

>> ALL RISE.

THE FLORIDA SUPREME COURT IS NOW IN SESSION PLEASE BE SEATED.

>> WE WILL TAKE UP FLORIDA ATLANTIC UNIVERSITY BOARD OF TRUSTEES VERSUS HARVARD BRANCH OCEANOGRAPHIC INSTITUTE FOUNDATION INCORPORATED. CASE NUMBER 2023 - 1470.

>> THANK YOU MR. CHIEF JUSTICE MAY IT PLEASE THE COURT ANDY BARTO ON BEHALF OF THE FAU BOARD OF TRUSTEES WITH THE COURT'S PERMISSION I YIELD FIVE MINUTES TO MR. SHANK ON THE ATTORNEY GENERAL TO ADDRESS THE NOTICE ISSUE.

IN 2018 THE LEGISLATURE AND THE BOARD OF GOVERNORS AMENDED FLORIDA LAW TO CONFER ON STATE UNIVERSITIES THE RIGHT TO APPROVE OR DISAPPROVE APPOINTMENTS TO THE BOARD OF TRUSTEES OF UNIVERSITY DIRECT SUPPORT ORGANIZATIONS.

THE COURT BELOW ERRED IN HOLDING THE 2018 AMENDMENT IN PAIRS UNCONSTITUTIONALLY IMPAIRS A CONTRACT BETWEEN FAU AND IT'S DIRECT SUPPORT ORGANIZATION HARVARD BRANCH FOUNDATION.

IT AIRED FOR TWO REASONS, FIRST THERE IS NO IMPAIRMENT OF THE CONTRACT BECAUSE THE CONTRACT MAKES NO PROVISION FOR THE SELECTION OF THOSE DIRECTORS BECAUSE IT MAKES NO PROVISION FOR THE SELECTION OF THE DIRECTORS IF THERE WERE IMPAIRMENT THEM PUBLIC INTEREST WOULD MORE WILL THEY JUSTIFY THE CHALLENGE LAWS.

THEY ARE TO TRUSTEES OF THE VAST RESOURCES ADMINISTERED ON BEHALF OF THE STATE UNIVERSITY SYSTEM.

THE BOARD OF DSO ARE THERE FOR DEDICATED TO THE STATE UNIVERSITY. DID THE DCA ERROR IN ELICITING THIS CONSTITUTION IN THE FIRST PLACE.

>> YES IT WAS ADDRESSED.

THE FOUNDATION DID NOT GIVE NOTICE TO THE ATTORNEY GENERAL AND THAT BARS CONSIDERATION OF THE CLAIM AS WAS EXPANDED UPON.

>> YOU'RE HARDLY IN A POSITION TO ARGUE THAT ARE YOU?

SINCE YOU ALSO ASKED THE COURT TO DECIDE THE CONSTITUTIONAL ISSUE IN THAT CORRECT?

>> YOUR HONOR, WE DID IN OUR PRETRIAL STIPULATION IDENTIFY THAT IT IS ONE OF THE ISSUES FRAMED IN THE BRIEFINGS.

BUT WE DON'T BELIEVE THAT FAU HAS THE ABILITY TO WAIVE THE RIGHT THAT BELONGS TO THE ATTORNEY GENERAL AND TO THE PUBLIC.

>> I UNDERSTAND.

THAT IS A SEPARATE ISSUE.

BUT THAT YOU HAVE STANDING TO ARGUE ABOUT.

>> YOUR HONOR, I THINK.

>> THE UNIVERSITY HAS IT.

>> I THINK IT CAN BE RAISED IN THE SHELTON CASE A SECOND DCA RAISED IT.

I THINK IT'S SOMETHING THAT WE CAN RAISE AND THAT THE ATTORNEY

GENERAL CERTAINLY HAS THE ABILITY TO WEIGH IN ON HERE.

>> IT SEEMED LIKE YOU ARGUABLY THIS WHOLE THING IS WASTEFUL BUT IT WOULD BE HUGELY WASTEFUL IF YOU GO BACK TO SQUARE ONE.

I KNOW YOUR ARGUMENT IS THAT IF YOU PREVAILED IN THIS ISSUE YOU THINK IT SHOULD BE THE END OF IT BUT IN MY RIGHT THAT THERE IS NO CONTROLLING LAW THAT IF THE COURT WERE TO GO DOWN THAT PATH? I MEAN, A DO OVER IS AT LEAST IN AVAILABLE OPTION.

>> I THINK WE HAVE SEEN IN THE CASE IS THAT THE COURT SIMPLY SAYS WE CANNOT ADDRESS IT.

THEY DON'T SAY WE ARE REMANDED TO THE TRIAL COURT SO THE DAG CAN BE GIVEN NOTICE IN THE TRIAL COURT CAN THEN CONSIDER THE ISSUE. CERTAINLY AT THIS STAGE THEY HAVE A TO PROVIDE THE NOTICE BUT THEY DID NOT DO IT.

THE BURDEN IS SQUARELY ON THEM UNDER THIS RULE AND WE WENT TO A TRIAL AFTER SIX YEARS OF LITIGATION AND AT THIS POINT I THINK YOU'RE RIGHT YOUR HONOR IT WILL BE WASTEFUL TO GO BACK AND DO IT AND AFTER ALL THE BURDEN IS ON THEM.

>> RIGHT.

>> AM I RIGHT THE FIRST TIME THE CONSTITUTIONAL ARGUMENT IS PRESENTED IN THIS LITIGATION IS IN THE AFFIRMATIVE DEFENSES RAISED BY HARPER BRANCH.

>> THERE ARE TWO ISSUES.

ONE IS APPOINTMENT.

THIS WAS RAISED BY FAU AND A COUNTERCLAIM AND THE FOUNDATION RAISED IT AS THE IMPAIRMENT ISSUE OF AN AFFIRMATIVE.

>> OKAY SO THE APPOINTMENT ISSUE COMES WHERE?

LIKE WHAT IS THE FIRST PLEADING THAT RAISES THE APPOINTMENT ISSUE.

>> THE COUNTERCLAIM FILED IN 2018.

>> OKAY SO YOU CAN FIRST ON THE CONSTITUTIONAL IMPAIRMENT ISSUE.

>> AND WE RAISED.

>> WE ASKED FOR A DECLARATORY JUDGMENT FOR APPOINTMENTS AND THEY RESPONDED WITH A DEFENSIVE CLAIMING THEIR CONTRACT IS IMPAIRED.

>> GOT IT.

>> HOW DOES DECERTIFICATION LOOK?

WHAT HAPPENS TO THE FORMER DSL IN THE DECERTIFICATION?

>> IT LOSES ITS STATUS AS A DSO THAT SUPPORTS THE STATE UNIVERSITY.

THE DSO LAW IS NO LONGER APPLIED TO IT.

IT IS NOT BOUND BY THAT AND IT DOES NOT CONTINUE TO EXIST AS AN ENTITY IS BEFORE THEY BECAME A DSO.

>> WHATEVER THEY HAVE A TICKET WITH THEM.

>> YES YOUR HONOR THAT'S HOW I IMAGINE IT.

>> I KNOW THE SCHOOL CAN DECERTIFY BUT CAN THE ENTITY SAY I DON'T WANT TO BE A DSO ANYMORE?

>> NO, THEY ACCEPTED THIS FOR IT TO BE CERTIFIED AS SUCH BUT THE DSO CANNOT DE CERTIFY ITSELF.

>> THE FOUNDATION HAS USED SEVERAL METHODS TO TRY TO BRING THE RIGHT OR OBLIGATION INTO THE MOU TO PROVIDE FOR THE APPOINTMENT OF DIRECTORS.

ONE OF THEM IS THE ARTICLES OF INCORPORATION OF THE BYLAWS WHERE THEY DO SET OUT HOW THE DIRECTORS WILL BE APPOINTED.

AND THE TRIAL COURT RELIED ON THAT AS EXTRINSIC EVIDENCE OF WHAT IS IN THE MOU AND THE FOUNDATION SEEMS TO CONCEDE THAT IT IS NOT EXTRINSIC EVIDENCE AND THEY RELY INSTEAD ON THE THEORY THAT THEIR ARTICLES AND BYLAWS ARE INCORPORATED BY OPERATION OF LAW INTO THE MOU.

