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Supreme Court of Texas.
In re BP PRODUCTS NORTH AMERICA, INC., Relator.
No. 07-0119.

October 18, 2007

Appearances:
Katherine D. Mackillop, Fulbright & Jaworski, LLP, Houston, Texas, for Relator.
Brent W. Coon, Brent Coon & Associates, Beaumont, Texas, for Real Parties in Interest.

Before:

Chief Justice, Wallace B. Jefferson, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices. David Gaultney, Justice, Ninth Court of Appeals, Beaumont, sitting by commission of the Honorable Rick Perry, Governor of Texas, pursuant to Tex. Gov't Code § 22.005. Justice O'Neill is recused.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated please. The Court is ready to hear argument in 070119, In re BP Products North America, Inc.
MARSHALL: May it please the Court, Ms. Mackillop will present argument for the relator. The relator has reserved five minutes for rebuttal

ORAL ARGUMENT OF KATHERINE D. MACKILLOP ON BEHALF OF THE PETITIONER

MS. MACKILLOP: -- Court.
MS. MACKILLOP: The issues that we brought to the Court today, the Rule 11 interpretation and the apex. To lawyers, to judges, the apex is more fascinating. Perhaps to litigants, the more pedestrian issue of the interpretation of the Rule 11 agreement is a little bit more important. Unless the Court prefers, I would like to talk very briefly about the Rule 11 question first.
CHIEF JUSTICE JEFFERSON: I would prefer that you explain why the case is not moot.
MS. MACKILLOP: I'll be happy to, your Honor. And I'm sure the question is whether it's moot because John Browne is no longer CEO of BP Products or BP p.l.c. What I suggest that the Court does is take the

analysis and the ruling by the El Paso Health Care case and apply it to the rest of the state. In that case --

JUSTICE: Speak [inaudible].

MS. MACKILLOP: I certainly will.

JUSTICE: Yes, thank you.

MS. MACKILLOP: In the El Paso case, the CEO, the high-level manager had moved on. And the question in that case was presented directly should the apex rule apply in -- apply to that apex official once he had moved on? The El Paso court said that it should. So what should --

JUSTICE MEDINA: What if we -- what if we disagree with that? I mean how long does this cloud Or -- or this cloak of protection follow a CEO or someone similarly situated?

MS. MACKILLOP: A very good question, let me -- let me present two alternative formulations of a rule when a CEO leaves the current position that he's in. The first one is the one that would apply particularly to this case, and that is when a CEO goes from company A to company B. And he's still a high level official, And that's what happened in this case. Although Browne no longer works for BP p.l.c. -- excuse me. In September, he took a job as a CEO-type person for a private equity firm in the U.S. and in London and is working for them. Now, let me give you the reason why I think that... that -- that if he moves from company A to company B, apex should still apply.

CHIEF JUSTICE JEFFERSON: Well he left in May of '07. And he went to company B in September, so in June it became moot then and then it revived?

MS. MACKILLOP: No in a -- in a -- not at all your Honor and if I -- if I can get to that second, that's my second iteration of the rule. If I could just first explain why this first proposition that I gave to you makes sense. The whole reason for the apex rule is to prevent harassment to the CEO, asking for a CEO deposition when he really doesn't have anything to add to the lawsuit, and also undue burden on the company by having a CEO constantly deposed in -- in litigation.

JUSTICE: Those -- those are great concepts. And I think they work for the most part, but here as I understand it you had a CEO who, from what I read in these briefs, took himself out of the cloak of protection by having a press conference, by talking to the Mayor, and by doing things that it seems to me that a CEO perhaps wouldn't do.

MS. MACKILLOP: Well, an -- an -- not -- not necessarily in the given particular circumstance. And if I can answer the -- the one question first and then get back to you on the -- on the -- the -- the PR aspect of it that the plaintiffs have raised. Let me very quickly go back to the question that Justice Jefferson had, and that it is if we have -- on going from company A to company B. Under the apex rules, he can't be deposed when he is the CEO of company A on company A litigation. Then why does it make sense for him to be deposed on company A litigation when he's CEO of company B.

CHIEF JUSTICE JEFFERSON: Because it has no impact on company A any longer. It doesn't disrupt their activities. He's not leading that charge at company A.

MS. MACKILLOP: But it -- it -- we still do have the harassment value to the CEO. Again, remembering that this only applies when he has no unique or superior knowledge. And -- and -- let -- let me just say, Justice Jefferson, that -- that I agree that -- that -- there should be a broader rule. Let me give you my second iteration of the rule. The second iteration is what the El Paso court said, and that is that we should have the apex rule govern CEOs and have it judged as of the time

they were the CEO of company A, that I used, before they leave. And let me give you the reasons that I think that that makes sense. His knowledge does not increase when he walks out of the door. His knowledge still is the lower knowledge of no unique or superior knowledge. Number two: How does it make sense that we have the harassment value? And indeed, Justice Jefferson, the undue burden aspect that we have when he's at company A, isn't it worse to company B to have their CEO pulled down of a post?

CHIEF JUSTICE JEFFERSON: But company B has not intervened that I -- that I -- to -- to my knowledge anyway, in this case.

MS. MACKILLOP: No sir, not at all. And I'm talking more about -- about -- about general rules. So logically, I think that you have to have a rule that applies the apex his -- to the CEO.

CHIEF JUSTICE JEFFERSON: I take your argument, yeah. And I know you want to get to the merits of the apex. So, why don't you explain how Mr. Browne did not have unique or superior knowledge.

