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Supreme Court of Texas.
Dennis L. MIGA, Petitioner,
v.
Ronald L. JENSEN, Respondent.
No. 00-0932.

October 24, 2001.

Appearances:
Scott P. Stolley, Thompson & Knight LLP, Dallas, TX, for Petitioner.
DONALD L. FALK, Mayer Brown, Houston, TX, for Respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen, Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice Craig T. Enoch, Justice Xavier Rodriguez, Michael H. Schneider Sr., United States District Court, Eastern Texas.

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JUDGE: The Court is ready to hear argument from petitioner in Miga v. Jensen.
SPEAKER: May it please the Court. Mr. Scott Stolley will present argument for the petitioner. The petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SCOTT P. STOLLEY ON BEHALF OF THE PETITIONER

MR. STOLLEY: May it please the Court. I'm Scott Stolley. I'm representing the petitioner Dennis Miga. In Lozano v. Lozano, this Court reinforced two important points about reviewing jury verdicts. First of all, the evidence must be measured against the charge as it is submitted. And secondly, from a circumstantial evidence, the jury is permitted to draw reasonable inferences about the defendant's state of mind. The broad question in this case inquired about the defendant's state of mind. Did the defendant make a promise of future performance with the intent not to perform as promised?
JUDGE: Mr. Stolley, could you address the jurisdictional point?
MR. STOLLEY: Yes, your Honor. The defendant has paid the actual damages. What's that issue in this part of appeal is the contract damages. He has paid those contract damages pursuant to a Rule 11 agreement. A binding unambiguous Rule 11 agreement that says, the --

the payment is unconditional. That means there are no strings attached to the payment. The defendant wants this Court to attach a string so he can pull that payment back. Unconditional is unambiguous. It means unconditional, there are no conditions attached to the payment. He wants this Court to attach a condition, an unstated condition, that would permit him to appeal and give his money back. Now, this is an enforceable Rule 11 agreement. It's not this Court's or any court's job to add unstated terms to the agreement.

JUDGE: So you're saying, even if this Court reversed the court of appeals' decision, the case that there's no way that he could come -- he could seek to return the money under your settlement agreement?

MR. STOLLEY: That is correct, your Honor.

JUDGE: So that's what makes this moot. It's not that he paid the judgment or makes this moot as he has a binding agreement prohibiting him from seeking any return of money. That's your point.

MR. STOLLEY: He has not paid in entirety. He hasn't paid the balance with the interest and attorney's fees. He hasn't paid the portion that he's raising, the disputed amount which is the contract damages.

JUDGE: And -- and whatever this Court does he is now not -- he has given up his right to seek the money back?

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

JUDGE: Do you have a release to that effect, any sort of settlement language that states that?

MR. STOLLEY: What states that is the language saying it's an unconditional payment, word satisfaction of the judgment. Satisfaction means payment. Satisfaction which means the judgment is paid and wiped out, and that part was being paid.

JUDGE: Does the amount of prejudgment interest that he owes, turn on the liability and in -- underlying liability. In other words, even if he can't get the money back, is it still a live issue because how much did the principal amount of judgment will determine how much prejudgment interest is owed?

MR. STOLLEY: The only part that that would affect is the -- that the court of appeals took away $1 million and benefitted at the bargained portion owed to the actual damage is. If this Court were to add those back in, then they're be more interested. If this Court doesn't have that back in then the interest would be, whatever the court of appeals says. Of course, we do have the issue about the court of appeals having taken away the prejudgment interest all together or it wants to be.

JUDGE: What is in Highland Church give us some room to look at other factors -- um -- and -- and view this case as one of implied duress. There's ah -- lot of money at stake here?

MR. STOLLEY: Because you're gonna get in the satellite litigation over what happened, who said what, and what does the agreement mean. We want to get involved into a lot of hassles about meaning of language, intent of the parties, oral evidence who-said-what-to-who. And I don't think this Court should be going down on that road into satellite litigation. In the first place, whether there is actual duress should be a fact question for the jury. We've never had an opportunity for the jury to find whether or not it was under duress that my client caused -- the case law back duress talks about the duress being caused by the defendant. Here, all we have is a natural consequence of the judgment. This Court has gone down the path before of trying to decide the meaning of language regarding indemnity agreements.

JUDGE: Doesn't then the federal rule on this issue -- isn't that

really a better rule? And lastly, satisfaction of the judgment and the agreement on which the judgment says -- the judgment is satisfied, unless it's unequivocal from the agreement that this was to end the litigation. The Court presupposes that that is not a waiver of the right to appeal the legal issues involved in the underlying litigation.

