Lewis B. Freeman v. First Union National Bank

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING, CHIEF JUSTICE ANSTEAD. MAY IT PLEASE THE COURT. CHARMAINE MILLSAPS, REPRESENTING THE STATE. COUNSEL COULD NOT BE INEFFECTIVE FOR NOT PRESENTING A DEFENSE THAT IS PRECLUDED AS A MATTER OF LAW. FLORIDA DOES NOT RECOGNIZE CONTRIBUTE OTHER NEGLIGENCE OF THE VICTIM, IN A CRIMINAL CASE, AS DEFENSE.

THEY ARE RAISING IT AS INTERVENING CAUSE.

WELL, BUT IT IS NOT. IT IS CONTRIBUTE OTHER NEGLIGENCE. WHEN THE VICTIM, THE RESTATEMENT OF TORTS DEFINES ALL THESE, AND WHEN YOU SAY IT IS CONDUCT ON THE PART OF THE PLAINTIFF IS THE WAY THEY DEFINE IT, OBVIOUSLY, BECAUSE THEY ARE NOT DEALING WITH CRIMES, FALLS BELOW THE STANDARD WHICH HE SHOULD CONFORM TO HIS OWN PROTECTION, THAT IS A CONTRIBUTING CAUSE, COOPERATING WITH THE NEGLIGENCE OF THE DEFENDANT, SO THE RESTATEMENT OF TORTS, IS, SAYS THIS IS CONTRIBUTE OTHER NEGLIGENCE. YOU ARE BLAMING THE VICTIM. AN INTERVENING FORCE --

I WONDER IF WE WERE NOT GETTING OFF IN SORT OF A LEGALESE KIND OF THING HERE, AS OPEN OATSED TO THIS ISSUE ABOUT THE BROAD -- AS OPPOSED TO THIS ISSUE ABOUT THE BROAD DISCRETION OF A DEFENSE LAWYER, I AM SOMEWHAT CONCERNED YOU KNOW, THAT THIS THING WOULD BE DECIDED ON THE BASIS OF SOME LEGAL THEORY OF WHO, LEGALLY, CAN BE HELD LIABLE OR NOT LIABLE, OR WHETHER COMPARATIVE OR CONTRIBUTE I HAVE NEGLIGENCE COULD BE, AS OPPOSED TO FOCUSING ON THE STANDARDS STANDARD FOR EFFECTIVENESS OF COUNSEL -- ON THE STANDARDS FOR EFFECTIVENESS OF COUNSEL.

YOUR HONOR, THE TRIAL COUNSEL'S TESTIMONY AT THE EVIDENTIARY HEARING, WAS CLEAR AND UNREBUTTED, AND HE SAID THIS WOULD BE A HORRIBLE IDEA. HE SAID THINGS LIKE IT WOULD INFLAME THE JURORS, IF I WERE TO BLAME THE TROOPER FOR HIS OWN DOOE. ISN'T THIS, UNDER THE LAW OF STRICKLAND, WHAT THE TRIAL JUDGE -- OWN DEATH.

ISN'T, THIS UNDER THE LAW OF STRICKLAND, WHAT THE TRIAL JUDGE WOULD HAVE TO EVALUATE. ISN'T TRIAL COUNSEL OPERATING UNREASONABLY OUTSIDE OF THE DEFERENCE HE WAS ALLOWED, IN PRESENTING THAT?

THAT WAS NOT PRESENTED. THE ONLY EVIDENCE PRESENTED IN THIS TRIAL COURT WAS THE TESTIMONY OF THE TRIAL LAWYER SAYING I THINK IT WAS A VERY BAD IDEA TO BLAME AN OFFICER FOR DOING HIS DUTY. IT IS NOT JUST SOMEBODY STANDING NEXT TO A VICTIM. THIS IS AN OFFICER DOING HIS DUTY. THIS WOULD PARTICULARLY IN FLAME A JURY, MORE THAN JUST A FRIEND STANDING BY SOMEBODY. THIS WOULD IN FLAME THEM MORE. YOU ARE BLAMING AN OFFICER FOR DOING HIS DUTY. AND SO, YOUR HONOR, IF YOU WISH TO DECIDE THIS STRAIGHT ON HIS TESTIMONY --

ISN'T THAT THE WAY THE TRIAL JUDGE EVALUATED IT?

THE TRIAL JUDGE REALLY FOUND THIS TO BE PROCEDURALLY BARRED. NOW, HE DID QUOTE, IN THE TRIAL JUDGE'S ORDER, HE DID, HE DID INDEED, QUOTE FROM THE TESTIMONY, AND HE SAID, MR. SHE LETTER TESTIFIED THAT IN HIS I KNOW I DON'T KNOW, STRATEGY -- IN HIS OPINION, STRATEGY WOULD NOT HAVE WORKED IN HIS CLIENT'S BENEFIT, BUT HE SAID, TRIAL COUNSEL,

HIMSELF, SAID THAT NEGLIGENCE CONCEPTS SUCH AS THIS HAVE VERY LITTLE APPLICATION IN CRIMINAL LAW. YOUR HONOR, I HAVE ALSO CITED A CASE FROM THE CALIFORNIA APPELLATE COURTS, THAT HAS BEEN ADOPTED BY THE CALIFORNIA SUPREME COURT, WHERE THEY TRIED TO MAKE AN ARGUMENT VERY MUCH LIKE, THIS DEALING WITH THE CALIFORNIA HIGHWAY PATROL MANUAL, AND THE CALIFORNIA APPELLATE COURT DID AFFIRM THE TRIAL COURT THAT HAD EXCLUDED THAT EVIDENCE. AND SO HE WOULD HAVE A VERY HARD TIME. YOUR HONOR, IN NO WAY DO I DISAGREE THAT YOU CAN COMPLETELY DISPOSE OF THIS ON A REASONABLE STRATEGIC MOTION. THAT WAS COMPLETELY UNREBUTTED, BUT TRIAL COUNSEL IS GOING TO HAVE AN EVEN BIGGER PROBLEM. HE IS GOING TO HAVE TO FIGHT WITH THE STATE ABOUT WHETHER YOU CAN EVEN DO THIS AS MATTER OF LAW, SO NOT ONLY IS IT A BAD IDEA. IT CERTAINLY, I DON'T THINK IT IS PERMITTED AS A MATTER OF LAW, SO HE HAS GOT TWO HUGE HURDLES, AND HE SAID HIS FINAL TESTIMONY WAS, I CONSIDERED IT. I WOULDN'T DO IT THEN. I WOULDN'T DO IT NOW. AND AS FOR PRESENTING IT AS A MITIGATOR, HE SAID, IF I HAD PRESENTED SUCH A DEFENSE, I WOULD HAVE GOTTEN A 12-ZIP QUOTE/UNQUOTE, JURY RECOMMENDATION. INSTEAD OF THE 10-2 THAT HE DID GET. AND YOUR HONOR, LET ME ALSO TELL YOU WHAT THE DEFENSE WAS AT TRIAL, NIGHT MERELY TRANSFERRED INTENT. THE STATE DID NOT HAVE AN EYEWITNESS PROVING WHO MADE THIS BOMB. SO A LOT OF THIS WAS REASONABLE DOUBT AS TO "WHO MADE THE BOMB" DEFENSE. THAT WAS REALLY HIS OPENING AND CLOSING STRATEGY THAT, THE STATE DID NOT PROVE WHO, PAUL HOWELL HAD PARTICULARLY MADE THIS BOMB. WHILE WE PROVED THAT IT WAS MADE IN PAUL HOWELL'S HOUSE, WE DID NOT PROVE THAT PAUL HOWELL MADE THE BOMB. IT WAS MORE REASONABLE DOUBT DEFENSE AS TO WHO ACTUALLY MADE THIS BOMB, AND THEN THEY ALSO WENT ON TRANSFERRED INTENT. SO YOU CAN DISPOSE OF THIS ONE OF TWO-WAYS. EITHER IT IS NOT PERMITTED AS A MATTER OF LAW, OR AS THE TRIAL COUNSEL TESTIFIED, THIS WOULD BE A VERY BAD IDEA. MOREOVER, THE POLICY, YOUR HONOR, IF YOU READ THE INTRODUCTION TO THE POLICY, THE INTRODUCTION TO THE POLICY STATES, IN ORDER TO SECURE THE OWNER'S PROPERTY AND TO PROTECT THE DEPARTMENT FROM CLAIMS, THAT IS WHAT THE POLICY, THAT IS THE STATED OBJECT OF THE POLICY. IT IS NOT TO PROTECT OFFICERS FROM BOMBS. THEY DON'T HAVE A STANDARD POLICY ON GIFT WRAP PACKAGES THAT FURNISH OUT -- THAT TURN OUT TO BE BOMBS. THAT IS NOT A STANDARD SITUATION. SO IT IS NOT AT ALL CLEAR THAT THIS IS A VIOLATION, EITHER OF THE FOURTH AMENDMENT OR OF THEIR POLICY. THANK YOU.

CHIEF JUSTICE: REBUTTAL.

