ORAL ARGUMENT – 01/10/01
00-0270
CHURCHILL FORGE V. BROWN

FRITSCHE: The opinion of the 3rd CA in this case eviscerates the contractual right of a landlord to reimbursement for damages under a contract with a tenant. More, importantly, but what is very critical to this case, it subjects any owner of more than 2 units, 2 rental dwellings in Texas to damages of $2,000 plus one month's rent if there is a reimbursement provision in a lease.

HANKINSON: Why can't they sue for negligence? If someone causes a fire in an apartment building and causes property damage, the property code provides that the common law remedies to recover for property damage, that is available isn't it?

FRITSCHE: Yes.

HANKINSON: There is nothing in the code that would preclude such an apartment house owner from pursuing that remedy at common law?

FRITSCHE: There is nothing. In fact, it was pursued at the time of the trial court level, and it was dropped...

HANKINSON: I understand. But your statement then that we're going to wipe out any ability for apartment owners to be able to be protected in this circumstance is a little bit of an overstatement given the fact that we do have a negligence cause of action at common law that's been preserved in the property code.

FRITSCHE: There is the negligence cause of action. But more importantly, 92.0563 of the property code specifically provides that a person who has more than two dwelling units, who relies on 92.006(e) or attempts to, could be liable for $2,000 in damages plus one month's rent.

HANKINSON: I understand your argument under the statute. But we have all of these the sky is falling positions in the briefs, and you've kind of started with the sky is falling argument, which makes it sound like that the property code would provide what you just stated as the exclusive remedy for an owner of a rental property. And I just want to confirm with you that I'm not missing something along the way. That in fact, there really is a remedy under Texas law if a tenant negligently causes a fire that in fact destroys the apartment complex.

FRITSCHE: Yes.

ABBOTT: Why was negligence not pursued here?

FRITSCHE: That was dropped at the TC level and I do not know why. I was not in this

case at the TC level. It was pursued on the breach of contract ground and proceeded on the breach of contract ground under the reimbursement provision under the TAA lease.

ABBOTT: Was there a limitations problem?

FRITSCHE: I don't know the answer to that question. I believe that they specifically relied on the contractual provision, because it is very distinct and very clear 92.006...

HANKINSON: There's no allegation that the respondent in this case was the person who caused the fire or was negligent in any way?

FRITSCHE: No.

HANKINSON: And in fact, it was her son who was the actual tenant, who was alleged to have been negligent.

FRITSCHE: She was a tenant, and the son was a tenant.

HANKINSON: I understand, but she didn't live on the property, is that right?

FRITSCHE: She did not reside there.

HANKINSON: But the underlying factual allegation is that she had nothing to do with causing the fire.

FRITSCHE: That is correct.

HANKINSON: That in fact, it was the son. So there really is no negligence cause of action against her.

FRITSCHE: Correct.

BAKER: So the only way to recover from her is under your contract argument.

FRITSCHE: Yes. She was a tenant, and under 92.001 of the property code, a tenant is defined as someone who has...

BAKER: So what's the specific issue in this case on why she is or isn't liable under the lease?

FRITSCHE: She should be liable.

BAKER: And why, because this condition is not covered by subdivision B?

FRITSCHE: She is liable because of the reimbursement provision in paragraph 12 of the TAA lease. It specifically states that contractually this person who is a tenant, a signatory under the lease, she was not a guarantor, she was not in the occupant provision, she was a signatory to the lease and a person who had the exclusive right to possession. That made her subject to all of the provisions of §92 of the property code as a defined tenant. This reimbursement provision is very specific. And the TAA lease continues to have paragraph 29 that says, each resident is jointly and severally liable for all lease contract obligations. She was legally a resident. She had the absolute right to exclusive possession of this unit at any time.

ENOCH: You have said that you have a negligence cause of action for burning down this apartment complex. But I'm trying to - for the CA to have concluded what it concluded in this case, it had to have concluded that this provision under the property code was tantamount - the provision that the contract was an attempt to waive the provisions of the code that says the tenant cannot be liable for the damages affecting health. If the CA's interpretation of the statute is correct, it seems to me what it argues against or what it's exactly saying is that the landlord would not have a tort claim against the tenant, because all that happens here is the notion that the landlord can't assert that the tenant must pay for conditions of the property that affect health and safety. And that's all they are saying. If they say that this contract which requires the tenant to pay for the damages that he negligently causes is an attempt to waiver of the landlord's obligation to make these repairs, it seems to me that might ultimately affect even whether or not a tort claim can be brought against the tenant.

