

2017 WL 1162940 (Tex.) (Oral Argument)
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Supreme Court of Texas

Miguel Angel Loya,
v.
Leticia B. Loya.

No. 15-0763
March 21, 2017

Oral Argument

Appearances:

Rachel A. Ekery, Alexander Dubose Jefferson & Townsend LLP, Austin, TX, for Petitioner.

Richard R. Orsinger, Orsinger, Nelson, Downing & Anderson, LLP, Dallas, TX, for Respondent.

Before:

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

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CHIEF JUSTICE NATHAN L. HECHT: We're ready to hear argument in 15-0763, Loya v. Loya.

MARSHAL: May it please the Court.

Ms. Ekery will present arguments for petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF RACHEL A. EKERY ON BEHALF OF THE PETITIONER

ATTORNEY RACHEL A. EKERY: May it please the Court.

The Loyas settled their property division seven years ago. The mediated settlement agreement they signed represented the conclusion of hard-fought divorce proceedings that had been pending for over two years. Both sides were represented by teams of capable lawyers. There had been 26 months of extensive discovery. Everything was on the table.

After multiple mediations including one final 22-hour session conducted by a retired Harris County district judge, the case was finally resolved.

Ms. Loya and her six lawyers signed off on one of the most contentious aspects, the property division.



JUSTICE DEBRA H. LEHRMANN: Excuse me, Ms. Ekery, but it seems to me that -- that the mediated settlement agreements indicates that future earnings were -- were awarded to the husband, future earnings, and the issue here is the bonus. And so, you know, it seems to me the income can only be earned once, and so what is your position as to when this bonus was earned?

ATTORNEY RACHEL A. EKERY: So that's a great question, and I think you can answer it by looking at Tab 3 of our Oral Argument Exhibits which contained some definitions. And if you look, it's got the Family Code definition of earnings.

Earnings means a payment to or due an individual regardless of source and how denominated. It includes a bonus. So the question -- we know the bonus was a future payment to Mr. Loya. It came nine months after the divorce. When it --

JUSTICE DEBRA H. LEHRMANN: What was it based on?

ATTORNEY RACHEL A. EKERY: There's no evidence in the record of what it's based on. It's a completely discretionary bonus and we have the bonus provision at Tab 4 which says, you will continue to be considered for an annual bonus based on various performance parameters considered by the company. Bonuses are completely at the discretion of the company and if paid are typically paid in March or April of each year.

JUSTICE DEBRA H. LEHRMANN: And the evidence is completely void of any indication of how that is computed?

ATTORNEY RACHEL A. EKERY: That's correct.

JUSTICE DEBRA H. LEHRMANN: Who would have had the burden to present that kind of evidence?

ATTORNEY RACHEL A. EKERY: Well, Mr. Loya moved for summary judgment on four grounds that the bonus was explicitly partitioned in the divorce decree, that res judicata -- I'm sorry -- three grounds, res judicata prevented relitigation of it, and that the bonus was not community property subject to division. And he proved in his affidavit that he had no entitlement to that bonus until Vitol's board met the following spring in March of 2011, nine months after the divorce and declared the bonus.

JUSTICE DEBRA H. LEHRMANN: Is that when they decided to grant the bonus --

ATTORNEY RACHEL A. EKERY: That's correct.

JUSTICE DEBRA H. LEHRMANN: -- grant the bonus?

ATTORNEY RACHEL A. EKERY: That's correct.

JUSTICE DEBRA H. LEHRMANN: Isn't this presumed to be community property? How does the community property presumption fit into this?

ATTORNEY RACHEL A. EKERY: Commun -- there -- the presumption applies to any property possessed during the marriage, and this wasn't possessed so that presumption is gone.

JUSTICE DEBRA H. LEHRMANN: So who had the burden? That's what I'm kind of --

ATTORNEY RACHEL A. EKERY: Well, I think he moved for summary judgment. He had the burden to show that he was entitled to it. And for Ms. Loya to -- which he did and for Ms. Loya to defeat summary judgment, she had to raise a fact issue.

JUSTICE EVA M. GUZMAN: When was the bonus earned?



ATTORNEY RACHEL A. EKERY: Okay. So going back to the definition of earnings, a payment to or due an individual. When was the bonus due to Mr. Loya?

JUSTICE EVA M. GUZMAN: When was it earned? When did he -- when did his performance merit a -- a -- a bonus? During what time period?

ATTORNEY RACHEL A. EKERY: That's a decision that the Vitol board makes in March of every year, and the bonus may not be based on his services at all. It could be that the company had a great year and has extra cash that it's gonna distribute to its employees. It could be based on a lawsuit that they settled. It might be based on Mr. Loya's --

JUSTICE EVA M. GUZMAN: Fiscal year 2010, I mean, what -- there has to be a period in time there was a -- a different case referenced in the briefing involving the same company --

ATTORNEY RACHEL A. EKERY: Yes.

