ORAL ARGUMENT - 04/23/97
96-0442
DAWSON-AUSTIN V. AUSTIN

LAWYER: May it please the court. This of course is an appeal from a divorce case which was tried in Dallas County. The parties were married in Minnesota in 1980; established their marital residence there and became involved in a corporation, which the husband had owned prior to marriage, known as Starkey Laboratories, whose principal place of business is in Minnesota.

GONZALEZ: Did you say they were married in Minnesota?

LAWYER: Yes.

GONZALEZ: I thought they were married in China?

LAWYER: I may have misspoken. Their first marital residence was established in Minnesota. The parties resided in Minnesota, and that was their first marital residence. After a few years the wife took up residence in their other residence, which was located in California. The wife eventually filed for divorce in the State of California, but did not have her husband served with petition. Immediately following the filing of the divorce case in California, husband moved to Dallas, Texas. And 6 months to the day following his move to Dallas, Texas, husband filed a petition for divorce in the 301st Jud. District Court of Dallas, Texas.

The husband's pleadings alleged no long-arm jurisdictional facts. Husband admitted in his pleadings that wife was a resident of California. Wife responded to this pleading and service with a pleading entitled Special Appearance, Motion to Quash, Plea in Abatement all subject to the above original answer is the official long winded title. It is interesting to note that on the very first page, and I believe it will be part of the demonstrative aid that Mr. Orsinger has brought for you today, that wife states that she objects to in personam jurisdiction. The wife says that the motion is filed prior to a Motion to Transfer or any other plea or pending motion, that she is not amenable to process she swears on the second page, that she is not a resident, nor was the last place of their marital residence ever in the State of Texas. She then goes on to secifically deny or to state specifically that she's never done business in Texas or committed any tort.

HECHT: Her special appearances only as to part of the action?

LAWYER: Her special appearance is in accordance with the holdings in Haufman v. Haufman; Fox v. Fox, and the SC case of Estin & Williams v. North Carolina is a pleading that she is amenable as...that the rim the issue of the divorce is subject to jurisdiction, but that her property and her personal obligations are not subject to in personam jurisdiction of this state.

Probably one of the leading text in this authority on this issue is authored by Mr. Orsinger at §20.6 of the Texas Family Law Service. He writes that: Texas courts in this situation recognized a visible divorce; and then states: Otherwise Texas does not recognize separable divorce. But that

is correct, your honor.

BAKER: Would you say again what her special appearance means within paragraph 2?

LAWYER: Paragraph 2, this special appearance is made to the severable claim asserted by Bill, wherein Bill seeks a division of the party's properties.

OWEN: The property that's at issue is separate property; is that correct?

LAWYER: It is. It is property acquired prior to marriage. Non-marital property if you use the terminology of common law states.

BAKER: But does that then mean that she objects only to the property division? Her special appearance does not then object to appearing as to her person in personam?

LAWYER: I would not read that that way because of the...

BAKER: Why did she say it?

LAWYER: The reason I wouldn't read it that way is because in I...

BAKER: I read that too. But why would she say what she said in II, if she's going to limit it? Why just not have II?

LAWYER: I think that the method of practice that has developed in the courts recognizes the concept of severable divisible ____ divorce in these situations.

BAKER: But they do that then doesn't the law vis-a-vis _____ appearance to say that if you appear for a limited purpose that you're there otherwise for all other purposes?

LAWYER: Yes sir and I think the other purpose would be as to the status of the divorce.

BAKER: So is the conclusion that she is there in personam?

LAWYER: I didn't reach that conclusion. No sir.

BAKER: If the court could enter an order granting a divorce, then they did it without her being served, waiver of service, or waive special appearance?

LAWYER: They can do it in personam of jurisdiction.

BAKER: But she has to have something happen to her is that right?

LAWYER: That's correct. But the assertion of that jurisdiction as I understand it under it under

the US SC cases is that divorce is a matter of status. It's an issue of quasi in rem assertion of jurisdiction and not an assertion of in personam jurisdiction.

BAKER: But without some appearance of hers you just can't grant divorces for people who are not before the court?

LAWYER: Without some service of her.

BAKER: Service by waiver of service or waiver of a special appearance? Because she is there with her lawyer in this lawsuit, then she goes forward with the divorce part.

