Judith Rose v. Norwegian Cruise Lines, Ltd.

FINAL CASE ON THE ORAL ARGUMENT CALENDAR IS ROSE VERSUS NORWEGIAN CRUSE LINES.

MAY IT PLEASE THE COURT. I AM KEITH HOPE OF KEITH HOPE PA IN KEY BISCAYNE, A WITH ME IS WILLIAM JULIEN, IN BOCA RATON FOR THE PETITIONERS. WE ARE HERE ON THE DECISION BELOW FROM THE THIRD DISTRICT, WHICH REVERSED THE TRIAL COURT'S CLASS CERTIFICATION, AND THIS COURT FOUND THAT IT CONFLICTED WITH THE FIRST DISTRICT'SION IN THE DAILY CASE,HD THE CASE BECAUSE THEY, BOTH, INVOLVED FOOD OR WATER POISONING OF A CERTAIN NUMBER OF PEOPLE WHO WERE EXPOSED TO THIS FOOD OR WATER DURING A CERTAIN PERIOD OF TIME.

WE ACCEPT IT PROVISIONALLY. COULD YOU ADDRESS WHY THE FACTS OF THE TWO CASES OR THIS CURSORY TREATMENT BY THE THIRD DISTRICT DOESN'T MAKE THESE, THE TWO CASES DISTINGUISHABLE? WHY IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE ROSE CASE AND THE MacFAD ENCASE?

THE -- AND THE MacFADDEN CASE CASE?

JUST 2IS -- JUSTICE PARIENTE, THE THIRD DISTRICT CASE IS SHORT BUT IT DOES SAY THAT THERE WAS A CLASS, CONSISTED OF ALL PAYING PASSENGERS WHO CONSUMED WATER AND/OR FOOD UNFIT FOR HUMAN CONSUMPTION AND WERE, THUS, MADE ILL ON THIS SHIP DURING THEIR VOYAGES, AND THEN IT SAYS CLASS CERTIFICATION IS IMPROPER BECAUSE OF INSUFFICIENT COMMONALITY, WHICH IS ONE OF THE ELEMENTS OF CLASS CERTIFICATION. THE MacFADDEN VERSUS DAILY CASE HAD A VERY SIMILAR FACTUAL PATTERN, AND THAT IS IN THE FOUR CORNERS OF THAT OPINION. A CERTAIN NUMBER OF PATRONS AT THE RESTAURANT EIGHT AT THE SAME RESTAURANT OVER A FOUR-DAY PERIOD. THEY GOT SICK FROM THE UNFIT WATER AND FOOD, AND THE CLASS WAS CERTIFIED IN THAT.

WOULD IT ALWAYS BE, AS THE RULE OF LAW, THAT IF THERE IS A LOT OF PEOPLE IN EITHER A RESTAURANT OR A CRUSE SHIP, THAT COMMONALITY IS ALWAYS -- OR A CRUSE SHIP, THAT COMMONALITY IS ALWAYS MET?

JUSTICE PERIANT, I CAN'T SAY THAT IT WOULD ALWAYS BE MET. THIS CASE IS STRIKING BECAUSE THERE WAS A SINGLE OUTBREAK OF VIRUS IN THIS CASE WHERE A CERTAIN NUMBER OF PEOPLE WERE EXPOSED TO IT. NOW, IN EVERY FOOD POISONING CASE, I WOULD NOT SAY IT IS AN AMENABLE CERTAINFICATION, BUT CERTAINLY THE MacFADDEN AND DAILY CASES WERE CERTIFIED ONLY FOR CLASSES.

IS IT NEGLIGENCE LIABILITY OR ONLY CAUSE OF ACTION?

IT SHOULD -- OR CAUTION?

-- OR CAUSATION?

IT SHOULD ONLY BE LIABILITY. DUTY, LIABILITY IN FACT, WHICH WOULD BE CERTAIN CLASSIFICATION. THE STANDARD OF EACH INDIVIDUAL PERSON'S INJURIES AND THE EXTENT OF EACH PERSON'S DAMAGES AS WE CITED SHOULD BE TRIED INDIVIDUALLY, WITHIN THE CLASS ACTION.

IS THAT WHAT THE JUDGE DID IN THIS CASE?

THE JUDGE'S ORDER IS NOT AS GOOD AS IT COULD BE, JUSTICE PARIENTE, AND I WOULD HAVE TO ADMIT THAT THAT ORDER SHOULD BE AMENDED AND MODIFIED ON REMAND, WHICH I SUBMIT THE RULE WAS SPECIFICALLY PROVIDED FOR. THIS WAS THE INITIAL CLASS CERTIFICATION ORDER, OVER THE MANY YEARS THAT WE FINALLY GOT TO A HEARING, AND THIS ORDER SHOULD BE, BUT IT DOES NOT MEAN WITH RESPECT, THAT THIS WAS NOT A GOOD CASE FOR CLASS CERTIFICATION. IT MEANS THAT THE COURT OUGHT TO LOOK MORE CLOSELY AT WHICH COMMON QUESTIONS CAN BE PROVEN CLASS WIDE, AND WE WILL CONCEDE TODAY, THAT IT SHOULD BE LIABILITY ONLY, CERTAINLY NOT DAMAGES, BECAUSE THE VERY CASES WE RELY ON, JUDGE ATKINS'S DECISION IN HERNANDEZ, AND THE STERLING CASE IN THE SIXTH CIRCUIT, MacFADDEN AND THE MAD CRAB CASE CERTIFIED ONLY AS TO LIABILITY, WHICH WOULD BE DUTY, BREACH AND CAUSATION THAT GOES TO FACT. THOSE THREE ISSUES ALONE ARE SO SIGNIFICANT THAT, IF THEY CAN BE PROVEN, AND THE BURDEN OF THAT CLASS CERTIFICATION IS NOT TO PROVE YOUR CASE, WHICH RESPONDENT'S ENTIRE ARGUMENT IS THAT WE DIDN'T PROVE OUR CASE AT THE CLASS CERTIFICATION SECTION. ALL WE HAD TO SHOW WAS --

GO BACK TO THE JURISDICTION ISSUE. ISN'T IT, IF YOU HAVE A FOOD POISONING OUTBREAK OF CUSTOMERS, VERSUS, AGAIN, JUST FROM THE FOUR CORNERS OF THIS OPINION, THREE DIFFERENT CRUISES WITH A L OUTBREAK. WHY ISN'T THAT, FOR THE PURPOSE THAT, AGAIN, IN THE THIRD DISTRICT YOU HAVE GOT A RESTAURANT CASE, THEY DON'T CITE TO ROSE. THEY HAVE GOT TO LOOK AT MacFADDEN. WHETHER OR NOT THE THIRD DISTRICT IS RIGHT OR WRONG IS NOT OUR FIRST BURDEN. WHY IS THAT NOT, AGAIN, THE FACTS THAT THERE IS A RESTAURANT VERSUS THREE CRUISES, ENOUGH TO SAY THAT THAT MIGHT BE A DIFFERENCE FOR A COMMONALITY, AND NOT CERTAIN IF IING THE CLASS? -- AND NOT CERTIFYING THE CLASS?

