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Supreme Court of Texas.
Jesse C. Ingram, Ph.D. and Behavioral Psychology Clinic, P.C.
v.
Louis Deere, D.O. and Hillvale Medical Group Association d/b/a Hillvale
Medical
Association.
No. 06-0815.

February 5, 2008

Appearances:
Craig T. Enoch, Winstead, PC, Austin, TX, for petitioner.
Georganna L. Simpson, Law Offices of Georganna L. Simpson, Dallas,
TX, for respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument
in 06- 0815, Jesse Ingram versus Louis Deere.

COURT MARSHAL: May it please the Court. Mr. Enoch will present
argument for the petitioner. Petitioner has reserved five minutes for
rebuttal.

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

MR. ENOCH: May it please the Court. I'd like to start out with a
short story. Dr. Deere in this case attended and graduated from medical
school over 40 years ago, nearly 50 years ago. He did his residency in
Dallas, Texas, during the tumultuous '60s. I was called into this case
after the trial to prepare a motion for judgment NOV or for a new
trial. I read the record in this case and came to the immediate
realization that the jury verdict, based on the record, was virtually
unexplainable. I appeared at the hearing before Judge Evans and this is
what Judge Evans said. "One last comment before I let you all argue.
It's something that you will all not ever find in the record but
occurred during the trial. In my and-- what occurred during the trial
was, in my opinion, the number one most impressive thing or more
outstanding thing in the jury's mind as they evaluated this case and

that was what started out in my experience to be a fairly innocuous question when Mr. Smith asked Dr. Deere, would you tell the ladies and gentlemen, it was something like, you know, when you, when you got your education or you know, your education background of something and Dr. Deere said that in the whatever, was it in the '50s or in the '60s, which was it? It was in the '50s? I believe so Mr. Smith responded. The Court, Yeah, my recollection was the '50s. He told this jury he went through medical college in the '50s and this Courtroom fell silent and Mr. Smith paused dramatically. Now, pauses don't show on the record, as you all know. We sat there for a second while the jury contemplated the thought that Dr. Deere went to a medical college when there were signs over in the records building that said whites only drinking fountain and blacks only drinking fountain and white's restroom and black's restroom and that sat pretty strong with him is my suspicion as they evaluated these two men. And so that's nowhere in the record." That's just one of those credibility issues that the jury has the right and the power to evaluate as it evaluated the testimony of these two doctors. I told the Judge then as I tell you now. The number one instruction in a jury instruction is that bias and prejudice plays no role in the decision of the facts of this case. I believe that verdict is explained that way. But we don't have to reach that question and in fact, the opportunity for a new trial has passed us all by. Interestingly, I don't think the trial judge ever suspected that bias in favor of a witness versus opposed to a witness is just as improper. He ultimately divided the baby in half in the verdict and then, he immediately recused.

JUSTICE: Do we have any idea why he recused?

MR. ENOCH: We have no reason to know why he recused. It's not in the record, either. But the countenance of the Judge changed when I suggested to him bias may have played a role in the verdict in this case. But Dr. Deere ultimately got what he wanted. He wanted a judgment NOV. I suggest to you that as a matter of law, Judge Hartman, was correct in granting the judgment notwithstanding the verdict and I believe this Court's decision in City of Keller versus Wilson decides the two main issues in this case. First, the Court cannot disregard contrary evidence that a reasonable jury could not disregard and a witness whose assumptions are disproven in the trial of the case. An expert witness' opinion is not reliable and therefore, no evidence. There is literally no evidence supporting any set of the jury findings in this case. As an example, we can look at the damages question that's here and we provided an exhibit for you all. The first page shows the expert, Mr. Ramey's testimony in this case. The expert, all parties agree I should say, that Dr. Deere, whatever he was to be paid for whatever services he was to performed was 20% of the gross revenues. We're not disputing that. Mr. Ramey comes in and projects that the gross revenues over whatever period of time, for which the jury awarded 20% to Dr. Deere, would have been \$25 million. There is no evidence in this record that any income at the clinic even approached half of \$25 million. In fact, at the time of trial in 2004, when Mr. Ramey is testifying, he projects income for the years for which there was actual records of incomes.

JUSTICE MEDINA: What evidence do they have of an oral agreement that a partnership existed?

MR. ENOCH: Your Honor, I think they have no evidence that a partnership existed. The second page of the exhibit demonstrates that in the partnership act, TRPA, there are five indicators of a partnership.

JUSTICE HECHT: Do-- does everybody agree that it applies? Or is-- there seems to be some confusion about that.

MR. ENOCH: Well, your Honor, under TRPA and the comments by the legislature, it applies where the parties think they have a joint venture or a partnership or whatever arrangement they have. So we believe by the statute under TRPA, which came into existence in '93, this partnership formed in late '97, that TRPA applies, certainly governs the elements and certainly, this Court in, we did not cite it in our opinion but the Court is familiar with Triplex. That case referred to one of those elements, even in joint enterprise arrangement.

