

THE NEXT CASE AND THE FINAL  
CASE ON TODAY'S DOCKET IS DK  
ARENA, INC. VERSUS EB  
ACQUISITIONS LLC.

>> GOOD MORNING.

GOOD AFTERNOON.

MAY IT PLEASE THE COURT, I'M  
ALVIN DAVIS, I REPRESENT DK  
ARENA IN THIS MATTER.

THIS IS A FAIRLY NARROW ISSUE, A  
SITUATION IN WHICH THE FOURTH  
DISTRICT FOUND THAT THE  
PROMISSORY ESTOPPEL WAS A  
SUFFICIENT BASIS FOR OVERCOMING  
THE APPLICATION --

>> DID THEY SAY

PROMISSORY ESTOPPEL OR DID THEY  
SAY --

>> THEY DID NOT, FOURTH DISTRICT  
DID NOT CHARACTERIZE IT AS  
PROMISSORY, USING THAT TERM, BUT  
THEY REFERRED AND EB REFERRED TO  
THE PROMISE BY MR. KING, HE  
PROMISED TO DO THE DUE  
DILIGENCE.

SO THIS IS WITHIN PROMISSORY  
ESTOPPEL, NOT WITHIN EQUITABLE.

>> I HAVE A QUESTION ON THAT,  
AND AS I UNDERSTAND, EQUITABLE  
ESTOPPEL, THAT IS A NAME FOR A  
VERY, VERY, VERY BROAD CATEGORY  
OF CASES WHICH WOULD INCLUDE  
OTHER TYPES OF ESTOPPEL THAT ARE  
EQUITABLE IN NATURE.

AM I WRONG FOR LOOKING AT IT  
THIS THAT PERSPECTIVE?

PROMISSORY ESTOPPEL MAY BE ONE  
FORM OF AN EQUITABLE ESTOPPEL.

IT MAY BE ONE FORM THAT FALLS  
UNDER THE BROAD UMBRELLA.

HOW WOULD YOU INSTRUCT US?

WHAT IS THE ACADEMIC POSITION  
WITH REGARD TO THE --

[INAUDIBLE]

>> BROADLY INTERPRETED, ESTOPPEL  
IS ESTOPPEL AND PROMISSORY'S  
ESTOPPEL IS A FORM OF ESTOPPEL.  
FOR PURPOSES OF THIS CASE, THEY  
MAKE A DISTINCTION BETWEEN  
PROMISSORY ESTOPPEL IN WHICH YOU

PROMISE SOME FUTURE EVENT AND  
EQUITABLE ESTOPPEL WHICH IS  
CUSTOMARILY REFERRED TO AS A  
CHANGING PHYSICIAN FROM THESE  
STATEMENTS OF FACT.

THE STATING OF FACT NOW AND  
LATER YOU CHANGE A POSITION,  
THAT'S WHEN EQUITABLE  
ESTOPPEL --

>> SO YOU COULD FIND THAT  
ESTOPPEL'S A VERY SMALL,  
FINITE -- YOU BELIEVE THAT  
THAT'S OUR CASE LAW?

>> AND MY QUESTION ON IT, AND,  
YOU KNOW, I GO BACK TO THE  
TANNENBAUM CASE WHICH INVOLVE NO  
WRITTEN CONTRACT WHATSOEVER.  
THAT WAS, WASN'T THAT THE  
CASE --

>> YES, YOUR HONOR.

>> NOTHING IN WRITING.

HERE IS A WRITTEN CONTRACT THAT  
COMPLIES WITH THE STATUTE OF  
FRAUD, AND THEN THERE'S THIS DUE  
DILIGENCE PERIOD, AND IT WAS NO

QUESTION IT WAS EXTENDED IN

WRITING TO OCTOBER 4TH.

>> YES, YOUR HONOR.

>> IT WAS CLEARLY NOT EXTENDED

AGAIN IN WRITING BECAUSE IF IT

HAD BEEN, WE WOULDN'T BE HERE.

>> YES, YOUR HONOR.

>> HOWEVER, OCTOBER 4TH

DISCUSSIONS TAKE PLACE, THAT'S

WHEN IT WOULD HAVE EXPIRED.

OCTOBER 5TH, MR. KING APPEARS

BEFORE THE CITY OR COUNTY

COMMISSION, I GUESS -- WAS IT

THE CITY COMMISSION OR COUNTY

COMMISSION?

>> CITY, YOUR HONOR.

>> BECAUSE ABBY GREEN, WASN'T

SHE THE COUNTY COMMISSIONER?

>> NO, CITY.

>> OKAY.

AND SHE -- AND HE'S PROMOTING

THIS.

SO, CLEARLY, AT THAT POINT THE

CONTEMPLATION IS WE'RE WAIVING

THIS EXPIRATION OF THIS DUE

DILIGENCE PERIOD BECAUSE WE'RE  
SPEAKING IN FAVOR OF THE  
CONTRACT.

AND SO IF WE'RE GOING TO START  
TO PARSE OUT, AND I THINK JUDGE  
GROSS TRIED TO PARSE IT IN A  
DIFFERENT WAY, JUST SAID THIS IS  
A BIG DEAL IN THE --

>> YES, HE USED THAT ESSENTIAL  
TERM --

[INAUDIBLE]

>> YES, WHICH I SEE YOUR POINT  
THERE.

BUT IF WE'RE GOING TO BE SAYING  
WHAT THE STATUTE OF FRAUD IS  
MEANT TO DO WHICH IS TO HAVE  
CONTRACTS IN WRITING THAT  
INVOLVE, IN THIS CASE, THE SALE  
OF REAL ESTATE AND WE HAVE THAT,  
BUT WE'VE GOT A PARTY TO THIS  
THAT HAS THE RIGHT TO HAVE SAID  
YOUR --

[INAUDIBLE]

HAS EXPIRED, BUT INSTEAD ACTS IN  
FURTHERANCE OF AN EXTENSION,

THAT THE PERSON RELIES ON, I'M  
HAVING MY HARD TIME SEEING WHY  
THE EQUITIES OF THAT SITUATION  
DON'T AT LEAST QUALIFY, AND, YOU  
KNOW, I WAS LOOKING AT THE CASE  
THIS MORNING OF FORBES V. BABEL  
AS THE WAIVER OF SOMETHING THAT  
WOULD HAVE OTHERWISE BENEFITED  
THE, YOU KNOW, THE DK WHICH IS  
YOU ONLY HAVE 60 DAYS FOR DUE  
DILIGENCE, AND IT'S EXPIRED.  
AND, IN FACT, NO, THEY GO AHEAD  
AND THEY ACT IN FURTHERANCE OF  
IT.  
SO TELL ME FROM, I GUESS, BOTH  
THE FACTS OF THIS CASE, WHAT'S  
WRONG WITH IT AND THEN WHY AS A  
MATTER OF JURISPRUDENCE IT WOULD  
BE A, IT IS WRONG TO INCLUDE  
WHATEVER YOU CALL THIS KIND OF  
ESTOPPEL, THIS KIND OF ESTOPPEL  
AS AN EXCEPTION TO THE STATUTE?  
>> FIRST, FACTUALLY.  
THERE WAS AN ORAL EXTENSION FROM  
THE FOURTH UNTIL THE 11TH.

THERE WAS TESTIMONY IN THE  
RECORD FOR THAT.

THE MORE IMPORTANT TESTIMONY IS  
THAT ON THE 11TH,

REPRESENTATIVES OF EB MET WITH  
THE REPRESENTATIVES OF DK.

ACKNOWLEDGED THAT THE DUE  
DILIGENCE PERIOD WAS EXPIRING ON  
THE 11TH.

AND REQUESTED A FURTHER  
EXTENSION OF THAT.

THIS IS UNREBUTTED IN THE  
RECORD.

>> NOW, SO YOU WOULD SAY THAT  
UNDER THE STATUTE OF FRAUD THAT  
THEY COULDN'T HAVE EXTENDED IT  
VERBALLY FROM THE 4TH THROUGH  
THE 11TH?

>> I WOULD SAY THAT, AND  
REPRESENTING MR. KING FOR 15  
YEARS, I WAS NOT SURPRISED THAT  
THAT HAD OCCURRED.

BUT IT WAS A LIMITED EXTENSION  
BECAUSE WHAT THE COURT IS  
TALKING ABOUT, WHAT EB IS

TALKING ABOUT IS AN ENDLESS  
EXTENSION OF A DUE DILIGENCE  
PERIOD WHICH TAKES PROPERTY OFF  
THE MARKET INDEFINITELY WHICH  
JUST --

[INAUDIBLE]

HE WAS NOT WILLING TO DO.

THE IMPORTANT FACTUAL ISSUE  
HERE, AND I THINK IT'S A VERY  
SIGNIFICANT FACT IS THAT IN THE  
CONVERSATION, AND IN THE RECORD  
OF THE TRANSCRIPT OF PAGES 171  
OF THE TRIAL TRANSCRIPT, THE  
TESTIMONY, UNREBUTTED TESTIMONY  
IS THAT THERE WAS THIS  
CONVERSATION BETWEEN THE TWO  
SIDES AT WHICH POINT THE LAWYERS  
FOR MR. KING -- I WAS NOT  
INVOLVED THEN -- BUT THE LAWYERS  
FOR MR. KING, THE PROPERTY  
LAWYERS, SAID TO, HE'S  
NOW-CONGRESSMAN KLEIN, IT'S  
EXPIRING TODAY.  
THE DUE DILIGENCE IS EXPIRING  
TODAY, AND MR. KLEIN



ACKNOWLEDGED THAT FACT AND SAID

WE NEED A FURTHER EXTENSION.

