Leonard Northup v. Herbert W. Acken, M.D., P.A.

PLEASE RISE.

PLEASE BE SEATED.

GOOD MORNING AGAIN. NEXT CASE ON THE COURT'S DOCKET IS NORTHUP VERSUS ACKEN. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT, COUNSEL, MY NAME IS SCOTT WHITLEY ON BEHALF OF THE PETITIONER. I AM GOING TO BRIEFLY GO OVER THE FACTS AND THE CASE, BECAUSE I THINK IT IS VERY IMPORTANT ON RESOLVE THIS DISPUTE. THIS IS A MEDICAL MALPRACTICE CASE. IT INVOLVES A DISPUTE OVER A CLAIM OF WORK PRODUCT. THE CASE WAS SET FOR TRIAL. IT WAS SET TO BE TRIED IN MARCH OF 2002. THE COURT'S UNIFORM PRE-TRIAL ORDER REQUIRED BOTH PARTIES TO EXCHANGE WITNESS AND EXHIBIT LISTS ON OCTOBER 28 OF 2001. PRIOR TO THAT TIME, MY EXPERT WHO IS A GYN AT JOHNS HOPKINS HAD BEEN DEPOSED BY DEFENSE COUNSEL ON TWO OCCASIONS APPROXIMATELY SIX HOURS. AND AFTER THE WITNESS AND EXHIBIT LISTS WERE EXCHANGED, THERE WAS SOME CONVERSATION ABOUT PRIOR DEPOSITION TESTIMONY THAT DOCTOR DILLON HAD GIVEN. I FILED A REQUEST FOR PRODUCTION REQUESTING ANY AND ALL PRIOR DEPOSITIONS OF DOCTOR DILLON IN DEFENSE COUNSEL'S POSSESSION. DEFENDANT OBJECTED ON THE BASIS OF WORK PRODUCT. WE HAD A HEARING. AT THE HEARING THE TRIAL COURT OVERRULED THE WORK PRODUCT OBJECTION. THE TRIAL JUDGE SPECIFICALLY DETERMINED THAT -- I'D INDICATED I DID NOT WANT, I'M NOT ASKING DEFENSE COUNSEL TO TELL ME WHICH DEPOSITIONS HE INTENDS TO WHICH OR WHICH PORTIONS OF THE DEPOSITIONS HE INTENDS TO WHY YOU USE. BUT IF HE INTENSE TO USE THEM AT TRIAL I'M ENTITLED TO SEE WHAT DOCUMENTS HE MAY USE.

DID YOU DISTINGUISH, THAT COUNSEL WANTED TO USE THOSE DEPOSITIONS AS DIRECT EVIDENCE AS OPPOSED TO, FOR IMPEACHMENT PURPOSES?

IT WOULD ONLY BE FOR IMPEACHMENT PURPOSES. I DON'T KNOW HOW HE WOULD BE ABLE TO USE THE EXPERT, DEPOSITION OF MY EXPERT FOR DIRECT EVIDENCE.

WELL I ASSUMED THAT. I JUST WANT TO MAKE IT CLEAR. WE ARE JUST TALKING ABOUT DEPOSITIONS THAT COUNSEL WOULD USE SOLELY FOR IMPEACHMENT PURPOSES?

THAT IS THE ASSUMPTION THAT I HAD.

THIS IS YOUR EXPERT?

THIS IS MY EXPERT.

AND THEREFORE NOT INTRODUCED INTO EVIDENCE. ONLY --.

THAT WOULD BE CORRECT. AND.

AND WHY CAN'T YOU GET THESE DEPOSITIONS ON YOUR OWN? IF IT IS YOUR EXPERT.

BECAUSE MY, MY EXPERT DOESN'T, AT LEAST WHAT HE TOLD ME, I DON'T HAVE POSSESSIONS OF

ANY PRIOR DEPOSITIONS.

WELL COULD YOUR EXPERT TELL YOU THE CASES IN WHICH HE HAS PREVIOUSLY TESTIFIED AS AN EXPERT?

YOU KNOW, HE'S BEEN A DOCTOR FOR 20 SOME ODD YEARS. I AM SURE HE CAN TELL ME SOFT CASES HE'S TESTIFIED IN. I DON'T THINK HE COULD TELL ME ALL OF THE CASES.

ISN'T ONE OF THE PURPOSES OF WORK PRODUCT PRIVILEGE AS ANNOUNCED IN HICKMAN VERSUS TAYLOR AND OTHER CASENESS FLORIDA, THAT YOUR OPPONENT ISN'T SUPPOSED TO DO YOUR LEG WORK.

THAT'S TRUE. HOWEVER, THIS COURT IN THE DODSON VERSUS PURCELL CASE, SOMETHING THAT MAY HOLD WORK PRODUCT PRIVILEGE AT ONE POINT OF THE LITIGATION LOSES WORK PRODUCT PRIVILEGE IF IT'S INTENDED TO BE USED EITHER AS SUBSTANTIVE OR IMPEACHMENT EVIDENCE AT TRIAL.

IS THE CASE MANAGEMENT ORDER HERE?

YES.

DOES THAT CASE MANAGEMENT ORDER REQUIRE THE PRODUCTION OF, OF DOCUMENTS INTENDED TO BE USED AT TRIAL?

YES.

AND ARE YOU ASSERTING THAT THIS CONSTITUTES A VIOLATION OF THE CASE MANAGEMENT ORDER?

YES. I SAID --.

DID YOU TELL THAT TO THE TRIAL COURT, DID YOU FILE A MOTION SAYING COUNSEL'S VIOLATING THE CASE MANAGEMENT ORDER?

I FILED THE MOTION TO COMPEL. AND I SAID YOUR HONOR, WE ARE SET FOR TRIAL IN FIVE WEEKS. YOU HAVE ALREADY ISSUED YOUR UNIFORM PRE-TRIAL ORDER. THE PRE-TRIAL ORDER INDICATED THAT WITNESS AND EXHIBIT LISTS WERE TO BE EXCHANGED ON OCTOBER 28. HERE WE ARE NOW IN JANUARY OR FEBRUARY, AND THERE IS AN INDICATION THAT THESE DEPOSITIONS MAY BE USED FOR IMPEACHMENT AND I HAVEN'T SEEN THEM.

ARE THESE DEPOSITIONS ON THE EXHIBIT LIST?

NO, SIR THEY WERE NOT.

WHY ISN'T YOUR REMEDY PREMATURE AT THIS POINT BECAUSE THERE IS NO EVIDENCE THAT YOUR OPEN UPON NEBT HAS ATTEMPTED TO INTRODUCE AS EVIDENCE AT TRIAL DOCUMENTS THAT WEREN'T INCLUDED ON THE EXHIBIT LIST. AND UNTIL HE ATTEMPTS THAT, YOU DON'T ARGUE THAT THERE IS A VIOLATION BECAUSE RIGHT NOW THERE IS NO VIOLATION OF THE CASE MANAGEMENT ORDER. YOU HAVE GOT NO EVIDENCE THAT HE INTENDS TO USE, INTRODUCE ANY DEPOSITION AT TRIAL.

I DON'T AGREE WITH THAT CHARACTERIZATION. I MEAN.

WELL AT THAT POINT, AT TRIAL IF YOUR OPPONENT INTENDS TO INTRODUCE THE DEPOSITION OF YOUR EXPERT DOCTOR AT TRIAL, DON'T YOU HAVE AN ARGUMENT JUDGE, THIS ISN'T ON THE CASE MANAGEMENT ORDER, EXHIBIT LIST, THEREFORE HE CAN'T INTRODUCE IT?

I DO HAVE THAT ARGUMENT BUT IF ONE WERE TO ACCEPT THE ARGUMENT YOU'RE ADVANCING, THEN YOU'RE SAYING A TRIAL COURT DOES NOT HAVE THE AUTHORITY TO TELL ONE OF THE LAWYERS WHO INTENDS, WHO MAY USE A DOCUMENT AT TRIAL THAT THEY HAVE TO DISCLOSE IT.

HOW IS THE TRIAL COURT SUPPOSED TO KNOW WHAT DOCUMENTS COUNSEL IS GOING TO USE AT TRIAL?

