ORAL ARGUMENT – 11/12/03
03-0179
KANSAS CITY SOUTHERN INDUSTRIES

SMITH: In Texas guardian ad litem cannot execute an affidavit and sign a settlement agreement for a minor when that minor has not been interviewed by the ad litem, when that minor's whereabouts are unknown at the time of the settlement and at the time the affidavit was executed, and if that minor's very existence is an unknown. In permitting the guardian ad litem to take those acts, the TC failed to analyze and apply the law correctly. She approved an illegal fiction, and that legal fiction permitted the guardian ad litem to exceed the authority that he/she have in the State of Texas.

WAINWRIGHT: Was there ever an attorney ad litem appointed to try to find the unlocated and missing minors?

SMITH: Not that I know of. As far as I know Mr. J.P. Smith was the guardian ad litem that was appointed, and he is the only ad litem, guardian or attorney otherwise that has been appointed in this case.

I would like to clarify that we're not here today complaining in any way of the conduct of plaintiff's counsel Mr. Schneider and Mr. Grady. They took over a case that was completely unmanageable. They got it organized. They spent countless hours getting this thing ready for mediation. They were professional. They were aggressive. They were fair. They were very good attorneys to work with. The same with Mr. Smith, the guardian ad litem. We're not alleging any type of bad faith conduct or anything unethical on their part. They were very clear with the court when this issue came up. They argue, and effectively to the TC, that the guardian ad litem has this authority in the State of Texas. We argue differently and the TC agreed with them.

PHILLIPS: One of these missing minors shows up and wants more than the $74 that they were allotted. Are they bound by this judgment in your opinion, or is it void as to them?

SMITH: We have taken the position and in looking at the law, if they show up the judgment is binding on them. They can go down to the registry of the court and get their $74, their portion from the KCSI. But they can get their total lump sump settlement. The second part, if they don't like that settlement where do they go? Well if you look at the Grunewald opinion, I would believe that they might have a private cause of action against the ad litem for breach of fiduciary duty.

PHILLIPS: But if the trial judge had no authority to appoint the ad litem for them and the ad litem exceeded his authority in approving settlement, how come this missing, unrepresented, unknown client is bound under the judgment?

SMITH: If they do exist - I mean there is a question of whether or not these people actually exist. If they are there, I think in looking at the law and applying the law, that if they show up the affidavit is valid. It would be similar to a parent challenging the validity of the affidavit or the validity of the settlement. And again that falls back to they would have no standing to complain about it.

PHILLIPS: Then how are you irreparably harmed? You've bought your peace. Whether they spend it or not, I don't see is any concern of yours. If you've agreed to a judgment and now they are bound by it, then declare victory and go home.

SMITH: Well I think that's the position the other three defendants took. My client, I respectfully argue, thinks that although they may have bought their peace to those that have come forward and taken their money, and the vast majority of those have, they gave their money, they paid $300,000 with the understanding that there were 11,000 plaintiffs. That turned out not to be the case. We're still missing almost 300 people. That adds up to $64,000. Although they may have bought their peace for those we could find, they have been irreparably harmed in that they gave this money for something that is no longer there.

PHILLIPS: But how come that can't be appealed one day? Either get a severance and appeal it now, or try all these adults and get that out of the way, and then complain that you'd like your money back.

SMITH: I think you have to look at the specific circumstances of this case. This case involved thousands of plaintiffs in the Cashmere neighborhood in Houston, Texas. There was a companion case that broke off from the Douglas matter that was nonsuited here in Harris County, it was refiled in Jefferson County on the eve of limitations. That case was called to trial. The parties settled before trial. This case continued. At one time it had 20 different plaintiff's attorneys. When the present counsel got the thing organized, got it managed, my client had not been sued by the minors. We had only been sued by one intervener, Arthur Sledge, and Mrs. Sledge's suit was the only suit pending against the KCSI at the time of the settlement.

