

>> COURT IS NOW IN
SESSION, PLEASE BE
SEATED.

>> WE NOW COME TO THE
THIRD AND FINAL CASE ON
TODAY'S DOCKET, HERITAGE
MANOR OF MEMORIAL PARK,
INC. VERSUS DFG GROUP.

>> I'M BARD RICKENBACH
ON BEHALF OF ELISHKA AND
WIDOW KATHLEEN MICHEAL,
I WANT TO TAKE THIS TIME
TO ADDRESS A COUPLE OF
ISSUES, I THINK THERE'S
5 TOTAL ISSUES, IF WE
COUNT SUB-ISSUES IN THE
BRIEF.

THERE'S TWO THAT I WANT
TO HIGHLIGHT HERE, ONE
IS THE AULT ISSUE AND
FOR A MOMENT I WILL
ASSUME THAT THE FOURTH
DISTRICT'S OPINION
DECIDING THAT THERE WAS
NO COMPENSATORY DAMAGES
IS CORRECT, WE WILL GO
AHEAD AND ASSUME FOR
SAKE OF ARGUMENT BUT
THEN CAN THEIR OPINION
THAT FOLLOWS THAT THERE
CAN BE NO PUNITIVE
DAMAGES BECAUSE THERE'S
NO COMPENSATORY DAMAGES
STAND.

AND THIS COURT CAME TO
THE EXACT OPPOSITE
CONCLUSION, AULT V. LOHR
AN ASSAULT AND BATTERY
CASE, THE RULE IN THAT
CASE WAS NOT LIMITED TO
ASSAULT OR BATTERIES OR
SOME TYPE OF TORT.

THE CASE, THE DECISION
VERY CLEARLY SAYS THAT
-- THAT WE SHOULD ADOPT
THE PRINCIPLES SET
FORTH, WE BELIEVE IN
EXPRESS FINDING OF
BREACH OF DUTY SHOULD BE
THE CRITICAL FACTOR IN

AWARD OF PUNITIVE DAMAGES, ACCORDINGLY WE HOLD THAT THE FINDING OF LIABILITY ALONE WILL SUPPORT AND AWARD PUNITIVE DAMAGES EVEN IN THE ABSENCE OF A FINANCIAL LOSS FOR WHICH COMPENSATORY DAMAGES WOULD BE APPROPRIATE. LATER ON WE ACCEPT THE VIEW THAT NOMINAL DAMAGES WILL BE PRESUMED FROM AN ENCROACHMENT ON ESTABLISHED RIGHT. BASED ON THAT DECISION, WE SHOULD HAVE RETAINED OUR PUNITIVE DAMAGES AWARD IN THIS CASE, NOW THE FOURTH DISTRICT HAS ON A NUMBER OF OCCASIONS WORKED AROUND AULT VERSUS LOHR AND THE OPINION --

>> THE COURTS HAVE WORKED AROUND THE WAY YOU'RE SAYING THAT BASICALLY HAVE LIMITED TO THE FACTS AND TO CIRCUMSTANCES WHERE THERE CAN BE A FINDING OF LIABILITY AND FINDING OF ESTABLISHMENT OF CAUSE OF ACTION WITHOUT ACTUALLY FINDING A FINDING OF DAMAGES, ISN'T THAT CORRECT?

>> YES, AND THAT WOULD BE -- WE GET INTO THE THORNY ISSUE OF, YOU KNOW, WHERE DOES -- IF WE ARE GOING TO DISTINGUISH IT ON THAT BASIS, AND IN THE OPINION ON THAT CASE IS NOT LIMITED TO THAT BASE, AND THEN FROM FRAUD, THAT WAS THE COLEMAN CASE, MORGAN STANLEY VERSUS COLEMAN

HOLDINGS BECAUSE FRAUD
REQUIRES COMPENSATORY
DAMAGES AS AN ELEMENT OF
LIABILITY, SO THEY SAID
YOU HAVEN'T PROVEN YOUR
CLAIM BUT THEN HAS GONE
FURTHER TO SAY THAT, YOU
KNOW, BASICALLY AULT
VERSUS LOHR APPLY TO
ASSAULT AND BATTERY
CASES AND DOESN'T APPLY
TO ANY OTHER TYPE OF
CASE, BUT THERE'S NO
REASON FOR THAT, THERE'S
NO EXPLANATION FOR WHY
THAT WOULD BE TRUE, HERE
WE HAD A BREACH OF
FIDUCIARY DUTY, A
CONSPIRACY TO BREACH A
FIDUCIARY DUTY, AND
LET'S LOOK AT WHAT THIS
BREACH WAS, WE HAVE
MICHAEL MASANOFF WHO
USED TO BE A LAWYER IN
FLORIDA WHO WORKED ON
SACHS, SAX & KLEIN, THE
REPRESENTATIONS OF MY
CLIENTS WHO ARE NOW
DECEASED AND THEY
INHERITED CEMETERY PLOT,
15ACRES IN SOUTH OF
FLORIDA THAT WAS
PARTIALLY DEVELOPED AND
THEY NEEDED TO SELL IT.
>> IT WASN'T DOING VERY
WELL.
>> FROM MY UNDERSTANDING
THEIR HUSBANDS DIDN'T
FINISH UP THE PROJECTS.
>> ISN'T THE BOTTOM LINE
BECAUSE OF THE REMEDY
YOU ELECTED YOU
ESSENTIALLY SUFFERED NO
HARM?
>> OKAY, WE CAN GET TO
THE REMEDY, THAT'S
ANOTHER POINT OF ERROR
WITH THE FOURTH
DISTRICT'S OPINION
BECAUSE WHAT THEY DID ON