MR. STOLLEY: Well, again the Court is going to get involved in satellite litigation with the presumption --

JUDGE: How -- how would that happen?

MR. STOLLEY: Because the presumption is that the appeal right was not -- was preserved, there's one of the fights over whether or not it's preserved. The presumption --

JUDGE: And that would happen in the appellate process. There would be no -- you wouldn't go out and file a separate lawsuit because the argument has been resolved before the court of appeals makes a decision. Unless it makes a decision, the argument is resolved.

MR. STOLLEY: But I don't that an Appellate Court should be making a fact finding in the first instance. I think the presumption should be opposite from the federal presumption. The presumption should be that the appeal right was given up unless it's expressly preserved. That would --

JUDGE: Now, let me ask, what's the -- maybe you can persuade me there's logic to that, but surely Miga would rather have $23 million in his pocket than the opportunity to earn 10% interest for the year or two, for the appeal to come. I mean, I didn't understand that part of the argument. But gosh! We got $23 million. We would rather knock that $23 million on the risk of getting 10% interest from this fellow.

And so, it -- I don't find that argument persuasive. And the other argument is, the legal issues are established in the trial court. You either have error, or you don't have error. What is the -- what's the real problem here in one party saying, "Hey, I'm sitting here with liability from millions of dollars, earning interest at ten percent -- uh -- every year. I'll just ahead. I can afford it. I can even afford the risk if the guy can't give me the money back. But I'll pay it, get that over with, but I still wanna arrive that -- to challenge whether or not the trial court judgment was correct. If they're not correct, then I'll have the opportunity to get my money back up." What's the significant problem with that process?

MR. STOLLEY: First of all, your Honor, Mr. Miga would not have taken the money if it was subject to a condition.

JUDGE: Well, I have that. I -- I find that unpersuasive that he wouldn't take $23 million on the risk that maybe he'd get an additional $10 million interest. So, I just don't -- I just find that unpersuasive.

MR. STOLLEY: I submit respectfully, your Honor. But it's not the Appellate Court's role to make a fact finding about that. Whether he truly would or would not have --

JUDGE: No, you give that as policy. You simply give that as a policy reason for why the Court opt to stick with the -- when you pay the judgment, one of the considerations is parties rely on it. And -- and you say, "Well, yeah he would rely on it," and I don't find that a -- as persuasive a policy consideration. You might -- you might choose not to, but as a policy consideration, I don't find that persuasive.

MR. STOLLEY: The presumption -- if you presume that the appeal right was preserved you're gonna get into the pragmatic, you got into with indemnity agreements with the Court openly resolved after years of hassle by saying, "We're not gonna force it unless it's expressly stated that indemnity applies to real negligence. We're not gonna get

into these hassles about interpreting the terms of the agreement," that's what the Court should adopt. If the Court's going to change the law in this area, that's what the Court opts to do. The presumption should be -- the burden should be on the defendant to get in expressed reservation of his right to appeal.

JUDGE: Has the respondent correctly characterized the law in other jurisdictions? For example, New York, Florida. Do you take issues in any of those decisions --

MR. STOLLEY: I take issue. Yes, your Honor. I think that the only universal rule drawn from the case law is whether the payment was voluntary or involuntary. The Courts are all over the map, over what standards to apply to determine whether it's voluntary or involuntary. It might not -- it might not even be a reasonable task because you get into all these factors about, was there duress, was there not duress. Is it duress when it's nearly a natural consequence of the judgment that the plaintiff was absolutely not responsive to the Court?

JUDGE: But are there sole jurisdictions that hold in addition to, that you have to have evidence of compromise or settlement, or otherwise voluntary which is not a suit?

MR. STOLLEY: Some of the Courts follow the presumption that the appeal right is still there. Unless the circumstances indicate that the appeal right was somehow relinquished.

JUDGE: And that would include New York, California, Florida.

MR. STOLLEY: I think Florida, I couldn't say for sure about New York and California. I can say this. If that court does apply that presumption, the presumption has been overcome here. The Rule 11 agreement shows that the appeal right was relinquished. The Rule 11 agreement says that the payment was unconditional and that the payment went towards satisfaction of the judgment. So, under either presumption, Miga prevails. But I do encourage this Court to apply the presumption that the defendant has the burden to get an expressed reservation which did not occur. In fact, in this case, the reservation of the defendant wanted was expressed in negotiated out of his draft.

JUDGE: Can you go to the merits of your case? Just essential to the [inaudible].

