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Supreme Court of Texas.
Tony Gullo Motors I, L.P. and Brien Garcia, Petitioners,
v.
Nury Chapa, Respondent.
No. 04-0961.

October 19, 2005.

Appearances:

Craig T. Enoch, Winstead PC, Austin, Texas, for petitioner.
Kristin Bays, Bays and Bays, Conroe, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,
Justice Harriet O'Neill, Justice David M. Medina, Justice Paul W.
Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil
Johnson and Justice Scott A. Brister

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JUSTICE: Thank you, be seated. The Court is now ready to hear argument in 04-0961, Gullo Motors versus Chapa.

COURT MARSHALL: May it please the Court. Mr. Craig Enoch [inaudible] for petitioner. Petitioner has reserved eight minutes for rebuttal.

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE PETITIONER

MR. ENOCH: May it please the Court. My opponent, Ms. Bays and there is my co-Counsel Alex Valdez, [inaudible]. It's my honor to be representing Tony Gullo Motors in this matter. The plaintiff in the underlying case was Nury Chapa. I courteously, as a [inaudible] at Gullo Motors. Nury Chapa claims, she contracted to buy a particular tag of SUV. And Gullo Motors delivered to there-- another. That's her entire case. It is all ...

JUSTICE: What's the different, what's the difference in the two?

MR. ENOCH: Pardon?

JUSTICE: What's the difference into letter C

MR. ENOCH: As best I can tell maybe there is a problem about lumbar seats -

JUSTICE: Lumbar supports.

MR. ENOCH: - lumbar supports and the seats. There wasn't dispute whether those could be added to the regular calendar but all to play

the dealership said, "Yes, you could I [inaudible]

JUSTICE: What about the Michelin tires. Was that a difference?

MR. ENOCH: Well, not and certainly out of standard but certainty can be no involvement at a Michelin tires to this [inaudible]

JUSTICE: Where they ...

MR. ENOCH: As best I know that I think all of it but at some point the attorney showed up and said that, "We're not negotiating with Gullo on behalf of Ms. Chapa." And from that case, Ms. Chapa recovers from the Court of Appeals both her contract damages and tort damages including both attorney's fees and punitive damages. At all we disagree with the jury's finding that we breach any contract with Ms. Chapa. We're not here challenging that finding. But we certainly do challenge the Court of Appeals conclusion that plaintiff is entitled in addition to a contract damages for tort damages. Says DeLanney this Court has been very clear and has consistent withheld that we will not turned a duty breach that rise on the contract into a cause of action for tort align coverage for tort damages. In Crawford, this Court concluded that same reason covers deceptive trade practices actions under breach of contract.

JUSTICE O'NEILL: But we do recognize fraudulent inducement.

MR. ENOCH: Certainly, I didn't find dragging this-- the problem is this case is backwards. The Court of Appeal said, "This was fraudulent inducement." The problem was that all of her evidence about whatever it is the fraud that occurred was all after she had accepted the vehicle.

JUSTICE WAINWRIGHT: But you can have evidence after to show an attempt before.

JUSTICE: And the jury said it fraud.

MR. ENOCH: The jury said there was fraud but again, you have to look at the evidence in this case. Here is the evidence, the facts I'll go right to that. Ms. Chapa says, "I decided, I decided I want an SUV. I want a four cylinder SUV because of a mileage and I went to Gullo Motors because it's forecloses dealership to my home." From then on, literally, Ms. Chapa's oral testimony diverges from any other evidence in the case.

JUSTICE O'NEILL: Well, now let-- Oh, we don't arguing no evidence or we argue when you do agree that there was fraudulent inducement claim recognizable that was support many case damage elements.

MR. ENOCH: No, I don't. I do not agree in the facts of this case that there's a fraudulent inducement committed. There is no evidence of fraudulent inducement. In fact, in this case, in this case, there is no evidence if it true Ms. Chapa that Tony Gullo Motors ever agreed to provide her a Highlander Limited. The evidence in this case when talks out at bottom is Ms. Gullo said-- Ms. Chapa said, "I want a Highlander Limited" and all of the evidence which she contend is that Tony Gullo Motors never would allow her to have it, a Highlander Limited. They offer to a Highlander, without breaks, they didn't give her the upgrades that they offered her. They presented her with their only written documents. Here, at all when in contract that shows no Highlander Limited but just a Highlander. Her, who point on that is, "I saw they're contract. I didn't agree with their contract. I've changed their contract but they didn't sign it. I wrote in Limited on the contract when I notice it wasn't there." They took the contract from his saying, "they need more signatures." I never saw the contract on that. This is not a situation where they said, "We'll sell you a Highlander Limited." And then I did not. This is a case which Ms. Chapa said, "I want a Highlander Limited." And they would sell it to you. But even if that were the case, even as where fraudulent inducement, you

