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Supreme Court of Texas
Lee C. Ritchie, et al.
v.
Ann Caldwell Rupe, as Trustee for the Dallas Gordon Rupe, III 1995 Family Trust, Respondent
No. 11-0447
February 26, 2013

Oral Argument

Appearances:

Robert B. Gilbreath, Hawkins Parnell Thackston & Young LLP, Dallas, TX, for Petitioners.

Jeffrey S. Levinger of Levinger PC, Dallas, TX, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Justices Nathan L. Hecht, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, Debra H. Lehrmann, Jeffrey S. Boyd, and John P. Devine.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 11-0447, Ritchie v. Rupe.

MARSHAL: May it please the Court, Mr. Gilbreath will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF THE PETITIONER

ATTORNEY ROBERT B. GILBREATH: Good morning, may it please the Court. This case asks the Court to clarify the nature of the Shareholder Oppression Doctrine or the Shareholder Oppression Claim in Texas. That's an issue this Court has not addressed since 1955 and since 1955, there is now a statute in Texas that provides a cause of action for shareholder oppression and our position is that the remedy for shareholder oppression is limited to that that is provided in the statute. I think the logical starting place for this case, however, is to explore the question of whether my client's conduct was oppressive in the first place and--

JUSTICE DEBRA H. LEHRMANN: Can I ask you, what do you think the appropriate standard is? What should govern at this point in time?

ATTORNEY ROBERT B. GILBREATH: We think that the Court should apply the burdensome, harsh and wrongful conduct standard. The court of appeals mentioned both standards and applied both standards, but it's our position the Court should apply only the burdensome, wrong and harsh, burdensome, harsh and wrongful conduct standard and the reason for that is that there's no statutory basis for the reasonable expectation standard. The statute, the oppression statute focuses on the conduct of the majority shareholders, not the expectations of the minority shareholder and so you have states, Michigan and South Carolina have both said, look, our statute just doesn't support application of the reasonable expectations test.

JUSTICE DEBRA H. LEHRMANN: Do you think it would really matter with regard to the outcome of this case which standard were accepted, adopted?

ATTORNEY ROBERT B. GILBREATH: For this case, no, Your Honor. I believe that it's quite clear that our conduct is not oppressive under either standard. It could have an effect in future cases because the reasonable expectation standard suffers from a number of flaws. It's basically a strict liability standard, a no-fault standard and it doesn't take into account legitimate business justifications for the conduct of the majority and that's kind of what happened here. I think that the court of appeals failed to, it focused too much on the expectations of the minority shareholder and failed to take into account the legitimate business justification we had for not meeting with the purchasers or prospective purchasers of her stock.

JUSTICE EVA M. GUZMAN: There'd be a distinction when looking at the reasonable expectation standard for original participants, original owners versus those who come into the interest through inheritance, for example.

ATTORNEY ROBERT B. GILBREATH: Right, yes, a number of commentators and courts, particularly the New York courts have said, look, the reasonable expectation standard really doesn't work when you have somebody, I mean the test is supposed to look at your expectations that motivated you to join the enterprise, the corporation, to buy stock and so if you didn't buy the stock in the first place, you just inherited it, then the reasonable expectations test doesn't work.

JUSTICE JEFFREY S. BOYD: Well can't you inherit the predecessor's expectations. I mean, can't we judge their rights based on the expectations of the person from whom they inherited the stock?

ATTORNEY ROBERT B. GILBREATH: I think that you probably could, Your Honor, and in this case that wouldn't factor into the analysis much because there is no evidence of any expectation by either Ms. Rupe or her predecessors that the company would meet with perspective buyers of, third-party buyers of stock, a minority shareholder's stock, but I think that is possible.

JUSTICE NATHAN L. HECHT: Why should it be an objective test?

ATTORNEY ROBERT B. GILBREATH: Well it needs to be an objective test because if it's subjective, then you're going to overprotect the minorities' interest. You're going to promote fraud. The minority shareholder's going to be able to come in and say well I had this expectation.

JUSTICE NATHAN L. HECHT: But if it's objective, then it wouldn't matter how you acquired the stock.

ATTORNEY ROBERT B. GILBREATH: Then the court of appeals did break down the reasonable expectations test into two facets. The court said there are specific expectations, which might be more subjective and then general expectations that any shareholder might have. Under those circumstances, I would agree, Your Honor, it would be more objective, but I will say that the South Carolina Supreme Court in the Kirkiades case, which is cited in our brief, kind of catalogs the complaints or problems with the reasonable expectations test and does a good job of it. Among other things, one of the criticisms is is that it undermines the institution of stare decisis. I mean it's kind of like I suppose the tort of intentional infliction of emotional distress. You're never going to have a case you can look back on because the reasonable expectation standard is so vague and nebulous.