What we had was the threat of all these minors coming forward who did not have limitations issues and filing suit. And that's what we settled. When that settlement was approved, Judge Jamison still had before her viable and live claims against the Union Pacific and Nalco Chemical Co. Those claims were still pending. There were some logistical issues in those claims in that Mr. Snyder and Mr. Grady did not represent all of the plaintiffs that still had claims against UP and Nalco. So there was a very good question back last Fall when this all came forward is whether or not - when would a final judgment ever be entered?

And the interlocutory judgment that we had before us adjudicated the rights of KCSI, but was not a final judgment. And in looking at this court, what this court said in Mid America, the petition for writ of mandamus was appropriate because we did not have an adequate remedy at law. If we waited, and we had no idea at that time how long it would be before there was

a final judgment - I mean we've lost the use of our money for that much longer period of time. That's why...

HECHT: What's an interlocutory final judgment?

SMITH: Well it was final to some parties. It adjudicated the rights of some parties. It adjudicated the rights of the minors, but it was still interlocutory. Because as I understood the situation and none of these claims were pending against my client, you still had a bulk of adult claimants who had filed lawsuits and served Nalco Chem. Co. and the Union Pacific RR. And those claims were still pending. Some of those claims, I believe were being handled by Mr. Grady and Mr. Schneider, and the rest of those claims were being handled by two attorneys who we knew in name only. They had attended part of the mediation and left without ever making an announcement of appearance. They had come to two different hearings before J. Jamison without announcing and without making an appearance and left during those hearings. So we knew we had this mystery group of plaintiffs somewhere.

What you see in the situation we have with the minor plaintiffs, tracking all of these people was an impossibility. Especially with the split off between the two suits.

HECHT: How can a guardian or anybody settle a claim for somebody they can't even find?

SMITH: That's the issue we have. We say that he or she cannot settle that claim if he/she cannot find that minor.

HECHT: Then it shouldn't be res judicata. I mean they should be out, but they shouldn't be bound by the settlement or a judgment if they don't even know it's happening.

SMITH: What seemed to occur and what we thought would occur is as these people show up they go and they get an order for J. Jamison permitting them to withdraw their funds from the registry of the court. They go down to the district clerk, they withdraw their funds.

HECHT: Has that been happening?

SMITH: That has happened, and that happened at the time that the real parties filed their brief on the merits. They filed affidavits of approximately 103 additional minors that have appeared since we perfected the petition for writ of mandamus. That drops the number down from 381 to approximately 285 being the number that we're dealing with today as I understand it.

And my client has taken somewhat of a dangerous position in this case. Because if this court grants us the relief and returns this money, I don't think there is going to be issue or claim precluded from turning around later on down the road if they want to and file suit against KCSI or KCSR. And that's not a position I'm advocating, but that is the result of the legal

issue before the court today. And at that time we would assert our defenses that we had in the underlying case in the first place. We did not believe that we were a tort-feasor. The car that was involved in this scene was accidentally given to us by another RR. We immediately gave it back. That was kind of our defense.

WAINWRIGHT: In your reply brief, you indicated that 3 or 4 of the minors were born 1 year after the accident occurred. Are those 3 or 4 part of the 285, or were they part of the 381?

SMITH: We took the position when we looked at those affidavits that they were never a part of the original 381 minors. They have birth dates that occurred well over 1 year after the accident in question. We don't know where they came from. They are not on any plaintiff chart that we maintained either in the Douglas action or in the West action. For purposes of this argument we conceded that we just go ahead and knock them off the 381 and agree with the real parties in interest that the number of missing minors is 285.

At some point in time if our argument is accepted a determination is going to have to be made whether it is a determination of looking at the record, or just setting forth an order with a date that says after this date if minors have not appeared before the registry of the court to get their money back, the KCSI portion of that - KCSI is the only defendant asking this - would get their portion for that number back.

I can't figure out how to do it otherwise, because the number has been and remains fuzzy. Several of these plaintiffs were plaintiffs in the West case. We know of several of the plaintiffs, even looking back in the adult plaintiffs who have been to the well two and three times. They've come in under different names, or their situation has changed with their address, or they have a different social security number. And the number of people that brought suit is just so great that it was almost an impossible task in getting this thing organized and settled.