BOTH ARE METHODS OF TRYING TO BRING INTO THE MOU SOMETHING THE PARTIES DID NOT PUT THEIR.

AND THE ARTICLES AND BYLAWS ARE NOT INCORPORATED BY OPERATION OF LAW INTO THE MOU BECAUSE THEY ARE NOT LOST TO BEGIN WITH.

AND ALSO EVEN IF THEY WERE INCORPORATED INTO THE MOU THE IMPAIRMENT CONTRACT CLAUSE WOULD NOT APPLY TO IT BECAUSE IT DOES NOT APPLY TO THE PROVISIONS THAT ARE INCORPORATED INTO CONTRACTS BY OPERATION OF LAW THAT IS THE ROAMING CASE THE BY THE SUPREME COURT.

THE ONLY PROVISIONS OF THE CONTRACT PROTECTED FROM IMPAIRMENT ARE THOSE THE PARTIES BARGAINED FOR THAT ARE IN THE CONTRACT.

WE SEE NOTHING IN THE CONTRACT ABOUT HOW THESE APPOINTEES ARE TO BE APPOINTED.

>> CAN YOU RESPOND TO THE ARGUMENT ABOUT THE MEETING TO BE ASCRIBED TO THE SILENCE OF THE CONTRACT ABOUT ADDITIONAL APPOINTMENTS?

CAN YOU DO THAT?

>> THEY REPLY ON THE NEGATIVE IMPLICATION THEY SAY FAU WILL HAVE TWO APPOINTEES OF THE BOARD AND THEY INFER FROM THAT -

>> THAT IS USUAL TO HAVE, BUT TWO APPOINTEES?

>> THAT'S RIGHT.

I THINK IT WAS SIMPLY A QUESTION OF TWO APPOINTMENT OF THREE APPOINTMENTS I THINK THEY WOULD HAVE A STRONGER INFERENCE.

THEY WOULD HAVE A STRONGER CASE.

BUT THEY'RE DRAWING AN INFERENCE THAT IS EVEN FURTHER THAN THAT. THEY'RE SAYING THAT THE PARTIES CONSIDER AND AGREE MUTUALLY WHICH IS WHAT THE NEGATIVE IMPLICATION CAN REQUIRE NOT ONLY THAT FAU IS LIMITED TO TWO APPOINTMENTS BUT THAT FAU HAS NO ROLE WHATSOEVER IN THE SELECTION OF THE OTHER DIRECTORS.

NOT ONLY CAN THEY NOT APPOINT THEM BUT THEY HAVE NO APPROVAL POWER AND NO SAY WHATSOEVER.

>> THIS IS NOT ABOUT APPOINTMENT POWER BUT APPROVAL POWER.

>> THAT'S RIGHT.

>> IS ONLY APPROVAL POWER WHICH IS DIFFERENT.

AND I THINK THAT IT IS A STEP TOO FAR.

I THINK TO SAY BECAUSE THE PARTIES AGREE THAT FAU HAS ONLY TWO AND THE MOU IS OTHERWISE SILENT AS TO THE OTHER DIRECTORS TO INFER FROM THAT THAT THE PARTIES MUTUALLY CONSIDERED AND AGREED THAT FAU HAS NO SAY WHATSOEVER IN THE APPOINTMENT OF OTHER DIRECTORS I THINK IS CARRYING THE INFERENCE TOO FAR.

I THINK THE COURT IN THIS CASE I THINK IT CAN AND SHOULD RECOGNIZE A COUPLE OF THINGS.

ONE IS THE ARTICLE ONE SECTION TEN CONTRACT CLAUSE TALKS ABOUT THE OBLIGATION CONTRACT.

CERTAINLY, THERE IS LANGUAGE IN CASES IN FLORIDA ABOUT AND PEERING THE VALUE OR STRENGTH OF A CONTRACT BUT IT IS NOT WITH THE CONTRACT CLAUSE IS ABOUT.

IT IS NOT ABOUT PROTECTING THE ABSTRACT HOPES OR EXPECTATIONS OF THE PARTIES BUT FINDING AN OBLIGATION THAT IN THE CONTRACT AND IS THE OBLIGATION BEING UPHELD.

IT DOES NOT EXIST HERE.

TO THE OTHER THING I THINK THE COURT CAN ESTABLISH HERE IS THAT HOW WE INTERPRET CONTRACTS.

I THINK JUSTICE IS THE SUPREMACY APPLIED IN STATUTES WE RELY ON THE WORDS AND WE DON'T LOOK BEYOND THE WORDS OF THERE IS A FAIR MEANING TO BE DERIVED FROM IT.

I THINK THE SAME PRINCIPLE CAN APPLY TO CONTRACTS AND SHOULD APPLY TO CONTRACTS OF THE PARTIES HAVE NOT ONLY THE RIGHT AND OPPORTUNITY BUT THE DUTY TO PUT TO THE CONTRACT WHAT THEY WANT THE CONTRACT TO EMBODY.

THERE IS NOTHING IN THIS CONTRACT TO THE PARTY SPELL OUT OR AGREE UPON SOME METHOD OF APPOINTING THE DIRECTORS OTHER THAN THE TWO THAT FAU APPOINTS AND TO LOOK BEYOND THAT NOT ONLY UNDERMINES POTENTIALLY THE INTEGRATION PROVISION THAT'S IN THE CONTRACT BUT ALSO WEAKENS RELIANCE ON THE TEXT OF THE CONTRACT.

PARTIES RELY ON IT TO KNOW WHAT THEIR RIGHTS AND OBLIGATIONS ARE.

>> BUT EVEN IF THIS THING SAYS FAU GETS TO APPOINTMENTS AND THE REST OF THE APPOINTMENTS WILL BE DONE HOWEVER THE BOARD AND MEAN IT SEEMS LIKE YOU WOULDN'T WANT TO SUGGEST THAT YOU COULD HAVE TWO PARTIES THAT COULD INSULATE THEMSELVES FROM THE GOVERNMENT REGULATION AND IT MIGHT AFFECT SOMETHING REALLY I MEAN FAU CANNOT REALLY BARGAIN THIS AWAY.

AND DECIDE HOW TO BEST REGULATE THIS.

>> THAT'S RIGHT YOUR HONOR.

IF THERE WAS A DIRECT CONFLICT BETWEEN SOMETHING THE PARTIES HAD AGREED TO IN A SUBSEQUENT STATUTE AND OF COURSE YOU MOVE ON TO IF

THERE IS AN IMPAIRMENT YOU MOVE ON TO THE BALANCING TEST AND THAT IS WHERE THE WOULD MORE THAN JUSTIFY THIS.

THIS IS NOT A GARDEN VARIETY COMMERCIAL ENTITY THAT HAS ITS OWN SEPARATE INTEREST.

THESE ARE ENTITIES THAT BY LAW HAVE AGREED TO ANNEX A STATE UNIVERSITY AND SUPPORT THE STATE UNIVERSITY AND TO DO NOTHING ELSE BUT TO DEDICATE THEMSELVES TO PUBLIC INTEREST AND DEDICATE THEIR RESOURCES FOR THAT PURPOSE.

I THINK THE BALANCE IS DIFFERENT HERE THAN WHAT YOU WOULD SEE A DIFFERENT CONTEXT.

>> YOU RAISED RESOURCES CAN YOU ADDRESS THE REGULATION 9.0014 IN THE BUDGET ISSUE?

>> YES YOUR HONOR.

THE BUDGET FIRST OF ALL MAKING ESTABLISHING A BUDGET WE THINK ARE TWO VERY DIFFERENT THINGS.

TO SAY THAT IS ALL ROLLED INTO THIS ONE PROVISION IN THE MOU AND IS THE SOLE DISCRETION TO MAKE DISTRIBUTIONS IN THE PROVISION GIVING THE DSO COMPLETE DISCRETION THROUGHOUT THE ENTIRE BUDGET PROCESS OF THE ADOPTION BUDGET I THINK IS OVER READING THE PROVISION BY FAR AND THE REASON WE KNOW THE PARTIES NEVER EVEN CONTEMPLATED IT BECAUSE THE LAWS THAT AFFECT IT IN EFFECT AT THAT TIME DID PROVIDE FOR UNIVERSITY OVERSIGHT OF THE BUDGET PROCESS.