THAT BECAUSE WE CHOSE TO ENFORCE THE PRECEDENT THAT WE ARE LIMITED TO BASICALLY CONTRACT DAMAGES, BUT THAT'S NOT ENTIRELY, YOU KNOW, THAT'S A WRONG ANALYSIS BECAUSE THE CLAIM WE WON ON WAS A TORT, SO THEY USED --

>> BUT YOU HAD A THEORY THAT THE BREACH OF DUTY HAD CAUSED YOU HARM BUT THE JURY FOUND THAT IT DIDN'T BECAUSE THERE WASN'T A DISCREPANCY IN THE PRICE AND SO WHEN YOU ELECTED THE REMEDY, ESSENTIALLY -- AND UNDERSTAND THAT ALL ARGUABLY ANNOUNCED THE RULE THAT WAS BROADER THAN THE FACTS OF THE CASE BUT, I MEAN, BY GOING INTO THE FACTS AND THE FIDUCIARY DUTY BREACH AND EVERYTHING, SEEMS LIKE BY, BY THE REMEDY YOU CHOSE THAT KIND BECAME KIND OF IRRELEVANT.

>> THAT WHAT BECAME IRRELEVANT?

>> THE BREACH OF DUTY DIDN'T CAUSE YOU ANY HARM.

>> OKAY, I'M GOING TO DISPUTE THE IDEA THAT BREACH OF ATTORNEY'S CONFIDENCE, CLIENT-ATTORNEY CONFIDENCE CAN NEVER HAVE NO HARM, THE VERY FACT --

>> WHAT WAS THE HARM THEN?

>> THE HARM WAS THAT THE THE CONFIDENCE HAS BEEN BREACHED, THAT'S ALL.

>> THE ATTORNEYS PAID

FOR THAT.
THE ATTORNEYS PAID FOR
THAT.
>> THE ATTORNEYS PAID
FOR THAT.
>> IN MORE WAYS THAN
ONE, RIGHT?
>> WELL, I GUESS HE
VOLUNTARILY GAVE UP HIS
LICENSE AND NOW MAKING A
GOOD LIVING AS A
BUSINESS CONSULTANT.
BUT AN ATTORNEY-CLIENT
RELATIONSHIP IS
SACROSANCT, THAT'S WHAT
MAKES THIS WORK, THE
RULE THAT WAS CREATED
THE INTERLOPER, THE
PERSON OVER HERE, FOR
WHATEVER NEFARIOUS
PURPOSE WANTS TO GET
INFORMATION CAN GO TO
ANY ATTORNEY, BRIBE THE
ATTORNEY, GIVE THE
ATTORNEY A THOUSAND
DOLLARS -- A HUNDRED
THOUSAND DOLLARS, THEY
GAVE MR. MASANOFF, GIVE
THEM A HUNDRED THOUSAND
DOLLARS AND HAVE THE
ATTORNEY GIVE UP
INFORMATION, IT MAY HAVE
NO ECONOMIC VALUE
WHATSOEVER BUT THE
CLIENT HAS LOST
SOMETHING INCREDIBLE BY
VALUABLE, IT'S THE
PRIVACY, THE CONFIDENCE
THAT WHATEVER IT MIGHT
BE, IT MIGHT BE THAT THE
CLIENT IS SUFFERING FROM
A TERRIBLE DISEASE, IT
HAS NO ECONOMIC VALUE TO
ANYONE ELSE --
>> IN ORDER TO HAVE A
COMPLETE CAUSE OF ACTION
YOU DO HAVE TO PROVE
DAMAGES.
>> NO?
>> YOU DON'T.

THERE'S NO CASE, THERE'S NO AUTHORITY FOR THE FACT THAT WE HAVE TO PROVE DAMAGES AS AN ENTIRE -- AS AN ENTIRE CAUSE OF ACTION LIKE IN FRAUD.

NOW, THERE'S A -- THERE'S ALWAYS A LITTLE CONFUSION CAUSED BY THAT BECAUSE LIKE THIS COURT'S DECISION GRACEY VERSUS EAKER, IT NAMES THE ELEMENTS OF THE CAUSE OF ACTION AND THE ELEMENTS OF EVERY CAUSE OF ACTION ARE ALWAYS THE SAME.

THEY ARE DUTY, BREACH OF DUTY, CAUSATION AND DAMAGES AND SO FROM THAT SOME PEOPLE AND SOME COURTS WILL LOOK AT IT AND SAY, OKAY, WELL, DAMAGES ARE AN ESSENTIAL ELEMENT TO THE CLAIM, WELL, IN ONE WAY FROM ONE PERSPECTIVE DAMAGES ARE THE ESSENTIAL ELEMENT IN EVERY CLAIM BECAUSE I CAN DRIVE 100 MILES AN HOUR THROUGH STOP SIGNS AND BARELY MISSED PEDESTRIANS, DOWNTOWN TALLAHASSEE BUT UNLESS I HIT SOMEBODY, THERE'S NO CAUSE OF ACTION -- >> CRIMINAL LIABILITY. THOSE ARE TWO COMPLETELY DIFFERENT THINGS.

