03-1670

HEAR YE.HEAR YE.HEAR YE. THE SUPREME COURT OF THEGREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEERX 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 AND WELCOMETO THE FLORIDA SUPREME COURT.WE HAVE A VERY IMPORTANT GROUP OF PEOPLE WITH US THIS MORNING THAT I WANT TO RECOGNIZE. THAT IS THE EIGHTH GRADEHONOR STUDENTS FROM FOREST LAKE EDUCATION CENTER , LONGWOOD, FLORIDA. IF I UNDERSTAND IT CORRECTLY, THIS IS THE 18th CONSECUTIVE YEAR THAT THIS GROUP HAS BEEN VISITING THE FLORIDASUPREME COURT. I UNDERSTAND THEY ARE ESCORTED BY MATT WENDORF AND LINDA WHO HAVE , AND WE WELCOME AND LINDA HOFF, AND WE WELCOME YOU. I KNOW THAT ALL OF THE ATTORNEYS BEFORE THE SUPREMECOURT TODAY ARE GOING TO BE INTERESTED THAT THEY HAVE LISTENERS ON THE BENCH BUT ALSO THAT THEY HAVE STUDENTS IN THE AUDIENCE. WE ARE READY TO G O WITH THE FIRST CASE AND W E APPRECIATE COUNSEL BEING READY I N ROBINSON VERSUS NATIONWIDE. IF COUNSEL IS READY , YOU MAY PROCEED.

THANK, YOUR HONOR , IF IT PLEASE THE COURT . RICK UP FEHR FROM WEST PALM BEACH RICK UP FEHR FROM WEST PALM RICK HUPFER FROM WEST PALM RICK KUPFER FROM WEST PALM BEACH , AND I DIDN'T REALIZE THAT WE WOULD BE ADDRESSING THE STUDENTS.

CAN YOU GIVE US THE POINTS THAT GIVE RISE TO OUR JURISDICTION AND REPEAT THAT POINT, BECAUSE THE POINT HAS BEEN MADE, I BELIEVE THAT, YOU HAD THE SERVICE OF AN OFFER OF JUDGEMENT GOING IN THE OTHER DIRECTION. IN THE CASE FROM THE THIRD DISTRICT, AS OPPOSED TO THE PLAINTIFF 'S OFFER IN THIS CASE, SO COULD YOU ADDRESSTHAT JUST BRIEFLY .

WE WOULD AND WE BELIEVE IT IS ACTUALLY THREE DIFFERENT TYPES OF CONFLICTSTHAT HAVE ARISEN IN THIS CASE, ONE THAT WE HAVE RAISED AS OUR FIRST POINT BECAUSE IT I S THE MOST OBVIOUS ONE , IN THE KELLER CASE OUT OF THE THIRD HELD THAT THAT 90-DAY WAITING PERIOD BEFORE SERVE AGO PROPOSAL FOR SETTLEMENT BEFORE SERVING A PROPOSAL FOR SETTLEMENT DOESN'T RENDER A PROPOSAL VOID FROM ITS INCEPTION BUT RATHER REQUIRES AN ABATEMENT FOR THE REMAINDER OF THE 90-DAY PERIOD BEFORE THE OFFER OF JUDGMENT BECOMES EFFECTIVE. I AM PROBABLY GOING TO REFERTO THIS AS AN OFFER OF JUDGMENT BECAUSE IT IS INGRAINED OVER THE YEARS, BUT IT IS ACTUALLY A PROPOSAL FOR SETTLEMENT NOW.

IF THE PLAINTIFF MAKES THE OFFER WITHIN THE 90 DAYS , THAT I T MIGHT WELL BE VOID, BECAUSE THE STATUTE WAS SPECIFICALLY DESIGNED TO ALLOW DEFENDANTS A PERIOD OF TIME TO BE ABLE TO ASSESS THE CASE, BEFORE BEING, HAVING TO RESPOND TO AN OFFER OF JUDGMENT OR SETTLEMENT , SO WHY ISN'T THE KUVIN DISTINGUISHABLE ON THOSE GROUNDS? IT MAY B E SAID WHILE IT MAY BE TRUE AS FAR AS A PLAINTIFF GOES, IT IS CERTAINLY NOT TRUE WHEN A DEFENDANT FILES OFFER.

I THINK THAT FIRST OF ALL , THE PURPOSE OF THE RULE OF PROCEDURE WAS TO GIVE BOTH PARTIES AN OPPORTUNITY TO CAREFULLY EVALUATE BOTH THE CLAIMS AND THE DEFENSES. THE PLAINTIFF HAS TO BE ABLE TO EVALUATE THE DEFENSES , AND THE DEFENDANT IS NOT

ALLOWED TO SERVE AN OFFER OF JUDGMENT, PROPOSAL O F SETTLEMENT, FOR 90 DAYS AFTER THE ACTION HAS BEEN COMMENCED FOR THAT REASON, SO I THINK THE GOAL , I THINK , OF THAT 90-DAY WAITING PERIOD, IS PRETTY MUCH BILATERAL FOR BOTH PARTIES , BUT AS I READ THE KUVIN OPINION , IT DOES INDICATE THAT IT IS ENTIRELY AT ODDS WITH THE MAJORITY 'S OPINION IN THE GRIP CASE, THE FOURTH DISTRICT.

WE CAN'T DECIDE CONFLICT,BASED ON A THIRD CASE BY LOOKING AT GRIP.

KUVIN IS A REAFFIRMATION ON WHAT WAS SAID IN GRIP.I DON'T THINK IT RELIED EXPRESSLY ON GRIP , AND THETHIRD DISTRICT IN KUVIN HAS SAID WE DISAGREE WITH THE APPROACH THAT HAS BEEN TAKENBY THE FOURTH DISTRICT IN THE GRIP CASE. KUVIN CAME BEFORE THIS CASE , SO IT COULDN'T EXPRESS ANYTHING ABOUT THIS CASE , BUT IT IS VERY OBVIOUS THAT THE THIRD DISTRICT AND FOURTH DISTRICT HAVE A PHILOSOPHICAL DISAGREEMENT ABOUT WHETHER A VIOLATION OF THE 90-DAY PROVISION SHOULD RESULT IN JUST AN ABSOLUTE VOID ADMONITIO DISMISSAL.

SO YOUR POSITION IS THE 90 DAY ABATES UNTIL THE 90-DAY COMES INTO - -

OUR POSITION IS IT SHOULD BE TREATED LIKE MANY OTHER PREMATURE PLEAD INGS.

YOU CAN SERVE I T WITH THE COMPLAINT?

YOU CAN SERVE IT WITH THECOMPLAINT.BY YOUR ARGUMENT , YOU CAN SERVE IT WITH IT?

90 DAYS.

SO IT PUTS IT ON THE DEFENDANT'S BACK AT THIS POINT OR VICE VERSA .

VICE VERSE A THE DEFENDANT OR PLAINTIFF WOULDBE ABLE TO PROPOSE A SETTLEMENT FOR THE BEFORE THE 9 0 DAYS BUT IT WOULDN'T BE EFFECTIVE FOR THE REMAINDER OF THE 90 DAYS. IF YOU TAKE A GOAL-ORIENTEDAPPROACH TO THIS ISSUE , WHICH IS I THINK WHAT THE KUVIN CASE PRIDE TRIED TO DO, THE POINT OF THE OFFER OF JUDGMENT KUVIN CASE TRIED TO D O , THE POINT OF THE OFFER OF JUDGMENT TO GIVE EVERYBODY 9 0 DAYS BEFORE THEY HAVE TO RESPOND TO AN OFFER FOR SETTLEMENT .

WE HAVE CLEARLY HELD THAT THE TIME PERIODS ARE PROCEDURAL, SO I T IS RULE OF PROCEDURE NOT STATUTE , CORRECT?

CORRECT.

AND WE HAVE ALSO HELD THAT THE TIME PERIODS ARE TO BE STRICTLY ENFORCED , HAVE WE NOT? DIDN'T WE HOLD THAT , INRESPECT TO MEDIATION , THE TIME AFTER MEDIATION , PART OF THIS RULE, IN A CASE CALLED NEALEY VERSUS PUEVA. WE REFUSED TO ALLOW ATTORNEYS FEES WHEN THEJUDGMENT WAS NOT IN COMPORT WITH THE RULES. ARE YOU FAMILIAR WITH THAT CASE?

GULLY VERY VERSUS BODEK PROVIDES THAT THE TIME PERIODS ISN'T NECESSARILY CARVED IN GRANITE.

