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LEWIS & LAMBERT V. JACKSON

LAWYER: May it please the court. There are two straightforward issues in this case. The first is whether employees of an employer who contracts for services that primarily benefit a business, that which incidentally benefit the employees can be consumers under the DTPA? And the second point is whether the defendants are entitled to a dollar for dollar settlement credit when other defendants have settled a case in a DTPA breach of warranty suit? I am going to address the consumer issue and Ms. McCoy will address the credit issue.

The question of who is a consumer has been plaguing Texas courts for a long time. Ever since the passage of the DTPA. This court recently has had 4 occasions in which to look at the issue. In Parkway v. Woodruff and Dole v. Dallas Boys Club, this court did not have to reach the consumer issue and footnoted in both of those cases that it was not considering the issue. In the US Brass cases, the court has granted writ; heard argument in October, and those have not yet been decided. In Arthur Anderson v. _____ Equipment is here before you on writ.

The real truth of the matter is the DTPA in 1745.4 defines a consumer as an individual who seeks or acquires goods or services by purchaser leave(?). Really a pretty simply definition. And there's not much problem in the normal consumer transaction. When a plaintiff who purchases or acquires services directly from a seller, when you have that fact situation courts haven't had any difficulty. The question comes when the plaintiff does not actually purchase directly or does not acquire directly the services from the seller. And that's the case we have here.

It is our opinion that in those circumstances unless there is a direct benefit, unless that person is an intended beneficiary they are not a consumer. Now that doesn't mean that there is not a recovery. In fact this case is a classic example of this. As this court knows this case was originally tried on theories of negligence, products liability, both 402A and B, tried to a jury. There was a recovery for negligence. We do not dispute that here. And in fact the real reason that the plaintiff doesn't want to take that is there were contributory negligent findings as to both the individual plaintiffs that would essentially bar any recovery that they would get.

GONZALEZ: Did Donna Jackson and Teresa Holley directly benefit from the air conditioning system _____?

LAWYER: No, I do not believe they did. And let me tell you your honor why I believe that's the case. In looking at the cases this court has previously considered, and other courts around the state I think it's clear that they were incidental beneficiaries. And let me first talk about the Brandon case from the Austin CA, decided by Judge Aboussie early in 1995. In that case very similar to here Seton Medical Center contracted with someone to make sure all of its equipment was sterilized. That's a dangerous process that involves toxic gases to sterilize various items. And they contracted also for a maintenance agreement. And in that case, in Brandon, Ms. Brandon was injured, exposed to the gases allegedly because the maintenance was not done correctly. And the question was: Was she an incidental beneficiary because she was certainly the one handling the sterilization equipment, doing the sterilization of the instruments, or was this something that was primarily contracted for to benefit the company? Judge Aboussie came to the conclusion that it was primarily for the company, and that otherwise you would open up types of claims for anybody involved.

ABBOTT: As opposed to that situation and these other case, wouldn't you agree that there

were only 3 people who were going to benefit from the repairs to this system, and that was the 2 plaintiffs involved in this case, and one other person?

LAWYER: Your honor that's partially true; and, yes, we would have to admit that there is no doubt there were a small number of people who would benefit from the event which was a small part of the project we worked on. But I think you have to concentrate on all of the facts that Lewis & Lambert did. Remember Lewis & Lambert was the subcontractor of a subcontractor of a general contractor, the only party in this case with which of course the hospital had a contract.

The vent system was there to protect anybody who was in the lab. And there were other people who visited the lab. In fact there was testimony at trial from a doctor who visited, and others who did on a routine basis. So therefore although 3 people worked in the lab a significant amount of the time, it certainly does slice down the group of people, the truth of the matter is there were more people that could have been benefitted and were directly benefitted. And I think that's important.

ABBOTT: What about a second issue and that is somewhat the but for test; and that is that these changes would not have been made but for the complaints and the requests by the plaintiffs in this lawsuit?