LAWYER: That's correct. I would only say that I don't think a special appearance as to the division on status would be well taken. Since it's pretty clear that the fact that you're not a resident will not prevent the court from determining granting the divorce. It's only as to the issues of property and personal obligations.

The pleading which was, and I think the issue that we believe exists is whether or not federal law on the doctrine of severable divorce preempts the state law which holds that it is generally an abuse of discretion, or is impermissible to sever property from status at the TC level. But as everyone also knows and as written in the Texas Family Law Service, it is always done on appeal that the divorce is confirmed, but the case is remanded back for property division. So we do recognize severable divorce at least to the appellate stage. And I think that the true rule in the state is is that it is generally an abuse of discretion to sever property from the status of the marriage. And in our situation we believe that the federal law would preempt, and that the cases in Texas are several which submit to this.

In Fox v. Fox, the wife filed just the same special appearance that was filed in this case, wherein she filed and said: I don't object to Texas granting the divorce, but I object to any exercise over my person or my property as to my personal obligations between my husband or the division or divorce.

OWEN: I want to make sure I understand your argument. You're saying that the Texas TCs don't have jurisdiction over the separate property stock. They can't make an award of that in a divorce action in Texas; is that what you're saying here?

LAWYER: They would not have jurisdiction.

OWEN: They don't have jurisdiction?

LAWYER: Over in personam jurisdiction to determine her rights with regard to the enhancement of that stock, which is the particular issue in this case.

OWEN: And the husband has never lived in California so he could make the same argument in the California court I take it. So neither of the parties now reside in Minnesota, and there's no divorce pending in Minnesota, what court does have jurisdiction?

LAWYER: That's true. First off, there is no basis for the husband to object to the assertion of California jurisdiction and California does have jurisdiction in this case over the husband. That was a residence which each of them bought together.

OWEN: I'm talking about the stock.

LAWYER: The stock would go with the parties where their marital residence was or the state that would have the most significant contact with it under conflicts of law.

ENOCH: If the residence is owned by him aren't you still talking about in rem as opposed to personal jurisdiction? Because he owns property there California could dispose of the property there without him being subjected to personal jurisdiction, right?

LAWYER: It would be determined on Bill Austin's contacts with the State of California whether they are systematic and continuous, whether that was the place of marital residence or not, whether they had activities there where they had to do a residency in Minnesota and in Texas

ENOCH: If the stock, the shares, were located here in Texas, then Texas would have jurisdiction of that in rem as property regardless of whether she was ever in Texas or not?

LAWYER: I disagree. Shaefer v. Higner decides that I think pretty decisively that the situs of the stock does not determined in personam rights with regard to the obligations concerning the stock. Here's the point. What this case really grows out of is the combined efforts of the parties which enhance the separate property. And that is probably a personal obligation between the parties although it has a nexus to that certificate of stock, it has a nexus to that company. It arises out of their marital relationship and their obligations to each other, their duties of using their community time, toll and effort for each other. And so the certificate is an evidence of ownership. And its situs could be moved to anywhere, but it would not affect where the parties lived and what they did together that contributed to the enhancement of it.

What we are deciding in this case is Mrs. Austin's what we call in Texas a "right of reimbursement", what she is entitled to for this dramatic increase in value of the stock.

ENOCH: But again the court in Texas regardless of where she lives could decide the title of the stock? They could decide who has title of this stock?

LAWYER: Most commentators in effect Richards Article of 20.6 would disagree that that's probably inappropriate at this point and it's constitutionally infirmed in that regard because of the fact that the growth of procedural safeguards with Schaefer v. Hightner being the primary lead case would indicate that what you're doing is you're deciding wife's rights with regard to a piece of property and her ability perhaps to execute upon it if that were permitted in this state, which it is not on separate property, but her rights that are affected and have some nexus with that stock. It's a very complex question. I don't want to digress.

HECHT: Wouldn't the rule be different if it was realty? How can you own realty in a state and

not submit to its jurisdiction?

LAWYER: Well you've hit upon a very significant facet of this case.

HECHT: The stock may not even be issued; who knows where it is?

LAWYER: And it may be transferred in Delaware. It may be transferred on a corporate stock book in New York City. And you're right about realty. The facts of this case and its application especially with conflicts are very limited because in most circumstances 99% of it the parties are going to move to Texas together. They are going to establish a marital residence which is going to be sufficient basis for jurisdiction in determination of property rights.