NO DIFFERENT THAN ANY OTHER TRIAL. YOU KNOW, IF YOU ASK ME WHAT DOCUMENTS BEING I GOING TO USE AT TRIAL, I DON'T KNOW WHAT DOCUMENTS I'M GOING TO USE AT TRIAL. I CAN'T TELL YOU WILL WHAT DOCUMENTS. HOWEVER, I CAN TELL YOU WHAT DOCUMENTS I MAY USE AT TRIAL. AND I'M REQUIRED TO LIST THEM. AND I DID DO THAT. I LISTED THE DOCUMENTS.

BUT ISN'T -- THAT'S WHERE WE KIND OF RUN INTO THE PROBLEM WITH THE SURVEILLANCE FILM AND THE SURVEILLANCE FILM IS A FINITE THING THAT YOU GOT IT, AND YOU KNOW YOU'RE GOING TO USE IT. OR IF, IF YOU'RE CONTEMPLATING USING IT, THEN YOU GOT TO COUGH IT UP IN THE PRE-TRIAL.

HOW IS THAT ANY DIFFERENT THAN THIS?

BUT WHAT I'M TRYING TO GET TO IS THE FACT THAT YOU, YOU SAID AT THE BEGINNING, I DON'T WANT HIM TO IDENTIFY WHAT PORTIONS OF DOCUMENTS THAT HE'S, OF THESE DEPOSITIONS HE'S GOING TO USE. I JUST WANT TO KNOW WHAT DEPOSITIONS HE HAS. AND I WANT TO DRAW THAT DISTINCTION BECAUSE SEEMS TO ME THAT IT IS AN IMPORTANT DISTINCTION IF YOU'RE RELYING ON DODSON, WHAT SPECIFICALLY DO YOU SAY THAT THIS CASE MANAGEMENT ORDER REQUIRES HIM TO IDENTIFY?

THE CASE MANAGEMENT ORDER REQUIRED HIM TO IDENTIFY ANY DOCUMENT THAT MAY BE USED AT TRIAL. AND THAT WOULD INCLUDE, THAT DOCUMENT WOULD INCLUDE DEPOSITIONS IN HIS POSSESSION. AND WHAT THE REASON I WANTED -- THE REASON I WANTED TO IDENTIFY, THERE WAS SOME QUARREL IN THE DEPOSITION ABOUT MATTERS BEING TAKEN OUT OF CONTEXT. AS YOU ALL KNOW UNDER 9008 THE RULE OF COMPLETENESS, IF I DON'T, IF THE FIRST TIME THAT I GET TO SEE THIS DEPOSITION IS AT TRIAL, UNDER 9108, I HAVE TO AT THAT TIME, IF HE GOES IN AND TRIES TO IMPEACH MY WITNESS, I HAVE TO AT THAT TIME SAY YOUR HONOR I REQUEST THAT HE READ PAGE 50 OF THE DEPOSITION BECAUSE HE IS TAKING THINGS OUT OF CONTEXT. AND THE TRIAL COURT SPECIFICALLY NOTED THAT IN, WHEN WE WERE MAKING THE ARGUMENT.

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FOR PURPOSES OF THIS, WE HAVE GOT AN AGREEMENT THEN THAT, IF HE'S GONE OUT AND GATHERED 50 OF THE PRIOR TIMES THAT YOUR EXPERT TESTIFIED, HE DOESN'T HAVE TO IDENTIFY ALL 50 OF THOSE. IT'S ONLY WHAT HE INTENDS TO USE AT TRIAL.

OR MAY USE. HOWEVER THE PRE-TRIAL ORDER -- THE POINT I'M MAKING, I THINK IT IS VERY SIMILAR TO THE SURVEILLANCE, DESPITE THE FACT THAT IT IS FINITE VERSUS HOWEVER MANY DEPOSITIONS OR HOWEVER MANY SURVEILLANCE FILMS. IS YOUR VILLAINS FILM IS WORK PRODUCT UNLESS OR UNTIL YOU INTEND TO USE AT IT TRIAL.

FOLLOW THAT OUT. LET'S SUPPOSE THAT HE DOES HAVE THE SURVEILLANCE FILM. THAT HE DOESN'T DISCLOSE IT. THEN WHAT HAPPENS IF HE ATTEMPTS TO USE IT AT TRIAL?

WELL THE OBJECTION THAT I WOULD MAKE IS, I'D SAY YOUR HONOR, UNDER DODSON, HE WAS REQUIRED TO LIST THIS ON HIS PRE-TRIAL.

AND ISN'T THAT, I AM NOT SURE ABOUT HOW MANY CASES THAT ARE OUT THERE, BUT ISN'T THAT FAIRLY CLEAR UNDER THE CASE LAW NOW?

THERE IS ALSO SOME CASE LAW THAT TALKS ABOUT WELL ARE YOU REALLY TRULY PREJUDICED? THE ARGUMENT THE DEFENSE WOULD MAKE IN THAT CASE WOULD BE WELL, HOW CAN HE CLAIM PREJUDICE -- IF THE SURVEILLANCE FILM OF HIM.

JUST TO FINISH UP HERE, IS IT ORDINARILY THE WAY THAT THAT RULE IS INTERPRETED, IS IF YOU DON'T DISCLOSE SOMETHING AND THEN YOU ATTEMPT TO USE IT AT TRIAL, THE COURT HAS THE AUTHORITY AND ORDINARILY SHOULD SAY UH-UH, YOU CAN'T USE THAT. BECAUSE WE HAD THIS PRE-TRIAL ORDER AND IT REQUIRES DISCLOSURE. AND IN FLORIDA, WE HAVE GOT THE PRETTY BROAD RULE ABOUT NOT HIDING IN THE BUSHES.

CORRECT.

ALL RIGHT. NOW, LET'S SUPPOSE THE, WE HAVE THE SAME SITUATION HERE AND HE WAS GOING TO GET TO KNOW YOUR CLIENT PRETTY WELL THROUGH READING THESE PRIOR DEPOSITIONS. BUT HE'S NOT GOING TO USE THEM ACTUALLY TO SAY, NOW DIDN'T YOU SAY IN A PRIOR DEPOSITION, OR YOU KNOW, TO ACTUALLY PULL THAT OUT AND USE IT IN SOME WAY THERE. NOW, IF THAT'S THE CASE, HE IS JUST GOING TO USE IT AS A WAY TO PREPARE HIMSELF FOR THE WITNESS, MUST HE DISCLOSE THAT?

I DON'T THINK SO.

WELL THAT'S THE -- WHY ISN'T THE SAME RULE APPLY HERE, THAT IS, THAT, REALLY HE'S NOT GOING TO BE ABLE TO USE THESE DEPOSITIONS OPENLY UNLESS HE DID DISCLOSE THEM PURSUANT TO THE TRIAL COURT. YOU HAVE GOT AN ORDER OUT OF THE TRIAL COURT RIGHT, THAT SAID DISCLOSE THEM?

YES.

THE SECOND DISTRICT SQUASHED THAT ORDER, IS THAT RIGHT?

THAT'S CORRECT.

WHAT ELSE DID THEY DO? DID THEY QUASH IT AND SAY SOME OTHER REMEDY? TELL ME WHAT THEY DID.

THEY QUASHED IT AND SAID IT WAS WORK PROBLEM. PART OF THE PROBLEM IS --.

WELL ISN'T IT WORK PRODUCT, NOT SUBJECT TO BE DISCLOSED SO LONG AS IT ISN'T ANTICIPATED TO BE USED AT TRIAL UNDER FLORIDA CASE LAW?

BUT THE ARGUMENT THAT WAS ADVANCED IN FRONT OF THE TRIAL COURT IS THAT HE DID INTEND TO USE THEM AT TRIAL. AND IT WAS WORK PRODUCT UNLESS OR UNTIL, UP UNTIL THE MOMENT HE DECIDE TODD USE IT, WHICH IS CONTRARY TO PRIOR PRONOUNCEMENTS OF THIS COURT.

SO YOU'RE SAYING LIKE THE SURVEILLANCE TAPE.

THAT'S CORRECT.

