The Florida Bar v. Daryl James Brown

THE NEXT CASE ON THE COURT'S CALENDAR IS FLOR IDA BAR VERSUS D ARYL JAMES BROW N. JUST WAIT A MINUTE, UN TIL EVERYONE GE TS SETT LED AND MR . VOS HAS A CHANCE TO GET H ISRECORDS. HOW IS, THE ARGUMENT , MR . TOZIAN, YOU ARE GOING TO BE GOING FIRST. WE CAN GET STARTED , MR . TOZIAN, SO YOU HAD TEN MINUTES AND THEN THE BAR IS GOING TO TAKE 15 MINUTES.

MAY IT PLEASE THE COURT. SCOTT TOZIAN ON BE HALF OF DARYL BROWN, WHO IS BEFORE THE COURT THIS MORNING. THE FLORIDA BAR CONCED ES IN THIS CASE THAT MR . BROW N'S CONDUCT WAS COMMERCIAL CONDUCT THAT WAS LEGAL, YETNEVERTHELESS THEY IN SISTTHAT THE CON DUCT WAS UNETHICAL, DUE TO SOME HEIGHTENED STANDARD THAT THE BAR SAYS EXIST INS THE CASE. NOW, WE AGRE E THAT LAWYERSWERE HELD TO HEIGHTENED STANDARDS. THOSE STANDARDS HAV E TO BE DELINEATED SOMEWHERE, EITHER BY THE LA W, AND IN THIS CASE THE BAR CONCEDED THAT LEGALLY WHAT HE DID WAS PROPER, OR BY THE RELATIONSHIP OF THE PARTIES , ATTORNEY/CLIENT RELATIONSHIP , ATTORNEY TO THE COURT RELATIONSHIP. IF I D O SH ARE A REL ATIONSHIP . NONE OF THAT EXI STED H E RE. BY CONTRACT, THERE COULD BE A DUTY. THAT DIDN'T EXIST HERE. SO THERE IS NO DUTY DELINEATED, THAT MR . BROWN WAS OBLI GATEED TO FOLLOW THAT, CAUSE THESE VIOLATIONS.

WHAT, I TH OUGHT THAT THE ESSENTIAL ALLEGATION WASTHAT H E MISREPRESENTED THAT THE COLLATERAL , THAT, WELL , HE STATED THAT THE COLLATERAL WAS SO LELY FOR THE BOND, AND THEN HE , THERE AFTER, REPLED GED THE COLLATERAL. WASN'T THAT THE E SSENCE OF, I MEAN

HE W ROTE A LE TTER , A MARCH 6 LETTER THAT IS IN THE RECORD, WHERE HE SAI D

ARE YOU SAYING THAT , W HEN HE SAID IT IS NOT ILLEGAL , IT DOESN'T AMOUNT TO A COMPLETE MISREPRESENT ATION OF THE SITUATION, WHEN YOU HAVE, YOU HAVE G I VEN COLLATERAL, IN ORDER TO, F ORA B OND, AND THEN YOU ESSENTIALLY REPL EDGE THAT COLLATERAL FOR ANOTHERPURPOSE?

NO, MA'AM, BECAUSE H E WROTE A LETTER ON M ARCH 6 , YOUR HONOR, AND ON THAT DATE, HE SAID , HERE IS WHAT I PROPOSE , BUT WHATEVER WE ULTIMATELY REACH WILL HAVE TO BE AG REED UP ON BY T HEBANK. SO IT WAS A PROP OSAL. IN RESPONSE TO THAT, THE PIONEER , THE SURETY COMPANY DRAFT ADD DOCUM ENT WITH THE BANK, WITHOUT ANY REVISION OR IN PUT F ROM MR . BR OWN. THEY SAID HERE IS WHAT W E WANT YOU TO SIG N, AND IT SAID ESSENTIALLY, THAT THE BANK WOULD HOLD THE CD , THAT HILL VIEW CORPORATION , MR . BROWN OWNED, WOULD GET THE INTEREST, AND THAT THE CD WOULD NOT BE REL EASED , WITHOUT THE THE WR ITTEN PERMISSION OF PIONEER, THE SURETY COMPANY , AND THAT PIONEER, WHEN ADV ISED OF THE CONCLUSION OF THE LAWS UIT , WOULD CONSENT TO THE RELE AS E OF THE C D , AND IT S AID NOTHING FURTHER. THERE WAS NO REQUIREMENT THAT HE NOT PL EDGE IT ELSEWHERE OR GIVE A JR. INTEREST TO ANYBODY ELSE , AND A JU NIOR INTEREST TOANYBODY ELSE, AND THAT WAS THEIR AGREEMENT, AND DRAFTED BY THE SU RETY COMPANY AND THE BANK, WITHOUT ANY INPUT AT ALL FROM MR. BROWN. IT WAS FU LLY HIS INTENTION AND THE RECORD IS CL EAR ON THIS, THAT THE RECORD WOULD SERVE AS THE C D TO REIMBURSE THE SURETY COMPANY AT THE E ND OF THE CASE EXCEPT THE SURETY COMPANY VOLUNT EERED PAYMENT.

DOESN'T THE SURETY COMPANY HAVE THE RIGHT TO DO THAT? I TH OUGHT A PART OF THAT AGREEMENT SAID THAT THE SURETY COMPANY WAS THE ONE WHO HAD THE RIGH T TO DETERMINE WHETHER TO SETTLE , WHETHER TO MAKE PAYMENT , WHETHER TO AP PEAL OR ANY OF THAT. SO WHY , WHAT WAS WRONG W ITH THE SURETY COMPANY MAKING PAYMENT?

BECAUSE EVE RYBODYINVOLVED IN THIS CASE ACKNOWLEDGED , NOTWITHSTANDING THE RIGHT TODO THAT , THAT THERE IS A CONCEPT KNOWN AS VOL UNTARYPAYMENT BY A SURETY COMPANY , WHEN A SURETY COMPANY PAYS BEFORE IT IS LE GALLY OBLIGATED TO DO SO . MR. LA UDER MICK , WHO WAS THE PRESIDENT LAUDER MI LK , WHO WAS THE PRESIDENT OF THE SURETY COMPANY, SAID , I AM COMFORTABLE WITH THAT CONCEPT AND THE S URETY COMPANY SAID THEY VOLUNTEERED PAYMENT, AND HA THAT IS WHEN WE WENT B ACK AFTER IT.