JUSTICE O'NEILL: Yeah. One of the, one of the elements of TRPA, as you call it, no particular thing controls. You look at the whole circumstances. It seemed to loosen up the requirements for a partnership and if that's the case, apparently, there is some evidence that Ingram referred to Dr. Deere as a partner.

MR. ENOCH: Yes, your Honor. That -

JUSTICE O'NEILL: How are we to credit that sort of evidence in light of not giving any particular or not requiring all the indicia of partnership that had been required before?

MR. ENOCH: My first response to that, your Honor, as we cited in our brief, the mere fact that a party says we're partners is not an evidence of a partnership because partner is a legal conclusion as well as a factual conclusion. So you have to look at the circumstances in which the partner is referred to.

JUSTICE O'NEILL: Well, it does go to the intent element, though.

MR. ENOCH: An expression of an intent to be partners. What Dr. Deere's testimony was that Dr. Ingram referred to him as a partner, he overheard him say so and Dr. Deere testified, my understanding of partner is people you do work with. Dr. Deere called his employees partners.

JUSTICE BRISTER: Was there any testimony that the two litigants in the trial said, let's be-- let's form a partnership? Let's be partners.

MR. ENOCH: No, your Honor. Dr. Ingram adamantly opposed that. But we're not arguing about that the Court needs to consider a disputed fact in our favor. We're saying, just accept what Dr. Deere said. I overheard Ingram say I was his partner. Dr. Deere, what do you understand partner to be? I call my employees partners. I understand-- I understood partner to be [inaudible] works together but I don't think we have to stop there. My point is the legislature sends five indicators of a partnership. There is no evidence of at least four of those and we suggest the evidence of the one item, the one item, an expression to be partner is equivocal at best.

JUSTICE O'NEILL: Well, there's some indication that Dr. Ingram didn't really contest the existence of an oral partnership arrangement, just questioned the duration of it and so it -

MR. ENOCH: Well, your Honor, I think we, I think we'd win really on the at-will nature of the partnership but we don't agree that there was a partnership. We just agreed that Dr. Deere thought there, said there was one when he heard a partnership but in looking at the record, we think the record has to support the existence of a partnership.

JUSTICE O'NEILL: But I'm talking more about the waiver point. The preservation point.

MR. ENOCH: Your Honor, I-- the, the preservation point, virtually all of their preservation points go to an evidentiary review and did we object to the charge. In the ultimate answer in a JNOV the Judge granted the judgment on [inaudible]. As a result, if there is any basis

in the record to justify the judgment withstanding-- notwithstanding the verdict, then the Court must affirm the judgment.

JUSTICE BRISTER: So what does the legislature mean? They say, you know, here, I mean, these factors are all ones which this Court has said before are mandatory. And now, they're saying well, they're not mandatory. So what in the world do they mean? Why did they do this? I mean, I did, you know, well, you might look at these things. I mean, this reads like a Sandra Day O'Connor opinion. Well, you look at these things but you know, it's kind of a feel you get as to when you cross the line. I, I don't know who-- when does a partnership exist?

MR. ENOCH: I think that's a difficult-- there's a difficult answer to that question. I think what the legislature was trying to say and only what the legislature was trying to say was it was to respond to case decisions that said if this element is missing, you don't have a business arrangement. And the legislature want to encourage business arrangements and they understood that people not-- may be very sophisticated, maybe not very sophisticated. Maybe just on a handshake deal, we'll put money into an enterprise and they said, [inaudible], we're not going to find that it's not a partnership, just because one or more of these elements are missing and I think that's a reasonable interpretation. I think it is an unreasonable interpretation when you have direct evidence that none of those elements exist from the witness who's claiming to have a partnership -

JUSTICE WAINWRIGHT: So let's talk about -

MR. ENOCH: - and to say, well, then you're still in partnership.

JUSTICE WAINWRIGHT: - a, a couple of the elements. Sharing of profits and sharing of losses or liabilities. If the parties agreed that one-third of the revenue would go to each of them individually and one-third would pay for expenses or costs, why isn't that an indication that they each get a third of the revenue as profits if one-third is going to pay expenses and costs? How do you address that argument?

MR. ENOCH: That, that was the question Judge Evans was posing to me. Whether I share expenses or not is not sharing losses. I may not have a profit. Therefore, I may have zero money in my pocket but I'm not liable if I owe more money than I earn. That's a loss. Judge Evans just-- he said, well, they were going to pay their expenses first before you got the profit. Well, first of all, that is not a showing of losses. That simply is a recognition that until expenses are paid, there is no profit. But the reverse of that is not true. Dr. Deere never said, never said that he would not get his "royalty" if the expenses exceeded 80% of the business. He never said that. Now, the Judge said, well, because he doesn't get his royalty until the entire expenses are paid. But if you look at what they say the agreement is, they assumed there would be enough left over for his royalty to be paid and in fact, Mr. Ramey never have subtracted any expenses before he calculated the 20%. Gross revenue was gross revenue.

