This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
Gym-N-I Playgrounds, Inc., Petitioner,
v.
Ron Snider, Respondent.
No. 05-0197.

September 27, 2006

Appearances:
Christopher A. Fusselman, The Fusselman Law Firm, Houston, for petitioner.
Ruth G. Malinas, Ball & Sweet, P.C., San Antonio, for respondent.

Before:

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

CONTENTS

COURT ATTENDANT: Oyez, oyez, oyez, The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas, are admonished to draw near and give their attention, for the Court is now sitting. God save the City of Texas and this Honorable Court.

JUSTICE: Thank you. Please be seated. Good morning, the Court has two matters on this oral submission document, in the ordered their appellant's, they are, Doc. No. 05-0197 Gym-N-I Playgrounds, INC. versus Ron Snider from Comal County in the third Court of Appeals District and 040 what is it-- 292 City of Texas. Texas land office on the Texas land of commissioner versus Heiret W. Holland from Madikeri County and the 13th Court of Appeals district, and I will not be sitting in that cause. The Court has allotted 20 minutes preside in each of this arguments and would take a brief recess between the two. This proceedings have been recorded and a link to the argument should be posted on the Court's web site by end of the day today. The Court is now ready to hear argument in 05-0197 Gym-N-I Playgrounds versus Ron Snider.

COURT ATTENDANT: May it please the Court, Mr. Fusselman would lead an argument for the petitioner, petitioner have been notified and [inaudible].

ORAL ARGUMENT OF CHRISTOPHER A. FUSSELMAN ON BEHALF OF THE PETITIONER

MR. FUSSELMAN: May it please the Court, Counsel. This is a case about predictability and certainty in contract law, rescued commercial list that they implied warranty of commercial suitability as implicated, and the answer is waivers provision that she brought for non-specific answers waiver provision. It also involves at-- what is turned as a waivers of subrogation which was ruled upon by the Court of Appeals below. The argue-- they could have been utilized by the trial Court to grant some rejudgment in this case. For that reason, we'll be grassing both of them. But I'd like to try to do first-- give your road map a promblen with the argument and then-- again looking for questions. Our first part of the argument will that-- the first part of the argument will be that-- the implied warranty and the waivers subrogation clauses are both extra ordinary risk ship in, in provisions. As such it must be in guiding, we're arguing that the tendency which the original didn't least expired in 1996, four years before the date of loss. At that referring to a month to month tendency are arguing if that sense of revered to my, my pendency. The mishap in provisions were no longer have guiding, and therefore, no longer enforceable as extra-- which are extra ordinary breach shifting provisions. Secondarily, we'll argue that, to the extent that Court would disagree with us and important with role of that, the breach shifting provisions continued to be in a fact that the language of those which setting preventions were not sufficient. Why is it implied warranted of that infomercial purposes, or too late to write to the cover under the other theories which include negligence, negligence per se, gross negligence and, and again the breach of implied warranty. [inaudible] ...

JUSTICE: Let's assume, let's assume that the provision are enforceable here, just for purposes of argument.

MR. FUSSELMAN: Yes sir.

JUSTICE WAINWRIGHT: We held in the last four years that implied warranty of habitability in the residential context, generally cannot be waived, and you make an argument that in [inaudible] the implied warranted suitability in a commercial context should not be waived. We did have that statement in Davidow that generally this implied warranty is not waived unless the tenant agrees to-- and we used some, some fairly specific language. Central facilities will remain in a suitable condition and the-- at least, at least the tenant must expressly agree with their certain defects. The Court of Appeals makes the point that, the Davidow we didn't say in that 1988 case, but that's the only way that the "as is" clause is going to be in effect here. What, what's your response to that, that, that point by the Court of Appeals.

MR. FUSSELMAN: Justice Wainwright, the Court of Appeals that-- my opinion on that si-- on that particular topic, you didn't notice, actually in merge both of waiver argument and a breach argument. And what they argued are what they wrote, that there's more than one way to write through the implied working commercial suitability. Certainly this Court never said that and it's part of their argument, what they do is say."And in fact let me read it for you, Martin last night." And it's, it's barely confusing language when you read through it, somewhat trying to get as clear as I can. This is from page 12, of the original opinion. What the Supreme Court in Davidow approved one means of waiving the implied warranty of suitability, and he gave that standard. It did not state that this is the only method that would be implied warranty of suitability can be weighed, rather the Supreme Court explicitly stated that determination of whether there has to be an actionable breach, which is different from waiver, of the implied

warranty of suitability depends on the particular circumstances of case numbers to the facts of their case. One of the factors to be considered in that analysis is whether the tenant waived the defects. As it continues to reach its analysis, he gets the end and list those facts-- and then it says in short, "Davidow indicates that there is more than one way to over write oral [inaudible] implied warranty of suitability, but what it gives is its much called task to reach that conclusion is actually a mixture of that proving out a breach versus waiving the right to the-- the right's under the implied warranty of suitability."

