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Supreme Court of Texas.  
In re Weekley Homes, L.P.  
No. 08-0836.

March 31, 2009.

Appearances:

Craig T. Enoch, Winstead PC, Austin, TX, for relator, David Weekley Homes, for petitioner.

Christopher H. Rentzel, Bracewell & Giuliani LLP, Dallas, TX, for real party in interest, HFG Enclave Lane Interests, Ltd., for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is now ready to hear argument in 08-0836 in re: Weekley Homes.

MARSHALL: May it please the Court, Mr. Enoch will present argument for the Relator. The Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE PETITIONER

ATTORNEY CRAIG T. ENOCH: May it please the Court, I'm Craig Enoch and my co-counsel at the table is Joel Reese. He's one of my partners. It's our honor to be here to represent David Weekley Homes. When this Court promulgated its new discovery rules in 1998 and 1999, it added this comment, comment number one, while the scope of discovery is quite broad, it is nevertheless confined by the subject matter of the case and reasonable expectations of obtaining information that will aid resolution of the dispute. The rule must be read and applied in that context. And rule of procedure 192, this Court instructs what the permissible process of discovery is. The Court also instructs in rule 92 what the permissible scope of discovery is. It is both not.

JUSTICE DAVID M. MEDINA: Excuse me.

ATTORNEY CRAIG T. ENOCH: I'm sorry, Your Honor.

JUSTICE DAVID M. MEDINA: Mr. Enoch, can you envision when any type of case when an entire hard drive would be required to be produced?

ATTORNEY CRAIG T. ENOCH: Your Honor, as a matter of fact not. Even rule 196.4 takes the position that even if you get to mirror the hard

drive, the hard drive remains in the possession of the responding party. The only question is if it's going to be very expensive to reproduce it, then the Court has to address the cost of doing so, but even in the rule that permits a hard drive to be mirrored, if that's the case, it doesn't allow for the hard drive to be physically removed from the owner's possession and given to the requesting party's agents to look at the document.

JUSTICE PHIL JOHNSON: Well if the owner doesn't know how to look for something in there, how is the Court going to make sure that it's properly examined to see if there's something in there that should have been produced?

ATTORNEY CRAIG T. ENOCH: Your Honor, there are forensic analysts who can look at hard drives and can do that. The question is who is supervising when that happens and it's got to be the responder.

JUSTICE HARRIET O'NEILL: Did you client offer to do that on its own? That we'll use our own people to do that?

ATTORNEY CRAIG T. ENOCH: Your Honor, we're not even there yet because there is not any basis for the Court to order any of these hard drives to be mirror imaged at all because under 196.4, the question was is it electronic information that needs to be found. That's metadata. That's what the Court has asked for. It says if you're looking for the electronic signatures of the pages, if you're looking for electronic information that does not appear on the document that gets printed from that electronic information, here's the process that you go look for for that metadata. In this case, in this case, envision if you will a warehouse of filing cabinets filled with files filled with documents. The only distinction between that case and this one is that that warehouse of files can be accumulated on a disk this big. But in terms of the concepts that the Court has imposed, has understood under Rule 192, the concepts are identical. We don't allow a requestor to go into our warehouse and start leafing through files to determine what they want. We make them identify what they're looking for.

JUSTICE DALE WAINWRIGHT: So you're saying the only thing being requested is documents, copies of emails, not metadata or electronic information that may be in the computer on hard drive, but the only thing that's being requested is documents that can be printed out and produced if they exist.

ATTORNEY CRAIG T. ENOCH: The record in this case is we just don't believe those are all the documents let us go mirror image the hard drives.

JUSTICE DALE WAINWRIGHT: Now you would agree with me, Counsel, that if there's a reason for a Judge to order as a sanction or to order because the party has been obstreperous and just is stonewalling and won't produce relevant discovery, then a judge has the authority to order mirroring, hard drive, under appropriate protections in order to get even production of documents. At some point, a trial judge can have that discretion and authority wouldn't you agree?

ATTORNEY CRAIG T. ENOCH: Your Honor, I think there are cases in other jurisdictions that look at the conduct of the responding party and evaluate that conduct to determine how severe the Court's intervention into this process must be on the production. I'm not sure, I'm not sure that the physical removal of the hard drives to an offsite deal in the absence of evidence of spoliation, the absence of destroying documents on the hard drive, in the absence of active intentional conduct on part of a defendant to eliminate information that might otherwise be available. I'm not sure that it would just if any lesser conduct would justify the actual removal, but simply as Rule

196.4 says that within the business domain of the responder, the Court can place a forensic specialist to do the imaging of the hard drive and collect the information.

JUSTICE DALE WAINWRIGHT: So you do agree that the trial judge does have authority to do this in certain circumstances, but you don't think those circumstances are present in this case?

ATTORNEY CRAIG T. ENOCH: Certainly not in this case.

JUSTICE DALE WAINWRIGHT: Now who is paying the forensic experts, the Price Waterhouse Cooper's people and who are they going to call and ask if there are questions as they were doing the mirror image and those things?

ATTORNEY CRAIG T. ENOCH: Well, Your Honor, that's answered by the court's order in this case. It is their forensic expert who will be doing the mirror imaging at their forensic expert's lab, not in our facilities with their lawyers present.

JUSTICE DALE WAINWRIGHT: Now there's also been an assertion in the briefs that the experts are not going to read any of the information. They're going to look for these 21 search firms through a computer program and they wouldn't be reading the information. They'd just be accumulating it and then passing it on. Actually you, the representatives of Weekley, who would then have the ability to object and product a privilege law. What about the assertion that the experts weren't going to read it? I thought that was curious.

ATTORNEY CRAIG T. ENOCH: Well, it's curious to me because we have no evidence from the experts what they're going to do. There is no evidence in this record from the experts about just exactly what it is that they do. So I don't know.

