

>> ALL RISE.
HEAR YE, HEAR YE, HEAR YE.
THE SUPREME COURT OF FLORIDA IS
NOW IN SESSION.
ALL WHO HAVE CAUSE TO PLEAD,
DRAW NEAR, GIVE ATTENTION, YOU
SHALL BE HEARD.
GOD SAVE THESE UNITED STATES.
THE GREAT STATE OF FLORIDA, THIS
HONORABLE COURT.
LADIES AND GENTLEMEN.
THE SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> WELCOME TO THE FLORIDA
SUPREME COURT.
FOR THE FIRST CASE FOR THE DAY
IS NDS CANADA VERSUS RAD SOURCE
TECHNOLOGIES.
YOU MAY BEGIN.
>> MAY IT PLEASE THE COURT.
I'M ROBERT MOORE. I'M HERE ON
BEHALF OF THE APPELLANTS.
I WILL RESERVE TWO MINUTES IN
THIS ARGUMENT FOR REBUTTAL THIS
IS COURT CASE AND THE CERTIFIED
QUESTION FROM THE 11th
CIRCUIT ADDRESS AS CONTRACT
ISSUE THAT IS TO BE ADDRESSED
UNDER FLORIDA LAW.
THE UNDERLYING CASE INCLUDED
MANY ISSUES INCLUDING ONE ISSUE
THAT REQUIRED A PATENT
INFRINGEMENT ANALYSIS.
BUT THE CERTIFIED QUESTION HERE
HAS NOTHING TO DO WITH THOSE
PATENTS OR THAT PATENT
INFRINGEMENT ANALYSIS.
THIS IS NOT A FEDERAL PATENT
CASE DESPITE WHAT THE APPELLEES
SAY.
IN FACT THE 11th CIRCUIT
REJECTED THE SAME ARGUMENTS THAT
RAD SOURCE MADE WHEN THEY ARGUED
ON A MOTION TO RECONSIDER THIS
IS A PATENT LAW CASE AND PATENT
LAW SHOULD DECIDE WHETHER THIS
AGREEMENT IS AN ASSIGNMENT OR A
SUBLICENSE.
>> BUT IN ADDRESSING THE CASE THERE
IS A MATTER OF LAW, WHERE I SEE IN

THE BASIC QUESTION, SHOULD THERE BE A BRIGHT-LINE RULE IF THERE IS ONE DAY LEFT IN A LICENSE AGREEMENT, THAT THAT THEN IS A SUBLICENSE AND NOT AN ASSIGNMENT?

SO IN DECIDING THOUGH THE ISSUE AND TAKING THE FACT IT IS A PATENT OR A PRODUCT MAY MAKE THE ANALYSIS DIFFERENT THAN IF IT WERE AN APARTMENT THAT WAS, SO WOULD YOU AGREE ABOUT THE BRIGHT LINE THAT WE'RE SUPPOSED TO DECIDE THAT ISSUE?

>> I AGREE.

THE QUESTION IS UNDER FLORIDA IS THERE A BRIGHT-LINE RULE A BRIGHT LINE TEST AS TO WHETHER AN AGREEMENT IS AN ASSIGNMENT OR A SUBLICENSE?

I THINK THE ISSUE IS LITTLE MORE COMPLEX ONLY THE ONE DAY REVERSIONARY INTEREST BECAUSE THE CERTIFIED QUESTION ALSO POINTED OUT THE SUBLICENSOR IN THIS CASE REMAINED LIABLE TO THE LICENSOR IN THIS AGREEMENT.

>> IF YOU LOOK AT THE FACTS THEY PUT IN THE AGREEMENT THEY DON'T HAVE TO PAY BACK TO THE LICENSOR UNTIL THEY GET MONEY FROM BEST. THAT WOULD BE A CHANGE, IF THE, IF THE AGREEMENT HADN'T BEEN MADE.

THERE IS A LOT, WHAT I SAY THERE IS A LOT OF FACTUAL NUANCES. THE QUESTION AGAIN TO ME IS, BASIC ISSUE WE SHOULD BE DECIDING FROM FLORIDA LAW IS, HERE ARE THE FACTS YOU'VE GIVEN US.

SHOULD THERE BE A BRIGHT-LINE RULE?

>> I AGREE WITH THAT AND I DO THINK THAT FLORIDA LAW PROVIDES THAT THERE IS SUCH A BRIGHT LINE RULE.

THERE IS NO DISTINCTION BETWEEN THE TYPES OF CONTRACT INVOLVED IN A MATTER WHEN YOU --

>> THAT'S WHAT I WOULD LIKE TO EXPLORE AND I THINK IT'S A VERY INTERESTING QUESTION HERE. IT SEEMS TO ME THAT IT IS VERY DIFFICULT IN TRYING TO USE REAL ESTATE, REAL PROPERTY CASES IN THE ANALYSIS, IN THAT GO PEOPLE CAN'T POSSESS THE SAME PROPERTY AT THE SAME TIME. IF I COULD SUBLICENSE SOMETHING TO YOU AND ALSO TO SOMEONE ELSE. YOU COULD HAVE MULTIPLE SUBLICENSES IN SOME CIRCUMSTANCES. SO THAT'S WHY IT SEEMS DIFFICULT TO CREATE A BRIGHT LINE THAT WOULD SAY IT APPLIES TO EVERYTHING WHEN YOU MAY HAVE DIFFERENT CIRCUMSTANCES. HELP ME WITH THAT.

>> EXCEPT THERE I THINK YOU HAVE TO LOOK AT THE LICENSE AGREEMENT ITSELF. WHAT TYPE OF SUBLICENSE RIGHT WAS GIVEN TO THE PARTY.

>> OKAY. EXACTLY. BUT THAT'S NOT WHETHER IT'S ONE DAY SHORT OF THE FULL LIFE OF THE, OF THE RIGHT.

>> BUT THE ISSUE WHETHER YOU CAN SUBLICENSE TO MORE THAN ONE PARTY WOULD BE DETERMINED BY THE SUBLICENSE RIGHT THAT'S IN THE CONTRACT. AND HERE THE LICENSE AGREEMENT INCLUDED A VERY BROAD SUBLICENSE RIGHT. THAT'S WHAT THEY AGREED TO AFTER A YEAR OF NEGOTIATION WITH LAWYERS.

>> WHICH IS, WHICH IS THAT NO ONE ELSE HAS THE RIGHT TO USE IT.

>> WHICH IS THAT THE LICENSE RIGHT WAS TRANSFERABLE WITH THE RIGHT TO SUBLICENSE. YOU NEED TO FIRST DETERMINE WHETHER THE SUBLICENSE COMPLIED WITH THE LICENSE AGREEMENT. IS THERE A BREACH OF THE

CONTRACT IN THE SUBLICENSE?
AND THAT'S NOT THE CASE HERE.
THERE IS NO BREACH.

THE QUESTION IS WHETHER THE
AGREEMENT THAT ENTERED INTO HERE
WAS AN ASSIGNMENT BECAUSE IT WAS
SO BROAD AND TRANSFERRED ALL THE
INTERESTS, ALL THE RIGHTS AND
ALL THE OBLIGATIONS OR WHETHER
IT'S A SUBLICENSE AND --

>> THAT WHAT SEEMS TO ME IS THE
ANSWER.

IT IS NOT IN THE LENGTH OF THE
TERM BUT IT IS IN THE AGREEMENT
ITSELF.

I THINK THAT IS WHAT YOU'RE
SAYING, AREN'T YOU?

>> I THINK THE LENGTH OF THE
TERM IS ONE FACTOR TO DETERMINE
WHETHER OR NOT --

>> CONTROLLING.

>> ABSOLUTELY,
ABSOLUTELY NOT.

THE ONE DAY REVERSIONARY
INTEREST, WE SAY THAT IS A
REVERSIONARY INTEREST THAT IS
A SUBLICENSE AND SUBLEASE RATHER
THAN AN ASSIGNMENT.

THERE ARE FACTORS THE COURT
COULD LOOK AT AND SHOULD LOOK
AT.

DID ALL THE INTEREST GET
TRANSFERRED UNDER THE SUBLICENSE
AGREEMENT?

IF YOU LOOK AT THE CERTIFIED
QUESTION I THINK THE 11th
CIRCUIT RECOGNIZED THAT NORDION
REMAINED LIABLE.

THAT IS, SUBLICENSE ENTERED HOW
DOES THAT WEIGH IN THIS ANALYSIS
OF ALL THE INTERESTS AND RIGHTS
TRANSFERRED?

