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Supreme Court of Texas.
Dennis L. Miga, Petitioner,
v.
Ronald L. Jensen, Respondent.
No. 07-0123.

October 14, 2008.

Appearances:
Jeffrey S. Levinger, Carrington, Coleman, Sloman & Blumenthal, L.L.P., Dallas, Texas, for petitioner.
Warren W. Harris, Bracewell & Giuliani LLP, Houston, TX, for respondent.

Before:

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

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COURT ATTENDANT: Oyez, Oyez, Oyez! It's the honorable, the Supreme Court of Texas. All persons having business before the honorable, the Supreme Court of Texas are admonished to draw near and give their attention, for the Court is now sitting. God save the State of Texas and this honorable Court.

CHIEF JUSTICE JEFFERSON: Thank you. Please be seated. Good morning. The court has three matters on its oral submission docket. In the order of their appearance, they are docket number 07-0123, Dennis L. Miga versus Ronald Jensen from Tarrant County and the Second Court of Appeals District. Docket number 07-0760, Greg Tanner and Others versus Nationwide Mutual Fire Insurance Company from Caldwell County and the Eleventh Court of Appeals district. And 08-0379 In the Interest of J.O.A. and Others from Collingsworth County and the Seventh Court of Appeals District.

The Court has allotted 20 minutes per side in each argument and expects to conclude all the arguments before noon. We will take a brief break, recess between the argument. And these proceedings are being recorded and a link to the arguments should be posted on the Court's website by the end of the day today.

The Court is now ready to hear argument in 07-0123, Dennis Miga versus Ronald Jensen.

COURT ATTENDANT: May it please the Court. Mr. Levinger will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JEFFREY S. LEVINGER ON BEHALF OF THE PETITIONER

MR. LEVINGER: Thank you, your Honor. May it please the Court. When the majority of the court below gave Jensen restitution of his unconditional payment, it violated at least four controlling principles of law.

First, the parties have freedom to enter into contracts and courts will not rewrite their bargains.

Second, that an express contract can override equitable doctrines.

Third, that the payment of a superseded judgment is a voluntary act.

And fourth, that financial incentives or disincentives will not transform choice into coercion.

Any one of these principles requires reversal of this judgment. I'd like to first talk about the parties' Rule 11 agreement which, which is embodied in the court's order of August 29, 2000. The parties' agreement is actually the starting point and in my view, it's the ending point of this analysis. There is no language in the, in the agreement whatsoever requiring Miga to reimburse any of the $23.4 million payment that he made to Miga.

JUSTICE BRISTER: Why didn't he just pay you?

MR. LEVINGER: Why he didn't pay me?

JUSTICE BRISTER: Your position is, he meant to pay us. Why did he put it in the Registry of the Court instead of just giving you the money? That's your position; it's the same as if he gave us the money.

MR. LEVINGER: Well, he did not put it in the Registry of the Court. He paid it directly to Miga.

JUSTICE BRISTER: Okay.

MR. LEVINGER: Okay.

JUSTICE BRISTER: And Miga put it in an interest-bearing account?

MR. LEVINGER: Miga did a number of things with it, Justice Brister; he spent it, he paid his attorneys with it. He paid $5 million in taxes on it. All under the assumption that the money was unconditionally his. He viewed the money as being his.

JUSTICE O'NEILL: Well, let me ask you about that because my understanding is the parties agreed to disagree. So one of the problems I struggled with with this case is, it seems that an equitable remedy shouldn't apply if a contract controls the dispute. So therefore we, we should be looking at the contract.

MR. LEVINGER: Right.

JUSTICE O'NEILL: If we can't tell what it means, then we send it for trial as to the parties' intent but if the parties have different intent and say, "we agree to disagree," where does that get us?

MR. LEVINGER: What, what the parties agreed to disagree about, Justice O'Neill, was whether or not Jensen's right to appeal would be preserved. That's very different from whether he'd have a right to a refund.

JUSTICE HECHT: They didn't disagree about that?

MR. LEVINGER: They did not disagree about that. They were utterly silent as to, as about-- as to that; in fact the language of the contract negated any, any claim on the part of Jensen that he would have a right to get the money back.

JUSTICE HECHT: So you think Jensen intended to appeal and-- but

not, but just give up the money?

MR. LEVINGER: Well, I, I do think that, Justice Hecht, because he actually-- there were, there were two things he could have benefited from by appealing apart from getting the money back.

Number one, remember that there was a 23-- he, he paid toward the judgment; there still remained a judgment of about $6 million that was secured by a bond. By appealing, he could get rid of that.

Second, and perhaps more importantly ...

JUSTICE HECHT: Why would you-- I'm just wondering why you'd give up on 23 million to get 6?