MR. STOLLEY: I would love to, your Honor, on the fraud issue. Under Lozano we looked at all the evidence, the totality of the circumstantial evidence. When your do that in this case, there is more than enough evidence to support the fraud finding. There's more evidence here than there was in Lozano, where for example, for some defense, all you have is the taking the Fifth Amendment, dodging some discovery, and taking down some posters. Here --

JUDGE: What -- what -- what breach of contracts are left? That's not also a fraud?

MR. STOLLEY: Breach of contract that does not have the company with it. All the factors we have accompanied here denying the offer of promise, attaching one state of conditions to the promise, coercing the defendant, bullying the plaintiff -- bullying the plaintiff, lying about the effect of the release of whether it's going to be dealing with the option later, the inconsistent documentation, leaving the option oral but the release in writing, the gamesmanship he showed in trial by changing strategies at different points of about what his defense is, and by on trial all of a sudden coming up with information he didn't have at the time when he proposed six months before that. The jury could draw from all that circumstantial evidence be inference, a logical bridge that he didn't intend to perform in this contract. Now there's very few situations he's gonna have all of that circumstantial

evidence.

So, over the years, there's been fraudulent promised cases that had come on either way. But there's many more breach of contract cases in the books than there are fraudulent promise cases. It's simply not true that fraudulent promises are going to -- to insert the contract cause of action.

JUDGE: How are we gonna have a fraud claim when there's a dispute over what the terms of the oral agreement are by necessity?

MR. STOLLEY: Not necessarily, the Court could put some limits on it as I suggested, for example, that if the dispute over the terms goes to a material term, it goes to the heart of the bargain. That's tantamount to denying the entire promise. Then that could be a probable cause. In one of the cases, for example, when the defendant cites the Hearthshire case, it was a simple dispute about whether the contract containing an arbitration term. That didn't go to the heart of the defendant's obligation to perform. So it didn't give rise to a fraudulent promise --

JUDGE: Let me ask you, if the -- a couple of questions -- if the jury concludes that there was a binding obligation for the stock options, what happens to your fraud claim? They -- the fraud claim is premised on there is no binding obligation. There was a misrepresentation about the obligation and so there's no -- implicit in that is, then there's no obligation transferred, but we are forced to transfer because it was fraudulent. But if the Court -- if the jury concludes there was a binding obligation here, then there's no fraud, is there?

MR. STOLLEY: Yes there is. The fraud is not premised on whether -- uh -- the contract was binding. The fraud is premised on whether or not it's binding, he never intended to perform.

JUDGE: But it doesn't -- if the intend to perform is not -- is not relevant in a breach of contract case because either the obligation is binding or it's not, I'm -- you know, I may agree to do something. I may never have any intent to honor that, but if the jury finds that that's a binding contract, then irrespective to what intended, I'm obligated and judgment will be reflected as such, wouldn't it?

MR. STOLLEY: Contract would be enforceable but at the same time the defendant would have committed the tort fraudulent promise.

JUDGE: And so, if there was a fraudulent promise, then what would be the nature of the damages? If other than the contract damages, what the contract damages would've been -- what are other damages?

MR. STOLLEY: Punitive damages. This law -- this -- this state recognizes punitive damages for fraudulent tortuous conduct, plus the defendant in this case says that tort damages are different from contract damages.

JUDGE: Any other questions? Thank you Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Donald Falk to present argument for the respondent.

ORAL ARGUMENT OF DONALD L. FALK ON BEHALF OF THE RESPONDENT

MR. FALK: Donald Falk for respondent Ronald Jensen, your Honors. May it please the Court. There are three significant issues in this case. First, Miga cannot make a fraud case out of this contract claim

because there is no evidence that Jensen did not intend to perform the option at the time that he gave it. Indeed there's no evidence that he's not intended to perform the option anytime before Miga quit. The second issue also concerns the distinction between tort and contract that goes to the timing of the damages calculation. When contract damages are based on the value of the performance, here is the value of the securities minus the option price. That performance must be valued at the time of the breach. This Court has applied that mainstream rule unless the breach of the contract is essentially like a conversion because payment for the performance was made in advance. In that case --

JUDGE: What is -- what is the principal value of an option?

MR. FALK: The -- the principal value of an option is the ability to purchase stock at a particular time at a particular price.

JUDGE: And so it would be the profit that you can make on the options, the lucrative, sort of betting on the calm nature of the options.

MR. FALK: Well, the option -- what -- what we have here is a failure to exercise the options. One of the stock event, so the value of the option is necessarily the difference between the value of the stock at the time he tried to exercise and the price of the option.

JUDGE: Well, I guess my point is, it seems like if we -- if we were to apply your measure of damages, then what's the incentive for someone who breaches a stock option agreement like this? And -- and -- and as anticipated, the stock's gonna go up. What's the incentive for them to perform on the agreement if we do the date of the breach as the measure of damages?

