In the

Supreme Court of the United States

FIRESTONE TIRE & RUBBER COMPANY, PETITIONER,	)	
V.	)	No. 79-1420
JOHN C. RISJORD, RESPONDENT.	)	

Washington, D.C.
November 12, 1980

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

FIRESTONE TIRE & RUBBER COMPANY,

Petitioner,

v. : No. 79-1420

JOHN C. RISJORD,

Respondent.

Washington, D. C.

Wednesday, November 12, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:01 o'clock p.m.

APPEARANCES:

HARVEY M. GROSSMAN, ESQ., 5900 Wilshire Boulevard, Suite 1470, Los Angeles, California 90036; on behalf of the Petitioner.

JOHN R. GIBSON, ESQ., Morrison, Hecker, Curtis, Kuder & Parrish, 1700 Bryant Building, 1102 Grand Avenue, Kansas City, Missouri 64106; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Firestone Tire & Rubber Company v. Risjord.

Mr. Grossman, you may proceed whenever you are ready.

ORAL ARGUMENT OF HARVEY M. GROSSMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GROSSMAN: Mr. Chief Justice, and may it please the Court:

This case presents two basic questions. Was the order denying Firestone's motion to disqualify John Risjord appealable, and if so, should that order be reversed?

QUESTION: If it wasn't appealable, then we don't ever get to the second question?

MR. GROSSMAN: That's correct, Mr. Justice.

Before addressing the questions, I would briefly summarize the nature of the factual backgrounds that give rise to them. In essence, Attorney John Risjord represents the plaintiff in certain personal injury suits against Firestone. Mr. Risjord's firm also has a long-standing relationship with the insurance company, Home Insurance Company, which insures Firestone against those very claims. The record reflects that for some 20 years Mr. Risjord's firm has represented Home, the insuror, on a case-by-case basis and throughout that time has held Home out to the public as its foremost insurance client by listing it first in a non-alphabetical listing of

insurance clients in the Martindale-Hubbell Directory.

In prosecuting his personal injury suits against Firestone, Mr. Risjord has included a theory of intentional tort, and based on that theory Home has disclaimed coverage under its policy. Firestone moved for Mr. Risjord's disqualification, contending that in his management of the personal injury cases he inevitably would be affected, consciously or unconsciously, by his awareness of Home's interest in defeating coverage, and that even if it were assumed that his original selection of that theory of intentional tort weren't prompted by Home's interest in determining whether or how aggressively to pursue it, he would necessarily be affected, clouded as it were, in his judgment, because he would know that pursuit of that theory would be helpful and its abandonment harmful to his firm's longstanding client, Home.

QUESTION: Mr. Grossman, may I interrupt you for a moment to ask you a question that doesn't really go to the merits of this case at all? In the respondent's brief I notice on page 2 the second very short, one-sentence paragraph said that, "Risjord has filed complaints on behalf of a plaintiff against Goodyear Tire & Rubber Company, alleging identical claims..."

Now, would a judge who had an interest, legal or equitable, in Goodyear Tire & Rubber Company, should such a judge consider disqualifying himself from this litigation?

MR. GROSSMAN: As I understand the question, it is directed to the matter of --

QUESTION: Goodyear Tire & Rubber Company.

MR. GROSSMAN: I would say, no, Your Honor. I would not view that as requisite --

QUESTION: Was or is the insurance carrier for Goodyear Tire & Rubber Company, Home?

MR. GROSSMAN: I don't know. Goodyear Tire & Rubber Company is not a client of our office, and I am not aware of this --

QUESTION: And it's not a part of this litigation, I know.

MR. GROSSMAN: No, and I am not aware of who covers them. I have no knowledge and there's nothing in the record that I'm aware of that indicates that Home was their insuror, but I couldn't state that for a fact.

QUESTION: Perhaps your brother will be able to answer my question. But so far as you're concerned, you see no --

MR. GROSSMAN: I see no problem whatever in that regard.

The trial court recognized on the undisputed facts Mr. Risjord did in fact face a conflict of interest, but the court then went on to say, in substance, that he nevertheless could continue to represent the personal injury plaintiffs

against Firestone if he obtained the consent of those plaintiffs and of Home Insurance Company.

Firestone appealed from that determination, contending that not only was this not a situation where a consent approach was really a viable solution, but the trial court's approach to the consent was flawed in any event.

QUESTION: Why was it any concern of Firestone's?

MR. GROSSMAN: Because, Your Honor, Firestone viewed the matter, or had to view the matter not only in terms of whether the case might be won or lost, but also from the standpoint of insurability. And irrespective of the impact of Mr. Risjord's conflict of interest on the outcome of the case, it would at the very least create a greater risk that any recovery, even if more remote overall, would more likely be fashioned in a manner to defeat coverage. And we submit that that would be a gamble that Firestone ought not to be required to take and that even if Firestone were willing to take it the public interest shouldn't permit it.

QUESTION: Well, let's assume Firestone, for a moment, doesn't represent the public interest but just itself. Why is it that Firestone would suffer if he were not disqualified?

