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Supreme Court of Texas.
CENTURY MARINE, INC., SIPCO SERVICES & MARINE, INC., AND ROY R. BROCK, Petitioners,
v.
CHARLES GLEN VAGLICA, Respondent.
No. 01-0005.

February 13, 2002.

Appearances:
Robert M. Roach JR., Cook & Roach, L.L.P., Houston, Texas, for Petitioner.
Stephen G. Tipps, Baker Botts, L.L.P., Houston, Texas, for Respondent.

Before:

Thomas R. Phillips, Chief Justice, Priscilla R. Owen, Harriet O'Neill, Wallace B. Jefferson, Xavier Rodriguez, Nathan L. Hecht, Deborah Hankinson, James A. Baker, Craig Enoch, Justices.

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JUDGE PHILLIPS: Thank you. Be seated. The Court is ready to hear oral argument from petitioner in Century Marine v. Vaglica.
SPEAKER: May it please the Court. Mr. Roach will present argument for the petitioners. The petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT ROACH ON BEHALF OF THE PETITIONER

MR. ROACH: May it please the Court. I would demonstrate two things. The first is that this Court to review the legal petition to challenge depends necessarily on the type of -- of no evidence argument being presented to the Court. And the second, is that in this case, if the proper scope of review for no evidence point had been applied on the $700,000 testimonial admission of the plaintiff himself would have conclusively established as a matter of law, the opposite, the vital facts, the plaintiff had to prove to win and that was the condition precedent had been met.
JUDGE: Mr. Roach, would there be a third question instead how and when if you did preserve this argument that you're making today?
MR. ROACH: Your Honor, we made it at the post-verdict motion stage in the general --

JUDGE: If it would be a fair statement, did you rely basically on Griffin v. Superior as your case which establishes your theory?

MR. ROACH: It establishes our testimony of admission --

JUDGE: That's what I'm at.

MR. ROACH: Yes. I -- I wanna make another argument to you in addition but that is the testimony of admission case.

JUDGE: But the -- the whole argument hinges on whether that's a testimonial judicial admission.

MR. ROACH: I -- I wanted -- I have a fall back position that it's not briefed, your Honor. And I -- I have to tell you what that is. I think it's --

JUDGE: A fall back position that's not briefed?

MR. ROACH: It is not briefed. It is a version of the same argument. I don't mean to upset the Court, but when we say --

JUDGE: No, I'm not upset. I'm just not pleasant on how we can talk about not briefed point.

MR. ROACH: It's -- it's not a briefed point.

JUDGE: Or not -- not a briefed theory.

MR. ROACH: Well, it's -- it's an explanation of what we have here. The same thing we briefed, your Honor. And that is that we when there is undisputed evidence, uncontroverted evidence, which is in admission under the -- but that is something that the jury can't disregard. Now, what we've said, is it's -- an admission, is an admission, is an admission and any inference of the contrary is unreasonable. What I'm just advancing out and it's not a change of our position at over a new argument, it is the same. And it's the scope of review argument. It says that neither a jury nor court of appeals can disregard what is an under --

JUDGE: Is it really correct that you never said that and cited a brief until you filed a petition for review with our Court?

MR. ROACH: Didn't cite a brief, that's correct your Honor.

JUDGE: And if the argument that you made on your motion for reconsideration with the court of appeal was based on the dissent.

MR. ROACH: Well, the dissent bought our argument and we were happy to say since --

JUDGE: Like a light went on.

MR. ROACH: I'm sorry.

JUDGE: Like a light went on.

MR. ROACH: No -- no, absolutely not, your Honor. We -- we argued absolute positivity.

JUDGE: We don't looking at what you -- you -- you don't talk about -- what you're talking about today in your motion for JNOV. You didn't talk about it in this manner in your JNOV and the motion for a new trial. And you didn't talk about it in your brief to the court of appeals.

MR. ROACH: It has been our -- been our theory entirely throughout this case, your Honor, that when the plaintiff admits to a loss that conclusively establishes --

JUDGE: Well, does it conclusively establish? I mean you have $700,000 in the rent, but there's this and there's that and there's this, it gets them to think that -- that -- granting that the court of appeals went on but I mean, him saying, acknowledging that at one point in time it was $700,000 in the rent, doesn't necessarily exclude the way you want these other credits and came to over $300,000 figure, does it?

