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Supreme Court of Texas.
Italian Cowboy Partners, Ltd., Francesco Secchi, and Jane Secchi, Petitioners,
v.
The Prudential Insurance Company of America and Four Partners, LLC, d/b/a Prizm Partners and d/b/a United Commercial Property Services, Respondents.
No. 08-0989.

April 14, 2010.

Appearances:

Thomas F. Allen, Jr., Carrington Coleman Sloman & Blumenthal, LLP, Dallas, TX, for petitioners.
G. Luke Ashley, Thompson & Knight LLP, Dallas, TX, for respondents.

Before:

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

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0989, Italian Cowboy Partners v. The Prudential Insurance Company.

MARSHAL: May it please the Court, Mr. Allen will present argument for the petitioner. The petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS F. ALLEN, JR. ON BEHALF OF THE PETITIONER

ATTORNEY THOMAS ALLEN, JR.: May it please the Court. The court of appeals' opinion gives rise to a number of issues involving contractual disclaimers of reliance, the intersection of tort and contract and questions of landlord-tenant law. I'd like to begin with the issue of whether petitioner's fraud and negligent misrepresentation claims were barred as a matter of law by two provisions contained in the lease and then, time permitting, I'd like to touch briefly upon the issues of implied warranty of suitability and constructive eviction. After a 12-day trial and the testimony of approximately 20 witnesses, the trial court found and the evidence amply supported that through the actions of their agent, the respondents knowingly lied to Italian Cowboy Partners and the Secchis about the persistent sewer odor at the restaurant to induce them to sign the lease and the guarantee. The court of appeals, however, reversed the judgment and held that these claims were barred as a matter of law by two provisions contained at the end of the lease under the heading "Miscellaneous", Section 1418, entitled "Representations" and Section 1421, entitled "The Entire Agreement." This deeply flawed holding cannot be reconciled with this Court's opinions in Schlumberger Technologies v. Swanson and Forest Oil v. McAllen. [inaudible]--

JUSTICE NATHAN L. HECHT: I'm unclear from your brief whether you think these provisions just need to be in a differently captioned section of the lease like "real important, please read" or whether they need to be more specific or whether you just can't do it period.

ATTORNEY THOMAS ALLEN, JR.: Well, we certainly don't advocate that you can't do it period. I think this Court's precedence says--

JUSTICE NATHAN L. HECHT: The reason I'm confused about it, at page 20 of your brief, you say a person should not be able to "quote shield itself from liability for its own fraud by inserting a clause into the very contract that was procured by the fraud."

ATTORNEY THOMAS ALLEN, JR.: Well, I believe in that provision of the brief, we are really talking about inserting a merger clause that does not constitute an affirmative, unequivocal waiver of reliance on extrinsic representations.

JUSTICE NATHAN L. HECHT: You think there can be such a clause, just this one isn't it.

ATTORNEY THOMAS ALLEN, JR.: That's correct, Your Honor. That's correct and as we set out in the brief, this is a distinction that has been drawn by courts around the country.

JUSTICE PAUL W. GREEN: What would it look like? What would that kind of clause look like in this case?

ATTORNEY THOMAS ALLEN, JR.: Well, I think they certainly could look like the clauses in Schlumberger and Forest Oil. Both of those clauses and language that this Court italicized in its opinions said that the parties were not relying on the representations of the other parties. There was no such waiver of reliance or otherwise clear and unequivocal statement of no

reliance here.

JUSTICE PAUL W. GREEN: It would just be the reliance aspect.

ATTORNEY THOMAS ALLEN, JR.: That's right and then, I just want to be clear about one thing. This is not simply a tweak or the insert of a couple of magic words here or there, which the respondents have suggested. The difference between a merger clause of one kind or another and a no-reliance clause is a difference of kind because a merger clause, any clause that says that defines the boundary of the contract and bars parole evidence to bury the parties' agreement is a doctrine of contract. This is the point made by Judge Posner. It has nothing to do with whether the contract itself was induced by fraudulent misrepresentations. They are two entirely separate things.

