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BRADFORD V. VENTO

TOWNSEND: ...all roads lead to Rome. We have many ways to get the case reversed. But I think one issue that cuts across all the issues and actually demonstrates the fundamental error of the CA is the issue of intent. Because I believe that when the CA reversed the finding of conspiracy for a lack of intent, it should have realized that the same reasons that led it to that conclusion should have caused it to reverse fraud, tortuous interference, and intentional infliction of emotional distress. Because the common issue on all of those claims is Bradford's intent. And in fact, the plaintiffs have said as much in their brief, that intent is the dispositive issue in the case.

Simply put, they cannot identify any reason for Bradford to have wanted to harm Mr. Vento. And it's telling that in their voir dire and again in jury argument. The plaintiffs said, We don't have to explain that. I think that's a misreading of the law. But at the conclusion of the jury argument, they also said in a very fraudulent slip, It really doesn't make sense that he did this. And I think that's true. It doesn't make sense.

ABBOTT: Would you just briefly touch on one particular issue that's kind of way down the food chain of these issues to which intent would not apply and that would be the DTPA claim.

TOWNSEND: The DTPA claim does not require intent. That's correct.

ABBOTT: Tell me why there's not at least some evidence supporting the DTPA claim?

TOWNSEND: We believe there is no evidence to support the DTPA claim because it still has overlapping requirements with the fraud claim. One of those would be an objective test of causing confusion. Another would require a misrepresentation, which neither they nor the CA has ever been able to point to. They've pointed to failures to disclose, but not actual misrepresentations. And then there's the problem of reliance or causation in these terms and that Mr. Vento by his own admission said he relied for a total of 2 days and that nothing changed in that interim. And this points out another flaw in their entire case - two flaws actually. Their liability complaints seem to really stem from the events of Oct. 6, when the police were called to the scene and Mr. Vento was asked to leave. But the basis of their claims for liability, they have to back up to Oct. 4 when nothing really was going on. And then turning to their damages, the damages awarded by the jury to the extent they are supported by the evidence flow from events in January when Mr. Vento was locked out for not paying his rent, not from the events of Oct. that they claim give rise to liability. And I think you will see during their argument today they will take snippets here and there, but they will never match up a complete cause of action. They will have something that occurred in October, and then they will suddenly switch to a different event in January to try to prove damages from that.

Taking mental anguish is just one example. The mental anguish that is

compensable under the *Parkway* standard, the severe disruption of the daily routine, that evidence comes from January when he is locked out for never paying the rent for December, which is completely within our legal rights to do. The property code says if they don't pay rent, we get to lock him out. The only mental anguish that occurred as a result of the events in October was just the fact that he was mad, upset, those sorts of things. And that does not rise as I read the case law to the *Parkway* standard. So we don't think they've proved the $750,000 in mental anguish was caused by the events that they've actually got a judgment under.

Turning back to the fraud. They've got $750,000 in mental anguish and a lot of punitives predicated off of that. As intent plays into fraud, they would have to show that on Oct. 4, Bradford intended to deceive Vento into doing something. We're not ever clear of what. He had already bought the store, so it couldn't be to induce him to do that. They say, well it's to induce him to stay at the mall, but he was already obligated to be at the Mall at least through the end of October by the existing lease. And in fact, a lease had been negotiated for November and December. It had not been signed yet, but it had already been negotiated. So they never can show exactly what Bradford was trying to induce Vento to do much less why it would make sense for him to do that. They've concocted some theory about well he wanted him to stay there to sell the merchandise in the store. But we wanted Taylor. Vento it didn't matter. We got paid the same. They both were under the same terms of the lease. It made absolutely no difference who would be selling the inventory. There's no financial motive at all.

GONZALES: But you would want a tenant that pays the rent. Wasn't there a history that Taylor had problems meetings that obligation?

TOWNSEND: Yes.

GONZALES: So it may make a difference to you to have a tenant that does pay the rent on time.

