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Supreme Court of Texas.
Medical City Dallas, Ltd., Petitioner,
v.
Carlisle Corporation d/b/a Carlisle Syntec Systems, Respondent.
No. 06-0660.

October 17, 2007.

Appearances:
Robert B. Gilbreath, Hawkins, Parnell & Thackston, LLP, Dallas TX, for petitioner.
William David Ellerman, Jackson Walker, L.L.P., Dallas TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Dale Wainwright, Justice S cott A. Brister, Justice David Medina, Justice Paul W. Green, Justice Phil Johnson, and Justice Don R. Willett.

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PROCEEDINGS

CHIEF JUSTICE JEFFERSON: Please be seated. The court is ready to hear argument in 06-0660, Medical City Dallas versus Carlisle Corporation.
COURT MARSHALL: May it please the Court. Mr. Gilber-- Gilbreath will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF THE PETITIONER

MR. GILBREATH: May it please the Court. I'm here today as an emissary for the spirits of Professors Williston, Dwellan and Prosser, who all wanted me to tell you that the breach of express warranty claim in this case sounds in contract. In all seriousness, your Honors, the issue in this case is simple and straightforward. It's a claim or an action for breach of express warranty to use the words of section 38.001 of the Civil Practice and Remedies Code, a claim for an oral or written contract such with the prevailing plaintiff may recover attorney's fees. Now under the facts of this case involving a

commercial laws, it's hard to concede of any answer to that question but yes. For example, when the court surveys the case law in other jurisdictions, the treatises in the law reviews, the court will see that there is little or no question about that. A breach of express warranty claim sounds in contract. The Dallas Court of Appeals, however held that my client could not recover the attorney's fees that incurred in prosecuting it's breach of express warranty claim against the respondent for breach of-- an express written warranty that was issue in connection with the sale of roofing materials. Now the Court of Appeals relied primarily on the 1991 opinion by Chief Justice Phillips in a case called Southwestern Bell versus FDP Corp. And there was a case in which this Court was not addressing the question here today, whether attorney's fees are recoverable for breach of express warranty. But before I explain why the Court of Appeals reliance on Southwestern Bell versus FDP was misplaced, I think it would be helpful if I could give the court a few historical facts about Texas laws that pertains to this question. Before 1977, Chapter 38 which was in-- on this article 2226, did not provide for the recovery of attorney's fees for breach of contract. My prac-- I begin my practice in 1999, not fact came to as somewhat of a surprise and I didn't know that. But-- So for example in 1973, you have a Texarkana Court of Appeals decision in which the court held that the plaintiff could not recover attorney's fees for breach of a contract the whole March. And that was M.C. Winters versus Cope case, 498 Southwest 2d 484. That same year, in 1973, the DTPA was an active. And it provided for recovery of attorney's fees for claim for breach of warranty. Then in 1977, the legislature amended article 2226 to provide for recovery of attorney's fees for breach of contract. And six years later, the first Court of Appeals held that attorney's fees were recoverable for brief-- under article 2226 predecessor to 38.001, were recoverable for breach of an express written warranty. That case is not cited in our briefs. I think it's an important case for this Court to review. It's a case called Farther versus Irvine at 658 Southwest 2d 711. So writ denied case and that was the warranty-- an express written warranty issue in connection with the sale of the house. And the court held that the DTPA didn't apply because the sale of the house occurred before the effective date of the act. So the court went on to say but attorney's fees are recoverable for breach of this express written warranty under article 2226, the same statute will be on with here today. And the next year, 1984, this Court, in my opinion, pretty much stated that breach of express warranty sounds in contract when the court rode in the La Sara Grain Company case that, that is cited in our brief. The corporate, quote: While express warranties are imposed by agreement of the parties to the contract, implied warranties are created by operation of law and are grounded more in tort than in contract. The next year, 1985, the Fort Worth Court of Appeals held that attorney's fees were recoverable under article 2226 for breach of a guaranty agreement, which in many respect is very similar to a warranty agreement. And by the way, earlier this year, the Dallas Court of Appeals followed suit and reach the same holding, breach of guaranty agreement, you can recover attorney's fees under Chapter 38. That's case called Smith versus Patrick Trust in unpublished decision. So that's bring me up to 1991 and the Southwestern Bell versus FDP Corp. case. That-- That's the decision that the Court of Appeals relied on for its holding that attorney's fees were not recoverable for breach of express warranty. Now again, in that case the court wasn't dealing with the issue we have here today, rather the court was addressing the defendant's argument that the plaintiff's claim was for breach of

