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Supreme Court of Texas.
Intercontinental Group Partnership, Petitioner,
v.
KB Home Lone Star L.P., Respondent.
No. 07-0815.

March 12, 2009.

Appearances:

Jesse R. Castillo, Castillo Snyder, P.C., San Antonio, TX, for petitioner.

Renee F. McElhaney, Cox Smith Matthews Incorporated, San Antonio, TX, for respondent.

Before:

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

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 07-0815 Intercontinental Group Partnership v. KB Home Lone Star LP.

MARSHALL: May it please the Court, Mr. Castillo will present argument for the Petitioner. The Petitioner's reserved five minutes for rebuttal.

ORAL ARGUMENT OF JESSE R. CASTILLO ON BEHALF OF THE PETITIONER

ATTORNEY JESSE R. CASTILLO: Good Morning. May it please the Court. On behalf of Intercontinental Group, we welcome the opportunity to present this issue to this Court. We obviously think that the Trial Court, the Honorable Bobby Flores abused his discretion when he entered a judgment awarding attorney's fees for KB Home in this underlying litigation that we went to a jury, tried in 2006, and was submitted to the jury in connection with both KB Home's affirmative claim for breach of contract and the defendant's numerous defenses and counterclaims. At the end of the day, the jury answered the question on KB Home's only affirmative claim for relief, the breach of contract, on two issues. The first was on the breach of contract, the jury answered obviously yes. On the second question that was conditioned on a finding of liability, the jury found zero damages.

JUSTICE SCOTT A. BRISTER: Why did they do that? What was your

argument that KB Homes hadn't been damaged?

ATTORNEY JESSE R. CASTILLO: As the trial, one of the trial lawyers and I think it was, it really played on the cross-examination of KB Home's main expert, who indicated that he had a pattern of developing these types of communities in the valley, including Laredo, and I was able to demonstrate to the jury through their own numbers that we actually did KB Home a favor because they had lost money on each one of their developments in that pattern and so the jury, when they came back and they looked at did KB Home suffer damages, that was the evidence that was submitted to them that KB Homes had not been damaged, they had not bought these lots and had they bought these lots, they probably would have lost.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did you move for directed verdict at any point during trial on the no-damages point?

ATTORNEY JESSE R. CASTILLO: Both parties moved for a directed verdict. I as the defendant did move for directed verdict on, one, no liability on each of the issues there was, that there was obviously excused that the defendant's breach was excused and that there was no damages. Those were...

CHIEF JUSTICE WALLACE B. JEFFERSON: And if the Trial Court had granted your directed verdict at that point before it went to the jury, who would have been the prevailing party?

ATTORNEY JESSE R. CASTILLO: If the Trial Court had granted the.

CHIEF JUSTICE WALLACE B. JEFFERSON: Your directed verdict based on no evidence of damages.

ATTORNEY JESSE R. CASTILLO: In my view, the prevailing party would have been the defendant, Intercontinental Group, because a judgment would have been entered at that point that the plaintiff take nothing.

CHIEF JUSTICE WALLACE B. JEFFERSON: And if you had moved for summary judgment on that no damages point and the Trial Court had granted your summary judgment, there would have been no breach of contract finding ultimately, correct?

ATTORNEY JESSE R. CASTILLO: There would not have been any breach of contract finding at all.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you would still have been a prevailing party then?

ATTORNEY JESSE R. CASTILLO: Yes, Your Honor, under the prevailing party as that term of art is used in a prevailing party contract provision, maybe not under statutes, maybe not under Chapter 38 because, as this Court knows, under Chapter 38, only a plaintiff can recover attorney's fees. A defendant has no situation where he's being sued under Chapter 38 to be able to recover attorney's fees for prevailing. So in this instance where there is a prevailing party provision, the...

JUSTICE SCOTT A. BRISTER: Somebody's going to get attorney's fees.

ATTORNEY JESSE R. CASTILLO: Somebody's going to get attorney's fees.

JUSTICE SCOTT A. BRISTER: And why should be that the party that the jury found breached the contract?

ATTORNEY JESSE R. CASTILLO: Because the cause of action for breach of contract is not just, it has several elements. The existence of the elements include the existence of a contract, the breach by the defendant and the damages were caused by that breach.

JUSTICE SCOTT A. BRISTER: Let me give you a hypothetical. If instead in your case if KB Homes usually made money on these projects, but the subprime mortgage mess happened after your client breached the contract and so because of factors in the general market, nothing

having to do with the parties, the market plummets and as a result of something entirely extraneous, that's why there was no damages. So not because your clients were good guys and saving these people money by breaching the contract, but just because the market collapsed. Why should your client then get attorney's fees because of a fortuity?

ATTORNEY JESSE R. CASTILLO: I really don't think it would be a fortuitous event.

JUSTICE SCOTT A. BRISTER: My hypothetical it is. If I would have made money buying these lots and I file suit and we're about to go to trial and the market collapses which changes everything so it turns out these lots are not worth nearly as much through an entire fortuity, why should that fortuity mean sorry, the defendant gets the attorney's fees rather than the plaintiff?