OWEN: What I am trying to get out is just the legal theory of where we go with Schaefer v. Hightner. Let's just assume that you could not get in rem jurisdiction over the husband in California; you can't get in rem if we were to agree with you; you can't get in rem jurisdiction over the wife in Texas. Who does have the jurisdiction to decide this enhancement of the stock value? Who has the jurisdiction to make a disposition of that property since the parties no longer live in Minnesota?

LAWYER: In the facts you've given me I assume that there is no jurisdiction over husband in California?

OWEN: Correct. Just as you're arguing there is no jurisdiction of the wife in Texas. Assume that the same would be true in California.

LAWYER: Well I would accept the assumption although that's not a fact in the case. Then it would be to the last place of marital residence which would be Minnesota would be my belief...

OWEN: Where do we look to the law that tells us that it would be Minnesota?

LAWYER: Well I think that we would look at cases like Williams v. North Carolina, Eston v. Eston, Shaefer v. Hightner; Hoffman v. Hoffman is a case decided by the Ft. Worth CA; Fox v. Fox is a case decided by the Ft. Worth court. As I recall the Dallas CA has had more than one case involving the assertion of in personam jurisdiction with regard to child support obligations and whether or not you can determine the status of a child because the child is present at times. But you have certain other prohibitions about establishing personal obligations with regard to the children...

OWEN: So one of the parties would have to go back to Minnesota and file a third proceeding to get this specific asset divided up?

LAWYER: If you're correct that California has no jurisdiction.

HECHT: Why couldn't she sue him in Texas?

LAWYER: She could.

HECHT: Why couldn't he sue her in California?

LAWYER: He could. I mean any party can come in and take their jurisdiction.

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RESPONDENT

ORSINGER: I am here on behalf of the respondent to urge the court that the CA's opinion should be affirmed or that you should dismiss the writ as improvidently granted. And I wanted to initially give the court an overview of our petition on the 3 main areas in which you granted writ. One is the special appearance; one is discovery; and one is the conflict of laws question.

It's our view that there was a faulty special appearance because it was not verified and there was no proof offered at the special appearance hearing and that constitutes a waiver of jurisdiction.

BAKER: What about their argument that the petition had no jurisdiction on it? That's their argument there's no jurisdiction on facts so that they've waived it for that reason. All you've got to do is say I'm a nonresident.

ORSINGER: There is no case law in Texas that says that an allegation that the defendant is a nonresident concedes that there is no minimum contacts or no personal jurisdiction.

BAKER: You're position is there is no evidence in the record so what does the court look at to decide whether she's there or not?

ORSINGER: Ordinarily the court would look at the pleadings such as the verified special appearance and the supporting affidavits and the deposition testimony and the sworn testimony presented at the hearing on special appearances. We had none of those. She didn't verify her special appearance. Her affidavit that was attached, which is in the handout that I gave to the court, although it says it's under the penalties of perjury if you look at your jurat there is no jurat. It was just an acknowledgment before a notary that it had been executed. There was no oath.

PHILLIPS: Why doesn't the statute _____ over the rule?

ORSINGER: You mean the family code statute saying that an answer need not be under oath?

PHILLIPS: Yes.

ORSINGER: We believe your honor that that statute which goes back before the day that the special appearance rule even existed in Texas relates to the necessity of filing a sworn denial on the merits; and that the mere failure to file an answer sworn or not does not permit a default on the divorce. You still have to prove the divorce on evidence.

PHILLIPS: I assume when 128 was passed, this statute was not listed by the court, not sent by the court to the legislature as the statute was being modified?

ORSINGER: No it was not. And to my knowledge this is the first time it's ever been suggested by anyone anywhere that somehow the requirement of swearing to a special appearance or plea in abatement, or any other of the normal pleas that are required to be under oath is somehow obviated by the family code.

CORNYN: It can be amended?

ORSINGER: It can be amended. And Rule 128 says it can be amended.

CORNYN: Does Mrs. Dawson-Austin have a chance to amend it?

