effort in 1983 to 1985 took a long time involving much fewer number of units.

There's no dispute about this not being a construction defect case.

HECHT: You agree the breach occurred in 1976?

GOLDEN: The legal breach did. But under the Uniform Commercial Code, §77.25, a cause of action did not arise or accrue until the owner knew or should have discovered the breach. And similarly under the DTPA there was a discovery rule. And here there's no question the parties agreed that for limitations purposes any claims that were discovered timely, timely claims were claims that were discovered on or after Sept. 25, 1989. PPG admitted in the TC that limitations began to run on the DTPA claims on Oct. 13, 1989. In their second motion for summary judgment filed just two months before trial started, they said, (page 40 of our brief) "there is no disputed issue of material fact that JMB was notified by PPG on Oct. 13, 1989, that PPG was not going to replace any additional window units in One Houston Center because the 10-year warranty had expired. " Therefore, the period of limitations commenced on Oct. 13, 1989. At that time JMB knew the condition of the window units and also that PPG was not going to replace any more units in One Houston Center.

PHILLIPS: Can you file like a binding legal concession _____ motion for summary judgment?

GOLDEN: I believe under this court's authority in Holy Cross v. Wolfe, that there is authority for that. I believe that constitutes a judicial admission. A case decided last year by this court. That was not a momentary position by the way. This was a considered position of PPG. In the jury instructions, which they concurred in the statement of law to the jury, they said that a breach

of warranty and the warranty submission by agreement applied to both the DTPA claims and the UCC claims. It was considered a correct state of law for both by stipulation of the parties. But PPG said that a discovery of the breach could not occur until both: there was discovery of the defect and PPG refused to honor its warranty. Again that occurred for the first time on Oct. 13, 1989 after the Sept. 25, 1989 date that established the bar date.

And that actually is perfectly consistent with their argument in the TC where they were relying on the fact that they hadn't breached the warranty. That they had done what they were supposed to do. They were still contending that the products weren't defective. That the warranty didn't cover them. They lost those issues. So now on appeal they've reversed position on that.

But the fact of the matter is, that according to the law of the case as established in the Sargent case, a 1953 decision of this court, and of course rule 274, they can't change that approach on appeal. And that conclusively establishes that these actions were timely.

But of course there's more here. PPG argues on the one hand that a question of notice should have been submitted to the jury. But at page 23 of their reply brief they note that the purpose of notice in a warranty case is to give the seller an opportunity to cure, to investigate, to determine if there is a defect, and then have an opportunity to cure. PPG in this case misrepresented that they had cured, not through repair efforts, the cases that construction defect repair efforts that PPG relied on, but through the replacement of these goods. There were substitute goods supplied. And PPG assured the owner of One Houston Center that all of the problems were corrected with the replacement effort that occurred between 1983 and 1985. And although PPG points to some early guesswork about the extent of the problem, in a face to face meeting in June 1983, PPG made it clear Gene Grees(?) the 48 year veteran of PPG who was the head of their warranty division and the corporate representative for PPG throughout the trial, he made it clear that this problem would be corrected with the replacement of discrete units. And that was based on PPG, the inventor of this product having taken six or so units from the building, subjected them to extensive laboratory testing at PPG's headquarters and reporting back that the problem could be solved.

Now that statement was false. Because we knew from discovery that at the same time that Mr. Greve(?) was making those statements, those misrepresentations he knew because the lab informed him that the seals were attacking the coating, that all the units were inherently defective, and that because of the aspect ratio of these units PPG did not have the ability to manufacture units that would not fail. And that was true, not just with respect to the units that were originally sold. It was true with respect to the replacement goods that PPG was representing they were putting into the building to cure the problem.

OWEN: You started out by saying that every time one of these units fails there's a breach. And so each time a unit fails there's a breach of warranty. Is that your position?

GOLDEN: Well actually there was a breach at the time of delivery. Under the UCC breach occurs at the time of delivery even though the cause of action accrues when it's discovered. And under the DTPA, PPG misrepresented the characteristics of the warranty and misrepresented that the units were not defective.

OWEN: The first thing you said when you got up is it's not a sale, it's not a constructive defect case. It's a sale of separate units. Is that still your position?

GOLDEN: Yes.

OWEN: So when a unit breaks today or once your client purchased the building, is that a separate violation of the DTPA every time one fails?

