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Supreme Court of Texas.
AKIN GUMP, STRAUSS, HAUER & FELD, L.L.P., Petitioner,
v.
NATIONAL DEVELOPMENT AND RESEARCH CORPORATION and Robert E. Tang, Respondents.
No. 07-0818.

December 9, 2008.

Appearances:
Jeffrey S. Levinger, Carrington, Coleman, Sloman & Blumenthal, L.L.P., Dallas, Texas, for Petitioner.
Michael L. Jones, Law Office of David W. Shuford, Dallas, Texas, for Respondent.

Before:

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

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CHIEF JUSTICE JEFFERSON: The Court is now ready to hear argument in 07- 0818, Akin Gump, Strauss, Hauer & Feld, L.L.P. v. National Development and Research Corporation and Robert E. Tang.
SPEAKER: May it please the Court. Mr. Levinger will present -- present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JEFFREY S. LEVINGER ON BEHALF OF THE PETITIONER

MR. LEVINGER: May it please the Court. This appeal presents four issues about damages in a legal malpractice case. Now, if I can ask the Court to turn to Tab 1 of the handout, you'll see the jury question that dealt with damages.
The first issue in this case is that subparts A and E fail because there's no evidence that the amounts awarded in fact would've been collectible from either of the defendants in the underlying case at the time a judgment would have been rendered. Second, subpart A fails for the additional reason that there's no evidence of what the Pan-Sino stock was currently worth at the time of trial. And only incompetent evidence of what it was worth at the time, it should have been repurchased by the Panda defendants. Third, if any parts of subpart A or E is upheld, the amount should be reduced by the ten percent

contingent fee that Akin Gump would have been owed. And fourth, as the Court of Appeals correctly held, subparts C fails on both legal and factual grounds.

I'd like to begin, if I may, with the collectability issue. Subparts A and E represent the judgment that NDR potentially would have obtained against the two defendants in the underlying case, Panda-Global and Panda-Energy International. Now, NDR doesn't dispute, it had to prove that any judgment against either of those defendants would have been collectible, otherwise there's no causal link between the negligence and damages. Now, we can take Panda-Global out of the picture because they've admitted that Panda-Global was insolvent at all relevant times and that no judgment would have been collectible against it. That leaves --

JUSTICE HECHT: [Inaudible] I'm curious about that because, it owned Pan-Sino which owned Pan Western, which owned most of the joint ventures. So, why was it insolvent? It looks like it had an asset.

MR. LEVINGER: Well, Mr. -- Mr. Tang admitted numerous places in the record, your Honor, that -- that Panda-Global was insolvent. That it was basically a shell company which in fact is why he wanted Panda-Energy International during the point in time of the transactions to assume the liability to him under the letter agreement and of the shareholder agreement. So, there was just no question in this case, but that Panda-Global Energy was insolvent at all the relevant times.

JUSTICE HECHT: But -- but -- but that -- why -- I take your point. It has an asset which is hard to see how that makes it insolvent. If it -- it owns a company, that owns a company, that owns --

MR. LEVINGER: Right.

JUSTICE HECHT: -- a profitable venture or at least eventual assets --

MR. LEVINGER: [Inaudible] Right.

JUSTICE HECHT: How can it be insolvent?

MR. LEVINGER: The problem was that it was the issuer of $155 million in debt financing, Panda-Global Energy was. And it quickly turned out that the project was underwater, couldn't service the debt, and the -- the company was essentially, I think it was a Bahamian or a Cayman Islands shell company that was set up in Mr. Tang's eyes as sort of a ruse. And for that reason, he insisted that Panda-Energy International be the obligor on the -- on the agreements to him. So, really, and as the Court of Appeals held, that took Panda-Global out of the picture and that was a correct determination. That leaves Panda-Energy, where they also fail to show collectability. There's just no evidence that Panda-Energy could have satisfied any judgment after the August of 1999 trial or thereafter. In fact, the only evidence is to the contrary.

There's just nothing in this record that sheds any light at all upon Panda-Energy International's financial resources. There are no financial statements, no income statements, no balance sheets, no tax returns, no proof of assets, no proof of liabilities, no insurance policies, no cash or cash flow indications. In fact, the only evidence suggests that Panda-Energy International was insolvent.

One of its key employees testified at the August 1999 Panda trial that he said, "I'm trying to save the company," referring to Panda-Energy International, his company, because the project, referring to the power plant projects, can't meet their debt and were facing foreclosure. That's the only evidence we have about Panda-Energy International. Now, how did NDR and the Court of Appeals deal with that? Well, essentially they did two things, improperly. They focused

on the wrong time frames and, I think even worse, they disregarded corporate structures, almost in a way adopting a single business enterprise type approach to -- that this Court rejected about two weeks ago in the SSP Partners case.