MR. ROACH: There really two questions, your Honor. There is a question of whether they actually met the initial precedent at that

time and then another question and that is whether they could have met it in the future but for the defendant's absence. That's the key word issue. As to the first, whether they actually met the $300,000 initial precedent is conclusive of that $700,000 lost, $200,000 profit means they've lost $500,000 period. You have this other issue though that the court of appeals very correctly no challenge, it says there are other charges that could be counted as evidence for this future issue. Okay? But for the defendant's breach of in his story brief were fraud, what would -- would the condition present have been met?

JUDGE: But that's their legal theory. If they said they're accused from having to meet the condition precedent because of the conduct of defendant which prevented them from doing so.

MR. ROACH: That is exactly right.

JUDGE: So the -- so the evidence that Justice O'Neill has referred to is immaterial to the legal issue that -- that needed to be decided the issues in the case.

MR. ROACH: That's right. But they really didn't attempt a trial to prove the second part. They didn't attempt to prove if that in the future that they could have met the 300,000.

JUDGE: Let me -- let me go back. I -- I'm a little bit confused with your -- as I understand your theory, your claiming that -- that the plaintiff's testimony in this case was a judicial admission that is established as a matter of law, that he could not prevail on his contract claim.

MR. ROACH: That's right [inaudible].

JUDGE: But at the same time in your motion for re-hearing from the denial on the petition for review, you acknowledge that if we don't accept your judicial admission argument that in fact there is some evidence to support the jury's verdict.

MR. ROACH: If -- if we don't win $700,000, would we lose?

JUDGE: Because there is some evidence which -- which -- which mean that there's some evidence to support the jury's verdict.

MR. ROACH: It really just means that we haven't carried our burden for [inaudible] of issue. What we are acknowledging is we can't conclusively establish the right worth.

JUDGE: Right -- right if you can't -- and if -- because you can't conclusively establish then you're falling back to a -- to a no evidence standpoint from a standpoint of is there any evidence. And you admit there is some evidence?

MR. ROACH: There is evidence of something. There is -- what we do not admit there's evidence that the profit condition was met originally and we don't admit that it would have been met. But if you accept the court of appeals' analysis, we lose.

JUDGE: But you say here for example if this Court disregards all the evidence and the reasonable inferences contrary to the verdict as respondent says it must, the petitioners lose. And maybe I'm missing something but that seems to tell me that under -- is there any evidence standard that there is some evidence?

MR. ROACH: We still don't think there are reasonable inferences but -- but if the Court says of -- certainly the court of appeals thought that there were reasonable inferences supporting five different charges.

JUDGE: Well, and you admit that there are reasonable inferences in here. Because it says if this Court disregards all the evidence and reasonable inferences contrary to the verdict as the respondent says it must, the petitioners lose.

MR. ROACH: That's right. The court of appeals --

JUDGE: Well, then here's -- here's my problem with this then. I failed to see if there is any -- if there is some evidence in the record that supports the jury's verdict, then how there could conceivably be the type of judicial admission that Griffin talks about as being unequivocal to take it -- to the as a matter of law standard.

MR. ROACH: Yeah, I think it depends entirely, your Honor. Your sequence of review, if you look first to see whether they are inferences that you can draw that support the verdict and don't look on whether or not you have conclusively established the opposite of what the fact, this present was met. You can sustain it.

JUDGE: Well, but if --

MR. ROACH: But if do the opposite, you can't because it comes unreasonable -- that it becomes unreasonable inferences if we -- if we had prevailed and established that the profit condition wasn't worth fit under that.

JUDGE: But if you're going -- if you're going to meet your burden as a matter of law standard, then you're going to have to show as a matter of law that there was no conflicting evidence. That in fact the evidence was -- did establish an element or a point as a matter of law. Which we -- which -- which under -- which -- which is my -- when my understanding of reading all of the -- the reading and being familiar with as a matter of law cases, that means there's no conflicting evidence, no contrary evidence. I mean, I -- I -- I don't -- I don't know of any cases that go differently than that. Do you?

MR. ROACH: I don't think there's any cases that -- that goes to the issue we're presenting here today.