BUT GULLY JERRY GULLYVERY, WASN'T THAT ON THE GULLIVER WAS ON THE BASIS OF JURISDICTION.

YES.

AND WE HELD THAT THE RESERVATION OF JURISDICTION , MET THE REQUIREMENTS OF THE RULE ,

INSOFAR A S MEETING THE TIME PERIOD, SO I AM CONCERNED ABOUT THE FACT THAT A WHOLE SERIES OF CASES NOW, HAVE HELD THAT THESE TIME PERIODS OF THIS RULE , ARE TO BE STRICTLY ENFORCED , BEGINNING WITH NIELAN.

I AM NOT SAYING THAT THE RULE SHOULD BE STRICTLY ENFORCED. WE ARE HERE FIRST , TO DECIDE HOW, YOU HAVE TO ENFORCE THE 90-DAY PERIOD , BUT YOU CAN APPROACH IT TWO WAYS , BECAUSE 1.442, THE LANGUAGE OF IT REALLY LEAVES THE INTERPRETATION WIDE OPEN FORTHIS COURT.

WHAT IS THE LANGUAGE OF THE RULE?

SIMPLY THAT IT SHOULD NOT BE SERVED BEFORE THE ON THE DAYS HAS EXPIRED .

DOESN'T IT SAY , YOUR INTERPRETATION, THOUGH , ASFAR AS THIS POLICY , DOESN'T IT CONFLICT WITH THE PLAINLANGUAGE OF THE RULE?

I DON'T THINK SO. NO MORE SO THAN THE PLAIN LANGUAGE OF THE RULES OF PROCEDURE ALSO SAY THAT A NOTICE OF APPEAL HAS TO BE FILED 30 DAYS AFTER A FINAL ORDER , BUT IF A PARTY FILESA PREMATURE NOTICE OF APPEAL , IT REMAINS IN LIMBO UNTILTHE FINALORD ZR ENTERED , AND THEN IT TAKES EFFECT, AND JUDGE FARMER'S DISSENTING OPINION FROM THE FOURTH DISTRICT, SETS OUT A WHOLE LITANY OF CASE LAW , WHERE PREMATURE FILE LITTLE ARE CONSIDERED - - FILINGS ARE CONSIDERED BY THE COURT TO REMAIN IN LIMBO , RATHER THAN TO BE CONSIDERED INEFFECTIVE ENTIRELY, BECAUSE IF IT I S INEFFECTIVE ENTIRELY , THEN THAT CASE IS NOT GOING T O SETTLE LIKE THIS CASE DIDN'T SETTLE.

ISN'T THAT A DIFFERENT SITUATION, BECAUSE IN A NOTICE OF APPEAL , YOU HAVETO FILE IT NO LATER THAN 30 DAYS, WHEREAS THIS STATUTESEEMS TO SAY SPECIFICALLY , SHALL BE SERVED N O EARLIER THAN 90 DAYS. I MEAN, ISN'T THAT LANGUAGE PRETTY CLEAR? IT SHALL BE SERVED NO EARLIER THAN 9 0 DAYS? AND THEREFORE YOU CANNOT SERVE, YOU SHOULD NOT , AND CANNOT , SERVE IT BEFORE THE 90-DAY PERIOD.

WELL , A NOTICE OF APPEAL IS NOT SUPPOSED TO BE FILEDNO EARLIER THAN AN APPEAL ABLE ORDER BEING ENTERED BY THETRIAL COURT, AND IF IT IS SERVED

CORRECT.

ITS FILED BECAUSE SOMEBODY MISTAKENLY THINKS THAT THIS IS AN APPEALABLE ORDER AND THEY PREMATURELY FILE IT BEFORE IT IS SUPPOSED TO BE FILED. IF YOU LOOK AT JUST CERTIFICATE OF SERVICE HERE, IT LOOKS LIKE THIS WAS SERVED SIX DAYS BEFORE IT SHOULD HAVE BEEN SERVED, THEOFFER OF JUDGMENT , BUT I DON'T, IT DOESN'T SEEM TO ME, TO ACCOMPLISH ANY

WHICH BRINGS UP ANOTHER ISSUE. AS I UNDERSTAND, A PART OF YOUR ISSUE IS THAT THERE SHOULD HAVE BEEN A H EARING HERE, TO DETERMINE WHETHER OR NOT THAT CERTIFICATE OF SERVICE DATE IS THE ACTUAL DATE THAT THIS NOTICE WASFILED.

THAT'S CORRECT. THAT GOES TO A DIFFERENT ISSUE ON APPEAL , BUT, YES, THAT IS ANOTHER WAY THAT I THINK THAT THIS CASE CONFLICTS WITH EVERY OTHER DISTRICT COURT THAT HAS HADANYTHING TO SAY ABOUT A CERTIFICATE OF SERVICE AND WHAT THE EFFECT OF THAT IS.

ISN'T YOUR INTERPRETATION, THOUGH, GOING TO CREATE AMBIGUITY AND DOUBT ANDPROBLEMS? YOU ANSWERED AN EARLIER QUESTION OF JUSTICE BELL,FOR INSTANCE , THAT YOU COULD SERVE THE OFFER OF JUDGMENT WHEN YOU SERVE THE COMPLAINT , AND DOESN'T THAT CREATE AMBIGUITY AND DOUBT, I N TERMS OF, THEN , THE RECEIVING PARTY , THEY ARESERVED WITH PROCESS , AND NOWTHEY ARE, ALSO, SERVED WITH THIS OFFER OF JUDGMENT ,

AND SO THEY , REALLY, SAY , YOU KNOW, WHAT DO I , WHAT DO I DO? WHAT DO I HAVE TO DO? YOU KNOW , THERE IS , DO I HAVE TO RESPOND RIGHT AWAY? OR HOW LONG CAN I WAIT , AND THEY, NOW, ARE PUT IN THE POSITION OF HAVING TO CALCULATE SOME TIME THAT , REALLY, NOBODY KNOWS PRECISELY, THEN , PERHAPS , UNTIL THINGS ARE ALL OVER, AND IF YOU WORK IT EITHER WAY TH IS WAY , AREN'T YOU , REALLY, THEN , LEAVING SUBSTANTIAL DOUBT WITH REFERENCE TO WHEN PEOPLE HAVE TO RESPOND ? THIS RULE, OF COURSE , IS A RULE THAT HAS GUINNESS FITS. I MEAN , WE HAVE HAD ENORMOUS DIFFICULTY WITH, BOTH, THE STATUTES AND THE RULES , YOUKNOW , UNDER THEM. WE HAVE EXPRESSED THAT BE,OF COURSE , IN A NUMBER , BUT HOW ABOUT ADDRESSING THAT FOR A MINUTE , THAT I S GOINGBACK , IF YOU SAY , FOR INSTANCE , YES , WE COULD SERVE IT WITH THE COMPLAINT, DOESN'T THAT LEAVE ALL THIS DOUBT , WHEN , REALLY , THAT HAS BEEN THE CONCERN , IS THAT

IF IT REMAINS IN LIMBO FOR THE 90 DAYS , THEN IF AN OFFER OF JUDGMENT OR PROPOSAL FOR SETTLEMENT IS SERVED AT THE SAME TIME THAT SERVICE OF PROCESS IS DONE, THEN UNDER THE POSITION THAT I AM ESPOUSING , THE DEFENDANT WOULD HAVE 120 DAYS TO RESPOND TO IT , BECAUSE IT IS GOING TO BE ABATED FOR 90 DAYS , AND THEY ARE GOING TO HAVE THE NORMAL 30 DAYS AFTER THAT , SO THEY ARE GOING TO HAVE THE SAME PERIOD OF TIME TO RESPOND TO THAT PROPOSAL FOR SETTLEMENT, AS THEY WOULD HAVE , IF IT WAS SERVED ON THE 91st DAY . AS A PRACTICAL , I GUESS YOU COULD SAY THE SAME THING , WHAT IF SOMEBODY FILES A NOTICE OF APPEAL AT THE SAME TIME THAT THEY SERVE A COMPLAINT ON A DEFENDANT. WELL, THAT IS PREMATURE. DOE S THAT REMAIN IN LIMBO FOR THE WHOLE LITIGATION? I NEVER THOUGHT ABOUT WHAT THE RESULT WOULD BE. IF IT REMAINS IN LIMBO , IT REMAINS IN LIMBO.