JUSTICE PARIENTE, LET ME RESPOND TO THAT QUESTION. THIS IS WHY THEY ARE COMPARABLE, BECAUSE, IN THE RESTAURANT CASE, IT WAS "X" NUMBER OF PEOPLE, 1600 PEOPLE EIGHT AT THE SAME RESTAURANT, OVER A FOUR-DAY PERIOD. THE OUTBREAK WAS A SINGLE OUTBREAK OF A VIRUS. THE THREE CRUISES, THE CENTER FOR DISEASE CONTROL CONCLUDED, AFTER FOUR THOROUGH INVESTIGATIONS AND INSPECTIONS, THAT THIS VIRUS WAS THE SAME VIRUS ON ALL THREE VOYAGES. IT WAS A SINGLE OUTBREAK OF THIS STOMACH VIRUS, OVER THREE VOYAGES.

BUT YOU ARE HAVING TO GO WELL OUTSIDE THE THIRD DISTRICT'S OPINION TO TELL US ALL OF THOSE THINGS, AND ORDINARILY IN A CONFLICT SITUATION, IT IS EITHER A CLEAR ISSUE OF LAW THAT ONE COURT HAS ANNOUNCED THAT THEY ARE IN CONFLICT WITH THE OTHER COURT OR THEY HAVE SAID IT THAT WAY, OR THAT YOU CAN DETERMINE FROM THE EXPLANATION IN THE OPINION THAT THE COURT HAS WRITTEN. HERE, IT IS ALMOST AS IF THERE HAS TO BE AN ASTERISK AFTER THE LINE YOU READ FROM THE OPINION, THAT YOU KNOW, NOW LOOK AT THE RECORD, AND SEE, BECAUSE EVERY, AS YOU JUST EXPLAINED, IN ARGUING THIS THING ABOUT THE CENTER FOR DISEASE CONTROL, THAT WE HAVE GOT TO GO LOOK AT THAT IN ORDER TO FIND THAT OUT, WHICH NOW, WILL, WHEN WE MATCH THAT UP WITH THE FOURTHICT'S OPINION, SEEMINGLY BE IN CONFLICT. MG SOE DIFFICULTY, TOO WHETHER OR NOT THIS SHORTHAND HOLDING OF THE THIRD DISTRICT IS TRULY IN CONFLICT WITH THE FOURTH DISTRICT'S DIFFERENT HOLDING, IN MacFADDEN.

JUSTICE ANSTEAD, I WOULD AGREE THAT THE THIRD DISTRICT'S OPINION IS NOT AS DETAILED AS IT SHOULD HAVE BEEN, BUT IT IS CLEAR FROM THE FACE OF THAT OPINION THAT IT WAS ONLY CONCERNED WITH ONE DISCREET ELEMENT OF CLASS CERTIFICATION. WE HAVE NUMBER ROSSITY, ADEQUACY TYPICALITY, PREDOMINANT, SUPERIOR MANAGEABILITY, THERE ARE A LOT OF ELEMENTS IN CLASS CERTIFICATION. THE THIRD DISTRICT SAID ONE AND ONE ONLY, AND THAT COMES FROM THE "A" PORTION OF THE RULE, COMMONALITY, CASE LAW, WHICH, ONE OF THE EASIEST ELEMENTS TO PROVE. YOU HAVE A CASE WHERE A LOT OF PEOPLE WENT ON A SHIP AND GOT SICK WITH FOOD POISONING, AND THE THIRD DISTRICT, IN ITS OPINION, SAID COMMONALITY IS LACKING. IN THE FOURTH DISTRICT, YOU HAVE A NUMBER OF PEOPLE THAT GO A RESTAURANT

AND GET SICK, AND THE WAY THAT THEY CITED THE LAW, IT IS ALMOST ASSUMED ON PRESENTATION, BECAUSE THE LAW ON COMMONALITY IS BASICALLY ON TWO ISSUES. DID EVERYONE'S CLAIM ARISE FROM THE SAME COURSE OF CONDUCT BEFORE THEM. IN THIS CASE THE RESTAURANT FED THEM ADULT RATED WATER AND FOOD AND IN THIS CASE THE SHIP FED THEM ADULT RATED WATER AND FOOD, SO THAT IS THE SAME COURSE OF CONDUCT.

YOU AGREE THAT THE ISSUE IS NARROW.

I AGREE THAT EVERY PARTY HAS ALLEGED WHAT CLASS CERTIFICATION IS, AND THEY HAVE BASED THEIR OPINION SOLELY ON THE COMMONALITY FACTOR.

THEY CITE A CASE, THOUGH, THAT IS ON --

THEYTO THE ULYSSES CASE, JUSTICE PARIENTE, WHICH SIMILARLY, IN A SHORT O SFT, SIMPLY SAID WE FIND NO PREDONLY NANCE, NOT COMMONALITY -- NO PREDOMINANCE, SO NOT COMMONALITY SO, YES, THE CASE THAT THE THIRD DISTRICT CITED FOR ITS CONCLUSION THAT THERE WAS NO COMMONALITY, IF YOU READ THIS CASE, ALL IT SAID WAS IN THIS CASE WE FIND NO PROD ONLY NANCE, A, B AND C.

YOUR -- NO PREDONLY NANCE, A, B AND -- NO PREDOMINANCE, A, B AND C.

SO YOUR CONCLUSION WOULD BE THAT IT IS-NOT COMMON COURSE OF CONDUCT.

THE COMMON COURSE OF THE DEFENDANT AS A CLASS AS A WHOLE. THE NUMBER TWO IS EVERYONE'S CLAIM, DO THEY HAVE THE SAME LEGAL THEORIES. IF YOU LOOK AT THE TWO CASES, MacFADDEN VERDICTS DAILY, THE TERMS OF NEGLIGENCE AND BREACH OF IMPLIED WARRANTY, AND OUR CASE WAS NEGLIGENCE AND BREACH OF IMPLIED WARRANTY, SO IF YOU HAVE GOT THE SECOND COURSE OF CONDUCT, EVERYONE AS A WHOLE, THEN YOU HAVE GOT THE COMMONALITY. EVERYONE SAYS IT IS A LOW THRESHOLD.

I THINK THAT BRINGS US BACK TO WHAT WE DO ON OUR REVIEW FOR PURPOSES OF DETERMINING WHETHER THERE IS JURISDICTION, AND WE HAVE TAKEN THE, THIS COURT HAS TAKEN THE POSITION, SINCE THE CONSTITUTION WAS AMENDED, THAT THE JURISDICTION HAS TO BE FOUNDED UPON THE FOUR CORNERS OF THE OPINION, AND THE SUM TOTAL OF WHAT I READ, THE THIRD DISTRICT HAS SAID THAT WHAT IT DID WAS IT CAME TO A LEGAL CONCLUSION THAT, IN THIS PARTICULAR SITUATION, THERE WAS AN INSUFFICIENT BASIS FOR THE TRIAL COURT TO MAKE A DETERMINATION THAT THERE WAS THIS COMMONALITY. ISN'T THAT WHAT THE THIRD DISTRICT SAID?

THAT IS WHAT THEIR ON SAYS. THE SINGLE ISSUE.HE YO INR FOR THAT TO WITHIN THE FOUR CORNERS, BE IN CONFLICT, IT SEEMS TO ME WE WOULD HAVE TO HOLD, WE WOULD HAVE TO COME TO THE CONCLUSION THAT, UNDER NO CIRCUMSTANCES, COULD A REVIEWING COURT FIND THAT THERE WAS AN INSUFFICIENT BASIS FOR COMMONALITY.