THE FACT --

>> THE MAIN IS NOT A RIGHT BUT A
LIABILITY AND REALLY ILLUSORY
BECAUSE BEST HELD THEM
HARMLESS. PLUS AS I SAID THE
OTHER, OTHER PART OF THE
AGREEMENT IS WE DON'T HAVE TO
PAY YOU ANYTHING UNTIL WE GET

OUR MONEY FROM BEST.
WE'RE TALKING ABOUT, THIS COURT
IS BEING DECIDED TO ASK A
QUESTION OF LAW.

IF WE DECIDE THERE IS NOT A
BRIGHT LINE, ISN'T THAT ENOUGH
FOR THE 11th CIRCUIT TO MAKE
THE DECISION AS TO WHAT THEY
WANT TO DO WITH IT?

BECAUSE IT SEEMS LIKE THEY DID
JUST ABOUT EVERYTHING ELSE BUT
ANSWER THE QUESTION?

>> WELL IT DOES SEEM TO ME THAT
THE 11th CIRCUIT DISSENT DID
TAKE THE POSITION THERE IS THIS
BRIGHT LINE RULE IN FLORIDA BUT
IT DOESN'T SEEM TO ME THAT THE
QUESTION CERTIFIED TO THIS COURT
IS LIMITED TO, IS THERE A BRIGHT
LINE ATTACHED?

>> WE DON'T HAVE TO, IN DUE
DEFERENCE TO THE 11th
CIRCUIT, THEY HAD EIGHT OTHER
QUESTIONS OF FLORIDA LAW THEY
DECIDED TO ANSWER AND THEN ON
THIS ONE, FOR WHATEVER REASON,
WELL, WE'LL CERTIFY THIS AND THEY
PUT SOME, A COUPLE OF FACTS IN
BUT THEY DIDN'T PUT ALL THE
FACTS IN.

SO I DON'T KNOW WHY -- WHAT I'M
ASKING YOU IS, WOULDN'T THE
11th CIRCUIT, ONCE WE SAY
THERE IS NOT A BRIGHT LINE
RULE, BE IN

AS GOOD OR BETTER POSITION AND
KNOWLEDGEABLE ABOUT THE FACTS
AND BECAUSE THERE'S A PATENT
INVOLVED, THEN DECIDE WHAT THEY
WANT TO DO WITH THIS CASE?

>> WELL I DON'T THINK SO BECAUSE
THE DISSENT IS THE ONE THAT
SAID, BECAUSE THERE'S A
BRIGHT LINE RULE THERE IS NO
NEED TO EVEN CERTIFY THIS
QUESTION TO THE FLORIDA SUPREME
COURT.

>> NO, YOU'RE MISSING MY POINT.
IF WE ANSWER THERE ISN'T A
BRIGHT LINE RULE?

>> THAT THERE IS NOT?
>> THAT THERE IS NOT.
THAT GOES BACK TO THE 11th
CIRCUIT.
LET THEM TAKE ALL THESE, THIS
BUNDLE OF FACTS, JUDGE GOULD'S
OPINION AND DESIGN WHETHER TO
AFFIRM JUDGE GOULD ON HIS
DECISION WITH THE INTENT OF THE
PARTIES THAT THIS WAS AN
ASSIGNMENT, NOT A SUBLICENSE?
>> I DON'T THINK THAT'S THE
RESULT BECAUSE TWO OF THE PANEL
DIDN'T THINK THERE WAS A BRIGHT
LINE TEST AND THEY SAID WE NEED
TO CERTIFY THIS TO THE FLORIDA
SUPREME COURT.
>> ISN'T THERE IS A QUESTION
WHETHER OR NOT THE ONE-DAY
DIFFERENCE, ONE-DAY DIFFERENCE
CONTROLS IN THIS CASE?
>> ONE DAY DIFFERENCE IS ONE OF
THE KEY FACTORS?
>> THAT IS THE QUESTION, ISN'T
IT?
[INAUDIBLE]
AND WHERE THE SUBLICENSOR
REMAINS LIABLE TO THE LICENSOR
UNDER THE TREATMENT.
IS THAT THE ASSIGNMENT OR THE
SUBLICENSE?
THOSE ARE THE TWO KEY FACTORS
THEY PROPOSED.
THEY ADDRESSED A COUPLE OTHER
ISSUES THEY WOULD LIKE THIS
COURT TO ADDRESS.
FOR EXAMPLE, THEY SAY THEY
COULDN'T FIND ANY FLORIDA LAW
THAT STANDS FOR THE PROPOSITION
THAT WHERE THE SUBLICENSOR
DIVESTED ITSELF OF THE BUSINESS?
WHERE NORDION
SUBLICENSES TO BEST AND DIVESTS
ITSELF TO THE BUSINESS IS THAT
RELEVANT TO THE ANALYSIS?
THEY ASKED THAT QUESTION.
>> LET ME ASK YOU ABOUT THE ONE
DAY SIGNIFICANCE.
IS THERE SOMETHING INVOLVED HERE
IN THE ECONOMICS INVOLVED THAT

WOULD CAUSE THE ONE DAY TO BE VERY MATERIAL IN SOME WAY?

>> WELL IT IS MORE MATERIAL HERE THAN IN ALL THE OTHER CASES WE'VE CITED THAT FOUND THE ONE-DAY REVISIONARY INTEREST WAS ADEQUATE.

UNDER THE LICENSE AGREEMENT HERE WHEN THE TERM OF THE LICENSE AGREEMENT EXPIRES, THE RIGHT TO USE THE LICENSE TECHNOLOGY DOES NOT GO BACK TO RAD SOURCE. IT STAYED WITH NORDION.

>> LET ME ASK ABOUT THAT. I THOUGHT I READ SOMEWHERE THAT THE LICENSE AGREEMENT EXTENDED FOR THE LIFE OF THE PATENT. AND SO THE, THE END OF THE LICENSE AGREEMENT WOULD BE COTERMINOUS WITH THE END OF THE LIFE OF THE PATENTS.

THE RIGHTS, I DON'T UNDERSTAND HOW THE RIGHTS TO USE AFTER THE PATENTS HAVE ENDED IS OF ANY SIGNIFICANCE?

BECAUSE THAT WOULD BE IN THE PUBLIC DOMAIN.

WHAT AM I MISSING?

>> NO.

I THINK THERE ARE INTELLECTUAL PROPERTY RIGHTS ABOVE AND BEYOND THE PATENTS. THERE IS LICENSE TECHNOLOGY HERE ABOVE AND BEYOND THE PATENTS.

WHAT THIS LICENSE AGREEMENT SAYS AT THE END OF LICENSE AGREEMENT, NORDION GETS TO USE THAT LICENSED TECHNOLOGY.

>> SO WHAT, WHAT RIGHTS ARE WE TALKING ABOUT OTHER THAN THE PATENT RIGHTS?

>> KNOW HOW, INTELLECTUAL PROPERTY RIGHTS SEPARATE AND APART FROM THE PATENTS.

LIKE THE DESIGN.

LIKE THE NON-PATENTABLE INTELLECTUAL PROPERTY THAT GOES INTO THIS LICENSED TECHNOLOGY.

>> THAT MAKES NO SENSE BECAUSE NORDION, IF WE LOOK AT THE

FACTUAL SCENARIO IS THAT RAD PICKED NORDION BECAUSE NORDION HAD THE EXPERTISE IN THE AREA THEY WERE INTERESTED IN TO MARKET ITS PRODUCT.

NOT ONLY GETTING MONEY, FIXED AMOUNT BUT THEY WERE GOING TO GET MONEY FROM YEAR FIVE ON BASED ON THE NUMBER OF PRODUCT THAT IS WERE MARKETED.

THEY CARED, THE WAY I SEE THIS, LOOKING AT JUST THE FACTS THAT WERE PRESENTED, THEY CARED WHO IT WAS.

NORDION WAS GETTING OUT OF THE BUSINESS AND WAS TRANSFERRING TO, TO BEST.

HAD ALL THE FACTS, THE 11th CIRCUIT SEEMED TO THINK IT WAS IMPORTANT THAT THEY FIRST TRIED TO GET A ASSIGNMENT AND IT WAS REFUSED AND THEN THEY SAID, WELCOME BACK AND WE'LL LOOK AT IT.

THEN SOMEBODY CAME UP WITH THIS AGREEMENT THAT, WELL, WE'LL DO ONE DAY LESS AND MAYBE WE CAN GET AROUND THIS ASSIGNMENT. SO, ANSWER, BUT BACK TO WHAT JUSTICE POLSTON IS ASKING YOU. YOU'RE SAYING THERE IS SIGNIFICANCE IN THE ONE DAY BECAUSE THERE IS RECORD EVIDENCE THAT THAT ONE DAY WILL THEN ALLOW NORDION TO USE A PATENT, SOMETHING OR OTHER?

I MEAN WE DON'T -- BECAUSE I DIDN'T SEE ANYTHING IN THE OPINION THAT WOULD ALLOW TO US EVEN FIGURE THAT ONE OUT?