JUSTICE HARRIET O'NEILL: Let me ask you. Here's what bothers me about this case. As I read the briefing, all I see is you can't do this, you can't do that, you can't do this, but there's no effort to say let us fashion a way to get this information. Now let me go to, let's treat this like a regular paper document request. It strikes me that deleted emails that can be retrieved are like offsite storage. Would you agree with me on that analogy? They're not readily accessible. Let's just say they're offsite.

ATTORNEY CRAIG T. ENOCH: I agree. It's like the warehouse. It's got filing cabinets and you've got all the documents.

JUSTICE HARRIET O'NEILL: That way. In that instance, it would be your responsibility, Weekly's responsibility to go in and produce those documents in the first instance.

ATTORNEY CRAIG T. ENOCH: That's correct.

JUSTICE HARRIET O'NEILL: And they were not produced in the first instance.

ATTORNEY CRAIG T. ENOCH: One caveat. Our obligation is only to produce documents that are relevant to the question asked.

JUSTICE HARRIET O'NEILL: Of course, but again the documents requested relevant, not privileged, that they're in offsite storage. It's your client's duty to produce those documents in the first instance.

ATTORNEY CRAIG T. ENOCH: That's correct.

JUSTICE HARRIET O'NEILL: And there's been no offer to produce them, a motion to compel as filed and let's just again analogize it to offsite storage, it strikes me that it would be your client's burden then to either go offsite and retrieve the data yourself, which doesn't appear to me to have been offered, or if that can't be done, to offer some ways to get it done or prove that it's unduly burdensome and cost and expense just as you would with voluminous offsite storage.



ATTORNEY CRAIG T. ENOCH: Your Honor, there was a motion to compel. The motion to compel was litigated in the Trial Court. The Trial Court heard all the evidence on the motion to compel and said that our response was in good faith on the motion to compel.

JUSTICE HARRIET O'NEILL: I'm not saying bad faith, but is what you want here to be able to go through and take these data points and process them yourself and retrieve from the hard drives? I haven't seen that offer.

ATTORNEY CRAIG T. ENOCH: Your Honor, the posture of the case may be a little bit different and perhaps I should explain the posture of the case.

JUSTICE HARRIET O'NEILL: Let me rephrase my question.

ATTORNEY CRAIG T. ENOCH: Okay.

JUSTICE HARRIET O'NEILL: I keep reading why what the Trial Court did was improper.

ATTORNEY CRAIG T. ENOCH: Yes, ma'am.

JUSTICE HARRIET O'NEILL: How do you think it would be proper?

ATTORNEY CRAIG T. ENOCH: I don't think it'd be proper under these circumstances at all.

JUSTICE HARRIET O'NEILL: How would a plaintiff get this information properly?

ATTORNEY CRAIG T. ENOCH: First of all, Your Honor, they only get the information off of our hard drives if under Rule 196.4 they say they want metadata. If you look at the cases, but the only thing unique about this about the electronic is metadata.

JUSTICE HARRIET O'NEILL: So if they had said we want metadata.

ATTORNEY CRAIG T. ENOCH: That's right. Then they have to come to the Court under the Rule 196.4 and assert that there's a reason for metadata. It has to be relevant. The request has to be in the first instance be relevant metadata. The cases that they cite about metadata is because there's something about the document itself that indicates that there's something behind the document that metadata might be relevant to. As an example.

JUSTICE HARRIET O'NEILL: Wait, we're talking about deleted emails. Those are documents.

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor.

JUSTICE HARRIET O'NEILL: Why aren't they entitled to documents?

ATTORNEY CRAIG T. ENOCH: Your Honor, they would be if there was any evidence that there were any documents relevant to this case that were deleted. There is no evidence. There is no evidence in this case that any documents that existed relevant to this were deleted.

JUSTICE HARRIET O'NEILL: How could they ever prove that? I mean if this is like offsite storage, it's your burden to produce those in the first instance. They don't have to prove anything. And what I'm hearing from your side is we're not willing to search for deleted items. We're not going to do that.

ATTORNEY CRAIG T. ENOCH: Your Honor, okay, the record in this case says we have produced all the documents we have. We have produced all the documents we have.

JUSTICE HARRIET O'NEILL: But you haven't produced offsite documents.

ATTORNEY CRAIG T. ENOCH: No, we produced all the documents we have, offsite, onsite, computers, everything. We have produced the only evidence.

JUSTICE DON R. WILLETT: Have you produced all the documents you can have?

ATTORNEY CRAIG T. ENOCH: Yes, we've produced them all.

JUSTICE DAVID M. MEDINA: Have you produced the documents that have been deleted?

ATTORNEY CRAIG T. ENOCH: Your Honor, there's no evidence that we've deleted anything.

JUSTICE HARRIET O'NEILL: There is. Someone said our employees delete these documents regularly so we don't know what might be out there that's just been deleted and we don't know if we can retrieve it or not.

ATTORNEY CRAIG T. ENOCH: Your Honor, the testimony is that testimony is how do you maintain your documents and the testimony is periodically we have a narrow space on the computer and, therefore, some documents get deleted because in order to have the capacity to hold more documents, we need that capacity and we delete. That's an overwrite. That's an overwrite. We have not testimony they can retrieve any deleted documents.

JUSTICE HARRIET O'NEILL: We're using, but we don't have any testimony that you can't and so, again, offsite storage analogy, okay at the end of every day, we send every document we have to offsite storage. It strikes me as the same thing. That doesn't mean you don't have a duty to look through the offsite storage to determine if there's anything responsive.

