Noel Thomas Patton v. Kera Technology, Inc.
Docket Number: SC05-667

WE WILL CA LL THE NEXT CASE OF PA TTON VER SUS KER A TECHNOLOGY.

CHIEF JUSTICE: WE HAVE VISITORS, SO WE WILL GET THEM SETTLED IN. BEFORE WE START, I SEE THAT WE HAVE , OKAY. ALL RIGHT. THIS IS THE UNIVERSITY OF FLORIDA B LUE KEY LEGISLATIVE DAY GROUP. IS THAT CORRECT ? ALL RIGHT.SO THIS G IVES ME M Y CHANCE TO SAY G O GATORS! [LAUGHTER] THERE WAS NO CELEBRATIONYESTERDAY.I KNOW THERE WAS A LOT OF SELL GRATION -- CELEBRATION DOWNTOWN GAINESVILLE, BUT WE ARE GLAD YOU ARE UP HERE , OBSERVING BOTH THE LEGISLATURE AND YOU WILL HAVE THE CHANCE THIS MORNING, TO HER E AT THESUPREME COURT , OBSERVING HOW THE JU DICIAL BRANCH OPERATES , SO THANK YOU FOR COMING UP , AND BEING PART OF THE PROCESS O F GOVERNMENT BY LEARNING AND OB SERVING . WITH THAT , WE WILL CALL , IF THE PARTIES ARE READY , I HAVE CALL ED THE NEXT CASE, WHICH IS PATTON VERSUS KERRA M S. -- VERSUS KERA. MS. TEMPLE.

MAY IT PLEA SE THE COURT. MY NAME IS WE NDY TE MPLE , AND I REP RESENT THE PETITIONERS IN THIS CASE , EDWIN DEAN , E VE AND KNOLL PATT ON. WE ARE HERE TODAY TO -- AND NOEL PATTON. WE ARE HERE TODAY TO ASK THIS COURT TO DIS MISS THE FINDING OF THE DISTRICT COURT OF APP EAL --

JUSTICE: WOULD YOU AGREETHE ANALYSIS IN THIS C ASE SHOULD PROCEED IN ACCORDANCE WITH THIS COURT'S PRECEDENT ON THE BASIS OF THE HAUL CASE?

YES . -- HALL CASE?

YES, SIR , I DO.

AND UNDER THE HALL CASE, THE FIRST ST EP I S TO REVIEW THE RECORD AND SEE IF , BETWEEN THE TIME THAT THERE WAS THE L AST FILE PLEADING AND THE NEXT FILE , AND THE FILING O F THE MOTION TO DISMISS , THERE HAS BEEN ANY RECORD ACT IVITY . CORRECT?

YES. YES.

JUSTICE: AND IF THERE IS NO RECORD ACTIVITY FOR ONE YEAR DURING THAT PER IOD OF TIME, THEN THE TRIAL COURTHAS NO DISC RETION BUT THAT THERE , THE MA TTER S HOULD BE DISMISSED. CORRECT?

YES .

JUSTICE: NOW, IN THIS INSTANCE, THERE WAS NO RECORD ACTIVITY D URING THAT YEAR. CORRECT?

NO, SIR. THAT IS WHERE W E DIS AGREE.

JUSTICE: OKAY. WELL , THE , FROM MY LOOKINGAT THE DOCKET SH EET IN THIS CASE , INDI CATES THAT THE, SOLELY LOOK ING AT THE DOCKET SHEET , AND WHAT WAS FILED , THAT BETW EEN JULY 9 , BETWEEN JULY OF 2 001 AND AUGUST OF 2002 , THERE WAS NO PIECE OF P APER THAT WAS FILED. IS THAT CORRECT?

THAT IS TRUE.

JUSTICE: OKAY. SO GOING THROUG H THAT FIRST STEP, WH Y IS IT NOT TRUE THAT THERE IS REQUIRED BY THE R ULE , TO , THE ACTION WOULD BE DISMISSED , AS FAR AS THE FIRST STE P IS CONCERNED?

WELL, THERE IS A TWO-PART ANSWER TO THAT, YOUR HONOR. THE FIRST IS WE BE LIEVE THAT THERE IS RECORD ACTIVI TY AS IT EXIS TS UNDER THE RU LE AT THAT TIME , AND IN A MOMENT I WILL GET IN TO WHY I THINKTHAT THE NEW RULE, THE AMENDMENT TO 1.420-E AP PLIES IN THIS CASE BECAUS E IT WAS PENDING ON APPEAL AT THE TIME THAT THE RULE WAS ADOPTED, WH ICH I BEL IEVE ALSO MAN DATES REV ERSAL ON THIS CASE, BU T TO AN SWER Y OUR Q UESTION DIRECTLY AS TO RECORD ACTIVITY , THERE IS DIFFERENT CIRCUMSTANCE S INTHIS CASE. I F YOUR HONOR RECALLS WHAT HAD HAPPENED , IS THAT THE MOTIONS OR WHAT I CALL THE LOP OR THE LACK O F PROSECUTION MOTI ON WERE FILED BUT THEY WERE NEVER SERVED. IN FACT --

CHIEF JUSTICE: LET'S GO BACK. IN THIS WE ARE HERE BECAUSETHERE IS A CONFLICT.

YES, MA 'AM .

CHIEF JUSTICE: THAT ISKNOW THE THE CONF LICT - - THAT IS NOT THE CONFLICT ISSUE . I UNDERSTAND THE CONFLICT BEING THAT, WHEN THERE IS A PENDING MOTION , A DISPOSITIVE MOTION --

YES .

CHIEF JUSTICE: -- THAT AT LEAST THE FIRST DISTRICT APPEARS TO S AY THAT THAT,THEN , TA KES IT E ITHER AS GOOD CAUSE, BECAUSE THERE HAS BEEN THE BALL , SO TO SPEAK IN THE COURT 'S COURT. SO , WHAT , IS THAT WHAT WE ARE HERE, THAT THE CONFLICT ISSUE THAT WE ARE HERE ON?

YES , YOUR HONOR , WE AREHERE ON THAT CONFLICT ISSUE , AND AS YOUR HONOR ALSO MENTIONED , ONCE THIS COURT DOES AC CEPT REVIEW OF THE CON FLICT , IT CAN REACH THE OTHER ISSUES IN THE CASE.

CHIEF JUSTICE: BUT AN ISSUE OF WH O IS RIGHT ON THIS QUESTION , AND IS THEREA DIFF ERENCE IN THIS CASE FROM THE OTHER CASES, I N THAT THERE IS EVEN A CONFLICT IN THE TESTIMONY AS TO WHETHER THE COURT HAD RULED AND THEN THE BALL WASBACK IN THE PLAINTIFF'SCOURT TO PRE PARE THE OR DER.

RIGHT.

CHIEF JUSTICE: SO DOES THAT MAKE THAT DIFFERENTTHAN, SAY , THE FIRSTDISTRICT CASE?