>> WASN'T THAT REVEALED?

WHEN YOU SAY THERE'S A DIFFERENCE IT DIDN'T PROVIDE FOR REVIEW BY THE UNIVERSITY AND NOW IT IS APPROVAL?

>> A COUPLE DIFFERENT THINGS.

ONE THERE WAS A BOG REGULATION IN THE BOG HAS ITS OWN LEGISLATIVE POWER IN THIS ISSUE THAT FLOWS FROM THE CONSTITUTION.

BOB REGULATION PROVIDES FOR THE RECOMMENDATION BY THE UNIVERSITY PRESIDENT OF THE BOARD OF GOVERNORS WHICH WOULD THEN REVIEW IT BUT THERE IS A SEPARATE PROVISION, STATUTORY PROVISION THAT SAYS IN EVERY STATE UNIVERSITY OR DSO USES THE PROPERTY OF A STATE UNIVERSITY IT SUBJECTS ITSELF TO BUDGET REVIEW AND OVERSIGHT IN ACCORDANCE WITH UNIVERSITY REGULATIONS.

THESE ARE TWO SEPARATE PROVISIONS AND THEY ASK FOR AND HAD INCLUDED IN THE MOU A PROVISION THAT ALLOWED THEM TO USE UNIVERSITY PROPERTY.

THEY WERE FAMILIAR WITH THE LAWS AND THEY WERE SOPHISTICATED PARTIES AND KNEW THEY WERE OPTING INTO BUDGET REVIEW AND OVERSIGHT.

THERE IS NO WAY THEY COULD HAVE IMAGINED THAT THEY COULD BUY CONTRACT INSULATE THEMSELVES FROM THE REGULATION AND SOLE DISCRETION TO ESTABLISH THEIR BUDGET WHICH IS WHAT THEY ARE

ARGUING FOR IT'S COMPLETELY INCOMPATIBLE WITH ANY KIND OF REGULATION OR OVERSIGHT OF THE BUDGET WHICH NOT ONLY IS A BOG REGULATION BUT IS PROVIDED FOR AT THE TIME AND THEY DON'T WANT TO USE UP MORE TIME SO UNLESS THE COURT HAS FOR THE QUESTIONS I WILL YIELD TO HIM AT THIS TIME.

>> I HAVE A QUESTION ABOUT THE DECERTIFICATION.
ARE THESE THINGS BASICALLY CAPTIVE?

IT SEEMS LIKE IF THEY DON'T WANT TO FOLLOW STATE LAW I DON'T KNOW WHAT THEY WOULD WANT IN THAT COULDN'T THE BOARD SAY LISTEN IF YOU'RE NOT WILLING TO FOLLOW THE APPOINTMENTS LAW AND BUDGET REVIEW LAW THEN WE WILL DECERTIFY YOU?

>> THE UNIVERSITY COULD DO THAT.

>> THEY WANT THEIR MONEY RIGHT?

>> WE CERTAINLY SUPPORT THE UNIVERSITY AND THEY HAVE SUPPORTED THE UNIVERSITY.

WE THINK THAT IT WOULD BE A PRODUCTIVE RELATIONSHIP GOING FORWARD BUT THIS IS SOMETHING THE UNIVERSITY COULD DO.

IT'S NOT SOMETHING THE DSO COULD DO.

>> THEY ARE STUCK WITH YOU GUYS BASICALLY?

>> YES.

THAT IS WHAT THEY COMMITTED TO UNDER FLORIDA LAW.

IT IS THE ENTITY THAT THEY ARE.

>> SO YOU THINK THAT BY AGREEING TO BECOME DSO IN THE MOU IT BASICALLY WAS WHAT THEY SIGNED UP FOR.

>> YES THEY SIGNED UP FOR DSO STATUS.

THAT CHARACTERIZES THEM AS AN ENTITY THAT IS WHAT THEY ARE.

UNLESS THE UNIVERSITY DECIDES THAT THAT RELATIONSHIP IS NO LONGER PRODUCTIVE.

>> OKAY THANK YOU.

>> GOOD MORNING YOUR HONORS.

ROBERT SHANK FOR ATTORNEY GENERAL ASHLEY MOODY.

THE ATTORNEY GENERAL IS TASKED WITH PROTECTING FLORIDA'S LAWS AND IT'S HARD IF NOT IMPOSSIBLE TO PROTECT THE LAWS AND CHALLENGES THAT SHE DOES NOT EVEN KNOW ABOUT.

>> I WANT TO ASK YOU THIS WHEN THE ATTORNEY GENERAL FOUND OUT ABOUT THIS IN THE COURSE OF THE DISTRICT COURT PROCEEDINGS WHY DIDN'T THE ATTORNEY GENERAL STAND MUTE?

>> I THINK WE WERE FIRST NOTIFIED AT THE APPELLATE LEVEL.

>> THAT'S A DISTRICT COURT YES I UNDERSTAND.

>> I'M SORRY.

>> FEDERAL COURT TERMS.

>> STATE DISTRICT.

>> I THINK THE REASON IN PART IS BECAUSE IN MEMORIAL TELLS US WE DON'T HAVE TO GET INVOLVED.

IT IS SAID AND THIS COURT IN 2018 AND SAID THAT WE HAVE A RIGHT TO BE NOTIFIED AND IT DOESN'T MATTER IF WE DECIDED TO INTERVENE OR NOT.

WHAT MATTERS IS WE GET NOTICE SO THE ATTORNEY GENERAL CAN MAKE THE CALCULATION BEHIND THE SCENES IS THIS A CASE OF PARTICIPATION.

>> IT IS A CASE ABOUT STRIKING DOWN A STATUTE OF CONSTITUTIONAL GROUNDS NOT ABOUT IMPAIRMENT OF CONTRACT.

>> BUT IT IS A CONSTITUTIONAL CHALLENGE BASED IN -

>> I AGREE BUT YOU'RE CHARACTERIZING WHAT LEE MEMORIAL TELLS YOU AND IT SOUNDS TO ME LIKE YOU'RE REALLY ARGUING THAT HOW YOU READ LEE MEMORIAL TELLS YOU DIDN'T HAVE TO.

I DON'T THINK IT IS IN YOUR INTEREST TO TRY TO OVERSTATE THE HOLDING OF LEE MEMORIAL.

YOUR POSITION IS THAT WE DID NOT HAVE TO SO OKAY.

LET'S ASSUME WE REMAND THIS.

WHAT IS THE ATTORNEY GENERAL'S POSITION?

>> I ALSO THINK THAT LEE MEMORIAL ANSWERS THAT QUESTION AS WELL WHEN THE BOARD SAID IT BARS CONSIDERATION OF A CONSTITUTIONAL CLAIM AND THE CONSTITUTIONAL CLAIM HERE IS THAT THE REGULATES AND DEALS WITH BOARD APPROVAL AND DIRECTORS IS AS UNCONSTITUTIONAL AS APPLIED IN THE SCENARIO.

>> YOU WOULD MAKE AN AS APPLIED ARGUMENT.

HE WOULD NOT GO WHOLE HOG AND SAY IT IS JUST UNCONSTITUTIONAL AND BY THE WAY LEE MEMORIAL LET'S ESTATE BROADLY WHETHER OR NOT SOMETHING IS UNCONSTITUTIONAL EXERCISE LEGISLATIVE AUTHORITY OR NOT WHETHER OR NOT IT IS?

I DON'T THINK YOU'RE TRYING TO LIMIT YOURSELF TO THE AS APPLIED CHALLENGE.

I'M LISTENING VERY CAREFULLY TO THE WORD YOU SELECT.

>> NO, I THINK WE WOULD WANT NOTICE OF EVERY TYPE OF CONSTITUTIONAL CHALLENGE.

>> THAT IS THE AG'S POSITION ON REMAND IF IT GOES BACK DOWN?

>> YES.

>> I'M SORRY, YOUR POSITION ON REMAND IS THAT YOU WANT NOTICE?