TOWNSEND: And if anything, we would have preferred Vento. But you're right. The inferences that they want to draw really cut the other way. The only explanation that makes sense is that the events of the following days caused Bradford to change his mind. And you have to recall that on the afternoon of Oct. 4, after Vento comes in to see Bradford and they have this 2-minute casual discussion, Vento and Taylor have an altercation that is serious enough that Vento calls the police. Taylor actually went home before the police got there. Taylor then comes to Bradford and says this dirty Vento, he's claiming he owns the store. He's actually stolen stuff from me. I, Taylor, still own the store. And very suspiciously Vento does not come to Bradford with a similar story saying guess what? You know, I just bought the store. Hey this guy Taylor claims he didn't sell it to me. Vento does not do that. So then we're only the morning of Oct. 6, when there is going to be trouble and the police are summoned out there again and Bradford sees before anybody says anything to Bradford, or he says anything, the evidence is clear - he's just standing in the corner sort of watching these two guys yell at each other. And the police go to Vento and say, "can you produce

proof of ownership?" And he can't. And Bradford witnesses that. And it's only at that point that they turn to Bradford and say, "either who owns the store or whose name is on the lease". Nobody knows what was said. Everybody tells a different story. Vento, himself, tells both stories at different places in the record. We don't know what was really said. But the result was, that at some level Bradford said, "Taylor belongs here. Vento does not." And Vento was asked to leave.

Now they then try to build that into some serious threat that we kept him out of the store for 6 weeks before a court order got him back in. But the truth of the matter is, he went back to the mall a week later. He was talking to lawyers. I don't know why they weren't able to get a TRO any faster than they did. I don't think we are responsible for that. But within 6 weeks he had a TRO that said, "No, Vento you own the store." So he was put back in place. And that goes to our contention that if he had proved lost profits at all, it would only be 6 weeks of lost profits, because he was only out of the store between Oct. 6 and Nov. 23. After that, he's in the store, he's operating it. December rolls around and he won't pay the rent. And we send him notices to that effect. He still won't pay it. Never pays the past due expenses that Taylor has owed for electricity. Vento admits in the record, "I knew I would be responsible for Taylor's debts when I bought the store." Well did you ever find out what they were? No, I never bothered to ask. I knew I owed them, but I didn't bother to ask. So we send lock-out notices. As far as I know there's never been a contention that we didn't follow the property code right down to line and we locked him out.

BAKER: You have a no evidence point, is that right?

TOWNSEND: Yes.

BAKER: But what I've heard most from you is evidence on your side of the case. Tell us why there is no evidence to support the jury's answers to the questions and not why you think there is a dispute and, therefore, it should go the other way?

TOWNSEND: When we're dealing with the issue of intent, in this case we're dealing with circumstantial evidence by their own admission and by the CA's opinion, and this court has held for decades that when you're looking at circumstantial evidence to draw inferences, you look at all the evidence in the record to determine which inference is reasonable...

BAKER: What if I disagree with that and say we look at all the evidence on their side that supports the verdict and see whether there are equal inferences that could be divined by a jury and they can pick one of them?

TOWNSEND: Two answers. The first one will be that, I think you would be changing the law to say that you do that. But if you want to change the law and do that, you still have to determine that the inference is reasonable. And I will submit to the court that the inference they want you to draw is not reasonable because it just doesn't make any sense. There's no motive. As I mentioned earlier in their own jury argument they said, It doesn't really make sense what we're telling you. I

think they realize there is no reason behind this. If you go to the court's decision in Spojarek(?), Spojarek has been troublesome in the law because of headnote briefing. The West editor pulled out some dicta, stuck it in a headnote, and you see lots of CA's following it. And that says that if you deny making the promise and then you never perform the promise that that's some proof of intent to defraud. What they ignore is that *Spojarek(?)* itself in the very next paragraphs through the end of the opinion immediately start talking about direct evidence and motive that they have. And the reason that's important is because without something to tip the scales, you have equal inferences at best that are poised in equilibrium. Because denial of a promise and nonperformance is absolutely equally consistent with the fact that you never made any promise in the first place. Nonperformance and denial, that's proof of the fraud right there. Of course not. You have to something extra. And in this case, if they could point to motive or something that would tip the scales, then we would have a very different argument on our hands. But we don't.

