ORAL ARGUMENT - 11/21/96
96-0287
OWENS-CORNING V. MALONE
AND
96-0512
OWENS-CORNING V. WASIAK

SIMS: May it please the court. This court granted review of the Wasiak case, the specific question on the constitution issue presented by Wasiak in the face of 31 decisions of other courts, which for one reason or another have rejected that argument. The inference I draw from the court's acceptance of that issue in the Wasiak case is this court is unwilling, at least without giving it good shot, to accept the proposition that there is nothing courts can do about the tremendous problems created by the sheer volume of asbestos personal injury cases, that have flood federal courts, the courts of many but not all states, and the courts of Texas particularly. The problem in Texas is unique in the sense that the sheer volume of this litigation dwarfs the volume of litigation in the state courts of the other states. And is really comparable only to the volume of litigation that at least was pending in federal courts.

The problem I submit is caused by the mere existence of punitive damages. The experience with the federal courts, which rung their hands for many years, with individual federal judges saying we can't do anything about it; we'd like to do something about it, but we are powerless to do it. The federal courts finally did something about it. The panel on multidistrict litigation brought all the federal cases into one court for a pretrial management. The statistics are astounding I think by any measure. In an opinion of Judge Weiner, Eastern District of Philadelphia for the court in its report, it's fairly recent, 1996 Westlaw 539, 589, Judge Weiner points out that of the 62,000 cases, almost 50,000 pending in the Texas state courts as I stand here, the 62,000 cases in the federal courts that were brought to Philadelphia over 40,000 have been resolved. There are roughly 22,000 left; of those 22,000 according to Judge Weiner indeed most of them have been resolved. The cases that have been remanded to the federal district courts for trial have uniformly been remanded with the punitive damages severed from the case. The result of the severance of the punitive damages, I think it's plain on the face of Judge Weiner's opinion, has resulted in settlement that would not have occurred absent this mechanism, and has resulted in some cases going back for trial where they just couldn't be settled for one reason or another. As he also points out defendants have prevailed and gotten judgments in a number of those cases.

PHILLIPS: In order to recognizes this theory would we have to in your opinion find significant damage to the very defendant that's before us in this particular type of case, or could it be constitutionally a more general prohibition? And I make reference to the state of the record at the time these cases came up as far as the actual punitive damages paid out.

SIMS: Right. My response to that is that it's the nature of the beast. How do we know? I don't even understand the plaintiffs in this case to dispute the proposition that at some point in time the accumulation of punitive damages and I submit, and I think Moriel supports the proposition of

compensatory damages, give rise to punishment that is sufficient and not too much. And that certainly is the standard that this court set out in Moriel and it's a standard that the US SC set out recently in the BMW case.

GONZALEZ: But the question is how much money have you actually paid in punitive damages, that is the question, not the repeated exposure, but how much have you paid?

SIMS: We paid...

ABBOTT: More specifically, do you dispute what is said on this sheet?

SIMS: Not as of 1993. Let me turn the court's attention to Mr. Rosenthal's supplemental brief in this case.

ABBOTT: What was the date that the record was established in this case?

SIMS: For what purpose? Their position is it's the time of the judgment, the time the jury came back with the verdict, and judgment was entered. I assume that's Oct. 1, 1993. Mr. Rosenthall in his supplemental brief to convince the court that this is a frivolous argument cites about and discusses about seven recent cases in which the US SC has denied _____ for punitive damages and presumably those cases are over. I know no way to keep a case alive after the SC denies cert. The punitive damages in those cases alone add up to $14 million.

GONZALEZ: But $14 million as compared to what? Fourteen million to you and I perhaps is a lot of money. To a multinational corporation, or a Fortune 500 corporation it's a drop in the bucket. So we have to have something to compare it with to get a balance, to get a gage of how much damage if any is being afflicted.

SIMS: The damage that's been inflicted so far is that the main player, Johns Manville, went out of existence years ago.

ABBOTT: But Johns Mansville is not a party to this.

SIMS: They most certainly are not. In fact for our purposes they don't exist because.

ABBOTT: Can we get you to focus specifically on the question that Justice Gonzalez asked and the question that I asked, and that is: For the record that we have in this case what's the total amount of punitive damages paid out by OCF?

SIMS: Actually paid out as of Oct. 1, 1993

ABBOTT: Yes.

SIMS: I am prepared to accept the number $3 million because I assume that that's what

this record shows.

ABBOTT: And are we to pick out a number; is $3 million enough for us to say they've been punished enough? Is $300 million, or is $30?

SIMS: I think that this court's function is to step back and look at more than this case. Because the reality is is that there are 50,000 of these cases pending in this state.

ABBOTT: Is there precedent for a court to take into consideration facts which don't exist in a case, but other materials, or is that something that really a legislative body is for to take into consideration all facts which may exist and develop a policy?

SIMS: Legislative bodies do not decide constitutional questions.

ABBOTT: And we decide questions only based upon facts in this case.

SIMS: I believe that this court has a responsibility to, under the constitution, there are historic facts, and there are what I would call constitutional facts, and it is a constitutional fact that since Oct. 1, 1993, a significant amount of punishment has been inflicted on Owens-Corning in the courts of this state and in the courts of other states for the same course of conduct. And if you agree that at some point...

ABBOTT: What precedent do you have that says that we can consider those facts?

SIMS: I don't have any precedent. I have to rely on the force of my argument on that. Courts have been struggling with this issue. As I said at the outset, 31 courts have said no. Some of those courts, most of those courts, recognizing that this is a significant problem but concluding that there is nothing they can do about it.

