ORAL ARGUMENT — 12/3/97
97-0278
WILLY V. COASTAL STATES

MANESS: Each of the 3 questions on which the court has granted review in this case ultimately _____ the decision as to whether or not the obligation of an attorney to preserve the confidence in the secrets of the attorney's client foreclose the attorney's assertion of a Sabine Pilot claim against a former employer, who has allegedly fired the attorney solely because of the attorney refusal violate the criminal law.

GONZALEZ: You say allegedly fired, but the jury held against you, he was fired because...

MANESS: No question. We won on that.

ABBOTT: Does the way that issues have been framed by you and it seems also by the CA, it seems there has been no counter contention against _____ is that there is an assumption, a conclusion that this type of claim can exist in the attorney/client relationship as opposed to what the wording of the Sabine case was, which was, employee/ _____ relationship, is that even an issue that we can address in this case because of the posture of how you cast your points of error and the way the response was?

MANESS: Probably not. I would like say that Judge Davidson before we tried this case said in denying Coastal's motion for summary judgment, "As I viewed this matter, it's a case in which there is a dual relationship: there is an employer and employee relationship: there is an attorney/client relationship; and I as a trial judge am only going to try the issues associated with the employer/employee relationship."

The reason we cast the issue as we did in our application for writ of error is because we were quite surprised that the CA elected to accept our argument that an attorney can sue under the Sabine Pilot doctrine in a case such as this. But qualified that holding by saying, "In the facts and circumstances of this case, Willy could not have proven his Sabine Pilot claim without violating the attorney/client privilege." That was something that we weren't ready for. We filed our motion for rehearing, we specifically pointed out to the CA's panel that decided this case, that Rule 503 of the Tex. Rules of Civil Evidence specifically says, and I think I'm quoting the rule now: "There is no privilege under this Rule, subprovision 3, breach of duty by a lawyer or client as to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer." Well our position in the CA as of the time we filed our motion for rehearing was "Wait a minute, the court has erred in concluding that there is an attorney/client privilege issue of an evidentiary nature involved in this case, because Rule 503 specifically says there is not."

We were also surprised to see the CA rely upon a superseded provision of the disciplinary rule, and to use as the rule of decision on ethical precept that had existed at the time the

petition was filed in the DC in 1984, but that did not exist at the time of trial in 1994.

BAKER: What's your authority for arguing that, that 105 should have been applied rather than 4-101?

MANESS: Essentially our authority, I don't believe there are any cases that deal specifically with whether or not if the rule of decision applicable at the inception of the case, rather than at the time of trial should apply. But there's ample authority in our present Texas Disciplinary Rules of Professional conduct for a much broader proposition and that is, disciplinary rules, what we used to call the Canons of Ethics, used to call the Rules of Disciplinary Conduct, don't provide rules of decision in civil cases in Texas. At the present §9 of the Texas Disciplinary...

BAKER: But in this case, the parties tried it on the basis that those rules applied?

MANESS: I'm not sure that they did.

BAKER: Well didn't somebody object to...

MANESS: No. I don't believe...I think Coastal has consistently maintained that an attorney/client privilege forecloses Willy's _____.

BAKER: On the issue of applying the rules to the case, plus the next step where you were, that the court erred in not using 105 instead of 4, if I recall, the suit was filed in 1985, and it wasn't tried until 1991. So where is your argument if he really got ____ behind and tried the case in 1988 before the rules were changed?

MANESS: I think we're in essentially the same position, because there's no dispute that rule 503 of the Rules of Civil Evidence was enacted 1 month before Willy was fired?

BAKER: But what happens to your argument about...

MANESS: The ethical consideration?

BAKER: Yes.

MANESS: Our position would be in any event, the ethical rules, whatever version we use, don't provide a rule of decision for determining whether evidence is admitted or excluded in a civil case in Texas. I want to point out that the present disciplinary rules of professional conduct containing preamble, I'm quite honestly not certain whether the preamble is to be regarded as a prescriptive rule of law, that in the preamble paragraph 15, the preamble specifically says: "These rules are not designed to be standards for procedural decisions; furthermore, the purpose of these rules can be abused when they are invoked by opposing parties as procedural weapons. The fact that

a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the rule."

Now I read that language clearly and unequivocally of stating we don't use the disciplinary rules as a basis for deciding whether evidence is or is not admitted in a civil case in Texas.

HECHT: Surely a client can complain that confidences are being betrayed whether it's in litigation or anything else?

MANESS: No question.