The final thing I want to say about intent with relation to fraud is if Bradford really set out to defraud this man surely he could have done a better job than he did. The only comments anybody has pointed to is he said, Well the rent is $770 per month; they never talked about November and December; he said come back in January and we'll take care of you, which Vento himself interprets as I've got to negotiate a lease in January. Maybe I'll get one, maybe I won't, but we've got to sit down and negotiate.

There is an instruction in the charge that requires Vento to prove that Bradford knew not only Vento was ignorant of the matters, but that he didn't have an equal opportunity to discover those matters for himself. And neither the CA nor the plaintiffs have ever pointed to a single bit of evidence showing Bradford knew that Vento was unaware of the terms of the lease. Vento shows up with a cashier's check, which the mall required from Taylor. Vento shows up with the exact amount for the rent. Vento knows that the lease is short-term because he's talking about wanting a long-term lease. Every indication in the record to Bradford is that Vento has done his homework and knows the terms of the lease. And that, I, think, ties into the intent requirement because if Bradford knew that Vento was ignorant of some of these matters and could not find it out, then you could believe that maybe Bradford is trying to slick him into some deal. But when Bradford is standing there thinking this guy knows the terms of the lease, we're just having this causal discussion, once again it just totally cuts against any inference of intent to defraud in this case.

The intent requirement of tortuous inference is one of motive and purpose to interfere with the perspective contractual relations. The Texas law is a little bit jumbled, because you've never really fully addressed the elements of tortuous interference with perspective relations. The recent *Prudential* opinion Justice Gonzales authored points that out that you haven't really studied this tort that much. The restatement goes into a lot of depth about how that plays into justification, overlapped with motive, overlapped with intent, and it's actually a very complicated subject. And I'm not sure the pattern jury charges that we now have do justice to what the restatement thinks the law should be or the sullities that are out there. But the one thing that I

gleaned from this is that for this tort, you want to have a purpose of interfering with a perspective relation. I think the analogy would be to your case law on intentional infliction where you've now said, it has to be basically the purpose of the infliction is to inflict severe emotional distress. It's not going to be enough to be incidental or a by product. But it really has to be the focus of what you're trying to do. I think that's a good analysis for tortuous interference with perspective relations. You need to pretty much be targeting a perspective relation that you're trying to interfere with. It can't just be incidental. Because if it's incidental, it becomes just a consequential damage of some other tort or breach of contract or something like that.

They possibly could have sued us for breach of contract in this case and recovered some of these things as consequential damages. They didn't want to do that. Probably because they couldn't get mental anguish and punitive damages, but that's their choice. But that doesn't mean that you need to fill sorry for them and skew the tort law to give them a recovery when they made their own bed.

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RESPONDENT

O'NEILL: What evidence do you have of any reliance by Mr. Vento in this case?

SMITH: Let's go to 160. The reliance in this case was Vento left without getting a writing from Bradford. He asked for a lease. Bradford told him not to worry about it. Don't need a lease. Vento paid rent. And Bradford congratulated Vento...

O'NEILL: Well he didn't say you don't need a lease. He said, we'll talk about that after the first of the year.

SMITH: Vento asked for a lease and Bradford said, don't worry about it. And only two days later...

O'NEILL: But what right did Vento have at that point to demand a new lease? I don't understand the reliance point as it relates to that evidence.

SMITH: Vento had a right because he had bought out Taylor. And he showed Bradford the contract.

O'NEILL: That had already happened.

SMITH: That's correct.

O'NEILL: So where is the reliance?

ABBOTT: He already had a lease. By buying out the business, the lease was in place already and he assumed the lease. So you're in trouble one of two ways: either 1) he assumed the lease; or 2) the lease was not assignable to a new person. But going your way, he assumed the lease. So he didn't need another lease. He already had a lease.

SMITH: Bradford denied at trial that he had a lease. He said the lease was nonassignable. And so when Vento walked...

ABBOTT: But you're arguing that it was assignable.

SMITH: We haven't said either way.

ABBOTT: You're not going to take a position about whether or not it was assignable?

SMITH: Actually, I think it was.

ABBOTT: Okay. So it was assignable. So he assumed the lease.

SMITH: Yes.

ABBOTT: So he had a lease. Why did he need another lease?