>> WHAT DATE WAS THAT?

WAS THAT ON THE 11TH?

>> ON THE 11TH, YES.

>> BUT I THOUGHT YOUR ARGUMENT

WAS THAT THE ACTUAL EXTENSION

EXPIRED ON OCTOBER 4TH.

>> BUT FOR THE VERBAL EXTENSION

FOR ONE FURTHER WEEK.

>> OKAY.

AND THAT VERBAL EXTENSION

OCCURRED ON WHAT DAY?

>> ON THE 4TH TO THE 11TH.

>> BUT THE JUDGE FOUND ON PAGE 4

OF THE JUDGE'S ORDER, AND THERE

WAS TESTIMONY, THE COURT FINDS

THE DUE DILIGENCE PERIOD WAS

EXTENDED AT THE OCTOBER 4TH

MEETING FOR AN INDEFINITE

HEARING --

>> YES, HE DID.

>> OKAY, SO ISN'T THAT A FACTUAL

FINDING?

WE'RE HERE TO TAKE THE EVIDENCE

IN THE LIGHT THAT'S UNFAVORABLE  
BASED ON THE CREDIBILITY OF THE  
PEOPLE INVOLVED AND SAY WHETHER  
THAT'S A LEGAL MATTER FROM ALL  
OF THAT SO THAT IT WOULDN'T  
MATTER WHETHER IT WAS EXTENDED  
FROM THE 4TH TO THE 11TH, FROM  
THE 4TH TO THE 28TH?

IT'S NEVER THAT HE CAN'T DO IT,  
THAT'S WHAT YOUR POINT IS.

>> THAT'S MY POINT.

>> LET'S ASSUME THAT EXPIRED,  
THAT THE DUE DILIGENCE TERM  
EXPIRES.

SO AT THAT POINT CONTRACTS HAVE  
TO BE --

[INAUDIBLE]

RIGHT?

>> YES, YOUR HONOR.

>> SO WHY IS IT THEN THE TRIAL  
JUDGE'S FINAL JUDGMENT ON PAGE 7  
THERE, IN EFFECT, WHERE IT SAYS  
MR. KING PROMISED THAT HE WOULD  
ATTEND THE OCTOBER 26TH COUNCIL  
MEETING, AND HIS FAILURE TO DO

SO VIOLATED PARAGRAPH 14 OF THE  
AGREEMENT?

>> YOUR HONOR, THE TRIAL JUDGE  
CREATED AN ORAL JOINT VENTURE IN  
HIS RULING THAT NEITHER SIDE HAD  
ADDRESSED AND AS TO CAN WHICH  
THERE WAS --

>> THIS HAS TO DO WITH THE  
ORIGINAL CONTRACT, NOT THE ORAL  
JOINT VENTURE AGREEMENT.

ORIGINAL CONTRACT IN THE RECORD  
REQUIRES UNDER PARAGRAPH 14  
COMPLIANCE AND COOPERATION OF  
MR. KING, AND BASED ON THE --

[INAUDIBLE]

SO WHY SHOULDN'T WE LOOK AT THAT  
AS ARGUED TO SAY, LOOK, THERE  
WAS A VIOLATION OF THE CONTRACT  
HERE, SO ACCORDING TO THE TERMS  
OF THE CONTRACT, THERE OUGHT TO  
BE A RETURN OF THE DEPOSIT?

>> WELL, THE PROBLEM WITH -- AND  
I UNDERSTAND THE COURT'S  
POSITION.

THE PROBLEM IS THAT THE TRIAL

COURT RULED THAT THE BASIS FOR  
EXTENDING THE DUE DILIGENCE WAS  
THIS JOINT VENTURE THAT HE  
CREATED WHICH THE FOURTH DCA  
REJECTED.

HE MIXES AND MATCHES HERE.

IT'S DIFFICULT TO UNDERSTAND --

>> BUT DOESN'T -- YOU'RE GOING  
BACK TO THE JOINT VENTURE.

BUT ISN'T THE FINDING ON PAGE 7  
OF THE JUDGMENT HAVING TO DO  
WITH THE ORIGINAL CONTRACT NOT  
ANY TERMS OF THE JOINT VENTURE  
AGREEMENT?

>> HE'S GOING BACK TO THE  
ORIGINAL --

>> CORRECT.

NOT THE JOINT VENTURE, THE  
ORIGINAL CONTRACT.

>> BUT HE THEN FOUND A BREACH  
FOR WHICH HE REQUIRED MR. KING  
TO PAY ALL OF THE ATTORNEYS'  
FEES WITH THE FOURTH DCA  
REVERSED.

>> WELL, I'M TALKING ABOUT THE

DEPOSIT, MILLION DOLLAR DEPOSIT.

WHY SHOULDN'T THAT BE RETURNED  
BACK TO EB?

>> BECAUSE THE SO-CALLED BREACH  
BY MR. KING WASN'T THE BASIS FOR  
THE RETURN OF THE DEPOSIT.

THE RETURN OF THE DEPOSIT  
DEPENDS UPON WHETHER THE  
CONTRACT HAD BEEN TERMINATED OR  
NOT.

THE CONTRACT --

>> I'M SORRY.

I'LL LET YOU FINISH.

I THOUGHT YOU WERE DONE.

>> CLOSE ENOUGH.

[LAUGHTER]

>> LET ME GO BACK TO KIND OF  
PRELIMINARY QUESTION HERE.

AND THIS KIND OF FOLLOWS UP ON  
SOMETHING THAT JUSTICE PARIENTE  
ASKED ABOUT --

[INAUDIBLE]

I HAVE TROUBLE SEEING EXPRESS  
AND DIRECT BETWEEN TANNENBAUM  
BASED ON REVIEW.

I MEAN, WE'VE GOT, IT SEEMS TO ME, TO BE AN ENTIRELY DIFFERENT THING TO USE PROMISSORY ESTOPPEL TO TOTALLY GET AROUND THE REQUIREMENT FOR THE STATUTE OF FRAUD AND AN AGREEMENT BEING RIGHT.

THAT'S ONE THING.

IT'S ANOTHER THING TO ALLOW A WAIVER OR AN ESTOPPEL TO OPERATE, HOWEVER YOU WANT TO DESCRIBE IT.

AND I DON'T THINK THE TERMINOLOGY REALLY IS THAT, IS WHAT SHOULD DRIVE THIS.

SO I HAVE TROUBLE SEEING THE THE EXPRESS CONFLICT.

UP UNTIL NOW I THINK I WOULD BE IN THE MINORITY ON THAT BECAUSE I THINK FIVE JUSTICES DECIDED WE HAVE JURISDICTION, I THINK, ON THE BASIS OF TANNENBAUM.

BUT IS THERE SOME OTHER CASE WHERE THERE IS DISCUSSED IN THE DIRECT CONFLICT IF TANNENBAUM

DOESN'T DO IT, AND I UNDERSTAND  
THAT YOU WOULD ASSERT THAT IT  
DOES, BUT BEYOND THAT CASE, IS  
THERE ANOTHER CASE THAT YOU  
WOULD RELY, IF YOU COULD TELL  
ME, FOR EXPRESS --

>> WELL, THIS COURT DECIDED IN  
WR GRACE WHERE IT WOULD  
REINFORCE THE HOLDING IN  
TANNENBAUM.

AND WE CITED TWO OTHER CASES  
FROM THE FOURTH DISTRICT WHERE  
TANNENBAUM --

>> WELL, THE FOURTH WON'T DO IT.

>> IN THIS COURT, NO, YOUR  
HONOR.

>> AND CROWN REALLY RECOGNIZES  
THE DIFFERENCE BETWEEN AT LEAST  
EQUITABLE AND PROMISSORY, BUT  
PROMISSORY COULD BE USED FOR  
INSURANCE COVERAGE.

SO I THINK, AND FOLLOW THROUGH  
WITH WHAT JUSTICE CANADY IS  
SAYING.

MY CONCERN AS WELL, IF WE'RE

DEALING WITH SOME ABSOLUTE  
STATUTE FRAUD, ANY EXTENSION OR  
WAIVER OF A WRITTEN CONTRACT HAS  
TO BE ALSO IN WRITING, YOU KNOW,  
UNLESS THERE IS AN ACTUAL  
MISREPRESENTATION.  
THAT WOULD BE YOUR, YOU KNOW,  
THAT SOMEONE RELIED ON.  
THERE HAS TO BE AN AFFIRMATIVE  
MISREPRESENTATION.  
THEN THE, YOU KNOW, FEAR IN  
TANNENBAUM IT IS, NOW, PART OF  
THE CONTRACT IS IN WRITING, AND  
THE ISSUE IS SHOULD THE WHOLE  
STATUTE OR FRAUD BE EXCUSED  
BECAUSE SOMEBODY CAME DOWN TO  
FLORIDA AND HAD TO SPEND A LOT  
OF MONEY TO BECOME A DOCTOR AND  
COULDN'T GET THE AGREEMENT IN  
WRITING?  
JUST DOESN'T SEEM LIKE WE SET UP  
THIS ABSOLUTE RULE THAT IS,  
THEREFORE, THE REASON TO QUASH  
THIS CASE, AND IT MAY BE IT IS  
TO ELABORATE ON, YOU KNOW, JUDGE



ROACH'S THEORY OF WHAT KINDS OF  
ESTOPPEL ARE ADMISSIBLE AND WHAT  
AREN'T.

