ORAL ARGUMENT – 11/28/01
01-0002
CARPENTER V. CIMARRON

MICHEL: Today we are presented with an interesting and compelling issue with regard to the application, if any, of Craddock to Texas summary judgment practice. The petitioners contend or we challenge in this appeal essentially four primary areas of why this judgment of the CA should be reversed. One is that Craddock should not apply to summary judgment proceedings. Two, if this court so holds that Craddock should apply to summary judgment practice it should not apply in this case because a default did not occur in the trial below. Three, the CA's judgment and opinion impermissibly overrules a prior opinion of the same panel.

PHILLIPS: Can we make that judgment? I mean we could reverse a judgment of the CA because a panel didn't follow an earlier panel decision?

MICHEL: I would think in this particular situation this probably would be the only court left to do it.

PHILLIPS: Do you think that's error? That is a legal error for one panel not to follow its previous decision and do you have a citation?

MICHEL: The basis of the genesis comes from the O'Connor opinion, and also the cite of the Baker case in which a panel of one court should not override the panel decision of another court. Both of those cases are cited in our brief. And in the O'Connor opinion this court chose in depth to say that the panel make up of the CA was modeled after the federal procedure. Which of course there are numerous cases that say that one panel of a CA cannot overrule another CA.

PHILLIPS: Do you have a single US SC cite reversing a CA decision because a panel overruled another panel?

MICHEL: No. And fourth, if Craddock does apply and this court determines that this is a default judgment situation that the respondent in this case failed to carry its burden that it did not have conscious indifference.

O'NEILL: You've said that you think there should be - just we should apply a traditional abuse of discretion standard to review the TC's rulings before the summary judgment hearing took place, the motion for leave to file and the motion for continuance. How would you define the parameters of that abuse of discretion standard. And more specifically without saying Craddock applies because of default or no default, why wouldn't you apply the same equitable Craddock standards in that situation and use those same considerations to define the parameters of the TC's discretion?

MICHEL: In regards to the motion for leave and continuance standard there is case law out there that applies the good cause standard. I believe in the Haynes case, 35 S.W. 3166, that applies the good cause standard in the summary judgment motion for leave standard, and they differentiate the difference between the conscious indifference standard and the good cause standard on the basis that counsel's inadvertence is not sufficient. And so I think that would be the guiding principle in the motion for leave situation.

HANKINSON: Is there any case law in Texas in which a TC has denied a motion for leave to file a late response, the summary judgment motion in which this court has determined that the denial of the motion for leave is an abuse of discretion?

MICHEL: Yes.

HANKINSON: And under what circumstances has that been determined to be an abuse of discretion? Can you give us some of the factual parameters?

MICHEL: I believe in some of the cases that we've cited to this court, the examples of where a TC has abused its discretion is for instance, the parameter with regard to which the court has held that an abuse of discretion has existed is whether there was not sufficient time to respond or the counsel presented arguments that their inability to respond was due to some of the traditional external forces, not necessarily the neglect or inadvertence of the...

HANKINSON: Like what?

MICHEL: An unforeseen event, the inability to obtain discovery, things of that nature. That would be in the form of a motion for leave.

HANKINSON: And is there any case law in which the TC has abused its discretion for failing to grant leave in a case such as this where there is some allegation of a mistake on the part of the lawyer?

MICHEL: I haven't seen any. The closest that comes, that I think that are cited in the briefs, are when the CA's have applied the Craddock standard felt that the attorneys in those cases did not meet the conscious indifference standard.

HANKINSON: But those were all in connection with motions for a new trial after the fact when there had been no appearance before the court rendered judgment on the summary judgment motion.

MICHEL: That's correct.

HANKINSON: But I'm talking about in the context of using the procedural requirements of rule 166a, pre-decision by the court on the summary judgment motion. Has that ever been a factor

before that you know of in any case law?

MICHEL: I'm not aware of any in this situation.

O'NEILL: I think you've been addressing the denial of the motion for leave to file a late response. How would you define the parameters of the TC's abuse of discretion denying the motion for continuance? There's not much - I mean the TC has pretty unfettered discretion in that regard wouldn't you agree?

