

Supreme Court of Texas
June 12, 2015

Dacus v. Parker

No. 13-0047

Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE DEVINE delivered the opinion of the Court.

A majority of voters in Houston amended their city charter to create a fund for drainage and streets, requiring Houston to obtain funding for the project. Plans for charging beneficiaries of the drainage system for their use were published in a local newspaper. The ballot did not mention these charges.

After the vote, several voters “sought a declaration that the proposition was ‘illegal and invalid as a matter of law’ and a determination that the adoption of the amendment was invalid.” The trial court ruled in favor of the city, which the court of appeals affirmed.

ISSUE: “Whether a ballot proposition for a proposed city charter amendment meets the common law standard preserving the integrity of the ballot[?]”

In reversing the court of appeals decision, the Court explained that a proposition must contain sufficient language so as not to mislead voters. Further, the Court stated that “the ballot in this case should have mentioned the drainage charges required by the amendment.” Although the ballot does not serve to educate voters, the ballot must include sufficient information to allow voters to distinguish between various measures.

To accomplish this, the ballot must show the measure’s character and purpose to fulfill its requirements. A failing to meet the requirements “may affirmatively misrepresent the measure’s character and purpose or its chief features.” Additionally, it “may mislead the voters by omitting certain chief features that reflect its character and purpose.”

In this instance, the ballot misled voters by failing to identify the charges involved with the fund. Therefore, the Court remanded the case back to the trial court.

JUSTICE GUZMAN, joined by JUSTICE WILLET concurring.

Justice Guzman wrote separately to discuss the viability of the common-law standard discussed in the majority opinion. In discussing Texas's history of requiring precise language on ballots, the dissent urged that Houston's ballot construction was not sufficient to meet the required standards. The dissent further stated that "[p]roviding only enough information on a ballot to allow propositions to be distinguished from one another is necessary, but not necessarily sufficient."

Zorilla v. Aypco Constr. II, LLC

No. 14-0067

Case Summary written by Tyler Frankel, Articles Editor.

JUSTICE GUZMAN delivered the opinion of the court.

Mirta Zorilla (Petitioner) contacted Aypco Construction II, LLC and its owner, Jose Luis Munoz (together as Respondent), for the limited purpose of constructing modifications to the master bedroom and bathroom in a partially finished, 3,740 square foot residence located at North 23rd Street in Edinburg, Texas. After the modifications in the bathroom were completed, Petitioner was satisfied with the work, and the parties entered into negotiations to complete the rest of the North 23rd Street residence. After failing to pay Respondent for the work invoiced on May 2007, Respondent sued Petitioner.

Other than the fact that Petitioner agreed to pay for certain construction services, every other aspect surrounding the relationship between Petitioner and Respondent was disputed. Petitioner stated that the agreement was an oral agreement between her and Munoz, the owner, only. Additionally, Petitioner states she specifically indicated to Respondent that she would not pay for work after April 2007 unless she expressly agreed to it in writing. Furthermore, Petitioner testified that she explicitly told Respondent to discontinue work at the end of April 2007. Thus, Petitioner refused to pay Respondent for the work it completed in May of 2007. On the other hand, Respondent stated that there was, in fact, a written agreement between Petitioner and Respondent and that Petitioner knew that she was contracting not only with Munoz, but with the construction company as well. Additionally, Respondent stated that it was never told to cease working. Respondent worked until the residence was 80% complete, which went into May

2007, and invoiced Petitioner several times during that month. Because Petitioner failed to pay, Respondent sued Petitioner under fraud, breach of contract, and quantum meruit theories.

The jury found that Petitioner defrauded Respondent and awarded \$56,654.15 in economic damages and \$250,000 in exemplary damages. The jury also found Petitioner breached an agreement to pay Respondent for construction services at her two homes and awarded a total of \$56,654.15 in actual damages. In addition to compensatory and exemplary damages, the jury awarded Respondent \$150,000 in attorney's fees through trial and conditional attorney's fees in the event of an appeal. The court of appeals affirmed the trial court's judgment except the award of attorney's fees. Concluding that sufficient evidence supported the jury's fraud verdict and giving effect to Aypco Construction's election of its fraud remedies, the court reversed the attorney's fee award.

