ORAL ARGUMENT - 10/1/96
95-1278
GREEN INTERNATIONAL V. SOLIS

BALDWIN: May it please the court. This is your second construction contract case of the morning. This matter arises out of 3 construction subcontracts, that the petitioner and the respondent entered into approximately 7-8 years ago related to the construction of 3 different Texas Dept. of Criminal Justice prisons.

This matter is here before you today on some 8-10 points of error. Let me summarize the key ones. The first is whether the Dresser Doctrine of Fair Notice applies to construction contract clauses, such as a no damage for delay clause and a wrongful termination clause. Green feels that the CA erred when it found that they did. Second, that the fair notice doctrine doesn't apply and the no damages for delay clause is enforceable where there are any of the recognized exceptions to the application of a no damages for delay clause are present in this case. Again, Green feels that the CA erred when it suggested that at least two of them did. Three, assuming neither of the two Green clauses are affective, whether there was adequate evidence to support an award of $150,000 for credit reputation damages. Four, whether this case ought to be remanded to the TC for a hearing on the issue of fraud and the inducement related to one of the contracts where a trial amendment was attempted to be offered after the close of evidence and the TC rejected it. And finally, whether the matter ought to be remanded to the TC for a hearing on the question of malice as it relates to conversion.

I am going to begin with the issue of conspicuousness. The CA found that the Dresser doctrine of fair notice as that doctrine incorporates conspicuousness operates to invalidate two of the clauses in the subcontracts. The clauses are present in each of the 3 subcontracts. One clause is a no damage for delay clause; one clause is a wrongful termination clause. Green believes that the CA was erroneous in applying the requirements of Dresser to these clauses essentially for 4 reasons. The first reason is procedural. The matter was never raised in the TC. The issue was presented for the first time the conspicuousness issue was presented for the first time to the CA. It violates the rules of appellate procedure. Second, even if the matter was properly presented to the CA, the Dresser requirements do not apply to these kinds of clauses. First, these aren't releases and these aren't indemnification clauses. Second, the clauses don't act in the way that the Dresser clause acts. The clauses don't act to free Green of liability in advance for its own negligence. The clauses are being applied in this case in situations where Green according to the jury breached the contract, but there are no findings of negligence. And clearly there are distinctions between negligence and breach of contract.

Finally, with reference to the clauses in fact it would be within this court's prerogative to find that they meet the standard of conspicuousness that Dresser establishes. They are not hidden on the backside of forms, they are not in smaller print, rather they are set off in a number of paragraphs like every other clause in the contract.

Let me begin by running through each of those 4 issues in more detail. First, at trial Green pleaded as part of an affirmative defense that these clauses acted to bar certain portions of Allied's counterclaim damages. Allied at that time before trial did not file any pleading seeking avoidance of these particular contract provisions. After trial according to the CA in its motion to modify judgment that was filed in Feb. 1993, some 7 months after trial and 1 month after the judgment was rendered, Allied raised 2 attacks on the operation of these 2 clauses. The first alleged that the damages in question were not delay damages and, therefore, outside the scope of the contract provision. The TC found that they were delay damages and, therefore, within the scope of the contract provision. Second, Allied alleged that one of the four recognized exceptions to the no damage delay clause, those exceptions established in the Ball case, which we will talk about later, applied. The TC reviewed those exceptions, reviewed the issues that were submitted to the jury, reviewed the evidence in question and found as a matter of law that none of the exceptions were established. The TC therefore applied the no damages for delay clause to eliminate the delay impact damages.

As a response to Green's argument that these matters weren't the conspicuousness matter, the fair notice requirement to Dresser was not raised at the TC, Allied suggested that it is a matter of law, and, therefore could not be submitted to the jury. We agree with that. Clearly Dresser indicates conspicuousness fair notice requirements is a matter of law. That's not the issue here. The issue here is whether Allied complied with the rules of appellate procedure and properly reserved the issue with the TC. The rule in the McKinney case that talks about the rule indicate that in order to preserve an objection or a basis for error, a proponent of that error must present to the TC an objection or a motion that states the specific grounds upon which the motion was being raised. You've got to give the TC an ability to understand the precise ground. Conspicuousness was never mentioned to the TC.