OWEN: What specific remedy is it that you would have us adopt?

SIMS: The specific remedy we would have you adopt is to step back and look at Owens-Corning's situation as it stands today, as it stands today in all fairness to past and future plaintiffs - asbestos personal injury plaintiffs - take into account a charge of $950 million of costs uninsured expenses for this litigation that Owen's-Corning anticipates between now and the year 2000, we don't know what will happen after the year 2000, and ask the question under these circumstances: What societal purpose does the infliction of additional punishment actually serve? I don't think it's...

CORNYN: We've previously in the Moriel case when there was a constitutional challenge to our punitive damage law said we won't address the constitutional question because we will establish a new common law procedure. And why couldn't that be addressed by the admission of some additional testimony by the defendant relating to the matters that you've addressed here for the jury's consideration?

SIMS: That would take some of the pressure off. And we can get into that issue which is I think presented not only by the Malone case, but I would ask the court to remember that it is also presented in the Wasiak case. But that would have the effect of putting the condition of Owens-Corning in front of the jury. But of course juries like legislatures don't answer constitutional questions. And indeed juries unlike courts don't determine common law rules. Indeed this court could address our "enough is enough" overkill argument as a matter of state common law. But then of course we would have to deal as in Wasiak with the reality that the case is governed by substantive Alabama law, and it would create a very interesting question of whether the Texas courts could then apply at Texas common law rules, the roughly 40,000 Alabama resident cases pending in the state courts of Texas.

CORNYN: What other jurisdiction has accepted the argument that at some point the court will not allow further award of punitive damages based upon a common law decision by a court as opposed to some rule or some statute?

SIMS: It would be all dicta. But to give you an example, the SC of New Jersey in the Fisher case which considered this issue for the first and only time back in 1986 expressed what in my view were very grave concerns about how this litigation was going to evolve. That's a decade ago.

CORNYN: By dicta you mean they did not decide that you could no longer recover if they expressed concerns?

SIMS: Correct. They expressed concern about the road ahead. And this is before, this is before the major players in the industry started going bankrupt.

OWENS: What do we do about the argument in Wasiak that punitive damages under Alabama law for wrongful death are in actuality compensatory damages and not punitive damages as we know them in Texas?

SIMS: I think the answer to that is that a rose is a rose by any other name. I would like to read for the court the last sentence of the jury instruction on punitive damages.

> "In assessing damages you, the jury, are not to consider the monetary value of the life of the decedent for damages in this type of action are not recoverable to compensate the family of the deceased from a monetary standpoint on account of his death. For purposes of this question you are instructed that punitive damages are imposed in this type of action for the preservation of human life and as a deterrent to others to prevent _____."

That is punitive damages. The Alabama SC has been in the throws for years of trying to interpret a truly unique wrongful death statute, which in the 19th century it's SC probably made a mistake

with, and the Alabama SC has been unwilling to undue that mistake. And in effect recognize...

CORNYN: That's the jury instruction in the Wasiak case under Alabama law?

SIMS: That's the jury instruction. And it's right out of the Alabama...

CORNYN: What can we do about Alabama's substantive law on the jury instruction?

SIMS: What we know is that the jury imposed punitive damages. They imposed not for compensatory purposes, they imposed punitive damages. And to me that's the end of it. The gloss for a complicated state law reasons, political and otherwise, that the Alabama SC has put on punitive damages and wrongful death cases to me is not a determinative factor here. The jury imposed punitive damages. It seems to me that's the end of that.

CORNYN: Could you explain in the Malone case why you think the offer of Mr. Frank's testimony did not contain inadmissible matters which the TC would in any event have been authorized to exclude even if you're right that the defendant in a case of this nature should be able to introduce some evidence more than net worth relating to their financial status?

SIMS: I think we addressed that. But what happened at trial is that when we made our tender, the other side did not object. There is no objection in the record whatsoever. And at that point they accepted and indeed this testimony goes in. This is a standard presentation that goes in. Everybody knows that. It's used all over the country with dramatic impact I might add.

CORNYN: The tendered testimony in the Malone case was that there were 28 prior punitive damage judgments against Owens-Corning Fiberglass totaling $51 plus million. If in fact we agree, or the record reveals that only $3 million in punitive damage judgments were actually paid as of that time, why would the TC be in error in excluding that testimony because it would be in fact misleading about the impact of punitive damages on Owens-Corning's financial status?

SIMS: Two responses. First that's not the basis in which the TC kept the evidence out. Two, our position would be that properly instructed, the jury should be made aware of all outstanding judgments. It's a matter of argument to the jury just as it would be as a matter of argument for me to the court as to the weight, the significance for a factual or constitutional...

CORNYN: Even if the defendant will never have to pay them, or will never ultimately pay them you still think you ought to be able to show the amount of prior judgments?

SIMS: Yes your honor I do. And then it's a question of giving the plaintiff full rein to argue to the jury they will never pay those judgments. And indeed then presumably that parties can come forward with some analysis and argument on that. But that's not _____ information for a jury to have. A jury can handle that if it's properly instructed.

CORNYN: And why wouldn't that require in essence the relitigation or the reexamination

of the circumstances of those prior legal proceedings, those prior trials, basically mini trials within the main trial in order to determine...allow the jury to ascertain what will ultimately be the probable financial impact. In other words you're saying it's for the jury to sort out. How are they going to sort that out without a long rabbit trail?

