ORAL ARGUMENT - 02/13/96
95-0159
MERCEDES-BENZ CREDIT CORP V. RHYNE

LAWYER: May it please the court. If the decision from the CA is allowed to stand it will be the law in this state that any repossession of a motor vehicle that contains the debtor's personal property will be wrongful as a matter of law. It will also be the law in this state that any time a creditor is tendered a late payment, that creditor must choose either to repossess the collateral immediately or to give up the right to repossess nonjudicially. We submit that neither of these results are supported by established law or sound public policy. Accordingly we urge the court to reverse the decision of the CA, and to render judgment that Mr. Rhyne take nothing by his claims.

ABBOTT: Counsel isn't there an abundance of evidence showing waiver?

LAWYER: I don't think so your honor. Let me explain why. What we have is we have several payments that were tendered and accepted late but within 10 days. What we have also is we have some payments that were tendered and accepted late, that were accepted more than 10 days late. However, there is no evidence in this case that Mercedes Benz ever expressly waived anything. So what we are looking at if we are looking at waiver at all we are looking at a waiver by implication. Now what we've got to find is some decisive act that means waiver or that is so inconsistent with the rights of the creditor that it has to be deemed a waiver. What we've got is we've got Mercedes Benz accepting a late payment. However to the extent those payments were more than 10 days late Mercedes Benz always treated them as a default, always imposed the late fee, that is the remedy of its late fee and more significantly in every case Mr. Rhyne paid that late fee. As a consequence both parties in that situation always confirmed that the agreement in accordance with its original terms.

CORNYN: So anytime a creditor charges a late fee and accepts it it cannot be implied waiver under those circumstances?

LAWYER: Your honor if that's all there is then we submit that that's the case. And the reason why is because that is not inconsistent with the creditor's rights under the agreements of the original terms.

CORNYN: That's inconsistent if there's a right to accelerate and to repossess isn't it?

LAWYER: The creditor in a secured transaction has a number of different remedies. I think it has always been the law that the creditor can kind of pick and choose what remedies it wants to. Now if we've got a sort of...if you think about it in terms of sort of a mini-remedy, that is we've got a late fee then I think the question that the court has to grapple with is if the debtor is a little bit late and the creditor has a remedy of a late fee, do we want to say that by the creditor exercising that mini-remedy if you will that the creditor waives other remedies in the event the default gets greater. We submit to you that that is not

good public policy.

ABBOTT: Don't you think that Mr. Rhyne probably felt that being that Mercedes consistently allowed him to pay late, that he was surprised about the fact that his truck was going to be repossessed? In other words he was lulled into complacency about the whole issue because of Mercedes practices.

LAWYER: Your honor we don't think so. In the first place on the facts he testified that he always knew that he was late, and that he was prepared to pay the late fees. So to that extent I don't think he was ever lulled to sleep on the facts in this case. More to the point generally prior to the extension agreement which occurred in Sept. 1987, prior to that time there was a number of late payments. However, one of them, only one of them was greater than 10 days late. In fact it was the July payment immediately before the extension. That was the only payment that was more than 10 days late and I believe if I'm correct it was 14-15 days late. So at that point I don't think he claim any surprise at anything. In fact he contacted Mercedes Benz to say look I'm having a little trouble here; what I would like to do is put some payments to the rear, which Mercedes Benz agreed to do for him. And they then entered into that agreement, all other terms remaining the same. It was only after that that he started to get later and later and later and each time he was late fees were imposed and he paid them.

It is our position that when that happened and that is all consistent with the contract, so it's our position that when that happened both parties confirmed the original contract.

SPECTOR: How much was the late fee?

LAWYER: Your honor it was $5.

SPECTOR: And he would just add that onto his payments?

LAWYER: The facts are not real clear in terms of how it came up. He apparently was billed the amount. In any event the amount was added on periodically. For example there would be one check submitted that would be regular payment plus $10. There would be another check that was tendered for the regular payment, plus maybe $15. So they were added in and paid right along with the regular payments.

There is no question in this case that Mr. Rhyne was in default at the time truck No. 1 was repossessed. He admitted that he was 17 days behind. In fact he insisted on it on numerous occasions. So you look at the creditor's remedy in that situation. UCC §9.503 says: In the event of default, the creditor may repossess the collateral. You may hear reference made to a notice of acceleration. Mercedes Benz sent a notice of acceleration to Mr. Rhyne; Mr. Rhyne admitted that he received it. However, the TC found that that notice of acceleration was not preceded by a notice of intention to accelerate. Therefore the TC concluded that the acceleration of the maturity of the debt was not proper. We do not claim that the acceleration was proper. However, acceleration is not part of this case. It is not a requirement of repossession under §9.503 that the maturity of the debt be accelerated.