>> THERE'S SIGNIFICANCE IN THE ONE-DAY REVERSIONARY INTEREST BECAUSE DEMONSTRATION NOT ALL THE INTEREST AND OBLIGATIONS HAVE BEEN TRANSFERRED.

THAT'S THE FIRST POINT.

THE SECOND POINT, I THINK YOU ARE INCORRECT THAT AFTER FIVE YEARS THAT RAD SOURCE HAD AN INTEREST IN WHO THE LICENSEE WAS

BECAUSE OF PAYMENT OBLIGATIONS.
THEY WERE NOT ENTITLED TO ANY
ADDITIONAL PAYMENTS AFTER FIVE
YEARS.

THEY GOT PAID ALL OF THE MONEY
THEY WERE ENTITLED TO UNDER THAT
LICENSE AGREEMENT REGARDLESS WHO
THE LICENSEE WAS.

>> WHAT IS THE SIGNIFICANCE OF
THIS ISSUE NOW IS NOT ON DAMAGES
FROM THEIR POINT OF VIEW BUT
DAMAGES AS TO WHETHER YOU GET TO
SUE THEM AND RECOVER FIRST?

>> THAT IS THE ISSUE.

THE DISTRICT COURT FOUND THAT
RAD SOURCE BREACHED THE
NON-COMPETE PROVISION IN THE
CONTRACT.

HOWEVER BECAUSE THEY FOUND THE
FIRST BREACH IN THIS TRANSFER
FROM NORDION TO BEST, THEY SAID
THAT IS NOT ACTIONABLE.

>> THEY COULD MAKE A DECISION
THAT WAS NOT A MATERIAL BREACH
BECAUSE THERE WAS NO MONEY DUE
AND IT WAS MEANINGLESS.

IT IS NOT OUR CASE.

WE MIGHT GET INTO WHAT WE MIGHT
DUE IF THIS CAME UP THROUGH THE
APPELLATE COURTS.

IT IS VERY DIFFERENT THAN WHAT
WE ARE OBLIGATED TO DO AND I
HAVE HAD THIS -- THIS ISN'T THE
FIRST TIME THE 11th CIRCUIT
DOES THIS AND YOU DON'T SEE THE
FULL PICTURE.

>> RIGHT.

>> SO THAT IS WHERE MY
FRUSTRATION IS.

>> I CAN UNDERSTAND THE
CHALLENGE AND I DON'T THINK THIS
COURT NEEDS TO GET INVOLVED IN
WHAT HAPPENS NEXT BUT THERE IS
SOMETHING THAT IS GOING TO
HAPPEN NEXT DEPENDING ON WHETHER
OR NOT THIS SUBLICENSE AGREEMENT
THAT IS TITLED A SUBLICENSE
AGREEMENT AND STATE'S IT IS NOT
AN ASSIGNMENT, IS IT A
SUBLICENSE AGREEMENT UNDER

FLORIDA LAW OR IS IT NOT?
>> NOW WHAT YOU'RE SAYING IS IT MATERIAL WHETHER SOMETHING IS AN ASSIGNMENT OR SUBLICENSE? WHETHER THERE IS STILL MONEY DUE TO THE LICENSOR?
WHAT I'M SAYING ABOUT IT, IF WE SAY, AND I KNOW YOU WOULDN'T LIKE THIS AS A HOLDING.
THERE IS NOT A BRIGHT LINE RULE UNDER FLORIDA LAW.
THERE IS A WHOLE CONSTELLATION OF FACTORS THAT PLAY A PART INCLUDING WHAT IS THE UNDERLYING SUBJECT MATTER AS JUSTICE LEWIS SAID IT, IT IS DIFFERENT IF IT IS A PREMISES VERSUS A PATENT SO, YOU KNOW, THOSE VARIOUS FACTORS AND NOT MAKE A DECISION AS TO WHAT THIS IS, WOULDN'T THAT BE SUFFICIENT FOR YOU TO GO BACK AND ARGUE WHATEVER YOU WANT?
YOU MAY STILL WIN AT THE 11th CIRCUIT?
>> I GUESS THAT'S RIGHT, BUT IT SEEMS TO ME, TWO MEMBERS OF THE PANEL AT THE 11th CIRCUIT SAID, WE DON'T THINK THERE IS A BRIGHT LINE TEST.
SO WE NEED YOU, THIS COURT, TO TELL US FLORIDA LAW WHEN YOU HAVE A ONE DAY REVERSIONARY INTEREST AND THE LICENSEE, SUBLICENSOR REMAINS LIABLE TO THE LICENSOR.
>> THOSE TWO FACTORS.
>> THEY RAISED OTHER ISSUES.
>> HOW DID THE TRIAL JUDGE RULE ON THIS?
>> THE TRIAL JUDGE APPLIED FEDERAL PATENT LAW TO SAY SUBSTANTIALLY ALL THE RIGHTS WERE TRANSFERRED AND THIS IS ASSIGNMENT.
>> DID THE TRIAL JUDGE ADDRESS THE ONE-DAY ISSUE?
>> I DON'T BELIEVE HE DID BECAUSE HIS VIEW WAS THAT WHEN YOU TRANSFER SUBSTANTIALLY ALL THE

INTEREST AND OBLIGATION THAT IS AN ASSIGNMENT UNDER PATENT LAW. HE CITED THREE FEDERAL PATENT LAW CASES FOR THAT PROPOSITION. THE 11th CIRCUIT SAID PATENT LAW DIDN'T APPLY HERE.

THIS IS FLORIDA LAW.

TWO ISSUES I LIKE TO ADDRESS, THEY WANT YOU TO ADDRESS IS THIS DIVESTITURE.

>> LET ME ASK YOU.

SO IF WE LOOK AT FEDERAL PATENT CASE AND SAY, THAT IS SIMILAR TO WHAT THIS COURT SAID IN 1930, WHICH IT IS INTENT OF THE PARTIES THAT GOVERN ARE WE, ARE WE PRECLUDED FROM THE RELYING ON FEDERAL PATENT LAW?

>> WELL THE QUESTION CERTIFIED TO YOU IS FLORIDA LAW.

>> BUT WE ALL THE TIME LOOK AT, AGAIN, IT SEEMS KIND OF RIDICULOUS TO IGNORE WHAT THE UNDERLYING SUBJECT MATTER OF THE, OF THE ASSIGNMENT IS.

>> EXCEPT IF THE LOOK AT THE PATENT LAW CASE THAT IS RAD SOURCE CITES THEY STAND FOR A PROPOSITION THAT IS NOT WHAT WE'RE DEALING WITH HERE.

THOSE CASES STAND FOR THE PROPOSITION WHERE YOU HAVE A -- CONTRACT THAT SAYS

THE RIGHTS ARE NOT TRANSFERABLE AND THERE IS A STATE LAW THAT SAYS RIGHTS ARE TRANSFERABLE, DOES THAT STATE LAW APPLY AND MAKE PATENT RIGHTS TRANSFERABLE?

>> WHY SHOULD WE NOT AS A MATTER OF FLORIDA LAW MAKE IT ANALOGOUS TO FEDERAL PATENT LAW IN THIS THESE CIRCUMSTANCES?

>> HERE YOU HAVE A CONTRACT THAT SPECIFICALLY MAKES THESE LICENSED RIGHTS, THESE INTELLECTUAL PROPERTY RIGHTS ARE TRANSFERABLE. THE CASES ARE DISTINGUISHABLE. IN THOSE CASES THE PARTIES ENTERED INTO A CONTRACT THAT SAID THAT SAID THE PROPERTY

RIGHTS ARE NOT TRANSFERABLE, AND THEREFORE FEDERAL PATENT LAW WOULD SAY, YEAH, THAT'S RIGHT. WE DON'T WANT THE PATENT RIGHTS TRANSFERABLE.

WE HAVE TO PROTECT THE PATENT-HOLDER.

THEY AGREED ON A ASSIGNMENT PROVISION THAT REQUIRED CONSENT AND AGREED ON A COMPLETELY SEPARATE PROVISION THAT THESE RIGHTS ARE TRANSFERABLE WITHOUT A UNDER A SUB LICENSE WITHOUT ANY CONSENT RIGHTS WHATSOEVER.

>> THE TRIAL COURT, I'M LOOKING AT THIS, DIDN'T RELY ON FEDERAL AT LEAST IN THE PART WHERE THEY'RE MAKING THEIR DECISION. IT SAID THE SUBLICENSE AGREEMENT SUBSTANTIVELY TRANSFERRED ALL RIGHTS HELD BY MDS IN THE TECHNOLOGY LICENSE UNDER THE LICENSE AGREEMENT.