FRITSCHE: It could. And if I could expand on the 3rd court's confusion. The 3rd court basically misread this provision of (c) and rewrote it to say, a landlord's duties and remedies cannot be waived except by (e). What's critical and as Justice Hecht pointed out in Timberwalk, 92.061 is not a model of clarity. This entire habitability statute was not necessarily a model of clarity at the time it was enacted by the legislature. But what's critical throughout the habitability statute is that we're talking about a landlord's duty to repair, not a landlord's remedy against the tenant. It is the landlord's duty to repair and a tenant's remedy under B, which covers conditions materially affecting the physical health or safety of the ordinary tenant, which can be waived by (e). (E), which is what the 3rd CA turned on, specifically says that any condition covered by B can only be waived if the landlord first owns only one dwelling unit. Well every landlord that owns more than one dwelling unit, whether it's a multi-family, a property owner, or whether it's an individual who owns more than one unit, could never comply with (e). So what (e) does and what the 3rd CA did is they misread a statutory requirement to obtain a waiver of a duty as a statutory requirement for the wavier of a landlord's remedy.

HANKINSON: But the landlord's remedies are contained elsewhere in the property code. If a tenant is not taking care of property the way that tenant is supposed to, various other kinds of things, are there other provisions of the lease and there are provisions of the property code that for

example would allow the landlord to terminate the lease, to remove the tenant from the property. The point is, is that the landlord does have remedies elsewhere in the property code, and in the lease with respect to taking care of the property. Isn't that correct, or am I missing something? I mean if I'm in your apartment and you find out that I'm busy knocking holes in the wall, can't you terminate the lease and remove me from the property?

FRITSCHE: I can give you a notice to vacate for a non _____ breach of the lease and remove you from the property.

HANKINSON: And then on top of it, the other thing that the property code provides is that you have my security deposit, and you are able - there are provisions in the property code - I mean I have secured that I'm going to return the property to you in the shape in which I got it from you basically subject to normal wear and tear. And so the landlord then has a remedy. As a remedy, the use of the security deposit to be made whole in those circumstances. Isn't that correct?

FRITSCHE: That's correct, but if the security deposit is only $500 and the damages in this case were $772,000, the landlord really doesn't have the remedy. Because what the 3rd court did is they said that this reimbursement provision could not be utilized because it's a waiver under 92.006(e).

HANKINSON: But I'm just trying to understand how the property code works. And you have focused on the fact that (c) says a landlord's duties and a tenant's remedies. And that's what this particular set of provisions in the property code are designed to go to. But there are other provisions in the property code and that are then included in leases that go towards the landlord's remedies when a tenant doesn't do what the tenant is supposed to do. And I'm just saying that this doesn't cover the waterfront here does it?

FRITSCHE: It affects the 1.4 million leases that are in existence, the TAA leases.

HANKINSON: I'm just trying to understand how this fits in the greater scheme of things.

FRITSCHE: The property code specifically provides that the landlord and the tenant may contract for shifting of risks as each contract does.

HANKINSON: But what I'm focusing on is there is some place to go in the property code to look for the landlord's remedies.

FRITSCHE: If there is, under this opinion that was issued by the 3rd court, I don't see it.

HANKINSON: No. I'm asking you just in terms of the property code, then how is a landlord able to go in and evict a tenant if they are in fact are not paying rent, or not taking care of the property or whatever?

FRITSCHE: They have the absolute right to bring enforceable detainer proceeding under 24.005.

HANKINSON: That's my question is. Aren't there other provisions elsewhere in Texas law that give landlord's remedies against irresponsible tenants who aren't doing what they are supposed to do?

FRITSCHE: 24.005 specifically allows the landlord to do that. However, it also restricts the landlord from only receiving rent in an eviction proceeding. They can't sue for other damages if they are going to evict under 24.005.

ENOCH: But this statute would say that you could not evict a tenant if you had a condition affecting the health and safety that the landlord had not repaired. Isn't that the tenant's protection under this statute?

FRITSCHE: The tenant's protection is to force a landlord under this statute, and as this court pointed out in Timberwalk, the critical issue here was how does the tenant require the landlord to repair a condition that materially affects the health or safety of the ordinary tenant? That is the only area that subchapter B goes to. And that's why the reversal of the CA is so critical, because they read this that it is the waiver of a landlord's remedy as opposed to the waiver of a landlord's duties and the tenant's remedies. They basically rewrote 92.006.

HANKINSON: Go to the specific language and tell us why condition covered by subchapter B does not include casualty losses, since casualty losses as well as conditions caused by the tenant are all part of subchapter 92?

