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Supreme Court of Texas.
FORD MOTOR COMPANY, Appellant,
v.
Ezequiel CASTILLO, et al., Appellees.
No. 06-0875.

February 5, 2008.

Appearances:
Craig A. Morgan, Attorney at Law, Austin, TX, for Petitioner.
Roger W. Hughes, Adams & Graham, LLP, Harlingen, TX, for Respondents.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, and Don R. Willett, Supreme Court Justices.

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CHIEF JUSTICE JEFFERSON: Be seated. The Court is ready to hear argument in 06-0875 Ford Motor Company v. Ezequiel Castillo.
SPEAKER: May it please the Court. Mr. Morgan will present argument for the petitioner.

ORAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF THE PETITIONER

MR. MORGAN: May it please the Court. The big question raised by the strange facts of this case is whether concern for protecting the secrecy of jury deliberations and protecting former jurors from undue harassment should prevail over the interest of protecting the integrity of the jury system itself and of the -- protecting the interest of party to rely on the integrity of that system.
Here, the facts seriously suggest the possibility that the integrity of that system was compromised in a way that misled Ford into mistakenly entering this settlement agreement. Directly at the issue before the Court is Ford's thwarted effort to conduct discovery into the odd circumstances surrounding the settling of this misleading note.
JUSTICE O'NEILL: Now, what discovery did you not get -- I understand you spoke with all the Jurors, you hired an investigator presented a record of what you -- about the discussions with the jurors, and I understand that foreperson was even made available. What further discovery did you need?

MR. MORGAN: Your honor, we have no formal discovery whatsoever. The foreperson, in particular, was not made available. The foreperson was the one person who refused to speak with our investigator. We have specifically, in particular, we went to the judge, and we said look these circumstances are peculiar. We found out some of the surrounding circumstances erase suspicions about the motives of the sentiments of the jury who sent this note, which turns out to have not conveyed an accurate reflection of what the jury was deliberating or in fact under what the instruction, should have been deliberating. We asked the Judge, if be permitted, to take her deposition or have the Judge himself call her and inquest her about that. He expressed reservations, expressed concerns about the suspicious nature of what have been conveyed but refused Ford's request to undertake any formal discovery leaving Ford free to conduct a, quote 'informal investigation.'

But the point -- the point we -- that Ford makes in this appeal is simply this. This case should be no different from any other with respect to the party's right to conduct discovery. No decision in this state has ever held that the complete denial of discovery is harmless. But that party was nonetheless left free to conduct an informal investigation will --

JUSTICE WAINWRIGHT: Counsel, as I understand it, during deliberations the presiding Jurors send a note to the Court that asked, quote: 'What is the maximum amount that can be awarded?' close quote.

MR. MORGAN: That is correct.

JUSTICE WAINWRIGHT: It was then discovered that she sent that on her volition without the consent or vote of the other Jurors. Correct?

MR. MORGAN: That is correct

JUSTICE WAINWRIGHT: What do you suspect? What is it you are trying to discover?

MR MORGAN: Well, we strongly suspect that she sent that note in a deliberate effort to mislead the parties into believing the jury had reached the damage questions. And the dramatic effect that that would have in the courtroom is displayed, for example, in the movie The Verdict in which conveyence of that question to the courtroom is the climax of the entire movie.

JUSTICE BRISTER: Suppose the jury all agreed to send that letter -- to send that note out --

MR. MORGAN: Well, that will be a --

JUSTICE BRISTER: -- [inaudible]

MR. MORGAN: -- a different circumstance, your Honor.

JUSTICE BRISTER: Why? It --

MR. MORGAN: Well, --

JUSTICE BRISTER: -- the results will be exactly the same.

MR. MORGAN: Well, it might be, but it's much less likely that all of them would agree to send a note that was completely unrelated to the question they were deliberating.

JUSTICE WILLETT: Was the note sent after or before they have voted 11 to 1 for Ford and on liability?

MR MORGAN: It was sent after. The sequence was this, your honor. The jury began deliberating on Thursday, and over the course of Thursday, and Thursday, we -- from what we have discovered with subsequent interviews and in our informal investigation we are able to conduct, that there are two liability questions. The jury very quickly decided 11 to 1 in favor of Ford in the first liability question with the one remaining juror voting for the plaintiff being the presiding juror.

JUSTICE O'NEILL: Let me just ask you before get into --

MR. MORGAN: Yes --

JUSTICE O'NEILL: -- that. Is your present counsel then agree with your assessment of what the evidence is gonna show. My understanding is it was a little more equivocal than that among the jurors as to --

MR. MORGAN: Well, it maybe, your Honor. That just displays one of the problems you have with doing an informal investigation without the tools of adequate discovery. We don't know exactly what the evidence would show.

JUSTICE O'NEILL: I guess what I am saying though is -- is what you're about to answer in response to the previous question --

MR. MORGAN: Oh.

JUSTICE O'NEILL: -- is not necessarily the way everyone views that the discovery that was had.

MR. MORGAN: Oh, there was no discovery at all had, your Honor --

JUSTICE O'NEILL: Okay. But there was --

MR. MORGAN: -- okay.

JUSTICE O'NEILL: -- there were some --

MR. MORGAN: The -- the --

JUSTICE O'NEILL: -- testimony.