CHIEF JUSTICE WALLACE B. JEFFERSON: I think I understand what harsh and wrongful means, but what does burdensome mean?

ATTORNEY ROBERT B. GILBREATH: Burdensome would be conduct that, I'm trying to think of an example, if a minority shareholder is employed by the corporation and the corporation makes it extreme, let's say just to come up with an example. Let's say you have a minority shareholder who is a paraplegic, who's in a wheelchair. Perhaps if the majority shareholders decide well we don't want this minority shareholder anymore so they make it more difficult for her to get around at work. That could be considered burdensome and perhaps if combined with additional conduct to show that they're just trying to squeeze out this minority shareholder. That could be considered burdensome.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are all these questions of fact or law?

ATTORNEY ROBERT B. GILBREATH: Well in these cases, the jury is supposed to decide what actually occurred, what conduct occurred and then the court of appeals, I mean the trial court or the judge is supposed to decide whether that conduct rises to the level of oppressive.

JUSTICE JEFFREY S. BOYD: Mr. Gilbreath, should we begin with the conclusion, begin with the conclusion that

there does exist in Texas a common law right of action for oppression or should we begin with the assumption that there is not and that the only right of action is whatever exists under the statute?

ATTORNEY ROBERT B. GILBREATH: I believe that the Court should begin with the conclusion that it's governed solely by the statute. There is a little bit of case law in this state before the statute took effect. I mean most notably the Patton v. Nicolas case that this Court decided.

JUSTICE JEFFREY S. BOYD: But there's a whole lot since then.

ATTORNEY ROBERT B. GILBREATH: A whole lot since then, but, well, I beg to differ a little bit. There's not, the doctrine has not been that well developed in Texas. There are, I'd say, more like a handful of cases and the big question, of course, is the remedy because the statute provides a single remedy and that is a rehabilitative receivership. Now Texas is a little bit different than other states. When we adopted the Model Business Corporations Act in the 1950s, the remedy in the Model Act was to dissolve the corporation. Well the Texas legislature and the committee that helped develop the statute said, no, we don't want to do that. We want rehabilitation so the remedy in the statute is not disillusion. It's a rehabilitative receivership and so what we have in Texas is different than those other states where they said, well, we need alternative remedies because we don't want to just dissolve the corporation. Well, that's not what happens in Texas. We have something far short of disillusion, the appointed rehabilitative receivership to step in, normalize the parties' relationship, deal with whatever may be considered may be oppressive.

JUSTICE DON R. WILLETT: Isn't even receivership sort of a last resort if no other remedy is available or appropriate?

ATTORNEY ROBERT B. GILBREATH: Well, that's an interesting part of the statute that my opponents say authorizes courts to fashion new and different equitable remedies and I disagree. The language in the statute says if an alternative remedy at law or in equity is available, then don't award a receivership. I don't think that and it says available. I don't think that's authorization for the Court to create a new equitable remedy. It says if there are existing remedies out there, so I went and I looked at a 1952 article by George Slover of I think Carrington Coleman on the new receivership statute. It's in Volume 4 of Baylor Law Review and he says what we have in mind here when we talk about those alternative remedies is mandamus, injunction or damages. So if mandamus, injunction or damages are available, then you don't apply the oppression statute and appoint a receiver.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann.

JUSTICE DEBRA H. LEHRMANN: Okay, doesn't the receivership statute clearly contemplate that there exists other remedies available either in law or in equity and doesn't that make it pretty clear that receivership was not intended to be the only method?

ATTORNEY ROBERT B. GILBREATH: Again, I think what that language refers to only is if there are available remedies, such as an injunction or damages, then the law says you go file a suit for damages, for fraud, for injunction, we're not going to appoint a receiver. I just don't see that language as authorizing courts to come up with new, to fashion new equitable remedies that are not in the statute.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Guzman.

JUSTICE EVA M. GUZMAN: And I was going to ask you about damages. You made the argument about the article in the 1950s, damages. What does that component, what are the parameters of that component in the context of your damages be several million dollars for the value of your stock that you were not allowed to sell?

ATTORNEY ROBERT B. GILBREATH: I'm not sure I understand your question, Your Honor. Could, if you're talking about this case specifically, the, what the court of appeals and the trial court awarded a buyout and told us that we had to pay $7.3 million for her stock. The court of appeals then, of course, reversed that and said that was too much and sent it back so the buyout remedy we think is particularly inappropriate in this case and perhaps in general because it's not what this Court said in Patton v. Nicolas was that the statute, the oppression statute contemplates rehabilitation and normalization. Well a buyout is simply a court-ordered divorce. There's no rehabilitation whatsoever.