THEY VOLUNTEE RED PAYM EN T WHEN, AFTER THE JUDGE HAD DECIDEDED?

DURING THE TIME WHEN THE APPEAL WAS STILL V I ABLE AND DURING THE TIME WHEN HILL VIEW INTENDED TO APPEA L.

THIS IS WHER E I A M HAVING A PROBLEM HERE. IS, UNDER THE AGRE EMENT, DIDN'T THE SURETY HAVE T HERIGHT TO DECIDE WHE THER OR NOT THERE SHOULD BE AN APPEAL ?

I THINK AT THEIR PAR ILL. YEAH. IF YOU - - AT THEIR PERIL. IF YOU LOOK AT THE LANGUAGE,IT SAYS THAT, BUT I THINK THAT MR . BROWN AND HILL VIEW , HAD THE SAME DEFENSE THAT ANY OTHER PERSON WOULD HAVE , IN DEALING WITH THE SURETY COMPANY.

GIVE ME HE LP WITH THE TIMING ON THIS. HAD THE PE RIL NOT AL READY BEEN DETERMINED , BECAUSE ON APRIL 4, ONE WE EK AFTER MAKING THIS AGREEMENT, HE HAD AL READY PLEDGED THE INTEREST TO HIS OWN LAW F IRM AND GRANTED A SECU RITY INTEREST S THAT TRUE OR NOT TRUE?

IT IS TRUE THAT HE GAVE THEM A DO CUMENT EVIDE NCING HIS INDEBTEDNESS TO THE RM FIRM. THAT TO THE FIRM. THAT DOCUMENT WAS NEVER FILED AND PERFECTED AND THEREFORE THEY HAD N O SECURITY INTEREST AND IN THE SUIT A YEAR LATER , THE BANK REPRESENTED THAT A YEAR LATER.

BUT HE HAD PLEDGE D THE CD , THAT IT WAS REPRESENTED AS PRIORITY INTEREST.

I AM SO RRY ?

THAT IT WAS PR IORITY INTEREST.

THAT IS WHAT THE LANGUAGE OF THE DOCUMENT SAID. HOWEVER, THE PARTNERS IN THE FIRM SAID WE UNDERSTOOD THAT PIONEER HAD PRIORITY OVER US. THIS WAS A FORM DOCUMENT THAT A LAW CLE RK PRINTEDOUT.

FOR OUR PURPOSES, THE REFEREE MADE A CONT RARY FINDING TO THAT .

SHE DID MAKE A CONTRARY FINDING , AND QUITE FRANKLY , JUSTICE BELL, I THINK IT UNDERSCORES HER LACK OF UNDERSTANDING OF THE CASE , BECAUSE SHE REPEATEDLY SAYS THAT HILL VIEW HAD SUBJUGATED THE INTEREST OF PIONEER BY GIV ING THIS T O THE LAW FI RM. THAT IS ABSOLU TELY U N TRUE A S A MATTER OF LAW. UNTIL PERFECTION IS DONE , WHAT THE FIRM HAD WAS AN UNSECURED CLAIM , WHICH IS I N FACT WHAT THEY FILED IN BANKRUPTCY I, A YEAR AND-A-HALF LATER - - IN BANKRUPTCY, A YEAR AND-A-HALF LATER.

YOU SEEM TO BE GLOSSING OVER THE SECURITY AGREEMENT LIKE IT DOESN'T MEAN ANYTHING, THAT WE SEC RETLY HAVE IT UNDER THE TA BLE THAT WE ARE NOT GO ING TO DO ANYTHING

WITH IT , BUT H E SAID HILL VIEW PARTICIT AKE IT IS THE G O OD AND RIGHTFUL OWNER AND HAS MA RKET IN G TITLE FREE AND CLEAR OF ANY ENCUMBRANCES, EXCEP TING THE ENCUMBRANCES G RANTED TO BC AND W. ISN'T THAT FALLS AT THE TIME THAT HE SIGNED THE AGREEMENT?

THAT I S

ISN'T THAT WHAT WE ARE HERE ABOUT , THAT HE SIGNEDAN AGREEMENT KNOW ING IT W ASFALSE?ISN'T THAT WHAT WE ARE H ERE ABOUT , WHETHER IT IS RIG HT OR WRONG THAT , IS WHAT THE REFEREE FOUND WAS THE MISCONDUCT IN THIS C ASE.

THE RE FEREE FOUND THAT IT WAS IMPROPER TO DO A DO UBLE PLAJ DOUBLE PLEDGE, NO MATTER WHAT THE LANGUAGE WOULD HAVE BEEN. SHE WAS PRE CLUDED F ROM FINDING A DOUBLE PLE DGE.

IF HE HAD CONC LUDED SAYING HILL VIEW HAD PLED GED A MONTH AGO , THERE WOULD HAVE BEEN ANYTHING WRONG WITH THAT.THE REFEREE WOULDN'T HAVE FOUND ANY MISCONDUCT. IT WASN'T THE DOUBLE PLE DGE ITSELF. IT WAS THE FACT THAT HE HID THE DOUBLE PLEDGE FROM BOTH HILL VIEW AND P IONEER .

HILL VIEW KNEW IT. THE LAW FIRM KNEW ABOUT IT. HIS TWO PART NERS CAME AND SAID WE WERE WELL A WARE OF THE SUPERIOR CLAI M. WE WERE JUST WA NTING EVIDENCE OF INDEBTED NESS TO THE FIRM, SO THE ONLY ONE THAT DIDN'T KNOW ABOUT IT WAS PI ONEER , BUT PIO NEER OSTENSIBLY PERFECTED THEIR EARLIER INTEREST AND IT COULDN'T EFFECT THEM , S O NOBODY TH OUGHT ANYTHING ABOUT IT. IT WAS SHOV ED IN THE FI LE AS AN INTERNAL DOCUM ENT. IT IS UNFORTUNATE THAT THEY USED A FORM DOCUME NT THAT APPEARS TO GIVE PRIORITY INTEREST.

