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Supreme Court of Texas.
Seagull Energy E and P, Inc., Petitioner,
v.
Eland Energy, Inc., Respondent.
No. 04-0662.

November 30, 2005.

Appearances:
William P. Maines, (argued), Fulbright & Jaworski L.L.P., Houston, TX, for petitioner.
Carl D. Rosenblum, (argued), Jones Walker, New Orleans, LA, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill did not participate in the decision, Justice David Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister did not participate in the decision.

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JUSTICE: Please be seated. Court is ready to hear argument in 04-0662 Seagull Energy E and P versus Eland Energy Inc.
COURT CLERK: May it please the Court, Mr. William Maines we're presenting [inaudible] petitioner will reserve a five minutes for rebuttal.

ORAL ARGUMENT OF WILLIAM P. MAINES ON BEHALF OF THE PETITIONER

MR. MAINES: Good morning. I'm William Maines my calling for voice and I represents Seagull Energy Exploration Production which is now for a series of accusations for Eland Energy Corporation. Seagull was the operator of the auction or well which are the subject of this dispute. Eland was a participating interest in her-- in this well's. And one of the defendants in the trial allowed. We're here today presenting the Court with a very narrow issue and the issue is, is this, "Ones Eland assign that it's interest to Nor-Tex did Eland can make liable under the operating agreements when Nor-Tex defaulted in it's obligation that they is a portion share of a certain cost the defendant [inaudible]."
JUSTICE: Why wouldn't it be?
MR. MAINES: We believe it is -

JUSTICE: Should the contract . . .

MR. MAINES: - we believe it is.

JUSTICE: Because the contract, contractual language?

MR. MAINES: If the, the, the Court of Appeals held that it was not related to it's error because the contract does not expressing provide in the cost and sharing provision or the assignment provision. It does not contain the express orders that there is continuing liability after an assignment of a participating interest. That was the basis of the Court of Appeals opinion and we believe that was error.

JUSTICE: It seems to be a good bet of a disagreement about what really happens out there. Why is that?

MR. MAINES: Because this doesn't happen very often. As a general rule particularly in the offshore because these projects were so expensive to drill and so expensive to explore and develop. It is rare and, and this was one point that the parties did agree on about what really happens up there during this proper proceedings it is rare for a participating interest interest owner to default the performance. Our witnesses represent said that Mr. Allan of the co-member of Eland admitted that, that is were indicated that is also the case in this experience. It's a, it's a rare, it's rare occurrence in this, in this goes to the, the issue of whether or not there is a custom and practice with respect to what happens here and our position is; first of all, that there is not, it is undisputed this doesn't happened very often. And, and second, at the very best the evidence of trial indicated that our client Seagull when the issue joint us into it's billing look to the-- looks to current interest standards to pay but there's nothing extraordinary about that, that's nothing more than general business practice that companies expect their, their people within the business to pay, pay their debts when they're due.

JUSTICE: That's what the Court of Appeal said, that's what the Court of Appeals said. Isn't it? You look at the contract. Contract says, the owners pay, the owners for the one's you bill.

MR. MAINES: That was the basis of the, of the Court of Appeal's ruling. Yes. That was the basis of -

JUSTICE: The calls this what the contract said?

MR. MAINES: Because the contract, the contract does not expressly state that there is continuing liability but it also doesn't expressly the state that there is not continuing liability.

JUSTICE: But it does specify two page.

MR. MAINES: It specified that current interest in this case-- current join interest billings but it does not speak directly to what happens when there is a default after an assignment.

JUSTICE: Is it going to create problem to this contracts for the sign ability if there is clause in there saying if you want some as you need always responsible.

MR. MAINES: It, it will not and if there is no issue here about the validity of the assignments the operating agreements are assignable?

JUSTICE: No that was not my question was does it create a problem in the industry? If that calls is uncertain into the contract so that someone who purchases and takes you to sign can read in there and says if you take this assignment you're always going to be liable from here all that. Is that create problems with the industry?

MR. MAINES: It, it should not create problems with the industry. It, it shouldn't, it shouldn't win that in ability-- the ability of current interest owner to assign it's interest as long as it assigns it's interest to a financial refund before and companies deal with this

in a couple of different ways.

