

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.
FURR'S SUPERMARKETS, INC., Petitioner,
v.
Marthana BETHUNE, Respondent.
No. 00-0846.

April 18, 2001.

Appearances:

Mark C. Walker, Brown McCarroll, L.L.P., El Paso, Texas, for
Petitioner.

Dennis L. Richard, Richard Cobb & Hall, El Paso, TX, for
Respondent.

Before:

Chief Justice Thomas R. Phillips, Justice Priscilla Richman Owen,
Justice Harriet O'Neill, Justice Wallace B. Jefferson, Justice Nathan
L. Hecht (Not Present, but will Participate), Justice Deborah G.
Hankinson, Justice James A. Baker, Justice Craig T. Enoch.

CONTENTS

ORAL ARGUMENT OF MARK C. WALKER ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF DENNIS L. RICHARD ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF STEVE HUGHES ON BEHALF OF THE PETITIONER

JUDGE: The Court is now ready to hear argument from petitioner
Furr's v. Bethune.

SPEAKER: May it please the Court. Mr. Mark Walker will present
argument for the petitioner. The petitioner has reserved five minutes
for rebuttal.

ORAL ARGUMENT OF MARK C. WALKER ON BEHALF OF THE PETITIONER

MR. WALKER: May it please the Court. The question before the Court
in this case is whether a party's emotional state or sympathy for that
party's emotional state caused to good cause to prevent a successful
party from recovering its Court cost against that litigant pursuant to
Rule 131.

JUDGE: Mr. Walker, in Rogers v. Walmart we said that and I quote,
"In Rule 141 cases, an Appellate Court should scrutinize the record to
determine whether it's the Court's -- the trial judge's decision." We
don't have a record of that. How can we then scrutinize the trial
court's decision?

MR. WALKER: Your Honor, the Court -- I don't think that in Rogers
v. Walmart, the Court suggested that the record from the entire case is
gonna be before the Court. But we have before the Court yet the record

of the proceedings on the motion before judgment. The issue before this case is a legal issue. It's not really a factual issue. We're not here to say that Ms. Bethune did not suffer from Post Traumatic Stress Disorder thus she did not suffer from Histrionic Personality. The other problem is that --

JUDGE: But without a record, we would be required to say that in every case no matter the circumstances, emotional state can never ever be good cause under the rule.

MR. WALKER: I'm sorry. I didn't --

JUDGE: What -- what -- you're asking is to hold this is a matter of law. Emotional state can never be considered in any circumstances as qualifying under the rule as good cause.

MR. WALKER: That is correct, your Honor.

JUDGE: Even if caused by the defendant during the course of the trial.

MR. WALKER: Well, your Honor, there's a classic case concerning the -- the ways that you can deal with conduct in the trial. What we're suggesting is that -- that there will be reasonably objective ways to look at the inquisition of cause or to fail to award cause. And those who deal with situations such as in Rogers v. Walmart's case where there's a question of whether the conduct of the party during the course of the case unnecessarily increased cost and what we're suggesting is that's an err where you can reasonably objectively look at the issue, at that point make a determination if it is fair in this case as a good cause to prevent that successful party to recover all its support cost because of unnecessary increase of cost.

JUDGE: So even if during the course of the trial, the defendant causes -- harasses the plaintiff. Even if during the course of the trial and the judges watching what's going on here, and besides the defense counsels were asking the plaintiff, the judge could not punish the counsel even if they win their case by splitting the cost with the plaintiff.

MR. WALKER: Judge, we're suggesting that the party's emotional state in general is a not a reason that caused its good cause to be in Rule 131 as managed --

JUDGE: Well, I'm -- maybe I'm not articulating very well. Well, yes I am. Your argument is that even if the defendant harasses the plaintiff during the course of the trial but does not increase the cost of the trial, the judge would not have the discretion to punish the defendant by splitting the cost.

MR. WALKER: We're suggesting, your Honor, that the party's emotional state, I guess, very hard to determine what that party's emotional state. The harassment that you're talking about, I think, that will otherwise -- in terms of the cognitive reports of the trial, that's not our situation here. The issue here is whether that party's emotional state in general constitutes good cause to depart from the Rule 131.

JUDGE: With the way Judge Enoch has phrased the question, he is focusing on the defendant's conduct. And you're saying that costs, if they are not going to be paid by the prevailing part, may be tied to a party's conduct during trial.

MR. WALKER: We -- we say that the cost may be tied to the -- the -- the trial in terms of unnecessarily extended proceedings, making it longer, increasing the cost to the party. And as a result, the cost of that trial court's determination in terms of -- we -- we think that the defendant's conduct, for example, is dilatory, the extent of the proceedings is too long, and that circumstance well -- it may not

paired for that party referral for the cost.

JUDGE: But -- but the rule is not so limited on its face. It only talks about good cause.

