Affirmed in Part, Reversed and Rendered in Part and Majority Memorandum Opinion filed November 17, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00363-CV

BP LUBRICANT USA INC. F/K/A CASTROL NORTH AMERICA INC., Appellant

V.

JENKINS MANAGEMENT LLC D/B/A DR. GLEEM CAR WASH, Appellee

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2006-47682

MAJORITY MEMORANDUM OPINION

This case involves alleged breaches of a supply agreement between appellant BP Lubricant USA Inc. f/k/a Castrol North America Inc. (hereinafter "BP Lubricant") and appellee Jenkins Management LLC d/b/a Dr. Gleem Car Wash (hereinafter "Dr. Gleem"). The jury found that BP Lubricant breached the agreement and committed fraud, and awarded Dr. Gleem damages and attorney's fees. The trial court rendered judgment on the verdict and ordered conditional appellate attorney's fees.

On appeal, BP Lubricant (1) challenges the legal and factual sufficiency of the evidence to support the jury's findings that BP Lubricant breached the supply agreement and committed fraud; (2) contends the trial court erred in awarding damages for breach of contract and fraud because the award constituted a double recovery; (3) claims Dr. Gleem failed to segregate its attorney's fees; and (4) argues that the trial court erred in failing to render judgment for BP Lubricant on its breach-of-contract claim.

We agree that the evidence is legally insufficient to support the jury's findings that BP Lubricant breached the supply agreement and committed fraud. We reverse the judgment against BP Lubricant for damages and attorney's fees and render judgment that Dr. Gleem takes nothing. We disagree that the trial court erred in failing to render judgment for BP Lubricant on its breach-of-contract claim. We affirm the trial court's take-nothing judgment as to BP Lubricant.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 2003, Steve Belden from Jones Oil, Inc., a distributor of BP Lubricant products, brought Kevin Jenkins, owner of Dr. Gleem, a supply agreement from BP Lubricant that would offer Dr. Gleem higher rebates than what he was receiving. According to Jenkins's testimony at trial, Belden represented that to receive the higher rebates, Dr. Gleem would be required to make minimum purchases and pay for some equipment upgrades.

Joe Fernandez, a materials district manager with BP Lubricant, testified that Belden asked Fernandez to prepare the supply agreement for Dr. Gleem. Fernandez did so and gave it to Belden to return with Jenkins's signature. Fernandez stated that Belden had no authority to negotiate the terms of the agreement on BP Lubricant's behalf.

Jenkins attempted to negotiate changes to the proposed agreement. First, Belden returned the document to Fernandez with sections crossed out by Jenkins. One of the sections Jenkins attempted to eliminate was the liquidated-damages section. BP Lubricant's legal counsel did not approve of Jenkins's edits, and Fernandez gave Belden

a new copy of the supply agreement for Jenkins's signature with the liquidated-damages provision intact. Next, Jenkins crossed out the warranty provision. That amendment was eventually approved by BP Lubricant's legal counsel.

The agreement between BP Lubricant[1] and Dr. Gleem otherwise required Dr. Gleem to purchase certain products from BP Lubricant in a minimum volume of 15,897 gallons every six months for five years. The agreement further provided that BP Lubricant would be the exclusive supplier of bulk lubricants to Dr. Gleem during the term of the agreement. In return, Dr. Gleem received marketing support payments at the end of each semi-annual interval during the term of the agreement.

The agreement states that BP Lubricant may use various distributors to distribute its products. When the parties entered into the agreement, BP Lubricant was using Jones Oil as its distributor. However, on January 9, 2006, BP Lubricant decided to replace Jones Oil, and BP Lubricant informed Dr. Gleem of the change.

On April 10, 2006, Arnold Oil Company became BP Lubricant's distributor. Arnold Oil required that Dr. Gleem complete a credit application and agreement, which included (1) a warranty provision, (2) a security-interest provision, (3) an agreement that all balances must be paid on or prior to the tenth of the month or a service charge would be assessed, and (4) a personal-guarantee provision. Jenkins, acting on behalf of himself and Dr. Gleem, refused to sign the credit application and agreement.