JUSTICE EVA M. GUZMAN: -- and -- and a large sum of money bonus-based on performance that wasn't paid --

ATTORNEY RACHEL A. EKERY: Right.

JUSTICE EVA M. GUZMAN: -- because the -- the employee didn't perform so again what time period are we talking about here?

ATTORNEY RACHEL A. EKERY: Well, the Lewis v. Vitol decision is exactly on point and that involves a discretionary bonus with language that's very similar to Mr. Loya's bonus language. And the trader worked for Vitol the entire calendar year of 2002. Then in early spring of 2003, and he made -- he had made huge profits for the company that year, more than triple what he had made any other year, but in early spring of the following year he had a disastrous trading day and lost many millions of dollars for the company and that continued over several weeks.

So the Vitol board met and said, not only are we not going to award you a bonus, we're firing you. And Mr. Lewis sued and said, even if you're firing me, I earned that bonus in 2002. I worked the entire calendar year. I made huge profits for the company. I'm entitled to it. And the court of appeals said, no, you're not because the bonus is purely discretionary, the company has no obligation to award it to you. So it is not earned until it's declared by the company.

JUSTICE DON R. WILLETT: Does anything in the record define what goes into the, "various performance parameters"? So there -- is the record totally devoid of any sort of indication what that means?

ATTORNEY RACHEL A. EKERY: Yes. And that's what's a little puzzling about the court of appeals' decision is they looked to Mrs. Loya's affidavit that said the MSA did not divide the community portion of Miguel's bonus for services between January and June. And the court of appeals said that is some evidence that the bonus was based on services between January and June 2010, and I just don't see how that's the case, and there's -- there's nothing else in the record. It's being sent -- you know, the disposition of the court of appeals is to remand it for a trial when I -- where I presume a jury would try to ascertain what the Vitol board was thinking when it declared the bonus.

JUSTICE EVA M. GUZMAN: I guess Section 7.003 of the Family Code though does provide for post-divorce division of bonuses, and it -- I suppose that would come up when a decree or an MSA didn't specifically address a bonus or divide a bonus. Clearly, the -- the quote contemplates situations where bonuses are divisible postdivorce. So what are the principles that govern such an inquiry from your perspective?

ATTORNEY RACHEL A. EKERY: Well, I think that you still can't apply -- you can't under inception of title principles, a purely discretionary bonus that's awarded after the divorce is not property acquired during the marriage so there's logistical issues. First of all, we're trying to do a post-divorce division. Like I said, you're gonna have a jury trying to do a forensic examination after the fact of what was this court thinking when it awarded the bonus, and that's



pure guesswork and speculation, but not only that, it's contrary to inception of title principles which is the governing law in Texas.

JUSTICE EVA M. GUZMAN: Just taking a very pragmatic view though, you couldn't anticipate that parties would attempt to gain the system by not having these bonuses paid until after the divorce a year or two afterwards. So how does your rule address the potential for gamesmanship?

ATTORNEY RACHEL A. EKERY: I think if there were an issue regarding fraud, you know, that's something that the divorce court can always look at. There's no evidence of that here. Mr. Loya was completely open about his bonuses. He testified about them in a deposition in the divorce case more than a year before they signed the MSA. The Loyas have been married for 28 years. Mr. Loya got a bonus for the prior 18 years. Ms. Loya knew all about the possibility of a bonus. She was amply represented by counsel. They hammered out every detail of this property division.

JUSTICE DEBRA H. LEHRMANN: But isn't the fact that she requested very quickly after that MSA a clarification that what was intended by future earnings was the amount that was earned after June, the date of the MSA of 2010 rather than before?

ATTORNEY RACHEL A. EKERY: I think that reflects the fact that she realized the MSA, as written, covered the bonus and she was trying to add language that would carve out the bonus.

JUSTICE DEBRA H. LEHRMANN: But she could have just being clarifying what was meant, right, by future earnings?

ATTORNEY RACHEL A. EKERY: I think it was a material change that she sought and that the arbitrator rejected. She also moved to set aside the MSA claiming the bonus hadn't been divided and the trial court rejected that argument as well.

Justice Guzman, going back to your question of when is it earned, I think we have to go back to inception of title principles and Ms. Loya has suggested that's an outdated approach, but that's still the rule in Texas and that's still what's mandated by the Family Code which says, when you're trying to divide property between the separate estate and the community estate, you look to inception of title so inception of title is when you first have some sort of enforceable right to the property even if there are contingencies.