SMITH: Because Bradford's intent was not to recognize that lease with Vento. And that becomes critical. Because only two days later, Bradford is ousting Vento saying, you don't have a lease with me. And that's why Vento's reliance on walking out the door without a lease agreement is critical. It is the worst type of fraud you can imagine to have a person walk in and say, I've just bought this business from my partner and I want a lease please. Bradford says, don't worry about it. And two days later he's asking Vento claiming you don't have a writing with me. That's fraud.

ENOCH: Didn't a court give Vento access to the business when they approached the court for temporary injunction?

SMITH: His business had already been plundered by that point. The damage was done.

ENOCH: But the court must have concluded that Vento did have a lease. He had the right to possession of that leased premise. The court must have decided that in order to give Vento possession. So your argument is that it was represented that we had a lease. Later he said, we didn't have a lease. We went to court. The court said we had a lease. So he got what he thought he had. The court didn't say he didn't have a lease, which he thought he did. The court said, he did have a lease he thought he had. So where was the fraud that occurred here?

SMITH: The fraud occurred on October 4. Vento walks into Bradford's office. He

specifically informs Bradford that he has bought out his partner, Taylor. The direct evidence in this case shows Bradford knew of that partnership relation since July, 3 months earlier. And the specific representation that Bradford made to Vento on the morning of Oct. 6, and this is the critical evidence in the case, this is the climax at trial, when Vento walks into Bradford's office, (and this is in the box at the bottom) Taylor asked Vento the question: How did you know that Bruce Bradford knew and I knew that I did not own the store? That is what Taylor asked Vento. And the question is answered by Vento: Bradford said Bradford already knew I, Vento, was buying the other half of the store.

GONZALES: If in fact it's true that Bradford knew that your client had the lease, you're client believed he had the lease, why isn't it just a breach of contract if in fact the landlord here just simply fails to honor the lease?

SMITH: If all Bradford had done was fail to honor the lease, we might have a breach of contract action. But that's not all Bradford does.

ABBOTT: What Bradford does, is Bradford acknowledges that he already knew that he either was going to or did buy the other half of the store. How does acknowledging that somebody is buying a store constitute a misrepresentation? That's not a misrepresentation. It's not a representation at all. It's knowledge.

SMITH: If you look at page 160 in the statement of facts, you will see that when Vento walks in the door, not only does Bradford say he already knew Vento was buying the other half of the store and that he owned Collector's Choice, but Bradford also makes very important representations to Vento. Vento asks for a lease. He wants a writing. And Bradford says, don't worry about it that month. Come back in January and I will take care of you. And Vento pays the rent, which is an active reliance.

O'NEILL: Well he was obligated to pay the rent. What he was asking for was a lease in the future when this one ran out, right?

SMITH: No. He wanted the lease right then and there, because he had just bought out his partner. And he wanted to sign a lease with his name on it that established his rights at the mall.

O'NEILL: Where does it say that in the record?

SMITH: That's in the pages before 160.

O'NEILL: No. What you just said, that he wanted a lease right then for his place in the mall. Where does it say that? You're inferring a lot in just a little bit of language. Doesn't your position require a party to an arms-length transaction to reach out and help someone purchasing a business? Wasn't Bradford entitled to presume that Vento had read the lease of the business he was buying?

SMITH: No, because on the facts of this case, the evidence clearly shows that Vento was asking questions and he wanted a new lease, and he was there to negotiate one.

HANKINSON: But where is the action in reliance? In what way did he change his position as a result of that?

SMITH: He left without writings. He left his property in the store. He paid $770 in rent which was...

HANKINSON: If he owed the $770 in rent, that's not an detrimental reliance.

ABBOTT: And if he thought he had a lease, he would have left his property in the space.

SMITH: Vento paid rent on behalf of a sole proprietorship. And that was clear. Because when Vento walked in, he showed Bradford the contract and he paid rent for the sole proprietorship. And if you look at the contract, it specifically makes the representation that the contract converts Collector's Choice from a partnership to a sole proprietorship. And that raises a very important issue regarding *Kinsbock*(?). Because if you will remember what *Kinsbock(?)* says, Kinsbock(?) prohibits a third party from helping one partner cheat the other.