Subsequently, Dr. Gleem attempted to place an order on credit; Arnold Oil refused to deliver the products on credit without a signed credit application and agreement. On that date, Dr. Gleem purchased Kendall Motor products from Jones Oil. In May 2006, BP Lubricant advised Dr. Gleem it was in breach of the supply agreement.

[1] The parties to the supply agreement are Castrol North America Inc. and Dr. Gleem. The parties do not dispute that BP Lubricant was formerly known as Castrol North America Inc. For clarity, we will refer to this party as BP Lubricant.

BP Lubricant filed an original petition in the 127th Judicial District Court of Harris County, alleging a suit on a sworn account, breach of contract, and attorney's fees. Dr. Gleem filed an original answer and counterclaim for breach of contract, fraud, and attorney's fees.

At trial, Jenkins claimed that, despite the express provision in the contract to the contrary, Belden told him that the consequence of not purchasing the minimum volume of products specified in the agreement would be that Dr. Gleem would not receive the rebates. Dr. Gleem also took the position at trial that BP Lubricant changed the terms of the agreement when it began using a new distributor and the new distributor unreasonably required a credit application and agreement when one had never previously been demanded.

The jury found BP Lubricant failed to comply with a material obligation in the supply agreement, and its failure to comply was not excused. The jury awarded Dr. Gleem $36,000 for marketing-support payments Dr. Gleem would have received under the supply agreement and attorney's fees in the amount of $21,500.

The jury also found that Belden was acting as the agent of BP Lubricant and committed fraud against Dr. Gleem. The jury awarded damages in the amount of $24,374.28 on the fraud claim. The trial court rendered judgment on November 10, 2008, ordering that (1) BP Lubricant take nothing by its causes of action against Dr. Gleem; (2) Dr. Gleem have and recover judgment against BP Lubricant in the amount of $50,374.28 with pre- and post-judgment interest; and (3) Dr. Gleem receive attorney's fees in the amount of $21,500 with post-judgment interest.

The trial court ultimately signed an amended final judgment on February 6, 2009, amending the amount of damages to $60,374.28 and ordering conditional appellate attorney's fees. BP Lubricant timely perfected its appeal to this court.

II. ANALYSIS

A. JUDGMENT ON DR. GLEEM'S BREACH-OF-CONTRACT COUNTERCLAIM

In its first issue,[2] BP Lubricant argues that the trial court erred in rendering judgment for Dr. Gleem on Dr. Gleem's breach-of-contract counterclaim because the evidence is legally and factually insufficient to support the jury's finding that BP Lubricant breached the agreement.

In a legal-sufficiency challenge, we review the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). We credit favorable evidence if a reasonable fact finder could, and disregard contrary evidence unless a reasonable fact finder could not. *Id.* at 827. The evidence is legally sufficient if it would enable fair-minded people to reach the verdict under review. *Id*. The trier of fact is the sole judge of the witnesses' credibility and the weight to be given to their testimony. *Id*. at 819. This court cannot substitute its judgment for that of the trier of fact, so long as the evidence falls within the zone of reasonable disagreement. *Id*. at 822. But if the evidence allows only one inference, neither jurors nor the reviewing court may disregard it. *Id*.

When construing a written contract, we ascertain the true intentions of the parties as expressed in the instrument. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). We must examine and consider the entire writing in an effort to harmonize and give effect to all provisions so that none are rendered meaningless. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003); *Coker*, 650 S.W.2d at 393. If the written instrument is so worded that it can be given a definite or certain legal meaning, then the contract may be construed as a matter of law. *Coker*, 650 S.W.2d at 393.

[2] BP Lubricant lists seven issues in its "Issues Presented." However, in the "Argument" section of the brief, the issues are organized differently. For clarity, we will refer to the issues as they are addressed in the "Argument" section of the brief.

