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SCHLUMBERGER TECH. CORP. ET AL. V. SWANSON, ET AL.

ADDISON: May it please the court. At issue in this case is whether a party who knowingly signs with advice of counsel a negotiated release that specifically disclaims reliance on the released party should be able later to assert that there was reliance.

GONZALEZ: As a result of fraud, or alleged fraud, or fraud found by the jury?

ADDISON: Well your honor we respectfully submit that when a release as a factual matter states that there is no reliance there cannot be fraud as a matter of law. That fraud is both a factual and a legal possibility. But your honor correctly states the allegations in this case that the release was fraudulently induced.

GONZALEZ: There could never be a settlement agreement vitiated by fraud when we have a release of this nature; is that what you are saying?

ADDISON: No, your honor what we are saying is that under the factors in this particular case where there is a settlement of a commercial dispute between sophisticated parties represented by counsel, the dispute was negotiated and part of the language in the release is a disclaimer of reliance on the released party, and the releasing party has a counsel who has represented to the releasing party the effect of that disclaimer, we are saying that fraud is both a factual and a legal impossibility.

This case involves the settlement of a commercial dispute between similarly sophisticated parties who were represented by counsel. For 13 months the parties negotiated freely and ultimately entered into a release that contained a disclaimer of reliance on the released party.

PHILLIPS: If you have a smart lawyer you are saying it's not possible for someone to misrepresent confidential information within their purview to the other side of the negotiations?

ADDISON: There are two aspects in your honor's question. First of all with regard to the question of reliance either a party is relying or a party is not relying. As distinguished from this court's very detailed opinion in the Prudential case where the court outlined the three circumstances under which an as is clause might have been fraudulently induced you cannot fraudulently induce somebody to say, "I am not relying on you," when that party is relying on you. In the circumstance where the party is represented by counsel and the counsel explains to the party the legal effect of that disclaimer. Either you are relying in which case you can say so, or you are not relying in which case you say so. If you are relying and someone wants you to disclaim reliance, then perhaps you negotiate some more or you get some additional consideration. Either you're relying or you're not and you cannot when you are represented by counsel be

fraudulently induced into saying you are not relying when in fact you are.

ENOCH: What happens if it's clear from the record that although one party is very sophisticated, another party is very sophisticated, and they are all very rich, and all that sort of stuff, it is very clear from the record that the parties got together because of the respective expertise's of each of the individuals. And so one is very clearly relying on the expertise of the other, and it just so happens that the reason this deal falls apart is because the person who had the expertise in the deal said this just isn't going to work, and the other side says well I have to accept what you say because there is, unlike Prudential where you can go get anybody to go look at the building, in this case there is just not a whole lot of people who go down in the sea and look at diamonds. And so you just have to rely on that expert. And so then the two of you come together and you start negotiating the very sophisticated nature of the settlement how many millions of dollars and hundreds of thousands of dollars you are going to get paid for this and try and find someone who is willing to buy it and you execute it saying that's right I am not relying on any representation and that sort of thing. And then you get to the end of the deal and find out that your expert really...the expert that you are in business with really low-balled the deal because really his boss wanted him out of this transaction no matter what they could sell it for. And they had to get their other expert and their other sophisticated buyer to sign off on it so they could do this deal. And so they kind of led him down the primrose path. You're saying that because they're rich irrespective of the backgrounds of the various parties, that settlement is binding period?

ADDISON: No, we are not saying that. It is not clear to me Justice Enoch whether you are asking a hypothetical question or one addressed to the facts of this case. And I would like to...

ENOCH: I am not very good with hypotheticals...Here is the allegations in this case that you have.