have to change your position based on fraudulent inducement. Changing position means that I suffered some harm. The issue in this case is what was the contract? And the jury said, "The Highlander Limited," and as a result your reward is the difference in the value of the Highlander Limited that you say you contracted for it. And the Highlander that was delivered, that was their damages, that's what she claim through damages. In her testimony said, "That's what this was all about. I didn't get the car I contracted for." Fraudulent inducement claims are that, "I gave you to a contract, I did not want." That's fraudulent inducement. The facts in this case, the jury and gave her exactly what she said she contracted for. The Highlander Limited or rather you have their own value. The difference between what she said she contracted for and what she received.

JUSTICE: Well, view in the facts and perhaps the best light for Ms. Chapa she says, "I ask for a Highlander Limited. The salesman promise me a Highlander Limited. I showed up and he said it was here, vehicle is here ready to be picked up. It was not a Limited. As I left they said they'll get me the Limited, came back again they said, it was a Limited and what no Limited." There's supposed to put the additional options on. So they gave me something they promised. They gave me something that they-- different from what they promised they were going to give me." And then forge documents and conceal documents to cover up that. Is, is that sufficient for a jury to find fraudulent inducement? Is there a scintilla, more than a scintilla of evidence in there to support the intent to make a promise that you're not going to, not going to carry out before the transaction leaves consummated?

MR. ENOCH: No, it can't. Because this Court has held, "If the duty that is a bluish arises under contract, it's a contract payments claimed, contract which claim not a jury claim." In your scenario ...

JUSTICE: What, what can the duty or has from the misrepresent-- alleged misrepresentation. "You promise -

MR. ENOCH: Because the ...

JUSTICE: - me a Limited but then you don't give me a Limited and didn't intend to give me a Limited." That's what she's argued.

MR. ENOCH: Your Honor, under the Crawford case, that issue was addressed. Can you file the representation under the contract obligation, create a tort by then declaring and you do the step representation. The guts of this case is not that why can't permissive. "You agree to let me have the opportunity to control the delivery schedule over here and as a result all keep doing this and this tries in a little quash. Give you-- this is exactly the case where I wanted to buy a Highlander Limited from a person who sales Highlander Limited. They promise to sell me a Higher Limited-- Highlander or Limited and did not do so. Therefore, it's a fraud because it's a breach of the representation and I might-- I am entitled to a motion of damages and punitive damages.

JUSTICE: How about less ...

MR. ENOCH: But in fact the duty arises over the contract.

JUSTICE: How about less than fraud. Is it-- could be it a deceit, could it be deceptive trade practices assuming it's not fraud.

MR. ENOCH: Your Honor. In Frofer this Court address that question. If the duty arises under the contract. If the object of the contract was the delivery of that Highlander Limited, that is not accepted trade practice. This Court has been very clear if the duty arises under the contract and your claim is that duty is breached and then it's breach of contract. It's not tort damages.

JUSTICE: What if, what if a dealer was-- take it a little silver

thing on the back that says, "Limited" in cursive sticking it and pasting it on to the cars that weren't Limited that might be a deceptive trade practice, wouldn't? Representing that the car is something that it's not-- maybe not fraud is already agreed on the price that paid but there might be circumstances where something less than fraud would be a DTPA.

MR. ENOCH: I think the answer to that one is, if I didn't contract with them for them to sell me a Limited and they failed to do so. Then, I might have a claim on the DTPA which is in fact to create a cause of action where there is no other cause of action. So I go to the Highlander, I go to the Gullo Motors and I just see cars on the lot and said, "Oh, I would like that because of Limited stickers there and I go buy it. And I go out," and I'm not claiming under the contract they agree to sell it on me [inaudible] I bought some based on what they were representing here and there's no cause of action in Limited. Even though I don't have a contract claim against you. And I duly rises elsewhere whether there's a representation that lies ...

