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Supreme Court of Texas.
FOREST OIL CORPORATION and Daniel W. Worden, Petitioners,
v.
James Argyle MCALLEN, el Rucio Land and Cattle Company, Inc., San Juanito Land
Partnership, and McAllen Trust Partnership, Respondents.
No. 06-0178.

October 16, 2007

Appearances:
Geoffrey L. Harrison, Houston, Texas.
Craig T. Enoch, Austin, Texas.

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: Please be seated. The Court is ready to hear argument in 06-0178, Forest Oil Corporation and Daniel W. Worden v. James Argyle McAllen and others.

SPEAKER: May it please the Court. Mr. Harrison will present argument for the petitioner. Petitioner has reserved three minutes for rebuttal.

ORAL ARGUMENT OF GEOFFREY L. HARRISON ON BEHALF OF THE PETITIONER

MR. HARRISON: Good morning.

CHIEF JUSTICE JEFFERSON: Good morning.

MR. HARRISON: May it please the Court.

This Court should not permit the McAllen respondents to avoid their unambiguous written and signed agreement to arbitrate, based on a six years after-the-fact claim that they were fraudulently induced by an alleged oral representation by an unidentified person from an unidentified company at a week-long, confidential mediation settlement meeting back in 1999. That 1999 confidential settlement mediation at which the alleged oral representation supposedly was made resulted in a written, fully- executed settlement agreement in which Mr. McAllen and the other plaintiffs expressly and in writing agreed to arbitrate all

claims relating to the McAllen ranch leases -- that is Section 7; agreed in the release language itself to arbitrate all environmental, surface, personal injury, wrongful death, and other claims that were carved out of the release, agreed in the release itself to arbitrate all those claims -- that is Section 9.1; disclaimed reliance on any statement or any representation by any agent of Forest Oil or any of the other defendants in that 1999 case -- that is Section 10.2; represented the McAllen respondents did, that they were relying on their own judgment, represented that they had been fully advised by their counsel -- also Section 10.2, and confirmed that their counsel had read and explained the entire contents of the releases and the legal consequences of those releases -- also Section 10.2, and the settlement agreement contains a merger clause that supersedes all oral agreements or understandings -- that is Section 16.1. Mr. McAllen has admitted in this case that his fraud story contradicts and is 180 degrees opposite of what he signed --

JUSTICE O'NEILL: Well, he didn't really agree to that, does he? I mean, he -- my understanding of the argument is that the disclaimer of reliance language is limited to execution of the releases and not what was carved out of the releases.

MR. HARRISON: That is not correct, Your Honor. I believe that is indeed an incorrect position espoused by the McAllen respondents.

JUSTICE O'NEILL: Well, I agree but it is a position espoused.

MR. HARRISON: It is a position. However, the record citation to Mr. McAllen's agreement that his position in this case is 180 degrees opposite of what he agreed to and signed in Section 10.2 comes in his testimony at the motion to compel arbitration hearing found at Reporter's Record volume 2, pages 87 to 88. He absolutely admits that his after-the-fact fraud story is opposite of what he agreed to back at the time contemporaneously and in writing.

JUSTICE O'NEILL: Well, are you arguing an estoppel there? I mean, the way I read their argument is they are trying to limit the disclaimer of reliance piece to, I'm looking at page 12 of their brief, with disclaimed reliance in connection with executing the releases, and what was excepted out, they not agreed to release so the disclaimer of reliance does not apply to what we have excepted out. I understand your arguments, but how do you address that specific argument that this just says in executing the releases.

MR. HARRISON: Section 10.2 says much more than that. But let me answer that direct question. Mr. McAllen admits as is in black and white in Section 10.2, that he is not relying on any oral representation or statement of any kind by anyone with respect to the releases or the legal consequence of the releases. He admits that much. Section 9.1, which is Mr. McAllen's release, in the last sentence within the release itself, provides that all claims that are carved out of the release must be arbitrated pursuant to Section 7 of that agreement. Within the language of the release, part of the release itself, we find the arbitration language in the express reference and incorporation. Even under Mr. McAllen's argument, an incorrect one under the language of Section 10.2 and his testimony at the motion to compel hearing, but even under his incorrect argument that he only conceives now having disclaimed reliance on any statement leading to the release, the arbitration clause is found within and is part of the release. That argument does not carry the day. He has disclaimed reliance.

