ORAL ARGUMENT — 11/4/97
97-0430
FORD MOTOR CO V. TYSON

LAWYER: This is a mandamus proceeding arising out of the imposition of severe sanction for alleged discovery abuses. The sanctions ranged from exclusion of evidence, that goes to the very heart of the case, to a $10 million monetary claims. The original sanctions were $10 million.

The underlying case is a product's liability action arising out of a 1991 car accident. And the sanctions controversy centers over a document that we described in our papers as the Kent Report. Now, Kent, was an engineer hired by State Farm. State Farm was the plaintiff's liability insurance carrier to go out and investigate the cause of the crash right after it happened. State Farm is not involved in this case. It's never been involved in anyway in any action against Ford.

Now how Ford initially received a copy of that Kent Report is really not in dispute. An investigator working for Ford's lawyer called the State Farm adjuster on the phone, identified himself as a Ford representative working on this very case and asked for a copy. The adjuster consulted with her supervisor, got back with the investigator and said: State Farm will be happy to give you a copy, but we'd like to recoup some of the $6,000 fee we paid to the engineering firm to do the report. Ford agreed to pay $500 and State Farm gave Ford a copy of the report.

SPECTOR: Now was this during the time that discovery was at a standstill because of the agreement?

LAWYER: It was during the time that a rule 11 agreement was in effect. Rule 11 agreement was entered into in Oct. 1993, and after the plaintiffs served their initial discovery request on Ford, then the lawyers got together and said: We don't have to answer your discovery, we won't serve discovery until we have a chance to talk settlement. The settlement talks happened in March, 1994, and that got unwound at the end of March. The phone calls to State Farm and the receipt of the Kent Report happened at the end of February. So, yes, it was during the time of that letter.

But, I would like to emphasize that 1) there's testimony in the record from the lawyer who negotiated that agreement, that all it was meant to do is you don't answer my discovery and I won't serve any on you. It didn't have anything to do with third-party discovery. But more important, that wasn't discovery, that was an investigation of the claim, that at the time there wasn't a discovery request served on State Farm or served on anybody else. It was just part of the investigation.

ABBOTT: And the report was obtained one day before the motion to quash was filed?

LAWYER: That's right.

ABBOTT: No dispute about that?

LAWYER: I don't know if there's a dispute about that or not. The CA said in its opinion, that the motion to quash was filed on the same day we received the report. If you look at what the facts are, Ford received the report on March 2, at 8:45 a.m. So, I'm confident that that's the first thing that happened that day. The motion to quash, the certificate of service is dated the 2nd, but the letter by which it was served, the cover letter saying: enclosed please find plaintiff's motion to quash, is dated March 3.

ABBOTT: And when did you receive it?

LAWYER: Ford's lawyer received it on March 7.

ABBOTT: The document was obtained before the motion to quash was filed, and the document was obtained not in violation of Rule 11. Is the only issue to focus on, the issue of whether or not the document was privileged, or is there another _____ focus on?

LAWYER: I think the only issue to focus on is whether the document was privileged. There's potentially an issue on whether Ford obtaining the rest of the file, which happened two months after that, that there was something wrong with that. The rest of the file is not what we're all up here fighting about really. The important thing is the Kent Report, because of what it said, how important the evidence is that it contains.

ABBOTT: Did the judge ever make any finding that because of obtaining the other file, because of conduct with regard to the TRO or because of any other action was the basis of excluding the Kent Report?

LAWYER: I don't know that the order is that clear. I mean the order certainly recites those findings.

ABBOTT: I agree.

LAWYER: The order recites those findings, that Ford abused the discovery process by among other things getting the TRO, which how that is discovery is not very clear. It's either, but...by the way it obtained the Kent Report, by the way it obtained the claim file. Plaintiffs of course relied on the cases that say: in deciding what sanction to impose, the judge can think about all the things that have been _____ in the case. It's not clear for what alleged violation the exclusion was handed down.

The reason the Kent Report is so critical is because there are only two

allegations in the underlying incident. Plaintiff's say: The crash happened because either the brakes didn't work, or because the cruise control would not disengage. Kent's Report guts both of these theories. Now for $6,000, State Farm got an extensive report. Kent spent several days on the car, he took some of the components off and worked on them off the car, then put the back on and tested it again. And his report concludes unequivocally that at the time of the crash the brakes functioned properly, and that the cruise control would disengage properly at various speeds when you pushed the clutch or the brake pedal.