JUSTICE NATHAN L. HECHT: So you don't think a receiver could buy back the stock? You don't think a receiver could buy back the stock?

ATTORNEY ROBERT B. GILBREATH: I think the receiver, let me think about that for a moment, Your Honor, yes, I suppose that a receiver, I mean I think the receiver's authority is probably set by the court, but the receiver probably could do that. It wouldn't--

JUSTICE NATHAN L. HECHT: I wonder how you're better off under a receivership.

ATTORNEY ROBERT B. GILBREATH: You might not be, Your Honor, you might be and I'm not saying that the statute as it is framed now is the perfect statute. My position is just one of that the court should not be able to come up with new remedies. That's for the legislature and make no mistake about it, if the court recognizes the buyout remedy, it will greatly incentivize shareholder oppression litigation.

JUSTICE JEFFREY S. BOYD: So what's the right remedy here? I mean given the findings of oppression and breached fiduciary duty, all that the plaintiff wants is out. I mean what other remedy can be granted that would actually provide a remedy for the plaintiff in this circumstance.

ATTORNEY ROBERT B. GILBREATH: Let me preface it, of course, by saying and I haven't gotten to that point in my argument yet and may not be able to, but our position is, of course, we did not commit oppression. She was not oppressed. She is not entitled to any remedy. That said, if I'm wrong about, the Court believes I'm wrong about that, then the remedy here, the least-intrusive remedy, the least harsh remedy would simply be an injunction telling us to go and meet with her perspective purchasers. Now if she says well I could have made more money years ago when I was trying to sell this stock. It's not worth as much now, well then I guess she could prove that up and try to recover damages for the difference between the value of the stock when she thought she had a seller and, of course, there's no evidence that anybody really wanted to buy it. They're just perspective purchasers, but I suppose you could make

up the difference with damages, but the least harsh remedy, which is what the statute calls for and the case law calls for would be simply an injunction. Go meet with her perspective buyers.

CHIEF JUSTICE WALLACE B. JEFFERSON: So what was your business rationale for refusing to meet with the perspective buyers?

ATTORNEY ROBERT B. GILBREATH: Well, we retained, when she, we cooperated a great deal with Ms. Rupe and meeting with her lawyers and with her business valuation people, her appraisers, the person who was trying to sell the stock. We met with them, gave them information, but then when she wanted us to meet with the perspective purchasers, we said that seems risky so we went and hired, retained, specially retained securities counsel from a long-time, large Dallas firm, who advised us, look, that's dangerous. It's way too risky to meet with this perspective purchasers. There's a hair trigger for securities fraud liability, innocent misrepresentations can get you sued for securities fraud liability. There's no scienter requirement. There's a very great danger here that you'll say something that will get the company sued so our decision was we needed to protect the company and the other shareholders and so we drew the line at meeting with perspective purchasers and it's our position that that is in no way oppressive.

JUSTICE EVA M. GUZMAN: So the court of appeals also found though or I see withheld corporate books and records and made her unreasonable offers as trustee of the trust and also made her a conditional offer. If refusing to meet was not oppressive, what about those things?

ATTORNEY ROBERT B. GILBREATH: The court of appeals, actually, I believe it's footnote 39, the court of appeals said we do not find that the offers that you made to these shareholders were oppressive, the $1 million offer and the $1.7 million offer, the court said we don't consider those to be oppressive in any way and then towards the end of the opinion, the court says we find no evidence that you withheld books and records and so--

JUSTICE JEFFREY S. BOYD: But there is a finding of breached fiduciary duty here?

ATTORNEY ROBERT B. GILBREATH: There is a finding of breached fiduciary duty.

JUSTICE JEFFREY S. BOYD: Doesn't your client ultimately lose even if we threw out all remedies based on oppression?

ATTORNEY ROBERT B. GILBREATH: No, Your Honor, because there is no fiduciary duty under these circumstances and probably first and foremost, the fiduciary duties question was simply duplicative of the oppression finding and so you can't have a breach of fiduciary duties if you don't have oppression.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Levinger will present argument for the Respondents.