Issues: (1) Whether the court of appeals erred in refusing to consider Petitioner's evidence-sufficiency challenges to the jury's breach-of-contract findings; (2) Whether the statutory cap on exemplary damages is waived if not pleaded as an affirmative defense or avoidance; (3) Whether the prejudgment-interest rate award to Respondent was excessive; and (4) Whether foreclosure of the statutory and constitutional mechanics and materialman's liens were proper.

As to the first issue, the court held that the court of appeals did not err in its refusal to consider Petitioner's evidence-sufficiency challenges to the jury's breach-of-contract findings. The court's reasoning was that any obligation imposed by the December 2006 contract impacts the fraudulent-inducement analysis only if the jury necessarily determined that Petitioner had, in fact, agreed to the terms of the December 2006 contract or that there was otherwise an agreement between the parties requiring written approval for modifications. However, the evidence on that point conflicted; the jury was neither asked whether the agreement was in writing nor asked to determine the essential terms of any agreement; and, importantly, both the fraud and breach-of-contract questions permitted the jury to award damages based on the existence of an oral agreement that did not include any such requirement. In the absence of a finding that Petitioner and Respondent agreed that modifications must be approved

in writing, Petitioner's argument concerning the contract-enforcement issue failed.

Secondly, the court held that the exemplary damages award did exceed the statutory cap and thus, reduced the damage award to \$200,000. In reaching this decision, the court first looked at whether, because not explicitly stated, the damages cap fell into the residual category of Texas Rules of Civil Procedure Rule 94 governing affirmative defenses. It held that the exemplary damages cap did not bear the characteristics of an affirmative defense or avoidance, and therefore applied automatically. Specifically, it does not require proof of any additional fact to establish its applicability. Moreover, there is no defense to a statutory cap on exemplary damages. Though certain types of claims are excluded from the statute's application, the statutory cap applies automatically to claims not expressly excepted. Thus, the court stated that the cap is therefore the rule, not the exception, and even though Petitioner did not specifically plead it in the trial court, it still applied.

Regarding Petitioner's third point of error, the court held that the prejudgment-interest award of 1.5% per month was appropriate. In post-verdict motions filed in the trial court, Petitioner argued that prejudgment interest should be set at 6% per annum because there was no proof of an agreement specifying a different interest rate. The trial court, however, awarded prejudgment interest at the rate of 1.5% per month under the Prompt Payment Act, which applies when a real property owner fails to pay a contractor the amount allowed under a contract within thirty-five days after the owner receives a written payment twenty-three request from the contractor. On appeal, Petitioner argued that the Prompt Payment Act was inapplicable because there was insufficient evidence she agreed to compensate Respondent for the construction work performed in May 2007. The court of appeals concluded that the essential contract finding was subsumed in the jury's fraud verdict, in which the jury expressly found Petitioner had failed to pay Respondent \$56,654.15 for construction services pursuant to an agreement to pay for that work. Because the court of appeals concluded the evidence was sufficient to support the fraud verdict, and based on Respondent's election of fraud remedies, the court determined that Petitioner's evidentiary challenges to the jury's breach-of-contract findings were not material to the prejudgment-interest

inquiry. The court then indicated that Petitioner's argument here was "somewhat muddled." The court stated that it had already concluded that the fraud finding was valid and concluded that there was more than a scintilla of evidence to support the jury's finding of such an agreement. Therefore, the prejudgment-interest award was affirmed.

Finally, as to Petitioner's final argument, the court affirmed the court of appeals holding that the liens were proper. Petitioner asserted two reasons for contesting foreclosure on the liens. First, Petitioner continued her evidence-sufficiency challenge to the breach-of-contract charge. Second, Petitioner argued that lien foreclosure was improper as to another property because it was her homestead and there was no proof of a written agreement.

Regarding Petitioner's first reason, this court agreed with the court of appeals' analysis upholding the foreclosure of the liens based on the jury's fraud verdict because (1) the court had found sufficient evidence to support the verdict, as part of the fraud submission, and (2) the jury determined that Respondent was entitled to compensation for the work performed in accordance with an agreement. Performance and existence of a contractual debt were encompassed in the jury's fraud findings; the court of appeals found the evidence sufficient to sustain the fraud verdict; and Petitioner did not challenge the court of appeals' analysis of that issue. Therefore, this court rejected Petitioner's first argument.