THE RULE SAYS SHALL. LET'S NOT FORGET THE POLICY OF THE RULE. I MEAN, IT SAYS SHALL AND IT SHOULD APPLY EQUALLY TO DEFENDANTS AND PLAINTIFFS , AND WHY NOT JUST ENFORCE THAT PART, WHICH IS JUST AN EASY NUMBER AFTER 90 DAYS , IT CAN , EITHER SIDE CAN SERVE, THAT IS WHAT THE RULE SAYS , AND WHY CREATE EVERYTHING ELSE THAT WE ARETALKING ABOUT , LITIGATION OVER WHEN THE CERTIFICATE OF SERVICE WAS REALLY , WHEN IT WAS REALLY SERVED , I MEAN, WHAT IS THE PURPOSE , YOU KNOW, WE HAVEN'T, WE ARE HAVING A LITIGATION OVER WHAT WAS SUPPOSED TO BE SOMETHING THA T WAS T O PROMOTE SETTLEMENT AND MINIMIZE LITIGATION , AND WHAT YOU ARE SORT OF , WHAT YOU ARE TALKING ABOUT , AND IT SEEMS LIKE THE THIRD DISTRICT, ALSO, IS SOMETHING THAT, IN A WAY , PROMOTES OTHER LITIGATION ABOUT THE , WHEN THE TIME PERIOD ACTUALLY STARTS , AND WHEN SOMEONE HAS TO FIGURE OUT WHEN TO RESPOND. I JUST BE DON'T, WHAT IS THE REASON TO DO THAT , I GUESS.

THE REASON TO DO IS THAT IS BECAUSE I DON'T THINK IT WOULD PROMOTE LITIGATION. IT WOULD ELIMINATE LITIGATION .

BUT IT IS FROM THE PLAINLANGUAGE OF THE RULE AS IT IS WRITTEN, IS IT NOT?

YOU ARE STILL ENFORCING THE EFFECT OF THE RULE. WHAT IS THE EFFECT OF VIOLATING THAT RULE, AND THE RULE DOESN'T SAY. IT DOESN'T HINT.

HAVE YOU ALLEGED CONFLICT WITH MERCER VERSUS RAINE?

YES.

LET'S GO IN TERMS OF THIS CASE, SINCE WE SORT O F HASHED OUT THAT THIS RULE SAYS SHALL AND YOU HAVE GIVEN THE POLICY REASON WHY,MAYBE , W E SHOULD VARY IT , BUT NOW IN THIS CASE, WHAT HAPPENS IS THE PLAINTIFFWANTS TO DO , THERE IS A RESPONSE THAT IS FILED THAT SAYS THAT THE MOTION WAS O R THE OFFER WAS UNTIMELY , CORRECT?

YES.

AND THEN THE PLAINTIFFWANTS TO DO DISCOVERY ABOUT WHAT?

WELL , FOR TWO THINGS , THE PLAINTIFF WAS TRYING TO SHOW THAT THE CERTIFICATE OF SERVICE WAS CONTAINED A MISTAKE AND THAT THE OFFEROF JUDGMENT WAS NOT ACTUALLY MAILED OUT UNTIL THE FOLLOWING WEEK , AFTER THANKSGIVING HOLIDAYS. THE PLAINTIFF WAS, ALSO , TRYING TO SHOW THAT, EVEN THOUGH THE DEFENDANT WASSERVED WITH PROCESS FORMALLY ON A CERTAIN DAY , THAT THEY RECEIVED , THAT THEY INFORMALLY RECEIVED EVERYTHING TWO WEEKS EARLIER, WHICH WOULD WORK WITHIN THE 90-DAY PERIOD OF TIME. THE TRIAL JUDGE FELT THAT THIS WAS A LEGITIMATE AREA OF DISCOVERY TO GO INTO. NATIONWIDE VERY STRONGLY FELT THAT THIS WAS NOT A LEGITIMATE AREA OF DISCOVERY TO GO INTO AND WOULDN'T PROVIDE ANY DISCOVERY AFTER BEING ORDERED AND ORDERED AND ORDERED . THE REASON WHY I THINK MERCER VERSUS RAINE FITS IN H ERE, BECAUSE IN MERCER UNDER RULE 1.380, THE TRIALJUDGE IS GIVEN BROAD AUTHORITY AS TO HOW TO DEAL , IN MULTIPLE DIFFERENT WAYS , WITH DISCOVERY MISCONDUCT , BUT IN THIS CASE THE FOURTH DISTRICT HAS SAID THAT A TRIAL JUDGE CANNOT STRIKE PLEADINGS OR DO ANYTHING THAT 1.380 SAYS THAT A TRIALJUDGE CAN DO , IF THE DEFENDANTS ' OBJECTIONS MIGHT HAVE HAD MERIT IF I T WASN'T STRICKEN, OR IN THIS CASE , THAT THE UNDERLYING COMPLAINT OF, IF THE COMPLAINT , IF THE DEFENDANT'S DEFENSE IS THATTHE CLAIM WAS UNTIMELY , THEN CAN'T BE STRICKEN , NO BADLY HOW BADLY THEY MISS B E NO BADLY HOW THEY MISBEHAVED , BECAUSE THAT TAKES ALL OF THE TEETH OUT OF 1.380.

THAT GOES BACK TO THE CONSTRUCTION OF THE RULE F THE RULE IS YOU ARE ALLOWED TO LOOK BEHIND THE CERTIFICATE OF SERVICE, IFYOU ARE NOT ALLOWED TO LOOK BEHIND IT, THEN YOU ARE CORRECT THAT THERE SHOULDN'T HAVE BEEN DISCOVERY ON THAT ISSUE. DON'T THEY BOTH G O TOGETHER BASICALLY?

THE RULE, YOU CAN GIVE THE STRICTEST CONSTRUCTION IN THE WORLD, TO THE RULE FOR OFFERS OF JUDGMENT. THAT DOESN'T SAY THAT A PARTY SHOULDN'T BE ABLE TO PROVE TO THE COURT THAT THERE WAS A MISTAKE AND THAT IT WASN'T MAILED OUT WHEN IT WAS SAID TO HAVE BEEN MAILED OUT. THAT IS 90 DAYS.

RULE SAYS SERVICE, BUTYOU ARE SAYING HERE THAT, THE PLAINTIFF WAS ASSERTING THAT THEY ACTUALLY DIDN'T SERVE IT ON THE DATE THE CERTIFICATE SAYS IT WAS SERVED?

YES. THE PLAINTIFF WAS TRYING TO SHOW, WAS TRYING TO DISCOVER , AND HAD REASON TO BELIEVE TAKE TO BELIEVE THAT THE CERTIFICATE OF SERVICE WAS ACTUALLY FILLED OUT BEFORE ALL O F THE PAPERS WENT OUT.

WHY WOULD YOU NEED DISCOVERY ON THAT POINT? THE PLAINTIFF WOULDN'T HAVE THAT EVIDENCE TO PRESENT.

WELL , THE PLAINTIFF WAS TRYING TO OBTAIN DOCUMENTARY EVIDENCE IN TERMS O F THE ENVELOPE THAT IT WAS MAILED IN, IN TERMS OF LOG ENTRIES THAT WERE MADE BY THE ADJUSTOR SHOWING RECEIPT. THE PLAINTIFF HAD A HARD COPY, CERTIFICATE OF SERVICE , INDICATING THAT IT WAS MAILED OUT 84 DAYS AFTERDISCOVERY WAS FILED. THEY WERE DOING DISCOVERY AND TRYING TO ACCUMULATE ALL OF THE EVIDENCE THAT THEY COULD SO THAT WE COULD HAVE AN EVIDENTIARY HEARING TO SHOW THE COURT THAT THAT WASA MISTAKE. MISTAKES ARE SOMETIMES MADE IN A CERTIFICATE O F SERVICE.

IF, IN FACT, A MISTAKE WAS MADE, IT WOULD HAVE FAILED OUTSIDE OF THE ON THE-DAY PERIOD? I MEAN, IT WOULD HAVE BEEN 90 DAYS OR MORE , SINCE THE FILING OF THE COMPLAINT?

IT MIGHT HAVE BEEN , DEPENDING UPON WHAT THE EVIDENCE SHOWED ON DISCOVERY.IT WOULD HAVE BEEN VERY CLOSE, BECAUSE

THE PLAINTIFF WAS THE ONE WHO ACTUALLY MAILED OUT THE NOTICE, CORRECT?

CORRECT.

