



For a fully searchable and synchronized transcript and oral argument video, go to the TX-ORALARG database on Westlaw.com.

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
East Texas Salt Water Disposal company, Inc., Petitioner,
v.
Richard Leon Werline, Respondent.
No. 07-0135.

January 16, 2008

Appearances:

Greg Smith, Ramey & Flock, PC, Tyler, Texas, for Petitioner.
Gregory J. Wright, Bunt & Wright, PLLC, Longview, TX, for
Respondent.

Before:

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

CONTENTS

ORAL ARGUMENT OF GREG SMITH ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF GREGORY J. WRIGHT ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF GREG SMITH ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 07-0135 East Texas Salt Water Disposal Company v. Richard Werline.

MARSHALL: May it please the Court. Mr. Smith will defend argument for the petitioner [inaudible].

ORAL ARGUMENT OF GREG SMITH ON BEHALF OF THE PETITIONER

MR. SMITH: May it please the Court. And good morning, your Honors. This case squarely presents the question of appellant jurisdiction over an order vacating and granting a rehearing of arbitration under the Texas Arbitration Act. The Court of Appeals in Texarkana held that the Texas Arbitration Act allows appellant review if such an order somewhere in the order also states that it denies a confirmation of the order. In going to where that cannot be true and should not be held true by this Court, I think we should begin with the common ground. And I would submit that that is in the Jurisdictional Statute 171.098 of the Civil Practices and Remedies Code in its subsection A5. A5 is the subsection that states that jurisdiction is conferred on an Appellate Court in the event of an order vacating without the direction of rehearing. From that, we should know that an order that vacates and grants rehearing, certainly if that's all it does, is not allowed a jurisdiction because --

JUSTICE HECHT: It's just not --

MR. SMITH: -- as otherwise -- yes, your Honor.

JUSTICE HECHT: It's just not in the list but you can't logically infer from the file that just because you can appeal from a vacation without a rehearing, you can't appeal from a vacation with review. It just, it doesn't speak of the issue.

MR. SMITH: Your Honor, I would beg to disagree in this respect. And that is, first of all, that if you don't infer that, then the words without directing a rehearing have no effect and --

JUSTICE HECHT: Well, except that it might -- they might be in there to clarify that if there is a vacation without a rehearing, you can't appeal. The writers might have thought --

MR. SMITH: Certainly, your Honor, we recognize there are occasions when surplus words serve a function and some statutes include...

JUSTICE HECHT: We could call your attention to the fact that --

MR. SMITH: Yes, your Honor. We don't think that's the circumstance though, your Honor. And also, if you consider it that the statute construed in its entirety and certainly the appellate jurisdictional provision construed in its entirety with -- but with this one issue that we have here, it appears to confer appellate jurisdiction only in circumstances that align with the common law, the notion that appellate review is afforded from final decisions and it's not afforded from interlocutory decision.

JUSTICE HECHT: It is not in the Federal Statute, the rehearing part.

MR. SMITH: Absolutely correct, your Honor.

JUSTICE HECHT: But which came first, the Uniform Laws or the Federal Statute.

MR. SMITH: My belief is that the Uniform Act, it was passed in 1955 or '56. I believe that preceded the Federal Act. And certainly all the state's decisions that are discussed in the briefing in this case wherever they are from, they have statutes that have this similar provision, to vacate without directing a rehearing. If you begin with -

JUSTICE HECHT: But none of the briefs try to explain any directing history in this. I suppose you have looked for it and just[inaudible] -

MR. SMITH: Your Honor, I hate to say that is true here. Maybe a better researcher than I could find it but I certainly can't find it. Certainly, the Texas legislature, there is no directing history from our own state's legislature on the statute because they adopted this from Uniform Act. They didn't specifically address this one provision. Now, if there -- if it is true that there is jurisdiction on appeal from an order merely vacating and no jurisdiction on appeal from an order that vacates and remands for a new arbitration, from that it simply has to be the right decision as a policy matter that there also is no appellate jurisdiction if you fold in what I believe fortuitous order that says confirmation is denied and this, this --

JUSTICE HECHT: Although if you're going to vacate and remand, you're not going to confirm.

MR. SMITH: Absolutely right and that -- that is a premise of the argument, not the only premise but a premise, is that simply the motion to confirm has been mooted by the fact that a rehearing has been granted.

