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Supreme Court of Texas.
Alton J. MEYER, Meyer Acquisition Corp., and Ford Motor Company, Petitioners,
v.
WMCO-GP, LLC and Bullock Motor Company, Respondents.
No. 04-0252.

March 23, 2005.

Appearances:
Darrin M. Walker, Law Office of Darrin Walker, Kingwood, TX, for Respondent.
Pengcheng Glen Shu, Baker & Hostetler LLP, Houston, TX, for Petitioner.

Before:

Wallace B. Jefferson, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul w. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

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JUDGE: The Court is ready to hear argument in 04-0252, Alton J. Meyer and Ford Motor Company v. WMCO-GP and Bullock Motor Company.
SPEAKER: May it please the Court. Mr. Glen Shu will present argument for the petitioners. Petitioners would reserve five minutes for rebuttal.

ORAL ARGUMENT OF PENGCHENG GLEN SHU ON BEHALF OF THE PETITIONER

MR. SHU: May it please the Court. The issue in this case is whether the lower court properly applied the equitable estoppel doctrine or more specifically whether the lower court erred in finding that WMCO is signatory to an agreement containing an arbitration clause was not equitably estopped from avoiding the arbitration clause when that -- when that, duly in that contract is asserted against the nonsignatories, Ford Motor Company and the Meyer defendants. The court, he feels, first erred in finding that the term between the parties which was contained in the arbitration clause precludes the application of the equitable estoppel doctrine.
JUDGE: Let me -- let me ask first, Texas law governs this, not federal law, right?
MR. SHU: That's correct.

JUDGE: And the equitable estoppel not a cause of action in Texas where it said most recently, it say, defense mostly to limitations, do you have any case that's ever said what the elements of equitable estoppel are and whether you can find somebody to a contract by equitable estoppel?

MR. SHU: There are a number of lower court cases that have applied the Fifth Circuit opinion in Grigson to the situation were --

JUDGE: Again, interesting if we were in federal law applied, but it doesn't. What -- it is there, I'm not aware of any case where we've ever said equitable estoppel binds somebody to a contract, are you aware of any Texas case?

MR. SHU: Yes.

JUDGE: Other than -- other than a handful of the courts of appeals in arbitration context?

MR. SHU: This court In re FirstMerit case did say that a party that sues on contract is bound by the contract that --

JUDGE: It didn't say, we didn't mention the equitable estoppel.

MR. SHU: But it is --

JUDGE: Yes, we didn't mention equitable estoppel --

MR. SHU: That's correct --

JUDGE: Are you ever -- ever aware of us ever saying equitable estoppel bind somebody to a contract?

MR. SHU: No, not -- not this Court specifically along the grids and lines.

JUDGE: Is ratification any different from equitable estoppel?

MR. SHU: Equitable estoppel usually applies when a party is precluded from taking that act that they normally get allowed to. Ratification would be, as I understand it, a situation where a party has adopted, ratified the act --

JUDGE: It kept the benefit. They take, they receive the benefits without complaint and then having received the benefits they change their mind and say, well, we don't want to live up to the obligations in the contract.

MR. SHU: Correct.

JUDGE: And that's what you're complaining. Is that done here or not?

MR. SHU: That I am -- that is what we are complaining about.

JUDGE: And how did you -- how did WMCO receive the benefits of their contract which, as I understand it, never happened?

MR. SHU: They are imposing the duties in that contract any lawsuit against the nonsignatories, Ford and Meyer claims. At the same time they're trying to avoid the obligation in that contract to arbitrate those claims.

JUDGE: What -- what duties are they trying to impose?

MR. SHU: The -- the essence of the contract was the obligation the seller, both motor companies to transfer that he was right --

JUDGE: Give us -- give us the car dealership, they're not asking for the car dealership.