WAIT.YOU ARE TE LLING ME THE FORM DOCUMENT THAT IS USED OVER AND OVER AND OVER A GAIN , AND I AM A TRANSA CTION AND REAL ESTATE ATTORNEY.I KNOW WHAT FORM DOCUMENT IS. THE FORM DOCUMENT SAID IN THEIR FORM FUR THER THE UNDERSIGNED OFFICER PERCENT I HERE BY REPRE SENTS A NDWARRANTS THAT HILL VIEW IS THE SOLE OWNER OF THE CD AND THAT HILL VIEW HAS GOOD AND MARKETABLE TITLE, ET CETERA , ET CETERA. IS THAT A FOR M? DOESN'T IT TAKE THE INTRODUCTION OF THE NAMESAND INTEREST AND MANIPULATION OF THE FORM , I N ORDER TO DO THIS?

YES. YES, SIR. IT WOULD TAKE THE PLUGGING IN OF NA MES, BUT AS FAR AS THE OTHER LANGUAGE WAS , ACCORDING TO THE TESTIMONYOF THE PARTNERS , WAS S TOCKLANGUAGE IN THE FORM THAT SOMEBODY PULLED.

SO YOUR POSITION IS THAT THIS DOCUMENT MEANT NOTHING, SO THEREFORE, HOW MUCH WAS THE CD FOR?

$420,000.

SO , THEN , $420,000 SHOUL D HAVE BEEN AVAILABLE TO SATISFY THE PIONEER 'S PAYMENT. CORRECT?

ABSOLUTELY.

HOW DID THAT , HOW DID IT END UP THAT THE LAW FIRM GOT $100,000 OF OUT OF THIS?

IT IS IMPO RTANT , FIRST , TO NOTE THAT THE REFEREE FOUND, AT THE TIME THAT MR. BROWN DID THE SEC URITY AGREEMENT WITH HI S LAW FIRM , HILL VIEW DID THE SECURITY AGREEMENT, THAT HE BELIEVED THERE WAS ENOUGH M ONEY TO G O BOTH PLACES, THAT HE

BELIEVED HIS GREATEST EXPOSURE IN THE LAWS UIT WAS $140,000, $15 0,000 , AND THAT THERE FOR THERE WOULD BE ENOUGH MONEY TO PAY B OTH FEES AND CO STS AFTERWARDS , AND SHE MADE THAT FINDING , AND WHAT HAPPENED WAS THE JURY VERDICT WAS MORE THAN $140,000 AND THIS EAGLE COUNTY JUDGE UP PED IT AND BUMPED IT UP TO $3 50,000 AFTER A JURY VERD ICT, AND SO MR. BROWN 'S BELIEF IN SIGNING THE SECOND J U NIOR PLEDGE TO HIS FIRM, THAT THERE WAS PLE NTY OF MONEY FOR EVERYBODY, STARTED TO LOOK A LITTLE BIT SHAK EY, BUT YOU CAN'T LOOK AT HIS INTENT A YEAR AND-A-HALF LATER, AT THE TIME OF

WHY, IF IT IS ONLY A JUNIOR INTEREST , THEN , WHY WASN'T THE FULL AMOUNT OF THE OBLIGATION OWING TO PIONEER PA ID?

BE CAUSE PIONEER VOLUNTEERED PAYMENT DU RING THE PENDENCY OF THE APP EAL. AND WHEN THEY DID THAT , T HECOLORADO COUNSEL, ADVISED HILL VIEW, MR . BROWN , THAT THEY SHOULDN'T HAVE PAID IT , THAT THE APPEAL SHOULD HAVE BEEN ALLOWED TO RUN I TSCOURSE, AND FRANKLY, T HEPRESIDENT OF THE PIONEER, SAID, HAD I KNOWN THAT T HEY INTENDED TO APPEAL , I WOULD NOT HAVE PAID IT, BUT MY LAWYER DIDN'T TEL L ME THAT. HE CL EARLY ACKNOWLEDGED THAT CUSTOM IN THE INDUSTRY WOULD BE TO ALLOW THE PRINCIPAL TO DEFEND UP AND THROUGH APPEAL.

SO ARE YOU SAYING THAT NOTHING WAS DONE WR ONG IN THIS CASE BY MR . KNIGHT?

THERE ABSOLU TELY WAS NOTHING DONE WRONG.

SO YOU WANT A COMP LETE REVERSAL, NOT JUST A REDUCED

THAT'S CORRECT THERE.IS NO RULE THAT I S NOTICED HERE THAT WOULD PUT ANYBODY ON NOTICE , ANY LAWYER ON NOTICE, THAT COMMERCIALLY LEGAL CONDUCT IS UNETHICAL. YOU CAN'T GET THAT FROM 484-C AND 384- 3.

SO WHAT YOU ARE AS KING U S TO SAY IS THAT THE ETHI CS O F THE FLORIDA BAR AND LAWYERS IS EQUIVALENT TO COMMER CIAL CONDUCT, AND THERE IS NO GREATER RULE

I AM NOT SAYING THAT. I AM SAYI NG THAT THE RULES DEFINE, UNDER 403-1 , THEY DEFINE WHEN SOME THING MUST BE DISCLOSED , VERY SPECIFICALLY WHEN I T MUST BE DISCLOSED , AND THE CASESCITED TO THE BAR C ITE PE OPLE REPEATEDLY LYING TO THE BANKS ABOUT FINANCING SITUATIONS, A C TIVE MISREPRESENTATIONS. THERE WAS ABSOL UTELY NO MISREPRESENTATION FOUND , A NDSO THAT IS WHY THE FLORIDA BAR RULES

IF T HERE WAS NOTHING FOUND TO BE MISREPRESENTATION AND HIS REPRESENTATION TO PIONEER THAT IT WAS G OING TO BE THE SOLE HO LDER OF THE C D WAS A MISREPRESENTATION, BECAUSEHE INTENDED TO COLLATRISE IT TO HIS FIRM AND THA T WOULD BE A FINDING OF FACT, ITWOULD BE A VI OLATION THAT VIOLATED THE CODE OF CONDUCT , WOULD IT NOT ?