The only requirement is that the debtor be in default.

BAKER: What did the installment sales contract require? What was your obligation? Did you have to give a notice of intent to accelerate? Did you have to then give a follow-up notice of foreclosure?

LAWYER: The contract was silent as to that. There was an option to accelerate. So under the law it required 2 notices: the notice of intent to accelerate; and the notice of acceleration.

BAKER: Did the agreement provide for waivers by Mr. Rhyne involving _____ claims?

LAWYER: Under the current state of the law the agreement could have provided for a waiver if the waiver language was very, very specific, if the borrower's waiving the notice of intention to accelerate and or also the notice of acceleration. And I believe the state of the law is that those waivers would have been good. They were not in the contract.

ENOCH: How many late payments could Mercedes Benz have accepted over the course of this contract before a waiver could be implied? Could waiver be implied at all is my question?

LAWYER: I think my answer to that would have to be so long as Mercedes Benz was accepting payments and asserting its right under the terms of the contract, that is by deeming it in default and imposing its late charges, then I think that would not be a waiver. Now I can hypothesize facts that might result in an estoppel under various facts. But I don't think we have anything like that in this case.

ENOCH: How many late payments in this case did Mercedes Benz accept before the truck was repossessed?

LAWYER: I've got it broken up into 2 groups. Prior to the Sept. extension agreement I believe there were 16 total payments. I believe that 13 of those payments were late; that 12 of those payments were late by less than 10 days, and that the July payment was 14-15 days late. The Aug. payment was also more than 10 days late, but it was at that time the parties were talking to each other about you know can we do an extension agreement, which they did, so that meant then that the Aug. and Sept. payments were put off to the end of the contract. They were moved back 42 more months. Then the Oct. payment I want to say was about 18-20 days late, and thereafter he was late. He was more than 10 days late every month thereafter and late charges were imposed and paid every time.

ENOCH: At what point after setting a couple of payments to the end of the contract term and then the other 3 late payments did Mercedes Benz say they are not going to take any more? I mean they write him and say that's it; you've had 13, 14, 25 chances; you haven't responded; so that's it we expect the next payment to be on time, or that's it? I mean did that occur?

LAWYER: They did not send that letter. The only letter that they sent that the TC found was the notice of acceleration and it as I mentioned was ineffective as an acceleration.

ENOCH: That was before the repossession?

LAWYER: That was before the repossession. That was March 10. And the repossession was May 3, I believe. There is evidence that there were a couple of phone calls. But to answer your specific questions, no, a letter was not sent that said specifically: You have been in default and we expect timely performance henceforth, or we are going to repossess.

ABBOTT: Is the evidence clear that that letter was even received by the Rhynes?

LAWYER: The notice of acceleration?

ABBOTT: Yes.

LAWYER: Yes Mr. Rhyne admitted that he received that letter. We have an issue in this case that is germane to waiver is how far behind was Mr. Rhyne at the time the vehicle was repossessed? Now I mentioned that Mr. Rhyne testified repeatedly that he was only 17 days behind. However, that is not evidence that the court needs to concern itself with. And the reason is this: Mr. Rhyne when confronted with his documents, that is his canceled checks, his check stubs and his bank statements conceded that if Mercedes Benz was correct and that check 3006 did not include the October payment, then Mr. Rhyne conceded that he was 2 payments behind at that time. He conceded that he was incorrect, that he was only 17 days behind and he conceded that Mercedes Benz had a right to repossess that truck under those circumstances.

Now the evidence that Mr. Rhyne purports to rely on to the justification in support of that position is a notation at the bottom of check 3006. The CA and the TC both interpreted that notation as meaning that the Oct. payment amount was included in that check. Both courts erred in that. And the reason they did was because there was a contemporaneous document executed by the same parties on the same day, covering the same material that both courts failed to consider. This court has stated the rules of construction numerous times. Number 1) ascertain the intention of the parties; 2) if there are multiple writings that are executed by the same parties contemporaneously dealing with the same subject matter, then the court must interpret those writings together as a single writing; 3) if there are 2 provisions that purport to be in conflict, then the interpretation should be such that it avoids the conflict and harmonizes the provisions if that is possible; 4) and most importantly interpretation of a writing that is unambiguous is a question of law that this court can review de novo.

