This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Dr. Erwin Cruz
v.
Andrews Restoration Inc., et al.
No. 10-0995.

December 7, 2011.

Appearances:

Jennifer G. Martin of Schell Cooley, LLP, for Petitioner.

Shawn M. McCaskill of Godwin Ronquillo, P.C., for Cross-Petitioner-Respondent.

Russell W. Schell of Schell Cooley, LLP, for Cross-Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 10-0995.

MARSHAL: May it please the Court, Ms. Martin will present argument for the Petitioner and Mr. Schell will present argument for the Cross-Respondent. They have collectively reserved 13 minutes for rebuttal. Ms. Martin will open with the first seven minutes. Ms. Martin and Mr. Schell will present rebuttal.

ORAL ARGUMENT OF JENNIFER G. MARTIN ON BEHALF OF THE PETITIONER

ATTORNEY JENNIFER G. MARTIN: May it please the Court, this is a case of statutory construction. The question before this Court is whether the courts of appeals and primarily the Dallas Court of Appeals in construing the DTPA remedy provision of restoration has appropriately said that it is the equivalent of the equitable remedy of rescission. I think the simple answer, applying the rules of statutory construction is no. The plain language of the statute does not use the word rescission and this Court ought to look at that language that the legislature took care, presumably, in drafting.

JUSTICE EVA M. GUZMAN: What should restore mean? I mean do you really think the legislature intended for this windfall because, in some cases, it could be small and in some cases it could be significant. So what does restore mean in your view?

ATTORNEY JENNIFER G. MARTIN: Restore means, the plain ordinary meaning, which is what the Court is bound to give it, is to get back. To restore to the consent of what was taken from it. Now, I think key to this is in violation of the statute. So I don't think it is a per se windfall because it is money or property that was taken in violation of the statute and so, Justice Guzman, in putting it in that context, it is exactly what the legislature intended in creating the DTPA.

JUSTICE DEBRA H. LEHRMANN: So what were those damages?

ATTORNEY JENNIFER G. MARTIN: In this case, the trial court found, by summary judgment, that the amount of money taken from Dr. Cruz in violation of the statute was $1,059,940.52. That was a summary judgment finding that has been unchallenged.

CHIEF JUSTICE WALLACE B. JEFFERSON: How did the absence of this statement in the contract cause Dr. Cruz injury?

ATTORNEY JENNIFER G. MARTIN: Well, there are a number of ways that it may have caused Dr. Cruz injury. One is that he was brought into this suit and there was an attempt to foreclose a lien on his home and, significantly, the trial court also found, as a matter of summary judgment that's been unchallenged, that the failure to include this language in the contract was the producing cause of harm to Dr. Cruz.

CHIEF JUSTICE WALLACE B. JEFFERSON: The jury found zero damages in question number 29.

ATTORNEY JENNIFER G. MARTIN: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Even though the trial court said I'm instructing the jury that there was this missing language. The question is what sum of money, if now paid, would fairly and reasonably compensate Dr. Cruz for damages. So isn't correct that Dr. Cruz did not prevail under Section 17.50?

ATTORNEY JENNIFER G. MARTIN: The only way that that would be true is if Dr. Cruz had not already obtained the finding from the court on summary judgment that he had been injured and also obtained a summary judgment finding that the amount taken in violation of the statute was the $1,000,000.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you're saying he was already a prevailing party under 17.50 before the case was tried?

ATTORNEY JENNIFER G. MARTIN: Yes, Your Honor, and the additional questions submitted to the jury, had the jury filled in a dollar amount in that blank, would have afforded him the opportunity to recover under the provision of the DTPA that is most commonly used, which is the provision that allows him to recover actual damages because the jury answered that answer zero. And I would agree that it seems, on the facts of this case, it seems odd that the trial court could have found by summary judgment yet the jury found zero in that and it was not, the factual finding by the jury was not challenged. But--

JUSTICE NATHAN L. HECHT: I wonder which part of the notice you think was injury, the omission of which part do you think was injurious? It says you and your contractor are responsible for meeting the terms and conditions of this contract. Surely, omitting that couldn't be injurious. Everybody knows that two people sign a contract, both people are responsible.

ATTORNEY JENNIFER G. MARTIN: Well significantly, Your Honor, in this case in getting into a little bit of the issues that were discussed below, but weren't brought as part of this petition, Dr. Cruz did not understand that he was the one that was going to be liable on this contract. It was always his understanding from talking to his contractor that the recovery would be out of his insurance proceeds.

