ORAL ARGUMENT - 3/20/96
96-0001
PERRY HOMES CONTRACTORS V. PATTERSON

LAWYER: May it please the court. The issue in this case is whether a defendant should be required to disclose private confidential financial information in every case where an allegation of entitlement to punitive damages has been made, or whether a plaintiff should be required to establish a prima facie case of entitlement either by jury verdict or otherwise before the plaintiff is allowed discovery on net worth.

SPECTOR: What would otherwise be?

LAWYER: Otherwise would be something like the Wyoming plan which I will discuss. Perry's position in this case is that a plaintiff should be required to make that prima facie showing. The reasons for that is: first of all financial information is private and confidential in nature, and I think that's been judicially accepted by courts across the country for many years.

ABBOTT: One of the arguments concerning the confidentiality as far as your particular client is concerned is because the information may be disclosed or learned by competitors. And that's why it is important for you to have mandamus relief. Correct?

LAWYER: Yes sir.

ABBOTT: Would then this test not apply if we were dealing with individuals who don't have to worry about competitors, but merely have a concern about having significant private information about that concern, but there is no real impact to their lives like there would be for instance to you because of a competitor?

LAWYER: I think that of course in my situation my client has a reason for competitors not to know what their financial status is. But beyond that I think that there is a strong feeling and belief that financial information of all kinds from private individuals whether they be doctors, whoever they are, that information is private and confidential to them.

ABBOTT: Would we in essence be coming up with a rule that arguably could be extended to allow for mandamus relief whenever discovery is requesting information that falls within say a realm of privacy? What if you were involved in a lawsuit and you were issued discovery that asked for something, not tax returns, but something else of an equally private nature that you didn't want to have disclosed: something maybe concerning your medical background - who knows what it may be, and you wouldn't want that disclosed could you then go down and seek mandamus relief that would be sustained because of that?

LAWYER: The only way I can answer that at this point is that I'm focusing now on financial information. And with respect to financial information I think the cases are fairly clear that that is private confidential information that people don't like to have disclosed. Now when it comes to medical information, medical information is disclosed in cases all the time if there is an issue in the case relating to that medical condition. In this case you have a situation where there is relevance with respect to financial condition of Perry, but only on issues that deal with the bifurcated part of the trial or the punishment phase of the trial. So until the plaintiff makes the burden of having established that he has a right to punitive damages by making a prima facie case of gross negligence, or malice, or whatever that information is not even relevant.

ABBOTT: You bring up another concern and that is of relevancy. Are we to fashion a rule such that whenever a trial court requires someone to produce something, a party to produce

something, that would be irrelevant would they then be entitled to mandamus relief?

LAWYER: Well I guess it depends on what it is your honor. If it's financial information in this context I would not think so. But in this particular context with respect to financial information, the courts that have granted or decided, or the states that have decided that bifurcation is an appropriate way to deal with this issue of the introduction of net worth information to the jury, all of those states have also provided rules or promulgated rules that require the plaintiff to make some sort of prima facie showing of entitlement to those damages before that information is discoverable. So at least in this context that we are talking about today, that certainly might entitle a person to mandamus relief. But if this court were to fashion a rule that requires a court to get that prima facie evidence from a plaintiff either by affidavit or otherwise before he allows the discovery of the net worth, that would take care of the situation.

PHILLIPS: At the time of Munsford our impression from the briefs that 43 states allowed this type of information, that we were joining the overwhelming majority. I didn't see anything like that number in the briefs this time. Are there other jurisdictions out there or were we misinformed in Munsford?

LAWYER: I am not sure about that your honor. I do know that of the 43 states that were mentioned who allow net worth information, over 1/2 of those states have rules with respect to how and when financial information should be discoverable.

PHILLIPS: But you were talking about virtually every other state. We don't really know that; is that right?

LAWYER: Well we do know that the 15 or so states who allow bifurcated trials have rules with respect to when and how net worth information should be disclosed. And most of them say that some prima facie evidence should be made before that information is disclosed to the other side.

