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Supreme Court of Texas.
Service Corporation International and SCI Texas Funeral Services, Inc., d/b/a
Mont Meta Memorial Park
v.
Juanita G. Guerra, Julie Ann Ramirez, Gracie Little and Mary Esther Martinez.
No. 09-0941.

December 9, 2010.

Appearances:

Mike A. Hatchell of Locke Lord Bissell & Liddell, LLP, for petitioner.
Mark L. Kincaid of Kincaid & Horton LLP, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

ORAL ARGUMENT OF MARK L. KINCAID ON BEHALF OF THE RESPONDENT

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: So the Court is ready to hear argument in 09-0941.

MARSHAL: May it please the Court, Mr. Hatchell will present argument for the Petitioners and has reserved five minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

ATTORNEY MIKE HATCHELL: May it please the Court. This is a suit for a wrongful disturbance of a grave-site brought by the widow of the deceased and three daughters against SCI Texas which own the cemetery and its parent corporation, Service Corporation International. It was tried under three theories of liability, negligence, intentional infliction of emotional distress. All liability theories were found against both defendants. Two million dollars were awarded to the widow, actual damages and \$100,000 each to the daughters. Three million dollars were awarded in punitive damages to the parent corporation, Service Corporation International, and one million against SCI Texas. It was confirmed by the Corpus Christi Court of Appeals only on the theory of trespass. The other issues were not reached. I think that we can best spend our time today of many interesting ques-

tions in this case on two. To what extent will the Texas court allow pleadings in other lawsuits to prove the reprehensibility factor of punitive damages? And number two, is it true that all actors involved in this case were employees of the parent company, a holding company, because they periodically in the testimony said they worked for SCI, a nickname or acronym? I think the Court can approach these questions, the first of those questions by asking itself three important rhetorical questions. Question number one is and let me give you the backdrop of question number one. Approximately 25 lawsuits involving other cemeteries in other counties and one in Florida were introduced in this case over strenuous objection. There is no question, Plaintiffs have said that these are introduced to show and support punitive damages.

JUSTICE DAVID M. MEDINA: Were those other cases, did they involve the subsidiary or the parent corporation?

ATTORNEY MIKE HATCHELL: Well it's a mixed basket. By my count, ten did not involve either. Some involved Service Corporation, well let's call it SCI Texas and at least one that I remember and perhaps more named both and one I believe, Aragon, involved the parent company.

JUSTICE DON R. WILLETT: What about the Florida litigation?

ATTORNEY MIKE HATCHELL: The Florida litigation, as I recall, involved a Florida subsidiary and SCI International. So the first rhetorical question is can you prove reprehensibility through pleadings and other lawsuits, newspaper clippings about those lawsuits and even bring parties in those lawsuits to testify about their pain and suffering? I think clearly the answer is no. This Court constructed its analysis in *Bennett v. Reynolds* through the lens of the due process clause in Supreme Court decisions and I suggest that the Court will do well to do so in this case. For example, in *Philip Morris*, we have the holding that a state cannot punish for harms that are alleged to have been visited on non-parties. In *State Farm*, the Court held due process does not permit courts in the calculation of punitive damages to adjudicate the merits of other parties' hypothetical claims against defendants.

CHIEF JUSTICE WALLACE B. JEFFERSON: But did you defend in part this lawsuit on the ground that this, what happened in this case was an isolated occurrence by one employee? Is that fair to say or not?

ATTORNEY MIKE HATCHELL: Well that's a fair statement, yes, that certainly has been our argument.

CHIEF JUSTICE WALLACE B. JEFFERSON: And so when, if the other side wants to contest that and say, no, this, there's a pattern, there's a practice, it's happened in other, several other times, that's a valid rebuttal to that argument, right?

ATTORNEY MIKE HATCHELL: It is not a valid rebuttal insofar as the introduction of pleadings are concerned. The United States Supreme Court and I think this Court in *Bennett* has held that it is the actual harm that is important. I suppose that it would be, and there is implication certainly in *State Farm* that if there is an underlying scheme or pattern that replicates and is connected to the harm caused to the plaintiff that may be relevant, but I think in a moment in my argument, Your Honor, when we get to the nature of these lawsuits, you're going to see that there simply is no connection.

