ORAL ARGUMENT – 04/02/03
02-0690
PRUDENTIAL INS. CO V. ITALIAN COWBOYS

ASHLEY: This mandamus proceeding involves a challenge to the July 19, 2002 order entered by the presiding judge in the CC at Law No. 3. That order denied relator's motion to strike a jury demand that had been filed by the real parties in interest in this commercial lease dispute. The effect of that order was to invalidate a contractual provision contained in the commercial lease agreement that was at issue in that lawsuit.

The basic challenge that was urged by the real parties in response to our motion to strike that jury demand was that such a provision would be violative of the Texas Constitution, and violative of Texas public policy.

That is an issue that has not been directly addressed by this court. It was raised 10 years ago in the River ____ Associates case, but not reached in that case. It is an issue however that we believe has been subsumed within other cases that have been decided in Texas. There are jury trial waivers contained within contractual provisions, such as arbitration agreements that have been enforced in this court and in the lower courts of Texas.

The issue has also gotten considerable attention in jurisdictions outside of Texas. And the overwhelming majority of courts that have considered the issue outside of Texas have enforced contractual jury trial waivers like this one. Some of those decisions in context very similar to this one.

The relator's position is that the court should do the same. Otherwise, Texas is going to be clearly outside the mainstream on this issue and there are no circumstances in this case which would justify refusing to enforce this particular provision.

O'NEILL: Here's a problem I have. You've got two different agreements here. We've got a lease agreement and a guarantee agreement. Typically you don't have any defenses that might you might have under the lease. Defenses against a guarantee are different than defenses against a _____ lease. They are two separate causes of action, even though they are part of the same transaction. The fact that there is no similar clause in the guarantee agreement seems to me that at least the individuals would have the opportunity to a jury trial _____ their guarantee defenses which are different from the lease defenses, why would they not be?

ASHLEY: As developed in our brief this is part of an integrated transaction. The guarantee does contain a provision that specifically incorporates obligations - the guarantors and makes them subject to the provisions of the lease agreement. It was all part of an integrated transaction. And because they are subject to the provisions of the lease agreement, then the jury trial waiver would apply to them as well.

O'NEILL: So then it would be just the incorporation language then? If there were not the incorporation language would your argument be different?

ASHLEY: It would be a slightly different argument. But again they are part of the same - it was all part of one integrated transaction.

O'NEILL: I understand that. The problem I have with that is even though it's part of one transaction, since the elements of the causes of action are different and the defenses are different, I don't automatically presume then that there is a waiver in one as there is with the other.

ASHLEY: I think it's a separate issue as to whether the guarantors are subject to the jury trial waiver. Even if they were not, that wouldn't invalidate the jury trial waiver as to Italian Cowboy, the limited partnership.

O'NEILL: And I wasn't going there. If we were to find the jury waiver valid, but it has to be strictly construed to bind only the parties to that agreement, it's hard for me to see how just the fact that they were all assigned at or around the same time would make any difference if the nature of the causes of action are different _____ and the parties are different.

ASHLEY: That's correct. I think it's a separate issue. And I think we rely upon the relationship and some of the language in the guarantee to support our claim that the jury trial waiver applies to them. That issue is very similar in two of the cases. I believe it's the Connecticut SC case and the Massachusetts CA case that was cited in our brief. And in both those situations I believe there were both leases and guarantees involved. And the jury trial waiver was enforced against all parties in those cases.

The underlying case itself is really a garden variety commercial dispute. There is nothing particularly unusual or unique about the issues that are involved in that lawsuit. It's a lease dispute over some property in the Keystone Park Shopping Center in North Dallas. The Italian Cowboy partnership was the one that actually filed the suit first. They sued to try to avoid their obligations under the lease agreement claiming constructive eviction. And there was also a fraud claim in connection with the condition of the premises.

