Metissia Ricks v. Rene Loyola, M.D.

MR. CHIEF JUSTICE

WE ARE CERTAINLY PLEASED TO WELCOME ALL OF THE VISITORS TO OUR ORAL ARGUMENT ON THIS WEDNESDAY, MARCH 6, HERE AT THE FLORIDA SUPREME COURT. AND WE ARE ESPECIALLY PLEASED TO HAVE THE WOMEN OF ALPHA KAPPA ALPHA VISIT US AS PART OF THEIR ANNUAL TALLAHASSEE AND ANNUAL STATE OF FLORIDA DAY, AND THIS REPRESENTS YOUR FIRST VISIT TO THE FLORIDA SUPREME COURT, AND, OF COURSE, WE HAVE HAD THE OPPORTUNITY TO SPEAK WITH YOU EARLIER THIS MORNING. WE, ALSO, HAVE THE WINTER HAVEN CHAMBER OF COMMERCE LEADERSHIP GROUP FROM POLK COUNTY, WITH THE EXECUTIVE DIRECTOR, AND THE, WE HAVE THE GLORIA EDWARDS TEEN IN TALLAHASSEE, WHICH IS ALL OUTSTANDING STUDENTS FROM HIGH SCHOOLS IN POLK COUNTY, AND THAT GROUP IS LED BY FORMER REPRESENTATIVE LORI EDWARDS, SO WE ARE CERTAINLY PLEASED TO HAVE YOUR PARTICIPATION WITH US IN OUR ORAL ARGUMENT THIS MORNING. THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR IS RICKS VERSUS LOYOLA. MS. ROSS.

THANK YOU, YOUR HONOR. LORI ROSS ON BEHALF OF THE PETITIONER, METISSIA RICKS. IN 1985, THERE WAS A SPLIT AUTHORITY BETWEEN THE FOURTH AND THE THIRD DISTRICTS, WITH REGARD TO WHETHER OR NOT A PARTY COULD MOVE FOR MISTRIAL AND ASK THE COURT TO RESERVE ON THAT MOTION OF MISTRIAL AND TAKE IT UNDER ADVISEMENT. THE FOURTH DISTRICT HELD THAT, BASKINE COURT TO RESERVE, YOU WAIVED YOUR MOTION FOR MISTRIAL. THE THIRD DISTRICT, IN A SPLIT DECISION, HELD THAT YOU DID NOT WAIVE YOUR MOTION FOR MISTRIAL AND THAT WHAT THE PROCEDURE DID WAS IT ALLOWED THE COURT TO TAKE UNDER ADVISEMENT THE PROCEEDINGS UNTIL THE JURY RENDERED ITS VERDICT, THE REASON BEING A JURY VERDICT COULD CURE POTENTIALLY, WHATEVER MISCONDUCT OCCURRED DURING THE COURSE OF THE TRIAL.

IS IT YOUR POSITION THAT THIS IS ESSENTIALLY A MATTER OF DISCRETION WITH THE TRIAL JUDGE?

YES, IT IS, YOUR HONOR. AND IN FACT, THE FOURTH DISTRICT DID NOT APPLY THE REASONABLE DISCRETION RULE AS SET FORTH BY THIS COURT AND THE STATE OF STUCKEY VERSUS BROWN AND ALL OF THE CASES ON WHICH STUCKEY RELY.

WHAT WOULD BE THE BOUNDARIES OF THAT DISCRETION?

THE TRIAL COURT WILL, THE BOUNDARIES OF THAT DISCRETION ARE SET FORTH IN THE KANNAKARIS RULE, IN THAT IF THERE ARE DIFFERENCES IN THE TRIAL COURT'S ACTION --

BUT PRACTICALLY IN CONTEXT, WHAT IF WE HAD A TRIAL THAT WAS SCHEDULED AND EVERYONE RECOGNIZED THAT IT WOULD PROBABLY GO ON FOR SIX MONTHS OR NINE MONTHS, AND A BASIS CAME UP FOR THE COURT TO RULE ON A MOTION FOR MISTRIAL IN THE VOIR DIRE EXAMINATION. CERTAINLY WE WOULD HAVE TO THINK THAT THERE WOULDA BOUNDARY THERE, JUST BY SHEER WEIGHT OF THE LENGTH OF TIME.

THERE IS A BOUNDARY IN VOIR DIRE, BECAUSE NOBODY HAS ARGUED ANYTHING IN VOIR DIRE. ALL YOU ARE DOING IN VOIR DIRE IS ASKING THE VENIRE QUESTIONS, BUT BY THE TIME YOU GET TO OPENING STATEMENTS, IT IS A CRITICAL PART OF THE TRIAL, IN THAT ANYTHING THAT IS SAID

IN THE OPENING STATEMENTS WILL HAVE A RESTENCY EFFECT ON THE JURY -- A RECENCY EFFECT ON THE JURY IN THE TRIAL FROM THE OPENING STATEMENT.

IF THE TRIAL IS GOING TO TAKE SIX MONTHS, THE TRIAL JUDGE CAN STILL --

-- TAKE IT UNDER ADVISEMENT.

-- TAKE IT UNDER ADVISEMENT, AND THEN THE WHOLE SIX MONTHS IS WIPED OUT.

YES, YOUR HONOR, AND THE REASON BEING UNDER THOSE CIRCUMSTANCES, IT IS JUDICIALLY ECONOMICAL FOR THE COURT TO TAKE IT UNDER ADVISEMENT, BECAUSE IF THE JURY CURES TE VERDICT AND OVERCOMES WHAT IT HEARD IN THE OPENING STATEMENT, YOU ARE NOT WIFING OUT THE SIX MONTHS.

BUT ON THE OTHER HAND, IF THE JURY DOES NOT CURE IT, AND IT TOOK SIX MONTHS, HOW DO YOU BALANCE? WHAT KIND OF BALANCE SHOULD THERE BE MADE IN THE TIME IT TOOK TO DO THAT TRIAL, WHEN THIS ERROR OCCURRED ON THE FIRST DAY, WHY SHOULDN'T THERE BE SOME LIMITS PLACED ON HOW LONG A TRIAL JUDGE SHOULD TAKE THIS UNDER ADVISEMENT?

WELL, THE PROBLEM WITH, AND I DON'T DISAGREE WITH YOU THAT THERE ARE SOME LIMITS, BUT I DON'T KNOW WHAT THEY ARE, BECAUSE RICKS DOES NOT SPELL OUT WHAT THEY ARE. ALL IT SAYS IS IN THE INTEREST OF JUDICIAL ECONOMY. THIS IS THE VERY FIRST CASE, THE VERY FIRST CASE IN THE HISTORY OF THIS COURT.

WHAT DO YOU PROPOSE TO BE THE BOUNDARIES THAT SHOULD BE SET?

I WOULD PROPOSE A BALANCING BY THE TRIAL COURT, WHICH, IN FACT, OCCURRED HERE. THE TRIAL COURT SAW THE IMPACT OF THE STATEMENTS ON THE JURY. THE TRIAL COURT COULD SEE HOW THE JURY WAS REACTING TO THE IMPACT OF THOSE STATES AND WHETHER OR NOT THEY WERE BELIEVED OR NOT.

IF IF THE MOTION FOR MISTRIAL WAS MADE, TO BE ADDRESSED AT ANY POINT DURING THE TRIAL, WHAT ABOUT THE COMMENT HERE, WHEN THE COMMENT OCCURRED DURING CLOSING ARGUMENT, AND IT IS REASONABLE FOR THE TRIAL JUDGE TO RULE AFTER THE JURY DELIBERATES. IS IT YOUR POSITION THAT EDRICK DIDN'T PRONOUNCE A RULE ONLY TO WHAT WAS APPLICABLE IN CLOSING ARGUMENT, AS OPPOSED TO SOMETHING THAT WAS SAID AT THE BEGINNING OF THE TRIAL?