So, you know, the case the court decided in 1976, *Cearley*. This was a military pension. And the husband said, well, I might die or be dishonorably discharged so I might never get this pension so it shouldn't be awarded in the decree. And this Court said, no, those are contingencies, but they're not enough to reduce the bonus to a mere -- a pension to a mere expectancy. And we're gonna -- to the extent it accrued during the marriage, this was a benefit that accrued every month of service, you know, on a lockstep basis.

And so the court said this can be allocated on a time allocation basis and then we can just include [inaudible] clause in case it never materializes, but you can't do that with a discretionary bonus that's not earned over each month of service in a lockstep fashion. Some bonuses are earned that way, but this bonus was not.

JUSTICE DEBRA H. LEHRMANN: What -- what if a worker was working through March 14th of the year and then got divorced on March 15th, but did not receive his or her paycheck until March 20th. What would you say about that?

ATTORNEY RACHEL A. EKERY: For a salary or for a bonus?

JUSTICE DEBRA H. LEHRMANN: For salary.

ATTORNEY RACHEL A. EKERY: Salary, I think, is different. The salary you are earning everyday you work. And so if you're paid a month --



JUSTICE DEBRA H. LEHRMANN: The discretionary nature of it, that's what you're saying is different?

ATTORNEY RACHEL A. EKERY: Yes. Yes.

And I think that goes back to the Family Code definition of earnings which is a payment to or due an individual. You would be due that payment for salary for the period you worked, and that's different from a discretionary bonus.

I'd like to direct the Court's attention, if I may, to Exhibit 2 which sets out both partitions and the arbitrator's ruling with a time line underneath.

We think this case can be resolved very simply along the lines that Chief Justice Frost's dissent pointed out, and that is that this bonus falls within all future income and earnings. And if you look at the future earnings partition, all future earnings from each party are partitioned to the person providing the services giving rise to the earnings.

And then the community income partition. This mediated settlement agreement shall serve as a partition of community income setting aside to each spouse all income earned by each such spouse or attributable to property awarded to the each such spouse or confirmed as each spouse has separate property herein.

So we've depicted those on a time line below along with reflecting the arbitrator's ruling of when each partition took effect. And you can see that everything from January 1, 2010 forward is covered. We know that future income and earnings cover everything from June 13, 2010 forward, and we know that the retrospective partition of income for 2010 covers everything from January 1, 2010 forward. So no matter whether you classify this bonus as past income or future income, it's covered by these partitions.

JUSTICE JEFFREY S. BOYD: Is there a relevant difference between the meaning of income and earnings?

ATTORNEY RACHEL A. EKERY: I don't think so. Ms. Loya's brief sort of suggests that there is, but she never explains how. And if you look at the two definitions, the definitions of earnings and income are focused on receipt of the money so if you're just construing the party's contract, the plain language of these definitions, earnings means a payment to or due an individual.

From Black's Law Dictionary, earnings means revenue gained from labor or services. Revenue is money coming in. Income means the money or other form of payment that one receives. So under the plain language of the contract, the definitions, you look at when the money was received.

JUSTICE JEFFREY S. BOYD: So if this agreement had just said all future income and did not include the words "and earnings" the -- it would have no impact on the outcome of this legal issue?

ATTORNEY RACHEL A. EKERY: I think that's right because you have future income and past income covered, and it's got to be one of those two things.

And, you know, Ms. Loya points out that to avoid the retrospect of partition of income, she says, well, this wasn't income received in 2010. It was paid in 2011. Well, if it's not 2010 income then it has to be future income. So again, I think it's captured by one or the other of the partitions and we think the case can be resolved very simply on that basis.

I see my time is expired.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Ms. Ekery.

We'll hear from the respondent.



MARSHAL: May it please the Court.

Mr. Richard Orsinger will present argument for the respondent.

ORAL ARGUMENT OF RICHARD R. ORSINGER ON BEHALF OF THE RESPONDENT

ATTORNEY RICHARD R. ORSINGER: May it please the Court.

Let me address Justice Lehrmann's first question on future earnings. In our estimation, the term "future earnings" using -- using common sense terms means earnings in the future which you earned for work that you do in the future. In this particular situation, the interpretation is offered that future earnings means money received later for work done in the past.

JUSTICE DEBRA H. LEHRMANN: Let me ask you, Mr. Orsinger. How do you get around her argument that Family Code Section 101.011 which defines earnings as a payment to or due an individual, how do you get around that, that that points to the discretionary nature of this, the word "due?" How to do you get around that?

ATTORNEY RICHARD R. ORSINGER: That definition comes out of the parent-child portion of the Family Code where you're determining how to -- how to calculate the income for child support purposes and you would not want to include in someone's child support obligation a potential future bonus that you don't know whether they're going to receive it. Once it's received, though, it's clearly income.