MR. LEVINGER: Well, and, and here's my second reason for that. By, by attacking the Court of Appeals' ruling as to the lost profits measure which gave Miga some $18 million, by attacking that, which Jensen would do with his appeal, what he would do-- be able to do is reduce or eliminate Miga's appeal in which he was trying to get more. Miga was trying to get $43 million of punitive damages that the -both the trial court and the Court of Appeals had taken away. Plus, an additional some $4 million in in prejudgment interest, plus another million dollars in actual damages. And Jensen, by attacking the Court of Appeals' ruling as to the actual damages measure would be able to do, to defeat or at least minimize Miga's appeal, Miga's claim for that additional money. That's why he had an interest, a justiciable interest in, in appealing apart from getting the money back.

JUSTICE HECHT: But ...

MR. LEVINGER: And ...

JUSTICE HECHT: I-- it's hard to see that because he might win or lose; I mean, it doesn't change his chances, doesn't change what's going to happen if, if he loses; it just changes the interest, it looks like to me.

MR. LEVINGER: Well, ...

JUSTICE HECHT: And it might not even change that.

MR. LEVINGER: The problem, Justice Hecht, is that the language in the agreement, the Rule 11 agreement, negated any intention on the part of Jensen to get the money back. He-- they use the word "unconditional payment," "unconditional tender toward satisfaction of the judgment". These words which Jensen himself selected can, can have only one meaning; that he relinquished all rights to the money at the time he paid it to [inaudible].

JUSTICE O'NEILL: Well, in the [inaudible] ...

JUSTICE WAINWRIGHT: Should we read "unconditional tender" in connection with the rest of the sentence? [inaudible] "unconditional tender toward satisfaction of the judgment in order to terminate the accrual of post-judgment interest."

MR. LEVINGER: Right.

JUSTICE WAINWRIGHT: Can you read "unconditional tender" without the rest of the sentence?

MR. LEVINGER: I, I think you should read it with the rest of sentence, Justice Wainwright; when you do, you have the words "unconditional", "tender", and "satisfaction". In order to stop the running of post-judgment interest under the finance code, you have to satisfy a judgment. So you have the word "satisfy", but then he added the words "unconditional" and "tender", and the word "unconditional" alone I think, should be conclusive of what happened here, conclusive of Jensen's intent.

JUSTICE WAINWRIGHT: So what role does-- counsel, what role does, "in order to terminate the accrual of post- judgment interest;" what role does that modifier play?

MR. LEVINGER: That, that was a stated purpose of making the payment; it was not the only purpose. Another purpose of course was to reduce the bond collateral, to get the collateral back, and to make the payment. There were other ways, he had other options available to stop the running of post-judgment interest. He could have, he could have not superseded to begin with, and allowed execution to issue, at which time interest would stop.

JUSTICE WAINWRIGHT: So you would read the "unconditional tender toward satisfaction of the judgment," the same as if the rest of the sentence were in it and the same as if the "in order to terminate the accrual of post-judgment interest" were not there?

MR. LEVINGER: Yes.

JUSTICE WAINWRIGHT: So those words are superfluous in your reading.

MR. LEVINGER: No. I, I think those words describe the purpose but ...

JUSTICE WAINWRIGHT: But the outcome is the same whether those words are in there or not, as you read it.

MR. LEVINGER: Yes. I, I think that's right.

JUSTICE HECHT: Coming back to what-- coming back to what you said just right before that; you said he had a number of other options and one was to just let the officer come and execute. Right? And so why would he do this?

MR. LEVINGER: Well, I, I think that Jensen had pretty much concluded that, that he was on the hook for $23.4 million.

JUSTICE HECHT: But if he had let the officer come and instead of hauling off chairs or leases or whatever, had just handed him a check and said, "Okay, you win; here's the money," then there would be no question that he could get it back ...

MR. LEVINGER: That's exactly right.

JUSTICE HECHT: - no question that he could go ahead and appeal.

MR. LEVINGER: That-- that's exactly right. That would be an involuntary payment that would give rise both to an appeal and to a right of restitution.

JUSTICE HECHT: So he just made a mistake, basically.

MR. LEVINGER: Well, that, that may well be right. When he uses the word "unconditional", "unconditional" of course means absolute, unrestricted, no strings attached, no intent to, to attempt to recover the money, no event that limits or qualifies the transfer. That's ...

JUSTICE GREEN: But what, what, what is the payment of $23 million in cash-- where does, where are the-- why isn't that unconditional? Were there conditions on that?

MR. LEVINGER: Are, are you talking about in a situation different from this case?

JUSTICE GREEN: Well, as Justice Hecht was talking about, ...

MR. LEVINGER: Right.

JUSTICE GREEN: You know, here's the judgment; rather than supersede it and rather than have a sheriff come over and disrupt my business, I'll just give the $23 million in cash. What's ...

MR. LEVINGER: Well, ...

JUSTICE GREEN: - conditional about that?

MR. LEVINGER: Well, the, the, the case law is clear that in that instance that would be an involuntary payment because there is-- there is compulsion of the judgment there.