ATTORNEY JESSE R. CASTILLO: Because the defendant is still bringing this action, prosecuting this action to enforce that contract and the reason that it brings the contract for is for breach of contract and damages resultant therefrom and there has been a change in circumstances under your scenario where now there is no damage does he continued to prosecute his claim? Does he present the evidence, does the plaintiff present the evidence and say, they breached the contract, but, jury, we have not been damaged. We're not asking you for any damages. What relief at that point are they still asking for? Why are they prosecuting the claim? Why are they seeking to enforce the contract? What is the relief that they're asking for?

JUSTICE SCOTT A. BRISTER: Because up until the market collapsed, they had damages.

ATTORNEY JESSE R. CASTILLO: That probably is not a...

JUSTICE SCOTT A. BRISTER: Because of something unforeseeable, it turns out they can't collect, but now they have to pay all of your attorney's fees. That just seems like a not, it seems to take attorney's fees away from any connection with who was right and who was wrong.

ATTORNEY JESSE R. CASTILLO: It would in that situation, but the converse would be true as well. How could KB Homes recover attorney's fees when it doesn't prosecute its action and has not suffered any damages. Sure, there is a breach and there's many situations where then no one would ever stipulate, for instance, to liability on negligence because...

JUSTICE HARRIET O'NEILL: But you claimed in this case that you're a prevailing party as well.

ATTORNEY JESSE R. CASTILLO: Absolutely.

JUSTICE HARRIET O'NEILL: And you don't have a judgment for damages.

ATTORNEY JESSE R. CASTILLO: Absolutely because the judge, the definition of prevailing party is someone who is vindicated by the judgment and the judgment vindication is a take-nothing judgment.

CHIEF JUSTICE WALLACE B. JEFFERSON: You also didn't prove up attorney's fees. You didn't have a jury question on fees?

ATTORNEY JESSE R. CASTILLO: We had a jury question on fees under Chapter 38 that was tied to an oral agreement. It had nothing to do with the Santa Clara lot contract.

CHIEF JUSTICE WALLACE B. JEFFERSON: Right.

ATTORNEY JESSE R. CASTILLO: And the provision in this particular case says attorney's fees as fixed by the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, fixed by the Court can mean a judgment that is based on a jury verdict right?

ATTORNEY JESSE R. CASTILLO: The judgment on the underlying claims

is entered into the judgment. Then there the issue is who is the prevailing party after you get that judgment. And then that application for attorney's fees is to be fixed by the Court. It's very similar to, for instance, a claim under the Texas Labor Code, who is the prevailing party. You get a prevailing party of finding a discrimination or retaliatory discharge, you get nominal damages, then there's an application for attorney's fees to the Court because you are the prevailing party or you're not the prevailing party. It's very similar. This language in the contract says as fixed by the Court, but to answer your question, we did not get a jury finding under our attorney's fees.

CHIEF JUSTICE WALLACE B. JEFFERSON: Under?

ATTORNEY JESSE R. CASTILLO: Chapter 38 and it wasn't submitted under prevailing party.

JUSTICE SCOTT A. BRISTER: Because the Trial Judge was supposed to do that?

ATTORNEY JESSE R. CASTILLO: Yes, Your Honor.

JUSTICE DAVID M. MEDINA: Where do you get your definition for prevailing party, where are you finding that language?

ATTORNEY JESSE R. CASTILLO: Prevailing party, we're finding that language in a couple of places. One prevailing party is used in statutes and it's used in contracts and the Court struggled to figure out where is prevailing party defined. Prevailing party is not defined in any of the statutes either and so the United States Supreme Court in *Farrar* went to prevailing party and went and said prevailing party is a term of art. We look to *Black's Law Dictionary* as how, to determine how it's used and it says a party who is vindicated by the judgment regardless of the amount of the damages and I think this Court in the *Southwestern Bell v. Franco* case also looked at the *Farrar* opinion and said we look not at the jury verdict, we look at the judgment and we look at the whether the, if the judgment vindicates a party regardless of the amount of damages awarded. That's where courts are looking for the definition of prevailing party because prevailing party is not defined in this contract and it's not defined really in any statute and so we look at the term of art as courts have interpreted. In the *Franco* case, the United States Supreme Court said you look at the judgment and whether any party was vindicated by the judgment. Is there a change in legal relationships between the parties? Is there damages awarded to the party? Is someone vindicated by that judgment?

JUSTICE SCOTT A. BRISTER: Well this is a little broader here because it's "to enforce the terms of the contract or to declare rights hereunder."

ATTORNEY JESSE R. CASTILLO: Correct.

JUSTICE SCOTT A. BRISTER: So why wouldn't the finding that your client breached the contract be a declaration of rights?

ATTORNEY JESSE R. CASTILLO: Again there's no definition of what a declaration of rights is, but if you look at the judgment, what rights were declared. Was there a declaration of anybody's rights in the judgment? There was, there was no question that we had a contract. There was no question that that contract required certain things. It required the defendant to develop the lots into a multi-family plats so that KB Homes could come in and develop them. All those requirements were said on the contract. There was no dispute about what the rights were and the contract was.

