ORAL ARGUMENT – 10/15/03
01-1142
SWB V. GARZA

HATCHELL: This is a retaliatory discharge case under §451.001 of the Labor Code. Based on a finding that the plaintiff was disqualified from his position, or discharged from his position of refining the worker's comp claim, the jury awarded $1 million in actual damages and $1 million in punitive damages.

The three issues that we have raised on appeal are, is there evidence of a statutory violation? is there evidence of malice to support the punitive damage award? and was the case properly submitted in terms of the statute?

I think we will only be able to argue two of those, and I prefer to argue the first two issues, although I am prepared to address all of them.

Regarding the liability question, the legal test which was given the jury is, that jury was told that an employer does not violate the statute if the employer would have disqualified the employee when it did. In other words if Garza had not filed the comp claim. In other words, but for the comp claim Mr. Garza would not have been discharged or disqualified.

I realize that the parties have treated the court to a blizzard of facts in this case, but analytically I think this case falls very comfortably under the absence of control cases. And the no evidence argument can be dispatched really very summarily. In the absence of control cases what you have is a situation where it is unquestioned that an employee has been disciplined or discharged because of a violation of a standing policy. And in that case the CJ made a fairly strong statement by simply saying that it cannot be the case that termination would not have occurred when it did but for the employee's assertion of a compensation claim. In other words its virtually impossible for a retaliatory discharge to have occurred in a situation where the discharge is based on absence of control.

What we have in this case is almost identical, because we have an employee who beginning in 1987 was threatened with termination if he had another accident regardless of fault. Then in 1989 and in 1992, he was also either given or threatened with the precise employment action that was taken in this case, which was disqualification from his outside plant technician's job.

When in 1994 he had the accident that is made the basis of this suit, the precise same discipline was administered as had been threatened as early as 1987. The accident occurred on a Thursday, October 20, and the evidence which has been cited by the plaintiffs, by the CA and by us, is that on that Thursday or the following Friday the supervisors of the employee in question made the decision to essentially invoke the threats that had been made in prior years.

PHILLIPS: Was there any written memorial of that decision contemporaneous with it?

HATCHELL: There is not a written memorial of that decision. The first written memorial that you have of that decision is found in exhibit PX 10 or PX 11, which is the report of the supervisor. It's actually dated Nov. 7. But the interesting thing abut that report is it contains statements to the effect that there had been no injury involved in the case. And all of the testimony from all of the supervisors is, that the decision which shows up in that memorandum had been made on the Thursday or Friday following the accident. And the comp claim was not asserted until the following Monday.

Basically our position is that the wheels were in motion before the employee in this case had knowledge of the compensation claim. And using the CJ's approach in the absence of control cases, we say that it was essentially inexorable that this employment decision was going to be made regardless of knowledge of the compensation claim.

WAINWRIGHT: You referred to your client's driving policy. Is it undisputed that Mr. Garza did not have three unsafe acts while operating a motor vehicle within 3 to 4 months? That's obviously one of the points of contention that's been made that that policy was not violated, although that was part of the discipline that Mr. Garza was taken off his driving abilities at SWB.

HATCHELL: It is undisputed that he was not in violation of the driving policy at the time. But I think it is also undisputed that he was not disqualified because of a violation of the driving policy. He was not disqualified from driving. In effect he was, but he was disqualified from the position of outside plant admission, which peripherally included driving. I think that opposing counsel has done a good job to try to make this appear to be a violation of policy, but unfortunately it fails because that policy is simply inapplicable in these particular circumstances.

That policy states on its face that the employer reserves to excel all rights to discipline regardless of violation of the policy. So 1) he was inapplicable in this case; and 2) it could not be _____.

PHILLIPS: Has this court ever established the evidentiary standards under which we review a punitive damages award?

HATCHELL: I don't think so. Much of the case law regarding the clear and convincing standard has been written after the briefing closed in this case. But I think as the court knows as well as I do that those very excellently crafted opinions ultimately has come to the conclusion that the statement of the law is that what we are looking for in a no evidence of malice context is some evidence from which the jury could reach a firm conviction for malice in this case.

You may remember in 1937, W. St John Garwood wrote an article on a review of factual sufficiency of the evidence, and he came as close as I think as I've ever seen to articulating how a court looks at evidence.