MICHEL: I think so. I think that probably the guiding principle to look to obviously is this court's opinion in Tenneco, although it doesn't really give a standard per se on the abuse of discretion standard. It does outline in pretty detail what is required in a motion for continuance: the specificity of the discovery required; the materiality of the discovery needed; the attempts to obtain the discovery. So I think you're correct. I don't know if there is per se a standard that has been applied. But the court has given a good guideline.

O'NEILL: You've named some sort of equitable things. What's wrong with importing some of the equitable pieces of Craddock into defining the TC's parameters for abuse of discretion in that context?

MICHEL: I don't think there is anything wrong with that. I think in that situation the court should look into all of the surrounding circumstances that go into a motion for leave or a continuance. I think the procedures set up by the rules and by the case law would significantly help if it's incumbencing all of the factors that are presented to the TC. And I would think at that motion for leave status or the motion for continuance, you would set forth all of your grounds, whether they be legal or equitable.

HANKINSON: If I understand correctly, the matters that were raised by the motion for a new trial in this case, the Cowan(?) Green(?) situation that communications between the lawyers on who were representing the nonmovant, none of that was raised in connection with the motion for leave or the motion for continuance. Is that correct?

MICHEL: It was argued at the motion for leave. It was not presented in the motion for leave itself.

HANKINSON: It was argued. It was brought to the TC's attention?

MICHEL: Yes. And it was brought in the motion for continuance as well. Argued, I should say.

HANKINSON: But not in the motion itself?

MICHEL: Not in the motion itself. The body of the motion for leave itself is extremely

short and it doesn't state why it needs the leave. In the motion for continuance it kind of takes a contrary position and says, well we need more discovery. And that has never been presented before at anytime until the day of that hearing. And of course at the time the extension was granted, the first extension was granted to the June 4 date, no statement at that time because it was agreed by both counsel on both sides of the case that additional discovery was needed at that point.

HANKINSON: Craddock was raised by the nonmovant in the motion for a new trial?

MICHEL: Yes.

HANKINSON: When the TC held its hearing, did the TC hold a Craddock hearing at that point in time?

MICHEL: By all intensive purposes, I don't think it's stated explicitly on the record. But the hearing certainly was the testimony, the line of questioning, the arguments were all Craddock related. And the respondent certainly asserted and briefed the issue for the court holding that Craddock was the standard to be applied.

HANKINSON: Well in connection with denying the motion for a new trial did the TC give any indication of whether or not it considered Craddock as the basis for its decision and analyzed the evidence that had been presented in connection with the Craddock requirements?

MICHEL: From the face of the record, I don't think you can tell. Certainly I think it's fair to say that the court in deference probably did consider it and rejected it.

PHILLIPS: Is there some neutral scholarship out there that supports your position?

MICHEL: We have not located any at this point that was necessarily favorable to our position . There is Timothy Patton's article that I don't think is necessarily critical of it. It just raises your attention to it saying that this is an issue that's out there. Beware of it. And it cites the conflicting cases.

ENOCH: The argument that you make that if the elements of Craddock are proven, then the TC must grant a new trial. There's no discretion. It must grant it. Implicit in that is the argument that if you're really checking abuse of discretion for failure to grant continuance or grant the late filed pleading, that you could establish the Craddock elements and the TC still deny leave to file or deny the continuance and not abuse its discretion. Without _____ at Craddock or not if those elements were in fact proven and brought to the court's attention on the leave to file late, what else would the trial judge be allowed to rely on to avoid having abuse of discretion?

MICHEL: You're saying what is the standard or what the TC should apply at that motion for leave status if not Craddock?

ENOCH: Your argument is that Craddock would prevent a TC from exercising its discretion to deny leave to file. Just say those elements are established at the hearing what other factors would a TC be able to rely on to exercise its discretion not to grant relief to file?

MICHEL: One example comes, and I think it's in play in this case is, for in fact a defective or deficient motion for leave is in fact filed. Hence, I think when the TC is presented with that factual situation with a defective motion for leave, and it's just because Judge let's go ahead and grant this motion, and then later on it's developed in the motion for new trial, which is exactly what I think happened in this case. At the motion for new trial they go ahead and present all of the things that they probably should have presented at the motion for leave standard. I think that's a classic example of where you would be forced to grant the Craddock motion and the TC would have been correct to deny the motion for leave. That is our position here, and I don't think the respondents even argue on appeal to the court below or to this court that the TC erred in denying the motion for leave, because it was on its face defective. So consequently the TC in our brief to this court is kind of handcuffed into granting that motion.