JUSTICE HARRIET O'NEILL: But if there's been a representation made that's claimed to be fraudulent later, that there's been an affirmative representation and the statement in the contract says these are the only representations that have been made to me and there are no others. So why doesn't that subsume a reliance element?

ATTORNEY THOMAS ALLEN, JR.: A couple of responses. First, language just like that has been looked at by a number of treatises and opinions and it's been interpreted to have the effect of defining the boundaries of the contract and the parties' agreement. That's in Corbin and some of the other cases we cite in our brief. But even if that is a plausible interpretation of that provision and that's the interpretation that the respondents have offered that this negates the existence of representations and, therefore, how could we rely on them. Not only does that disregard the historical and traditional interpretation of these clauses, but if it is at best plausible, that does not reach the clear and unequivocal requirement of Schlumberger and Forest Oil.

CHIEF JUSTICE WALLACE B. JEFFERSON: But Counsel, let me just ask a practical question. If I am Italian Cowboy Partners and I see this representation and it says there's acknowledgment that neither landlord nor agents or employees have made any representations except those that are set forth within the "A" corners of this contract, why wouldn't I say no, that's not correct. There were representations made about the absence of sewers or the safety of the electrical wiring or that sort of thing that had been part of our negotiations so I'm not going to sign the contract with this provision in there or I'm going to make sure that these expressed provisions make it into the contract before I sign it. Why isn't that the way to interpret this contract and set a course for future conduct of contracting parties.

ATTORNEY THOMAS ALLEN, JR.: Well, part of the problem is that the issue itself, the issue of the sewer order that had plagued the prior tenant and the Italian Cowboy Restaurant was a latent defect, as the trial court expressly found, that Italian Cowboy Partners could not have discovered until after signing the lease and the guarantee moving in, there was testimony to that effect. So it was a practical matter. They were not on notice of what to look for.

JUSTICE NATHAN L. HECHT: I don't understand that all they had to do was ask the prior owner.

ATTORNEY THOMAS ALLEN, JR.: Well, as the trial court found, at the time they entered into the lease and the guarantees, there was no restaurant in business.

JUSTICE NATHAN L. HECHT: I know, but in the five months that the lease was being negotiated, they could have asked the prior tenant any problems and a year later, the tenant came around and said, oh by the way, there was sewer odor in here.

ATTORNEY THOMAS ALLEN, JR.: And I don't think that was disputed that that was hypothetically possible. Hypothetically, they could have done more investigation.

JUSTICE NATHAN L. HECHT: Say it was impossible to discover, but it just seems to me it was a very easy phone call.

ATTORNEY THOMAS ALLEN, JR.: Well, it was, I suppose that as I read the trial court's findings, the latent defect was only discovered when they moved in. They were not on notice in any way and the reason they weren't on notice was because the landlord actively misrepresented the condition of the premises, actively concealed this defect. So they had no reason to call up and do so at that time.

JUSTICE NATHAN L. HECHT: Let me take you back before we wander off too far on the question about what should the clause say. We had this problem in Prudential and you have a problem with the, not this Prudential, but a former Prudential case, with the, you have a problem with the Deceptive Trade Practices Act that says that you can't disclaim application of X so the argument was made in that case you can't disclaim reliance. The statute precludes that. So the argument was made in the case well we didn't do that. We disclaimed the fact of any extraneous representations and if none were made, then there were none to rely on and nothing precludes that. Why isn't that a better approach?

ATTORNEY THOMAS ALLEN, JR.: Well, I guess it's not the better approach because, as I was suggesting a moment ago, it does not involve the level of clarity and knowing deliberate waiver of a right and this is a very significant right that people are giving up, the right to sue someone who's deliberately lied to them to get them to enter into a--

JUSTICE EVA GUZMAN: The court of appeals, along those lines, the court of appeals focused on the fact that there were sophisticated business entities, that they were represented by counsel and looked to this language about the representations to conclude that they were basically disclaiming any reliance. Why isn't that in the context of these parties and this case a valid position to take?

