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**Gloriann Wilson v. Eva J. Salamon M.D.**

CHIEF JUSTICE: THE NEXT CASE ON THE COURT'S CALENDAR IS WILSON VERSUS SALAMON.

GOOD MORNING, MADAM CHIEF JUSTICE AND FELLOW JUSTICES OF THIS COURT. MY NAME IS WAYNE JOHNSON, AND I REPRESENT PETITIONERS IN THIS MATTER. I WOULD LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL. THIS CASE STEMS FROM THE TRIAL COURT'S APPLICATION OF RULE 1.402-E, IN THAT THIS MATTER WAS DISMISSED FOR LACK OF PROSECUTION. IN TERMS OF THE LOWER LEVEL CASES, SIGNIFICANT EFFECTS OF THIS CASE WERE IN OCTOBER 2001, CERTAIN DISCOVERY ACTIVITIES WERE CONDUCTED.

IS IT YOUR POSITION THAT, IN OUR CASE WHICH IS THE BASIS OF THE CERTIFIED QUESTION IN THE HALL CASE, THAT WE REVERTED TO THE POSITION THAT, I THINK, THAT THE FOURTH DISTRICT HAD EARLIER ADVOCATED, AND THAT IS THAT, IF THERE IS NOTHING, IF THERE IS ANYTHING THAT IS FILED, REGARDLESS OF ITS CONTENT, THAT THAT IS A SUFFICIENT BASIS.

NO. YOUR HONOR, IT IS OUR POSITION THAT, IF THERE IS A COURT ORDER OR IF THE RULE CLEARLY STATES PLEADINGS OR COURT ORDERS IN THIS FILE, THEN ON THE FACE OF THAT RECORD, THAT IS SUFFICIENT TO PRECLUDE DISMISSAL. IF THERE ARE ITEMS --

SO YOUR POSITION IS THAT THE STATE OF THE LAW IS THAT, IF THERE HAD ONLY BEEN THE MOTION FOR COUNSEL TO APPEAR, THAT WOULDN'T HAVE BEEN SUFFICIENT, BUT BECAUSE THE COURT ENTERED AN ORDER ON IT, THAT THAT WAS SUFFICIENT.

IF THERE HAD ONLY BEEN THE MOTION, THEN WE GO TO THAT, BUT BECAUSE THIS IS THE TYPE OF MOTION THAT REQUIRES A COURT ORDER, THEN, AT THAT POINT THAT IS ENOUGH ON THE FACE OF THE RECORD.

WELL, YOU WOULD AGREE THAT WE REALLY DIDN'T DEAL WITH THAT ISSUE IN HALL.

THAT ISSUE WAS NOT DEALT WITH IN HALL, A BE I DON'T THINK IT WAS DEALT WITH IN THE PRIOR, IN THE CASES, BELL DUKE AND THE CASES, EITHER.

IF THE TEST REMAINS THAT, AS IT CAME OUT OF TONY VERSUS FREEMAN AND DEL DUCA, THAT THE REAL ISSUE IS NOT WHETHER THERE IS A PIECE OF PAPER IN THE RECORDER, WHETHER IT BE AN ORDER OR A PLEADING THAT, IT HAS TO BE ANALYZED ON THE BASIS OF WHETHER IT ADVANCES THE CAUSE TOWARD RESOLUTION, THEN WHY DOES IT MAKE ANY DIFFERENCE WHETHER IT IS AN ORDER OR A MOTION THAT IS THE PIECE OF PAPER?

BECAUSE RULE 1.420-E SAYS ORDER OR PLEADINGS.

DOES IT SAY OTHER?

IF SAYS OR OTHERWISE DEFINED. PLEADINGS, THE DEFINITION OF PLEADINGS, SOMETIMES THE TERM WE CALL MOTIONS, PLEADINGS, BUT I THINK IT IS FAIRLY CLEAR IN CASE LAW THAT MOTIONS ARE NOT PLEADINGS. PLEADINGS, COUNTERCLAIMS, ITEMS SUCH AS THAT IT IS AN ORDER OF THE COURT.

WHAT IS, IN TERMS OF OUR REVIEW OF THIS, THIS IS A RULE AT THIS POINT, RATHER THAN A

STATUTE? SO IN TERMS OF OUR AUTHORITY TO INTERPRET OUR OWN RULES, WHAT IS DOES IT SAY? YOU ARE SORT OF ARGUING THAT THE PLAIN MEANING OF RULE, THAT IS THE ARGUMENT, THE ACTIVITY?

HAVE WE EVER, AT LEAST IN THE LAST 15 YEARS, HAVE WE EVER APPLIED A PLAIN MEETING? HAVEN'T WE ALWAYS LOOKED AT WHETHER THE ACTIVITY ADVANCES THE CASE?

IN HALL, THE PLAIN MEANING OF THE RULE CERTAINLY DISCUSSED, AND THAT IS NOT JUST SECOND DISTRICT COURT OF APPEAL BUT, ALSO, THE FOURTH DISTRICT COURT OF APPEAL IN ABADDON, THE FOURTH DISTRICT, IN ABADDON, THEY WERE LOOKING AND SAYING, HAY, THERE IS A CONFLICT HERE, BECAUSE DEL DUCA AND HALL DO NOT SEEM TO BE CONSISTENT, BECAUSE IN HALL, THERE WAS A PLAIN MEANING LOOK AT THE FACE OF THE RECORD. EITHER THERE WAS ACTIVITY OR THERE IS NO ACTIVITY.

DOESN'T THE 1951 CASE, STARTING OUT GULF APPLIANCE, WHERE, OF COURSE, THERE WAS A STATUTE, BUT PRESUMABLY IT WAS WORDED SIMILARLY TO THE RULE AND SAID THAT IT HAS, THE ORDER WAS NOT SUFFICIENT. THERE WAS, AND THAT THERE HAD TO BE SOME ACTIVE MEASURE TAKEN BY THE PLAINTIFF INTENDED AND CALCULATED TO ADVANCE THE SUIT TO JUDGMENT. SO ISN'T, I MEAN, ISN'T, HASN'T THAT REALLY BEEN THE THREAD FOR THE LAST HALF CENTURY, THAT THAT IS WHAT THE RULE IS INTENDED TO DO? NOT JUST HAVE PIECES OF PAPER IN THE FILE?

GULF APPLIANCE DID ORIGINALLY STATE THAT AND THEN CAME EASTERN ELEVATOR, WHICH INTERPRETED CERTAIN THINGS IN GULF APPLIANCE, BECAUSE GULF APPLIANCE SAID THAT THE PLAINTIFF HAD TO DO THIS, AND EASTERN ELEVATOR SAID, NO, ACTIVITY BY THE DEFENDANT.