MR. FALK: Well, the date of the breach is -- as I say, has been in every jurisdiction including this one, the measure of damages unless there has bee -- unless the nonbreach or the breaching party retains both the payment and -- and the price. The incentive is $1million. In this case, if someone tries to exercise in the money options as the jury found these were basically in the money options, the value of security was more than the option price of 25 times the option price as it happens. So same incentive not to breach any contract, whether or not a stock will go up in the future, is precisely the type of speculative concern that has been excluded from contract --

JUDGE: Hasn't there been a --

JUDGE: Go ahead.

JUDGE: Hasn't there been a retention by the employer in this instance? In lieu of wage increases that may be offered to the employee in that time, they're offering these options.

MR. FALK: That -- that he has an option because of that, he has a -- he has lawsuit at all. He has the option contract. He did not pay for the stock. And this is -- this is -- this is a case about a refusal to exercise an option.

JUDGE: Well, didn't the employee pay for it through continued employment?

MR. FALK: He paid for the option but not for the stock. In -- in -- in the -- under the -- under the finding that there was a contract at all. He -- he did pay for the option, the ability to at the time of his choice asked reasonable time to ask for delivery of the stock at stated price. That is what was breached here.

JUDGE: On the mootness question, um -- I gave Mr. Stolley a hard time about just -- I don't find it persuasive that a person would give up 23 million dollars on the hopes of getting ten percent interest during the course of an appeal. But I am troubled by the litigating

over how to get the money back. It seems to me a rule that says that if you pay the judgment, meaning we've given the money to the other side, you really give up the right to appeal because all the Court's then are just deciding the -- the kinda -- the law principle behind it. But in fact, for you to get the money back, you've got to go back to trial court, maybe initiating new proceeding, and go after trying to recover the money. There's not a mechanism in the Appellate Court to direct the party to return the money that you voluntarily, unconditionally gave to them. Why shouldn't the Court have a bright line rule that says pay the judgment and that's the only reason you do. Just to pay it, avoid post judgment interest or -- or whatever that is. The Court just doesn't want to buy itself additional litigation on trying to get it back if we decide that the reason of the judgment is wrong.

MR. FALK: Well, your Honor, I think that's the wrong assault for -- for a number of reasons. One, it -- it is outside the bounds of experience in this state or in other states for people to pay judgments without execution and to have to go get it back. In fact, if there's been an execution as a whole circuit form of action and the code to do that. There hasn't been an execution. It would seem to me there are two things, some Courts have suggested rather vaguely, that an order, maybe you have to return the judgment to clear the payment as pursuant to an agreed order. Conceivably, the trial court would have jurisdiction to issue an order that the -- that that money be repaid. If -- if that is -- if that violates this -- this Court's sense of the proper procedure at the very least, an action for money having received could be [inaudible] here. That -- the principle of that action is that someone who paid over money at some point, and the person whom the money has paid does not have the right to it. That seems to cover exactly this disposition. And yes, there might be some -- some litigation, it seems rather -- rather minor -- rather minor possibility that that would be a serious litigation here. I would add that this -- I was just scouring --

JUDGE: Now -- now your position though is that because in the significant difference in what interests you would be charged in the open market based on what the legislature requires to be paid post judgment is all that it takes to force someone into paying a judgment. Your -- your scenario kinda indicates to me that anybody who's sophisticated financially would opt to pay their -- if they got a judgment admission, opt to pay it immediately and then proceed with the appeal because of the difference in the interest rates. So, it seemed to me that our rule that would permit one to do that would have substantial risk of increasing litigation over getting judgment's return.

MR. FALK: Well, I guess I have two responses to that as well. First, I guess the first basic response is what's wrong with encouraging the payment of judgments. We think, as we said in our brief, that this Court should adopt the mainstream view. The view that the federal system and -- and at least the major states and we believe that the majority of the states would certainly and the other large states with a lot of business and a lot of contract litigation that places the presumption to the effect that payment of the judgment by itself does not moot an appeal unless there is a -- signs of -- there's has been a compromise or settlement. There are no signs --

JUDGE: But isn't this more than -- isn't this more than payment by itself, I mean, it was termed unconditional and satisfaction of the judgment and in fact the preservation of appeals language was stricken.

MR. FALK: Well --

JUDGE: I mean, I -- we're gonna talk about presumptions here. It seemed to work the other way.

