

NO. 06-0875

IN THE SUPREME COURT OF TEXAS

FORD MOTOR COMPANY,

Petitioner,

v.

EZEQUIEL CASTILLO, et al.,

Respondents.

On Petition for Review from the Court of Appeals for the
Thirteenth District of Texas, at Corpus Christi,
(Court of appeals cause number 13-04-00638-CV)

PETITIONER'S OPENING BRIEF ON THE MERITS

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STATEMENT OF THE CASE

- Nature of the Case:* The judgment at issue is based on the alleged breach of an oral settlement agreement entered while the jury was deliberating on the plaintiffs' claims in a product liability lawsuit. Defendant Ford Motor Company withdrew its consent to that settlement and requested permission to take discovery into whether the note from the presiding juror that had precipitated the settlement was the result of misconduct or outside influence. That request was denied. The trial court thereafter entered summary judgment against Ford on the settlement agreement.
- Trial Court:* The Honorable Abel C. Limas, 404th District Court, Cameron County, Texas.
- Trial Court's Disposition:* Based upon a settlement agreement reached while the jury was deliberating, but from which Ford withdrew its consent, the trial court entered judgment for the plaintiffs. *See* Appendix Tab 1.
- Parties in Court of Appeals:* Defendant Ford Motor Company took an appeal from the trial court's judgment. The Appellees were Ezequiel Castillo, et al, the plaintiffs in the trial court.
- Court of Appeals:* Thirteenth Court of Appeals, Corpus Christi, Texas.
- Court of Appeals Disposition:* Affirmed in a published opinion with one dissenting justice. *See Ford Motor Company v. Castillo*, 200 S.W.3d 217 (Tex. App. – Corpus Christi 2006, pet. filed); Appendix Tab 2. The panel consisted of Chief Justice Valdez and Justices Castillo and Garza. Justice Garza authored the opinion of the Court. Justice Castillo filed a dissenting opinion.
- Requested Disposition from this Court:* Ford Motor Company seeks a reversal of the trial court's judgment and a remand to permit Ford to undertake discovery into whether there was misconduct on this jury or the exercise of improper outside influence on it.

STATEMENT OF JURISDICTION

The Supreme Court has jurisdiction over this appeal under TEX. GOV'T CODE §22.001(a)(1) and (6) for two reasons. First, because the justices of the court of appeals disagree on a question of law material to the decision. And second, because, in its majority opinion, the court of appeals has committed an error of law of such importance to the state's jurisprudence that it should be corrected.

ISSUES PRESENTED

1. Whether it was reversible error to deny discovery into potential juror misconduct and improper outside influence in the presiding juror's sending of a question during deliberations, where that note was not relevant to those deliberations and was sent over the objections of the other jurors but precipitated a settlement agreement on which the plaintiffs obtained summary judgment without any such discovery.
2. Whether it was error to strike affidavits from the other jurors concerning the circumstances under which the presiding juror sent this question, where the affidavits were not being used to attack a verdict, or a judgment entered on a verdict, did not offer the statements of the presiding juror for their truth, and were offered to show the possibility of improper outside influence.

STATEMENT OF FACTS

The description of the underlying facts by the court of appeals is incomplete and not entirely accurate. Ford thus feels obliged to provide the following summary.

I. During deliberations, the jury sends a note that provokes the parties to settle.

This judgment is based on a settlement agreement that was reached during the trial of a product liability case arising out of a vehicular accident. The five plaintiffs (now Appellees) were injured during the crash of a Ford Explorer in Mexico.¹ Alleging that the accident was caused by defects in the vehicle itself, the plaintiffs sued Ford Motor Company for strict product liability, negligence, and related theories.²

Following a month-long trial on those claims,³ the case was submitted to the jury on Friday afternoon, September 24, 2004.⁴ The jury deliberated for a short time that Friday and then recessed for the weekend. It returned to deliberate on Monday, but was then off Tuesday because the presiding juror had a family medical problem.⁵

While the jury was out, the plaintiffs and Ford conducted settlement talks. Ford's counsel later told the trial court that, on Tuesday night, the parties had been moving toward a settlement, with plaintiffs demanding between \$1.9 and \$2 million, and Ford

¹ See 1 CR 3 (Plaintiffs' Original Petition); 1 CR 141 (Plaintiffs' Second Amended Original Petition); 1 CR 173 (Plaintiffs' Third Amended Original Petition); 1 CR 199 (Plaintiffs' Fourth Amended Original Petition); 1 CR 224 (Plaintiffs' 5th Amended Original Petition).

² See generally 1 CR 3 (Plaintiffs' Original Petition); 1 CR 141 (Plaintiffs' Second Amended Original Petition); 1 CR 173 (Plaintiffs' Third Amended Original Petition); 1 CR 199 (Plaintiffs' Fourth Amended Original Petition); 1 CR 224 (Plaintiffs' 5th Amended Original Petition).

³ See 4 RR 39 at line 23, to 40 at line 2 (Judge Limas says that he and his court reporter determined there were something like 21 "actual days we were in trial," in addition to approximately seven days of hearings on motions.).

⁴ 2 CR 9-18 (Court's Charge read to the jury). See also 2 CR 325 (affidavit of juror Virginia White),

⁵ See 2 CR 326 (affidavit of juror Virginia White); 2 CR 333 (affidavit of juror Samuel Ramirez, Jr.).

offering \$1.5 million.⁶ Then, shortly after the jury resumed its deliberations on Wednesday morning, Sept. 29, it sent out a note, signed by the presiding juror, asking “What is the maximum amount that can be awarded?”⁷ (A copy of that note is included in the Appendix to this Brief at Tab 4.)

Predictably, the parties interpreted this note to mean that the jury had reached the damage questions and, pursuant to its instructions,⁸ must have therefore answered one or both of the liability questions with a finding against Ford. The plaintiffs’ settlement demand quickly escalated, and the parties shortly thereafter reached a settlement for \$3 million.⁹ They announced the existence of that settlement (although not its terms) in open court.¹⁰ The trial court released the jury without a verdict ever being returned.¹¹ He thanked the jurors for their service and told them they could now speak to the parties’ lawyers, but he made it clear the jurors could refuse to do so if they would rather not:

So I’m going to release you from the rule that I’ve instructed you all along for you not to discuss this case and so, you all are released from that restriction and you now may, after I’m through with you, you all may remain if you wish to. If you wish to remain a few of you, all of you so that you can discuss the case or the lawyers will ask you questions. They can ask you questions, I’m going to allow that and I always encourage my jurors do that especially in a case

⁶ 4 RR 13 at lines 14-18. (Representation to the court by Ford’s counsel, made without contradiction, objection, or disagreement, that “the night before [plaintiffs’ counsel] was down to 1.9 or 2 million and I was at – my client was at 1.5 and my client said that, you know, we’ll split the difference with you okay. That’s where we were.”).

⁷ 2 CR 323.

