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Supreme Court of Texas.
HELENA CHEMICAL COMPANY and Hyperformer Seed Company, Petitioners,
v.
Kenneth WILKINS and Tom Wilkins individually, and d/b/a Chapotal Farms
and
Porciones 99 Properties, Geen Wilkins and Mark Wilkins, individually
and d/b/a
Tabasco, and Wilkins Family Limited Partnership, Respondents.
No. 00-0418.

February 7, 2001.

Appearances:
Charles C. Murray, Atlas & Hall, McAllen, TX, for petitioners.
John B. Skaggs, Skaggs & Garza, McAllen, TX, for respondents.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla R. Owen, Justice H arriet O'Neil, Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Deborah Hankinson, Justice James A. Baker, Justice Craig Enoch, Justice Greg Abbott.

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JUSTICE: Thank you. Please be seated. The Court is ready to hear oral argument from petitioners in Helena v. Wilkins.
SPEAKER: May it please the Court. Mr. Murray will present argument for petitioners. The petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF CHARLES C. MURRAY ON BEHALF OF THE PETITIONER

MR. MURRAY: May it please the Court. The respondents, the Wilkins, planted the Cherokee brand grain sorghum seed that they purchased from the petitioner, Helena Chemical Company, did not [inaudible] a warranty to represent it and that they suffered loss [inaudible] farming operations as a result. The Wilkins received a $360,000-verdict from the Starr County jury. The trial court entered judgment on the verdict. Court of appeals affirmed its split 2 to1 decision.
And then to focus on the point concerning the Seed Arbitration Act in [inaudible] in the no evidence to point regarding causation damages. The Seed Arbitration Act creates a special arbitration mechanism for one claiming to the damage as a result of [inaudible]. And its

prerequisite in the words of the statute, any suit based on said [inaudible], the claimant must before going to court submit the case to arbitration before the State Seed and Plant Board, which is a board comprised with neutral [inaudible].

The board is to investigate and to ensure a good investigation, the board -- the claimant according to the statute must file the arbitration within the time necessary to allow effective inspection of the plants in field conditions. The findings or conclusions of the board are not binding but in any subsequent litigation may be introduced as evidence to assist the finding of a fact.

It -- as majority of the opinion in the court of appeals noted, there are two [inaudible] that the legislature had in mind with this provision. One, to provide a potential avenue of [inaudible] and two, to provide information from an unbiased body of experts to guide the finder of fact in the -- often particularly complex area of the interaction between seed and various environmental cultivation factors that all go in to determining how crop comes out.

And the Wilkins failed to invoke the arbitration presumably before filing a suit despite the fact that one of the Wilkins, a practicing attorney, admittedly was aware of the requirement, and also as required by law, the arbitration requirement is set for on every seed bag of the Helena sales. On Helena's motion after the lawsuit was filed, the trial court compelled the case to arbitration for the seed board. The Wilkins waited 16 months after that order to begin the -- to file the arbitration. In the State Seed and Plant Board ruled that the arbitration was filed too late at that point to permit the effective inspection according to field conditions as required by the statute and therefore, declined to arbitrate.

JUSTICE: Isn't there evidence in the record that Helena Chemical tried to persuade the claimants not to engage in arbitration process?

MR. MURRAY: [inaudible] your Honor, that only evidence on that point whatsoever is in Exhibit 45, which is a letter of August 1994. This was a harvest that took place in the summer of 1994 and Mr. Wilkins in August letter, and this is the only evidence at all in that point says, "I am mindful that the code requires arbitration. I believe Mr. Yoca of Helena's representative, earlier suggested to my secretary that he was interested. I believe Mr. Yoca earlier suggested to my secretary that he was interested in mediation. And I am not sure if that was a suggestion that we forego in statutory arbitration. That's the only evidence on that point anywhere in the record. Mr. Wilkins, the author of the letter himself did not testify. Your Honor, that is hardly enough to meet the requirements of estoppel even as of August of '94, false representation made with knowledge to someone who doesn't have means to acquire the knowledge and acting only to once detrimental reliance.

JUSTICE: Is a refusal of the board to arbitrate always [inaudible] a jurisdiction on your interpretation of the statute?

MR. MURRAY: Certainly, if the case -- if it's because the case has not been filed in time as required by the statute, and which is the case here and I can't --

JUSTICE: All right. I -- I mean under your interpretation of statute had a refusal to arbitrate?

MR. MURRAY: Yes.

JUSTICE: And your position is, that even though that's not a decision by the arbitration board, we in fact didn't get to arbitrate?

MR. MURRAY: That's correct.

JUSTICE: I mean, it was never arbitrated?

MR. MURRAY: Yes, your Honor.

JUSTICE: We had actually never had an opportunity in the arbitration proceeding to go through, and that fact-findings even if the plaintiff loses because there's no evidence, now that we can inspect. We haven't had an arbitration.

MR. MURRAY: That's right. It is --

JUSTICE: And my question to you is that, given your -- had you would have as imperfect statute, wouldn't that lead to the result that if, for whatever reason, the arbitration board decides not to arbitrate or refuses to arbitrate then that is effective to deprive the trial court of jurisdiction? If we interpret the statute this way, it will never resolve.

MR. MURRAY: I -- I think so your Honor. It certainly in this case where it's not filed timely and maybe if the arbitration board --

JUSTICE: No, I understand.

MR. MURRAY: -- has no good reason.

JUSTICE: No, I understand. But I'm just looking at the logical --

MR. MURRAY: Yes.

JUSTICE: -- implications of the construction that you would have us put on the --

MR. MURRAY: That --

JUSTICE: -- statute.

MR. MURRAY: -- that is correct, your Honor. And I think that's justified by the language in the statute saying it must be filed in time to permit effective inspection --

JUSTICE: Then -- then --

JUSTICE: Then what is the statute saying that -- that upon -- that arbitration is a prerequisite to a lawsuit?

