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MARSHAL: PLEASE RISE. 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 NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT.

CHIEF JUSTICE: GOOD MORNING. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD GOOD MORNING EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE COUNSEL BEING READY ON THE VERY FIRST CASE. WE UNDERSTAND THAT YOU ALL HAVE DIVIDED UP YOUR TIME. THE MARSHAL IS GOING TO TRY TO ASSIST YOU, BECAUSE YOU HAVE ALSO DIVIDED UP TIME ON EACH SIDE, BY TURNING A WARNING LIGHT ON, SO HE ALSO IS GOING TO KEEP TRACK OF THE TOTAL AMOUNT OF TIME THAT YOU HAVE ON EACH SIDE, AND A RED LIGHT WILL COME ON WHEN THAT TIME HAS BEEN CONSUMED AND WE WILL TRY TO STRICTLY ADHERE TO THAT, BUT YOU ARE THE ONES THAT ARE GOING TO HAVE TO BE RESPONSIBLE FOR THOSE DIVISIONS ON EACH SIDE, SO WITH THAT, WE WILL CALL THE FIRST CASE, MARTINO AND JOST.

MAY IT PLEASE THE COURT. I AM PHILLIP BURLINGTON, HERE ON BEHALF RONNA MARTINO. MY PLAINTIFFS WERE IN THE TRIAL COURT AND IT AROSE BY RONNA MARTINO GOING TO WAL-MART AND BEING INJURED BY A SHOPPING CART. THE EVIDENCE IS CLEAR THAT, ON THE SAME DAY AS THE INCIDENT OCCURRED AFTER GETTING MEDICAL ATTENTION, SHE RETURNED TO THE STORE, AND SHE TESTIFIED THAT SHE DIRECTED THE MANAGER TO THE SPECIFIC CART IN THE PARKING LOT AND ASKED THAT IT BE RETRIEVED AND SAVED AND ALSO ASKED THAT THE VIDEOTAPE OF THE SURVEILLANCE CAMERA OVER --

LET ME ASK YOU, IF YOU WOULD ADDRESS, PLEASE, THE ISSUE OF WHERE THE DUTY ARISES TO MAINTAIN THESE RECORDS, AND FOR HOW LONG DOES A RETAILER SUCH AS WAL-MART, HAVE TO MAINTAIN A PROPERTY?

WELL, YOUR HONOR, THE DUTY ARISES FROM THE REASONABLE EXPECTATION OF AN IMPENDING CLAIM, WHICH IN THIS CASE, ALTHOUGH OUR CLAIM WAS DISMISSED --

COMMON LAW DUTY.

I AM SORRY?

COMMON LAW DUTY.

COMMON LAW DUTY? WELL, THE COMMON LAW REQUIRES THAT YOU ACT REASONABLY TO PRESERVE A PARTY'S CHOSEN ACTION.

NOW, THAT BONDU WAS BASED UPON A STATUTORY.

YES. THAT HAD TO DO WITH MEDICAL RECORDS.

AND THERE, REALLY, ISN'T ANY DISCUSSION IN THE PUBLIX CASE OUT OF THE FOURTH DISTRICT,

AS TO THIS ISSUE OF DUTY.

CORRECT. I AM VERY CONCERNED, BECAUSE WE HAVE IN MODERN LIFE, A SITUATION IN WHICH COMPUTER RECORDS, FOR INSTANCE, REGULAR PROGRAMS THAT DISPENSE WITH COMPUTER RECORDS, IN EVERY INSTANCE, AND WE HAVE GOT A STATUTE OF LIMITATIONS AGAINST RETAILERS, FOR FOUR YEARS. DOES IT MEAN THAT, SIMPLY BY REASON OF NOTICE, THAT SOMEBODY IS MAKING, IS POTENTIALLY GOING TO MAKE SOME CLAIM THAT EVERYTHING THAT HAS TO DO WITH THAT CLAIM, HAS TO BE PRESERVED FOR FOUR YEARS, OR FOR HOW LONG?

NO. I DO NOT BELIEVE THAT THE LAW REQUIRES THAT. WHAT THE LAW REQUIRES IS THAT A PARTY ACT REASONABLY, AND IN MY CLIENT'S CASE, WAL-MART NOT ONLY ENLISTED AN AID TO PREPARE A REPORT BUT LATER SHE RECORDED A STATEMENT, TWO DAYS LATER, SO AT THE SAME TIME THEY WERE GATHERING THEIR EVIDENCE, THEY WERE ELIMINATING THE EVIDENCE THAT WOULD HAVE BEEN HELPFUL TO MY CLIENT.

WHERE DID THAT DUTY, THOUGH, ARISE? YOU SAY THAT THEY HAVE A DUTY TO ACT REASONABLY. IN OTHER WORDS I AM NOT SURE THAT YOU REALLY HAVE RESPONDED TO JUSTICE WELLS'S INITIAL QUESTION ABOUT THE DUTY. YOU KNOW, LET'S GO BACK TO A SIMPLE HYPOTHETICAL AND QUOTE THE GOOD OLD DAYS, AND THAT IF SOMEBODY HAD A RECORD OR AN ITEM OR SOMETHING, THAT MAYBE THEY THREW AWAY THE GUN, AND IT WAS DISCOVERED THAT THEY HAD THROWN AWAY THE GUN, AND SOMEBODY WOULD OBVIOUSLY DRAW AN INFERENCE FROM THAT, WELL, THEY THREW AWAY THE GUN BECAUSE IT WAS GOING TO CONSTITUTE EVIDENCE AGAINST THEM, AND YOU MIGHT INTRODUCE EVIDENCE THAT THEY THREW AWAY THE GUN IN THE TRIAL OF THE CLAIM AGAINST THEM, AND TO HAVE THE JURY, THEN, SAY, WELL, AH-HA! YOU MUST HAVE BEEN GUILTY, BECAUSE HE -- HE MUST HAVE BEEN GUILTY BECAUSE THEY THREW AWAY THE GUN. NOW WE ARE IN A WHOLE NEW WORLD, IT SEEMS LIKE, THOUGH, IN TERMS OF WHAT HAPPENS, IF YOU THROW AWAY THE GUN. HELP US WITH WHERE DID THE TRANSITION OCCUR OR WAS IT A TRANSITION? WAS IT ALWAYS SOMETHING UNDER THE COMMON LAW HERE. DO YOU UNDERSTAND MY QUESTION?

YES, AND IT IS OUR POSITION THAT THE DUTY ARISES FROM THE COMMON LAW, IN THE SENSE THAT THE PLAINTIFF'S LAWSUIT IS A REASONABLE EXPECTATION OR PROPERTY INTEREST, AND JUST AS IN GENERAL TORT LAW, WHERE THERE IS AN OBLIGATION TO ACT REASONABLY, WHEN THEY WERE CLEARLY AWARE, BASED ON THEIR CONDUCT, THAT A CLAIM WAS --

SO WHEN DID WE GO FROM AH-HA! HE THREW AWAY THE GUN, AND THEREFORE I WANT YOU TO FIND THAT THAT IS PART OF MY EVIDENCE AGAINST HIM. THERE MUST HAVE BEEN FINGERPRINTS ON THE GUN OR THERE MUST HAVE BEEN SOMETHING ON THE GUN THAT WOULD HAVE HELPED US PROVE OUR CASE AGAINST HIM, AND THEREFORE WE USE IT IN AN EVIDENTIARY WAY OR A BURDEN OF PROOF WAY, BUT WHEN DID THE TRANSITION TAKE PLACE FROM THAT USE OF THAT, TO, NOW, THERE IS AN INDEPENDENT CAUSE OF ACTION AGAINST THE PERSON THAT THREW AWAY THE GUN OR WHATEVER. WHEN DID THIS AND WHAT HAPPENED?

WELL, THE IMPOSITION OF THE INFERENCE, NECESSARILY AROSE FROM THE RECOGNITION OF SOME TYPE OF DUTY, BECAUSE IT IS DEEMED, IT IS DEEMED A SITUATION WHERE A JURY IS ALLOWED TO MAKE AN INFERENCE. THEY ARE NOT REQUIRED TO, BECAUSE OF THE CONDUCT OF THAT PARTY. AND BECAUSE THEY, THEIR CONDUCT COULD BE DEEMED UNREASONABLE, A VIOLATION OF A DUTY, THAT IS WHY THE JURY WAS ALLOWED TO MAKE THAT INFERENCE, BECAUSE THE LAW PERCEIVED THAT THAT THERE WAS AN OBLIGATION OF SORTS.