MR. MORGAN: -- the that affidavits we obtained and the interviews we obtained are all consistent that the jury had decided the first liability question in favor of Ford, was still deliberating the second liability question, the remainder of Thursday and on Friday. The jury resumed on Tuesday morning when the presiding jury came in and made a little speech about how they should rule for the plaintiff was unsuccessful, and then while the jury was still deliberating the second liability question, sent out the question about damages. There is no dispute about that. There is some unresolved question about how many of other jurors were aware of her sending that note. How many of them objected to it. But there is no question the jury -- the jury had not reached the damage question.

JUSTICE HECHT: Let me be clear. You think you're entitled to discovery about -- that -- about the internal deliberations of whether to send a note or not?

MR. MORGAN: No, your Honor. We're -- we're entitled -- we want to conduct discovery into the circumstances surrounding the sending of this note and why it was sent.

JUSTICE HECHT: Well, but that's what I am asking you.

MR. MORGAN: To the extent that it becomes relevant to -- to -- to determine what was occurring in the jury room. Yes, we want to investigate that. And remember here --

JUSTICE HECHT: [inaudible]

MR. MORGAN: -- there was no verdict return. And this note was not part of the discussions.

JUSTICE HECHT: The internal deliberations are protected much more carefully than any possibility of extrinsic influence of the jury. So, you have -- the rules help you with respect to can you discover whether someone bribed a juror or to do something the juror should have done.

MR. MORGAN: That's right. And we --

JUSTICE HECHT: But with respect to the internal deliberations, if they were all sitting in there and thinking should we send this note out or not and some said yes, some said no, and they finally decided one way or the other. Do you think you're entitled the discovery about that, too?

MR. MORGAN: Well, we might be. I'm not sure that was irrelevant, but the -- depending upon what we learned from a more focused discovery of her motives and where the idea originated from --

JUSTICE HECHT: But if it's all her idea, and if it originated inside the jury room, and that's all there was, right or wrong, my -- what I don't understand from your earlier answer is, do you wanna get into that one?

MR. MORGAN: Well, your honor, yes. Yes.

JUSTICE BRISTER: And what do we do with rule 327(b)?

MR. MORGAN: Well, there --

JUSTICE BRISTER: They may not testify as to any matter or statement occurring during the course of deliberations.

MR. MORGAN: Well, your Honor, that -- that - - we -- there was no verdict returned here. We do not -- we are not challenging a verdict. We are --

JUSTICE BRISTER: It's now a question which -- when she sent out the note, the jury was in deliberations, and you're gonna ask her to testify about that matter. That's expressly prohibited by the rule.

MR. MORGAN: Well, your Honor, if it is --

JUSTICE BRISTER: Any exception to it?

MR. MORGAN: We take -- we said that there should be an exception in this case, and there are four possibilities of what the evidence could lead, and we don't know where they would go.

JUSTICE JOHNSON: Mr. Morgan, let me --

MR. MORGAN: The first --

JUSTICE JOHNSON: -- ask you this, are you asking us to give you a ruling on what you can or cannot ask under discovery. Or are you asking --

MR. MORGAN: No.

JUSTICE JOHNSON: -- for a ruling saying you're entitled to discovery?

MR. MORGAN: We're entitled to discovery. We --

JUSTICE JOHNSON: And as I understand, would that be up to the trial judge to formulate what you could or could not do under the rules of discovery?

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

JUSTICE JOHNSON: Does it make a difference to you why you breached this agreement as to whether or not you're entitled to discover. What difference does it make why you breached the agreement. You breached the agreement to settle, as I understand. You agreed to that, don't you?

MR. MORGAN: Yes. We entered the agreement and a -- there are four possibilities this evidence could lead and I will tie them into potential defenses. The first and easiest case which a plaintiff should never address is -- and we -- and I will hesitate to say or I hasten to say, we do not, at present, have any evidence to suggest this, but the clearest smoking gun would be if the -- if this presiding juror sent that note to provoke a settlement and got that idea outside the jury from someone who could be traced back to the Plaintiff's camp.

JUSTICE JOHNSON: But let me --

MR. MORGAN: Okay.

JUSTICE JOHNSON: -- let me -- let me go back to my question.

MR. MORGAN: That is a possibility.

JUSTICE JOHNSON: Let me go back to my question, what difference does it make. As I understand, there's a settlement agreement.

MR. MORGAN: Yes.

JUSTICE JOHNSON: A rule 11 settlement agreement. Ford now -- Ford later says, 'We're not gonna comply with it. We're not going to pay it.' Is that Ford's position?

MR. MORGAN: Yes --

JUSTICE JOHNSON: All right. So now we convert the tort case into a contract case.

MR. MORGAN: It has been converted into contract case, your Honor.

JUSTICE JOHNSON: And your position is, it's a contract case, we're not -- we didn't get any discovery regardless of the reason. And under a lawsuit like this, we're entitled to some kind of discovery whatever the trial judge is gonna let us do when we go back down there.

MR. MORGAN: That's right, your Honor.

JUSTICE JOHNSON: Have I misstated that somehow?

MR. MORGAN: That's -- no -- that's correct. Our position is this -- this is a dispute over a contract in which we were induced to enter the contract by a mistake and perhaps by fraud in the inducement. The circumstances I just described, while we do not have any evidence of present to suggest that. If we -- if we conduct discovery and find out the circumstances I have just described turned out to be true, that would be clearly fraud in the inducement. In addition, it's probably just outright jury tampering improper outside influence, and jury misconduct.

JUSTICE JOHNSON: Let me go back and ask one more time. Are you asking us if -- if -- if we -- if -- if -- if we rule on your favor, that is your entitled discovery, are you asking us to set the parameters on this discovery --

MR.MORGAN: No.