JUSTICE HECHT: It looks -- it looks like that would give the trial judge just unreviewable power to force the parties to get a result that the trial judge wanted.

MR. SMITH: It is certainly the argument that is raised in this case by our opponents. It's an argument that is raised frequent by the proponents of review of new trial orders, new trials granted in the interest of justice but several things can be said. Number one is it is a harm that's not evident in this case certainly and we suggest it's not evident in any other published case. You simply don't find a record where this is a problem, that trial courts repeatedly are sending things back to the arbitrator simply because they think the wrong party won. That's not what --

JUSTICE BRISTER: But there are a lot of cases that send it back for rehearing because they didn't decide a couple of left-over issues.

MR. SMITH: Yes, your Honor. I believe that's correct.

JUSTICE BRISTER: So is -- I'm wondering if that's what the drafters had in mind here, if -- or the example, there's five issues and arbitrator has [inaudible] that they don't rest -- address to the Court, you just can't make them up because you all agree with the arbitrators so we want a rehearing on undecided issues. You wouldn't want to be appealing that because the arbitration is just halfway over. But it does seem kind of different if you're tossing out the whole award and the arbitrator in saying we want somebody new. That does seem pretty final. Why wouldn't you want to review that?

MR. SMITH: Well, it's not final and I would suppose this is a point of distinction from the situation of post-trial in the civil justice system. Regardless however you fall on the issue of whether a new -- grant a new trial should be reviewable immediately, regardless of how you fall there, you shouldn't grant review in this case or any other case when an -- a case is sent back for a new arbitration and it's simply because of the --

JUSTICE BRISTER: No, but I am -- I think that the right analogy is not a new trial. The analogy for a new trial would be if the arbitrator issued award and the arbitrator decided I want to change my own award. The analogy would be to reverse and remand from the Court of Appeals. And if the Court of Appeals says we want a reverse and remand for a new award, that wouldn't stop us from reviewing what they did to see if it was right. And I'm just, you know, this is -- the bugaboo raised by the Court of Appeals if you just wanted what would keep a trial court from any case saying, "I just think this arbitrator is impartial. I'll fire him and I'd get a new one." That would clearly subvert the parties' agreement if the trial judge was just doing it 'cause I don't like the award.

MR. SMITH: It clearly would, your Honor but --

JUSTICE BRISTER: And so, what would stop it?

MR. SMITH: Your Honor, there may be nothing stopping him but that was a legislative choice. It was policy choice and the legislature waived that risk against --

JUSTICE BRISTER: They waived that risk by adopting the Uniform Act without any discussion.

MR. SMITH: The draftsman of the Uniform Act. That --

JUSTICE BRISTER: Right.

MR. SMITH: -- maybe that's where I should put --

JUSTICE O'NEILL: No, but -- what if -- it strikes me that this particular instance is more like a motion for a new trial because the trial court withheld that there was evidence of partiality, willful misconduct, and gross mistake, which is a sort of like a new trial saying jury misconduct. I mean the trial court cited the fundamental reasons that it could vacate an award. If it went back to a different arbitrator, which you're arguing it should, and then that award was

confirmed and it came up on appeal, there'd be nothing to preclude the Court of Appeals from reviewing whether the vacation of the first award was proper or not, correct?

MR. SMITH: That could be. That's certainly not posed in this case but that is -- that could be true, your Honor. And it's also correct, I believe, that at some point, regardless of this jurisdictional statute, there may be a role for mandamus to play. If in fact a trial court on the record says, "Wrong party won. Send it back and I'm going to keep sending it back until the right party wins." At some point, there may be a mandamus this issue to stop this successive loop but certainly, that is not this case.

JUSTICE HECHT: But arbitration is supposed to be faster and cheaper.

MR. SMITH: Absolutely, your Honor.

JUSTICE HECHT: Maybe it isn't, but it's supposed to be. And it just seems to me that one party could wear another party out pretty easily by saying, "The Judge just sent us back." I can do it again but at some point and maybe this fellow is -- but some fellow is going to have to give up at some point.