This court also rejected Petitioner's second argument that the other property was her homestead. It rejected this argument because Petitioner failed to establish that it was her homestead and, even if she did establish it was, Petitioner did not preserve the argument in the trial court. To claim the constitutional protection afforded to homesteads, Petitioner carried the initial burden of establishing (1) overt acts of homestead usage and (2) the intention to claim the property as a homestead. The court held Petitioner did not meet her initial burden. Furthermore, the court held that Petitioner waived this argument. Therefore, this court affirmed the court of appeals on this point of error.

Thus, the Court reversed the exemplary damages and rendered them to be \$200,000 and affirmed all other points of error.

Atkins N. Am., Inc. v. CCE, Inc.

No. 11-0481

Case Summary written by Allison Grayson, Online Edition Editor.

Per curiam.

The Texas Department of Transportation (TxDOT) hired a general contractor for a road construction project, which involved plans created by Atkins North America, Inc. After silt began escaping onto nearby property, TxDOT directed CCE to rid the property of the silt.

TxDOT later declared CCE in default of its direction when CCE failed to comply. Upon receipt of an order from TxDOT to stop work, “CCE hired a third party to complete the road project, then sued Atkins for the additional costs, alleging that Atkins’s plans were faulty and led to the release of the silt.” CCE’s claims included negligence, negligent misrepresentation, breach of contract, and breach of warranty.

In response, Atkins moved for summary judgment under the notion that “the economic loss rule barred recovery of negligence damages[.]” Atkins refrained from making the same arguments in terms of its negligent misrepresentation claim. The trial court granted Atkins’s motion for summary judgment. While the court of appeals affirmed part of the trial court’s ruling, the court remanded the case for a closer look at CCE’s negligent misrepresentation claim.

ISSUE: Whether the Supreme Court of Texas should grant Atkins’s motion for rehearing?

In this instance, the Court refrained from rehearing the case. In explaining its decision, the Court stated that “the economic loss rule barred a general contractor from recovering delay damages from project architect with which it did not contract.”

Harris Cnty. Flood Control Dist. v. Kerr

No. 13-0303

Case Summary written by Allison Grayson, Online Edition Editor.

JUSTICE DEVINE delivered the opinion of the Court, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE GUZMAN, and JUSTICE BOYD joined.

More than 400 residents and homeowners in Harris County experienced flooding during “Tropical Storm Francis in 1998, Tropical Storm Allison in 2001, and an unnamed storm in 2002.” In response to the flooding, the homeowners blamed “Harris County and Harris County Flood Control District, asserting that they approved new upstream development without implementing appropriate flood-control measures, and that they were substantially certain flooding would result.”

In 1976, the U.S. Army Corps of Engineers created a report looking at recurrent damaging floods in the White Oak Bayou. While the problem mainly came from the “inadequate channel capacities of the streams[,]” increasing suburban development furthered the problem. In response to these problems, the Army Corps of Engineers recommended changes to reduce any flooding in the future.

The government entities agreed to take charge of the project, where they hoped to “maintain or reduce the bayou’s 100-year flood plain.” Although the federal government was responsible for funding much of the project, the funding did not keep pace with new development in the area. Many of the new homes constructed “were not in the 100-year flood plain when built or approved.”

In response to the delay in funding, Harris County officials developed their own plan. In 1984, the county adopted the “Pate Plan” to eliminate flooding.

After experiencing a flood, residents in the area asked about the county’s flood control measures. Discovering flaws in the Pate Plan, the flood control district commissioned another report, which the government entities later adopted in the 1990s.

By 1999, the residents argued that “all of their homes were within the 100-year flood plain[,]” which was evident from three successive floods that occurred between 1998 and 2002. Based on these facts, the homeowners in the area filed an inverse condemnation suit. Subsequently, the government entities filed a plea to the jurisdiction and motion for summary judgment. “The trial court denied the motion, and the court of appeals affirmed the denial of the plea to the jurisdiction.”

Issue: Whether “homeowners raised a fact question as to the elements of a taking.”

Here, the Court explained that in a takings case, showing that the act in question was intentional is not enough. Instead, “there must also be knowledge to a substantial certainty that the harm will occur.”