MR. SHU: We're asking the benefit of the bargain if they have received the car dealership. So if what the Ford Motor Company and Meyer gets out of it, if the lawsuit had been Bullock Motor Companies you failed to transfer the dealership on a breach of contract claim, it would be the same sort of performance would be the same thing they be seeking against Bullock Motor Company. The -- the Court of appeals held that the phrase, "between the parties" in the arbitration provision precluded the application of the equitable estoppel doctrine. All of the cases that have recognized equitable estoppel, both the Texas lower

court virtually all federal circuits and sister states have recognized that the equitable estoppel doctrine applies in situations were a nonsignatory to the contract may compel arbitration simply because they are not a party to the contract. If they were party to the contract they wouldn't need to rely upon equitable estoppel doctrine. The Grigson case from the Fifth Circuit sets us at two situations in which the equitable estoppel doctrine will apply. The first is when a party must rely upon the terms of the agreement and asserting its claim against the nonsignatories. And second of all when the claims against a nonsignatory and signatory are substantially intertwines at the point that the conduct complaint about would apply to both -- both the signatory and the nonsignatory.

JUDGE: What does inextricably intertwined mean? I mean, it's gotta be more than the agreements just gonna be introduced into evidence or is relevant to some way?

MR. SHU: Absolutely, you can't just simply be there's agreement out there with an arbitration clause.

JUDGE: And -- and I'm having a hard time understanding how on a tortious interference claim this contract is gonna be inextricably intertwined?

MR. SHU: On a tortious interference contract claim, it's not so much of a second prong of Grigson substantially -- substantially interdependent in assert of his conduct. It's a fact that the tortious interference claim relies upon the purchase and sale agreement which contains the arbitration clause. One of the elements of a tortious interference claim --

JUDGE: What do you mean, it doesn't really -- it introduces it as an exhibit and it says here is the contract we claim was interfered with.

MR. SHU: Well, element number one would be there is a contract. Two, it was interfered with. So, one of the elements of a tortious interference claim itself is the proof and existence of the contract. The other way to look at it is if you take the fact finding that we have. Take out the purchase and sale agreement there are no causes of action. None of -- there would no complaint here from WMCO against Ford, Meyer, or even to the Bullock Motor Companies if you take that fact, the existence of that contract out of [inaudible].

JUDGE: In Formosa Plastics though, we held you can bring a fraudulent inducement claim, wasn't really without having to sue on the contract. It's not a -- you didn't have to sue on the contract, not arbitration case of course, but you're just saying, I was fraudulently induced to it, had these extra calls you don't have to. Obviously, fraudulent inducement contract would be irrelevant if you hadn't actually signed the contract. But there in that context we said you could sue off the contract in fraud. Wouldn't that -- should we have a different rule for contracts in general than arbitration clauses in particular?

MR. SHU: I'm sorry Justice Jefferson, I'm not sure I understand?

JUDGE: In other words there would be some context were you just said, well, if there had been no contract there would had been no claim. That's certainly true of fraudulent inducement. But in Formosa Plastics was that -- that doesn't mean you have to sue on the contract. You've still have an independent tort claim. Could that be possible or would -- why wouldn't that be possible with arbitration clauses as well?

MR. SHU: But I presume in the Formosa Plastics situation there would still be the lines upon to -- to assert that there is an expert

contractual duty of fraudulent inducement. You'd still have to prove that there was this -- this contract there. And -- and the duties that are being complained about flow from that contract even if -- even if the contract --

JUDGE: Well --

MR. SHU: -- suing upon what duties might have been in that contract.

JUDGE: What duties were from the contract here than as to the arbitration clause and, I mean, it seems to me like you introduce it as exhibit one, this is the agreement I had and I interfered with it, but -- but the dispute is not between the parties to that agreement?

MR. SHU: And it wasn't between the agreement in the Grigson case by the Fifth Circuit either. In our contract, the purchase and sale agreements section, paragraph 1.1 has the obligation that the seller will transfer the dealership. That is the -- the core issue among all the causes of action, among all the facts of obligations in this complaint. That -- that dealership was not transferred. Now, the only difference between a strict standard breach of contract claim against Bullock Motor Companies and what we have here is that they have been converted into tort claims against nonsignatories.

JUDGE: Why isn't that just ancillary to -- to the cause of action? How is that so intertwined that it has to be compelled to go to arbitration?

MR. SHU: I'm sorry, how is it different?

JUDGE: How is it not ancillary to the cause of action?