HANKINSON: Let's go back to reliance though. He says he's purchased the business. He has the lease. He pays the rent. He comes in and asks for a lease in the future. Where is the act in reliance? How did he change his position based on these comments so that he in fact relied on what you claim is a misrepresentation? How did he change his position at that point in time, not before and not after?

SMITH: He changes his position in a number of ways. Bradford is claiming that Vento did not assume the lease.

HANKINSON: Well I understand, but I think that's a really important question for you to answer. How did he change his position?

SMITH: He did not take action to protect his rights. He had property in the store that he could have taken out and protected. The evidence shows...

HANKINSON: He had a lease at that point in time, right, because he had taken over the business? He had a lease so he was entitled to be in the space and he paid the rent and he left his property there during the course of that term of the lease, right?

SMITH: Keeping his property in there was an act of reliance because he was relying on the recognition and acquiescence of Bradford that occurred on page 160 when Bradford told him, Don't worry about getting a lease. And that was critical, because if you will recall only two days

later Bradford is saying, Vento, you don't have a lease, even though some evidence shows Taylor had given Vento consent to be in Space E1 at the Valley Vista Mall, and Bradford had given Vento permission in Space E1; he's at least a tenant of sufferance. And Bradford had to give him 3 days notice before ousting him. And Bradford's excuse was, you don't have a writing.

HANKINSON: Let's move over to intent. Mr. Townsend began his argument by telling us that the same arguments used by the CA in saying there was no evidence of intent on the conspiracy claim would apply to numerous of the other business torts that are raised. What evidence is there in the record of intent? Would you respond to his argument that the CA's decision on the intent element of the conspiracy cause of action is in fact dispositive of the same issue on the other causes of action.

SMITH: The CA was completely wrong when it ruled on the absence of intent. And this is the evidence of intent. If you look very carefully at what Bradford is saying on Oct. 4, you will see that he knows that there is a partnership relation between Vento and Taylor. And he knows that Vento has bought out Collectors's Choice. But look what he tells the jury. What Bradford tells the jury is that his understanding was at all times Taylor was the sole proprietor of the store. He's not making the innocent mall manager defense here. Because the innocent mall manager defense is, I thought Vento was his partner; I thought Vento had bought out Taylor. But then I got conflicting information from Taylor and I made a bad decision in throwing out Vento because now that we are here at trial and I see all the evidence, I understand Vento really did buy out Taylor.

HANKINSON: But why is that evidence of intent? Intent to do what?

SMITH: If Bradford is saying that I believe Taylor is the sole proprietor of the store, then his representations to Vento are false.

HANKINSON: But that goes to falsity. Why is that evidence of intent? So he wasn't telling the truth at that point in time. It may be evidence of that. Why is it evidence of intent?

SMITH: Intent to do what?

HANKINSON: What is the intent element of the causes of action?

SMITH: Intent to induce action and fraud.

HANKINSON: Why is that intent to induce reliance - intent to rely upon the misrepresentation?

SMITH: Because Bradford knows in his mind his intent is that Taylor owns as a sole proprietor. But his words don't equal his intent and he says when Vento says give me a lease, I want a writing, Bradford says don't worry about it. Because Bradford is believing that Taylor is the sole

owner.

HANKINSON: But what difference does all of that make? Why is that intent to induce his reliance?

SMITH: Because when the - if you look at the restatement, section 8A, that's the standard for intent. It's substantially certain that if Bradford says don't worry about it, that Vento is going to walk out the door without a writing, and as we see...

ABBOTT: There's something here that doesn't make sense. And that is, you're saying that Bradford intended to induce Vento into a lease agreement, right?

SMITH: Into leaving without a writing.

ABBOTT: Henceforth, inducing somebody to leave without a writing is going to be a new cause of action in Texas? He obviously didn't induce him into a lease agreement because Bradford was contending that there wasn't a lease agreement. So he induced him into not doing anything in not forming a business, and how is that a claim?

SMITH: Under the facts of this case, it is evidence of Bradford's intent to induce Vento's reliance. Because when Vento walked in there and showed Bradford the contract, Bradford knew that Vento was relying on Taylor's representations and Bradford's actions here are laser like. And the precision here of what he says is focused on inducing precisely the action that later harms Vento. Vento says, I want a writing. Bradford says, don't worry about it. And two days later, the bombs are falling on Vento.