In this instance, the Court determined that a fact question existed as to “whether the government entities were substantially certain their actions in approving development without appropriately mitigating it would cause the plaintiffs’ homes to flood.” Further, the Court explained that no evidence existed to show that the government entities were substantially certain the flooding would occur when they approved the development. Therefore, the Court held that the homeowners raised a fact question concerning the intent of the government entities.

Additionally, a study suggested that a fact question existed as to whether the approval of the development caused the flooding of the homeowners’ homes. Moreover, the Court determined that at “least some evidence [existed] that in approving new development and drainage plans causing flooding, the entities’ were acting for a public use.”

Based on the determination that fact questions still existed in this case, the Court denied the government entities’ plea to the jurisdiction and affirmed the decision by the court of appeals.

JUSTICE WILLETT, joined by JUSTICE JOHNSON, JUSTICE LEHRMANN, and JUSTICE BROWN, dissenting.

Justice Willett dissented because he did not believe the homeowners presented a cognizable takings claim. Further, he explained that the majority’s decision would “encourage governments to do nothing to prevent flooding, rather than studying and addressing the problem.” Additionally, Justice Willett wrote that the majority opinion left out other important elements required for a takings claim, including: affirmative conduct, specificity, and public use.

Justice Willett also discussed the fact that the Takings Clause and sovereign immunity often conflict in situations such as this one. Explaining his position, he stated that “[w]hile the right to compensation for a taking is constitutionally mandated, sovereign immunity is also a matter of constitutional significance.”

Ultimately, Justice Willett wrote that he was concerned the Court’s decision “unnecessarily expand[ed] taking liability.” Further, he

argued that the decision could “make the government an insurer for all manner of natural disasters and inevitable man-made accidents.”

JUSTICE LEHRMANN, joined by JUSTICE WILLET, dissenting.

Justice Lehrmann wrote separately to further discuss “the availability of compensation when a taking occurs, regardless of whether it is for public or private use.” She explained that the Court has never “held that a taking that fails to satisfy the public-use element is not compensable.” When the government takes private property without paying the owner for it, “the owner may recover damages for inverse condemnation.”

Austin v. Kroger Texas, L.P.

No. 14-0216

Case Note written by Tyler Frankel, Articles Editor.

JUSTICE BOYD delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE DEVINE joined, and in which CHIEF JUSTICE HECHT, JUSTICE GREEN, JUSTICE WILLETT, and JUSTICE BROWN joined except as to Part IV.

In this case, Randy Austin (the employee) fell while mopping a restroom floor at the Kroger where he worked in Mesquite, Texas. The employee was a self-described “floor clean-up person” whose supervisor instructed him to clean up two oil-like spills, one in the women’s bathroom and one in the men’s bathroom. Kroger’s safety handbook indicated that employees who clean these types of spills should do so using a “Spill Magic” system that involves a powdery absorbent product, a broom, and a dustpan. This system likely reduces the chances of a slip-and-fall by about 25% (according to the Kroger handbook). But, this system was not available at the store the day the employee was instructed to clean the spills, thus the employee attempted to clean the spills with a mop. After successfully cleaning the women’s bathroom, the employee began to carefully clean the men’s bathroom. The employee successfully cleaned about 30% of the spill before he slipped and fell in the remaining amount of liquid, resulting in a fractured femur, a dislocated hip, and a nine-month hospital stay. During the

employee's hospital stay, he underwent six surgeries, leaving his left leg two inches shorter than his right.

Kroger, the employee's employer, had elected not to subscribe to the Texas workers' compensation system. The employee sued in state court, asserting claims for negligence, gross negligence, and premises liability. In support of his negligence claim, the employee alleged that Kroger had engaged in negligent activities and failed to provide a necessary instrumentality—namely, the Spill Magic System. Kroger removed the case to federal district court, which granted Kroger's motion for summary judgment on all of the employee's claims. The Fifth Circuit affirmed as to the employee's negligent activity and gross negligence claims, but reversed and remanded the necessary-instrumentalities claim. Regarding the employee's premises liability claim, the Fifth Circuit found that the nature and scope of an employer's duty to provide its employees with a safe workplace is arguably unclear under Texas law when the employee is aware of the hazard of risk at issue, thus leading to the Fifth Circuit certifying a question to the Texas Supreme Court.

