

>> All rise.

The Supreme Court of Florida is now in session.

Please be seated.

We now take up the third and final case on today's docket, Diamond Aircraft Industries, Inc. versus Horowitch.

>> If it may please the court, my name is Hala Sandridge and I'm on here on behalf of the appellate, Diamond Aircraft Inc. We are here based on four issues certified to this court by the 11th Circuit Court of Appeals. By way of background, this is a case in which the appellee Dr. Horowitch sued Diamond Aircraft for an air jet that he believed should be sold to him for a price that Diamond Aircraft believed was inaccurate.

After the litigation embroiled for quite quite sometime --

>> Can we get down to it?

We understand the background.

>> Absolutely.

>> With regard, my understanding is the ultimate determination in the federal court was that the law the state other than Florida was applicable?

Substantive law, no?

>> No, no, Your Honor, no.

What happened is that the law of Florida applied.

The law of Florida apply to three of the claims and there was a fourth claim that was a FDUTPA claim.

Ultimately with the court held that under that conflicts of law analysis, the law of Arizona could apply to a consumer fraud claim.

>> So we had a case that both Arizona law applied in Florida law applied?

>> Yes, absolutely.

>> I'm not sure I understood that to be the case.

>> In fact I wanted to absolutely correct that, that this was a contract that had a

Florida choice of law provisions that provision that applied to Florida law.

And so, Florida law applied as to the other claims and they argued for the law.

If you take a look at all the arguments that were made in the District Court, we argued Florida law on the specific performance claim on the breaches claim on the applied covenants of good-faith.

>> That's fine, you answered the question.

>> The trial judge said you couldn't have attorneys fees on any of the other claims.

Is that correct?

>> That is correct.

>> So under the claims where the Florida law is applicable, were there any provisions for attorneys fees outside of the unfair practice area and the offer of a judgment which is another issue, under any of those statutes that were Florida law were actually applied, was there any attorneys fee provision?

>> No.

So the only two possible basis for getting attorneys fees would be FDUTPA or the offer of judgment.

>> But under the fair practices statute, Arizona law was applied in this case, correct?

>> No and I really want to make this very clear because this is a little tricky.

There is no such thing as a common-law common law consumer fraud type of claim so what the plaintiffs first first-aid as they brought a claim of and all their other claims were Florida law claims.

They argued that Florida law applied.

What the District Court did is it applied Florida's conflict of law analysis and said on this claim, not with respect to the

rest of the case but on this claim Florida does not have an interest in assuming that it would be decided because it involved an Arizona citizen so it implied that Arizona -- it allowed him to proceed under Arizona.

They proceeded under it and they lost under that.

There are no attorney fees and here's the second I want to make so clear and I feel as though this is mischaracterize. We are not trying to apply this FDUTPA fee provision.

>> The question is, if the fee provision of the Florida act applies then the question becomes up to what point? Does it apply to all or just where the court made the determination that the Florida law would not apply?

>> I think you hit the nail on the head because what is being confused here is the idea that we are trying to apply FDUTPA to get fees.

What we are talking about first is the issue of entitlement. Were we entitled to fees for prevailing under FDUTPA?

The second question as to amount of fees, would we be able to reach in and get fees all the way to the end of the case and naturally that would include some of the fees that were tried.

>> So it would not applied to the three causes of action that were clearly using Florida law for?

We would not be talking about fees for those?

>> We would, we would and here's the reason why.

It's because they are so intertwined and this is a real interesting feature that is somewhat exclusive to the FDUTPA fee claim and it allows you to get fees for everything, for everything that you have to try

in a case as long as the issues were intertwined and I don't think this was any different than any other attorney fee type claim you face but it's hard to separate out some of the claim so what you would do, and again I think you have to separate out entitlement and amount.

First he would have to conclude --

>> I don't know, maybe it's how you say it.

It may be entitlement after the determination is made that the Florida consumer act is not going to apply.

I think its play-on words what you are talking about or entitlement.

>> They blend together is all I'm saying and at the appointed time they blend together.

If we won under FDUTPA then you get to the second issue that the court certified which is the issue of whether or not we would get fees for anything after the summary judgment was rendered in our favor on that particular point.

Getting back to the FDUTPA issue which I think is an important point that the 11th Circuit focused on is the issue of whether or not we are entitled to FDUTPA fees because of the basis under which we prevailed.

I would suggest to the court that if you are going to go with a plain construction of what the statute says, the FDUTPA attorneys fees provision provides us with prevailing party attorneys fees that prevail on defeating their FDUTPA claim.

It does not require that we prevail on any particular theory or analysis and I guess --

>> My question is, if the FDUTPA had been a law and that law had applied is there anything different about whether someone would be less likely to prevail

under Arizona's statutory scheme versus Florida's?

Is it the same analysis?

>> No, they are slightly different.

>> That is where I have this issue of attorneys fees and where they stopped because it is a game-changer in that first you want to be fair and you want to get people on notice which is why these are --

But if all of a sudden the cause of action changes based on a change in the substance of the law, it would seem that it would be not appropriate to continue fees after the point that Arizona law was clearly been applied to the statute, the statute that would grant fees and offer a judgment separately just on that one.