JUST VERY, VERY BRIEFLY. I JUST WANTED TO NOTE THAT THIS SITUATION IS A LITTLE BIT LIKE, IN THE REAL WORLD, WHEN YOU ARE TRYING THESE CASES, INVOKING AN INSANITY DEFENSE. IT IS VERY UNPOPULAR TO DO, BUT IT IS WHEN THAT IS ALL YOU HAVE, YOU HAVE GOT TO GO WITH WHAT YOU HAVE GOT, AND THAT IS WHAT WE SAY WAS, SHOULD HAVE BEEN DONE IN THIS CASE. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU VERY MUCH. FREEMAN VERSUS FIRST UNION NATIONAL BANK.

GOOD MORNINGS YOUR HONOR. MAY IT PLEASE THE COURT. I AM PATRICE TALISMAN ON BEHALF OF LEWIS FREEMAN. THIS ARISES OUT OF THE PONS I SCHEME THAT WAS OPERATE -- OUT OF THE

CHIEF JUSTICE: UNDER WHAT NAME AND TITLE AND WHAT THEREY?

COMMITTING AND AIDING FRAUDULENT TRANSFERS, IS THE EXACT NAME OF COUNT SEVEN.

IS THAT AS A TORT OR WHAT THEORY OF LAW? EQUITY?

YES, YOUR HONOR. AS A TORT, AIDING AND ABETTING IS, IN FACT, A TORT, AND IT WAS IN FACT, PLED AS A TORT.

SO THERE IS NO CONSPIRACY CLAIM HERE, NO CONSPIRACY TO DEFRAUD, FOR INSTANCE.

THERE WAS A CONSPIRACY CLAIM THAT WAS MADE, A CONSPIRACY TO COMMIT FRAUDULENT TRANSFERS, AND WHEN THE COURT SAID THAT THERE WAS NO AIDINGS AND ABETTING CLAIM -- NO AIDING AND ABETTING CLAIM, THAT WAS DISMISSED.

BUT THE FRAUD AS A TORT, ONLY UNDER THE UNIFORM TRANSFER, NOT AS AN INTENT TO COMMIT FRAUD.

IT WAS COMMITTING JUST AS AIDING AND ABETTING FRAUDULENT TRANSFERS.

BUT UNDER THE ACT, NOT UNDER THE COMMON LAW.

I BELIEVE THAT THEY, BOTH, CENTER SOLELY ON FRAUDULENT TRANSFERS, NOT FRAUD IN THE SENSE OF FRAUDULENT MISREPRESENTATIONS THAT WERE MADE. THE WAY THE CASE LAW --.

DID YOU PLEAD THAT THE BANK, ACTUALLY, FIRST UNION ACTUALLY DID ANYTHING OTHER THAN TRANSFER? IN YOUR PLEADINGS, WHAT FACTUAL BASIS DID YOU LAY OUT FOR THIS AIDING AND ABETTING, OTHER THAN THE MERE TRANSFER OF FUNDS?

WE PLED THAT THEY HAD NOT ALLEGED THAT IT WAS IN FACT A FRAUDULENT SCHEME, THAT IN FACT, IN ALLOWING, THAT THEY KNEW, THROUGH THE DEPOSITS THAT WERE BEING MADE, THE MUST NOT, I THE AMOUNT OF MONIES THAT WERE BEING -- OF MONEY THAT WAS BEING DEPOSITED -- THE MONEY, THE A MONIES THAT WERE BEING DEPOSITED, THEY DID NO INVESTIGATION OF IT AS THEY SHOULD HAVE UNDER THE RULES, AND ACTUALLY IN TRANSFERRING MONEY OUT, THEY ACTUALLY VIOLATED THEIR OWN RULES, BECAUSE THEY WOULD TRANSFER A MILLION DOLLARS AT A TIME OR ALLOW THE WIRE TRANSFER TO BE STRUCTURED SO THAT A MILLION DOLLARS RATHER THAN $250,000 --

OTHER THAN THE TORT, OTHER THAN THE STATUTE IN 726, OTHER THAN THAT STATUTE, IS THERE ANY DUTY THAT YOU ARE ALLEGING?

NO. IT IS, IN FACT, THE FLORIDA LEGISLATURE HAS DECLARED THAT THESE TRANSFERS WERE FRAUDULENT, AND THEREFORE,, AND THE FLORIDA LEGISLATURE HAS PART -- AS PART OF CHAPTER 726, 726.11, SAYS THAT THIS SECTION OR THIS CHAPTER IS TO BE SUPPLEMENTED WITH THE PRINCIPLES OF LAW AND EQUITY, INCLUDING THE PRINCIPLE AND AGENT. COURTS ARNDT COUNTRY HAVE HELD THAT THIS MEANS THAT, IN FACT, YOU HAVE A CONSPIRACY TO COMMIT FRAUDULENT TRANSFER. YOU HAVE AN AIDING AND ABETTING TO COMMIT FRAUDULENT TRANSFER.

WHAT IS THE REMEDY, THEN, UNDER THE STATUTE?

MONEY DAMAGES.

MONEY DAMAGES. OTHER THAN SETTING ASIDE THE TRANSFER OR GOING AFTER THE ASSETS OF --

726.108-1-C, EXPRESSLY SAYS THAT THE COURT MAY GRANT ANY RELIEF THAT THE CIRCUMSTANCES REQUIRE. AND THE FLORIDA QOURTS IN THE PAST -- COURTS IN THE PAST, HAVE IN FACT EXPRESSLY HELD THAT THAT MEANS THAT YOU CAN AWARD DAMAGES, INCLUDING DAMAGES AGAINST TRANSFER OR. -- AGAINST THE TRANSFERER. HANSON VERSUS STATE OF FLORIDA, THE COURT SPECIFICALLY ALLOWED MONEY DAMAGES AGAINST THE TRANSFERERER. IN THIS CASE IT WAS ADMITTED THAT IT WAS THE TRANSFERER. THERE WAS AN AWARD OF DAMAGES. THIS COURT, IN SAFLE BROTHERS PRODUCE, BEFORE THE UNIFORM TRANSFER ACT, ALLOWED AN AWARD OF DAMAGES IN AN ACTION BASED ON SETTING ASIDE OF FRAUDULENT TRANSFERS. SO THE FLORIDA COURTS DO, IN FACT, SAY THAT DAMAGES ARE AN APPROPRIATE

REMEDY FOR A FRAUDULENT TRANSFER.

I AM SORRY. YOU SAID, I JUST WANT TO MAKE, DID YOU SAY THAT FIRST UNION HAS ADMITTED THAT IT WAS THE TRANSFERER OF THE ASSETS?

YES. IN THIS SITUATION, WHAT WE ARE TALKING ABOUT ARE MONIES THAT WERE DEPOSITED INTO FIRST UNION BY PRINCIPLES OF UNIQUE GYMS, AND THEN WIRE-TRANSFERRED FROM FIRST UNION TO THE --

BUT IT WAS NOT THE TRANSFER'.

IT WAS NOT THE TRANSFER'. THE -- THE TRANSFER EE.

IT WAS NOT THE TRANSFER EE.

WHAT AMOUNT OF MUST NOT DIYOU DEMONSTRATE IN THEIR TRANSFER?

THAT IT WAS DONE AT A TIME OF LOOTING OF THE CORPORATION, SO IT WAS DEMONSTRATED, WHAT WE HAVE SAID UNDER THE ACT.

GOING BACK TO NUMBER ONE, ARE YOU CLAIMING THAT THE TRANSFERS MADE BY THE BANK WERE ILLEGAL?

YES, YOUR HONOR, THAT THEY WERE FRAUDULENT TRANSFERS. THAT THEY WERE FRAUDULENT AS TO THE CREDITORS, UNDER 725.06 AND 05 AND THEREFORE THEY WERE ILLEGAL.

WHO WERE THE CREDITORS?

I AM SORRY.

IT IS A LONG BENCH. THAT'S OKAY. ANOTHER CREDITORS WERE, IN THIS CASE, THE AS EMBLERS, WHO ARE WHO WERE OWED $40 MILLION BECAME --

WHEN DID THEY HOLD CONTINGENT CLAIMS?

THOSE WITH CONTINGENT CLAIMS UNDER THE FRAUD TRANSFER ACT, HAVE A RIGHT TO CLAIM UNDER THAT TRANSFER ACT.

DID THEY ALWAYS BECOME CONTINGENT CLAIMS OR DID THEY BECOME CONTINGENT CLAIMS, AT THE POINT WHERE THERE WAS A LAWSUIT FILED?

NO, SIR, YOUR HONOR, THEY HAD PAID NO MONEY IN, ON THE PROMISE THAT THEY WOULD BE PAID MONEY BACK FOR EVERY DEPOSIT OF $3,000 TO BUY IT, WHEN YOU BRING BACK THE ASSEMBLED NECKLACE, YOU WILL BE GIVEN $4800, SO THEY WERE CLEARLY CLAIMANTS, AT THE TIME THAT THESE TRANSFERS WERE MADE. IN FACT, AS WE POINTED OUT IN THE BRIEF, 19 MILLION DOLLARS, I AM SORRY, $6 MILLION OF THE TRANSFER WERE MADE AFTER UNIQUE GYMS WAS SHUT DOWN.

