Amendments to Florida Rules of Civil Procedure

MARSHAL: HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW FLEER -- DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT. WE HAVE GOT A SPECIAL GROUP OF GUESTS WITH US THIS MORNING. THE STUDENTS FROM THE SAFETY PATROL OF THE PORT SALERNO ELEMENTARY SCHOOL, ESCORTED BY THE ASSISTANT PRINCIPAL OF THE SCHOOL, MR. LARRY GREEN. MR. GREEN AND STUDENTS, WELCOME TO THE FLORIDA SUPREME COURT. WE HAVE AN INTERESTING DOCKET OF CASES THIS MORNING, WHICH DEAL WITH COURT PROCEDURES, AND I KNOW THAT THE LAWYERS THAT ARE HERE TODAY, TO DISCUSS THOSE CASES, ARE GOING TO BE ESPECIALLY EDUCATIONAL ABOUT OUR RULES. SO WITH THAT, WE WILL GO RIGHT TO THE FIRST CASE. AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE. IF COUNSEL IS READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS DOMINICK MacKENZIE, AND I APPEAR BEFORE YOU TODAY, AS THE CURRENT CHAIR OF THE RULES OF CIVIL PROCEDURE COMMITTEE, AND THE COMMITTEE RESPECTFULLY HAS FILED A BIENNIAL REPORT AND RESPECTFULLY SUBMITS THAT ITS PROPOSED RULE CHANGES SHOULD BE ADOPTED BY THIS COURT. IN SHORT, THE COMMITTEE PROPOSED CHANGES IN THREE SPECIFIC CATEGORIES RELATING TO THE RULES OF CIVIL PROCEDURE. THE FIRST AMENDMENTS TO THE RULES WERE DESIGNED TO ACCOMPLISH SUBSTANTIVE CHANGES CONSISTENT WITH RECENT COURT DECISIONS, IN AN EFFORT TO, PERHAPS, CODIFY OR REFLECT RECENT, OR, EXCUSE ME, COURT DECISIONS FOR STATUTORY CHANGES. THE SECONDARY OF RULES WERE DESIGNED TO ACCOMPLISH SUBSTANTIVE CHANGES TO THE RULES PROPOSED BY THE COMMITTEE, ITSELF. THOSE TWO SPECIFIC RULES WERE RULE 1.370, RELATING TO REQUESTS FOR ADMISSIONS, AND 1.380, RELATING TO SANCTIONS FOR REQUESTS FOR ADMISSIONS, AND THEN THE LAST AREA OF RULES WERE DESIGNED TO ACCOMPLISH EDITING CORRECTIONS TO PROPERLY UPDATE REFERENCE TO APPLICABLE AUTHORITIES OR REFERENCES.

REGARDING THE FIRST AREA I THINK YOU ARE REFERRING TO RULE 1.070-J.

YES, SIR.

CAN YOU ADDRESS A CONCERN I HAVE THAT, WHEN YOU, I THINK YOU ADDED SOME LANGUAGE, BUT THEN YOU DELETED SOME LANGUAGE THAT, I THINK, THIS COURT HAD ADDED IN TORE TOUR A, AND BY -- IN TORTURRA, AND BY DELETING THAT LANGUAGE, IT SEEMS TO IMPLY THAT, WHEN AN AMENDMENT IS FILED, ALL PARTIES HAVE TO BE SERVED, INCLUDING AN ORIGINAL DEFENDANT.

I BELIEVE THAT IS A VALID CONCERN, YOUR HONOR, AND IF I MAY, PERHAPS, ANSWER YOUR QUESTION BY WAY OF HISTORY, THIS RULE WAS BROUGHT TO THE COMMITTEE FROM THIS COURT, IN RESPONSE TO THE TORTURRA VERSUS WILLIAMS DECISION, AND WITH ALL DUE CANDOR, I BELIEVE THAT THE COMMITTEE MAY HAVE LOST SIGHT OF WHAT THIS COURT ASKED IT TO DO IN TRYING TO ACCOMPLISH THE DIFFICULT TASK THAT IS PRESENTED BY THESE

PARTICULAR RULES OR THE EFFECTS OF THE STATUTE OF LIMITATIONS. IN ESSENCE, BY WAY OF HISTORY, LET ME JUST EXPLAIN TO YOU THAT THE COMMITTEE, IN JUNE OF 2000, MARJORIE GADARIAN GRAHAM ANNOUNCED THAT SHE WOULD BECOME THE CHAIR OF A COMMITTEE TO LOOK INTO THE STATUTE OF LIMITATIONS, SPECIFICALLY WITH RESPECT TO JUSTICE PARIENTE'S, I THINK, CONCURRING OPINION IN THE TORTURA CASE. THE LANGUAGE THAT YOU REFERENCE, JUSTICE CANTERO, WAS TAKEN OUT, BECAUSE WE THOUGHT THE RULE DIDN'T RELATE TO THE PLEADING REQUIREMENTS FOR THE AMENDMENT COMPLAINT, SO THE LANGUAGE THAT WAS ACTUALLY REMOVED FROM THAT RULE WAS LANGUAGE ADDRESSING THE SUFFICIENCY OF AN AMENDED COMPLAINT, AND IT WAS DECIDED, IN THE SUBCOMMITTEE, THAT THE BETTER PRACTICE, WE THOUGHT, FOR PURPOSES OF CONSISTENCY AND CLARITY IN THE RECORD, WAS NOT TO ADDRESS THE SUFFICIENCY OF THE PLEADING BUT TO SAY THAT IT SHOULD BE FILED WITH THE MOTION, AND WHAT THE COMMITTEE THEN DID WAS DECIDED, IN ORDER TO BE EFFECTIVE, THERE NEEDED TO BE A REFERENCE TO 1.190, SO THAT THE TWO RULES WOULD BE CONSISTENT. IN ESSENCE IT WOULD BE CLEAR THAT, WHEN YOU FILE A MOTION FOR LEAVE FOR AN AMENDED COMPLAINT, YOU MUST FILE THE MOTION.

IS THAT LANGUAGE, DID YOU PUT IT IN THE, IN ANOTHER PART OF THE RULE? IT SEEMS TO ME THAT IS PRETTY IMPORTANT, ABOUT THESE NEW PARTIES.

THAT WAS REFERENCED IN RULE 1.190 AND IN THE COMMITTEE NOTE, THE COMMITTEE NOTE REFERENCE UNDER 1.070, SAYS "PLEASE SEE RULE 1.190-A."

I THINK WHAT JUSTICE QUINCE IS ASKING IS, DID YOU REFER TO THE FACT ANYWHERE ELSE, THAT YOU ONLY HAVE TO SERVE NEW PARTIES. YOU DON'T HAVE TO RESERVE THE ORIGINAL DEFENDANT.

NO, YOUR HONOR. ABOUT TWO O'CLOCK LAST NIGHT, I REALIZED THAT WHAT WE SHOULD HAVE DONE IN THAT RULE WAS PERHAPS PUT SOMETHING WITH RESPECT TO NEWLY-IDENTIFIED PARTIES, IN THE LANGUAGE OF THE RULE, SO AS TO MAKE IT CLEAR.

SO YOU AGREE THAT WE SHOULD NOT ADOPT THIS PROPOSAL AS WRITTEN NOW.

I WOULD CANDIDLY AGREE WITH YOU IN THAT RESPECT, THAT THE RULE PROBABLY NEEDS TO BE CHANGED TO REFLECT THAT SPECIFIC CONCERN, IF IT IS A CONCERN OF THE COURT.

IF WE JUST ADDED AGAINST ANY NEW PARTIES, 100 DAY SERVICE FOR AMEND COMPLAINTS OF ANY NEW PARTIES. DOES THAT SOLVE THE PROBLEM?