SO IF YOU COULD STILL ADDRESS  
THAT ISSUE --

>> I WILL.

>> -- ABOUT SOME HARD AND FAST  
RULE THAT WE HAVE ADOPTED AND  
STUCK TO ALL THESE YEARS, THAT  
EVERY PART OF A CONTRACT EVEN  
EXCUSING THE PART OF IT AS IN  
WRITING.

>> WELL, MY PREFERENCE WOULD NOT  
BE FOR AN ELABORATION OF JUDGE  
GROSS' OPINION, BUT THE  
REJECTION OF HIS OPINION.

[LAUGHTER]

>> I'M SAYING THE ELABORATION OF  
TANNENBAUM TO SAY THIS APPLIES  
ACROSS THE BOARD.

>> YES, I UNDERSTAND.

>> ANY KIND OF A SITUATION OTHER  
THAN, AND WE WOULD JUST BE  
MAKING THIS UP AS WE GO,  
SOMETHING THAT WE'LL CALL

EQUITABLE ESTOPPEL WHICH IN YOUR  
VIEW IS A SMALLER SUBSET OF  
ESTOPPEL DIFFERENT FROM BE  
PROMISSORY ESTOPPEL AND  
DIFFERENT FROM WAIVER.

>> I'M JUST GOING BY THE  
DEFINITION OF EQUITABLE ESTOPPEL  
IN THE CASE LAW, AND THAT REFERS  
TO A MISSTATEMENT OR A  
CONCEALMENT OF A FACT,  
PROMISSORY ESTOPPEL REFERS TO A  
PROMISE OF SOMETHING THAT IS  
GOING TO HAPPEN AGAIN IN THE  
FUTURE.

>> BUT WHAT ABOUT, AGAIN, THE  
IDEA THAT TANNENBAUM HAS NOTHING  
TO DO WITH THIS -- THAT SOMEBODY  
ISN'T REPUTING A CONTRACT THAT  
EXISTS BUT IS NOT INSISTING ON,  
AGAIN, AND I REALIZE YOUR VIEW  
OF THE FACTS MAY BE DIFFERENT,  
BUT AGREEING TO WAIVE A SPECIFIC  
PROVISION OF THE CONTRACT?

>> WELL, IF I MAY, AND I DON'T  
MEAN TO BE HYPERTECHNICAL, BUT

THIS IS THE SUPREME COURT,  
WAIVER WAS NOT ADDRESSED BY THE  
JUDGE --

>> WELL, MOST RESPECTFULLY, IF  
YOU CAN BE AFFIRMED ON ANY  
BASIS --

>> YOU'RE DOWN TO FOUR MINUTES.

>> OKAY, WELL --

>> YOU CAN CONTINUE.

>> LET ME RESPOND TO YOUR  
QUESTION.

THERE ARE CASES WE'VE CITED HERE  
WHERE ACCORDING TO TANNENBAUM  
NOTHING WAS IN WRITING.

THERE ARE A SERIOUS -- SERIES OF  
CASES WHERE THE STATUTE OF  
FRAUDS WAS HELD TO APPLY TO AN  
EXTENSION OF THE CLOSING DATE  
WHICH IS VERY SIMILAR TO THIS,  
TO AN EXTENSION TO OBTAIN  
FINANCING TERMS --

>> LOWER COURT CASES?

>> YES.

THEY'RE ALL LOWER COURT CASES.

>> SO YOU'RE SAYING THIS COURT'S

OPINION IS IN --

>> THAT CONFLICT, IT HAS TO BE

FROM ANOTHER APPELLATE --

>> THE DECISION, THE, UM,

BRADLEY DECISION BOTH FROM THE

THIRD TO THE ORLANDO DECISION

FROM THE FIFTH.

ALL ARE CONSISTENT WITH

TANNENBAUM.

>> I AGREE WITH MY COLLEAGUES.

CASES OUGHT NOT BE DETERMINED

BASED ON LABELS.

AND THAT'S GOING TO MY INITIAL

QUESTION HERE.

I THINK THERE'S A SIGNIFICANT

LEGAL ISSUE THAT THE LAW IN

FLORIDA IS REALLY CONFUSED WITH

REGARD TO THE STATUTE OF LAW AND

WHEN SOMETHING HAPPENS, WHETHER

IT AVOIDS IT, WHETHER IT'S AN

EXCEPTION OR WHAT HAPPENS TO IT.

AND I THINK THAT WE'RE ALL OVER

THE BOARD ON THAT.

AND WE DO NEED SOME

CLARIFICATION.

>> THERE IS NO QUESTION ABOUT  
THAT BOTH IN TERMS OF WHAT'S  
EQUITABLE ESTOPPEL, WHAT'S  
PROMISSORY ESTOPPEL, WHEN  
DOESN'T IT APPLY, WHEN DOESN'T  
IT APPLY.

AND THIS ILLUSTRATES NOTHING SO  
MUCH THAT THERE IS CLEAR  
CONFUSION IN THE FOURTH BUT  
ELSEWHERE.

MY PREFERENCE WOULD BE TO HAVE  
IT REVERSED, BUT IT IS ALSO  
USEFUL TO HAVE THIS CLARIFIED BY  
THE COURT.

>> I AGREE WITH YOU.

WHAT IS AN EXCEPTION, WHAT IS A  
REASON, A LEGAL DOCTRINE TO  
AVOID THE APPLICATION STATUTE OF  
FRAUD.

AS YOU SEE IT COMING OUT OF THIS  
CASE.

>> I DON'T THINK THAT THERE  
SHOULD BE.

THE LAW THAT WAS ENUNCIATED IN  
TANNENBAUM WAS PRETTY CLEAR.

I THINK THE CARVEOUT BY JUDGE  
GROSS PROVIDES NO GUIDANCE TO  
ANYONE, WHAT IS AN ESSENTIAL  
TERM.

I THINK GIVING UP THE RIGHT FOR  
A MILLION DOLLAR DEPOSIT AND  
EXTENDING DUE DILIGENCE  
INDEFINITELY WOULD BE AN  
ESSENTIAL TERM.

HE DOESN'T SAY WHAT AN ESSENTIAL  
TERM IS, HE TALKS ABOUT THE TWO  
CASES WHERE THEY CLEARLY AFFIRM  
TANNIN BAM AND FOLLOW  
TANNENBAUM.

BUT THAT'S OF NO GUIDANCE TO  
ANYONE.

>> PLEASE THE COURT, KEVIN MARCO  
FOR THE RESPONDENT, EB  
ACQUISITIONS.

THE FOURTH DISTRICT'S COURT  
OF -- THE FOURTH DISTRICT'S  
DECISION IN THIS CASE DID NOT  
RECITE ANY NEW LAW, DOES NOT  
CONFLICT WITH ANY OF FLORIDA'S  
DISTRICT COURTS OF APPEALS OR,

FRANKLY, ANY JURISDICTION.

THE LAW RECOGNIZES AND HAS  
RECOGNIZED FOR YEARS THE  
PEACEFUL COEXISTENCE OF THE RULE  
OF LAW AND ESTOPPEL.

>> THIS CASE WASN'T DECIDED ON  
WAIVER.

>> WELL --

>> WAS THIS CASE DECIDED ON  
WAIVER?

>> IT WASN'T DECIDED ON A  
WAIVER.

>> SO THE JUDGE HAS CREATED SOME  
BODY OF LAW THAT WROTE THIS -- I  
READ THAT OPINION, IT TALKS  
ABOUT SOMETHING CALLED  
ESSENTIAL, ESSENTIAL ELEMENTS OR  
ESSENTIAL REQUIREMENTS,  
SOMETHING LIKE THAT.

I FORGET THE PHRASE.

THAT'S WHAT CAUGHT MY EYE IN  
THIS CASE AS FAR AS I'M  
CONCERNED IN LOOKING THAT THE IS  
YOU COULD ALMOST SAY ANYTHING,  
ANY FACT IN THE WORLD WILL AVOID

APPLICATION STATUTE OF FRAUD AS

LONG AS WE JUST GIVE IT A LABEL.

THAT'S MY CONCERN.

>> WELL, JUSTICE LEWIS, WITH

RESPECT TO THE WAIVER, THERE IS

A SYNERGY BETWEEN THE WAIVER OF

DK TO RELY ON THE STRICT

PROVINCE OF THE CONTRACT AS

WRITTEN AND THE ESTOPPEL TO

PREVENT DK FROM RELYING ON THE

STATUTE OF FRAUD AS IT --

>> RESPECTFULLY, I THINK THEY'RE

TWO DIFFERENT THINGS.

I THINK THE LAW'S ALWAYS

RECOGNIZED THAT A WAIVER AND

ESTOPPEL IS DIFFERENT.

ESTOPPEL REQUIRES A CHANGE IN

POSITION.

>> THE TRIAL COURT DID --

>> IS THAT NOT THE LEGAL

DISTINCTION BETWEEN THE TWO?

>> OH, OF COURSE IT IS.

>> OKAY.

IT CAN'T BE THE SAME.

SO WE KNOW THEY'RE NOT THE SAME.



>> THERE ARE TWO DISTINCT --  
UNDER WHICH THE COURT COULD  
AFFIRM.