⁸ The Court’s Charge submitted two liability questions to the jury: (1) design defect in the roof strength of the 2001 Ford Explorer, and (2) design defect in the handling or stability of the 2001 Ford Explorer. *See* 2 RR 9-10; 2 CR 344-45. Each remaining question in the Court’s Charge was then expressly conditioned on the jury having answered “Yes” to one of these first two liability questions. *See* 2 RR 11-18; 2 CR 346-59.

⁹ *See* 4 RR 4, 7, 10-11.

¹⁰ *See* 3 RR 3-4.

¹¹ *See* 3 RR 6.

like this. . . . Now, you don't have to do that. It's up to you. You don't have to do that but I do encourage it.¹²

II. Ford suspects misconduct with the jury; it asks to take discovery from the jurors but is denied permission.

After the trial judge was finished speaking with them, Ford's counsel went into the jury room to meet the jurors.¹³ He found that the presiding juror had left immediately and was no longer there, but that all of the other jurors had stayed and were willing to talk to him.¹⁴ What they said was strange indeed. It turned out that the jury had not decided either of the two liability questions against Ford, and it had thus never reached any of the damage issues. To the contrary, the jurors had decided the first question in Ford's favor by a vote of eleven to one.¹⁵ They were still deliberating on the second question when the case settled, and the resolution of that question seemed to be headed strongly in the same direction – eight jurors voting in favor of Ford, two in favor of the plaintiffs, and two undecided.¹⁶

So Ford's counsel asked the jurors the obvious question: why then did they send out the note asking about damages?¹⁷ The jurors responded by telling him they had not sent it.¹⁸ The note had been sent by the presiding juror, Cynthia Cortez, on her own initiative, without the approval of any of the other jurors, and over the active objections of several of them -- who had pointed out that the question was not relevant to the liability

¹² 3 RR 6 line 18, to 7 line 11.

¹³ 4 RR 26.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 4 RR 27.

¹⁸ *Id.*

issue on which they were deliberating and that the damage issues – which were explicitly conditioned on that liability issue -- might never even be reached.¹⁹

Struck that, under these circumstances, the sending of this note seemed odd and suggested the possibility of outside influence, Ford filed a Motion to Delay Settlement requesting permission to undertake discovery into that possibility.²⁰ This Motion was supported by four affidavits, several of them handwritten by the jurors themselves, describing the course of the jury’s deliberations and the behavior of the presiding juror in sending out the note.²¹ These affidavits stated that the jury had answered the first liability question in Ford’s favor, was still deliberating on the second liability question when the case settled, and had never reached any of the damage questions.²² The affidavits also confirmed that this note, asking about any limit on the damage award, was sent on the sole initiative of the presiding juror, without the consent of the others, and over the explicit objections of at least some of them.²³ Further, the affidavits stated that the presiding juror had been the only vote in favor of the plaintiffs on the first liability question, and was one of the few in favor of the plaintiffs on the second question.²⁴

Referring to “disturbing questions about the circumstances under which that note originated,”²⁵ Ford asked for permission to take discovery into the possibility that it was

¹⁹ *Id.*

²⁰ *See* 2 CR 317.

²¹ *See* 2 CR 324 (affidavit of juror Virginia White); 2 CR 331 (affidavit of juror Ester Herrera); 2 CR 333 (affidavit of juror Samuel Ramirez, Jr.); 2 CR 336 (affidavit of juror Rosa Linda Salinas).

²² *See* 2 CR 325, 333.

²³ *See* 2 CR 331, 334, 336.

²⁴ *See* 2 CR 325, 333.

²⁵ 2 CR 317.

the product of improper outside influence.²⁶ In the alternative, Ford asked the trial court to itself undertake an investigation into that possibility:

Ford requests that it be allowed to take discovery, or that the Court independently undertake discovery, on the issue of outside influence in the drafting of this note.²⁷

Ford repeated this request at the hearing on this Motion, explaining that it wanted to determine “whether or not there was any outside influence on a juror that caused that juror to do something improper who happened to be the foreperson of the jury.”²⁸ Ford asked the trial court for permission to undertake discovery in order to make that determination:

We would ask either the Court to have a hearing and let us bring the jurors in to make a record of what happened, and or, alternatively, to allow us to depose the jurors, which we cannot do without the Court’s permission.²⁹

Once again, Ford asked that, if it was not permitted to employ discovery for this purpose, the trial court conduct its own investigation into the possibility that there had been improper influence on the jury:

[I]t is to me something that should be of concern to the Court if there was any outside influence, and it may be that nothing will show up about it at all, but there’s only one way to find out and that’s to have either the Court do its own investigation and or the Court allow us to bring the jurors in and have a hearing in front of the Court and or to depose them and then come back to the Court with our findings and make a determination as to where we go from there.³⁰

²⁶ 2 CR 320.

²⁷ 2 CR 320.

²⁸ 4 RR 7 at lines 21-24.

²⁹ 4 RR 3 at lines 11-15. *See also* 4 RR 27 at lines 15-18 (“we don’t know how else to do this because we don’t have authority to subpoena somebody for a deposition and so forth without – and that’s what we’re asking the Court.”)

³⁰ 4 RR 4 at lines 8-16.

The trial court acknowledged the appropriateness of the investigation that Ford's counsel had initiated,³¹ and it recognized that Ford might feel understandably compelled to continue that investigation.³² The court also said the affidavits were "proper" and sufficient "to apprise the Court of something that could have gone wrong."³³ Yet, although a "very tough decision,"³⁴ the trial court denied Ford's Motion.³⁵

III. The trial court orders Ford to pay the settlement and denies Ford's request to reconsider.

Shortly thereafter, plaintiffs filed a motion to enforce the parties' settlement agreement, asking that Ford "be ordered to fund the settlement amount."³⁶ The trial court held a very brief hearing on that motion³⁷ and then, ten days later, signed its order directing Ford to pay the settlement into a "qualified fund" that the order established.³⁸

Having anticipated this order from the hearing, Ford had filed a motion asking the trial court to reconsider it before the order was formally signed.³⁹ That motion referred to Ford's previously-described concerns about the potential misconduct of the presiding juror in sending out the note that precipitated the settlement.⁴⁰ And it stated that "Ford

³¹ 4 RR 16 at lines 20-23 ("[I]t seems to me that your law firm Mr. Rodriguez, has already kind of started an investigation which is something that I would do, guys, if I had this concern.")

³² 4 RR 25 at lines 1-3 ("You all go through the process that you to need to go and you find that it's necessary to go through that process then we'll deal [with it].")

³³ 4 RR 18 at lines 15-17.

³⁴ 4 RR 27 at line 20.

³⁵ 4 RR 28 at line 22 ("Well, I'm denying the motion."). *See also* 2 CR 337 (Order signed October 13, 2004).

³⁶ 2 CR 361 ("Plaintiffs' Motion to Enforce Settlement and to Require Defendant to Deposit Settlement Funds Into a Qualified Settlement Fund," filed October 19, 2004) at 362.