JUDGE: No, my point is if I go back and look the jurisprudence to the extent than a --- to the extent that an Appellant Court has applied and as a matter of law standard in reviewing an evidentiary record to determine that the evidence does establish something as a matter of law. That we find in those opinions the discussion that there is no conflicting evidence or contrary evidence.

MR. ROACH: Yes, because --

JUDGE: Okay. And in this -- and it -- yeah, right by definition. But in this particular case, there is in fact some conflicting evidence as you admit in here that there are reasonable inferences that -- that you disregard all the evidence and reasonable inferences contrary to the verdict, then you lose, that must mean if there is some evidence that conflicts. And what you're asking as to do is to apply Griffin to the point that even in the face of conflicting evidence that we should treat a statement by the plaintiff from the witness stand as being a judicial admission such that we should disregard any other contrary evidence in the record. I mean that's what I understand you're asking us to do. And that seems to me to be going a whole lot further than we've ever gone.

MR. ROACH: Yeah, that's right your Honor. The conflicting evidence that you and I both agreed here does not get to the point of satisfying the condition present, okay? We said the conditional present isn't that. We will concede. There are -- there is some conflicting evidence that will make you some [inaudible] a $300,000 bond. But we do not concede that the $300,000 profit is established. All we said in the line and we quote it, your Honor, is that if the court of appeals is -- if the court of appeals' analysis is taken for what it is and -- and we broke that, the 700,000 figure instead of the 408,000 figure because it has no revision throughout the Court.

JUDGE: But -- but what -- but I don't understand how that can be conclusive when in fact the plaintiffs theory of the case is that it

was the defendants conduct that -- that prohibited the condition precedent from being met.

MR. ROACH: As a legal matter, your Honor, there is no way that -- that the only case I see is the key -- a key and that case does not stand from the proposition that you get to completely excuse the failure of the condition precedent you've met. It stands from the opposite of position. And that is you still have to prove that brought forth the defendant's actions that you would have met the condition precedent.

JUDGE: But the jury found that -- the jury found that. So, if we're going to -- if we're going to do a sufficiency review with -- in respect to that line, we're going to then consider all of that evidence in and any reasonable inferences that flow from it to support the jury's verdict.

MR. ROACH: The jury did not find that because that was not the plaintiff's theory at file. The plaintiff had a legally improper -- had a legally inadequate view and that was all we had to do is show [inaudible], and that excuses us from trying to prove that the condition precedent was met. We're the first people to say no, you didn't satisfy your verdict. You still have to prove that the condition precedent would have been met in the future but for the actions of the defendant. So, the jury didn't agree and the jury's -- getting back to Griffin, the jury was not committed in this and the Beaumont Court of Appeal does not -- does not permit it to take uncontroverted testimony of admission evidence ignored. And if it wasn't ignored we win, as plain as that.

JUDGE: Well, let me ask you this that based on your statement, there is another evidence in the record, in your line of cases it said that if something like this happens, that you have to protect your record by objecting to any other evidence that might controvert itself and that the other statement, and whether the record will show that you did it. Or -- or is there evidence in there without objection on that basis?

MR. ROACH: That's a question that I've looked at myself, your Honor; and I looked at Griffin to see if there was anything about an objection having been raised there and I didn't see any objection being raised there. I --

JUDGE: But when you read Griffin again taking your statement, yes there's other evidence, it seems clear that Justice Griffin and the surviving Griffin said that -- that statement by the worker was the only evidence period. And the whole case and it proved the opposite of the element that he had to prove. So that is Griffin distinguishable because you now have your statement. Yes, there is other evidence [inaudible].

MR. ROACH: We've got into a terrible semantic problem. I should've probably fixed it in the beginning. There is no -- no conflicting evidence at all on the loss of [inaudible] Washington. The 700,000, the -- the object of this testimony admission. There was no evidence contradicting that. The only evidence that I could admit at to as being conflicting goes to this future question of what could have been charged but for the -- as income -- but for the -- the -- that the [inaudible] to have breached the defendants. This is Griffin because there is absolutely no other evidence.

JUDGE: Let me ask you, I'm not clear yet. Taking -- what is the total amount of money accepting all the inferences in favor of the respondent here that would come in the future toward this $300,000 cap. What's all those inferences?

MR. ROACH: Six hundred thousand dollars, your Honor. A little less actually, 593 -- 593.

JUDGE: So your -- your argument is that doesn't -- none of that information goes to take away from a $700,000 loss on his other job.