MR. FALK: Well, let me -- let me address there are three questions in that, and let me address them one at the time. Unconditional -- certainly under the voluntariness test that the Court's current voluntariness test, unconditional does not mean the same thing as voluntary any more than unconditional surrenders or voluntary surrender. Yet it means that the plaintiff could spend the money. It didn't have to be kept in escrow, nothing else. The plaintiff could spend the money and -- and Mr. Jensen took the risk that he'd be able to get it back. There was no satisfaction given. In fact, Mr. Miga argued strenuously to the trial court that this would not satisfy the judgment and there's nothing in this agreement that says that any part of any judgment, or any claim is satisfied, compromised, or settled.

JUDGE: But wasn't it -- it termed as payment toward satisfaction of the judgment?

MR. FALK: But it was not a gift, your Honor. It was certainly connected up with -- it was connected up with this -- this lawsuit and needed to be connected up with this lawsuit and that the judgment were affirmed, it would -- it would satisfy that. But that does not by any means mean that there was any relinquishment of the right to seek return of the money upon reversal by this Court.

JUDGE: This seems to me that it would be very easy to fit in there. This was without prejudice to our right to appeal. And apparently, there was some attempt to do that, but that was stricken through. And how in the hell we can read that other than a presumption of the other way?

MR. FALK: Well, I -- I don't think that should be a presumption, either way at all. What happened was that provision essentially said that the -- that the -- Miga would waive his right to bring the argument he brought in this Court. Waive his right to make the jurisdictional argument. He didn't want to do that. He didn't agree to do that. And the agreement was to --

JUDGE: Is this in the record?

MR. FALK: Well, he certainly refused that. The -- the -- the terms are the -- the terms have been -- the terms of the --

JUDGE: But what you're telling that right now is not in the record?

MR. FALK: Well, the terms of the agreement --

JUDGE: About why this was stricken through.

MR. FALK: Well, I -- I -- I believe the term -- I believe that is -- is in the record before this Court, which is a what that --

JUDGE: Was there an affidavit attached to one of the briefs explaining that, isn't that correct?

MR. FALK: There's an affidavit attached to the brief. And in fact, that Mr. Miga wouldn't agree to the provision, I think is -- I don't think that's under any dispute here.

JUDGE: But the reasons you're giving for one, I -- I didn't see that in the record, maybe I just missed it.

MR. FALK: Well, there's an affidavit to the effect that the parties -- they would not agree to waive their argument. We would not agree to waive our appeal. And so we basically chewed up the -- the jurisdictional issues here.

JUDGE: I understand, but you were giving reasons as to why that was, I didn't see that in the record.

MR. FALK: Well, I did not -- certainly did not mean to go -- go beyond the scope of the record. What I thought I was doing was saying

they would not agree. I was trying to -- to explain what that -- what the provision, which is in the record says, which is -- which is essentially made an impossible or would've been an impossible for them to able to stop from challenging the jurisdiction. And I guess that's the simple thing and that -- that -- that is in the record. Why they did not wanna do that was not in the record, but I don't think it's subject to any reasonable dispute.

JUDGE: Can I ask you a question? Your client wants to preserve his appeal based on the issues that the measured damages in the trial court was incorrect. Is that right?

MR. FALK: The -- the measure of contract damages in the trial court and affirmed, yes.

JUDGE: And if you win that point, if I understand, that means that the judgments are being reformed and your client would only owe the million dollars that the jury found as, whatever it was, and not the profits because the measure of damage submitted was at the time of trial. is that correct? And so, the bottom line that many people fail, you would get a refund of $22 million? Obviously [inaudible]

MR. FALK: Roughly, yes. I mean there would be prejudgment interest on the million dollars and then reposted -- pre -- pre- and postjudgment.

JUDGE: So that's how that works? --

MR. FALK: That -- that's --

JUDGE: -- you got to win that point on the measured damages in order to be entitled to a refund of what you paid.

MR. FALK: Absolutely.

JUDGE: And to able to do that you have to keep the appeal here.

MR. FALK: Absolutely.

JUDGE: Well, what about the other side's cross petitions saying, well there was fraud and we're entitled to a punitive damages which would add another, what was it, $46 million or whatever it was to what was being owed. That is still here before us, isn't it? On the punitive damages?

MR. FALK: Well, the punitive damages aspect -- um -- as punitive damages has not been passed upon by any Court yet and this is in front of this Court whether there is a fraud claim raised before this Court.

JUDGE: Well, but I mean, if there's a fraud claim then the Court reveals that there's no evidence of the fraud claim. So, no recovery --

MR. FALK: Right.

JUDGE: -- for the component which is probably fine with you. But you said it, well now that there wasn't, I mean we are entitled to get our fraud damages which include the punitives. So, that's a substantial amount of money incurred from his side of the case. Is that true?

