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Supreme Court of Texas.
William Chu
v.
Chong Hui Hong.
No. 06-0127.

October 16, 2007

Appearances:

Murry B. Cohen, Akin Gump Strauss Hauer & Feld LLP, Houston,
Texas, for petitioner.

G. Stanley Cramb, Law Offices of Cramb & Marling, L.L.P., Bedford,
Texas, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: Court is now ready to hear argument in
06-0127, William Chu versus Chong Hui Hong.

COURT MARSHAL: May it please the Court. Mr. Cohen will present the
argument for the petitioner. Petitioner has reserved five minutes for
rebuttal.

ORAL ARGUMENT OF MURRY B. COHEN ON BEHALF OF THE PETITIONER

MR. COHEN: Mr. Chief Justice, may it please the Court. I'm Murry
Cohen. Along with my colleague, Stephen Barrick, I represent the
petitioner, William Chu. Also, with us today is Mr. Robert Simon of
Fort Worth representing the amicus. I must also say that with us today
is Marilyn Craftman from State of Iowa, who has nothing to do with this
case except she heard her little brother was arguing a case and wanted
to see him in action before the pious Court of the State. The Fort
Worth Court of Appeals had made three holdings that are not only
unprecedented in Texas law, they're contrary to holdings of Texas law
and their three holdings, I think this Court would never make and
should never approve. First, the Court created a new tort. It created
it not, not out of whole cloth as a common law tort but sort of a mixed
marriage. It tacked onto this tough statutory remedy, not cause of

action but remedy, the tort of aiding and of conspiring to aid and abet a fraudulent transfer. That was its first major new unprecedented holding. Three courts have opined that there is no such cause of action. They're all federal courts construing the same statute TUFTA and those courts are the Fifth Circuit in *Mack v. Newton* (737 F.2d 13430, the Northern District of Texas) and *FDIC v. White* (1998 WL 120298), and the Northern District of Texas in *Mullens v. Te*. The second holding the Court made which is unprecedented in Texas law is that having created that new tort. They created a right to not just return of the property as authorized under the statute but consequential damages, lost profits. Not satisfied with that, the Court went on to make a third major new holding, which is that the person recovering cannot just recover the property and actual damages and consequential damages but also punitive damages as the plaintiff did in this case. And the Court affirmed it two to one over a thoughtful dissent by Justice Gardner.

JUSTICE HECHT: Can the spouse ever recover against a third party in a, in a divorce proceeding?

MR. COHEN: No, your Honor. Under the law of this Court, it cannot.

JUSTICE HECHT: That's contrary to the holding in the, the *Schlueter* case (975 S.W.2d 584).

MR. COHEN: It is contrary to the holding in the *Schlueter* case. The, the ...

JUSTICE HECHT: I didn't mean to cut you off.

MR. COHEN: It, it absolutely is. I believe the court cannot affirm at least, at the very least the alternative causes of action probably not, and I'll tell you why in just a minute the TUFTA cause of action either, Justice Medina, without overruling *Schlueter*.

JUSTICE O'NEILL: Well *Schlueter* was only asked between spouses. *Schlueter* specifically revert-- reserved the third party question and in fact seemed to be perhaps condone it because the award stood below against the father, the father-in-law.

MR. COHEN: That's right. May I speak to that? I don't think it's right to say that the court-- was a-- you're right of course that it was-- did not involve third party liability as this case does. But I wouldn't say that it reserved the issue. What it said was 'We don't reach the issue because it isn't presented.' The father-in-law didn't attack it on that basis. Second of all, this Court has reached the issue, all be it not, in *Schlueter*. And it reached it and ruled unanimously in 1960 in *Cohrs versus Scott* (338 S.W.2d 127) that a third party conspirator with a husband defrauding a wife of community property was not subject to liability when the primary actor was the husband. Don't let anybody tell you, Justice O'Neill, that fraudulent transfer cases are boring. In *Cohrs versus Scott*, W.H. Scott, was the elected District Attorney of Harris County. He was taking community property to buy automobiles for his mistress who's no ordinary mistress. She was the owner of the house of ill-repute. Later after he won his election, he had to leave office under that cloud of suspicion. In this case, his wife was suing Mr. Scott, the husband's co-conspirator, Mr. Cohrs. He bought the Cadillacs and held the notes and dealt with the property secretly used to buy the Cadillacs. What the Court held was unanimously is that beyond any question as between Scott and Cohrs, that's Mr. Scott, not Mrs., Mr. Scott was the principal actor. As to Mrs. Ayers, the, the mistress, the automobiles and the fraud under the facts before us, the fraud having been initiated by the husband and mainly carried out by the husband just like in this case. She must look primarily to him and his property to right the wrong. And they held

that the trial court settled that by dividing the property in the divorce. So, you ...

JUSTICE O'NEILL: Since mistresses seem to be all over these cases, what about the lottery ticket to the mistress?