ABBOTT: So it's your position that as of today there would be no way that you could get an expert in court that would support those same conclusions?

LAWYER: We have an expert report that supports those conclusions, but he relies on the Kent Report. And part of the sanctions is, that not only is the Kent Report inadmissible, but none of Ford's witnesses fact or expert can rely on the Kent Report in anyway. It actually says: directly or indirectly. The sequence of events here, that the crash was Nov., 1991, Kent looked at the car in December 1991, and January 1992, two years goes by before Ford gets a chance to look at the car. The case against Ford wasn't filed until the Fall of 1993, and then we first got to look at the car in early 1994. And it's undisputed that by the time we got out there, the brakes didn't appear to work any longer. And Kent looked at the car while it was still in State Farm's custom. He got done in January 1992, and in February 1993, State Farm turned custody of the vehicle over to plaintiff's counsel, who maintained it the rest of the time. Like I said, by the time we got out there, the records says: we got in the car and pushed the pedal, and it went straight to the floor. That's not what happened, Kent testified.

ABBOTT: And it stands today, you are unaware of any other mechanical type of analysis _____ the car to establish the brakes didn't work, or the cruise control didn't disengage?

LAWYER: That's exactly correct. And that's why the Kent report is so important, that's why it's central, and that's why we believe the motions for sanctions were filed.

There was one motion filed right after Ford got the whole file. That was back in 1994 when the case was still pending in Harrison County. That was set for hearing that summer, the hearing was passed by agreement, and then 18 months went by where nothing happened. The rest of 1994, all of 1995 and the beginning of 1996, Ford has the Kent Report and the whole file, plaintiffs never saw an order requiring us to give it back, or an order limiting our use of it. Then all of a sudden, March 1996 comes along, they file another motion for sanctions. Now at this time the case had been transferred to Dallas and assigned to Judge Tyson, and the motion for sanctions says: When Ford did get to test the car, it did destructive testing, something was wrong with our testing; and 2) that we abused the discovery process not by getting the Kent Report in March, but by getting the whole file by subpoena in May 1994. That's all the motion for sanctions complains about.

Nevertheless, we had the hearing. Judge Tyson, it was clear from her comments at the hearing and a long time before the hearing, that she felt that the Kent Report, the whole file was presumptively privileged. Anything in the insurance company file was subject to a privilege owned by the insured and in violate, and that Ford acted improperly even by asking for the report in the first place.

The Dallas CA did not address the propriety of Ford's conduct. Of course as Judge Phillips made at the beginning that the Dallas CA threw out the $10 million sanction and ordered Judge Tyson to vacate it and declined to review the remainder of our arguments, concluding that our remedy by appeal was adequate. We think the court got that wrong. Our burden up here of course are the same two prongs: to show that Judge Tyson abused her discretion; and 2) to show that our appellate remedy would be inadequate.

The abuse of discretion as Judge Abbott suggested, starts with the question of whether this document was privileged? Again this is a legal conclusion. I should say that Judge Tyson reached that under *Walker* is not entitled to the same deference. It was a factual determination.

Throughout their papers, the plaintiffs say: the privilege that was violated here is the insured/insurer privilege. Well, of course, that's not in the rules. So I will try to go through and decide what privilege they could even be trying to meet here. It can't be attorney/client, because there isn't any attorney involvement outside of _____. And if you look throughout the file, the only communications from the plaintiff's lawyers to State Farm were to the effect of: You don't need to be involved in this case against Ford. They have the claim pending against State Farm to this day subject to a towing(?) agreement that extends limitations.

So the idea that there could be privileged attorney/client communications between those two is totally unsupported by the record. The same is true of attorney-work product. It can't be that privileged, because there was no attorney involved and no mental impressions of legal _____.