AGAIN, WE TOOK OUT THE NEW PARTY REFERENCE, AND IT SHOULD PROBABLY BE PUT BACK IN FOR CLARITY.

I DON'T KNOW HOW YOU ARE GOING TO DIVIDE UP YOUR TIME, BUT I HAVE ANOTHER RULE THAT WE GET A SUBJECT OF COMMENT FOR LITIGATION, 1.3442, AND IT IS A QUESTION WHERE YOU ARE SAYING THAT A JOINT PROPOSAL NEED NOT STATE THE APPORTIONMENT, IF THE PARTIES ARE ALLEGED TO BE VICARIOUSLY, CONSTRUCTIVELY, DERIVETIVELY, OR TECHNICALLY LIABLE. WE JUST CAME OUT WITH A CASE, WILLIS SHAW EXPRESS, AND THE USE OF THE WORD "DER I HAVETIVELY" CONCERNS ME -- DRIFTIVELY" CONCERNS ME, BECAUSE IT SEEMS THAT YOU WOULD BE LIABLE WITH AN EMPLOYER/EMPLOYEE, BUT THE QUESTION OF USING THE WORD DERIVATIVE, AND FOR EXAMPLE, WILL THE HUSBAND AND WIFE BE ABLE TO MAKE A JOINT OFFER OR A JOINT OFFER CAN BE MADE AGAINST THEM?

I THINK THAT THE PURPOSE OF THE AMENDMENT TO RULE 1.442 IS, AS BEST AS I CAN TELL FROM MY MINUTES AND MY NOTES, THAT WE WERE TRYING TO REFLECT THE LANGUAGE IN THE DANNER CONSTRUCTION CASE, AND AS WELL AS THE, THERE IS, THE SAFE LIGHT CASE, I BELIEVE, WHICH BASICALLY THE COMMITTEE FOUND THAT THE COURTS, THROUGHOUT THE STATE, IN ALL

FIVE DISTRICTS, RECOGNIZED THAT VICARIOUS LIABILITY SHOULD BE AN EXCEPTION TO THE APPORTIONMENT REQUIREMENT UNDER THE RULE. TO ANSWER YOUR QUESTION SPECIFICALLY, BECAUSE WE HAVE RECEIVED NUMEROUS COMMENTS FROM THE PUBLIC CONCERNING THIS PARTICULAR RULE, IT WAS THE COMMITTEE'S INTENT, AS FAR AS I CAN INTERPRET IT, THAT THE RULE 1.442 IS DESIGNED TO REQUIRE APPORTIONMENT, WHEN IT RELATES TO SEPARATE AND DISTINCT CLAIMS THAT HAVE SEPARATE AND DISTINCT VALUES. IF IT IS A SEPARATE CLAIM WITH A SEPARATE VALUE, NEEDS TO BE APPORTIONED, SO YOUR SPECIFIC QUESTION, A HUSBAND AND WIFE, SUCH AS THE BAHER CASE, IF I AM PRONOUNCING IT CORRECTLY, OR THE HINGSTON CASE, THIS COURT ADDRESSED THE RULE PRIOR TO THE JANUARY 1, 1997 AMENDMENT, BUT THE COMMITTEE'S INTENT WAS TO REFLECT THE FACT THAT, IF IT IS A SEPARATE AND DISTINCT CASE, AND THE GATES VERSUS FOLEY CASE, JUSTICE ADKINS, RECOGNIZED THAT A CONSORTIUM CLAIM FOR A WOMAN IS, IN FACT, A LEGALLY SEPARATE AND DISTINCT CLAIM. IT REQUIRES AND IT HAS A SEPARATE VALUE. IT REQUIRES AN APPORTIONMENT. THE DERIVATIVE LANGUAGE, QUITE FRANKLY, I DON'T THINK WAS SPECIFICALLY CONFRONTED BY THIS COMMITTEE. THE COMMITTEE SIMPLY WAS TRYING TO REFLECT THE DANNER CONSTRUCTION HOLDING.

DO YOU THINK THE RULE IS, HAS SUFFICIENT CLARITY TO DEAL WITH CIRCUMSTANCES AND LITIGATION INVOLVING VICARIOUS CLAIMS THAT ALSO HAVE DIRECT CLAIMS? OFTEN YOU WILL HAVE THE ALTERNATIVE PLEADING, THAT A PARTY HAS VACK AIRS RESPONSIBILITY, BUT THEN IN A DIFFERENT COUNT, YOU MAY HAVE -- PARTY HAS VICARIOUS RESPONSIBILITY, BUT THEN IN A DIFFERENT COUNT, YOU HAVE, IS A COURT CLEAR UNDER THAT KIND OF SITUATION, UNDER THOSE KINDS OF CIRCUMSTANCES, SO THAT WE WON'T GET BACK INTO, THIS RULE CREATES MORE LITIGATION THAN IT APPEARS TO SOLVE, SO --

WITH ALL DO RESPECT, I THINK THE RULE IS CLEAR ENOUGH, BECAUSE THE RULE APPLIES, AND A PORTION OF IT THAT HAS NOT BEEN AMENDED FOR SOME TIME, THAT THE OFF REMEMBER CAN ESTABLISH -- THE OFFERER CAN ESTABLISH THE TERMS THAT IT CAN MAKE, AND IF YOU ARE CONFRONTED WITH AN OUTLINE, YOU CAN SPECIFY THE TERMS THAT YOU WANT. THERE WAS A COMMENT FROM A PUBLIC MEMBER, ABOUT WHETHER THERE SHOULD BE, IF YOU MAKE IT A CONDITION OF YOUR SETTLEMENT TO HAVE A PARTY RELEASE ITS CONSORTIUM CLAIMS, EXCUSE ME, NOT CONSORTIUM CLAIMS, CONTRIBUTION OR INDEMNIFICATION CLAIMS, BECAUSE THERE IS A PROVISION IN THIS RULE THAT SAYS IT IS WITHOUT PREJUDICE TO CONTRIBUTION OR INDEMNIFICATION. AGAIN, I THINK IT IS UNDERSTOOD IN THE RULE, IN THE FIRST PART OF THE RULE, THAT IF YOU, AS THE PERSON MAKING THE PROPOSAL FOR SETTLEMENT, WOULD LIKE TO SPECIFY THAT, IF YOU ARE GOING TO ACCEPT THIS PROPOSAL, YOU MUST WAIVE OR, WAIVE YOUR CONTRIBUTION OR INDEMNIFICATION CLAIM THAT, IS TAKEN CARE OF IN THE RULE. THE RULE ALLOWS YOU TO DO THAT, SO THAT IF YOU DON'T DO IT, IT IS WITHOUT PREJUDICE AS TO THOSE REMAINING CLAIMS, BUT I THINK THE RULE, AND I AM BEING VERBOSE, FORGIVE ME, SUFFICIENTLY IDENTIFIES AND GIVES THE PERSON MAKING THE PROPOSAL, SUFFICIENT GROUNDS TO, AND MR. EATON MADE A COMMENT, IN HIS COMMENTS, THAT A PERSON SHOULD BE THE MASTER OF HIS OWN OFFER. I THINK THE RULE ALLOWS YOU TO DO THAT, AND THE LANGUAGE IN THE RULE DOESN'T NEED TO BE AMENDED TO ACCOMPLISH THOSE PURPOSES. IF YOU WANT THE RULE TO WAIVE INDEMNIFICATION OR CONTRIBUTION FROM A PARTY, YOU SIMPLY STATE THAT THIS CLAIM SATISFIES THESE PARTICULAR ELEMENTS, INCLUDING CONTRIBUTION OR INDEMNIFICATION. IF YOU REMAIN SILENT, THEN THE RULE SAYS IT IS WITHOUT PREJUDICE AS TO THAT PARTICULAR ISSUE. IF I MAY --

LET ME ASK YOU ABOUT RULE 1.190, THE NEW SECTION THAT TALKS ABOUT PUNITIVE DAMAGES. DID THE COMMITTEE CONTEMPLATE THAT, WHENEVER YOU WANTED TO AMEND YOUR COMPLAINT TO ADD PUNITIVE DAMAGES, THAT THERE WOULD, IN FACT, BE A HEARING? BECAUSE IT TALKS ABOUT BEING SERVED AT LEAST 20 DAYS BEFORE THE DATE FIXED FOR THE HEARING.