JUSTICE NATHAN L. HECHT: Well this is a doctor who signed a contract and didn't think he was going to have to pay?

ATTORNEY JENNIFER G. MARTIN: He understood from his dealings with Mr. Martinez, who's his friend the record shows, that it was going to be only money out of his insurance proceeds and that he would not be personally liable for anything.

JUSTICE NATHAN L. HECHT: In the second sentence, if you sign this contract and you fail to meet the terms and conditions, you may lose your legal ownership rights, but he didn't, right? But you think that was injurious too?

ATTORNEY JENNIFER G. MARTIN: He did, in fact, come to court, hire lawyers and defend himself against that. Not to mention suffering, presumably, although I will admit there was no evidence of it, but I would say if someone's foreclosing on my house, it would cause me some amount of grief and mental anguish. I think that the Court could presume that the legislature believed that it was important enough that this language be in a contract that they made it a per se DTPA violation. But the fact is and this Court really doesn't have it before it deciding whether Dr. Cruz was injured because the Respondents haven't challenged the trial court's summary judgment findings that Cruz was a consumer, that there was a DTPA violation, that the DTPA violation caused Dr. Cruz harm and that the amount obtained by the Respondents on the DTPA violation was the million dollars and change. The real question for this Court to decide is whether the statutory language allows the Court to engraft this extra language of rescission that's nowhere in it. [inaudible] could have said rescission if they'd meant rescission and the legislature used words that focus only on returning to the consumer where there's no language in there that talks about what needs to be done to put back the wrongdoer in his original position.

JUSTICE DALE WAINWRIGHT: If damages is found by summary judgment, why was the question submitted to the jury?

ATTORNEY JENNIFER G. MARTIN: Because there was still the possibility that Dr. Cruz could have been awarded actual damages and there is the (b)(1) provision of the damages present.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

MARSHAL: May it please the Court, Mr. McCaskill will present argument for the Respondents.

ORAL ARGUMENT OF SHAWN M. MCCASKILL ON BEHALF OF THE RESPONDENT

ATTORNEY SHAWN M. MCCASKILL: May it please the Court, good morning, Your Honors, Counsel. My name is Shawn McCaskill of the law firm of Godwin Ronquillo in Dallas and I'll be arguing today on behalf of Andrew's Restoration, Inc. d/b/a Protech Services. As in the briefs, I'll refer to my client, for sake of convenience, as Protech. This morning, I'm going to be handling two parts of this case. First of all, I'll respond to Mrs. Martin's argument on the Cruz petition for review and then, secondly, and time permitting, I'll present Protech's petition for review as against Chubb. I'll try to respond to some of the questions that have already been posed here this morning throughout my argument. First of all, as to the Cruz petition for review against Protech. The court of appeals properly affirmed Protech's judgment against Cruz holding that the trial court properly denied the remedy of restoration of consideration under DTPA Section 17.50(b)(3) because Cruz did not surrender the benefits that he had received from Protech from its humidity and mold control services at Cruz's residence. In its opinion, the Dallas Court of Appeals relied on its prior decisions in Smith v. Kinslow and David McDavid Pontiac v. Nix, both of which had interpreted section 17.50(b)(3) of the DTPA to incorporate the equitable doctrine of rescission, including their requirement that the claimant surrender benefits received before getting restoration. Justice Guzman posed the question of what does restore mean? I would submit that restore means putting the parties back to square one, the status quo. In this case, as another question was posed about the windfall.

There would be a windfall to Dr. Cruz. He obtained benefits from my client for services that were provided and given that these were services, mold control, humidity control, those services were not or those benefits were not and cannot be returned or surrendered back to my client.

JUSTICE EVA M. GUZMAN: What about the argument articulated by the same court, the Fifth Court in Park Forest that there is a punitive component to the legislature's use of the term restoration and that it would not require the consumer to return any benefits because that really is sort of inconsistent with the purposes of the statute to begin with?

ATTORNEY SHAWN M. MCCASKILL: In the Park Forest case, that statement was a dicta statement and an unpublished opinion without precedential value as to what the legislature may have intended in using that term restore. There's two important things to note about that case though. First of all, in that case the remedy of restoration of consideration was, in fact, denied. The court found that the plaintiff was not entitled to restoration of consideration. Secondly, this Court looked at that issue. The petition for review in that case mirrors the petition for review filed by Cruz in this case and this Court denied the petition for review on the exact same issue in the Park Forest case. There is no legislative history that either side has found or evidence of legislative intent to support the argument that Cruz is making or that was hypothesized in the Park Forest case. This argument, Cruz's argument has been refuted and refused by the four courts of appeals that have considered this issue and they have all uniformly and correctly held that the Texas Legislature must have intended that restoration of consideration would not provide a windfall.