MR. WALKER: That is right, your Honor. But the Rule 141 is, I think, it clearly limited exception to the Rule 131. The rule does not speak in terms of the trial court. You know, its discretion may assess or calls other hand. It says, there's gonna be some good cause.

JUDGE: But good cause is always a matter of the trial court's discretion, isn't it?

MR. WALKER: It's -- within certain parameters.

JUDGE: So it isn't -- we're reviewing this decision for abuse of discretion?

MR. WALKER: That's correct, your Honor.

JUDGE: Alright. So the fact that it says good cause is not sufficient in itself to limit the reasons but the Court must in fact exercise its discretion to find good cause in order to support a deviation from the normal rule.

MR. WALKER: That is correct, your Honor. And the cost must be a good cause.

JUDGE: So we're not dealing with it as a matter of law question here. We're dealing with the question of discretion.

MR. WALKER: Well, the -- what constitutes good cause, I think, is a matter of law. There is an issue is can the party's emotional state -- the fact that personal fragile emotional state, what are the party's sensibilities are? Those that constitute good cause and this Court does provide parameters for determining what good cause is. And so, yes, in terms of -- of evaluating the trial court's decision that the trial court cites a reason that this Court does not feel as good cause, then we're talking about an issue that is --

JUDGE: I can accept -- it seems to me I can accept that if Furr's is sued because they caused emotional distress to the plaintiff, and you get to the end of the trial and the jury says Furr's didn't cause emotional distress to the plaintiff. I mean, there's a certain symmetry to the argument. Well, if the jury says it didn't cause emotional stress, how dare the trial judge decide there's emotional distress in and split cost? There's a certain symmetry to that. The question is that the trial judge is permitted to look at the conduct of the trial, which you can see he can or she can. And based on their discretion, decide to reassess the cost based on what happens during the trial of the case.

The argument here is that events happen during the course of the trial. During the course of this hearing, apparently there are some people standing outside the court room because there's concern that she might commit suicide. There's always reference to stop the happening during the trial for which we don't have the record. Is this clear? Is it clear in this record that the only -- is it clear in this record that there is nothing that the defendant did during the course of the trial that caused emotional stress, and if that's in -- and if that is not your argument, then I'll come back to my question which is during the course of the trial. Couldn't the trial judge have concluded that the way the defendant conducted the trial caused harassment of the plaintiff without any additional cost and still be good cause for splitting cost?

MR. WALKER: Judge, if that were his plan, then Rule 141 would require him to state it on the record, which he did not do. In this case, we have to look at the record we have before since that of the transcript of the hearing.

JUDGE: Well, he didn't state anything on the record for good cause.

MR. WALKER: He didn't say very much, that's right. And under Rule 141, if he doesn't state ah -- a good cause reason on the record then that's gonna be his discretion or should we form judgment.

JUDGE: Counsel, how long was the trial?

MR. WALKER: The trial was the better part of the week. Almost like four days.

JUDGE: Why didn't you bring the complete record of the trial to the court of appeals?

MR. WALKER: Your Honor, we felt it was not necessary because at the hearing of the judgment which the Court has a report, the only two reasons that Bethune propered to avoid the imposition Court process were, one, just in general the fragile emotional state of the plaintiff, not, and never made to contention at Furr's and anything to cause her condition. But we did anything a dilatory conduct or has asked her anything during the course of the trial. That was not a contention at all of her case.

The second reason that they gave or trying to avoid the payment for the imposition or taxing for cost, was her past condition. She was on disability at that point. She just didn't have any money. So the only two reasons proper for one as a general proposition, she's in a fragile emotional state. Not that we did anything during the conduct of the trial to harass her and avoid her. And two, her impecunious financial condition. And we assert as a matter of law those two reasons are constitutional cause.

JUDGE: But you're asking us to assume all of those things to be the case. But we don't have a record to review. And if we don't have a record and we are to presume that what occurred during the proceedings supports what the trial court did. I mean, what you're talking about are lot of things in terms of what happened in the trial court. But there was no record in the court of appeals. There was no record here for us to make that determination.

MR. WALKER: Your Honor we can see in terms of the presumption we talked about under the Rule of TRAP 34.6, the presumption we're talking about there is -- okay, assuming -- we have to assume that there is evidence, as a posit from a psychiatrist that her fragile emotional state be conceded. That was her fragile emotional state. But we contend that this is not a factual problem, this is a legal issue.

JUDGE: Well, again --

MR. WALKER: Assuming this could be true, the party's emotional state does not constitute good cause --

JUDGE: Well, again, I wanna point you to the language in Walmart that says unless the record demonstrates an abuse of discretion, which seems to me that it's your burden to bring forth a record that will demonstrate an abuse of discretion. And without a record, the only choice we have is to make a matter of law of determination.

MR. WALKER: Well your Honor, in the -- I think the justice where you obtained in the Rogers v. Walmart case gave -- the language came out but he also said that they reviewed before them the record and the hearing on the motion and judgment, and they looked at that record which causing to find that yes there was evidence to support the trial court's determination. What we say is that we don't want to increase this cost by having -- their complaint is the provision of cost.