ATTORNEY THOMAS ALLEN, JR.: Well, I think particularly in the context of these parties and these circumstances, it was not the correct decision. We

don't dispute that the parties were represented by counsel and were sophisticated restaurateurs, but here where the language itself does not contain, what it easily could have contained, a clear disclaimer or waiver of reliance on the extrinsic representations coupled with the circumstances. The circumstances that the subject of their later dispute was never discussed in any meaningful or relevant way. Indeed, the discussion was the fraud itself, the discussion of the condition of the premises.

JUSTICE EVA GUZMAN: Well, so you would advocate that it has to conclusively negate the element of reliance in order for it to be valid.

ATTORNEY THOMAS ALLEN, JR.: Yes, Your Honor, and I believe that's an easy fix. It was on display in Forest Oil. It was on display in Schlumberger, in numerous of the other cases that we've discussed and the reason for that is that it strikes, it not only preserves the distinction between tort and contract, which is a distinction that this Court has long been careful to delineate and enforce, but it also strikes the right balance as a matter of policy. It still respects parties' freedom of contract, their ability to contract for certainty and predictability in commercial transactions and yet still likewise vindicates the competing policy of the abhorrence of fraud. Under the court of appeals opinion--

JUSTICE NATHAN L. HECHT: So on Schlumberger and Forest Oil, there was a pending dispute and you think that disclaimer is effective, can be effective even if there's no pending dispute.

ATTORNEY THOMAS ALLEN, JR.: Well, I believe in Forest Oil, Justice Willett said that the Schlumberger exception applied to contracts broadly and not simply to settlement of an ongoing dispute though that remains a significant consideration and that is certainly consideration here. The parties were at the beginning of this commercial lease. The Secchis and Italian Cowboy Partners had no inkling of the sewer odor that would later ruin their business. This was very different than resolving a dispute such as Schlumberger where the parties had been going back and forth for a long time about the value of their joint venture. So given the prospective nature of the facts, given the act of concealment by the landlord and the fact that the language in the contract itself does not rise to the level of clear and unequivocal waiver, all of those reasons auger in favor, we believe, of finding that these provisions were not effective to negate the claims as a matter of law.

JUSTICE NATHAN L. HECHT: But if a commercial landlord came to you and said we've been around the block here. We don't want any disputes and you will be surprised how many arise after the deal is done and people don't like it. So we want to write a provision in the contract, the lease, whatever it is, that completely insulates us from any claims of fraud in the inducement and you think that can be done? Or--

ATTORNEY THOMAS ALLEN, JR.: Yes, sir, absolutely. As I said, I think Forest Oil and Schlumberger provide a ready example. If the parties wanted to belt and suspender it, the landlord could themselves disclaim any representations they may or may not have had. That's been suggested in some commentary, but at the bare minimum--

JUSTICE NATHAN L. HECHT: In your view, in this case we're just down to where this clause does it.

ATTORNEY THOMAS ALLEN, JR.: I'm sorry, Your Honor.

JUSTICE NATHAN L. HECHT: In your view, in this case we're just down to whether this clause does it or not?

ATTORNEY THOMAS ALLEN, JR.: That's not our only issue. The other two issues, the other two defects in the court of appeals' opinion have to do with the discussion of the issue that later became their dispute and the boiler plate status of these provisions themselves, but, yes, the first and I believe necessary and most important fact is that these clauses were simply insufficient to negate reliance and bar these claims for the doctrinal and policy reasons we've outlined in our brief and explained in a number of cases. In the time I have left, I'd like to switch gears briefly, if I could, and just discuss the implied warranty of suitability element. This was an alternate basis of liability against the respondents at the court of appeals reverse as a matter of law.

