ORAL ARGUMENT — 2/3/98
97-0825
AUSTIN V. HEALTHTRUST

ROSENBERG: I suppose this is the case and many cases which come before this court, that the underlying facts are somewhat secondary to legal issues being presented. However, I would like to briefly acquaint you with the facts given rise to Ms. Austin's claim.

Ms. Austin worked as an emergency room nurse for the Gulf Coast Medical Center in Wharton. In July, 1992, she reported to her supervisor that a co-worker who was a fellow nurse was stealing narcotics for his own benefit, and working under the apparent influence of narcotic drugs. As is the case in most wrongful discharge cases, the respondent in its brief on the merits has apparently claimed that Ms. Austin's termination was due to something which had nothing to do with her report of her co-worker; however, in moving for summary judgment, the only basis that the respondent brought before the court was that Texas law does not provide a remedy for the facts alleged I point this out because in its brief on the merits, the respondent claims that Ms. Austin was terminated because of her refusal to treat a black patient. I believe that's a highly inflammatory allegation.

This morning, however, we're not here to determine the true reason for Ms. Austin's termination, that's a question left for people more suited than us to answer the question, in this case a Wharton county jury, we are here to discuss whether or not on the facts alleged, Ms. Austin has a cause of action that is, or should be recognized under Texas law?

HECHT: Would she have one under existing statutes now?

ROSENBERG: No. The respondents point out in one of the amicus _____, art. 4525(a), which is the nursing statute. That statute was passed by the legislature in 1983; however, subsequent amendments to that statute came into fruition in later times. There is one section which deals with wrongful discharge. In that statute it's §11 or 11a. If you look at the enactment date of that, I believe it was Sept. 1993, it was definitely 1993, and they were all passed in September, so it was after the cause of action accrued, so the answer to you was that there would be no statutory remedy.

HECHT: No. I mean if the circumstances arose today, she would have a statutory remedy?

ROSENBERG: No, also, because that statute addresses complaints made to the state agency governing nurse examiners not to your supervisors. So the answer again would be, no.

HECHT: What about §161.134 of the health & safety code?

ROSENBERG: That deals with nursing homes.

HECHT: No, that's 242.133. Section 161.134 is about hospitals.

ROSENBERG: Hospitals, co-workers, she may or may not have a cause of action. The enactment of that statute was again subsequent to the cause of action in this case.

HECHT: It was in 1993 again.

ROSENBERG: Right. There was a wave of legislative activity right about that time.

ABBOTT: So what you're saying, there has been since this incidence arose legislative action creating a cause of action for this type of situation when the report is made to a governmental agency?

ROSENBERG: Correct.

ABBOTT: Why does that not lend credence to the notion that the legislature in considering this they could have established this cause of action, not only for reporting to an agency, but also for reporting to a supervisor or some other authority at the hospital, and why would that not...since they decided not to go down that route, why should that not mitigate towards a conclusion that we shouldn't go down that route either?

ROSENBERG: Because our Texas SC has recognized a public policy exception to the at-will doctrine. Not every single question is rightly brought before the legislature. The at-will doctrine is a judicially created doctrine. This court said in *Sabine Pilot* that we have the power to amend a judicially created doctrine, that's well within your power. The legislature simply can't ...when the legislature acts in enacting these statutes, as I see it, it acts in a re-active mode rather than a pro-active mode.

HECHT: But in either branch what we're trying to get at is what's good for the public? What's should the law be in that circumstance? And why doesn't the rejection of H.B. 62 indicate that at least that branch has decided this is not a good idea?

ROSENBERG: I can't speak for what was behind the legislature. I don't lobby the legislature. I try plaintiff's cases obviously. But what I see happening in this situation is, you have a conversion of interests dividing the legislature and were not able to come up with a true method in how we would enforce or police such a statute. The reason why the house bill that you just cited did not pass was not a policy issue as to whether or not we should have a private right of actual whistleblower case, but it was what guidelines? And a hangup was on the guidelines. It was a sole cause question. There was a view that took Justice Doggett's approach on how to resolve these whistleblower cases. And if you look at it and what this court subsequently did in the *Hines* case where you have a

subjective and an objective standard does really address the causation issue that this court already addressed.