Why isn't that a better instruction of the statute and in favor of instruction?

>> There are two reasons.

There are two reasons.

Again, I'm going to talk about the difference in the statute which does not allow you to claim fees until all bills are exhausted and also I want to talk about a difference --

>> Why is that different than a statutory fee?

>> It is a little different.

If you look at this statutory, and this is different, you can't fight a motion for attorneys fees until all the appeals have been exhausted so you prevail in litigation and then you are required within 30 days to file your motion, not so under FDUTPA.

You have to wait until it's over.

>> Then why are we --

>> They did appeal, so after the judgment in Diamond they did not appeal.

Here is the other difference in federal court.

In federal court, when there is,

and actually this part isn't
much different than state court.
>> Can I go back to your first

--

What does that matter in terms
of what I asked that at some
point it switch to Arizona and
when it switched to Arizona the
approval fees should stop?

>> That is the point I was going
to make.

It was in the case because it
was an interlocutory ruling.
This was a ruling on a summary
judgment and it was not
immediately appealable.

It was in the case and here is
our fear.

Our fear is they take it up on
appeal.

The actual ruling that FDUTPA
did not apply so until this case
was over and done, we were
continuously defending against
FDUTPA.

>> How could you continuously be
defending against something that
is no longer part of a claim or
an action?

>> You are correct that the
court had ruled on summary
judgment that it was out and our
hope was that it was going to
stay out and our hope was that
would not be reversed by the
11th Circuit on appeal but it
was technically still in the
case.

>> Why was that your hope?

Your hope is that because the
FDUTPA, the Florida FDUTPA
provision is more favorable to a
plaintiff in the Arizona one?

>> I think the causation issue
in FDUTPA is easier to prove for
a plaintiff than it is under
Arizona law.

>> Are they saying that the
anticipation might be right and
that you litigate is the reason
that this court should rule back
in furtherance of Florida
statute, that attorneys fees
should continue to accrue even
one the court has made a rule

which ended up being affirmed that it's in other states statutory scheme that applies? >> I think it's the usual posture of the claims being in the case until they made the decision not to appeal. We are doing everything in this record --

>> But I thought the doctor agreed to the Arizona law also and the court was weighing whether or not Florida law applied.

So it wouldn't have stopped at that point when they went forward under Arizona law? Didn't the court rule that Florida law was not applicable?

>> No, they hedged their bets. They waited and fought this battle.

They wanted to use FDUTPA in there because FDUTPA applies.

>> The summary judgment was in it.

Isn't that question next?

>> Yes, I'm sorry and responding to Judge Perry and I apologize, they did earlier suggest that maybe they could go under Arizona law and were still trying to keep FDUTPA in there because FDUTPA got the attorney fees.

Once the summary judgment was granted they have to then move and defend against ACFA.

Our whole point is and tell there was final judgment, there were many pieces of the puzzle related to the relationship between the parties, the actions that we took that went to the FDUTPA issue just like they went to the ACFA issue.

The causation was a little bit different but --

>> See now that was an issue and the litigation of that case at that point.

It's interesting how FDUTPA once the trial court has decided, this is not governed by FDUTPA litigation is proceeding under

the Arizona statute.

I understand now the FDUTPA is in the proceedings in the trial court litigating the client at that point.

Now, FDUTPA is an issue.

>> I see here what you are saying and it's not at issue in the sense that we were trying it.

It was still, as we have perceived it because it was an interlocutory decision -- it was a case.

>> But, if the decision that FDUTPA did not apply was set aside on appeal, the whole thing would have to be litigated over, right?

>> Yes.

>> It's not like you are covering your bases in FDUTPA. You were still litigating that too because you have gone down one track in the trial court. For good or for ill, and that will determine what happens in the field determines whether it will be done or not.

>> I will tell you part of the reason also for our argument is that the language of the statute itself is very broad because it includes, and this is what the 11th Circuit was questioning and what they really I I think had a concern about is the language in the statute is very broad.

>> It does seem, and thinking of two different scenarios.

What if there is a case where there is a motion to file a FDUTPA claim and for eight months, it remains pending and ultimately it's not even allowed?

Certainly you would say that you can get attorneys fees under FDUTPA in that case.

>> You are right.

[LAUGHTER]

>> Okay, and then on the other hand in a situation where it's ultimately found though that

FDUTPA applies, there might need a better claim at the time you spent under Arizona that you should be subsumed because it's all part of the ultimate claim but this is the reverse of that and this is where I don't see how that the logic applies.

>> Well, and I go back then -- I don't think it's an entitlement issue.

I think it's an amount issue and I think it would be in the trial court's discretion like it typically is an in attorney's fees case.

>> That can't be so.

I hear this over and over and I must tell you I really disagree with this argument.

It is a question of whether you are entitled to consider those and you get into these play on words to avoid the entitlement issue.

But I would like you to go to our ruling in statute because -- how the rule can be applied or the statute applied to address the attorneys aspect and the equitable thing.

This creates more litigation and craziness than any one of us ever thought.

>> Judge Lewis, I just want to make sure, do you feel comfortable with the way I have responded on the entitlement issue through the time that there was a summary judgment? And so your question is aimed more at after the summary judgment?

>> That is issue two.