JUDGE: Well, I understand the case 22 but you don't want to increase the cost in your record.

MR. WALKER: That's what I'm trying -- I'm trying to explain.

JUDGE: But at the same time our rulings gonna have the a very broad sweeping effect and our presenting has cost you more to appeal than the cost issue anyway. So to a certain extent there's a principle involved here. And we're gonna be making a broad based rule and my understanding of our jurisprudence is we have to have a complete record in order to do that. Otherwise, you're asking us to rule as a matter of law in no circumstances ever even in the circumstance that Judge Enoch proposes, can there ever be a good cost finding that is based upon an emotional state.

MR. WALKER: Well your Honor, I think that if we have look at Rule 141, we can put this in context, it'll help us in determining what record is necessary because in Rule 141, you gotta have good cause finding on the record. If the trial court doesn't make -- again the good cause finding in the record, then you don't have much record as necessary.

JUDGE: Did you request the trial court to stake good cause on record?

MR. WALKER: We -- the trial court said -- we -- he did -- we did not because it didn't feel it was pertinent at the time of hearing. I asked them to [inaudible] state, we further -- he made a statement that they went on to say that he was going to but each party bear their own court cost. But under Rule 141, if we take a look at -- what is the issue in dispute? And the issue in dispute is an issue that as a matter of law we can say this would not constitute good cause when you look at what the record has propered, ah -- the hearing, the -- the -- the ideas offered to avoid court cost. Do we really need to go look at the entire record of the case? In this case --

JUDGE: But the parties referenced the trial at the hearing. The parties recalled to the judge things that happened in the trial. So clearly the judge was basing the decision on proceedings during the trial. And so it's hard for me to try to limit our record to the one hearing our cause since the trial court obviously was taking into account the entire proceedings.

MR. WALKER: The trial court was taking into account what the -- what the record with the capital [inaudible] in terms of hearing and talks about the party's emotional state in general. In other words, what the psychiatrist testified to, and we don't dispute that. So we do not bring that forward because we don't consider that that's an issue of dispute. We agreed what psychiatrist said. We don't feel that the record is necessary because assuming that to be true, her emotional state in general is not the cause. And the trial court did not make any finding. There was no reason offered to say that it was a conduct to the parties or conduct to the defendant, in this case Furr's, that caused emotional harm or always a reason pertaining to the Rogers v. Walmart case to depart from the general rule. If in fact the trial court had indicated, well, we think that you necessarily increased cost. Then in that case, I think we would be required by the Court the entire record because we dispute that, there's a factual dispute but -- but that's not the case. We have a fairly limited circumstance.

JUDGE: Mr. Walker, you -- and I'm still troubled and I'm not sure -- maybe you've answered my question but you're -- to get to where you want to go without the record here. Do we have to say that irrespective of the conduct of the defendant during the course of the trial, if there is not an actual increase in cost of the litigation, the judge does not have the discretion to split cost.

MR. WALKER: Your Honor, we're not continuing that. That's not the case here. We're looking at that the discussion at the hearing and the

reasons offered and those were only -- there was nothing there about the conduct of the parties and the trial court did not make that funny. But we have to look at first is what is the trial court's rule and then work back from there. Here, reading what he said, very liberally he focused on emotional state of the party.

JUDGE: In the absence of the trial court saying the basis for the splitting of the cost, then you say that the basis for splitting the cost is limited to what the plaintiff at that hearing?

MR. WALKER: I think that's got to be the -- the -- the point, your Honor. Because otherwise when you left to get that and speculate as the reasons from the trial court, and that's why we have Rule 141, which it says that it's gotta be good cause. Number one, it's gotta be completely recognized a good cause, not any cause, not whatever the trial court thinks. And that reason's gotta be stated on the record. If the Court finds the trial court did not state good cause on the record, that's an abuse of discretion on the trial court. Then we simply reverse and reform the judgment. So we're -- what we have to do though, your Honor, is take a look at not everything that possibly could have occurred at the trial but what is the reason? What is the good cause on the record?

JUDGE: Can inability to pay for the cost ever be good cause under Rule 141?

MR. WALKER: I don't think so, your Honor.

JUDGE: What about all the cases that were in light of the services against a party who has won on the trial court because the losing party is unable to pay the cost. That is being in good cause. So why would you be saying principle applied if a party is unable to pay can show the trial court?

MR. WALKER: That's really counted as administration of justice issue, your Honor, which is kind of a lacking circumstance. In terms of the party's pecuniary ability, I think that our law doesn't treat people differently because of their station in life or their ability to pay.

JUDGE: Well, you -- you do agree though that there is a lot of case law in Texas where a losing party has been unable to pay ad litem fees that the victorious party has been assessed of the cost and that's been upheld on appeal?

MR. WALKER: That's right. There are cases going both ways in that issue.