MR. MURRAY: Your Honor, that is in 64.002 part (a), when a purchaser of seed designed for planting claims to have been damaged by the failure of the seed to produce or perform as represented by warranty or label, the purchaser must submit the claim to arbitration as provided in this chapter as a prerequisite to the exercise of the purchaser's right to maintain a legal action.

JUSTICE: Going back to your earlier point, now let's say that in 64.005 that the board shall conduct arbitration as provided by this chapter?

MR. MURRAY: Yes.

JUSTICE: And if they're to do it as provided by that chapter, does that mean that they have to do it within the time necessary to permit the effective inspection of the plants?

MR. MURRAY: Yes, your Honor.

JUSTICE: But where does it say effective inspection of plants by the arbitration board? Why can't it be by independent third party?

MR. MURRAY: The -- the statute, and I'm not sure I can point to it real quickly says that the inspection, it will be by the board or -- or a member of the board and in this [inaudible] --

JUSTICE: [inaudible] In this particular case that wouldn't matter at all because the arbitration was filed in '96 and the effective inspection of plants terminated in '93 and '94?

MR. MURRAY: That's correct, your Honor.

JUSTICE: Well, but -- but -- again, the question is effective inspection by whom?

JUSTICE: But the point is, there's no one here who can inspect the plants --

MR. MURRAY: Well, it is --

JUSTICE: -- [inaudible] with the field conditions.

MR. MURRAY: You're correct, Justice Abbott saying that if that board, it could have been inspected by any, but there is a provision, Justice O'Neill and -- and I can't put my hand on it right now, but it's in the statute. It says that the inspection is to be by the board or one of its members, which nothing it allows in the delegation to somebody else. It -- it --

JUSTICE: Mr. Murray --

MR. MURRAY: Yes?

JUSTICE: On that point, there's nothing in the -- nothing in the statute that says the arbitrating panel can refuse to arbitrate. There's a timeliness issue.

MR. MURRAY: Correct.

JUSTICE: And the timeliness issue is best [inaudible] is because you have to have something to review.

MR. MURRAY: That's correct.

JUSTICE: But in 64.004, the commission has the authority to make findings about why it can't decide the facts in the case based on the failure to do things timely. Now, if we're gonna interpret the statute to say that is a requisite following suit. You don't arbitrate, you can't file a suit. The statute contemplates that there were -- might be a circumstance for the arbitration panel as unable to make a decision because timeliness is an issue or they just can't based on the facts that are available to them. They can't make that. Is that can -- from all of that does the arbitration panel didn't have the authority to refuse to arbitrate in such a way that then the parties are deprived of the right to go to court.

MR. MURRAY: Well, I think certainly in this case where the complaint was not filed within the time necessary to -- to permit effective field inspection as required by the statute, it certainly lay within their authority and -- and I think failed to refuse to arbitrate.

JUSTICE: Well, Mr. Murray, now would the result have been any different? Let's say that everyone shows up for the arbitration, and because they couldn't do their inspection, and everything was there and the board says, "Well, obviously we don't have any evidence here." So, as a result, instead of refusing to arbitrate, they made specific guidelines. No evidence of problem with the seeds, because an inspection couldn't be conducted, and therefore, no one construed one way or the other what was going on. Let's say that they went through that and they made specific findings, based on the fact there was no evidence because they couldn't get an inspection. Would that satisfy the prerequisite to sue language that's contained in the statute?

MR. MURRAY: If I understood your hypothetical correctly, your Honor. You're talking about a situation it's here where they couldn't arbitrate because they lost to file timely --

JUSTICE: Exactly.

MR. MURRAY: -- it's too late to --

JUSTICE: Exactly. I mean that -- they -- the point is, is that they show up in the arbitration proceeding because they waited this period of time and they couldn't do the inspections. Basically, you have a hearing where this is a failure on the burden of proof. And in fact, findings can be made on it. We are unable to find, you know, we don't find these because we couldn't do the inspection. There's no evidence of these because the crops are all gone now, and so no one can inspect it to see. Therefore, we conclude that the seed company wins. Let's say that these exact facts were result by that kind of an order rather than this was delayed and they refuse to arbitrate. Under those

circumstances, has the prerequisite to suit language been satisfied sufficient to give the trial court jurisdiction?

MR. MURRAY: Your Honor, I don't think the board would be within -- would be --

JUSTICE: Now, that's not my question. That's not my question. My question is, if that order had read differently, instead of saying we're not gonna arbitrate 'cause too much time has passed and instead said we're here to arbitrate and [inaudible] no one has able to put on evidence if anything, and we make specific findings as we are required to make, and the seed company wins this arbitration. May have been tricked -- may have been caused by the delay because we can't inspect but we actually have a determination in favor of the seed company that resulted from the delay. Does that satisfy the prerequisite to sue sufficient to trigger jurisdiction?

MR. MURRAY: I -- I think not because I think they violated the statute because the statute says you've got to file within the time necessary to --

JUSTICE: Well, no but the language that -- the language that you said is that they have to submit the claim as a prerequisite to the exercise of the purchaser's right to maintain an action.

MR. MURRAY: Yes.

JUSTICE: Your position is it was never arbitrated.

MR. MURRAY: But it also says, your Honor, in 64.006 that a complaint in arbitration must be filed within the time necessary to permit the effective inspections or if it wasn't filed in that time, I -- our position is the seed board has no authority other than to decline the arbitration which is what it did and the prerequisite is not satisfied.

JUSTICE: So how do we justify that then with Section 34.004, which allowed the trial court to take into account any findings that the board of arbitration with respect to the failure of any [inaudible] to cooperate in arbitration proceedings including any finding as to the effect of delay in filing the arbitration claim or the board's ability to determine the fact? That sounds like just exactly our circumstance what I just explained.

MR. MURRAY: Not for this sure is --

JUSTICE: Okay.

