Florida Dept. of Health & Rehabilitative Services vs. S.A.P.

GOOD MORNING, AND WELCOME TO THIS ORAL ARGUMENT AT THE FLORIDA SUPREME COURT. OUR FIRST CASE ON THE DOCKET THIS MORNING IS DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES VERSUS S.A.P. MR. McCOY.

GOOD MORNING, YOUR HONORS. IF IT PLEASE THE COURT, I AM CHARLIE McCOY HERE, ON BEHALF THE PETITIONER, THE DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES. YOUR HONORS, LET'S BEGIN WITH WHAT THIS CASE IS. IT IS A SUIT FOR NEGLIGENT SUPERVISION OF A CASE WORKER. I WANT TO EMPHASIZE THAT, BOTH THE INJURIES SUSTAINED AND THE CAUSE OF ACTION, DO NOT HAVE ANYTHING TO DO WITH CHILD SEXUAL ABUSE AND THEY ARE NOT ALLEGING ANY INTENTIONAL TORT, BUT TO GET TO THE FACTS, 21 YEARS AGO THIS MONTH, OCTOBER '79, WHEN THE CHILD, S.A.P., WAS ABOUT FOUR, SHE WAS FOUND IN A DEPLORABLE CONDITION BY THE POLICE, AT HER FOSTER PARENTS' RESIDENCE. SHE AND HER YOUNGER SISTER HAD BEEN IN THEIR CARE ABOUT NINE MONTHS, AND SHE HAD SUSTAINED BURNS AND BRUISES OVER MOST OF HER BODY. A POLICE REPORT DESCRIBED HER ASAP EARING TO BE EMACIATEED. SHE WAS OBVIOUSLY SEVERELY UNDER WEIGHT, AT THE LEAST. SHE, THEN, PASSED THROUGH A SUCCESSION OF TEMPORARY PLACEMENTS. THE CONTENTS ARE VERY CRYPTIC, BUT TO 1984, SHE WAS IN THE CUSTODY OF H.R.S., WHEN SHE WAS PLACED WITH FOSTER PARENTS, WHICH, I THINK, WERE PARENTS THAT INTENDED TO ADOPT.

YOU ARE CITING WHAT WAS IN THE COMPLAINT AND ATTACHED TO IT?

I AM TELLING YOUR HONORS THE MATERIAL FACTS OF WHAT IS BEFORE YOU. THE FIRST APPEAL WAS UPON DISMISSAL, AS BEING BARRED BY THE STATUTE OF LIMITATIONS, THEN, OF COURSE, THE FIRST DCA REVERSED AND SENT IT UP HERE ON --

YOU ARE CITING, BUT THIS IS ONLY BASED ON --

-- ALLEGATIONS IN THE COMPLAINT, YOUR HONOR. SHE CONTINUED IN THE PLACEMENT OF ADOPTIVE PARENTS, BEGINNING IN '84, FOR SOME AMOUNT OF TIME, DURING WHICH TIME SHE REPORTED HER FATHER FOR ALLEGEDLY SEXUALLY ABUSING HER, AND THEN, AFTER THAT, I THINK, SEVERAL TEMPORARY MORE PLACEMENTS, UNTIL SHE WAS RELEASED FROM H.R.S. AS LEGAL CUSTODY, IN 1993, WHEN SHE WAS 18. THE YEAR BEFORE, IN 1992, H.R.S. ISSUED AN INTERNAL INVESTIGATIVE REPORT, WHICH REVEALED FOR THE FIRST TIME, AT LEAST PUBLICLY, THAT HER CASE WORKER BACK IN 1979, HAD FALSIFIED THE VISITATION REPORTS. BASED ON THESE FACTS, SHEAL EDGED THAT -- SHE ALLEGED THAT -- OBVIOUSLY SHE WAS FOUR YEARS OLD AT THE TIME OF HER INJURIES, THAT NONE OF HER FOSTER PARENTS, LEGAL GUARDIANS OR HAD A CONFLICT OF INTEREST, SO THEY COULD NOT HAVE BROUGHT THE SUIT ON HER BEHALF, SO SHE ALLEGED THAT THE TRIAL COURT AND, MAYBE, A LITTLE MORE DEFINITIVELY, IN THE FIRST DCA, SHE ALLEGED TO THE TRIAL COURT THAT THE CAUSE OF ACTION WAS TOLLED, HAD ACCRUED BUT WAS TOLLED. THE ISSUE OF DELAYED ACULE WAS, ALSO, BROACHED.

THIS IS A CAUSE OF ACTION FOR NEGLIGENCE.

NEGLIGENT SUPERVISION, YOUR HONOR. WANT TO EMPHASIZE THAT THE H.R.S. IS NOT THE PERPETRATOR, AND THERE IS NOT AN INTENTIONAL TORT HERE, SO THAT FACT AND LEGAL ISSUE IS AN IMPORTANT DISTINCTION FROM THIS COURT'S RECENT DECISION IN HERNDON. THE

CERTIFIED QUESTION RAISES THE FIRST OF TWO ISSUES YOU ALL NEED TO ADDRESS, AND THAT IS WHETHER THE CAUSE OF ACTION DID ACCUSE -- DID ACCRUE. THE STATE'S POSITION IS IT ACCRUED IN 1979, WHEN THE INJURIES OCCURRED.

SHE DID NOT KNOW, AT THAT POINT, SHE WAS FOUR YEARS OLD, AND --

YES, YOUR HONOR.

-- AND YOU, ALSO, SAID THAT THERE WAS NO ONE ACTING ON HER BEHALF THAT KNEW OR SHOULD HAVE KNOWN OF WHAT HAD HAPPENED.

SHE -- THEY ALLEGE THAT NO ONE WHO KNEW WOULD ACT IN HER BEHALF. THAT IS IF YOU HAD A CONFLICT OF INTEREST, SAY, THE ALLEGED SEXUAL ABUSE BY THE ADOPTIVE FATHER -- I WANT TO EMPHASIZE THAT WAS AT LEAST FIVE YEARS LATER, AND THEN A VAGUE ALLEGATION OF CONFLICT OF INTEREST OR LEGAL INCOMPETENCE BY TEMPORARY FOSTER PARENTS AT ALL TIMES AFTER 1979.

NOW, THE DISTRICT COURT DID NOT DEAL WITH SOVEREIGN IMMUNITY IN ITS ORDER?

NO, YOUR HONOR. I VERY STRONGLY URGED THEM TO RECOGNIZE THAT, BOTH FACTS AND LEGALLY, THAT THE H.R.S. HAD SOVEREIGN IMMUNITY. THAT IS THE CRUX OF OUR POINT, BEING BOTH THE TOLLING AND THE ACCRUAL, THAT THE TOLLING HERE SETS THE PROCEDURAL FRAMEWORK OF WAIVER. LIMITED WAIVER, 768.28, NOT CHAPTER 25, THE GENERAL LIMITATION STATUTE. AS TO TOLLING, THOUGH --

SOVEREIGN IMMUNITY IS AN AFFIRMATIVE DEFENSE. IS THAT CORRECT?

IT IS MORE THAN A TYPICAL AFFIRMATIVE DEFENSE. OBVIOUSLY THE STATE NEEDS TO ASSERT IT, BUT IT IS, ALSO, IN SOME ASPECTS, HELD JURISDICTIONAL. AT THE VERY LEAST, SOMEONE SUING -- AN IMMUNE DEFENDANT, SOVEREIGN DEFENDANT, HAS TO VERY CAREFULLY COMPLY WITH CONDITIONS PRECEDENT AND THE SOVEREIGN IMMUNITY STATUTE, THE WAIVER, IS VERY STRICTLY CONSTRUED.