JUSTICE EVA M. GUZMAN: Well in Smith though, this Court held that the DTPA was enacted and didn't want to burden the consumers with the burdens of proof and defenses that normally attach to contract claims. So how does that, our statement, this Court's statement in Smith reconcile with the position you're taking now because that's what you're doing, you're importing.

ATTORNEY SHAWN M. MCCASKILL: Right. Well, the DTPA does have some requirements even though there are elements, there are prerequisites in order to be a prevailing party under the DTPA, including, as has been discussed previously this morning, that to be a prevailing party under the DTPA, there has to be some damage to the plaintiff. Simply having a finding of a violation of the DTPA is not sufficient under Section 17.50(a) to be a prevailing plaintiff under the DTPA. That's why question 29 was submitted to the jury when Your Honors asked that question, why was that question even submitted. Because Cruz needed a damage finding in order to be in a position to even elect any remedy whether it's damages or restoration of consideration. Due to the fact that the Plaintiff did not obtain a finding in question 29 of any damages, Plaintiff is not a prevailing party and cannot win. That's the prerequisite to get to even electing the remedy of restoration of consideration. Further to that point, Justice Guzman, the punitive nature, the additional damages that are provided for under the DTPA also have some prerequisites. The DTPA additional damages provision requires that such conduct be made knowingly or intentionally. There are prerequisites before you get to the DTPA additional damages. In this case, the jury did not answer question 27, which was in knowing or intentional finding as against my client, Protech. So to the extent that we would equate or analogize restoration of consideration as a punitive in nature damage or analogous to the DTPA additional damages, Cruz does not have a finding to support going to that punitive remedy. Not only does Cruz's argument fail on the law, but on the lack of evidence and findings in this case. Cruz claims entitlement to over a million dollars in restoration paid to Protech for its humidity and mold control services. However, it's undisputed that Cruz did not pay a million dollars to Protech for the humidity and mold control services. The evidence at trial established that, in fact, Chubb paid most or a substantial part of that million dollars that was paid to Protech in 2002 and 2003 for its services. Chubb's claim fails because or, excuse me, Cruz's claim fails because Cruz did not provide evidence as to what amount he paid, what amount he would be entitled to as far as restoration of consideration and Cruz did not submit an issue to the jury requesting a finding as to what amount Cruz actually paid. This would, in essence, be a windfall. Cruz is asking for a million dollars back when Cruz did not pay a million dollars and did not prove that he paid a million dollars. Chief Justice Jefferson had the question regarding what was the harm to Cruz from the lien being filed on the house? None. There was no money was acquired by Protech with respect to the lien placed on Cruz's homes-

tead, which was the violation of the DTPA. Section 17.50(b)(3) provides that each consumer who prevails may obtain orders necessary to restore money acquired in violation of the subchapter. Cruz's DTPA claim that we're discussing this morning was based on the invalidity of that lien that was placed on the home. However, there are no damages associated with that. There's no finding of damages in the jury charge. Protech did not acquire any money, did not acquire any benefit from placing that lien on Cruz's residence. There was no harm done.

JUSTICE EVA M. GUZMAN: Well there's always some benefit because you're protecting your stance as a creditor. I mean, clearly, they could not have sold the home out from under Protech so there is some benefit that's always going to attach to that.

ATTORNEY SHAWN M. MCCASKILL: Briefly and then the lien was released so it wasn't a benefit that lasted very long to the extent it was there, it was since released and any harm, purported harm of placing the lien on the building that would come up in a sale was voided.

JUSTICE EVA M. GUZMAN: But there was some benefit.

