Larson & Larson v. TSE Industries, Inc.

SC08-428

>> NEXT CASE ON THE DOCKET IS
LARSON & LARSON, P.A., VERSUS TSE
INDUSTRIES, INCORPORATED.
>> MR.^VESELY, ARE YOU READY TO
PROCEED?
>> MAY IT PLEASE THE COURT.
MY NAME IS BRANDON VESELY.
I'M FROM THE LAW FIRM OF KEANE,
REESE, VESELY, AND GERDES IN
ST. PETERSBURG, FLORIDA.
I'M HERE ON PETITIONER'S.
HERBERT LARSON, BILL LARSON IS
WHO IS HERE TODAY AND THE
LARSON & LARSON, P.A. LAW FIRM.
YOUR HONOR, THE SECOND DISTRICT
DECISION BELOW TURNS FLORIDA
STATUTE OF LIMITATION
JURISPRUDENCE ON ITS HEAD.
>> LET'S, IF YOU WOULD START
WITH THE FACTS WHICH, ARE
SOMEWHAT CONFUSING TO ME IN
THAT, WHAT THE DISTRICT COURT'S
OPINION SAYS ABOUT WHAT EVENTALLY
HAPPENED HERE IS, AS I
UNDERSTOOD IT, THAT THERE WAS,
A JUDGMENT, THAT WAS NOT
APPEALED, THAT WAS IN AUGUST,
OF WHATEVER YEAR IT WAS,
CORRECT?
>> AUGUST OF 2002.
>> RIGHT.
AND THEN, BUT THE COURT DID,
HAVE A PROCEEDING AS TO WHETHER
ATTORNEY'S FEES WERE GOING TO BE
ASSESSED AND MADE A
DETERMINATION AT THE SAME TIME
THAT THAT JUDGMENT WAS ENTERED
THAT THERE WOULD BE ATTORNEY'S
FEES THAT WOULD BE ASSESSED
BUT, THAT THE DETERMINATION AS
TO THE AMOUNT WAS GOING TO BE
LATER, IS THAT CORRECT?
>> THAT'S CORRECT.
LET ME BACKTRACK IF I COULD
HELP WITH YOU THIS THERE'S TWO
CATEGORIES OF DAMAGES THAT THE

RESPONDENT, TSE, IS SEEKING IN THIS CASE.
>> OKAY.
>> ONE CATEGORY OF DAMAGES IS THOSE ATTORNEY'S FEES THAT YOU'RE TALKING ABOUT THAT FRANKLIN INDUSTRIES, THEIR OPPONENT WAS SEEKING IN THE PATENT INFRINGEMENT ACTION ON BASIS IT WAS EXCEPTIONAL CASE. FIRST CATEGORY OF DAMAGES I SAY IT'S FIRST BECAUSE IT'S FIRST IN TIME ARE THE DAMAGES THAT THE ATTORNEY'S FEES THEY PAID TO THE LARSON DEFENDANTS FOR THEIR MALPRACTICE IN PROSECUTING THE CASE.
>> OKAY.
>> AFTER THOSE --.
>> IS THERE, ARE YOU CONTENDING THAT THE STATUTE RAN ON THE ASSESSMENT OF ATTORNEY'S FEES FOR WHICH THE JUDGE WAS GOING TO MAKE A LATER DETERMINATION AS TO THE AMOUNT?
OR DO YOU CONCEDE THAT THE STATUTE OF LIMITATIONS HAD NOT RUN AS TO THOSE ATTORNEY'S FEES?
>> YOUR HONOR, I BELIEVE THERE IS ONLY ONE STATUTE OF LIMITATIONS AND THAT STATUTE OF LIMITATIONS RAN, BEGAN TO RUN WHEN THE FINAL JUDGMENT BECAME FINAL.
>> THIS IS MY PROBLEM ON THIS BECAUSE I CAN SEE WHERE A SITUATION WHERE THE ATTORNEYS FEES WAS MAYBE BASED ON OFFER OF JUDGMENT OR SOMETHING AND THE MALPRACTICE WAS NOT PUTTING ON A WITNESS, SOMETHING THAT DOESN'T NECESSARILY, ISN'T INTERTWINED.
BUT CORRECT ME IF I'M WRONG, BUT THE WHOLE BASIS OF THIS MALPRACTICE CLAIM WAS NOT THAT THE FIRM WAS UNSUCCESSFUL, BECAUSE EVERY, EVERY LAWYER WOULD BE SUBJECTED TO A LAWSUIT IF THEY JUST LOST A CASE AND THEN, THEY COULD BE SUED.
THE BASIS FOR THE MALPRACTICE IS THAT THEY FILED AND CONTINUED TO PROSECUTE A

FRIVOLOUS CLAIM AND, WITH THAT IN MIND, I DON'T SEE HOW IN THIS CASE, THE TWO THINGS AREN'T INTERTWINED, WHICH IS, THEY WOULDN'T HAVE BEEN ABLE TO RECOVER DAMAGES JUST FOR THEIR ATTORNEY, JUST FOR ATTORNEY'S FEES THEY PAID TO LARSON BUT FOR THE FACT THAT THE CLAIM OF MALPRACTICE LARSON SHOULD HAVE ADVISED THEM NOT TO BRING IT AND WAS FRIVOLOUS IN CONTINUING TO PROSECUTE IT AND THAT DETERMINATION WAS AND DETERMINATION WHAT THOSE DAMAGES WERE, REALLY TO ME IN THIS CASE, WAS REALLY THE GIST WHAT THIS CASE WAS ABOUT. HELP ME WITH THAT SITUATION.
THIS ISN'T JUST LIKE A PREVAILING PARTY ATTORNEY'S FEE CLAIM.
THIS IS VERY SERIOUS STUFF TO SAY THIS WAS FRIVOLOUS, UNWARRANTED, ALL THOSE WORDS THAT THE TRIAL COURT USED.
>> LET ME HELP YOU BY THIS.
IN HYPOTHETICAL SITUATION --
>> AM I CORRECT ON THAT, THAT IS THE --
>> I DON'T THINK YOU'RE CORRECT BUT I WILL TRY TO TELL YOU IN THE BEST WAY THAT I CAN.
I THINK THE CONFUSION HERE IS WHETHER OR NOT THEY HAD A CLAIM AT THE TIME THAT THE FINAL JUDGMENT BECAME FINAL BECAUSE FRANKLYNN ATTORNEY FEES TWO MONTHS LATER THOSE FEES WEREN'T IN PLAY THE FINAL JUDGMENT BECAME FINAL.
THEY IN FACT HAD A CLAIM FOR MALPRACTICE AT TIME THE FINAL JUDGMENT BECAME FINAL.
IF YOU LOOK AT THEIR COMPLAINT THEY'RE ALLEGING LARSON DEFENDANTS COMMITTED MALPRACTICE DURING THE CASE IN CHIEF AND CAUSED THEM TO CONTINUE TO PAY ATTORNEY'S FEES THROUGH THE FINAL JUDGMENT.
>> WHAT WAS THE MALPRACTICE THEY WERE CLAIMING DURING THE TRIAL?