THAT IF THERE IS A REASONABLE ANTICIPATION OF USE AT TRIAL, THEN IT MUST BE DISCLOSED AND THAT THERE SHOULD BE A FORECLOSURE OF THE USE OF THIS AT TRIAL UNLESS IT'S DISCLOSED?

THE WORRY THAT I HAVE AND THE REASON I'M HERE IS, YOU KNOW, THE ARGUMENT IF I WERE ON THE OTHER SIDE, THE ARGUMENT I'D MAKE, JUDGE, IS SECOND DISTRICT QUASHED YOUR ORDER, I DON'T HAVE TO DISCLOSE IN UNTIL I HAVE TO USE IT. I WANT SOMETHING TO SAY NO THAT'S NOT ACCURATE.

JUST AS YOU GET TO LOOK AT THE SURVEILLANCE FILM --.

CAN I CLARIFY? IN A SURVEILLANCE FILM, THE TRIALS I CONDUCTED, THE DEFENSE HAS TO BRING A WITNESS TO TESTIFY AS A PI OR WHATEVER THAT I TOOK, AND THEY ACTUALLY HAVE A WITNESS AND THEY INTRODUCE THE VIDEO AS AN EXHIBIT. AND THE TRIAL COURT ORDER ON PARAGRAPHS 4 A TALKS ABOUT LISTING WITNESSES AND FOUR B SAYS AND A LIST OF ALL POTENTIAL EXHIBITS. AND WHEN YOU CROSS-EXAMINE, WHEN THIS DEFENDANT CROSS-EXAMINES YOUR WITNESS IN THIS CASE BY USING DEPOSITIONS IN OTHER CASES HE NEVER TENDERS TYPICALLY, THAT ISY ASKED IN THE BEGINNING, TENDERS A DEPOSITION AS AN EXHIBIT. IT IS NOT MARKED AN AS EXHIBIT TO BE INTRODUCED INTO EVIDENCE. THAT ISY THINK IT IS A CRITICAL DISTINCTION. YOU CANNOT COMPARE THIS TO SURVEILLANCE VIDEOS BECAUSE SURVEILLANCE VIDEOS ACTUALLY COME IN AS DIRECT EVIDENCE.

BEFORE I WAS A PLAINTIFF'S LAWYER I WAS A DEFENSE LAWYER. I HAD ONE TRIAL, WE BASICALLY, THE VIDEO WAS PLAY FOR THE JURY, IT WAS MARKED AS A COURT EXHIBIT. AND THEN IT WAS PLACED AS A COURT EXHIBIT AND IT DID NOT GO INTO EVIDENCE BECAUSE THE JURY ACTUALLY WITNESSED, THEY WATCHED.

BUT IT CAME IN AS DIRECT EVIDENCE.

IT CAME IN AS DIRECT EVIDENCE.

NOT AS IMPEACHMENT.

CAN I ASK THIS QUESTION? WHAT'S THE RELEVANCY OF IT UNLESS IT IS USED FOR IMPEACHMENT? ISN'T IT ALWAYS IMPEACHMENT?

EXACTLY.

BUT YOU'RE AGREEING IT IS DIRECT EVIDENCE.

I'M SAYING IT IS NOT DIRECT, I AM SAYING HE WANTS TO USE IT AS IMPEACHMENT.

THE FILM, WE ARE GOING BACK TO WHY THIS IS DIFFERENT. YOU SEEM TO BE AGREEING IT IS ALWAYS DIRECT EVIDENCE ON SURVEILLANCE FILMS. I AM SUGGESTING IT IS ALWAYS IMPEACHMENT BECAUSE IT IS NOT RELEVANT UNLESS AND UNTIL THE CLAIMANT SAYS I CAN'T DO THIS AND THEY BRING IT IN TO IMPEACH HIM.

I AGREE WITH THAT.

YOU WERE AGREEING THE OTHER WAY.

IN THE CASE I HAD IT WAS IMPEACHMENT EVIDENCE. IT CAN BE USED AS DIRECT EVIDENCE, BE MARKED AND PUT BACK.

IT CAN BE USED EITHER WAY.

THE DIFFERENCE THOUGH, MAKE SURE ABOUT THIS, IT ONLY BECOMES RELEVANT, SURVEILLANCE FILM BECOMES RELEVANT IF SOMEBODY DENIES THAT THEY CAN'T DO SOMETHING. BUT IT IS ACTUALLY, GOING BACK TO JUSTICE BELL, IT COMES BACK, IT IS

SOMETHING THE JURY HEARS AS SUBSTANTIVE EVIDENCE. CORRECT? SUBSTANTIVE. IN OTHER WORDS, THEY SEE THAT AND THAT'S SUBSTANTIVE EVIDENCE THAT THE PLAINTIFF CAN DO THIS WHEN THE PLAINTIFF SAID THEY COULDN'T DO IT.

MY UNDERSTANDING IS, IT IS ONLY SUBSTANTIVE EVIDENCE IF IT IS MARKED AND GOES BACK TO THE JURY ROOM. IT IS IMPEACHMENT EVIDENCE IF THEY VIEW IT, IT IS LIKE LISTENING TO A DEPOSITION, A WITNESS BEING DPEECHED WITH A DEPOSITION TRANSCRIPT.

BUT THE JURY WILL HEAR A INSTRUCTION, IF YOU'RE GOING TO PUT IN, JUST LIKE A WITNESS STATEMENT. A WITNESS STATEMENT OF THAT SAME WITNESS IN THE CASE DOESN'T COME IN TO EVIDENCE AS DIRECT EVIDENCE. IT COMES IN AS TO SAY DIDN'T YOU SAY THIS ON A PRIOR OCCASION? AND YOU'RE NOW TESTIFYING INCONSISTENTLY. THEN THE JURY IS TOLD OR HOPEFULLY THEY'RE TOLD THAT THAT IS NOT -- THAT AFFECTS THEIR CREDIBILITY. IT IS NOT THAT THAT --.

I'D HE BE LIMITING INSTRUCTION TO.

AND THAT'S DIFFERENT FROM SURVEILLANCE FILM, THIS IS PROOF, THIS IS THIS PLAINTIFF COULD JUMP UP AND DOWN, THAT'S HOW IT'S CONSIDERED. WITH THAT IN MIND WHAT I WANT TO ASK YOU IS WHY IS THIS ANY DIFFERENT THAN A WITNESS'S STATEMENT, WHICH IS THAT UNTIL THE, THE EXPERT SAYS, IS ASKED THE QUESTION, DID YOU ON A PRIOR OCCASION SAY THAT YOU NEVER THOUGHT CANCER COULD DEVELOP THIS WAY? AND IF THE WITNESS SAYS NO, I AGREE WITH THAT, THERE IS NO IMPEACHMENT. IT IS ONLY IF THEY DENY THE STATEMENT THAT THEY HAVE MADE ON A PRIOR OCCASION THAT THE IMPEACHMENT CAN OCCUR.

WELL THIS COURT IN DRUGS SPECIFICALLY INCLUDED STATEMENTS, I DON'T AGREE WITH THE STATEMENT THAT IF I HAVE A STATEMENT THAT I MAY USE FOR IMPEACHMENT AT TRIAL THAT I DON'T HAVE TO DISCLOSE, I DON'T AGREE WITH THAT STATEMENT. THIS COURT IN SURF DRUGS SAID GENERALLY THOSE DOCUMENTS, PICTURES, STATEMENTS AND DIAGRAMS WHICH ARE TO BE PRESENTED AS EVIDENCE ARE NOT WORK PRODUCT.

AS EVIDENCE. YOU'RE IN YOUR REBUTTAL TIME.

AND DODSON ALSO TALKED ABOUT FOR IMPEACHMENT PURPOSES.

THE MARSHAL HAS REMINDED YOU.

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GOOD MORNING. MAY IT PLEASE THE COURT MY NAME IS MICHAEL DELUG GA, ON BEHALF OF DOCTOR ACKEN.