SIMS: I don't believe there would be any need whatsoever for the jury to look behind the face of the judgments. I think what the plaintiff would be free to do is to present their accountant, their statistical expert to argue to the jury only X percentage of these will ever in fact be paid; and Owens-Corning is free for its part to argue that's not true at all and this is the impact of these punitive damage awards on us. It's not just...I mean the amount actually paid can in some ways itself be very deceptive. These cases the jury returns a big punitive damage award and at least as a general proposition what plaintiffs want to do is to disguise the punitive damages because they are taxable. They certainly are taxable now under federal law. So who knows what is ultimately paid. At the other end of the system I think what we're talking about is that juries have visited upon defendants generally and Owen's Corning specifically a certain amount of punitive damages. And I'm not saying that the amount that's ultimately paid is irrelevant. What I am saying is that the full range of possibilities that should be laid open to the jury, and it's not going to result in many trials. In fact the portion of the trial in which Mr. Frank's testimony normally is admitted will only go on for a day, a day and a half, and this wouldn't probably not complicate it at all. Normally the plaintiff puts on his or her expert accounting witness and they join issue and the jury comes back.

BAKER: What is it exactly that you are asking this court to do? To hold it because Owen's Corning has been assessed punitive damages in prior cases for a course of continuing conduct that you shouldn't be assessed anymore punitive damages? Or is it to permit Owen's Corning to introduce evidence showing all of this in whatever way you can by way of mitigation?

SIMS: Our primary submission is that the combination of punitive damages that has been assessed against Owens-Corning coupled with what is in effect punishment in the form of the extraordinary amount that has been paid out and will be paid out in compensatory damages to deserving plaintiffs constitutes constitutionally sufficient punishment, and that anything more doesn't fulfill either a deterrent or a punitive purpose. It punishes Owens-Corning more...

BAKER: Which jurisdiction gets to draw the line first and why?

SIMS: There has been an extreme reluctance on the part of 31 other courts, some federal, who are in a much less favorable position to do it from a sort of a power standpoint and a _____ standpoint to be the first. As I started my argument, the state of Texas is different in the sense that it is in a position to truly have a significant impact on this litigation because roughly 1/3rd of the cases pending in the whole country are pending in the courts of this state. And I think we are in a situation in which if the issue is to solve that problem, this court is in the unique position to do it just as the multidistrict panel is in the unique position to resolve more than 60,000 cases in the federal system. And when you add those numbers up, I certainly wouldn't stand here and say that every state court would follow the lead of this court, but if you look through those 31 opinions what you will see is judicial frustration and a feeling of judicial impudence. We can't solve the whole

problem so why should we try to solve a small part of the problem. And I can understand that. This court can solve a lot of the problem and of course our hope would be that this rationale would then move into this whole area of litigation and take over.

ABBOTT: If we implemented your solution, why would that not be depriving rights of the claimants? It would be in essence acting against the constitutional rights of the claimants.

SIMS: Let me first say that as this court and every court of which I am aware has declared time and time again there is no right to punitive damages in the sense...

ABBOTT: Well let me clarify because as understand your comment what you're saying is that jurors could consider compensatory damages when determining whether or not a company has been punished enough, that's at least what I thought I heard you say. And in essence they could decide that OCF has been punished enough so John Doe claimant really isn't entitled to any compensatory damages. Am I erroneous in...

SIMS: No. They as well as the courts' exercising their review powers would take into account the compensatory damage burden on Owens-Corning in determining whether additional punitive damages...excuse me, I am not talking about taking away compensatory damages...

ABBOTT: I'm sorry I misunderstood that.

SIMS: In fact it is because of the problem of future claimants and the need to preserve the ability...I mean Owens-Corning is one of the last deep pockets. Let's put it right out there on the line. That's what we are talking about. They were not the big players - Johns Mansville was. Johns Mansville is gone. So because you have appropriately joint and several liability for compensatory damages, Owens-Corning and a few other companies now carry that load. That's our legal system. We are not in this court telling you to undo that. In fact a very important thing here is to look to those future claimants and try to make sure that they get a fair shake. This plaintiff wants to cut and run. And that's understandable too. They don't feel any obligation to future claimants at all.

GONZALEZ: Let me see if I can get a handle on this. Let's assume you are a member of this court, and let's assume you have such skill, persuasion, that you are able to convince 4 other of our colleagues to write an opinion in this case the way you want it to come out, what would you say in that opinion?

SIMS: I would say that the time has come when there is enough information available about the past course and the probable future course of personal injury litigation in Texas, that the court is prepared to declare as a federal constitutional matter and as a matter of Texas' common law, that there is no further societal interest served in terms of either punishment or deterrence by the imposition of any punitive damage awards on Owens-Corning or similarly situated companies and that it is time to get on with the business of compensating deserving plaintiffs and weeding out undeserving plaintiffs.

GONZALEZ: So not only do you want us to declare Owens-Corning free of any threat of punitive damages in Texas, but in the whole country; do I understand you correctly? You want us to write an opinion so that we will set the law for California, New York, Louisiana, Arkansas, and the other states. Do I understand you correctly? Is that a yes or no answer?

SIMS: If the court answer the question as a federal constitutional matter, that precedent would obviously not be binding on the courts of other states. It would be binding even as a federal constitutional matter in this court. I assume that there is at least an even chance that the US SC might feel it necessary to take the case because it will be the SC of Texas at a later point in time with more information available...

GONZALEZ: Would that be the height of arrogance for our court to do that?

SIMS: No. Your honor all you would be doing is saying this is how we interpret the federal constitution as best we know how to do in the State of Texas. That happens everyday. The SCs of states routinely decide issues of federal constitution law, and they are used as persuasive, not binding authority in arguments of appellate counsel all over the country. That is not arrogance. All you are doing is doing what you do best, which is taking the constitution be it Texas or federal, and giving it your best shot.