LAWYER: That's another excellent question and especially when you read the face of the CA's opinion. We have taken an unusual step in this, at least for me and for our firm of contesting the statement of facts in the CA's opinion. And in fact in a supplement that we have handed out for you today I have taken all of the record cites that are from the appellant's brief on this issue. There isn't evidence of that. And in fact what you're going to find is that Lewis & Lambert in fact the man at the hospital, the administrator, who contracted actually with another contractor on this issue; never talked to Lewis & Lambert about it. Let me be fair, there is no doubt that in response to those complaints Lewis & Lambert did come out and do some remedial work on the issues. But does the mere fact that there has been a complaint confer consumer status on an employee who makes a complaint to someone else who makes it yet to a third and fourth, and in this situation probably a 5th and 6th person to correct it? I don't think so. And I think we can look at this court's opinions to reach that determination. The case the plaintiffs rely on is Kennedy v. Sale(?) and there's no doubt in that case that this court found that there was some direct relationship and goods and services were acquired. It was also a situation in which there is no doubt that the goods and services were acquired by the company and purchased by the company but for some benefit to the employees. But I ask you to remember that case and remember specific items about the case because they are important. And I don't do this normally but at 892 of the opinion, the court says precisely what it means. And in that case if you will remember we had a situation where we were dealing with a group insurance issue. No doubt that the employer paid for it, no doubt that the employer intended to benefit - precisely employees. There was a meeting at which the plaintiff appeared and heard a sales pitch in which misrepresentations were made.

As the court says in their opinion: There is no doubt that this person, the plaintiff, was covered by the insurance, and more importantly, that they were named insured. They had a very precise acquisition of services. And at page 892, the court said: Yeah, in that situation there was a situation in which the employee acquired direct and primary benefit. That's completely different from what we are talking about here. The El Paso court took up the same issue in Hernandez v. Casco. And Judge Barahas writing for that court said the same thing. He said: Listen when you're talking about all this there are obviously incidences in which employers are going to purchase things for their business. But the issue really on acquisition, which is remember acquire is part of the definition, and the question is whether they acquired. He defined acquire to mean, and I think it is the best definition and quite frankly the only definition that I can find of the term acquire as it's used, he does it this way. He says it means to get or come to have is one's own. And he said that's what the SC was saying in Kennedy v. Sale(?).

I also think that's what the court in the early and mid-80s was talking about in Cameron and Plenniken(?). And I want to address those briefly for you because I think they can become important. In Cameron also relied upon heavily by the plaintiffs mentioned in Parkway v. Woodruff is a case this court would consider in determining consumer status. The SC looked at a situation where a purchaser of a house relied on representations made in a multiple listing service, a MSL book, by not his own realtor, but the realtor for the other party. And the question was: Did they acquire any goods or services in the transaction? If you look at that opinion at page 539 what this court says is: they acquired the house and services that went with it all of which were related to the opposite side of the transaction of which the realtor was an agent. There was an acquisition of services there. There is not an acquisition of services here. Flinican, same situation, a little bit different. And in that situation a couple wanted to build a house, contracted with somebody who was a contractor, the contractor went to the bank and sold the contract. The bank then becomes a party and unfortunately the contractor leaves after doing only 20% of the work. And the fascinating thing there is the bank forecloses and a consumer claim is brought.

Again what this court says is there were some services and goods acquired with the house. It's something that they own. They reduced it to their possession. It was theres. Or as Judge Barahas says: It was to have is one's own. The cases on the other side are clear. Brandon especially. And Brandon is the one we really ask you to rely on. In those cases the employer goes out, gets something of benefit that is a primary benefit for the company, it has an incidental benefit for the employee, and they are not consumers. The same result reached in Lara v. Lyle, where the court said exactly the same thing. In Junoz v. Gulf Oil, same situation, same situation where the court repeatedly says: The primary benefit for one, for the employer, incidental benefit for the employee, there is no consumer status. The reason for that is clear. If we don't have this test everybody who's an employer of a large corporation who takes services is going to be a consumer.

One of the things I think the court has to look at in drafting this opinion because this issue has come up twice before and the court didn't reach it, and it's before the court in other cases is this: What do you want to say consumer is? What restrictions do you want to put on this downstream person? I think first it's a primary benefit except the Brandon test. It's a primary benefit of the employer with incidental benefit, although safety is always important as the court in Lara said, that it is the primary verses incidental benefit test. I think that's most important and this court does not have to overrule one case it has ever written in the past to make that holding and reject consumer status here.

Also I think you ought to consider adopting the Hernandez statement of Judge Barahass where he says: That acquire means reduced to one's own. That's Kennedy v. Sales; it's Cameron; it's Flinnegan. The court does not have to overrule one of these cases to reach that decision.