PHILLIPS: Could you explain to me once again what effort you made to get this judgment final as to all the people who have had their money and had relief, or alternatively final as to these judgments so that this could go up through the regular appellate channels and not through an attempt at mandamus?

SMITH: We didn't. In looking at the law we determined that the most prudent and most judicious in our opinion manner in which to handle this was through a petition for writ of mandamus. We had already paid our money. Our money had been paid over 6 months previously. We have lost the use of that money.

JEFFERSON: What steps could you take to make this judgment final so it could be subject to appeal?

SMITH: I think we could have attempted to get the thing severed out and then have a final appealable judgment at that time.

HECHT: What severed out?

SMITH: Once the minors were settled and Ms. Sledge, and we paid to settle her claim, the KCSI was done along with Illinois Central RR. Those were the only live claims against us. So the interlocutory judgment that J. Jamison signed on Oct. 15 effectively adjudicated the rights of both the KCSI and the Illinois Central RR. We looked at the possibility of asking J. Jamison to sever out that portion of the judgment and make that a final judgment, because it would dispose of all the claims and all the parties involved relating to the minors. In reading the case law and what is and what is not an adequate remedy at law, we made the determination that it was the more prudent action to just go ahead and file a petition for writ of mandamus complaining of the excessive acts of the guardian ad litem in this case. And the legal fiction that was permitted by the TC in misanalyzing and misapplying the law in this case.

O'NEILL: But that would be abuse of discretion, but you also have to show an inadequate remedy by appeal. And we repeatedly said expense and delay is not enough.

SMITH: But it is part of it. And if you look at the MidAmerican case, the court in 1995 says if a normal appeal is too burdensome and the delay is too long, then - and I believe this is in the Walker case...

O'NEILL: And the burdensome here would be did you say $64,000 that you are deprived of for a period of time?

SMITH: Yes.

O'NEILL: And you could have arguably gotten a severance pretty immediately and taking it right up. So the delay would be insignificant really.

SMITH: I'm not sure how easy - everything in this case was so difficult. I'm not sure that a severance would have been as easy in this case as a severance normally would be. I have severed a case before...

O'NEILL: But it would be your burden to show that somehow you couldn't get it severed easily.

SMITH: Correct. I think what we are looking at in this case in analyzing whether or not we had an adequate remedy at law, is which was the most efficient and most prudent way to do it accompanied with an abuse of discretion, which we argue the TC committed an abuse of discretion on this legal question. We're not arguing about the underlying factual issues whether or not the ad litem breached the fiduciary duty or followed the dictates of the Texas Family Code. We have an overall legal question that we think there was an abuse of discretion there. Then you analyze whether or not we had an adequate remedy at law. MidAmerican clearly says that an order that has the effect of adjudicating the rights of a party, and that is order is not immediately appealable, then

you don't have an adequate remedy by appeal and you may exercise extraordinary petition for writ of mandamus.

I don't know in trying to answer your question honestly how easily it would have been to get a severance of this case. We thought we had a pretty clear, pretty narrow legal issue that could very quickly be brought up through the CA by mandamus action and that it was appropriate for mandamus consideration without getting the severance and taking it up through the normal avenue of appeal.

SCHNEIDER: Is $64,000 what we're talking about?

SMITH: Yes. The number we know is $300,000.

SCHNEIDER: In other words you would rather have the $64,000 back rather than taking the chance after all the organization and planning they've done to settle this case, you would rather take your $64,000 back than to stand a chance of maybe getting this case resolved and getting this case basically taken care of itself. Letting J. Jamison get this case off the docket.

SMITH: Yes. That's the risk that KCSI is willing to take. They thought they bargained for X. They found out later that that was not the case. It added up to a substantial amount of money. I believe real parties in interest have referred to it as a meager settlement. Individually it may be somewhat meager. I think $75 isn't meager. But when you multiply it it comes out to $64,000, and KCSI would rather have the money back and run the risk of defending these suits later on if in fact they are ever brought and provide the peace right now.