GOLDEN: I think you could certainly view the case that way. And the shatterproof glass case, a case out of the 8th circuit in Missouri, noted that because units are individually warranted and defects with respect to some doesn't indicate necessarily defects with respect to others. You could find that in 1991 there were separate breaches of warranty when there was this explosion of failed units at the building.

OWEN: If that's true, why doesn't the provision of the DTPA saying that your clients, the amount of assets that you have prevent you from suing under the DTPA? Why doesn't that kick in?

GOLDEN: Because as discovery revealed here, at the time of this sale there was a breach of warranty with respect to all of the units. It doesn't mean that at later times when they fail that that wouldn't give rise to another claim purely for breach of warranty under the Uniform Commercial Code. But under the DTPA and under the Code as well breaches occurred at that time because the units were defective and the warranty was not being honored. They could not replace the units with nondefective units as PPG admitted in Aug. 1996 through discovery in this case.

ENOCH: There's an argument about when the cause of action began to accrue. Just my normal thinking of things, if I had a 4-year warranty on an automobile, so they were continuing to honor the warranty to try and repair a particular problem that I had, and then finally the warranty period expires, and then they announce to me they are not going to repair the car any more even though the defect continues, I would have ordinarily had thought my statute of limitations would run from the time that they refuse to honor the warranty. Do you agree with _____ that the statute runs from the time that I knew I had a problem with the car?

GOLDEN: No. And that's not the law of the case as submitted to the jury either. And in this situation what actually happened was, the analogy would be you go in with a problem with your car and they say, J. Enoch we're so sorry. Here's a new car. That should take care of the problem. That's what happened here. These goods were replaced but they were replaced with equally defective goods. Now at the same time...

ENOCH: Assuming that's the case, when do you claim the statute of limitations began to run in your case?

GOLDEN: It could not have run any earlier than Oct. 13, 1989, because that's the first date that PPG said that it was not going to honor the warranty any longer.

ENOCH: Now you've described the UCC and the DTPA as having a common discovery rule. Is that the discovery rule you're talking about, that you could not have discovered the injury that you suffered until they said they weren't going to honor the warranty, or is that the date the statute begins to run as a matter of law? Is that a discovery issue or is that when the breach occurred?

GOLDEN: For purposes of this case they are the same. The law has been established by the instructions to the jury that discovery could not occur until both the defect was discovered and they refused to honor the warranty. Under the Sargent case rule 274 that is the law of this case. But with respect to your question, if JMB or Houston Center had attempted to bring a lawsuit anytime before PPG said it was not going to honor the warranty, it would have been thrown out as frivolous. Based on the representations, which were, we've honored the warranty, we've replaced your goods, and we wouldn't be able to show any damages at that point. So the earliest time that we could have begun to discover any issue was in Oct. 1989. Again within the limitations period.

O'NEILL: If the damages had been trebled in this case under discretionary trebling rather than a version of the act that's in effect at the time _____, would you agree that then the additional damages would have a punitive nature that would not survive?

GOLDEN: No. I would certainly agree that an aspect of multiple damages under the DTPA is punitive. But that's just one aspect. And they would still survive because the DTPA is a remedial statute that's to be liberally construed. A concept that this court acknowledged just two weeks ago in _____ v. Kyler(?).

HECHT: But for an express warranty case what does it add except additional damages?

GOLDEN: It supports the purpose of the DTPA.

HECHT: You say it's a remedial statute, but the only thing it adds is additional damages.

GOLDEN: It adds consistent with the legislative mandate, the remedies that the legislature thought important in order to encourage lawsuits, to deter similar violations, to promote an efficient and effective means of protecting transactions like this.

HECHT: If your argument was this statute creates a cause of action for actual damages, and also has a punitive element to it and you have to take them both together so the punitive element

doesn't just cancel out the remedial part of the statute, then I see the argument has some force to it. But the cause of action for breach of warranty was there before and all the statute adds is the punitive element. So if that's the case, why should that action as opposed to the warranty action, the statutory action be _____?

GOLDEN: Because the legislature has said that breaches of warranty are also causes of action under the DTPA. But of course we had jury findings with respect to both an unconscionable contract as well as the so called laundry list DTPA violations.

HECHT: Why isn't the unconscionable cause of action under the DTPA very intentionally personal? I mean it does focus on the taking advantage of a specific person.