In support of its argument that the issue need not be made to the TC, Allied cites Dresser. Allied cites a Dresser paragraph that begins: Page never pleaded nor submitted jury questions on fair notice. And that's what they give you in support of their argument that the matter need not be presented to the TC. The very paragraph however continues. However it did argue that the provisions in both the Dresser contract and the Houston(?) Fishing(?) contract did not comply with the fair notice requirements and responses to motions for summary judgment, directed verdict, and instructed verdict. Clearly, Dresser requires that the issue be presented to the TC first. In cases that apply Dresser following Dresser all indicate that fair notice requirements can be waived if they are not presented to the TC. The US Rentals case and the Newman(?) case both so hold.

Now the CA acted, they looked at the clauses and they say these clauses violate the conspicuousness requirement. We believe they are wrong. Even if they were proper in reaching the issue, they applied the Dresser requirements erroneously. First, the clauses clearly are not indemnification clauses. According to Dresser an indemnification clause creates a new cause of action, creates liability on the part of the indemnitor that didn't exist beforehand. It makes the indemnitor potentially liable not only to the indemnity but to third parties in the event things occur. That's not the case here. These clauses don't create any new liability on the part of Allied, or the clauses releases within the definition of Dresser.

According to Dresser a release extinguishes a claim or a cause of action as would a prior judgment and is an absolute bar to any suit on a subject matter. These clauses don't do that. These clauses don't extinguish claims. These clauses are part of overall construction contracts, which as you all discussed this morning, allocate risks, create remedies, scatter rights and duties and obligations among the parties. That's the purpose of these clauses. That's why these clauses are in contracts. And the clauses in question both create remedies and establish damages. They provide remedies and they create new causes of action and provide defenses. The clauses are allocation of risks? Yes. And they are also definition of remedies. For example the no damages for delay clauses. It establishes that in the event the contractor causes a delay, the subcontract - Allied - is entitled to a time extension. A right not necessarily exiting under common law. It creates a new remedy for Allied. At the same time it indicates that Allied is going to bear the burden or the risk of damages that might occur as a result of delay, that's the contractor's responsibility, a clear allocation of risk in a clause that has been enforced by this court and other courts in this state over and over again, without reference to conspicuousness. The clause also does a third thing. It indicates that if Allied is delayed by a third party, Green has the obligation if it receives a delay claim from Allied to pass that claim on and to prosecute a delay claim against the owner. For example; requires Green to do that. So that if Green does not, it's a breach of contract. The clause doesn't extinguish a cause of action. Rather the clause defines remedies and risks that might occur that might pertain to a certain sequence of events that are explained within the clause.

Dresser is also explicit in the type of clauses that it applies to. Dresser says it is important to note that our discussion today is limited solely to the types of releases which relieve a party in advance of liability for its own negligence. That's an important distinction. It relieves a party in advance of the consequences of its own negligence. This clause doesn't do that. Even if it were a release it doesn't do that. This clause pertains to breaches of contract. And it's the Jim Waller case and other cases that talk about the distinction between contract and negligence discuss their different causes of action, the damages are different.

In this case the damages that Allied sought were benefit of the bargain damages. Economic damages that pertain specifically to the contracts in question. According to Waller it's a breach of contract. It's not negligence. And it's entirely reasonable to allow a party to a contract to allocate risks with respect to breaches of contract. Whereas, the same sort of allocation or release attached to negligence might not be. It might be the extraordinary allocation of risk that Dresser talks about. Negligence is unforeseeable. You don't know what's going to happen in negligence and you can't tie the sorts of damages down in negligence. In Dresser for example, a drill bit got lost. That was unforeseeable to the parties at the time the project started. However, it is totally foreseeable to the parties when they are entering into contracts such as this, that material shipments might delayed, that some of the material might be defective, that coordination issues might arise, that cite access might be denied. Those events can all take place, can all affect the performance on a project and not be negligence. But they might be breaches of contract. And so allowing parties to allocate the risks among themselves for breaches of contract is not an extraordinary allocation of risks. Rather it's a normal, and usual, and reasonable one.

ENOCH: Early on in your argument you talked about the extra damages were simply the result of

delay and there shouldn't be this extra. But the jury questions one asked for extra work that doesn't appear to be predicated upon the delay; and a second question asked for extra expenses that appear to be predicated on delay.

BALDWIN: There are three different jury issues that discuss extra work or impact costs. The+ extra work finding is really not at issue here except to the point I argued results that closed from the operation of Green's periodic releases that I haven't discussed.

ENOCH: Earlier when you said the extra work or delay damages you are just referring to that one question that talked about extra expenses, you are not referring to the first one?

BALDWIN: The delay damages which the TC are the impact costs and the TC found all flowed from time related events and is approximately $178,000. That's what we are talking about, and the credit reputation damages which the TC also found to be both time related and barred by the wrongful termination clause.