MR. SMITH: That point is well taken and that goes back to the weighing of policy issues that I spoke about that we believe the draftsman of this Act weighed on the one hand the risks that trial courts might somehow initiate the successive loop arm against the fact of affording two layers of judicial review be it in arbitrations. And they said when a trial court has said there has to be a new arbitration when we know there will already be an arbitration proceeding, it would be a prudent matter as a matter of policy to say the arbitration will be more expeditious, cheaper. It will better effectuate the parties' intentions that it would be to impose a second layer of review on appeal in the process. Because after all, if the only way that the appeal can possibly be more efficient than the rearbitration is number one, if the appeal is quicker and cheaper than the rearbitration and number two, if the appeal reaches a preordained reversal of the trial court's decision. Otherwise, we're going to have arbitration, trial courts vacation, appeal, then new arbitration. So it just adds another level. It was a policy matter for the draftsman and we believe that squarely, if you look at the language, vacating without directing a rehearing, that that embodies that policy matter that when a rehearing is granted, that the arbitration is not final, in fact the arbitration is just beginning anew.

JUSTICE WAINWRIGHT: Counsel, practically, what occurs at the trial court remands if arbitrator says, "I'm staying on what I said."

MR. SMITH: Well, certainly, that's not this case because we have a new arbitrator. I suppose we'd have to see what the trial court did after that. And if the trial court issued the same ruling again, perhaps we're at the point in that case of a mandamus proceeding or some other proceeding as Mr. Arbuckle I think said, "Where the court could initiate some kind of level of plain review." But we are not at that juncture in this case even with what --

JUSTICE O'NEILL: Well, it's fair to say, if I may react, that the legislature presumed in 171.9885 that a trial court would be honest in its assessment [inaudible].

MR. SMITH: Judge O'Neill, that is absolutely correct and that goes along with the inertia concept, I would say, behind all trial court's judgments, generally at least.

JUSTICE HECHT: Well, but I assume the trial judge will be equally honest in one, two, three, and four but you could appeal those.

MR. SMITH: That's because those essentially in the game, if you can't appeal those, you'll never get an appeal recognized. Here, we're not saying there can never be an appeal. It is just that there can't be an appeal until the last word is writ by the arbitrator during arbitration.

CHIEF JUSTICE JEFFERSON: But what's before the trial court when in a typical case in here, she makes a decision whether to confirm or to remand or run a rehearing? What is the record that the trial courts -- I mean there are no -- the proceedings are not transcribed? You get documents, or just argument of counsel or --

MR. SMITH: It certainly depends on the arbitration. Some proceedings are transcribed and most arbitration proceedings I think are not transcribed. And again that goes the thinking, I believe is, that that makes it less likely that the arbitration will be reversed and goes towards the efficiency matter. But we don't know in every case that the proceedings are or aren't transcribed. Here, I believe, and I'm sure Mr. Wright will correct me, but I believe the proceedings -- well, I don't want to misspeak. I'm not sure.

CHIEF JUSTICE JEFFERSON: What was the report of judges is I guess what I'm asking. What is the evidence of partiality, for example?

MR. SMITH: Well, the evidence of partiality simply goes to the fact of what this trial judge, or excuse me, what this arbitrator did. The nature of it is that we have an employment agreement. We have a situation where the employee almost simultaneously says "I want a new title or a new position of vice president," on one hand. And then the very next day, he says, "I am deeming that I have been constructively discharged because I have that position." And so it doesn't make any kind of logical sense -- the position underlying what the arbitrator did. And then number two, it's a matter of exceeding the arbitrator, scope of the arbitration. It was supposed to be, your Honor, just simply an arbitration based on construction of the contract --

CHIEF JUSTICE JEFFERSON: Okay.

MR. SMITH: -- [inaudible] see that to the nature of the quasi-tort.

CHIEF JUSTICE JEFFERSON: Okay. Other questions? Thank you very much, Counsel. The Court is ready to hear argument from the respondent.

MARSHALL: May it please the Court. Mr. Wright will present argument for the respondent.

ORAL ARGUMENT OF GREGORY J. WRIGHT ON BEHALF OF THE RESPONDENT

MR. WRIGHT: May it please the Court. The Sixth Court of Appeals got construction Section 171.098 of the Texas Arbitration Act correct. For the first time, a Texas court took a thorough, logical look at what have become of subsection 3 and A5.

JUSTICE O'NEILL: Well the Court purported to rely on plain language --

MR. WRIGHT: Correct.