ARE YOU SAYING OUR CASE LAW IS CONFUSING AT THIS STAGE, BECAUSE THE QUESTIONS THAT YOU ARE GETTING, I THINK, ARE INDICATIVE OF THE FACT THAT INITIALLY, PROBABLY, OUR RESPONSE TO THIS APPEAL AND QUESTION THAT IS CERTIFIED AND YOUR APPEAL, IS THAT THE PREVAILING LAW OUT OF THIS COURT, IS THAT WHATEVER IS FILED, BE IT PAPER, PLEADING OR AN ORDER, HAS TO BE SOMETHING THAT HAS THE ADDITIONAL GLOSS OF MOVING THE CASE TOWARDS RESOLUTION, AND THAT THAT IS THE PRESENT STATE OF THE LAW OUT OF THIS COURT ON THIS DISMISSAL RULE. ARE YOU SAYING THAT YOUR REVIEW OF OUR CASES, INDICATES THAT THAT IS NOT THE CURRENT STATE OF THE LAW? UNDERSTAND MY QUESTION? CURRENT STATE OF THE LAW OUT OF THE FLORIDA SUPREME COURT, WITH REFERENCE TO THIS RULE AS TO DISMISSAL FOR INACTIVITY, IS THAT IF SOMETHING MUST BE FILED WITHIN THE ONE-YEAR PERIOD, THAT IF SOMETHING ADDITIONAL, WHETHER IT IS AN ORDER, PLEADING OR PIECE OF PAPER, AS TO WHETHER OR NOT THAT ADVANCES THE CAUSE TOWARDS RESOLUTION, AND THAT THAT GLOSS, UNDER OUR PRESENT LAW, REMAINS ON THAT RULE. DO YOU AGREE WITH THAT, OR ARE YOU SAYING THAT IS NOT THE PRESENT SAFETY LAW AS WE HAVE WRITTEN IT?

I WOULD SAY IT IS NOT THE PRESENT STATE OF THE LAW.

TELL ME WHAT THE PRESENT STATE OF THE LAW IS, AS YOU UNDERSTAND IT TO BE FROM THIS COURT, AND THEN JUST TRY TO STATE WHAT YOU BELIEVE THE RULE IS, IN RELATION TO THAT.

THE PRESENT STATE OF THE LAW IS THAT THE FIRST ANALYSIS, IF YOU LOOK AT THE FACE OF RECORD THAT IS UNDER HALL, IS THERE ACTIVITY OR IS THERE NOT. IF THERE IS NOT, UNDER --

WELL, THEN, BUT THEN HALL WOULD HAVE OVERRULED OR RECEDED FROM DEL DUCA, WHICH CLEARLY SAYS UNDER THE FIRST PRONG, THAT IF THERE IS A RECORD OF ACTIVITY THAT FAVORS THE PLAINTIFF, AS LONG AT PLAINTIFF'S EFFORTS ARE NOT MERE PASSIVE EFFORTS TO KEEP THE SUIT ON THE DOCKET, THE PLAINTIFF REVEILS, SO IT WOULD APPEAR THAT, WHERE THE CONFUSION IS OR ISN'T, IS THE STATEMENT IN HALL. WOULD YOU AGREE? BECAUSE IT LOOKS LIKE DEL DUCA WAS PRETTY CLEAR THAT IT ISN'T JUST LOOK ING AT THE RECORD AND THAT IF

THERE ISN'T AN ORDER OR A PLEADING, THAT WAS THE END OF THE INQUIRY.

IN TERMS OF THE QUESTION, YOUR HONOR, YOU SAID LOOK, I DON'T THINK DEL DUCA SAID WHAT I JUST READ FROM HALL. TO ME, IT APPEARED THAT DEL DUCA WAS WHEN THERE WAS NO RECORD ACTIVITY. THE MOTION THAT IS FILED --

THERE WAS A REQUEST TO PRODUCE. THERE WERE PLEADINGS OR THERE WERE DISCOVERY REQUESTS FILED IN THE COURT FILE, SO THERE WAS, WE WERE EXAMINING THE FIRST PRONG IN DEL DUCA.

DOESN'T THAT SAY THAT THERE IS A SECOND QUESTION, AND THAT IS WHETHER OR NOT IT LEGITIMATELY APPEARS IN THE RECORD, REALLY, MOVES THE CAUSE ALONG TOWARDS RESOLUTION.

DEL DUCA DOES CERTAINLY STATE THAT.

LET ME COME BACK AND ASK YOU THIS, NOW, IN ANOTHER WAY, BECAUSE THIS IS OBVIOUSLY AN ISSUE THAT HAS TROUBLED BOTH THE COURTS AND PRACTITIONERS AND THIS COURT, FOR A LONG TIME. WHAT WOULD BE THE RULE THAT, IF YOU COULD WRITE THE OPINION, WHAT WOULD BE THE RULE, UNDER THE LANGUAGE OF TODAY, UNDER THE RULE AND THE POLICY THAT DEVELOPED, WHAT POLICY WOULD YOU HAVE US ADOPT TODAY, IF YOU COULD DO THAT?

IN ANALYSIS OF THE RECORD, THERE IS PLEADING OR A COURT ORDER, THEN DISMISSAL IS PRECLUDED. IF THERE IS, IF --

SO THAT PART OF IT WOULD SET, THERE WOULD BE NO EXAMINATION AS TO WHETHER OR NOT WHATEVER WAS FILED, MOVES THE CASE TOWARDS RESOLUTION. IS THAT CORRECT? IT WOULD DROP THAT REQUIREMENT.

NO, I WOULDN'T, YOUR HONOR, BECAUSE --

WOULD NOT. ALL RIGHT.

BECAUSE PLEADINGS AND COURT ORDERS ARE VERY LIMITED ITEMS. LET'S ASSUME THE PLAINTIFF FILES A DEPOSITION. THERE IS NO OUTSTANDING SUMMARY JUDGMENT MOTION OR ANYTHING LIKE THAT. THE DEPOSITION IS CONDUCTED 16 MONTHS AGO. DEFENDANT CAN STILL FILE A MOTION TO DISMISS, SAYING EVEN THOUGH THERE IS A NOTICE OF FILING IN THE RECORD, IT DID NOTHING TOWARDS THE DEL DUCA TEST.

IF WE ACCEPT YOUR STANDARD, THEN AREN'T YOU BASICALLY ELIMINATING "OR OTHERWISE" FROM THE RULE?

YES.

THERE WOULD BE NO BASIS TO EVALUATE "OR OTHERWISE".

WELL, FOR THE "OR OTHERWISE", I HAVEN'T SEEN ANYTHING WHERE THIS COURT HAS DEFINED IT.

LET ME GIVE YOU AN EXAMPLE. UNDER YOUR PROPOSAL, IF SOMEBODY FILED A NOTICE OF TAKING A DEPOSITION, IT IS NOT A PLEADING. THERE IS NO COURT ORDER RELATED TO IT, SO UNDER YOUR PROPOSITION, THAT WOULD NOT BE SUFFICIENT RECORD ACTIVITY, AND SOMEBODY COULD FILE A MOTION, THEN IT WOULD BE UP TO THE OTHER PARTY TO FILE THE STATEMENT OF GOOD CAUSE OR AFFIDAVIT WITHIN FIVE DAYS.