ENOCH: I'm just referring to those findings that had to do with...

BALDWIN: The extra work finding is not at issue here. Finally, the issue of whether the clauses themselves are conspicuous must be addressed. Dresser indicates that a clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. And again when a reasonable person against whom a clause is to operate ought to have been noticed, the clause is conspicuous. These clauses are in contracts broadly written. They ought to have been noticed by the subcontract.

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RESPONDENT

MARR: May it please the court. My name is Patrick Marr(?) representing the respondent Frank Solis. This case began when Green drove Mr. Solis off its construction subcontracts by interfering with his work and refusing to pay him for undisputed amounts owed. Despite its own misconduct Green then initiated this lawsuit by suing both Mr. Solis and his bank. Mr. Solis counterclaimed against Green and its surety company. After a 3-1/2 week jury trial, the jury unanimously found in favor of Mr. Solis on all counts, and against Green on all counts. Specifically the jury found in its verdict that Green had interfered with and breached its own contract obligations under the subcontracts. Secondly, that this misconduct by Green justified Mr. Solis in abandoning further work under the contract. Third, that Green had then wrongfully converted Mr. Solis' equipment. And fourth, that as a result, Mr. Solis had suffered approximately $500,000 in damages.

Mr. Solis unsuccessfully moved the TC for entry of judgment on this verdict. The CA found this was error and mandated entry of judgment on the full amount of the contract and conversion damages in

the judgment.

OWEN: Where in the TC did you raise the conspicuous issue?

MARR: We did not raise the word conspicuous and we concede that. However, on the waiver argument there are 3 answers to that. First as the CA found this court in Emerson expressly addressed the question of whether a post trial motion for judgment on the verdict preserved error for claims based on entry of judgment in an amount less than the verdict. This court held that that did preserve claims and legal challenges. The specific argument was not raised. It came up before this court which this court addressed in the Emerson case. Therefore, the post-trial motion for judgment on the verdict was sufficient to reserve error. Secondly, the CA properly found that Mr. Solis had raised the whole issue of the enforceability of this release by challenging its application to this case based on other exceptions to enforceability. The court properly found that it was not necessary to specifically raise the issue of conspicuousness. And I would note that there is a case that was recently decided subsequent to our filing of the briefs that I would be glad to submit a post-trial brief on. But in the Beneficial Personnel case decided by the El Paso CA on precisely this same fact, they found that the fair notice doctrine was preserved by a challenge of unenforceability of a release without any mention of the term fair notice, conspicuous, or express negligence. And third, even this court and other CAs have addressed pure questions of law based on contract documents when that question is fully answered by the document in front of the court.

For example, in the Flynn brothers case we cited in our brief the issue was whether a contract provision was unenforceable due to illegality. The CA said that it could be raised for the first time even sua sponte by the court on appeal. Similarly, this court has in the past found that the issue of ambiguity could be raised for the first time by this court even though it had never been raised by the parties before. And it's only fairness. The issue is fully addressed. There is no jury questions, there are not factual determinations, the question is whether this meets the legal standard. If determined as a question of law based on the document that is before this court and the court does have and the CA did have discretion to address that issue.

ENOCH: Is it critical to your argument on the conspicuousness and fair notice that negligence has to be a part of the delay clause?

MARR: I don't think it's critical. I mean it's a fact here that the clause here is almost identical to the one in Dresser. It waived claims of contract, claims of negligence, any claims of any type whatsoever. In Dresser they proceeded to a jury verdict on the negligence claim. Here we proceeded to a jury verdict on the contract claim. But the clause itself purports to prospectively waive liability for one's own future misconduct. And I don't think it matters whether its contract or negligence. And I would be glad to address all of the policy considerations that have been presented by Green.

They said basically because it's a construction contract that distinguishes Dresser.

ENOCH: In your brief on a number of occasions you paraphrased the clause and you substitute the word negligence for neglect, that actually appears in the contract. But you're saying that's not critical to your argument? This is a clause that transfers the contractor's liability to the subcontractor for the contractor's own contractual breach?

MARR: Yes. Or any other type of wrongdoing.

ENOCH: And you think that that requires then the clause to be conspicuous?