BUT WHEN THE DISTRICT COURT IS DEALING WITH THE TRIAL COURT'S ORDER, IT IS LOOKING AT FOUR CORNERS OF THE COMPLAINT, IN A MOTION TO DISMISS. DO YOU AGREE WITH THAT?

THE TRIAL COURT DOES LOOK AT FOUR CORNERS OF THE COMPLAINT. YES, YOUR HONOR.

AND PLAINTIFF STATED, IN ITS CAUSE OF ACTION, THAT IT WAS NEGLIGENCE, AND THE CHILD WAS NOT IN A POSITION TO EXERCISE HER RIGHTS AT THAT TIME, BECAUSE OF THE CONFLICT THAT YOU MENTIONED AND BECAUSE OF HER MINORITY. IS THAT PRETTY MUCH THE SUBSTANCE.

THAT WAS THE ALLEGATIONS IN THE COMPLAINT, YES, YOUR HONOR, THAT THERE WAS NO ONE COMPETENT OR WITHOUT CONFLICT OF INTEREST TO BRING THE SUIT FOR THE CHILD.

AT THAT POINT SOVEREIGN IMMUNITY HAD NOT BEEN RAISED.

WELL, YOUR HONOR, THE TRIAL COURT DID CITE TO BOTH STATUTES. IT WAS INTERESTING.

YOU SAID THAT '95 WAS NOT APPLICABLE. I DON'T QUITE UNDERSTAND IT. DO YOU SEE '95 AS -- DO YOU SEE 95 AS HAVING BOTH THE OLD STATUTE, THE NEW STATUTE, AS HAVING AN OPPOSED PROVISION?

YOUR HONOR, I DON'T THINK CHAPTER 95 HAS ANY BEARING, LITERALLY, ON THIS CASE AT ALL. NOW, LET ME TELL YOU WHY I THINK THE LOGIC OF HERNDON, TO ANSWER THE CERTIFIED

QUESTIONS AVAILABLE TO YOU. HERNDON BASICALLY -- AND, AGAIN, IT WAS AN INTENT CHILD SEXUAL ABUSE TORT, BUT YOU ALL SAID THAT THE LEGISLATURE EXCLUDED FROM THE CIRCUMSTANCES, PRIVATE DEFENDANTS, BUT EXCLUDED, FROM 95, ANY TOLLING OR CAUSE OF ACTION, FOR THAT MATTER, BASED ON REPRESSED MEMORY AND DELAYED DISCOVERY. NOW, AGAIN, I AM TALKING ABOUT TOLLING HERE, NOT WHEN THE CAUSE ACCRUED. BECAUSE THE CHAPTER 95 DID NOT MENTION THAT CIRCUMSTANCE, 768.28 DOES NOT MENTION ANY CIRCUMSTANCE, PERIOD, IN WHICH THERE CAN BE TOLLING, AS OPPOSED TO THE HALF DOZEN OR SO IN CHAPTER 95, SO BY THAT SAME LOGIC, YOU SHOULD HAVE NO HESITANCY IN ANSWERING THE CERTIFIED QUESTION, BEING, NO, THAT FRAUDULENT CONCEALMENT DOES NOT TOLL AN ALREADY-ACCRUED CAUSE OF ACTION FOR NEGLIGENT SUPERVISION. YOU WOULD REACH THE SAME RESULT, IF THE DEFENDANT, HERE, HAPPENED TO BE A PRIVATE ENTITY THAT DID NOT HAVE SOVEREIGN IMMUNITY, BUT, YOUR HONOR, THE TRIAL COURT'S ORDER OF DISMISSAL, ALSO, DISMISSED SOME ASPECTS OF THE COMPLAINT ON STRAIGHT UP SOVEREIGN IMMUNITY ANALOGY ASIANS OF FRAUD AND THAT SORT OF THING, TO THE EXTENT THE COMPLAINT WAS TRYING TO IMPLICITLY SUE IN FRAUD. THAT ISSUE HAS NEVER BEEN, IF IT WASN'T REVIEWED ON APPEAL. I THINK THE LAW OF THE CAUSE ESTABLISHES THAT THE ONLY THING LEFT THAT THEY ARE PRESSING IS THE NEGLIGENT SUPERVISION.

AREN'T WE, YOU KNOW, WE HAVE SPENT ALMOST HALF OF YOUR TIME, HERE, DANCING AROUND WHAT THE ISSUE IS THAT WE ARE HERE ABOUT, AND SO CAN'T WE COME MORE DIRECTLY TO TREAT THAT? WE HAVE GOT A LIMITED AMOUNT OF TIME.

YES, YOUR HONOR. THE ISSUE, THE CERTIFIED QUESTION IS WHETHER FRAUDULENT CONCEALMENT TOLLS AN ACCRUED CAUSE OF ACTION FOR CONCEALMENT.

LET'S TALK ABOUT THAT NOW.

YOUR HONOR, I THOUGHT I HAD, WHEN I BROACHED THE HERNDON CASE. IF WE CAN GO AND USE THE ANALOGY, IF WE ARE TALKING ABOUT PRIVATE LIT GEORGIANS. WE HAVE SPENT A LOT OF TIME TALKING ABOUT SOVEREIGN IMMUNITY.

YOUR HONOR, OUR POINT IS THAT SOVEREIGN IMMUNITY STATUTE, AS A MATTER OF LAW, CONTROLS THE FRAMEWORK OF THIS LAWSUIT, NOT CHAPTER 95. HOWEVER, THE LOGIC OF HERNDON IS, BY ANALOGY, APPLIES EQUALLY WELL. HERNDON SAID ONLY THOSE CIRCUMSTANCES LISTED IN CHAPTER 95 WOULD TOLL AN ACCRUED CAUSE OF ACTION. CHAPTER 95 DOES NOT INCLUDE TOLLING, DUE TO FRAUDULENT CONCEALMENT, IF IT APPLIED. BY ANALOGY, 768.28, THE STATUTORY WAIVER, SOVEREIGN IMMUNITY, HAS NO TOLLING, NO CIRCUMSTANCES WHICH ALLOW TOLLING, SO THEREFORE THERE IS NO --

WOULD YOU START WITH A PRIVATE SITUATION AND TELL US WHAT THE SITUATION WOULD BE THERE. LET'S SUPPOSE THAT WE HAD AN EXTENSIVE DAYCARE NETWORK OR SOMETHING, WHERE THE CHILD HAD BEEN IN THAT NETWORK FOR A LONG PERIOD OF TIME, AND THAT THE WORKERS THERE, AND THE PEOPLE THERE, HID, YOU KNOW, DID FRAUDULENTLY HIDE WHAT WAS GOING ON, TO THE PARENTS, AND ISSUED WRITTEN REPORTS TO THE PARENTS, ABOUT HOW THE CHILD WAS DOING, AND KNOWING, FOR INSTANCE, THAT A SUPERVISOR WAS ABUSING THE CHILD, PUT IN THERE THAT THE CHILD FELL DOWN IN THE BACKYARD OF THE CHILDCARE CENTER. IN OTHER WORDS AN EXTENSIVE PARALLEL SITUATION IN THE PRIVATE SIDE WOULD, IF WE COULD --

YOUR HONOR, THERE, STILL, WOULD BE NO TOLLING, ASSUMING THE CAUSE OF ACTION HAD ACCRUED. NOW, IF THE CHILD WAS CONTINUALLY REINJURED AT SOME POINT AND IT WERE DISCOVERED THE LIMITATIONS PERIOD MAY NOT HAVE RUN FOR THE MOST CURRENT INJURY, BUT ASSUMING THE CHILD WAS IN DAYCARE AND, EARLY ON, WAS INJURED, IT WAS A PRIVATELY RUN DAYCARE, THE RESULT, I THINK, WOULD STILL BE THE SAME, UNDER HERNDON VERSUS GRAHAM.