JUSTICE WAINWRIGHT: Was there -

JUSTICE: You talked about losses. Now, talk about profits.

MR. ENOCH: Your Honor -

JUSTICE WAINWRIGHT: I mean, if, if a business brings in \$100 and the third of it pays the cost of the business, then what's left lay people may call revenue or they may call profit but if they've set aside money to pay the expenses or the costs, what's left over, someone might call profits. You've addressed the loss' side, address the profits factor.

MR. ENOCH: Your Honor, that's the one thing I think the parties agreed on this way. This was not profit-sharing. Dr. Deere was getting

a percentage of the gross revenues. A set percentage of the gross revenues. Once we negotiate it, that set percentage was 20% of the gross revenues. There was not anticipated, no actual payment of, or even an understanding that he would get 50% or share whatever the profits may be and so there was no evidence from Dr. Deere that he was sharing profits in this case. His-- all of his evidence was, I got a royalty. I got percentage of the gross revenues of this enterprise.

JUSTICE MEDINA: Were there any objection to the jury charge on that first question?

MR. ENOCH: Your Honor, the only objection to the jury charge on the first question was that the very last element. I think it was Roman numeral IV of that element that said that you, you can-- you don't have to share losses if you expressly agree otherwise. I think that was objected to because that is one of the elements of the partnership -

CHIEF JUSTICE JEFFERSON: Do you agree -

MR. ENOCH: But there was no other objections.

CHIEF JUSTICE JEFFERSON: Do you agree that if there's-- that if this Court were to find there's some evidence of an expression of intent to form a partnership, then you lose on that JNOV point?

MR. ENOCH: I disagree because there-- because I think that standing alone, the fact that the party thought he had a partnership, that standing alone does not justify the jury concluding that there was, in fact, a partnership considering the total absence of evidence of any other element of partnership.

CHIEF JUSTICE JEFFERSON: [inaudible] But outside of this case, if there were another trial and, and there was a factual dispute on expression of intent, that alone would preclude a JNOV or would it not? Without even considering the other factors.

MR. ENOCH: I, I think, your Honor, it would be-- I, I think the Court would be treading on thin ice if they were to declare that merely an expression of a partnership, certainly with the facts of this case where one party claims the expression.

CHIEF JUSTICE JEFFERSON: I'm just looking at the statute and, you know, there is a prior law that, you know, that do all of these have to exist or can one exist alone and that's enough for a partnership and under the statute. Isn't it true that this sort of subjective intent is enough?

MR. ENOCH: I think under the statute, the expression of intent by one party would not be enough under the statute. I think, however, if you had the expression of intent by all the parties, perhaps it would be. I see that my time is, is up.

CHIEF JUSTICE JEFFERSON: Justice Brister -

JUSTICE: [inaudible]

CHIEF JUSTICE JEFFERSON: Thank you.

MR. ENOCH: Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. We'll hear more from you on rebuttal. The Court is ready to hear argument from the respondent.

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

ORAL ARGUMENT OF GEORGANNA L. SIMPSON ON BEHALF OF THE RESPONDENT

MS. SIMPSON: May it please the Court. This entire matter can be

resolved by this Court determining whether a partnership exist. Dr. -

JUSTICE HECHT: On that score, you have cited a few lines of the record really, two pages in your brief and I, I think that's it and one of them says, the question was what did, what did you believe your position to be with respect to a partnership and he-- and the answer was, Dr. Deere's answer, a co-owner and associate. And then, the other page was now, Doctor, you thought that you were an equal partner in the business, is that correct? And he answers, yes and it goes on. Is that all the evidence we have in this record?

MS. SIMPSON: I think there is additional evidence, especially because there was testimony about what each was supposed to do and that there was an intent expressed but more importantly, your Honor, is they've waived this entirety-- they've admitted that their partnership existed-- because when they were-- they never filed a verified defense.

JUSTICE BRISTER: But you tried it by consent.

MS. SIMPSON: It doesn't make any difference. It's a verified defense even in trial -

JUSTICE BRISTER: Oh, it, it certainly does.

MS. SIMPSON: No, you can try, excuse me, now you can try an affirmative defense by consent but even if it was tried by consent, that's irrelevant because it's an evidentiary burden. We never had any further burden to put on evidence over the existence for partnership, although we think there's plenty of evidence there -

JUSTICE BRISTER: [inaudible] question was there a partnership? That's - how can -

MS. SIMPSON: And that was -

JUSTICE BRISTER: - that's clearly tried by consent.

MS. SIMPSON: And that-- and again, this is a legal sufficiency issue and they did not object to that question so that by them not objecting to that question, they also said there was legally sufficient evidence of a partnership and about abundance of caution -

JUSTICE BRISTER: Who, who-- I'm looking at the charge. It says, was there a partnership? And it says the burden's on you to prove it by a preponderance of the evidence.

MS. SIMPSON: But it's a matter -

JUSTICE BRISTER: You should have objected to that if you thought you win without having to prove anything?

MS. SIMPSON: Well, -

JUSTICE BRISTER: It would have been you, right?