By way of example, they relied on an excerpt from Defendant's Exhibit 186 which I have under Tab 2; [inaudible] that they would rely on a defendant's exhibit to try to prove collectability. This is a -- an excerpt from a consolidated financial statement of JV 1 through 4, referring, of course, to the owners of the power plant. The numbers, of course, are large. They show $100 million in assets and about $47 million in equity, but they shed no light whatsoever on Panda-Energy International's solvency. And the reason I say that is demonstrated by Tab 3, which is the chain of ownership. You can see down at the bottom of Tab 3, the joint ventures. Panda-Energy International is five full tiers up the chain. And two entities in that chain, Panda Global Energy and Pan-Western, have no assets or are either insolvent or have zero equity. Moreover, any cash from the project --

JUSTICE JOHNSON: Could I -- you know, the word "insolvent" sometimes means different things in different contexts. And -- and Justice Hecht asked you about assets. You know, insolvent sometimes means you can't pay your bill, but that doesn't mean that you don't have a lot of -- you may own New Mexico --

MR. LEVINGER: Right.

JUSTICE JOHNSON: -- but that doesn't mean it's liquid, but that doesn't mean by the same token that you have no assets and you can't respond somehow. So, when we say insolvent, do you mean no assets, as Justice Hecht asked. None of these -- none of these companies up here on the tier had -- they did not have any assets?

MR. LEVINGER: Well, Pan-Western, we know specifically had -- had no equity. That's shown by another page of the same exhibit, Defendant's Exhibit 186.

JUSTICE JOHNSON: Had no equity. Now what does that mean?

MR. LEVINGER: No equity. It --it meant that in that particular case, there was a balance sheet and it showed that its liabilities exceeded its assets. Or -- or actually were equal, the liabilities equaled its assets, meaning it had no equity.

JUSTICE JOHNSON: And that -- and that --

MR. LEVINGER: And that was Pan-Western.

JUSTICE JOHNSON: And that showed the valuation of the 88 percent ownership of the JV's 1 through 4.

MR. LEVINGER: Yes. Pan-Western was the 80 -- 88 percent owner of the joint ventures, and it had no -- it had zero equity because it was the recipient of a large loan that was funded by the bonds. And it owed that loan back. It was the obligor on that particular loan. The only way it was able to fund the joint ventures was through the combination of a shareholder loan and equity, both of which were infused by the $155 million in debt financing. So, at the end of the day, all the cash from those joint ventures was committed to repaying the bond financing. And that's why - - that's why you cannot say that Panda- Energy International was able to satisfy any judgment at the relevant time merely because it's five-tiers of indirect ownerships over these joint ventures.

There's no evidence, none whatsoever, that Panda-Energy International's interest had value or more to the point, I suppose, would have generated -- generated any cash by which to pay back any particular judgment creditor. As another example of sort of this -- disregarding the corporate structure approach, they relied on the value

of the Pan-Sino stock. The Court of Appeals in particular did that. Even assuming it had any value, the critical point here is that Panda-Energy International didn't even own the Pan-Sino stock. Its predecessor had sold it back in 1997, to Panda Global -- Panda Global Energy.

JUSTICE HECHT: Which Panda Energy International owned.

MR. LEVINGER: Which it owned --

JUSTICE HECHT: Through Panda Global.

MR. LEVINGER: Through Panda Global and Panda -- Panda Global Energy, the one that owned the stock, again is the entity that he admitted was insolvent and a shell company. So, you can't get there that way either. And then as a final example of this approach, they like to argue that Panda, kind of the generic term, Panda, owned power plants throughout the world. Well, there are a couple problems with that. One is the source of that evidence comes from the bond offering memorandum, Plaintiff's Exhibit 9, which they admitted was not offered for the truth of the matter asserted. They admitted it for only for a limited purpose.

And there's simply no evidence of what plants Panda-Energy owned, or where it owned them, or what's its interest was, or when it owned them or what the plants may have been worth or whether any of those plants generated any money for Panda Energy International. You just can't get there through this very loose approach that they take. In sum, all they really do is stack, surmise upon speculation, upon inference, upon inference and that is simply no evidence of collectability at the relevant time with respect to Panda Energy International. The only evidence, in fact, showed that it was judgment-proof at the time of any judgment.

I'd like to shift gears and talk about the contingent fee deduction point. I think the Court would need to reach this only if it were to conclude that some amounts of either 5A or 5E are supportable. And if the Court were to so conclude, we submit that those amounts must be reduced by the ten percent contingent fee that NDR would have owed Akin Gump for recovering and collecting the amounts awarded under 5A and 5E. The deduction, I submit, is required by -- by basic principles of causation and compensation that apply in all tort cases alike. NDR's damages, under 5A and 5E --

JUSTICE BRISTER: In an hourly fee [inaudible] contingency, $100,000 hourly fee and they hadn't paid it. And Akin Gump sues them for the 100,000. Couldn't they defend, saying negligence, therefore we don't have to pay?