JUSTICE SCOTT A. BRISTER: The jury verdict declares that your client breached the contract, but that their client had no damages. That's why that would be a declaration of rights wouldn't it?

ATTORNEY JESSE R. CASTILLO: It could be if someone were to

interpret their...

JUSTICE SCOTT A. BRISTER: It's hard to tell who's, the question is that's a declaration of rights, but who prevailed.

CHIEF JUSTICE WALLACE B. JEFFERSON: But you wouldn't appeal from the jury's answer. You would appeal from a judgment. In other words, if it made a difference what the jury said to the outcome of your entitlement or theirs to attorney's fees, then you could take up a judgment if the judgment said you breached the contract or incorporated that in the form of some affirmative relief to the other side. But the jury verdict you're saying doesn't make a difference here because it never was, didn't matter to the judgment because there was no evidence of damages.

ATTORNEY JESSE R. CASTILLO: The jury's verdict did not matter to the judgment and it wasn't, it didn't declare any relief, didn't declare any change of relationships as a result of the jury's answer to that question and so we look at and so it's what this Court said in *Southwestern Bell v. Franco*. It says it's the judgment, not the verdict that we must consider in determining whether attorney's fees are proper.

JUSTICE HARRIET O'NEILL: The Court of Appeals seemed to compare it to the Civil Practice and Remedies Code Chapter 38 and I think it seems like the Court of Appeals presumed that the parties would have been aware of that provision which says that a person may recover attorney's fees in addition to the amount of a valid claim and costs and since that provision seems to pen the recovery to some sort of claim recovery, that by excluding that language from the party's agreement, there was no intent that there be a positive recovery.

ATTORNEY JESSE R. CASTILLO: I think the Court of Appeals did do that and what it's trying to read into the party's agreement that somehow limiting recovery of attorney's fees to the prevailing party that we somehow rode out the provision in Chapter 38 that there be a recovery of something in addition to your claim. There's no, obviously there's no evidence of that. There's no evidence that any discussion or anything about the, any question about what the meaning of prevailing party was other than a term of art.

JUSTICE HARRIET O'NEILL: But you are looking at case law interpreting this section to define what a prevailing party is and if we look to that statute to define prevailing party, isn't it fair to look to that statute to see what was missing from the party's agreement.

ATTORNEY JESSE R. CASTILLO: The problem with that argument is then it would never give the defendant an opportunity to recover attorney's fees under the prevailing party because you're still looking at Chapter 38 and the language of Chapter 38 that a prevailing party has to somehow recover on its claim. How can the defendant ever recover on a breach of contract claim some part of its claim?

JUSTICE PHIL JOHNSON: Going back to one of the original questions Justice Brister asked, it's your position that the parties agreed that one side or the other would be the prevailing party.

ATTORNEY JESSE R. CASTILLO: The way this contract was written, one side or the other was going to be the prevailing party.

JUSTICE PHIL JOHNSON: Okay, no ties.

JUSTICE SCOTT A. BRISTER: Well the contract's different from Chapter 38. In Chapter 38, you have to be bringing a breach of contract action to get attorney's fees. If you're just defending, you can't get them.

ATTORNEY JESSE R. CASTILLO: Correct.

JUSTICE SCOTT A. BRISTER: But under this contract, somebody's going to get them.

ATTORNEY JESSE R. CASTILLO: And the prevailing party and the reason is it's in there is prevailing party means a defendant who successfully defends against it changes the America Rule. It says you pay me my attorney's fees; you brought an action to enforce this contract. You didn't prevail. You brought an action to declare your rights and you got no relief, the defendant is entitled to their attorney's fees.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did you prove your fees to the Trial Court?

ATTORNEY JESSE R. CASTILLO: Did not. We submitted evidence to the jury under our Chapter 38 claim for breach of the oral agreement, but we showed up for a hearing in front of Judge Bobby Flores. We narrowed the issue. It was very clear that nobody was going under Chapter 38. Ms. Bartak, on behalf of KB Home very clearly said we are the prevailing party because we got a liability finding. Period. We said, no, you're not the prevailing party because you didn't prevail and didn't get the jury found zero, so you have not prevailed on your breach of contract claim and that's the determining issue to determine whether the prevailing party.

CHIEF JUSTICE WALLACE B. JEFFERSON: To preserve your appellate argument in favor of fees, would you, is there any reason you would have to present by affidavit or otherwise what your fees were in connection with this?

ATTORNEY JESSE R. CASTILLO: What we did with Judge Flores at the hearing, we said the key issue obviously is prevailing party. The threshold issue if we're not the prevailing party, then there's no use to put on proof. If we are the prevailing party, Judge, we're prepared (1) to incorporate all of the evidence that was presented to the jury on the amount of attorney's fees incurred and, secondly, to testify [inaudible] and supplement if that's what's needed, but that second step never occurred because he determined KB Home was the prevailing party based on the issue that there was a jury finding of liability.