OKAY.

CLEARLY THEY WERE CLAIMANTS AT THE TIME.

WAS THE BANK HERE A TRANSFER' OR A TRANSFER OR -- A TRANSFER EE OR A TRANSFERER, OR SIMPLY A CONDUIT?

I THINK IT ADMITTED THAT IT DESCRIBED ITSELF IN THE BRIEF AS A TRANSFERER. IN FACT,

UNDER BANKING LAW IT BECOMES THE UNIQUE OWNER OF THE --

ISN'T UNIQUE GYMS THE TRANSFERER?

CERTAINLY THE FRAUD IS AS TO UNIQUE JIRMS -- UNIQUE GYMS. WE ARE SAYING THAT THE TWO OF THEM TOGETHER.

AND THE ULTIMATE RECIPIENT WAS WHOM?

PEARLS AND GYMS IN LIECHTENSTEIN. YOU HAVE TO REMEMBER THIS WAS FAILED TO DISMISS AS TO ALLEGED CAUSE OF ACTION, SO PEARLS AND GYMS WAS A TRANSFER OR OF UNIQUE GYMS, SO THEY WERE HELPING TO GET THE MONEY OUT OF THE COUNTRY AND OUTFIT HANDS OF CREDITORS, SO IT WAS LOOTING.

THERE WAS NO TRANSFER OF FUNDS -- THERE IS NO CONTRACT WITH THE BANK?

THERE WAS NO CONTRACT.

THERE IS FIDUCIARY RESPONSIBILITY.

THERE WAS AS TO THOSE WHO MAY HAVE BEEN DEPOSITORS AT THE BANK.

BUT THAT IS NOT THE CASE HERE.

THAT IS NOT THE QUESTION.

WHAT I UNDERSTAND YOU DESCRIBED HERE, IS YOU ARE SAYING THAT THERE IS A STATUTORY CAUSE OF ACTION, UNDER THE TRANSFER ACT, FRAUDULENT TRANSFER ACT, AND WHAT I AM CONCERNED ABOUT IS THAT WE ARE ASKED A SPECIFIC QUESTION, AND THAT SPECIFIC QUESTION IS, IS THERE A CAUSE OF ACTION FOR AIDING AND ABETTING A FRAUDULENT TRANSFER? YOU SAY IT IS A STATUTORY CAUSE OF ACTION. WHAT, IN THE STATUTE, PROVIDES THAT CAUSE OF ACTION?

YOUR HONOR, I BELIEVE I DISAGREE. I DO NOT EXPRESSLY SAY THAT IT IS A STATUTORY CAUSE OF ACTION. YOU NEED THE STATUTE TO SUPPORT IT.

YOUR PLEADING SEEMS TO SAY THAT IT IS A STATUTE --

NO, YOUR HONOR, IT DOES NOT. MY PLEADING SAYS THAT, I AGREE THAT I NEED THE STATUTE, IN THE SENSE THAT THE STATUTE IS WHAT MAKES THE TRANSFERS A WRONGFUL ACT. BECAUSE OF THE STATUTE, YOU HAVE A WRONGFUL ACT. JUST AS IN EXEC YOU TECH VERSUS -- -- E KPPLT XEUTEC -- EXECUTECH VERSUS --

I THOUGHT YOU SAID THE STATUTE KEEPS YOU FROM HAVING A REMEDY.

THE STATUTE DOES NOT PROVIDE A REMEDY.

WHAT PROVIDES AWE REMEDY THEN?

COMMON LAW.

ON WHAT BASIS?

UNDER FLORIDA COMMON LAW, AIDING AND ABETTING HAS BEEN RECOGNIZED, JUST AS COMMON LAW --

AIDING AND ABETTING OF WHAT?

WRONGFUL ACT.

WRONGFUL ACT. THAT COVERS MANY SINCE. I WANT TO KNOW WHAT TORT YOU ARE RELYING ON.

IT DOES, YOUR HONOR, BUT THIS COURT HELD, IN EXECUTECH VERSUS OGEE --

THAT WAS CONSPIRACY ACTION, BASED UPON, THAT IS AN ENTIRELY DIFFERENT MATTER THAN WE ARE DEALING WITH HERE. I WANT TO KNOW WHAT TORT YOU ARE ADVANCING THIS AIDING AND ABETTING CAUSE OF ACTION ON.

YOUR HONOR, FIRST OF ALL, THIS COURT HELD THAT PRICE FIXING, BECAUSE IT WAS A VIOLATION OF THE DECEPTIVE AND UNFAIR TRADE PRACTICES ACT, WAS TORT. I BELIEVE THAT FRAUDULENT TRANSFER, WHICH IS ALSO A VIOLATION OF WHAT THE FLORIDA LEGISLATURE HAS SAID IS IMPROPER, IS A TORT. SECOND, UNDER CONSPIRACY LAW, YOU EITHER NEED A TORT OR A CIVIL WRONG. EVERY SINGLE CASE FROM THIS COURT FROM THE DISTRICT COURTS THAT DEFINE CONSPIRACY, SAY THAT IT IS THE PLAN TO VIOLATOR COMMIT A TORT OR COMMIT A CIVIL WRONG. WE HAVE A CIVIL WRONG HERE, IN THAT THE LEGISLATURE HAS DECLARED THAT TRANSFERS THAT ARE MADE IN SITUATIONS LIKE THESE, ARE IN FACT, FRAUDULENT, SO I BELIEVE THAT IS THE TORT THAT I HAVE.

ARE YOU ALLEGING A LOWER CULPABILITY THAN IS REQUIRED TO PROVE FRAUD, OR IS THE AIDING AND ABETTING THE CULPABILITY OF THE BANKING IN THIS CASE, DOES IT HAVE TO BE EQUIVALENT TO THE HIGH STANDARD OF FRAUD, OR ARE YOU ASKING FOR A LOWER STANDARD?

NO, YOUR HONOR. THERE IS, IN FACT, A STANDARD REQUIREMENT THAT YOU KNEW OF THE WRONGFUL ACT THAT WAS BEING COMMITTED, AND YOU PROVIDED SUBSTANTIAL ASSISTANCE TO IT. SO KNEW OR SHOULD HAVE KNOWN, SO WE ARE NOT SAYING THIS WAS A NEGLIGENCE ACT IN ANY WAY OR A NEGLIGENCE ACTION, SO IT IS IN FACT, A VERY HIGH CULPABILITY THAT WE WOULD HAVE TO PRESENT HERE.

IF IT IS THAT HIGH, HOW WOULD WE DISTINGUISH IT FROM A CONSPIRACY, WHICH IS NOT ALLEGED?

CONSPIRACY REQUIRES AN AGREEMENT THAT PARTIES ACTUALLY AGREE THAT THEY ARE GOING TO DO THIS. AIDING AND ABETTING ON THE OTHER HAND, REQUIRES SUBSTANTIAL, KNOWLEDGE AND SUBSTANTIAL ASSISTANCE, BUT IT IS DOES NOT HAVE THAT ELEMENT OF AGREEMENT.

WHAT IS THE KNOWLEDGE HERE? I AM TROUBLE, BECAUSE IT SEEMS TO ME, WITHOUT ANY KIND OF CONSPIRACY ALLEGATION HERE, WHAT YOU HAVE IS A STRICT SORT OF SOME TYPE OF STRICT LIABILITY ON THE PART OF THE BANK. THEY MAKE THESE TRANSFERS WITHOUT ANY KNOWLEDGE THAT THERE IS A PONZI SCHEME HERE, AND SO WHAT DID THE BANK DO WRONG?

ACTUALLY WHAT IS ALLEGED IS THAT THEY DID KNOW THAT IT WAS PONZI SCHEME THAT, THEY DID KNOW THAT IT WAS CRIMINAL.

AND HOW WAS --

BECAUSE YOU HAVE, THE WAY UNIQUE GYMS OPERATED, IT WAS USING A VERY SMALL BRANCH OF FIRST UNION, THE STATEIUM BRANCH, AS THE PLACE WHERE ALL OF ITS MONEY CAME TO. UNIQUE GYMS WOULD BRING IN, IN CASH OVER A SIX-MONTH PERIOD, MORE MONEY THAN WAS THE TOTAL OF THIS BANK'S, THIS ONE STADIUM BRANCH'S BANKS, TOTAL DEPOSITS, SO UNIQUE GYMS DEPOSITED, I BELIEVE IT WAS THE $40 MILLION, WHEN THE STATEIUM BRANCH REALLY

ONLY HAD, POSSIBLY, $50 MILLION FROM ALL OF THE OTHER ACCOUNTS.

SO IF THEY HAD GONE TO A LARGER BANK, WE WOULDN'T BE IN THIS POSITION?