I MEAN -- >> THERE'S TWO DIFFERENT WAYS.

WHEN WE TALK ABOUT FRAUD, THE COURT SAYS THAT DAMAGES ARE AN ESSENTIAL ELEMENT OF LIABILITY AND YOU CANNOT PROVE A FRAUD WITHOUT

PROVING THAT THERE ARE DAMAGES.

AND I THINK WHAT THE COURT MEANS BY THAT IS THAT BECAUSE FRAUD REQUIRES RELIANCE, RELIANCE DETRIMENTAL RELIANCE THAT THERE HAS TO BE SOME KIND OF INJURY IN ORDER FOR THERE TO BE DETRIMENTAL RELIANCE BECAUSE SOME SORT OF INJURY THERE'S NEVER DETRIMENTAL. RELIANCE IS NEVER DETRIMENTAL AND THEREFORE YOU'RE LOOKING IF THERE'S A LIABILITY FOR A FRAUD, THERE HAS TO BE SOME -- SOME DAMAGE THAT BRINGS YOU TO THE DETRIMENTAL RELIANCE AND THEN YOU HAVE LIABILITY.

EVERY OTHER CAUSE OF ACTION HAS JUST DAMAGES AS AN ELEMENT OF THE CAUSE OF ACTION, BUT THAT IS TRUE OF EVERY CAUSE OF ACTION, IT DOESN'T MATTER, SO A NEGLIGENCE CLAIM, WE DON'T HAVE TO PROVE DAMAGES IN ORDER TO WIN ON A NEGLIGENCE CLAIM, NOMINAL CHALLENGES ARE PRESUMED, BREACH OF CONTRACT, NOMINAL DAMAGES ARE PRESUMED. THE CASES I CITED TO YOU, THE MORTELLITE CASE, NO COMPENSATION DAMAGES AWARDED FOR BREACH OF FIDUCIARY DUTY AND THE COURT AWARDED PUNITIVE DAMAGES AND THEN THERE IS MONADI, BOTH OF THOSE CASES SHOW THAT BREACH OF FIDUCIARY DUTY DOES IN THE

REQUIRED PROOF OF DAMAGE
IN ORDER TO PROVE
LIABILITY PART OF THE
CLAIM.

SO EVEN IF WE TAKE THE
COLEMAN HOLDINGS CASE,
MORGAN STANLEY VERSUS
COLEMAN HOLDINGS CASE,
THE FOURTH DISTRICT IS
CORRECT ON THAT, THAT
WAS A FRAUD CLAIM, OKAY,
THAT DECISION IS LIMITED
TO FRAUD, THIS IS A
CONSPIRACY TO BREACH OF
FIDUCIARY DUTY AND WE
PROVED THAT BECAUSE THE
VERDICT FORM QUESTION
THAT THE JURY ANSWERED
WAS DID ONE OR MORE OF
THE FOLLOWING DEFENDANTS
CONSPIRED WITH MICHAEL
MASANOFF TO CREATE
BREACH OF FIDUCIARY DUTY
TO PLAINTIFFS WHICH WAS
A LEGAL CAUSE OF DAMAGE
TO PLAINTIFFS.

SO THE JURY DECIDED THAT
THERE WAS A -- THERE WAS
DAMAGE CAUSED AND I
THINK THAT JUST -- OKAY,
SECOND POINT IS AS A
GENERAL RULE THIS COURT
CANNOT HAVE A RULE THAT
IT IS OKAY FOR THE
GENERAL PUBLIC TO BRIBE
LAWYERS TO GET THEM TO
BREACH THEIR CONFIDENCES
WITH THEIR CLIENTS AND
AS LONG AS THERE'S NO
ECONOMIC DAMAGE, THERE'S
NOTHING THAT THIS COURT
OR ANY OTHER COURT CAN
DO TO THE PEOPLE WHO
ENTICE LAWYERS AND BRIBE
THEM TO BREACH THEIR
CONFIDENTIAL
INFORMATION.

>> I MEAN, I THINK IT'S
-- YOU KNOW YOU'RE
SMILING, YOU KNOW THAT

THAT'S A COMPLETELY
INACCURATE STATEMENT OF
WHAT -- WHAT THE
QUESTIONS ARE
SUGGESTING, I MEAN, AS
THE CHIEF JUSTICE
POINTED OUT, PEOPLE ARE
DISCIPLINED WHEN THEY
COMMIT WRONGS LIKE THAT,
WE ARE TALKING ABOUT
TORTS AND THE
RELATIONSHIP BETWEEN,
YOU KNOW, COMPENSATORY
AND PUNITIVE AND THE
ELECTION OF REMEDY THAT
YOU CHOSE AND
EVERYTHING, SO NOBODY IS
SUGGESTING THAT YOU CAN
BEHAVE THE WAY THE
LAWYERS DID AND HAVE NO
CONSEQUENCES TO IT.