JUSTICE O'NEILL: -- but we chose one subsection of plain language. There's another subsection that has plain language as well that says there's no right of appeal so you've got a statute that plainly says you can appeal, plainly you can't and the only way to harmonize that is to say that vacating an award, directing a rehearing is the same thing as denying confirmation.

MR. WRIGHT: I would disagree with the Court's position in that regard. And I direct the Court to the case, the Court of Appeals' case from Fort Worth, *J.D. Edwards World v. Estes* that's cited in that case. And what the Court is referring to is a situation that was presented by the Fourteenth Court of Appeals and *Prudential Securities v. Vondergoltz* which in that case, the Court said that A5 would be meaningless because denial of confirmation and an order vacating an award are the same thing. In fact they called it functional equivalent, which is a real cornerstone of the petitioner's case. They said A5 would never have meaning. Well, that's not what happened in the *J.D. Edwards's* case out of Fort Worth. In that case, the arbitrator's award was vacated. No hearing -- no rehearing was ordered and the Appellate Court was analyzing whether or not jurisdiction would like to review that case and they said it would. And that was a different case because the petitioners had presented the case and spoke of mandamus in a direct appeal under A5 because they didn't know which was correct. So, the Court was looking at the jurisdiction question under 171.098. And they said of course, this is a situation where the statute -- the plain language of the statute -- there was a vacation of the arbitrator's award. There was no rehearing ordered, jurisdiction was found to apply. That is a real world situation as opposed to *Vondergoltz* which is --

JUSTICE O'NEILL: But that's not like here though because there wasn't a rehearing ordered then.

MR. WRIGHT: But in *Vondergoltz* the court said the reason why we have to make this functional equivalent analogy is because denying confirmation and vacating the award are the same thing and A5 would never had any meaning but without ordering a rehearing of Section of A5, would never have any meaning if we do not treat it that way.

JUSTICE O'NEILL: But what do you do in the situation that Justice Brister raised where there are five points the arbitrator is best to decide. The arbitrator decides three. The trial court says go back, decide the other two. Why would we want that to come up through the appellate system under your argument?

MR. WRIGHT: We would look to the plain language of the statute and whether or not we had a denial of confirmation --

JUSTICE O'NEILL: Presumed a denied confirmation because --

MR. WRIGHT: If it denied confirmation, then the plain language of the statute provides that we would have a basis to review that opinion. Now, and you're getting back to the functional equivalent --

JUSTICE BRISTER: But that's gonna -- that's gonna take a long time in Judge O'Neill's example. When was the -- when did the trial court issue its order?

MR. WRIGHT: In this case?

JUSTICE BRISTER: Yes.

MR. WRIGHT: It would have been in 2004.

JUSTICE BRISTER: In 2004, if instead of doing this appeal, you have just gone back and done it the second time and then come up. And when I looked at both arbitration awards and said was the trial judge wrong to be the first one would probably -- could have gotten the case up here about as fast except we'd have two arbitration awards to pick through.

MR. WRIGHT: Well, that's certainly doesn't -- that's true but it certainly doesn't promote the fundamental principles of arbitration of promoting efficiency and economy because it makes no sense.

JUSTICE BRISTER: Well, but the whole reason that both acts, State and Federal, say no appeal and I'll order sending you to arbitration is because the assumption, right or wrong, is that no matter what happens

on arbitration, an appeal to the court will be slower. And that would seem to suggest that the right reading of this is no matter whether -- even if the trial court was wrong, shouldn't have vacated it, shouldn't have kicked out your arbitrator, shouldn't have kicked out your award. It would be faster to go ahead and do it again and then look at it all at once than looking at it twice.

MR. WRIGHT: And my point in response to that, Justice Brister, is that that wouldn't have been the case here because we would have to re-arbitrate the case, go back to the trial court and --

JUSTICE BRISTER: How long did the arbitration take?

MR. SMITH: It took three full days.

JUSTICE BRISTER: Well I know, but I mean, you know, you were talking about three years to get to this Court on the appeal.

MR. WRIGHT: But if we -- if there is jurisdiction under the plain language of the statute because the trial court's order denied confirmation, which it did, then we can have the trial court's action which the Sixth Court of Appeals and this lower court here held that the trial court overstepped its bounds -- substituted its judgment for the judgment of the arbitrary

JUSTICE BRISTER: Which may be right.