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REAL PARTIES

GRADY: These children are poor. Most of them at the time that the case was brought resided in the 5th ward here in Houston. They lack permanent addresses some of them. Some of them are somewhat migratory with their parents. And as the ad litem said on more than one occasion in his comments to the TC, that these children are part of a highly mobile population. So obtaining them and getting them at any particular time may be difficult.

This case really involves three issues involving a guardian ad litem appointed under rule 173 of the TRCP. It deals with the purpose of a guardian ad litem, the power of a guardian ad litem and the duties of the guardian ad litem. Because although relator wants to say that their complaint here is with the TC, with J. Jamison, their complaint is really with the guardian ad litem J. P. Smith.

Let's look first at the purpose of a guardian ad litem which this case is not found in our brief because it was decided by this very court on July 3, the day before our glorious holiday of this year. Approximately 4 months ago in Roberts v. Williams, CJ Phillips writing on

behalf of a 9-0 court on this issue stated that a guardian ad litem does not serve for the benefit of all parties. A guardian ad litem is appointed to protect the child's interest. The child and the child only.

HECHT: How can you protect the child if you can't find the child? Doesn't even know who the child is for sure.

GRADY: That is a valid and a good question. My answer would be the same way that the legislature on at least 3 different occasions has indicated that a guardian ad litem protects those people whose whereabouts were unknown. In §64.102(b) of the Civ. Prac. & Rem. Code, the legislature when appointing a guardian ad litem for someone who may have a mineral interest stated that the court may appoint a guardian ad litem from missing person if the court determines the appointment is in the best interest of the...

O'NEILL: Isn't that an attorney ad litem which is a totally different hat?

GRADY: An attorney ad litem does wear a completely different hat than a guardian ad litem.

O'NEILL: An attorney at litem is to find someone who's missing as opposed to protecting the interests of someone who is there. Isn't that the distinction?

GRADY: Yes. I believe that is correct. The second thing from the legislature, the second law from the legislature probably makes a little more sense than the receiver for a mineral interest. And that is the creation of a trust. Under the Texas Property Code, the Texas Trust Code that says the court may appoint (this is specific language from the legislature) a guardian ad litem to represent the interest of a minor, an incapacitated person unborn or unascertained person or person who's identity or address is unknown.

So a guardian ad litem can be appointed to represent someone whose whereabouts are unknown if its for purposes of a trust as well as determining heir ship under the probate code. Probate Code §53 says, that it appears to the court that there are or may be living heirs whose names and whereabouts are unknown the court may in its discretion appoint a guardian ad litem to represent that person's interest.

HECHT: So your position is that this judgment is final as to these 285 or however many children there are that have not shown up?

GRADY: Absolutely.

HECHT: So if they come in and they've got serious injuries that's just too bad. I mean they can sue the guardian ad litem, I guess. Probably not get very much there. So their claims are just gone.

GRADY: Yes. Their claims would be gone under that scenario.

HECHT: How can that be justified? That you could settle somebody's claims for a small amount of money and you don't even know whether they are seriously injured, not seriously injured, or even where they are.

GRADY: I would agree with that if that was the case in this case. But it's not. Because the evidence in this case indicates and looking at that first element under the Bird case out of Dallas, which is the ad litem should look at the damages suffered by the minors. This case could be best termed as a good liability, bad damage case. That's what we call an acute exposure minor injury case. And all the evidence in this case indicates 731 parental affidavits that were presented to the TC, as well as 381 affidavits from the guardian ad litem who he had seen over 2,000 children, that with regard to this particular case every minor with a claim as a result of this spill recovered from the temporary effects of the acrilimide(?) that they inhaled. There was no permanent injury, and that there were no ongoing symptoms.

WAINWRIGHT: Now how did the guardian ad litem conclude that as to the 381 unlocated minors? Was that from reviewing records?

GRADY: Reviewing the individual information that we had on each one of those people.