JUSTICE GREEN: Well ...

MR. LEVINGER: You're doing it to stave off execution. And the ...

JUSTICE GREEN: And maybe I'm missing something. That's sort of the

same thing that happened here, isn't it?

MR. LEVINGER: No. The difference here, it was-- Two things make this case very different in my view: the agreement and the bond. That-- that's, that's the essence of this case. Without the agreement, without the bond, this is a very different case. This case would be governed by the restitution after reverse of cases. This case would be governed by Restatement Section 74. The agreement and the bond make all the difference in the world in this case.

JUSTICE O'NEILL: But how do we get over the fact that, that I mean, it's just fundamental law that you don't apply equitable remedies when you've got a contract.

MR. LEVINGER: Right.

JUSTICE O'NEILL: So why aren't we just looking at the contract?

MR. LEVINGER: We, we should look just at the contract.

JUSTICE O'NEILL: And if we can't figure it out from the contract that, that-- the briefing seems to presume that if we can't figure it out from the contract, we go straight to, to equitable remedies. But traditionally, we say if the contract-- we can't-- we either enforce it if we can tell what it meant; if we can't, trial on the parties' intent. Nobody seems to want that either.

MR. LEVINGER: Right. Well, we, we did argue that at the end of the brief, Justice O'Neill. We said that at a minimum there might be fact issues here. You have the majority of the court below saying the agreement means one thing. You have the dissent saying it means another, and assuming those positions are reasonable and they may well be, we might have a fact issue as to the parties' intent which would necessitate a remand, and I think at the end of his brief, Jensen more or less agrees that, you know, this may be a case that's appropriate for remand. There are other fact issues I contend that would warrant a remand as well, concerning potential voluntariness, economic duress, although I think those are-- should be decided as a matter of law. At a minimum, there may be fact issues about those things; there may be a fact issue about Miga's detrimental reliance, change in position ...

CHIEF JUSTICE JEFFERSON: So everyone would be happpy with a remand and then we have a forth round of appeals, certainly after that trial?

MR. LEVINGER: We, we might. This case began in, in 1995, so what-- what's another five years, I guess.

JUSTICE HECHT: Let me, let me ask you ...

JUSTICE: The newspapers might think something, five years makes a difference.

MR. LEVINGER: Right.

JUSTICE HECHT: Professor Laycock says nobody has cited a case just like this one and he doesn't know of one. And several cases are cited for the proposition that judgment debtors who pay the judgment and win on appeal can get the money back.

MR. LEVINGER: Right.

JUSTICE HECHT: And then there's a lot of cases on, uh, voluntariness in-- the various equitable arguments that are being made. At-- is there a case where a judgment debtor paid the money and couldn't get it back?

MR. LEVINGER: Yes. Iowa Electric versus Atlas (654 F.2d 704) is the case we cited ...

JUSTICE HECHT: The Eighth Circuit case.

MR. LEVINGER: The Eighth Circuit case.

JUSTICE HECHT: And that's basically it, isn't it?

MR. LEVINGER: That's, that's the best case we found.

JUSTICE HECHT: Yeah.

MR. LEVINGER: Yes. But to follow up on Justice O'Neill's point, I, I think you're right. If you have a contract, an express contract, it does-- that governs the subject matter of the parties' dispute, which I believe this one does, then it overrides and trumps equitable remedies. And the Court of Appeals or at least the majority got it wrong by inverting the analysis by, by starting with restitution, the equitable principles, and then backing up to the contract and that's the wrong way to approach it. Here, the subject matter the parties' dispute is the, the payment. And Jensen's claim to a refund of that payment is part of the subject matter covered by the parties' dispute. I think the voluntary payment doctrine provides an alternative avenue toward reversal. There is no question here that Jensen's payment was voluntary. He had fully superseded it and that bond eliminated any obligation he had to pay the judgment. And in fact, it was Jensen was the one who proposed the payment to Miga not the other way around. There is no economic duress from the judgment, from either the judgment or from accruing interest, as the Court-- as the majority of the Court of Appeals seemed to believe. There is no threat of unlawful conduct that interfered with Jensen's free will and judgment; he admitted that in the trial court. There is no threat of financial penalties, loss of livelihood or damage to business of this multi- millionaire that Mr. Jensen was.

This case simply involved financial incentives or disincentives. And as I said, he had a number of choices and options including satisfying the judgment by means other than this agreement or alternately just cutting a better agreement or trying to cutter a bet-- better agreement with Miga. For example, offering him the money in return for an agreement that the money would be a conditional payment or alternatively just pay him a lump sum of money in lieu of the running of post-judgment interest, all alternatives to, to what he did.

JUSTICE WAINWRIGHT: Counsel, the first option you mentioned would not have stopped the running of interest, though. Right?

MR. LEVINGER: If, if he had satisfied the judgment in some way, whether by paying the money or by allowing the money to be taken, that, that would have stopped the running ...