JUSTICE: -- but the argument you suggest is the one that -- that was the majority opinion in -- in the court of appeals. That could sense much more [inaudible] to the language in 64.004, the introductory clause there. It says in any litigation involving a complaint that has been the subject of arbitration under this chapter, the party may introduce the report and then it goes on to cite the language you are reading findings about delay. It said that that's only in any litigation involved if the plaintiffs did not subject of arbitration --

JUSTICE: Well, then, I wanna --

MR. MURRAY: This one was never the subject of arbitration 'cause it is filed too late.

JUSTICE: I -- I wanna know where the -- where the board has the authority to make the decision that we refuse to arbitrate and as a result of refusing to arbitrate regardless of the reason why, and then we -- we in effect are right with making decision whether anyone goes to court or not. I mean, where is the authority in the statute that says, we can choose to decide we're not gonna arbitrate this one? Is there any [inaudible] in here that gives him that authority?

MR. MURRAY: I -- I think that's necessarily implied by the provision that the arbitrations must be filed --

JUSTICE: Okay, but there -- but there is no provision in here that says the board can refuse to arbitrate if you don't timely file.

MR. MURRAY: There is no explicit provision.

JUSTICE: That as well isn't implied though in 64.005 where it says that the board shall conduct the arbitration as provided by the statute, and it is provided in this chapter that the arbitration must be filed at the time that allows the panel to inspect the -- the plants while in the field condition.

MR. MURRAY: That's correct. And -- and our position would be that if it's not filed by that time, then the board has no choice but to decline the --

JUSTICE: Well, then how will we ever get to the point where we would ever give any meaning for language in the 64.004 --

MR. MURRAY: [inaudible]

JUSTICE: -- about the fact that the court can consider delay, and the effect of the delay and the board's ability to determine the facts. How could we ever get to that point?

MR. MURRAY: In this circumstance, your Honor --

JUSTICE: [inaudible]

MR. MURRAY: -- the complaint is timely filed, it still possible to have a field inspection, but it's not possible to have as good an inspection as it would have been had there not been delay, and if they had been filed earlier so the conclusions are somewhat hazier than they would otherwise be.

JUSTICE: And how much time in the statute did they have to file the arbitration?

MR. MURRAY: Within such time as is necessary to permit an effective inspection according --

JUSTICE: So we don't have any --

MR. MURRAY: -- to field conditions.

JUSTICE: -- absolute -- we don't have any absolute time period?

MR. MURRAY: There is not a bright line.

JUSTICE: So, since there is no -- since there is no bright line in this, then why wouldn't we be looking for the board to make findings for the, for example, a finding that it is -- that -- that this was filed too late for us to be able to do our inspection of this stuff. Why don't we actually have an arbitration decision that makes that determination?

MR. MURRAY: Well that's a conclusion they made, but not -- but it wasn't an arbitration finding because they declined to arbitrate.

JUSTICE: I know, but [inaudible] cycle that I see people getting caught. I'm just trying to reconcile these provisions obviously the court of appeals had some difficulty because there's a dissenting opinion, and so I'm trying to reconcile the two things. It sounds like a very vicious cycle. You know, I'm trying to figure how we'd break out of that.

MR. MURRAY: You know, I think the only way to do it, your Honor, and I -- I think it's supported by the language of 64.004 is to read 64.004 as only involving, only pertaining to claims that have been the subject of arbitrations and since this was not the subject of arbitration, then --

JUSTICE: Because they refused to arbitrate.

MR. MURRAY: Because it was too late, the 64.004 was not applied --

JUSTICE: Why don't we have the decision from the board that says we make findings that we're unable to decide because it was too late for us to inspect and therefore actually have an arbitration decision.

MR. MURRAY: Well, they certainly concluded that it was too late

because it lost to file timely. They didn't make arbitration findings because of that reason.

JUSTICE: In your argument -- let me understand your argument. Let's -- the arbitration board could have arbitrated this claim. They could have advised the court that because of the lateness in filing it, we cannot determine the facts of this case therefore, we can't render decision. Now, hear me out. So --

MR. MURRAY: Yes.

JUSTICE: They could have done this but your response to that have they done that, is that the arbitration panel did not have jurisdiction to do so because the arbitration was not filed in the time to do the -- and inspected under field conditions. That's your fallback position.

MR. MURRAY: Almost, your Honor. Our position is, the board having concluded that it wasn't timely filed because you could no longer inspect under field conditions then had no choice but to decline to arbitrate because as statute says --

JUSTICE: On the --

MR. MURRAY: -- it must be filed [inaudible] --

JUSTICE: [inaudible] if the board that concludes that and it sounds to me like it's arbitrated. And it's making the position that your argument is if they had accepted this to make a decision that this -- that they are unable to -- if they had accepted this, and done the findings about the inability to reach the facts -- to determine the facts in this case, they would not have had jurisdiction to do so because there had -- the filing have to be timely so they could inspect under field conditions.

MR. MURRAY: That's right. And if -- if a determination of the filing is not timely, it is somehow regarded as an arbitration itself then -- then that's a illegal that eviscerate the statute because any plaintiff with a shaky case, it goes [inaudible] and [inaudible] a panel of experts would simply delay until the last minute and avoid -- and avoided the entire effect of the statute.

JUSTICE: The flipside of that argument if the arbitration panel -- if the timeliness of field conditions is not a jurisdictional issue for the arbitration panel, it's not a jurisdictional issue of the arbitration panel, then the arbitration panel's determination of the lack of timeliness would be a decision on the merits, either to refuse it or to go ahead and haven't take nothing because they're unable to determine the facts.

MR. MURRAY: I -- I think that's right. I think it did not have jurisdiction to anything other than what it did.

JUSTICE: Any other questions? Thank you. The Court is ready to hear argument from the respondents.

SPEAKER: May it please this Court. Mr. Skaggs will present argument for the respondents.