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

MARSHALL: May it please the Court, Ms. McElhaney to present argument for the Respondent.

ORAL ARGUMENT OF RENEE F. MCELHANEY ON BEHALF OF THE RESPONDENT

ATTORNEY RENEE F. MC ELHANEY: First, I would like to explain to the Court that regardless of how the Court defines prevailing party whether it defines prevailing party as it has in the past and how intermediate courts have defined prevailing party, which is our position in the case, or creates a different definition for prevailing party, that it's different from existing law. In either respect, KB Home is the prevailing party here.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can I ask the same question I started with Mr. Castillo and that is if Intercontinental had moved for directed verdict and it was granted by the Trial Court based on his finding or conclusion that there was no evidence of damages, who would have been the prevailing party at that point?

ATTORNEY RENEE F. MC ELHANEY: Your Honor, at that point, I don't know that a summary judgment or a directed verdict could have completely disposed of the case because the parties agreed in this

contract that the issue of both enforceability and declaring rights under the contract are two separate...

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you think even if the Trial Court said no evidence of damages that's an essential element of a breach of contract case, you would still be entitled to present your evidence that Intercontinental breached and then prevail on that basis?

ATTORNEY RENEE F. MC ELHANEY: Yes, that's what the parties decided that they wanted their relationship to.

CHIEF JUSTICE WALLACE B. JEFFERSON: Based on that one paragraph about prevailing party?

ATTORNEY RENEE F. MC ELHANEY: Yes. Yes. That's what the parties agreed would be controlling in this case. The parties agreed that they wouldn't follow the provisions of Chapter 38, but instead they would only have one requirement to recover fees and that is to be a prevailing party. Chapter 38 has two requirements. Be a prevailing party plus receive some damages and there's a whole line of case law to explain what those damages are.

CHIEF JUSTICE WALLACE B. JEFFERSON: What affirmative, other than the fees, what affirmative, how did his change a relationship under our prior case law or what affirmative relief did you get when you lost ultimately the breach of contract case?

ATTORNEY RENEE F. MC ELHANEY: Well I think what Judge Brister said is exactly it. We were right and they were wrong. This contract or this lawsuit started because Intercontinental Group would not abide with the terms of the Santa Cara lot contract.

JUSTICE NATHAN L. HECHT: So you just sued out of moral outrage.

ATTORNEY RENEE F. MC ELHANEY: Well it's more than that, Your Honor, because we did and it's not moral outrage, but it is extremely important to us, to KB Home, to have our contracts validated and one of the allegations in this lawsuit...not...

JUSTICE NATHAN L. HECHT: Usually given what attorney's fees run, most clients hope to get something in the end.

ATTORNEY RENEE F. MC ELHANEY: I absolutely agree and we would have.

JUSTICE NATHAN L. HECHT: Other than just vindication that they were right in their hearts.

ATTORNEY RENEE F. MC ELHANEY: I agree, but that's not what the law says prevailing party means and that's what we're looking at here today. I would like to tell the Court that case law has been that the determination of prevailing party, which is the controlling issue as to whether we are entitled to attorney's fees is consistently in the case law meaning and this Court has also said it, it means that we win on the merits. We win on the main issue. We're vindicated by the judgment.

JUSTICE NATHAN L. HECHT: Okay, what I was wondering about though was suppose you had the breach finding, but there was an issue of limitations and you lost on that. Who would be the prevailing party?

ATTORNEY RENEE F. MC ELHANEY: In that instance, Your Honor, I think limitations is a threshold issue, which would prevent the Court or a jury from determining whether, in fact, there was liability.

JUSTICE NATHAN L. HECHT: No it was not. There were fact questions about when the breach occurred and it was submitted to the jury and my experience was defendants issues come right down in the charge not at the very beginning.

ATTORNEY RENEE F. MC ELHANEY: I agree with you in terms of the timing on the jury charge, but not in regards to the effect of the answers. I think that the effect of the answer on liability would be immaterial when the jury finds that that claim was not allowed to be

even asserted because it was barred by limitations.

JUSTICE NATHAN L. HECHT: And what if there had been a finding of no consideration?

ATTORNEY RENEE F. MC ELHANEY: If there had been a finding of no consideration, then that, in fact, would be kind of like a declaration regarding the rights of the parties. If would, if they had found that there was no consideration, if that was an issue in this case, which it wasn't, then we would have lost on the declaration of our rights and so we would not have been a prevailing party. And this...

JUSTICE NATHAN L. HECHT: So can you think of an element of the claim or a defense that if the defendant won on it would not make them the prevailing party other than the lack of proof of damages?

ATTORNEY RENEE F. MC ELHANEY: Your Honor, I'm not sure I have thought about the question in that respect and can give the Court a quick answer to that question. What I can tell you is that in the posture of this case, and under the terms of this particular contract, attorney's fees provision, the ability to recover fees was for prevailing on enforcing the contract, which would then be fees or some kind of damages, I would agree with. But there was also this second element where we could prevail and that was if we prevailed on declaring our rights or determining our rights under the contract and that was an embedded component of this lawsuit. It was a very hotly contested issue in this case as to whether the Santa Clara lot contract was, in fact, a valid contract and whether it was, indeed, even enforceable. One of the...