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

ATTORNEY JEFFREY S. LEVINGER: Thank you, Your Honor, may it please the Court. I want to go right to the evidence of oppression. I think it's a real mistake to think of this case as just a failure to meet situation. That was the coup de gra, that was the culminating blow, but there were at least three acts leading up to that that constitute oppression and Justice Guzman alluded to several of those, the conditioning of putting her on the board, even though they agreed that putting her on the board was in the best interest of the company. They were just trying to protect a majority shareholder, which they were trustees. Secondly, were the unfair offers and they indeed were unfair even though Ms. Dennard admitted that when offers are made, they must be fair. And then, of course, we have the situation of corporate waste, expenses being paid, employees being provided to Paula Dennard and nobody else. So I think it's very important to step back and take a broader view of oppressive conduct to consider a variety of acts may amount to oppression. There's no checklist for us to apply.

JUSTICE DEBRA H. LEHRMANN: Let me ask you something. Wasn't it your client's decision to sell the stock?

ATTORNEY JEFFREY S. LEVINGER: Well, in part, Your Honor. She had some serious financial problems after her husband died. She had a house under foreclosure and a child who she needed to support.

JUSTICE DEBRA H. LEHRMANN: But they weren't trying to push her out, right?

ATTORNEY JEFFREY S. LEVINGER: Well, yes, they were because initially she went to them and said would you be interested in buying my stock. This was shortly after her husband died and shortly after they refused to put her on the board based on this condition.

JUSTICE DEBRA H. LEHRMANN: Well what I'm getting at is does she have a right to, for them to assist her in selling her stock?

ATTORNEY JEFFREY S. LEVINGER: Well the testimony was that there's no contractual obligation on their part to buy the stock, but once they undertake to buy the stock, which they did, the testimony was that they have an obligation to be fair.

JUSTICE JEFFREY S. BOYD: Contractual?

ATTORNEY JEFFREY S. LEVINGER: I'm sorry?

JUSTICE JEFFREY S. BOYD: Contractual obligation to be fair?

ATTORNEY JEFFREY S. LEVINGER: Well, no, historical obligation to be fair because they had actually bought stock of other minority shareholders 10 years before for prices well in excessive of what they were offering to her. They were applying discounts to her that they weren't applying to anybody else and, indeed, they were applying a discount that they weren't even applying to Paula Dennard when they were valuing her shares based upon the very

same timeframe, the very same financial statements. They were valuing Paula for gift tax purposes which was supposed to be conservative at over $7000 and they were offering her less than $6000.

JUSTICE JEFFREY S. BOYD: But where did they have a duty to do something different than that? It wasn't out of the contract? Was it out of the statute, that little word oppression in the statute or are you arguing that we should find some common law duty beyond contractual and statutory duties?

ATTORNEY JEFFREY S. LEVINGER: No, I think it derives from the word oppression in the statute and the commonly accepted definitions of oppression whether you go based on the reasonable expectation test formed by previous purchasers of minorities 10 years before or whether you go on the probity and fair dealing standard.

JUSTICE EVA M. GUZMAN: So if they did have a duty to assist, if management had a duty to assist in the sale of the stock, what are the parameters of that duty? Is it just to meet with perspective buyers? Is it to paint a rosy picture? Is it to deliver documents, I mean what are the parameters of that duty if, in fact, it does exist?

ATTORNEY JEFFREY S. LEVINGER: I think Justice Moseley did a very good job of demonstrating the parameters on that. He said, look, this is a very simple case. This is a flat refusal to meet and there's one very important point I want to make. If I accomplish nothing else today, I want to make this point. The plaintiff's Exhibit 48 is a confidentiality agreement that the company drafted, the company drafted with the help of inside its lawyer, Mr. Lutz, and this confidentiality agreement was a requirement that all perspective buyers had to sign before they could even get documents and in it, and this is important because it goes to the issue of was there some business justification for refusing to meet. Well, no there wasn't because they had all the protections they needed under this confidentiality agreement. It very much limited the information that perspective purchasers were getting to some 29 pages, including about five webpage documents. Further, it required the recipients, in other words, the perspective purchasers to acknowledge and agree that the company was not providing any statements or information to them. It required them to disclaim reliance on anything the company was saying and when I say company, they define it broadly to include both the company and all the defendants and it required the perspective purchaser and Ann Rupe to indemnify the company. So they had all the protection they needed well before--

JUSTICE NATHAN L. HECHT: How does it help her though, I don't understand this part. How does it help her for perspective buyers to meet with a management that doesn't want her to sell her stock? It looks to me like the buyer will say well is this a good deal or not and they'll say, I wouldn't take it if you gave it to me and that's the end of that, then they've met, but they don't have any obligation to pump the stock, do they or anything like that?