MR. LEVINGER: You do see those suits, Justice Brister, and I think, in essence you're back into a disgorgement-type argument there. Fee forfeiture type argument --

JUSTICE BRISTER: Well, I mean that's -- I mean, there -- I've never seen a suit for attorney's fees that wasn't met by a counterclaim for attorney negligence. I just can't recall any where we had the outcome because usually one wipes out the other or one disappears and the other's recovered. But I -- since people always defend with that, wouldn't that -- is -- is that not a defense? Isn't that a defense or is that an entirely separate cause of action and they just create an offset?

MR. LEVINGER: I -- I think that maybe the answer. It -- this situation I think is different because we're dealing with a contractual contingent fee as distinct from some hourly fees that you have to speculate about what they might be to complete the case.

JUSTICE BRISTER: But if one's recoverable the -- you -- you

shouldn't be able to recover your hourly fee, but you know, it shouldn't be net of the hourly fee, but not of the contingency fee or the other way around.

MR. LEVINGER: Well, I -- I think that's -- that --

JUSTICE BRISTER: That was just the form of payment. It ought to be either both are net or neither is net.

MR. LEVINGER: That -- that -- that may be right, although I'm not sure the Court needs to get there. I think the contingent fee is the much more obvious as a matter of law point. An hourly fee might be something a jury may have to determine; what -- what would be the hourly fee that the lawyer would have to -- would have been incurred to complete the case: Here, where the contingent fee is contractual, they agree that they would owe ten percent upon completion of the case, if it were successful, and my point on this is, since their damage model assumes success, it's a but -- it sets up this "but-for" hypothetical world of success, you simply need to complete the "but-for" hypothetical by deducting what NDR would have owed at the end of the day, which was a ten percent contingent fee based on the amounts recovered and collected.

Now, the Court of Appeals disagreed with that for two reasons. I think neither reason is legally sound in any way. The first thing they argued is that Akin Gump failed to earn its fee and shouldn't be rewarded for its wrongdoing. Well, I think that focuses on the wrong question. It's not what happened in reality, it's what would have happened under this hypothetical "but-for" world that their damage model is based on -- their model is based on a hypothetical success. And if you base your model on hypothetical success, then what comes with that is the obligation to pay a ten percent contingent fee. The other argument they make is that, well, NDR is going to have to pay twice. They're going to have to pay Akin Gump via this offset or deduction, and then they're going to have to pay their lawyer in the -- the malpractice case -- the legal malpractice case.

The problem with that argument, and I think it's been demonstrated well by two cases I would refer the Court to: the Horn case out of the Wyoming Supreme Court and the Moores case out of the First Circuit Court of Appeals. The problem with it is it confuses two things. It confuses the proper measure of damages in the underlying case, which requires you to complete the "but- for" world. And then it confuses the second thing which is the prohibition against recovering attorney's fees in a legal malpractice case, indeed, in any tort case for that matter.

JUSTICE BRISTER: How many -- how many state Supreme Courts have we had rule on this issue?

MR. LEVINGER: I'd -- I'd have to just guess on this, I think we have less than five. And the cases, no matter what court they come from, they're pretty equally split between the two approaches. Many agree with what I said. The most recent I think is the Horn case. And in the Moores case out of the First Circuit. There's a whole -- another crop of cases that agree with the approach taken by the Court of Appeals which I think are deficient because the two reasons, every one of those cases rely upon are the two I just discussed. The -- the -- the lawyer didn't earn its fee, argument, and then the client will have to pay twice. And what those courts do --

JUSTICE HECHT: Would you have a fee forfeiture argument under Burrow against Arce?

MR. LEVINGER: That -- that argument, Justice Hecht, is really in response to their -- to their cross point where they say they should

get attorney's fees as damages --

JUSTICE HECHT: Yes, I know, but, would you - - could you make a claim for -- in this connection based on Burrow vs. Arce, they -- even though we do set up this model and it -- even though it does presume success, they shouldn't get their attorney fees because we are having to pay twice.

MR. LEVINGER: Well, this can't be a fee forfeiture case because they didn't plead, prove or obtain findings on a clear and strong breach of fiduciary duty. So, you can't get the fee forfeiture --

JUSTICE BRISTER: [inaudible] negligence [inaudible] breach of fiduciary duty is different?

MR. LEVINGER: Yes. That's right. Thank you.

CHIEF JUSTICE JEFFERSON: Any further questions?

Thank you, Counselor.

The Court is now ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Jones will present argument for the respondents.