So I think the purpose of the statute later in the Family Code is not the same as it is here in the property division or the property division side this Court, as well as the legislature has repeatedly indicated that deferred compensation can be part of the community estate even though you have no right to it and even though it hasn't been earned yet.

So I would say, Judge -- Justice Lehrmann, that the definition that is used in the Family Code for child support purposes necessarily focuses on something you actually are going to receive for sure. The property division is contingent on deferred compensation. It's entirely different and we think it's governed by different rules.

JUSTICE DEBRA H. LEHRMANN: Who had the burden here to prove when this bonus was earned?

ATTORNEY RICHARD R. ORSINGER: Well, because this was an appeal from a summary judgment, you -- all of the doubts you have about the facts must be interpreted in favor of the nonmovant who is Leticia Loya. We believe that in order to get a summary judgment that Miguel Loya had to prove as a matter of law that this bonus was entirely his separate property. There -- if there is nothing in the record that proves that this bonus is entirely his separate property then it should be reversed.

So, we believe, yes, there is a community presumption. Yes, there is a special burden on the movant and a motion for summary judgment to prove everything that's part of your case is a matter of law. He did not prove as a matter of law that this bonus was entirely his separate property so we believe that failure should result in a reversal of the summary judgment.

JUSTICE EVA M. GUZMAN: The dissent would conclude that even if it was community property, it was partitioned to Miguel -- Mr. Loya because it did not exist --

ATTORNEY RICHARD R. ORSINGER: Yes.

JUSTICE EVA M. GUZMAN: -- at the time of the MSA.



ATTORNEY RICHARD R. ORSINGER: Yes.

JUSTICE EVA M. GUZMAN: How did the bonus exist at the time of the MSA if it -- there was only the potential for a bonus?

ATTORNEY RICHARD R. ORSINGER: I'll answer the question and then I'd like to give a little follow-up to that.

The bonus existed in the sense that it was part of his employment agreement with the company that he would be compensated through a bonus -- annual bonus, and the bonus was discretionary and it was decided after the year closed based on what happened during the year, but it existed in the sense that it was part of a plan of employment. It was a deferred compensation. It's like a pension. It's -- it was built into his employment relationship so --

JUSTICE EVA M. GUZMAN: Well, except a pension, you acquire a vested interest at -- as you comply or fulfill certain, you know, time requirements or other. And here, it's possible you would never have an interest because they could just decide not to pay, correct?

ATTORNEY RICHARD R. ORSINGER: Largely, I agree with what the Court said, however, in the beginning, back in *Cearley v. Cearley*, the retirement benefit was a military retirement pension that did not vest until the end of 20 years. So what the court -- this Court addressed in the *Cearley* case was what happens when you have a claim for deferred compensation where the right is not vested and it's subject to being lost and it may never come into existence so vesting was rejected by this Court in *Cearley v. Cearley* in 1976. The fact that this bonus --

JUSTICE JEFFREY S. BOYD: And the reason for that is because if in fact it does vest which we don't know at this point in time whether it will or not, but 20 years later, once the 20 years passes, we know that it vest -- if it does in fact vest, we know that at least part of what vest was earned back here.

ATTORNEY RICHARD R. ORSINGER: Exactly, in my view.

JUSTICE JEFFREY S. BOYD: The question in this case is when the bonus is paid which -- which at the time of the MSA, we didn't -- you couldn't know if it was going to be paid or not and if so, whether it would, but it seems to me that the difference here is once it is paid, we still don't know when it was earned because there's no kind of criteria for whether and when it's earned at all.

So it doesn't necessarily, in other words, under the plan that you refer to represent work done between January 1 and June 13 of 2010. Maybe the board was sitting around and thought, boy, he had a really good October, November, December. Let's give him a big bonus. It had nothing to do with January through June. We don't know. And that seems to me to be the difference between this case and the *Cearley* or the -- the Air Force benefits case.

ATTORNEY RICHARD R. ORSINGER: Okay, Justice Boyd, let me point out that before the *Taggart*, *Cearley* cases were decided one year apart, we didn't have a method for allocating retirement benefits either. And this -- this Court ruled that a time allocation was the fairest way to allocate something where there was no clear differentiation as to when it was earned, the legislature later on came and adopted the time allocation rule for pen -- for stock options and restricted stock.

Before that statute, the case law was driven by the inception of title rule that Ms. Ekery talked about. If the option was granted during marriage, it was community no matter how much work was done after the divorce. If it was granted after the divorce, it was separate no matter what. The legislature said the best way to allocate an option or restricted stock is a time allocation rule. So we now have a time allocation rule from this Court on pensions. We have a time allocation rule from the legislature on stock options and restricted stock, but we don't have a Supreme Court case or a legislative enactment to tell us how to time allocate an annual bonus.