JUSTICE: The question, that if you re-- if, if the industry read the Court Appeals opinion isn't, isn't that going to be the requirement from now on if you want someone to be liable from now on you have to say so in the agreement so they can read it and find out what our obligation are sued, is-- wouldn't that be and then affect the industry hope when those policies in there?

MR. MAINES: The, the better practice would be the-- to express that requirement in words in the contract, yes. Our position is that it's not required who that language to be there because that's what the law requires that's what the statement section 318-3 requires that's what the five Court of Appeals cases that we cited to the court have held consistently. I, I, I want to follow up on the point your making of about the assignment because we're not challenging the validity of the assignment we're not trying to create our duo that does restrict the assign ability of interests. We're only asking the Court to applied the restatement view and the common law view that there is continuing liability absent in agreement otherwise for, for release or discharge by the original obligate to the contract and, and we're not asking the court to create any kind of implied covenant that serves to restrict the assign ability we, we agree that assign ability is a good thing that if companies not assign their interest and they believe that, that's in the, in their best performances interest issue he able to do so. The theory of our case has always been though that under the restatement view and under the cases that we cited to the court there is continuing liability after party assigns it's contractual rights and we see this in the 17-18 Associates versus Sunwest Case in the land or tenant contracts. We see this in Jones versus Cooper in the case of the assign of patent rights. We see this in murder case [inaudible] called the Post versus Perruquet in the context of a the set a sailed for William Gas. The Court of Appeals never really reach this point and, and this was really the heart of our theory of the case but the Court of Appeals never reach that point because it concluded two things. First, the Court of Appeals concluded that since the agreement did not expressly provide for continuing liability then your should not be continuing liability but in addition, the Court of Appeals concluded and this is really I think what Elands argument is and they say this claim on page order in their brief. Ones your no longer an owner you have no liability and, and this is were we believe the Court of Appeals went astray. That is not what the contract says under, under article-- the relevant provisions here article 8 and article 14. Article 8 merely indicates that, that participating interest owners share cost in if-- in portion to their participating interest. All our colleague does is sets up the, the, the manner of which the caused, caused or allocate. Our 14 deals with the issue of cost for abandonment of well abandonment flat form removal liabilities but the operating agreements are silent as to what happens with respect to cost one's there's been an assignment. So the issue becomes which way does an assignments cut. And our position is that, the assignment is, is, is answered by the restatement view which is-- if there is continuing liability absent release or an agreement otherwise by the original obligated the contract the operator. And by Texas case are which holds the same effect.

JUSTICE: Is does an assignments have to incorporate whatever the general rule law is isn't.

MR. MAINES: Yes it does.

JUSTICE: He expect contracting parties to say in all by the way we

corporate this rule, this rule, this rule.

MR. MAINES: And that is exactly what Texas Law is, your Honor. That, that is the law that's if-- this is describe ...

JUSTICE: Doesn't have to be.

MR. MAINES: It is Texas it is the law everywhere if that rule is been stated in Texas in West Energy versus Jennings with respect to rules applicable to bank deposits and the rule stated in Macury versus Der Banking Trust which respect to-- actually cover-- the cover you lost, the lost that required husband to consent-- condense, condenses of property by their wife's when those laws of constitution enforcement any longer but those-- the laws-- the parties do not have to state in writing what the law-- what law requires. The, The last point that I wanted to address is the-- this suggestion that there, there, there's never a way to terminate liability which is claim and applica-- this is a position that even this taken over the course of the case and that's just not the case some of the operating agreements and there are two examples for the operating agreements do, do show us how liability can terminate. The first is in section 14.3 which deals with-- were according-- does not consent to participating in, in a particular well. At that point the party is entitled to assign it's interest in that well. To the parties who do want to participate in the well and, and if there's any liability it has to pay the liability that makes this would respect to the well but if-- at that point it is release and the, the article 14, a article 14.3 express the states that, under those circumstances there is no liability as to that well and more important is I think article 15.1, we talk about that in a brief and it has to be were-- with were according ones to actually withdraw from the operating agreement and there's a calculation that set forth in that article and if party want's to withdraw and in turns out that it closed money for future DNA cause some time for just handling a removable cause. It writes a check to the operator and at that point it is looking for the liability under [inaudible] agreement. We'd like to reserve the rest of our time for rebuttal. Thank you.