I DON'T RECALL THE COMMITTEE SPECIFICALLY CONTEMPLATING WHETHER A HEARING WAS REQUIRED. MY NOTES REFLECT, AND I WAS THE SECRETARY ON THE COMMITTEE AT THE TIME,

AND I TRIED TO TAKE AS COPIOUS NOTES AS POSSIBLE, THAT THERE WAS A LARGE DISCUSSION, A VERY LENGTHY DISCUSSION, CONCERNING WHAT CONSTITUTED A PROFFER. AND I THINK THE COMMITTEE FOCUSED EXCLUSIVELY ON THE REQUIREMENTS OF A PROFFER AND UNDERSTOOD THAT THE EXTRASER -- THAT THE STRASSER VERSUS YALAMONKE CASE, IS NOT REQUIRED, HOWEVER IF YOU OFFERED AND IT TURNED INTO A HEARING, THE COMMITTEE THOUGHT, AND THE NOTE SPECIFICALLY REFERENCED THIS, THAT THE COMMITTEE THOUGHT, AS A MATTER OF DUE PROCESS, THAT THE PARTY WHO WAS PROFFERING THAT EVIDENCE MUST GIVE THE RESPONDING PARTY AT LEAST 20 DAYS TO KNOW WHAT EVIDENCE WILL BE PROFFERED. MR. FREED ENIS HERE -- MR. FREIDEN IS HERE, I THINK, ON BEHALF OF THE ACADEMY, AND PEFTH SEVERAL DISCUSSIONS THAT IT IS NOT ATTEMPTED TO CHANGE THE BURDEN OF PROOF IN THOSE TYPES OF SITUATIONS. THIS RULE IS NOT REQUIRING AN EVIDENTIARY HEARING. THIS RULE, IN ALL THAT I HAVE BEEN ABLE ABLE TO GLEAN, IT WAS MEANT TO CONFRONT A DUE PROCESS ISSUE THAT WAS CLAIMED BY JUDGE WHITMORE, IF I AM SAYING IT PROPERLY, IN THE BEVERLY HILLS CASE. BY WAY OF BACKGROUND, JUDGE WHITMORE WROTE HIS ORDER BEFORE THE APPELLATE COURT HAD ASKED US TO REVIEW THE ISSUE, SO WE HAD THIS ISSUE BEFORE IT CAME INTO THE APPELLATE COURT SYSTEM, AND ESSENTIALLY WE HAD A VERY LONG DISCUSSION, AND THE ONLY INTENT BEHIND THIS RULE WAS A DUE PROCESS STANDARD, IN ORDER TO ALLOW THE PARTIES TO KNOW WHAT EVIDENCE WAS GOING TO BE PROFFERED.

DID YOU THEN ADDRESS THE CONCERN THAT THE, REQUIRING THE FILING OF THE PROFFER WITH THE MOTION, IF THE MOTION HAD TO BE SET MONTHS AHEAD, THAT YOU KNOW, UNLIKE WITH THE SUMMARY JUDGMENT RULE, YET YOU REALLY HAVE 20 DAYS BEFORE THE HEARING, SO FILE WHAT YOU ARE GOING TO FILE, AND THEN THERE IS SOME COUNTERREQUIREMENT OF, IF THERE IS SOMETHING ELSE THAT THE DEFENDANT IS GOING TO USE, THAT THAT BE FILED. HAS COMMITTEE CONSIDERED THAT THOSE ARE, MAYBE, CONSTRUCTIVE SUGGESTIONS THAT WOULD MAKE THE RULE MORE, DESIGNED TO DO WHAT YOU ARE STATING YOU INTENDED TO DO?

IF I UNDERSTAND YOUR QUESTION CORRECTLY, THE COMMITTEE SPECIFICALLY, AND THE SUBCOMMITTEE CHAIR SPECIFICALLY ADOPTED RULE 1.510 AS THE BASIS FOR ALLOWING DUE PROCESS. AND ESSENTIALLY, WHAT THE SUBCOMMITTEE CHAIR DID, WHEN SUGGESTING THE RULE BE PASSED IN CONCEPT, WAS TO SAY LET'S BORROW THE CONCEPT UNDER RULE 1.510. THAT IS WHERE THE 20-DAY REQUIREMENT CAME FROM AND THAT IS WHERE THE "STATED WITH PARTICULARITY" REQUIREMENT COMES FROM. THERE WAS A DISCUSSION THAT SAID THAT RULE 1.100 INDICATES THAT EVERY MOTION NEEDS TO BE MADE IN A SHORT AND PLAIN STATEMENT AND THEREFORE THERE DIDN'T NEED TO BE PARTICULARITY, BUT THE MEMBERS OF THE GENERAL COMMITTEE INSISTED THAT IT SHOULD BE STATED WITH PARTICULARITY, BECAUSE OF THAT CONCERN.

I GUESS THE CONCERN, THE LAST SENTENCE SAYS A MOTION TO AMEND ANY SUPPORTING EVIDENCE SHALL BE SERVED AT LEAST 20 DAYS, SO YOUR INTENT WASN'T THAT THE SUPPORTING EVIDENCE HAD TO BE FILED AT THE TIME OF THE MOTION TO AMEND? OR WAS IT TO BE FILED TOGETHER?

THE, THE INTENT OF THE COMMITTEE WAS THE PARTY RESPONDING FOR, TO A MOTION FOR LEAVE TO AMEND TO ADD PUNITIVE DAMAGES, SHALL HAVE AT LEAST 20 DAYS TO KNOW WHAT EVIDENCE WILL BE PROFFERED, BEFORE THE HEARING ON THE MOTION FOR LEAVE TO AMEND. AGAIN, THE INTENT WAS SIMPLY DUE PROCESS. IN THIS CASE, THE FACTS OF THE CASE, THERE WAS DISCLOSURE ON THE DAY OF THE HEARING, AND THE APPELLATE COURT SAID THAT THAT PROBABLY SATISFIED DUE PROCESS, BECAUSE THERE WAS NO STANDARD, ASKED FOR THE COMMITTEE TO TRY TO APPLY A STANDARD, AND THE COMMITTEE FELT THAT THE BEST STANDARD TO APPLY WOULD BE 20 DAYS, SIMPLY 20 DAYS PRIOR TO A PROFFER BEING MADE. THE OTHER SIDE SHOULD KNOW WHAT IS GOING TO BE MADE AGAINST IF, IN ORDER TO -- AGAINST IT, IN ORDER TO PROPERLY REBUT, IF IT WANTS TO REBUT. SIMPLY THAT WAS THE INTENT OF THE RULE. NOTHING ELSE WAS INTENDED, IN TERMS OF CHANGING THE STANDARD

APPROVED, CHANGING THE BURDEN, ANYTHING OF THAT NATURE. IT WAS STRICTLY DUE PROCESS OF PRACTICAL APPLICATION.

CHIEF JUSTICE: THE MARSHAL HAS TURNED ON THE LIGHT TO REMIND YOU OF THE TIME YOU WANTED TO SAVE FOR REBUTTAL, SO IF YOU WANT TO PAUSE NOW.

I WILL SIT DOWN. THANK YOU.

CHIEF JUSTICE: MR. GRAVES. YOU ALL HAVE TEN MINUTES EACH?