THE NOTICE OF TAKING DEPOSITION IS FILED. THE DEFENDANT FILED A MOTION TO DISMISS, AT

THAT POINT, THEN THE ARGUMENT IS GOING TO BE WHETHER THAT NOTICE OF TAKING DEPOSITION IS ADVANCING THE CASE FORWARD. THAT WOULD GO BACK TO THE FULL CASE.

YOU ARE PROPOSE AGO TEST THAT TREATS ORDERS AND PLEADINGS SEPARATE FROM ANY OTHER TYPES OF THINGS THAT APPEAR IN THE RECORD.

CORRECT.

AND, BUT, AND THIS, ARE YOU SAYING THAT THIS IS WHAT FOLLOWS FROM HALL OR THAT THIS IS WHAT WOULD BE GOOD POLICY IN INTERPRETING A RULE THAT THE COURT HAS PROMULGATED?

I THINK IT FOLLOWS FROM HALL, BECAUSE IN ORDER, IF YOU RULE OTHERWISE, I THINK YOU ARE BASICALLY SAYING THAT THE STATEMENT IN HALL, NO LONGER, WE WOULD HAVE TO RECEDE FROM THAT STATEMENT IN HALL.

BUT YOU, I THINK IN HALL, THE SITUATION WAS THAT NOTHING HAD BEEN FILED IN THE RECORD. CORRECT?

CORRECT.

SO IF NOTHING HAS BEEN FILED IN THE RECORD, THEN THERE IS, AS HALL SAYS, THAT AND THEN WHAT YOU MOVE TO IS AN EVALUATION OF GOOD CAUSE, IF THERE IS SOMETHING FILED WITHIN THE FIVE-DAY PERIOD. ISN'T THAT RIGHT?

YES.

OKAY. AND, SO REALLY, I THINK THAT IS THE ANALYSIS IN HALL THAT THE THIRD CASE CONSTRUED, THE SCHENKE CASE, ARE YOU FAMILIAR WITH THAT?

I AM NOT FAMILIAR WITH SCHENKE.

THAT IS SORT OF THE ANALYSIS THAT THE COURT TOOK, BUT THE POLICY PROBLEM THAT I SEE IS, IF YOU DO HAVE SOMETHING, IF YOU DON'T HAVE SOMETHING LIKE HALL IN THE RECORD, IT IS AN EASY SITUATION, BUT IF DO YOU, THEN IT IS A PROBLEM WHERE SOMEBODY WAITS 363 DAYS WERE AND SUDDENLY POPS IN A REQUEST FOR PRODUCTION, OF SOMETHING THAT IS TOTALLY EXTRANEIOUS BURKES THAT DOES IT, THAT MEANS THEY GET ANOTHER 364 DAYS ON THE CLOCK, AND CERTAINLY THAT IS WHAT THE RULE IS INTEND OR THE ANALYSIS IN A CASE THAT HASN'T BEEN DISCUSSED, IN A CASE WHICH IS PRETTY CLEAR ON THIS, IS TONY VERSUS FREEMAN. ISN'T THAT CORRECT? ISN'T THAT THE PROBLEM?

THAT IS A PROBLEM, BUT, I MEAN, IF THE, THE PLAINTIFF, IF THE PLAINTIFF DOES SOMETHING ON THE 364th DAY, WHICH WAS, I THINK, THE CASE IN DEL DUCA, AS LONG AS IT MOVES THE CASE FORWARD, YOU CAN MAKE THE ARGUMENT THAT 363 DAYS, THE PLAINTIFF DOES NOTHING BUT 364th HE DOES AND IT IS GOING TO MOVE THE CASE FORWARD.

BEFORE YOU SIT DOWN, COULD WE AT LEAST HIT ON YOUR SECOND ARGUMENT, WHICH IS THAT, EVEN IF YOU CONSIDER THAT YOU HAVE TO LOOK AT THE PLEADING OR THE ORDER AND SEE IF IT MOVES THE CASE ALONG, HOW DO YOU, WHAT IS YOUR ARGUMENT THAT THIS MOTION FOR A PRO HOC VICHE APPEARANCE IN THE FIRST CASE, MOVE IT ALONG?

FIRST OF ALL, IT HAS TO BE FILED.

WASN'T THERE A MOTION FILED PREVIOUS TO, THIS FOR THE SAME LAW OFFICE? IT SEEMS TO ME THAT THIS LAW OFFICE HAS BEEN IN THIS CASE FOR SOME TIME, AND SO WHAT WAS THE SECOND MOTION? HOW DOES THAT MOVE THE CASE ANY? BY THE FILING OF THE SECOND MOTION?

BOTH WERE OUT-OF-STATE ATTORNEYS. THE FIRST ATTORNEY WAS THE PARTNER IN THE CASE. THE SECOND ATTORNEY WAS ASSOCIATE, WHICH WOULD BE HANDLING DISCOVERY ITEMS IN THE CASE. THE FLORIDA DEPOSITIONS AND FLORIDA ACTIVITY AND FLORIDA TRIAL, A MOTION IS REQUIRED FOR IT TO CONTINUE AND THE RESULTING COURT ORDER.

CHIEF JUSTICE: MS. BLACK.

THANK YOU. GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS CHARLOTTE BLACK.

CAN I ASK YOU A QUESTION, GOING BACK TO THE ORIGINAL STATUTE WHERE WE INTERPRETED THIS IDEA THAT THERE HAD TO BE AN ANALYSIS OF WHAT THE PLEADING WAS, THE ACTUAL STATUTE SAYS THAT, WHERE IT AFFIRMATIVELY APPEARS FROM SOME ACTION, BY FILING A PLEADING OR ORDER OF COURT OR OTHERWISE THAT, THE SAME IS BEING PROSECUTED, THAT LANGUAGE DOES NOT, DOES THAT APPEAR IN THE CURRENT RULE?

NO, YOUR HONOR. THE ORIGINAL LANGUAGE DATING BACK FROM WHEN THE FLORIDA STATUTE WAS CONVERTED INTO A RULE OF CIVIL PROCEDURE, HAS GRADUALLY CHANGED, AND THE CURRENT RULE DOES NOT INCLUDE THE LANGUAGE "PROSECUTED".

HOWEVER, IT IS CLEAR IF YOU READ THE RULE, THAT ALL ACTIONS ON THE FACE OF THE RECORD, THAT NO ACTIVITY, BY FILING A PLEADING, ORDER OR OTHERWISE, HAS OCCURRED IN THE CASE, IT WILL BE DISMISSED. HOWEVER, IT WOULD APPEAR TO CONCLUDE, JUST BY ITS PLAIN LANGUAGE THAT, IF THERE IS AN ORDER OF COURT, THAT THE RULE DOESN'T APPLY.