HECHT: So the plaintiff just stands to the discipline and gets his evidence admitted?

MANESS: I think that could be true. Accept for rule 503 is unequivocal. Rule 503 says there is no privilege. It fascinates me that we used to take clear and unequivocal language as lawyers and judges and try to interpret it in a way to fit it into different conceptual categories. It seems to me over my life as a lawyer in the last 29 years, we've now reached the point, certainly the present SC of the US has reached the point where we generally adopt the position if the language of a statute or a rule or a prescriptive standard for deciding a case is clear and unambiguous. Then we follow that language. We don't need to interpret it. We don't need to weigh competing policy consideration. The amicus brief fascinates me because it says basically: "This case involves great issues of public importance that involves with this court's weighing the competing considerations of the employers and the employees. Our response is, No, it doesn't. It involves simply reading the rule. If you read the rules, it's quite clear that an attorney who is wronged by a former employer may use what might be otherwise be arguably privileged or confidential communications to prove his claim. And if the argument is, "Well unscrupulous lawyers after being fired and they've used such confidences in an irresponsible manner to provoke a settlement," and that's the substance of this Green brief, our response is: "How about the irresponsible employer who attempts to enlist the assistance of attorneys to promote criminal acts and to evade their responsibilities to society generally."

OWEN: I want to ask you about that latter part. Is there any evidence in the record, I think it's called the Belcher report, that that was going to be disseminated to the public or given to a governmental agency?

MANESS: No there is not. In fact I believe the record is quite clear the Belcher report is what is called an internal environmental audit. It was designed essentially for the purpose of first determining whether the Belcher facilities were in compliance.

OWEN: How was the Belcher report going to be used then to further a crime, or fraud

on a _____?

MANESS: Well the Belcher report was evidence of we believe Coastal's efforts to use Willy for further criminal activity. Because as Willy testified at the trial, the preparation of the Belcher report as he did it, noted significant ongoing violation of law.

OWEN: What were the criminal activities that he was asked to perform?

MANESS: To change the Belcher report as a mechanism or a means to allow the Belcher corporate hierarchy to claim that they were in compliance with federal and state environmental laws when they were not.

OWEN: But they were not going to use that...

MANESS: They were not going to utilize the report, but they were going to actually utilize Willy's professional skills and efforts as an attorney to tell them on the record within the corporation, "You're ok, you're in compliance."

OWEN: And there was evidence that they were going to say: "We've got advice of counsel that says we're in compliance."

MANESS: There is evidence in the record, that that's the way the Coastal corporation operates. That's the way the Coastal corporation does it in Texas. You can take that to the bank. Absolutely.

This is a $8.5 billion corporation that the evidence at trial showed consistently and repeatedly attempted to evade its responsibilities under the environmental laws. Just replete with evidence that this corporation complies with the law when it wants to. When it doesn't want to it hires a staff of very capable lawyers to fence and box, and fiddle around with state and federal regulatory authorities. And of course, that's what we think is ultimately the cause that prompted Willy's firing. Willy was the kind of lawyer who said, "I'm not going to be a part of this."

Our position we think is relatively straightforward. This case involves a simple evidentiary issue. We think we win on that proposition that the court should remand the case to the CA...

HANKINSON: Does the record indicate anywhere what particular criminal statute was violated as a result of this request that the Belcher report be changed?

MANESS: It does. There's a footnote in our brief that sets forth...

HANKINSON: But does the TC record reflect that one?

MANESS: I believe it does. Judge Davidson as a matter of fact asked for a memorandum on that issue right before the case was submitted to the jury, and I hope that memorandum is in the record. But that was a concern that he raised. He asked us specifically, "What statute, state or federal would Willy have violated on this record had he complied with Coastal's request to change the Belcher?" And that should be in there.

HANKINSON: And there is a statute that indicates that had he taken the act of changing an internal memorandum, that was not intended for public disclosure, not intended to be filed with any agency, that that in and of itself would constitute a crime?

MANESS: I'm not sure that there is any specific statute that would condemn changing an internal environmental audit.

HANKINSON: Well that's what he was being asked to do.

MANESS: Yes, but that's in the same sense that there may not be any specific criminal statute that condemns having a couple of telephone conversations about not telling the truth to the environmental protection agency. It's the scheme, it's the design, the fabricate that woven together makes what we generally call a criminal conspiracy under Title 18, §2.

HANKINSON: So the statutes that he is claiming would be violated are in fact the environmental regulation statutes?