The relators responded. Prudential and Prism Partners, Prudential's leasing agent, sued for breach of the lease and for enforcement of the guarantees. The case was originally set on the jury docket for a non-jury trial on July 17, 2002. There was a jury demand filed on Feb. 22, 2002. Then there was an agreed continuance and an order entered shortly thereafter that reset the case to Sept. 30, 2002. That order did not specify whether the reset case was on the jury or non-jury docket. But when the court issued a letter on April 1, 2002, that clearly reflected that the setting was on the jury docket. Prudential then filed the motion to strike the jury demand. There was on the June 14, 2002 at which there was some brief testimony and some documentary evidence offered. That documentary evidence demonstrated that the Secchi's were represented by retained counsel. That actually there were seven drafts of this lease that were negotiated between the parties over a 5-month period. There were a number of provisions and in fact that's reflected on the final and executed copy of the lease itself. There are a number of provisions that were actually changed and to the benefit of the tenant in this situation. But the jury trial waiver provision was in each of the drafts and was not changed from the first draft to the final draft.

On June 19, 2002, the TC signed the order that denied the motion to strike the jury demand and this mandamus proceeding followed. The basic positions of the parties present a stark contrast. The real parties take the extreme position that the Texas Constitution provides an absolute right to jury trial in a civil case, and that that party cannot contract that right away. Apparently not in a pre-suit situation. Although they concede that if there is a decision made after the lawsuit is actually filed, that a jury trial waiver is valid under those circumstances. If a party does contract it away, their position is that that contractual waiver is just simply unenforceable and can be reneged upon at the option of the affected party.

Our position on the other hand is that the constitutional right to jury trial while it exist and certainly is important that it must be balanced along with the constitutional right to freedom of contract. And there's nothing unconstitutional about enforcing a pre-suit contractual jury trial waiver. That's a private agreement between parties. In a civil suit that is perfectly permissible.

PHILLIPS: Do you believe that such a waiver needs to be conspicuous?

ASHLEY: No. I don't believe that there are any particular conspicuousness requirements that would apply here. Our position is that the ordinary rules of contract interpretation should apply to these agreements as they do to arbitration contracts, as they do to insurance contracts. And that unless the legislature were to make some determination that a particular type of contract that contained a jury waiver needed some special attention or ought to have specific requirements that the ordinary rule should apply. And that if such a decision like that needs to be made then the legislature would be the appropriate call to make it.

PHILLIPS: Can't hear question.

ASHLEY: No. But there certainly is a different history on that law. I think the distinction in my mind in that situation is that there certainly are some different historical antecedents to that. But also that involves a transaction where there's a release of substantive rights or an assumption of substantive obligations that that is simply not the situation that's involved here with the waiver of procedural right.

PHILLIPS: Is it important that the caption to a paragraph adequately describe what's contained in the fine print?

ASHLEY: I think as a matter of general contract drafting rules certainly that's desirable and appropriate. I don't think there's anything misleading about the caption involved with this specific provision in this case.

PHILLIPS: If it said, rights of all parties the jury trial guaranteed, if that was the caption then the body was you waive your right to a jury trial, would that be misleading?

ASHLEY: I would think that that would be potentially misleading. Again, that's not the situation here.

WAINWRIGHT: Let me broaden the inquiry the chief just talked about. You pointed out that the right to a jury trial was important. The constitution says it is in_____. I'm not aware of any constitutional provision that says the right of indemnity is protected by the constitution. However, the right to a jury trial is. Shouldn't we therefore consider some heightened requirements maybe that the parties should have read the provision, maybe that should be conspicuous or something else when we're looking at a waiver of a constitutional right? I understand the arbitration agreement, choice of the form selection clause arena. We've said that we have not imposed such requirements. But shouldn't we take a look at some of those issues?

ASHLEY: It seems to me there could be policy choices in particular situations that might be appropriate. I don't think this is one of them. And I think that's in general a job for the legislature, not for the court if there is a particular circumstance where there is a heightened risk that somebody would be adversely affected. Here again we've got a situation where the parties involved on the other side of this transaction had negotiated at least 3 leases previously. They had an attorney negotiating this lease for them. They went through a 5-month negotiation period with 7 drafts.