YOUR HONOR, RESPECTFULLY WE WOULD DISAGREE. IN PARTICULAR, THE USE OF THE LANGUAGE "ACTIVITY BY FILING OF PLEADINGS." THE PLAIN LANGUAGE COULD HAVE SHRIMP SAID ON THE FACE OF THE RECORD, APARTMENT ANSWER OF PLEADINGS, COURT ORDERS OR SOMETHING.

IN ADDITION TO THE WORD "NO ACTIVITY"?

YES.

SO THEN IS AN AMBIGUOUS TERM, BECAUSE WE DON'T REALLY KNOW WHAT WE MEAN BY NO ACTIVITY?

YES, YOUR HONOR, AND ESPECIALLY CONSIDERING THE HISTORY OF THE RULE AND ITS GRADUAL CHANGE AND THE CONTINUED IN CONCLUSION OF THE DEFINITION OF RECORD ACTIVITY AS SOMETHING THAT IS BEYOND A MERE PASSIVE EFFORT, WHICH WOULD PROMULGATE THE CONCLUSIVE EFFORT ON ITS MERIT.

BY SIMPLY REFERRING TO PLEADINGS AND ORDER OF COURT, ISN'T THE RULE ESSENTIALLY SAYING THAT ACTIVITY IS, EITHER A PLEADING, AN ORDER OF THE COURT, OR IT COULD BE SOMETHING ELSE, AND WHY SHOULDN'T WE HOLD, THEN, THAT IF IT IS A PLEADING OR AN ORDER OF COURT, THEN BY DEFINITION IT ACTIVITY. IF IT IS OTHERWISE, IF IT IS SOMETHING ELSE, THEN WE NEED TO LOOK BEHIND IT AND SEE WHETHER THAT CONSTITUTES ACTIVITY.

YOUR HONOR, I BELIEVE ACTIVITY WOULD CERTAINLY INCLUDE SOME PLEADINGS AND SOME ORDERS, AND IT WOULD CERTAINLY POTENTIALLY INCLUDE SOME OTHER THINGS WHICH AREN'T PLEADINGS OR ORDERS. HOWEVER, IF I CAN PRESENT THIS HYPOTHETICAL TO YOU, CERTAIN PLEADINGS AND CERTAIN ORDERS OF THE COURT, PARTICULARLY AS INVOLVED IN THIS CASE, DON'T PERPETUATE THE RULES. IN THIS CASE, CLEARLY THE PETITIONER'S COUNSEL WHICH NEVER WITHDREW IN THIS CASE SO PLAINTIFF HAS NEVER BEEN WITHOUT COUNSEL, COULD HAVE FILED A MOTION FOR PRO HOC VICE AND DIDN'T, AND COULD HAVE DONE THAT ONCE A YEAR. OVER THE COURSE OF TEN YEARS, TECHNICALLY THEY HAVE MET THE REQUIREMENTS OF THE RULE THAT PLEADING OR ORDER BE ENTERED, BUT OVER THE COURSE OF THAT TEN-YEAR

PERIOD, NOTHING HAS HAPPENED TO PERPETUATE THAT CASE TO A CONCLUSION ON ITS MERITS.

I UNDERSTAND BECAUSE ARE SAYING, BUT HAS THE COURT ALREADY MADE THAT DETERMINATION. IT ALREADY SAID, AS MATTER OF POLICY THAT, WE ARE GOING TO CONSIDER ANY PLEADING, ANY ORDER OF COURT, IN ORDER TO BE LIBERAL TOWARD THE PLAINTIFF AND NOT DISMISS THE CASE ON SOMETHING OTHER THAN ITS MERITS, WE ARE JUST GOING TO DEEM ANY PLEADING AND ANY ORDER OF COURT ACTIVITY, AND THAT IS WHY WE ARE SPECIFICALLY REFERRING TO A PLEADING AND ORDER OF THE COURT AND THEN, IF IT IS SOMETHING OTHER THAN THAT, THEN, SURE, WE WILL LOOK BEHIND, IT BUT ALTHOUGH I UNDERSTAND WHAT YOUR ARGUMENT IS, THE RULE SPECIFICALLY REFERS TO THOSE TWO THINGS, ISN'T THAT ALREADY A POLICY DETERMINATION THAT THOSE TWO THINGS, BY DEFINITION, CONSTITUTE RECORD ACTIVITY?

YOUR HONOR, AGAIN, I WOULD STILL DISAGREE THAT IT IS NOT ANY PLEADING OR ANY ORDER OF THE COURT, THAT WHILE SOME PLEADINGS AND SOME COURT ORDERS MAY CONSTITUTE ACTIVITY WITH THE INTENT OR UNDER THE DEFINITION OF THE RULE.

WHAT IS THE PLAIN MEANING OF ACTIVITY? THAT IS JUST SOME MOVEMENT, ISN'T IT? THERE IS SOMETHING MOVING OUT THERE IN THE BUSHES AND WE KNOW THAT, BECAUSE WE SAW THE LEAVES OR WHATEVER, AND SO IF YOU GO TO THE DICTIONARY, LET ME ASK, YOU KNOW, AND THE PROBLEM ON THE DEFENSE SIDE, ALWAYS, IS THAT THE ARGUMENT IS THAT THE DEFENSE IS SO ANXIOUS, TO GET THIS THING PROSECUTED, ALL THEY HAVE TO DO IS FILE A NOTICE OF TRIAL OR WHATEVER. IN OTHER WORDS THAT THEY CAN, IT IS NOT AN ISSUE, USUALLY, WITH THE DEFENSE OF GETTING THE THING TO TRIAL. SHOULDN'T WE, IF WE ARE GOING TO STICK WITH THIS GLOSS THAT WE PUT ON THE RULE, SHOULDN'T WE GO BACK AND PUT SOME LANGUAGE, JUST AS APPEARED ORIGINALLY IN THE STATUTE, IN THE RULE? YOU KNOW, WOULDN'T THAT BE A FAR BETTER SOLUTION? I AM NOT SURE HOW IT IS GOING TO AFFECT THE RESOLUTION OF THIS CASE. AT LEAST THE LEGISLATURE HAD THAT LANGUAGE IN THERE THAT CHIEF JUSTICE PARIENTE REFERRED TO, THAT THE THING IS BEING PROSECUTED, SO WE REALLY HAVE PUT THAT GLOSS ON THERE, BUT IT DIDN'T END IT, ACCORDING TO THE RULE. IT ISN'T IN THE RULE. IT JUST REFERS TO ACTIVITY, IN A VERY BROAD WAY, IN THE PLEADINGS, ORDER OF THE COURT OR OTHERWISE, AND WHEN YOU COMBINE ACTIVITY WITH "OR OTHERWISE", BOY THAT, SOUNDS LIKE ANYTHING GETTING IN THERE, AND CERTAINLY SOME COURTS HAVE INTERPRETED IT THAT WAY INITIALLY. THEY GOT SHOT DOWN LATER, YOU KNOW, BY THIS COURT, BUT THEY DID THAT, SO POLICY WEISS, WOULDN'T IT BE A FAR BETTER THING FOR US, NOW,, TO AMEND THE RULE, IF WE ARE GOING TO STICK WITH THIS OTHER PROVISION, THAT IF IT DOES HAVE TO BE SOMETHING MOVING IT TOWARDS RESOLUTION THAT, WE PUT THAT LANGUAGE IN THERE, THAT THE SAME IS BEING PROSECUTED, SUCH AS THE LEGISLATURE HAD, OR SOME SIMILAR LANGUAGE THAT CONFORMS WITH OUR CASE LAW?