JUSTICE SCOTT A. BRISTER: How long was the trial?

ATTORNEY RENEE F. MC ELHANEY: The trial was six days. Ms. Hall here, one of my colleagues, was one of the trial lawyers.

JUSTICE SCOTT A. BRISTER: How much of the trial focused on breach of contract and how much on damages.

ATTORNEY RENEE F. MC ELHANEY: That is such a good question, Your Honor, because I want to point this out and I think it's important and I might have forgotten to point it out. This is a partial record case. We do not have the transcript of the entire trial before you, rather the petitioners brought this case to you on a partial record and didn't list, as the rules require, what their issues presented were going to be as the requirements are under the rules. Most important then is that this Court must presume that the rest of the record that's not here supports the Trial Court's judgment. So what was the Trial Court's ascertainment here? What did the Trial Court decide? The Trial Court decided that the main issue, the merits of this case was liability, was who was right and who was wrong, who breached the contract and underneath that allegation, underneath that finding in the jury charge was also a resolution by the jury of a hotly contested issue about whether the Santa Clara lot contract was indeed a valid contract that it was not a product of fraud, but, in fact, was a valid contract because that was one of the affirmative, not just an affirmative defense, but an affirmative claim that IG, I'll call them IG for the sake of confusion, that IG asserted in this case and sought damages for. In their pleadings, they expressly sought damages against KB Home on the theory that the Santa Clara lot contract was invalid as a product of fraud or that we had breached the contract, we had breached some obligation under the Santa Clara lot contract that allowed them to cancel the contract. And that allegation made them assert a claim for actual damages because they said because we improperly prevented them from selling lots, we put a lis pendens in place and we took other steps to try and prevent those lots from being sold, IG affirmatively

sought damages against us.

JUSTICE DON R. WILLETT: When you started your presentation, you said under any definition the prevailing party, you meet it. I'm kind of just thinking back to federal and state employment law which often makes a prevailing party eligible for recovery of attorney's fees, but as I understand the case law in that context as Justice Hecht alluded to, moral satisfaction isn't enough. A judicial finding that somebody broke the law isn't enough. If it's unaccompanied by injury, by damages, a technical victory unaccompanied by equitable relief or an award of money damages cannot bestow prevailing party status in the employment law context.

ATTORNEY RENEE F. MC ELHANEY: Well and I would tell you that that is a context that's not applicable here because the concept of prevailing party is one you created and you created it in the beginning with the Green International v. Solis case and it has developed ever since.

JUSTICE HARRIET O'NEILL: What I keep coming back to that confuses me is those cases relate to the statute and we're not looking at the statute. I can read this attorney's fees provision of your contract to mean in a suit for specific performance, for a suit for declaratory judgment and this suit did not involve either of those things.

ATTORNEY RENEE F. MC ELHANEY: Could I disagree with you, Your Honor, because I do believe that this case did, in fact, include declarations of the rights under the contract.

JUSTICE HARRIET O'NEILL: But only to the extent a breach of contract action does.

ATTORNEY RENEE F. MC ELHANEY: Exactly, but that is every, this breach of contract claim did subsume those declarations and so and we won on those declarations.

JUSTICE HARRIET O'NEILL: I understand that, but we use a suit for specific performance and a declaratory judgment by definition don't carry damages with them else you sue for breach of contract and so you dropped your specific performance claim and the other one says to declare rights and they don't talk about damages. So it almost sounds like if you're going to sue for specific performance or a declaratory judgment, then the losing party has to pay, but it doesn't say anything about a breach of contract action for damages. Could it be read that way?

ATTORNEY RENEE F. MC ELHANEY: I think it could be read that way, Your Honor, but I think what I think is probably what the another explanation or construction of the contract term is that probably falls more in place with what parties would generally expect is that enforcement means obtaining some kind of damages or some kind of specific performance whereas declaring rights refers to if there's a controversy about whether the contract is valid or not, what rights parties have under the contract, the party that wins those aspects of the case is a prevailing party. And it's either one of those. If you win either one of those, you're a prevailing party.

JUSTICE PHIL JOHNSON: Is it your position the same as other counsels that the parties in this case agreed that in the event of a lawsuit over the contract, one party or the other would be the prevailing party?

ATTORNEY RENEE F. MC ELHANEY: I disagree. I think there can be a push. I think there can be a situation where we might not have either prevailed on enforcement or on having our rights determined the way we think that the contract should have been determined and at the same time especially in a case like this where the petitioners here actually

asserted affirmative claims against KB based on the contract and they lost both of those. They've lost enforcement and they lost declaration of rights because the jury wholesale disregarded and sided against them on all of their claims regarding the enforceability of the contract and remember they also tried to say that they had properly cancelled the contract and the jury said no to that as well. And that would have been an attempt to enforce paragraph 15 of the contract. So in this situation, under our scenario, it could be seen a scenario where both parties lost on all of their efforts to recover and then in that situation, Your Honor, I would say there'd be a push and there'd be no prevailing party.