AND IT DO ESN'T AND I WILL TELL YOU WHY , AND, YES, I ACKNOWLEDGE THAT IS THE CONFLICT. IN THIS CASE , THERE IS , THE FACT IS THAT THE HE ARING , THE JULY 9 HEA RING THAT JUSTICE WELLS HAD REFERRED TO, WAS UNTRANSSCRIBED. THERE WERE NO COURT MINUTES, AND THE TRIAL COURT ITSELF, ADMITS THAT HE HAS NO RECOLLECTION WHATSOEVER ABOUT WHAT HAPPENED. AND THE ONLY THING THAT WE HAVE THAT DEMONSTRATES WHAT DID HAPPEN OR WHAT THE PARTIES AR GUE DID HAPPEN, WAS THE RESPONDENT'S CLAIM THAT , ABOUT OVER A YEAR L ATER, AT THE EMERGENCY HEARING THIS FRONT O F JUDGE HAUSER ON THE PETITIONER'S MOTION TO SET AS IDE THE DISMISSAL S , THE FIRST ORDERS GRANTING DISMISSAL ON THIS CASE, THAT THEY INFORMED THECOURT AT THAT TIME THAT JUDGE HAUSER HAD RULED AND THAT TE RRY MCCOLLOUGH THE ATTORNEY FOR THE PETITIONERS WHO HAD SUBSEQUENTLY BEEN DISBARRED FOR HIS MISCONDUCT IN THIS CASE, THAT HE WAS SUPPOSED TO PREPARE THE

ORDER. THE PROBLEM IS McCULLOUGH , HIMSELF , SAYS , AND HADINFORMED THE PETITIONERS AND THEIR SUBSTITUTE COUNSEL , THAT JUDGE HAUSER HAD RESERVED RULING AND THATTHERE WAS NO RULING. JUST JUST BUT REGARDLESS OFTHAT , IT SEEMS TO ME THAT, IF WE --

JUSTICE: BUT REGARDLESS OF THAT , IT SEEMS TO ME THAT, IF WE LOOK AT THIS WITHIN THE GU ISE , THE GA ZE OF WHETHER IT WAS GOOD CAUSE OR NOT , THAT THERE HAD NOT BEEN AN ORDER EN TERED, REGARDLESS OF THE REC ENT. WHAT WE SEE FROM MY ANALYSIS OF THE RECORD , IS THAT THE ONLY , THAT THERE WAS A COMPLAINT THAT WAS AT LE AST GOT , AS FAR AS SE VERAL COUNTS WERE CON CERNED. THERE IS NO STAT EMENT BY COUNSEL AS THE FIFTHDISTRICT PICKED UP ON , THAT THERE WAS ANY RE LIANCE BY COUNSEL OR THE P A RTIES , ON THE FACT THAT THE COURT HAD NOT RULED ON THIS MOTION TO DISMISS, AND THAT IN FACT , IN JUNE O F 2002 , AN OTHER LAWYER THAT WAS REQUESTED TO GO OVER FOR THE PAR TIES, HAD REVIEWED THE FILE AND KNEW THAT THERE WAS NOTHING THAT HAD BEEN FILED HERE. SO HO W IS IT A , ANY TYPE OF RELIANCE BY THE PART Y THAT THE MOTION HAD NOT BEEN RULED UPON ? NOT GOING FOR WARD?

I WOULD ARGUE , YOUR HONOR , T HERE WAS REL IANCE AND THERE IS AMPLE EVIDENCE TO SHOWTHAT THERE WAS. IF I COULD JUST B A CK UP FOR JUST A SECOND , POINT ABOUT THERE NOT BEING ANY DECISION ABOUT WHAT HAD HAPPEN ED, THERE IS NO WA Y TO KNO W WHAT HAD HAPPENED AT THAT HEARING.THERE IS THE UNVERIFIED AND SELF-SERVING, WITHOUT DUE RES PECT , STATEMENTS OF COUNSEL, BUT WE ALSO HAVE THE ISSU E OF WHAT MR . McCULLOUGH SAID , AND THIS COURT CAN'T REACH BACK AND MAKE THAT FACTUAL DE CISION , BECAUSE THE TRIAL COURT ITSELF COUL DN'T MAKE THAT DECISION.

JUSTICE: WHOSE BURDEN IS IT TO SHOW IN THIS PROCEEDING WHAT WENT ON AT THE TRIAL COURT LEVEL?

IT IS OURS , YOUR HONOR , AND I WILL TE LL YOU WHY. IN LIGHT OF THE POLICY , THE LIBERAL POLICY IN THE STATE OF RESO LVING CASES ON THE MERITS, WE ASK THAT THE FACT THAT THERE IS NO EVIDENCE AND THE CONFLICTING EVIDENCE THAT WE SHOULD CONSIDER THEFACT THAT THE TRIAL COURTHAD NOT YET RULED, AND WE DO K NOW AND IT IS A FACT THAT NO WRIT TEN ORDER WAS EVER ENTERED, AND TH ERE WAS REL IANCE , YOUR HONOR.

JUSTICE: HERE YOU HAVE A CASE WHERE IT IS UNDISPUTED THAT THERE WAS NO RECORD ACTIVITY. SO IT SEEMS TO ME THAT WHAT YOU ARE TRYING TO DO IS SHOW GOOD CAUSE WHERE THERE WAS NO -- WHY THERE WAS NO RECORD ACTIVITY AND YOU ARETRYING TO DEMONSTRATE, WELL , THERE WAS NONE BECAUSE THE B ALL WAS IN THE JUDGE'SCOURT.HE WAS, THE RULING WAS PENDING ON THE MO TION. WELL, THAT SEEMS TO BE THE BURDEN ON THE PLAI NTIFF TO SHOW THAT THE BAL L WAS IN THE JUDGE'S COURT AND THAT THE MOTION WAS PE NDING.

AND I BELIEVE THE EVIDENCE DOES SHOT FACT THAT THERE WAS NO ORDER THAT WASENTERED, THAT IS CLEAR. WE KNOW THAT THE JUDGE HAD NOT YET RULED.

JUSTICE: I T IS A DISPUTE AND THE FIFTH DCA DIDN'T RESOLVE THE DISP UTE AND NUMBER ONE, YOU DIDN'T RESOLVE YOUR BURDEN THATTHERE WAS A MOTION PENDINGBEFORE THE TRIAL COURT, AND NUMBER TWO , IT SEEMS TO METHAT THAT MAKES THE FIFTH DCA DECISION DISTINGUISHABLE FROM THE OTHER CASES THAT SAY CLEA RLY IN T H OSE CASES A MOTION WAS PENDING B E FORE THE COURT AND THE COURT HADNOT RULED ON THE MOTION.

AND YOUR HONOR , I THINK THAT REQU IRES AN ASSUMPTION THAT THE COURT HAD N'T RULED , AND I THINK HERE THAT IN THIS SITUATION , YOU KNOW, IT IS NOT MORE LIKELY THAT THECOURT HAD RULED THAN IT DIDN'T, AND I THIN K THAT THEP OINT HERE IS THAT THE RE IS NO WAY TO KNOW EX CEPT THAT AN ORDER WASN'T ENTERED, ANDTHAT WE SHOULD LOOK TO THAT AS EVIDENCE OF THE FACT THAT THE BALL WAS STILL IN THE COURT 'S , THE BALL WAS

STILL IN THE HAND S OF THE TR IAL COURT, AND THAT IS IMPORTANT BECAUSE IT IS A NONDELEGABLE D UTY.

JUSTICE: CAN WE GO BACK AND EX PLORE A LITTLE BIT IF WE MAY.

SU RE.

JUSTICE: IT APPEARS THAT ALL OF THIS CONTROVERSY STEMS FROM THE INTERPRETATION BY THE DISTRICT COURTS OF APPE AL OF OUR WATSOSKI CASE. WOULD YOU AGREE WITH THAT?

YES .