JUSTICE JOHNSON: How far you can go into it. Or is that something that's going to be up to the trial court and the lawyers to work out?

MR. MORGAN: No, your Honor. It will be up to the trial court just as it would be in any other contract.

JUSTICE BRISTER: But did not the Trial Judge decide that already?

MR. MORGAN: The Trial Court decided not to permit any discovery whatsoever [inaudible].

JUSTICE BRISTER: Quite. So, we were -- we looked at that for an abuse of discretion.

MR. MORGAN: Yes.

JUSTICE BRISTER: And as you've said to us, you said to him when I went to ask what went on the jury room, and he said he'd look at rule 327(b) and said no. And really, all else you didn't get to your four reasons, but all else you could ask him as well. While we want to put the jury person down and say under oath did -- was there an outside influence.

MR. MORGAN: Well --

JUSTICE BRISTER: But he or -- was he or she?

MR. MORGAN: There's a she.

JUSTICE BRISTER: And she says no, really, what else could you -- what other discovery could you arguably get if 327 (b) is enforced in your case without an exception?

MR. MORGAN: Well, your Honor, I would -- I would hesitate to speculate about what a trial lawyer who's familiar with the discovery tools use today would from this.

JUSTICE BRISTER: Which is true? She may break down and say, 'Oh, yes, you're right. I took a bribe. Throw me in jail.'

MR. MORGAN: No, that's not --

JUSTICE BRISTER: But assuming she does not do that, assuming, she says was [inaudible] -- were you bribed. Was it outside influence? And she says, 'No.' Really, what else you could you do?

MR. MORGAN: Well, your Honor, first of all, it's not just a matter of outside influence. I'd to address that point first. If in fact this juror -- this will be the weakest possible case that discovery might

reveal for us. The weakest possible case would be if a juror decided just to send this note out of completely innocent curiosity, okay, that nonetheless would enable or fits its -- the traditional elements of mutual mistake.

More likely, we think, far more likely under the suspicious circumstances presented here, there will be some basis for producing evidence indicated the note was sent to create the impression, in the courtroom, that the jury had decided liability for the plaintiff and it reached the damage question but Cortez got that idea on her own. In that case, she would have been using her temporary official position as a member of the judicial branch operate outside the jury deliberations, outside the process of returning a verdict in order to manipulate the system to produce the result that she will like -- she likes.

JUSTICE BRISTER: I -- I -- I agree with that maybe she should be thrown in jail but I am confused by your mutual mistake. When you get a question from the jury that just says, 'What's the maximum amount we can award?' And then you negotiate a higher settlement, which I understand was what occurred.

MR. MORGAN: Yes.

JUSTICE BRISTER: That's not based on a shared understanding that the jury's gonna return that verdict because the question didn't say they were gonna do that.

MR. MORGAN: No, your Honor.

JUSTICE BRISTER: It's based on assumption.

MR. MORGAN: It is not based upon a future assumption whatsoever. It's based upon an inaccurate assessment of current facts. And the current facts in which the party settled this case was the belief, conveyed by that note, that the jury had reached the damage questions, which under their instructions, they were not to suppose to address until the liability questions have been decided for the plaintiff. That was the mistake. Had nothing to do with the jury might return, there's always the possibility the jury could decide then go back. And that's why the case settled instead of waiting for the jury.

JUSTICE BRISTER: So you do not think jurors sometimes talk about damages before they talk about liability or in the course of talking about liability?

MR. MORGAN: They may.

JUSTICE BRISTER: So --

MR. MORGAN: They may, but that's not what happened here.

JUSTICE BRISTER: That wouldn't mean that they made up their minds, nobody could -- could -- how could you derive from that note that they were gonna return a verdict higher?

MR. MORGAN: We didn't, your Honor. We didn't. That's the point. We derive from that note that the jury had reached the damage questions with their

JUSTICE MEDINA: That's -- that's

MR. MORGAN: -- instructions.

JUSTICE MEDINA: -- that's a logical conclusion. I can understand your position and appreciate your dilemma. If you prevailed here though, where does it stop? Are lawyers are gonna be able to question every jury in a civil trial where they don't agree with the outcome?

MR. MORGAN: Not at all, your Honor. First of all, the rule -- here is the rule that we ask, 'that where the circumstances suggest the possibility that a presiding juror may have sent a misleading note to the courtroom in order to deceive the parties and thereby provoke a settlement, neither the secrecy of the jury deliberations nor her privacy interest as a former jury will prevent discovery that a party

who was thereby mislead may wish to undertake into the sending of that note. And the unusual facts here from a very narrow application that rule. First, that the note was unrelated to any issue the jury was deliberating; second, it was unrelated to any issue the jury should have been deliberating under their instructions; third, it was sent solely by the presiding juror; and fourth, there was no verdict ever returned.' We are not challenging a verdict.

JUSTICE BRISTER: If, assuming, not the worst case but a bad case which is all her idea, and she wanted -- she thought how the deliberation has been going and what gonna come out like she wanted, and so she said this question to make it come out a different way, is there any crime involved?

MR. MORGAN: I doubt that, your Honor. I doubt that. But it would be during this conduct, because --

JUSTICE BRISTER: There was nothing illegal she did.

MR. MORGAN: Well, it may not be criminal, but I would maintain that is illegal, and it is an abuse of her position. A presiding juror who has taken an oath to sit as a temporary official of the Court system should not be permitted to manipulate that system to produce the result that she wants that's outside the jury deliberations and outside the process of returning the verdict.

JUSTICE WILLETT: The other jurors did or did not know that the note was being sent?