In its first amended answer and counterclaim, Dr. Gleem asserted that BP Lubricant breached the supply agreement by changing the terms of the agreement when it began using a new distributor. Dr. Gleem claims the new distributor, Arnold Oil, refused to sell products to Dr. Gleem unless Dr. Gleem complied with the terms of a credit application. Specifically, Arnold Oil requested that Dr. Gleem complete a credit application and agreement, which included (1) a warranty provision, (2) a security interest provision, (3) an agreement that all balances must be paid on or prior to the tenth of the month or a service charge would be assessed, and (4) a personal guarantee provision.

To prevail on a breach-of-contract claim, a party must prove: (1) the existence of a valid contract; (2) the party tendered performance or was excused from doing so; (3) breach of the contract by the other party; and (4) damages sustained as a result of the breach. *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

Section 3 of the supply agreement states:

> 3. Assignment. Purchaser acknowledges that in its course of business, [BP Lubricant] may use various "Distributors" to distribute [BP Lubricant products] within specified geographic areas. Purchaser shall not transfer or assign this Agreement (as a result of selling the right to operate the business that is subject to this Agreement, by operation of law or otherwise) without the prior written consent of [BP Lubricant], which consent shall not be unreasonably withheld. Subject to the foregoing, this Agreement shall bind and inure to the benefit of the parties and their respective successors and permitted assigns.

Section 2 states, in relevant part, that "[BP Lubricant]'s sales to Purchaser will be made on the terms determined by [BP Lubricant] in its reasonable discretion." Dr. Gleem argues that the combination of these terms was unreasonable in light of the parties' relationship.

However, the agreement explicitly states that BP Lubricant could use various distributors to distribute its products and that the purchases would be made on reasonable terms to be determined by BP Lubricant. The agreement does not state that the distributors could not require a credit application or that a previous distributor's terms would be honored by the new distributor.[3] Dr. Gleem simply provided no evidence that the terms imposed by BP Lubricant were unreasonable by any recognized industry or otherwise relevant standards.

Therefore, the evidence is legally insufficient to support the jury's finding on Dr. Gleem's breach-of-contract counterclaim. Accordingly, we sustain this portion of BP Lubricant's first issue. As a result of our disposition, we need not address the portion of BP Lubricant's first issue that challenges the factual sufficiency to support the jury's finding on Dr. Gleem's breach of contract counterclaim. *See* Tex. R. App. P. 47.1.

B. JUDGMENT ON DR. GLEEM'S FRAUD COUNTERCLAIM

In its second issue, BP Lubricant contends the trial court erred in rendering judgment for Dr. Gleem on Dr. Gleem's fraud counterclaim because the evidence is legally and factually insufficient that BP Lubricant committed fraud.

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[3] In its reply brief, Dr. Gleem contends another example of BP Lubricant's breach of the agreement is the fact that the contract does not require cash-only sales unless Dr. Gleem's credit is determined to be impaired. The agreement states:

> In the event that [BP Lubricant] determines, in its sole discretion, that Purchaser's financial position becomes impaired or unsatisfactory to [BP Lubricant] at any time during the term of this Agreement, then [BP Lubricant] shall have the right to require Purchaser to make cash payments or furnish satisfactory security before any further deliveries are made hereunder.

This provision gives BP Lubricant the option to suspend purchase on credit in the event Dr. Gleem's financial position became impaired or unsatisfactory. The agreement also states, without limitation, that BP Lubricant's sales to Dr. Gleem will be made on the terms determined by BP Lubricant in its reasonable discretion. Arnold Oil, BP Lubricant's new distributor, offered two options: (1) payment on account after completion of a credit application or (2) cash payments. No evidence was presented that these terms were unreasonable.

In its first amended answer and counterclaim, Dr. Gleem asserted that BP Lubricant fraudulently induced Dr. Gleem to enter into the agreement in that BP Lubricant represented it to be a rebate agreement without any obligation for Dr. Gleem to purchase products. In the alternative, Dr. Gleem claimed BP Lubricant failed to disclose material facts to Dr. Gleem which proximately caused damages.

