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Supreme Court of Texas.
In re D. Wilson Construction Company, et al., Relators.
American Standard and the Trane Company, et al., Petitioners,
v.
Brownsville Independent School District, Respondent.
Nos. 05-0326, 05-0327.

February 14, 2006

Appearances:
John R. Griffith (argued), Griffith & Garza, LLP, McAllen, TX, for petitioners.
Baltazar Salazar (argued), Houston, TX, for respondent.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Scott A. Brister

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JUSTICE: Be seated please. The Court is ready to hear argument in 05-0326 In re D. WILSON CONSTRUCTION COMPANY consolidated with 05-0327 American Standard and the Trane Company versus Brownsville I.S.D.
COURT ATTENDANT: May it please the Court. Mr. John Griffith will present argument for the Petitioners. Petitioners have reserved ten minutes for rebuttal.

ORAL ARGUMENT OF JOHN R. GRIFFITH ON BEHALF OF THE PETITIONER

MR. GRIFFITH: Good morning, my name is John Griffith. I represent D. Wilson construction in general contractor on two buildings that were built on ground of equities. The real issue I think before the Court is whether the supplementary conditions that were modified by B.I.S.D treated ambiguity in the arbitration clause in the general conditions of the contract between the parties. I also think that the other main issue is whether the Trial Court and the Court of Appeals to that matter should have gone beyond just finding an ambiguity and attempted to determine the intent of the parties in by stopping with the finding of ambiguity based which just clear to have for a job. But before I get into those real issues, I think that first thing we need to establish is that the contract document include the general conditions. Clearly at $8 million project is not going to be built on a two days contract.

This two days contract cites the general conditions, the general conditions themselves cite that they are part of the inspection documentation. The project manual cite that it's part of the project construction document and I think most importantly, the School District themselves in their supplementary conditions, my private general conditions-- clearly they wanted to be a part of the contract as part of the binding agreements between the parties because they made modifications to it when they presented it to the regional contractor. So both reasons it's, it's-- I think it7Ds fairly clear that the construction contract includes the general conditions-- the general conditions have an arbitration clause so then the question becomes: is that arbitration clause made ambiguous because of the supplementary conditions that were, were draft to and put into the-- put into the general conditions. Now the School District is claiming at this point that there's no arbitration clause at all in their latest pleadings in this case, they had claimed that the entire contract was found ambiguous by the Trial Court because the Trial Court wrote a letter that said that the contract is ambiguous when clearly the only issue before the Trial Court was, was the arbitration clause ambiguous. There was even an argument of that the entire contract was ambiguous and plus the School District time in the case 22 of the entire contracts ambiguous and not existent; what are they're trying to enforce, how can they sued for breach of contract and that's clearly not the case. So I think trying to say that the Trial Court by saying the contract was ambiguous implied that, that more than the arbitration clause when ambiguous is not, is not proper. Second, there's an attempt in the ideas of B.I.S.D. who the Thirteenth Court of Appeals at the beginning that the Thirteenth Court of Appeals says that the contract does not include an arbitration clause which it doesn't because this, this part of the contract doesn't, however is included in the general conditions doesn't-- again doesn't mean that there is no arbitration clause. So again I think the B.I.S.D really is that to where they were recently arguing which is that the addition of the supplementary conditions 4.5.1.1 made 4.5.1 ambiguous. Now ...

JUSTICE: And and how it is not; it seems to me.

MR. GRIFFITH: First of all ...

JUSTICE: It's clearly they get ambiguous, is it not?

MR. GRIFFITH: And if what you're saying that the 4.5.1.1 addition to 4.5.1 may say ambiguous, the reason it doesn't because firstly, you have to harmonize the provisions. 4.5.1.1 is basically 11th to agreements here in the provision. If you, if you have a fact question under the contract, you go first to the Superintendent, you may take it to the Board and the Board has to make that decision. That does not supercede and that the Board decision is final. That does not supercede the arbitration clause which applies to disputes under like breach of contract and, and other claims and controversies.

JUSTICE: Why not?

MR. GRIFFITH: Because the School District cannot be defined arbitration, they can't issue a judgment that would bind -

JUSTICE: Were you would infect?