JUSTICE: They ask me just briefly on the attorney's fees question. Claimant they should have segregated [inaudible] cite Stewart Title which says to recognize the exemption to this duty to segregate arises when there intertwine inextricably. This was in 1991, when the Court said that I was of here, and I have troubled finding where this recognize the exemption appeared before 1991. Did the Court ever say inextricably intertwine before 91 that you're aware ...

MR. ENOCH: I'm not aware that they said inextricab-- inextricably intertwine.

JUSTICE: It's a [inaudible].

MR. ENOCH: I think it's just recognize the practical reality, is it the same evidence proves two things. How do you say, "Well, half of all these tossed in. But I don't think we can have to go there. In this case, if there's a recovery under tort they have to demonstrate that they had an independent duty that was breached and caused damages. In this case, the only duty that they showed that we claim was there was breach of contract. They claim that they have escaped that because I have a separate duty, separate obligations, separate representations and separate damages. So they themselves set up this case to say they are not inextricably intertwined, they're separate issues. Our difference with them is and always has been. Their entire case is, "I want to go on Motors, I ask for a Highlander Limited they gave me a Highlander and I therefore can" ...

JUSTICE O'NEILL: Can you, can you envision a scenario that where they say, "Okay, were going to do a banking switch here." Let's do the old Highlander Limited pertain. We're going to tell him were going to sell him Highlander Limited and were going to, you know, say it's on order. I mean, what if this sell might this could be premeditate. We're just going to pull the scheme and we will forge documents that we need to. I mean, based on your argument you could never pursued that as a frontline.

JUSTICE: May I ask a question?

MR. ENOCH: Yes, your Honor. What about that, that varied question, in fact they suggest if they could switch as far as I go back to how this begin this is not a situation before in Ms. Chapa proceed words from Gullo Motors, "We'll sell you a Highlander Limited." In fact all the evidences that Gullo Motors was not going to sell a Highlander Limited particularly because she wasn't going to pay the price but I'm not going to argue without a breach of contract issue when I'm going to say, by the switch says, "I'm going to sell you this." -

JUSTICE: Has to be paid?

MR. ENOCH: - And when I buy then I find out it's something different in what you said.

JUSTICE: Abate with switch is different from just as switch.

MR. ENOCH: Abate and switch is different than switch. And in fact all of the-- that the-- don't be too confused by the forgeries that may have here. There are some that she [inaudible] has her signature on it which are the-- we owe you slips of paper which is what she and Garcia negotiated over on the add-on which is the ultimate outcome of this case.

JUSTICE: Any further questions.? Thank you, Counsel. And the Court is ready to hear argument from the respondent.

JUSTICE: May it please the Court. Ms. Kristin Bays [inaudible].

ORAL ARGUMENT OF KRISTIN BAYS ON BEHALF OF THE RESPONDENT

MS. BAYS: Say it's an honor to appear before you today and may it please to be here. I think the problem that this Court's identified for some of its questions is the core problem with the position that you care about from Gullo [inaudible] related [inaudible]. Essentially, to conclude as thus Gullo, that Ms. Chapa has no tort for DTPA claims. This Court would have to overrule literally centuries of case law beginning of Randey Rudolf in 1849, recognizing that litigants can recover in both contract and tort when duty is in both are breached and again Gullo's position would required this Court to eliminate from Texas's jurisprudence, DTPA and fraud causes of action because as you pointed out Justice O'Neill, you could never recover if the fraud was so successful that it ended in a contract. There's just no justification from this Court to party so what is ...

JUSTICE: So what was the, what was the fraud.? What was the evidence of fraud?

MS. BAYS: The evidence of fraud legally the claim of fraud was they promised her a Toyota Highlander Limited never intending to deliver it.

JUSTICE: Well, that's true of every contract.

MS. BAYS: Well, that is not necessarily true of every contract. I may well contract with you fully intending to ...

JUSTICE: Every, every breach of contract case with the party's dispute what the contract was. A jury could find in favor of the plaintiff or defendant and in favor of the plaintiff that you promised what the plaintiff says and you delivered only what the defendant says so that would turn every case what we didn't have in the written contract with the party's dispute what terms are into a fraud, wouldn't it?

