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IN RE ERNST & YOUNG

YATES: On this mandamus proceeding we believe that mandamus will lie and that we meet the standard for mandamus under a trilogy of decisions from this court following Martin v. Lofton. And the trilogy that I referred to is Dillard Dept. Stores v. Hall, Texaco v. Sanderson and K-Mart v. Sanderson, all of which involved over-broad discovery requests where the court held that mandamus would lie and that there was no adequate remedy by appeal and it was an abuse of discretion because the request on its face was over-broad as a matter of law.

PHILLIPS: Right now this court is vacant. Is that correct?

YATES: Yes.

PHILLIPS: If we get this opinion out while it's still vacant that's fine, but if the governor appoints somebody before we got it out would we need to abate this case for that judge to take another look?

YATES: Under your rule, Rule 7.2(b), right. It would be appropriate at that point because then there would be a successor judge.

PHILLIPS: So we're sort of in a race with the governor's office?

YATES: Yes.

O'NEILL: You're not saying it's overly-burdensome? Burdensome is not an issue?

YATES: Not in the sense burdensome of trouble, expense in getting the documents. We have the documents. They are in our general counsel's office.

O'NEILL: So they're there, and they are discreet, and they are public record as well?

YATES: Right. But the request is still over-broad in terms of being over-broad and not limited sufficiently in time, place and subject matter, so that it's reasonably calculated to lead to admissible or relevant evidence. That's the over breath that's at the basis of this trilogy of your cases that we rely on here.

The actual wording of the request is Complaints and Pleadings. And we have been talking about that in terms of petitions and complaints but it does say pleadings.

SMITH: You submitted these two boxes of sample documents. Were those documents

selected in a lottery fashion, in random selection, or do they represent the most irrelevant lawsuits out there? What do those two boxes represent?

YATES: They were in two boxes because there were two sets given to J. Lopez. One involved documents that were responsive to a request in a lawsuit that's going on between co-defendants Cendant and Ernst & Young in New Jersey. And one had documents in it that were responsive to the request here, but were not provided to New Jersey.

SMITH: So that one box is everything from New Jersey?

YATES: I'm not sure it was one box, but that's the two _____. I think it's important to recognize that we did that, and it's true that we were trying to demonstrate how broad and over-broad and irrelevant some of the documents would be. But we didn't have to do that. This mandamus stands or falls on the over-breath, on the face of a request. Which is the point that J. Hecht made in his separate opinion in Lofton v. Martin. It's over-broad as a matter of law on the face of a request.

PHILLIPS: You're not making any claim that it's a _____. I mean some of these cases have gone off on the fact that it's a million documents. And merely the burden of gathering and in producing cannot possibly outweigh the benefit that may be down in the bottom of that haystack. You're not making that type of claim here.

YATES: Not in the sense of cost or expense or trouble to get them together.

PHILLIPS: So it's purely that it's an over-broad request and beyond the bounds of discovery?

YATES: We still stay it's harassing in the sense that it goes beyond relevant discovery and that it goes beyond discovery that would be appropriately limited by time and place and subject matter.

PHILLIPS: But not harassing in terms of vacant(?). You're going to have to shut down your normal audit business.

YATES: That's right. We've conceded that.

SMITH: So you're saying that those boxes are random?

YATES: Right. What is the request? I think that is important because we're arguing it's over-broad on its face. The request which was put to us by our co-defendant is for all the pleadings and complaints for audits. They allege audit malpractice: anywhere in the US. So it's any auditor for Ernst & Young anywhere, not the particular auditors involved here for 7 years. And so it's also a long time period.

PHILLIPS: We're not saying harassing or - I mean not in the classic sense. This is not harassment and undue burden. This is merely - your argument it's clearly outside the rules of permissible discovery?

YATES: Right. Because it's not calculated to lead to the discovery of admissible evidence, because it's not sufficiently limited so as to be reasonably calculated to do so.

PHILLIPS: Now how does that without more entitle you to a mandamus extraordinary remedy under the standards we've been trying to grope towards for the last decade?

YATES: First of all, we think if you look at the trilogy of cases that we rely on that they argument there is precisely this argument...

PHILLIPS: So they're saying the fact that it's a million documents is just a make way. That's just a throwaway that you put into some of these cases?

YATES: Right. And once we give over the documents of course, we are denied the relief we're seeking.

PHILLIPS: Would any over-broad discovery then be entitled to mandamus relief?

YATES: It would have to be a clear abuse of discretion. So I would argue it has to be so over-broad as to constitute a clear abuse of discretion. I have a request that I feel like is over-broad with respect to everyone of the three guideposts that the court provides in this trilogy of cases. It's over-broad on subject matter. It's over-broad on time and it's over-broad on place because it's nationwide.

ENOCH: You say that it's over-broad because it won't lead to admissible evidence. Is it critical to your argument that we have to look at this in the context of US SC guidance on punitive damages?