COUNSEL, WOULD YOU CLARIFY SOMETHING FOR ME BECAUSE YOUR OPPONENT THIS MORNING HAS FRAMED THE ISSUE IN TERMS OF DOCUMENTS OR DEPOSITIONS INTENDED TO BE USED AT TRIAL. AND FROM READING THE SECOND DISTRICT'S OPINION, THE OPINION SAYS THAT THE REQUEST FOR PRODUCTION REQUESTED COPIES OF ANY AND ALL DEPOSITIONS OF DOCTOR DILLON THAT WERE IN THE CUSTODY AND CONTROL OF DEFENSE COUNSEL. SO THE PRODUCTION REQUESTS SEEMED TO BE MUCH BROADER AT THE TRIAL LEVEL AND THE ARGUMENT MUCH BROADER AT THE SECOND DCA LEVEL THAN IS BEING ARGUED THIS MORNING. WHAT SPECIFICALLY WERE THE ISSUES BELOW AS TO THE BREADTH OF THE PRODUCTION REQUESTS?

THE PRODUCTION REQUEST WAS, BASICALLY THE PLAINTIFF HAD LEARNED THAT TRIAL COUNSEL HAD OBTAINED A NUMBER OF THE DEPOSITIONS THAT DOCTOR DILLON HAD GIVEN OVER TIME. THOSE DEPOSITIONS WERE OBTAINED PURSUANT TO AN INVESTIGATION THAT TRIAL COUNSEL HAD PERFORMED. HAD LOOKED THROUGH CERTAIN DEPOSITIONS AND HAD OBTAINED CERTAIN

OF THOSE DEPOSITIONS. PLAINTIFF COUNSEL LEARNED OF THAT AND FILED A REQUEST TO PRODUCE. OBJECTED BASED ON WORK PRODUCT AND THERE WAS A MOTION TO COMPEL.

SPECIFICALLY DID THE REQUEST TO PRODUCE REQUEST COPIES.

I BELIEVE IT WAS COPIES OF THE DEPOSITIONS THAT DEFENSE COUNSEL HAD OBTAINED OF DOCTOR DILLON.

REGARDLESS IF THEY, WHETHER THEY WERE GOING TO BE INTRODUCED AT TRIAL OR NOT.

I'D HAVE TO LOOK BACK AT THE SPECIFICS OF THE REQUEST TO PRODUCE. I APOLOGIZE, I DON'T KNOW THE SPECIFIC LANGUAGE.

DO WE HAVE AN AGREEMENT THOUGH AT SUCH TIME AS THERE IS A DETERMINATION THAT BY COUNSEL, THAT THE DOCUMENT OR TESTIMONY OR WHATEVER IS GOING TO BE USED, WHETHER IT'S DIRECT EVIDENCE OR IMPEACHMENT, THAT UNDER OUR RULES OF DISCOVERY AND OUR CASE LAW, THAT THOSE MATTERS THAT ARE GOING TO BE USED AT THE TRIAL HAVE TO BE DISCLOSED?

YES. ABSOLUTELY.

SO THIS BUSINESS OF WHETHER IT'S DIRECT EVIDENCE OR IMPEACHMENT IS REALLY NOT THE POINT HERE?

I HAVE NEVER LOOKED AT IT AS THAT BEING THE CENTRAL ISSUE IN THIS CASE. MY UNDERSTANDING OF THE ISSUE IN THIS CASE IS, IS THIS INFORMATION OR MATERIAL DEFINITELY GOING TO BE USED AT TRIAL? AND IF SO, IT IS, IT DOES HAVE TO BE DISCLOSED. THE ISSUE IS WHEN DO YOU KNOW WHEN IMPEACHMENT EVIDENCE IS GOING TO BECOME IMPEACHMENT EVIDENCE?

AS I UNDERSTOOD YOUR POSITION, FOLLOWING UP ON JUSTICE CANTERO'S QUESTION, IS THAT YOU GOT THIS BROAD REQUEST OR THE TRIAL COUNSEL DID, ASKING FOR ALL OF THE MATERIAL ABOUT THIS EXPERT THAT HAD BEEN GATHERED. AND THAT YOUR ARGUMENT WAS, I DON'T HAVE TO GIVE EVERYTHING THAT I GATHERED BECAUSE THAT'S WORK PRODUCT.

THAT'S CORRECT.

BUT YOU WOULD NOT -- BUT AT SOME POINT IN TIME WHERE IT BECOMES IN GOOD FAITH EVIDENT THAT IT'S GOING TO BE USED DURING THE COURSE OF THE TRIAL, YOU WOULD AGREE THAT THAT, THOSE PARTS OF THOSE DEPOSITIONS OR THE DEPOSITIONS, WHATEVER, THAT IN GOOD FAITH ARE KNOWN THAT THEY'RE GOING TO BE USED AT TRIAL, EVEN THOUGH IT'S IMPEACHMENT, AT THAT POINT THEY HAVE TO BE DISCLOSED?

THAT IS CORRECT. AND THE PROBLEM THAT WE HAVE IN THIS PARTICULAR CASE IS WHEN IS THAT MOMENT IN TIME? WHEN DO YOU MAKE THAT DETERMINATION THAT THE PRIOR DEPOSITION TESTIMONY WILL DOCTOR DILLON IS GOING TO BECOME VIABLE IMPEACHMENT?

WHY WOULD YOU TAKE THE DEPOSITION, IT'S A REPRESENTATION, BUT THE DOCTORS ALREADY BEEN DEPOSED.

THAT IS CORRECT.

EXTENSIVELY. AND I MEAN THIS IS THE WAY THAT THESE THINGS DEVELOP. I MEAN EVERYBODY'S TRIED LAWSUITS. IS THAT YOU KNOW WHAT THE INFORMATION YOU HAVE THERE, AND YOU'RE LOOKING TO SEE WHAT ELSE YOU HAVE THAT YOU'RE GOING TO IMPEACH HIM WITH.

THAT'S WHAT I'M HAVING TROUBLE DEALING WITH IN GOOD FAITH, IS THE SITUATION, YOU HAVE ALREADY DEPOSED EXTENSIVELY, ANYONE, AND YOU HAVE GOT OTHER DEPOSITIONS. AT THAT POINT IN TIME, YOU SHOULD KNOW. TO HIDE BEHIND THIS WELL I'M GOING TO WAIT UNTIL HE SAYS IT AT TRIAL I THINK IS A VERY SHALLOW APPROACH, WHETHER IT IS PLAINTIFF, DEFENDANT, WHOEVER IT IS.

I AGREE IT IS NOT PARTY SPECIFIC. THE REASON WHY, THAT IS THE REASON WHY THE QUESTION WAS PHRASED OR TISSUE WAS PHRASED AS IT WAS IN THE BRIEFS. THE POINT IN TIME, OUR ARGUMENT IS THAT THE POINT IN TIME WHEN THIS, THESE PRIOR DEPOSITIONS COULD BECOME IMPEACHMENT EVIDENCE IS NOT DURING OUR CROSS-EXAMINATION OF DOCTOR DILLON. YOU'RE RIGHT. WE HAVE ALREADY DEPOSED DOCTOR DILLON AND WE HAVE MADE THE CROSS-EXAMINATION OR LAID THE PREDICATE FOR WHATEVER CROSS-EXAMINATION WE WANT TO MAKE AT TRIAL. THE ISSUE IS, WHAT IS DOCTOR DILLON GOING TO SAY ON DIRECT EXAMINATION AND IS THERE GOING TO BE ANY STATEMENT THAT DOCTOR DILLON MAKES ON DIRECT EXAMINATION THAT WE CAN'T NECESSARILY PREDICT THAT WILL IMPLEMENT -- IMPLICATE PRIOR DEPOSITIONS OR TURN PRIOR DEPOSITIONS INTO PRIOR INCONSISTENT STATEMENTS? WE WON'T KNOW THAT UNTIL THE DIRECT EXAMINATION IS CONDUCTED.

WELL LET'S ASSUME HE SAYS SOMETHING AT HIS DEPOSITION NOW, AND YOU DO KNOW WHAT HE SAID AT HIS DEPOSITION. AND NOW HE TESTIFIES JUST LIKE HE DID IN HIS DEPOSITION AT TRIAL. AND YOU NOW PULL OUT DEPOSITION THAT HE GAVE FIVE YEARS AGO WHEN HE TALKED ABOUT WHAT THE USUAL SIGNS ARE OF WHATEVER KIND OF THING. AND NOW YOU WANT TO IMPEACH HIM, YOU KNOW, WITH THIS STATEMENT.