IF SHE WERE TO FIND THAT.

NO W WE ARE GO ING TO WHAT THE FIND INGS WERE. NOW YOU ARE ARGUING AS TO THE FACT UAL FINDI NGS. BECAUSE IF WE TAKE THE FACTUAL FINDIN G AS TR UE, SHE HAS DEMONSTRATED A VI OLATION OF THE CO DE OF CONDUCT. DO YOU AGREE WITH THAT?

I AGREE THAT IS FORCONCLUSION, BUT I DO NOT AGREE UNDER ANY CIRCUMSTANCES THAT A L ETTER SAYING HERE IS A PROP OSED TRANSACTION, BI NDS HIM IN ANY WAY . I AM IN M Y OKAY. THANK YOU.

CHIEF JUSTICE: YOU ARE INTO YOUR REBUTTAL .

MAY IT PLEASE THE YOU ARECOU RT. JODI ANDERSON ON BE HALF OF THE FLORIDA BAR. MR. BROWN'S CUMULATIVE SIMILAR MISC ONDUCT INVIOLATING RULE 4-8.4-C , WARRANTS A SUSPENSION GREATER THAN SIX MON TH S RECOMMENDED BY THE REFE RE E IN THIS CASE, AND THAT IS BASED ON THE FINDINGS OF FACT, THE STANDARDS FOR IMPOSING LAWYER SANC TI ONS AND CASE L AW.

LE T'S JUST G ET TO T HEACTUALLY, THE NUT OF , AS JUSTICE ANST EAD SOMETIMESSAYS, THE CO CONUT .

YES .

WOULD YOU ADD RESS WHERE WE SEPARATE FROM A BUSINESS TRANSACTION OR COMMERCIAL DEALING , ONE HAS A CREDIT CARD AND THEY AGREE THEY ARE GOING TO PAY , BUT THEY DON'T. WHAT SEPARATES THE COMMERCIAL JUST BUS INESS TRANSACTION, FROM THIS CASE THAT WE ARE TALKING ABOUT, SO THAT ONE DOES NOT HO NO R A CONTRACTUAL OBLIGA TION. I WOULD ASSUME THEY HAVE AN INTENT. THEY ARE NOT GOING TO MAKE A PAYMENT ON SOME THING. DOES THAT TH ROW IT INT O AN ETHIC A.M. VIOLATIONS ARE OR AN ET HICAL VIOLATION , O R IS THERE SOMETHING ABOUT THAT? WHAT ABOUT THIS ONE?

IN THIS CASE , MR . BROWN MADE REPRESENTATION TO SAY PIONEER, AND THE TESTI MONY AND THE FINDINGS OF THE REFEREE , WAS THAT PIONEER WOULD NOT HAVE IS SUED THE BOND, BUT FOR THE REPRESENTATIONS MADE BY MR. BROWN, REPRESEN TING HIMSELFTHAT HE WAS A FLORIDA LAWYER , SPECIALIZING IN CONSTR UCTION LITIGATION, AND THAT THIS $420,000 WOULD SERVE AS F ULL CASH COLLATERAL. MR. BROWN BE ING AN EX PERT IN CONSTRUCTION LITIGATION , WOULD KNOW WHAT THE COMMON MEANING OF FULL CASH COLLATERAL IS, AND THAT THAT MEANING WOULD BE THAT THAT MONEY WOULD BE FOR THE PURPOSE OF SECURING THE BOND. THAT BOND , IN COLORADO , HAS TO BE APP ROVED BY THE COURT , AND THE STATUTE RE QUIRES THE $420,000 TO BE P OSTED . SO THE REPRESENTATION THAT HE MADE , PIONEER RELIED ON THAT REPRES ENTATION THAT IT WOULD SERVE AS FULL CASH COLLATERAL, AND RELIED ONTHE FACT THAT HE WAS AN ATTORNEY IN FLOR IDA THAT WAS EXPERIENCED IN THESE MATTE RS , AND UNDERSTOOD THAT , BUT FOR THAT REPRESENTATION , THEY WOULD NOT HAVE ISSUED THE BOND.

WE COULD GET INTO SITUATIONS WHER E ONE WOULD POST COLL ATERAL STOC KS , BONDS, THINGS THAT MAY , LATER, BE DE VALUED OR LOSE VALUE THROUGH THAT PROCESS, AND THAT WOULD BE THE SAME CIRCUMSTANCE, W OULD IT NOT, THAT SOMEONE HAS AGREE D TO PLACE THE FULL COLLATERAL. SO I AM HAVING TROU BLE WITH JUST THAT ANALYSIS. IT SEEMS TO ME THAT WE NEED SOMETHING THAT TI PS IT BEYOND JUST A BUSI NESS DEAL GONE BAD OR BAD BUS INESS JUDGMENT. THAT IS WHAT I AM TRYING TO SEE. THAT IS WHAT I AM TRYING TO UNDERSTAND. CERTAINLY THAT IS NOT MUCH DIFFERENT FROM FLORIDA LAW. CERTAINLY THE COURT HAS TO ACCEPT THE SURETY FOR THE BOND. YOU TRANSFER THE LIEN.THERE IS NO KIND OF MA GIC IN THIS. THIS IS PRE TTY STA NDARD CONSTRUCTION KIND OF LITIGATION, I SN'T IT?

I THIN K THE DIFFERENCE IS THAT THE REPRESEN TATION MADE TO AC QUIRE THE BOND AND THEN SUBSEQUENTLY, SEVEN DAYS LATER, REPLEDGING THAT MONEY TO HIS OWN FIRM FOR A SELFISH MO TIVE , IS , MA KES I T DISTINCTIVE FROM A TYPICALTRANSACTION , BE CAUSE HIS FIRM, THEN, WAS GOING TO REPRESENT HIM IN THE CONSTRUCTION LITIGATION. ALSO, THE

SO IT IS, THEN , THE IMMEDIATE GRANT OF INTEREST TO HIS PERSO NAL LAW FIRM.

CORRECT.

