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Supreme Court of Texas.
Frymire Engineering Company, Inc. by and through Real Party in Interst, Liberty
Mutual Insurance Company, Petitioner,
v.
Jomar International, Ltd. and Mixer S.R.L., Respondents.
No. 06-0755.

December 4, 2007

Appearances:
Stewart K. Smith, Law Offices of Robert E. Yates, Irving, TX, for petitioner.
Hilaree A. Casada, Hermes Sargent Bates, L.L.P., Dallas, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Texas Supreme Court Justices, En Banc.

CONTENTS



CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 06-0755 Frymire Engineering Company versus Jomar International.
COURT MARSHAL: May it please the Court. Mr. Smith will present argument for the petitioners. Petitioners have reserved five minutes for rebuttal.

## ORAL ARGUMENT OF STEWART K. SMITH ON BEHALF OF THE PETITIONER

MR. SMITH: May it please the Court. My name is Stewart Smith. I represent the petitioner Frymire Engineering Company by and through Liberty Mutual Insurance Company in this matter. This case is before the Court on appeal with simply one issue and that was whether or not the trial court erred in granting the respondent's traditional and no-evidence motions for summary judgment. At trial, the respondents asserted traditional and no-evidence summary judgment on three grounds. The first ground was that the petitioner did not have standing to sue. The second ground was that petitioner's claims were barred by the Rules of Contribution. The third ground was that there was no evidence of causation, either proximate cause or producing cause. The Court of Appeals didn't address the last two elements because they are affirm on

the standing issue and this case is now before this Court. In looking -

JUSTICE HECHT: Or if, if you were to prevail on that issue, the case would have to go back for review of the other two issues.

MR. SMITH: Your Honors, in looking at this case, the thing that first of all jumps out is that if the Court of Appeals is right that my client made a voluntary payment in this case, I would want you to notice that the contract that my client was operating under paid my client a total of 128,000 dollars. The loss in this case was 458,000 dollars and some change so if the Court of Appeals is right that my client made a voluntary payment, then my client literally accepted 128,000 dollars, and by the way, that wasn't profit, that's just simply money they expect-- they, they accepted for the job. You know, out of which they take their expenses but if we look at that, then the Court of Appeals would hold that we accepted 128,000 dollars for the privilege of paying out 458,000 dollars. I would suggest here that common sense would tell us that obviously we didn't do that voluntarily. We did that pursuant to a contract and the contract has remained to this case and it's important because it satisfies the second element of the doctrine of equitable subrogation, that is that the payment has to be made involuntary.

JUSTICE MEDINA: Is this any different from the insurance company paying the damages from the loss resulting from forged insured then later trying to seek subrogation against the manufacturer of an alleged defective product?

MR. SMITH: The principals are, are equal and that is that here the, the a, the, the payment that was made, was made pursuant to a contract just like an insurance company made payments pursuant to its a, a contract of insurance.

JUSTICE MEDINA: And, and those contracts there's a subrogation plan since this insurance carrier have the right to subrogate on behalf of this insurers or similar calls in this contract?

MR. SMITH: There isn't but -

JUSTICE MEDINA: Is there a need to be one, for an equitable subrogation claim?

MR. SMITH: Absolutely not. There is language in the, in, in petitioner's brief that talks about how this Court has recognized that there is no boundaries to the elements of subrogation. In other words, the doctrine of equitable subrogation is not limited to a specific context but the Courts have said over and over again that in any context where equity demands that when someone pays the debt for which someone else is primarily liable and the person who pays that debt didn't do so voluntarily then they can avail themselves of the doctrine of equitable subrogation.

JUSTICE HECHT: Is there still a dispute whether the valve was defectively designed? We never have gotten to that part too.