MR. ROACH: Exactly.

JUDGE: And to get to the judgment, the respondents retest to put those two figures together.

MR. ROACH: That's exactly right.

JUDGE: And all of his inferences in all of his testimony about the future job does not get him passed the uncontroverted laws on the first job and therefore he can't get to his 300,000 even if there was fraud by the Century Marine here that keep it from getting the 600,000.

MR. ROACH: Exactly. Even with all the -- all the disputed evidence that we're willing to concede. They're still $200,000 short of proving the real questions which is not in conflict and which is undisputed and that is they still a hundred -- $200,000 short of the $300,000.

JUDGE: Well, Mr. Roach I don't understand that -- that if -- if that really is the record why you need to be focusing on this judicial admission argument because then if that really is the case and you have no on point uncontroverted evidence on the point that you're trying to make then, we're just in the ball park in this matter of law. It doesn't mean we don't have to go so far as to say, "Here's a judicial admission and my gosh, we're gonna hang our head on that and because it's an admission that's the end of the line." I mean --

MR. ROACH: That's why I started with the judge's statement.

JUDGE: I deceive the -- the -- the -- the -- the judicial admission seems to me a better of a Red hearing when you're talking about as matter of law kind of argument and may very well be dangerous territory if in fact you're looking at -- when you -- when you're -- cause as I see it, you're judicial admission argument has been phrased in a way that would indicate that once that statement came out of that man's mouth while he was in the witness stand, that was the end of the inquiry and no one can do anything else after that, which is a slightly different issue than saying this record is a matter of law this point was established.

MR. ROACH: I understand and I -- I think we -- we return to where I -- where I ended, trying to return -- save some time for rebuttal. We don't have to go as far as the judicial admission if it is a matter of law. We thought it would be an accord against the law, which is Griffin as a 1960 case. To say this is a perfect situation. When the plaintiff admits himself he can't win, he's out of Court, that's something for review of Court.

JUDGE: And I take it you -- you disagree with Chief Justice Greenhill's discussion in his dissenting opinion about the difference between a formal judicial admission and an admission for purposes of the rules of evidence and how that plays out, or do you agree with this analysis?

MR. ROACH: Well, I think I read the analysis for a different point. I was going to brief Justice Greenhill that if it's just a witness talking about something that they perceived, that wouldn't be good enough. That's not this case. We have the person himself who was responsible for the work and responsible for the numbers, certified it to the government as being accurate, admitting it to a $700,000 lawsuit.

JUDGE: Well, what -- what if -- what if he admits during direct though $700,000 lawsuit and comes back on cross and -- and or -- when his -- when his lawyer takes him then and his -- and then his starts

explaining, "Well, here's what I really meant in terms of that." So that it really does undercut the admission.

MR. ROACH: I think that's perfect.

JUDGE: Then what happens?

MR. ROACH: No, I think it stops being a judicial admission, if Justice -- including Justice Greenhill. If he doesn't have real self -- personal, if it's not really a key issue, if it's not something that, you know, basically they intended to say but on this record you could come to that conclusion because it's where it doesn't come back. All they do is prove it's more than $700,000 and he can't quantify how much more than $700,000 in this. Thank you, your Honor.

JUDGE: Thank you.

JUDGE PHILLIPS: Any other questions? Thank you Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Tipps will present argument for the respondent.