MARR: Yes your honor I do. And for the simple reason that none of the policy considerations they make, Green makes for distinguishing apply here. Their argument boils down to there is some difference between negligence and breach of contract. One's a greater evil I guess. I'm not sure why one's a greater evil. In this case the party suffered $500,000 worth of damages and was nearly driven out of business by this conduct. They then say well these are common clauses, these are in the construction industry, these are not really releases, these are experienced businessmen. None of those arguments hold water. Dresser was a construction industry. It was a case between experienced businessmen. The clause at issue, the release in Dresser, the indemnity in Ethel were clauses that shifted risk from one party to another in a commercial construction context. This court said nevertheless, and even though as the court in Ethel recognized, these clauses were pervasive throughout the industry. Indeed Ethel says there is a _____ of lawsuits based on these very same clauses. This court started down the road of saying: If you're going to be escape liability in advance for your own future misconduct, then you should at least, we're not saying you can't do that, you can write any provision you want, but you have to do it so that it's conspicuous and express and meets the fair notice doctrine.

CORNYN: Does Dresser to your mind or should Dresser apply to all risk allocation provisions in the contract?

MARR: Only those that release liability prospectively for your own misconduct.

PHILLIPS: What about limit liability?

MARR: That is not the issue before this court, and I'm not extending. I believe that would be a different issue and I am not arguing that any limitation on damages would be covered by the Dresser law.

PHILLIPS: _____ $1 we don't have to reach that in this case?

MARR: Correct. I would note that Green's argument that there remains causes of action for Mr. Solis is simply invalid. If you look at the very clauses themselves they say that Green shall "not be liable for delay" due to the contractor's "act, neglect, or default." It goes on to say "under no circumstances shall contractor be liable to pay subcontractor any compensation." There is no cause of action. There is no claim. Their argument about a 2 week or an extension of the contract period is not a cause of action. All

that is at most is a limitation on some hypothetical contract action that Green could claim allegedly, I don't think they could, that if Green sued Mr. Solis because Green forced the project to be delayed, that that would be an invalid suit. Well I think that would be invalid under the law if it was Green that caused the delay to sue the subcontractor for the consequence of Green's own misconduct would not state a valid claim. But at best that's a defense to Green's cause of action. It's not a cause of action, it's not a claim for Mr. Solis. So Mr. Solis is left with no damages at all.

I also want to address this issue of whether this is properly a damage for delay case. I do not believe it is. We've submitted to the court delay damages have a specific meaning in the construction industry. According to the noted expert who we cite in our brief, who wrote a book on construction delay claims, delay damages only refer to those direct costs attributable to the expansion of the performance period. This includes extended home-office overhead, and field costs. It does not apply to the expansion, the explosion of costs that Mr. Solis suffered here. The expert here did not testify about overhead costs or delay costs. What they testified about was inefficiencies. What happened here it would take 2 hours to do what should have been done in 1 hour. And that's what the expert witness in Ex. 90 Mr. McCauley's testimony never talks about delay damages. He talks about the unproductivity that was caused by the interferences, hindrances, out of work sequences, and generally poor planning by the contractor. This exploded the cost. It took more man hours. You could do it in the same day in the same hour. You had to put 2 people on the project. Green was constantly demanding put more people on the project to get it done within the contract period. These contracts were fully performed before the completion dates set in the contract. These are not delay damages. Nor is this a wrongful termination case.

Mr. Solis did not submit questions and did not try this case on a wrongful termination theory. His theory was that it rightfully abandoned the contract. When Green refused to pay it Mr. Solis then couldn't meet his payroll, couldn't pay its suppliers and therefore was totally incapable of proceeding with the contract any further. So he walked the project. They tried to turn it into a wrongful termination by then sending out a termination notice after the fact that would apply days after the project had been abandoned by Mr. Solis. The simple answer was that was not the evidence of wrongful termination, that was not the jury question, that was not the issue in this case. So that clause simply has no meaning here.

ABBOTT: Is there evidence that your client read the contracts?

MARR: The evidence is to the contrary. Mr. Baldwin himself cross examined Mr. Solis on that issue and said: Didn't you read the contract? Mr. Solis said No. He said two things: 1) I'm a Texas contractor; I am used to using the standard AIA (American Institute of Architect) contracts that subcontractors use in the State of Texas. I had never seen a contract like this. And 2) that I didn't read the whole contract. I started reading where there was a provision about unloading some materials and whose responsibility it was. I stopped right then and went and worked it out and it was only after I had signed the contract, and at a later date that I read and disputes arose that I read the contract. So prior to entering into the contract Mr. Solis had no actual knowledge of these owner's provisions in the contract.

ABBOTT: Then what would it matter if they were conspicuous?