MR. GRIFFITH: - define.

JUSTICE: You would infect but it says that question to be decided by another, okay. I wouldn't paid enough. Yes, you were that's in that. Then that was it said it was?

MR. GRIFFITH: The fact questions that they are referring to their issues of, of fact as to what things they're suppose to be built where. It doesn't go as far as claims in controversies but let's just argue in

though that, that's correct that 4.5.1.1 who does in it 4.5.1 ambiguous. That's not where you stop. You have to go beyond that once you've find ambiguity, you don't walk away from the contract at that point, you have to figure out what the intent of the parties are so you go to the next level.

JUSTICE: Of, what was the intent?

MR. GRIFFITH: The intent of the parties was to arbitrate. The arbitration clause contained in 4.5.1 was included in the contract delivered by the agent of the School District- the Architect to the general contract. They included it in there. They very clearly know how to modify, add and delete to the general conditions because they did. They took out provisions, they put in provisions and they modify provisions. They did not take out the arbitration clause though. If they would wanted the arbitration clause gone, or they would've taken it out, they, they know how. They took it out to the Architect's contracts; they actually does it in a subsequent ventures contract so they are very aware of that, of that provision and they know how to modify it.

JUSTICE: Someone comes in and says, "We put these in like we were suppose to then yours as much," and you don't agree with that, the owner doesn't agree with that. Then how do you decide-- are we going to arbitrate that or are we going to go with this owner calls, calls a provision?

MR. GRIFFITH: I would think that it is going to be sufficient to where you're going to be suing for breach as not just they dry and stall grass feedings versus a ling feedings, do-- I do a certain thing under the project at certain way. But this is a dispute after the fact where they're coming back asking for money. It's a claim on controversy; that's a reason, it's not just a fact question, it's being resolved during the building process. But again even if there is an ambiguity there, the arbitration clause is still in the contract and there's a presumption for arbitrability, I mean, that's one needs to clear on all the cases. The ambiguity should be construing it's the drafter, the district and the district knew how to take out the arbitration clause. They knew how to modify it they knew how to make changes to it. Finally, and this is something I discovered if we were trying to argue. There was a affidavit by Mr. Douglas and it was introduced before the Trial Court and I've determined that I don't think it actually made it to the record for this Court but it was introduced in front of the Trial Court in order as to be able to supplement that record since it wasn't from of the Trial Court. That is very clearly, it's a clear and concise statement that the intent of the parties was to arbitrate the intent of Mr. Wilson was our ...

JUSTICE: What, what you're arguing right now is not in the record you're saying?

MR. GRIFFITH: It is in the record at the Trial Court stage -

JUSTICE: But not ...

MR. GRIFFITH: - actually did not come up to this level for some reasons it didn't, it didn't make and I, I don't know why it was but it was before the Trial Court. It was considered at that level and I think it would be appropriate for the Justices to consider here since it was in front of Trial Court.

JUSTICE: So if the contract said, clause seven had been arbitrated with anything in clause 12, we're not going to arbitrate, we're going to file a lawsuit in Court, bring a disputes. Your theory is we decide that because we favor arbitration?

MR. GRIFFITH: My theory is that you've got an ambiguity, now you

got to go one step farther, you're going to determine the intent of the parties. Do we mean to leave seven in or do we really mean to leave twelve in.

JUSTICE: But how can you do that if, if it is preamble to the supplementary conditions. Sort of says, "we give effect to this?" I mean it seems to say this modifies changes deletes or adds to. This, this-- you got to look to this piece first.

MR. GRIFFITH: Correct. And, and again it modifies, adds or deletes.

JUSTICE: Deletes. So if you had an arbitration agreement and something that's inconsistent with it. Why didn't it deleted the arbitration provision by its add amounts.

MR. GRIFFITH: Actually, if you look at the actual language it says-- I don't know, if I had it in front of me but it says that to the extent not altered by the contract it is spurts out it actually does it provision in the, in the language.

JUSTICE: Well, did-- and the generally says that the following supplements modified change delete form or add too and then it goes down to except these other bonds provided in this contract.