MR. GROSSMAN: Well, assume that -- well, there are at least three ways that Firestone would suffer, we would contend. First of all, of course, if in fact his conflict led him to

pursue the case in a way that was guided in terms of insurability. We think that factor would prejudice Firestone because they are entitled to have the case presented by an attorney who is guided by the interest of the plaintiff, not of the insurance carrier.

QUESTION: Would the options open to the plaintiffs' counsel as to insurability or not, affect recovery against Firestone?

MR. GROSSMAN: As I said, they could affect the prospect that any recovery might be fashioned in such a way as to avoid coverage under the policy. And there's an additional burden, I would cite to the Court, and that is that even if Firestone ultimately prevails on the merits, Firestone could be prejudiced by being required to defend against claims which but for Mr. Risjord's conflict of interests would not have been pursued or if pursued would have been abandoned at an earlier stage of the proceedings.

QUESTION: Mr. Grossman, let me continue the interruption. Firestone had an action against Home for breach of fiduciary duty. Is that action still pending?

MR. GROSSMAN: That action is still pending, Mr. Justice.

QUESTION: Is it being held for resolution of this case, or just clogged in the calendar?

MR. GROSSMAN: No. It is simply pending in the lower

court and it has not been set for trial at this time.

I might add -- well, excuse me.

QUESTION: Your answer is basically that Firestone might have to pay a greater or lesser amount depending on how much insurability there was in its policy with Home, is that correct?

MR. GROSSMAN: Our position is that Firestone is put at risk because it stands a greater chance that recovery or the prospects of recovery might more likely be guided, or I should say the recovery might more likely be fashioned in such a way as to avoid coverage under Home's policy. And we think that's a risk which shouldn't enter into the case. Firestone shouldn't face the risk that the case will be guided, not just in terms of the victory of the plaintiff -- that's a risk that they obviously would have to take, but they shouldn't have to take the risk that the case would be guided in such a way that if plaintiff recovers the recovery would be more likely fashioned in a way that would prejudice the position of Firestone as against Home on its insurance policy.

QUESTION: Mr. Grossman, suppose this lawyer had withdrawn his name and had in turn given all of his plans, all of his trial briefs, to another lawyer. Would you have a complaint against that lawyer?

MR. GROSSMAN: If he imparted his matters of public record to another lawyer, we would have no quarrel with that.

QUESTION: If he handed anything he wanted to him, could you complain about it?

MR. GROSSMAN: Ordinarily, I would say, not unless there was some link between the two. Not if the other attorney were entirely independent and took over the case, it would seem ordinarily we would not be complaining about that. Assume the other lawyer has no connection with Home Insurance Company, there'd be no problem that I could see, ordinarily, in that instance.

QUESTION: Well, suppose he's a new lawyer that Home had just hired? I'm asking to see how hypothetical your position is.

MR. GROSSMAN: Well, if Home assigned --

QUESTION: You're still worried about what might happen, which has not happened, and might not happen. Is that what you're complaining about?

MR. GROSSMAN: The reason we are concerned, Your Honor, is that we --

QUESTION: You might have to pay more money.

MR. GROSSMAN: Well, not just the question of paying more money. We run the risk that we --

QUESTION: Well, are you pursuing the public interest or your own private Firestone interests? Because if you aren't, how are you going to recognize that as money?

MR. GROSSMAN: Our position, obviously, is prompted

by what we perceive to be Firestone's interests, but we believe in this particular case Firestone's interest happens to coalesce with the public interest because the continued prosecution of this case in the face of the conflict of interest that Firestone's complaining of in our view would be contrary to the public interest because it injects an element of the case, that is, the consideration of Home, a division of loyalty, a lack of independent judgment, which ought not to be permitted. And to further answer the question posed by Mr. Justice Marshall, I would say that we don't feel the question is hypothetical, in the sense that it is inevitable in our view that Mr. Risjord being human, knowing of Home's interest, that his judgment will be clouded by that awareness. The only problem we face is that we cannot determine, and really can't measure at any stage in the proceeding, just what the impact is. We won't be able to tell that even when the case is finally decided.

QUESTION: Is Home Fire Firestone's excess insuror?

MR. GROSSMAN: Yes, Mr. Justice Rehnquist, it is. Firestone -- so I can clarify that matter -- Firestone selects its own counsel. The problem here is not that Home has picked an attorney to represent Firestone, but rather it's the link between Home and the plaintiff attorney. And our concern, and I think the reason that the Court ought to be concerned with that situation, even though it differs

from the usual case where the insurance company selects an attorney to represent the defendant and the conflict arises in that context, is that where the insurance company is linked to the plaintiff's attorney, number one, he has greater control over the case than does the defendant's attorney; number two, there are two interests at jeopardy, the plaintiffs he represents -- and we submit that the risk toward plaintiffs, for example, ought to be represented by counsel whose judgments are not prompted by divided loyalty. That may not be Firestone's motives, but we believe that their interests coincide with those of Firestone in this instance.

And thirdly, and perhaps most importantly, where the insurance carrier is linked to the plaintiff in the case -- as in this instance, the plaintiff's attorney -- it's much more difficult to police the effect or impact of a conflict of interest on the myriad of tactical and strategic choices that an attorney like Mr. Risjord is going to make, or will have to make, in the course of the case.