JUSTICE BRISTER: But in the commercial context, I mean, what if somebody says, "The only way you can do it is-- who agrees to make repairs, and he got a place with no fire system." And they say, "yeah, you know, at least it's bes-- can't be expensive, cause we going to put in the fire suppression system." and said "Don't worry I'm just going to scour asbestos there. I don't want to fire suppression system, let's negotiate lower term, we do and then ferns down and I'll sue you anyway." I mean, this are grown ups, this is not somebody going out to rent on a park, but these are grown ups, they know what they want to do. Why should we be telling them? Nope, this is whose going to put in the fires suppression system and this is how much we going to charge for it.

MR. FUSSELMAN: First to answer that Justice Brister, is certainty and predictability.

JUSTICE BRISTER: Oh sure we could, we could say every apartment in Houston has going to be rent for a 100,000 a month, and be certain. It'll be predictable and have nothing to do with what Courts do.

JUSTICE: But in this case in aDavidow opinion, that's expressly what the Court said had to be done. I hope-- let me turn my back on you but I [inaudible] -

JUSTICE: The last term is quite all right.

JUSTICE: - I mean, that is the opinion and you know-- Davidow is a Doctor. And surely if there was a, if there was a sophisticated person in a world out [inaudible] that at least a Doctor is as sophisticated as vogue to run a wit trading company.

JUSTICE BRISTER: So I-- your not saying that a Doctor should know all about commercial leases and buildings, and AC, are you?

MR. FUSSELMAN: Not at all, in fact I support Davidow, I believe in Davidow-- Doctor Davidow to treat it correctly and [inaudible] ...

JUSTICE BRISTER: I mean normally, I'm realizing things were little different 1988, but normally we imply terms in a contract. It fells, number one, the parties didn't address it, and number two, if to had addressed it, it would certain what they wouldn't say it. I mean, you could do that on department of conflicts of-- in Texas as, as matter of fact it doesn't say one thing to other-- one way or the other about air conditioning, we can imply air conditioning would require. Cause that's just the way it is. But this is different, isn't it?

MR. FUSSELMAN: What? It doesn't say ...

JUSTICE: Which one of those if either does your client meet-- It wasn't address to the contract, but this was and if we-- If you had addressed it, we know certainly that you would have put the risk of our processional-- I mean, why does either of those apply here?

MR. FUSSELMAN: Because the tenant or the landlord under David-- at Davidow or Davidow is required to list specific defects that the tenant is to take on. The lease agreement must list specific defects the tenant is to be charge with. And if it doesn't li-- if it doesn't list specific defects then those defects, to the extent that the jury determines they are latent defects, are laid back on the landlords

shoulders.

JUSTICE: So what if it's defect that's expensive to find out? Like asbestos.

MR. FUSSELMAN: I don't know Judge. That's expressly for the jury to decide whether or not, that's a latent defect that breached the implied -

JUSTICE: I'm just, -

MR. FUSSELMAN: - warranty of suitability.

JUSTICE: - I'm just wondering why in Prudential you can buy it "as is", but you can't lease it "as is".

MR. FUSSELMAN: I think there's a very a-- there's a-- The answer to that, is that, when your buying it you opt stead the financial word with all supply. You have to find extra [inaudible] with all to-- to have Attorneys, to have inspectors to look at it, you're making a follow-up decision and you know the landlords going away. As soon as he gets his check, he's done. In this case it's a lease, and the landlord's with me every step of the way. And if I don't do something right, He can kick me out, he can put me out of business. I'm at his back to call his summer guards under the lease. In exchange to that, since he has that power, then he also has the obligation and make sure I can use my business for it's intended to be. And that's what Davidow says, Davidow specifically says, "It cannot be assumed that a commercial tenant is more knowledgeable about the quality of the structure than a residential tenant." A business may not be expected to possess the extra keys, necessary to adequately inspecting the premise-- premises and many commercial tenants lack the financial resources, to hire inspectors and repairman to ensure this ability to premises.