MR. SHU: Well, the cause of action, each of the causes of action, you know depend upon that contract. If you read the petition, the purchase and sale agreement is referenced at least ten times. Every one of the causes of action represents the tortious interference. It says, you tortiously interfered with the purchase and sale agreement, the illegal conspiracy claims that Ford and Meyer defendants conspired to prevent that contract from being consummated. The fourth cause of action is that both Ford and the Meyer defendants caused the Bullock Motor Company to breach the contract. I mean, each one of these causes of action are -- are going to be relying upon not only the existence, but the very -- the very fact that the dealership was not transferred as promised by the --

JUDGE: But -- but it's ancillary to the right of first refusal contract. I mean, if -- if Ford did not wanna arbitrate and WMCO was trying to force it into arbitration, Ford's argument is gonna be -- our defense is justification on a tortious interference claim. And that whole -- that whole defense is gonna turn on the Ford right of first refusals. It seems to me the focus of litigation is gonna be the scope of that agreement. And -- and the fact that there was an agreement with WMCO just as -- as Justice Medina says ancillary to that determination.

MR. SHU: Well, the purchase and sale agreement does reference Ford's right of first refusal. And I think the dissent and the Court of Appeals noted that really the claims have intertwined not only with the purchase and sale agreement but with Ford's right of first refusal. But I think the more appropriate way to look at it is Ford's right of first refusal doesn't even come into play until that purchase and sale agreement is found not consummated, end of the complaint. Ford would never have the reason, I'm sorry, until that ink agreement is entered Ford Motor Company would have no reason to be even exercise the right of first refusal. So what came first was the agreement to sell the dealership. And if you take -- if you take the fact that the dealership was not transferred out of this fact pattern the entire petition falls.

There is no claim to be asserted. And I think that's what the Grigson case from the Fifth Circuit was saying when it said that when each of the signatories claims against the nonsignatory, makes reference to, what presumes the existence of a written contract the claims arise out of, and relate directly to the written agreement and arbitrations [inaudible].

JUDGE: Ford is kind of related to this transaction. It was in it from the -- but Meyers' kind of comes in at the end. Would it make any difference or what's your view of this situation? Suppose that two parties have an agreement of any kind and they have agreed to arbitrate their disputers and some complete interloper, someone -- neither one of them contemplates at the time of their structuring of their relationship, comes in and tries to interfere with the contractual relations, tortiously interfere, do you think if one party since that interloper arbitration would be required?

MR. SHU: I believe so --

JUDGE: It seems to flow from your position.

MR. SHU: That's exactly what happened in the Grigson case. The, it was a movie with Matthew McConaughey and the owners of the movie sued Matthew McConaughey and his agency for tortious interference with the distribution agreement. And, you know, the Fifth Circuit held that was a classic situation where the equitable estoppel doctrine apply. The agreement that the signatory claimant was complaining about was being asserted against the nonsignatory, Matthew McConaughey and his -- and his agency. And based upon that, the reliance upon the agreement, you know with those duties is what caused, it's what required our -- the equitable estoppel doctrine to be applied. The Court of Appeals also erred in finding that the arbitration clause was narrow and then therefore that concluded equitable estoppel. As far as I know having researched this, I'm not aware of any other case that would suggest that a narrow arbitration clause would prevent the application of equitable estoppel. Now I do concede there might be situations where you have a narrow arbitration clause. But the issue of whether a party is bound to that arbitration clause is a question of law and separative on the scope. And then once they decided that they are bound then they have to look at the scope to determine whether or not the party at scope comes in. The Court of Appeals here erred because it didn't apply the normal presumptions that a -- that all doubts resulted in favor of arbitration. All those cases such as this Court's In re Merit case was not cited in their opinion. The case was very clear that the party's opposing arbitration has -- has the burden to show that the claims fallout beside the arbitration clause. That's this Court's case in Prudential Securities v Marsh --

JUDGE: But all of those are on the premise that you first established in the agreement to arbitrate. That's the question we are trying to decide here, I mean --

MR. SHU: Well --

JUDGE: -- Yeah, there's a policy in favor of arbitration and the parties have agreed to it, they've signed it and fought into it. That's interesting but not -- in this context it is really not relevant.

MR. SHU: In the first -- In re FirstMerit case that did -- did deal with nonparty's arbitration among nonparties. Now, it's a different situation. It was a non signatory plaintiff compelling a signatory defendant. We have a signatory plaintiff and a nonsignatory defendant. So the situation is a little bit different but it still, the essence is still there that a party is bound to the contract. As this Court said when your relying upon when this -- when you're suing upon

the contract you're bound by the terms of the contract including the arbitration clause.