MR. SMITH: Well, that's-- what's important about the case. This case is that, since it's an appeal of a summary judgment, when we look at the traditional motion for summary judgment, the standard is every reasonable inference has to be indulged in favor, must be indulged in favor of my client and the evidence must be viewed in the light most favorable to my client and when we look at the no-evidence, the only burden my client has is to present something as a little bit more than a scintilla of evidence that there's material issue of genuine fact and when we looked at the record here, this whole case turns on the fact that there if, if respondents were to prevail, they have to establish as a matter of law that my client was a tortfeasor and that's interesting because the only evidence in, in the record concerning the

installation of the Add-A-Valve was my client's experts who said that the Add-A-Valve wasn't installed properly according to the manufacturer's instructions. There is no-- you will find no statement from a manufacturer's rep from the respondents saying that the valve was not installed properly. In fact, you won't find any statement from any witness or any claim from any witness that the valve was installed improperly.

CHIEF JUSTICE JEFFERSON: But is that right under law on a basis for summary judgment, it doesn't matter. Then-- I mean, they're not basing their contention as I understood it on whether or not the valve was defective but just said, you don't have this subrogation law, I might be wrong that?

MR. SMITH: Well, the two are related because it goes to whether or not we paid the debt on which they were primarily liable. Because in fact, according to the record, in fact you'll find the uncontroverted evidence in the record, is that the cause in fact of this loss was the defective valve. Our expert's testimony that the valve was defective is not controverted by any other evidence in the record nor is there any claim by anyone that the valve was not defective. That if-

JUSTICE GREEN: But your, but your CGL policy made to cover Frymire, with Frymire was not negligent for ...

MR. SMITH: Yeah. That was and, and your Honor, that's-- this is outside the record. That issue was not raised at the trial court. However, if we, if,-- I mean, we were never asked to produce the policy or coverage or questions were not brought up. If they were brought up, what would have happened was that, you would have seen that, that policy in fact was endorsed to provide contractual liability coverage for Frymire service contracts. It is true as a general principle that general liability policies don't provide coverage for contractual liabilities but as your Honor knows, a general liability policy can be endorsed in countless number of ways and in this case, it was endorsed by by client.

CHIEF JUSTICE JEFFERSON: But, but, but we don't have that in the record.

MR. SMITH: It's not in the record, but neither was it raised in the record that there was a lack of coverage. The Court of Appeals misapplied this Court's decision in Smart versus Tower Land Investment Company. It's in the brief but basically, the Court of Appeals quoted this language in Smart that the equitable subrogation maybe invoked to prevent unjust enrichment when one person confers upon another of benefit and that Court of Appeals highlighted this language that is not required by illegal duty or contract. The Court of Appeals then went on to seem to argue that or seemed to find that because we had a contract with Renaissance and with the general contractor for Renaissance that therefore we made a contract or we made a payment pursuant to illegal duty or contract and violated this dicta language from Smart but the problem with their application is that language is referring to a debt between the equitable subrogor and the debtor not between the equitable submortgagee and the equitable subrogor which is the debt between or the contract between Frymire and the Renaissance Hotel in this case. If we were to follow the Court of Appeal's reasoning, we would in fact never ever have the doctrine of equitable subrogation because it would be impossible to prove the second element of the subrogation. That is that the payment must be made involuntarily. But the Court of Appeals further misapplied Smart because when you read through Smart, you'll find that the Court, this Court talked about the doctrine of equitable subrogation but the reason why they decline to left Tower Land

Investment unveil itself of the doctrine in this particular case was because the mortgage contract in that case expressly precluded personal liability from Mr. Smart for unpaid property taxes which was what Tower was seeking to be reimbursed for but the discussion in that case is very germane to this case and that it helps us answer another question that the respondents raised in this case and that is the respondent said, well, another reason why you can't apply the doctrine of equitable subrogation in this case is because in this case, give the equitable subrogee paid money directly to the equitable subrogor instead of paying money to someone else on behalf of the equitable subrogor and the respondents alleged that that have never been done before but in this Court's discussion in the Smart versus Towerr case, this Court has actually, this Court actually set forth the laundry list of cases where in fact that has been done. It has been done in the context of the mortgagee-mortgagor situation where the mortgagee is seeking reimbursement for taxes, property taxes is paid from the mortgagor and this Court set forth a laundry list of cases where that was allowed and in those cases, the mortgagee pays the property tax directly to the taxing authority who is in effect the equitable subrogor. The mortgagee then steps into the shoes of the taxing authority and subrogates against the mortgagee. That's exactly -

JUSTICE BRISTER: Was your client liable in tort to the Renaissance Hotel as well as contract?