ATTORNEY CRAIG T. ENOCH: It seems to me on that particular answer you would still have a rule 196.4 that you'd come forward saying that there's a need to go double-check their computers and the rule says that the defendant maintains control of their computers if the cost is prohibitive, then the plaintiff has to share the cost or the court assess costs for producing equipment, but even on that circumstance, there is a rule specifically in place that governs how that will be handled and managed by the Court.

JUSTICE SCOTT A. BRISTER: Separately from this case, just in cases in general, you can ask the other side for emails relating to our contract.

ATTORNEY CRAIG T. ENOCH: Yes, sir.

JUSTICE SCOTT A. BRISTER: And could you ask the other side for deleted emails, emails that have been deleted in the ordinary course of business relating to our contract.

ATTORNEY CRAIG T. ENOCH: If we can retrieve them, yes.

JUSTICE SCOTT A. BRISTER: And if you and if it's expensive you can ask them to pay for it so they could ask for any of these deleted emails.

ATTORNEY CRAIG T. ENOCH: That's correct.

JUSTICE DALE WAINWRIGHT: Have they in this case?

ATTORNEY CRAIG T. ENOCH: Your Honor, they have not asked for the deleted emails. They have not produced and I think to me the key to this, they have not set it up in such a way as either to show that we've not produced everything we have or that there were relevant inquiries that we had at one time and deleted and I think that's the threshold here, we don't have, they have no evidence. They've not offered any evidence that we have anything that was relevant to this case that was deleted. Now the argument that I understand is being made is that because we have a witness who says we can't carry all those emails that we have on our machines and, therefore, there's a deletion that occurs. It's not the same thing. You said we have relevant information that we have deleted and, therefore, go get it and all of the rules of discovery require in the first instance that there has to be a request for relevant information. This Court's order, this Court's order gives our computers to their experts. Their experts will say look

for any document that says fence, look for any document that says reinstate.

JUSTICE HARRIET O'NEILL: Again, let me get back to how would you. Let's go back to the Trial Court. How would you propose these documents? Tell me the procedure you think's probable.

ATTORNEY CRAIG T. ENOCH: If there was any evidence of bad faith.

JUSTICE HARRIET O'NEILL: Okay, I'm the plaintiff and I want all documents relating to the stability study. What was that called?

ATTORNEY CRAIG T. ENOCH: Land slope, slope stability.

JUSTICE HARRIET O'NEILL: Slope stability study. I want all documents relating to that. All communications of any kind, way, shape or form. You would say that the deleted items, the offsite storage, they would have to prove that in that offsite storage there are documents that may be relevant.

ATTORNEY CRAIG T. ENOCH: They would have to prove.

JUSTICE HARRIET O'NEILL: [inaudible] in the first instance.

ATTORNEY CRAIG T. ENOCH: That's correct. They would have to have through their experts some indication that those documents exist offsite.

JUSTICE HARRIET O'NEILL: How, tell me how they would do that?

ATTORNEY CRAIG T. ENOCH: Because a backup tape. My own familiarity is if I have a system that has a backup for this, then it's possible if I know I've got a backup system, then it's possible to say well that deleted item might still be out there because it was on the backup, but if I don't maintain a backup system, if all I do is have a system that overrides whatever it is I deleted, then it's not at all sure that there's an offsite for this kind of information.

JUSTICE HARRIET O'NEILL: Well but if there's not, then nothing's going to happen. Price Waterhouse is going to go in there and there won't be anything.

ATTORNEY CRAIG T. ENOCH: Price Waterhouse, there's been no evidence whatsoever about anything about the system about where it can be. So.

JUSTICE HARRIET O'NEILL: Again, I'm trying to get at what you think their burden should be. We want all documents related to the stability study. Now I've got to prove how you maintain your documents and I've got to prove that they're retrievable and relevant information may be in there. That's my burden in the first instance.

ATTORNEY CRAIG T. ENOCH: Your Honor, I believe that would be your burden in the first instance and let me try and explain how I see this. I give you a request for a document, a document that meets this category. You say you've got them all. I've given them all to you and what happens? The other side comes up and says you haven't responded. I know you say you have, but you have not responded. Therefore, I'm going to bring a motion to compel you to respond.

JUSTICE HARRIET O'NEILL: I have discovered that you maintain documents in offsite storage and I want those offsite storage documents and you say, but they're in South America, I can't get them and so it strikes me that they can say well either you get them or we're going to send somebody down there to look for specific boxes.

ATTORNEY CRAIG T. ENOCH: Your Honor, and the Court would say, what is your indication that they have these documents offsite.

JUSTICE PHIL JOHNSON: But what if you respond we don't know because we haven't looked. We don't have anybody. We haven't sent anybody to the warehouse because we don't have anyone to send. Does the Trial Court have to say okay that's it or can the Trial Court say well if you don't send someone, we're going to. I'm going to.



ATTORNEY CRAIG T. ENOCH: Your Honor, I think our answer was we looked and we'd given you everything we found.

JUSTICE PHIL JOHNSON: Okay, if that's it.

JUSTICE HARRIET O'NEILL: But you didn't look in offsite storage. You didn't look in deleted emails.

ATTORNEY CRAIG T. ENOCH: We didn't look, I guess, we did not say we did not look at deleted emails.

JUSTICE HARRIET O'NEILL: I thought there was testimony to that effect.

ATTORNEY CRAIG T. ENOCH: In a different hearing, different subject, different question, our general Counsel made a general comment about how the documents are managed but nothing about these emails. There was no question about this subject matter or these emails, but a general understanding from the general Counsel of how some items communications among the various employees work and we ended up with a general comment about after 30 days, they get deleted because they have capacity issues in those computers, but not in reference, not in reference to any of those documents that are the subject of this was that coming.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions?

JUSTICE DALE WAINWRIGHT: One final question, request for product number 18 regarding Russell Rice, one of the persons identified in the Trial Court's order. Please produce any documents in your possession, custody and control relating to any communications including but not limited to emails between Russell Rice of Weekley and White. Does that request for production in Weekley's view include deleted emails?