>> THERE WERE NUMBER OF INCIDENTS --
>> NEGLIGENT NEGLIGENCE WAS FAILURE TO ADVISE TSE TO SETTLE OR DROP THE PATENT INFRINGEMENT SUIT AND CERTAINLY, THAT ISSUE AS TO WHETHER THERE WAS, YOU KNOW, MALPRACTICE IN THAT REGARD WOULD TEND, AND, DEPEND ON, WHETHER THE TRIAL COURT FOUND THAT IT WAS FRIVOLOUS TO BRING THIS CAUSE OF ACTION.
>> I, I DISAGREE WITH THAT. I BELIEVE THAT THEY HAD A CLAIM.
IF YOU WERE TO STRIP AWAY AND IGNORE THE MOTION FOR EXCEPTIONAL CASE, THAT WAS BROUGHT BY FRANKLYNN INDUSTRIES AND INIGNORE THAT FOR A MOMENT AND STEP BACK AND SAY, DID THEY HAVE A CLAIM FOR MALPRACTICE? I BELIEVE THE ANSWER IS, YES THEY DID.
IN FACT IT'S IN THEIR COMPLAINT THAT'S THEIR ALLEGATION.
THAT LARSON, LARSON DEFENDANTS COMMITTED MALPRACTICE IN PURSUING THIS CASE AND ALLOWING THIS CASE TO GO FORWARD THROUGH FINAL, THROUGH THE FINAL JUDGMENT WHEN THEY SHOULD HAVE ADVISED THEM LONG AGO THAT THIS WAS A BAD CLAIM.
>> WHEN DID THEIR DAMAGE, WHEN DID THEY SUSTAIN DAMAGES?
>> ACCORDING TO THEIR COMPLAINT AND ACCORDING TO WHAT THE CLAIM, THEY, THE FIRST DOLLAR OF DAMAGES BECAME FIXED AT THE POINT THE FINAL JUDGMENT BECAME FINAL.
>> BUT DIDN'T THEY INCUR DAMAGE THAT THEY'RE COMPLAINING ABOUT IN THE EXTRAORDINARY ASSESSMENT OF FEES?
>> THAT'S THE CONTINUATION OF DAMAGES.
AS YOU KNOW UNDER THE ACCRUEL RULE, THE RULE OF ACCRUEL IN FLORIDA THE FIRST DOLLAR OF DAMAGES --
>> NO ONE CITED BUT THIS SOUNDS

AWFUL LIKE A ARGUMENT MEAD IN THE FREMONT INDEMNITY.
>> IN THE PEOPLE MONTH CASE I BELIEVE YOUR DISSENTING OPINION ADDRESSED WHETHER OR NOT IT WAS POSSIBLE FOR THE FINAL JUDGMENT TO BECOME, I'M SORRY, IF THE STATUTE OF LIMITATIONS BEGIN RUNNING WHEN THE FIRST DOLLAR OF DAMAGES WAS INCURRED.
>> RIGHT.
>> PRIOR TO THE FINAL JUDGMENT BECOMING FINAL.
AND THE COURT, THIS COURT STATED IT SHOULDN'T BEGIN AT THAT POINT BECAUSE THERE WAS NO, THERE WAS ALWAYS AN OPPORTUNITY, ALWAYS A CHANCE THOSE DAMAGES WERE HYPOTHETICAL, ALWAYS A CHANCE, APPELLATE, APPEAL OR POSTJUDGMENT MOTION MIGHT CHANGE THE OUTCOME.
IN THIS CASE --
>> ISN'T THAT TRUE HERE?
I MEAN, ISN'T THE MAJORITY, WHAT THE MAJORITY IS SAYING, SAID IN FREMONT, ISN'T THAT TRUE HERE?
BECAUSE THE, THE APPEAL WAS, COULD STILL BE MADE OF THE DAMAGE FOR THE EXTRAORDINARY CIRCUMSTANCE UP UNTIL THE TIME IT WAS DISMISSED IN OCTOBER?
>> YOUR HONOR, THERE WAS TWO CATEGORIES OF DAMAGES.
THERE WAS 700, I DON'T KNOW THE EXACT NUMBER, BUT A LOT OF MONEY THAT WAS PAID TO THE LARSON DEFENDANTS, THAT THEY'RE SEEKING REIMBURSEMENT FOR, HAD NOTHING TO DO WITH THE FREMONT, WITH THE FRANKLYNN ATTORNEY FEES WHICH IS A WHOLE SEPARATE CATEGORY.
>> HOW DO WE DEAL WITH THE SPECTER, IF WE ACCEPT YOUR THEORY HERE, THAT YOU'VE GOT THE CLIENTS THAT ARE BEING REPRESENTED BY THIS LAWYER IN THESE POSTJUDGMENT MATTERS, THAT YET, THEY ARE COMPELLED AT THE SAME TIME TO BRING A LAWSUIT FOR PREJUDGMENT

DAMAGES, AND YET CONTINUE WITH
THE SAME LAWYER WHO IS
DEFENDING A CLAIM FOR
EXTRAORDINARY CIRCUMSTANCES
ATTORNEY FEES?
IS THAT FACTOR RELEVANT OR
SHOULD IT BE RELEVANT TO OUR
ANALYSIS?
YOU UNDERSTAND MY --
>> I APPRECIATE THE QUESTION.
I UNDERSTAND IT COMPLETELY.
>> THAT THE SAME LAWYER --.
>> ISSUE, YOUR HONOR, IN
FLORIDA, THE FLORIDA COURTS
HAVE CREATED A JUDICIAL SCHEME
THROUGH THE CASE LAW AND
THROUGH THE STATUTES THAT
PROVIDE FOR THAT SCENARIO AND
IT SAYS THAT IN THE RARE
CIRCUMSTANCE WHERE YOU WON'T,
EVERYTHING IS NOT RESOLVED WHEN
THE FINAL JUDGMENT COMES FINAL,
THERE IS AN OPPORTUNITY THERE
MIGHT BE SOME DAMAGES
POSTJUDGMENT, AS THERE WERE IN
THIS CASE, THERE'S TWO YEARS.
THEY WERE RESOLVED IN THIS CASE
IN ONE MONTH.
YOU DON'T HAVE TO BRING THE
CLAIM FOR TWO YEARS.
AND IT'S IN THE RARE
CIRCUMSTANCE THAT THE MOTION
FOR EXCEPTIONAL CASE WASN'T
RESOLVED WITHIN THE FIRST TWO
YEARS, POSTJUDGMENT, THEN YOU
COULD PROBABLY ENTER, YOU COULD
FILE THE MOTION AND STAY IT.
THERE'S A LOT OF MECHANISMS YOU
COULD DO TO STAY THIS --
>> MAY I ASK A QUESTION THOUGH
ON THIS?
THIS IS REALLY SORT OF PART OF
WHAT JUSTICE ANSTEAD IS ASKING
AND WHAT TROUBLES ME.
FIRST OF ALL, HAVE WE, IN A
SITUATION OF LITIGATION
MALPRACTICE, HAVE WE DEALT WITH
THE ISSUE OF THE ROLE OF
ATTORNEY'S FEES, EITHER WHETHER
PREVAILING PARTIES OR WHATEVER,
WHETHER THE LITIGATION IS
FINAL?
HAVE WE IN ANY OF OUR CASES?
>> IN THE SILVERSTONE CASE THAT

COURT ENTERED, IT SAID THE
BRIGHT-LINE RULE IS WHEN THE
FINAL JUDGMENT BECOMES FINAL.
THIS IS --
>> THIS IS THE ISSUE, AGAIN,
LET ME ASK YOU, HAVE WE DEALT
WITH THE ISSUE OF ABOUT THE
ROLE OF ATTORNEY'S FEES IN
WHETHER LITIGATION IS FINAL OR
NOT?
>> I, LIKE POSTJUDGMENT
ATTORNEY'S FEES?
I DON'T BELIEVE IT'S EVER BEEN
ADDRESSED.
>> OKAY.
SO THIS IS A CASE OF FIRST
IMPRESSION WE'RE GOING TO BE
TRYING TO APPLY WHAT WE HAVE,
THE PRINCIPLES THAT WE'RE
TRYING TO DO IN A WAY, IT'S
ALMOST LIKE IT'S, WE'VE BEND
OVER BACKWARDS TO HELP
ATTORNEYS BECAUSE WE, IN MY
VIEW, BECAUSE, WE'RE SAYING,
LISTEN, WE REALLY WANT TO WAIT.
WE DON'T WANT THIS THING TO BE
BROUGHT PREMATURELY.
AND MY PROBLEM HERE ON BOTH
SIDES IS THAT, OBVIOUSLY THE
LAWYERS WHO WERE BRINGING THE
MALPRACTICE CLAIM THOUGHT IT
WAS RUNNING FROM OCTOBER.
THEY WERE VERY DILIGENT WHAT
THEY BROUGHT IT.
IT'S NOT LIKE THEY SCREWED UP.
THEY MUST HAVE THOUGHT IT RAN
FROM STIPULATION FOR DISMISSAL
WAS ENTERED.
BUT WHEN YOU HAVE THE FACT
THAT, YOU CAN'T GO TO TRIAL IN
THIS CASE ON A MALPRACTICE
AGAINST A THE LAWYERS WITHOUT
BEING ABLE TO SAY, AND, THERE
WAS A TRIAL COURT FINDING THAT
THERE WERE EXCEPTIONAL
CIRCUMSTANCES.
THAT THIS WAS A FRIVOLOUS
LAWSUIT.
AND EVEN THOUGH YOU SAY, WELL
THERE'S TWO YEARS TO BRING IT,
WHAT I'M SAYING ABOUT THIS
CASE, IS IT DOESN'T SEEM TO ME
THAT, AND, THAT IS AN
ESSENTIALAL PART OF THE CASE.