IN ADDITION TO THAT, WELL, POSSIBLY. THE POINT IS, WELL, THERE ARE TWO POINTS, FIRST POINT IS THAT THIS ACTION WAS DISMISSED ON THE COMPLAINT, SIMPLY BECAUSE FLORIDA LAW DOESN'T RECOGNIZE THE CAUSE OF ACTION. SHE DID NOT IN ANY WAY FIND, THE TRIAL COURT DID NOT FIND AND THE ELEVENTH CIRCUIT DID NOT FIND THAT WE DID NOT SPECIFICALLY PLEAD WHAT WE NEEDED TO SHOW, A SUBSTANTIAL ASSISTANCE AND KNOWLEDGE, SO I APOLOGIZE, IF I AM NOT ANSWERING YOUR QUESTION FULLY, BUT THAT CERTAINLY ISN'T WHAT I WAS THINKING ABOUT, WHEN I WAS READING THIS OR PREPARING FOR THIS ARGUMENT. BUT BEYOND THAT,, TO THE EXTENT THAT YOU NEED KNOWLEDGE, THERE WAS, IN FACT, EVIDENCE THAT, OR IT WAS ALLEGED IN THE COMPLAINT, SINCE WE ARE STILL ON A MOTION TO DISMISS, THAT THE PRINCIPLES OF -- THE PRINCIPALS OF UNIQUE GYMS HAD MET WITH THE PRESIDENT OF THE -- WITH THE MANAGER OF THE BANK. HE HAD TOLD HIM ABOUT HOW THE WHOLE OPERATION WENT, THAT THESE WERE, IN FACT, MAGICAL BEADS, AND THE PRESIDENT OF THE BANK HAS TESTIFIED THAT HE KNEW THIS WAS A FRAUDULENT CLAIM, THAT IN FACT THIS ISN'T WHAT WAS GOING TO BE HAPPENING. YOU COULD TELL THE DEPOSITS THAT WERE BEING MADE AT UNIQUE GEMS, I AM SORRY AT THE BANK, WERE PEOPLE COMING IN, LINING UP TO BOTH CASH THEIR $4800 CHECKS OR THEIR MORE CHECKS.

HE SAID HE TESTIFIED HE KNEW IT WAS FRAUDULENT OR THAT IT WAS, MAYBE, DECEPTIVE?

ONCE AGAIN, YOUR HONOR, I BELIEVE THAT IT WAS FRAUDULENT, BUT SINCE I AM HERE ON A DISMISSAL OF THE COMPLAINT, I AM NOT GOING TO QUOTE A DEPOT TO YOU. I COULD NOT POSSIBLY DO -- A DEPO TO YOU. I COULD NOT POSSIBLY DO. THAT.

ARE WE GOING TO HAVE A POLICY, THEN, THAT SAYS IF THERE IS A CAUSE OF ACTION HERE, THAT EVERY BANK, WHENEVER THEY GET AN UNUSUAL NUMBER OF DEPOSITS, NOW HAS TO INVESTIGATE THE SOURCE OF THAT MONEY AND DETERMINE THE BUSINESS OF ITS CUSTOMER AND HOW IT GOT THAT MONEY AND MAKE SURE THAT THAT MONEY IS LEGITIMATE?

NO, YOUR HONOR. I DON'T BELIEVE SO, BECAUSE AS I SAID, THE STANDARD IS, IN FACT, KNOWLEDGE, OR --

YOUR COMPLAINT DOESN'T SAY KNOWLEDGE THOUGH. YOUR COMPLAINT SAYS EITHER KNEW OR DELIBERATELY IGNORED --

RIGHT. THE STANDARD IS DELIBERATELY IGNORED. I DON'T BELIEVE THAT WHEN THINGS ARE NORMAL --

WHERE IS THIS STANDARD OF DELIBERATELY IGNORED? IN OTHER WORDS, WHAT WE ARE TALKING ABOUT IS AN AREA OF THE LAW THAT IS, THAT IS VERY ILL-DEFINED, AND NOW YOU ARE SAYING THAT THE STANDARD IS, FOR RESPONSIBILITY OF AN AID ERROR ABETER, WHATEVER, IS -- ABETER, WHATEVER, IS DELIBERATELY IGNORED, AND YOU ARE SAYING THAT THAT BEING A STANDARD IN A CAUSE OF ACTION, THAT YOU ARE HAVING A LOT OF DIFFICULTY ESTABLISHING THAT IT IS EVEN RECOGNIZED, SO YOU NEED TO COME BACK TO SQUARE ONE THERE -- TO SQUARE ONE HERE, AS FAR AS YOUR BEST CASE SCENARIO, AND IF I UNDERSTAND IT, LET ME TRY TO GIVE, IF WE HAVE A HUSBAND COME INTO THE BANK AND SAY I HAVE HAD A FALLING-OUT WITH MY WIFE. AND I HAVE GOT ALL THIS MONEY THE BANK, AND, REALLY, I WANT TO MAKE A TRANSFER, AND I RECOGNIZE THAT IT PROBABLY IS GOING TO BE A TRANSFER THAT WILL LATER BE SET ASIDE, BECAUSE I AM REALLY DEFRAUDING MY WIFE BY DOING, THIS BUT HE IS TELLING THE BANK OFFICER THAT THIS IS WHAT HE IS GOING TO DO AND HE WANTS TO DO WITH THE MONEY THAT IS THERE IN THE BANK, AND THAT IF THE BANK GOES AHEAD AND TRANSFERS THE MONEY AFTER THEY HEAR WHAT HE SAYS, AND ALTHOUGH IT IS PERFECTLY

LEGAL, THAT IS THAT HE HAS GOT THE AUTHORITY OR WHATEVER TO DO IT, THAT IF, ONCE THE BANK HAS HEARD THAT HE IS TRYING TO DEPRIVE HIS WIFE THAT HE IS GOING TO DIVORCE OR WHATEVER, OF THESE FUNDS, THAT ONCE THEY HEAR THAT, THAT THEY, ALSO, WILL BE LIABLE, THEN, TO THE WIFE LATER, IF SHE IS IN A POSITION TO BE ABLE TO SET THAT TRANSFER ASIDE. IS THAT WHAT YOU ARE SAYING?

YOUR HONOR, IF, IN FACT, THAT IS A FRAUDULENT TRANSFER, AND THE ONLY WAY THAT HE COULD DO IT, AND THEY SUBSTANTIALLY ASSISTED AND THEY HAD KNOWLEDGE.

IT WASN'T A TRANSFER, BUT THEY KNEW THAT IT WAS A FRAUDULENT TRANSFER, AT THE TIME THEY --

YES, YOUR HONOR.

-- MADE THE TRANSFER.

YES, YOUR HONOR.

OKAY. WELL, THE MARSHAL REMINDED YOU THAT YOU ARE IN YOUR REBUTTAL TIME.

THANK YOU, YOUR HONOR. I WILL SAVE A FEW MINUTES FOR REBUTTAL.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. ELLIOTT SCHERKER WITH THE GREENBERG TRAURIG LAW FIRM, REPRESENTING FIRST UNION. AIDING AND ABETING IS NOT A TORT, ANYMORE THAN CIVIL CONSPIRACY IS A TORT. AIDING AND ABETTING IS A THEORY OF LIABILITY, JUST AS CONSPIRACY IS A THEORY OF LIABILITY. THE QUESTION IS WHETHER THERE IS ANY THEORY OF LIABILITY, AND THAT IS WHAT THE ELEVENTH CIRCUIT ASKED THIS COURT TO DECIDE, THAT WOULD ALLOW A NONTRANSFER', WHICH IS WHAT FIRST -- NONTRANSFER EE, WHICH IS WHAT FIRST UNION, BY THE WAY WE DON'T ADMIT THAT WE WERE A TRANSFER EE OR A TRANSFERER. WE HAVE MADE TO DISMISS. THAT IS ALL WE HAVE DONE.

LET ME ASK YOU THIS QUESTION, MR. SCHERKER. WE HAVE A REAL SMALL BANK, AND THE PRINCIPAL OF THAT BANK WORKS WITH SOME CORPORATE ENTITY THAT THERE IS KNOWLEDGE THAT IT IS GOING TO RAISE $100 MILLION, AND IT IS GOING TO BE DONE ON THE BACKS OF THE PEOPLE AND WE KNOW THAT IT IS GOING TO BE A PONZI SCHEME, BUT THE BANK SAYS I CAN USE MYSELF AS A CONDUIT AND I CAN USE THE MONEY, INVEST THE MONEY FOR THE BANK AND I CAN USE THAT $100 MILLION WHILE IT IS IN MY INSTITUTION AND THEN I WILL TRANSFER THE MONEY ON AND WASH MY HANDS OF IT, CAN THE BANK DO THAT UNDER THIS SCENARIO, AND IF NOT, WHY NOT, AND IF SO, WHY SO?

THE BEST ADVANCEMENT OF THAT IS THIS COURT WAS TOLD THIS MORNING THAT, IF THE ELEVENTH CIRCUIT AT THEIR REQUEST, ALLOWED THEM TO GO BACK TO THE DISTRICT COURT AND AMEND THEIR NEGLIGENCE COUNT AGAINST FIRST UNION, BECAUSE THEY SAY THEY CAN BRING A NEGLIGENCE COUNT AGAINST FIRST UNION ON BEHALF OF THE CREDITORS, SO THAT IS THE ANSWER TO YOUR QUESTION, THEY SAY THERE IS A REMEDY AT COMMON LAW FOR THE ALLEGED WRONG TO THE CREDITORS.