JUSTICE NATHAN L. HECHT: Do you agree that there was no breach if the ten ant had the duty to repair?

ATTORNEY THOMAS ALLEN, JR.: Well, it's a bit of a complicated answer. If the tenant had the duty to repair and the cause was within the premises, for example--

JUSTICE NATHAN L. HECHT: Duty to repair.

ATTORNEY THOMAS ALLEN, JR.: The duty to repair. So, for example, there was a lot made about a sink as one of the causes of the odor, not all of, the only cause.

JUSTICE NATHAN L. HECHT: Does it come down to that? If, I mean are we arguing about the law or the facts here?

ATTORNEY THOMAS ALLEN, JR.: Well, we're arguing a little bit of both. I think that the primary defect in the court of appeals' opinion was a legal error. The court of appeals took it as true that one of the causes and, indeed, the "but for" clause really of the odor was the cracked, misapplied grease trap and the plumbing that was not plumbed at the right incline. It was too shallow, causing the sewage to back up into the grease trap. There was absolutely no dispute that that shouldn't happen. The court of appeals assumed that was a cause of the odor, assumed that that was within the common area, which was the landlord's duty to repair, but nevertheless held that the implied warranty of suitability was not implicated because the odor occurred within the premises and as we explained in the brief, that can't really be reconciled with this Court's opinion in Davidow where the doctor leased some premises. There were many defects and one of them was the lack of power. The defect occurred in the premises, but the cause was the landlord not paying the bill. That occurred some-

where else, but nevertheless the implied warranty applied and the same is true here. I see my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Allen. The Court is now ready to hear argument from the respondents.

MARSHAL: May it please the Court, Mr. Ashley will present argument for the respondents.

ORAL ARGUMENT OF G. LUKE ASHLEY ON BEHALF OF THE RESPONDENT

ATTORNEY G. LUKE ASHLEY: May it please the Court. One of Prudential's purposes in contracting in this case was to avoid the almost nine years of litigation in which it has become embroiled. Prudential specifically contracted to obtain an agreement, indeed a representation from Italian Cowboy that there were no promises or representations.

JUSTICE HARRIET O'NEILL: There does appear to be a body of law that says you have to have a specific disclaimer of reliance in order to negate a fraud in the inducement claim. How do you address that body of law?

ATTORNEY G. LUKE ASHLEY: Well, I don't think that's required by either the rationale of Schlumberger or by Forest Oil. There is no expressed statement that they are disclaiming reliance in this case, but you cannot rely upon statements that you've agreed or promises that you've agreed were never made.

JUSTICE HARRIET O'NEILL: But would you agree that that's a division in the law around the country that there's jurisprudence that accepts that sort of distinction?

ATTORNEY G. LUKE ASHLEY: I don't agree with that. I don't believe that there, the cases that, and we discuss them in our brief, do say that there are no magic words, that it's again and basically a question of contract instruction where whether you have clearly and unequivocally agreed without regard to whether you specifically use the words "reliance" or not. The general distinction in those cases is that a merger clause like 1421 in this case, by itself, is not going to be enough, but if you do what the court stated is required in Forest Oil, that is you look at the contract language itself and the totality of the circumstances in making the analysis, then I think in this case, it is clear that what Prudential bargained for, what Prudential obtained was an agreement that there had been no promises with respect to the premises made so the disclaimer in this case specifically addresses the type of representation or promise that eight, nine months later, after Italian Cowboy was unable to successfully operate the restaurant, they abandoned the premises and then turned around and made precisely the type of claim. They claimed they were fraudulently induced by representations they agreed didn't exist.

CHIEF JUSTICE WALLACE B. JEFFERSON: But just assume the very worst conduct

and this case or another case where you know that there is a huge problem with the premise, maybe even dangerous. You actively conceal it. You put a tarp up. You direct the buyer to another part of the building when they ask you, "Has there been a mold problem? A sewer problem?" You know that the answer is yes, but you say no, but then you put this clause in. Is that where the law is taking us and I'm assuming the very worst and I just want to see if you would agree that that permits a bad actor to hide his or its misconduct through a merger or no representation clause like this?