ORAL ARGUMENT OF JOHN B. SKAGGS ON BEHALF OF THE RESPONDENT

MR. SKAGGS: I think it's probably ironic but I may well have the right to oppose [inaudible] brought up to review that it might be the reason that we're here because I think I made a comment I have no idea it was a briefing that if it is not all ready to file a suit in state that the state board can use outside investigations that they're ought to be. I think I challenged the court to go ahead and -- and make that

part of the law of the state. That's gonna be dispositive [inaudible].

JUSTICE: We're here dealing with the statute?

MR. SKAGGS: Yes, Ma'am.

JUSTICE: I wanna call from Justice Hankinson's and Justice Enoch's question. It seems to me that just looking at the statute that the legislature was trying to make happen was to have an independent third party, the Texas Tech, University of Texas, people look at the crop out on the field and make the findings and then the jury and the court [inaudible] have the benefit of that, is that the purpose you're gonna say?

MR. SKAGGS: I think it probably is.

JUSTICE: Now, how -- how is that purpose carried forward if we were to allow plaintiff who says, you know, I really don't want independent analysis by the University of Texas and Texas Tech. I will await two to three years to bring that claim and let the jury decide, and I just do not have the independent analysis. I want my third party expert. Now, if we rule for you, isn't that effectively what we're saying?

MR. SKAGGS: Well, in -- in our situation I don't think that that has the effect but I think you're right.

JUSTICE: The whole -- in your situation, that is exactly in effect.

MR. SKAGGS: Pardon me?

JUSTICE: In your situation that is exactly the effect.

MR. SKAGGS: Well --

JUSTICE: Because in your situation, we don't have an independent analysis undertaken by independent authority instead what we're confined to is competing expert testimony, and that is exactly what the legislature was trying to get away. So, this case is a quintessential example of what the legislature was trying to avoid.

MR. SKAGGS: Sure, but without a binding result, what difference does it make?

JUSTICE: That -- they didn't make it a binding result because what they wanted to do was try to encourage a very expeditious resolution based upon [inaudible] expert.

MR. SKAGGS: Which I think it encourages. I -- I think it does encourage an expeditious examination of the facts by this interested the third party.

JUSTICE: Well, in this case they waited two years to even file a lawsuit.

MR. SKAGGS: Well, in this case also, we were in a position where we we're still negotiating the other side well [inaudible]. We have been way beyond the point.

JUSTICE: This seems kind of bogus in the sense that this is some of business that real quick -- if you're -- you're a lawyer, and you had the cases --

MR. SKAGGS: Sure.

JUSTICE: -- made that pop up against the statute limitations. Are you not gonna go ahead and file the lawsuit if -- if you're undertaking negotiations with the other side maybe that keep talking for a few more miles, a few more years and then without any hard facts agreements extending the statute limitation, you will file your lawsuit later and then say what can we do they were negotiating with me?

MR. SKAGGS: Well, let me count on -- I wanna answer the question, but let me count on this, since the statute itself has the total information --

JUSTICE: In that regard tolling, once the complaint for

arbitration has been found.

MR. SKAGGS: Sure, exactly. You are not talking about the same thing. My recollection about when this was filed I -- I was the trial lawyer in case too and I like a lot of people that kinda argue in front of you, I had this from [inaudible]. My recollection is that by the time we got the -- the problem happened in July. The second problem happened in July by the time the December issue came around five months approximately [inaudible] it became very obvious that we do not go and get a resolution done. At that point, the plants were gone. And then by February which would've been two months later, which when we actually filed a lawsuit, and my recollection is that we've been dealing with, and I maybe wrong about this, but I think this lawsuit was either filed within eight months of the final problem or within [inaudible] but didn't they [inaudible] right at against the statute [inaudible] --

JUSTICE: Isn't the purpose of the statute to require an inspection before the plants are gone?

MR. SKAGGS: Sure. I think it is. Which makes sense of course because if you're -- you're having to rely on just what somebody said, that would be something entirely different. But in this case, we have -- as would be the case in many cases. We have analysis by outside third parties, soil analysis, plant analysis, photographic evidence, things that the court could rely on aside from the opinions of people's respective expert. I think, we even had a breeder out there, a guy who can assess --

JUSTICE: But that's not --

MR. SKAGGS: -- the [inaudible] of the plant.

JUSTICE: Again, we're -- we're dealing with the statutory language. That's where I'm having a hard time getting around this. You could have been pending negotiations while the board was conducting its arbitration it was nothing. So, why didn't you follow the statute in '94 when you had crop problems in '94, not just '95 but '94. Why didn't you call up the board, and say we want an arbitration team down here pending your independent investigation and then you wouldn't have had these problems. Then the jury would have been able to have findings from this independent source and to take it -- take into account.

MR. SKAGGS: I've raised that.

JUSTICE: -- [inaudible] comes before it?

MR. SKAGGS: And I can't comment on what happened before I got involved in the lawsuit or in the claim. I was involved after the plants -- I have nothing I could go see by the time I was hired.

JUSTICE: And nothing that the arbitrators can see?

MR. SKAGGS: And nothing that the arbitrators could see other than the evidence that both sides had preserved, soil sample and so forth.

JUSTICE: In a reason for construction of the act that the language just seen it was asking about the delay that deals with what the arbitration is timely initiated and there's some delay for someone -- in getting an evidence or it may [inaudible] arbitration was filed in July when the plants are about to be harvested versus March when you were --

MR. SKAGGS: Sure.

JUSTICE: Is that a reason of contraction of the statute to deal with the timeliness issue?

MR. SKAGGS: And -- and I don't follow you. Perhaps I -- I'm lost, I may moving to something else but --

JUSTICE: But yeah, I think --

MR. SKAGGS: -- [inaudible].

JUSTICE: -- the language in the section that said the court made

the arbitrators may advise the court on what effect timeliness had --

MR. SKAGGS: Sure.

JUSTICE: -- on its analysis. Isn't a reasonable construction of that statute that you bring a timely arbitration that it may be too late for the -- the crop may have been damaged [inaudible] but there still may be issues that the arbitration panel can't resolve even though they're looking at the crop in the field?