SO THERE WOULD BE NO, YOUR ANSWER, THEN, WOULD BE THAT THE TRANSFER, FRAUDULENT TRANSFER STATUTE, ITSELF, WOULD NOT BE IMPLICATED.

NO, SIR, IT WOULD NOT.

WE WOULD LOOK SOMEWHERE ELSE, SO REALLY THAT IS ALL WE ARE LOOKING AT, BECAUSE

HERE IT LOOKS LIKE THERE ARE MULTIPLE COUNTS THAT HAVE WOUND UP IN THE TRANSFER STATUTE, 4 AND 5 AND 7 AND BY INCORPORATION, SEVERAL OF THEM. SO DOES THIS ALL FALL UNDER THIS THEREY?

THEY DROPPED MOST OF THEM. THEY ALLEGED FRAUDULENT TRANSFER AGAINST US. THE DISTRICT COURT DISMISSED IT. THEY DIDN'T RAISE IT ON APPEAL. THEY ALLEGED CONSPIRACY TO ADMIT FRAUDULENT TRANSFER SENSE AGAINST US. THEY DROPPED IT AFTER THE ELEVENTH --.

SO THAT IS GONE.

SFERING GONE EXCEPT THE LATE CHECKS COUNT, WHICH IS A NEGLIGENCE COUNT THAT THEY SAY THEY CAN BRING AGAINST US ON BEHALF THE CREDITORS, SO THEY WANT TO CREATE A NEW TORT OUT OF A STATUTE THAT IS, AS EVERY COURT HAS ADDRESSED IT SERIOUSLY HAS TOLD HELD, IT WAS A CREDITOR'S REMEDY. THAT IS ALL IT IS.

BACK TO JUSTICE LEWIS'S QUESTION AND THE HYPOTHETICAL, IN OTHER WORDS, LET'S TAKE THE HYPOTHETICAL THAT THE BAD GUYS IN THIS CASE, ACTUALLY WENT TO THE BANK PRESIDENT AND IT WAS HIS GOLFING BUDDY OR WHATEVER, AND SAID I HAVE REALLY COME UP WITH A PONZI SCHEME THAT IS GOING TO MAKE ME MILLIONS AND MILLIONS OF DOLLARS IF IT WORKS. BUT I NEED A LENDING INSTITUTION OR A NEED A BANK, A FINANCIAL INSTITUTION, TO PUT ALL OF THIS MONEY, YOU KNOW, TO DO THIS, BUT HE JUST VERY BLATANTLY SAID THIS IS GOING TO BE A PONZI SCHEME, YOU KNOW, I AM TELLING YOU, AND IT IS GOING TO BE A GOOD DEAL FOR YOU, TOO, AND YOUR INSTITUTION, BECAUSE THERE IS GOING TO BE MILLIONS AND MILLIONS OF DOLLARS THAT ARE GOING TO FLOW THROUGH YOUR INSTITUTION, SO YOU ARE GOING TO GET THE BENEFIT OF ALL AND-A-HALF. AND I AM REALLY EXCITED, YOU KNOW, BECAUSE IN A COUPLE OF YEARS I AM GOING TO BE LIVING IN AUSTRALIA AND WHATEVER, AND SO NOW THE SAME FACTS HAPPEN THAT WE HAVE HAPPEN HERE, AND THE BANK PRESIDENT, NOW HE NOT ONLY KNOWS BECAUSE HE HAS BEEN TOLD, HE ALSO IS A PRETTY SMART PERSON, AS HOPEFULLY BANK PRESIDENTS ARE, AND THEY KNOW ABOUT THE STATUTES AGAINST SCHEMES LIKE THIS, WHATEVER. AND SO WOULD A CREDITOR THAT ULTIMATELY SUFFERS THROUGH THIS PONZI SCHEME, BE ABLE TO ALLEGE A CONSPIRACY CLAIM AGAINST THE BANK, UNDER THOSE CIRCUMSTANCES Z, WHERE I AM -- CIRCUMSTANCES, WHEREAS THE HYPOTHETICAL I AM GIVING IS THEY HAVE TOLD THE BANK PRESIDENT, AND YOU KNOW, PLUS TOLL HIM THAT THE BANK WAS GOING TO -- PLUS TOLD HIM THAT THE BANK WAS GOING TO BENEFIT FROM THIS. CONSPIRACY?

THAT QUESTION PROVES EXACTLY WHY FIRST UNION'S POSITION IS CORRECT. THE FACTS THAT YOU HAVE RECITED, CHIEF JUSTICE ANSTEAD, WOULD MAKE A CLASSIC DAYS OF CONSPIRACY TO -- CLASSIC CASE OF CONSPIRACY TO COMMIT FRAUD.

WITHOUT THE STATUTE THAT IT IS BASED UPON.

YES, YOUR HONOR, CONSPIRACY TO COMMIT COMMON LAW FRAUD. IF ANYTHING IS PERFORM TO ASSIST IT, THAT IS COMMON LAW FRAUD.

THAT IS WHAT I ASKED YOUR OPPONENT EARLY O.

OF COURSE.

AND SHE SAID, IF I RECALL, THEY DID HAVE, ALSO, A CONSPIRACY COUNT.

THEY AT ONE TIME HAD A CONSPIRACY COUNT TO COMMIT A FRAUDULENT TRANSFER.

SO YOU AGREED THAT, THE CERTIFIED QUESTION FROM THE ELEVENTH, IF YOU JUST READ THE QUESTION, ITSELF, IT ONLY SPEAKS TO UNDER FLORIDA LAW. BUT ARE YOU IN AGREEMENT OR DISAGREEMENT THAT WE SHOULD ONLY ANSWER THAT QUESTION AS IT RELATES TO UNDER

FLORIDA LAW UNDER 726?

WELL, JUSTICE BELL, OF COURSE THE COURT IS FREE TO ANSWER AND PROVIDE THE ELEVENTH CIRCUIT WITH WHATEVER GUIDANCE IT WISHES, BUT THIS WAS CLAD, AND YOU HEARD MY OPPONENT SAY SO, AND YOU CAN'T LOOK AT THE COMPLAINT AND SAY OTHERWISE, BECAUSE THEY SPECIFICALLY, IN THE AIDING AND ABETTING COUNT, INCORPORATE PARAGRAPHS 80-THROUGH-87, WHICH IS THEIR FRAUDULENT TRANSFER COUNT, AND THEIR FRAUDULENT TRANSFER COUNT TO SEEK RELIEF UNDER CHAPTER 726. THEY DON'T PLEAD COMMON LAW FRAUD. THIS IS THE THIRDITYRATION OF THEIR COMPLAINT IN THE DISTRICT COURT AND THEY HAVE NEVER PLED COMMON LAW FRAUD. THEY HAVE ABANDONED EVERY OTHER COUNT AGAINST US EXCEPT AIDING AND ABETTING IN THE OTHER NEGLIGENCE COUNT THAT THEY CAN PURSUE.

SO THERE IS NO REAL QUESTION OF WHETHER THERE IS A COMMON LAW QUESTION FOR FRAUD. THE QUESTION IS REALLY UNDER 726, THERE IS A PROVISION FOR AIDING AND ABETTING.

OR WHATEVER YOU WANT TO CALL IT. CONSPIRACY FOR AIDING AND ABETTING, AND I RECOGNIZE THERE ARE CASES IN FLORIDA THAT HAVE ALLOWED AN AGENCY TO ENGAGE IN FRAUDULENT TRANSFER AND GO FORWARD. THERE IS A HANDFUL OF DISTRICT CASES IN THE TRANSFER SOLELY AS TO WHETHER IT SHOULD BE IN A JURY TRIAL AND DIDN'T ADDRESS ANY OF THE ISSUES THAT ARE PRESENTED HERE.

SO LET ME SEE IF I UNDERSTAND WHERE YOU ARE ON THIS, AND THAT IS THAT, UNDER THIS STATUTE, THE FRAUDULENT TRANSFER STATUTE, YOU COULD NEVER HAVE AN AIDING AND ABETTING COUNT, OR UNDER THE FACTS OF THIS CASE, THERE IS NO AIDING AND ABET SOMETHING.

I DON'T BELIEVE THERE CAN -- AIDING AND ABETTING?

I DON'T BELIEVE THERE CAN EVER BE AN AIDING AND ABETTING COUNT AGAINST A NONTRANSFER EE. NOW, AS TO WHETHER THERE COULD BE AN AIDING AND ABETTING COUNT AGAINST A TRANSFER EE, PROBABLY NOT, BECAUSE THE REMEDY IS ALWAYS DISGEORGEMENT, AND AS THE THIRD DISTRICT NOTED IN BETA REAL, IT DOESN'T MATTER WHAT YOU CALL THE REMEDY, SO LONG AS YOU ARE GOING AGAINST THE TRANSFER EE AND GETTING DISGEORGEMENT.