JUSTICE EVA M. GUZMAN: Did the Guerras have to introduce evidence to establish how the acts were connected or their similarity before the actual introduction of the acts. Was there some sort of predicate showing that they had to make?

ATTORNEY MIKE HATCHELL: That would certainly be my contention. Your Honor, but again I'm very concerned about the use of pleadings, allegations because here is the problem. As the Supreme Court of the United States has said, once you start talking about pleadings, then the other side has the opportunity to rebut. We don't know what's happened, what the actual matter is. The other side gets to rebut. The laws of that state,

for example, if your foreign pleadings apply, we get to make our defenses and, therefore, what happens is you turn the whole trial into a mini-trial about the give-and-take of lawsuits, which I'll show in a minute, have absolutely no bearing or even similarity to the case. So I guess my answer to your question is yes if they proved some sort of underlying pervasive national scheme that replicated the harm, it could conceivably be admissible to bear upon the underlying nature and animus of the conduct in question, but not otherwise. Just as an aside --

JUSTICE PHIL JOHNSON: [Inaudible] you're still, your position as to pleadings remains as it is?

ATTORNEY MIKE HATCHELL: It's my first point, the pleadings should not be admitted.

JUSTICE PHIL JOHNSON: Even if there were proof of an actual.

ATTORNEY MIKE HATCHELL: That is correct.

JUSTICE PHIL JOHNSON: And your position is there's no proof of the actual scheme or course of conduct in this case?

ATTORNEY MIKE HATCHELL: One of these cases do we really know the outcome. That was the Aragon case and it was not final at the time. And that's the case, by the way, in which a plaintiff was brought in to actually testify as to what happened to her and what her pain and mental anguish were and that is the one case that did involve a wrongful disinterment although under slightly different circumstances.

CHIEF JUSTICE WALLACE B. JEFFERSON: If that were the only case and the result were the same, would your arguments be similar what, what -- because that wouldn't be a pleadings case so what would your argument be in that?

ATTORNEY MIKE HATCHELL: My argument would be then that you have to show that the particular incidents that occurred, let's just say in the Aragon case, were not the result of just a unique combination of circumstances of employees behaving badly. If you're going to get to the level of SCI Texas and particularly International, you've got to show, in my judgment, and I think the Supreme Court of the United States cases and certainly Texas cases support the notion that there must be an underlying scheme or common response to a specific situation; otherwise, all you are doing is saying that you can be punished because you've been sued a lot.

JUSTICE DAVID M. MEDINA: What are your rhetorical questions that you posed to us? The rhetorical questions?

ATTORNEY MIKE HATCHELL: Are you asking my first rhetorical question?

JUSTICE DAVID M. MEDINA: You said you have four of them.

ATTORNEY MIKE HATCHELL: The first rhetorical question is can you prove the reprehensibility factor in the analysis through pleadings and newspaper clippings and testimony of Plaintiffs? And I would be remiss also to say that if you look beyond the United States Supreme Court decisions, Texas common law has banned pleadings as proof of punitive damages or really is proof of even liability since the early 1900's calling them wholly inadmissible absent admissions of interest. Such testimony is usually prejudicial and clearly immaterial.

JUSTICE DON R. WILLETT: What are your other three?

ATTORNEY MIKE HATCHELL: Question number two. If pleadings are permissible, what type of conduct must they prove? And here again we have guidance from the United States Supreme Court. It is said that in Philip Morris if we did not previously hold explicitly that a jury may not punish for the harm caused others, we do so hold now. The due process clause, so the Court has held, prohibits punishing for harm caused to strangers to

the litigation. That dissimilar acts independent from acts sued upon may not serve as a basis for punishment. And as I said to Justice Guzman, the only relevant conduct would be conduct that eliminates the reprehensibility in this case of Mr. Gaspard's acts. But what do we have in these 24 lawsuits? A large percentage of them, as I have mentioned, do not mention either SCI Texas or Service Corporation International. All but one involved different cemeteries. All involved different actors, very different scenarios, very different legal theories. For example, there is a class action regarding the completion date of an unbuilt mausoleum, disputes over preparation of the body, complaints about the way services were conducted, water in a grave, billing disputes, giving the death certificate to the wrong heir and only one of them by my count involved a wrongful disinterment. The Texas precedents are in my judgment the same. You must show that conduct with strangers, in other words strangers to the litigation, was so closely connected with the transaction at issue that it shows a common scheme or plan, a regular response to repeated facts of the situation. And as I have just indicated there is no such proof here.