contract; not breach of warranty, then rise to the level of breach of warranty and thus was not actionable under the DTPA. And for that purpose-- on that purpose only, Chief Justice Philips distinguished between breach of contract and breach of warranty. And this, and, and this is the troublesome phrase, he stated that they are not the same cause of action. And that's what has lead to this Court's-- Court of Appeals' decisions including the one in our case to bring those here today. But that's not what-- I, I am certain that Chief Justice Phillips would be shocked in surprise that we're on that, that decision in that languages being interpreted as holding that you-- the breach of express warranty doesn't sound in contract for purposes of Chapter 38. He would-- He was explaining was there's a difference between the two process of action because you know, breach of warranty occurs when the buyer finally excepts the good and finds that there are deficient on some respect. Breach of contract occurs when the goods are never delivered essentially. But the court never held that breach of express warranty doesn't sound in contract, instead the court simply explained that only a true breach of warranty claim is actionable under the DTPA. I think distinguishing between breach of contract and breach of warranty for that purpose is, is akin to distinguishing between the fraud and negligent misrepresentation for purposes of-- for example, the types of damages that are recoverable as this Court has done in cases like Formosa Plastics and DSA versus Telsburg. It doesn't mean that both claims don't sound in contract-- I mean, it tort. And it doesn't mean that the proportional responsibility statute in Chapter 33 doesn't applied to both claims. And likewise, just because there are differences between breach of warranty and breach of contract, doesn't mean that breach of express warranty doesn't sound in contract. Yes, as Justice-- Chief Justice Phillips pointed out in the Southwestern Bell case. The remedies for the theory that with in separate parts of the UCC but that doesn't mean that Chapter 38 doesn't applied to a claim for breach of express warranty. So if a claim for breach of express warranty does sound in contract, then a plaintiff can recover attorney's fees under Chapter 38. So in shorten, this case and in the other cases that the respondent rely on, the Courts of Appeals were just reading far too much into the language in the Southwestern Bell versus FDP.

CHIEF JUSTICE JEFFERSON: Should this case have been brought under the DTPA?

MR. GILBREATH: No, your Honor. That's not-- that's probably not apparent in the record. But Medical City is-- would have assets over $25 million. So I think that's why the decision was made not to bring them to the DTPA. One court of in-- that's a nice segue way to my other point and that is this that one that Court of Appeals that they are rely on-- one with decisions, the court said, "Well, you can't have a claim for breach of warranty actionable under Chapter 38 because you can recover your attorney's fees under the DTPA and therefore that would make the DTPA provision meaningless." I really don't understand that assertion. I mean first, the DTPA says that the remedies have provides the cumulative. And second, when the DTPA was enacted, I remember that was 1973, he didn't have a right to recover attorney's fees under article 2226 for breach of contract. So there was no way to recover attorney's fees for breach of express warranty so the DTPA came along. So I would say-- An then in 1977, I amended article 2226 to make attorney's fees recoverable for breach of contract. So I would say arguably, the legislature has now twice express that it's intent that you recover your attorney's fees for breach of express warranty. Now

there is a distinction here that the court-- if the court decides to rule in my client's favor, there is a distinction, I think the court I want to make in it's holding because a claim for breach of express warranty can sound under some circumstances in tort. And my Fifth Edition of Prosser and Keeton has an excellent discussion on this point. What he says is that whether the claim sounds in contract or tort depends on a nature of the damages. So when damages are sought for intense both-- Prosser says he calls an "intense both economic and commercial losses," then you got a claim for breach of contract. I, I mean, the breach of warranty claims sounds in contract. When the breach of warranty plaintiff is seeking damages for personal injury, or injury or harm to other property, then you have a claim that would sound in tort. And so I think the court-- if you rule in my client's favor, you'll want to make that distinction if you don't want plaintiffs to recover attorney's fees and what is essentially the court action. And I think the easiest way to draw that distinction would be by reference to Chapter 82 of the Civil Practice and Remedies Code. Section 82.001 defines, quote, products liability action as any action against the manufacturer or seller or recovery of damages arising at the personal injury, death or property damages allegedly caused by defective product whether the action is based on strict forth liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty or any other combination of theories.