SO YOU DON'T NEED AN AIDING AND ABETTING COUNT UNDER TRANSFER', BECAUSE YOU CAN GO RIGHT UNDER THE STATUTE.

THERE ARE A HANDFUL OF DECISIONS IN THE ALASKA DECISION IN CONSPIRACY SUMMERS AND SOME OTHERS, THOSE COURTS ALSO, IN CREATING A COMMON LAW TORT, SAY THAT, WHEN A STATUTORY REMEDY IS INADEQUATE BECAUSE THE TRANSFER' HAS SOLD THE PROPERTY -- TRANSFER EE HAS SOLD THE PROPERTY INVOLVED, OF COURSE WE ARE DEALING WITH MONEY, AS SOLD THE PROPERTY INVOLVED AND YOU CAN'T UNWIND IT, BECAUSE YOU HAVE GOT A SECOND GENERATION TRANSFER OF SORTS, THOSE COURTS REALIZE THAT THERE MAY BE A CAUSE OF ACTION OF SOME KIND AGAINST THE TRANSFER EE.

WHAT IF THERE WAS A SITUATION WHERE THE TRANSFERER STILL HAS THE MONEY OR WHATEVER, AND THE CREDITOR, NOW, PUTS THE TRANSFERER ON NOTICE AND SAYS THAT I AM AWARE THAT YOU HAVE RECEIVED INSTRUCTIONS FROM WHOEVER, TO MAKE THIS TRANSFER, BUT ATTACHED IS DOCUMENTATION THAT WILL SHOW THAT THIS WILL BE A TRANSFER, CONTRARY TO FLORIDA LAW, AND AGAINST MY INTERESTS AS CREDITOR. AND I AM PUTTING YOU ON NOTICE THAT, IF YOU MAKE THAT TRANSFER, I INTEND TO HOLD YOU LIABLE, ALONG WITH THE OWNER OF THE PROPERTY FOR WHOSE BENEFIT YOU ARE MAKING THE TRANSFER, ANOTHER EXPLICIT SITUATION. WHY WOULDN'T THE TRANSFERER, THEN, HAVING BEEN PUT ON NOTICE OF

THE UNLAWFULNESS UNDER FLORIDA STATUTE OTHER SCHEME HERE, BE LIABLE, THEN, IF THEY WENT AHEAD AND MADE THE TRANSFER? AND WHY WOULDN'T THAT FALL UNDER THE PROVISIONS OF THE STATUTORY SCHEME THAT TALK ABOUT COURT SHAPE AGO REMEDY, IF NECESSARY.

LET ME VIOLATE THE CARDINAL RULE AND ANSWER THE QUESTION PARTIALLY WITH A QUESTION. IT IS LIABLE FOR WHAT? NOW, THE, THIS COURT SAID IN FRIEDMAN AND I THINK I HAD THIS LANGUAGE ALMOST EXACTLY RIGHT, WHEN THE COURT WAS INTRODUCING THE SUBJECT OF THE CASE, WHICH IS --

THE AMOUNT OF MONEY TRANSFERRED --

WHAT THE COURT SAID TO PREVENT, I BELIEVE THAT IS THE EXACT LANGUAGE IN THE PARAGRAPH, TO PREVENT UNLAWFUL TRANSFERS, SO THAT AN IN JUNK TEE, SO THERE -- INJUNCTION, SO THE TRANSFERER MIGHT BE PUT ON NOTICE, BUT IF THE TRANSFER IS MADE, THE TRANSFERER, BY VIRTUE OF THE TRANSFER, I DON'T KNOW WHAT ELSE THE TRANSFERER MIGHT BE LIABLE FOR, SOUNDS LIKE A POSSIBLE BREACH DUTY, SOUNDS LIKE A NUMBER OF OTHER THING THAT IS COME TO MIND, BUT IF THE TRANSFERER IS IN VIOLATION OF THE STATUTE, FOR ALL PRACTICAL PURPOSES NOW OUT OF THE GAME BECAUSE OF THE UFTA, BECAUSE THE UFTA ONLY LOOSE FOR THE TRANSFER EE.

THE STATUTE DOES NOT CONTEMPLATE LIABILITY ON THE PART OF THE TRANSFERER, IS THAT-.

THE STATUTE UNDER THE SCHEME, DOES NOT CONTEMPLATE LIABILITY. IT IS NOT A TORT. THAT IS WHAT THE FIFTH DISTRICT SAID IN BANK FIRST AND THAT IS WHAT ALL OF THE DISTRICTS THAT HAVE LOOKED AT THIS ISSUE HAVE SAID.

BECAUSE THERE IS TWO LEVELS, YOU ARE SAYING THAT THERE WOULD NEVER BE AN ACTION FOR DAMAGES, NO MATTER WHETHER SOMEONE IS A TRANSFER ERROR TRANSFER EE, THAT THIS IS BASICALLY AN INJUNCTIVE TYPE OF STATUTE, AND OF COURSE IT LOWERS THE STANDARD FOR WHAT HAD TO BE PROVED. I THINK, YOU KNOW, IN TERMS OF THE COMMON LAW, THERE ARE A SERIES OF STATUTORY CRITERIA IN WHICH, IF YOU ESTABLISH THEM, YOU CAN GET THE ASSET BACK, BUT DO WE NEED TO REACH THE QUESTION IN THIS CASE, AS TO WHETHER THERE NEVER CAN BE AN ACTION FOR DAMAGES, NO MATTER WHETHER IT IS A TRANSFER ERROR TRANSFER EE, THIRD PARTY. DO, UNDER HOW THIS QUESTION IS PHRASED, DO YOU --

THE ACCURATE ANSWER IS TO RESOLVE MY CASE, AND THE CLAIM THAT WAS BROUGHT AGAINST US THAT IS LEFT. THE AIDING AND ABETTING OF FRAUDULENT TRANSFER BY A NONTRANSFER EE, WHICH IS HOW THE QUESTION IS PHRASED. NO, YOUR HONOR, THE COURT NEED NOT REACH THAT ISSUE, I THINK, TO BE HONEST, THE LOGICAL EXTENT OF WHAT I AM SAYING HERE AND WHAT OUR POSITION HERE IS, YES, AND THAT IS TO THE EXTENT THAT THERE IS DICTA IN THAT CASE, GOT IT WRONG, AND THAT WHILE THERE MAY BE SOME POSSIBILITY IN SOME FUTURE CASE DOWN THE ROAD WHERE THE COURT CAN SAY THE STATUTORY REMEDY IS INADEQUATE AND THAT THERE IS NO OTHER REMEDY, AND GO THE WAY OF THE ARIZONA AND ALASKA COURTS AND ALLOW FOR SOME FORM OF COMMON LAW RELIEF, BUT THE CLASSIC EXAMPLE, YOUR HONOR, IS THE MORGAN-ROMP CASE THAT WE BOTH CITED IN OUR BRIEF, BUT I THINK OPPOSING COUNSEL MISSED IT, A CREDITOR'S FRAUD TORT, NOT AN UFTA POSITION, IT WAS A CREDITOR'S FRAUD TORT, AND TO TRANSFER MONEY TO HIDE ASSETS, AND WHAT THE COURT SAID IS THEY COULD PROCEED AGAINST THE LAW FIRM ON THE CLAIM OF TREAD TORE'S FRAUD, WHICH IS NOT VERY -- OF CREDITOR'S FRAUD, WHICH IS NOT VERY ITCH UNLIKE COMMON LAW FRAUD.

ISN'T THE DISTINCTION HERE THAT THE BANK AND YOUR CLIENT, IN THIS SITUATION, NEVER RECEIVED THE PROCEEDS OF THESE TRANSACTIONS. THEY ACTED AS TRANSFERER, BUT TELL ME WAS IT HELD IN ANY CASES WHERE THE SUBSEQUENT PARTY, NOT THE DEBTOR BUT THE INSIDER, DID NOT RECEIVE EITHER THE ASSETS OR THE PROCEEDS FROM THE SALE OF THE ASSET?

THERE ARE CASES IN WHICH COMMON LAW AIDING AND ABETTING OR CONCERT OF ACTION, TO BE MORE ACCURATE --

I UNDERSTAND YOU ARE DEALING WITH COMMON LAW. I AM TALKING ABOUT UNDER --

BUT UNDER THE UFTA, EXCEPT FOR THE LANGUAGE ENHANCER, WHICH ALLOWED A DAMAGES CLAIM AGAINST A TRANSFERER, I DON'T BELIEVE SO. BUT I DO HAVE TO SAY THAT, UNDER FLORIDA LAW, THE BANK, MY CLIENT, BECAME THE OWNER OF THOSE MONIES FOR THE TIME OF THE DEPOSIT, AND THE TRANSFER WAS MADE AT THE DIRECTION OF WHAT THE ELEVENTH CIRCUIT, I THINK, CALLED THE OWNER OR THE TRIAL COURT CALLED THE OWNER, SO IT IS A LITTLE BIT MURKY AS TO WHAT THE BANK'S STATUS WAS. THE ONE THING FOR CERTAIN WAS THAT THE BANK WAS NOT A TRANSFER EE IN THE COURSE OF A FRAUDULENT TRANSFER, WHICH WAS THE MOVEMENT OF THE MONEY OUT OF THE COUNTRY.