ORAL ARGUMENT OF MICHAEL L. JONES ON BEHALF OF THE RESPONDENT

MR. JONES: May it please the Court. Let me begin with the issue of collectability because there was a -- a couple things that I don't think are clear.

Counsel referred to, what you have before you, under Tab number 2, the consolidated financial statement. I don't think what was made clear is Panda International filed this as its business record. It filed a business record affidavit. And it said, this is our -- it didn't say this is our financial statement; it said this is our business record. When you look at that document, it does not have a name on it. Counsel would have you believe that the JV 1-JV 4 indicates that that refers to the joint ventures, and it may well be. But the question is, whose financial statement is this that reflects over $108 million in assets and owner's equity of over $47 million? Panda Energy International filed this as its business record. There's certainly evidence, that's sufficient evidence, or more than a scintilla of evidence that Panda Energy International, who claims this is its business record, had over $47 million worth of owner's equity.

JUSTICE BRISTER: But a -- I mean, a business may get all kind of demand letters from another party and keep them as a business record, that doesn't mean they vouch for it.

MR. JONES: Well, that's true if it's -- if it indicates on the record where it came from. This is a financial record in this -- that this company says, these are our records. And it clearly refers to the -- the assets that we're talking about. And I would also compare, if you would look at Tab number 3, and Justice Hecht, I think you alluded to this somewhat. If you look at this diagram, the four joint ventures are at the bottom of the diagram. The -- also attached to that business record were the financial statements of Pan-Western that indicated that Pan-Western had zero equity. So, if you look at the financial statement, it's like, okay, whose owner equity is this? 47,000,000. Well, the only party that said this is our business record is Panda International, which obviously is the ultimate parent that owns all these assets. So, it's certainly, I believe, sufficient evidence in the record that that's Panda Energy International.

JUSTICE JOHNSON: But even -- but even if that's true, I -- as I understood it, opposing Counsel's position that Pan-Western owned 88

percent of $47 million owner's equity, but they owed $110 million or some figure like that, so that there's no -- so that there's no equity there which is what it shows here, zero equity, how do we still get to an asset that's subject to execution to collect your judgment?

MR. JONES: Well, I think the point there is that Pan-Western, if this is -- this can't be Pan-Western's consolidated financial statement because this shows an owner's equity of 47 million.

JUSTICE JOHNSON: Sure, that's the JV. It reads there JV's. But I'm saying assuming that to be true, this chart shows Pan-Western owns 88 percent of each joint venture, so they would own -- assuming that and logically, they'd get 88 percent of the owner's equity, well, that'd be $35 million or so, let's assume. But on the other hand, if they have a liability of $155 million or $100 million or even $50 million, they still have zero equity. So, if you take your judgment out and execute on Pan-Western, that will go up -- will go all the way up the line here, but -- but effectively we -- you execute on them, do you have any asset that's going to be collectible or how do you collect?

MR. JONES: Well, a couple of points. There is no $155 million in liability listed --

JUSTICE JOHNSON: I understand that. But one of these companies somewhere, apparently is liable for the bond money --

MR. JONES: Yes, sir.

JUSTICE JOHNSON: -- aren't they?

MR. JONES: Yes, sir. And our --

JUSTICE JOHNSON: That's what I understood his position to be.

MR. JONES: Our position is the ultimate -- the -- the party that we would have obtained the judgment against is the ultimate parent that owns all these assets, is at the top, not at the bottom. We might have had some problems at the bottom but at the top, the ultimate owner of all these assets is who we had the judgment against. And --

JUSTICE HECHT: But also the liabilities, right?

MR. JONES: Yes, sir.

JUSTICE HECHT: And we don't know whether the liabilities exceed the assets?

MR. JONES: According to this financial statement they do. If -- if they've got 40 -- if they've got over $100 million worth of assets and they've got $47 million worth of owner's equity. And also remember, we're talking about a judgment of $537,000. We're not talking a huge judgment. And we're talking about entities that own hundreds of millions of dollars worth of assets. I would also point out that the evidence in the record indicated, if you refer back to the diagram, that Panda Global Holdings Inc., the second company on the tier, had $70 million in cash in the bank. That -- that's directly owned by Panda Energy International. It -- it's somewhat amazing to me that we're standing here talking about collectability when we're dealing with entities that have hundreds of millions of dollars of assets. [Inaudible]--

CHIEF JUSTICE JEFFERSON: Well, the numbers are -- the numbers are impressive but we've got to analyze, I mean, you know, these auto companies have billions of dollars, but they're in trouble right now.

MR. JONES: Yes, sir.

CHIEF JUSTICE JEFFERSON: And -- and so the question that I have is -- is that chart Tab 2 and your analysis of it, is that all of the evidence that the judgment was collectible or is there more?