What I think they are trying to _____ is the investigator _____ communications privilege. But by the very terms of that rule it only applies in the very case in which the communications were made in anticipation of. The rule says: It only applies to communications made in connection with the prosecution, investigation or defense of a particular suit, or in anticipation of the prosecution or defense of the claim made part of the pending litigation. That means potentially there could have been privilege if the Kent Report was made by State Farm in anticipating the plaintiff's case against Ford potentially. But the claim's adjuster testified unequivocally that was not the _____.

The question to the witness was specifically to the Kent Report: Did you prepare this file to assist the plaintiffs in a case against Ford? The answer is, no. Later in the

hearing: Why did you prepare this file? What was the purpose of this claim's file? Answer: Two reasons: 1) routine investigation of State Farm's coverage (we had a policy on the driver and the second policy on the car and we were trying to see what was indicated); 2) potential liability claims against the driver. No evidence that there was any thought to helping the plaintiff in the case against Ford. And again, the plaintiff's lawyers told them we don't want your help. You are to stay out of the case against Ford.

So, none of the privileges fit here as a matter of law. For that reason, we say that Judge Tyson abused her discretion in assessing any sanctions against Ford.

Turning very quickly to adequate remedy. All we have to do is look at *Walker v. Packer*. It says that your appellate remedy will be adequate if the TC's error vitiates or severely compromises your ability to present a viable defense.

The CA didn't apply that test. It said: We can't tell that the Kent Report is the only evidence relevant to your defense; therefore, you have _____ on appeal. I think the only evidence test kind of gives effect to the court's word "vitiates", but it ignores the rest of the phrase - severely compromise.

ENOCH: Can a CA decide that part of an order is _____ by appeal and part of an order is not, and just kind of pick and choose which parts in the order to set aside?

LAWYER: I don't think it's consistent at all with the policy behind a rule that you only get mandamus if your appellate remedy was inadequate. _____ said for two reasons why are relators to meet that standard. And said: We don't want undue interference with the TC's docket, and we don't want the appellate court's docket overburdened. Well in this instance, once the CA decided to take the case, stay the underlying order, have reached, hear oral argument, considered the case, write an opinion - that took 9 months. So the TC's docket was already interfered with and the appellate court's docket was already burdened and it wouldn't have been interfered with or burdened anymore to decide the whole case. So I don't think the adequate remedy by appeal _____ should be enforced piecemeal. It ought to be assessed as to the whole order.

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RESPONDENT

LAWYER: The question here is whether or not a trial court decision that certain discover may not be admitted in evidence refused is subject to mandamus; and whether or not this $25,000 attorney's fees for the appellate process is subject to mandamus?

I do not agree that there are only two issues with regard to the Kent Report.

I think there are three issues. First of all, in the record Ford's then lawyer testified that he knew about the motion to quash on March 2, not March 3, not March 7. In the record he says: I knew about it on March 2. The next issue with regard to the Kent Report is violation of the rule 11 agreement. The third issue with regard to the Kent Report is attempting to go around the motion to quash sending out this court reporter virtually ex parte, then obtaining it in some sort of usable form. Those are the three issues with regard to the Kent Report.

HECHT: But you don't think it's privileged?

LAWYER: I do think it's privileged. But those are the three procedural issues before you get to the privilege. That might be a better way to say it.

GONZALEZ: What privilege are you asserting?

LAWYER: I believe it's investigative privilege, that is the party communication privilege as well as the consulting expert privilege. Surely, there is a privilege that attaches to insured's statements to their insurance carrier.

HECHT: Whose is the privilege?

LAWYER: I believe it has to be the insureds.

HECHT: Cohen's?

LAWYER: It's either going to be Cohen's or Archer, because at this point in time they are handling both files together.

HECHT: But they're adverse claimants regards also are they not?

LAWYER: They are potentially adverse at that point. But I don't know if they are actually adverse. It's not as if Cohen had sued Archer. At that point, State Farm thought that there might be some potential, but apparently did not believe that it was so significant that they needed separate files at that point. The point of the record they were still handling it together.

ABBOTT: If we were to establish that as a rule and kind of applied it across-the-board would that mean that when insured sues an insurance company for a breach of contract, the claim file technically is the insureds and therefore can see everything that's in that file?