>> WE DON'T WANT REMAND AS LEE MEMORIAL TELLS US THE PROPERTY REMEDY BARRING CONSIDERATION OF THE CONSTITUTION THAT THE TRIAL COURT PROPERLY DECIDED NOT TO CONSIDER THE CONSTITUTIONAL CLAIM AT ALL IN THAT CASE THERE WERE TWO CONSTITUTIONAL CLAIMS AND THE AG WAS NOTIFIED ABOUT ONE OF THEM BUT WAS NOT NOTIFIED ABOUT ANOTHER AND THAT THE PARTY THERE ACTUALLY TRIED TO CURE THE DEFECT BY AMENDING THE NOTE IS THAT THE TRIAL COURT LEVEL AND THIS COURT STILL SAID THAT CONSIDERATION OF THAT CLAIM WAS INAPPROPRIATE.

>> YOU DON'T THINK THERE'S ANY ISSUE WITH THE FACT THAT DIDN'T RAISE THIS TO THE FOURTH DCA WHEN YOU ACTUALLY HAD NOTICED THAT IT

WASN'T BROUGHT TO THE TRIAL COURT?

>> NO I DO NOT.

THERE WAS A SEPARATE NOTICE OF PROVISION AT THE DCA LEVEL 9425. AND I THINK THAT WE ALSO REQUIRED NOTICE AT THAT LEVEL BUT AT THAT POINT THE VIOLATION OF RULE ONE POINT O 71 HAD ALREADY TAKEN PLACE.

>> IT SEEMS LIKE A GOOD TIME TO RAISE IT TO THE DCA.

>> AGAIN, YOUR HONOR, I GUESS I DON'T SOUND LIKE A BROKEN RECORD OR AT LEAST I BELIEVE LEE MEMORIAL DOESN'T REQUIRE US TO INTERVENE ABOUT RIGHTS OF NOTICE BUT I SUPPOSE THE FUTURE WE MAY DECIDE WHETHER TO ACTUALLY MAKE THE SAME ARGUMENT AT THE DCA LEVEL BUT AGAIN I THINK THIS ISSUE IS VERY IMPORTANT TO US BECAUSE WE NEED TO BE ABLE TO ACT IN VARIOUS STAGES OF PROCEEDINGS TO PROTECT OUR RIGHTS AND INTERESTS.

>> IN LEE MEMORIAL PART OF THE ISSUE THERE WAS THE DISTRICT COURT HAD ACTUALLY SIGNED AN ISSUE THAT WAS NOT ARGUED BY THE PARTIES TO IT.

IT SEEMS LIKE IT PUTS IT OFF IN A DIFFERENT CATEGORY THAN WHAT WERE TALKING ABOUT HERE WHERE IT IS THIS IS A VERY LIVE ISSUE AND THE ATTORNEY GENERAL IS TOLD ABOUT IT AND JUST SAYS NOTHING. AND HIS SO IT SEEMS LIKE THERE OUGHT TO BE SOME KIND OF PRINCIPLE HERE THAT EVEN THE STATE HAS TO SPEAK UP WHEN THEY HAVE THE FIRST OPPORTUNITY TO DO SO AND, I UNDERSTAND WHAT YOU'RE SAYING BUT AGAIN MAYBE I'M MISSING SOMETHING BUT THE FACTS AND THERE ARE SETTING THIS APART FROM THE POINT THAT YOU ARE TRYING TO MAKE AND I SAY THIS IS SOMEONE WHO BELIEVES THAT THIS RIGHT OF THE STATE TO COME IN AND DEFEND THE CONSTITUTIONALITY OF LAWS IS VERY IMPORTANT.

I WROTE ABOUT IT.

YOU MAY HAVE CITED IT.

IT'S NOT THAT I THINK IT IS UNIMPORTANT BUT HIT IT IS A RIGHT THAT HAS TO BE UTILIZED.

IT SEEMS LIKE TO ME.

I'M JUST WONDERING WHY IT IS NOT A RIGHT THAT HAS TO BE UTILIZED WHEN THERE IS THE OPPORTUNITY GIVEN AND IT MIGHT BE THAT THE ATTORNEY GENERAL WOULD HAVE SAID NO, THIS HAS TO STOP.

WE DID NOT GET THE NOTICE DOWN THERE AND IT OUGHT TO BE REVERSED ON THAT BASIS OR MAKE THE CONSTITUTIONAL ARGUMENT THAT THERE IS NOT AN IMPAIRMENT.

LET'S JUST KIND OF IGNORE IT.

I WONDER ABOUT IT.

BUT THAT'S IT.

>> I WOULD LIKE TO QUICKLY RESPOND.

I UNDERSTAND THE CONCERN THERE.

I THINK THAT WE ARE JUST VERY CONCERNED ABOUT CASES IN WHICH WE MAY NOT GET NOTICE FROM THE PARTIES BECAUSE THE BALL MAY BE DROPPED.

AND IT MAY TAKE YEARS AS IN THIS CASE FOR US TO RECEIVE PROPER NOTICE AND IN THAT TIME THE DAMAGE MAY BE DONE.

>> IT SEEMS LIKE TO ME IF AT THAT POINT IS THE TIME TO COME IN SCREAMING AND HOWLING ABOUT IT RATHER THAN WAIT UNTIL IT COMES HERE.

WHAT IF IT COMES UP HERE AND YOU AREN'T EVEN NOTIFIED WHEN IT COMES HERE.

ARE YOU GOING TO COME LATER AND SAY WE DID NOT HAVE NOTICE AND WHAT YOU DID WAS NOT PROPER I DON'T KNOW.

>> THAT IS WHAT I THINK IS BEING CALLED FOR.

>> BUT DON'T YOU THINK THAT I MEAN THE AG THEY HAVE AN ENTITLEMENT TO BE HEARD SO WHY WOULD WE NOT APPLY THE SAME PRINCIPLE AND THE SPECIFIC CASE AT THE DISTRICT COURT LEVEL AS THE AG WAS NOTICE AT THE DISTRICT COURT LEVEL I KNOW YOU SAY THE VIOLATION HAS OCCURRED BUT THAT'S ALSO A VIOLATION OF THE AG IT WOULD BE IN HER DISCRETION TO WEIGH IT.

SO AT THE AG DID NOT APPEAR IN THE DISTRICT COURT WILL WOULD WE NOT TREATED AS A WAIVER IN THIS PARTICULAR ARGUMENT THAT IN THIS CASE NOTICE WASN'T SERVED FOR OR NO ONE CARED IN THAT CASE DISTRICT COURT AND THEREFORE IT'S WAIVED.

>> WE CANNOT JUST ASSUME THE RIGHT HAS BEEN WAIVED LIKE THAT [INAUDIBLE] TYPICALLY WE THINK OF WAIVERS IN TERMS OF INDIVIDUAL RIGHTS TO A PARTY IT HAS TO BE INTENTIONAL.

>> >> IT COULD BE A FORFEITURE.

>> NONE OF MY QUESTION IS WHAT WE LOOK TO FOR EVIDENCE OF YOUR CHOICE TO WAIVE IT IF NOT SILENCE?

>> I THINK THAT IS THE ONLY EVIDENCE >> BUT WHAT OTHER EVIDENCE COULD THAT BID AND IF YOU SOMETHING?

>> WE COULD COME TO THE DISTRICT COURT LEVEL.

>> SO WE SAY AT THE DISTRICT COURT LEVEL AND IT THEN MAY BE YOU WAIT TILL THERE IS AN OPINION AND YOU WAIT TILL IT'S HERE ON MERIT BRIEFING ALL THE TIME ALL THE ADDITIONAL RESOURCES AND THEN YOU USE THE RULE FOR THE FIRST TO TIME THAT'S WHAT YOU ASK US TO DO TODAY?

>> CERTAINLY, THIS ROLE MIGHT STRIKE.

THE HOLDING MIGHT SEEM TO SOME AS HARSH BUT THAT IS THE CONSEQUENCE TO THIS BRIGHT LINE RULE.

WE HAVE OTHER RULES THAT HAVE VERY STRICT CONSEQUENCES SUCH AS THE TIME TO FILE FOR AN APPEAL YOU MISS IT BY ONE DAY AND THAT'S IT. SO IT'S A FUNCTION OF PROTECTING THE VERY IMPORTANT INTERESTS OF THE ATTORNEY GENERAL TO MAKE SURE THEY DO THEIR CONSTITUTIONAL

DUTY.

