

ORAL ARGUMENT – 02/05/03
02-0244
IN THE INTEREST OF L.M.I. & J.A.I.

CASEY: The smoking gun if you will in this particular case is the meeting that was in attorney Ciavaglia's office. And I think the mother of my client summed it up best when she said "it felt like we were caged animals."

In order to void a affidavit for relinquishment, it's necessary, and we believe was shown at the TC level, that there was overreaching on the part of a number of people. We further believe that in terms of the statutory requirements of placing a child were totally violated.

The respondents reply basically, as I understand it, it breaks down into two issues. One, is a procedural issue in terms of waiver and in terms of things that were basically presented in his motion to dismiss for lack of jurisdiction, which this court has previously overruled. The other issue is the one in terms of as it applies particularly to the waiver that was presented by Luz Duenas, who he says that she was the one that induced that particular, those written promises from Mr. Ciavaglia to get future pictures, to get future updates.

Basically their argument is an estoppel argument. In fact the cases that they cite are estoppel type arguments. I know _____ put out something there, you can't then come back and say well since you're the one that put it out there you can't now rely on the grounds to reverse it.

O'NEILL: Taking your argument to its logical conclusion wouldn't we then have to require in all these proceedings, in voluntary relinquishment cases, that a certified interpreter would be there and translate every word, word for word?

CASEY: I think the affidavit almost requires that by the very fact that _____ initials that I have read it, I have understood it, I have...

O'NEILL: That would be what we would have to do, although it's not required by statute?

CASEY: What is required by statute though is that a person have knowledge of this...

O'NEILL: Which is a factual determination for the TC to make at the time everyone is before the court.

CASEY: Agree.

O'NEILL: The way I read your argument is, we would then take it out of that realm to determine whether it's understood or let the fact finder, being the judge in this case, find that? In

other words if I'm on the TC and there's a procedure like this before me, I can't conduct it unless I have a certified interpreter there to word-for-word translate. I'm not saying that would be a bad thing.

CASEY: What I'm saying is I don't know that that would be necessary in every case. To me it is very ironic that the fact that Mr. Duenas was provided an interpreter at this particular proceeding, so obviously there had to be some cause for concern I would think, a red flag at the minimum, that this individual was not a person who understood English as his primary language.

O'NEILL: And there was some interpretation done there. Again, you would have to require a certified interpreter to literally read every word.

CASEY: Obviously that would make sure that this problem didn't arise. But to say that it must be done that way, I don't know because I'm assuming that most people when they are under oath they are going to be forthcoming as to whether or not they understand or don't understand even if they may have been born in the country other than this one, and English was not their primary language. But the problem we've got here is that we have a genuine dispute, but I think the evidence is overwhelming and again by the very fact that he's got an interpreter there at the trial on this cause, and what he did understand according to his testimony and the testimony of others was this threat of jail and everything else going on, that it seemed to me that the evidence was overwhelming that his...

O'NEILL: So we are weighing the evidence here. We have to find there was no evidence to support what the TC did.

CASEY: In terms of this case, I think...

O'NEILL: But what precludes someone from coming in after the fact, absent a certified court reporter with the record showing that it was literally translated, saying I was railroaded, I really didn't understand it. I said I did. And we do have testimony that parts of it were translated accurately just not all. What's to prevent someone from coming in after the fact and saying well really I didn't?

CASEY: What prevents anybody from being dishonest is what you're saying if they said that and it wasn't true.

O'NEILL: I think he would acknowledge he understood a lot. He just now says he didn't understand it all.

CASEY: In terms of the affidavit, I think he signed it and initialed because of the pressure that was being put on him, and figured that was the way not to go to jail.

JEFFERSON: Do you think that the fact that understanding or to not, do you think that has to be established that Mr. Duenas understood the nature of the document he was signing by clear and

convincing evidence, or would it be just a preponderance of the evidence the TC gets to decided, or what sort of standard is applicable?

CASEY: In terms of because you're waiving a constitutional right, I think fair and convincing evidence would be the more appropriate standard.

JEFFERSON: And under that standard if there is some evidence that he understood some words in English, would that satisfy a clear and convincing standard that he understood what was going on?