YATES: In Campbell v. State Farm.

ENOCH: Which is what you have provided. To get to your answer do we not necessarily have to say that if it's a complaint that's even identical to the one that's made here as long as it was a complaint that was filed in Arkansas it's over-broad because that would not be admissible on the issue they claim it to be admissible, punitive damages. Correct?

YATES: We did provide the Campbell case because we feel like it demonstrates the wisdom of this court's jurisprudence limiting requests like this that go to gross negligence.

ENOCH: That's central to your position that the out of state documents would not be admissible, wouldn't lead to admissible evidence?

YATES: It is helpful to our position. I would hope that this court even if Campbell had not been decided in terms of the constitutional constraints of due process that this court would still believe that under its own case law, under this case law that I cite that you all wrote, you would still think it was over-broad to allow nationwide _____.

O'NEILL: But in order to find that upper breath, we would have to buy your assumption that we can only look for relevance to what happened by this auditor in this office before this malpractice occurred.

YATES: No, not necessarily. The reason that they say they want the documents and Mr. Duggan told J. Lopez it's because of gross negligence. And of course the Sanderson case and the K-Mart case involved gross negligence contentions.

O'NEILL: Let's put gross negligence aside. Let's just look at pattern or practice. I can see easily a scenario and I think they quoted one of the deponents in the case who made some reference to another case that he was not involved in. The premise being that Ernst & Young follows generally accepted accounting principles. Why is this not relevant to rebut that?

YATES: It may depend on what the subject matter of the accounting malpractice was in that case. In other words, the subject matter here that they cite in their request is all auditing malpractice. There's a lot of different forms of auditing malpractice.

O'NEILL: Then if it may depend on that don't they need it to determine whether it does depend on that? You're asking them to take you at your word that it doesn't.

YATES: Because I'm asking this court to hold that they have to be bound by their petition just like you held in Sanderson v. Texaco where you said if the gross negligence complaint goes to safety, they don't get all documents related to safety so they can figure out if there's a pattern or practice. That's exactly what they wanted to do in the Texaco case. They wanted to establish a corporate culture of disregard for safety. And this court wrote no. I'm going to go look at the petition. I'm going to look at the exact type of harm alleged in terms of safety, and in that case it was exposure to Benzene, and I'm going to limit their document request to that type of harm.

O'NEILL: Tell me how you think a proper request should be worded?

YATES: With respect to subject matter, we would go to the allegations of their petition and we would say. Okay. What type of auditing malpractice is alleged in this petition. It's alleged that E&Y auditors in this case failed to detect and failed to disclose that revenues were inflated at CUC by manipulating reserves and other mechanisms. In other words, over-inflation of revenues by reserves. That's one way to limit the type of auditing malpractice that is the type that is asserted in this petition. And you could say, Okay. Under Texaco v. Sanderson we're going to hold them to their petition. We're going to go look at what's alleged and we're going to say that it's over-broad as to subject matter unless it relates to the risk and the harm and the misconduct that's asserted in

the petition.

But you see if you say all accounting malpractice, then that's the universe. That's like saying all safety records in the Texaco case. And there are other limitations as well with respect to time. They've got a 7 year time frame here.

OWEN: It seems to me that a lawsuit could be filed as late as 2001 over acts that occurred in 1977 or 1976. So why is 2001 so far out of abounds?

YATES: Because of why they want it. They want it for gross negligence in order to demonstrate that E&Y was on notice of this pattern.

OWEN: I'm saying that the lawsuit that the gross negligence in another case may have actually been alleged to have occurred in 1996 or 1997, the lawsuit might not be filed until 2000-2001.

YATES: One way to do a limitation here would be to say that if the lawsuit alleges within the relevant time frame as opposed to being filed. And what is the relevant time frame? They've got a 7-year time frame here starting in 1994. But the audit in question here was 1994 to early 1996. It was completed in April 1996. And then the transaction that they are suing on was later. By August 1996 it was closed. And see they are claiming they relied on the audit to be induced into the transaction. So why would misconduct asserted in other lawsuits that arose after the transaction was completed or after the audit was completed help them prove a pattern or practice or help them prove that they were induced into this transaction. That's for underlying liability.

OWEN: So if were limited to claims for gross negligence that related anyway to overstatement of earnings for any time period when the underlying allegations occurred up through 1997 would you object to that?

YATES: For the underlying liability we feel like it would have to be alleged misconduct that occurred at least before their intervention of transaction, and we would argue before the audit was complete.

You don't have to accept the bright line to say that 7 years is too broad. Seven years for other acts was held by this court to be too broad in K-Mart, and 5 years was held for other acts to be too broad in the Dillard case.

O'NEILL: Because that was so overly-burdensome and harassing.