JUSTICE WILLETT: What about the distinction between express and implied warranties? Do-- Does the latter still sound in tort principally?

MR. GILBREATH: This Court has on a number of occasions said indirectly, strongly intimated, and maybe said directly on some occasions that implied warranty claims sound in tort. I think it's an interesting-- it's a very interesting issue. A lot of the commentators like to get salacious when they talk about warranty. For example, Prosser told that if warranty law is a "freak hybrid born" of the elicit intercourse between contract and tort law. Another commentator I was reading on said and call this cause of action "hermaphroditic." This, this strange origins that warranty law has. But the court says-- I think Chief Justice Phillips noted that Southwestern Bell have been a little more reluctant when it comes to implied warranties. But this Court has said on number of occasions, "Implied warranty tends to sound in tort." It has also said on another occasion, and I guess that it's a statutory claim, so I don't think you can say for certain. The commentators though tend to treat implied warranty differently and consider it more of a tort concept. When it comes to breach of express warranty, sure, it started off at-- it has its root; its origins in tort law but over the decades, it has clearly become a claim that sounds in contract. There's an interesting commentary, your Honor.

CHIEF JUSTICE JEFFERSON: What, what it does mean sounds in contract? It's about?

MR. GILBREATH: And it-- it's-- I think it's sort of-- I guess it's-- maybe it's-- I'm trying to be scholarly but it's the scholarly. Wait-- saying it. It's a contract claim. That's what the, the commentators would say, "Well, it sounds in contract but as an educate I say it is a breach of contract claim. It is a contract claim. It mirrors the language of Chapter 38 because if you look at this 20-year membrane warranty that they gave us, that is clearly a contract." So ...

JUSTICE GREEN: Well, if the, if the manufacturer which is brought in by saying general contractor to put on the roof. Where is the

contractual relationship between the owner and the manufacturer?

MR. GILBREATH: The-- That's a point that they do make in their brief. And it's a point that is done in a couple of ways. First of, if you want to look at it in terms of-- if you were asking, where is the consideration for this warranty I did? Well, UCC 2-313 comment 7 says under those circumstances, no consideration is necessary. The other question, the way to look at this, well, how can we had no contractual relationship with them. Did we undersets the question you are asking but in the PPG case, Justice Brister cited the case in a footnote. It's very similar in this case called U.S. Pipe & Foundry Company versus City of Waco. And there, this Court said from the very similar type of transaction. And this Court said, you look through the form to the substance. And in this situation, sure, we have the-- our contract was with Charley Company, the roofing company. But in that contract there was a call for a warranty on the roofing materials. So we-- This was a part of the bargain we wanted a warranty on these roofing materials. And we were really doing business with Carlisle through this transaction; through this relationship. And that's what the Supreme Court set them at U.S. Pipe & Foundry Company case. If we really look at the true nature of the transaction, that's what it was. We had essentially contractual relationships with them. And particularly, if we look at this-- it's a written contract; the warranty is.

JUSTICE JOHNSON: And the-- and there was evidence to indicate that your client's inquired about and/or relied upon their being an extended warranty?

MR. GILBREATH: Yes, your Honor. I don't have the cite to the court's record or the record on that but I can get it to the court. But it's in the, the bid document, the bid documents that we wanted the warranty.

CHIEF JUSTICE JEFFERSON: You said there's essentially contractual relationship but during the charge offerings, didn't you deny that there's any contractual relationship between the-- ...

MR. GILBREATH: I think there are ...

CHIEF JUSTICE JEFFERSON: - within Carlisle?

MR. GILBREATH: I wa-- It wasn't me. I wasn't at the charge examiner but I'm-- I understand the point and I think back and forth throughout this case, we've been pointing to finger each other and saying, "Were you said that was a contract or you said it wasn't the contract and you should be stopped." And frankly, I don't think the court should decide the case-- this case on the basis of those words of arguments whether they come from us or the other side. I think the question here is simply, Is the claim like this, breach of express warranty, does it sound in contract? Is it a breach of contract claim? And so now, thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Thank you. The court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Ellerman will present argument for the respondent.