SO IF WE HAD THE PARENTS, AND I AM TALKING, NOW, A PRIVATE SITUATION WHERE THEY COULD BRING AN ACTION ON BEHALF THEIR CHILD, BUT THEY HAVE, IN ESSENCE, BEEN DEFRAUDED BY THE DAYCARE PEOPLE, THERE WOULD BE NO TOLLING.

NO TOLLING, YOUR HONOR. NOW, THAT IS EXACTLY WHAT HERNDON SAID. NOW, HERNDON, ALSO, BROACHED THE SECOND ISSUE, WHICH, I THINK, YOU ALL NEED TO REACH IN THIS CASE TO DISPOSE OF THE CASE, ALTHOUGH IT IS NOT PART OF THE CERTIFIED QUESTION. IT IS THE HARDER OF THE TWO POINTS, AND THAT IS WHEN DID THE CAUSE OF ACTION ACCRUE HERE. AGAIN, 728.68 CONTROLS. THERE IS TREMENDOUS CASE LAW, AND THE WORDING OF THE STATUTE, ITSELF, REQUIRES STRICT CONSTRUCTION. 768.28 DISPLACE NO LEGISLATIVE INTENT THAT THE COMMON LAW RULE, AS TO A CRUEL, WAS CHANGED BY THE WAIVER OF SOVEREIGN IMMUNITY. THE COMMON LAW RULE, WHICH YOU ALLSTATED IN THE CHRISTIAN I CASE -- CHRISTIANI CASE, STATED IN THE CAUSE OF ACTION, THE INJURY ACCRUED WHEN THE CAUSE OF ACTION INJURED. HERE THEY ALLOWED FOR CONCEALMENT FOR DELAYED A CRUEL BECAUSE OF THE CONCEALMENT. WE ARE HERE, BECAUSE THE WAIVER OF SOVEREIGN I AM UNITE IS VERY NAR -- IMMUNITY IS VERY NARROW. IT IS A MATTER OF LEGISLATIVE GRACE, AS AS TO EXPRESS LANGUAGE IN THAT STATUTE, THERE IS NO DELAYED A CRUEL FOR ANY REASON.

DOES THE STATUTE ADDRESS A CRUEL AT ALL?

IT USES THE WORD ACCRUES TWICE, YOUR HONOR, ONCE TO SAY YOU HAVE GOT TO FILE YOUR PRESUIT NOTICE WITHIN THREE YEARS, BUT I WANT TO POINT OUT IN THE FOUR-YEAR LIMITATIONS PERIOD THAT IS IN THE STATUTE, IT SAYS FOUR YEARS FROM WHEN THE CAUSE OF ACTION ACCRUES. IT DOES NOT FURTHER EXPLAIN ACCRUES.

SO IT DOESN'T -- WE HAVE TO, THEN, RELY UPON OUR COMMON LAW, TO IDENTIFY WHEN A CRUEL, THE QUACKS -- THE CAUSE OF ACTION ACCRUES.

NO, YOUR HONOR. FIRST, UNLIKE CHAPTER 95, THE WAIVER OF SOVEREIGN IMMUNITY HAS TO BE STRICTLY EXPRESSED BY TERMS AND CASE LAW, AND NOBLY ABS FROM CHAPTER, THE SOVEREIGN IMMUNITY WAIVER, IS THAT LAST ELEMENT LANGUAGE. AS YOU RECALL IN CHAPTER 95, ONE OF THE EARLIER SUBSECTIONS, IT SAYS A CAUSE OF ACTION ACCRUES FROM WHEN THE LAST ELEMENT OCCURS. THAT SENTENCE IS NOBLY ABS FROM 768.28, AND I WANT TO POINT OUT TO YOU THAT, WHEN SOVEREIGN IMMUNITY WAS WAIVED, THIS BROAD WAIVER WAS 1973. THE LEGISLATURE COULD NOT HAVE BEEN CONTEMPLATING, AND YOUR HONOR, I RECOGNIZE I AM STARTING TO INTRUDE IN MY REGULTHS P BULTHS TIME -- IN MY REBUTTAL TIME, BUT I WILL WIND IT UP AND RESERVE WHAT IS LEFT. THE SOVEREIGN IMMUNITY LANGUAGE, THAT SENTENCE WAS NOT PLACED IN CHAPTER 95, UNTIL A YEAR LATER, IN 1974, SO YOU COULD NOT SAY THAT THE LEGISLATURE WAS IMPLICITLY CONTEMPLATING THAT LAST ELEMENT POSITION, WHEN IT WAIVED SOVEREIGN IMMUNITY. SECONDLY THERE, IS NO LANGUAGE IN THE WAIVER, THE SOVEREIGN IMMUNITY WAIVER, THAT CROSS REFERENCES CHAPTER 95, GENERALLY, FOR THIS PURPOSE. IF YOU LOOK CLOSELY AT ONE PORTION OF THE WAIVER, IT DOES CROSS-REFERENCE CHAPTER 95 FOR PURPOSES OF SAYING A MEDICAL MALPRACTICE ACTION HAS TO BE BROUGHT WITHIN THE LIMITATIONS SPECIFIED IN THE APPROPRIATE PART OF CHAPTER 95, SO CERTAINLY THE LEGISLATURE HAD IT DESIRED TO, COULD HAVE EITHER DEFINED HOW IT WAS USING THE WORD "ACCRUES" IN THE WAIVER, OR IT COULD HAVE CROSS-REFERENCEED CHAPTER 95, SPECIFICALLY THE LAST ELEMENT LANGUAGE, AND DID NOT DO SO, SO WHEN YOU COMBINE THAT LAST ABS OF LANGUAGE, THE WAIVER OF THE HAS TO BE STRICTLY CONSTRUED, AND YOU ALL HAVE TO FIND THAT THERE IS NO DELAYED DISCOVERY OR DELAYED CAUSE OF ACTION AND AMEND THE LEGISLATURE'S ACTION AND FIND FOR THE DEFENDANT.

MAY IT PLEASE THE COURT. GOOD MORNING. MY NAME IS JAY HOWELL. I REPRESENT THE CHILD WHO IS IDENTIFIED AS S.A.P., THE RESPONDENT IN THIS CAUSE.

HOW SOON AFTER YOUR CLIENT LEARNED OF WHAT HAD HAPPENED, WAS NOTICE FILED?

SHE LEARNED OF WHAT HAPPENED TO HER -- SHE STILL DOES NOT HAVE ANY KNOWLEDGE, HERSELF, AND WE ALLEGE THAT IN THE COMPLAINT, OF WHAT HAPPENED TO HER. SHE ASKED, WHEN SHE BECAME AN ADULT, AT 18 YEARS OF AGE, IN AUGUST OF '93, WHAT HAPPENED TO ME? SHE STILL HAS NO MEMORY OF IT. IT ALL COMES FROM OTHER PEOPLE AND THE REPORTS. SHE HAS NEVER HAD A MEMORY OF IT. SHE WAS FOUR AT THE TIME OF THESE PARTICULAR ACTS OF NEGLIGENCE THAT ARE THE SUBJECT OF THIS.

WAS THERE SOMETHING THAT TRIGGERED THE FILING OF THE NOTICE? WASN'T THERE --

TWO THINGS, YOUR HONOR, TRIGGERED THE FILING, I THINK. ONE, HER TURNING 18 IN AUGUST OF '93, BECAUSE THAT FINALLY GAVE HER ACCESS TO THE COURTS. SHE HAD NO GUARDIAN, NO PARENT, NO PERSON WHO WAS ABLE TO ACCESS THE COURTS DURING HER MINORITY. THE SECOND EVENT OCCURRED IN DECEMBER OF '92. MR. McCOY MENTIONED IT. THE INSPECTOR GENERAL FOR H.R.S. DID AN INTERNAL INVESTIGATION. THEY RELEASED THAT TO THE PUBLIC, IN DECEMBER OF '92. IN THAT REPORT, FOR THE FIRST TIME, IT BECAME KNOWN THAT THEY HAD FALSIFIED THE RECORDS OF THE SUPERVISION OF THIS CHILD, AND THAT THEY HAD OBSTRUCTED THE LAW ENFORCEMENT INVESTIGATION INTO IT. THOSE ARE TWO TRIGGER MECHANISMS THAT BROUGHT THIS TO COURT.