JUSTICE DAVID M. MEDINA: What was the conduct between the parent corporation and the subsidiary?

ATTORNEY MIKE HATCHELL: There is no evidence at all showing the conduct between other than the fact that what the evidence shows is that the parent corporation is a holding company, it owns stock in all the subsidiaries and it has no employees.

JUSTICE DAVID M. MEDINA: Subsidiary has its own board of directors.

ATTORNEY MIKE HATCHELL: Pardon?

JUSTICE DAVID M. MEDINA: Does the subsidiary have its own board of directors?

ATTORNEY MIKE HATCHELL: Yes. Well I'm not sure that's really shown whether or not there's interlocking directors or not. I'd be happy to search the record to see, but that did not come out in testimony although 10K's are in evidence and it's possible that it is and I'd be happy to let you know that. But please bear in mind that, and we'll get to this in the second part if we can get that far, there was no alter ego, sham corporation theory or anything of that nature. It appears the corporate bail submitted in this case. So the liability of Service Corporation International, by their own words, is what they call direct relationship meaning that all of these people theoretically were employed directly by International. The third question is to what extent may suits in other states and this is the Florida litigation to which I speak, a horrendous situation which began 25 years, 20 years, pardon me, before Service Corporation [inaudible] or its subsidiaries had ownership of a cemetery involving desecration of 600 graves, crushing vaults, throwing bodies in the swamp, ultimately resulting in the payment of \$100 million settlement of a class action and a million dollar fine. This really is beyond the pale. Texas does not have any legitimate interest in conduct that harms any citizens other than the citizens in Texas. Once we venture outside that bounds of Texas, we must consider laws of that jurisdiction, available defenses in that jurisdiction, civil penalties in that jurisdiction. The potential for double punishment clearly exists, but also the tremendous disparity between the nature of the conduct involved is shocking in this case and yet it was used over and over and over again to pound us into submission. So we say that that alone reverses the case. I've touched upon the liability of Service Corporation International. It can be simply boiled down to this. They contend that there was a direct relationship, meaning that there was a direct employment relationship between all of the actors in this case for two reasons. Because some of the witnesses got on the stand and said I worked for SCI or SCI did this and because the corporate logo could be used by SCI Texas. Cases are quite clear that used by permission or a corporate logo is no evidence of disregard of the corporate fiction and it certainly should not be proof of an employment relationship. The use of an acronym, SCI, a nickname, falls in the same category. It just essentially proves nothing. If you look at the equally probable balance rule, saying I work for SCI proves nothing because the initials SCI are in the actual official name of the Texas Corporation. They are not in the name of International. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any questions? Thank you Mr. Hatchell. The Court is now

ready to hear argument from the respondents.

MARSHAL: May it please the Court, Mr. Kincaid will present argument for the respondent?

ORAL ARGUMENT OF MARK L. KINCAID ON BEHALF OF THE RESPONDENT

ATTORNEY MARK KINCAID: May it please the Court, Counsel. I will address the point that petitioners have addressed and then, of course, anything else that the Court is particularly interested in. Service Corp International and SCI Texas find themselves appealing a different case than they tried and that is tremendously important to this Court's resolution. The issue on evidence of other similar incidents, the Florida case and then the 24, 25 Texas cases is presented to you on one very narrow issue and that is the impact that that evidence had, the unconstitutional impact that evidence had on punitive damages. So the first insurmountable hurdle that Petitioners have is they failed to make that objection timely in the trial court. Justice Wainwright as you wrote for the Court in *In re BLD* and any number of other cases, two things have to happen to preserve error so that trial judges are given an opportunity to correct the precise error that the party then wants to complain about on appeal. That did not happen on this case and as *In re BLD* said and there are a couple of other cases cited, the rule about preserving error applies even to constitutional arguments and that makes perfect sense. Think of the predicament we have if every time this evidence comes around, SCI never objects to the trial court that there is any constitutional infirmity, that there is any violation of due process, that under *State Farm v. Campbell*, you cannot punish the conduct in Florida. The entire trial is conducted with many objections about the evidence, relevance and similarity, but nothing that invokes the constitutional argument.

