Suzanne S. Ham v. Scott Ryan Dunmire

PLEASE RISE. HEAR YE, HEAR YE, HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW IN SESSION. ALL WHO HAVE CAUSE TO PLEA, 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.

GOOD MORNING EVERYONE. AND WELCOME TO THE FLORIDA SUPREME COURT. JUSTICE BELL IS RECUSED ON THIS FIRST CASE THAT WE HAVE THIS MORNING BECAUSE OF HIS PARTICIPATION AT THE TRIAL LEVEL. AND I APPRECIATE COUNSEL BEING READY TO GO ON THAT CASE. SO, WITHOUT ANY FURTHER ADO, WE WILL CALL THE CASE OF HAM VERSUS DUNMIRE. COUNSEL'S READY, YOU MAY PROCEED.

MAY IT PLEASE THE COURT, I'M RICHARD WARFIELD, PENSACOLA, ATTORNEY FOR THE PETITIONER, MRS. SUZANNE HAM. THIS CASE IS HERE ON CONFLICT JURISDICTION FROM DISTRICT COURT OF APPEAL, FIRST DISTRICT, CERTIFYING THAT THERE WAS CONFLICT BETWEEN THE DECISION HERE IN THEIR COURT AND THE, ONE OF THE OTHER DCA COURTS. THIS MATTER STARTED OFF AS SORT OF A ROUTINE REAR-END TYPE COLLISION WITH PERSONAL INJURIES TO MISS HAM. SUIT WAS FILED JANUARY OF 2000. PROCESS WAS SERVED WITHIN ABOUT 30 DAYS. AND NOBODY RESPONDED.

WITHOUT GOING INTO ALL THE DETAILS, WHICH WE'RE GENERALLY FAMILIAR WITH, COULD YOU TELL US WHAT LEGAL ERROR IT IS THAT YOU ARE CLAIMING THE TRIAL COURT MADE THAT IS NOT CONSISTENT WITH OUR CASE LAW ON THIS ISSUE.

I THINK THE DECISION OF THE TRIAL COURT, SIR, IN DISMISSING THE CASE WITH PREJUDICE AS A RESULT OF FAILING TO ANSWER CERTAIN DISCOVERY, PRIMARILY SOME INTERROGATORIES.

AND WHAT CASE LAW OUT OF THIS COURT DO YOU FEEL WAS VIOLATED?

I THINK THE TOWNSEND VERSUS SPANGLER CASE, CASE OF DISTRICT COURT OF APPEAL.

WHAT DOES THE CASE THAT YOU JUST CITED -- THAT'S A CASE FROM THIS COURT?

YES, SIR.

AND WHAT DOES THAT CASE SAY?

NOT FROM THIS COURT. FORGIVE ME.

IS THERE A CONTROLLING CASE FROM THIS COURT OR DO YOU CLAIM THERE IS A CONTROLLING CASE FOR THIS COURT?

KOZEL VERSUS OSTENDORF CASE THAT HELD THAT THE DISMISSAL OF THE CASE BASED SOLELY ON THE ATTORNEY'S NEGLECT, UNDULY PUNISHES THE LITIGANT AND ESPOUSES A POLICY THIS COURT DOES NOT CARE TO PROMOTE.

ARE YOU ADVOCATING THAT A TRIAL JUDGE COULD NEVER IN ANY INSTANCE, BASED ON THE

CONDUCT OF THE LAWYER REPRESENTING THE PARTY, ENTER A DISMISSAL WITH PREJUDICE AFTER FINDING THE LAWYER'S CONDUCT ON BEHALF OF THE CLIENT --

YES, SIR, IF IT PREJUDICES THE CLIENT WHO KNEW NOTHING ABOUT IT, WAS NOT INVOLVED IN IT AT ALL. THAT IS WHAT THE CASES SEEM TO SUPPORT. THE DCA CASES AT LEAST.

DIDN'T KOZEL CREATE A NUMBER OF FACTORS IN DETERMINING WHETHER DISMISSAL WAS APPROPRIATE AS A SANCTION AND ONE OF THE FACTORS WAS THE CLIENT'S INVOLVEMENT? SO DOESN'T THAT IMPLY THAT THE CLIENT'S INVOLVEMENT IS NOT THE SOLE DETERMINING FACTOR IN WHETHER DISMISSAL AS A SANCTION IS APPROPRIATE? AND IF THE CLIENT WAS NOT INVOLVED, BUT OTHER FACTORS ARE SUBSTANTIALLY PRESENT, THEN DISMISSAL MAY STILL BE APPROPRIATE? IS THAT APPARENTLY WHAT WE HELD IN KOZEL?

NOT ALTOGETHER, SIR, BECAUSE THIS HEARING ON MOTION FOR SANCTION, I'M SURE YOU READ THE RECORD, LASTED ABOUT TEN MINUTES. IT WAS A TELEPHONIC HEARING BETWEEN THE COUNSEL AND THE JUDGE.

NOW WE ARE GETTING TO WHETHER THE COURT APPLIED KOZEL. BUT MY FIRST INITIAL QUESTION IS WHETHER KOZEL SAYS THE CLIENT'S INVOLVEMENT IS ONLY ONE OF SEVERAL FACTORS TO CONSIDER IN DETERMINING WHETHER DISMISSAL AS A SANCTION IS APPROPRIATE.

PERHAPS THAT'S SO, SIR.

SO YOU AGREE THAT THAT'S THE CASE? THERE MAY BE OTHER FACTORS PRESENT, EVEN IF THE CLIENT WAS NOT INVOLVED, THAT WOULD JUSTIFY DISMISSAL?

YES, SIR. I RELY PRIMARILY UPON THE CASE LAW THAT SAYS THAT PRIOR TO, TO DISMISSAL OF THE CASE, THE COURT MUST MAKE A FINDING -- WORD IS PRETTY SPECIFIC -- A FINDING --

WEREN'T THERE ACTUAL FINDINGS MADE IN THE ORDER THAT WAS ISSUED BY THE TRIAL JUDGE THAT INDICATE THAT THIS WAS, YOU KNOW, A CONTINUING COURSE OF CONDUCT?

YES, YOUR HONOR. AND THE ORDER THAT WAS FINALLY ENTERED. BUT THE HEARING LASTED, AS I SAID, TELEPHONIC HEARING, AT THE CONCLUSION OF WHICH WITHOUT ANY ADO.

YOU'RE REALLY GOING BACK TO WHETHER OR NOT THE TRIAL JUDGE REALLY ADDRESSED THE FACTORS IN KOZEL?

YES.

BUT I THOUGHT THE ISSUE THAT WAS REALLY BEFORE THIS COURT IS WHETHER OR NOT BECAUSE THE, THE COMPLAINTANT WAS NOT AT FAULT, THAT THE TRIAL JUDGE COULD NOT IN FACT DISMISS THE CASE. ISN'T THAT REALLY THE ISSUE THAT IS IN CONFLICT HERE?

YES, MA'AM, I THINK THAT IS THE ISSUE AND THE CONFLICT.

AND SO, IF WE GO BACK THEN TO KOZEL, WHICH HAS ALL THOSE FACTORS, HOW CAN WE RULE THAT THAT IS THE SOLE FACTOR THAT SHOULD BE LOOKED AT HERE?

WELL, THE DISTRICT COURTS APPARENTLY SAY THAT, WHETHER THE DISTRICT COURT IN THIS PARTICULAR CASE SAID THAT THE PLAINTIFF OR THE APPELLANT IN THAT CASE, PETITIONER HERE, WAS TOTALLY WITHOUT FAULT.