As a matter of practice, in federal law practice today in the mediations, the parties negotiated on a time allocated basis,

and I have established that in this record by including in my brief a CLE presentation of the advanced family law course of the article and the speech in which they admonished all of the lawyers in the audience, and the judges that when you're resolving these cases, typically the lawyers will time allocate. It's a fair rule. It's a just rule. It appears to be a rule that exists around the country.

Yesterday, I submitted to this Court an article written about the jurisdictions around the United States. Admittedly, they're not mostly community property but in most instances, they find marital property interest in a bonus paid after divorce for work done during marriage and it appears to me that the common rule is time allocation. So --

JUSTICE EVA M. GUZMAN: But you still get back to the future earnings even if it were community property, could you have been more specific in this MSA and AID, it seems that you just said -- you get all future earnings.

ATTORNEY RICHARD R. ORSINGER: So, Justice Guzman, the -- the property division is in the schedules attached to the mediated settlement agreement and that's what the MSA says. These partitions are almost incidental to the property division. And when you have a partition that says that your future earnings are your separate property, that's logical, isn't it? After you get divorced, everything that you earn is gonna be separate property. This bonus was not divided explicitly so it's only reached in this case if -- if the mediated settlement agreement partitioned it in that future earnings language.

And to go back to Justice Lehrmann's original question, you know, what is the difference between future earnings and past earnings? To me, if you do work before a certain date and the check comes later, that relates to when the work was done. If you do work after a certain date and the check comes in, that relates to work after the divorce.

JUSTICE JEFFREY S. BOYD: But we -- but -- but that just gets back to whether this particular bonus was paid because of work that was done between January and June of 15 -- of 2010 and we just don't -- I mean, I'm thinking about law firms. They've got a very -- the large firms have a very carefully drafted bonus deal. You have to at least meet your minimums and then if you beat your minimums by a hundred hours, do you get this bonus and then that bonus and it all is sort of laid out with some discretion on the end, but it's very clearly based on what you do the prior year.

Here, is there any evidence that reflects that the bonus paid on March the 15th reflects -- is based on the work done the prior year?

ATTORNEY RICHARD R. ORSINGER: No explicit evidence which I would say in a summary judgment works against the movant, but common sense supports the idea that when you get paid a bonus, it's based on the work you did in the past not based on the work you did in the future.

JUSTICE PAUL W. GREEN: Not -- not necessarily. You could have a bonus paid for having nothing to do with performance. They look into this employees and we pay -- maybe he hasn't performed but we -- but we wanna protect this intellectual property so we're gonna give him a \$4.5 million bonus to sign this noncompete agreement.

ATTORNEY RICHARD R. ORSINGER: I agree that any specific arrangement could differ from the norm. Let me just give you an example. In the arbitration hearing in this case, Mr. Loya's lawyer himself said, it's all very clear, what they're trying to do -- let me tell you what they're trying to do. They are trying to -- Mr. Loya gets paid a bonus in the spring of each year relative to the prior year. That's out of page 375 of our appellate record.

It's commonly understood that the bonus that's paid at the beginning of a year is relative to the work that was done in the prior year. And the reason it's discretionary is if the employee performance was not good, or if the company didn't make a profit, the bonuses are gonna be scaled back or they're gonna be eliminated. Common sense tells us that bonuses are always paid in March after you get your financials from the end of the prior year.

JUSTICE DEBRA H. LEHRMANN: Where did you get that, that bonus was paid relative to the prior year? Is that in the record?



ATTORNEY RICHARD R. ORSINGER: Yes, it's on page 375 of the Clerk's Record. It was -- it was Mr. Loya's lawyer arguing in arbitration and he said, Mr. Loya gets paid a bonus in the spring of each year relative to the prior year. That's -- that's common sense. That's what -- the only people I know who get bonuses before they perform are athletes. They get a signing bonus for committing to play for a team, and that's a marital property issue that remains to be resolved in Texas is what do you do with the signing bonus.

JUSTICE JEFFREY S. BOYD: And lawyers.

ATTORNEY RICHARD R. ORSINGER: Yes. So at any rate, this is a summary judgment appeal, if there's a deficiency in the proof, it works to the benefit of the nonmovant. You should not penalize Leticia because she didn't prove that the bonus is unrelated -- is related to prior services.

JUSTICE DEBRA H. LEHRMANN: But that's my question is that, even if the bonus was not explicit, if this page 375 did not deal with it and I don't know if does or not, but if it didn't, you still have the summary judgment aspect of it that it has to go against the movant.

ATTORNEY RICHARD R. ORSINGER: That's right. And so really what the majority of the court of appeals did was they decided that the character of this bonus is not a question of law for the court, it's a question of fact for the fact-finder and they reversed the summary judgment and send it back to the trial court. That's exactly what --

CHIEF JUSTICE NATHAN L. HECHT: How -- how -- the --

ATTORNEY RICHARD R. ORSINGER: Yes.