YATES: Those cases don't necessarily turn on the expense of the trouble. And when we say we've given up our burdensome, we're saying we can't stand here and say it's going to be costly and so much trouble for us because we have the documents. But those cases turn on the over-breath of the request in terms of the relevance of the request. And it still would not be relevant even

if it doesn't cost me a lot of money to turn it over.

JEFFERSON: Let's say we wanted to reconsider that. What is the harm in limiting mandamus relief to circumstances where there is a real monetary burden or manpower or something like that because otherwise you're not claiming privilege? Any harm can be addressed during the trial on appeal. So why shouldn't we adjust our jurisprudence _____?

YATES: I think that would be a change in the jurisprudence.

JEFFERSON: Why shouldn't we consider that?

YATES: Because you're then permitting a fishing expedition of all sorts.

JEFFERSON: What's the harm?

YATES: The harm to me is that you are allowing the other side then to propose and get away with getting discovery that's not within our rules because it's not drafted in a way that's reasonably calculated to lead to admissible evidence because it's not sufficiently limited in time, place and subject matter, which is the law. That's your jurisprudence.

JEFFERSON: But there are a lot of times you can make objections. If it doesn't matter to the client or to you, you will answer whatever the discovery is because it's really not relevant. In terms of mandamus relief this extraordinary remedy why should we take that extra step here? We have, but why should we continue?

YATES: Mandamus of course turns on clear error of law. And if the discovery rules do not permit the request as drafted, then it's a clear error of law. And as far as no adequate remedy by appeal we are certainly being required to do something that we will never be remedied for. Because once we turn over the documents they are turned over. And to say that it's not harmful to allow the plaintiffs to go on this kind of fishing expedition and go try and find out every bad deed that Ernst & Young has ever done, to say that that's not harmful, I think that blinks reality in terms of how litigation really works. Because they are going to go take that and then they are going to concoct some gross negligence program, and then you do get to Campbell, a nationwide gross negligence. If the court is prepared to throw over the trilogy that we rely on, then I think you do need to look at the US SC decision in Campbell and ask whether or not you're allowing discovery of irrelevant information when you allow a nationwide search. Because that's precisely what Campbell is prohibiting on a constitutional basis. And that's what they want the documents for: gross negligence for punitive damages.

SMITH: This audit was done out of Connecticut. Is that correct?

YATES: Yes.

SMITH: And there's a few partners there that were basically the key partners involved in this.

YATES: Right. And that's the limitation that we would suggest either as a subject matter limitation or a location limitation. Instead of saying any audits for anywhere in the US by any Ernst & Young auditors, how about limiting it to the auditors who were in charge of this audit. That would get them the complaints or the lawsuits that J. Owen referred to.

SMITH: But their argument is basically that there's a company culture or a company manual or internal interpretations that these partners knew about but blew off. And is that condoned? I assume there's a hierarchy at the firm where there's some people who are considered in charge of the whole thing nationwide. Then is this a culture that was allowed to exist? How do you find that out unless you look at the whole accounting practice nationwide to see if this is a company culture like...?

YATES: And you would be looking at that culture for purposes of gross negligent, punitive damage. And that's where I think we really need to focus on the US SC decision in Campbell, which says that there are constitutional concerns with assessing punitive damages because I'm a bad company that has a nationwide practice of doing bad things.

O'NEILL: Do you think the pleadings in the Aero(?) Kim case are a fishing expedition?

YATES: The Aero Kim case settled, and in fact those pleadings were provided to the co-defendant in New Jersey.

O'NEILL: Do you agree that those pleadings are not a fishing expedition and are producible?

YATES: I agree that they do go to the auditors in question, which is one of the elements. But then I would say you have to look at the subject matter of the alleged audit malpractice there. And are you going to go with the notion that all audit malpractice is the same subject matter. And if it's not, then you have to look at what's alleged there. And if you allow them to say, Well I'm alleging a violation of the generally accepted auditing standards...

O'NEILL: Well who has to look at what's alleged there?

YATES: The court has to look at what's alleged there. That's what you did in Texaco v. Sanderson. That's what you did in K-Mart and in Dillard.

O'NEILL: Are you saying in camera?

YATES: No. You look at the face of their petition and you compare the face of the petition: what is the allegation that's alleged in terms of whether the subject matter of the request

is over-broad. In fact in Texaco there's wonderful language where the court wrote that the plaintiff is entitled to no more than the documents that relate to the specific type of harm that he's alleging in the petition limited by relevant time and relevant place.

O'NEILL: Do you think that the pleadings in that case are producible?

YATES: No. Not from what we've seen. It's not in our record..

O'NEILL: You would agree they're relevant?

YATES: Not necessarily because if the type of auditing malpractice alleged is not similar in type...

O'NEILL: So even if this person, Wilchford(?), was the person who committed auditing malpractice in that case, but it's a different type of malpractice, you'd say it's not producible, and if you're the only one who could look at the pleading and make the determination as to...