To prevail on a fraud claim, a party must prove: (1) that a material representation was made and the representation was false; (2) the other party knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) the other party intended to induce the party to act upon the representation; and (4) the party actually and justifiably relied upon the representation and suffered injury.[4] *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

In the supply agreement, Dr. Gleem agreed to buy from BP Lubricant its "monthly requirements [ ] for automotive motor oil, lubricants, greases, fluids and cleaners . . . provided [ ] that such purchases . . . shall be no less than the minimum aggregate semi-annual volume of 15,897 gallons for each 6 month interval" during the term of the agreement. The agreement also provided that BP Lubricant "shall be the exclusive supplier of bulk lubricants" to Dr. Gleem during the term of the agreement. In the event the agreement was terminated other than by mutual consent or expiration, Dr. Gleem was required to "pay to [BP Lubricant] within thirty (30) days of the date of notice of such termination liquidated damages equal to $.50 times the aggregate number of gallons required to be purchased by [Dr. Gleem] . . . less the number of gallons of [BP Lubricant] [p]roducts actually purchased by [Dr. Gleem] . . . ." The agreement states that such

[4] Jury questions 10, 11, and 12 dealt with whether BP Lubricant committed fraud. The jury was asked if, prior to the execution of the October 23, 2003 supply agreement, Belden committed fraud against Dr. Gleem. The question was submitted only with the definition for misrepresentation; the question did not include a definition for failure to disclose. The jury answered affirmatively. The jury was also asked if Belden was acting as the agent of BP Lubricant when he committed the alleged fraud; the jury answered affirmatively. The jury then awarded $24,374.28 in damages for the alleged fraud.

damages "are solely in connection with a breach" of the agreement by Dr. Gleem "arising out of [Dr. Gleem's] early termination" of the agreement.

Jenkins testified that Belden brought him the agreement so Dr. Gleem could receive higher rebates in exchange for paying for some equipment upgrades. Jenkins acknowledged that to get the rebate, he agreed to buy a minimum number of gallons of BP Lubricant product every six months. Jenkins stated that Belden explained to him that if Dr. Gleem did not meet the minimum purchasing requirement, Dr. Gleem would not get the rebate. He stated that no one from BP Lubricant contacted him to discuss the terms and conditions of the agreement and that he was unsure what the damages provision meant but signed the agreement anyway.

However, Jenkins also testified that he personally negotiated the agreement, and he understood the agreement before he signed it. In fact, Jenkins particularly attempted to renegotiate specific portions of the agreement. He returned the agreement to Belden with sections explicitly crossed out, including the liquidated-damages provision. Belden took the agreement to Fernandez who, in turn, sent it to BP Lubricant's legal department. BP Lubricant's legal department refused Jenkins's proposed amendments with the exception of the warranty provision.

Therefore, Jenkins is charged with knowledge at the time he signed the agreement (1) that it contained a liquidated-damages provision and (2) his request to cross it out was not accepted by BP Lubricant. *See Mayes v. Stewart*, 11 S.W.3d 440, 451 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (quoting *Bynum v. Signal Ins. Co.*, 522 S.W.2d 696, 700 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.) that "[i]f the person to whom a false representation is made is aware of the truth, it is obvious that he is neither deceived nor defrauded, and, therefore, any loss he may sustain is not traceable to the representation but is self-inflicted").

Even if Belden was acting as an authorized agent for BP Lubricant during the negotiation of the supply agreement[5] and Belden's statement could be construed as communicating to Jenkins that the only consequence of not meeting the minimum purchase requirement was no rebate, Jenkins could not justifiably rely, as a matter of law, on an alleged oral statement that unequivocally contradicts the express and unambiguous terms of a written contract that he negotiated.[6] *See TMI, Inc. v. Brooks*, 225 S.W.3d 783, 795 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *DRC Parts & Accessories, L.L.C. v. VM Motori, S.P.A.*, 112 S.W.3d 854, 858-59 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (en banc). Here, the unambiguous terms of the agreement were that Dr. Gleem agreed to buy from BP Lubricant a minimum amount of product for each six-month interval of the five-year contract and BP Lubricant would be the exclusive supplier of bulk lubricants to Dr. Gleem during the term of the agreement. In the event of a breach of the agreement, BP Lubricant retained rights under the liquidated-damages provision.