YOUR HONOR, PERHAPS THE CHANGE IN THE LANGUAGE WOULD RESULT IN A MORE CLEAR FINAL RESOLUTION FOR SOME OF THE PARTIES.

WHAT I AM CONCERNED ABOUT --

BUT I DON'T THINK IT IS NECESSARY.

-- IS THE RULE AS IT IS WRITTEN NOW, REALLY IS A TRAP, AND IT IS A STRANGE THING OUT THERE --

YES.

-- THAT WE HAVE TO TEACH LAW STUDENTS THAT YOU READ THE RULE BUT THAT DON'T DO YOU MUCH GOOD. NOW YOU HAVE TO GO AND FIND OUT WHAT HAPPENED IN THE REAL WORLD, AND IN THE CASE OF THIS PARTICULAR RULE, IT LOOKS LIKE THE RULE REALLY DOESN'T MEAN WHAT

IT SAYS. IT MEANS SOMETHING ELSE, THAT WE HAVE ADDED A GLOSS TO, YOU KNOW, THROUGH OUR CASE LAW, SO I AM CONCERNED THAT SOMEBODY WOULD THINK, WELL, ALL WE NEED TO DO IS GET SOMETHING IN THERE ON THE 363d OR 362d DAY. THAT WILL BE ACTIVITY, BECAUSE WE HAD TO MOVE, IN ORDER TO DO, IT AND SO IT WAS SOME ACTION, AND IT CERTAINLY WOULD COME UNDER A "OR OTHERWISE" PROVISION, SO DON'T YOU THINK IT WOULD BE BETTER FOR US TO AMEND THE RULE, IF THAT IS WHAT WE ARE GOING TO INTERPRET THE RULE AS MEANING?

AGAIN, PERHAPS AN AMENDMENT TO THE RULE WOULD BE A BETTER OPTION, BUT I DON'T THINK IT IS NECESSARY.

IF WE LOOK, JUDGE ALTENBERND, HE NOT ONLY WROTE THIS CASE BUT HE WROTE THE DISTRICT COURT CASE AND SET OUT WHAT THE HISTORY IN DEL DUCA, AND IN THAT HISTORY, HE SET OUT THAT IT IS PLAINLY EVIDENT THAT WE HAVE BEEN HAVING THIS DEBATE SINCE BEFORE, THAT DEL DUCA, AND IN FACT THE FOURTH DISTRICT HAD COME OUT WITH AN OPINION SAYING IT IS ANY ACTIVITY, BUT THE, WHAT MY CONCERN IS, IS THAT, AS JUDGE GRIFFIN WROTE IN A CASE THAT IS CITED IN HALL, THAT THE PROBLEM THAT WE HAVE IN INTERPRETING THIS CASE, IS THAT THE TRIAL COURTS DON'T KNOW WHAT IS MOVING THE CASE TOWARD RESOLUTION AND WHAT IS NOT, AND SO WE HAVE THIS VERY IN COHERENT DECISION-MAKING AT THE TRIAL LEVEL, BECAUSE WE HAVE GIVEN THAT TYPE OF DISCRETION REALLY, TO THE TRIAL JUDGES. NOW, HOW CAN WE AVOID THAT?

YOUR HONOR, TO A CERTAIN EXTENT, IT MAY NOT NEED TO BE AVOIDED, BECAUSE THE TRIAL COURT SEWAGE, SINCE IT IS AN ABUSE OF DISCRETION STANDARD OF REVIEW, IS IN THE BEST POSITION TO VIEW WHAT IS THRILL MOVING THE CASE FORWARD. THEY ARE IN THE BEST POSITION TO EVALUATE.

BUT REALLY, AGAIN, AND THE DEFENSE ALLUDED TO IT, THIS WAS A RULE THAT WAS DESIGNED TO SEE CAN WE GET CASES, THAT THE COURT SHOULD BE ABLE IN A WAY TO CONTROL ITS OWN DOCKET, AND IF THE PLAINTIFF IS JUST, FILED A CASE AND NOTHING HAS EVER HAPPENED, THEN, AND THEY ARE NOT REAL SERIOUS ABOUT PROSECUTING IT, WE OUGHT TO GET IT OFF THE DOCKET. BUT NOTHING DOES STOP THE DEFENDANT FROM SAYING IT IS READY FOR TRIAL. SO THE QUESTION IS, DO WE KNOW, WAS THIS CASE READY FOR TRIAL, OR WAS THIS JUST SOMETHING WHERE THE CASE HAD BEEN FILED, AND THEN YEARS LATER THERE, IS JUST NOTHING HAPPENING? DO WE KNOW WHAT THE SITUATION IS IN THIS CASE, FROM OUR RECORD?

YOUR HONOR, I DON'T KNOW THE UNDERLYING TRIAL MATTERS. I CAME IN AND STARTED WORKING FOR THE FIRM AT THE MOTION TO DISMISS, ACTUALLY.

BUT GOING BACK TO THIS, WHY SHOULDN'T THE SOLE ISSUE ABOUT THIS ORDER WAS PASSIVE OR ACTIVE, WHY SHOULDN'T IT BE THAT WE CONSTRUE THIS BY PLAIN LANGUAGE AND SAY AN ORDER OR A PLEADING IS ENOUGH, AND IF THE COURT OR THE DEFENDANT ISN'T HAPPY WITH IT, THEY CAN GO SAY I AM SETTING IT FOR TRIAL IN SIX MONTHS AND YOU BETTER BE READY.

YOUR HONOR, I DON'T THINK THE RULE SHOULD BE CONSTRUED SIMPLY BY THE PLAIN LANGUAGE OF --

WHAT IS WRONG WITH THAT AS A POLICY? IN OTHER WORDS THIS IS NOT A STATUTE OF LIMITATIONS ISSUE. THIS IS A QUESTION ABOUT WHETHER THE CASES SHOULDN'T JUST STAY STAGNANT IN THE COURT SYSTEM. SO AS LONG AS WE HAVE WAYS TO MAKE SURE THAT THAT, THOSE CASES MOVE ALONG, A KIND OF A CHECK, OKAY, 364 DAYS, THAT WE WOULDN'T HAVE SOMETHING THAT FOR TEN YEARS WAS HAVING A STATUS CONFERENCE EVERY 364 DAYS, WE WOULD SAY THOSE CASES NEED TO BE SET FOR TRIAL. YOU HAVE HAD ENOUGH ORDERS AND PLEADINGS. WE ARE READY TO GO, AND IF THE PLAINTIFF CAN'T GO, THEN THE PLAINTIFF IS REALLY, WELL, WHY DID FIVE YEARS GO BY AND YOU HAVEN'T DONE ANYTHING?