MR. COHEN: Greatest case I've ever seen. That's Mayes versus Stewart (11 S.W.3d 440) from the 14th Court of Appeals think there's a very important difference in Mayes versus Stewart that lets the party recover, lets the wife, the, the former wife in Mayes recover. And that is that unlike this case and unlike Cohrs versus Scott and unlike a legion of other cases, Ginsburg (137 S.W.3d 231), for example, from the first book, unlike cases where the wife was not permitted to recover, the reason she wasn't permitted to recover was because the prop, the theft from the community was known at the time of the divorce taken into account and compensated for an unequal division. In Mayes, this lottery ticket worth millions of dollars wasn't known at the time of the divorce. The divorce became final. It obviously was not considered in making any unequal division. In fact, the husband after the mistress turned on him, he sued the mistress because she wasn't conspiring with him anymore to see that he got the lottery ticket proceeds. He told his former wife what she was doing. She sued them both. And he was indicted and convicted for aggravated perjury. The reason I mentioned that, Justice O'Neill, is it-- they had to give the wife in Mayes versus Stewart relief because she couldn't have gotten it in the divorce. That's what distinguishes that case from this one.

JUSTICE O'NEILL: Wouldn't it have been different if the community estate had not had the funds to cover that sort of a loss? In other words, if you'd got a transfer of a lot of money and you can't get it back and the estates' not sufficient to make the spouse whole, then can you go against the third party?

MR. COHEN: I suspect that, that is a common problem where there's no money left in the estate to pay for what has been stolen and wasted by the misconducting spouse. That argument of injustice was made powerfully by Justice Hecht and Justice Spector, in the dissenting opinions.

JUSTICE O'NEILL: But again, that wasn't a third party. That was as to the spouse, not dealt with interspousal immunity.

MR. COHEN: That's right.

JUSTICE O'NEILL: A different twist.

MR. COHEN: That's right. But Cohrs versus Scott did deal with a third party where, where the community property, the, the defrauded community property was taken into account during the divorce.

JUSTICE O'NEILL: But, but give me other than the from what's been done in specific cases. What would be a reason why you wouldn't allow it? You've got a third party who's actively aided or abetted a fraud, and there's no more property left, and the community state can't compensate. What would be wrong with allowing suit against the third party?

MR. COHEN: The only reason that Justice Hecht could come up with I believe in his dissent, of course, he was arguing for the side he disagreed with was enough is enough. We're not going to abrogate interspousal immunity that far. If the court wants to change public policy to permit that sort of new level of liability, it would have to overrule both Cohrs, both -

JUSTICE O'NEILL: I just don't understand.

MR. COHEN: - Schlueter together.

JUSTICE O'NEILL: Well, as to a third party, you wouldn't have to overrule Schlueter.

MR. COHEN: All right.

JUSTICE O'NEILL: But, but what's the public policy argument that would preclude because I understand the evolution of, of interspousal immunity in *Schlueter* didn't deal with it as to a third party. And I can't, I can't understand the policy argument. If you've got a wrongdoer, why you shouldn't be able to pursue them differently?

MR. COHEN: The courts seem to-- I have struggled with that. The Court seemed to have resolved to treat a marital community comparable to a bankruptcy estate. That's not a very romantic notion. That's not what we usually think we're signing up for when we propose marriage and engage in it. But that's how the courts have looked at it as a circle within which there are a husband, a wife and their property and that the frauds stay within that circle. I think that the injustices-- the possible injustice in a case like that, that was identified in the dissenting opinion in *Schlueter* is probably unanswerable except that the court at that time felt that, that was the right way to treat a marital community.

JUSTICE MEDINA: Does the record indicate that Attorney Chu personally benefitted in this transaction other than collecting reasonable attorney's fees?

MR. COHEN: Not at all, and, Justice Medina, it does not. It only shows and I would specifically point out the same pages of the record that my opponent, Mr. Cramb cite in his brief which is Volume 5 at 115 to 127 and page 135, it only shows, and that's the only pages he cited, that he knew, Chu knew, that the wife had an interest, not that he knew that the husband wasn't authorized to deal with that interest, you would recall the husband signed a statement and notarized that he was, not that he knew the husband was going to take that money and leave with it for Korea, doesn't show that.

JUSTICE MEDINA: Would it make a difference if, if he did know that or if he did benefit in some-- for some personal gain?

MR. COHEN: I believe that might be a factor the court could consider in considering the punitive damage award. I think it might be a factor that the court, considering weighing the effect of *Cohrs* versus *Scott*, *Cohrs* versus *Scott*, they say what the husband was the principal actor by the implication *Cohrs* was a minor actor, you would consider that maybe to say, "Well, how much did, how much-- was he a minor or a major actor?"

CHIEF JUSTICE JEFFERSON: Wouldn't it also be a factor in whether he fixed the destination of the transferee under TUFTA?

MR. COHEN: No.