MR. FALK: There certainly is substantially amount of money. All the only point I was trying to make, your Honor, was that whether punitive damages were justifiable under the law has not been passed upon separately in the part from whether there was any fraud claims at all. That -- that's the only point I was trying to clarify. But yes, there is a significant -- it's a significant amount of money.

JUDGE: In other jurisdictions where the Courts allow the parties to satisfy the judgment and then appeal and then get the money back, how's that handled procedurally that through the common law, through rules?

MR. FALK: I think it varies across the many states in which it is not something that's litigated very often because it -- it may be litigated if the if the party is out of money, and then the party that took the benefit is out of money. But I think it varies sometimes. It

would be statutory provision. I'm not closely familiar with it, your Honor, but I believe, that in some Courts -- some Courts this would be the trial coalition in order under its, you know, general equitable powers ordering the return of the money, in some Courts there will be a separate action and in -- in some states, I believe, there's -- as there is here for a judgment satisfied the execution there then there may be a coverage. I think at -- that there is a positive in the jurisdictions.

JUDGE: On the -- on the damages question, the -- the measure of this Court has applied has been the normal measure. The distinction does not justify it yet. The distinction has been made in other court's and in this Court, that if -- if the amounts of conversion you get the tort-like remedy. There's no evidence for that here. In fact, the other Courts have applied that as far as we can tell, this is the only Court that in a contract setting or nearly the only one even in the tort setting that -- that allows the damages to run up, sort of to the day of trial as opposed to the reasonable time after conversion. In fact, the Texas Courts generally apply a much more conservative rule for conversion itself. Here, there's no distinction. At least none has been offered between the reasonable time rule and the time of breach because the reasonable time rule is usually -- is almost without exception. It doesn't exceed a couple of months.

In fact -- and that Mr. Miga testified the on his last -- last piece of testimony in page 92 of the six-volume record that he didn't know any -- anything that would change the value of the company in March, at least seven months after the breach. I don't know that there is anything really to add on the fraud claim beyond what the Court -- what the Court said. I am happy to answer any questions on. I think of really -- the really basic concern here is whether a dispute over the term, a dispute that doesn't arise until quite a bit later is or is it manifested at least until quite a bit later is enough to suggest that the option order did not intend to perform the contract at the time the contract was entered into. I -- I think that that can't, there is no limiting principle that -- that Mr. Miga has suggested, apart from the set of rules of this Court -- this Court has applied or someone says contemporaneously or nearly contemporaneously though ushered on the intent to perform that part of the contract.

Certainly even if that were significant, the limits placed on the option according to Mr. Jensen's testimony did not render it a nullity or render it worthless. There would be no difference if Miga had remained employed and made the option under the Court's design to order royalty even under the strict dispute. He would still have made about 50% on his money which isn't true, which isn't bad for a day's work.

JUDGE: Mr. Falk, the -- you suggest, isn't it, that if the date of the breach is not when he assessed the value and saves within a reasonable period of time. What would be an -- what would you suggest to meet the elements for determining reasonableness that we -- we have difficult time because for us, reasonableness necessarily implicates some sort of jury findings about whether it was reasonable. What -- what elements would you expect the jury as to -- what was the reasonable period of time when exercising stock option?

MR. FALK: Well, to begin with, I don't think the reasonable time measure's appropriate here because the conversion measure is inappropriate because the -- the stock wasn't paid for in advance. If but -- but to answer the question, if it were appropriate, usually a reasonable time is when it's been applied, it usually has to do with maybe some restrictions on the stock that has to come off, there maybe

some -- some characteristics of the market that are particularly odd here with the private transactions, so it might be a couple of months. Of course, the Court -- the Courts -- the Courts of Texas and every other state deal with some frequency in cases involving private stock.

Family disputes, rather disputes between people who own pieces of private companies. And then in the contract setting at least, it's always just been the time of the breach even though of course in -- in reality, it takes more than -- more than a nanosecond to -- to dispose a stock of that kind. That -- that's why, I think the time of the breach is -- is -- is perfectly acceptable measure here especially since the evaluation of a private security is -- is gonna be approved up through testimony, either it has a bonifide offers or to intrinsic value, and so on and so forth, which does not -- does not depend so much on -- on the fluctuations within a few days in the market. One -- one example that it is -- is one example ah -- is it that if someone has a massive amount of stock, then we credit the company. It may not maybe unreasonable to suggest that they could've sold them all one day. But here, you'll be looking at a private transaction if a reasonable time worth of the infer.

