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Supreme Court of Texas.
JCW Electronics, Inc.
v.
Pearl Iriz Garza, individually and on behalf of the Estate of Rolando Domingo
Montez, deceased, and Belinda Leigh Camacho, individually and as next friend of
Rolando Kadric Montez, a minor child.
No. 05-1042.

October 18, 2007

Appearances:
Thomas F. Nye, Vidaurri, Lyde, Gault & Quintana LLP, Corpus Christi, Texas, for petitioner.
Jane M. N. Webre, Scott, Douglass & McConnico, L.L.P., Austin, TX, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 05- 1042, JCW Electronics versus Pearl Garza.
COURT MARSHAL: May it please the Court. Mr. Nye will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS F. NYE ON BEHALF OF THE PETITIONER

MR. NYE: May it please the Court. My name is Tom Nye. I represent JCW Electronics, Inc. who raised four issues before this Court. I'd like to address two this morning. The first issue deals with Chapter 33 and the second issue dealing with proximate cause. First, the issue dealing with Chapter 33. The issue before this Court is whether or not Chapter 33 of the Civil Practice and Remedies Code apply to bar the plaintiff's claims for breach of implied warranty under the Business and Commerce Code Chapter 2. Clearly, Chapter 33 does. In this case, the jury found Mr. Montez 60% at fault, under the 51% bar rule, the

plaintiff's claims were barred against JCW. Two points that I'd like to make here. First, taking a look at the statute, is this a claim in tort? The applicable statute is the 1995 version of the Civil Practice and Remedies Code because the cause of action occurred in 1999. Under the 1995 version, it says, "This Chapter applies to any cause of action based on tort." This claim is a product's liability claim arising out of the death of Mr. Montez, where the plaintiffs are alleging [inaudible] damages and other personal injury damages. There can be no dispute that this is a claim based on tort. In contrast, this is not a claim for commercial loss. This is not a claim where the economic loss rule applies. It's not a claim where the parties are contending that the product was defective in the exchange between the buyer and the seller. It's clearly a tort and nothing but a tort. Therefore, under the breach of implied warranty under Chapter 2, the issue becomes does Chapter 33 apply? I think the best evidence that Chapter 33 applies is really what the legislature did in 1987. In 1987, the legislature specifically referenced breaches of warranty under Chapter 2, Business and Commerce Code. There can be no better evidence of the legislative intent to cover breaches of implied warranty under Chapter 2 than when the legislature put that language directly within Chapter 33. The issue then becomes when it was amended in 1995, did the legislature intend to take it out? What happened in 1995 is that the labels, the causes of action label, were removed from Chapter 33. Negligence was taken out. Strict tort liability was taken out, products liability was taken out and also breaches of implied warranty, that title, that cause of action, under Chapter 2. But in its place, the legislature made it broader. It said, "Any cause of action based on tort, meaning negligence, strict tort liability, products liability as well as torts that arise out of Chapter 2 for breaches of implied warranty." So I think that there could be no mistake that the intent here of the legislature was that under Chapter 33, and in both the 1987 version and the 1995 version, they were going to cover claims for breaches of warranty under Chapter 2. Another point worth making and that is if the legislature intended Article 2 to cover the apportionment fault and, and they wanted to change that in 1995, then I think we would've seen a corresponding change in the amendments to the statutes under Article 2. Under Article 2 there were no changes in 1995 under the remedies provision, except for one and that dealt with Section 2-705 as Seller's Stoppage of Delivery.

JUSTICE MEDINA: Mr. Nye, there seems to be a lot of discussion in the Court of Appeals' opinion about this product, this phone being-- not being used for the-- it's expected or intended use and that, that your client represented to the city that these products were safe to be used in a cell. And that argument is I think the one that interest me and that it seems that if the, the product didn't have this cord on then perhaps this, this tragic event wouldn't have happened. But having said that, certainly I didn't expect-- I wouldn't, I wouldn't think that someone would harm themselves with a phone cord. Could we discuss that?

MR. NYE: Yes, your Honor.

JUSTICE MEDINA: Expected intended use of this product?

MR. NYE: The-- there was evidence from the other side that they claimed that we represented that this telephone was safe for unattended jail use. I can certainly see a claim, a potential claim, brought by the city or the police department with respect to those negotiations between the buyer and the seller. But what we have here is one step removed. We have the end-user who engages in an intentional act and

commits suicide. This phone ...

JUSTICE BRISTER: [inaudible] Mr. Montez had depression or suicidal before this occurred?

