

ORAL ARGUMENT — 10/21/98
97-1205
ROCKY MOUNTAIN V. LUBBOCK COUNTY

WEAVER: First, I would like to point out that the CA erred in holding that Rocky Mountain Helicopter failed to preserve error by not objecting to the submission of the DTPA question, which was question No. 3 submitted to the jury. Rocky Mountain Helicopters was not required to object to that question in order to preserve its no evidence point.

An objection to a jury question, or an instruction, or definition is usually required in a situation where there is something wrong with the form of the submission, or there is an omission, the definition is incorrect, something that requires correction prior to submission.

Rocky Mountain Helicopters has made no complaint about the form of the DTPA question itself, the definition. The good workman like manner is proper. It's proper under the law if a duty had arisen. Rocky Mountain Helicopter's complaint is that there is no evidence to support the question in this particular case under the facts of this case. Thus, Rocky Mountain Helicopters has presented a no evidence point. It did so under the proper vehicles of a motion for judgment, JNOV, and a motion to disregard.

BAKER: If you say there's no evidence to support an implied warranty, is that the same argument that one doesn't exist as a matter of law in the first place?

WEAVER: We're saying that under the facts of this particular case, no duty arose. It didn't arise as a matter of law, but you have to look at the facts in the case to decide whether it arose or not.

BAKER: If you say there's no evidence to support a jury finding of implied warranty, doesn't that assume the existence of an implied warranty in the first place as opposed to like a summary judgment saying: we say you shouldn't even get to a trial on an issue of implied warranty because as a matter of law they don't exist in this kind of case, and here is the reason why?

WEAVER: I guess a probably more accurate way to put it would be to say that no evidence supports the submission of the issue to the jury.

ABBOTT: Then, wouldn't you have to object?

WEAVER: No. Objection would have been proper. There could have been an objection. That is one way to preserve such a point is to object at the jury charge phase. One of the ways to preserve a no evidence point is to object to the submission saying there is no evidence to support its submission. It might be because there's a total lack of evidence, or it might be because there's no evidence presented in the case that would give rise to a legal duty. And we've cited to the court in our brief *Houston v. _____*, where the court held that you do not have to object to the form

of the question, you didn't have to object to the jury charge stage in order to preserve a no duty argument that it was in essence a no evidence point, and it could be raised after the jury came back with its verdict by way of a j. n.o.v. _____ motion to disregard.

And again, the rationale behind requiring the objection prior to the submission to the jury does not apply in this case. There was no correction that needed to be made to the question being submitted other than to disregard it and not submit it. And we can do that just as easily after it's submitted to the jury as we can before. It's just go ahead and we will disregard it, and that's what we asked the court to do.

SPECTOR: Aren't there other issues that were submitted under the DTPA question?

WEAVER: Yes. There were other issues as well as to misrepresentations. And there's no evidence to support any of the complaints. What we did is in our briefing to the CA we attacked each and every plank of it. And then the CA came and they only looked to the implied warranty and they held that there was an implied warranty and there is evidence of that. And we've come to this court saying, that the court erred in holding that there was an implied warranty. And in our briefing in the CA that we have referred the court to, we have argued and we have shown that there was no evidence of any of the four elements of DTPA violations or the four allegations of DTPA violations. Really there are three misrepresentations, and then the breach of warranty. And the representations stem from post-transactional documents that they were generated after the transaction, after the contract was entered into, and does not give rise to a DTPA violation.

HANKINSON: Now we don't have that CA's briefing, and you have not briefed to us whether or not the judgement is correct below based on the other alleged violations of the DTPA that were included in the broad form submission, correct?

WEAVER: Well the briefing has been supplied to the court. The clerk pointed out last week that I was to send copies of it since I was relying on that briefing.

HANKINSON: So your position is that you're relying on that briefing even though your petition for review makes no mention of reserving the issues or doing anything else in it, and you're relying on that in asking us to determine by looking at a combination of all this briefing that there is error in the judgment below to the extent it's based on a DTPA?

WEAVER: Yes. What we're saying is that in our petition for review we focused on what the CA did, and the CA erred in finding that there was evidence of the implied warranty. And on the briefing on the merits we relied on our briefing below for that. And we have attacked each and every potential basis for supporting the DTPA issue.