MR. WRIGHT: And so the people have to [inaudible] --

JUSTICE BRISTER: But -- but the -- but how much if -- if that's right -- if -- if -- if that's right -- the trial court was wrong, shouldn't -- shouldn't have thrown out, and shouldn't order, but a new arbitration would have taken how long, three to four to five months?

MR. WRIGHT: I would only --

JUSTICE BRISTER: Going back and now the trial judge, assuming a bad trial judge, not this case, but assuming there is a bad -- "Okay. I like this award better. I'm affirming it." Then you appeal both of them. We'd have a delay of three or four months rather than three or four years. What is wrong with that?

MR. WRIGHT: That couldn't be 'cause that's not what the statute says.

JUSTICE O'NEILL: Well, but you -- you said that. But why does subsection 5 not directly say you can't appeal if a rehearing has been ordered?

MR. WRIGHT: Because there is a difference between a denial of confirmation and a vacation of an arbitration.

JUSTICE O'NEILL: Whether there is or they're written, subsection 5 says no.

MR. WRIGHT: Subsection 5 says that you may appeal an order that vacates an arbitrator's award without directing a rehearing. But section A3 says you can --

JUSTICE O'NEILL: Well, and a logical -- well, but -- but I mean plainly, that means if a rehearing is directed, you can't.

MR. WRIGHT: If the order vacates the award and directs a rehearing, then there is no jurisdiction. If it fails to direct a rehearing, then there is jurisdiction. But A3 deals with confirmation.

JUSTICE O'NEILL: All right. I know. Here, we directed a rehearing.

MR. WRIGHT: Correct.

JUSTICE O'NEILL: So five says no. Three says yes.

MR. WRIGHT: On that basis.

JUSTICE O'NEILL: Of course. Three says yes, five says no.

MR. WRIGHT: That is right. In this case, it is a separate basis for interlocutory jurisdiction. Well, that is if you adopt the functional equivalence argument. Justice Brister has --

JUSTICE O'NEILL: Functional equivalence aside. I mean, forget that

concept. Five says no, three says yes. How do you harmonize the change?

MR. WRIGHT: In this case, a portion of the statute provides a distinct, separate basis for appellate jurisdiction.

JUSTICE O'NEILL: And a portion says no.

MR. WRIGHT: But where the Legislatures Act provides for jurisdiction in one instance there may be other parts of the case that are not appealable. But the legislature says under A3 that where there's a denial of confirmation, you have appellate jurisdiction. A5 has meaning under other factual settings as indicated by the *J.D. World* case. And in fact, I can think of an example that would even be more common where A5 would have meaning under different factual setting than we have here and that would where neither party is satisfied with the award of the Arbitrator. Nobody seeks confirmation, which is really similar to what happened in *J.D. World*. We may not have a denial of confirmation --

CHIEF JUSTICE JEFFERSON: What if the Court vacates and, you know, grant rehearing and refuses to deny, I mean, there is some party seeking judgment denying this confirmation.

MR. WRIGHT: Well, first of all, the fact that the Court would refuse to rule on a properly presented pending motion is a problem for me because I think that in our Court system, the parties are entitled to have rulings. And so, where a Court refuses to rule on a denial --

JUSTICE BRISTER: No question you can get mandamus. If you file, you are entitled to a ruling. Court just refuses to have a ruling, at some point you can get mandamus.

MR. WRIGHT: That is exactly correct. And so under the plain language of the statute --

CHIEF JUSTICE JEFFERSON: But what if the Court in the situation of Justice O'Neill posed before, that there are two matters that still need to be determined? And so you, the case comes on -- on the arbitrator's decision and the judge says well, this is not done yet, go back down, I am sending it back down.

MR. WRIGHT: And if the Court denies confirmation, there would be jurisdiction. However, that would not be the most thoughtful ruling for the trial court and in that case where the arbitration was clearly incomplete. We do not have a final award and the proper ruling would be just to vacate the awarding and remand it for further --

JUSTICE O'NEILL: So the Judge says on this record because there are still two issues pending. I really can't confirm or deny a confirmation. So, I'm gonna hold off on that ruling until these other two issues are decided.