JUDGE: And no other term? I mean it's only the arbitration clause that it seems you're relying on here. Is that -- is it there, you're trying to construe the terms of the contract or relying on obligations that are implicit on the contract.

MR. SHU: That's correct. And there, I mean, I'm not sure there'd be any terms in the contract that we would complain about that it would be unfair to avoid when it were sued based upon the obligations of that contract.

JUDGE: Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Darrin Walker will present argument for the respondents.

ORAL ARGUMENT OF DARRIN M. WALKER ON BEHALF OF THE RESPONDENT

MR. WALKER: May it please the Court. As I see it there are two issues in the case. In the first case the first issue is the question of law of whether the claims asserted by WMCO arguing within the scope of the arbitration agreement. And the second question is even if they are, can or did the district court abuse its discretion by refusing to apply equitable estoppel under the circumstances. And I'll address the second question 'cause I think that's the one that's of the most interest to the Court. We had not disputed in this case the underlying assumption that equitable estoppel is available. And so I --

JUDGE: So the trial judge can just pick. That's where you're headed on abuse of discretion?

MR. WALKER: No --

JUDGE: I mean, we can't have trial judges in one part of the state enforcing the arbitration clauses and not in another.

MR. WALKER: No, I think --

JUDGE: You can't have nonsignatories bound in one part of -- in one courtroom and not bound at the courtroom next door.

MR. WALKER: No. That's not what I'm suggesting.

JUDGE: What's been -- what's the discretion?

MR. WALKER: But -- but in any case were the question is one of discretion for the trial judge --

JUDGE: Whether you're suing on the contract. There's an eight corners deal, we look at the contract and we look at the pleading, right?

MR. WALKER: What -- for the first determination --

JUDGE: In an eight corners rule for a hundred years that's never been a discretionary matter. We review that de novo though we can read those things.

MR. WALKER: That's true. Whether --

JUDGE: So what's the discretion?

MR. WALKER: The -- that the nondiscretionary determination, in a matter of law determination is whether these claims are covered within the scope of the arbitration agreement. The discretionary determination is when a nonsignatory who cannot rely on the contract seeks to enforce the contract the arbitration clause in the contract whether the other party is equitably estopped from relying on the nonsignatory status as a nonsignatory to defend against that claim and --

JUDGE: So is it -- is it your position that if the trial court had ruled the other way that would be okay too?

MR. WALKER: It -- it might have been. It might have been because under the circumstances the court would have to look at all the, whatever evidence was provided. Now, I will suggest that in our case if Judge Wilson had ruled differently we would have argued that the WMCO never agreed to arbitrate these claims because the only claims WMCO agreed to arbitrate were -- were claims relating to dispute between WMCO and Bullock arising out of the construction or application of the terms of that contract. And there is no such dispute in this case.

JUDGE: Well, but wait a second, I mean your client with the big -- the elephant in this case, is that Ford had a right of first refusal which by exercise --

MR. WALKER: That's true --

JUDGE: If they did so rightly, you lose.

MR. WALKER: Well, yes, our claim is based on -- on the fact that their violation of the confidentiality agreement [inaudible] --

JUDGE: So you -- you being a good citizen are asserting Bullock's defense that Ford breached the contract first by violating in confidentiality for us?

MR. WALKER: We are asserting our --

JUDGE: I mean you gotta find some way around the first -- there is a right of first refusal. That means normally, not at anything about the facts in this case, that means normally you lose. You're an outsider. You wanna buy a car dealership. Unless there is something illegal about the right of first refusal you lose it. Ford exercises its right to first refusal. So you gotta get around that. And so you say, oh well, Ford's in breach of Bullock's contract. Your -- I mean that's -- am I right?

MR. WALKER: No, Judge, and with all due respect we're saying Ford breached -- well, Ford is in breach of its contract with Bullock --

JUDGE: Right.

MR. WALKER: -- not in breach of Bullock's contract [inaudible] --

JUDGE: So you're asserting -- in effect intervening yourself into somebody else's contract with an arbitration clause, why aren't you bound by the arbitration clause?

MR. WALKER: Well, in this case the petitioner laid its -- its reliance on the arbitration clause in the Ford, Bullock contract.

JUDGE: Of course you didn't sue him?

MR. WALKER: I'm sorry?

JUDGE: You didn't sue him, right?