INDEED IT WAS A ORIGINALLY MDS' INTENT TO COMPLETELY ASSIGN AND TRANSFER ANY INTEREST PRIOR TO, THE TIME THAT RAD SOURCE WITHHELD CONSENT.

SO WHY ISN'T THAT FACTUAL FINDING NOT BEING CHALLENGED, SOMETHING WE SHOULDN'T TAKE INTO CONSIDERATION?

>> I READ THE DISTRICT COURT DECISION BEFORE THIS ARGUMENT. I BELIEVE THE CITATION FOR THAT PROPOSITION WAS THREE FEDERAL PATENT LAW CASES WITHOUT LOOKING AT FLORIDA LAW.

THIS THAT IS WHAT WE ARGUED TO THE 11th CIRCUIT AND I THINK THAT'S HOW WE GOT HERE.

>> I THINK AS MATTER OF FACTUAL INTEREST AS JUSTICE PARIENTE POINTED OUT ONE DAY CAN BE A SHAM.

IF PARTIES DO ONE DAY, 12 HOURS, ONE HOUR, EXCEPT, WHERE --

>> SEE EXCEPT WHERE THE PARTIES SPECIFICALLY AGREE YOU HAVE BOTH ASSIGNMENT RIGHT THAT REQUIRES

CONSENT AND SUBLICENSE RIGHT
THAT DOES NOT REQUIRE CONSENT,
THE ONE DAY REVERSIONARY
INTEREST SUPPORTS THE
PROPOSITION THIS IS NOT AN
ASSIGNMENT.

IT IS NOT THE END OF THE
ANALYSIS.

IF THAT WAS ALL WE WERE DEALING
WITH HERE I WOULD HAVE A MUCH
MORE DIFFICULT ARGUMENT BUT IF
YOU READ THE 11th CIRCUIT
DECISION, NORDION REMAINED
LIABLE TO RAD SOURCE.

NOR DID I DON'T KNOW REMIND
LIABLE TO KEEP CONFIDENTIAL
INFORMATION CONFIDENTIAL.
THEY HAD OTHER OBLIGATION THAT
IS REMAINED WITH IT EVEN AFTER
THE SUBLICENSE WAS ENTERED INTO.
NORDION DIDN'T STEP OUT OF THE
PICTURE.

WE HAD A SITUATION WHERE YOU
HAVE RAD SOURCE, NORDION IN THE
MIDDLE AND SUBLICENSEE BEST ON
THE OTHER SIDE.

THOSE ARE THE FACTS AND THE
QUESTION TO THIS COURT IS THAT
SUFFICIENT TO MAKE THIS A
SUBLICENSE UNDER FLORIDA LAW?
I WILL TELL YOU, ON THE, I'VE
GOT, I'M RUNNING OUT OF TIME
HERE I APOLOGIZE.

>> YOU'RE IN YOUR REBUTTAL TIME.

>> HUH?

>> YOU'RE IN REBUTTAL.

>> TWO ISSUES.

ON THE QUESTION OF DIVESTITURE,
THERE ARE TWO CASES WE CITED IN
OUR OPENING BRIEF WHICH IS THE
SUPREME COURT OF NEBRASKA AND
INDIANA CIRCUIT COURT, APPELLATE
COURT THAT SAY WHEN YOU'RE
DIVESTING YOURSELF GETTING OUT
OF THE BUSINESS IF YOU KEEP YOUR
ONE OR TWO DAY REVISIONARY
INTEREST THAT IS SUFFICIENT.

IT'S A SUBLICENSE.

REBUFFING THE SUBLICENSE THE
SUPREME COURT OF NEBRASKA SAID

WHEN YOU ATTEMPT AN ASSIGNMENT
FIRST AND IT IS NOT CONSENTED TO
AND YOU GO FORWARD WITH A
SUBLICENSE THEY ACTUALLY FOUND
THAT IS EVIDENCE THAT YOU INTENDED
A SUBLICENSE BECAUSE THE
ASSIGNMENT WAS NOT CONSENTED TO.
YOU DON'T WANT TO BREACH YOUR
AGREEMENT AND GIVE UP ALL YOUR
RIGHTS.

SO THAT WAS ACTUALLY EVIDENCE
THAT THIS WAS PROPERLY A
SUBLICENSE.

THAT IS THE EXACT SITUATION WE
HAVE HERE.

THIS IS NOT A SHAM.

WHEN NORDION WAS DENIED THE
ASSIGNMENT RIGHT IT SIMPLY LEFT
THAT PROVISION OF THE LICENSE
AGREEMENT AND WENT TO A
COMPLETELY SEPARATE CONTRACT
RIGHT THE SUBLICENSE RIGHT AND
EXERCISED THAT RIGHT.

AND AS THE 11th CIRCUIT
SAID, THAT WAS THE BENEFIT OF
THE BARGAIN NEGOTIATED.

>> YOU'RE OUT OF TIME.

I WILL GIVE YOU AN ADDITIONAL
MINUTE FOR REBUTTAL.

>> OH, THANK YOU VERY MUCH.

>> MAY IT PLEASE THE COURT.

MY NAME IS ANUJ DESAI,
WITH COCOUNSEL SCOTT TAYLOR.

WE REPRESENT RAD SOURCE
TECHNOLOGIES, INC.

I THINK THE COURT IS ON THE
RIGHT TRACK HERE.

I WANT TO ADDRESS A FEW POINTS
THAT HAVE BEEN FOCUSED ON.

THE FIRST IS THE ONE-DAY
REMAINDER.

I HAVE ACTUALLY WRITTEN DOWN,
IT IS A SHAM.

IT IS ILLUSORY, ACTUALLY I HAD
WRITTEN DOWN, AS JUSTICE PARIENTE
POINTED OUT.

I WANTED TO DRAW AN ANALOGY TO
THE CNHF CASE UNDER FLORIDA LAW
WHICH TALKS ABOUT ASSIGNMENTS
VERSUS SUBLEASES.

THE POINT IT MAKES WHAT IS DETERMINATIVE THERE WHETHER THE ENTIRE INTEREST IS TRANSFERRED WITHOUT A REVISION BEING RETAINED BY THE ORIGINAL LESSEE. IN THAT CASE IT IS AN ASSIGNMENT.

THE ONE DAY REMAINDER IN THIS THESE TYPE OF SITUATIONS IN LEASES TYPICALLY EXISTS SO THAT THE PREMISES CAN BE SURRENDERED BACK THE ORIGINAL TENANT WHO CAN THEN DELIVER THAT BACK TO THE LANDLORD.

THAT'S THE POINT OF THE ONE-DAY REMAINDER.

HERE THAT ONE-DAY REMAINDER MAKES NO SENSE BECAUSE AT THE END OF THE TERM OF THIS SO-CALLED SUBLICENSE AGREEMENT, THERE WILL BE NO REVERSION.

>> WHAT ABOUT THESE, WHAT ABOUT THESE OTHER RIGHTS?

AND IN THE DISSENT, JUDGE PRYOR'S DISSENT HE SAID NORDION RETAINED RIGHT TO USE THE LICENSE AFTER CONCLUSION OF THE ORIGINAL LICENSE AGREEMENT WITHOUT FURTHER OBLIGATIONS TO RAD SOURCE.

OKAY, WHAT DOES THAT, WHAT ARE WE TALKING ABOUT WHEN WE TALK ABOUT THE RIGHT TO USE THE LICENSED TECHNOLOGY AFTER THE CONCLUSION OF THE --

>> AND WE RESPECTFULLY DISAGREE WITH THE DISSENT.

SO THE POINT THE DISSENT MAKES IS THIS TECHNOLOGY IS GOING TO COME BACK TO NORDION.

PRACTICALLY SPEAKING ITS NOT NORDION LEFT THE BUSINESS YEARS AGO, TRANSFERRED LAND, BUILDINGS EMPLOYEES, ALL ITS OTHER IP, EVEN ITS TRADEMARKS TO BEST.

>> OKAY. SO THAT IS THEIR PARTICULAR SITUATION BUT, SAY, THOSE FACTS WEREN'T THERE. WHAT ARE, WHAT RIGHTS ARE WE TALKING ABOUT?

>> WELL, TO MAKE, TO ANSWER THAT QUESTION THERE'S ALSO ANOTHER REASON THAT IS NOT GOING TO HAPPEN.

THE SUBLICENSE AGREEMENT ITSELF POINTS OUT ON THE VERY FIRST PAGE IN THE RECITALS, THE LICENSED TECHNOLOGY, CAPITALIZED TERM IS AN ASSET THAT BEST PURCHASED UNDER THE ASSET PURCHASE AGREEMENT.

SO AT THE END OF THE DAY, AT THE END OF THIS TERM IN 2022 OR WHENEVER, FOR THAT ONE DAY, BEST ISN'T GOING TO GIVE ANYTHING BACK TO NORDION IT IS NOT GOING TO GO BACK.