MR. JOHN R. GRIFFITH: Then-- and I, I guess I would differ to the exemptions otherwise provided in this contract because that's the language in 4.5.1.1 it says that, that talks about disputes in other words the specific provision we're trying to harmonize says accepts us otherwise is, is listed in the, in the contract so does accepts us otherwise provided and this case otherwise provided these arbitration but to go back to, to the question you have that presumption you also have the ambiguity construed as addressed but remainly, you just don't stop with the finding of ambiguity. That I think is my fundamental issue here is that the Trial Court needed to go beyond that and make a determination of what was the intent of the parties. And they stop they said, "ambiguity"period in the sentence and that's not where you stop, you have to go beyond that. I think that's fundamentally the problem that this began I think it's the Court -

JUSTICE: Telling what that trial looks like on intent. There's always sort of facts that it is controlled about the documents and what's that going to look like?

MR. GRIFFITH: I, I guess all I need to ask for a little additional of time because-

JUSTICE: You can ask the questgate.

MR. GRIFFITH: Okay. The Trial would be but first, first you go look at the document itself, so you have an argument to the Court about all the provisions within the contract. And did it once, you go beyond that, you can actually get in the parole evidence and even actually have witnesses-- live witnesses. In fact, that's allowed under this -

JUSTICE: I understand but I mean it's worth to be imagine that if somebody's going to say, "Well, we intended to arbitrate", somebody's going to say, "no, we didn't intended to arbitrate." I can't see how that work, why would it not be a better construct to follow a line of cases that say, "in order to compel arbitration, you have to show a clear agreement to arbitrate" here there is no clear agreement to arbitrate is simply use and therefore, the trial court about abuse its discretion.

MR. GRIFFITH: Well, and see I would not defer that the, the line of cases don't say you have to be clear the agreement urgent which you have to have is there's a presumption that you're going to arbitrate. There's an arbitration clause in there that you do everything that you can to enforce that arbitration clause as oppose to finding every way

to get out from under it. Then that's the way the presumption works.

JUSTICE: Any further questions? Thank you counsel.

JUSTICE: The Court is ready to hear argument from the Respondents of Trial Court.

COURT ATTENDANT: May it please the Court. Mr. Baltazar Salazar will present argument before the Respondent.

ORAL ARGUMENT OF BALTAZAR SALAZAR ON BEHALF OF THE RESPONDENT

MR. SALAZAR: May it please the Court, opposing Counsel, we have the Brownsville Independent School District, the Board of Trustees and the General Counsel for the Brownsville Independent School District, and the children of the Brownsville Independent School District, we'd like to thank you for the opportunity to argue with me today. I think, I think the Court just heard a very good lure right there. The, the policy that, that appellants are asking for is: let's arbitrate at any cause. That's not the law in state of Texas. The State of Texas is there must be first an agreement to arbitrate and that agreement must be-- must have an arbitration clause, must have some arbitration languages. If there is no contract to arbitrate, you can't force it; I don't care if there's Federal Law that, that favors arbitration or State Law and we all know that there's a trend that way. But you can't force a party such as a District to arbitrate if there is no arbitration agreement. And if the Court looks at every single case that appellants have, have, have cited in their brief the first married bank, the Deminy case, that Nuton case, every single case, they all talk about in the arbitration agreement and whether this is employment agreement it says, "on page one, which both parties signs not on addendum, not by Webert Clemets" ...

JUSTICE: Well, but we pass all that. There are some PCS we said specifically, "you don't have to cite it because neither Federal nor Statute says has-- you have to sign the arbitration agreement," says, "it has to be in a writing and agreed to." And so the fact that's in this one and you signed to that one, we've already cross that bridge. If the deal is the one you signed says, "this is all the parties agreements and overhearing document a 127 there's an arbitration agreement." Just like there's a general specifications over there. We don't have to sign every general specification, the deal is arbitration agreements are neither more nor less enforceable; another provisions and a last word may say both parties have to sign everyone, every page of the Architect's plan. Why is this any less enforceable?