MR. MORGAN: That's a little unclear. At least some of them say they didn't have any idea it was sent. At least two of them said they knew about it and objected because it was unrelated to the liability question they were deciding.

JUSTICE WILLETT: And did the Court convene the jury in the courtroom to answer the question or the note was simply sent?

MR. MORGAN: It was simply sent back, must have been their usual responses and then discretion of the jury.

JUSTICE WAINWRIGHT: There are four things you said discovery could show; one was fraudulent inducement potentially --

MR. MORGAN: Right.

JUSTICE WAINWRIGHT: -- the second one not the [inaudible] --

MR. MORGAN: The second one would be --

JUSTICE WAINWRIGHT: -- mistake if it was innocently sent up --

MR.MORGAN: Right, right.

JUSTICE WAINWRIGHT: -- and I guess there are two more.

MR. MORGAN: There are two more that are somewhere between us to -- there's two extremes. The second possibility moving from the most extreme one which would be fraudulent inducement would be that the note was sent to mislead -- mislead and that Cortez has got the idea from outside the jury but not from the plaintiffs and that would be, for us, the offense of mutual mistake which is an equitable defense which we believe would be strengthened by the fact that it will be improper -- result of improper outside influence on the jury and jury misconduct, as I described. The next possibility was with the note was sent to mislead but Cortez got her idea on the -- on her own and we contend that that would be a mutual mistake strengthened by the fact that it was during misconduct because she was misusing her official position.

JUSTICE WAINWRIGHT: Did you try the case, Mr. Morgan?

MR. MORGAN: No, your Honor, I did not.

CHIEF JUSTICE JEFFERSON: Any further questions?

CHIEF JUSTICE JEFFERSON: Thank you, counsel. The Court is ready to hear argument from the respondent.

SPEAKER: Yes, this court, Mr. Hughes will present argument for the

respondent.

ORAL ARGUMENT OF ROGER W. HUGHES ON BEHALF OF THE RESPONDENT

MR. HUGHES: May it please the Court. There's a deeper question here and it's whether accepting Ford's central thesis will force trial courts to indulge litigants, who suffer from buyer's remorse while settling a case during trial.

The point that it is behind all of our arguments is to honor the existing rules of procedure that give a Judge discretion to simplify the proceedings to enforce a settlement to terminate litigation and discourage stalling. And I'd like to talk about one thing that counsel said that I disagree with. There are some other ones but the one was that, is that Mrs. Castillo, the presiding juror, refused to talk to them. Their briefs lead that innuendo but there's not one shred of evidence on the record to support that. The evidence was that at a hearing, the judge told them he had received a complaint from the juror in which response to Ford's trial lawyer responded: 'Yes, we did have a conversation with her, an interview.' Something was said, 'It might have offended her, we regret it.' That it would have been offensive, that was it. They did not comply with rule 2520166(a) to say, 'Your Honor, we need discovery from this juror because she won't talk to us.' They didn't say anything like that. They didn't even put that in their response the motion for summary judgment nor at any sub point after that.

What happened? It was their burden to put that in front of the Court. And this Court, as I said in the Wal-Mart cases which --

JUSTICE HECHT: Why is that -- why should they have asked ahead of time?

MR. HUGHES: Because the rule requires them to state that. There was this summary judgment rule specifically states, if for any reason you're unable to present your evidence you have to have an affidavit on record to show that, and what is it you want to do, and why it is you can't get an affidavit or evidence in any other permissible format. And that's the question -- now I'd like to -- I hate to take a moment out to -- we talked about what I hope is a nonissue and that's the pleading issue.

I see in the handouts that there was a question about whether our motion to enforce should be treated as a pleading. All I can say is the Court of Appeals correctly pointed out; they waived that in the Court of Appeals just as they have waived it here if they don't assign it as error and they were reply brief in the Court of Appeals which is quoted extensively in the Court of Appeals' opinion, they specifically said, 'We are not making any complaint about the adequacy of the pleadings to support a judgment for breach of contract.'

JUSTICE JOHNSON: Mr. Hughes, assuming that to be the case, you have a tort case, then you have a contract case. You agree with that?

MR. HUGHES: Correct.

JUSTICE JOHNSON: And we have a brand new case on the contract.

MR. HUGHES: In one sense, yes, but it's not a brand new case.

JUSTICE JOHNSON: Well, it's not a brand new case because you still have the -- the discovery cut-off order from the court case in position. Is that --

MR. HUGHES: Yes.