ATTORNEY JEFFREY S. LEVINGER: Well, no, they don't have an obligation to pump the stock and Justice Moseley, I think, made that very clear. No, the obligation's simply to meet, to show the perspective buyer the whites of your eyes, to show them who you are and no, they don't have an obligation to say anything or to pitch the company. The perspective buyers had all the information they wanted, but to flatly refuse to even meet with them sends out a message that you do not want to be a minority shareholder in this company because--

JUSTICE NATHAN L. HECHT: Isn't that message loud and clear? That's what I don't understand. It looks to me like you would be very, in a very risky position to buy this stock just like she is.

ATTORNEY JEFFREY S. LEVINGER: Well, their object was to make sure that she had only one person to sell the stock to and that was them as majority shareholders. They wanted to reacquire it at a low-ball price. That was the object. They didn't want a third party coming in and kind of raining on their parade so, yes, they did send out a message of the refusal to meet, the flat refusal to meet as Mr. Staseb, the investment banker said, sent out the message that we have no chance of selling this stock, none whatsoever and they had five groups lined up to talk. The Lamar Hunts group was one of the groups that had actually signed this confidentiality agreement in addition to, I think, four other groups and as Mr. Stasen said, the whole thing just fell apart when several months later after these confidentiality agreements were signed, they flatly refused to even meet so that--

JUSTICE EVA M. GUZMAN: The refusal to meet had a legitimate basis though if it was the exercise of proper business judgment. As a matter of law, should the refusal to meet always be oppression or can management exercise business judgment as is alleged here?

ATTORNEY JEFFREY S. LEVINGER: Certainly, management has flexibility and the right to exercise their judgment, but in this particular case, there was no exercise of judgment and when they say they met with counsel, let me address that for a moment. That lawyer that they purported to hire did not testify in this case. His name came up for the first time when Mr. Ritchie started talking on cross-examination. When his lawyer asked him what did the lawyer tell you, what did he advise you, there was an objection to hearsay and it was sustained so we do not know what that lawyer, if there was a lawyer, advised him to do. Further, and this is fairly critical, we don't know whether that lawyer that they called, if they did call him, ever saw plaintiff's Exhibit 48 and knew that it had been signed so the advice they purported to get, I suggest, was one-sided probably with uninformed advice and I don't think they have a right to absolutely rely on the advice of counsel and yes, you do have the right to exercise business judgment, but not to the point where it crosses the line as it did in this case. It crossed the line from anything legitimate to downright self-dealing and oppression and wrongful conduct because they already have this in their hip pocket.

JUSTICE PHIL JOHNSON: You said there was an objection to what the lawyer said, but did the witness testify that the reason they did not meet was because of advice of counsel?

ATTORNEY JEFFREY S. LEVINGER: Well, yes and no, Justice Johnson. What the question was did you go out and try to get advice from a lawyer? Yes. What was the advice? Objection, hearsay, sustained. Then the question was what did you do after you talked to your lawyer and he said the lawyer helped me draft a letter that I sent to Ann Rupe that explained that we would not meet. So it's a lot of leaps to know what exactly the lawyer said and more importantly, we don't know whether the lawyer rendered advice with full knowledge of the protection that the company had already bargained for, including this getting perspective buyers to disclaim reliance, to disclaim that any statements were made and to indemnify.

JUSTICE PHIL JOHNSON: But it seems like there is testimony that there was reliance on the lawyer and then what the lawyer knew would go to the weight of that testimony and the weight of could they rely on the lawyer which would go somewhat to business judgment being exercised.

ATTORNEY JEFFREY S. LEVINGER: Maybe, but I suggest to you that that requires a lot of gap filling that just

doesn't exist in this record. The entire testimony relating to this lawyer took up about two pages and further, Mr. Lutz, who was the in-house lawyer and a director made it very clear that he thought Ann did, in fact, have reasonable expectations that she'd get some help in trying to sell the stock and that it would have been possible to meet. He was the in-house lawyer and further, Paula Dennard, and I think I quoted her testimony at length in the brief, agreed that it would be oppressive to a minority if the management refused to meet and she said she disagreed with the refusal to meet.

JUSTICE EVA M. GUZMAN: What is the benefit to the company though for taking the risk assuming that there is some risk of liability with the securities [inaudible].

ATTORNEY JEFFREY S. LEVINGER: Well the benefit in this case, yes, the benefit in this case would have been to potentially get out of the company, eliminate a shareholder, in this case Ann Rupe as trustee of the family trust, who they didn't like. Back in March of 2003, they had already said we think the best thing to do would be to buy back your stock. You go your separate way. We go our separate way and we just won't have anymore issues or conflict. So I think the company did have an interest in helping her to sell her stock to a third party.