JUSTICE WAINWRIGHT: A conditional tender would not have stopped the running of interest.

MR. LEVINGER: I-- I'm not sure about that, Justice Wainwright. I, I, I know that's what the parties have argued from time to time and, and looking back at the cases I'm not sure why it has to be unconditional to stop the running of post-judgment interest. The statute, 304.005 I believe it is, of the Finance Code refers to satisfying the judgment. Post-judgment interest accrues until the judgment is satisfied. It doesn't say, you know, satisfied unconditionally. So I think a seizure of the money would satisfy the judgment and stop the running of interest. I think a, a payment without the, without the umbrella of this agreement would, would satisfy the judgment and stop the running of interest, and alternatively, he could have just fashioned some other kind of deal to stop the running of interest.

JUSTICE WAIWRIGHT: So you're saying you're not sure you-- that, that the conditional tender would have stopped the running; you're saying a conditional tender would have stopped the running of interest?

MR. LEVINGER: A, a, a satisfaction of the judgment in some way, shape or form would stop the running of interest. The, the tender and the conditional language seems to come out of the Baucum case (370 S.W.2d 863) which has sort of perpetuated itself throughout this

jurisprudence. And Baucum was different because it involved an agreement between an insured and an insurer that required a, a tender to stop, stop the running of interest. And when the tender was made, there were some conditions attached to it, and the court said, that's not a tender. So it really came from the contractual language in that case. I just looked at the statute which says, you need to satisfy, satisfy the judgment.

I think actually, Miga I (96 S.W.3d 207), although they argue that it supports them, I think it's actually consistent with our position. Miga I at bottom said that a voluntary payment will not moot an appeal if the judgment debtor clearly expresses an intent to appeal. That's what Miga I held. I think it follows from that, that a voluntary payment will not foreclose a right to restitution if the judgment debtor likewise expressly reserves the right to get the money back. And that did not happen here; in fact quite the contrary.

CHIEF JUSTICE JEFFERSON: Are there, are there any further questions? Counsel, your time's expired. Thank you. And the Court is now ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Mr. Harris will present argument for the respondent.

ORAL ARGUMENT OF WARREN W. HARRIS ON BEHALF OF THE RESPONDENT

MR. HARRIS: May it please the Court. The general rule is that when a party pays a judgment and the judgment is later reversed, the money paid may be recovered. That's been the law in this state for over a hundred years; that rule' been recognized by the US Supreme Court since the, at least the 1830's, and that rule has been recognized by the Restatement since at least 1937. And that appears to be the law in every jurisdiction. This longstanding restitution after reversal rule and its exceptions, none of which apply to Miga, should be the starting point of the Court's analysis.

JUSTICE O'NEILL: Well, why don't we start with-- we don't go to equity if we have a contract.

MR. HARRIS: Because the argument they make is but-- based on Fortune Production (52 S.W.3d 671). And let's talk about Fortune Production.

There, the claim was that Conoco had been unjustly enriched because Conoco took field liquids without paying for them and this Court said, "We can't do that because there's an express contract that governs those field liquids." The Court looked at the contract language and looked at the definition of the gas stream, as it was defined in the parties' contract. And the Court said that it's not going to allow the equitable claim because quote, "This is because parties should be bound by their express agreement. When a valid agreement already addresses the matter, recovery under the equitable theory is not allowed." We don't have that here. We have a contract, an agreement that was expressed in an agreed order where the parties agreed to disagree about whether there would be an appeal, there was no agreement on whether the payment would be final and in fact, there was a disagreement over that issue because after the Court of Appeals' judgment came down on Miga I, Jensen attempted to pay the judgment and make a final payment. Miga rejected that. And there's absolutely no mention in this agreement of restitution so they're taking a contract

that does not have an express agreement. It's got an absence of an agreement. And they're trying to use that to apply the Fortune Production rule and that's what they can't do. The rule in Texas has been that if you pay a judgment and it's reversed, you're entitled to restitution unless you agree that the payment is final.

JUSTICE WAINWRIGHT: Wasn't there some language in a draft of the agreement I think I saw suggested in the briefing that would have affected the-- what you're saying, that there would be return at some point if the judgment's reversed and that got taken out before the final agreement?

MR. HARRIS: The language that got taken out dealt with whether Jensen had the right to appeal. That was the language that was put in that was rejected. But before that agreed order was drafted and, and that draft was done, Jensen filed a motion with the trial court asking to put the money in the registry of the court to make it a final payment. That was undisputedly rejected by Miga. So that we know here the parties expressly did not agree that there was a final payment. There was no agreement whether there would be an appeal. The rule being proposed by Miga would turn the restitution after reversal rule around 180 degrees.

Under their rule, if there is a contract that relates to the payment of a judgment, unless you expressly reserve your right to restitution, you've lost it. The restitution after reversal rule's the exact opposite of that.