MARR: Well if they were conspicuous and he should have been on notice of that. The argument that somehow these meet the conspicuous test, they are buried in small print on the 3rd or 5th page, depending on which contract you look at, there's no caption, there's no large print. If it had been raised conspicuously, if it had been on the first page, if it had been on large print, if it had a title, then it would have met the conspicuousness test and therefore we wouldn't be here before this court on this issue.

Green ignores the language in Dresser that adopts the UCC contractual standards for conspicuousness. I mean Dresser was a negligence claim before the jury but it arose out of a construction contract and the negligent performance of that contract. And in addressing the conspicuousness and fair notice argument this court reached out to contract law to fashion the rule it determined was appropriate.

As to credit reputation that's essentially a no evidence appeal. And briefly I will just state the record before it has evidence of foresee ability, Green's own witness said that they wrote a letter to the State of Texas saying not paying us, and not paying our subcontractors can drive them into insolvency in this market. They also said specifically we knew that the contractors depended on these payments. There was clear foreseeability. Green failed to pay Mr. Solis for 2 months and then Mr. Solis couldn't meet his payroll, and couldn't pay his suppliers. Even though for a 20-year construction history he had always met every payroll on time, every supplier payment on time until he entered this contract with Green. He had also been able to obtain bank loans, he had been able to obtain bonding, but after this he missed for the first time his payrolls, his suppliers, his own _____ Fred testified that word of missing these payments spread throughout the Abilene construction industry; it ruined his credit, both testified to that. Thereafter Mr. Solis couldn't work on his own. He couldn't get any bonds. He couldn't get any bank loans. And there is testimony to that.

SPECTOR: Was there evidence that he was unable to secure a bond, and unable to...

MARR: He testified that he was not able to, and that thereafter the only type of work that he could get was unbonded work where the owner or contractor would front the payroll, would pay the employees or pay the suppliers in advance. He had no credit. He couldn't do it, and he didn't do it. This man's worked hard and long, he did what he could to keep Fred. He did go out and try to work throughout the period before trial. And there was his testimony that he couldn't get the construction bonds.

As to the remands on the issue of fraud and conversion, the fraud was explicitly pled. Yes the caption said Fraud, the body in paragraph 6.1 of the 5th amended counterclaim said that Mr. Solis relied upon the misrepresentations of Green in entering into the contract. That's the very essence of fraud and the inducement. Moreover, this court has held that when you plead an issue like fraud or negligence absent a special exception that encompasses any variant of the theory of fraud and negligence. Second, and finally, the CA held that if there had been any variant between the pleadings and the evidence, that the TC improperly denied a trial amendment because of the lack of evidence of surprise or prejudice, and clearly

fraud inducement especially if the explicit language in the counterclaim was not an entirely new theory separate and apart from the issue of fraud.

As to conversion they allege again that there was no conversion. They haven't challenged the jury's underlying finding that Green wrongfully seized Mr. Solis' equipment. They relied in trying to defeat the conversion claim ab initio that Green had a contract right to seize that property. The CA found, no, you didn't have a contract right because you were...

ENOCH: But they haven't challenged that finding. They are simply challenging whether or not you go back and try the malice issue.

MARR: I disagree that they are challenging it when they make the argument that there can be no malice because they have a legal justification to do this. The issue of did they have a legal justification has been resolved in the underlying conversion. They did not. Therefore, the only issue they're left with is was it properly pled. And on that issue the complaint shows that the conversion claim states specifically that the conversion was wrongful, and that it was intentional and specifically pleads exemplary damages. Wrongful and intentional conduct is the definition of malice. Therefore, we submit that it was properly pled and the issue was before the court, and the CA correctly ordered a remand on that issue.

The CA and jury merely compensated Frank Solis for the damage he undisputably endured when Green forced him off the project and nearly drove him out of business. To escape its full responsibility Green relied on inapplicable contract provisions. It also seeks the right to bury on page 3 and page 5 some obscure case placed in its own contract provisions that prospectively waive one's liability for its own future misconduct. The policy rationale in Dresser applies here and the case should be upheld on that basis. If you disagree for any reason there are two totally independent grounds: the applicability issue (these were not applicable); and finally the CA found that the delay clause was also unenforceable because this fell within one of the exceptions to delay clauses. One of those exceptions specifically includes delays that are so long that they justify the abandonment of the contract. Well on Jury Q. No. 12 the jury found not a delay in payment, but no payment, and that that justified abandonment of the contract. I submit that total failure to do something is the limiting case of delay in doing something. And so clearly if nothing else you can look at jury questions 3, 8, and 14 would show delays and other misconduct justifying establishing breach. But in jury question 12 the jury specifically found that there was a nonpayment, and like I say you can't get any more delayed than that, and that that justified abandonment of the contract.