HANKINSON: While in this case you don't think that Craddock should apply for one reason is because you say there is no default. If we had before us the circumstance in which there was a problem with respect to the notice of the summary judgment hearing or receiving summary judgment motion or something so that the nonmovant wholly failed to appear and participate in the summary judgment process and judgment was rendered against the nonmovant, similar to someone not appearing for trial, then do you think that Craddock should apply in the context of a motion for new trial, and would the reason be because then a default does occur?

MICHEL: I would say that certainly does present a more difficult situation. And I think the analogies are somewhat closer. And our first position would be, no, that Craddock does not apply even in that situation. I think the standard you could apply would still be the motion for leave standard.

HANKINSON: You mean the motion for leave after the judgment had been entered?

MICHEL: Absolutely. I think to try to keep it consistent maybe is at some point whether it's 7 days out or it's the day of the hearing or whether it's within the 30 day period of time.

HANKINSON: But if judgment has been rendered against me on the merits and I did not participate in anyway in the summary judgment proceedings, never got the motion, never filed a response, didn't appear at the hearing, then why isn't that similar to a default that occurs in connection with a failure to appear at trial? I didn't get notice of the trial setting. I didn't show up. The court went forward. The opposing party put on their case. Just like in a summary judgment proceeding, the movant would have put on their case. Judgement rendered against me on the merits. Why don't the equities weigh similarly in the summary judgment default circumstance as to a failure to appear at trial default?

MICHEL: I think the court in your question you really pose two hypothetical mixed on one question. One is you don't get notice. And we're not arguing that Craddock or even a lesser standard wouldn't apply if you had no notice...

HANKINSON: I'm just talking you just don't appear for whatever the reason. And one of the things that Craddock is designed to do is to sort out why you weren't there and excuse your failure to participate.

MICHEL: I would say one is I think inherently is what we're trying to preserve with the Craddock situation is if there is a default. I think the traditional Craddock situation that almost all practitioners are familiar with is the no answer default situation. And in that situation, there are no procedural remedies in place at that time, no other alternatives that would give notice to a litigant about upcoming deadlines. You've got your notice, the one shot, and judgment is entered.

Here you are already engaged in the litigation process. Here presumably you have gotten notice, the litigant has gotten proper notice so the procedural safeguard is there.

O'NEILL: Well those procedural safeguards are there when you go to trial too.

MICHEL: Yes they are. Absolutely. What I'm getting to is you've gotten that procedural safeguard, then your second alternative built into the rule, which I would argue is the motion for leave status, which - it's not necessarily and I don't think we're mincing words, the applicable standard may be at the heart of this issue of what is the standard to apply. And if we're mixing names, you've got the whole Craddock apparatus that you apply from a default situation. It's been modified a little bit in these summary judgment contexts. And maybe it's the standard. And in deference to an alternative position perhaps the conscious indifference standard could apply in that situation.

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RESPONDENT

MURPHY: I have a number of holes to poke in petitioner's more puzzling and alarming arguments, both in their brief on the merits and in their oral argument here today.

HANKINSON: Why don't you start by telling us why if you actually adhere and participate in the summary judgment proceeding, filing a motion for leave to file a late response, motion for continuance, participate in the hearing, why isn't those circumstances there is a default when in fact defaults typically arise when the party has not been heard? I'm having a hard time putting this in the default cubby hole.

MURPHY: The essential thing to remember with regard to motions for summary judgment is that the default does not occur with regard to the nonmoving party on the day of the hearing. It occurs seven days prior to the hearing.

HANKINSON: A default occurs when judgment is taken against you. And so the default occurs when the TC signs the judgment rendering judgment against you.

MURPHY: Actually I would make a distinction there between the act of default and the default judgment entered by the court. The default occurs when the party fails to do something which they were obligated by the rules of procedure to do.

HANKINSON: But if I fail to file an answer on the Monday following 20 days, I may leave myself open for a default, but I have not truly defaulted and default has not occurred until the court enters judgment against me.

MURPHY: Again, I would make a distinction...

HANKINSON: So if I file an answer on that Tuesday and get to the courthouse before you do with your default judgement motion the TC can enter a default judgment.