FRITSCHE: The most critical point is that if the tenant causes the damage, unless it was caused by normal wear and tear, the landlord does not ever have a duty under subchapter B to repair that condition.

HANKINSON: But you've underlined over here for us condition covered by subchapter B, which seems to be the language that everything turns on. And so I'm real interested in your position about attaching the plain meaning to that language and what does that language in specific mean. How do we determine that?

FRITSCHE: The plain meaning begins in 92.006, which refers to conditions _____ affecting the physical health or safety of the ordinary tenant. The tenant's right then devolves under 92.052(a), where the tenant has the right to require the landlord to meet its duty by giving notice, the tenant is not delinquent at the time the notice is given, and the condition that they are giving the notice regarding materially affects the physical health or safety of an ordinary tenant.
HANKINSON: And your opponents going to tell us, I think, that condition covered by subchapter B if it means conditions materially affecting the physical health or safety of any ordinary

tenant, it's going to include fires that burn down apartment complexes. So what's your response?

FRITSCHE: Subchapter B addresses casualty losses in 92.054. All subchapter B in 92.054 addresses with regard to casualty losses is the right for either party to terminate the lease. And then you go back to 92.061, as this court said in Timberwalk, specifically outlines only and refers to the duties of the landlord and the remedies of a tenant. It does not change or alter any law under contracts, statutory law or common law that is otherwise consistent with subchapter B.

BAKER: But in .054, either the landlord or the tenant can terminate if it's a complete loss. The exception is if the tenant caused it. So that defines duties and remedies. In fact it defines remedies in both cites of that...

FRITSCHE: A remedy regarding the termination of the lease, the right to reside there.

BAKER: So that's all that covers is here's the remedy regardless of who did it first, either side can terminate. But if the tenant did it, they can't terminate it, but the landlord can. Is that right?

FRITSCHE: Correct.

BAKER: Then the second part it if it's partially destroyed, then the same rights. But if the tenant caused it, the tenant doesn't have a right. So that is just remedies only. What I'm not clear on is how do you get to the point that just because under .052(b), the landlord doesn't have a duty if the condition was caused by the tenant, that that somehow also limits or puts something on the tenant. How does that section just because it says the landlord doesn't have a duty go the other way and imply a duty on the tenant contractually or statutorily at this point?

FRITSCHE: If it doesn't, the result would be absurd because you would have no one...

BAKER: But they know how to do the thing because they showed us they could do that in .054. Because they said if it's caused by the tenant, then the tenant doesn't have the remedy.

FRITSCHE: I believe 92.054 really only goes to the right to possession of the property, whether you're going to occupy...

BAKER: That's my point. It doesn't affect the issue that we have here.

FRITSCHE: That's correct.

BAKER: They're saying the key is whether this situation is one covered by subchapter B. And if it is, then 92.006(e) applies and we see what the consequences are by applying (e). And their view is when you get there and you apply (e), your landlord can't meet that requirement so they

can't contract the way they did. Is that true?

FRITSCHE: That's true. But it's only as to the landlord's duty to repair and the tenant's remedy if the landlord doesn't repair. It is not anything beyond that. In 92.061 it specifically says that notwithstanding what is in subchapter B, there is no waiver of the landlord's contractual or other statutory rights, including the right to contract for the right of reimbursement.

O'NEILL: If we read condition covered by subchapter B to include casualty loss, wouldn't it make some sense that the legislature made a policy choice that they weren't going to allow a casualty loss put on a tenant unless the conditions are met?

FRITSCHE: These conditions - I don't believe so. Because the only way any landlord can meet 92.006(e) is if they only own one rental unit.

If the landlord can't bring an action against the tenant for the destruction of the entire building, they can't bring an action against the tenant for a hole in the wall that the tenant caused or that the tenant's friend caused.

BAKER: Sure they can for negligence.

FRITSCHE: They could, but not under the reimbursement provision under this contract. The act may not have been negligent. There may have been a child playing...

O'NEILL: But that would not be a casualty loss would it?

FRITSCHE: That would not be a casualty loss. When you look at 92.054, however, casualty losses as addressed in 92.054 only address who has the right to terminate the lease.

O'NEILL: I understand that. But again the question is, if casualty loss is a condition covered, why wouldn't this be a legislative policy choice to put that burden on the landlord to require insurance for casualty loss, that it takes into account of charging rent and not be able to pass that on to the tenant in a multi-use _____?