AND THAT'S ONE OF THE FACTORS TO CONSIDER. BUT WHAT ABOUT THE OTHER FACTORS? UNDER KOZEL?

WELL, SINCE WE HAVE NO RECORD HERE, WE DON'T KNOW WHAT WAS GOING ON IN THE JUDGE'S MIND.

SO WE DON'T REALLY KNOW, I MEAN, THE RECORD DOESN'T REVEAL ONE WAY OR ANOTHER WHETHER YOUR CLIENT KNEW OF THE DISCOVERY CUT-OFF OF THE PRE-TRIAL ORDER AS STATED IN, ON ITS FACE THAT DISMISSAL COULD BE A POTENTIAL SANCTION FOR FAILURE TO TIMELY FILE THE WITNESS LIST, THE RULES OF PROCEDURE THAT REQUIRE INTERROGATORIES TO BE FILED ON TIME. INTERROGATORIES IN THIS CASE WERE SEVERAL MONTHS LATE. HOW DO WE KNOW ON THIS RECORD THAT YOUR CLIENT KNEW NOTHING OF, OR WAS EVEN THE CAUSE OF THE PROBLEM IN THIS CASE?

WELL, SINCE WE HAVE NO RECORD, WE DON'T KNOW THAT.

BUT UNDER -- ISN'T THAT AN OBLIGATION -- IN OTHER WORDS, YOU'RE TRYING TO SAY THERE WAS AN ERROR, YOU DIDN'T TRY TO BRING FORTH ANY EVIDENCE TO SHOW THAT YOUR CLIENT DIDN'T KNOW ABOUT THIS, CORRECT?

NO, MA'AM, THERE WAS NO EVIDENCE TAKEN. JUST NO EVIDENTIARY HEARING.

BUT YOU DO UNDERSTAND THAT WE HAVE TWO -- WE'RE HERE BECAUSE THE CONFLICT IN THE CASES IS THAT IT SEEMS LIKE THE THIRD DISTRICT HAS ESTABLISHED A PER SE RULE THAT IF THERE ISN'T EVIDENCE THAT THE CLIENT WAS, KNEW OF THE WILLFUL OR OBSTRUCTIVE BEHAVIOR, THAT DISMISSAL CAN NEVER BE A REMEDY, AND THE FIRST DISTRICT HAS DISAGREED WITH THAT. THAT'S THE CONFLICT ISSUE, CORRECT?

I THINK THAT'S CONFLICT ISSUE, YES, MA'AM.

NOW WE HAVE DISCUSSED, AS THE JUSTICES SAID, THAT THE ONLY CASE OUT OF THIS COURT THAT SPEAKS TO IT, LISTS THAT AS ONE OF SEVERAL FACTORS. CORRECT? RATHER THAN A SOLE FACTOR OR A DETERMINATIVE FACTOR.

THAT'S BASICALLY CORRECT.

NOW THE ISSUE ABOUT THE INDIVIDUAL ASPECT OF THIS CASE REALLY IS NOT SOMETHING THAT WE'RE HERE TO DECIDE THE SPECIFICS OF, THERE ISN'T CONFLICT ON THE ISSUE WHETHER THERE WAS A RIGHT TO AN EVIDENTIARY HEARING, WHETHER THE HEARING WAS INSUFFICIENT. THAT'S REALLY NOT SOMETHING THAT THIS COURT USUALLY GETS INTO ONCE WE DEAL WITH THE CONFLICT ISSUE. SO ONCE YOU HAVE AGREED THAT THE WHOLE -- THAT YOUR CLIENT'S LACK OF KNOWLEDGE ISN'T THE SOLE FACTOR, THAT SORT OF ENDS THE CONFLICT ISSUE FOR THIS COURT, ASSUME WE AGREE WITH YOU.

WELL, I THINK THAT'S A MAJOR FACTOR. IT WOULD HAVE BEEN VERY WELL IF WE HAD A RECORD FROM THIS VERY SHORT-HELD TELEPHONIC HEARING AS TO WHAT OTHER FACTORS MAY HAVE ENTERED INTO THE JUDGE'S MIND WHEN HE PLANNED HIS DECISION.

SO YOU FEEL THAT THE ORDER ITSELF DOESN'T COMPLY WITH OUR OPINION IN KOZEL; YOU THINK THAT IT IS DEFECTIVE AND THERE IS CONFLICT ON THAT ISSUE, THAT IS THAT THE ORDER NEEDS TO SET FORTH ALL SIX FACTORS AND WEIGH THEM IN ORDER FOR THERE TO BE A DISMISSAL?

THE ORDER WAS PREPARED BY COUNSEL AFTER THIS HEARING, SOME SIX DAYS AFTER THIS HEARING. MAY I SAY WITHOUT RESORTING TO THE VERNACULAR OF THE STREET, I THINK HE WAS JUST TRYING TO COVER HIMSELF WHEN PREPARING THIS ORDER. AND WHEN I GOT A COPY OF IT, I IMMEDIATELY HAND-DELIVERED A LETTER OBJECTING TO IT BECAUSE SEEING, BASED UPON MY KNOWLEDGE OF THESE CASES, THERE WAS NO HEARING, THERE WAS NO EVIDENCE TAKEN. MY CLIENT WAS NOT PRESENT. THE JUDGE MADE NO FINDING OF FACT. JUST WAVES HIS HAND AND

ANNOUNCED THE CASE IS DISMISSED.

WAS KOZEL CASE CITED IN YOUR LETTER?

NO, MA'AM -- NO, SIR, I DID NOT. I DON'T THINK I DID. I CITED THE CASE FROM THE DISTRICT COURT OF APPEAL, THE MERIT CASE.

HERE IS MY PROBLEM, MR. WARFIELD. AND THAT IS THAT IT APPEARS TO ME THAT THE CONDUCT HERE WAS THE CONDUCT THAT WAS BEING SANCTIONED, WAS THE CONDUCT OF THE LAWYER. AND THAT IS THAT THE LAWYER WAS RESPONSIBLE FOR ANSWERING THE INTERROGATORIES. THE LAWYER WAS RESPONSIBLE FOR THE WITNESS LIST. THE LAWYER WAS RESPONSIBLE FOR HAVING THE CASE PREPARED TO GO TO TRIAL AT THE TIME THAT THE COURT HAD SCHEDULED IT FOR TRIAL. NOW IF IT IS A TRUMP OF THIS TYPE OF SANCTION THAT THE CLIENT HAS TO KNOW, IF THAT'S AN ESSENTIAL FACTOR, THEN THERE IS NO WAY THAT YOU ARE GOING TO BE ABLE TO SANCTION THE LAWYER WHEN IT IS JUST THE LAWYER'S CONDUCT, USING DISMISSAL AS A SANCTION. ISN'T THAT RIGHT?

BASICALLY CORRECT, SIR.

AND SO EVEN THOUGH THE LAWYER -- SO WE WOULD BE TAKING THAT TO A SANCTION OUT OF THE HANDS OF THE TRIAL JUDGE IF WE SAID THAT IT HAS TO BE -- IT CAN ONLY BE USED IF THE CLIENT IS INVOLVED IN THE, WHAT THE BASIS OF THE SANCTION IS?