And, of course, there's the danger that -- let's assume that Firestone ultimately attains reversal, there's still the danger that since a retrial doesn't start with a really clean slate, that in the interim the proceedings would have been indelibly painted with acts or omissions of Mr. Risjord prompted by his concern for Home.

And at this point I'd like to address a question I

think implicit in a question asked by Mr. Justice Blackmun earlier, and that is the possibility of a suit by Firestone against Home. The reason we don't feel that's an answer is, first of all, that the conflicts question we're concerned with in this instance is really separate from whether or not Home is accountable to Firestone.

And secondly, we believe the most appropriate place to determine the effectiveness of a consent approach which the trial court adopted here is the very proceeding where those consents are relied on -- and Firestone ought not to be relegated to the vagaries of whatever relief if any it might be able to obtain against Home, given the problems of proving damages, the impact of the action of Home on the outcome, and so on. Now --

QUESTION: Is your claim abuse of discretion?

MR. GROSSMAN: We don't believe any discretion was involved, Mr. Justice Marshall, because the trial court acknowledged that the conflict existed. The facts were essentially undisputed. The trial court erred, or went off base, so to speak, because it didn't render appropriate redress for the conflict, and we think in that context --

QUESTION: That it wasn't discretionary?

MR. GROSSMAN: We don't believe that there was any appropriate place for the trial court to exercise discretion in that situation. We don't believe that it was called upon

to exercise discretion in that context, just as we don't believe that this was a case where the trial court has decided any disputed fact issue which might be entitled to deference. It's simply a case where the trial court misperceived the consequences of its own findings of fact.

Now, the Court of Appeals for the 8th Circuit next considered the matter. And as I mentioned, Firestone's position was that the trial court's consent approach was flawed because they looked to the wrong party's consent, and consent wasn't viable.

The Court of Appeals for the 8th Circuit, without hearing argument, only addressed the merits in one sentence in which they stated, in substance, the trial court's action was an abuse of discretion and as I just mentioned, I don't think that really even addressed the problem.

Basically, what that court addressed was the question of appealability and held in effect that in that circuit appeals from orders denying disqualification would no longer lie.

I should mention one other fact. At the time of the motion the record reflects that Mr. Risjord was representing Home in one case, the Cannova case. Subsequently, he withdrew from that case and ultimately the case has been disposed of. Well, we submit that it doesn't really obviate the conflict, because irrespective of whether Mr. Risjord or his firm are

representing Home at a given instant, Mr. Risjord would be aware that his firm's potential future business with a long-standing client, Home, could be affected by whether his actions in the personal injury suits against Firestone tend to further or defeat Home's efforts to avoid coverage.

Now, turning first to a question raised at the outset, the threshold question of appealability, we contend that not only are the Cohen criteria satisfied but that the treatment of appeals of orders denying disqualification as appealable would be consistent with sound judicial administration.

Inasmuch as it's generally conceded that the Cohen criteria of finality and separability are present, the key question is whether the Cohen test of urgency is met. In other words, do we have a situation in which the appeal can wait until the judgment on the merits of the case or not?

We submit we can't wait, because in the interim the parties and the public interest will have suffered irreparable injury.

QUESTION: You would come out differently, then, on the appealability of an order disqualifying a lawyer, because there would be no finality under Cohen?

MR. GROSSMAN: It is correct that I believe a stronger case can be made for appealability of orders denying disqualification than of orders granting, but I think I would frankly acknowledge that even as to orders granting

disqualification, the general view that their appealability is not one that I would be prone to take issue with, although I think we have a stronger case under Cohen in the case of orders denying disqualification.

QUESTION: But you lack the finality element in Cohen, in an order granting disqualification, don't you?

MR. GROSSMAN: Well, I believe that would be a valid concern. I believe that would be a valid concern which isn't present here and as a matter of fact I believe that concern points up the fact that in our view the courts which have held that appeal is to be permitted where disqualification is granted, not where it is denied, really are proceeding in a sense topsy-turvy, because the stronger case can be made when the denial occurs, rather than where the grant occurs.

Now, again addressing the urgency factor, the reason we believe this injury occurs is essentially this, and why we believe appealability should be permitted. If we wait until the final judgment on the merits, there is the danger -- and obviously no one can say; it is a matter of prediction, because no one can say with certainty just what's going to happen in any case -- but there is a real danger that the case will become indelibly stamped or shaped by the fruits of a breach of confidence or by acts or omissions prompted by divided loyalty, as in the present case. And there's no way that an appeal for the final judgment on the merits could really remedy that.

And in terms of the public interest -- and we think that it is appropriate to address that question, irrespective of Firestone's personal concerns here -- the very fact that a case proceeds in the face, with the taint of a conflict, in our view would tend to undermine the public policy which proscribes conflicts of interest and would adversely color the public's perception of the administration of justice.

QUESTION: Well, do you think someone who might be sitting in a courtroom at this hearing, in the spectator's part, could get up and move for disqualification of one of the attorneys on the grounds that it was contrary to the public interest?