MR. SKAGGS: Sure and I -- but I -- and I can also propose other reasonable interpretations for a part of the statute. One thing is, it's not up to the board to make a comment about the delay it's up to the judge and in cases as I recall to the statute when you look at it. It's up to the judge if a case the trial of a judge to considering his own discretion about the effects of the delay and whether it made a difference. In this case, Judge Pope who was the trial judge in Starr County looked at it, and said that he didn't think it obviously he felt that he didn't think it made any difference because he kept it on the docket. There was a motion made to dismiss the case at the time of the trial or prior the trial and what we were in a pretrial and Judge Pope overruled.

JUSTICE: But that's the issue we're hearing on [inaudible] even the -- can't the legislature validly say, you've got to go through this process while the crops are in the field. Otherwise, you can't bring a lawsuit; don't you think that [inaudible]?

MR. SKAGGS: Well, let me -- I -- I don't wanna dodge a question, but let me make this kind of argument. It doesn't say can't bring a lawsuit. It says you can't maintain your cause of action by bringing the lawsuit I -- I don't wanna get down that road before we -- we get into those kind of statutes [inaudible]. Liability statutes where if don't send a 60-day notice, like for example, if somebody's city ordinance, that you can't sue them. It is not a question of -- of not [inaudible] but --

JUSTICE: I've read it. I stand corrected. Can't the legislature validly say that you can't maintain your legal action unless you get down this independent team out there while the crops are in the field?

MR. SKAGGS: Of course they can. They are the legislature.

JUSTICE: And didn't that what they said?

MR. SKAGGS: They said it well, you're gonna lead me down into the defenses that we have to why we didn't have any -- didn't feel like we have any obligations to be cooperating with the arbitration process, which had to do with and if you wanna get into it, we can or we [inaudible] until it's appropriate --

JUSTICE: I'm just talking about the statute --

MR. SKAGGS: -- But what about the statute? What part of the particular provisions of the statute pertaining to the particular cause of action we had on the said trade practices, which I don't think it did. I mean, by the time I got hold of it, plants were dead, they're gone. I have posed a motion to arbitrate, motion to abate the [inaudible] the arbitration based on the fact that is based on the things that have to do with seed labeling, has to do with negligence as to warranty. Our cause of action is under the DTPA, and consumability and under false or deceptive facts or practices. We alleged that the things we lost were of fraud --

JUSTICE: Assuming -- assuming the [inaudible] took your causes of action failed within the statute. Aren't you -- weren't you compelled to bring an arbitration within that time period [inaudible] you're still [inaudible] before you could maintain any legal action?

MR. SKAGGS: That was [inaudible] and there was an argument that

was made by opposing counsel at the time of the hearing, I opposed it. I don't think we had is it -- what was it Havner or was it Gammill but we finally got some clarification about whether if you have a -- a component of a cause of action related facts that you might be compelled and then arbitrated at the same time which is of course the court's interpretation of common law, this court's interpretation and you are the Supreme Court. You can say that and that is the law. But if the legislature excludes and in fact, this is where I'm at. We get in -- in the of a Flemming and FitzgeraldI guess in how is this so on probably got an ambiguous statute, and I'm trying to figure out what the intent of the legislature was. But in 64.003, the legislature in the actual language of the statute when they tell you, what you have to put in the seed label, the first to is maintaining certain legal actions.

JUSTICE: So, you're not arguing that -- that the statute requires you to bring negligence and warranty claims before the crops go out of the field or your -- or your [inaudible].

MR. SKAGGS: Well, I -- I --

JUSTICE: You're just saying that it since you brought a DTPA action this doesn't apply to you at all?

MR. SKAGGS: Well, yeah. Yes, Ma'am --

JUSTICE: But, you're saying --

MR. SKAGGS: Hadn't it been based on negligence I think that -- that all the evidence consideration is supposed to be evident and gotten to the -- I think we probably are in the position before we had to get [inaudible] because clearly the statute, it was based on negligence on the seed label or actual or sort of warranty or even extra clear on 64.002. That's in the first four lines of the statute.

JUSTICE: They say you -- you lose on those claims.

MR. SKAGGS: Well, I lost on the [inaudible] the jury [inaudible]. We didn't submit negligence. We didn't submit seed label. We did submit warranty, and they did give us that but there are a number of reasons why as an alternative ground to believe I wouldn't rely on warranty anyway. If I had only one warranty, and we didn't even have the statute to worry about, I -- I think that the evidence were our problems right now. We already claimed them. If that's what all I got from the jury but I did -- I got the DTPA.

JUSTICE: Okay, we may be sitting as in different directions. So what you're saying is, is that if your claims were based upon warranty of the seed label or negligence, then even though you really kind of go what do you maybe willing to say, well maybe the statutory prerequisite of filing for arbitration may make your claim not [inaudible] and strong.

MR. SKAGGS: I think so, if those were --

JUSTICE: But when you say --

MR. SKAGGS: -- [inaudible] wins.

JUSTICE: Okay, what you're saying is those argue your claims.

MR. SKAGGS: But those aren't our claims --

JUSTICE: You're suing for something else.

MR. SKAGGS: -- sure --

JUSTICE: -- and that you're entitled to consider those other claims?

MR. SKAGGS: Yes.

JUSTICE: Okay.

JUSTICE: May I -- Mr. -- explain to me what a trial looks like if you actually have an arbitration and you have a report done as a result of the arbitration proceeding. It's a non-binding decision, it's a

report based on the investigation that was conducted by the board. You go to trial --

MR. SKAGGS: All right.

JUSTICE: -- did anything preclude either party from bringing in their own experts surveying, I want to do their own investigation during the course that proceeding that's just something that can be put into evidence and considered by the fact-finder at the point in time that the case is resolved.

MR. SKAGGS: That's correct.

JUSTICE: Look, may I ask you. I'm looking at the charge under the statute if you tried this case into a jury. Does the charge contemplated their instructions by the judge on the judge's viewpoint of say the [inaudible] this was delayed and so the arbitration board didn't make a decision?