MR. SALAZAR: The reasons is it's not less enforceable because every caselaw that looks as, as look at this issue says, "the contract that was signed talks about the document that signed reference an AIA document." In this case, there is no reference. And opposing Counsel, in their briefs that they tried Trial Court loaded by the Court of Appeals have said, "well, there is a reference stood AIA document A201." Well, what they haven't tell the Court is that's not in the contract, the signed signatories did not signed that. It's not even in the general provisions, the general provisions actually refer to a third document which is the AIA arbitration document.

JUSTICE: What you're, you're seeking to enforce all that, aren't you? All the provisions in the general conditions and all this supplemental AIA provisions. You want that in inverse, don't you?

MR. SALAZAR: No.
JUSTICE: You don't want any of that?
MR. SALAZAR: We do not ...
JUSTICE: Enforce the two pages?
MR. SALAZAR: I'm sorry.
JUSTICE: You just want to enforce the two pages that bring all that.
MR. SALAZAR: We want to enforce those two pertinent pages and any project manual pages have rendered and in the project manual, it talks about-- again we're talking about earlier to supplementary conditions. And again I think the Court went through and look at the supplementary conditions looked at the project manual. And I don't know what the Court was thinking but the Court decided that, that contract was ambiguous. The Court didn't say the arbitration clause ambiguous. It said the contract is ambiguous so the supplementary conditions of our positions is then ruled because if there's any problem the School District wants to be able to say if we have problems to payment the ultimate fact finders going to be the School Board and it has it in the supplementary conditions says, "we will patrol how much gets paid once it get paid."
JUSTICE: And you think everybody on this project agreed that if-- after the school buildings were built the School District decided they wanted it for free and said "no we're not paying anybody, anything" that would be the end of that.
JUSTICE: That can't be right -
MR. SALAZAR: I understands-- I understand that can't be right but there's a lot of case I think before this Court bare that, that said ...
JUSTICE: A deal is a deal. You said we could stiff here at the end and so we can.
JUSTICE: It's called Governmental immunity.
MR. SALAZAR: I, I just say ...
CHIEF JUSTICE JEFFERSON: If that's, if that's what your standing on like that -
MR. SALAZAR: No.
CHIEF JUSTICE JEFFERSON: You're standing on everybody intended that the speech be settled by the School Board means school board could do anything they want, really. Is that, that's your intent, everybody understood that.
MR. SALAZAR: That is what is in the contract. That is what was reference to -
JUSTICE: My client did not mean as Opposing Counsel says if those are dispute, why you're building the thing. Do we have to add this or not add this, School Board settles that.
MR. SALAZAR: Because that's what not the contract says-- the contract says, "any dispute" so don't say, "during the building", it doesn't say, "after the building" does any dispute, it's not timed-- it's not time barred.
JUSTICE: Well, what does it mean when it says, "except as otherwise provided in this contract."
MR. SALAZAR: That is-
JUSTICE: What that that possibly mean?
MR. SALAZAR: I'm not sure but that-- I believe that's where the Court may have look at the ambiguity. That maybe where the Trial Court give you delay to the supplementary conditions. The Trial-- the, the supplementary conditions were first mentioned because it work for the documents of the appellate Court level and the appellate Court level

said clearly if is the Court was looking at ambiguity here's something that can show ambiguity. Here, here is some ambiguity.

JUSTICE: And who's going to settle that jury or the Judge?

JUSTICE: The Judge. I believe that is a matter ...

JUSTICE: Where or when? I mean we need to cited the start whether we're going to arbitrate it or not -

JUSTICE: And maybe.

JUSTICE: - and so all that-- these Judges decided this ambiguous what is here she waiting for?

MR. SALAZAR: I, I don't know-- I can't get in the Courts-- in the Courts mind but it would have been nicer if the Court would have been ordered and says this contract has ambiguous and as, as per supplementary condition makes it further ambiguous as to the arbitration clause. That would have been nice, it would have been a good fact finding but it wasn't there and I've only got that what the Court gave me. Our position is that ...

JUSTICE: So we-- But but one party says we've got an arbitration agreement the other says no there's not. Trial Judge agreed with me has to decide that so we-- don't we have to reverse this case make the Trial Judge to decide that.