JUSTICE: AT THE TIME IT SEEMS TO ME THAT WE HE LDTHAT, BECAUSE OF THE MOTION TO REC USE THAT WAS FILED, THAT THAT SO MEHOW WAS, ALTHOUGH I DIDN'T DISAGREE THAT IS THE LA W OF THIS COURT, BUT DOES THAT NECESSARILY MEAN THAT THAT WOULD APPLY TO ALL THESE KINDS OF THINGS? IT SEEMS TO ME THAT IT IS CREATING A LO T OF CONF USION . WE HAVE A NOTICE OF TRIAL. OKAY. WHOSE BURDEN IS IT THEN? WHA T DO WE DO? SO HAVE WE NOT , HAVE THE DISTRICT COURTS OF APPEAL HOUSE JT EXP ANDED THE -- OF APPEAL JUST NOT EXPA NDED THE WATZOWSKI DECISION? THAT UNDE R THE CIRCUMSTANCE , UNDER THE RECU SAL PROVISIONTHAT, THAT IS SUPPOSED TO HAPPEN WITH IN A SHORT PERIOD OF TIME, AND THEN IT ACTUALLY CAME O UT IF IT IS NOT GRA NTED , THEN IT IS GRANTED.I MEAN , THAT , THERE WERE NO ACT IONS TA KEN, SO WHYSHOULDN'T WE JUST LE AVE WATSOWS ASK.I AS THE P URE - - WATSOUSKI AS THE PURE LAW THAT IT IS , AND NOT G ET INTO SOMETHING AS THAT IS THE MOTION THAT IS DISPOS ITIVE OR THAT IS THE MOTION THAT IS PENDING , AND ELIMINATE ALL OF THESE THI NGS THAT HAVE NOT BEEN CORRECTED. WHY WOULD THAT NOT BE A BETTER APPROACH?

YOUR HONOR , I THINK WHAT DISPOSI HAVE MOTION IN A CASE -- A DISPOSITIVE MOTION IN A CASE MEANS THE CASE IS IN LIMO , AND EXAMPLES I HAVE REFERRED TO WHERE THE COURT HAS RESERVED RULING ON A DISPOSI HAVE MOTION, IF YOU LATER FILE IT FOR TRIAL IT A NULLITY. SO YOUR CASE CAN'T EVEN BE AT ISSUE , BECAUSE THE COURT STILL HAS THAT DISPOSI HAVE MOTION. IT IS DISPOSITIVE FOR A REASON, BECAUSE YOUR CASE EITHER GOES FORWARD OR IT STOPS , AND IF I COULD JUST INTERRUPT FOR A MOMENT AND ADDRESS JUSTICE CANTERO 'S QUESTION, I DO BELI EVE THERE WAS RECORD ACTIVITY. I AM NOT CONCEDING THAT THERE WASN'T , AND MY ARGUMENT IS IN THE BRIEF THAT, BY THE VER Y FACT THAT THE MOTIONS WERE NOT PROPERLY SE RVED UNDER RULE 1.080-D, REQ UIRES THAT IF THE MOTION IS TO B E DEEMED FILED, IT HAS TO BE SERVED THEREAFTER.

JUSTICE: WOULD YOU ALSO AGREE THAT THERE WAS, IN THE MOTION THAT WAS FILED, THAT THE JUDGE, THEN , RULED THAT THERE SHOU LD BE A S E COND HEARING?

YES, SI R.

JUSTICE: ON THE DUE PROCESS GR OUNDS . THERE ACTUALLY WAS NOT CHALLENGED, THE FILING OF THE LACK O F PROSECUTION MOTIONS. THOSE MOTIONS ST OOD .

I DISA GREE, YOUR HONOR, AND THE ORDER IT SELF , IT IS TRUE, DOES NOT S AY I HERE BY VACATE THE ORDERS AND FI NDTHAT THE MOTIONS ARE A NULLITY , BUT IT DID FIND THAT THEY WEREN'T SERV ED IN ACCORDANCE WITH 1.080-D , WHICH REQUIRES AND DEFINES FILING AS FILING AND SERVICE IMMEDIATELY THEREAFTER.

JUSTICE: THEY WERE SERVED ON COUNSEL FOR , THEY WERE SERVED ON MR. McCULLOUGH .

BUT THEY WERE NOT SERVED ON ATL ANTA CO-COUNSEL , WHICH THE TRIAL COURT SPECIFICALLY F OUND VIO LATED THE DUEPROCESS RI GHTS OF THE PETITIONERS AND THAT IS

THE GROUND ON WHICH HE V ACATED THE ORDER AND I THINK IT IS IMPORTANT AND IT MAY SO UND H YPER TECHNICAL , BUT IT IS IMPORTANT THAT YOU GET NOTICE, AND IF YOU LOOK AT THE RULE IT MAKES IT VERY C LEAR THAT A FTER SERVICE OF A NOTICE, THE NOTICE IS PROPERLY SERVED, THEN THE TEN-MONTH PERIOD TO THE RULE RULE CAN PROPERLY RUN , AND IT IS HELPFUL ON THIS BECAUSE YOU CAN'T JUST FILE A MOTION. IT IS TRUE THAT THE MAJORITY OF THE CA SES D O SA Y THAT IT IS THE ONE-YEAR LOOK-BACKPERIOD IS SET FROM THE FILING OF THE MOTION BECAUSE IT BOOKS A B OOK END TO THERECORD, BUT I THINK THAT YOU WILL FIND THAT THERE IS NO CASE THAT THERE IS A SITUATION LIKE THIS WHERE THAT MOTION WAS ALSO NOT ONLY, WAS FILED BUT WAS NOT SERVED AND I T WASN'T TECHNICALLY SERVED UN TIL AFTER THERE WAS RECORD ACTIVITY AND THERE HAD BEEN DEPOSITIONS AND VA RIOUS OTHER NOTICES FILED IN THIS CASE, AND THAT IS OUR POSITION ON THE RECORD ACTIVITY, BECAUSE WE DO BELIEVE THAT THERE WAS RECORD ACTIVITY FOR THAT REASON, AND YOUR QUESTIONABOUT THE IMPORTANCE OF A DISPOSI HAVE M OTION , I THINK THAT IT IS -- OF A DISPOSITIVE MOTION , I THINK THAT IS NECESSARY BECAUSE GOOD CAUSE STILL EXISTS. IT EXISTS IN THE NEW RULE , SO IT HAS TO BE RESOLVED. THIS SITUATION IS G OING TO COME UP AGAIN AND AG AIN THOUGHT JUST CASES IN THE PIPELINE BUT, A GAIN, FOR THO SE CASES THAT NOW APPLY UNDER THE NEW RULE.

JUSTICE: THE MOTION IN WATSOWS ASK. I WAS NOT A DISPOSI HAVE MOTION. IT WAS WHO WAS GOING TO HEAR THE CASE.

YOU CAN'T GO FORWARDUNTIL YOU HAVE A NEW JUDGE OR WHETHER YOU HAVE DECI DED WHETHER THE CASE HAS MERIT AND GOES FORWARD.

JUSTICE: YOU CAN DO DEPOSITION, OTHER HEARINGS. A MOTION TO DISMISS. YOU CAN DO ANY NUMBER OF THINGS TO ADVANCE A CASE.

BUT THE QUESTION IS DO YOU HAVE TO AND UNFORTUNATELY THAT IS THE GENAIR YO THAT WE HAVE TO LOOK AT HERE -- THE SCENARIO THAT WE HAVE TO LOOK AT HERE,BECAUSE IT IS A VERY HA RSH SITUATION WHEN YOU DISMISS SOMEONE'S CASE, BUT DID THEY HAVE TO DO THAT WHEN THE T RIAL COURT STILL HAD THAT ORDER ON ITS DE SK , AND THAT WAS A NONDELEGABLE DUTY AND I BELIEVE JUSTICE PARIENTE , YOU HAD CONC URRED IN YOUR OPINION IN WILTON SKRCHLT SOLOMON -- WILTON V SO LOMON , THE CASE DO ES HAVE TO MOVE ALONG. IT CAN'T REST WITH THEPLAINTIFF , AND I THINK THAT IS WHY THESE MOTIONS WERE DISPOSI HAVE AND IMPORTANTHERE. ONE THING I DON'T WANT T O OVERLOOK IS GO OD CAUSE , AND THE GOOD CAUSE OF THE CONDUCT OF MR . McCU LLOUGH, WHICH I THINK GOES TO THE QUESTION THAT JUSTICE WELLS , I THINK YOU HAD A BOUT RELIANCE, AND HERE , EVEN SUBSTITUTE COUNSEL WAS M ISLED BY MR . McCULLOUGH. SUBSTITUTE COUNSEL WHO ULTIMATELY BECAME SUBSTITUTE COUNSEL, CONTACTED McCULLOUGH AFTER NUMEROUS EMAILS AND TR YING TO RE ACH McCULLOUGH, THEY WERE STILL TOLD THAT JUDGE HA USER HAD NOT YET RULED ON THE MOTION , AND TE RRY McCU LLOUGH WAS STILL THE COUNSEL OF RECORD AT THAT TIME , AND --