WELL, JUSTICE WELLS, I WOULDN'T GO THAT FAR. I CERTAINLY WOULDN'T SAY THAT YOU CAN NEVER BEEN REVIEWED OBVIOUSLY, BUT I WOULD SAY THAT, YOU KNOW, THAT THE BRIEFS AND THE RECORD, THAT IS NOW BEFORE YOU WAS BEFORE THE THIRD DISTRICT, AND I AM NOT ASKING, I AM NOT SAYING TO FIND YOUR JURISDICTION AND MISREAD THEM, BUT CERTAINLY THE THIRD DISTRICT HAD THE FACTS AND THE LAW BEFORE IT, AND IT CONCLUDED THAT THERE WAS NO COMMONALITY IN A CASE THAT IS SO CLOSE TO THE FOURTH DISTRICT'S CASE, WHICH WAS CITED TO THE THIRD DISTRICT --

WELL, YOU JUST DISCUSSED, FOR INSTANCE, THIS OTHER PRONG ABOUT WHETHER THE CAUSES OF ACTION WERE THE SAME. DOES THE THIRD DISTRICT'S OPINION RECITE THAT THE CAUSES OF ACTION ARE THE SAME?

NO, YOUR HONOR. I DON'T BELIEVE IT MENTIONS WHAT THE CAUSES OF ACTION ARE.

HOW CAN YOU OVERCOME THAT, THEN? THAT IS IF THAT IS, AS YOU HAVE CANDIDLY STATED THERE, IF THAT IS AN ESSENTIAL PART OF THIS, THEN HOW, ON THE FACE OF THAT OPINION, CAN WE MAKE THAT DETERMINATION?

WELL, I DON'T KNOW THE ANSWER TO THAT QUESTION, JUSTICE ANSTEAD. I REALIZED, WHEN I FIRST LOOKED AT THE THIRD DISTRICT'S OPINION, THAT IT WAS HARD TO FIND THE CONFLICT, BUT THE MORE THAT I READ THE MacFADDEN CASE AND LOOKED AT THE THIRD DISTRICT, THE MORE I THOUGHT THEY WERE IN CONFLICT. THEY ARE CERTAINLY IRRECONCILEABLE.

IT HAS A LOT OF APPEAL, BECAUSE ON THE SURFACE IT SAYS THAT SOMEBODY IS SAYING IN ONE FOOD POISONING CASE WITH A LOT OF PEOPLE, THERE IS NO COMMONALITY, AND IN ANOTHER CASE THE COURT IS HOLDING THAT IN A FOOD POISONING CASE WITH A LOT OF PEOPLE, BUT WHEN WE CAREFULLY LOOK AT OUR RULES OF REVIEW AND JURISDICTION, AND, AGAIN, I APPRECIATE YOUR CANDOR, AND THE WAY THAT YOU E APPROACHING THIS, BUT I AMGDI THAT BEING ENOUGH THAT JUST IN EVERY INSTANCE IT APPEARS THAT WE HAVE GOT TO GO INTO THE RECORD, AND WE HAVE GOT TO GO SOMEPLACE ELSE, IN ORDER TO ESTABLISH THIS THRESHOLD JURISDICTIONAL ISSUE. SO YOU HAVE DONE THE BEST YOU CAN. I APPRECIATE THAT. WHY DON'T YOU MOVE ON TO THE MERITS.

WOULD YOU ADDRESS ONE POINT, THOUGH.

YES, SIR.

WHAT IS NECESSARY, AS A MATTER OF LAW, TO DETERMINE OR TO SHOW COMMONALITY? LET'S JUST LOOK AT THAT. CAN YOU DETERMINE, FROM THE FACE OF THE OPINION OF THE THIRD DISTRICT, THAT THERE WERE PUP MUL TIP HE WILL PEOPLE INVOLVED -- THAT THERE WERE MULTIPLE PEOPLE INVOLVED?

YES, JUSTICE LEWIS.

CAN YOU DETERMINE FROM THE FACE OF THE THIRD DISTRICT CASE THAT THEY ALL CONSUMED FOOD OR WATER?

YES, JUSTICE LEWIS.

CAN YOU DETERMINE, FROM THE FACE OF THE THIRD DISTRICT CASE THAT THEY WERE ALL AT THE SAME PLACE?

YES, JUSTICE LEWIS.

IS THAT ENOUGH TO ESTABLISH, AND THAT THEY WERE ALL MADE ILL.

CORRECT. I WAS GOING TO ADD THAT.

IS THAT NOT ENOUGH TO ESTABLISH, AS A MATTER OF LAW, COMMONALITY, IF YOU LOOK AT THE FOURTH DISTRICT'S FACE OF THAT OPINION?

INNINGS. WE HAVE ALL --

WHAT IS YOUR DOUBT? WHERE IS YOUR DOUBT? LET'S TALK ABOUT WHERE YOUR DOUBT IS.

THE ONLY DOUBT IS THE ONE THAT JUSTICE ANSTEAD RAISED. IF IT HAS TO BE IN THE FOUR CORNERS OF THE OPINION THAT THE EXACT CLAIMS WERE BREACH OF IMPLIED WARRANTY AND

NEGLIGENCE, IF THAT IS AN ABSOLUTE REQUIREMENT, THEN IT DOESN'T APPEAR ON THE THIRD DISTRICT'S --

THAT IS COMMONALITY. THE ONLY THING WAS, AS I READ THAT OPINION, THAT IT IS IMPROPER, IN SUFFICIENT COMMONALITY. THAT IS THE ONLY THING THAT I READ THE THIRD DISTRICT TO SAY.

ABSOLUTELY. ABSOLUTELY. AND IF YOU TAKE THOSE FACTS THAT YOU JUST ISOLATED FROM THE THIRD DISTRICT'S OPINION, AND YOU LOOK AT THE LAW OF COMMONALITY, WHICH IS DISCUSSED IN MacFADDEN AND BRUEN, WHICH IT CITES THERE, ISN'T ENOUGH, BECAUSE TE PN IS DO THE NAMED PLAINTIFFS' CLAIMS ARISE FROM THE SAME COURSE OF CONDUCT, AND THE THIRD DISTRICT'S OPINION TALKS ABOUT PAYING CUSTOMERS WHO CONSUMED WATER AND/OR FOOD UNFIT FOR HUMAN CONSUMPTION, AND THUS WERE MADE ILL ON THIS SHIP, DURING THEIR VOYAGES. SO THEREFORE FROM THAT, I BELIEVE YOU CAN CONCLUDE THAT THE PLAINTIFFS, WHO WERE ON THAT VOYAGE, THEIR CLAIMS AROSE, ARE GOING TO BE EXACTLY THE SAME AS EVERYBODY ELSE IN THE CLASS. I BELIEVE THAT IS A FAIR INFERENCE FROM THAT, WITHOUT HAVING SAID THE EXACT WORDS.

ESSENTIALLY, YOUR POSITION THAT THE FOURTH DISTRICT GOT IT RIGHT.

THEY ABSOLUTELY DID, JUSTICE ANSTEAD, AND THE THIRD DISTRICT ABSOLUTELY GOT IT WRONG.

CHIEF JUSTICE: THANK YOU.

JUST A MINUTE. WAS THE FOURTH DISTRICT CASE DECIDED IN 1997, IS IT CITED TO THE THIRD DISTRICT?

ABSOLUTELY.