Issues: (1) The Fifth Circuit asked the Texas Supreme Court to address the following certified question: Pursuant to Texas law, including § 406.033(a)(1)-(3) of the Texas Labor Code, can an employee recover against a non-subscribing employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy? Put differently, does the employee's awareness of the defect eliminate the employer's duty to maintain a safe workplace? (2) Whether contemporaneous negligent activity by the employer is necessary to an employee's instrumentalities claim.

The Texas Supreme Court addressed the Fifth Circuit's certified question, clarifying that, under Texas law, (1) subject to two limited exceptions, an employer generally does not have a duty to warn or protect its employees from unreasonably dangerous premises conditions that are open and obvious or known to the employee; and (2) under this general rule, the Texas Workers' Compensation Act's (TWCA) waiver of a non-subscribing employer's common law defenses does not eliminate an employee's burden of proving that the employer owed him a duty as an element of a premises liability claim. The court reasoned that, generally, an employer has the same premises-liability duty to its employees as other landowners have to its invitees on their premises—

which is the duty to make safe or (adequately) warn. Moreover, it reasoned that the TWCA's waiver has no effect on an employer's duty, only on their liability, due to the statutory waiver of defenses. Therefore, even if an employer has waived the TWCA, the employee must still prove that the employer owed him a duty of care. Furthermore, the court then held that the two exceptions to this general rule were (1) the criminal activity exception, which may arise when a dangerous condition results from the foreseeable criminal activity of third parties; and (2) the necessary-use exception, which may occur when the invitee necessarily must use the unreasonably dangerous premises, despite the invitee's awareness and appreciation of the dangers, the invitee is incapable of taking precautions that will adequately reduce the risk. The court held that the employee's case did not fall under one of the two exceptions and declined to create a new one. Thus, based on the general rule, Kroger satisfied its duty.

The court then turned to the employee's necessary-instrumentalities claim. While this issue was not part of the certified question, part of the court addressed it at Kroger's request. Kroger alleged that the claim fails as a matter of law. While the court declined to decide the merits of the employee's instrumentalities claim, it did address one of Kroger's arguments dealing with the relationship between the instrumentalities claim and the premises-liability claim. The court held that an employer owes additional duties to its premises-liability duties to its employees, including the duty to provide the employees with necessary instrumentalities. It held that contemporaneous negligent activity is not an element of an instrumentalities claim, but rather this type of claim may be founded on nonfeasance or misfeasance. The court reasoned that while only an employer that has control over the premises where the employee is injured has a premises-liability duty, the duty to provide necessary and safe instrumentalities applies generally to employers.

In its final answer, the court stated that, under Texas law, an employee cannot recover against a nonsubscribing employer for an injury caused by a premises defect of which he is fully aware but that his job duties required him to remedy. Employers, like landowners to invitees, have the duty to maintain their premises in a reasonably safe condition for their employees, but employers will ordinarily satisfy their duty as a matter of law by providing an adequate warning of concealed

dangers of which they should be or are aware of. If an exception applies (one of the two explained above), the employer may owe a duty to protect the employee from the reasonably safe condition despite the employee's awareness, and the TWCA will prohibit a nonsubscribing employer from raising defenses based on the employee's awareness.

Kachina Pipeline Co., Inc., v. Lillis

No. 13-0596

Case Summary written by Frederick C. Hutterer, Staff Member.

JUSTICE BROWN delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE WILLET, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE BOYD joined.

Kachina Pipeline Company, Inc. (Kachina) purchased natural gas from Michael Lillis to resell to Davis Gas Processing (Davis). Kachina installed a compression system, which permitted it to transfer gas to Davis via a high-pressure inlet. In order to successfully transfer gas to Kachina, a producer's compression system had to have sufficient pressure to overcome the working pressure of Kachina's system.

Kachina and Lillis entered into a five-year gas purchase agreement in 2005, in which Lillis would provide Kachina with gas, and Kachina would pay Lillis a portion of resale proceeds obtained from Davis. At the end of the five-year period, Kachina had the option to purchase gas from month to month. The agreement stated that "[i]f Buyer installs compression to effect delivery of Seller's gas, Buyer will deduct from proceeds payable to Seller hereunder a value equal to Buyer's actual costs to install, repair, maintain, and operate compression" There was also an option requiring that Lillis notify Kachina of third party purchase offers, granting Kachina the option to "continue the purchase of gas under the terms of this Agreement" from Lillis with price adjustments allowing Lillis to receive the same benefit as the third-party offer. Lillis entered into a gas purchase agreement with Davis in 2008.