WAINWRIGHT: Now the guardian ad litem I remember reading in the briefing, it's alleged that he indicated that at some point in time he probably saw most or maybe all of these minors. Did he say for the 381 in those individual affidavits that he prepared that he had seen all of those minors, interviewed all those? He couldn't say that for sure?

GRADY: No. He could not say that for sure. There's nowhere in those 381 affidavits that he says that he saw each one of these children. But he did say as you pointed out that he had probably at one time or another seen each one of these minors and that's because he was the ad litem, not only in the Douglas case, but in the West case. So he had control and saw over 2,000 children in this case.

WAINWRIGHT: How current were the records he looked at? The point again is if these records stopped at a certain point in time there is some latent injury, latent condition these children suffered, they showed up later with some very serious injuries. Under your approach they would be bound to $74?

GRADY: They would. But in this case there is no evidence of any latent injuries that acrilimide(?) the chemical at issue here has ever caused any person, adult or child. The ad litem made the decision for these 381 minors four years after this accident happened. And during that four year period after dealing with 2,000 different minors came to the conclusion that not only had a particular group of them not suffered any ongoing symptoms or long term effects, there was no

evidence that even one of them did. And that also applies to the adults in this case, which is the very reason that this case when it was resolved why it was in the best interest of the children to settle this case.

One of the reasons it was in the best interest to settle and the reason that this settlement was adequate for them was because of the low offers made by each defendant, the low offer being the defendant's last offer. The ad litem described that at the TC as being that decision to accept that small offer as basically being a no brainer. That he could get something for them or nothing for them. So that decision for him was very easy. In fact his exact words were "simply not logical to argue that the relatively small amounts of money being paid to these minors are not in their best interest."

HECHT: It just seems to me that that cuts both ways. If it's not very much money why not just split the amount and if they show up some day and they want to sue then they can, and if they don't they don't. If it's not very much then I don't understand why it's important to settle the claims of people you can't find.

GRADY: Because they made the offer to each one of these minors. And someone with authority, that being the guardian ad litem, looked at this and asked himself the question, is this offer ever going to come back? And based upon the circumstances in the case...

HECHT: Is it true that at the time the offer was made everybody thought all of the children would show up?

GRADY: I don't know the answer to that question. I would think that if that were the assumption that they would have put that in the agreement that they drafted and sent to us. None of the other three defendants ever asked for any money back, and none of the three defendants put that particular provision what you're referencing in their agreement, and neither did relator.

HECHT: Do you anticipate that the money from the other settlements is just going to sit in the registry of the court until somebody shows up or they don't?

GRADY: No. I believe that once the children turn 18 years of age what's going to happen is what has been happening: they are going to go down and pick up their money. We ran into a lot of problems with some of these minor's parents who wanted the money for themselves and said if we're only getting $700 - $800 then I want that money now to go buy gym equipment for kid or for whatever the reason they wanted the money. And to protect the child against that, the money was put into the registry of the court. So we were also dealing with people who when you would send them a letter and say that there's been an offer made to your child, we need to meet with you, some of the people wouldn't respond because they were fearful that that was the local government's way of collecting on traffic tickets.

So we ran into numerous problems in getting some of these parents to

participate.

SCHNEIDER: It's your opinion this judgment is final?

GRADY: Yes. It's final as to the minors.

SCHNEIDER: It hasn't been severed.

GRADY: It has not been severed.

SCHNEIDER: It looks like to me the order says its rendered as to the adults but didn't render as to these 381 people.

GRADY: I may have misunderstood what you said. When we presented the interlocutory final judgment to the court, that was only as it applied to the minor cases. All of the adult cases that were settled were nonsuited. And the reason that it was interlocutory was because there were approximately 120 adult claims of people that we couldn't locate as well. And through the course of diligence during the course of this appeal that number dwindled to 47. So we have found additional adults.

We didn't reach out and start that search for what they termed these missing minors because we thought someone with authority had already accepted the money.