JUSTICE: And of course, I appreciate Judge Superior's knowledge of market conditions. But it might be after the market-- some people that own buildings are exactly with us, who had buildings left home and they don't know anything, and they don't have any money and they want to get rid of this thing, but they don't want their-- rest of their life's savings destroyed or something burns down-- I mean, sometimes, it is-- sometimes, in fact to the landlord's with the-- and the tenants are big rich corporation, even though Judge Superior seems to think it's always the other way around. It is not always the case like that, is it?

MR. FUSSELMAN: Well, I can't say it's always the case like that Judge, but I can say that it's relieves [inaudible] ...

JUSTICE: Some were is his own property.

MR. FUSSELMAN: What would lead the Court today and ...

JUSTICE: And sometimes they lease it, and your rule is-- they paid for everything here.

MR. FUSSELMAN: Not at all Judge, is that you have to expressn't if the facts aren't as expressly laid on to the tenant, then they belong to the landlord if those defects would be in bridge to the implied warranty of suitability for commercial purposes. It's the landlord's structure, it's his premises, it's the landlord in this, in this case of Mr. Snider's obligation to produce and provide a, a suitable structure, a suitable premises for carrying out the business that Gym-N-I is carrying out. And by the way this isn't just a situation, where he happen to be a landlord, and they happen to be a tenant. Mr. Snider actually built this business, this was Mr. Snider's business, he built out this business to another level before he sold it to my clients, and leased it to my clients. In this instance Mr. Snider had personal knowledge, very personal knowledge of the structure and of-- the house was wired. And knowledge regarding the ordinance requirement that it had uphold the fire sprinkler system. Knowledge of his negotiations

with the fire marshal to not install both fire -

JUSTICE: Well, I, I -

MR. FUSSELMAN: - sprinkler system.

JUSTICE GREEN: But maybe I'm mistaken, but I thought that your clients were with him for at least six years at the same place?

MR. FUSSELMAN: They did work for him, Justice Green. But they worked for him, they were employees. They weren't his partners ...

JUSTICE GREEN: So they weren't aware that there was no fire suppression system?

MR. FUSSELMAN: They maybe un-aware that there wasn't a fire suppression system. I don't know and I don't think the record reflects whether or not they are aware or where of the necessity of a code require fires protection system. Furthermore I don't-- I think you will find it in the law, from a reading of the law. That it would be improper to place all the tenant the burden of bringing a premises up to-- code to suspect the fire suppression equipment. And in fact in Davidow or Davidow another line is because commercial tenants often enter in short term leases, the tenants have landed economic inset to make any extensive repairs to the premises. In this case for four years before the fire, for 48 months, 100 month to month tenancy, where fire trucks paying $60,000 sprinkler system. The minute they leave or get ask to leave, which they're all noticed within 30 days, they can be-- it reverse back to the language.

JUSTICE GREEN: In Centex, we affirmed a broad kind of mall that applied a warranty of habitability of residencies, and it only took the legislature 153 days to place the kind of mall with a statutory scheme, which is not the shortest brief of time in which they rejected one of our opinions, but it's up there. Do we-- What should we take from that if anything about how strong to make the implied warranty that's similar in commercial context.

MR. FUSSELMAN: The Justice had-- if I would say is that, "We're Lawyers and we're Judges and we're the Court system with the judicial system," it's our job to make these laws applied, and to administer them, back to the public legislature turns this surround. Right now we got lost if you could drive through the [inaudible], Boston, or Houston, or Dallas, and look all those windows and all those buildings-- for most of them there's a commercial lease behind. It allow them to have grazing provisions that we have here today, a lot of them have been coming to Davidow in depending on how much law rule in this case, is going to determine whether or not those folks have a good lead survive. It's going to determine whether or not landlord can leave from hydra. It's going to determine whether or not the landlord can breach an ordinance for not being complied with law ordinance,and leave it on the shoulders of the lost risk. So on and so forth.

JUSTICE BRISTER: So our job, so our job here today is to specify what exactly an all commercial leases. The landlord has to appear "period" nor the defendant may-- the tenant has to appear "period", and since we know best about all leases, were in the best position to do that.

MR. FUSSELMAN: No Justice Brister, your job today is to stand behind Davidow and say when the big boys get together as you're talking earlier, to make their deal-- to make your deal, put it in words, say Mr. Finn disregards appeal.