MS. BAYS: It would which this Court addressed involve this Jark opinion back in 1986 and the Formosa opinion back in 1998 to ensure that that doesn't happen. What the evidence has to be is something more than nudge forms. The evidence has to be circumstantial evidence and it maybe evidence that occurs after the breach Justice O'Neill, but it proves intent before that shows that there was never any intention to perform.

JUSTICE: Now specifies exactly what that evidence is.

MS. BAYS: In this case, Ms. Chapa's testimony obviously was some evidence of this facts but the documentary evidence was probably more

compelling since generally documents are more compelling than testimony. What the documents in this case revealed was that Gullo defended the entire based on it's exhibit 25, that was on extensively the contract between it and Ms. Chapa and it reflected that Ms. Chapa purchased the exact vehicle that was delivered to her. No question that that's the contract, that wasn't breach but the problem with that contract was never identified the vehicle by a vehicle identification number which Gullo's own documents submitted as evidence reflected could not have been there on the date the contract was signed. The contract was signed on December 29th, Gullo did not acquire that vehicle on a dealer trade until 6 days later on January 4th. That number couldn't appear on the contract. Once more, the contract makes no mention of any options that Ms. Chapa would have purchased and yet when Gullo made its second delivery of a base model vehicle, that car have been taken to a third party vendor at the expense of Gullo to put in leather seats which are evidence demonstrated came standard and a Limited and it putted in a "TV," "VCR" which was an option that Ms. Chapa testified she did purchased with the purchase of a Limited but there's no reflection that any such purchase was made in the contract the Gullo said [inaudible] ...

JUSTICE: But again let's say we-- you and I get into a dispute about what we agreed to and so after that dispute arises, I forge a document which just happens to get my version of the facts. Is that proof that I-- that proves only that we're on a fight breach of contract now. That doesn't prove back at the time we make this agreement, I was intending to defraud you, does it?

MS. BAYS: It doesn't necessarily but I guess I would remind the Court of what the treaties say about a brick not being a law. That one piece of evidence by itself may not carry today but when that evidence is added to testimony about what the agreement was when it is added to testimony that when you sign an actual contract that reflected the terms that the plaintiff said make where the agreement that that document was taken from you never to be seen again.

JUSTICE: But again looks when every breach of contract we disagree about the terms. You say, "We signed a contract that had your terms in it and since we don't have it now I must have destroyed it." Don't we just turned every contract-- every contract case were we disputing the terms becomes a fraud?

MS. BAYS: Unless the dispute about the terms was, as it was in this case about what the promise was. This wasn't for example a dispute about when the car was to be delivered or what the purchase price for the car would be. This was a dispute about what she bought, the subject matter of the contract not just terms that would be important aspects of the contract but the core subject matter of what it was the issues of purchasing. That was what in dispute and this Court acknowledged in this full Jark opinion and again in Formosa that when there is a-- when, when the defendant denies that it ever made a promise that the jury concludes was in fact made that that is some evidence circumstantial that there was never any intention to perform when that promise was made that was the evidence in our case.

JUSTICE: So we just don't need breach of contract anymore, we can do it all about fraud.

MS. BAYS: Well, not necessarily.

JUSTICE: We name me one circumstance where we have a-- did we disagree about the terms of our contract that I will only be able to sue a contract rather than fraud.

MS. BAYS: It would be any case that would involved a dispute about

the terms of the contract based on a claim of ambiguity and that frequently occurs on breach of contract cases. If the dispute between the two of us is whether that vehicle identification number was the correct one or whether some of the numbers were transpose so that I had actually purchased to Mazzarate. That would be a breach of contract dispute between the two of us but if my claim was I always purchase to Mazzarate. Look at the purchase price in the contract, why would I have ever spent a \$150,000 on as where a Highlander Limited. Now, we have dealt into the realm of whether you made me a promise never intending to deliver it and it is well said in Texas law. That's fraudulent inducement, that sounds in tort and those were the facts that the jury was convinced of in this case unanimously and those are the facts made final by the Court of Appeals agreement with them. This Court must accept this truth that Gullo promised a Limited never intending to deliver that car so for the Court to conclude that Ms. Chapa has no tort claims, this Court would then have to conclude that's not a tort, it is. And Ms. Chapa is entitled to recover [inaudible] for any tort damages associated with it. Those we prevent to the part of damages, for mental anguish damages, the travel damages or rather the penalty damages against Mr. Garcia under the DTPA. Also, attorney's fees that Gullo complains about this. What Gullo says rightly is that Ms. Chapa never segregated for attorney's fees between the breach of contract and DTPA claims on the one hand and the fraud claims on the other but there are two reasons why this does not prevent Ms. Chapa from recovering her attorney's fees in this case. The first is-- this were [inaudible]. This Court made it clear that when the facts overlap as they certainly do in this case among causes of action from which attorney's fees are recovered belong some and not on others. When the facts overlap, and presentation of the case requires attention to those facts, you don't need to segregate because it ...