WELL, THE DISSENT DISCUSSED IT, DID IT NOT?

WELL, NO, THE DISSENT CITED ITS OWN CASE IN BUR -- BRUEN, WHEREAS MacFADDEN VERSUS DAILY RELIED ON ITSELF.

CHIEF JUSTICE: THANK YOU. YOU ARE IN YOUR REBUTTAL TIME, COUNSEL.

MAY IT PLEASE THE COURT. I AM CURTIS MASE ALONG WITH CATHERMENT IN MacIFER. WE ARE HERE FOR NORWEGIAN CRUSE LINES.

CAN YOU TELL US ON THE FACE OF THE THIRD DISTRICT CASE THAT IT WAS UNFIT FOOD OR WATER.

YES.

CAN YOU TELL THAT IT WAS UNFIT FOR HUMAN CONSUMPTION.

YES.

AND THAT IT WAS ON A PARTICULAR THING. THEY CALL IT THE ROYAL ODYSSEY.

ON THREE SEPARATE VOYAGES, AND THAT IS THE WAY THE CLASS IS DEFINED BY THE THIRD DISTRICT. I AGREE WITH THAT.

IS IT THE THREE DIFFERENT VOYAGES THAT CREATE THE DIFFERENCE OR WHERE IS THE ELEMENT OF COMMONALITY THAT IS DIFFERENT, SOMEHOW, ON THE FACE. I AM JUSTGT . DON'T GO BEHIND

ANYTHING. JUST LOOK AT THE FACE.

THE PROBLEM IS ON ITS FACE, WE CAN'T, AND THE APPELLATE COURT BELOW, THE THIRD DISTRICT DID GO BEHIND IT. THAT IS PART OF WHERE THE RUB IS HERE. WHAT WE CAN DETERMINE ON ITS FACE ARE THE THREE FACTUAL ITEMS THAT YOU JUST LISTED.

WHAT IS MISSING FROM COMMONALITY, AS A MATTER OF LAW IN FLORIDA, AS YOU CITE THOSE CASES?

THE COMMONALITY USED BY THE THIRD DISTRICT MAY HAVE BEEN SOMETHING OF A MISNOMER.

THEY USED COMMONALITY.

THEY SURE DID, BUT THEY ALSO SPECIFICALLY CITED TO THE ULYSSES CASE, WHICH WAS A PREDONLY NANCE CASE.

AND THEN YOU HAVE JURISDICTION OF LAW.

NO, WE DON'T, YOUR HONOR. WE HAVE THE AREA WHERE THE TWO TERMS ARE USED INTERCHANGEBLY, BUT THE FACT COMMONALITY IS OFTEN USED TO ENCOMPASS THE PREDONLY NANCE ASPECT AS WELL. IN THE OPINION WHICH -- PREDONLY NANCE ASPECT AS WELL -- PREDOMINANCE ASPECT AS WELL, WHICH WE CITE IN OUR CASE.

IS THERE ANYWHERE WHERE THEY CITE TO THE PREDOMINANCE? IN THE WORDS. WE ARE LOOKING FOR THE LANGUAGE OF THE COURT. ANOTHER LANGUAGE --

THE LANGUAGE OF THE COURT IS THE PROBLEM. HERE IS THE PROBLEM THAT WE GET INTO. LET ME BE VERY PRACTICAL ABOUT IT. YOU HAVE GOT A GROUP OF PEOPLE, AND IF THEY ARE IN THE FOURTH DISTRICT AND THEY GO INTO ONE PLACE AND THEY EAT BAD FOOD AND ARE SICK, ONE SET OF LAWS APPLIES TO COMMONALITY. HOWEVER, IF YOU ARE IN MIAMI, SAME GROUP OF PEOPLE GO TO THE SAME PLACE AND EAT, THIS DECISION SAYS THERE IS NO COMMONALITY.

NO, IT DOESN'T. I RESPECTFULLY DISAGREE AND I WILL TELL YOU WHY.

ALL RIGHT.

WHAT THE APPELLATE COURT, THE THIRD DISTRICT WAS FACED WITH WAS THIS. THE THIRD DISTRICT WAS FACED WITH AN ORDER ENTERED BY A TRIAL JUDGE, IN ACCORDANCE WITH THE REQUIREMENTS OF RULE 1.220, WHICH SPECIFICALLY MANDATES THAT THE TRIAL COURT SEPARATELY STATE FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON WHICH IT BASIS ITS DECISION TO EITHER GRANT OR DENY CERTIF THIS ORDER GOES THROUGH AND FINDS THE TYPICAL FOUR ELEMENTS WITH WHICEL IN THE FIRST PART OF THE RULE, THOSE BEING NUMBER ROSSITY AND SO FORTH -- NUMEROSITY AND SO FORTH, BUT THEN IT GOES ON TO FIND THAT THE CLASS IS CERTIFIABLE IN THE SECOND PORTION OF THE RULE, UNDER EITHER 1.220-B-1 AND 1.220-B-3, WHICH ARE BY DEFINITION IN THE RULE MUTUALLY EXCLUSIVE. IN FACT THE RULE STATES THAT YOU MAY ONLY CERTIFY UNDER B-3, WHEN A CLAIM OR DEFENSE IS NOT MAINTAINED UNDER B-1, AND THE THIRD DISTRICT IS HANDED ORDER BY A TRIAL JUDGE, WHICH STATES ON ITS FACE THAT THE REQUIREMENTS FOR CERTIFICATION, PURSUANT TO RULE 1.220-A, 1.220-B-1 AND B-3 HAVE ALL BEEN MET. IN THAT SENTENCE, IN AND OF ITSELF, THIS ORDER IS SO HORRENDOUSLY INCONSISTENT, THAT THE APPELLATE COURT WAS FACED WITH THE SOMEWHAT DAUNTING TASK OF FINDING OUT EXACTLY WHAT HAD HAPPENED, AND THE APPELLATE COURT CHOSE TO REVERSE ON ONE OF MANY GROUNDS, WHICH IT COULD HAVE DONE SO.

WE HAVE TO GO BY THE FACE OF THE OPINION.

YES AND WE ALSO HAVE TO TRY TO DECIDE WHETHER THE THIRD DISTRICT'S OPINION, IN FACT, CONFLICTS WITH MacFADDEN. IT DOESN'T.

YOU CAN'T DETERMINE THE FACE OF THE THIRD DISTRICT OPINION FROM THE ORDER BEHIND IT. YOU HAVE TO LOOK AT THE FACE OF THE THIRD DISTRICT OPINION. IF THEY SAID BECAUSE OF THE ORDER IN THIS CASE SUCH-AND-SUCH THAT, IS A DIFFERENT SCENARIO. ALL THEY GIVE IS FACTS, AND THAT IS WHERE I AM STRUGGLING.

BUT THE SAME LOGIC APPLIES TO DETERMINING CONFLICT, BECAUSE THE FACT IS, FROM THE FACE OF THE THIRD DISTRICT'S OPINION, YOU CAN'T DETERMINE CONFLICT WITH MacFADDEN.

I CAN DETERMINE CONFLICT ON THE BASIS, LET ME SUGGEST HOW, IS THAT EVERY FACT NECESSARY FOR COMMONALITY IS STATED ON THE FACE, YET THEY SAY LEGALLY, AS A MATTER OF LAW, THERE IS NO COMMONALITY. WHY CAN YOU NOT REACH THAT CONCLUSION?