MS. MACKILLOP: Certainly, and -- and going back to Justice Medina's question about -- about the things that happened during the process of this. If I could just add one last thing -- to the -- to the reasoning of -- of why I think the apex should continue. The -- the value of a CEO's deposition as a litigation trophy or severance -- excuse me -- settlement leverage is not exactly the same when he moves on, but it's not gone. It's not gone at all. Now let -- let me move on into the -- to the apex issues. And I'm not gonna tell the Court what the apex rules are. The court knows what the apex rules are. Let me see if I can apply them to -- to this particular case because no litigant here is asking the Court to do away with apex or to change it in any way, simply to apply it to this particular instance. Let me first answer the question that you had about the -- about the -- the PR or -- or -- talking to people. One thing that Alcatel says is that the importance of a case or important of an incident, to a particular company is not enough to automatically imbue the CEO with unique or superior knowledge. And when you have a very important event, a very important bad event, like this that happens to a company, then the CEO needs to go talk to his employees. He needs to be a presence there. He needs to ask them how they are and how they are doing. He did that immediately after the accident. And then I don't know if what you were talking about was what was happening after the accident. But then, about a year or so later after the accident, during the Rule 11 issue, when it came up or during around that time, after a lot of other unpleasant and -- and -- and not good things had happened to this company, the Alaska pipeline issues, some trading issues. Then the CEO did again go and talk to his own employees, and talked to them about how the company was doing and what he saw the future of the company being. But that's not a PR campaign. A CEO is supposed to do those sorts of things. He's supposed to go talk to his people. And this precisely what was happening here.

Another thing that the -- the -- cases tell us, Alcatel again, receiving reports from others does not imbue a CEO with -- with a unique or superior knowledge. And there was evidence here that he received reports from various people, but again, that's not enough under Texas law. One other thing the plaintiffs talked about, and again, what I'm trying to do is take precisely what they have said, agree that it's -- it's -- it's factual and apply it to the law. The next point straddles really two principles of Texas law and that is that the CEO's ultimate responsibility for corporate decisions or participating in a decision that is important to the company, does not

imbue the CEO automatically with unique or superior knowledge.

CHIEF JUSTICE JEFFERSON: Is there evidence that Mr. Browne, prior to the accident, paid special attention to the Texas City Refinery in regards to safety.

MS. MACKILLOP: There is a -- a question about that. Let's say it's true, I do not think the evidence is that it is completely true. But let's say it is true, then under Alcatel and all the other cases, the fact that a CEO is receiving a report on Texas City, separately, let's say from another of the refineries in North America, doesn't give him any particular special knowledge about Texas City. It's just that he's looking at it. Harkening back to what I was saying about ultimate responsibility and participating in decisions, what that applies to is the fact that when Browne came to Texas City the day after the accident, he said that the company accepted responsibility for what happened on their premises and planned -- and the company planned to compensate fully anyone that their actions had injured, which is what they've been trying to do for the last two and a half years. He was acting as a CEO. He was speaking for his company. He wasn't giving new knowledge. He wasn't saying anything other than what the company had decided to do. I'm not really sure this is much of an issue anymore since the briefing, we've tried part of the case at this point. And we've made very clear that BP is not disputing its responsibility for this particular incident.

JUSTICE MEDINA: Let us talk about this Rule 11 agreement.

MS. MACKILLOP: Yes sir.

JUSTICE MEDINA: How can a Rule 11 agreement circumvent a trial court's order?

MS. MACKILLOP: The Rule 11 agreement is a simple --

JUSTICE MEDINA: Here the trial judge ordered the deposition of the CEO, correct?

MS. MACKILLOP: Correct.

JUSTICEMEDINA: And there then there was the Rule 11 agreement sometime after that.

MS. MACKILLOP: Correct. And if I can in answering your question, let me -- let me put -- although it is in the brief, maybe I can put it a little better for you under Rule 11. And -- and -- also to tell you, you all know that BP can win either through the apex or through the enforcement of the Rule 11. So the Rule 11 to us crucially important here, too. And I appreciate your asking about it. Let me just give you a thumbnail sketch of what was going on. With a September 18 trial setting, on July 31, at the very end of discovery, in fact we would say after discovery was cut off, we got a deposition notice for John Browne. August 28, the trial court, after briefing and hearings, the trial court ordered the depositions of both Manzoni, the number two guy in Refining, and John Browne, the CEO. Three days later, the parties had entered into a Rule 11 agreement. Because parties don't have to take depositions, even if the trial court says they can take depositions. It's still their option as to whether they are gonna take the deposition. We agreed to present Manzoni. They agreed to forebear from taking Browne or other management people because they also sent out a deposition notice of one of the Board members. We present Manzoni for deposition on September 8, ten days before trial. The plaintiff's announced that they are satisfied with what they have gotten. On September 15, the Friday before the Monday trial setting, there is a hearing. The plaintiffs have added a new claim. We asked for continuance because we haven't had that opportunity to do discovery on the claim. The trial court continues the case to November 6. And guess

what happens Wednesday, September the 20th? We get a deposition notice for John Browne. Now, there's nothing to interpret here on this Rule 11. It's clear. There's no ambiguity. It's an easy contract to read. If you look at the facts that they have brought forward in trying to say that there were new facts that came out in Manzoni's deposition that show unique and superior, because under the contract it is unique and superior, not unique or superior knowledge of Browne. There's nothing new. The appointment of James Baker , that was in the press months before. The fact that there was an e-mail talking about -- Justice Jefferson mentioned that -- that John Browne might have been looking at Texas City separately.