MR. GROSSMAN: While there is authority and there are cases suggesting that any attorney, at least -- leaving aside the question of a lay person -- any attorney who in a case, who was aware of a conflict of interest, because of the public policy considerations involved, does have a duty to call that to the court's attention. I believe that view is sound if that is the question.

QUESTION: No, that wasn't the question. The question was whether a lay person who presumably has as much interest in the public interest being enforced as attorneys do could get up and move for disqualification of one of the attorneys to the case being heard on the grounds of conflict of interest?

MR. GROSSMAN: I would submit, Mr. Justice, that if in fact that did occur it would be appropriate. However, I would state that in this instance, fortunately, we needn't address that situation because we feel that Firestone does have a very strong personal interest which entitles it to raise it, the question, for the reasons I have indicated. In other words, we feel there is a degree of private prejudice, so the Court in this case doesn't have to address the question whether a public interest concern alone would be sufficient. I believe it ought to be; I don't believe it's necessary to rest the decision here on that ground.

Now, the suggestion has been made that we don't have to allow appeal under the Cohen Doctrine here because the parties can secure relief under alternative means. One suggested is writ proceedings; another, permissive appeals under 1292(b) of the Judicial Code.

We submit, however, that if writs are kept within the limits that this Court has prescribed, and they're very narrow limits, they don't afford a proper means of redress in this instance. And on the other hand, we believe it would be unwise for the Court to disregard the limits on writs and allow them to be used in effect as substitute appeals because that would set the lower courts adrift without the benefit of the Cohen guidelines.

And as for permissive appeals, the very criteria the

statute lays down for such appeals would tend to preclude their use in many instances involving orders denying disqualification. For example, the very fact that those orders are collateral might be viewed as an indication that the disposition of the order -- or appeal from the order, I should say, would not necessarily further the ultimate disposition of litigation, as required under 1292(b).

And finally, on this question of appealability, I would submit that this isn't a situation where deferring appeal until final judgment is really helpful because, no matter what stage of the proceedings we look at the matter, there's just no way to tell what the impact of the conflict would have been. So we don't gain any benefit by waiting.

Now, if this is the case, the question is, why, if it would seem appropriate to nip a proceeding in the bud where it's tainted, have some of the courts failed to allow appeals? I think the answer rests on two misconceptions. The first, that this sort of appeal would deluge the appellate courts. The experience of the 2nd Circuit, which we cited, supposedly the worst case, does not bear out -- 11 published opinions in six years certainly doesn't account for the deluge. And it's worth noting that in a significant percentage of those cases the court below was reversed. And neither do we believe that there's any necessity for delaying the proceedings based on the appeal of a question. As a matter of fact, we haven't

delayed the proceedings here --

QUESTION: Mr. Grossman, the question really isn't whether there's a necessity for delaying, as I understand it. This is a 1291 issue, isn't it?

MR. GROSSMAN: Yes.

QUESTION: If it is a final order within the meaning of 1291, I suppose there's a duty to appeal within 30 days, isn't there, if it's a final order?

MR. GROSSMAN: That would be correct. And as a matter of fact, we would submit that for that same reason there's no need to look to alternative remedies because if the appeal lies under 1291, then this Court's Cohen Doctrine would indicate that's as far as we have to go. We don't have to look any further for alternative remedy.

QUESTION: That's right. If you want to preserve the objection, you've got to appeal within -- every time your motion is denied.

MR. GROSSMAN: That is correct. And Abney, I believe, this Court's decision in Abney teaches that if there is any abuse the court can control it by appropriate rules and policies, expedite appeals, and to --

QUESTION: Mr. Grossman, is there law on the question whether a motion to disqualify a judge that is denied is appealable immediately?

MR. GROSSMAN: There is relatively little on that,

and the little that exists would indicate that it's not appealable. I think the problem in that instance that distinguishes it from the situation we're dealing with here, is that where a judge is involved, the only real impact is on the disposition of the case on the merits. The argument is that the case will be wrongly decided and that of course doesn't give rise to the question of separability or the collateral nature of the matter

QUESTION: Do you think it's more important to get the lawyer out than the judge if there's a conflict of interest or something like that?

MR. GROSSMAN: Well, the problem with the attorney's disqualification is it raises a question of breach of confidence and of breach of --

QUESTION: So do -- a motion to disqualify a judge can raise the same kind of thing?

MR. GROSSMAN: No, but where the motion is to disqualify a judge, the ruling, or the matter really goes to the ultimate disposition of the case. The effect of it isn't that there be an intervening -- no, I would submit, Your Honor, that in the case of a judge disqualification, normally the challenge is not that during the interim he's going to be breaching loyalty or breaching confidence, using clients' secrets. Rather, that he is prejudiced in a way that will impair a decision on the merits, and because of that we submit that

that type of a case doesn't lend itself to disposition under Cohen because it's tied to the merits. It doesn't present the separability factor.

QUESTION: Well, but your argument is that this lawyer is going to pursue an intentional tort theory so that he recovers on a theory where there's no coverage. That affects the whole prosecution of the merits of the case, doesn't it?