CHIEF JUSTICE NATHAN L. HECHT: troubling aspect of that is how can that be when she knew well about the bonus? How could she not have thought the MSA covered the bonus one way or the other?

ATTORNEY RICHARD R. ORSINGER: Okay. So if she knew about the bonus, he knew about the bonus, neither one of them listed the bonus on the schedules of assets that were divided so both parties failed to be sure that the bonus was specifically awarded in the property division.

CHIEF JUSTICE NATHAN L. HECHT: Unless they thought it was cover -- oh, but yes, specifically but they may have thought it was covered by the future earnings or the past earnings.

ATTORNEY RICHARD R. ORSINGER: That may well be, although, I think as Justice Lehrmann pointed out, my client snapped on to this issue when they were drafting the mediate -- the agreement incident to divorce as to whether the language should explicitly include or exclude the bonus which suggest to me when she came forward with that issue right away was a matter that the parties have not directly contemplated.

But if there is any lack of clarity in whether the bonus was allocated by the partition, in my view the summary judgment needs to be reversed because of the ambiguity in the meaning. Unless this Court determines that as a matter of law, the intent of the parties was to partition the bonus in the future earnings clause, unless you decided that as a matter of law then this needs to be reversed and sent back down.

JUSTICE PHIL JOHNSON: The -- the agreement says it's intended to serve as a partition of community income so what is the bonus in your -- the bonus is -- is -- your position has to be, it's not future earnings? It's part -- earned part in the first six months and part in the second six months.

ATTORNEY RICHARD R. ORSINGER: Correct, your Honor. Our --

JUSTICE PHIL JOHNSON: And so is it community income since it's not future earnings, that's covered by the -- the agreement. Future earnings is covered by the agreement. So is it community income then? Is that how we're gonna



classify it?

ATTORNEY RICHARD R. ORSINGER: Yes, Justice Johnson. We believe --

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY RICHARD R. ORSINGER: -- it's community income because of compensation for work done during marriage.

JUSTICE PHIL JOHNSON: Well then, doesn't the agreement say it shall serve as a partition of community income setting aside to each spouse all income earned by each spouse so it seems as though it's not future earnings, that's your position, it's earnings attributable to the whole year, but it's income earned by each spouse -- is -- is set aside to each spouse so it seems that they tried to allocate both earnings and income for the end -- for the entire year so it's earnings for the first six months.

ATTORNEY RICHARD R. ORSINGER: [inaudible] my reading of the -- my reading of the mediated settlement agreement is that the earnings that they're talking about is earnings that arise from assets that were awarded to the party. And --

JUSTICE PHIL JOHNSON: It says earnings by all income earned by each spouse and/or attributable to property awarded to each spouse.

ATTORNEY RICHARD R. ORSINGER: Right.

JUSTICE PHIL JOHNSON: So --

ATTORNEY RICHARD R. ORSINGER: So --

JUSTICE PHIL JOHNSON: [inaudible]

ATTORNEY RICHARD R. ORSINGER: -- to me the question is, earnings are treated separately from income on property, and the income on property is partitioned to the party that received the property in the property division.

JUSTICE PHIL JOHNSON: Right, right.

ATTORNEY RICHARD R. ORSINGER: The income of earnings is unrelated to that. We have to grapple with the issue of what is the difference between future earnings and past earnings. To me, the --

JUSTICE PHIL JOHNSON: Earned income of property?

ATTORNEY RICHARD R. ORSINGER: No. In my opinion, earnings means labor, services rendered.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY RICHARD R. ORSINGER: And that's why when you see the earnings clause, it talks about the person whose -- whose services gave rise to the earnings. So to me the income clause doesn't help us here because we are treating earnings differently from the income arising from -- from property.

JUSTICE JEFFREY S. BOYD: So you think there's a relevant legal difference between all future income and all future earnings as that phrase is used in this agreement?

ATTORNEY RICHARD R. ORSINGER: It is our position, your Honor, that future earnings is unique to the compensation for services as distinguished from all other forms of income and that's why it was separated out and



discussed separately.

And the -- the idea of -- bless you -- the idea that the future earnings, to me, this case really is a question of whether there's -- can be a community interest in money received after the divorce for work done before the divorce. If this Court is of the view that if you do work during marriage and get paid for it after the divorce then it's community property, then this case should be reversed. If you --

JUSTICE JEFFREY S. BOYD: Well, reversed and remanded for --

ATTORNEY RICHARD R. ORSINGER: A trial.

JUSTICE JEFFREY S. BOYD: -- determination of the fact issue.