JUSTICE BRISTER: Make, make your deal with the following exemptions, you can't do this, you can't do this, you can't waive that.

MR. FUSSELMAN: Oh, no, you must do this, you must say, "This is what you must be fixed, -

JUSTICE BRISTER: Same thing.

MR. FUSSELMAN: - Mr. tenant." Well, it is different specifically because the tenant is unnoticed of what they required to do, to fix the premises and tenses. You know, what I accept that is not that far removed for being thank about from [inaudible] ...

JUSTICE: But if they said "except that", then its going to set empty ...

MR. FUSSELMAN: I'm sorry.

JUSTICE: If they don't accept it, it's going to set empty, because the Court says, "This is the only deal that you can make," and they say, "That's not a deal we want."

JUSTICE: If you'd said empty under-- in the scenario. I think more formal consideration is what's fair and what's predictable and what's certain with respect to commercial leases. And in this instance, what we're trying the landlord's, you want money for renting, for renting your premises then you must have it ready for what is supposed to do.

JUSTICE: Let's, let's get away from Davidow in this Court for a moment and look at the "as is" clause. And assuming that the tenant is not sophisticated and the law doesn't know about Davidow and melding homes and Prudential [inaudible], all that. The languages that tenant except the premise as is, the landlord has not made and does not make any representations as to commercial suitability, physical condition or any other matter affecting or relating to the premises and the tenant acknowledges the number of representations have been made warranties and etc. Now, what is a tenant to think about of buying and just leaving, leaving Davidow aside for a moment. Doesn't it tell the tenant, who knows what condition this building is in. It could be dangerous-- And I'm agreeing to lease it, even given that potential danger marking behind the walls somewhere.

MR. FUSSELMAN: My time has expired just to [inaudible].

JUSTICE: You answer that question.

MR. FUSSELMAN: I think the answer in your question is, that's exactly that tells him. Let's see coming up, let's see. You don't know what your hitting, nobody's protecting you, nobody's telling me that you can use this premises for what I'm telling you to get for. I'm not promising you could get for it. Done leasing it, and I know that your business is hiring that business for you did. I sold the equipment to you. And that's what happen in this case. That you are, if you don't have Davidow and you use to ask this provision you're at. Your on your own kid.

JUSTICE: Okay. Further questions. Thank you, Counsel. The Court is ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court, Miss Malinas will present argument to the respondent.

ORAL ARGUMENT OF RUTH G. MALINAS ON BEHALF OF THE RESPONDENT

MS. MALINAS: May it please the Court. If the issue in this case predictability and certainty, then the Court of Appeals opinion has to be affirmed. Review the questions as follows, Whether or not an "as is" provision, this particular "as is" provision which is not general as the petitioners keep asserted it's a very lengthy paragraph of the portion of which, was courted by the Chief Justice. The answer to that question cannot be waived or disciplined, guess it can be.

JUSTICE: What is predictability require affirming the Court appeals opinion?

MS. MALINAS: Because the-- this lie-- this lease was very lengthy, it was negotiated along sly. Both sides had Lawyers, they-- the record here indicates that the two individuals Mr. Finn and Ms. Caddell, who were the principals of Gym-N-I. They knew exactly what was in there and Mr. Snider was not going to lease the premises to them, unless he would get those provisions, with the selling the business.

JUSTICE: What-- like you're, you're talking about the specific facts in this case, but we're not common law area. Which we know is Judge made law. Either rule we announce, so long as it's clear, definitive promotes predictability. Because the parties will know what the rule is, I can seat down and negotiate around it. If there is no implied warranty that can be waive an "as is" clause. So there isn't, as long as the rule is clear, it promotes predictability. Doesn't it? either way.

MS. MALINAS: Yes, but I think the law is clear that in every other context, even outside of leases. The Courts of Texas have said that "as is" clauses are enforceable, so long as the parties are not defrauded, and their especially, especially enforceable when the parties are sophisticated as these were, where they actually new about the clauses they were pointed out, it was explained to them ...

JUSTICE: You say if-- we-- but the-- both parties have lawyers and, and that's true and so we would expect that the lawyers would have research the law. And if they did, they would see that Davidow says, "That the implied warranty-- that there's an implied warranty, warranty of suitability," that means that at the inception of the lease, there are no latent defects. And if this so they said are final to lease of the premises for their intended commercial purpose and that this essential facilities will remain in a suitable commission. That's the implied warranty in Davidow and then they would also know that under Davidow to waive those warranties. The parties must expressly agree that the tenant will repair certain defects. How did this "as is" clause square with that background law, and that meditation on the use of "as is" clauses.