MS. SIMPSON: Exactly. But the problem is, is that as a matter of law, it already had been proven so as abundance of caution, you go ahead and put it in there. We got it -

JUSTICE BRISTER: How, how would it been proven as a matter of law?

MS. SIMPSON: Because they couldn't file a verified denial so we -

JUSTICE BRISTER: Our law is clear on that. If you don't file, verified or not, you're right and you can object at trial. But if nobody objects and it's tried by consent, verified denial is irrelevant. Are you saying that's not the law?

MS. SIMPSON: The trial by consent goes to [inaudible] law and the cases that they cite go to affirmative defense as you can try it by consent. But when you're talking about verified denials, that takes away our evidentiary burden that to put on the evidence that the partnership existed and I would, and I would appreciate it if the Court, because there is no law in that particular issue, if the Court would look that-- look at that particular issue in its opinion. But in addition to that, we have other admissions and waivers. Because at the time of the directed verdict, this is a direct quote and I'm on the

page, this is of the record, volume 6, page 206. This is Mr. Hercules, which was Dr. Ingram's lawyer. "And I don't think anybody can seriously argue about the fact that evidence is all over the record about breach of contract and partnership. So I don't make my instructed verdict on those issues." Right there, he admitted that there was legally sufficient evidence, which is what is before this Court right now.

CHIEF JUSTICE JEFFERSON: Okay, but apart from all the waivers, getting back to Justice Hecht's first question, is-- are those two pages from the record on partnership all that exists? What else is there?

MS. SIMPSON: I think if you take the total-- totality of the record and the agreements, because there was a lot of explanation about what Dr. Deere thought partners-- were partners working together. He said that they did work together when he went and do-- when they went to the conference and they were talking about the agreement. You know, he answers no, this isn't the agreement. I'm not going to sign that agreement because I'm also an owner of the business and he was indicating the joint venture there. There was significant evidence throughout the record that he believed that a joint venture existed. Additionally though, even his own accountant [inaudible] Dr. Ingram -

JUSTICE MEDINA: It seemed, it seemed that we have -

MS. SIMPSON: Yes, sir?

JUSTICE MEDINA: It seemed that we have no meeting of the minds here. You have one person saying we have this agreement, another person saying no, it's this agreement -

MS. SIMPSON: But it's -

JUSTICE MEDINA: And then it since-- so why is there, obviously it won't reduce to writing so how, how can you form a partnership, or allege there to be a partnership when you have the two parties involved don't agree to what the partnership is or was?

MS. SIMPSON: Well, they can agree-- first of all, that is Dr. Ingram's side. Now if you talk to Dr. Deere and we're supposed to look at this in the favor of Dr. Deere here, is Dr. Deere testified [inaudible] we-- that was, we had talked about it for a number of years. He approached me and said, we wanted to get together and this is we wanted to form this agreement, this joint partnership, this joint venture. I mean, they didn't use those exact words. I mean, well, there was some testimony at trial but I mean, as far as in their heads, it didn't seem like they were, you know, but it looked like they wanted the partnership because they intended to work together. They had to have each other to function and to do the work. I mean one was necessary to the other.

JUSTICE HECHT: I'm just trying to be clear. In the brief and response says, pages 12 to 13, the record demonstrates that Dr. Deere and Dr. Ingram each own 50% of the joint venture and each had an equal right to manage and conduct the business of the joint venture and it cites two pages of the record and the brief, the brief and reply at 5 says, those pages don't say that. And all I'm trying to get at, it's kind of unusual for parties at this point to be arguing about what two pages of the records say but my question to you is, is there anything else besides these two and if there is, why didn't you cite it in your brief?

MS. SIMPSON: I believe there is more and it's because I didn't adequately brief it, your Honor. I'll be glad to if you would like me to give you additional specific citations in the record that I do believe support that but I do believe since this was, again, I know you all wanted -

JUSTICE BRISTER: Except, I mean, how long was the trial?

MS. SIMPSON: The trial was an eight-day trial.

JUSTICE BRISTER: And so tell us it's [inaudible] it's a stack like this to tell us -

MS. SIMPSON: It's -

JUSTICE BRISTER: Well, I'm looking at the totality of the circumstances, it's in there somewhere. That's not very helpful. We need -

MS. SIMPSON: And I'll-- if the Court would like, I'll be glad to go through and get more specific citations and I apologize for not -

JUSTICE BRISTER: [inaudible] specific about an agreement, yes, that's, that's -

JUSTICE O'NEILL: Presume -

MS. SIMPSON: But I think the intent alone, I think the clearly intent was in there that that was an agreement and Mr. McClellan, who was Dr. Ingram's accountant even went back and said he believed that there was an agreement between these two parties. His own, Dr. Ingram's own, attorney referred to this as a partnership throughout. Something -

JUSTICE O'NEILL: Let's presume there is a partnership.

MS. SIMPSON: Yes, ma'am.

JUSTICE O'NEILL: Why didn't it terminate in March of 1999 when Deere walked out and Ingram said, "We're done."