MR. NYE: Yes, your Honor. There is evidence not of depression, but there's evidence that he suffered a classic case of withdrawal from Valium and that that can short-circuit the brain. There is also evidence that he used marijuana within one to three hours prior to his death and that he had consumed cocaine within 5 to 12 hours prior to his death. There is also evidence from the toxicologist that the drug usage immediately prior to the death did affect his mental faculties at the time that he killed himself. This is a tragic case, a very tragic case. He was told that that day that he was going to be released at 5:00. His mother comes to pick him up at 4:45. At 5:00, he's checked on and then at 5:25 he is found hanging.

JUSTICE BRISTER: He'd been in jail how long?

MR. NYE: He'd been in jail for 42 hours or under arrest for 42 hours.

JUSTICE BRISTER: [inaudible] I'm sorry, did you say marijuana within three hours?

MR. NYE: Within three hours, one at undisputed evidence from the toxicologist because there was THC levels in both his blood ...

JUSTICE BRISTER: What's going on in the jail down there?

MR. NYE: I'm sorry?

JUSTICE BRISTER: What's going on in the jail down there?

MR. NYE: The record does not reflect, your Honor. I do not know. But that's the undisputed evidence that it was there. There's an important point to be made here. The phone and Mr. Montez co-existed. He used it three times for 41 hours. There were no problems. Something happened in the 42nd hour, and what happened was something that occurred in his mind. He made the conscious intentional decision to take his own life and that kind of leads me into the second issue of proximate cause. Here, the undisputed evidence is nothing that my client did at any time contributed to his decision to take his own life.

JUSTICE WILLET: Let me take you back very quickly before we get into this to Chapter 33 and tell me why the Court shouldn't be concerned about the waiver.

MR. NYE: The Court should not be concerned about waiver at all because we raised the Chapter 33 issue before the Court of Appeals.

JUSTICE WILLET: Well, what if we disagree with you that Chapter 33 applies? That instead it's the UCC as a comprehensive scheme that applies. You argued Chapter 33 all along so have you-- if we disagree with that, are you still entitled to a reduction based on the UCC or have you waived that argument?

MR. NYE: We have not waived that argument and we are absolutely entitled to a reduction. The trial court entered judgment based on breach of contract, not based on breach of implied warranty and based on fraud. Breach of implied warranty under Chapter 2 arose for the first time in appellee's br-- in appellee's brief before the Court of Appeals. They raised the cross-point saying if we lose on these other two claims we're entitled to recover under breach of implied warranty. We did raise before the Court of Appeals, saying that we're entitled to a reduction of 85%. We did not specifically reference the UCC but we did make that argument. This Court in Bentley said that if the error arise out of the judgment from the Court of Appeals, we can do one of two things. We can raise it on motion of rehearing or we can raise it before this Court and we did both. We raised it on rehearing or we

raised it before this Court. There is no waiver. So even if this Court does apply Article 2, we're still entitled for reduction of 85% of the damages. I would like to briefly get back to the issue of proximate cause. The undisputed evidence is that nothing that we did in any way contributed to his decision to commit suicide. This Court has held no less than six times in the last 16 years that when the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible, then there is no proximate cause. There's no cause in fact and that's exactly what happened here. Mr. Montez could've committed suicide any number of ways. He could've used his shirt. He could've used his pants. He could've used a sheet from the bed. But he just happened to use our phone that was within the jail cell. Clearly, under those circumstances, although JCW may have had some responsibility in this area of causation, it ceased at the moment he decided that he would use his own intentional choice. His own intentional conduct to commit suicide. As this Court said in Exxon Corporation versus Beecham, suicide is an intervening force which breaks the chain of causation.

JUSTICE MEDINA: Are these phones still in the cells down there?

MR. NYE: They, they are not. They were taking it-- they were taken out. The, the standard at the time for telephones was to have a 36-inch cord. The standard at the time for telephones inside the jail was a 32-inch cord. Our telephone had an 18-inch cord. We had no prior knowledge that any suicide had ever taken place with respect to our cord. There was disputed evidence as to whether or not we knew about prior suicides that had taken place with telephones but no evidence that we had knowledge of suicides dealing with an 18-inch cord. They were removed following the-- this incident. Well, immediately following this incident, they weren't removed. We shortened-- we, we discussed the issue with the, the police department. We shortened the cord to 8 inches and then the record reflects there was another suicide. And what happened in that case was the, the person extended the wire, even though it was only 8 inches, he extended the wire and he committed suicide and I think the evidence in the case is, is that if someone wants to commit suicide, it's very hard to prevent that. And that's why this Court has the long-established law of this State that if the product does no more than furnish the condition that makes the injury possible then, there is no proximate cause. There's no cause in fact in the case.