JUSTICE DEBRA H. LEHRMANN: What if they would have met with the investors and they would have given their opinion that the company was going through some financial difficulties. Would you be making the same argument? Would that have been oppression if they were giving their honest opinion that the company was really having some problems, are you saying they had a duty to say that everything's rosy?

ATTORNEY JEFFREY S. LEVINGER: No, I'm not saying that at all and I'm, first of all, I want to step back and look at it in a much broader sense. I think you need to look at the totality of the conduct starting as early as '03 when they wanted to get her out of the company for a low-ball price so they could acquire the stock back. I mean it all leads up to this failure to meet. So we get to the refusal to meet. No, they don't have a duty to lie about the company. I think Justice Moseley made that absolutely clear. Had they met, I don't know if we'd be here today. I really don't because it may well have been the case that these people might have bought the stock at some price. I can't speculate because they crossed the line. They shut the door and in effect have left her trapped, I say her, the family trust, have left it trapped inside this company.

JUSTICE DON R. WILLETT: You just don't buy the argument that by shutting that door or if they had not shut that door, they would have opened the door to exposure under securities law. You just don't buy that there was any plausible real vulnerability there.

ATTORNEY JEFFREY S. LEVINGER: No and it's because of plaintiff's Exhibit 48. They had it thoroughly buttoned down and, in fact, they would not even agree to release any information until they first knew who the perspective buyers were and saw that the perspective buyers had signed this.

JUSTICE PAUL W. GREEN: Who negotiated that Exhibit 48?

ATTORNEY JEFFREY S. LEVINGER: Take a look at also--

JUSTICE PAUL W. GREEN: I mean who were the parties.

ATTORNEY JEFFREY S. LEVINGER: Yes, defendant's Exhibit 49 is a series of emails between a lawyer who's then representing Ann, Mr. Stasen, the investment banker, Mr. Lutz, the in-house lawyer and Mr. Ritchie and from that, it's evident that it was Mr. Lutz, the in-house lawyer who prepared this.

JUSTICE PAUL W. GREEN: For whose benefit?

ATTORNEY JEFFREY S. LEVINGER: For the company's benefit, the benefit of the companies and the remaining shareholders of the company.

JUSTICE PAUL W. GREEN: But, again, I guess I don't quite understand why it would be oppression to not have a meeting when you don't know what came out of that meeting, good or bad.

ATTORNEY JEFFREY S. LEVINGER: Well and that's the point. I mean we're simply saying all they needed to do was just meet. When, as Mr. Stasen...

JUSTICE PAUL W. GREEN: [inaudible] requirement in that, I mean just simply to throw it out as there as we didn't meet and it's because of that all these bad things happened, but it could have been the other result.

ATTORNEY JEFFREY S. LEVINGER: Well, Justice Moseley, I thought, made it very clear that people have general expectations that when you have stock that's not restricted, that you should be able to alienate it and it would be wrongful and oppressive and harsh under either standard to utterly stand in the way of that person's ability to try to sell that stock. I'm not saying it would have succeeded, but to just thumb your nose at that person and say we won't even meet when it's evident that it was part and parcel of an overall scheme to trap her, to freeze her and to get her to sell her stock back to the remaining shareholders at a low-ball price, that's oppressive and I think Justice Moseley laid out the narrow contours of that obligation and Mr. Stasen did too. He said in my experience, third-party purchasers always want to see the management of the company that they're buying into.

CHIEF JUSTICE WALLACE B. JEFFERSON: Is the finding of a breach of fiduciary duty duplicative of the oppression finding or so if you lose on oppression, do you lose on fiduciary duty or is there an independent avenue for you to recover?

ATTORNEY JEFFREY S. LEVINGER: Well they're independent and they've always been treated that way and, indeed, in the post trial briefing, the other side treated them as alternatives and they are alternative because the burdens are different. If you have a breach of fiduciary duty as the jury found in question number one, then question number two is puts the burden on them to show that they complied with that duty and it lists the traditional things they must comply with in order to comply with their fiduciary duty, honesty, fairness, things like that that are right out of the pattern jury charge. So the burden is on them and they didn't comply with that burden. I would also point out that question one, which was the inform of fiduciary duty question was their question and their instruction and it

instructed the jury that they could find an informal fiduciary duty based upon a finding that the majority shareholders dominated control over the company and not only did they not object to that, they requested it and the evidence clearly supported a finding that these three, this triumvirate dominated control over the company and that led right to question two where they failed to carry their burden of showing that they complied with their fiduciary duty. So, yes, Chief Justice Jefferson, I think the judgment can be and should be affirmed based alone on questions one and two and I think it's a different path to essentially the same result.