MS. SIMPSON: Well, first of, all Deere didn't walk out, okay. He was out-- they came to the meeting. He says, "I don't agree to this. I am not an employee -

JUSTICE O'NEILL: He never [inaudible] back -

MS. SIMPSON: Well, the next week though when he was called he was ready to go back and then he got another phone call an hour later saying, "Don't come in."

JUSTICE O'NEILL: Well, [inaudible] all right. Again, -

MS. SIMPSON: Premises belong -

JUSTICE O'NEILL: Why did that terminate the partnership?

MS. SIMPSON: Because the premises belong to Dr. Ingram and you can't-- you have to give specific content. He didn't-- Dr. Deere [inaudible] "I didn't terminate it. I didn't want to withdraw. I didn't want to go back."

JUSTICE O'NEILL: Well, why didn't Ingram terminate it? Why didn't that constitute a termination by Ingram of the partnership?

MS. SIMPSON: Because Ingram couldn't terminate the partnership. [inaudible] that was okay if he was going to expel Dr. Deere then he had to specifically state, "I'm going to expel," so that it was up to him or if Dr. Ingram is the one who says, "Okay, I terminated the partnership." Well, the partnership is not terminated till there's a winding up. There still not been a winding up.

JUSTICE BRISTER: What's the wind-- what's the winding up?

MS. SIMPSON: The winding up is the process of determining who owns what and -

JUSTICE BRISTER: Winding, winding up is paying the -

MS. SIMPSON: Paying him out.

JUSTICE BRISTER: Anything other than that?

MS. SIMPSON: I think it's paying, making sure all the creditors are paid, and I think if the case -

JUSTICE BRISTER: Winding up is just we close those books and we open new ones. We keep doing business. It happens all the time. So why do you get future profits if-- doesn't the jury's award for past earnings wind up the partnership and that's it?

MS. SIMPSON: No, because the jury can't until the, the day of the

trial the jury didn't believe that the partnership had been wound up because the partnership continued ad nauseam. I mean if Dr. Ingram was trying to withdraw by doing-- by kicking Dr. Deere out, I mean, here you have the situation where you have two partners.

JUSTICE HECHT: What happened at trial that made it more clear that they weren't going to continue in business together?

MS. SIMPSON: That they weren't going to continue the business?

JUSTICE HECHT: Yes, ma'am.

MS. SIMPSON: There was, there -

JUSTICE HECHT: I mean, wasn't it clear from-- certainly from the, from the petitioner's file that says, "You're not my partner anymore" that they weren't partners anymore.

MS. SIMPSON: Well, he didn't say, "I'm not your partner anymore." He says, "I guess we can't do business together," and Dr. Ingram specifically admitted that Dr. Deere never told them that he wanted to withdraw from their agreement or that he ever-- that's directly from Dr. Ingram himself. That he said, "No, I'm not going, I don't want this," you know, he said he admits that Dr. Deere was not the one who said he wanted to end this relationship, specifically said that. And also -

JUSTICE HECHT: If, if Ingram wanted to end the relationship, would it have, would he have ended it at that point?

MS. SIMPSON: I think if Dr. Ingram had specifically sent a letter to Dr. Deere and says, "I'm-- I want to terminate this partnership -

JUSTICE BRISTER: No, wait a second. That's not fair.

MS. SIMPSON: But no, let me -

JUSTICE BRISTER: Your whole-- no, no. The deal is, I get to interrupt because I'm the Judge. It may seem unfair but when you get to be the Judge, you can interrupt.

MS. SIMPSON: I apologize, your Honor.

JUSTICE BRISTER: All right? But the deal is, you can't say, well, they said oral partnership but the withdrawal had to be in writing. That's not fair.

MS. SIMPSON: What I was going to go on to say [inaudible] I'm sorry I interrupted but I wanted to finish this statement was I said, "I think if Dr. Ingram had specifically done that then this would be a clearer -

JUSTICE: [inaudible]

MS. SIMPSON: It would be clearer but what the fact of the matter is -

JUSTICE BRISTER: But if they, if they can join in a partnership by saying, "Let's go into business together," why couldn't they end the partnership by saying, "Get out?"

MS. SIMPSON: But the problem here is, is you have Dr. Ingram that did the getting out. He said, "Get out!" So even if so-- that's essentially an expulsion rather than a withdrawal. So it's either Dr. Ingram withdrew or he expelled Dr. Deere. You only have two partners here so therein lies the problem. And if you have a breakdown in the, the communication here, takes advantage of Dr. Deere and his rep-- and his wonderful reputation, state-wide reputation, to build up a business for 15 months, then when it starts turning significant profits all of a sudden he says, "Get out! I've decided that, you know, it's my premises, you get out."

JUSTICE BRISTER: Well, -

MS. SIMPSON: For Dr. Deere to stay would be trespassing. For him to come back -

JUSTICE BRISTER: - [inaudible] that happens.

MS. SIMPSON: - without permission.