WHEN DID THAT BLOSSOM INTO AN INDEPENDENT CAUSE OF ACTION?

WELL, THE CASE LAW STARTED, PROBABLY, IN THE EARLY '80s, AND IT APPEARS TO ME, THAT THE REASON WHY IT HAS BECOME SUCH AN ISSUE, IS BECAUSE WHEN FULL-BLOWN DISCOVERY WAS AUTHORIZED UNDER THE RULES IN '71, AND YOU STARTED TO HAVE ACCESS TO MATERIALS AND

THE PARTY NOT ONLY HAD GREATER ACCESS BUT GREATER ABILITY TO PROVE WHAT HAPPENED TO EVIDENCE THAT IS NO LONGER THERE, THAT --

SO YOU FEEL IT IS CONNECTED TO MODERN-DAY DISCOVERY.

WELL, I THINK THAT IS WHY SPOILATION --

THE MARSHAL HAS WARNED ABOUT THE TIME.

I GUESS I HAD BETTER TURN OVER. THANK YOU.

AFTER YOU INTRODUCE YOURSELF, MAYBE YOU CAN PICK UP ON --

MAY IT PLEASE THE COURT. I AM WILLIAM GENTRY AND I HAVE GOT LARYNGITIS. PLEASE IGNORE MY FROG HERE. I REPRESENT KAYREN JOST, AND IN OUR CASE THIS CASE DOES CLEARLY INVOLVE WHERE THERE WAS A DUTY, CLEARLY AWARE THAT FACTS ALLEGED FRAUD AND DECEIT, WHICH AT COMMON LAW WOULD BE OCCURRED EXTRINSIC. MOST OF THE ACTIONS OCCURRED PRIOR TO TRIAL. THE ACTS OF FRAUD AND DECEIT --

YOU SAY THERE IS A DUTY. IS THERE A STATUTORY DUTY?

I KNOW WE HAVE ONE OF DESTRUCTION OF MEDICAL RECORDS, WHICH IS AN INNATE DUTY. WE HAVE POLICIES AND PROCEDURES THAT WERE REQUESTED DURING THE COURSE OF DISCOVERY. FLORIDA LAW HAS HELD THAT THERE IS A DUTY TO RESPOND TO THAT. THOSE WERE WITHHELD. WE HAVE TAMPERING WITH A WITNESS AND ATTEMPTS TO INTIMIDATE WITNESSES, WHICH THERE IS A DUTY NOT TO DO THAT THE.

WELL, LET ME TRY TO SEPARATE THESE THINGS, THOUGH, WHAT YOUR CLAIM IS, IS BASED, AS I UNDERSTOOD IT, IS BASED UPON SOME DOCUMENTS HAVING TO DO WITH REVIEW OF ONE DOCTOR'S CONDUCT.

NO, SIR. I APOLOGIZE, IF THAT IS THE WAY IT CAME ACROSS. DUE TO THE DEFENDANT'S EFFORTS, THERE ARE ACTUALLY TWO DOCUMENTS. ONE WAS THE DOCUMENT THAT SHOULD HAVE BEEN MADE AND APPARENTLY WAS MADE WITH RESPECT TO THE FAILED SWAN'S CATHETERIZATION, AND IT DID NOT EXIST. SECONDLY, THERE WAS HOSPITAL POLICIES AND PROCEDURES THAT PROVIDED THAT A PERSON SUCH AS DR. MAUDE, WHO DID NOT HAVE CERTAIN CREDENTIALS, WAS NOT PERMITTED TO DO SOME TYPES OF THINGS AND THOSE POLICIES RELATED TO THOSE ISSUES WAS HIDDEN AND CONCEALED AND WAS NEVER PROVIDED. THOSE WERE THE TWO THINGS THAT WE ARE FOCUSING ON AND A WITNESS BEING ASKED TO WITHHOLD EVIDENCE IS EXTRINSIC FRAUD, NOT SOMETHING INTRINSIC IN THE CASE --

WHY AREN'T THE NORMAL REMEDIES AVAILABLE FOR THOSE IN? YOU KNOW, WHEN I WAS ON THE -- FOR THOSE? YOU KNOW, WHEN I WAS ON THE CIRCUIT BENCH, THIS STUFF CAME UP AND THERE WERE MANY REMEDIES AVAILABLE, COUNSELING FOR WITNESSES, ET CETERA, TO CONTEMPT, TO SANCTIONS, ET CETERA. APPARENTLY THAT IS WHAT CALIFORNIA DETERMINED, AFFECTION PERSONALITYING.

CALIFORNIA DETERMINED, IN A CASE LIKE JOST, THEY SAID WHERE IT WAS DISCOVERED DURING THE CASE, THOSE REMEDIES WOULD BE SUFFICIENT. ONE, FOR EXAMPLE, THE INFERENCE, THE INFERENCE AS DESCRIBED BY VALLESON, SO THOSE WEREN'T DESCRIBED AT ALL, AND I THINK THE COURT NOTED IN ONE PARTICULAR CASE, THAT THAT IS NOT GOING TO DO THE SAME AS WHERE YOU HAVE THE EVIDENCE THAT THEY EFFECTIVELY ADMITTED THE FAULT, AND SO THE PRESUMPTION INFERENCE DOES NOT PUT THE PLAINTIFF BACK WHERE HE WAS. WE HAVE A UNIQUE CIRCUMSTANCE HERE, IN A RECENT DECISION IN THE HUMANA CASE, YOU NOTED THAT THIS IS AN INDEPENDENT CAUSE OF ACTION THAT DERIVES BECAUSE OF THE FAILURE TO

PRESERVE EVIDENCE AND THE IMPACT ON DEPRIVING PLAINTIFF OF THIS CLAIM.

WAIT A MINUTE. WAIT A MINUTE, MR. GENTRY. IN HUMANA, WE HAD MONDU OUT THERE. WE HAD THIS PUBLIX DECISION OUT OF THE FOURTH DISTRICT, AND THEY HAD RECOGNIZED THAT THERE WAS A CAUSE OF ACTION. THIS COURT HAD NEVER RECOGNIZED.

BUT YOU ADDRESSED THE CAUSE OF ACTION.

AND WE WERE NOT DEALING WITH WHETHER THERE WAS A CAUSE OF ACTION.

YOU WERE ADDRESSING THE NATURE OF THE CAUSE OF ACTION, WHICH WAS, AS AN INDEPENDENT CAUSE OF ACTION THAT ACCRUES, WHEN THE WRONG OCCURS, AND IN ANSWER TO JUSTICE BELL, I WAS GOING TO SAY IN THIS CASE, BECAUSE THE PLAINTIFF DID DIE, AFTER THE APPEAL OR IN, SHORTLY AFTER THE REVERSAL, HIS CLAIM WHICH VESTED AT THE TIME OF THE WRONGFUL ACT, DOES NO LONGER EXIST. THE DAMAGE THAT HE VIRTUALLY HIS CLAIM THAT HE HAD, HE CAN'T BRING A CLAIM OF A SURVIVORSHIP ACT. THERE IS NO RECOVERY IN THE WRONGFUL-DEATH ACT. THERE IS NO REMEDY. THEY HAVE BEEN SUCCESSFUL IN DEPRIVING HIM OF ANY OF HIS RIGHTS, BY VIRTUE OF HIDING THE EVIDENCE.

YOUR CLAIM IS BASED UPON INTENTIONAL.

INTENTIONAL. NOT.

AND YOU --

I THINK THE COURTS FOR EXAMPLE, IN THE RECENT WEST VIRGINIA CASE THE WAL-MART FOLKS MAKE A SUBTLE DISTINCTION BETWEEN NEGLIGENT AND INTENTIONAL AND ALLOWS A CAUSE OF ACTION AGAINST ANOTHER PARTY IF THEY FIND INTENTIONAL, BECAUSE THAT CONDUCT IS SO HEINOUS, BUT THEY DON'T ALLOW FOR NEGLIGENCE, SO I THINK THERE IS A MAJOR DISTINCTION, AND THE COURT PROBABLY NEEDS TO --

MEASURE OF DAMAGES.