MR. JONES: I think there's more, Justice Wallace. As I mentioned, Panda Global Holdings Inc. the evidence indicated had $70 million in the bank in 1999. I don't agree with Counsel. I think there's

sufficient evidence in the record of the other assets that were owned ultimately by Panda Energy International. A power plant in Washington, DC. Power plants in Asia and in other countries. So, I believe that there is more than a scintilla of evidence that clearly, a $537,000 judgment could have been collected against this entity.

Let me move to what -- what I think is probably one -- the most important issues before this Court that was raised in our petition: whether the issue of whether under Texas law, a plaintiff can recover attorney's fees incurred in litigation with a third party as an element of economic damages when the fees are the natural and proximate result of the negligence of the defendant.

The -- there's obviously a clear split of authority among the Courts of Appeals here in Texas and that issue has been subject to wide debate. The majority of the Texas Courts of Appeals to consider that issue have adopted this exception that we are urging this Court to adopt. And I would also point out that -- this exception has been widely recognized by other courts, the majority of courts to consider it around the country. We're not challenging the American Rule that attorney's fees as such are not recoverable unless they're authorized by statute of contract.

JUSTICE JOHNSON: [inaudible]. We're talking about sub sections or Section C, the 216,000 and the jury charge?

MR. JONES: Yes, we are.

JUSTICE JOHNSON: And that asks about attorney's fees and expenses paid by NDR in the Panda lawsuit.

JUSTICE JOHNSON: Now, are we arguing about appellate attorneys' fees or are we arguing about attorneys' fees--

SPEAKER: [Inaudible].

JUSTICE JOHNSON: The reason I say that the -- the jury charge does not ask about appellate attorneys' fees, and I'm wondering why we're talking about appellate attorneys' fees?

MR. JONES: You're correct. It does not limit the recovery to only attorneys' appellate fees. We believe that the record before this Court that the jury went -- supports the argument that the jury went through and figured what NDR had to pay on appeal.

JUSTICE JOHNSON: Yeah, but that's jury mental processes. Do we even get to -- do we get to analyze juries' mental processes?

MR. JONES: Perhaps not. I'm just trying to explain where they came up with the number.

JUSTICE JOHNSON: Well, I know, but -- but -- why -- why do we even talk about that because it seems to me like the problem with talking about appellate attorneys' fees is -- is the discussions going back and forth is if this charge asked about appellate attorney's fees, then you might be -- have more traction about attorneys' fees because of Akin Gump's negligence that you had to defend yourself. But it looks to me like this just says how much money did we pay Akin Gump do we get back? And that -- that could have been the first $216,000 under the charge here. It looks to me like -- am I missing something?

MR. JONES: No, sir. I would agree with that. It is not limited to appellate attorneys' fees. But I do believe that this -- this recovery would be supportable if this Court recognizes that attorneys' fees can be recovered as economic damages if the record supports that NDR did in fact pay over $200,000 to Akin Gump to appeal this verdict. I believe that could be that this Court could support it as long as the evidence in -- is in the record, and I believe that it is.

JUSTICE HECHT: The cross-respondent says it -- there's no evidence you paid it.

MR. JONES: I believe there is, and I don't believe that -- that -- that issue was not raised in the court of appeals, so I don't believe it's been preserved for this Court to consider, but I do believe -- and we have cited the record the -- on appeal -- there are actually expenses paid to other lawyers, Bill Dorsanio and Maureen Armor were hired to help on the appeal. I believe that Mr. Tang testified he paid all fees on appeal. Akin Gump's billing records are in the record. And they do show if you sit down and add them up, which I actually did, they do show very close to what the jury came up with in appellate attorneys' fees, almost $215,000.

JUSTICE BRISTER: Did you pay? What -- what -- which -- did you pay trial fees to them also? Was the --

Was the 10 percent a pure contingency. [Inaudible] a bonus.

MR. JONES: No, it wasn't -- it was a -- it was a blended rate. So, there was a significant amount paid in -- on actual hourly rates plus the ten percent contingency.

JUSTICE BRISTER: And -- if you -- in a malpractice case, attorneys' fees, you don't to get back the fees you spent on the firm that was [inaudible] -- just because they're negligence, do you?

MR. JONES: No, just [inaudible] -- you don't -- not that you actually paid --

JUSTICE BRISTER: The only -- only way to get fees back, so far we've held, is breach of fiduciary duty.

MR. JONES: Correct.

JUSTICE BRISTER: And there was no pleading or proof in this case that Akin Gump plead --

MR. JONES: No.

JUSTICE BRISTER: -- breach of fiduciary duty?

MR. JONES: We agree with that. And as to that issue of the ten percent, I think the majority of the courts, and I do think it is the majority, at least according to the legal malpractice --

JUSTICE BRISTER: Well, there's a difference in majority of the courts between -- with no disrespect, you know, one of five intermediate Appellate Courts in Illinois vs. The Illinois Supreme Court. How many Supreme Courts have actually addressed this question?