FOR THE SAME REASON I WAS BEGINNING TO EXPLAIN EARLIER, WHICH IS THAT THE TERM COMMONALITY, THAT TERM OF ART, IT ENCOMPASSES NOT ONLY THE CONCEPT OF COMMON QUESTIONS OF LAD FACT, BUT IT, ALSO, ENCOMPASSES THEF OT THO BE A COMMON METHOD OF PROVING THE FACTS WHICH ARE RELEVANT TO THE COMMON ISSUES OF LAW AND FACT. MODERN CASES WHICH HAVE GONE INTO WHAT A COURT MUST DO, IN REACHING A CLASS CERTIFICATION DECISION, HAVE SAID THAT NOT ONLY MUST A COURT LOOK TO THE ALLEGATIONS OF THE COMPLAINT BUT IT MUST, ALSO, GO BEHIND THOSE ALLEGATIONS AND REQUIRE THAT A PROPONENT OF CERTIFICATION NOT JUST PLEAD THE REQUIREMENTS NECESSARY FOR CERTIFICATION. THAT IS THE ELEMENTS IN THE RULE. BUT THAT HE, ALSO, PROVE FACTUALLY, THOSE ELEMENTS, BEFORE GETTING THE CASE CERTIFIED. IN FACT, THE FOURTH DISTRICT COURT OF APPEAL, IN A SUBSEQUENT OPINION, EXECUTECH, SPECIFICALLY HELD THAT IT MUST BE BOTH PLED AND PROVEN AS TO ELEMENTS. IN ORDER TO LOOK AT COMMONALITY IN THIS PARTICULAR CASE, YOU MUST GO BEHIND THE MIGHT NOT OPINION. YOU CANNOT SIMPLY -- YOU MUST GO BEHIND THE OPINION. YOU CANNOT LOOK AT THE REPUTATION OF THE DISCREET FACTS AND SAY THEY RESIST COMMONALITY.

WHAT IF THERE WAS A CASE THAT INVOLVED A RESTAURANT IN DADE COUNTY. WOULDN'T A DEFENSE LAWYER, PLAINTIFF'S LAWYER OR JUDGE, LOOKING AT THIS ROSE CASE, SAY THAT THIS STANDS FOR THE PROPOSITION THAT, AS A MATTER OF LAW, WHEN YOU HAVE THIS, THAT THERE IS NO COMMONALITY, AND THAT IS, I AM STRUGGLING WITH, AND MAYBE YOU ARE NOT HAPPY IT IS A SUMMARY, BUT I AM STRUGGLING WITH THE FACT THAT, BECAUSE THERE AREN'T MORE FACTS TO SAY THAT THE JUDGE'S ORDER WAS DEFICIENT AND THEREFORE THE JUDGE ANDUOUSED ITS DISCRETION THAT THIS CASE -- ABUSED ITS DISCRETION THAT THIS CASE, BECAUSE IT CONTAINS SO FEW FACTS ACTUALLY STANDS FOR A PRINCIPLE OF LAW THAT, WITH THESE THREE ELEMENTS MET THERE, IS NO COMMONALITY AS A MATTER OF LAW, INSTEAD OF APPLYING AN ABUSE OF DISCRETION STANDARD, AND YOU MAY BE RIGHT. YOU MAY WIN ON ANOTHER BASIS, BUT AS FAR AS FOR THE CONFLICT, JUST ON THE LEGAL PRINCIPLE THEY HAVE STATED, THEY HAVE STATED NO COMMONALITY. NOW, YOU ARE SAYING, WELL, THEY PROBABLY MEANT THAT THE JUDGE DIDN'T, HIS ORDER WASN'T ENOH, AND I KNOW YOU ARGUED EVERY OTHER, YOU KNOW, ASPECT OF,TEEF THIS CAUSES ME CONCERN, AND THE FACT THAT IT IS A SUMMARY CAUSES ME CONCERN, AND THE FACT THAT MacFADDEN WAS OUT THERE AND CITED TO THE THIRD DISTRICT, AND IT IS NOT MENTIONED OR DISTINGUISHED CONCERNS ME, FOR WHETHER OR NOT THERE IS AT LEAST APPARENT CONFLICT BETWEEN THESE TWO CASES.

PART OF THE DIFFICULTY IS THAT MacFADDEN, AS WAS ROSE IN THE THIRD DISTRICT, IN EACH INSTANCE THE APPELLATE COURTS WERE RULING UPON ORDERS THAT WERE BEFORE THE TRIAL COURT, WHICH CONTAINED, WE DON'T HAVE MacFADDEN'S ORDER BUT CERTAINLY THIS ORDER CONTAINED A RECITATION OF THE JUDGE'S REASONING, TO THE EXTENT THAT IT WAS THERE. AND THE THIRD DISTRICT, I AGREE WITH MR. HOPE, IT WOULD BE HELPFUL IF WE HAD MORE

CONCERNING THEIR THOUGHT PROCESS BUT WE DON'T.

CONCERNING ULYSSES, THEN YOU WOULD HAVE CLEARLY NO CONFLICT, RIGHT?

IT ALMOST DOES, YES, BUT THE TROUBLE, JUSTICE, TO ANSWER YOUR QUESTION, IS THIS. IT SAYS THERE IS NO COMMONALITY, BUT IT CITES TO A CASE ON PREDOMINANCE. THE FACT IS THAT IT DOESN'T HAVE OVERWHELMING PREJUDICIAL VALUE, I WOULD SUGGEST, BECAUSE IT IS CONFUSING AS TO EXACTLY WHAT THE THOUGHT PROCESS WAS, BUT IF, IN FACT, WHAT THE RULING WAS BELOW, WAS BASED UPON A PREDOMINANCE ANALYSIS AND THE CASE CITED IS ON PREDOMINANCE, THEN THAT RULE SAG CORRECT RULING AND IS NOT IN CONFLICT WITH MacFADDEN. MacFADDEN REALLY DOESN'T DISCUSS PREDOMINANCE IN ANY DETAIL. WHAT IT DOES IS GOES THROUGH MUCH MORE OF AN ANALYSIS AND THE VARIOUS FACTORS AND DISCUSSES TO SOME EXTENT THE COMMONALITY, BUT IT DOESN'T GET INTO THE AREA OF PREDONLY NANCE, AND THE THIRD DISTRICT DOESN'T GET INTO PREDOMINANCE, OTHER THAN THAT THEY, TOO, CITED A CASE ON PREDOMINANCE, BUT WE EITHER NEED TO HAVE A CASE WHICH ESTABLISHES A NEW RULE OF LAW OR INTERPRETS A RULE OF LAW IN A MANERTHAT IS CONSISTENT, AND I DON'T THINK THIS OPINION DOEST.

YOU ARE RELYING ON THE FACT THAT THEY SAID THERE IS NO COMMONALITY, AND MOST PEOPLE READING THIS WOULD SAY THAT IS EXACTLY WHAT THEY HELL. THEY REALLY SAID THERE IS NO PRE -- WHAT THEY HELD. THEY REALLY SAID THAT THERE IS NO PREDOMINANCE.