SO WHY WOULDN'T THE PLAINTIFF HAVE KNOWLEDGE OF WHEN THE NOTE , THE MAILINGWAS ACTUALLY DONE ,,

I THINK THE ATTORNEY , WE DON'T HAVE CERTIFICATE OF SERVICE FROM THE ATTORNEY. WE NEVER GOT THAT FAR. NATIONWIDE WAS DEFAULTED BEFORE WE GOT TO THAT POINT, BUT THE TRIAL JUDGE AUTHORIZED DISCOVERY, BECAUSE WE WERE TRYING TO ACCUMULATE AS MUCH INFORMATION AS POSSIBLE FOR THAT EVIDENTIARY HEARING. I AM NOT SAYING THE PLAINTIFF WOULDN'T HAVE ANY KNOWLEDGE ABOUT IT, EITHER, BUT THEY WANT TO PRESENT AS GOOD A CASE AT THE EVIDENTIARY HEARING AS THEYCAN , AND THEY WANT TO SEE WHAT EVIDENCE THEY CAN GET FROM NATIONWIDE'S FILES, TO

CHIEF JUSTICE: THE MARSHAL HAS TURNED ON THE LIGHT, REMINDING YOU THAT YOU ARE IN YOUR REBUTTAL TIME. I JUST WANT TO REMIND YOU, TOO.

WOULD YOU ADDRESS , THOUGH

TIME FLIES!

- - BEFORE YOU SIT DOWN , YOUR VIEW WITH REGARD TO OTHER CIRCUMSTANCES WITH REGARD TO TIME LIMITATIONS , FOR EXAMPLE A DISCOVERY VIOLATION OR SOME VIOLATION IN CONNECTION WHAT CLAIMTHAT, ON ITS FACE MAY NOT B E BARRED BY A STATUTE OF LIMITATIONS OR OTHER TIME LIMITATION, AND THE TRIAL COURT IS A SANCTION - - THE TRIAL COURT AS A SANCTION , WILL STRIKE ALL PLEADINGS AND NOT LET THE OPPOSITION RESPOND I N A CIRCUITOUS DEFENSE OR SOME OTHER TIME LIMITATIONS. WHAT IS YOUR VIEW WITH REGARD TO THE PARTY BEING INCLUDED THAT STILL CAN ASSERT THE UNTIMELINESS OF A CLAIM?

I DON'T THINK I T MAKESSENSE TO ALLOW THE PARTIES WHO HAVE BEEN STICK TONE COME BACK AND STILL ALLEGE THEIR DEFENSES TO THE COURT. WHAT IS THE POINT IN STRIKING THE DEFENSE?

DO WE HAVE A HISTORY OF A LINE OF CASES THAT ADDRESSTHAT CONCEPT?

NO , I THINK BECAUSE THIS IS THE FIRST CASE WHICH HASSAID THAT , EVEN AFTER DEFENSES OR PLEADINGS HAVE BEEN STRICKEN, THEY ARE REALLY NOT STRICKEN. IF THEY MIGHT HAVE HAD MERIT BEFORE THEY WERE STRICKEN .

IT SEEMS TO ME THAT THERE IS A CASE OUT OF THE THIRD DISTRICT , AULS VERSUS 7-ELEVEN, AND IT IS ONLY THE WELL -PLED ALLEGATION WHICH CAN BE CONSIDERED, AND I AM TRYING TO SEE HOW TIME LIMITATIONS CAN FIT INTO THAT KIND OF CONCEPT. THAT HAPPENED TO BE A PRODUCT CASE WHERE THERE WAS A SALE AND, ALSO , A CLAIM FOR PRODUCT LIABILITY, ANDTHE COURT, EVEN THOUGH THERE WAS A DEFAULT ENTERED AGAINST ONE OF THE PARTIES, WOULD NOT PERMIT THAT TO BE PURSUED AGAINST THE OTHERS.

I AM NOT SURE IF EITHER ONE OF US HAVE CITE HAS HAD THAT CASE IN THE BRIEFS , TO BE HONEST.

WOULDN'T IT BE IMPORTANTTO KNOW WHAT THE COURTS HA VE DONE, WITH THESE TIME LIMITATION KINDS OF THINGS AND THE STRIKING , IF WE ASSUME THAT THE SANCTIONS ARE CORRECT , THAT , AND YOU CAN STRIKE PLEADINGS SUCH AS THIS OR STRIKE POSITIONS OR DEFENSES , ISN'T IT IMPORTANTFOR US TO KNOW WHAT OUR JURISPRUDENCE AND WHERE IT

LEADS US?

SURE. OF COURSE THAT IS IMPORTANT.

SO WHERE ARE WE? I AM NOT SURE I AM CLEAR ON THAT FROM WHERE THE ARGUMENTS ARE OF THE PARTIES IN THIS CASE.

WELL , I DON'T KNOW THAT THERE IS ANY CASES COMING UNDER THE OFFER-OF-JUDGMENT STATUTE , PARTICULAR

I UNDERSTAND THAT , BUT BY ANALOGY IS WHAT I AM LOOKING FOR .

BUT BY ANALOGY , I WOULD THINK STILL, THAT IF YOU HAVE DISCOVERY CONFLICTS OR PLEADINGS ARE STICK PHONE WHATEVER REASON , ONCE PLEADINGS ARE STRICKEN , I THINK IT MAKES KIND OF A MOCKERY OF THE RULE AUTHORIZING STRIKING PLEADINGS , TO SAY THAT THE JUDGE STILL HAS TO ALLOW THAT PARTY TO COME BACK ANDRAISE THE EXACT SAME ISSUESTHAT WERE JUST STRICKEN .

WHAT HAPPENS, THOUGH, TO THE TRIAL JUDGE, SAY , I KNOW THIS SCENARIO , TO THE HEARING ON ATTORNEYS FEES NOW, AND HE HAS YOUR OFFER OF JUDGMENT OR WHATEVER , AND HE LOOSE AND HE SAYS , WELL , AND HE LOOKS AND HE SAYS,WELL , YOU KNOW , THIS THING WAS SERVED WAY OUTSIDE THE TIME PROVISIONS OF THE RULE , CAN WHICH IS THE ONLY THING THAT GIVES ME ANY AUTHORITY TO GRANT YOU ATTORNEYS FEES, AND WHAT AM I GOING TO DO NOW? I AM HERE AT THE HEARING , AND IT APPEARS TO ME , THAT I HAVEN'T BEEN VESTED IN AUTHORITY TO GRANT ATTORNEYS FEES , BECAUSE O F THE , OF THIS BEING WAY OUTSIDE THE PROVISIONS OF THE RULE . NOW , I THINK IT GOES TO WHAT JUSTICE LEWIS IS ASKING , THAT IS THAT THERE MAY BE SOME CASES WHERE PEOPLE REALLY JUST DIDN'T SET OUT A VALID CLAIM THAT CAN BE RECOGNIZED, YOU KNOW , BY THE COURTS , AND SO THERE ARE OCCASIONAL CASES THAT SAY , EVEN IN A DEFAULT SITUATION , THAT THE COURT, IF THEY RECOGNIZE THAT THIS JUST ISN'T A LEGAL CASE OR SOMETHING.

I THINK THAT, PERHAPS ONLY THE WELL-PLEADED ALLEGATIONS SHOULD BE THE ALLEGATIONS THAT STAND ANALOGY ASIANS THAT AREN'T WELL PLEADED POSSIBLY SHOULDN'T, BUT I , ALSO , THINK THAT RULE 1.380 , STANDS ON ITS OWN I N AUTHORIZING ATTORNEYS FEES , AND ONCE A PARTY HAS BEEN SANCTIONED, YOU DON'T NEED TO LOOK AT AN INDEPENDENT ATTORNEYS FEE STATUTE LIKE THE OFFER-OF-JUDGMENT STATUTE OR ANY STATUTE. THAT, WHICH IS ANOTHER REASON WHY I THINK THE CONTINGENCY MULTIPLIER IN THIS CASE NORMALLY , SARCUS SAYS ON AN OFFER OF JUDGMENT , YOU DON 'T GET THE CONTINGENCY MULTIPLIER , BUT 1.380 IS AN INDEPENDENT BASIS FOR THE COURT TO RELY ON , AND SO THAT IS WHY I DON'T THINK SARKIS APPLIES TO THIS CASE, EITHER.

CHIEF JUSTICE: UNFORTUNATE LY WE HAVE CONSUMED YOUR TIME AND WE APPRECIATE YOUR RESPONSES.THANK YOU.