³⁷ *See generally* 5 RR 3-8.

³⁸ 2 CR 515 ("Order Establishing Qualified Settlement Fund and Setting Funding Date," signed November 4, 2004).

³⁹ *See* 2 CR 379 ("Motion for Reconsideration of Order Regarding Payment of Settlement to Trustee," filed November 2, 2004).

⁴⁰ 2 CR 380.

has withdrawn its consent to the settlement.”⁴¹ Ford pointed out that, having withdrawn its consent to the entry of an agreed judgment on the settlement, the plaintiffs’ only remedy under Texas law would be for them “to amend their petition and assert a claim for breach of contract, in response to which Ford shall assert its defenses of mutual mistake, and if warranted, fraudulent inducement.”⁴²

At the same time, Ford also filed a motion to set aside the settlement agreement and asked for a new trial, or for a mistrial, on the basis of juror misconduct.⁴³ Among other things, Ford argued that the settlement agreement should be set aside for a mutual mistake of fact and that Ford should not be penalized for having relied on the assumption that the jury would follow its instructions and consider damages only after finding liability.⁴⁴ The question in the presiding juror’s note had misleadingly suggested that the jury had reached the damage questions in accordance with those instructions.

Along with this motion, Ford filed the results of the investigation it had conducted without the aid of formal discovery: the transcripts of interviews conducted by private investigators with ten of the twelve members of the jury.⁴⁵ In these interviews, the ten jurors consistently and repeatedly told those investigators that the jury had answered the first liability question in favor of Ford, that they were still deliberating on the second

⁴¹ 2 CR 380.

⁴² 2 CR 380.

⁴³ 2 CR 383 (“Motion to Set Aside Rule 11 Settlement Agreement and Motion for New Trial, or Alternatively, Motion for Mistrial Based Upon Jury Misconduct,” filed November 2, 2004).

⁴⁴ 2 CR 383-84, 401-02.

⁴⁵ *See* 2 CR 408-514. These include interviews with jurors Esther Silva Herrera, 2 CR 412; Maritza E. Lopez, 2 CR 417; Rosa Linda Mendez, 2 CR 422; Virginia White, 2 CR 427; Samuel Ramirez, Jr., 2 CR 433; Rosalinda Salinas, 2 CR 444; Esmeralda Cueller, 2 CR 456; Christina Gonzalez, 2 CR 474; Efrain Garcia, 2 CR 489; and Joe Suarez, 2 CR 500. These transcripts were authenticated by the affidavit of a private investigator who stated that he was present during each of the interviews, that he had listened to the audio recordings from the interviews, that the audio recordings were accurate, and that each transcript accurately reported that respective interview. *See* 2 CR 408-11. The jurors being interviewed, however, were not under oath.

liability question when they were released, that they had not reached the damage questions, and that they were leaning heavily toward finding no liability on the second question so that the damage issues might never have been reached at all.⁴⁶

All ten jurors also told the investigators that presiding juror Cynthia Cortez had sent this note solely on her own initiative, without first discussing it with the rest of the jury, and without the consent of any of the others -- a few of whom were not even aware of the note and some of whom vigorously opposed sending it.⁴⁷ Several said this was curiously unlike how Ms. Cortez had handled any of the preceding eleven notes the jury had sent, which she had first read aloud to the other jurors for their discussion and consent.⁴⁸ Furthermore, Ms. Cortez had been the only vote in favor of the plaintiffs on the first liability question, and was one of only a few in favor of the plaintiffs on the second question.⁴⁹ The jurors described Ms. Cortez as “strongly” for the plaintiffs,⁵⁰ as “one of the strongest, most outspoken” in their favor,⁵¹ and as “very adamant” in advocating the plaintiffs’ case.⁵²

Further, several jurors observed that, after being off on Tuesday, Ms. Cortez had arrived on Wednesday morning and virtually announced that they were going to finish that day.⁵³ She then apparently launched into an argument urging a verdict for the

⁴⁶ See generally 2 CR 412-514.

⁴⁷ See generally 2 CR 412-514.

⁴⁸ See, e.g., 2 CR 449-52, 477-80, 492-93, 495-97, 512.

⁴⁹ *Id.*

⁵⁰ 2 CR 492.

⁵¹ 2 CR 505.

⁵² 2 CR 509; 2 CR 488 (juror Christina Gonzalez); 2 CR 509 (juror Joe Saenz).

⁵³ 2 CR 465 (juror Esmeralda Cuellar).

plaintiffs on the second liability issue,⁵⁴ reciting facts and figures about the stability of the Ford Explorer that at least one juror thought did not come from the evidence at trial.⁵⁵ It seems this had little effect, however, since the jury remained heavily lopsided in favor of finding no liability.⁵⁶ One juror, in fact, said that at this point more of those who had been on the fence began to swing towards Ford.⁵⁷ But Ms. Cortez remained “very adamant” in favor of a verdict for the plaintiffs.⁵⁸

It was at this point that Ms. Cortez then decided to send out the question asking the maximum amount the plaintiffs could be awarded.⁵⁹ This question was entirely her idea; none of the other jurors approved of sending it, and several strongly objected.⁶⁰ One of those described how, when he objected to sending this question, Ms. Cortez “just smiled and smirked.”⁶¹

To Ford, the results of this informal investigation suggested juror misconduct.⁶²

The plaintiffs filed a combined response to Ford’s two motions.⁶³ Among other things, they objected to the interview transcripts, contending they were unsworn hearsay, were improper under Texas Rule of Evidence 606, and were insufficient to show jury misconduct under Texas Rule of Civil Procedure 327a.⁶⁴ They also argued that Ford was

⁵⁴ 2 CR 470-71 (juror Esmeralda Cuellar); 2 CR 509 (juror Joe Suarez). *See also* 2 CR 326 (previously-filed affidavit from juror Virginia White)

⁵⁵ 2 CR 470-71 (juror Esmeralda Cuellar).

⁵⁶ 2 CR 429-30, 436, 447, 464-66, 483, 494-95, 499, 505

⁵⁷ 2 CR 509.

⁵⁸ *Id.*

⁵⁹ *See, e.g.*, 2 CR 510.

⁶⁰ *See generally* 2 CR 324-36, 412-514.

⁶¹ 2 CR 441 (juror Samuel Ramirez, Jr.).

⁶² 2 CR 399 (“Juror Cynthia Cortez engaged in misconduct.”); 2 CR 400 (“The facts here call into question the integrity of the jury process.”)

⁶³ 2 CR 526.