Therefore, the evidence is legally insufficient to support the jury's finding on Dr. Gleem's fraud counterclaim. Accordingly, we sustain this portion of BP Lubricant's second issue.

As a result of our disposition of this issue, we need not address (1) the portion of BP Lubricant's second issue that challenges the factual sufficiency to support the jury's finding on Dr. Gleem's fraud counterclaim; (2) the portion of BP Lubricant's second

[5] The jury was instructed that "the distributor for BP Lubricant was the agent of BP Lubricant USA Inc., formerly known as Castrol North American Inc. with regard to the sale and delivery of bulk lubricants" and the distributor at the time the written agreement was negotiated was Jones Oil. During closing argument, BP Lubricant attempted to distinguish this instruction by contending that while Jones Oil was the agent with regard to the sale and delivery of its bulk lubricants, Jones Oil was not BP Lubricant's agent for purposes of negotiating the supply agreement.

[6] Neither party contends this is a case in which one makes a specific misrepresentation and then relies on a general provision in the contract to avoid a fraud claim. *See, e.g.,Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) (discussing waiver-of-reliance provision in relation to fraudulent-inducement claim); *Prudential Ins. Co. of America v. Jefferson*, 896 S.W.2d 156, 162 (Tex. 1995) (discussing "as is" provision in written contract in relation to fraud claim).

issue that challenges the legal and factual sufficiency of the evidence to support the jury's finding that Belden had actual or apparent authority to act on behalf of BP Lubricant; and (3) BP Lubricant's third issue that the trial court erred in awarding Dr. Gleem damages for fraud and breach of contract because the award constituted double recovery. *See* Tex. R. App. P. 47.1.

We hold that the evidence is legally insufficient on Dr. Gleem's breach-of-contract and fraud counterclaims. We reverse the judgment against BP Lubricant and in favor of Dr. Gleem for damages and attorney's fees. *See Parker Drilling Co. v. Romfor Supply Co.*, 316 S.W.3d 68, 77-78 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) (party not entitled to breach-of-contract damages or attorney's fees when legally insufficient evidence); *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 930 (Tex. 1996) (rendering take-nothing judgment on fraud claim when no showing of detrimental reliance). We render judgment that Dr. Gleem takes nothing from BP Lubricant.[7]

C. JUDGMENT FOR BP LUBRICANT

In its fifth issue, BP Lubricant contends the trial court erred in failing to render judgment in its favor on its breach-of-contract claim because the evidence conclusively established that Dr. Gleem breached the agreement first, thereby excusing BP Lubricant's performance as a matter of law. BP Lubricant claims that, upon Dr. Gleem's breach, BP Lubricant was entitled to its liquidated damages under the agreement's liquidated-damages provision. Specifically, BP Lubricant contends the evidence conclusively established that Dr. Gleem breached the agreement first when Dr. Gleem stopped purchasing under the agreement prior to the end of the five-year term. BP Lubricant also argues that Dr. Gleem repudiated the agreement by refusing to perform and then purchasing a competitive brand from Jones Oil.

[7] In its fourth issue, BP Lubricant contends that the trial court erred in awarding Dr. Gleem attorney's fees because Dr. Gleem failed to segregate its attorney's fees. Because of our disposition, we need not address this issue. *See* Tex. R. App. P. 47.1

We review the trial court's denial of a motion for judgment notwithstanding the verdict (jnov) under a legal-sufficiency standard. *See Wilson*, 168 S.W.3d at 823. In a legal-sufficiency challenge by a party with the burden of proof at trial, we examine the entire record to determine if the appellant established his claim as a matter of law. *See id.* at 825-26; *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). Only if the claim is established as a matter of law will we sustain BP Lubricant's issue. *See Sterner*, 767 S.W.2d at 690.