PHILLIPS: Do they usually withhold until after the first trial, or do they generally allow it during discovery after some showing has been made to the court?

LAWYER: There are 2 schools of thought actually.

PHILLIPS: Right now as I understand it, the second phase of the bifurcated trial is starting up after a brief recess, which would not be possible under one of your alternatives?

LAWYER: That's right. Under the New York rule. The financial information is not even discoverable until after a jury has returned a verdict entitling a plaintiff to punitive damages.

ENOCH: But in the New York rule you don't really get discovery on the financial do you?

LAWYER: That's right you don't. They file a stipulation of net worth, or an affidavit of net worth.

ENOCH: Back when Lunsford was decided, in fact you refer to a couple of cases that Lunsford actually refers to, those cases it seemed to me decided both the bifurcation and the discovery concerns all at the same time. Particularly the Wyoming case. I mean it came to the conclusion we are going to bifurcate this and this is how we are going to handle discovery with regard to that. It seems to me that the majority opinion out of this court in Lunsford had both that before it. It had the bifurcation question and it had the discovery question and it denied the bifurcation saying we are not going to do that. And it also addressed the discovery issue that we are

not going to delay discovery based on some prima facie. Is there any way that this court can accept even your alternative, the Wyoming circumstance without specifically overruling Lunsford? Is there any way we can get where you want to go without overruling Lunsford?

LAWYER: In Transportation Ins. Co. v. Moriel this court held that a bifurcated trial would be allowed when a defendant requested by a proper motion. And that in part would overrule Lunsford right there. And the only thing about it is well Lunsford considered and rejected the Wyoming plan. But the Wyoming plan was in 2 parts. Now this court has adopted 1 part. The part that they haven't adopted is the protection that a litigant needs in order to protect his own private financial information when there is an attack on trying to get that information from him. And that's what this addresses. So part of that was already done in Moriel.

ENOCH: But one of the problems though that's presented is in Lunsford the specific question is you're going to get this discovery and our particular rules do not permit the requesting of a prima facie showing of what permits you to go look at for punitive damages for this admissibility of the punitive. So in Lunsford this court actually held that our rules as they are written do not permit this kind of request for a prima facie showing. That's pretty strong language in Lunsford.

LAWYER: As you know Lunsford came up on an original proceeding. And Lunsford overturned existing law because before that time your honor net worth information was not discoverable. So the SC on mandamus held that net worth information was discoverable. So the existing law that it came up on they changed. So I don't see that this is all that different.

ENOCH: We ought to fix what went wrong last time?

LAWYER: That would be a good way to put it.

BAKER: So you want us to overrule Lunsford?

LAWYER: I wouldn't suggest that you do that. Unless there was no other way to get around it, then perhaps you should.

BAKER: You suggest that we have to to get where you want to go?

LAWYER: Well no, because the key issue in Lunsford was whether or not net worth information was discoverable. And you wouldn't be overruling that. The rest of it discussed how and when that information should be made available. And I don't know if that was part of the holding, or just dicta. But the central holding and the key holding in Lunsford was that net worth is discoverable, which put Texas then in line with I understand 43 other states who had allowed it.

PHILLIPS: Under a non-New York plan how would you suggest that a plaintiff go about marshalling the evidence to make this showing to the trial judge prior to trial, that it was reasonably likely or possible or whatever the standard is, that there was going to be a fact issue on punitive damages?

LAWYER: Certainly I think that a plaintiff should have the opportunity to make discovery on the issue of gross negligence, or malice, or whatever issue it is he is attempting to get his punitive damages on. And after he's had that opportunity some time close to the end of discovery, but certainly far enough away from trial date, he should be required to make some prima facie showing through affidavits much like a summary judgment proceeding to present to the court the evidence that he has to see if he passes muster on what it takes in order to get gross negligence finding.