>> THANK YOU

>> MR. CHIEF JUSTICE MAY IT PLEASE THE COURT I WOULD LIKE TO START WITH THE ISSUE OF NOTICE BECAUSE THIS IS A CLEAR CASE WHERE THE ATTORNEY GENERAL WAIVED THE RIGHTS AND WERE GIVEN NOTICE IN COMPLIANCE WITH THE RULES ON APPEAL.

>> I WANT TO KNOW, IF THIS IS A SUBSTANTIVE STATUTE THAT PROVIDES A PUBLIC RIGHT OF THE TRIAL COURT LEVEL THE STATUTE DOES NOT SAY ANYTHING ABOUT THIS IT SAYS THE COMPLAINT WAS SERVED AND SO IF WE HAVE A PROCEDURAL RULE IMPLEMENTING AS A PROCEDURAL MECHANISM TO IMPLEMENT THAT NOTICE AT THE APPELLATE LEVEL THAT IS NOT AMENDING THE STATUTE AS TO THE SUBSTITUTE REQUIREMENT TO BE SERVED ALONG WITH THE COMPLAINT SO, WHY WOULD WE NOT GIVE EFFECT TO THAT LEGISLATIVE PREROGATIVE IN THAT CASE TO REQUIRED AT THE TRIAL COURT LEVEL AND DO AS THE AG LEVEL SAYS HERE WHICH IS TO TREAT IT AS A CONSTITUTIONAL COMPLAINT.

>> A COUPLE OF REASONS AND ONE IS THAT YOU CAN STILL WAIVE IT.

THERE'S NO REASON THE WAIVER CAN'T APPLY.

IT IS THE SAME RIGHT.

IT IS THE NOTICE ABOUT THE CONSTITUTIONAL ISSUES.

NOW WE WILL GET TO THE AS APPLIED.

>> YOU WOULD AGREE THERE'S NO BASIS FOR US TO FIND WAIVER AT THE TRIAL COURT LEVEL FROM THE AG STANDPOINT.

>> NOT A TRIAL COURT BUT APPELLATE AND ONCE IT'S WAIVED AT APPELLATE THEY CANNOT COME BACK TO THIS COURT AND RAISE THE ISSUE CONCERNING THE TRIAL COURT LEVEL.

WHAT IF F A NEVER FILED A NOTICE OF APPEAL AT ALL THE KEYS WOULD HAVE NEVER COME UP HERE.

MANY TIMES THERE COULD BE ERRORS IN THE TRIAL COURT THAT IF THEY ARE NOT RESERVED AND WAIVED OR NOT PRESERVED THEY ARE WEIGHED AND THIS IS NO DIFFERENT.

AND IN THE LEE MEMORIAL CASE AS JUSTICE CANADY POINTED OUT IS DIFFERENT.

THIS IS WHERE THEY CONSTITUTIONAL ISSUE WAS RAISED WHEN THE PARTY SHOULD NOT READ THE ISSUE AND IT WAS AFTER LEE MEMORIAL WAS DECIDED THAT THE RULES OF APPELLATE PROCEDURE WERE AMENDED TO PROVIDE THE APPEAL TO THE AG.

NOW THE SECOND POINT THAT I WOULD MAKE IS THAT THE NATURE OF THE CHALLENGE HERE WAS NOT TO STRIKE THE STATUTE UNCONSTITUTIONAL.

DO NOT CALL INTO QUESTION TO USE THE LANGUAGE OF 1.71 THE CONSTITUTIONALITY OF THE STATUTE.

IT WAS RATHER A QUESTION OF WHETHER OR NOT AS APPLIED TO THIS DSL AGREEMENT THERE WAS AN IMPAIRMENT OF CONTRACT.

THIS COURT HAS NOT DECIDED THIS ISSUE BEFORE BUT IN A FEDERAL

SYSTEM AS WE HAVE BRIEFED ENDED IN THREE OTHER STATES SIMILAR RULES TO THIS HAVE BEEN INTERPRETED AS DEALING ONLY WITH FACIAL CHALLENGES WHERE IT HAS AN EFFECT BEYOND THIS CASE.

THE RULING HERE HAS NO EFFECT BEYOND THIS CASE AND SO THAT IS AN IMPORTANT DISTINCTION WHICH WE THINK SHOULD BE FOLLOWED.

>> BUT I WANT TO ASK YOU ABOUT THAT AND I DO UNDERSTAND YOUR POINT IN 47 BUT IT DOES APPEAR TO ME TOO SET UP A IS A REQUIREMENT THAT WOULD ONLY APPLY TO A FACIAL CHALLENGE WOULD BE PROBLEMATIC BECAUSE THERE ARE SOME AS APPLIED TO CHALLENGES THAT GO TO THE HEART OF WHAT THE LEGISLATURE IS TRYING TO GET THAT.

IT MIGHT NOT BE A FACIAL CHALLENGE OR FRAMED AS A FACIAL CHALLENGE BUT GETTING AT THE MAIN THING THAT THE CASE INVOLVES THE PRIMARY APPLICATION OF THE STATUTE.

WOULDN'T BE PROBLEMATIC FOR US TO HAVE A DISTINCTION LIKE THAT GIVEN THE HUNT?

>> I WOULD SAY I THINK THAT THERE ARE LINES ARE DRAWN AND THE FEDERAL HAS DRAWN AS FACIAL AND AS APPLIED BUT THIS COURT COULD DRAW IT A DIFFERENT PLACE AND SAY IN THIS CASE WHICH IS A CASE THAT ONLY INVOLVES THE APPLICATION OF A STATUTE TO ONE PARTICULAR MEMORANDUM OF UNDERSTANDING INVOLVING ONE PSO THIS IS NOT THE TYPE OF ISSUE WHERE IT IS NECESSARY TO REVERSE AND GO BACK TO SQUARE ONE.

YOU COULD REACH IN UNDER THE HARMLESS ERROR DOCTRINE I THINK BUT SECONDLY COULD ALSO AVOID THE CONSTITUTIONAL ISSUE HERE ENTIRELY BY THE ARGUMENT WE HAVE MADE ADMITTEDLY IT WAS NOT REACHED BELOW THE COURT CONSTITUTIONAL ISSUE BUT THERE'S A SERIOUS QUESTION OF RETROACTIVITY WHEN YOU ARE APPLYING THIS NEW STATUTE TO A MEMORANDUM OF UNDERSTANDING THAT IS ALREADY IN EFFECT.

>> BUT THE PRECEDENCE REGARDING RETROACTIVITY ISSUE LATELY DOES IT INDICATE THAT IT WILL BE ONE THING IF FAU SAID WE WANT A RETROACTIVELY APPROVAL OF PEOPLE HAVE ALREADY BEEN ON THE BOARD BUT AS LONG AS THE ACTIVITY IS BEING REGULATED AND THAT HASN'T HAPPENED YET THAN THE RETROACTIVITY ANALYSIS DOES NOT KICK IN.

>> I THINK YOUR CASES ON BOTH SIDES.

WE CITE HAHN IN THE PAPER WHERE IT WAS AN EFFECT ON FUTURE CHILDREN BY APPLYING A STATUTE TO MARITAL COURT.

>> BUT THIS IS A CONTRACT BEING PERFORMED SO I PRESUME THE CONTRACT IS GOVERNED BY THE LAW OF THE STATE OF FLORIDA RIGHT?

>> IT IS.

BUT IN THIS CONTRACT THE PARTIES DID NOT IMPORTING THE LAW THAT CHANGES THE FUTURE.

>> NO, THE GENERAL CHOICE OF LAW PROVISIONS WHEN YOU SAY CONTRACT IS GOVERNED BY THE LAW OF THE STATE YOU MEAN THAT DURING THE TERM OF THE CONTRACT WHILE THE DUTIES OF THE CONTRACTOR BEING PERFORMED

THE DUTIES ARE AS DEFINED BY THE LAW THE STATE?

>> BUT NOW, IF YOU ARE APPLYING THE STATUTE TO THAT CONTRACT TO APPLY IN THE FUTURE I THINK -

>> IT IS NOT THE FUTURE IT IS THE PRESENT.

THIS CONTRACT IS BINDING BETWEEN PARTIES.