To prevail on its breach-of-contract claim, BP Lubricant had to prove: (1) the existence of a valid contract; (2) BP Lubricant tendered performance or was excused from doing so; (3) breach of the contract by Dr. Gleem; and (4) damages sustained as a result of the breach. *See Triple B Servs., LLP*, 264 S.W.3d at 446.

Section 8 of the agreement states:

> 8. Damages. In the event that this Agreement is terminated other than by mutual consent or expiration under Section 4 above, Purchaser shall pay to [BP Lubricant] within thirty (30) days of the date of notice of such termination liquidated damages equal to $.50 times the aggregate number of gallons required to be purchased by Purchaser (the minimum aggregate semi-annual volume multiplied by 10) less the number of gallons of [BP Lubricant] Products actually purchased by Purchaser pursuant to this Agreement from the Effective Date until the date of termination. Such damages are solely in connection with a breach by Purchaser of this Agreement arising out of Purchaser's early termination of this Agreement and are in addition to any other claim, right or remedy [BP Lubricant] may have. The parties agree that such liquidated damages represent a reasonable estimate of the losses that would be sustained by [BP Lubricant] as a result of early termination of this Agreement and that such liquidated damages are intended to compensate such losses and are not a penalty.

Therefore, under section 8, liquidated damages are recoverable only if the supply agreement is "terminated" other than by mutual consent or expiration. Section 7 of the agreement sets forth four ways in which the agreement may be terminated. Under section 7, as it applies in this case, the agreement could be terminated:

> (c) by the non-defaulting party, in the event that the other party breached any material obligation under the agreement or under any other loan agreement between the parties and such breach continued for 30 days after receipt by the defaulting party of written notice of the breach from the non-defaulting party[.]

BP Lubricant contends Dr. Gleem ended the agreement early and, therefore, owes liquidated damages under the liquidated-damages provision. However, there was no testimony that BP Lubricant affirmatively terminated the agreement as termination is defined in section 7 of the agreement.[8]

Fernandez testified that he did not know whether BP Lubricant had ever terminated the agreement. While a senior attorney for BP Lubricant sent Jenkins notices of Dr. Gleem's alleged breach, the letters did not state that BP Lubricant was terminating the agreement. Because BP Lubricant did not terminate the agreement consistent with the relevant contractual provisions, the liquidated-damages provision was never triggered. *See Huntley v. Enon Ltd P'ship*, 197 S.W.3d 844, 852-53 (Tex. App.—Fort Worth 2006, no pet.) (section in contract allowing party to recover earnest money as liquidated damages never triggered, therefore party could not enforce it).

Damages are an essential element of a breach-of-contract action. *See MBM Fin. Corp. v. Woodlands Operating Co., L.P.*, 292 S.W.3d 660, 666 (Tex. 2009); *Triple B Servs., LLP*, 264 S.W.3d at 446. Even if BP Lubricant proved the other elements of its breach-of-contract claim, BP Lubricant did not prove it was entitled to liquidated damages under the agreement. In addition, BP Lubricant did not seek damages other than through its liquidated-damages provision.[9] Therefore, we overrule BP Lubricant's fifth issue. Accordingly, we affirm the take-nothing judgment as to BP Lubricant's breach-of-contract claim.

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[8] While section 8 of the agreement uses the word "terminate" to describe Dr. Gleem's early ending of the agreement, the "Termination" section of the agreement does not provide for the agreement to be terminated by the defaulting party.

[9] Jury question 6 read: "Find the amount of liquidated damages as calculated under section 8 of the October 23, 2003 Supply Agreement."

III. CONCLUSION

We sustain BP Lubricant's issues regarding Dr. Gleem's breach-of-contract and fraud counterclaims. We reverse the judgment against BP Lubricant for damages and attorney's fees and render judgment that Dr. Gleem takes nothing. We overrule BP Lubricant's issue regarding its own breach-of-contract claim. We affirm the trial court's take-nothing judgment as to BP Lubricant.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Sullivan, and Christopher. (Christopher, J. concurs in result only, without opinion.)