ADDISON: Let me answer that two-fold. First of all it is our position that this case should have been decided as a matter of law and should be decided by this court as a matter of law. But as long as we have the record let me call the court's attention to one particular exhibit in the record, Plaintiff's Ex. 103. It is 12 pages of handwritten notes written by John Swanson himself. It is a stream of consciousness of what was going through his mind when he was trying to decide whether to take this offer or not. How much easier the Prudential decision might have been to write for this court if you had had something similar from Mr. Goldman. It is 12 pages of handwritten notes. It is very difficult to read. And I will respectfully direct the court to the testimony on May 13, page 141, line 23 to page 157, line 2, where Mr. Swanson reads this into the record. We know from that exhibit exactly what was going through his mind when he was trying to decide whether to take this deal or not. And what did he say? "He is taking it because half a loaf is better than none." And then he comes back later and complains that he got half a loaf. He took it because a bird in the hand is worth two in the bush. This is all in his own handwritten notes.

GONZALEZ: Ms. Addison you make that identical argument to the jury I take it or somebody did, and the jury didn't buy it?

ADDISON: Yes, your honor.

GONZALEZ: Why should we particularly when the juries are the fact finders?

ADDISON: Your honor we are here saying...the question before this court your honor is when a party issues a release disclaiming reliance on the released party what legal effect are you going to give nothing but the self-serving testimony, "I relied," when all of the objective manifestations are to the contrary. And I respectfully submit that's exactly what we have in this case.

PHILLIPS: Is there anyway that a party could be fraudulently induced to sign such nonreliance language? The Prudential case clearly recognizes there could be a case where this type of disclaimer was procured by fraud?

ADDISON: I think that an as is clause as exhibited by Prudential could be fraudulently induced in the 3 ways that that court...it's a primer for either had a fraudulently induced one, or what not to do if you want to enforce one. It is our position that a disclaimer of reliance cannot be fraudulently induced by a party represented by counsel where there is a negotiated document. And here it is undisputed that their lawyer contributed to the language of this document. This was a negotiated document.

CORNYN: Well the distinction is made between legal effect or the contents of the release or what the scope of the release may be in the facts from which a decision to settle is made. And you are saying even if there is a misrepresentation as to the factual basis for the settlement, that you still can't get behind this language?

ADDISON: There is no misrepresentation as to the factual basis of a settlement. The disclaimer we have here is a factual statement. It is very detailed. The facts that it states are: "We Swansons are not relying on you Schlumberger." But just like the as is clause in Prudential they didn't stop there, they went farther. They went quite a lot further. They started by saying, "None of us is relying on any statement." Then they went further and said, "Each of us is relying on his or her own judgment." So they told us what they are not relying on, then they told us what they are relying on. Each has been represented by Hubert Johnson as counsel. He has read this to us. He has explained it to us. Not just the contents, but the consequences and we are releasing you. That is a factual statement that they are not relying on.

What the CA did in this case is set aside this release on nothing more than self-serving subjective mental processes of John Swanson. And it is our position if you look at the CA's opinion you will see that the testimony of reliance is John Swanson's subjective mental processes and self-serving testimony. We are saying that to overcome this kind of language in a release, that is no evidence as a matter of law.

CORNYN: And you never could produce evidence under any hypothetical that would get around this language; is that your argument?

ADDISON: Under the factors of this case that would certainly be true. The factors in this case are overwhelming.

CORNYN: This is a hypothetical question. Hypothetically is is ever possible to produce any evidence that would get around the nonreliance language in this contract?

ADDISON: I think that it would be under certain circumstances. What we believe this court should articulate is a rule. First of all if the court is not inclined to articulate a rule where this type of language under these type of objective circumstances (a lawyer, negotiations) and let's not forget this was settlement of a commercial dispute which is very, very important. Adversarial relationship between the parties. No question but that the Swanson's _____ _____ Schlumberger similar sophistication of counsel; 13 months of negotiation. You may not need all of these factors, and in fact you probably won't have all of these factors in any particular case.

If the factors of counsel and reliance are not dispositive in every circumstance, and they may not be dispositive in every circumstance. For example: My lawyer had Alzheimer; my lawyer was on cocaine; I didn't have effective assistance of counsel. That I can certainly conceive of circumstances where these objective factors may not be dispositive.