MURPHY: Because the default has been cured. But the default occurs on Monday at 10 when the answer is not filed. The default judgment may not be entered until some time later and a party has the opportunity to cure the default before the judgment is entered. The same thing happens with regard to summary judgments 7 days before the summary judgment hearing with regard to both...

HANKINSON: If it is a default you have an opportunity to cure the default with your motion for leave, the motion for continuance.

MURPHY: Well you certainly have the opportunity to try and cure the default. It's different from a true default judgment where you haven't filed an answer. Because if you get that answer on file in a true default, no answer case, if you get your answer on file before the court enters the judgment, then you've cured the default. However, in a summary judgment context, you don't necessarily have that absolute right. The TC can do what the TC did in this case: deny the motion for continuance, deny the leave to file the late response.

HANKINSON: You would agree that your definition of default cannot comport with how this court has characterized default in the various circumstances in which we recognized it?

MURPHY: Are you asking with regard to...

HANKINSON: When we talk about a default occurring as a result of failing to file an answer, we have traditionally referred to the point in time when the court enters judgment. Similarly when judgment is entered after trial, and there is a failure to appear at trial. So you're asking us to expand the concept of default because it doesn't comport with the traditional definition of when a default judgment occurs?

MURPHY: I'm not sure that's what I'm asking. It may be that my understanding of when a default occurs is defective. But I would suggest to the court that the act of defaults, the failure of a party to do something which is required by the rules of procedure and the default judgment itself are two different things.

HECHT: Craddock has three pieces. We've talked somewhat about general equitable concerns, and I would like to shelve that for a second and just talk about the specifics of Craddock. You could apply the third prong fairly easy. Has the other party been prejudiced? Are you willing to compensate for the prejudice? So he showed at the motion, he incurred some attorney fees, you may have to reimburse that. That would be a Craddock concern. It seems that you could apply that in the summary judgment context just like you could in the default judgment. Do you disagree with that?

MURPHY: I don't disagree with that.

HECHT: Meritorious defense is harder because for a new trial you don't have to prove that you're going to win. You just have to prove that you might. Here, there's no analog in the summary judgment context. If you have a response that gets you there, you've won. And if you don't you lose. How do you apply that element of Craddock in this situation?

MURPHY: The CA's which have applied Craddock to the default summary judgment context have said, that proving a meritorious defense in the summary judgment context means raising a fact issue on each of the claims that are challenged by the summary judgment movant.

HECHT: But then you've won. It's totally different from the motion for a new trial. You haven't won the case when you set up a meritorious defense in a motion for new trial.

MURPHY: Precisely. You haven't won the case when you raise a meritorious defense by raising a fact issue in a default summary judgment context either. All you've done is put the case on track for a trial on the merits.

HANKINSON: But you've won the summary judgment proceeding.

MURPHY: That's true.

HANKINSON: Is the ultimate resolution of the summary judgment proceeding.

MURPHY: But it's not the ultimate resolution of the case, and that's an important distinction to make.

PHILLIPS: But that means these deadlines are not really deadlines.

MURPHY: Well they are deadlines if Craddock is the standard, because then the TC has

some guiding rule, some guiding principle to determine whether to allow a late filing...

HECHT: And isn't that guiding principle - that seems to be what we're about here - because element three is always easily taken care of. The second element I don't see how it fits. The first element seems to be what the fuss is over. And that is, should you get past this problem for a lack of conscious indifference or - at some point the bar goes high. If you fail to make an objection to evidence, if you fail to object to the charge, we don't relieve you of that failure because you weren't consciously indifferent. We said, well you had your chance. It's over. Way back at the beginning if you failed to file an answer we say, well that's too early, you can't tell for sure, so we've set the bar pretty high. It's no conscious indifference. Why should we set the bar here at a lack of conscious indifference? Why shouldn't it be lack of ordinary care or lack of good practices or something like that?

MURPHY: The threshold should be the Craddock threshold, because when a party fails to respond to a motion for summary judgment it is an outcome determinative mistake.

PHILLIPS: That's true for waiving an appellate point for not filing their brief on time, and throughout the whole pretrial file and appellate process there are ways you can lose your case. And I don't know how you make the distinction once the parties are before the court.

MURPHY: There are certainly many ways that you can affect the outcome of your case. But there are relatively few where the failure to do something results in a judgment almost immediately.

