ORAL ARGUMENT – 11/09/04
03-0913
KROGER V. SUBERU

PEAVLER: To make a citizen libel to be molted in damages...

JEFFERSON: What does molted mean?

PEAVLER: I kind of like to think of it as mulch. You're just piled under in it. For an honest discharge of duty as to give immunity to crime and to weaken the restraining power of criminal law, thereby endangering the security of law abiding people. For this reason, Texas law gives malicious prosecution defendants an initial presumption that they act in good faith. Now more than ever in light of heightened security concerns in our country, citizens need to know that they can report crime without fear of compensatory and punitive damages when they are merely expressing what they believe.

The CA in the Digby case got this right. That court recognized that the presumption affords no more protection to a malicious prosecution defendant than any other defendant, if a plaintiff is able to come and rebut it with just her own testimony and nothing more. You would never have a presumption of good faith if you allowed a plaintiff's self serving statements to rebut it every time.

WAINWRIGHT: Why couldn't the trial judge charge the jury that there's a presumption. It's not just a level playing field. Pick one side. But there's a presumption and then also allow the uncorroborated testimony you're complaining about. Wouldn't that still preserve the presumption?

PEAVLER: Kroger did actually request a presumption instruction, and the Texas law is that whenever a TC instructs the jury about a presumption, that's an impermissible comment on the weight of the evidence. For that reason, the court has held that the presumption is merely a matter of going forward with some evidence and once the presumption is met, then the presumption disappears.

My guess is that by feeling that the presumption was met or rebutted, the TC felt the presumption no longer was in play and hence had no role in the trial.

The other states that have considered this point agree with the El Paso CA that a plaintiff's self serving testimony without more(?) is insufficient. In this case, I think it is especially notable that Ms. Suberu's testimony not only was uncorroborated, but also was self contradictory. She claims that Kroger must have known that she didn't have a cart because she never saw the cart. But in her own criminal testimony, she admitted that she saw the cart and that Kroger pushed the very cart that she now claims she didn't see back into the store.

There is no evidence in this case, other than plaintiff's own statement that she didn't do it, that Kroger didn't have probable cause. Probable cause focuses on the subjective awareness of the complainant. All of the evidence that plaintiff presented merely goes to the reasonableness of it, but there is nothing as to the subjective awareness that's required for malice.

The inquiry for probable cause is somewhat objective in that it does look at what would incite a reasonable person to believe committed a crime, but then in order to actually establish liability, the person has to actually believe or have a very strong suspicion that the person did not commit a crime.

HECHT: What do you think has to be corroborated? The amount of time she was in the store? the fact that there was a cart or not a cart? there was groceries in the cart or not in the cart? The Hertz payment? To what extent do you think corroboration is required if that should be the rule?

PEAVLER: I believe that corroboration should be on a material of fact, a material fact that affects the complainants believe as to whether a crime was committed. For example in this case, if Ms. Suberu had a disinterested witness come in and say I was standing right there and she wasn't even near a cart, she never touched a cart. That's corroboration.

HECHT: See that's going to be kind of hard to come up with. At least if you presume innocence in these things, or even if you presume guilt, usually the person who is detained is not looking around for witnesses at the moment that they are being detained. They are worried about what's going to happen to me next. So you're not trying to get names and addresses so that you can call them later and say remember that cart I had. So it strikes me that this could be a very heavy burden for a plaintiff to discharge.

PEAVLER: I think that it can be. I think you're exactly right. The reason that that's justified is we look behind the reason for the presumption. Just like with the presumption of innocence, we recognize that the prosecutor may not be able to overcome this presumption and people who are actually guilty may get off. But the underlying policy justifies what I call fiction in some instances to protect certain important societal interest. In this case, it may well be that if there is an occasional case where a plaintiff who has a legitimate malicious prosecution complaint is unable to prove her case. But I think the other side of the equation and the benefit and the need to encourage citizens to report crime outweighs that nominal risk of not being able to prove a case.

HECHT: Do you think in this case, if she could prove that she was only in the store 10 minutes, that would pretty much corroborate her story wouldn't it?

PEAVLER: I think that would be enough to rebut.

HECHT: She didn't have but $216 worth of groceries in10 minutes if she was standing over at the pharmacy for 2 of them.