ORAL ARGUMENT OF WILLIAM DAVID ELLERMAN ON BEHALF OF THE RESPONDENT

MR. ELLERMAN: May it please the Court. At the outset of my opposing counsel's argument, he invoked the names of Professor Dwellan and Prosser and other sought affiliate to do the same. In the La Sara

Grain case decided by this Court a long time ago, our Court quoted Professor Dwellan in saying, that to say warranty is to say nothing of legal effect. There are many different kinds of warranties. There are express warranties, implied warranties, warranties of fitness for particular purpose. There are warranties that are connected to contracts. There are warranties that are actually part of contracts and there are warranties such as those at issue here which a manufacturer issues to a purchaser of a product. Those warranties are freely transferable. There's no privity of contract requirement for plaintiffs-- for plaintiff who holds one of those warranties, to sue a manufacturer such as Carlisle. The bottom line here is that the court in this case is being asked to make a decision that breach of warranty claim in the abstract-- or breach of express warranty claim in the abstract, entitles a successful plaintiff to recover attorney's fees under Chapter 38.

JUSTICE: So you concede that some warranties-- attorney's fees are recoverable to separate some more ...

MR. ELLERMAN: I don't know that I would concede that point, your Honor. And, and the reason is I don't think that point is even brought to the court today. Here, there was no contract.

JUSTICE BRISTER: But we're, we're not right here for just your case.

MR. ELLERMAN: I understand.

JUSTICE BRISTER: I mean, if you got-- if you gave-- borrows two options: You can buy roof that lasts five years that costs $10,000; you buy one that lasts 40 years that it costs to $60,000. I' going to buy the expensive and I want it to lasts. And it lasts six years instead of 40, that's not a breach of contract?

MR. ELLERMAN: Well, that might be if the buyer had a contract with the seller. If, if the buyer and the seller had the contract to sure, I am certain that happens.

JUSTICE BRISTER: So if-- So the difference is if the contract-- if the warranty is-- in a written or oral contract, then it would be a breach of contract?

MR. ELLERMAN: I think that's one level of distinction. The other level of distinction is to look at what ...

JUSTICE BRISTER: But I'm not trying to-- I know they're different cases. I'm just trying to say: Do you concede attorney's fees would be recoverable?

MR. ELLERMAN: Not necessarily because I think once that deci-- once that is looked at, then a court would also have to look at the factors presented by this Court to Southwestern Bell.

JUSTICE BRISTER: How in the world if I got two different con-- roofs that cost two different prices 'cause they're going to last two different periods. And I get the expensive one and it done less. How in the world is that not a breach of contract?

MR. ELLERMAN: If there was a contract between the parties I think it, it certainly could be. And I think, I think under that circumstance, the party maybe able to suit for breach of contract and breach of warranty or, or either one.

JUSTICE JOHNSON: Who did you want to go to-- who, who did you want your product to in the writing that you furnished?

MR. ELLERMAN: That's a good question, your Honor. The, the warranty at issue in this case, the 20-year warranty was issued by Carlisle, my client, to Charley Company. If you look at the warranty ...

JUSTICE JOHNSON: In reference any-- in any manner do you ultimate

consume?

MR. ELLERMAN: No, it did not.

JUSTICE BRISTER: Of course, they pass with, with the goods.

MR. ELLERMAN: That's what as ...

JUSTICE BRISTER: As we said in PPG.

MR. ELLERMAN: That's exactly right. Warranties are-- like the one at issue here are transferable. That's one of ...

JUSTICE BRISTER: So, so, if this was the general contractor, then they would be able to keep soon, 'cause roof in last, they would-- could get attorney's fees.

MR. ELLERMAN: Well, the-- that assumes that this warranty was a contract. I, I haven't seen that Medical City-- I mean, excuse me, that Carlisle and Charley Company were parties to a contract. And I don't know that the record shows that. What this is, is simply a manufacturer's warranty that was issued to the purchaser who was Charley Company. That warranty ultimately in adapt in the hands Medical City of course. The Medical City suit for breach of warranty. Medical City has never, never throughout the trial court proceedings, argue that it had a contract with Carlisle. And I think even in, in Medical City's briefing to this Court, it acknowledges that the contract-- that to the extent there was a contract. Underlying facts of this case, that contract was between Medical City and Charley Company. Carlisle wasn't a party to any such agreement. But what has happened here is Medical City could not sue Carlisle for breach of contract for the reasons we've discussed. Medical City had no contract with Carlisle, therefore it suit on the warranty that was presumably transferred to it from Charley Company. Medical City, following a successful verdict on its breach of warranty claim, is trying to get its attorney's fees from a statute that applies only to contract claims. Now ...

JUSTICE ONEILL: What's the purpose of that statute? What's the purpose of 38.001?