YATES: No the court looks at it.

O'NEILL: Then it would have to be in camera because you're not producing it.

YATES: Oh, you're talking about the Aero Smith pleading itself. Yes. I see your point.

O'NEILL: So you're asking us to rely on your word that it's not similar.

YATES: No. What I'm asking you to do is to look at the request on its face and compare it to their petition, their petition in this case, in order to determine over breath. That's what I'm asking you to do.

With respect to your similarity question that you're asking now. That's in Campbell too. Campbell says that a first party bad faith claim is too different from a third party bad faith claim. So if you had an insurance adjuster in Campbell, the same insurance adjuster, and he did bad things on a third party claim and bad claims on a first party claim, under the Campbell opinion the first party claim in constitutionally irrelevant with assessing punitive damages. Because the SC 6 to 3 says it has to be so similar when you're assessing punitive damages and third party claims and first party claims are not.

O'NEILL: I'm just confused on how we assess similarity without seeing the pleadings.

YATES: You redefine the request in a certain way. And then Ernst & Young looks at its documents and it says which ones - it's the same way you would do any other production. We would withhold certain documents and say we don't think they meet the requirement. And if there

were some question, I assume we could let the judge look at them in camera and see if he thinks we're wrong.

O'NEILL: So if they pled 10 different means of auditing malpractice, then every complaint that had those same different means of auditing malpractice would be producible?

YATES: There could be 10 different meetings of safety concerns in Texaco v. Sanderson. There could be 10 different ways that the Texaco refinery violated safety rules.

O'NEILL: If they said you violated gap by 1, 2, 3, 4 5, then you would have to produce all pleadings where they alleged gap was violated by 1,2,3,4,5?

YATES: I'm here to argue to you that we think that that is too broad a way to state the subject matter limitation. Because if you do it based on well we violated general accepted auditing standards...

O'NEILL: No. I'm saying they specify how.

YATES: But look at those auditing standards. They are very broad. They're like the standards that govern lawyers. You know, you will be independent from your client. It's very broad. And so that's why we're saying you ought to look at their petition and look at what's the type of auditing malpractice that's alleged to have had happened here. Just like in Texaco, you looked at what's the type of safety risk that was alleged to be a problem in the case. And here it's inflation of revenue by manipulating reserves. Compare it to the complaint that the plaintiff attaches to his brief to this court. Remember the complaint from the federal DC in Chicago, where the plaintiff proudly tells you this is the kind of thing I want to use. This is what I want. And in that case, different Ernst & Young auditors, in Chicago audited a bank and failed to reveal that the bank had over-valued its assets. Is the over-valuing of the assets in the bank the same or similar subject matter? It's auditing malpractice. Is that the same or similar to what happened here? Particularly when you look at Campbell and when you have the US SC saying first party claims are too different from third party claims. For purposes of gross negligence that's the key is to recognize that that's why they say want the documents is to get to punitive damages.

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REAL PARTY

DUGGINS: I submit to you the E&Y is steering this court down a slippery slope by urging this court to substitute its judgment based upon a very small sliver of a 4-1/2 year history for the judgment of the trial judge who has lived through that entire 4-1/2 year history. And as the court confirmed in Loftin, a difference in judgment does not amount to an abuse of discretion. And this case does not contrary to what E&Y just told you turn on clear error of law. As the CJ pointed out, to get mandamus a party must demonstrate that they will lose forever a substantial right. And there has been no showing in this case on that threshold.

WAINWRIGHT: I understand from the briefing that FISI does not have any claims against E&Y in this proceeding that we're here about. It has claims against EYUK but not against the EY that's in this proceeding. Is that correct?

DUGGINS: Cendant has a cross claim against Ernst & Young's London affiliate that is pending. But I don't think the fact that there is no direct claim against the US E&Y makes any difference. Because rule 192.3 says, you can obtain discovery of any matter as long as it relates to the claims or defenses of you or any other party. It's very express on that.

WAINWRIGHT: We are here about FISI's document requests?

DUGGINS: The plaintiffs have the identical request.

WAINWRIGHT: Which one was ruled on at the TC?

DUGGINS: The court was aware that the plaintiffs had the request because they participated in the argument. The May 7 order that's in question is a grant of the FISI - it's an overruling of the E&Y objections made in response to the FISI request.

WAINWRIGHT: Were these documents requested in the class action in New Jersey that I understand was settled, or any other lawsuit that FISI or the other parties have against EY?

DUGGINS: I'm not participating in the giant New Jersey class action. I'm not aware that this Aero Kim pleading for example has been produced. I have certainly not seen it. I do know that there was a request that the federal judge granted a similar request for pleadings in the New Jersey court. I do not know what the request was. I do not know what the objections were that were made by E&Y to that request.