JUDGE: Let me -- let me ask you that it in a circumstance like this where the breach occurs at the same time the option is -- is attempt to be exercise and there is recognized market. There -- there's a price for the option in and there's a recognized market value for the option. It seems to me that's one argument presigned in this case that opt to apply. But it seems to me that there's some authority out there indicating that -- that isn't necessary always in the case and to say when somebody anticipatorily repudiates the option and there is no -- I mean at market. Is -- is there any indication in the authorities out there that the reasonableness test is -- is a -- a test that you used to when the circumstances of a breach contemporaneous with the -- effort exercise and recognized market doesn't exist? Is there -- is a notion of that -- that is a substitute when certain factors don't exist is it an independent decision by the Court?

MR. FALK: Well most as I -- as I say most -- most Courts do not even apply a reasonableness test unless you are in a conversion-like situation. But those that do, you can repack, you can -- you can look at the question one of two ways. And certain situations were talking about often there is something that is restricting the accomplishment of the performance. Strictly, if it is an anticipatory breach, some of the cases that -- that were cited on -- on both sides for example involve warrants or other agreements that would require the breaching party to register the security. That process takes some months then the stocks would be issued, and only then would be nonbreaching party have the ability to realize -- realize his profit, the benefit of his bargain.

So that if the breach was in November, as for -- for the exercise of the conversion, whatever, or stock or whatever, might have been in November but there is no way have the performance been made that it would have been due and complete until March than the Courts have generally said. March is the time to evaluate. But -- so, I think the answer to your questions is "yes." But for the most part in those situations, you can also refrain the questions when the performance is due and when the breach really affects the ---

JUDGE: Mr. Falk, I understand that the value was submitted to the jury at the time of trial.

MR. FALK: Or a number of values were summit to the jury but the -- the -- it is undisputed and indisputable that the jury arrived at its

so called lost profits figure and -- and -- that by multiplying the number of shares by the price right before trial, the most recent price introduced into evidence

JUDGE: But in your argument for value at the time of the breach correctly measured, would you have made that argument if this case was dragged in January of this year, when I understand the stock was bought in nickel?

MR. FALK: Well the -- the -- the prevailing rule the -- the rule that the mainstream and the bedrock rule that this Court has always adhered to has been the time of the breach. So the argument that the -- and all Courts have been ah -- have ah -- even those that permit a reasonable time after the breach have allowed the plaintiff. Unless there's some other limitation on the ability to sell the material or commodity or the superiority of luck, then to get the highest price within the reasonable time so that -- I mean, I don't think there we would have a leg to stand on it. If after we agree with the Court's have said and if you're going to let the plaintiff get the benefit of -- of -- of these years have grown up, then defendant ought to get the benefit too. But the rule has been and should remain that it's at the time of the breach. That's what -- that's what's foreseeable. That's when people are deciding what to do with the contract. When to enter into it, when to break it. And this Court has generally recognized that -- that it's permissible to break contracts without being subjected to court-like remedies. You have to look at what people were thinking of, what people were looking at that time. And at that time, the time of the breach, that value takes into account what happens in the future, what best guessed people have at that time and that's the measure. Thank you.

JUDGE: Any other questions? Thank you Counsel.

MR. FALK: Thank you.

REBUTTAL ARGUMENT OF SCOTT P. STOLLEY ON BEHALF OF THE PETITIONER

MR. STOLLEY: One point on the witness issue. I think that the defendant's argument illustrates why this Court should not go down the path of trying to decide for decipher ambiguous -- agreements. And we should require explicit reservation. To defend at once you have to parse the word unconditional and said well it means this or it means that, it doesn't mean totally unconditional. It's kinda like the defendant is saying it depends on what the meaning of is. I urge this Court not to go down that path. On the fraud issue, many Courts including this Court have said breach of the promise plus denial of the promise is sufficient to constitute evidence to support fraud planning.

Now in every case like this is going to be a fair performance, so what tips in over the edge in that circumstance is denial of the promise. If a logical bridge can be drawn between the denial of the promise and the inference that the defendant didn't intend to perform then what's logically?

JUDGE: I'm having trouble Counsel. I mean, if to prove in this theory that at the time the promise was made, there was never intend to perform, so how is that where a subsequent denial of the promise evidence of intent at that time?

MR. STOLLEY: The Courts have said in many cases including this Court that denial of the promise is post contract circumstantial

evidence that bears on what his intend was at the time of contract that a logically bridge can be drawn, that inference can be drawn. There is a connection. Now if that is the case, then certainly that -- that bridge can be drawn. That connection can be made with respect to the other circumstantial evidence that was offered in this case. The Courts have recognized that the other circumstantial evidences are categorized and if those categories of evidence are sufficient for the jury to draw the inference. In -- in this kind and type of case, you have --

JUDGE: But can't you draw inference the other way? Was there evidence here where another employee that was offered the options, other family members were offered the options, they received the options. So why isn't this evidence just a mere employer's discontent that their valued employee decided to leave and now post -- post events, he's become upset for the employee and he's decided not to put all the terms and the option.