MS. MALINAS: Well, I belie-- You have to look at the fraud lease, and in the whole lease in paragraph 7, it's entitled "Amendments of the premises", and the tenant in this lease was given all obligations to repair and maintain in a conditional legibilities. As far as the code of that-- The code violations that they've alleged that, that the record conclusively rebuts, there's a provision in the lease, there is-- well, I believe it's 30-- its paragraph 18, requires the tenant to comply with all ordinances rules and regulations. The Bynum case which their-- that involved the sale of the used house, but if for given enforce in "as is" clause when somebody is buying residents, then surely we put in a commercial lease. And there Bynum said that, "The fact that there were, there were code violations when same remodeling was done they were-- whatever town that arose to have that, required a building permit, and there were no building permits obtained whether their modeling has done." That, that did not preclude application of the "as is" clause. Nothing in this case other factually or legally justifies the remedy that sought here. And that is avoidance about, about of a lengthy non-boiler plate negotiated lease between three individuals, all of them had extensive business experience.

JUSTICE: But if we adapt the reasoning of the Court of Appeals, it's pretty good that these identical clause would appear in all contracts before the law. Right?

MS. MALINAS: That it seems that the tenant will sign them.

JUSTICE: As but-- Yes, but they will-- In the form they will be in almost all.

MS. MALINAS: I don't think that's necessarily true because at "as is" clauses have been recognized in sales for a long time, and they, maybe in pre-printed, you know, pre-printed contracts.

JUSTICE: We can-- will make a side bet about that. But let's assume that appears in most forms shortly after if we were to talk to your conclusion. Then, the deal is, when the place burns down by talk to their Lawyer and the tenants say, "We never noticed that there was no fires suppressions system," and the landlord says, "I'd told of that", it all goes to a jury, and we end up leases or whatever a jury says, which sometimes maybe which one of the parties they like the best. Is that a good way to allocate fire losses by whichever party appears more attractive to a jury. Right or wrong?

MS. MALINAS: I don't think so that's why I said that ...

JUSTICE: How do we avoid that-- Assume, we have an "as is" clause we're going to have to have something like the same factors we had in Prudential.

MS. MALINAS: Yes.

JUSTICE: Which then leaves it to, at least one whether somebody knew or didn't know, which is emphasized to both briefs here, and ...

MS. MALINAS: Well, I, I think in any contracting situation were you have great disparity between contracting parties the law gives certain remedies and defenses. But here-- I mean, I think you have to look-- I know this Court wants to look at, at the effect of it's decision was, but also needs to look at the facts in which this case arose. And in this, in this case if the Court adapted a Prudential reasoning which hasn't destroyed commercial sales -

JUSTICE: Has it appeared at -

MS. MALINAS: - And so -

JUSTICE: - all.

MS. MALINAS: - if that, if that reasoning were adapted the Court of Appeals decision would have to be affirmed in this case. And all we're saying is, is, is credentials to law, there's no reason not to extend it to commercial leases, we-- there are statute ...

JUSTICE: The reason distinction of Course between lease and purchase near-- For in it is right, people do inspect thing before they buy, they hired inspector those in, in speculating, I don't know, they don't usually that with leases do they?

MS. MALINAS: No, but were not arguing that the implied warranty of habitability should be done allay with or that anything should happen to Davidow. We're just saying that it can be disclaimed under the same circumstances as our present in Prudential, and that is where you have knowledge and here they knew that there was not sprinkler system. They knew about the code issue, because what opposing counsel didn't bring up which is been brought-up in the brief is that, Mr. Finn was there when that fire marshal came by and the discussion about sprinkler system was had. And he knew that the fire marshal-- although he said, "You know, you might want to put one in there was a big investment there, the building was just slightly over 20,000 sq.ft or series of buildings," but he did not cite them for a code violation, he had some discretion as he testified. So there was-- there's never been a finding by anybody of a code violation and Mr. Finn knew there was no sprinkler system. So that, that issue wouldn't be want-- that would prevent application of an "as is" clause. What are the factors that Prudential issue looked at is-- where both parties represented by Counsel. Here

that-- a negotiations originally begun about a year before the lease.