>> That is what we are talking about.

>> This isn't our case.

We are responding to questions. Question two has to do with whether it stops at the summary judgment or moves on.

>> I just wanted to make sure based on Judge Lewis', that I answered the issue.

Thank you.

I'd like to turn to the next issue which is a very interesting issue and is the Fourth DCA's determination in Palm Beach Polo and the Fifth DCA's subsequent determination in the Winter Park case that equitable relief cannot be the subject of an offer of judgment.

And, here is what I suggest.

I suggest that there is no conflict amongst any of the courts on this issue and that if you look at Palm Beach Polo and you look at the Winter Park case, they really say the same things as the other cases that have been addressed by the DCA on the issue of whether an offer judgment can apply when there is a brief.

Here is what I suggest is the appropriate and workable ruling before this court to announce. That, the real issue in the case is over money, and an offer judgment would apply.

And let me give you some examples of some of the cases in which the courts found that they offer judgment would apply.

VIP Realty case for instance in which there was a fight over a commission and there was a declaratory judgment action.

Yes, declaratory judgment is seeking equitable relief but the reality is they were fighting over a sum of money.

Who was entitled to it and it's very easy in that set of circumstances to serve an offer of judgment.

>> Was it disputing the amount of the commission?

>> It wasn't.

>> I'm just asking.

>> Yes and so let me give you this case as an example.

A claim for a specific performance and I just reread the amended complaint this morning to make sure I was telling you the right thing and I am.

Their dispute was what they had to pay in order to get a claim. They alleged that they were entitled to get the claim for \$850,000.

We alleged that if they wanted to buy it, they would have to have \$1.3 million so the dispute was over money.

It was just the difference they would have to pay.

If you look at the Palm Beach Polo case, it just can't work with an offer of judgment because it had an independent claim.

It wasn't an alternative claim. In which the appellant was seeking to have the court declare that they have the right to an easement by way of necessity.

>> But there was a specific performance.

They wanted a plane, right? There's more to a subject of performance than an active damage.

>> I will tell you that was did. The question is, what we would sell it to them for?

>> That is always the case.

If I want that on the contract, I have to get specific performance and I will sell it to you for more but not that price.

>> Judge Lewis, that is exactly what my fear is.

People are always disputing what they have to sell something for. If we then say that every time you have a dispute over goods or property, that someone can then sue for specific requirements to get it for the price if they want?

>> My concern is and I hear exactly what you are saying, you can insulate yourself from this provision by sewing one in but on the other hand the words of the statute to the damage and I'm concerned of overlaying another 20 years of litigation

on this stupid rule that was designed.

I'm sorry, I mean it was designed to stop it, but it doesn't.

It's just creating more and more so I see that approach just from a policy standpoint for our rule.

Not our statute, but our rule.

It's insanity that we love to get involved and say did you really mean that are not really mean it or is that really good? You need some demarcations, don't we?

>> Justice Lewis I'm trying to find a workable solution for this court, honestly.

As I look through these cases, I realize that they had, they had found a workable solution and it existed for years, decades.

I think it was two decades, in which there were claims for subrogation, declaratory relief and conjunctive relief and the courts had managed for years to apply offer of judgments in this case.

It was until the Palm Beach Polo case came up where you had a claim that clearly was not a claim.

It couldn't be a claim for anything other than nonmonetary relief.

You know we want a declaration and an injunction with respect to an easement by way of necessity so what I believe the rules should be is exactly what it has been for years, and I think that those cases can be reconciled.

I see that my time --

>> You have used all of your time plus two minutes.

I will nonetheless give you two minutes for rebuttal.

>> Thank you.

>> May it please the court.

I'm James C. Hauser,
representing Dr. Horowitch.
The case I think has been

radically changed since your decision last month in the southeast floating docks case versus "37th Law Weekly," S. 63. On the issue of the offer of judgment that is who is deciding that you would not apply offers of judgment when the laws of jurisdiction apply.

>> That was my question, will your opposition says the cases that proceeded forward were Florida law.

>> Would happen is my understanding is what happened there was a seven month period where there is a breach of contract, another couple of counts but those cases were resolved during that seven month period.

The only issue that was taken under the Arizona law was the Arizona consumer fraud act. That was the only issue that was litigated and by that time all the other issues had been resolved.

>> I don't know that it does. The contract of all cases would apply.

>> The offer clearly can apply to any of the time spent on the Arizona consumer fraud act case because that was decided under another law.

I think the Southeast floating docks also had another question and this is a key question as far as we are concerned.

The key question is the FDUTPA question in the FDUTPA question is, if you'd want to apply a foreign law in offer judgment cases which is a much more broadly written statute regarding attorneys fees then FDUTPA, then clearly you would have to apply the same law regarding, you have to rule the same way that we are not going to allow attorneys fees if the laws of a foreign jurisdiction applies.

>> I don't follow that one now

because if you file an action against me, only one count under the Florida unfair deceptive trade practices and I prevail, but I prevail on an argument that statute does not apply to our deal because some other law applies, that somehow that prevailing party provision has no application all of a sudden and you filed it under that provision

>> CASE HAS DECIDED BY APPELLATE COURSE AND TOOK EXACTLY THAT POSITION JUSTICE LEWIS.