Look at the extension agreement. It's plaintiff's ex. 9. That extension agreement was executed by Bernice Rhyne, Mr. Rhyne's wife. He testified that that was her handwriting, and he testified that she had authority to sign that document on his behalf. That document is dated Sept. 8. That

document bears the account number of the account for truck 1, and that document says: Total amount due, $1491.94. Now compare that to the check that has the notation at the bottom. It was also signed by Bernice Rhyne. It is dated Sept. 8, the same day, it has on it the identical account number as the extension agreement. It is payable to Mercedes Benz in the amount of $1491.94 - to the penny, the amount stated as due in the extension agreement. There is no question that these two writings are all part of the same transaction and should be construed together.

* * * * * * * * * *

RESPONDENT

LAWYER: May it please the court. This is a statutory DTPA and UCC case. Importantly I think it is at the outset is to recognize what the standard of review is in this case as far as the evidence is concerned. Under Poole and Ames, all of the conflicting evidence must be resolved in favor of Mr. Rhyne and his counterclaimant, the prevailing party in this case, and all reasonable inferences from that evidence must be resolved in favor of Mr. Rhyne.

One of the remarkable aspects of the briefing here by the petitioner is that it's a revisionist approach to what the evidence is. It talks about the evidence that Mercedes Benz put in, but it never talks about the evidence that Mr. Rhyne put in.

BAKER: There were findings of fact and conclusions of law in this case is that right?

LAWYER: There are findings of fact and conclusions of law. The findings of fact are uniformly in favor of Mr. Rhyne and the evidence in support of those, the conflicting evidence, the reasonable inferences favor those findings of fact.

BAKER: But they have to be supported by evidence?

LAWYER: By some evidence.

BAKER: Under the no evidence review?

LAWYER: Exactly. And Mr. Rhyne did put in evidence...

BAKER: What sort of standard of review are the conclusions of law?

LAWYER: On the conclusions of law it is de novo your honor of course.

BAKER: So what's your answer to the implied waiver?

LAWYER: Getting to the issue of waiver. The history of the credit performance in this case

is that for a period of something over 1 year Mr. Rhyne was at some times on time, but nearly always late with his payments.

BAKER: Do you agree with his argument that there is no express waiver in the case?

LAWYER: There is an express waiver in the case.

BAKER: Where do we find that?

LAWYER: Mr. Rhyne testified that Mr. Krieger told him that as long as the payments came within 30 days, there would be no repossession.

BAKER: Is that on the first truck, or the 2nd truck?

LAWYER: That's on both trucks. It was reaffirmed in connection with the 2nd truck. At the time of the repossession check 3006 had been paid in September. Mr. Rhyne reviewed that check and the check plainly says it's a payment, plus the construction of that in support of the findings of fact is that it was a payment since both August and Sept. payments were moved to the end of the contract, that is the payment for October. It was paid in September, but for October. After that point as you track through the payments, when you get to the point where _____ follows Rhyne out of far Texas to Beaumont, Mr. Rhyne is only 17 days late on his payment. He is within the 30 days that hehas been told is acceptable. He has been at times almost 60 days late - one time. But most of the time after the payments were moved he had 4 payments that were about 30 days late up until the time he was repossessed.

BAKER: By your argument that means there is no extension charge?

LAWYER: Yes there were $15 on that check, check 3006, there were $15 in late charges, plus almost $70 in charges to move the 2 payments to the end of the contract and a payment.

BAKER: By that you mean there's only $70 for extension fee charged in Mr. Rhyne's _____?

LAWYER: That's correct.

BAKER: What does that do to the usury claim?

LAWYER: The usury claim was an alternative claim from the outset in my view.

BAKER: Are you abandoning the usury claim?

LAWYER: Yes sir. Our primary concern here, our primary argument here is that this charge

was a payment. If it wasn't a payment it would be usurious. Recall however that already built into each one of these payments is a time price differential interest charge.

BAKER: Is there any dispute that they can charge consideration to agree to move 2 payments to the end?

LAWYER: They could do so, but under the UCC it is not necessary that that be supported by consideration.

BAKER: Assuming that this agreement that he refers to, that was part of the agreement between the parties for the extension?