JUDGE: All right. So with respect to the question of inability to -- to pay the cost, that is an accepted factor under Texas law in some circumstances under Rule 41 as the basis for good cause.

MR. WALKER: Under very limited circumstances which are really administration justice issue to try to make sure that for example at light on gets paid. But that's not the same case here. We are talking about the general proposition of court cost, a party incurs.

JUDGE: I'm just -- I'm just been trying to make it clear. You're talking about a lot of per se rules here this morning. And so we start talking about per se rules that -- where we don't have to have a record and we're going to have absolute and it seems to me that we've eliminated the court's ability -- the trial court's ability to exercise the discretion under the Rule 41 which Rule 41 seems to guarantee the trial court.

MR. WALKER: There is --

JUDGE: I want to know how far your asking is to go. If your asking is to spill over to the inability to pay cost area as well.

MR. WALKER: But we're talking about non administration of justice

cost issues there [inaudible] --

JUDGE: But my question is: Are you asking also for a per se rule and the inability to pay costs as also being not good cause as a matter of law?

MR. WALKER: Ah -- yes, we are. In terms of the circumstances here, just as a general proposition.

JUDGE: So how much discretion -- the trial court has really a little discretion and you're pinning in the trial court very significantly, are you?

MR. WALKER: We think that the trial court pursuant to Rules 131 and 141 have very limited discretion because Rule 131 speaks in terms of mandatory language of the successive party [inaudible].

JUDGE: Thanks you. Thank you.

JUDGE: Any other questions? Thank you Counsel. The Court is ready to hear argument from respondent.

SPEAKER: May it please the Court. Mr. Dennis Richard will present argument for the respondent.

ORAL ARGUMENT OF DENNIS L. RICHARD ON BEHALF OF THE RESPONDENT

MR. RICHARD: This case is not about hurt feelings. It's not even about disappointment over losing. What the Court was confronted with on September 3, 1999 was more than the thing a mentally ill lady. Mr. Walker has conceded the fact that she had a problem and also conceded the fact that her mugging at the Furr's Grocery Store aggravated that problem. But he stopped short of advising what Judge Ferguson faced on that day. At that was a 62-year-old woman who was in the court room, who her psychiatrist had testified was predisposed to suicidal ideation, who in the court room that day, burst out that she was threatening suicide and as she was doing that, just outside the court room, are two El Paso Police Officers who had been summoned by a third party to take her into protected custody which they as soon as the hearing concluded.

JUDGE: Why was your client in the court room?

MR. RICHARD: Why was she there?

JUDGE: Why was she there? She was in that mental state.

MR. RICHARD: Well, she came because there was a hearing that had been scheduled.

JUDGE: Why didn't someone stopped her or suggest that she's not or rescheduled the hearing if she was in that agitated mood?

MR. RICHARD: No. I didn't know about it that it does. All I can say is that we showed up for the hearing. She was there and then the police officers that were -- had come to just outside the -- the chamber doors.

JUDGE: Does the judge announce the ruling from the bench in her presence?

MR. RICHARD: He did.

JUDGE: Would your argument be different had the judge said, "Well, I'll take this under advisement and issue a ruling within 30 days?"

MR. RICHARD: No. I don't think it would make a difference for me as what argument I'm advancing --

JUDGE: No, what you're advancing right now is because of her severe emotional state at the time the hearing was made. Apparently, if the judge had ruled against her, she was going to commit suicide on the

spot. My question is, if the judge took it under advisement, she went home, she calmed down over a period of several weeks, and the judge did what judges typically do and that is just issue an order several weeks later. She may not have even known about until you told her about it later.

MR. RICHARD: Well, I would submit to you that what -- the problem that we have in this case is that Rule 34.6(c) was not complied with by Furr's. As the result, we don't have the record which would include other reasons why the judge could've decided the way he did.

JUDGE: But can we look at those other reasons? Rule 141 says, "The Judge has to state good cause on the record." And doesn't that limit us to whatever -- isn't our total universe of what we look at the words the judge -- the judge used.

MR. RICHARD: Here's what Judge Ferguson used. He said, "I am not going to be the one to precipitate any further emotional problems for her. That could include emotional problems that had been precipitated during the course of that trial." So the Court could be considering, as part of its basis of good cause, the conduct of Furr's and their Counsel during that one week trial.

JUDGE: Do you know -- are there any cases that reimposed costs because of conduct -- apart from conduct that increases expense to a losing party?

MR. RICHARD: I can't cite you to a case, your Honor. All I wanna do is to --

JUDGE: Did you make any kind of allegation ever that Furr's conduct during the trial created your client's mood or emotional state?

MR. RICHARD: I believe Furr's conduct during the trial has a lot to do with her emotional state.

JUDGE: Did you argue that to the judge or put that in your brief and say that's the reason that you shouldn't work cost or assess cost against person?

MR. RICHARD: I don't know that I argued it at the hearing. I basically pointed out and the Court thinks that -- that we're ah -- testified to during the trial the fact that she was 100% disabled because of the stresses --

JUDGE: No, that hadn't to do with Furr's.