PEAVLER: I agree with you. That would be enough to rebut the presumption, and then it would simply be a matter of her proving per preponderance of the evidence burden that Kroger lacked probable cause. The important thing that's missing in this case is there is no corroboration of any kind about how long she was in the store, whether or not she had a cart. In fact her own testimony is conflicting on this issue.

O'NEILL: What about the argument that you waived this point, because it was never expressed in terms of requiring corroboration. It was always a general no evidence point. Because perhaps if it had been articulated - I mean I agree that generically that might be considered subsumed under a no evidence point. But if you had articulated it as no corroboration, the case might have been tried differently. She might have tried harder to find that kind of corroborative evidence.

PEAVLER: The objection that Kroger made was to the legal sufficiency and, in particular, the lack of evidence of subjective awareness that she was not committing a crime. The fact that we did not cite the Digby case is not dispositive of this issue.

O'NEILL: But aren't those two different things: evidence of subjective awareness; and specifically corroboration.

PEAVLER: Not necessarily. The corroboration is simply a sufficiency of the evidence argument. It's more support for the argument that it requires more than what plaintiff put on. I don't think any trial counsel is fully prepared to make full appellate arguments at the TC level. At that point, we're preserving error and moving on. J. Calvert has expressed that all you need to do to preserve evidence is to state you have a legal sufficiency objection, and we did that.

The Arkoma case, which also is before you, has similar issues. And if the court were to find a waiver in this instance, I think it would very much inhibit litigants from being able to fully develop their cases on appeal when they have properly preserved it.

O'NEILL: It would also allow defendants to lie behind the law. Admittedly if that specific objection had been made, plaintiff might have attempted to put on other or additional evidence.

PEAVLER: Actually I don't think so, because when Kroger was arguing that the presumption had not been rebutted, J. Canales stated that he believed it has because there was some evidence that she didn't have a cart, and, therefore, Kroger gave false information. And because the judge was convinced that no matter what, that was sufficient evidence to raise a fact issue. It would not have made any difference in the TC.

JEFFERSON: If we take your argument to its logical conclusion, the DA always has the discretion. You know a citizen can't force a prosecution to go forward. Are there limits to your argument that there has to be proof that the complainant somehow had the ability to make the prosecution happen. It's ways in the prosecutor's discretion.

PEAVLER: I think to some extent. Mostly it is to the prosecutor's discretion. I think the key issue is what the prosecutor testifies was the determining factor in his decision. In order for the complainant to be the cause of the prosecution, the information that they provide, the false information they provide has to be the determining factor. This case is an interesting foray into what false information is sufficient to show causation. Plaintiff argues that Kroger said it stopped her in the parking lot instead a foyer. Even if that's true, that's not material to the crime and not material to a prosecutor's decision whether to prosecute. The police testified it's immaterial where they are stopped so long as they pass the point of purchase.

So I do think there are cases, in fact there are many cases I think, where a prosecutor would say, but for that information, I would not have prosecuted. But this is not the type of case we have here.

BRISTER: So your suggested corroboration rule - it's not limited to shopkeepers. It's everybody.

PEAVLER: I don't think the court needs to reach that in this case. For purposes of this case and the important societal interest underlying malicious prosecution, I think the corroboration need only be for purposes of rebutting the presumption of good faith. There is case law to support back from the late 1800s and early 1900s from this court, that where you do have an interested witness whose testimony is uncorroborated, that in the face of contradictory testimony is legally insufficient evidence. It doesn't appear to me that Texas law has followed that course, although it has not expressly been overruled. But we would submit in this case the court need only limit its decision to the presumption of good faith and rebutting that presumption, because that preserves and promotes the underlying...

BRISTER: You tell us there is two states, Mississippi and North Dakota that have done this. I assume that means that the rest have not?

PEAVLER: From the research that we conducted, the only states that we found - we actually found a few additional states that we cited in our reply brief. Alabama has three decisions, all of which are cited in the reply brief. The Lindsey v. Camelot Music case was actually attached as an appendix exhibit. Alabama has held...

BRISTER: So Mississippi, Alabama and North Dakota.

PEAVLER: And Delaware and New York. The North Dakota case, the plaintiff pointed out in his reply that it could be read either way. Kroger agreed. So we would submit that the only clear cases, the state's involving clear cases are New York, Mississippi, Delaware and Alabama. And in each of those it involved similar facts in that the plaintiff's general denial of guilt and proclamation of innocence was the sole evidence that the plaintiff was able to come forth with in order to establish lack of probable cause.