ORSINGER: She did have a chance to amend it but what she chose to do was to have a hearing on the special appearance. She requested a continuance to do discovery. It was denied. They proceeded to a hearing on the special appearance. It was denied. Then Mrs. Austin went forward with her attack on the service, her attack on the subject matter jurisdiction and her attack on a plea and abatement to a prior pending California proceeding. Only after all of that did she amend.

CORNYN: What were her alternatives? At the point where the court says: you didn't verify your special appearance and so I am overruling that.

ORSINGER: She should have asked the court saying: Your honor under Rule 128 I am permitted to request the opportunity to amend and I make that request. She should not have invoked the general jurisdictional authority of the court to rule on her alternative relief if she wanted to keep the issue open of her special appearance.

CORNYN: Why isn't that a gotcha?

ORSINGER: It's not a gotcha because it's written right in the rule how you are supposed to file a special appearance and then after awhile we put the safeguard in that if you have made the mistake that other lawyers make that you didn't verify it, request the opportunity to amend.

CORNYN: On the larger issue, or one of the larger issues, assuming hypothetically people who are residing in another state that one of the spouses moves to Texas for the sole reason of taking advantage of Texas' marital property laws, and brings stock certificates of the business with him, and that's the only contact with Texas, is that a good idea for Texas to encourage people to do that sort of thing by holding this court or any other court holding that you thereby establish the statement: the most significant contacts in terms of determining what the marital state is and how it ought to be divided?

ORSINGER: I agree that that constitutes forum shopping but it's not more forum shopping than moving from Minnesota to California, and filing a divorce; and it's no more forum shopping than trying to bring the divorce law of Minnesota into Texas. However, that's not what happened in this case, and the court did not find that happened in this case. The corporation that the husband owned has two factories located in the state of Texas. They have land in New Jersey, Florida, Oregon, California, Texas, Minnesota, they were married in China. This is a multi-state even multi-national

couple. They have property everywhere. They have a business that does business in a lot of different states. And there is no indication, no finding or not even any evidence that the husband was motivated solely by forum shopping to come to Texas.

CORNYN: I know you are arguing on the facts of this case that this is not the case that I asked you to hypothesize. But in the hypothetical case, is there nothing that a court or litigants can do to avoid that kind of blatant forum shopping clearly to get an advantage in the divorce proceeding?

ORSINGER: What I would suggest is that the jurisdictional rules themselves contain the necessary protection. If a party comes to a state and files for a divorce, we all know that they can get the dissolution of marital bonds based on domicile alone. It is also my view contrary to what Mr. Evans attributed to the written materials, that whatever state the divorce is in also has the authority to adjudicate the property that's located in that state, whether it's real or personal.

HECHT: Why if it's personal?

ORSINGER: Because it's long been recognized that it is proper for a state to exercise jurisdiction over the real property and the personal property that's located in the state. And in the handout that I gave to the court, I included copies of restatement §60 and 64, Restatement of Conflicts, and 60 says: the state has the power to exercise judicial jurisdiction to affect interest in the state which is not merely intrinsic; 64, subsection 2 says: a state has power to exercise judicial jurisdiction to affect interest in a share certificate which is within its territory.

HECHT: So if I and my business partner have a dispute over who owns our IBM stock, I can go to a state neither one of us have ever been in, clump down the stock certificates and ask for an adjudication?

ORSINGER: Well I believe that that situation I am not prepared to say that the court is required to extend jurisdiction then if the stock is only there for purposes of the lawsuit. I think that perhaps that's comprehended by the idea that it's intrinsic.

HECHT: Well what if I say I am going to move here, live here, stay here forever, and now I want you to decide even though the defendant, my business partner, has no contacts with the state whatever?

ORSINGER: I think under the recognized doctrines of jurisprudence that have existed over 100 years, that's perfectly permissible. I would also say it's permissible as a matter of constitutional law under Shaefer v. Heightner, but I also want to point out the subsequent case of the US SC of Vernon v. The Superior Court of California.

ENOCH: Under a portion of the Family Code it presupposes that you have to be here for 6 months. So there are some protections there for forum shopping _____?

LAWYER: Absolutely. You would have to live here as your domicile for 6 months before you can even bring a divorce proceeding. So that would ameliorate a situation where someone came here

and tried to file a suit first maybe a week or two after they came.