LAWYER: Right now you are taking me to the revision agreement which I will just move to so we can discuss that. Mr. Rhyne did not admit that Mrs. Rhyne's signature is on Ex. 9. They popped this exhibit up in the courtroom; it had never been produced in discovery; the judge overruled the objections to it. Mr. Rhyne said he had never seen it before, and he didn't know whether that was her signature. And then he was asked: Well would she had been authorized to sign such an agreement? He said: Yes. But he never identified her signature. And Judge Moncias specifically in his findings of fact found that that exhibit was not creditable. In fact the record would suggest that that exhibit was fabricated by NBCC.

BAKER: The extension agreement?

LAWYER: The extension agreement.

BAKER: But you agree that the check's okay?

LAWYER: The check was signed and sent by her.

BAKER: It had the same signature on it?

LAWYER: Yes sir it does have a valid signature.

BAKER: And it did go into evidence?

LAWYER: The check did go into evidence. Ex. 9 was admitted into evidence, and then later found by the judge in his findings of fact to be not creditable. That's how that was handled. So under the reasonable inferences that should be given in support of the TC's findings of fact, these are not contemporaneous documents and Ex. 9 cannot be used to interpret the meaning of the check.

BAKER: He said they were both dated the same day, Sept. 8, is that right or wrong?

LAWYER: Your honor I can't answer that. They probably are dated the same day.

BAKER: Well would you agree that if they are dated the same day, that's pretty contemporaneous?

LAWYER: If they were both signed by her, which Ex. 9, there's no evidence that it was signed by her.

BAKER: Was she deceased at the time of the trial?

LAWYER: At the time of the trial she was deceased.

GONZALEZ: And he is deceased now?

LAWYER: Yes your honor. We lost him very recently.

GONZALEZ: Something filed suggestion of death?

LAWYER: I just haven't gotten that done, but I will. But under the San Antonio Real Estate case, these are cases from this court: Puckett v. Hoover, Ford v. Culberson, these are cases that we cite in our brief. Mr. Rhyne was not in default, or if he was in technical default, the technical default had been waived by Mercedes Benz, and he was in compliance with his contract.

ENOCH: Wouldn't a letter of acceleration put Mr. Rhyne back on notice that they weren't giving up their right to come after his truck?

LAWYER: I would like to get to that now your honor. The so-called letter of acceleration was not even addressed to Mr. Rhyne. That's the only letter that he got from Mercedes Benz. And it was addressed to a James Estep, someone Mr. Rhyne, if it is a real name, had never heard of before. So this letter that they say that constitutes this notice of acceleration, not preceded by a notice of intent, and they never gave a request to repossess or a notice to repossession of any kind, this only letter that they ever sent called a Notice of Acceleration was not even addressed to Norman Rhyne, or Marcella Rhyne. It was addressed to James Estep.

BAKER: But Mr. Rhyne got it if I understand the record.

LAWYER: He received it. It came to his residence, and he got it. And it caused him some concern. He testified about that.

BAKER: So he was aware even though another name was on it, that it pertained to his account with Mercedes?

LAWYER: I think that the inference that must be given there is that he was not aware.

BAKER: Well then why was he concerned?

LAWYER: Because it was something from his creditor talking about a default, but it wasn't addressed to him.

BAKER: Did he do anything after receiving that letter?

LAWYER: After he received that letter...your honor I cannot remember whether he paid...I can't remember the date of that letter. He made a payment on April 14. I can't remember whether that's after that letter came or before. But he did make his last payment on April 14, 1988, which was the March 14th payment. He was 30 days late on that one. Now these are the dates I'm giving you. The dates I'm giving you that when he paid is when Mercedes credit received and posted the payment. He had mailed the payment earlier obviously, because they got to them and they posted them on these dates.

A creditor who gets into this situation of waiver is not helpless. This court's opinion in A.L. Carter Lumber Co. spells out precisely what that creditor is to do. And the amici need not be concerned because this court has given direction since 1943 what they are to do. They notify the debtor that they will no longer receive late payments, and they must give reasonable time to perform. Probably that may include moving some payments to the end if they have let a debtor get late rather than get all the money up front if they can't get the money caught up immediately. There must be a reasonable opportunity for performance provided under the A.L. Carter Lumber Co..

HECHT: It looks like that would be an incentive not to cut anybody any slack; be pretty tight about it?

LAWYER: This is interesting. And on the facts of this case right after Mercedes-Benz Credit Corporation put the 2 payments, August & Sept. to the end of the truck 1 note, Mercedes Benz Credit Corp. made Mr. Rhyne a loan on truck 2. So they obviously considered him credit worthy. We are in the mid '80s, a lot of people were having cash flow problems in the mid '80s. But I think that a creditor has to read whatever they read into any particular credit to determine whether or not they think it's still an on-going credit worthy situation or whether they foreclose, repo, and take their loans. Obviously in this situation they felt that Mr. Rhyne was still credit worthy because they made him a loan after they did that.