I THINK THAT'S CORRECT, SIR. I THINK THAT IS TRUE. IF THE CLIENT HAS NO INVOLVEMENT IN IT, THAT THE SANCTION OF DISMISSAL BEING THE MOST SEVERE SANCTION OF ALL --

DID YOU IN FACT PRESENT TO THE TRIAL JUDGE ANY ALTERNATIVE TO DISMISSAL? BECAUSE ONE OF THE FACTORS IS TO CONSIDER WHETHER OR NOT THERE IS SOME ALTERNATIVE LESS THAN DISMISSAL THAT WOULD SATISFY THIS KIND OF SITUATION. DID YOU PRESENT SUCH AN ALTERNATIVE?

I WOULD LIKE TO TELL YOU THAT I DID, BUT I CAN'T TELL YOU THAT BECAUSE I DO NOT REMEMBER EXACTLY WHAT WAS SAID. I KNOW THAT I WAS SHOCKED AT THE JUDGE'S DECISION TO WAVE HIS HAND AND SAY THE CASE IS DISMISSED. THAT'S THE FIRST TIME THIS EVER OCCURRED TO ME IN MY CAREER. MOST OF THE TIME IT IS A FINE OR CHEWING THE LAWYERS OUT ABOUT DOING SOMETHING HE DIDN'T DO, NOT DOING SOMETHING HE SHOULD'VE DONE. I EXPECTED THAT SINCE I DIDN'T REALLY THINK IT WAS THE COUNSEL ON THE OTHER SIDE, NOT PRESENT COUNSEL, BUT PRECEDING COUNSEL WAS VERY CONCERNED ABOUT IT BECAUSE JUST TELEPHONE HEARING.

WHAT DEFENSE WAS OFFERED UP TO EXCUSE THE FAILURE TO COMPLY WITH THE DISCOVERY AND OTHER ORDERS?

WELL, NUMBER ONE, THE INTERROGATORY -- ONLY ISSUE ON THIS THING ON THE MOTION WAS FAILING TO ANSWER INTERROGATORIES.

WELL, THERE WAS MORE THAN THAT. IT WAS THE NO, FAILED TO LIST THE TRIAL WITNESSES AS WELL.

WELL, THEY ARGUED THAT, SIR, BUT I DON'T THINK THAT WAS IN THE MOTION.

I THINK IT WAS IN THE MOTION.

IT MAY HAVE BEEN IN, SIR. WELL, BE THAT AS IT MAY, THE INTERROGATORIES WERE ANSWERED DAY AFTER I GOT THE SANCTIONS.

HOW ABOUT THE WITNESS LIST?

I THINK THE WITNESS LIST WAS -- INTERROGATORIES INCLUDED THE WITNESS LIST, JUSTICE. I DON'T KNOW -- I DON'T REMEMBER RIGHT OFFHAND ABOUT THAT.

WELL, THE INTERROGATORIES MAY HAVE ASKED FOR A LIST OF WITNESSES WITH KNOWLEDGE OF THE FACTS, BUT THAT IS DIFFERENT THAN A WITNESS LIST FOR TRIAL, WHERE THESE ARE THE WITNESSES THAT YOU INTEND TO PRESENT AT TRIAL. THOSE WILL BE TWO DIFFERENT LISTS, RIGHT?

YOUR HONOR, I LISTED THE WITNESSES IN THE INTERROGATORIES, WHICH WITNESSES THAT THEY HAD ALREADY DEPOSED OR HAD RECEIVED MEDICAL INFORMATION FROM -- ONLY ISSUE IN THIS CASE --

BUT THE PRE-TRIAL ORDER REQUIRED THAT THE LAWYERS PROVIDE EACH OTHER AND THE COURT WITH A LIST OF THE WITNESSES CONTEMPLATED TO BE CALLED AT TRIAL, IS THAT CORRECT?

THAT'S CORRECT, SIR.

WAS THAT DONE?

NO, SIR. I DON'T RECALL IT BEING DONE, SIR.

LET ME ASK YOU --

THIS WAS IN THE INTERROGATORY ANSWERS, THE WITNESSES WE'LL USE AT TRIAL.

BUT WE ALL KNOW THAT THERE IS A SEPARATE PROCEDURE THAT IS, YOU KNOW, BEEN GOING ON FOR YEARS AROUND THE STATE OF FLORIDA, THAT CALLS FOR THE LAWYERS TO FILE PRE-TRIAL STATEMENTS AND THEN TO INCLUDE IN THAT, THE STATEMENT OF THE WITNESSES THAT THE LAWYERS IN GOOD FAITH INTEND TO CALL AT THE TRIAL. AND YOU ACKNOWLEDGE THAT THAT WAS NOT DONE, IS THAT CORRECT?

I DON'T BELIEVE IT WAS. PRE-TRIAL STATEMENTS WERE FILED.

SO WHAT REMEDY WOULD YOU HAVE AS FAR AS -- WHAT WOULD YOU HAVE THIS COURT DO AT THIS POINT IF WE AGREE THAT THERE IS CONFLICT AND SO -- HOW WOULD WE TREAT THE MATTER FURTHER NOW FROM YOUR STANDPOINT?

WELL, OBJECTIVELY, I WOULD LIKE TO SEE THE MATTER SENT BACK DOWN FOR EVIDENTIARY HEARING FOR FINDINGS OF FACT IF THIS WAS THE CLIENT'S FAULT OR MY FAULT.

DID YOU REQUEST AN EVIDENTIARY HEARING?

SIR?

BEFORE, DID YOU REQUEST AN EVIDENTIARY HEARING?

WELL I, IN MY MOTION FOR A REHEARING, I POINTED OUT THAT THERE WAS NO EVIDENTIARY HEARING.

WHEN THE JUDGE HELD A HEARING, YOU AGREED TO PARTICIPATE BY TELEPHONE, IS THAT RIGHT?

I'M SORRY, SIR?

DID YOU PARTICIPATE BY TELEPHONE?

YES, SIR.

DID YOU TELL THE JUDGE THIS IS THE TYPE OF MOTION THAT SHOULD BE DETERMINED BY EVIDENTIARY HEARING?

NO, SIR, I DID NOT TELL HIM THAT.

WERE YOU ON NOTICE THAT DISMISSAL WAS ONE OF THE SANCTIONS THAT THE DEFENDANT WAS SEEKING?

OF COURSE I WAS ON NOTICE OF THAT BY VIRTUE OF THE PRE-TRIAL NOTICE ENTERED.

IT WAS A MOTION FOR SANCTIONS THAT SOUGHT DISMISSAL. I MEAN, THE PROBLEM IS, AND IT GOES BACK TO WHAT JUSTICE WELLS SAYS, IS THAT ASSUMING THAT A SANCTION WOULD BE STRIKING OF THE PLEADINGS, OR STRIKING OF A DEFENSE OR NOT BEING ABLE TO PUT ON WITNESSES, ALL OF THESE THINGS SAY THAT IT HAS TO BE THE CLIENT THAT IS INVOLVED IN THIS, WOULD MEAN THAT ESSENTIALLY THE WHOLE ATTORNEY-CLIENT RELATIONSHIP IS, IT IS THE ATTORNEY THAT IS RESPONSIBLE FOR THE CLIENT'S CASE. I'M NOT SURE HOW THAT RULE WOULD EVER WORK, SINCE MOST OF THE VIOLATIONS ARE DISCOVERY VIOLATIONS, MERCER VERSUS RAINE, WE ARE TALKING ABOUT A WHOLE HOST OF CASES THAT ARE FOUNDED ON THERE BEING ABUSES OF THE DISCOVERY PROCESS. NOW YOU SEEM TO SAY YOUR ABUSES DON'T RISE TO THAT LEVEL. BUT THAT IS NOT REALLY THE ISSUE WE ARE HERE TO RESOLVE TODAY.