MEASURE OF DAMAGES IN MY CASE, IS TO PUT ON THE EVIDENCE, INCLUDING THE FACT OF HIS PREMATURE DEATH, AND THE JURY DETERMINED WHAT WOULD HAVE BEEN THE MEASURE OF DAMAGES, IF WE PROVED THAT THESE MATTERS PRECLUDED HIM FROM PROVING HIS CASE. WHAT WOULD HAVE BEEN THE DAMAGES THAT SHOULD HAVE BEEN AWARDED UNDER THIS, IF WE HAD BEEN ALLOWED TO TRY A CASE AT TRIAL, AND THE JURY SHOULD KNOW --

DID YOU SEE THIS AS A COMPLETELY SEPARATE TRIAL, AFTER HAVING TO ATTEMPT TO PROVE YOUR CASE? OR ARE YOU TOTALLY ALLOWED TO FOLLOW COMPLETELY SEPARATE PROCEEDING AND GO DUAL, OR IT HAS TO BE IN THE SAME PROCEEDING?

I THINK THE CASES THAT WERE ADDRESSED IT, UNTIL JOST, HAD FELT AND SHOULD HAVE BEEN BROUGHT AT THE SAME TIME, WHICH, AGAIN, THE HUMANA CASE CAME UP IN THAT SAME POSTURE, WHERE THEY WERE SUING THE SPOILATOR AND THE MANUFACTURER OF THE LADDER. ALL OF THAT EVIDENCE WILL COME IN. THE JURY DECIDES DID THIS LACK OF EVIDENCE SUBSTANTIALLY IMPAIR THE CASE, AND IF SO, THAT JURY IS BEST ABLE TO DETERMINE THE DAMAGES, IN THE DISCRETION OF THE TRIAL COURT, BECAUSE IF THE COURT FINDS THAT THERE WOULD BE PREJUDICIAL HARM TO THE DEFENDANT, HE CAN BIFURCATE IT AND DO IT IN TWO STEPS. WE BELIEVE IT SHOULD BEGIN AND PROCEED IN THE SAME PROCEEDING. YOUR HONOR, I AM OUT OF TIME.

LET ME ASK YOU THIS, SO YOU ARE CONTEMPLATING, IN THIS KIND OF ACTION, IF WE AGREE THAT THE FIRST PARTY, YOU CAN HAVE A FIRST PARTY SPOILATION CLAIM, THAT THE

DEFENDANT OR THE PLAINTIFF WOULD BE ABLE TO PUT ON EVIDENCE OF WHATEVER IS MISSING, THEN THE DEFENDANT WOULD BE ABLE TO COME BACK IN AND SAY, WELL, NO, THIS NEVER EXISTED. THOSE KINDS OF THINGS, OR WE GET OFF ON A WHOLE OTHER TRIAL WITHIN A TRIAL. THAT IS WHAT YOU ARE REALLY CONTEMPLATING.

I DON'T REALLY THINK IT IS GOING TO BE ANOTHER TRIAL WITHIN A TRIAL, BECAUSE IF I PROVE I AM ENTITLED NOW TO PROVE, THAT THEY HID IT OR THEY WHATEVER, WITH MY INFERENCE, SO IT IS THE SAME THING. IT IS EITHER WE ARE GOING TO HAVE TWO TIMES DOING IT OR ONE TIME DOING IT, AND IN MY PARTICULAR CASE, TRYING MY MED MAL CASE IS TOTALLY A WASTE OF TIME, BECAUSE I DON'T HAVE A CLAIM ANYMORE. WE TRULY ARE UNIQUE IN THE DAMAGES PART IN THIS CIRCUMSTANCES.

YOU DON'T HAVE A CLAIM EITHER?

NO, MA'AM, BECAUSE IN THE MEDICAL MALL PRACTICES DEATH ACT THERE, ARE NO SURVIVORS. WE ARE CAUGHT IN A CATCH-22 HERE. THANK YOU.

GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. ROSEMARY WILDER, REPRESENTING WAL-MART. I AM ACTUALLY, THIS COURT REALLY NEEDS TO GET TO THE ISSUE OF DUTY. THE ACTUAL CONFLICT QUESTION IN THIS CASE IS WHETHER THERE SHOULD BE A RECOGNIZED INDEPENDENT ACTION FOR NEGLIGENCE SPOILATION OF EVIDENCE. THERE ARE TWO RELEVANT COMPLAINTS.

SUCH AN ACTION IN A THIRD PARTY CONTEXT, CORRECT?

BECAUSE DISMISSED WITHOUT PREJUDICE, SO ACTUALLY THE ONLY THING THAT IS PENDING BEFORE THE COURT, A QUESTION OF NEGLIGENT SPOILATION FOR AN INDEPENDENT COURT. BUT -

DO YOU THINK THERE IS A POSSIBILITY OF HAVING A SPOILATION CLAIM IN A THIRD PARTY CONTEXT, WHAT IS THE RATIONALE FOR NOT HAVING IT IN THE FIRST PARTY CONTEXT, WHEN IT IS IN FACT, THE FIRST PARTY WHO IS GOING TO REALLY BENEFIT THE DEFENDANT, THE ONE WHO WOULD REALLY BENEFIT FROM THE ABSENCE OF THAT KIND OF EVIDENCE, THAT HAS BEEN EITHER INTENTIONALLY OR NEGLIGENTLY DESTROYED.

THERE IS TWO MAIN REASONS. FIRST OF ALL, IN THE THIRD PARTY CONTEXT AND ALL THOSE THIRD PARTY CASES, WHAT YOU WILL FIND IS A DUTY TO PRESERVE THE EVIDENCE, BASED ON A CONTRACT, STATUTE, ADMINISTRATIVE REGULATION, SO ALREADY THERE IS A DUTY IMPOSED IN THE THIRD PARTY LITIGATION CASES, WHEN YOU LOOK AT THE THIRD PARTY CASES, THAT IS WHAT THEY ARE TALKING ABOUT. SECONDLY, IN THE THIRD PARTY CASE, SOME COURTS HAVE FOUND THAT THERE REALLY ISN'T REMEDY IN ALL OF THE CASES THAT, ALLOW THE PLAINTIFF TO SEEK SOME KIND OF RECOVERY. THE THIRD PARTY CASE.

THEY INDICATE THAT THERE IS SOME STATUTORY, HE INDICATES THAT THERE IS SOME BASIS FOR HAVING TO KEEP THESE MEDICAL RECORDS, SO ISN'T HE IN THE SAME POSITION AS THE FIRST PARTY, THE THIRD PARTY CLAIMANT?

RIGHT. EXACTLY. AND IF THERE IS A CONTRACTUAL BASIS OR STATUTORY BASIS, THEN THE COURT, AND WHETHER IT BE A FIRST PARTY OR THIRD PARTY CLAIM, CAN REMEDY THE SITUATION, BASED ON WHETHER THE STATUTE WAS ADHERED TO OR NOT, AND SOME OF THE COURTS THAT TALK ABOUT THE THIRD PARTY CLAIM LIKE THE CEDARS SINAI CASE AND THE TREVINO CASE, FIND NO INDEPENDENT TORT, EVEN IN THE THIRD PARTY SITUATION, BECAUSE THERE IS A REMEDY IN THE COURT FOR THE BREACH OF THE STATUTE OR AN ADMINISTRATIVE RULE THAT USUALLY THE LEGISLATURE HAS SET OUT. IN THE BREACH OF CONTRACT SITUATION

IN THE THIRD PARTY SITUATION, THEN YOU HAVE A CLAIM FOR BREACH OF CONTRACT. YOU BREACHED THE CONTRACT. THAT, REALLY, WAS MILLER VERSUS ALLSTATE. THAT IS THE CONTINENTAL VERSUS HERMANN CASE OUT OF THE THIRD DISTRICT. SO THERE WAS A REMEDY THERE. BUT THE REMEDY THAT IS AVAILABLE IN BREACH OF CONTRACTOR STATUTORY REGULATION OR ADMINISTRATIVE REGULATION, CAN ALSO EXIST IN A FIRST PARTY CASE. THEY HAVE THOSE REMEDIES. BUT IN ADDITION TO THOSE REMEDIES, THEY HAVE ALL THE STATUTORY REMEDIES, I AM SORRY, ALL THE SPOILATION OF EVIDENCE REMEDIES THAT NORMALLY EXIST, FOR WHICH SANCTIONS ARE PERFECTLY CAPABLE.