THE ONE-DAY REMAINDER IS ILLUSORY.

TO FURTHER ANSWER A QUESTION ABOUT WHAT COULD POSSIBLY BE GIVEN BACK EVEN IF YOU IGNORE THAT, YOU'RE CORRECT.

THE PATENTS DO EXPIRE.

THERE IS SOME KNOW HOW, SOME TECHNOLOGY THAT RAD SOURCE LICENSED TO NORDION IN PATENTS.

THE TRIAL COURT FOUND THAT NORDION TRANSFERRED THAT CONFIDENTIAL TECHNOLOGY TO BEST IN BREACH OF THE LICENSE AGREEMENT.

THAT WAS A BREACH OF THE CONFIDENTIALITY PROVISION OF THAT AGREEMENT.

AND SO THE QUESTION WAS ASKED EARLIER, WELL THE LICENSE IS PAID UP.

SO WHAT DOES RAD SOURCE HAVE TO LOSE?

RAD SOURCE HAS BEEN HARMED. IT HAS BEEN HARMED BECAUSE RAD SOURCE ACTUALLY RETAINS THESE PATENTS FOR OTHER PURPOSES.

THE LICENSE GRANTED TO NORDION WAS FOR A SPECIFIC FIELD, FOR THE RS 3000 SYSTEM AND RETAINED THE PATENTS FOR ALL OTHER PURPOSES BECAUSE IT DOES OTHER

THINGS IN X-RAY IRRADIATION.
SO IN FACT WHEN THE LICENSE
AGREEMENT EXPIRES, THE PATENTS
EXPIRES THESE OTHER THINGS STILL
HAVE VALUE.

THAT IS WHERE THE BREACH
OCCURRED THAT THE TRIAL COURT
RECOGNIZED.

>> WELL WHERE, WHY WOULDN'T,
BECAUSE YOU NOW, YOU'RE SAYING
WELL, IN THIS CASE IT IS
ILLUSORY BECAUSE THEY GOT OUT OF
THE BUSINESS.

IN OTHER CASE MAYBE IT IS NOT
ILLUSORY BECAUSE THEY REMAINED
IN THE BUSINESS.

WE ARE NOT CHARGED WITH FIGURING
OUT THESE INNUENDOS.

IT SEEMS TO ME THAT, YOU KNOW,
YOU'VE ASKED FOR IT TO BE, THE
QUESTION TO BE REPHRASED, THAT
IF WE ANSWER THAT THERE IS NO
BRIGHT LINE RULE IN FLORIDA,
ISN'T THAT, FOR THIS -- BECAUSE
I MEAN ISN'T THAT SUFFICIENT FOR
THE 11th CIRCUIT?

BECAUSE OTHERWISE TO SAY, WELL
MAYBE IN SOME CASES A ONE-DAY
AND BEING LIABLE -- MAY BE
SIGNIFICANT DEPENDING ON WHAT IS
THE UNDERLYING PREMISES.

WHETHER IT'S A PATENT VERSUS A
HOUSE AND THAT IT IS, THAT IT'S
THE INTENT THAT IS GOING TO
GOVERN, NOT A BRIGHT LINE THAT
YOU RETAINED ONE DAY, WOULDN'T
THAT BE, FROM OUR PURPOSES AND
FOR THE 11th CIRCUIT A
ADEQUATE ANSWER?

>> I THINK YOU'RE CORRECT,
YOUR HONOR.

I THINK POINT YOU MADE EARLIER
DURING APPELLANT'S ARGUMENT
THERE IS NO BRIGHT LINE TEST TO
ADDRESS THE SITUATION WE HAVE
BEFORE US, WHICH IS THE TRANSFER
OF PATENT RIGHTS UNDER AN
INSTRUMENT.

FLORIDA LAW HAS NOT SPOKEN ON
THIS ISSUE BEFORE ABOUT HOW TO

TRANSFER THE CHARACTERIZE THE
TRANSFER OF PATENTS RIGHTS.

>> WE COULD SAY PATENT RIGHTS
VERSUS A PREMISES, THAT YOU'RE
NOT, THAT THE ANALYSIS IS GOING
TO BE DIFFERENT BECAUSE OF
WHAT'S IN, THE VERY NATURE OF
WHAT IS INVOLVED.

>> THAT'S CORRECT.

>> WHAT ABOUT, HIS ARGUMENT,
WHICH HAS SOME APPEAL IS, IS
THAT, WELL, TWO THINGS.
FIRST OF ALL WHAT IS THE
SIGNIFICANCE OF THE FACT THAT
THEY NORDION WAS REMAINING
LIABLE?

THAT IS PART OF CERTIFIED
QUESTION.

SO IF YOU COULD ADDRESS THAT --

>> SURE.

THAT IS PUT IN THE CERTIFIED
QUESTION.

WE WOULD RESPECTFULLY DISAGREE
THEY REMAIN LIABLE.

WE THINK THAT IS ALSO ILLUSORY.

>> THAT'S THE PROBLEM IS.

TO SAY WELL, IT IS ILLUSORY HERE
SO IT IS NOT SIGNIFICANT SEEPS
TO DODGE THE QUESTION.

EXPLAIN, WHAT THAT ISN'T THAT
SIGNIFICANT IN MOST SITUATION
THAT IS SOMEBODY IS, YOU KNOW,
IS REMAINING ON THE HOOK AND
THAT IS WHY YOU DON'T NEED THE
CONSENT BECAUSE YOU NEED THE
CONSENT WHEN SOMEBODY ELSE IS
GOING TO TAKE OVER BOTH THE
RIGHTS AND THE LIABILITIES BUT
YOU DON'T NEED THE CONSENT IF
THEY'RE GOING TO REMAIN LIABLE?

>> AND WE WOULD SUBMIT THAT THE
11th CIRCUIT HAS ASKED THIS
COURT TO ADDRESS THE OVERALL
ISSUE OF BREACH AND TO REPHRASE
THE QUESTION AS NEEDED.

>> PLEASE ANSWER JUST THAT PART
ABOUT, ISN'T THAT WHY, WHY ISN'T
THAT SIGNIFICANT IN A VACUUM, A
SIGNIFICANT FACTOR?

IN DISTINGUISHING IT FROM AN

ASSIGNMENT, FROM A, ASSIGNMENT.

>> IF THE PURPORTED SUBLICENSOR WAS TRULY LIABLE THAN THE COURT WOULD NEED TO CONSIDER THAT IN ITS EVALUATION OF WHETHER WE HAVE AN ASSIGNMENT OR A --

>> SEEMS LIKE, FOR YOUR CLIENT, YOU'VE GOT, ASSUMING THERE IS LIABILITY YOU'VE GOT TWO SOURCES NOW TO LOOK TO.

YOU'VE GOT BOTH NORDION AS WELL AS BEST BECAUSE BEST IS GOING TO HOLD HARMLESS.

HOW ARE YOU WORSE OFF FROM THAT PROVISION?

>> WELL, FROM THE LIABILITY PROVISION RAD SOURCE MAY NOT BE WORSE OFF.

IT IS THE OVERALL ASSIGNMENT THAT HAS BEEN ACCOMPLISHED HERE WHICH IS A BLATANT TO EMPTY THE ANTI-ASSIGNMENT CLAUSE THAT IS THE HARM HERE.

>> WHAT IS THE HARM IF THERE WAS NO MORE MONEY DUE IN THE REAL WORLD SITUATION HERE?

IF ALL MONEY WAS COMPLETED, WHERE'S THE HARM IN WHATEVER YOU CALL THIS THAT NORDION WAS GETTING OUT OF THE BUSINESS?

>> TWO POINTS, THE HARM AS MENTIONED BEFORE WAS RAD SOURCE SAID NO TO THE ASSIGNMENT INITIALLY BECAUSE BEST WAS SEEN AS A POTENTIAL COMPETITOR IN THE OTHER X-RAY RADIATION TECHNOLOGY FIELD SO IT SAID NO.

THE HARM THAT WAS DONE, THIS TECHNOLOGY WAS TRANSFERRED, ASSIGNED TO BEST WITHOUT RAD SOURCE'S CONSENT.

>> WHAT IS THE DIFFERENCE THEN, AND I CAN SEE THAT BECAUSE THEY WERE LOOKING FOR THE RIGHT PERSON TO MARKET THEIR PRODUCT, WHAT IS, IF THERE HAD BEEN A TRUE SUBLICENSE BECAUSE THE AGREEMENT ALLOWED THEM TO ENGAGE IN SUBLICENSING, WHICH I ASSUME WAS THIS IDEA, LISTEN, I'M

GIVING YOU THIS VALUABLE RIGHT.
NOT ONLY DO I WANT YOU TO MARKET
IT BUT I WANT AS MANY
INDIVIDUALS TO MARKET IT.
WERE THEY ALLOWED UNDER THAT
SUBLICENSE TO ALSO, WERE THEY
JUST GIVING THEM THE PRODUCT OR
WERE THEY ALSO ALLOWING THE
SUBLICENSE TO INCLUDE THE
INTELLECTUAL KNOW-HOW AND PATENT
INFORMATION?