YOU SUE ON THE FDUTPA STATUTE. UNDER THE STATUTE THAT DIDN'T APPLY.

NONE OF THESE CASES, EVER DISCUSSED THE VERY BASIC LAW IN THE STATE OF FLORIDA.

THAT THE AWARD OF ATTORNEY FEES IN INTERROGATION OF ATTORNEY LAWS AND GOING TO BE CONSTRUCTLY CONSTRUED.

HOW CAN WE COVER ATTORNEY'S PIECE UNDER A STATUTE WHEN THAT DOESN'T APPLY?

>> BECAUSE YOU TOOK THEM INTO COURT SAYING THAT IT DID APPLY. IF YOU DRAG SOMEBODY INTO COURT, ASSERTING A CLAIM AGAINST THEM, UNDER A STATUTE, YOU SAY, YOU OWE ME MONEY, OR YOU SHOULD DO SOMETHING YOU SHOULDN'T DO UNDER THIS STATUTE.

AND THEN THEY PREVAIL AND ESTABLISHING NO.

THAT LAW DOESN'T APPLY.

>> THEY DID PURR VAIL BUT NOT UNDER THE STATUTE.

>> THEY PREVAILED UNDER YOUR CLAIM.

>> NOT UNDER THE STATUTE.

>> YOU WOULD SAY UNDER THAT REASONING THAT NO DEFENDANT WOULD EVER BE ENTITLED TO FEASE. THE DEFENDANT GETS ATTORNEY FEES.

>> DOES IT NOT RECOVER UNDER THE STATUTE?

>> NO, I'M SORRY I DON'T MEAN TO BE DISRESPECTFUL.

>> I'M SAYING THAT'S WHERE THIS

ARGUMENT LEADS US.

THIS COURT IN THIS STATE THAT'S
EVER HELD THIS?

>> YEAH, BUT I THINK IT'S A
FAIR STATEMENT LET HE PHRASE IT
THIS WAY.

>> YOU'RE HOPING WE WILL BE.

>> WELL, I SUGGEST THAT YOU
SHOULD, YES.

THAT IS AN ENORMOUS DISTINCTION
BETWEEN WE DON'T HAVE SUFFICIENT
PROOF TO PROVE OUR CASE.

AND THE FACT THAT THE STATUTE
DOESN'T APPLY IN THE FIRST
INSTANCE.

THERE WAS A QUOTE FROM THE 11TH
CIRCUIT AT PAGE 1264 IN THE CASE
WHICH WE'VE HEARD THESE FOUR
QUESTIONS TO YOU.

IF AN ALLEGED VIOLATION DOES NOT
FALL UNDER FDUTPA IS NOT A
VIOLATION OF THIS PART.

501.1025 HAS TWO REQUIREMENTS.

NUMBER ONE IS THAT MUST BE A
VIOLATION OF THIS PART AND

NUMBER TWO MUST BE A JUDGMENT.

IN THIS PARTICULAR CASE, I WANT
YOU TO PARTICULARLY LOOK AT THE
DECISION THAT JUDGE FAWCETT MADE
IN HER ORDER RULING THAT ARIZONA
LAW APPLIED NOT FLORIDA.

I'M NOT SURE THAT ORDER WAS A
JUDGMENT FOR PURPOSES OF

501.1025 NEVER BEEN A DECISION
ON THE MERITS THAT THAT DID OR
DID NOT APPLY.

THERE WAS AN A ATTACK ON THE
JURISDICTION.

>> THAT'S A DIFFERENT ISSUE.

SO YOU'RE SAYING THERE'S NEVER
BEEN A FINAL JUDGMENT ENTERED IN
FAVOR OF THE DEFENDANT --

>> UNDER FDUTPA.

>> ON THIS CLAIM WAS THERE EVER
A FINAL JUDGMENT ENTERED ON THE
SUMMARY JUDGMENT?

>> I THINK YOU HAVE TO READ THE
ORDER.

THEY JUST JUDGED FAWCETT SAID
THAT IT DOESN'T APPLY AND THAT
ARIZONA LAW DOES APPLY.

BUT I DON'T THINK THAT'S A FINAL
JUDGMENT.