Among the things the court should consider are the following: to what degree is the ultimate fact in this case, malice, dependent on or refuted by inferences from evidence? to what degree are there other reasonable inferences from the same evidence? to what degree is the inference drawn from or rebutted by the shear absence of the evidence rather than positive facts? where intent is the issue, as it is in this case, to what degree is it necessary to interpret intent from other facts? how reasonable is that interpretation? to what degree is the ultimate fact dependent on scientifically, irrefutable or unrebuttable evidence like documents?

I actually believe that if there is a factual dispute underlying or the ultimate fact in a clear and convincing review, how evenly divided that dispute is and how seriously credibility is impugned may actually be a factor for the court to consider. And I realize that the court has held and I think legitimately in many respects based on prior precedent. But J. Garwood in his 1937 article says that the court must come parallelously close to looking at credibility issues in that determination as well.

PHILLIPS: Heretofore we have established a clear and convincing evidentiary review only when mandated by the US constitution or our constitution. And the SC has declined to mandate that, at least under the US constitution, an interview of punitive damages. On the other hand most of the time we do have a clear and convincing standard for the gross negligence. And so this kind of falls into a gray area, because most of the time when we have set up that standard it's because it's constitutionally mandated.

HATCHELL: Of course we may have a Ostenberg(?) v. Peca(?) issue here, because clear and convincing standard was given the jury and nobody has complained about that in this case. I understand your honor's concerns in that regard, but I have briefed this case as if that is the controlling standard. Because it is the standard to which the jury was specifically charged and to which neither party made an objection. And so I have tried in our briefing as best we can to hook on to the court's most recent writings in the parental termination cases, to which I find it is very, very well done opinions which we find some solace. But not the kind of analytical construct by which we measure the clash of evidence to determine what the clear and convincing standard is.

HECHT: Does the Campbell case do you think from the US SC require that we look at the evidence differently than we would in another case?

HATCHELL: If it is not constitutionally mandated, no, I do not think so. I do think that in any case, and I think the court is fairly clear on this, where the clear and convincing standard applies that clearly we're looking at some intermediate level of review that falls between preponderance and beyond a reasonable doubt. In this case the parties have assumed that burden and I assume that it overlays on this particular case.

HECHT: There are two situations. There's the case as in the free speech context where not only do you have a heightened burden to show actual malice but the appellate court is constitutionally obliged to look at the evidence anew. And then you may have another situation

where you have a higher burden, but the court is not under that obligation.

HATCHELL: I think that's true. And I think the issue there, which is I think an extremely sophisticated issue, that it is focused upon how much difference is given to the trier of fact or the jury, how much deference is given to the ability to resolve factual disputes and determine credibility issues. I personally think that the notion of de novo review in a no evidence context is somewhat of a non____, because I always view no evidence to a large measure being a question of de novo review. In other words determining the legal affect of facts that are essentially undisputed or those that we would assume the jury accepted.

So I find myself being somewhat confused by the overlay of de novo. It doesn't help me in my analytical construct to a great extent. But in this particular case I do not - this obviously is not a constitutional mandated de novo review. But I think I have suggested that in any - and it would really be nice if we could have one standard for clear and convincing review, although I understand particularly emanating from Whitney(?) v. Bunton that there may be even a more heightened ___ standard of review in the first amendment cases.

WAINWRIGHT: Still related to that standard on appeal, as you recognize where parental rights are involved, the 1st amendment is involved, we have mandated following substantially the US SC: a review that seeks to find a firm belief or conviction that the TC's findings were true. This case doesn't involve those same kinds of constitutional issues. The only case you cite for the appellate standard is Turner v. KTRK, which involves first amendment constitutional issues. And you cite the higher standard of appellate review in this very convincing evidence context. Explain your justification for doing that if it's more than just having your belief that we should have one standard of appellate review for clear and convincing evidentiary findings.

HATCHELL: My justification for citing that is, because Osterberg v. PECA(?) requires that I assume clear and convincing is the standard, as in this case, I have to look somewhere for a definition of clear and convincing evidence. And I've not seen a definition of clear and convincing that drops below the firm conviction requirement. So that's why I have cited those cases. What I think happens when you have the constitutionally mandated issues is there is some tweaking, as I've indicated to J. Hecht, the deference which is given to the resolution of underlying factual disputes and credibility issues, which I suggest in a case of this nature should be considered.