SUBJECT TO YOUR CONSTITUTIONAL ARGUMENT.

I THINK THIS IS A LOSER.

THE IDEA THAT YOU NEED TO MAKE IT RETROACTIVE TO THE TERM CONTRACT FROM FORMATION SWALLOWS THE NEED TO HAVE A GOVERNING LAW PROVISION.

IT CANNOT BE THE LAW.

>> IF I MIGHT, YOUR HONOR, MENTION A THIRD POINT WHICH I THINK RESPONSE TO ONE OF THE QUESTIONS FROM THE COURT WHICH IS, THE REMEDY HERE IS A RE MANNED AND IT'S KIND OF A WASTEFUL REMEDY BECAUSE THEY HAVE NOT EXPRESSED ANY OF THAT THE ATTORNEY GENERAL WANTS TO CONSIDER AND THEY COULD HAVE DONE IN THIS COURT OR THE COURT OF DCA BUT, THERE IS AUTHORITY FOR THAT IN THE SEMINOLE CO VERSUS BRADEN CASE FIRST DCA DECEMBER 2,023 CENTS TO REMEDY FOR FAILING TO NOTICE THE ATTORNEY GENERAL UNDER RULE 9.4 TO FIVE IS GIVING THE ATTORNEY GENERAL AN OPPORTUNITY TO BEFORE THE ARGUMENT OUT OF THE BRIEF OF THE CONSTITUTIONAL ISSUE.

>> WHY IS THIS NOT A SECOND BITE OF THE APPLE?

WE ALWAYS TALK ABOUT CASES ON THIS LINE OF THOUGHT BUT WHY WOULDN'T WE APPLY IT HERE?

>> IT WILL BE WASTEFUL TO JUST ON THIS PROCEDURAL GROUND NOT REACH THE ISSUE ON REMAND BECAUSE GIVEN THIS IS AN ONGOING ISSUE AND IT CAN BE FILED.

>> I'M JUST TRYING TO THINK OF ANY OTHER CASES WHERE WE APPLY A REMAND BEING CONSIDERED WASTE RATHER THAN PROCEDURE.

>> IF THERE'S A POINT TO THE REMAND IT MAKE SENSE TO REMAND BUT THE MOST EXTREME THING IS TO REMAND.

I THINK THE OTHER OPTION IS TO SAY IT'S HARMLESS ERROR WAIVED BECAUSE THE ATTORNEY GENERAL KNOWINGLY THERE'S NO OTHER EVIDENCE SHOWING AND KNOWING INTELLIGENCE WAIVER OF THE RIGHT WAIVED BEFORE DCA AND HAS NOT EVEN IN THIS COURT EXPRESSED A VIEW ON THE MERITS OF THE ISSUE.

AND ON THOSE MERITS IF I MAY TURN TO THAT, YOUR HONORS, OUR POSITION IS ANCHORED IN THREE FACTS, OR POINTS, ONE, IN PLAIN LANGUAGE MEMORANDUM OF UNDERSTANDING WHEN IT TALKS ABOUT TWO DIRECTORS IT SHOULD BE INTERPRETED AS LEAN TO AND NOT A RIGHT TO THE IMPROVE OTHER DIRECTORS.

>> TELL ME ABOUT WHAT IMPORTATION YOU'RE TALKING ABOUT.

IT SEEMS TO ME LIKE THEY HAVE STATED A FACT.

THERE IS AN AGREEMENT BETWEEN THE PARTIES THAT THERE IS AN

APPOINTMENT POWER.

NUMBER ONE IT HAS NOT SAID ANYTHING ABOUT APPROVAL POWER AND IT HAS NOT SPOKEN AS TO THE OTHER MEMBERS OF THE BOARD.

TELL ME ABOUT THIS IMPORTATION.

>> YOU HAVE IN THE MEMORANDUM OF UNDERSTANDING AND SECTION NUMBER FOUR WHICH IS THE SECTION THAT ALL ISSUES HERE ARRIVE FROM. A PROVISION WHICH SAYS FA YOU TO APPROVE THE ARTICLES IN THE BYLAWS OF THE FOUNDATION AND THEY DID SO.

THOSE ARTICLES AND BYLAWS PROVIDED FOR A METHOD OF APPOINTMENT OF ALL THE OTHER DIRECTORS WHICH WOULD BE BY THE FOUNDATION ITSELF. I THINK WHETHER ONE REACHES IT BY THIS INCORPORATION THROUGH SECTION FOR THE MEMORANDUM OF UNDERSTANDING OR SIMPLY AS A LOWER COURTS DID EXTRINSIC EVIDENCE TO DEAL WITH THIS ISSUE OF LATENT AMBIGUITY -

>> WHAT IS AMBIGUOUS?

WHEN SOMETHING IS AMBIGUOUS IT IS CAPABLE OF TWO POSSIBLE MEANINGS.

WHAT ARE THE TWO POSSIBLE READINGS OF YOU HAVE THE POWER IN THIS CONTRACT TO A POINT TO BOARD MEMBERS.

WHAT IS AMBIGUITY?

>> WE WOULD ARGUE THAT ON ITS FACE IT IS NOT AMBIGUOUS BECAUSE OF AND THE CANON WHICH APPLIES HERE BUT AT MINIMUM AND AT WORST - >> THE NEGATIVE IMPLICATION CANON RESPECTIVELY THE NEGATIVE IMPLICATION CANON IS SOMETHING WE USE CAUTIOUSLY BECAUSE IT IS CONTEXT DETERMINED AND USUALLY IT WE HAVE ENUMERATED SEVERAL THINGS AND EXCLUDED SOMETHING.

WHAT IS THE ENUMERATION OF THINGS THAT I'M APPLYING THE NEGATIVE IMPLICATION CANON TO HEAR?

>> WHEN YOU SAY YOU HAVE THE RIGHT TO BY NEGATIVE IMPLICATION IT DOES NOT MEAN THAT YOU HAVE ANY RIGHT WITH RESPECT TO THE OTHERS.

>> WHAT IS YOUR BEST CASE FOR THAT BEING A GOOD PROPER USE OF THE NEGATIVE IMPLICATION CANON?

BECAUSE I CANNOT THINK OF ONE.

>> WE HAVE S CRANE RENTALS AND WE HAVE 773 REJECTING THE ARGUMENT IN THE OR PROVISION ON CANCELLATION RIGHTS CREATING A LATENT AMBIGUITY SO I THINK THAT WOULD APPLY THERE AND I WOULD NOTE THAT'S GLIA AND GARNER'S TEXT INDICATED 109 TO 110 WHEN A LEGAL TEXT DECLARES A SPECIFIC MODE OF APPOINTMENT NECESSARILY IMPLIES ALL OTHER MODES.

>> I WANT TO ASK YOU, AS FAR AS THE NATURE OF THE VESTED RIGHT THAT YOU SAY IS HERE DOESN'T MATTER TO YOUR CLAIM THAT THE LEGISLATURE CHOSE TO MAKE THE TRUSTEES THE APPROVING AUTHORITY. I CAN'T REMEMBER IF IT'S THE TRUSTEES OR WHATEVER BUT WHAT IF THEY SAID WE ARE WORRIED ABOUT DSO AND HOW WELL THEY'RE DOING THEIR JOB

SO WE WANT TO MAKE ALL BOARD APPOINTMENTS SUBJECT TO THIS BY THE ATTORNEY GENERAL APPROVAL OR SOME ADVISORY GROUP OR WHATEVER IS BEING SET UP.

IS IT YOUR POSITION THAT BASICALLY BECAUSE FAA YOU AND YOUR CLIENT HAD SOME KIND OF IMPLICIT THEY WILL GET TO THEY CREATED A RIGHT THAT THE LEGISLATURE CANNOT REGULATE EVEN IF IT IS IN WAYS THAT DON'T INVOLVE THIS TO HIMSELF >> IT WOULD STILL BE AN IMPAIRMENT OF CONTRACT WITH A VESTED IT IN THE ATTORNEY GENERAL OR TRUSTEES AS THEY DID OR SOME OTHER PARTY.

THIS IS IN CITRUS COUNTY WHERE IT IS APPLICABLE.

>> THIS IS AN INCREDIBLY BROAD PRINCIPLE.