MR. STOLLEY: That was an inference the jury could have drawn. But they chose not. The chose to draw the inference that he didn't intend to perform. They have the opportunity to see the man testify. They had the chance to look him in the eye and decide that they didn't believe him. They have the chance to decide they believe Mr. Miga. That Mr. Miga was bullied, that he was coerced, that he was lied to. And the jury had the opportunity to refer all of that conduct that this man never intended to perform. This is merely deciding not to perform later on. Um -- so I -- I submit that logical bridge can be drawn. In a case like this, you have to rely on post contract conduct. The defendant never signs a contract. He is saying "I'm not going to perform. You have to rely on later evidence to infer what he intended at the time." That's the only way this kind -- kind of claim can proven, and this Court has recognized for merely a 150 years that fraudulent promise is a legitimate cause of action in Texas. Regarding the damages question, the defendant is asking for a nonprecedented rule. He's asking this Court to hold the consequential damages are simply not available. This Court has said many times that direct damages are one measure, but if the plaintiff isn't made whole, consequential damages were also applied and pending for approval and found by the jury. He wants to tell this Court that Mr. Magi doesn't get any consequential damages.

JUDGE: In terms of that consequential you're talking about the lost profits?

MR. STOLLEY: Yes your Honor. And -- and leaving out the consequential damages means that basically a loss presuming a forced sale at the time of the breach. The law is presuming that Mr. Magi was forced to sell at the time of the breach and that's all he gets.

JUDGE: Difficulty with your argument seems to me -- to be that if the stock had gone to zero eventually you would say while we get the breach, we get the damages as in a breach but just don't get anything after that, sort of a one way ratchet. You get something no matter what and maybe you'll get a whole lot more.

MR. STOLLEY: That's always the case. The plaintiff can get the direct damages as a matter of law. It can choose whether or not he wants to seek consequential damages. If the consequential damages are zero, although negative, it seems not to go after the case and still gets as directing --

JUDGE: But in their prerequisite for either loss of profit or consequential damages is they got to be reasonably foreseeable and by definitions, stock of this type is volatile value. There's just no way of knowing when it's gonna go up or down.

MR. STOLLEY: Nobody has a crystal ball but it was reasonably

foreseeable to Jensen that the price of the stock would go up. That's why he bought the company. That's why he gave the options to Miga. That's why he gave the options to his children. He expected -- reasonably expected the price would go up. And now, he's expectation proved to be true --

JUDGE: But now it's going down.

MR. STOLLEY: If you believe the extra record of evidence. So the --

JUDGE: But stock by its regulations are risky. It implies that very few -- very few people would say I bet [inaudible] that this stock is gonna go up. It is a risk.

MR. STOLLEY: It fluctuates. But the -- the test is whether the damages themselves and the fact that damages occurs is reasonably foreseeable or not. The amount -- you don't have to reasonably foresee the amount.

JUDGE: Are there any other -- is there any other authority out there that would measure the damages as at -- as of the time of the trial or a stock option?

MR. STOLLEY: Well, there are cases that cited within the brief. I can't tell you, they're on the top of my head where, of course, had replied either randomly measured the highest and immediate value or the value of the trial. But again, the measure you're proposing, your Honor, is not what the Court has submitted. The Court submitted lost of profits and the jury was entitled the find that his paper profit was the -- the map -- the value of the stock at the time of trial.

JUDGE: Any other question?

JUDGE: Did -- did you seek for specific performance?

MR. STOLLEY: That was one of the claims originally.

JUDGE: But was that dropped before trial?

MR. STOLLEY: I -- I'm not clear on what happened to it. It was dropped or it was somehow dismissed by the Court.

JUDGE: Because it seems on -- on the theory of specific performance for the bridge um -- under that theory and they would be required to perform by giving it the options at the day of trial.

MR. STOLLEY: If specific performance was granted and that's right.

JUDGE: And at the day of trial, they would have been worth the amount the jury rewarded?

MR. STOLLEY: That's correct. That's --

JUDGE: I'm a little bit puzzled why a specific performance wasn't pursued.

MR. STOLLEY: Well the -- that's to disconnect between the defendant's desire only to limit to the value of the trial, whereas a specific performance would clearly give the value later. But the defendant took the position that specific performance was not available because it's not generally available when damage is qualified.

JUDGE: Any other question? Thank you, Counsel. That concludes the arguments on the first cause.

SPEAKER: All rise.

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