FRITSCHE: I think you have to go back to this court's decision in Timberwalk and what the court said with regard to the reason that subchapter B was originally enacted. It was created to establish a scheme and a system for a landlord to be held to minimum standards of habitability. That was all that subchapter B was enacted to do. And the enactment of subchapter B created the right of a tenant to force a landlord who was lax in his or her duties to repair a condition that materially affected their health or safety by giving them notice, by not being delinquent in rent when they gave notice, and if that condition in fact materially affected the physical health or safety.

OWEN: If I understand your position, 92.006(e) allows the landlord to shift that right

of repair - take that right of repair away from the tenant. That's all this statute was designed to do if they only own one apartment complex?

FRITSCHE: What 92.006(e) does is it creates a situation most likely where there is an unsophisticated landlord and perhaps an unsophisticated tenant, it creates a statutory scheme for in this one circumstance the landlord to shift.

OWEN: It negates the duty to repair in 92.052(a)?

FRITSCHE: Correct. And that's the key thing. The duty to repair verses a remedy.

OWEN: That's your position on what the purpose of 92.006(e) is, is to negate the duty to repair under 92.052(a)?

FRITSCHE: Yes.

HANKINSON: Going back to Justice O'Neill's question about a policy consideration, conceivably why would the legislature have had such very, very specific requirements in terms of repairing things as you say this provision does, but not in any way cover the circumstance to protect a tenant from a huge casualty loss such as the burning down of an entire - I mean no requirement with respect to what the lease needs to do if you read this provision as restrictively as you would have it be read? And we've got the legislature being very, very concerned about saying, gosh we want to make sure that tenants know what they are getting into, it has to be conspicuous, it has to be all kinds of other things, and that's for just repairing a hole in the wall. But you know, it doesn't really matter if there's a shifting or a - and in this instance, it's not the negligent tenant who is trying to be held responsible. But we can just put anywhere in the small print in the lease that you can be responsible for burning down a whole apartment complex even though you weren't negligent. What's the policy choice behind that kind of interpretation or drafting of a statute? I don't understand that.

FRITSCHE: I think you have to go back to the bases and the reason the legislature enacted the habitability statute. It was in response to this court's decision in Cama___(?) to create the minimum standards of habitability only, not to create some broad duty on the part of the landlord to repair any condition that the tenant causes negligently or that a tenant's friend causes negligently.

HANKINSON: Is a fire that burns down an apartment complex a condition covered by subchapter B?

FRITSCHE: Only if it materially affects the health or safety of an ordinary tenant and the tenant is using this statute, subchapter B, in an attempt to require the landlord to meet his/her duty to repair the condition. Otherwise, it is not.

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RESPONDENT

PIERCE: Petitioner in their brief presents the issue on appeal as being the following: can a landlord who owns multiple rental dwellings contractually obligate a tenant to pay for damages caused by a co-tenant in the same dwelling? The answer to that question is yes, but only for the conditions enumerated in 92.006(f), which concerns damages for wastewater stoppage, to doors, windows and screens, and from leaving doors and windows open.

OWEN: Let's say you are an apartment owner and you rent to two college students. And they pile the furniture up in the middle of the floor and light a fire and burn it all up and burn up the walls, burn up all the drapes, burn up the carpet. You have no remedy against them?

PIERCE: You definitely have a remedy against them. You have the common law remedy of negligence or intentional actions on the part of those two tenants.

OWEN: What if you as a landlord had required their parents to sign the lease, and say, look, I don't rent to college students at all unless the parents agree to be liable under this reimbursement clause. So, I want you to understand if your children tear up this apartment you are going to be liable. Now, you're saying the statute doesn't permit landlords to do that?

PIERCE: The statute will not permit a landlord unless the landlord has one dwelling or less and then only if it meets the fair notice requirements of 92.006(e)...

OWEN: Your answer is no. You would have no recourse against the parents even though you required them to sign the lease and required them to reimburse in case there was a...

PIERCE: Exactly. Absent a common law right, you would have no recourse against a non-negligent tenant because of the clear, specific and unambiguous language of 92.006(e).

ENOCH: You've said that several times. Point to the language in 92.006(e) that says that a landlord cannot contract with the tenant for the tenant to be liable for the tenant's own negligence.

PIERCE: It doesn't say that.

ENOCH: So what about any language in any of those provisions that says that a landlord cannot contract with a tenant for the tenant to be liable for the damages that tenant causes by the tenant's negligence?

PIERCE: That's not the facts of this case. And the statute I don't believe says that. We're talking about a nonnegligent tenant.

ENOCH: No, let's talk about the facts in this case.

PIERCE: Nonnegligent tenant.