>> IN THE TRIAL COURT, DID YOUR,  
DID YOU SUE FOR THE RETURN OF  
THE DEPOSIT, YOUR CLIENT?

>> WE SUED FOR THE RETURN OF THE  
DEPOSIT.

>> THEY RAISED THE STATUTE OF  
FRAUD?

>> THE STATUTE OF FRAUDS WAS AN  
ISSUE.

>> OKAY, WAS IT AVOIDANCE THEN?

>> WE FILED THE COUNTERCLAIM FOR  
BREACH OF THE CONTRACT.

WE ALSO RAISED DEPARTMENT OF THE  
DEFENSE'S --

>> SO THAT WAS IN YOUR ORIGINAL  
PLEA?

AND I AGREE THAT THERE'S -- I  
JUST ALWAYS, I'M NOT QUITE AS  
WELL-SCHOOLED, BUT WE ALWAYS SAY  
WAIVER AND ESTOPPEL AS IF THEY  
SOMEHOW COULD BE, YOU KNOW, IN  
THIS CASE EITHER YOU WAIVED

COMPLIANCE WITH CONDITION OR YOU  
WERE STOPPED THERE ASSERTING IT.

I MEAN, I SEE THOSE AS TWO  
DIFFERENT THINGS.

YOU SAY YOU'VE PLED THEM BOTH.

>> WE PLED THEM.

THE FACT OF THE MATTER IS  
SEVERAL OF THE JUSTICES HAVE  
ALREADY RECOGNIZED --

>> NO ONE FOUND THAT THE TRIAL  
COURT, NOR THE DISTRICT COURT  
THAT THERE WAS A WAIVER IN THIS  
CASE?

>> THAT'S TRUE, JUSTICE QUINCE,  
HOWEVER, THE RECORD DOES --

>> I'M JUST ASKING YOU, THAT'S A  
FACT.

NEITHER COURT FIND THAT THERE  
HAD BEEN A WAIVER IN THIS CASE?

>> NO COURT HAS -- YES.

I AGREE.

NO COURT HAS SPECIFICALLY FOUND  
A WAIVER.

HOWEVER, THE TRIAL COURT --

>> AND WHEN YOU LOOK AT THE

FOURTH DISTRICT OPINION, FOURTH  
DISTRICT DOES USE THE TERM  
ESTOPPEL, CORRECT?

>> YES, IT DOES.

>> OKAY.

SO MY QUESTION TO YOU IS THIS:

IS THERE A REAL DIFFERENCE, IS  
THERE A DIFFERENCE BETWEEN  
PROMISSORY ESTOPPEL AND  
EQUITABLE ESTOPPEL?

OTHERWISE, IT SEEMS TO ME IF  
THERE IS NO DIFFERENCE, THEN WE  
COULD, YOU KNOW, YOU COULD  
ELIMINATE THE STATUTE ALTOGETHER  
AND JUST GO WITH THIS.

BECAUSE I THOUGHT PROMISSORY  
ESTOPPEL, AND YOU CAN CORRECT ME  
WHEN YOU GET TO ANSWER HERE,  
THAT PROMISSORY ESTOPPEL  
INVOLVES A PROMISE THAT EXPECTS  
SOMEONE TO RELY ON AND THEY DID,  
IN FACT, RELY ON IT.

INVOLVES SOME KIND OF  
MISREPRESENTATION OF A FACT, AND  
THAT'S THE EQUITY THAT ALLOWS

YOU TO CIRCUMVENT THE STATUTE OF  
FRAUD.

AND IF YOU WOULD TELL ME YOUR  
UNDERSTANDING OF THE DIFFERENCE  
BETWEEN PROMISSORY ESTOPPEL AND  
EQUITABLE ESTOPPEL.

>> MY ANSWER WOULD BE IN LINE  
WITH THE QUESTION THAT JUSTICE  
PARIENTE WAS RAISING THAT I  
DON'T BELIEVE THIS IS A  
PROMISSORY ESTOPPEL CASE.

BASED ON MY EXPERIENCE, I  
BELIEVE PROMISSORY --

>> THERE WAS A PROMISE IN THIS  
CASE THAT'S ALLEGED, A PROMISE  
TO FORGO, TO EXTEND THE DUE  
DILIGENCE PERIOD, CORRECT?  
THAT WAS THE PROMISE.

>> WELL, YES, THAT WAS A  
PROMISE.

IT'S ALSO THE ESTABLISHED FACTS  
OF THE CASE.

>> AND THEN WASN'T THAT WHAT WAS  
RELIED ON?

THAT'S WHY I'M REALLY HAVING A

HARD TIME UNDERSTANDING HERE  
EXACTLY WHAT THE SECOND, THE  
FOURTH DISTRICT MEANT WHEN THEY  
WERE TALKING ABOUT ESTOPPEL.  
SO THAT'S WHY I'M TRYING TO GET  
YOU TO EXPLAIN TO ME THE  
DIFFERENCE BETWEEN PROMISSORY  
ESTOPPEL AND EQUITABLE ESTOPPEL.  
WAIVER ASIDE --

>> SURE.

>> I DON'T WANT TO GET INTO THAT  
RIGHT NOW, BUT WHAT IS THE  
ESTOPPEL HERE THAT THE FOURTH  
DISTRICT'S AFTER.

>> WELL, THE ESTOPPEL WAS EB'S  
FOREBEARING ON ITS RIGHT TO  
TERMINATE THE CONTRACT AND  
REQUEST THE GOES SIT BACK AS WAS  
ITS RIGHT TO DO.

PROMISSORY ESTOPPEL, I BELIEVE  
THE COURT HAD DEFINED IT AS A  
SUBSTITUTE FOR CONSIDERATION OR  
AS THIS COURT RECOGNIZED IN THE  
TANNENBAUM IS THE SUBSTITUTE FOR  
A CONTRACT.

IN TANNENBAUM THERE WAS NO  
CONTRACT, AND THE PLAINTIFF,  
THEREFORE, WAS --

>> YOU MEAN A WRITTEN CONTRACT.

>> THERE WAS NO WRITTEN  
CONTRACT.

IT WAS RIGHT WITHIN THE, WITHIN  
THE STATUTE OF FRAUD.

AND AS SEVERAL MEMBERS OF THE  
COURT HAVE ALREADY IDENTIFIED  
HERE, THERE WAS A WRITTEN  
CONTRACT --

>> BUT THE FORBEARANCE WAS IN  
EXCHANGE FOR A PROMISE TO  
CONTINUE A JOINT VENTURE  
DISCUSSION TO TRY TO COME TO AN  
AGREEMENT HERE.

AND SO IT SEEMED LIKE IT'S JUST  
AN ABSOLUTE MODIFICATION OF THE  
WRITTEN CONTRACT.

>> WELL, AS THE COURT'S  
RECOGNIZE, AND IT REALLY DOES  
SPEAK TO THE LACK OF CONFLICT  
AND, YOU KNOW, THE HARMONIOUS  
EXISTENCE BETWEEN TANNENBAUM AND

ALL OF THE DISTRICT COURTS OF  
APPEALS WHICH HAVE DECIDED THE  
ISSUE.

>> SO ARE YOU TELLING ME THAT  
THE DISTRICT COURTS HAVE NOT  
LOOKED AT THE TANNENBAUM CASE AS  
SAYING, IN THE ESSENCE, THAT  
WHEN YOU HAVE A CONTRACT, A  
WRITTEN CONTRACT, AND THERE'S A  
POSITION THAT SAYS THAT, YOU  
KNOW, IN THE ADDENDUM HAS TO BE  
IN WRITING ALSO THAT PROMISSORY  
ESTOPPEL IS NOT, CANNOT BE USED  
TO CIRCUMVENT THE STATUTE OF  
FRAUD?

THAT'S NOT HOW THE DISTRICT  
COURTS HAVE LOOKED AT  
TANNENBAUM?

>> THE CASES WHICH HAVE UPHELD  
THE DOCTRINES OF WAIVER AND  
ESTOPPEL UNDER OR THESE  
CIRCUMSTANCES, AND IT'S THE CASE  
THAT JUSTICE POLSTON WAS  
ALLUDING TO PROVIDES THAT THE  
ESTOPPEL IS, PREVENTS THE UNJUST

APPLICATION OF THE STATUTE OF  
FRAUD.

BUT THE RELIANCE OF FIRMS THAT  
WERE RELIED UPON IN THIS CASE THE  
EXTENSION OF DUE DILIGENCE, IN  
THE OTHER CASE THE OTHER  
DISTRICT COURT OF APPEALS HAVE  
DECIDED HAVE BEEN THE EXTENSION  
TO THE TIME FOR CLOSING, THOSE  
TERMS DO NOT BECOME PART OF THE  
CONTRACT IT.

THE CONTRACT ITSELF IS THE  
PURCHASE AND THE SALE.

THE CONSIDERATION HASN'T  
CHANGED, BUT WHAT CHANGES IS THE  
CONDITIONS UNDER WHICH A  
PURCHASE AND SALE SHALL TAKE  
PLACE.

THE SAME PROMISE UNDER DIFFERENT  
CONDITIONS.

AND THOSE, THAT'S BEEN THE WHO  
WOULDING OF, YOU KNOW, YOU GO  
THROUGH THE CASES THAT WE RELIED  
ON, SECOND DCA IN THE YOUNG  
VERSE --



>> WOULD YOU ANSWER JUSTICE

QUINCE'S QUESTION?