SMITH: The plaintiffs in the underlying suit are they suing your company for punitive damages?

DUGGINS: Absolutely.

SMITH: And so to the extent would this discovery be relevant to basically you pushing off your punitive damages on to Ernst & Young and saying it was their fault that this all happened?

DUGGINS: It's not just punitive damages that this discovery relates to. It's the defenses of the auditor here. There's no question that Mr. Shamoun's clients are suing about 25 different defendants on a wide array of claims and defenses that relate to the issuance of CUC's financial statements that were filed with the SEC in 1995 and 1996, and to E&Y's audits of those financial statements. And in late 1998 after CUC and HFS had merged it was announced that those prior CUC financial statements were materially incorrect and not prepared in accordance with GAP. It turned out in excess of $500 million in income had been misreported. And E&Y said those financial

statements were reliable and were prepared in accordance with GAP.

HECHT: Regards remedy if the request were for complaints that had been made against E&Y for sexual improprieties between auditors or E&Y personnel and their clients, and the evidence was it would only cost $100 to produce that. You don't think there would be mandamus relief?

DUGGINS: Not under the Walker v. Packer, and particularly where as in this case E&Y voluntarily waived over-breath, burden, time scope.

HECHT: Since you can't get them back and the case is never going to be reversed on appeal on that basis what is the appellate remedy? If you don't want to produce them because you don't think they are the other party's business, they are not even suing about that, so you're never going to get them back, and the case can never be reversed on that because it's irrelevant to the case, what remedy would you have?

DUGGINS: Well I don't know that there is a remedy where the producing party did not object to the TC that this involves confidential, personal information. That it would be burdensome. All of the various objections that I think were taken into account in this so-called trilogy of cases where all three parties raised over-breath and burdensomes, and the court seems to waive...

OWEN: But you're saying no court has any oversight over the TC to make them comply with our relevance rules? That's basically what you're saying.

DUGGINS: No. I am not saying that. I am saying that I think part of the requirement to obtain relief in this court is that you must show a substantial right will be lost in this case.

OWEN: If the TC consciously disregards our relevance standards in the rules of civil procedure, who has authority to remedy that?

DUGGINS: If a substantial right would be lost, which is not the case here then maybe so. All I am saying is in this particular case where the pleadings are sitting in an office, there is no substantial right endangered by allowing the plaintiffs and FISI to pay E&Y for a copy of those pleadings. Those are public documents.

OWEN: Well so are sexual harassment pleadings.

DUGGINS: I understand that. As I say, I think there's a difference where a party has searched the proper objections to those, and I would agree...

OWEN: Well the only objection is they are in my general counsel's office. It's only a foot high. It won't cost me very much to produce them, but I don't think I ought to have to produce them. Who's going to ride herd on the TC and say at some point you've got to follow our relevance rules?

DUGGINS: I think that obviously this court can and has ridden herd on the TC's. All I'm suggesting to you is my reading of Walker v. Packer is that this court emphasized that there must be a deprivation of a substantial right forever. The loss of a substantial right.

JEFFERSON: But the question is really, and as I understand it to be, let's assume the worst case scenario. That there is a TC judge who just doesn't like our rules of procedure, thinks discovery ought to be anything that's conceivable, doesn't have to be tied to relevance or even the particular matters of this lawsuit, and just says you have a right to roam through all of their corporate documents. As long as it doesn't cost that much for them to produce it you are entitled to it. The rules be damned. The issue is how does somebody who is subject to that sort of abuse of discretion going to get relief? You're saying you can't get it by mandamus because Walker v. Packer doesn't allow it. You're also saying there's no real appellate remedy once those documents are produced and there's no reversible error because all those documents are relevant. So who is going to tell that court you can't do that? You can't ignore the rules that way.

DUGGINS: I don't know that I have a great answer to that circumstance. It's certainly not the circumstance here. I guess the situation is where it's so far out of bounds the party has an obligation to bring that to the TC's attention. And I suppose in that circumstance maybe you could argue some substantial right is lost. All I am saying is that in producing audit malpractice pleadings filed against E&Y during this limited time frame is not going to deprive E&Y of a substantial right.

HECHT: If it were a law firm and malpractice were alleged what kind of discovery would the plaintiff be entitled to of complaints that have been made against the firm? All malpractice suits that have been filed? All complaints made against any of the lawyers?

DUGGINS: My own view is that I think a TC under appropriately pleaded facts would have the discretion to require that over a certain period of time. In this case, there's been much made about the fact it's a nationwide search. But let's not forget that E&Y does conduct audit services through a national office, through a single audit manual in accordance with a single set of auditing standards. And all US public companies who file financial statements must prepare them in accordance with general accepted accounting principles. So there is a known set of standards and limited set of standards applicable to the conduct here. And E&Y provided these services from offices in London, Connecticut, California, Michigan, Tennessee, Florida. The transaction occurred in Texas. Mr. Shamoun alleges his clients were misled by E&Y in Texas. There's a wide range of offices and people involved. Some 75 auditors who were involved in just the 1995 and 1996 audits alone.