AND FOLLOWING UP WITH WHAT JUSTICE ANSTEAD IS SAYING, WE REALLY WOULD BE FORCING, AN ATTORNEY TO SAY, LISTEN, YOU KNOW, I DIDN'T ACT FRIVOLOUSLY, BUT THEN, AND TAKE TWO DIFFERENT POSITIONS AND FORCE THAT CLIENT TO GET A DIFFERENT LAWYER.
AND THOSE TWO THINGS LEAD ME TO BELIEVE THAT THESE KIND OF CASES, THAT THIS ISN'T ANCILLARY.
ATTORNEY FEES IN SITUATIONS LIKE THIS COULD BE A MAJOR PART OF THE LAWSUIT.
MAYBE THEY, YOU KNOW, THERE WAS A THOUSAND OF DAMAGES BUT THE ATTORNEY FEES ENDED UP BEING, YOU KNOW, $500,000.
SO I DON'T SEE HOW ATTORNEYS FEES BEING WHAT THEY ARE, THIS DAY AND AGE CAN BE CONSIDERED NOT PART AND PARCEL OF THE FINAL JUDGMENT IN A CASE WHERE THEN SOMEONE IS GOING TO BE SUING SNORE FOR MEDICAL MALPRACTICE, I MEAN LEGAL MALPRACTICE.
HELP ME ON THAT.
I REALIZE IT'S A DIFFERENT POINT.
THAT'S WHAT I'M STRUGGLING WITH.
>> YOU'RE YOUR EXAMPLE MAYBE THERE IS $1,000 OF DAMAGES AND 500,000 LATER ON, I THINK THIS COURT IS ACTUALLY MOVING AWAY FROM THE TRADITIONAL RULE OF ACCRUEL WHICH GOVERNS STATUTE OF LIMITATIONS IN FLORIDA.
IF THERE IS $1,000 OF DAMAGES YOU NEED TO BRING YOUR CLAIM.
YOU CAN'T WAIT.
>> WOULD NEVER COME UP WITH THE FINAL JUDGMENT RULE.
HERE, BY THAT, BY THE TIME THIS LAWSUIT WAS BROUGHT AND THE FIRST $1,000, OR 2,000 WAS PAID TO THE ATTORNEY, THERE WAS, YOU KNOW, UNDER THAT THEORY THERE WOULD BE A CAUSE OF ACTION TO ACCRUEL.
>> I READ SILVERSTONE TO BE

TOTAL AGREEMENT WITH CITY OF MIAMI VERSUS BROOKS WHICH IS SEMINAL CASE.
>> DOESN'T SILVERSTONE USE THE LANGUAGE WHICH RESULTS IN DAMAGE TO THE CLIENT?
AND HOW CAN, THE POSTJUDGMENT DAMAGES THAT WERE AWARDED IN THIS CASE NOT BE A PART OF THE DAMAGES THAT WERE AWARDED TO THE CLIENT?
>> THEY ABSOLUTELY WERE A PART OF IT BUT THEY WEREN'T THE FIRST DOLLAR.
>> DON'T YOU HAVE TO LOOK AT THE UNDERLYING ACTIVITIES OF WHAT CREATED THE MALPRACTICE ITSELF?
I MEAN, HERE YOU'VE GOT SOME UNDERLYING EVALUATIONS OF THE CASE BY A LAWYER SUBJECTED TO MALPRACTICE AS THE UNDERLYING CASE.
THAT IS THE FIRST SET OF DAMAGES YOU'RE TALKING ABOUT.
BUT HERE THERE ARE SOME SANCTIONS OR THIS EXCEPTIONAL FEE AWARD, AND THAT COULD ARISE SEEMS TO ME UNDER 57.105 IN FLORIDA, FAILURE TO EVALUATE MERITS OF THE CASE IN PROPER WAY OR SOME KIND OF PROCEDURAL PROBLEM.
AND A PROCEDURAL PROBLEM, WEREN'T THERE HERE A FAILURE TO DISCLOSE IN INTERROGATORIES?
>> THERE WAS.
>> WHICH SEEMS PROCEDURAL IN NATURE, WHICH SEEMS LIKE IT WOULD CREATE AT LEAST A POSSIBILITY THAT THE SECOND EXCEPTIONAL FEE AWARD COULD BE REVERSED ON APPEAL AND, COME OUT IN A DIFFERENT WAY THAN THE FIRST JUDGMENT?
>> FIRST OF ALL, YOU HAVE TO RECOGNIZE THAT ALL THE MALPRACTICE IN THIS CASE, IF AT ALL, IF IT OCCURRED AT ALL, OCCURRED IN THE MAIN CASE, BEFORE FINAL JUDGMENT EVERY WAS ENTERED.
THERE IS NO ALLEGATIONS THAT ANYTHING HAPPENED AFTER THE

FINAL JUDGMENT TO ALLOW THE MOTION FOR EXCEPTIONAL CASE TO BE PUT FORTH.
I THINK WHAT YOU'RE SAYING IS, THAT MAY BE.
THAT THEY WOULD HAVE AN OPPORTUNITY TO APPEAL THE MOTION FOR EXCEPTIONAL CASE AND THEY MAY NOT BE SUBJECTED TO THING FRANKLYNN ATTORNEY'S FEES.
LIKE I SAID IN MY BRIEF, IT DOESN'T NEGATE, NOTHING THAT OCCURRED IN THE MOTION FOR EXCEPTIONAL CASE DIDN'T NEGATE THEIR ALLEGATION THAT THEY WERE DAMAGED AS A RESULT OF WHAT HAPPENED IN THE MAIN CASE.
>> WHY WOULDN'T THAT BE ANALOGOUS TO, LET'S SAY THE LAWYER CONVINCED THEM TO TAKE AN APPEAL.
WE'VE SAID IF THERE'S AN APPEAL YOU HAVE TO WAIT FOR THE APPEAL TO BE OVER.
>> THAT IS SILVERSTONE.
>> THAT REALLY NO MERIT TO THE APPEAL.
THE LAWYER CONVINCED THEM TO TAKE THE APPEAL.
>> RIGHT.
>> THAT POSTPONES THE INEVITABLE DAY.
BUT IF THEY TAKE THE APPEAL, AND, THEY STILL LOSE, WHAT WE'VE SAID IS, WELL, THAT EXTEND THE LIMITATION PERIOD.
SO THE WHY WASN'T THE, WHY SHOULDN'T WE ANALGIZE THE POSTJUDGMENT MOTION HERE TO TAKING AN APPEAL?
THAT IS, THAT, THE CLEARLY THE, AT LEAST FROM THE STANDPOINT OF THE CLAIMANTS, THAT THE CONDUCT IS CONTINUING.
SO WE HAVE CONTINUOUS NEGLIGENCE RIGHT UP UNTIL THEY FINALLY, YOU KNOW, IT'S OVER WITH THE AWARD OF ATTORNEY'S FEES OR DENIAL THEREOF AND THEY SEPARATE NOW AND PART THEIR WAYS.
WHY WOULDN'T THAT BE THE SAME IF WE'VE EXTENDED THE LIMITATIONS PERIOD TO AN APPEAL