Lillis sued, arguing that Kachina breached the gas purchase agreement. Lillis claimed that the agreement did not allow for compression taking place after the gas was transferred to be deducted from his proceeds. Kachina counterclaimed, stating that Lillis's failure

to notify them of his new agreement with Davis constituted a breach of the original purchase agreement. Both parties sought summary judgment.

The trial court granted Kachina's motions for summary judgment, asserting that Kachina had the right to deduct and that Kachina exercised an option to extend the contract termination date to May of 2015. The court of appeals reversed, holding that the Agreement did not permit the deduction of compression costs. It also held that the option did not provide for a five-year extension.

Issue: Whether the compression cost provision of the agreement applied to compression occurring after Lillis delivered gas to Kachina and whether the option supported a five-year contract extension.

The Supreme Court of Texas held that the agreement only permitted Kachina to deduct the costs of compression installed during the contract term if additional systems were necessary to compensate for the working pressure of Kachina's compression system. Additionally, the Court held that the option did not permit a five-year extension, thereby affirming the court of appeals' decision that the deduction of compression costs and a five-year extension were inappropriate.

As to the first issue, the court reasoned that under the section of the agreement providing for the deduction of compression costs, Lillis had the duty to overcome Kachina's working pressure. In the case that a producer failed to provide sufficient pressure, the agreement permitted Kachina to either do nothing or install additional compression and deduct costs from Lillis. The Court asserted that the right to deduct compression costs was contingent upon Kachina's elective installation of additional compression. Notably, the agreement did not apply to preexisting compression because it would be unreasonable for the parties to intend for the provision to apply to compression already in place. Kachina argued that "deliver" referred to final delivery to Davis, but the Court rejected this reasoning because the Agreement repeatedly used "delivery" to reference transfers from Lillis to Kachina. Additionally, there was no evidence that Kachina's systems were under-pressurized because the record established that compression was not necessary to effectuate gas flow from Kachina to Davis. Lastly, Kachina argued that Lillis acquiesced to compression costs due to the deduction of costs from a prior contract between the two. The Court concluded that evidence of Lillis's subjective intent

under a prior contract could not be considered to interpret the agreement's unambiguous meaning.

As to the final issue, the Court reasoned that the language of the Agreement did not support a five-year extension because it only permitted Kachina to continue to purchase gas pursuant to the contract terms. Kachina argued that the five-year period was a term under the Agreement. The Court stated that another term of the Agreement was that it would continue month-to-month, not that the parties would be subjected to an additional five-year term. Kachina also claimed that the market price of gas changes, necessitating a new five-year period to enable Lillis to receive the same economic benefit as he would have with Davis. The Court asserted that the language of the agreement still did not support a new five-year term, and that a month-to-month term would protect Lillis's interests by permitting him to engage in a more lucrative outside deal. Lastly, Kachina claimed that the Court's interpretation would result in absurdity, as it would have to exercise its option every month. The Court responded that a month-to-month term allowed Lillis to acquire a better deal and that Kachina could have contracted for a longer Agreement if the economics required it.

In this case, the Court held that Kachina could not deduct compression costs from Lillis's proceeds and that the agreement did not provide for a five-year extension. The Court affirmed the court of appeals' judgment and remanded the case to the trial court for determination of accounting and costs and fees.

CHIEF JUSTICE HECHT, joined by JUSTICE GREEN and JUSTICE DEVINE, concurring in part and dissenting in part.

Chief Justice Hecht concurred with regard to the Court's judgment regarding the five-year extension but dissented with the Court's conclusion that Lillis was not obligated to pay for preexisting compression. The dissent argued that the Court simply speculated that no compression was needed to transfer gas from Lillis to Kachina. The dissent also stated that it would not make sense for Lillis to stop paying for compression installed during his prior contract with Kachina, only to pay for newly installed compression under the new agreement. In the dissent's opinion, Lillis avoided paying for compression as was his obligation pursuant to the Agreement, while Kachina did not have the right to extend the agreement by five-years.