CASEY: I don't think it's just merely to say that I understand it. I think where it says, he says I've read every word, to me I don't think some is appropriate. Because where you've got that initial that says I've read every word, I understand every word. There's no doubt in my mind that some of those people at least attempted and maybe even succeeded in sort of giving him a general idea if you will, an overview, but I don't think that's adequate. That's why the statute requires or those affidavits have all those initial each line so that there's no doubt that they have understood each and every word that's going down on there. So in terms of saying that they understand some of it, I don't think that's good enough. I think they've got to understand every word. And that's why you have those _____. That's why it's bolder.

JEFFERSON: Now there is testimony from others who were present that he understood what he was signing.

CASEY: That is correct.

WAINWRIGHT: And why isn't that enough for us to affirm the TC's determination on a fact finding?

CASEY: Part of the problem is we're sitting here talking about _____. If I had been a trial attorney I would be going object your honor. It calls for speculation as to who know what somebody else understands or doesn't understand. And so in terms of that type of evidence, I just don't even know how probative that should be. I kept waiting for somebody to testify saying have you ever seen him have a conversation at home in English? And that question to my knowledge was never asked. And have you ever seen him conduct business in a store? Those are the sort of things that I would have thought that might have given some evidence credibility. But instead everybody focused on that particular meeting, and saying well did he understand what was going on?

SCHNEIDER: What do understand the legal effect when you introduce an affidavit? What has the petitioner proved at that time?

CASEY: I'm assuming that the affidavit came in without objection. So in terms of the code that you have at least prima facie established that which is necessary under the code to provide

for a termination. And in terms of whether there is some objection to it. And again, I think that's the purpose of this trial was is because my clients felt that they had been overreached.

SCHNEIDER: Am I hearing you right that if there were no objection, then a prima facie case would have been made, and then the burden then would have shifted to the other side to somehow or another impeach that or raise a fact question?

CASEY: I think that's a correct statement.

SCHNEIDER: So the burden in effect, the prima facie burden of clear and convincing evidence even is already established once you introduce the affidavit, and then from there on it's the other side, your side, duty now to come forward and to discredit that and prove, to make your case, to shift the burden back?

CASEY: I think it shifts back because I think once my clients - I mean in terms of what they come up and say look we don't understand, or I don't understand, or my client doesn't understand, I think at that point in time, then I think the burden shifts back again to the person trying to establish the validity...

O'NEILL: At what point in time does it shift back? A year later? Two years later?

CASEY: I'm talking about right there at the trial.

O'NEILL: At the trial you've got the affidavit which is a prima facie case.

CASEY: Prima facie case. So the respondents in this case, met that prima facie case. And then at that point in time when Mr. Duenas says look here's the overreaching problems that I had, here's the language barrier that I had, here are the various things that I was dealing with. Then at that point in time, I think the burden shifts to sit there and say no there wasn't this overreaching, this affidavit is not just merely a piece of paper. This was something that was done correctly and within the...

O'NEILL: But that was not done at the hearing.

CASEY: I don't think they met that burden.

O'NEILL: Well nothing occurred at the hearing and your clients indicate that at that time he didn't understand.

CASEY: I think he did. He sat there and talked about - you know he _____ language. He sat down. He was just told to sign this stuff. He said that he didn't understand it.

O'NEILL: I'm talking about at the relinquishment hearing.

CASEY: That's what I'm talking about. He testified to that fact that he didn't fully understand. I will tell you that these are not the most artful questions that were asked.

O'NEILL: What do we do with the testimony from the attorney Ciavaglia, who says that he told them that he would fully, finally and forever give up any parental rights to his children and his right to change his mind. And that he was speaking English, but that the mother translated it in Spanish and the third person who understood Spanish confirmed that that was adequately conveyed.

CASEY: My feeling on that again is I don't think you can do a summary or hit the high points even. I think it's necessary just by the wording of the statute and the wording of the affidavit. I mean that's why you have those specific forms such as that. Because just in terms of when some third party is sitting there telling you this is what it is, and that's why you have that evidence, the document speaks for itself.

ENOCH: We've got an affidavit where he says he read the thing, he read it all the way, he's got it initialed on the deal that says he understood, he verifies, he gets sworn in and swears that it's all true and correct. What is the rule you now propose when the person who signed it now comes forward and says they didn't understand it? What is the rule you propose that would establish clear and convincingly that they understood?

CASEY: Basically, I think the rule is already there in terms of what is overreaching and what is not. And what I believe is that in terms of the language barrier is overreaching. I'm not asking for...