CHIEF JUSTICE JEFFERSON: - that he received a portion of the proceeds.

MR. COHEN: I would answer the question. No. Let me state a fact and, and response to that question, Chief Justice Jefferson. First of all, the only benefit he did receive was, as far as this record shows, was a, a law fee which is the same as far as we know as that same fee he would have received if this dispute had never arisen. I suppose and I believe the language you may be referring to in TUFTA is that TUFTA gives relief against transferees or-- and I want to say this very carefully, it doesn't give it against transferees and beneficiaries. It gives it against transferees and "the person" for whom the transaction was made. That is a much more specific limitation than mere beneficiaries. As we pointed out, the bicycle messenger who took the deed to the courthouse was a beneficiary. I suppose I am a beneficiary. I'm here because of all these that transaction representing Mr. Chu. But for it, the nine of you would have only two cases today. I know if

that makes a beneficiary or, or harmed by the transaction but if that's the kind of-- that's why, I would argue that's why the statute doesn't say beneficiary. It says "the person" for whom ...

JUSTICE BRISTER: What if Mr. Chu's client was the husband who's-- and the husband comes and says, "I want you to claim that this donut shop is mine, separate property mine alone," does attorney supposed to say, "No, I won't do that because I think" -

MR. COHEN: Let me make sure I understand.

JUSTICE BRISTER: - because I'm concerned about the, the attorney status here. I understand you're, you're for the other side. But let's, let's just-- you know, we're talking about what's-- you know, between spouses for all the transfers and stuff. What if, what if husband comes to his attorney and says, 'I want you to claim this donut shop is mine and mine alone.'

MR. COHEN: You're assuming, Justice Brister, that Mr. Chu was representing the husband of the plaintiff in this case?

JUSTICE BRISTER: I -

MR. COHEN: Okay.

JUSTICE BRISTER: - I just-- you know, what, what is-- Is the attorney supposed to an object this-- attorney's supposed to say, "No, I'm not going to make that argument that it's yours and yours alone because I think it's hers."

MR. COHEN: I-- in your hypothetical, would the husband be-- would Mr. Chu be representing only the husband and not the co-owner wife?

JUSTICE BRISTER: No, in other words, you're-- Mr. Chu's even one more step removed where the people better involved in the deal are coming and one of the people says, "It's mine and mine alone." Is he supposed to object to that and say, "No, I won't take that position?"

MR. COHEN: I, I don't think he is. Consider I, I thinking in response to that question the powerful presentation made by the amicus brief is particularly relevant. Consider the problem faced by Mr. Chu. I know that you would have it that he was representing the husband of the sellers. But here, he was representing the buyers. This is a transaction that had already tried to close and failed. There'd been a bounced check. There'd been a threat by Mrs. Hong of criminal prosecution for that bounced check threat back of civil litigation. Then we have the buyers, Chu's clients, still saying, "Let's close this deal." He is writing letter saying "I'm going to sue for his client," "I'm going to sue you if you don't." And then into his office walks, Mr. Hong realized unlike Mr. Cohrs, Chu had no dealings over the years with Mr. Hong.

JUSTICE BRISTER: This is the other side.

MR. COHEN: It's the other side. He had of course at decades of dealings with Mr. Scott. And here they are. And what is his duty to his client? Is it to refuse to close the deal that they've been paying to represent them on to undertake a duty of investigation? You know, as, as Mr. Simon said in his amicus brief, does not only imposes unheard of duties of investigation on parties like attorneys, title company's, accountants. But these duties can't be discharged by any amount of investigation in the public record. Who would-- they don't show who is a contingent possible creditor in, in the future. And further, those liabilities are uninsurable because as in this case, the far intentional torts like conspiracy. So I, I think it sets up an impossible conflict for an attorney because in that position he has a salary didn't represent walking in. And here's the question that he must answer which he can't. And your hypothetical is "Who's my client?"

JUSTICE WAINWRIGHT: Does your position undermine at all the case

law on abrogating interspousal immunity for personal injury claims?

MR. COHEN: I don't think so. I think it has no effect on that. I think this Court is drawing a clear line on personal injury claims, treating them of, of that recovery of separate property.

CHIEF JUSTICE JEFFERSON: Other questions? I think the Court is now ready to hear argument from the respondent.

COURT MARSHAL: May it please the Court. Mr. Cramb will present argument for the respondent.

ORAL ARGUMENT OF G. STANLEY CRAMB ON BEHALF OF THE RESPONDENT

MR. CRAMB: May it please the Court, Chief Justice. In this case, the fraudulent transfer act is a statutory tort. It's broad enough to encompass conspiracy liability for Mr. Chu who made this whole thing happen. The record is very clear ...

JUSTICE: What did he do besides that he drafted the paper?