Once we get over the hurdle of whether there has been a preservation of error, we get to the merits of the breach of the warranty claim, and we find that there is no implied

warranty that arose under the evidence in this case. This court made clear that implied warranty of good and workmanlike manner with respect to services only rises as to the repair or modification of an existing good. The court made that clear in *Parkway Co. V. Woodruff*. The CA bypassed this restriction. Instead, the CA read *Melody Homes v. Barnes*, as permitting the creation of an implied warranty whenever public policy warrants it. And in this case, the CA created a warranty based on its conclusion that the work performed here was inherently dangerous.

ABBOTT: Let's assume that you are 100% right on that particular issue. Why would the jury's verdict nevertheless be affirmed because of the fact that there were other _____ issues submitted in the question?

WEAVER: Because there is no evidence to support any of the DTPA issues that were submitted. And that's what our briefing in the CA shows. And really the reason for all the focus on the good faith and fair dealing is that was the only thing that was really argued to the jury, that was the only thing that they really took seriously in their presenting the case to the jury, and that has really been the bone of _____ throughout the case.

The other issues, I think if the court reviews our briefing, sees that they are really pretty quickly dismissed. And the only thing that was debatable was the implied warranty.

The public policy exception that they try to create here is rather a broad one that threatens to swallow the rule itself. Any number of services pose a danger if not performed correctly: commercial air service, surgery, residential and natural gas services. But when there are other remedies that exist, such as a cause of action for negligence, or a cause of action for gross negligence, there is no need to create a new implied warranty in all of these cases.

Moreover, just as this court recognized in *Parkway*, a demonstrated need for an implied warranty is but one principle to be drawn from *Dennis v. Allison*, and *Melody Homes*. The court also looked at a second principle, a second prong or requirement in saying that warranty only extends to services provided to remedy defects existing at the time of the consumer transaction. And what we have here is the turning off or not of a pump. There is no defective good that's being modified or serviced. When they are talking about broad services and providing air ambulance care, it doesn't even involve the crash of a helicopter or anything else. It's a very incidental thing. It doesn't really involve directly the refueling of the aircraft, the refueling has been completed. It's just that the pump was not turned off. It's a very incidental matter that was not essential to the services contracted for and there is no need to come in and make a broad sweeping exception in this case.

Our final point relates to the hospital's failure to present expert testimony on the breach and causation and how it is fatal to its case. The hospital would have this court believe that this case is as simple as someone leaving a garden hose turned on. But the CA's opinion, the hospital's theory at trial, and the evidence adduced at trial all really belie that. In trying to create an implied warranty in this case, the CA stressed the expertise and specialized knowledge required of

Rocky Mountain Helicopters.

The hospital in making their case before the jury, what they argued was that this mechanic that was hired by Rocky Mountain Helicopters had had 26-years of practical and teaching experience in helicopter maintenance, and in refueling helicopters needed some particular training for refueling in this case because this was such a specialized, difficult, complex thing to operate. And the evidence at trial concerned the custom in the industry regarding shut-off lights, the need for leak detectors, pumps running for weeks without problems, and the intricacies of O-rings and whether proper O-rings were used and the sealants in the O-rings. These are not matters that are within the knowledge of ordinary lay people. Not unlike the case of *Hagger v. Ramirez*, Ft. Worth CA case cited in our briefing, where expert testimony was required to prove negligence in dusting a wrong field. Expert testimony was required in this case to prove that Rocky Mountain Helicopters breached any duties that it had in this case.

This issue relates to the implied warranty issue, but it also relates to the negligence issue as well, because they are basically the same. They try to take the negligence issue and take the same facts and just call it implied warranty. Because there was no competent testimony that Rocky Mountain Helicopters' conduct fell below the standard of care, the jury issues on the DTPA and on the negligence must be disregarded.

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RESPONDENT

WELCH: I am here representing Lubbock County Hospital District, d/b/a University Medical Center. We would note that at the inception of this litigation, I believe that University Medical Center was then known as Lubbock General Hospital, but has since changed their d/b/a.

The issue that I think I want to touch on first is, of course, the waiver issue. And I think Justice Baker had it absolutely right when he said: isn't this an issue that once we get to the point where we've submitted it to the jury, that we've made an assumption that the warranty already exist.