JUSTICE WAIWRIGHT: Well, why didn't the parties just put in the agreement that if the judgment's reversed on appeal-- since we're dealing with this subject and getting a judge to sign it as an order, not just an agreement-- why didn't the parties just say, so there won't be any confusion, no issue about equity versus express terms, that the amount paid's going to be returned if the judgment's reversed?

MR. HARRIS: Judge, there's no evidence in this record that the parties actually talked about that issue. Backing up two steps, they did talk about whether Jensen even had the right to appeal, so taking, taking that prior step, the parties couldn't agree on that. And that's the language in Mr. Knoll's affidavit that the parties agreed to disagree on the issue and basically bring the issue to the court. That was the question that the parties brought to this Court in Miga I. And the Court held that Jensen did properly reserve his right to appeal. So they stopped at the first step. Jensen attempted to make a final payment. That was also rejected. There was no discussion of what would happen with restitution. But they didn't even get to that step two or step three because they stopped at step one.

JUSTICE WAINWRIGHT: So the parties put as much in the agreement as they could agree to and the rest-- there was no agreement, continual bickering, just-- so we can't put anything in there about that.

MR. HARRIS: There, there's no evidence there was discussion of restitution. The order stops at the payment. The order has three decretal paragraphs: it says that the amount of the bond is reduced; that reduction in the bond allowed the collateral to be released. The next decretal paragraph says payment shall be made for the amount that the bond was reduced, the quid pro quo. And the third paragraph says post-judgment interest shall cease running. That is where this judg-- this order stopped. So it only runs through the payment.

And Judge O'Neill, getting back to your question, that's why this case and this contract is different than Fortune Production, because it stopped at the payment-- there is no express agreement about what happens after that. For example, would Jensen have his right to appeal?

Nothing in the contract about that. Is there a right to restitution? Nothing in the contract. We know that right arises under law but there is nothing in this agreement about it. Everyone went into this situation with their eyes wide open. They knew Jensen was going to appeal. They knew the case may or may not be reversed on appeal. And they knew whenever the appeal was over, Miga may not have all the money, but that was the decision the parties made going into it. This Court should not allow the absence of an agreement on restitution to bar that right which has existed for at least a hundred years under Texas law. Let me now go back up to restitution and talk about the exception that Miga is trying to create.

JUSTICE BRISTER: But why would you give the other side the money knowing they could move it to some place you can't get it back?

MR. HARRIS: To cut off the running of post-judgment interest; that's what you have to do. You have to satisfy the judgment.

JUSTICE BRISTER: But if you don't have an agreement about what's going to happen in case of reversal, aren't you just taking your chances?

MR. HARRIS: Absolutely.

JUSTICE BRISTER: And you've agreed to take your chances so why should, why should we-- I'm just puzzled if ...

MR. HARRIS: Why should the court order the return to Mi?

JUSTICE BRISTER: If he moved the funds to the Isle of Man or the Netherlands Antilles or somewhere where you couldn't get it back, you'd just be out of luck, right?

MR. HARRIS: We, we would have to engage the legal process to recover the money. The reason the court ...

JUSTICE BRISTER: Then if US courts don't reach there, you'd be out of luck.

MR. HARRIS: Right. And that is a risk that Jensen took, the risk of collection. It, it's a trade-off in cutting off the interest that was running at $2 million a year. I mean, this was a significant number and Jensen made the decision to run the risk on being able to collect the money back if the case were ultimately reversed. And it's real simple why the Court should order that payment to be made, the reason that it's ordered in every jurisdiction in this country-- to prevent unjust enrichment. Miga is not entitled to this money. The Courts have said that. Unless he can fall within one of the exceptions to the restitution after reversal rule, he should have to pay the money back.

JUSTICE BRISTER: And you are entitled to any interest he's made or to interest on, at a-- some statutory rate?

MR. HARRIS: The interest that's running in this case is interest 30 days-- post-judgment interest begins running 30 days after the trial court's judgment in Miga 2.

JUSTICE BRISTER: The mo-- the money you're getting back, the money that is not a part of the judgment, do you get any i-- do you get that back with interest, or just the money back?

MR. HARRIS: In this case, no. There is no-- there is not a claim for interest in the judgment. It, it only begins running 30 days after the judgment on-- in the case on remand in Miga II, the trial court's judgment is when interest begins running.

JUSTICE WAIWRIGHT: The money paid to uh, uh, Miga, Miga then had to pay $5 million in taxes on. It sounds like ownership and unconditional transfer of title to the money.

MR. HARRIS: He had the absolute use of the money. The payment of taxes is a defense to a claim for restitution, claiming that it would be inequitable. Three points on that.