SO SHE -- DID SHE FILE THE SUIT OR THE NOTICE OF INTENT ON HER OWN BEHALF? NO ONE FILED IT FOR HER?

I FILED IT FOR HER.

AS HER NEXT FRIEND?

AS HER ATTORNEY. I ACTUALLY WENT INTO THE DEPENDENCY COURT AND ASKED FOR AN APPOINTMENT AS ATTORNEY AD LITEM EARLIER, IS HOW I CAME INTO THIS.

DO YOU AGREE THAT BOTH 95.051, THE '79 STATUTE, AND THE MORE RECENT STATUTE, BOTH, CONTAIN A STATUTE OF REPOSE, SEVEN-YEAR STATUTE OF REPOSE?

95 CERTAINLY DOES, ALTHOUGH WE ARE NOT PARTICULARLY RELYING ON THE REPOSE PROVISIONS HERE. 768 DOES NOT HAVE ANY REPOSE LANGUAGE.

79 CONTAINS, IN ANY EVENT, THE ACTION MUST BEGUN WITHIN SEVEN YEARS AFTER THE ACT. OR OCCURRENCE GIVING RISE TO THE CAUSE OF ACTION. YOU DON'T READ THAT LANGUAGE AS BEING A STATUTE OF REPOSE?

YES, I DO THE. WE ARE NOT RELYING ON IT PARTICULARLY HERE. IT IS OUR POSITION THAT HER CAUSE OF ACTION DID NOT ACCRUE, UNTIL ONE OF TWO EVENTS TOOK PLACE, HER TURNING 18, SO THAT SHE COULD DO SOMETHING ON HER OWN, OR THE DISCLOSURE, IN THE END OF '92, ABOUT THE FRAUDULENT CONCEALMENT.

SO YOU ARE RELYING ON THE CAUSE OF ACTION NOT ACCRUING, RATHER THAN A TOLLING.

YOUR HONOR, WE HAVE AN ARGUMENT THAT INCLUDES BOTH. OUR POSITION, VERY SIMPLY STATED, IS THIS. THIS CHILD'S CAUSE OF ACTION DID NOT ACCRUE, IN THE TERMS THAT YOU HAVE DEFINED IN HERNDON VERSUS GRAHAM. THAT THE STATUTE, 768, SPECIFICALLY MENTIONS ON TWO INDICATIONS. THIS CHILD'S CAUSE OF ACTION DID NOT ACCRUE. THE STATUTE OF LIMITATIONS DID NOT START TO RUN UNTIL SHE TURNED 18. UP UNTIL THAT TIME, THERE WAS NO ONE WHO COULD HAVE BROUGHT THIS CASE.

YOUR POSITION ON WHETHER A MINOR'S CAUSE OF ACTION ACCRUES PRIOR TO THEIR MINORITY, EXPIRATION OF THEIR MINORITY AT AGE 18, THAT IS CONTRARY TO LONG-STANDING LAW IN THIS STATE. CORRECT? NARDONE, THOUGH NARDONE WAS CHANGED LATER, AS TO THE DISCOVERY PROVISION, STILL, IS -- THAT IS STILL VERY CLEAR, THAT THE ACTION BY A MINOR DOES NOT -- IT ACCRUES PRIOR TO THE TIME THAT THE MINOR TURNS 18. THAT IS CLEAR. CORRECT?

YES, SIR. THERE HAS NEVER BEEN A PROVISION IN FLORIDA, AS SOME STATES, LIKE CALIFORNIA, DO HAVE, THAT SAY THAT STATUTES AUTOMATICALLY TOLL UNTIL YOUR 18th BIRTHDAY, AND THAT IS NOT THE SITUATION HERE. WHAT OUR CASES HAVE DECIDED, THERE IS THREE OR FOUR IN FLORIDA AT THE DISTRICT LEVEL, WHAT THEY HAVE LOOKED AT IN EACH OF THESE CASES IS FACTS. DID THE -- NOT WAS THERE AN AUTOMATIC BLANKET, BECAUSE THERE ISN'T, BUT DID THE CHILD REALLY HAVE ACCESS? DID THE CHILD HAVE A NEXT FRIEND, A PARENT, SOMEONE WHO, WITHOUT A CONFLICT OF INTEREST, COULD GET TO COURT ON THEIR BEHALF? HERE THERE WAS NO ONE, SO FACTUALLY THIS CHILD'S CAUSE OF ACTION DID NOT ACCRUE, UNTIL SHE WAS 18.

YOU ARE SAYING THAT LEGAL RULE IS PREMISED ON THE ASSUMPTION THAT THERE IS A PARENT THERE THAT IS AWARE OF WHATEVER THE INJURY MIGHT BE, AND THEREFORE IS BOUND TO ACT ON BEHALF OF THE CHILD, AND THAT THAT PREMISE IS LACKING IN THESE CIRCUMSTANCES. IS THAT --

YES, SIR. AND THE LAW IS, EVEN, HARSHER THAN THAT. OUR RULES OF CIVIL PROCEDURE SAY, AND OUR COURTS HAVE REITERATED THAT THIS IS WHAT IT MEANS, THAT A CHILD CANNOT BRING AN ACTION ON THEIR OWN BUT MUST APPEAR, 1.210 OF OUR RULES OF CIVIL PROCEDURE, MUST APPEAR, THROUGH A NEXT FRIEND, PARENT OR A GUARDIAN, AND THE COURTS HAVE HONORED THAT, THAT THAT IS A BAR, TO THE CHILD OF FILING SOMETHING, SO WHENEVER THIS ISSUE HAS COME UP IN FRONT OF OUR APPELLATE COURTS, THERE IS, ALWAYS, AN EXAMINATION OF THE FACTS. WHAT ABOUT THIS CHILD'S LIFE? WHEN WE ARGUED MD VERSUS ARVIDA DISTRICT, SEVERAL YEARS AGO, THERE IS ALWAYS CONCERN, WELL, DID THAT CHILD HAVE ACCESS TO A PERSON --

I AM NOT SURE I UNDERSTAND YOUR ANSWER TO JUSTICE PARIENTE'S QUESTIONS, THOUGH, ABOUT WHO FILED THIS ACTION OR WHO FILED THE NOTICE, AND YOU SAID TWO THINGS, ONE, THAT IT WAS AFTER HER 18th BIRTHDAY, AND THAT YOU FILED IT, YOU KNOW, ON HER BEHALF BURKES THAT YOU WENT INTO COURT TO BECOME A GUARDIAN AD LITEM. NOW, I AM TRYING TO UNDERSTAND WAS THAT, THEN, FILED IN HER CAPACITY, NOW, AS AN ADULT, IN OTHER WORDS, SO WE ARE NOT TALKING ABOUT A NEXT FRIEND OR -- LOCO PARENTIS OR A PARENTAL SITUATION. YOU ARE TALKING ABOUT THIS NOTICE WAS FILED AFTER SHE BECAME AN ADULT AND WAS LEGALLY ENTITLED TO ACT ON HER OWN. IS THAT --

YOUR HONOR, NO.

WE NEED SOME CLARIFICATION OF THAT, IN TERMS OF WAS THAT FILED AFTER SHE BECAME AN ADULT OR 18?