They had an opportunity at many stages of this litigation starting with special exceptions to the pleadings, they could have moved for summary judgment, could have moved for directed verdict, could have objected to the submission of the warranty issue as an alternative under the DTPA issue. They did not.

BAKER: His argument was, well we can wait till after the verdict and file a motion for judgment n.o.v., and assert there is no evidence to support a finding of implied warranty even if you have assumed it when you submitted the issue to the jury. Now that's correct isn't it?

WELCH: Well I understand what his argument is, but I think we have to focus on which

facts does the court need to look at to decide whether the warranty exist. And that's the question they are asking this court to decide. Look at their points No. 2 and 3: does the warranty exist, is basically what they are asking this court to ask. The warranty arises as a matter of the relationships between the parties created by the contract. There is no dispute in this case that the contract existed.

BAKER: A breach of a contractual warranty doesn't give rise to a DTPA case does it? This is an implied warranty so it couldn't be in the contract?

WELCH: Yes, but in the *Sherinbeck* case, this duty is implied in every contract. And I think that's what we have to focus on is that the fact here is the contract exist and implied within that relationship created by the contract, is this duty that they will not be negligent in performing their duties under the contract. I don't think that fact was in dispute in this case.

HANKINSON: If the facts aren't in dispute, and it presents then a question of law for the TC to decide based on these undisputed facts whether this implied warranty in fact exists under Texas law, why does it matter whether or not there is an objection to a jury charge? Couldn't this have been raised by a special exception with failure to state a claim, summary judgment, no cause of action under Texas law, motion to disregard jury findings afterwards because the jury findings are of no legal effect under Texas law, motion for judgment notwithstanding the verdict for the same reason? If it's a legal question why does it matter whether or not the jury answers the question and in what way has the failure to object at that point in time caused any harm to your client?

WELCH: I think you're right, that it may not cause any harm to my client, but I don't think it causes any harm to his client either.

HANKINSON: But why does it make a difference then whether there's an objection made or not if what we're asking is a trial court to answer a legal question?

WELCH: I think it gives the parties the opportunity if they are going to say that we have to wait till the jury answers some fact question to determine whether the warranty arises as a matter of law, then they have to give the court the opportunity to find out: have we gathered all the evidence? Are all the facts on the record for the court to make that decision? And I think it's beneficial to have those issues decided at the TC rather than lay behind the log and say: well we'll just figure out on appeal. It waste the court's time. It waste our time.

SPECTOR: Is there evidence that support the other issues that were submitted under DTPA?

WELCH: I believer there is. And I think the Amarillo court in their opinion did a good job of laying out those things that they felt like supported the other alternative submissions.

SPECTOR: They seem to focus on the implied warranty.

ABBOTT: Let me ask you this, that would perhaps answer Justice Spector's question. You say in your brief that Rocky Mountain Helicopters failed to turn off the copter. Is there evidence of that?

WELCH: I think that the evidence on record is is that Rocky Mountain had this maintenance flight that was at the pump. There's no question that they refueled. There is no evidence that anyone else touched the pump in the interim time between the first refueling and the second flight landing there.

ABBOTT: So the evidence shows that Kidderman was the last person to use the fuel pump before the leak?

WELCH: Correct. And the evidence is also from Kidderman's own testimony to have the leak occur in this quantity, the pump would have to have been left on. What we're touching on here is I think is one of the more important issues in this case, and that is, that the DTPA question was submitted in broad form. What the petitioner in this case would have this court do is look at only the implied warranty issue as submitted, and find that that invalidates the whole verdict.

HECHT: He said several times, there is no evidence as to any of it, didn't he?

SPECTOR: That's my question. What is the evidence of false, misleading or deceptive acts, misrepresentations for example?

WELCH: Well as we outlined in our brief, there are other representations contained within the contract that were not kept with. The indemnity provision was not upheld. There were representations that they would provide persons who had the knowledge and skill required to perform the services, and there was evidence that Kidderman who operated the pump did not receive that training. That's his own testimony.

BAKER: You have a negligence cause of action and the DTPA cause of action, and that's it?

WELCH: Right.

BAKER: No breach of contract? No fraud in the inducement?