EDRICK MAY HAVE SAID THAT BACK IN 1985, BUT A LOT HAS CHANGED SINCE 1985. I AM NOT SAYING THAT IS NOT WHAT THE COURT SAID BACK IN 1985. I AM SAYING IT HAS BEEN TOO NARROWLY INTERPRETED IN 2002, IN LIGHT OF ALL OF THE CHANN TH THAT HAVE HAD TODAY, WHICH MAKES THAT APPLICN LIMITED STRICTLY TO CLOSING ARGUMO LONGER A REASONABLE APPLICATION.

BUT HOW WOULD A REVIEWING COURT DETERMINE WHETHER THE TRIAL JUDGE HAS ABUSED HIS DISCRETION? I GATHER THAT YOU DO RECOGNIZE THAT, AT A CERTAIN POINT, THERE WOULD BEN ABUSE OF DISCRETION OR DO YOU RECOGNIZE THAT?

I DO RECOGNIZE THAT, AND THT HYISURT HAS ONLY SAID, IN TERMS OF LOOKING AT THE ABUSE AT THE TRIAL COURT'S DISCRETION IT DEPENDS UPON WHETHER REASONABLE PERSONS COULD DIFFER AS TO THE APPROPRIATE OF THE TRIAL JUDGE'S ACTION. HERE THE PROBLEM WITH THE FOURTH DISTRICT DECISION IS IT DOESN'T EVEN ADDRESS THE REASONABLE PERSON TEST THAT WAS SET FORTH BY THIS COURT. IT DOESN'T PURPORT TO ADDRESS IT. AND WHEN IT CONSIDERS THE REMARKS THAT WERE MADE IN THE OPENING STATEMENT, IT, ALSO, DOES NOT ADDRESS ONE OF THE TWO PROBLEMS WITH THE OPENING STATEMENT. IT ADDRESSED THE ISSUE OF WHETHER

OR NOT THE PARTIES WERE REFERRING TO OR THE DEFENSE COUNSEL WAS REFERRING TO A SETTLEMENT, WHEN IT SAID WENT WE WANT YOU TO QUESTION WHY THESE PEOPLE ARE NO LONGER PRESINEOURTROOM.

NOW, WHAT WAS THE FIC BASISF EMOTION FOR MISTRIAL?

THE SPECIFIC BASIS OF THE NOTION MISTRIAL WAS TWOFOLD. -- OF THE MOTION FOR MISTRIAL WAS TWOFOLD. NUMBER ONE, THE STATEMENT REFERRED TO COULD ONLY HAVE REFERRED IN OPENING STATEMENT, TO ACT OF THE SETTLING TND COULD ONY HAVE ASKED THE PARTIES TO TAKE INTO ACCOUNT WHY THOSE THOSE SETTLING PARTIES WERE NOT PRESENT IN THE COURTROOM. THE REASON BEING IT WAS OPENING STATEMENT. THERE WERE NO WITNESSES THERE. THE ONLY PEOPLE WHO WERE THERE WERE THE PARTIES. AND IT SPECIFICALLY ASKED THE COURT TO -- I MEAN THE JURY TO ASK THEMSELVES WHY THOSE PEOPLE WEREN'T PRESENT. THEN IT GOES ON TO SAY, AND IT IS A DIRECT CHALLENGE TO THE PLAINTIFF'S COUNSEL, GOES ON TO SAY WE ASSURE YOU, THOUGH, THAT NEITHER THE PLAINTIFF NOR HER LAWYER ARE GOING TO TELL YOU WHY THEY ARE NOT IN THE COURTROOM. THAT IS AN ACCUSATION, A COVER-UP. THEY ARE NOT GOING TO TELL YOU WHY THEY ARE NOT HERE, AND THERE IS A REASON WHY THEY WERE ACCUSING US OF A COVER-UP.

IN THIS CASE, THE OTHER PARTIES THAT YOU ARE REFERRING TO, WERE, IN FACT, NAMED AS DEFENDANTS IN THE LAWSUIT ORIGINALLY. CORRECT?

CORRECT. AND THEY SETTLED.

THE SITUATION WHERE ONLY THE DEFENDANT WHO IS ON TRIAL HERE WAS ACTUALLY NAMED IN THE COMPLAINT, BUT THE DEFENDANT IS DEFENDING, BASED ON THE FACT THAT THESE OTHER CAREGIVERS MAY HAVE BEEN NEGLIGENT, ALSO, OR IN FACT WERE THE NEGLIGENT PARTY. WOULD THIS STATEMENT, THEN, BE INCORRECT?

WOULD IT BE INCORRECT?

IMPROPER.

IT IS IMPROPER, AND THE REASON WHY IT WAS IMPROPER WAS, AGAIN, TWOFOLD. NUMBER ONE, THE ONLY REASON WY THOSE PEOPLE WERE NOT PRESENT IN THE COURTROOM AS PARTIES, WAS BECAUSE THEY HAD SETTLED.

BUT ON A SITUATION AS I JUST POSITED TO YOU, THEY ARE NOT IN THE COURTROOM BECAUSE THEY DIDN'T SETTLE. THEY WEREN'T EVEN A PART OF THE LAWSUIT AT ALL, SO WOULD IT BE IMPROPER UNDER THOSE CIRCUMSTANCES?

I THINK IT WOULD BE IMPROPER, UNDER THE CIRCUMSTANCEST E HAVE GOT HERE, JUSTICE QUINCE, THE ONLY REASON BEING WHY THEY WEREN'T IN THE COURTROOM. THERE WOULD HAVE BEEN OTHER EXPLANATIONS.

HOW DOES THIS WORK UNDER FABRE?

THAT IS THE QUESTION, JUSTICE QUINCE IS ASKING.

I UNDERSTAND THAT.

AND THE PROBLEM --

THESE PEOPLE, ARE THEY ON THE VERDICT FORM?

THEY WOULD BE ON THE VERDICT FORM, SO LONG AS THE DEFENSE HAD PLED THEM AS FABRE PARTIES, AND THE ANSWER IS WE COULD COME BACK AND SAY, BUT FOR THE FACT THAT THEY HAD SETTLED, WE COULD COME BACK AND SAY SPECIFICALLY, ADDRESS IT AS A FABRE ISSUE AND SAY THEY ARE GOING TO BE BEFORE NE ISSE F PONMENT. BUT WE --

THEY ONVERDICT FORM?

YES. THEY WERE ON THE VERDICT FORM.

SO REALLY THEOPER PART OF THE ARGUMENT, IN ABRE WORLD, WHERE IT IS DIFFERENT THANE EDRICK WORLD, JURORS AREKEDO APPORTION AGAINST PARTIES THAT AREN'T TH.

RRECT.

SO SOMEWHERE ALONG THE WAY, SOMEONE NEEDS TO SAY THERE ARE GOING TO BE INDIVIDUALS WHO AREN'T THERE THAT YOU ARE GOING TO HAVE TO APPORTION FAULT. THE QUESTION, I GUESS, TO ME, THE PART THAT MAYBEROSSES THE LINE,ISUREUGH THAT RICKSADR ATTORNEYS AREN'T GOING TO TELL YOU WHY THEY AREN'T HERE, IMPLYING THAT THERESSOME HIDING GOING ON.

AND NEFARIOUS CONDUCT ON THE PART OF NOT JUST PLAINTIFF BUT HER COUNSEL. NOW, LOOK AT WHAT HAPPENS AT THE MOTION FOR MISTRIAL THAT FOLLOWS.

LET ME GO BACK.

CERTAINLY.

WHAT IS THE PROPER, WHAT IS THE APPROPRIATE NOW, IN FABRE -- WHAT IS THE PROPRIETY NOW, IN FABRE, OF WHAT IS LEGITIMATE ARGUMENT, ABOUT PARTIES THAT AREN'T THERE THAT ARE GOING TO BE ON THE VERDICT FORM.