>> I'M NOT TALKING ABOUT
THE LAWYERS, I'M TALKING
ABOUT MR. FALCONE, DFG.
MR. FALCONE, THEY CAME
INTO THE RELATIONSHIP,
THEY ARE ADVERSARY, THEY
ARE THE BUYER OF THE
PIECE OF PROPERTY AND
THEY WENT TO THE LAWYER
AND BRIBED THE LAWYER.
SO NOW THE PUNITIVE
DAMAGES THAT WE HAVE ARE
AGAINST MR. FALCONE AND
DFG AND THEY ARE THE
ONES WHO NEED TO PAY,
HIS HEAD HAS BEEN
CHOPPED OFF, HE'S DONE,
BUT WHO HASN'T?
IT'S HIS COCONSPIRATORS,
THE PEOPLE WHO CAME IN
AND SAID, MR. MASANOFF,
I WILL PAY A HUNDRED
THOUSAND DOLLARS TO HELP
US GET THIS PIECE OF
LAND FROM YOUR CLIENTS
AND HE WENT AHEAD WITH
IT.

HE EVEN GOT \$75,000 IN
ADDITION FROM SACHS, SAX

& KLEIN AND HE WAS WORKING BOTH SIDES OF THE TRANSACTION DURING THE ENTIRE TRANSACTION. SO HE DID A LOT OF BAD THINGS, BUT THOSE THINGS DON'T HAPPEN IN A VACUUM BUT THEY HAPPENED BECAUSE MR. FALCONE AND DFG APPROACHED HIM AND TALKED HIM INTO BREACHING CONFIDENCES AND MY CLIENTS LOST SOMETHING VALUABLE AS SOON AS THAT OCCURRED, AND, YES, WE HAD -- THEY POINT OUT IN THEIR BRIEF THAT 18 WITNESSES TESTIFIED, NOBODY COULD SAY WHAT THE CONFIDENTIAL INFORMATION WAS THAT WAS HANDED OUT. WELL, YOU KNOW WHY THAT IS, IT'S BECAUSE ONE OF THEM LIES, THE OTHER ONE SWEARS TO IT. WE WILL NEVER KNOW WHAT WAS -- WHAT TRANSPIRED BUT ALL HAD TO BE MR. FALCONE, THESE LADIES HAVE NO IDEA WHAT THEY ARE DOING AND THEY JUST WANT SOME MONEY, THERE IT IS, YOU KNOW, THEY'LL SELL CHEAP. >> WELL, THEY GOT IT AND THEY DECIDED THEY WANTED TO KEEP IT. I MEAN, THAT'S THE -- THAT'S THE REALITY ABOUT THE REMEDY HERE. YOU KNOW, I UNDERSTAND WHAT YOU'RE SAYING BUT I ALSO UNDERSTAND THAT THERE ARE A LOT OF THINGS THAT GO ON AND PEOPLE DO UNTOWARD THINGS AND ENGAGE THAT DO UNTOWARD THINGS WHERE THERE'S REALLY NO REMEDY

IN THE LAW.
THERE'S NOT A REMEDY FOR
EVERY UNTOWARD ACT OF
BAD CONTACT WHEN THERE'S
NO INJURY.

NOW, I UNDERSTAND THAT
PEOPLE THINK THERE OUGHT
TO BE REMEDY FOR EVERY
UNTOWARD THING THAT
PEOPLE DOES, NOT EVERY
LIE THAT SOMEBODY TELLS,
NOT EVERY SECRET THAT'S
REVEALED, EVEN BY AN
ATTORNEY, WELL, WHAT
DIFFERENCE DOES IT MAKE?
NOW, FOR THE ATTORNEY,
THAT'S A DIFFERENT
MATTER BECAUSE THERE'S
THAT FIDUCIARY
RELATIONSHIP AND THE --
AND THAT BREACH, BUT THE
THIRD PARTIES, THAT --
I'M STRUGGLING TO SEE
HOW THAT DOESN'T FALL IN
THIS CATEGORY OF JUST
LIKE, BAD THINGS
HAPPENED, BUT IF YOU
CAN'T SHOW YOU WERE HURT
BY IT, THAT DOESN'T MEAN
YOU NECESSARILY GET
MONEY.

>> ALL RIGHT, SO LET'S
-- I WILL POINT OUT TWO
THINGS QUICKLY.

>> OKAY.

>> NUMBER 1, I THINK THE
CONSTITUTION THAT
THERE'S A WRONG THERE'S
A REMEDY AND WE HAD
ACCESS TO COURTS.

SO WE HAVE A JURY THAT
FOUND THAT THERE WAS A
CONSPIRACY TO DO US HARM
AND THAT IT DID HARM US,
ALL RIGHT, NOW THERE'S
-- THERE'S TWO WAYS THAT
WE GOT HARMED, ONE IS
THAT THE SALE PRICE AND,
OKAY, THE JURY, WE WERE
UNABLE TO PROVE TO THE

JURY SATISFACTION THAT
THERE WAS A -- THAT WE
SOLD IT FOR LESS THAN WE
SHOULD HAVE, OKAY.
THERE'S ANOTHER POINT OF
ERROR ABOUT THAT BECAUSE
THE -- THE DISTRICT --
THE CIRCUIT COURT
ALLOWED IN A WHOLE BUNCH
OF EVIDENCE OF THE
RECESSION AFTER THIS
OCCURRED AND ABOUT ALL
OF THE COSTS THAT --
COST OVERRUNS AND WHY IT
REALLY WASN'T PROFITABLE
FOR THEM TO BUY
\$6 MILLION AND THAT WAS
-- THAT WAS COMPLETELY
WRONG.