ORAL ARGUMENT OF STEPHEN TIPPS ON BEHALF OF THE RESPONDENT

MR. TIPPS: May it please the Court. I think I could be most helpful if I took a few minutes of the outset to explain why there is legally sufficient evidence in this record to support this verdict. I disagree with the -- with the suggestion made in the motion for rehearing that if the Court considers all of the evidence which arguably it may need to do, that Mr. Vaglica loses. I have done the math indulging all reasonable inferences in favor of the verdict and according to my math, Mr. Vaglica wins. And I've set out the math in this handout that I have distributed to the Court this morning. And what I have done basically is take the mathematical calculation contained in the petitioner's brief and revised it, drawing inferences in favor of the verdict. My math differs from the petitioner's math in two fundamental ways. In the first plea, concerns this alleged $700,000 admission and the second concerns a credit that was due Century Marine because Mr. Brock, who controls Century Marine presented Century Marine from curing a default declared by the government, which resulted in the termination of the contract, which resulted in the government's witholding the entire retainage. And what I'd like to do is to address first those two concerns. And then move to the fraud issue.As the Court is well aware, the -- the leading case with regard to judicial admissions is the Griffin case. The Court has considered that issue more recently in the Hennigan v. IP Petroleum case which I believe neither side cited probably should have 858 S.W.2nd 371. The testimony in this case quite frankly does not even approach the standards established in those cases for turning a quasi admission, to use the Court's term, into a judicial admission. This testimony is not the sort of clear, deliberate, or unequivocal omission -- admission that's required by those cases. The possibility of a mere mistake has not been ruled out. As a result, this testimony is not binding. It is not conclusive. It does not preclude courts from drawing other reasonable inferences from the record. And it would not preclude this Court from accepting any of the alternative arguments that are made at pages 31 through 33 of Mr. Vaglica's brief. But even if, you look at Mr. Vaglica's testimony, which is what I've done in my math, you still come to the conclusion that the condition precedent could have been

satisfied if reasonable inferences are drawn in his favor. And, but you start by looking at the testimony itself, and I have reproduced the relevant part on the second page of the handout. The petitioner is relying entirely on four lines of testimony that appear on Page 144 Volume 5. And -- and that is where Mr. Vaglica in response to a leading question, in which the questionnaire is trying to sum up testimony that has been given previously says, "Yes, the job ended up some $700,000 in the red." But if you go back just two earlier pages, you can see that the set up of that testimony was first of all, the questioner elicited from Mr. Vaglica testimony, that the -- the job initially was a little over a million dollars in the whole. But there was then payment of a partial -- partial retainage about $400,000. If you then take those general kind of estimate-type testimony and compare them with the precise testimony that's elsewhere in the record, you come to these conclusions. The testimony given by Mr. Vaglica, a little over a million dollars in the whole, corresponds to the testimony given by Mr. Abrera, to the effect that the precise number was $1,027,000. And we footnoted that reference. Even more clearly, if you take about $400,000 of retainer, that corresponds to the precise number, which is in the document, which is fairly $9,023. So if you do that math, what you'll really come up with is the testimony that the -- the actual loss at the time of termination was $617,977. What happened was, the questioner in his client's self-interest rounded up to $700,000 and got Mr. Vaglica to agree to that when he probably more properly should've rounded down. But the -- the jury certainly could've concluded looking just at Mr. Vaglica's testimony, that the starting number is not $700,000, but it's $617,977. You then go down to that and there are five items which the petitioners quite properly have conceded because they must -- because they must resolve inferences in Mr. Vaglica's favor. That's the -- the first -- the next five digits that are footnoted, reference footnote three, that's $597,000. The next area where I differ with the petitioners has to do with the right to cure. And that's at $232,707 number.

JUDGE: And -- to summarize it at this point, one way or the other, you don't disagree so much with the $700,000; at least it doesn't make any difference whether it's $617,977 or 700. So the real focus is on this $232,707?

MR. TIPPS: Under -- under this alternative calculation, that's correct. This calculation grew up results in a number bigger than $300,000 even if you replace the 617 with 700.

JUDGE: Right.

MR. TIPPS: This is not the only formulation that is supported by the record.

JUDGE: But as you calculated it here, the argument then shifts to whether -- we're not arguing about the -- whether there was -- whether 700,000 was established as a matter of law. We're arguing about whether there's any evidence to support $232,707.

MR. TIPPS: Which there is.

JUDGE: Okay.

MR. TIPPS: But -- but there's also -- I emphasize, there's also evidence to support alternative numbers that go at the top. There's some evidence to support the court of appeals number. There -- there are other arguments that have made it to the pages 31 through 33 in the brief. I'm presenting this one as one way the Court could resolve the issue. The cure issue has to deal with this, because Mr. Brock, who controls Century Marine, would not allow Century Marine to comply with the July 1993 cure notice. That contract was terminated and the

government was able keep the entire million-dollar retainage. And this is set out on the third page of the calculation here. If you start with the amount of the retainage, that's 15 percent of the contract demand. And we've cited in the footnote have you back in to the number. I think that's a rock hard solid number that as a time of termination, the government was holding $1,041,000 that was ultimately owed Century Marine. If Mr. Vaglica had been allowed to cure the depot, according to his testimony, it would've cost between $400,000 to $500,000. So indulging reasonable inferences in his favor, he used $400,000. At the end of the day, Century Marine got 409,000 of the 1.41 million. So you have to subtract that. The point is, that if Brock had not interfered with Century Marine's ability to complete the job -- to cure and complete the job and avoid this penalty, Century Marine would've had another $232,000.