JUSTICE: SO HOW DO YOUANSWER THE QUESTION EARLIER THAT YOU DID HAVE COUNSEL REVIEW THE FILE A MONTH BEFORE THE YEAR-LONG PERIOD R AN. WHY DID THAT NOT, WHY IS THAT NOT SUFFICIENT TO PUTCOUNSEL ON NOTICE WE BE TTER DO SOMETHING. WE BETTER MAKE SURE , ASK THE JUDGE IF YOU NEED TO ENTER YOUR ORDER OR DO SOME FILING OR DO SOM ETHING , BECAUSETHERE WAS OBVIOUSLY, UPON REVIEW OF THAT FILE A MONTH A HEAD OF TIME , NO PRIOR ACTIVITY FOR THE 11 MONTHS.

I THINK THIS B RINGS THINGS FULL CIRCLE BECAUSE McCULLOUGH WAS L YING TO WHO ULTIMATELY BECAME SUBSTITUTE COUNSEL AND SAID JUDGE HAUSER WAS STILL, HAD RESERVED RULING , AND BA SED U PON THAT REPRESENTATION.

JUSTICE: BUT EVEN THAT RULING WAS ONLY TO TH REE OF THE SIX COUN TS OF THECOMPLAINT. IT WASN'T A MOTION TO DISMISS THE EN TIRE COMPLAINT.IT WAS A MOTION AS TO ONLY PART OF THE CO MPLAINT OR THECLAIM, SO IF WE ACCEPT YOUR DEPOSITION, YOU HAVE A MOTION TO D ISMISS AND IT IS ONLY TO PART OF THE COMPLAINT , AND EVEN ACCEPT THE ARGUMENT THAT YOU ARE WAITING ON THE TRIAL JUDGE TO ENTER AN ORDER TO DISM ISS A PORTION OF THE COMPLAINT , THAT EVERYBODY JUST SITS THERE AND WA ITS.

OF COURSE THAT IS NOT THE PER FECT SITUATION. OF COURSE YOU PROBABLY SHOULDN'T JUST SIT THERE AND WAIT BUT THE QUESTION IS CANYOU RELY ON IT AND SHOULD THERE BE A BRIGHT-LINE RULE WHETHER YOU CAN RELY ON IT OR NOT.

JUSTICE: IN THE CIRCUIT I ASSUME, I HAVE BEEN PRACTICING THERE FOR AB OUT TWELVE YEARS, BUT IUNDERSTAND THAT , IF HELD TRUE THAT, COUNSEL WHEN LOOK ING AT THE TRIAL, COULD HAVE CALLED THE MA TTER UP ATTENTION PARTY HOUR.

H E WASN'T COUNSEL AT THE TIME.

JUSTICE: BUT HE COULDHAVE GOTTEN IN TO UC H WITH MR.McCULLOUGH OR ATLANTA COUNSEL COULD HAVE CALLEDTHE MATTER UP ATTENTION PARTY HOUR AND CALLED IT TO THE COURT'S ATTENTION.

I AGREE THAT THERE ARE L FTS THING THAT IS COULD -- LOTS OF THING THAT IS COULD HAVE BEEN DONE BUT THEQUESTION IS WERE THE PETITIONERS JUSTIFIED IN RELYING ON THE STATEMENT OF WHO AT THAT TIME WAS THEIR COUNSEL OF RECORD WHO HAD REPEATEDLY TOLD THE M AND AS IT TURNS OUT HAD LI ED TO THE M THAT THEIR CASE WAS STILL PEND ING.

CHIEF JUSTICE: I WANT TO REMIND THAT YOU ARE IN YOUR REBUTTAL. IF YOU WANT TO SAVE ANY TIME.

THANK YOU, YOUR HONOR. I DO. I WANT T O HIT VERY BRIEFLYON THE FOUR PO INTS. WE SAY THAT THERE IS UN FI N FINISHED BUSINESS WH ICH WE HAVE JUST TAL KED ABOUT ABOUT THE PENDING MOTION ANDRECORD ACTIVITY , WHICH I BELIEVE WE HAVE ALSO DISCUSSED AND THE GOOD CAUSE THAT EXISTS BECAUSE OF THE CONDUCT OF MR . McCALL -AND -- McCULLOUGH , AND THE RULE WOULD APPLY IN THIS CASE BECAUSE THIS IS A PENDINGCASE AND IT IS AN APPEAL OF FINAL JUDGMENT . THANK YOU.

CHIEF JUSTICE: MR . SHOWN?

MR . -- MR . SCHOENE?

MR . HELPNER , YOUR HONOR.

CHIEF JUSTICE: YOU CAN SEE WE HAVE A N ACTIVE BENCH. I WILL TRIAL TO TELL YOU WHEN IT IS TEN M ITTS .

MAY IT P LEASE THE COURT. G OOD MORNING, LADIES ANDGENTLEMEN.C HIEF JUSTICE. I REPRESENT DR . SIMM OWEN , ONE OF THE RES POND -- DR . SIMONE, ONE OF THE RESPONDENTS.WE ARE ASKING THE COURT TO APPLY THE PLAIN RULING OF 1.40 IT -E , FOLLOW DADE COUNTY -- 1.402-E , FOLLOW THE DADE COUNTY RULING REVERSING HALL , AND --

JUSTICE: WHY ISN'T THIS A SITUATION WHERE GOOD CAUSE REALLY SHOULD BE APPLIED, IN THAT YOU HAVE THIS PLEADING THAT WAS FILED SEVEN D AYS BEFORE THE HE ARING IN MA RCH OF 20 03 , WHICH INDICATES THAT THERE WASN'T A RULING ON THE MOTION TO DISMISS THOSE AT ALL , IN THE COURTTIME OOH TILE -- IN THE COU RT FILE , AND THAT THERE WAS THIS PR OBLEM WITH COUNSEL. WHY ISN'T THAT GOOD CAUSE , AS FAR AS THE PARTY IS CONCERNED ?

JUDGE , THE , MR ., JUSTICEWELLS , YOU NEED TO , YOU , WE NEED TO LOOK AT EXACTLY WHAT WAS FILED IN W RITING FIVE DAYS BEFORE THE SHOW CAUSE HEARING.IT IS A THREE-PAGE UNVERIFIED, UNSWORN -TO PLEADING BY COUNSEL. THAT IS WHAT WE LOOK AT UNDER HALL. DID , IS THAT SUFFICIENT TO SHOW GOOD CAUSE.

CHIEF JUSTICE: WELL, I G UESS THIS JUST FOLL OWS, W E WILL LOOK AT EXACTLY WHAT WAS FILED , BUT YOU HAVE A SITUATION WHERE , WAS IT YOUR CLIENT OR DID YOU FILE THEMOTION TO DISMIS S THE COMPLAINT?

YES, I DID , AND SO DID MR . SCHOENE .