MR. SKAGGS: I don't know. I really --

JUSTICE: Or do you just offer in the evidence whatever they say and -- and the jury gets to draw whatever conclusion they want to for and against somebody?

MR. SKAGGS: I do not have a clue how you do that without -- I've thought about that --

JUSTICE: Well, you know, I'm just thinking about whether it's somewhat against to somebody's type to work with compensation litigation where you get to the district court, and the jury of the fact-finder gets to look at the previous award and see what happened there, whether that's assuming our situation here.

MR. SKAGGS: Yeah. They are interesting. I don't know if it's assuming a situation interesting and odd thing about it is and the reason it's so hard to answer is because it says that the -- the court may give such weight the court not the finder of fact may give such weight to whatever the arbitration board doesn't see it as he sees it.

JUSTICE: Yeah, I understand it. That -- that's what prompted my question. It doesn't say anything about lack of the fact-finder which would make it a broader opportunity for a jury to view those things. I mean, if something just comes to mind, is that they could judge, a court can judge the weight. How can they instruct the jury when there's not supposed to comment on the way the evidence --

MR. SKAGGS: Well, not even beyond that the -- it -- it doesn't -- it allows either party to introduce the findings for in the evidence. It doesn't appear to give any discretion to court to exclude the finding by the board. And you know, where you'd go if that I assume that if I want an arbitration, I wanna get it done with, he wouldn't and if he want an arbitration, he wanna get it in and I wouldn't and then let it just be an evidence [inaudible] I am.

JUSTICE: Was there this -- was there evidence during the court -- I'm trying to figure how this plays out in the real world.

MR. SKAGGS: Sure.

JUSTICE: 'Cause I've never been involved in one of these. During the trial of this matter, was there any testimony offered and then admitted or refused on the fact that this case was not submitted to the arbitration board in time for them to do the inspection when in fact there was no report available? Was any of that raised during the course of the trial proceedings?

MR. SKAGGS: Judge, I -- I can't answer that question because a flaw in memory of Mr. Murray has gonna have the benefit that I haven't looked through his record now before he gets back after he may be able answer it. I know that it did come up in pretrial motions. Unreasonably, she will -- I know that remarked the -- the actual letter

from the board as evidenced, but I don't remember if that went to the jury or it was at court's exhibit. Although we had a court's exhibit and only in the case --

JUSTICE: Can't you copy it?

MR. SKAGGS: -- and I just don't remember if may have been one of our DTPA test and something like that.

JUSTICE: Well, you don't recall Mr. Wilkins being questioned like, you know, you -- you realized that you didn't get there in time to get an independent inspection, so now the jury that have a benefit of this or anything to that effect or anyone from the seed company being questioned about the fact that they were deprived to present independent investigation. You don't recall of being the subject in --

MR. SKAGGS: I don't think that ever came up in front of the jury. I don't think that ever came up actually in the pretrial court you just said.

JUSTICE: Are you familiar with the fact that the statute is based upon the court of law?

MR. SKAGGS: No, I wasn't.

JUSTICE: I see. You're not familiar with the Ferry-Morse Seed Co. case where [inaudible].

MR. SKAGGS: No, would you tell me what you think it says, I'll -- Well, if I like it I'll agree with you.

JUSTICE: I don't think you'll like it but I don't wanna waste time on that. Now, let me ask you about something else. You say that your claims are not warranty claims, seed label claims, or negligence claims. Instead they're the DTPA that in [inaudible] and those things. My first question is, what is your response to the petitioner's claim as they said in the brief that a warranty includes, quote, any affirmation of the fact in progress which relates to the goods and becomes part of the basis of the bargain citing Texas Business and Commerce Code. The point being that even though your claim is not one for breach of warranty, your claim falls within the broader definition of what that means in the Business and Commerce Code and therefore, should go the same way as the breach of warranty claim goes?

MR. SKAGGS: Sure and that's an obvious question to come up. I certainly see where you're going with that it's a -- it's had some [inaudible] in the trial level with for years. And in fact came up with fair charge [inaudible] is that common law is -- common law [inaudible] statutory law of the UCC and you got that thing that the DTPA calls warranty and how they are different and how they are the same. And there have been some important positions on it but it hasn't on [inaudible] we have a real clear review then I have alternative submissions prepared to give to the trial judge without -- the wording of the warranty along the statute, [inaudible] I can't dispute --

JUSTICE: Let me ask you this --

MR. SKAGGS: -- what you just said about what he says by the definition of warranty is on the [inaudible] --

JUSTICE: Well, then let me ask you this.

MR. SKAGGS: Okay.

JUSTICE: Which claims do you assert to file outside the parameters of what I'm about to read to you?

MR. SKAGGS: Yes.

JUSTICE: Any affirmation of fact or promise which relates to the goods and becomes a part of the basis of the bargain, which claims have you asserted to call outside the scope of that?

MR. SKAGGS: I really even highlighted that before I got up here so you didn't catch me by surprise. False, misleading and deceptive act or

practice under the DTPA. One of the three -- that was in the charge and in fact, the charge, it would have been question -- Question No. 1. One of the three definite issues that we utilize first, I mean a lots of -- I mean a lot of -- that have to do with use of currency claims whenever it came up in this but the third one was I -- I apologize, I don't know if the subsection was actually matches to with the statute but it's the failing to disclose information about Cherokee seed that was known at the time of the transaction with the intention to induce plaintiffs that's otherwise would not have entered into had the information been disclosed.

JUSTICE: And the court of appeals find there was no evidence.

MR. SKAGGS: No, I don't think it did. If they did, I'm certainly will take issue with that. I -- I'm not taking issue with what you're saying. I just don't recall it that way and it -- if that's how they see it, well, I'm certainly willing to discuss things based on the -- on a lot of facts of information. I believe they go to look something if that's actually in the opinion.

JUSTICE: What were you just reading from?