ENOCH: It seems to me under these circumstances you would have to prove that the pressure was so great that you could not exercise your own volition. Sort of like undue influence. So you would have to say that I was forced, maybe because he says they threatened him with jail, I signed it or something.

CASEY: Well that's one type of overreaching. But I think there's another type of overreaching too. If you negotiate a deal with somebody that has no ability to communicate with you. Quite frankly, I thought that's probably why this court was attracted to take this case because it was - you know the jail thing to me is secondary.

ENOCH: It was because he claims he did not understand English.

CASEY: And you've got somebody signing off on this affidavit saying I understand every word.

ENOCH: So your standard would be if he says he doesn't understand English that what you must do is read verbatim the words in the language that he claims he understands?

CASEY: The best example would be to have a certified interpreter as opposed to his

wife saying here sign, sign here, telling her mother to shut-up. I just don't think it passed a smell test or even close.

SCHNEIDER: Here we are three years later and we're going to answer the question what is the standard in this case? Do we have to show as a matter of law he did not understand? Are you going to take on that burden?

CASEY: There is no question there's a problem here in terms what does this man understand. Because he's actually the only one that can say for sure. But there was no evidence - I mean the only evidence was did you ever talk to him in English? And the wife said well I taught him the word seagull.

O'NEILL: But there is other evidence too. He worked at a restaurant. There was testimony that he understood a lot of what was going on there. He responded in English to the judge. There is indication that he knew other than the word seagull.

CASEY: No question about it. But we're talking about a legal document. We're not talking about preparing the restaurant food, which he testified to is that somebody else would sit there and tell him that. Would even translate that for him.

OWEN: Are you also making a statutory argument that it doesn't comply with the statute?

CASEY: As it relates to him, I've not made any statutory argument.

OWEN: Your only argument was due process?

CASEY: Yes.

OWEN: Was that raised in the TC?

CASEY: At the TC level nobody used the magic words due process. But it was obviously very clear that all along _____ lack of his ability to understand and the arrest factor in terms of the jail. There's no question that evidentiary that was all there, but nobody said your honor, I'm raising a due process argument.

OWEN: What about in the CA?

CASEY: It was raised.

OWEN: At what point?

CASEY: I think it was at the beginning.

OWEN: I think they argue it wasn't raised in rehearing. That's why I was asking.

CASEY: I think what wasn't raised at the rehearing was the statute. I think due process was raised at the very beginning at the appellate level.

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RESPONDENT

HEWITT: I would like to first of all deal with the undue influence fraud issue, and then deal with the preservation argument that J. Owen just touched on. I also think that it is obvious to this court that insofar as Ricardo, the natural father, whether he understood English or not, I concur that that was a fact question. It involved credibility choices that the fact finder got to make. The fact finder got to weigh his testimony and got to weigh the testimony of others who testified that, yes, he did speak English, yes he did understand. In fact the record shows that he spoke English before the ceremony, during the ceremony, and even after the ceremony.

JEFFERSON: What was the English that he spoke from the record?

HEWITT: The record shows that first of all he was asked about the spelling of his name and shown a document. He responded in English that his name was correctly spelled. There is a case right on point that we cited to the court in our brief that even points that out where the person later complaining years after the fact that, gee, I know what I said in the affidavit, but I really didn't understand. That they took the time to read it and understand it enough and knew enough about it to even change...

JEFFERSON: So he can spell his name.

HEWITT: He can spell his name. He understood the question that was put to him in English by the attorney.

JEFFERSON: Which question?

HEWITT: Is your name spelled correctly in this document? The record shows that the attorney repeatedly asked him Do you understand this? do you understand that this document is, or this line is saying? And that he responded affirmatively in English.

HECHT: Where does the record show that? How can you tell what's being translated and what he is saying in English?

HEWITT: He was responding to the attorney.

HECHT: But there was a translator there.

HEWITT: I'm talking about the trial now. I'm talking about the affidavit signing ceremony. Correct. It was being translated...

HECHT: You're not talking about the trial?

HEWITT: No. I'm talking about the ceremony.

OWEN: The record I've got they're questioning Esther and she says (and he answered in English), and she says well he didn't speak much. He just nodded his head. I don't recall him speaking much at all. Is that right or not?

HEWITT: I think that's partly right, but there's other testimony. The attorney Ciavaglia said that he asked Ricardo a particular question and Ricardo answered yes. Answered in the affirmative. And the CA's opinion reflects that as well.

O'NEILL: And further wasn't there also someone there who overheard the translation, who understood Spanish and said that that was an accurate translation?