Now as a matter of constitutional law, in Schaefer v. Hightner, which Mr. Evans referred to, there was a statute in Delaware saying that all owners of stock were deemed to have their stock located in Delaware, and because the stock was located in Delaware it was the situs of the stock they could exercise jurisdiction over the nonresident owners based on this legal fiction that there stock was in Delaware. The US SC says we will not accept that fiction in this lawsuit where your lawsuit is not over the stock. You're not suing over the stock, you're suing over some unrelated activity and you're saying because fictionally their stock is located in Delaware we therefore have jurisdiction. But even in Justice Marshall's opinion he says: When the claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the state where the property is located not to have jurisdiction.

Now mind you, the difference is Schaefer v. Hightner was litigation unrelated to the ownership of the stock. In our situation ownership of the stock and the rights relative to being married to the owner of the stock were the core of the issue. It goes on to say further, this is Justice Marshall saying about the effect of Schaefer v. Hightner: it appears therefore that jurisdiction over many types of actions which now are or might be brought in rem would not be affected by holding that any assertion of state court jurisdiction must satisfy the international _____ standard. In other words, even in Schaefer v. Hightner Justice Marshall is saying: we're probably not going to affect the import of litigation of property located inside the state. But let me go on because the SC in Vernon v. Superior Court of California, 1990, took several giant steps back from the Schaefer v. Hightner case. And in that case in the lead opinion written by Justice Scilia he says: It goes to far to say as petitioner contends that Schaefer compels the conclusion that a state lacks jurisdiction over an individual unless the litigation arises out of his activities in the state. Schaefer like International Shoe involved jurisdiction over an absent defendant and it stands for nothing more than the proposition that when the minimum contact that is a substitute for physical presence consists of property ownership, it must like other minimum contacts be related to the litigation. So what the Vernon case says is that if you are going to assert jurisdiction based on the location of property within the state, it has to be a lawsuit relating to that asset. Not a lawsuit relating to some other event and "a hah" we found an asset here so we can litigate the other event because you have an asset here.

But under Scilias opinion, if you're litigating the rights in the property, that's okay. And on the next page he says: It is fair to say however that while our holding today does not contradict Schaefer our basic approach to the due process question is different. In other words, let's not stop with the analysis on Schaefer, although I think we win on it. Let's look at the Burnam case. Because in the Burnam case they said: If your litigation is based on interest in the asset that is located in your state, that comports with due process.

It's also important to recognize that the standard in International Shoe has to do with fairness and historicity of the exercise of jurisdiction. Does it comport with our notions of fair play that have existed over the years of our jurisprudence? And as I demonstrated in the restatement of conflicts, yes, the exercise of jurisdiction over property in the state is part of our judicial tradition. It does comport with our traditional notions of fair play and due course. And additionally we have a specific

restatement on litigating rights in shares of stock.

CORNYN: What are the fairness factors that militate in your client's favor?

LAWYER: He is the sole owner of these shares of stock. And it would seem reasonable that wherever he lives that court or that state would have the authority to adjudicate his ownership rights.

CORNYN: But if he was still in Minnesota with those shares of stock, there would be a different division?

LAWYER: There would have been no divorce in Texas to begin with. But, yes, if he was in Minnesota, the Minnesota divorce court has different authority from the Texas divorce court. So if a divorce had been brought in Minnesota for example, that court has the power to take separate property under certain circumstances. And also in violation of our tradition, the increase in value of separate property stock attributable to labor is considered marital and divisible rather than in violating separate. And that would violate our rule of Jensen and Balone.

HECHT: But that's a separate issue. What law applies?:

LAWYER: Yes, that's a conflict issue and I want to...

HECHT: Whether you've got jurisdiction in Texas or not, Minnesota law may apply, or not?

LAWYER: We say or not is very important because this court has already said or not and the legislature has already said or not. What happened in the case of Cameron v. Cameron there was an issue about whether bonds that were purchased with money earned in common law jurisdictions was community or separate and divisible when it came to Texas. Now what happened was the legislature adopted 3.63b of the Family Code. And in 3.63b they said: we are not going to evaluate all of these contacts with all these jurisdictions that people have lived in. If you get divorced in Texas you apply our divorce law. What would have been community is divisible; what would have been separate is not divisible. And that was legislative enacted but only for cases that were filed after the effective date of the statute. This court was squarely presented with a similar situation but a case that was filed before the effective date of the statute and, therefore, the statute did not control. And in Cameron v. Cameron this court said: We are not going to adopt the cumbersome conflict of law approach. We are going to adopt the policy of 3.63b as the common law of our state. This is rational and this is better. So if you will that makes divorce cases different from contract cases and tort cases.