JUSTICE: But the-- Again, their, their government material differences between a purchase and at least a short term lease, aren't there? If you-- If there are couple of improvements required at the AC system through out the commercial building or sprinkler system. As not something a short-- the tenant that are leasing for short term is going to want to do it's going to be economical for the tenant to do certainly the owner of the property wants those capital improvements, if they are-- To me they're on the nature of capital improvements done to the building. So their material differences there, cause our question is do we want to make every lease have a term as petitioners are asking that certain central facilities and, and repairs have to be expressly put on the back of the tenant, for tenant the-- to, to, to have to do them or do we want the parties just seat down knowing what the rule is and negotiate what terms are going to be?

MS. MALINAS: But if-- the lot of rules, because I can hear talking about commercial leases. And if you look at the cases in which this leases of-- this implied warranty is applied, it's not exactly the same as habitability, its suitability for the, for the purposes, the commercial purposes for which the building is going to be used. So an un-air condition building might be great for storage, but a doctor wouldn't want to have his office there. Now of course the Doctor would know it's not air conditioned when he went there. And so why, you know, why would he sign a lease, I mean, I think that the position ...

JUSTICE: But there's some condition that the Doctor won't know about-- When we talking of latent defects, there once that a visual inspection they don't, they don't deal and there's something that the law has said that, that-- owner of the building has more information about than potential lessee. And I think that, that was the reason at this all, all convene that there's more information on the landlords side, than on the tenant's or the owners than on potential purchaser. And-- So economically the incentive-- at least some of the similar fire cases cite in, incentive ought to be on the seller or the lessor to either declared it and make division specifically for their repair and maintenance, or the implicit warranty is in effect.

MS. MALINAS: Well, I have-- I've-- am-- I have difficulties squaring that with Prudential, because prudential says ...

JUSTICE: How do you square with Melody Holme's in Davidow?

MS. MALINAS: Those are different worn-- alle-- Davidow doesn't say, I mean, I guess I view Davidow as saying we're, we're going to recognize this warranty and they were talking about breach, when they've talked about waiver. But I suppose, I'm trying to-- Maybe if we look at it this way, the implied warranty of suitability is there, unless its disclaimed that's not a new rule, that's not a, a rule that we haven't adapted in many other context Melody Holmes is a very specific warranty. Davidow was, was decided three months after and Melody Holmes that warranty the Court said, "You cannot disclaim this," three months later they-- Davidow is adapted and there's no discussion of disclaimer, except to say that, that if the tenant waives it, there can't be breach of it, and so that indicates to me that if not only can be waived, but that the waiver can be given a fact. Here the language is just so clear that-- and, and again you know, I don't want to focus too much on the facts, but the facts of this, of this case are very clear. The, the individuals who sign the lease on behalf of Gym-N-I and they were the only owners and the only principals. They testified that they did not get the-- they, they could have done an inspection, but they didn't because-- and this is applaud, they knew the building

better than us. And so yes, I think there is circumstances where it would be grossly unfair to, to give effect to an "as is" clause where an unknowledgeable lessor. It's-- Inner central release and their misrepresentations made, and so he finds himself stock with the building that he can't use. But that's not this case, so I suppose ...

JUSTICE: The Davidow and Prudential conflict, do you think?

MS. MALINAS: No, because there was no "as is" clause on Davidow.

JUSTICE: Okay. But DAvidow says, if-- Davidow says, "There's a, there's the implied warrant and to overcome that when the parties must expressly agree to repair certain defects." Is that right? So how, how is that not-- if we were to apply Davidow to this case. Does this lease required a tenant to repair certain defects?

MS. MALINAS: I believe it does it, it, it requires them to repair all of them. Keep in mind -

JUSTICE: What language -

MS. MALINAS: - this ...

JUSTICE: - what language does that, the recall from briefing the assertions made, that there's no specific defect assigned to the-- in the lease to the tenant, are you saying the general disclaimer -

MS. MALINAS: No, no -

JUSTICE: - or the disclaimer clause.

MS. MALINAS: - its, its paragraph 7, and it says, it's attached to our brief on the merits and it says, "tenant covenant and agrees that tenants so cost an expense to perform all maintenance and repairs of the premises and to repair or replace any damage or injury done to the premises or any part thereof, cause by any reason, except the gross negligence of landlord, all such ..."

JUSTICE: So the language to perform all maintenance and repair you believe expressly makes the tenant responsible for the AC and, and for sprinkler system?