JUSTICE HECHT: What is the status of the record on what juries well knew before -- about environmental issues at the property before

the closing of this argument?

MR. HARRISON: Your Honor, the status of the record is that one witness, a self-admitted disgruntled former employee, Mr. Pearson, testified about his beliefs that there were certain contamination on Mr. McAllen's land. However, at Reporter's Record volume 3, page 28, Mr. Pearson admitted under oath that he did not honestly know whether there actually was any contamination at all. In his words, quote, I'm not testifying whether or not it's contaminated, period, end quote. Disgruntled employee Bobby Pearson has an axe to grind. The record indicates he drove nine hours in a prior case, spent the night in another case --

CHIEF JUSTICE JEFFERSON: Could your argument be different if the employee was not disgruntled and there was evidence of contamination throughout that Forest Oil knew about, that its lawyers told Mr. McAllen, Don't worry about it, there is no contamination," and then put that clause in. Would your argument be different if those facts were?

MR. HARRISON: My argument would not be different. It would be exactly the same.

JUSTICE HECHT: Then, what do you do with the Warehouser Associates case that the brief -- the respondent's brief mentions but I don't think you address in the reply brief.

MR. HARRISON: I do not think the Warehouser case changes anything at all, Your Honor. It is another in a litany of cases that has no effect or bearing on in any way discrediting or limiting this Court's decision in Schlumberger. In Schlumberger, this Court announced a rule that is fully applicable here. And in Schlumberger, Your Honor, this Court explained at page 179, "The contract and the circumstances surrounding its formation determine whether the disclaimer is binding." And so Warehouser says nothing about that or in any way changes that. Rather, what we look to is whether the contract and the circumstances suggest that the disclaimer is binding. Here --

JUSTICE HECHT: The Warehouser case is as a sale in which the seller is alleged to known something about asbestos concealed on the property before the closing.

MR. HARRISON: Yes, as I recall the Warehouser case is one of two or three Fort Worth Court of Appeals cases cited.

JUSTICE HECHT: Now the [inaudible] 14th Court.

MR. HARRISON: Yes, your honor. Those as-is cases that deal with the sale of real property follow in a line that is not akin to this case. The Warehouser case and the other as-is cases relied upon by respondent look to as-is clauses and in some instances merger clauses. We do not contain the disclaimer of reliance clause that we find in Schlumberger and in this case and in the GTE Mobilnet case, and in the IKON case, and in the Fisher case, and in other cases that we -- that we have cited in our briefs. Here, the Section 10.2 contract disclaimer of reliance language is modeled on a near identical to the language that this Court considered in Schlumberger. Indeed, the 1999 settlement agreement at this case came 18 months after Schlumberger and implements that language almost to a tee. The circumstances here match and indeed surpass those upheld by this Court in Schlumberger. Both sides were represented by highly competent counsel. The negotiation was at arms length. Here a week-long mediation, according to Mr. McAllen, attended by some 30 lawyers and at times 100 people, knowledge and sophisticated business players represented by --

CHIEF JUSTICE JEFFERSON: Well, just to be clear, so Forest Oil could, as long as this language is in place, could lie about prior contamination and tell them -- and I know it's parole evidence -- but

tell Mr. McAllen, "Don't worry about it; there is none. You don't have anything to worry about. This is boilerplate language. Just sign here." And because this disclaimer gets rid of those claims or forced arbitration, he has to go.

MR. HARRISON: Absolutely yes, Your Honor. I do not believe that happened here but in the hypothetical, absolutely. If Mr. McAllen -- a settlement particularly at a mediation, is a give and take. Parties at some point reach a certain dollar amount or other consideration that they are willing to accept that is good enough for them. And if a litigant, here McAllen, disclaims reliance when in fact he is relying, then his lawsuit if he has one is not against the settling party on the other side, but instead against his own lawyers for malpractice for letting him disclaim that reliance and confront the situation that this Court set up in Schlumberger. The settling party on the other side of the equation like Forest Oil and Conoco and Shell and Fina here are entitled to rely on what Mr. McAllen himself represents and that is, that the key is not [inaudible]. You are entitled to achieve that kind of finality, not have after-the-fact second guess based on oral representations that are old and often incorrect.

JUSTICE JOHNSON: Would it make a difference if this were a preprinted contract as opposed to an agreement written after extensive negotiations?