OWEN: But we do have to have facts that underpin the constitutional determination. Just so I am clear about this. Is it your contention that we can make this broad pronouncement based on Mr. Frank's testimony?

SIMS: No your honor. It's my contention that the broad consideration of the issue ought to take into account materials such as the $14 million I was talking about in cases that are publically available...

OWEN: Even though that's not in our record?

SIMS: These are materials of which in any other circumstance where it's relevant there is no question about taking judicial notice of the fact then in a case in which the SC recently denied _____ according to Mr. Rosenthal himself. In effect, the court system finally put its final blessing on punitive damage award of $5 million and presumably that's going to get paid so you get that concern out. And so again it's the nature of the beast. It's the issue of when do yo make that decision and how do you be the fairest to everyone involved in the process. And again as I said earlier it's understandable that these plaintiffs want to get their money and get out the door before that day arise. But in all fairness to every plaintiff existing in future somebody has to stop and step back and again the question is does additional punishment actually serve any purpose.

OWEN: You have given us some factors that the US SC has set out in opinions about when punitive damages might be more than punitive and unconstitutional, but you have not applied those factors as far as I can see in the briefing to give us any facts to go by. For example: the nature of what you've been accused of and some comparable criminal penalties or how much does it

actually hurt Owen's Corning, what's your share holder's equity compared to what you've paid out, what you are liable to pay out. You give us these broad principles but have you brought it down to bear on the facts in this case where we can say yes enough is enough and we are at that point present.

SIMS: I think you can resolve this issue by reference to judicially available judgments about facts that could not possibly be put into dispute. And I think that we try to do and what we have tried to do in our briefs in Wasiak and Malone is operating within the strictures that the lower courts have imposed on us. We've tried to present as full a picture as could possibly be presented. It would be open to this court through a special master or a remand to have an evidentiary hearing I suppose on facts deemed critical by the court to ultimately resolve any constitutional question. In this case of course plaintiffs argued successfully at the trial level and in the CA that no punitive damage awards subsequent to the entry of judgment could even be taken into consideration. I came personally probably within an _____ eye lash of being held in contempt in a court for having put citations and copies of official court records - judgments in a brief on appeal - to make this argument. Why the hostility to, I know why plaintiffs do it, because I know what happens when juries get that information in front of them, punitive damage awards go down. In some cases down to zero. And that's the only thing we can attribute it to.

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RESPONDENT

GONZALEZ: Aren't you being irresponsible when you want to take your money and run and to hell with the other claimants in the future?

GUNN: Well my opening is going to be "I don't want to take the money and run - I want to stand and fight."

GONZALEZ: As long as you have plaintiffs. But I am talking about the other claimants out there you don't represent.

GUNN: Fair enough. I don't know what choice we have. I don't know what else to do accept to go to court, try the case, let's fight it out and see what the system does.

GONZALEZ: Until the money runs out, or they take bankruptcy?

GUNN: I don't think the money is running out your honor. The 10K that Mr. Frank introduced says according to management all of these judgments will have no material adverse affect on the company in the judgment of the management. Now I don't know if that is true or not, but they seem to be doing well.

BAKER: Would your tact be different if he had said that it's going to kill us and we are going to go bankrupt, would you appear here today? Would you even be here today if he said: We don't have any money and it's all over?

GUNN: I don't know what to say your honor.

GONZALEZ: Would you believe it?

GUNN: Mr. Sims is an honorable man. I would believe it if he said it. I don't know. The compensatories are the preponderance of our judgment, the punitives are not that large a portion.

BAKER: You represent Mr. Malone?

GUNN: I represent Mr. Malone.

BAKER: Some call it the $500,000 per plaintiff...

GUNN: And it varies on compensatory - it's _____ as to $1 million. The punitives were half on average although it varied up to...

BAKER: Would you be here if the punitives went to the state for some reason?

GUNN: I don't want to be here. They brought me here. I don't know what else to say. I'd rather go home.

PHILLIPS: You say you're standing and fighting but you brought a conditional remittitur did you not?

GUNN: It's a judgment call. I think we're right your honor. And if I might just tell you the 3 reasons I think we are right on this record and I will try to get to the bigger issues; 1) preservation; 2) admissibility; and 3) constitutionality. That is not in my brief and let me explain what I mean. Preservation is obvious. Justice Cornyn has already asked about it. It's the limiting instruction problem. There's no request for a limiting instruction in this record. The second is the admissibility problem which is the merits of admissibility under 403, and we say we win for the reasons given by Justice Gonzalez in prior opinions. And constitutionality is the BMW argument, it's the other half of BMW, not the excessiveness, it's the out of state problem of bringing in evidence from across the borders in front of these juries and these jurors in our cases and that is a very, very sticky quagmire. And I ask the court to think long and hard before it opens the doors because if it's relevant evidence for them to bring in, then it's relevant evidence for plaintiff's to bring in and the next case up here is going to be something like a breast implant case or another type where it's the plaintiffs lawyer who's brought in evidence of punitives from other jurisdictions.

Briefly let me get the preservation part out of the way and move to the big picture. There's not a request for a limiting instruction when they offered Mr. Frank's testimony. It's just not there. The record is filled with many other requests. The statement of facts at p. 905 is an example. But there are many requests and there's not one here. They argued about why they thought it was relevant but there is no express request for a limiting instruction. Rule 105 says it's got to be expressed. It's not just a technicality, that's a good rule with a good reason because it's

unfair to a trial judge to bust a 2 month trial based on a single ruling without giving the judge fair notice of what you want. Judges don't have paid staff in the TCs. They depend heavily on the lawyers to know what it is you want. And it's not hard to ask for a limiting instruction. It's unfair to make the trial judge sift through and the contamination problem here as Moriel talks about is very real because we didn't bifurcate out the punitive phase. And if you don't believe me read their motion for new trial.