JUSTICE JOHNSON: -- correct?
MR. HUGHES: Yes.
JUSTICE JOHNSON: So, we all -- We all agreed on that.
MR. HUGHES: Yes.
JUSTICE JOHNSON: All right. So, if we have now a contract case in the same proceeding with the trial court having cut-off discovery, so they go in to ask about discovery on -- they have to ask about discovery on the contract case otherwise, if they just start doing -- seems like doing subpoenas and notices, we have a problem with the trial judge maybe being a little upset. You can understand that. So they go in and ask the trial judge to do discovery but they have a whole different case here. It seems like how do we -- how do we reconcile those and the fact that what effectively it seems like we have is a contract case where they are preempted from doing any discovery?
MR. HUGHES: Well, first they are preempted because they had already agreed to a cut-off. And so, we have certain rules.
JUSTICE JOHNSON: Within the tort case. Now they've breached the contract. You've agreed to that as I understand.
MR. HUGHES: We certainly do.
JUSTICE JOHNSON: Okay. So now we have a breach of contract case. But we -- but we -- we have an unusual situation because we have breach of contract case, new case, you have new pleadings, you -- your position is new pleadings breach of contract but we've preempted our discovery rules by what's gone on before. How do we handle that and make that work out?
MR. HUGHES: Well, we have rules in place. And the first one was the one we -- you addressed just recently in the BP Products case about if you have an agreement concerning discovery, what are the limits the trial court can do to circumvent it, and it was their burden to establish good cause.
The second rule, which is in place, has to do with rule 166 that if you're faced with a summary judgment and you need discovery in order to present admissible evidence, you're supposed to articulate what that evidence is, where it is, and how it's going to change the outcome. And the point is, is that by the time they got to the point there was a summary judgment; they had interviewed all the jurors. They knew what they were going to say and they couldn't say anything more. So, we have a rule about people who can't explain why they need more discovery to respond to summary judgment.
And I pointed out, there is a case that's sided in the brief, I didn't discuss it in great length, the Tenneco (925 S.W.2d 640) case. It's somewhat similar to the Joe (145 S.W.3d 150) case. Only there, the plaintiff was summary judgment out on a breach of contract claim. The Tenneco case was a contract over a buying -- it was an option -- a right of first refusal to buy essential, I guess, an oil and gas plant. During the discovery period, the plaintiff found out there was a third breach of the contract of which they were completely unaware. Within a day or two after the deposition, the plaintiff files an amended complaints saying there's been a third breach. Within six weeks, when of course, discovery is going hot and heavy, Tenneco files a motion for summary judgment on the brand new claim, once again, the plaintiff's response, 'I haven't had the time. I don't know what all my defenses are.' And this Court -- that -- that motion got overruled and the trial court said, pardon me, this Court said 'I want time to investigate possible defenses, is not adequate.' The Trial Court committed no error in saying the -- and denying any continuance to conduct discovery that

that was no error just having hoping, looking that you're gonna find a defense. That's not enough, you have to be specific.

JUSTICE WAINWRIGHT: Counsel, I haven't look at Tenneco recently. It sounds like a material distinction between that case and this one is in Tenneco, they were allowed formal discovery.

MR. HUGHES: They were, but --

JUSTICE WAINWRIGHT: As I understand it, the petitioners claim they were allowed no formal discovery. It was all informal. And Counsel, as you know, taking a witness statement or giving us, you know, a note from someone who says this is what happened, could be an entirely different ball game from having someone under oath for a deposition or a document request or admissions that are certified as true by counsel and perhaps others when they sign them. Those are different ball games, aren't they?

MR. HUGHES: Not -- no, I don't think so.And let me explain this part.

JUSTICE WAINWRIGHT: And it was clear that there was a dispute what about what happened and whether the contract was really enforceable or was really breached at least one side argues that. And the judge knew that that was ongoing and then allowed no formal discovery.

MR. HUGHES: Well, I think that it gets back then to the Joe case. A party who is -

JUSTICE WAINWRIGHT: 39 Joint Venture?

MR. HUGHES: Yes.

JUSTICE WAINWRIGHT: This is Joe?

MR. HUGHES: There are -- they actually did file the affidavit. And the point was, is they couldn't point out anything and, of course, there was the backup statement. The motion was filed so fast, my lawyer was tied up in discovery. They didn't have any chance. And that was rejected, and there is no functional difference between a judge saying 'I'm sorry, there's not gonna be any formal discovery allowed,' and a party whose lawyer simply is so busy that they can't conduct discovery.

JUSTICE WAINWRIGHT: The difference in Joe, which I'm pretty familiar with, is --

MR. HUGHES: Yeah.

JUSTICE WAINRIGHT: -- that we said that none of the discovery that they sought would have change any of the outcome here.

MR.HUGHES: That was --

JUSTICE WAINWRIGHT: That's -- that's not the argument being made in this case.

MR. HUGHES: Yes, but that -- that -- that was not exactly the factual circumstances. But in Tenneco the argument was raised is we haven't had enough time to determine if we have potential defenses that we haven't learned of yet. And the Court said 'That's not enough, you have to be specific,' which is then why you were able in Joe to get to the point of, 'okay, you have to file an affidavit, you just can't say maybe I have issues to raise.' You have to be specific and if you don't, then there's no abuse of discretion.

JUSTICE WAINWRIGHT: Counsel, do you think that there -- there is discovery that the trial court could have carved out, targeted that would have been permissible even under rule 327(b)?

MR. HUGHES: I think if they had come in with actual proof of outside influence as it is classically understood and then the Court may have been able to lift it, but then they run into the problem under rule 166 and 252, they have to articulate what that evidence is to avoid summary judgment.

JUSTICE WAINWRIGHT: Okay. Just assume that the meet is what you

believe would be the requirements in order to obtain the discovery, there's discovery that could have been taken that would have been consistent with 327(b). Correct?

MR. HUGHES: If they could make a showing of outside influence. But the problem is, they even -- as the Court of Appeals said, their inability to conduct formal discovery did not obstruct them from finding out what these people had to say and reporting it to the Court if they thought it would help them. The problem is not that they couldn't get the witnesses to talk to them. The problem is this, that when the witnesses didn't have anything to say that helped them or they didn't want to report to the Court what they were being told.

JUSTICE WAINWRIGHT: But, so, there were 10 affidavits that were --

MR. HUGHES: No.