ARE THOSE REMEDIES REALLY ADEQUATE, IF THE PLAINTIFF IS GOING TO LOSE THEIR CASE, THEIR WRONGFUL-DEATH, WHATEVER KIND OF CASE IT IS, BECAUSE THAT EVIDENCE IS MISSING, ARE THESE OTHER REMEDIES, REALLY, ADEQUATE?

YES. THERE IS NO QUESTION. IF YOU LOOK AT, AND I THINK WE HAVE CITED SPANKO VERSUS ALPOBARA AND MAYBERRY VERSUS HORELL, AND IN THOSE CASES ALL YOU HAVE GOT TO DO IS GO TO COURT AND PROVE REMEDY. WHAT IS THE BIG DEAL.

ESSENTIALLY THIS INFORMATION COULD NOT BE CAPTURED AGAIN. THESE TWO CASES ARE REALLY NOT THE SAME CASES THAT WE ARE LOOKING AT. THE WAL-MART CASE AND THE HOSPITAL CASE ARE VASTLY DIFFERENT.

I THINK THAT THEY ARE VERY DIFFERENT.

VERY DIFFERENT. SO IN THE HOSPITAL SITUATION, THERE IS NO REMEDY, IF IT IS ONLY DISCOVERED POST TRIAL THAT SOMEONE HAS DESTROYED THE EVIDENCE.

I THINK IN THE HOSPITAL CASE, WHAT THEY HAVE IS THE REMEDIES THAT THE SUPREME COURT SET OUT IN VALESON, WHICH YOU HAVE A REBUTTABLE PRESUMPTION OF INNOCENCE AND THAT IS A REMEDY.

THE CASE IS OVER. THAT IS THE POINT. IN THE HOSPITAL CASE, THE CASE IS OVER. THEY HAVE NO CASE AND THEY HAVE NO REMEDY NOW.

I WOULD SUGGEST THAT, BASED ON A WEALTH OF INFORMATION OUT OF THE JURISDICTION, THAT AN INDEPENDENT TORT, WHETHER NEGLIGENCE OF FIRST PARTY OR THIRD PARTY, IS THAT WE ARE GOING TO BE LOOKING AT AN ENDLESS STREAM OF INFORMATION, AFTER POST-JUDGMENT.

WHAT IS THE REMEDY IN THIS CASE WE ARE LOOK AT TODAY?

IN THE HOSPITAL CASE, I DON'T BELIEVE THAT THEY HAVE A REMEDY, AND I BELIEVE THAT THE MAJORITY OF JURISDICTIONS AND I AM SURE THAT CO-COUNSEL WILL BE ABLE TO ADDRESS THAT BETTER. IT IS THEIR CASE, AND I THINK THAT MAY SOUND HARSH, THAT THEY DON'T HAVE A REMEDY, BUT ONE OF THE REASONS FOR NOT RECOGNIZING AN INDEPENDENT TORT SPOILATION OF EVIDENCE, IS FINALITY OF JUDGMENT.

SO FINALITY OF JUDGMENT SHOULD TAKE PRECEDENCE OVER INDEPENDENT EVIDENCE IN THE SYSTEM.

RIGHT. SO WHEN YOU ARE TALKING ABOUT WHAT YOU HAVE RAISED, THE COURT LOOSE TO THE DISCOVERY THAT WAS TAKEN IN THE CASE, WHAT HAPPENED IN THE CASE, AND THEY EITHER HAVE A REMEDY ON APPEAL TO GO BACK AND GET A NEW TRIAL, OR --

DOES THIS PARTY HAVE REMEDY ON APPEAL, THE HOSPITAL CASE?

I REALLY CANNOT ANSWER. THAT I REALLY DO NOT KNOW. HONESTLY DO NOT KNOW.

YOUR NEXT POINT.

ONE OF THE THINGS THEY CAN DO IS FILE A 1.540 MOTION, TO GET RELIEF FROM THE JUDGMENT.

IS THAT AVAILABLE IN THIS CASE?

I AM SORRY?

HAS THE TIME EXPIRED IN THE CASE?

I AM SORRY. I DO NOT KNOW WHAT THE TIME FRAME IS IN THE JOST CASE, BUT I THINK THAT THE CONSIDERATION THAT YOU ARE RAISING THAT MAYBE A PARTICULAR PLAINTIFF AND AN UNUSUAL SITUATION, MAYBE, WITHOUT A REMEDY, IS NOT NEW NEW. WE -- IS NOT NEW. WE ALL LOOK AT THAT WHEN WE SAY THE JUDGMENT IS FINAL. THERE ARE SOME REMEDIES TO GO BACK, APPEAL, 1.540, WHATEVER, TO LOOK AT A CASE AFTER THE JUDGMENT IS FINAL. BUT WHEN YOU LOOK AT THE CASES THAT HAVE, WHICH IS THE MAJORITY OF JURISDICTIONS THROUGHOUT THE UNITED STATES, FINALITY OF JUDGMENT IS ONE OF THE MAJOR REASONS FOR NOT RECOGNIZING AN INDEPENDENT TORT, BECAUSE THE CASE, ALL OF THIS LITIGATION, SHOULD TAKE PLACE DURING THE LITIGATION, AND IN OTHER WORDS WE ARE GOING TO HAVE THIS ENDLESS STREAM OF, EVERY TIME A CASE IS LITIGATED AND THE CASE IS OVER, WE ARE GOING TO FIND SOME PIECE OF EVIDENCE THAT MAYBE SHOULD HAVE BEEN PRESERVED AND WASN'T. ACCORDING TO THE PLAINTIFFS, IT DOESN'T EVEN HAVE TO BE MATERIAL OR SUBSTANTIALLY --

SO IN YOUR SCENARIO, THEN, IT WOULD APPEAR THAT THOSE WHO ARE MOST SUCCESSFUL IN DECEIVING, DESTROYING EVIDENCE AND DECEIVING, OTHERS WITH REGARD TO THAT DESTRUCTION ARE IN THE BEST POSITION THEN.

IT IS POSSIBLE. IT IS POSSIBLE. JUST LIKE IT IS, WHEN A WITNESS GETS ON THE STAND AND LIES. AND THERE IS NO REMEDY.

DO YOU THINK IT NOT FAR DIFFERENT FROM A STATEMENT FROM AN INDIVIDUAL, THAN A PIECE OF EVIDENCE? YOU DON'T SEE THAT AS ANY DIFFERENT?

CERTAINLY NOT. SURE. BECAUSE OF THE WITNESS'S TESTIMONY COULD BE THE KEY PIECE OF EVIDENCE. THAT WITNESS HAS LIED. THERE IS NO INDEPENDENT TORT FOR PERJURY. IF YOU TAMPER WITH THE JURY, THERE IS NO INDEPENDENT TORT TO RECOVER FOR THAT, AND THE REASON IS THAT THE COURTS WANT ALL LITIGATION TO TAKE PLACE IN THAT ORIGINAL CASE, BECAUSE THIS COULD GO ON FOREVER AND EVER AND EVER AND EVER, AND I KNOW THAT CEDARS SINAI TALKS ABOUT SPIRALING LITIGATION. MY NOTICE OF SUPPLEMENTAL AUTHORITY JUST GIVES YOU A SMALL VIEW OF CASES DECIDED AFTER I FILED MY BRIEF, SO THIS ISSUE CLEARLY IS ONE THAT IS SPIRALING AROUND THE UNITED STATES, AND THE QUESTION IS, DOES THIS COURT WANT TO GO DOWN THAT ROAD, AND MY SUGGESTION IS THAT THE ANSWER IS NO.