MR. RICHARD: Well, they had. I think the fact that she was mugged outside Furr's and --

JUDGE: But during -- it had nothing to do with the Furr's conduct or the Furr's Counsels conduct during the trial?

MR. RICHARD: Well, during the trial, your Honor, the judge had an opportunity to observe Marthana Bethune in the court room. He observed Mr. Walker trying the case, the questioning of Marthana Bethune. All things that were not brought forth in the record.

JUDGE: But -- but can we look at those in considering the trial does a discretion if they're not part of the reasons stated on the record?

MR. RICHARD: Well, I believe this Court has stated that a Rule 141 case says the Appellate Court should scrutinize the record to determine whether it supports the trial judges' decision to tax the successful hearing with the Court or all of the Court cops.

JUDGE: Okay, and that's ambiguous, isn't it? Are we limited to the reason the trial judge gave or can we look at the entire record to see if the decision the trial judge made could be supported for any reason?

MR. RICHARD: I believe that whenever a -- a limited record is brought forth, as it was in this case and the defendant, Furr's in this case, failed to comply with the -- the Appellate Court's rule.

JUDGE: But that samples an argument. What you're saying is that the trial judge gives a reason and there's a whole record and we can only look at that reason. If the trial judge gives us a reason and there's not a whole record, we can look at any reason whether the trial did state it or not.

MR. RICHARD: First of all, the reason I believe that Judge Ferguson gave included things that happened during the trial. And because they did not bring forth a complete record, this Court can't look at those things.

JUDGE: Counsel, you've benefited from the Court's ruling, is that correct? The Court split cost signal your client did not prevail, right?

MR. RICHARD: My client would have benefited, yes.

JUDGE: Exactly. Now, why did you not then, in accordance with Rule 141, submit to the Court for the Court's signature and order that state a good cause for -- for his ruling? Why wasn't -- why wasn't that your burden to do that?

MR. RICHARD: I believe that the hearing -- one of the things that Judge Ferguson asked me to do was -- first of all, the hearing started without a court order. And then a court order was summoned and then things were restated that had been talked about while the court order was not there. And I tried to summarize at that time the things that did take place.

JUDGE: Did -- but did you have an obligation to submit to the Court or to request from the Court an order that stated good cause for his ruling?

MR. RICHARD: I believe that the things that I recited ah -- in that hearing that are part of the record do establish --

JUDGE: What -- do you recited things of good cause? Isn't it the Court that has to make a finding of good cause on the record?

MR. RICHARD: Well, the Court made a finding that I indicated a moment ago about the fact that he would not be the one to precipitate any further emotional problems for Marthana Bethune. And he split the cost the way he did. But the things that I was reciting where things that were -- he observed the police officers that were just standing outside the court room. He heard the outburst that Marthana Bethune threatening suicide. He had heard the testimony that Marthana Bethune was predisposed to suicide ah -- all of this is a part of both the trial and what happened in that hearing.

JUDGE: What surprises me that your opposing Counsel is asking us to draw some bright line rules. It seems that the Court stated cause and it's our question to determine whether that's a good cause. And what do we have to look at to determine, to make that assessment of good cause? You say and I believe we've said before case by case basis need to look at the record. But as I understand your -- your opposing Counsel, they're saying that if we were to um -- that we should enact a rule that says "Emotional state can never, as a matter of law be good cause," else someone will come in and say, "I'll kill myself if you will word cause against me." And what do you have to say in response to that argument?

MR. RICHARD: Well, I would respond to this. The difference with Marthana Bethune was that we had a psychiatrist who testified that she was predisposed to suicide. We had an outburst of suicide in the court room. We had police officers waiting to take her into protective custody. A lot different than an individual who loses a case and then says, "Well, I'm disrupt because I lost the case." Ah -- there had been testimony about her fragile emotional state. These are all factors I

believe that Judge Ferguson had a right to take into consideration.

JUDGE: But where do you draw the line? If -- if we rule in your favor in this case, what if in the next case, all that happens is you have a psychiatrist who testifies that the person is going to commit suicide if caused her tax against that party but you don't have the police officers outside. Is that gonna be good enough the next time?

MR. RICHARD: I think -- I think what you do is to depend on the trial court judges and that are out there and make discretionary rulings everyday.

JUDGE: Well, that's the point and that is that you would have a situation where any sufficiently emotional losing litigant who is capable of playing upon the hard strings of the judge is going to be able to prevail and say that even though I lost, the cost should be taxed against the winning party. And of course the bigger the case, the more you're gonna have people come in and say, "Golly, gee this person's gonna really break down and we're gonna bring here police officer just to built up her case, to make it more like the first case."

MR. RICHARD: You know, I will respond to that that the test is an abuse of discretion test. And this Court has made the decision that that's whether the Court ah -- acted arbitrarily, unreasonably, or without reference to any guiding -- guiding principle. I believe that Judge Ferguson acted in a reasonable manner.