PHILLIPS: Have you cited J. Garwood's review?

HATCHELL: I have not.

PHILLIPS: Because of the constitutional limitations on our factual review, we have to be very careful in this area apart from a federal mandate.

HATCHELL: Yes. There's no question about that. That's the only discussion though where I have ever seen where a former justice of this court actually analyzes the way the court thinks about

the clash of evidence in deciding issues as factually sufficiency and in this case clear and convincing and no evidence. To me it is very, very important to be able to do that. If you have a testimonial statement verses a document that's a clash and the document wins because it's irrefutable.

That's what I find has been lacking in the articulation of the clear and convincing standards to this point, and it's not this court's fault. It' just that it has not had the opportunity to write on it yet. This overlay of clear and convincing now coming to us through statutes rather than the constitution is new to this court and I think we're all plowing new ground.

SCHNEIDER: Do you see a difference between a standard of review and burden of proof and the relation of those two principles?

HATCHELL: The standard of review I think is always driven by the burden of proof. So yes, I see a - certainly there clearly has to be a difference between the standard of review and the burden of proof to the extent to which you are permitting the fact finder free reign to resolve disputes or resolve credibility questions.

SCHNEIDER: Do you see the burden of proof of being a factual inquiry rather than any legal inquiry?

HATCHELL: A burden of proof to me is always the overlay of law on the facts. It sets the minimum standard to which a party is saddled with the burden of proof must rise. And so it is a legal overlay I think onto the facts.

O'NEILL: Wouldn't you agree that it's more problematic too when you're dealing with an issue like pretext that is only going to be established primarily with circumstantial evidence?

HATCHELL: Absolutely. And that's why I said in the first element that I talked about, to what degree is the ultimate fact dependent or refuted by inferences from evidence. I agree with you entirely.

O'NEILL: Doesn't that further limit our review as opposed to expand it?

HATCHELL: I think that looking back to Mr. J. Jefferson's recent opinion in the King Ranch case, in which he talks about the shear absence of evidence being no evidence. I think you can look at factors like that to determine whether the standard of review has been met or not met and so I don't see it as limiting this court's ability to review. But I do see it as raising a very sophisticated and complicated issue for the court.

* * * * * * * * * *

RESPONDENT

JULIA: For SW Bell to prevail today this court would have to ignore settled law on

preservation of error and waiver requirements on several fronts. You would also have to create a new standard for preservation of charge error where the TC says, Alright counsel. Do you all have any objection to the question I'm going to submit to the jury? And counsel says, No. I have no objection. And yet the TC is supposed to say, You know what counsel. I don't believe you. Because that's what happened in this case.

They would be rewriting the standard for charge preservation. And you would also have to rewrite the standard of review for sufficiency whereby you're allowed to substitute your judgment on the facts and say, You know what SW Bell. I like your version better.

O'NEILL: Do you agree that the clear and convincing burden applies, not as a legal matter, but as a matter that was unobjected to in the charge?

JULIA: Absolutely. It was our burden to produce clear and convincing evidence that SW Bell acted with malice in order for us to recover punitive damages in this case. But I do believe that this court has set out what the standard of review is when reviewing clear and convincing evidence in a malice situation. And I think all we need to do is look at Ft. Worth v. Zimwick(?). And as this court has held we're going to treat the retaliatory actions under the labor code the same as the retaliatory actions under the whistleblower act. And in Zimwick(?) this court said for finding punitive damages we turn to whether there is any evidence that Donaho engaged in his retaliatory conduct with the intent to cause the plaintiff injury or that he carried out his act with a flagrant disregard for their rights or actual awareness that their actions in reasonable probability could result in harm.

I think that that's saying that what the standard is, is we're looking for a scintilla or any evidence to support...

O'NEILL: A firm conviction or belief?

JULIA: Yes. Definitely. Affirmation...

HECHT: Well is that different from no evidence review where you don't have to find something to support a firm conviction?

JULIA: All I can do is look at the cases where we've applied gross negligence for punitive damages findings. And knowing that in those legal sufficiency reviews the court has said, Well we were looking for that scintilla to support clear and convincing evidence and punitive damages. We're going to look at the whole record. Whereas the typical legal sufficiency review in the whistleblower and labor code actions, which was of course then affirmed again by the unanimous finding of this court in Lynn v. Lynn, is that we're only going to look at the evidence and the inferences that tend to support the finding of the jury. And we're going to disregard everything else.