HECHT: It looks like if you were a creditor and were going to be perfectly careful about it if somebody was even a day late you send them a notice of intent, a notice of acceleration, and then I suppose they can pay up, and then you would have an agreement to go forward until the next late payment.

LAWYER: If they could. At some point obviously the transaction clause justifies that for people that are late on the house payments, late on their car payments, they have illnesses, a lot of reasons

why people don't perform exactly on time, particularly in consumer credit areas. And people accept those payments late and they go on and the people turn out to continue to be credit worthy and everybody's happy. So they don't send mail and stamps and computer letters and all that. It's not just programmed in. But at some point it becomes intolerable, then the provisions of A.L. Carter Lumber Co. have to be met.

Mercedes Benz never took any steps to comply with A.L. Carter Lumber Co. requirements.

BAKER: That argument is premised on waiver existing is that correct?

LAWYER: It is.

BAKER: So the key issue is this implied waiver?

LAWYER: Well that's correct. But the cases from this court that underpin the waiver issue are the San Antonio Real Estate; Puckett v. Hoover, and Ford v. Culberson.

CORNYN: If I understand correctly even if there is no implied waiver you say there is express waiver here?

LAWYER: Both.

CORNYN: So Mercedes Benz would not have been within its rights to demand to repossess as long as the payments were no later than 30 days over due under the express waiver that you spoke of earlier; is that correct?

LAWYER: I believe that's correct under that express waiver. Under the implied waiver I don't know how long it goes. Because I think at some point if there's been a series of times for example, the Feb. 14th payment was made or was credited at Mercedes Benz on March 28. So that's 6 weeks late. At some point the creditor has got to comply with the A.L. Carter requirements in order to get the credit back on track.

CORNYN: Opposing counsel says by charging the late fee, which was paid by Mr. Rhyne, that it preserved its other rights under the credit agreement; would you respond to that?

LAWYER: There is absolutely no precedent for that anywhere and there is nothing in the contract that says that. They have a processing fee. I'm assuming they have some processing costs where the payment doesn't hit right on time. They have the right to charge late payments under the consumer credit code, and they did. But it doesn't have a thing to do with waiver. There is not a case anywhere, and they don't cite a case, that the payment and collection of a late fee causes the waiver to disappear. This so-called grace period, they call it a 10-day grace period, I'm sure you've seen that in your papers, is a

period in which a payment will be received late without a late charge. After that a payment that is received late is assessed a late charge. But that's all so-called late charges. It doesn't have anything to do with the timeliness of future payments.

SPECTOR: Is it your position that there was no written extension agreement?

LAWYER: Yes.

SPECTOR: What was Mr. Rhyne's testimony that he knew it had been extended?

LAWYER: It's undisputed and that's also back at pages 1002, and 1003 in that area, it was undisputed in the entire trial that the August and September payments were put to the end of the contract.

SPECTOR: But there was no written agreement?

LAWYER: There was no written agreement unless it was Ex. 9. If that was a valid exhibit why wasn't it produced during discovery, and why was it just popped up in court? On examination by Mr. Rhyne by MBC's counsel without ever having shown it to anybody, and Mr. Rhyne's says: I've never seen this before. I say there's no written agreement and I think the reasonable inferences in this case dictate that there is no written agreement to do so. However, it's undisputed that those two payments were put to the end of the contract.

The damages in this case are significant, and I think justly so under the Moore v. _____ standard of requiring emotional pain, torment and suffering extending beyond the Parkway v. Woodruff mere worry, anxiety, vexation, embarrassment and anger. The Moore v._____ standard is met here. Mr. Rhyne was a gentlemen of age 77. He was not a sedentary retiree. He was a working man. He was an independent businessman and a farmer. He spent his life working and he wanted to work.

PHILLIPS: Can you tell us what the damages were for mental anguish since they were _____, what does it have to be?

LAWYER: It's important I think to note that there was no request by MBCC in the TC to segregate the damages by item. The proof in the record supports damages of various kinds, but the bulk of the damages would of necessity be mental anguish damages. The damages include: the damage to his credit so he couldn't get back into business, that could be a very large number.