YOUR HONOR, I WOULD SUGGEST TWO THINGS. FIRST THAT IT WOULD CREATE AN ABSURD RESULT, IN TERMS OF THE LANGUAGE OF THE STATUTE WOULD NOT, THEN, PERPETUATE THE PURPOSE OF THE RULE. IT IS SUPPOSED TO MOVE THE CASE FORWARD TOWARDS PROGRESS ON THE MERITS, CONDITIONED ON THE MERITS.

JUSTICE CANTERO POINTED OUT THAT THE LANGUAGE OF THE RULE SEEMS TO ACTUALLY SUPPORT WHAT WE ARE TALKING ABOUT HERE, WHICH IS NO ACTIVITY BY FILING A PLEADINGS ORDER OF COURT, SO IT SEEMS AS IF WE ARE, THAT THAT IS WHAT THAT RULE SAYS ON ITS FACE THAT, IS WHAT HAPPENED HERE, AND I DON'T SEE WHERE THE HARM TO THE SYSTEM IS BY INTERPRETING THIS RULE AS IT IS PLAINLY WRITTEN.

I THINK THE HARM TO THE SYSTEM IS THAT THE RULE HAS NOT BEEN INTERPRETED BY THE PLAIN LANGUAGE IN THE RULE ITSELF. CONSISTENTLY, SINCE THE INITIAL RULE --

NO. WHAT I HAVE SEEN, IT HAS BEEN A TRAP. IT IS LIKE A GOTCHA SITUATION, BECAUSE MANY TIMES THIS IS, THINGS ARE ACTUALLY GOING ON WITHOUT THEIR BEING PLEADINGS, AND THEY ARE PERFECTLY MOVING IT ALONG, AND THEN ALL OF A SUDDEN, IT GETS TO THAT 364th DAY AND WE HAVE ALL OF THIS POSTURING GOING ON, OR 366th DAY, SO I HAVE ACTUALLY SEEN THIS RULE AS CAUSING A LOT OF LITIGATION, AND I DON'T KNOW IF IT HAS REALLY HELPED, RATHER THAN THE COURT THAT HAS ACTIVE STATUS CONFERENCES AND OTHER INTEL SECRETARY WAYS TO MOVE CASES ALONG.

YOUR HONOR, WITH THE FACTS SPECIFIC TO THIS CASE WITH REGARDS TO THE PRO HOC VICE, WHILE THERE WASN'T PRO HOC VICE OR CERTAIN ORDERS, THE PETITION BY WITHDRAWING COUNSEL, WE RELIED ON EXISTING CASE LAW, WHICH WAS ALSO AVAILABLE TO PETITIONERS DURING THEIR PROSECUTION OF THIS CASE, TO KNOW THAT CHANGE OF COUNSEL, SUBSTITUTION OF COUNSEL, WITHDRAWAL OF COUNSEL, HAS CONSISTENTLY BEEN DEEMED INSUFFICIENT ON THE CASE RECORD TO --

SPECIFICALLY WHERE YOU ARE HEADED, COULD YOU SHARE WITH US YOUR INTERPRETATION OF THE DIRECT WORDS OF HALL, IN HALL, THE OPINION STATES RULE 1.420-E PLAINLY STATES AND THEN IT STATES WHAT IT SAYS. THEN IT PROCEEDS TO STATE, THIS REQUIRES ONLY A REVIEW OF THE PAST YEAR, A REVIEW OF THE RECORD. THERE IS EITHER ACTIVITY ON THE FACE OF THE RECORD OR THERE IS NOT. AND THEN IT GOES ON AND DISCUSSES IF A PARTY SHOWS THAT THERE IS NO ACTIVITY, THEN IS WHEN YOU GO AHEAD TO THE NONMOVING PARTY. SO WHAT IS YOUR INTERPRETATION OF THAT PRETTY STRONG, PRETTY DIRECT STATEMENT?

YOUR HONOR, MY INTERPRETATION OF THAT LANGUAGE IN HALL, IS THAT THERE IS SOMETHING ON THE FACE OF THE RECORD OR THERE ISN'T, AND THEN THE THE CASE INTERPRETS WHAT HAPPENS WHEN THERE ISN'T. THE CASE DOESN'T INTERPRET WHAT HAPPENS WHEN THERE ISN'T SOMETHING ON THE RECORD, AND IT DOESN'T INTERPRET WHAT HAPPENS IF THERE ISN'T, BUT ONCE THERE IS ACTIVITY, IN COMMISSION CASE LAW, THERE WOULD STILL BE A NEED TO EVALUATE WHETHER THAT IS SUFFICIENT ACTIVITY, WHETHER OR NOT IT IS PASSIVE AND WHETHER OR NOT IT ACTUALLY PROGRESSES THE STATE TOWARDS CONCLUSION, SO I DON'T THINK THE HALL CASE ISN'T NECESSARILY INCONSISTENT. I THINK IT SIMPLY ADDRESSES THE LATTER PORTION, WHEN THERE IS NOTHING ON THE FACE OF THE RECORD, BECAUSE THOSE ARE THE FACTS BEFORE IT. IT IS NOT NECESSARILY IN CONFLICT WITH THE CURRENT SITUATION.

BUT THE STATEMENT THAT ONE MAY ONLY, ONLY LOOK TO THE RECORD, IS A STATEMENT THAT CERTAINLY CAN LEAD TO SITUATIONS THAT WE ARE FACED WITH TODAY.

YOUR HONOR, SIMPLY BECAUSE THE BULK OF THE OPINION IS GEARED TOWARDS THE LATTER INTERPRETATION WHEN THERE IS NOTHING ON THE FACE OF THE RECORD, I THINK THE INITIAL LANGUAGE IN THE OPINION, WAS NOT NECESSARILY MEANT TO EXCLUDE THE CONTINUED INTERPRETATION OF PROSECUTION. IN FACT, IF FOOTNOTE FOUR OF THE HALL DECISION, THE