MR. CRAMB: He made an amendment to the contract after he sent a demand letter to both clients changing the terms of a contract reflecting that Gyu Kim who will call Mr. Hong here the husband was a sole owner of the business when he knew he was not, never asked for a Power of Attorney. And by the way, that's the simple way to resolve the title question here and resolve the attorney's problem. You'll get a Power of Attorney from the wife, giving the husband authority to sell the business. Mr. Chu didn't do that. He didn't ...

JUSTICE: Question, my question is: "Did he do anything other than draft the papers?"

MR. CRAMB: Yes, your Honor. He did. He drafted, he drafted the amendment, which he knew was wrong. He went in and closed the deal. He backdated the Bill of Sale to the original date and had his legal assistant act as notary.

JUSTICE MEDINA: For what duty would Mr. Chu owe to your client? Why isn't it-- why, why don't the lawyers that represented your client, why, why wouldn't they have a duty to look in to those alleged misconduct?

MR. CRAMB: Judge Medina, generally the attorney would have no duty. But when he knows the facts and he knows of my client's interest too, he has a duty to make sure that it's done right. He knew what he was doing here.

JUSTICE JOHNSON: What about a lawyer who's trying a lawsuit and knows the other side hasn't put some evidence up that he knows about or she knows about and you argue to the jury that just didn't happen because they didn't prove it. You know, that's something, a lawyer knows that somebody on the other side hasn't accomplished something. But to who-- is that going to make a lawyer liable in every instance when the lawyer takes a position that they may have some extra knowledge about?

MR. CRAMB: No, your Honor. I don't believe it, it will. In this case, he knew somebody had an ownership interest. And he did everything in his power to take away that interest without checking.

JUSTICE JOHNSON: Could he take away that interest? Did he ever take her interest away?

MR. CRAMB: No, but he ...

JUSTICE JOHNSON: So, he didn't take --

MR. CRAMB: Well, obviously we had to file a lawsuit. And it took

five years to get to trial and, and, of course, through the appellate system here. And we're here today still trying to recover that. He, he facilitated the Kims, the third party transferees, to do what they did which is take away this lady's interest.

JUSTICE BRISTER: But, but everybody in the civil litigation is trying to take away somebody else's interest, everybody, especially in divorces. And everybody in divorces is mad at each other and thinks the other side is cheating and lying. And I'm just wondering if we're going to have anybody willing-- left willing to represent people in divorces if it creates after every divorce a five-year lawsuit against the other side's, other side's lawyer, not even my lawyer. I haven't paid him a dime. This is the other side's lawyer. And I might sue for five years because I didn't get a good deal in my divorce. That obviously would be a disaster. Now, separate your case from that.

MR. CRAMB: Well, your Honor, in that case, both parties are represented by lawyers and have a fair hearing in court.

JUSTICE BRISTER: Divorces lot of times. Only one side's represented by lawyers.

MR. CRAMB: But they have an opportunity. In this case, my client wasn't given the opportunity. My client specifically indicated she would not sell, did not want to sell and didn't know anything about it. The first time she found out that Mr. Chu had done what he had done and closed the deal is when she went to work the next day and was locked out and couldn't get in. And that was her sole source of income for five ...

JUSTICE BRISTER: She can sue her ex-husband for, for that, for, for all.

MR. CRAMB: Yes.

JUSTICE BRISTER: And she can sue the other side, can't she?

MR. CRAMB: Yes, she can.

JUSTICE BRISTER: So why does she need to sue the other side's lawyer?

MR. CRAMB: Mr. Chu in this case facilitated the whole thing. Without him, this would never have occurred.

JUSTICE BRISTER: Yes, you say. All I've heard you say is he drafted the papers. And normally, that's, you know, law-- The question is: Do lawyers have to find-- make sure that everything they're being told when they draft papers is right or they have to pay for it personally?

MR. CRAMB: I think they have to, when they know it's not right. And Mr. Chu admitted that knew it was not right in trial.

JUSTICE BRISTER: When did he, when did he know it was not right?

MR. CRAMB: He knew that Ms. Hong had an interest.

JUSTICE BRISTER: When did he know that because she said so before?

MR. CRAMB: He, he also wrote her a letter. He adm that he knew she had an interest.

JUSTICE BRISTER: That -- let me -- sometimes, people he knew she had claimed an interest. He had-- she had-- he had treated her as having an interest before. And now, the other side is coming to him, saying, "I don't have it." We don't, we don't have anything recorded. There's no deed or anything on record that shows that he could he have checked, right?

MR. CRAMB: Yes, there was, your Honor. There was a contract between the Kims and the Hong's.

JUSTICE BRISTER: The same, in the same transac-- earlier in the same transaction, two people had said they were owner. And now, one is saying the owner.

MR. CRAMB: Yes, your Honor.

JUSTICE BRISTER: So he's going to have to decide the lawsuit between them before he decides whether he drafts the paper?

MR. CRAMB: No. As I said earlier, your Honor, I believe that the easy way to handle that is to get a Power of Attorney. It's done everyday in the title business. And that's why if a, a married couple sells a house whether it's separate property or community property, the spouse has to sign the documentation.