JUSTICE MEDINA: Do you have another issue with the jury charge?

MR. NYE: [inaudible]

JUSTICE MEDINA: Do you have another issue with the jury charge? Do you have an issue with the jury charge in the way it was submitted?

MR NYE: We did. We raised ...

JUSTICE MEDINA: [inaudible] affirmative defense?

MR. NYE: We did. We raised an issue of the, the affirmative defense under 93-001. This Court has never addressed that issue specifically on the proper way. Our contention here was that the jury was only allowed to consider negligence in apportioning fault. The jury was not allowed to int-- to consider intentional conduct. We objected. We submitted two issues. One, that Mr. Montez committed suicide and number two was that the sole cause of his damages, tracking the direct language of the statute.

JUSTICE JOHNSON: What, what about the negligence finding? There was a negligence finding on your client. Why does that not make the suicide issue immaterial?

MR. NYE: It does.

JUSTICE JOHNSON: How, how could it be the sole cause if, if there is a finding that your client was negligent?

MR. NYE: Because under the statute if defendant's conduct contributed to his decision to commit-- contributed to the suicide, not to the death but to the suicide, if it contributed to that, then that can be a factor. The way I read Chapter 93-001 is that if that defendant's conduct was one in which he committed suicide and there's no evidence that we fell below the standard of care which would've caused him to commit suicide. For example, if we withheld medication, there's a case on that, or we gave him the wrong medication and, and that failure that, that failure below the standard of care contributed to his decision to commit suicide, then Chapter 93 would not come into play. But just the mere fact that there was some, an allegation of negligence or that we breached an implied warranty, that does not prompt the intentional conduct of the decedent, Mr. Montez, because I think if you go way back to the Exxon Corporation versus Beecham, whenever you have a suicide, you're talking about an intentional act and that that breaks the chain of causation. And when the undisputed evidence is, is that our phone in no way played any role in causing him to make the conscious decision to commit suicide, then as a matter of law, we're entitled to judgment under proximate cause.

JUSTICE JOHNSON: But does that go to the suicide issue is my question.

MR. NYE: Yeah, that goes to the proximate cause issue on suicide. We had a separate issue under 93. It's not a rendition issue. It's a remand issue saying that we're at least at a minimum entitled to have that issue submitted. His intentional conduct ...

JUSTICE JOHNSON: And, and so your position is that negligence finding on your client does not negate the sole proximate cause finding you would have to have under the suicide.

MR. NYE: That's, that's correct. That the suicide does break the chain of causation there.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondents.

COURT MARSHAL: May it please the Court. Ms. Webre will present argument for the respondent.

ORAL ARGUMENT OF JANE M. N. WEBRE ON BEHALF OF THE RESPONDENT

MS. WEBRE: May it please the Court. My name is Jane Webre. I'm with the law firm of Scott, Douglass & McConnico and I represent the respondents, Mrs. Garza, individually and on behalf of the estate of Rolando Montez for the benefit of, of his infant child and I would like to start out my argument by emphatically disagreeing with Mr. Nye's characterization of the evidence regarding the, the drug issue and the depression issue. The-- there was testimony from the pathologist who did the autopsy. That's the, that's the, the state person who does this for a living who tests drug levels. Her name in Margie Cornwell and her testimony appears in volume 5, pages 38 to 44 of the record. And she testified that yes, there was some traces of drugs in his blood at the time that he died. But the levels were so low, here's a quote, "we're not even at levels which might have influenced his state of mind and all of it was consistent with drug use more than 48 hours before he died," which is consistent with the circumstances of his arrest. He was

arrested on his 19th birthday. He'd been out with friends. He'd been drinking, may have been some drug use as well. He was arrested for public intoxication. A young kid out partying on his birthday. So the, the autopsy findings are consistent with some drug use during that time but are not in any way consistent with like you said Justice Brister, smoking marijuana in one of the cells of a two-cell jail? It's this big with everybody on top of themselves? What we had, the only testimony of that was an expert, a retained private-paid expert, hired by JCW who testified, "Oh, yeah, this fellow smoked marijuana in the jail cell and used cocaine in the jail cell in the three to five hours before his death." But it is absolutely inconsistent with the pathologist report from Margie Cornwell.

JUSTICE O'NEILL: I'm having a hard time finding the relevance in that.