In Mr. Holman's brief, he points out that that particular e-mail had been presented in discovery produced in March of '06, nine months before Manzoni's deposition. The last thing that they argue is -- is somewhat illogical. They say well since Manzoni couldn't answer all of our questions, the only other person who can answer those questions is John Browne. Well, that's illogical. Just because one person doesn't know something; you can't then take the next step and say that the only other person in the corporation who knows that information is John Browne. The next thing that the court did was simply toss out the Rule 11 altogether. Now, the Rule 11 is a contract. And in Texas, to get out from under a contract, a party's got to plead and prove some sort of avoidance. There're various things mentioned here. When we asked the trial court what she meant, and what she was doing, and what facts they were based on, we really did not get much of an answer. In the -- in the plaintiff's brief, they didn't really do much to answer other than to do what Justice Medina said and log this PR campaign. Well, you can call it a PR campaign and you can spend any however you want to --

JUSTICE MEDINA: That is not what I said -- it goes -- [inaudible]

MS. MACKILLOP: No, no, no, I understand what they said -- yes, Sir. What they are saying -- but all it was, was John Browne going from place to place in North America and talking to his employees, in close meetings about what was happening with his company and how they were going to try to make it a better company and talking to his employees as a CEO would, when a company has been through some hard times. And I don't think that doing that is a PR campaign, where John Browne is trying to do something to the press. And speaking to the Financial Times, to me, is not a PR campaign.

JUSTICE WAINWRIGHT: Mr. Browne's personal visit to the accident site and talking with some of the employees and families. Did that provide unique information about the accident that perhaps others didn't have?

MS. MACKILLOP: No sir, I don't think so. I mean, you could tell me what happened in oral argument here yesterday. And that wouldn't give me unique or superior knowledge about what happened in oral argument yesterday.

JUSTICE WAINWRIGHT: Not necessarily, I agree. In this case, is there any indication in the record that Mr. Browne learned things that perhaps others who had been deposed didn't know?

MS. MACKILLOP: No sir, there's nothing at all. It's only the bare fact that he was there and he spoke to some of the employees.

JUSTICE JOHNSON: Counsel, the rules encourage the parties to reach agreements on discovery matters. Is it your position that the trial court cannot, for a good cause, set aside or ignore an agreement that the parties reached on discovery?

MS. MACKILLOP: I think there are instances when they can. The -- the -- The defendant and the plaintiff can't reach an agreement to

bypass a trial setting. You know a schedule that the court has under. The difference here is it's a deposition. It's not something that the parties are required to do. It's something the parties decide to do in litigation. And so, I think when you have a discovery dispute over whether a deposition is gonna be taken, that is something that the parties can resolve among themselves.

JUSTICE MEDINA: Was that Rule 11 agreement approved by the court?

MS. MACKILLOP: It was filed with the court, which is what we are supposed to do.

JUSTICE MEDINA: Court's knowledge?

MS. MACKILLOP: You know -- I don't -- I don't know.

JUSTICE MEDINA: Because Rule 91 says a party can't merely by agreement modify a court order without court's concurrence. And it seems --

MS. MACKILLOP: I can't say that we presented it to the court to approve until the -- the new notice of deposition came in. And at that point, we did ask the court to approve it through our motion for protection. And that was when the court set it aside.

CHIEF JUSTICE JEFFERSON: Further questions. Thank you, Counselor. The Court is now ready to hear argument from the real party in interest.

MARSHALL: May it please the Court, Mr. Coon will present argument for the real party in interest.

ORAL ARGUMENT OF BRENT W. COON ON BEHALF OF THE RESPONDENT

M. COON: May it please the Court, Counsel, Justice Gaultney. Your Honors, I'm not the -- the most astute at handling these matters, so bear with me some. I did stay at the Holiday Inn Express last night so maybe I can make through it, but one of the last times I handled one of these appeals, was actually in front of Justice Gaultney many years ago and at this circuit. It's an honor to have you here again sir. This is a simple issue in my opinion. It involves apex doctrine and whether or not you can go depose a CEO. And in this case was not -- they waived it by the conduct of CEO. And the very fact that he's no longer a CEO moots all these issues. I fully appreciate as the representative of the plaintiff's steering committee and the discovery that's been undertaken in this case, which has involved travels around the world, depositions of people from all walks of life, with respect to what happened out there, it was a horrible tragedy. And in this case, we're not doing this to harass a CEO. The purpose of the apex doctrine is to protect the CEO from harassing depositions, from repetitious depositions. The Sam -- Sam Walton case was where Wal-Mart was always being noted in Sam Walton's deposition, they ruled slip and fall. We have very unique facts here. This is something that does not happen every day.

JUSTICE MEDINA: What -- what specifically took the CEO out of the apex protection?

MR. COON: Out of apex? In this case, many, your Honor. One is the fact that he's no longer there takes him out of apex.

JUSTICE: So you would argue that the El Paso case is wrong?

MR. COON: Yes sir, to the extent, that ' what it says. I am not even really sure what it says because I read that case. And I did not even have a good understanding of the timeline. It appeared when they noticed his deposition, he was already moving. And so I'm not really

sure that the case was really clear on that particular issue. I know it was cited. But in reading, I'm not sure that that's clear with respect to the time line and whether or not the trial court made the ruling of the fact that he was departing and took that into consideration into ruling in the first place. Here, at the time of the notice, it was unbeknownst to us that this CEO was in fact going to resign. And the trial court made its findings. And in this case it's important to remember what that burden of proof is on the petitioners to set aside those trial court's findings. And she's had hundreds of hearings that seem like certain hundreds of motions and dozens and dozens of hearings over the last couple of years.

JUSTICE WAINWRIGHT: Let's assume it's not moot. Then, you are gonna list the information that Mr. Browne had -- I think you were planning to -- that was unique, that would justify an apex deposition.

MR. COON: Yes sir, there are number of things --

JUSTICE: What is that?

MR. COON: -- there are a number of things that are unique. First and foremost, at the very beginning, the day of the plant explosion, it was the afternoon of March 23rd. He was there by the next morning. He spent the day there. He interviewed the people that were there.