COURT CITES BACK, TO AND I BELIEVE IT WAS JUSTICE WELLS'S OPINION, CITES BACK TO LANGUAGE REGARDING PROSECUTION, WHILE THAT IS NOT IN THE CURRENT STATE OF THE RULE, IN THE HALL DECISION, IT DOES GO BACK TO EARLIER CASES INTERPRETING IT AS EARLIER LANGUAGE USED IN BOTH THE FLORIDA STATUTE AND THE RULE, RELATING TO PROSECUTION, AND I BELIEVE THAT THAT SHOWS AT LEAST AT INTENT TO CONTINUE TO PROMULGATE THE RULE THAT CASES NEED TO BE CONCLUDED, BASED ON THEIR MERITS. AND DURING PREVIOUS ORAL ARGUMENT, THERE SEEMED TO BE SOME CONCERN OR DISTASTE WITH THE FACT THAT CERTAIN COURT ORDERS OR THINGS MIGHT BE DEEMED PASSIVE, AND THE RESPONDENTS CERTAINLY DON'T MEAN TO SUGGEST THAT, BECAUSE SOMETHING WOULD BE PASSIVE, THAT IT IS UNIMPORTANT OR DONE IN BAD FAITH. THE IMPORTANCE OF THE DECISION BETWEEN ACTIVE AND PASSIVE, AT LEAST FOR THE RESPONDENT'S OPINION, SEEMS TO BE THAT SOME THINGS ARE ADMINSTERILE OR MAYBE EVEN MANAGERIAL, MAYBE EVEN HOUSEKEEPING, AND I THINK THAT IS ADDRESSED IN THE TONY DECISION, THAT NOT EVERY PIECE OF PAPER IN A FILE OR COURT FILE IS NECESSARILY ACTIVITY.

WHETHER YOU HAVE ACTIVITY ON THE FACE OF THE RECORD OR NOT, THAT YOU MUST GO THROUGHOUT ANALYSIS OF WHETHER WHAT GOING ON IN THE CASE, IT BE AN ORDER, ACTUALLY ON THE FACE OF THE RECORD OR THINGS THAT ARE GOING ON BEHIND THE SCENES, HAS TO BE VIEWED AS TO WHETHER IT IS MOVING THE CASE ALONG. THAT IS YOUR BOTTOM LINE HERE, AS I UNDERSTAND IT.

YES, YOUR HONOR, THAT IN ORDER TO PERPETUATE THE RULE, IT HAS TO FURTHER THE PROGRESS OF THE CASE, AND THAT SHOULD BE ON ITS MERITS.

WHAT IS YOUR INTERPRETATION OF THE PURPOSE OF THE RULE?

TO UNCLOG COURT DOCKETS AND TO FURTHER THE CONCLUSION OF CASES, BASED ON THEIR MERITS, NOT SIMPLY --

WHEN THERE IS RECORD ACTIVITY, YOU BELIEVE THAT YOU HAVE TO GO BACK BEHIND WHAT THAT ACTIVITY IS, FURTHERS THE GOAL OF REVIEWING CASES ON THE MERITS?

YES, YOUR HONOR, BECAUSE IT WOULD ALLOW A TRIAL COURT, WHO MAY HAVE A CLOGGED DOCKET, TO LOOK AT THIS AND TO DETERMINE WHETHER OR NOT THERE WAS AN INTENT TO FURTHER THE CASE OR WHETHER, AS CHIEF JUSTICE PARIENTE SUGGESTS, THE CONCERN THAT, AT 363 DAYS, SOMEONE SIMPLY FILES SOMETHING, OR --

AS FAR AS IF WE ARE REALLY LOOKING AT, THIS I MEAN, WE ARE TALKING ABOUT NUMBERS, BECAUSE A CASE THAT IS DOING NOTHING, IN OTHER WORDS, THEY DON'T HAVE 845 HEARINGS, IT IS JUST EXISTING, DOESN'T REALLY CLOG THE COURT'S DOCKET. IT MAY INCREASE THE NUMBERS, BUT A CASE THAT DID NOTHING FOR TEN YEARS WOULD NOT HAVE ANY EFFECT ON THE TRIAL COURT, SO WE ARE REALLY, AGAIN, I MEAN, WE ARE ENGAGING IN A MYTH. I MEAN, I THINK YOUR BEST ARGUMENT IS THAT DEL DUCA SEEMED PRETTY CLEAR THAT IT SAID THAT, IN THAT CASE IT WAS REQUEST TO PRODUCE AND A NOTICE OF SERVICE OF INTERROGATORIES. IT SEEMS THAT A REQUEST FOR PRODUCE IS A PLEADING. AND WE TALK ABOUT WE REALLY ARE LOOKING AT TWO DIFFERENT TESTS AT THAT POINT, AS TO WHAT TO ADOPT. I THINK THE COURT THIS MORNING, THOUGH, IS LOOKING BACK AT WHAT THE WORDING IS OF THE ACTUAL RULE AND QUESTIONING WHY WE HAVE MADE THIS FIRST PRONG SO DIFFICULT, FOR A TRIAL COURT AND SHOULDN'T, AND SINCE IT LOOKS LIKE HALL, THOUGH, I WAS NOT CLARIFIED IN THE FIRST {PRORNTION} CERTAINLY THE SECOND DISTRICT THOUGHT IT WAS, SO I GO BACK TO THE ISSUE WHY ISN'T IT BETTER FOR THE LITIGANTS TO HAVE A CLEAR RULE, PLEADINGS OR AN ORDER THAT, THAT IS ACTIVITY, AND THAT THAT WOULD PRECLUDE DISMISSAL UNDER THAT RULE T STILL DOESN'T PRECLUDE THE TRIAL COURT FROM SAYING I AM SETTING THIS FOR TRIAL. AN ANSWER HAS BEEN FILED. OR A DEFENDANT FROM ASKING THAT IT BE SET FOR TRIAL, BUT IT

ELIMINATES ALL OF THIS POSTURING THAT GOES ON WITH THE RULE.

YOUR HONOR, I THINK THE CLEAREST INTERPRETATION MIGHT BE BETTER FOR PLAINTIFFS IN CASES, I CERTAINLY DON'T THINK IT IS BETTER FOR LITIGANTS ON THE WHOLE. I THINK TO INTERPRET THE FACT THAT ANY PLEADING OR ANY COURT ORDER IN THE FILE, CONSTITUTES RECORD ACTIVITY, STILL DOESN'T MEET THE REQUIREMENTS THAT A CASE BE MOVED FORWARD TOWARDS CONCLUSION.

I UNDERSTAND BURKES CAN'T DEFENDANT ASK THAT THE CASE BE SET FOR TRIAL. THAT WAY IT IS NOT HANGING AROUND. WHAT, WHY ISN'T THAT THE BETTER SOLUTION?

WELL, THE DEFENDANT CERTAINLY IS IN A POSITION TO ASK FOR THAT. IT IS ALMOST DISTASTEFUL TO ASK FOR AN UNWILLING DEFENDANT TO FORCE PROSECUTION OF A CASE AGAINST HIM, IN ORDER TO CONCLUDE IT, WHEN THE PLAINTIFF WHO BROUGHT THE ACTION SHOULD BE FORCED, AND I THINK --

I GUESS THAT IN MY EXPERIENCE, ONE OF THE REASONS IS THAT IT IS GOING TO COST HUNDREDS OF THOUSANDS OF DOLLARS TO GET READY TO GO TO TRIAL. ISN'T THAT A REASON?