YES, SIR.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. IF IT PLEASE THE COURT, WHAT I HOPE TO DO IS TO CONVINCE YOU, IF YOU ARE NOT ALREADY CONVINCED, THAT REQUEST FOR ADMISSIONS ARE PERHAPS THE MOST POWERFUL PRETRIAL DISCOVERY TOOL THAT WE HAVE. AND IF ANYTHING, RATHER THAN LIMITING THE NUMBER OF ADMISSIONS PERMITTED TO THE PEOPLE OF OUR STATE TO GET AT THE TRUTH, BEFORE THEY HAVE TO GO TO THE EXPENSE OF TRIAL, THAT WELL ASK YOU TO -- THAT WE WOULD ASK YOU TO CLARIFY THE CONFUSION THAT EXISTS OVER THE USE OF ADMISSIONS, GIVE US A CLEARER IDEA OF WHERE THE LINE IS THAT WE SHOULD NOT CROSS, AND DEAL WITH THE FEES ISSUE THAT THE BAR COMMITTEE IS CONCERNED ABOUT, WHICH I CAN SEE THAT IS A LEGITIMATE PROBLEM, BECAUSE YOU HAVE THE SITUATION --

TELL US WHERE YOU ARE NOW.

WHERE WE ARE NOW IS THAT WE LAWYERS HAVE TO DEAL WITH THE RULES AS THEY ARE WRITTEN, AND RULE 1.280, OF COURSE, SAYS THAT I AM ALLOWED TO GET DISCOVERY OF ANY MATTER THAT IS NOT PRIVILEGED, BY SEVERAL DIFFERENT METHODS, INCLUDING REQUESTS FOR ADMISSIONS. WHEN WE TURN TO THE RULE, ITSELF, IT SAYS THAT I AM ALLOWED TO REQUIRE THE OTHER SIDE TO ADMIT THE TRUTH OF ANY MATTER WITHIN THE SCOPE OF 1.280, AND THAT IS A VERY POWERFUL THING TO BE ABLE TO DO. IN FACT, IT IS IN THE FORM OF A LEADING QUESTION, WHICH I CANNOT DO WITH INTERROGATORIES. AND --

COUNSEL, ARE YOU SUGGESTING THAT THERE SHOULD BE NO LIMIT ON THE NUMBER OF ADMISSIONS IN THE RULE?

NO LIMIT ON THE NUMBER, YOUR HONOR, BUT RATHER, A LIMIT ON THE USE. YOU KNOW, THERE ARE TWO KINDS OF LAWYERS. PLEASE FORGIVE ME. THERE ARE THE LAWYERS WHO SEEK THE TRUTH AND THE LAWYERS THAT SEEK TO HIDE IT. I CAN'T THINK OF A BETTER WAY TO GET AT THE TRUTH THAN TO REQUIRE THE DEFENDANT OR THE PLAINTIFF IN A CASE, TO ADMIT THAT HE OWNED THE VEHICLE. HE WAS DRIVING THE VEHICLE AT THE TIME OF THE ACCIDENT OR WHATEVER IT MIGHT BE. THESE ARE NOT COMPLICATED THINGS. THEY ARE VERY EFFICIENT. IT IS EITHER YES OR NO. IT DOESN'T TAKE FOREVER TO ANSWER.

THE PROPOSAL, THE BAR'S PROPOSAL DOESN'T ELIMINATE THE USE OF REQUESTS FOR ADMISSIONS. IT JUST SAYS THEY ARE LIMITED TO 30, UNLESS YOU CAN STIPULATE TO MORE OR YOU GET PERMISSION OF THE COURT. WHAT IS WRONG WITH THAT?

WELL, ONE OF THE THINGS THAT IS WRONG WITH IT, YOUR HONOR, IS THE REASONS GIVEN. THE REASONS GIVEN DON'T MAKE SENSE TO ME, AND FORGIVE ME, BUT MY COLLEAGUES IN STEWART ACTUALLY CHUCKLED. EVERYBODY IN MY OFFICE THOUGHT IT WAS FUNNY, AND THE PRESIDENT OF THE LOCAL BAR THOUGHT IT WAS SOMEWHAT RIDICULOUS THAT WE WOULD ARGUE TO REDUCE THE NUMBER OF ADMISSIONS BECAUSE OH, MY GOODNESS, PEOPLE ARE USING THEM FOR DISCOVERY OR TO PROVE THE ELEMENTS OF THEIR CASE! WELL, THAT IS WHAT IT IS FOR. THE

RULE SPECIFICALLY STATES, IF I MAY, THE PURPOSE OF THE RULE IS TO EX-PEDITE THE TRIAL OF THE ACTION, RELIEF THE PARTIES OF THE TIME AND EXPENSE ENTAILED IN PROVE GOT GENUINENESS OF DOCUMENTS OR THE TRUTH OF MATTERS OF FACT WHICH CAN BE ASCERTAINED BY REASONABLE INQUIRY.

LOOK, I AGREE WITH YOU COMPLETELY THAT THAT IS ONE OF THE PURPOSES OF REQUESTS FOR ADMISSIONS.

SURELY.

IT IS ALSO THE PURPOSE OF INTERROGATORIES, BUT WE LIMIT INTERROGATORIES TO 30, UNLESS YOU GET PERMISSION OF THE COURT.

BUT THE TIME REQUIRED TO ANSWER ADMISSIONS IS NOTHING COMPARED TO THE TIME TO ANSWER INTERROGATORIES.

BUT WE ARE NOT TALKING ABOUT TIME. WE ARE TALKING ABOUT NUMBER. SO WHAT IS WRONG WITH SAYING 30 OR 50 OR 60, IF THAT IS THE PROBLEM, BUT HAVING SOME LIMIT, UNLESS YOU CAN STIPULATE WITH OPPOSING COUNSEL OR GET PERMISSION OF THE COURT.

WHAT I WOULD ASK THE COURT TO CONSIDER WOULD BE A RULE OR AN ORDER THAT WOULD CLARIFY, FOR US, WHAT IS EXCESSIVE. NOT IN TERMS OF A FIXED NUMBER. FOR EXAMPLE I HAVE A CASE NOW IN WEST PALM BEACH THAT INVOLVES SIX DEFENDANTS, FOUR INDIVIDUALS, TWO CORPORATIONS, THE THEFT AFTER VERY LARGE INVESTMENT BUSINESS. VERY COMPLEX ISSUES, AND I NEED MORE THAN THE 30 ADMISSIONS, BUT THE COURT MAY BE DISINCLINED TO CREATE ANYMORE WORK FOR ITSELF THAN NECESSARY. WHAT I WOULD ARGUE IS, IF SOMEONE FILES MORE ADMISSIONS THAN NECESSARY, WELL, THEN, THE COURT COULD RULE THAT THAT WAS SOMETHING THAT MIGHT BE DEALT WITH. BUT THE ARGUMENT HERE THAT --

WHY ISN'T THE ANALOGY TO THE INTERROGATORIES, IS IT CORRECT THAT THE INTERROGATORY RULE LIMITS THE NUMBER OF INTERROGATORIES TO 30, UNLESS THERE IS A STIPULATION OR PERMISSION BY THE COURT. IS THAT CORRECT?

YOUR HONOR, INTERROGATORIES ARE TYPICALLY DIRECT QUESTIONS THAT REQUIRE LISTS OF INFORMATION, AS YOU KNOW, THE NAME AND ADDRESS AND SO FORTH AND SO ON, AND SO FORTH AND SO ON, VERY DETAILED ANSWERS, RATHER THAN YES OR NO. IT IS EITHER TRUE OR IT IS FALSE. IT IS NOT AS COMPLICATED AS AN INTERROGATORY.