TIME, WHY NOT EXTEND IT HERE
WHERE THE CONDUCT CONTINUES?
ALLEGEDLY.
>> FIRST OF ALL THERE IS NO
ALLEGATIONS THAT THERE WAS ANY
MISCONDUCT IN THE POSTJUDGMENT
MATTERS, SO YOUR SCENARIO
DOESN'T REALLY APPLY IN THIS
PARTICULAR SITUATION BUT I
WILL, I REALLY WANT TO ANSWER
THE QUESTION AND THE QUESTION
IS, WHY SHOULD YOU NOT EXTEND
IT UNTIL ALL THE LITIGATION,
ALL THE LAWYERS ACTIVITY IS
CONCLUDED?
BECAUSE --
>> I DON'T WHY NOT?
>> BECAUSE IT NEGATES THE BASIC
CONCEPT THE RULE OF ACCRUEL.
FIRST DOLLAR OF DAMAGES THAT
YOU KNOW ARE CERTAIN, KNOW
THOSE DAMAGES ARE CERTAIN --
>> HOLDINGS WITH REFERENCE TO
APPEAL CONFLICTED WITH THAT.
>> NO, YOUR HONOR.
IN THOSE SCENARIOS THE APPEAL
MIGHT CHANGE THE FACT THAT
YOU'RE DAMAGED.
MIGHT NEGATE THE DAMAGES.
>> WHAT JUSTICE POLSTON SAID,
THEORETICALLY HERE, ON APPEAL
AFTER AWARD OF FEES, THAT
DETERMINATION OF FRIVOLOUSNESS
OR EXCEPTIONAL CASE COULD HAVE
BEEN OVERTURNED.
THAT'S WHAT HE IS SAYING.
>> MAYBE THIS WERE TO HELP YOU.
IF I WERE TO SAY, THERE WERE NO
DAMAGES WHATSOEVER, THAT THE
LARSON DEFENDANT, ATTORNEYS
FEES DIFFERENT SUFFER ANY
DAMAGES BY WHAT THE LARSON
DEFENDANTS BILLED THEM FOR THIS
CASE, IT WAS NOTHING, I WOULD
AGREE WITH YOU.
BUT WHEN YOU HAVE A CLAIM IN
THEIR OWN COMPLAINT THAT
SAYS WE WERE DAMAGED BECAUSE
YOU PROSECUTED THIS CASE WRONG,
YOU MADE US STAY IN THIS CASE
FOR A LONG TIME.
WE SHOULDN'T HAVE BEEN IN THIS
CASE.
WE HAD TO PAY YOU 700,000 AS A

RESULT OF THAT, THAT IS THE FIRST DOLLAR OF DAMAGES.
NOTHING THAT WHAT HAPPENED IN THE MOTION FOR EXPRESSIONAL CASE THAT CAME AFTER WAS GOING TO CHANGED CASE THAT THERM DAMAGED BY THE LARSONS.
>> YOU'RE SAYING BIFURCATE THE DAMAGES THIS IS UNIQUE TYPE OF CASE YOU CAN BIFURCATE THE WRONG OR --
>> I DON'T AGREE WITH BIFURCATION.
WHAT I'M SAYING THAT SINCE WE'RE TALKING ABOUT THE SAME MISCONDUCT, ONCE THE FIRST DOLLAR OF DAMAGES ACCRUES YOU HAVE TO BRING YOUR CLAIM.
>> THAT'S WHAT I QUESTION.
I UNDERSTAND WHAT YOU'RE SAYING ABOUT, IF IS THE SAME MISCONDUCT, THEN ALL THE DAMAGES FROM THAT FLOW FROM THAT I UNDERSTAND THE ARGUMENT BUT WHAT I'M SERIOUSLY QUESTIONING IS, WHETHER IT ARISES FROM THE SAME MISCONDUCT.
SEEMS TO ME IN THE FACTS OF THIS CASE, THE SECOND DCA OPINION TALKED ABOUT THE FAILURE TO DISCLOSE INTERROGATORIES WHICH SEEMS TO BE, MORE PROCEDURAL, AND NOT THE SAME AS WHAT OCCURRED -- [INAUDIBLE]
>> YOUR HONOR, THE.
>> CONVINCE ME HOW IT'S --
>> I DON'T NECESSARILY BELIEVE IT HAS TO BE SAME BECAUSE IT ALL OCCURRED PRIOR TO THE FINAL JUDGEMENT BEING FINAL.
IF THEY HAD A CLAIM FOR MALPRACTICE, YOU'RE BASICALLY SAYING THERE IS TWO MALPRACTICE CLAIMS.
>> NO, I'M SAYING THERE IS ONE MALPRACTICE CLAIM.
ONE JUDGEMENT FOR SANCTIONS WHICH IN THIS CASE SEEMS TO ARISEN PROCEDURALLY.
I UNDERSTAND WHERE YOU COULD HAVE SAID AS JUSTICE PARIENTE SAID IN THE BEGINNING IT COULD

BE INTERRELATED.
IF EVERYTHING IS, IF THE
SANCTION AWARD WAS BASED ON THE
SAME MISCONDUCT THAT OCCURRED
UNDERLYING MALPRACTICE ACTION I
COULD SEE WHERE IT WOULD BE
INTERRELATED THE SAME CONDUCT.
I DON'T SEE THE FAILURE TO
DISCLOSE AND INTERROGATORIES
SEEMS TO ME PROCEDURAL WHICH IS
A DIFFERENT MISCONDUCT.
>> A, IT'S NOT IN THEIR
COMPLAINT.
THERE IS TWO SEPARATE ACTS.
BUT, BEYOND THAT, I CAN SEE
THAT THE HYPOTHETICAL, I CAN
SEE THAT HAPPENING.
BUT MY POINT IS, WHEN YOU HAVE
A MALPRACTICE CLAIM, THAT
YOU'RE SUING THEM FOR A TORT,
MALPRACTICE.
RIGHT?
YOU'RE SUING THEM FOR
PROFESSIONAL MALPRACTICE.
IF YOU HAVE A CLAIM FOR
MALPRACTICE YOU HAVE TO BRING
IT WHEN THE FIRST DOLLAR OF
DAMAGES IS INCURRED.
FIXED, WHEN IT BECOMES FIXED.
>> MY PROBLEM, SEEMS TO ME
THAT'S THE ARGUMENT I MADE IN
FREMONT AND I LOST.
>> WELL, THAT'S ONLY BECAUSE IN
THAT PARTICULAR INSTANCE, ALL
OF THE DAMAGES THAT WERE
AVAILABLE, ALL OF THE DAMAGES
WERE SUBJECT TO THE APPEAL
PROCESS AND, THE CONCEPT THAT
IT WAS A HYPOTHETICAL,
HYPOTHETICALLY COULD CHANGE AS
A RESULT OF THE APPEALS.
>> WELL THEY, THE DAMAGES BEGAN
TO BE INCURRED BECAUSE OF THE
HAVING TO PROVIDE THE DEFENSE.
AND THE EXTENT OF THE DAMAGES
WAS WHAT WAS CONTINUED TO BE
UNCERTAIN.
BUT THE FACT OF THE DAMAGE IS,
AS I UNDERSTOOD THE CASE, THE
FREMONT CASE, THAT THEY HAD
ACCRUED.
THAT HAD ACCRUED.
AND THAT THIS, THIS COURT AS I
SAW IT, HISTORIC CASE LAW, HAD

BEEN THAT THAT GAVE RISE
TO THE CAUSE OF ACTION FOR THE
STATUTE OF LIMITATIONS.
BUT THIS COURT HAD MADE THE
DETERMINATION IT WAS GOING TO
FOCUS UPON THE FINAL JUDGMENT.
>> THAT'S CORRECT.
>> AND THE FINAL JUDGMENT WAS
GOING TO BE THE HERE ALL AND
END ALL.
I THINK CONFUSION HERE YOU'VE
GOT TWO FINAL JUDGEMENTS.
>> IF YOU READ IT IN RELATION
TO THE CITY OF MIAMI VERSUS
BROOKS, IF YOU READ THOSE TWO
CASES SIDE BY SIDE IT MAKES
PERFECT SENSE.
I BRIEF THE SILVERSTONE CASE
WAS SAYING EVEN THOUGH IT'S
VERY UNLIKELY THOSE PARTICULAR
DAMAGES IN FREMONT WERE EVER
GOING TO CHANGE, THE FACT THAT
YOU STILL HAD A PROCEEDING THAT
WAS NOT FINAL YET, YOU NEVER
KNOW.
IN THIS PARTICULAR --
>> LET ME, YOU HAVE GONE WELL
BEYOND YOUR TIME INCLUDING YOUR
REBUTTAL TIME.
>> SORRY.
>> LET ME SEE IF I UNDERSTAND
WHAT YOUR ARGUMENT IS HERE.
IT IS THAT WITH THE FIRST
JUDGMENT, AND IT NOT BEING
APPEALED, THAT THOSE DAMAGES
WERE FIXED AND CAN NEVER CHANGE
AND BECAUSE OF THAT, THAT IS
WHEN THE STATUTE OF LIMITATIONS
BEGAN TO RUN ON THIS
MALPRACTICE?
>> AND THAT IS A SEPARATE
CATEGORY OF DAMAGES THAN WHAT
THEY WERE SUBSEQUENTLY HIT
WITH, AS A RESULT OF
FRANKLYNN'S MOTION FOR
EXCEPTIONAL CASE.
IF YOU STRIP AWAY THE MOTION
FOR EXTENSIONAL CASE THEY HAD A
CAUSE OF ACTION ON SEPTEMBER
16th, 2002.
THEY DIDN'T BRING THAT CAUSE OF
ACTION, WITHIN TWO YEARS, AND
THEREFORE THEY'RE BARRED.
>> THANK YOU VERY MUCH.