First, at the time he made the tax payment, he knew there was a claim for restitution. That had become abundantly clear. The money was paid on August 29 of 2000; by November 30 of 2000, Jensen had filed a response to a motion to dismiss in this Court, claiming restitution, citing section 74 of the restitution, it was absolutely clear that Jensen believed he was, he was entitled to the money back. After the first of the year, Miga then decides to keep the money and to pay taxes. If he didn't want to pay taxes on it, he could have tendered the money into the registry of the court. But he made the decision to keep the money.

The second issue is, he can get a refund on the money. Section 1341 of the ...

JUSTICE HECHT: The tax, you mean?

MR. HARRIS: Oh, I'm sorry -- of the tax. Yes. Of the $5 million in taxes. Section 1341 of the Internal Revenue Code allows a refund where it's established that the taxpayer did not have an unconditional right to the, to the funds. And that's what has been established by the judgments in the lower courts in this case. So he's entitled to get a refund of the money.

And the final point is, even if this is a defense to restitution, it's only a defense to the extent he can't recover the 5-- some portion of the $5 million in taxes. But that's not what Miga's arguing. He's arguing, I don't have to give back any of the $23.5 million because I paid 5 million in taxes. So that defense even if it's valid would only apply to the portion of the taxes that he can't recover. But that's simply a defense to the restitution claim. The other defense that Jensen-- excuse me-- that Miga is attempting to argue relates the supersedeas bond. He claims that if a party supersedes the judgment before making payment, then that is going to bar the payment because it's voluntary. And there are two points I'd like to make there. The first is that supersedeas is irrelevant. It's the Court's judgment backed by the state's ability to enforce it, that's the compulsion. When you pay a judgment, it's not voluntary. This Court recognized that in Bolton (185 S.W.3d 868) when it said that the type of implied duress when you're dealing with a judgment in governmental enforcement is different than the type of duress that you're dealing with in an normal commercial case.

JUSTICE O'NEILL: That was, that was taxes.

MR. HARRIS: That was taxes but it was I think looking more broadly when it talked about the term "implied duress" and, and simply referred to governmental compulsion. Tax cases are different, there's no doubt. But Bolton would be consistent with other jurisdictions, with the Restatement. For example, ...

JUSTICE O'NEILL: But no one has ever stated that a judgment, a lawfully entered judgment that's accruing interest, is the same type of compulsion that a tax case with the fede-- the government power over you, is-- that's never been equated, the two.

MR. HARRIS: It has not been equated to a tax case. And I believe tax cases are different. You, you've got different underlying policies about the taxing authority and the ability to keep the money for certainty, et cetera. But it's still governmental compulsion. The, this is different than a contract. Whenever you don't satisfy a con-- ...

JUSTICE O'NEILL: I, I think that's the leap that they don't want us to go. Because if we, if we go that far then, to say lawful interest is compulsion is just a little bit of a, a leap from where we've ever gone. But let, let me ask you this, under the Restatement, 'cause I'm struggling with the Restatement language. It's-- talks about a person

who's conferred a benefit, whose property has been taken is entitled to restitution, judgment's reversed unless restitution would be inequitable, or the parties' contract that payment is to be final.

MR. HARRIS: Correct.

JUSTICE O'NEILL: We can't tell if they've contracted that or not.

MR. HARRIS: Correct.

JUSTICE O'NEILL: So we can't tell if this would apply.

MR. HARRIS: You know the parties did not contract for the payment to be final here for two reasons.

First, there was in attempt to make a final payment. After the Court of Appeals' judgment, Jensen offered to pay it.

JUSTICE O'NEILL: Well, sure. He offered to pay the million dollars to get his 23 back.

MR. HARRIS: No, no, your Honor. He offered to pay the $23 million. He, he wanted the case to be over.

JUSTICE O'NEILL: Oh, I thought you mean after this round, this [inaudible].

MR. HARRIS: No, no. After the Court of Appeal's judgment in Miga I. So whenever the Court of Appeals basically took out $6 million of the trial court's judgment. The trial court had already disregarded the 43 million in punitive. The Court of Appeals took out about a million, uh, as a double recovery and took out about 5 million in interest, so it knocked about another 6 off. At that point, Jensen said, "I'll pay the judgment, final payment, let's be done with it."

Miga said, "No. I want to go to the Supreme Court. I want to reinstate my fraud finding and I want to get that $43 million in punitive damages." So Miga expressly said no.

So we know there wasn't an agreement and then we look at the language of the order, the contract. You have to look at the contract and the agreed order as to what it really does. And what it does is modify the security. We talked about the decretal paragraphs. It reduces the bond, it orders the payment in the amount and it says interest is going to quit running. And you look at the language of the agreed order. It says the tender is being made toward satisfaction of the judgment in order to terminate the accrual of post-judgment interest. So that's what's going on in, in the order.