JUSTICE HECHT: But you didn't learn that in the Manzoni deposition.

MR. COON: No, sir, we did not know that. But in terms of the things that he had superior knowledge about, if we're talking about all of it, he was there. He injected himself in the litigation from the very beginning.

JUSTICE HECHT: I thought it had to be -- I thought your agreement was -- to not take the deposition, based on what you knew so far and only change your mind if you learn something new in the Manzoni deposition.

MR. COON: Yes, sir. And again now we're talking about two different issues your Honor, first is whether or not we're to discuss all the things he had notice of with respect to whether or not the Rule 11 is applicable. If the Rule 11 is applicable, there are different standards that would apply to some of the issues that this Court would be faced with. So if we are talking about what he knew, just in terms of apex, and whether --

JUSTICE WAINWRIGHT: Let's finish that. And then let's come back to that other issue which I am also interested in.

MR. COON: Yes, sir. Well we know that for whatever reasons, he personally monitored Texas City Refineries process in progress for a number of years. We don't know why. We couldn't get an explanation from anyone as to with 18 refineries around the world, why he always looked at Texas City separately, and treated it separately. We know that he was personally involved in a number -- yes sir.

JUSTICE WAINWRIGHT: On that point, any information he would have about Texas City came from someone else, people below him, right?

MR. COON: Yes sir.

JUSTICE: He wasn't out there turning the gadgets, operating the machinery --

MR. COON: Agreed.

JUSTICE WAINWRIGHT: -- starting and stopping the refinery.

MR. COON: Agreed.

JUSTICE: So anything he knew came from someone else.

MR. COON: The information he was provided with, would have come from other sources. But the reasons he wanted to monitor that so closely and personally is very different. That would be his knowledge.

JUSTICE: But that would have come from, at least, maybe he -- he formed independent -- opinions, I don't know but any information that would serve as the basis of that would have come from somewhere -- someone else. Wouldn't it?

MR. COON: Yes sir. The information would have been -- the question is why did he want this information separate? What was it he was looking for? And the reason that's important is that we found out that through the discovery in this case, that there were lots of warning signals at Texas City about the potential for a catastrophic event, both internal, consulting, investigations that were done there, as well as external consulting.

JUSTICE BRISTER: So -- so you can prove all of those things. Why -- why do we -- why do we need to know. Somebody had to tell him those things, give him those things. So discover all those things, ask all those people. What did you ask, why do we need him?

MR. COON: Yes sir. We have asked many of those. I'm not saying that you cannot go to every other person in the world involved in this. But at some point --

JUSTICE BRISTER: Well the whole idea of unique is that there's not anybody else to go to. But if he's doing all this because somebody told him, you need to watch this place, go ask all those people.

CHIEF JUSTICE JEFFERSON: Was there a committee that made safety decisions at BP, or was it the CEO, or how did that work?

MR. COON: We're not sure exactly what it was that he reviewed and what he formed the basis of. We do know that there are many different committees at many different levels within the BP infrastructure, both at the plant level, the regional level, and in the international level.

CHIEF JUSTICE JEFFERSON: In other words, one reason he may be looking at this separately from all the other refineries is because he has a decision to make. He knows that there are problems and his decision may be the -- the factor that increases safety at the refinery.

MR. COON: Absolutely, and that's what's important about this case. Lord Browne was a very hands-on CEO and had a unique and vast stating interest with respect to Texas City in particular.

JUSTICE BRISTER: But wouldn't that -- wouldn't that be -- but that argument applied to all cases. All CEOs, in the final analysis, make the final decision.

MR. COON: Yes sir, they do but there's rarely -- the circumstances were that CEO's expressed such a keen interest in a particular operation of a particular unit. He has injected himself into the operations and the budgets at Texas City.

JUSTICE: But counsel --

MR. COON: And so for that -- that is just one of many reasons. Yes sir.

JUSTICE: -- but counsel, you knew much of this information, if not all of it, before you entered into the Rule 11 agreement.

MR. COON: Yes sir, and again, I think we are talking about all of the different reasons and then separately Rule 11, but I would agree with that.

JUSTICE: And the --

MR. COON: I --

JUSTICE: And the -- the Court did not actually order the deposition taken, did it? I mean they sent -- she essentially said that you could take the deposition and you chose instead to enter into the Rule 11 agreement.

MR. COON: Yes sir. And then as a result of taking Manzoni and

other conduct at BP after taking Manzoni, the judge set aside that Rule 11. And the judge had been very active with respect to setting the tone and tenor of the litigation, in fact --

JUSTICE BRISTER: It looks like from her orders, she's mad at them for doing this pretrial, trying to tamper with the jury pool --

MR. COON: Yes sir.

JUSTICE BRISTER: -- but it had nothing to do with what Manzoni said.

MR. COON: It -- it's probably based on the mooted issue. She understood what Manzoni said. She had been briefed on that. She also was understandably upset and concerned that after she had admonished BP throughout the litigation to be careful with respect to its public relations campaigns and how to address them, in terms of massaging public sentiment about the facts of the case. That Lord Browne injected himself back into the case, on the eve of trial and that BP sent out mailers to thousands of Galveston County residents, private communications on the eve of trial --

JUSTICE BRISTER: So how does --

MR. COON: -- that she had admonished them not to do.

JUSTICE BRISTER: -- how does the punishment fit the crime then?

MR. COON: Well, it -- it -- you would have to ask the judge as to what all of her motivations --

JUSTICE BRISTER: Oh no, no, no, no, no.

MR. COON: -- but --

JUSTICE BRISTER: On sanctions orders, the judge had better say it.

MR. COON: Yes, well that is not a sanction.