WAINWRIGHT: How far does your argument go? What if there's a post-trial waiver in a contract, the parties went to trial, the provision said that if the award was more than - considering cross-claims or counterclaims - more than $1 million net in favor of one side or the other, both sides agreed that they would not abide by that, but would then go to arbitration. Could the parties do something like that post-trial?

ASHLEY: I don't know of any reason why they could not.

WAINWRIGHT: Even after a jury trial?

ASHLEY: Make an agreement in advance to limit their recovery? I think in general that may be close to a liquidated damages type of clause, which could be subject to invalidation as a penalty. But again, I think that presents different issues and affects substantive rights more than the procedural rights. In art. 5, §10, the commentary notes that civil suits relate to in affect as to the parties against whom they are brought only individual rights which are within their individual control and which they may part with at their pleasure. And I think that's really what the situation was here. This was a provision that was fairly bargained for and that Texas should join the majority of jurisdictions and enforce those provisions.

WAINWRIGHT: If we get into a situation where because of different arrangements, agreements that people enter into freely that jury trials become rare is that okay? Does that cause you any concern?

ASHLEY: In the civil context if they become rare as a result of private party's contractual agreements, I don't think that's something that really is - I think that is something that is not necessarily a bad thing. I think it is up to the parties who are involved and participating in that situation to decide whether a jury trial is too cumbersome, expensive or not. And if they are not under some sort of disability, I think they have the ability to make that decision and it should be enforced.

PHILLIPS: The respondent in this case is no longer in office.

ASHLEY: That is correct.

PHILLIPS: Has either side approached the current judge?

ASHLEY: No.

PHILLIPS: Has there been any motion to substitute parties?

ASHLEY: There has not.

ENOCH: Should the court give the new judge an opportunity to rule in this before the court proceeds further on the mandamus? Do you have a position on that at all?

ASHLEY: I haven't looked at that specific issue. It does seem to me that the mere fact that there's been a subsequent change after the proceeding had already gotten to the CA, and was already pending in this court, that it's appropriate for this court to review the issue. There would be no real reason, and certainly out of the normal course of events, for a successor judge to come in and just review any decision that the predecessor judge has made.

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REAL PARTY IN INTEREST

MADOLE: J. Wainwright if I could address one thing. Art. 5, §10, the exceptions that are mentioned by the legislature, I do not believe are exceptions to jury trial, but rather are exceptions to when a fee must be paid for a jury trial. And such language does not appear in the cognate provision governing county courts. In §17 it's clear that it's the fee that's being described there. So, I would submit there's no jury trial exceptions in art. 5, §10, but only fee exceptions.

I'm asking the court to be in the mainstream of the history of jury trial. I was the one that cited the LR _____, they didn't, to point out that there were 24 to 1 against us on jurisdictions that considered this question. I'm not dismayed by that at all. I submit to you that those decisions are shallow, they are uneducated, and are about to be _____ by this court.

The problem with these courts and those decisions is that they treat the right to a jury trial much like a waiver of presentment on a note. And of course a lot of these cases come up in the context of a note, a lease or now they are talking about putting them in employment agreements. And they will become rare. The jury trial is fixing to be wiped off the face of the earth in commercial litigation.

There is a lot of illness in the jury system, but I submit the illness is because we haven't done what's in art. 1. And that is pass laws to purify them and perfect them. It's not the jury system itself.

What's wrong with these decisions that have gone the other way is, they treat the right to jury trial as not a matter of pubic concern, but if it's like presentment in a note or the suretyship defenses that you mentioned: exoneration. The old common law. And therefore can be a matter that bargaining parties can put on a table. But that's not true. This is a matter of public concern. And when you have a matter of public concern, then those aren't subject to contracts in the same way that a mere private right of parties is.

OWEN: What about arbitration? How does that square with public policy? This is far less _____ arbitration.