ATTORNEY G. LUKE ASHLEY: Obviously, that's not this case and I think that.

CHIEF JUSTICE WALLACE B. JEFFERSON: But would it permit somebody who has an evil intent or bad motive. They're trying to get rid of property that they know is unsafe to avoid liability for some kind of misrepresentation of fraud by putting the same provisions that we're talking about here in the contract?

ATTORNEY G. LUKE ASHLEY: Again, I think that is precisely why in Forest Oil and in Schlumberger and I think it would be appropriate in this case for the Court to say that you're not establishing this bright-line rule. You're not saying that there aren't circumstances, extreme circumstances in which a party may actually, you get the right language, but then not be able to enforce it. If there is a level of conduct, of tortious conduct that is sufficient to under those circumstances to override the actual contract language of the parties, I'm not here arguing that that situation doesn't exist. I am here arguing that that situation doesn't exist here. In this case, you had Prudential, who engaged the property manager and Prudential is an institutional landlord, not the only one, but they have a national institutional landlord who is negotiating leases in a wide variety of situations and through a wide variety of agents and so what Prudential did because it was not personally involved in the actual lease negotiations and, by the way, neither was Mr. Secchi or Ms. Powell, who allegedly made the representations in this case, but Prudential undertook to protect themselves against precisely this type of claim by obtaining the representation that there were no promises and now assuming that Ms. Powell actually made the statements and went off the reservation, that's obviously conduct that should not be sanctioned, but in this situation, you really have a decision to make as to which misrepresentation you're going to tolerate. You have to assume for purposes of the analysis of the disclaimer that there was a misrepresentation before the lease was signed by Fran Powell at Prizm. There was also a misrepresentation by Italian Cowboy and we know that was made because it's right there in the lease in writing that says that there were no promises or representations made with respect to the premises.

JUSTICE PAUL W. GREEN: What kind of rule would you write though that would, the facts would be so bad that you could take a look at a paragraph like this and you say well, in one case it applies and in another case it doesn't? How would we [inaudible] about that?

ATTORNEY G. LUKE ASHLEY: I acknowledge, Your Honor, and I'm not in any better position than anyone else to try to write a rule that would fit within an exception, but where you have a situation where the party to the contract, Italian Cowboy, represented by counsel, is after the misrepre-

sentation by Fran Powell, then enters into a lease and specifically agrees that no representation has been made, it is unfair to saddle Prudential with that, allow them to get out of that representation.

JUSTICE PAUL W. GREEN: Well sure, but by the same token it sounds almost like that the rule is being advocated here is one that would, as the Chief Justice pointed out, that would protect the tortfeasors in these circumstances.

ATTORNEY G. LUKE ASHLEY: Well it excuses, if you will, or it makes the misrepresentation that Fran Powell allegedly made nonactionable because Italian Cowboy made a subsequent representation that they were not relying upon that or that the representation had not been made.

JUSTICE DALE WAINWRIGHT: Which is why there's seems to me always a little bit of tension and unease in these types of cases because the parties are both sitting down and signing off on the statement that both sides know is not true, that no representations were made and not just this case, but Forest Oil and Schlumberger and it kind of blanks reality, but I guess on the other hand, it models or follows reality because, as we said in Forest Oil and Schlumberger, we still hold that these provisions preclude reliance and thereby preclude fraud because both sides are sophisticated. They know the business. They have counsel. They have had the opportunity to do due diligence and they're making a calculated decision whether to do additional due diligence that cause X, whether to try to change the purchase price at Y and if they stop doing due diligence and there's some problem that they don't follow up on, litigation may cost Z. At some point, these sophisticated lawyered-up parties make a call and then put a provision in here that says we go our separate ways if there's anything else out there, but we know that provision that no representations were made is not true. It's always uneasy for me in these types of cases.