JUSTICE: Why not. Hundred-- a hundred years of Texas law says, "You can only get attorney's fees for statutory reasons or contract." Now, when you draft on the petition in this case, Were you trial Counsel.?

MS. BAYS: Yes.

JUSTICE: But when your drafting the petition in this case you get to the paragraph on fraud. Well, that's not a statutory cause of actions. It's not a contract and for the-- whatever limited amount of time your writing the fraud provision. If you recover attorney's fees, 100 percent of your attorney's fees then you just recover at least some small amount of attorney's fees for something that a hundred years of Texas law says, "You can't get attorney's fees forward." Why is it's sterling-- sterling is different case. Sterling is where you say, "You breach the contract. No, you breach to the contract and to win it's true." You have to prove that they breach first. Iris is little different, Iris is attack on for something that he can't get attorney's fees bar and if your-- jury awards a hundred percent of attorney's fees. We've just breach the hundred years of Texas law. Haven't we?

MS. BAYS: Well, potentially but in the hypothetical that you've outlined, I don't think so and again this why the overlap becomes an important consideration on whether segregation is even possible because in your hypothetical about drafting the petition. It's true that there would be some time spent drafting allegations related to a cause of actions which attorney's fees might not be awarded. But in Texas, under rule 26, we plead facts so the essence of pleading a petition is to write up the set of facts that pertains to a particular case and then it identify what damages are associated with the claims being raised.

The point is that there just too much overlap even though these are attacked on cause of action is not a true direct attack, you breach, you didn't breach. This is a case where the facts are so intertwined inexplicably so were inexplicably that would be the wrong word. I'm not in spite as to begin ...

JUSTICE: It's going to be, it's going to be ...

MS. BAYS: I going to leave with that. [inaudible] but the facts were so going to intertwined. It really becomes difficult if not impossible.

JUSTICE: What, what would be, what would be wrong with the rule to say, "You have to segregated every case and then you just get on the stand and say "99.5 percent of what I did was related to DTPA or contract alone." What would be wrong with that rule?

MS. BAYS: Really nothing. That would be inappropriate rule on this Court to adapt and frankly a sensible one because it ensures that the attorney's fees do apply for causes of action for which they are recoverable. But that action raises an interesting issue for this Court to consider as whether Ms. Chapa actually plead any causes of action for which attorney's fees would not be recoverable. Fraud typically as you have pointed out does not carry with it in award of attorney's fees. Obviously, breach of contract in DTPA too that's statutorily based. But this Court in the early 90's suggested that perhaps attorney's fees would be inappropriate recovery on a fraud claim giving how closely intertwined fraud and breach of contract claims are. For instance, an Eagle Properties versus Shower Bower and Williams versus Calif of containing cases decided in 1990. This Court apply the 4 years statute of limitations applicable to contract cases to fraud cases because of the similarities. Later on in 1991-- I'm sorry that's not right-- in 1990, this Court in the Gill Savings Case versus Sherkin reviewed the case where attorney's fees were awarded for fraud based on the breach of contract very similar to the facts of this case. The question before the court was whether it was really appropriate for the trial court to would not a given an award of attorney's fees for appellant fees and bankruptcy fees and this Court remanded to the trial court for consideration of what those fees would be, finding that they should have been awarded. Again, on the fraud claim, this Court didn't say explicitly and in fact in Shenlar versus Osceola Farms, this Court noted that that would be a decision save for another day. Perhaps, today is that day. There is such an overlap between fraud claims and as to fraud that is virtually impossible to imagine a fraud claim that would not involve the contract in some form of action. Because of this overlap, it may will be and perhaps should be permissible for litigants suing for fraud to also be able to refute their attorney's fees under the same theory of using Civil Practice of Ramedies section 38001 sub 8, which permits and it's to be lawfully construed an award of attorney's fees associated with contractual claims. So Ms. Chapa ought to recover her attorney's fees. Of course, the big issue in this case contains for exemplary damages particularly those against Gullo. The ones related to Mr. Garcia had been conceded.