GOLDEN: I suppose in a sense it could be viewed that way. But here, I can't imagine an action being more impersonal. This court has said for 120 years that property causes of action, or actions related to property are assignable. It is classically impersonal. And that's true with the unconscionability aspect as well. The gross disparity between the value received and the consideration paid, and at the time of the transaction.

HECHT: But there's also the element of taking advantage of a person to a grossly unfair degree. A plaintiff who was very savvy, very sophisticated might not win an unconscionability cause of action for that reason, because the jury just felt like he knew what he was doing. Even though they might find for him on the warranty claim or some other claim. And vise versa, someone who didn't really know what they were doing and was really trying to operate in good faith might win an unconscionability cause of action. Why isn't that the kind of personal thing that shouldn't be assigned?

GOLDEN: Of course we had a jury finding in this case that there was unconscionable conduct. And I think that's what decides the case. That's the governor if you will to make sure of what kind of claims you actually have. But here there is no question but that at the time of this transaction, PPG understood it was subject to the mandatory trebling and the other aspects of a DTPA action. As this court observed in Gupta it makes no difference to the original seller whether there's been an intervening owner. The harm is just as great to the subsequent owner who purchases the property and the responsibility no greater with respect to the seller. And that's a situation we have here.

HECHT: As I take your argument, you have a broader argument, which is the prior owner could have assigned this claim to the ADC claims purchasing company just as well as it could assign it to you. And that's your argument. Any claim under the DTPA could be assigned to anybody.

GOLDEN: Actually that's not my argument. I think that this case should be decided on these facts. And here you don't have a situation as J. Holmes described of a situation of fact from which the claim sprung being separate(?). Here this claim followed the property. And it literally

followed the property. This claim wasn't even known at the time that this transfer of property occurred.

PHILLIPS: But it did follow the property into the hands of someone who on their own would not be able to bring a DTPA claim.

HOLDEN: But as of 1976 they certainly would have been, which is the date that I think we need to look at. If this assignment had not occurred, then Houston Center Corp. surely would have been making the same arguments, asserting the same positions, seeking the same damages, and PPG would have been defending on the same bases and making the same arguments that it is here.

If this claim were not permitted, then PPG or any seller could simply fraudulently misrepresent the characteristics of their goods, deceive the purchaser and be satisfied that at some point in time if I've done that successfully long enough, I will be able to argue that the DTPA claim no longer exists.

OWEN: That was one of my concerns. It seemed to me that you were kind of mixing up the discovery rule with fraudulent concealment. And as we know there are different things and there are different burdens on that. And you did not get a finding with regard to limitations on fraudulent concealment.

HOLDEN: Obviously they are separate concepts or course. And here with respect to fraudulent concealment PPT should be equitably estopped to be asserting limitations as a defense given the abundant evidence of misrepresentations that they made.

ENOCH: If this court concluded that when you're talking about a breach of warranty the cause of action does not accrue until that point that the warranty is avoided by the seller. If they tell you we're not going to honor the warranty, your cause of action for breach of warranty could arise at that point couldn't it? What really is going on here is that there was an effort to be replacing the windows. And at some point they decided we're not replacing anymore windows. And you're suing for a breach of warranty to have good functioning windows that the cause of action would accrue at the time they breached it, which would be 1989.

HOLDEN: That's when the discovery occurred.

ENOCH: But if the court determines that's when the breach occurred, then you would be under the 1989 statute as opposed to 1976 statute.

HOLDEN: To do that you would have to avoid the jury answers to questions 1 and 2, and also you would end up upsetting a great deal of law with respect to when a breach occurs verses when a cause of action accrues even under the uniform commercial code.

ENOCH: Really the issue is when you discovered as a matter of law the defects in the

glass.

HOLDEN: It's actually an intensely fact bound question. As this court has held, both the discovery rule and fraudulently concealment are intensely fact bound. And here there was obviously more than a scintilla of evidence that the owner, One Houston Center, didn't discover and within reasonable diligence should not have discovered before then. And KPMG doesn't change that result at all. There you had a plaintiff who actually sued a defendant. He understood he had an injury. He had a wrong. He sued a defendant. He just didn't sue everybody. That's not our case here. We have no quarrel with KPMG, and certainly fraudulent concealment pleadings in a summary judgment context would not rescue a claim. But that's not our situation.