LET ME ASK YOU SOMETHING. GETTING TO 1.540, BECAUSE I AM CONCERNED ABOUT JUSTICE, IF SOMEBODY FINDS OUT, AFTER A JUDGMENT, THAT EVIDENCE HAS BEEN DESTROYED, ESPECIALLY DELIBERATELY TO AVOID A JUDGMENT, UNDER 1.540, YOU USUALLY HAVE ONE YEAR TO BRING A MOTION FOR RELIEF FROM JUDGMENT FOR FRAUD OR NEWLY-DISCOVERED EVIDENCE. HOWEVER, THE LAST SENTENCE SAYS THIS RULE DOES NOT LIMIT THE POWER OF A COURT, TO ENTERTAIN AN INDEPENDENT ACTION TO RELIEVE A PARTY FROM A JUDGMENT DECREE ORDER OR PROCEEDING OR TO SET ASIDE A JUDGMENT OR DECREE, FOR FRAUD UPON THE COURT, AND IT SEEMS TO ME THAT DESTROYING EVIDENCE DURING A PROCEEDING WOULD CONSTITUTE FRAUD UPON THE COURT THAT WOULD ALLOW PARTY TO BRING AN INDEPENDENT ACTION.

I THINK SOME OF THE COURTS HAVE LOOKED AT THAT AS, PERHAPS, THE TESTIMONY, WHAT I MEAN TALK ABOUT, NO INDEPENDENT CAUSE OF ACTION FOR PERJURY ON THE STAND NO. INDEPENDENT CAUSE OF ACTION FOR FALSIFYING EVIDENCE. I BELIEVE THAT IS IT. THEY ARE TALKING ABOUT EXTRINSIC FRAUD. YOU CAN BRING A CASE FOR EXTRINSIC FRAUD, BUT, AGAIN, I BELIEVE WHAT YOUR HONORS ARE FOCUSING ON --

ISN'T DESTROYING EVIDENCE THAT IS RELEVANT TO CASE, A SPECIES OF FRAUD UPON A COURT?

I BELIEVE SO. I BELIEVE SO. BUT, AGAIN, ALL OF THIS HAS NORMALLY AND ROUTINELY BEEN HANDLED, WITHIN THE LITIGATION, ITSELF. NOW, AGAIN, THE ISSUE BEFORE THIS --

THAT ASSUMES THAT THE PLAINTIFF DISCOVERS THE DESTRUCTION OF THE EVIDENCE, WITHIN THE LITIGATION. I MEAN, WE CAN ASSUME THAT HAPPENS MOST OF THE TIME, BUT THERE WILL BE SOME SUBSET OF CIRCUMSTANCES IN WHICH THE PLAINTIFF DOES NOT DISCOVER IT, EVEN WITHIN A YEAR AFTER THE JUDGMENT.

RIGHT. RIGHT. I ABSOLUTELY UNDER THAT, AND, OF COURSE, THAT IS BASICALLY THE GIST OF THE PLAINTIFF'S ARGUMENT, THAT THERE IS HAS TO BE AN INTENTIONAL, THERE HAS TO BE AN INDEPENDENT TO TORT TO REMEDY THIS, BUT I THINK WHAT YOU ALL ARE TALKING ABOUT IS A HARD CASE MAKING BAD LAW. YOU ARE TALKING ABOUT A VERY UNIQUE SITUATION THAT RARELY OCCURS, WHICH IS WHY THE MAJORITY OF JURISDICTIONS IN THE UNITED STATES REJECT THE INDEPENDENT TORT OF SPOILATION, BECAUSE THEY FEEL, JUST LIKE THE CALIFORNIA COURT DID, AFTER HAVING INDEPENDENT TORT SPOILATION, BOTH NEGLIGENT AND INTENTIONAL, FOR 14 YEARS, REJECTED THE TORT AS NOT BEING WORKABLE. THERE IS TOO MUCH, TOO MANY PROBLEMS WITH ALLOWING THAT KIND OF TORT ACTION, AND I JUST WOULD LIKE TO ASK THE COURT TO, AGAIN, LOOK AT THE CERTIFIED CONFLICT IN THE CASE AND FIND THAT THERE IS CONFLICT THAT MARTINO WAS CORRECTLY DECIDED, THAT MONDU MUST BE QUASHED. THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS TRICIA VALLES, AND I REPRESENT THE LAKELAND REGIONAL MEDICAL CENTER. WHEN THIS CASE WAS APPEALED --

WHAT THE ORIGINAL CLAIM BE THE SAME AS THESE INVOLVE?

WHEN YOU ARE LOOKING AT THE ORIGINAL CLAIM, YOU ARE LOOKING INTO THE FUTURE.

DO THEY INVOLVE THE SAME ELEMENTS OF CLAIM?

NO. WITH THE STATUTORY CAUSES OF ACTION AND INDEPENDENT ACTION, THAT DO NOT INVOLVE THE SAME DAMAGES ONLY, BUT THAT WAS A LEGISLATIVE DECISION THAT WE ALL HAVE TO ABIDE BY, FOR THE REASONS THE LEGISLATURE PASSED THE WRONGFUL-DEATH STATUTE.

THAT IS THE SAME CAUSE OF ACTION FOR A WRONGFUL-DEATH ACTION AS FOR A CIVIL DAMAGE AS FOR A TORT REMEDY. YOU CAN'T AGREE WITH THAT?

NO, YOUR HONOR, BECAUSE IT STILL DOES COME BACK TO WHAT IS THE CAUSE OF ACTION. IT IS MEDICAL MALPRACTICE. WHAT ARE THE LIMITATIONS ON DAMAGES, THAT IS SET FORTH BY THE LEGISLATURE, SO ALTHOUGH TECHNICALLY THERE IS A SPECIAL STATUTE YOU KNOW HAVE -- YOU NOW HAVE TO BRING IT URGED, UNDER THE SAME CAUSE OF ACTION AS THE SURVIVEAL ACTION, YOU STILL GET THE SAME MEDICAL EXPENSES FOR THE YEARS HE WAS ALIVE AND YOU STILL GET WHAT WAS LEFT TO THE ESTATE IN TERMS OF LOST ACCUMULATIONS, AND YOU STILL GET AN ADDED EXPENSE AND BENEFIT, IF YOU WANT TO LOOK AT THE DIFFERENCES.

LET ME ASK YOU, THIS MR. GENTRY SAID THAT THERE WAS A SWAN'S CATHETER RECORD THAT IT

WAS BASED UPON, PLUS THE PERSONNEL TYPE RECORDS. DO YOU AGREE WITH THAT?

YOUR HONOR, THE ACTUAL ALLEGATION DEALT WITH A RESUSCITATION RECORD IF YOU GO BACK TO THE ACTUAL ALLEGATIONS, THERE IS NO ALLEGATION OF A PARTICULAR SWAN CATHETER RECORD. WHAT THERE IS AN ALLEGATION OF CREDENTIALING TO PERFORM THE SWAN'S, WHICH ALTHOUGH WE ARE HERE ON A MOTION TO DISMISS, BECAUSE IT HAS BEEN RAISED, AND IF YOU LOOK AT THE ESSENTIAL CASES THAT HAVE COME OUT --

ONE OF THE CASES IS A MEDICAL RECORD, CORRECT?

CORRECT, YOUR HONOR.

AND THERE IS A STATUTORY OBLIGATION TO MAINTAIN THAT RECORD.

CORRECT, BUT WE GET INTO WHAT WAS THE RESPONSIBILITY TO MAINTAIN THAT RECORD. AGAIN, WE ARE HERE ON A CAUSE OF ACTION THAT EXISTS SINCE TRIAL. THERE HAS NEVER BEEN A CAUSE OF ACTION THAT EXIST AGAINST THE PLAINTIFF. HE STILL HAS ALL OF HIS MEDICAL MALPRACTICE ACTIONS, HIS DAMAGES, THERE WITH. WHAT UPSETS THE PLAINTIFFS IS MR. MYERS DIED, AND WAY THOUGHT WAS A \$20 MILLION CASE BECAUSE OF WHAT THE LEGISLATURE HAS DONE IN WRONGFUL-DEATH CASES, TO PRECLUDE GIVING ME WRONGFUL-DEATH, ALL OF THE CASES GOING BACK TO 1997, AND WHAT HE NEEDS TO DO IS BRING AGAINST THE COURT A REQUEST FOR SANCTIONS, IF HE BELIEVES THAT IS APPROPRIATE, AND JUSTICE BELL WAS ASKING ABOUT, ALL OF THE CASES WOULD HAVE BEEN BROUGHT FORTH IN THE CASE, TO THE POINT WHERE IT WAS NOT INTENTIONAL YET, AND IT WAS ABSOLUTELY MATERIAL, WHICH WE DISAGREE THAT IT IS AND DISAGREE THAT SPOILATION ACTUALLY OCCURRED IN THIS CASE, WHEN YOU GET TO THE ACTUAL DESTRUCTION, WE WOULD HAVE A CAUSE OF ACTION IN THE CASE.