SHE ASKED YOU THE DIFFERENCE.

WOULD YOU TELL US THE LEGAL

DIFFERENCE BETWEEN PROMISSORY

ESTOPPEL AND EQUITABLE ESTOPPEL?

THAT'S WHERE SHE STARTED.

SHE TOLD YOU WHAT SHE UNDERSTOOD

IT TO BE LEGALLY.

>> MY UNDERSTANDING IS EQUITABLE

ESTOPPEL IS DETRIMENTAL -- WELL,

ESTOPPEL, PERIOD, AND IT

CERTAINLY FALLS WITHIN THE

BROADER PERIOD, IS DETRIMENTAL

ALLIANCE WHICH HAS BEEN

INTRODUCED BY PROMISES OF

ANOTHER PARTY.

>> IS THAT COMMONLY, GENUINELY,

LEGALLY KNOWN AS ESTOPPEL?

>> NO.

>> WHAT IS THAT KNOWN OF?

>> WHATEVER'S KNOWN, IN

TANNENBAUM WE CALLED IT THE

SO-CALLED DOCTRINE OF PROMISSORY

ESTOPPEL, AND --

[INAUDIBLE]

AND NOW I DON'T KNOW WHERE WE  
EVER SAID, BUT EQUITABLE  
ESTOPPEL CAN BE ACCEPTED, AND WE  
CERTAINLY DIDN'T SAY IN  
TANNENBAUM ALTHOUGH THERE IS A  
PRETTY GOOD DISSENT, 4-3, 4-2,  
BUT NOBODY'S ASKING US TO SPEAK  
TO TANNENBAUM HERE.  
BUT WE DIDN'T TALK ABOUT  
EQUITABLE ESTOPPEL.  
SO THE ONLY HOLDING OF  
TANNENBAUM IS THAT PROMISSORY  
ESTOPPEL IS NOT --

[INAUDIBLE]

BEING A PROMISE OF REASONABLY  
EXPECTING FORBEARANCE AND WHICH  
DOES.  
HERE THE PROMISE WAS TO EXTEND  
THE DUE DILIGENCE PERIOD.  
AND THEY ACTED IN RELIANCE ON  
IT.  
THAT'S THE PROMISSORY ESTOPPEL.  
THERE'S NOTHING IN TANNENBAUM  
THAT SAYS IT'S ONLY IF IT

RELATES TO THE ACTUAL MATERIAL  
TERMS OF THE CONTRACT.  
IT'S EACH PART OF THE CONTRACT,  
INCLUDING A DUE DILIGENCE  
PERIOD, INCLUDING A TIME FOR  
CLOSING ARE ALL PART OF WHAT  
NEEDS TO BE IN WRITING UNDER THE  
STATUTE OF FRAUD, DOESN'T IT?

>> YES, JUSTICE PARIENTE.

AND IT WAS -- THE QUESTION THAT  
I, THE ANSWER THAT I ADDRESSED  
TO JUSTICE POLSTON, BASICALLY,  
THE CONSIDERATION REMAINS  
UNCHANGED.

IT'S JUST THE MANNER IN WHICH  
THE CONTRACT IS GOING TO BE  
PERFORMED.

>> WHAT WAS THE CONSIDERATION  
FOR THIS SO-CALLED INDEFINITE  
EXTENSION OF TIME OF THE DUE  
DILIGENCE PERIOD?

>> IT WAS FORBEARANCE.

IT WAS FORBEARANCE OF EB BY ITS  
RIGHT TO PULL BACK A MILLION  
DOLLAR DEPOSIT, AND IT WASN'T A

CHANGE --

>> OKAY, AND WHAT DID EB GET IN  
RETURN?

>> IT GOT AN OPEN DUE DILIGENCE  
PERIOD SO THE PARTIES COULD  
PURSUE THEIR JOINT VENTURE  
DISCUSSIONS WHERE --

>> [INAUDIBLE]

>> FORBEARANCE TO KEEP THE  
CONTRACT ALIVE AS OPPOSED TO  
HAVING THEM PULL BACK.

>> YES, JUSTICE CANADY.

>> WELL, THE THING, I MEAN, IN  
TRYING TO GET STABILITY IN  
FLORIDA LAW, I MEAN, WE CAN'T  
HAVE JUST THE LAW IS THAT WE  
HAVE A STATUTE OF FRAUDS, BUT  
IT'S A PHANTOM.  
BECAUSE EVERY TIME YOU CAN COME  
ALONG AND WE CAN CHANGE IT BY  
WE'LL PROMISE THIS OR WE'LL DO  
THAT AND THERE IS NO SUCH THING,  
WE'RE EVEN EXPANDING STATUTE OF  
FRAUDS NOW IN THE UCC.  
EITHER FURTHER THAN FROM REAL

ESTATE CONTRACTS.

SO MY CONCERN IS THE STABILITY

IN FLORIDA LAW, A CLEAR

STATEMENT OF NO SUCH THING AS

PROM STORY ESTOPPEL TO BAR

APPLICATION OF THE STATUTE OF

FRAUDS.

ISN'T THAT WHAT TANNENBAUM SAYS?

>> WELL, I THINK THAT WOULD BE

AN EXTREME READING OF TANNENBAUM

GIVEN THAT IT WASN'T A REAL

ESTATE CASE --

>> IT WAS A STATUTE OF FRAUDS

QUESTION.

IT WASN'T THAT IT COULDN'T BE

PERFORMED WITHIN THE PERIOD OF A

YEAR.

WASN'T IT?

>> YES.

>> OKAY.

WE'RE GOT GOING TO GET ANYWHERE

HERE BECAUSE THIS COURT IS NOT

IN THE EXCEPTION BUSINESS.

>> LET'S LOOK AT THE COURT'S OWN

PRECEDENT.

TANNENBAUM WAS DECIDED IN 1966.  
NO MENTION WAS MADE OF GILMAN  
WHICH THIS COURT HELD IN 1945  
THAT THE STATUTE OF FRAUDS CAN'T  
BE INVOKED OR NONPERFORMANCE WAS  
CAUSED BY THE OTHER CONTRACTING  
PARTY'S ORAL AGREEMENT.

>> NOW I GUESS HERE'S THE -- ARE  
YOU -- YOU'RE SUGGESTING WE  
SHOULD DISCHARGE --

[INAUDIBLE]

YOU'RE NOT SUGGESTING THAT WE  
PROCEED WITH TANNENBAUM OR THAT  
IT'S WRONGLY DECIDED OR ARE YOU?

>> WELL --

>> BECAUSE NOW WE COULD LOOK AND  
SAY, YEAH, THAT'S '66, THAT'S  
'45, WE NEED TO BRING, YOU KNOW,  
CLARITY.

BUT I GO BACK TO THAT.

ALTHOUGH I DON'T LIKE WHAT  
HAPPENED HERE, THE IDEA THAT  
THEY KNEW HOW TO PUT AN  
EXTENSION IN WRITING, THEY DID  
IT ONCE, ALL THEY HAD TO DO IS

THEY THOUGHT THEY WERE GOING TO  
EXTEND IT.

THIS ISN'T LIKE A, SOMETHING  
THAT WOULD BE DIFFICULT TO DO.  
SPEND FIVE MORE MINUTES AND PUT  
IT IN WRITING.

AND IF SOMEBODY WASN'T GOING TO  
PUT IT IN WRITING, THEN YOU'D BE  
THINKING, THEY'RE TRYING TO  
SNOOKER YOU.

BUT MAYBE THAT'S WHAT HAPPENED.

MAYBE MR. KING, I MEAN, HE WAS  
OBVIOUSLY PLAYING IT, YOU KNOW,  
HE WAS NEGOTIATING WITH OTHER  
PEOPLE, PROMISING TO DO ONE  
THING, AND NONE OF THAT SEEMS  
LIKE TERRIFIC BEHAVIOR, BUT THE  
ISSUE IS THAT THE COURT OR THE  
LAW SAYS IF SOMETHING IS GOING  
TO CHANGE IN A CONTRACT, YOU'VE  
GOT TO PUT IT IN WRITING IN A  
REAL ESTATE CONTRACT.

>> WELL, AS TO THE FIRST PART OF  
YOUR QUESTION, JUSTICE PARIENTE,  
WE DID WRITE IN OUR BRIEF ABOUT

WHAT WE FOUND AS THE EMERGING  
TREND IN PROMISSORY ESTOPPEL LAW  
WHERE MANY STATES, AND WE HAD A  
LONG CITE IN OUR BRIEF, HAVE  
STARTED LOOKING AT THE DOCTRINE  
OF PROMISSORY ESTOPPEL AS A  
MECHANISM AND TOOL TO PREVENT  
THE KIND OF INJUSTICE WHICH,  
PERHAPS, THE PLAINTIFF SUFFERED  
IN TANNENBAUM.  
BUT TO AFFIRM, THE COURT NEED  
NOT REFRAIN OR REPUDIATE  
TANNENBAUM AT ALL BECAUSE THERE  
IS A DIRECT LINE PRIOR TO  
TANNENBAUM WHICH WAS UNDISTURBED  
IN TANNENBAUM, GILMAN, FORBES,  
INTERESTINGLY, SOUTH INVESTMENT  
CORP. WHICH WAS A CASE RELIED  
UPON BY DK EXTENSIVELY.  
THE COURT WROTE, AND I THINK  
THIS GETS BACK TO A QUESTION  
THAT JUSTICE LEWIS WAS RAISING  
AS TO THE DOCTRINE OF ESTOPPEL,  
AND THAT'S WHAT I CALLED IT TO  
PREVENT THE UNFAIR CIRCUMSTANCES



WHICH THE UNJUST APPLICATION OF  
FRAUDS -- THIS COURT WROTE WHEN  
INVOKED FOR THE PURPOSE OF  
WORKING A CHANGE IN THE TITLE TO  
LAND IS TO BE APPLIED WITH GREAT  
CAUTION.