NUMBER ONE, I DON'T THINK YOU CAN CHALLENGE THE PLAINTIFF TO EXPLAIN THE ABSENCE OF PARTIES FROM THE COURTROOM. THAT IS AN IMPROPER CHALLENGE. RIGHT IN AND OF ITSELF.

BECAUSE THE ONLY WAY TO EXPLAIN IT WOULD BE BY SAYING SOMETHING THAT IS NOT, THAT THE JURY IS NOT SUPPOSED TO HEAR.

EXACTLY. AND THAT IS NOT ADMISSIBLE, AND THAT EVERYBODY UNDERSTANDS IS NOT ADMISSIBLE. NUMBER TWO, BY CHALLENGING THE PLAINTIFF AND HER COUNSEL TO EXPLAIN WHAT IS INADMISSIBLE, YOU ARE MAKING IT LOOK LIKE THE PLAINTIFF AND HER COUNSEL HAVE SOMETHING TO HIDE. SO THE SCOPE OF PERMISSIBLE, WHAT DID THEY SAY? THEY COULD SAY THAT YOU WILL BE HEARING EVIDENCE ABOUT OTHER HEALTHCARE PROVIDERS, AND WE BELIEVE THAT, AT THE CONCLUSION OF THIS CASE, YOU WILL BE APPORTIONING FAULT TO THESE HEALTHCARE PROVIDERS. THAT WOULD BE A COMPLETY PPROPRIATE OPENING STATEMENT OR YOU COULD DETAIL THE OTHER HEALTHCARE PROVIDERS AND SAY AT THE CONCLUSION OF THIS CASE WE ARE GOING TO ASK YOU TO DETERMINE A PORTION OF LIABILITY TO THEM.

WHAT OTHER REMEDIES WERE POSSIBLY AVAILABLE AT THE TIME THAT THIS OCCURRED? FOR INSTANCE, INSTRUCTING THE JURY TO DISREGARD THAT STATEMENT STATEMENT.

THE TRIAL COURT SAID THAT HE WOULDN'T GIVE A CAUTIONARY INSTRUCTION, BECAUSE IT WAS JUST GOING TO COMPOUND IT.

WAS A CAUTIONARY INSTRUCTION ASKED FOR?

IT WAS NOT, AND THE REASON BEING IN THE TRANSCRIPT, THE PLAINTIFF'S LAWYER SPECIFICALLY SAYS I DON'T THINK THERE IS ANYTHING THAT CAN BE DONE TO CURE IT, AND HEITYMIZES THOSE TWO REASONS -- AND HEITEMIZES HOSE TWO REASONS. YOU HAVE JUST ACCUSED ME IN ONE FELL SWOOP AND --

IT WAS NOT ASKED FOR?

IT WAS NOT ASKED FOR BECAUSE PLAINTIFF'S COUNSEL SPECIFICALLY SAID IT CAN'T BE CURED AND THE TRIAL COURT CONCURRED AT A LATER TIME IN THE RECORD.

WHAT WE ARE TALKING ABOUT NOW IS NOT REALLY THE EDRICK ISSUE, WITH REFERENCE TO THE MISTRIAL MOTION BEING RESERVED. WE ARE, NOW, REALLY TALKING ABOUT ANOTHER LEGAL ISSUE, AND THAT IS THE REVIEW OF THE TRIAL COURT'S GRANT OF A NEW TRIAL. ISN'T THAT YOU ARE REALLY FOCUSING ON NOW?

NO. I AM FOCUSING ON BOTH, AND THE REASON WHY, EDRICKE WAS BASED ON POLICY. THERE ARE A WHOLE SLEW OF CASES THAT HAVE COME OUT FROM THIS COURT SINCE EDRICKE, WHICH BOWLS SISTERS WHAT THIS -- WHICH BOWL SISTERS WHAT THIS COURT WAS -- WHICH BOLSTERS WHAT THIS COURT WAS TRYING TO DO IN EDRICKE.

YOU HAVE STATED THAT THERE WAS NOT A CONFLICT BETWEEN THIS CASE AND EDRICKE, AT LEAST THAT THE IS WAY UNDERSTOOD YOUR ANSWER TO BE. AS FAR AS YOU SAID THANKS HAVE CHANGED SINCE EDRICKE AND SO THERE ARE REASONS, SO WOULD YOU ADDRESS THAT. WHERE IS THE CONFLICT BETWEEN EDRICKE AND THIS CASE?

THE CONFLICT IS IN THE READING OF EDRICKE TOO NARROWLY, AND THAT IS A MISAPPLICATION OF EDRICKE.

WHERE IS IT READ TOO NARROWLY BY THE COURT?

IT IS READ TOO NARROWLY TO SAY THAT IT HAPPENED IN OPENING STATEMENT OR IT IS OVER. YOU EITHER WANTED THE MISTRIAL OR YOU DIDN'T WANT THE MISTRIAL.

DID THE TRIAL COURT ACKNOWLEDGE EDRICKE AND INTERPRET HERE, WOULDN'T YOU AGREE THAT THE JUDICIAL ECONOMY THAT WAS BEING DISCUSSED IN EDRICKE WAS THE JUDICIAL ECONOMY OF WHETHER YOU GRANT A MISTRIAL AT THE VERY END OF THE CASE, JUST BEFORE IT GOES TO A JURY, AS OPPOSED TO AT THE VERY BEGINNING OF THE CASE, BEFORE ANY WITNESSES HAVE BEEN CALLED AND THE TRIAL HAS EVEN STARTED? WOULD YOU AGREE WITH THAT?

I WOULD AGREE THAT, BACK IN 1985, WHEN EDRICKE, THE ISSUE BEFORE THE COURT WAS WHETHER IT WAS REASONABLE, AND THAT IS WHAT THE COURT USED, IN DETERMINING THAT THE PROCEDURE COULD BE USED DURING CLOSING ARGUMENT, BUT SINCE THAT TIME, IN MURPHY VERSUS INTERNATIONAL, IF YOU LOOK AT THE REASON FOR THE CONTEMPORANEOUS OBJECTION RULE, THE REASON WHY WE REQUIRE CONTEMPORANEOUS OBJECTION IS BECAUSE WE HAVE GOT THE AVAILABILITY OF THE EDRICKE PROCEDURE, AND THAT IS THE WHOLE REASON OR THE UNDERPINNING OF MURPHY VERSUS INTERNATIONAL, AND IF YOU LOOK --

BUT YOU AGREE THAT EDRICKE DID NOT PASS ON THE SITUATION OF HAVING AN ERROR OCCUR BEFORE THE TRIAL ACTUALLY STARTED?

THEY DID NOT SQUARELY SAY IT COULD NOT HAPPEN. THEY JUST SAID IT WAS REASONABLE.

THE ISSUE OF JUDICIAL ECONOMY IS CLEARLY YOU WOULD, I ASSUME AGREE, TOTALLY DIFFERENT FROM THAT PERSPECTIVE, IS IT NOT?

I DON'T BELIEVE IT IS, AND I DO BELIEVE --

IN OTHER WORDS THERE IS NO DIFFERENCE BETWEEN A TRIAL HAVING GONE ON FOR HOWEVER LONG AND THEN JUST BEFORE IT IS SUBMITTED TO A JURY, TO TAKE A MOTION FOR MISTRIAL AND RESERVE DECISION ON THAT, AND DOING IT THE VERY BEGINNING, BEFORE THE TRIAL IS EVEN STARTED?

IT IS --

THERE IS NO DIFFERENCE BETWEEN THOSE TWOSITSN YR --.