>> WHERE WOULD BE THE -- LET'S
TALK THIS, I THINK IT'S AN

INTERESTING ARGUMENT.
AND WHAT WE'RE TRYING TO DO IS
WE'RE INTERPRETING A STATUTE.
>> THAT'S CORRECT.
>> NOT OUR DECISION, IT'S THE
LEGISLATURE'S DECISION.
>> ABSOLUTELY 100% CORRECT.
>> ISN'T THE INTENT TO TRY TO
GIVE US WHAT'S THE INTENT OF THE
FDUTPA STATUTE.
>> THE INTENT OF THE STATUTE IS
NOTHING --
IN YOUR SOUTHEAST DOCKETS CASE
YOU SAID THAT WE'RE GOING TO
HAVE TO LOOK AT INTENT OF THE
FLORIDA LEGISLATURE TO DETERMINE
WHETHER OR NOT THE STATUTES
SHOULD BE PRIED TO AN OUT OF
STATE OR ANOTHER JURISDICTION.
THEN YOU WENT THROUGH THE
ANALYSIS OF THE OFFER OF
JUDGMENT STATUTE.
>> GETTING BACK TO WHAT WOULD
HAPPEN IS SOMEONE BRINGS A CLAIM
UNDER FDUTPA AND THE DEFENDANT
FILES A MOTION TO DISMISS.
>> RIGHT.
>> SAYING THAT THE FACTS DON'T
SET FORTH THE CAUSE OF ACTION
UNDER THAT.
>> RIGHT.
>> AND THE JUDGE AGREES.
>> RIGHT.
>> YOU WOULD AGREE THERE
ATTORNEY'S FEES WILL APPLY?
TO --
THE DEFENDANT?
>> MY POSITION IS THAT YOU
JUSTICE LEWIS YOU ARE PER
VAILING PARTY.
UNDER CAMPBELL AND RECITED IN
OUR BRIEF.
ALL OF THESE CASES SAY THAT
WE'RE GOING TO STRICTLY CONSTRUE
STATUTES.
YOU PREVAILED.
THAT'S A BROADER LANGUAGE.
I WANT YOU TO LOOK AT THE
LEGISLATIVE HISTORY OF 501.1025
NOT MERELY INVOKED.
IF THAT'S WHAT THE STATUTE SAID
I THINK IN THAT DECISION YOU GET
ATTORNEY'S FEES.
WHAT HAPPENS WHEN THE STATUTE IS
NOT APPLICABLE IN THE FIRST

PLACE?

YOU CAN'T AWARD ATTORNEYS PIECE
UNDER A STATUTE THAT DOESN'T
APPLY.

>> YOU WOULD SAY IN THAT
BECAUSE THE -- IT WOULD BE A
DISMISSILE.

NO JUDGMENT.

>> I'M ASKING --

>> IS THAT THE CASE OR POSITION
TAKEN IN THIS CASE.

NO FINAL JUDGMENT ENTERED UNDER
THE FDUTPA STATUTE.

I DIDN'T THINK SO.

>> BUT I WILL CITE TO THE COURT
AND I'LL CITE TO THE COURT TWO
CASES.

WHERE THERE WAS A VOLUNTARY
DISMISSAL.

YOU HAVE A PREVAILING ATTORNEY
FEES PROVISION.

THE DEFENDANT WILL BE ENTITLED
TO ATTORNEY'S FEES.

NOT SO FDUTPA YOU HAVE TO BE A
JUDGMENT.

THAT'S THE DIAMOND'S CASE.

BUT I THINK THAT -- I THINK THE
REASON I HAVE DIFFICULTY, I
SUSPECT WE MAY RESPECTFULLY
DISAGREE.

HOW CAN YOU GET ATTORNEYS FEES
UNDER A STATUTE WHEN THE STATUTE
DIDN'T APPLY?

I THINK THE ANSWER IS IT CAN.

>>> NEVER GOT THAT FAR.

LITIGATING WHEN STATE STATUTE
APPLIES ARIZONA OR FLORIDA.

GET ATTORNEYS FEES FOR
LITIGATING JURISDICTION?

MY ANSWER IS NO.

I WOULD LIKE TO QUICKLY SWITCH
IF I CAN I'LL BE HAPPY TO TAKE
ANY OTHER QUESTIONS.

FROM JUDGMENT BECAUSE I THINK
THERE'S SOME VERY, VERY SERIOUS
ISSUES IN THE --

>> I WANT TO MAKE SURE FROM A
PRACTICAL ANALYSIS.

IF WE FIND THE FDUTPA APPLIES AB
AND IT DOESN'T STOP AT THE
JUDGMENT, DID YOU WANT TO JUST
SAY BECAUSE --

>> UNDER SOUTHEAST FLOATING
DOCK NO STOPS AT THE JUDGMENT.
IF YOU SHOULD RULE THAT WAY.

>> MAYBE --
I'M TALKING UNDER NOT THE OFFER
OF JUDGMENT STATUTE BUT I'M
TALKING ABOUT THE FDUTPA CLAIM.
>> RIGHT.
>> YOU SAY FLOATING DOCKS
INFLUENCES THAT IT STOPS WHEN
THE ARIZONA LAW APPLIES.
>> YES, BECAUSE IF MY GOODNESS,
IF YOU'RE GOING TO RULE THAT OFF
OF JUDGMENT IS SUBSTANTIVE OF
LAW FOR PURPOSE OF LAW PURPOSES,
THE --
OFFER OF JUDGMENT STATUTE IS
WRITTEN MUCH MORE BROADLY THAN A
THE FDUTPA STATUTE, AND THE
OFFER JUDGMENT STATUTE SAYS IN
ANY CIVIL ACTION FOR DAMAGES,
TIMED IN THE CASE IN THE STATE
OF FLORIDA, THE FDUTPA STATUTE
SAYS IN ACT OR PRACTICE
INVOLVING A VIOLATION OF THIS
PART AFTER JUDGMENT.
IF OFFER OF JUDGMENT FOR
CONFLICT OF LAW PURPOSES IS --
IS NOT GOING TO BE APPLIED IN
FORCE JURISDICTIONS CLEARLY,
CLEARLY, FDUTPA CANNOT BE
ENFORCED BECAUSE FDUTPA IS MUCH
MORE NARROWLY DRAWN.
I'VE GOT ABOUT 7 MINUTES I WOULD
LIKE TO TALK THE OFFER OF
JUDGMENT.
ONE OF THE, I THINK THE KEY
ISSUES AS FAR AS I'M CONCERNED
IS THE FAILURE OF DIAMOND IN
THIS PART NOT TO JUST
TECHNICALLY VIOLATE RULE 1.442.
BUT TO RULE IT OUT.
TALKING ABOUT C2F, THE
REQUIREMENT THAT AN A OFFER
STATE WHETHER IT DOES OR DOES
NOT INCLUDE ATTORNEY'S FEES.
BACK IN 1997, THIS COURT ADOPTED
THIS RULE.
AND THE REASON FOR THIS RULE WAS
TO MAKE SURE THAT THE OFFER WAS
NOT AMBIGUOUS.
IF IT INCLUDES ATTORNEY PIECE
THAT HAS EXTREME CONSEQUENCES
DOWN THE LINE.
IF IT DOESN'T HAS EXTREME
CONSEQUENCES LET ME GIVE YOU TWO
EXAMPLES.
>> TALKING ABOUT 1.442.