JUSTICE JOHNSON: Doesn't that make, doesn't that make your client his client? Aren't you trying to make your client his client by making him get a Power of Attorney to protect your client?

MR. CRAMB: No, your Honor, making him get a Power of Attorney is assuring that the people transferring to his clients have authority to transfer [inaudible].

JUSTICE JOHNSON: Who, who does he have an obligation to, to get a Power of Attorney, his clients or your client?

MR. CRAMB: He has an obligation to assure that his client is getting -

JUSTICE JOHNSON: Wait a minute.

MR. CRAMB: - proper title.

JUSTICE JOHNSON: My question was who does he have the obligation to, his client or your client? You're, you're suing him, saying he has an obligation to your client to get a Power of Attorney. How, how does that duty arise to your client?

MR. CRAMB: The, the duty arises, I believe, Judge because he knew that my client had an interest. He admitted he knew he had an interest. And he didn't do anything about it. He just took this man's word for it. And they were checked on it.

JUSTICE BRISTER: What if his own client was telling him, "I want to close. I don't care about an attorney-- or the Power of Attorney."

MR. CRAMB: Well, well, he can only sell what-- Mr. Kim, the husband, can only sell what he own which is what happened. And, and that's all he could get.

JUSTICE BRISTER: But his client, his client's willing to take that risk, saying "I, I don't care. I don't want a Power of Attorney. I, I want it closed." Are you-- you're saying, aren't you, the lawyer has to say, "Sorry. I won't do it."

MR. CRAMB: No, as long as it's disclosed. In this case, he tried to cover it up by changing the contract.

JUSTICE BRISTER: Well, his client's not suing him. Mr. Chu's client's not suing him.

MR. CRAMB: That's correct. In, in this case, your Honor, Mr. Chu and his clients were both found to be co-conspirators in committing the fraudulent transfer. So, I don't think his client could sue him.

JUSTICE WAINWRIGHT: If we approve of the rule that you're arguing for, will that mean that in every transaction if a lawyer, opposite of taking a party, is put on notice or it suggested that something might not be quite accurate, whether it's in a partnership on the other side of the table across from its-- from the lawyer or spouses that the lawyer then has to take action to, to protect the parties from the other side of the table?

MR. CRAMB: No, your Honor. I don't believe that.

JUSTICE WAINWRIGHT: Okay, we're a partnership. Would you-- What if this were a partnership, not, not spouses, no spousal relationship involved, would you make the same argument that you had a duty to go get a Power of Attorney to protect a partner?

MR. CRAMB: No. I would not.

JUSTICE WAINWRIGHT: Under your rule and keep it from applying in a partnership context?

MR. CRAMB: Under the facts that, that you'd given me, your Honor, no, I don't think I would. In this case, the difference is, in this case, Mr. Chu knew of Ms. Hong's interest and did everything he could do to do away with it and not notify her. In a partnership interest, a case that you're talking about, there's no evidence of that knowledge.

JUSTICE WAINWRIGHT: Well, let's assume there was, same question.

MR. CRAMB: Your Honor, if the facts show that the lawyer actively engaged an intent to deceive and defraud, yes, I think he would have liability. If the facts did not show that, I don't think he would.

JUSTICE WAINWRIGHT: Now, you're adding facts. Just assume that the lawyer was on notice that something told to him by a partner on-- and entity opposite him might not be right or is incorrect, is the lawyer then and surely partnership contacts have an obligation to do something to protect the partners of the party opposite his client in the transaction?

MR. CRAMB: I don't believe so, your Honor, under that set of facts.

JUSTICE WAINWRIGHT: How would you, in a principled fashion, limit the rule that you're arguing for in the spousal context so that it doesn't apply in a partnership context?

MR. CRAMB: Well, I, I think the, the elements of fraud take care of that and that the elements of fraud in fraudulent transfer requires knowledge and intent. And I didn't hear anything that would show knowledge and intent on the part of the lawyer in the, in the partnership situation that you were giving me. So, I, I think that's the difference. Now ...

JUSTICE HECHT: Mr. Cramb, the jury found lost profits of \$190,000.

MR. CRAMB: Yes, sir.

JUSTICE HECHT: And that was they were instructed to find the amount of profits lost by the wife as a result of the transaction from plaintiff. What was the evidence supporting that award?

MR. CRAMB: Your Honor, we had tax returns from the transferees. We had direct testimony on what the gross sales were, what the cost of goods were, what, what the other costs were.

JUSTICE HECHT: Was this for the period of time that the Kims had possession of it or ...

MR. CRAMB: Yes, your Honor, it was, up to the date of trial.

JUSTICE HECHT: And she, she got it back. It wasn't for any period after that.

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

JUSTICE HECHT: So, it was just for the period of time that the Kims had possession that the trial court later restored to the wife.