THE OTHER PART OF THIS
IS THAT WHEN THERE WAS
CONSPIRACY BETWEEN ALL
THESE -- AMONGST ALL OF
THESE PEOPLE TO -- TO
GET CONFIDENTIAL
INFORMATION AND TO WORK
AGAINST MY CLIENTS, MY
CLIENTS WERE STILL
PAYING ATTORNEYS' FEES
TO SACHS, SAX & KLEIN,
NOW THAT MEANS THAT
EVERYTHING KARSH AND
MASINOFF DID, WHY IS MY
CLIENT PAYING THESE
PEOPLE?

THOSE ATTORNEYS' FEES
WERE WORTHLESS, THAT
RELATIONSHIP WAS
WORTHLESS TO ME AND
THERE ARE TWO CONTRACTS
GOING ON HERE, ONE IS
THE SALE OF THE PROPERTY
AND THE JURY SAID THAT
THERE WAS NO REAL
DAMAGES FROM THAT, BUT
THE JURY ALSO SAID THAT
BECAUSE OF THE
CONSPIRACY, THE
ATTORNEYS' FEES THAT MY
CLIENTS PAID SHOULD

NEVER HAVE BEEN PAID,
THEY SHOULD GET THAT
BACK BECAUSE THOSE
DAMAGES --

>> A CONSUMMATED
TRANSACTION WHICH THEY
AFFIRMED AND YOU HAD THE
OPTION OF UNDOING THE
TRANSACTION, TAKING THE
-- YOU GOT WHAT
2 MILLION IN ATTORNEYS'
FEES WHEN YOU YOU HIT
675 OR SOMETHING LIKE
THAT.

>> FIRST OF ALL, NO
OPTION OF RESCISSION,
TECHNICALLY WE DID, BUT
IN ORDER TO RESCIND YOU
HAVE TO PUT THE PARTIES
BACK IN THE POSITION
THEY WERE BEFORE THE
TRANSACTION AND THAT
MEANS THEY WOULD HAVE TO
PAY BACK THE \$6 MILLION
AND REIMBURSE THE
\$19 MILLION THAT HAD
BEEN PUT INTO THE
PROJECT, SO AS PRACTICAL
MATTER THAT IS NEVER
GOING TO HAPPEN.

SO THE ONLY OPTION THEY
HAD AT THAT POINT IS TO
AFFIRM THE CONTRACT, BUT
THEY ARE ONLY AFFIRMING
THAT CONTRACT, BUT THIS
CONTRACT OVER HERE FOR
THE ATTORNEYS' FEES THE
JURY DECIDED THAT THOSE
ATTORNEYS' FEES EVEN IF
IT'S JUST ONE DOLLAR WAS
WASTED, THEY PAID MONEY
TO MR. KARSH TO TALK TO
MR. MASANOFF SO
MR. MASSANOF TALKED TO
MR. KARSH.

>> I DON'T WANT TO CUT
YOUR TIME.

I WILL GIVE YOU EXTRA
TIME BUT, ANYWAY --

>> I GUESS I WILL WAIT

FOR A LITTLE BIT THEN
AND I WILL SIT DOWN.

>> OKAY, AND I WILL GIVE
YOU 3 MINUTES ON
REBUTTAL.

>> ALL RIGHT, THANK YOU.

>> MAY IT PLEASE THE
COURT, MY NAME IS LAUREN
PURDY WITH THE GUNSTER,
YOAKLEY & STEWART LAW
FIRM AND COUNSEL WITH
DCA, CORNWELL, WE
REPRESENT THE
RESPONDENTS IN THE CASE,
AWARDED \$2 MILLION OF
PUNITIVE DAMAGES IN
CONTEXT OF BREACH
FIDUCIARY DUTY CLAIM
WHEN THE PLAINTIFFS
ELECTED A REMEDY THAT
DID NOT PROVIDE FOR ANY
COMPENSABLE DAMAGES
BECAUSE THE FOURTH DCA'S
DECISION DICTATING THAT
A WORD AND THE WAIT OF
AUTHORITY IN THE
DISTRICT COURTS OF
APPEAL AND THE UNITED
STATES SUPREME COURT,
THIS COURT SHOULD AFFIRM
-- I THINK IT'S
IMPORTANT TO PROVIDE A
LITTLE BIT MORE CONTEXT
TO THE REMEDY THAT WAS
ELECTED AND WHEN IT WAS
ELECTED AND HOW BECAUSE
I THINK THAT'S HELPFUL
FOR UNDERSTANDING THAT
THIS ISN'T -- THE
RESPONDENTS ARE NOT
GETTING OFF FOR A BAD
ACT THAT WAS FOUND.
THE PETITIONERS PAID --
RECEIVED OVER \$6 MILLION
FOR A BUSINESS AFTER 9
AND A HALF YEARS OF
LITIGATION, 9 AMENDED
COMPLAINTS, SETTLEMENT
ON THE EVE OF TRIAL WITH
THE LAWYER THAT WAS