WE ASK THE COURT TO REINSTATE THE FINAL JUDGMENT .

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MY NAME IS BEHIND A MYNAME IS HINDA KLEIN , AND I AM HERE ON BEHALF OF NATIONWIDE. WITH RESPECT

WOULD YOU ADDRESS THE JURISDICTION ISSUE, TOO , AND MY PARTICULAR CONCERN WITH THE JURISDICTION ISSUE IS THAT WE HAVE SUCH AN EXPRESSSTATEMENT FROM THE THIRD DISTRICT, FOR INSTANCE, POINTING TO A DISSENTING OPINION, IN AN EARLIER CASE , FROM THE FOURTH DISTRICT , IN SAYING WE AGREE ABSOLUTELY , WITH THE DISSENTING VIEW EXPRESSED, AND

THEN WE HAVE A DECISION HERE THAT EXPRESSLY , REALLY , RELIES ON THE REASONING OF THAT EARLIER DECISION , SO FOR PEOPLE THAT READ THE LAW REPORTS OUT THERE , THEY SAY, WELL , THE THIRD DISTRICT AND THE FOURTH DISTRICT CLEARLYARE AT ODDS HERE , AND THAT IS SORT OF WHAT WE HAVE FACIALLY, SO WOULD YOU, WITH THAT, HELP US WITH THE JURISDICTIONAL ISSUE .

YES. ACTUALLY, WE DON'T BELIEVE THAT THERE IS AN EXPRESS AND DIRECT CONFLICT, IF FOR THE REASON , REASONS EXPRESSED BY THE THIRD DISTRICT IN THE CUBAN CASE, WHERE THEY DISTINGUISHED THE CUBAN CASE FROM THE GRIP CASE , BECAUSE FROM THE KUVIN CASE, WHERE THEY DWIRKD THE KUVINCASE FROM THE GRIP CASE,BECAUSE IT WAS A RECOVERMADE TO A DEFENDANT , WHEREASIN THIS WAY IT IS THE OTHER WAY AROUND .

HELP US. WALK US THROUGH THAT. WHY WOULD THAT MAKE A DIFFERENCE, WITH THIS VIEW ABOUT THE PREMATURE SERVICE OF AN OFFER?

WELL , BECAUSE THE 90- DAY PROVISION , THE REASON IT WAS INITIALLY PUT IN THERE WAS TO ENABLE THE PARTIES TO PRETTY MUCH HAVE A HANDLE ON THE CASE BEFORE THEY HAVE TO ADDRESS WHAT COULD ULTIMATELY CONSTITUTE AN ANXIOUS FOR FAILING TO SETTLE. IN A CASE WHERE AN OFFER IS MADE TO A PLAINTIFF , THE UNDERPINNING IS THAT THE PLAINTIFF , PRESUMABLY , KNOWSMORE ABOUT THE CASE OR SHOULD KNOW MORE ABOUT THE CASE AND THE MERITS, THAN THE DEFENDANT IN THOSE EARLY DAYS. THE SAME DOES NOT HOLD TRUE , WHEN THE OFFER IS MADE BY A PLAINTIFF TO A DEFENDANT. WHICH I S , ALSO

ISN'T THE PLAIN LANGUAGE , THOUGH , THE SAME , SHALL BE SERVED.

ABSOLUTELY.

AND THERE CAN BE, IN TERMS OF NOW WE ARE GOING TO POLICY, IF WE GO TO POLICY,THEN , YOU KNOW, YOU HAVE A PRODUCTS LIABILITY CASE , AND IN THAT CASE, YOU KNOW , THE DEFENDANT HAS POSSESSION OF MOST OF THE INFORMATION , TO KNOW, FOR THE PLAINTIFF UNTIL THEY GET INTO THE LAWSUIT, REALLY , DOESN'T GETDOCUMENTS , YOU KNOW , THE DEFENDANT KNOWS THAT THERE IS A SMOKING GUN OR NOT . SO I MEAN , THE WHOLE IDEA WAS TO MAKE THIS BILATERAL , AND I HAVE GOT A REAL PROBLEM , I THINK THE IDEA IS EITHER WE STICK TO THE PLAIN LANGUAGE OR W E SAY IT IS , YOU KNOW , GOES BOTH, WHATEVER THAT RULE OF CONSTRUCTION IS , HAS TO GO BOTH WAYS . AND I DON'T SEE HOW YOU , THERE IS NOT ONE BIT OF DIFFERENCE IN THE LANGUAGE.DO YOU AGREE WITH THAT?

ABSOLUTELY. I THINK THE KUVIN COURT WAS PLAIN LY WRONG IN MAKING THAT DISTINCTION, BUT IN ADDRESSING THE COURT'S JURISDICTION TO RECONCILETHE TWO CASES, WE FOCUSED O N WHY THEY ARE DISTINGUISHABLE FROM THIS ONE, FOR PURPOSES OF THIS COURT'S JURISDICTION. I ABSOLUTELY AGREE WITH THE COURT, THAT THE WORD "SHALL" MEANS SHALL , AND THERE IS NO OCCASION FOR THE COURT TO INTERPRET IT DIFFERENTLY , AND CERTAINLY NO POLICY. IF ANYTHING, THIS CASE DEMONSTRATES WHY THERE SHOULD BE A STRICT POLICY AND WHY THERE SHOULDN'T AND THERE SHOULD BE AN OPPORTUNITY FOR EVIDENTIARY HEARINGS AND SO ON.

WHY ON THE ONE HAND, IF A POLICY SUCH AS THE THIRD DISTRICT INDICATES, BE WORTHWHILE, SINCE AT THETIME THAT THE DEFENDANT ACTUALLY GETS THE COPY OF THE LAWSUIT, THE DEFENDANTIS ALSO PUT ON NOTICE THATTHIS IS REALLY WHAT THE PLAINTIFF WANTS , AND THEYCAN ACTUALLY BE VIEWINGTHEIR CASE AND ALL OF THE EVIDENCE THAT THEY HAVE , WITH THAT IN MIND, AND MAY, IN FACT , PROMPT AN EARLIER SETTLEMENT, SO WHY WOULDN'T THAT, ALSO ACTION BE A GOOD POLICY?

WELL , LET'S WHYWOULDN'T THAT , ALSO , BE A GOOD POLICY ?

LET'S KEEP IN MIND THAT THERE IS NO POLICY AGAINST MAKING A SETTLEMENT OFFER AT ANY TIME BEFORE 90 DAYS. WE ARE DEALING WITH A SANCTION THAT IS A DEROGATION AFTER RULE THAT IS COMMON LAW. IT IS NOT ABOUT WHETHER THEPARTIES CAN SETTLE. IT IS WHETHER THE FAILURE TO SETTLE SHOULD ULTIMATELY RESULT IN SANCTIONS .

SHOULD THERE BE AN OBLIGATION, THOUGH, WHETHERIT IS VOID OR VOIDABLE , FOR A PARTY , IN THIS CASEY ASSUME NATIONWIDE JUST DIDN'T RESPOND TO THE OFFER? IS THAT WHAT HAPPENED FROM THE RECORD IN THIS CASE?

THERE WAS A COUNTEROFFER HERE, WAS THERE NOT?

I BELIEVE THEY HAD.

SO THEY FILED A COUNTEROFFER OF SETTLEMENT?

THEY DID NOT.

SO THEY MADE , THERE WAS , THEY NEVER FILED A MOTION TO STRIKE THE OFFER, CORRECT?

THAT'S CORRECT .