MR. CRAMB: Yes, your Honor.

JUSTICE HECHT: And was that-- is that a community loss? I mean, I guess, if they were still married, so I wonder, if that's a community injury, that the community could claim some recovery of it.

MR. CRAMB: That, I believe, is a community injury. And, Judge, the final decree awarded my client a hundred percent of the business and the business loss.

JUSTICE HECHT: Right. And then, and also set aside the award of the value of the business, lost value of the business -

MR. CRAMB: Yes, it did.

JUSTICE HECHT: - because she got the business back.

MR. CRAMB: Yes.

JUSTICE HECHT: But the Kims just got, according to the evidence,

the Kims just got to keep the \$190,000.

MR. CRAMB: The Kims didn't get to keep the \$190,000, your Honor. That was awarded to my client.

JUSTICE HECHT: I know, but there's been no, there's been no recovery yet.

MR. CRAMB: That's correct. Yes, your Honor.

JUSTICE BRISTER: And on conversion, how did Mr. Chu convert any property? Was there any evidence that he'd got anything other than a fee?

MR. CRAMB: No, your Honor. There was no evidence that he got anything other, other than the fee. Now, he did represent the, the Kims throughout the litigation. And he, of, of course, is-- was pointed out he did avoid any liability to the Kims as a result of that continued representation.

JUSTICE BRISTER: But you concede that conversion finding against Mr. Chu is unsupported.

MR. CRAMB: I believe that the conversion finding would be supported to a conspiracy theory.

JUSTICE BRISTER: Well, I'm didn't ask if they conspired to convert. I just said that the following person's been convert and, and say that Chu guessed, that there's, there's no evidence to that.

MR. CRAMB: No, other, other than his direct participation in assisting them in their findings.

CHIEF JUSTICE JEFFERSON: Under the TUFTA, how is a, a transferee? He didn't receive the, the donut shop. He didn't receive proceeds because they are all he got was a, a lawyer's fee.

MR. CRAMB: Yes, Judge. And there're several jurisdictions including New York where that is enough. In fact, one of the cases 'Stochastic Decision, Decisions,' inferences 'DiDomenico' (995 F.2d 1158) out of the Second Circuit in New York, they found was enough for the attorney to have liability. There's a transfer.

CHIEF JUSTICE JEFFERSON: And then in Florida the Florida Supreme Court went the other way and said the fee is not enough. Where-- what, what-- where is the majority in the nation on this question?

MR. CRAMB: Judge, I think the majority is all over the board. You have -

CHIEF JUSTICE JEFFERSON: Well, that's -

MR. CRAMB: - cases on both sides from, from a lot of jurisdictions. And I've-- I could not make a clear majority either way this. Of course, a lot of jurisdictions have not ruled on this issue. My, my brief had a number of jurisdictions that, that ruled that way. And even in the same federal districts, same circuits, some of the trial courts rule differently.

JUSTICE BRISTER: The fraudulent transfer law is ancient. It's been around here probably longer than Texas, it's been around. And the idea was always just to get the property back. So how does it apply-- just in theory, why should it be applied to somebody who doesn't have the property? Shouldn't we be going after the person that got it even if they're in Korea?

MR. CRAMB: Yes, your Honor, except that I believe that would be bad policy to limit it just to the transferee and eliminate somebody that would've directly participated in making that happen when that person knew exactly what was going on and who had interests. And that's Mr. Chu in his case, he knew.

JUSTICE BRISTER: So, so you, you think we should be encouraging people to go get the aiders and forget about the guy that's got the property.

MR. CRAMB: I'm-- I, I think, your Honor ...

JUSTICE BRISTER: Isn't that, isn't that who she should be focusing on, the guy that took the money and ran?

MR. CRAMB: I think, I think the court should focus on both. Otherwise, what you're doing is, is letting anybody to participate-- help somebody else defraud somebody out of property with no liability opportunity.

CHIEF JUSTICE JEFFERSON: Would you have a, would you have a cause of action against Chu if he hadn't done this pro bono?

MR. CRAMB: Yes, you're still on it. You're still a lawyer. Well, I, I would as a conspirator, you Honor. I don't think I would as a transferee.

JUSTICE BRISTER: How about the-- how about at the bank that transfer the funds to Korea knew perfectly well that the, the now ex-wife was claiming the funds? They're liable too?

MR. CRAMB: I don't know that the bank knew that the wife was [inaudible].

JUSTICE BRISTER: So, a hypothetical case that's not your case but the next one will be if we go with you. And they're going to say the bank knew that she said this was her donut shop and they should not have transferred those funds to Korea. So they're going to be liable too.

MR. CRAMB: I believe that comes down to whether they had actual knowledge of it or not.

JUSTICE BRISTER: Assume they did. Assume they knew. She had picked up the phone and told them the day before, 'Don't touch that money, that's my money,' and that banks can't touch it either or they'll-- they have to pay.