JUSTICE: The, the exemplary damages awarded will exceed the DTPA.

MS. BAYS: That certainly would.

JUSTICE: So don't you, I mean, don't you have to elect. You can't recover on fraud and contract [inaudible].

MS. BAYS: That is exactly right.

JUSTICE: And in that what the-- but [inaudible] court did. Didn't they just give you back everything under all claims and so you didn't have to pick?

MS. BAYS: Well, I guess my answer will be sort of but please bear in mind that we did make an election at the time that we went to get the judgment entered. We did make that elections because your absolutely right, we cannot recover on all causes of actions in a judgment that will violate the one satisfaction rule. Our election was to recover under the DTPA against Mr. Garcia and to recover under the fraud claims with Gullo Toyota. So Gullo's liability and Mr. Garcia's liability will be joint in several as to the actual damages and the attorney's fees but this Court concludes that they are recoverable fraud but they will be separate as to the penalty damages under the DTPA against Mr. Garcia and the exemplary damages under the Civil Practice of Remedies come from fraud against Gullo.

JUSTICE: But if we decided there was no evidence of fraud then you would fall back from DTPA [inaudible] -

MS. BAYS: Is that what you mean?

JUSTICE: - such that -

MS. BAYS: Yes.

JUSTICE: - there's a large of recovery of the contract.

MS. BAYS: That is exactly right and under the rule 301, we are entitled to the largest recovery that we could get based upon the verdict pleadings of the evidence so we certainly would.

JUSTICE: That ...

MS. BAYS: I think the evidence of fraud is sufficient. I frankly think that this is a case that rise out with the imposition to exemplary damages under chapter 41.

JUSTICE: Well, may not a little strong if I, if I understand the facts here, if I'm go to my car dealer and get the wrong trim land and I get an extra \$200,000. It would cope me a people line enough to do that only.

MS. BAYS: Well, you certainly would if that were the case.

JUSTICE: Not only do I get a car. I'm not going to car I want it, but I get an extra \$200,000 [inaudible] or five more.

MS. BAYS: Frankly, I expect you would hope that there would be retailers out there that would treat you in that fashions [inaudible]

JUSTICE: But I mean the purpose of exemplary damages is not to encourage people to file suits. It's to encourage people not to do this kind of behavior. This is probably a little bit much, isn't it?

MS. BAYS: I think it is not. I would respectfully disagree with you and the reason is because this is the case that involve not just your your plain and open acts of fraud. Not just misrepresentation about trim packages or the color to be able that you are seat, not even just as you pointed out before taking the Limited sign up of a true Limited and pasting it on to base [inaudible]. This is a case where Ms. Chapa came in with \$30,207 cash and said, "I want the Limited on the showroom floor." Fellow said, "That one has been sold, we can get you one just like it," and they never intended to do that. The evidence in fact revealed that they never intended to do that so much so that when she finally called among the carpet about it. They produce forge documents including too that forged signature of her husband which was suspicious given that he was deceased at the time that this document were to have been sign. Those are felonies under the Penal Code. Each one of those those acts of forgery, each one of those, those incidence of securing the execution of the document by deception, destroying the real contract between the parties, each one of those carries with it under the Penal Code, \$10,000 penalty and incarceration. This is the outrageous misconduct that the Court focused on in the Ellech Forning case and the Morea opinion. This is the case that justifies an

imposition of punitive damages to punish in term but as you pointed out ...

JUSTICE: The question-- the one question I have is a if you come-- if you come in and say, "I want to buy this car." And the dealer says, "Well, I'll sell it to you." And he does having intention to do it and so the buyer comes back at the appointed time and says, "Well, here I am, here's the money." And the dealer says, "Well, I lied and I'm really just to take advantage of you 'cause you know you look like somebody I'd like to." Tell me a very bad facts. Still you-- what is the-- where is the injury there. I mean, have your money, you don't have the car but there's no reliance damages nothing is bad has happened. If ever the only one in the world then maybe would but if you could just walk down the street and do the same thing that-- it's hard to see where the damages and I know that's not this case but, but what's the-- what's your response to that?