MADOLE: I would not agree with that. This is not _____ Petroleum. The arbitration is an opt-out. This very clause that this court is being asked to rule on not only rips rule 216 out of the book that says when you ask for a jury you get one. It rips that out. If you will read it it says when they sue us we can't even file a counterclaim against them. It rips rule 97 out too.

HECHT: But with arbitration you don't even get a _____.

MADOLE: That's right. But the taxpayers of Dallas county aren't paying for that arbitrator. They aren't paying for rules. And when you do arbitration, you can decide what the rules of evidence. You can decide how many arbitrators there are. The parties decide. And I would point out that in the history of arbitration, arbitration when it first came up was declared against public policy as _____ by the courts as _____ jurisdiction and then specific statutes were passed to allow that. And that's true of Texas arbitration and federal arbitration.

O'NEILL: But here you're setting your set of rules. Because basically what you're saying is we're agreeing to a bench trial, and the rules of civil procedure are going to apply. And so you are in effect agreeing to the rules of the game by doing that.

MADOLE: Read 14.16. It says, in the event the landlord commences an action for nonpayment of rent, tenant shall not impose any counterclaim.

PHILLIPS: That's not before us today.

MADOLE: But it shows the intent and it also shows why this is a public policy issue. It shows that if you say that the parties can contract with what constitutes the tribunal, a judge and a jury that can't stop there. It can't stop that they can't repeal rule 97. It can't stop that they - let me pull some other examples from the constitution. Suppose in a note you say, I waive my right not to got to prison for a debt, for nonpayment of a debt. Can you do that or is that a matter of pubic concern? You would think the fact that it's enshrined in our constitution makes it a matter of public concern.

PHILLIPS: But it is true that in most jurisdictions a non-jury trial can be obtained much more swiftly than a jury trial.

MADOLE: This is sort of like saying since elections are inefficient we ought to do away

with elections. The jury trial can be made to work. I'm not saying there's no ails in the jury trial. But that decision as to whether the parties should want a jury trial or to go non-jury should only be allowed, and our constitution really only contemplates that it should be allowed once litigation is commenced.

HECHT: Why is that? I couldn't tell from your brief if you agree that a rule 11 agreement could waive a jury and be binding.

MADOLE: No. From my brief, my position would be no. That the only way you waive a jury is in accordance with rule 216. This court in its rule making authority as it derived from the constitution that's the only people that have the right to say how jury works. And so, if you don't make a demand under 216 there is no jury waiver. And that's what the constitution says: demand received, demand received.

HECHT: You make an argument in your briefs that ought not to be a pre-suit waiver. But you're not saying - you're argument doesn't say this - but you're not arguing besides that you could have a post-suit waiver by agreement. You can only have a post-suit waiver if you just don't question that.

MADOLE: That's right. And I would say that old Holloway litigation that was in Dallas so long was the one CA case which _____ addressed. And I argued that in my brief that they seem to say that. There was a post-agreement settlement that the court said, if you think that was a jury waiver, you can't confer fact finding power, and the court might agree.

OWEN: So the TC said, this is a complex litigation. We're going to do a scheduling order and I want you all to decide by a date certain whether you need a jury. And it's 6 months away for the trial date. If the parties agree in writing to a rule 11 agreement waive the jury, you say that's not enforceable?

MADOLE: I would say this court should say no. The jurisprudence that is already established under 216 should be the _____. Pure and simple.

WAINWRIGHT: So you're saying this court should put limitations on party's right to contract, where that right to contract is protected in the constitution. What are the limitations? I mean outside of illegal and criminal conduct, what are the limitations in your mind?

MADOLE: It seems to me that this is a matter of public concerns. So certainly anything in the Bill of Rights, such as could the parties agree that someone could not testify for want of religious belief. When our constitution says they can testify even if they don't have any religious belief. You can't waive being in prison. But certainly those things that are in the bill of rights, like jury trial, ought not to be the subject of private parties. And this court has answered that.