ATTORNEY SHAWN M. MCCASKILL: I would disagree, but I can see your point, Your Honor.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY SHAWN M. MCCASKILL: Cruz's other argument, he cites the Boyter v. MCR Construction case in arguing that no benefits were retained by Cruz because the house ended up being declared a total loss and then demolished. In Boyter, the court of appeals noted that the party must show that he and the other party are in the status quo and that the party is not retaining benefits received under the instrument without restoration to the other party. In this case, the status quo was not undisturbed. Protech provided its services, humidity and mold control services, to Cruz's residence in 2002 and 2003 before it was declared a total loss and demolished. Cruz retained those benefits and, obviously, now that the home was subsequently demolished, those benefits cannot be returned or surrendered to Protech such that Cruz could recover restoration of consideration. The court of appeals in this case correctly noted that there was some evidence that Protech's services at Cruz's house did, in fact, dehumidify the house and reduce levels of mold. Cruz did not demolish the house until 2005, at least a year and a half after Protech had left the premises. Cruz continued to own the home for a significant length of time after Protech had provided its services. According to the court of appeals, a reasonable person could conclude that Cruz derived some benefit from Protech's services and Cruz did not obtain a finding that there was no value or benefit.

JUSTICE EVA M. GUZMAN: Was he ever back in that house though because I guess he moved out and Protech discontinued the mold prevention services and then Chubb wanted, allegedly, some time to consider whether demolition would be appropriate? Did Dr. Cruz ever move back in?

ATTORNEY SHAWN M. MCCASKILL: Your Honor, there were two incidences of water damage first in March of 2001 and then again in May of 2001. Towards the latter part of May of 2001, Cruz moved out of the residence and moved his family out of the residence and did not return.

JUSTICE EVA M. GUZMAN: So when you talk about the benefit that he obtained by continuing to own the home, what was that exactly?

ATTORNEY SHAWN M. MCCASKILL: Well, during, and this goes into my next part about the Protech v. Chubb part of the appeal, Cruz continued to own the residence. The damage was so significant that Mr. Martinez, the owner of Protech, had recommended at the outset this house is so far gone, I would recommend demolishing it and declaring it a total loss. He made that recommendation to Dr. Cruz and Chubb. Dr. Cruz accepted that and agreed and said this house is so far gone, but he continued to own it. It was still his home. Chubb was the one that made the decision we want to try to remediate and restore this house. So technically although that

didn't happen in the end, there was the possibility that Cruz would end up moving back into his home or selling his home. So the value to him of these benefits were to keep his house viable for either habitation by himself or for subsequent sale to somebody else. That did not happen, but that was the benefit during these two years of remediation services.

JUSTICE EVA M. GUZMAN: And I guess you can't look behind or ahead with the lens and say well ultimately it was worthless during this time period. You have to assume there was some benefit to holding a worthless home?

ATTORNEY SHAWN M. MCCASKILL: Right.

JUSTICE EVA M. GUZMAN: Okay.

ATTORNEY SHAWN M. MCCASKILL: And that goes into the next part of my argument this morning, the Protech vs. Chubb petition for review. As in the Haas Drilling case from this Court, the jury in this case correctly found that an agreement existed between Protech and Chubb and the jury correctly found and questioned (1)(b) that Chubb received direct consideration for its promise to be primarily liable for the debt to Protech satisfying the main purpose doctrine exception to the statute of frauds. On the statute of frauds in Section 26.01 of the Texas Business and Commerce Code provides that a promise by one person, you answer for the debt, default or miscarriage of another is not enforceable unless that promise is in writing and signed by the promissor. In the Haas Drilling case, this Court stated that the Main Purpose Doctrine is applicable to take an oral promise to pay the debt of another out of the statute of frauds. In another case, Cooper Petroleum v. La Gloria Oil and Gas, this Court stated that the theory of the main purpose rule is that where the promise is made for the promissor's own benefit and not at all for the benefit of the third person, the reason for the statutory provision fails and the promise should be enforced. As I stated a moment ago, this was Chubb's decision to control the humidity in the Cruz residence notwithstanding Cruz's request to declare it a total loss. Mr. Marx, the Chubb adjustor on this case, stated that he believed the house was repairable and that he never felt it was going to have to be torn down. At the inception of the water damage, Mr. Martinez of Protech recommended to Chubb and to Cruz that this house was so far gone it needed to be demolished and declared a total loss because even trying to remediate it would blow through the insurance policy limits. Cruz accepted that recommendation. In October 2001, December 2001, January 2002, Cruz and his attorneys demanded that Chubb declare the home a total loss, demolish it and pay him under his insurance policy. It wasn't until January 30, 2002 that there was any response from Chubb. Mr. Marx, the adjuster, stated that the demand for a total loss was neither accepted nor rejected at this time and that Chubb needed even more time to consider what to do. Six months later in June of 2002, Chubb made the decision to start controlling the humidity in the house. Chubb retained Protech at that time in June of 2002, retained Protech to control the mold and humidity in the house and said we will pay you, Protech, to do these services. All of the testimony at trial from Cruz, from Mr. Martinez, from Cruz's attorneys all testified that this was Chubb's decision to control the humidity in the house. Mr. Marx, the Chubb adjuster, again stated at that time in June of 2002, he was not going to tear that house down. Now after the direct consideration supporting the jury's finding as against Chubb, Chubb engaged Protech to control the humidity and stated it would pay Protech. Chubb received direct consideration for its promise to be liable to Protech in the benefit of taking that year from June of 2002 until June 2003 to attempt to remediate and restore this house so that it wouldn't have to declare it a total loss and knock it down.