MS. WEBRE: Well, that was a question that, that is relevant ...

JUSTICE O'NEILL: I understand your response to the question but in terms of the proportionate responsibility and whether it applies, I mean, there's not a "no-evidence" challenge to -

MS. WEBRE: Well, ...

JUSTICE: O'NEILL: - any of the liability questions.

MS. WEBRE: I, I agree it is not relevant but I wanted to respond. But, but I do think it, it in some way relates to the proximate causation question and in, in, in that way to the suicide question because Justice Brister also asked, was there any evidence of depression and Mr. Nye said, "No, no, not at all." We don't know what went through this fellow's head. Not so. The record shows that 24 hours before he died, he talked to his mother on that same telephone, made a collect call to his mother on the same telephone and said, "I, I'm dying." I, I'm so upset and the mother was so undone by that phone call. She called the police chief and said, "You need to keep an eye on my son." He is so upset and the police chief said, don't worry, ma'am. We'll take care of him. Now this is the same police chief who 24 hours later had to got out and tell her ...

JUSTICE BRISTER: Any-- anything other than that he was depressed about him being in jail?

MS. WEBRE: There is nothing beyond him ...

JUSTICE BRISTER: I, I'm trying to understand for-- I can understand a jury finding that this phone is a-- unfit for a particular purpose if you put it in a mental ward.

MS. WEBRE: There ...

JUSTICE BRISTER: But why, why is it-- I mean it has to be-- your theory has to be it's unfit because people will use it to commit suicide but most-- vast majority of people in jail don't commit suicide.

MS. WEBRE: Here are some facts that the rec-- in the record about suicides in jail. There were two people who testified about this phone and about suicide in jail and why this really is an unsafe thing to do. One was Lennie Schrimsher, who was the manufacturer of the phone, and he said, absolutely not. We never ever would have put these phones in a jail cell. Absolutely not. The manufacturer said, we have no idea they would've done this. We never would have let them.

JUSTICE BRISTER: I-- I'm not, you know -

MS. WEBRE: But there was also an expert -

JUSTICE BRISTER: - once the lawsuit starts, people say all kinds of things. I-- I'm just, you know, we, we got to look at warranty law and in every case where somebody files suit, something bad happened. But warranty law looks at it before we know what happened and says, is

this un-- you know, is a phone unf-- it's just unfit to have phones where prisoners can use them.

MS. WEBRE: Well, your Honor, the-- all I can tell you is what the testimony was in the record. There was also an expert named Lindsay Hayes, whose testimony appears in volume 6 of the record at page 74 and he was-- he is an expert on jail suicides and he testified, the jury heard evidence, "the suicide rate in jail is five times that on the outside. Ninety-five percent of the suicides are hangings. Sixty-five percent occur in the first 48 hours after arrest."

JUSTICE BRISTER: But how many of them were people who've shown no previous depressive tendencies?

MS. WEBRE: I, I don't know that, your Honor.

JUSTICE BRISTER: Now that's pretty relevant, isn't it?

MS. WEBRE: Well,-- but all I can tell you is what the evidence before the jury was. The jury heard evidence that a telephone in a jail cell really is a big deal.

JUSTICE BRISTER: But this, this is now - this is the whole problem with experts, yeah, of course, people have-- there are people who hang themselves in jail, it's a depressing circumstance, you wouldn't want to be in it, but I'll bet most of them that it's a problem with had previous histories of depression. I mean, that's usually pretty strongly related to people that commit suicide.

MS. WEBRE: Your Honor ...

JUSTICE BRISTER: The deal is we just, you know, how about people that are, like the courthouse. A lot of people are under a lot of pressure in a courthouse. You know, [inaudible] well, you should have anticipated-- it's perfectly foreseeable, they are going to hang themselves at the-- trial law, you brought it there at the courthouse. I mean where we are going to stop with this?

MS. WEBRE: Well, your Honor, what this Court has before, the, the only appropriate evidence for this Court to consider in deciding if this verdict is, is appropriate, this judgment is appropriate, is the evidence that was presented at trial and the evidence that was presented at trial ...

JUSTICE BRISTER: That's what I'm worried about.