So I think that the standard is different in that you have to look at the entire

record and all of the evidence rather than just the evidence and inferences that support the firm belief of malice. But I do still believe that we're looking for any evidence or a scintilla to support that firm belief.

HECHT: When we're doing a no evidence review of negligence for example all we're looking for is some evidence that somebody who's rational could have concluded negligence. But here you think we have to look at evidence that would not only persuade a rational person, but has to give a firmer belief. It has to be in essence be clear and convincing.

JULIA: Well again all I can do is look at the language that this court wrote in the Zimwick(?) opinion which is we turn to whether there is any evidence. And so I think if we look at the record in this...

HECHT: To support a firm belief is what I'm trying to get you to focus on.

JULIA: Exactly. To support a firm belief. And in this case, I think that for finding punitive damages we look at well, what types of cases are going to rise to the level that we're going to allow a finding of actual malice and we're going to allow punitive damages to be recovered, and we only have to look at Continental Coffee. In Continental Coffee you said, only the most egregious violations of the statute are going to warrant a finding of actual malice and award of punitive damages. And in this case SW Bell not only violated the statute, they did it egregiously.

WAINWRIGHT: I didn't see any citations to any of our opinions in you brief about the standard of review on appeal. Was Zimwick(?) cited there?

JULIA: Cited actually in SW Bell's brief.

WAINWRIGHT: Then what other cases that cite our standard of review of clear and convincing evidence do you agree with? Do you agree that In re JFC also cites the correct standard of review of clear and convincing evidence to appeal? Of course that involves parental rights.

JULIA: I think that points to what is the mistake in Mr. Hatchell's reasoning when he cites Turner, which is the 1st amendment case and trying to say that there's a heightened standard of review for clear and convincing. What they've done is instead of taking it from what have we generally done in gross negligence where we've applied the clear and convincing standard at trial, and say what's our review? They are trying to cite cases where there is a heightened burden such as a termination of parental rights, which is this court has found to be a fundamental constitutional issue. They are citing 1st amendment cases, which this court knows is a....

OWEN: What's the difference? Clear and convincing evidence whether it's legislatively mandated or constitutionally mandated from a logical standpoint why would the review be any different from case to case?

JULIA: I don't know why it would be. I just know what I've read in the cases, and it seems to be that the heightened standard has only been applied in those cases where there was a constitutional mandate, such as 1st amendment cases.

OWEN: Why should there be a difference logically? I mean if you're weighing something, measuring something why would you apply a different standard when clear and convincing evidence is the burden of proof? Why would that change the standard of review on appeal from case to case?

JULIA: Other than the fact that this court has said that we have to look at - apply federal law when we're talking about US constitutional issues or when you've said you have to apply a heightened and different standard when you're talking about fundamental issues. Maybe there should be one standard. But I think in this case regardless of the standard that you apply, whether it's a heightened standard or a no evidence scintilla standard, you're still going to find clear and convincing evidence that SW Bell acted with malice.

PHILLIPS: As far as SW Bell being legally responsible for these damages, you concede you have to live by the charge the jury was given on actions of a _____, the legal standards by which the corporation can be charged with the conduct of its actions.

JULIA: Of course, I agree that we are bound by what we put in the charge. And maybe we made a mistake and we should have gone with a less erroneous standard, which of course there are less erroneous definitions of vice principal. But we're stuck with what was in there. But I think what's interesting about that point, and obviously it's something that Texas Assoc. of Business is very concerned about because it was the entire subject of their amicus to this court, and say, Please, Please, we can't hold people responsible for acts of actual malice if they didn't prove managerial agent. But that particular issue is not right for this court's review, because it was never, never raised in the TC. They never made a complaint that there was no evidence of managerial agent. Nor was it raised at the 13th CA. Never, which is why the 13th CA's opinion is silent on the issue of what evidence there was to support managerial agency, because SW Bell didn't raise it at that court, and, therefore, it's not right for this court to consider.