MR. SMITH: That is, that is, that was the-- in short, no, your Honor and you'll that there's no evidence in the record to support that. The only claim of negligence made by the respondents against us is that the valve was negligently installed and again when you review the record, you'll find that the only evidence on that issue -

JUSTICE BRISTER: I mean to, to Renaissance, even if you hadn't to agreed to contractual indemnity. Renaissance could have sued you-- your client.

MR. SMITH: No, not in tort. No sir.

JUSTICE BRISTER: Because you can, you can negligently install valves and where you negligently installed them, you're not liable for it?

MR. SMITH: The only evidence in the record is that the valve was properly installed but according to the manufacturer's instructions.

JUSTICE BRISTER: Well, that is product liability when you install the product too.

MR. SMITH: Right.

JUSTICE BRISTER: And product liability-- do damage to other property, the rest of the hotel.

MR. SMITH: Right.

JUSTICE BRISTER: And so that's a tort.

MR. SMITH: Yes, your Honor that is a tort and -

JUSTICE: I mean I'm, I'm just with the, the-- I'm not, I'm trying to help you not to hurt you, I think -

MR. SMITH: Sure.

JUSTICE BRISTER: I mean that CA said, "Oh no, this was just some voluntary contractual liability," but if you hadn't sign for indemnity and you go in there to repair a pipe and flood the hotel to two and a half million dollars, you're liable in tort whatever your contract says. Aren't you? And, and was there some disclaimer or something that was involved in this case that may meant Frymire was not liable in tort with the Renaissance?

MR. SMITH: There's no evidence that Frymire was liable in tort. There's no evidence that the valve was not installed properly. There's

no evidence that the valve was negligently installed.

JUSTICE BRISTER: But if you installed a defective product, you would be liable for it. Whether your -

MR. SMITH: Not necessarily.

JUSTICE BRISTER: Whether your negligent or not?

MR. SMITH: The defect might be, it could be a latent defect. It could be something that isn't discoverable. I, I would disagree that we would necessarily be liable just for the act of installing a defective product.

CHIEF JUSTICE JEFFERSON: But if you were liable in tort you would be settling joint tortfeasors [inaudible]

MR. SMITH: Well, ...

CHIEF JUSTICE JEFFERSON: And, and, and therefore your claim would be barred by Contribution, Tax Contribution law. Wasn't that right?

MR. SMITH: Perhaps, although in the Keck case, that's not the approach that this Court took because in the Keck case, the excess insurer the primary-- the excess insurer asked to sue the primary insurer under the doctrine of an equitable subrogation. The primary insurer made a counterclaim saying that the excess insurer had comparative negligence and in that situation, this Court did not hold that the, the excess insurer but was barred from or they had no standing to sue under the doctrine of equitable subrogation on the basis that contribution rules were being violated. What this Court held is that those issues should be submitted through the trier of fact. The excess' own negligent should be submitted to the trier of fact as a defense to the doctrine of equitable subrogation and presumably depending upon how much responsibility was assessed to each party that would then determine whether or not the doctrine was viable.

CHIEF JUSTICE JEFFERSON: Further questions?

MR. SMITH: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you. The Court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Ms. Casada will present argument for the respondents.

ORAL ARGUMENT OF HILAREE A. CASADA ON BEHALF OF THE RESPONDENT

MS. A. CASADA: May it please the Court. May name is Hilaree Casada and I represent Jomar International on this, in this case but I'm here today arguing on behalf of both respondents. I'd like to in my time before the Court as well as answer any questions you have; I'd like to focus on really the main issues in these cases as respondents see them. That in what I understand what this case really is, this case is not an equitable subrogation case. This is a case where we have a party seeking to avoid its freely and voluntarily bargained for contract liability under the guise of equitable subrogation.

JUSTICE MEDINA: Did the manufacturer of the defective product should get a free pass on this type of case?