If it were a property damage claim with the cause of action being transferred along with the problem, the property, then I believe the assignment could occur. Now it would be a much tougher question and an issue about the treble damage aspect. But under this court's teaching in Haufer(?) and Lavender, then there's nothing particularly offensive about the survivability of a claim for punitive damages. But that's not the situation we have here. But with respect to that, counsel cites this law review article by Matthew Rollins in a student comment advocates a situation where a DTPA claim should be assignable. But says that the multiple damage aspect should not be.

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REBUTTAL

HOLMAN: When did the breach occur? That is the big question here.

O'NEILL: But didn't the jury instruction define that and it was unobjected to?

HOLMAN: The jury instruction was unobjected to, but we're talking about whether there's any evidence that limitations didn't run as a matter of law. The reason that the jury instruction was unobjected to is because the court had already denied both an instructed verdict on this issue and a directed verdict on this issue. And so we preserved under the _____ Energy case, we preserved the no evidence challenge to the limitations.

O'NEILL: So you're bringing a no evidence challenge to the jury's finding. And you're saying there's no evidence to support their finding under the instruction that the first time they knew that the warranty would not be performed was the October date?

HOLMAN: We're saying that limitations is established as a matter of law, and that there's no evidence to support the findings that it wasn't. The only reason that they contend that the 1973 DTPA applies is because they contend the breach occurred then. If the breach occurred when they found out about it in 1989, they would be barred from bringing a DTPA action.

OWEN: The breach could have occurred, but there's a discovery rule under the DTPA. And the jury was asked a question about the discovery rule specifically, and they were instructed that

PPG's failure to comply with the warranty could not have occurred until it refused to perform its obligations under the warranty. So there is evidence that as of Oct. 13, 1989, that's when PPG refused to perform the warranty. How do you get around that?

HOLMAN: Their contention is that we didn't perform under the warranty when it was installed, because we installed all defective things that they say we knew were defective. That's when they say the breach occurred.

O'NEILL: But again, the question is even if that's the case, the discovery rule applies here, and how do you get around this jury instruction - are you saying the discovery rule does not apply here?

HOLMAN: No. I'm saying the discovery rule applies but the evidence is undisputed when they had knowledge of the injury. And the knowledge of the injury...

O'NEILL: Well the definition says the injury and the refusal to correct it.

HOLMAN: In the Lambert v. _____ case, which is an express warranty case, the discovery rule runs from the time that you know of the injury. In that case there were 10 different times that he tried to get the contractor to repair.

O'NEILL: That gets back to my question on the way it was defined here as the injury and refusal to perform. And there was no objection made to that definition. So how do you compare it to the case you just cited?

HOLMAN: In that case you're talking about defects in the charge. And in this case we're talking about what evidence supports the charge.

OWEN: But that's the point. We have to take the charge as given and look at the evidence to support that. You're point goes to the A-part of the charge of when did they know of the injury. But there's a B part to the charge that says and PPG refused to perform its obligations.

HOLMAN: Under their theory of course PPG refused to perform its obligations when it replaced 3,000 of the 12,000 and didn't replace all of them. At the time that PPG left...

O'NEILL: I thought there was a stipulation as to the Oct. date.

HOLMAN: It's not a stipulation. That also is a red herring. That is brought up in the second motion for partial summary judgment. It was brought up at a time when we were still trying to argue that the two year limitations applied. It was an alternative pleading. And this court has often held that in order to be a judicial admission it has to be clear, positive, unequivocal and that if you make statements in an alternative pleading that's not a judicial admission. We preserved our limitations point both in the instructed verdict, which is in the record at vol 16, page 142, and also

vol. 20, page 5, where we preserved our limitations arguments in the instructed verdicts. We also preserved our limitations arguments after trial in post verdict motions.

OWEN: When do you say that we can say as a matter of law on this date PPG had refused to perform its obligations under the warranty, and, therefore, there is no evidence to support this jury's finding?

HOLMAN: I would say that that occurred in 1985, PPG finished doing all of the repairs. At the time it was 3,000 out of 12,000 windows. And they said to Dennis Greer that there's no way to predict whether anymore are going to fail. In other words they admitted that there was a problem that they had no control over, and they couldn't repair.

OWEN: But they didn't say also if there's another problem we're not going to fix it. This is it. Did they?

HOLMAN: No they didn't say that. If you have notice of the injury fraudulent concealment doesn't apply. Fraudulent concealment ends when you have notice of the injury. And all of this about PPG fraudulently concealing things, because they had notice of the injury and they had notice of the defect was not cured, then they could not pursue this cause of action.