CHIEF JUSTICE: AND YOUR INTEREST IS TO GET THIS CASE DISMISSED. PRESUMABLY IT WASN'T A DELING MOTION BUT A SUBSTANTIVEMOTION, AND YOU H O PED TO GET THE CASE DISMISSED. NOW YOU ARE GOING ONE MONTHOUT , TWO MONTHS OUT, THREE MONTHS OUT, FOUR MONTHS OUT. AT WHAT POINT IS IT , WHY IS IT GOT CHA TO THE PLAINTIFF , WHO HERE WE HAVE SOMEBODY, ALAWYER THAT APPARENTLY WAS DISBARRED , AT L EAST IN PART OF BECAUSE OF HIS CON DUCT HERE, WHY ISN'T IT A J OINT OBLIGATION IN A SITUATION HERE, I MEAN I DON'T KNOWTHAT IT SHOULD BE THE TRIAL COURT'S , BUT TO SA Y YOU KNOW , A YEAR IS COMING UP . I SHOULD FIND OUT , I WANT TO GET A RULING. I WANT TO GET MY C LIENT UNDER F ROM -- MY CLIENT OUT F ROM UNDER THIS. IT IS DIFFERENT WHEN THERE IS NO DISCOVERY GOING ON, BUT THAT MOTION IS PENDING . WHAT IS THE POLICY TO SAY UNDER THESE CIRCUMSTANCES , TO JUST GO DISMISS , I AS SUME THE STATUTE OF LIMITATIONS HAS RUN SO THE PLAI NTIFF IS OUT OF COURT.

JUDGE, I RESPECTFULLY , CHIEF JUSTICE, I DO NOTBELIEVE IT IS THE DEFENDANT, IT WAS THE DEFENDANT'S COUNSEL'S DUTY TO SUBMIT THE PROPOSED ORDER. THE JUDGE DIRECTED THE PLAINTIFF'S COUNSEL TO SUBMIT THE ORDER. HE DID N'T DO SO. WE WAIT ED AND WAITED AND WAITED. WE ADVI SED JUDGE HAUSER --

CHIEF JUSTICE: HAD THE MOTION BEEN DENI ED. IS THAT IT?

IT HAD BEEN GRANTED IN PART AND DENIED IN PART.

CHIEF JUSTICE: IS THAT IN THE RECORD THAT IT WAS G RANTED IN PART AND DENIED IN PART?

BY OUR REPRESENTATION TO SAY JUDGE HAUSER AT THE DECEMBER 20 , 20 02 HEARING.

CHIEF JUSTICE: AND YOU SAID COUNSEL DON'T , YOU KNOW , USUALLY THERE WOULD BE AN EXCHANGE OF WHAT IS IN THE ORDER. THERE IS NOTHING THAT DEFENSE COUNSEL DOES TO FOLLOW UP TO SEE WHE THERTHAT IS GOING TO ACCURATELY REFLECT WHAT THE JUDGERULED?

MR . McCU LLOUGH NEVER PREPARED THE ORDER AS DIRECTED, YOUR HONOR, NEVER SUBMITTED --

CHIEF JUSTICE: DID YOU EVER CALL THEM AND SAY HOW COME YOU HAVEN'T PREPARED THE ORDER YET?

WE DID NOT DO SO BECAUSEWE DID NOT KNOW WHET HER HE WAS PRO ST EED SOOEDING WITH THE CASE OR NOT - - PRECEDING W ITH THE CASE OR NOT. WE BELIEVE IT IS NOT COUNSEL'S DUTY TO TRY TO PREPARE OR T O PREPARE AN ORDER THAT THE TRIAL COURTDIRECTED MR. McCULLOUGH TO PREPARE.IT WAS THE PETITIONER'S BURDEN AT THE SHOW CAUSEHEARING TO SHOW GOOD CAUSE, TO SHOW THAT THE BALL WAS SQUARELY IN THE TRIAL COURT'S HA NDS AND NOT THE PETITIONER'S HANDS. THEY DID NOT DO S O. THEY DID NOT SATISFY THAT HEAVY BURD EN . THEY HAD TO HAVE PROVED THAT THE JUDGE E ITHER TO OK THE M ATTER UNDER ADVISEMENT ANDDID NOT RULE , OR THAT SOMEONE PREP ARED A N ORDERAND SUBM ITTED IT

TO JUDGE HAUSER AND HE DIDN'T SIGN THE ORDER. THEY FAILED TO DO THAT. SO THEY --

JUSTICE: YOU ARE REPRESENTING YOUR CLIENT,AND A LAWYER WHO HAS BEEN DIRECTED TO DO SOMETHING , AS OPPOSED TO YOU BEING DIRECTED TO DO IT , YOU DON'T THINK THAT YOU HAVE AN OBLIGATION TO SAY , JUDGE , YOU G AVE HIM A WEEK OR TEN DAYS OR A MONTH OR WHAT EVER , AND IT HA SN'T HAPP ENED. WE WANT THIS LITIGATION TO MOVE ON. WE WANT THE ORDER THAT GRANTS IN PART , THE MOTION THAT WE SUBMITTED THERE , TO BE ENTERED, AND YOU TOLD HIM TO DO IT. THIS LA WYER HAS NOT DONE IT . AND MY CLIENT IS OVER HERE, WAITING FOR THIS LIT IGATION TO MOVE ON. YOU DON'T THINK THAT YOU HAVE ANY OBLIGATION T O LET THE COURT KNOW THAT THEOTHER , THE LAWYER ON THEOTHER SI DE HAS BEEN DERELICT IN HIS DUTY IN THAT CIRCUMSTANCE? IN OTHER WORD S IT LOOKS TO ME THAT THE LAWYER ON THE OTHER SIDE, NOW, I S REALLY ON THE HOT SEAT , IN TE RM S OF NOT CARRYING OUT THE JUDGE 'S DIRECTIONS AND EVERYTHING, BUT YOU ARE SAYING, NO , THAT YOU DON'T HAVE ANY RESPONSIBILITY TO YOUR CLIENT AND TO THE COURT TO CALL THAT TO THE COURT'S ATTENTION? TO GET THIS THING GOING .

YOUR HONOR, IF WE COULD PUT IT I N THE CONTEXT OF THE WAY THE LITIGATION WAS GOING , A T THE TIME THE MOTION T O DISMISS AND STRIKE WAS ARGUED, THE CASE HAD BEEN PENDING FOR OVER TWO AND-A-HALF YEARS, AND IT WAS STILL IN ITS IN ITIAL PLEADING STAGES. WE HAD NO REAL KNOWLEDGE THAT THIS PLAINTIFF REALLY , THE PLAINT IFFS WANTED TO PURSUE THIS CASE , SO WE D O NOT BELIEV E THAT WE HAD ANY OBLIGATION TO S PEED UP THE PROCESS , TO SEE WHETHER MR . McCULLOUGH WAS GOING TO PREPARE THE ORDER.

CHIEF JUSTICE: JUSTICE LEWIS THAT IS HAAS AQUESTION.

JUSTICE: GENERALLY IN THIS THESE CASE S, AT LE AST YOU HAD WON PART IALLY WHAT YOU HAD SOUGHT IN YOUR MOTION TO DISMISS, AND DOESN'T THE PARTY THAT WINS NORMALLY HAVE THE OB LIGATION TO OR DO THE ORDER THAT DEMONSTRATES WHAT IT IS THEY ASKED THE COURT TO DO AND THE COURT DOES IT?

WELL , WE PARTIALLY WON AND W E PARTIALLY LOST AT THAT HEARING, YOUR HONOR , AND , A GAIN , THE RECORD , THE ONLY THING IN THE RECORD IS THE JUDGE HAUSER DIRECTED MR . McCULLOUGH TO PREPARE THE ORDER .

THAT I S IN THE RECORD OR THAT IS IT, THAT IS WHAT YOU ARE ALLEGING.

WE REPRESENTED TO JUDGE HAUSER AT THE EMERGENCY HEARING ON DECEMBER 20 , 2002,THAT THAT IS WHAT OCCURRED, AND IN FACT , IN THE L A CK OF PROSECUTION TO DISMISS THE MOTION.

JUSTICE: WE HAVE , A GAIN, NO TRANSCRIPT OR ANYTHING TO DEMONSTRATE THAT IT WAS IN FACT MR . McCULLOUGH WHO WAS ORDERED TO DO THE ORDER?