THE FACTS THAT THE COURTS USE THE TERM INTERCHANGEBLY, AND COMMONALITY HAS BEEN HELD BY THE COURTS TO INCLUDE NOT ONLY THE COMMONALITY EXISTENCE OF THE FACTS BUT A METHOD OF PROOF FOR DEMONSTRATING THE FACTS NECESSARY TO GET AT THOSE COMMON ISSUES. IN FACT, THE FOURTH DISTRICT, IN THE EXECUTECH OPINION DISCUSSED, REALLY IN THE ANALYSIS, DISCUSSED THAT THE PLAINTIFFS FAILED TO MEET THE BURDEN TO COME FORTH WITH A METH ON THE THEOLOGY BY WHICH THEY WOULD BE SHOW, BY GENRIZED -- GENERALIZEED PROOF, THAT AN ALLEGED CONSPIRACY EXISTED. HERE THERE IS NO WHERE IN THE RECORD A GENERALIZED PROOF WAS PRESENTED TO THE TRIAL COURT. THERE WAS NO DEMONSTRATION TO THE TRIAL COURT OF PREDOMINANCE, AND IN FACT IN THE TRIAL COURT'S ORDER THERE IS NO MEANINGFUL DISCUSSION OF PREDOMINANCE AT ALL.

AS TO THE FIRST CONCEPT OF COMMONALITY, DO YOU DISAGREE THAT THAT IS MET HERE, AT LEAST TO ALLOW CERTIFICATION, AS TO LIABILITY, IF, WITHOUT ANYTHING MORE? WITHOUT CONSIDERING PREDOMINANCE AND THE OTHER ISSUES? OR, BECAUSE -- I AM NOT POSITIVE I UNDERSTAND WHAT YOU ARE ASKING. I AM SORRY.

COMMONALITY IS USED IN THE PRONG OF THE RULE.

RIGHT.

IS THERE, ISN'T THERE COMMONALITY IN THIS CASE?

I DON'T BELIEVE SO. I DON'T BELIEVE THAT COMMONALITY SIMPLY DEVOLVES THAT THE STATEMENT THAT PASSENGERS WERE ALL ON A SHIP. PASSENGER ON THREE SEPARATE VOYAGES, PASSENGERS EIGHT FOOD OR DRANK WATER, AND BANKERS -- E FOOD OR DRANK WATER AND PASSENGERS GOT ILL. I DON'T THINK WHAT THESHAVNGND ADDRESSING FOR MANY YEARS IS THE CLASSIC MATTERS, THAT SIMPLE CONCLUSIVE ALLEGATIONS OR SUBSTANTIAL ALLEGATIONS ARE ENOUGH TO INCLUDE COMMONALITY. A LOT OF THE RULE 23.40 CASES THAT ARE IN DETERMINING WHETHER THE ELEMENTS AFTER CLASS ACTION ARE MET, SO TO ANSWER YOUR QUESTION, SIMPLY SAYING THAT CERTAIN FACTUAL PREREQUISITES EXIST, I DON'T BELIEVE IS ENOUGH IN THIS CASE, AND HERE IS WHY. THE CDC REPORT, TALKED ABOUT A THES REALLY THE ONLY MEANINGFUL SCIENTIFIC DETAILED ANALYTICAL EVIDENCEE HAVE NTNED ON THES,AND YOU MAY RECALL SOME DISCUSSION IN THE BRIEF ABOUT TESTINGE SEQUENCES TO SEE IF THE VIRAL

STRAINS WERE THE SAME A 23OPLE, AND INTERESTINGY ENOUGH OF 23 PEOPLE, THEY DETERMINED THAT ONLY THREE OF IDENTICAL STRAINS. DOIHT LEAT 21TWHICH IS THAT THERE ARE1ATIONS.

THE TRIAL COURT, IN MAKINGHISDETN S THIS SORT OF MIXED EVIDENTIARYILITYTHAT THE WAY THAT THIS WENT ON?

ABSOLUTELY.

IN THE TRIAL COURT?

AND I DON'T KNOW WHAT YOU MEAN BY MIXED, EXCEPT THAT THE SENSE OF BOTH PARTIES PRESENT THE EVIDENCE.

AND THE TRIAL COURT, THEN, MAKES A DETERMINATION AS TO, BASED UPON FACT AND LAW, AS TO WHETHER THE PRESICK SETS OF A CLASS CERTIFICATION IST-S TOTHER THE PREREC WRITING OF CLASS CERTIFICATION ARE MET.

YES.

SO IT IS A MIXED QUESTIOF FACT THAT THE TRIAL JUDGE IS MAKING.

I BELIEVE THAT THE JUDGE DETERMINED THIS, WHERE, BELOW AND YOU CAN READ THE TRANSCRIPT OF THE HEARING, THE TRIAL JUDGE TREATED THIS ON A MOTION TO ARD AND REPEATEDLY SAID THAT IS LEFT FOR TRIAL. I DON'T DECIDE THAT NOW. I TAKE ALL THE ALLEGATIONS AS TRUE. WE BELIEVE THAT AS ABSOLUTELY ERRONEOUS. WE DO NOT BELIEVE YOU TAKE THE ALLEGATIONS AS TRUE. WE DO NOT BELIEVE IT IS TRUE FOR A TRIAL JUDGE TO ACCEPT THE ARGUMENT OF THE PLAINTIFF AND DISREGARD FACTUAL UNDERLYING EVIDENCE BECAUSE ULTIMATELYDING WHETHER AN ISSUE IS COMMON, WHETHER COMMONALITY,OING TO FLOWM THE INDIVIDUAL FACTS OF THE CASE. THG TO FLOW FROM WHETHER OR NOT YOU ACTUALLY HAVE A VIRUS WHICH CAN BE TRANSMITED IN MYRIAD OF WAYS AND WHETHER YOU HAVE SYMPTOMS WHICH COULD BE SEASICKNESS OR A MYRIAD OF OTHER POTENTIAL SOURCES. THE CDC WAS LOOKING FOR A POINT SOURCE, AWAY TO IDENTIFY WHAT, SPECIFICALLY, WAS CAU-WHAT I AM READING IS WHAT IS, WHAT ARE THE PARAMETERS OF WHAT THE DISTRICT COURT CAN REVIEW IN THIS REVIEWING THIS CERTIFICATION? CAN IT MAKE A DETERMINATION, BASED UPON THE LOOKING AT THE ORDER, THAT THE COMMONALITY IS NOT BEEN ESTABLISHED, AS A MATTER OF LAW?

I BELIEVE LOOKING AT THE ORDER, ITSELF, IN THIS CASE, IT CAN MAKE A DETERMINATION THAT THE ORDER IS FLAWED FOR A NUMBER OF REASONS, BUT I BELIEVE LOOKING AT THE EVIDENCE UPON WHICH THE ORDER WAS PREMISED AND THE ALLEGATIONS UPON WHICH THE ORDER WAS PREMISED, THE DISTRICT COURT CAN AND MUST MAKE A REVIEW AND CONSIDERATION, AS TO WHETHER OR NOT THE CONCLUSIONS ON COMMONALITY WERE CORRECT, AND I BELIEVE THAT INCORPORATES QUESTIONS OF LAW AND AN APPLICATION OF WHAT WAS PRESENTED FACTUALLY, EVIDENCE YAERL BELOW, AND THEN -- EVIDENTIARYLY BELOW, AND THEN --

IS IT ABUSE OF DISCRETION STANDARD? IF IT IS NOT ABUSE OF DISCRETION THEN MacFADDEN IS WRONG, BECAUSE MacFADDEN SPEAKS TO ABUSE OF DISCRETION.