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RESPONDENT

COWART: It's five appearances, this is really not a malicious prosecution case at this point. What it actually involves is straightforward appellate procedure issues, presentation of complaint issues, and just the general applicable rules that govern appeals in Texas. The rules that you should apply here are well settled, routinely applied by the appellate courts and serve important judicial and policy goals.

Virtually every issue presented by Kroger that relates to the malicious prosecution liability issue are burdened by the federal procedural problems. I guess the bottom line is that there are certainly rules that apply in Texas appellate courts no matter whose ox is getting gored. And at this point in time, Kroger's ox is getting gored by these rules.

Starting first with the corroboration issue. I attached their efforts to preserve their no evidence complaints as appendixes to our brief on the merits. And if you look through those, you will see that nowhere in there they did mention the word corroborative. In fact, I can't find it in the record at all. They cite Digby over and over and over again in their pleadings. But nowhere do they say that Digby applies in this way.

Essentially what they are asking you to do is create a Maloie(?) jnov for directed verdict. Remember the Maloie(?) Brothers case says that when you are appealing from a summary judgment motion your point of error is properly - the TC erred in granting summary judgment. Now under that point of error you are entitled to raise any and every complaint you have about the summary judgment that's properly preserved below in your brief.

And so what they are saying here is, that well we should have a similar rule for preserving no evidence complaints in the TC. We should be able to say to the honorable judge of this court, the plaintiff's evidence is legally insufficient. Respectfully submitted, defendants. And from that, I'm entitled to complain about any and every problem that I can find in the record once I get up on appeal. That's not the way the system works.

The often cited explanation for when the evidence is insufficient is with J. Calvert's law review article. And he says, among the times when the evidence is legally insufficient is when there's a complete absence of evidence on a material fact. And another one is when the rules of law or evidence prevent the court from considering the only evidence offered to prove a vital fact. I would say that on the one hand when you go in and say there is no evidence of subjective intent or no evidence of malice, what you're really saying in that instance is there is a complete absence of evidence to support that material fact. If on the other hand you are going to argue that the rules prevent you or the law prevents the court from _____ only evidence offered to prove a vital fact is in J. Calvert's formulation, that ought to be specifically argued to the TC.

BRISTER: We stop a customer outside the grocery store with a pack of cigarettes and no

receipt. They say I did pay for it. I paid cash. I just don't have the receipt. All of those cases go to the jury, and the jury can find malicious prosecution or not. All you need is the plaintiff in the malicious prosecution to say I did too pay for it.

COWART: I think that Richey case specifically says no, that's not the case. Richey and the Lankey(?) case, those cases say that if the objective elements and I think Martin says that as well, a case from this court a few months ago, that if the objective elements of the crime reasonably appear, then...

BRISTER: But the argument would be, as it is in this case, that they weren't reasonably appear, because they knew that I paid. Even though the store employees all swear they don't know it. The plaintiffs says they do too, the manager was standing right there when I paid. The jury could believe him right?

COWART: The jury could.

BRISTER: And so Richey has to be wrong.

COWART: No. Because in that instance the defendant can't say or the plaintiff cannot say that they didn't know that I - and I hear what you're saying, that it might be a fact issue that they try to create. But Richey says that if the objective elements appeared, you don't get to go to the jury.

BRISTER: Here, the defendant said the objective elements, she had a cart, she's outside the store, didn't pay for it. Why isn't that the objective element?

COWART: I guess in Richey the facts were uncontested. And that's the distinction. Here the facts are contested.

BRISTER: So all you do is you have to say they did too know, because they were standing right there. I didn't steal. I paid for it. Don't have a receipt. Nobody else agrees with me. Give me $100,000.

COWART: That might be the result of the way our system works. Two weeks ago in the Dillards Dept. Store v. Silva, a wrongful imprisonment arrest case this court specifically said when you got a fact issue like that, when it's a credibility contest - who's telling the truth, then the juries make those decisions. And that's not unheard of comment in our malicious prosecution law. You've got Akin v. _____, 1983. It says the same thing. Richey v. Brooskhires, the facts were uncontested. The plaintiff said, yes I put the cigarettes in my pocket. Yes. I walked outside. Yes. I forgot to pay for them. I'm sorry. I didn't intend to steal them. And the court said, well, you can't expect them to understand your subjective intent. In that case the plaintiff admitted that he had committed an objective elements _____. It's kind of similar to Martin because in Martin, the plaintiff couldn't contest the fact that he had sold the cows even though the collateralization agreement prohibited him from selling any of the cows. But that's the way our system works. It's a credibility case. Under

Dillard, Richey and Akin those all go to the jury.