SCHNEIDER: Factually though about what the judge signed. There is nothing in the record indicating this is a final judgment other than the words interlocutory final judgment. The judge didn't render on that agreement?

GRADY: There is a provision in the interlocutory final judgment that says that the court intends to enter final judgment once the remaining adult cases have been resolved either by way of dismissal with prejudice if they don't come forward for trial. That would be the way that they would be disposed of. And at that time, I think that's when the court would enter final judgment. As you well know, you can't have two final judgments in a case.

JEFFERSON: If we were to hold that the judgment was final as to the missing minors in this case, and you say there's no harm done because these are insignificant claims generally, the monetary amount is not that significant, what would be the effect of a holding that says a judgment is final in a case where those claims could be significant where serious injuries are later brought by the minors and they are attempting to recover millions of dollars of damages for the conduct of the defendant? If we were to hold that they are out in this case, the judgment is preclusive in this case, why wouldn't it be in that case and, if it is, why would that be good principle for us to establish?

GRADY: I think in the scenario that you pose that it could be a problem if the kids later come back and say this settlement was inappropriate.

JEFFERSON: But it would be a strange rule to alter the res judicata effect of the final judgment depending on factual circumstances that might later arise.

GRADY: And I think that that's why it's best left to the trial courts in appointing a guardian ad litem and in viewing the circumstances as to what is in the best interest of the child. The trial judge is in the best position to determine if there's been enough done to satisfy that best interest determination to give that judgment conclusive effect in the future.

JEFFERSON: Just subject to abuse of discretion review?

GRADY: Yes. I think that that has worked in this state. It's appropriate in this state to give the trial judges the discretion to determine if enough has been done to meet the best interest of the child standard.

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SCHNEIDER: I wanted to address J. Hecht's question, because it's a question that I've asked myself over and over while preparing for this case. How can a guardian ad litem settle a claim for someone that he can't find?

I think that there has been a misstatement or a misreading of the status of these 285 minors. These 285 minors aren't in a category of being missing or their whereabouts unknown. In this population of 285 minors there are many children whose parents simply refused to sign the affidavit because they wanted to get the money for themselves. They would come to the town meetings that we hosted and said, I need that money for food, or I need it for a soccer uniform. And the ad litem got up and said, I'm approving all of these settlements. I appreciate and I will listen to your objection, but the offers are in the best interest of the children.

There were parents who simply refused to participate because they were afraid of the proceeding. They thought that it was some official proceeding where they could somehow get in trouble.

HECHT: That all strikes me as making it all the more important to find the minor. If you can't depend upon the parents to be looking out for the minor, how can the guardian look out for them if he doesn't see them or talk with them or make contact with them?

SCHNEIDER: The guardian becomes parens patriae. The parent of the country. He then has that very important duty to do what's right for that child.

HECHT: I agree with you. I just don't see how you can if you don't know who it is. If this were an adult and the attorney came into court and said, Your honor we would like to accept this settlement. Of course I can't find my client, but I'm sure if my client were here he would want to settle on this basis. It looks to me like somebody would file a rule 12 motion and say, maybe this

is a good settlement and we would like to get the case over with, but we can't deal with an attorney who doesn't have a client.

SCHNEIDER: Quite possibly in the case of an adult. But in the case of a minor, the Byrd v. Woodruff case out of Dallas in 1994 where this court denied writ said two very important things that address your question. That the guardian ad litem is empowered to make decisions for and act on behalf of the minor, and the guardian ad litem (and this is the key language) stands in the place of and represents the interests of the minor.

I read an article actually that another justice on the panel wrote about oral argument in front of the SC, and he said, you better be ready to tell us what you're rule of law is, you better know it, and you better write it down, and you better memorize it. And the rule of law is simply that out of the Berg case, that the guardian ad litem should have that power to make decisions for and act on behalf of the child and stand in that child's place...

O'NEILL: There's one thing I'm confused about. There seems to be a disconnect here. We seem to be arguing about whether these children have never been seen and no one knows who they are verses what appears to me to be the language of these individual affidavits that seem to imply that the minor has been talked to, there's been a questionnaire prepared. Was there a questionnaire for each minor?