I THINK UNDER THOSE PARTICULAR CIRCUMSTANCES, GIVEN THIS COURT'S OPINIONS IN SURF DRUGS, IN DODSON, I THINK THE TRIAL JUDGE WOULD BE OBLIGATED TO PRECLUDE THE DEFENSE COUNSEL FROM DOING THAT. IF THE PLAINTIFF RAISES A PROPER OBJECTION UNDER THE HYPOTHETICAL THAT YOU HAVE PROVIDED AND CAN SHOW THE COURT LOOK, JUDGE, THERE IS NOTHING HERE THAT WAS TESTIFIED TO BY MY EXPERT THAT IS ANY DIFFERENT THAN WHAT HE TESTIFIED TO DURING THE COURSE OF HIS DEPOSITION.

ISN'T THAT, I MEAN AGAIN IN TERMS OF TRYING TO MAKE THIS MANAGEABLE, AND I WOULD LIKE TO SAY THAT, IF YOU HAD A SURVEILLANCE FILM OF THE DEFENDANT, YOU'RE NOT GOING TO RISK ANYTHING, WELL OF COURSE DODSON SAYS YOU'RE GOING TO LIST IT ON YOUR EXHIBIT LIST BECAUSE YOU'RE REASONABLY CERTAIN YOU'RE GOING TO TRY TO USE THAT. AND IT'S GOING TO COME IN AS AN EXHIBIT OR IT IS GOING TO BE SHOWN TO THE JURY AS DIRECT EVIDENCE. WITNESS STATEMENTS, IF YOU HAD, OF A WITNESS, UNDER -- YOU HAVE TO LIST THOSE IN ANSWERS TO INTERROGATORIES, WHO DO YOU HAVE WITNESS STATEMENTS OF? AND WHAT DATES WERE THEY TAKEN? BUT UNLESS IT IS AT THAT POINT IT IS STILL WORK PRODUCT AND UNLESS THEY CAN OBTAIN THE SUBSTANTIAL EQUIVALENT, YOU'RE PROTECTED UNTIL WHAT TIME? IF HAD YOU A WITNESS STATEMENT, YOU LIST THE WITNESS STATEMENT, DO YOU HAVE TO LIST WITNESS STATEMENTS THEN AND PRODUCE THEM BEFORE TRIAL? BEEN A WHILE --.

IF WE HAVE A GOOD FAITH BELIEF THAT WE INTEND TO USE THOSE DOCUMENTS OR THOSE STATEMENTS AT TRIAL, THERE WOULD BE A WITNESS AND EXHIBIT DISCLOSURE DATE THAT WOULD BE IN THE PRE-TRIAL ORDER. WHICH I THINK IS ALSO WHAT HAPPENED IN THIS CASE. WAS REFERENCED BY THE PETITIONER'S COUNSEL.

SO WHAT YOU'RE SAYING IS NOW BECAUSE THIS, IN THIS CASE THE PRE-TRIAL STATE HAS PASSED THAT YOU HAVE A GOOD FAITH BELIEF NONE OF THESE DEPOSITIONS, BASED ON WHAT THIS EXPERT SAID IN HIS DEPOSITION, CONTRADICT ANYTHING HE SAID IN HIS DEPOSITION? IS THAT WHAT YOU'RE TELLING US?

THE ARGUMENT IS THAT WE, WE DO NOT KNOW AT THIS STAGE WHETHER DOCTOR DILLON IS

GOING TO TESTIFY ON DIRECT EXAMINATION IN A MANNER WHICH WILL TURN --.

NO WHAT I'M ASKING IS, SO THEREFORE HIS DEPOSITION, IF HE TESTIFIES CONSISTENTLY WITH HIS DEPOSITION, WHAT YOU'RE TELLING THIS COURT NOW IS THAT YOU HAVE NO GOOD FAITH BELIEF THAT YOU WOULD NEED TO USE ANY OF THESE PRIOR DEPOSITIONS AS IMPEACHMENT?

THAT IS CORRECT. BECAUSE IF THAT WERE THE CASE, THEN WE WOULD HAVE TO DISCLOSE THEM BECAUSE WE WOULD KNOW.

SO NOW THE NEXT QUESTION THOUGH I HAVE FROM A REAL MANAGEMENT POINT OF VIEW, WE ARE NOT TALKING ABOUT A DISCRETE STATEMENT, WE ARE MAYBE TALKING ABOUT IF THIS IS PROFESSIONAL EXPERT, I DON'T KNOW, MAYBE 20, 30 DEPOSITIONS, REALLY FROM A MANAGEMENT POINT OF VIEW, HOW DOES THE COURT -- YOU HAVE THE DIRECT EXAMINATION, ARE YOU SUGGESTING AT THAT POINT THEN, IS THAT THE POINT YOU THEN GIVE THE COURT AND THE OPPOSEING ATTORNEY ALL THESE DEPOSITIONS? YOU HAVE TO RESEARCH ---RECESS FOR THE TRIAL. I MEAN IS THAT REALLY A PRACTICAL WAY TO DO SOMETHING THAT IS, YOU KNOW, AS OPPOSED TO MAYBE LISTING THE DEPOSITIONS THAT YOU HAVE? I MEAN AT THE POINT, ISN'T THAT A SAFER WAY, BETTER WAY, AT LEAST LISTING THESE ARE THE DEPOSITIONS WE HAVE EVEN THOY DON'T WANT TO GIVE YOU THE DEPOSITIONS?

WELL BECAUSE I THINK BY, THAT'S WHAT THEY WERE ASKING FOR, THEY WERE JUST ASKING FOR LAYS, YOU KNOW, THEY'RE NOT, THEY'RE ASKING FOR THE DEPOSITIONS THEMSELVES. BUT I THINK BY DISCLOSING THE LIST OF DEPOSITIONS WE OBTAINED, THAT WOULD IN EFFECT DO THE SAME THING. IMPOSING OUR MENTAL IMPRESSIONS.

WHY WOULD THAT BE THE CASE? IN OTHER WORDS, IF YOU JUST DISCLOSE A LIST OF THE DEPOSITIONS THAT YOU HAVE OR THE TIMES THAT HE'S TESTIFIED THAT YOU CAN, AND OF COURSE YOU SAY WHAT WE'RE NOT GOING TO DO IS GIVE YOU OUR COPY THAT HAS OUR RED UNDERLINING, YOU KNOW, AND THE EXCERPTS OR THE WORK THAT WE DID THEN TO PULL THOSE OUT NOW AND WHERE WE THINK THAT POTENTIALLY THIS DOCTOR IS GOING TO TESTIFY INCONSISTENTLY WITH WHAT HE'S DONE BEFORE OR SOMETHING LIKE THAT. BUT JUST THE RAW PRODUCT OF A LIST OF THE DEPOSITIONS, WHY WOULDN'T THAT BE MORE CONSISTENT WITH OUR CASE LAW THAT SAYS REGARDLESS OF HOW THE THINGS ARE GOING TO BE USED, THAT THEY SHOULD BE DISCLOSED? OBVIOUSLY, YOU KNOW, THEY HAVE GOT TO DO THE WORK IN TERMS OF, NOW THEY HAVE GOT A LIST OF 20 DEPOSITIONS OR SOMETHING, AND THEY'RE ALL 150 PAGES LONG. THEY'RE THE ONES THAT ARE GOING TO HAVE TO DO THE WORK JUST LIKE YOU HAD TO DO THE WORK OF GOING THROUGH THEM TO FIND OUT WHETHER THERE IS THINGS IN THERE THAT YOU CAN USE SO OF COURSE THEY DON'T GET THE BENEFIT OF THE WORK THAT YOU DID AS AN EXPERT PROFESSIONAL LAWYER. BUT THEY DO GET THE DEPOSITIONS IN TERMS, YOU KNOW, WHETHER YOU PROVIDE A COPY OR NOT I THINK IS ALSO -- WHY WOULDN'T -- HAVING THAT LIST OF DEPOSITIONS BE MORE CONSISTENT WITH OUR CASE LAW, WHICH IS THEN VERY, VERY BROAD IN TALKING ABOUT AMBUSH AND ALL THAT, THAT EVEN WITH REFERENCE TO IMPEACHMENT, THAT WE THINK THE BETTER RULE IS THAT AT LEAST ALL THAT STUFF TO THE EXTENT IT CAN BE OUT THERE?