WELCH: We don't have a breach of contract claim because the damages that resulted to the Hospital were not directly as a result of the breach of the general agreement, and that was for Rocky Mountain to provide Air Ambulance services and all the incidentals that go with it. The damages that resulted to University Medical Center was due to their failure to perform that contract in a reasonable manner, such that it caused fuel to spill. They incurred property damage as a result of the...

BAKER: Well the damages were cleanup and related property damage?

WELCH: Yes. That was what the issue is, that we've got a TNRCC order that tells us that we need to remediate the site, and we have some cleaning costs.

BAKER: So the basic allegation is, he landed there, filled up his helicopter and forgot to turn off the pump?

WELCH: Yes.

BAKER: And that was the proximate cause of the leak, which caused your damages?

WELCH: Right.

BAKER: So how does any misrepresentation allegedly in connection with the contract fit into a DTPA claim?

WELCH: We get there in one respect through the implied warranty of good and workmanlike performance that we believe attaches to this contract. Another aspect of our damages of course is that we're claiming that we are not liable for these damages due to the indemnity provision that they have failed to uphold in this case as well.

BAKER: But you just told me you didn't sue on the contract breach for failure to pay under the indemnity claim?

WELCH: That's true.

BAKER: So you can't argue that here then? You would have to somehow fit all this into a DTPA claim?

WELCH: We get there by alleging that they represented in the contract that they would uphold that end of the bargain, which they didn't.

OWEN: You say a breach of contract constitutes your DTPA claim?

WELCH: The failure to adhere to that particular provision, which required them to indemnify us for any property damage losses that we incurred as a result of the...

OWEN: You're saying that the breach of their contract is your DTPA claim?

WELCH: One aspect of it is a breach of that particular provision in the contract, yes. Additionally, though, as I stated, there are some other representations that go along with that

contract, including providing trained persons to perform the duties that they assumed under the contract.

ABBOTT: More, specifically in that regard, one claim you make for the violation is failure to abide by the indemnity agreement. Why didn't you just bring a cause of action for breach of the indemnity agreement?

WELCH: I'd like to answer that question. I was not involved in the trial of this case, and I don't know the reason behind why that issue was not brought under breach of contract.

SPECTOR: It's your position that every contract has an implied warranty within it?

WELCH: If we start with the *Sharingbeck* case that says that every contract carries with it a duty to perform the duties undertaken in that contract in a nonnegligent manner and look at the *Colson* case that says that there is no discernable difference between that duty to perform the duties under the contract in a nonnegligent manner and the duty to perform in a good and workmanlike manner, then I would say, yes, that that duty arises in every contract.

OWEN: And, therefore, translates into every breach of an implied warranty under contracts is also a violation of the DTPA?

WELCH: Yes as the DTPA existed at the time that this lawsuit was brought.

ABBOTT: Another way in which you say that a DTPA violation occurred was because of the improper training of personnel?

WELCH: Correct.

ABBOTT: And you say that RMH had a personnel manual requiring this training, and that they didn't comply with the requirements of their own manual?

WELCH: Right.

ABBOTT: In your brief however, you don't say that the existence of that manual, the existence of the training program, the training prerequisites established in _____ were ever communicated or represented to your client? In other words, regardless of whatever their own internal requirements may be, I don't see anything in your brief that establishes it as a violation of the DTPA because there was no representation to your client about it?

WELCH: Well the representation was that they would provide personnel to operate and maintain the helicopters. And complied in that is that they were to provide people who were capable of doing that, not just to go hire someone off the street that didn't have the relevant base level of

knowledge and expertise to perform those duties. And whether we get there through saying that their own internal procedures for hiring persons and training them or we say that that is just an implied duty under the contract, I think, either way I think we get there.

ABBOTT: As a practical matter, what happened here is that 40% of the negligence was assigned to White's pumps. What happened with regard to White's pumps?

WELCH: I believe they settled out before the litigation, before the trial. As a footnote to this litigation, the companion case that I referenced in footnote 108 on page 37, has been decided by the 5th circuit adverse to University Medical Center. So there is no insurance coverage out there to take care of the claim. I just wanted to clear that up with the court. Our time I think to file an application for cert is this Friday. I have been instructed not to do so.