ATTORNEY G. LUKE ASHLEY: And that is why there is this tension between the tort law that recognizes this exception and contract law, the basic fundamental principle of contract law that says that the parties are to be held to the contract that they've made.

JUSTICE PAUL W. GREEN: Well, but nobody's going to write a lease agreement that says here you sign this and this paragraph says that if I've committed fraud that I'm not liable. That would take care of the problem wouldn't it? I mean, if we're that specific. But then they wouldn't sign the agreement. So the effect of that is is that well I've got something, if I've got something to hide then I'll just write a more generic paragraph and then claim that that gets me off the hook in the end.

ATTORNEY G. LUKE ASHLEY: If they were to sign that particular paragraph, then certainly you can justify that on the basis they've expressly agreed to assume the risk, but every contract is an allocation of risks and responsibilities and in this case, which again is not nearly as extreme as the one you posit, the parties clearly did allocate risks and responsibilities and the risk that there had been some prior representation unauthorized representation by an agent of Prizm on behalf of Prudential was shifted to Italian Cowboy once Italian Cowboy agreed that in entering into

that lease, no such representations had been made.

JUSTICE EVA GUZMAN: But that seems to make the argument for an express mention of reliance even stronger. Everyone knows we made representations and I'm saying that we didn't, but even if you did, I'm not relying on them. That seems to sort of support that there should be an expressed disclaimer.

ATTORNEY G. LUKE ASHLEY: Well there's a it's a belt, again, it's a belt-and-suspenders thing, but absent some legislative determination that you've got to or legislative-like determination that you must use particular words, it seems to me that the basic principles of contract instruction and the basic principle of contract law that you're going to be bound by the conduct that objectively indicates what your agreement is then that controls.

JUSTICE HARRIET O'NEILL: Why don't these leases contain "as-is" clauses? Everybody knows what that means and we take the premises as is and there had been no representations. Why not something that straightforward?

ATTORNEY G. LUKE ASHLEY: Well, actually, we'd probably still be here in this case because the Prudential against Jefferson Associates case specifically said that they were enforcing the as-is clause, but again held open the possibility there's an exception for fraudulent inducement. An as-is clause would be, I think would have had the same effect in this case and as-is clause coupled with the merger clause, the integration clause, it makes it clear that that's the entire agreement coupled with the allocation of a repair responsibility would mean under the totality of the circumstances that you wouldn't allow this type of fraudulent inducement claim directly contrary to what the written agreement is to be made, but there's a myriad of contract situations and parties negotiate, different parties take different approaches. The question is then for the Court unless there is some sort of statutory or legislative-like requirement for use of magic words, what in this case properly effectuates the intent of the parties as manifested by their objective conduct and as manifested by the words of their agreement?

JUSTICE PHIL JOHNSON: It seems like the magic words are going to be repeated in every contract then and so those magic words are not going to be, someone's going to say well I know the magic words are there, but that's not the way it was. It seems like you just don't avoid it by using, by having magic words though.

ATTORNEY G. LUKE ASHLEY: You don't avoid it unless the courts are going to grant summary judgment and [inaudible]

JUSTICE PHIL JOHNSON: Enforce the agreement as written whatever the agreement says.

ATTORNEY G. LUKE ASHLEY: Yes. Yes.

JUSTICE PHIL JOHNSON: And your view is that's the totality of the circumstances as we've said before?

ATTORNEY G. LUKE ASHLEY: Well I don't think that the statement in Forest Oil that you consider the language of the contract and the totality of the circumstances really says anything more than you do in the course of ordinary contract construction anyway.

CHIEF JUSTICE WALLACE B. JEFFERSON: In examining the exceptions that are spoken about across the country, has there even been a line about that if there's economic injury then no exception will apply because that's what the whole purpose was that balance of risk, but what if there is a concealment of a dangerous aspect of the property where someone is injured or dies as a result of the concealment of that defect and in those instances there would be an exception and [inaudible].