Mr. Hatchell devoted substantial number of pages to that issue in his brief, and made very eloquent arguments. But Mr. Hatchell was not the attorney that was involved at the 13th CA, and that attorney wasn't involved at the TC level. And so I think that's why we have to go back to the first issue that I said is presented before this court, which is they are asking for a new law on preservation and waiver that's just incredible.

Typically what do we have in law, in cases? You have the upside down pyramid. You go to your case, you go to your trial, and you throw in every objection you can think of. And then if you lose you will narrow it down for you intermediate appeal and you say, Okay, what really was the harmful error, or what would entitle us to another shot at it. And you narrow it down and make your argument a little bit more succinct and more direct, and then well if you lose

at that level, then you come before this court and you narrow it down further and fine tune those arguments so that this court can have the opportunity to really decide what's the issue is in the case.

As J. Wainwright wrote this summer in Emory BLD, accuracy and judicial decision making is very important as far as preservation of error, because that way the lower courts have had the opportunity to consider and rule, thereby, giving this court the benefit of other judicial review. And in this case the opposite is happening. They started out at the TC with Mr. Stigert(?) making no objections. They never objected to the pleadings. They never filed special exceptions. He never objected to the evidence that was admitted on disqualification or retaliatory disqualification or taking him off of driving. He didn't object to the charge - not only did he not object, the court asked him, Do you have any objections to question 1 on liability? And his answer was, No.

HECHT: Mr. Hatchell says that's in the context of just having submitted the plea charge and have the judge say, Well, we don't need to go through this issue by issue, and I'm not going to give it. Here's my charge.

JULIA: I think that that's a distortion of what happened. In every case you go in and one side gives their version of the charge, and the other side gives their version of the charge. Then the court says, Alright. I'm going to go either with yours or with yours, or I'm going to do my own. The court should be able to rely on what the attorney had said last. Mr. Stiver in this case never made any objection. Never made the court aware. And as you said in the Payne decision in 1992 there should be but one test for determining whether or not they've preserved error in the charge, and that is, was the TC aware of the complaint.

HECHT: The problem here is, looking back it's kind of hard to see - I mean when a trial judge says I'm not going to give you what you want. Now do you still have any objection. It's a bold soul who says, Yes. I renew all of my objections one by one again.

JULIA: Actually that's not what happened in this court, because what happened in this court, the judge didn't say I'm not going to give you what you want. All my Stiver said is I'm objection because you didn't include my instruction on the liability question. And the court said, Well I included it in my question. Now do you have any objection to my question? And he said, No.

Look at Payne. How was the court aware that there was a complaint? Well one side wanted it to be a premises defect, and the other side wanted it to be a special defect. That was what the case was about. That was the question of law before the court. The court was obviously aware. And also in Payne, the lawyer objected. Might have made the wrong objection, but he still objected and said, I think the question you are submitting is wrong.

HECHT: Do you think disqualification is different from discrimination?

JULIA: No. I believe that disqualification is the form of discrimination that Mr. Garza

suffered in this case. And that goes to the issue of valid verses invalid theory. Again, I have to premise what I am going to say about it. They waived it because they didn't raise the issue at trial at all. And they didn't give the TC the opportunity to correct any error if there was. But let's look at whether or not this was a proper thing to be put in before the jury. This issue of disqualification.

The statue says that you may not discharge or in any other manner discriminate against an employee for filing a comp claim. The clear language says that discharge is one of the types of discrimination that an employee can face, because obviously discharge on its own is not some evil thing. We live in an at will state. You can fire anybody for any reason or no reason. But if you fire them in retaliation for filing a comp claim you've violated §451.001 of the labor code.

As this court has said when people have complained about broad submission where you list all the various alleged fraudulent statements that the defendant has made, this court has said there's nothing wrong with that. As a matter of fact in Scott v. Atchison separate questions are not required, limitation may be accomplished very simply by including in a single issue all of the alleged negligent acts.

Just like in Ft. Worth v. Zinwick(?), the court was charged pay. Did they violate whistleblower by sending them to work security at the courthouse? or failing to give him his promotion? or failing to make him a deputy? Sending somebody to work security at the courthouse in and of itself is certainly not some evil act. But it is a violation of the whistleblower act. And this court found that there was sufficient evidence in that case to show that retaliatory action.