>> THE SUBLICENSE AS IT CLEARLY
STATES IS RIGHTS TO USE THE
SYSTEM.

THE TESTIMONY IN THE TRIAL COURT
IT WAS MEANT FOR INTERNATIONAL
DISTRIBUTION PURPOSES TO
SUBLICENSE IT.

>> JUST THE PRODUCT?

>> RIGHT.

>> WELL ISN'T THAT THEN, TO ME,
IF THAT'S TRUE, THAT'S THE MOST
SIGNIFICANT ASPECT OF THIS CASE
THAT REALLY ISN'T ENCOMPASSED IN
THE CERTIFIED QUESTION WHICH IS,
THEY DID NOT CONTEMPLATE UNDER
THE SUBLICENSE AGREEMENT THE
RIGHT TO TRANSFER THE KNOW-HOW.
ONLY LIKE YOU WOULD SAY IF IT'S
A, YOU KNOW, A PRODUCT, THAT
SOMEBODY WAS ABLE TO SELL THE
PRODUCT BUT NOT THE KNOW-HOW HOW
TO MAKE THE PRODUCT?

>> I DISAGREE THERE.

THE SUBLICENSE RIGHTS WERE FOR
THE LICENSED TECHNOLOGY TO USE
THE SYSTEM.

WHAT WASN'T GRANTED WERE TWO
OTHER THINGS.

THERE IS NO RIGHT TO SUBLICENSE
THE ENTIRE AGREEMENT AS NORDION
DID AND THERE WAS NO RIGHT TO
DELEGATE ALL THE OBLIGATION THAT
IS UNDER --

>> I'M ASKING ABOUT THE
KNOW-HOW.

YOU SAID THEY BREACHED THIS
BECAUSE THEY DIDN'T WANT THE
TECHNOLOGY OR KNOW-HOW TO GO TO
A COMPETITOR WHICH BEST WAS.

SO I'M ASKING YOU, WELL, WASN'T THAT SOMETHING THAT WOULD HAVE BEEN ALLOWED ANYWAY UNDER THE SUBLICENSING PART?

>> HAD NORDION TRULY -- NORDION SUBLICENSED THE AGREEMENT, THAT WOULD BE CORRECT.

THAT IS NOT WHAT NORDION DID. WHAT NORDION WAS ESSENTIALLY NULLIFY THE PROTECTION OF THE ANTI-ASSIGNMENT CLAUSE.

>> I GO BACK TO WHAT DIFFERENCE IT WAS MAKING, MAYBE THAT DOESN'T MATTER BUT WHAT DIFFERENCE DOES IT MAKE TO RAD OTHER THAN THEY GOT, THEY THOUGHT THIS WAS ON OPPORTUNITY, NOW WE CAN GET INTO MARKETING A NORTH PRODUCT IN VIOLATION OF THE NON-COMPETE CLAUSE?

>> IT IMPACTS THE FEDERAL POLICY THAT UNDERLIES PATENT LICENSE AGREEMENTS.

PATENTS ARE A CREATURE OF FEDERAL LAW.

AS YOU KNOW THEY GRANT A LIMITED MONOPOLY TO THE PATENT-OWNER.

WHAT IS THE VERY IMPORTANT PRINCIPLE OF THAT MONOPOLY THE PATENT OWNER GETS TO CONTROL AND SELECT THE DOWNSTREAM LICENSEES. IF RAD SOURCE DID NOT WANT BEST AS A DOWNSTREAM LICENSEE, IT GETS TO SAY SO.

>> BUT I THOUGHT THAT YOU SAID THAT THEY, YOU AGREED THAT THEY COULD HAVE GRANTED A SUBLICENSE TO -- GRANTED A SUBLICENSE TO BEST, THEY, NORDION COULD HAVE DONE THAT.

>> THEY COULD HAVE DONE THAT HAD IT TRULY BEEN A SUBLICENSE FOR RIGHTS TO USE THE SYSTEM.

THAT IS NOT WHAT NORDION DID. NORDION SOLD THAT BUSINESS TO BEST.

ASSIGNED AWAY ALL THE RIGHTS AND ASSIGNED AWAY ALL THE OBLIGATION AND ESSENTIALLY ASSIGNED THE AGREEMENT OVER TO BEST AND THAT

IS VIOLATION OF THE LICENSE
AGREEMENT AND WHAT THIS CASE IS
ON ALL FOURS WITH --

>> MAYBE I'M BEING THICK ABOUT
THIS. TRY TO EXPLAIN SO TO -- TO
ME BECAUSE THERE WAS ON TO
SOMETHING ABOUT THERE WAS THIS
TECHNOLOGY OR PATENT TECHNOLOGY
THEY DIDN'T WANT OTHERS TO HAVE
BUT THEN YOU'RE SAYING, NO, THEY
STILL COULD HAVE GOTTEN THAT IF
THEY WERE A SUBLICENSEE.

DID YOU NOT JUST SAY THAT?

>> HAD BEST TRULY BEEN A
SUBLICENSEE FOR PURPOSES OF ONLY
SUBLICENSING THE RIGHTS TO USE
THE SYSTEM, THE AGREEMENT WOULD
HAVE ALLOWED THAT.

BUT THAT IS NOT THE CASE HERE.
THE ENTIRE AGREEMENT WAS
SUBLICENSED, ALL OF THE
OBLIGATIONS WERE DELEGATED WHICH
ARTICLE 32.9 SAYS YOU SIMPLY
CAN'T NOT DO WITHOUT
RAD SOURCE'S CONSENT.

NORDION DIVESTED THE BUSINESS, TOLD
THE SEC LEFT THE BUSINESS.

WHAT HAPPENED HERE IS AS
ASSIGNMENT.

AND YOU CAN'T USE A LIMITED
SUBLICENSE CLAUSE TO NULLIFY THE
PROTECTION OF THE
ANTI-ASSIGNMENT CLAUSE.

THAT IS WHAT NORDION HAS DONE
HERE.

>> YOU SAY THAT IS BECAUSE
THERE'S A PATENT INVOLVED.
IS THAT THE REASON?

>> THAT IS IMPORTANT PART OF IT
AND THAT AFFECTS THE ANALYSIS OF
THIS IS THERE ONE-DAY REMAINDER?

>> WE COULD SAY IN THE AREA WHEN
YOU'RE DEALING WITH PATENTS,
FLORIDA LAW IS GOING TO FOLLOW
FEDERAL PATENT LAW.

WE DON'T HAVE TO -- WE DON'T
HAVE TO SAY WE'RE BOUND BY IT
BUT BECAUSE THE POLICIES THERE
ARE ABOVE MY PAY GRADE IN
UNDERSTANDING ALL THE NUANCES OF

PATENT LAW, THAT IS A BETTER POLICY TO FOLLOW AND JUDGE GOULD WHO HAD A SEVERAL WEEK TRIAL, WHICH I SEE IT SEEMS TO HAVE GOTTEN IT RIGHT?

>> THAT IS CORRECT, YOUR HONOR. IF THE COURT DOES DECIDE TO ADDRESS THE CERTIFIED QUESTION, THEN IT CAN DO AS THE BIOSYNEXUS COURT DID ON ALL FOURS WITH THE SITUATION HERE.

THERE TOO THERE WAS A BROAD LICENSE AGREEMENT BETWEEN BIOSYNEXUS AND GLAXO.

THERE WAS UNRESTRICTED LICENSE AGREEMENT IN THAT LICENSE AGREEMENT.

WHAT DID GLAXO DO?

IT SUBLICENSSED THE EXACT SAME RIGHTS IT HAD TO MEDIMMUNE, WHICH IS WHAT NORDION DID WITH BEST.

IT DELEGATED SUBSTANTIAL ALL THE OBLIGATIONS TO MEDIMMUNE WHICH IS WHAT NORDION DID WITH BEST.

WE ONLY HAVE A SUBLICENSE.

THE BIOSYNEXUS COURT DECIDED TO FOLLOW FEDERAL LAW BUT IT SAID THAT EUROPE LAW FOLLOWS PRINCIPLES OF FEDERAL LAW WHICH IS WHAT JUSTICE PARIENTE IS SUGGESTING HERE.

>> LET ME ASK YOU HERE THE SAME THING I ASKED YOUR OPPOSING COUNSEL.