HECHT: But beyond your waiver argument, we want people to report crimes and we don't want them to be so fearful that they will say, well I better not say anything because that could be a bad result. Of course we don't want to tilt it too far, but we want to move it a little bit in the direction of favoring the reporting of crime so that people will be more encouraged to do that than if they just know they are exposed to liability. Given that that's the case, why isn't a rule requiring corroboration consistent with and not too much bigger than that policy?

COWART: Because it's under other Texas case law. The only instances when they point to corroboration are statutory. They are asking for a common law rule...

BRISTER: No. We have different areas. Service of citation: if they say they served you. You can't just come in and say they didn't serve you. You have to corroborate the fact that you weren't served. Because we don't presume that process servers have a reason to lie about this. Now similarly we don't normally presume that shopkeepers have an advantage. It gives them more customers by arresting customers every so often. The idea is that they are not going to do this to harass their customers because they want people to come there, and they will only do it if they really think the crime happened. So there are several areas in law where we require corroborations. And the question is, should this be one?

COWART: Respectfully with process servers, you can defeat that by your own testimony. That's what the corroboration is, you go in there and testify that no I didn't get it. You show the process that's usually in your firm for receiving legal notices, then you demonstrate that that process was followed, and it didn't wind up on your desk.

And it's a radical change in Texas law if you adopted the corroboration requirements. It's a departure from all the law that's gone before it. The Meadows case from 1975; Ellis from 1994, both of those cases this court considered whether it would increase the burden of proof on the malicious prosecution claim. And the court said, no, the burden of proof is a preponderance of the evidence. And it's reviewed under the traditional standards of appellate review.

A preponderance of the evidence is not - you've got to bring in somebody else to testify that supports you. And secondly, it makes the most vulnerable person more vulnerable. The lonely stranger. A solitary person of a different ethnicity or different race or from a different state. A traveler. Somebody who has no friends in the area can be a victim to whatever the discretion or whatever that this store owner wants to inflict on her.

I agree that we would like to presume that everybody in the country and everybody in the state acts reasonably and for good purposes at all times. That's simply not the case.

HECHT: Do you think it reflects on Ms. Suberu's credibility that the presence of any Hertz money out in the car can't be substantiated? She has no records. Hertz has no records.

COWART: Of course it reflects on her credibility.

HECHT: If she had been walking out of the store and Ms. Weir came up to her and said where are you going? And she said, I'm going out to the car to get $30 that Hertz gave me 1 hour ago. And her husband who was standing there by beside her turned around to her and just blurted out, We don't have $30 in the car. Then if Ms. Weir says okay, that's enough for me. I think you are leaving here with stuff you haven't paid for. Would that give Ms. Weir reasonable probability to think that she was planning to drive? Just the fact that she knew at that time, or she had reason to know, that her stated motive for going to the car was not true.

COWART: I think in that instance she would have, assuming in your scenario that Ms. Suberu is pushing a grocery basket full of groceries out the front door...that's an objective indication it's an offense. It doesn't matter what she's going out there for.

HECHT: I suppose that the reason that the CA doesn't want to consider whether there was any Hertz money out at the car, is that that's not evidence that supports the verdict. That's evidence that's contrary to the verdict. And that's of course a rule to disregard evidence. It's contrary to the verdict. But if that's really true, it does sort of put the case in a different light that she says she's going out to the car for a reason that it just can't be substantiated.

COWART: It's not true. The jury determined it's not true. That's what we have juries for.

HECHT: Well the jury can't imagine that there is money out there when there's no money out there.

COWART: But if it's a fact issue of whether there is money out there or not, the jury by its verdict resolved the fact issue in favor of Ms. Suberu.

HECHT: She says that's what she was going out there for. Nobody has any records that there is any money out there.

COWART: She says it's out there. And on the issue of other state law. The only state that says that corroboration is required is Alabama. And I don't even think that really says corroboration is required. What it says is, very denials of appeals are not sufficient to carry a plaintiff's burden of proof of producing substantial evidence resisting a summary judgment motion under Alabama procedure. We don't have a substantial evidence rule in Texas. I don't know what exactly that means.