MR. HARRISON: It might, Your Honor. That is where the respondents' argument knew in this Court here, for a reason to remand of conspicuousness might come in. There is a long line of cases dealing with preprinted contracts typically with language on the back of the contract not separated out by a heading that does not call attention to itself. There, I think that you might confront, Your Honor, the conspicuousness problem that you absolutely do not confront in this case. The reason is Mr. McAllen was advised by counsel. He has admitted under oath, in the record, that he was actually aware of the arbitration clause and of the disclaimer of reliance. As a matter of law, this Court's Dresser Industries decision: "Fair notice and conspicuousness requirements are not applicable when the complaining party has actual notice," as Mr. McAllen admitted here and indeed as his brief on the merits, and that is at page 31.

This case, this Court is asked to disregard Schlumberger because the release here in this settlement agreement did not fully and finally resolve once and for all, all matters between the parties. This a key point that the respondents make. But that point makes this a more compelling case for applying the disclaimer of reliance rather than less because in Schlumberger this Court's application of the disclaimer of reliance led to an elimination of claims. Here, this Court's application of the disclaimer of reliance does not eliminate claims, rather, it as the parties agreed to in the 1999 settlement and surface agreement, shifts the formum in which those claims must be brought --

JUSTICE WILLETT: Let's jump quickly to relief, the requested relief.

MR. HARRISON: Yes, Your Honor.

JUSTICE WILLETT: McAllen said that even if we agreed with you on the merits, that you are requesting more relief than we can grant, given the procedural posture of the case, what do you say about that?

MR. HARRISON: Well, I think that is plainly wrong, Your Honor, by the respondents. The relief that we are requesting here is indeed an order compelling arbitration. The further relief that we request, also entirely proper within this Court's jurisdiction, is that this Court also order that the nonsignatories to the arbitration clause, that

their action be stayed and that, Your Honor, is well within this Court's authority. Section 171.025 (a) of the Texas Civil Practice and Remedies Code makes the stay mandatory when an issue subject to arbitration, if there is an order of arbitration or an application for that order, which is what we confront here. This case should have been stayed any of the four times that Forest asked the trial court to stay under that section.

But furthermore, Your Honor, in the In Re Ganon case and just a month and a half ago in Justice Brister's In Re Merrill Lynch decision, this Court made very clear that, quote, Assuming the same issues must be decided both in arbitration and in court, we hold that the latter must be stayed until the former is completed. There is a very simple reason for that. A stay of litigation ensures that the plaintiffs do not have their contract and defeat it, too. They can't do an end-run around their agreement to arbitrate. This Court absolutely has that authority, Your Honor. I'll reserve the rest of my time if there are more questions. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, counselor. The Court is now ready to hear argument from the respondents.

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

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE RESPONDENT

MR. ENOCH: May it please the Court. My name is Craig Enoch, and I am here representing James McAllen and the interest that he signed on behalf of on the settlement agreement.

Looking at the brief, it really -- well, back in the early '80s, there was a movie called "Absence of Malice" and Paul Newman played the son of a mafia chieftain who woke up one morning and found he was on the front page of the newspaper indicating that he was somehow implicated in a murder that occurred, and the plot of the rest of the movie was simply this: what the newspaper said was accurate but it wasn't true. What we have is good briefing, marvelous briefing that is accurate but we believe based on the record, based on the law is simply not leading to the correct conclusion.

So I want to make two points in response, first, about the truth of the facts in the record, and two, about the truth of the law in Schlumberger. First, let's be clear. This case is not about avoiding a settlement agreement. We are not here trying to side aside a settlement agreement. This case is not even about avoiding a new agreement about what we will do about cleanup, site cleanup, surface cleanup, on an ongoing forward basis with the oil companies that are producing and pumping on our property. This is only an argument, only a dispute about whether James McAllen and the interests he signed on behalf of is prohibited as a matter of law from asserting that he was fraudulently induced in executing an arbitration agreement over an existing personal injury, existing environmental injury claim.

JUSTICE O'NEILL: But doesn't the nature of a disclaimer of reliance, by it's very nature, you are trying to take care of just the situation when somebody says "but what you told me wasn't right." I mean, what is the purpose of the disclaimer of reliance clause if not to prevent the type of claim he is making here today.