ACTUALLY ON BOTH SIDES OF THE TRANSACTION WHO PAID A SUBSTANTIAL SUM OF MONEY WHICH WE KNOW BECAUSE OF THE AMOUNT OF THE SETOFF, THE JURY AWARDED \$0 OF DAMAGES FOR THE SALE OF THE BUSINESS AND IN CLOSING, PETITIONERS TRIAL COUNSEL AVENATTI, GOODMAN, ARGUED TO THE JURY THAT THE PETITIONERS WERE HARMED \$42 MILLION, THEY LOST \$42 MILLION, THAT WAS BELOW MARKET VALUE FOR THE SALE OF THE BUSINESS, THE JURY AFTER, AFTER SEEING 18 WITNESSES IN -- AND ALL OF THE TESTIMONY FOUND THAT, NO, THE PETITIONERS RECEIVED MARKET VALUE FOR THE PROPERTY, THE CONSPIRACY FAILED, WHATEVER IT WAS FAILED AND THEY WERE NOT HARMED. NOW, THE PETITIONERS DID NOT ELECT A REMEDY FOR 2 YEARS AFTER THE JURY'S VERDICT WAS RENDERED AND THEY ONLY ELECTED A REMEDY BECAUSE OF THE RESPONDENTS FILED A MOTION FOR FINAL JUDGMENT AND THE TRIAL COURT DIRECTED THE PETITIONERS TO ELECT RESCISSION AND AFFIRM CONTRACT AND RECEIVE WHATEVER DAMAGES WERE ALLOWED AT THAT TIME. THEY OPPOSED THAT MOTION AND SAID THEY SHOULD WAIT AND DECIDE WHETHER TO ELECT REMEDIES, THEY DID ELECT TO AFFIRM THE CONTRACT AND AS A RESULT

THE ONLY AVAILABLE AVENUE OF BUCKET OF DAMAGES FOR THEM WAS LOST PROFITS WHICH THE COURT -- WHICH THE JURY FOUND DID NOT EXIST. THE SUGGESTION THAT THE AULT CASE IS LIMITED TO ASSAULT CASE, THAT'S WHAT THE FOURTH DCA FOUND, THE FOURTH DCA RECOGNIZED IN OTHER CASES OF DEFAMATION AND SLANDER WHERE DAMAGES ARE PRESUMED BY ESTABLISHING THE OTHER ELEMENTS OF THE CLAIM, IN THAT CONTEXT, AN AWARD OF PUNITIVE DAMAGES CAN BE PROVIDED EVEN WITHOUT A COMPENSATORY DAMAGE.

>> LET ME ASK YOU THIS, IF THE JURY HAD AWARDED A DOLLAR IN DAMAGES WOULD THE PLAINTIFFS BEEN ABLE TO KEEP THEIR PUNITIVE DAMAGES AWARD?

>> I THINK THEY POTENTIALLY COULD HAVE ALTHOUGH THERE WOULD HAVE BEEN STILL THE ANALYSIS THAT THIS COURT ADOPTED AN ANGLE WITH RESPECT TO THE GUIDE POST AND STATE FARM AND BMW AS FAR AS THE REASONABLE OF THE AWARD IN LIGHT OF THE AMOUNT OF DAMAGES, BUT POTENTIALLY AND THE REASON IS BECAUSE IN THE CONTEXT OF THE CLAIM LIKE CONSPIRACY TO BREACH FIDUCIARY DUTY JUST LIKE FRAUD AND JUST LIKE TORTIOUS INTERFERENCE, OTHER CLAIMS LIKE MISREPRESENTATION IN THE

11TH CIRCUIT SOLTERO
CASE, YOU TO ESTABLISH
EVERY ELEMENT OF THE
CLAIM OTHERWISE YOU
HAVEN'T ESTABLISHED THE
CAUSE OF ACTION AT ALL,
YOU HAVEN'T ESTABLISHED
LIABILITY.

>> SO HOW DO YOU DEAL
WITH THE CASES THAT IN A
CLAIM LIKE THIS THAT IF
THERE'S A ZERO DAMAGE,
THAT IT'S CONSIDERED TO
BE A NOMINAL AWARD OF
DAMAGES?

>> I THINK THE CASES
THAT ARE TALKING
CONSIDERING NOMINAL
DAMAGES SHOULD BE
LIMITED TO THE FACTS,
TYPE OF CAUSE OF ACTION
LIKE ASSAULT AND SLANDER
WHERE IT'S PRESUMED AND
THERE'S NO REQUIREMENT
OF THAT ADDITIONAL
FINDING AT ALL.

IN THE ASSAULT CASE AND
SLANDER CASE,
ESTABLISHING THE
ASSAULT, THE CAUSE OF
DAMAGES HAVE BEEN
COMPLETE AND ELEMENTS
BEEN ESTABLISHED,
FORTUNATELY THE COURT
DOESN'T HAVE TO REACH
THE QUESTION WHETHER IF
THERE WOULD HAVE BEEN A
NOMINAL AWARD IN THIS
CASE WOULD THAT HAVE
CHANGED THE ANALYSIS
BECAUSE THE PETITIONERS
FOR WHATEVER REASON
ELECTED NOT TO -- NOT TO
INSTRUCT THE --

>> WE SORT OF DO UNLESS
WE EXCEPT YOUR
PROPOSITION THAT ALL THE
CASES THAT SAY ZERO
AWARD IS A NOMINAL
DAMAGE, AWARD ARE

LIMITED AS YOU
SUGGESTED.

I MEAN, IF WE -- THE
CASES DON'T SAY THAT.