OTHER THAN WHAT I HAVE JUST STATED, THAT'S CO RRECT . THERE WAS NO COURT REPORTER AT THE HEARING ON THE MOTIONS TO DISMISS AND STRIKE. THERE WAS AL SO N O --

JUSTICE: AND THE JUDGEDID NOT RECALL WHETHER HE HAD DONE THAT OR NOT.

HE STATED THAT HE HAD N O RECOLLECTION WHEN HE WAS ASKED AT THE DECEMBER 20 , 2002 HEARING .

JUSTICE: WHAT WOULDHAPPEN UNDER YOUR THEORY , IF IT AND EEFERD FOR THE JUDGE AND -- IT APPEARED BEFORE THE JUDGE AND HE SAID OKAY, SUBMIT AN ORDER SE TTING THE CASE FOR TRIAL AND THAT IS A LL THAT IS EVER DONE AND THE PARTY NEVER SENT AN ORDER SETTING THE CASE FOR TRIAL? DISMISS IT AFTER A YEAR?

IT IS THE PLAINTIFF'S BURDEN TO EX PECT E YED THE -- EXPECT EYED O OIT -- EXPEDITE THE CASE FOR TRIA L.

JUSTICE: DO YOU AG REE THAT, IF YOU FILE A NOTEIES FOR TRIAL , THERE IS A PLETHORA OF AUTHORITY THAT SAYS YOU CA NNOT DISMISS IT WITHIN A YEAR BECAUSE YOU ARE WAITING FOR THE JUDGE TO SET I T .

CERTAINLY .

JUSTICE: SO IT IS THE ORDER .

THE ATTORNEY THAT DROPS THE BALL IN THESE CASES --

JUSTICE: YOU AGREE WITH THE THIRD DISTRICT LUKOWSKI CASE?

I DO AS A MA TTER OF POLICY, BUT IN T HIS CASE THAT WAS NOT PROVING THAT THE BALL WAS IN THE TRIAL COURT'S HANDS AND NOT IN THE PETITIONER'S HANDS.

JUSTICE: THAT IS WHYTHERE IS NO CONFLICT HERE I F THIS IS A DIFFERENT CASE FROM THOSE CASES, THEN WHEREIS THE CONFLICT?

I AGREE , AND THE FI FTH DCA'S OP INION IS VERY FACT INTENSIVE. IT SAYS WE AFFIRM , BECAUSEUNDER THE TOTALITY OF THE CIRCUMSTANCES , BASED ON THE LIMITED RECORD BEFORE US , THERE IS N O AB USE OF THE TRIAL COURT'S DISCRETION SHOWN.

JUSTICE: BUT RESPECTFULLY , THE DYE CASE SAYS THAT THERE IS AN OUTSTANDING DISPOSITIVE MOTION , DOES IT NOT? FACIALLY SAYS THAT.

ABSOLUTELY.

JUSTICE: DO WE REALLY BELIEVE THAT DY E IN THIS CASE CAN STAND?

I BELIEVE THAT DYE IS AN ABERRATION AND AN UNWARRANTED EXP ANSION .

JUSTICE: THAT WELL MAY BE, BUT THESE TWO JUST DON'T RUNHEAD ON INTO EACH OTHER? THAT IS WHAT THIS WHOLE CASE IS ABOUT, IS IT NOT? IS THERE WLORNT THERE IS A PENDING AND DIS - - IS WHETHER OR NOT THERE IS A PENDING AND DISPOSITIVE MOTION AND DYE PROVES IT. IT SAYS, NO , YOU LOOK AT THE FACTS AND OTHER THIN GS.

DYE IS A LIT TLE BIT DIFFERENT THAN THIS BECAUSE IN DYE IT WAS SI MPLY FILED. IT WAS NOT AR GUED AND THE JUDGE DIDN'T RULE.

CHIEF JUSTICE: THAT IS ALMOST WO RSE, BECAUSE HOW IS THE JUDGE SUPPOSED TO KNOW IT IS THERE?

THAT IS WHY I DO NOT BELIEVE THAT DYE SHOULD BE ADOPTED.I BELIEVE IT IS AN ABSOLUTE ABERRATION IN THE COURT'S R ULING.

JUSTICE: YOU MAY BE ABSOLUTELY CORRECT. CAN THEY STAN D?

I DON'T THINK SO.

CHIEF JUSTICE: WOULD YOU LIKE TO C REED YOUR TIME ? -- TO KROOED YOUR TIME ? -- TO CEDE YOUR TIME?

GOOD MORNING, YOUR HONORS. I AM JOH N CHANEY , AND I REPRESENT GEORGE LONG AND KERA TECHNOLOGY. O UR MES SAGE TODAY HERE IS THAT THIS IS REAL LY A SIMPLE CASE. THAT IS NOT INVOLVING THE FIRST STAGE OF HALL.IT IS THE SECOND STAGE OF HALL, BUT I THINK THAT WHAT IS VERY IMPORTANT IS TO DETERMINE WHAT WAS IN THE RECORD BEFORE THE TRIAL COURT AT THAT SHOW CAUSE HEARING , AND WE HAVE R AISED REPEATEDLY IN OUR BRIEFS , THAT ALL O F THIS DISCUSSION ABOUT ATTORNEY MISCONDUCT AND , REALLY , THE ONLY TIME THAT THEY ESTABLISH OR MAKE THE ASSERTION IN AFFIDAVIT FORM THAT THE TRIAL COURT HADN'T RULED , IS IN THESE AFFIDAVITS ATTACHED TO THEMOTION FOR A HEARING, THAT THE TRIAL COURT WAS FREE TO TOTALLY IG NORE . AND IF YOU LOOK AT THE THREE-PAGE OBJECTION THAT THIS WAS ALL THAT WAS IN FRONT OF THE TRIAL COURT , AND THIS IS W HY I THINK THAT THEY FA ILED MISERABLY IN SHOWING GOOD CAUSE.

CHIEF JUSTICE: W HO IS IT THAT FILED THAT THREE DAYS BEFORE? WHICH COUNSEL?

THIS IS THE PLAINTIF FS.

CHIEF JUSTICE: WHICHCOUNSEL FOR THE PLAINTIFFS?

MR . M A NN.

THE SUBSTITUTE COUNSEL?

CORRECT.

CHIEF JUSTICE: THE PROBLEM WITH THIS CASE AND I A GREE THAT THE CONDUCT OF THE MAIN COUNSEL , ITSELF, CAN'T CONSTITUTE GOOD DOWE KAU, BUT WE CLEARLY -- GOOD CAUSE, BUT W E CLEARLY HAVE COUNSEL THAT DROPPED THEBALL FOR THE PLAINTIFF, AND THE COURT , AS YOU CAN SEEFROM THE ADOP TION OF THE NEW RULE , HAS DETERMINED , B ASED ON THE ADOPTION OF THE RULE S,THAT THIS ISN'T GOING TO BE GOTCHA ANYMORE, THAT THERE IS GOING TO BE CASE MANAGEMENT, ACTIVE CASE MANAGEMENT, SEE WHAT ISGOING ON , SO IN A CASE LIKE THIS, TEN MONTHS LATER , IT CAN SHOW UP AND THE JUDGE WOULD SAY YOU MEAN NO BODY PREPARED THE ORDER I DIRECTED YOU TO PREPARE ANDIT WOULD GET PREPARED AND GET BACK ON TRACK, AND SO I AM STRUGGLING WITH THIS I DE A THAT MAN Y OF US WERE TRIAL LAWYERS HERE , THAT A JUDGE WOULD EVEN SAY PREPARE A N ORDER AND THEN A YEAR WOU LD GO BY AND NOBODY WOULD INQUIRE IF THE ORDER HAD BEEN INTORD CALL THE LAWYER AND SAY DID YOU FORGET TO PREPARE IT?