JUSTICE DAVID M. MEDINA: Do you think that they could escape that by making an argument that the objection was so obvious or the error was so obvious that an objection was not needed?

ATTORNEY MARK KINCAID: No because once you drill down to the constitutional arguments, Your Honor, *State Farm v. Campbell* as we pointed out in the supplemental briefing and then our briefing on petition. *State Farm versus Campbell* itself talks about the circumstances under which other instances are proper to show a recidivist, to punish a recidivist. So if the trial court is given the opportunity to consider the constitutional argument, the opposing party, that's the other aspect, the opposing party is given an opportunity to respond at that time. In this case, it is undisputed that Service Corp International and SCI Texas never made this argument until I think they finally got on to it in their supplemental motion for new trial or motion for judgment NOV. So basically they're put in the procedural posture of saying to the Court, surprise, this entire trial we just had now comes to not. You cannot render judgment on the evidence that came in because of this previously un-raised constitutional argument.

JUSTICE PHIL JOHNSON: Well, they also in their brief raised the question, the non-constitutional question of simply can you prove by pleadings and allegations in other lawsuits a wrong or a course of conduct and this is due, is there any non-constitutional merit for their argument.

ATTORNEY MARK KINCAID: Respectfully, Your Honor, no there is not. The way they have phrased their argument and when you look back to the Court of Appeals opinion, there were briefing issues in the Court of Appeals and the Court of Appeals very clearly said SCI's briefing on this point about other similar incidents isn't very good. They haven't briefed it very clearly, but the Court of Appeals said, Corpus Christi Court said we think they have preserved it as to the constitutional argument, so we addressed that. Now in this Court when you start out with the very phrasing, the boldface phrasing, numbered phrasing of the issue, they say the constitutional impact on punitive damages. So while there is an interesting subordinate discussion about if you're going to constitutionally pass muster, what quality of proof is necessary, it all channels back into the unreserved constitutional argument.

JUSTICE PHIL JOHNSON: I thought they also mentioned 404 in there and rule 404 --

ATTORNEY MARK KINCAID: They do as a basis for, I'm sorry I didn't mean to cut you off, Your Honor, they mention that as a basis for why these aren't similar enough to pass the constitutional muster, but there is no separately preserved error other than the constitutional one and it's clear in their statement of the issue, the bold-face statement. This unconstitutionally impaired punitive damages so the Court can't get there. A second reason, a very profound equally valid reason the Court can't get there they tantalized the court with some very interesting issues, but that's not this case. The second reason is the Florida suit, it was particularly remarkable and as the trial court said when you've got this many allegations of this kind of conduct, that raises a question of what's happening at the top and as Chief Justice Jefferson pointed out, when they're trying the case saying this is a rogue employee, they even argue in this case a comedy of error, Keystone Cops. When it's a managerial person, Jay Gaspard, ordering people to go out and move the body, to hitch it up to a backhoe, lift it up and drag it aside after being told by the family not to do that, it is a valid defense to say at some point when you have been accused this many times of this conduct, that alone has probative value because one important fact in this case, it's Plaintiff's exhibit seven, which I think you may have the original, and that is it's this pitiful, pitiful book that dates to 1933 that the pages are falling out; it's kept together with Saran wrap. That's what the initial employees looked at to see whether this grave was available. That's what they looked at to see the double ditto marks that said no it's not or overlooked. And there's a question when people keep saying you have done this, mirror allegations, at some point that creates a duty to inquire. SCI and SCI Texas should say you know people are saying this about us. Let's go see if our recordkeeping allows this to happen. It's an easy defense for SCI to say that didn't happen. But when you have 600 people in Florida saying that you moved bodies without permission, that starts to have some independent probative value. But here's the biggest problem, the second procedure hurdle they cannot overcome as to the Florida case. That lawsuit, the class action, the bad publicity, the reporting that SCI didn't contest it, but paid \$100 million to resolve it and a million dollar criminal fine, that was reported in the newspaper which was read by the Guerra family. At the same time, SCI admittedly is lying to them about the status of Mr. Guerra's grave. Lying to them that it's all been resolved; concealing from them the fact that they had secretly gone out and dragged his body over with a backhoe to solve their business problem. At the very time the Guerra family is wondering is he buried in the right place? Do we have a problem? Is this the grave we should go grieve at? They're reading this newspaper coverage. One argument in the case, the Guerra family made the choice to exhume the body, to make sure he was really there and to make sure that he was really in the casket that was there understandable in light of these allegations that in Florida they had dumped 600 bodies in the woods and let animals eat their parts.