NO, I DON'T THINK THAT IS THE ISSUE. THE ISSUE IS THE CONFLICT AND WHETHER OR NOT THERE SHOULD HAVE BEEN A FINDING BEFORE, WHICH THE CASE LAW SEEMS TO SAY THAT THERE MUST BE A FINDING BEFORE THE DISMISSAL. IN THIS CASE THERE WAS NO FINDING OF ANYTHING. BECAUSE THERE WAS NO EVIDENCE PRESENTED.

THE MARSHAL HAS REMINDED YOU THAT YOU'RE IN THE TIME YOU WANTED TO RESERVE FOR SOME REBUTTAL. TIME TO PAUSE.

THANK YOU VERY MUCH.

GOOD MORNING. MAY IT PLEASE THE COURT, THERE ARE TWO CONTROLLING CASES HERE.

IF YOU WOULD INTRODUCE YOURSELF SO WE HAVE A RECORDING OF THIS.

BRUCE FEHR, PENSACOLA, FOR THE DEFENDANTS AND THE RESPONDENTS HERE. THERE ARE TWO CONTROLLING CASES. THERE IS THE DEBARRO CASE AND THE KOZEL CASE. THE DEBARRO CASE REQUIRES THAT THE TRIAL JUDGE MAKE A WRITTEN SPECIFIC FINDING OF A WILLFUL DISOBEDIENCE OF THE COURT ORDER AS PREREQUISITE TO DISMISSING THE CASE.

DID THE JUDGE DO THAT DURING THE HEARING IN THIS CASE?

NOT DURING THE HEARING.

SO WAS THE ORDER OF THE ATTORNEY THAT WAS SENT IN THAT INCLUDED THIS FINDING THAT WAS NOT MADE BY THE JUDGE DURING THE HEARING, IS THAT WHAT OCCURRED?

YES, JUDGE.

LET'S PLACE THIS CASE IN ITS REAL POSTURE. THE INTERROGATORIES OF WHICH YOU HAVE

COMPLAINED WERE REALLY UPDATE INTERROGATORIES, WERE THEY NOT?

YES.

THEY REALLY ASKED FOR JUST WHAT'S HAPPENED SINCE WE TOOK YOUR CLIENT'S DEPOSITION.

AND SINCE THE ANSWERS TO PREVIOUS DISCOVERY.

AND THOSE WERE IN FACT ANSWERED BEFORE THIS HEARING?

I BELIEVE THEY WERE.

AND AS I LOOK THROUGH THE FILE, IT LOOKS LIKE THAT THERE WERE PROBABLY 25 OR 30 SUBPOENAS FOR RECORDS TO OBTAIN ALL THESE MEDICAL RECORDS. IT WAS JUST CAUSATION AND DAMAGES, CORRECT?

CORRECT.

AND THE CLIENT'S DEPOSITION WAS TAKEN?

YES.

AND WERE THE OTHER WITNESSES DEPOSED? I COULD NOT TELL FROM WHAT WAS SENT TO OUR COURT WHETHER THE EXPERTS WERE DEPOSED BY YOUR SIDE.

I BELIEVE SOME HAD. I'M NOT FAMILIAR ENOUGH WITH WHAT HAPPENED AT THE TRIAL LEVEL.

SO REALLY WHAT WE HAVE, IT COMES DOWN TO THE MORNING OF THE HEARING, WE HAVE NOT LISTED OUR WITNESSES FOR TRIAL.

CORRECT.

ISN'T THAT ESSENTIALLY WHAT THIS CAME DOWN TO?

AND EXHIBITS.

IS THERE -- DOES THE BENNINGER PEST CONTROL, KING CASE, HAVE ANYTHING TO DO WITH THIS CASE OR REMEDIES OR SANCTIONS THAT CAN BE IMPOSED WHEN A PARTY ATTEMPTS TO CALL A NON-LISTED WITNESS?

I DON'T BELIEVE SO.

SO THAT A TRIAL JUDGE WOULD THEN, IF A WITNESS IS NOT LISTED, IT IS JUST NOT LISTED, WE DISMISS THE CASE?

NO, THE CASE WOULDN'T NECESSARILY BE DISMISSED. THE TRIAL JUDGE WOULD HAVE THE OPTION TO EXCLUDE AN UNLISTED WITNESS.

WHAT'S THE CRITERIA APPLIED UNDER THAT CIRCUMSTANCE?

PREJUDICE TO THE PARTY.

AND IS THAT NOT THE SAME THAT'S DISCUSSED IN THE CASE WE HAVE BEEN DISCUSSING THIS MORNING, FROM THIS COURT? PRETTY MUCH THE SAME STANDARD, WILLFUL, DELIBERATE, PREJUDICE, WHAT IMPACT IT IS GOING TO HAVE, WHAT DID THE PARTY KNOW ABOUT THIS TESTIMONY?

IN THIS PARTICULAR CASE, SIR, THE QUESTION IS WHETHER THE DEFENDANTS ARE NOW EXPECTED TO GO TO TRIAL WITHOUT HAVING A DEFINITIVE LIST OF THE WITNESSES.

WELL, WOULD AN ALTERNATIVE HAVE BEEN TO EVALUATE AS A WITNESS WAS CALLED, AND THEN JUST NOT PERMIT THAT WITNESS TO TESTIFY? IS THAT AN ALTERNATIVE OR IS THIS DISMISSAL THE PROPER SANCTION?

THAT WOULD HAVE REQUIRED THE COURT, DURING THE COURSE OF THE TRIAL, TO GO THROUGH AND AT THE TIME, SINCE WE HAD NO WITNESS LIST, WE, THE DEFENDANTS WOULD HAVE NO IDEA WHO THE WITNESSES WERE GOING TO BE OR WHAT THE EXHIBITS WERE GOING TO BE.

EVEN THOUGH YOU HAD BEEN GIVEN THE NAMES OF ALL THE TREATING DOCTORS, YOU DEPOSED THE TREATING DOCTORS, YOU STILL SAY THERE IS PREJUDICE TO PUT INTO THE EQUATION ON WHETHER A DISMISSAL IS PROPER HERE?

IT IS NOT AT ALL UNCOMMON FOR A TRIAL LAWYER ON THE EVE OF TRIAL TO PAR DOWN THE LIST OF POTENTIAL WITNESSES CONSIDERABLY WHEN COMING UP WITH THE LIST OF WITNESSES.

ISN'T THE PROBLEM WE ARE CONFRONTED WITH HERE, IS THAT, IN KOZEL, THE COURT MADE THE STATEMENT THAT IT IS INNOCUOUS STATEMENT THAT DISMISSAL IS A LAST RESORT TYPE SANCTION? BECAUSE -- AND ESPECIALLY, I DON'T KNOW, BUT FROM, BECAUSE I HAVEN'T SEEN IT IN THE RECORD, WHETHER THE STATUTE OF LIMITATIONS HAD RUN HERE. HAD IT RUN?

IN THIS CASE THE STATUTE HAD RUN, SIR.

SO IT IS AN EXTREME SANCTION.

AGREED.

AND EXTREME SANCTION THAT AFFECTS BOTH THE LAWYER AND THE CLIENT. AND SO I ASSUME YOU WOULD AGREE THAT IT IS A LAST RESORT TYPE OF SANCTION.

AGREED.

THE CASE COULD BE CONTINUED, THE CASE COULD -- YOU COULD STRIKE THE WITNESSES IF THAT ALSO SEEMS TO ME TO BE A PRETTY EXTREME SANCTION. SO, WAS THIS THE TYPE OF CASE IN WHICH -- WHAT HAD HAPPENED UP TO DATE IN THIS CASE WAS SO EXTREME THAT THE SANCTION OF LAST RESORT SHOULD HAVE BEEN APPLIED?