MR. ELLERMAN: Well, one of the stated purposes and I believe probably the primary stated purposes to avoid the detouring parties from engaging in litigation because of the cause of law off.

JUSTICE ONEILL: The purpose is to allow attorney's fees when if did not been allowed before in certain circumstances.

MR. ELLERMAN: In, in the circumstances delineated in that statute.

JUSTICE ONEILL: And said you give any import to the provision in 38005 that is to be construed liberally if there's any question about whether warranties are contracts or contracts are warranties that to the extent there's uncertainty there, does that prove the analysis and then why?

MR. ELLERMAN: I, I think obviously we agree that, that liberal interpretation should be employed. I think what the statute means when it says liberal interpretation is something different than what the court is being asked to do today. In the Doctor's Hospital case, out of use and I believe, which discussed-- that's I've cited in, in the petitioner's grief, which discussed application of that statute to promissory estoppel claims, and held that the statute would not apply to those points. The court stated that liberal construction does not permit the court to inject language into that statute that's not there. In other words, to say that the statute applies to a promissory estoppel claim when the statute by its expressed terms applies to the contract.

JUSTICE ONEILL: Well, but, but, in order for the, the buyer to be made whole here, they had to go through the same elements of proof whether they were suing for breach of contract or sued-- suing for

breach of warranty. I mean, you'd agree with that. Right?

MR. ELLERMAN: Well, they have to show that there was a breach of-- of the document that was issued to them which was the warranty.

JUSTICE ONEILL: And that the, the brief at trial and all the expenses they can be the same. Then, why wouldn't we levelly construed that to allow recovery? There's something unfair. Adherently, the attorney's fees required to be my whole exceed demand of the damages that you wouldn't allow under it's liberal purpose to have those recovered.

MR. ELLERMAN: And the-- and the, the result here may on it's phase seem unfair. But Chapter 38 applies to contract claims. The DTPA which we discussed earlier, it allows recover-- recovery for breach of warranty claims. But as opposing counsel has ...

JUSTICE ONEILL: But not for big companies?

MR. ELLERMAN: Not for big companies. That's correct.

JUSTICE BRISTER: If the roof here d-- falling on somebody, and its product but they didn't claim, that clearly not be a contract claim. But all their suing for here is economic loss. Right?

MR. ELLERMAN: Yes.

JUSTICE BRISTER: And economic loss rule says, "If you just suing for damage to the product, you have to sue in contract to the whole reason for this substantial difference," as I understand, the whole reason they're moving the restate by the economic harm out of the tort is to cause economic losses are not torts; thee're contracts. And personal injury and other property losses are torts; they're not contracts. And so how come-- so how can warranty be contract but not a contract?

MR. ELLERMAN: That, that may be the general rule, your Honor, that, that the claim for economic loss generally sound in contract.

JUSTICE BRISTER: You know, any jurisdiction that doesn't recognize economic losses?

MR. ELLERMAN: No, I did not, your Honor. The distinction I believe that needs to be made in this case is there may be as this Court recognized in La Sara and other cases. The general rule may very well be that a warranty-- an express of warranty can't exists without a contract. There're cases that have said that opposing counsel's brief those cases and argue those cases today. That may be the general rule. But there's always exceptions to every general rule. And this ...

JUSTICE ONEILL: But we're not-- if I don't understand that the statement is when you say there can be an express warranty without a contract, but isn't an express warranty a contract?

MR. ELLERMAN: No, your Honor, I don't believe that it is. And I, I don't believe-- and I believe the UCC makes a distinction between warranties and contracts in that regard in section 2.313, I believe comment 2. The court states that nothing in the express warranty section of the UCC is intended to disturb the body of law that warra-- express warranties cannot exist without a contract. And the reason it can't exists without a contract is because of the privity issue. If we, we had the case with, we listen to this morning in this Court about sales of automobiles. Well, if, if I purchase an automobile and that comes with a manufacturer's warranty. And then, I go in-- to sell that car to somebody else and taken on the line that that person sells to somebody else and we get to the 56 seller. Will that person may still have a valid warranty but it-- that purchaser has no privity of contract with manufacturer. So for that ultimate purchaser down the line to be able to sue the manufacturer for breach of contract simply flies in the phase of contract law. There's no offer; there's no

acceptance; there's no agreement.