MS. MALINAS: Yes and they goes on, I mean-- I guess -

JUSTICE: What, what about-

MS. MALINAS: - this is ...

JUSTICE: - a sewage system?

MS. MALINAS: I don't know who, who would be responsible for that cause-- or there-- from my personal experience often the, the cities, the city and the, and the, and the premises owner or less-- or lessor is responsible for the part of it.

JUSTICE: But my question is, does the language-- the tenant's responsible to perform all maintenance and repair include a tenant be un-obligated to repair sewage system.

MS. MALINAS: I think it would, again it-- -

JUSTICE: So you think, -

MS. MALINAS: - Mr. Snider ...

JUSTICE: - you think this language effectuates Davidow's expressly agreed that the tenant will repair certain defects, as what you're telling that's your answer to the chiefs question.

MS. MALINAS: Yes because I don't think that David-- The usual commercial leases, you know, the pre-printed forms that you get at a, at a real estate agents office will, will this town-- okay, landlord. Landlord's responsible for the brief specially in a large building. We can have multiple tenants, their going to be responsible for the common areas, the roof, the air conditioning, the things that gather the building as a whole and the tenant is going to be responsible for repairs within their own space, for example if your, if your office space includes restaurants and all the plumber packs up, you have to go out and get plumber to come fix it at your own expense. And then the

tenants-- if there's lots of repairs done to the building at the end of the year the tenant's divide-up some of those extra expenses, because that's in a lease as well.

JUSTICE: So you don't distinguish between normal used repair and maintenance and capital improvements for example. What if the sewer problem required digging up the lot with the backhoe and replacing a lot of pipes leading into the city sewer system. Would that be a tenant repair, under this language, in your opinion?

MS. MALINAS: Well, again it says, it says what it says, if it's maintenance and repairs of the premises, Mr. Snider brought the hard bargain in this case. They wanted to purchase, they wanted to purchase the business, they didn't want to purchase the premises and the equipment, so ...

JUSTICE: Let's, let's, let's compare Prudential's purchase with a long term lease, let's say the tenant is in a 40 year lease and let's assume the useful life time of a AC system or sprinkler system is 34 years and the tenant probably going to-- if their being rational say, "I'm going to get the entire use of this couple improvement under my facts, so I may as well do it, it's no more cause to me, terms of my 40 year use than for the owners," and then the short term lease, aren't there some differences between the purchase and a, and a lease, terms of where logically perhaps the burden should seat, if were going to put ourselves in the position and determine logically what party should contract for.

MS. MALINAS: Yes, but there are again, okay. If you announce the rule that, that you have to list out every single possible defect or, or, or problem or allocate every part of the building to one party or the other. There's going to be circumstances where that parts going to go out. And that's how the Courts have dealt, the lower Courts have dealt with this "as is" clauses. There's going to be a neat problem at all. The cases we cite that-- and even the one's they do, it was the landlord trying to get out of, out of a big problem because he didn't comply with his obligations under the lease. So if the landlord is suppose to fix the roof, and the roof is unfixed and there's an "as is" clause in it. I don't think that even applies, because if the landlord has taken on the responsibility of fixing the roof, he's breached to another provision of the lease. And so really the only difference here is that there's been some-- there's case law that says, "that if the warranty of suitability is breached it's separate and apart from the obligation to pay rent." So I'm finished ...

JUSTICE: Are there further questions? Thank you Ms. Malinas.

JUSTICE MEDINA: There's your adversary made a comment that if there was a leak in a roof and this contract hadn't had "as is" clause and the part of the origin says that "the landlord has to repair the leaks" but there's "as is" clause would-- why wouldn't the "as is" clause control over the responsibility that's designated to the landlord. How should it?

MR. FUSSELMAN: Justice Medina, I think that it, I think that if anytime a special defect is placed in a contract on the shoulders at one party, with that party carries that, I think in that scenario if for instance there was a broad form "as is" provision. But it did the reverse of what I'm saying it should do, in other words it says, "But the landlords shall repair the roof." I think the landlord would be required to repair the roof to get out of the trash law allegation to do so.

JUSTICE: And seems like an insurance policy which is we cover for mold for example, are don't coming from mold, but in suing laws clause

provides otherwise. It seems like there was the same analysis made by the other-- your co-count for your adversary there that-- you know, that bank contract provides one area covered, but takes it away with an "as is" clause.