JUSTICE BRISTER: Kind of looks like one to me. I mean, she -- she -- she's quite clear here. The reason I am doing this is because you all are temp -- this company's temp on the [inaudible], so I will show them -- make your British Sir show up here for a depo.

MR. COON: Well, it -- it..it could be for those things, it could also be the mere fact that Lord Browne continued to interject himself personally into the litigation. He was not just out talking to his employees and rallying the troops and making them feel better. On the eve of trial, the very first trial, it was the Rhode case, the little lady -- the young lady right here who lost both of her parents - - on the eve of that trial, there was a lot of international coverage of the event. And Lord Browne then starts crisscrossing the continents. And he doesn't just talk to his employees. He gives stories to Fortune Magazine, he gives stories to the Financial Times. He goes out and tells the BP version over and over.

CHIEF JUSTICE JEFFERSON: Back -- back to the Rule 11 agreement, I can see where a Rule 11 agreement binds the parties to -- to the signatories to when it is filed in court.

MR. COON: Yes sir.

CHIEF JUSTICE JEFFERSON: And I can even see that most circumstances, a trial court is going to enforce a Rule 11 agreement, but don't -- aren't there circumstances where a trial court has reasons not to abide by Rule 11 agreement -- other -- because discovery was incomplete, or because circumstances have changed, or because the court believes that just -- the Rule 11 agreement doesn't further justice or fairness in the case.

SPEAKER: We can't --

CHIEF JUSTICE JEFFERSON: Doesn't a trial court have that sort of discretion to manage their own trial, their own docket.

MR. COON: Well absolutely, the -- the litigants can't control the pace of the discovery. Those go to the court. And if either side takes

issue with that then they can appeal. She --

CHIEF JUSTICE JEFFERSON: What if there is a Rule 11 agreement where they -- where both sides say, we don't want to go to trial January 1st, but the trial court says, I see that Rule 11 agreement but I believe this case is ready for trial, it's gone on too long, I am ordering trial to proceed. Would a mandamus issue against that judge?

MR. COON: You may have a mandamus against him. I would presume that under most circumstances it would fail.

JUSTICE JOHNSON: Well can -- can a trial court order the parties to take a deposition?

MR. COON: Yes sir, they did. In this case actually, part of this PR campaign resulted in mailers that went to many of the --

JUSTICE JOHNSON: Can the trial court order the parties to take depositions of A, and B, and C --

MR. COON: Yes sir.

JUSTICE JOHNSON: -- and D upon pain of dismissal of this case or sanctions.

MR. COON: Certainly she --

JUSTICE JOHNSON: What is there -- what -- what authority do you have for that?

MR. COON: Well, I'm assuming she has -- I say she, in this case it's she -- but the court has a lot of authority with respect to the [inaudible]

JUSTICE JOHNSON: What if the parties wanted to go to trial without any depositions. Does the trial judge have the authority to say, you are not going to trial unless you take those depositions.

MR. COON: I agree with that your Honor. But in terms of other issues, in this case in fact, she ordered depositions to be undertaken and it was resulting -- it was her impression that BP violated her specific rules, with respect to private communications to the jury pool, on the eve of the trial. And they sent out thousands of letters, to the residents of Galveston County, including those that were on the jury pool, about their side of the story, on the eve of the trial. And she found about this and sua sponte, ordered the parties to appear, and the people at the public relations campaign at BP that were responsible for it, and then ordered us to go take depositions, including those persons involved as part --

JUSTICE JOHNSON: If she can --

MR. COON: -- of an exploration into the sanctions issue.

JUSTICE JOHNSON: She has been ordering you to come to court --

MR. COON: Yes sir.

JUSTICE JOHNSON: -- she was ordering you to be there and testify.

MR. COON: Yes sir.

JUSTICE JOHNSON: Does -- does she think she -- she has the authority to say, go to New Orleans and take a deposition. And if you don't, then bad things are going to happen. I'm gonna sanction you.

MR. COON: You know Judge, maybe that would -- your Honor, maybe that would extend their authority, but I would be reticent to be the one to take them to task.

JUSTICE JOHNSON: I understand. And what if the parties agree that we're not going to take a deposition and enter a written agreement, and your position is, she can say regardless of the parties who -- it's their case, that she can say you are not going to -- if you don't take the deposition despite your agreement, the litigant's agreement, if you don't take the deposition, I'm going to sanction both of you and you think that is within -- that is not an abusive discretion?

MR. COON: I -- I think that under -- again it would be case by

case, but under many circumstances, it would be an abuse of discretion, yes sir.

JUSTICE WAINWRIGHT: So you do not dispute that the judge voided the Rule 11 agreement.

MR. COON: In our opinion she did.

JUSTICE WAINWRIGHT: And are you saying that the reason was the PR campaign, in her view that there were attempts to taint the jury pool.?

MR. COON: I'm saying that there's evidence that was one of the factors, based on her comments and based on the specific findings in her order. However, there were a number of issues that came up to demands on the deposition that did not resolve underlying and key questions we had in the case. For instance [inaudible] --

JUSTICE: Before we get to those. One other potential basis, I guess, for voiding the Rule 11 agreement, the order says BP made misrepresentations that induced plaintiffs to enter the Rule 11 agreement. I do not see where those are set out. Did the judge say what those were?

MR. COON: Yes sir, the misrepresentation were primarily the same ones that were the basis of the apex all along. And that is Lord Browne is a busy man. He does not have time to get involved in talking to lawyers and explaining what he knew, if anything, with respect to this explosion and the conduct of BP. And in spite of that, which was a partial inducement into entering into this agreement. After it was entered into, Lord Browne then went on an international campaign of talking to anyone in the media that would listen to him --

JUSTICE WAINWRIGHT: Were there others --

MR. COON: -- with respect to their stories.

JUSTICE WAINWRIGHT: -- other alleged misrepresentations?