CHIEF JUSTICE JEFFERSON: You think of things like the claim sounds in tort or it sounds in contract. Now are you saying that this claim here sounds in tort?

MR. ELLERMAN: I'm not saying that the claim sounds in tort.

JUSTICE BRISTER: It doesn't sound in tort and it done sound in contract, what is in sound in here?

CHIEF JUSTICE JEFFERSON: What does it sounds?

MR. ELLERMAN: I don't know. I guess it sounds in warranty, your Honors. I-- They're, they're simply -

JUSTICE: No way.

MR. ELLERMAN: - that I can fathom. You can say the claim sounds in contract when there's no contract in this case. So if the court will present it with a lawsuit, let's say Charley Company, and I don't know that the record contains a contract between Charley-- contains a contract between Charley Company and Medical City. But if two parties-- two such a contract, if one of the party sued for breach of warranty, then the court might be able to find that that case-- the case is so intertwined with the parties' contractual relationship in the terms that contract and the warranty may even be part of that contract that the court could say this is really a contract case. Here, we don't have that. There, there is no contract. There was never in that contract claim ...

JUSTICE: But ...

JUSTICE BRISTER: And so the case is-- the economic loss rule cases which are universal in American law, they all say this: "If you're suing for the value of the product, even if it's on a warranty, this case sounds in contracts." So you can't get middle languages and you can't get grounds of damages. How is-- how is-- get-- how can it sound in contract or something is in not others.

MR. ELLERMAN: Is your question-- I'm not sure I understand your question.

JUSTICE BRISTER: I don't mean the econo-- I mean the economic-- I mean, these are, these are not new cases. They've been around for a long term. If you bought a boat and the boat sinks and nobody died in a timid dim-- damages in the other properties, the U.S. Supreme Court said a long time ago, your claim sounds in contract. You don't have a strict liberal I look it-- claim. You don't have a tort claim. Your claims sounds in contract. The only thing you can sued for is contract damages. And it seems like that it says warranties sound in contract and contract law.

MR. ELLERMAN: I-- Well, I-- again ...

JUSTICE BRISTER: I never heard anything that anyone say something sound it in warrant.

MR. ELLERMAN: Well, I think generally as, as the court recognized in La Sara, contract-- warranty claim is not independent of a contract. But there is a unique situation and that's what presented here that there is a warranty without a contract. And so I think it support ...

JUSTICE MEDINA: How do you said that, that seems to be fairly standard? Especially, if we're talking about loose or products that have a warranty that last for a long period of time. Those warranties are can be transferred. So how, how is that unique?

MR. ELLERMAN: Well, I don't know if "unique" is a right choice of words but it's different. It's different from the situation contemplated by the court in La Sara. It's different from the, the line of cases cited by the petitioner regarding other causes of action such as promissory estoppel, conversion, Berlow, et cetera. In everyone of

those cases, there was a contract between the parties to the lawsuit. Everyone of the-- And I do-- I'd, I'd take issue with, with certain of those lines of cases particularly the promissory estoppel once as did the court in the Doctor's Hospital case are accused to. Promissory estoppel is not a contract claim. The Fifth Circuit, in holding the Chapter 38, applied the promissory estoppel relied on the restate the contracts, which says, "Promissory estoppel is really a contract claim." That's not the ruling standard ...

CHIEF JUSTICE JEFFERSON: And how about that's other cases, conversion in Berlow, et cetera, et cetera that are [inaudible] on their brief. All those are wrong as well?

MR. ELLERMAN: I don't believe that all those cases are necessarily wrong, your Honor. Those cases are different. They're entirely different. The conversion cases, for example the Exxon versus Bell case at the Texarkana states that generally attorney's fees are not recoverable for conversion. It goes on to state that the entire case in that opinion was based on the contract. The Mustang Trading case at the Dallas which petitioner asserts is a departure from what the court did in this case also concerned conversion. In that case, the plaintiffs sued for conversion and breach of contract. The plaintiff recovered on its claims, there was no statement in the judgment as to how attorney's fees were awarded or, or on what claimed attorney's fees were awarded. There was no statement of facts presented in the Court of Appeals. So the Court of Appeals said, "Well, we can presume that attorney's fees were awarded for the breach of contract claim." So any discussion of conversion claim wasn't really particularly relevant there. But in any of that, even in that case, there was a contract between the parties.

JUSTICE BRISTER: But every warranty arises with contract.

MR. ELLERMAN: Not, I'd-- I understand.