PHILLIPS: There's going to be some grey area where the trial judge doesn't give it, but

then after hearing the evidence decides it should go to the jury, that the plaintiff won't have the benefit of this evidence.

LAWYER: Well that's very true.

PHILLIPS: And if the trial judge denies this motion and the evidence doesn't materially change is that a binding ruling then that there is no evidence of punitive damages sufficient to have the bifurcation?

LAWYER: My thought is that in order to get the discovery he should be able to present something to the court that indicates to the court that he may get to the jury on the issue. I wouldn't think that that would preclude him from submitting the issue to the jury if something else comes up during the trial of the case that would entitle him to it. But I think that he would get a pretty good indication from the court as to how the court was going to...

PHILLIPS: But the trial judge can change his mind, either direction, to allow net worth and then say well after having actually heard it there's not enough there?

LAWYER: Right.

GONZALEZ: If you were to recite the facts more favorable to the plaintiff in this case as to their right to discover this information what would it be? As I understand the facts there was no direct relationship between the plaintiff in Perry Homes. They are a second-hand buyer?

LAWYER: Yes, sir. They are second-hand buyers. There was no communication and they haven't alleged a specific communication between Perry and the Revays(?), and in the deposition which is not before the court. But in the deposition they admitted he hadn't talked to anybody from Perry Homes. It hasn't been alleged that they relied on any advertising material of Perry Homes. In their depositions they testified that they did not.

GONZALEZ: We're left with a mere allegation in the pleading, but not even an allegation of wrongful conduct.

LAWYER: There are allegations of breach of contract, fraud, misrepresentation, unconscionable conduct, gross negligence, those allegations are in there. And there are allegations of misrepresentations. But there aren't any specific statements with respect to what took place. The only thing that is stated specifically factually is that Perry built the house, that there were problems with the foundation because of soil conditions. Basically that's it.

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RESPONDENT

LEMON: May it please the court. I take issue with counsel as to what the issue is before the court today. The issue is not whether a defendant has to turn over his financial documents. The issue is did Judge Patterson act in an unreasonable and an arbitrary manner when he ordered that these documents, this information which is not before the court as far as I know, was not brought up on appeal, I haven't seen anything that shows the in camera documents are even before the court for the court to look at, but did he act in an arbitrary and unreasonable manner? And I submit that he did not.

GONZALEZ: That was the identical issue of Lunsford v. Morris?

LAWYER: That's correct your honor. And in fact if you take your _____ two wrongs do not make a right. I believe the court tightened up mandamus since that time with the

Walker v. Packer case. But even at that point I think you made a good issue talking about the vehicle. What is the vehicle for this change? If the court wants to change what the rule is, which I submit it doesn't need to, but if it wants to then perhaps it should go through the committees as I think Chief Justice Phillips mentioned in his dissent on rehearing is go through the committee, let the rules committee look at this and talk to people who are actually out there practicing who actually go through the Moriel bifurcation now and how it works, and what the effect would be at that time. What I intend to cover is somewhat the background that Judge Patterson was considering, factual and procedural, and then the practical effect of what we have if what we have now and what would happen if we applied either of these two methods that have been suggested by opposing counsel. First of all we have Walker v. Packer which says: Judge Patterson had to be arbitrary, and he had to be unreasonable in what he did. It's very clear. There's no doubt about that. And in this case this was suit was filed in October, 1994, and I think what we've got here may be the cart before the horse with regard to opposing counsel's argument in that this suit was filed in Oct., 1994, and there was discovery that was _____ at the end of 1994 there was an abatement period. In March, 1995, is when the objections were filed by the defendants, by Perry Homes. There were a couple of hearings, and in fact there was one hearing on the motion to compel or on two motions to compel by the plaintiffs. In August there was 1 hearing, and Judge Patterson said: Okay I want this document submitted to me in camera, and there were other issues that he denied the plaintiffs what we were requesting. But he said I want to take these in camera. Three weeks later is when we get our first motion to bifurcate this trial. Now Moriel says you've got to file a timely motion to bifurcate the trial. And it's my recollection that that's been codified now and I can't recall the exact time frame, but I don't think 11 months is a timely motion to bifurcate a trial. So even before we get to this hearing where the judge is first considering it, we've got our motion to compel, they haven't asked for a bifurcation. As we sit here today we never had a hearing on the bifurcation, nor on their special exceptions. They come in and they say: all our special exceptions are going to wipe out their case, they are not going to be able to recover these punitive damages, they will never get them, there's not way. Well they don't have a hearing. They haven't asked for a hearing. They haven't written a court and say: give us the hearing on this. We've had 2 other hearings after the August hearing, and since they've filed their special exceptions and their motion to bifurcate, we've had two other hearings on these same issues. And at no time has there been a hearing on special exceptions or the bifurcation. So as this court I believe is looking at this case we don't have a bifurcated case. There is no order that's been entered saying: yeah, we are going to bifurcate it pursuant to Moriel. And if you look at Hines v. Hash clearly these type of issues can be waived. That of course is the case with regard to waiver of the DTPA notice _____.