MS. WEBRE: Well, your Honor, I, I think there was plenty of evidence and if this Court looks at the testimony of Lindsay Hayes, looks at testimony of Lennie Schrimscher and also looks at the testimony of Bradley Woods, who is the president of JCW who testified yes, yes, he'd heard of jail suicides by telephones, not one of ours, but yes, he knew of those before and he didn't tell Port Isabel. Yes, he convinced Port Isabel to keep the phone in there with the shortened cord and someone kill themselves two weeks later. No, he did not tell his other jail customers about the two hangings in the Port Isabel jail after they happened. He kept his phones in a lot of other jails and here's what he said about that, "I don't think it's my responsibility to foresee any possible suicides in a police department jail." So the jury had that evidence and like you said Justice O'Neil, "There is not a factual sufficiency or, or a legal sufficiency challenge to the finding of breach of implied warranty here."

JUSTICE BRISTER: Let me ask you a personal question.

MS. WEBRE: Yes, sir.

JUSTICE BRISTER: Does it make sense to you that when a person hangs themself with a phone cord, it's 40 percent somebody else's fault?

MS. WEBRE: That is a question that is in the province of the jury and I think absolutely, yes, your Honor. Because -

JUSTICE BRISTER: [inaudible] That's why I asked you personally.

MS. WEBRE: - there is ...

JUSTICE BRISTER: Does it make sense to you when somebody with no depressive tendencies, no history of this, it's 40 percent their fault?

MS. WEBRE: Absolutely, your Honor, because there, there was, as I have said, "There was a lot of testimony about that."

JUSTICE BRISTER: [inaudible]

MS. WEBRE: And there was also testimony about the, the mother having called the police chief and said, he is so upset, please keep an eye on him. JCW presented testimony that, that the Port Isabel City-- the, the police officers were negligent in not checking up on him more often and if they had followed their regulations in how often they check on him, he never would have died, and that leads into your question, Justice Johnson, about the suicide.

JUSTICE JOHNSON: [inaudible] Counsel, he's upset that they take his pants away from him, that they take everything away from him, the, the difference, I think what I am struggling with is assuming he is upset and told his mother as you said and that's the evidence in there, then what do they have to do? They had to take everything away and lead him in there naked with-- in a, in a room with nothing else in it? Because we have all of these things including a telephone that were available and provided the conditions that he might have used to commit suicide? So how far do we go with that? That's what I'm struggling with. What causate-- I mean, how do you ...

MS. WEBRE: Well, you, your Honor, I think, I think there is a bright line that can be drawn for this Court in deciding that question and, and that is what is, what is an innocuous instrumentality that is put to ill use by an upset teenager and what is a not innocuous but rather inherently dangerous instrumentality?

JUSTICE JOHNSON: It didn't seem all that bright.

MS. WEBRE: Well, we have a fact finding here-- with fact finding that it was not safe for unattended use in a jail cell.

JUSTICE JOHNSON: But, but that line, innocuous versus, versus non-innocuous, that line doesn't seem all that bright to me.

MS. WEBRE: Is it a, is it a, is there a safe-- is it unsafe for where it was? That, that is a straight fact question. A bed sheet is safe, is, is innocuous. A bed sheet is a safe thing.

JUSTICE MEDINA: Ms. Webre, you make some impassioned arguments there, but there are other issues that I, I would like for you to address before your time expires. One that I think is significant is a waiver issue that Justice Willet raised during the last arguments for opposing counsel there. Can you address that and whether or not Chapter 33 was ...

MS. WEBRE: I believe Chapter 33 has been preserved throughout. I believe that Mr. Nye briefed Chapter 33 as a, as a, as a bar, as a total bar throughout. I don't believe that Chap-- that the Article 2 is preserved because it was not raised until after the Court of Appeals' opinion even though the, the scope of the UCC implied warranty and what damages are available and what not were fully briefed. For example, in the briefing in the, in the Court of Appeals, JCW briefed that, that under the implied warranty, it should still-- Article 33 applies-- Chapter 33 applies, so there should be a total bar, but even if it's not a total bar, then you-- the Court should use common law principles, you know, dating back to Duncan versus Cessna, use common law principles but never once invoked the Article 2 purport in a proximate causation reduction. So, so I would submit that that is, that that is waived. I believe Chapter 33 is properly preserved. I would submit the