MANESS: All federal criminal statutes under the Clean Air Act, Clean Water Act, and so forth. We cited those in our brief.

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RESPONDENT

CRAWFORD: Contrary to the assertions by petitioner's counsel, this case does involve significant elements of far reaching public policy. This case is about whether different standards of ethical conduct should be applied to in-house or outside counsel, whether in-house counsel should be excused from protecting privileged information to the same extent that all other attorneys must if they wish to practice law in this state? Coastal would show that there should not be an ethical standard that is different and lower for a lawyer who also happens to be employed by a company.

ABBOTT: It's my reading, that you have not raised as an issue here whether Sabine Pilot should apply to the attorney/client relationship. Do you concede that it should?

/CRAWFORD: We specifically argued our first point of error to the CA that the nature of the attorney/client relationship precludes the extension of Sabine Pilot to the attorney/client relationship absolutely. The CA did not adopt that argument, although they granted our first point of error, but

they adopted a second more moderate position. But we did make the argument to the CA and it was preserved on appeal to that court. I don't believe we specifically renewed that briefing by reply point to this court. But I still think this court, since it has the discretion to decide in a judicially created exception to the At Will Doctrine, how far the extensions should apply. I think this court clearly has the discretion to define or to decide that no extension is warranted. So I think this court clearly can reach that issue.

This case also is about what the rule Texas would follow in permitting in-house counsel to sue for wrongful termination? Affirming the CA's holding would be an adoption of the more moderate approach, that the State of California adopted in the General Dynamics v. Superior Court, and it is the better rule if this court should decide that the cause of action should be extended to attorneys at all, which we do not think this court has to do.

Finally, this case is about the damage that will be done to the consultation that goes on on a daily basis between companies and their in-house counsel. If in fact clients do not know that the communications that they have will be privileged in the future in the event an in-house attorney is discharged for some reason and decides to claim that that was because he gave advice that wasn't followed to the internal _____.

ENOCH: Accepting for the moment that whatever gets decided in this case ought to apply to all attorney/client relationships not just a particular in-house counsel circumstance. What client would be entitled to expect their communication to be privileged if they're attempting to order an attorney to break the law?

CRAWFORD: If an attorney is ordered to break the law there are exceptions, the confidentiality that are set out in the disciplinary rules. And the rules clearly provide that if a lawyer in order to prevent future crime or fraud that involves great risk of personal injury, he must disclose. So the client has no right to expect confidentiality.

ENOCH: That's a circumstance where it comes to the attorney's attention that the client might commit a crime in the future, then the attorney must disclose. That's not what I'm talking about. I'm talking about what client reasonably expects to have his or her communication to the lawyer protected when the client is ordering the lawyer to commit a crime?

CRAWFORD: I think if the lawyer is ordering the attorney to commit a crime, and the lawyer takes steps under the rules to disclose that, the client has no right to expect that is would be privileged.

ENOCH: But in the Sabine Pilot case, the circumstance there was the employee was ordered to do something that was a crime, and so excluded it. So why under circumstances as it exist now, an attorney not able to disclose circumstances about being ordered to do a crime, Sabine Pilot or employment context, or to the police, or whatever?

CRAWFORD: In the first place, the attorney/client relationship is not a standard employer/employee relationship. It has productions of confidentiality and privilege far beyond the normal employment relationship. In the second place, if you're talking about the facts in this case, as a matter of law, the changes that Mr. Willy was requested to make in the Belcher report, which is in the record as Ex. 30, do not as a matter of law and could not under any foreseeable analysis require him to commit a crime. There simply is no crime that he was ordered to commit in this case.

GONZALEZ: You tried to convince a jury of that, but they didn't buy your argument.

CRAWFORD: The question of whether or not Mr. Willy was discharged for what is truly an illegal act is an issue of law for the court.

GONZALEZ: It was submitted as a fact issue, was it not?

CRAWFORD: The jury was asked whether the only issue, but they were not asked to make the decision of law as to whether or not, he in fact was requested to do something that's illegal. That was assumed in the issue. After the TC had passed on the issue and I think incorrectly.

ABBOTT: Has that issue been perfected here?

CRAWFORD: Yes it has.

ABBOTT: It's certainly not one of the points of error brought by the petitioner. Where has it been perfected?

CRAWFORD: The argument is made in the reply brief, and it was made thoroughly before the CA. We argued at length that if in fact the cause of action was extended, and if in fact our objection to the use of privileged information was not sustained, then as a matter of law alternatively the changing of the Belcher report could not had subjected Mr. Willy to criminal liability. And, therefore, it could not be the basis for a cause of action under Sabine Pilot, even if that cause of action was extended to those facts.