MR. SALAZAR: No, because before we're free ask the question was there an arbitration agreement if that I say was a contract that include in the arbitration, that's what you going to look at first. You don't look at well, let's still look at the arbitration agreement first and that part of it because Texas favors arbitration. That's not the case law, the law is let's look at the contract first. Is there an unambiguous contract first then we look at the arbitration clause and if the arbitration clause is ambiguous we wouldn't be here today.

JUSTICE: Well, that the Trial Judge have to start over with the contract is ambiguous or not?

MR. SALAZAR: Yes-

JUSTICE: They it was ambiguous?

MR. SALAZAR: They said it was ambiguous.

JUSTICE: Of they walk by the same circuit then why we would send it back to that decision to be made.

MR. SALAZAR: To find that were the arbitration clause is ambiguous.

JUSTICE: The contract-- you said the contract was ambiguous. You don't know yet whether it's enforceable or not.

MR. SALAZAR: Well, that's what the finding was by the Trial Court that the contract was ambiguous I, I,-- he didn't go with the second part whether the arbitration clause was ambiguous. And I, I want to redirect the Court back to that issue is-- the issue here is really-- the Trial Court found that the contract was ambiguous. Does the Court now forced the District to go to arbitration because the contract was ambiguous or does this Court asked the Trial Court to go back and look into the arbitration clause. If in fact there was. Our position has did from day one that the intent was not to arbitrate and opposing Counsel has stated that they like to supplement the-- their intent. We would like to do if we have the Attorney that will represent the School District which filed an affidavit at the Trial Court Level and said we've specifically took out the, the, the arbitration language with the, with the Architects and it was placed in their arbitration.

JUSTICE: May I ask disposition is the contract is not ambiguous and that the arbitration provision has been deleted.

MR. SALAZAR: That's correct.

JUSTICE: Why didn't you just say that at the contract?

MR. SALAZAR: Because-- well, the reason it wasn't said there's two separate contract first of all there's a D. Wilson contract and the Stotler contract. Those are two separate contracts that we're talking about and they argue for-- and they don't-- none of them state that the arbitration clause is reports, there. None of them state all the case of that I have looked at, all say, "If in fact arbitration condemned they stayed in there by reference we're going to fit in arbitration." There's some arbitration language if in fact it is born to come in if you read those contracts.

JUSTICE: What about the other has otherwise provided, provided has pretty standard language in this time for contracts and general refers to arbitration agreements.

MR. SALAZAR: Generally it does but this one it doesn't, this one it doesn't. If in fact just as the issue here today was whether 4.1 the arbitration that the standard form general arbitration clause if that was ambiguous I wouldn't be here, I wouldn't be before this Court. Well, we would arbitrated this case just like we have three of the Defendants before the defendants in the same case. The District knows when they arbitrate cases and in that we have other contracts that we have arbitration clauses we send him to an arbiter. In this case the arbitration clause is not reference if there's no language in the contract the supplementary conditions are rather bay to that rather big use you could say they yes the School Board decide you could say maybe told you that the construction maybe it's after construction it is ambiguous and I'm talking about the, the supplementary conditions. The other issues that I'd like to address to the Court is, is the issue of waiver. I'd like to remind the Court that the Brownsville School District is a defendant on this case. Most cases were, were any body comes before this Court to say, "We, we'd like to invoke arbitration is because they are the defendant." The Brownsville School District was sued in this case. American Standard Trane versus B.I.S.D. One case that I've been able to find is the Divero versus Kates and that Kates-- Kates says if you act inconsistent with your right to arbitrate. If you file suit if you render the Court House that you've waive into the matter of law and you didn't-- the Defendant in this case the choice. There's only one case and the reason there's only one case because normally it fells the other ground with Defendant was asking for an arbitration. I'd like to remind the Court that we are the Defendants in this case. The Defendant's have active inconsistent with the right to arbitrate. That-- not only in this case ...

JUSTICE: Purchase of the sent e-letters saying let's go to arbitration, what would you have said?

MR. SALAZAR: We've said let's look at the contract.

JUSTICE: You would, you wouldn't said no just like you're saying now?

MR. SALAZAR: No, No ...