>> THANK YOU VERY MUCH.
>> MAY IT PLEASE THE COURT.
MY NAME IS MARIE TOMASSI.
I'M WITH THE LAW FIRM OF TRENAM KEMKER AND WE REPRESENT TSE IN THIS PROCEEDING.
PETITIONER'S POSITION RAISES VERY SPECTER OF ALL THE CONCERNS AND CONSIDERATIONS THIS COURT TRIED TO AVOID WITH PEAT MARWICK, WITH BLOMBERG, THIS EXPRESSED BRIEFLY IN THE PEREZ MATTER ALL OF WHICH ARE CITED IN OUR BRIEF.
>> DOESN'T THIS COURT'S JURISPRUDENCE STAND FOR THE PROPER PROPOSITION, ONE, THAT THIS ONE, LITIGATION-RELATED LEGAL MALPRACTICE CASES ARE GOING TO KEY ON THE FINAL JUDGMENT AS THE ACCRUEL OF THE CAUSE OF ACTION?
>> YOUR HONOR, THAT IS ESSENTIALLY WHAT SILVERSTONE SAID BUT --
>> FOLLOW THAT UP WITH BLOOMBERG.
>> YES, YOUR HONOR.
BUT WHAT THE SECOND DISTRICT SAYS, AND I THINK CORRECTLY NOTED, THEY SAID THIS CASE RAISES ATH FACTUAL SITUATION THAT WAS NOT CONTEMPLATED IN SILVERSTONE AND THE SECOND DISTRICT IS CONSISTENT WITH SILVERSTONE REACHING FOR FINALITY OR END OF THE UNDERLYING LITIGATION.
>> IF THERE WAS AN APPEAL, IF YOU WENT TO JUDGMENT, ON THE, JUDGE PLENTY ON ATTORNEY FEES AND UNUSUAL AND EXTRAORDINARY CASE, YOU TOOK AN APPEAL AND THAT APPEAL WAS FOUR YEARS IN DETERMINATION, THE STATUTE OF LIMITATIONS WOULD NOT BEGIN TO RUN ON THE FINAL JUDGMENT THAT WAS ENTERED IN AUGUST OF '02 OR ANY MALPRACTICE CONNECTED WITH IT UNTIL THE END OF THE APPEAL AND EX-IN THE EXTRAORDINARY CASE?
>> THAT COULD BE ONE RESULT, YOUR HONOR.

ANOTHER RESULT, HOWEVER, COULD BE THIS THAT COURT COULD EXPRESSLY RECOGNIZE AND ADOPT THE CONTINUED REPRESENTATION DOCTRINE WHICH JUDGE ALTERNBERND SAID THIS DECISION BELOW WAS PARTIALLY DOING OR PERHAPS DOING AND WHICH OTHER COURTS --
>> THE PROBLEM WITH THAT IS, THAT DEPEND ON WHETHER YOU FIRE YOUR LAWYER OR NOT AS TO WHETHER YOU GOT SOME MALPRACTICE CASE.
THAT, AS I UNDERSTOOD, WHAT THIS COURT DID IN THIS TRILOGY OF CASES THAT MAJOR HARDING WROTE IN 2001, INCLUDING THE FREMONT CASE IS THAT, THIS COURT WAS SAYING WE'RE GOING TO DISCARD ALL THIS BUSINESS.
HE TALKS A LITTLE ABOUT CONTINUOUS REPRESENTATION.
AND WE'RE GOING TO KEY IN ON THE CENTRAL FACT OF WHEN THE JUDGMENT BECOMES FINAL.
ISN'T THAT WHAT THIS COURT DID?
>> WELL, YOUR HONOR, RESPECTFULLY NOT EXACTLY BECAUSE, IN SILVERSTONE THIS COURT CERTAINLY KEYED OFF WHEN THE FINAL JUDGMENT BECAME FINAL BUT IT DID NOT ADDRESS WHETHER COUNSEL CONTINUED TO REPRESENT THE CLIENT IN OTHER PROCEEDINGS CONTINUED TO GO ON IN THE UNDERLYING LITIGATION.
>> ISN'T VIRTUALLY EVERY CASE THOUGH THAT'S OUT THERE, GOING TO HAVE SOME COLLATERAL PROCEEDING AND, THAT THE, WHAT WE'RE TRYING TO DO, IT'S A LITTLE BIT LIKE THE HARD CASES MAKE BAD LAW CONCEPT THAT, WE'VE GOT TO FASHION A RULE THAT HOPEFULLY CAN APPLY TO MOST ALL CASES, AND, IF WE ACCEPT THE PRINCIPLE THAT, WELL, WHEN THERE ARE COLLATERAL PROCEEDINGS STILL GOING ON, THAT THOSE ARE SOMEHOW GOING TO EXTEND THE LIMITATION PERIOD, AREN'T WE THEN INVITING, REALLY, NOT CLARITY IN THE LAW

THAT EVERYBODY KNOWS ABOUT, FOR
INSTANCE, THAT, AN ACCIDENT
HAPPENS, AND, THE CLAIMS
ADJUSTER IS TRYING TO SETTLE
IT, YOU KNOW, WITH THE LAWYER
THAT REPRESENTS THE CLAIMANTS.
THE LAWYER THAT REPRESENTS THE
CLAIMANT KNOWS ALTHOUGH HE IS
ENGAGING IN THOSE SETTLEMENT
NEGOTIATIONS, THE CLOCK IS
TICKING AND THAT, IF, YOU KNOW,
IF IT REACH AS POINT, WHERE,
YES, HE WANTS TO ENCOURAGE
BECAUSE HE WOULD FAR RATHER
HAVE A VOLUNTARY SETTLEMENT
THAN HAVE TO FILE A LAWSUIT.
BUT THE CLOCK IS TICKING AND SO
WHY WOULDN'T THAT RULE WORK
HERE ALSO?
THAT IS, THERE MAY BE
COLLATERAL PROCEEDINGS GOING ON
IN THE LAWSUIT BUT THE CLOCK IS
TICKING AND YOU'VE GOT TO LOOK
AT THE CLOCK AND THAT THAT'S A
BETTER RULE YOU KNOW, TO WORK
FOR THIS BROAD CATEGORY OF
CASES THAN A RULE THAT SAYS,
WELL, YOU GOT TO LOOK EACH TIME
AT WHAT THE NATURE OF THOSE
COLLATERAL PROCEEDINGS ARE AND
THERE WHETHER'S BEEN
CONTINUATION OF A OF
RELATIONSHIP BETWEEN THE LAWYER
AND THE CLIENT AND SORT OF GET
US INTO SORT OF A CASE-BY-CASE.
NOBODY IS REALLY GOING TO KNOW
WHAT IS GOING ON OUT THERE,
BECAUSE THE NEXT THING WILL BE,
WELL, THEY TOLD US TO HANG
IN THERE OR SOMETHING.
MAYBE WE CAN RELOOK AT THIS
THING.
WE CAN FILE A MOTION TO VACATE
UNDER THE CIVIL RULES OF
PROCEDURES.
THERE IS STILL SOMETHING
COLLATERAL WE CAN DO.
SO HELP ME WITH THE UNCERTAINTY
OF A RULE THAT THE SECOND
DISTRICT REALLY HAS HERE AND
WHAT YOU'RE ADVOCATING FOR
COMPARED WITH THE OUR NOW CASES
THAT SAY, FINAL JUDGMENT, CLOCK
IS TICKING.