ATTORNEY RICHARD R. ORSINGER: Correct.

JUSTICE JEFFREY S. BOYD: I mean, you would agree that if the jury conclude -- not that this is their theory but -- but say their theory was that these bonuses are paid as a means to keep the employee on board for 2011. In other words, in March, we'll pay you \$5 million if -- because we think you're gonna stay with us for the rest of this year --

ATTORNEY RICHARD R. ORSINGER: Yeah.

JUSTICE JEFFREY S. BOYD: -- you would agree if the jury thought that was factually the basis for this bonus then you would lose?

ATTORNEY RICHARD R. ORSINGER: Absolutely.

JUSTICE JEFFREY S. BOYD: Okay.

ATTORNEY RICHARD R. ORSINGER: I think -- I think that someone could come forward with the proof that this bonus in particular was for a certain reason like maybe someone was planning to resign and went to resign, and they said we'll give you an extra \$5 million if you'll stay on for the next year. To me, that is a fact question and is not inherently something that any court including the Supreme Court can say as a matter of law, although --

JUSTICE DEBRA H. LEHRMANN: Excuse me, Mr. Orsinger.

ATTORNEY RICHARD R. ORSINGER: Yes, your Honor?

JUSTICE DEBRA H. LEHRMANN: I'm sorry to interrupt, but --

ATTORNEY RICHARD R. ORSINGER: Go ahead.

JUSTICE DEBRA H. LEHRMANN: -- we're short on time so how would you respond to the Petitioner's argument that it's -- that -- that your saying, you know, this has to do with whether or not income or -- or bonuses earned during marriage can -- they're received after marriage, if that means that it's not community property and not subject to division. But the argument against that is that because of the discretionary aspect of this that's what makes this different. How do you respond to that?

ATTORNEY RICHARD R. ORSINGER: I feel like that was resolved in the Cearley case and even before the Busby case. I'm gonna quote from the Cearley case talking about an earlier case Busby that had to do with the military disability.

The husband argued that he never possessed a property right in his disability retirement benefits during the marriage. They were a mere expectancy because he had not retired prior to the divorce and the rights were subject to forfeiture by

death or dishonorable discharge prior to his retirement. These arguments were overruled. In other words, his argument that he didn't have a property right meant it wasn't community, that was rejected in *Busby v. Busby*.

And then in the *Cearley* case, the Supreme Court -- this Court comes along and said, the portions that he earned during the months of coverture became contingent earnings of the community -- contingent earnings of the community. We believe that this bonus represents contingent earnings of the community. If the money is paid, part of it is community. If the money is never paid, it's nothing. It --

JUSTICE DEBRA H. LEHRMANN: And the discretionary aspect does not affect that?

ATTORNEY RICHARD R. ORSINGER: We don't believe so. And -- and why should it? If it's compensation for work that you did during marriage, whether somebody exercised discretion or whether it was according to an automatic formula, what difference does it make? It's compensation for work done by a spouse.

JUSTICE DEBRA H. LEHRMANN: Unless -- unless it -- it -- unless the -- unless the property right, the effective date is the date that the decision is made that the bonus will be paid.

ATTORNEY RICHARD R. ORSINGER: That's of the vested -- vested property rights concept that existed in Texas up until the time of the *Cearley* case, and they said this is not a property right issue. This is a compensation question.

My time is up, your Honor.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Mr. Orsinger.

ATTORNEY RICHARD R. ORSINGER: Thank you very much.

CHIEF JUSTICE NATHAN L. HECHT: Ms. Ekery, you have five minutes.

REBUTTAL ARGUMENT OF RACHEL A. EKERY ON BEHALF OF THE PETITIONER

JUSTICE EVA M. GUZMAN: Ms. Ekery, do we ever have to reach the question about bonuses, you know, whether they are part of the community estate if in fact it's cov -- the -- the fact that it's covered by the income tax clause or the future earnings clause?

ATTORNEY RACHEL A. EKERY: No, you don't, you know, it's an interesting question -- it's -- there's no case from this Court directly answering it, but the *Loyas* short circuited all of this by entering into an MSA that had two partitions that were global with respect to earnings and income.

JUSTICE EVA M. GUZMAN: But equally compelling if we don't find it's covered, they're burdened on -- on the fact issue is not -- not very high in this context, I would imagine.

ATTORNEY RACHEL A. EKERY: Well, they still have to come forth with some evidence that it was based on Mr. Loya's services during the marriage and they just haven't. Mr. --

JUSTICE JEFFREY S. BOYD: But wait, don't you have to come forward with evidence that it wasn't 'cause you want a summary judgment?



ATTORNEY RACHEL A. EKERY: Well, we came forward with evidence from Mr. Loya saying he had no right or entitlement to that bonus until it was declared by the Vitol board. And under Texas law and under inception of title principles, that's when you acquire the enforceable property right.