JUSTICE: So they have to file a lawsuit to get somebody to order you to go to arbitration?

MR. SALAZAR: Well, that's not true because I will-- part of the record which I've, which I've included part of the record to the Trial Court. This is the second lawsuit involving the same defendants. The first lawsuit was filed in the, in the-- was also in Cameron County. It was styled that Castillo versus I forgot I believe that's Castillo versus D. Wilson re-appellant. Castillo versus Caron Sandrank I've noted it in my, in my case that was a case it was filed in 2001. So students and faculty members file suit against all the general contractors, all the general contractors in this case. In that case it

was two years before we, we, we-- two years before we re-suit- we re-suit one time before. The same Defendants D. Wilson stalled every single one in here in that case they were sued by students and and faculty members. In that case they filed the cross-claim. A cross can claim is a lawsuit and I've taken exert from that case that was two years before it. They didn't clanged and say we want arbitration in that case. They say we want a judgment, we want a jury they came for judicial relief. They came to the Courts that ask for relief.

JUSTICE: They involved the same contract?

MR. SALAZAR: It involved the same contract the same sub-facts. The School District was sued there not only the School District sued in there we, we have to spent close to hundred and seventy-five thousand dollars and there's an affidavit at Trial Court trying to defend that suit.

JUSTICE BRISTER: So the parties can take inconsistent positions if it benefits your clients, right?

MR. SALAZAR: That is correct, however, if they have an arbitration if they have an arbitration clause they should invoke that in Andaksum-- they never did they've invoke they were asking for judgment, they were asking for a jury and then after some of these Defendants, specifically American Standard Trane, the District was taken out of that lawsuit and severed and then was-- because of the immunity which, which we have we were severed and then American Standard Trane builds out some other Defendants and they appeal it to a Thirteenth Court. So not only that they a suit, then it go to another Court of Appeals eventually that case was dismissed. But clearly that is active inconsistent with the right to arbitrate. This was before we file a suit.

JUSTICE: I think that Billboard ever solve that case.

MR. SALAZAR: This Billboard assume we could not ...

JUSTICE: They get to the woodly persons decided those facts.

MR. SALAZAR: That, that could've-- that was an option. That was-- we re-suit, we have to entry suit we have to defend the suit.

JUSTICE: So you wait to your right for this Gillbord to preside everything finally too.

MR. SALAZAR: In that case we didn't work. So that is the issue of waive right then I think ruled in important issue because if, if the defend- if any- in this case a plaintiff acts inconsistent with the right to arbitrate if they file suit against you they're not acting with their-- they're not acting consistent with the right to arbitrate. I believe that, that isn't very very in tort issue that was not addressed really and the reason I don't think it's addressed because it never have a plaintiff say "oh we're suing you, oh by the way after we sued you we want to, we want to arbitrate" that the case law is here that, that choice is given to the School District as a Defendant. The other issue that the, that I believe is important, that I've, that I've seen the Court going to in a-- they've raised it as Equitable estoppel. The-- this Court another has several cases before it in the recent near by the Equitable estoppel and I look back and I review cases that would missed case but also the fifth circuit case of the Congresson case. To found out exactly what it, what it meant 'cause I-- Equitable estoppel is one of those bad headaches that I get from Law School. I still don't remember what it is. And I went back and look at the, the definition-- I still couldn't figured it out. So I went back and I read the Congresson case and and the Fifth Circuit case says it's the grieve of this called "grievsy". That this circuit case which this Court has used as cornerstone says there's two emphasis when the Court can institute