>> WELL, RESPECTFULLY, YOUR HONOR, THE CONTINUOUS REPRESENTATION DOCTRINE WOULD ADDRESS THE CONCERNS THAT YOUR HONOR HAS RAISED AND THE CONCERNS THAT JUSTICE PARIENTE HAS RAISED.
>> I THINK THE COURT, LET'S ASSUME WE DON'T ADDRESS, WE DON'T ADOPT THE CONTINUOUS REPRESENTATION DOCTRINE.
I MIGHT THINK THAT IS A GOOD IDEA.
LET'S JUST ASSUME NOT.
THIS IS MY CONCERN HERE AND OF COURSE WE'RE HERE BECAUSE THERE IS CONFLICT WITH THE FOURTH DISTRICT THAT WOULD ALLOW YOU TO AT LEAST BRING A CLAIM BASED ON THE FACT OF THIS DECEPTION ON THE INTERROGATORY I GUESS WHERE THE DAMAGES ACCRUE WHEN YOU GET THE ATTORNEY'S FEES, YOU KNOW, SET ON THAT, VERSUS JUST BRINGING THE CLAIM.
YOU KNOW, WOULD ALLOW TO YOU BRING TWO SEPARATE, UNDER THE FOURTH DISTRICT VIEW, YOU WOULD BE ALLOWED TO RECOVER FOR THE AMOUNT THAT YOU PAID IN SETTLEMENT, WHICH I GUESS IS CONFIDENTIAL.
DO WE KNOW WHAT IT IS?
HOW MUCH MONEY CAME OUT OF THE --
>> YOUR HONOR, I DON'T BELIEVE THAT'S IN THE RECORD BELOW BECAUSE OF TERMINATION PROCEEDINGS.
>> BECAUSE THAT REALLY STARTS TO GO TO ME, WHY, IT'S, WOULD BE GOOD IN THIS CASE TO HAVE IT BE FROM THE DATE OF THE SETTLEMENT BECAUSE WE'RE PRESUMING WHEN THEY SETTLED IT, THEY SETTLED IT BOTH, THE FINAL JUDGMENT, AS WELL AS THE VEXATIOUS ATTORNEY'S FEES FOR AMOUNTS LESS THAN THE TWO MIGHT HAVE BEEN INDEPENDENTLY.
AND I'M AFRAID IF WE ADOPT THE RULE THAT IS BEING URGED BY THE PETITIONER WE WOULD END UP HAVING ATTORNEYS SAY, LET'S

JUST, WE'RE NOT GOING TO LOSE ANYTHING.
LET'S APPEAL THE FINAL JUDGMENT SOME THAT WILL GO ON AND THEN WE WILL THEN HAVE A TIME TO TRY TO RESOLVE THE WHOLE THING.
THEY WOULD HAVE NOTHING TO LOSE ON THAT, LISTEN MAYBE WE CAN WIN THIS THING ANYWAY AND GET A REVERSAL BUT IN THE MEANTIME WE'LL END DEFEND YOU ON THIS VEXATIOUS THING BECAUSE IT'S IN OUR INTEREST AND YOUR INTEREST TO PAY THE LEAST AMOUNT.
THAT IS MY CONCERN ABOUT THE POLICY REASONS WE TRIED TO INCUR SETTLEMENT, TRIED TO ENCOURAGE THE ATTORNEY WORKING WITH THE CLIMATE TO MINIMIZE THE DAMAGES.
I'M AFRAID WE END UP WITH THE OPPOSITE IF THIS RULE TAKES PLACE.
ON THE OTHER HAND, LET ME GIVE YOU, JUST AS JUSTICE ANSTEAD SAID IT'S A RULE FOR ALL CASES LET'S ASSUME THE JUDGMENT WAS FOR $10 MILLION AND THE MALPRACTICE OCCURRED BECAUSE THE LAWYER DIDN'T SHOW UP FOR TRIAL.
IT WAS A $10 MILLION JUDGEMENT.
AND NOW, THERE IS, AND THAT'S NOT APPEALED.
BUT THERE IS, BECAUSE THE LAWYER DIDN'T SHOW UP AND MISSING IN ACTION FOR ALL THAT TIME.
THERE IS COST JUDGMENT -- YOU WOULD SAY THAT COST IS GOING TO BE PART OF THE DAMAGES SO WE HAVE TO WAIT UNTIL THE COSTS ARE ESTABLISHED AND SOMEONE APPEALS THAT.
THAT DOESN'T, THAT COULD WOULD SEEM LIKE CONTRARY TO THE INTEREST OF JUSTICE.
SO, IF WE DON'T ADOPT CONTINUOUS REPRESENTATION, HOW DOES THIS RULE WORK IN MY SCENARIO OF THERE IS A $10 MILLION JUDGMENT, THE

MALPRACTICE WAS CLEARLY ABOUT
THE LAWYER NOT SHOWINGING UP
BUT NOW WE HAVE A COST JUDGMENT
THAT IS GOING UP ON APPEAL?
>> THE SECOND DISTRICT'S
PRINCIPLE OPINION HERE, NOT THE
CONCURRING OPINION, ADDRESSES
THAT BY SAYING THAT CONSISTENT
WITH SILVERSTONE IN THIS
DIFFERENT FACT CIRCUMSTANCE
WE'LL LOOK TO THE END OF THE
UNDERLYING LITIGATION.
YES, YOUR HONOR, IN SOME RARE
INSTANCE, MAY BE OUTLYER, SMALL
COST JUDGMENT IS GOING TO
DICTATE THE START OF THE
STATUTE OF LIMITATIONS AS, YOUR
EXAMPLE WAS, BUT, IT WILL GIVE
YOU THE FINALTY, YOUR HONOR,
YOU'RE SEEKING WHICH IS WHEN
THE UNDERLYING LITIGATION IS
CONCLUDED, WHETHER BY
SETTLEMENT OF THOSE ANCILLARY
MATTERS OR BY JUDGMENT ON THOSE
ANCILLARY MATTERS THAT IS
EITHER NOT APPEALED OR IS
CONCLUDED BY APPEAL, YOUR
STATUTE STARTS.
IT'S THE SAME BRIGHT-LINE.
IT'S JUST STARTING AT A
DIFFERENT TIME.
I THINK THAT'S WHAT THE MAIN
OPINION IN --
>> JUST, I DON'T KNOW YOU
ANSWERED IT BUT IF IT'S THE,
YOU GOT BOTH FINAL JUDGMENT AS
WELL AS THE FINALTY OF THE
COLLATERAL MATTERS, THEN,
APPEAL OF THE COST JUDGMENT
WOULD KEEP THE STATUTE IN
ABEYANCE?
>> IT MIGHT, YOUR HONOR.
IF THIS COURT'S PRIMARY CONCERN
IS BRIGHT-LINE DEADLINE, THAT
IS A FACT THAT WE'LL LIVE WITH.
THAT MIGHT HAPPEN IN SOME
CASES.
BUT YOU HAVE YOUR BRIGHT-LINE,
WE ALL KNOW WHEN THE STATUTE
STARTS RULE.
>> WHY CAN'T WE HAVE TWO
BRIGHT-LINES?
>> BIFURCATED APPROACH, YOUR
HONOR?

>> BIFURCATED APPROACH LIKE THE FOURTH DISTRICT.
THE THERE YOU HAVE A BRIGHT-LINE.
THERE IS A FINAL JUDGMENT.
WHATEVER CLAIM YOU'VE GOT, WITH RESPECT TO THE MATTERS THAT RELATE TO THAT, THE CLOCK IS TICKING.
>> RIGHT.
>> THEN YOU'VE GOT ANOTHER FINAL JUDGMENT AND THE CLOCK IS, TICKING ON THAT.
AND YOU KNOW, CLOCK MAY START TICKING ON ONE BEFORE THE OTHER AND THERE MAY BE THIS AWKWARD CIRCUMSTANCE FOR SOME PERIOD OF TIME BECAUSE SAME ATTORNEY MIGHT BE INVOLVED BUT, SUCH IS LIFE.
AND WHAT JUDGE COWART SAY ABOUT THAT?
JUDGE COWART?
IN DISSENTING OPINION.
JUDGE COWART, ABOUT THE, MAY BE TIME TO DISCARD THE BUMBLING LAWYER AND MOVE ON?
>> RIGHT.
>> WHAT'S WRONG WITH THAT?
WHAT IS REALLY WRONG WITH THAT APPROACH?
BECAUSE THERE, YOU HAVE GOT TO, WHY ISN'T THAT MOST CONSISTENT WITH WHAT THIS COURT AS PREVIOUSLY SAID?
>> IT'S AN OPTION OF COURSE THAT EXISTS FOR THIS COURT TO DECIDE, BUT WHAT'S WRONG WIT, IS THAT IT VIOLATES THE VERY CONCERNS THAT THIS COURT HAS REPEATEDLY ATTEMPTED TO ADDRESS.
THAT IS, PREMATURELY DISRUPTING A CLIENT RELATIONSHIP.
THAT IS, PLACING A CLIENT IN CONFLICTING POSITIONS WITH THEIR COUNSEL AND THAT IS GIVING THE ERRANT COUNSEL TO CORRECT OR MITIGATE THE HARM THAT WAS CAUSED.