THERE IS A TWO-PART ANSWER, SIR. FIRST IS THAT THE QUESTION OF HOW EXTREME THE SITUATION IS AND WHAT SANCTION JUSTIFIES OR IS JUSTIFIED UNDER THE CIRCUMSTANCES, UNDER KOZEL IS A MATTER TO BE LEFT TO THE DISCRETION OF THE TRIAL COURT AFTER CONSIDERING THOSE SIX FACTORS. CERTAINLY DISMISSAL IS AN EXTREME SANCTION AND IN A CASE WHERE THE CLIENT MAY OR MAY NOT HAVE HAD ANY PARTICIPATION IN IT, AGAIN, THE COURT NEEDS TO CONSIDER THAT. A GOOD EXAMPLE ALSO, HOWEVER, IS THE SANCTION, IF YOU COULD CALL IT THAT, FOR FAILING TO FILE A COMPLAINT WITHIN THE FOUR YEAR STATUTE OF LIMITATIONS.

WHAT ARE THE FACTORS, THOUGH, THAT MILITATE IN FAVOR OF THIS EXTREME SANCTION HERE? WHAT FACTORS WOULD YOU CITE THAT WOULD MILITATE IN FAVOR OF THIS MOST DRASTIC FASHION?

IN THIS CASE IT WOULD BE THE TIMING OF THE DISOBEDIENCE HAPPENING ON THE EVE OF TRIAL.

ON THAT, HAD THERE BEEN PRIOR MOTIONS TO COMPEL AND HAD THERE BEEN ANY HISTORY IN

THIS CASE ABOUT TERMS OF PRIOR ORDERS ENTERED?

I AM NOT FAMILIAR WITH ANY, JUDGE.

I MEAN THIS IS NOT -- AGAIN, WE ARE TALKING ABOUT A REAR-END COLLISION.

I DON'T BELIEVE THERE HAD BEEN ANY OTHER INSTANCES UP TO THIS LAST SERIES OF EVENTS.

SO WOULD YOU SAY THAT AS A PER SE RULE IF SOMEBODY DOESN'T FILE THE WITNESS LIST ON TIME, EVEN THOUGH ALL THE ORDERS IN FLORIDA DO SAY THIS, THAT A JUDGE WITHOUT ANYTHING SPECIFIC TO CASE, JUST MAKING THE FINDING AS WILLFUL, NOT FINDING A WITNESS LIST ON TIME IS SUFFICIENT REASON TO DISMISS A CASE WITH PREJUDICE?

NOT IN EVERY CIRCUMSTANCE. BUT AGAIN, THIS IS SOMETHING THAT IS LEFT TO THE DISCRETION OF THE TRIAL JUDGE.

BUT ORDINARILY THOUGH, DON'T WE SEE, AND AGAIN NOW WE ARE TALKING ABOUT THESE FACTORS, IN THE LIGHT THEY SHED ON WHETHER OR NOT THIS MOST DRASTIC OF SANCTIONS IS ENTERED. SO WOULDN'T THE MORE CLASSIC EXAMPLE BE THAT THERE HAD SIMPLY BEEN REPEATED REFUSALS, THAT IS, THE TRIAL COURT HAS GIVEN THE PARTY OR THE LAWYER CHANCE AFTER CHANCE TO GET THAT DONE. AND AFTER GIVING THEM CHANCE AFTER CHANCE, THAT THEY FAIL TO DO THAT? ISN'T THAT ORDINARILY THE CIRCUMSTANCE THAT WOULD POINT IN FAVOR OF THIS MOST DRASTIC SANCTION? THAT IS, THAT THE TRIAL JUDGE NOW HAS BASICALLY EXHAUSTED PATIENCE AND SAID, YOU KNOW, I HAVE ORDERED YOU TO DO IT BY THIS DATE AND THEN YOU DIDN'T DO IT THEN OR YOU DIDN'T DO IT COMPLETELY. THEN I GAVE YOU UNTIL THIS DATE. I GAVE YOU YOUR THREE STRIKES AND OUT OR WHATEVER. ISN'T THAT THE ORDINARY PATTERN THAT WE WOULD SEE THIS DISCRETION THAT YOU TALK ABOUT, HAS TO BE INFORMED BY THESE FACTORS? AND IT IS NOT JUST SORT OF ROLLING THE DICE AND SAYING YEAH, THERE IS SIX FACTORS THERE AND IF THE TRIAL JUDGE JUST SAYS YEAH, I READ THE SIX, NOW I CAN DO WHATEVER I WANT TO DO. THAT THOSE SIX FACTORS AND THE FACTS IN THE PARTICULAR CASE INFORM THAT DECISION TO INCLUDE THIS MOST DRASTIC SANCTION, IS THAT NOT THE CASE?

I THINK THAT WAS THE ROSE CASE WHERE THE TRIAL JUDGE GOT SO FED UP WITH THE ATTORNEY'S ANTICS.

BUT TELL US WHAT OTHER FACTORS HERE MILITATE IN FAVOR OF THIS MOST DRASTIC SANCTION, WHAT ELSE AMONG THE KOZEL FACTORS WOULD YOU SAY DO EXIST IN THIS CASE AND ESTABLISH THAT THIS REALLY IS THE ONLY REMEDY THAT THE TRIAL JUDGE HAD AVAILABLE IN THIS CASE?

WELL, THE FIRST PLACE TO LOOK WOULD BE THE LACK OF OTHER REMEDIES. A MONETARY SANCTION WOULD HAVE DONE NOTHING TO PROVIDE THE INFORMATION THAT HADN'T BEEN PROVIDED.

LET ME ASK YOU ON THAT QUESTION, THE LACK OF OTHER REMEDIES. WOULD IT HAVE REMOVED ANY PREJUDICE TO YOU IF THE JUDGE HAD SAID, WELL FIRST OF ALL, I AM GOING TO GRANT ATTORNEY'S FEES AND COSTS INCURRED IN FILING THIS MOTION, EVEN THOUGH THE INTERROGATORIES WERE FINALLY ANSWERED BEFORE THE HEARING HERE, OBVIOUSLY THEY WERE ANSWERED AS A RESULT OF THE FILING OF THIS MOTION. SO WE WILL GIVE YOU THE ATTORNEY'S FEES FILED AND HAVING TO COME DOWN AND ARGUE THIS MOTION AND FILING THE MOTION. IN ADDITION, I AM GOING TO GIVE CONTINUANCE TO THE TRIAL, I DON'T SEE ANY PREJUDICE TO THE DEFENDANT GRANTING A CONTINUANCE. IT IS ONLY GOING TO POSTPONE THE DAMAGES YOU MAY ULTIMATELY HAVE TO PAY SINCE LIABILITY WAS ALREADY ESTABLISHED. AND I AM GOING TO REQUIRE THE PLAINTIFF TO FILE WITHIN TEN DAYS OF THE DATE OF THIS

HEARING A WITNESS AND EXHIBIT LIST. AND I AM EXPLICITLY STATING NOW THAT THE PLAINTIFF WILL ONLY BE ABLE TO INTRODUCE THOSE WITNESSES AND EXHIBITS THAT ARE LISTED ON THAT LIST, AND IF THAT LIST IS NOT PROVIDED WITHIN TEN DAYS, THE PLAINTIFF WILL NOT BE ABLE TO PROVIDE ANY WITNESSES. WOULD THAT BE A LESSER SANCTION?