HEWITT: Yes. There were actually two Spanish speaking witnesses other than the parties who were there, and they testified that Ricardo was being told the correct things in Spanish as the attorney was reading from the affidavit in English.

OWEN: I thought the record was the grandmother gave him a paragraph long summary of what the affidavit said. And it was undisputed that no one translated the affidavit word-for-word or even paragraph by paragraph to him in Spanish.

HEWITT: There's a conflict in the record to that effect. Because it was either Ms. Trovaldo(?) or Ms. Garcia, as I recall, testifying that Ricardo was being told the correct things in Spanish as the attorney was reading the document in English.

HECHT: But the testimony is unequivocal that the whole thing took less than 1 minute. You couldn't read the affidavit in English in a minute.

HEWITT: I think it took longer than that.

OWEN: Well here's the testimony. And are you sitting here and telling the court today when the attorneys and the secretary presented the 7 page document to Mr. Duenas, that those 7 pages were translated to Mr. Duenas in Spanish. And Esther said each page was not translated word for word. No.

HEWITT: I think that's correct. She certainly said that. But Ms. Trebaldo(?) also said that what was being spoken to him in Spanish was the correct things as the lawyer was speaking them in English.

JEFFERSON: Just assume with me that the record shows that the entire affidavit was not translated beginning to end. That there were entire sections that were left out. What is the evidence that Mr. Duenas understood, for example, there are statutory requirements that have to be given _____ before termination is permitted. But there's no evidence that those portions were translated to Mr. Duenas. So assume with me that the entire affidavit was not translated. So what's the evidence that he understood what he was signing? What other evidence is there that he either spoke or understood English?

HEWITT: There is evidence that he spoke English at work. There was evidence after the signing ceremony where Esther went up to him and congratulated him for his courage and what a wise decision he had made and so forth. And asked Maria's mom to translate that into Spanish. And Ricardo answered Esther that he understood her and translation was not necessary.

JEFFERSON: If there are couple of instances in Duenas did understand the word courage and maybe knew how to spell his name in English. Is that really enough, if this standard is clear and convincing, that he knew what he was signing?

HEWITT: Yes. And I think that there is more in the record than just those items that you mentioned. For example, the record says that he was told "he was giving up his rights as a father." He was told "he wasn't going to be the father anymore." He was told "he was giving up his rights to his children." He was told he will no longer be responsible for them once this is all through. That's it."

JEFFERSON: Was he told that he could no longer direct the moral or religious training of the children, or that he would lose power to consent to the children's marriage or to enlist in the armed forces, or to submit to psychiatric or surgical treatment, or to make decisions of substantial legal significance concerning the children. All those things. Were those translated to him? Is there evidence of that?

HEWITT: I don't recall those items that you mentioned being in the record. There is nothing in the record that says he was not told those things. There was testimony repeatedly from a number of non-party witnesses that he understood. Non-party witnesses to the affidavit signing that he understood. As the judge asked the questions just a few minutes ago. What's the impact of him sponsoring his own affidavit into evidence? I can tell you what the impact of that is. And it's seen in Cactus Drilling among other cases, and the impact of him sponsoring his own affidavit into evidence is, that he was bound by the facts recited therein. And the facts recited therein are exactly what you just finished saying, plus a whole bunch more. So there's evidence that he spoke English and understood English from non-party witnesses at the signing ceremony. There is evidence that the material was translated correctly for him. There is divergence from that. There's not a whole bunch of detail. I would certainly like to see a lot more detail, but I was not the trial lawyer. We're talking about credibility issues here. Weight of evidence issues here that are determinations solely in the purview of the fact finder.

O'NEILL: This is not a parental termination case.

HEWITT: Yes it was. It's not an adoption case though.

O'NEILL: Well it's a voluntary relinquishment which is different from parental termination. Because parental termination is involuntary. And therefore, you must have clear and convincing evidence. Are we certain clear and convincing applies in a voluntary relinquishment case, and if so, how is applied? Is the legal concept in a voluntary relinquishment case there must be clear and convincing evidence of voluntariness, or it must be clear and convincing evidence that the affidavit was verbatim translated? I'm trying to understand what the actual, because we seem to be pariting this clear and convincing standard that applies in an involuntary termination, and I don't know what that standard looks like when it is a voluntary relinquishment.