JUSTICE EVA M. GUZMAN: Does it, in terms of the similarity, there was some finding of criminal wrong doing in Florida and no such findings in this complaint? Isn't that significant in terms of this, I guess, whether or not that really was similar conduct?

ATTORNEY MARK KINCAID: Your Honor, there might be an issue on the similarity of that detail of it. As far as moving bodies without permission, that is the relevant similarity.

JUSTICE EVA M. GUZMAN: Well but they were, in Florida they were dumping bodies in the woods and here I believe it said that a foot or a foot and a half, which is significant, but is there enough similarity there?

ATTORNEY MARK KINCAID: Well one point on the foot and foot and a half, you don't get to invade someone's rights a little bit. You don't get to desecrate a grave a little bit. There's no legal basis for that.

JUSTICE EVA M. GUZMAN: I guess in terms of the reprehensibility, dumping the bodies in the woods and desecrating the corpse [inaudible].

ATTORNEY MARK KINCAID: If I may, let me address another aspect of the Florida case apart from the similarity. There were admissions in the record by SCI representatives that as far as moving bodies without permission, it was similar. So on that point, there's an admission that it was similar. I mean the SCI employee said well

you know there wasn't, we didn't scatter body parts, it's different. So that also was in the record. But this is not an issue of similarity as to the Florida case. Because of the issue of the reasonableness of the Guerra family's decision to exhume the body, which itself would necessarily enhance their mental anguish and, in fact, was challenged by SCI's lawyers as they didn't have to do that. So part of the record is Julie Ramirez saying we were reading these articles. That was part of what concerned us. That's what made us do that. So the evidence in the Florida lawsuit is relevant on that precise point. Were they justified in taking this action, which necessarily caused more mental anguish? The important point on that is once the Florida lawsuit was relevant for any issue under established Texas precedent, SCI had to ask for a limiting instruction and they did not. So whether the Florida lawsuit is sufficiently reprehensible on any other issue, whether it's similar enough, which we think it is, on any other issue, they have waived that error by failing to request a limiting instruction where the judge would say you may only consider this newspaper reporting, these allegations on this issue. You may not consider it on any other issue.

JUSTICE EVA M. GUZMAN: They were required to ask for that limiting instruction even though they had objected and made relevance and probative value?

ATTORNEY MARK KINCAID: Yes.

JUSTICE EVA M. GUZMAN: Types of --

ATTORNEY MARK KINCAID: Yes. And, Your Honor, the law is very clear to give the trial court an opportunity to correct or avoid error when evidence is inadmissible for one purpose and inadmissible for another, it is the burden of the party opposing that evidence to ask for a limiting instruction so that the jury is instructed to only consider for the proper purpose. SCI failed to do that. Again understandably, there is an effort to appeal a different case than was tried.

CHIEF JUSTICE WALLACE B. JEFFERSON: Do you think that you did not have to pierce the corporate veil in order to get to the parent company? And if that's correct because that are no findings on that, why is that?