IT WOULD NOT BE AN ADEQUATE SANCTION, SIR.

FIRST A CONTINUANCE WOULD SERVE TO BENEFIT PRIMARILY THE PLAINTIFF, ALLOWING THE PLAINTIFF MORE TIME TO PREPARE FOR TRIAL.

IT ALLOWS BOTH SIDES MORE TIME, DOESN'T IT?

IT ALSO THEN FORCES THE DEFENSE TO INCUR THE COSTS OF PREPARING FOR TRIAL TWICE.

I THOUGHT YOUR ARGUMENT WAS I CAN'T PREPARE FOR TRIAL IF HE DOESN'T PROVIDE ME THE WITNESS AND EXHIBIT LIST.

CERTAIN AMOUNT OF PREPARATION OF COURSE HAS ALREADY BEEN DONE. AND THEN THE DEFENSE HAS TO DECIDE BASED ON THE WITNESS AND EXHIBIT LISTS, WHERE TO FOCUS THE ENERGIES AND EFFORTS AT TRIAL.

HAD DISCOVERY ALREADY BEEN CUT OFF?

THE SEPTEMBER 15 DATE WAS THE DISCOVERY CUT-OFF.

SO WHAT WOULD HAVE BEEN -- AGAIN, YOU HAVE YOUR INTERROGATORIES, THERE WAS -- ANOTHER THING THAT CONCERNS ME HERE. THERE WAS AN ISSUE ABOUT WHETHER THERE REALLY WAS AN EXCHANGE OF EXHIBITS. THE JUDGE WITHOUT TAKING TESTIMONY MAKES A DECISION THAT THE PLAINTIFF'S LAWYER VERSION WAS NOT CREDIBLE. YET THERE IS NO TESTIMONY, NOBODY IS UNDER OATH. YET THERE IS A BASIS IN THIS, IN THE FINDINGS, AT LEAST ON THE HEARING, THAT SAYS THIS EXCHANGE DIDN'T TAKE PLACE. WHY -- HOW IS THAT, HOW CAN A JUDGE ACCEPT ONE PERSON'S VERSION VERSUS THE OTHER AS A BASIS FOR DISMISSAL OF A CAUSE OF ACTION THAT WILL REQUIRE THE PLAINTIFF TO LOSE ALL OF HER RIGHTS WITHOUT HAVING THAT TESTIMONY UNDER OATH AS TO WHAT ACTUALLY HAPPENED?

TRIAL JUDGES AS PART OF THEIR JOB AS FINDERS OF FACT DETERMINE ONE PERSON'S VERSION OF THINGS OVER OTHERS.

WITHOUT THAT BEING UNDER OATH?

TESTIMONY UNDER OATH AND THE INFERENCES THAT COME FROM THAT, THE ATTORNEYS ARE BEFORE THE TRIAL JUDGE. THE TRIAL JUDGE IS IN THE BEST POSITION TO MAKE THE DETERMINATION OF WHAT HAPPENED AND WHO --

THIS IS REALLY UNREVIEWABLE BECAUSE THERE IS NO RECORD, AS WE HAVE BEEN POINTING OUT. SO NO COURT COULD EVER REVIEW SOMETHING WHERE THERE IS NO EVIDENCE, WHERE THERE IS NO RECORD, CORRECT? THERE IS NO WAY TO REVIEW IT.

CORRECT. THE TRIAL JUDGE ISN'T REQUIRED TO HAVE AN EVIDENTIARY HEARING.

GOING BACK, YOU AGREE WITH JUSTICE CANTERO THAT ATTORNEY'S FEES WOULD BE CERTAINLY ONE APPROPRIATE SANCTION. SINCE THE INTERROGATORIES WERE FILED, SINCE THE DISCOVERY WAS CUT OFF, SO THEY COULDN'T ADD SOMEBODY THAT WASN'T ALREADY LISTED, ALL RIGHT, WHY WOULDN'T IT JUST BE I WANT YOU WITHIN 24 HOURS TO FILE YOUR, WHO ON THIS LIST HERE YOU ARE GOING TO BE CALLING FOR TRIAL?

AS A PRACTICAL MATTER, THE ASSUMPTION WOULD BE THAT THE ATTORNEYS HAVE SPENT A MATTER OF WEEKS OR MONTHS GETTING PREPARED FOR THE TRIAL DATE, WHICH WAS SUPPOSED TO GO IN SEPTEMBER. THE LIKELIHOOD OF GETTING ON A TRIAL JUDGE'S, BACK ON A TRIAL JUDGE'S DOCKET WITHIN FOUR TO SIX MONTHS.

WELL, THE WITNESS LIST WAS TO BE FILED BY SEPTEMBER 3, CORRECT?

CORRECT.

AND WHEN WAS THE MOTION TO, FOR SANCTIONS FILED?

23RD.

AND SO, ARE YOU SAYING BY THE TIME THE MOTION FOR SANCTIONS GOT ENTERED, THE TRIAL DATE WAS ALREADY PASSED?

THE TRIAL DATE WAS SEPTEMBER 30TH. THE SCHEDULED TRIAL DATE.

SO WHAT HAPPENED THEN? -- SO SEPTEMBER 6 -- I'M SORRY, YOU HAVE FROM SEPTEMBER 6 TILL THE 26TH, THE TRIAL IS SUPPOSED TO BE STARTING. AND WHAT HAPPENS? WHY DOESN'T IT START?

BECAUSE THE PLAINTIFF HAS STILL NOT PROVIDED WITNESS AND EXHIBIT LISTS.

WITHOUT THAT, THE DEFENSE IS LEFT TO GUESS WHO OF THE LONG LIST OF POTENTIAL WITNESSES LISTED IN THE ANSWERS TO INTERROGATORIES MAY ACTUALLY SHOW UP. IF SOME OF THOSE ARE NOT GOING TO BE ON THE PLAINTIFF'S LIST, THE DEFENSE MAY WANT TO HAVE THEM SUBPOENAED TO SHOW UP THEMSELVES.

I GUESS I AM TRYING TO FIGURE OUT WHY THE MOTION WASN'T HEARD UNTIL AFTER THE TRIAL DATE. WHY WOULDN'T HAVE BEEN FILED AND HEARD BEFORE, RIGHT AFTER THE FAILURE TO LIST THE WITNESSES?

I BELIEVE THE MOTION WAS HEARD PRIOR TO THE TRIAL DATE. AND THE ORDER WASN'T ENTERED INTO -- UNTIL AFTERWARDS.

IF I UNDERSTAND CORRECTLY, ARE YOU ADVOCATING A PER SE RULE HERE, THAT IS, IF THE DATE PASSES IN, FROM THE PRE-TRIAL ORDER, THAT YOU WERE SUPPOSED TO PROVIDE THE WITNESS AND EXHIBIT LISTS, AND IN ALL INSTANCES THERE WILL BE A DISMISSAL WITH PREJUDICE?

NO, SIR.

THAT'S WHAT IT SOUNDS LIKE HERE WHEN YOU SAID, YOU KNOW, THAT ONCE THAT DATE PASSES, THAT THERE IS NO ADEQUATE RELIEF FOR THE DEFENDANT. WAS THE PLAINTIFF'S LAWYER ASKED IN THIS CASE, WHY HAVEN'T YOU FILED THE WITNESS LIST? AND THE LISTED EXHIBITS?