JUSTICE PHIL JOHNSON: You could look at it the other way around. Both parties prevailed against the claim against them.

ATTORNEY RENEE F. MC ELHANEY: And in that situation, Your Honor, I would say it then is kicked to the Trial Judge who has been watching the trial for the last six days, who sees how many witnesses had to do with liability and how many witnesses had to do with damages, who presided over the case for several years and the process of discovery, who was there when the jury came in and gave its verdict and one set of lawyers looked like this and one set of lawyers gave high-fives. It is that reason why the standard of review for determining who is the prevailing party is based on abuse of discretion.

JUSTICE SCOTT A. BRISTER: But the Trial Judge decides that.

ATTORNEY RENEE F. MC ELHANEY: Because the Trial Judge decided that and the Trial Judge decided that here.

JUSTICE SCOTT A. BRISTER: Why wouldn't the jury decide who's the prevailing party?

ATTORNEY RENEE F. MC ELHANEY: Well, in this case, no one.

JUSTICE SCOTT A. BRISTER: [inaudible] both argued it to the judge.

ATTORNEY RENEE F. MC ELHANEY: That's right.

JUSTICE SCOTT A. BRISTER: So you all.

ATTORNEY RENEE F. MC ELHANEY: That's right. I could see an instance, Your Honor, where.

JUSTICE SCOTT A. BRISTER: That's normal, almost always we give attorney's fees questions to the jury in every other circumstance.

ATTORNEY RENEE F. MC ELHANEY: We do, but we don't. It's actually the judge who decides whether those fees are actually going to be awarded or not and that does bring me to an important point. The hearing where the two parties were arguing about who was entitled to attorney's fees, that hearing asserted two issues. Who is entitled and how much are your fees. We both argued we were prevailing parties. At the close of the hearing, Mr. Calvillo, who was trial counsel and this is in the record because we supplemented the record with this, Mr. Calvillo said he had affidavits and that he would file them and the judge said do what you want, I think I have enough and Mr. Calvillo never filed those affidavits. So there was no evidence before the Court.

JUSTICE SCOTT A. BRISTER: Could, could, would there be anything that prevented. So it sounds, two questions. First, it sounds to me like you're saying who the prevailing party is a question of mixed fact and law for the Trial Judge to be judged reviewed on appeal by abuse of discretion. It sounds like what you're saying.

ATTORNEY RENEE F. MC ELHANEY: I think I would agree with that. I don't, I guess it is a question of fact because I am saying there's lawyers that are high-fiving and there are lawyers that are downtrodden.

JUSTICE SCOTT A. BRISTER: It doesn't sound like it to me.

ATTORNEY RENEE F. MC ELHANEY: But wouldn't it be awful to require us to have a record at the end of a trial which we would have done in this case that said.

JUSTICE SCOTT A. BRISTER: Let the record reflect.

ATTORNEY RENEE F. MC ELHANEY: Let the record reflect that Ms. McElhaney, as the Appellate lawyer, is high-fiving Ms. Hall.

CHIEF JUSTICE WALLACE B. JEFFERSON: I guess I still don't understand though if the trial, let's just say there is summary judgment or directed verdict Trial Court grants it in favor of Intercontinental and says on the same day, here's my judgment. It's take nothing because there's no damages and you're saying at that point, Judge, that's not the end of the matter. The trial needs to continue on my breach of contract action and the judge says that's done. I mean, you can't, there's no way you can recover. You can appeal this judgment if you want to, but this finally resolves all the facts and the legal matters before me.

ATTORNEY RENEE F. MC ELHANEY: The first thing that I would do, Your Honor, is I would ask the Trial Judge to give us a ruling on liability and so that and I would hope...

CHIEF JUSTICE WALLACE B. JEFFERSON: And I'd say take nothing, that's your liability ruling.

ATTORNEY RENEE F. MC ELHANEY: Okay, so my liability ruling is no, no liability. Then I've lost on enforcement and I've lost on my declaration of rights and so I have lost and so I am not entitled to attorney's fees, but in this case, we have a different scenario here because, in fact, we did get the declarations that we wanted. Whether you call them a declaration, the law doesn't allow us to assert a separate declaratory judgment action when the issues of declaration are subsumed within the breach of contract. So it would have been if we are set a standard like this, then we're now going to be requiring parties to specifically plead out the legal determinations, not legal, the determinations that they need to have regarding their contract and enforceability and validity was a huge issue in this case.

JUSTICE SCOTT A. BRISTER: My other question was would anything prevent parties from drafting a provision that said whoever wins on the breach of contract action gets their attorney's fees regardless of what the damage question says?

ATTORNEY RENEE F. MC ELHANEY: Your Honor, the parties get to they certainly could do that.

JUSTICE SCOTT A. BRISTER: Contract anything they want.