ENOCH: So your argument is that a...

PIERCE: Even as to a negligent tenant if this answers your question, the statute would not allow a landlord to use an agreement as the basis for recovery against a negligent tenant unless they can fit themselves within the requirements of 92.006(e), but that does not mean the landlord is without a remedy.

ENOCH: What provision says that a landlord cannot require a tenant to pay for damages caused to an apartment by the tenant's co-tenant?

PIERCE: The language in 92.006(e), which does that in its entirety. First of all, 92.006(e), we're talking about a residential apartment or residential leases only, and the landlord and a tenant may agree that the tenant has to pay for repairs covered by subchapter B but only if those conditions are met.

ENOCH: Which is a condition materially affecting the physical health or safety of the ordinary tenant that was not caused by the tenant or a lawful occupant of the tenant's dwelling or a member of the tenant's family.

PIERCE: Not correct. A condition of subchapter B can be caused by the tenant. It can be caused by the landlord. It can be of unknown cause. It can be an act of God. There's no limitations as to the source of what a condition of subchapter B is.

ENOCH: Except the waiver language in (c) only applies to a landlord cannot get the tenant to waive a duty of the landlord. (C) says a landlord's duty cannot be waived except as to subsection (e). It's the duty of the landlord referred to in (c) is predicated on a condition not caused by the tenant, and that duty cannot be waived by the tenant.

PIERCE: I think the confusion, at least I'm having if I understand the question, is that 92.006(e) does not create an additional duty on the landlord. All it says is that if you're going to shift the risk...

ENOCH: Of a duty that the landlord has.

PIERCE: The landlord in our case has no duty to repair the premises.

ENOCH: Right. And (c) is a provision about an attempt to waive a duty.

PIERCE: But we're talking about...

ENOCH: What language says that the landlord cannot contract with a tenant to pay for damages caused by the tenant or a lawful occupant of the tenant's dwelling or a member of the tenant's family? What provision in there says that the landlord cannot contract with the tenant to reimburse it for those damages?

PIERCE: The landlord can as long as it has one dwelling or less and meets the fair notice requirements. This landlord can't.

ENOCH: But (e) only applies if the landlord attempts to waive its duty to make a repair. But B says it doesn't have that duty.

PIERCE: That's not what (e) does. The landlord's not attempting to waive his duty to repair. In our fact situation, the landlord has no duty to repair. We have a total casualty loss...

PHILLIPS: Is (e) independent of (c) in your view?

PIERCE: I don't see why it can't stand on its own.

PHILLIPS: And if you're not allowed to make a deal - if the landlord and tenant are trying to make a contract that's not within (e) or not within something else in the property code, then they can't make the deal. Is that the way you read it?

PIERCE: If the deal of course is limited to a residential landlord/tenant dwelling setting, and if the deal has to do with getting the tenant to pay for a condition covered by subchapter B, only through the agreement, yes, I assert it stands on its own.

PHILLIPS: So somewhere in ch. 92 is everything about a landlord can charge rent.

PIERCE: That's right.

ENOCH: And (e) has to be read independently of (c)?

PIERCE: I don't know that it has to be read independently of (c). To come back to your concern, again...

HANKINSON: Put it another way. Do you have to engraft (c) into (e) to be able to interpret (e)? If I understand the argument that your opponent is making, he is saying we need to look at (c) in order to be able to interpret (e). And I think that's the source of the questioning - do you have to do that?

PIERCE: I don't think you have to do that. I think what my opponent is attempting to do is take a clear, specific and arguably in my position a very unambiguous statute and engraft onto it language that says, well (e) does not apply if the damage is caused by the tenant, the tenant's guests, etc. That language is not there. There's nothing to make (e) inapplicable.

HANKINSON: What's your response to his argument? He's asking us - I think what he's saying is you've got to look at all of these provisions together and how they work together in order to understand what (e) means. And would you respond to that argument. I understand you must be saying something different.

PIERCE: Well I think they all do work together if you understand that all (e) does is limit a landlord's ability through an agreement to shift the risk to a loss that's covered to a tenant. That's all (e) does.

ABBOTT: You said that the scope of what (e) does is to limit the ability to shift the risk of loss. And that I think is over-reading what subchapter B does. Subchapter B is focused on insuring the habitability of a tenancy. And basically what (e) is focused on is limiting the landlord's ability to shift to the tenant the responsibility for habitability.

PIERCE: If I understand the court's statement, that may be correct. I think also chapter (b) does for our purposes in (e) is define the conditions that are covered.

ABBOTT: Define the conditions.