MR. FUSSELMAN: In other ways the-- I think another thing to keep in mind is that there are rules construction involving landlord tenant leases in commercial context. One have miss if there is a an ambiguity in the lease and has to be construed against landlord, if the landlord created the lease and then tendered it to the tenant, for the tenant acceptance or rejection, another ...

JUSTICE: But that's not what you have here.

MR. FUSSELMAN: My opinion in this case that is what we have. In this case Mr. Snider presented my clients with the lease they took it to a lawyer. The lawyer says this is not in favor for Mr. Snider and then my McClure said, "We need space," and they sign the lease. And that's part sophistication argument that defendant makes. I think that's important, but let's remember something about sophistication. Let's question a fact. And this is a summary judgment case.

JUSTICE: Let's go back to ambiguity or mal-ambiguity. The disclaimer clause also says, "Landlord makes no other warranties express or implied of merchantability, marketability, fitness, or suitability."

MR. FUSSELMAN: Yes, your Honor. But in this instance Davidow ...

JUSTICE: Why, why didn't, why didn't at the end of the story?

MR. FUSSELMAN: Because Davidow says it's not. Davidow says irrespectable what work he-- you want.

JUSTICE: Davidow says, that for essential facilities that they will remain in a suitable condition.

MR. FUSSELMAN: That's correct.

JUSTICE: What are essential facilities?

MR. FUSSELMAN: The facilities necessary to do the work of the business.

JUSTICE: So an AC is necessary in Brownsville.

MR. FUSSELMAN: True.

JUSTICE: Is it necessary in North of Texas in September?

MR. FUSSELMAN: Maybe, maybe not. That question for the jury to decide.

JUSTICE: And the Davidow then says, the parties to at least expressly agree that the tenant will repair certain defects. What are certain defects?

MR. FUSSELMAN: And that's exactly right, it's not just the specific ...

JUSTICE: How clear is Davidow?

MR. FUSSELMAN: I'm sorry? Da-- Davidow -

JUSTICE: Davidow

MR. FUSSELMAN: Davidow very clear, it's a certain defects and certainty they means.

JUSTICE: Oh you disagreed you, you just said that essential facilities depends upon a jury verdict that's a fact question ...

MR. FUSSELMAN: That's right.

JUSTICE WAINWRIGHT: So how, I mean, That doesn't seem to seat well with your statement that Davidow is very clear and on the other hand you say that to determine what the essential facility means, we have to ask the jury. Those you don't, don't fit in the same logical construct.

MR. FUSSELMAN: Justice Wainwright, It's the difference between waiver and breach. The waiver issue Holder Coin, Gober versus Wright¢ which is the writ denied case is a matter of law for the Court to

decide. The breach of the implied warranties as matter of fact for the jury to decide. And whether or not that would cost to the essential facility in Brownsville or [inaudible] would be a question of facts for the jury to decide. What the Court would decide is whether not the waiver reached far enough to include, will provide that tenure.

JUSTICE: Or anytime there just needed facts-- material facts those are questions for the jury, I'm talking about reading Davidow that says "essential facilities will remain in a suitable condition" and then it says "that the tenant's responsible, like expressly agreed for certain defects."

MR. FUSSELMAN: Exactly.

JUSTICE: And I'm just asking how clear is Davidow. How much does Davidow say, I'm, I'm frankly not sure how much Davidow says.

MR. FUSSELMAN: For me it's clear.

JUSTICE: And Davidow didn't address an "as is" clause either.

MR. FUSSELMAN: Well, it didn't address an "as is" clause and in fact it said "what you must do is specified-- specify certain defect that are responsibility of the tenant and 'as is' clause doesn't do that." You know, as a matter of fact in the Lee versus Perez case are not with Justice Brister's, you should be clear with it. There was an issue about whether or not I think it was a deep restriction constitute today, a latent defect that was protected under the implied warranty of suitability. And in that case it was determined, I believe that it was. But I do wanted to-- I know my time is almost done, I just want to barely get across the point-- this is a bad intensive case, and this not-- this is a summary judgment granted by the top Court and affirmed on a appeal and were after talking about factors. All the words you heard were factors, those are fact, those are facts for the juries to decide. My time is expired.

JUSTICE: Any further question?

JUSTICE: Thank you very much Counsel, the case was submitted and the Court will take a brief recess.

COURT ATTENDANT: All rise.

2006 WL 5918098 (Tex.)