BUT IT IS MUCH MORE SOPHISTICATED THAN THAT, IS IT NOT? BECAUSE OF THE CONSEQUENCES OF AN ANSWER TO REQUEST FOR ADMISSION, AS YOU SAY.

YES, SIR.

CONSEQUENCES CAN BE DRAMATIC IN THAT RESPECT. BUT WHY NOT, IF YOU ARE GOING TO HAVE THAT REQUIREMENT IN THE INTERROGATORIES RULE, TRIAL JUDGES NOW JUST COMPLAIN OF THE EXCESSIVE AMOUNT OF TIME THAT THEY HAVE TO SPEND POLICING THE DISCOVERY PROCESS IN THE CIVIL COURTS.

YES, SIR.

I THINK THAT PERHAPS THAT IS BECAUSE A NUMBER OF LAWYERS, INCLUDING SOME THAT I HAVE HAD TO DEAL WITH, CITE FROM THE 1971 CITY OF MIAMI VERSUS BELL CASE THAT, HAS BEEN CHANGED. AFTER THE RULES AMENDMENT IN '72, IT WAS NO LONGER OBJECTIONABLE TO ASK FOR ADMISSIONS OF ELEMENTS THAT GO TO THE HEART OF THE CASE. THAT WAS CHANGED. IT WAS DONE AWAY WITH. THERE IS A PROGENY OF CASES THAT FOLLOWS THAT. THERE IS A

RECENT CASE, THE ARENA PARKING CASE, WHERE THE COURTS HAVE SAID, NO, THIS IS OKAY. YOU CAN DO THIS, AND WHY SHOULDN'T WE BE ABLE TO DO IT? WHY SHOULD I NOT BE ABLE TO CAUSE THE OTHER PARTY TO ADMIT FACTS BEFORE TRIAL RATHER THAN PUTTING THESE POOR PEOPLE THAT CANNOT AFFORD LEGAL FEES, TO GO TO TRIAL.

THAT IS IN THE INTERROGATORIES, DOES IT NOT?

NO, SIR. A REQUEST FOR ADMISSION IS A LEADING QUESTION. AN INTERROGATORY IS NOT. I CAN, IT IS IN THE SAME FORM AS A LEADING QUESTION. WE ALL KNOW THAT IS THE MOST POWERFUL WAY TO GET AT THE TRUTH. ALL I WANT TO DO IS TO BE ABLE TO GO AFTER BAD PEOPLE WHO HAVE DONE BAD THINGS, MAKE THEM ADMIT THAT THEY HAVE DONE THEM, BEFORE I HAVE DRAINED MY CLIENTS' POCKETS DRY. SO WE GET SOME CLARIFICATION FROM THE COURT AS TO WHAT IS EXTREME, WHAT IS EXCESSIVE, RATHER THAN LIMITING THIS VERY POWERFUL DUE PROCESS RIGHT THAT BELONGS TO THE PEOPLE OF THE STATE OF FLORIDA.

ISN'T IT EXCESSIVE, THOUGH, VIRTUALLY -- ISN'T THE TERM EXCESSIVE, THOUGH, VIRTUALLY ALWAYS GOING TO TERM ON THE INDIVIDUAL CIRCUMSTANCES OF THE CASE?

I WOULD SUGGEST THAT PROPER USE OF ADMISSIONS COULD PROBABLY SAVE THE STATE MILLIONS OF DOLLARS BY GETTING CASES SETTLED BEFORE TRIAL, AND THAT IS JUST ONE MORE PURPOSE AND TO ADD ONE MORE THING, THE RULE, COMMENT SAYS ONE PARTY MAY NOT OBCONTINUEATELY PUT THE OTHER PARTY TO HIS TRUTH, AND I WOULD SUGGEST THIS IS COMMONPLACE, AT LEAST IN THE FOURTH DCA WHERE I PRACTICE. SO IT IS COMMONPLACE.

THERE HASN'T BEEN ANOTHER?

THERE HASN'T BEEN BEFORE THIS AND I DON'T SEE THAT THERE SHOULD BE AFTER THIS, AND ABOVE ALL, I WOULD ASK THE COURT THAT, IF YOU ARE INCLINED TO LIMIT IT, THEN REQUIRE THE RULES COMMITTEE TO GIVE AWE BETTER EXCUSE THAN SOME PEOPLE ARE USING IT FOR DISCOVERY, BECAUSE I HAVE THE BOOK, AND THE BOOK SAYS THAT IS WHAT IT IS FOR. THAT IS NOT A GOOD REASON TO AMEND IT. IF YOU WANT TO AMEND IT FOR SOME OTHER REASON, LET MEMCOME UP WITH A BETTER REASON. THANK YOU, SIR.

CHIEF JUSTICE: MR. FREIDEN.

MAY IT PLEASE THE COURT. PHILLIP FREIDEN ON BEHALF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS. GOOD MORNING. I RISE TO SPEAK AGAINST THE WORD RING OF RULE 1.190 AS PROPOSED. -- I RISE TO SPEAK AGAINST THE WORDING OF RULE 1.190 AS PROPOSED. FIRST OF ALL, WITH RESPECT TO WHERE MR. MacKENZIE AND I AGREE AND DISAGREE AS TO ALL OF THIS AND AS HE STATED, IT WAS NOT, AS HE STATES I WAS NOT ON THE COMMITTEE. IT WAS NOT THE COMMITTEE'S INTENT TO REQUIRE AN EVIDENTIARY HEARING, NOR WAS IT THE COMMITTEE'S INTENT TO REQUIRE, TO CHANGE THE BURDEN OF PROOF. I SUBMIT THAT I THINK THE RULE, AS PROPOSED, DOES EXACTLY THAT. AND I THINK THAT IS THE PROBLEM. THE, TRYING TO CONFRONT DUE PROCESS IS, OF COURSE, MARCH TORTIOUS AND A GOOD CONCERN, BUT THIS RULE, AS WRITTEN, AND I BREAK IT DOWN INTO THREE SECTIONS, IS AN INVITATION TO MAKING A RATHER SIMPLE PROCESS INTO A VERY COMPLICATED ONE. I FIRST WOULD AT LEAST ANECDOTALLY POINT OUT THAT, OTHER THAN THE MEEKS CASE AND JUDGE ALTENBERND'S CONCERNS, I AM UNAWARE THAT MAY NOT BE VALID, BUT I AM UNAWARE OF ANY PARTICULAR PROBLEM WITH THIS RULE THAT HAS EXISTED, NOR CAN I DISTINGUISH IT FROM NUMEROUS OTHER SITUATIONS IN WHICH THERE IS PRESENTLY NO RULE THAT REQUIRES SERVICE OF ANY PAPERS BEFORE A HEARING. JUST OTHER DAY I WAS IN A MOTION FOR A NEW TRIAL, AND IN MY ARGUMENT I WAS HANDED A MEMO OF LAW.

WE SHOULD HAVE A RULE FOR ALL PURPOSES.

I WAS AFRAID THAT THEY WOULD COME UP, IF I BROUGHT THIS YOU MEAN, BUT I THINK THAT WOULD -- THIS UP, BUT I THINK THAT WOULD GET US THROUGH A FEDERAL COURT SYSTEM, AND TO ME THAT IS BEING HANDLED BY CIRCUIT JUDGEORS TRIAL JUDGES SINCE THE BEGINNING, WITH A MIX OF COMMON SENSE AND PROFESSIONISM. I CAN'T IMAGINE WHY A CIRCUIT JUDGE WOULD ACTUALLY TOLERATE THAT, BECAUSE IT PUTS THE WHOLE HEARING IN JEOPARDY, WHEN THE JUDGE HAS TO FIRST START READING SOMETHING. AND SO AS A MATTER OF PRACTICE, I THINK THE BETTER LAWYERS WILL PROVIDE THE MATERIALS BEFOREHAND. IT IS THE PROFESSIONAL THING TO DO.