LAWYER: I don't think so. In fact, that's the second part of Justice Hecht's question. I think that in some instances, the insurance company is going to own part of that, that is if my insured is going to sue me, I have the right to defend myself against the claim. At the same time, it can't be argued seriously that the insured has no interest in that. The fact that *National Tank Co. v.*

Brotherson this court was faced with NATCO's investigation as well as the insurance company's investigation. And pretty clear, this court held that NATCO was a proper party to argue in favor of no such privilege. In this case, you clearly have the investigator privilege, that is the party communication privilege and they go out and they hire their own engineers to take a look at this. In that context, I don't think that there is any serious dispute, but that the insured and the insurance company have an interest in those privileges. And I don't think that one can just up and waive the other privilege. And in fact, whenever Ford saw fit to sue the 5-year old it was our firm who wound up representing her under the auspices, certainly with the approval of State Farm.

So, in that context, we were clearly acting on behalf of not only of the Archers' and Cohens but also on behalf of State Farm.

ABBOTT: But that occurred after the court was _____?

LAWYER: Absolutely. But I think that it speaks to the nature and ownership of the privilege and the relationship involved. This court, I do not think, wants to get into drawing fine lines between maybe you anticipated that this party was going to sue you arising out of this transaction but you did not foresee that that party was going to sue you, and , hence, it's privileged as to this claim and not as that claim. I don't think that is the law under anticipation of litigation. I don't think that is the law under the party communications privilege.

ENOCH: Let's parse away the insured and the insurers. Would State Farm under the facts of this case be able to claim that the research cause of this wreck was done in anticipation of litigation? Could they withstand a challenge to claim that the Kent Report is a privileged document?

LAWYER: Absolutely. And in fact they did that. The claims adjuster testified that she had been contacted by an attorney on Dec. 13 in regard to a potential claim. On top of that she testified that she was investigating for those potential claims, and in addition to that, on page 183 of the record, she testified that she was also concerned where there was a possibility, I should say, that the truck who the Archer's hit was going to wind up filing a lawsuit.

ENOCH: But that privilege applies to that particular litigation and nobody brought any sort of claim like that against State Farm?

LAWYER: It applies to that particular litigation and this is that particular litigation. I don't think that the court has ever drawn a distinction that says: If you are involved in a multi-party wreck, and you anticipate suit 1, 2 and 3, and institute an investigation to defend /yourself, and you don't think about no. 4, maybe it's the comp carrier, maybe it is some adverse party, maybe it is the landowner whose property you damaged, and you didn't think about it, I don't think that if you are maintaining an investigation as to 1, 2 and 3, that this 4th one that you did not foresee immediately is somehow not privileged.

I don't know that post-obtaining the report vitiates and somehow changes the nature of the underlying material. If it was privileged when it was created, then it was privileged when Ford bought and paid for it. And the TC was certainly within her discretion to rule and impose the sort of sanction that she did.

ENOCH: If Ford had brought a subpoena against State Farm, or State Farm's expert evaluation in this automobile they can _____, you think under the state of the law on that work product _____, State Farm would prevail in maintaining _____?

LAWYER: I don't think they would prevail in the work product. I think they would have prevailed under anticipation of litigation _____ party, communication privilege.

What Ford really wants is some sort declaratory judgment from this court saying that they can use this report later on. And I don't think that's a proper use of mandamus. First of all, remember that all this evidence that this is essential, this is key, and this is the heart and soul of our case, that was never presented to the TC. In fact, this court is the first court that's ever been blessed with that _____ when it was filed in the affidavits accompanying the motion for leave to file.

HECHT: Why is it abuse of the discovery process to request potentially _____?

LAWYER: I don't know that it is to request it. How you obtain it would certainly be an abuse of the discovery process.

HECHT: Why is that?

LAWYER: If Ford had opened the window and State Farm crawled in, ____ through the file and taken it out...

HECHT: But they can do that if there was consent. If I ask you to show me your file with regards to a particular client, and you do it, have I committed discovery abuse?

LAWYER: I think that you have in some instances. For instance: if there is a rule 11 agreement, that limits that. Second, if you then realize you can't use that report, and go out and subpoena it, and trump a motion to quash, as was done in this case, I mean just because they have the Kent Report doesn't necessarily do them any good. They don't have any proof about form, they don't have it in a manner that they can use it at trial, they don't have it in a manner that an expert will reasonably rely upon it. I think that there are going to be serious issues at the trial court level as to whether or not the Kent Report can ever come into evidence under *Robinson* and _____. I think that those are all issues that speak to whether or not there is an adequate remedy on appeal.