If you look at all these other cases, the Mississippi case we've had a debate about it between the parties as to what that case actually means. That's in our brief. The New York case, there was an indictment handed down, and under the restatement and under New York law, if you've got an indictment you've got to show in order to defeat the claim of probable cause you've got to show that the indictment was procured by false representations, or by some bad, bad means you've

got this indictment. So New York is not a case where you've got an arrest. It's a grand jury indictment. The restatement says that if you've got an indictment that's some evidence that they have probable cause, and then you've got to undercut the indictment by independent evidence. So that case isn't applicable here.

The Delaware case that they cite, it's an instance where the plaintiff did not plead lack of probable cause. It's a 12(b)(6) motion or summary judgment motion under federal law. They did not plead a lack of probable cause and the TC says well there's no pleading and no evidence to support the pleading. There's a mere allegation that these cops created these claims to hide their misdeeds in arresting the plaintiff. And this is the plaintiff who had been arrested. He conceded he had been DWI, he conceded he was speeding, he said he was swearing at the cops. The contest in that case was over whether the cops beat him up in the course of arresting him.

The North Dakota case, they've conceded doesn't apply. So when you look at these cases only Alabama remotely in my mind suggests that this is a requirement. Secondly, if you look at Digby itself, which is the case that they are relying on in Texas, in terms of what it required for corroboration. In Digby it was the situation where a couple got a bank loan collateralizing some insurance policies. And they say that the VP of the bank who authorized this loan, authorized them to borrow against the value of these insurance policies to make payments against the loan. Then when they defaulted on the loan, the bank goes to collect on the insurance policies, and guess what? There's no value in the insurance policies.

The CA says well the only affirmative evidence that the plaintiffs advance is their own testimony that there was this disagreement with this one bank VP. They were allowed to borrow against the value of the insurance policies. We are going to want collaboration. So what we find is collaborating evidence is the fact that the VP didn't notify the insurance company, or more to the point, there is no evidence that the VP notified the insurance company, that those insurance policies had been collateralized. That's not to my mind collaboration of material fact. Texas collaboration with no evidence. How can you collaborate something under this case with no evidence of the fact.

If you are going to set the Digby formulation, the hurdle the plaintiff has to get over to collaborate would be extraordinarily low. The Digby court says it only has to be consistent with plaintiff's testimony. So that's what we've got here. If I've got to show collaboration that's consistent with my testimony, I've got statements in the evidence attributed to the pharmacy technician who was on duty that night who knew Ms. Suberu by sight, who knew her husband by sight, who said that when she came in to the pharmacy, she didn't see a cart. She later says, oh, but I heard one. But you know what? That's contrary to the verdict, so I don't think you can consider it. She said, I didn't see one. She was at my desk for a little while. She asked for prescriptions, but I wanted to give her her husband's prescription. She said I'm going to go back out to the car. That might not be exactly right. I don't know that Ms. Suberu says she's going to the car, but she did leave the pharmacy counter and within a matter of minutes she saw her returning to the store escorted by the Kroger employees who arrested her.

So the time frame was corroborated. The purpose of going to the Kroger store is corroborated. The fact that she was surprised by being given the prescription for her husband is corroborated.

BRISTER: So why did the Kroger employees do this? They don't like black customers? That's the only implication I can get.

COWART: Right. And I hear you judge. And Kroger inserted race into this case. We didn't. They repeatedly questioned the witnesses...

BRISTER: Why did they do this to Ms. Suberu?

COWART: I'm not sure. Maybe they were looking to score - maybe they get credit for arrests.

BRISTER: You're just speculating now.

COWART: I am, but that's what you are asking me to do.

BRISTER: No. We have to show malice. And if we can't imagine why a store would do this, why would that be malice?

COWART: Malice and motive are not equivalent. Malice is acting with disregard for the rights of another person. Knowing that you are likely to inflict harm on this person. And if it's true that they didn't see Ms. Suberu pushing a cart out the store, they might have seen somebody pushing a cart out of the store...

BRISTER: But if they are just mistaken that's not enough.

COWART: But they weren't just mistaken. According to jury, they knew that Ms. Suberu was not pushing that basket. I think what happened, and if I'm allowed to speculate, there are some people stealing grocery cart or baskets, and Ms. Suberu was mixed in with them as they were going out the door. Ms. Weir yelled stopped. The people who are stealing skedaddled. Ms. Suberu turns around and says, yes. And they say you're with them, which is in the record, you're coming with me. And so it's a matter of not merely mistaken because they can see who was pushing what. So it's not a mere mistake.