>> I THINK, SO CANDIDLY
THE -- I THINK THE --
THE CHALLENGE FOR THIS
COURT IS THE BASIC
LANGUAGE IN AULT V. LOHR
APPEARS TO BE BROUGHT
AND THE WAY THE AULT IS,
LASSITER CLEARED, IS
LAID OUT IN THE DECISION
MORGAN --

>> NOT FROM THIS COURT.
I MEAN, SO THIS COURT
HAS A VERY BROAD
STATEMENT OF AULT AND
APPEAR THAT THE FOURTH
DISTRICT CONFLICTS WITH
THAT.

I MEAN, YOU TO DIG IN
AND DISTINGUISH AND --
AND SAY THAT AULT STANDS
FOR SOMETHING MORE
NARROW THAN AULT SAYS TO
COME TO A CONCLUSION
THAT THE FOURTH DISTRICT
DIDN'T CONFLICT WITH OR
HOLDING AT ALL, CORRECT?

>> JUSTICE LAWSON,
RESPECTFULLY I WOULD
DISAGREE THAT IT
ACTUALLY CONFLICTS
BECAUSE PART OF THE
DIRECT AND EXPRESSED
ANALYSIS IS WHETHER THE
FACTS DISTINGUISHABLE
BETWEEN THE CASES AND
HOW THE RULE OF LAW CAN
BE APPLIED IN SUBSEQUENT
CASES AND THE RULE OF
LAW IN AULT HAS BEEN
APPLIED IN SUBSEQUENT
CASES TO -- TO SAY THAT
IN THE CONTEXT OF CLAIMS
WHERE DAMAGES ARE
PRESUMED PER SE SUCH AS
SLANDER AND DEFAMATION
AND SUCH AS ASSAULT AND

SUCH AS CONVERSION, IN THOSE CASES PUNITIVE DAMAGE OF SOME AMOUNT CAN THEORETICALLY STAND PUT AGO SIDE THE DUE PROCESS REQUIREMENTS TO HAVE 14TH AMENDMENT, BUT COURTS CAN CONSISTENTLY APPLY WHAT THE RULE IN AULT IS TO CASES WHERE DAMAGES ARE ACTUAL ELEMENT OF THE CLAIM CONSISTENTLY BECAUSE IN CLAIMS LIKE FRAUD, IF AFTER THE CLOSE OF THE PLAINTIFF'S CASE, THE DEFENDANT SUCCESSFULLY MOVES FOR DIRECTIVE VERDICT, THE CASE WOULD END AND IN THE NORMAL -- I HAVEN'T HAD PROBABLY AS MANY -- AS MANY JURY TRIALS AS THE JUDGES ON THE BENCH HAVE HAD IN THEIR CAREER AT THIS POINT, BUT I'VE NEVER SEEN FOR WHAT IT'S WORTH A CASE WHERE DIRECTED VERDICT WAS GRANTED AFTER THERE WAS NO DAMAGES AN THEN WE STILL CONTINUED ON WITH THE CASE SO THAT WE COULD HAVE A PUNITIVE DAMAGE TRIAL LATER AND SO JUST THINKING ABOUT THAT CONSISTENCY IN FLORIDA LAW AND THE CONSISTENT WAY THAT AULT CAN BE APPLIED WE WOULD SUBMIT THAT THERE IS NO DIRECT AND EXPRESSED CONFLICT. THE ONLY CASE THAT'S EVEN ARGUABLY A CONFLICT AND WE THINK IT'S DISTINGUISHABLE IS THE MORTELLITE DECISION THAT PETITIONER'S COUNSEL WAS REFERENCING. ARGUABLY THE MORTELLITE

DECISIONS HOLDINGS WAS
DICTATED BECAUSE THE
COURT WAS REMANDING THE
CASE FOR ENTIRELY NEW
TRIAL ON DAMAGES AND
GRATUITOUSLY SAID
WITHOUT ANY SIGNING, BY
THE WAY, PUNITIVE
DAMAGES ARE -- ARE --
SHOULD BE AWARDED
REGARDLESS OF WHETHER
THERE'S COMPENSATORY
DAMAGES EVEN THOUGH AS
FAR AS WE COULD FIND IN
THE OPINION THERE'S BEEN
NO -- THERE HADN'T BEEN
FINDING THAT PUNITIVE
DAMAGES WERE AWARDBLE.
ADDITIONALLY TO THE
PLAINTIFF -- THE
PETITIONER'S COUNSEL WAS
MAKING ABOUT THE
ELECTION OF REMEDIES
HERE, I THINK IT'S
IMPORTANT TO REMEMBER
THAT WHEN THEY ELECTED
THE REMEDY OF AFFIRMING
THE CONTRACT, THEY
BECAME BOUND BY THE
TERMS OF THAT CONTRACT
AND THE CONTRACT, THE
PETITIONER'S COUNSEL WAS
TRYING TO DISTINGUISH
THE CONTRACT BETWEEN THE
LAWYER AND THE CONTRACT
FOR THE SALE OF THE
BUSINESS, BUT THE SALE
OF THE BUSINESS CONTRACT
WHICH IS IN THE RECORD
AT 38135 TO 36, SECTION
1C SPECIFICALLY SAYS
THAT THE SELLERS AGREED
THAT THEY ARE BOUND TO
PAY ALL OF THEIR
ATTORNEYS' FEES AND
COSTS UP TO THE CLOSING.
SO WHEN THEY ELECTED TO
AFFIRM THE CONTRACT,
THEY ELECTED TO BE BOUND
BY ALL OF THE TERMS AND