ATTORNEY MARK KINCAID: Yes. Your Honor, let me address that separately. The case wasn't tried on piercing the corporate veil theory. It wasn't tried on alter ego theory. It was tried squarely on the theory that there is direct evidence that SCI, the parent company, did this as well as SCI Texas. So it's a very interesting question in some other case about what is the relevance of the logos? What is the relevance of corporate branding? Those are interesting cases that this Court is going to face at some point given the way business is conducted, but that's not this case. The evidence in this case, and we cited it for you in the brief and it's shown in the record. From the very beginning, the lawyers who tried the case created uncertainty for the parent company because having said in voir dire we represent SCI Texas and Service Corporation International and explained the parent subsidiary relationship at Volume 3, page 44, Mr. Murray says without differentiating says to the jury in opening statements, we admit we did something wrong, shouldn't have happened. We admit it, have admit it, we're sorry, we apologize. Not SCI Texas did something wrong. That's not the only one, that's the theme that went through there was a failure --

JUSTICE DAVID M. MEDINA: But that's not evidence.

ATTORNEY MARK KINCAID: That's not, that's right, but that's a theme that went through. Now they attempt to parse out that SCI was ambiguous or meant something differently. But in context, Jessica Alvarez, the employee who first dealt with the family, she said she was employed by SCI.

JUSTICE PHIL JOHNSON: Which SCI?

ATTORNEY MARK KINCAID: Well she said SCI, as you read the entire record, let me give you a few references. For example, Able Martinez, one of the gentlemen who dug up the grave and moved the body said he was employed by the SCI Company. Alfredo Rodriguez --

JUSTICE PHIL JOHNSON: Which one was that?

ATTORNEY MARK KINCAID: Well --

JUSTICE PHIL JOHNSON: You have the burden proof.

ATTORNEY MARK KINCAID: Yes we do and let me give you the context because, Your Honor, I think the context is important. Because the context reveals that when people said SCI, the jury was entitled to understand that as big SCI. Service Corporation --

JUSTICE PHIL JOHNSON: Why?

ATTORNEY MARK KINCAID: Because of the context. From the context, it becomes clear that whenever it was SCI Texas, the subsidiary people would call that out specifically. For example --

JUSTICE PHIL JOHNSON: Now the other party briefs says there's direct testimony that SCI International had no employees there. It's all --

ATTORNEY MARK KINCAID: And there's direct testimony to the contrary, Your Honor. I mean that was a disputed fact.

JUSTICE PHIL JOHNSON: What was the direct testimony to the contrary?

ATTORNEY MARK KINCAID: For example, Vicky Trevino, she was the one, she became the manager after Jay Gaspard passed away. She was the one responsible for sending the false letter drafted by SCI's attorney. And he testified, Scott Ahrendt and there was no question he was from the big company. He was a corporate lawyer; he was not from the little company.

JUSTICE DAVID M. MEDINA: Well, that generally isn't enough to get to the --

ATTORNEY MARK KINCAID: That's right, but what Vicky Trevino says, Your Honor, she testified in the record, volume 5, page 110, that she said Service Corporation International. She didn't just use the logo and there's more.

JUSTICE EVA M. GUZMAN: Was that testimony corroborated by any other type of evidence that might establish documentary of evidence, for example?

ATTORNEY MARK KINCAID: Yes it was, as a matter of fact, Your Honor, plaintiff's exhibit 103, which is hugely important. Plaintiff's exhibit 103, it's three pieces of paper from the personnel file of Jay Gaspard, the villain in this as characterized by both sides, the one who actually ordered the desecration of the grave. So he was a manger, undisputed, and the question is who did he work for? There was testimony that he worked for SCI. So which SCI? The personnel file, plaintiff's exhibit 103, there are two or three documents that simply show changes, like his termination, like his promotion and they had the SCI logo, which again the logo itself isn't in our view enough. But the document that is enough that alone is more than a scintilla and justifies affirmant on this point is when Jay Gaspard, when they posted his position as manager prior to the burial of Marcos Guerra, prior to the events in this case, in February of 2000 the employee requisition form it does not say SCI, it does not say SCI Texas. It does not have a logo. It has the words Service Corporation International spelled out. So there's a fact issue on who Jay Gaspard worked for. That document alone is more then a scintilla and there is still more. Justice Guzman, you asked if there corroborating evidence. We could prove with corroborating evidence or they could disprove with un-corroborating evidence and that's very important for this reason, and this is something I didn't point out in the brief because it was raised by their reply brief. Where they said well you could have shown employment records, you could have shown payroll stubs, you could have shown all this. We