ATTORNEY G. LUKE ASHLEY: I'm not aware of any case that has made that distinction. I mean, obviously then your Court would be making a policy determination that really a party has an affirmative duty to disclose in those situations even though normally in negotiations at arm's length such as this, there is no affirmative duty to disclose. Let me also address the other grounds on which the court of appeals based its decision. There was on the issue of the implied warranty of suitability, there really is no issue in this case concerning the duty repair. The undisputed testimony is that the while there may have been some uncertainty as to the source of the sewer gas odor, that in order for it to have gotten into the restaurant, it had to travel up to the roof. It had to be all these systems were vented to the roof and then it had to be drawn back down through the air intakes of the air conditioning and heating system into the restaurant. Mr. James, the person that was engaged by Italian Cowboy through investigate and to repair the problem and others all agreed that the odor had to have come from the roof down into the restaurant and the undisputed evidence was that the problem was remedied when the subsequent tenant, Scoots Restaurant, operated by Mr. Leatherwood, actually raised the vent stacks and there was apparently or may have been a misrouted drain that was capped and as a result of that, the odor disappeared. So there's no question that under Section 5.2 of the lease that the tenant bore the repair responsibility for the heating and air conditioning and the plumbing system. There's a lot of argument about the grease trap, which is, part of which is physically located outside the premises or the building itself, but again, if the grease trap was the source of the odor to any extent, it was because the odor was vented up to the roof and then sucked back down in. The problem actually may have been aggravated by the Secchi's because they added some additional air conditioning when they came in and made the, did the remodeling work on the premises. So the covenant, the warranty of suitability clearly doesn't apply to the sewer gas odor in this case because the repair responsibility clearly lay with the tenant.

JUSTICE EVA GUZMAN: Does that include the, I guess the investigative aspect of that? Sometimes the repair is pretty easy once you figure out what the problem is and I guess Prudential knew there was a problem and leased it anyway, didn't take any steps to investigate the source of the problem. So does that still kick it to [inaudible]?

ATTORNEY G. LUKE ASHLEY: What Prudential did is I think there was some,

because there was this uncertainty and what the source of the problem was, that's why Prudential actually accommodated Italian Cowboy and was working with Italian Cowboy to try to identify and they paid some money.

JUSTICE EVA GUZMAN: I was speaking after the first tenant left and before Italian Cowboy came in, there was a period in there when there was no work done to investigate the source of the problem.

ATTORNEY G. LUKE ASHLEY: Correct.

JUSTICE EVA GUZMAN: Then you sign a lease and you say well it's your re sponsibility.

ATTORNEY G. LUKE ASHLEY: Well, there's no evidence and this is our other point that the court of appeals actually didn't need to reach, but there's no evidence that Fran Powell knew that there was still a problem. The only evidence that Fran Powell had any knowledge of a sewer odor issue at the Hudson's are three conversations she had with Matt Quinn, one of which clearly related to a different odor problem and then the other two and Mr. Quinn's testimony, his deposition testimony, was that those were in the context of his reassurance to her that they were working on the problem and would solve it. The last of those conversations, it's unclear, but it could not have been any later than November of 1999 and the restaurant continues to operate until February of 2000 when Hudson's closed. So there's absolutely no evidence in the record that Fran Powell knew that there was any continuing problem of sewer gas odor at the time that she was talking to the Secchi's.