PIERCE: And those conditions are what materially effect an ordinary tenant - health and safety. If you have that kind of damage, and you want the tenant to pay for it, you've got to come within the confines of (e).

ABBOTT: It's not talking about that kind of damage. The whole focus it seems to me of 92.006(e) is to limit - well going back to the big scheme of things. The big scheme of things is before we had the statutory scheme there were certain common law burdens put on the landlord to ensure the habitability of the tenancy. Do you agree?

PIERCE: I agree.

ABBOTT: And the purpose of part of these provisions is to ensure that the landlord by statute will continue to be responsible for the habitability of the tenancy.

PIERCE: It creates duties to repair.

ABBOTT: And the purpose of this is to ensure that landlords will not be onerous with

their tenants by shifting to the tenant the responsibility of ensuring the habitability of the tenancy.

PIERCE: Certainly.

HECHT: Unless you just own one unit, and then you can tell the tenant look habitable or unhabitable that's your problem. So why doesn't all (e) do is stand for the very unremarkable proposition that if you're a commercial landlord in Texas you have to keep the property habitable, and if you're not you don't.

PIERCE: And you better insure your casualty losses because you're the best person in a position to know your risks and protect yourself against those risks, and don't expect a nonnegligent tenant...

HECHT: But it wouldn't make any difference whether he was negligent or not.

PIERCE: Well he would still have a cause of action if they're negligent. It's just that they were limited by use of an agreement to shift it in an agreement.

HECHT: Why does that make any sense?

PIERCE: To protect a nonnegligent tenant, and to engraft upon a statute what is known as the fair notice doctrine that's present in common law. Because they recognized the disparity of bargaining between a commercial landlord and a tenant. And who's better able to assess this risk and protect themselves from the risk. How can even a tenant protect themself from this risk?

O'NEILL: Does a tenant have an insurable interest in anything beyond it's own unit and a bulk of units _____?

PIERCE: I would argue probably not unless you argue that this reimbursement clause creates the insurable interest.

ABBOTT: Did Ms. Brown not have insurance here?

PIERCE: Homeowner's insurance. Her own personal homeowner's insurance.

OWEN: But you can get liability insurance. You can get an umbrella to cover personal liability.

PIERCE: Homeowner's insurance and I would argue that the umbrella for it would not cover contractual obligations.

ABBOTT: Did her insurance pay for this?

PIERCE: She is being _____ on her reservation of rights letter and they are saying they are not going to pay for it because its contractual obligation is not covered by a Texas homeowner's policy.

ENOCH: As best I can tell, you say this subparagraph (e) stands independent of (c). Even if we read all of these together, (e) could stand alone?

PIERCE: I see no reason why it could not.

ENOCH: (E) stands for the proposition that a landlord may not contract with a tenant for the tenant to be liable for the tenant's own negligence or the negligence of a tenant's family member. You're saying (e) prohibits a landlord from making that kind of contract?

PIERCE: Yes.

ENOCH: What does subpart (c) do with respect to (e)? (C) says that a landlord for a condition not caused by the tenant has an obligation to repair. Is that what (c) is doing? It's saying that the landlord has an obligation to repair and that obligation to repair can't be waived unless they follow the conditions of (e).

PIERCE: Or the other provision: (d), (e), or (f).

ENOCH: We're talking about (e) here. And so (e) accomplishes two purposes. One is, it not only gives the mechanism by which a landlord shifts away its duty to repair a condition not caused by the negligence of a tenant, but (e) also standing alone is tantamount to a public policy determination by the legislature that a landlord cannot contract with a tenant for a tenant to reimburse it for property damage caused by the tenant's negligence.

PIERCE: I can't think of any reason why that is not correct.

ENOCH: Now what's a condition covered by subchapter B?

PIERCE: It's in 92.006(c), and 92.052 talk about a condition means the state of property that materially affects the health and safety of an ordinary tenant. In 92.054 specifically says that casualty loss from fire or smoke that makes the premises totally or partially unusable is such a condition.

ENOCH: So it's important that (c) be considered in determining what a condition covered by subchapter B is?

PIERCE: It also defines that condition. It's not the only place in chapter 92 where we can look for that.

ENOCH: (E) has to be read in connection at least in part with (c) in order to find out what this condition is?

PIERCE: I've cited other provisions besides (c) that also define that condition. In subchapter B.

HECHT: But (d), (e) and (f) are just exceptions to (c). (C) says you can't do this except as provided in (d), (e) and (f). Well what can't you do? A landlord's duties may not be waived. An attendant's remedies cannot be waived. Where does (c) say that a landlord's right to make a tenant pay for the damage the tenant causes cannot be waived?