ENOCH: Under the statute is there any requirement for the court to have a hearing on a motion to bifurcate?

LEMON: I don't believe there is. The statute would not apply I don't believe because of when this suit was filed. I think the only thing that would apply would be Moriel. And of course Moriel came out in June, 1994, and it was 15 months after that opinion was out. So it wasn't like they didn't know Moriel was in existence. They didn't know they could ask for a bifurcation. So that was in effect at the time, and I think that's what would be controlling. So Judge Patterson has 3 hearings on this. We have no evidence, none whatsoever presented by Perry Homes, the defendants, at any of these 3 hearings. Not any; not an affidavit; nothing. Now they did submit an affidavit with regard to other issues we were seeking. We were seeking files with regard to other foundations in the neighborhood. But as to these documents they didn't submit any evidence. Their only objection is that it isn't relevant, and that it was to harass. They never in their objections have they ever said: hey, this is private, this is confidential, this is going to embarrass us, this is going to humiliate us. They didn't. They said it's not relevant. Well at that time it was relevant. And at this time it is relevant because the case has not been bifurcated.

After having these 3 hearings, after having the documents submitted in camera, after reviewing them, after denying plaintiffs relief on the other, Judge Patterson enters an

order saying: this information is confidential. You can have it plaintiffs, but it's confidential. So there's a multitude of safeguards involved in this issue. And this is what my _____ shown is a general rule. Whenever a judge...I've never had a judge just say: Okay, you've got the financial documents, and I represent both sides - defendants and plaintiffs - every time you can have the financial documents but it's under an order of confidentiality. Or we're going to keep it in camera and you can come up to the courthouse and you can look at it, and you can know what's in it, but you can't take it out. You can't dissimulate it. Well you've got the safeguards of contempt, you've got rule 13. I think that you also have specifically listed in the Lunsford case is the discretion of the judge with regard to whether it's for harassment, or an invasion of privacy. The case specifically says: we're going to leave that to the trial judge. And I think that was something that was specifically mentioned by CJ Phillips in the dissent in Lunsford on the rehearing was the TC knows what's going on. He's down there, he's in the trenches, he knows whether it's for harassment, he knows whether it's really private, whether it's going to have any effects on this case or not, and whether it's going to be embarrassing. So I think that in light of what Judge Patterson did you've got confidentiality, you've got an in camera inspection, you've got 3 hearings, and you've got pleadings at the time asserting an allegation for which punitive damages are recoverable, and you don't have a motion for bifurcation to have timely been filed, no hearing having been requested on special exception or bifurcation. The issue is not do defendants have to turn over their financial records? The issue is considering what Judge Patterson did, what he considered, was that unreasonable and it was arbitrary?

GONZALEZ: What is the allegation as to fraud as to Perry Homes?