MR. GROSSMAN: Well, not in the sense that Cohen uses the term, because we're not addressing a question which goes to the claim itself. It is true, I would concede --

QUESTION: Well, sure you are. Whether it's an intentional or a negligent theory goes to the claim itself.

MR. GROSSMAN: But the mere fact that a ruling may affect the manner in which the case is handled in our view doesn't dissipate the separability because, for example, in Stack v. Boyle, when we speak of excessive bail, which this Court held was appealable under Cohen. It's true that if the Court posts, or requires excessive bail, the client may not be able to consult with his attorney, and that may impair the attorney's prosecution of the case. But we would submit that is much too tangential to defeat separability under the Cohen Doctrine in this instance.

QUESTION: Mr. Grossman, isn't it true that where an intervenor files to intervene and it's denied, he can appeal,

but if it's granted, the other side cannot appeal? Isn't that true?

MR. GROSSMAN: That is correct, because --

QUESTION: Well, isn't that a lot like this?

MR. GROSSMAN: That is correct, Mr. Justice Marshall. As a matter of fact, I think that also addresses the question raised by Mr. Justice Rehnquist, and would be an argument for treating, if the Court were to so conclude, for treating denials of disqualification as appealable even if grants were not so treated.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Gibson.

ORAL ARGUMENT OF JOHN R. GIBSON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GIBSON: Mr. Chief Justice, may it please the Court:

In this case Firestone, that has never been a client of Risjord's, seeks his disqualification. This case involves no question of breach of confidential information. That admission is made abundantly clear in the reply brief filed by Firestone in this case. The only question relating to conflict is that -- and again, it is speculating what might be -- that Risjord in representing these plaintiffs could guide or fashion the case in such a way that would be harmful to Firestone and helpful to Home.

Now, this assumption is based on this factual

situation, and it is one in which the complete story has not yet come out. Firestone is saying that the Risjord theory is based on what he continuously refers to in his brief as a highly unusual intentional tort theory, and that Home has denied coverage for this theory. Now, what is not said is that Risjord has also pleaded counts in negligence and counts in defective products under Restatement 402(a), alternative counts. He has also pleaded, as was brought out a minute ago, these same theories against other defendants, Goodyear, Budd, Kelsey-Hayes, and we simply don't know who has their coverage. There has certainly been no record made in this case that Home has anything to do with those parties.

Now, the fallacy; not only has there been this lack of disclosure of this information, but the fallacy that Mr. Grossman, that Firestone must face, is this -- and I think the district judge knew when he heard the motion for disqualification, the common practice in products cases, in most litigation, is that the plaintiff's attorney is going to submit all of the evidence he has, he's going to submit his cases in the alternative, and the jury then or the judge will determine what the basis of liability is going to be.

So it is an alternative submission which is undoubtedly what we're going to have in this case, not simply a guiding and fashioning and a pursuing of one theory and an abandoning of the other theories. That simply isn't the

practicality of what is going to happen.

Now, the real conflict, as has been observed, is between Firestone and its insuror, Home. And there is a lawsuit that has been filed that raises that particular question.

QUESTION: We never get to any of this if we find that the order refusing to disqualify was not appealable, do we?

MR. GIBSON: I'm sorry, I didn't get the first part of your question?

QUESTION: We never get to this conflict situation if we were to conclude that the order refusing to disqualify Risjord was not appealable?

MR. GIBSON: That is correct, Your Honor. If this Court decides this case is not appealable, in the recent case of Coopers & Lybrand, which was decided in 1978, the Court found that the Death Knell Doctrine didn't apply, the Cohen Doctrine didn't apply, there was no appeal, and you don't get to this whole question of conflict and consent, which is tied in with the facts of the case. It simply isn't necessary to go that far.

Some of the courts of appeals have gone the next step and decided that question. Some of them haven't. But certainly there is no need to do this. But all of these facts were before the district judge, when he made his order in this case, and following that he fashioned the remedy of either

withdrawal from representation of one or the other of the clients, or obtaining consents.

Risjord first obtained those consents from the plaintiffs and from Home and then, following that, Risjord was asked to withdraw by Home, and he did withdraw, and following that, that case, that one case was the one case that Risjord had represented Home in for about a 10-year period. We have the deeply rooted argument, we have the Martindale-Hubbell listing. There is no question that they'd been listed as a client in Martindale-Hubbell. But the facts are that Risjord had represented Home in that one fire case, and they were simply one of six insurors, and Home had 10 percent of the risk. And the case was referred to him by an independent adjuster. That's not the real nature of --

QUESTION: Mr. Gibson, Home is not only listed in Martindale, it's listed first.

MR. GIBSON: That's correct, Your Honor. And Mr. Risjord in his testimony, in his deposition that he gave, said that he had tried to get a change made, he had suggested to them repeatedly that they alphabetize it, and he finally just gave up on it. They just wouldn't do it. They were certain that --

QUESTION: Who wouldn't do it? Martindale?

MR. GIBSON: Martindale just simply would not alphabetize it for him, and he simply gave up after repeated

requests.

QUESTION: You mean Martindale would not adhere to his request for a change in his listing of representative clients?