JUDGE: What are the guiding principles are you talking?

MR. RICHARD: For Judge Ferguson?

JUDGE: Yes.

MR. RICHARD: A one week trial. Watching Marthana Bethune, listening to her testimony, listening to the testimony of her psychiatrist, observing her outburst of threatening suicide, observing the two police officers that were standing just outside the court room that took her into protective custody, those are the things.

JUDGE: So what that means again is that in the future in all future cases that are litigating in the Texas, judges whenever there is a situation where you have a psychiatrist testify that a person is subject to suicide, that person is gonna be able to evade having cost of court taxed against them, if those are the guiding principles.

MR. RICHARD: I still believe that it's the trial court that looks at it and makes the decision. It's a -- it's a discretionary decision.

JUDGE: What if this have been a three month trial and a -- so the record will be prohibited -- well, would be prohibited, very expensive. You would still say that in order to have a review of the trial judge's ruling, a party that's only that compliant and cost and taxed the wrong way will have to get that entire record prepared or else we have to presume that somewhere within that three there was a factor that would support that exercise of discretion.

MR. RICHARD: Now Judge, all that Mr. Walker had to do was comply with the rule and the rule says that you must include a statement of the points or issues to be presented on appeal. He did not do that. Because he did not do that, then he does not get the presumption that the rest of the record is irrelevant. We get rather the presumption that it is all relevant and that it supports the judgment of the trial court. And that's why we can the decision that is a mistake about not bringing forward ah -- the record or at least complying with that rule is vital to this event.

JUDGE: That he -- Mr. Walker argues though that -- that in a notice of appeal, he notices that the issue he wants to raise is the trial court's assessment of cause, didn't he?

MR. RICHARD: He makes reference there but there's a case law that has addressed just such a -- a general statement like the one that Mr. Walker used in his notice of appeal. Seeking only to appeal Judge Ferguson's failure to award cause pursuant to Rule 131 and insufficient to satisfy Rule 34.6(c) and that's Kwik Wash Laundries v. McIntyre 840 S.W.2d 739.

JUDGE: What should he have said to limit his appeal?

MR. RICHARD: All he had to do is say -- you know, in a -- with particularity what the issues were. I guess the issue about emotional state. He needed to specify --

JUDGE: So, just the general objection that he split cost was not sufficient to raise the issue of whether or not a good cause was sufficient.

MR. RICHARD: Exactly. Other case -- in a more recent case, a general description of the proposed attentions of err is insufficient, that's Gardner v. Baker and Botts, that's 6 S.W.3d 295.

JUDGE: And is the purpose of those holdings to then require or request of just those portions of the record that would deal with that particular piece?

MR. RICHARD: Exactly and it would be my burden. Once he would specify what they are, it would be my burden --

JUDGE: To request that portion of the record.

MR. RICHARD: That portion of the record that I believe should be in there. By not doing that, then he falls prey to -- to the presumption that I thought [inaudible].

JUDGE: In -- in working at drawing this bright line. Let's go back to the facts you claim support ah -- the trial court's discretion. Which of the facts that were presented would you mind would be necessary to eliminate in order to say that the trial abused its discretion? If you eliminated the police officers, would the trial court have abused its discretion? If you eliminated the psychiatrist testimony, would the trial court have abused its discretion? Which facts would you eliminate in order to show as a matter of law the trial court abused its discretion?

MR. RICHARD: All I can respond to that again is to say what this Court's set forth as the standard for abuse of discretion is did he act arbitrarily. If he --

JUDGE: Well, let me ask you. Well, if that's the case -- I mean, let's assume you had a half day trial with no emotional losing party. The emotion -- the losing party seemed to be a happy individual and the trial court awarded cost against the prevailing party. Would that be an abuse of discretion?

MR. RICHARD: I can't answer that.

JUDGE: So, you're saying it's always just gonna be -- we're always gonna have to rubber stamp whether the --

MR. RICHARD: No, not at all. Not at all.

JUDGE: Then -- then help me -- so, you're saying the trial court can abuse its discretion.

MR. RICHARD: I think I believe that the trial court can abuse its discretion.

JUDGE: Okay, then help me understand which facts would have to be eliminated in this case to show the trial court abused its discretion?

MR. RICHARD: I can't think -- I can't believe that you can take and said what you're trying to do is a bright line test. I think it has to be that the trial court based upon the trial court's observations and the evidence that came forth, and that's what we get back to is the fact there is no record, then you don't have an opportunity to look

over the trial court's shoulder and decide whether or not it has abused its discretion. The problem that they have and should have ah -- because of the rule, is that you now and -- and the case law has said, this Court, meaning the Supreme Court must presume that the omitted portions of the record are relevant to the this appeal and that the missing evidence supports the trial court's judges. So, we don't have to -- I guess, what I'm saying is -- although I do believe that Judge Ferguson had been caused and I believe there was enough stated. Despite that, the fact that they didn't bring forth a full and complete record or complied with the rule as they should have, they in the end must live with what they've done. And this Court, according to the case law, is to presume that the -- that the omitted evidence would have supported Judge Ferguson's decision.