MR. COON: I know that was a acute.

JUSTICE BRISTER: So if there's a bad explosion and you have a whole bunch of cases, mass tort cases. If the CEO goes around and says it is not our fault, we're a good company, then you subject yourself to an apex deposition.

MR. COON: No sir, I don't think you do. I don't think --

JUSTICE BRISTER: That's what all -- that's what they are supposed to do, right?

MR. COON: Yes sir, I agree.

JUSTICE BRISTER: They don't do that because they have unique knowledge. They do that because they have the corporation and they're the one, and somebody's got to go around saying none of it was all our fault.

MR. COON: Agree.

JUSTICE BRISTER: So, why -- why did that change the circumstances?

MR. COON: I don't think that alone changed the circumstances, I think that BP -- in the court's opinion, the BP course of conduct, with respect to what she perceived to be deliberate defiance of her admonitions, with respect to the public relations campaign was a factor.

JUSTICE BRISTER: Well, I understand --

MR. COON: But only factor your Honor.

JUSTICE BRISTER: I understand your being upset with the letters to potential jurors, but going around -- I'm a little concerned about a judge in South Texas and the First Amendment, when a company wants to defend itself in the public press. Okay, well I'll punish you personally. That's clearly a sanctions order. And we've got to do a lot of things under Trans America before you do that, right?

MR. COON: Yes sir, but I don't think that was the case. I think

that BP maintained all along that Lord Browne was too busy as an apex officer, to get involved in explaining the circumstances of this case -- this particular case. And yet Lord Browne injected himself again, after he arguably got a partial bye for the prior involvement in the case --

JUSTICE: But --

MR. COON: -- by injecting himself again on the eve of trial, when they were hoping to operate under the presumption that the Rule 11 agreement was going to give him that very bye.

JUSTICE: I understand that you did not ask for a hearing to set aside the Rule 11, that the judge did this on her own?

MR. COON: I hate to misspeak, your Honor, because we had so many hearings on so many issues. And I personally didn't attend them all, but my recollection and inference from the discussion with people is that was something that came up at the hearing with respect to just asking to go forward on the depo itself. And that was the one-hour time frame under the Rule 11.

JUSTICE GREEN: After you noticed Mr. Browne.

MR. COON: Yes sir, after it had been noticed. And again, the renoticing of the deposition -- and part of the reason it was to one hour in the first place, there's a lot of history here. We were about to go to trial on the first major case. And we are very -- there were a lot of time constraints of -- of taking these depositions, particularly in Europe, in London, and being prepared for trial at the same time. And that also involved, as part of the negotiations, John Manzoni, the number two person, coming to Chicago, even though he resided in London, and that the Lord Browne deposition would be shorter in it would be by telephone. Because of the time involved in going back over to London and setting it all up. So that was part of it, and some of those reasons dissipated as a result of the fact that the case was continued. And the case was continued as petitioner noted, as result of some additional allegations that basically were that there falsified documents with the TCQ with respect to the operation of that particular unit.

JUSTICE: Is there currently a trial setting [inaudible]

MR. COON: Yes, your Honor, settings are ongoing. In fact, we had trial settings in February. We just got out of a trial for one that lasted about a month. And there is one set, I think November is the next setting. And there are still hundreds and hundreds of cases pending that would benefit from whatever Lord Browne would have to say --

JUSTICE: What -- what if --

MR. COON: -- with respect to these matters. I'm sorry. Yes.

JUSTICE: What impact, if any does -- you not being able to take his deposition have on your case?

MR. COON: You know, you could say that it does not have any impact, but my personal belief is that if the CEO admits to a number of things, it has more power and influence on a jury, than it would coming from that CEO's underlings. And we know from what we've seen at this point and things developed in the case, that Lord Browne was highly involved in a number of issues. First and foremost and the key issue in this case, in my opinion has always been, why did this plant blow up? And it blew up because Lord Browne was personally involved in making a -- across the board budget cut, where he ordered all these plants to cut their budget, their operational budget, 25 percent in sustained it. It's unheard of. The plant managers have accommodated him, kept their jobs. The plant managers that resisted were demoted.

JUSTICE: He ordered that -- that reduction across all plants?
MR. COON: Yes sir, across the entire --
JUSTICE: Were there explosions at any other plants?
MR. COON: Sir?
JUSTICE: Were there explosions at any other plants?
MR. COON: Yes sir, there have been. The pipeline's another example. And that's part of the problem. The CSB, the Chemical Safety and Hazard Investigation Board, found and determined through a very thorough review of the -- most of the records we obtained in discovery and some of their independent investigation, that it was the budget cuts that compromised the infrastructure of the entire BP operations, in particular Texas City. And there were many root causes. There were many causes, but one of them was the open ventilation systems were 50 year old, had been scheduled to be replaced so these things didn't dent the atmosphere and were constantly taken out of the budget because of that budget reduction. The board operators, there were two, they reduced it to one. Even during shutdowns and start ups. And that was directly attributable to the budget cut. We traced all that back to the 1999 budget cut in Texas City as a result of Lord Browne's orders to cut your budget at Texas City, George Carter and Tim Scruggs sent there and went line at him. And we have all those documents. What we're going to --
JUSTICE BRISTER: [inaudible] sounds like you got a great case. Why do you need -- why do you need the CEO to come and say that is not what happened?
MR. COON: [inaudible] your Honor.
JUSTICE BRISTER: Or do you suspect for some reason he's gonna come and say, you're right, you're right, we were bad.
MR. COON: No your Honor. And that's a good point. It is an incredible case. I've never seen a case like it.
JUSTICE BRISTER: But we --
MR. COON: It is an incredible case.
JUSTICE BRISTER: But we -- you off and go to trial. And all we'll here about is whether to continue holding this thing up for this apex deposition for stuff you already about.
MR. COON: It has [inaudible]
JUSTICE BRISTER: What do you think is going to happen?
MR. COON: Well first, your Honor, it has held up. We'd gone to trial, and in our opinion successfully without his testimony. But the question is should a CEO get a walk just because there's a lot of other damning information. That is not the standard for apex. This man, in my opinion, is a wrong doer of a high source. He was personally warned, over and over, many of the problems that this budget cut would cost. He is a liar under oath and was fired by BP for lying to another court about a homosexual relationship with a young boy that he found on the Internet. That's who this man is. There's no reason for our courts to protect him.
JUSTICE JOHNSON: Counsel, do you have -- you disagree -- you disagree with the El Paso case. Now that he is --
MR. COON: El Paso Health Care, your Honor.
JUSTICE JOHNSON: Now that he's -- now that he's -- now that he's gone, do you think he ought to be subject to deposition like anyone else, I take it?
MR. COON: Yes sir, if -- if that's what that case really stands for. And I'm not really sure again because of the time line involved but we would say that.
JUSTICE BRISTER: Well let me just ask again, do you -- do you