⁶⁴ 2 CR 528-32.

not entitled to rescission of the settlement agreement on the ground of mutual mistake because the mistake, if any, was on a “collateral matter” -- the status of jury deliberations – instead of on the subject matter of the contract.⁶⁵ The plaintiffs also maintained that, even accepting as true the statements in the interview transcripts, there had been no jury misconduct because there was no requirement that a majority of the jurors approve a question sent to the court.⁶⁶

The trial court denied both of Ford’s motions.⁶⁷ It sustained the plaintiffs’ objections to the interview transcripts, striking them as “improper evidence.”⁶⁸ But it then held that, even considering those statements, they did nothing to show juror misconduct or outside influence.⁶⁹ The court again directed Ford to immediately pay the full settlement amount.⁷⁰

Concerned that the trial court seemed to believe that it could simply order Ford to pay under a settlement agreement that Ford disputed because of facts on which it had been refused permission to take discovery, Ford filed a Notice of Appeal to contest that order.⁷¹

⁶⁵ 2 CR 532-34

⁶⁶ 2 CR 532-33.

⁶⁷ 2 CR 554.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ 2 CR 555.

⁷¹ 2 CR 569 (“Defendant Ford Motor Company’s Notice of Appeal”). This Notice of Appeal was mailed on December 2, 2004, but did not reach the court of appeals for filing until December 7, 2004.

IV. Plaintiffs ask for summary judgment on the settlement agreement; Ford again objects to the lack of discovery.

Perhaps also realizing the odd posture of the trial court's directive, the plaintiffs, at about this same time, filed a motion for summary judgment on the same settlement agreement the court had already twice ordered Ford to pay.⁷²

In its response to that motion, Ford urged that the plaintiffs' only proper recourse for a purported breach of the settlement agreement required "pleading a claim for breach of contract and then proceeding through the traditional course of litigation on that claim."⁷³ Ford insisted that it "has the right to be confronted by appropriate pleadings, to assert defenses, to conduct discovery, and to submit contested fact issues to a judge or jury."⁷⁴ In short, Ford argued there was nothing special about the plaintiffs' claim that entitled it to expedited treatment or made it different from any other action for breach of contract.

Furthermore, Ford complained that summary judgment on an entirely new breach of contract claim at that point would be premature since Ford had not had the opportunity to avail itself of any of the procedures – including discovery – by which such a claim should be resolved:

Granting summary judgment at this juncture, without allowing Ford an opportunity to conduct discovery, assert defenses, or have

⁷² 2 CR 556 ("Plaintiffs' Motion for Summary Judgment" filed December 3, 2004).

⁷³ Supp. CR 2. *See also* Supp. CR 4 ("Plaintiffs are required to plead their claim to enforce the settlement agreement, and then to proceed through the traditional course of litigation as they would with any other claim.")

⁷⁴ Supp. CR 7. Ford also noted that the plaintiffs had never amended their pleadings to assert a claim for breach of contract. *See* Supp. CR 4.

contested fact issues tried by a finder-of-fact will deny Ford all of its rights as a litigant.⁷⁵

Ford specifically noted that it was entitled to take discovery to investigate the circumstances surrounding the sending of the presiding juror's note, and to thereby determine if it was the result of juror misconduct or of improper outside influence:

Allowing Ford to conduct further discovery to determine the motivation of the presiding juror's actions and any outside influences that possibly swayed her may provide further proof that she committed juror misconduct. Under Texas law, Ford is entitled to conduct this pretrial discovery before enforcement of the settlement, just as it would be entitled to do in any other breach of contract case.⁷⁶

Ford urged that there were "a number of apparent and potential fact issues" precluding summary judgment, including "whether there was juror misconduct, whether Ford was improperly misled, and whether the parties entered into the settlement under a mutual mistake."⁷⁷ It argued that "once its pretrial discovery has concluded," Ford would then have the right to submit all such factual disputes to the finder of fact.⁷⁸

Plaintiffs filed a reply.⁷⁹ They scoffed that Ford's arguments were "either procedural or a vague claim that a fact question exists on some amorphous affirmative defense."⁸⁰ They belittled the discovery that Ford wanted to pursue as "immaterial."⁸¹ Besides, they insisted, the court had already denied that discovery:

⁷⁵ Supp. CR 5.

⁷⁶ Supp. CR 5.

⁷⁷ Supp. CR 6.

⁷⁸ *Id.*

⁷⁹ Supp. CR 11 ("Plaintiffs' Brief in Support of Motion for Summary Judgment and Objections to Defendant's Summary Judgment Evidence" filed January 5, 2005, the day before the hearing.)

⁸⁰ Supp. CR 11.

⁸¹ Supp. CR 12.

The court previously denied Ford's request for permission to do discovery because it was unable to explain what it thought it could prove or how it was relevant. In short, Ford is not entitled to a fishing expedition.⁸²

Similarly, plaintiffs brushed the purported fact questions aside as irrelevant because the court had already decided all of those questions in the plaintiffs' favor.⁸³ As a result, they insisted, Ford had already had its "day in court" and should not get another:

As for fact questions on Ford's affirmative defense, the Court has already disposed of it in a prior evidentiary proceeding and found Ford's claims and evidence legally insufficient. Ford had its "day in court" on whatever grounds it is urging to rescind the contract and lost.⁸⁴

Finally, plaintiffs objected to the affidavits from jurors White, Herrera, Salinas, and Ramirez.⁸⁵ Plaintiffs maintained that these affidavits were improper under the Texas rules that preclude evidence of the jury's deliberations or mental processes in reaching a verdict.⁸⁶ They also insisted that these affidavits were "hearsay" because they reported what juror Cynthia Cortez had said in the jury room.⁸⁷

V. The trial court grants the plaintiffs' motion and enters judgment against Ford.

The trial court granted the plaintiffs' motion for summary judgment.⁸⁸ Its order granting that motion made a series of "findings," including the determination that Ford

⁸² Supp. CR 14.

⁸³ Supp. CR 12.

⁸⁴ Supp. CR 12.

⁸⁵ Supp. CR 20.

⁸⁶ Supp. CR 20. Referring to TEXAS RULE OF EVIDENCE 606 and to TEXAS RULE OF CIVIL PROCEDURE 327(b) (which plaintiffs' Brief in Support of Motion for Summary Judgment erroneously cites as TEXAS RULE OF EVIDENCE 327(b)). Both rules, of course, expressly permit the use of such evidence to show "whether any outside influence was improperly brought to bear upon any juror." TEXAS RULE OF EVIDENCE 606(b); TEXAS RULE OF CIVIL PROCEDURE 327(b).

⁸⁷ Supp. CR 20. Plaintiffs apparently overlooked the fact that Ford never suggested the statements Ms. Cortez had made *were true*.