JUDGE: What if -- what if his reasons are patently erroneous? He -- a judge calls as he did because of the ethnic background of the litigants or something, then would this rule still apply and we would need to presume that there was some good cause within the rest of the record?

MR. RICHARD: I can't address whether -- I really don't know as far as that's concerned but we don't have that situation in this case.

JUDGE: Well, your opposing Counsel says you do. They -- they say the reason the judge gave on its face that is that he's not gonna be the cause of any further problems she had is an invalid reason, the same as if it's I'm readdressing cost because of the party with a certain racial background. And so that -- that's my question to you, I just want to isolate.

MR. RICHARD: Yeah, and my --

JUDGE: The reason on its face is so bad that nobody can argue with it. Would -- would you still have your presumption? I need to look at the rest of way.

MR. RICHARD: The reason that the judge gave is a reason that could improve the conduct of Furr's during the trial of the case.

JUDGE: Well, would that -- my question is what if the reason was just awful compare with -- ?

MR. RICHARD: And that was -- and that was the only reason that was given --

JUDGE: That's reason he get. Would we need to look at the rest of the record?

MR. RICHARD: May not.

JUDGE: Counsel I would ask you to -- since we don't have the record, you refer to the conduct of Furr's during the trial of the case, in the oral argument there has asked you to tell what conduct are you referring to? I mean, is that really an issue or is that just a presumption that you're asking us to make?

MR. RICHARD: Well, it's a presumption that I believe that the Court is required to make because of the case law and the rule.

JUDGE: Now, was there a conduct of Furr's during the trial of this case that you think would make the Court to assess cost differently than under Rule 131?

MR. RICHARD: I believe there was.

JUDGE: What -- what -- what was it?

MR. RICHARD: I mean, I'm way outside the record.

JUDGE: Cross -- cross examination?

MR. RICHARD: Well, the cross examination and the -- the rules --

JUDGE: The -- the cross examination was too aggressive, for example. Is that what you're saying?

MR. RICHARD: You mean -- again, as an advocate yeah, I would take

the position it was too aggressive. I would take the position that Furr's had written rules about how they were suppose to have security at their stores.

JUDGE: I'm not talking about -- about the underlying facts there, I'm talking about the conduct. Were there any sanctions? Do we have any orders and sanction against Counsel prefers for their conduct. There is a --

MR. RICHARD: No, there were -- not any sanctions.

JUDGE: Were there motion for sanction that we can review that you prepared based on conduct of the defense Counsel?

MR. RICHARD: No.

JUDGE: Do you believe the trial judge can consider the facts that are submitted to the jury and you know, says any cost? In other words, the defendant did something that caused the accident. The jury panel may didn't but the trial judge can say I think the jury may have been, I can't -- I can't reverse their verdict and I don't want to try this thing again but I'll just settle with the cause. They can come out a little fair.

MR. RICHARD: No, I don't believe that the Court should be doing that.

JUDGE: So, if that's the case then we can't really consider anything about Furr's -- they're book in on what they should have done or should not have done in terms of security, etc. I mean, that -- that was the jury's problem.

MR. RICHARD: I believe that was the jury's problem.

JUDGE: Any other question? Yes. Mr. Richard, Mr. Walker argues that if we find the Court's statement of good cause insufficient, regardless of what the record may or may not show, if we find the trial judge's statement of good cause insufficient he says that results are reforming the judgment. Do you have any authority out there that would argue that it will be remanding trial court for reconsideration of the assessment of cause or do you agree with Mr. Walker that if the statement of good cause is insufficient then it simply is a rendition of all cause against the plaintiff.

MR. RICHARD: I don't have a case to give you Judge but I would believe that if that were the decision that the Court made, it ought to go back to the trial court to give the trial court an opportunity to state most decision.

JUDGE: My other question is, the trial judge -- you have one statement in the record from the trial judge on what he's going to do and it says he was not going to precipitate emotional -- further emotional problems, irrespective of what the record shows. Is it good cause for the judge to say that I won't assess cause because I will emotionally harm the plaintiff by doing so? Would that be a basis, a good cause basis for trial judge to reassess cost? Because the trial judge thought that he would cause emotional stress.

MR. RICHARD: I believe that if the statement by the judge that having heard the entire trial and observe the things that took place in the hearing, then he's making the decision about how he is gonna handle trials. But that's part of the discretion that he has with the statement for good cause.

JUDGE: Any other questions? Thank you Counsel.

MR. RICHARD: Thank you.

REBUTTAL ARGUMENT OF STEVE HUGHES ON BEHALF OF THE PETITIONER

SPEAKER: May it please the Court? Mr. Steve Hughes will present the rebuttal for the petitioner.