I MEAN, I DON'T KNOW , SINCE AGAIN , WE DON'T HAVE A SITUATION ABOUT IS THERE PREJUDICE , ABOUT WELL , MY GOODNESS, I DIDN'T HAVE ANY TIME , BECAUSE IT WAS FILED ON THIS DATE , BUT WHAT ABOUT THE SECOND PART, WHICH IS THAT THE CERTIFICATE OF SERVICE SAYS IT I S FILED SIX DAYS BEFORE. THE PLAINTIFF I S ALLEGING THAT ACTUALLY THAT CERTIFICATE OF SERVICE HAS A MISTAKE , AND THAT THEY NEEDED DISCOVERY, TO BE ABLE TO SUPPORT THEIR CLAIM THAT, IN FACT , IT WAS SERVED LATER , BECAUSE IT WAS RECEIVED LATER , AND YOU KNOW, WHATEVER THE EVIDENCE WOULD HAVE BEEN, AND THE JUDGE THOUGHT ENOUGH OF THAT DEFENSE , OR I GUESS IT WOULD BE A REBUTTAL TO YOUR DEFENSE OF UNTIMELINESS , TO ALLOW DISCOVERY ON IT , AND INSTEAD OF HAVING DISCOVERY , NATIONWIDE, I GUESS , STONE WALLS, I DON'T KNOW THE WHOLE HISTORY OF WHAT HAPPENS , BUT ENOUGH FOR THEJUDGE TO SAY , THROW UP HIS OR HER HANDS AND SAY , I , YOU KNOW , YOUR PLEADING IS STRICKEN . YOUR RESPONSE OF UNTIMELINESS IS STRICKEN. FIRST OF ALL , I GUESS THE FIRST QUESTION WOULD BE , WHY ISN'T IT APPROPRIATE T O LOOK BEHIND THE CERTIFICATE O F SERVICE, THAT IS THAT IT CREATES A PRESUMPTION THAT IS REBUTTABLE , NOT AN IRREBUTTABLE PRESUMPTION , AND ISN'T THAT IN CONFLICT WITH OTHER CASES, WHICH DON'T SAY THAT THE CERTIFICATE OF SERVICE IS REBUTTABLE, SO , FIRST , THAT QUESTION , WHY ISN'T, YOUKNOW, IF WE LOOK AT IT AND SAY, OKAY , YOU ARE RIGHT. IT NEEDS TO BE 90 DAYS BEFORE. THE PLAINTIFF IS SAYING THIS WAS. THIS PLEADING SAYS CERTIFICATE OF SERVICE BUT IT IS NOT. IT LOOKS LIKE IT IS PREMATURE BUT THEY ARE SAYING, NEW YORK CITY WE REALLY SERVED IT LATER. WHY ISN'T A REBUTTABLE PRESUMPTION APPROPRIATE AND ISN'T THAT IN CONFLICT?

WELL , ACTUALLY WE DON'T BELIEVE IT IS IN CONFLICT , FOR THE SIMPLE REASON THAT NONE OF THE CASES OPPOSING COUNSEL HAS RELIED ON IN HISBRIEF AND NONE THAT I HAVE BEEN ABLE TO FIND , INVOLVE A SITUATION WHERE IT WAS THE PARTY WHO CERTIFIED THE SERVICE , WHO WAS NOW SEEKING TO ARGUE THAT HIS SIGNATURE ON A CERTIFICATE OF SERVICE AS AN OFFICER OF THE COURT , SYSTEM IMPROPER , BECAUSE I T WAS ACTUALLY SERVED ON A DIFFERENT DAY. ALL OF THOSE OTHER CASES INVOLVE SITUATIONS WHERE IT IS THE RECIPIENT OF WHATEVER THE DOCUMENT IS, WHO CHALLENGES THE CERTIFICATE OF SERVICE.

WHY SHOULD THAT MAKE A DIFFERENCE? LET'S , LET ME , IN OTHER WORDS , WE ALWAYS D EAL IN HYPOTHETICALS, S O LET'S SUPPOSE THAT THE LAWYER, NOW, FOR THE PLAINTIFFS , HAS PREPARED, AND ACTUALLY SIGNED ON A CERTIFICATE OF SERVICE , BUT THEN H E READS THE LATEST FLORIDA LAW WEEKLY, AND HE SAYS , OWE GEE , THE FLORIDA AND HE SAYS GEE , THE FLORIDA SUPREMECOURT HAS JUST DECIDED I CAN'T SERVE ONE OF THESE . I HAVE STRICTLY

COMPLIED WITH THE RULE AND ALREADY FILLED EVERYTHING OUT , BECAUSE I THOUGHT THAT I WAS GOING TO GET SERVICE OF PROCESS SOONER , AND SO HE CALLS THE LAWYER ON THE OTHER SIDE AND SAYS YOU KNOW,I HAVE ALREADY COMPLETED, I TOLD YOU I WAS GOING TO MAKEAN OFFER OF JUDGMENT, YOU KNOW, A SETTLEMENT OFFER OR WHATEVER , AND I HAVE GOT IT HERE , BUT I REALLY CAN'TSERVE IT O N YOU , IN ORDER TO BE IN COMPLIANCE WITH THE RULE, FOR ANOTHER WEEK , AND SO ACTUALLY A WEEK LATER , H E WRITES A COVER LETTER AND SAYS ATTACHED PLEASE FIND THE OFFER OF JUDGMENT THAT I PREPARED LAST WEEK BUT IHAVE DELAYED SENDING TO YOU, IN ORDER TO BE IN COMPLIANCE WITH THE SUPREME COURT RULE,SO HE HAS GOT A LETTER.HE HAS GOT A TELEPHONE CALL AND I T ACTUALLY HAPPENED THAT WAY AND I N THAT PARTICULAR CASE , SHOULDN'T THERE ALWAYS BE AN OPPORTUNITY T O DEMONSTRATESOMETHING LIKE THAT? YOU KNOW .

WELL , I DON'T THINK SO. I THINK IF YOU LOOK AT THE CERTIFICATE OF SERVICE , IN LIGHT OF THE RULE O F CIVIL PROCEDURE , AND THE FACT THAT IT HAS GOT TO BE STRICTLY CONSTRUED

SO EVEN IN MYHYPOTHETICAL, HE HAS GOT A COVER LETTER , HE HAD ACONVERSATION WITH THE LAWYER, HE DELAYED ACTUALLY SERVING IT, SO HE COULD BE IN COMPLIANCE WITH OUR DECISION AND THE RULE? YOU ARE SUE SAYING, BOY, THE MINUTE H E YOU ARE SAYING , BOY , THE MINUTE HE FILLED THAT OUT, HE CAN'T USE THAT ONE AGAIN. HE HAS GOT TO DO A NEW ONENOW , EVEN THOUGH HE EXPLAINED EVERYTHING ANDTHERE IS PRETTY GOOD PROOF OF THAT.

FIRST OF ALL IN YOUR SCENARIO THERE, IS CERTAINLY NOTHING TO STOP THE ATTORNEY FROM SENDING ANOTHER ONE ON A TIMELY BASIS , OR THERE IS CERTAINLY NO REASON FOR THE ATTORNEY TO SIGN AND DOCUMENT, CERTIFYING THAT IT WAS SERVED ON SUCH-AND-SUCHA DATE, IF HE WAS GOING TO SERVE IT A WEEK LATER!

LET ME COME TO JUST , AND THEN I WILL , REGARDLESS OF ALL OF THAT AND I REALIZE NOW WE ARE SORT OF MOVING INTO THE OTHER ISSUE, ISTHAT THE NATIONWIDE REFUSING TO COMPLY WITH DISCOVERY , NOW , HAS GOT TO B E THE WORST CASE SCENARIO , THAT IS IT IS LIKE THE POLICE OFFICER COMES UP TO YOU AND SAYS PLEASE COME WITH ME . YOU DON'T PUNCH THE POLICE OFFICER IN THE NOSE , AND HERE YOU DON'T SAY I DON'T CARE WHAT THE JUDGE HAS ORDERED , I AM NOT GOING T O DO THAT , AND THIS APPARENTLY , NOW YOU HAVE HAD ONE TRIAL JUDGE, AND YOU HAVE THREE JUDGES ON THE DISTRICT COURT OF APPEAL , THAT HAVE REVIEWED THIS AND CONCLUDED THAT NATIONWIDE WAS , FLAG RANTLY DISREGARDING THE ORDERS FOR THE TRIAL COURT JUDGE, SO HOW CAN WE AVOID THAT, THAT IS THE CLAIM THAT NATIONWIDE SETS OUT THAT THIS IS NOT IN COMPLIANCE WITH THE RULE , HAS NOWBEINBEEN STRICKEN , AND THE OBVIOUS HE HAVE HAS NOW BEEN STRICKEN , AND THE OBVIOUS EFFECT OF THAT HAVING BEEN STRICKEN , IS YOU DON'T GET TO MAKE THAT DEFENSE ANYMORE , IN RESPONSE TO ATTORNEYS FEES.

FIRST OF ALL , DESPITE THE TRIAL COURT AND THE THIRD DISTRICT COURT OF APPEAL

FOURTH.

I AM SORRY , FOURTH DISTRICT COURT OF APPEAL , WE DID NOT FAIL OR REFUSE TO COMPLY WITH DISCOVERY REQUESTS.