JUSTICE NATHAN L. HECHT: But if management had met with all the buyers they could sign up and no buyer materialized, then is it your view that it would be oppressive not to make her a fair offer to buy back her stock?

ATTORNEY JEFFREY S. LEVINGER: Well they did have buyers materialize just as a factual matter.

JUSTICE NATHAN L. HECHT: But if they didn't, I'm just trying to press the theory here.

ATTORNEY JEFFREY S. LEVINGER: Yeah, well, you know, I think we need to look at the totality of the circumstances. We can't isolate single events and I think in this case, if you see that everything is leading up to an effort to free somebody out of the management of a company with the object of giving them really no option but to sell their stock back at a low-ball price, which they admit is not a fair price. They admit it was arbitrarily calculated, I think that's oppression.

JUSTICE NATHAN L. HECHT: So you think this situation should be treated like a partnership basically. If the partner wants out, you either have to buy him out or you have to wind up the business.

ATTORNEY JEFFREY S. LEVINGER: There are certain closely held companies that I think approach a partnership type situation. I think the Hollis v. Hill case out of the Fifth Circuit is a good example of that two 50/50 shareholders and the court said, look, these guys are essentially like partners and we will find a breach of fiduciary duty in a situation like that. Quick word about the remedy, the stock buyout. I think the Court is right in focusing on the language of the statute, which says that these harsher remedies of receivership, rehabilitative receivership which may or may not lead to liquidating receivership, they can be imposed only if the Court determines that other remedies available either at law or in equity are inadequate which, to me, contemplates specifically that other remedies, legal and equitable are available. Is a stock buyback one of them? Certainly, it is. You look at Patten v. Nicolas decided in 1955. In that case, they reversed the imposition of a dissolution situation and held that a forced stock distribution, forced dividend was an appropriate, equitable remedy and they--

JUSTICE JEFFREY S. BOYD: But not under this statute. They weren't working under this statute because it hadn't been enacted yet.

ATTORNEY JEFFREY S. LEVINGER: Right, they were anticipating. They talked about the statute and they said that the purpose of this statute appears to be rehabilitative instead of to force a dissolution and in the course of that, they talked about the flexibility that trial courts need in fashioning appropriate legal or equitable relief and here I would suggest that ordering a stock buyout and on remand, it will be repriced to eliminate any concern that we get a windfall or they're harmed, according to Justice Moseley's opinion, the stock buyout is the appropriate remedy be-

cause it really meets the parties' initial expectations. Remember, if you look at plaintiff's Exhibit 20, it's their letter where they wanted her out.

JUSTICE DON R. WILLETT: Do you agree that a stock's minority status deems that just inherently less valuable than preferred or some other kind of stock in a closely held corporation and might make it less attractive to potential buyers?

ATTORNEY JEFFREY S. LEVINGER: Potentially, yes. In fact, that's why on remand, I think we're required to take into account certain discounts, the marketability, lack of marketability discount or a lack of control type discount.

JUSTICE JOHN PHILLIP DEVINE: Do you concede that there is no legal duty to have this meeting and as I understood your argument, her reasonable expectation was based on history, historical conduct and other buybacks and so forth?

ATTORNEY JEFFREY S. LEVINGER: Well, legal duty, I think it flows from the statute, the word oppression, the way in which oppression is defined. It's such a case-by-case situation with conduct spanning of a whole variety, it's difficult to say that there's some legal or statutory duty. It all flows out of the general command not to oppress as defined by the case law if that answers your question.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Mr. Levinger.

ATTORNEY JEFFREY S. LEVINGER: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

JUSTICE PHIL JOHNSON: Counsel, I have one concern and that is if we talk about rehabilitation, how does a receiver rehabilitate the parties when they're so adverse as these parties apparently were other than effectuating some type of buyout?

REBUTTAL ARGUMENT OF ROBERT B. GILBREATH ON BEHALF OF PETITIONER

ATTORNEY ROBERT B. GILBREATH: Well, Your Honor, under these specific facts, I must beg to differ with opposing Counsel, who I think may have left a bit of a misimpression about the facts regarding our attitude towards Ms. Rupe. It's absolutely not true that we wanted to squeeze her out of the corporation, that we made--

JUSTICE PHIL JOHNSON: Let's divorce ourselves from these facts.

ATTORNEY ROBERT B. GILBREATH: Okay.

JUSTICE PHIL JOHNSON: If we're talking about rehabilitative receivership, parties who, you do have parties who

get adverse in these closely held corporations.