Equitable Staple. One of them is when the, the person sued in this case of District relies on the contract which is true. Breaches contract you can't rely on more than that with this subcontractors. Here we have contracts of the subcontractors. The second instance is when the cause of action is so intertwined between the contract and subcontractors that you almost force to go there. But before you get in that recent case which inquired about they used it. Element number one is that the signatories must have a written agreement containing an arbitration clause that is appeal. If you don't have that written arbitration clause you don't have a written agreement then that Equitable Staple does not apply and again I go back to square one is there an arbitration clause in this contract and the answer is no. The district has taken that position day one and contiguous it take it. The district's position is that we cannot be-- we should not be forced into arbitration if our contract didn't say arbitration. All of the cases that we've look at are arbitration clause they're all-- cases were on page one it's mind their arbitration the times that the Court have reference arbitration they reference it and saying, "look at the arbitration policy manual." That's on the document that signed by the signatories, and the revert said cite as suspected that's going to be an issue the reference part. We do not believe that the, that arbitration was reference in the original contract with either Stotler or or D. Wilson. In Stotler's case the project manual is not even mentioned. In D. Wilson's case-- no, I'm sorry it's D. Wilson's case that, that the project manual is not mentioned and in Stotler's case it's mentioned that they're the ones who files cross-claimed against us in the suit two years far as open. Either way we feel that they have-- either way their right to arbitral or their, their contract never references the arbitration clause and the one case that they, that they rely on is a Teal case and that Teal case says by reference. The contracts have by reference were bringing in AIA document 201 this case is not like that varies factus, a factuses ...

JUSTICE: Sounds all right. If we find the contract is ambiguous if we disagree with you, do we resolve that ambiguity here do we send it back to the Trial Court have then take a crack at it accept determination?

MR. SALAZAR: If you find that the, the-- that the contract is ambiguous you let the Trial Court keeps its decision. The standard that uses abuse of discretion there's plenty in the record for the Court to, to have decided it that it is ambiguous first of all and then all the case that have been cited by opposing Counselors the one that said well, if it's, if it's ambiguous then it's in-- that is in proof of summary judgment this is not a summary judgment case. If the Trial Court felt that it was ambiguous the Trial Court is the trier of fact there the one that saw the contract they've heard arguments it was about half the hearing that we have there for this arbitration clause. If the Trial Court found that it was ambiguous then I'd read as it the-- that this Court not only file the Trial Courts findings but also the Court of Appeals findings.

JUSTICE: Any further questions? One by one.

JUSTICE: You argued that ambiguity acquits to no enforceable agreement to arbitrate period. You can't control arbitration if there's-- in the face of ambiguity.

MR. SALAZAR: Correct.

JUSTICE: Thank you gentlemen.

JUSTICE BRISTER: Thank you.

COURT ATTENDANT : May it please the Court. Mr. John Griffith and

Mark-- Mr. Mark Beaman will presents the rebuttal for the Petitioners.

JUSTICE: Mr. Griffith what do you say about that?

REBUTTAL ARGUMENT OF JOHN R. GRIFFITH ON BEHALF OF PETITIONER

MR. GRIFFITH: I think very clearly that if there's an ambiguity is the duty of the Court to resolve the ambiguity. I mean you if don't create a contract and just make it unenforceable because of ambiguity. The case sounds clear what you do is you determine the intent of the party. You try to resolve the ambiguity, you try to harmonize that either with in the contract itself and then you have to go beyond that for all evidence you do that next but I think ...

JUSTICE: This Trial Court-- this Trial Court do not proceedings and handled that initially or does this Court takes prescribe?

MR. GRIFFITH: I-- now that we're here I'd like to this Court surrender this decision because I think it's very clear from the contract itself. Again, the arbitration clause was not taken out despite what Counsel said the arbitration clause was very specifically that then and the District knew what they were doing because they knew how to add, delete and modify those conditions and they chose only to add an additional 4.5.1.1 they didn't touch any of the other provisions that allowed arbitration even though in other situations they deleted that provisions or deleted provisions that addressed other, other issues.

JUSTICE: Please address Mr. Salazar's waiver argument.