MR. WALKER: We -- we sued -- didn't sue whom?

JUDGE: Bullock?

MR. WALKER: Bullock is a -- is a named defendant as a necessary party that the -- the petition says that it is named as a -- as a necessary party.

JUDGE: You didn't really sue him. You're not asking for any dime from them?

MR. WALKER: We don't claim Bullock did anything wrong other than the fact that it was prevented from consummating its contract with us, that's right. There is no real dispute between Bullock and WMCO. Bullock wanted to sell WMCO the dealership. WMCO wanted to buy. Ford exercised its right of first refusal. That was in its separate contract with Bullock. Petitioners had not alleged that -- that the trial court should have compelled the arbitration based on the arbitration clause that was in Ford's contract with Bullock.

JUDGE: Yeah, but if your right that Ford breached the

confidentiality agreement, Bullock really wasn't forced. Bullock could raise that argument, too.

MR. WALKER: Well, I suppose Bullock could have, yes.

JUDGE: So?

MR. WALKER: But I don't --

JUDGE: And if it may -- if it may have it and have requested arbitration, where would you be?

MR. WALKER: Well, I suppose that we would still have a separate claim against Ford, Meyer, and so forth. The same claims we've asserted here. And it would be a, I suppose a race to the courthouse or res judicata if the arbitration between Bullock and -- and Ford were completed first then Ford --

JUDGE: But you -- but you think it would still not be required to arbitrate if Bullock were in the case wanted relief and sought arbitration?

MR. WALKER: If Bullock were in the case were it sued Ford, Judge, I would candidly admit that I haven't paid much attention to the arbitration agreement in the Ford-Bullock contract because the petitioner --

JUDGE: Assuming it says, arbitrate everything?

MR. WALKER: If -- if the -- if it's a broad arbitration clause that said all disputes relaying to this agreement, well, the court would still have to apply equitable estoppel to bind WMCO to that contract because WMCO is not -- is not a signatory.

JUDGE: And -- and what do you think the outcome of things?

MR. WALKER: And if WMCO were suing Ford under these claims, in that case, I still don't think that the -- that the elements of equitable estoppel is, assuming this court were to adopt the same elements of equitable estoppel that the federal courts have, and I know its an open question but -- but applying those elements, I don't think they apply, because those two elements are, one, WMCO has to rely on the terms of the contract with the arbitration clause and we are not relying on the terms of the WMCO-Bullock contract.

JUDGE: But -- but I think it's important to, you know, unravel the -- the ends of this argument. So you're saying the arbitration could proceed Bullock and Ford arbitration. And you would race to the courthouse and perhaps get, if you got a, you know, tortious interference binding person it wouldn't matter what happened in the arbitration. I mean, why wouldn't -- why shouldn't the law be that you, if you are asserting a tortious interference claim the arbitration is already happening that you opted be compelled to arbitrate with everybody and put in one tight pack?

MR. WALKER: Well, that may -- I think that the short answer to that is that arbitration is matter of -- of agreement consent, not coercion. And unless WMCO who did not agree to arbitrate anything with Ford were in some way equitably estopped from asserting that defense that I'm not a party to this Ford-Bullock contract then WMCO is being deprived of its right to proceed in court when it has never agreed to arbitrate.

JUDGE: Sure you agreed to arbitrate. There's an arbitration clause in your contract your client signed.

MR. WALKER: Well, I was -- I was foreseeing under the essential myth, this was a hypothetical case --

JUDGE: Right. What you're trying to be alleged in equity is you have artificially not sued Bullock. In fact, you have sued Bullock because they don't know when you have contract with, but you just aren't asking for any damages because they were forced by Ford even

though you say Ford was breached and I'm still unclear as why defendant in a breach of contract is forced to do something if they have a defense to the contract.

MR. WALKER: Well, you have a -- you asked us two questions. The second one you asked was why the defendant is forced to do something when they have a right to do it under their contract.

JUDGE: Yeah, when they -- when they have the right to avoid the contract?

MR. WALKER: Right, and -- and that goes to the merits of our claim but as I understand it, that the --the

JUDGE: But if, but that's the key. If the merits in your claim are governed by an arbitration clause we don't want to do that in court.

MR. WALKER: But -- but the merits -- that's talking about Ford's obligations under the Ford-Bullock contract.