WE CAN'T REL ITIGATE THAT.

I UNDERSTAND THAT , WHICH IS WHY WE DIDN'T RAISE THAT IN OUR BRIEFS. NEVERTHELESS

THAT IS NOT A POINT HERE. YOU CAN'T RELITIGATE WHETHERYOU DID OR YOU DIDN'T.THAT HAS ALREADY BEEN DETERMINED. EYE UNDERSTAND THAT , BUT THE ARGUMENT WE DID RAISE IN THIS BRIEF AND WHICH I S APPROPRIATE BEFORE THIS COURT , IS ASSUMING FOR THESAKE OF

ARGUMENT THAT THERE IS JURISDICTION , ASSUMING FOR THE SAKE OF ARGUMENT , THAT THE TRIAL AND THE APPELLATE COURTS HERE WERE CORRECT IN FINDING THAT SANCTIONS WERE WARRANTEDHERE, 1.380 DOES NOT AUTHORIZE OR JUSTIFY THESANCTION FOR A NUMBER OF REASONS.

LET ME ASK YOU ABOUT THAT , BECAUSE THE WAY I UNDERSTAND THE POSTURE OF THE CASE , IS THERE IS A TRIAL , WHATEVER , THE POST-JUDGMENT OR POST TRIAL , YOU ASK FOR ATTORNEYS FEES OR THEY ASK FOR ATTORNEYS FEES, AND YOU SAID YOUR OFFER OF SETTLEMENT WAS VOID. YOU CAN'T GET ATTORNEYS FEES , AND THE TRIAL COURT SAYS,WELL , I AM GOING TO ORDERDISCOVERY ON THE ISSUE OF WHETHER IT IS VOID WHEN IT WAS FILED , IF IT WAS WITHIN THE 9 0 DAYS OR NOT, AND THEN YOU SAID , WELL , NO , WE DON'T THINK THAT IS CORRECT. YOU SHOULDN'T BE ORDERING THAT. THE TRIAL COURT FINDS , WHETHER YOU AGREE WITH IT OR NOT , THE TRIAL COURT FINDSTHAT YOU OBSTRUCTED DISCOVERY ON THAT ISSUE , SO IF YOU OBSTRUCTED DISCOVERYON THAT ISSUE , WHY ISN'T IT WITHIN THE DISCRETION OF THE TRIAL COURT , TO SAY, TO ISSUE AN ORDER SAYING , SINCE THIS IS THE ISSUE YOU OBSTRUCTED DISCOVERY ON, IAM GOING TO FIND THAT ISSUE IN FAVOR OF THE PLAINTIFF . AND SPECIFICALLY AREN'T THERE PROVISION INS RULE 1.380-B , THAT WOULD PROVISIONS IN RULE 1.308-B, THAT WOULD ALLOW A JUDGE TO IMPOSE JUST THAT KIND OF SANCTION, ORDERS THAT MATTERS REGARDING WHICH QUESTIONS WERE ASKED OR ANY OTHER DESIGNATED FACTS , SHALL BE TAKEN TO BE ESTABLISHED FOR PURPOSES O F THE ACTION , IN ACCORDANCE WITH THE CHRACHL THE PARTY OBTAINING THE ORDER. IN OTHER WORDS , THE , WHYCOULDN'T THE TRIAL COURT FIND THAT OFERT WAS MADE AFTER 90 DAYS , BECAUSE THAT WAS THE ISSUE BEING LITIGATED?

WELL , ACTUALLY IT WASN'T , JUDGE , JUSTICE CANTERO. FIRST OF ALL , THE TRIAL COURT NEVER ACTUALLY FOUND THAT ANYTHING W E DID PRECLUDED THE PLAINTIFF FROM SUPPORTING THEIR THEORIES . FIRST OF ALL , THEY HAD NUMEROUS THEORIES , NONE OF WHICH ARE ESTABLISHED BY THE LAW. FOR EXAMPLE , ONE OF THEIRTHEORIES WAS THIS CONSTRUCTIVE KNOWLEDGE THEORY. A SECOND THEORY WAS THAT THEIR OWN CERTIFICATE OF SERVICE WAS INCORRECT .

BUT HASN'T ALL THAT BEEN MOOTED, BY THE JUDGE IMPOSING THIS SANCTION?

BUT THAT IS OUR POINT T ACTUALLY HASN'T BEEN MOOTED , BECAUSE FIRST OF ALL , THE VAST MAJORITY OF THE DISCOVERY THAT WAS SERVED ON NATIONWIDE , WAS DISCOVERYTHAT HAD LITERALLY , LITERALLY NOTHING TO DO WITH ANY OF THOSE ISSUES AT ALL.

YOU ARE GOING NOW , GOINGBEHIND, AGAIN , YOU ARE CONTINUING TO ARGUE THE DISCOVERY VIOLATION, AND AS THE CHIEF HAS MENTIONED, CANWE APPROACH THIS ON THE BASIS A DISCOVERY VIOLATION WAS FOUND. YOU STILL DISAGREE WITH. THAT REWE UNDERSTAND THAT , BUT THE POINT IS IN FOLLOWING UP WITH WHAT JUSTICE CANTERO INDICATED , LET'S SUPPOSE YOU HAD ASSERT ADD STATUTE OF LIMITATIONSDEFENSE THAT IS NOT CLEAR ON THE FACE AND SOMETHING HAD OCCURRED AND THE JUDGE SAYS, OKAY, YOU ARE NOT GOING TO BE ABLE TO PRESENT YOUR DEFENSE.WHAT HAPPENS IN THAT SITUATION? DO YOU HAVE AUTHORITY THAT WOULD SAY THAT YOU CAN STILL ASSERT YOUR TIME LIMITATION AS A BAR , UNDER THOSE CIRCUMSTANCES?

YES, I DO , JUDGE.

OKAY. THAT IS - -

I POINTED IT OUT.

THAT IS WHERE WE WANT TO GO. ANOTHER MORELAND CASE BASICALLY HOLDS, THAT IS A SUPREME COURT CASE FROM 1910, THAT A DEFAULT ENTITLES A PLAINTIFF TO RELIEVE

FORWHICH A PROPER PREDICATE HAS BEEN LAID. I WOULD SUBMIT THAT, WHEN YOU ARE TALKING ABOUT A PROPOSAL FOR SETTLEMENT

THAT CASE CAME OUT OBVIOUSLY BEFORE THE RULESOF CIVIL PROCEDURE AND BEFORE RULE 1.380. IS THERE ANY CASE INTERPRETING 1.380 , THAT SAYS WHAT JUSTICE LEWIS WAS ALLUDING TO , REGARDING THE STATUTE O F LIMITATIONS OR ANY OTHER KIND OF DEFENSELIKE THAT?

NOT THAT I AM AWARE OF.

ISN'T, THIS AGAIN , THAT GOES BACK AROUND THE CIRCLE , BECAUSE IF THE CERTIFICATE OF SERVICE , PER SE , ESTABLISHES THE DATE THAT A T IS SERVED , AND THERE IS NO DISCOVERY THAT COULD BE DONE TO CHANGE THAT, THEN THE DISCOVERY BECOMES COMPLETELY IRRELEVANT , AND THAT IS WHY , AND SO WE HAVE TO GO BACK BURKES IF THE ISSUE IS THAT THERE CAN TO GO BACK , BUT IF THE ISSUE IS THAT THERE CAN BE ASSERTIONS THAT THE CERTIFICATE IS IN ERROR FOR WHATEVER REASON , FOR EXAMPLE JUSTICE ANSTEAD GAVE YOU ON EXAMPLE. I CAN THINK OF SOMETHINGWHERE IT IS SERVED ON THEBEGINNING AFTER NEW YEAR ANDTHE PLAINTIFF REASONABLY , IT IS 2000 AND THEY PUT, STILL, IT IS 1999. THEY SERVE IT ON JANUARY 1 , 2000 , BUT INSTEAD SOME CLERICAL ERROR IS IT IS JANUARY 1 , 1999 , WHICH I S YOU KNOW , CERTAINLY WAY BEFORE, OUTSIDE THE TIME LIMIT , SO IF THE , THAT IS THE THRESHOLD QUESTION WE HAVE TO DECIDE , THAT IT IS A CERTIFICATE O F SERVICE , ITSELF , THE ONLY EVIDENCE OF THE TIMELINESS OF THE OFFER? IF WE DISAGREE THAT THAT IS THE ONLY EVIDENCE, THEN THE JUDGE ALLOWING THE DISCOVERY, WHETHER IT IS WAS ON DIFFERENT ISSUES BUT AROUND THAT ISSUE, DECIDEDED THAT THAT DISCOVERY WAS IMPORTANTFOR THE PLAINTIFF TO HAVE I N ORDER TO SHOWTIMELYNESS , AND AT THAT POINT , THEN , THE SANCTION, IN TERMS OF WHAT MERCER SAYS, I S ONE OF THE SANCTIONS IS STRIKING THE PLEADINGS O R HAVING A FACT ADMITTED AS TRUE , AND I THINK YOU HAVE TO WIN THE FIRST BATTLE, WHICH IS THAT THE CERTIFICATE OF SERVICE IS PER SE , THE ONLY EVIDENCE,IN ORDER TO MAKE YOUR OTHER POINT, WHICH IS THAT THE DISCOVERY WAS COMPLETELY IRRELEVANT TO ANY CONCEIVABLE ISSUE IN THECASE, AND THEREFORE MERCER CAN'T APPLY , BECAUSE YOUHAVE GOT, STILL , A PLEADING THAT SHOWS ON ITS FACE , THAT THE OFFER WAS VOID. IS THAT, I MEAN , IN A ROUNDABOUT WAY, THAT YOUR , BUT YOU WOULD AGREE THAT THAT FIRST PEG HAS TO BE THAT WE ACCEPT YOUR PROPOSITION THAT THE CERTIFICATE OF SERVICE PER SE , ESTABLISHES THE DATE.