MR. GRIFFITH: And actually I was going to allow Mr. Beaman to discuss that more directly. There is no waiver argument that's provided D. Wilson, D. Wilson file no cross-claims D. Wilson took no actions inconsistent of enforcing they like to arbitrate that was as to other parties so it would be-- please the Court I do this way on that one issue. I do want address a non signatory. I think that Tan Demily the only position that was taken by Counselor of B.I.S.D was if there's no arbitration clause then a non-signatory can't let you on to it. Well, okay. That of course if there's no arbitration clause, there's no arbitration clause. If however, there is an arbitration clause which is pretty clear from the contracts that there is an arbitration clause in there while they maybe ambiguous then the non-signatory because they are being sued pursuant to that contract that's how the work was done by the subs and the other non-signatories and because they're all being sued joint severally for this entire project they would file the Equitable Staple guidelines and they would be, they would be tag along with, with the general contract are under the arbitration provision. The other issue I think they was kind of important here and it hasn't necessarily come up yet is the, is the problem that we have is the TAA versus the FAA. I think that's right now we're always trying to enforce the FAA because basically anything touches in as they're comers. We end up with the situation were you got Trials Courts that-- may this case we're just lucky if he wrote the letter that says I found the ambiguity because the order that this made the sign that said deny arbitration. The 13th Court of Appeals routinely denies Mandainles without giving any reasons at all. They've just said Mandainles denied and so in this situation we actually have a little bit an idea what the Court was doing but if you're under the TAA where we have interlocutory appeal with they have been findings the fact that may actually have an

appellant procedure they cover that we'd be having a lot more-- we have online information to be discussing before the Justices and I don't know how you resolve that other than perhaps some sort of a request to the Appellant Courts in the Trial Court they do to the finding a fact that they do to present something other than just an order denying arbitration so they has to say more similar to the TAA if we're going to be taking all this cases up in the DFA because basically the Federal Law preambs everything. And that I guess is a little bit of a side back I think that's one of the issues that maybe something that the Court wanted to address with this opinion. I'm going to go ahead and refer to Mr. Beaman on the waiver issue.

MR. MARK BEAMAN: May it please the Court. Another's procedure's a little unusual but these issues work separate and distinct between the parties on the Petitioner's side. The first thing I'd like to address on the claims concerning waiver in this case. The Respondent's Attorney has indicated to the Court that this case was brought by my client Trane and that is correct but the nature of the original petition in this case was only assent for temporarily exemption to preserve evidence. There was no claim bought by Trane in this case seeking Judicial Resolution of the disputes between B.I.S.D and Trane. It was only to preserve evidence at, at that time because of there was a remediation project that was on going at the school or about to begin at the school and the parties wanted a chance to get away in a document evidence so that's all that was there and I don't think that is by asking to preserve evidence is certainly not taking a position which it-- is it consistent with arbitration in fact one for the argue is it entirely consistent with arbitration to go in-- to preserve evidence because you need evidence as arbitrations as well as it trial. The second action that Respondent has, has brought up in this briefing and has brought up today is the fact that Trane was involved in the Castillo matter. This is the personal injury case that was filed I believe in a 197th District Court. In that case, the students of the school had sued Trane along with the number of other defendants including the School District. So this was not the case in which Trane was lined up and bring the School District into the case this is the case where they were both co-defendants and simply put that case was the case involving personal injury. It was not a case that dealt with the property damage claims which were the subject of the arbitration provisions which are in issued in this case. So with the our contention that because that case involve personal entry claims of students against two co-defendants is-- it would not be proper for arbitration and that was our position then, that was our position there. The ...

JUSTICE: It's position that, in that, that particular fact pattern arbitration was inappropriate because it was personal injury. Arbitration's not appropriate anytime involved that personal injury.

MR. MARK BEAMAN: Well, it was personal injury by the students. It was personal injury finds by the students and I have no spec in this contract for whatsoever. So at that point they were seeking Judicial Relief, they were seeking recovery for personal injury damages and there's no way I-- at least that I can concede that they can be brought under the terms of the arbitration provision between co-defendants. They have their own independent fines for personal injury was said they were entitle to pursui- pursued. In connection with what happened in that case in terms of the pleadings on how the parties are induct, there were cross-actions on that case and claim and and the Respondent has Mrs. Stotler filed cross-actions to that case only for contribution and compared for responsibility assessment. So these cross-actions were

not filed by Trane against the Respondent seeking affirmative relief. It was only to seek findings have compared to be responsibility are deficit tough finding. Enough one that seeking Judicial Resolution of the client which are the subject to arbitration agreement today. So those were upholds. Thank you.

JUSTICE: Any questions?

JUSTICE: Thank you Counsel. The case is submitted and the Court will take a brief recess.

COURT ATTENDANT: All rise.

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