ATTORNEY ROBERT B. GILBREATH: You do.

JUSTICE PHIL JOHNSON: How can a rehabilitative receivership take out that animosity and that feeling and at the end of the day, you still have one group owning a majority and one group in the minority.

ATTORNEY ROBERT B. GILBREATH: There may be circumstances where it is perhaps impossible to iron out the differences. The parties in our hypothetical situation chose to do business this way.

JUSTICE PHIL JOHNSON: Right and typically they always do, but if we can't, how do you, if you can't rehabilitate, your position seems to be the only thing left to do is dissolve the corporation.

ATTORNEY ROBERT B. GILBREATH: That may well be the only remedy. I don't think that the Court should be stepping out to assist the parties in a contractual relationship, a business relationship like this to help them fix the problems that they are experiencing when there are other ways unless it's dissolution. Part of the resistance to the shareholder oppression doctrine is if the courts will step back and let the legislatures handle this and perhaps the legislature steps back too, the parties would be encouraged to prepare themselves for these types of relationships through contacts and shareholders.

JUSTICE JEFFREY S. BOYD: That might be ideal for us to just step back and say, look, this is a matter of contract and the parties get to decide and as you just said, the legislature also would need to step back. The problem we have here is the legislature didn't step back. A long time ago, they passed a statute that used this word oppression and we're struggling to figure out, we can't ignore that. We can't just completely ignore it.

ATTORNEY ROBERT B. GILBREATH: No, of course not.

JUSTICE JEFFREY S. BOYD: On the other hand. We've got to give it some contours.

ATTORNEY ROBERT B. GILBREATH: Yes.

JUSTICE JEFFREY S. BOYD: And the difficulty in doing that and where you could be the most help to us is just very clearly say for us what should be the contours of our judicial interpretation or construction of that language in the statute.

ATTORNEY ROBERT B. GILBREATH: I believe that the Court should interpret the statute as permitting a shareholder oppression cause of action with the sole remedy being a rehabilitative receivership. Once the Court does that, the legislature will be free to do as the many legislatures have. I have, for example, this is Oregon's statute, which started out like ours and then they inserted a buyout remedy in the statute, which has about five separate provisions telling courts exactly how to enforce a buyout remedy. It's very specific and this Oregon statute 60.952 in their corporations and partnership code and I think that's what Texas needs to do. If this Court exercises judicial restraints,

says we're not going to try to read anything into this statute, the legislature is better situated to weigh all the considerations that go into whether we want to incentivize more shareholder oppression through a buyout because that is what has happened over the years as the Court has seen from some of the sources I've cited, oppression litigation has gone up like this and you know what? It coincides exactly with recognition of the buyout remedy in judicial opinions and in statutes.

JUSTICE NATHAN L. HECHT: What do you understand is supposed to happen on remand by the court of appeals?

ATTORNEY ROBERT B. GILBREATH: On remand, there's supposed to be simply on a new trial on the value of the stock.

JUSTICE NATHAN L. HECHT: Ordinarily if damages were unliquidated, you have to retry liability, but you don't think that's called for by the remand?

ATTORNEY ROBERT B. GILBREATH: No, Your Honor, no. In my remaining 30 seconds, I do want to disagree strongly with this notion that we were making low-ball offers to get Ms. Rupe out of the corporation. We made those offers to accommodate her. She came to us and said, will you buy me out and we said, we're having problems right now with our Hutton subsidiary, having serious problems, so here's what we can do for you at this point and then we said, why don't you hold on to your stock because things are going to get better. If Hutton recovers from this, your stock will be worth a lot more.

JUSTICE DEBRA H. LEHRMANN: Isn't what the court did by remanding the case going to achieve what you want because on remand, they're going to look at the things that's going to make that fair, right?

ATTORNEY ROBERT B. GILBREATH: No, we don't want, I mean, we don't to be ordered to buy her out. She's the one that wants out of the corporation and that's the misimpression I think that's been left. We don't want to be ordered to buy her out for whatever price a jury says. If she wants out, maybe we can come to accommodation, but we're not the ones that wanted out. She wanted out.

JUSTICE DEBRA H. LEHRMANN: But you've offered to buy her out and so at a fair price, isn't that really what you want?

ATTORNEY ROBERT B. GILBREATH: We offered to buy her out just as an accommodation to her. We've been portrayed as bad guys, but we were really trying to help Ms. Rupe and it was a mere accommodation to help her out. So we're not the bad guys that we've been portrayed in this case.

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

MARSHAL: All rise.

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