>> IT WAS RESOLVED BY OCTOBER SO YOU HAVE GONE -- YOU DON'T HAVE A SITUATION OF

EITHER/OR BY OCTOBER, THE
CLAIM COULD HAVE YOU KNOW, WAS
THERE TO BE BROUGHT, AND IF
YOU HAVE GOT A -- MOTION, IF
YOU BRING ONE LAWSUIT AND THE
OTHER IS STILL ON APPEAL, YOU
KNOW, FOR THE COLLATERAL MATTER
OR ANCILLARY MATTER, YOU CAN
SAVE THE FORMER WHILE THE
LATTER GETS RESOLVED, YOU CAN --
>> YES, YOU CAN, YOUR HONOR, BUT
--
>> BUT THE ONLY THING I SEE
HERE, THIS HASN'T REALLY BEEN
BRIEFED, IS THAT BECAUSE
YOU CAME UP WITH THIS
SETTLEMENT YOU MAY HAVE --
SINCE WE DON'T KNOW WHAT IT
SAYS, SO THE TWO, YOU KNOW, THE
DAMAGE MAY HAVE BEEN, YOU KNOW,
MIXED TOGETHER.
BUT THAT IS
NOT OUR -- IF WE ADOPT THIS TO
TO HYPOTHETICALLY FOURTH
DISTRICT APPROACH WE COULD
SEND IT BACK FOR FURTHER
PROCEEDINGS, THAT WAS THE ONLY
THING I THOUGHT COULD BE A
PROBLEM IF WE -- IF WE ADOPTED
THE FOURTH DISTRICT'S
APPROACH.
>> BUT LET ME PLAY THIS OUT
FOR YOU ON OUR FACTS, JUST A
SLIGHT MODIFICATION.
ASSUMING OUR CASE, THAT OUR
CLIENT DID NOT SETTLE THE FEE
CLAIM WITH FRANKLIN
INDUSTRIES, THAT FOR WHATEVER
REASON IT COULD NOT BE SETTLED
OR THE PARTIES WOULD NOT
SETTLE IT, AND INSTEAD OF
FINAL JUDGMENT EVENTUALLY ENTERED
LIQUIDATING THAT CLAIM, THEN
OUR CLIENT TAKES AN APPEAL TO
THE 11th CIRCUIT OF THE
LIABILITY AND/OR AMOUNT
ULTIMATELY THAT IS CONCLUDED,
IT IS UNLIKELY, I SUBMIT TO
THIS COURT, THAT THAT WOULD BE
DONE WITHIN TWO YEARS, THAT
THAT ENTIRE PROCESS WOULD BE
DONE IN TWO YEARS UNDER
PETITIONER'S VERSION.
UNDER THE BIFURCATED VERSION,

MY CLIENT WOULD HAVE HAD TO SUE LARSON, DEFENDANTS WHILE THEY WERE SIMULTANEOUSLY TRYING TO AVOID SANCTIONS WOULD HAVE BEEN SAYING TO DISTRICT COURT AND 11th CIRCUIT OUR LAWYERS DID NOTHING WRONG, WE DID NOTHING WRONG, WE BROUGHT THIS CLAIM IN GOOD FAITH, AND WE PROSECUTED IT, LOST NO SANCTIONS --
>> LET ME AT LEAST TRY TO GET IT STRAIGHT IN MY MIND, YOUR POSITION.
THAT IS: DO YOU AGREE THAT THIS COURT STROVE IN THAT SERIES OF CASES IN 2001 TO REACH A BRIGHT LINE RULE?
>> YES, YOUR HONOR.
>> AND THE BRIGHT LINE WAS THE FINAL JUDGMENT CAUSE OF ACTION ACCRUED AT THE TIME FINAL JUDGMENT IN THE UNDERLYING LITIGATION WHICH GAVE RISE TO THE MALPRACTICE?
>> IN THE CASES THAT WE PRESENTED TO THIS COURT ON THEIR FACTS, YES, YOUR HONOR. NONE OF THEM INVOLVING THE CONTINUING REPRESENTATION OF THE CLIENT WITH ONGOING MATTERS --
>> OKAY.
AND WHAT YOU ARE SAYING IS THAT WHEN THERE IS AN ANCILLARY ACTION THAT THE -- THE RELATED CASE, IN OTHER WORDS, IS REFERRED TO IN PETE MARWICK, I THINK THAT THE STATUTE OF LIMITATIONS WOULD NOT BEGIN TO RUN ON ANY OF THE CAUSE OF ACTIONS THAT THE CLIENT HAD AGAINST THE LAWYER, UNTIL THE -- UNTIL THERE WAS A CONCLUSION, EITHER BY SETTLEMENT OR FINAL JUDGMENT BECOMING FINAL, IN THE ANCILLARY LITIGATION.
>> THAT'S CORRECT, YOUR HONOR, OR THE END OF THE REPRESENTATION OF --
>> -- THIS IS WHERE I'M SYMPATHETIC TO YOU IN THIS

CASE, AND I STILL --
THINKING BACK TO TRIAL LAW
LAWYER DAYS, IF I HAD TO BRING
MY FIRST CASE ON THE
FINAL JUDGMENT ABOUT HOW BAD
THESE LAWYERS WERE, TO MAKE ME
GO THROUGH THIS LITIGATION AND,
AT THE SAME TIME, I'M APPEALING
AN ADVERSE AWARD OF ATTORNEYS'
FEES ARISING FROM SANCTIONED
BEHAVIOR AS JUSTICE POLSTON
POINTED OUT, THAT PIECE OF
EVIDENCE THAT THE TRIAL COURT
FOUND THAT MY ACTIONS WERE SO
BAD THAT THEY WERE
SANCTIONABLE, I GOT A
SUBSTANTIAL ATTORNEYS' FEE AWARD
AGAINST ME IS PART AND PARCEL
OF MY BEING ABLE TO PROVE MY
MALPRACTICE CASE FROM MY POINT
OF VIEW, IF IT IS REVERSED --
IT HELPS THE -- DEFENDANT
LARSON SAY WE WEREN'T SO BAD,
THAT IS -- THAT ACTION.
AND SO THAT IN THIS CASE IT SEEMS
THAT IT CRIES OUT, AND MAYBE
THAT IS WHY THEY WERE FOR --
IT HAS GOT TO BE CONTINUOUS,
AND ANOTHER CASE WHERE
I GAVE YOU MY SCENARIO WHERE
THERE IS -- THERE ISN'T EVEN,
YOU KNOW, ONE HAS TO DO WITH
THE GUY NOT SHOWING UP, THE
OTHER HAS TO DO WITH SOME
SMALL AMOUNT OF --
JUDGMENT, IT SEEMS RIDICULOUS.
BUT, YET, WE ARE TRYING TO COME
UP WITH SOME BRIGHT LINES HERE,
AND YOU ARE SUGGESTING THAT A
BRIGHT LINE HAS TO BE
CONTINUOUS REPRESENTATION, AND
JUSTICE CANADY TOLD YOU WHY
THAT COULD LEAD TO SOME
MISCHIEF.
I MAY AGREE WITH YOU,
BUT I SEE THE OTHER SIDE, AND
THEN, ON THE OTHER HAND, YOU
ARE SAYING, YEAH, IT IS OKAY,
YOU MIGHT HAVE TO WAIT TILL
EVERY SINGLE LITTLE THING IS
RESOLVED, BUT THAT THERE IS A
DAMAGED CLIENT OUT THERE WHO
HAS GOT SUBSTANTIAL DAMAGES,
AND THEY MAY NOT BE ABLE TO