MR. CRAMB: I think there's some exposure.

JUSTICE GREEN: So, the, the more ordinary your common situation being here one of the spouses cleans out bank account and takes off with the money. How, how would this affect that? Do you think the bank would be liable in that situation?

MR. CRAMB: No, your Honor, because in, in that situation, each spouse has a right, an absolute right to take a hundred percent of the proceeds out of bank account.

JUSTICE GREEN: But, but, but the, but the bank, but bank-- banker knows that their bank-- there is a divorce proceeding under way and dividing up the property. And one of the spouses comes in, says, 'I'm to take all the money.' An -

MR. CRAMB: I -

JUSTICE GREEN: - an officer knows, the bank officer knows all of this.

MR. CRAMB: I don't, I don't think that, that bank would-- under that circumstance, should have any liability unless the bank was aware of a court order that prevented that from happening because the agreement when the spouse has opened that account is that either one of them could withdraw a hundred percent of the proceeds at any time for any reason.

JUSTICE O'NEILL: Presume with me that TUFTA would not apply in this situation. Argument's been made, it doesn't apply for money damages for an aiding and abetting theory. And if it didn't, then what would your next argument be in terms of recovery? Would it be conspiracy to commit conversion?

MR. CRAMB: Conspiracy to commit conversion, conspiracy for breach of fiduciary duty, which the jury also found in this case. And I think those are the two other causes of action that the jury found.

JUSTICE O'NEILL: Those would be the two alternatives then that would support the judgment?

MR. CRAMB: Yes, your Honor.

JUSTICE HECHT: There's a statement in the briefs that you elected recovery under the statute. Does that go with attorney's fees?

MR. CRAMB: Yes, your Honor. That and recovery of, of the actual donut shop business.

JUSTICE O'NEILL: The Court of Appeals didn't address the, the conversion count, did they?

MR. CRAMB: No, your Honor. They-- because the Court of Appeals found on the initial cause on, on TUFTA they didn't achieve it.

JUSTICE O'NEILL: And she elected, she elected the TUFTA remedy.

MR. CRAMB: Yes, your Honor.

JUSTICE O'NEILL: And what would her recovery be under a conversion account?

MR. CRAMB: I believe her recovery would be the same.

JUSTICE O'NEILL: Except for attorney's fees?

MR. CRAMB: Except for the attorney's fees. Yes, your Honor.

CHIEF JUSTICE JEFFERSON: Any further questions? That's only for their argument.

MR. CRAMB: Just in, in short, Justice, I believe that the, the better policy for this Court to consider and for the State to, to follow is to allow the third party liability as found by the Court of Appeals in this case to punish if you will or to, to prevent the kind of thing that happened to, to my client in this case. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Cramb.

REBUTTAL ARGUMENT OF MURRY B. COHEN ON BEHALF OF PETITIONER

MR. COHEN: Mr. Cramb talked about the 'Stochastic Decision' from the Second Circuit, a case cited in his brief in our reply brief. In that case, it was-- the evidence was overwhelming that the defendant acted directly for his own personal benefit. But to mention of that case causes me to inform the Court that we're going to be sending the Court very shortly a letter referring to three decisions that had been made just on the first nine and a half months of 2007, so far all from Federal District Courts construing the law of three different jurisdictions, Minnesota, Montana and Arizona, all of which held that there is no transferee liability under a conspiracy theory. And one of those cases made an asset management. I'll give you the citation in the case in the letter. Is, is the case involving the law firm of Paul, Hastings, Janofsky and Walker(2007 WL 129003). The facts are remarkably similar it was decided a few months ago.

JUSTICE HECHT: The question-- we asked respondent quite a few questions about the lawyer's duty in this case. But I don't read your brief to argue that issues. And my-- is that correct? Or do you also argue that the lawyer did not have a, a duty in this case to get a Power of Attorney and to investigate the facts and so.

MR. COHEN: Justice Hecht, we, we certainly do argue that. We didn't capture-- we didn't frame it in terms of duty because we weren't dealing with a negligence cause of action. The sole basis, of course, for this judgment is statutory. It's TUFTA. And so we framed in terms of those elements, transferee, beneficiary types of damages. The discussion in this case outline shows that I had only dealt in Court

with the benefits of oral argument. But I think it does show the benefit of it because to me the bottom line for this case is and this also is pointed out in the amicus brief is we have an adversary system. An adversary system isn't limited to the courtroom. It certainly starts there perhaps to all of us that had the situation of sitting on a bench in a courtroom with our adversary a few feet away, waiting for the case to be called, hoping it would be quickly called before he hears about the case decided last week by the 14th Court of Appeals. But before he finds out-- that the witness sitting back here to the motor case know things favoring the State that-- but they haven't learned because they have an interview.

JUSTICE O'NEILL: Well, let's get away, let's get away from the lawyer-client duty.

MR. COHEN: Right.