YOUR HONOR , I CA N ANSWER THAT, AS FA R AS MY TWO CLIENTS.IF YOU LOOK AT THE MEMORANDUM OF UNDERSTANDING, KERA TECHNOLOGY WAS ACCOMPANY IN SE VERE FINANCIAL DISTRESS. THEY ARE OUT OF BUSINESS SOON AFTER THIS CASE IS FILED. GEORGE LONG , I DON'T WANT TO GET INTO PARTICULARS, BUT HE HAS NE VER BEEN ABLE TO F UND THIS LITI GATION. I , MY DUTY IS TO MY CLIE NT, AND MY CLIENT TOLD ME DON'T DO ANYTHING UNLESS YOU HAVE TO , AND FRANKLY THIS CASE STARTED ON TWO PROMISE OTHER NOT ES. ONE WAS PAID IN FULL SOON AFTER THE CASE WAS FILED. THE OTHER ONE NEVER BECAME DUE. I NEVER THOUGHT THAT THIS CASE HAD ANY MERIT. WE HAD A HEARING. CERTAIN COUNSEL WERE DISMISSED, AND FOR ALL I KNEW , THESE PLAINTIFFS WHO ARE FR OM TAIWAN , DEC IDED TO ABANDON THIS CASE. AND I DON'T BE LIEVE I T WAS MY RESPONSIBILITY , IN VIOLATION OF MY CLIENT'S INSTRUCTIONS, TO GO UNDERTAKE SOME ACTIVITY TO MOVE THE CASE FORWARD, AND THAT IS WHERE IT STOOD AS FAR AS MY CLIENT WAS CONCERNED, AND THERE IS NO DOUBT IN MY MIND THAT THE COURT TOLD MR . McCULLOUGH TO PREPARE AN ORDER.

CHIEF JUSTICE: YOU TESTIFIED, WAS THAT TESTIFIED TO?

YES. I DID NOT PUT IT IN MY MOTION, AND FRANKLY MR . McCULLOUGH AND I HAVE HAD CASES TOGETHER. IT IS NOT A NICE THING TO PUT IN A MOTION. I JUST PUT IN MY MOTION THAT AN

ORDER HADN'T BEEN ENTERED.OKAY. BUT I THINK , IF SOMETHING E LSE HAPPENS , IT IS U P TO THE PLAINTIFF AT THAT SECOND PHASE OF SHOW CAUSE, TO TE LLTHE COURT ABOUT IT , AND I THINK PUT IT IN EVIDENTIARY FORM. THIS COURT SAID , IN SOLOMON , THAT DURING THE SECOND ST EP , THE ANAL YSIS FA VORS THE DEFENDANT. THE PLAINTIFF HAS A HIGH BURDEN TO ESTABLISH GOOD CAUSE. I DON'T THINK THIS THREE-PAGE DO CUMENT UN SWORN , MEETS THAT BU RDEN .

JUSTICE: IS IT TRUE THAT NONE OF THE PART Y'S DOCUMENTS IN THIS CASE WERE SWORN? THERE WAS NO SWORN TESTIMONY , EITHER WAY, ABOUT WHAT HAPPENED ON JULY 9?

EVERYTHING THAT IS IN AFFIDAVIT FORM IS IN THIS, THE AFFIDAVIT S ATTACHED TO THE MOTION FOR REHEARING , WHICH I THINK THE LA W IS CLEAR THAT THE JUDGE R OACH WAS FREE TO IG NORE THOSEENTIRELY. THE OTHER --

JUSTICE: YOUR FILING YOUR MOTION OR IN RE PLY TO HISRESPONSE, YOU NEVER FILED ANY AFFIDAVITS SAYING THAT THE JUDGE HAD RULE D ON THE MOTION AND INSTRUCTED MR . McCULLOUGH T O FILE A --

NO, YOUR HONOR , WE WERE PREPARED TO , BUT WE GET THIS IN THE MAIL AS COMPLETELY UNSWORN, AND WHEN YOU LOOK AT THIS.

JUSTICE: BUT I AM SAYING WHEN YOU FILE YOUR MOTION TO DISMISS AND AFTER HE FILED THE RESPON SE, YOU DIDN'T FILE AN AFFIDAVIT , EITHER.

NO. BECAUSE I BELIEVE --

JUSTICE: SO WE CAN'T TAKE YOUR WORD FOR IT JUST LIKE WE CAN'T TAKE HIS WORD FOR IT. ALL WE KNOW FROM THE RECORD HERE, ALL WE CAN SAY IS THAT IT WAS DISPUTED , FOR PURPOSES OF WHAT EVER LAW WE ARE GOING TO W RITE.

I THINK THAT LEADS US TO THE SAME RESULT, BECAUSE I BELIEVE THAT M Y BURDEN IS TO FILE A MOTION THAT SAYS LOOK AT THE DOC KET. NOTHING HAS HAPPENED FOR THELAST YEAR. I BELIEVE THAT IS MY SOUL BUR DEN. THEN WHEN WE GO --

JUSTICE: UNDER WATSOWSKI, WHEN YOU LOOK AT THAT RECORD, MAYBE MORE THAN A YEAR , NOTHING HAD HAPPENED. A M OTION TO RECUSE HAD BEEN FILED , CORRECT?

YES, SIR.

JUSTICE: SO I MEAN, WHAT - - THAT DOESN'T ALWAYS ANSWER THE QUESTION. THIS COURT HAS SAID THAT , NO , THAT SOMETHING ELSE HAS TO HAP PEN.

I READ THAT CASE AS BEING B ASED ON A RULE OF JUDICIAL ADMINISTRATION THAT WAS A SPECIFIC DIRECTIVE TO THE T RIAL COURT TO DISP OSE OF THAT MOTION WITHIN 30 D AYS .

JUSTICE: ON REC USAL , SO IT SHOULD BE LI MITED JUST TO RECUSAL CASE S AND THAT IS WHAT THE BODY OF LAW SHOULD BE.

JUDGE, IF I COU LD, I N PARAGRAPH 2-A, THIS IS THAT OBJECTION, THE ONLY THIN G THAT WAS IN FRO NT OF THE TRIAL COURT , THE MOTIONS WERE ARGUED ON JULY 9 , 2001, BUT NO ORDER WAS EVER ENTERED THERE ON BY THE PREDECESSOR JUDGE.THAT IS THE ONLY FACT THAT THEY PUT IN FRON T OF THE TRIAL COURT , AND THAT IS APPARENT FROM THE RECORD . THE HALL CASE C ITED LITTLE VERSUS SULLIVA N ABOUT GOOD KAURX AND LITT LE SAYS , AND THIS I S - - GOOD CAUSE , AND LITTLE SAYS, AND THIS IS A 1965 SUPREME COURT CASE , THAT GOOD CAUSE , FINDING IT IS NOT AN ARBITRARY OR UNRESTRAINED, NOT A PRODUCT OF UNRESTRAINED DISC

RETION . I AM PARAPHRASING. GOOD CAUSE M UST HAVE EVIDENTIARY SUPPORT. WHERE IS THE EVIDENTIARY SUPPORT IN THIS CASE? I DON'T BELIEVE THIS REALLY JUST L E GAL ARGUMENT PROVIDING THE COURT WITH ABSOLUTELY NO FACTS THAT WEREN'T APPA RENT FROM JUST LOOKING AT THE RECORD , MEETS THE HIGH BURDEN OF SHOWING GOOD CAUSE, AND I THINK THAT IS THE RESOLUTION OF THIS CASE. AND IF SOMETHING ELSE WAS RAISED , THE RE IS NO TRANSCRIPT. BUT THERE ARE OTHER CASES THAT SAY LEGAL ARGUMENT IS NOT GOOD C AUSE I N WR ITING .

JUSTICE: IN THE WATSOWSKI , WAS THERE AN AFFIDAVIT FILEDBY THE IMPRISONED MR. ESCLOTTA?