In another case the Arthur Anderson v. Perry Equipment case it has also been argued that both sides intend. In other words the seller and the purchaser both intend that the benefit go primarily on one side: either to the employer, which would be no consumer employee; or consumer status. I think that's worth considering as well. Again the court I don't think would have to even under that circumstance overrule any of the cases it has previously decided.

I am going to turn it over to Ms. McCoy to take the rest of the argument on the credits.

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McCOY: May it please the court. In the time remaining I would like to briefly address why Lewis & Lambert is entitled to a dollar for dollar credit regardless of whether the judgment is based on negligence or the DTPA for the amounts that the plaintiffs received before trial from the 4 settling

defendants. In this regard I would like to emphasize 3 points. First of all in this case there is no dispute that we are dealing with a single indivisible injury. The second is the jury question that was submitted to the jury, questions 11 and 12, asked the jury to determine the total amount of damages sustained by the plaintiffs. It wasn't specifically limited to what the conduct allegedly attributed to Lewis & Lambert. In those findings the jury attributed $1,366,000 in actual damages to Ms. Holley. She received from the settling defendants $1,365,000. Ms. Jackson, the jury awarded her $200,000 in actual damages. Before trial she had received $140,000 from the settling defendants. The third point I would like to make is that the plaintiffs voluntarily pursued a DTPA recovery under their breach of warranty finding. As Mr. Keltner mentioned instead of going with the negligence finding, the plaintiffs wanted to avoid the 49% contributory negligence finding and also the dollar for dollar credit that the plaintiffs don't dispute applies under that scenario. They wanted to take advantage of the benefits of the DTPA recovery in terms of a less stringent causation standard, the ability to potentially recover extra damages and attorneys fees. However the CA in this case erred in improperly allowing the plaintiffs to escape the consequences. And that is the application of the original contribution scheme.

CORNYN: The respondent says that you can cite no case that applies the original contribution scheme to a plaintiff's personal injury recovery under multiple theories including breach of warranty; is that true?

McCOY: That's incorrect. We can cite this court to its decisions in Stewart Title v. Sterling, and First Title v. Garrett...

CORNYN: Are those personal injury cases?

McCOY: They were not personal injury cases; however, your honor the court did not specifically make an exception or did not make that distinction in those cases.

CORNYN: So you can't cite a personal injury case but you say that those cases were not limited and would include personal injury?

McCOY: The DTPA recovery this court held that the original contribution statute and accordingly the dollar for dollar credit applies.

ABBOTT: Is it your position that the Duncan analysis applies only to products related cases?

McCOY: Our position is that the plaintiffs had the opportunity to pursue a common law breach of warranty claim. Duncan would apply in that instance. However, they chose to pursue it under the DTPA. Under those circumstances and under this court's holdings in Stewart Title and First Title, the original contribution statute and not Duncan applies under these circumstances.

PHILLIPS: Did you have 3 points or 4 points?

McCOY: Those were my 3 points your honor.

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RESPONDENT

McMAINS: May it please the court. I'm Russell McMains, co-counsel for the respondent Teressa Holly and also here to make an argument that is essentially similar on behalf of Donna Jackson, who has independent counsel but our arguments are similar and related insofar as the two issues that are posed by the petitioner is concerned.

I would like to initially take considerable issue with the alleged misstatement of facts by the CA because I think that even the documents that are supplied by the petitioner established just the contrary in fact in the document that the petitioners have filed this morning under Tab B, page 1321 of the record involving testimony from Donna Jackson. The inquiry is:

Do you recall telling any of the people with hard hats that you didn't think the ventilation was working properly?

Yes.

What was their response?

It seems like one time someone did check and said you're right that's not working.

What did you do at that point?

At one point I told the administration; talked to Dr. Herrin; we closed the lab down; we got a contract to send the prosthesis out to be done outside the hospital.

They are the ones who requested the repair services. They are the ones who made the request. There are other places in the record, including the administrator Mr. Roberts who testified repeatedly on these issues. There is a direct request for the services in regards to the repair of the ventilation system as found by the CA.

OWEN: Is that essential to your case? Had they not made a direct request would you be arguing this case before us today?

McMAINS: Well I probably would have lost at the CA to be candid about it if there had not been an actual request or input by them in the original system.

OWEN: Is that essential to your theory of liability under the DTPA?

McMAINS: In terms of consumer status?