WE BELIEVE THAT DE NOVO THAT IS APPROPRIATE, AND WE BELIEVE THAT THE TRIAL COURTS, IN MAKING THIS RIGOROUS ANALYSIS, WHICH IS TALKED ABOUT ALL OF THE COURTS, INCLUDING THIS JURISDICTION, TWO YEARS AFTERS, IN MAKING THAT JUSTIFICATION OF FACTUAL ANALYSIS IS MAKING IT PREDOMINANTLY OFF DOCUMENTARY EVIDENCE, AND IN THAT CASE AND BECAUSE IT IS ALL FOR THE APPELLATE COURT TO REVIEW, WE BELIEVE THAT THE APPELLATE COURT DOESEE NOVO REVIEW, AND WE ALSO BE LEE THAT THE -- BELIEVE THAT THE IDEA --

BECAUSE ARE SAYING FROM THE FACE OF THE OPINION, THE THIRD DISTRICT IS APPLYING A DE NOVO MATTER OF A LAW WE VIEW, WHEREAS -- REVIEW, WHEREAS MacFADDEN HAS USED, IN THE SAME TYPE OF SITUATION, USED ABUSE OF DISCRETION SO YOU ARE SAYING MacFADDEN IS WRONG.

YES, AND HE ARE SAYING THE STANDARD FOR ABUSE OF DISCRETION IS WRONG IN THIS CONTEXT.

WHY ISN'T THAT -- THE THIRD DISTRICT DOESN'T STATE WHAT WAS USED, FROM THE FACE OF THE OPINION, AND IT IS UNCLEAR AND NO WAY TO DRAW FROM THE LOOKING AT THE TWO WINY OPINIONS, WHEN DRAWING -- AT THE TWOOPINIONS, WHEN DRAWING ON THE JURISDICTION JURISDICTION. FROM THE TWO OPINIONS. SO THAT THE APPELLATE COURTS MAY IN THIS STATE, DO WHAT THE FEDERAL APPELLATE COURTS DO, WHICH IS TO PROVIDE GUIDANCE TO THE TRIAL COURTS ON MATTERS OF CLASS CERTIFICATION. HERE, WHAT THE THIRD DISTRICT DID, IN LOOKING THROUGH THE VARIOUS FACTS, WHICH THE TRIAL COURT HAD BEFORE IT, WAS IT REACHED THE CONCLUSION, AS MATTER OF LAW, THAT THE TRIAL COURT WAS INCORRECT IN ITS CONCLUSION THAT THERE WAS COMMONALITY, BUT WHAT FACTUALLY WENT THROUGH THE THIRD DISTRICT'S MIND IN DOING THAT ISN'T BEFORE THIS COURT. THE LIMITED OPINION THAT WE HAVE SIMPLY GIVES SOME INSIGHT INTO WHAT THEY WERE THINKING, AND THE PHRASEOLOGY COMMONALITY IS BACKED UP BY A CITATION TO A CASE ON PREDONLY NANCE, AND, AGAIN, I WOULD SUGGEST THAT WHAT WAS HAPING IS THAT THE THIRD DISTRICT WAS, AS MANY COURTS HAVE, USING THOSE TWO TERMS INTERCHANGEBLY. PREDONLY NANCE REQUIRES THAT THE COMMON ISSUES PREDOMINATE THE CASE AND THAT INDIVIDUAL ISSUES NOT PREDOMINATE THE CASE. STUDYING THE UNDERLYING FACTS IN THIS CASE, AND IN PARTICULAR THE CDC'S FINDINGS, THE CDC WAS UNABLE TO IDENTIFY ANY SINGLE SOURCE. THEY IDENTIFIED SOME CONCEPTS, SOME IDEAS, BUT THEY WEREN'T ABLE TO COME UP WITH A POINT SOURCE THAT THEY COULD TAKE A LOOK AT. INTERESTINGLY IN MacFF Y THE OPINION TOTALLY, THERE SEEMED TO BE A MUCH CLEARER DETERMINATION, OVER THE COURSE OF 4 DAYS, NOT 30 DAYS AND THREE CRUISES WITH DIFFERENT CRUISES, THAT THE PATIENTS THERE HAD ALL EXPERIENCED SALMONELLA POISONING, AND THAT IS SOMETHING THAT YOU CANNOT GET FROM THE OPINIONS, BECAUSE IT IS NOTD VERY CLEARLY IN THE ROSE OPINION, BUT IT IS INCLUDED IN THE EVIDENCE THAT THE THIRD DISTRI.HAT THE TRIAL JUDGE'S ORDER WAS WRITTEN, IN TERMS OF USING BROAD CONCLUSORY LANGUAGE, TALKING ABOUT NEGLIGENCE, BREACH OF WARRANTY AND SO FORTH, WE BELIEVE UNDER THE PREVAILING LAW IS INSUFFICIENT, AND WE BELE THAT WHAT HAS TO HAPPEN IS THAT, AS THE THIRD DISTRICT, DID THE APPELLATE COURT MUST GO BEHIND THOSE CONCLUSORY CONCEPTS AND MUST LOOKE FACTS AND SEE WHETHER THOSE FACTS, IN FACT, SUPPORT THE CONCLUSIONS AND THAT THAT IS WHAT IS REQUIRED FOR CERTIFICATION. IN THIS CASE, WE BELIEVE, RESPECTFULLY,TEINDISOMPLYEDOMITIRD ICHINS CONCLUSIONS, WAS ABSOLUTELY CORRECT, AND THAT IS EXACTLY WHYHE THIRD DISTRICT REVERSED. WE DON'T BELIEVE ON ITS FACE THE THIRD DISTRICT OPINION CO WITH THE FOURTH DISTRICT'S OPINION. SIMPLY LOOKING AT, FOR EXAMPLE, WHAT THE CDC REPORT SHOWS IN TERMS OF THE SYMPTOMS OF THE INDIVIDUALS, THAT THEY HAD DIARRHEA AND VOMITING, AND THAT WAS THE PREDOMINANT CONTACT, AND EVEN THE OPINIONS GAVE INSIGHT INTO THE INDIVIDUALIZED NATURE OF THINGS. MR. ALT CLAIMS, TWO YEARS POST INCIDENT, UNLIKE MANY, MANY OF THE INDIVIDUALS EXPERIENCED IN THE CDC REPORT THAT HE EXPERIENCES BLOATING, AND YET THAT IS A COMPLETELY DIFFERENT SIMPTOM, AND IN ORDER TOGET TO WHAT CAUSED THAT, IT IS GOING TO REQUIRE A BACKTRACKING OF ANALYSIS FROM WHAT OTHER MEMBERS HAVE. BECAUSE IN THIS CASE WHAT YOU ARE DEALING WITH IS THREE SEPARATE CRUISES AND WHAT THE CDC ATST THINKS WAS SOME TYPE AFTER VIRAL OUTBREAK WITH AN UNKNOWN ETIOLOGY AND AN UNKNOWN SOURCE, AND YOU ARE ATTEMPTING TO COMPARE THAT AND THE POTENTIAL MILES AN HOUR USED OF -- MYRIAD OFS FOR IT TOAENTE OF SALMONELLA CASE, MacFADDEN, WE BELIEVE IS CLEAR ON ITS FACE. WE ATTEMPTED TO MEASURE THAT BY CITING THE THREE CRUISES AND CITING THE PREDONLY NANCE CASE, BUT THIS DOES NOT -- PREDOMINANCE CASE,

BUT THIS DOES NOT CONFLICT WITH MacFADDEN AND ON ITS FACE SHOULD BE AFFIRMED.