⁸⁸ Supp. CR 23 ("Order on Plaintiffs' Motion for Summary Judgment" signed January 10, 2005.)

had “entered a valid and binding settlement agreement,” that it had breached that agreement “without excuse or justification,” that there was no evidence of jury misconduct or mutual mistake, and that Ford had no grounds on which to avoid the contract.⁸⁹ It also sustained the plaintiffs’ objections to all four of the juror affidavits and ordered them stricken.⁹⁰

Two weeks later, the trial court entered final judgment in the plaintiffs’ favor.⁹¹ *See* Appendix Tab 1. In addition to once again awarding plaintiffs the amount of the settlement agreement, that judgment also awarded them prejudgment interest from October 19, 2004,⁹² and attorneys’ fees of over \$55,000.⁹³

VI. The court of appeals affirms in a split decision.

Two justices of the court of appeals affirmed the trial court; one dissented. *See* Appendix Tab 2. The majority acknowledged there is nothing about an action to enforce a settlement agreement to exempt it from “the common law pleading and proof requirements,” and – like any other claim for breach of contract – such an action “must be based on proper pleading and proof.” 200 S.W.3d at 224. It then concluded that the plaintiffs’ motion to enforce the settlement agreement was “a sufficient pleading” of their new claim for breach of contract, and that Ford had an adequate opportunity to plead its defenses to that claim. 200 S.W.3d at 224-25.

⁸⁹ Supp. CR 24.

⁹⁰ Supp. CR 24.

⁹¹ Supp. CR 26 (“Final Judgment” signed January 25, 2005.)

⁹² Supp. CR 28. October 19, 2004, was the date on which plaintiffs had filed their Motion to Enforce Settlement. *See* 2 CR 361.

⁹³ Supp. CR 28. The judgment also directed Ford to pay court costs of \$5800 (*see* Supp. CR 29 at ¶ 2) and guardian ad litem fees totaling \$46,000. *See* Supp. CR 29 at ¶¶ 4-5.

The majority then overruled Ford's complaint about the denial of discovery on three grounds: First -- and despite quoting Ford's careful explanation that it was not complaining about the need for more *time* to conduct discovery, but was complaining instead about the trial court's *denial* of that discovery -- the majority nonetheless held that Ford had waived this complaint because it had not filed a verified motion for continuance to request a delay on plaintiffs' summary judgment motion. 200 S.W.3d at 226-27. The majority reasoned that such a motion was required -- despite the existing order denying Ford's requested discovery -- because a request for continuance might have lead the trial court to change its earlier ruling to permit the discovery:

Under rule 166a(g), the trial court could have revisited its prior ruling and ordered a continuance to permit "affidavits to be obtained or depositions to be taken or discovery to be had." *Id.* This is the very relief Ford claims it was erroneously denied.

200 SW3d at 227 n.4.

Second, the majority held that Ford had also waived this complaint by giving the trial court "mixed messages" on the need for discovery because, after the court had denied its request to take that discovery, Ford's counsel had, at a subsequent hearing, said Ford could meet the schedule outlined for funding the settlement. 200 S.W.3d at 229-30. But the opinion itself notes that Ford raised this discovery complaint again in response to the plaintiffs' Motion for Summary Judgment. 200 S.W.3d at 230.

Third, the majority held the trial court's ruling had not "actually foreclosed" the discovery Ford sought to obtain because Ford was still able to conduct informal interviews of those jurors who were willing to cooperate voluntarily. 200 S.W.3d at 228,

230-31. The Court of Appeals concluded that Ford was thus “able to conduct its own investigation,” and any error in denying formal discovery was therefore harmless. 200 SW3d at 230. As the majority saw it, Ford’s ability to conduct informal interviews with those jurors who were cooperative allowed it “to collect virtually all the evidence it sought to discover,” and the evidence was then “submitted to the trial court for review.” 200 SW3d at 229-30.

Of course, the trial court then struck all of that evidence precisely because it did not satisfy the standards that would have been met by evidence obtained through formal discovery.⁹⁴ And, pointedly, the Court of Appeals itself noted that the very juror whose conduct was in question, the foreperson who sent the note, utterly refused to cooperate with any interview at all. 200 S.W.3d at 228-29. (Indeed, she did not just refuse to cooperate; she sent a letter of complaint to the judge when she was approached.⁹⁵)

The dissenting justice concluded that there was no live pleading on which a summary judgment for breach of contract could be entered, and would have reversed for that reason. 200 S.W.3d at 232-33. She therefore did not reach the issue concerning the denial of discovery. 200 S.W.3d at 233.

⁹⁴ 2 CR 554.

⁹⁵ Supp. RR 7-9.

SUMMARY OF THE ARGUMENT

At the heart of this appeal is the integrity of the jury system. The circumstances here – which present a troubling question of first impression -- strongly suggest that the foreperson of this jury “gamed the system,” that she sought to provoke the defendant to settle by sending out a note calculated to mislead that defendant into thinking the jury had decided to hold it liable for an award to the plaintiffs. What is more, the note suggested the jury was considering a very large award, since it asked how large the law would permit that award to be. Ford was in fact misled, and on the basis of that misconception it agreed to settle the plaintiffs’ claims.

Ford’s point in this appeal is thus simple and straightforward: these circumstances are troubling enough to at least warrant investigation. They strongly suggest that the presiding juror sent this note in a calculated effort to create a misleading impression on the status of jury deliberations and to thereby provoke a settlement. Ford finds this disturbing on its face, and it finds even more disturbing the possibility that some outsider might have been the source of this idea.⁹⁶ Ford should at least have been allowed to conduct the discovery it sought.

It is certainly possible, of course, that diligent and thorough discovery might have failed to produce any such evidence. Perhaps, despite outward appearance suggesting otherwise, the sending of this note was entirely spontaneous and utterly innocent. In that event, Ford might have ultimately lost against the plaintiffs’ action for breach of this

⁹⁶ Throughout this dispute, Ford has avoided suggesting that any attorney associated with this case was involved in any improper conduct (*see, e.g.*, 4 RR 3 line 23, to 4 line 1), and it will continue to do so in the absence of very convincing proof. Nonetheless, Ford believes that it should be allowed to investigate this matter through formal discovery and to follow the evidence wherever it might lead.

settlement agreement even if it had been allowed to conduct the discovery it sought. But that possibility is hardly a sound basis for depriving Ford the opportunity to conduct discovery at all.

The plaintiffs' complaint about Ford's alleged breach of this settlement agreement should not have been treated differently from any other claim for breach of contract. There are established procedures under which such claims are resolved. Those procedures include pleading the claim, conducting discovery to gather evidence, and then submitting disputed questions of fact to the jury or court at trial. None of those procedures were observed here; all of them were short-circuited. That was not right and should be corrected.

ARGUMENT

I. The plaintiffs' claim is no different from any other claim for breach of contract.

Both the trial court and the Court of Appeals seem to have been mistaken on this point. The trial court apparently thought a plaintiffs' effort to enforce a Rule 11 settlement agreement is of a special nature, different from a simple claim for breach of contract, and thus outside the normal procedures for resolving such a claim. It was notably impatient to enforce this agreement: it denied Ford the opportunity to conduct discovery, twice hastily ordered Ford to pay the settlement amount -- before the plaintiffs had even filed a motion for summary judgment, and was untroubled by the lack of any formal pleadings on the plaintiffs' claim.