OWEN: Yes.

McMAINS: Our position in the consumer status is they did seek or acquire the services in question.

OWEN: But does that hinge on their direct request for the repair services?

McMAINS: It hinges as I read the cases on them being direct beneficiaries in essence of the service.

OWEN: But does that have anything to do with the fact that they asked for the repairs? If they had said nothing and the repairs had been made would they still be beneficiaries under your rationale?

McMAINS: If you're asking me the fact that they didn't ask the contractor Lewis & Lambert as opposed to asking their people to do it?

OWEN: Or if someone had else had asked for the repairs other than your clients, and the

repairs were made?

McMAINS: The cases do make that distinction. In fact the Hernandez case specifically says and it's relied upon by them and the specific distinction in Hernandez is on page 634 of the opinion where it says: Indeed the facts clearly establish that Hernandez did not request or ask for the goods. Now in regards to one of the cases specifically that we have relied on is Superior Trucks v. Allen case, there is a specific notion even though there is no purchase made by the individual in question. Again following a line of cases that says there is no privity of contract required. They did ask for it, and did seek it and the seeker need not be the purchaser. Just as the court said in Kennedy v. Sale that the acquirer need not be the purchaser in order to be a consumer, and qualifies a consumer under the act which is to be liberally construed under Cameron v. Terrell & Garrett, which this court has held consistently since 1983. So with a liberal construction of the act, then the question is whether or not the consumer status issue was simply was the seeking or acquiring of goods to be purchased or leased. In fact the purchase or lease doesn't even have to be consummated in order to qualify as a consumer, and is the jest of the complaint of the consumer related to the transaction. That is do they have a relationship of the transaction? They do have that relationship in this case to the transactions. They were the only people using this equipment. They were the people who shut down the lab because this stuff wasn't working. They were the people who went back to work on the basis that it was working. There is no dispute in this case on breach of warranty. There has never been any kind of attack on the breach of warranty findings at any level by the defendants in this case, either at the trial level, or at the CA level. Breach of warranty is actually independent of the DTPA. It's not a statutory cause of action per se. Rather the DTPA is a supplementary remedy with regards to breach of warranty. They have therefore committed a breach of warranty, basically admitted and uncontested by the other side, the DTPA is to be liberally construed with regards to the regress of those breach of warranties.

PHILLIPS: So if there were 300 people working in this lab, and 50 of them signed a petition requesting this vent, they would have DTPA status, and the other 250 wouldn't unless they made some oral...

McMAINS: If this court is to follow the Hernandez distinction that is argued by the petitioners, then the answer to that is yes, in terms of the request for a particular repair service. Laura Casko, the other cases Laura is a vehicular collision or basically a running over of someone. And the suggestion is that somehow that they are an acquirer of the services of the trucking company who of course were not hired to run over anybody. They were hired to transport some culverts. And the argument was that tangentially they were supposed to do it safely. This is not an argument on tangential safety. In fact the record establishes that in the beginning Donna Jackson had input in the design of the ventilation system in this case because that's where they were working. They were working in a closed room facility for the first time when this new part of the hospital was being opened. And the administrator confirms all of that.

Those findings are made by the trial judge in essentially a letter opinion that the trial judge wrote, which is why he made the determination he made in the first place.

ABBOTT: What about Mr. Keltner's analysis that reduces the issue down to whether or not the repairs had been reduced to one's own?

McMAINS: Again, the argument that he is making with regards to the acquiring is not an argument relating to services. It's an argument that he is relating to the question of goods. But the word acquire also modifies in the statute the term services: How does one acquire services? And the notion that they reduced them to their own is really...and in the Hernandez case the specific distinction argued by the court is they didn't request the dock levelers in question. They didn't ask for them; they weren't purchased for them. Superior Trucks v. Allen is a case in which there was the request, and there was a purchase by

someone else and the court says: He doesn't have to make the purchase in order to qualify as a consumer. That's one of the lead cases that is relied upon by the CA and correctly so.

Ultimately the argument is made, well we need to look at Brandon, because we think Brandon is very close. But Brandon specifically has this quotation in it, 880 S.W.2d 488 says: We agree with the analysis of the consumer's issues status as set forth by the Laura Casko(?) courts an employee is entitled to consumer status under the DTPA on claims involving goods or services an employer purchasers primarily for the employees' benefit. And there is evidence to support the purchase of these repair services in this case primarily for the benefit of the employees and at their request they both sought and acquired. There is ample evidence to support that, and ample evidence to support the consumer status issue.