HEWITT: Here's what I think, and I think the record bears this out as well. There are shifting burdens here. And the argument that we've been making today, the argument we've been talking about today involve things that were affirmative defenses that were Mr. Casey's clients' duty to plead and prove, and they had to do that and they acknowledged this at trial. It's on the record. Trial counsel said, we have to prove this by a preponderance of the evidence.

O'NEILL: Prove voluntariness by a preponderance of the evidence?

HEWITT: Yes. We have to prove voluntariness. We have to prove undue influence. We have to prove overreaching. All of these things that petitioners had to prove at trial and they acknowledge that burden

O'NEILL: So it's their burden at trial to overcome the affidavit by preponderance of the evidence?

HEWITT: Yes. The case law is legend, longer than I am tall and certainly more than the hair on my head, that when a voluntary affidavit of relinquishment is tendered into evidence in due form, and there's not any complaint that it was not in due form, that alone, and counsel has admitted this in briefs in front of the CA and in briefs here typically citing the In re Bruno case, is enough to establish termination.

JEFFERSON: So his signature in this context you're saying is all that is required to establish voluntariness even as against a claim that the person who signed it had no idea. Let's say that the person was deaf, dumb and blind, just had no idea what was on their, but somebody directed the hand to the line and the signature was made, that that is enough?

HEWITT: It is enough.

O'NEILL: You're saying that's enough to shift the burden to them to show.

HEWITT: Then the burden shifts for the person to come in and say I was blind.

JEFFERSON: And then once the burden shifts and that presumption rebutted by testimony that I'm deaf, dumb and blind, then does the burden shift back to the proponent of the affidavit or not?

HEWITT: I think the determination of whether it was rebutted or not is a determination made by the fact finder.

JEFFERSON: All I'm talking about is evidence. There is no evidence to the contrary. Does that shift the burden back to the proponent of the affidavit or not?

HEWITT: I don't think so. I don't think it shifts like that. I think the burden is on me to come in and show the requisites for voluntary relinquishment. And we did that.

OWEN: You have to show by clear and convincing evidence that it was voluntary? That's your burden.

HEWITT: Yes. And we did that in a variety of ways.

O'NEILL: Affidavit comes in. Prima facie proof. The burden shifts. They have to prove not voluntary, by preponderance. If that burden is met, then it shifts to the other side to prove clear and convincing?

HEWITT: No. I think the initial burden is on us.

O'NEILL: But you're saying the affidavit satisfies that burden?

HEWITT: Alone satisfies that. Then the burden shifted to them...

O'NEILL: So at that point we don't get into clear and convincing anything?

HEWITT: Right. Then the burden shifted to Ricardo and Maria to establish their affirmative defenses: I was blind; I can't understand English; I didn't understand what I was signing; a gun was put to my head for me to sign. The burden shifted to them to establish those affirmative defenses by a preponderance of the evidence and that's a fact finder credibility weight of evidence choice. If they had done that, then they would have established an affirmative defense to the voluntariness of those affidavits and it would have been toast. They did not establish those affirmative defenses by a preponderance of the evidence.

O'NEILL: Our review of that decision is there was no evidence to support the TC's failure to find, or we have to show that they established their case as a matter of law?

HEWITT: As a matter of law. And that leads me to the next issue, and respond to J. Owen's earlier question. And that is, this preservation of issue argument. The matter of law questions before this court today, and they are all matter of law questions that petitioners have presented to this court, those issues were never raised at the TC. Counsel hasn't pointed you to one place in the record where it was. There was no motion for new trial raising anything, because there was no motion for new trial.

The case was pitched in the CA as factual sufficiency. And I can point you to several places in the brief. Appellant's brief in the CA, page 12, he wanted a remand. Factual sufficiency relief. He said the preponderance of the evidence is factual sufficiency.

OWEN: Was the argument raised in the CA briefs that he did not understand English, and the affidavit therefore was not voluntary?

HEWITT: Yes. That was raised but it was raised in the context of a factual sufficiency question. The first time that matter of law issues appeared in this case was on motion for rehearing after the CA had already issued its decision. Matter of law appeared for the first time in this case, not in the TC, not on the issues, not in the CA's briefs, but on motion for rehearing in the CA. And that tells me under Sherry and Dryer and Steve Sash and a number of other cases by this court, that these matter of law issues are not properly before this court for review. You just can't switch horses in midstream like that without even giving the TC a shot at it.