JUSTICE WAINWRIGHT: Well. they're talked about. What do you wanna say about the affidavits? Obviously, you don't --

MR. HUGHES: There are only 4 affidavits.There were 10 unsworn what we call Q&As, that is somebody just types up what is being said. Nobody is under oath. The 10 Q&As were stricken because they were unsworn and they don't complain about that ruling. That ruling is not assigned as error.

However, what the trial court did was, you got to understand the procedural background, they first came in after agreeing to pay on the records saying, 'Oh, yeah, we're gonna pay.' They then come back and just file a garden-variety motion to set aside the agreement and they attached those statements. The trial court's ruling on their motion was, I'm gonna exclude the Q&As because they are unsworn but I have read them anyway. And if I didn't -- if I didn't exclude them, based on those, I find no outside influence. They don't complain about that ruling. They do not complain about the judge's express ruling on their motion saying, 'I don't find any outside influence,' and that motion, they presented without claiming, they needed any additional discovery to meet their point.

JUSTICE WAINWRIGHT: And as to the four affidavits?

MR. HUGHES: Those were excluded under rule 327 and 606. No -- no I will say this, the first time they asked for discovery right after -- right after the jury was discharged. The judge denied the objection, admitted the affidavits, read them, and said, 'They don't prove outside influence. Go talk to the jurors and bring me more evidence.' That was the judge's first ruling.

JUSTICE GREEN: Mr. Hughes.

MR. HUGHES: Yes.

JUSTICE GREEN: Let's assume there was no outside influence but the scenario that Mr. Morgan outlined is what happened or could happen, that is to say a presiding juror, without discussing the matter with the rest of the jurors, just takes it on him or herself to go out and try to influence the proceeding in the manner such as this. What should this Court's response be to that?

MR. HUGHES: Well, I think it's already been mentioned earlier. A Court may have inherent power and perhaps, to contempt -- contempt power to sanction a juror who is somehow obstructing the proceedings. But that doesn't amount to grounds to rescind a contract. That, instead, has to be fit in to one of the recognized equitable reason and the only one they have articulated is mutual mistake. That won't fly. Mutual mistake number one requires a mistake about a fact. Now the only thing that was going to drive forward, to go up or down, to settle now or settle later, was their estimation of number one, what was the verdict likely to be. Number two, how is the trial judge going to rule

on all their post verdict motions and then, of course, what's gonna happen in the Court of Appeals if we get a bad judgment. All those things are in the future. The fact that they're on one question now, every trial lawyer knows -- every trial lawyer knows.

Jurors talk about a lot of things as they go through. They may talk about damages before they finish talking about liability. They may change their minds while they are being polled in the jury box.

JUSTICE GREEN: Right. But going back to the example on how would -- how would we find out if that's what occurred without some formal discovery?

MR. HUGHES: Well, once again, the -- the judge in this case said, 'You can talk to the jurors. Bring me evidence of misconduct.' But then, the question is, where, if you got affidavits from the jurors, does it lead. Juror misconduct is not a grounds to set aside a settlement agreement. You have to get -- you have to put it in one of the standard categories --

JUSTICE GREEN: So, would -- well -- so, the presiding juror is somehow found to have acted ultra vires to say and causing this settlement that otherwise would not have occurred to occur, and so we can discipline somehow that juror but it doesn't do anything to set aside the fraudulently induced, if that's what it was, agreement.

MR. HUGHES: Well, that's the point. It's not fraud and it's not mutual mistake.

JUSTICE GREEN: It does look unclear though.

MR.HUGHES: Well, your Honor, this Court has already held in the cases I cited in and the --

JUSTICE BRISTER: Wouldn't you concede when the parties, according to the brief, the parties were talking of settlement in the 1 million -- upper of $1 million range. They got this question and they settled for $3 million and it turns out that the jury wasn't even close to thinking about what's the maximum amount of damages we could award so you would concede it looks unfair. Your client has gotten a windfall.

MR. HUGHES: Well, no. There's a factual predicate here we dispute. Their recitation of the settlement negotiation was disputed. That just came from the unsworn argument of counsel in support of a motion. Our lawyer disputed that said, 'No, that was not the state of negotiations.' Now, I understand that the impact of the note but the --

JUSTICE BRISTER: What do he say it was?

MR. HUGHES: He -- he said that they're completely wrong and -- all Ford stand was if a note comes out from the jury, all deals are off.

JUSTICE JOHNSON: Well, Mr. Hughes, it seems like that would almost make these lawyers witnesses in a mutual mistake of fact question on a breach of contract. It seems like the further we go onto these, the more and deeper we get as to why discovery might be necessary in the breach of contract case.

MR. HUGHES: Well --

JUSTICE JOHNSON: What else -- what's in the lawyer's mind is truly, I mean, that's what the term is, in mutual mistake seems like. Either they did or did not both act on the same assumption or it seems like we might just be getting deeper into it.

MR. HUGHES: Well, we're getting -- the breach of contract case, our case is made. The question is their defense. Do they have mutual mistake and -- or as they say fraud. This Court has already said, and I understand where the Court is going, what I'm saying is, we have to get back to what is the issue, that is the defense, to get some out for breach of contract. This Court and other courts have already said 'If a third party makes a false statement of fact to you and that misleads

you into entering into agreement that is not fraud. It's only fraud if the defendant participates in it.' Now, they disclaim that in the trial court.

Mutual mistake is not a problem because the court, this Court, and the restatement all take the position that the mistake of fact that will support rescission has to go to the ability to perform the agreement, not the inducement to enter into it. That's why people who enter into construction contracts and then suddenly find out it is going to be more expensive or difficult to perform don't have mutual mistake as a defense. Mutual mistake is not key on what induced you or caused you to enter into the agreement. It has to do with whether you can perform the agreement and you can't perform it because you made a mistake of fact that -- about something that would help you -- about how to perform the agreement. That's not it. They're talking here about a mistake that goes to their inducement.