YES, YOUR HONOR, FOR THE EXPENSE TO THE DEFENDANT AND THEN IN A CASE IN WHICH HE HAS BEEN BROUGHT IN, WOULD CERTAINLY BE, AT LEAST ONE REASON, WHY THE DEFENDANT SHOULDN'T BE FORCED TO NOTICE IT FOR TRIAL. I SEE THAT MY TIME IS UP, IF I MAY BRIEFLY CONCLUDE.

CHIEF JUSTICE: YES.

YOUR HONOR, WE WOULD SIMPLY ASK, AS RESPONDENTS THAT, THE CERTIFIED QUESTION BY THE SECOND DCA, BE ANSWERED IN THE AFFIRMATIVE, THAT THE CONTINUED CASE LAW AND THE ANALYSIS BE REQUIRED BY THE TRIAL COURTS, TO DETERMINE WHETHER OR NOT A PLEADING OR AN ORDER OF THE COURT, IS ACTUALLY RECORD ACTIVITY, IN THAT IT PROMOTES PROGRESS OF THE CASE TOWARDS A CONCLUSION ON ITS MERITS.

CHIEF JUSTICE: THANK YOU VERY MUCH.

LET ME TEST THIS IDEA OF THE FACT THAT THE DEFENDANT SHOULD GO AHEAD AND HAVE THE CASE SET FOR TRIAL. LET'S LOOK AT A HYPOTHETICAL, WHICH A DOCTOR IS SUED IN A MEDICAL MALPRACTICE CASE, AND IN ORDER FOR THAT CASE TO GET TRIED, YOU ARE GOING TO HAVE TO GET EXPERTS, AND YOU ARE GOING TO HAVE TO SPEND SEVERAL HUNDRED THOUSAND DOLLARS, GETTING THE CASE READY FOR TRIAL, A AND YET THE PLAINTIFF, WHO HAS FILED THE ACTION, AND THEY HAVE BEEN THROUGH THE PRE-SUIT SCREENING AND THERE IS A DETERMINATION THAT IS SEEN THAT THERE REALLY ISN'T MUCH BASIS FOR THE MEDICAL MALPRACTICE, AND THE PLAINTIFF FILES THE SUIT AND JUST LETS IT SET THERE FOR 364 DAYS, AND THEN ALL OF A SUDDEN FILES A PRO HOC VICE, DOES THAT CASE CONTINUE UNDER THE CIRCUMSTANCES, AND WOULD THE BURDEN BE ON THE DEFENDANT, TO GET THAT CASE SET FOR TRIAL ?

YOUR HONOR, IN RESPONSE TO QUESTIONS, THE DEFENDANT DOES HAVE SOME BURDEN. I REPRESENT MAINLY DEFENDANT, ACTUALLY, AND MY CLIENTS AT THE TIME, WE ARE ADVISING, HEY, IF THE PLAINTIFF DOESN'T HAVE A CASE AND THE PLAINTIFF IS NOT MOVING, WE WILL NOTICE IT FOR TRIAL AND SEE WHAT HAPPENS WITH THE PLAINTIFFS, AND THE TRIAL COURTS ARE, I THINK, TAKING AN EVEN MORE PROACTIVE ROLE THAT I HAVE SEEN FOR TEN, TWELVE YEARS OF PRACTICE, BUT I HAVE SEEN TRIAL COURTS MOVE IT ALONG AND BEEN VERY DIFFICULT WITH THE CONTINUANCE AND TOLD THE PLAINTIFF, HEY, EITHER GET TO TRIAL OR SETTLE THE CASE, AND THE QUESTION YOU JUST RAISED, THE PLAINTIFF DEFENDANT CERTAINLY COULD HAVE DONE THAT, AND IF THE PLAINTIFF DOESN'T HAVE A CASE, IT CERTAINLY WILL SETTLE FOR A SMALLER AMOUNT OR THE CASE WILL GET THROWN OUT.

IN THE PAST YEARS, WE HAVE HAD THINGS FILED AND THEN WE HAVE HALL. ALONG, A FEW YEARS AGO, THIS COURT ANALYZED AND REASONED THAT AN ACTUAL ORDER OF A TRIAL COURT, AN ORDER, A PRETRIAL CONFERENCE, A CONFERENCE AT WHICH STIPULATIONS COULD HAVE BEEN ORDERED, THAT SUMMARY JUDGMENTS COULD HAVE BEEN ENTERED, AND THAT ANY ACTION TAKEN TO LIMIT OR EXPAND THE ISSUES TO BE PRESENTED, WAS NOT AN ORDER THAT WOULD KEEP A CASE ALIVE. AND THEN WE HAVE THE LANGUAGE IN HALL DOESN'T, AND THE FACTS IN HALL. SO HAS THIS COURT, REALLY, CHANGED, SINCE THE EARLIER DECISION INVOLVING A CASE WITH AN ACTUAL ORDER FOR PRETRIAL CONFERENCE?

YES.

HAVE WE CHANGED, AND IF SO, IS IT HALL, OR WHAT HAS CAUSED THE CHANGE FROM THAT DAY?

GETTING TO THAT END, AND THERE IS CONFUSION IN THE AREA. IT IS DIFFICULT TO DISTINGUISH, AND I FORGOT WHICH JUSTICE WROTE THAT IN THE LAST OPINION. ACTUALLY, I THINK IT WAS YOU, IN THE MOTION CASE, SAID IT IS DIFFICULT TO DETERMINE WHAT HAS GONE ON BETWEEN THE CASE MANAGEMENT CONFERENCE OR THE STATUS CONFERENCE. THERE IS CONFUSION. THAT IS WHERE THE TRIAL COURT SAID, THE SECOND DCA SAID THERE WAS CLARIFICATION NEEDED.

BUT IN DEL DUCA, THERE WAS A REQUEST FOR PRODUCTION. A REQUEST FOR PRODUCTION IS A PLEADING, AM I RIGHT?

MY UNDERSTANDING IS PLEADINGS WERE COUNTERCLAIMS AND SO FORTH.

I GUESS THAT WOULD BE AWAY TO DISTINGUISH IT, BUT I THINK THAT WE HAVE, I GUESS THAT WOULD BE A WAY TO DISTINGUISH IT, BUT I GUESS FILINGS UNDER THE RULE AS BEING PLEADINGS, MAYBE IT IS IN THE "OR OTHERWISE", ANYWAY, I FIGURE YOUR, I SEE YOUR TIME IS UP, AND IF YOU WOULD LIKE TO CONCLUDE.

THANK VERY MUCH. WE WOULD LIKE THE SECOND DCA BE REVERSED IN THE CASE AND THE CASE SET FOR RETRIAL. THANK YOU.

CHIEF JUSTICE: THANK YOU FOR ORAL ARGUMENT, AND WE WILL TAKE OUR MORNING RECESS OF 15 MINUTES.

MARSHAL: PLEASE RISE.