JUSTICE EVA M. GUZMAN: So how did Protech prove though that this alleged consideration was Chubb Lloyds sort of main purpose for agreeing to be liable?

ATTORNEY SHAWN M. MCCASKILL: Well that was the only reason Chubb was involved. Given that Cruz had demanded from the beginning before the humidity control services were even rendered, Cruz had requested that the house be declared a total loss and demolished and, as I stated earlier, Cruz had moved out. He still owned the house, but the benefit was to Chubb. Chubb was the one that wanted to maintain the house for a possible remediation and not have to pay the greater amount of money to declare it a total loss, demolish it and

pay Dr. Cruz under the insurance policy, that was the benefit to Chubb. And some of the cases including the Haas Drilling case from this Court support that analogy where if there's a cost savings, if there's some money that's going to be saved by the promissor stepping in, taking over the project as in Haas Drilling and in the Texarkana construction case that I cited in our brief, those situations where the promissor is getting a cost savings or potential cost savings from stepping in and taking over a project, that is sufficient benefit and direct consideration to the promissor to make them liable under the main purpose doctrine exception to the statute of frauds.

JUSTICE PHIL JOHNSON: Of course, the doctor had an obligation under the policy to protect the property, did he not?

ATTORNEY SHAWN M. MCCASKILL: Yes, he did. He still--

JUSTICE PHIL JOHNSON: And Protech, all it had to do to solve this problem was get a letter from Chubb or say wait, wait, this is going to run several thousand dollars a day. It's going to be an expensive deal.

ATTORNEY SHAWN M. MCCASKILL: Yes.

JUSTICE PHIL JOHNSON: Get me an authorization for that. That's all they had to do to avoid the problems with the statute it seems like.

ATTORNEY SHAWN M. MCCASKILL: The latter part is correct. There was no letter or contract as you're referencing between Chubb, a written contract between Chubb and Protech. To go to your first point, Your Honor.

JUSTICE PHIL JOHNSON: Protech's presumed to know the law like everyone else.

ATTORNEY SHAWN M. MCCASKILL: That's correct, Your Honor. To go to your first point on the insurance policy issue, Chubb's promise to pay Protech was out of funds owed by Chubb to Cruz.

JUSTICE PHIL JOHNSON: Well, at least Cruz's position was they were owed. I think it's probably common knowledge many times when there's a loss, the insured may think the loss is much greater than it turns out to be or the claim is made that it's much greater and then that's where you get into the negotiation part of it.

ATTORNEY SHAWN M. MCCASKILL: Correct.

JUSTICE PHIL JOHNSON: Okay, so Cruz and Protech say it's a total loss. Chubb says we're not so sure and we've all got a financial interest in this, let's try to figure it out. That's really where the parties were it seems like.

ATTORNEY SHAWN M. MCCASKILL: That's correct. From--

JUSTICE PHIL JOHNSON: And both of them were, I mean there's no one saying that anybody was in bad faith here is there?

ATTORNEY SHAWN M. MCCASKILL: I agree.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY SHAWN M. MCCASKILL: To go back to the insurance policy point, this is discussed in our brief and there's an analogous situation in the case that we cite in our brief Smith Seckman Reid v. Metro National. This not an insurance policy case, but it's analogous. In that case, Fame was a tenant at a mall owned by Metro. The lease granted Fame a $1.1 million construction allowance payable by Metro to build a bowling alley