JUSTICE O'NEILL: What if Chu was the brother-in-law, or father-in-law as in Schlueter and had actively aided and participated in a conversion of property, let's put TUFTA out of there as well, and knew that he was engaged in a conversion maliciously engaged of in the conversion, let's say they profited from the conversion and that didn't happen in this case, but let's say they split the value of the property and he took part of it, went own way and the, the ex-spouse went the other, why wouldn't we have a cause of action for conversion independent from the, the just and right division of marital property.

MR. COHEN: I believe that the case of Likover (696 S.W.2d 468) grants relief this is the case cited and discussed in both briefs. The Likover case in the First Court grants relief against the lawyer in a situation like that. But he was right in there pitching all the way, Justice O'Neill.

JUSTICE O'NEILL: But then that would be in evidentiary review and you wouldn't be arguing then that liability would be precluded.

MR. COHEN: I believe you're right. But the facts would be as you stated. He was in there pitching all the way and furthermore succeeded in getting a piece of the proceeds.

JUSTICE: And that's, and that's a different here because he, he, he received fruits of whatever his labors were to conspire in defrauding that case.

MR. COHEN: That's certainly. That, that's, that ...

JUSTICE: That's not the case here, is that correct?

MR. COHEN: It is not the case here. But I was, of course, responding to the hypothetical. And Mr. Likover was in there orchestrating the fraud, doing the best he could to bring it about. He wasn't sitting in his office when suddenly a gentleman walks in and says, 'All right. I'm here to take the deal we didn't do two months ago.'

JUSTICE O'NEILL: Well, and, and just a followup, if, if the, if the TUFTA cause of action doesn't stand, then what would be the disposition? Would it be remand to the Court of Appeals to review the conversion finding? Would it be a sufficiency review of the conversion finding? What, what would be the result if you prevail on your TUFTA claim?

MR. COHEN: I think this Court has the authority under Boyce Iron Works (747 S.W.2d 785) to take those-- get those issues and decide them. If it does, I would suggest that it follow Schlueter and Cohrs versus Scott and say that there is no basis for liability on those either. I realized that's a powerful issue.

JUSTICE O'NEILL: The Schlueter-- well, Schlueter doesn't cover the third party.

MR. COHEN: That's right. Cohrs versus Scott I believe does. But I believe this Court has the authority to reach those issues. Whether it were to reach them or remand them would be its, its discretion.

JUSTICE O'NEILL: And you would agree that if, if we then said Schlueter doesn't prevent or there's, there's no public policy reason to preclude a third party claim for someone you actively participated in a conversion, then you go to a sufficiency review.

MR. COHEN: I think you would do that. To reach that point, I think you would have to hurdle the barrier of Cohrs versus Scott.

JUSTICE WAINWRIGHT: Mr. Cohen. You-- your client was found by the jury to have been a number of things that are bothersome conversion, conspiracy to breach fiduciary duty in other banks. We certainly don't want to be seen at this Court as countenancing or in encouraging such conduct. I know you're here not on the ethics or the morals of the conduct but on the legality. But what do you say about the argument from the other side that some bad things happened here? There ought to be a remedy.

MR. COHEN: The bad things that happened here, Judge, were that, let's talk about the evidence, was that a lawyer was sitting in his office, representing his client when the other side came in and said, 'We're here to do what your client wants us to do which is sell him the business.' And he got them to say, sure, he would have been better off and protected both himself and his client if he had gotten a Power of Attorney or demanded that Mrs. Hong appear. But he did get a written statement that he had Mr. Hong signed. I'm calling the husband Mr. Hong. His name is actually Kim of course, but I don't want to confuse it. He did have him sign a sworn statement that said an, an acknowledged statement in front of a notary that said, 'I have full power to do this.' This was adversary in his office, saying, 'I'm here today to do this deal. Would he be there tomorrow? How long would he stay?' He tried to cover it the best he could. I don't see the moral culpability that so angered the jury, the trial court and obviously the majority in this case. I know that this Court probably spends half its time, maybe more, trying to figure out why do lawyers, judges and juries act as they do. In this case, you don't have to wonder. You can read the first paragraph in the Fort Worth Court's opinion. They're furious. Even the dissent was not pleased with Mr. Chu. But I challenge you to read this record and see what he did that was so horrible because the pages I was telling you about before Volume 5 at 115 to 127 and 135, the ones pages they selected, you won't find it there. In this case, he was the last man standing. The husband had fled with the money to Korea. The buyers took bankruptcy. There's a notice of bankruptcy in the record. Mr. Chu was there to suffer for whatever wrongs the husband did. The jury knew they couldn't get to those other parties.

CHIEF JUSTICE JEFFERSON: Justice Johnson, did you have a question? Any further questions? I thank you, Counsel. The cause is submitted. And the Court will take a brief recess.

MR. COHEN: Thank you.

COURT MARSHAL: All rise.

2007 WL 5329467 (Tex.)