LEMON: The allegation as to fraud is that they knew when they built these houses they knew that that soil was bad, and that they had knowledge that when they built the house eventually whoever ended up with it whether it was a first time buyer, or a fifth time buyer, that they know what's going to happen and the house is going to fall apart. You've got the Dupta(?) case, you've got all the other cases with regard to the implied warranty also continuing with these homes, with builders, and that's clearly been established.

CORNYN: Could you address all these other issues aside that you've addressed could you talk about the infeasibility or the impracticality of I believe you alluded to that earlier in your initial response?

LEMON: First of all as I mentioned the usual practice is that it's going to be held as confidentiality. The other issue is with regard to insurance companies, which as the court is well aware are often the target defendants not necessarily in this case, but in other cases the financial information is on file with the state. It's always on file with the state. You can always get a certified copy there. But the practicality problem that you run into with an insurance company you can get a certified copy of this document, then you can offer it into evidence, and you can depose people and you can ask them you know is this accurate, etc., etc. If you go with what is being discussed 1) you are not going to have an opportunity to try and settle the case. The court doesn't live in a vacuum, and I'm sure the court is aware that if there is a lot of money out there for a defendant, it will have a different effect on your case as to whether the defendant has zero money. And while that is not admissible, of course, you've got insurance and the rules provide of course that you can get the information with regard to insurance. And I think there's an analogy there that as a plaintiff's attorney I am looking to see what my final recovery can be in a case. I've had cases before you find out the net worth and then you know your case is not pursued quite as vigorously and you can resolve it.

CORNYN: You raise an interesting question or interesting issue if the judgments going to be paid for by insurance why would net worth of the insured be relevant to anything?

LEMON: Well the way the law is of course, the punitive damage element - one of them,

there's 7 of them, one of them is net worth. And talking about practicality, and of course you would put on evidence, maybe, maybe you wouldn't. I have had cases before where you specifically decide not to put on the net worth. The defendant you know everybody thinks that they are a national company and they are worth a lot of money, and then you find out hey they don't really have any net worth. Well you don't want to put them on. And that leads to another practical problem is when you're doing the voir dire in a case and you're talking about punitive damages, and you're seeking punitive damages, you've got to know what is going to be happening when you get down. You've got have credibility with a jury panel, and the jury. When you say you know when this is over we are going to be seeking punitive damages, and then you come back and you see that they don't have net worth. You don't want the jury to know that they only have a few cents in net value. That's not an element that you want to submit. And what I submit to the panel here is that the plaintiff should not be sandbagged, and the plaintiff should be able to go in with financial documents 1) that he can ask deposition questions about and prove up. And I'm not saying just go chase every rabbit, but to where he is comfortable that they are accurate. Something that was presented in the Lunsford case of course was the definition of net worth. You know what is net worth? Well I would submit that on occasion I have had disagreements with opposing counsel as to what net worth is. And the number that the opposing counsel thinks is net worth is not what I'm thinking is net worth. And I don't think that the defendant should be the one who can choose: okay, you can put this number on with this depreciation you're going to have this number, but we are going to use a different method for depreciation and you can't put that one on.

ENOCH: I'm not sure that you've answered Judge Cornyn's question.

LEMON: I was working on it. I hit some of them. Another one is with regard to just the kind. When you try a lawsuit juries get really antsy as you are probably aware. And if you wait until after you've tried part of your lawsuit you've got the voir dire problem that I mentioned earlier, then you also have this gap. And there's no way that I can see that in practical terms you can stop the trial and have them give you a document you see for the first time; your case has been pending 3 years and you get this document and then you've got 5 minutes to come in and prepare your whole case on punitive damages. That's another practical problem that I have seen. And I think that it would also be the kind of thing to where if you told the jury that okay this is a big mega company, and then you didn't put it on you are really, really be into some problems. But the time gap - to get the jury back in and back going again because by then if you go under Moriel...I've seen that that's quite a bit of problem there. But the only issue usually is the net worth. And so if you say come back in we are going to show you net worth and then all of a sudden you decide not to use net worth and they come back in, they are going to be wondering what's going on.