ATTORNEY CRAIG T. ENOCH: In my view, in everything we could locate.

JUSTICE DALE WAINWRIGHT: In your client's view as they approached it at the Trial Court.

ATTORNEY CRAIG T. ENOCH: That's right. In the client's view, they produced everything they thought they could retrieve.

JUSTICE DALE WAINWRIGHT: Does that include deleted emails?

ATTORNEY CRAIG T. ENOCH: In my, I understand, it would be my understanding anything that could be retrieved and they would assume if they did not know any deleted emails were available to them to be retrieved, I guess there would be some not delivered. The specific question on that delivery, the Trial Court found good faith in responding to that particular request.

JUSTICE DALE WAINWRIGHT: I'm not sure I've got an answer. Did they produce deleted emails? I will change my question a little bit. Did Weekley at the Trial Court produce any emails that had been deleted?

ATTORNEY CRAIG T. ENOCH: That I do not know.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel. The Court is now ready to hear arguments from the Real Party in Interest.

MARSHALL: May it please the Court, Mr. Rentzel will present argument for the Real Party in Interest.

ORAL ARGUMENT OF CHRISTOPHER H. RENTZEL ON BEHALF OF THE RESPONDENT

ATTORNEY CHRISTOPHER RENTZEL: May it please the Court and the opposing Counsel, this is a case involving allegations of fraud and fraudulent concealment and as this Court said in 1995 in the Bianci case, it is oftentimes impossible to have direct evidence of what has been withheld and it can only be proved by circumstantial evidence.

JUSTICE SCOTT A. BRISTER: Before you get into the details, can I just ask you something about the case?

ATTORNEY CHRISTOPHER RENTZEL: Yes.

JUSTICE SCOTT A. BRISTER: As I understand it, your client bought from the developer, your client bought the leftover lots from the developer and Weekley had promised to buy all of the lots eventually.

ATTORNEY CHRISTOPHER RENTZEL: Yes.

JUSTICE SCOTT A. BRISTER: Why would they have any motivation or incentive to defraud you?

ATTORNEY CHRISTOPHER RENTZEL: At the time that our client, which was a lot warehouse, came on the scene, Weekley had a letter of credit of \$900,000 up with the bank. The underlying developer was then in default and that letter of credit could have been imminently drawn and Weekley would have been out \$900,000. By virtue of this transaction where HFG came on the scene and basically stood in the shoes of the developer, that earnest money exposure went down to \$148,000.

JUSTICE SCOTT A. BRISTER: Okay, thank you.

ATTORNEY CHRISTOPHER RENTZEL: Justice O'Neill, I think it might be helpful if I addressed two or three of the questions that you raised starting with the first one. Was there ever an offer on the part of David Weekley Homes to go into their system and produce deleted emails and the answer to that is no.

JUSTICE NATHAN L. HECHT: Why should that, I'm not clear why they should offer that. Is that how discovery?

ATTORNEY CHRISTOPHER RENTZEL: Well actually.

JUSTICE NATHAN L. HECHT: The respondent responded by saying well, how about this.

ATTORNEY CHRISTOPHER RENTZEL: Well you get into the areas here right at this point that's been addressed and surfaced and the Zuba Lake opinion and the Sedona conference and a lot of different articles as to has that responsibility.

JUSTICE NATHAN L. HECHT: Well in Zuba Lake, they knew there was likely to be some material in what they were going to go in the backup tapes they were going to search and it turned out there was. And they knew that from talking to the people involved in the case. Has any effort been made to ask these fellows Rice, Bailey, Vestado and Thompson if there were such emails or reports or anything.

ATTORNEY CHRISTOPHER RENTZEL: I took the deposition and this was in, much of this was in the record of the previous motion to compel, which had three different hearings and five days after the order on the Motion to Compel was signed, we filed this Motion for Limited Access. So they almost blended together.

JUSTICE DAVID M. MEDINA: You said limited access.

ATTORNEY CHRISTOPHER RENTZEL: Limited access to computers. That was actually the technical name of the motion.

JUSTICE DAVID M. MEDINA: Well it assumes if maybe I'm misunderstanding what you're saying, but if the judge signed this type of order, that seems to be awful broad if he's ordered the production of the entire hard drive systems.

ATTORNEY CHRISTOPHER RENTZEL: The title of the motion was a motion for limited access to computers, I believe I'm remembering that correctly, but it specified specific computers.

JUSTICE SCOTT A. BRISTER: So what did you find out in the deposition?

ATTORNEY CHRISTOPHER RENTZEL: What we found at the deposition, we found that one thing in Mr. Rice's deposition was that yes, he did communicate by emails. That they would be deleted. He would have what



was still in the system and what he had archived and, in fact, Mr. Rice produced 30 emails over the course of the discovery. At the Motion to Compel hearing, Mr. Birchfield, the General Counsel for David Weekley Homes and this was read into the record at the hearing that's involving access to the hard drives, he testified as is in the record here that there was periodic deletion oftentimes less than 30 days of all emails for people within the company and given the fact that three critical employees, the project manager, the area president, the area vice-president, produced one email between them over what was a very troubled development over the course of a multi-year period, we saw that there was an unexplained gap or discrepancy in their production.

JUSTICE NATHAN L. HECHT: Did you ask them what about this gap?

ATTORNEY CHRISTOPHER RENTZEL: Yes.

JUSTICE NATHAN L. HECHT: And what did they say?

ATTORNEY CHRISTOPHER RENTZEL: Yeah well that was a subject of the Motion to Compel.

JUSTICE NATHAN L. HECHT: No I mean, there was no evidence taken on the Motion except Mr. Birchfield's testimony at some point right?