C2F.

>> I FIND IT A LITTLE ODD THAT THE FEDERAL COURT IS ASKING A CONSTRUCTION OF OUR RULE.

WHY IS THAT?

>> BECAUSE THIS IS A DIRECT IMPLICATION IF IT'S A LAW OR NOT.

>> LOOKING -- BUT WHERE A PROCEDURE RULE?

THEY ASKED, I THINK BECAUSE IN SOME INSTANCES, THE RULE HAS SUBSTANTIVE ISSUES LIKE THE STATUTE HAS PROCEDURAL ASPECTS TO IT.

>> VIEWED OUR RESUME AS SUBSTANTIVE.

>> FOR PURPOSE WAS EERIE.

>> ALL RIGHT LET'S ASSUME THE FOLLOWING.

IN THIS PARTICULAR CASE, DIAMOND MAKES AN OFFER OF JUDGMENT FOR \$40,000.

THEIR OFFER IS SILENT AS TO WHETHER OR NOT IT INCLUDES ATTORNEY'S FEES.

HE NEEDS TO KNOW WHETHER TO INCLUDE ATTORNEY FEES FOR TWO SECONDS.

>> LET ME ASK TWO FUNDS MENTAL QUESTIONS.

AT THE TIME THE OFFER WAS MADE THERE WAS ON THE TABLE OF POSSIBILITY OF ATTORNEY'S FEES BEING AWARDED THAT WASN'T ELIMINATED FROM THE CASE.

>> KEEP GOING.

>> THANK YOU, SIR.

IF DR. HOROWITZ WERE TO ACCEPT THE OFFER AND THE OFFER OR MEANT THAT THE OFFER DIDN'T INCLUDE ATTORNEY'S FEES THEN HE COULD GO TO COURT AND GET THE ATTORNEY'S FEES THAT HE INCURRED FROM THE DATE IT WAS FILED AND TO THE DATE THAT THE OFFER WAS SERVED. TAKE A LOOK AT THE MADDY CASE THAT YOU DECIDED LAST YEAR.

REGARDING THAT ISSUE --

IF IN FACT HE DOESN'T ACCEPT THE OFFER AND LET'S ASSUME THAT THE. THAT THE FOR ILLUSTRATIVE PURPOSES ONLY.

THAT A JURY COMES BACK AND AWARDS \$10,000.

THE DEFENDANT IS ENTITLED TO A
ATTORNEY'S FEES, IF, IN FACT,
THE AMOUNT OF THE OFFER WAS LESS
THAN -- THE AMOUNT OF THE
JUDGMENT WAS LESS THAN 70% OF
THE OFFER.

NOW IF THE OFFER A DIDN'T
INCLUDE ATTORNEY'S FEES, THE
ATTORNEY'S FEES THAT WERE
INCURRED FROM THE DATE THE
COMPLAINT WAS FILED AND TO THE
DATE OF THE OFFER, WILL NOT BE
ADDED TO THE JUDGMENT TO COME UP
WITH THAT 75% CALCULATION.

IF, IN FACT, THE OFFER A
INCLUDED ATTORNEYS FEES, THEN
THAT LET'S SAY FOR THE SAKE OF
ARGUMENT A HE SPENT \$100,000
WORTH OF TIME FOR THE DATE FROM
THE DATE THE COMPLAINT WAS FILED
AND TO THE DATE THAT THE OFFER
WAS SERVED.

THAT \$100,000 WILL BE ADDED TO
THE \$10,000 AND THE DEFENDANT
WILL NOT BE ENTITLED TO
ATTORNEY'S FEES BECAUSE THE
AMOUNT WE COVERED WAS NOT LESS
THAN 75% OF THE OFFER.

I'M SEEING A LOT OF --
DOES EVERYONE UNDERSTAND WHAT
I'M TRYING TO CONVEY?

SO THIS RULE --
JUSTICE KENNEDY?

>> YOU'RE NOT TEACHING US.

[LAUGHTER]

>> I'M SORRY.