IF IT HAD BEE N A DIFFERENT LAW FIRM , LET'S ASSUME HE HAD COLORADO COUNSEL AND THEY WERE GOING TO DEFEND , AND HE WOULD HAVE GIVEN THEM AN INTEREST A S WELL, BECAUSE IN THESE THINGS, YOU DO POST SECURI TY BEYOND WHAT THE ALLE GED CLAIM IS , AND WOULD

THAT HAVE BEEN A VIOLATION AS WELL, OR WAS IT BECAUSE IT WAS HIS OWN FIRM?

I THINK THAT THAT FACT THAT IT IS HIS OWN FIRM AND HE HAS INTEREST AS A PART NER, SO THAT HE DE RIVED A 20 PERCENT INTEREST FROM THE $100,000 THAT WAS ULTIMATELY OBTAINED , IS T HEDISTINCTION.

SO LET ME GO BAC K. THE, MR . TO ZIAN SAYS THAT THE AC TUAL TE RMS OF THE AGREEMENT WITH PIONEER , WAS NOT THAT IT WAS , THAT THE COLLATERAL WAS IN CA PABLE OF BEING REPLEDGED. DO YOU DISA GREE THAT IT IS CLEAR THAT THE AGREEMENT REQUIRED THAT IT NOT BE PLEDGED AGAIN, OR , SO , IS IT THE REPRESENTATION T O PIONEER OR THE REPRESENTATION TO THE LAW FIRM?

I THINK

OR BOTH?

THAT THE REPRESENTATION TO PIONEERWAS THAT IT WOULD NOT BE PLEDGED AGAIN.THE TESTIMONY OF THE REPRESENTATIVES OF PIONEER , WHO APPROVED THE BOND , WAS THAT THEY WOULD NOT HAVE ISSUED THE BOND , BUT FOR FULL CASH COLLATERAL. AND THE REFE REE'S FINDINGWAS THAT IT , IN FACT , WAS A DOUBLE PLEDGE AND THAT I T WAS DISH ONEST , BECAUSE H E MADE THE REPRESENTATION TO SAY PIONEER. THEY RELIED ON HIS REPRESENTATION TO SAY THEIR DETRIMENT, AND THEN H E TURNED AR OUND AND PLEDGED I T AGAIN, SEVEN DAYS LA TER, IT TO HIS OWN LAW FIRM , WHO INURED A BENE FIT FROM THAT SECOND PLE DGE.

WHAT IS YOUR RESPONSE TOMR. TOZIAN' S CONTENTION T HAT THE ONLY RE ASON THAT IT WAS TO THEIR DE TRIMENT , WAS THAT PIONEER WAS A VOLUNTEER ?

I WOULD , MY RESPON SE TO THE FACT THAT PIONEER VOLUNTEERED IT, IS THAT THEY WERE UNDER A COURT OR DER. THERE WAS A JU DGMENT, AND THEY WERE ORDERED BY THE COURT TO PAY THAT JUD GMENT. AT THE TIME THEY PAID THAT JUDGMENT, THE SOLASET O F HILL VIEW, WAS JUST $420,000 THE SOLE ASSET OF HILL VIEW WAS JUST $420,000. IN ADDITION, HILL VIEW WAS IN BANKRUPTCY I. IN ADDITION , A JUDG MENT MADE BY COUNSEL IN RECOMMENDING TO HIS C LIENT THAT THEY SHOULD PAY THE JUDGMENT , BASED ON A VALID JUDGMENT AND COURT ORDER , BEC AUSE THE JUDGMENT WAS VALID, THE FACT THAT PIONEER WAS MADE, W ASWITHIN THE JURISDICTION O F THE COURT BY THE MERE FACT OF ISSUING THE BOND, S O THAT NO MOTIONS OR SUITS NEEDED TO BE FI LED IN ORDER TO ENFORCE THAT JUDGMENT . AND THAT POTENTIALLY , WOULD HAVE OPENED THEM UP TO A BAD FAITH SIT UATION, HAD THEY NOT PAID THAT JUDGMENT ATTHE TIME THAT THEY WERE ORDERED TO PAY THAT JUDGMENT.

YOU MEAN YOU DON'T HAVE A PERIOD OF TIME FOR AN APPEAL , THAT ACCOMPANY I S HE LD IN BAD FAITH, TAN DOES NOT STAND AS COLLATERAL FOR AND IT DOES NOT STAND AS COLLATERAL FOR THE APPEAL I N COLORADO? YOU HAVE, SUPPOS EDLY , A JUDGMENT. I MEAN, WHAT ELSE DO YOU DO FOR A SUPERSEDEIOUS BOND. AN INSU RANCE COMPANY GIVES A PIECE OF PAPER SAYING WE BOND THIS THING , I S THE SAME THING AS TRANSFERRING THE LIEN TO THE BOND , ISN'T IT?

WELL

THERE IS NOT A PERIOD THAT THE PARTY CAN TAKE AN APPEAL THAT THEY ARE ALL AUTOMATICALLY IN BAD FAITH, IF THEY DO NOT PAY IT THE DAY AF TER THE JUDGMENT IS ENTERED.

I THINK THE FACTS AT THE TIME, THAT PIONEER MADE THE DECISION TO PAY , THAT THERE WERE NO OTHER ASSE TS , THE RE WAS A VALID JUDGMENT, AND THAT NO SUPERSEDEIOUS BOND HAD,

IN FACT , BEEN POSTED, AND THERE WERE NO

DOES COLORADO REQUIRE A DIFFERENT, I GUESS THAT IS PROBABLY A FUNDAMENTALQUESTION, DOES COLORADO REQUIRE AN ADDI TIONAL SUPERSEDEIOUS BOND?

CORRECT.

IF THE LIEN IS ALREADY TRANSFERRED TO A BOND? THE INITIAL BOND IS NOT SUFFICIENT? IS THAT WHAT YOU ARE SUGGESTING?

I DON'T KNOW THE ANSWER TO THAT, AS FAR AS COLORADO LAW , BUT I , MY UNDERSTANDINGIS THAT , A SUPERSEDEIOUSBOND WOULD HAVE B EEN REQUIRED TO HAVE BEEN POSTED .