proximate cause is waived, because that was raised for the first time in the reply brief and it was not raised in the brief of appellant even though proximate causation was relevant at that time because the judgment recited fraud and fraud requires proximate causation and yet there was no challenge to the proximate cause finding in the brief of appellant. But, but I do want to, to turn-- Justice Johnson, I want to address specifically, you had a question earlier about the suicide, affirmative defense. In that statute, it's Chapter 33 provides that, it, it's not just a failure on the part of this defendant to comply with a standard, with a, with an applicable legal standard, but, but there is, the statutory suicide defense is not applicable at all, if there-- if the damages are caused in whole or in part by a failure on the part of any defendant to comply with an applicable legal standard. And the jury found negligence not only on the part of JCW but also on the part of the city of Port Isabel and there was testimony that the conduct of the officers was directly related to the suicide issue of not checking on him often enough and indeed that was testimo-- a case that JCW put before that the, the jury that, that this is all the [inaudible] the fault of the police officers because they should have been checking more often and if they had checked 10 minutes earlier as the procedure said. And there is case law, I, I can recite for the-- cite to the Court cases specifically in the context of a jail suicide, a case called "Martinez versus City of Brownsville", 2001, West Law 1002399. That was a jail suicide case in which one of the allegations was that here was a, was a, a depressed and potentially suicidal inmate and the police officers could've done this, they could've put him on surveillance, they could have taken away this, they could've checked more often, they could've done that, and they didn't. And the Court said, then you don't get a suicide defense because you breached an applicable legal standard, you, the police officers, in failing to [inaudible]. And so, so I think that that the suicide defense is-- the way that statutory defense works in a way it's a bursting bubble where if there is a, a breach of an applicable legal standard by any defendant, pop, that statutory defense goes away. You still have, you know, as we have here and, and if it were appropriate, you have obviously the jury had in mind the suicide, the fact that this fellow committed suicide when they allocated 60% to him, they are weren't just thinking of, of other things and so, so as a, as a practical matter we have, we have a harmless error situation at best.

JUSTICE JOHNSON: When, when would-- of course, if the Court determines in the case that you just were discussing that there was breach of an applicable legal standard, that takes the fact-finding out of the jury's hands.

MS. WEBRE: Well, the ...

JUSTICE JOHNSON: As a matter-- the Court had to find as matter of law. But let's talk about this case where we did have jury findings that you had negligence and improper actions of the part of the defendants that actually were causally-related. If you have those issues, does that, according to your position in regard to this sole proximate cause aspect of the suicide, does that negate that?

MS. WEBRE: Absolutely, and, and the, the Waco Court of Appeals decided a case on exactly those facts. It's called "Petit versus Dowell", 2005 West Law 1907101.

JUSTICE JOHNSON: So assuming that they were entitled to an issue, would it-- what would your position be on the materiality of, of the trial court's refusal to submit that?

MS. WEBRE: That, that the, the fact-finding of violation of an

applicable legal standard by both the city of Port Isabel and JCW Electronics negates the applicability of that statutory affirmative defense as a matter of law, and here is the quote from the Waco case, "if the jury failed to find that Dr. Petit's negligence proximately caused Lance's suicide, Dr. Petit was exonerated. If the jury found to the contrary as it did, Section 93.00182 precludes Lance's suicide from being used as an affirmative defense." In other words, the fact that there was a, a finding of a breach of an applicable legal standard by a defendant's that that renders this-- the Chapter 93 affirmative-- suicide affirmative defense inapplicable.

JUSTICE HECHT: It is kind of a small point, but why would you need a defense if you didn't breach any standard?

MS WEBRE: It is, I can't figure out why that-- why and how that statute would ever be applicable. It's ...

JUSTICE HECHT: [inaudible] and didn't look like it would ever apply.

MS. WEBRE: No, and, and it's kind of a funny thing. If you look at the way that statute is structured that its title is, is assumption of the risk which, which is no longer its own stand-alone affirmative defense. All of those sorts of concepts of assumption of the risk can end, you know, suicide. The, the conduct of other people all gets subsumed into other, other concepts. So I ...

JUSTICE HECHT: You-- I mean you agree it seems to read, if you don't need a defense, you have one.

MS. WEBRE: Correct. Correct. I, I don't-- I can't think of a scenario where this would ever be a meaningful affirmative.

JUSTICE JOHNSON: [inaudible] that we say it's been subsumed, that's what we say, but the legislature apparently says something differently.

MS. WEBRE: I can't help if the legislature is going to be goofy here or there. But I, I-- all I know is that that is not applicable here because the fact-findings of breaches of applicable legal standards as to the city and as to JCW render that specific affirmative defense inapplicable here. But I, I would like to turn in, in my remaining time and talk about, specifically talk about the Chapter 33 question, and, and I think for this Court, if this Court is going to-- and, and obviously the question is, "What did the legislature intend on the scope of Chapter 33?" And the Chapter 33 question has to stand or fall on this Court's interpretation of the, the very beginning of that statute. This Chapter applies to, I mean it has A and then it has B. And A says, "A cause of action based in tort." And B says, DTPA, and so my, my first question is well, if there ever were a tort-like statutory cause of action, it would be the DTPA. It, it authorizes personal injury and mental anguish damages, it's based in issues like rep-- misrepresentation, claims that would otherwise be redressable in tort have been, have been subsumed into the DTPA, but also if this Court were going to look, Mr. Nye pointed out to the 1987 version of, of the, of Chapter 33 and how it has evolved through time and how we ought to read the tea leaves of what it means today as animated by what it used to say.