Now, all I can say at this point is the Court would -- and I hesitate to put it this bluntly, the Court would have to create a new ground equitable reason to set aside and I have -- and before the Court --

JUSTICE BRISTER: We -- we -- we -- we should be. If this happened in a lot of cases, it could be a big problem.

MR. HUGHES: Well, I don't think it's going to happen and --

JUSTICE BRISTER: Let me be -- if this -- if people got the understanding, they could privately send out a note that would manipulate a settlement, a lot of jurors might do it. And how would we stop that, when our rule says you can't ask the jurors about what anyone did in the jury room.

MR. HUGHES: Well, your honor, I really don't -- let me put it this way: I think if you look from the jury instructions -- the instructions the jury are getting, I think it be -- you've a hard time, from the point of view of a lay person, figuring out that what you say in your notes is going to go the attorneys. If you look at the standard instructions, they just say your notes are going to the judge. You don't -- I mean, we all know that --

JUSTICE BRISTER: But, is there an instruction. I can't find one in 226(a) that says, the -- the only notes can be sent out have to be from the whole jury rather than --

MR. HUGHES: There isn't. There isn't.

JUSTICE BRISTER: But really, the lady didn't even violate any instruction --

MR. HUGHES: No. And that's -- that's a point. There is no instruction that says they have to get approval. There was a dispute about how they would go about sending out notes and --

JUSTICE WAINWRIGHT: But Counsel, the presumption is and the understanding is that notes from the jury come from the jury, not from a juror acting privately, surely you understand that? There are several former trial judges up here who've taken hundreds of verdicts. Any note that comes out of that jury room, everybody in the courtroom presumes come from the jury and not from an individual juror acting privately with an agenda, if that was the case.

MR. HUGHES: Well, your Honor, number one as we said, I don't think the jury can hold other jurors incommunicado and I think it was indicated in the Boyett (674 S.W.2d 782) case that I cited in their brief, that if the presiding juror or even a majority of jurors decide, 'I'm sorry, that note is going out no matter how much some individual juror wants it, that's too bad.'

JUSTICE WAINWRIGHT: But that's still -- but that's still

considered of an action by the entire jury not the notes sent out without, if that was the case here, the other jurors, knowing what was going on.

MR. HUGHES: Well, first, there -- one of the unsworn statements which was not... --

JUSTICE WAINWRIGHT: [inaudible] your time's about out. Let me ask you a question. If during deliberations the presiding juror sent out a note that said, 'What happens if we reach zero on damages?' Would that have affected your conduct in consideration of the settlement?

MR. HUGHES: I think it might --

JUSTICE WAINWRIGHT: Would that have bothered you -- is that kind of thing, whether it come from the plaintiff or the defendant's side when it seems to be, and may be, an agenda by an individual, if that's the case here, that's causing us a lot of concern, we don't want to undermine the integrity of the process, but wouldn't that concern you if that question came out?

MR. HUGHES: Your Honor, I've actually seen questions come out. But we've already answered all the liability questions now et cetera. And pretty much, it puts an end for all further discussions if there had been hit that point.

JUSTICE WAINWRIGHT: If it's a statement from the jury, not in individual acting, if they are, with an agenda; those are different things.

MR. HUGHES: Your honor, I think if that were the case, the Court has power to deal with that directly with the juror but that -- no it's not -- that is not a ground to start setting aside settlement agreements.

JUSTICE WAINWRIGHT: So -- so what concerned you, my hypothetical question is, what, if anything should happen in response?

MR. HUGHES: And as I said, the Court has the inherent power to deal with that. But I don't think that that fits with any of the traditional equitable grounds to set aside settlement agreements. And I think one of the reasons, again, is a lot goes into the decision about to settle besides just one jury note. Lawyers think about their -- all their trial motions, and pretrial motions, and all of that. And so just to say based on this one note, and this one juror's notions, we're going to let you scuttle a settlement that -- because you misread the jury.

JUSTICE WILLETT: Real quick. You said there was a dispute as to how the jury would submit notes. What do you mean?

MR. HUGHES: I think, if you'll look at the affidavits, they are not entirely clear that there was any -- the jurors have any fixed practice. Once again, if you can look at the 10 Q&As, which were excluded and which they don't complain, but if you were, I think you will find that some juror said the process was, we would talk about it. Some of them would say, she would say, 'I'm gonna send this out, anybody object?' And if there were no objections, it didn't make any difference if you agree, I mean, there was no fixed procedure. But there was one juror who said, 'Yeah, I knew this note was going out and I had no objection to it.'

End of my story. Any further questions? Red light. Thank you. I will request you affirm.

REBUTTAL ARGUMENT OF CRAIG A. MORGAN ON BEHALF OF THE PETITIONER

MR. MORGAN: This certainly is a bizarre set of facts and we share Justice Brister's concern that it not be one that occur very often. There don't seem to be any reported decisions and necessarily in this state, neither side seems to be able to find one anywhere in the country and that dealt with the circumstance but the position of the plaintiffs who have taken in response is simply untenable. Their position simply stated is that no evidence, no evidence that Ford could possibly obtain through the course of formal discovery could be relevant to any defense it might assert to enforcement of this settlement agreement and that just cannot be.

JUSTICE O'NEILL: Did you specifically seek to take the deposition of the presiding juror before the trial court?