ABBOTT: You told me what you raised in the CA, but you haven't told me how it's raised here.

CRAWFORD: I think it is in the briefing as to whether or not it could be considered unlawful. And certainly in the prayer, we have requested that if this court should not affirm on the ground that the CA decided, you should then and I think can go ahead and reach the point of illegality. At the very least this court remand to the CA for consideration of that point, which it did not do. But I think this court has the authority to reach the point.

This case involves an in-house attorney who refused the request of his superior

to make what are editorial changes to the tone of the document that is attached as Ex. 30. I would invite all of you to look at the Belcher report, which is in evidence, the changes that were requested are noted in handwritten notations in the document. It is completely wrong when Mr. Willy claims that if he had made the changes that are requested, the company would have been given no notice that it had environmental deficiencies that needed to be corrected.

What were requested by this superior, Mr. Clint Fawcett in the legal department, were changes to the document to change its tone to reduce his hectoring and its badgering of management, and its sort of condemnation of past management practices. But the substance of what needed to be changed, the permits that were needed, and the things the company needed to be done, are all still in the report. The only changes that were requested were internal changes solely going to _____. Now there is a reason for that. Mr. Fawcett testified in the testimony below, that when he originally received the request from Mr. Al Smith for an audit of what Belcher needed to do in order to comply with the environmental laws, he put together a team. And one of the members of the team was Mr. Donald Willy, and Mr. Smith told him "he didn't want Mr. Willy involved, because he didn't trust his judgment. He didn't want him involved in the audit." And Mr. Fawcett said, "No, he'll do a good job for you, he's a good environmental lawyer." But the record also shows in the lower court that Mr. Willy, although he was concededly a good environmental lawyer, had a tendency to be stubborn, to insist on his own advice to the detriment of listening to anyone else's point of view, he had a tendency to hector management and to stick his nose into matters that are not his concern, and I think all of these went into the considerations that Mr. Fawcett employed when he asked Mr. Willy to make some changes to the tone of the original report.

ENOCH: Your main point of being here is that the notion of Sabine Pilot in the employer/employee relationship regarding an in-house counsel doesn't apply because the in-house counsel has an attorney/client privilege that they cannot avoid even if the nature of the conversation is to order the attorney to commit a crime, that is the first point that Coastal is trying to make here?

CRAWFORD: Yes.

ENOCH: Now your second point is, if we decide that an employer can't order the attorney to commit a crime and expect that to be privileged as a communication, the next point is as a matter of law, what he was directed to do was not a crime?

CRAWFORD: That is precisely correct.

ENOCH: And it really is irrelevant whether he was hectoring or badgering or anything lese. All we would do is look at the direction that was given to him and decide as a matter of law if that was a direction to commit a crime?

CRAWFORD: That's absolutely correct. And the point I was trying to make is that if you

look at the requested changes, as a matter of law, they cannot amount to a request that he commit a crime.

OWEN: What statute or regulation did the TC find he had been asked to violate?

CRAWFORD: I have not seen a specific finding by the TC in the record concerning a finding of a specific statute.

OWEN: You said the issues submitted to the jury assumed the violation?

CRAWFORD: It assumed that in fact he was fired solely for committing a wrongful act. The argument on the directed verdict in the statement of facts is not completely recorded. And I have not seen a ruling. I have seen the order of the TC announcing that the motion for directed verdict is overruled, but not reason was stated. And I don't know what statute the TC had in mind in thinking that a violation of the criminal law might be implicated. And I don't believe that's in the record.

HECHT: What is the answer to the argument that this was admissible under 503 and 1.5?

CRAWFORD: In the first place, I think the disciplinary rule that was in effect at the time the report changes were requested back in 1984 is the disciplinary rule that ought to govern Mr. Willy's conduct. And I think that's the operative time. And we argued in the briefs also that at least when he filed his cause of action, the disciplinary rule in effect at that time should control whether or not he was violating his ethical obligations in order to do so.

ABBOTT: But wasn't 503 alive at that time also?

CRAWFORD: 503 was in effect at that time and that is the rule of evidence. I think however, that if you look at the comments to rule 503(c)(3), which is the breach of duty exception that Mr. Maness was referring to, if you look at the comment to that provision, it says: "The exception is required by considerations of fairness and policy when questions arise out of dealings between attorney and client as in cases of controversy over attorney's fees, claims of inadequacy of representation, or charges of professional misconduct." That rationale for the exception is the same rationale that applies under the disciplinary rules, and it is no broader. And I think to try and read the text of the rule to create a broader exception, particularly under the facts of this case, is going to be extraordinarily destructive.