WHY ISN'T THERE ENOUGH TO DISTINGUISH THE THREE VOYAGES FROM A ONE-RESTAURANT SITUATION? SO THAT THERE IS NOT CONFLICT. THE LAST STATEMENT THAT COUNSELIE YOU TO RESPOND TO THAT.

AND I WAS --

HASTT WASALLY,A DETERMINATION IS HERE IS THAT MULTIPLE VOYAGES, AND YOU ARE TALKING ABOUT GOING TO SEE, ARE SUFFICIENTLY DIFFERENT FROM A SINGLE-RESTAURANT SETTING, TO CAUSE THESE THINGS TO BE TOTALLY DIFFERENT, OR SUFFICIENTLY DIFFERENT, SO THERE REALLY IS NO CONFLICT HERE.

NO. THE REAL ANSWER TO THAT IS SIMPLY THIS. IF IT WERE THREE SEPARATE VOYAGE VOYAGES, THREE DIFFERENT SHIPS THAT, MIGHT BE ONE THING, BUT THE CDC CONCLUDED THAT THIS WAS ONE OUTBREAK. IT STARTED ON THE FIRST VOYAGE. YOU HAVE TO UNDERSTAND THESE THREE VAJS -- VOYAGES, THEY WENT OUT FOR TEN DAYS. THEY CAME IN AND UNLOADED AND RELOADED AND WENT OUT FOR ANOTHER TEN DAYS.

NOW YOU ARE GOING BEYOND THE CDC. THEY CITED THE FOUR CORNERS OF THE OPINION, AND HE SAID THAT WITHIN THE OPINION THEY REFERRED TO THE FACT THAT THESE ARE THREE SEPARATE CRUISES, AS COMPARED WITH A SINGLE RESTAURANT, IN THE FOURTH DISTRICT CASE, SO IT COMES BACK TO WITHIN THE FOUR CORNERS THERE, OF WHETHER OR NOT THAT IS A SUFFICIENT DISTINGUISHABLEING FACT -- DISTINGUISHING FACT TO DISTINGUISH THE CASES, AND SO YOU END UP WITH A DIFFERENT RULING.

I DID NOT UNDERSTAND THAT THIS QUESTION WAS MEANT ON THE CONFLICT ISSUE, BECAUSE MOST OF WHAT COUNSEL ARGUED IN HIS ARGUMENT, WAS THE MERITS AND THE CDC REPORT.

JUSTICE ANSTEAD INTERPRETED MY QUESTION BEAUTIFULLY.

BUT I DIDN'T AND I APOLOGIZE FOR QUESTION IS HOW CAN YOU TELL FROM THE FOUR CORNERS OF THE THIRD DISTRICT'S OPINION, ABOUT THE THREE VOYAGES?

THEY MIGHT BE THREE VOYAGES, ONE IN JANUARY, ONE IN JUNE, AND ONE IN OCTOBER. AND YOU KNOW, THAT THEY HAD SAID THAT AS A MATTER OF FACT, WE ARE GOING TO START LOOKING AWFULLY DISTINGUISHABLE, ARE YOU NOT?

THEY HAVE A FOOTNOTE, JUSTICE ANSTEAD, THAT THEY DO SAY DURING THEIR VOYAGE, FOOTNOTE ONE, THREE SEPARATE VOYAGES WERE INVOLVED. THEY DON'T GIVE THE DATES. THAT IS TRUE. I CAN'T PUT THEM THERE. IF THE DATES ARE THE CRUCIAL TURNING POINT, I HAVE A MILLION THINGS I WOULD LIKE TO SAY ON THE MERITS ABOUT THE PREDONLY NANCE AND --- ABOUT THE PRO DOMINANCE AND THE COMMON PROOF AND THIS STUFF, BUT THE COURT SEEMS MORE INTERESTED IN ASKING ME QUESTIONS ABOUT THE CONFLICT, AND I REALIZE IT IS A VERY DIFFICULT ISSUE.

YOU USE YOUR TIME THE WAY THAT YOU --

IF WE --

WOULD YOU ADDRESS THE STANDARD OF REVIEW. ANOTHER STANDARD OF REVIEW IS SO CUT AND DRIED. U.S. SUPREME COURT, ELEVENTH CIRCUIT, EVERY FLORIDA COURT, EVERY CASE THEY CITE IN THEIR BRIEF. IF YOU LOOK AT THE CASE, THEY WILL SAY THE STANDARD OF ABUSE -- THE STANDARD OF PROOF IS ABUSE OF DISCRETION. THERE IS NO AUTHORITY CITED. IT IS NOT A CLASS ACTION CASE. IT IS NOT A CERTIFICATION ORDER. IT IS A MOTION FOR A NEW TRIAL,

WHERE THE COURT LOOSE AT THE SAME DOCUMENT, SO WE ARE GOING TO HAVE DE NOVO. THERE IS NOT ONE CASE, IN THE HISTORY OF AMERICAN JURISPRUDENCE, THAT SAY YOU HAVE REVIEW. IT IS ABUSE OF DISCRETION. IT IS CERTIFICATION. IT IS VERY CLEAR. THE JUDGE SAYS IS THIS THE KIND OF CASE WHERE WE CAN SAVE TIME AND MONEY BY DOING IT AS A CLASS ACTION, AS OPPOSED TO SEVERAL HUNDREDS OF CASES THAT EACH HAVE TO PROVE LIABILITY, OR IS IT THE KIND OF CASE THAT I CAN GET SEVERAL HUNDRED PEOPLE'S CASES RESOLVED EASIER AND QUICKER THAN DOING, BY DOING DID IN CLASS ACTION, AND THAT IS WHY THEY ARE REALLY REACHING FOR THE THIRD DISTRICT, EVEN THY DON'T SAY IT, TO REVERSE HERE, BECAUSE THE STANDARD OF PROOF, IF YOU LOOK AT THE BRIEFS IN THE THIRD DISTRICT, THEYWTRFW WAS.

WHAT ABOUT THIS ARGUMENT THAT HE REALLY WAS, BY CITING TO THE ULYSSES CASES, THIS REALLY IS ABOUT PREDOMINANCE. SO WOULD THE COMMON ISSUES IN THIS CASE PREDOMINATE OVER THE OTHER ISSUES?

THIS IS EASY. PREDOMINANCE IS SOMETIMES A VERY DIFFICULT, IN MASS TORT ACTION CASES, BUT THIS ONE IS EASY, BECAUSE YOU ARE TALKING ABOUT ALL OF OUR PEOPLE WEREITY LITERALLY AND LEGALLY -- WERE LITERALLY AND LEGALLY, IN THE SAME BOAT. IT WAS THE SAME BOAT THAT HAD A BAD WATER SYSTEM. WHAT DO YOU HAVE TO PROVE FOR PREDOMINANCE IN THIS CASE IS SIMPLE. CASES DO SAY GO BEHIND THE PLEADINGS AND SEE WHAT THE CLAIMS AND ELEMENTS ARE AND SEE IF ANY OF THOSE CAN BE PROVEN CLASS WIDE.

CHIEF JUSTICE: THANK YOU, COUNSEL. YOUR TIME IS UP. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL BE IN RECESS.