AFFORD TO WAIT TILL THIS
$10,000 COST JUDGMENT IS
APPEALED.
SO THAT IS -- SO YOU HELP ME
FIGURE OUT HOW YOU TAKE THIS
CASE WHERE IT SEEMS LIKE THE
JUSTICE OF THE CAUSE DEMANDS
IT IS ALL RELATED VERSUS THE
ONE EVERY LITTLE ANCILLARY
COLLATERAL MATTER A LAWYER
COULD COME UP WITH HAS TO BE
RESOLVED.
>> YOUR HONOR, IT STRIKES ME
THIS COURT IS LOOKING FOR THE
BRIGHT LINE IN THE CLEAR RULE,
AS IT SHOULD, AND --
>> YOU HAVE TO, BECAUSE
ATTORNEYS ARE RELYING ON IT.
>> EXACTLY.
AND THERE ARE
TWO OPTIONS HERE.
AND ONE IS TO
SAY AT THE CONCLUSION OF ALL
THE ANCILLARY PROCEEDINGS IN
THE UNDERLYING LITIGATION THAT
GIVES RISE TO THE MALPRACTICE
CLAIM, THAT IS WHEN YOUR
STATUTE STARTS, ADDRESSES THE
CONCERNS IN OUR FACT PATTERN,
ADRESSES THE CONCERNS IN FACT
PATTERNS WHERE PARTS ARE
APPEALED, BUT NOT THE WHOLE
THING, AND IT GIVES YOU A
BRIGHT LINE, BUT IT MAY LEAD TO
AN OCCASIONALLY ABSURD -- RESULT,
LIKE THE ONE YOUR HONOR
POSITS.
>> WHY WOULDN'T SOME
SKEPTIC ABOUT EQUITABLE
POLLING FILL IN THE GAPS, THAT IS,
THAT IF YOU COULD DEMONSTRATE
THROUGH THE ACTION OF YOUR
LAWYER THAT CONTINUED TO
REPRESENT YOU THAT IT WOULDN'T
BE EQUITABLE TO ENFORCE THE
TWO-YEAR STATUTE OF
LIMITATIONS, THAT WOULD TAKE
CARE OF THE EXTRAORDINARY
CASE.
WHY WOULDN'T -- WOULD THE ALREADY
EXISTING CONCEPT OF EQUITABLE
TOLLING BE PRESENT TO THAT, THE
PROBLEM WITH EQUITABLE TOLLING,
IT REQUIRES ALMOST MISCONDUCT, IF

YOU WILL, BY THE LAWYER MISLEADING THE CLIENT.
SO IT DOESN'T APPLY IN A CASE WHERE EVERYONE IS TRYING TO WORK TOGETHER TO MITIGATE THE HARM, TO AVOID DISRUPTING THE RELATIONSHIP, TO AVOID THE INCONSISTENT POSITION, AND SO IT WOULD ONLY COME INTO PLAY IN EXTREME CIRCUMSTANCES.
WE SUBMIT THE SECOND ALTERNATIVE FOR THIS COURT IS TO GO AHEAD AND ADOPT THAT CONTINUOUS REPRESENTATION DOCTRINE THAT ALREADY APPEARED TO BE LAW IN THE SECOND AND THIRD DISTRICT.
>> HOW CAN THAT DOCTRINE BE RECONCILED WITH THE STATUTE?
I MEAN, REALLY, ALL OF THIS IS ABOUT INTERPRETING THE PROVISIONS OF THE STATUTE, AND THAT THE PERIOD OF LIMITATIONS SHALL RUN FROM THE TIME THE CAUSE OF ACTION IS DISCOVERED OR SHOULD HAVE BEEN DISCOVERED WITH THE EXERCISE OF DUE DILIGENCE, IT SEEMS THAT -- SOME OF WHAT YOU ARE ARGUING KIND OF GETS FAR AFIELD FROM THAT AS POSSIBLE.
WHY DOESN'T IT --
>> WELL, BECAUSE, YOUR HONOR, INSTEAD OF ADDRESSING WHETHER THE CAUSE OF ACTION ITSELF ACCRUES, OR WHEN THE STATUTE BEGINS TO RUN, YOU ARE REALLY ADDRESSING WHEN YOU START -- WHEN YOU START COUNTING THAT STATUTE OF LIMITATIONS UNDER THE -- CONTINUING REPRESENTATION RELATIONSHIP, ALMOST LIKE A TOLLING, IF YOU WILL, YOUR HONOR, BECAUSE THE THEORY OF THOSE CASES IS THAT YOU ARE GOING TO AVOID THE DISPUTE OVER WHETHER IT WAS HIDDEN FROM THE CLIENT, WHETHER THE MALPRACTICE WAS HIDDEN FROM THE CLIENT, OR THE CAUSE ITSELF SHOULD HAVE BEGUN TO RUN WHETHER FROM THE ORIGINAL -- FILE BECOMING FILE OF THE ANCILLARY, YOU SIMPLY LOOK

AT WHEN THE REPRESENTATION IN
THE UNDERLYING LITIGATION
ENDED, AND IT IS NOT ONLY IN
THE CONTROL OF THE CLIENT AS I
BELIEVE THE COURT EXPRESSED
LATELY CONCERN WITH, THE
LAWYERS CAN FIRE THE CLIENT IN
MANY CASES, LAWYERS CAN
WITHDRAW IN THE CIVIL CONTEXT,
AND PROTECT THEM.
SO, IF YOU WANT, AS THE LAWYER
WHO HAS BUNGLED THE CASE TO
START THAT STATUTE OF
LIMITATIONS, YOU WITHDRAW FROM
REPRESENTING THAT CLIENT AND
THEREBY GIVE UP YOUR
OPPORTUNITY TO HELP FIX WHAT
YOU HAVE CREATED, BUT --
>> I JUST WONDER HOW ALL THAT
WORKS, IN THE WORLD OF CLAIMS
MADE -- POLICIES -- FROM THE
DATE THAT YOU FIRE THE LAWYER
THE TWO YEARS BEGINS TO RUN?
OR THE DATE THAT THE LAWYER
SENDS A LETTER WITHDRAWING?
I MEAN YOU'VE GOT -- SEEMS
TO ME, ENORMOUS -- [INAUDIBLE]
>> THERE ARE PRACTICAL
CONSIDERATIONS, I THINK, FROM
MANY OF THESE ROLES.
TO SUGGEST, FOR EXAMPLE, THE CLIENT
COULD GO AHEAD AND FILE THE
MALPRACTICE CLAIM, AND THEN
THE STATE HAS REALLY NO -- NO
PLACE IN THE PRACTICAL REALITY
OF LITIGATION, BECAUSE AS SOON
AS THAT COMPLAINT GETS FILED
IT BECOMES AN EXHIBIT IN THE
EXTRAORDINARY PROCESSING FOR
ATTORNEYS' FEES.
SO REALLY, NO MATTER HOW THIS COURT RULES,
THERE WILL BE ANCILLARY ISSUES
THAT ARISE, BUT IN LOOKING FOR
THE BRIGHT LINE THAT WILL DO
THE MOST JUSTICE FOR THE
CLIENTS -- WE SUBMIT THAT THE
SECOND DISTRICT GOT THE
BALANCE RIGHT AND CAN BE
AFIRMED AS IS, OR THAT THIS
COURT CAN GO AHEAD AND TAKE UP
THAT CONTINUOUS REPRESENTATION
DOCTRINE THAT THE SECOND AND
THE THIRD DISTRICT ALREADY
SEEM TO THINK WAS THE LAW OF

FLORIDA PRIOR TO OUR FILING
THE LAWSUIT BELOW.
>> WELL, WITH THAT, THANK YOU
VERY MUCH.
>> THANK YOU.
>> YOU HAVE GONE OVER YOUR
TIME.
I THANK BOTH COUNSEL
FOR THEIR ARGUMENTS HERE
TODAY.
>> COURT IS NOW ADJOURNED
UNTIL TOMORROW.