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

ATTORNEY G. LUKE ASHLEY: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF THOMAS F. ALLEN, JR. ON BEHALF OF PETITIONER

ATTORNEY THOMAS ALLEN, JR.: Thank you, Your Honor. I'd like to start with the last part first, the implied warranty of suitability. First of all, I need to take issue with a couple of the characterizations of the record. The roof vent was not the only source of the odor. There's testimony by Ron Perry who was the Secchi's original contractor who performed a paper test showing that the odor, which ended up being the worst source of the odor was coming up through the floor not through the air conditioning vents. I believe Richard Allen, who was the contractor for the subsequent tenant, did not state that the, stated that the air conditioning was not the issue there. And, finally, with regard to the remedy that the subsequent tenant created, they didn't just reroute a pipe. They moved the kitchen. They basically gutted and reconfigured the restaurant. They moved the kitchen from one side to the other. They testified that they replaced 40% of the plumbing and as the trial court found, that was not a repair. That was an alteration which took it outside the scope of Section 5.2. If

that's what they had to do to fix the odor, that wasn't a repair. And so and as far as the accommodation to Prudential, by Prudential to help fix this problem, they did attempt to help the Secchi's fix it. The problem was that was coupled by Fran Powell's continuous concealment and affirmative misrepresentations about the nature of the odor and its presence at the prior, with the prior tenant. Finally that there was no evidence that Fran Powell knew of the odor. Again, they're asking the Court to reweigh the evidence as found by the trial court. She was never told that it was fixed and her testimony was disputed even by David Osborne, who was the President of Hudson's Grill, the prior tenant with regard to whether he had ever told her there was an odor. She denied ever smelling the sewer odor. She said there was only a wood odor. So I think the evidence was more than sufficient to support the trial court's conclusion that she had sufficient knowledge and intent to fraudulently induce the Secchi's. Going back to the disclaimer of reliance question, with regard to the no-reliance body of law that I believe Justice O'Neill asked about, I refer the Court to our briefs. There are a lot of cases that talk about this. There are a lot of cases that draw this distinction between merger clauses and no-reliance clauses. This would be a workable system.

JUSTICE NATHAN L. HECHT: Why is it workable when we said in Jefferson Associates you can't disclaim reliance under the DTPA? So it wouldn't have any--

ATTORNEY THOMAS ALLEN, JR.: I'm sorry, Your Honor.

JUSTICE NATHAN L. HECHT: Why is it workable when we said in Jefferson Associates that you can't disclaim reliance under the DTPA?

ATTORNEY THOMAS ALLEN, JR.: Well, the DTPA may be an exception to Schlumberger.

JUSTICE NATHAN L. HECHT: But it's a very big one.

ATTORNEY THOMAS ALLEN, JR.: It is, but fraudulent inducement, avoiding contract on the basis of fraud, negligent misrepresentation, all of those are still encompassed by Schlumberger and Forest Oil.

JUSTICE NATHAN L. HECHT: Then you'd only be liable for potentially troubled damages but the point was made in the Jefferson Associates case it is more effective to disclaim the representations because that's a factual matter. Reliance is kind of like I'm not relying on it. Well, maybe you are or maybe you aren't, but it wasn't said, it wasn't said.

ATTORNEY THOMAS ALLEN, JR.: Well, that's right and I think that goes to Justice Wainwright's point that these types of disclaimers or whatever label you want to affix to them that 1418 represents, do represent attention. I suppose it's the difference between disclaiming representations and disclaiming your reliance upon those representations and the large body of case law says that you have to disclaim the reliance on those representations, not merely the representations themselves. I believe in the Reeves opinion by this Court going back to 1957, the Court was quoting a Massachusetts opinion which said we can easily envision the type of scena-

rio in which a party would represent, would agree rather, that there have been no representations, but yet fully understand there had been representations that got them to enter into the contract in the first place and still relied upon them. I suppose the bottom line here is that this is a contract and in a contract, words are all you have. Words matter. And if you're going to give these words the extraordinary power to negate the fraudulent representations that induced you to enter into this contract in the first place, those words at least need to be clear and they at least need to clearly contain some sort of obvious promise by the party that they are not relying on those representations coupled with the lack of negotiation and discussion of the specific issue, the result otherwise is untenable as a matter of policy and doctrine. Thank you.

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

MARSHAL: All rise.

2010 WL 1625291 (Tex.)

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