BRISTER: They thought she was part of a gang.

COWARD: And then they contended that she was pushing the basket. And so that strengthens her case. They are lying intentionally to try to convict this woman. That has nothing to do with what was going on.

The record says she was going out. There was a couple of people in front of her. And when Kelly Weir called stopped, she stopped, the other people didn't. And Ms. Suberu says I didn't have anything to do with any baskets.

Malicious prosecution does have a very fine balancing act. This court has said over and over again, that the balancing act is accomplished by carefully defining the elements and then requiring the proof under usual and traditional standards to meet those elements. It's not accomplished by skewing the fight in the TC so badly that the plaintiff cannot win.

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REBUTTAL

PEAVLER: One reason Kroger contends there was no waiver is kind of like an evidentiary ruling that the TC could hear. There's nothing to hear here. This is a pure matter of law that can be handled at any level among the case without judicial waste, such as you would have in a case of having to send the whole case back to be tried.

O'NEILL: It can be cured by the plaintiff. Plaintiff if they hear your directed verdict motion that there's no corroboration here, they can ask to open the evidence to put on the witness they didn't think was necessary when they didn't think corroboration was required.

PEAVLER: I think it's safe to presume that a plaintiff is going to put on everything she has in order to support her case. Certainly there has been no allegation that she was precluded from putting on any argument or evidence as a result of the timing, which Kroger cited this case.

The problem in this case is that there is no evidence of malice. The only evidence that was used was this lack of probable cause. They found plaintiff's testimony, and that was used to infer malice. The problem is, when you infer malice in that regard, it's a fiction. You are actually inferring a wrongful intent because you can think of no other reason that somebody would do something unreasonable. But as J. Brister was pointing out, there is no motive here for Kroger to turn away its customers. This only hurts Kroger's business.

In addition, nowhere in the record is there any evidence that any Kroger witnesses - now keep in mind. There were four people who saw her do this. One of whom was no longer employed at the time that he testified, and was not in anyway involved in the prosecution or even reporting of the crime. Completely disinterested witness. There is no reason why any of them would do this. And there's no evidence to support that they knew they were false or mistaken. The possibility exists, maybe they were mistaken. But there's no evidence that any of those witnesses thought they were mistaken at the time.

Also, this court's recent decision in the Dillard v. Silva case shows that being arrested is not the type of substantial harm, extreme risk of substantial harm that courts tend to punish with exemplary damages.

The plaintiff's failure to put on any affirmative evidence of Kroger's state of mind is fatal to her case. In addition, the court raised the ____ case, the suggestion that perhaps using this gross negligence definition of malice contained in the prior statute that's at issue here, isn't appropriate in an intentional tort case such as this. In the Texas Beef Cattle case this court held that there's a higher level of proof necessary to prove malice in tortuous interference with a contract case. We submit the same should be true here. When you look at the public policies underlying the tort and the reasons for the presumption and that we are trying to encourage people to report suspicious activity, you need to require...

BRISTER: We're trying to encourage some people to report some suspicious activity. We don't want to encourage divorced spouses to report crimes by their other spouses because they do plenty of that already. But your rule requiring corroboration means that's just going to be just fine for them to do that, because there's no harm in doing it. There's no harm in lying about what your ex spouse did. Because unless they corroborate it there's no malicious prosecution. So really your argument depends on what kind of crimes we're wanting to encourage people to report. Because we want some and not others.

PEAVLER: I think it has to be applied across the board. And the point that...

BRISTER: I think probably so too. But then why shouldn't it apply this way rather than that? We've got some we do, and some we don't. Why should we go out on a limb with Alabama rather than stay with the other 48 states?

PEAVLER: Well the other states have not rejected this theory. It simply has not been brought up. The states that have analyzed this issue have ruled in favor of requiring corroboration.

With respect to the spousal issue, I suspect that the evidence in such a case would show that there is no corroboration. Given how well they know each other and the availability of proof, there would likely be corroboration.

Finally, I would like to point out that the Dillard case is distinguishable as far as relying on credibility of the witnesses. Because that case was merely a false imprisonment case. It didn't involve the same public policy concerns behind a malicious prosecution case.