MS. CASADA: They should, they should not get a free pass in this type of cases. However, they should not be held, your Honor, to a contract that was negotiated without their input, that was negotiated based on the con-- the general contractors, the Frymire, made this, this contract in order to hedge its paths, in order to make sure that, you know, it can get this contract, make some money, and then be -

JUSTICE BRISTER: You did mention-- say indemnity, it didn't agree to anything other than it would have been liable for a common commercial law, right?

MS. CASADA: This it, it, it is as said it would be inden-- it would indemnify Renaissance or any in our claims.

JUSTICE BRISTER: If that-- their putting, their putting in it a water pipe. If the water pipe bust and floods the place, they have to pay for it, even if whether is an indemnity contract or not.

MS. CASADA: Well, I, I agree with you in that regard, your Honor, that in this case, our first contention is equitable subrogation doesn't apply because the debt we're dealing with is this contractual debt that they bargained for. However, they also could have been, been sued exactly like you asked the petitioners. They could have been sued by Renaissance in tort. They could have been a joint tortfeasor in this case and the -

JUSTICE BRISTER: But if they're right, that they were an innocent retailer, then they got a statutory cause of action against you. You're right, joint tortfeasors can't get contributions on lots of cases but if they are an innocent retailer selling a defective product which I understand is precisely their claim here, of course, they can get-- legislature says so but before that, the common law said so.

MS. A. CASADA: But that's not what they've done here. They have -

JUSTICE BRISTER: Well, the whole deal of the Court of Appeals' opinion is somehow this was a voluntary undertaking that they just volunteered. We'd like to make the Renaissance Hotel happy. That's not-- nobody had ever contracted anything before. Renaissance would have done exactly what they did say, "Pay for the damage you've done and they would in turn grab you and say, pay for the damage that your product that we installed here." So I'm trying to understand why anybody thinks they volunteered?

MS. CASADA: Well, they volunteered in this case quite, quite frankly because they contracted with Renaissance to cover these types of claims, these types of damage.

JUSTICE BRISTER: And your position-- and you honestly believe they wouldn't have own Renaissance a dime-- but for the contractual indemnity?

MS. CASADA: No, your Honor, that's not, that's not what I'm saying at all. It, it's just in this case, it didn't get to the point where Renaissance picked its tortfeasors, pick its defendants and sued.

JUSTICE BRISTER: And, and equitable subrogation doesn't require that you wait until the lawsuits are filed and then we pay the lawyers 100,000 dollars then okay, well now it's not voluntary anymore.

MS. CASADA: But equitable -

JUSTICE BRISTER: I mean you can settle knowing you're going to get sued, right? And still get equitable subrogation?

MS. CASADA: In the right context. And in this context first, the first step we have to do is show that you are primarily liable. That you, that you settled a debt -

JUSTICE BRISTER: Who else has been liable for this flood?

MS. CASADA: Well, that's not the, the debt that we're looking at for equitable subrogation. The debt we are looking at is the contract at -

JUSTICE BRISTER: But my question, who else would have been liable for the flood?

MS. CASADA: Well, in this case, there could have been the installation could have been negligent. There is actually evidence in the record that if, if the issues had been the, the merits and, and the

liability aspects which they weren't at the summary judgment phase. If they had been, there could have been more evidence brought in. But even if you look at the admissions on clerk's record on 31, Renaissance inserted that Frymire was responsible for the property damage. They admitted that. It is not limited to only contractually liable. That could be tort liable. The experts themselves specifically Spruiell the second expert that you'll find at the clerk's record on page 149.

JUSTICE HECHT: Let me ask you, if the, if the hotel would [inaudible] and it's not as Frymire's fault, let us just assume -

MS. CASADA: Okay.

JUSTICE: And it was not through installer's fault it and there it was the manufacturer of a product or product manufacturer's fault. And the contractor stands to the loss and says, "Okay, it happened on our watch. We were there. We'll pay you." Why shouldn't the product manufacturer have to cover that loss because it was really their fault?