MR. ENOCH: Your Honor, I think there is a value to the purpose of

reliance, and Schlumberger answered that question. There ought to be a mechanism, and Schlumberger wrestled over this. A mechanism whereby the parties in the contract can actually, finally, and fully dispose of their dispute. That was Schlumberger's issue. But Schlumberger was very careful to note there is a tension here because we don't want someone in the middle of the negotiations to make a representation about a fact, about a fact that they know will be relied upon and then rely on a disclaimer of reliance in the contract to say Kings X there is no fraud in inducement, which is exactly the hypothetical the Chief Justice raised. What happens if I know I am telling a lie? What happens if I know they are relying on it? Does reliance do away with it?

JUSTICE O'NEILL: But that is the purpose of putting the clause in there. I mean, you got lawyers and you represent all sorts of things. I guess what I'm worried about is the exception swallowing the rule because someone can always come back and say they misrepresented this, they misrepresented that fraud in inducement. And it seems like you've watered down these disclaimers considerably.

MR. ENOCH: Your Honor, that's why Schlumberger was very careful to analyze what it was doing. It knew, the Court knew, in Schlumberger, that that it was possible for an exception to swallow the rule, vice versa. The Court also knew that it was possible that if you didn't have restraints on fraud in inducement, it could swallow any effort on the part of people to solve their claim.

JUSTICE O'NEILL: How would you construct, how would you write this clause if you wanted to prevent this type of argument they made? Would you say, these representations have been made to mean specifically and I am relying -- disclaiming a reliance on them and settling this suit? Would you require every single representation to be set out in the agreement before the disclaimer?

MR. ENOCH: Your Honor, I believe that's what they would like to you to conclude, that you have to look at what the reliance disclaimer says. What Schlumberger says is, it's not the language in the reli, disclaimer. It is the circumstances within which that disclaimer is executed. So, what is it? What is the representation that's being complained about? What is the reliance that's being complained about? What is the subject matter being complained about? In Schlumberger, the Court clearly states the Swansons never believed what Schlumberger was saying about the value and feasibility of the sea min, sea diamond mining.

Here, in this case, there was not a dispute about radioactive pipe being delivered to the property or even iron sponge, which is toxic, being buried on the property. The dispute was royalties. They walked into settlement on a dispute on royalties. This is not a case where I am trying to get out of a settlement agreement because they misrepresented something about no environmental problems on the property or even we're not gonna settle personal injury.

JUSTICE O'NEILL: But as part of the whole settlement package, a piece of it was any future disputes we had about anything, we're going to arbitrate?

MR. ENOCH: Correct.

JUSTICE O'NEILL: And so you can't say that wasn't part of the settlement package thing.

MR. ENOCH: Your Honor, that is correct. Future disputes. We are not here arguing to set aside this agreement on an ongoing basis. What you're gonna do when you are out there on the well site and you're gonna clean up after yourselves. The representation, the representation, I'm not signing this arbitration agreement unless you

tell me that you are not aware of any environmental problems on the property. And the answer is, we're not aware, sign it. It's an existing, it's an existing claim. They knew he was -- James McAllen was interested on it. They assured him it wasn't signed and now they say because he agreed on an ongoing basis --

JUSTICE BRISTER: But without many lawyers in the room, is it too much to ask, okay, if that's what you are relying on, put that one in and count.

MR. ENOCH: Well, actually I think it makes a different point, Your Honor. With that many lawyers in the room, you'd think there would be someone that they brought at some point in two years to say that conversation did not occur.

JUSTICE GREEN: But isn't that exactly what the parties intended anyway, in the sense that it appears to me that the arbitration provision says that any of these kinds of little disputes that may arise, I mean the scope of the arbitration provision, the scope of the arbitration agreement, is to be decided by the arbitrator.

MR. ENOCH: Your Honor, we are not here talking about the scope of the arbitration agreement but to address your question. Suppose that it is clear from the evidence that there is a this, there is a lack of knowledge of one of the parties agreeing to the contract, the other party knows that they don't have that information, and they represent -- neither of us have information indicating there is an existing claim. Let's all decide to arbitrate. The question is not the scope of the arbitration. The question is, we are going to decide to arbitrate on any future claims arising under the mutual understanding that neither of us know of any claims existing. What happens if one party knows I delivered radioactive pipe to the well site and knows that I buried stuff at the well site and because he is asked, the other side has asked, I know he does not know that we have done that.

JUSTICE HECHT: Had the pipe been tested at that point?

MR. ENOCH: Yes, Your Honor. There is regulation about pipes that come out of the ground. In this area, it is very common for pipe to pick up radioactive material so there is a requirement for testing.