Let me explain what I mean by that. Any in-house lawyer who advises his client in any area of the substantive law that is enforced by a criminal provision is going to have a basis if he argues that refusals to follow his advice or orders that he change that advice are in effect orders for him to somehow assume criminal liability, because the area is regulated by criminal laws. Any lawyer who advises his client internally on compliance with the antitrust laws, for example: in

whether or not the client can make an acquisition or set a price or enter a joint venture, or advises his client in matters of trade overseas, an area that's regulated by the Foreign _____ Practices Act, or advises his client in connection with compliance with the environmental laws or OSHA or any of the mirid _____ federal legislation that are regulated by criminal statute. If this could holds that because of Rule 503, the attorney if his advice is not followed in an area that impinges on criminal liability has a cause of action under Sabine Pilot and claimed that he was terminated because his advice wasn't followed, is going to be able to hold his employer hostage to a threat to reach the privilege and to haul his employer into court anytime he's _____, or feels like his advice isn't being sufficiently followed. The tort, if applied on the facts would become so nebulous that I think it would truly erode to the point of evaporation the protection of confidentiality for internal attorney-client communication.

PHILLIPS: Aren't there middle grounds between if the attorney has no remedy at all verses a client have no hope of any confidentiality. In other words, when we deal with trade secrets we have a fairly rigorous procedure for a trial judge to examine and take whatever time needed and to get whatever law, briefing help that's needed to make a decision about whether it's a trade secret or not. Couldn't a trial judge be trusted to undertake the same kind of _____ to decide whether or not communication does involve a crime?

CRAWFORD: I think there is a middle road. I mentioned to Justice Abbott before that we initially argued that the court simply should not be extended at all to the attorney-client relationship. But a more moderate approach is the one that was adopted by the California SC in 1994 in the General Dynamics case, in which the court held, that they were going to allow attorneys to proceed as long as it was clear that privileged communications were not going to have to be divulged, they were going to let them get into court, but at some point they were going to severely scrutinize whether their claims could be proved without breaching the privilege. And if they had to breach the privilege, and they didn't have an exception under the disciplinary rules that would permit them to do so, then they were simply not going to be given cause of action for tort in which they could pursue. And I think that is sort of a middle ground between saying you have no cause of action at all and saying rule 503 governs...If you read 503 literally the way Mr. Maness would read it when it says: "If there's a breach of duty there's not privilege," that means if you read that literally, and you don't look at the context that it's supposed to apply to, that anytime in-house counsel goes to court and files a petition claiming a breach of duty, the privilege is gone. Because there's a breach of duty that's alleged. And I really think that destroys the privilege in this context. So that cannot be the way that rule 503 should be applied. It would be enormously bad public policy and I think it would be bad law.

But there is a middle ground, and I think General Dynamics represents that if in fact you decide that the tort of wrongful termination should be extended to the attorney/client relationship. And it appears to be perhaps, it's hard to say because there are only a handful of cases that have been decided.

PHILLIPS: You keep saying extend the tort. What you really mean is if we decide not to restrict a certain occupation?

CRAWFORD: Well Sabine Pilot involved a guy who was just _____ and dove into the water and was ordered to do so in spite of the fact that...

PHILLIPS: It's still a job.

CRAWFORD: It's still a job. No question about it. I guess I'm saying it would be an extension because of what the federal court in Willy v. Coastal decided in this case back in 1986, when Judge Hitner looked at this case when it was originally filed and he said, trying to predict what Texas would do, that "he didn't think that this court would extend the Sabine Pilot tort to apply to the attorney/client relationship," and he held that as a matter of law, there simply was no cause of action in tort, because the attorney's remedies are defined by the code of professional responsibility and if he is ordered to commit an illegal act, he withdraws from the representation.

And it may be that this is a hard choice, or that there are some hard economic consequences.

ENOCH: There could be another middle ground. There could be a determination up front by the court whether or not there has been an order to commit a crime before you get beyond what the nature of the communications were. For example: the judge here could have been presented with the statutes that the argument is the crime would have been committed had certain conduct occurred, and decide whether or not that would be a violation of the statute. I mean that could happen.

CRAWFORD: You're right. There are a number of middle approaches this court could take beyond simply saying that we're not going to extend the tort or, as Justice Phillips' phrased it, "To restrict the court," so that it doesn't apply to the attorney/client relationship. There are middle grounds that can be followed.