JUDGE: But only if, they will track cure. Only if Vaglica would have tried to cure.

MR. TIPPS: If he had -- if he had been allowed to cure.

JUDGE: If he had allowed to, is there any evidence that he would have?

MR. TIPPS: Yes.

JUDGE: What's that?

MR. TIPPS: The --

JUDGE: The reply brief says on page 8, there isn't.

MR. TIPPS: And there is. The reply brief makes two arguments. The first is that there is no evidence that Mr. Vaglica would have complied with the cure notice. That involves a misreading of Mr. Vaglica's testimony and the key testimony is in Volume 5 pages 192 and 193. Some of the most important testimony in the whole case can be found on Volume 5 beginning with about 191 through about 196. The facts are that Brock was Vaglica's superior. Brock had to approve everything that Century Marine did. Vaglica, and you need -- the testimony is a little garbled and you have to read it carefully. But if you do read carefully, and you hear it and I think the jury heard it. What is apparent is that Mr. Vaglica was frustrated with his relationship with the government contractor. He disagreed with what the government contractor wanted him or the government inspector wanted him to do. And he concluded, in his business judgment that the thing to do was to force the government's hand, force them to give him a cure notice which -- with which he was then being obligated to comply. But with the respect of which, he could then claim later that he should've not had to comply. And get his money back. And -- as he -- as he put in his testimony, was essentially forces you to do, and you don't have to. But he then goes on and says that if you're forced by the cure -- if you're forced to by the cure notice, you have to start dealing with the government's way.

JUDGE: But the question, I guess was does it make any sense to spend, what you're saying, $400,000 to 500,000 to make 232 or just give up?

MR. TIPPS: No. It makes sense that -- it make sense to spend $400,000 in order to get $600,000. He had to get $400,000 anyway, if he has spent the money and prevented the government from terminating and withholding, he would've gotten -- he would've been 600 -- he would've been $600,000 all for the good. He got four -- so 200 better of.

JUDGE: Right. But I'm saying is, does it making any sense to put out four, hoping that you're gonna get -- get the two? When you actually didn't satisfy the cure and making it four back someday or just walk away from it.

MR. TIPPS: Well. Now. It -- it makes sense to stand the four in order to prevent the government from terminating and withholding the entire amount of the retainage.

JUDGE: Because you make the two.

MR. TIPPS: Yes. And -- and that was what Mr. Vaglica thought. That whole plan was foiled though, when Mr. Brock and the evidence would suggest for ulterior reasons, refused to let him spend the money. At that point, and this is the testimony that the petitioners point out at the Court in their brief. At that point, Mr. Vaglica who found himself having to make the best of a bad situation, worked out a mutual plan of action and they tried to satisfy the government anyway. But the point is, that his plan was foiled by Mr. Brock and that's why he didn't get the two. The second argument that they make, is that -- that they claim that there's no evidence that the failure to comply with the cure notice, caused the government terminate contract, but there is. And the Court made no further then the cure notice and the subsequent termination letter, which are -- which is also attached in the packing. The jury could reason -- certain -- arguably the -- those documents established conclusively that the termination resulted from the failure to cure. But they certainly support reasonable inferences on the part of the jury that the failure to cure resulted in the termination, and accordingly resulted in their inability to get the full the amount of the retainage. The petitioner's point, to testimony from Mr. Vaglica that he considered the termination to beat the result of a legal maneuver by the government. What they overlook is that the government was in the position to execute that legal maneuver and to hold on to the full amount of retainage only because Century Marine had not cured. That was the only reason that they had to ride the issue of termination notice. There's also some suggestion in the briefing, that the -- that -- that Century Marine could not have completed the job on time under any event. But that again is belied by the testimony. The testimony is that if or there is evidence, that if Century Marine had been allowed by Brock to cure and spend the $400,000 or $500,000 that would've cost that it could've completed the job. And the test -- the evidence is on -- in volume five pages -- first on page 192. Question, the reason that the contract was going to take that $400,000 to $500,000 to complete was not really based on the amount of work that needed to be done, was it? Answer no. And then even more clearly, Volume 5 page 193. Beginning on line 14 down through 123. Question, in order to get the job done during the time that he had remaining on contract, would you have had put people on the clock 24 hours a day? Answer, even without spending this $400,000 to $500,000, which is what would've -- would've cost to comply with the government's cure notice. Even without spending this $400,000 to $500,000 we still put two shifts on. And then at the end, to do what they expected, which is to spend the full amount of money. We would have had to put four -- we would have had to put four times of that. The evidence is that had the money been spent, the job would've gotten done and it wouldn't have been terminated, or adding in, there is evidence from which the jury should reasonably infer that.