ENOCH: Do you agree that the exceptions that you rely on 1) is that it requires a finding that there was a wilful intent on one of those exceptions; and the other one was an unreasonable delay. And you're arguing that the jury finding that there was no payment is tantamount to a finding that the delay was unreasonable?

MARR: I agree with that. That is our argument. I also agree that as the CA did you can look at

the jury findings that there was delay in delivery of materials, that there was delay in resolving conflicts in the work, there was a mix of time related and nontime related mismanagement of this project. And so if you look at the totality of all the jury responses it's clear that there was delays in a number of fashion including most severely total failure to pay late or at all and that these justified the abandonment of the contract. And that square fits within the third exception.

OWEN: There were three contracts. The delay was on one contract and you're saying that that justified the abandonment of the other two?

MARR: Actually the Snyder contract was found to be substantially complete, the first contract. They were just down to the punch list at that time. The Dayden contract is really the contract that we are at issue here on this issue; and the Woodville contract the long and the short of it is the jury found against both of us on that and that issue is no longer before the court. Nobody got damages and we are not asking for damages, they're not asking for damages. So the third contract really is a nonentity. It does relate to the issue of fraud because among other misrepresentations when on Aug 2, trying to get Mr. Solis to sign this new contract on Woodville, they represented to him that he wouldn't get paid unless he signed the contract. He signs the contract, then doesn't get paid. To this date hasn't been paid. And therefore that's an element among many other misrepresentations of a fraud claim. But other than the fraud claim there is no issue pertaining to the third contract.

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REBUTTAL

HAMILTON: Before I talk about the fraud I feel compelled to respond to one or two of the misstatements. The jury clearly found that Solis breached the Woodville contract, and awarded no damages to Green. I don't know how you interpret that into the jury finding against Green. It simply found that the Woodville contract was breached by Solis. When Mr. Marr talks about the payment issue, whether payment came or not, the payment finding by the jury is not related at all to the impact costs that we are talking about with reference in the no damages for delay clause.

HECHT: Regards the Dresser issue. If the clause had said contractor agrees shall not be liable to the subcontractor Solis for contractor's own negligence, that would be clearly under Dresser?

HAMILTON: If the contract provision said subcontractor releases and holds contractor harmless from the consequences of the contractor's negligence I would agree that would fall squarely within Dresser.

HECHT: What is the difference between saying you hold them harmless from the consequences of their own negligence, and hold them harmless for the consequences of their causing delay?

HAMILTON: I don't believe that this clause does hold Green harmless from the consequences of its own delay first. I believe that in fact Green is obligated under this clause to give Solis a time extension which

is a valid remedy and a valuable remedy in the event Green causes delay. There is not a hold harmless clause. It simply says in the event of delay you don't get monetary damages. And I think the clause also creates the remedies that we talked about before. But I also think there's a distinction between negligence and breach of contract in that parties who enter into contracts can foresee that there will be events that will arise that could constitute breach. And parties to a construction contract especially want the construction project to go on. Notwithstanding the fact that those situations arise. So remedies are created and risks are allocated. It's not a situation such as the situation in Dresser where the triggering mechanism for the lawsuit wasn't a breach of contract, it was that somebody went out there and negligently performed work and damaged the actual project that was being performed. That's not the case here. And that's not what we are arguing. We are arguing that parties ought to be able to allocate risks among themselves in the context in which they negotiate a price and a schedule and all the other terms and conditions of a construction contract and they ought to be sure that those provisions are going to be enforced.

ENOCH: How do you respond to Mr. Marr's comment that the damages that were proved up were not your typical delay damages as contemplated by in the construction industry?

MARR: I think that that's not necessarily an accurate assessment of what the damages are. I think the damages all relate to time related situations. There is a case out of Massachusetts that is almost exactly on point. It's Reynolds and we cite it in our brief in which the Massachusetts Supreme Judicial Court says: when the damages flow from schedule related items, misscheduling of the work, or expansion of the work, or compression of the work, those are all situations that fall within a no damages for delay clause. And in this case the TC heard the testimony and reviewed the jury finding, looked at those findings and recalled the testimony and agreed that these impact costs all flow directly from time delay related issues.