JUSTICE BRISTER: I mean that argument carried to its logical conclusion would make Texas not an employment-at-will State because employers do that sometimes. They allegedly take an employee, get the knowledge, get good use out of them, and kick them out when they're no longer-- but your argument is, has to be more than that because -

MS. SIMPSON: It's a partnership.

JUSTICE BRISTER: But what part of the partnership says we can't terminate it at-will?

MS. SIMPSON: You can terminate it at-will but you still have to follow the steps of the Texas Revised Partnership Act. And if I can analogize-- analogize the family [inaudible] I am most comfortable with, you have a husband and a wife. You can't just end it by saying, "Get out, honey!" or "Get out, husband!" You can't do that. You have to go through the steps that we require in the state of Texas, which is you have to file that petition, you have to get that divorce, and you have to wind up the marriage.

JUSTICE BRISTER: You don't have to get a court order to end a partnership. You do to-- in a marriage.

MS. SIMPSON: Okay. But in this, the TRPA still requires you to take certain steps and that's why the analogy is you have to take ...

JUSTICE BRISTER: A step other than paying me the value of my half of the partnership.

MS. SIMPSON: Well, that's what he had to do and he had to show the books and accounting for that. They kept asking -

JUSTICE BRISTER: But there is not [inaudible] -

MS. SIMPSON: - for the books.

JUSTICE BRISTER: You've got a jury finding. What he was owed was \$34,000. Why didn't that [inaudible]?

MS. SIMPSON: We disagree on, on the accounting in some of the books. We don't disagree. I think we're no both in agreement on the, the tax return showed certain things for those, for those months. But even that information wasn't given to us until 2002. So you don't [inaudible] the partnership act. The partnership act doesn't end until you wind up the partnership and it [inaudible] doesn't terminate until you wind up the partnership and that was part of the problem is the jury didn't believe that it was terminated in March of '99 even though Dr. Deere left because the partnership continued as is. It has gone on. It was existing at the time of trial. It still, to my knowledge, exists today and I, I hate to beat the dead horse but I want to make one more point on the waiver because they, they're, what their case that they've cited in the brief does not support that and this was not raised in the second motion for JNOV.

JUSTICE BRISTER: What-- how-- why would they have raised this objection when they won? The trial judge at the end of all the JNOVs said judgment for them. They would have had no reason to preserve after that.

MS. SIMPSON: They didn't' raise it in the second motion for JNOV and the JNOV was granted only on the grounds stated in the JNOV. That's what the, that's what the order says. Granted on the grounds stated. This was not a ground on which the JNOV was granted. Therefore, it's-- they have, they have not preserved it. So for all the other reasons they hadn't preserved, they didn't preserve it on that reason-- for that reason.

JUSTICE BRISTER: But I'm just wondering how they would have. The trial judge says, "Okay, granted." So take nothing [inaudible]. Thanks very much, Judge. Now, I need to preserve my error on the other reasons

that what you just did is right. We wouldn't-- what would be the sense of somebody doing that?

MS. SIMPSON: But their whole challenge is they've granted it on the fact that there-- they're claiming it was granted because there was legal insufficiency that the partnership existed but they didn't raise it.

JUSTICE BRISTER: But the record-- my point is the record is not closed. If they still have time to file another JNOV and another motion for a new trial they can raise new points and preserve error, even if that's the first time. But once you've won everything, there's no reason to keep doing that.

MS. SIMPSON: But they didn't win everything. Because if there is, if a partnership exists under the TRPA on its face, there's a fiduciary duty. And they never challenged. They have not challenged in this Court and not brought before this Court that if there is a fiduciary-- if this partnership exists and there's a fiduciary duty as a result of that partnership they have not challenged the damages related to that breach of fiduciary duty.

JUSTICE BRISTER: How do you read this statute? It says we look at these five factors but a couple of them listed down here don't disqualify. So when-- how many do you have to have to be a partnership?

MS. SIMPSON: I think -

JUSTICE BRISTER: What do you think?

MS. SIMPSON: You can have one. You can have [inaudible] one alone, I think the intent alone but here you have, you have share, it's a share of profits, well-- and share of losses. Well, what is the profit? They decide, one-third, one-third, one-third. As the Justice pointed out earlier, to me that's-- one-third was supposed to set [inaudible] expenses and then Dr. Ingram comes to Dr. Deere and says, "Wait a minute. My practice is gone. My wife's practice is gone and would you reduce?" Well, then he reduced to 20%. So now there's 80%.

JUSTICE BRISTER: I'm not, I'm not-- I'm, I'm trying to-- there's a new statute. It's changed the rules of partnership. I'm trying to figure out, not in your case but in general, how we're going to work this. Now, if it's just one of them, for instance, participation or right to participate in control of a business. If that alone is enough, then that, that would convert every corporation into a partnership.

MS. SIMPSON: Well, as I said before, I think you have to have kind of a -

JUSTICE BRISTER: It can't be [inaudible].