JUSTICE O'NEILL: It's difficult to read. I mean, you can read that order both ways. I struggle with, with the fact that we don't know whether the parties contracted that the payment was final. But also the, the tentative draft of the Restatement talks about voluntary payment. And it says that, "where the party against whom a judgment has been rendered succeeds in postponing the execution by motion, by supersedeas or otherwise, the claim for restitution will not arise." Isn't that what happened here?

MR. HARRIS: No. It says the claim won't arise, it, it means there was never a claim to be made because the money wasn't paid. It's basically saying, this section of the Restatement doesn't apply where a, a judgment is superseded and it's never paid, a claim for restitution doesn't arise because you didn't pay the money. You can't have a claim to get your money back. Therefore, there's no claim for restitution. I mean, it never arises because there is no payment. If you read the rest of the paragraph in context, it's apparent. I mean I know that's what they've argued, that it's an exception where it's been superseded but that's not what it says.

JUSTICE O'NEILL: Well, it says, "if you succeed in postponing execution by motion, supersedeas or otherwise." And I suppose what they're saying is "otherwise", is what happened here. You, you

succeeded in postponing execution, it wasn't supersedeas, you substituted your money for supersedeas but you still managed to postpone execution.

MR. HARRIS: But we paid the judgment and that's the difference in the comment that they're referring to and in our situation. I mean we, we did satisfy the judgment in this case. That comment is talking in-- and Professor Laycock in his brief has the exact same analysis of what that comment means. That comment is going to the situation where you never have a payment of the judgment. It's not satisfied, it's not paid, it's not executed on. And so the claim for restitution doesn't arise. I mean, we all agree with that. But, but again, going back to this order, Judge, we know that there wasn't an agreement and first of all, it should be pointed out, this is an exception to the restitution rule. So Miga has the burden to show that there was an agreement. I mean, that, that's the exception, to be able to prove the exception. And what they've argued is the unconditional tender is an agreement but we know that's not what it-- what it is either. Everyone agrees that the word "tender" means offer. So what we have is an unconditional offer. There's nothing that had to be done before that offer could be accepted. And Miga did accept it and once he'd accepted it, he could use the money any way he could.

The tender had to be unconditional under Baucum and the cases following it to make the judgment satisfied. If, if you look in the cases, the condition that's typically put on a payment that is insufficient to stop post-judgment interest, is where they require release or some other sort of agreement. And the cases are clear now. That's a condition that's been put on the payment. You can't do that. It has to be unconditional payment.

And this Court recognized that rule in Miga I, that that was the purpose under the order and that the tender has to be unconditional in order to stop the running of post-judgment interest.

In Miga I, the Court also said that the reservation of the right to appeal didn't make the tender conditional. And likewise, the right of restitution which arises in law doesn't make it conditional. So there's nothing that's in conflict between the unconditional tender and us having the right to restitution. Just like this Court said in Miga I, whenever you reserve the right to appeal, such reservation does not make the tender conditional. It's, it's the same basic analysis.

JUSTICE WAIWRIGHT: It sounded a minute ago like you were suggesting that the term "tenders" means simply an "offer", is really no different substantively than using the term "unconditional tender." I mean, put the, the stopping of the accrual of interest to the side, put that issue to the side. It sounded like you're suggesting that tender and unconditional tender mean the same thing in this context, putting to the side interest.

MR. HARRIS: I, I believe that's generally right. That the tender has to be unconditional and, and a tender is offer. So what, what you end up with it is an unconditional offer toward satisfaction of the judgment in order to stop the accrual of post-judgment interest.

JUSTICE WAIWRIGHT: And the term "unconditional" is just needed because of the statute to ensure the running of the-- halting of the running of interest as you read Baucum.

MR. HARRIS: That's the language that's used in Baucum and it's the language that's been picked up in the subsequent cases. I mean, if, if I were drafting this agreement, I would put the word "unconditional" in it to make it clear that that stops post-judgment interest.

JUSTICE O'NEILL: All right, let me ask you. What happens if, if

the case-- if you were to prevail in the case, is, is there something the trial court needs to decide in terms of what's equitable? In other words, could, could the trial court decide that the taxes that were paid need to be reimbursed or, or, or are we done? Would we render or would we remand?

MR. HARRIS: The, the Court would render. There is a trial court judgment that, that, that all the Court would need to do would be to render unle-- unless there's a reversal, simply a rendition is what's required. They had the ability to go to the trial court and, and make their defenses. The defense they argued on taxes was that Miga doesn't have to pay a penny back because he paid taxes on it. They didn't make the argument that the, that the defense went only to the portion he couldn't pay. They may be able to go reopen that in the trial court, but for this Court's purposes, the trial court's judgment is final and disposes of all issues.

JUSTICE WILLETT: Mr. Levinger says there still benefits to appeal even if the money is non-refundable. What do you make of that?