THE PROBLEM IS, BY GIVING THE LIST, WE ARE IN EFFECT DOING A MAJOR PORTION OF THE LEG WORK AND WE ARE SEPARATING LEG WORK IN -- THERE ARE TWO DIFFERENT SORT OF FILTERS THAT ARE GOING ON HERE. ONE IS THE FILTER FROM THE ENTIRE UNIVERSE OF DOCTOR DILLON'S DEPOSITIONS. I DO NOT KNOW THE PRECISE NUMBER. BUT LET'S SAY FOR THE PURPOSES OF ARGUMENT THAT THERE ARE A HUNDRED DEPOSITIONS THAT DOCTOR DILLON HAS GIVEN OVER THE COURSE OF HIS CAREER. IF WE AS DEFENSE COUNSEL GO THROUGH THOSE ONE HUNDRED DEPOSITIONS AND CHOOSE TO ACQUIRE 25 OF THEM. THERE IS ATTORNEY OPINION WORK PRODUCT THAT GOES INTO MAKING THAT PROFESSIONAL JUDGMENT. AND THEN THERE IS A SECOND FILTER THAT IS WHAT ARE THE, OF THOSE 25 DEPOSITIONS THAT HAVE BEEN OBTAINED,

WHICH ONES ARE WE GOING TO USE AT TRIAL?

AISUM THERE IS ALSO OTHER INFORMATION THAT YOU THEN GATHERED ABOUT WHAT HAPPENED IN THOSE OTHER TRIALS, ABOUT JURY VERDICTS AND OTHER INFORMATION THAT IS, THAT COUNSEL WOULD CONSIDER TO BE SOMEWHAT PROPRIETARY BY REASON OF HAVING GATHERED THOSE DEPOSITIONS.

THAT IS CORRECT. ALTHOUGH I'M NOT SURE THE REQUEST TO PRODUCE SPECIFICALLY REQUESTED ANY PERIPHERAL INFORMATION REGARDING THE CASES IN GENERAL.

BY GIVING THE DEPOSITION, I ASSUME IT GIVES IT WHERE THE TRIAL WAS.

THAT'S CORRECT.

LET ME ASK YOU THIS. THE -- DOESN'T THIS USUALLY COME UP IN A CONTEXT IN WHICH YOU TAKE A DEPOSITION OF THE DOCTOR, AND THE DOCTOR IS TESTIFYING ON THE PLAINTIFF'S SIDE THIS TIME, ABOUT X DISEASE. THEN THE DOCTOR, YOU HAVE GOT A DEPOSITION IN WHICH THE DOCTOR HAS TESTIFIED ON THE DEFENSE SIDE ABOUT X DISEASE. AND SO YOU LOOK AT THE DEPOSITION AND YOU KNOW AT THAT POINT IN TIME THAT THAT'S SOMETHING THAT THIS DOCTOR IS GOING TO TESTIFY ABOUT IN THIS TRIAL AND SO AT THAT POINT, YOU HAVE GOT TO GIVE THAT UP, DON'T YOU?

I AGREE THAT IF -- AN ATTORNEY MAKES A GOOD FAITH DETERMINATION DURING THE COURSE OF DISCOVERY PRIOR TO THE DISCLOSURE OF DOCUMENTS INTENDED TO BE INTRODUCED AT TRIAL, THAT YES, I AS DEFENSE COUNSEL AM GOING TO USE THIS DEPOSITION AT TRIAL, THEN YES, I THINK THE ATTORNEY HAS AN OBLIGATION TO DOES ENCLOSE -- DISCLOSE IT.

THE TRIAL JUDGE HAS TO LOOK AT BOTH OF THEM IF THE OBJECTION IS MADE AT THE TIME OF TRIAL AND IF YOU HAVE HAD IT IN YOUR BRIEFCASE IN THAT POSTURE AND HAVEN'T GIVEN IT UP, THEN THE TLIL JUDGE SHOULDN'T LET YOU USE IT.

THAT IS CORRECT. I WOULD AGREE WITH THAT. BECAUSE, I'M NOT HERE ADVOCATING A POSITION WE SHOULD BE ALLOWED TO TRY THE CASE BY AMBUSH. I UNDERSTAND THAT THE SERIES OF CASES OR OPINIONS THAT HAVE COME FROM THIS COURT AND FROM THE DIS -- DISTRICT COURTS OF APPEAL. I AM CERTAINLY NOT SUGGESTING WE WOULD TURN THE CLOCK BACK.

LET ME ISSUE THE BROAD STATEMENT THAT WE MADE IN ONE OF OUR DECISIONS HERE. THIS FIRST ADHERING TO THE PHILOSOPHY EXPRESSED IN SURF, AND IN ACCORDANCE WITH THE MAJORITY VIEW, WE HOLD THAT UPON REQUEST A PARTY MUST REVEAL THE EXISTENCE OF ANY SURVEILLANCE INFORMATION HE POSSESSES, WHETHER OR NOT IT IS INTENDED TO BE PRESENTED AT TRIAL. WHAT WE REQUIRE IS THAT A PARTY MUST DISCLOSE THE EXISTENCE OF MATERIAL WHICH IS OR MAY BE RELEVANT TO THE ISSUES IN THE CAUSE, WHETHER IT IS SUBSTANCE, KROBIVE OR IMPEACHMENT EVIDENCE. THIS IS WHAT, I ALLUDE TO IN SAYING THIS COURT HAS TAKEN THE PATH OF REALLY BEING, VERY BROAD. AND I'M TRYING TO SEE IN BALANCING THAT PATH OF BEING VERY BROAD WITH CLEARLY THE RIGHTS OF THE WORK THAT A PROFESSIONAL DOES IN TERMS OF FOR INSTANCE READING AN ENTIRE DEPOSITION AND DISCOVERING IN THERE THAT THERE ARE SIX OR SEVEN PLACES WHERE YOU POSSIBLY CAN IMPEACH THIS DOCTOR WITH SOMETHING HE'S NOW SAID IN HIS DEPOSITION OR WILL TESTIFY TO AT TRIAL. BUT CLEARLY THAT'S, THAT CROSSES THE LINE, YOU KNOW, OF WHAT THE LAWYER'S DONE AS A PROFESSIONAL. BUT THE DISCLOSURE OF THE EXISTENCE OF THAT DEPOSITION THAT HAS BEEN EXAMINED --.

WELL I WOULD SUGGEST THAT THE PARALLEL IN THIS CASE WOULD BE THE DISCLOSURE OF THE FACT THAT YES IN FACT WE HAVE GONE OUT AND DONE THIS INVESTIGATION AND OBTAINED A NUMBER OF DEPOSITIONS OF DOCTOR DILLON. THAT PUTS THE BALL BACK IN THE PLAINTIFF'S COURT.

THAT IS WHY I AM SAYING YES WE DID DO SURVEILLANCE.

BUT ISN'T THAT THE QUOTE YOU JUST READ?

REGARDLESS WHETHER THE SURVEILLANCE --.

DO WE HAVE TO IDENTIFY YES IN FACT WE HAVE OBTAINED SURVEILLANCE?

AND THAT YOU HAVE TO DISCLOSE THE ACTUAL FILM.

ONLY IF IT IS GOING TO BE USED AT TRIAL. IF I REMEMBER THAT OPINION CORRECTLY, THERE IS A THRESHOLD QUESTION THAT A PLAINTIFF CAN ASK OF A DEFENDANT --.

WHETHER OR NOT, WHETHER OR NOT IT IS INTENDED TO BE USED AT TRIAL.

WE HAVE TO DISCLOSE THE EXISTENCE OF THE SURVEILLANCE TAPE? BUT WE DON'T HAVE TO HAND IT OVER UNLESS WE INTEND TO USE IT AT TRIAL.