AND MAY BE THE IS THE NEXT STEP IN THE ANALYSIS WHICH THE CITRUS COUNTY CASE DID NOT GET TO WHICH IS EXTENDING THE IMPAIRMENT OF PUBLIC INTEREST BUT I MEAN IT SEEMS LIKE IT'S ONE THING TO HAVE RULES THAT GO TO THINGS THAT ARE ON PARTY A WHICH IS OBLIGATED TO B AND WE WILL GIVE YOU ALL THESE ASSETS AND WE WILL BUY THEM AND CONVERT TO DSO BUT YOU'RE BASICALLY SAYING ON ALL THESE THINGS WHETHER THEY ARE ADDRESSED IMPLICITLY OR EXPLICITLY ESSENTIALLY YOU CAN INSULATE YOURSELF FROM REGULATION.

>> MR. CHIEF JUSTICE CONSIDER THE ALTERNATIVE WHICH IS A PARTY TO A CONTRACT WHICH FAU IS AND THEY ARE THE STATE AND THE STICK AND COME IN AND YOU AND UNILATERALLY REWRITE THE CONTRACT AND CHANGE ANY SORT OF THING UNLESS THE IMPAIRMENT OF CONTRACT WAS APPLIED.

>> PART OF IT GETS TO THE OBLIGATION ISSUE AS WELL.

I MEAN IF YOU READ THIS THING I'M SURE YOU READ IT A MILLION TIMES BUT FROM JUST MY READING AT THE MAIN POINT OF IT IS TO EFFECTUATE THE PURCHASE OF OTHER ASSETS AND, YOU KNOW, IT ACKNOWLEDGES THAT THE FOUNDATIONS WILL COME INTO DSO.

BUT DSO IS REGULATED BY STATE LAW AND REGULATIONS AT THE WAS NOT TO REGULATE ONGOING DSO WORKINGS OF THIS ENTITY.

>> FIRST OF ALL, I THINK IT IS IMPORTANT TO RECOGNIZE THAT THIS DSO CAME TO THIS AND GAVE \$90 MILLION WORTH OF LAND.

NOW HAS AN ENDOWMENT OF IS RAISED IT'S NOT STATE MONEY 95,000,021 IN THE RECORD.

SO THE STATE IS SEEKING TO GAIN CONTROL OVER THIS.

THE RECORD SHOWS IN 2015 THEY WENT TO THE FOUNDATION AND SAID WE WANT YOU TO USE THIS FUND TO MAKE ME A 50,000 DOLLAR CONTRIBUTION TO THE FOOTBALL STADIUM.

THE FOUNDATION IS CONCERNED ABOUT THE STATE OVERREACH.

THE RECORD IS CLEAR THAT THAT IS WHY THIS WAS A HEAVILY NEGOTIATED MEMORANDUM OF UNDERSTANDING.

WHEN PARTIES AGREE TO PRESERVE THE INDEPENDENCE OF THE FOUNDATION.

>> IT SEEMS LIKE TO ME HE WHAT IS THERE IS A RELUCTANCE TO BE A DSO AND THAT HAS OVERCOME AND THEY HAVE THIS MEMORANDUM AND IT

AMOUNTS TO TRYING TO PUT A SQUARE PEG IN A ROUND HOLE.
DO YOU WANT TO BE SOMETHING REALLY DIFFERENT THAN A DSO?
BUT YOU SIGNED UP TO BE A DSO?

AT THE END OF THE DAY IT SEEMED LIKE YOU SIGNED UP TO BE A DSO
CAME INTO THIS AREA THAT IS HIGHLY REGULATED WHERE WHAT YOU HAVE
GOT IS BASICALLY WHAT HAS TO BE USED FOR THEIR BENEFIT.

AND, SO, THAT IS A PUBLIC MATTER AND IT SEEMS LIKE I DON'T KNOW
ABOUT CITRUS COUNTY AND I THINK THIS IS DIFFERENT BUT I MIGHT
THINK ABOUT CITRUS COUNTY AND I JUST THINK WHEN YOU SIGN UP TO GO
INTO THE STATUS OF A THAT IT IS HIGHLY REGULATED AND OBVIOUSLY
SUBJECT TO FUTURE REGULATION AND THEN TO BE MAKING THE COMPLAINT
YOU'RE MAKING IT JUST SEEMS TO CUT AGAINST THE CONTEXT.

>> I THINK CITRUS COUNTY ALSO INVOLVED PUBLIC ENTERPRISE AND THAT
IS TRUE WHICH I KNOW YOU'RE HONOR'S OPINION IN THAT DEALT WITH BUT
HERE YOU ARE DEALING WITH AN ENTITY CREATED BY PRIVATE INDIVIDUALS
WITH PRIVATE MONEY THAT NEGOTIATE A MEMORANDUM OF UNDERSTANDING.
IF THAT DOESN'T HAVE ANY LEGAL EFFECT THAN IT MEANS IT COULD BE
CHANGED AT WILL.

THE REMEDIES WHICH THE STATE OR FAU HAVE WHICH IS NUMBER ONE, THE
STATE CERTIFICATION PROCESS WHICH THE CHIEF JUSTICE ASKED ABOUT
WHICH IS ONLY OPEN TO FAU IT DOES NOT RATCHET IN ANOTHER DIRECTION
AND SECONDLY, THEY CAN FORCE THE REQUIREMENT THAT FUNDS WILL BE
USED FOR THE PURPOSE OF FAU AND IF FOR SOME REASON THE FOUNDATION
WAS GOING TO DO SOMETHING THAT DIDN'T MEET THAT THEY COULD ENFORCE
THE REQUIREMENT.

>> BUT THERE ARE CHECKS AND BALANCES.

>> THE CONTRACT IS IRRELEVANT IN THIS SENSE BECAUSE IF THEY WANTED
TO ENFORCE THAT THEY WOULD BE AT THE STATE.

THE CONTRACT IS NOT ABOUT THIS IT SEEMS TO ME. **CAN YOU ADDRESS WHY
WE SHOULDN'T READ CITRUS AS FAR AS IT GOES BUT TO THE EXTENT THAT**
IT DOESN'T GET TO THE FINAL PART OF THE ANALYSIS IN THE CASE.
CAN YOU ADDRESS WHY WE SHOULDN'T READ CITRUS AS FAR AS IT GOES AND
THEN APPLY THIS ANALYSIS IT DOESN'T DO?

>> TWO THINGS YOUR HONOR, FIRST OF ALL, IN CITRUS COUNTY THE COURT
DID NOT DO THE BALANCING BUT I THINK THAT IS BECAUSE THE NATURE OF
THE IMPAIRMENT.

THAT, LIKE HERE IT APPROVAL POWERS AND TO THE TYPE OF RESTRICTIONS
ON DISBURSEMENTS AND EXPENSES THAT ARE INVOLVED HERE.

REMEMBER THIS COURT SAID THAT IT WAS ECHOED IN THE DIFFERENT CASES
THAT VIRTUALLY ALL IMPAIRMENTS OF CONTRACT ARE NOT LAW AND SO I
THINK THAT THIS COURT CITED CITRUS COUNTY WITH AN APPROVAL WHEN IT
GOT TO THE CIRCE CASE.

I THINK THERE ARE TWO WAYS THAT YOU CAN REACH THIS DECISION I
THINK FIRST DIRECTLY UNDER CITRUS COUNTY THE NATURE OF THE

IMPAIRMENT IS SUCH A CANNOT BE JUSTIFIED IN SECOND THE COURT CAN SAY WE WILL APPLY THE BALANCING TEST AS A LOWER COURT DID THEY SAID THERE WAS NO EVIDENCE PRESENTED HERE THAT WOULD SUPPORT IF IT WAS EITHER A STATE INTEREST THAT WORK HERE OR A NO EVIDENCE TO DENY IT WAS A SEVERE IMPAIRMENT OF THE RIGHTS.

>> BUT THE STATE INTEREST IS SELF EVIDENT.
IT SEEMS LIKE THAT.

IT HAS VALUE.

I THINK THIS IS MORE OF A BALANCING TEST BEFORE YOU GO INTO PUBLIC INTEREST AND THAT SORT OF THING.