JUSTICE HECHT: So they knew at the time of the settlement or before that there was a greater residual in the pipe than there was supposed to be?

MR. ENOCH: Yes, Your Honor. There is evidence, and I believe it's at volume number 3, if I recall correctly pages 14 and 19 of the reference from their disgruntled employee about other employees who knew about the pipe.

JUSTICE HECHT: I know you argue the Warehouser Associates case that I mentioned --

MR. ENOCH: Yes, Your Honor.

JUSTICE HECHT: -- in your brief, the petitioner says it is different, partially because of the disclaimer, but what is your response to all that?

MR. ENOCH: Your Honor, my point would be I think the Fifth Circuit in the Gamex case which we've cited in our brief and the 14th Court of Appeals in Celotex, and the Warehouser case, both look at Schlumberger and I think they do a pretty good job of working through the elements of Schlumberger to come to the conclusion that they do in both cases, that the representation that was made is not going to be barred from being asserted based on simply a clause that disclaims reliance.

JUSTICE HECHT: One difference we haven't talked about very much, in Schlumberger, as you remember, nobody really knew. I mean, people thought they knew but one side thought there was, you know, diamonds

galore in the seabed and the other side thought it was all a big bogus hoax. And so there was a huge disagreement, and it was impossible to tell for sure. Whereas, in this case, the positions were a little closer in that, you know, there is some knowledge on both parts, on your client's part, that maybe there are issues out there, and that is why he reserved them. There is some knowledge on the part of the operator, that they put the pipe in that they did, tested it and it came out the way it did.

I am wondering if you can explain Schlumberger by saying, well, when people just don't know, the disclaimer is going to be operative, but if one person at the table has pecuilarly, peculiar knowledge of the situation, we are more reluctant to do that. In the Celotex case, there is evidence that somebody went out and found asbestos and then covered it up or something. What is your view of that?

MR. ENOCH: Your Honor, I think Celotex is very, very close to the facts of this case. I think my answer is going back to Schlumberger. And as explained by the 14th Court and the Fifth Circuit and their two cases that follow up on it, it is not the language. It is not the language. Because I guess it is Prudential v. Jefferson or Jefferson v. Prudential, I don't remember, the, the whole issue there was, we are going to buy the building as is and oh by the way you can do your inspections. The whole issue in that and it comes back in Dallas Farm Machinery, there is just an inherent problem policy-wise for the Court to say that an individual knowing that they are misrepresenting a state of facts, that they know the other side will rely on to escape fraud in inducement simply because there is a generic provision that says we are not relying on them. It is facetious to say, because he says I relied on the advice of my lawyers, I can't sue them, not sue them, cannot escape the arbitration, when they specifically represented they knew of no environmental problems out there when they are the only ones who could do it. Schlumberger -- I'm sorry.

CHIEF JUSTICE JEFFERSON: But what about when they don't know. I mean, and it is unclear, we just don't know. Would they have a duty to investigate before they can believe that this disclaimer is going to be affected?

MR. ENOCH: We don't reach that question because they did know and the records says so.

CHIEF JUSTICE JEFFERSON: But what would happen --

MR. ENOCH: The question about reckless disregard, I'm not sure the Court would go there. I am not sure the Court would need to go to reckless disregard. Once the record demonstrates they didn't have knowledge of what -- they didn't have a basis to misrepresent. It seems to me then a disclaim of reliance plays into the rule. The issue in Schlumberger was in fact, the record was clear. Nobody knew what this was going to be worth that is why they were having a fight. And then they come along, Swansons come along and say, Oh, by the way, we think they really knew what it was worth later on, and so we get out of this because it was really a different value. What about the central subject of the settlement was the value and the misrepresentation they claimed was a misrepresentation of value. There is no way. There is no way a representation about environmental harm on their property was central to the settlement because the settlement specifically excluded. If you look at the language that I provided, it says --

JUSTICE O'NEILL: That doesn't mean it wasn't central to the settlement. I mean, it may have been a very big piece that they wanted to arbitrate any future disputes. We want to get out of this county, and we want to be in Houston, and we are giving up more in the

settlement so that we know if we have any more future disputes with this people. I mean, why isn't that a bit of a quid pro quo for the underlying settlement in itself?