But I think the general trend and the better rule and if you will look at General Dynamics and look at the cases that followed it, particularly the Massachusetts case, GTE Products Corp. v. Stewart that is also cited in the briefs, the general rule that the court seemed to be taking when they are adopting the middle ground is to say that a claim for wrongful discharge can be brought if it's based on a fundamental public policy exception to the employment-at-will doctrine but that's only if there is no violation of the obligation to preserve client confidences and secrets is required to prove the cause of action.

HECHT: Petitioner says in their brief that they claim the support of virtually all scholarly commentary. And I don't find a response to that in your briefing. In a supplemental brief would you address that claim. It's on page 20 of their petition.

CRAWFORD: We will be happy to submit a supplemental brief on that.

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REBUTTAL

MANESS: Despite my profound disagreement with Justice Scilia on virtually every issue that comes before the SC, I think he's exactly correct when he suggests that as lawyers and judges we have to rely principally upon the plain meaning of language to do our job.

OWEN: Before you get into that let me ask you some more questions about the violation of the law. It's my understanding that it's Mr. Willy's position that some facilities were reported in violation. There have been violations of the federal environmental statutes. In assuming that there is an obligation under these statutes to report noncompliance, why isn't every lawyer, whether you're in-house counsel or outside counsel, who comes upon knowledge that their clients are not in compliance, are they obligated immediately to report that to the federal authority?

MANESS: They are certainly obligated to seek immediate correction of the problem. It's a dual obligation both to report and correct it.

OWEN: They tell their client to correct it, but are they obligated to report to the federal authorities if their client is not in compliance?

MANESS: Yes in the event that the status of noncompliance violates the law. Certainly. In the same sense that as a lawyer if I work for a bank and I found out the president was embezzling, I would be obligated to go to the district attorney. You bet. Absolutely.

OWEN: What if you found out that your client had committed a murder, are you obligated to report that?

MANESS: That's a single discreet act that occurs in the past. We're talking here about an on-going criminal activity. If the activity has consequences for the future for example: a spill of a crude in the Biscayne Bay that could kill all of the wildlife there, yes I have an obligation to report that.

OWEN: And what was it exactly that happened here that you say would be a crime if Mr. Willy had done what was asked?

MANESS: The best way to describe that is to say: This simply isn't a case where we claim that Willy was fired for refusing to modify or change the Belcher Report. There was an on-going sequence of events to which Willy testified extensively and which involved a number of different documents and pieces of evidence. The most significant thing here is that there are all kinds of ways to assure that there's no irresponsible breach of the attorney/client relationship by a

dissatisfied attorney. And in fact Judge Davidson followed most of those. This case came before this court once before in Coastal's application for mandamus to try to seek preventure of disclosure.

HANKINSON: What are these protections?

MANESS: Among other things, of what happened here. There was an order directing discovery, but under a strict obligation of confidentiality that the documents would not be publicly disclosed. There is a motion for summary judgment, the fact that there is no factual basis for the claim under this court's revised summary judgment procedure. Cases that involve true bad faith can be easily disposed of without any disclosure of evidence at all.

But it seems to me that the most important thing here is if you read the rule, 503, the rule says: There is no privilege to begin with. And how in the world can we say basically we've adopted a rule but we're now not prepared to follow that clearly allow the admission of this evidence. Most of Coastal's arguments are basically as I understand it, an argument for either repeal 503(d)(3), or for substantially modifying it. And I'm not prepared to agree that that's the way this court ought to go about its business.

By the way, I don't think any other issue is before the court as counsel has suggested. The court can only decide the cases that it granted writ of error on.

HANKINSON: They won in the CA. They are not obliged to raise points of error are they?

MANESS: They did indeed.

HANKINSON: And we could uphold it on a different basis?

MANESS: On any basis that the court chooses to do. The point is, the CA has never ruled on that issue.

GONZALEZ: How about Coastal's argument that Willy here was fired not because of any allegations that he refused to engage in falsifying some reports and hide some criminal activity, but he was fired simply because he lied, he lied talking to the TDWR, and he was incapable of getting along with others?

MANESS: The jury rejected that argument. The same argument was made before the jury, and 10 of 12 citizens of Harris County, Texas said: No dice. That's a _____ of argument that's designed to coverup or conceal the real reason for the firing. That's our response.

We ask the court to follow the rules: remand this case to the CA for consideration of the remaining issues raised.