MR. WRIGHT: And so there would not be a denial of confirmation under that circumstance and therefore sending it back to arbitration. There would be no appellate jurisdiction and when we get the proper result which really is consistent with what Justice Brister was raising in the *Bison* case which is that the functional equivalence misplaces the analogy and that is the cornerstone of petitioner's case. It is what *Vondergoltz* relies on. It says that a denial of confirmation and a vacation of the award are the same thing.

The *Stolhandske* opinion under the First Court of Appeals says it a little differently and something that Justice O'Neill mentioned as well. It says that vacating an award and ordering a new arbitration is the same thing as a new trial and I would urge this Court to recognize that that is not the case at all. They are not functional equivalents of each other because the trial court has much broader discretion to grant a new trial in ordinary litigation than they do to reverse or vacate an arbitrator's award. So there really -- it -- it misplaces the

analogy. The trial court is not the trial court. They are sitting as a first reviewing court or an appellate court, and they got an extremely high standard of review. The standard of review is to treat the award of the arbitrator with the discretion -- with the deference that would be given to a final judgment from a court of last resort. That is the language from the *JJ Gregory* case. There's a long list of Texas cases that takes that position. So really as far as finality goes, the final judgment comes from the arbitrator not from the trial court. The trial court is in the capacity of a reviewing court. And so to the extent that the petitioner has used a functional equivalent argument like the one set forth in *Stolhandske* to get to a finality and interlocutory appeal issue is a moot point. If you put those analogies in the proper place, and that is all they are. It is just analogies. And analogies are helpful but they also are sometimes they're not.

JUSTICE BRISTER: Can you deny a confirmation without doing something else? It seems to me if you deny -- arbitrator gets an award, come in to the trial court. The trial court refuses to confirm. You would either have to send it back to confirmation -- to arbitration or you would have to say as a matter of law, gross mistake, willful -- can you -- can you say -- because of gross mistake the law just did not allow this claim and the trial court just entered judgment and if you deny confirmation, do you always have to send it back?

MR. WRIGHT: Under 171.087, which is an earlier Section of the Arbitration Act, that statute provides very clearly that in order to deny -- well, what it says is that, "Unless grounds are offered for vacating, modifying, or correcting an award, the Court on application shall confirm it." So, the answer to your question is no. You can't deny confirmation and do nothing else. The Court has to something. They have to indicate a basis for vacating the award. Now, if they vacate the award and they don't order a rehearing we have jurisdiction under A5.

JUSTICE BRISTER: So it seems to me then denying confirmation and sending it back to arbitration would be the same as vacating an award and directing a rehearing.

MR. WRIGHT: They have the same result but they are not the same thing. It is a distinction with a difference, despite what Counsel would argue. The legislature and the Uniform Act treats confirmation and vacation as two different things. And in fact, even the *Vondergoltz* opinion, relied upon by the petitioners, indicates on Page 331 of that opinion that except as to the parties requesting it, denial and vacation are functional equivalents, and that is where they use the term functional equivalents. Well, it is a distinction because the statute says that it is distinct, that confirmation gets treated one way, vacating gets treated a different way. Are they similar? Of course they are similar. They end up with similar results.

JUSTICE BRISTER: But the difference, the difference would be if denial has to send it back, one could completely subvert the party's arbitration agreement by just vacating the award and doing nothing. That seems to me then if they vacate the award and did nothing, you could not make the recalcitrant party go back to arbitration because there is no court order and the arbitrator cannot throw you in jail if you do not show up. So if they just vacate and do not direct to rehearing that needs to be appealable because otherwise, nothing will happen. But if they do vacate and direct to rehearing, then that suggests there is no reason to appeal.

MR. WRIGHT: And under A5, if they vacate and they fail to order a rehearing that's expressly appealable under the language of the

statute. And that is was happened under *J.D. Edwards World* case.

JUSTICE O'NEILL: What -- why do you think that language was included in there? It's not in the FIA? Why do you think it is here? Why do you think the [inaudible]?