MR. HARRIS: I don't believe in this case there's any meaningful benefit that you receive for writing a check for twenty three and a half million dollars whenever you know you're not going to get any of it back. The $6 million that he talked about setting aside, that had already been set aside. The Court of Appeals had already reversed that. The $6 million bond that was left in place, the Court of Appeals have already set that aside. We didn't need to appeal.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF JEFFREY S. LEVINGER ON BEHALF OF PETITIONER

MR. LEVINGER: Well, to answer your question, Justice Willett, by attacking the $23.4 million ruling in the Court of Appeals concerning the measure of damages, by successfully attacking that and establishing that that's an improper measure of damages, Jensen would be able to defeat or at least minimize Miga's claim to get $43 million in punitive damages, an additional $4 million of interest and potentially another million dollar in damages. So there was a purpose for him in attacking that particular ruling which he had to do by a no-- by his own independent appeal even though he might not have gotten the money back.

We-- we have not really heard a satisfactory explanation for the words "unconditional tender and satisfaction" in the Rule 11 agreement.

"Unconditional" has got to mean and can only mean absolute, unrestricted, no strings attached. And when they argue that they have a right to get the money back, that attaches a string and pulls the money back. That fails to give any meaning to the word "unconditional." It was indeed a final payment. It may not have been a final settlement but it was a final payment. And in fact, I think if anything, the, the negotiations leading up to that, where he did try to settle, where Jensen had tried to settle, in fact, supports our position because it demonstrates his intent that the $23.4 million from his point of view was pretty much history. He'd lost that amount twice, first in the trial court and then in the Court of Appeals and he was prepared to make a partial satisfaction of that amount of the judgment that he likely knew he would owe anyway at the end of the day.

I think Fortune Production actually aids our case, particularly

when you read it in conjunction with the Frank's Casing (246 S.W.3d 42 ) which both take a very broad view of the subject matter of the party's dispute. And use that to foreclose equitable remedies and that's what we have here: a contract that dealt with the subject matter of the parties' dispute, the payment, and it forecloses equitable remedies. The Court of Appeals or at least the majority just got it wrong by inverting the analysis and starting with restitution before you look at the parties' contract. As to the tax refund, Section 1341, I think Jensen's argument, own argument, is inconsistent with our ability to get a tax refund.

To get a tax refund, you have to show that the, that the payment appeared to be unrestricted in the year in which it was made. His argue-- his argument is that it was restricted in the year in which it was made. So his own argument undercuts his contention that we automatically get a tax refund and at a minimum, it ought to be somewhat of a fact question as to our reliance and our change of position.

JUSTICE JOHNSON: What, what would you say about his argument that if we, if we're talking restitution as an equitable remedy, you would have the equity of saying I, I can't pay that five, I've already paid that in taxes, it's gone.

MR. LEVINGER: Well, the, the other problem, your Honor, is that in order to even qualify for tax refund, you have to pay the money back to begin with.

JUSTICE JOHNSON: Yeah. But, but I'm just saying as an offset to the 23.5, as -

MR. LEVINGER: Right.

JUSTICE JOHNSON: - I understood his argument, the taxes could be taken into account when you're talking equitable restitution, your-- you can plead wait, it's gone. I shouldn't have to pay that back.

MR. LEVINGER: Right.

JUSTICE JOHNSON: That-- so what would be your position on that?

MR. LEVINGER: Well, my position is it demonstrates his change in position. He, Miga thought the money was his unconditionally and based on that he paid taxes and that is an equitable defense if we get down to restitution. Their argument, -

JUSTICE JOHNSON: If you ...

MR. LEVINGER: - yeah, their argument that it's at most a $5 million offset has no support. It comes from something the, the amicus mentioned for the first time; it was not even in their briefs. So they're, they're sort of making it up as they go along. I just don't think there's any support for that. I think, I think it functions, if we're talking about equity, as an absolute defense. The other point I wanted to make is in response to Justice O'Neill, who was reading from section 18, specifically section 18, comment C. "When a party against whom a judgment has been rendered succeeds in postponing the equi-- the execution or effectiveness of the judgment pending review, by motion, by supersedeas bond or otherwise, the claim described in this section will not arise." The response to that is well, that just describes a situation when no payment is made at all. I disagree. Comment C is headed, it's entitled, "Voluntary Payment." And that's -

JUSTICE: [inaudible].

MR. LEVINGER: - where that sentence lies, in the voluntary payment section.

JUSTICE HECHT: Professor Laycock, Professor Laycock wrote it, and he disagrees with you.

MR. LEVINGER: No. I, I don't think he wrote section 18 uh, uh-- I

think he may have been on a review committee or something but I don't think he was the reporter for Restatement Third. What they're overlooking is that that sentence appears in the section entitled, "Voluntary Payment." Now, Section-- Comment A, talks about a no payment situation but that's not what Comment C talks about. Comment C involves voluntary payment. Does the Court has any further questions at me?

CHIEF JUSTICE JEFFERSON: Any further questions? Okay -

MR. LEVINGER: Thank you.

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

COURT ATTENDANT: All rise.

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