SCHNEIDER: Yes.

O'NEILL: And so the specific medical symptoms were asked about. There were none. It was determined there were no medical bills. It's not like they can't be found. They've been found. They've been questioned. The ad litem looked at those questionnaires and determined no permanent injury. And so I'm a little bit confused on this - we don't know who or where they are argument.

SCHNEIDER: You're absolutely right. At the time these clients were signed up understand that our law firm didn't sign them up on powers of attorney. They were referred to us by lawyers that did. And the requirements that we had when we took over the case was that you need to have a signed power of attorney from the guardian of the child. You needed to have a signed medical authorization from the guardian of the child. We needed to have all medical records with respect to the child. So there is tangible objective evidence that the people exist. And so the real fiction here is to say that they don't exist. Everyone of them has a social security number that is on file with the district clerk.

O'NEILL: I'm specifically looking at paragraph 8 of the affidavit that says it's the guardian's opinion that the minor - ____ Singleton is just one that I pulled out at random, has recovered. There are no permanent injuries. My opinion is based on review of the individual files, including medical records, reports of complaints, questionnaires on behalf of each minor, etc. And so again, it sounds like we're talking about two different cases.

SCHNEIDER: I would agree with you that all the evidence in the record suggests existence. And that existence whether or not these persons are a figment of someone's imagination is not an issue in this case. The question is, that their parents refused to sign a parental affidavit for one reason or another. One reason being we couldn't find them. Another reason being they wanted to get the child's money. Another reason being as I said they were afraid of the meeting or whatever the case may be. But as far as existence I agree with you. That there is ample evidence in the record that all these children are real people. And as J.P. Smith put it best, it cannot be in their best interest to take their money away and give it back to a tort-feasor that's agreed to pay it.

WAINWRIGHT: The chemical release occurred Aug. 21, 1998. The lawsuit was filed Sept. 14, 1998. When were the questionnaires completed that you are referring to?

SCHNEIDER: Many of the questionnaires, I would say the vast majority of them were at or around the time of the chemical release.

WAINWRIGHT: And you signed up the clients when?

SCHNEIDER: In 2001.

WAINWRIGHT: Three years later?

SCHNEIDER: I think so. Yes.

WAINWRIGHT: And the guardian ad litem submitted the affidavits to the TC when?

SCHNEIDER: In 2002.

WAINWRIGHT: Four years later?

SCHNEIDER: Yes.

WAINWRIGHT: Based on questionnaires from 1998?

SCHNEIDER: Based on that. Based on the medical records that we had, and we had also sent out supplemental questionnaires to all of the clients, which said if you've experienced any further problems, please let us know. And so the ad litem had those to review as well.

WAINWRIGHT: Were there supplemental questionnaires for all of the 285 minors with answers received?

SCHNEIDER: I cannot represent to the court that we received answers from all of them. But I can say that we received answers from the vast majority of them.

WAINWRIGHT: And they're in the record?

SCHNEIDER: I don't believe that the supplemental questionnaires are part of this court's record. I would supplement the record with those.

WAINWRIGHT: As to the 731 minor claims that were settled, as I read the record and the briefing, KCSI paid the settlement at least in part in consideration for a release of all liability. Were releases signed for the 731?

SCHNEIDER: Yes.

WAINWRIGHT: What about for the 285 that have not been located, at least in KCSI's characterization of it?

SCHNEIDER: Releases were signed for those folks as well.

WAINWRIGHT: By whom?

SCHNEIDER: By the guardian ad litem.

WAINWRIGHT: Who signed the releases for the 731?

SCHNEIDER: The parent or the next friend.

O'NEILL: Talk to me about mandamus here. I haven't heard you argue mandamus. And we're talking about such things as interlocutory final judgments as though they are an oxymoron. I'm not so sure they are. You can have judgments that are final as to the different parties, but they are interlocutory. They are not appealable yet because all the parties haven't been resolved. I'm a bit confused. You're not conceding that this is mandamuable are you?