PHILLIPS: But my lawyer received wilfully, fraudulent information about the effects of the deal is not the same as your lawyer being on Alzheimer for the purpose of creating a fact issue?

ADDISON: Judge, that is the biggest red herring in this case. Every expert they had...

PHILLIPS: I am not looking for red herring. I am only looking for the best factual scenario that they can create in order to support some evidence of this jury verdict, to create some fact and then have that fact be some evidence of the jury verdict.

ADDISON: There is no evidence of reliance here other than self-serving subjective testimony. And our position is that when you are going to bust a release you need something more. Our position is that there are certain objective standards and manifestations you can look to to say if you've got these present you may not be able to get to a jury. But if you get to a jury you've got to have something more than self-serving subjective testimony to demonstrate your reliance.

CORNYN: Self-serving testimony is no evidence?

ADDISON: Self-serving testimony is no evidence. This court has already ruled that in Williams v. Glash. This court has ruled that if you are going to bust a release for mutual mistake you will not permit self-serving subjective testimony of the releasing party to say I was mistaken. Mrs. Williams in Williams v. Glash was not permitted to testify as to her subjective mental processes.

ENOCH: Ms. Addison, maybe I don't understand. You are saying that the only evidence that supports the jury's finding of fraud is just the mental processes of Mr. Swanson. At least there are assertions throughout the briefs that Sedco and Schlumberger at least had an argument within their own organization as to the value of this before they sold it. But if you accept the evidence that supports the jury finding you are saying there is no evidence that Sedco or Schlumberger thought this was worth a lot more than what they were telling the Swansons?

ADDISON: There is no evidence that Schlumberger thought it was worth more than they got. There was evidence they tried to get more than they got. There is no evidence that someone at Schlumberger said this thing is worth a zillion dollars, but I am going to shoot myself in the foot. And by the way this is not a self dealing case. This is a case...it is very important this court understands: Schlumberger got out at the same time the Swansons did. We didn't flip it for a profit, and we didn't hang onto it and profit by it. We got out at exactly the same time. This is not a self-dealing case.

GONZALEZ: You got a lot more money, and you sold it for...

ADDISON: Schlumberger had put in $6.8 million South African rand and got $10 million South African rand back. The Swansons knew that. The Swansons knew that they were getting $2 million rand. The dispute in this case...but it was all Schlumberger's money. The dispute in this case is not that they should have gotten a higher percentage of the total sales price. In fact that was just a source of funds. The dispute is that instead of $10 million rand it should have been you know X hundreds of millions of dollars.

ENOCH: As I understand the dispute it is that Schlumberger made a decision that they wanted to sell out for whatever reason. That their engineers said this was a profitable enterprise. But Schlumberger didn't want to be in a diamond mining operation. But in order to sell out they had to also have the Swanson's agree to the sell out. And that the Swansons had they known that it was a profitable enterprise would not have decided to sell out. Now that is I understand the Swanson's position. On that position the Swansons say that it is not that they didn't trust Schlumberger although they didn't, and it wasn't that they thought it was worth more than what Schlumberger was saying it was worth, because they did. It is because Schlumberger knew prior to the settlement agreement that it was in fact worth more, and simply hid that information from the Swansons in order to keep them guessing as to what it was worth so that they settled for 1/2 on the dollar. That's what I understand the case to be. And my question to you was you are saying there is no evidence in the record in the trial of this case that Schlumberger...that the jury could infer that Schlumberger knew that the value of this was more than what they were saying it was worth?

ADDISON: Let me answer your question two different ways. First of all with regard to fraud there cannot be fraud without reliance. And what we are saying here is that there is no evidence in this record of reliance other than the self-serving subjective mental processes of John Swanson. So first of all there can't be fraud for that reason. Secondly, with regard to information that was misrepresented or that was withheld, that was hotly contested below. There is no evidence that Schlumberger believed at the time

it took $10 million rand that it was worth more, but they were just going to walk away from this diamond mine in the sea. The evidence is that is the most that they could get under the circumstances.