FOUR MONTHS BEFORE IS ACTUALLY. WE FILED THE NOTICE LETTER.

AND WAS THAT FILED, THEN, HAD YOU BEEN APPOINTED HER GUARDIAN, FOR PURPOSES OF THIS LITIGATION?

YES, SIR.

THE NOTICE?

THAT IS EXACTLY WHAT HAPPENED. I WENT INTO COURT BEFORE HER MAJORITY, AT THE VERY END OF HER MINORITY, AND ASKED FOR THE APPOINTMENT AS ATTORNEY AD LITEM.

AND THAT COINCIDED WITH THE RELEASE OF THIS REPORT THAT DISCLOSED WHAT HAD BEEN HAPPENING?

ACTUALLY NOT ONLY DID THE REPORT CAME ABOUT SIX MONTHS BEFORE THAT, BUT WE HAD ASKED FOR THESE RECORDS IN THE DEPENDENCY, ITSELF, AND THEY WERE NEVER PRODUCED.

LET ME GO -- YOUR COMPLAINT HERE IS SOLELY AGAINST H.R.S., CORRECT?

YES, YOUR HONOR.

AND IT IS FOR NEGLIGENCE, CORRECT?

YES, YOUR HONOR.

SO NECESSARILY IT HAS TO BE ON THE BASIS OF 768.28.

YES, SIR.

CORRECT. OKAY. AND IN THE ALLEGATION -- DO YOU AGREE WITH MR. McCOY'S ARGUMENT THAT, UNDER THE CIRCUMSTANCES WHERE THE COURT'S JURISDICTION IS BASED UPON 768.28, THAT IT IS ACTUALLY 768.28-6-A, THAT CONTROLS WHETHER THE ACTION IS FORECLOSED, BY REASON OF STATUTE, BY LIMITATIONS, AS OPPOSED TO CHAPTER 95?

YES, I DO. IT IS 768 THAT CONTROLS.

OKAY. AND WOULD IT BE -- WHAT VERSION OF 768.28 DO YOU CONTEND APPLIES?

'79, YOUR HONOR. THAT IS THE ONE I HAVE USED. IT WAS THE ONE IN PLACE AT THE TIME OF THE INCIDENT.

WHY DOES '79 APPLY?

BECAUSE THE -- I MEAN, THERE IS A CHANGE THAT WE HAVE TALKED ABOUT, THAT OCCURRED IN '81, BUT THE OPERATIVE TIME, I BELIEVE, IS OCTOBER OF '89, WHEN THIS NEGLIGENCE OCCURRED, AT LEAST THE PREVIOUS SIX MONTHS TO THAT TIME. THEN, THE CAUSE OF ACTION, ITSELF, IS FILED IN '95. SO THE TIME PERIOD IS '79 TO '95, AS TO WHETHER THE CAUSE OF ACTION ACCRUED. THERE ISN'T A MATERIAL CHANGE IN 768, ON THE ISSUE OF A CRUEL AND THE USE OF THE WORD, FROM '79 UNTIL TODAY, ACTUALLY. WHAT WE ARE RELYING ON IS FOUR SOURCES, REALLY, THAT WE BELIEVE A CLOSE EXAMINATION OF FOUR SOURCES REVEALS THE LEGAL ANSWER TO THESE ISSUES. NUMBER ONE, THAT THE STATUTE, ITSELF, SPEAKS DIRECTLY TO THIS ISSUE. 768, ITSELF. THE LANGUAGE OF 768 SAYS THAT IT MUST BE FILED WITHIN FOUR YEARS AFTER SUCH CLAIM ACCRUES. ACCRUES IS USED TWICE IN 768. OBVIOUSLY THE LEGISLATURE CONTEMPLATED THE COMMON ENGLISH INTERPRETATION OF THAT WORD AND USED IT, ACCORDINGLY. OUR ARGUMENT, IN THAT REGARD, IS SIMPLE. BECAUSE SHE DID NOT HAVE FACTUALLY, PRACTICALLY, OBJECTIVELY, GENUINELY, ANY ACCESS TO THE COURTS, UNTIL 18, HER CAUSE OF ACTION CERTAINLY DID NOT ACCRUE UNTIL THAT POINT.

BUT THE NEGLIGENT SUPERVISION, AS I UNDERSTAND YOUR COMPLAINT, IS WRAPPED UP IN THE CONCEPT THAT THERE WAS A FAILURE, BY REASON OF FRAUD LEAPT CONCEALMENT, ACTUALLY, BY H.R.S., OF THE ABILITY FOR KNOWLEDGE TO COME OUT ABOUT HER CONDITION. I MEAN, ISN'T THAT THE GIST OF IT?

ACTUALLY OUR ALLEGATION IS BROADER THAN THAT. WE HAVE ALLEGED THAT THEY NEGLIGENTLY FAILED TO SUPERVISION HER PLACEMENT. NOTHING TO DO WITH FRAUDULENT RECORDS. SUPERVISION HER PLACEMENT, MONITOR AND SUPERVISION HER CASE WORKER. THEY

NEGLIGENTLY FAILED TO REMOVE HER FROM WHAT THEY SHOULD HAVE KNOWN WAS AN ABUSIVE SITUATION, AND LASTLY, THAT THEY FALSIFIED THE RECORDS AND NEGLIGENTLY ALLOWED THOSE FALSE RECORDS TO REMAIN, AS A PART OF HER FILE, WITHOUT CORRECTION.

WHAT I AM CONCERNED ABOUT IS THAT, UNDER THE POLICY OF SOVEREIGN IMMUNITY, THE LEGISLATURE HAS SEEN FIT TO CONCEDE TO THE COURSE THE POWER TO ADJUDICATE CLAIMS. THIS CLAIM COULD BE PRESENTED, TO STILL BE PRESENTED TO THE LEGISLATURE, REGARDLESS OF WHETHER IT CAN BE PRESENTED TO THE COURT. AND THAT -- WHERE DOES THE COURT -- IT SEEMS TO ME THAT THE LEGISLATURE HAS MADE IT CLEAR, SINCE IT DID THAT, IN THE EARLY '70s, THAT IT WAS DOING THAT FOR A LIMITED PERIOD OF TIME. THAT WAS AN ABSOLUTE FOUR-YEAR PERIOD. AND, IN FACT, THE NOTICE PROVISION WAS MUCH SHORTER, BACK IN THE '70s, WHEN THIS ALL BEGAN, AND I AM JUST CONCERNED WHETHER, BY LEAPING OUT OF THAT BAR, THE COURT STRAYS FROM THE INTENT, BY LEGISLATURE, OF GIVING TO THE COURT, THE POWER TO ADJUDICATE THESE CLAIMS.

MY BELIEF, YOUR HONOR, IS THAT THE DRAFTING OF 768 AND THE PRINCIPLE OF SOVEREIGN IMMUNITY, ITSELF, CONTEMPLATES OUR COMMON LAW, CONTEMPLATES OUR PROCEDURAL ASPECTS, CONTEMPLATES THE -- AND THE COURTS HAVE ADDRESSED THIS. THIS COURT ADDRESSED IT IN BARRETT VERSUS METROPOLITAN DADE COUNTY. THERE HAVE BEEN TIMES IN THE PAST, WHEN THE COURTS HAVE BEEN ASKED TO SAY WHETHER OTHER PROCEDURAL, EQUITABLE CONCEPTS APPLY TO THE STATE, AND THE COURTS HAVE SAID, JUST AS THIS COURT DID IN BARRICK, YES, WE ARE NOT GOING TO EXEMPT YOU FROM COSTS, THE CHAPTER 768, THE COST STATUTE. USUALLY THE COURTS HAVE RELIED ON ONE PHRASE, IN DOING THIS, THE SAME PHRASE THAT THIS COURT RELIED ON IN BARRICK, AND THAT IS THE STATE SHALL BE LIABLE IN THE SAME MANNER AS A PRIVATE INDIVIDUAL. THE SECOND MATTER IN 768 THAT, I THINK, BRINGS ALL OF THESE PROCEDURES INTO PLAY IS IF A PRIVATE PERSON WOULD BE LIABLE TO THE CLAIMANT, IN ACCORDANCE WITH THE GENERAL LAWS OF THIS STATE. I DON'T THINK THAT PLACES, SEQUESTERS THE SOVEREIGN, IN SOME NETHERWORLD, WHERE THE PROCEDURAL ASPECTS AND EQUITABLE ASPECTS OF OUR COMMON LAW AND OUR LEGISLATIVE SCHEME ARE NOT APPLICABLE.