The Cearley case did not eliminate inception of title in Texas. The time allocation rule is just a very granular application of inception of title because you're accruing your rights, you know, lockstep basis over time, that's how the title is incepting as well.

With a discretionary bonus, that doesn't happen. When did Mr. Loya have a right to this bonus during the marriage? In January? In February? In March? No. Never during the marriage. Not until the board met the following spring and said we're going to award you a bonus.

JUSTICE JEFFREY S. BOYD: Well, but Cearley never had a right to the pension -- the military retirement benefits until they vested which was not during the marriage?

ATTORNEY RACHEL A. EKERY: But they had -- he had an enforceable but contingent right, and this Court said the contingencies aren't enough to reduce it to an expectancy and this is -- the bonus is just an expectancy. And the cases from the courts of appeals, there's no case from this Court, but involving discretionary payments from employers, post-Cearley make this distinction.

There's one -- the Whorrall case from the Austin Court of Appeals. Husband got a discretionary special payment from IBM. It could have been called a bonus but it was called a special payment. Husband had worked for IBM for 21 years and had only been married for the last five years, and he said this should be divided on a time allocation basis and only 5/21 of the bonus should be community property, and the court of appeals said no.

It's -- it quoted Cearley and it quoted Busby and it said, to qualify as a retirement benefit capable of being apportioned between his separate and community estate, the payment must be, "an earned property right which accrues by reason of years of service" -- which is in Busby -- or must be, "a form of deferred compensation which is earned during each month of service," quote in Cearley. The fact that such payment is purely discretionary with the company negates the notion that it's earned or accrued over the employee's tenure so because it was paid during the marriage it was all community property.

I'd like to just touch on a couple of other issues, if I may.

Justice Johnson, you raised the community income partition. If you look at the plain language of that partition, there is no basis for limiting it to income from property. It says setting aside to each spouse, all income earned by each such spouse, I mean, it can't get much broader than that, and so it clearly covers income from your job.

JUSTICE PHIL JOHNSON: So you're not limited to earnings?

ATTORNEY RACHEL A. EKERY: No, sir.

JUSTICE PHIL JOHNSON: It's income --

ATTORNEY RACHEL A. EKERY: Right.

JUSTICE PHIL JOHNSON: -- if it's income earned by spouse is covered by the agreement?

ATTORNEY RACHEL A. EKERY: That's right.

JUSTICE PHIL JOHNSON: Well, all of these lawyers sitting around putting this agreement together, they -- your position is they thought they covered it?



ATTORNEY RACHEL A. EKERY: Yes. And, you know, Ms. Loya's argument is, well, we didn't list it on the inventory. Her lawyers prepared the spreadsheet of assets, and it would have been a very simple matter for her if she believed it to be community property to carve out the bonus and to use the time allocation rule if that's what she wanted to do and say I'm entitled to half of this bonus, but the parties agreed instead to global partitions of income and earnings.

So, no, Mr. Loya didn't list it. He had no right in it at that time he also didn't list his bonus for 2012, for 2013, for 2014 because he knew all of this was being resolved with the global partitions of income and earnings.

JUSTICE JEFFREY S. BOYD: To be clear, even if this agreements specified -- I'm sorry -- even if the company's plan specified that all bonuses paid in March were based on the work performed the prior year, like law firm bonuses typically are specified, even then in your view, you would still prevail because as a matter of law, the payment and amount of the bonus itself is wholly discretionary up until the time the board decides to pay it?

ATTORNEY RACHEL A. EKERY: So -- I'm sorry, can you give me the --

JUSTICE JEFFREY S. BOYD: So in other words, the decision is based -- so whether -- whether you get a bonus and the amount of the bonus, the plan clearly spells out is based on you and your company's performance the prior year.

ATTORNEY RACHEL A. EKERY: Okay.

JUSTICE JEFFREY S. BOYD: Nevertheless, whether -- and the amount of any bonus is totally discretionary by the board up until March.

ATTORNEY RACHEL A. EKERY: So it can be zero.

JUSTICE JEFFREY S. BOYD: So even though -- even though if you get it, it's based on the work done the prior year because you may -- may or may not get it totally at their discretion, you would prevail.

ATTORNEY RACHEL A. EKERY: That's correct.

JUSTICE JEFFREY S. BOYD: Okay.

ATTORNEY RACHEL A. EKERY: That's correct.

CHIEF JUSTICE NATHAN L. HECHT: Any other questions?

Thank you, Ms. Ekery.

ATTORNEY RACHEL A. EKERY: Thank you.

CHIEF JUSTICE NATHAN L. HECHT: The case is submitted, and the Court will take a brief recess.

MARSHAL: All rise.