MR. ENOCH: Let's move forward. The settlement had those royalties. The question is, does the --- the new reliance really apply to their agreement to arbitrate future disputes. I suggest even if it goes to their agreement to arbitrate future disputes, this Court would not say that because they executed this new reliance on representations, would not say that if there is an existing dispute out there, not a dispute, an existing environmental problem on the property that they new about before the settlement of this case and Mr. McAllen made it clear to them he was not executing the arbitration agreement if they new of any problems out there and they said no go ahead and sign. We have made whatever step, whatever requirements Schlumberger requires to make in this record to set that aside.

JUSTICE O'NEILL: But how easy would it be to say, you know what, in connection with this settlement, we want you to make a representation that to your knowledge there is nothing out there right now. I mean, couldn't that be made a part of the agreement?

MR. ENOCH: [inaudible] in hindsight is helpful. The question is does it meet the Schlumberger test, or rather does the Schlumberger test satisfied by them to keep Mr. McAllen from asserting his right to not go to arbitration on his existing claims at the time the case was settled.

JUSTICE WAINWRIGHT: If the rule were that if two sophisticated parties sit down, represented by counsel, and sign a disclaimer that it will be enforced come hell or high water, doesn't that send the message and create the incentive that both sides must do their due diligence before they sign them? It just makes everybody do their homework. Wouldn't that be the case, and what would be wrong with such, such a position?

MR. ENOCH: Your Honor, I think Schlumberger answers the question. They were all sophisticated parties. I am not here to say that James McAllen is not a sophisticated party. But Schlumberger does require the parties to be knowledgeable in the area that they are settling. In Schlumberger, these parties were knowledgeable about the fact that they didn't know the values they were settling.

JUSTICE WAINWRIGHT: I'm sorry to interrupt, counsel. Put Schlumberger to the side. My question is a conceptual one. What do you think? What is wrong with that rule? A disclaimer will be enforced absolutely, the parties sit down, and sign it and it is broad enough and specific enough to apply to the dispute. And then the incentive, the message gets sent that you've got to do your homework because you signed the disclaimer. The argument being made against it, well they may lie. The argument can also come from the other side. Well, you may lie. If either side lies then it seems like both can just say write the disclaimer out of the contract.

MR. ENOCH: Your Honor --

JUSTICE WAINWRIGHT: but a rule that says do your homework if you sign the disclaimer.

MR. ENOCH: To overrule Jefferson, Prudential v. Jefferson you would have to overrule Dallas Machinery. You would have to overrule a number of cases to get there. In this case, I would say the distinction would be, if it's something I could know then I could certainly waive any interest I have on that plane. But what happens if it is something that under the record I do not know and under the record, in inspection, even the right of inspection, I could not have discovered

in the right of Inspection. This acreage is 36,000 acres. They're burying stuff --

JUSTICE WILLETT: Let me take you back to request of release. Mr. Harrison says that if we agree with him on the effect of the disclaimer and how that defeats a reliance on a fraudulent transfer claim, that we compel as your signatories and stay as to nonsignatories and that's the way we go. But you say, he has requested more relief than that given the procedural posture of this case, procedurally entitled to. So tell me if we agree with him in the preclusive effect of the disclaimer, what remains of your claims and how do we treat this?

MR. ENOCH: Your Honor, we have not argued the scope of the arbitration, it's up here. I do believe a number of the issues based on the record. If you decide against our position on the disclaimer, we believe some of the other issues can be decided based on law questions not factual sufficiency review. But we do raise this question, the pipe that was covered with this radioactive material was not at that site based on any of the drilling or lease operations. They were delivered to the site at the request of James McAllen for the purposes of building a rhino pen that was out there. So there is clearly a question about what arises under the lease. It just so happened that it was Forest Oil that delivered the pipe. This was not pipe indicated to be used on the property at all, it was just delivered in warehouse and used. Other property where this pipe was delivered, was a pipe that was on property that was not under this particular responsibility in lease, so those are a couple of the questions about where we think the trial judge's review of the evidence is pertinent. But I do believe many of the issues probably the Court can conclude as a matter of law if you want to take the time to resolve all those issues.

CHIEF JUSTICE JEFFERSON: Any further questions?

MR. ENOCH: Your Honor, as I say, I believe the question is, we have accurate information, but from that point of view, is it the truth? And I think Schlumberger decides this case. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you.

REBUTTAL ARGUMENT OF GEOFFREY L. HARRISON ON BEHALF OF THE PETITIONER

MR. HARRISON: May it please the Court.