The same thing in this case. We could have gone down the line. We could have said, alright. Did they violate 451 by discharging him, disqualifying him from driving and making him work as the janitor? None of those are invalid theories. They are all simply stating the alleged specific retaliatory actions of SW Bell under the same legal theory of 451.

Again, Spencer v. Eagle, which is another case that SW Bell has cited in their brief, Eagle Star objected to the charge. And the problem in that case was that the insurance code under which they were suing said that you can only maintain a cause of action under specifically enumerated subsections of this chapter. Well the labor code doesn't hold us to that. The labor code says, you can file your cause of action if they discharge, or in any other manner discriminate against the employee for filing a worker's comp claim.

Mr. Hatchell in his argument today talked a lot about the evidence of the violation. And his version of why there was no evidence of the violation. And he says that the absence of control cases apply. And I believe the case he was talking about was the one where there was a well settled policy of the company that if you're gone for more than 6 months, then you are going to lose your job. And in that case the plaintiff was gone for longer than 6 months and they uniformly applied the policy that they had and they fired him from his job. And there was no violation of the statute.

In this case, we did not have adherence to well stated policies. He says. Alright, well we should win because we just meated out the precise same discipline that was threatened back in 1987 and again in 1992. But that's not true. In those case the discipline that was threatened was that he was going to be taken off the payroll. That he was going to be fired. And each time one of those threats...

HECHT: Well then what happened was better.

JULIA: No.

HECHT: This was worse than being fired.

JULIA: This was worse than being fired. And it goes to he malice. As the testimony was by disqualifying him from driving, and they just didn't disqualify him from outside work, because he said fine, then let me go back to the engineering department where I worked before. I will work as a _____. That's an inside job. So I'm no longer an outside plant technician. And all I have to do is maybe drive a Ford Escort from location to location. And SW Bell said, oh, no, no, no. We're not going to let you drive the Ford Escort even though you did it for 2-1/2 years before without incident or accident or any safety violations. Because you haven't just been disqualified from outside plant work. You've been disqualified from driving. And as a 30 plus year employee of SW Bell testified, in over 700 grievance proceedings that they had been in and in all of their years at SW Bell they had never seen an employee disqualified from driving the way David Garza was. And that goes again against disparate treatment. It goes again to one of the standards that was enumerated in Continental Coffee for how to prove causation.

Also the TC was able to hear the disparate treatment when they compared Louie Hernandez's file, that was his partner, to his file. And there were 12 violations of Louie Hernandez. They had photographs of him out there with no hard hat, without his belt on, hauling trailers that he wasn't supposed to without a hitch. They admitted that he had dropped cables with heavy metal hooks on them, that was clearly a safety violation. He told David Garza you ought to get a lawyer, and if this guy makes any issue with you be prepared to call security. They were able to compare the disparate treatment. Because what happened to his partner as a result of all of those egregious safety violations? Nothing. He didn't even have him listed as unsafe on his yearly review. The partner came out unscathed and yet David Garza was disqualified from driving.

WAINWRIGHT: Let's assume that the managerial agent, vice principal issue was preserved. Is there any evidence that the general manager, for instance Wayne Rider had authority to hire as well as fire in the record?

JULIA: It certainly was not proved by direct evidence. And there's no case that requires that you prove the ability to hire, fire and engage in nondelegable duties by direct evidence. You don't have to put them on the stand and say, Isn't it true you have the ability to hire? and isn't it true you have the ability to fire? Because just like in discrimination cases generally as this court

has said and as the 7th circuit said, you're rarely going to prove those by direct evidence.

WAINWRIGHT: And Mr. Rider did say that the citation from the record and the briefing is accurate, that he ultimately made the decision to terminate Mr. Garza?

JULIA: Yes.

WAINWRIGHT: What about evidence of the other two prong?

JULIA: The fact that he said that he had the ability to hire David and give him work as an outside contractor. The fact that he said that in his department the 500 people working for him, the fact that...

WAINWRIGHT: The first point you mentioned where he said Mr. Rider said he had the ability to hire him as an outside contractor and give him duties. Where is that in the record?

JULIA: I can submit it in a letter brief. And it goes to the whole issue of hey, if they really were firing him or disqualifying him from driving as a result of safety violation, then why would tell him that he could and should do exactly the same work for SW Bell just in an independent contractor status.