JUDGE: Do you agree that the court of appeals is wrong in trying to use the budget number or not?

MR. TIPPS: I will concede that I can't figure out how that number works. There are better -- the theory I just articulated is far better theory than the court of appeals' theory. There are other theories in our briefing that are better than that one. But I don't know how they taking budget numbers and turn them into -- into [inaudible].

With regard the fraud, there are basically, in my formulation, the

way I understand it, there are two different kinds of fraud. We in our brief can say three. I think two and three kinda merge together. Let me talk about the second first, because the second fraud finding does not require that the court conclude that the $300,000 level would've been reached. The second fraud theory has to do, is the fraudulent-inducement theory. The theory, presuppose, the theory against the proposition that Mr. Vaglica, before he ever signed the memorandum of agreement, had an oral agreement that he made at the time he sold his property to the prior owners, that if -- they have been waned out of the business, he could buy the property back from what they paid in Court, which is $255,000. When he entered into the memorandum of agreement, he gave up any rights under that prior oral agreement, and that's explained from the last paragraph of the memorandum of agreement, which says that if you don't purchase under this agreement, our relationship will return to what it was before the agreement, except, you will have any right to buy any assets. The evidence is, that Mr. Vaglica was defrauded by Brock in entering into the memorandum of agreement and giving up his rights under the oral agreement by first misrepresentations, that the BPB Company would require him to enter the memorandum of agreement and not honor his prior -- not honor the prior oral agreement. And that representation was made by Brock even though he never talked to the BPB Company about this. And second there is the non-disclosure by Brock, that in fact, when he was encouraging Vaglica to enter into the memorandum of agreement, in fact, he and his partner Twidal had already concluded to buy the property themselves.

JUDGE: Mr. Roach says in his brief that because that was an oral agreement purchase -- purchasing of real property that it would be barred by the statutes of frauds and therefore is not enforceable, so that negates this claim, would you respond to that argument?

MR. TIPPS: Yes, we're not going to enforce the oral agreements. We're relying primarily on this court's decision in Clements v. Weathers which recognized that in oral agreement, set forth in the statutes of frauds could form the basis of the tortuous interference claim. And the reason for that is, the court -- courts don't presuppose that parties are not going to honor all agreements. So we're not trying to enforce the oral agreement, we're simply -- we simply alter the oral agreement as evidence of value. And the oral agreement gave Mr. Vaglica the right to make a very favorable purchase because he could pick and purchase property that later was established to be worth over $500,000. I think it's $575,000 for 255. And -- and that's -- that's exactly -- that's the measure of damages that they found, 284 or something like that. And our -- the jury could have concluded in drawing the reasonable inference that if Mr. Vaglica have not given up that right, the right to pursue this oral agreement, that the BPB Company might well have honored the oral agreement; in which case, he would've been $284,000 to [inaudible]. So I think the short response is that the -- the statute of fraud doesn't apply. The other fraud theory which does require that the Court conclude that the $300,000 number has been reached is basically a false promise theory. And the theory is that Brock proposed the memorandum of agreement to Vaglica as Vaglica's opportunity to buy the property back. Brock though, since he controls Century Marine knew that, he could prevent Vaglica's rights on the memorandum of agreement from ever approve it. And in fact the circumstantial evidence shows that he did do that. He did it by controlling the profits on the job, by requiring Mr. Vaglica to pay additional expenses that he shouldn't have to pay. His motivation of putting the evidence by the fact that he already had an intention to