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REBUTTAL

CASEY: I want to reaffirm what J. Jefferson asked about in terms of what was said and what wasn't said as to specifics that are contained in the affidavit. I would direct the court's attention to the record in vol. 3, page 45, the testifying of Mr. Ciavaglia. And he specifically asked who was doing any translating, and talks about that it was Maria's mother that was doing some translating.

It says, Ms. Pruett, That would be Maria's mother? That's correct. And what do you recall her doing with regards to that document? Well there's a specific part of the form that requires a set of initials by each one. It's a double space section and it says they understand the importance of this document.

Tell me what happened if you would what happened? I directed his attention specifically to this section and began to read it. And at that point, Esther said, Mom why don't you translate that to him and make sure he understands. At that point Maria turned to her mother in a very agitated fashion and said, he don't give a shit, he don't even buy diapers. So nonetheless, Ms. Pruett did continue to what sounded to me was to translate that in Spanish.

Did it take her awhile to read that into Spanish? She didn't seem to read it.

O'NEILL: Do you agree that at the hearing the affidavit is the proof, and then it shifts to your clients to do a preponderance of the evidence regarding undue influence, involuntariness, etc?

CASEY: Yes.

O'NEILL: At that point isn't it an intensively, factual inquiry? Don't we have to find as a matter of law there was no evidence that he understood English?

CASEY: It's not just a matter of understanding. It's a matter of...

JEFFERSON: I think you're saying the signature is not prima facie proof. I mean as I understood the argument for somebody who claims that they don't even speak the language in which the affidavit is written.

CASEY: Right. They're saying they translated and they didn't.

ENOCH: You agree that to set aside the affidavit, you had a burden by a preponderance to show that that affidavit was not voluntary?

CASEY: Yes.

ENOCH: The TC ruled against you.

CASEY: Correct.

ENOCH: So on appeal your burden is to prove that at least in this court, and apparently at some point in the CA to win you have to say that you established the nonvoluntariness as a matter of law. If you lost on the factual decision by the TC, then your burden is not to convince them there's a fact question. Your burden is to convince them that there was not a fact question. That as a matter of law you establish he didn't understand. And the basis of your assertion that as a matter of law he did not understand it, is because he did not speak English?

CASEY: That's correct.

ENOCH: And therefore the law required it to be read to him verbatim in Spanish?

CASEY: That's ____.

ENOCH: If the court doesn't agree that the affidavit has to be read verbatim in any event do you lose based on the fact that the gist of the affidavit at least arguably in the evidence was given to him in Spanish?

CASEY: Probably.

JEFFERSON: Couldn't the affidavit be voluntary as to what was translated only and not as to what was not translated? For example, this affidavit - there's a summary that says you lose the rights to your children. Do most people understand what that means, that you might not ever be able to see your children again, or that you might not be able to consent to marriage or to write to them or to telephone them? And there's no evidence in this record that any of those portions were translated before he signed this document?

CASEY: And again, if you look there at page 47 and 48, the attorney says I did a summary and that's all she did. He said that's about what I said in about three sentences. We've attacked the affidavit as a matter of law and that it was defective because it wasn't in its entirety, because the statute has certain prerequisites that have to be in this. I don't think you can do a partial understanding and thereby jump to termination. To me that would be another grounds just showing that as a matter of law that he doesn't get it because of the fact that it was only partial.

O'NEILL: But in terms of the burden shifting the affidavit, the signature shows the language? Your clients then are burdended to prove not voluntary. So your client's burden to prove I didn't understand I was giving up the right to consent to marriage. I didn't understand I was giving up the right to do this or that. I didn't understand I was giving up the right to make these decisions. Right?

CASEY: I think that's correct.

SCHNEIDER: I think it was met by the very fact that they were sitting there saying translate. The people that were on the other side that were encouraging you saying we've got to translate, we've got to translate, but then what they translated was not the statutory requirements...

JEFFERSON: Let me ask on that. Let's say that the affidavit that was given to an English speaking person had some of the same attributes that this one did, but lacked the statutorily required portion and that signature was given. Would that be a valid affidavit or would it not?

CASEY: Absolutely not. And quite frankly I think at that point in time they would not have met their prima facie burden by putting in a defective affidavit in the first place. I guess in one sense that's why I say it shifts back again to them. That's why I think that burden shifts because they haven't shown by their own testimony of their people that they asked for a translation and the translation that they made was again paraphrasing. It was not statutory prerequisites.