PHILLIPS: But you can lose a summary judgment motion even if the other side doesn't file. That's not automatically outcome determinative because on its own face it can collapse. So this is not - I mean in your particular case it might have been outcome determinative but that's not a universal rule.

MURPHY: The difference there is that whether the summary judgment movant's evidence and motion for summary judgment are sufficient to justify judgment as a matter of law is not something which is in the control of the responding party. That's an important distinction to make.

HANKINSON: Say that again. I didn't understand that.

MURPHY: Whether the motion for summary judgment and the summary judgment evidence is sufficient to support a judgment considering only the motion and the evidence that is filed by the proponent is something which is not within the control of the summary judgment respondent.

The important thing to remember is that we certainly could have and in fact we did go to the TC that day and argue against the motion for summary judgment.

HANKINSON: Why don't you have enough protection with the procedural rules that are already in place? You can get leave to file late. You can move for a continuance. Even after the judgment has been taken. You can also move the TC at that point in time after the hearing for a late filed evidence to reconsider the summary judgment motion. Why aren't there plenty of procedural protections built into place in summary judgment practice as it is to give you the opportunity to have presented to the trial judge everything you presented post judgment, you could have presented pre-summary judgment hearing in connection with the motion for leave and the motion for continuance?

MURPHY: I agree with you wholeheartedly that the procedural framework is in place to cure mistakes like the mistake that was made in this case. The thing that's missing in Texas jurisprudence is the guiding rule or principle that's going to inform the TC's discretion...

OWEN: You want us to say essentially that anytime counsel, their secretary makes a mistake and it's inadvertent, they are automatically entitled to continuance. That would be the effect of this rule. Because if you had presented those grounds in your motion for continuance, your position is the TC has to grant that motion for continuance?

MURPHY: I'm not sure that we're arguing that that would apply in a motion for continuance.

OWEN: What's the difference? I mean how can the TC have not abused its discretion on a lack of - which is inadvertence on your part - and she says, no you don't get a continuance, grant summary judgment against you, but then in the motion for new trial Craddock grounds is required to grant you a new trial. I mean that seems disproportionate to me. It seems to me if the TC has to give you a new trial if you bring it up post-judgment, the TC also would have to give you a continuance prehearing.

MURPHY: And I agree that that would be the better practice. Because if the TC were to grant us either a continuance or an opportunity to file a late response at that time, there would be the absolute minimum of prejudice and delay. If you have to wait until an opportunity to file and have heard a motion for new trial, then there's necessarily going to be some amount of delay - about 1-1/2 months of delay.

OWEN: If we were to rule for you from henceforth our pre-trial deadlines are all subject to being mandatorily set aside by the TC. And the counsel says, I'm sorry I just didn't calendar it, and I missed the deadline?

MURPHY: I think that where counsel can show an actual mistake and disprove conscious indifference and intentional conduct that that should be the rule.

RODRIGUEZ: But isn't it true that in Craddock there is a reason for, the guiding principle there is and many of those cases of when there's no answer to default judgment, the defendant didn't have a lawyer, the citation may arise by publication and so there's not even actual notice. And what

we were saying in Craddock is that person probably has a right to defend himself or herself in court if there has been some sort of mistake made. But here, once the answer is filed, an attorney is hired to represent that defendant, that attorney has notice of a hearing, then all of those equitable ideas in Craddock just simply don't really apply in this context do they?

MURPHY: Well it's important to remember that there are pure default no answer cases that apply Craddock where the defendant did have an attorney and where the attorneys simply forgot to file the answer on time, and the party was given a new trial there. So it's not as though we're expanding Craddock to an area or a procedural situation in which it's never applied before, because it has applied in that precise circumstance. Clerical errors, calendaring mistakes, those have been used to justify a new trial under Craddock in the past.

O'NEILL: I think that you can hear the court's concern as to where we draw the lines here. Let's say you send a request for admissions that are going to be outcome determinative. And the time goes by and you miss calendar them. Are we going to apply Craddock there?

MURPHY: The rules say that if you can show good cause for failure to respond to a request for admission in time, that the court can...

O'NEILL: Then why don't we also apply that in this context, because the rules also provide procedural safeguards? Why don't we stick with the procedural safeguards if the rules already apply?