JUSTICE: But doesn't [inaudible] claim sound in contract under the economic loss rule that the loss is the value of the product but really it sounds in tort if you're talking about damage to other property or personal injury.

MS. WEBRE: Well, that is-- this Court has recited how-- where does a breach of warranty-- in, in various ways through the years. And this Court has also said that the UCC is not a fish nor fowl. It is, it is a

statutory cause of action and so these, these tort and contract distinctions are not, are not really germane to us. But, but I think that, that it's important to look specifically at the fact that, that the legislature specified the DTPA in there. They had to have done that for some reason. It is tort-like, it is a tort-like statutory cause of action and so one would think, if, if well, if it sounds like a tort, quacks like a tort, it would've come in under A so why did they add it as B? They did that in 2003. The legislature did that in 2003 as part of the whole House Bill 4 thing, but if we're going to read the tea leaves on why they do something in what order, you know, there's the, the statutory construction maxim that if the legislature amends a statute after a Court case and they, they leave something in place there, they're presumed to have agreed with how the Court interpreted that statute. Well, here's what happened. In November of 2002, the San Antonio Supreme Court, Supreme Court-- the San Antonio Court of Appeals decided that JHC Ventures versus Fast Trucking case and they squarely addressed this point and they said absitively, not, Chapter 33 does not apply to UCC breach of warranty claims. The legislative session immediately following, this is November of '02, immediately following '03, the legislature amends the scope of Chapter 33. They do not address the UCC at all but they put in the DTPA, that this does apply to the DTPA. Now if I were reading the tea leaves, I would say that that manifest a legislative intent that, oh, my goodness, the statutory causes of action are not going to be under Chapter 33. We need to make sure that the DTPA is, because we think DTPA ought to be, so they added it in. Now, if this Court determines that, in deciding whether or not Chapter 33 applies to UCC causes of action, I think even though we are under an, an earlier manifestation of Chapter 33 that didn't have the DTPA section, I think this Court needs to, to grapple with that, need to address why would the legislature had put DTPA in there if quacks like a duck, sounds like a torts, sounds like a-- quacks like a tort is, is what stands or falls on whether a, a particular statutory cause of action comes within Chapter 33.

JUSTICE WAINWRIGHT: So, so you're arguing that the addition of Section B undoes the all language in Section A?

WEBRE: They un ...

JUSTICE WAINWRIGHT: Or at least for statutory torts.

MS. WEBRE: Under the, under the, the concept of, of expressio unius est exclusio alterius by saying that specifying that the DTPA applies, the legislature had to have meant something. And, and another concept is ...

JUSTICE WAINWRIGHT: So your answer is, yes?

MS. WEBRE: My answer is, yes.

CHIEF JUSTICE JEFFERSON: Any other questions? Thank you, Counsel. Mr. ...

JUSTICE: [inaudible] says that, "If you've waived anything, you've waived proximate cause." What do you say?

REBUTTAL ARGUMENT OF THOMAS F. NYE ON BEHALF OF PETITIONER

MR. NYE: Absolutely not. Absolutely not. At the Court of Appeals level, the judgment remember was entered on breach of contract and on fraud. We defeated those claims. For the first time in appellee's brief they raised breach of implied warranty. In defense to that, we were

allowed to file an extensive brief by the Court of Appeals addressing our defenses to breaches of implied warranty. We certainly were allowed to bring up proximate cause at that point in time. Moreover, the, the problem with the judgment in this case, the breach of implied warranty was entered for the first time by the Court of Appeals. We were allowed either under an Article 2 claim to raise that on motion for rehearing or before this Court. That, too, is not waived.

CHIEF JUSTICE JEFFERSON: Mr. Nye, you are asking for this Court to reverse and render a take-nothing judgment, is that correct?

MR. NYE: That's correct.

CHIEF JUSTICE JEFFERSON: Based on Chapter 33's bar?

MR. NYE: On, on the Chapter 33 issue, we're asking for a remand and a new trial.