I guess the final thing that I would mention to the court is, that Rocky Mountain has not contested the negligence issue on this appeal, but we're only talking about the warranty issues. So, regardless of what happens with the warranty issue, I think we still have some verdict that stands, and I think what we get is a rendition back at least to the negligence _____ if that's what the court so decides to do.

HANKINSON: Didn't they challenge on the negligence in the CA, and the CA didn't dispose of that aspect of it? Didn't they make some challenge to the jury findings on negligence in the CA even though the judgment out of the TC was based on the DTPA?

WELCH: Right. And the CA they did.

HANKINSON: And the CA has not in fact reviewed that piece of the appeal yet, right?

WELCH: I think what the CA said in their opinion is, is that because we found there was some evidence to support the implied warranty breach, that that was essentially the same as negligence. Although, I would argue that implied warranty puts a slightly higher standard because it's not of the reasonable and prudent person, but the reasonable and prudent service provider in that particular duty. But I think what they said is, that because they found that there was evidence to support the breach of the warranty, that that also supported the breach of the duty under simple negligence.

HANKINSON: Did they dispose of all of the issues presented by Rocky Mountain challenging the negligence piece of the case?

WELCH: I believe they did. I believe they have addressed every point that they brought. On this petition there is not any point seeking for this court to review the findings on simple negligence. In fact, one of their alternative remedies in this case is to have the judgment reduced by the comparative fault finding.

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REBUTTAL

WEAVER: In fact, the CA expressly stated that it was not ruling on the points of error relating to the negligence issue because it had found sufficient evidence on the implied warranty. It's page 9 of its first opinion in this case.

BAKER: Does that mean then if you win every point you've raised here, it still goes back to the CA to look at the negligence?

WEAVER: To look at the negligence. And one of the issues here really I think would be controlling on the CA, and that is, the need for the expert testimony on the implied warranty. I think the facts are the same.

BAKER: What about the negligence issues? Keep the same assumption it goes back to look at the negligence things. Does it take expert testimony for a jury to determine whether somebody did or didn't turn off a pump?

WEAVER: Under the facts of this case, yes, it would. And that's what we've cited the court to the *Hagar v. Ramirez*, which was a negligence case dealing with crop dusting, where they cropdusted the wrong field. And the TC said, no, there was no expert testimony required because it was within the common experience of people if you dust the wrong field, that's negligence. And the CA held, no, that the intricacies of performing that act of piloting and cropdusting is not within the ordinary purview of lay people; and therefore, there was expert testimony required. And this is not just really as simple as whether or not he turned it off. The testimony was that he did turn it off; however, the testimony was also that sometimes it would appear to be turned off, but it would not actually go off, and that it could have been running at the time he left it, he could not tell because of the rotors because they were doing a hot refueling, and 70 - 80% of the pumps in the industry have indicators lights to let you know whether it is really off or not, because sometimes it's difficult to tell. There are a number of facts in this case in whether the training was adequate in this case was one of their allegations of negligence. And they were negligent in not training him properly. And I think that they would require expert testimony whether this person having 26 years of training was adequately trained to perform this work. These are really questions I think that need to go back to the CA.

OWEN: With regards to the negligence claim, you didn't ask us to remand to the CA did you?

WEAVER: I don't recall if it's specifically in it, and if it's not, I would ask that as part of the further relief that it would be remanded to the CA because they have not determined that issue. That would have been an error on my part if I do not ask the court to remand.

Going back to the misrepresentations, the evidence of misrepresentations it's laid out in page 8 and 9 of our brief in front of the CA. The internal operations manual was promulgated. It was an internal document promulgated by Rocky Mountain Helicopters after the inception of the contract, and there is no evidence in the record that it was ever communicated to the hospital. This could not support any kind of misrepresentation under the DTPA and we will go through and we knock out of all the misrepresentations, I think there's some confusion created as to when duties arise or when duties are implied by a contract when warranties are implied. And whereas, a person who contracts to perform a service has a duty to use reasonable care in providing that service, not every such contract creates an implied warranty. Because if it did, then we would have a DTPA violation for any time you had a negligence cause of action arising out of a contract. And I don't think that's where the court wants to go with this case, and I don't think that's where the court should go with this case.

Shell Oil Co. V. Humphrey, held that there was no duty. No duty point may be raised by no evidence point.