MR. GIBSON: That is his testimony, that he could not get them to alphabetize it. And that's in the record in the case. But the question -- and I might say, of course, that the district court did certify this case under 1292(b), but Firestone elected not to pursue that method of appeal, so that they appealed under 1291.

QUESTION: Do you know why they made that choice?

MR. GIBSON: I'm sorry?

QUESTION: Do you know why they made that choice?

MR. GIBSON: I cannot say, Your Honor. I don't know whether it was the passage of time or -- I just don't know. But they elected -- now, in the Coopers & Lybrand case, Mr. Justice Stevens's opinion in 1978, there is no attempt to seek the 1292 certification. But here it was given by the court and Firestone elected not to do so.

But the real underlying question on the issue of appealability in this case, I would suggest to the Court, is simply this, the Cohen Doctrine applies to a small class of cases. It is an exception to the rules of final decision and appealability, and the question before this Court, I suggest, is should this limitation, this exception, this small class of

cases be expanded to include a type of case that the courts of appeals have found is disguised harassment, an abused procedure, that which is used as a tactical and a strategic weapon.

Now, when we filed our brief in this case, I think on page 21 we cataloged some five circuits that had so characterized appeals in disqualification cases.

QUESTION: Well, don't all lawyers use tactical and strategic weapons in trying to beat their opponents?

MR. GIBSON: They certainly do, but the courts have particularly pointed out that this is a particular subject of abuse, and the five circuits have -- in the last month two more circuits have joined the procession. The 3rd Circuit in the P. Stone case which we have in our supplemental brief joined in this observation. And I just learned yesterday of another decision from the 1st Circuit. And if I may, Mr. Chief Justice, I would provide a citation of this case to the Court by letter. But the 1st Circuit on the 31st of October of this year, In re: Continental Investment Corporation, Case No. 80-1362, also made a similar observation, and also determined that cases of this nature, where there was a denial of a motion to disqualify, were not appealable.

There has been a consistent movement since about 1976 away from the rule of appealability. When this case came to this Court on petition for certiorari, Firestone referred to the Silver Chrysler case from the 2nd Circuit as the leading

case for the rule that disqualification denials were appealable. In May of this year that decision was overruled by the Armstrong case in the 2nd Circuit, and that joined the procession of Community Broadcasting from the District of Columbia, Melamed from the 6th Circuit, this case below, and now, October 31, the decision of the 1st Circuit in the Continental Investing in which they also joined in the ruling that these cases are not appealable.

QUESTION: Mr. Gibson, is Goodyear Tire & Rubber Company tangentially involved in this case?

MR. GIBSON: They are named as additional defendants in a number of the cases where that's applicable. There is a particular case against Goodyear only that's part of this record, and identical claims are served against them.

QUESTION: Who is their insurance carrier?

MR. GIBSON: The record is silent on that subject. I would certainly think, if Home had been their carrier, we would have known about it, but the record is simply silent as to who their -- we know that Home is Firestone's carrier, but the record is silent on the Goodyear carrier, and I simply have to assume that had Home had some relation to any of the other defendants, it would have been made part of the record in this case.

QUESTION: And you don't know, personally?

MR. GIBSON: I do not know, sir.

QUESTION: Was there a motion made in any of the Goodyear cases to disqualify Mr. Risjord?

MR. GIBSON: This is the only motion to disqualify.

QUESTION: So then Goodyear has no interest in the outcome of this case?

MR. GIBSON: Firestone who is arguing here that what's good for Firestone is good for the public, is the only person making the complaint in this disqualification matter.

There are two recent decisions of this Court, 1978 decisions, the Coopers & Lybrand case that I referred to; and U.S. v. MacDonald, Mr. Justice Blackmun's opinion, in which the Cohen Doctrine was rejected. Coopers & Lybrand involved denial of a class certification motion, MacDonald involved a denial of a motion to dismiss on a speedy trial basis.

And one of the grounds asserted in both of those cases was that those particular types of case were effectively reviewable on appeal after the conclusion of the case. And I would suggest in this case, where we are dealing with what could be and what might be the possibility that the case would be guided or fashioned in a way favorable to Home and unfavorable to Firestone, that it can only be effectively reviewable after trial, because we don't know what's going to happen in the trial of this case. First, the court might rule that the intentional tort theory isn't submissible and isn't going to the jury at all. The court might rule that all theories

go, in which case we don't have the situation that Firestone complains of in which they're simply saying that it's intentional tort only and there's no coverage, and therefore the the load is all on Firestone and goes off of Home. We simply aren't going to know. So the case is really only effectively reviewable at the end of the case.

And these courts of appeals decisions that have led the procession away from appealability have based their reasoning on the fact that these cases do involve factual situations and they are effectively reviewable after trial. And that's Community Broadcasting, Melamed, Armstrong, and the new Continental Investment case that's just come out.

QUESTION: Is the trend the same way with respect to orders granting disqualification?

MR. GIBSON: Several of the cases, Community Broadcasting, Melamed, I think the 8th Circuit in this case, and Armstrong, all held that because the orders granting disqualification parted a client from the lawyer, and because the order granting really certified that there was merit, that there was a reason for treating them differently. Now, Armstrong recognized that maybe this was an inconsistent position, and the -- I think Chief Judge Feinberg in his majority opinion simply accepted the fact that it might be logically inconsistent, but the practicality of it made this a desirable course.