OWEN: Why isn't arbitration _____ the constitution?

MADOLE: For two reasons. One, it is not an attempt to obtain public justice on terms

the parties try to dictate.

OWEN: If we interpret the constitution the way you say, I don't see that there's an exception for arbitration.

SMITH: Is arbitration addressed also in the Texas constitution?

MADOLE: I don't believe that it is.

I will submit that arbitration works well in the security area. Part of the reason you're seeing this push to have this court file a jury waiver is because in a lot of areas it works terribly and it's known to work terribly. And it's known, particularly in the labor area, that the arbitrator has to be arbitrary or he can't get _____ either side or would be eliminated. So they don't like that. They don't want to get away from a jury because they don't want a fair and impartial tribunal. They don't like arbitration...

OWEN: I'm trying to follow your logic. You say, never, never, never unless you decide not to pay the jury fee that's okay.

MADOLE: That's right. But there is a qualitative difference. There is _____ between a post-litigation decision or waiver and a pre-litigation contractual waiver. For one, you are doing one at a time when you know what the dispute is and when you know where you want to be. At the time of getting a loan, and these are in loans now, they are in the deeds of trust in Dallas county, Texas, they are in employment agreements. I got an employment flyer for the March 2000 Texas employment...

O'NEILL: So if the lease agreement said arbitration - I think that's what we're all struggling with. Because all these agreements now have arbitration clauses and we enforce those, but we're not going to let judges try them.

MADOLE: The idea that arbitration means we should be able to agree to a bench trial, is a non_____. An arbitration does not implicate the same public concerns. We have a specific statute in Texas in which the Legislature has said, there is a public interest in parties being able to agree to the rules of the tribunal, who the tribunal will be, but they don't implicate the constitution or the public institutions.

O'NEILL: What if it says, we agree to binding arbitration before a trial court according to the rules of civil procedure?

MADOLE: There are some times when federal judges, for instance, have been selected as arbitrators outside the courtroom. It's not a court proceeding.

O'NEILL: What if this agreement said, arbitration division, the parties hereby agree to binding arbitration and the arbitrator shall be the judge of a TC that any case will be filed in, and the rules of arbitration will be the rules of civil procedure.

MADOLE: I can't imagine that the courts will validate that.

OWEN: I've seen contracts like that. In the offshore area particularly. They designate the federal DC geographically closest to the well and it will be arbitrated before that judge in a non-jury trial.

MADOLE: That's sort of like saying the prosecutor will be my lawyer.

O'NEILL: But what if the agreement did say that. You would say it would be unenforceable because?

MADOLE: This is directly analogous. For the same reason that I can't adverse posses against a sovereign. I've got a little farm. For the same reason I can't build the peach stand on the right-of-way. For the same reason I can't advance my fence - agree with my neighbor to put my pipe down in ____ river and take water out of it. It belongs to the public. And you can't dictate by contract that a judge who's on the public payroll is now going to be your arbitrator. You can't do that. And I can't imagine any court in the land will allow that.

ENOCH: I agree with you that the parties by their agreement can't confer jurisdiction on the court. So the parties can't agree that the 101st DC will have jurisdiction to resolve this dispute. They might agree that if we have a dispute the venue will be in Dallas county or something. But I'm not sure that's the same thing as the parties saying that if we have a dispute, we agree to have a bench trial on it and not a jury trial. The weakness it seems to me of the argument is in fact the recognition in our rules that a party by their inaction or by their late action can be forced to give up the right to a jury trial. And that's how I view this failure to pay the jury fee in time, the failure to make the jury demand in time. We say you can lose this constitutional interest in a jury by your waiting too long to make the request. And once we've identified that it's just not an automatic thing getting the jury trial, I'm not sure that we can say that the parties can't in advance of their litigation decide among themselves that I'm not going to demand a jury trial.