I THINK THAT THE WAY THAT THIS LANGUAGE READS HERE IS THAT IF YOU HAVE IT AND IT MAY POSSIBLY BE USED AT TRIAL, THAT IT HAS TO BE DISCLOSED.

I SEE WHAT YOU'RE SAYING.

IT IS VERY BROAD, PERHAPS WE HAVE GONE EVEN BROADER CERTAINLY THAN A LOST JURISDICTIONS. I'M TRYING TO BALANCE THESE TWO THINGS HERE.

I'M HAVING, I JUST WANT TO MAKE SURE ABOUT THE DIFFERENCES IN THINGS. LIKE IN THE GUARD NEAR CASE, GARDNER INVOLVED IN THE FOURTH DISTRICT SOMETHING WHERE THE NURSING HOME HAD ALREADY GIVEN OVER DOCUMENTS AND THEN THE REQUEST WAS TELL ME WHICH ONES YOU THINK ARE RELEVANT.

WHAT DO YOU THINK ABOUT THESE DOCUMENTS?

THAT IS TO ME SO CLEARLY A WORK PRODUCT SITUATION. DO YOU AGREE WITH THAT?

YES, I DO.

WE THEN HAVE A SITUATION WHERE, SAY IT IS A PRODUCTS LIABILITY CASE AND THE PLAINTIFF HAS GONE AND DONE DUE DILIGENCE AND GOTTEN PRIOR ADVERTISING AND LOTS OF THINGS ON THE CORPORATION. BUT NOT IN THIS LAWSUIT. AND OBVIOUSLY THOSE ARE GOING TO BE, IF THEY'RE EXHIBITS, THEY'RE GOING TO BE LISTED AT THAT TIME. IT SEEMS TO ME THAT THE ISSUE WITH THE DEPOSITIONS, AND I DON'T KNOW WHETHER IT IS MORE, TO ME IT IS STILL MORE AKIN TO A WITNESS STATEMENT THAT, AND I THINK I'M HAVING TROUBLE WITH THAT, WHICH IS YOU HAVE ACQUIRED SOMETHING THAT IS A PRIOR STATEMENT OF THIS WITNESS. AND SINCE OUR DISCOVERY RULES REQUIRE THAT THOSE STATEMENTS AT LEAST BE LISTED, THAT IS, STATEMENTS OF THESE DATES, WHY IS THAT NOT ANALOGOUS TO WHAT AT LEAST SHOULD HAPPEN HERE, WHICH IS AT LEAST SAY HERE ARE THE PRIOR STATEMENTS? COULD YOU DISTINGUISH AND TELL ME WHAT'S DIFFERENT ABOUT DOING THAT? KRUTION DISTINCTION IN ANY MIND, ONE HAND THERE IS A GOOD FAITH STATEMENT THOSE PRIOR WITNESS STATEMENTS ARE GOING TO BE USED AT TRIAL.

BUT IN DISCOVERY, YOU HAVE TO LIST, DOWNTOWN HAVE TO PRODUCE THEM, BUT YOU HAVE TO SAY, IF YOU HAVE WITNESS STATEMENTS AND THE DATES. THEY'RE WORK PRODUCT BUT THEY HAVE, THE EXISTENCE OF THEM HAS TO BE LISTED IN INTERROGATORIES, CORRECT?

YES. AND I GUESS THE DISTINCTION I WOULD DRAW IS THAT IF IN THE CONTEXT OF A DEPOSITION, WHICH IS IN ALL LIKELIHOOD PART OF THE PUBLIC RECORD OF WHATEVER COURT IN WHICH THE DEPOSITION WAS TAKEN, SIMPLY BY IDENTIFYING THE DATE AND THE TIME OF THE DEPOSITION GIVEN, WE WOULD IN EFFECT BE DISCLOSING OUR WORK PRODUCT. THERE IS NO OTHER WAY AROUND THAT.

SO IF THERE WAS A HEARING AND IT TURNED OUT THAT WHAT REALLY HAPPENS HERE IS THAT THERE IS A MALPRACTICE DOCTOR'S BANK, YOU KNOW, THAT OF ALL DEPOSITIONS OF EVERY PLAINTIFF EXPERT, AND REALLY ALL YOU HAD ACCESS BECAUSE YOU'RE A DEFENSE LAWYER. BUT THE PLAINTIFF DOESN'T HAVE ACCESS, OR VICE VERSA. THERE IS ACTIONS AGAINST HONDA MOTOR COMPANY AND ALL THE PLAINTIFF'S LAWYERS GOT TOGETHER AND THEY HAVE GOT EVERYTHING THAT HONDA SAID ALL OVER.

I THINK BOTH OF THOSE SITUATIONS ACTUALLY EXIST.

I KNOW THEY EXIST. SO WOULDN'T THAT BE THEN SOMETHING THE JUDGE COULD CONSIDER IF IT IS WORK PRODUCT, THAT IS THAT IT'S REALLY NOT EQUALLY AVAILABLE WITHOUT SUBSTANTIAL ADDITIONAL LABOR. AND THAT'S WHERE I SEE THAT MAYBE WE DON'T HAVE THE RECORD HERE TO SHOW THAT, WHETHER YOU HAD TO GO AND DO, YOU KNOW, HUNDREDS, THOUSAND HOURS OF WORK TO GET THESE, WHEREAS IN TRUTH, THIS PLAINTIFF'S EXPERT REALLY DIDN'T KEEP COPIES VERSUS THE FACT THAT HE KEPT COPIES AND YOU'D HAVE TO GO OUT AND DO ALL THAT WORK. I MEAN THAT MIGHT BE -- I THINK THAT WENT BACK TO JUSTICE CANTERO'S INITIAL QUESTION, WHICH IS THAT IS IT EQUALLY AVAILABLE? WE DON'T KNOW UNDER THIS RECORD.

I AGREE THE RECORD DOESN'T REALLY ESTABLISH THAT ONE WAY OR THE OTHER. ONE OF THE ISSUES OR ONE OF THE CONTENTIONS THAT THE PETITIONER'S COUNSEL HAD BELOW WAS THE FACT THAT WE THE DEFENSE WERE MAKING REPRESENTATION THAT IS THE DOCTOR DILLON HAD ACCESS TO ALL OF HIS DEPOSITIONS. AND I STILL MAINTAIN THAT THAT'S TRUE. THAT DOCTOR DILLON HAS, HE'S A PROFESSIONAL, HE'S A DOCTOR. HE KNOWS -- HE IN ALL LIKELIHOOD HAS KEPT RECORDS. AND AGAIN THIS IS ARGUMENT, NOT EVIDENCE, WHICH IS ONE OF THE ISSUES THE PETITIONER POINTED OUT. BUT I DO NOT BELIEVE THAT IT WOULD CONSTITUTION -- CONSTITUTE AN UNDUE HARDSHIP FOR DOCTOR DILLON TO GO BACK INTO HIS RECORDS AND FIND OUT WHERE HE GAVE DEPOSITIONS. THIS ALSO LEADS TO ANOTHER OF YOUR QUESTIONS EARLIER, I APOLOGIZE I DIDN'T ANSWER YOUR QUESTION REGARDING THE JUDICIAL KMO QUESTION YOU RAISED EARLIER. THE ISSUE IS THE DEFENSE HAS DONE THIS LEG WORK TO OBTAIN THESE DEPOSITIONS. THE PLAINTIFF KNOWS THAT THIS HAS HAPPENED. SO NOW IT IS THE PLAINTIFF'S OBLIGATION TO GO AND DO LEG WORK TO FIND OUT WHAT DEPOSITIONS ARE OUT THERE AND FOR COUNSEL TO MEET WITH THE EXPERT TO REVIEW THESE DEPOSITIONS IN ORDER TO PREPARE THEMSELVES FOR THE EVENTUALITY OF IMPEACHMENT. THE PETITIONER IS GOING TO ARGUE THAT WELL THIS IS GOING TO SHUT DOWN TRIALS FOR DAYS AT A TIME WHILE WE PORE OVER HUNDREDS OF PAGES OF TRANSSCRIPTS. NO, I DON'T THINK THAT'S THE CASE. I THINK WHAT HAS TO HAPPEN, THAT IS PART OF THE PREPARATION FOR TRIAL. AND IF COUNSEL NEEDS A 30 MINUTE RECESS OR HOWEVER LONG THAT WOULD BE APPROPRIATE. BUT IT IS NOT A QUESTION OF COMPLETELY SHUTTING DOWN THE TRIAL FOR SEVERAL HOURS OR DAYS AT A TIME AS HAS BEEN SUGGESTED.