ATTORNEY CHRISTOPHER RENTZEL: And Mr. Rice, I did ask Mr. Rice at his deposition and his testimony was all I have is what I archived and save and I gave that to my lawyers. That was what his testimony was.

JUSTICE NATHAN L. HECHT: Well then what basis is there to look for anything else?

ATTORNEY CHRISTOPHER RENTZEL: The discrepancies and inconsistencies in their production. You've got critical people involved in this particular development, who produced a grand total of one email throughout the course of this entire timeframe notwithstanding the fact that they had repeated problems with the developer and then notwithstanding the fact that they had slope stability problems, which resulted in a finding by a geotechnical consulting company.

JUSTICE NATHAN L. HECHT: If you think there are deleted emails, then why ask for all the documents on four hard drives that have 21 terms in them?

ATTORNEY CHRISTOPHER RENTZEL: That's the procedure that the forensic experts utilize. What they do.

JUSTICE SCOTT A. BRISTER: These are the people that are going to get paid for doing all this right?

ATTORNEY CHRISTOPHER RENTZEL: They in fact would be paid by my client to answer an earlier question. Yes, they'd be paid by that. In this procedure is the same procedure that has been described in the case law back since '99.

JUSTICE SCOTT A. BRISTER: Judge Hicks question is why don't you ask them for the emails about this project that you deleted.

ATTORNEY CHRISTOPHER RENTZEL: But the way they operate is that they have to mirror image the entire hard drive and then they applied the search terms and draw out the documents, the hits. That's the only way they can do it. Other, when they mirror image the hard drive, it is some kind of a mechanical process.

JUSTICE NATHAN L. HECHT: Is that in the record?

ATTORNEY CHRISTOPHER RENTZEL: The details of that are not in the record. The details of that, frankly, are discussed in virtually every case starting with the Playboy Enterprises case through Zuba Lake. It's a fairly common procedure.

JUSTICE DALE WAINWRIGHT: Counsel, did you ask Weekley if Weekley could go back and produce the deleted emails.

ATTORNEY CHRISTOPHER RENTZEL: More than that and this is what I

was going to say to Justice O'Neill. In our motion to compel that we filed and this is in the record, this is Appendix page 0313, we asked that the Court order them to produce the various emails, deleted emails, and we specifically asked however HFG requests that the Court require Weekley to search for any emails stored on servers or backup tapes or other media, any email folders and email accounts of the individuals listed. What we tried to do at the motion to compel stage was have David Weekley Homes go into their own system and pull off these deleted emails.

JUSTICE DALE WAINWRIGHT: And what happened?

ATTORNEY CHRISTOPHER RENTZEL: They absolutely opposed every aspect of this and the Court denied the motion.

JUSTICE DALE WAINWRIGHT: Did the Trial Judge at any point order the defendant to go get their deleted emails over their [inaudible].

ATTORNEY CHRISTOPHER RENTZEL: No, she denied our motion.

JUSTICE DALE WAINWRIGHT: And you can see the problem we're wrestling with here is taking someone's property away from them, give it to someone else to search through in discovery in a lawsuit without a whole lot of targeting as to what's relevant. Maybe the 21 search terms helped there, but only a few of those terms were identified in the briefs, maybe that's because of trade secret or confidentiality concerns, but before generally the paper discovery. I think it was pretty clear that before you let anybody order anybody to rumble through the opposing party's files, you've got to order them to do that first. The Trial Judge has never ordered the defendant to rumble through their electronic file cabinets for deleted emails first?

ATTORNEY CHRISTOPHER RENTZEL: She did not.

JUSTICE DALE WAINWRIGHT: Before giving it to the other side.

ATTORNEY CHRISTOPHER RENTZEL: She did not order them to do so. She denied this request.

JUSTICE DALE WAINWRIGHT: Don't you think if it were your client wouldn't you want your client to have the opportunity to go and look for deleted emails before someone orders your hard drive sent to the other side first?

ATTORNEY CHRISTOPHER RENTZEL: Well here's the problem. If back in the first Zuba Lake case, where there was a breakout of five different categories of just how accessible is various data, the data left on the hard drive that might be fragmented might be partially overwritten, you don't know until you get there. That's deemed to be inaccessible and at least under the federal guidelines and the federal rules, the producing party doesn't have to go in there at their own expense. That's just a whole different procedure. And I think that's why this procedure has been adopted. I mean really what this is and all the cases that we're talking about and that have been briefed, and they're all frankly reconcilable, they largely deal with the shifting of the burden of the costs from the producing party to the requesting party.

JUSTICE DALE WAINWRIGHT: And I understand that, but there's also a matter of propriety of your own property before you lose control of your own property, don't you think there needs to be some evidence that there's things out there that notwithstanding an order to produce, you still aren't producing before you say your file cabinet, electronic file cabinet goes to them to look through, to the other side to look through.

ATTORNEY CHRISTOPHER RENTZEL: Well and it doesn't go to us, Justice Wainwright. It does go to Price Waterhouse Cooper.

JUSTICE DALE WAINWRIGHT: You're paying the experts.

ATTORNEY CHRISTOPHER RENTZEL: That is correct.

JUSTICE DALE WAINWRIGHT: And if there's a question in the process, as I understand it of making this mirror image, they call you not the defendants right?

ATTORNEY CHRISTOPHER RENTZEL: I don't believe that particular point is addressed in the protective order.

JUSTICE DALE WAINWRIGHT: Who do they call?

ATTORNEY CHRISTOPHER RENTZEL: Well my understanding is they are experts. Their CV's were submitted to the Court.

JUSTICE DALE WAINWRIGHT: They're not going to have any questions?