MADOLE: Here's the difference. I've got a case right now down here in Austin where we didn't elect a jury. It's mainly a legal issue. This case is mainly a fraud issue where we want the jury to assess the credibility. But that's very different when I am thinking about the case, the litigation, the issues, I've done discovery, I know the score. We're equal before a court. We're being governed by equal rules. That's extremely different from when I want a loan and we're friends. When I want a lease and we're friends. When I want an employment job, because that's a job. To continue my job. That's a very different situation to say the people of Texas and to think it's really going to be equal and the people of Texas are going to be conscious of everything that's involved in a waiver. Waivers are supposed to be knowing and intelligent. You can't have a waiver of litigation that you don't even anticipate at a time you're trying to be friends and they've got what you want. Those are qualitatively and quantitatively different. The recognition in our rules recognizes only that there may be in the context of a case that the parties can make a valid and open assessment.

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REBUTTAL

ASHLEY: Here's what seems to me to be the bottom line. If you sort through all the rhetoric, there doesn't seem to be and while the position is extreme even Mr. Madole concedes that at some point in someway that a litigant can waive their right to a civil jury trial. What we're disagreeing on is when they can do that and possibly how they can do that. If this had been so important, then this is something that the lawyer for Italian Cowboy should have negotiated over and should have raised this at the time that they were going through the 7 drafts of this lease over the 5-months of negotiations.

PHILLIPS: If there had been no lawyer would it make any difference?

ASHLEY: No. But in this particular case it clearly should have been raised at that time. And if they weren't able to trade and work out an acceptable agreement on that, then they could have gone and sought other space and negotiated with another _____. But the fact of the matter is that Texas while it does protect the right to jury trial, it also treats parties to lawsuits, treats parties to contracts as adults. Except in special situations you're presumed to have read and understood the agreement that you sign and you're bound to live up to that.

O'NEILL: What kind of parameters should we put on it? There's a recent case out of the Northern District of Texas. Are you familiar with the _____ case that talks about four factors - unequal bargaining power. Would you object to analyzing it under those four factors?

ASHLEY: I think in this particular case we can satisfy that knowing that voluntarily intelligent standard.

O'NEILL: I thought you would say that. But would you object to applying those factors?

ASHLEY: I don't think that there is any need or any reason with respect to these sorts of agreements. Just like there's no reason and no need to apply special rules with special choice of law clauses or arbitration agreements other than the normal contractual rules. Our position is, if there really is a perceived special need and special circumstances, consumer transaction, something like that, that is a decision the legislature would make. But in other context, this court has even though there is in fact a disparity of bargaining power in a consumer context, enforced similar types of provisions. And so I do not believe that there is any reason in this particular case to apply any special standard. But if they did look at some special standards in this case, this is not a particularly - I don't think there's any reason to invalidate this particular jury waiver.

Arbitration is not a total opt out _____.

WAINWRIGHT: Article 5, §10, Mr. Madole mentioned, and I'm not sure I disagree that the mention of the legislature regarding jury trials there is with regard to their ability to make exceptions or prescribe exceptions to jury trial in addition to not paying a fee on time. However, article 1, §15 of the constitution says, the right of trial by jury shall remain inviolate. The legislature shall pass such laws as may be needed to regulate the same and to maintain its purity and efficiency. Should

the courts be involved in this, or should the legislature be making these decisions?

ASHLEY: My position is, with respect to these types of provisions that the ordinary rules of contract construction and the ordinary defenses that you would have if you are improperly induced into a contract would be sufficient protection. If there are additional protections needed in specific situations, that's a matter for the legislature to address.

WAINWRIGHT: Is your position consistent with this specific language that the legislature shall pass such laws as may be needed to regulate the same?

ASHLEY: The legislature obviously has the ability to regulate that. But I don't think this waiver issue simply is not - I don't think it is addressed in that language nor is it addressed in any of the cases that they have cited in their brief. There is absolutely nothing in those cases that talk about how important the jury trial right is, that is dealing at all with a situation where somebody has signed an agreement to waive that right.