There was a dispute as to whether this thing was minable or not. There was a dispute as to commerciality. All of that had evidence going both ways. But there is no evidence that Schlumberger believed it was worth a whole lot more and they were just going to leave it on the table and walk away from it. The evidence is they tried to get more for it, but not that they knew that it was more, and they were affirmatively. If they wanted to get out for whatever reason why would they take $10 million rand if they could have gotten $100 million rand. It really doesn't make much sense.

GONZALEZ: Let me ask you to comment on the CA's application to 27.01 to this case.

ADDISON: That increased the damages to the Swansons by $49.3 million. §27.01 also has an element of reliance, and I have already addressed reliance, and that isn't here, that shouldn't apply. There is no conveyance here, and there is no real estate, and without a conveyance and without real estate you cannot have an application of 27.01. The choice of law issues are well addressed in our brief.

I think what we have here is the settlement of a commercial dispute. And I think it really strains credulity to imagine that the legislature would have intended 27.01 to apply to a settlement of a commercial dispute under these circumstances.

HECHT: Is it your view that there are 2 bases for the judgment in this case: breach of a fiduciary duty; and the statutory fraud?

ADDISON: Well yes, and also a relationship of...yes, breach of a fiduciary duty and statutory fraud. If I might anticipate a question that was not asked there is no evidence in this record of a breach of a partnership or a special relationship.

HECHT: But my question is those are the two bases on which the judgment rest in your view?

ADDISON: Yes.

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RESPONDENT

SUSMAN: May it please the court. The jury in this case found three causes of action, three bases for avoiding plaintiffs' exhibit 9: 1) fraud by misrepresentation; 2) fraudulent nondisclosure; and, 3) a breach of fiduciary duty arising from a special relationship of trust and confidence. The question presented by Schlumberger is does plaintiff's exhibit 9 immunize itself from these three causes of action? The answer is clearly, clearly it does not, at least from 2. The first thing you look at in plaintiff's ex. 9 is a

definition of a claim which appears on page 2. Schlumberger does not contend that they define claim broadly enough to include fraud and the inducement or procuring or negotiation of this release. It defines claim as a liability in connection with the prospecting or exploration of sea diamonds. They do not even contend that they got a release in this case for breach of fiduciary duty or fraudulent inducement or fraud by nondisclosure. What they contend is if you look at 19 inconspicuous words inserted on page 5 of a 6 page legal document, and the yellow was not on there, that's the way it looks to the Swansons. The yellow was put on there so it will be conspicuous to you. It's that yellow language on page 5 of this document that they contend contracted away a necessary element of one of the Swanson's cause of actions.

GONZALEZ: Mr. Susman you have left off significant portions there without being highlighted. You left off without the highlight each of us is relying on his or her own judgment, and each has been represented by Mr. Johnson as legal counsel in this matter. To me that's as equally important as what you have highlighted.

SUSMAN: Well it's important your honor in the sense that when you exercise your own judgment...I mean Schlumberger knew that these people were not experts in sea diamonds. They did not have the raw data; they didn't have any of the valuator reporters. Their judgment is only as good as the data and information that Schlumberger provided them. And Hubert Johnson has no expertise whatsoever in evaluating mining technology or sea diamond geology. What they claim is important is the disclaimer of reliance. And it is clear that this doesn't disclaim any part of a cause of action for nondisclosure or breach of fiduciary duty because reliance is no part of those causes of action. It may disclaim reliance of an affirmative representation, but not a breach of fiduciary duty or nondisclosure. So this court doesn't have to reach to affirm the judgment below. The issue that Schlumberger presents which is an argument to this court to overrule the last 40 years of this court's jurisprudence established in Justice Calvert's opinion in 1957 in the Dallas Farm Machinery case.

GONZALEZ: How do you respond to Ms. Addison's argument that it defies common sense for Schlumberger to have sold its valuable assets if they had known that you know 10 years down the road they were going to discover all of these diamonds they would have kept it.