WHY ISN'T IT A GOOD IDEA? YOU HAVE GOT THE SUMMARY JUDGMENT RULE THAT DOES REQUIRE SOMETHING TO, YOU KNOW, WE ARE TALKING ABOUT EVIDENCE. WE ARE NOT TALKING ABOUT MEMOS OF LAW, THAT THERE BE SOME, BEFORE THE HEARING, IF THERE IS TO BE A HEARING REQUIREMENT, TO TAKE ACCOUNT FOR, YOU KNOW, THE LAST MINUTE SURPRISE. WHAT IS WRONG WITH THAT?

I DON'T THINK THERE IS ANYTHING WRONG WITH T I WAS NOTING THAT I DON'T THINK THE RULE NECESSARILY NEEDED TO BE CHANGED OR DISTURBED, BECAUSE OF, AS I SAY, BAD CASES MAKE BAD LAW. ONE LAWYER COMES IN IN A HEARING IN THE MEEKS CASE. JUDGE ALTENBERND IS UPSET ABOUT IT, AND SO IS THE TRIAL JUDGE, BECAUSE THE LAWYER PROVIDED ALL THE MATERIALS OR REFERRED TO THEM AT THE HEARING. I DON'T THINK IT IS NECESSARY TO CHANGE THE RULE, BUT I WOULD SAY I HAVE NO PROBLEM WITH SOME SORT OF REASONABLE REQUIREMENT THAT DOES NOT GET YOU CAUGHT, CAUGHT UP IN THE PROCESS OF YOU CAN NEVER CATCH UP WITH YOURSELF. BY THAT, I MEAN THE SITUATION WHERE 20 DAYS BEFORE YOU FILE YOUR MATERIALS, AND IF MORE MATERIALS ARE AVAILABLE, YOU DON'T WANT TO BE PRECLUDED FROM ALLUDING TO THEM OR HAVE TO RESET THE HEARING. THAT AS SOON ONE OF THE THINGS.

LET ME ASK YOU SOMETHING.

YES.

WHAT ABOUT A SHORTER TIME FRAME? BECAUSE I SEE THIS AS A LITTLE DIFFERENT FROM A MOTION FOR SUMMARY JUDGMENT. IN A SUMMARY JUDGMENT, ONE SIDE FILES ALL THESE PAPERS AND THE EVIDENCE AND EVERYTHING, AND THEN THE OTHER SIDE HAS TO NOT ONLY RESPOND TO THE MOTION BUT CAN FILE COUNTEREVIDENCE, PERHAPS, AND IT REALLY IS, I THINK, LIKE YOU SAID, A LOT MORE COMPLICATED. HERE, I DON'T CONTEMPLATE THAT A DEFENDANT WOULD, IS GOING TO SUBMIT COUNTEREVIDENCE, BECAUSE IT IS REALLY ONLY THE PLAINTIFF'S BURDEN TO COME UP WITH SOME EVIDENCE IN THE RECORD, SO I WOULD SEE A TEN-DAYTIME FRAME WOULD BE ADEQUATE IN THIS KIND OF SITUATION. WHAT WOULD YOU THINK OF THAT?

I WOULD AGREE WITH 20, IN THE SENSE THAT AS LONG AS IT IS NOT A HARD AND FAST RULE THAT, ONCE YOU GET TO THE HEARING AND SOMETHING ELSE HAS ARISEN IN THE 20 DAYS, YOU ARE NOT PRECLUDED FROM ASKING THE COURT TO CONSIDER IT, I SEE NO PROBLEM, AND I THINK AS A PRACTICAL MATTER IN SUMMARY JUDGMENTS, I THINK THE JUDGE, IF YOU SAID BUT SOMETHING CAME UP YESTERDAY, I THINK MOST JUDGES WOULD SAY, WELL, I AM NOT GOING TO GRANT IT, BASED, I AM NOT JUST GOING TO GO BACK ON THE RECORD PER SE, BUT I HAVE NO PROBLEM WITH SOME REASONABLE TIME PERIOD, TEN DAYS, FIVE DAYS, 20 DAYS. I THINK THAT IS THE LEAST PROBLEMATIC ASPECT OF THIS PROPOSED RULE.

BUT DO YOU HAVE ANY SPECIFIC LANGUAGE THAT YOU WOULD RECOMMEND TO REPLACE WHAT YOU FIND OFFENSIVE HERE?

I ACTUALLY DO. I WAS TOLD I COULDN'T OFFER THAT, SO I HAVE IT HERE IN MY NOTEBOOK, BUT I DO HAVE A PROPOSAL, BUT I MEAN, THE LANGUAGE THAT I WOULD USE, IF YOU WANT ME TO --

YEAH. WOULD YOU JUST CHANGE SOME OF THE WORDING IN THAT SECTION, OR JUST WHAT?

LET ME BREAK IT DOWN, IT IF I COULD, INTO THE THREE CONCERNING AREAS. AREA NUMBER ONE IS THE NOTICE, WHICH WE JUST DISCUSSED, AND AS WE AGREED, I GUESS, I HAVE NO PROBLEM WITH THAT. NUMBER TWO IS THE PART THAT SAYS STATE WITH PARTICULARITY, WHICH, ENGRAPHS THE SUMMARY JUDGMENT LANGUAGE INTO THIS, WHICH IS NOT APPROPRIATE, BECAUSE THIS IS AN ENTRY LEVEL MOTION TO AMEND TO DEVELOP EVIDENCE AND TO DEVELOP A CASE. SUMMARY JUDGMENT HIS CASE DISPOSITIVE, AND SO THERE IS -- SUMMARY JUDGMENT HIS CASE DISPOSITIVE -- SUMMARY JUDGMENT IS CASE DISPOSITIVE, IN RELATION TO THAT RULE, AND I WOULD SEE NO REASON TO DELETE THAT LANGUAGE.

WHAT CREDENCE OR EFFECT SHOULD THE RULES PAY TO THE STATUTORY REQUIREMENT OF A REASONABLE SHOWING BY THE EVIDENCE IN THE RECORD?

WELL, AS IT HAS BEENPRACTICED AND I THINK EFFECTIVELY, YOUR HONOR, A, SHALL WE SAY A PRIMA FACIE SHOWING OF REASONABLE MATERIALS SHOULD BE ADEQUATE. IT IS REALLY, IT HAS BEEN DESCRIBED IN THE CASE LAW, AS EQUIVALENT TO A MOTION TO DISMISS. A PRIMA FACIE CASE, TAKE EVERYTHING THE PLAINTIFF SAYS IS TRUE AND ASSUME IT TO BE TRUE. DO NOT HAVE COUNTEREVIDENCE, AND THAT IS WHAT WAS CONTEMPLATED ON THIS ENTRY LEVEL MOTION TO AMEND.

WHAT ABOUT THE WORDS, WITH PARTICULARITY, THOUGH, CONTRADICT THAT STANDARD THAT YOU JUST STATED?

I THINK THAT JUST CREATES AN ARGUMENT OVER THE PROCESS, WHICH IS, HAVE THEY COMPLIED WITH THE RULE WITH PARTICULARITY, AND IT GETS THE COURTS INTO A SITUATION, AND I HAVE BEEN IN THESE WHY THE ARGUMENT IS NOT -- WHERE THE ARGUMENT IS NOT NOW WHETHER THE PLAINTIFF CAN SHOW ENOUGH TO GET PUNITIVE DAMAGE BUT WHETHER OR NOT THE PLAINTIFF HAS SPECIFIED WITH PARTICULARITY, WHICH ALL COUNSEL BASICALLY KNOW.