I believe that this court is more suited to determine causation and standards of causation, then is the legislature because the questions have been phrased...been posed to this court many times since. In fact, in *Hines*, I hate to say if you look closely at your own opinion, but if you look closely to your own opinion, you don't limit it to whistleblower cases. You limit it to, or you actually expand the causation theory to whistleblower and similar cases. And I may be misusing a word, but the notion I got when I read *Hines* was that the causation standard was not only for whistleblower cases, but wrongful discharge cases in general. In fact as y'all know we just came out with the pattern jury charge, which I am proud to say I was an editor of, that's the standard we used, because it was mandated by the SC, the causation issue.

I will be the first person to step forward and say that the relationship between employers and employees in this state, the employment at-will doctrine should remain substantially inviolate. Obviously, I agree with it and support all of these exceptions, these statutory exceptions that Justice Hecht brought out, that preceded that, article 451, which we used to call 8307c, the Commission on Human Rights Act and statutory legislation such as that. I strongly disagree, and I wish to make this point very, very clear, I strongly disagree with the total eradication of the employment at-will doctrine. An employer as I see it should be free to fire and hire at-will, and likewise, an employee should be free to come as he does. I think that's fairly clear. I am not looking to open up a new pandora's box here.

There are instances, as in this case, where we've got to look back at the common denominator, the common denominator is public policy. Public policy sometimes mandates that we take a closer look at fundamental principles of law, such as, the at-will doctrine.

OWEN: Hasn't the legislature done that? Why should we create a cause of action that's any broader than the one created by the legislature?

ROSENBERG: There's only so much that we can legislate. We can't foresee every single instance occurring. Let's take a very remedial issue. Let's say you have a restaurant worker who observes that the restaurant is intentionally putting out contaminated food that could potentially cause botulism. Obviously, that's a public policy interest right there. But the owner of the restaurant says: You keep doing that, we bought this meat and we've got to get it out, and the restaurant worker complains about it. Well, under the state of the law as it is right now, even though there's a strong public policy concern, there's no remedy for this person. If he either reports it to a supervisor that a co-worker is doing this, or if he refuses to do it, there is a question because of the criminal penalties mandated in the *Sabine Pilot* doctrine. We can't then ask the legislature to come up with a board of restaurant examiners to make an antiretalitation provision there. The legislature simply can't cover the waterfront. There's too much there. And that's my problem, and that's why we've got to look at public policy, an underlying policy whether or not the facts of the case before this court

are strong enough to add a little expansion to the public policy exception.

As this court said in *Winters v. The Houston Chronicle*, this court did not forego the possibility of expanding the public policy exception to the at-will doctrine. It simply said: We're not willing to do it at this time on this set of facts. Two times since then, that I know of, the *Thompson* and the *Burgess* case, the plaintiffs in that case invited this court to accept the case on application for writ of error. Writ was denied in both of these cases.

If you look at *Burgess*, *Thompson* and *Winters*, all you have in those cases is whining and complaining. Somebody's having an affair with somebody: somebody is misappropriating company goods for his own good; somebody's working for personal gain on company time, things of that nature.

HECHT: *Burgess* was a little more serious than that?

ROSENBERG: Well *Burgess* had some equipment going into radiation activity. But if you read further in *Burgess*, the allegations also were that (I don't remember, that was the affair, or somebody working on private business), but there were other allegations. I refer to that as a shotgun petition or somebody will just allege a mired cause of action. I wasn't the one who was inclined to accept writ of error, but as I see it, trying to decipher in my own mind in preparation for this argument, the reason why writ was not granted was because of the public policy concerns. As I see it, this case invites the opportunity, the factual scenario is present, we can all agree not, that there is a great public policy interest in whether or not an emergency room nurse is 1) going to steal drugs from the hospital when no orders were written for these drugs; or 2) administer care to somebody while they are under the influence of alcohol; and that's the difference, that's the very strong difference.

SPECTOR: Under the law at the time of the incident, if this had been reported what action does the board take?

ROSENBERG: It wasn't reported to the board.

SPECTOR: But the law allowed reporting of illegal activity?

ROSENBERG: And you're assuming in this case a report was made to the board?

SPECTOR: If it had been made, what does the board do with that information?

ROSENBERG: From a wrongful discharge perspective?

SPECTOR: Public policy.

ROSENBERG: It initiates an investigation. It goes to the factual merits of the allegations, and it rectifies a situation.

SPECTOR: Can it take away a license of a nurse or something of that nature?

ROSENBERG: I believe it could. In this case, as I understand it, the nurse who was involved allegedly stealing the drugs is no longer working there. That person's been terminated.