SUSMAN: They argued that to the jury. And our argument was that they didn't care, they really did not care. I mean there was a lot of facts explaining why...their biggest argument to the jury was how in the world can Schlumberger have any ill will because it's hurting itself when it sells to DeBeers. We argue that it has all kinds of c_____ and there was evidence of all kinds of arrangements with DeBeers nationwide, that Schlumberger did not want to be in this anymore. I mean these were fact issues and I don't want to use this as a podium to tell you...but there was ample evidence and the jury found on all these issues, both on nondisclosure and affirmative misrepresentation.

Going back to Justice Calvert's opinion in 1957 in Dallas Farm Machinery. The debate had been raging for 3-4 decades at that time, whether a contractual provision can make itself invulnerable to attack for fraud and the inducement. Justice Calvert resolved the issue then. He quoted

from the Massachusetts SC, this was not a tort case, he quoted contract experts: Corbert, Willotson, McCormack, Wigmore, McCormack and Wright. And then most importantly he quoted in that case the restatement of contracts. He quoted §573, that is today Restatement of Contracts Second, §196. Comment A, on the first page of that section here is what it says. It says, "Language in a contract that prevents reliance is effective only if it actually has that effect and is not a mere recital." The sky is not falling in. There has been no dearth of settlements of disputes since 1957. There has been no ground swell of lawsuits to set aside releases.

GONZALEZ: But there will be as a result of this opinion according to Ms. Addison if we were to hold your way?

SUSMAN: If you don't overrule...I am suggesting she is just wrong. There is no evidence. This has been the law, the law that I am...and this was a law in Justice Hecht's opinion in Prudential. I mean there is a case if you look at the Prudential the contract in that case had three aspects. It first had an as is clause. Taking the property as is with any and all latent feedbacks. Second, it had a disclaimer of reliance. Purchaser acknowledges that he is not relying upon any representation statement or assertion of the other party. Third, it had a statement of what they were relying on. It wasn't on their own judgment. It says, "We are relying upon our examination of the property."

Now here we don't have an as is clause, and we don't have a statement that the Swansons went over and examined the sea diamonds or the data about the sea diamonds because they couldn't. What we have here is that they are relying on their own judgment. And Schlumberger knew how defective that was given the fact that they didn't have any information.

HECHT: Going back to Comment A, there doesn't seem to be much doubt that this is not merely a recital. And if it's not merely a recital, the other situation the comment poses is whether it actually has that affect. And I guess the question is is that a legal question, and is it part of this case?

SUSMAN: And the jury found it did not have that effect. The jury found that the Swansons relied. They had to find actual reliance.

HECHT: But it seems to me that it is different in this case than it would be in a printed form consumer transaction where they printed on the back, "That you haven't relied on anything we've told you?"

SUSMAN: Well not a lot your honor. These Swansons are men in their 60s. And you can get a reading _____ to the _____ says, "we represent that we are above the age of 18 years old." When you begin reading this are you thinking hey is this boilerplate, or is this tailored to me 60 years old? It is in the middle of a document. This was never conspicuous. It was never called to anyone's attention during negotiation. There was no request for it. There was no discussion of it. There was no mention of it. The Swansons accepted the deal proposed by the Schlumbergers on Feb. 17...

BAKER: Go back to Justice Gonzalez's question about the part you haven't highlighted. They agreed that their counsel had read and explained to each of them the entire contents of the release in full as well as the legal consequences. Do you think that's just boilerplate buried in there?

SUSMAN: No, sir. And they didn't deny that they understood the consequences. No lawyer explaining this release in 1988 if he had read Dallas Farm Machinery would say that that this release is bulletproof against fraud committed in the very act of getting the release.

PHILLIPS: Is there any language that anyone could ever put into a complicated settlement like this one, that would guarantee that you would not have a jury trial later if anybody got this out of...

SUSMAN: Sure, and I can tell you what I would put in it. First in the releasing clause I would make it clear that one of the claims we are releasing is a claim for fraudulent inducement either by affirmative representations or nondisclosure or any claim for breach of fiduciary duty.
BAKER: Well that's easy to say after the fact of this case.