MS. SIMPSON: You can have a totality of the circumstances what, what were each of them responsible for, what [inaudible] is supposed to do -

JUSTICE BRISTER: [inaudible] what is that-- how many does that mean, that these I need to be the totality of the circumstances?

MS. SIMPSON: I think there's going to be a facts determination obviously in each case and -

JUSTICE BRISTER: So really, your, your argument is, you don't really know whether you have a partnership until the jury comes back with a verdict.

MS. SIMPSON: Finder of fact, yes. I mean that, well, on its face obviously it's -

JUSTICE BRISTER: Rather shocking, isn't it?

MS. SIMPSON: Well, if you have, obviously it's the oral partnerships that are causing a problem. Because if you have a written partnership, we'll never get there. So if you have the oral partnership again, yes, I think that the Court needs to come out what do you need,

what do you need to get to where you're going to go because it's going to be helpful in the future because I think we have a lot. I don't it's the Mom and Pop partnerships we're having a problem with. Obviously, if it's the 100- partner law firms, we're not-- you know, everybody's got a written agreement but in -

JUSTICE BRISTER: Everything's in writing.

MS. SIMPSON: Right, everything's in writing. It's when you have these oral situations and I would suggest to the Court a case that I've cited in my brief in [inaudible]. It's, it's out at the Southern District, the Bankruptcy Court. I actually think they do a very good job of going, of going through the situation. There was an oral partnership. It was kind of loosey-goosey. One did, you know, did the work, the sweat equity, one contributed all the money. They traded off on who was doing the books but this, that's the case that I found most thorough that actually did some analysis of this, not only on the partnership issue, although they, they stated some things, which-- it was somewhat analogous to the situation here and then they hit the fiduciary duty issue for -

JUSTICE WAINWRIGHT: Counselor.

MS. SIMPSON: Yes?

JUSTICE WAINWRIGHT: Where did Ramey get, your expert, get his numbers? In -

MS. SIMPSON: From their book.

JUSTICE WAINWRIGHT: I mean, some-- for some of the years they were, it looks like almost twice the actual revenues that he used to base his damages figures on.

MS. SIMPSON: He got it from looking at their books and records and what he concluded was during the first two years it increased by 14.2% and he thought 30% of his own practice was doctors, chiropractors, psychologists, these, you know, clinic-type businesses. He said in his experience that he believed from, he couldn't trust the records. Part of the problem was we had tax returns for '98 and '99. There were no tax returns presented after that and he called in to question a lot of the books and records. So what he was trying to do is project. I don't think it's going to continue at a 14% growth rate. My experience is that 10% based upon the records that the limited records I have seen and that were produced to me and the questions that I had, I think that this is a justifiable increase for each year.

JUSTICE WAINWRIGHT: Well, if, if you assume a 14% increase, then you go from 2000 where the revenue, actual revenue, was about \$1.2 million to 2001 where your expert's projection was \$2 million. That is an \$800,000 increase. That's a lot more than 14%. And petitioners asserts that the revenue has actually declined, not increased.

MS. SIMPSON: [inaudible]

JUSTICE WAINWRIGHT: - so your 10% or 14% is going in the wrong direction. Where'd your expert get his numbers?

MS. SIMPSON: Well, [inaudible]. His numbers-- the, the numbers that he was going by started when we had hard numbers for '98 and '99 because we had tax returns and figured they wouldn't allow in the tax returns. So we took that last number and then he added, multiplied it by, you know, did 10% of that number, added 10%, added in 10%. That's where he got the numbers and -

JUSTICE WAINWRIGHT: Why didn't he use the actual revenues?

MS. SIMPSON: Well, that was the problem. We-- although they say the revenue, the money, the numbers were given, we say that they were not. And we called in to question a great deal about the books and records and the testimony that Dr. Ingram's accountant gave was really

conclusiory, because he just says that was the actual number. He didn't produce the tax returns. He didn't produce books and records -

JUSTICE WAINWRIGHT: When you say -

MS. SIMPSON: - to the jury.

JUSTICE WAINWRIGHT: When you say, "They say," I assume you mean petitioners.

MS. SIMPSON: Yes, sir.

JUSTICE WAINWRIGHT: That the numbers were given? What does that mean?

MS. SIMPSON: [inaudible] Doctor-- Mr. McClellan, testified -

JUSTICE WAINWRIGHT: Is it [inaudible] what the actual revenues were?

MS. SIMPSON: Mr. McClellan's, accountant simply testified the actual revenues were \$1.2, the actual revenues were \$1.4, introduced no back-up, did never said where he got those. He says, "These are the actual numbers and these are the numbers he should have used." But those numbers weren't furnished to Mr. Ramey. He said, I don't-- I didn't have those numbers.

JUSTICE WAINWRIGHT: So, so you say the actual revenues by the petitioner aren't accurate but your expert based his numbers on numbers from the petitioner's expert.

MS. SIMPSON: We based our numbers -

JUSTICE WAINWRIGHT: It sounds like you're saying neither sides' numbers were accurate but that doesn't help support your position that your expert is accurate.