THAT INCLUDES
TRANSACTIONAL FEES AND
COSTS, SO IT'S NOT
POSSIBLE DESPITE THE
FACT THAT IT'S A TORT
FOR THEM TO AFFIRM THE
CONTRACT, RECEIVE THE
MONEY BACK FOR GOING
THROUGH WITH A DEAL THAT
THE JURY FOUND CAUSED
THEM NO DAMAGE OF ANY
COMPENSABLE AMOUNT.
FINALLY, TO THE EXTENT
THAT THE COURT HAS ANY
OTHER QUESTIONS ABOUT
THE -- ABOUT THE TESTS
WE WOULD SUBMIT THAT IN
THIS CASE THE -- THE
STATE FARM AND BMW TEST
ADOPTED BY THIS COURT
AND ANGLE DEMONSTRATES
THAT AN AWARD OF
\$2 MILLION WHEN THERE'S
NO COMPENSATORY DAMAGE
ISN'T APPROPRIATE IN
THIS CASE.

>> LET ME ASK YOU ABOUT
THE PUNITIVE DAMAGE
STATUTE, HAS THAT BEEN
-- HOW DOES THAT FIGURE
INTO THE ANALYSIS?
WE HAVE A STATUTE AND I
THINK I'VE -- MY
RECOLLECTION IS I SAW
THE NUMBER 2 MILLION IN
THE STATUTE.

AM I WRONG?

>> JUSTICE CANDAY, I
BELIEVE THAT IN THIS
CASE WE WOULD ADMIT THAT
THE STATUTE ITSELF
DOESN'T BIND THE TERMS
OF WHAT IN AND OF
ITSELF, THE TERMS OF
WHAT POTENTIAL PUNITIVE
DAMAGE AWARD COULD BE
BECAUSE OF OTHER
FINDINGS THAT THE JURY
MADE IN THE PUNITIVE
DAMAGE PHASE OF THE

TRIAL, BUT THE COURT IN
FOURTH DCA'S DECISION
RECOGNIZE THAT WHILE
THAT IS A COMPONENT OF
THE ANALYSIS WHEN THE
STATUTE DOESN'T APPLY
FOR CERTAIN TYPES OF
CLAIMS, FOR CLAIMS SUCH
AS THIS ONE WHERE WE ARE
TALKING ABOUT NOT ONLY
MINIMAL BUT NONEXISTENT
PURELY ECONOMIC LOSS
THAT THE ANALYSIS FROM
BMW WOULD APPLY AND
WOULD ELIMINATE AN AWARD
FOR PUNITIVE DAMAGES
WHEN THERE HASN'T BEEN
COMPENSATORY PUNITIVE
DAMAGE AWARD.
IF NO FURTHER QUESTIONS,
FIND THAT THE
PETITIONERS HAVE NOT
RECOVERED ANY
COMPENSABLE DAMAGES,
THANK YOU.

>> I JUST WANT TO
ADDRESS THIS IDEA THAT
THE -- THAT WE HAD TO
PROVE ACTUAL DAMAGES IN
ORDER TO PROVE FIDUCIARY
DUTY, GRACEY VERSUS
EAKER LISTS AND HAS
FOOTNOTE POINTING THE
READER TO STEVENS VERSUS
CRICKET CLUB CONDOMINIUM
FOR EXPLANATION OF
DAMAGES AND IN THAT
CASE, THE -- THE
PLAINTIFFS WERE UNABLE
TO PROVE THAT THERE WERE
ANY DAMAGES FROM THE
BREACH OF FIDUCIARY DUTY
AND THE COURT HELD THIS
AS THIRD DCA, NOMINAL
DAMAGES CAN BE AWARDED
WHEN A LEGAL HAS BEEN
PROVED BUT RECOVERABLE
DAMAGES WERE NOT PROVEN,
WHEN STEVENS CHARGED THE
BOARD OF DIRECTORS WITH

MISAPPLYING FUNDS THE
BOARD OF DIRECTORS
RETURNED THE 1992
ESSENTIAL ASSESSMENT
FUNDS TO THE UNIT OWNERS
AND SPECIALLY ASSESSED
THE FUNDS NECESSARY TO
REPAIR THE SOUTH
TERRACE.

STEVENS FAILED TO PROVE
THAT HE SUFFERED ANY
DAMAGE DUE TO
MISAPPLICATION AND THUS
AWARD OF NOMINAL DAMAGES
WAS PROPER.

THERE IS NO REQUIREMENT
THAT WE ASK FOR NOMINAL
DAMAGES, NOMINAL DAMAGES
ACCORDING TO THIS COURT
IN AULT ARE PRESUMED TO
OCCUR OR TO BE GIVEN
WHEN WE HAVE PROVEN A
WRONG WAS COMMITTED.

WE HAVE PROVEN THAT A
WRONG WAS COMMITTED, A
BREACH OF DUTY OCCURRED
AND WE ARE ENTITLED TO
SOME -- THAT NOMINAL
DAMAGES.

I THINK THAT'S IT.

THANK YOU.

>> ALL RIGHT.

WE THANK YOU BOTH FOR
YOUR ARGUMENTS AND THE
COURT IS NOW ADJOURNED.

>> ALL RISE.