IF THE APPE LLATE LAWYER ADVISED THEM TO APPEAL OR TOLD THEM T HEY WERE GOIN G TO APPEAL , THEY WOULD HAVE H ADTHE RIGHT TO POST A SUPER SIDIOUS BOND AND NOT P AYTHAT JUDGMENT?

I APOLOGIZE , JUSTICE CANTERO. I COULDN'T UNDERSTAND, I COULDN'T HEAR YOUR QUESTION.

MAY BE I AM JUST NOT ARTICULATING IT WELL. IF THE APPELLATE LAWYER HAD TOLD THEM WE ARE APPEAL ING THE JUDGMENT, WOULD THEY HAVE THE RIGHT TO, THEN , FILE A SUPER SI DIOUS BOND IN ORDER NOT TO PAY ON THE CD , PENDING THE APPEAL ?

I DON'T KNOW THE ANS WE R TO THAT QUESTION. I , IF THEY HAD POSTED A SUPER SIDIOUS BOND AND THE APPEAL HAD PROCEEDED , THEN LOGICALLY, I WOULD BE LIEVE THAT PROCEDURALLY, T HEY WOULDN'T HAVE TO PAY, BUT THAT DIDN'T OCCUR, BECAUSE THE PARTIES ENTERED INTO A SETTLEMENT . BUT THE FINDINGS OF FACT OF THE REFEREE, WERE THAT PIONEER DID NOT VOL UNTEER PAYMENT. PIONEER ACTED WITHIN THEIR DISCRETION AND WITHIN THEIR RIGHT PURSUANT TO THE SECURITY AGREEMENT, NOT THE SECURITY AGREEMENT , THE INDEMNITY AGREEM ENT THAT W AS SIGNED, AND IN CONJU NCTION WITH THE COURT ORDER , ORDERING THEM TO PAY THE JUDGMENT, THAT THEY WERE WITHIN THEIR ABSOLUTE RIGHTTO MAKE PAYMENT AT THE TIME THAT THEY DID.

DOES THE BAR 'S CAS E AND THE NATURE OF THE SA NCTION , DEPEND ON A FINDING THAT PIONEER WAS , IN FACT, HARMED?

NO. IT DOESN'T. I BELIEVE THAT OUR POSITION IS THAT THERE WAS , THAT WAS NOT THE ONLY MISREPRESENTATION.THAT WAS NOT THE ONLY HARM . THROUGHOUT THIS CASE, THERE WERE MULTIPLE MISREPRESENTATIONS THAT WERE MADE, AND THE REFEREE USED THOSE INSTANCES O F MISREPRESENTATION AS AGGRAVATION IN HER FIN DINGS OF FACT. NOT ONLY WAS THERE THE INITIAL MISREPRESENTATION BY THE , THA T THE BAR ALLEGES OF SECURITY, WELL , FI RST , MAKING THE REPRESENTATION TO PIONEER THAT THE BOND , THAT THE $420 ,000 CD WOULD SERVE AS FULL CASH COLLATERAL , AND THEN SUBSEQUENTLY PLED GING THAT TO HIS OWN COMPANY , WHICH I WOULD DISAGREE WITH THE RESPONDENT 'S POSITION THAT THE REFEREE FOUND THAT , AT THE TIME THAT HE SIGNED IT, THAT HE BELIEVED THAT THERE WAS ENOUGH MONEY. THAT WAS NOT THE REFEREE 'S FINDING OF FACT . HER FINDING OF FACT STATED THAT, AT SOME TIME , HE DID BELIEVE THAT THERE WASENOUGH MONEY , NOT AT THETIME THAT HE SIGNED THE INDEMNITY AGREEMENT THAT HE BELIEVED THERE WAS ENOUGH MONEY.SECOND TO THAT, THE SECOND MISREPRESENTATION THAT HE WOULD HAVE MADE , WOULD HAVE BEEN IN THE ATTACHMENT OF THE SECURITY AGREEMENT YET AGAIN , TO THE UCC FILI NG, TO PERFECT THE CLAIM OF HIS O WNLAW FIRM. THEN, IN THE

WHEN WAS THAT DONE?

PARDON ME?

WHEN WAS THE UCC FILING MADE?

THAT WAS DONE

THAT ATTACHED THE, W ITH THE LAW FIRM THAT WAS A CTUALLY FILED?

CORRECT. CORRECT.I THOUGHT IT STATED THATTHERE WAS ONLY AN INTERNAL DOCUMENT.

CORRECT. THAT GO ES TO THE ISSUE OF MISREPRESENTATION.IF THAT, IN FACT , WAS ONLY AN INTERNAL DOCUMENT, THEN WHY WOULD THEY ATTACH IT TO THE UCC- 1 AS A BASIS FOR PERFECTING THEIR RIGHT, AND THEN SUBSEQUENTLY IN THEBANK

WHERE WAS THAT FILE D? IN COLORADO?

THAT WAS FILED I N COLORADO, CORRECT , WITH T HECOURT. AND THEN

I THINK SHE ASKE D YOU WHEN IT WAS IT FI LED?

WHEN ? I DON'T KNOW THE EXACT DATE OF. THAT.

WAS IT FILED

IT WAS SUBSEQUENT TO THE JUDGMEN T AND THE TR IAL .

SUBSEQUENT T O PIONEER PAY SOMETHING.

NO.IT WAS PRIOR TO PIONEER PAYING.

S O THAT IS THE S ECOND , YOU ARE SAYING THE MISREPRESENTATION, THEN, AT THAT PO INT , IN WHICH I T STATES THAT HILL VIEW , THAT HILL VIEW HAS NOT PLEDGED THE COLLATERAL , THAT THAT , THAT THAT FILING WAS FRAUDULENT.

CORRECT.

WHAT OTHER MISREPRESENTATION?

THAT AN AFFIDA VIT WAS FILED IN THE BANKRUPTCY COURT IN FLORIDA, AND INTHAT AFFIDAVIT , MR . BROWN PERSONALLY , AS THE PRES IDENT OF PIONEER , OF HILL VIEW , STATED THAT THERE WERE N O OTHER CLAI MS TO THE $4 20,000 CD. AND THAT, ALSO , WAS A MISREPRESENTATION IN THE BANKRUPTCY COURT.