THERE CAN'T BE, BECAUSE JUDICIAL ECONOMY MUST ALWAYS DEFER TO THE UNDERLYING FAIRNESS OF THE TRIAL, AND THE TRIAL RT IS IN THE BEST POSITNO ASSESS THAT. THAT IS THE WAY IT HAS TO BE, AND THE REASON WHY, IF I COULD JUST SPEND ONE MORE MINUTE OF MY REBUTTAL TIME. MR. CHIEF JUSTICE

YOUR REBUTTAL TIME.

ON PAGE 51 OF THE RECORD, IMMEDIATELY AFTER THE COMMENTS WERE MADE, PLAINTIFF'S COUNSEL MOVED FOR A MISTRIAL. NOW, LOOK AT WHAT HAPPENED AT PAGE 51 OF THE TRANSCRIPT. THE DEFENSE LAWYER SAYS I DON'T WANT TO GO THROUGH AN ENTIRE TRIAL IN THIS CASE FOR YOUR HONOR TO RULE ON A MOTION FOR MISTRIAL AT THE END. I WOULD RATHER YOU RULE ON IT NOW. EITHER HE WANTS IT OR HE DOESN'T WANT IT. I THINK WHAT HE IS LOOKINGING FOR IS TO HAVE HIS CAKE AND EAT IT TOO, OF COURSE THAT BEING THE EXACT SAME ARGUMENT THAT WAS REJECTED IN EDRICKE, BECAUSE THAT WAS JUDGE SCHWARTZ'S DISSENT AND THAT IS THE POINT I AGREE WITH. THE POINT I AM MAKING IS THE PERSON WHO JUST COMMITTED THE ERROR THAT PERVADES THE TRIAL IN CHARGE OF DETERMINING WHETHER OR NOT A CASE IS POSTPONED INDEFINITELY AND RETRIED, BASED ON HER ERROR, OR WHETHER OR NOT THAT CASE CONTINUES AND THE MOTION FOR MISTRIAL IS WAIVED. THERE IS SOMETHING FUNDAMENTALLY WRONG WITH LETTING THE OFFENDING PARTY CONTROL WHETHER OR NOT A NEW TRIAL IS GRANTED. THANK YOU.

MAY IT PLEASE THE COURT. BILL VIERGEVER, ON BEHALF OF THE RESPONDENT RENE LOYOLA. THERE ARE SEVERAL POINTS THAT OPPOSING COUNSEL HAS MISSED, AND THE FIRST IS THAT --

LET ME ASK YOU THIS. THIS IS A SITUATION WHERE THE FOURTH DISTRICT REVERSED A TRIAL JUDGE FOR GRANTING A NEW TRIAL, RIGHT?

CORRECT.

NOW, THAT IS ON THE BASIS OF BROWN VERSUS STUCKEY OUT OF THIS COURT, A MATTER WHICH CAN ONLY BE DONE IF THE TRIAL JUDGE MAKES AN ERROR OF LAW. CORRECT? I MEAN, IT IS, YOU HAVE GOT TO GIVE DEFERENCE TO A TRIAL JUDGE IN THE GRANTING OF A NEW TRIAL.

WELL, UNLESS THERE IS AN ABUSE OF DISCRETION THAT RISES TO THE LEVEL THAT WARRANTS A REVERSAL.

AND SO THE VERY ESSENCE OF THIS CASE REVOLVES, REGARDLESS OF WHETHER IT IS EDRICKE OR BROWN VERSUS STUCKEY, ON WHETHER THE FOURTH DISTRICT COMMITTED AN ERROR IN THE REVERSAL OF A GRANT OF A NEW TRIAL. BY THIS TRIAL JUDGE, RIGHT?

WELL, I THINK EITHER STANDARD OF ABUSE OF DISCRETION WOULD BE SATISFIED IN THIS CASE, AND I THINK THERE IS QUESTION OF WHETHER OR NOT THE STUCKEY STANDARD ACTUALLY APPLIES, BECAUSE THIS IS ACTUALLY, FOR ALL PRACTICAL PURPOSES, NOT A MOTION GRANT AGO NEW TRIAL. IT IS A MOTION GRANTING THE MISTRIAL. THE JUDGE RESERVED RULING ON A

MOTION FOR MISTRIAL.

BUT THE JUDGE GRANTED A NEW TRIAL.

THAT IS WHAT HE DID, BUT ONLY BECAUSE HE RESERVED RULING. THE DISCRETION ON A MOTION FOR MISTRIAL DURING TRIAL, I BELIEVE IS A STANDARD ABUSE OF DISCRETION.

THE WHOLE ESSENCE OF THE CONCEPT OF BROWN VERSUS STUCKEY IS THAT THE JUDGE SEES ALL OF THIS UNFOLD IN FRONT OF THAT TRIAL JUDGE, AND IS IN THE BEST POSITION TO KNOW WHETHER A NEW TRIAL SHOULD OR SHOULD NOT BE GRANTED ON THE BASIS OF WHAT IS IN THE RECORD. ISN'T THAT RIGHT?

ABSOLUTELY CORRECT, YOUR HONOR, BUT I WOULD PUT FORTH THAT THERE IS STILL A STANDARD THAT CAN BE CROSSED. STUCKEY DID NOT SAY A TRIAL COURT NEVER ABUSES ITS DISCRETION BY GRANTING OR DENYING, GRANTING A MOTION FOR NEW TRIAL. THERE HAS TO BE SOME POINT WHERE IT IS POSSIBLE TO CROSS THAT THRESHOLD.

WHERE IS THAT POINT?

THIS CASE, YOUR HONOR.

AND SIX DAYS LATER, HOW LONG DID THE TRIAL LAST?

IT WAS A SIX-DAY TRIAL WITH MULTIPLE EXPERTS COMING IN FROM OUT-OF-STATE.

WHY COULDN'T THE JUDGE NOT MAKE THAT DETERMINATION, BASED ON HIS TRIAL CALENDAR, THE ACCOMMODATION OF WITNESSES, THE AVAILABILITY OF COURTROOMS, AND ALL OF THOSE THINGS THAT I, FOR 23 YEARS AS A TRIAL JUDGE, WENT INTO MAKING THOSE DECISIONS? WHY COULD HE NOT OR THE TRIAL JUDGE IN THIS CASE NOT MAKE THAT DETERMINATION, WITHOUT HAVING HIS DISCRETION CHALLENGED BECAUSE IT WAS ABUSED?

WELL, I THINK THAT THE TRIAL JUDGE MAY, UNDER SOME OF THOSE CIRCUMSTANCES, BE ABLE TO. THOSE ARE NOT THE FACTS BEFORE IT, AS CITED IN THE FOURTH DCA'S OPINION. THERE WAS NO EVIDENCE THAT THE RESERVATION OF RULING IN THIS CASE PROMOTEDEITHER OF THE POLICY CONSIDERATIONS CITED IN EDRICKE.

SO IT IS YOUR POSITION THAT THE DELAY DOES NOT APPLY. HE WOULD HAVE BEEN REVERSED, EVEN IF HE GRANTED IT AT THE OPENING STATEMENT.

I AM SORRY. I DON'T UNDERSTAND YOUR QUESTION.

IT IS YOUR POSITION THAT, IF HE GRANTED A MISTRIAL AEOPTATEMD YOU APPEAL THAT, IT WOULD BE REVERSED.

NO, YOUR HONOR. I THINK WE WERE THERE AT THE FIRST DAY OF TRIAL IN FT. PIERCE PIERCE. IF HE GRANTED THE MOTION FOR MISTRIAL, WE WOULD HAVE EMPANELED ANOTHER JURY AND STARTED THE CASE OVER.

BUT HE MADE A DECISION THAT HE WOULD RATHER WAIT UNTIL THE END OF THE TRIAL TO SEE IF A VERDICT CURED IT.

CORRECT.

SO WHY WAS THAT NOT AN APPROPRIATE USE OF HIS DISCRETION?