We frankly submit that from the standpoint of the record, from the standpoint of the cases, that you would have to depart from the cases in order to take a position that an employee who specifically seeks or who specifically acquires a service simply because he didn't pay for it or simply because it was paid for ultimately by a series of contracting arrangements, that they are denied consumer status. The CAs have consistently in DFW v. Commercial Roofing v. Marrow(?) have specifically said there is no privity requirements. One who acquires need not be a purchaser. Those are roof services purchased by the warehouse owner, and it's the person who has goods in the warehouse that is suing. He is an acquirer. No privity is required. It doesn't matter that there was a contract. Joseph v. PPG Industries is a materialman supplying defective windows to a general contractor, and the building purchaser is still considered to be a consumer in that case. Had the windows been specifically requested by one of the tenants we submit so would that tenant be a consumer under the rationale in Joseph v. PPG, DFW, Flenningan and all the other cases. This is a backhanded attempt to introduce notions of privity. Notice the cute way in which the response was made, well didn't they seek to require the services? Well, no, actually they complained to their employer who then they had a general contractor and they are actually a sub of the general. They are the people responsible for doing the ventilation system. There is no question about that. There is a breach of warranty finding. No question about that. Breach of warranty duty, they don't have any question about that. They didn't object to the submission of the breach of warranty issue at all except to suggest that it should be a proximate cause issue and not a producing cause issue because they are not a consumer. That's the only complaint that they had.

OWEN: Moving away from the liability issue assuming that we were not to agree with you, and your clients would not have consumer status, can you tell us on the crediting issue how you would say the credit should be applied and why?

McMAINS: The point on the dollar for dollar credit issue is quite simply a question of: Does Duncan apply to this situation, to a breach of warranty case? Duncan says on its face it applies to a breach of warranty case; in a case that is essentially a tort case, that is one for personal injury or property damage. Now there is an attempt to gloss over this notion of a distinction between personal injury and property damage cases; and consequentially economic loss cases. And that's exactly what the other side has done in these cases is in my judgment a glossing over. Stewart, Cameron none of those cases involve anything but economic losses. Rather and consequential economic losses. They are not in the nature of the very tort concepts that were dealt with in Duncan. And that is damage to person or property. It is physical damage to person or property that has justified the application of Duncan. Duncan specifically says: In cases where there are mixed theories of liability submitted and found, specifically including strict liability, and breach of warranty, express or implied when that happens, then this scheme applies; and that scheme is no credit. That's what the Duncan case so holds.

OWEN: Why do we exclude the comparative negligence statute when there's negligence finding?

McMAINS: Because the SC in Duncan specifically was dealing with the problem of when you have mixed liability findings, that is negligence and something else, that the comparative negligence statute as it existed at the time of Duncan only applied to negligence cases.

OWEN: Why do we draw a distinction between as you put if physical damages opposed to economic loss; what's the rationale for that?

McMAINS: Because that's the nature of the tort concept. From 1984 when Duncan was written we were dealing with a concern for tort in terms of contribution rights. You have rights contribution enforced for tort feasors. There were no cases at that time actually suggesting that some kind of breach of warranty damage under the UCC for economic loss constituted a tort for which there was contribution. There is a contribution accorded under the UCC. There isn't contribution accorded to economic losses. Those distinctions have been specifically made by the court since the 1970s in the Mid Continent Aircraft case, which is a case that I actually argued before the court back in 1978. That case basically says when there's damage to the product itself based on breach of warranty and no damage to anything else it's not a tort. It doesn't arise to the level of tort. But when there is damage to something else, when there is some physical damage, when a nature of the injury is involved is one that sounds in tort, then we can deal with concepts of tort. That's where the entire issue of rights of contribution existed at all. Because tort, that's the requirement under the old 22.12, which is now Ch. 32, which is the scheme that is argued that should be applied required findings of joint and several liability, joint tort feasors, that they be tort feasors. The notion that somehow the DTPA and insurance code were "statutory torts" and creature of statute, is one that basically was injected by the courts essentially in Sterling for the first time. Now the entire contribution issue under the DTPA was raised after it had been determined that there was no right of contribution or indemnity by the El Paso CA. The legislature responded and said you get contribution or indemnity as the law would require it. It gives you no specification as to what system it is. This court writing in Plastix(?) says: that just means you get it as you do in ordinary case. In other words you look at the type of case it is to see what kind of scheme applies.