LET ME UNDERSTAND WHERE YOU SIGH THIS -- WHERE YOU SEE THIS QUESTION THAT HAS BEEN BEGIN TO US BY THE ELEVENTH CIRCUIT, IS IT, FROM THE ELEVENTH CIRCUIT'S OPINION, A MATTER OF STATUTORY CONSTRUCTION THAT WE ARE DEALING WITH?

YES, SIR.

AND THAT IS WHAT WE ARE DEALING WITH.

I THINK THAT THE COURT IS BEING CALLED UPON TO SAY THERE IS A STATUTORY SCHEME THAT VOIDS FRAUDULENT TRANSFERS AND ALLOWS DISGEORGEMENT FROM A TRANSFER EE. DOES THAT STATUTE ALLOW FOR ANY SORT OF CLAIM, WHETHER YOU WANT TO CALL IT NCAT AS CONSPIRACY AND AIDING AND ABETTING, ALTHOUGH THEY DO REQUIRE CIVIL WRONGS, AND ANY ASPECT OF THAT STATUTORY SCHEME THAT ALLOWS A JUDGMENT CREDITOR TO GO AFTER A NONTRANSFER' THIRD PARTY FOR DAMAGES.

-- NONTRANSFER EE THIRD PARTY FOR DAMAGES.

SO FROM THAT, IT WOULD BE YOUR PERSPECTIVE THAT WE REALLY DO THIS AS A MATTER OF STATUTORY CONSTRUCTION AND NOT WANDER OFF INTO WHAT COULD POSSIBLY BE COMMON LAW TORT.

TO ANSWER THE QUESTION, THAT MAY BE ALL THE COURT HAS TO DO. IT IS REALLY WHAT THE UNITED STATES SUPREME COURT DID IN THE CENTRAL BANK CASE THAT IS CITED IN OUR BRIEF. IT SAID WE WANT TO LOOK AT WHAT CONGRESS INTENDED WHEN IT ENACTED THIS PARTICULAR STATUTE, TO SEE IF AIDING AND ABETTING IS A TEMP' VIOLATION.

SO -- IS A TEMPE VIOLATION.

SO WE HAVE THE BANK, AND WE HAVE THE ATTORNEY, WITH KNOWLEDGE, THAT IS THE PURPOSE OF HIS CLIENT, HAD ASSISTED IN SETTING UP A TRUST, SO THAT IT WOULD BE HIDDEN FROM CREDITORS, AND I MEAN THE STRAIGHT HOLDING OF THE FIFTH DISTRICT WAS THAT IT DOESN'T CREATE A CAUSE OF ACTION AGAINST A PARTY WHO ALLEGELY ASSISTED A DEBTOR IN A FRAUDULENT CONVERSION OR TRANSFER OF PROPERTY, WHERE THE PERSON DOES NOT COME INTO POSSESSION OF THE PROPERTY.

YES, MA'AM.

NOW, AGAIN, HERE WE HAVE A SITUATION AND WHAT WE WOULD BE SAYING IS THAT THE BANK, EVEN THOUGH THE BANK HAS THE POSSESSION, IN TERMS OF THE DEPOSITED IS MADE, HOW DO YOU, AGAIN, GET AROUND THAT THEY ARE NOT IN POSSESSION OF THE PROPERTY?

THEY WERE LAWFULLY IN POSSESSION. THERE IS NO CLAIM THAT THE DEPOSITED WAS A FRAUDULENT TRANSFER. THE ALLEGED FRAUDULENT TRANSFER WAS WHEN THE MONEY WAS MOVED OUT OF THE COUNTRY, AT THE DEPOSITOR'S REQUEST. WHAT THE THIRD DISTRICT SAID IN BET A REAL, IS EVEN IF -- IN BETA REAL, IS TAKE AWAY ALL THE LANGUAGE THAT WE HAVE GOT HERE, EVEN THE TRANSFER EE DOES NOT COMMIT A TORT BECAUSE IN FLORIDA, BASED UPON BEING A TRANSFER' AND -- TRANSFER EE AND A FRAUDULENT TRANSFER, IT IS NOT A TORT EVEN AS TO THE TRANSFER EE. IT IS MERELY AS TO THE CREDITOR'S MEMORY.

AGAIN, IF THIS WAS PERSPECTIVE THAT, SOMEHOW AFTER THE FIRST MILLIONS WERE BEING TRANSFERRED OUT, THE CREDITORS GOT WIND OF WHAT WAS GOING ON, WOULDN'T THE BANK, WOULD THE BANK HAVE TO BE A PARTY IN A FRAUDULENT, YOU KNOW, IN A DISGEORGEMENT ACTION, BECAUSE THEY ARE IN POSSESSION NOW, OF SOMETHING, AND YOU ARE GOING ON HAVE TO STOP THIS FLOW OUTFIT COUNTRY, WOULDN'T YOU HAVE TO, WOULDN'T THE BANK HAVE TO BE BROUGHT IN AS A PARTY?

IF THE CREDITORS WERE ATTEMPTING TO STOP THE TRANSFERS, THE BANK MIGHT WELL BE A CLASSIC TRANSFER EE, THE PURPOSES OF DISGEORGEMENT ONLY, FOR THE PURPOSES OF THE CREDITOR'S REMEDY.

SO THAT WOULD BE UNDER, THE ONLY WAY THAT THEY WOULD BE NAMED WOULD BE UNDER THE FRAUDULENT TRANSFER STATUTE.

AND JUSTICE PARIENTE, I LIKE TO USE THE WORD NAMED, RATHER THAN THE WORD LIABLE, BECAUSE IT WOULD MERELY BE A DISGEORGEMENT OF MONIES THAT THE DEPOSITOR, THE DEBTOR, SHOULD NOT HAVE DEPOSITED IN THE FIRST PLACE.

SO IF YOUR ARGUMENT IS THAT THE STATUTE DOES NOT PROVIDE FOR DRIM FOR DAMAGES, HOW DO WE INTERPRET LANGUAGE OF SUBSUBSECTION 3, WHICH SAYS THAT ANY OTHER RELIEF THE CIRCUMSTANCES MAY REQUIRE?

JUSTICE CANTERO, THAT READS TO ME LIKE EQUITY, AND THE HANSARD COURT SAID WE READ THE STATUTE, THE ONE THAT AUTHORIZED THE JURY TRIAL OF DAMAGES CLAIM, WHICH IS ALL THEY DID, WE READ THIS, BUT THERE IS ONE COURT OUT THERE IN OHIO THAT SAID THERE IS A CLAIM FOR DAMAGES AND MAINE MAY BE A PART OF THAT, TOO, ALTHOUGH MAINE MAYBE THE BASIS FOR ALL OF THE FLORIDA DECISIONS THAT HAVE COME OUT RECENTLY, SAID THAT IT SHOULD BE READ AS EQUITY ONLY, BUT I DON'T THINK THAT THE COURT NECESSARILY HAS TO GO THERE.

I UNDERSTAND, BUT IF YOU --

IF YOU TAKE THIS ARGUMENT THAT ARISES FROM THESE THREE CASES THAT HAVE RECENTLY BEEN DECIDED BY THE FLORIDA COURTS, THAT THE WELL-REASONED DECISIONS, I THINK, FROM THE FEDERAL DISTRICT COURTS THAT HAVE BEEN INTERPRETED SIMILAR STATUTE STATUTES -- SIMILAR STATE STATUTES, HAVE SAID THAT ULTIMATELY THIS IS PURELY A CREDITOR'S REMEDY, THAT THERE MAY BE CIRCUMSTANCES IN WHICH THE COURT MIGHT WANT TO LOOK AT THE APPROACH TAKEN BY THE ARIZONA COURT AND ALASKA COURT IN ALLOWING SOME SORT OF COMMON LAW REMEDY, BUT THAT THIS STATUTE IS PURELY A CREDITOR'S REMEDY. THAT IS WHAT IT WAS ENACTED TO DO. IF IT DOESN'T CREATE A TORT, THEN HOW CAN IT POSSIBLY ALLOW FOR AN AWARD OF DAMAGES.

IF AS YOU SAY IT PROVIDES ONLY FOR EQUITY REMEDIES, WHAT EQUITY REMEDIES REMAIN AFTER THE OTHER SUBSECTION INS THE STATUTE ALLOW FOR THE TRANSFER, ATTACHMENT AND INJUNCTION, APPOINTMENT OF SEVER, WHAT ELSE IS LEFT?

I DON'T HAVE -- AFTER RECEIVER, WHAT ELSE IS LEFT?