ENOCH: Misrepresentation that is made is Bradford misrepresents to Vento what Bradford understands Vento's ownership relationship to be?

SMITH: Correct.

ENOCH: I could understand if somebody misrepresented some facts to someone who didn't know the facts. But how can Bradford misrepresent to Vento what Vento's ownership interest is? Vento knows his own ownership. Vento knows he bought the store. Bradford acknowledges to Vento, Well I understand what your ownership is, you don't need to have this document. And Vento says, Well okay, I don't have the document. And then Vento sues because Bradford takes some sort of action that Bradford would not have been able to take if Vento had gone ahead and insisted that Bradford give him a document that he didn't insist upon because Bradford misrepresented to him what he understood Vento's ownership to be.

SMITH: It's critical because Bradford later attempts to make decisions that affect Vento that depend on what he believes. So Bradford's misrepresenting to Vento his beliefs about

Vento's rights and then he's deciding Vento's rights against him.

ENOCH: And then Vento goes to court and the court decides, Yes, Vento, you have the lease after all. So irrespective of writing or no writing, the court concludes the facts are as Vento claimed the facts to be irrespective of having gotten writing on that one day. Bradford says, I'm sorry, you're not really the owner. Vento says, Wait a minute, I 've got this lease and goes to court. The court says, Yes, Vento you're right. Vento you've got everything you claimed you had.

SMITH: No. In fact there was severe damage done to Vento during the interim. His priceless, personal collection that he had collected since 11 was gone. Vento was subjected to extreme coercion on Oct. 6. Let me try to explain this to you because I know you don't put your hearts down when you put your robes on.

ENOCH: Irrespective of Bradford's misrepresenting to Vento what Vento's ownership interest is, Bradford as the mall manager could have locked out Vento from the mall. Vento then would have had an action under the lease to get access back into the mall.

SMITH: Bradford did much more than that. And that's the problem here. What Bradford did is he locked Vento out and gave all of his property to Taylor. And in the process Bradford knowing Vento had the rights of a partner, he locked that partner out, helped one partner deceive and defraud and breach fiduciary duties owed to the other, and in the process he puts Vento in an extraordinary coercive situation. Vento is there before in his real property which he is entitled to 3 days notice before he's ousted, and they are making false statements about Vento to armed police officers who are there and at the time they should be defending Vento because Vento does have property rights and that's his property in the store. But what they do is they turn this into an extraordinarily coercive situation which is analogous very closely to what I gave as the example in the restatement under the intentional infliction part of my brief. There is a group of people, they are armed, they are there, they are separating Vento from his property wrongfully, they are doing it because Bradford and Taylor are lying about Vento's rights. This is not Vento's property they say. Taylor owns the store. Those are knowingly false statements that damage Vento. They threaten his person. They threaten him with arrest and seizure of his person right there on the spot through false statements that are specifically designed to harm Vento. And Bradford has other options than simply locking Vento...

O'NEILL: Let's look at the other options. What if Bradford had told the police officer, I don't know who belongs here. What would the police officer have said? Who is on the lease? What would have changed if Bradford had said, We've got a partnership dispute here. I don't know.

SMITH: Well quite a bit. Because at that point since Vento is in peaceful possession of the lease, Vento was entitled to 3 days notice...

O'NEILL: Well he obviously wasn't in peaceful possession. I mean, obviously there was

a dispute going on or the police wouldn't have been called out.

SMITH: No, Vento had been in possession as a partner since July and he had bought out his partner in September, and he had been in the store paying rent with promises from Bradford. He was in possession. He had the only key and that's why Vento's rights are important in one sense, because he has real property rights as well as possessory interests in that property that's within the confines of that store. And so when Taylor and Bradford coercively put Vento in that situation, they are harming him and that is why you must understand and recognize some mental anguish awards is proper in this case.