IT PERMITS VERBAL STATEMENTS OR  
ADMISSIONS BE SUBSTITUTED IN  
PLACE OF THE WRITTEN EVIDENCE OF  
TRANSFER WHICH THE STATUTE OF  
FRAUDS AND THE GENERAL RULES OF  
LAW REQUIRE.

SO, AND SUBSEQUENT TO  
TANNENBAUM, YOU KNOW, YOU HAD  
UNITED OF OMAHA WHICH IT WAS THE  
THIRD DCA, THAT WAS THE SAME  
COURT THAT CERTIFIED THE  
QUESTION IN THE TANNENBAUM WHICH  
THIS COURT DECIDED.

>> DOESN'T THIS CASE, I MEAN, TO  
ME, THIS CASE SORT OF IS THE  
POSTER CHILD FOR WHY, FOR WHY WE  
SHOULDN'T HAVE THESE KINDS OF  
EXCEPTIONS TO THE FRAUD.

I MEAN, HERE WE HAVE ONE PARTY

WHO SAYS, YES, WE TALKED ABOUT  
EXTENDING THIS DUE DILIGENCE  
PERIOD, BUT IT WAS ONLY FOR  
SEVEN DAYS.

AND WE HAVE THE OTHER PARTY  
SAYING, YEAH, WE TALKED ABOUT  
EXTENSION OF THIS DUE DILIGENCE  
PERIOD, BUT IT WAS FOR AN  
INDEFINITE PERIOD OF TIME.

AND WE HAD REDUCED THIS TO  
WRITING, WE WOULDN'T HAVE THIS  
KIND OF DISPUTE.

AND SO, YOU KNOW, ALL OF THIS  
REALLY BRINGS TO MY MIND THAT  
THESE EXCEPTIONS THAT WE'VE BEEN  
CARVING OUT FOR THE STATUTE OF  
FRAUDS ARE CONSUMING THE STATUTE  
OF FRAUDS BEFORE WE EVEN HAVE  
IT.

>> WITH ALL DUE RESPECT, JUSTICE  
QUINCE, THERE HAVE BEEN  
EXCEPTIONS TO THE STATUTE OF  
FRAUDS SINCE THE STATUTE OF  
FRAUDS WAS CREATED.

>> I UNDERSTAND THERE HAVE BEEN

EXCEPTIONS.

I'M JUST SAYING IF WE'RE GOING  
TO GET DOWN TO THE ANYTIME  
PICKING ABOUT WAIVER, ABOUT  
EQUITABLE ESTOPPEL, PROMISSORY  
ESTOPPEL OR WHATEVER KIND OF  
ESTOPPEL YOU WANT TO CALL IT,  
THEN WHY ARE WE MESSING WITH --

>> A COUPLE OF POINTS AND ONE  
SUGGESTION.

FIRST OFF, IT'S BEEN RECOGNIZED  
BACK TO CARDOZA THAT THE STATUTE  
OF FRAUDS SHALL NOT BE USED AS  
AN INSTRUMENTALITY OF FRAUD OR A  
STUMBLING BLOCK --

>> THAT GOES BACK TO JUSTICE  
QUINCE'S ORIGINAL QUESTION IS  
MISREPRESENTATIONS IN FRAUD.

WE'RE NOT TALKING ABOUT THAT IN  
THIS CASE.

WE'RE TALKING ABOUT, WELL,  
THERE'S A DIFFERENT AGREEMENT  
THAN WHAT WE HAVE IN WRITING.  
THAT'S WHAT THIS IS, ISN'T IT?  
YOU'RE SAYING THE AGREEMENT IS

DIFFERENT THAN WHAT THIS WRITTEN  
DOCUMENT SAYS, AND HERE ARE THE  
FACTS.

AND THE OTHER SIDE SAYS, NO,  
IT'S NOT.

BUT THIS IS NOT A FRAUD.

THAT'S A DISPUTE WITH REGARD TO  
THE FACTS.

>> IT WAS AS THE NEW YORK,

PARDON ME, THE NEW HAMPSHIRE

SUPREME COURT FOUND THAT WAS

RELIED ON ON THE FOURTH AND WAS

ALSO CITED BY THE SECOND DPA IN

YOUNG AND --

[INAUDIBLE]

THE TERMS OF THE PERFORMANCE DO

NOT EFFECT THE CONTRACT ITSELF.

AND THAT'S A DISTINGUISHING

FEATURE FROM SHOAL HOLDINGS

WHICH THE COURT DIDN'T ALLOW MY

OPPOSING COUNSEL TO ARGUE

BECAUSE OF THE LACK OF CONFLICT

WITHIN THE FOURTH.

BUT FOR DECADES COURTS HAVE

RECOGNIZED THAT THE PARTY CAN'T

BENEFIT FROM ALTERED PERFORMANCE  
WHICH WAS INDUCED BY THEIR  
REPRESENTATION, THAT THEY WOULD  
IS ACCEPT PERFORMANCE.

AND BACK TO --

>> COULD I?

I WANT TO MAKE SURE I GET TWO  
QUESTIONS ANSWERED.

FIRST, ISN'T IT YOUR POSITION  
THAT EVEN IF YOUR OPPONENT WINS  
ON THE ESTOPPEL ARGUMENT AND  
THAT STATUTE OF FRAUD APPLIES TO  
YOU, THAT YOU'RE STILL ENTITLED  
TO THE RETURN OF DEPOSIT BECAUSE  
OF THE BREACH THAT OCCURRED BY  
MR. KING NOT GOING TO THE --

[INAUDIBLE]

>> [INAUDIBLE]

JUSTICE POLSTON.

>> SO EVEN IF STATUTE OF FRAUD  
APPLIES, THEN YOU STILL WIN YOUR  
DEPOSIT BACK?

>> YES.

THERE IS ONE POSSIBLE WAY THAT  
DK COULD MAKE AN ARGUMENT, IT'S

AN UNSUSTAINABLE BURDEN.

THE ONLY WAY THEY COULD MAKE THE  
ARGUMENT, AND I DIDN'T HEAR IT  
TODAY S THAT ON OCTOBER 4 ALL  
DUTIES UNDER THE CONTRACT JUST  
CEASE TO, CEASE TO BIND KING  
ANYMORE BECAUSE THE MONEY JUST  
DIDN'T APPEAR IN HIS HANDS.

AND, FRANKLY, THERE WAS NO  
OBLIGATION UNDER THE  
AGREEMENT --

>> BUT BE THAT'S THE -- IF  
THAT'S THE CASE, IT SEEMS TO ME  
THAT WHY IS THERE THEN STILL AN  
OBLIGATION TO APPEAR 22 DAYS  
LATER?

I MEAN, IF THE, BE THE --

>> BECAUSE THE CONTRACT'S STILL  
IN EFFECT.

I MEAN, IF DUE DILIGENCE --

>> WELL, WAIT A MINUTE.

IF, IN FACT, THERE WAS NO  
EXTENSION OF THE DUE DILIGENCE  
PERIOD BEYOND OCTOBER 4TH, IT  
SEEMS TO ME THAT THEN THERE'S NO

OBLIGATION AND THAT IT'S NOW  
TIME TO EITHER, YOU KNOW, CARRY  
THROUGH WITH CONTRACT OR NOT.

THE OBLIGATION --

>> I'M SORRY.

[LAUGHTER]

>> I APOLOGIZE.

>> THEN THE OBLIGATION, TELL ME

WHY YOU STILL HAVE THE

OBLIGATION ON OCTOBER THE 22ND?

>> BECAUSE UNILATERAL ACTION

WITH RESPECT TO THE DELIVERY OF

THE DEPOSIT WAS NOT SOMETHING

THAT WAS EB'S RESPONSIBILITY.

IF YOU LOOK TO ADDENDUM

PARAGRAPH TEN WHICH IS REALLY

THE ONLY CONTRACTUAL ARGUMENT

THAT DK CAN MAKE, ADDENDUM TEN,

PARAGRAPH TEN SAYS AT THE END OF

THE DUE DILIGENCE PERIOD

ASSUMING THAT BUYER HAS NOT

GIVEN NOTICE TO SELLER THAT IT

INTENDS TO TERMINATE THE

CONTRACT, THE PARTIES --

PLURAL -- SHALL TAKE THE

FOLLOWING ACTION: THE DEPOSIT  
SHALL BE RELEASED TO SELLER, AND  
THE SELLER SHALL DELIVER CLOSING  
DOCUMENTS AND OTHER RECORDS  
REGARDING CLOSING.

THAT WAS NEVER DONE.

BUT LET ME JUST EMPHASIZE ONE  
OTHER POINT.

SUBPARAGRAPH A, ADDENDUM TEN  
DOES NOT REQUIRE EB TO DELIVER  
THE DEPOSIT.

EB DIDN'T HAVE THE ABILITY TO  
DELIVER THE DEPOSIT.