JUSTICE: Thank you Counsel, the court is ready to your argument from the respondent.

COURT CLERK: May it please the Court, Mr. Carl D. Rosenblum will present argument for the respondent.

ORAL ARGUMENT OF CARL D. ROSENBLUM ON BEHALF OF THE RESPONDENT

MR. ROSENBLUM: Good morning your Honors, Mr. Chief Justice member of the Court. May it please the Court. The issue here is simply risk allocation this is a typical oil and gas contract dispute. Analyzes under standard joint operating agreements. Very importantly your Honors, it does not involved the relationship between a lessee and a lessor there is no lessor involved in this case this is simply a dispute among co leases or more appropriately a former co lessee my client Eland Energy and Seagull a co-lessee it this-- this dispute concerns a liability for plugging abandonment and salvage course all arising after July 1, 1996 there is no issue that when Eland wasn't owned when it was a participating interest known up to July 1 of 1996 the Eland paid all of it share of cost. The issue is post to July 1, 1996 ones Eland became a former working interest government or more appropriately done under the specific provisions of the operating

agreement. The express language a former participating interest owner.

JUSTICE: Why would any owner rather than go through the withdraw provisions of agreement section 15, nothing it is simply sell there interest [inaudible] done in this case to avoid any further liability other than waiver for force and share the cost why would, why would owner do that.

MR. ROSENBLUM: The issue-- Why would any owner do it? It will depend upon the circumstance at the time even clearly pay of all it's obligation up to July 1 of 96. If you-- If, If the court is aware I provided bench sheets perhaps the last Tab. would be more directly on point. The last Tab is a pie chart and it clearly shows that one's Eland sold this interest and I can emphasize enough that this interest which shown-- sold at a auction were it was a blind no minimum then Eland certainly hope you got more than the consideration that received but what happened it shows that there was more production after it sold this interest then while it owned it. The slice of the pie chart is in yellow is the amount of production the Eland owned the interest the slice that's in blue is post to sign it so at the time Eland shows to sign it and Seagull tells you today your Honor, that they really want and promote free assignment. Seagull does it all the time it is common practice in the industry at the time under the circumstance the party intending to transfer out this interest would decide whether or not it fought-- it could get more for its value for its interest at the time by selling it at an auction as was known here or decided to revert [inaudible] so it would really depend upon the circumstances. If I answering your question -

JUSTICE: Is a gamble?

MR. ROSENBLUM: Excuse me your Honor.

JUSTICE: Is a gamble?

MR. ROSENBLUM: In this case it was someone at the gamble to eat because they certainly hope that they would have receive more consideration for selling the properties they did it in a blind number in the big auction which happens all the time obviously when they found out that it was sold to Nor-Tex and sold for the consideration, it was sold for particularly in hindsight your Honor,-looking at the amount of production that came out after the assignment there gamble didn't go the right way but the important point is the language of the operating agreement is what sets out the risk allocation between the parties ...

JUSTICE: And to think just before get off that settlement you can take the hardest case and therefore working and discovers, one of them is the operator and there all-- their watching video player and the three say, you know, all this day we going to have to follow this wells and it's going to be a bunch of money and why don't we get out now all the get is good. We'll sign our interest to a some [inaudible] they did that in the essence and stick our rather the operator with the closing out expenses when it comes to have close always well, plug always wells. What's your response to that?

MR. ROSENBLUM: These are lessee federal lessees on the out of continental shelf under the MMS that United States middle match it's service regulations. The assignment of two parties are required to be approved by the MMS. There is no issue raise by Seagull in this case as to whether the assignment the note-- to the assignment to Nor-Tex were valid in that situation Justice Hecht if from pronouncing it correctly -

JUSTICE: Yes.