HECHT: Why? Because the legislature could pass a statute in contracts that says no matter where the contract arose and what other rules might apply, if they sue in Texas, Texas law applies. They could do that.

LAWYER: They could do that. Now in this situation what happened was the contention was are the rights and property brought to Texas when the couples migrate here and do we have to look at the law of former jurisdictions to find out what power the court has over it? And what the legislature

said, which several other states had done, is to say well if they live so many years in such and such a state and so many years in such and such a state, well their retirement benefits are 2/5 under the law of this state and 3/5 under the law of this state, and they said: this is too complicated; we need to try a divorce case in Texas based on law we are all familiar with. So they passed a statute saying that if you have a divorce in Texas we are going to apply our distinctions of separate and community. And the court adopted that in Cameron as a matter of common law.

HECHT: It just looks like you could abolish all of the law of conflicts if the 50 states would agree to pass a law that says no matter what our state law of government is?

LAWYER: Yes, but there is special considerations in the family law arena. There are special compensations made. For example: minimum contacts now is widely recognized by every legislature in the US congress. You don't have to have minimum contacts to adjudicate custody and visitation. There was a time when people thought you did. The US SC truly has never spoken to that issue but every single state legislature in the US congress has agreed that that's not required. Even in Schaefer v. Hightner there's a footnote saying that status adjudications have a separate rule and we're not saying that our minimum contacts analysis is going to affect those status of adjudications.

We believe that the Cameron case has already ruled that you do not borrow the law of other states and that the legislature has said you do not borrow the law of other states to divide property in Texas. It is very important by the way to maintain the distinction which is ignored I believe in petitioner's brief. We're not talking about ownership rights. We're not talking about rights that the wife had in the stock before she came to Texas because she was an owner. She has not ownership rights. This is entirely his separate property and under Eggermyer v. Eggermyer a Texas court cannot take it away from him. So we already have a SC ruling in a statute that says that Texas law should be applied...

HECHT: But the increase may be community?

LAWYER: The increase is not community under Balone and Jensen. You have a right to reimbursement for undercompensation, but you do not have an ownership right and that was decided in Balone and carried forward in Jensen.

BAKER: The bottom line is the courts finally own the under compensation issue?

LAWYER: That is the claim that the wife has in this situation. She has a reimbursement claim and she has...

BAKER: Do you agree with that that it's all a reimbursement claim?

LAWYER: Yes, Mr. Evans said that, that they are not asserting an ownership right and if that's true then I don't know why they are trying to bring Minnesota law in. Because the essential difference between Minnesota law and Texas law is a right to ownership instead of a right to reimbursement. For us to say that this is a reimbursement case is to say that in fact Texas law

applies.

I do want to address the discovery issue simply because there seems to be so many differences of opinion at the CA level. In this situation we have interrogatories that were filed on the 30th day before trial declaring that two consulting experts were now going to be trial experts. It was disclosed in January, the case went to trial on July 1, it was disclosed in interrogatories in January that the wife had hired experts that they were consulting experts. But in those same answers to interrogatories, the wife said: all of our consulting experts are going to be testifying experts. So as long as January she had made the decision that they were going to testify. She said I don't have their opinion so I am not going to disclose them. On the 29th or 30th, the day before trial depending on how you calculate it, because even her lawyer in the TC says it was 29 days, she uncloaked these witnesses and said they are now going to be testifying experts. But the wife did not sign the answers to interrogatories and she did not verify them. And in fact if you read the answers to interrogatories you will find and look at the good cause hearing, that the lawyer was not even in touch with the wife. He had sent the interrogatories to her, she had not responded to him, and so at the very last minute he signed the interrogatories himself and filed them.

OWEN: As a practical matter how can a party verify a designation or disclosure in answers to interrogatories that it's true and correct. I mean the party doesn't know who the lawyer will call, the party doesn't know what the experts will testify to necessarily. Why is a verification meaningful when you are dealing with expert witnesses?