MR. SKAGGS: I was reading from the court's -- I'm sorry, the court's charge and that was Question No. 1.

JUSTICE: One [inaudible] you had on this Court?

MR. SKAGGS: Well, not necessarily. I have -- I still -- we're gonna need to get some direction from the Texas Supreme Court about the distinction between UCC award and the DTPA warranty. If I'm gonna stand here to concede that I don't have a -- if a representation under the DTPA really is warranty and if a -- if any but it's different from, you realize of course that warranty is a separate enumerated basis for liability under the DTPA --

JUSTICE: Let me -- [inaudible] but I have a question --

MR. SKAGGS: -- and there is a separate place for warranty [inaudible]

JUSTICE: -- One and three. You include expressed warranties other than the DTPA warranty.

MR. SKAGGS: I'm sorry. I --

JUSTICE: In both Questions 1 and 3 --

MR. SKAGGS: Yes.

JUSTICE: You asked the jury that expressed warranties that are other than the DTPA warranty.

MR. SKAGGS: And at least I come right out of the DTPA. One of the three are actually longer because number one is longer than the SLAPP and then two is the unconscionable action. Three is whatever we decided we were submitting on the warranty, and I couldn't tell you now whether we were submitting UCC warranty or DTPA warranty.

JUSTICE: At least have --

MR. SKAGGS: I don't remember which are we [inaudible] --

JUSTICE: The first two definitions of under the Question 1, what a warranty is also with [inaudible].

MR. SKAGGS: That's why we gonna need some guidance for.

JUSTICE: And assuming --

MR. SKAGGS: Or even if that's the case, I don't disagree with what -- what you're calling [inaudible]. I don't disagree with what Mr. Murray had said the general definition of warranty is. I don't see any wrong statements that says warranty in this count [inaudible] but the statute is exactly the same thing. It's the warranty under the -- [inaudible]. I don't know. I don't know the answer to that.

JUSTICE: But if this only cuts off some cause of action.

MR. SKAGGS: Right.

JUSTICE: Because arbitration had often said that it would not be very effective because you can sue by the products law, you can sue for fraud as you did, you [inaudible] DTPA.

MR. SKAGGS: Well, that's what this legislature did.

JUSTICE: Whatever --

MR. SKAGGS: And the statute said --

JUSTICE: It wouldn't be very effective in achieving its purpose if [inaudible] of action.

MR. SKAGGS: Probably. If -- if that's what they intended to do.

JUSTICE: Any other questions? Thank you, Counsel.

MR. SKAGGS: Thank you.

JUSTICE: Mr. Skaggs this is a non -- I'm sorry, I'm sorry, Mr. Murray, this is a non-binding -- non-binding procedure.

REBUTTAL ARGUMENT OF CHARLES C. MURRAY ON BEHALF OF THE PETITIONER

MR. MURRAY: It is, I --

JUSTICE: Okay and -- and also you don't have any reason to dispute that -- excuse me -- in the type of dispute that might arise between a purchaser of seed and a seller of seed but there could be causes of action at common law that arise from the transaction.

MR. MURRAY: Yes.

JUSTICE: Right? Okay now, if that's the case, and as a purchaser of seed, I have a common-law cause of action and I am required to submit to a non-binding arbitration procedure that if I failed to comply with the statute, cuts off my right there forth. Why doesn't that interpretation of the statute lead to constitutional problems these of the open courts because I have cause of action common law, I never got it litigated in any place in a binding forum and now, I am precluded from taking a common-law cause of action of the court? Why doesn't your, I mean, help me through that.

MR. MURRAY: 'Cause [inaudible] has not been raised.

JUSTICE: I -- I -- But I'm concerned about the implication to Constitution and we have to interpret statutes in a way --

MR. MURRAY: I appreciate --

JUSTICE: -- it rendered them constitutional. And what -- what I -- the question after listening to the discourse throughout the morning leads me to wonder why your interpretation couldn't lead to in fact cutting off someone from access to the court for resolution of the claim of common law, which the open courts provision of the Constitution of Texas prohibits the legislature from doing.

MR. MURRAY: Your Honor, I suggest it's not any different from the discourse decision in the Jack Engel case. Where you had contractual claims and you have misrepresentation claims. And the contractual claims were subject to an arbitration agreement and there is --

JUSTICE: And they were -- and they were subject -- and they were to subject to a binding arbitration?

MR. MURRAY: Subject to a binding arbitration agreement --

JUSTICE: Yes.

MR. MURRAY: -- with misrepresentation claims, common-law misrepresentation claims or not. And the court said because those claims are all factually intertwined, it all has to go to arbitration. So -- so --

JUSTICE: Well, but -- but if a party has agreed to go to

arbitration as contracted because that's part of the transaction that they have entered into with the opposing party and in fact, the result is a binding decision where in fact, they have basically by contract chosen to litigate their matter in a private piece of, you know, called private forum as opposed to courts. That's a very different circumstance in a situation that cuts off access of the courts where a common-law cause of action by statute, not by agreement, and that would only lead to a non-binding report in any event.

MR. MURRAY: Well --

JUSTICE: So, I don't see anyone as being the sank into the heart of the -- I --

MR. MURRAY: Well --

JUSTICE: -- I point out a couple of things, common law, non-binding, no contract statute --

MR. MURRAY: Well --

JUSTICE: -- [inaudible] about all tort problems, doesn't it?

MR. MURRAY: Well, respectfully your Honor, I -- I think Engel does entry because there the person agreed only to arbitrate their contract rights not their common-law misrepresentation rights yet because they would factually intertwined, as they are here.

JUSTICE: All right, but -- but --

MR. MURRAY: Then they're cut off from the whole thing.