I DON'T KNOW WHAT TRANSPIRED BETWEEN COUNSEL THEN ASSIGNED TO THIS CASE AND THE PLAINTIFF'S ATTORNEY. BUT THE --

ISN'T THAT THE FUNDAMENTAL THING THAT NEEDS TO BE ASKED? IS THAT, WHY WASN'T THIS DONE? AND THEN, YOU KNOW, ASSUMING THAT THERE IS REALLY NO ADEQUATE EXCUSE, SAYING WELL, CAN YOU GET IT DONE IN 24 HOURS?

AGAIN, THAT IS ONE OF THE KOZEL FACTORS, WHY WASN'T THIS DONE? AND THAT WAS NEVER ADDRESSED -- NEVER OFFERED BY THE PETITIONER.

WELL WHY SHOULDN'T, IF IT DOESN'T APPEAR HERE THAT REALLY THE KOZEL FACTORS WERE APPROPRIATELY ADDRESSED, EITHER BY EVIDENCE AS FAR AS THE KNOWLEDGE OF THE CLIENT THEMSELVES AND SOME OF THESE OTHER THINGS, WHY WOULDN'T IT BE APPROPRIATE HERE FOR THERE TO BE REMAND TO THE TRIAL COURT, SINCE THERE IS SUCH A SERIOUS CONSEQUENCE HANGING IN THE BALANCE, AND AM I CORRECT, THIS IS A CASE WHERE RESPONSIBILITY WAS ADMITTED?

NOTHING WAS EVER ADMITTED.

EXCUSE ME, YOU HAD -- WHEN YOU SAY RESPONSIBILITY, YOU HAD A DEFAULT ENTERED IN THIS CASE. AND A DEFAULT WAS ENTERED IN THE YEAR 2000. YOU MOVED TO SET ASIDE THE DEFAULT IN 2001; ISN'T THAT CORRECT?

I BELIEVE SO.

IN THE ORDER SETTING IT ASIDE, CHIEF JUSTICE WAS CORRECT, RESPONSIBILITY WAS ADMITTED. THAT WOULD BE CAUSATION AND DAMAGES.

BUT IN TERMS OF RESPONSIBILITY FOR NOT COMPLYING WITH THE COURT'S ORDER.

COURT ASKED A DIFFERENT QUESTION.

I APOLOGIZE IF I MISUNDERSTOOD IT.

WHY WOULDN'T THIS BE AN APPROPRIATE CASE THEN FOR, SINCE IT DOESN'T APPEAR IN A RECORD THAT WE HAVE HERE THAT ALL THE KOZEL FACTORS WERE CONSIDERED AND PROPERLY WEIGHED, THEN WHY SHOULDN'T THERE BE A REMAND HERE?

WELL, UNDER THE EXISTING CASE LAW FROM THIS COURT, THE KOZEL FACTORS ARE JUST THAT. THEY'RE FACTORS. THEY'RE NOT RULES. IT IS NOT A CHECKLIST. NOW THE FOURTH DCA HAS TURNED KOZEL INTO A LIST OF REQUIREMENTS.

YOU'RE SAYING OUT OF OUR DECISION, THAT A TRIAL JUDGE CAN CHOOSE TO CONSIDER THOSE FACTORS OR NOT CONSIDER THEM?

WELL, THE COURT IS TO CONSIDER THOSE FACTORS. BUT AS FACTORS NECESSARILY, SOME ARE GOING TO APPLY, SOME ARE NOT. SOME WOULD BE GIVEN MORE WEIGHT THAN OTHERS. AND SOME WOULD BE GIVEN LESS WEIGHT.

THIS IS MY PROBLEM AND IT IS SOMETHING WE TALK ABOUT DISCRETION THAT A TRIAL COURT HAS. AND THERE ARE MANY AREAS WHERE A TRIAL COURT HAS CONSIDERABLE DISCRETION. BUT AGAIN, GOING BACK TO THIS CASE, WHICH IS A ROUTINE REAR-END COLLISION, WHERE THE DISCOVERY WAS ESSENTIALLY COMPLETED. I'M STILL TRYING TO UNDERSTAND, WHAT WOULD PLACE ONE JUDGE IN, WITH A DECISION, I'M NOT GOING TO DISMISS THIS CASE, I AM GOING TO ASSESS SANCTIONS OF ATTORNEY'S FEES AND COSTS AND REQUIRE YOU TO FILE YOUR WITNESS LISTS WITHIN 24 HOURS, OR THEY WILL BE BARRED. AND ANOTHER JUDGE SAYS I AM DISMISSING IT, AND THEY BOTH -- AND IS IT THE MAGIC WORDS THAT IT WAS WILLFUL THAT THE EXHIBIT AND WITNESS LIST WASN'T FILED ON TIME? WHAT IS THE -- WHAT'S THE DIFFERENCE IN WHY ONE JUDGE WOULD BE ABLE TO DO THAT IN ONE SITUATION AND ANOTHER COULD JUST DISMISS IT? WE JUST SAY DISCRETION IN BOTH SITUATIONS? THEY HAVE DISCRETION EITHER TO HAVE SOMEONE HAVE THEIR CAUSE OF ACTION OR NOT WITHOUT ANY FURTHER EXPLANATION OTHER THAN JUST SAYING IT WAS WILLFUL?

THE LAW IS CURRENTLY THAT IT IS A MATTER OF THE COURT'S DISCRETION, AFTER CONSIDERING THE KOZEL FACTORS. AND THAT IS RIGHTLY SO BECAUSE IT IS THE TRIAL JUDGE WHO CAN

ASSESS EACH INDIVIDUAL SITUATION.

I GUESS WE ARE TRYING TO FIND OUT, SINCE WE ARE ASKING YOU, BECAUSE HE HAS THE RECORD BEFORE HIM, WHICH WE HAVE. AND HEARD COUNSEL FOR ABOUT TEN MINUTES. WHAT IS IT IN THIS CASE THAT MAKES THIS CASE STAND OUT FROM SOME OTHER CASE WHERE THE WITNESS LIST IS NOT FILED ON TIME? WHAT IS IT? JUST TRY -- BECAUSE THERE HAS BEEN, NO PRIOR ORDERS ON SANCTIONS. THERE WAS NO -- ALL THE DISCOVERY, THERE WAS NO ISSUE THAT THEY DIDN'T GET ALL THE RECORDS THAT THEY NEEDED. WHAT FACTOR DO WE -- CAN WE WRITE AN OPINION TO SAY WHY THIS CASE WOULD BE DIFFERENT FROM ANOTHER CASE WHERE A TRIAL JUDGE WOULDN'T DISMISS THE CASE?

PRIMARILY IT WOULD THEN BE IN THE LACK OF AN ALTERNATIVE SANCTION THAT WOULD HAVE ACCOMPLISHED THE RESULT OF PROVIDING THE DISCOVERY AND THE EXHIBIT AND WITNESS LISTS.

SO THEN, IT GOES BACK TO WHAT JUSTICE ANSTEAD ASKED YOU, YOU WERE REALLY ADVOCATING FOR A PER SE RULE THAT WHEN A DEFENDANT OR A PLAINTIFF DOES NOT FILE THEIR EXHIBIT AND WITNESS LISTS ON TIME, THAT A DISMISSAL IS ALWAYS AN APPROPRIATE REMEDY?