CHIEF JUSTICE JEFFERSON: What's the ...

MR. NYE: That on the proximate cause, we're asking for a rendition of judgment.

CHIEF JUSTICE JEFFERSON: Okay, so on the Chapter 33 issue, is the percentage of the plaintiff's negligence is-- was 60 percent here?

MR. NYE: That is correct.

CHIEF JUSTICE JEFFERSON: And you would get a remand for new trial?

MR. NYE: Well, I think, I may be confused [inaudible].

CHIEF JUSTICE JEFFERSON: [inaudible]

MR. NYE: The issue here with respect to the first issue is that Chapter 33 applies and if 33 applies, the 51 bar rule comes into place, and because the plaintiff was found 60 percent at fault, that bars all of their recovery against us.

JUSTICE BRISTER: [inaudible] Sixty percent of those were negligent, how do we attribute question 2 to question 9 on applied warranty?

MR. NYE: Our responsibility was to submit his fault. His fault was based on negligence, that was all that we were allowed to submit. We were not allowed to submit ...

JUSTICE BRISTER: Did you ask for, did you ask for a comparative question on question 9?

MR. NYE: I don't believe there was a, a comparative question with respect to 9, but there certainly was a request to compare his intentional conduct. All we had to do with respect to the, to the 51% bar rule was what was his percentage of conduct? Was it greater than ours? And we submitted that we got a finding in excess of 51 percent. I'd also like to address the JCW versus ...

JUSTICE BRISTER: Well, I mean, but whose, you know, who was negligent to compare their negligence, might not jury find something different about comparing fault to a warranty?

MR. NYE: I guess there is a possibility there. I think that the issue in this case was pretty clear. Their theory was look, this phone, it's not safe for unattended use. Whether you couch that in terms of negligent-- negligence, breach of implied warranty or misrepresentation, all of them were basically the same. We're entitled to that bar rule under that submission to the jury in that case. I would also like to briefly address the Fast Trucking case. That was a breach of express warranty case. It dealt with the commercial loss. It did not deal with the tort so it is clearly is not applicable here. I would like to also briefly address the proximate cause. Under the plaintiff's reading of the statute, it basically serves no purpose. Obviously, the legislature don't enact statute unless they intended for it to have some force and effect.

JUSTICE BRISTER: [inaudible] what does the last phrase mean?

MR. NYE: Proxil-- proximate cause means that if a plaintiff intentionally kills himself and if defendant's conduct plays no role in his decision to commit suicide, then it is the sole proximate cause [inaudible] damages and the plaintiff cannot recover. If the def-- if the plaintiff puts on evidence that defendant's conduct played a role in contributing to or causing him to commit suicide, then it would not be applicable.

JUSTICE BRISTER: No, I'm not talking about the applicable legal standard. Yes, if that's his defense but if he failed to follow the applicable legal standard, never mind.

MR. NYE: That deals with the key word there in the statute is, is suicide. Was the suicide caused by-- as a result of the defendant's failure to follow the applicable legal standard? It doesn't say death. It says, "was the suicide" and, and that is the key issue there. There's no evidence in this case that are conduct contributed to his decision to commit suicide.

JUSTICE O'NEILL: Well, that -

JUSTICE: How do you, how do you distinguish between ...

JUSTICE O'NEILL: - that would be a very limited circumstance if that could ever happen so under one reading the statute never applies and under your reading would bar just about everything.

MR. NYE: Not, not necessarily so. There's already been a couple of occasions where Judge Gonzales had a case out of this Court where the, the failure to give medication or the proper medication, there was a fact issue as to whether or not ...

JUSTICE O'NEILL: But they're very, very narrow.

MR. NYE: Uh-hmm. I, I think that that's what the legislature intended. At least, under that interpretation it does make some sense that it does have applicability especially to this case.

CHIEF JUSTICE JEFFERSON: Other questions?

MR. NYE: Yes.

JUSTICE MEDINA: How do you distinguish suicide from death?

MR. NYE: [inaudible]

JUSTICE MEDINA: [inaudible] the statute didn't say suicide, it said death. I mean, how do you distinguish the two in your mind?

MR. NYE: In my mind the suicide is an intentional act that occurred in this case and if our conduct caused the, the intentional act of a suicide contribute to that in any way, we would not be allowed to, to that defense. But if it did not contribute to the suicide or the intentional conduct, then the statute would apply.

CHIEF JUSTICE JEFFERSON: Any other questions? The cause is submitted and the Court will take a brief recess.

COURT MARSHAL: All rise.

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