MS. CASADA: Because issue of equitable subrogation is, is, is-- that would be an expanding the doctrine of equitable subrogation that I do think this Court or any Texas Court had-- has contemplated in this case. This is different from the excess insurance situation.

JUSTICE HECHT: I don't see how this expanding if you see the debt as the debt that the product manufacturer owes for the loss. If that's the debt, then the contractor is answering for that debt, the debt of another. Why shouldn't he be able to recover against that debtor?

MS. CASADA: Well, in this case your Honor, I, I would respectfully disagree that that's the debt we are dealing with and I, I think that's where the parties have really been confused throughout these in both sides.

JUSTICE HECHT: And I, I that's the part I'm having trouble understanding. Because it seems to me, its obvious that the debt is what the person who causes the loss, owes the person who suffers and it seems to me that's the debtor and if that's the case, then it looks to me like this is classic subrogation.

MS. CASADA: Well, well your Honor, it seems that, it's kind of a circular argument. Our, our, our contention is that indebted issue was the contractual debt and obligations and liability that Frymire on its own contracted with Price Woods and thereby Renaissance as part of the process of, of getting this job. If on the one hand, if, if you look at the debt that way, this is a contractual debt and it was only Frymire's debt. Jomar and Mixer were not parties to that contract. They were not parties to that debt. However, if you take it out and say, the debts distort the damage from, from, from the water damage. They still do not get, unfortunately, in this situation back around to where Jomar and Mixer are then liable and that's because if you're looking at it as well as they extinguish this tort debt, well who's, who's, who they were standing in the shoes of?

JUSTICE WILLETT: How about this, is the hotel's own insurance company had pointed out money to make the repairs, could they have gone after your client?

MS. CASADA: Haven't thought about that.

JUSTICE WILLETT: You -

MS. CASADA: Then if, if the hotel's insurance company had gone ahead and pay. Yes, in that case, that would have been -

JUSTICE WILLETT: How is this any different? In short, you say that the voluntary contract with Price Woods defeats equitable subrogation but insurance companies everyday of the week seek subrogation based on voluntary payments they made under insurance contracts, say voluntarily entered in to.

MS. CASADA: Well, the main difference is that here Frymire settled with Renaissance. They did not pay on behalf of Renaissance. They are not an insurance company. Frymire's not, Frymire's not an insurance company and then the insurance context, the insurer in, in, in your -

JUSTICE BRISTER: But the, but the indemnity contract only said Frymire and Renaissance to say, "Who is going to get the insurance to over this?" "Okay, you're going to get." Why is that any different, than if Renaissance had gotten it?

MS. CASADA: Because in this situation, the insurer if you were going to make Frymire the insurer in this case, which is -

JUSTICE BRISTER: Not Frymire insurance company, Liberty.

JUSTICE: Frymire and Renaissance both have insurers they say, "Who's going to get the insurer?" So you get-- we will pay you this much but you get it. Okay, we will get it. So they get it. But why is that any different than if Renaissance have got?

MS. CASADA: Because in the Renaissance context, Renaissance, their insurer would not have been part of the causation at all. And in this case, you've got a situation where Frymire is a potential tortfeasors. They installed the valve and insurer in the typical context is subrogated to the insured on whose behalf it paid. Here, it's Frymire contracted with Renaissance to get a job. They were hired by Renaissance and then they were told, "You have to get insurance if you're going to enter into this," and they did and the insurance covered the loss. Renaissance was for all we can tell from, from the record fully compensated for the loss and, and, and also released all claims related to the loss. So at the end of the day, which I think gets us back to a little bit to Justice Hecht's question, so at the end of the day, even if you're saying this debt is the tort debt which we disagree with, we say when you have to go through the process of figuring out, whether or not equitable subrogation applies. You have to look of what the debt is. But even assuming the debt is a tort debt, that's, that's been taken care of and that brings us around to the issue of contribution and the, the issue of assignment in -

JUSTICE HECHT: I want to ask-- I want to ask you about that in just a second. But it's, its odd that if you think that if the hospital, I'm sorry, if hospital [inaudible] if hotel's insurer pays the loss, it can seek subrogation from the manufacturer because the debt is the manufacturer's debt to the hotel. But if the general contractor pays the loss, it can't because the debt is not the manufacturer's debt. I do not see how the debt shifts depending on who pays the loss.