ATTORNEY CHRISTOPHER RENTZEL: And they're either going to be able to turn up or not turn it up. They've got various software packages that they would utilize. We would not be in the process and to address something that was said earlier by opposing Counsel, on three different occasions at the argument in the record, in this particular motion for limited access to the hard drives, itself had two hearings totally 62 pages of transcripts and at that hearing on three different spots, we made clear that our client and myself and my associate, nobody from our side would be there while Price Waterhouse Coopers was making the mirror imaging and going through the search terms.

JUSTICE DAVID M. MEDINA: Let me ask you this here, Mr. Rentzel. Mr. Enoch said that the only way to get into this request that you have is through metadata. It has to be relevant. What's your response to that?

ATTORNEY CHRISTOPHER RENTZEL: I think that's completely wrong.

JUSTICE DAVID M. MEDINA: And why so?

ATTORNEY CHRISTOPHER RENTZEL: From the very beginning of this case, we have said that we are proceeding under the normal discovery rules of paper discovery. This is a question that Justice O'Neill raised. Obviously and this is in our motion, we followed the Hansa case as closely as we could. We painted between the numbers of that case. It was the only one on the books in Texas. The Hansa case itself cites a lot of prior precedent from the federal system and the State court system. It cited to the Playboy Enterprises v. Wells case on eight different occasions, a Southern District of California federal case. That case said multiple things, but not the least of which was the fact was that when you're requesting a document, you're also requesting the document in deleted form.

JUSTICE DALE WAINWRIGHT: Let me ask if I can put a final point on Justice Medina's question is there anything that you're seeking other than a hard copy of the deleted emails?

ATTORNEY CHRISTOPHER RENTZEL: No.

JUSTICE DALE WAINWRIGHT: So there's no metadata per se.

ATTORNEY CHRISTOPHER RENTZEL: Yes, we're not seeking metadata. We are seeking what we would had the printed off all their emails and handed them to us. That's really all we're trying to get to right now. We're not seeking metadata.

JUSTICE PAUL W. GREEN: Let me make sure I understand then. If you're not seeking anything but paper, so if they say, okay, you've asked for an email. We'll look in our email. They're like everybody else's I guess. You've got your email account. If it's deleted because of deleted items folder, you delete from there and go to some archive thing or some backup and so forth and if you can identify those, then you can print out a copy and produce them. But if they've been shredded, let's go back to the paper, you take a document and here's a document and runs it through the shredder, it no longer exists unless you send somebody to try to piece those pages back together. Now is that what you're looking for in these electronic records, the documents



that have been overwritten partially and so forth, you try to piece them back together or are you trying to find the record that's somewhere in there that if you look at it, oh there's an email that's identifiable and it can be printed out by pressing the print button.

ATTORNEY CHRISTOPHER RENTZEL: To answer your question, first of all, you cannot, if a hard, the only hard copies of documents have been shredded, then that's just going to be unavailable information. Here the forensic experts would be able to retrieve perhaps all of the emails or a lot of them, but they don't have to, they do not have to piece them together line by line.

JUSTICE PAUL W. GREEN: So they would be a, it would be an electronic file that you could look at on the computer monitor and says whatever the file number is or name is and you could print that. So on the backup takes or on their email system or their computers you can see numbers. So now from what I understand that other Counsel said is that they've gone through and looked for all that and I guess what you're saying, you just don't believe them.

ATTORNEY CHRISTOPHER RENTZEL: No, no, no, here's, no I'm not saying that all. Here's what the testimony was before the Court and read into the Court.

JUSTICE DALE WAINWRIGHT: Summarize it first what your opinion is and then tell us what the testimony was. Bottom line, what's your summary?

ATTORNEY CHRISTOPHER RENTZEL: The bottom line is within 30 days all of their emails in their system are deleted unless they're archived. They say they've produced their archived information. They say they have not produced their deleted information because it's gone. It's been deleted.

JUSTICE PAUL W. GREEN: Shredded.

ATTORNEY CHRISTOPHER RENTZEL: Well but it's someplace. Being deleted and this is in Zuba Lake and Sedona Conference, it doesn't mean it's gone. It just means it's lost its address in the directory, but it's likely still on the hard drive. It actually this deleted information went to the server, the backup tapes initially, but their backup tapes only have a life expectancy of 30 days themselves. So once you go 30 in 30 days, it is gone except on the hard drive and they did not go back to the hard drive and do what we say we would pay to have done.

JUSTICE DAVID M. MEDINA: Mr. Rentzel, let me ask you this. Is this an all-or-nothing case? I loved being a trial judge. It was a lot of fun until you got to issues like this on discovery and so we kind of fashion a remedy. Do you either get all of it or none of it or is there something, some method to get what you actually need and proceed on with the course of the trial.

ATTORNEY CHRISTOPHER RENTZEL: I honestly do not see how you could split this baby. I mean, there's going to be, what we tried to do is be as narrow as we possibly could by pinning this down to a one-year timeframe, 21 search terms, four computers and then what that turns up.

JUSTICE PHIL JOHNSON: Depends on what it is.

JUSTICE NATHAN L. HECHT: Don't you think this is likely to produce hundreds if not thousands of documents that have nothing whatever to do with this case?

ATTORNEY CHRISTOPHER RENTZEL: That would be no different that the warehouse with hard copies and that's just part of the production.

JUSTICE NATHAN L. HECHT: I understand that, but when a, when you say I've been to the warehouse. I looked there. There aren't any documents. You don't appoint a special master to go in there and go

through them himself one by one and say well this might be, this might be, this might be because it has the word defective in it.

ATTORNEY CHRISTOPHER RENTZEL: Well what happens is.

JUSTICE NATHAN L. HECHT: You couldn't afford it for one thing.

ATTORNEY CHRISTOPHER RENTZEL: After the mirror imaging and then the application of the 21 search terms, the number of documents that are triggered by that, the hits, are then sent to opposing counsel, counsel for the relator, to review for relevance and privilege.