believe once he is gone, he ought to be subject to deposition like anybody else, period?

MR. COON: We could say that in this case, yes sir. But again, there additional mitigating circumstances. One which was that when he resigned as CEO, he no longer had any transitional issues associated with the company. He didn't stay there to help the transition. He was no longer occupied inhaling the bearers at BP. So it's a clean severance. In fact, it appears he spent the next six months after that resignation, sending out resumes. And certainly, there were ample opportunities there to do it. Also, if you look at his course of conduct, he is by his consent injecting himself into this case. Has demonstrated ample opportunities to talk to us. He has given media conference [inaudible]

JUSTICE: [inaudible] hundreds of trials that are pending or on hold awaiting our decision in this -- in this matter, right?

MR. COON: No sir, that is correct.

JUSTICE WAINWRIGHT: If Mr. Browne had ignored the explosion, would your position be that he's derelict in duties for ignoring something important at his company. I'm -- I'm trying to figure out what you think a CEO should do, certainly not ignore it, but you don't think he should be doing what Mr. Browne did either.

MR. COON: Well, if he does what this particular CEO did, I'm not saying whether you should or shouldn't. But this particular CEO handpicked the investigators, had all the investigators, internal and external investigators, in the conference reports. He picked them and had them report to him the findings. He was involved even at that level. He personally picked the replacement plant manager for this plant. And their refining operations are just one of many operations at BP. And he wears many hats. Yet he just kept this hat on for so long where he constantly injected himself, personally, into the issues and operations that facility, before the explosion, during the explosion, and the for the two years after the explosion.

JUSTICE WAINWRIGHT: Chief, another -- one other question. We started sometime ago, you started to answer the question -- Justice Hecht's question about what new was found out about Mr. Browne's unique knowledge arising from Mr. Manzoni's deposition.

MR. COON: Okay, we know that Mr. Manzoni was not able to answer a number of questions.

JUSTICE WAINWRIGHT: No.

MR. COON: Yes sir.

JUSTICE WAINWRIGHT: What new was found out about Mr. Browne's unique knowledge after you took -- or from Mr. Manzoni's deposition? What new and unique that Mr. Browne could -- could talk about related to discoverable information in this case?

MR. COON: We know that -- and again, maybe I am not even on the same page with you, but we know that Manzoni could not explain to us, anything about the budget cut.

JUSTICE WAINWRIGHT: Let me -- let me try to explain --

MR. COON: Yes sir.

JUSTICE WAINWRIGHT: -- it differently because -- and it looks like we're on different planes. Okay. Up to the point of Mr. Manzoni's deposition, there had been many depositions and a lot of discovery taking, correct?

MR. COON: Yes sir.

JUSTICE: As I under -- read the Rule 11 agreement, Mr. Browne's deposition the parties agreed, was not going to be taken unless from Mr. Manzoni's deposition there was new information that disclosed what

Mr. Browne knew uniquely about this case. That is Mr. Manzoni's deposition had to disclose things that was unknown from all the discovery up to that point, okay and this had to be unique to Mr. Browne. Is that a fair description unique [inaudible] did?

MR. COON: Yes sir. I understand -- I understand where you are going from, and I think -- and it's probably my fault to some degree with respect to that Rule 11 agreement. It could be read, strictly construed that we were looking for only brand new evidence. It was not our intention. It was certainly not my intention to mean that if he could not explain the key issues. And the key issue all along with us was more than all of the other things, more than what he was told, at the incident, seen or anything else. What was know about and how can you enlighten us about this budget cut? And Manzoni knew nothing about it. That was -- that was a key fact.

JUSTICE: Okay, and I am just looking at the Rule 11 agreement. And you say maybe you interpreted it differently, but it says new evidence. That's why I am asking what new, not old, new.

MR. COON: Anything that was uncovered in Manzoni's deposition that we did not know about before?

JUSTICE: That related to Mr. Browne's unique knowledge about discoverable facts in this case.

MR. COON: Probably just the dovetailing, your Honor, of the things that we had already been looking for that Manzoni could answer.

CHIEF JUSTICE JEFFERSON: Any other questions. Thank you, Counsel.

MR. COON: Yes sir. Thank you all.

REBUTTAL ARGUMENT OF KATHERIN D. MACKILLOP ON BEHALF OF THE PETITITIONER

MS. MACKILLOP: Upon some of the discussion that's gone before.

JUSTICE JOHNSON: Counsel, let me ask a question of whether --

MS. MACKILLOP: Certainly.