SUSMAN: Well I am responding to the question. Yes. The question is who is the risk given Dallas Farm Machinery is in place, given the jury has found...they were the ones who committed fraud, we were the victims of the fraud, who is the risk of not writing this clear enough to fal_____. This court in a whole lot of decisions, the Ethel v. Daniel, the Dresser v. Page, the Houston Light & Power v. Atchison Topeka said, "Look if you want to extraordinarily shift the risk of your own negligence or strict liability in either an indemnity or a release you better say so. Because the policy of the law is to avoid clever scribblers hiding their intent." So how could have made the intent clear? The Schlumbergers could have had the Swansons warrant, "We note you may have told us some lies were untrue in connection with getting us to sign this release. We further note that this is important information that you have not disclosed to us. You have told us that there is important information that you have not disclosed to us and we do not care either that there is such information, or that you may be lying to us to get us to execute that release." It could have been as the court _____ both conspicuous and unequivocal before you engage in such extraordinary risk shifting.

CORNYN: Assuming that the Swansons had the ability to determine the data, the underlying data themselves could they have used language equivalent to that used in Prudential and said, "We are selling it to you as is, and you're relying solely on your own investigation and nothing we are telling them."

SUSMAN: Yes. I mean I think that you could...I mean theoretically under Dallas Farm Machinery and the court's opinion in the Prudential case, theoretically fraud in the inducement overcomes all. Even an as is clause. And that's what happened. In your decision this year in Prudential after looking at those three provisions in this as is agreement, the court still goes on on §2b of the opinion and discusses all of the Goldman's arguments for avoiding the agreement in the first place: nondisclosure about the conditions; misrepresentations. The court said part of its puffing(?), part of it was true, or they didn't know it was false. All of that discussion would have been unnecessary. So the answer to your question is...I

mean they would have come closer to complying to having a bulletproof release if they had created a data room, put all the data in it, told the Swansons, "Go hire your own geologists and experts and have them study the data." This notion that in this case the jury had to rely on subjective protestations of, "I relied," is simply contrary to the record.

Hubert Johnson, the lawyer, testified that he got information from the Schlumbergers about value, which he passed on to the Swansons. Part of the information were not statements of opinion, but statements of fact. Experts Lane and Sear have both studied this according to Schlumberger and they have put a negative value on this property, which the jury found, and which the evidence was was false. That fact information was passed onto Johnson. Johnson said he passed it on to the Swansons. Johnson said he trusted the Schlumbergers to be truthful with him. He had no way of evaluating whether these sea diamonds were worth anything. He said if he had not trusted them he would have advised his clients to conduct a further investigation.

CORNYN: Couldn't he have hired his own experts and conducted his own investigation?

SUSMAN: Yeah. You talk about increasing the transaction costs in this state of getting a release or giving one if all the transaction lawyers to protect themselves from malpractice claims because their argument is if you have a lawyer there the lawyer is responsible. If you require lawyers who advise clients in executing releases that they are going to be responsible for things that they know nothing about they are going either have to hire experts on all matter of things like sea diamonds, or they are going to have to decline the representation, or they are going to be liable for malpractice. Because under their argument having a lawyer there insulates the wrongdoer, the person that committed the fraud, but if a lawyer is not there, the victim maintains his cause of action.

Getting back to this subjective reliance because Ms. Addison said that over and over again: the only evidence is of subjective reliance. At page 107 of the transcript, Billie Smith an employee of Schlumberger who is talking to the Swansons, an officer says: "Well in any event Mr. Smith the Swansons did not get...you never made available to them any of the underlying data? Correct. "No, I did not." "As far as you were concerned they had to rely on Schlumberger to tell them how things were going, whether things were looking good, bad, or indifferent." Correct? Answer. "Right." That's not subjective protestations I believe. That is objective...Schlumberger knew they had to rely, intended them to rely, and they did rely.