MURPHY: I would suggest to the court first of all that good cause by itself is a lower standard than Craddock. Craddock, you have to negate conscious indifference and intentional conduct, and you have to show a meritorious defense, and you have to show the absence of undue prejudice or delay. Now those second two may not always be particularly onerous burdens, but good cause is an even lower threshold, even easier to prove. It doesn't have those other two elements. You don't have to negate conscious indifference or intentional conduct. You just have to have some good cause.

OWEN: Then we would be saying that failure to properly calendar is automatically good cause as a matter of law?

MURPHY: If that's what the evidence showed, then I think that would be good cause. Now that doesn't mean that in every case where attorney alleges a calendaring mistake that they are automatically going to be entitled to a new trial.

HECHT: That's clearly the law. If all you have is calendaring mistake how can that be conscious indifference? You would never lose that case. You said it might be different in some other case. It can't be the case can it?

MURPHY: Well there are some cases that have applied Craddock in the no answer

summary judgment context where an attorney said he didn't know about the hearing, that he did not receive notice of the summary judgment hearing. And the circumstantial evidence showed that he sure should have known about it, that he had constructive knowledge of it, and therefore, did not meet the first prong of Craddock. The case I'm talking about is Gonzales out of the Beaumont CA in 1993, where the attorney the court said was guilty of the selective acceptance of certified mail. He simply refused to accept the certified mail letter that set the hearing, and the court found that even though he might not actually have known that the hearing had been set, still he was guilty of intentional of consciously indifference conduct.

O'NEILL: What is conscious indifference? What if you have sloppy calendaring procedures in your office?

MURPHY: I would suggest that that is negligence as opposed to conscious indifference. Conscious indifference is to know that one is obligated to do something and to consciously choose not to do anything about it. Negligence by the way is not the test in Craddock. Even a negligent mistake will satisfy the first prong of Craddock. A slight mistake will satisfy the first prong.

JEFFERSON: Don't you see some danger though in the rule you're advocating here? If a lawyer comes within days of summary judgment knowing that the hearing is _____ for whatever reason didn't get the job done, that there's going to be an affidavit from him or his secretary in order to avoid a case that's filed into the ruling on summary judgment? So don't you see that if we adopt Craddock here that that's going to give free rein to lawyers who _____ _____ and avoid summary judgment altogether or give them much more time for discovery?

MURPHY: First of all, let me address the much more time for discovery. It doesn't necessarily do that. Because if one has failed to respond to a motion for summary judgment as happened in this case, and the evidence that exists at the time the response should have been filed is sufficient to overcome the motion for summary judgment, then I think Craddock should apply and I think that the attorney should be given a second chance. If, however, the party must develop evidence after they have failed to file the response and it is based on that evidence that they think they are entitled to a new trial, then I would say that they have not met their burden under Craddock.

HANKINSON: Well that's what happened in this case, because the expert's affidavit was post dated after the hearing by several weeks wasn't it?

MURPHY: Yes. But the expert's affidavit is not necessary to overcome the motions for summary judgment. And I wish we hadn't filed that expert's affidavit. It would have simplified the case considerably. The CA found, and if you look at the record, you will see that the evidence we wanted to file with our late response on the day of the summary judgment hearing is sufficient to overcome the motion for summary judgment.

HANKINSON: Was that provided to the TC as part of the motion for leave

MURPHY: A copy of the response was attached to the motion. Yes.

HECHT: In their reply brief, the petitioners raised the question whether you would apply this same standard process to defective responses as opposed to no response at all. The affidavit was accidentally left off, something was x'd through typing error, something was left out, would you apply it there as well, or just to no response?

MURPHY: Well that's the beauty of the Craddock test. What we're talking about here is an equitable remedy. And when you have an equitable remedy it is necessarily a fact intensive inquiry. That is to say, the TC is going to have to look at the facts and circumstances of that particular case.

HECHT: Let me put it to you this way. If the affidavit is left off the response and the lawyer comes in and says, Judge, I was not consciously indifferent, I was just negligent, it was just a mistake. Is that enough to get him by or not?

MURPHY: I think it should be. Yes.

OWEN: Why wouldn't that apply as the chief pointed out, objections to the jury charge? I come in with a sheet of pretried _____ to the jury charge and my secretary when she was collating them left one out, and then on appeal I said, I intended to object. It was just negligence on my part. I wasn't consciously indifferent.