MS. CASADA: Because in, in the former if the, if the Renaissance filed to claim that they were going to file suit and the insurance companies got involved. At that point in time, the, you know, the, all the potential tortfeasors Frymire, Jomar, Mixer, whoever they maybe could then say, you know what, we wanted to settle this. And at that point, we're joint tortfeasors-- there're joint tortfeasors being sued by the, the, the original plaintiff and the plaintiff in this case should be Renaissance and in this situation, I, I think a good example on analogous example is International Proteins versus Purina case. I think that it's, it's, I know it's not exactly because we're all done with the construction contracted in that situation but it, it is directly on point in that this Court specifically said that the settling defendant tortfeasors can't get contribution from the other defendants and, and there were problems with and, and the Court recognized that you know allowing equitable subrogation in that context cause problems at the trial. I mean, if there were dual roles and dual

paths, then that's exactly what would happen in this case.

JUSTICE HECHT: Well, because if that's the proble that I've, I've never been sure International Proteins was rightly decided or Jenkins or even Mahin but maybe this is because I don't understand it but, but it doesn't make any-- the one distinction between these case and those cases is that one of the possible joint tortfeasors has a contractual obligation to pay the plaintiffs. Does that, does that, is that distinction important? It's one thing to say we don't want the joint tortfeasors arguing among themselves, suing each other over who owes the plaintiff want but if one of them has already paid the plaintiff of contractual obligation then we don't really have that argument.

MS. CASADA: Well, I think that's where, where from respondent's point of view, the petitioner's have been talked really out of both sides of their mouth and why, I think this arguments gets very confusing and circular because at the end of the day, that's, the only difference between this case and you now Smart and Jenkins and Purina is that these, the settlement happened before any sue was filed, before anybody said, "Aha, you're a joint tortfeasors" and at the end of the day, if they are permitted to stand in the shoes of Renaissance, they're going to have the same dual hat problem that we've had in these other cases.

JUSTICE WILLETT: What evidence is there in the record that Frymire acted tortiously at all? What specific record evidence is there of that?

MS. CASADA: Specifically your Honor, there-- it, its, it the main evidence is in the form of the Spruiell and I'm looking for that right now. Courts record 149 Spruiell, one of the experts, discusses the insulation of a separate bulb valve next to the Add-A-Valve and while at the end of the day, his assessment is, hey, that could have caught that caused extra tort but more likely than not, it wasn't that large of a problem and a discrepancy, that evidences Spruiell 's entire extra report goes through and talks about the installation process, the decision to add the separate valve. There is also evidence that it was unclear whether or not the instructions were followed in terms of shutting everything down, shutting the pumps down in this situation. There were also questions that I think Spruiell 's expert report goes through where they talked about there were 12 different valves that they reviewed. The one that that failed but was the only one that only had the sticker sealant in rather than the hard sealer plus the sticker sealer adhesive and so if that was fleshed out than the line if you go to the question of liability on the merits. There, there would be evidence this is joint tortfeasors situation at the end of-

CHIEF JUSTICE JEFFERSON: The argument is that, that doesn't matter right?

MS. CASADA: Correct.

CHIEF JUSTICE JEFFERSON: Even if it were conclusively established that it was all Jomar's fault, bad design, the way this was set up, they're not entitled to contribution or subrogation or anything.

MS. CASADA: Correct your Honor. That's, that's exactly right. In this case, they've set it up where the contracted with Renaissance, they paid under that contract. Now, they come to the Court and say we want to be able to act like the Renaissance even though we're not Renaissance's insurer. We didn't owe Renaissance any duties before we entered into this contract to indemnify them or design them even though, even though we decided on our own to enter into this. Now, we want to allow-- to get paid under the doctrine of equitable subrogation from these manufacturers.