MR. ROSENBLUM: - In that situation the MNS would look at whether or not the receiving party was the shelf company that hypothetical

provides and would not prove the assignment. In this situation you haven't being sold an officer. Were all of the debtors are pre-qualify very important Nor-Tex and the briefs by Seagulls is suggested and in solve in party. The auction was in the summer of 96 -

JUSTICE: That, that doesn't, that doesn't the question. I mean, assume that there were language pre-approved and no problem was any those [inaudible] may still found from bankruptcy which answer to Justice Hecht's question.

MR. ROSENBLUM: The clear answer is that's the bar-- the bargain at the party ended into and that's really wasn't a policy implication Justice Medina is saw in court. The policy issue is it the parties freely abandon it recognizes by the court of appeals to allocate the risk at the exception, you know, this operating agree it was drafted at the exemption by Seagull before Eland was on the scene. Eland was a post participating interest donor. They came in the process down the chain if they allocate that risk the court of appeals rectifies the jurisprudence of the State of Texas recognizes and I will cite to the court that heritage bank case, the American manufactures mutual place in the world indemnity case that the courts are to enforce the parties bargain. This place-- case is clear as the [inaudible] -

JUSTICE: May I ask you a question about that. Do you think it is the law of Texas that a-- and as I-- a contracting party two parties in the contract. One assigns his interest to another. Generally speaking do you think it's the law or not that the assign or remains liable to his contracting party for the obligation under agreement.

MR. ROSENBLUM: The law is depends upon what the obligations were when in this case the assignment8 or Eland comes in to the picture 8.1 and it's in a [inaudible] ...

JUSTICE: Do you think the obligations are pay for the cause while I'm participating while I'm, while I've got part of working it.

MR. ROSENBLUM: Exactly. All right and that's the express language says 8.1 says, what the basis of the charges are. It says that, you pay a proportion to your participating interest when you go to the definition section and this are all in the bench exhibit when you go to the definition section of 210 and it talks about participating interest it's specifically says based on ownership on the list. So if you are not a current own as Eland was not as of July 1, 1996 under the express warning you have no obligation to pay those cost. Now, in this case the question was ask I think by you Justice Hecht to Mr. Maines. Well, these doesn't happen that often. I will suggest these happens more often but the parties clearly recognize and follow the exact language in the agreement. We have it 8.6 the exact situation with the parties contemplated. Well, what happen if a current participating interest donor tells the four. It tells you exactly what happened that the remain [inaudible] pick up proportionally that chair and they have subrogation specifically does not say you go back in the chain there was also a question I think by I'm not sure, Justice Johnson, maybe. How about the industry it was you, your Honor. The industry issue, if you are want to go back generations among the chain is that not going to cause a problem for the industry and I would say contrary what Mr. Maines by his team counsel said, it would cause real problems, just take the situation of the bank coming to Eland Energy deciding whether they want to loan some money and looking at all of the prior interest that Eland [inaudible] try to decide whether there is these contingent liability out there as he borrow that's one problem. From an industry perspective the important thing is knowing what the burden is when going to link to it. When the parties indeed into these agreement even

clearly understood that when it was an honor, it was obligated to pay its proportion of share. If you don't have an ownership interest and these was all indorse by the Court of Appeals decision all indorse by the express warning of these, of the contract if you don't have an interest you not obligated to pay. There is testimony exceeding footnote 6 of our brief on demerits were even see those joint interest account, Mr. Thomas Seller. The individual that was sending out the bills he testify if you don't have an interest I'm paraphrasing but it's in footnote 6 if you don't have any interest then you're not obligated to pay. The Court of Appeals recognize that the bargain at the parties struck for the risk allocation has started these argument telling you that it's really an issue of writ allocation. How you going to allocate the risk in this contract. The parties allocated the risk that if your an owner, your obligated if you're not an owner you have no continuing obligation. That's what's wrong with the argument from Seagull's perspective to suggest that even needs to be released from a continuing obligation, when Eland came in as well as every other interest owner. They were only obligated for so long as they own an interest.

JUSTICE: Mr. Rosenblum, Mr. Rosenblum, is there, is there conflict in terms between sections 814 of the contract and section 15.1 or sections 8 assignment 15.1 specifically tells you how to get out of the contract?