* * * * * * * * * *

RESPONDENT

ENOCH: Let me ask you a question. There is a statute that requires Ms. Austin to report to the appropriate authority this misconduct. If she fails to report that misconduct is there some sort of sanction against her?

SCHULTZ: Yes. It says in the statue that the board can take some type of action against her. I think it's §10.

ENOCH: In the *Sabine Pilot* circumstance, it was an employee who refused to obey and order that would have been in his view an illegal activity?

SCHULTZ: Yes.

ENOCH: In this case an order from the supervisor to Ms. Austin to not report a conduct, is that a requirement by an employer to do an illegal act?

SCHULTZ: No it's not, because the duty to report, and what you talked about first is what happens if she doesn't report it, it's civil penalty not criminal penalty. So it is not illegal for her not to report; therefore, it would not be illegal, or they would not be asking her to do an illegal act by not reporting it.

ENOCH: Does this become a much closer question in this case where the nurse reports to the employer conduct that ought to be reported to an appropriate authority and the employer tells her not to report; does this become actually a closer case to *Sabine Pilot* than at first blow?

SCHULTZ: I don't think it does. Because I think that there's specific law that says: she is to report it. If she does report it, then she's already protected under these statutes not only from retaliation, but also she's immune from a lawsuit from the person that she's alleging is doing something wrong. They can't come back after her on a defamation claim, something like that. And that's why it's so important that the court give deference to the law that's already there because it's more specific than what the petitioner is asking for here. It sends a message to every registered nurse that if you report inappropriate conduct (and it sets out what that it is, it doesn't always have to be

illegal, it could be other things), then the law will protect you, the law gives you the antiretaliation, plus the immunity. And the important message that's sent to that is: We want reports to the board so that the board can keep track of who there's reports against and can police its own occupation. If you were to grant what the petitioner is asking for here, it wipes that whole thing out, because it's saying: You don't have to report to the board to still get this protection. Plus, that statute has specific other guidelines in it that require people to do certain things: When to report, when there's a presumption, all that kind of stuff. And if the court were to come back with adopting this exception, that would eliminate that.

The other statute that's very important here is a more general statute that was passed by the legislature in 1993 that says: that all hospital employees, not just registered nurses, can report any illegal acts. And under that statute, you would be required to bring a lawsuit; if you are retaliated against, you are required to bring a lawsuit within 180 days. If the court were to adopt what the petitioner is asking for here why would you use that statute? I mean that completely, really eliminates that statute that the legislature has already done.

Another important thing in this case to keep in mind is, that the legislature specifically looked at H.B. 622 in 1995, and said: This catch-all, one-size fits all whistleblower statute is not something that we're willing to adopt. The original H.B. 622 said: An employee who in good faith reports activities within the workplace that constitute a violation of the law, or would otherwise have probable adverse effect on the pubic resulting in physical harm or hazzard to the public health or safety. And that was rejected in committee. Then they tried to tone it down and they substituted a proposal that says: "the activities to be reported have to be illegal," and the legislature again rejected that. What they've said is: We want to instead of using a broad one-size fits all type statute, we want to pick out what things we think are most important, we want to decide who you would make that report to, because there's lots bigger issues than just protecting a whistleblower.

And this court in 1993, in *Graff v. Beard*, it said: We think it's significant in appraising petitioner's request to recognize common law social host liability that the legislature has considered and declined to create such a duty. And that's exactly what we've got in this case. Instead, what the legislature has done is specifically for registered nurses way back in 1987 it said: That if you are a registered nurse and you have reason to suspect that another registered nurse, which is what we've got in this situation, has exposed or is likely to expose a patient or other person unnecessarily to a risk of harm...or if that nurse is impaired, then you have a duty to report that in a signed written report to the board. Now, she didn't do that, otherwise, she would have sued under that statute.

What you've pointed out is if this had happened today, she would not only have that statute to rely upon, but she would also have the Texas Health & Safety Code, §161.134, and that provides a cause of action for an employee who believes that his or her hospital employer has retaliated against him or her for reporting a violation of the law. Both of those statutes give a potential plaintiff in a case like that actual damages, exemplary damages, attorney's fees,

reinstatement, lost wages, lost benefits. And also in the Texas Health & Safety Code, the legislature said: We think this is so important that we're going to require every hospital or health facility that falls within that statute to post this requirement, post this statute, so that the people who work there know that if they make a report of illegal conduct they are protected.