GONZALEZ: Would you talk about the rule 11 agreement. Mr. Knight says: all the agreement says is that we are not going to serve interrogatories on your side. There is no agreement. They were not beyond that.

LAWYER: The rule 11 agreement is in the record under Tab 26. I don't think it says: we're agreeing not to send interrogatories. Apparently Ford now claims that they view this as a one-way street. We, Ford, have received in discovery didn't want to respond to it so we entered into this. But I don't think that's a fair reading of it. And it certainly is not the reading of it at the TC, the judge who actually read the testimony gave it.

I think that there were significant issues as to whether or not the rule 11 agreement was violated, and she was in the best position to tell that.

GONZALEZ: Specifically, what is your claim about the agreement? How was that agreement violated?

LAWYER: I believe that the rule 11 agreement was violated by sending out discovery to State Farm _____, and that was clearly done prior to the time that rule 11 agreement was _____. I don't know that paying for it, however, in a _____ and improper that is, I don't know that in and of itself technically violated the rule 11 agreement. Frankly, the parties didn't contemplate that someone was going to go out and buy evidence in this case, and so, that wasn't part of the...

GONZALEZ: Buying a report that already existed. State Farm has a legitimate right to try to recoup some of the $6,000 it paid.

LAWYER: I don't disagree with that.

GONZALEZ: So then how can that be _____ when they recoup $500 on $6,000?

LAWYER: I think that anytime a litigant seeks to get some information that way...

GONZALEZ: The report is already done. There was nothing to indicate the report was changed in anyway, modified, altered, deleted when Ford got it, is there?

LAWYER: You are absolutely right. And if the law is, that litigants can go out and buy evidence from...

GONZALEZ: Buy a report.

LAWYER: Buy a report, buy evidence, buy witness statements, buy photographs...

GONZALEZ: But you're implying that by "buying" a report that that's going to shade the

conclusions, you're manufacturing something that doesn't exit. The person who pays for it wants a specific result by the mere fact they are paying for it. That's not this case, is it?

LAWYER: I agree. And that's not what I am suggesting. I am suggesting that there is something wrong. I think that there should be something wrong with a law which says: You can go out talk with a party who is in privity with your opponent and buy evidence from that. Now if that is the law, if that is acceptable, then this court should say so. I think that the AVA takes a different view of it.

BAKER: Is State Farm a party in this litigation out of which this arises?

LAWYER: No, sir.

BAKER: Does it make a difference that they are not a party?

LAWYER: Not in this context because they were in privity with the party is what I meant to say. If you are buying a report, you're buying it from someone who is in privity with _____.

ABBOTT: Were they in privity with the party that they may sue?

LAWYER: They were both in privity with the party..they had both claims there. It is not unusual for a liability carrier both defend and have to respond to a lawsuit. For instance, if there is an incident where someone is injured and it happens off the premises. Their homeowner's policy would be triggered. They may be sued for causing an injury to the other person's property and their homeowner's policy is going to have to defend it. At the same time they may have an action against a third-party for those injuries. And it's not at all uncommon from the liability context to have both an adverse relationship with the insured, and a joint defense with the insured, as is done here.

SPECTOR: Was the report made available to the plaintiffs before this lawsuit?

LAWYER: I think that if the plaintiffs had asked for it it would have been made available to them.

SPECTOR: Did they have it in their possession?

LAWYER: I can't tell from the record whether or not we actually had it in our possession. That's not clear in the record and was never raised.

HECHT: Well if Archer is going to sue Cohen, is it Cohen's privilege or Archer's privilege? Are they both entitled to it?

LAWYER: I think that you have to look to see how and why it was developed.

HECHT: Just say Archer sues Cohen, is it privilege or not?

LAWYER: I think as between the two of them it's not. I don't know that that allows you to reveal it to third-parties. I mean if one client is upset with another client and they both have an attorney/client privilege with the same lawyer, and there's a dispute there, I don't think that opens it up to _____. I don't think the entire world is then entitled to that sort of information.