LAWYER: The most important reason why verification should be required for supplementation is that if you don't require verification for a supplemental answer to interrogatory, you eviscerate the sworn interrogatory practice. Because what will happen is that the original interrogatories that have to be under oath will now be: I don't have enough information to answer this. And then you will start getting your supplemental answers, none of which are sworn, and so what will happen is that by creating this exception, the supplemental answers to interrogatories do not have to be sworn, the exception will swallow the rule...

OWEN: I am talking about experts specifically.

LAWYER: If we talk about experts specifically. You do know whether or not an expert has been contacted and arranged to have them testify. You can swear to that under oath. If you have interviewed with them or...

OWEN: The party may not, the lawyer might. But a party may not.

LAWYER: Well that's true. But the party is responsible for the knowledge of all of their agents. And the verification is important in this situation and even the signings important in this situation because the lawyer who filed these answers to interrogatories had them filed in April. He filed the supplemental answers in June. His client did not authorize the filing of supplemental answers and so we're going to trial in a case in which the client could say she had 8 lawyers in different states. She could say: I didn't authorize the filing of that interrogatory. I don't consider myself responsible. I didn't sign it. I didn't swear to it. And he had no authority to do it. And, furthermore, the

interrogatory answers do not say what the witness's opinion is. If you read them, and they are in this handout that I gave to the court, they say that it is the lawyer's belief that the value is so much, or the claim is so much. They never once disclose what the expert's themselves will testify to.

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REBUTTAL

CORNYN: Mr. Evans what was your client's expectation that Minnesota law would apply to the division of marital estate in this case?

EVANS: I think if you apply §6 to this, the reasonable expectation would have been was that their marital residence was established in Minnesota. I believe that it's a fair inference from the testimony that that was the last location at which they resided together. Now they both continued to work for the company right up until the time the divorce was filed. They were both participants in the company although there's no doubt that the time, toll and effort of Mr. Austin was significantly more important to that. But she had absolutely no expectation that Texas law would apply.

One thing I would like to correct is is that there is proof in this record of nonresidency. At the statement of facts, page 37 and 38 on the Nov. 10 hearing, the following occurred: Mr. Razio having no witnesses, having been ordered to proceed on his special appearance which was not set by him, but the special appearance motion to quash plea in abatement were all set by opposing counsel, and thus he was faced with the Hopson choice I think that may have been alluded to earlier. He tenders at this point the pleadings signed by Cindy Austin-Dawson. Now she signed that as a pro se party under Rule 13, which is at least a certification that she's investigated the facts and it's not brought for purposes of bad faith. She has pre-sworn declarant statements there to it that she was served in her home in California. And she has attached to it her petition for divorce in California, which is signed by her under penalty of perjury that she is a resident of California.

GONZALEZ: Which she had been dormant for over 6 months.

EVANS: Dormant if you consider negotiations in an attempt to reach an amicable settlement.

GONZALEZ: With those services?

EVANS: I do not dispute that. That's correct. A mediated result is much better than 4 years of litigation. But the point is when it was tendered by Kenneth Ragio, this pleading - respondent's exhibit 1 and the petition that is under consideration, Mr. Tindel counsel for Mr. Austin said I join the tender. There was a joint tendered exhibit. It was admitted without objection and thus under Rule 802 any hearsay contained within it was probative of the facts asserted to include the jurisdictional facts which are on the 1st and 2nd page. So there is evidence in the record. What about the request for recess? On page 41 and 42, it suddenly becomes apparent to Mr. Ragio that there is this defect in the jurat, that the clip and paste or the title of the pleading is going to cause him great problem. He suggested a recess and as you follow it you realize the TC says what good would that do? An unsworn appearance is a general appearance, and overrules his request for recess. So it does

appear in the record.

Supplemental interrogatories interests of justice Transamerica and a few other large issues may loom out here as a result of the granting of this writ. I would like to just address it. Six CAs at least have held that you do not have to verify interrogatories - supplemental answers to interrogatories. Prior to in the old rule and prior to the new rule there was a case out there that said a defective verification was not fatal. If this court decides that you have to swear to supplemental answers and you can't verify, this is going to play over into depositions. How would you supplement a deposition? Would you renotice the client's deposition? Would it apply to defective jurats an acknowledgment instead of a sworn statement? What if the notary doesn't have a certificate? The point is is to get the information out there.