This case is clearly a Duncan scheme. If we have a proximate cause issue here in addition to a producing cause issue there is absolutely no question that Duncan applies. The argument is that somehow you should be deprived of the right of recovery because you were a consumer, and because you have elected to try your case on a DTPA supplemental remedy for a warranty that exist outside the DTPA and exited common law which is precisely the type of common law warranties that were dealt with in Duncan that somehow we should penalize people who are consumers for using the DTPA, that we should get a worse result in the DTPA than we get otherwise if we were to apply ordinary warranty law when there's no contest on their being a breach of warranty. That's absurd. This court has consistently held that DTPA must be liberally construed to effectuate its purposes. But you can secure remedies for breach of warranty.

OWEN: If we hold that there is no liability under DTPA you're left with a negligence finding is that correct?

McMAINS: Well that's not actually true. As I've said we have an uncontested breach of warranty issue. The fact of the matter is from a procedural standpoint their only complaint to the breach of warranty issue is their suggestion is: well you don't get it under the DTPA. The court thought we did when they submitted it. They thought that it was a question of law. In reality the only way that issue is raised is by way of an objection to the submission of the producing cause issue saying that it should be proximate cause. You don't waive the cause of action in common law for breach of warranty. The breach of warranty exists independent and therefore the only remedy actually that they would be entitled to if that were true that somehow that we were denied consumer status would be a remand for the simple reason that as this court held in Spencer v. Eagle Star: if you sustain an objection to the charge you get a retrial.

And it's not a question of saying that you have waived an entire ground of recovery. We haven't. It's not a ground anyway, it's a supplement remedy under the statute that we were entitled to take advantage of.

This is an over statement really of the effects anyway of the submission of the producing cause issue. They have no contest on this being a breach of warranty. And really the facts in this record are essentially undisputed that this ventilation system was not working, never really worked, that certainly when they repaired it and told everybody they could go back, it still didn't work, that's what resulted in their injuries. There is ample testimony to support that and none of that's contested.

ABBOTT: Are you saying that you received a separate jury question on a breach of warranty unrelated to the DTPA question?

McMAINS: Well what I am saying is that the breach of warranty question is not a DTPA question per se. The producing cause aspect of it...

ABBOTT: So you got a damage finding on a breach of warranty?

McMAINS: We have a damage finding based on a breach of warranty, which does have a causation element of producing cause.

ABBOTT: If that's the case would that mean that contributory negligence would not apply to a breach of warranty case?

McMAINS: If we did not get the advantage of the supplemental remedies and if in fact you were to...because of the fact we don't have a proximate cause of submission one way or the other, the trial court held that it was not necessary, and that basically is their complaint based on this consumer issue. If it should have been proximate cause, then really all that is is a remand point. We are not suggesting that there is an independent grounds to affirm at this level. I am not attempting to borrow the proximate cause finding in the negligence case. Clearly if this was a straight common law breach of warranty case with no effort to invoke the DTPA which we did in this case, then the contrib findings would apply. The credit principles clearly would not have applied. There is no way they could squeeze that in Duncan. Their argument is simply that somehow because to put the overlay of the DTPA in it, that Sterling trumps Duncan and that's not what Sterling says. And there is no rationale for suggesting that that's what it says. It says that in cases in which you are not otherwise controlled by Duncan or specifically by another contribution scheme, then we will go to what is Ch. 32. This case is specifically controlled by Duncan. It is a breach of warrant in a tort context for physical injury, and that is the essence of Duncan.

OWEN: Assuming we disagree with you down the line and if you were left with a comparative negligence finding, how would you apply the credit in that situation?

McMAINS: Well there is no question that under Ch. 33 as it existed at the time was solely a negligence question, that the credit principles would basically wipe out the recoveries in both parties. We don't have any contest on that.