JUSTICE NATHAN L. HECHT: Don't you anticipate they'll be a lot of them?

ATTORNEY CHRISTOPHER RENTZEL: I have no idea. I mean there's just no way of knowing.

JUSTICE NATHAN L. HECHT: Just don't think on an operation like Weekley Homes defective or letter of credit or entry or earnest money or mowing is going to show up very often.

ATTORNEY CHRISTOPHER RENTZEL: But it's four people. It's four peoples' personal hard drives for a one-year period and I honestly don't. We tried to keep that as narrow as we could.

JUSTICE SCOTT A. BRISTER: Did they only work on enclave?

ATTORNEY CHRISTOPHER RENTZEL: No, but they've worked in the Dallas area.

JUSTICE DON R. WILLETT: I thought I heard Mr. Enoch tell Justice Owen that the plaintiff here could have asked for deleted emails, but never did, but I thought I heard you say earlier that just simply is not the case.

ATTORNEY CHRISTOPHER RENTZEL: As I reference back to the Playboy Enterprises case, our position has always been that we were proceeding under 1923B, a request for documents. Initially, that's where we were. We never get into the terrain of 196.4. We have not been asking for Excel spreadsheets, databases, tables or anything of that nature. That's the computer data that Mr. Enoch is referring to. We have not gone that route. We've requested documents. Had they not deleted them, they would have given them to us. They have deleted them and then the Playboy Enterprises case, the law is and other cases following it and it is very often cited is that when you request a document, you are by doing so requesting the deleted version of it.

JUSTICE HARRIET O'NEILL: Okay, let me ask you a question. If you had proceeded under 196.4, let me make sure I understand the procedure correctly, and you would, it would be your burden to say we want emails including deleted emails and here's how we want it produced in paper form let's say and that seems to be what the rule says, it says the responding party must produce it at this responsive and reasonably available. So in that instance, Weekley would say, it's not reasonably available because it requires searching our hard drives and that's not reasonably available, I would presume they would say.

ATTORNEY CHRISTOPHER RENTZEL: Right.

JUSTICE HARRIET O'NEILL: And they would have to show that they could not through reasonable efforts retrieve the data or information requested. So then if the Court orders the respondent to comply with the request, it can order the requesting party to pay the expenses. So it seems that under 196.4, it contemplates that the responding party itself goes through the data with the plaintiff in this instance paying that cost.

ATTORNEY CHRISTOPHER RENTZEL: It would contemplate that, but again from the very outset, we never believed that was the controlling rule. We've always believed we're not going after electronic data. We're going after the documents. Again, going back to the Playboy Enterprises

case.

JUSTICE DALE WAINWRIGHT: But, Counsel, when you're going after documents, you always give the party that owns them, that possesses them, the first opportunity to produce before you give the file to the other side to go through.

ATTORNEY CHRISTOPHER RENTZEL: And we have had the request, a motion to compel and then within a week of the denial, we have the written denial of the motion to compel, we then filed this motion.

JUSTICE DALE WAINWRIGHT: Right and as you said, the trial judge never ordered the defendant to go do what now is ordered to happen through some third-party that your client's paying.

ATTORNEY CHRISTOPHER RENTZEL: The Judge did not order them to go retrieve this.

JUSTICE DALE WAINWRIGHT: If, do you think that would be an unreasonable thing for the Judge to have ordered?

ATTORNEY CHRISTOPHER RENTZEL: I think where the law is when it comes to documents that have been deleted and are only existing on the hard drive, I think the prevailing law today is that that burden typically shifts to the requesting party to pay that cost.

JUSTICE DALE WAINWRIGHT: So you think in the electronic age we're in, that burden in this particular type of circumstance has changed.

ATTORNEY CHRISTOPHER RENTZEL: Yes.

JUSTICE DALE WAINWRIGHT: Versus 10 years ago.

ATTORNEY CHRISTOPHER RENTZEL: I definitely think so.

JUSTICE PHIL JOHNSON: Are you saying the burden's changed or the burden of bearing the cost has changed?

ATTORNEY CHRISTOPHER RENTZEL: I think that the risk, the costs have been shifted and I also think that the standard has evolved over that 10-year period and if I could close just with this, in the last two weeks, two courts have spoken to this issue. One being a district court in Kansas and ironically the Supreme Court of New Hampshire having this exact issue raised for the first time and this is 13 days ago and if I could just give the Court these citations. The case in Kansas is Julie White, which reference is, it's 209 US District Lexus 22068.

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, can you submit that in a letter of argument?

ATTORNEY CHRISTOPHER RENTZEL: Would be happy to.

JUSTICE HARRIET O'NEILL: I have just one quick question. Why is data on a hard drive not electronic data?

ATTORNEY CHRISTOPHER RENTZEL: It is electronic. I don't think it's electronic data under 196.4 because that's, we saw that as being data compilations such as tables, spreadsheets and databases as opposed to documents under 192.3B.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Wainwright.

JUSTICE DALE WAINWRIGHT: Thank you, Chief. As to the burden, you're not just asking for shifting the burden in terms of paying the costs. What you as I understand are saying is that the burden of doing the initial review of the hard drive is not on the party who's been requested to produce. It now that hard drive gets sent to a third party paid by the other side to review versus having the party who owns the records do their initial compelled review. You're asking that that shift as well in the electronic age.

ATTORNEY CHRISTOPHER RENTZEL: And they always had that opportunity to do this at any point prior to this juncture. They did not do it and I think this is the point where we are in the case law going back to Playboy Enterprises says that under the protective order and the court



appointment of that third-party expert, that's no longer our agent, that's an officer of the court doing the investigation notwithstanding the fact that it would be our client paying the fee. Thank you very much.

REBUTTAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF PETITIONER

ATTORNEY CRAIG T. ENOCH: May it please the Court, obviously the Court is really concerned about what when the initial request for documents to be produced, the significance of that when everybody now uses computers and they save documents or they delete documents or whatever. I don't want to leave the Court with any sort of impression that the key to this case is deletions of anything because there is no because the point will be that the evidence that's out there is that Weekley in order to encourage their employees to save the important documents, they've got to be filed. They have to be moved to a file, otherwise they cannot receive any more emails and then in a general comment, well I guess you'd have to delete something in order to get your next email, but the process is to create a capacity on the individual's hard drives to force them to file the documents, to file the documents. The evidence in this case extensive discovery in this case is we've produced all we have.

JUSTICE HARRIET O'NEILL: I'm really having a hard time understanding where you are. I mean, I hear you say we've produced everything. We don't have any duty to do anything else. But if there are documents on the hard drive, do you object to proceeding under the procedure put out in 196.4. It sounds like you're objecting to Weekley itself going in to retrieve this data.

ATTORNEY CRAIG T. ENOCH: Your Honor, and that's the other point I probably haven't been clear on. My point to this Court will be there are rules of discovery that if properly followed, give the Court the authority to make certain steps and I'm not here, the record I say here wouldn't justify using the rule. But I'm faced with an argument that we were never put in a posture to make in the Trial Court. There was never that argument made in the Trial Court.

JUSTICE HARRIET O'NEILL: That's what I'm asking you now. I understand they requested, they made a request to have you go through and look at these documents, look at these hard drives and there was an objection to that.

ATTORNEY CRAIG T. ENOCH: Your Honor, there was a request to produce documents. There was a Motion to Compel. We had an argument about the production of documents. The Trial Court denied the Motion to Compel and found good faith. We have never had an argument about these hard drives. There has never been a request for a production of these hard drives.

JUSTICE HARRIET O'NEILL: I thought Counsel just read it to us. I thought he just read from the Motion to Compel.

ATTORNEY CRAIG T. ENOCH: Not for the hard drives, Your Honor.

JUSTICE DON R. WILLET: What information contained on the hard drive.

ATTORNEY CRAIG T. ENOCH: He requested emails pertaining to the subject matter of the litigation. We said we provided all emails to the subject. The connection, if I were to say okay, we should provide. If we can retrieve emails that ostensibly have been deleted, I guess we should if the request was under 196 to produce that electronic data.

JUSTICE HARRIET O'NEILL: Okay, presume it is 196. You have no

objection to Weekley hiring its own person to go in and retrieve data.

ATTORNEY CRAIG T. ENOCH: Your Honor, I think at that point, if we don't have an objection, we would not make an objection. If at that point we think that the request is not relevant. We think that's a threshold to any of the [inaudible].

JUSTICE HARRIET O'NEILL: The Trial Courts clearly found that it's relevant. But today as we stand here, is there an objection to Weekley itself going in with these data points and retrieving the requested information.

ATTORNEY CRAIG T. ENOCH: Your Honor, for my client, yes. We would have an objection. I don't know what the client would say. I would not advise a client to go look in their hard drives for "fence." I would not advise my client to go in their hard drives to look for "mow."

JUSTICE HARRIET O'NEILL: Then how can they get information if, in fact, it's shown that there is and I understand you contest whether it's been properly shown, but presume it is shown that there are documents that are on a hard drive that are retrievable, how would you propose they get them because all I keep hearing is no, no, no. How would you craft a response to this request? You don't like these terms. Do you agree that there could be terms searchable more narrowly that would get at what they're looking for?

ATTORNEY CRAIG T. ENOCH: I think yes, certainly more narrowly under the names of the particular development and a series of words that are attached so they show up within a paragraph or within five digits of each other. I suppose it could be more narrowly. In fact, the cases that have gone to this extreme have all looked at how narrowly crafted the Court's order is in producing [inaudible].

JUSTICE HARRIET O'NEILL: But you've proposed none.

ATTORNEY CRAIG T. ENOCH: Your Honor, when we came to the hearing, they had no words and the judge said well give me some words and they had the 25 words that they added.

JUSTICE HARRIET O'NEILL: And you proposed no additional and searches.

ATTORNEY CRAIG T. ENOCH: We didn't propose any additional answers, but one of our points about the Court's order, it reversed the burden. If on "mow" as an example, "mow" tings a document. We have to, the defendant, has to log that document irrespective of relevance. So the point about 196.

JUSTICE HARRIET O'NEILL: Now you're on a different point.

ATTORNEY CRAIG T. ENOCH: Well I wanted to explain that because I'm still subject to this order that the retrieval mechanism has a burden to us to log even the relevancy.

JUSTICE DALE WAINWRIGHT: Is there in the record a listing of all 21 search words. I saw five or six in the brief. Where is the list of all 21?

ATTORNEY CRAIG T. ENOCH: I'm sorry, Your Honor, on the Court's order establishing a procedure, there's an Exhibit A that's attached that has about 25 search terms that are listed there. If you don't have it, I'll certainly get a copy to you.

JUSTICE DAVID M. MEDINA: The trial judge didn't send you back to the jury room with the bailiff to try to get things worked out?

ATTORNEY CRAIG T. ENOCH: You know, I think trial judge says this is new and innovative and let's try this out, but I think the rules already provide a mechanism for doing that.

JUSTICE HARRIET O'NEILL: Well the Trial Court may have just said I can't, I'm not getting any help here and I'm just going to do the best I can.

ATTORNEY CRAIG T. ENOCH: Possibly, Your Honor, I don't know.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? If not, thank you, Counsel, for the argument. This cause is submitted. All the arguments are concluded for the day and the Marshall will now adjourn the Court.

2009 WL 973016 (Tex.)