in the mall. Fame hired Smith Seckman and Reid to provide engineering services on this bowling alley. Eventually, Smith filed suit again Metro alleging that Metro's authorized agent orally represented to Smith that Metro would be responsible for payment to Smith for its services in connection with this bowling alley. Metro pleaded the statute of frauds and won a summary judgment. Court of appeals reversed that summary judgment and granted in favor of Metro, the landlord, and held that Metro took an active role in the management of the bowling alley project throughout the course of the project and that Smith had received checks from Metro. The court of appeals also noted that as to the direct consideration to Metro for its promises to pay Smith, Metro was interested in having a bowling alley in the mall and the services provided by Smith were in furtherance of that goal. The court of appeals also noted, and this is the important part, that Metro was bound by the lease to provide Fame, the tenant, with up to $1.1 million in build-out funds to build this bowling alley in the mall. The court of appeals concluded that if Smith could prove that Metro, the landlord, had made that oral promise to be primarily responsible to pay Smith out of those build-out funds owing to Fame, then such promised would be deemed to be based on valid consideration given primarily for Metro, the landlord's own benefit. Let's look at the present case. In this case, Chubb took an active role in the management of the Cruz residence project. Chubb paid Protech some, but not all of the bills. Chubb was interested in controlling the humidity and mold in the house for the reasons stated earlier for a possible remediation restoration and not having to demolish it. Protech services were provided in furtherance of Chubb's goal. Chubb was bound by the insurance policy to provide coverage to Cruz and Chubb made those promises to Protech to be responsible to pay Protech out of those insurance funds that were, in essence, owing to Cruz. Finally, Your Honors, in the few seconds I have remaining, the court of appeals erred in stating that the benefits did not accrue directly to Chubb and that were, at best, emote, indirect or purely speculative. The court of appeals stated that this case was similar to this Court's opinion on Cooper Petroleum. Cooper Petroleum was completely different, factually distinguishable and inapposite to the present case. Cooper Petroleum involved a creditor who sued an individual who had allegedly made an oral promise to guarantee a corporation's debt with the result being that the creditor continued to do business with the corporation on credit. The individual was not a stockholder of that corporation and the only benefit that he received from the creditor's extension of credit was through his being a shareholder of a different corporation that owned a potential stake in the debtor corporation. In the present case, Chubb was far beyond being a stockholder of a different corporation that owned a potential stake in the debtor corporation. Chubb was the one involved in the project. Chubb did the deal. Contrary to having merely a potential stake in the matter, Chubb had taken over the Cruz residence and the project after Cruz had moved out in May of 2001. And it was Chubb's decision a year and a bit later in June of 2002 to do the mold restoration and remediation project and controlling the humidity. I see that my time is up; unless the Court has any other questions, I would respectfully request that the Court grant the release requested by Protech. Thank you for your time, Your Honors. Happy Holidays to each of you. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor. Mr. Schell. Let me ask you, Mr. Schell, are, is it true that the interest of Dr. Cruz and Chubb Lloyds are completely aligned at this point?

REBUTTAL ARGUMENT OF RUSSEL W. SCHELL ON BEHALF OF CROSS-RESPONDENT

ATTORNEY RUSSELL W. SCHELL: The interest outside of the applicable, legal principals involved on appeal are aligned, Your Honor. There has been a post verdict, post judgment accommodation between Chubb and Dr. Cruz. So there's no adversity between the two parties.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you.

ATTORNEY RUSSELL W. SCHELL: It's well settled that in order to create primary liability of Chubb Lloyds here to answer for Dr. Cruz's indebtedness to Protech under his written remediation agreement with Protech that preceded notice of the loss to Chubb and preceded any involvement of Chubb Lloyds in this homeowner's claim, Protech had the sole burden of proof on three separate independent issues. Number one, that there was an expressed intent by Chubb Lloyds to create primary liability in Chubb Lloyds for Dr. Cruz's indebtedness. Number two, that that expressed intent was supported by legal consideration. And number three, that the con-

sideration was the sole purpose or the leading object or the main purpose as those terms have been used interchangeably by this Court in the promise made allegedly by Chubb Lloyds. The Fifth Circuit chose the path of least resistance here in finding that this alleged agreement found no support in the evidence because there was no consideration flowing between Chubb Lloyds and Protech or Mr. Martinez for this alleged oral agreement. As I will observe in a moment, the court of appeals could just as easily have addressed either of the other two issues under which Protech had the burden of proof and finding that there was no evidence to take this alleged oral agreement out of the statute of frauds. But the path of least resistance here, clearly, was finding that the alleged oral agreement was lacking in consideration because no benefit flowed to Chubb Lloyds for any alleged agreement to pay Protech for its remediation services.