JUDGE: So why didn't you sue Bullock? This was the party who promised to deliver a dealership and didn't?

MR. WALKER: Well, because Bullock wanted to comply with the contract and Ford exercised its right of first refusal.

JUDGE: So if, assume the case was both Ford did not nothing and Bullock just refused to deliver the dealership you would have sued Bullock for breach of contract and you would have had to arbitrate?

MR. WALKER: That's right.

JUDGE: So -- so the reason you don't have to arbitrate is not what Bullock did but why it didn't?

MR. WALKER: No. The reason we don't have to arbitrate is because the party that's moved to compel arbitration is Ford and Ford is not --

JUDGE: Yeah, only because you didn't sue Bullock. If you had sued Bullock you would have had to arbitrate. If Bullock had done exactly what they did which is not give you the dealership you would have sued. You would have to arbitrate, but your argument is, because the devil made them do it then you don't have to arbitrate.

MR. WALKER: Well, Judge, I mean it is true that because we are seeking relief from Ford for Ford's tortious conduct, it does not arise out of the contract. Our obligations in the contract between us and Bullock that we claim we're not subject to arbitration, but I -- I want to point out that your -- your question gets to what I think is an important issue in this case and an important issue in equitable estoppel. And that is, this is not like those cases were there is a subterfuge or an artificial attempt to enforce the terms of the contract against the signatory, against the nonsignatory to evade an arbitration provision. This is a case where, legitimately, the reality of the situation is the bad actor is the third party. And so the cases that apply equitable estoppel do so because there is inequitable conduct that deprives one of the signatories of the benefit at his bargain arbitration. And in Grigson what they said was, look even if the signatory is not sued in the case he is dragged into litigation. He has to come in and testify and explain. And if he don't send the case to arbitration against the nonsignatory, the signatory is deprived of the benefit as bargained.

JUDGE: Well, not all of the cases require that there'd be some bad or inequitable conduct at issue here. Some of them just based it on other types of contract-based theories, supplied contract to agency and others. In fact, even the dissent in Grigson acknowledged that equitable estoppel is a good theory in an appropriate set of circumstances. Are you aware of any cases that have held any jurisdictions where courts have held that as a matter of law equitable estoppel will not apply in the arbitration context for nonsignatories?

MR. WALKER: I know --

JUDGE: In fact all of the ones that even decline to apply in the case acknowledge that in appropriate cases it would govern the circumstances.

MR. WALKER: Exactly what the Court in this case did.

JUDGE: You said several times that you're not suing on the contract between -- you're not suing Ford for obligations arising from the contract between WMCO and Bullock. However, you are, aren't you? Your petition says that Ford and its assignee validate the terms of the Ford agreement. And failing to treat agreement between Bullock and plaintiff confidentially, because of the breach of that confidentiality agreement that caused the interference, isn't that your claim?

MR. WALKER: Yes, but because --

JUDGE: So you're suing on a breach of confidentiality that which is an obligation that was in the WMCO-Bullock contract?

MR. WALKER: No. That obligation was in the Ford -- the Ford-Bullock contract. Ford's right of first refusal had a condition in it that they had to keep the terms of the Bullock contract with the third party confidential. So that's an end. I'm glad you asked that question because if I didn't make that clear I wanted to --

JUDGE: What's your -- what's your damages your client is suing for?

MR. WALKER: Well, they're unspecified but I would assume that it's loss of profits from the operation of the dealership. I don't dispute that --

JUDGE: So, if it is the benefit of the bargain how are you not suing based -- I mean, how are we -- how's the jury gonna calculate what WMCO would have made without using the terms of the WMCO-Bullock contract?

MR. WALKER: Well, the only -- in the sense that the, that the thrust or purpose of the WMCO-Bullock contract was the sale of the dealership, that would come into evidence and that will be a basis for the jury to -- to assess the damages in this case. Our argument is, that standing alone, the fact that the contract is going to be an evidence that it is an evidentiary fact that will keep that -- as a basis of the claim and that it might even be considered by the jury in assessing damages is not enough to apply equitable estoppel.

JUDGE: So, the benefit of the bargain is, I'm buying a dealership worth this and I'm buying with profit stream of this and buying it at this price and this price only comes in the WMCO-Bullock contract.

MR. WALKER: That's true.

JUDGE: So we -- we cannot calculate your client's damages without reference to the WMCO contract?