The retaliation in this case was swift. It was clear and egregious. And the findings of the 12 jurors, the TC and the 3 CA justices should be affirmed.

* * * * * * * * * *

REBUTTAL

HATCHELL: I have four points for rebuttal. First, when counsel speaks about the clear and convincing standard by describing it as a hunt for a scintilla of evidence that leads to a firm conviction. It seems to me that that's a legal non_____. Because scintilla is a quantum requirement and clear and convincing is a quantum requirement, I believe J. Hecht's most recent opinion discussed this issue. So I don't think that that is the standard.

O'NEILL: I guess where I get confused is doesn't the jury word "pretext" almost implies some sort of malice?

HATCHELL: Yes.

O'NEILL: If you're putting forth something as a pretextural matter and you're building a file as a pretext for what you're really doing, doesn't that just sort of subsume the concept of malice in and of itself?

HATCHELL: It may well. The cases actually discuss this to some extent. And of course

I think you understand that what we're looking for in the punitive damage context is a culpability that is greater than that which leads to ordinary liability. So to the extent that pretext implies a level of malice what we are looking for then insofar as evidence to sustain the punitive damage award is something that's even greater than that. And we've probably not done any better than what was given here, and that is the actual malice ill will and spite and what have you. But it has to emanate from some sort of animus that is greater than that animus which...

O'NEILL: How do you define that though. If you've got a record of what the plaintiff claims in this case of going back and fabricating a review after the accident that had never been gone into before of building a case that didn't exist by manipulating data – how do you separate pretext from super pretext from really bad pretext?

HATCHELL: I think it's very difficult. And I'm not sure that I can get much better than you sort of know it when you see it. Because there certainly is no legal standard by which that can be done. But certainly, I think if what were shown in this record is what you are suggesting, and that is, a conscious building of a file to justify an end result, I would say that that probably is some evidence of actual malice. But that's just not what occurred in this case.

The building of the record - this record of 10 accidents had already been compiled and was type written before this incident ever occurred. So I reject the notion that you can classify this entire investigation as entirely pretextural. They've never actually made the argument that this is pretextural in nature.

But I think you raise a very, very good question. Where is the dividing line as to the animus necessary for ordinary liability and that which is necessary for punitive damages. Again, we use Clements v. Wither's standard in this case and it serves well I think, that it has to be a particularly egregious and pointed type of animus.

O'NEILL: For example then saying someone will be disciplined before the investigation is done wouldn't get you there?

HATCHELL: No. That would not get there at all. And particularly in this context because that is precisely the point that we have tried to make. The statement that you're talking about is the document that was probably signed on Nov. 6, and the decision to discipline this employee had been made 10 days earlier. So the statement that you're talking about is totally consistent with what our view of the factual scenario is. And I think in that particular context rather than just kind of wrenching it out of context and putting it up, in context it is a perfectly legitimate statement, that I have made the decision based upon the threat to fellow employees and the public, that this employee is going to be disciplined no matter what anybody says.

PHILLIPS: Will you respond to the argument that whatever your points may be about managerial review of not established in the standard that set out for themselves in the charge that that was waived at that point not being brought up in the CA?

HATCHELL: We have consistently in this case preserved and argued a no evidence point. In J. Spector's decision in Rocky Mountain Helicopter, she espoused a rule that I have thought has been the rule all along, and that is that a no evidence review is simply a means of looking at what is and what is not evidence. And she said in that case that you can take any legal argument by which you can characterize evidence as non probative under a blanket or a generic no evidence standard. And so by simply citing the fact that we have no evidence of conduct by a managerial agent in this case, I am simply saying it seems to me that there is no evidence of that type of conduct that is necessary to support the punitive damage award.

That is the lens through which the court looks at the evidence to determine whether it is probative or non probative.

HECHT: What were your other three points.

HATCHELL: The other point was what does the charge do wrong in this case? Counsel makes the argument, and I think it's probably factually correct, disqualification was a form of discrimination. The problem with using disqualification as a standard by which the jury could find liability is that it takes away the legal lens through which the jury looks at the conduct. You would not for example have a case in an ordinary automobile accident in which you said, did defendant fail to turn to the right or was he otherwise negligent in operating his vehicle? The first of those simply takes away the reasonable Mann standard, and I think that's what was done in this case.