I WOULD SAY THAT DISMISSAL IS AN APPROPRIATE REMEDY BUT NOT ALWAYS THE APPROPRIATE REMEDY. AND AGAIN, THAT IS A MATTER TO BE LEFT TO THE TRIAL JUDGE. HERE -- AND ADMITTEDLY THIS IS CERTAINLY NOT THE MOST EGREGIOUS SITUATION EVER REPORTED. SOME OF THE FOURTH DCA CASES ARE PRETTY, REPRESENT SOME PRETTY HORRENDOUS CONDUCT ON THE PART OF COUNSEL. BUT THE TRIAL JUDGE SHOULD BE LEFT WITH THE ALTERNATIVE, AFTER CONSIDERING THE KOZEL FACTORS, AS TO WHAT THE BEST RESULT IS. AND IN THIS CASE, HE COULD HAVE ISSUED ANOTHER ORDER THAT SAYS OKAY, YOU DO IT NOW OR ELSE. AND THEN WHAT COMES NEXT? ANOTHER ORDER, YOU DO IT NOW OR ELSE. AND EVENTUALLY WE HAVE A TRIAL JUDGE MAKING THREATS INSTEAD OF ISSUING ORDERS.

WHY WOULDN'T THAT COME UNDER THE CRITERIA OF PRIOR ORDERS ON SANCTIONS? WE HAVE DONE IN THIS CASE. THAT WOULD SATISFY THE ELEMENT, AN ORDER YOU DON'T FOLLOW, THAT IS THE PRIOR SANCTION. SO YOU HAVE ESTABLISHED ONE OF THE ELEMENTS OF KOZEL.

BUT THEN, SIR, THE QUESTION BECOMES, HOW MANY PRIORITIES?

DO WE START PUTTING A LIST ON THAT?

HERE WE HAVE NONE.

DO WE ADD A SUB FACTOR TO ONE OF THE FACTORS OF KOZEL? UNFORTUNATELY THROUGH THE HELP OF OUR QUESTIONS, WE HAVE USED UP ALL YOUR TIME. APPRECIATE YOUR ARGUMENT VERY MUCH. THANK YOU.

MR. MARSHAL, HOW MUCH TIME LEFT? ALL RIGHT, COUNSEL, YOU HAVE THREE AND A HALF MINUTES LEFT FOR REBUTTAL, IF YOU WISH.

I'LL TRY TO ADDRESS ONE THING THAT CAME TO MY MIND.

LET ME ASK YOU A QUESTION. WERE YOU THE TRIAL COUNSEL IN THIS CASE?

SIR?

WERE YOU THE TRIAL COUNSEL?

YES, SIR.

NOW I WANT -- I CERTAINLY UNDERSTAND THE RAMIFICATIONS OF A DISMISSAL WHEN THE STATUTE OF LIMITATIONS HAS RUN FOR THE CLIENT. BUT HAVING BEEN A TRIAL LAWYER IN THIS STATE FOR ALMOST 30 YEARS, I AM ALSO VERY CONCERNED ABOUT LAWYERS THAT DO NOT COMPLY WITH PRE-TRIAL ORDERS OF A TRIAL JUDGE. AND AS YOUR OPPONENT SAID, THAT DOES CAUSE DAMAGE TO THE DEFENDANT. AND THAT THERE IS PREPARATION TIME, THERE IS EXPENSE THAT'S INVOLVED, AND I WANT TO KNOW WHAT DO YOU THINK THIS TRIAL JUDGE SHOULD HAVE DONE WHEN YOU DIDN'T FILE AND COMPLY WITH THE PRE-TRIAL ORDER?

THE TRIAL JUDGE AT THAT POINT, YOUR HONOR, SINCE THE INTERROGATORIES WERE ANSWERED, WE NEVER HAD THE MEETING THAT WAS SCHEDULED THROUGH, NOT THROUGH MY FAULT. I CAN ASSURE YOU. NONETHELESS, TRIAL JUDGE COULD HAVE SAID OKAY, THE INTERROGATORIES HAVE BEEN ANSWERED, THE ONLY ISSUE IS DAMAGES. YOU HAVE ALL THE WITNESSES --

WHOSE FAULT WAS IT THAT YOU DIDN'T SUBMIT YOUR WITNESS LIST?

PARDON ME, SIR?

WHOSE FAULT WAS IT THAT YOU DID NOT SUBMIT A WITNESS LIST IN COMPLIANCE WITH THE JUDGE'S ORDER?

MY FAULT, SIR.

DID YOU SAY THAT AT THE HEARING?

IT WAS NOT DISCUSSED AT ALL.

THE WITNESS LIST WASN'T DISCUSSED AT ALL?

PRIMARILY THE INTERROGATORIES WERE DISCUSSED AND THE JUDGE NEVER ASKED ANY QUESTIONS AT ALL. HE JUST DISMISSED THE CASE. AND WITH PREJUDICE OF COURSE BECAUSE THE STATUTE HAD RUN.

THE PROBLEM IS WE DON'T HAVE ANYTHING IN THE RECORD TO KNOW WHAT THE TRIAL JUDGE DID, WHAT YOU SAID, WHAT YOUR OPPOSING COUNSEL SAID. IS THAT CORRECT?

YES, SIR. THAT IS CORRECT, SIR.

THERE WAS NO COURT REPORTER AT THE HEARING?

NO, SIR. THAT'S CORRECT, SIR.

AND IT IS THE APPELLANT'S DUTY TO MAKE SURE THAT THERE IS A RECORD FOR REVIEW IN THE APPELLATE COURT, ISN'T IT?

WOULD THINK SO, YES, SIR. JUST AN EQUAL DUTY ON THE PART OF THE APPELLEE.

WHERE HAVE WE SAID THAT THE DUTY RESTS EQUALLY IN THE APPELLEE AND?

IF THEY WANT THE CASE REPORTED, I THINK THE DUTY RESTS ON BOTH PARTIES.

AND DID WE NOT SAY IN APPLEGATE VERSUS BARNETT BANK OF TALLAHASSEE, IT IS THE APPELLANT'S DUTY TO MAKE SURE THERE IS A RECORD AND IF THERE IS NO RECORD FOR REVIEW, THEN THE ORDER MUST BE AFFIRMED?

I'M NOT FAMILIAR WITH THE CASE, SIR. I'M SORRY. GETTING BACK TO, THE JUDGE COULD HAVE SAID, YOU ANSWER THESE WITNESS LISTS BY TOMORROW AFTERNOON AT 5:00, OR THE CASE WILL STAND DISMISSED. AND IF THEY WANTED TO SQUAWK ABOUT IT IF I DID THAT AND IF THE DEFENDANT WANTED TO SQUAWK ABOUT IT, THEY COULD HAVE ASKED FOR A CONTINUANCE. AND THERE WAS A PRECEDENT BECAUSE THIS CASE WAS CONTINUED ONCE BEFORE.

IS IT YOUR POSITION THAT FOR NON-COMPLIANCE WITH THE PRE-TRIAL ORDER, THERE SHOULD NOT HAVE BEEN ANY SANCTIONS AGAINST YOU?

NOT AT ALL, SIR. I THINK THERE SHOULD HAVE BEEN A SANCTION. BUT SOMETHING LESS SEVERE THAN A DISMISSAL.

WHAT SANCTION?

SIR?

WHAT SANCTION WOULD YOU RECOMMEND?

I THINK AN APPROPRIATE REPRIMAND, A FINE, CONTINUANCE OF THE CASE, WHICH WOULD HAVE BEEN OFF ABOUT TWO OR THREE MONTHS LATER BEFORE WE GET TO TRIAL. I THINK THOSE WERE PROPERLY SANCTIONS.

ALL RIGHT, WE ARE GOING TO HAVE TO END THE ARGUMENT ON THAT NOTE. WE WILL TAKE IT FROM HERE ON THE BRIEFS AND THE ARGUMENTS YOU TWO HAVE PRESENTED. THANK YOU VERY MUCH.