MR. JONES: I know the New Hampshire Supreme Court has. Counsel mentioned the Wyoming -- I'm sorry I can't -- I can't give you [inaudible] --

JUSTICE BRISTER: Just a very small handful.

MR. JONES: That's right. But let me point out that the reason that -- that those, we've kind of addressed them -- the reason that courts have not or [inaudible] the courts that have ruled the way we think that the -- this Court should rule, the way the Dallas Court of Appeals ruled, is that the attorney hasn't earned his fee. He's breached his contract through his negligence; the client has lost the lawsuit --

JUSTICE BRISTER: Well, it's not exactly that. The -- because they did render legal services. The contract was for legal services and a fee, and they did render legal services. So I understand the arguments of breach of contract, but really it's really more like a -- a warranty and we've held in medical malpractice, that's a tort. We've never, in fact, on limitations and numerous other areas we've held that, if you're claim is below standard care, that's a tort, that's not a breach of contract action.

MR. JONES: Correct. And --

JUSTICE BRISTER: So, wouldn't it be correct that your claim -- the way these usually work where one sues for the fees and the other one sues for malpractice, it's not a defense to the suit for fees; it's an

offset against the suit for fees.

MR. JONES: Correct. And I -- I think it -- I say breach of contract, it's negligence. I mean, basically the attorney didn't earn his fee. It's an equitable exception I believe that the Courts recognize. Let me just use an example. If you hire an attorney, he recovers $100,000. You've got a $40,000 contingency fee. The client recovers $60,000. In the negligent attorney scenario, the -- the lawyer is negligent, the client recovers nothing. The client then has to go out and hire the second lawyer, the malpractice lawyer. He worked through the numbers; the client ends up with $36,000 at the end of the day. Their argument that you should put the plaintiff in the position that he would have been had the lawyer performed competently, you'd have to give him 60,000. But if you take your fees --

JUSTICE BRISTER: I -- I understand the equities, that that ought to be real because that's what's fair. But that would in fact be giving recovery of attorneys' fees in a tort which for 150 years, this Court has said, we're not going do that. Right -- right or wrong, that's what we've said.

MR. JONES: You could look at it that way. But I think the other courts look at it -- it's an equitable exception you're not having to pay the negligent lawyer. It's not so much you're recovering your attorneys' fees, you're just not having to pay the negligent lawyer for not doing the job that he should have done. You're correct, the lawyer performed services, but in -- the ultimate result was those services weren't worth anything. The client got absolutely nothing out of it. The client was entitled to a recovery but-for the lawyer's negligence the client got zero. So, yes, I guess you can say the law firm provided services, but they had no value. The client lost. So to put the client back where he should have been, you shouldn't force that client to pay the negligent lawyer for something that he didn't do for a fee that he did not earn. So, I -- I don't think you're allowing the recovery of attorneys' fees as much as -- it's an equitable exception that says you should not be forced to pay the negligent lawyer for a job that he didn't do. Very briefly --

JUSTICE JOHNSON: [Inaudible] Justice -- Justice -- One of -- Justice Brister's questions, do we treat any other tort recovery like this at all? Or is this -- would this be a special rule for lawyers?

MR. JONES: To be honest with you, I was trying to think of another scenario and I -- and I haven't come up with one because you typically don't have a scenario such as this where you have a contingency fee, number one. You know, a doctor -- you're not going to pay a contingency fee. So it's hard to find another scenario, Justice, where you're going to have this same factual situation. I think it just -- just does apply to lawyers. Because I -- quite frankly, I can't come up with another scenario that logically that would make sense. I mean you don't, you know, you don't hire a plumber or you don't hire -- hire a general contractor on a contingency fee, so he's --

JUSTICE HECHT: [Inaudible] You think we should treat contingency fees and hourly fees differently? That doesn't seem to make a lot of sense.

MR. JONES: It -- it doesn't, and I see the logical disconnect there. I guess the ultimate result is on a contingency fee where you -- where the lawyer takes it on a contingency fee -- agrees he's not going to get paid unless he does the job and does a recovery is the only exception that I can see. I mean, going back to the issue of can we recover attorneys' fees and economic damages -- another scenario, you hire a lawyer to do a will. If he doesn't do it correctly, you have to

hire another lawyer to correct his mistakes. The question is, do you still have to pay the lawyer that -- that drafted the will? Or let's say you've already paid him, do you get your money back? I mean, that's a more difficult situation. It seems a lot clearer, obviously, when you're talking about a contingency fee.

JUSTICE WAINWRIGHT: What if an architect designs a building? It's an hourly fee, building's effective, suit, damages for the building they didn't -- the purchaser didn't get. Should the same rule apply to architects? Any logic that says it shouldn't, if you're right?