BECAUSE THIS COURT, IN EDRICKE, SAID THAT THE DISCRETION TO RESERVE RULING IS LIMITED,

AND IT IS LIMITED BY THE PRECEPTS OF JUDICIAL CON ME MI AND THE RULING -- JUDICIAL ECONOMY AND THE RULING MIGHT DISCOURAGE CONDUCT IN THE WANING MOMENTS OF THE CASE.

AND THE ACCOMMODATION OF WIT WITNESS AND RESERVATION OF THE COURTROOM, WHY WASN'T THAT JUDICIAL ECONOMY?

I DON'T THINK ANY OF THAT WAS IMPLICATED IN THIS CASE. ON THE CONTRARY, EVERYONE WAS READY TO I AM PANEL ANOTHER JURY -- TO EMPANEL ANOTHER JURY AND GO FORWARD.

WERE YOU THE TRIAL COUNSEL?

I WAS NOT TRIAL COUNSEL.

WASN'T IT INTENTIONAL INTENT TO GET BEFORE THAT JURY, BECAUSE THE STATUTE SPECIFICALLY SAID THAT YOU WERE FORBIDDEN TO GET BEFORE THE JURY? ISN'T THIS A PRETTY EGREGIOUS SITUATION?

I THINK, IN RETROSPECT, THE COMMENT APPEARS TO BE EGREGIOUS. YOU LOOK AT THE ENTIRE TRANSCRIPT, I THINK THERE IS AN EXPLANATION FOR WHY IT CAME OUT THE WAY IT D PLAINTIFF'S COUNSEL IN THEIR OPENING STATEMENT, SPENT A MAJORITY OF HIS TIME DISCUSSING WHETHER OR NOT DR.A WAS OR WAS WAS NOT NEGLIGENT. AT THE VERY END HE BRIEFLY MENTIONED THE FACT THAT THERE WOULD BE OTHER PARTIES ADDRESSED AND HIS CHALLENGE TO THE DEFENSE WAS DEFENDANTS ARE GOING TO TRY AND BLAME SOMEONE ELSE WHO IS NOT IN THIS COURTROOM TO DEFEND THEMSELVES. NOW, WHEN YOU LOOK AT THE TRANSCRIPT, THE DEFENSE COUNSEL WENT THROUGH AN ENTIRE OPENING STATEMENT, MANY, MANY, MANY PAGES, ADDRESSING ONLY WHETHER OR NOT THE EVIDENCE WAS GOING TO SHOW DR. LOYOLA WAS NEGLIGENT, AND THEN IN THE VERY CLOSING OF THE DEFENSE STATEMENT, LOOKING BACK AT NOTES FROM PLAINTIFF'S OPENING STATEMENT, ADDRESSED THE SETTLING DEFENDANTS IN THE MANNER THAT WAS USED, PERHAPS NOT THE BEST, BUT IT MIRRORED WHAT PLAINTIFF --

BUT IT WAS DIRECTLY IN VIOLATION OF THE STATUTE, ISN'T IT?

ACTUALLY IT IS NOT DIRECTLY IN VIOLATION. THE STATUTE PERMITS EVIDENCE AND COVENANTS NOT TO SUE.

DIDN'T YOU KNOW YOU WERE ABOUT TO GET INSURANCE BEFORE THE JURY, AND THEN YOU MAKE THIS KIND OF VEILED REFERENCE TO WHO WAS OUT THERE INVESTIGATING IT. WASN'T THAT SOMEBODY FROM STATE FARM? I MEAN, ISN'T THIS THE SAME TYPE OF CONDUCT BY THE LAWYER THAT WAS INTENTIONALLY GETTING AROUND THIS STATUTE?

I CAN SAY ABSOLUTELY IT WAS NOT INTENTIONAL. I CAN SEE THE ANALOGY YOUR HONOR IS DRAWING. IN THIS CASE, IT ABSOLUTELY WAS NOT INTENTIONAL. I BELIEVE IT WAS A DIRECT RESULT OF MIRRORING THE LANGUAGE USED BY PLAINTIFF'S COUNSEL, WHEN PLAINTIFF'S COUNSEL SAID THEY ARE GOING TO TRY TO BLAME SOMEONE WHO IS NOT HERE, IN THE COURTROOM TO DEFEND THEMSELVES.

HERE YOU ARE NOT TRYING TO DEFEND THE IMPROPER ARGUMENT THAT THE JUDGE FOUND WEREN'T PROPER AND FORMED THE BASIS OF GRANT AGO NEW TRIAL. SO GOING BACK TO WHETHER THIS IS A MISAPPLICATION OF EDRICKE OR A PROPER APPLICATION BY THE APPELLATE COURT, UNLESS WE WERE TO ADOPT A BRIGHT-LINE RULE THAT SAID THAT THE EDRICKE RULE ONLY APPLIES IN CLOSING ARGUMENT OR IT ONLY APPLIES, IF IT IS GOING TO BE IN OPENING STATEMENT AND IT IS A TWO-DAY TRIAL, BUT WHEN IT GETS TO BE A FIVE-DAY TRIAL, YOU CAN USE YOUR DISCRETION ANY -- YOU CAN'T USE YOUR DISCRETION ANYMORE, JUDGE, TO RESERVE,

GOING BACK TO JUSTICE HARDING'S QUESTION. HOW DOES THIS CROSS THE LINE OF THE DISCRETION OF -- THAT A JUDGE IS GRANTED TO RESERVE RULING, UNLESS YOU SAY THAT EDRICKE DIDN'T GIVE THAT DISCRETION WHEN IT OCCURS DURING OPENING STATEMENT.

I DON'T THINK EDRICKE IS CLEAR WHETHER IT GIVES DISCRETION DURING OPENING STATEMENT. IT, CERTAINLY, ARGUABLY DOES, BUT I THINK THAT THEIR LIMITATION ON THE OPENING STATEMENT IS CLEAR. THERE ARE TWO COMPONENTS. NEITHER OF WHICH THERE WAS ANY EVIDENCE OF IN THIS CASE. IF WE HAD A SITUATION WHERE THERE WAS A HOTLY-CONTESTED JURY AND WE ENDED UP WITH A JURY THAT THE DEFENSE HAD RUN OUT OF PREEMPTORY STRIKES AND HAD NOT BEEN ABLE TO EXERCISE STRIKES FOR CAUSE AND GOT A JURY THEY DIDN'T LIKE, THEN THERE MIGHT BE SOME EVIDENCE IN THE RECORD THAT WARRANTED RESERVING RULING BECAUSE OF THIS KIND OF CONDUCT. E EVEE RECORD OF THAT. THYS EMPANELED WITHBOTH SIDES HAVING PREEMPTORY STS LEFT.

WAS THERE A DISCUSSION, WHEN THE OBJECTION WAS PRESERVED BY MOVING FOR A MISTRIAL, THE JUDGE SPECIFICALLY, LATER ON IN THE RECORD, ACKNOWLEDGES THAT HE WOULD NOT HAVE GRANTED A CAUTIONARY INSTRUCTION, BECAUSE IF HE BROUGHT IT UP AND TOLD THEM TO DISREGARD IT, THAT WOULD ONLY HIGHLIGHT IT, SO THE JUDGE FELT THIS WAS HIGHLY PREJUDICIAL. AT THE TIME THAT THE JUDGE SAID I AM GOING TO RESERVE RULING, WAS, WHAT WAS THE ARGUMENT ON THE OTHER SIDE, TO SAY, NO, WE HAVE TOO LONG A TRIAL? YOU REALLY OUGHT TO DO IT NOW. AND WHAT DID THE JUDGE SAY TO THAT?