ENOCH: Under the statute that we now have it appears that all the defendant has to do is request the bifurcation, the TCs got to grant it as I read the statute?

LEMON: Timely.

ENOCH: And it says that the motion is timely if its made before voir dire. So I guess under the statute when you come up and you put the jury out there on the panel and the defense lawyer goes up and says I want it bifurcated, the statute says the court shall bifurcate. Under those circumstances it seems to me that under the new statute of new cases any rule that would say well net worth is not discoverable until after you bifurcate and all this sort of stuff is not necessarily going to be workable. But the Wyoming situation which says if you're going to allege a claim for punitive damages, that before net worth's discoverable you have to make a prima facie showing why wouldn't that be a reasonable solution to both people's circumstances accepting for the moment that Lunsford specifically says our rules don't provide for that. But why wouldn't it be a reasonable compromise to say if you're going to seek net worth then be prepared to do a prima facie. Then it doesn't depend on whether it's bifurcated; it doesn't depend on whether you have separate trials; it doesn't depend on when the defendant either bifurcates or doesn't bifurcate. If you go in with the notion that I'm

going to seek punitive damages, you come in with the anticipation that I'm going to have to make a prima facie showing before I can go to the next step of discovery; why isn't that a workable circumstance?

LEMON: I think there are at least 3 problems with that. One is what is the prima facie showing? How do you tell the TC this qualifies as a prima facie showing, and this doesn't qualify as a prima facie showing? Two, in Dallas county right now it takes 3 months to get a hearing in many of the courts. And if you run into having to prove your liability and get enough evidence to prove liability, you may not have a hearing before the trial. I have had that happen on several occasions where we've had issues and we want a hearing, and we are 3 months away from trial, both sides, and we just cannot get a hearing. So that's another issue. One is that it's going to increase the workload for the TC, and then the other is you are going to have a lot more appellate review I would imagine. Because if I go to a judge and I show him what I think is prima facie evidence and the judge says no this doesn't qualify and I need that information, then my only recourse that I could see would be a mandamus type setting. Or then having go all the way through appeal and of course that's the type situation where you wouldn't have all the evidence that you need I think to present in an appellate record. You would also have the problem with the settlement. Your possibility of settlement would diminish significantly I think when you don't know what's going on financially.

Again, I get back to the fact that before the court today is a mandamus proceeding, and whether the court is inclined and thinks that a rule is appropriate to change the method and the timing of discovery you know I don't know how the court is inclined, but I do know that this is not the vehicle to do it. To use a term in Lunsford it would be preposterous to say that Judge Patterson after having the 3 hearings, the confidentiality that he acted in arbitrary and in an unreasonable manner.

HECHT: Judge Patterson may not have thought that Lunsford gave him any choice?

LEMON: Well actually that was my other...I'm glad you asked that question, because Lunsford does give the other choice. Lunsford says that the TC is the one who is at the scene basically, and at the scene he knows whether it's harassing...

HECHT: Well short of that he may not have thought that unless he found that that he had any choice other than to give it to you immediately.

LEMON: Well he didn't, that's what I submit to the court. That is what the law was. How can you say that...

HECHT: And if it turns out that's not what the law should be, then it's not an abuse of discretion in those terms, but there would never be a change if the issue didn't come up and the court didn't resolve it.

LEMON: There would never be a change by way of mandamus. There would be a change by way of the rules committee for the rules of civil procedure rules of evidence, which I submit is the proper way to do it because you get so much more input, more than just me up here talking to you, or opposing counsel. You've got all the lawyers, all the people on the committee who can talk about these things, who can talk about the practicalities and everything. So I submit that in fact the rules committee would be the way to change it if the court was inclined to change it. But I don't think that's necessary.

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REBUTTAL

GONZALEZ: Why isn't it preposterous to say that Judge Patterson abused his discretion by

following the law?