have four or five employees saying I work for SCI and, for example, Susano Garza, he was the gentlemen that in one of the other instances of moving the brother-in-law's headstone, he's the one who said we knew it was in the wrong place. I was told not to tell the family. I was told to dump the headstone. Susano Garza when asked who he worked for, he said Service Corporation International.

JUSTICE EVA M. GUZMAN: Is that enough though? Just the statement of the employees to establish --

ATTORNEY MARK KINCAID: Yes absolutely, absolutely.

JUSTICE EVA M. GUZMAN: What authority tells us so?

ATTORNEY MARK KINCAID: And here's an important reason why, Justice Guzman, SCI, big SCI, SCI Texas, both of those entities had voluminous access to employment records, to paystubs, to paychecks, every one of you Justices know who you work for and if you didn't know who you work for, you could look at your paystub and if you were still confused about who you worked for, your employer, the state of Texas has the ability to say Justice Jefferson works for me. They have access to that evidence and it's an opinion you wrote Wal-Mart, Justice Green, Wal-Mart stores v. Middleton back in 1998. The party's failure to produce evidence within his possession or to testify about it, creates a rebuttable presumption unfavorable that the party to that party, which itself has probative value. SCI brought one witness and one witness only, William O'Brian, to say what they are arguing now. SCI Texas is different, SCI Texas is the one that owned the cemeteries. When every other employee said I work for SCI and two of them said Service Corporation International and the lawyers without differentiating argued to the jury we admit we did wrong and SCI and SCI Texas having access to evidence to conclusively prove who each person worked for did not come back. That has [inaudible] --

JUSTICE PHIL JOHNSON: So is it your position that the employees worked for both of them?

ATTORNEY MARK KINCAID: No, it is our position that when they said SCI and in the context of it, the jury could take that to mean that they worked for Service Corp. International. Something I didn't --

JUSTICE PHIL JOHNSON: So which ones could the jury have decided because the, the jury charge here really doesn't distinguish. Which employees do you believe the jury could have found worked for International and which worked for Texas? Can you differentiate between those two?

ATTORNEY MARK KINCAID: Your Honor, the way the evidence came in, it was very clear that the companies did not differentiate in how they conducted their business. So I think the correct answer the jury could impart is both.

JUSTICE DALE WAINWRIGHT: Which employee said they worked for Service Corporation International, using those terms?

ATTORNEY MARK KINCAID: Vicky Trevino and Susano Garza. The others all said SCI. And one think --

CHIEF JUSTICE WALLACE B. JEFFERSON: Any objection to the form of the submission of the question, the main question I guess on the trespass case that would have distinguished between SCI and SCI Texas?

ATTORNEY MARK KINCAID: No, there were two separate lines for each entity and there was no objection that I recall, Your Honor. You might take a look at the closing argument. For example, Adriana Cardenas for the defendant said "I'm proud to stand before you today representing SCI Service Corporation International, SCI Texas and Mount Meta," Volume 7, page 29. We admit we did something wrong. They did not differentiate; they did not bring evidence to let the jury differentiate. The evidence had much more than a scintilla to justify the judgment again Service Corp. International. I appreciate your consideration.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

ATTORNEY MIKE HATCHELL: May it please the Court, I have three very brief rebuttals.

JUSTICE DALE WAINWRIGHT: Can you start where Mr. Kincaid left off with the difference between the two companies, if there is?

ATTORNEY MIKE HATCHELL: The difficulty that they have in this case is that they didn't submit any jury question as to whether or not there was, which employees worked for which corporation. Therefore, they have to prove that conclusively. When an employee gets on the stand and says I work for SCI and SCI is in the name of the Texas Corporation, how is that proof beyond a shadow of a doubt conclusively that this employee worked for the international company?