THAT WAS PRECISELY IT, YOUR HONOR. THE ARGUMENT WAS WE DO NOT WANT TO GO FORWARD IN THE WHOLE TRIAL AND CALL ALL OUR EXPERTS FROM OUT-OF-STATE. IF YOU FEEL IT IS SUFFICIENT TO GRANT A MISTRIAL, YOU SHOULD GO AHEAD AND GRANT THE MISTRIAL NOW AND I WANT TO POINT OUT THAT PLAINTIFF'S COUNSEL DID NOT REQUEST A CURETIVE INSTRUCTION AND DID NOT MAKE A STATEMENT THAT A CURETIVE INSTRUCTION WOULD BE HELPFUL. THAT WAS SOLELY ON THE PART OF THE JUDGE LATER IN THE CASE, AND I WOULD LIKE TO POINT OUT THAT WHEN HE GAVE HIS INSTRUCTION TO SAY THE JURY AT THE CLOSE OF THE CASE, HE ADDRESSED SEVERAL QUESTIONS THAT HE NORMALLY GETS AND GAVE ANSWERS TO THOSE QUESTIONS AND INCORPORATE INTERESTED THAT AN INSTRUCTION SAYING, CASES LIKE THIS, WHEN THERE ARE OTHER PARTIES THAT YOU MAY HAVE TO APPORTION TO, IT IS NOT AN ISSUE FOR YOU TO DETERMINE WHY THEY ARE NOT IN THE COURTROOM AND TO BASE YOUR --.

BUT YOU ARE NOT SAYING THIS WAS NOT ADEQUATELY PRESERVED IN THE MOTION FOR MISTRIAL IN THIS CASE. THERE WAS A HIGHLY.

LY ---THERE WAS A HIGHLY IMPROPER COMMENT MADE AND A MOTION FOR MISTRIAL AND REQUEST WHICH THE JUDGE GRANTED. THERE IS NO REQUIREMENT, ONCE YOU MAKE THE MOTION FOR MISTRIAL THAT YOU ALSO HAVE TO SAY, BUT IF YOU DON'T GIVE THAT, I WANT A CAUTIONARY INSTRUCTION.

I THINK IT IS ACTUALLY A VERY COMPLICATED QUESTION, YOUR HONOR BECAUSE PRIOR TO EDRICKE IT WAS ABSOLUTELY A PRESERVATION ISSUE. THE FOURTH DISTRICT CONCURRED WITH THE THIRD AND HELD THAT IF YOU CONCUR WITH THE RULING, YOU ARE WAIVING YOUR OBJECTION, SO POST EDRICKE, IF YOU MAKE A REQUEST AND IF THE COURT ABUSES DISCRETION BY RESERVING RULING WHEN IT SHOULDN'T HAVE, I DON'T KNOW THAT THAT IS A PRESERVATION ISSUE. IT NOW BECOME AS QUESTION OF WHETHER THE TRIAL COURT USED ITS JUDICIAL DISCRETION. I THINK THE PLAINTIFF ERRED BECAUSE THEY ASSERT THE THE QUESTION -- BECAUSE THEY ASSERTING THE QUESTION, AND BY RESERVING THE RULING, THEY ARE WAIVING THAT.

AS A PRACTICAL MATTER, IT WOULD BE ALMOST IMPOSSIBLE TOLL REVERSE A JUDGE. HE COULD ALWAYS TAKE THE POSITION THAT I LET THE TRIAL GO TO ITS FIVE-DAY CONCLUSION, BECAUSE I

THOUGHT THAT THE JURY MIGHT CURE THE ERROR. AND THAT IS A REASONABLE POSITION, IS IT NOT?

I DON'T THINK IT IS REASONABLE TO SAY IT WOULD BE ALMOST IMPOSSIBLE, BECAUSE I THINK THE ABUSE OF DISCRETION HAS TO FINALLY HAVE A LIMIT, YOUR HONOR, AND THIS CASE, THE LIMIT WAS CROSSED, BECAUSE THE WHOLE PURPOSE OF EDRICKE WAS TO PROMOTE JUDICIAL ECONOMY, AND WE HAVE TURNED THAT WHOLE IDEA ON ITS HEAD. THIS CASE WAS THE PERFECT EXAMPLE. WE DID THE TRIAL ONCE AND NOW WE ARE GOING TO HAVE TO DO THE TRIAL ALL OVER AGAIN, IF THIS COURT REVERSES THE FOURTH DCA.

BUT YOU HAVE TWO TRAINED LAWYERS HERE DISAGREEING ON WHERE THAT ABUSE OF DISCRETION LIES, SO THAT IS WHY I AM SAYING IT IS A PRETTY HEAVY THRESHOLD TO, WHEN, FOR AN APPELLATE COURT TO REVERSE THE TRIAL JUDGE AND SAY HE ABUSED HIS DISCRETION AND GIVE MANY REASONS WHY HE DID OR DID NOT ALLOW THE TRIAL TO CONTINUE, ONE BEING, OVERRIDING, THAT I THOUGHT IT WOULD BE CURED BY THE VERDICT.

YOUR HONOR, IT IS A HIGH THRESHOLD. I CAN'T DENY THAT, BUT YOU LEAD ME TO AN IMPORTANT POINT WHEN YOU POINT OUT THAT TWO ATTORNEYS CAN DISAGREE ON WHAT THE SCOPE OF DISCRETION IS, AND THAT BRINGS US BACK TO THE ORIGINAL POINT THAT EDRICKE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH THE FOURTH DISTRICT COURT OF APPEAL OPINION.

WE HAVE BEEN THROWING AROUND THIS CONCEPT OF JUDICIAL ECONOMY ALL MORNING AND I AM A LITTLE BIT TROUBLED, AND MAYBE YOU CAN HELP ME WITH AN ANSWER TO IT. IF WE HAVE A FLAWED PROCEDURE, AN UNFAIR TRIAL, WHERE, IN FLORIDA JURISPRUDENCE OR THE JURISPRUDENCE OF THIS COUNTRY, IS IT WRITTEN THAT JUDICIAL ECONOMY, QUANTITY OF CASES, IS SO OUTWEIGHS QUALITY OF JUSTICE THAT WE ARE GOING TO APPROVE PREJUDICIAL, HARMFUL, UNFAIR TRIALS? CAN YOU HELP ME WITH THAT T.

NO, I CAN'T, YOUR HONOR. I DON'T BELIEVE SUCH CASES EXIST AND I DON'T THINK THAT IS THE ISSUE THIS CASE PRESENTS, BECAUSE I THINK A REVIEW OF THE RECORD CLEARLY REFLECTS THAT THAT DID NOT HAPPEN IN THIS CASE AND WE GO BACK TO THE TRIAL COURT WAS THERE AND THEY HAVE A HIGH STANDARD AND THAT IS TRUE, BUT THERE HAS TO BE A LINE WHERE THE APPELLATE COURT CAN ADDRESS THAT DISCRETION. IF NOT, THERE IS NO APPELLATE REVIEW. THE TRIAL COURT WOULD BE THE FINAL ARBITER, SO THERE HAS TO BE A LIMIT, AND IN THIS CASE THE LIMIT WAS CROSSED AND IT IS ASTONISHING HOW OVERWHELMINGLY THE EVIDENCE WAS IN FAVOR OF THE DEFENSE --

IF YOU DON'T START THE PROCEEDING IN A FAIR POSTURE, THE ISSUE IS NOT WHETHER THERE IS EVIDENCE, IS IT? THE ISSUE IS WHETHER YOU HAD A FAIR PROCEEDING. WE DON'T EVALUATE WHETHER THE EVIDENCE IN CASES WHERE WE DON'T HAVE A PROPER JURY OR IMPROPER STATEMENTS OR MADE, WELL, THERE IS PLENTY OF EVIDENCE, SO THEREFORE WHAT THE HECK? WE WILL JUST APPROVE WHAT HAPPENED, EVEN THOUGH, WHERE DOES THAT LEAVE US IN OUR JUSTICE SYSTEM?