JUSTICE EVA M. GUZMAN: If the house did not ultimately have to be demolished, but instead was remediated in some form, there would be benefit to having the time to figure that out because it might have been less expensive to remediate than to demolish so the time did have some benefit.

ATTORNEY RUSSELL W. SCHELL: Well as the court of appeals pointed out, that is speculative. That is hypothetical. What Chubb Lloyds had the obligation to do was to satisfy its policyholder, Dr. Cruz, and to properly adjust his claim in accordance with the homeowner's policy and the facts on the ground. However long it took was beside the point.

JUSTICE EVA M. GUZMAN: To properly adjust though, you need time don't you to figure out whether you're going to remediate the home or demolish it. You need time to properly adjust.

ATTORNEY RUSSELL W. SCHELL: Ironically, the last thing that Chubb Lloyds needed here was the amount of time that it took for Dr. Cruz and Protech and Dr. Cruz's counsel, who was handling this matter during the claim, to drag their feet the way they did because the house, indeed, did deteriorate until it was a total loss and policy limits were paid. That was the last thing Chubb [inaudible].

JUSTICE EVA M. GUZMAN: You agree that you did need some time to properly adjust.

ATTORNEY RUSSELL W. SCHELL: Some time is needed, Your Honor, and certainly under the insurance code, we have a prompt payment of claims statute that puts the insurance company on a very truncated time window in handling a claim, a property claim of this nature and, unfortunately here, time was working against Chubb Lloyds not for Chubb Lloyds and certainly there was no evidence whatsoever in the trail court that the main purpose or the primary benefit of any alleged agreement supported by consideration was buying time. There simply was nothing in the record of a desire to buy time by Chubb Lloyds.

JUSTICE EVA M. GUZMAN: I apologize for interrupting, but I don't have the record here, but I thought it was your adjustor who said it didn't need to be demolished and that caused additional inquiry.

ATTORNEY RUSSELL W. SCHELL: Well there was between the adjustor and the insured and Protech, there was an ongoing discussion as to what would be the most expedient resolution of the claim whether the house could, indeed, be remediated, whether the house should be demolished and rebuilt and it was Dr. Cruz's desire to have his home demolished and completely rebuilt from the get-go. It was the adjustor's opinion that, indeed, this mold claim could be remediated and the house rebuilt. Ultimately, the house sat for so long that it was necessary to do the latter. There was no evidence in the trial court that the Chubb Lloyds' claim representative ever expressly stated to anyone that he and Chubb Lloyds would take primary liability for the indebtedness that Dr. Cruz had incurred with Protech under his written contract with Protech. It's simply not in the record. And it is somewhat frustrating that we have repeatedly challenged Petitioner on this issue to show us where in the record a Chubb Lloyds' representative, Mr. Marx or anyone else, said to Mr. Martinez or anyone else that you don't need to look to Dr. Cruz under your contract with Dr. Cruz. We will accept primary liability for that indebtedness. It simply is not in the record. What had happened here is under a preexisting relationship between the insured, Dr. Cruz, and Mr. Martinez, the contract was entered into, liability was incurred as Protech rendered ser-

vices at the insured dwelling and Dr. Cruz paid Protech for those services and then Mr. Martinez suggested to Chubb Lloyds, yeah, you may have an insurance claim on your homeowners policy, you should put them on notice. That was done. Chubb responded and at all material times, Chubb told Dr. Cruz and his attorney, Adam Hardison, we will pay Protech for the services at your home if and when you authorize us to do so. Initially, Dr. Cruz was paying Protech directly and Chubb was reimbursing Dr. Cruz for those incurred charges. Subsequently, Mr. Hardison asked Chubb Lloyds to instead cut checks directly to Protech. But any payment from Chubb Lloyds to Protech was always conditioned on the expressed authority of the insured as it properly should be.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the record reflect how much Chubb Lloyds paid Protech?

ATTORNEY RUSSELL W. SCHELL: Yes, Your Honor, it does and I want to say it was close to a million dollars and I don't have the figure directly in hand, but it certainly was in the trial court record and it was quite a sizeable sum ultimately. I see my time is out; any other questions I would be glad to entertain.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Mr. Schell. Ms. Martin?