MURPHY: The failure to object to a question on a jury charge is not necessarily going to be outcome determinate.

OWEN: Let's say in that case it is.

MURPHY: That is a tough one to answer. Again, because we're talking about an equitable remedy, I would say it would depend on the facts and circumstances present in that case. Of course under the laws that now exist, that is not grounds for relief that you forgot to object. You have to make the objection at a particular point in time. The difference between that situation.

OWEN: You have to file a response to motion for summary judgment. I just see a hole here that's saying, I was just negligent, would apply virtually every deadline in the rule book.

MURPHY: And in fact it already does apply to several deadlines that are in the rule book.

O'NEILL: And it seems like the distinction to be drawn with Justice Owen's example is, you've got a party before the court and in the default situation you don't have a party before the court, which gets us back to our original question as to why the procedural safeguard is already in place in the summary judgment context aren't sufficient. Because if you are there to file a motion for leave and move for continuance, you have a party before the court and different procedural rules should apply.

MURPHY: Clearly the TC has the discretion to grant the motion for continuance, to grant the motion for leave to file the late response, to grant a new trial after judgment has been rendered. The question is, what guiding principle is going to inform that discretion, and that's what we're here to talk about today.

OWEN: That's the key issue - I mean is negligence going to be in every case as a matter of law good cause under the rules?

MURPHY: Again, it depends on the facts and circumstances. But if the uncontroverted evidence shows negligence, shows a mistake, then I think it should be grounds for a new trial.

HANKINSON: I'm a little bit confused. I thought that your position in this case was that Craddock should apply in connection with a motion for a new trial filed after a summary judgment has been rendered against a nonmovant.

MURPHY: Correct.

HANKINSON: And you're still holding that position. You're not saying to us that we should apply Craddock to the procedures already in place with the motion for leave and motion for continuance?

MURPHY: I think the court doesn't even have to reach that question whether it applies to a continuance or a motion for leave. Because those are subsumed within the new trial standard.

OWEN: The TC could have under our existing _____ could say, well I find that negligence in failing to property calendar is not a valid basis; I'm not going to give you continuance. And you proceed with the summary judgment motion. But if the motion for new trial would be required as a matter of law to grant a new trial, so it would seem _____ to say well no that's not a good grounds for a continuance or for leave to file late, but it mandates a new trial. Do you see the...

MURPHY: I do see that and that's why I think it would be the better practice to apply the Craddock standard at the earliest stage in the litigation or the earliest stage after the default as possible. Less delay. Less prejudice. Less cost.

HANKINSON: With the exception of the expert affidavit that was evidentially signed at some point in time after the summary judgment hearing, did you have the opportunity and did you in fact apprize the TC of everything that you apprized the TC in the motion for new trial at the time of the motion for leave and the motion for continuance?

MURPHY: All of that was attached to the motion for leave to file the late response. So if the court had decided to read through the late response it would have had notice of everything we were arguing.

HANKINSON: But I'm talking about the other things too: the mistake, how it occurred; everything associated with that. There was nothing new, the exception of the expert affidavit presented to the TC in connection with the motion for new trial?

MURPHY: That's essentially correct. The one thing I would add to that is that on the day of the summary judgment hearing, we weren't sure how this had happened, how had we blown this date. And we discovered that between the summary judgment and the motion for new trial.

HANKINSON: What did you say to the TC about why the response had not been timely filed?

MURPHY: Simply that it was a calendaring mistake because it was not on my calendar. And that's all. We didn't know how it had not made it to my calendar.

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REBUTTAL

MICHEL: The respondents are distancing themselves from that expert affidavit. It is clear in the record at page 179, in the clerk's record, that Aldridge testified that he needed the continuance as a basis. And specifically he stated, in particular to retain an expert in order to respond to the liability and damages issue. At page 167 and on page 6 of the reporter's record vol. 2, the respondents asserted that Aldridge would obtain an expert's testimony to use in the response.

HECHT: If conscious indifference is not the standard, then what is the standard?

MICHEL: At what stage?

HECHT: To get this set aside. To get the summary judgment set aside.

MICHEL: I would say it would be a motion for reconsideration.

HECHT: Based on what though? What's the standard? What do you have to show?

MICHEL: Good cause.

HECHT: And why isn't a calendaring error good cause?

MICHEL: I don't think...

HECHT: It could happen to anybody.