If I might begin with the exchange with Justice Hecht. Schlumberger, Your Honor, at page 178 of the opinion tells us this: "Accordingly, we assume as we must that Schlumberger misrepresented the project's technological feasibility and commercial viability and that such misrepresentations are actionable as fraudulent inducement." Schlumberger cannot be distinguished on that basis.

JUSTICE HECHT: But it still, I mean, obviously there wouldn't be a case if there weren't some evidence of fraud. If you don't make an argument of fraud then the whole case would go away. But still, there was a lot of disparity and a lot of uncertainty about what was down there. As compared to Prudential, where the seller knew there was probably asbestos in the building, but he didn't want to go look, that buyer knew the same thing, or could have known the same thing, and here where, you know, the information level is closer [inaudible].

MR. HARRISON: Prudential, of course, do not have the language that we confront in this case and in Schlumberger. But further, Your Honor, I do not think that is quite right even in Schlumberger. We do have the

language I just read, but beyond that, Schlumberger also discusses that Schlumberger had reports that had been requested by the Swansons that were not provided to the Swansons. Schlumberger absolutely had information that it did not give to the Swansons. That is not a basis to distinguish this case at all.

But furthermore, I believe that Justice O' Neill, your exchange is very important here, particularly in light of one of the issues that respondents highlight in their briefs, and that is the question of whether the subject matter here is somehow so different. And the answer is that's not right at all for the respondents. Your Honor is exactly on point. The record at Reporter's Record volume 2, page 45, and again at pages 110 and 112 contains Mr. McAllen's admission that the 1990 litigation was about, quote, issues of royalties, issues of surface agreements. Further, McAllen testified that, quote, surface issues were, quote, very, very significant -- very, very important, end quote, critical to him in settling that prior litigation therein entire 1999 surface agreement that is part of the 1999 settlement agreement that covers exactly surface issues that are issues in this case. The subject matter of the 1999 confidential mediation from which all of the alleged oral representations at issue here come absolutely concern the very same surface issues that we confront here.

But if I could, Justice Willett, again, on the question that you raise about whether there is authority here in this Court to address the questions, yes, I think the Capitol Brick case out of this Court in 1986 certainly indicates this Court has authority to address rather than remand, particularly given that the issues as appropriately counsel opposite concedes, are issues that can be decided on the law. The two issues that they do point to you in their brief are of scope and of conspicuousness. We discussed conspicuousness earlier. The scope question is really no question at all for two reasons. One, Mr. McAllen has testified and admitted that his claims in this case are within the scope of the arbitration clause. They must --

JUSTICE MEDINA: Excuse me, just real quickly before we run out of time here. Environmental claims are often very, very difficult to discover. They manifest themselves years later after the environmental contamination in some instances. The party can do all the due diligence that is required under their corporate policy or even under environmental laws, and the contamination is still not discovered until years later, and I think that is what the argument is on the other side, that one side had knowledge of some alleged contamination and didn't divulge it to the other side. It is irrespective of what due diligence may have been done. It could not have been discovered. What is wrong was setting aside that specific provision of the arbitration agreement which it makes some very compelling argument on why it should be enforced in its entirety, and what is wrong was setting that side to discover whether or not there was some type of fraud in the inducement of this contract.

MR. HARRISON: Let me finish for purposes of answering the question, accept your thesis, though I think the record in this case disproves that. But accepting that here, two things. First, I think that Justice Brister's question which incidentally is the last question that Mr. McAllen was asked by me at the motion to compel hearing is quite telling, and that was if what you are saying is really true, that this oral representation was made and you relied on it, then why didn't you ask the other side to put that representation in warranty? And as counsel opposite said almost the exact same words, Mr. McAllen's answer was "Good question." He doesn't have an answer for it, so in this case,

we have serious doubt about the representation the way it was made. And I think that is the way though, Your Honor, to answer and address the situation that you posit, and that is, you have sophisticated parties represented by counsels sitting at a bargaining table, hear for a week, with the mediator's assistance. Let those parties decide what they will agree to or not. Let them strike their own bargain and let this Court enforce that bargain that those sophisticated parties represented by counsel made. Here, if Mr. McAllen felt that there were surface issues that were important, he did, and if it really mattered to him, it didn't, but if it really mattered to him, if he really relied, then don't say you're not relying and call it out, the specific representation warranty that you need. This Court should enforce the bargain that these parties made.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The case is submitted, and the Court will take a brief recess.

SPEAKER: All rise.

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