IS THERE, PRESENTLY, IF THIS -- IF THE COURT DIDN'T HAVE JURISDICTION, BE ANY PROHIBITION TO FILING A CLAIM STILL?

NO, ALTHOUGH, YOUR HONOR, I THINK THE STANDARD, CARR VERSUS BROWARD COUNTY, BRIEFED IN THIS MATERIALS, ARTICULATES IT AS THE LEGISLATURE HAS TO PROVIDE A REASONABLE ALTERNATIVE, IF IT IS GOING TO TOTALLY FORECLOSE SOMEBODY FROM ACCESS TO OUR COURTS. I DON'T BELIEVE THAT THE POSSIBILITY OF A CLAIMS BILL, WITHOUT A LAWSUIT OR JUDGMENT THAT PRECEDES IT, I THINK, IS, REALLY, A SLIM CHANCE AT CHARITY, FRANKLY.

I HATE TO INTERRUPT YOU, BUT WHAT IS -- ISN'T THERE A -- THE CONCEPT OF SOVEREIGN IMMUNITY AND THE FACT THAT THIS IS SOMETHING THAT IS GIVEN BY THE LEGISLATURE, TO THE COURTS, LONG RECOGNIZED, BACK TO THE BEGINNING OF THIS STATE? ISN'T THAT SOMETHING THAT, REALLY, TAKES OUT OF CONSIDERATION, ACCESS TO COURTS VIEW, WHEN YOU ARE SUING THE GOVERNMENT? WHEN YOU SUING THE GOVERNMENT, YOU ARE DOING IT AS A MATTER OF LEGISLATIVE GRACE, TO GIVE THE COURTS THAT OPPORTUNITY TO ADJUDICATE THESE CLAIMS, REALLY, FOR THE BENEFIT OF THE LEGISLATURE.

I AGREE. IF THEY DON'T MEAN THE WORD "A CRUEL", THEY SHOULDN'T USE IT. THE LEGISLATURE HAS PUT THE WORD A CRUEL, TWICE, IN THE STATUTE, AS MR. McCOY MENTIONED. YOU KNOW, WE HAVE BEEN ARGUING THIS CASE AT THE APPELLATE LEVEL, ALONE, FOR FIVE YEARS, AND A CRUEL HAS CHANGED, AS A CONCEPT, AND I WAS PARTICULARLY GLAD TO SEE THIS COURT PUT SOME FLESH ON THAT SKELETON, TWO WEEKS AGO, IN HERNDON VERSUS GRAHAM, BECAUSE THIS IS A SOURCE OF CONFUSION IN OUR COURTS. EVEN WHEN WE ARGUE THIS SYSTEM TIMES AS

WE HAVE, A CRUEL IS DIFFERENT THAN THE TOLLING OF THE STATUTE OF LIMITATIONS, AS YOU ALL SAID IN HERNDON. IF THAT IS THE CASE, THEN THE WORD "A CRUEL", HAS A COMMON LAW MEEK THAT OUR SUPREME COURT HAS NOWORD AND. -- MEANING THAT OUR SUPREME COURT HAS ORDAINED. THE CAUSE OF ACTION IS ACCRUED. I BELIEVE IT IS A FAIR AND EQUITABLE APPROACH, IN 768, TO SAY THAT THE USE OF THE WORD "A CRUEL" HAS MEANING, JUST COMMON MEANING THAT HAS BEEN CLEARLY EMPHASIZED BY OUR SUPREME COURT. I DON'T THINK THAT IS UNFAIR. I DON'T THINK IT IS REACHING TOO FAR INTO SOVEREIGN IMMUNITY. I DON'T, REALLY, BELIEVE THAT THE LEGISLATURE CONTEMPLATED TOTALLY REMOVING THE SOVEREIGN FROM THE RULES THAT THE REST OF US PLAY UNDER.

WELL, TALKING ABOUT TOLLING, NOW, AND, PERHAPS, THE FRAUDULENT CONCEALMENT, AND I OFFER THIS QUESTION FOR BOTH OF YOU TO CONSIDER, WHETHER THERE IS ANY RELEVANCE TO AN ANALOGY HERE, IF, INSTEAD OF THE ABUSE SITUATION THAT WE HAVE HERE, WE HAD A SITUATION, FOR INSTANCE, WHERE H.R.S. HAD A BUS THAT IT USED TO TRANSPORT THE CHILDREN, AND THE CHILD WAS STRUCK BY THE BUS, AND SERIOUSLY INJURED. AND H.R.S. FRAUDULENTLY CONCEALED THE FACT THAT IT WAS THE BUS AND CLAIMED THAT IT WAS PHANTOM VEHICLE THAT STRUCK THE CHILD, AND YOU KNOW, MADE ENTRIES INTO THEIR RECORDS TO THAT EFFECT AND TOLD EVERYBODY ELSE IT WAS A PHANTOM VEHICLE. THEY HAVE NO IDEA, YOU KNOW, WHAT VEHICLE IT WAS OR ANYTHING. AND THEN, YEARS LATER, AFTER THE NOMINAL LIMITATIONS PERIOD IS PASSED, FOR BRINGING A CAUSE OF ACTION, SOMEBODY'S CONSCIOUS BOTHERED THEM, AND THEY DISCLOSED THAT IT WAS THE H.R.S. VEHICLE THAT STRUCK THE CHILD. IS THERE AN ANALOGY THERE, AND WHAT WOULD BE THE EFFECT OF THAT CONCEALMENT, IN TERMS OF THE LIMITATIONS PERIOD, IN THAT ANALOGY SITUATION?

I BELIEVE, YOUR HONOR, IN THAT ANALOGY, IT SHOULD TOLL IT AS WELL. I THINK THE FUNDAMENTAL RATIONALE OF THE FRAUDULENT CONCEALMENT DOCTRINE, AND YOU ALL HAVE SAID IT, AS HAVE MANY COURTS, IS SO THAT THE WRONG DOER IS NOT ONLY NOT PROTECTED BY HIS OR HER WRONGDOING, BUT THAT THE COURT NOT BECOME A PARTY TO IT. AND THE -- THERE IS A FUNDAMENTAL VIRTUE IN HAVING FRAUDULENT CONCEALMENT, AS A PART OF OUR COMMON LAW, AND THAT IS SIMPLY IT, THAT IT IS INEQUITY ONLY -- INEQUITABLE AND, ALMOST, UNTHINKABLE, TO SEE, AS A SYSTEM OF LAWS, AND FOR THE HIGHEST COURT TO SAY, WELL, I AM SORRY, BUT THE WRONG DOER WILL WIN HERE. THEY WILL PROFIT. THEY WILL SUCCEED FROM CONCEALING THEIR OWN ACTS. IT IS AN ESSENTIAL PART OF THE COMMON LAW OF ALMOST EVERY STATE. AS THE U.S. SUPREME COURT HAS SAID, THEY HAVE READ IT, BACK IN 1949. THEY SAID THEY HAD READ IT INTO EVERY FEDERAL STATUTE OF LIMITATIONS.