I think the 1st Circuit in this recent opinion simply

determined that it would not reach that question. But I think there is, of course --

QUESTION: So the answer to my question is, yes? The trend generally is to treat them both -- is not -- no, it's no? To treat them differently?

MR. GIBSON: Yes. The trend is to treat them differently. That's correct, Your Honor; that's correct.

Armstrong, particularly, pointed out that in cases of this kind the trial court can always reconsider the motion, that protective orders can be issued, and that, of course, reversal and a new trial on the appellate level are sufficient remedies to take care of the particular problem involved in this kind of case.

Now, the recusal cases that were the subject a minute ago are one specific incident where courts have refused appealability -- and I would say that there is far more problem from the public perception of justice so far as recusal motions of the trial judge than is involved in the attorney situation. Certainly, if they're even, the recusal cases are strong evidence that there should be no appeal in this type of case.

Mr. Justice Stevens in Coopers & Lybrand observed that rulings on venue, summary judgment, and discovery, really were not different from determinations of class action issues that were involved in that case and certainly they are not different from disqualification motions.

There are other issues. Now, the 1st Circuit, the new 1st Circuit decision, Armstrong, both pointed to the important legal issue as an aspect of the Cohen Doctrine. Armstrong recognized that there was a split in this reasoning. Cohen did say that it was the right to security for cost that was the issue in that case that merited appealability, and if it had been a discretionary ruling, this would not have been an appealable order.

Again, Armstrong goes back and forth on whether this is an issue. The 1st Circuit new decision does say that this is an issue. In the Coopers & Lybrand decision, Mr. Justice Stevens was particularly writing about the Death Knell Doctrine. But he said there that to allow appeals from cases that turned on the facts throws the appellate court into the trial business, and obliterates the distinction between the function of the trial court and the function of the appellate court as has been set out in the statutory scheme.

One other reason for the importance of the issue being a factor in this case is that 1292(b), the discretionary appeal statute, did not exist when Cohen was decided. It now does exist. And in those cases where there is the possibility of irreparable harm, 1292 is available and 1651 mandamus is also available.

QUESTION: As an element necessary for certification, you would have to say that it is a probably dispositive issue

in the case, don't you?

MR. GIBSON: That's correct, Your Honor.

QUESTION: How could you ever say that the disqualification of a lawyer was a probably dispositive issue in the case?

MR. GIBSON: Well, not -- I think under 1292(b) a legal question has to be shown, but I think all of these circuits have discussed the fact that these discretionary procedures will be available where there is irreparable damage posed.

QUESTION: Well, how have they answered the question that I just put to you?

MR. GIBSON: Your Honor, I don't think they do. I don't think they do. To my knowledge they've not.

Two other issues where Cohen is not met in cases of this kind: separability of issues, the collateral doctrine, -- that's the very wording, that's the very description of it -- simply doesn't apply in this case, and the Solicitor General's brief that has been filed deals with this question because the entire theory of Firestone is that the trial of the case could be fashioned, or could be guided, in a way that is going to be harmful to Firestone and helpful to Home. And we're not going to know, really, until after the case has been tried. So their very argument in this case is tied up with how the case is going to be tried. Risjord --

QUESTION: Was there any discussion in the trial court when this question came up as to whether the judge ought to entertain this suggestion on behalf of Firestone?

MR. GIBSON: The suggestion on behalf of Firestone that it consent? Your Honor, I think the record on that --

QUESTION: No, as to whether or not this objection ought to be heard at all? What interest did the objector have in it? Did the judge feel that there was really a case or controversy?

MR. GIBSON: This is the point that we raise so far as the merits of this case are concerned --

QUESTION: I know you do.

MR. GIBSON: -- that Firestone was never a client of Risjord.

QUESTION: Yes.

MR. GIBSON: And that the disqualification motion should only have been available to a client.

QUESTION: I understand; that's your position now. But was that position expressed in the trial court?

MR. GIBSON: I don't think there was discussion of it at the time the trial court considered this. The record does not so inform.

QUESTION: The trial judge must have thought it was a suggestion that deserved ruling on?

MR. GIBSON: I think we'll know --

QUESTION: I'd like to know. I wondered, if it were raised there --

MR. GIBSON: I think we simply can't know. The trial judge found -- of course --

QUESTION: I suppose the transcript would show what the discussion was?

MR. GIBSON: That's been -- that's in the record, and I think there's no discussion of that at all. I think the trial judge found that there were many speculative areas raised in the motions, and he said, I'm going to disregard all of those. And he got down to this as the nub of it, and he said, any possibility of adverse effect on independent representation can be dispelled by filing the consents or by withdrawal from the one.

QUESTION: Mr. Gibson, do you happen to know, has the trial been held in abeyance pending the outcome of this appeal?

MR. GIBSON: The trial has not been held in abeyance, and I understand discovery has proceeded on. In this particular case it has not resulted in the delay that many of the courts of appeals say attend the filing of such a motion. But --

QUESTION: Some trial courts view an appeal under 1291 as requiring that the trial proceedings stop, whereas an appeal under 1292(b) permits the trial proceedings to go on. But they went on here in either event.