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REBUTTAL

TOWNSEND: I would like to address two issues. First, the question on intent; and second, the court's questions about reliance. As a threshold matter on the intent issue let me point out that even if the court were to indulge all of the attenuated inferences that the plaintiffs are asking the court to draw about Bradford's intent, none of that is responsive to the requirement in the charge that Bradford had to know Vento did not have equal access to the same information and willingly withheld that information from Vento. That defect in the plaintiff's proof is fatal, independent of the question on intent. And that requirement of equal access to the information is the critical restraint that protects the tort of fraud by nondisclosure from becoming a duty to disclose every fact in every commercial transaction. So that requirement has to be strictly enforced in order to maintain the parameters of this fraud. And there is no evidence in this record that Bradford had any reason to know Vento couldn't have gotten the exact same information from another source.

HANKINSON: Now you're into a question of whether or not there is a duty to disclose something as opposed to fraud that's based on the misrepresentation. You're in a failure to disclose mode now. And I understand that they are dealing with an allegation of an affirmative misrepresentation. How do those two dovetail? I'm confused.

TOWNSEND: I think that there is no suggestion from the plaintiffs or their proof that there is an affirmative misrepresentation. The only argument could be...

HANKINSON: I thought they said that the misrepresentation was, You don't have to worry about it, you'll get your lease.

TOWNSEND: Right. And the failure to then disclose the fact that there are provisions that would limit the ability to assume that lease. The fact that you don't have to worry about it, that in itself is not any representation of a statement of fact. It is not a statement that would support an affirmative misrepresentation claims. Only when it's coupled with the plaintiff's theory that having made that representation, Bradford had some duty to go further and explain the terms of the lease does it become fraudulent. And in that case, Bradford had to know that Vento wouldn't have

understood the conditions under which he could assume the lease.

ENOCH: On Mr. Smith's response to my questions was talking about what are the damages. What happens here? And as I understand what he was saying, Bradford tells Vento, knowing Vento's relationship, You don't need a lease. Now we can assume that's because the lease is in place until December and he's buying the business and so he just takes over. Smith comes back and responds, But your honor when the altercation came up Bradford was asked by the police, Who is the one who is supposed to leave? By designating Taylor as the one who has the lease and the police remove Vento, Bradford places Taylor in possession of the personal property, the operations of the store. By Bradford telling Vento he doesn't need a written lease and then afterwards putting the wrong person in possession of the store operations by his action, that in effect is the result of the misrepresentations. Bradford enabled the previous owner to get back in possession and therefore starts selling off all this property to Vento's harm.

TOWNSEND: What that highlights is that if there were any claim in this case, it could have best have been a clair for breach of contract. Because there is no reasonable inference that Bradford could have known on Oct. 4, when he said, Don't worry about a least or come back in January, that he was going to have an opportunity two days later to oust Vento from the store and this discussion with the police officers. And as *Foremosa* reminds us, the critical distinction between contract and fraud is proof that the defendant intended to defraud the plaintiff at the time the promise is made. And there is no evidence that would support a reasonable inference here that Bradford intended at the time he made that statement to take advantage of Vento two days later.

The court obviously recognizes there is no evidence that Vento would have taken any action other than the actions he did take had he been given the information that he claims he needed. But it's even worse than that. Because the plaintiff's reliance theory is that he forbore from getting proof of his ownership. But by the plaintiffs own testimony there was an altercation between Taylor and Vento later on Oct. 4. So Vento knew ownership was disputed. There is no evidence that he would have altered his position and consequently there is no fraud.

ABBOTT: Turn to page 183 of the jury charge. It's Tab B. This is the DTPA question. Would you look at items A, B & F. Explain to my why this evidence, the evidence that we've talked about, the evidence of "don't worry about it" and perhaps similar statements don't satisfy A, B & F.

TOWNSEND: Let me talk about F, first. F specifically requires evidence that the defendant intended to induce the plaintiff into a transaction. So the intent argument eliminates F. As for A & B, causing confusion or misunderstanding, that would require an objective standard that the defendant should have objectively known that a reasonable person would be confused, otherwise the DTPA would become a strict liability statute. It's exactly the same problem as the common law nondisclosure rule. If the only reason that Vento was confused was because he subjectively didn't understand the terms of the transaction rather than a reasonable person wouldn't have understood

it, then the DTPA is strict liability in all commercial transactions.