MR. WRIGHT: I would be speculating. And it is part of the -- it is part of the Uniform Act and most states include the same language. My speculation would be that the court intended or the drafters did intend to put the roles in their proper place, sit on an arbitration award where we get a final verdict. And where we have a vacation without a rehearing, we've got a problem. We do not have a final judgment in that case. And so that language is included under A5 to give the parties a remedy to get a new arbitration. What happens under the *Vondergoltz* functional equivalent theory and petitioner's theory, however, is we take that same phrase without directing a rehearing, and we pencil it in in A3. We're rewriting the statute. The problem with the flawed logic of the functional equivalent approach is that something is going to be rendered meaningless in that statute. But if you put the roles in the proper perspective, if you put the function -- the arbitrator is really the trial court. The trial court is really sitting in the capacity of a reviewing court. This is really more akin to a vacation and new arbitration is more akin to a reverse and remand than it is to a new trial, which I think is certainly the logical conclusion. When you do all of that, the plain language of statute works just perfectly. And we get jurisdiction for appellate purposes exactly when the statute says we should. And --

JUSTICE HECHT: If the Federal Act applied here and this was in the Federal Court, there would be an appeal.

MR. WRIGHT: That is correct.

JUSTICE HECHT: And we made some effort to harmonize these two arbitration procedures because so many agreements are on the [inaudible].

MR. WRIGHT: Correct.

JUSTICE HECHT: This -- I know the parties have said this is governed by the state statute. Would it be governed by the Federal Statute or that issue has just never come out?

MR. WRIGHT: It is not because if we need to be in the contracts that they have adopted the Federal Statute and it is not in the contract in this case.

JUSTICE HECHT: They have to put it in the -- and if it were in the contract so that it would -- so that it would be covered by both, then how would that -- how do you see the conflict in the Federal Statute, the State Statute being resolved.

MR. WRIGHT: Well if we want to try to get the two statutes harmonized, then we would want appellate jurisdiction aligned in the same circumstances which in this case would mean appellate jurisdiction should [inaudible] because the court felt they had confirmed an award or they vacated an award which under the Federal Statute provides a proper basis for jurisdiction. Under the States Statute, under the *Vondergoltz* functional equivalent theory and the theory proposed by the petitioner, you would not have jurisdiction because that theory says, look, denying confirmation is the same thing as vacating the award and we are rendering A5 meaningless because they are the same thing, I mean, even though they are really not. So by torturing the statute, you know, we penciled in a new requirement that would not exist under the Federal law.

JUSTICE HECHT: Well, in *Evan*, we said interlocutory appeal is a matter for the legislature to grant for Texas Court but we won't be

able to review agreements covered by the Federal Statute the same way agreements covered by the State Statutes so we are going to let that happen by mandamus. If these were covered by both the Federal and State Law, I guess, and they were different, I guess that would mean that the party to bring mandamus for review as permitted by the Federal Statute but not on appeal.

MR. WRIGHT: Well, I would be speculating and that which is what the Court is asking me to do but I suppose that would be the remedy. Regarding interlocutory nature of this appeal, however, I would add 171.098 is very clearly a legislature's indication of interlocutory appellate jurisdiction. A1, that provides that a party may appeal a judgment or decree, denying an application to compel arbitration. Denying an application to compel arbitration -- we do not have a final judgment and an appeal of an order denying an application to compel arbitration. Even A5 is very much interlocutory in nature. It says we have jurisdiction that where a Court's order vacates an award without directing a rehearing. The *JD Edwards World* case directed -- addressed that subject. We do not have a final judgment because we vacated the Arbitrator's award. So it is very clear that 171098 is intended to provide some interlocutory appellate jurisdiction. Petitioner would say yeah under A1 and A5 but not A3. Well, I fail to see where the legislature indicated the difference -- the plain language of the statute. And by the way, this statute could not be any simpler. It does not have any long -- big words or run on sentences with a lot of commas. It is very simple and unambiguous and it provides that an order confirming or denying confirmation provides for appellate jurisdiction.

The *Werline* port cited this Court in the *Mega Child Care* case to say that when the text of the statute is unambiguous, we are going to use the plain language of the statute unless it renders an observed result. There is no observed result here. So it is very clear that the plain language approach is the superior approach. It is our opinion that and believe that the Sixth Court got it correct and that this Court should adopt the plain language approach and affirm the judgment of the Court of Appeals.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF GREG SMITH ON BEHALF OF THE PETITIONER

MR. SMITH: Can a denial of a confirmation serve a function independent of itself? Yes, it can, under the statute and that function is that just like a vacation of itself, it can occur when the result is a determination by the trial court that the arbitrator -- that the parties did not agree to arbitrate. If you have that circumstance, I would suggest that vacation and denial or equivalent rulings and the trial court could say we vacate the arbitrator's ruling. We do not send it back to a new arbitration because there was no agreement to arbitrate. And the Statute itself reigns itself to that interpretation and it is for this reason the word denial only occurs in one place and that is in the appellate jurisdiction statute. Otherwise, the statute talks about available remedies being confirmation, vacation, modification, or correction.