The Court of Appeals recited the principle that the plaintiffs' claim was merely an action for breach of contract and that it should be so treated. 200 S.W.3d at 223-24. But it did not then treat it that way. In particular, it excused the trial court's denial of discovery with reasoning wholly inconsistent with how such a claim would normally be handled. *See infra* at pp. 28-30.

Both lower courts were wrong in their underlying approach. If any party to a settlement agreement revokes its consent before judgment is entered on that agreement, the trial must "refuse to sanction the agreement by making it the judgment of the court." *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983). The settlement agreement can be enforced in a new action for breach of contract, of course, but that requires the same pleadings, pre-trial procedures, proof, and factual development that is

required for any claim for breach of contract – especially if the validity of the agreement itself is being challenged:

The validity of the settlement agreement, however, may not be determined without proper pleadings and full resolution of the surrounding facts and circumstances.

654 S.W.2d at 444.

Even where the settlement agreement is reached during a mediation ordered by the court, furthermore, the trial court has no authority to summarily enforce that agreement if one party withdraws from it. *See Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656 (Tex. 1996). Once again, the party seeking to enforce that agreement must bring a claim for breach of contract. *Id.* And that claim is subject to precisely the same rules and procedures as any other claim for breach of contract:

We hold that, because the appellee disputed the validity of the settlement agreement, the appellant was required to seek enforcement of the agreement in a separate action, subject to the normal rules of pleading and proof.

925 S.W.2d at 657. *See also, Bauer v. Jasso*, 946 S.W.2d 552, 555 (Tex. App. – Corpus Christi 1997, no writ) (“enforcement of a disputed settlement agreement . . . must be determined in a breach of contract cause of action under normal rules of pleading and evidence.”).

A claim for the breach of a settlement agreement must go through the same procedures of pleading, discovery, and trial that are applied to resolve any other claim for breach of contract. *See Citgo Refining and Marketing, Inc. v. Garza*, 94 S.W.3d 322 (Tex. App. – Corpus Christi 2002, no pet.); *Cadle Company v. Castle*, 913 S.W.2d 627,

630-31 (Tex. App. – Dallas 1995, writ denied); *Clopton v. Mountain Peak Water Supply Corp.*, 911 S.W.2d 525, 527 (Tex. App. – Waco 1995, no writ) (“The same procedures used to enforce other contracts should apply to mediated settlement agreements.”); *Browning v. Holloway*, 620 S.W.2d 611, 615 (Tex. Civ. App. – Dallas 1981, writ ref’d n.r.e.) (“Once it is accepted that the law of contracts governs these agreements, then it obviously follows that enforcement of the agreement must be supported by pleadings and proof.”).

A defendant accused of breaching a settlement agreement should not be deprived of its “right to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit contested fact issues to a judge or jury.” *Citgo Refining and Marketing, Inc. v. Garza*, 94 S.W.3d at 330. *See also Cadle Company v. Castle*, 913 S.W.2d at 632 (same).

Here, these rights were denied. In its haste to enforce this settlement agreement, the trial court short-circuited all of these procedures and protections. The plaintiffs never filed an amended petition to assert a cause of action for breach of contract; Ford was denied discovery to support its defenses, and there was no trial at which contested fact issues could be submitted to a judge or jury. In short, the trial court did not treat this as a claim for breach of contract, subject to the same procedures and requirements normally applied to such a claim. Nor did the Court of Appeals. That was error.

II. The trial court should have allowed Ford to conduct discovery before summarily enforcing the settlement agreement.

Although the opinion below suggests some confusion on this point, the trial court's denial of discovery has been the principal complaint upon which Ford's appeal has explicitly focused.⁹⁷ In light of the odd events by which it had been induced to enter this settlement agreement, Ford sought the trial court's permission for the unusual step of taking discovery into the circumstances surrounding the presiding juror's sending of the misleading note that had precipitated that settlement.⁹⁸ The trial court denied Ford's request.⁹⁹ That denial was erroneous, and it is that denial about which Ford complains.

A. The opportunity to conduct discovery is fundamental to a fair trial.

The mere fact that the plaintiffs were seeking to enforce a Rule 11 settlement agreement did nothing to suspend the principle that "A party to a breach of contract suit is entitled to pretrial discovery." *Cadle Company v. Castle*, 913 S.W.2d at 631. This Court has stressed the fundamental importance of that pretrial discovery as "the linchpin of the search for truth," which should rarely be denied:

Affording parties full discovery promotes the fair resolution of disputes by the judiciary. This court has vigorously sought to ensure that lawsuits are 'decided by what the facts reveal, not by what facts are concealed.' Discovery is thus the linchpin of the search for truth, as it makes 'a trial less of a game of blind man's bluff and more a fair contest with the issues and facts disclosed to the fullest practicable extent.' Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery.

⁹⁷ See Ford's Brief of Appellant filed in the Court of Appeals on April 27, 2005; Ford's Reply Brief of Appellant filed in the Court of Appeals on July 21, 2005.

⁹⁸ 2 CR 320; 4 RR 3, 21-24, 27.

⁹⁹ 4 RR 28; 2 CR 337.

State v. Lowry, 802 S.W.2d 669, 671 (Tex. 1991) (internal citations omitted).

Ford was thus entitled to a full and fair opportunity to conduct discovery into the odd circumstance by which it was induced to enter this settlement agreement:

Both the plaintiffs and the defendants are entitled to full, fair discovery within a reasonable period of time, and to have their cases decided on the merits.

Able Supply Co. v. Moye, 898 S.W.2d 766, 773 (Tex. 1995). *See also, In re Colonial Pipeline Co.*, 968 S.W.2d 938, 941 (Tex. 1998)(same). But Ford was not permitted any such discovery, much less permitted a “reasonable period of time” in which to conduct it.

This deprived Ford of the chance to obtain evidence going to the heart of its defenses against the plaintiffs’ claim. In particular, it prevented Ford from gathering evidence to show that it had been wrongly induced into this settlement agreement by jury misconduct, by improper outside influence on that jury, or perhaps even by illegal jury tampering. Such evidence would have been relevant to a number of potential affirmative defenses, such as fraudulent inducement or mutual mistake, and to equitable doctrines for rescission that might apply to an agreement arising from a corruption of the judicial system.

Denying discovery that is so central to a party’s claims or defenses is fundamentally unfair. Indeed, such a denial of discovery is widely recognized as so plainly unfair that a party does not have to wait to challenge it on appeal, but can complain about it immediately through mandamus:

Erroneous denial of discovery going to the heart of a party’s case severely compromises a party’s ability to present a viable claim or defense at trial, and renders the appellate remedy inadequate.