JUSTICE BRISTER: Name, name one that doesn't.

MR. ELLERMAN: Well, if there is a, a product that is sold by retailer, a consumer nece-- you know, probably has a contract when he purchases that product. That contract is with the retailer, not with the manufacturer. The warranty ...

JUSTICE BRISTER: Your whole, your whole argument is not that there's no contract. It's that, you're, you're going back to the days of privity. We have-- we don't have privity. In that particular contract there's a [inaudible] ...

MR. ELLERMAN: Our argument is that there is not a contract because from-- that's our first argument.

JUSTICE BRISTER: There has, there has to be a contract. They-- one party sold, you sold the roof to a general and the general paid you. That's a contract.

MR. ELLERMAN: I think if ...

JUSTICE BRISTER: And the general did, did contract with the hospital and the hospital paid the general. We've got at least two contracts here. We don't have-- This is not a zero contract case.

MR. ELLERMAN: And if, if that is correct then Medi-- then Medical City was ...

JUSTICE BRISTER: How could that possibly not be a correct? I do-- I know you don't agree in that.

MR. ELLERMAN: I agreeing with you.

JUSTICE BRISTER: But, but how could money changing hands in this world not be a contract?

MR. ELLERMAN: It-- I think it could be, your Honor. I agree with ...

JUSTICE BRISTER: By stole it?

MR. ELLERMAN: The, the difference is Medical City couldn't sue enforcing its contract.

JUSTICE BRISTER: Oh, it's just a virtues purely a privitic-- privity are and they're not a contract.

JUSTICE ONEILL: So the-- why they get around that is damages to save the contractor and let the contractor then bring in manufacturer.

MR. ELLERMAN: But usually, your Honor, that would-- that would be possible and in fact ...

JUSTICE ONEILL: And that the contract that could recover his attorney's fees but you couldn't recover here's against the general.

MR. ELLERMAN: Correct. And I, I don't recall the specifics of what-- when I trial, but the contractor was a defendant throughout the trial in this case. And I don't believe there was any recovery against ...

JUSTICE ONEILL: But how would, how would that make any sense that that's contract-- that, that the person has been damaged can't get their attorney's fees but the general contractor can?

MR. ELLERMAN: And-- So that I understand tyour question partly. Under what theory would the general contract could be recover in its fees?

JUSTICE ONEILL: Breach of contract.

MR. ELLERMAN: Breach of contract claim against the manufacturer.

JUSTICE ONEILL: But as you're saying, they're the only one that has a breach of contract claim. So the general brings in, the gen-- you see the general and the manufacturer. The general asserts the cross claim against the manufacturer and says, "I want my attorney's fees on the cross claim." So they get their attorney's fees but the plaintiff who's been damaged does not get theirs.

MR. ELLERMAN: That could be a situation that might arise, you know, the fact of the matter though, is the Chapter 38 applies to contract claims. If, if those parties that you just describe in those circumstances had contract claims and so they were victorious, certainly they would have a claim for attorney's fees. This just doesn't fit. And if it doesn't fit, then it's up to the legislature ...

JUSTICE JOHNSON: Legislature did a statute that one point reference sounds in contract and then it was outside ...

MR. ELLERMAN: I believe, I believe the language used might have been founded on contract. And, and I think if, if that's the language that-- If I'm recalling that correctly-- founded on contract presumes that there is a contract and there may be a contracts in certain circumstances as I've discussed earlier. The UCC certainly contemplates that there can be suits for breach of warranty without a contract.

JUSTICE JOHNSON: The fact that the consumer is suing you based from your promise that your product was good for 20 years, still there's not make it founded on the contract.

MR. ELLERMAN: I don't believe that it does, your Honor. I, I believe that founded on the contract means that there is a contract. A contract requires more than just a promise. A contract requires an offer and acceptance, the meeting of the minds ...

JUSTICE JOHNSON: But there was a contract. We've got agreed there was a contract. You saw it at least to the general.

MR. ELLERMAN: There was arguably a contract between us and the general and between ...

JUSTICE JOHNSON: You're saying there wasn't a contract between ...

MR. ELLERMAN: I'm not saying that, I'm not saying that, your Honor.

JUSTICE JOHNSON: Okay. So there were sometime track as we, we've,

we've just been exploring here earlier. And as on that contract, you have no liability whatsoever. I mean, this is not a duty imposed by law. It's a promise that your client made when they sold a product.