MR. ROSENBLUM: I don't think there's any conflict at all Justice Medina. It is the parties depending upon the circumstances I indicated in response -

JUSTICE: Justice Green.

MR. ROSENBLUM: - to Justice Green's questions the pay upon the circumstance at the time when you want to get out. You have options and again the law of Texas is clear, we will enforce the court should enforce I urge this force to enforce the policy decision that they not enforced the parties bargain that they entered into. Not try to rewrite the contract so depending upon the circumstance Justice Medina either you assign it or you can as to buy you away out.

JUSTICE: But isn't-- didn't Eland have an opportunity to exercise withdraw rights about that the contract ...

MR. ROSENBLUM: It certainly did.

JUSTICE: And I mean that's will impress but I try one of this say that's how to get out.

MR. ROSENBLUM: That is one way to get out but it's not the only way, the assignment he was even post it today Chief Justice Jefferson. That these really support a free assignments Eland put this, this properties in a package sale in an auction. Eland certainly hope that they received a lot what consideration for it. If they were evaluated the said circumstances Mr. Chief Justice at the time realizing they will not to get substantial amount funds and bouncing that with variety of way out if you will on to that withdrawal section and if they had forced like to know what was going to happen at the auction, maybe they wouldn't done that Justice Jefferson but in this case you don't have to foresight and the pie chart which is so important shows that the economics audit if Eland really wasn't as-- is being accused of attempting to dumped the property at the end of it's life. The pie chart completely refused that and if Eland knew that it was going to have productions for a number of years. It may not have chose. Now the facts here are, Eland purchases-- acquired these properties it's in the record these were off-sure properties. They're different than off-shore properties. And Eland's court business was not in the off-sure so it

put these properties among many, many other properties. The auction which happens all the time there are clearly held auctions. Were there a hundreds of properties sold at one time with point is looking at kind of rooms for evaluate whether they want to buy the properties. To what extent Justice Hecht the property is the beauty the eyes of the beholder. There could have been a situation where somebody did on this property and pay a lot more money. Eland was not happy when they found out that they were forced to sell this property at these no male in the bid bid blind auction.

JUSTICE: How these dispute typically resolve?

MR. ROSENBLUM: Excuse me.

JUSTICE: Are these, this type of dispute typically resolved? The dispute are whether or not your responsible right in assignment. How will they resolved?

MR. ROSENBLUM: Almost he just to it. If there's no language in the agreement between the parties marked. The general principle that Seagull is telling you to follow in the five cases would apply. But if the parties have specific language in there barging as we have here. The Court of Appeals recognize that this precise situation was conflict, all right, those cases sided for the general proposition. If you look at that all of them say in one way or another unless the agreements says all for us. For example, in the Jones case the assigning was granted summary judgment because it need or expressly re-employed the assume, the royalty payment obligations. Here in Nor-Tex, Eland society expressly assume those obligations and when Eland came in to the picture earlier on, it did so only to the extent it wasn't while it wasn't owned. So the Jones case which is one of the cases that single sides for the general proposition actually supports holding Eland's positions here. It depends upon the the barging, that's why that real policy implications here-- and I recognize that your decision is beyond justice case. I'm here on behalf Eland but I recognize that what the court rules is beyond the state the ...

JUSTICE: Let me ask you a question, let me go back to this allocation I think admissible. The court rules really makes at least with the court agreement. This is a lessee obligated to pay on the-- on this-- on the assignment on his greater just Judge Brister and he did most because he is now the lessee [inaudible], your cause of action is against him and not me [inaudible] is that what your saying?