MR. WALKER: Well, that's true but that is not attempting to impose a duty upon Ford, arising out of the WMCO contract. A contract made provided --

JUDGE: It's -- it's collecting from Ford exactly the damages you would have collected from Bullock from breach if Ford had not been around?

MR. WALKER: Well, and other damages and if we're suing Ford under tort there is, assuming there -- there would be probably be other elements of damage. But one element of damage probably would be the same as if Bullock had, had breached. Our argument is essentially that the petitioner's view of equitable estoppel is so broad that it would swallow the rule that parties should not be compelled to arbitrate disputes they didn't agree to arbitrate unless there is some good reason in equity to make them do that. And -- and the courts that have

addressed the issue haven't established these sort of two alternative tests for good reasons in equity. We don't think, and the Hill case out of Fifth Circuit that came after Grigson, you know, it held that just because the contract is an important fact or it is the plaintiff's opinion on the contract is not enough, the party must actually be trying to enforce the terms of the contract against the nonsignatory, but at the same time try to avoid that the unpleasant arbitration clause.

So I cannot dispute and you raised valid points that the fact that there is this contract between WMCO and Bullock to sell the dealership that's an important fact in the case. I would just argue that if that is enough to force someone to arbitrate a dispute that they had not agreed to arbitrate, then the exception of equitable estoppel swallows the fundamental rule that arbitration is a matter of consent, not coercion. And even if it would be convenient or judicially effective to force a party who never agreed to do so to arbitrate the -- the countervailing policy of only holding parties to contracts they have agreed to, supersedes that and that's our position.

JUDGE: But Bullock breached the contract. Whether, the reason for their motive is really irrelevant to the fact that they breached?

MR. WALKER: That's true.

JUDGE: And you're trying to ignore the fact that they breached to -- to keep from arbitrating with Bullock?

MR. WALKER: Well, we have elected, we named Bullock as a necessary party. We have elected to pursue a viable valid court claim against Ford and there may be all kinds of reasons for a plaintiff to let not to sue someone.

JUDGE: But you don't have a tortious interference claim if there was no breach by Bullock?

MR. WALKER: Well, I suppose we wouldn't have any damages if Bullock had gone ahead and sold us the dealership.

JUDGE: Now, if Bullock has a good excused for not performing its own breach, if Bullock didn't?

MR. WALKER: Oh, I see what you mean. Yes, I suppose that's right. If there was -- if there was a valid exercise at the right of first refusal by Ford then Bullock was not obligated to transfer the dealership. So --

JUDGE: You lose then?

MR. WALKER: I think -- I think that's right. If it -- if the violation of the confidentiality provision did not void the right of first refusal that's the major tenet as I read the complaint.

JUDGE: Let me ask you a different question on the FirstMerit. Nonsignatory, if you bring the same claims on the contract you gotta -- you're bound by the arbitration clause. What if nonsignatory has two causes of action? One on the contract and one tort completely unrelated, separate, and apart from, maybe even a different part of the transaction. What do we do? Do we send both of those to the arbitrator?

MR. WALKER: I don't think so. I think that the courts can severe nonarbitrable claims --

JUDGE: Normally, let me ask you a few more facts. Normally if there is an arbitration agreement, we leave it up to the arbitrators to decide whether issues are inside or outside the arbitration clause. Wouldn't the best rule if you have both dissent on the arbitrator and decide after arbitration whether one of those offer on, 'cause otherwise we're gonna have two lawsuits --

MR. WALKER: I'm aware of the rules that say that, you know, all these different things are matters for the arbitrator to decide if

there is a valid arbitration clause. On the other hand, I am and I can't cite you any cases that support as I'm giving you my thought, but I'm of the opinion that if a party has specifically, for example in this case, there is a fairly narrow arbitration clause, we agreed arbitrator speaks between us about the terms of this contract and, I'm sorry I didn't see my --

JUDGE: Finish.

MR. WALKER: May I finish?

JUDGE: Yeah.

MR. WALKER: I don't thinks it's fair to send a claim to an arbitrator to decide when it's clearly not covered under the scope of the arbitration clause.

JUDGE: Thank you, Counsel.

MR. WALKER: Thank you.

JUDGE: What do you think about that? One clearly on the contract and one clearly not, what do we do with it?