I DON'T IN SIGHT INTO THE LEGISLATURE. I THINK THE LEGISLATURE PUTS THAT UNIFORM ACT IN THERE FOR WHAT CAN'T BE ANTICIPATED, SOME SORT OF RELIEF BEYOND THE TRADITIONAL FORMS OF EQUITABLE RELIEF THAT WOULD ALLOW THE COURT TO DO CERTAIN THINGS, AND QUICKLY COMING TO MIND IS THE LOVETT DECISION, WHICH OF COURSE THEY SAID PREDATES THE UFTA BY ABOUT 50 YEARS, AND WHAT THE COURT SAID IN THAT CASE IS, BECAUSE WE CAN'T TRACE DOWN THESE BUNCH OF GROCERY TRUCKS AND THINGS LIKE THAT THAT HAVE BEEN SECRETED, AND WE WERE DEALING, BY THE WAY, WITH TRANSFER EES IN THAT CASE, THEY COULDN'T TRACK DOWN OR DECIDE WHOSE WAS WHAT, THAT AT THAT TIME WHEN LAW AND EQUITY WERE DIVIDED IN FLORIDA, THIS COURT SAID WE ARE GOING TO ALLOW DAMAGES TO MAKE THEM AS WHOLE AS THEY WOULD HAVE BEEN, HAD WE BE ABLE TO UNWIND THIS TRANSACTION, AND IT IS ACTUALLY NOT UNLIKE WHAT ARIZONA AND ALASKA COURTS HAVE DONE, SO MAYBE THAT IS WHAT THE UNIFORM ACT HAD IN MIND.

WITH OUR HELP, WE HAVE USED UP ALL OF YOUR TIME AND APPRECIATE YOUR RESPONSES TO OUR QUESTION.

THANK YOU.

COUNSEL, REBUTTAL AND MR. MARSHAL, HOW MUCH TIME? THREE MINUTES?

THANK YOU, YOUR HONOR. I APPRECIATE THAT.

CAUSE OF ACTION, ARE WE ONLY TALKING ABOUT THE REMAINING COUNT OF AIDING AND ABETTING? ARE THESE OTHER CAUSES OF ACTION, HAVE THEY GONE BY THE WAYSIDE?

YES, YOUR HONOR, THEY HAVE.

SO WE ARE ONLY NOW TALKING ABOUT AIDING AND ABETTING UNDER THE STATUTE?

AIDING AND ABETTING UNDER THE STATUTE OR UNDER THE COMMON LAW, AND JUST BECAUSE THAT IS HOW SOME OF THE OTHER STATES HAVE DEALT WITH IT.

HELP ME WITH THE AIDING AND ABETTING UNDER THE STATUTE OR UNDER THE COMMON LAW.

OKAY. OKAY. MR. --

THIS IS PLED AS AN ALTERNATIVE?

YOUR HONOR, THE COMPLAINT, IS COUNT SEVEN AND, GOSH, UNDER THE FEDERAL PLEADING RECORD, IS 2-46 VOLUME 2 DOCUMENT 46, AND IT SIMPLY DISCUSSES AIDING AND ABETTING FRAUDULENT TRANSFERS, AND IT DOES NOT, ITSELF, DESCRIBE IT ASSETS A STATUTORY OR A COMMON LAW COUNT.

SO IT DOESN'T FIGHT THE SUBSECTION OF THE STATUTE THAT PROVIDES FOR --

IT DOES NOT ACTUALLY, NO, YOUR HONOR.

-- THAT PROVIDES FOR --

NO. NO. IN PRIOR COUNTS, FOUR AND FIVE THAT JUSTICE LEWIS DISCUSSED, THEY DID, IN FACT, SUE FIRST UNION AS A TRANSFER EE AND THOSE WERE DISMISSED FOR FAILURE TO STATE A CLAIM BECAUSE FIRST UNION WAS NOT A TRANSFER EE. BUT THESE --

IT DOESN'T THE ELEVENTH CIRCUIT DIRECT THEIR QUESTION TO US ON THE TWO, THE NATURE OF

THE FUFTA, ITS REMEDIES AND ITS RELATIONSHIP TO THE REMEDY CODE, IS WHAT THEY ARE TALKING ABOUT, AND WE FIND IT DIFFICULT TO PREDICT HOW THE FLORIDA SUPREME COURT WOULD DECIDE THIS ISSUE, BASED ON STATUTE, SO ISN'T IT A MATTER OF STATUTORY CONSTRUCTION THAT --

ACTUALLY WHAT HAPPENED, WHAT THE ELEVENTH CIRCUIT ACTUALLY CERTIFIES AS A QUESTION IS WHETHER, UNDER FLORIDA LAW THERE IS A CAUSE OF ACTION. WHAT HAD HAPPENED WAS THAT THE DISTRICT COURT HAD SAID THAT YOU CANNOT HAVE A CAUSE OF ACTION BECAUSE THE FLORIDA UNIFORM FEDERAL FRAUDULENT TRANSFER ACT DOES NOT GIVE YOU ONE, AND WE SAID, WELL, YES IT DOES. ACTUALLY, WELL, WHAT WE SAID WAS BUT THERE IS AIDING AND ABETTING LIABILITY, AND THE FRAUDULENT TRANSFER ACT DOESN'T PREVENT US FROM USING THAT, AND THEN THE ELEVENTH CIRCUIT ISSUED ITS OPINION, SO I DON'T THINK THAT THE ELEVENTH CIRCUIT HAS LIMITED IT, EITHER, BUT UNDER THE STATUTE --

DON'T YOU NEED THE STATE UNDER THE CALL, WHETHER YOU ARE GOING UNDER THE STATUTE OR UNDER THE COMMON LAW, SO NOT ONLY THE DEFENDANT BUT THIS COURT AT THIS POINT, CAN DECIDE WHICH WAY IT IS GOING?

I THINK THIS COURT --

YOU CAN'T STATE TWO DIFFERENT CAUSES OF ACTIONS IN THE SAME COUNT?

YOUR HONOR, THIS WAS A MOTION TO DISMISS. THIS WAS THE FIRST TIME I HAD PLED AIDING AND ABETTING. IF THE COURT, IF WE WEREN'T IN THE SUPREME COURT BUT THE FIRST TIME --

TELL ME WHEN YOU PLED IT, WAS YOUR CAUSE OF ACTION UNDER THE STATUTE OR UNDER THE COMMON LAW?

I THINK IT IS UNDER BOTH. I THINK IT PLEADS BOTH. WHETHER 2 IS -- WHETHER IT IS PROPER TO DO SO OR NOT, I THINK IT IS BOTH.

WOULD SHOULD WE RECOGNIZE AN AIDING AND ABETTING CLAIM THAT DOESN'T RISE TO THE LEVEL OF A CONSPIRACY TO DEFRAUD OR A CONSPIRACY TO VIOLATE A FRAUDULENT TRANSFER?

BECAUSE THIS COURT, WELL, FIRST OF ALL, I THINK THAT AIDING AND ABETTING DOES RISE TO THE LEVEL OF CONSPIRACY. I THINK IT IS DIFFERENT ELEMENTS, BUT I DON'T THINK THAT THAT MEANS THAT THERE IS ANY LESS CULPABILITY THAT IS INVOLVED. SECOND, THIS COURT HAS RECOGNIZED, SINCE 1929, AN AIDING AND ABETTING CLAIM, SO I DON'T THINK THIS IS ANYTHING NEW AND CERTAINLY THIS COURT HAS ISSUED OR THE FLORIDA COURTS HAVE ISSUED DECISIONS THAT SET OUT THE PARAMETERS OF THAT.

WHY ISN'T YOUR OPPONENT CORRECT, THOUGH, THAT, IN TERMS OF LOOKING AT THE STATUTE, NOW, IF THIS WAS STRICTLY THE CREATION AFTER STATUTORY SCHEME TO ASSIST CREDITORS, THEN IT OBVIOUSLY ALREADY HAD LIABILITY, IN OTHER WORDS, OF THE OTHER PARTY ON A DIFFERENT BASIS. YOU KNOW. A DEBTOR WHATEVER. AND IT STRICTLY IS TRYING TO INVOKE ADDITIONAL REMEDIES ON BEHALF OF CREDITORS.

AND IN DOING SO, AND I AGREE, IT IS ADDITIONAL REMEDIES, BUT IN DOING SO, IT SAYS, UNDER 726.11, ALL PRINCIPLES OF LAW AND EQUITY ARE INCORPORATED HERE IN AND SUPPLEMENT HERE TO, SO TO THE EXTENT THAT AIDER AND ABETER IS A THERE I HAVE LIABILITY, I THINK 726.11 INCORPORATES IT IN AND ALLOWS UNDER THE STATUTE TO HAVE THIS CAUSE OF ACTION. UNDER 726.108, IT DOES 578 ALLOW DAMAGES WOULD BE THE ONLY THING AND THEREFORE YOU COULD HAVE DAMAGES.

CHIEF JUSTICE: I AM AFRAID --

I AM SORRY.

WE WILL TAKE THE REST OF IT ON YOUR WRITTEN BRIEF. THANK YOU BOTH FOR RESPONDING, ESPECIALLY TO OUR NUMEROUS QUESTIONS. THE COURT IS GOING TO TAKE A 15-MINUTE RECESS AT THIS TIME BEFORE WE HEAR THE LAST CASE. WE WILL STAND IN RESIST SAYS. -- IN RECESS.

MARSHAL: PLEASE RISE.