REBUTTAL ARGUMENT OF JENNIFER G. MARTIN ON BEHALF OF PETITIONER

ATTORNEY JENNIFER G. MARTIN: What is absent from all of the court of appeals' decisions that have incorporated rescission into the restoration remedy was absent again from Respondent's argument today and that is any justification for engrafting rescission and its equitable constraints on the remedy of restoration crafted by the legislature when they created the DTPA. In his argument, I heard Mr. McCaskill say that it was their position that restore in its plain ordinary meaning meant he said putting the parties back and that's why he believed it was rescission. But if you look at the expressed language of the statute, it talks about restoring to the consumer taken in violation. So, again, applying that plain ordinary meaning as this Court is required to do using the ordinary meaning of restore, if you put back to any party in the suit the money that was acquired in violation of the statute, then you have no additional requirement of returning the parties to the status quo or other equitable considerations, such as notice and tender that had been engrafted by the courts of appeals on consumers beyond anything in the statute. Counsel for Protech argued that there are requirements. You don't just have a DTPA violation and then you automatically get these remedies, that's true and that is an argument. And just as Mr. Schell is frustrated that he has never seen pointed out to him in the record where there's evidence of certain elements of statute of fraud, I'm frustrated that I've yet to hear why we get to ignore summary judgment findings. And as I told this Court, the jury finding addresses whether Dr. Cruz could recover actual damages, but we've heard no argument that would explain why it is insufficient for Dr. Cruz to recover that he obtained a summary judgment finding that he's a consumer. He obtained a summary judgment finding that there was a violation of the DTPA. He obtained a summary judgment finding that that violation of the DTPA caused him injury or harm and he obtained a summary judgment finding that the amount that was acquired in violation of the statute was $1,059,940.52.

CHIEF JUSTICE WALLACE B. JEFFERSON: Does the record reflect how much Dr. Cruz paid of that amount as opposed to Chubb Lloyds?

ATTORNEY JENNIFER G. MARTIN: While there's not a specific factual finding on it, yes, I believe you could comb through the evidence and find the specific amount, but I also think that that's, in essence, an invalid argument to differentiate. The reality is and this dovetails into the statute of frauds' argument, those were always Dr. Cruz's funds. And ultimately what happened when Chubb didn't pay the rest of the money to Protech on these invoices, that pit wasn't that Chubb kept the rest of its money, it cut a check for the rest of the policy proceeds to Dr. Cruz. It was then Dr. Cruz's choice what he did with those proceeds and based on his understanding that he had not received a thing of value and that he had been defrauded on Mr. Martinez and based on advice received, he understood that he should not continue to pay for those and that was his choice. But for the same reason, all the funds paid previously by Chubb, even though they weren't directly tendered by Cruz, they are still funds paid on Cruz's behalf, which is how the court worded its summary judgment finding.

JUSTICE EVA M. GUZMAN: Is there any difference between the injury or harm addressed in the summary judgment and the damages, is there a difference between injury or harm and then damages which were ultimately found to be [inaudible].

ATTORNEY JENNIFER G. MARTIN: I think the language, I mean the court's language in its order is that there is injury or harm and that that actually I'm sure was chosen as the language even though I wasn't involved at that point in the proceedings. But there's language from this Court saying that to prevail, a consumer must show that he was injured or harmed by the DTPA violation.

JUSTICE EVA M. GUZMAN: But then you couldn't show, or didn't successfully show damages.

ATTORNEY JENNIFER G. MARTIN: He didn't successfully show economic damages that would allow him to recover under the first provision.

JUSTICE PHIL JOHNSON: What other kind of injury or harm did he suffer?

ATTORNEY JENNIFER G. MARTIN: Well, again, I don't know why the jury found a different way and why counsel at that point in time didn't challenge the jury's finding as being against the weight of the evidence, but--

JUSTICE PHIL JOHNSON: But my question was if it did not have damages, what other type of injury or harm is it that your position is that he suffered as found by the trial court?

ATTORNEY JENNIFER G. MARTIN: Your Honor, what I would say is we do have a conflict between what the trial court found by summary judgment and what the jury concluded and it is a very odd procedural stance for this case.

JUSTICE PHIL JOHNSON: Let me ask it a different way. What evidence is there in the summary judgment record of injury or harm? What was the evidence in the summary judgment record?

ATTORNEY JENNIFER G. MARTIN: I can't tell the Court that I recall that off the top of my head right now. If there are no further questions, then I will give you back almost a minute and [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you to all Counsel. That concludes the sole argument of today and the Marshal will adjourn the Court.

MARSHAL: All rise.

END OF DOCUMENT