MR. GIBSON: In this case discovery activities have proceeded on and I think they are still a ways away from the trial of the first case.

But, of course, in this case Risjord has been before the court of appeals, Firestone has been before the court of appeals, and the discretionary finding of the trial court has been passed upon by the court of appeals, and Firestone has had the very appeal and the very review that it says the appealability question would entitle it to. And we have cited cases in our brief that this Court frequently has said, where two courts, where a trial court and the court of appeals have passed on the factual considerations, this Court will not open them up and look into those issues.

QUESTION: Well, this is a troublesome point for me because in both the recent 2nd Circuit case here and the 8th Circuit here they first hold the order as nonappealable, and then they go ahead and decide it.

MR. GIBSON: I think as a matter of procedure in those circuits, these orders had been appealable and they were ruling that from this point on they would not be appealable, so that the lawyers would know what the rule is going to be, and they went ahead to pass on the merits, because the change was made in these cases.

Now, the 1st Circuit didn't do that. But the 2nd did, the 6th did, the 8th did.

QUESTION: Well, Judge Lay certainly spelled it out specifically, that it was prospective and not applicable to this case.

MR. GIBSON: That is correct, Your Honor. That is correct, Your Honor.

QUESTION: That he had to, in order to rule.

MR. GIBSON: That is correct, Your Honor.

And that's -- I think it was to give the day in court, to go the extra mile, that led the 8th Circuit as well as the 2nd and the 6th to take this procedure, because then the new procedure was spelled out.

But the consents were obtained and were filed. The withdrawal took place and really, DR-5.105. And here we are today in the highest court of the land that is a court of law, and I suggest there are many reasons why disciplinary action should be filed with the state court disciplinary mechanism. We have one in Missouri that is appointed by the Missouri Supreme Court. And I suggest that's an appropriate place for advancing the public interest. In this case I think there is the aspect to the case of attempting to rid oneself of a very vigorous advocate, a lawyer that has probed deeply, that is -- I think publicity in a companion Goodyear case was one of the grounds in this motion that went its way. They have probed into the Watergate documents deeply to find a connection with the slush fund theory, and where they're going with that

I don't know, but we have a vigorous advocate, and as these courts in the appealability issues rule, the tactical, strategic use of this, the disguised harassment, the artifice of what I think Armstrong refers to as "the artful movement" is much with the case.

QUESTION: Of course, Mr. Risjord was a member of the Missouri Bar.

MR. GIBSON: Yes.

QUESTION: If he were not, suppose he were a visiting lawyer, what you have just said would be rather inapplicable, wouldn't it?

MR. GIBSON: Well, of course, I think, under the new rules, the new Uniform Rules of Attorney Conduct, the district court would have the means at its disposal to take care of the problem. And of course I think under those procedures they would refer to the State Bar organization where that exists.

QUESTION: Who is the district judge here? Judge Collinson?

MR. GIBSON: Judge Collinson.

In one of the cases, the relief that is requested by Firestone in this case in the trial court simply was that Risjord be disqualified in any case in which Home had coverage or in which confidential information had passed from -- in any way. Now, the admission is clear that there was no passage

of confidential information, because Risjord's only representation of Home was in the totally unrelated fire case. And the other basis for the motion was not satisfied because Home did not provide coverage in the Hale case. And this simply shows the overbroad reach of the motion that is filed in this case.

But the whole issue on merits, the whole issue on who has the right to consent -- and I might say that this question of consent is discussed in the 4th Circuit opinion in the Aetna Casualty case that's referred to in the Solicitor General's brief. And they point very clearly to the fact that it is the client that is required to give the consent. And in that case, a foreigner to this attorney-client relationship is attempting to assert this theory. And the 4th Circuit held that it is the right of a client that exists to give the consent, and that's exactly what was done in this case. Consents were obtained from Home, they were obtained from the personal injury claimants.

And I might say, in discussing the question of the discretion of the trial court, one other fact that has not come before this Court, there is much assertion in the argument of Firestone that Risjord obtained consents from the unsophisticated plaintiffs. And this Court was not told in the briefs that three of those unsophisticated plaintiffs had referring counsel and that those referring counsel had discussed the consents with their clients, and had obtained the consents from

the clients and the referring counsel had also given their consent.

But it is omissions of fact of this kind, and of course there are assertions that Home and Risjord are acting in tandem. There is no evidence of that at all. And the district judge said, there are many speculative matters that he is not going to get to, but here we have the question of purely a factual determination. We have the trial court exercising discretion, finding the facts, reaching conclusions from the facts, fashioning a remedy of either withdrawal from the representation of one or filing the consents.

Risjord did both of those things. There simply is no issue in this case that requires disqualification, and the entire issue really can turn on the fact that this is a case that should not be appealable, and that ends the entire discussion.

I ask this Court to affirm the ruling of the district court.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. the case is submitted.

(Whereupon, at 1:58 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1013

FIRESTONE TIRE & RUBBER COMPANY

V.

JOHN C. RISJORD

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: William J. Wilson