LAWYER: I think mandamus your honor has been used in recent past to clarify the law. And a good example of that is National Tank v. Brotherton where the court thought he was following the law when it had to to with work product privilege. And thought he was following the law when he allowed discovery of an insurance company's file or an investigative file. Because he thought that in order to protect a file like that from privilege there had to be an imminent possibility of litigation. But the court clarified that on a mandamus or original proceeding. So I think the courts have used it for that reason or to change the law when the law needed to be changed. And I think in this instance it clearly does because not only is there the risk, I know that you mentioned in WalMart v. Alexander another problem with unlimited discovery is the potential for abuse. If all that is required for discovery is sensitive, private, and confidential information in tort actions is a mere assertion of gross negligence in a pleading needless abuse and harassment could occur. And in fact your honor that kind of harassment has occurred. And a good example of that is in Kern v. Gibson, where the plaintiff tried to get everything under the sun, his information on all of his assets, information on his box at the Cowboy stadium, and this fellow wasn't even a defendant. He just happened to own the corporation.

ABBOTT: What about the argument though that the only objection that you have perfected here is one of irrelevancy. In other words confidentiality is not a perfected objection. So you are asking this court to issue a mandamus for a TC's failure to rule the proper way on an irrelevancy objection?

LAWYER: We made two objections. We objected on the basis that it was irrelevant and not such that it would lead to the discovery of relevant evidence; and we also objected on the basis that it was harassing. Now the cases all say that private confidential information...financial information is private confidential information. Well it's harassing to ask for that unless you have some reasonable basis for wanting it. And if you don't have a basis for wanting it, then why get it.

SPECTOR: Does the TC here define what documents constitute net worth?

LAWYER: No your honor. The only thing the TC said was net worth documents.

BAKER: What did you give them to look at ?

LAWYER: We gave the court a balance sheet in camera.

BAKER: One piece of paper?

LAWYER: Yes.

BAKER: And that's burdensome to give them one piece of paper?

LAWYER: I didn't object on the basis that it was burdensome. I objected on the basis that it was harassing, and on the basis that it was not relevant. That was the main objection. One piece of paper, 2 pieces of paper...

BAKER: Well you argue two things here that I think we need to get cleared up. Burdensome was one of your arguments. And the other was that if that information was given to the plaintiff, it's going to harm them because the competitors will learn about their net worth. But clearly there's an order by the TC making that confidential and they can't disseminate it to anybody. Correct? Did you ask for the order to be confidential if they turned it over?

LAWYER: Yes your honor.

BAKER: So you got what you asked for there?

LAWYER: Yes, but we didn't...

BAKER: You just don't want to give it up at all?

LAWYER: That's right your honor. And I don't think we should be required to give it up at all. And it's not just that one piece of paper that's involved. They have now sued several Perry entities, and they now have production requests for financial information.

BAKER: But that's not our record here?

LAWYER: No, it isn't but it will impact what decision this court makes here today. So there's more out there than simply just this.

OWEN: Why doesn't the confidentiality order or a procedure where the judge keeps it in chambers and you can only go up to the courthouse and look at it; why wouldn't that be adequate protection?

LAWYER: Well first of all the court didn't do the latter.

OWEN: But if they were to do that, why wouldn't that be adequate?

LAWYER: First of all Mr. Lemon and Mr. Shaw sue builders on a regular basis. And they have sued Perry before. There is no doubt they are going to sue them again. So there's really no reason why they should have that information in hand because that information will be available to them in other cases. And once the information is given out, then you can't put the cat back in the bag. The information is out; it's available. And courts have said that this kind of information once it gets out, the damage is done. You can't undo that damage once it gets out. That would be a good solution your honor to let them go look at the information in the court's chambers at a time when it became relevant for example once the trial or once they made a determination about what they could see. But the problem I see with that is that if they establish a prima facie case of an entitlement for punitive damages, then they need to have the opportunity to do some discovery. And once they get the information they should and I think everybody agrees they should have some opportunity to do discovery on it if is not satisfactory to what they've been given.