MR. HUGHES: May it please the Court? Interestingly, it was the First Legislature of the State of Texas in 1846 that passed the statute that said the successful party should get its cost. The good cause exception was tasked in 1879. And since that time, the Court have essentially looked at three different categories for avoiding the payment of cost to the successful party, that is whether the party completely prevail in the administration of justice to get Court-appointed personnel such as ad litem is paid. And the Rogers v. Walmart situation, in which the defendant has unnecessarily extended the proceeding. And I think what the Courts have implicitly recognized is that for good cause, you got to have a darn good reason and if that reason must bear on what happened in the trial, how the case was tried and the case is outcome. And I think what the Courts have avoided, although not explicitly, is that the Courts have not looked at extraneous results of the rulings or matters such as a party's situation line, party's emotional state, or to cancel their judgment on that --

JUDGE: Counsel, does Furr's in anyway contest that this plaintiff had very significant problem?

MR. HUGHES: No.

JUDGE: Do you in anyway contest that this is very extreme set of facts as opposed to the scenario if someone mentioned earlier that somewhere we should accept because they lost their case? And in fact, we are really dealing with a very significant problem. Does Furr's in anyway dispute that?

MR. HUGHES: No, your Honor. We can see that she did estimate her problems.

JUDGE: This woman has very significant problems and she was not dangerous.

MR. HUGHES: That's right. Our contention is the extraneous effect or the effect of imposing cost should not be a relevant factor.

JUDGE: You all know that she has endangered others either?

MR. HUGHES: At the moment -- we do not doubt at the hearing that she had made statements to the effect. After that, she could calm herself.

JUDGE: I know. But having heard the psychiatrist to trial and having seen her conduct and everything, you all had no reason to question that this was very real?

MR. HUGHES: That is correct, your Honor.

JUDGE: Okay.

MR. HUGHES: And again, I think, your Honor, where the Courts have discretion, as it been pointed out before, it was the timing of entering judgment. There was no reason the judgment -- the judge had to enter the judgment at that time, he could have called a recess. He did not necessarily had the parties -- they are the lawyers. They are many sign of judgment and that's where the Court's discretion lay in this case but not in refusing the tax cost.

JUDGE: The trial just gets -- just get one shot in giving good reasons under Rule 141?

MR. HUGHES: I -- I believe so, your Honor. Because it says that the trial judgment state on the record these reasons.

JUDGE: Are there other places in the rule that are this restrictive. By that I mean, the trial does give us a statement it

doesn't have to begin the order. Just offhand language. And then that's it. That limits what we can look at and the trial just never get some violence.

JUDGE: That's -- what the lower courts have done, almost exclusively is they have looked at the record, looked at the statement of good cause. If it wasn't there argument seems sufficient. They have reformed the judgment.

JUDGE: But are there any questions in the rules other the cases on this rule. There are other places in the rules with a similar scheme?

MR. HUGHES: I can't think of any other.

JUDGE: I can -- I am just sitting here trying to think it out.

JUDGE: I -- it is unusual that there has to be a statement of good cause. And I think that's what affects the record issue in this case. It's that we can't go rumbling through and presume that the record showed anything other than the statement that the judge gave. That's the universe.

JUDGE: Can you conceive of any scenario at in which all in which the emotional status of the plaintiff could affect the award of cost, it can be good cause?

MR. HUGHES: I don't believe so your Honor. Because I think the judge can handle that through his discretion and error in judgment [inaudible] --

JUDGE: Well, let's take for example a situation, not -- I'm not saying that happened here, and I haven't been anyone indicate it did. But let's -- let's presume that during the trial, Walmart's Counsel unnecessarily harassed the plaintiff on the witness stand, berated her, brought up embarrassing things in her past and it really was -- it caused her a complete breakdown. In your estimation, could that ever constitute a basis for good cause if that happened?

MR. HUGHES: Your Honor, I -- I don't believe so and I say it because we believe that if you look at the case at the good cause exemption, it's been very narrowly construed by the Court in certain situation.

JUDGE: Well --

MR. HUGHES: And there are other methods that can be utilized by the trial court.

JUDGE: Well, you say it's been narrowly construed, that means we have found in certain cases that good cause existed. That doesn't mean that we have said that they never ever can under any other circumstances. It's just there have been certain situations where we have recognized of it. So under my scenario, where they subject the plaintiff withering cross examination, it was improper, and caused her to have a nervous breakdown events cost and cause is heard to have a nervous breakdown even then you could say cost cannot be awarded against Walmart.

MR. HUGHES: I -- I believe that I would not be right one, your Honor. I think in the Court's discretion of a lie and limiting the cross examination or making statements at trial against the party or the attorney.

JUDGE: Any other questions? Thank you Counsel.

MR. HUGHES: Thank you.

JUDGE: That concludes the argument in the first cause and the Court will take a brief recess.

SPEAKER: All rise.

2001 WL 36163418 (Tex.)