JUSTICE DALE WAINWRIGHT: Help me understand why they have to prove that conclusively? If they raise, if there's evidence that some of the responsible employees say they work for the international company and use the full name of it and the others said SCI, at least as to the ones that use the full name, why do they have to prove anything beyond that to the jury? And even if you can claim it was contested, that's enough evidence that they work for the international company isn't it, at least the ones that said the full name?

ATTORNEY MIKE HATCHELL: No, it's not enough evidence because we're not dealing in this case with the findings of some corporate policy. We're dealing with the supposed trespass that was committed by the general manager and two or three people operating a backhoe. That's the only thing that harmed them. And it's that conduct of those individuals that has to be visited back under respondeat superior in order to make, fix liability in this case. And it's just beyond me that anyone can say if I say I work for the SCI Company that that proves conclusively I work for a holding corporation that only owns stock [inaudible] --

JUSTICE DALE WAINWRIGHT: I'm still not understanding why they have to prove that conclusively.

ATTORNEY MIKE HATCHELL: Because of --

JUSTICE DALE WAINWRIGHT: If there's enough evidence that reasonable minds can disagree [inaudible] the jury conclude that the ones that said I work for International, use the full name, work for International.

ATTORNEY MIKE HATCHELL: Well master servant relationship is generally a question of fact and it was not submitted in this case. It was their burden to demonstrate that the actors for whose conduct we are being punished and for whose conduct we've been found liable were, in fact, employees under the doctrine of respondeat superior. And if you don't submit the question, then you have to establish it conclusively.

JUSTICE PHIL JOHNSON: May I ask two questions. Number one was there any objection to any of the charges submitted that there was no finding as to employee status?

ATTORNEY MIKE HATCHELL: No, there was no objection to that. [Inaudible] --

JUSTICE PHIL JOHNSON: So maybe some, there may be some question about that. Second question on objection to the charge was there any objection in regard to the damages issues in the Casteel matter that's been brought?

ATTORNEY MIKE HATCHELL: We did not raise Casteel.

JUSTICE PHIL JOHNSON: Was there any objection to the way those charges were submitted because they were predicated on affirmative findings to I believe two, three or four. Was there any objection to that submission?

ATTORNEY MIKE HATCHELL: That's correct. There was no objection to the conditions to that.

JUSTICE DON R. WILLETT: What were your three rebuttal points if you haven't touched them yet?

ATTORNEY MARK KINCAID: Regarding the necessity to raise unconstitutionality, there are three responses. First of all, we did object beginning at page 15 of Volume 1 of the record and we objected on the ground that there was no appropriate similarity under Rule 404(b) in Texas and also that it was highly prejudicial and the prejudice outweighed any value from the evidence. That is pretty much the language that the United States Supreme Court has required. You do not have to, in making objections like that, raise due process because due process enters the scenario as an enjoinder upon the state to provide procedures that protect against arbitrary and excessive and depriving punitive damages. So, and it was raised before the Court, I mean it was raised in the supplemental motion for a new trial if we had to. In Philip Morris, there was no objection on constitutional grounds to the charge of the Court. The due process clause comes into as an enjoinder as I say upon the states and you simply don't have to raise it before the trial court. And the third one is [inaudible] --

JUSTICE DALE WAINWRIGHT: But in Philip Morris, excuse me, Counsel, was there an objection to the evidence coming in? You said there's no objection on constitutional grounds to the charge.

ATTORNEY MIKE HATCHELL: Oh goodness, Your Honor, we say we started --

JUSTICE DALE WAINWRIGHT: Was there an objection in Philip Morris, let me put a finer point in my question. Was there an objection in the Philip Morris case on constitutional grounds to the evidence coming in?

ATTORNEY MIKE HATCHELL: I will have to check that and see, Your Honor. I do not know that.

ATTORNEY MIKE HATCHELL: And finally Justice Willett, we also have in our brief objections based on Texas law.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. Thee cause is submitted. That concludes the Court's session for this morning and the marshal will adjourn the Court.

MARSHAL: All rise.

2010 WL 5139254 (Tex.)

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