MR. MORGAN: Yes.

JUSTICE O'NEILL: You formally requested for deposition?

MR. MORGAN: Well, I don't know if it's formally which was never noticed or anything. We went to the judge at the hearing who decided on our briefs and said, 'Your Honor, you know, this is what we found out about the circumstances we have.' We would ask -- given the sensitivity of the area we're starting in which we're starting the thread, we would ask the Court for permission to either take her deposition or ask the Court to bring her in and question her about this because this looks suspicious to us, and the judge said, 'No.' There was a subsequent time when the request for formal discovery was included in part of the agreements in lieu in the papers. But yes, we did ask for that. No I'm not --

JUSTICE O'NEILL: Basically, with your present counsel's statement that you did not specifically request discovery as to her.

MR. MORGAN: Yes -- no -- yes. There is no question. That was precisely the focus of discovery not the --

JUSTICE BRISTER: But given that the judge granted that, wouldn't you be violating rule 327(b)?

MR. MORGAN: No, your Honor, we would not be because that deals -- that deals of -- he -- he construed that to be. We we're not seeking to overturn a verdict and that deals with a challenge to a verdict. Now verdict has ever even reached here. And furthermore, even that rule provides an exception for outside influence and there was a reason here.

JUSTICE HECHT: It seems to me that lawyers are assessing these kinds of things all the time. So, you have a summary judgment here and when you're standing out the hallway and you say, 'Well you know can we settle, I don't know, I don't know,' and you go in, 'well it's time to go in a hearing.' So you go in a hearing and argued with the judge and the judge gets [inaudible] and then he says 'You know, I don't know. I think the woman has a pretty strong argument here but I -- she's pretty convincing. But I need to think about it.' Don't you go out in the hallway and discuss settlement differently than when you went in, and maybe the judge thinks that. Maybe he's just trying to provoke a settlement. Maybe he honestly changes his mind later on. That's just something for counsel to witness, it seems to me.

MR. MORGAN: Well, maybe your Honor and we may have -- and it's true on the one hand, that we have assumed the risk of interpreting the intent or these facts behind this note in one sense. But the one thing that we absolutely never assumed was the risk of fraudulent inducement. That is obviously the easiest case here. That would be the smoking gun but we don't know. and judges are not jurors, jurors are -- they take an oath, follow their instructions, follow the procedures, they are

part of a group, they are supposed to act as a group, and the reason that they are empanelled is to go through the process of deliberating to reach a verdict towards one side or another, a judgment. Here, there is a reason to suspect that we had one juror manipulating her official position to produce a result that's completely outside the jury deliberations, completely outside returning the verdict. And that's not -- that's an abuse of her position quite simply, and we have a right to investigate that.

JUSTICE HECHT: There's no evidence of what she did the day off except take her son to the emergency room?

MR. MORGAN: No. No, your honor, it's not. And to briefly address Counsel's position, even if we do not show fraudulent inducement which obviously again will be a smoking gun, the facts here, if we believe would be developed would easily fit within the traditional elements of mutual mistake which requires a reasonable mistake of fact held mutually by the parties that materially affects the agreed upon exchange, and that, we think, would fit here. It isn't equitable remedy which considers surrounding circumstances which would include, we contend that misconduct of a juror who is deliberately manipulating her official position in a way that's not contemplated by the law. We believe that this verdict -- that this judgment should be reversed, re-managed by Ford to undertake the discovery necessary to find out what really happened.

JUSTICE O' NEILL: Let me just clarify one point. To do that, we would have to say that trial court abused its discretion in denying discovery as to the presiding juror?

MR. MORGAN: No, your Honor, I would not know if that -- it abuse this discretion and denying a discovery into the circumstances surrounding the sending of this note by which Ford was misled into entering in the settlement agreement. Relevant to its potential defenses or fraudulent inducement, mutual mistakes --

JUSTICE O'NEILL: But I guess that's where I get confused because what difference does it make what the other jurors would say. Apparently, we wanna know what induced her to see if there was a fraudulent inducement. So, she is really the only one --

MR. MORGAN: Well, your Honor what the other jurors would say maybe may -- may reveal what her intents were. I mean, as the argument today has displayed, there was some disagreement among the parties now about what occurred, what the posture was at the time she sent that note, whether any other jurors agreed to its sending whether and to what extent other jurors objected, and what comments or remarks she made to them about the current intent in sending the note. So I'm not, I'm not -- we're -- we're not willing to say no. We just depose her and she said, 'No, I was innocent and that's it.'

JUSTICE O'NEILL: So you want us to say that trial court abused its discretion in not allowing discovery of the jurors and the presiding juror -- all the jurors.

MR. MORGAN: Well, broader than that, discovering into our affirmative defenses of mutual mistake and fraudulent inducement as related --

JUSTICE O'NEILL: But who else -- who else would that be?

MR. MORGAN: Well, I don't know, your Honor. If the evidence leads to someone outside the jury, we gonna want to follow that.

JUSTICE WAINWRIGHT: There's a movie that raised that specter, The Runaway Jury by the Grisham Book rather than The Verdict [inaudible] verdict.

MR. MORGAN: That was the outside influence. The movie, The Verdict

-- my time is up. But I reviewed this recently so I can relay -- in The Verdict, the climactic scene is when the -- the jury actually returns in that scene, the foreman stands up and says, We've decided to go on --

CHIEF JUSTICE JEFFERSON: I think we've heard enough. The cause is submitted and the Court will take a brief recess.

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