HECHT: Assuming that you can get back to 1994 why would you stop at 1994? Why not go back?

DUGGINS: At the time we thought that was a reasonable cutoff.

HECHT: I'm trying to find out why. Are you being merciful?

DUGGINS: Primarily it's because E&Y has objected to producing any work papers on this account even though it's been in charge of this audit client. Since it took it public in 1983 it has objected to producing any work papers prior to 1994. So we have just used that as a cutoff rather than fight that and continue to fight objection after objection.

HECHT: But you think you could go back?

DUGGINS: I think you probably could because we have evidence for example in one of the depositions taken out in California that I took that E&Y was aware of recurring errors that were material to the largest subsidiary as early as 1992.

This May 7 order is limited in time. It is specific and definite. It identifies a class and type of documents and they are public documents. It's not 30 years of pleadings. It's not E&Y's litigation files on suits. It doesn't include other types like sexual harassment claims or labor claims. And it's not a Loftin request. All evidence that supports your defense.

OWEN: Is it limited to petitions and complaints?

DUGGINS: It's limited to pleadings and complaints filed...

OWEN: So it's all pleadings in every case not just the petition?

SMITH: Is it just the original petition and complaint, or does it include summary judgment motions, final judgments?

DUGGINS: We have always interpreted it this way when we have been in front of the TC and had discussions to mean pleadings and complaints, the original petitions in state court action and an original complaint in a federal court action. Not summary judgment motions at all. There's never been any doubt about that and that's why I think they haven't compiled in what they've say they've pulled these together.

WAINWRIGHT: Well the federal rules define what a pleading is. Our rules don't. That's why we're asking that question. So you don't want anything except complaints, amended complaints, supplemental complaints, pleadings in state courts being petitions, amended petitions, answers, third party petitions and answers. Those types of things.

DUGGINS: I would say consistent with what I told the TC each time it's come up. We want lawsuits filed against E&Y in which it was sued for audit malpractice. And we did our best to word it when we said pleadings and complaints to try to pick up the state terminology and the federal terminology.

I would like to focus on the objections that E&Y withdrew. Even though the brief in this case leads off in the statement of the issues with reliance on over-breath as the basis for

relief, that specific objection was made and withdrawn months before the hearing as was burdensomeness, vagueness, ambiguity, and seeking documents outside the time frame. Those objections were made and withdrawn. And I don't see how relator can now come to court and reassert those objections.

At the hearing E&Y offered nothing other than token argument. It said, judge there's been lots of discovery. Enough is enough. Which is not an objection. And this is a little bit of a witch hunt. There was no evidence offered. There was no comparison suggested like compare this with that.

SMITH: You're saying there wasn't. So there wasn't any discussion or suggestions about how to trim this request up to make it within the rules? Was it let's do it for 4-years. Let's have a better definition of audit malpractice, more narrow definition.

DUGGINS: That was never requested by the other side at all if that's what you're asking. J. Owen picked up on an important point. It's artificial for the relator to say a case filed in 2001 must involve acts in 2001. Most audit and malpractice suits are filed years after the financial statements are misstated and the audit malpractice occurred. The errors often go unreported by the company and by the auditor for years. We do think that evidence of subsequent similar conduct is relevant to the plaintiff's punitive damages claim.

OWEN: Wouldn't you agree that there is going to be some types of audit malpractice that are very dissimilar to this?

DUGGINS: I don't know if I would necessary agree with it. But I have not seen any pleadings other than what we read about. The best example is the one that's attached to the plaintiff's brief that was just filed late last year in which E&Y is alleged to have committed the same types of wrongs that the Kevons' allege. Specifically that it sacrificed the required independence and sound auditing judgment in favor of selling other services. The very claim made by Mr. Shamoun's clients.

If in E&Y's position that it meets the Walker v. Packer test of the deprivation of a substantial right is met by the mere expenditure of effort, then this court will be rewriting that case and changing the law. Because mere effort cannot equate to the loss of a substantial right.

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SHOUMAN: Attached as an exhibit is a case against Mr. Wilchford that's filed by a plaintiff. Mr. Wilchford is a defendant in our case. And if we look at the tailored request of documents, we didn't ask and the judge didn't order accounting malpractice lawsuits, negligence lawsuits. They specifically tailored and he specifically tailored the request to auditing malpractice.