YOUR HONOR, I WOULD AGREE TOTALLY. IF THERE IS AN UNFAIR TRIAL, IT WOULD BE IMPROPER FOR AN APPELLATE COURT TO REVERSE THE ORDER GRANTING A NEW TRIAL.

HASN'T THE LEGISLATURE SAID THAT, WHEN YOU DO WHAT YOU DID IN THIS CASE, THAT THAT IS CONTRARY TO THE POLICY OF THE STATE, AND IT IS CONTRARY TO OUR STATUTES?

THE LEGISLATURE HAS NOT, YOUR HONOR. THE FOURTH DCA.

THE STATUTE DOESN'T SAY THAT?

NO. THE FOURTH DCA POINTED OUT THAT THIS DID NOT VIOLATE THE LANGUAGE OF THE

STATUTE, BECAUSE THE STATUTE SPECIFICALLY PRECLUDES THREE THINGS, EVIDENCE AFTER SETTLEMENT, EVIDENCE OF A COVENANT NOT TO SUE, AND EVIDENCE THAT A PARTY WAS DISMISSED BY ORDER OF THE COURT. THIS DID NOT REFERENCE ANY THREE OF THOSE AND THE FOURTH DCA PICKED UP ON THAT. I TOTALLY UNDERSTAND YOUR HONOR'S CONCERN AND IT IS GOING IN THAT DIRECTION, AND THAT IS WHY AN IMPROPER COMMENT, BUT IN THE CONTEXT OF AN ENTIRE RECORD, THE COURT DOES HAVE THE DISCRETION TO REVIEW AND THE TRIAL COURT CONCLUDED THAT IT WAS NOT A FAIR TRIAL --.

IF THE DEFENSE GETS UP AND SAYS YOU ARE NOT GOING TO HEAR FROM THE DEFENDANT IN THIS CASE? ISN'T THAT SIMILAR?

I THINK THAT IT IS VERY CLEAR THAT THAT IS SUCH A FUNDAMENTAL RIGHT THAT THE VIOLATION OF THAT RIGHT DOES WARRANT A NEW TRIAL IN ALL CIRCUMSTANCES. I DON'T THINK THERE IS ANY SUCH HOLDING THAT A COMMENT THAT ARGUABLY MIGHT SORT OF IMPLICATE A VIOLATION OF A STATUTE ALWAYS, IN ALL INSTANCES, REQUIRES THAT THE TRIAL COURT GRANT A NEW TRIAL, PARTICULARLY IN THIS INSTANCE, WHERE IF IT WAS SO CLEAR, WHY DID THE TRIAL COURT RESERVE RULING? WE COULD HAVE GRANTED THE MOTION FOR MISTRIAL THAT DAY AND EMPANELED THE JURY AND GONE FORWARD. THAT IS WHY I THINK THIS RECORD CLEARLY DEMONSTRATES IT WASN'T SO CLEAR.

THIS WHOLE ARGUMENT, WHAT IS YOUR BOTTOM LINE HERE? ARE YOU SAYING THAT WE SHOULD, THESE CASES SHOULD BE DETERMINED ON A CASE-BY-CASE BASIS, OR ARE YOU ASKING THIS COURT TO COME UP WITH SOME KIND OF BRIGHT LINE THAT SAYS, AFTER SO MANY DAYS, THAT THE TRIAL IS GOING TO LAST A CERTAIN PERIOD OF TIME. WHAT ARE YOU ADVOCATING HERE?

I AM ADVOCATING THAT THIS COURT FOLLOW ITS PRIOR DECISION IN EDRICKE.

EDRICKE DOESN'T SAY ANYTHING ABOUT OPENING STATEMENTS. IT IS A CLOSING STATEMENT KIND OF CASE, SO ARE YOU ADVOCATING, THEN, THAT IF IF HAPPENS AT THE BEGINNING OF THE TRIAL, IT SHOULD BE DONE THEN AND NEVER AFTERWARDS?

ABSOLUTELY NOT, YOUR HONOR, AND I THINK EDRICKE LEAVES US ON A CASE-BY-CASE BASIS, FOR THE TRIAL COURTS AND APPELLATE COURTS OF THIS STATE TO DETERMINE THE SCOPE OF THE DISCRETION. THAT BRINGS US BACK TO THE FACT THAT THIS DECISION FROM THE FOURTH DCA DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH EDRICKE BECAUSE EDRICKE DOES NOT LAY OUT THE PARAMETERS OF THE DISCRETION. THE FOURTH DISTRICT SAW THIS SITUATION AND STARTED TO CARVE OUT THE PARAMETERS. IF THEY STARTED TO WRITE AN OPINION THAT CONFLICTS WITH THIS, THEN THIS COURT WOULD ADDRESS THAT AND FURTHER THE SCOPE OF DISCRETION.

IT SEEMS TO ME THAT WHAT THIS CASE REALLY TALKED ABOUT IN THE DISTRICT COURT WAS THE JUDICIAL ECONOMY ASPECT OF IT. IS THAT WHAT IT REALLY BOILED DOWN TO?

IT BOILED DOWN TO THAT BUT IT ALSO POINTED OUT THE SECOND CONCERN ADDRESSED IN EDRICKE THAT THESE COMMENTS DURING CLOSING ARE INDICATIONS THAT THE PARTY IS THINKING THAT THE CASE IS NOT GOING THEIR WAY AND IS DESPERATE.

BUT DOESN'T THAT COMMENT TAKE INTO CONSIDERATION THE PEOPLE THAT ARE ALREADY THERE, READY TO TESTIFY, ET CETERA, AND NOT WANT TO HAVE TO PUT THIS OVER TO ANOTHER TIME? IS THAT THE KIND OF JUDICIAL ECONOMY, OR ARE WE LOOKING AT HOW LONG THIS TRIAL IS GOING TO TAKE?

I THINK THAT --

WHAT IS IT?

I THINK THAT IS AN A RIVETING QUESTION. MY PERSONAL INTERPRETATION WOULD BE THAT WOULD BE PERFECTLY APPROPRIATE FOR A TRIAL COURT TO TAKE THOSE JUDICIAL ECONOMY CONSIDERATIONS INTO CONSIDERATION IN MAKING THIS DETERMINATION. NONE OF THAT WAS PRESENT IN THIS CASE.

AND HOW DO YOU WEIGH THE JUDICIAL ECONOMY VERSUS THE FACT THAT THIS MIGHT BE CURED DOWN THE LINE BY THE JURY VERDICT?

WELL, I THINK THAT --

AND MORE IMPORTANT FACTOR OR WHAT?

I THINK THAT IS A PRETTY TOUGH QUESTION, BUT GIVEN THE HIGH DEGREE OF DISCRETION THAT THE TRIAL COURT HAD IK THAT THE APPELLATE COURTS ULTIMATELY, AS THEY GRATH THIS ISSUE, WILL FIND THAT THEY WILL DEFER TO THE TRIAL COURTS, AND IF THERE IS SOME EVIDENCE THAT THIS PROMOTED JUDICIAL ECONOMY, I THINK THE APPELLATE COURTS WOULD DEFER TO A TRIAL COURT RESERVING RULING.

WHAT KIND OF EVIDENCE WOULD YOU REQUIRE? THE HAVE YOU JUDGE HAS -- THE JUDGE HAS SET THE CASE FOR TRIAL. GETS A COURTROOM, BASED ON THE NUMBER OF DAYS. GETS JURORS, HAS A JURY LIST AS TO WHO IS GOING TO TESTIFY, HAS AN ESTIMATE OF THE NUMBER OF DAYS. WHAT EVIDENCE DO WE HAVE TO PUT IT ON THE RECORD, AS TO THE, WHAT THE JUDGE NEEDS TO KNOW FOR REVIEWING COURT? I AM NOT --

I THINK ANYTHING ON THE RECORD THAT COULD SUPPORT THE TRIAL COURT'S RULING WOULD BE SUFFICIENT. EVEN IF YOU WERE IN THE FIRST DAY OF TRIAL LIKE THIS CASE, IF THE TRIAL COURT SAID I HAVE GOT WITNESSES HEAR AND READY TO GO. I DON'T WANT TO SEND THEM HOME. THEY HAVE FLOWN IN FROM CALIFORNIA. I THINK WE HAVE GOT TO GO. THAT IS WHY WE ARE GOING TO DO THIS. IN THIS CASE IT WAS JUST CONTRARY. WE WERE ALL READY TO EMPANEL ANOTHER JURY AND CONTINUE FORWARD LIKE NOTHING HAPPENED.