I'M NOT TEACHING YOU.

>> I APOLOGIZE --

I'M NOT TRYING TO BE
DISRESPECTFUL.

>> I THINK SO THE REASON FOR
THE RULE HAS THIS ISN'T JUST A
TECHNICAL VIOLATION LIKE
CAMPBELL, BUT THIS PREJUDICED
DR. HOROWITCH IN BEING ABLE TO
EVALWAIT HIS DECISION WHETHER TO
ACCEPT THE OFFER.

AND THIS GOES TO THE VERY HEART
OF THE OFFER OF JUDGMENT.

YOU STATED IN STATE THREE
NICOLES THAT IT CAN'T BE
AMBIGUOUS.

CITED CASES, GEORGE VIEW NORTH
CRAFT THAT DEALT WITH A 1993
VERSION.

THAT SORT OF FOLLOWED THE
FEDERAL RULE AND NEVER MENTIONED
ATTORNEYS FEES.

ONLY ALLOWED YOU COSTED BASE ON
AN OFFER A OF JUDGMENT.

THIS NEW STATUTE 768.79 HAS A
REAL PRACTICAL PROBLEMS WHEN THE
ISSUE OF ATTORNEY'S FEES IS PART
OF THE CASE, AND THE OFFER WE
ABSOLUTELY MUST KNOW WHETHER OR
NOT THAT OFFER A DOES OR DOES
NOT INCLUDE ATTORNEY'S FEES
THAT'S THE REASON FOR THE RULE.

>> DID I UNDERSTAND YOU IN YOUR
ARGUMENT TO SAY THAT IF IT
DOESN'T IDENTIFY WHETHER IT
INCLUDES ATTORNEY'S FEES OR NOT
THAT IT WOULD BE CONSIDERED NOT
TO INCLUDE THEM?

>> NO, WE DON'T KNOW.

NOBODY KNOWS.

THE 11 CIRCUIT PRESUME IT HAD
KNOW WITH ALL DUE RESPECT,
THEY'RE WRONG.

BECAUSE NOW THAT YOU HAVE A RULE
THAT SAYS YOU HAVE TO STATE
WHETHER IT INCLUDES ATTORNEY'S
FEES.

I DON'T KNOW BASED ON THAT RULE.
WHETHER AN OFFER THAT'S SILENT
DOES INCLUDE ATTORNEY'S FEES.
DOESN'T INCLUDE ATTORNEY'S PIECE
PIP GUESS I GO TO THE FOLLOWING
STATEMENT, IT DOESN'T MATTER.
YOU HAVE STATED.

THAT THEY HAVE TO NOTIFY THE
OFFER WHETHER IT INCLUDES
ATTORNEY'S FEES.

DIDN'T COMPLY WITH THE RULE
THAT'S THE END OF THE DISCUSSION
THEY DON'T GET THE FEES.

>> WHAT DID THE 11TH CIRCUIT
SAY THEY'RE CONFUSED ABOUT.

>> BASED ON UNICARE COURT THAT
WAS NOT BASED ON AN OFFER OF
JUDGMENT.

NOT BASED ON 768.79 OR THE OTHER
OFFER OF JUDGMENTS.

THAT IF YOU MAKE AN OFFER OF
JUDGMENT THAT SILENT ON
ATTORNEY'S FEES IS PRESUMED TO
INCLUDE ATTORNEY'S FEES.

>> TO INCLUDE.

BUT THAT DECISION 1989 WAS
DECIDED PRIOR TO THE --

>> BUT THEN SPECIFICALLY
FOCUSED ON LANGUAGE OF ALL
CLAIMS.
>> BUT --
>> REPORTS TO COVER ALL CLAIMS
THAT IT WOULD BE IMPLIED THAT
INCLUDES THE CLAIM FOR
ATTORNEY'S FEES SINCE THAT'S THE
CLAIM.
>> WELL, NO, IT'S --
>> I'M PROBABLY WRONG SAYING
THE LODGIC.
>> ASKING FOR ATTORNEY'S FEES
THAT'S NOT ACCOUNT.
I GUESS I THINK I'VE EXPLAINED
TO YOU THE PRACTICAL PROBLEMS OF
ALLOWING -- ALLOWING THIS TO GO
FORWARD.
JUSTICE LEWIS YOU MADE A
ESTIMATE.
FAIR STATEMENT THAT THE AREA OF
JUDGMENT IS CONFUSING AND
COMPLEX AND GETS MORE SO EVERY
DAY.
YOU ALLOW A PARTY TO FLAT OUT
IGNORE ONE OF YOUR RULES THAT
HAS A PRACTICAL EFFECT AS FAR AS
THE OFFEREE IS CONCERNED AND YOU
NOW HAVE TRUE CHAOS IN THIS
ENTIRE AREA.
>> I WOULDN'T COUCH THIS AS A
PARTY REFUSING TO FOLLOW THE
RULES.
DIDN'T HAVE ATTORNEY FEES IN IT
I THINK THAT'S THE BEST WAY TO
APPROACH THIS.
NOT IMPLYING ANY EVIL MOTIVE
INTO THIS.
THIS IS WHERE IT TAKES US.
>> BUT NOW TAKE -- CREATE TOTAL
CONFUSION IN THIS ENTIRE AREA.
I'M NOT GOING TO ADDRESS THE
PALM BEACH POLAR CASE OTHER THAN
TO SAY THAT YOU CAN'T GET 75% OF
SPECIFIC PERFORMANCE ONE OF THE
THINGS THAT WE WERE CONCERNED
ABOUT IS THAT WE WERE FORTH IN
LINE TO GET THIS CHECKED.
I THINK THEY STILL HAVEN'T
PRODUCED THE JET.
SO REALLY IMPORTANT FOR US.
WE WANTED THE JET AND TO GET THE
FORTH JET.
GOING TO TAKE THEM I BELIEVE
WHEN THEY SAID PRODUCING THESE

JETS PRODUCE THEM MAYBE THREE A MONTH.