YES AND NO . YES , BECAUSE WE BELIEVE THAT , OF COURSE , WHETHER THE PRIMARY ISSUE HERE WAS IF THE OFFER OF JUDGMENT WAS VALID TO BEGIN WITH. CERTAINLY IF IT WAS SHOWN TO BE VALID FOR OTHER REASONS, WE WOULDN'T BE HERE. WE WOULDN'T HAVE BEEN LITIGATING FOR SIX MONTHS BURKES SECONDARILY AND I THINK EQUALLY AS IMPORTANT, FROM THE INCEPTION OF THIS AND ON ITS FACE , IT WAS INVALID FOR A SECOND REASON AS WELL , AND THAT WAS BECAUSE IT WAS A JOINT OFFEROF JUDGMENT , AND THIS CASE HAS VERY CLEARLY HELD THAT JOINT OFFERS OF JUDGMENT, WHICH ARE NOT APPORTIONEDBETWEEN THE OFFERING PARTIES , ARE INVALID .

SO THAT IS A DIFFERENT ISSUE THAN THE CERTIFICATE OF SERVICE.

AND IT WAS RAISED FROM THE INCEPTION.

BUT THE FOURTH DISTRICT DOESN'T EVEN ADDRESS T .

DOESN'T ADDRESS IT AT ALL. THEY DIDN'T ADDRESS, IT BUT IT CERTAINLY WAS ANOTHER GROUNDS FOR - -

IF YOU ARE CORRECT ON THAT , THEN THAT WOULD BE SOMETHING , I DON'T KNOW, THAT COULD BE REMANDED FORTHAT DETERMINATION , CORRECTSOME YOU WOULDN'T ASK US TO START TO, I MEAN, IN OTHER WORDS IF THE ISSUE HERE IS THAT THE CERTIFICATE, I MEAN , WE HAVE GOT

THREE ISSUES WE ARE DEALING WITH. ONE , DOES SHALL MEAN SHALL FOR BOTH PLAINTIFFS AND DEFENDANTS. THAT IS THE FIRST ISSUE. TWO, IF SHALL DOES MEAN SHALL, THEN DOES THE CERTAIN IFERK OF SERVICE UNTIMELINESS, CAN THERE BE EVIDENCE ADMITTED TO SHOW THAT IT STILL WAS TIMELY . NOW , THREE , YOU HAVE GIVEN A WHOLE OTHER THING, WHICH IS THAT THERE IS SOMETHING ELSE ON THE FACE OF THIS OFFER THAT WOULD NOT MAKE IT VALID THAT HAS NOTHING DO WITH TIMELINESS.

AND THAT ARGUMENT WAS RAISED FROM THE VERY BEGINNING.

WOULD THE TRIAL COURT

WHY WOULDN'T THAT BEINCLUDED IN THE PLEADINGS BEING STRICKEN AND THE SANCTIONS IMPOSE !!ED BY THE TRIAL COURT? THAT IS THAT YOU ASSERTING ANOTHER REASON , AND THE JUDGE STRIKING YOUR DEFENSES ?

WELL , FIRST OF ALL, IF THE OFFER I S INVALID , I T WAS VOID FROM ITS INCEPTION. IT DOES NOT, AS THE FOURTH DISTRICT SAID , GET TO THE RESUSCITATE.

NOW WE ARE BACK TO THE QUESTION THAT JUSTICE LEWIS FIRST POSED , AND YOU SAY THAT THERE REALLY ISN'T ANYAUTHORITY OUT THERE , OTHER THAN A 1910 SUPREME COURT CASE , REALLY , O N ANOTHER ISSUE.

WELL , EXCEPT THAT THEREIS A MAJOR DIFFERENCE

ISN'T THAT GOING TO INVITE, THOUGH , THE TRIAL COURT HAS DIRECTED YOU TO DO DISCOVERY ABOUT THIS , AND YOU ARE NOW GOING TO BE ABLE TO SAY, WELL , I DON'T CARE . YOU ARE GOING TO THUMB YOUR NOSE TO THE TRIAL COURT. I REALIZE IT IS NOT YOU. YOU ARE STUCK WITH THE LAWYERS THAT WORKED ON THE CASE BEFORE . BUT DOESN'T THAT JUST , REALLY , INVITE CONTEMPT FORTHE COURT , THAT IS I DON'T CARE , JUDGE , WHAT YOU HAVE ORDERED , I AM NOT GOING TO DO IT, AND THEN , LATER , I AM SIMPLY GOING TO KEEP ASSERTING THAT THIS IS A FACIAL PROBLEM AND DEFECT, AND I AM NEVER GOING TO COMPLY , AND ISN'T THE BETTER ANSWER TO THAT , YOU DO COMPLY. YOU STILL ASSERT YOUR RIGHTS , AS FAR AS THAT ISSUE IS CONCERNED , BUT YOU TAKE THOSE UP AT THE TRIAL JUDGE , EVENTUALLY GOOFS ON THAT , YOU TAKE UP THAT ON APPEAL AND DON'T STONE WAIL AND SAY STONEWALL AND SAY I AM NOT GOING TO COMPLY WITH THE ORDERS.

DIFFICULTNESS THAT WE HAVE IS THIS WASN'T A BUNCH OF IRRELEVANT DISCOVERY. THIS WAS DISCOVERY THAT WAS DESIGNED TO GET TO PRIVILEGED INFORMATION ON THE PART OF NATIONWIDE.

BUT YOU HAVE A RIGHT TO APPEAL AND GO BY CERTIORARI .

I DID.

IN OTHER WORDS THE SYSTEM BUILDS IN SAFEGUARDS FOR THERIGHT WAY TO DO THAT. THE RIGHT WAY TO DO THAT IS TO DO THOSE THINGS. YOU DON'T DO IT THE WRONG WAY, BY SAYING I AM NOT GOING T O COMPLY . LOTS OF PEOPLE END UP IN PRISON FOR DOING THAT I N OTHER SETTINGS, WHATEVER, SO THERE IS NO SPECIAL PRIVILEGE GIVEN TO LAWYERS OR INSURANCE COMPANIES , FOR THUMBING THEIR NOSES AT TRIAL COURT JUDGES. THE APPELLATE COURT IS THERE FOR THAT VERY PURPOSE.

I ABSOLUTELY UNDERSTANDTHAT, JUDGE , BUT, IN DETERMINING THE APPROPRIATENESS OF ANY SANCTION , THE ISSUE OF THE PREJUDICE SUFFERED BY THE OPPOSING PARTY , IS OF PARAMOUNT IMPORTANCE . HERE THERE WAS LITERALLY NO EVIDENCE O F PREJUDICE.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO STOP THERE , BECAUSE WITH BOTH OF YOU , WE HAVE USED UP YOUR TIME , AND WE APPRECIATE BOTH OF YOU, ESPECIALLY , RESPONDING TO OUR CONCERNS AND OUR QUESTIONS.THANK YOU BOTH , VERY MUCH.

THANK YOU .