MS. BAYS: Well, it would depend again on, on some additional facts that may be included in the hypothetical. As you've out uot loaded there really is no damage, but if you went back to the dealership [inaudible], I'd lie, I never intended to sell you that car and by the way if you mention that to anyone, anyone at all, you will discover who you were dealing with-- as the Gullo appear causing you mental anguish and concern about whether you are perhaps dealing with an entity that was so unscrupulous and criminal that you may actually be in danger if you complain. I think perhaps you have suffered damages even though you have retain the benefit of bargain money that you would have paid in for the car. Those are the facts of this case, established by the Court of Appeals and found by the jury. This is a situation where this is outrageous conduct deserving attention and exemplary damages. The problem with exemplary damages in Texas is really is that because they are designed to be in penalty imposed by juries. There is always a concern on legitimate one, the juries may just have major reaction on emotional responses and come up with numbers with so many zeros to be claimed on.

JUSTICE: The car salesman is hard to believe juries would want to punish car salesman.

MS. BAYS: Well, it, it perhaps isn't but without being said. This is the case where, where the facts of the case is not to mention the defendant could in fact create an emotional reaction from a jury that would not be based on the law where the evidence and we therefore pre-violative the due process was that is unfair concern. I think it's one that doesn't exist in this case but it is a unfair concern to deserve that judicial attention which gives this Court the opportunity to do with this case to instruct the Court of Appeals in Texas about an issue that displayed to them. How do we know even the word is [inaudible] excessive. How do we know if it has a reasonable relationship. There are three ways and three only, it is a three step analysis and the law has established it that this Court authorized them very clearly so that this confusion no longer exist in the state. The first is you give difference to the jury. The statute speaks to that directly under section 41010 sub(b) but the US Supreme Court has spoken to that even more clearly four times in the last 4 years and the pass of opinion report noted this matters have always been left to the jury for more than 200 years. It takea a strong case under the due process plus to undo that and at the [inaudible] opinion, the court noted as long as there is a fair procedure that is followed, whatever flows from it-- whatever were flows from it is one that should be entitled to a strong presumption of validity. Perhaps, an irrevocable one. Our statute

provides that fair procedure if it is implied with, if the evidence supports [inaudible], it passes [inaudible]s.

JUSTICE: Any further questions.? Thank you, Counsel.

MS. BAYS: Thank you.

REBUTTAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF PETITIONER

MR. ENOCH: Just a couple of comments about it. I appreciate the court's concern about the conduct of this case and what exactly do you do. I stand by my position that I see no way that you could hold that there's a fraud out, fraud claim here that's vibe without creating a fraud claim in every breach of contract case but even if the court disagree with me on that, I do believe that decision in Jim Abraham by this Court is instructive. It looks at the object of the contract and looks at the object of the damages. What is the key here, the object of the contract was she thought she wanted-- she wanted a Highlander Limited, she got a Highlander and her damages is a difference in value of those cars. What was the object over damages, the difference in the value of those cars. She gets the difference in the value of those cars from the jury in addition she gets a motion on damages and punitive damages in Jim Abraham it says, "You were going to look and see what the complaint is. The complaint is you bought a home, you said a home didn't meet what you've contracted to buy therefore, your limited to your contract damages." That's how this case gets decided for claim was I didn't get the car that I contracted to buy and the jury awarded the value of the difference. That is the object of contract, that's the object of the damages. I'd like to refer to the hypothetical when Ms. Bays raised with you the most right. This is not [inaudible] where Ms. Chapa paid \$36,000 for a Highlander Limited and got a Highlander is just the opposite. This is a case where she offered \$24,000 for a Highlander Limited and she was told no, that's a \$36,000 automatically. Then over the course of the dispute she end ups hanging \$30,000 which includes a Highlander and adds on that. Now, she's going to argue, "No, they, they said they sell me a Highlander Limited for \$30,000." This is not a situation where she paid the purchased price for a Highlander Limited. This is a place where she paid less than [inaudible] that they wouldn't sell it for first price you offered. So the [inaudible] don't quite told up. On a front page, I think the court in dealing with this has to think of this. There must be more to prove an intent to the fraud than in merely I want to contest the contract terms. Splurge is it well, [inaudible] is out there, I understand the languages there but there has to be more to prove fraud and the contract context that is when the duty arises on the contract which prove that there was no intent to comply with the contract and simply evidence that one of contracted parties denies a contract exist.