ASSUMING THAT A SPOILATION DID TAKE PLACE IN THIS CASE, DO YOU AGREE THAT THE DEFENDANT, THE PLAINTIFF WOULD BE ENTITLED TO SOME KIND OF INFERENCE, TO DRAW FROM THAT SPOILATION?

I BELIEVE HE WOULD BE ABLE TO PRESENT THE ARGUMENT TO THE COURT AND REQUEST, IT AND THEN WE WOULD HAVE ALL OF THE FIVE FACTORS THAT THE McALLISTER COURT TALKED ABOUT COMING TO PLAY, OF WHICH INTENTIONALITY IS ONE. THAT WOULD ALSO BE THE PREJUDICE, THE RELEVANCY. ULTIMATELY THE RELEVANCY OF A RESUSCITATION RECORD IN THIS CASE IS GOING TO BE IRRELEVANT.

SO IF THAT IS THE CASE, IF YOU CAN, IN FACT, IF HE CAN DEMONSTRATE HIS CLAIM AND THERE IS A INFERENCE TO BE DRAWN FROM IT, DO YOU AGREE OR DISAGREE THAT THE JURY SHOULD, THEN, BE INSTRUCTED ON IT?

YOUR HONOR, AGAIN, THAT IS IN THE LEVEL OF WHAT THE JUDGE CAN DECIDE NEEDS TO OCCUR, TO REMEDY THE SITUATION. THE LOWEST LEVEL IS AN INFERENCE WITH NO INSTRUCTION. THEN YOU GO TO AN INFERENCE WITH AN INSTRUCTION. THEN YOU GO TO A REBUTTABLE PRESUMPTION, WHERE THE BURDEN OF PROOF IS NOW ON THE DEFENDANT AND THEN YOU GO TO DEFAULT JUDGMENT, SO AS CASES IN OTHER JURISDICTIONS HAVE LOOKED AT THIS, SORT OF A SLIDING SCALE AND A LEGAL MATTER FOR THE JUDGE TO DETERMINE. ALL OF THESE PLAINTIFFS WANT TO GET THE CASE BEFORE THE JURY AND BRING THIS INFLAMMATORY INFORMATION TO THE JURY, WHEN HALF THE TIME IT IS IRRELEVANT TO THE CAUSE OF ACTION. THERE IS ALWAYS GOING TO AND PIECE OF SOMETHING THAT PROBABLY WAS DEEMED PRIVILEGED, NOT TURNED OVER, DEEMED TO BE IRRELEVANT, AND THESE ARE ALL OF THE THINGS THAT THE LITIGATION PRIVILEGE PROTECTS.

WE ARE HERE AT THE MOTION TO DISMISS STAGE.

CORRECT, YOUR HONOR.

AND THE LEGAL STANDARD THAT WE MUST FOLLOW IS THAT WE MUST, ARE WE NOT, TO ACCEPT EVERYTHING TRUE AS ALLEGED IN THE COMPLAINT.

ABSOLUTELY, YOUR HONOR.

AND EVERYTHING YOU ARE ARGUING IS SOMETHING THAT IS GOING TO COME UP DURING THE LITIGATION, CORRECT?

WHAT I AM ARGUING --

IS THAT CORRECT?

THAT IS CORRECT, AND THERE IS A PROTECTION WITHIN THE LITIGATION THAT YOU DON'T NEED A SEPARATE CAUSE OF ACTION. I AGREE THAT ALL OF THESE REMEDIES ARE AVAILABLE AND CAN BE UTILIZED, AND FOR THE SAME REASONS THAT THE COURT DIDN'T RECOGNIZE ANY SEPARATE CAUSE OF ACTION IN THE MIDDLEBROOKS CASE, IT HAS TO APPLY TO THIS CASE AS WELL. THANK YOU, YOUR HONOR. THE KAREN JOST, WITH REGARD TO THE MEDICAL MALPRACTICE CASE, WE HAVE TO GO BACK TO THE ORIGINAL CASE, BECAUSE WHAT HAPPENED IS THE COURT DETERMINED THAT THERE WAS AN EVIDENTIARY ERROR AND AN ERROR IN INSTRUCTION AND A NEW TRIAL WAS ORDERED. AND JUST LIKE IN EVERY OTHER CASE WITH AN ERROR IN INSTRUCTIONS OR EVIDENTIARY ERROR, YOU GO BACK AND TRY THE CASE AND YOU TRY THE CASE WITH THE TRUE FACTS AT THE TIME YOU TRIED THE CASE. YOU DON'T PRETEND THE FACTS WERE WHAT THEY WERE, ONE, TWO, THREE, FIVE YEARS AGO, AND YOU DON'T PRETEND WHAT THE LAW WAS. THERE ARE CHANGES IN THE LAW THAT BENEFIT A PLAINTIFF OR DEFENDANT, WHEN THE CASE IS RETRIED. YOU TRY IT UNDER THE NEW LAW, AND WHEN YOU TRY IT -- AND WHEN IT IS TRIED, YOU TRY IT UNDER THE TRUE FACTS.

ARE YOU SAYING THAT THERE WAS NO SPOILATION CLAIM MADE?

JOST ONE, THE PLAINTIFF'S ONLY COMPLAINT AT THAT TIME, WITH REGARD TO THE EVIDENCE, WAS THAT THEY SHOULD HAVE BEEN ABLE TO PUT ON THIS WITNESS DR. GRAY, TO TESTIFY WHAT HE HAD BEEN TOLD ABOUT AVOID DAMAGE OR AVOID COLLATERAL ISSUES, WHATEVER HE WAS TOLD, AND THERE IS APPARENTLY DEBATE ABOUT WHAT THE OTHER DOCTOR TOLD HIM AND WHAT HE MAY HAVE BEEN TOLD THE OTHER DOCTOR WAS TOLD TO TELL HIM. APPARENTLY THE COURT MADE SOME REFERENCE ABOUT WHAT WE DON'T WANT THESE, IT WAS SUPPOSED TO BE A FACT WITNESS AND HE DIDN'T WANT HIM TESTIFYING ON COLLATERAL ISSUES.

THIS SPOILATION OF EVIDENCE WAS SOMETHING THAT WAS FOUND SUBSEQUENT TO THE?

YOU COULD SAY. THAT IT WAS SOMETHING THAT WAS PLED SUBSEQUENT TO THAT, ONCE MR. MYERS DIED, BECAUSE, THEN, I MEAN, TO BE CANDID, AND I THINK EVERYONE WOULD ADMIT, THE SPOILATION CASE IN THE HOSPITAL CONTEXT HERE, IS TO TRY TO GO BACK AND GRAB SOME DAMAGES THAT NO LONGER EXIST UNDER THE TRUE FACTS OF THE CASE, BECAUSE OF THE STATUTORY CHANGE.

WELL, IF IT IS DUE TO THE DISRUPTION OF EVIDENCE, IS THE REASON THAT WE ARE IN THIS POSTURE TODAY, THEN WHY SHOULD ALL OF THOSE SITUATIONS BE HOISTED UPON THE SHOULDERS OF THE PERSON WHO CAME INTO THE COURT, ATTEMPTED TO PROVE THEIR CASE, AND ONLY BECAUSE, IF IT IS TRUE, AND CERTAINLY THEY HAVE GOT TO PROVE THEIR CASE, THE STATEMENTS MAY BE ALL WRONG. IT MAY BE ALL FALSE, BUT HAVE THE OPPORTUNITY, BECAUSE, REALLY, IF YOU DON'T, THEN YOU ARE REWARDING DESTRUCTION OR CONCEALMENT OF EVIDENCE, WHICH IS GOING RAMPANT, IT APPEARS, FROM EVERYTHING WE READ IN THE LAW

REVIEW ARTICLES AND LEGAL LITERATURE, THE PROBLEM THE TRIAL COURTS ARE FACING CAR JUST BEYOND BELIEF, SO YOU HAVE TO GO BACK AND TAKE A LOOK, BECAUSE THE CAUSE OF ACTION IS NOT THE SAME CAUSE OF ACTION AFTER THE DEATH. YOU WOULD AGREE WITH THAT?