CORNYN: If there had been a Moriel type bifurcation here where all the jury was considering in the second phase was punitive damages, you wouldn't need a limiting instruction would you or would you?

GUNN: I think that's correct. Then it's just a straight-up fight: Does this come in or not? Or let's be more precise. It's not just a question of admissibility yeah or nay. There is some trial court discretion and at some point can the trial court properly exclude it? Perhaps it could go either way. And let's move to the second prong because that's the core of the case. And I want to develop this argument by contrasting our positions. My view and having thought about it through a lot of sleepless nights is that this is judge material not jury material. I think in the long run you will be happier and the system would be better off if you regulate these awards based on the policy arguments Mr. Sims has made as a legal matter whether it's common law remittitur powers, excessive fines clause, due process clause, or the states counterparts to those. That I think will be better at holding the punitive damage awards in balance. Moriel says it ought to be.

HECHT: Why?

GUNN: I think it's harder to cure than it is to prevent. It seems to me that if the fire is raging, it's tougher for you to police that in every case. Some cases don't get up here. I think it's cleaner to do it as judge material and let the judge have a hearing, and bring in what ever evidence to develop that the court has asked about and Mr. Sims has said is out there. Let the judges hear it, then you've got de nova review, then you're not handcuffed with factual sufficiency bars on your jurisdiction. And you don't have the problem of trying to grab every case. You can lay down clear guidelines de nova as a law matter, and I think that's better. If you give it to jurors, it's going to be a mixed bag. There will be some cases where the evidence may reduce the giving of an award. But I submit that in most cases that's not going to be true. Asbestos is a strange beast. In fact they admit on p. 13 of their Motion for Rehearing its "admittedly unusual" for a defendant to want this kind of evidence in." Most of the product cases that I work in are on the defense side. And I get the phone call after the jury comes back in phase 1, and the defense lawyer is saying "I want to hire you, some lawyer has just killed us in the opening phase, and now he wants to bring in stuff from out of state." My advice would be keep it out; object to it on relevance, 403, BMW, do anything to keep that out because the really good plaintiffs lawyers will be better at taking advantage of it than the really good defense lawyers.

ABBOTT: So let's say we have a standard that would be a standard applied by a judge. What standards should the judge consider when deciding whether or not to kick out the punitive damages?

GUNN: It's an unanswerable question. There is no answer. The Zubiati(?) case is famed for its words because it just is. And BMW gave us the constitutional version of Zubiata because it just is. There is no algebraic line but I think the court could get somewhere. There were ratios that have been used in other states for common law remittitur of punitive damages, that may be one approach. It would probably be unworkable to come up with any precise standard.

BAKER: Are you suggesting or when you use the word judge material that the judge should decide the damages question vis-a-vis the amount?

GUNN: Not in the first instance. I would say let the jury bring back the number in a very short punitive phase. Keep it short and flange it down instead of expanding it into the showcase and then at the post-trial stage have the judge hold a hearing. It could be done pretrial.

BAKER: So what is the function of the judge?

GUNN: The function would be to hear their properly assigned arguments that an award of punitive damages, X amount, or of any amount violates the Texas excessive fines clause of art. 1, §13, or the open courts clause or something like that.

GONZALEZ: But what is the standard by which a trial judge is supposed to make these judgments?

GUNN: I have no answer for you. But it's got to be done.

GONZALEZ: Where do we drawn the line and how far do we advance the _____ , this is any trial judge can decide for themselves about standards?

GUNN: I agree. But we have the same problem with it when it goes to jurors. I mean the Alamo(?) Krause factors are no bargains. And they have mutated somehow from standards of...

BAKER: What do you suggest we do with out Texas constitution when we make these changes?

GUNN: It seems to me that the court will have to do what the SC did in BMW and put your little toe in the water and just step very gingerly. I think that's a better way to police it. I'm not saying it's going to be easy. But you will have more power, less restrictions. It's going to be worse if it goes to jurors first, because then you're firefighters trying to put out the fire. It's better to prevent the fire, keep it down, keep the punitive phase short. We know it's going to make the punitive phase longer. I think it's going to make punitive damages larger. And then you've got the practical problem if all this evidence can come in we have to relitigate cases like in Malone Service. I mean he says maybe it's going to take 1-1/2 day. Well maybe 1-1/2 day for his side, but...

ABBOTT: Why couldn't you have it just be...admit to the jury only the amount of punitive damages actually paid by a defendant in what is considered to be an unequivocally related case such

as an asbestos case?

GUNN: I have no problem with that.

ABBOTT: It shouldn't take but about maybe 30 minutes or an hour.

GUNN: I think that could be done. If it's been actually paid, that's okay. But not half the story, the full story. And not half the story like gross sales because they are trying to get gross sales or the equivalent in through Krause factor No. 4 - situation and sensibilities. And oddly enough it was Owen's-Corning's own lawyers from Gibson, Dunn & Krutcher who stood at this podium in the Walmart v. Alexander case and said: "The evidence that comes in ought to be truly evidence of net worth." And that brought down a barrage of hostile questions...the plaintiff's argument brought down a barrage of hostile questions and now I'm trying to carry their banner and make that argument.

I would say this is fallout from Lundsford. We have grappled with headaches from Lunsford and it's just more of it. Let's not expand the punitive phase, let's shrink it down.