I am not clairvoyant. There is no way that a lawyer can mirror facts in another lawsuit filed against the defendant if they hadn't seen it. I'm not able to do that. And so I look at this case and if you look at what J. Lopez ordered this case would not be responsive to the request. And I ask myself, can I gain any relevant information from this case that is not responsive to the requests? And the answer is yes. In our lawsuit we allege facts that E&Y when asked to participate in an investigation by CUC with regards to accounting malpractice, fraudulent conduct by some of its officers and directors, E&Y raised their hand and said we are not going to participate in this investigation if we don't have an agreement with UCUC and your lawyers that you will not render any decisions as it relates to our audit and our audit practice. And when you look at this case that's cited that's not responsive to J. Lopez's request. We find a position's statement in the opinion by E&Y that says, we have to give auditing work papers and auditing information to a previous owner of a corporation who had access to at it at the time they owned it.

Now I know the bridge isn't really wide and it may not be very long, but if I take their position's statement in this case that's not responsive to J. Lopez's request, I can find relevant information to use at my trial.

HECHT: What?

SHOUMAN: That E&Y took a position in this case as reported...

HECHT: In another case with other people or the same people or?

SHOUMAN: The same case with other people.

HECHT: I don't understand. I sue you for malpractice. I prove one of your 800 partners screwed up at one time and now I've got evidence against you.

SHOUMAN: If you sue me for malpractice and you claim that I was not entitled to produce records to your partner, and I say I am required to produce records to your partner, and that is not malpractice. Do you think my act of producing records to your partner in a previous issue or a previous lawsuit or a previous claim is not relevant to your case against me? I think it is. It shows an act. It shows conduct. It shows habit. It shows course of dealing. And it also shows my position on the issue.

What we have here is we have a fraud cause of action. We've have a conspiracy cause of action. We have an element, which is intent. And when you look at the rule 404(b), how is a plaintiff to prove intent? I cannot possibly get the Matlock confession by any of these defendants that are going to testify. I intended to commit an illegal act. I have to do it circumstantially. I may have to do it by inference. And the law says that I am allowed other evidence to go to the issue of intent. And if I have prior lawsuits of auditing malpractice with similar conduct, I'm allowed to at least discover. Whether it's inadmissible or not is not the test. It's whether I can gain and garnish some relevant information. I submit to you I am able to do that. Just give me a

chance to do it.

I'm entitled to know the net worth of a $10 billion company. They are private. I'm entitled to get their balance sheet, I hope. And in their balance sheet there will be a...

SIDE 1 ENDS

SIDE 2

...well what is contingent liabilities made up of? Lawsuits that are pending. Lawsuits that may not have settled. I'm entitled to go in to the veracity of their number that they have put on their balance sheet on contingent liabilities. And the only way to do it is to have an access of what those contingent liabilities are, otherwise I won't be able to do it.

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REBUTTAL

YATES: J. Hecht made the point that the objections that were made included objections that the request was irrelevant, was not calculated to lead to relevant, and also that it was a fishing expedition under Lofton. So if you went to Lofton you would see the same type of over-breath. But beyond that on our motion to reconsider, which is Tab 9, we laid out a whole paragraph on why the request was unbounded, how it wasn't limited by offices, how it wasn't limited to these particular auditors, that it wasn't tailored to similar claims. So it's just not true that we didn't preserve the complaint here. The waiver argument is a red herring.

O'NEILL: If this were up here on an appeal, after verdict, and we hold that this was improper, we still have to do a harm analysis. How are you harmed?

YATES: We are harmed because we have been made to produce documents and information that the rules do not require us to produce.

O'NEILL: But you would not obtain reversal under a traditional harm analysis because they are public records that are no burden to produce. So if you can't get to harm on a regular appeal, how can you get to extraordinary relief on mandamus?

YATES: If we're being required to produce documents that we're not required to produce it may not be calculated to cause an improper judgment, but on the mandamus standard are we being denied a remedy that we can't get remedy by appeal. You see you just posited the situation that I can't get it remedied by appeal.

O'NEILL: But couldn't we carry that analogy to the TC rules that it's going to admit a certain document, and it is clear error to admit that document. Why under your theory could you not then bring it up on mandamus that he cannot admit the document?

YATES: In the middle of trial?

O'NEILL: Sure. Under your theory it's clear error.

YATES: But I'm here following behind a body of jurisprudence that this court has already developed...

O'NEILL: Presuming that, on the admission of evidence, the TC goes off the deep end and admits something that is totally irrelevant and says I'm going to allow it in on Monday morning. Under your analysis that would be mandamusable.

YATES: I'm not sure that that's the case.

O'NEILL: Why is that any different? Because you seem to be saying because it's error it's mandamusable.

YATES: No. It's error for which I can't get an adequate remedy by appeal. And I'm denied a substantial right because he gets to go on a fishing expedition and I have to give him all kinds of documents that are not within the discovery rules, which then permits him to concoct whatever scheme he's going to to come up with the punitive damages of gross negligence. Pattern or planned.

O'NEILL: But even if you can't get over harmless error, that's what I'm having trouble with. It's public document. You've got it.