BUT ISN'T THERE AN OR SHOULDN'T THERE BE, IN RESPECTING WHAT THE LEGISLATURE DID, A PROCEDURAL DIFFERENCE BETWEEN PLEADING SIMPLE NEGLIGENCE AND PLEADING A SUFFICIENT BASIS FOR THERE TO BE A CLAIM FOR PUNITIVE DAMAGES, ESPECIALLY WHEN IT CONTEMPLATES THAT THERE HAS TO BE, ALREADY, SOMETHING THAT IS IN THE RECORD?

WELL, I THINK THE DIFFERENCE IS THAT, IN ONE, YOU CAN MAKE ALLEGATIONS, AND IN THE OTHER, YOU HAVE TO SHOW PROOF. IT IS ALREADY THERE.

WELL, ISN'T THAT WHAT THE PARTICULARITY IS REACHING FOR? I MEAN, I AM NOT HUNG UP ON THE PARTICULAR LANGUAGE, BUT -- I THINK WE HAVE TO DO SOMETHING.

MY APPROACH IS FAIRLY PRAGMATIC, AS OPPOSED TO THEORETICAL, AND MY EXPERIENCE WITH EVERY TIME WE PUT A WORD INTO SOMETHING, IT BECOMES, IT HAS A LIFE OF ITS OWN, ANTIC LART WILL REQUIRE A WHOLE GAMUT OF THING THAT IS NEED TO BE DONE THAT AREN'T NECESSARY.

SO YOU ARE SAYING THAT IT SHALL SPECIFY ANY EVIDENCE IN THE RECORD THAT PROVIDES A REASONABLE BASIS. THAT, I MEAN, SPECIFIED IS --

THAT WILL BE FINE, I THINK, TO ENGRAPH SOME SORT OF GLOBAL DESCRIPTION OF THE LANGUAGE ADDS A NEW LEVEL. IT DOESN'T, HONESTLY, I THINK THAT CAN BE LIVED WITH. I DON'T THINK IT IS AN IMPROVEMENT, PERSONALLY, BUT I DON'T THINK, I THINK THE WORST PART OF THIS PROPOSED RULE IS THE ONE I HAVEN'T GOTTEN TO YET, WHICH IS THE WORD "RESPOND", AND IN THE BRIEF OF THE ACADEMY, ALTHOUGH I MAY PAY THE PRICE FOR SAYING THIS, I THINK

THAT THEY MISSTATED SOMETHING OREO AGREE WITH SOMETHING, THEY SAID SIMPLY SUB-- OR, I DON'T AGREE WITH SOMETHING, THEY SAID SIMPLY SUBSTITUTE SOMETHING OR ADDRESS, AND I DIDN'T HAVE THE OPPORTUNITY TO RESPOND, BUT I THINK BOTH WORDS SPEAKS TO THE CONSEQUENCE THAT MR. MacKENZIE SPEAKS TO, WHICH IS THAT YOU WILL BE LED INTO A MINITRIAL. IT WILL BE IRRESISTIBLE TO OPPOSING COUNSEL, TO NOT FILE SOMETHING WHEN THEY SAY I AM SUPPOSED TO ADDRESS THIS OR RESPOND TO THIS, AND THAT LEAVES YOU KNOW WHERE, BECAUSE THE TRIAL JUDGE HAS NO POSSIBLE WAY TO WEIGH THE EVIDENCE, BASED ON PAPERS. HE IS NOT SUPPOSED TO WEIGH THE EVIDENCE. ALL YOU ARE DOING IS ASKING TO GO TO THE NEXT LEVEL, WHICH IN MANY INSTANCES MAY OPEN THE DOOR TO DISCOVERY ON LIABILITY. I MEAN, IN MANY OF THESE CASES, THE JUDGES WON'T ALLOW YOU TO GO AND DISCOVERY INFORMATION THAT RELATES TO A PUNITIVE CLAIM, WHEN YOU DON'T HAVE A PUNITIVE CLAIM PENDING. SO JUST TO GET THERE, IN ORDER TO HAVE TO HAVE THIS MINITRIAL, WHICH RESULTS IN A JUDGE SITTING THERE, LOOKING AT MY PILE OF PAPERS AND HIS PILE OF PAPERS --

BUT REALLY, THE ESSENCE OF THAT IS WHETHER YOU CAN GO AND GET THE ASSET INFORMATION, AS FAR AS THE DEFENDANT IS CONCERNED. THAT IS THE PRACTICAL ASPECT.

I THINK THERE IS A PRACTICAL ASPECT, WHEN YOU GET INTO WHETHER OR NOT YOU CAN GET TO OTHER MATERIAL IN CASES, IN NURSING HOME CASES. WE HAVE HAD JUDGES LIMIT US ON THE DISCOVERY OF PRIOR EPISODES WITH OTHER PATIENTS, BECAUSE WE DON'T HAVE A PUNITIVE CLAIM, AND THE PUNITIVE PLEADING WILL OPEN THAT UP IN MANY IN STAPZ.

WELL, WOULD YOU -- IN MANY INSTANCES.

WOULD YOU JUST SUGGESTION LIMITING THAT SENTENCE? BECAUSE IT SEEMS WHAT YOU ARE SAYING IS THE LAW THE LEGISLATURE SET FORTH THAT, THERE HAS GOT TO BE A REASONABLE BASIS FOR RECOVERY, AND THE PROFFER HAS GOT TO, OBVIOUSLY, SET THAT OUT, SO I AM NOT SURE, REALLY, WHAT, MAYBE I CAN ASK MR. MacKENZIE WHAT THAT SENTENCE REALLY ADDS TO IT, ANY PROFFER AND SHALL CONTAIN SUFFICIENT DETAIL TO PERMIT AN OPPOSING, OBVIOUSLY IF IT DOESN'T HAVE SUFFICIENT DETAIL, THE JUDGE ISN'T GOING TO GRANT MOTION.

OF COURSE. I PROPOSED SOMETHING ALONG THE LINES THAT, A MOTION FOR LEAVE TO AMEND SHALL BE A COMED ANY BY THE AFFIDAVIT -- ACCOMPANIED BY AFFIDAVIT, DEPOSITIONS OR SOMETHING ELSE THAT SUPPORT THE PROFFER, UNLESS THE MATERIALS HAVE BEEN PREVIOUSLY PROVIDED TO THE PARTY MOVED AGAINST, IN WHICH CASE AN INDEX OF SAID MATERIALS WILL SUFFICE. ONE OF THE THINGS IS WHY PROVIDE EVERYBODY WITH ALL OF THE DEPOSITION AS THAT THEY HAVE, AS LONG AS YOU LIST THEM. THE MOTION TO AMEND AND SUPPORTING EVIDENCE OR PROFFER SHALL BE SERVED ON ALL PARTIES, AT LEAST 20 DAYS BEFORE THE TIME FIXED FOR HEARING. ALL WE ARE DOING IS SAYING THERE THAT YOU HAVE GOT 20 DAYS TO LIST WHAT YOU BASICALLY ARE RELYING ON, AND IT DOESN'T BRING INTO THE FOCUS OF THE DEFENSE LAWYER, I AM SUPPOSED TO FILE SOMETHING AGAINST IT. I THINK THOSE ARE THE PROBLEMS I HAVE WITH IT.

CHIEF JUSTICE: THANK YOU VERY MUCH.

YES, SIR. THANK YOU.

MAY IT PLEASE THE COURT.

CHIEF JUSTICE: MR. MARSHAL, HE HAS GOT ABOUT FOUR MINUTES.