BUT ISN'T WHAT YOU ARE ADVOCATING A SITUATION IN WHICH ONE PARTY, FOR WHATEVER REASON, DOESN'T LIKE THIS JURY, IS, HAS GOT SOMEBODY THAT SUDDENLY THEY, THEIR EXPERT DOESN'T LOOK LIKE THEY ARE GOING TO BE GOOD, SO WHAT THEY ARE GOING TO DO IS THEY ARE GOING TO SAY SOMETHING AND GET A MISTRIAL. AND THEN THERE IS NOTHING THAT THE TRIAL JUDGE CAN DO, EXCEPT UNDER THAT, GRANT THE MISTRIAL, AND THAT WORKS TO THE DETRIMENT OF THE OTHER PARTY.

WELL, WE ARE HYPOTHESIZING HERE ABOUT A FUTURE CASE, AND I THINK THAT BRINGS US BACK TO WHY IT IS SO IMPORTANT THAT THIS COURT NOT ADDRESS THIS ISSUE, WHEN IT DOES NOT HAVE CONFLICT JURISDICTION. THIS COURT IS CONSTANTLY UNDER SCRUTINY FOR SELF-IMPOSING YOUR JURISDICTIONAL LIMITATIONS, AND I THINK THIS CASE IS A PERFECT EXAMPLE OF YOUR ONLYDATION -- OF YOUR OBLIGATION TO DO THAT, BECAUSE EDRICKE DID NOT DEFINE PARAMETERS OF THE SCOPE OF DISCRETION. IT JUST TOLD THE ALLEY APPELLATE COURTS OF THE STATE THERE ARE LIMITS TO RESERVE RULING. THE FOURTH DISTRICT HAS NOW SAID WHEN THERE IS ABSOLUTELY NO EVIDENCE TO SUPPORT THE FACT OF FAVORING JUDICIAL ECONOMY IN THIS INSTANCE, WE BELIEVE THAT IS AN ABUSE OF DISCRETION. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. REBUTTAL.

YES, YOUR HONOR. LET ME GO BACK TO ONE OF YOUR QUESTIONS JUSTICE WELLS, WITH REGARD TO ISN'T THIS A DIRECT VIOLATION OF THE STATUTE, AND THE ANSWER IS YES. IT IS EXACTLY LIKE INSURANCE. IT IS AS THOUGH THEY SAID, IN OPENING STATEMENT, AT THE CONCLUSION OF

THIS CASE, YOU SHOULD CONSIDER THE FACT THAT SOMEBODY OTHER THAN THE PERSON SITTING IN THIS ROOM WILL HAVE TO PAY THE JUDGMENT. DID THEY MENTION INSURANCE? NO. DO WE KNOW WHAT THEY ARE TALKING ABOUT? OF COURSE WE DO! WE KNOW EXACTLY WHAT THEY ARE TALKING ABOUT. IT WAS A CHALLENGE TO THE PLAINTIFF'S COUNSEL, TO EXPLAIN WHAT WAS FORBIDDEN BY STATUTE, AND THE PROBLEM WAS TWOFOLD. THE SECOND PROBLEM WAS A CHALLENGE TO THE JURY, TELLING THEM THAT THE PLAINTIFF AND THEIR LAWYERS WERE LYING TO THEM AND MISLEADING THEM. THAT COULD NOT BE CURED, AND THE JUDGE, AT PAGE 640 OF THE TRANSCRIPT, SAYS I WON'T GIVE, I COULDN'T GIVE A CAUTIONARY INSTRUCTION. IT WOULD JUST COMPOUND IT IN THE MINDS OF THE JURY. THAT WAS THE PROBLEM. THE FOURTH DISTRICT, IN ITS DECISION, DOES NOT MENTION ONE WORD, NOT ONE WORD ABOUT THE IMPLICATION THAT THE PLAINTIFF AND HIS COUNSEL WERE MISLEADING THE JURY. WITH REGARD TO THE ARGUMENT THAT THEY HAVE BEEN MAKING AS TO JUDICIAL ECONOMY, THAT EVERYBODY WAS READY TO GO, FIND THAT IN THE RECORD! IT DOES NOT APPEAR. ALL WE HAVE GOT IS MISS EILER, THE DEFENSE COUNSEL'S STATEMENT ON PAGE 51 THAT I WON'T IT -- I WANT IT NOW OR I DON'T WANT IT AT ALL. A LONG LINE OF CASES HAS HELD, BEGINNING WITH CROSSLY VERSUS STATE, THAT JUDICIAL ECONOMY CANNOT SUPERSEDE THE ULTIMATE FAIRNESS OF THE CASE. IT ENDED A WEEK AND-A-HALF AGO WITH DEHADA VERSUS ROBERTS, WHERE THE COURT SAYS IT IS NOT FAIR TO HAVE YOU INTERRUPT JURY SELECTION TO HAVE YOU GO RUNNING DOWNSTAIRS TO CHECK THE JURY INDEX, TO SEE WHETHER OR NOT JURORS ARE LYING. WHY? JUDICIAL ECONOMY HAS TO DEFER TO OVERALL FAIRNESS. FINALLY, THIS TRIAL JUDGE, WHO SAT THERE THROUGH THIS TRIAL DURING SIX DAYS, FOUND THE STATEMENT WAS NOT ONLY ERRONEOUS. IT WAS PREJUDICIAL AND IT WAS INCURABLE. THOSE WERE SPECIFIC FINDINGS. IN ORDER TO COME TO THE CONTRARY CONCLUSION, THE FOURTH DISTRICT DID NOT APPLY THE ABUSE OF DISCRETION STANDWHICH REQUIRED REASONABLE PERSONS TO DIFFER. THEY SIMPLY SECOND-GUESSED WHAT THE TRIAL JUDGE HAD DONE.

HOW DOES THAT -- EXCUSE ME. GO AHEAD.

IF THE JUDGE HAD JUST SAID I AM NOT GOING TO RESERVE RULING. I AM GOING TO, YOU ARE GOING TO GET THIS MISTRIAL NOW OR I AM GOING TO GIVE AWE CAUTIONARY INSTRUCTION, WOULD THAT, ALSO, HAVE BEEN WITHIN THE JUDGE'S DISCRETION? IN OTHER WORDS WOULD EDRICKE RULE? DOES THE JUDGE HAVE TO GRANT THE REQUEST TO RESERVE RULING, OR CAN THE JUDGE, ESPECIALLY IF IT HAPPENED IN OPENING STATEMENT, SAY, NO, YOU ARE GOING TO HAVE TO MAKE THAT CHOICE.

WELL, THAT IS THE WHOLE PROBLEM WITH THE FOURTH DISTRICT'S DECISION. IT LOOKS LIKE IT IS A BRIGHT-LINE RULE. IT HAPPENED IN OPENING STATEMENT. AND THEREFORE IT IS NOT JUDICIALLY HE CAN NOMINAL, BECAUSE YOU HAVE GOT -- -- ECONOMICAL, BECAUSE YOU HAVE GOT FOUR MORE DAYS OF TRIAL COMING. JUSTICE HARDING? THANK YOU VERY MUCH FOR THE TIME. MR. CHIEF JUSTICE

THANK YOU FOR YOUR ASSISTANCE IN THIS CASE.