The last point I want to make and it's a transition to the other part of the argument because it goes to BMW is there is a part of the BMW opinion which nobody has talked about. Remember in BMW the SC also held it was improper for the plaintiff to point to out-of-state conduct to try to punish the defendant on. Now that's going to come in if these other verdicts and judgments come in from out-of-state. That's going to be the problem. And the arguments I think against that are pretty good, and I would try to keep it out if I were a defense lawyer and I would use the arguments that my friend Ted Nutrose has put in the Wall Street Journal right after BMW came out. I will lodge this with the court, but he makes strong arguments that you can't even consider net worth or the profitability of the company or anything that happened outside the borders. Obviously BMW has got to be developed. But I think it's a constitutional quagmire that we would get ourselves into if the doors open up. Because if it's relevant for them to bring it in it's going to be relevant for plaintiffs to bring it in.

We ask the court to uphold the judgment in full.

* * *

ROSENTHAL: I came to court today prepared to argue the facts of this case and the constitutional propriety of the punitive damage judgment that is in this case. Most of Mr. Sims' argument dealt with social issues, policy issues, political issues that are really in my view untethered to the facts of this particular case. I think that clearly the court needs to be aware of the ramifications of its decision and there is a social problem out there. But I think that at bottom what the court should do is review the TC's judgment, review the judgment of the CA and determine whether a legal error was made. And I think if the court performs this function it will find that there is no error in the judgment, that the TC did the only thing it could do based on the record presented to it, and denied on _____ motion to reduce the punitive, award or eliminate it. And the CA did the only

thing that it could do based on the record before it in affirming the judgment of the TC.

HECHT: Do you agree with Mr. Gunn, that this is a judge problem and it should be reviewed after the trial on the punitive damages?

ROSENTHAL:: I think it's a close question. In this particular case under Alabama law it is a judge problem and Alabama law specifically authorizes the TC after a punitive damage verdict is returned to closely examine the verdict, to consider other factors, to hold a post-trial evidentiary hearing if it's requested by the defendant - and it was in this case - to look and see if the damages are excessive - exceeds society's interest in punishment and deterrence.

CORNYN: Are you talking about the law after life Insurance Company of Georgia?

ROSENTHAL: No your honor. I am talking about the law applicable at the time of this case and that was the Greenwell hearing that's commonly referred to.

CORNYN: Under Alabama law at the time this case was tried, the jury would not be entitled to consider punitive damage net worth sort of testimony would it?

ROSENTHAL: That's correct. The jury would not be allowed to do that. Now what Justice Cornyn was referring is that I think in April the Alabama SC adopted new procedures for trying punitive damage issues and followed the Texas court in bifurcating those issues, and allowing the jury to consider the kind of mitigating evidence that I think was considered at the Greenwell hearing. Accepting wrongful death cases from that, but still adopting the Texas procedure. So the law has changed, but at the time of trial, and that was a perspective application, but at the time of trial it was a judge call. The alternative is to allow a defendant to present this kind of mitigating evidence in the second phase of the Moriel trial.

ENOCH: In Alabama the trial judge reviews the jury verdict on punitive damages. In Texas the appellate court follows the Krause factors in reviewing an award of punitive damages. Why couldn't in addition to those elements of review considering the punitive damages does have a punishment element, that the appellate court be assigned the task of or I guess we would have the evidence develop at the TC, that a defendant be permitted after the award of punitive damages to present evidence that they had already been punished and bring before the court for a judge review whether or not the punishments been enough. In other words a decision not only do we follow the Krause factors but whether or not there ought to be permitted an award for punitive damages in this case all because of previous awards, whether they be by judgment or payment of others, and simply be an additional element of review that the appellate court would have to make.

ROSENTHAL: I think if I understand your question correctly, I think that's fine. And I think that's exactly what occurred in this case being the Wasiak case. You're talking about a post-trial evidentiary hearing at which this type of evidence is presented and Owens-Corning did make an extensive record at the post-trial hearing, which the TC reviewed and said reviewing all of the circumstances that go into a punitive damage award, I do not believe that this punitive damage award

is excessive. And he reported that in a written order which was reviewed de novo by the CA in Austin in this building, and not disturbed. So yes I think that is one way that this type of mitigating evidence with successive punitive damage defense can be considered and it can remain a judge issue, and that is one option for the court.

HECHT: Do you agree that there is something to the "enough is enough" argument?

ROSENTHAL: I think there is some policy basis for it, yes.

HECHT: Do you think it's constitutional or rooted in the common law, what source?

ROSENTHAL: I think it's rooted in the common law. I do not believe it's constitutional. I understand there is a difference of opinion on it. There could be grounds for a disagreement on that. I do not think that the successive nature of punitive damages is either per se "unconstitutional", I think that's indisputable, or even a consideration. I think it's more of a policy issue.

My ultimate point which I wanted to impress the court today is that if it is a consideration constitutionally it does not apply in this case on this record. And that's the focus here. And the discussion about the procedures that the court could use to evaluate the evidence and give weight to it and make these judgment calls which again I've said that it certainly is an option for the court to have the judge review it, but it may well be a better option to have the jury make that determination, that's what juries do is decide facts. And it seems to me that the second phase of the Moriel hearing is almost tailored made for that kind of determination.

HECHT: Well that's what Mr. Sims argues, part of his argument, and you agree with that part?

ROSENTHAL: I think there is some merit to that argument. Placed in the role of policy maker for the Texas courts, I would be in the position of disagreeing with Mr. Gunn if I said that a jury shouldn't consider it. I think it's certainly a judgment call. And I think it's close question. But ultimately in this case the judge did consider the evidence. There was no objection to that type of procedure, and the judge considered the evidence and found that the evidence of over-kill in this case did not warrant disturbing the punitive award.