I BEG THE COURT'S INDULGENCE. I FORGOT TO INTRODUCE MADELEINE WHO ARE WICK AS THE STAFF ATTORNEY -- MADELEINE HORWICK AS THE STAFF ATTORNEY. VERY QUICKLY, I THINK MR. FREIDEN'S, I THINK, COMMENTS, REGARDING STATED WITH PARTICULARITY, JUSTICE WELLS, I

THINK YOU PROPERLY POINTED OUT PARTICULAR EVIDENCE, RECORD PROOF IS NECESSARY IN ORDER TO BE GRANTED LEAVE TO AMEND, AND THE COMMITTEE WAS SIMPLY TRYING TO DRAW THE DISTINCTION THAT YOU HAVE TO LET THE OTHER SIDE KNOW WHAT EVIDENCE WILL BE PROFFERED. IT IS NOT A COMMENT ON THE REQUIREMENTS OR THE BURDEN. RESPOND, QUITE FRANKLY, I THINK IS SEMANTICAL. A RESPONSIVE PLEADING IS AN ANSWER. MAYBE THE WORD SHOULD BE "ANSWER". A MOTION TO DISMISS IS NOT A RESPONSIVE PLEADING. THE COMMITTEE WAS SIMPLY TRYING TO ACCOMPLISH, OUT AFTER REASONABLE AND ORDERLY PROCEDURE FOR THE PRESENTATION AND CONSIDERATION OF PUNITIVE DAMAGE PROFFERS. IT IS NOT INTENDED TO BE A COMMENTARY ON THE BURDEN OF PROOF OR THE EVIDENCE REQUIRED. IT --

DO YOU AGREE WITH MR. FREIDEN THAT ANY RESPONSE IN THIS KIND OF MOTION TO AMEND, WOULD NOT REQUIRE OR PERMIT COUNTEREVIDENCE IN THE RECORD?

I THINK THE STANDARD ON THESE TYPES OF HEARINGS PERMITS COUNTEREVIDENCE. IT DOES NOT REQUIRE COUNTEREVIDENCE. BUT IN ESSENCE, I THINK, AGAIN, TO JUSTICE PARIENTE'S COMMENT, I THINK THE RULE WOULD STILL BE ACCOMPLISHED, IF THE SENTENCE IN QUESTION WERE TO READ ANY PROFFER IN SUPPORT OF THE MOTION SHALL CONTAIN SUFFICIENT DETAIL TO PERMIT THE COURT TO RULE ON THE MOTION, AND TAKING OUT THE LANGUAGE "AN OPPOSING PARTY TO RESPOND TO THE PROFFER." DUE PROCESS IS THE RIGHT TO BE HEARD. THIS RULE IS DESIGNED TO ALLOW THE OTHER SIDE DUE PROCESS. KNOW WHAT IS COMING AND HAVE THE OPPORTUNITY TO BE HEARD. I THINK THE WORD --

LET ME ASK YOU, THAT SENTENCE, OBVIOUSLY IF THERE IS NOT ENOUGH DETAIL FOR THE COURT TO RULE, THE COURT CAN'T RULE. I AM NOT SURE HOW THAT, OTHER THAN, YOU KNOW, WE HAVE GOT RULES OF PROCEDURES TO HELP THE PARTIES AND THE COURT, BUT IF THE MOTION IS NOT LEGALLY SUFFICIENT, BECAUSE IT DOESN'T STATE THE EVIDENCE THAT PROVIDES A REASONABLE BASIS FOR RECOVERY, THE JUDGE HAS TO, WILL DENY THE MOTION.

I THINK YOU ARE RIGHT, AND I THINK, AGAIN, THE ANECDOTE OF A MOTION TO DISMISS WAS USED. WELL, A MOTION TO DISMISS, YOU ASSUME ALL FACTS ARE PLEADED AS TRUE BUT YOU STILL HAVE TO PLEAD SUFFICIENT ULTIMATE FACTS. THIS MOTION SIMPLY SAYS YOU HAVE TO SHOW AT LEAST 20 DAYS PRIOR TO YOUR PROFFER, SUFFICIENT PARTICULAR EVIDENCE IN SUPPORT OF YOUR MOTION.

I THINK MAYBE IT JUST SAYS, I AM JUST SEEING, AGAIN, IT IS HARD IN AN ORAL ARGUMENT, AND IT IS, THAT IS WHY WE HAVE COMMENTS BEFORE, SO THE COMMITTEE CAN RESPOND TO REDRAFT A RULE, BUT IT SEEMS THAT THERE IS ALMOST REDUNDANCY THAT MIGHT CREATE A CONCERN THAT THERE IS MORE REQUIREMENTS, BECAUSE IT FIRST SAYS "SHALL STATE WITH PARTICULARITY" AND THEN IT SAYS "SHALL CONTAIN SUFFICIENT DETAIL." WELL, ARE THOSE TWO THINGS OR IS THAT THE SAME THING? IF THE PURPOSE IS DUE PROCESS, THEN WHAT YOU WANT TO MAKE CLEAR IS THAT, WHATEVER IS RELIED ON, IS GIVEN TO THE PARTY. THEY ARE FILED WITH THE MOTION OR REFERENCED IN THE MOTION PRIOR TO THE TIME THE JUDGE IS GOING TO RULE.

AND THAT WAS EXACTLY THE INTENT OF THE COMMITTEE, AND THE COMMITTEE THOUGHT 20 DAYS WAS A REASONABLE TIME TO DO THAT. WITH RESPECT TO THE REQUEST FOR ADMISSIONS, AGAIN, JUST BY WAY OF ANECDOTE, THE COMMITTEE WAS ADDRESSING, A JUDGE ON THE COMMITTEE SHARED AN ANECDOTE OF 3,000 REQUESTS FOR ADMISSIONS. ANOTHER MEMBER OF THE COMMITTEE, SEVERAL MEMBERS OF THE COMMITTEE SAID, AND EVERYBODY WAS IN AGREEMENT, THAT IF YOU FILE A COMPLAINT, THE RESPONDING PARTY, NO PUN INTENDED, THE RESPONDING PARTY IS ENTITLED TO DENY THE COMPLAINT, AND IF YOU TAKE THE COMPLAINT ON A WORD PROCESS OR AND TURN IT INTO -- PROCESSER AND TURN IT INTO A REQUEST FOR ADMISSIONS AND SEND IT OUT TO THE OTHER PARTY TO DENY IT, THAT WOULD BE ATTORNEYS FEES, AND THAT WOULD BE THE ABUSE ATTEMPTING TO BE ADDRESSED BY THE COMMITTEES.

KILTHS -- KITTLE VERSUS KITTLE SAYS YOU YOU HAVE THE RIGHT TO AN INTERPLEAD OR. THIS COMMITTEE SOUGHT TO CHANGE 3,000 REQUESTS FOR ADMISSIONS AND RESPONDED LEAVE IN THE RULES TO REQUEST AS A SAFEGUARD AND AS JUSTICE ANSTEAD STATED, THE CONSEQUENCE OF STATED RULES FOR ADMISSION HAS BEEN HIGHLIGHTED BY THIS COMMITTEE IN THE PROPOSED RULE 1.380, SO IF YOU DO NOT RESPOND AND PROPERLY DENY THE REQUEST FOR ADMISSIONS, UNDER THE NEW RULE 1.380, THE PARTY THAT DENIED THOSE REQUEST FOR ADMISSIONS, WILL PAY THOSE CONSEQUENCES, SO THE COMMITTEE ADOPTS THE CHANGE OF THE RULE. THANK YOU FOR YOUR TIME.

CHIEF JUSTICE: THANK YOU ALL, MEMBERS OF THE COMMITTEE WHO VOLUNTEER TO WORK ON THESE MATTERS, AND WE ESPECIALLY APPRECIATE LAWYERS BEING WILLING TO COME FORWARD TO BE SURE THAT WE CATCH THESE ISSUES, AS WE KNOW, THE RULES, THEMSELVES, OFTEN ENGENDER A LOT OF CONTROVERSY IN LITIGATION, SO THANK YOU ALL VERY MUCH, FOR YOUR VOLUNTEER SERVICE HERE. ALL RIGHT.