REBUTTAL ARGUMENT OF PENGCHENG GLEN SHU ON BEHALF OF THE PETITIONER

MR. SHU: I think you would send it to arbitration. There is gonna be a point of which an arbitration word comes out and the court has gonna have to decide whether or not those claims did fall in the arbitration clause or not. So it's probably more efficient for a court to send it to all -- all the arbitration if the arbitrator decide and then the arbitrator decided wrong we could be corrected. But at some point a court is gonna have to decide whether those claims have any [inaudible].

I would like to react to one of the comments made by the respondents that -- that the equitable estoppel doctrine is worth propounding from the Grigson case in the Fifth Circuit. It is so broad that it would swallow the rule that a -- the party who did not agree to arbitrate cannot be compelled to arbitrate. It is -- I don't believe that is the case that it's gonna be so broad, I mean, that the -- the language from the Grigson case and the MS Dealer case from the Eleventh Circuit which you relied upon, I mean, it's sort of a collection on what's been going on the federal circuit for about 20 years now. And it's fairly narrow. It says that the agreement, the claimant who gets a nonsignatory must reference or presume the existence for written agreement. Now he's correct, the Hill, the Hill case decided by the Fifth Circuit did say you can't just have a claim which touches upon an agreement with an arbitration clause and the whole thing goes to arbitration, that's a correct decision.

Here is another case cited by both parties in their briefs but not really discussed very much, the Mohammad case which, I think, is a good example of a situation were it's not gonna be so broad. The Mohammad case was an employer-employment situation. The employee signed an employment contract which contained an arbitration clause. The employee sued in court for race discrimination. Well, the employment contract contained an arbitration clause but the race discrimination claim was not compelled to arbitration in that situation. So another example, I think in using our facts is, let's assume Ford had defamed WMCO during this transaction and said, you know, terrible things to the public about WMCO. That might be a claim that would not fall into the -- or should not be compelled to arbitration. Because it doesn't really rely

on the agreement and the agreement would be involved somehow because, that's why Ford had got involved.

JUDGE: Well, but -- I mean as I understand the federal cases, nobody has ever said the only times equitable estoppel come in is intertwined claims or sued on the contract. They've said that's two situations it does. And as I understand equitable estoppel in the federal courts it's a doctrine that means exactly what it says, we're gonna estop you because it's equitable which could be very broad.

MR. SHU: Well, I don't --

JUDGE: Any time we want to estop somebody from complaining about arbitration 'cause we don't think it's fair we can do it.

MR. SHU: And I think what the Grigson court was trying to do was trying to put limits on any court --

JUDGE: They certainly didn't say these are the only two where we're ever gonna apply equitable estoppel.

MR. SHU: They did say it was --

JUDGE: I mean in -- in effect four or five of the different alter ego agencies etcetera could also be called equitable estoppel for stopping somebody from avoiding arbitration because it ain't fair under the circumstances.

MR. SHU: They could -- they could --

JUDGE: So, its --

MR. SHU: Those -- those other theories alter ego, those come from --

JUDGE: But if the federal courts keep going broader we should follow along, if Mr. Walker is correct that it is broad?

MR. SHU: I think Texas would want in defining the Texas Arbitration Act to follow the Federal Arbitration Act to some extent. But, I mean, certainly the courts in the state are able to prevent the slippery slope that you are talking about from any -- any claims. I think they would have done it. The Mohammad case is a perfect example. You don't -- you don't compel a race discrimination claim based upon arbitration clause in any point of contract or any policy made. I think all of the claims in this case clearly rely upon the agreement, the buy and sell agreement. And I think one of things I pointed out in the brief is that if there was any questions as to whether or not it was going to relate upon these claims one thing that a party can do in this situation is stand up and stipulate, my claims will not rely upon the purchase of sale agreement. If you think you could separate the claims based upon the --

JUDGE: I think, that's what Mr. Walker says. You -- you doubt it. You disagree especially on the fourth allegation, right?

MR. SHU: And I haven't heard any such stipulation. I mean, I think he says it could be done but it's -- it hasn't been done. And that would be one way to clearly -- clearly allow a court to go forward and say, well, we'll only litigate those claims that don't rely upon and as evidence comes in that looks like it relies upon the agreement those would have to be sent to arbitration.

JUDGE: Thank you, Counsel. The cause is submitted.

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