DOES A ONE-DAY DIFFERENCE MAKE A ECONOMIC DIFFERENCE IN THAT CASE TO YOU?

>> TO MY CLIENT IT MAKES NO DIFFERENCE BUT AS HAS BEEN RECOGNIZED IT DOESN'T MAKE A DIFFERENCE TO NORDION EITHER. IT IS ESSENTIALLY ILLUSORY. IT IS OF NO VALUE.

THEY DON'T GET ANYTHING BACK. THE EMPLOYEES COME BACK FOR ONE DAY.

THE LAND DOESN'T COME BACK.

THE BUILDINGS DON'T COME BACK.

IT IS OF NO VALUE. THE SUBLICENSE

AGREEMENT STATES ON THE VERY FIRST PAGE THAT THIS LICENSE TECHNOLOGY IS A ASSET AND BEST PURCHASED IT IN THE APA. IT IS CONTRADICTING ITSELF WITHIN THE AGREEMENT.

>> THE DIFFICULTY THAT ALL LAWYERS HAVE AND WE HAVE, WHEN IT COMES TO THESE CERTIFIED QUESTIONS AND, WE ARE TRAINED TO ARGUE THE CASE AND PREVAIL IN THE CASE BUT THIS IS MORE OF AN ACADEMIC EXERCISE WHERE THEY'RE ASKING WHAT IS THE LAW.

SO IF YOU COULD, SEPARATE THAT. I KNOW IT IS DIFFICULT FOR EVERYONE INVOLVED.

COULD YOU, COULD YOU PROVIDE US WHAT YOU BELIEVE TO BE THE ELEMENTS OF LAW, OF FACT, THAT SHOULD BE CONSIDERED IN AND ARE CONTROLLING WHEN TRYING TO MAKE THE DETERMINATION WITHOUT GOING INTO THE ARGUMENT, I WIN BECAUSE?

YOU UNDERSTAND MY QUESTION?

>> YES.

>> THIS REALLY WILL TURN OUT TO BE MORE OF A LAW REVIEW ARTICLE, AN ACADEMIC EXERCISE.

>> I UNDERSTAND, YOUR HONOR.

>> COULD YOU DO THAT?

>> YES, YOUR HONOR. I THINK YOU'RE ON THE RIGHT TRACK IF IN THE SENSE WE HAVE TO LEAVE THE CONTEXT OUT OF ANSWERING IN ANSWERING THE QUESTION OF UNDERLYING FACTS.

>> SOME OF THOSE FACTORS MAY BE IMPORTANT AS AN ELEMENT, BUT TO THAT EXTENT.

BECAUSE THE 11th CIRCUIT HASN'T ASKED US TO DECIDE THE CASE.

>> RIGHT.

>> THEY ASKED, WHAT IS THE LAW?

>> HELP US WITH THAT.

THEY ARE LOOKING FOR THE COURT'S GUIDANCE.

>> I UNDERSTAND THAT.

HELP US WITH THAT.

>> BUT YOU DON'T THINK WE SHOULD GIVE IT?

>> IN MY VIEW FEDERAL LAW APPLIES.

I UNDERSTAND THIS COURT HAS THE DISCRETION TO ADDRESS THE ISSUE AND IN ADDRESSING THE ISSUE I BELIEVE, AS THE COURT HAS NOTED BEFORE, THAT IT IS NOT GOING TO CREATE A BRIGHT LINE RULE THAT CAN BE MANIPULATED DOWN THE ROAD.

AND SO IF THE COURT WANTS TO BE CONSERVATIVE AND WANTS TO ADDRESS THE LIMITED ISSUE BEFORE IT, WITH LIMITED CASE AND THE FACTS BEFORE IT, THAT THERE IS A POSSIBLE REPHRASED QUESTION AND THIS IS, THIS IS DIFFERENT FROM WHAT'S IN OUR BRIEFING, SO I WANTED TO PRESENT IT TO THE COURT, IT IS EVEN MORE SIMPLE AND LIMITED TO THE ISSUE BEFORE THE COURT WHICH IS, WHEN A LICENSEE ENTERS INTO A CONTRACT TO TRANSFER SUBSTANTIALLY ALL OF ITS INTERESTS IN A PATENT LICENSE AGREEMENT FOR AN ENTIRE TERM OF THE LICENSE AGREEMENT, SAVE ONE DAY, IS THE CONTRACT AN ASSIGNMENT OF THE LICENSE AGREEMENT, OR IS THE CONTRACT A SUBLICENSE?

AND IN OUR VIEW THE ANSWER SHOULD BE, AGAIN FOLLOWING THE POLICY OF FEDERAL LAW AND THE WELL-REASONED CASE THAT IS WE'VE CITED, THAT THE CONTRACT IS AN ASSIGNMENT OF THE LICENSE AGREEMENT AND THIS IS THE SAME ANSWER THAT THE TRIAL COURT REACHED.

THIS IS THE SAME ANSWER THAT THE 11th CIRCUIT WANTS TO REACH AND WE THINK THIS IS THE ONLY CORRECT ANSWER THAT WOULD DO JUSTICE IN THIS CASE.

>> WHAT ARE THE ELEMENTS THOUGH THAT GO INTO REACHING THAT

CONCLUSION?

YOU JUST GAVE US A CONCLUSION,
NOT THE BUILDING BLOCKS UPON
WHICH THAT CONCLUSION CAN BE
MADE.

>> WELL THE ELEMENT, THE
KEY ELEMENT WHICH IS WHAT THE
FEDERAL CASE LAW FOLLOWS, HAVE
SUBSTANTIALLY ALL RIGHTS OF THE
PATENT RIGHTS IN QUESTION BEEN
TRANSFERRED TO THE DOWNSTREAM
LICENSEE OR SUBLICENSEE?
IF THE ANSWER TO THAT IS YES,
WHICH THE TRIAL COURT MADE A
FACTUAL FINDING ON THAT POINT.
THAT HAS NOT BEEN DISTURBED.
THEN WE BELIEVE THAT THE FLORIDA
SUPREME COURT CAN CREATE THAT
LIMITED, BRIGHT LINE RULE IF IT
WANTS TO AND ANSWER THE QUESTION
IN THIS CASE, IN THE POSITIVE.
SO --

>> AGAIN WE'RE NOT BEING ASKED
FOR THIS.

WE'RE ASKED TO ESTABLISH
SOMETHING.

WHAT IS -- YOU'VE GOT
SUBSTANTIALLY ALL OF THE RIGHTS.
WHAT ARE THE OTHER ELEMENTS?

>> THE OTHER ELEMENT IS LIMIT IT
TO A PATENT LICENSE AGREEMENT.
SO THE CERTIFIED QUESTION TO THE
COURT BRINGS IN CASE LAW OF
LEASES, REAL ESTATE CONTRACTS
AND SO ON BUT IF THIS COURT
LIMITS IT TO A PATENT LICENSE
AGREEMENT THEN IT APPLIES TO THE
CONTEXT OF WHY YOU'RE ONLY
LOOKING AT SUBSTANTIALLY ALL
RIGHTS BEING TRANSFERRED BECAUSE
AS YOU RECOGNIZED, IT IS
DIFFERENT FROM A LEASEHOLD.
PATENT'S RIGHTS ARE COTERMINUS,
TWO PEOPLE CAN ENJOY THEM AT THE
SAME TIME WHICH IS WHAT IS
HAPPENING HERE BUT WHEN YOU
TRANSFER SUBSTANTIALLY ALL THOSE
RIGHTS THE PATENT OWNER IS
DIVESTED OF THAT IMPORTANT
RIGHT.

>> WHEN YOU SAY PATENT, IS THAT DIFFERENT THAN JUST A PRODUCT? HOW ABOUT IF WE HAVE A PRODUCT WITH NO PATENT AND SOMEONE HAS A LICENSE TO DO SOMETHING WITH, JUST A PRODUCT AND THERE IS NO PATENT INVOLVED, IS THAT THE SAME AS THE PATENT OR IS THAT DIFFERENT?

>> WE BELIEVE IT WOULD BE DIFFERENT BECAUSE THERE IS NO FEDERAL PATENT POLICY THAT IS GOVERNING ANY SORT OF MONOPOLY OR RIGHTS IN THAT SITUATION. THERE ARE NO PATENTS INVOLVED. IT IS SIMPLY A CONTRACT RELATING TO A PRODUCT.

>> OKAY.

AND SO YOU REALLY ARE SAYING THAT I HAVE TO CARVE OUT PATENT RIGHTS?

WHAT IF WE DO NOT AND WE SAY THIS IS JUST THE SAME AS A PRODUCT?

WHAT IS GOING TO HAPPEN?