YES, BUT IT IS BECAUSE OF THE DEATH NOT BECAUSE OF SPOILATION.

I AGREE WITH THAT AND IT MAY HAVE REACHED THAT POINT, SIMPLY BECAUSE THE EVIDENCE WAS NOT THERE BEFORE. THAT IS NOT A POSSIBILITY? IS THAT NOT A POSSIBILITY?

IF YOU ARE SAYING IS IT POSSIBLE THAT SOMEBODY COULD TRY TO DELAY THINGS AND SO FORTH UNTIL A PERSON DIED, SURE, THAT IS A POSSIBILITY.

AND A DESTRUCTION OF EVIDENCE OR THE ALLEGATION IS HERE, WHATEVER HAPPENED WITH THE EVIDENCE HAS PLACED, PUSHED THIS CASE OFF TO THE POINT THAT DEATH HAS FOLLOWED, AND IT IS NO LONGER THE SAME CAUSE OF ACTION.

WELL, IT IS THE SAME CAUSE OF ACTION. THERE ARE THE SAME --

NO. THE WRONGFUL-DEATH STATUTE SPECIFICALLY SAYS THAT YOU CAN HAVE NO LONGER, THE SURVIVOR ACTION IS GONE.

IT DEPENDS ON WHETHER THE DEATH CAUSED, WHETHER THE NEGLIGENCE CAUSED THE DEATH. SURE. SURE.

AND THEY PLED IN THE ALTERNATIVE. IF YOU LOOK AT THE CLAIM, THEY HAVE GOT SURVIVOR ACTIONS AND WRONGFUL-DEATH CLAIMS. AND SPOILLATION IS RUNNING LOOSE HERE. THERE IS NO SPOILATION WITH REGARD TO ALLEGED TELLING A WITNESS TO TESTIFY OR NOT TO TESTIFY. THAT IS STILL THERE. THE WITNESS CAN COME IN AND TESTIFY AND THAT IS NOT SPOILATION. THAT IS EVIDENTIARY ERROR JUST LIKE ANY OTHER EVIDENTIARY ERROR, AND YOU GO BACK AND RETRY THE CASE MUCH THE FACT THAT MR. MYERS HAS DIED IS A DEVELOPMENTAL IN THE FACTS, AND YOU RETRY IT WITH HIM HAVING DIED. THOSE ARE THE TRUE FACTS. THERE IS NO SUGGESTION HERE AND THEY DON'T EVEN PLEAD THIS THAT WE DELAYED FOR THAT PURPOSE OR THAT WE DID SOMETHING TO CAUSE A DELAY. THEY HAD MORE INFORMATION ABOUT THE PLAINTIFF THAN WE DID. IF THEY KNEW THAT HE WAS GOING TO DIES, THEY WOULD HAVE TAKEN THE \$3 MILLION.

WHEN DID THIS ISSUE HAVE TO DO WITH THE MISSING HOSPITAL RECORD, WHEN DID THAT FIRST GET INTO THIS RECORD?

IT IS FIRST PLED IN ONE OF THE AMENDED COMPLAINTS, WHEN IT COMES BACK FROM JOST ONE AFTER THE APPELLANT DECISION THERE. THAT IS WHERE IT COMES UP, FAN YOU LOOK AT THE PLEADING ON THAT AGAIN, I THINK IT CAME UP THAT THEY FAILED TO MAINTAIN IT OR SOME WORDS TO THAT EFFECT. THE PLEADING SAYS IT WAS EITHER DESTROYED OR THEY FAILED TO MAINTAIN OR FAILED TO PRODUCE IT. IF YOU DIDN'T CREATE IN THE FIRST PLACE, YOU DIDN'T SPOILATE IT, AND IF YOU DIDN'T HAVE IT, YOU DIDN'T SPOILATE IT. THANK YOU.

CHIEF JUSTICE: YOUR TIME IS UP. MR. MARSHAL, HOW MUCH TIME IS LEFT FOR THE PETITIONERS, TOTAL TIME?

LET ME ASK YOU ONE QUESTION F THERE IS A DUTY AS WAS ASKED FIRST, IS THE DUTY BILATERAL, IN OTHER WORDS DOES IT GO TO THE PLAINTIFF, TO MAINTAIN EVIDENCE THAT MAY ASSIST IN THE FULL GETTING TO THE TRUTH?

YES. THERE IS NO QUESTION OF THAT, UNDER TORRES AND UNDER THE MANY CASES THAT HAVE

DISMISSED PLAINTIFFS' CASES WHERE THEY HAVE EITHER NOT PRESERVED THE EVIDENCE OR EITHER IN THE SITUATION WHERE THEY HAVE GIVEN WHAT IS CONSTRUED TO BE PERJURY --

AS FAR AS A SEPARATE CAUSE OF ACTION NOT WITH REMEDY WITHIN THE LITIGATION.

THE CAUSE OF ACTION IS ESSENTIALLY ELIMINATING THE PLAINTIFF'S CAUSE OF ACTION, AND THEN SANCTIONS FOR EXPENSES OR COSTS THAT HAVE BEEN ENDURED. -HOE THAT HAVE BEEN INCURRED. I AM NOT AWARE AFTER CASE SPECIFICALLY ADDRESSING ONE OR THE OTHER, WHERE THERE IS A SPECIFIC CAUSE OF ACTION FOR THE DEFENDANT, BUT IN MANY CASES THE PLAINTIFF HAS THAT DUTY, AND I DO NEED TO SAY A FEW THINGS ABOUT DUTY.

DO YOU THINK THAT IS AN ADEQUATE REMEDY WITHIN THE LITIGATION?

IN THE CASE OF PLAINTIFF, YES, BECAUSE THEY ARE COMING AFFIRMATIVELY FOR RELIEF F A PLAINTIFF HAS A COUNTERCLAIM THERE, MAYBE DIFFERENT ISSUES, BUT WHEN YOU COME BEFORE THE COURT WITH DUTY TO RELIEVE, YOU MAY HAVE TO PROVE YOUR CASE TO THE ADVERSARY, AND IN OUR CASE, WE BELIEVE THAT IT ARISES FROM THE ASSUMPTION OF DUTY WHEN WAL-MART MADE THE INVESTIGATION, TOOK A RECORD, TOOK A RECORDED STATEMENT. MY CLIENT COULD NOT SEIZE THESE ITEMS OF PROPERTY. SHE HAD NO CONTROL, AND THEY ASSUMED THE DUTY BY STARTING THAT INVESTIGATION, AND I WOULD CITE SECTION NINE, RESTATEMENT, BUT, ALSO, COURTS HAVE RECOGNIZED THAT, IF WE ARE GOING TO FIND NO DUTY HERE, THEN IT MAKES A MOCKERY OF THE FACT FINDING SYSTEM, AND DUTY IS OFTEN DESCRIBED AS A POLICY DETERMINATION THAT SOMEONE'S RIGHTS ARE ENTITLED TO LEGAL PROTECTION. ALL MY CLIENT WANTED WAS A FAIR SHOT. SHE NEVER GOT IT. SHE ISN'T GOING TO GET IT, AND WITH REGARD TO EVIDENCE OF THE DEFENDANT, THEY ARE SMART TO SPOILATE, BECAUSE THAT ONLY CREATES THE POSSIBILITY THAT THE JURY WOULD ASSUME THAT IT IS HARMFUL, IF THAT EVIDENCE IS ABSOLUTELY DAMAGING, THEN THE DEFENDANT WOULD BE SMART TO SPOILATE AND CREATE A CAUSE OF ACTION.

WITH REGARD TO THAT CAUSE OF ACTION, IS THE JURY INSTRUCTED THAT IT MUST TAKE AN ADVERSE INTEREST FROM THE SPOILATION OF EVIDENCE?