JUSTICE: Are you saying we have to over rules[inaudible] to rule in your favor?

MR. ENOCH: You don't have to in this case. But I don't think this part for closes in this Court in addressing the question about fraud and breach of contract cases that there has to be more than simply I'm not going to comply with the contract. Let's talk about the forgeries in this case-- the forgeries in this case, forgeries, fraud, deceptive practices. Ms. Chapa has to change her position based on the forgeries, the fraud, the deceptive practices. She has to do something because

she's let into those ...

JUSTICE O'NEILL: Well, but there, they're using that to show that the, the intent all along. That's my understanding of the import of that evidence.

MR. ENOCH: The intent not to-- The intent not to sell her but the contract did the seller but she won on them, she won on the contract. I mean, the only thing it goes to is to say we don't have this contract and so I supposed potentially the court would say, "You created false documents to try and win to trial this case. We are assenting you for problem in the court. We are assenting you for bringing false document for the court," that that's kind of big issue if your talk about what the proof of the contract is. But she didn't buy a Highlander. Some of them based on them forging those documents. This all happened after the fact. She walks in and says, "That's not my contract, where is my contract. Well, this is the only document we have. No, I wrote on a document, I changed the terms of the document. I put my handwriting on document and I don't see on these documents." That's the evidence in this case, all after the fact all after since driving a Highlander with agreed upon [inaudible] that she now argues that he didn't add to-- and didn't put on to her car. We're talking about the contract breach ...

JUSTICE: If the rule was you have to segregate attorney's fees in all cases and Ms. Bays or whoever the attorney fees expert was and said, "Well, 99.5 percent of my time was spent." Would have had to been spend by just fraud contract and DTPA. Would you have any grounds of appeal at the point, it's just because it's a hundred percent and something have to be related to fraud that brings you here on these segregation point, is it not?

MR. ENOCH: I think that's right, your Honor.

JUSTICE: So if, if the rule was you have to segregate all cases but you can to say whatever percentage. Then, and I guess the Courts of Appeals would decide on a factual sufficiency basis that this Court maybe if possible to make a legal sufficiency argument and we wouldn't have this all or nothing situation where we decided to segregation required, you get nothing or do another trial.

MR. ENOCH: That's correct, your Honor. There is in Courts of Appeals said thought but that was a remand question because they, they admit the no evidence [inaudible] on a segregation but not the, not the actual evidence-- sufficiency evidence thing and they would remand it. On the other hand, on the other hand there is no obligation to segregate your opinions when the objection is made and go forward with the fraud and having failed to do so and -

JUSTICE: But it's -

MR. ENOCH: - there's no evidence that on a segregate.

JUSTICE: - as a Trial Judge unknowing it drove crazy to say, "We just had DTPA and contracted them." Appeal's court reverse DTPA and just awards contract to of course based with the decision. Do we cut the attorney's fees or do we send it back to the trial court where the jury-- the new jury is going to be mad if everybody about describing attorney's fees where case we did four years ago and-- is there any way around this that [inaudible] some process of-- when something is eliminated on appeal. We haven't to do a second trial on attorney's fees.

MR. ENOCH: Of course, I argue on the degree on National case. We all said if there's an objection that don't segregate, that's the end of [inaudible]. Okay, and so I hope that's the decision of the court but may not be. I understand there's other case and after I did have a couple of comments, we didn't really talk about the mediator issue and

on a punitive damages issue and I'm liable to answer your questions about that. I do have a legal point, they agreed to the mediator and therefore had a judgment in their case in no other remand. I do not believe that they can raised the punitive damages issue before this Court remit trials [inaudible] this Court can have jurisdiction of it. But they did agree to the mediator and as a result obtained the judgment of the Court of Appeals so I don't believe that issue can proper to be raised here. This-- and unknown statute to the punitive damages issue, I didn't hear the argument on that. I think that's [inaudible] question for it.

JUSTICE: Are there any further question? Thank you very much Mr. Enoch that concludes the argument and all argument for today and [inaudible].

COURT ATTENDANT: All rise. [inaudible] Honorable Supreme Court of Texas [inaudible].

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