>> WELL, IN THAT CASE, YOUR HONOR, IT WOULD BE AGAINST THE MAJORITY VIEW OUT THERE AND AGAINST THE FEDERAL PATENT POLICY.

>> I UNDERSTAND BUT WE'RE BEING ASKED TO DO THAT.

THIS COURT DOES CRAZY THINGS, RIGHT?

A LOT OF PEOPLE CRITICIZE US FOR WHAT WE DO.

SO, I KNOW YOU'RE TRYING TO WIN YOUR CASE BUT IF IT'S A PRODUCT, WHAT'S THE SIGNIFICANT ELEMENT?

>> IF IT'S A PRODUCT WITH NO PATENT RIGHTS ABOVE EARNING IT --

>> RIGHT.

>> -- THEN WE DON'T BELIEVE THERE IS ANY RATIONALE OR ANY POLICY THAT WOULD SUPPORT, YOU KNOW, IF YOU'RE DECIDING IN A VACUUM TO SAY, JUST BECAUSE SUBSTANTIALLY ALL RIGHTS IN THE PRODUCT HAVE BEEN TRANSFERRED

THERE'S AN ASSIGNMENT.
I WOULDN'T HAVE ANYTHING HERE TO
PRESENT TO YOU TODAY TO SUPPORT
THAT RULING.
BUT WE THINK THIS INVOLVES
PATENTS AND THAT IS WHAT MAKES
IT DIFFERENT.
THANK YOU.

>> REBUTTAL.

>> I WILL TRY TO ADDRESS YOUR
QUESTION.

THIS COURT SAID IN 1930, IF A
LESSEE TRANSFERS ALL OF HIS
ESTATE TO ANOTHER, THE
INSTRUMENT OF TRANSFER OPERATES
AS BETWEEN THE ORIGINAL LESSOR
AND THE ASSIGNEE OF THE TERM AS
AN ASSIGNMENT.

THE BASIC QUESTION, HAVE YOU
TRANSFERRED ALL OF YOUR ESTATE.
WHAT ARE THE ELEMENTS TO
DETERMINE WHETHER A PARTY HAS
TRANSFERRED ALL OF HIS ESTATE?
YOU FIRST HAVE TO LOOK AT THE
CONTRACT.

AND HERE THE STARTING POINT IS A
CONTRACT, THE LICENSE AGREEMENT
THAT INCLUDED AN ASSIGNMENT
PROVISION THAT REQUIRED CONSENT
AND A BROAD SUBLICENSE PROVISION
THAT DID NOT REQUIRE CONSENT.
THAT'S THE STARTING POINT.

SO THE QUESTION, UNDER THIS
SUBLICENSE WHICH THE CONTRACT
SPECIFICALLY ALLOWED, WAS ALL OF
THE INTEREST TRANSFERRED.

AND I THINK THE ELEMENTS IN YOUR
ANALYSIS SHOULD BE, ONE, IS
THERE A REVERSIONARY INTEREST?
IS IT ONE DAY?

IF IT IS ONE DAY THERE ARE MANY
CASES THAT SAY THAT IS
ADEQUATE REVERSIONARY
INTEREST --

>> WHAT IF WE DON'T AGREE THAT
THE DAY IS NOT --

>> I WOULD SAY TO YOU THAT IS
NOT THE ONLY REVERSIONARY
INTEREST.

WHAT RIGHTS WOULD REMAIN AT THE

END OF THE LICENSE AGREEMENT IF THE PATENTS HAD EXPIRED? THIS LICENSE AGREEMENT INCLUDES SCHEDULE A, THE LICENSE TECHNOLOGY THAT GETS TRANSFERRED. THE FIRST THREE ITEMS ARE THE PATENTS.

THEN IT GOES FOR TWO PAGES LISTING THE DRAWINGS, SPECIFICATIONS, MANUALS AND PROCEDURES.

THAT IS THE TECHNOLOGY THAT WOULD REVERT BACK.

>> BUT THEY TRANSFERRED THAT IN THE ASSET AGREEMENT TO BEST.

>> NO --

>> THEY GOT OUT OF THE BUSINESS.

>> I DISAGREE WITH THAT.

>> YOU DISAGREE WITH WHAT HE SAID?

>> I DO.

THE SUBLICENSE AGREEMENT WHICH THE COURT HAS PUT BEFORE YOU THAT SUBLICENSE EXPIRES ONE DAY BEFORE THE LICENSE AGREEMENT EXPIRES.

THERE IS ONE-DAY REVERSIONARY INTEREST.

PLUS NORDION WOULD GET THE RIGHT BACK TO USE ALL THE PATENTS INTO PERPETUITY.

>> CAN WE, WE CAN'T GET INTO TRYING TO DECIDE SOMETHING THAT IS NOT A FACTUAL FINDING AND I'M CONCERNED THAT, THAT, THAT IS WHY I SAY, IF WE ANSWER THERE IS NOT A BRIGHT LINE RULE, IN FLORIDA, AND SPECIFICALLY IN PATENT CASE THAT IS A PATENT CASE LAW IS THE MORE PERSUASIVE TO APPLY, THAT SEEMS TO ME ALL THAT WE SHOULD BE DOING.

>> WELL --

>> WE CAN'T ANSWER WHAT YOU JUST SAID.

>> WELL IT SEEMS TO ME THAT IS THE QUESTION BEFORE THIS COURT. IS THE SUBLICENSE AGREEMENT AN ASSIGNMENT OR AN, IS IT AN ASSIGNMENT OR IS IT IN FACT A

SUBLICENSE?

THAT IS THE QUESTION POSED.
RAD SOURCE SAYS, DON'T EVEN LOOK
AT THAT DOCUMENT.
LOOK AT THE ASSET PURCHASE
AGREEMENT.

THAT IS GETTING AWAY FROM THE
WHOLE ISSUE PRESENTED TO THIS
COURT IT SEEMS TO ME.

BUT --

>> THAT WOULD BE A FACTOR UPON
WHICH THE 11th CIRCUIT WOULD
APPLY WHAT WE SAY THE FLORIDA
LAW IS.

>> WELL --

>> WOULD BE CONSIDERED BY THEM
BUT MAYBE NOT BY US.

>> BACK TO YOUR QUESTION, THE
ELEMENTS, THE REVERSIONARY
INTEREST.

ONE DAY IS ADEQUATE ACCORDING TO
ALL THE CASES BUT THERE IS MORE
THAN THAT HERE.

SECOND DOES THE
LICENSEE, SUBLICENSOR REMAIN
LIABLE TO THE LICENSOR?

THAT IS IN THE QUESTION.

THERE IS NORDION REMAINS LIABLE
TO RAD SOURCE.

THEN THE OTHER ELEMENTS ARE,
DOES THE SUBLICENSOR, ORIGINAL
LICENSEE, HAVE OBLIGATIONS AFTER
THE ORIGINAL SUBLICENSE
AGREEMENT WAS ENTERED INTO?
HERE THAT WAS THE CASE THERE
WERE OBLIGATIONS TO MAINTAIN
CONFIDENTIALITY.

THERE WERE OBLIGATIONS TO
PREVENT ANY DISPARAGEMENT OF
RAD SOURCE AND THERE WERE
OBLIGATIONS TO ENFORCE THE
RIGHTS OF THE LICENSE
AGREEMENT --

>> YOU'RE NOT REALLY SAYING IF
IT HAD BEEN AN ASSIGNMENT THAT
SOMEHOW NORDION COULD HAVE GONE
OUT AND BLABBED ABOUT THE
TECHNOLOGY?

THEY STILL HAVE A DUTY OF
CONFIDENTIALITY EVEN IF THEY

TRANSFERRED THEIR RIGHTS?
>> MAY HAVE BEEN ACTIONABLE BUT
NOT AS A BREACH OF THE CONTRACT.
HERE THE CONTRACT OBLIGATION
REMAINED AND THAT IS ONE OF THE
ELEMENTS OF A SUBLICENSE.
NORDION DIDN'T LEAVE THE
PICTURE.
YOU KNOW, ARE THEY STILL
INVOLVED OR IS THIS ALL OF A
SUDDEN A MATTER BETWEEN RAD
SOURCE AND BEST?
AND UNDER THE AGREEMENT THAT,
THAT IS IN THE RECORD YOU CAN
SEE THAT'S NOT THE CASE.
NORDION REMAINED IN THE PICTURE
WHICH IS ONE OF THE KEY ELEMENTS
WHETHER OR NOT THIS IS
ASSIGNMENT OR SUBLICENSE.
>> YOU'RE OUT OF TIME.
ARE THERE ANY OTHER QUESTIONS
FROM THE BENCH?
>> I COULD GO ALL DAY.
VERY INTERESTING QUESTION
ACTUALLY.
>> THANK YOU ALL VERY MUCH.
>> THANK YOU.