NO OTHER CLAIMS OTHER THAN WHICH CLAIM?

OTHER THAN HIS OWN LAW FIRM'S CLAIM .

DID SHE FIND THAT AS A SEPARATE VIOL ATION?

SHE DID NOT FIND IT AS A SEPARATE VIOLATION, BECAUSE IT WAS NOT CHARGED IN THE BAR'S COMPLAINT, BUT SHE FOUND IT AS AN AGGRAVATING FACTOR, G OING TO CREDIBILITY , IN EVALUATING THE CREDIBILITY OF MR . BROWN I N THIS CASE. SHE, ALSO , FOUND AS A

I ME AN, JUS T IN TERM S OF TRYING TO KNOW WHAT IS BEING DEFENDED AGAINST, THAT SE EMS LIKE A PR ETTY SIGNIFICANT MISREPRESENTATION , BUT I AM CONCERNED, IF IT WASN'T CHARTED SEPAR ATELY , A BOUT HOW IT GETS CONSIDERED. YOU WANT TO MAKE SURE THAT WE STAY WIT H EXACTLY WHAT WAS CHARGED AND THAT THAT I S NOT A VIOLAT IO N.

CORRECT.

YOU CAN'T BUILD ON , IF THERE IS NOT A MISREPRESENTATION TO BEGIN, WITH YOU CAN'T MAKE ONE OUT OF SOMETHING SUBSEQUENT.

RIGHT. ALTHOUGH IT IS NOT C ITED IN OUR BR IEF , THE BATISTE CASE , WHICH IS AT THE FL ORIDA BAR VERSUS ALBE RT O BAT ISTE , AND THAT IS AT , WHAT IS THE CITE ON THAT , IT WAS THE SU PREME COURT'S CASE 000-2219. THE COURT RULED THAT IT IS ABSOLUTELY

COUNSE L, HAVE YOU PROVIDED THAT TO YOUR OPPONENT?

NO, JUSTICE.

YOU FILED A NOTICE OF SUPPLEMENTAL AUTHORITY?

NO, JUSTICE.

IT IS REALLY NOT APPROPRIATE . IT IS APPROPRIATE AF TER THIS ORAL ARGU MENT, FOR YOU TO FILE A SEP ARATE SUPPLEMENTAL AUTHORITY.

UNDER, YES , JUSTICE. UNDER THE STANDARDS FOR IMPOSING LAWYER SA NCTION , UNDER STANDA RD 9.2 , AGGRAVATION , THAT STANDARD STATES THAT ANY CONSIDERATIONS OR FACT OR S ARE PERMISSI BLE THAT MAY JUSTIFY AN INCREASE IN THE DISCIPLINE FOR AN ATTORNEY. SO IN THE REPORT OF REFEREE , THE REFEREE SPECIFICALLY FOUND THAT THAT , A LONG WITH OTHER INSTAN CES , G AVE HER A FLAVOR FOR THE CREDIBILITYOF THE RESP ONDENT , SO IT WAS NOT ONLY THE CO NDUCT CH ARGED IN THE CASE , BUT OTHER CONDUCT THAT CAME TO L IGHT DURING THE COURSE OF THE TRIAL THAT WAS, E ITHER , INTRODUCED AS EXHIBI TS O R TESTIMONY.

SO BECAUS E YOU WERE SAYING THERE WERE A LOT OF DIFFERENT MISREPRESENTATIONS , BUT WHAT YOU ARE REALLY SAYING IS THAT THE REFEREE , IN MAKING FINDINGS ON CREDIBILITY, LO OKED TO OTHER MISREPRESENTATIONS AND, ALSO , TOOK INTO ACC OUNT THE COURTS IN COLLAPSE OBSERVATIONS ABOUT MR. BROWN.

CORRECT .

CHIEF JUSTICE: I SEE YOURTIME IS UP. YOU MAY CONCLU DE.

THANK YOU. HER CONCLU SION WAS THAT , NOT ONLY THE RESPONDENT BUT HIS PARTNERS' TESTIMONY WAS INCREDIBLE AND UNWORTHY OFBELIEF.

CHIEF JUSTICE: HOW MUCH TIME, MARS HAL? THREE MINUTES.

CAN YOU HELP US CHRONOLOGICALLY .

YES, SIR.

WITH REFERENC E TO BOTH THIS EV ENT AND THE PRIOR DISCIPLINE AND THE FACTS UNDERLYING THE PRIOR DISCIPLINE, AS FAR AS WHEN THESE TWO MATTERS OCCURRED. CAN YOU HELP US WITH THAT.

WITH THE TIME LI NE ? YES, SIR. THIS TRAN SACTION BE GAN I N '95 , WITH THE FOL KS IN COLORADO. THE

BUT THE PLEDGING , AS FAR AS

THAT WAS IN ' 9 7.

THAT WAS IN ' 97.

THAT WAS IN '97.

PRIOR DIS CIPLINE WAS FOR EVENTS THAT OCCU RRED WHE N?

THE EVE NTS OCCURRED IN THE MID-NINE TIES , BUT IT WASN'T PROSECUTED BY THE BAR , UNTIL '98 OR '9 AND DIDN'T RESULT IN AN ORDER , UNTIL AFTER 2000 SOMETIME, S O THERE WAS NO , WHEN T HIS HAPPENED, THERE WAS NO PENDING DISCIPLINARY CASE. IF THAT HELPS YOU AT ALL.