SCHNEIDER: Not at all. In fact, I don't think that it's an attack on J. Jamison's conduct. I think that the mandamus for lack of a better word was a backdoor way to attack the guardian ad litem's conduct, and in order to get this court to set a rule on what a guardian ad litem has to do in a case such as this.

O'NEILL: Do you know of any obstacles that would have been presented to a severance motion below?

SCHNEIDER: Not at all.

HECHT: To be clear on para 8 of the affidavit. For example the guardian says further I am not aware of any ongoing symptoms for this minor. But does that really say anything? I mean neither am I, but who cares.

SCHNEIDER: Well he says that with a little more information than you have before you. I indicated that we sent out supplemental questionnaires to these folks asking them, are you suffering from anything now? have you had any effects you haven't told us about? It wasn't just once. We sent out multiple.

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...the SC, county of _____ and county of ____ cases, similar situation involved termination of parental rights, but you had an ad litem that failed to interview the minors at issue, and made a recommendation to the court based upon reports of others in dated reports. And the Mississippi SC said you cannot do that. That was not an effective use of your power.

The judge taking what Mr. Smith put in his affidavit states in her judgment, the guardian ad litem has met with the parents, guardians and, or next friends of each of the minor plaintiffs. And that just was not the case. The evidence was not there.

Those people who were present, who we could find, who we could settle they got what we believed to be a good and fair settlement. Their claims were addressed. Their claims were adjudicated. And they received compensation.

We're not concerned with those people. It's the fact that we've got a situation where we don't know if 285 of these people even exist. They can't be located.

O'NEILL: You've got a name, and a social security number, and a questionnaire filled out. How can you say they don't exist?

SMITH: We don't know how the original plaintiff list came about. We don't know how it was determined that this person was John Smith, with ss# 457-53-2473, as opposed to Janie Smith with the same ss#. We don't know how the original plaintiff list was compiled. The plaintiffs had filed suit in name. Some questionnaires, and I believe if you go back and look at the questionnaires, for some of the plaintiffs we have missing questionnaires.

Again this was with the original plaintiff's attorneys who signed these cases up. All that we were presented with was a list of names, with ss#'s. We were given all of the questionnaires that were in the possession of Mr. Grady...

O'NEILL: Last known address. Next friend's name. Last known phone number.

SMITH: Correct. And the information wasn't even current enough for those last known addresses to be used to find these approximately 285 missing individuals.

I just don't think a lot of them exist other than in name. And you just haven't had a great avalanche of people just suddenly appear despite real parties in interest efforts to find

these people. You haven't had the avalanche of people appear saying, Oh yeah. Sorry. We've been missing. Here we are.

These people, I don't think exist. And to respond to J. Schneider's question before I sat down earlier on buying the peace. KCSI asserts that the other defendants aren't here because they had more of a reason to buy the peace. We're willing to take our chances because we feel very strongly that we did nothing wrong originally, which is reflected in our settlement amounts. And that if we do have to defend a suit by 2 or 3 of these individuals a couple of years on down the road, we've got a very good defense and we're willing to access the courts, which is our right and present our defense and we think we would prevail on that.

PHILLIPS: You said that your study of the case law convinced you that mandamus was the appropriate way to proceed. Have you given us your best cases in the briefing so far?

SMITH: I think if you look at Leeman and what is a final judgment, and what makes a judgment final for appealable purposes. If you look at the MidAmerican case and the situation there, and if you look at the Walker case which we also cite in our brief in my humble opinion that gives us solid basis to argue today that we don't have an adequate remedy of appeal that petition for writ of mandamus is the way to go. And I disagree with Mr. Schneider's statement that we are arguing about an abuse of discretion of the TC, and we're not trying to backdoor in an attack on the guardian ad litem. We objected to the ad litem's authority or use of authority at the TC. The TC overruled our objection. She stated very clearly, "I'm not giving you your money back." It's her quote. And we did argue at that time that that was an abuse of her discretion. So that's one element.