But there is absolutely no reason why the exclusion of the Kent Report if that what it comes down to cannot be reviewed on appeal. It may be that Ford gets another group of lawyers, get's their 5th or 6th group of lawyers, and decides not to introduce it at time of trial. It may be that under *Robinson and Daubert* that it is excluded. It may be that it is accumulative. Ford claimed to have evidence from Andrea Archer that she said that the brakes didn't work. If that's the case, then maybe they don't need the Kent Report.

I do not think that the TC committed an abuse of discretion by enforcing a rule 11 agreement, sanctioning a party that went around a motion to quash, and paying for evidence that was generated under the ostracize of the privilege. I do not think that is the law, that is abuse of discretion. I do not think that should be the law.

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REBUTTAL

LAWYER: When the investigator called State Farm, he couldn't have made it more clear that: "I am representing Ford in its case against your insured, and I would like a copy of that report." And the claims adjuster testified unequivocally that she understood that. The idea that any of this was covert is ridiculous. The record reveals that we got the report at 8:45 a.m., on March 2, that was before anybody had any idea plaintiffs were going to file a motion to squash the subpoena that we had issued. Everything we did was out in the open and above board.

ENOCH: It seems to me the key to his argument is this report was generated in anticipation of litigation for the purposes of saying it's a privileged document?

LAWYER: I think that is the key to his argument. But I don't see he comes even close to meeting it. The only evidence why...actually there is no evidence I don't believe in the file why specifically the Kent Report was generated. The claims adjuster testified that the reason this claim's file existed, including the Kent Report were two: I was investigating coverage for State Farm; and I was investigating a potential liability claim against the driver. That means it's not privileged in an affirmative claim against Ford. In fact, if it were part of a claim's investigation like the *Blackmon* case in our brief says: The insurance company owns the privilege and can assert it against the insured until liability on the policy is established. In this case, liability on the Archer's policy still hasn't

been established. So _____ the deal, then State Farm _____ the privilege and was perfectly within its rights to waive it when it decided voluntarily to give a copy of the report to Ford and plaintiffs have no grounds for complaint.

If the report was generated in anticipation of a potential liability claim against the driver, Cohen, then 1) that's not this case; 2) the adjuster testified the only potential claim against Cohen that she foresaw were the passengers of the car. And before we got the file by subpoena, the plaintiffs asked for and received the whole file. The plaintiffs are all represented by the same counsel. If the report was generated anticipating that Archer might sue Cohen, all the privileges were certainly waived the minute it was given to Archer's lawyer.

What Mr. Gonzalez says violates the Rule 11 agreement, and I wrote this down. He said: serving a subpoena on State Farm. We didn't do that. The way this played out was on Feb. 28, the court reporter issued a subpoena and it was served on plaintiffs, which is merely their right to receive notice on it. It was not served on State Farm. And when we got the motion to quash or when we got word of the motion to quash was coming, Ford told the court reporter: Don't serve this on State Farm. Let's see what happens with the motion to quash.

The subpoena was served on State Farm in May, and the rule 11 agreement was filed in March. So there is no way that rule 11 was violated by serving the subpoena on State Farm. It happened 6 weeks after the _____ expired.

Adequacy of remedy by appeal, there's two reasons that we should be entitled to mandamus. One is the one I've already discussed, and that that test shouldn't apply piecemeal to an order that the court reporter has already decided _____. But even if it did, I think we meet *Walker v. Packer* on the clause that says: If you have a viable defense, and it is severely compromised by the TC's discovery _____ (that's what we have here. Not some incidental trial ruling that this is not admissible. We have a discovery _____.) then you're going to _____ by _____ adequate. Separately in *Walker v. Packer* it says: The appellate remedy may _____ deny discovery _____ part of the case.

I think what Mr. Gonzalez meant to say is that we attached affidavits to our petition for writ of mandamus in this case, that we had not submitted to the TC _____. Those affidavits are from our experts and they say: It's my opinion that the brakes were working fine, and the basis for my opinion is the Kent Report, and I'm not aware of any other evidence that I could base my opinion on. So, if I can't base _____ court, I don't have anything to say.

handicapped