JUSTICE: Okay, but factual distinction, parties agreed to do that. This is the legislature by statue saying this is what has to happen. It's a legislative action that in fact gives rise to open court issues not a question of what parties --

JUSTICE: Well, if your [inaudible] --

JUSTICE: -- privately do [inaudible] --

MR. MURRAY: -- because the seeds were purchased --

JUSTICE: Can I just --

JUSTICE: -- with a disclaimer [inaudible] --

JUSTICE: I just, I mean I understand that your -- I understand intertwine argument but that's a case where there's a contractual arrangement has been made and the parties have agreed to it. This is legislative action that a purchaser of seed has not consented to in connection with the purchase, has not agreed to or whatever. And in fact, it also leads to a non-binding decision. So, why don't we have the legislature cutting off access to the courts for common-law causes of action if we interpret the statute the way that you say?

MR. MURRAY: Well -- well first of all, I don't think it matters that it's not binding. It is not binding but we were robbed with the right to have a -- have a guidance from the Seed Board and as if we don't think it's any different for them, of course, we got cut off from this common-law misrepresentation claims in Jack Engel.

JUSTICE: Well, but you're not claimant --

JUSTICE: But you know there is --

JUSTICE: -- but you're not the claimant -- you're not the claimant though. I'm talking about a claimant who has guarantee access to the court. You're -- you're the one who's -- you're saying you were denied access to arbitration. I'm talking about whether or not this has been denied which doesn't exist in the constitution. We're talking about -- I'm talking about denial of access to the courts. So, what's at issue here is the fact that you're saying that a plaintiff cannot have access to the court. And my question to you is why doesn't that create a court's problem for that plaintiff, the purchaser of seeds.

MR. MURRAY: Well, the -- it's the only way to stood up from the court is because you didn't timely follow the procedures set out in the

statute. Why is that any different, your Honor, than the DTPA later or other requirements that are [inaudible] --

JUSTICE: Is that the statutory cause of action?

MR. MURRAY: -- to the lawsuit.

JUSTICE: That is statutory cause of action? I'm talking common-law cause of the action.

JUSTICE: Judge [inaudible]

MR. MURRAY: Oh, but [inaudible] Judge Abbott had a question.

JUSTICE: Okay, I'm sorry. Does it make a difference?

JUSTICE: With regard to that question, that the seeds' package on themselves that were purchased by the farmer had the arbitration agreement on there and a -- the prerequisite that in fact, here's exactly what it says, on the seed package itself, did it -- did it not say that arbitration is required as a precondition of maintaining certain legal actions?

MR. MURRAY: Yes, in various statutes. I believe, yes.

JUSTICE: Does that -- Is that tantamount to a contract entered into by the seed purchaser?

MR. MURRAY: I -- I think it is, and it's also fortified by the statute.

JUSTICE: Do you know that there is an attorney general's opinion that says the statute is not binding here

JUSTICE: Judge Baker?

JUSTICE: In fact, my question was the argument made by opposing counsel that as I understood the DTPA action is outside the scope of this act, and it was submitted to the jury, and it will support his judgment, aside from all of the discourse on the act.

MR. MURRAY: In -- on our response to that there's two things, your Honor. First of all, it -- all of these claims were factually intertwined. They're all based on statements like this is a good seed and has excellent dry land potential, and furthermore, all of these causes of action, whether warranty or DTPA misrepresentation or DTPA unconscionability, all have the same causation requirement that he's got to show if he had planted a different seed that he would've gotten a better crop. So, certainly it's a factual --

JUSTICE: Well, but the -- the difference is this argument is, even if the arbitration problem starts to make some of these causes of action, I still have a right to maintain and pursue to a judgment if I can, a DTPA action.

MR. MURRAY: In -- in our suggestion not under the language of the statute because 64.002 says anyone who's planning to be damaged by the buyer of seed to produce or to perform as represented -- as represented by warranty or by label that certainly he is sued to court --

JUSTICE: Or by warranty --

MR. MURRAY: As represented by warranty --

JUSTICE: -- warranty --

MR. MURRAY: -- or label --

JUSTICE: -- label. Okay. All right.

MR. MURRAY: Yes. Certainly, he is such a person. Certainly, he made that claim and the -- our position is the only way he could've awarded the effect of the statute is -- is not to make any plant along those lands at all. We say all of these plants were --

JUSTICE: But -- but he made a statutory claim under the DTPA under one or two or three [inaudible]?

MR. MURRAY: Correct.

JUSTICE: Would you agree that the DTPA was passed by the legislature to furnish consumers with causes of action against

manufacturers and others where they would otherwise not have them?

MR. MURRAY: But there is no exception in the Seed Arbitration Act --

JUSTICE: Why does it have to be when we know the purpose of the DTPA?

MR. MURRAY: Well, because I think the -- the comprehensive nature exist to maintain a legal action and -- and I would --

JUSTICE: But this would be a statutory action not a common law.

MR. MURRAY: Well, again, 64.002 doesn't say to maintain a common law cause of action or a statutory action. I would have certainly raise this as illegal.

JUSTICE: But the language says certain. You know, where on the notice, on the package it says certain legal actions.

MR. MURRAY: Yes.

JUSTICE: Why would they say that if they didn't mean for something this could be out there?

MR. MURRAY: Well, I think that they're certainly made a -- some legal actions. This is not, I'll admit 64.002 is -- is not all encompassing, it concerns every claim that could relate to seed in any way. But I say first that it -- that it regards how you dress him up or what causes of action you plea him under, it relates to all of his claims or at least, they're all intertwined together.

JUSTICE: Any other questions?

JUSTICE: Well, okay so to say, you're basically saying that it's not a prerequisite to all seeds but to some seeds?

MR. MURRAY: It's not -- it's not a prerequisite to all suits and if anything to do with seed. What it says is, if a purchaser of seed has to go one of the act, if he claims to have been damaged by the buyer of seed to produce or perform as represented by one pure label. I say that covers all of these claims would certainly, if there are some, but it doesn't cover the [inaudible] ones.

JUSTICE: Anything else? Thank you, Counsel. That concludes today's oral arguments. The marshall will adjourn the Court.

SPEAKER: All rise. Oyez. Oyez. Oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

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