AS A PRACTICAL MATTER, THEN, YOU HAVE TWO ALTERNATIVE THEORIES FOR SAYING THERE IS DELAYED A CRUEL OF THIS CAUSE OF ACTION. ONE IS THE FACT THAT YOU HAVEAL EDGED THAT NO ONE WAS ACTING OR WAS AVAILABLE TO ACT ON THIS CHILD'S BEHALF. THE SECOND BEING THAT, BECAUSE OF THE CONCEALMENT, THERE IS NO KNOWLEDGE, EVEN IF THERE HAD BEEN A RESPONSIBLE ADULT. CORRECT?

YES.

THOSE ARE THE TWO. HOW ARE THOSE -- IS THE JURY SUPPOSED TO BE THE ENTITY THAT WILL DECIDE, AS A MATTER OF FACT, WHETHER THERE HAS BEEN DELAYED A CRUEL? HOW HAS THAT GONE, AS A PRACTICAL MATTER IN THIS CASE, IF WE ALLOWED THIS CASE TO GO FORWARD, IS THAT DETERMINED?

FRAUDULENT CONCEALMENT HAS BEEN A SUBJECT FOR THE TRIER OF FACT. THAT IS THE JURY OR THE JUDGE IN THAT CASE, AS TO WHETHER THERE WAS FRAUDULENT CONCEALMENT. I ASSUME, AT THE TRIAL OF THIS CAUSE, THAT THE JURY WOULD MAKE A DECISION, NOT ONLY ON THE BASIC COUNTS OF NEGLIGENCE BUT, ALSO, ON THAT LAST ITEM, AS TO WHETHER OR NOT

THE DEPARTMENT FALSIFIED ITS RECORD AND NEGLIGENTLY ALLOWED THOSE RECORDS TO REMAIN FALSE. IT IS A HYBRID ISSUE, ON FRAUDULENT CONCEALMENT, OBVIOUSLY, WHERE THE COURTS REAL ROOUL AS -- WHEN THE COURTS RULE AS SUFFICIENT AS A MATTER OF LAW, BUT I THINK IT HAS AN IMPACT ON THIS ISSUE AS TO THE PROCEEDINGS, IF IT IS STILL ALIVE.

WAS THERE ANYONE TO ACT ON YOUR CLIENT'S BEHALF?

I THINK THAT IS MORE OF A DECISION FOR THE COURTS. I APPRECIATE THE OPPORTUNITY TO BE HERE. IT IS A LONG WAY FROM WHERE THAT CHILD WAS DISCOVERED TO THIS COURT. I URGE YOU TO GIVE LIFE BACK TO HER CLAIM AND ALLOW HER ACCESS TO OUR COURTS. IT IS A FUNDAMENTAL ISSUE. THANK YOU.

COUNSEL, COULD YOU RESPOND TO THE ANALOGOUS SITUATION THAT I PRESENTED? IS THAT RELATIVE TO THE ANALYSIS HERE AT ALL, AND THAT IS, IF, UNDER THE SAME CIRCUMSTANCES, THE CHILD HAD BEEN INJURED AND STRUCK BY AN H.R.S. VEHICLE AND, OF COURSE, WE KNOW THERE HAS BEEN A WAIVER OF SOVEREIGN IMMUNITY --

YES, YOUR HONOR.

-- THAT IS NOT AN ORDINARY SITUATION, BUT H.R.S. HAD FRAUDULENTLY CONCEALED THAT FACT.

YES, YOUR HONOR. THAT WOULD BE MY FIRST POINT. THE ANALOGY DOESN'T STAND UP, YOUR HONOR, WITH ALL DUE RESPECT, FOR THIS REASON.

WHAT WOULD BE THE CIRCUMSTANCES? IN OTHER WORDS WHAT --

THE REASON IT DOESN'T STAND UP --

WOULD THE STATUTE OF LIMITATIONS JUST RUN ITS NORMAL COURSE, IN THE CIRCUMSTANCES THAT I DESCRIBED?

FIRST, YOUR HONOR, UNDER BOTH THE HERNDON CASE AND EXPRESS LANGUAGE OF CHAPTER 95, EVEN IF IT WERE PRIVATE DEFENDANTS, YOU WOULDN'T HAVE ANY KIND OF TOLLING, DUE TO DELAYED DISCOVERY, BASED ON ATTENTIONAL TORT OF SEXUAL ABUSE, BECAUSE YOU ARE DOING JUST A NEGLIGENCE PERSONAL INJURY.

BUT WITH THE BUS STRIKING THE CHILD AND IT BEING FRAUDULENTLY CONCEALED, WOULD THE STATUTE OF LIMITATIONS JUST RUN ITS COURSE, AND THE ACTION WOULD BE BARRED, DESPITE THE FACT THAT H.R.S., THE OWNER OF THE BUS, THE DRIVER OF THE BUS, ET CETERA, FRAUDULENTLY CONCEALED THE FACT THAT IT WAS THE BUS THAT STRUCK THE CHILD, AS OPPOSED TO A PHANTOM VEHICLE?

UNDER THE COMMON LAW, WHICH WE THINK IS WHAT APPLIES HERE, BECAUSE THE SOVEREIGN IMMUNITY WAIVER DOESN'T CHANGE IT, THE CAUSE OF ACTION WOULD HAVE ACCRUED, AS OF THE DATE OF THE ACCIDENT, THAT THE INJURIES RESULTED FROM. THE FOUR-YEAR LIMITATIONS PERIOD WOULD RUN IN FOUR YEARS, BECAUSE THERE IS NO PROVISION FOR TOLLING, UNDER THAT CIRCUMSTANCES, AND LIKEWISE, BECAUSE 768.28 CONTROLS, AND IT HAS NO PROVISIONS THAT CHANGE THE COMMON LAW RULE, AS TO A CRUEL, THE CAUSE WOULD, ALSO, ACCRUE AT THAT TIME, AND BECAUSE IT ACCRUED AT THAT TIME OF THE ACCIDENT, THE FOUR-YEAR LIMITATION PERIOD WOULD RUN, AND THE CAUSE WOULD BE BARRED, AFTER FOUR YEARS, PERIOD. THAT IS TO SAY -- THAT IS THE STATE'S POSITION, SIMPLY STATED, THAT THE SOVEREIGN IMMUNITY STATUTE HAS NO PROVISION FOR DELAYED A CRUEL AND NO PROVISION FOR TOLLING OF A CAUSE OF ACTION THAT HAS, INDEED, ACCRUED, SO NEITHER IS ALLOWED. NOW, I WANT TO EMPHASIZE THAT, YES, THE LEGISLATE USER USED THE WORD ACCRUES, LITERALLY -- THE