HECHT: Since 1987, the legislature has enacted several statutes. Why doesn't that indicate a movement toward more general whistleblower liability?

SCHULTZ: I think what it indicates is a movement that we're going to pick out the ones that are most important, and we will make statutes to address those. And the legislature specifically said: We are not going to use just a broad brush and cover complete whistleblower, and that's what I talked about what they did back in 1995. And in 1997, the issue never even came up with the legislature. But they have addressed issues especially since *Sabine Pilot* in 1985, I guess they got the message that this is something important, and that they need to make these laws in particular areas. But they look at it from a different view than what the court looks at it. Instead of addressing or creating law based on the facts of one person, they are looking at it from a much broader perspective. And instead of just protecting whistleblowers they are saying: Okay, what's important in this situation? I think what's important is, we want registered nurses reporting that other registered nurses are doing something improper. And, we, as the legislature think that the Board of Nursing needs to know that so that they can monitor their own. They've done something similar to that with doctors. Instead of saying: we're going to take a huge exception or a huge broad brush, we're going to make specific issues.

Recently a case came out of this court *Bohatch v. Butler & Binion*, the one about partners in a law firm, and I guess that addressed at-will. But the reason I bring it up is, the concern as I understand it in the concurrence and in the dissent was: What kind of message are we sending to other partners in a law firm? Well, the same thing ought to be looked at in this case and, that is, what kind of a message are we sending to registered nurses? I think what you want to send is a message that says: if you follow the law that's already there and report it to the appropriate board, then the law will protect you. And that's something that's completely different than what we had in the *Bohatch* situation.

GONZALEZ: Conversely the message to the health care industry is, that if you have a whistleblower that does not follow the statute but goes directly to their supervisor, you are going to get fired and you have no remedy?

SCHULTZ: Well if it's an illegal act, then the other statute steps in and you don't have to report that to the board. You can report that to a supervisor.

GONZALEZ: Stealing drugs is not illegal?

SCHULTZ: Yes. I'm saying under the statute that we've got they would be covered if they

were to go to a supervisor, administrator, state agency, or to a law enforcement agency, and that's under the Texas Health & Safety Code, §161.134. So they are protected. It's not necessary in that situation, if it's not a registered nurse, to report that to a board, you can do that through a supervisor. If that happened today, she could have taken advantage of both of those statutes, and they wouldn't be asking the court to create a common law exception for this situation.

ABBOTT: So, if we were to find in their favor, we would be in essence adopting what the legislature subsequently enacted?

SCHULTZ: Actually what you would be doing by that is eliminating these statutes. Because, like I said, if there is a 180 day statute of limitations that the legislature has seemed to be important, if you create this my understanding is there would be a 2-year statute of limitations that's applied to common torts, and why would anybody have to hurry to file within the 180 days? Obviously, the legislature thought that that was an important public policy issue too, is that if you're going to have one of these claims, you need to do it in a timely manner so that employers aren't sitting there wondering what is going to happen in the future.

Now there's a big difference between what came out in the *Sabine Pilot* case verses what we're talking about today. Telling somebody: You either have to commit an illegal act or you're going to be unemployed is much different than what we've got in this situation especially where this woman had remedies. If she had reported to the board, she would have been covered.

SPECTOR: Is there anything in the record, as Justice Enoch was inquiring, that the employer told her not to report or anything of that nature?

SCHULTZ: No, there's nothing in the record. What she says is: She was told by her supervisor not to tell anybody about this. And the other thing that's in the record, but since it was a summary judgment, we didn't bring this out was: He said that because he didn't want word to get back to the person who was taking the drugs before he could complete his investigation and confront this person and say: Are you stealing drugs from us and taking them at work? So that's what the record will show.

The rule that the petitioner wants us to set up really can also create some absurd situations, but one that could easily come up is: someone working in a hospital who goes to their supervisor or administrator and says: I've noticed that the residents are working 12-hour shifts and it is my reasonable belief, good faith belief, that that causes a potential danger to the public. I've noticed that after 11-hours they start to get tired, that kind of thing. Now certainly that is not something that's illegal; and, secondly, there are studies to show that there's nothing improper about that and that's the best way for these residents to learn, that kind of thing. But if you've got a situation where that person then gets fired, say 2 months down the road for whatever reason, they would have a potential claim under this because they can come in and say: Well I raised that issue, and I think that because of that, I was terminated. This is more than just a little exception. I mean

this would create a flood of litigation, because just about in any situation an employer who thinks that they have been wronged by their employment being terminated can come up with at some point they disagreed with their employer about some issue, they had good faith reason to believe that there was something that the employer should change, but I don't think that the court wants to create an exception that would make it so that...