MR. JONES: I guess, the logic would be true if the entire work that the architect did served absolutely no value which I have a hard time thinking that there would no value there.

JUSTICE WAINWRIGHT: Depends on the defect, doesn't it?

MR. JONES: It does. But I think the only difference there is is the architect is not saying, "I'm going to take this on a contingency and only if it's perfect and it works the way it should."

JUSTICE WAINWRIGHT: Well, you just acknowledged you don't see a good reason for distinguishing contingency versus hourly fees. Assume that's correct, then would it -- it doesn't matter if it's hourly or contingency. Is there a good reason for treating lawyers different from architects?

MR. JONES: Not under -- not under that question, no, sir. I just think the ultimate result for the client, if we talk about making the client whole on what the client's out but-for the lawyer's negligence, to me that's where I think these courts go and say just it's not equitable to say that -- that because you hired a lawyer on a contingency fee, you're only going to end up with 36,000 even though you should have ended up with 60,000, but-for the lawyer's negligence --

JUSTICE WAINWRIGHT: So the -- so the distinction is, I'm presuming, reading into your argument, Burrows v. Arce. Architects don't have Burrows v. Arce.

MR. JONES: True. Although I don't really see it as a -- as a -- as a typical fee forfeiture. From my standpoint, it's not a fee forfeiture. It's not a [inaudible] -- it's just a negligence case where they didn't earn their fee. If they paid hourly, would they have to give it back? More complicated, but -- I -- I mean, that's where I come down on if you want to make the plaintiff whole, to the person who doesn't understand all these issues, if you want to make them whole, they would say paying two contingency fees because the lawyer was negligent just isn't fair and I know we've agreed to that, Justice Brister. But as an equitable exception, the lawyer hasn't earned his fee and he shouldn't be entitled to a credit against those damages.

JUSTICE BRISTER: Well, the jury could -- the jury could cut the fee because the nature of the services wasn't up to par. But to say that -- probably -- the jury probably couldn't say zero. I mean, I understand your client lost, but lots of people lose and they still have to pay their lawyers. And so, probably couldn't say the value was just zero.

MR. JONES: I think you could under certain circumstances. And I think in this case, no one denies Akin Gump has not challenged the findings that they were negligent and but-for their negligence, Panda should have won. So, I think you do have scenarios where I guess the lawyer has performed services, but the net result is the client's recovery is zero. So -- I mean, yes -- I mean well, the bottom line is the client got nothing other than having to go out and hire a malpractice lawyer to then come in and sue the lawyer. So, is there any

benefit to what that negligent lawyer did? I don't think so.

JUSTICE JOHNSON: What was the purpose for - - for example, question number 8, did Akin Gump perform compensable work?

MR. JONES: They had a quantum meruit claim for their work. And so that was the reason for submitting --

JUSTICE JOHNSON: That's for the unpaid fees?

MR. JONES: Yes.

JUSTICE JOHNSON: Okay. So, the jury found they did not perform compensable work, so they didn't get to recover those?

MR. JONES: Correct. Under a quantum meruit theory, that's what the -- that's what the jury determined, what the Judge ultimately determined.

JUSTICE JOHNSON: Okay. They still had a contract for the fees to be paid on an hourly basis?

JUSTICE BRISTER: And I understand some states do that. They say, well, you can't [inaudible] and do quantum meruit. But again, our rule for a hundred years has been is if there's -- if there's a contract, you can't sue in quantum meruit. So we're kind of foreclosed from that direction.

MR. JONES: Correct. And once again, I go back. I think that's why courts just look at it more from an equitable standpoint, I guess it's not -- very briefly just close with our economic damages. I urge this Court, to follow a majority of Texas Courts of Appeals, and what I consider to be the majority around the country, and to allow a party to recover attorneys' fees as economic damages does not violate the American rule. We're not saying that you can file a lawsuit and collect attorneys' fees, but there's so many situations these days, particularly involving lawyers where you have to a hire a lawyer to solve the problem. And there's no -- no logical reason to say that -- that under those circumstances attorneys' fees never can be -- can be recovered as damages.

One of the best examples, I think, that we've used is, if -- if a lawyer commits a malpractice in, let's say, helping with an estate tax return, you could hire an accountant, maybe you do hire an accountant to help correct those damages, but you're always going to have a lawyer to help you correct that problem. And there's no reason why you could recover the accountant's fees, but you can't recover attorney's fees simply because of the American rule. My time's up. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Mr. Jones.

REBUTTAL ARGUMENT OF JEFFREY S. LEVINGER ON BEHALF OF THE PETITIONER

MR. LEVINGER: I'd like to start first with that last point about the claim for appellate attorneys' fees. In fact, there is no evidence that they paid Akin Gump any appellate attorneys' fees. And we did raise that argument in the court below. We raised it in our reply brief.