ISK Biotech Corp. v. Lindsay, 933 S.W.2d 565, 567 (Tex. App. – Houston [1st Dist.] 1996, orig. pro.). *See also*, *In re Colonial Pipeline Co.*, 968 S.W.2d 938 (Tex. 1998); *Walker v. Packer*, 827 S.W.2d 833, 843 (Tex. 1992); *In re Whiteley*, 79 S.W.3d 729 (Tex. App. – Corpus Christi 2002. orig. pro.); *In re R.R.*, 26 S.W.3d 569, 573 (Tex. App. – Dallas 2000, orig. pro.)

Ford did not lightly seek to undertake discovery into the circumstances surrounding the presiding juror’s sending of this note. Undeniably, there is a need to tread carefully in such matters. *See, generally*, TEX. DISCIPLINARY R. PROF’L CONDUCT 3.06, *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G app. A; *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998), *cert. denied*, 526 U.S. 1146 (1999). It was for precisely that reason that Ford sought the trial court’s permission to undertake such discovery.¹⁰⁰

But the fact that the conduct of the jury is a sensitive subject scarcely means that Ford should not have been allowed to conduct discovery on that subject at all.

B. The trial court’s basis for denying Ford’s discovery was wrong.

The trial court was simply wrong in its apparent belief that this discovery was precluded by Rule 327 of the Texas Rules of Civil Procedure and by Rule 606 of the Texas Rules of Evidence. Neither rule applies here. And besides, neither rule says anything that would thwart the discovery Ford was seeking.

¹⁰⁰ *See, e.g.*, 4 RR 3 at lines 11-15 (Ford’s counsel explains that Ford is asking that the court either conduct a hearing to which the jurors could be subpoenaed or that Ford be allowed to depose the jurors, “which we cannot do without the Court’s permission.”)

Rule 327 provides that, in the context of a motion for new trial for jury misconduct, a juror may not testify about events that occurred during the jury's deliberations, although he can testify about outside influence:

A juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict concerning his mental processes in connection therewith, except that a juror may testify whether any outside influence was improperly brought to bear upon any juror.

TEX. R. CIV. P. 327 (b). Similarly, Rule 606 provides that such evidence from a juror is inadmissible in an inquiry into the validity of a verdict or indictment although, once again, he can testify about outside influence:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. . . . However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

TEX. R. EVID. 606(b).

To begin with, there is the threshold point: Both of these rules deal with whether a juror's testimony is admissible, not with whether it is subject to discovery. These are two distinctly different things; whether information will be admissible at trial does not determine whether it is subject to discovery. *See Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 553 (Tex. 1990) ("It does not matter that the information sought may be inadmissible at trial if it appears reasonably calculated to lead to the discovery of admissible

evidence.”). In addition, Ford was not seeking to challenge the validity of the jury’s verdict, since this jury never reached a verdict and this judgment was not entered on a verdict. What is more, both rules recognize an exception for evidence of outside influence on the jury. And Ford was seeking discovery to investigate precisely that.

In short, there was no legal prohibition at all against the discovery Ford was seeking. That discovery should have been permitted. The trial court’s denial of it was reversible error.

The facts of this case are so unusual that there do not appear to be any others directly on point. But there is at least one that is instructive because it reasoned through closely similar concerns. *See Avary v. Bank of America*, 72 S.W.3d 779 (Tex. App. – Dallas 2002, pet. denied).

That arose out of the settlement of a wrongful death case reached at a court-ordered mediation. Following the distribution of settlement proceeds among the various plaintiffs, the guardian of the estates of two of the decedent’s minor children sued the executor of the decedent’s estate for breach of fiduciary duty, negligence, fraud, and conspiracy. She claimed that the executor (a bank), which had attended the mediation with her but was located in another room with the other plaintiffs, had turned down a settlement offer that would have been much more favorable to the estate, accepting instead a settlement that allocated more of the proceeds to those other plaintiffs. 72 S.W.3d at 785.

To support these allegations, the plaintiff sought discovery into what had occurred in that other room during the negotiations at the mediation. The trial court was troubled

by the plaintiff's desire to pursue this discovery because of the statute that, it believed, acted to prohibit such discovery in favor of protecting the confidentiality of mediation proceedings. *See* TEX. CIV. PRAC. & REM. CODE § 154.073. The court nonetheless did permit the plaintiff to conduct some very limited discovery into those events, including allowing her to depose the executor's representative at the mediation. 72 S.W.3d at 785-86. The trial court then granted the executor's motion for summary judgment. 72 S.W.3d at 784.

The Court of Appeals reversed. The trial court's severe restrictions on the plaintiff's discovery had prevented her from obtaining the evidence she needed to defeat the executor's motion for summary judgment. 72 S.W.3d at 793-94. Although this result, "however harsh," would nonetheless be correct if the statute truly compelled it, the Court of Appeals held that it did not. 72 S.W.3d at 794-801. Neither the language of the statute nor the policy it was meant to serve required abandoning the general rule in favor of "very broad" discovery. 72 S.W.3d at 802. The trial court had abused its discretion in frustrating the plaintiff's legitimate effort to pursue that discovery:

The trial judge should have considered the facts, circumstances, and context surrounding the particular information sought, rather than issuing a blanket prohibition on any further discovery.

72 S.W.3d at 802. The judgment was therefore reversed and the case remanded. 72 S.W.3d at 803.

The same reasoning applies here, and it should lead to the same result. There was no statute or rule to preclude the discovery that Ford wanted to undertake. Yet the trial court did not permit it. The denial of that discovery prevented Ford from obtaining the

evidence it needed to defeat the plaintiffs' motion for summary judgment. The trial court abused its discretion in frustrating Ford's desire to pursue this discovery. So the judgment should be reversed and the case remanded.

C. The Court of Appeals's basis for affirming the denial Ford's discovery was wrong.

The Court of Appeals affirmed the trial court's denial of discovery on three grounds. None will survive rational scrutiny.

First, it held that Ford had "waived" this complaint by not filing a verified motion for continuance to postpone the hearing on the plaintiffs' motion for summary judgment. 200 S.W.3d at 226-27. This is very wide of the mark. Ford did not want a continuance. And Ford has never complained on appeal that it did not get a continuance. Indeed, a continuance of this hearing would have done Ford precisely no good whatsoever; the trial court had already refused to allow Ford to conduct the discovery it wished to undertake.¹⁰¹ Giving Ford more time to not do that discovery would have been a meaningless gesture. It is the denial of that discovery about which Ford complains, not the trial court's failure to postpone the hearing.

The Court of Appeals reasoned that a verified motion for continuance was nonetheless required because it might have led the trial court to reconsider its prior ruling denying the discovery Ford wanted. 200 S.W.3d at 227 n. 4. This is a bewildering suggestion. No authority in this State has ever held that such a step is needed to preserve error. Ford did everything the established law requires: It presented a timely request to

¹⁰¹ 4 RR 28; 2 CR 337.

the trial court, its request was sufficiently specific to enable the court to make an informed ruling, and it obtained an express ruling on that request. *See, e.g., Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); TEX. R. APP. PRO. 33.1(a). There is no precedent for the suggestion that, after doing all this, it was still necessary to file another motion, asking for something else, on the offhand chance that it might lead the trial court to reconsider its previous ruling on a different matter. That is not the law, and it should not become the law.