ATTORNEY RENEE F. MC ELHANEY: They can until the legislature decides that that's not proper and on a policy basis enters a, or creates a statute that says no, you can't do that.

JUSTICE SCOTT A. BRISTER: So really the question for us here is whether in this provision, the parties intended, what the parties intend to happen when you won breach of contract but zero damages.

ATTORNEY RENEE F. MC ELHANEY: Right and I think it's really important for us and Judge O'Neill, you brought up a good point. Why do we keep going back to Chapter 38? And we go back to Chapter 38 because the concept of prevailing party was created in the context of this Court and other intermediate courts, in the other intermediate courts deciding what the meaning of Chapter 38 is because the language of 38 is such that it recognizes that you could have a valid claim, but still have a separate requirement, that is you need to recover actual damages.

JUSTICE PAUL W. GREEN: So if it's true then that the parties can contract for whatever they want and that's what you say that they've

done here in this, what your opposing counsel says also, so we can throw out all the jurisprudence about what prevailing party means because the parties say what it is.

ATTORNEY RENEE F. MC ELHANEY: No, I disagree and here's why. Because this contract term uses the word prevailing party so we have to assume that the parties and they didn't define what prevailing party means, so we have to go to the law to see what prevailing party means under this contract.

JUSTICE DALE WAINWRIGHT: Normally in a contract situation, we go to the common and ordinary meaning of the term, not to the legal definition of the term unless specified otherwise.

ATTORNEY RENEE F. MC ELHANEY: I would agree and I think we went under that too because if you at the Blacks Law Dictionary definition that was used in Flagship and many of the other cases that are so specific about what prevailing party means, they used a Blacks Law Dictionary meaning that is win on the merits, win on the main issue. The party that was vindicated and I assure you, the party that was vindicated here was KB Home and we must presume that also because we have a limited record, but if we didn't have a limited record, but I can't say that because I'm going to limit myself to the record.

JUSTICE PAUL W. GREEN: I guess the question would be how do we advance the ball here jurisprudentially.

ATTORNEY RENEE F. MC ELHANEY: I think that's a great question.

JUSTICE PAUL W. GREEN: You have this provision in the contract. Why is it important to the jurisprudence of the state that we decide what this provision means when anybody can change it from.

ATTORNEY RENEE F. MC ELHANEY: Well and you've got a good point there because this provision, it was argued to you that this provision is on every real estate contract and it's a part of the standard real estate contract. But that's not right. The word prevailing party is, but the rest of our language is actually fairly unique. The issue about enforcement and declaring rights is unique to ours, but I do think it would be helpful, I really do, I mean I wish you hadn't granted the petition to tell you the truth. I love arguing with you guys or discussing with you guys, but my client would have loved to just have the petition denied, but I do think it will be helpful to the intermediate courts, to the district courts and frankly to people in my office that are writing contracts, to have a clear understanding that prevailing party means wins on the merits regardless of the amount of damages or whether damages is even awarded. That's the case law that's out there. I do agree in some instances that's been muddied. I think this is an opportunity for this Court to clarify that and follow the precedent that it sent and that it followed most recently in the Mustang case where this Court said that the Mustang Pipeline won on liability and so they, therefore, had a valid claim, which is prevailing party, but even despite having a valid claim and being the prevailing party, they could not recover under Chapter 38 because they did not recover any damages.

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

ATTORNEY RENEE F. MC ELHANEY: Thank you very much.

REBUTTAL ARGUMENT OF JESSE R. CASTILLO ON BEHALF OF PETITIONER

ATTORNEY JESSE R. CASTILLO: The definition of prevailing party in this contract and this Court's opinion is going to be important because

the term prevailing party does appear in statutes. It appears in numerous contracts. It appears in the Property Code, enforcement of condominium association rules.

JUSTICE DALE WAINWRIGHT: We could limit the opinion to just defining prevailing party under the contract. We could limit the opinion to that.

ATTORNEY JESSE R. CASTILLO: And so if prevailing party, the definition of prevailing party and what that means to people who enter into a real estate contract or any contract or this contract is important because what the Court of Appeals said is we answer that question by determining the answer to the question on liability, simply just liability and so that's the case. Then as a plaintiff, all I have to do is show liability and I'm the prevailing party under one of these breach of contract claims. I never have to get to my damages.

JUSTICE SCOTT A. BRISTER: But I'm wondering about her, your opposing party's proposition is that it's a mixed question of law and fact. I mean, I can think of, I know the US Supreme Court has said you know, if you recover \$1, you're a prevailing party period and that's a nice, easy bright line rule and there's advantages to that. On the other hand, I can think of a lot of cases, I can think of cases where getting \$1 is a big loss to the plaintiff. I can think of other cases where saying, defendant, you did something wrong, plaintiff gets \$1 is a big win for the plaintiff, that it really depends on what the fight was about whether getting \$1 was a win or a loss. Why shouldn't we take into account all the facts about what the fight was really about and who really prevailed in deciding when you got \$1 you won or your lost.