YATES: Right. I see your attempt to say that it opens pandora's box. But I think it doesn't, because this is limited to a discovery request where this court has already gone. You could just say we're not going to allow mandamus on admissibility rulings. But you've already said that mandamus is available.

O'NEILL: But admissibility at trial would be worse. That would be more mandamusable if there is a clear erroneous ruling on evidence to come in to the jury.

YATES: I'm not sure that's right. But I see your point. J. Hecht puts his finger on similarity on the analogy to legal malpractice. If you can come in on a legal malpractice claim and say, okay, I want every lawsuit that alleges legal malpractice (now here it's auditing malpractice) without any requirement of similarity then you have a request...

ENOCH: Let me explore that. One of the difficulties is this seems to me to be a range of issues of being broad or not too broad. Let's take the legal malpractice. Would it be sufficient if the request was limited to malpractice in the administration of estates?

YATES: It might be.

ENOCH: But couldn't you then argue like you do in this case, well there can be any number of things you could do in the administration of an estate, and so it's too broad because you're including all administration of estate, and really it needs to be the administration of just generation skipping trust.

YATES: What you're proposing is different ways to limit the subject matter. Maybe you limit it by saying only complaints against this auditor, this lawyer. Maybe you limited it by saying only this speciality. Auditors like lawyers specialize in different areas. They audit banks or they audit energy companies. Maybe you limit it like that. But to say that we can't figure out how to limit it, and so we're not going to grant mandamus relief and we're not going to say this is over-broad, in all your cases before you didn't tell the trial judge exactly how to limit it. You said we're granting mandamus relief because this request is too broad. It's too broad because it's not like the petition's allegations. And that's what we are asking for is to require similarity on auditing malpractice like what they are alleged here.

ENOCH: But on the determination of similarities, on the determination of how focused it would be, don't we necessarily in that over-broad context have to look at what a burden it places? You argue well this is so broad it's accounting malpractice. And they say, oh, no, it's limited to just auditing malpractice. And you say, well auditing malpractice is so broad it ought to be limited to a particular auditing malpractice.

YATES: And you can pick where on that specter J. Enoch you want to stop and say...

ENOCH: Shouldn't then the court actually look and say, Well auditing malpractice may be more broad than it ought to be, but it's only going to require you to produce the complaints that's sitting on that desk that's a foot high. And the burden just isn't significant there, and we'll allow that to happen as opposed to all lawsuits that were filed over 20 years. And we can easily determine that's an over-broad deal and we ought to limit it.

YATES: We think that all lawsuits over 7 years is over-broad. But if you agree that it's over-broad in the sense that it's not narrowed by subject matter except to auditing malpractice, it's not narrowed to the particular accountants, it's not narrowed to the Stanford, CT office, it's not narrowed in place, or person or subject matter other than auditing malpractice like legal malpractice, if that is over-broad, then it's not within the rules of procedure. And if it's not within the rules of procedure that's a clear error of law. And then we can debate whether you think there's an adequate remedy by appeal if I have to turn over stuff that the rules don't require me to turn over so he can have a fishing expedition which is what this is.

SMITH: What responsibility, if any, does your clients have through their lawyer in front of a district judge to stand up and say, look, this is too much. What are they going to do with the March 2001 lawsuit filed in Alaska against some partners who had never been to Connecticut regarding an audit about school attendance? That was one example in the brief. So why didn't you stand up and say that?

YATES: The hearing was based on the objection. The objection said that in effect. That's my position. When it said it was irrelevant, not calculated to lead to discovery of relevant information, it's a fishing expedition under Lofton. I grant you, the hearing was brief. The hearing was brief on both sides. It's in this record. It's only a couple of pages on this topic. But after the hearing when the judge ruled against us, we filed a motion to clarify. We said, hey, wait a minute. This is unbounded. And we went through all those things you just said about how it needed to be limited. I would say to the extent we had an obligation to do that, we did it.

I don't think it's requiring him to be an expert in accounting anymore than Texaco v. Sanderson, he had to be an expert in safety in a refinery. It's a question of looking at the plaintiff's petition and saying, hey, this alleges a specific type of auditing malpractice, not just plain auditing malpractice. And is what they're requesting limited to that same type.

WAINWRIGHT: Real parties go on for pages in the briefing about the alleged obstreperous conduct involving discovery of E&Y in failure to comply with discovery on many occasions and frustration of the trial judge. Should that be material to our decision at all?

YATES: We didn't think it was, which is why we didn't spend pages in our response rebutting those allegations. We think we're here on mandamus concerning the judge's decision on this request on our objection and whether it is on its face as a matter of law over-broad as to subject matter, time, and place and, therefore, subject to mandamus under this court's precedence. So no, I don't think that's irrelevant. We don't think it's relevant. We don't agree with it. We don't believe we were obstreperous and we think we had a perfect legitimate right to object to this request.