Similarly, the Court of Appeals held that Ford had waived this complaint because, after the trial court denied its request to do discovery, Ford gave the trial court “mixed messages” by acting as if that ruling were final. 200 S.W.3d at 230. This is just as flawed as its previous suggestion. There is no authority to support the Court of Appeals in its belief that a complaining party waives error if it treats a matter as decided after the trial court has already made an adverse ruling on it. If this were the law, the only way to preserve error would be to relentlessly badger the trial court about that ruling at every later step of the proceeding. That, too, is not the law; and that, too, should not become the law.

Finally, the Court of Appeals held that any error in denying Ford the opportunity to conduct discovery was harmless because Ford was still able to do informal interviews with the jurors who were willing to cooperate. 200 S.W.3d at 228, 230-31. Once again, there appears to be no precedent to support this reasoning – no authority saying that the denial of formal discovery is harmless if a party can still attempt to conduct an unofficial investigation. To the contrary, all the cases point in the opposite direction. *See, e.g., In*

re Colonial Pipeline Co., 968 S.W.2d at 941; *Able Supply Co. v. Moye*, 898 S.W.2d at 773; *Walker v. Packer*, 827 S.W.2d at 843; *State v. Lowry*, 802 S.W.2d at 671; *In re Whiteley*, 79 S.W.3d 729; *In re R.R.*, 26 S.W.3d at 573; *ISK Biotech Corp. v. Lindsay*, 933 S.W.2d at 567.

And on this record, such reasoning would be notably difficult to justify. After all, Ford could obtain no discovery whatever, of any kind, from the presiding juror whose conduct was directly at issue; she not only refused to cooperate but wrote a letter of complaint to the trial judge when she was approached.¹⁰² What is more, the trial court struck the results of the interviews Ford was able to obtain.¹⁰³

Denying Ford the opportunity to conduct formal discovery was wrong. Neither the trial court nor the Court of Appeals had any basis for concluding otherwise.

III. Finally, the trial court was mistaken in sustaining plaintiffs' objections to the juror affidavits.

Although hardly critical to the arguments above, Ford nonetheless feels constrained to note that the trial court was wrong in striking the four juror affidavits. It struck them for two reasons: (1) because, in reporting statements made by other jurors, the affidavits contained "inadmissible hearsay," and (2) because the affidavits testified on matters that occurred during jury deliberations and were therefore inadmissible under TEXAS RULE OF EVIDENCE 606 and TEXAS RULE OF CIVIL PROCEDURE 327(b).¹⁰⁴ The

¹⁰² Supp. RR 7-9.

¹⁰³ 2 CR 554.

¹⁰⁴ Supp. CR. 20. The trial court also struck as speculation that portion of Virginia White's affidavit stating her belief about the result that deliberations would have reached if they had been allowed to continue. *Id.* But that portion of Ms. White's affidavit is not significant to any of Ford's arguments. What matters are those portions of her affidavit reporting events that had already occurred before the deliberations ended.

Court of Appeals held that Ford had not shown harm from the exclusion of these affidavits, and it therefore did not reach the question of whether the trial court's ruling was erroneous. 200 S.W.3d at 231-32. It was erroneous; both grounds were mistaken.

To the extent these affidavits reported statements made by other jurors, they were not being offered to show that such statements were true. They were being offered to show that the statements were made. Indeed, it does not matter one whit whether the statements that Cynthia Cortez made were true (Ford maintains that many of them were not). What matters is that she made those statements at all. Similarly, it is beside the point to ask whether the objections that the other jurors made to sending this note were "true." The point is that those objections were made. As a result, none of these statements were "hearsay" since none of them were offered to prove the truth of the matter the statement asserted. *See* TEX. R. EVID. 801(d)(definition of hearsay); *McCraw v. Morris*, 828 S.W.2d 756, 757 (Tex. 1992)(out of court statement not hearsay if offered for purpose other than to prove truth of matter asserted).

The trial court was similarly mistaken in its interpretation of Texas Rule of Evidence 606 and Texas Rule of Civil Procedure 327(b). As discussed above, these rules restrict juror testimony used in an effort to attack a verdict, or to attack a judgment entered on one, and both of them make an express exception for testimony about an outside influence on the jury. Here, Ford was not seeking to attack a verdict, or a judgment entered on a verdict, since this jury never returned a verdict. And the affidavits were offered, at least in part, to indicate the possibility of outside influence improperly exercised on a member of the jury.

The plaintiffs' objections to these affidavits should have been overruled. They were properly before the trial court, are now properly before this Court, and are properly considered as evidence in support of Ford's position in this appeal.

CONCLUSION AND PRAYER

In one sense, this is a breach of contract case in which the circumstances that had induced the defendant to enter the contract turned out to be dramatically different from what they had seemed. The defendant sought to conduct discovery into those circumstances but was refused. The trial court then entered summary judgment on the contract only four months after the contract was created, after twice ordering it enforced, and without the benefit of proper pleadings or any discovery. For these reasons alone, the trial court was wrong. It ignored precedents from this Court stating that it had no special license to enforce an allegedly-breached settlement agreement without following the usual procedures, but was supposed to treat such a claim as it would any other case asserting a breach of contract. It simply did not.

But there is a good deal more. The discovery that Ford wished to undertake, but which the trial court would not permit, goes to the heart of the integrity of the jury system. There is reason to suspect that the note from the presiding juror that precipitated this settlement may have been sent for that very purpose – to induce a settlement, and for no other reason. Whether that was “gaming of the system” by the presiding juror on her own initiative, or came at the suggestion of some outsider, it is not the way the system

ought to work. Nor is it how the jury system should be seen as working, nor how it should be allowed to work.

Petitioner Ford Motor Company therefore asks that the judgment entered below be reversed and that this case be remanded for further proceedings. Ford also asks that the case be remanded with instructions that it be permitted to undertake discovery, in support of its potential affirmative defenses, into the possibility that there was misconduct on this jury or the exercise of improper outside influence upon it. In addition, Ford asks for any other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 9.5 of the Texas Rules of Appellate Procedure, I hereby certify that a true and correct copy of the foregoing Petitioner's Opening Brief on the Merits has been served by First Class United States Mail on the following counsel of record this ___ day of May, 2007:

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APPENDIX

Tab

Trial court’s Final Judgment,
signed January 25, 2005 (Supp. CR 26) 1

Court of Appeals Judgment, Opinion, and Dissenting Opinion
Ford Motor Co. v. Castillo, 200 S.W.3d 217
(Tex. App. – Corpus Christi 2006, pet filed)..... 2

Order on Plaintiffs’ Motion for Summary Judgment,
signed January 10, 2005 (Supp. CR 23) 3

The note from the jury
sent September 29, 2004 (2 CR 323)..... 4