PHILLIPS: But just looking at the mental anguish, if we determine that had to be $500,000 say, and we find that there is evidence of a dollar or more of mental anguish under our no evidence standard, do we have any authority to look at the number or once we determine there is some evidence of mental anguish, which is allowed by law, is that the end of our review?

LAWYER: What you just said is correct. That's the end of this court's review.

PHILLIPS: Do you have a convenience citation _____?

LAWYER: I think Bernard v. Wilson is the right cite for that your honor.

ABBOTT: Does the record contain the sufficient findings to support punitive damages?

LAWYER: It does your honor. The record contains findings that the violations were made knowingly, wilfully, wantonly, and with malice. So they not only meet the DTPA, but they also meet the requirements of Crause, and of Haslip and the US SC findings of requirement.

GONZALEZ: Who are the beneficiaries to this judgement if it were to be affirmed?

LAWYER: It would be Mr. Rhyne's, of course there is not anything on the record on this, but it would be his grandchildren.

* * * * * * * * * *

REBUTTAL

LAWYER: Mr. _____ cited us to A.L. Carter Lumber. Does A.L. Carter Lumber apply? If it does, do you meet it? If it doesn't, then why doesn't it?

LAWYER: Your honor A.L. Carter need not be overruled by this court in order to reverse the decision of the CA in this case. In A.L. Carter, this court held that by the conduct of the parties they had modified the agreement. Thus, payments that were originally due, and I am sorry I forgot the actual date when they were originally due, but it was the 5th or the 8th or somewhere in that vicinity, by modification, by conduct of the parties the payments then became due on the 22nd. What we submit to you here is that because Mercedes Benz never acted inconsistently, that is it asserted its remedies of late charge and Mr. Rhyne paid those, that we never had a modification. The parties always confirmed the agreement as originally written.

SPECTOR: Was there a late payment after the misguided acceleration letter?

LAWYER: There were late fees charged. Candidly I can't recall. I don't recall if he even made any more payments after that.

HECHT: If there's no written extension agreement do you lose?

LAWYER: No we don't lose.

HECHT: Why not?

LAWYER: Because the most that the evidence shows is that Mr. Rhyne testified that he had a conversation with the Mercedes Benz employee saying that they were going to put a couple of payments to the back. Now there never was any discussion whatsoever about whether there was going to be a charge for that, and if so, how much was the charge. So the charge I think there is still room here that the charge was for the extension. But as a matter of fact, and I do need to correct one thing, and this statement of facts is very, very lengthy, but I need to address the court's attention to the questioning by Mr. _____ and the answers given by Mr. Rhyne...

BAKER: Gives us the volume and pages please.

LAWYER: Volume 7, pages 221, and 222. And they were looking at plaintiff's No. 9, which is the written extension agreement at the time.

Q That's your wife's handwriting?

A That's my wife's handwriting.

On the next page, lines 2-7:

Q Did Bernice, that is Mrs. Rhyne, have authority to sign that document in front of you on your behalf?

A Certainly.

Then Mr. Rhyne goes on to volunteer she could sign anything that comes up if I wasn't there. That written extension agreement was the agreement in this case. And just as a matter of fact it is required under Ch. 7 of the Credit Code that the extension agreement be in writing.

BAKER: But opposing counsel says the TC entered a finding that that exhibit is not credible.

LAWYER: The TC did indeed have a finding that that document is not credible. And I will be quite frank your honor I am at a loss as to tell you what that means. The document was admitted; Mr. Rhyne testified that it was his wife's handwriting; he testified that she had authority to sign it. I don't know what it means...

BAKER: Well how can we handle that finding of fact that's the sole prerogative of the TC to make those assessments?

LAWYER: I think the way the court can handle that finding of fact is simple. There is no

evidence to support that finding.

BAKER: But there doesn't have to be.

GONZALEZ: What about the question that this document sprung on the witness was a surprise, it was never produced on discovery?

LAWYER: I don't know the answer to that your honor. He testified that he had not seen that document before. He then went on to testify that nonetheless it was his wife's handwriting, and that she had authority to sign it.

GONZALEZ: Did he testify that the signature on the document was his wife's signature?

LAWYER: Yes he did. I'm sorry. He testified that the signature was his wife's handwriting.

GONZALEZ: Mr. _____ represented to the court that there is no evidence that Mr. Rhyne said that the signature on the document was his wife's.

LAWYER: The signature was the...literally the name was Norman A. Rhyne. I mean the name that was written on there was the name Mr. Rhyne. What he testified to was that that name was in his wife's handwriting, and that she had authority to sign that document on his behalf.

waiver