IT'S PRETTY OBVIOUS WHY YOU AND I THINK DSO IS OVERSIGHT AND THIS ARGUABLY IS RELATIVELY LIGHTLY INTRUSIVE WAY TO GO ABOUT IT.

>> FOR ALL THE DSO THEY DON'T HAVE A MEMORANDUM OF UNDERSTANDING AND REACHING THE CONTRACT THAT WOULD BE TRUE BUT IF IT REACHES A CONTRACT IN A SEVERE WAY THAN THE STATE HAS TO DO MORE THAN JUST POINTS TO THE GENERALIZED CONCERN BUT TO DISPROVE THAT THIS IS A SEVERE IMPAIRMENT OR TO EVIDENCE THAT SUPPORTS THAT THERE IS A JUSTIFICATION FOR THE LAW TO DO THIS OTHERWISE THE BALANCING TEST DOES NOT MATTER.

WITH THE COURT'S PERMISSION I WILL SAVE THE BALANCE OF MY TIME FOR REBUTTAL ON THE CROSS APPEAL.

>> I WILL ADDRESS THE CITRUS COUNTY CASE VERY BRIEFLY.

CERTAINLY, THERE IS A SURFACE COUNTY RESEMBLE US WITH CITRUS COUNTY BECAUSE IT HAS THE EMPLOYMENT DIRECTORS BUT THAT'S WHERE THE SIMILARITY ENDS.

THE CITRUS COUNTY CASE IS DIFFERENT BECAUSE THERE WAS A CONTRACT ON THIS VERY SUBJECT AND THEY ARE ALLEGATION WAS OF THE ARTICLES AND CORPORATIONS WERE THERE AND UNDER CHAPTER SIX SEVENTEEN THAT'S EXACTLY WHERE THE PROCESS FOR APPOINTING DIRECTORS MUST BE SET FORTH.

THERE WERE PROVISIONS ON THE APPOINTMENT OF DIRECTORS THAT WERE BEING REWRITTEN BY THE LAW.

NOT SO HERE.

THEY SPOKE ABOUT CONTRACTS BEING NEGOTIATED AND THIS ISSUE WAS NOT NEGOTIATED.

THERE'S NOTHING IN THE CONTRACT THAT TALKS ABOUT HOW DIRECTORS ARE APPOINTED OTHER THAN FAU DIRECTORS.

THE OTHER THING THAT DIFFERS OF COURSE IS THE COURT DID NOT APPLY THE BALANCE AND SO WE KNOW UNDER ONE HAND THE STATE INTEREST WAS MUCH MORE SIGNIFICANT HERE BECAUSE THEY ARE COURT THE LEGISLATURE ENACTED A SPECIAL LAW AIMED AT A SINGLE CONTRACTUAL RELATIONSHIP AFTER DISPUTES HAD RISEN.

AN ACT OF GENERALLY APPLICABLE LAW WAS FOR THIS ON THIS BASIS.

>> HOW DO WE DO THE PUBLIC INTEREST THIS SEEMS OVERWHELMING.

HOW DO PUBLIC INTEREST THING THAT WE USE THE SITE HOW SUBJECTIVELY GOOD THIS IS.

WE HAVE OVERWHELMING EVIDENCE. I THINK THAT THIS IS AN OBVIOUS INTEREST.

THERE'S NOTHING TOO CONTROVERSIAL ABOUT IT.

\$8 BILLION IN ASSETS ARE DEDICATED TO STATE PURPOSES FOR THE BENEFIT OF THE UNIVERSITY STUDENTS DONORS TAXPAYERS THERE REALLY WAS NO REASON IN A QUARREL WITH THAT. I THINK EVERY CASE WILL BE CONTEXT SPECIFIC. I THINK IT WILL DEPEND ON THE RECORD BUT IN THIS CASE IT EASILY CLEARED THE BAR.

THE OTHER PART OF THIS IS THE SEVERITY OF IMPAIRMENT. THE CITRUS COUNTY SAID THERE WERE 16 DIFFERENT SUBSECTIONS THAT ALTER IN DIFFERENT WAYS THE GOVERNANCE OF THAT FOUNDATION.

IT WAS NOT SIMPLY ABOUT APPOINTMENT OF DIRECTORS AND APPROVAL OF APPOINTMENTS.

SO THE COURT CONSIDERED SOMETHING WHERE THERE WAS A SIGNIFICANT FUNDAMENTAL SHIFT IN THE GOVERNANCE FINANCIAL GOVERNANCE AND LEADERSHIP OF THE ENTITY THAT IS REALLY NOTHING LIKE THIS CASE. I THINK CITRUS COUNTY IS DISTINGUISHED ON ANY NUMBER OF GROUNDS. WITH THAT, YOUR HONOR, WE THANK YOU AND ASK THAT THE COURT REVERSE AS TO THIS POINT AND OTHERWISE AFFIRMED.

>> MAY IT PLEASE THE COURT THERE ARE THREE ISSUES I WANT TO ADDRESS AND REBUTTAL BASED ON WHAT WAS SAID.

FIRST, CITRUS COUNTY IS DIRECTLY APPLICABLE BECAUSE THEY ARE THE COURT SAID IMPOSING NEW OBLIGATIONS BY STATUTE EVEN IF IT DIDN'T CHANGE THINGS IN THE EXISTING AGREEMENT COULD ITSELF BE AN IMPAIRMENT?

SO EVEN IF YOU HAD SILENCE AND DID NOT HAVE A REFERENCE TO THE TWO DIRECTORS YOU ARE STILL IMPOSING NEW REQUIREMENTS ON THE CONTRACT. AND THESE ARE SIGNIFICANT.

WHAT COULD BE MORE SIGNIFICANT THAN WHO ARE THE DIRECTORS AND THE ISSUE OF THE BUDGET.

THAT'S A SECOND ONE I WANT TO MAKE.

IT WAS SPECIFICALLY NEGOTIATED TO HAVE SOLE DISCRETION OVER OUR CROSS APPEAL IS PREDICATED ON THE FACT THAT YOU CANNOT HAVE SOLE DISCRETION OVER EXPENDITURES IF YOUR BUDGET IS SUBJECT TO THE APPROVAL OF FAU.

SOLE DISCRETION MEANS EXACTLY THAT.

DISCRETION YOU HAVE THAT IS NOT SUBJECT TO SOMEONE ELSE COMING IN. IN FACT THE RECORD SHOWS THAT THE CFO OF FAU MR. ATWATER ADMITTED, HE SAID THAT IF YOU HAVE CONTROL OVER DISBURSEMENTS THEN YOU CANNOT HAVE THESE TYPES OF DISBURSEMENTS UNLESS THEY ARE IN THE APPROVED BUDGET.

SO THE CONTROL OF THE BUDGET CONTROLS THE DISBURSEMENTS FLATLY

AGAINST THE SOLE DISCRETION LANGUAGE.

THIRD POINT, IT IS THAT HOW DO YOU WEIGH THE PUBLIC INTEREST AND DO THE BALANCE?

THERE ARE TWO PORTS IN THIS CASE, CIRCUIT COURT AND DCA HAVE FOUND THAT IN THIS CASE THERE WAS NO EVIDENCE THAT WAS PRESENTED TO SHOW THERE WAS A SUBSTANTIAL PUBLIC INTEREST TO APPLY THE STATUTE TO THIS DSO OR THAT WOULD COMPROMISE OR SUPPORT THE ISSUE THAT THIS WAS NOT A SEVERE IMPAIRMENT.

I THANK YOU HAVE TO LOOK AT THE FACT THAT HERE YOU HAVE THE STATE CHANGING SOMETHING THAT GOES TO FUNDAMENTAL RIGHTS OF APPOINTMENT AND FUNDAMENTAL RIGHTS OF THE SOLE DISCRETION OVER DISBURSEMENTS WERE BOTH COURTS BELOW HAVE FOUND THERE WAS NO EVIDENCE PRESENTED TO SUPPORT THE INTEREST THAT NOW THE STATE IS RAISING.

UNLESS THE COURT'S QUESTIONS WE BELIEVE THAT THE FIRST ISSUE SHOULD BE AFFIRMED AND THE SECOND SHOULD BE REVERSED.

THANK YOU YOUR HONORS.