PHILLIPS: An exception does not have to be that broad to encompass the relief that the petitioner seeks here?

SCHULTZ: But the relief that the petitioner seeks here is specific to the registered nurse situation, and there is already statutes that cover that much more specifically. And what the court would be saying by doing anything other than affirming the summary judgment is saying: first, we recognize that the legislature specifically looked at this issue in 1993 and turned it down, but we still think that there ought to be a change; and, also, it's saying: We're going to eliminate not only the two statutes that I have talked about, but there's plenty of other statutes. Like you point out since 1987, the legislature has adopted many statutes to cover different areas.

PHILLIPS: Haven't we created common law remedies that ended on the date the statute becomes effective. And I'm thinking of *El Chico v. Pool*, that's one such instance.

SCHULTZ: I don't think that that's what happened, but I'm not that familiar with that case.

GONZALEZ: There's nothing to prevent this court from giving Ms. Austin a remedy as they've requested, make it co-extensive with the statute _____. We can do anything with the judicially created exception, can we not?

SCHULTZ: You could. But what it does is it eliminates really...

GONZALEZ: How do they eliminate it?

SCHULTZ: But the statute of limitations changes the remedies available...

GONZALEZ: We could do the same thing here. We can do anything we want to with a judicially created cause of action and put any limits we want to. And we don't annul any statutes, we just make it co-extensive.

SCHULTZ: But why do that if there's already a law...

GONZALEZ: To give her a remedy. It's as simple as that.

SCHULTZ: To give this specific person remedy?

GONZALEZ: That's right. Yes.

SCHULTZ: But that creates so many problems and there's already a statute that would apply to anybody in her situation. In fact, if she had done the right thing, she would have a remedy.

OWEN: But the anti-retaliation statutes were not in place at the time this incident occurred were they?

SCHULTZ: I don't think that's right. There may have been a part of that statute that was amended, but it's not something that was added. The anti-retaliatory part of that statute was already in existence. He's right, there was an amendment to it, but it wasn't something that created that in 1993. That remedy was available to her if she had pursued it

ENOCH: The duty for her to report was to the board or an appropriate authority?

SCHULTZ: To the board or to TPAT(?)

ENOCH: And that existed at the time. And it's your view that also another provision existed at that time, that had she done that, she would have been protected in some measure?

SCHULTZ: Yes. And that's what she should have done. The board wants those reports so that they can govern their own.

GONZALEZ: The supervisor tells her: Don't take this complaint to me, take it to this other authority here, because we're interested in public policy, and we want to do what's right for our patients; you've given it to me but let me tell you, we're the wrong entity to file this complaint, take it to this board.

SCHULTZ: What happened is, they immediately did report it, that supervisor who is also a registered nurse did right, did what the statute requires them to do, and it was reported.

GONZALEZ: But then they got rid of Ms. Austin.

SCHULTZ: Six months later she was terminated. I don't agree with the facts they've got in the case. But on summary judgment our theory all along was there is no common law cause of action in this case, and to date there still is not, but there is a statutory remedy, and if she would have pursued that, we wouldn't be here. We may be here on a different issue, but we wouldn't be here on this one.

The *Sabine Pilot* case sent a message that upholding state and federal laws carrying criminal penalties is an important public policy and that people shouldn't have to choose between unemployment and being a criminal. A message in this case should be that we think it's

important for an employee especially those in a profession like nursing where there are statutory protections that that employee follow the laws that have been set up for that profession. Doing that sends a message not only to everybody that's in that particular profession, but it also sends a message to the legislature that we will uphold the laws that you have created, we like these kind of laws, these health care laws we want you to encourage people to make these reports and that encourage them to pass similar law where they think there's a specific need, not a broad brush exception, but where there is a need for it.

GONZALEZ: Help me understand your argument. You're saying at the time of this incident, the time the suit was filed, she had a statutory cause of action against anti-retaliation protection? Under what statute?

SCHULTZ: Under Texas Revised Statute 4525a, and §11 is the anti-retaliation provision of that statute.