And I would suggest that clad appropriately, the word denial is wasted in the appellate jurisdictional statute, kind of as a housekeeping mechanism recognizing that a trial court could I think

properly say when it intends to vacate the trial court's -- excuse me -- the arbitrator's ruling on this basis that there is no agreement to arbitrate. It might say we're -- I am denying confirmation as opposed to I am vacating it or perhaps there is only one motion in front of the Court and that was a motion to confirm which is its only vehicle to do it. That is not this case and I would suggest to this Court that when a trial court in its order has remanded for a new hearing that in that circumstance, throwing in the word that I am denying the motion to confirm has no effect, it does nothing whatsoever to the character and nature of the ruling and two things follow because of that, they are these.

First of all, if the court allows that superfluous event, that immateriality to control whether or not the keys to the Court of Appeals are left open, it is as if you are building a financial system, say on -- which -- which conference wins the Super Bowl. And then there's that wide -- deal -- held belief by some folks that if the NFC wins the Super Bowl, the mortgage is going to go up. If the AFC wins it is going to go down. I suggest that [inaudible] should not use that as a sound method to determine whether or not the [inaudible] rate is going to go up.

JUSTICE HECHT: Would this be -- if this were in the Federal System would it be appealable?

MR. SMITH: If this were in the Federal Court, yes your Honor, it would absolutely be appealable.

JUSTICE HECHT: And under A1, we said if it is appealable on the Federal System, we want to give it some review in the state system, the only way we have of doing that is by mandamus. If this were in the state court but governed by the Federal Statute, this [inaudible] require that mandamus be available for review in this circumstance.

MR. SMITH: Not in this case, not at this time. And it simply is, first of all, I would like to step back and say something about this overlaid -- FAA over the TAA. Recognized that all the FAA really does and really intends to do even when it applies because it's a transaction involved in interstate commerce is to say the state law is going to be pre-empted but only to the extent that the state law impairs the fundamental purpose of preservation that -- preserving the party's intent to arbitrate the dispute. That is not an issue here because come hell or high water, this case is going to be decided by arbitration. It's been sent back for a new arbitration.

JUSTICE HECHT: But in -- in A1 we said if you could appeal in the Federal system, we are going to give you the same right of review in the state system and -- but we have to do it by mandamus because we cannot create a right of appeal. And so, does that mean, if these were governed by the Federal contract you'd have -- statute you'd have a review by mandamus.

MR. SMITH: No, your Honor, I still do not believe it does and that is because again, this overlay what you have is a statutory mandate that would read -- read like this: "The Texas Acts still applies even if the party said the FAA is going to govern our agreement. The Texas Acts still applies to the extent it's not preempted by the FAA." Assuming it is in the Texas Court. Now, I am assuming this is a proceeding that's in the Texas State System and the Texas Act includes Section 98. And Section 98 tells this Court when there should be appellate review and when there shouldn't. In that circumstance, I believe it would be wrong to essentially rewrite the statute by saying we are going to grant mandamus relief as of matter of course initially from that decision to vacate. Now, there's a place --

JUSTICE HECHT: And my last question on this subject is if it were only governed by the Federal State, that was our first case today, and that the agreement would not comply with the Texas Statute, would there be a right of review if the case was in the State Court?

MR. WRIGHT: Your Honor, that is where I differ from the litigants in the first case. I believe if the case originates in the state system, you cannot wring the TAA out of the case. All you have is again that overlay and the only part of the TAA that is mashed or that is ineffective -- it does not rise up in the case is the part that is preempted by the FAA. I believe that what is what required by the *Mastrobono* case and some of the others by your Supreme Court say, eight or nine or ten years ago. It is simply not the truth that you can divorce a case in the state system from the TAA regardless of whether the Federal Act applies or does not apply.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and that concludes the arguments for this morning. And the Marshall will adjourn the Court.

MARSHALL: All rise. Oyez. Oyez. Oyez. The Honorable, the Supreme Court of Texas now stands adjourned.

2008 WL 2346235 (Tex.)