CORNYN: You keep saying this case. You mean the Wasiak case?

ROSENTHAL: Yes. In the Wasiak case. And to be clear about it, the contention that Owens-Corning is making in this case is that the punitive damage award as a matter of federal constitutional law should be struck. Under the due process clause. Not that they would prefer that it would be a little bit less, not that as a policy reason the courts should consider limiting the size of such awards, but that this award violates constitutional due process. I think that's an argument that as Mr. Sims conceded in his argument has been rejected by 31 other similarly situated courts as illustrated by that board that you all have a copy of. And I don't think that's a tenable argument. But again if there is some kind of constitutional protection from successive awards in this case the Wasiak case they have

not shown entitlement to that protection.

The reason, and I will go over them, as our chart shows Owens-Corning has paid to the date of judgment of the record being created $3 million in punitive damages. And this is for the whole scope of its misconduct - for its 20 year period of marketing its defective product - $3 million is the total that it paid in punitive damages to all plaintiffs.

HECHT: Do you think we can or should consider damage awards that have become final on appeal since then?

ROSENTHAL: The answer is no. I don't believe that. I don't believe it's appropriate for this court or the CA for that matter to construct a new evidentiary record. I think this court should limit itself to deciding whether the TC erred in entering the judgment as should the CA. And so, no, I don't think so. I think if they are allowed to refer to other punitive damage awards that have been affirmed we should be able to pull out the latest 10K or 10Q showing that instead of $2.8 billion their net sales were $4.5 billion and that the stock has maintained its value despite this alleged onslaught of liability. So no that's the long answer to the question. No I don't believe a new evidentiary record should...I think the court should confine its attention to the evidentiary record before the court.

OWEN: Did y'all put in information of shareholder's equity; any evidence of that?

ROSENTHAL: Yes there was. I think the evidence that was put in referring to the negative net worth of the company...

OWEN: No, I want to know what the shareholder's equity was; what does the record show?

ROSENTHAL: It's a simple question; I'm not sure I understand it. Let me give you the facts and I hope that the...

OWEN: Well the 10K, 10Q financial statement will give you a bottom line of shareholder's equity. And I just wonder what the evidence shows.

ROSENTHAL: It's in the record and I don't have that part of the record before me.

OWEN: Do you know if it's positive or negative?

ROSENTHAL: The company had a negative net worth, which was attributable to incurring debt to fend off a hostile takeover in 1986. The company incurred $2.5 billion in debt of which it had paid off about $1.5 billion by the time of judgment. So the negative net worth was unrelated to the asbestos liabilities and in fact the company had gone well on its way to paying off that debt compared to all of the asbestos liabilities. And this company incurred more debt to fend off the hostile takeover than all the asbestos liabilities past, present and future. I think that's a very

significant point that the court needs to take into account.

In 1991, and this is not on the chart, but the value of the stock of Owens-Corning was at 15, and in 1993 it was at 45. That's in the record, that's in the Peter Frank testimony. So the value of the stock had tripled in the 2 years before the judgment in this case was returned. So this is an extremely healthy company. This is a company that has repeatedly told the Securities and Exchange Commission that it has budgeted its liabilities, and that the uninsured were unreserved costs of asbestos litigation will not have the materially adverse affect on the company. So it's able through insurance, of which it had $675 million available at the time of the Green Oil hearing, and through its other provisions. In addition to that it was saying there was no material adverse affect.

OWEN: Is your argument it is not enough until the company is bankrupt?

ROSENTHAL: No, that's not our argument. And as a policy matter I think that there are things that can be done to address that issue. Our argument is that in this case as a constitutional matter, there is no constitutional authorization to set aside these awards. I think that for purposes of determining whether an award is excessive is a matter of state law, that may be something that could be considered and that's something that the CA considered in this case. The CA expressly considered the liability in other cases potentially and said, no. In this case it hasn't gotten to the point that we need to give this company some relief under our law. And I certainly don't think it deserves relief under the constitution.

CORNYN: I understand you have objections in these cases to the form in which Mr. Frank's testimony was offered. But that aside, in a Texas case tried under Texas law where the jury is instructed by the Krause factors, why wouldn't evidence of the punitive damage awards that the company had in fact paid be admissible or shouldn't it be admissible under the Kruase factors on the question of punitive damages?

ROSENTHAL: I think that goes back to the question that Mr. Gunn was asked whether this should be a judge call or a jury call.

CORNYN: Well I'm assuming it's a jury question.

ROSENTHAL: If it is a jury question, then I think the evidence obviously can come in. I think in this particular case we had a technical objection that was iron clad to the evidence which the CA upheld, and which this court did not grant the writ on. But in addition to that I think it needs to be parsed through and there's some type of evidence that may well be appropriate consideration and there are others that could be prejudicial. For example: the extent of insurance coverage....

CORNYN: But you're not here arguing that in future cases that this court should refuse to allow evidence of anything else other than net worth on the question of punitive damages are you?

ROSENTHAL: No. I'm not here to argue that.

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REBUTTAL

SIMS: Two quick points. First Justice Cornyn on the question of objections to the Frank testimony in the Malone case, the objection of the plaintiffs was not based on either hearsay or rule 403. That's why there was no limiting instructions. It was based on the argument that the information is either too speculative or it would invade the problems of the jury. So I don't understand what need there was at that point for us to ask for a limiting instruction. The fact is that they did not ultimately object on hearsay grounds in the TC and that's why the CA reached the merits of the issue and as the TC had done held that this just isn't relevant in the State of Texas. Secondly, why this court would want to enforce an Alabama policy that no longer even exist.