That was the first opportunity we had to raise the argument because up until that time, their argument had simply been, we want a refund of the moneys we paid Akin Gump, without distinguishing between trial and appeal. We argued in our appellant's brief below that that's tantamount to disgorgement. And they came back in the appellee's brief and didn't deny that but they say, well, but what we're really seeking are the appellate fees that we shouldn't have otherwise had to pay. We're seeking those as damages. And we said in our reply brief, well, you can't just re-label damages when ultimately you're seeking

disgorgement and moreover you did not pay those appellate fees.

JUSTICE JOHNSON: Is there any objection to the way it was submitted?

MR. LEVINGER: Not as to 5C, I don't believe, no, your Honor. And -- but -- but clearly it -- what it went to were -- were fees that they paid Akin Gump. And they paid Akin Gump I believe 350,000 fees for the trial, but not for the appeal. The last invoice that was paid, we see this from Defendant's Exhibit 172, was dated September of 2000 which was 5 months before there was even a final judgment in the case. That was the last invoice that was paid.

Now, while they -- while they did pay some amounts during the pendency of the appeal, those amounts were credited to the past due bills that were incurred during the trial. And they don't make any complaint now about the -- the fees they paid for the trial. So, in fact, there were no fees paid for appellate work. And in any event, as the Court of Appeals said, there is a big causation problem because as the court said, they likely would've paid appellate fees win, lose, or draw. This new damages argument, I think, also fails as a matter of law. This is not a case like its hypothetical where the fees sought to be recovered as damages were paid to another lawyer to -- to correct the situation created by the malpractice lawyer. This is a situation where they're seeking to recover fees from the -- from the very same lawyer who allegedly committed malpractice. And any way you look at it, that's fee forfeiture or -- or fee disgorgement which this Court said in Burrow v. Arce is allowed only in the case of a breach of fiduciary duty.

JUSTICE JOHNSON: Opposing Counsel says they hired two additional lawyers for -- for appeal.

MR. LEVINGER: Well, not exactly. They hired those lawyers after the -- after the verdict. And two things, one is there's no evidence in the record what -- what portion of those lawyers' fees were for the trial, which they don't complain about or don't try to recover versus the appeal. Moreover, the amounts they paid those lawyers, Prof. Dorsanio and Armor are, at a minimum, Mr. Tang admitted from NDR, about $30,000. Maybe at maximum about $50,000. So, anyway you cut it, they can't even use the fees paid to those other lawyers to get to the amount found by the jury. It -- It's just kind of a bootstrapping.

JUSTICE HECHT: But you think it would be a different matter if they had hired somebody else for the appeal?

MR. LEVINGER: It -- that -- that's a closer case, I think, where--

JUSTICE HECHT: Why?

MR. LEVINGER: I'm sorry?

JUSTICE HECHT: What difference should it make?

MR. LEVINGER: Well, it -- it -- I guess that's not an issue the Court needs to solve today. But I think that maybe fits a little bit more closely within Restatement of Torts 9-14, which says that basically if you incur fees in a prior suit because of the tortuous acts of another--

JUSTICE BRISTER: How does the jury decide -- okay, if they had represented you right and you'd have won, you'd still would've had an appeal anyway and how does the jury decide whether somebody who's not even a party would have appealed anyway? And how much that hypothetical appeal would have cost?

MR. LEVINGER: That -- I think that underscores the speculative nature of their -- of their claim for appellate fees in addition to the fact that they -- that they didn't pay him, that's why the Court of Appeals said, there's just no evidence here of causation under that --

under that new theory.

JUSTICE JOHNSON: It seems like and I'm troubled by -- we -- we have a jury submission on attorneys' fees, and we have some evidence that they hired different attorneys on appeal to -- to defend against the claim on appeal --

MR. LEVINGER: Rather to assist, I think, Akin Gump. Right.

JUSTICE JOHNSON: To assist or to -- to defend. They [inaudible] no objection to that so it seems as like -- as though they may have some legal evidence of -- these other attorneys that are hired on appeal -- some legal evidence, legal sufficiency to support some damages, so why are we not in a factual sufficiency analysis here on this 216, which is the Court of Appeals' business, not ours?

MR. LEVINGER: Well, I think you're in a legal sufficiency because they're -- they made no effort to -- to demonstrate how much of the fees paid to these two other professors were allocable to trial work versus appellate work. Their -- their bills are not in evidence. There's just some very conclusory testimony about what they billed and what they were paid. So, I don't think you can draw any conclusions from that, which, by the way, they raised for the first time in their reply brief in this Court. They didn't even argue the fees paid to those other lawyers as part of their principal argument concerning appellate attorneys' fees.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. The cause is submitted and Court will take another brief recess.

SPEAKER: All rise.

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