THE DEPOSIT WAS IN THE HANDS OF  
AN ESCROW AGENT.

SO UP UNTIL THE TIME WHERE KING  
FAILED TO APPEAR AT THE MEETING,  
AT THE MEETING THAT HE DIDN'T  
ATTEND THAT DOOMED THE PROJECT,  
EB NEVER HAD ANY NOTICE THAT THE  
RELEASE OF THE DEPOSIT WAS  
SOMETHING THAT WAS IMPERIAL TO  
KING, THAT KING'S PARTICIPATION  
IN THE PROJECT WAS AT RISK  
BECAUSE OF THE FAILURE OF THE



DEPOSIT TO MAGICALLY APPEAR.  
EB NEVER TOOK ANY ACTION, NOR  
DOES THE RECORD SHOW ANY CONDUCT  
WHATSOEVER BY EB WHERE IT  
OPPOSED OR PREVENTED THE DEPOSIT  
FROM THE BEING DELIVERED TO  
KING --

>> WHEN DID YOU SAY THE CONTRACT  
TERMINATED?

WHEN DID YOU SAY ONE PARTY OR  
THE OTHER -- WELL, COULDN'T HAVE  
BEEN -- WHEN DK SAID IT WAS  
TERMINATING THE CONTRACT?

>> I'M SORRY, I DIDN'T HEAR THE  
QUESTION.

>> WHEN WAS THE CONTRACT BY --  
AS I NOW REALIZE AND I MAY HAVE  
MISSTATED IN MY OWN --

[INAUDIBLE]

IF THE ONLY THING THIS DUE  
DILIGENCE PERIOD SAYS IS WHETHER  
OR NOT THEY GET THEIR DEPOSIT  
BACK, BUT AS OF THE DATE THAT  
KING IS SUPPOSED TO APPEAR,  
THERE IS AN ONGOING CONTRACT,

ISN'T THERE?

>> YES.

THE FOURTH DCA SPECIFICALLY

ADDRESSES IT AND, REALLY, I'LL

USE LANGUAGE DIFFERENT THAN --

>> SO LET ME, SO IF THE CONTRACT

IS IN EXISTENCE, THE ONLY THING

THAT HAS BEEN LOST, WAS LOST BY

DB WAS THAT IF THEY BREACH IT OR

THEY WANT OUT, THEY DON'T GET

THEIR DEPOSIT BACK.

IS THAT CORRECT?

>> DID YOU SAY DB?

YOU MEAN EB?

>> I'M SORRY.

THEY'RE TOO CLOSE -- YEAH, EB

AND DK.

I'VE PROBABLY BEEN DOING THAT

ALL MORNING, ALTHOUGH IT'S

AFTERNOON.

YOU SAID AS FAR AS EB, EB WHO

WAS YOUR CLIENT, CORRECT?

>> YES.

>> THAT AS OF OCTOBER 25TH FROM

THEIR POINT OF VIEW THERE'S AN

ONGOING CONTRACT --

>> THE CONTRACT WAS STILL OPEN.

>> AND THEY EXPECT --

[INAUDIBLE]

TO FURTHER PROMOTE THIS PROJECT.

>> ABSOLUTELY.

>> UNDER PARAGRAPH 14.

>> PRECISELY.

>> AND THE ONLY THING THAT IF

THE DUE DILIGENCE PERIOD,

THOUGH, WAS NOT EXTENDED, THEN

AND IF THEY DIDN'T BREACH FIRST,

KING DIDN'T BREACH FIRST, THEN

YOU WOULD LOSE THE RIGHT TO GET

YOUR CONTRACT BACK?

>> WELL, IF WE TERMINATED THE

CONTRACT BECAUSE OF THE DUE

DILIGENCE WAS OPEN, WE HAVE A

RIGHT TO PULL BACK THE DEPOSIT.

>> NO, I'M SAYING IT WAS IN

WRITING, SO THE JUDGE CAN STILL

MAKE A DETERMINATION AS TO

WHETHER KING BREACHED THE

CONTRACT WHILE IT WAS IN

EXISTENCE AND BEFORE THERE WAS A

DEMAND FOR THE RETURN OF THE  
CONTRACT, OF THE DEPOSIT.

>> AND THAT'S WHAT THE TRIAL  
COURT FOUND, THAT KING BREACHED  
THE AGREEMENT WHILE THE  
OBLIGATION --

>> WAS THAT LITIGATED BEFORE THE  
FOURTH DISTRICT?

I MEAN, WAS THAT AN ISSUE ON  
APPEAL?

>> IT WAS.

THE FOURTH DISTRICT OPINION  
DEALT WITH IT RATHER SHARPLY, IT  
JUST, YOU KNOW, FOUND THERE WAS  
COMPETENT AND SUBSTANTIAL  
EVIDENCE TO SUPPORT THE LOWER  
COURT'S FINING OF BREACH, AND  
THAT'S THE RECORD AND THE  
ESTABLISHED FACTS WHICH ARE  
ON --

>> WHY DOES THE FOURTH DISTRICT  
NEED TO REVISIT IT?

>> WELL --

>> MAYBE WE'RE NOT THE FOURTH --  
I UNDERSTAND THAT, BUT IT SEEMS

TO ME THAT WE STILL HAVE A

PROBLEMATIC, YOU KNOW --

>> LET ME ME SEE HOW YOU ANALYZE

THIS.

SO YOU'RE SAYING AT THE END OF

THE DUE DILIGENCE PERIOD THAT DK

WAS REQUIRED TO OFFER CLOSING

DOCUMENTS, AND THAT WAS THE ACT

THAT'S MISSING TO ENTITLE THEM

TO THE MONEY TO THE DEPOSIT?

>> WELL, THE ADDENDUM REQUIRES,

YES, AT THE END OF THE DUE

DILIGENCE PERIOD --

>> RIGHT.

AND THAT'S WHAT YOU'RE SAYING.

YOU'RE SAYING BECAUSE THEY

DIDN'T DO THAT, THIS CONTRACT IS

OPEN, IT'S PROCEEDING, AND BY

NOT APPEARING THAT'S A BREACH OF

THAT CONTRACT?

>> WELL, THEY DIDN'T PERFORM THE

OBLIGATION --

>> RIGHT.

WELL, IT'S A BREACH.

I MEAN, WHAT IS IT?

>> WE MISSED IT.

THIS IS A FRIENDLY QUESTION, AND  
IT SEEMS LIKE YOU'RE NOT GIVING  
US A STRAIGHTFORWARD ANSWER --

>> YEAH.

>> BECAUSE IF WE'RE WRONG ON  
THIS, I MEAN --

>> YEAH.

>> I'M TRYING TO UNDERSTAND THIS  
BECAUSE IT SEEMS TO ME, I MUST  
TELL YOU, IT SEEMS TO ME THE  
FOURTH DISTRICT TOOK OFF ON A  
DISCUSSION OF -- ESTOPPEL THAT  
MAY NOT HAVE ANYTHING TO DO WITH  
ANYTHING.

THERE WAS A CONTRACT AND ONE  
PARTY BREACHED IT, OR THERE WAS  
NO CONTRACT, AND NOBODY'S  
BREACHED IT.

IT CAN'T BE BOTH.

AS I'M HEAR WHAT DK SAYS IS THAT  
YOU HAD A PERIOD OF TIME IN  
WHICH YOU NEEDED TO HAVE DUE  
DILIGENCE, AND IF YOU DON'T  
CANCEL BY THAT DATE, THEN YOU

FORFEITED YOUR DEPOSIT BECAUSE  
YOU DIDN'T GO THROUGH WITH THE  
DEAL.

THAT'S WHAT THEY'RE SAYING,  
AREN'T THEY?

>> YES, THEY ARE SAYING THAT.

>> OKAY.

WELL, AND YOU'RE SAYING THIS IS  
NOT AN ESTOPPEL, YOU'RE SAYING  
THEY BREACHED THEIR CONTRACT  
BECAUSE THEY HAD TO COME FORWARD  
WITH CLOSING DOCUMENTS.

THEREFORE, THEY HAD NOT, THIS  
DEAL IS STILL OPEN, AND DIDN'T  
SHOW UP FOR THE HEARING AND,  
THEREFORE, THEY BREACHED IT, AND  
YOU'LL GET YOUR MONEY BACK.

>> YES.

>> OKAY, ALL RIGHT.

>> LET ME GIVE YOU A FRIENDLY,  
DIRECT ANSWER.

YES.

AND WE DID BRIEF THE POINT, AND  
IT'S AN ARGUMENT, IT'S THE MAIN  
ARGUMENT WE'RE MAKING BEFORE

THIS COURT THAT INDEPENDENT OF  
THE DUE DILIGENCE PERIOD WHETHER  
THE COURT FINDS THAT THE EXTENT  
IS ENFORCEABLE OR NOT, EB IS  
STILL ENTITLED TO THE RETURN OF  
ITS DEPOSIT BASED ON ITS  
INDEPENDENT BRIEFING.

I KNOW I'M WAY OVER TIME.

I'M TRYING TO GET BACK TO ALL  
THE QUESTIONS, JUST GETTING BACK  
TO THE WAIVER ON ESTOPPEL, AND I  
SHOULD PROBABLY QUIT, BUT I  
CAN'T RESIST.

>> I WOULD STILL LIKE TO ASK MY  
SECOND QUESTION.