WHAT , I AM CONC ERNED ABOUT, OF COURSE , YOU MENTIONED THE PRIOR DISCIPLINE, BUT IN PARAGRAPH 53 OF THE REFEREE'S ORDER REGARDING THE RESPONDE NT'S CREDIBILITY , SHE QU OTES F R OM THE TRIAL COURT IN COLORA DO AND SAID THAT THE COURT GOT A FLAVOR FRO M MR . BROWN DURING THE JURY INSTRU CTION CONFERENCE, WHEN BROWN AGREED OFF-THE-RECORD TO THE SLANDER OF T I TLE CONSTRUCTION, AND THEN OFF-THE-RECORD VOICED H ISOBJECTION TO THE INSTRUCTION. BROWN DID THE SAME THING REPEATEDLY ON THIS PROJECT. HE WOULD ORDER CHA NGES TO BE DONE IMMEDIATELY AND THEN WOULD DENY SO AFT ER THE WO RK HAD BEEN ACCOMPLISHED. IN TERM S OF TRYING TO PUT EVERYTHING INTO PERSPECTIVE , AND I WOULD AGREE IF THE FOUNDATION DOESN'T EXIST , THEN AL L OF THESE OTHER THI NGS ARE JUST DISTUR BING , AND, BUT , WHAT IS YOUR RESPONSE JUST ABO UT THE REFEREE USING , WAS , DID SHE IMPROPERLY OR PROPERLY U SETHAT?

I THINK IT IMPROPERLY INFLUENCED HER, AND I THINK SHE FAILED T O TA KE INTO CONSIDERATION WHAT THE JUDGE DID IN THIS CASE EARLY ON. HE ST RUCK EVERY WITNESS T HAT HILL VIEW HAD. HE TOOK A $147 ,000 JUDGMENT AND HE T URNED IT I NTO A $350,000 JUDGMENT. IT IS IN EA GLE COU NTY , COLORADO, AND IT IS AN EAGLE COUNTY CONTRACTOR, AND IF YOU LOOK AT THE TIME LINE , ONE OF THE TIME LINES THAT IS REALLY IMPORTANT IS THESE ARE ALL LOCAL LAWYERS IN DEN VER.MR. MEIR FILES HIS W RIT OF GARNISHMENT.

ARE YOU SAYING THAT MR . BROWN GOT HOMO TOWN - - HOMETOWNED? IS THAT W A UR SAY SOMETHING .

IS THAT WHAT YOU ARE SAYING?

I AM SAYING IT IS PLACES THAT ARE HOME AND PL ACES WHERE I HAVE BEEN .

BUT ARE YOU SAYI NG THAT IS, AS FAR AS PUTTING U P THE CD, AS FAR AS THE LIEN WAS CONCERNED, AND THE FACT OF, ALSO, PLEDGING THE SAME $420,000 TO THE LAW FIRM , OCCURRED WITHIN A WEEK OF EACH OTHER.

YES, SIR.

SO THERE WASN'T ANY LACK OF UNDERSTANDING ON MR . BROWN'S PART THAT HE WAS DOUBLE PLEDGING THIS MONEY ! AND THAT, TO ME , IS WHERE THE NUT OF THIS COCO NUT D OES LIE, THAT , CAN WE CON DONE A LAWYER IN WHAT IS ABSOLUTELY A LE GAL TRANSACTION

A LEGAL TRAN SACTION.

A LEGAL TRANSACTION, FROM THE STANDPOINT OF BEING A LAWYER AC TING , DEALING WITH HIS LAW FIRM, AND, ALSO , HOLDING HIMSELF OUT AS THE REASON THAT THIS BONDING COMPANY CAN TRUST HIM I S BECAUSE HE IS A LAWYER?

I, THE RECORD IS CERTAINLY DOESN'T SUPPORT THAT, THAT HE SAI D YOU C ANTRUST ME

BECAUSE I A M A LAWYER. THEY KNEW HE WAS A LAWYER, BUT YOU HAVE TO LOOK AT HIS CONDUCT AFTER THE SEC URITY AGREEMENT WITH THE FIRM. THEY DID NOT FILE THAT. THEY DID NOT PERFECT THAT SO-CALLED SECURITY INTEREST AT ALL, UNTIL, O N AP RIL 30 , A WRIT OF GARNISH MENT WAS FILED BY THE LAWYER FOR T HEDEVELOPER, AGAINST THE CD , APRIL 30 OF '9 9. THE SAME DAY, APRIL 30 OF '99, FOR THE FIRST TIME , PIONEER FILES THEIR UC C. THIS I S AFTER FINE EAR HAS MADE PIONEER , E X CUSE M E,THIS IS AFTER HE MADE HIS DEMAND OPINE EAR AND TH EY ARE TALKING ABOUT PA YING THE JUDGMENT. IT IS CLEAR FROM THE RECORD IF YOU READ THE RECORD, THAT WHAT F EELY WAS TRYING TO DO IS GET PAID BY PIONEER AND, ALSO, ATTACH THAT, WHAT IS LEFT OF THE CD FOR ITS ATTORNEYS FEES CLAIM, AND THEY TESTIFIED AS SUCH . IT LOOKS LIKE THEY WERE IN CAHOOTS ON THAT IS SUE. THEN, O N MAY 7 FOR THE FIRST TIME, A WEEK LATER , WHEN MR . CRAINBUELL SEES WHAT ISGOING ON, HE FILES HIS UCC FILING TO TRY TO PRO TECT THE CD AGAINST V EELY GETTINGMORE THAN THE JUDGMENT AMOUNT. FIVE DAYS AFTER THAT , IT BECOMES CLEAR O F THE INSIDE JOB THAT IS GOING ON, WHEN PIONEER PAYS VE ELY , $330,000.

YOU SAID THERE WAS NO REFERENCE OR PROOF THAT PIONEER EVER FILED THAT APRIL

IT IS IN THE RECORD .

IT IS IN THE RECORD?

Y ES, SIR. IT IS I N THE RECORD.

THE FINDING ON PARAGR APH 41 IS THAT THAT N EVER WAS DEMONSTRA TED.

I THINK THAT IS FLORI DA BAR'S EXHIBIT 2 4 AND T HEREIS AMPLE REFERENCE TO IT IN THE TESTIMONY OF THE WITNESSNESSES. IT CLEARL Y WAS FILED ON APRIL 30.

CHIEF JUSTICE: ANYBODY ELSE HAVE QUESTIONS ON THE FACTS OF THIS ? JUSTICE BELL? DID YOU CONCLU DE? JUSTICE BELL? OKAY. YOU MAY CONC LUDE.

THANK YOU .

CHIEF JUSTICE: ALL RIGHT. THE COURT WILL TAKE ITS MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RI SE.