PIERCE: (C) in referencing (e) in effect does that because (e) abrogates by implication the common law remedy of a contract cause of action because there's a clear repugnance _____.

HECHT: By the terms of (c), (e) is just an exception.

PIERCE: Correct. And the landlord may have a duty to repair. But (e) is not creating an additional duty especially in our fact situation. The landlord could take the casualty loss money invest it in stocks and walk away and our tenant does not have a right to require him to repair the premises or terminate the lease or require a reduction in...

HECHT: Which is not a very surprising thing that a person who burns down an apartment can't make the landlord build it back. That's not very surprising.

PIERCE: My client did not burn down the apartment building. That's an important distinction in this case.

HECHT: A tenant burned it down.

PIERCE: A tenant burned it down. And if they have a cause of action against my client outside of an agreement that does not meet (e), they can go after my client. There is no such cause of action.

HANKINSON: Looking at condition covered by subchapter B, I just want to clarify what you said earlier that language in (e). If it means conditions materially affecting the physical health or safety of the ordinary tenant because of the totality of the provisions, it means those kinds of conditions caused by the tenant, caused by the landlord, caused by an act of God, or caused by who knows what.

PIERCE: The source of them are not limited.

HANKINSON: And in fact, chapter 92 deals with all those various scenarios.

PIERCE: It certainly does.

HANKINSON: It's not limited to just those that the landlord may cause or be responsible for.

PIERCE: That is correct, or what the tenant may cause and be responsible for.

ENOCH: Now is the condition in subparagraph B of 92.052 the same condition that's covered in (e)?

PIERCE: Yes. It has to be a condition that materially affects the health and safety. You could outside of (e) if you have a bad paint job and you have a condition you want - you don't have a duty to repair and you want to move it to the tenant, I guess you could do it because it's not a condition that materially affects the safety and welfare of the tenant, and (e) would not prohibit that. So I think the restrictions of (e) are clearly limited to those type of conditions. And that's why it incorporates subchapter B for that definition.

BAKER: But condition as set out in this statutory scheme is a broader term than casualty loss because of what you just said about the paint deal.

PIERCE: But it includes the casualty loss and that's the facts of our case. And that's why we focus upon that particular provision.

I ask the court to look at this reimbursement clause in question. This is not an accurate representation of the reimbursement clause in question. If you dig out that reimbursement clause, get out your magnifying glasses, because it's going to take one to read it. It's buried in the contract. What is emphasized in the reimbursement clause is what is in effect of 92.006(f) provisions which have to do with wastewater stoppages. Any normal ordinary human being that would read that would read it as limiting their damages to that.

O'NEILL: But the text is accurate. The emphasis is different.

PIERCE: The emphasis is different and it's not conspicuous, boldly printed, it's hidden and it's just the type of language and clause that the fair notice doctrine provisions in the common law or in (e) are intended to protect a non-negligent tenant like Mrs. Brown in this case.

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REBUTTAL

O'NEILL: Does a tenant have an insurable interest in apartment dwellings beyond its own? Could they get insurance from a private _____?

FRITSCHE: I think that they can get insurance for any act and consequential damage for

their negligence that occurs in their apartment unit. It's a _____ industry in the landlord/tenant field is tenant insurance for acts of negligence that occur on the property. And I think it would be a consequential damage if the smoking materials as in this case of Mr. Brown caused - if he negligently caused the damage to the rest of the units in the building, his insurance carrier would cover it. And yes, they do have - a tenant does have an insurable interest.

HANKINSON: But they wouldn't insure based on a contract reimbursement provision in those policies?

FRITSCHE: I don't know if they would or not. There is some very creative carriers. I don't know whether they would not insure for that.

HANKINSON: For that kind of a policy then am I going to have to insure to the value of the entire complex because I'm still going to have a limit on the amount of my insurance? So if I get a $50,000 policy or $100,000 policy and I'm living in a $10 million apartment building, obviously the $100,000 policy even if it goes towards consequential damages isn't going to help me a whole lot if someone's going to come and say you've got to pay for the whole $10 million.

FRITSCHE: I would agree with you that it's going to be insured to the limit of whatever policy you purchase.

ENOCH: Have you looked at the legislative history for this?

FRITSCHE: I have not. I have conferred with counsel for the Texas Apartment Association, Mr. Nieman. And Mr. Nieman has I think sat and listened and tried to find some legislative history and he's informed me that there really is none.