PHILLIPS: Our Williams v. Glass opinion is unnecessarily complicated is it not?

SUSMAN: Well I think that's a different case. This is the case that the court talked about as the exception in the Prudential case. And if you really compare Goldman conceded that he was a sophisticated purchaser of property on a _____ basis. In this case the Schlumberger's officer who testified at trial, Dillard _____ said the Swansons were not sophisticated in a transaction of this magnitude. Goldman was given an opportunity to inspect the property and he did so. The Schlumbergers

had no opportunity to see the diamonds. There was no evidence that Goldman was under any time pressure. Free to negotiate and _____ did. The Swansons were given 5 hours to accept this deal. Goldman and Prudential bargained at arms length. Swansons and the Schlumbergers according to the jury had a special relationship of trust and confidence. It begun at the very beginning of the relationship where one party puts another party in the position of superiority and influence. That is what leads to a position. And maybe they didn't get exactly a technical partnership, but they were a hair away from having a partnership. They called each other partner. And the only thing absent in the partnership relationship even according to them was an agreement to share losses. So there was not an arms-length negotiation. The as is clause is clearly not boilerplate. An as is clause is defined under the Uniform Commercial Code, §2.316. It's a term of art. Everyone knows what an as is clause is.

Here you have that none of us rely clause in these 19 words in the middle of a document preceded by we're above the age of 18. The as is clause in the Prudential case was an important part of the bargain. In this case nonreliance clause was never requested, never discussed, never negotiated, and as I said never even mentioned at the time the deal was offered and accepted by a letter agreement. The clause only shows up without discussion in a release 3 days before the Swansons signed it.

Let me spend a minute about talking on the subject of 27.01. And as I've said on all this you get to the same place by both the nondisclosure finding and the breach of fiduciary duty finding. Both of which are alternative ways of attacking the release and are not dealt with in Schlumbergers' argument. On the subject of 27.01 it literally applies to this case. And the court should not hold otherwise. Nothing in the statute suggests that the Texas legislature intended to deny its protection to Texans defrauded in Texas by Texans simply because the stock of the real estate is located somewhere else.

GONZALEZ: How about the fact that there is no conveyance in a negotiated settlement?

SUSMAN: Everyone agrees your honor that plaintiff's ex. ____ had the effect of delivering to, whatever the conveyance. I don't know whether it is conveyance, a delivery, a quick claim. It doesn't make any difference. It is delivering to Schlumberger whatever interest the Swansons had in these minerals. An interest in minerals whether it is a royalty or something else is a real estate in Texas. The statute requires a transaction involving real estate. You've got to be a sa_____ to say that this is not a transaction involving a real estate when you have a document that delivers to another party your interest in minerals. Well they say it's a future interest. People transfer future interest in real estate all the time. Present conveyances of future interest in real estates. And according to their argument if you convey a lease that doesn't being till next week, or the lease you sign doesn't being to next week, it's not a transaction in real estate. That is just not the law.

We have discussed this in our brief. The statute has been changed. At one time the measure of damages in the statute was the difference between the value of the property and its value at the time it was delivered. So the court said you have to have a current delivery. That was changed, the requirement of a current delivery because the measure of damages is no longer specified in that way. But

there was a current delivery here of a interest. It was an interest in diamonds. A 10% interest in diamonds is an interest in diamonds. Under Texas law that is real estate. But if the Texas legislature intended to have this statute apply, it appears it did, it clearly didn't intend to defer to the laws of a foreign country or state in determining what is real estate. So we believe that 27.01 should be applied, and the court should not rewrite that statute simply to avoid its application to this case.

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REBUTTAL

ADDISON: If you look at the CA's opinion, which is now in the Southwestern Report, I have highlighted all of the evidence. They concluded by saying there is evidence on both sides of the reliance issue, therefore this was a fact question for the jury. But if you look at what the CA's used to bust this release what I highlighted in yellow is what came out of John Swanson's mouth. John Swanson testified, "He trusted, he relied, he believed, he relied, he trusted, he believed, he relied, he relied, he relied." The CA busted this release on subjective self-serving testimony.