IT IS NOT INSTRUCTED THAT IT HAS TO. A PLAINTIFF WOULD HAVE TO PROVE NOT ONLY THE SPOILATION AFFECTED SUBSTANTIALLY THE ABILITY TO PROVE THE CASE, BUT THAT THE LOSS OF EVIDENCE WAS CAUSALLY RELATED TO THAT INABILITY, AND THE PLAINTIFF WOULD HAVE THE BURDEN OF PROOF ON THAT, BUT A JURY WOULD HAVE TO BE ABLE TO, I MEAN, THERE IS, OF COURSE, SOME DEGREE OF A DETERMINATION OF WHAT THAT EVIDENCE WAS. AND THAT WAS THE CONCERN OF CEDARS SINAI, WHEN THEY SAID, WELL, THE FACT OF DAMAGE IS TOO UNCERTAIN. IF THE FACT OF DAMAGE IS TOO UNCERTAIN IN A CAUSE OF ACTION, THEN IT IS TOO UNCERTAIN FOR AN INFERENCE, AND NO CASE HOLDS THAT. WHAT IS CLEAR IS THAT, WHEN A DEFENDANT DESTROYS EVIDENCE, THE DEFENDANT HAS A REASON FOR THE UNCERTAINTY THAT, DEFENDANT SHOULD NOT GET THE BENEFIT THAT THEY CREATED, SO IN THE SPOILATION CASE, THEY WOULD HAVE TO PROVE THAT THERE WAS A VIABLE CAUSE OF ACTION AND THAT THE DEFENDANT WAS ON NOTICE OF IT, AT THE TIME THE EVIDENCE WAS DESTROYED, THAT IT SUBSTANTIALLY IMPAIRED THE ABILITY TO BRING A LAWSUIT, THAT THE LOSS OF THAT EVIDENCE WAS CAUSALLY RELATE TO DO THAT INABILITY AND DAMAGES SO FORTH.

HAVE THE COURTS RECOGNIZED THAT?

COURTS HAVE RECOGNIZED.

WHERE ARE YOU?

WE ALLEGED NEGLIGENCE BECAUSE THAT WAS WHAT THE STATE OF THE LAW WAS, AT THE TIME THAT WE FILED OUR SECOND AMENDED COMPLAINT. I MEAN, IT WASN'T NECESSARY. YOU CAN

ALWAYS ADD, OF COURSE, EVEN TO A NEGLIGENCE CASE, A PUNITIVE DAMAGES CLAIM, CLAIMING IT WAS INTENTIONAL.

WHERE DOES THE SPOILATION OCCUR IN A COMPANY WHEN, IN AN ORDINARY COURSE OF BUSINESS, DOCUMENTS ARE DESTROYED THAT ARE RELATIVE TO A LAWSUIT. THEY INTENTIONALLY DESTROY THE DOCUMENTS, BECAUSE FOUR YEARS OR OLDER, DOCUMENTS ARE DESTROYED, IS THAT INTENTIONAL OR SPOILATION NEGLIGENCE?

THAT GETS TO THE INHERENT AUTHORITY ISSUE THAT I RAISED IN MY BRIEF, WHETHER AUTHORITIES HAVE THE AUTHORITY TO CONTROL A PARTY'S CONDUCT BEFORE THEY ARE SUBJECT TO THE JURISDICTION OF THE COURT, AND THAT IS WHY WE THINK SANCTIONS ARE NOT ALWAYS ADEQUATE. IN THE SITUATIONS MR. CHIEF JUSTICE

I AM AFRAID THAT YOU ARE LEAVING MR. GENTRY WITHOUT ANY TIME WHATSOEVER, AND HAVE WE REACHED THAT POINT? IS THERE ANY TIME LEFT? TWO MINUTES.

ONE OF THE THINGS THAT IS I THINK IS VERY IMPORTANT, IN THE SUGGESTION THAT THERE IS LITIGATION PRIVILEGE TO COMMIT FRAUD, THE ARGUMENT WAS MADE THAT PERJURED TESTIMONY HAS ALWAYS BEEN HELD AS BEING PROTECTED BY LITIGATION PRIVILEGE. THAT IS TRUE. THE REASON WHY, IS BECAUSE IT IS INTRINSIC IN THE CASE. THE WHOLE PHILOSOPHY ABOUT PROTECTING CERTAIN CONDUCT, FOR EXAMPLE WITH A WITNESS, THEY SHOULDN'T BE FEARFUL THAT, IF THEY TESTIFY TRUTHFULLY AND IF IT IS ADVERSE TO THE PARTY THEY MAY BE SUED, LATER, FOR PERJURY, AND THE COURSE, AND THAT IS THE PUBLIC POLICY, AND IT IS ALSO BECAUSE THAT WITNESS CAN BE CROSS-EXAMINED. INTRINSIC CONDUCT, EVEN INTRINSIC FRAUD, IT HAS TO DO WITH THINGS THAT HAPPENED IN THE COURTROOM, EVIDENCE THAT IS PUT IN THE COURTROOM AND IN THE FILE, AS IN ELEVEN, MAYBE, WHEN THE LAWYERS MADE A PROPER PERMISSIBLE MOTION TO RECUSE, THEY COULDN'T BE SECOND-GUESSED. WHAT WE ARE DEALING WITH HERE IS EXTRINSIC FRAUD. EXTRINSIC FRAUD HAS ALWAYS BEEN FRAUD WHERE A WITNESS, OR A PARTY HIDES EVIDENCE, AND SPOILATION, BECAUSE IF YOU HIDE IT AND GET AWAY WITH IT, THERE IS NO CAUSE OF ACTION. YOU HAVE DESTROYED IT. BUT IF YOU LOOK AT THE WHOLE CASES OF EXTRINSIC AND INTRINSIC, EXTRINSIC FRAUD IS NOT PROTECTED BY MILE LITIGATION EXPERIENCE, UNDER COMMON LAW OR ANY OTHER LAW.

WHAT ABOUT COMMON LAW, THAT DOESN'T OCCUR OUTSIDE THE COURTROOM, THE DEFENDANT IS REQUIRED TO PRODUCE THE DOCUMENTS, DOESN'T PRODUCE THE DOCUMENTS, SAYS THEY DON'T EXIST, AND THE PLAINTIFF FINDS OUT LATER, THAT THEY DO EXIST AND THE COURT TAKES SANCTIONS ON THEM, ISN'T THAT SOMETHING UNDER RULE 37?

WE SUBMIT THAT IS EXTRINSIC, BECAUSE IF THEY FAILED TO PRODUCE, THEY CANNOT PUT IT INTO THE PROCESS WHERE IT CAN BE CROSS-EXAMINED OR REVIEWED. THAT IS ORDINARILY VIEWED AS EXTRINSIC, EVEN THOUGH IT IS IN THE PROCESS, IT IS EXTRINSIC TO THE ACTION.

THAT EXTRINSIC ACTION IS DEALT WITH IN THE TRIAL COURT BY THAT LITIGATION.

IF IT IS DISCOVERED TIMELY, AND, AGAIN, IN THE CALIFORNIA CASE IN WHICH WE RELY ON POINTS OUT THAT THAT APPLIES UNTIL WHEN IT IS DISCOVERED DURING THE DISCOVERY PROCESS AND SOMETHING CAN BE DONE.

IN THESE CASES HERE, THE DESTRUCTION HAS BEEN DISCOVERED, WITHIN THE LITIGATION IN BOTH CASES, IS THAT RIGHT? ANOTHER DISCOVERY IN THIS CASE STARTED HAPPENING DURING THIS TRIAL AND ACTUALLY SOME OF IT HAPPENED ON REHEARING IN THE SECOND DISTRICT COURT OF APPEAL, WHEN THEY FILED A TRANSCRIPT OF AN EXPARTE COMMUNICATION WITH A JUDGE. THE DISCOVERY IN THIS CASE WAS ONGOING THROUGHOUT THIS PROCESS, THAN IS WHY WE FILED THE AMENDED COMPLAINT WHEN WE CAME BACK.

WE DON'T HAVE TO DEAL WITH THE ISSUE HERE, OF WHETHER, WHEN A PLAINTIFF DISCOVERS GREATER THAN A YEAR AFTER JUDGMENT, THAT EVIDENCE WAS DESTROYED.

NOT IN MY CASE, YOUR HONOR, AND SECONDLY, BECAUSE THE JUDGMENT WAS SET ASIDE.

THANK YOU VERY MUCH.

THANK YOU.

CHIEF JUSTICE: THANK YOU ALL, VERY MUCH.