JUSTICE HECHT: Just so out we clear if, part of the question the Chief Justice have asked you, if you lose you still have the position that even if there is a cause of action, we do not know because we didn't do any wrong, is that true or not? You still say that the valve is not defectively designed or ...

MS. CASADA: That's, that really wasn't discussed in the record but I would assume, yes if we got to that point, that's all we would be, yeah without that arguing. But in, in this case, they've set it up wrong. This is an equitable subrogation question and they cannot be equitably subrogated plus it's a ...

JUSTICE HECHT: What should they do, what should Frymire had done if it wanted to make things right with the hotel but it didn't want to pay for something that didn't, it wanted to be reimbursed from the real culprits?

MS. CASADA: They probably should have contracted from the beginning for the indemnity -

JUSTICE HECHT: It seems like, it's kind of perverse to encourage people not to agreed to pay damages.

MS. CASADA: But at the same time, on the flip side, your Honor, we would argue that its, its not appropriate, it's not equitable to expect and allow the contractor to then be able to say, okay, I'm just going to find, I'm at the front, I'm going to go ahead and hedge my bets and I'll pay you if anything happens because then I'm just going to be able to get reimbursed from these other fellows.

JUSTICE BRISTER: Doesn't that wipe out equitable subrogation for all the insurance companies?

MS. CASADA: No, no your Honor it doesn't because in this cas,-- in the excess insurance situation you've got.

JUSTICE BRISTER: Then [inaudible] I'm not primary insurer. A primary insurer agrees by contract to pay somebody's damages that they didn't have any responsibility to pay. They just entered the contract and say, we're going to pay your debts for you and if your right, then we've been wasting time given insurance company's equitable subrogation for years and years and years.

MS. CASADA: I, I, I-

JUSTICE BRISTER: Voluntarily entered into this contract to pay somebody else's debt, how foolish of it?

MS. CASADA: But in the insurance context, there are all of these other duties and, and case law and jurisprudence that, that make the concept of equitable subrogation and these questions of whether or not something was involuntary or voluntary.

JUSTICE BRISTER: The only thing the Court of Appeals held was when his client agreed to take on this and they voluntarily entered into a contract so no equitable subrogations here, that's exactly what an insurance company does when, a lot of the insurer does primary care when it signs an insurance contract.

MS. CASADA: But in Texas, there's a presumption -

JUSTICE BRISTER: That is exactly what they do.

MS. CASADA: Well, in Texas, there's a presumption that when they do that, it's an involuntary payment and we're saying that presumption should be not extended -

JUSTICE BRISTER: Why is that any different? Why is the contract they entered with Renaissance anymore voluntary or less or an insurer than an insurer's agreeing to give somebody liability insurance?

MS. CASADA: Because in that situation, the insured-- or I think you have to-- if you take that you have to assume than in this scenario, Frymire is the insurer and we get back to the whole concept

of if Frymire is the insurer, they're potentially liable and in the, the typical insurance round your insurer is not going to be a tortfeasors. Your insurance company is simply the company that's said, okay, if you do something wrong, we're going to cover it knowing that that we can then go against anybody else that may have, may have done that. That's not the hierarchy that we have in the situation.

JUSTICE WILLETT: Assume that, assume the fact-- assume that the facts are crystal clear, undisputed, this product is the culprit, this product was defective. It caused the accident. We're talking about equity and equitable subrogation and how does letting a manufacturer of a product that is undisputedly flawed. How does letting them escape scot-free, put the equity in equitable subrogation, or this just seems in conflict.

MS. CASADA: My time is up your-- Chief Justice may I answer the question?

CHIEF JUSTICE JEFFERSON: Answer the question please.

MS. A. CASADA: In-- I, I think that, that's, that's with all due respect have a sky is falling, falling kind of mentality where that wouldn't necessarily happen. In this case, Renaissance could have sued Jomar and Mixer and they wouldn't have gotten off scot-free. Now, there would have been arguments to be made that they have been made whole, that they have at least -

JUSTICE WILLETT: - Are you saying your insurance company, your insurance company could have sued them as well, you said earlier is that right?

MS. A. CASADA: Uh hmm.