LEGISLATURE USED THE WORD ACCRUES, LITERALLY, TWICE IN THE WAIVER. MR. HOWELL MENTIONED THAT. THERE IS NO INDICATION THAT THE CHANGE OF THAT, BY USE OF THE WORD "ACCRUES" CHANGED THE COMMON LAW RULE, THAT HAD BEEN IN PLACE FOR YEARS, AND THAT COMMON LAW ACTION ACCRUES THE DATE WHEN THE INJURY OCCURRED. AND THERE IS NO LAST ELEMENT LANGUAGE IN THE WAIVER OF SOVEREIGN IMMUNITY, AND JUSTICE WELLS, I WANT TO GO BACK TO, I THINK IT WAS YOUR QUESTION ABOUT WHICH VERSION OF SOVEREIGN IMMUNITY WAIVER CONTROLLED. OPPOSING COUNSEL MADE A DEVASTATING CONFESSION. HE SAID THAT THE 1979 VERSION CONTROLLED. IF IT DOES CONTROL, THEN THAT IS WHEN THE CAUSE OF ACTION -- YOU CAN'T SAY THE 1979 CONTROLS AND THEN SAY YOUR CAUSE OF ACTION ACCRUES IN 1992, SAY, WHEN THE H.R.S. ISSUED ITS INTERNAL INVESTIGATION. YOU CAN'T HAVE IT BOTH WAYS. IF THE CAUSE OF ACTION ACCRUED IN 1992, THEN THE 1992 LAW APPLIES, AND, OF COURSE, WE HAD THE 1980 CHANGES TO THE WAIVER OF SOVEREIGN IMMUNITY EXPRESSLY IF YOU ARE REASSERTING SOVEREIGN IMMUNITY FOR ACTS OF BAD FAITH AND THAT SORT OF THING. IF, INDEED, THE 1979 LAW CONTROLS, IT IS BECAUSE THE CAUSE OF ACTION ACCRUED THEN, AND IF IT ACCRUED THEN, THEN THE CAUSE OF ACTION, FOUR YEARS LATER, IN 1983, THE STATUTE OF LIMITATIONS TOLL -- THE STATUTE OF LIMITATIONS CONTROLLED, AND YOU DON'T HAVE -- AND YOU HAVE SOVEREIGN IMMUNITY. IF HE SAYS THE 1979 LAW CONTROLLED, THEN WE CAN'T SAY WE WANT THE 1979 LAW AND BRING IT UP TO 1982. YOU CAN'T HAVE IT BOTH WAYS.

COUNSEL, DON'T YOU SEE A DISTINCTION, HERE, BETWEEN A SITUATION, SUCH AS A MAINTENANCE VEHICLE, HAVING NOTHING TO DO WITH THE CHILD, INJURING THE CHILD, AND, HERE, INJURIES OCCURRING WHILE ONE IS ESSENTIALLY IN THE CUSTODY OF HEALTH AND REHABILITATIVE SERVICES OR THE CHILD WELFARE AGENCY. DO YOU SEE A DISTINCTION BETWEEN THAT, SOMEWHAT OF A FIDUCIARY OR PROTECTIVE NATURE, THAT WE SHOULD DRAW UPON IN SOME FASHION TO ADDRESS?

YOUR HONOR, I UNDERSTAND THE FACTUAL DIFFERENCE. I WOULD REMIND YOU THAT THE CHILD, YES, WAS IN THE LEGAL CUSTODY OF H.R.S. BUT OBVIOUSLY WAS IN THE DAY-TO-DAY CONTROL OF THE FOSTER PARENTS, WHO, INDEED, WERE THE PERPETRATORS AND NEVER NAMED IN THIS LAWSUIT. STILL, BECAUSE THE WAIVER OF SOVEREIGN IMMUNITY IS PURELY A MATTER OF LEGISLATIVE GRACE, IF IT IS NOT WRITTEN DOWN IN THAT STATUTE THERE, IS NO DELAYED A CRUEL AND THERE IS NO TOLLING PERIOD, THAT IS WHAT THIS COURT HAS TO FIND, UNDER THE LAW THAT REQUIRES STRICT CONSTRUCTION OF THE SOVEREIGN IMMUNITY WAIVER, PARTICULARLY IN THE ABSENCE OF ANY LANGUAGE INCORPORATING ANYTHING FROM CHAPTER 95. THE -- THAT IS BASICALLY WHAT I HAVE, YOUR HONOR, AGAIN. THE SOVEREIGN IMMUNITY STATUTE CONTROLS. OPPOSING COUNSEL CONCEDED THAT. SINCE IT IS STRICTLY CONSTRUED, IT DOESN'T MENTION TOLLING, AND IT DOESN'T MENTION DELAYED ACCRUING FOR ANY REASON. ALSO, IN THE CONTEXT OF TOLLING, IT HAS THE LANGUAGE, IT IS FOREVER BARRED, IF NOT BROUGHT WITHIN FOUR YEARS. THIS COURT HAS HAD NO HESITANCY IN SAYING THE ANSWER TO THE CERTIFIED QUESTION AS TO TOLLING IS, ABSOLUTELY, NO, AND UNLIKE A PRIVATE DEFENDANT, WHEN SOVEREIGN IMMUNITY IS INVOLVED, THERE IS NO DELAYED A CRUEL, UNLESS EXPRESSLY PROVIDED BY THE LEGISLATURE, SO THEREFORE THIS CAUSE OF ACTION IS TOTALLY BARRED.

DO YOU AGREE THAT, IF, ASSUMING THAT WE LOOK TO THE OTHER LANGUAGE, WHICH SPEAKS TO THE FACT THAT THE SOVEREIGN, THAT THE STATE IS TO BE TREATED AS ANY OTHER PRIVATE INDIVIDUAL, IF WE TAKE THIS BACK AND ASSUME THAT THIS WAS A PRIVATE INDIVIDUAL, THAT THE ALLEGATION OF THERE BEING NO ONE TO ACT ON THIS CHILD'S BEHALF AS DELAYING A CRUEL OR THE FACT THAT THERE WAS NO KNOWLEDGE OF WHAT HAD HAPPENED, UNTIL THE INTERNAL INVESTIGATION HAD BEEN REVEALED, WOULD BE ENOUGH TO SUSTAIN -- SURVIVE A MOTION TO DISMISS, IF THAT IS ALL WE ARE HERE ON, STILL, I GUESS?

I UNDERSTAND. I AM HESITANT TO ADOPT YOUR PREMISE WHOLESALE, YOUR HONOR, BECAUSE, REMEMBER, FACTUALLY THIS INVOLVES SOMETHING NO PRIVATE ENTITY CAN DO, WHICH IS

INVOLUNTARILY REMOVING CHILDREN FROM THEIR NATURAL PARENTS AND PLACING THEM IN FOSTER CARE. THAT IS THE ROOT OF THIS, BUT IF IT WERE A PRIVATE DEFENDANT, SOMEHOW, SUED FOR THE EQUIVALENT OF NEGLIGENT SUPERVISION, ASSUMING THE CAUSE OF ACTION ACCRUED, THEN THERE IS THE SEVEN-YEAR REPOSE LANGUAGE IN CHAPTER 95 THAT JUSTICE SHAWAL ALLUDED TO. WHAT THIS -- JUSTICE SHAW ALLUDED TO. WHAT THIS SAYS IS THE CAUSE OF ACTION FOR A CHILD IS NO MORE THAN SEVEN YEARS, THEN BACK TO THE SPECIFIC FACTS OF A CASE, COULD THERE BE DELAY IN A CRUEL, AND BECAUSE OF THE INHERENT DIFFERENCE BETWEEN A PRIVATE DEFENDANT, IF YOU WILL, AND A SOVEREIGN IMMUNE DEFENDANT, THAT IS THE CRITICAL THING. I CAN'T SAY THERE WOULD BE LIABILITY AND SO THEREFORE THERE WOULD BE LIABILITY HERE. WE HAVE A SOVEREIGN DEFENDANT, AND THE SOVEREIGN IMMUNITY STATUTE SAYS ONLY TO THE EXTENT PROVIDED IN THE ACT, AND THAT REQUIRES STRICT CONSTRUCTION, EVEN IF THE CASE LAW DIDN'T, SO I CAN'T ANSWER YOUR QUESTION COMPLETELY. THERE WOULD BE NO TOLLING -- EXCUSE ME -- THERE WOULD BE TOLLING FOR A PRIVATE DEFENDANT, ONLY TO A MAXIMUM OF SEVEN YEARS.

MR. McCOY, I THINK YOUR TIME IS UP.

THANK, YOUR HONOR.

THANK YOU VERY MUCH. THANK YOU, COUNSEL.