NO, YOUR HONOR, BUT I BELIEVE THAT THE MOTION T HAT WAS PENDING HAD TO BE BROUGHT TO THE COURT 'S ATTENTION IN WRITING FIVE DAYS BEFORE THE HEARING. AND THIS DOCUMENT DOESN'TBRING ANYTHING TO THE COURT'S AT NE XT WRITING.

WAS THAT DONE IN WATSOWSKI?

I CAN'T SAY. I CAN'T SAY. I BELIEVE THAT THIS CASE IS A STRAIGHTFORWARD APPLICATION OF THE TWO-STEP PROCESS IN HALL , AND WHEN YOU LOOK AT WHAT I S ACTUALLY BEFORE THE COURT , IT JUST CAN'T MEET THAT HIGH BURDEN TO SHOW GOOD CA USE. HAVE ANY OTHER QUESTIONS FOR ME ON OTHER ISSUES?

WHAT ABOUT THE APPLICATION OF AMENDED RULES ?

I AM SO RRY , BUT I DON'T , IT SEEMS TO ME THAT THE ORDER , THE FINDING, THE DECISION THAT IMPLEMENTED THE RULE SAID THAT THEY WERE EFFECTIVE AS OF JULY 1 , 2006. I THINK THE DISCUSSION , REALLY, ENDS THERE. I DON'T KNOW HO W YOU CAN GO BACK THREE YEARS AND SAY WE HAD TO FILE SOMETHING , YOUKNOW, AFTER TEN MONTHS . IT, TO ME , IS JUST NOT A WORKABLE ARGUMENT. THANK YOU, YOUR HONOR.

I WILL TR Y TO BE AS BRIEFAS I CAN , JUST TO ADDRESS REAL QUICKLY , THE ARGUMENT THAT WAS BROUGHT UP BY COUNSEL REGARDING PRESERVATION OF THE GOOD CAUSE ISSUE.

JUSTICE: BEFORE YOU GET TO THAT , WOULD YOU AGREE THAT THE , WATSOWS ASK. I -- THE WATSOWSKI CASE WAS A CASE THAT WAS DEALING WITH A VERY S PECIFIC MOTION THAT REQUIRED THE TRIAL COURT TO ACT WITHIN A CERTAIN PE RIOD OF TI ME? I MEAN, THAT IS A DIFFERENT SITUATION THAN THIS MOTIONTO DISMISS. CORRECT?

I THINK IT IS DIFFERENT , BUT I, ALSO , THINK IT IS ANALOGOUS , BEC AUSE THE DUTY TO ENTER THAT ORDER STILL RESTS WITH THE TRIAL COURT , AND THAT IS A NONDELEGABLE DUTY.

JUSTICE: THE RULE IN THAT INSTANCE PUT THE BURDEN ON THE TRIAL COURT TO ACT.

THAT IS TRUE.

JUSTICE: AND THAT WAS THE BASIS OF OUR DECISION, CORRECT?

I D O AGRE E THAT THE RULE IS DIFF ERENT. IT RE QUIRES IMMEDIATE ACTION. HOWEVER, I DO BELIEVE THAT THE TRIAL COURTS DO HAVE DUTY TOYS PROMPTLY ENTER ORDERS, AND IF NOT --

JUSTICE: LET ME ASK AQUESTION. ON A MOTION TO DISMISS, WHERE DOES THE REQUIREMENT MANDATE THAT THE COURT ENTER A WRIT TENORD HE R? THERE WAS AN ORAL PRONOUNCEMENT ALLEGEDLY , AND IF THE JUDGE HAD SAID IGRANT IN PART AND DE NY IN PART, THEN THE PART IES COULD SIMPLY HAVE ANSWERED TO THAT ORAL BY FILING RESPONSIVE PLEADINGS OR BY FILING A A MENDED PLEA DING. COULD HAVE COMPLIED WITH THE ORAL

ORDER OF THE COURT, WITHOUT THEIR EVER BEING A W RITTEN ORDER ENTERED AS O PPOSED TO THE RECUSAL .

SURE. THEY COULD HAVE DONE THAT BUT THEY DIDN'T. IT IS ALSO IMPORTANT THAT THE FACT THAT IT IS ACTU ALLY WRITTEN AND ENTERED INTO , THE DOC KET IS WHAT MAKES IT AN ORDER AND ACTUALLY RENDERS THE ORDER UNDER THERULES , BUT I DO UNDERSTAND WHAT YOU ARE SAYING. I THINK THE POINT I S HERE THAT IT DIDN'T HAPP EN. WHAT WE DO KNOW IS THAT THERE WAS NEVER AN ORDERTHAT WAS ENTE RED, AND THAT IS A IMPO RTANT FACT HERE , BECAUSE NOBODY OTHER THAN THE TRIAL COURT CAN ENTER THAT ORDER , AND -

JUSTICE: DO YOU AGREE OR DISAGREE THERE WAS NOTHING KEEPING THE PARTIES FROM GOING FORWARD ON THIS BASIS.

COULD THE PARTIES HAVE GONE FORWARD? Y ES. DO THEY HAVE TO? THAT IS THE ISSUE. AGAIN, I WISH THIS WAS A PERFECT CASE WHERE EVERYBODY DID SOMETHING PRO ACTI VITY AND --- PROACTIVELY AND CLEARLY IT DIDN'T HAPPEN THAT WAY AC ROSS THE BOARD FOR WHATEVER REASON. THE ORDER HAS TO BE ENTERED, AND FOR PURPOSES OF SIGNIFICANCE OF THE ORDER , I THINK NOT TO BE HYPER TECHNICAL BUT IT IS IMPORTANT, AND THE FACT OF THE MA TTER IS COULD THEPLAINTIFF AND SHOULD THEPLAINTIFFS HAVE BEEN ENTITLED TO RE LY ON THE FACT THAT HAD HAD NOT BEEN ENT ERED.

MY CONCERN HERE IS DO YOU AGREE THAT THIS WO ULD NOT HAVE BEEN A DISPOSITIVE ORDER AS TO THE CASE , UN LIKE THE DYE CASE WAS A MOTION TO SMITH CASE FOR FAILURE TO STATE A CAUSE OF ACTION . THIS MOTION ONLY WE NT TO A PART CLAIM. THE CLAIM ST ILL EXISTED. E VEN ON THE MOTION AS FILED.

I DON'T WANT TO KIND OF PARSE WORDS WITH YOU. I UNDERSTA ND WHAT YOU ARE S AYING CAN SOMETHING HAVE HAPPENED? YES, IN ANY IN STANCE SOMEONECOULD HAVE FILED ANYTHING IN A CASE , AND I UNDERSTAND WHAT YOU ARE TRYING TO GET AT BUT I DO THINK IT IS IMPORTANT FOR PURPOSES OF ESTABLISHING A BRIGHT-LINE RULE THAT THERE IS UNIFORMITY, CONSISTENT WITH WHAT THAT THIS COURT HAS TRIED TO DO IN VARIOUS CASES TO CONSISTENTLY A PPLY THE RULE TO AM END THE GOTCHA EFFECT.

CHIEF JUSTICE: YOU ARE OUT OF YOUR REBUTTAL, BUTYOU ARE OUT O F TI ME.

THAN K YOU , YOUR HONOR.

CHIEF JUSTICE: I THANK BOTH SI DES FOR AN EXCELLENT ORAL ARGUMENT.I AM SURE FOR THE OBSERVERS IN THE AUDI ENCE, AL THOUGH MAYBE THE SUBJECT MATTER WASN'T THE MOST INTERESTING FOR OUR STU DENTS , THE LEVEL OF ADVOCACY WAS SOMETHING WE CAN BE PROUD OF. THANK YOU VERY MUCH. THE COURT WILL TAKE ITSMORNING RECESS OF 15 MINUTES.

MARSHA L: PLEASE RISE. THANK BOTH SIDES FOR THAT.