MS. SIMPSON: No, we based our numbers on the first two years where there were tax returns. There was no dispute what the tax return said. And that's where we started with our initial numbers and then he had to estimate and project out so that he could, from his experience and from his background from what he could tell from the records and I see my time has expired.

CHIEF JUSTICE JEFFERSON: Yes, are there any further questions? Thank you, Ms. Simpson.

REBUTTAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF PETITIONER

JUSTICE: Mr. Enoch, can you respond to this waiver issue? Whether or not you, you waived it.

MR. ENOCH: About the - the partnership on the motion and trial? We did cite a case that said, "When the Judge grants the JNOV, judgment notwithstanding the verdict, the obligation of the Appellate Court is to affirm it on any grounds," and what we have said throughout is there is no evidence supporting any of the jury findings in this case and that includes partnership. In answer to Justice Johnson's question about objections to the charge on the partnership questions, our exhibit before the Court matches up the evidence on the record against the indicators that the charge uses. So we accept the charge and its definition of what the indicators are and demonstrates there is no evidence of those -

JUSTICE O'NEILL: If you -

MR. ENOCH: - so we're not attacking the charge itself.

JUSTICE ONEILL: If you agree to be compensated, one-third, one-third, one-third out of revenue that means if the business makes nothing, you make nothing. Why is that not sort of a sweat equity sort

of contradiction?

MR. ENOCH: It doesn't. Your Honor, if that were, if that were Dr. Deere's testimony, I'd say he had some evidence of sweat, sweat equity. That was not his testimony. His testimony was, it was one-third of gross revenues. Now, what he talked about is we anticipated a third -

JUSTICE O'NEILL: But I'm not into profits. I'm just saying if you got a loose relationship and you say, "Look, I'm not going to take anything out unless we have something in it. If it makes \$100, I'll, I'll take 33-1/2, whatever the gross revenues are." But if it makes nothing, aren't you risking-- you're taking some risk that the business will not do well. You're, you're-- I don't understand why whether you tag it to profit or revenue, it has anything to do with whether you've agreed to contribute sweat equity.

MR. ENOCH: Well, I guess, your Honor, we have not briefed that particular question but I do believe in partnership while there's a question about sweat equity versus compensated for your sweat. In other words, if I was going to build that house and you were going to give me \$100,000 to build the house and then we sold the house and it generated X dollars over and above what the investor put in it, we'd split it 50-50, my sweat equity would be the equity put into the house. But if my compensation for providing medical services will be 20% of the gross revenues of the business that I'm working for and I'm being paid for my time, I have not contributed capital at all to the business. I'm simply being paid for my time and that was the issue that was difficult in this one.

JUSTICE O'NEILL: But -

MR. ENOCH: [inaudible] compensation for his time as the doctor.

JUSTICE O'NEILL: But the business couldn't have operated without him. It had to have a medical director.

MR. ENOCH: That really is kind of a confusing part that I think Dr. Deere plays on. This business was in operation for a number of years. There is an aspect of the business, full services, that requires a licensed medical physician in order to prescribe and complete the process. The clinic was an active, ongoing operation when Dr. Deere was invited to be the medical director to provide a part of those services, those services, which goes to the question about abandonment. We accept on JNOV that we fired Mr. Deere or we asked him to leave the partnership, although that's disputed by Dr. Ingram, but let's accept that's the case. But the reason he was there is because for the services we were trying to provide required a medical doctor. We can go get another medical doctor to do that and be a part of this but he left, never to return, but claims he is entitled to 20% of the gross revenues of an operation.

JUSTICE: How did the tax returns treat this relationship?

MR. ENOCH: Your Honor, that's an interesting question. The tax returns simply showed the gross revenues of the clinic. Dr. Ingram was responsible for that. This was not a sharing of the record. This was not a sharing of the bookkeeping. Dr. Ingram handled all the bookkeeping, all the administration, hired and fired all the employees.

JUSTICE: So Dr. Deere's salary was-- or compensation was expensed out of that?

MR. ENOCH: His compensation was-- well, I don't know how it was expensed in the tax returns. What I know is that the records that Mr. McClellan, used were the tax returns for the years that he had the actual income that Ramey only projected and as Ramey said, Ramey used the tax returns for '97 and '98. So the, the evidence was all the same about what the gross revenues of the clinic was. Of course, one of the

assumptions by Dr. Ramey was that he was also including income from rehabilitation services and as Dr. Deere said he knew nothing about rehabilitation services and didn't do any work for rehabilitation services. I want to address one, one part of this on paid, . The jury verdict did count March '99 as being significant. It said it was unpaid. The undisputed evidence is after Dr. Ingram excused Dr. Deere. Dr. Ingram looked at the income, wrote out a check for \$34,247.68 and sent it to Dr. Deere who received it. For these reasons, we think the Judges' judgment should be affirmed.

CHIEF JUSTICE JEFFERSON: Thank you, Counselor. The cause is submitted and the Court will take a brief recess.

COURT MARSHAL: All rise.

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