MR. ROSENBLUM: No sir, Justice Green and it's very important and I'm glad you ask me the question. Your hypothetical has the context of a lessor, lessee relationship. This operating Green is not and there was no party in this case dealing with the lessor out-- if I can your Honor what I would suggest is, if you have a summer daughter account and three or four more sharing in apartment and they decide that-- let's say these four of them they each going to pay 25 percent of the rent to the landlord is not an issue between them and the landlord, it's an issue of one their college-- when the college student default, who is going to pick up that extra 25 percent of the rent that's exactly an essence what these operating agreement did. It allocated the risk among the co-lessee. Your hypothetical which brings in the lessor is exactly why the reference to restatement language that Mr. Maines brought to the court's attention. The reference to the treaties, the reference to other scholars that are sided in a brief is completely inapplicable to this cases aside from the fact that in each one of those cases. Let's take the MMS regulations because those are the regulations that when apply to this federal lessees. The MMS regulation clearly said and on that section 20, excuse me, 30(c)(f)(4) 256.62. It

says you as assign or liable for all obligations that a crew on to your leagues before the date that the regional director approved your request for the assignment of record time of the least. The region directors approval of the assignment does not believe you approved list obligations. Number one, that's the lessor situation; number two, it's specifically consisting delay the parties agreed in the operating brand. It's a crude obligations before the assignment. So if you have an assignment, as you have here and it's approved and there's no ways to buy Seagull about whether the assignment's properly went to Nor-Tex. This are all obligations post the assignment. That's why it's so important to recognize; number one, Justice Green, that we don't have the lessor-lessee relationship here, number one. And number two, there's no issue of whether Eland paid his obligations while it was an owner that's what brings you back to the express warning of the agreement. That's what brings you back to the testimony of the Seagull witnesses it's in the record, not the Eland witnesses but Seagull witnesses that are telling you what the industry cause in practices that on very well-aware that you can't look out-- I understand my times is up I just finish my point.

JUSTICE: Yes, complete your thought.

MR. ROSENBLUM: On very well-aware that you can't looked at the full evidence, if you have a clear and unambiguous language approach or bared. What we're suggesting is that you crossed that industry and practice evidence is completely consistent and we have sided in our brief the appropriateness to looked that constants in industry practice evidence when it is consistent to support the unambiguous language in the ground. Thank you for your patience.

JUSTICE: Thank you.

COURT CLERK: May it please the Court Mr. Clifford to present the rebuttal [inaudible].

REBUTTAL ARGUMENT OF MR. CLIFFORD ON BEHALF OF PETITIONER

MR. CLIFFORD: I did not hear the Eland dispute to general contours of the restatement rule. Did not hear Eland dispute that, that's part of Texas law. In terms of lessor-leaser relationships, it, it should be undisputed that this rule has been applied in a number of context not just landlord-tenant but for example the Pots case. Jones case in a patent rights. So it's not a landlord-tenant rule. What I hear Eland saying is that it depends on the contract has in a particular circumstances. So let's look at the particulars of the contract and I think it would be helpful for the court to hear and compress two articles of the operating agreement, 14.3 against article .6. 14.3 is the specific provision that governs assignments in the context of abandoning a wealth. And in that narrow specific context, if the court looks at the operating agreement it's attach it's 512 brief. 14.3 assign of interest at the very end of that paragraph after talking about how the assignment works in the context of abandoning a wealth, it specifically says, 'The party so assigning shall be relieved from any further liability with respect to said wealth.' This illustrate our point in that narrow circumstance the contract expressly said, 'If you have an assignment in the context of abandoning a wealth then you are relieve.' Compare that to Article 26 which is the general assignment provision governing assignments other than those arising in the context

of abandoning a wealth and there is no similar provision. It comes back to the questions Mr. Maines is clear which way does the silence cut. Under Article 26 with the contract this assignment, with the contract does not say to the S and E award or liability is terminated upon assignment. The silence cuts in favor of continuing liability which is our, our main point. If-- I think too if you focus on how this fits together with the other provisions of the contract it make sense. Record was made to article 8.6, the description offer of article 8.6 was a little bit incomplete because if you looked at it closely it says that the operator has an options to seek payments from current interest other to the unpaid cost. The specific claim which is upon operator's request. It's an option to go to the current interest owners if it is an option to go to these current interests owners that must be mean that you have an options not to go to the current interest owners. I.E, you can go to prior interests owners who made assignments if there's not expressed language cutting off their liability after the assignment. Seagull's interpretations ...

JUSTICE: [inaudible] is a pretty broad interpretations of that.

MR. CLIFFORD: I'm sorry?

JUSTICE: That seems to be a pretty broad interpretation of that section of the contract.