ATTORNEY JESSE R. CASTILLO: You should take a look at what this fight was about. Where do you start? You start at plaintiff's original petition and you look at the jury charge and you look at the final judgment. Whatever she indicated that the case might have been or was something else, it was nothing other than breach of contract or specific performance. It was specific performance and alternatively breach of contract and the prayer for relief was judgment for damages.

JUSTICE NATHAN L. HECHT: And how much? How much was asked?

ATTORNEY JESSE R. CASTILLO: How much? They presented to the jury \$1.2 million. And at the end, you look at the final judgment and the final judgment didn't declare any rights. It didn't enforce any rights. It didn't vindicate the plaintiff. KB Homes might think that they've been vindicated, but at the end of the day, it doesn't matter of who high-fives. A defendant was sued for \$1.2 million, for breach of contract.

CHIEF JUSTICE WALLACE B. JEFFERSON: Did you waive any or all of your arguments here today by bringing partial record instead of the full record?

ATTORNEY JESSE R. CASTILLO: No, Your Honor, I think that the answer to that question is I know they cite the [inaudible] v. Marks case, a 1996 case by this Court, but I think the answer to that question is [inaudible] Supermarkets v. [inaudible] case where a party may request a partial reporters record and I think that that case answers that question. But let's say that, let's assume that she's correct that somehow I should have had the transcript of the six days of trial and every exhibit, we have the exhibits, but not every word that was spoken in six days of trial. Let's assume that's correct. You still look at the judgment. Was anybody vindicated by that judgment? What was this case about? Where is the vindication? You look at the judgment. Was there any declaration of rights? No. Was there any damages? No. Was there any change in.

JUSTICE SCOTT A. BRISTER: What in the contract says you look at the judgment?

ATTORNEY JESSE R. CASTILLO: It doesn't it says prevailing party.

JUSTICE SCOTT A. BRISTER: But I mean, people do bring, I mean declaratory judgment actions where you don't get any damages at all and we do leave it up to the Trial Judge to say some discretion who was really the winner here in Chapter 37. Why shouldn't we do that here?

ATTORNEY JESSE R. CASTILLO: Because in Chapter 37, it's a declaration of somebody's rights, remedies or obligations under a written agreement.

JUSTICE HARRIET O'NEILL: Let me get back to Justice Brister's original question I think we started the arguments with that if we were to decide in your favor then you would be a prevailing party under the parties', the plain language of the parties' agreement.

ATTORNEY JESSE R. CASTILLO: Yes.

JUSTICE HARRIET O'NEILL: And so you'd have the rather perverse result that you didn't prevail on any substantive issue in the case and yet you get your attorney's fees and isn't that sort of an odd result?

ATTORNEY JESSE R. CASTILLO: Absolutely not because the result is a defendant can prevail on a cause of action by defeating liability or damages. A plaintiff has to show both. What the Court's going to be doing is flipping that situation where a plaintiff, all he has to do is show liability. I'm home free. I recover my attorney's fees because I've shown liability. I don't have to show damages. A defendant, on the other hand, has to defeat both liability and damages and you're actually flipping the established burden of proof and whose burden is it to show on a breach of contract.

JUSTICE DALE WAINWRIGHT: If KB were awarded \$1 would you have a different position here?

ATTORNEY JESSE R. CASTILLO: I would have a different position because they were awarded a nominal amount and if you look at the United States Supreme Court, they've looked in the Farrar case. If you look at nominal damages, can they be awarded attorney's fees, then the amount is in questions, but certainly they've said a judicial pronouncement that someone has violated even a constitution requirement does not make, does not bestow prevailing party status on the plaintiff.

JUSTICE PHIL JOHNSON: Would you address briefly Counsel's position that you did not [inaudible] perfect your appeal in regard to attorney's fees?

ATTORNEY JESSE R. CASTILLO: Yes. That transcript where.

JUSTICE PHIL JOHNSON: I mean preserve error. I mean preserve error. Did the Trial Court tell you that you didn't have to introduce evidence in order to preserve error on your post trial attorney's fees hearing?

ATTORNEY JESSE R. CASTILLO: No, the Trial Court didn't. At the hearing, both parties asked the Court to take judicial notice of the amount of attorney's fees testified to at trial. KB Home did the very same thing and obviously they had a jury finding that said 66 or one-third and the defendant had also testified about attorney's fees under its oral agreement consequent of Chapter 38 and we asked the Court to take notice of all the testimony that had been provided at that trial concerning the breach of contract claim.

JUSTICE PHIL JOHNSON: No question the Trial Court understood that if you prevailed, you wanted your attorney's fees?

ATTORNEY JESSE R. CASTILLO: No question, Your Honor, no question. And if the Court would look at the reporter's record Volume 4, it's the

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transcript of that hearing in July, it's very clear that that was the question. That was the only issue. That was the only, in fact, we moved for an entry of a judgment. That was the only issue that was being preserved, who was the prevailing party.

JUSTICE PHIL JOHNSON: Thank you.

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

MARSHALL: All rise.

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