CORNYN: Well we don't really know what Alabama law is yet, because the SC vacated the Life Ins. of Georgia v. Johnson in light of the BMW case.

SIMS: No your honor they didn't.

CORNYN: They did not?

SIMS: No your honor. In fact my law firm is filing a cert petition in that case if we haven't already filed it.

CORNYN: So what is the status of the judgment in Life Ins. Co of Georgia v. Johnson?

SIMS: Is in effect on its way to the SC or it's sitting there.

CORNYN: And it was not vacated in light of BMW v. Gore on Oct. 15, 1996?

SIMS: In all fairness I don't think the Alabama SC is going to change....well I take that back. Who knows what they are going to do. Two more quick points. First, Owens-Corning is a successful company. I don't deny that for a second. The burden of our argument is not that we are right up against the wall with respect to bankruptcy. What I submit is the question of whether further punishment will in fact advance any societal interest at all cannot possibly turn...

GONZALEZ: Further punishment than the $3 million?

SIMS: My submission should be clear. I think the court not only should but must take into consideration the facts as they exist today.

GONZALEZ: That are outside the record?

SIMS: It depends on what you call the record.

GONZALEZ: Well the record admitted in the TC.

SIMS: You are begin called on, you are being asked by Owens-Corning to determine a federal constitutional question, and it's our submission that in determining that issue it is the nature of the case, and the nature of our claim, that there are a lot of cases out there, there are a lot of judgments, cases at different stages.

PHILLIPS: Well don't we have to look at your current financial situation?

SIMS: I would agree with that completely. There has been plenty of talk of 10K's; 10Ks are admissible we know that. We will file our most recent 10K and 10Q. But we've been prevented from doing that in the courts of Texas.

GONZALEZ: But doesn't that cut against you and show that you're very healthy, your stock has gone up?

SIMS: My point there is that the present financial condition of a company that has been managed well and has apparently got some good products and is doing well is constitutionally irrelevant to the question whether additional punishment of that company for acts that occurred 25 years ago advances a societal purpose. Those are two very different inquiries.

ABBOTT: Let's assume that your argument prevails, and we write an opinion consistent with the principles you've discussed so far. And we come along a couple of years later to the next case, and what we have is a two-person plumbing company who is being sued for the 5th time for installing faulty polybutylene pipes. And what happened is they have a net worth of $50,000, and they got hit in the first trial for $100,000 in punitive damages and now they take a case up to the Texas SC for a second case where they've been hit with $100,000 in punitive damages. Would we not be obligated to apply the opinion in this case that you want us to render to say that the second rendering of $100,000 in punitive damages is too much?

SIMS: If I understand your figures, would that in effect be more than their net worth. I think that case you would probably decide on exactly that basis. In other words, I think that when you're dealing with a situation outside of the mass tort context, both the jury at the second trial and the reviewing courts, including the TC reviewing the jury's judgment certainly ought to be aware of the financial impact of this punitive damage award on this plaintiff or these two plaintiffs. But there I think it would be a bit more straight forward. You would have a plaintiff, you would have two defendants who were going to go under. And in that kind of situation, I think what you have to balance is does it make sense? Does it advance a societal interest to have a punitive damage award drive a small business out of existence?

ABBOTT: If punitive damage awards are to be governed by looking at societal interest should punitive damage awards go to the state?

SIMS: They will argue as a matter of policy absolutely yes. In fact it is Chief Justice Rhenquist as Associate Justice Rhenquist pointed out way, way back that he was one of the first judges to pick up on the windfall notion and he commented on the oddity that they make sense until

you give them to the plaintiffs.

GONZALEZ: You would give the plaintiff no incentive for bringing a law suit and working up the case, fronting all the costs?

SIMS: There is some of that, but it is very easy to provide for attorney's fees or other rational mechanisms to promote weeding out of conduct that society believes shouldn't take place. So there is a purpose there that could be filled.

GONZALEZ: I floated that idea in an opinion, that we ought to consider giving ½ of the punitive damages to the state to fund pro bono; and some of your colleagues in the business community are alarmed at that proposal because if we do that and we tell the juries that ½ of the awards are going to go the state to fund projects such as that, they are going to up the punitive damages.

ENOCH: That doesn't address your issue though. Your issue is that Owens-Corning had been producing asbestos over a number of years, but a number of years ago a number of people were exposed to it, but the evidence of the bad conduct is exactly the same in each of those cases. And in each of those cases Owens-Corning is being assessed a punishment for the same conduct. And whether it gets paid to the plaintiff or to the state, you're point is that how many times does Owens-Corning get punished for the same conduct. And at some point shouldn't the court step in and say the punishment has been satisfied. You continue suing for your damages, but the punishment's over with. Now isn't that your point?

SIMS: That is my point. Again, we are talking about conduct that occurred 25 plus years ago. Under most of our statutes of limitations these disputes are long since behind us. In the area of latent disease we are dealing with a very different problem

GONZALEZ: But your defective product is all over; it's in a lot of buildings everywhere, and will be there for a long time.

SIMS: And it will take a lot of money and Owens-Corning because of the bankrupt condition of a lot of companies that manufactured that asbestos will pay much more than its fair share in compensatory damages to get that stuff out of the buildings, and to bring just compensation to individuals who were in fact injured - some very grievously by asbestos. How does that, the fact that Owens-Corning is involved in that, where does the punishment come in? What is it going to do? What is your punishment going to do?