JUSTICE WILLETT: Okay.

MS. CASADA: Are there any other questions?

JCHIEF JUSTICE JEFFERSON: Thank you.

MS. CASADA: Thank you your Honor.

JUSTICE BRISTER: Mr. Smith, were you all suing for contribution or indemnity?

REBUTTAL ARGUMENT OF STEWART K. SMITH ON BEHALF OF PETITIONER

MR. SMITH: Our action would be more akin to indemnity, your Honor, because we're saying the whole thing was your fault. We're not saying give this part of it back because we are partly at fault. We're saying we weren't at fault at all. You caused the whole thing. We have to pay it because of our contract. So the action would be an indemnity, not contribution.

JUSTICE BRISTER: An indemnity action, we don't have a joint tortfeasors problem.

MR. SMITH: That's correct.

JUSTICE BRISTER: Since whoever is bringing an indemnity has to show that they weren't a tortfeasors.

MR. SMITH: That's correct. And I would also agree that the cases when we talked about the doctrine of equitable subrogation, the cases that this Court have decided that are very closely analogous to this case before you now, are the primary in excess insurer cases because when you look at those cases, you have a contract with excess insurer and the insurer you have a contract to which the primary is not a party too just like in this case, you had a contract with Frymire and Renaissance that the respondents were not a party too, okay? And the

excess makes a payment under that contract and this Court has held that's not a voluntary act, that's pursuant to legal obligations in the contract.

JUSTICE HECHT: I supposed if you're contract had said, we're paying your loss then because we treasure your business, we'll add ten percent to that. You couldn't expect the product manufacturer to pay for that ten percent?

MR. SMITH: No, that would be, that, that would be correct. But again going back to that excess primary insurance equitable subrogation cases, the Court has also noted that when the excess pays under its policy when the damages have been inflated by the primary's mishandling of the underlying litigation, that involuntary payment under the contract has the effect of extinguishing the debt that the primary should have paid in the first place and therefore an equity, the excess may sue, has standing to sue, under the doctrine of equitable subrogation against a primary. That's exactly the same type of case we have here. My clients paid the contract to the hotel involuntary pursuant to their legal obligations of the contract. That con-- that payment had the effect of satisfying the cause and effect of the loss, which was the defective valve and therefore in equity my client should be able to step into the shoes of the hotel and sue the respondents to recover those moneys.

JUSTICE JOHNSON: Counsel has your position changed? The Court of Appeal says, "There is no evidence that Renaissance made any demand upon your client to recover damages. They just made a demand under the contract." That's what his opinion says. Do you agree with that? And my question is going to be if the demand on your client was simply a demand-- a tort demand. Does that change your position?

MR. SMITH: Well, the-- I think our position is the demand that Renaissance made to us was to honor the contract -

JUSTICE JOHNSON: The contract.

MR. SMITH: - which says ...

JUSTICE JOHNSON: That's all the Court of Appeals says, that's all the evidence in the record.

MR. SMITH: And I would agree with that.

JUSTICE JOHNSON: Okay. So this is not-- you didn't pay any wise under a tort.

MR. SMITH: No.

JUSTICE JOHNSON: Not at all?

MR. SMITH: No. And I would also direct your Honor's attention, it's not true that in answers to the defendant's or the respondent's admissions that we said that we admitted to some sort of tort liability. For instance, their admission number four was that it made or denied that no property on lease or rented by Frymire have suffered any damages as result of the October 12, 2001 repair work and installation of the Add-A-Valve product. Our response was admit however Frymire had a legal obligation to pay for the damage even though it was not at fault in causing the damage because of its contractual duties. Therefore, Frymire was not a mere volunteer to pay for damages but had a legal obligation to pay for same and is entitled to the benefit of the doctrine of equitable subrogation. So we did not just give unqualified admissions on those type of question but we did qualify our admissions very specifically to make it clear that we were prevailing ourselves in the benefit of the doctrine of equitable subrogation.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Counsel. The cause is submitted and that concludes the argument for today and the Marshal will adjourn the call.

COURT MARSHAL: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

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