MR. ELLERMAN: And although there are contractual relationships, your Honor, Medical City under the particular facts of this case was not entitle to assert the breach of those relationship against Carlisle. It's only claim was breach of warranty. And that's been undisputed throughout the litigation of this case.

CHIEF JUSTICE JEFFERSON: If the statute still said founded on a contract, would your argument be different?

MR. ELLERMAN: No, your Honor, it wouldn't. Further questions.

CHIEF JUSTICE JEFFERSON: Thank you.

MR. ELLERMAN: Thank you, your Honors.

REBUTTAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF PETITIONER

MR. GILBREATH: To cite the article 2226 did say founded-- suit's founded on oral or written contract, that was the language before. Justice Johnson, your question about the warranty itself and whether reference my client, it did indeed. I don't think Mr. Ellerman was anyway misrepresenting what he says but it does reference our client. And it says it doesn't say issued to or anything like that. It just did the fact ...

JUSTICE JOHNSON: Certificate-- You're retold about the certificate?

MR. GILBREATH: It's, it says, "20-year membrane material warranty." And then at top it has this "Charley Company" attached this type of its address on the left side. And on the right side, it says "Medical City Building B" and then gives our address. So it did reference our client.

JUSTICE JOHNSON: And that's the certificate issued by Carlisle.

MR. GILBREATH: It's-- Yes, your Honor. It's-- I guess that bid to our brief. Now Mr. Ellerman started off by saying that well, there's all kind of warranties out there. And I've guess he was implying that if you hold that you can recover attorney's fees for breach of warranty, then you're going to be allowing attorney's fees for a bunch of different animals out there does not-- I mean, we're just asking the court to hold that you can recover attorney's fees for breach of an express warranties involving commercial losses. Again, the distinction on Adams suggest that the court, you wouldn't-- won't alarm for breach of warranty claims that involved here.

JUSTICE BRISTER: But your, your argument that it applies-- justify sound in contract, not by sound in tort. Statute does say oral as in oral or written contract. Does it say sound in-- or you're changing the statute?

MR. GILBREATH: That's correct. No, I don't think you are changing the statute, your Honor, because again, a claim for breach of express warranty is a claim for breach of a contract. Yes, the, the warranty concept has change over the years but it is squarely now considered by everybody, a claim-- a contract claim. And so you are not ...

JUSTICE BRISTER: Is this personally injury of property damage in which case is not at contract.

MR. GILBREATH: That's correct, your Honor, because that back to the "freak hybrid nature" of the claim but I think there's very little

support for any idea that breach of an express warranty that involves commercial loss. I mean it sounds in contract, it's not a tort, Prosser said it. Prosser and Keeton, I think, does an excellent job at discussing that point. As the question about the purpose of section 38.001, when I started preparing for this argument, that was one of the first things I wanted to explore because well, that, that was an important point I looked up. I have Farnesworth on contracts and I wanted to see what he says about why do we have remedies for breach of contract. And the purpose, I think is-- I mean, we need to keep the economy going. If people can't enforce contracts, then the economy would break down. Farnesworth says, "We need to encourage premises to be able to be confident to rely on the promissory's promise." And so if you-- breach of warranties are integral part of our economy and if you can't enforce them, you need an incentive to make the promissory comply with the warranty. And that's an incentive that this thing it keeps the economy going. Justice Brister one point that you raise, I wanted to address another point that I thought about in. It seems that every case that I have worked on, probably in the last 10 year does involved the fraud going. Now why is that-- I think in many instances, a representation could be-- the difference between the warranty and fraud is often scienter. And so if you could bring a claim for breach of warranty and recover your attorney's fees and I think you would have more people bringing warranty claims that ought to be a warranty claims. They are warranty claims, not a fraud claims. Instead of having people trying to bring fraud claims in order to get I guess punitive damages. We have weighty many fraud claims. And I think if the court says "Look, we can recover your attorney's fees for breach of warranty. We'll give a lot for this case out of tort system and in to the contract system where they belong." So in short-- I mean, it's very clear breach of the express warranty in this case wasn't breach of contract and which we recover our attorney's fees. Thank you.

CHIEF JUSTICE JEFFERSON: Any further question. Thank you Counsel. The cause is submitted that concludes the argument for this morning. And then Marshall will adjourn the court.

COURT MARSHALL: All rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas now stands up.

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