ENOCH: Respond to Mr. Pierce's argument that despite (e) being denominated in exception to (c), (e) stands on its own as a statement by the legislature that it is going to prohibit landlords from contracting with tenants and co-tenants to reimburse them for damages caused by the tenant.

FRITSCHE: I would submit that it does not. Because (c) refers to the duty. 92.052 refers to the duty of the landlord. (B) specifically says the landlord does not have a duty.

ENOCH: But he says (e) is not limited to the landlord's duty. (E) is limited to simply a condition.

FRITSCHE: He's saying that it's a shift in loss where he's attempting to - what the statute does it shifts the burden of loss, but it cannot. The only way you get to (e) is through (c).

HANKINSON: Then put in your analysis as you're talking about this his position that the

condition, which means materially affecting the physical or safety of the ordinary tenant, if you look at subchapter B, you're going to find in there conditions caused by the tenant, conditions caused by the landlord, normal wear and tear not really caused by anybody, acts of God and whatever, that condition is not attributable to one person's conduct or to one person's duty?

FRITSCHE: The waiver provision in (e) is not going to apply when the condition in subchapter B, 92.052, is caused by the tenant or a lawful occupant in the tenant's dwelling or member of the tenant's family. And, again, 92.052(b) refers to again the duty of a landlord to repair, not the remedy or the right of the landlord to obtain reimbursement.

HANKINSON: I guess I'm not connecting. I'm really trying very hard to understand your argument, and maybe I'm not quite there yet. When I read (e), what I read is agree for the tenant to repair a remedy at the tenant's expense any condition covered by subchapter B. I don't see any discussion of duty or anything else. I see a very broad term there intended - and I'm not make the connection with how duty fits. Now I really would like to understand.

FRITSCHE: I don't think you're being dense. It was very confusing to the 3rd court also. And what's happening here is the 3rd court was reading (e) as a revision to (c). The only way that (e) is applicable to a condition in subchapter B, is as a waiver. And it is a waiver of a landlord's duty in 92.006(c) - a landlord's duties and a tenant's remedies under subchapter B which covers conditions materially affecting the physical health or safety of the ordinary tenant.

BAKER: Under .052(b), the landlord does not have the duty if it's caused by the landlord's negligence. So how can in your scenario the way you are explaining it, you have to go to (e) through (c) when there's no duty on the landlord when those facts exist? And why doesn't it then stand alone as opposing counsel says?

FRITSCHE: Tenant resides below another tenant. Someone drops a weight through the floor. There are insects or something coming through the holes. There is a condition that materially affects the health or safety of an ordinary tenant. That tenant down below has the right to give the landlord the notice as long as they've paid their rent and say that this condition materially affects the health or safety of the ordinary tenant.

BAKER: But that tenants a different one than the one we're talking about in this case, because the rights of the landlord against the lower tenant don't implicate the issue we have in this case. So I don't see how your example fits.

FRITSCHE: In this particular case, 92.006(e), which is what the 3rd court turned on specifically - it cannot apply because the tenant is the person who caused the damage. 92.052(b) of subchapter B specifically only refers to the landlord's duty when it's caused by the tenant. This waiver in .006 refers to those landlord's duties. Not the landlord's remedy to go back against the tenant.

HANKINSON: If B refers to certain conditions that the landlord is not responsible to pay for or to fix, and those are conditions that materially affect the physical health or safety of the ordinary tenant, right?

FRITSCHE: Right.

HANKINSON: Explain to me why if you have an enforceable provision in a lease under subpart (e) of 92.006, it then doesn't give the landlord the remedy under B to make the tenant pay?

FRITSCHE: Because the only way (e) acts as a wavier is if that landlord owns one unit.

HANKINSON: I understand. But let's presume the landlord owns one unit. And (e) applies because my scenario was that you have an enforceable 92.006 provision in a lease. Doesn't that provision then create under B of 92.052 the right in the landlord to require the tenant to pay for those kinds of things?

FRITSCHE: That is correct.

HANKINSON: So in fact, (e) is more than just a waiver provision tied to (c). When it is enacted it also affects other conditions, because earlier on you were saying well look what B does, there's no duty, but it doesn't make the tenant pay. (E), if an enforceable agreement is entered underneath it can then give the landlord the right to make the tenant pay for the conditions reflected in B?

FRITSCHE: Again, it's the duty to repair verses the right of reimbursement.

HANKINSON: No, I understand that. But your answer to my question is yes, that if you have an enforceable provision under (e), it can then create a right in the landlord to force the tenant to pay under B, that otherwise does not exist?

FRITSCHE: Correct.