JUSTICE JOHNSON: -- representation was made that six -- for about six months after Lord Browne left as CEO, he did not have a whole lot to do. Is that -- do you -- is that -- is that anywhere in the record that you -- do you agree or disagree or disagree with that representation?

MS. MACKILLOP: Your Honor, I think we are outside the record, way outside the record, in talking about --

JUSTICE JOHNSON: Outside the record.

MS. MACKILLOP: Yes sir, yes sir.

JUSTICE MEDINA: But -- but -- I thought you said during your argument that there was a period of time where he was looking for a job, right? There was a period of time theoretically that he would not have fallen under any apex protection.

MS. MACKILLOP: There was a point at which he was not employed. He was still on the board of some -- he was still on boards, various boards of various companies, but he was not to my knowledge employed as a CEO-type person.

JUSTICE MEDINA: That's important, I think for the analysis of whether or not there was a protection that flows after his first job to the next job. If there is a window -- a period of time where he is not protected.

MS. MACKILLOP: Right. And I just did not want to say that I knew

what he was doing day to day. All I can tell you is that he --

JUSTICE JOHNSON: Follow up a little on -- if you have someone who is not an apex person --

MS. MACKILLOP: Uh -- huh.

JUSTICE JOHNSON: -- involved in a case such as this and they leave the company and they become an apex person for -- instead of company A, they leave company A and they became an apex for company B. Is it your position then that because they are now apex of company B, they shouldn't -- we have to apply the apex rules to them in the explosion or accident over company A.

MS. MACKILLOP: No and let me tell you why.

JUSTICE JOHNSON: Why would we do it in this case?

MS. MACKILLOP: Because, he would not have been an a -- your -- your -- your premise is he was an apex.

JUSTICE JOHNSON: Was not apex for starters.

MS. MACKILLOP: Right. And so that means that he would have had the unique or superior kno -- he -- he would not -- he would have had more knowledge than unique or superior, right? He would have had something add to --

JUSTICE JOHNSON: Well, I don't know. I am just -- I am just going to the question of -- the fact that the person is now an apex and -- a different company, does that, how does enter into it is the -- I am struggling with that. Why -- why do we let company B, putting this person in as an apex, affect what happened before? That's -- that's what I am --

MS. MACKILLOP: And I'm not -- I'm not sure that it would. I'm not sure that it would because what my position is, is that when all we are talking about is the apex and number one company, that's what should stick. And -- and -- I'm -- I'm not trying to say the rule is no matter -- whenever in your career you become an apex official, boom you cannot give any discovery.

JUSTICE: Just retired. Why should the apex protection continue after somebody retires?

MS. MACKILLOP: Well in -- in -- in -- I struggle with that a little bit, but to try to make a logical rule that we can live with, your Honor. Are we going to say that you can depose someone when he's at the end of his career and he's retiring, tut you can't depose him if he's in the middle of his career?

JUSTICE BRISTER: Well -- and that's -- why not? The argument is they're no longer trying to hold up the company. Ha-ha, we will show you if you do not settle with us, we'll waste a bunch of time of your key executives. But if they are wasting a bunch of time of retirees --

MS. MACKILLOP: Well and then you know, it is all a weigh in your Honor, you know -- if at some point the harassment leveled because he is retired and on the golf course, the harassment level to him is not quite as much. Perhaps -- or excuse me, the undue burden to the company isn't quite as much because you are not taking them out of their business.

JUSTICE BRISTER: Right.

MS. MACKILLOP: It is not to say that the harassment value --

JUSTICE BRISTER: So why -- why do we keep [inaudible]

MS. MACKILLOP: Well, that -- that is like Sam Walton retires. And he gets to be deposed in a thousand slip and fall cases. Well he did not have anything else to do. But the truth of the matter is, the only reason they want Sam Walton is for harassment purposes.

JUSTICE BRISTER: Well [inaudible]

MS. MACKILLOP: The little bit of undue burden that still comes to

the company --

JUSTICE JOHNSON: Always subject to relevancy. I mean you can move to quash on the basis that -- he doesn't know anything about this. I mean you can -- you have the same rules still apply that we don't just go out, and spend a lot of money, and harass people in general. But that is different from apex considerations, isn't it?

MS. MACKILLOP: Right. It is because in apex she was saying that -- you're -- you're not going to get deposed unless you have unique or superior knowledge.

JUSTICE JOHNSON: But you always have the relevancy. If Sam Walton didn't know anything about a slip and fall in California because he was in Europe all that time, well you have always got the relevancy objection to quash, right?

MS. MACKILLOP: Well -- well you do but -- here -- here's the problem we have, and you heard it from -- from the argument, and that is because he knew about -- Sam Walton knew about budget cuts. Well then, we're going to have him deposed at any case where we can articulate a reason or come up with a reason that budget cuts, well if you had more money, you might not have had the slip and fall. And the reason they want Sam Walton is not to make the case go forward. The reason they want Sam Walton is for other purposes. If I can just make one point before I sit down, your Honor?

JUSTICE BRISTER: Is that -- I can understand why Wal-Mart would want to protect Walton, but when you fired the CEO, does that make it a little different in this case?

MS. MACKILLOP: Well the -- our CEO quit. He wasn't fired. And I don't think principally it should make a reason. I don't think so.

CHIEF JUSTICE JEFFERSON: Are there further questions?

MR. COON: Yes, your Honor, I want to make one point.

JUSTICE: You're going to make your point?

MS. MACKILLOP: Oh I'm -- I'm sorry -- I'm sorry. Just want to respond, I apologize, to what Justice Brister said about sanctions. Yes indeed there is no evidence of any sort of public comments tainting the jury pool by Browne going to visit people in California, Illinois, and Ohio, who not surprisingly will not be on a Galveston County jury and will not be in the jury pool.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshall will adjourn the Court.

MARSHALL: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas.

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