buy the property himself. That's fraud. The -- the petitioners take the position -- well it's not -- it's not fraud under the Crim Truck & Tractors v. Navistar case because Mr. Brock wanted a part of the memorandum of agreement. First of all, given Brock's relationship and ability to control Century Marine, arguably, he was effectively a part of that agreement. Mr. Abrera testified that, at one point, I know it's not here that the agreement in everybody's mind was between Brock in one hand and Vaglica on the other. But more importantly, he is fraud. Yet a person who is in a position to influence the behavior of the party to a contract misrepresents to the other party what rights he has under the contract when he -- when knows that he is going to be able to prevent those conditions from occurring. I can't cite the Court to a [inaudible] case for that proposition. But, I think, basic fraud law would lead you to the conclusion that that constitutes fraud. We think that under numerous theories, the court can't conclude that there's legal insufficient evidence to support this verdict and ask the court to affirm.

JUDGE PHILLIPS: Any other questions? Thank you Counsel.

REBUTTAL ARGUMENT OF ROBERT ROACH ON BEHALF OF THE PETITIONER

MR. ROACH: May it please the Court. Let me deal first with the cure argument. The cure argument is beaten by Vaglica's admission, Volume 5 Pages 56, 57 that they tried -- they tried this cure approach -- this cure strategy; he thought it would have worked. The only reason it didn't work is because the government terminated the contract to hold on to the retainer. The government holds on to retainer so they can get the crop they need to ship into the hands of the next contractor and have somebody there, in Virginia, this -- this is the other testimony, I -- I just stopped the testimony from Volume 5. The reason that makes sense for the government to want to terminate and hold on to the retainer is, so they can have somebody else at the place where the ship has to be moved in Virginia, do the work there. And -- and after that work is done, that's when they refund the $400,000 that's left out of the million-dollar retainer. The point is, no matter what Mr. Vaglica or Mr. Brock would have done, the government precluded them from carrying because the government terminated the contract to hold on to the retainer, Mr. Vaglica's own admission and that's not controverted or disputed by them after he admits that. It didn't make any difference. Justice Hecht's on the fraud statute, the fraud issue. He said we're not trying to enforce, not exactly right. Importantly, what they're trying to do is to say I had an enforceable right. I could have sold this enforceable right to -- to buy the property. That was valuable and so I sustain some loss where it should be an enforceable right that have to satisfying the statute of frauds. And it doesn't satisfy the statute of frauds. The question of whether $700,000 -- I'm going to Justice Hecht, your question about the -- the cost report. The sole basis by which the Beaumont Court deals -- gets around the -- the testimony of admission, the $700,000 loss, is not fit. If you put the 700,000 figure in, we win. The $700,000 --

JUDGE: [inaudible] in that particular, procurement you argu now.

MR. ROACH: That's right. That's right. We admit. If we lose the cure argument, we lose.

JUDGE: Is there anything else you could -- could conceive that

might merit --

MR. ROACH: Merit, we will conceive --

JUDGE: I mean, we got two loses and no win --

MR. ROACH: We got all kinds of --

JUDGE: We might want to go for a third.

MR. ROACH: Merit, if we lose the merit. Okay, and there's for money because of merit. Then we lose.

JUDGE: What's merit made of?

MR. ROACH: Merit is the claim for -- the claim for money because of the government's termination. But that's -- that as you saw in the briefs where we say if was -- they had two merit claims, one was he didn't include this claim or was not included in the final thing that went to trial. And the other one was, the evidence from the expert was it was a weak claim in his judgment, he shouldn't bring it and there was nothing controverting that. So what's -- so, next point, is that the merit cost as Justice Hecht alluded to still have to be accounted for. In fact, Vaglica admitted, that the $700,000 figure was just a ball park because there were continuing costs. The lawsuit is gonna be greater because of prosecuting merit. And the fact is that the merit did go on for some time. It's not in this record because the trial occurred before the final merit costs were considered. The jury can't construe what the final loss would be under Mel Washington because the cost escalating without limit on this record. Griffin -- Griffin is an important case that we think ought to be -- that ought to be reaffirmed. The argument has been made that, this is not the kind of testimony admission that ought to be -- that ought to be approved. We think it should be for the reason as previously stated. Thank you, your Honors.

JUDGE PHILLIPS: Any other questions? Thank you Counsel. That concludes the argument that this subject calls and we'll take another brief recess.

SPEAKER: All rise.

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