SPECTOR: Did her supervisor immediately report this? If that's correct, then there would be no reason for her to report it?

SCHULTZ: Well what he did is he reported this to the Texas Pure Assistance ____, he reported there, and the statute specifically says you can either report it to the board, or you can report it to TPAT_____. He then also reported it to the board. So there was a report made. That's why the court says the registered nurse has to report it, not make sure your supervisor reports it.

* * * * * * * * * *

REBUTTAL

ROSENBERG: Justice Gonzalez, in the brief that they filed, the similar question such as the one you just asked was answered by Mr. Schultz himself. Section 11a, did not come to us until Sept. 1993. The answer to your question: Did Ms. Austin have a remedy back then, is no. On page 15 of their brief, footnote 9, they talk about 161.134. And Mr. Schultz himself says: Because this statute was enacted in Sept. 1993, it is not applicable to the instant case. Well statute 161 was not enacted until Sept. 1993, and §11a was not enacted until Sept. 1993, why should there be any difference when Mr. Schultz concedes in his brief that the second statute I just cited wouldn't apply?

Members of the court, Ms. Austin did the right thing. She reported illegal activity that had a very, very highly potentially adverse effect on the public health and welfare of whatever citizens of this state were being treated in the emergency room at that time.

Counsel brought up the *Butler and Binion* case. I'm going to use very, very core English but as a published opinion I want to read _____ concurring opinion:

What's the use you learning to do right when it's troublesome to do

right, and ain't no trouble to do wrong and the wages is just the same.

If Linda Gayle Austin would have sat on her chair and watched this take place, she would still be a nurse at the Wharton Hospital.

SPECTOR: I'm unclear here. She reported this to someone at the hospital, her supervisor, and then action was taken, is that in the record?

ROSENBERG: It's unclear what's in the record and what's not. I'm not going to come to this court and say Mr. Schultz's argument is outside the record. But what I understand from the way this case was pled or some of the pleadings that were filed is that there's an allegation that the person to whom the whistle was blown to, the supervisor, was a personal friend of the allegedly drug user and misappropriater.

SPECTOR: But my question is, she reports what she believes to be unlawful activity, and she was not terminated for 6 month, within that six months was action taken according to what she had reported?

ROSENBERG: I don't agree with the 6 months. I think it was less than that, but action was taken. I agree with counsel that there was a report eventually filed, an investigation took place, and the alleged misappropriater was not working anymore.

As this court might recall, the statute of limitations was never really addressed in the common law *Sabine Pilot* doctrine. The first time this court ever addressed statutes of limitations in wrongful discharge cases that were not already provided for by statute, I can't remember the name, it came to you from the El Paso CA, Johnson is in the style somewhere. In that case, this court adopted a two year statute of limitations for wrongful discharge cases. It was a case where the cause of action accrued when the person first realized that her job was no longer there. I'm not so certain that that doesn't deserve another look. I don't have any problem with a shorter statute of limitations.

OWEN: How does this court create an 18-month statute? The statute of limitations are created by the legislature. How do we judicially by fiat say: Well, we're going to create a new cause of action; oh, by the way, you've only got 18-months to bring it?

ROSENBERG: I don't think you can. But I'm just saying I don't have any problem with the fundamental appropriation or assigning of a lower statute of limitations. I don't know if that's a question that can be resolved by this court, because I think the legislature has to enact a statute of limitations in that situation. And you go back to a 2-year statute, I will concede this, I think it's cleaner to have a tighter statute of limitations, I just don't know how it's done.

The law offers protection, it's clear, but that didn't happen in this case. It

wouldn't happen until afterwards. The wrongful discharge statute didn't happen until after the cause of action accrued and Ms. Austin was left no remedy. There was a question about whether or not this is appropriately left to the Texas legislature. There has been some instances where there's been conflict or miscommunication between the SC and the Texas legislature. Most recently, the *Light v. Centel Cellular* case, dealing with covenants not to compete, you remember that this court issued its opinion in _____ *v. Walkenhut*, the legislature followed with some guidelines for the governing of covenants not to compete. What they did was take out the public interest factor, then this court came back in the *Light* case and defined what consideration was, and basically had to put Humpty Dumpty back together again after the legislature took a shot at it.

I'm not casting a stone at the legislature. I just think that although there are some questions that are better left for the legislature, but when we're talking about the amendment of a judicially created doctrine, that that's better left to this court