MR. CLIFFORD: But I think it comes back to the point of which way does the the silence cut and, and if you, if you look at 15.1 of law provisions plus 8.6, plus 14.3 which is the abandonment of one that we've just talked about plus .6. I think what the court will see, is that in specific narrow circumstances assignments were dealt with for even circumstances when there was and the intend to cut-off liability after the assignment where on depending to catch all provisions of article 26.1 and that was simply not there the, the expressed language consisted with the restatement position cutting off as more liability is simply not there to be found. I, I would like to address a couple of points with respect to the industry custom and practice which I really think is a red herring and it's a red herring for couple of reasons: number one, the contract has been found in claim they use, we contend as unambiguous, they contend as unambiguous. I don't know that industry custom and practices has anything to say about this issue, but I think also when the court digs in to the record sites that are offered footnote 6, 7, and 8 of humans grief. What the court is going to find is a couple of things; first, Mr. Maines objective this during the bench trial portions of the case called the that there's a partial summary judgment qualified bench trial then interest and affirm to defends it's-- what the court will find for example it binds three of the reporters record on page 150-151, 230- 232, by four, Page, 115-116 is that we objected at the bench trial portion was Mr. Maines objectives saying, "Judge there trying to get behind the partial summary judgment, don't let them do this, this is inappropriate or re-ruled as the matter law what the contract means." The response by Eland the trial was, "Oh judge this goes to our former defenses of waiver and estoppel," that's sort of thing. You'll find that at 150 and 151 violent three 230-232. The affirmative defenses are have not the brief in this Court they will not reach the Court of Appeals below the purpose were now the threshold the part of summary judgment issue. Bottom line is the purported evidence of industry, custom and practice was offered according to human for purpose other than what we are talking about today.

JUSTICE: So [inaudible], there's an assignment and for the next 20 years operator since checks to the S and E, calls or paid by the S and

E and 20 years later it comes down to plug and abandon then reasons to completely unrelated. The S and E is now bankrupt a bit of bit surprise but the standard didn't find out there own coat, when everybody is been acting for 20 years as if they want.

MR. CLIFFORD: Well, in terms of surprise that he had comes down to the questions of, when you interpret the operating agreement against the settle from the statement rules reflected in Texas, they should be no surprise, there should be an understanding that the S and E liability continues in the future -

JUSTICE: There's a no imply waiver for synonyms checks to decide for 20 years of taking payments from the assignee before he ...

MR. CLIFFORD: I would submit to the court that it's going to depend on facts of of, any particular case, but if there's no indication that the S and E has seized to live up to its obligations to pay its proportion cost its so forth will there would be instruct to come up with the waiver situations to those circumstances, but you know let's look at it in terms of allocating risks, if the assignor looks to cut-off its continuing liability then it can ask for a language similar to that which appears in Article 14.3 saying, "Your liability seizes upon assignment," that's the article-- that's the language that's missing here, and, and I want underscore another point about records to participating interests I, I think what I hear in arguing is that we've got an express release looked at the participating interest language, and I would submit to the court that when you get right down to it participating interest is how you do the math, it's how you compute that which is received under the operative agreement that which is owned under the operating agreement, participating interests does not address the completely separate question of the viewer can assign your interests away. Do you have continuing liability or not? I think this is illustrated again by Article 14.3.

JUSTICE: Mr. Rosenblum indicate that is [inaudible] some subrogation line under that clause.

MR. CLIFFORD: There maybe, there maybe rights as between the assignor and holding as he need to try to do by certain even try to do that in his case but I think what's interesting under 14.3 is it makes reference to the participating interest language that human has hindsight base on her just a very substantial degree and yet even in a clause that expressly references the participating interests if 14.3 is still have the express language in the Eland says after your assignments in this abandonment context your liability assigned or is terminated if, if all of this is found out and the answer by the participating interests and the participating interest appears in 14.3 then why do you need that extra statement in 14.3 it says the assignor's liability is cut-off. If I may finish the answer is because the, the, the, the questions is address by language specifically addressing what happens to assignor's liability not by participating. Thank you.

JUSTICE: Thank you counsel the case has submitted. The court will take a brief recess.

CLERK: All rise.

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