MICHEL: It can. Absolutely it can happen to anybody, including myself. I think the calendaring mistake issue is not sufficient...

HECHT: Why?

MICHEL: I think you would have to go into the details once again of the calendaring mistake. Once again, I think it begs the question, is the calendaring mistake just simple flat out negligence. And if that's the standard, I think it will be...

HECHT: What if it's complicated, sympathetic and explainable negligence?

MICHEL: Which is what I would do. There's different levels. I think there's certainly different levels. In the abstract if you just say calendaring mistake, I think that's kind of quite frankly a simple, vague response. We certainly contest in this case that it wasn't a calendaring mistake in no way shape or form. This is not the case of where they simply forgot to put it on the calendar. The only counsel of records calendar is on the secretary's calendar, and the fallacy in the whole calendaring mistake issue is that Aldridge was the one who was to procure the expert affidavit. It had nothing to do with Murphy.

OWEN: I really didn't have any trouble seeing the difference between a post answer default judgment where we said Craddock applies in a post summary judgment new trial situation. I really don't see the difference. Maybe we shouldn't have said Craddock applied, but we did. So how do we distinguish that?

MICHEL: Perhaps a refining. It you do say Craddock applies, perhaps where the real key in this, and I think the court has already been hitting on both of us on what the standard is and should be, but Justice O'Neill set forth in the Medina case that the failure to take some action, which would seem indicated to a person of reasonable sensibilities under the circumstances. And if that is the Craddock standard and if the court is going to apply the Craddock standard, whether it be at the motion for leave stage, whether it be at the motion for continuance stage, or whether it be post summary judgment default stage, that that is the standard that quite frankly might...

SIDE A ENDS, SIDE B BEGINS

HANKINSON: Shouldn't Craddock apply for the same reasons that it applies in a failure to appear at trial default?

MICHEL: I knew I was going to get this question. That is an extremely difficult question. My response would be no. And the reason why is, I think we're still in the situation of a motion to practice verses going to trial. I think the practicalities weigh against it. We're still in the procedural world of rule 166a that sets forth the deadlines. And I think there's still some procedural remedies that allow the motion for leave to come in on the backside of it to assert that motion. And I think trying to superimpose this test that was developed, as far back in the late 1800's, to a complicated motion for summary judgment practice my answer would still be no.

OWEN: Well in Craddock you're really better off, and people who are really, really

late are better off than the people who find out just before the hearing. Isn't that right? In other words the equities go to the guy that really wasn't in terms of the deadline as opposed to someone who discovers it just before trial or just before the hearing?

MICHEL: I think that is a problem in applying Craddock. Because the guy who really blows it will get this conscious indifference standard. Whereas a person who is fairly on top of it and misses a deadline comes in and _____ himself on the court _____ the motion for leave status has come up front and done it, and that's the inherent conflict by giving a benefit to somebody who's really blown it. And we've got the problem of somebody who under this particular CA's holding, where you've had your notice, you've had your motion for continuance. There's not a rule I can think of out there. I haven't found any other situation where your initial remedies have a higher burden than at your _____ where the more you mess up, the easier the burden is.

HANKINSON: The same thing would apply if I find out about a trial setting a day before trial and I go racing down to the courthouse because I know trial is about to occur and with my motion for continuance in hand and the judge says, no, sorry we're going to trial as opposed to if I just sit on my hands and let it go forward without me. We have that same scenario that arise in connection with trial.

MICHEL: We do. And it is an abuse of discretion either in a motion for new trial phase, or at the continuance. If the TC could deny a motion for continuance, you find out the day before trial - this was just not on my calendar. And the court says, too bad. You're going to trial. Just have your client here and get ready verses you find out about it a day or two after and you're not there. I think once again you've got to apply and reflect...

HANKINSON: We do have a different standard...you get to use Craddock after trial and on the other hand you've got to go in and show good cause for a motion for continuance on the day of trial. And that's exactly the dichotomy we have set up.

MICHEL: That is exactly the dichotomy. If there is some middle ground perhaps it might be the Medina - conscious indifference standard - that could be applied, but I don't see...and I've looked long and hard at the rationale behind why the SC had extended it to not appearing at trial. And I haven't really logically gotten that together. I got the no answer. That perfectly makes...but I can't fit it in with the trial(?) stage(?).