ALL RIGHT. WE HAVE GONE OVER YOUR TIME. WE APPRECIATE YOUR COOPERATION IN RESPONDING TO OUR INQUIRIES. COUNSEL, REBUTTAL?

MR. MARSHAL, HOW MUCH TIME?

QUICKLY YOUR HONOR. SGLE --.

WHY DON'T YOU JUST START WITH WHAT COUNSEL JUST ENDED WITH? WHY ISN'T IT UP TO YOU TO TRY TO DETERMINE IF YOUR WITNESS HAS MADE ANY KIND OF CONTRADICTORY STATEMENTS

TO WHAT HE IS GOING TO TESTIFY TO IN THIS TRIAL? WHY SHOULD OPPOSING COUNSEL EFFORTS IN THAT DIRECTION BENEFIT YOU?

MY EXPERT HAS TESTIFIED THAT HE DOES NOT KEEP RECORDS OF CASES HE'S TESTIFIED IN. AND HE DOES NOT HAVE --.

I'M NOT TALKING ABOUT THE RECORDS. WOULDN'T YOUR CLIENT KNOW AT SOME POINT WHETHER OR NOT HE HAS MADE SOME KIND OF STATEMENTS IN THE PAST THAT ARE CONTRADICT TEAR TO WHAT HE'S SAYING NOW?

I WOULD BELIEVE HE OUGHT TO KNOW. I DON'T THINK HE THINKS HE HAS MADE ANY. I WOULD LIKE TO -- ONE OF THE THINGS THAT BROUGHT THIS, THERE WAS SOME ARGUMENT BACK AND FORTH DURING THE DEPOSITION ABOUT STATEMENTS BEING TAKEN OUT OF CONTEXT. AND THAT'S WHAT REALLY GOT THIS BALL ROLLING. MY EXPERT DOESN'T BELIEF HE'S MADE STATEMENTS CONTRARY TO WHAT HE'S TESTIFIED TO IN THIS CASE.

BUT YOU HAVE GOT CONCESSION TODAY THAT AS OF THIS DATE, THAT THE -- THERE ARE NO CONTRADICTIONS BECAUSE HE HAS A GOOD FAITH BELIEF THAT HE'S NOT GOING TO USE THEM. SO YOU'RE PRETTY, IF HE STICKS TO WHAT HE SAYS --.

IF THERE IS NO OPINION ISSUED BY THIS COURT, YOU KNOW, I DON'T KNOW HOW -- IF WE GO BACK IN FRONT OF THE TRIAL JUDGE, COUNSEL, APPELLATE COUNSEL, HE IS NOW TRIAL COUNSEL, GET THE SECOND DISTRICT OPINION SAYING HEY JUDGE, THEY QUASHED YOUR ORDER SAYING WE HAVE TO PRODUCE THIS. I ARGUED AT THE HEARING I DON'T HAVE TO DISCLOSE IT UNTIL I INTEND TO USE IT AND THAT'S NOT CORRECT AS CHIEF JUSTICE ANSTEAD WAS POINTING OUT.

DO YOU AGREE THAT THE COLLECTION OF THESE DOCUMENTS AND THIS SELECTION CONSTITUTES CONSTITUTES -- CONSTITUTE A WORK PRODUCT ISSUE?

I AGREE THAT THEY CAN. BY COUNSEL'S OWN ADMISSION, IF YOU BELIEVE WHAT THEY'RE SAYING, WE DON'T KNOW WHAT DOCTOR, WE DON'T KNOW IF WE ARE GOING TO USE THEM UNTIL DOCTOR DILLON FINISHES DIRECT EXAM. BY HIS OWN ADMISSION THEY HAVEN'T MADE A COLLECTION IN A SELECTION OF DOCUMENTS.

WHAT HE IS SAYING THERE MAY HAVE BEEN A HUNDRED DEPOSITIONS, HE'S SELECTED 25 THAT ARE POTENTIALLY USEFUL. I MEAN JUST HYPOTHETICAL. ISN'T THAT A WORK PRODUCT ISSUE?

HOW COULD YOU SELECT A DEPOSITION WITHOUT READING IT OR KNOWING? YOU CAN'T MAKE A SELECTION OF A DEPOSITION WITHOUT YOU, WITHOUT FIRST HAVING READ IT.

ARE YOU SAYING THEN IF THE, IF THE LITIGANT HAS, YOU KNOW, IF I GOT A HUNDRED DOCUMENTS IN MY POSSESSION BUT I DON'T KNOW YET IF I'M GOING TO USE SOMETHING FOR IMPEACHMENT, AND AGAIN THE QUESTION IS, IS AT WHAT POINT DOES THIS HAVE TO BE DISCLOSED? NOW, SHOULD THE ISSUE BE, AND IT IS NOT IN THIS RECORD, THAT AGAIN, THERE IS A DEFENDANT'S BANK OF AURL CLIENT'S, OF ALL YOUR WITNESS'S DEPOSITIONS, YOU DON'T HAVE EQUAL ACCESS, YOU CAN'T GET IT WITHOUT UNDUE HARDSHIP. WE ARE NOT GOING TO BE REQUIRING SOMEBODY TO GO TO 50 STATES TO GET DEPOSITIONS. BUT WE DON'T HAVE THAT PREDICATE IN THE RECORD AND SHOULDN'T THAT MAYBE BE A REQUIREMENT AT LEAST.

I THINK THE CRUX OF THIS CASE TURNS -- I THINK DODSON WAS DECIDED FAIRLY BECAUSE IN DODSON THEY ALLOWED -- IF I WANT SURVEILLANCE, IF I AM A DEFENSE LAWYER AND I TAKE SURVEILLANCE AND I DISCLOSE I HAVE SURVEILLANCE, I GET TO TAKE THE PLAINTIFF'S DEPOSITION. THAT'S FAIR. BUT THEN THE PLAINTIFF'S LAWYER THEN GETS POSSESSION OF THE TAPE BEFORE TRIAL. THAT'S FAIR. I THINK --.

SEE, IN ALL, I'M SURE THERE ARE PARALLELS BUT TO ME THE SURVEILLANCE FILM IS A UNIQUE -- IT IS NOT, THERE IS NO WAY BE WITH ONE SURVEILLANCE FILM.

I'M GOING TO FOLLOW UP, YOU'RE ASKING ME EARLIER, AND THIS IS A FOLLOW-UP FROM CHIEF JUSTICE ANSTEAD, I AM READING THE PARAGRAPH BELOW WHAT YOU'RE READING, THIS IS FROM DODSON, WE HOLD THE CONTENTS OF SURVEILLANCE FILMS AND MATERIALS SUBJECT TO DISCOVERY IN EVERY INSTANCE WHY THEY ARE INTENDED TO BE PRESENT TODD TRIAL EITHER FOR SUBSTANTIVE, CRABBIVE OR IMPEACHMENT PURPOSES.

WHO MAKES THAT DECISION OF WHO, IF THEY'RE INTENDED FOR USE OR NOT.

I THINK THE TRIAL JUDGE MAKES THE DECISION WHEN HE SAYS I HAVE A PRE-TRIAL CATALOG, YOU NEED TO LIST ANY EXHIBIT OR WITNESS THAT YOU MAY CALL. I THINK WHEN -- IF NO ONE KNOWS EXACTLY A TRIAL IS VERY FLUID. I DON'T KNOW EXACTLY WHAT WITNESSES I'M GOING TO CALL OR NOT CALL. BUT I AT LEAST HAVE TO SAY THESE ARE MY POTENTIAL WIS, THESE ARE MY POTENTIAL EXHIBITS.

WE HAVE RUN OUT OF TIME. THANK YOU BOTH.