GONZALEZ: Would you respond to the argument made that there is a lot more than what you are arguing, the testimony of Schlumberger's own employees on page 107 of the statement of facts?

ADDISON: The quote that Mr. Susman just read to the court, that was the question of were the Swanson's dependent on you to get certain information...did they rely on you for certain information? And the answer to that is yes. When the time came to sign the release however, they knew they didn't get the information. They knew they mistrusted Schlumberger. They knew they didn't get the information. This was a negotiated release and they gave that up. By the time the gloves are off and people are fighting you've got the right. It was in response to Judge Cornyn's question couldn't they have hired their own experts? That is one of the things that is going through their mind in plaintiff's ex. 103. We think Schlumberger's experts have told them it's worth too little. We can hire our own experts who will say it is worth more. That's one of the things that they realized when they signed this release. They affirmatively decided to rely on their own judgment that half a loaf is better than none; a bird in the hand is worth two in the bush.

Now Mr. Susman says we are making lawyers guarantors of the success of these deals. They didn't need diamond experts. These people were the experts. They needed exactly what they had. They need an expert on releases. They needed to understand the consequences of what they were signing. And the record is clear that they understood the consequences of what they were signing, and that this was a negotiated release.

When Justice Cornyn asked Mr. Susman a few moments ago, "Couldn't you stick in an as is clause in this release?" This is a release in settlement of a commercial dispute. That is critical. It is critical to remember this is a release in settlement of a commercial dispute. This is not a sale. No matter how hard they try to shoe horn it into the sale of real property this is a settlement of a commercial

dispute. It is a release of claim. They signed this document knowing they didn't have all the information. And by the way I would also like to call to the court's attention, the information that they didn't have was information we didn't have either. We were contractually prohibited from getting it from DeBeers, and then contractually prohibited to give it on to them. So this is not the situation where we had it and we just wouldn't show it to them. It is very important and they knew that there was a contractual prohibition on their getting this information and they signed this release willingly knowingly.

GONZALEZ: You're saying with regards to the negative value assessed to this property, that you didn't have any idea that that was wrong?

ADDISON: The consortium agreement provided for a fair price determiner, an independent third party. He came in and looked at it and said, "this isn't even worth what you have in it Schlumberger." Schlumberger had $6.8 million rand in it. So you can imagine when they get an offer from DeBeers to buy them out for $10 million rand it starts looking pretty good.

GONZALEZ: There was allegations here of reliance, reliance on failure to disclose critical information. And my question to you is did you have other information other than this property had a negative value?

ADDISON: The information that we had is that the technology that existed at the time. And this wasn't just at the time of the release. This was true 5 years later at time of trial. The information we had is that the technology that existed at the time time did not permit the diamonds to be mined economically. In other words you couldn't get them out at a profit. The other information that we had at time of trial is that up till the day this jury came back, and I don't know what the status is today, the South African government had never ever given anybody a permit to mine these diamonds.

The other information that we have is...their experts didn't have any of this information either when they calculated their damages that this thing is worth a gazillion dollars. And every expert who took the stand for the Swansons said, "Gosh, if they had come to me in 1987 I would have told them the same thing."

HECHT: At certain places it appears that your argument and certainly that of the amici is that if there is a lawyer consulting in the negotiation of a release, then the release cannot be set aside for fraud. But I hear you today to argue a weaker position than that, that you do have to look at other circumstances as well.

ADDISON: I hope you don't hear me arguing a weaker position. I hope you hear me arguing a narrower position. Our position is that where there is a lawyer, where there is a settlement, where there is a negotiated document, where the document contains a disclaimer, where the parties understand the disclaimer, know that it is in there and agree to it, that you should not be able to bust a release at all. And if this court is not inclined to make such a rule dispositive in all circumstances you certainly ought not to be

able to do it on nothing more than I relied, I relied, I believed, I trusted, and I relied.