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REBUTTAL

LAWYER: Let me answer some of the questions that were asked from the bench and also respond to a number of Mr. McMain's argument. His argument basically is you didn't read Duncan, Duncan controls the case. Here is the question I have for the court. Everybody admits and you just heard Mr. McMains admit that if this were a negligence only recovery, the credit would apply. No doubt about

that. Credit applies and there would be no _____ recovery. And that's important. The second thing is Stewart Title, First Title from this court say that in DTPA the old contribution statute original contribution statute applies. I will admit and Judge Cornyn I would say it is true these are not personal injury cases and none that we cite to you are. And I will admit that. But under those cases, the original contribution statute applies. The Houston courts and the Dallas court in Hamra(?) most recently say even in implied warranty cases under the DTPA there is no doubt that the original applies. My question to you is if the original applies in negligence and then it also applies under the DTPA for implied warranty so we get a dollar for dollar credit how come when they are mixed we don't? And I think the answer Judge Abbott was in your question, and that was was Duncan limited to a strict liability or product's liability question? In the case I must admit to you the answer is no. The case doesn't say that. It says what Mr. McMains said it said. When you have mixed theories of law which could be including warranty, and I think they were talking about common law warranty, and I think they were talking in products liability, strict liability and the like, then you go to Duncan. But the truth of the matter was I think that's what it meant anyway although it didn't say it because it makes no sense to say when you throw in two causes of action either which the original contribution statute applies to, and either one you get a dollar for dollar credit, but when you combine them you don't, that doesn't make a whole lot of sense to me, and I don't think it makes sense to the jurisprudence of the court.

I also disagree with one other thing Mr. McMains said. Remember he said wait a minute you're punishing people for use of the DTPA. You will come out worse than you ordinarily would have come out under negligence. Not so and this case proves that fact. This case got tried in serious contribution: 49% was found against both of these plaintiffs. That significantly reduced their recovery. They had originally sued the people who designed this system, the people who did the mechanics. They said we did the ventilation system. Don't be fooled by that. Yes we did the venting system. But the fan and the mechanics to that were done by the mechanical contractor who was the sub above us. And it is those people that sued for this one injury. And the truth of the matter is they didn't want to take negligence because it didn't give them a recovery with the contrib in the negligence finding. They didn't get the product's liability finding they wanted from the jury. 402a was found against them by the jury. The judge took away 402b because this wasn't a 402b case. That's not appealed here. They don't contest that.

HECHT: Can judgment be rendered on the verdict for breach of warranty?

LAWYER: Absolutely.

HECHT: Apart from the DTPA?

LAWYER: Yes, sir. No doubt about it. And I will admit Justice Hecht he is right. As this court found in the Parkway decision, there is no doubt that the breach of warranty theory under the DTPA relies on common law. I mean that's what the breach of warranty is. You are just entitled if you get under it to use DTPA to get damages. But think about the enhancements you have. You have attorney's fees which you don't get under regular breach of warranty findings in common law. You get producing cause rather than proximate cause, which was submitted here and the judge believed it was producing cause because it was under the DTPA. So you get all that benefit.

ABBOTT: Follow up on what Justice Hecht asked and that is would it not require a remand?

LAWYER: No it does not.

OWEN: Why not?

LAWYER: I don't think it requires a remand for 2 reasons: the issue of a credit if it is dollar for

dollar can apply after the judgment. That's the beauty of the dollar for dollar credit. This case was submitted as producing cause over our objection. It is a DTPA case. That's why you have the attorney's fees in it. Otherwise the court wouldn't have rendered judgment for attorney's fees and the like. It can be rendered because that's the basis on which it was tried to get the enhanced recovery for attorney fees and a shot at additional damages. Remember judge this was question 9 in the charge. If there is any doubt about this look at question 10. It is the knowing question from the DTPA that's predicated on question 9. And I think that answers the question.

CORNYN: Did Ms. Holley make a direct request for repair services?

LAWYER: No sir, and let me explain that. And I want to be as concise with this as I can be. She did make a direct request it appears to the hospital folks. The things that Mr. McMains talked about about the hard hats there, yes, that's in the record. But no idea of who those people were, whether they are Lewis & Lambert or otherwise. It's important for you to remember that the hospital administrator who she says in her brief and the CA says in their opinion she did talk to say: He says I didn't deal with Lewis & Lambert; I dealt with people above them. I also want to be very candid with you. There is no doubt that Lewis & Lambert came out to fix the vent problem once the complaints were made.

CORNYN: In response to her complaint?

LAWYER: It would appear so although that's not tied up in the record. You certainly could draw that inference. And I don't want to suggest that you could not draw that inference.