[LAUGHTER]

>> JUSTICE POLSTON, ASK YOUR  
SECOND QUESTION.

>> OKAY.

THE FOURTH DISTRICT THAT AWARDED  
YOUR CLIENT \$500,000 IN DAMAGES  
BECAUSE THERE WAS A FAILURE OF  
IT TO BE A JOINT VENTURE --

>> THAT WAS WHAT THE --

>> AND YOU'RE NOT CHALLENGING



THAT HERE.

>> WE DID NOT APPEAL THAT.

>> OKAY, THANK YOU.

>> JUST TO BRING SOME CLARITY --

>> 15 SECONDS.

>> OKAY.

WE DID PROPOSE A TEST, AND I  
THINK THAT IT WOULD ANSWER A LOT  
OF THE CONCERNS WHICH JUSTICE  
LEWIS HAS RAISED CONCERNING WHEN  
THE DOCTRINES OF WAIVER AND  
ESTOPPEL WOULD APPLY TO  
SITUATIONS LIKE THIS UNDER THE  
STATUTE OF FRAUDS WHERE THERE'S  
A WRITTEN CONTRACT, WHERE THERE  
IS WAIVER BY THE PARTY WHOSE  
BENEFITS OF THE TERM EXISTS AND  
INDUCES RELIANCE BY THE OTHER  
PARTY AS TO SOME OTHER  
PERFORMANCE THAT WILL BE  
ACCEPTABLE.

THAT WOULD BE A SUGGESTION WHICH  
WE'VE MADE FOR THE PROPER USE OF  
THE DOCTRINES OF WAIVER AND  
ESTOPPEL TO PREVENT THE INJUST

APPLICATION OF THE STATUTE OF  
FRAUDS WHICH DK IS ADVOCATING  
TODAY.

FOR ALL THESE REASONS, WE  
BELIEVE THE DECISION BY THE  
FOURTH DCA SHOULD BE AFFIRMED.

>> THANK YOU.

>> JUSTICE QUINCE, IF YOU'LL  
LOOK AT PAGE 9 OF OUR BRIEF, WE  
DEFINE PROMISSORY ESTOPPEL AND  
EQUITABLE ESTOPPEL.

>> OKAY, SO LET ME SEE IF I CAN  
HOME IN ON WHAT WE WERE JUST  
DISCUSSING WHICH IS ONCE THE DUE  
DILIGENCE PERIOD ENDED, WHO HAD  
AN OBLIGATION TO DO SOMETHING?

>> THE DUE DILIGENCE PERIOD  
ENDED, THEY DID NOT TERMINATE  
THE AGREEMENT.

WE HAD THE RIGHT TO DEMAND THAT  
\$1 MILLION DEPOSIT.

WE DEMANDED THE --

>> BUT WAIT.

DIDN'T YOU WANT TO GO AHEAD WITH  
THE CONTRACT?

IN OTHER WORDS, THE DUE  
DILIGENCE PERIOD ONLY MEANS THAT  
THEY ARE LOSING THEIR CHANCE TO,  
FOR THEM TO GET THEIR DEPOSIT  
BACK, BUT IT DOESN'T MEAN THAT  
THE CONTRACT'S STILL IN  
EXISTENCE, ISN'T IT?

>> IT WOULD HAVE BEEN IN  
EXISTENCE IF THEY HAD PAID THE  
MILLION DOLLARS.

>> EXISTENCE WAS THE MILLION  
DOLLARS IN YOUR CLIENT'S POCKET.

>> YES.

WE ASKED FOR THE MILLION, AND  
THE RECORD TESTIMONY IS THAT  
MR. MARKEY ON BEHALF OF EB TOLD  
THE ESCROW AGENT NOD TO PAY  
THE -- NOT TO PAY THE MILLION  
DOLLARS.

>> AND THAT HAPPENED BEFORE.

>> THAT HAPPENED BEFORE THE  
MEETING WAS SUPPOSED TO OCCUR,  
AND THAT WAS IN BREACH OF THE  
CONTRACT --

>> AND THAT'S WHY HE DIDN'T SHOW

UP, IS THAT THE TESTIMONY IN THE  
RECORD?

>> YES.

>> HE DIDN'T SHOW UP BECAUSE  
THEY --

>> YES.

BECAUSE HE DIDN'T GET THE  
MILLION DOLLARS.

>> SO YOUR ARGUMENT IS WITHOUT  
GETTING THE MILLION DOLLARS,  
THEY WERE NOT OBLIGATED TO COME  
FORWARD WITH THE CLOSING  
DOCUMENTS OF --

[INAUDIBLE]

I UNDERSTAND THAT HIS ARGUMENT  
IS THAT THE CONTRACT WAS GOING  
ON AND IT WAS YOUR OBLIGATION  
THEN TO COME FORWARD WITH THE  
CLOSING DOCUMENT.

>> YES.

YES.

BECAUSE WE GET THE MILLION  
DOLLARS BACK, THAT MEANS THEY  
ARE BUYING THE PROPERTY AS IS  
AND, THEREFORE, WE WOULD HAVE

BEEN OBLIGATED TO DIVIDE CLOSING  
DOCUMENTS.

THEY DIDN'T PAY THE MILLION  
DOLLARS, THEY DIDN'T BUY  
PROPERTY AS THERE WAS NO NEED  
FOR CLOSING DOCUMENTS.

ONE FINAL POINT, IF I MAY, IN  
TERMS OF THE CONSIDERATION FOR  
THE EXTENSION OF THE DUE  
DILIGENCE.

WE TALKED ABOUT, WELL, WHAT DID  
DK GET, WHAT DID EB GIVE OR GET?  
THIS IS ESSENTIAL.

AT THE TIME OF THE DISCUSSION ON  
THE 11TH THAT I'VE MENTIONED  
EARLIER, THE LAWYERS FOR --

[INAUDIBLE]

THAT THIS CONTRACT TERMINATES,  
THE DUE DILIGENCE TERMINATES  
TODAY.

IF YOU DO NOT TERMINATE THE  
CONTRACT, THEY SAID TERMINATE  
THE CONTRACT, WE'LL CONTINUE THE  
NEGOTIATION, LIFE WILL GO ON.

BUT IN ACCORDANCE WITH THE

SPECIFIC TERMS IF YOU DON'T  
TERMINATE IT, WE GET THE MILLION  
DOLLARS.

NOW, THE REASON AND THE ONLY  
REASON IN THIS RECORD THAT THEY  
DID NOT TERMINATE THE AGREEMENT  
THEN OR AT ANY TIME AFTER THAT  
IS NOT BECAUSE THEY WERE RELYING  
ON THIS EXTENSION.

THERE IS NO TESTIMONY THIS  
RECORD TO SUPPORT THAT.

THE ONLY EVIDENCE IN THE RECORD,  
AND I WOULD ASK THIS COURT TO  
LOOK AT THE PAGES THAT WE'VE  
ATTACHED, 169 THROUGH 174.

THE ONLY REASON THEY GAVE WAS WE  
CAN'T TERMINATE THE CONTRACT  
BECAUSE THEN WE WOULD BE IN  
BREACH OF A COMPANION CONTRACT  
WITH THE TRIRAIL SYSTEM BECAUSE  
THERE WAS A PENALTY PROVISION IN  
THAT CONTRACT IF THEY TERMINATED  
OUR CONTRACT.

BUT THE REASON THAT CONGRESSMAN  
KLEIN GAVE FOR NOT BEING WILLING

TO TERMINATE THE CONTRACT WAS WE  
CAN'T DO THAT BECAUSE WE'LL BE  
IN VIOLATION OF A --

>> I JUST WANT TO MAKE SURE.

CONGRESSMAN KLEIN WAS NOT A  
CONGRESSMAN.

>> NO.

>> NOT A CONGRESSMAN NOW?

>> NO.

>> IT JUST MAKES IT, YOU KNOW --

>> I'M TRYING TO BE RESPECTFUL  
OF PEOPLE THAT ONCE HAD A TITLE.

>> I JUST THINK IT GETS, YOU  
KNOW, WE CERTAINLY DON'T WANT TO  
THINK OF A CONGRESSMAN  
PRACTICING LAW SO --

>> WELL, WHAT WENT ON HERE, HE  
WOULDN'T BE.

[LAUGHTER]

>> IN ANY EVENT, THE REASON THE  
CONTRACT WASN'T -- I DIDN'T MEAN  
THAT AS YOU'RE ALL TAKING IT.

[LAUGHTER]

WELL, I DID, BUT --

[LAUGHTER]

THE REASON THE CONTRACT WASN'T  
TERMINATED HAD NOTHING TO DO  
WITH THE EXTENSION --

>> BUT ISN'T THAT A FACTUAL  
FINDING THAT SOMEBODY MADE  
BELOW?

>> IT'S NOT A FINDING BECAUSE IT  
WASN'T NECESSARY TO BE FOUND.  
THE FOURTH DISTRICT REJECTED ALL  
OF THE TRIAL COURT'S DECISION.  
BUT IT IS THE ONLY FACT IN THE  
RECORD AS TO WHY IT WASN'T  
TERMINATED.

THANK YOU ALL.

>> WE THANK YOU BOTH FOR YOUR  
ARGUMENT.

THAT'S THE LAST CASE ON THE  
DOCKET TODAY.

THIS SESSION OF IS -- THIS  
SESSION OF COURT IS ADJOURNED.

>> ALL RISE.