IF WE ACCEPTED THE 1.5 MILLION WE WOULD GO TO THE BACK OF THE LINE.

WE WOULD NOT BE ABLE TO GET OUR JET.

AT A SPECIFIC TIME --

SO WE WANTED THE JET WHETHER WE WERE SUPPOSED TO GET OUR JET.

>> I'M GOING TO GIVE YOU ANOTHER MINUTE OR TWO.

>> GREAT, I APPRECIATE THAT. SO WE THINK THERE'S A VIOLATION OF SPECIFIC PERFORMANCE, AND BY THE WAY, IF A PARTY FILES A COUNT ONE CON RELIEF THERE ARE PRACTICAL REMEDIES THAT AN OFFER A HAS.

THE OFFERER HAS THE ABILITY TO MAKE THE OFFER OF JUDGMENT AS TO THOSE OTHER SPECIFIC COUNTS.

AND THAT WAS NOT SOMETHING THAT WAS ADDRESSED BY THE 11 CIRCUIT. SO IF SOMEONE FILES A SUIT FOR RELIEF OR INJUNCTION, THE STATUTES STILL APPLIES BUT ONLY TO THE DAMAGE PORTIONS OF THE CASE.

ANY OTHER QUESTIONS?

OKAY.

THANK YOU VERY MUCH.

>> THANK YOU.

WITH RESPECT TO THE LANGUAGE OF THE FDUTPA CLAIM, I WOULD LIKE TO GO BACK OVER IT BECAUSE IT DOES NOT SAY WE'RE REQUIRED TO OBTAIN A JUDGMENT FINDING THAT WE PREVAILED.

HERE'S WHAT IT SAYS.

IT SAYS IN ANY CIVIL LITIGATION. IT WAS CIVIL LITIGATION. RESULTING FROM AN ACT OR PRACTICE INVOLVING A VIOLATION OF THIS PART.

THAT'S WHAT THIS WAS.

THIS WAS A CASE IN WHICH THEY ALLEGED WE VIOLATED FDUTPA. EXCEPT AS PROVIDING IN SUBSECTION FIVE, THE PREVAILING PARTY, WE PREVAILED UNDER FDUTPA UNDER ANY STRETCH OF THE IMAGINATION, WE BEAT THEM ON THEIR FDUTPA CLAIM. AND THEN HERE'S WHAT IT SAYS,

AFTER JUDGMENT IN THE TRIAL COURT, AN EXHAUSTION OF ALL APPEALS.

SO IT'S TALKING WHEN IT TALKS ABOUT A JUDGMENT, IT'S A TEMPORAL MATTER.

IT IS NOT YOU HAVE TO OBTAIN A JUDGMENT FINDING THAT YOU PREVAILED ON THE MERITS.

IT DOES NOT SAY THAT.

>> DOW DO YOU SEE A DIFFERENCE IN THAT A STATUTE APPLIES. AND THE JUDGE RULES THAT BECAUSE OF THE LAW OF THE -- CONFLICT OF LAWS THAT IT DOESN'T APPLY.

REALLY FURTHERING WHAT THE LEGISLATURE INTENDED FOR FDUTPA CLAIMS THAT AS A CONSUMER PROTECTION STATUTE AND ITS STATUTES AND INTERROGATION OF THE COMMON LAW SHOULD BE STRICTLY CONSTRUED TO GIVE A REALLY, A WIND FALL IN THIS. YOU MAY SAY IT'S NOT A WIND FALL BUT IT ISN'T KEEPING WITH THE SPIRIT OF WHAT THE FDUTPA ATTORNEY'S FEE PROVISION WAS MEANT TO ENSURE.

>> YOUR HONOR, THIS CASE IS AN EXAMPLE OF THE OTHER SIDE OF THAT.

AND THE MANDEL CASE TALKED ABOUT THE REASON WHY THE LEGISLATOR DECIDED TO GIVE ATTORNEY'S FEES TO DEFENDANTS.

BECAUSE WHEN YOU INCLUDE A FDUTPA CLAIM IN AN ORDINARY BREACH OF CONTRACT CASE IT TOTALLY CHANGES THE FLAVOR AND THE SCOPE OF THE LITIGATION, AND I CAN TELL YOU, BOY DID THAT HAPPEN IN THIS CASE.

ALL OF A SUDDEN THEY USED FDUTPA TO GET DISCOVERY.

TO FIND OUT ABOUT OTHER CUSTOMERS OF OURS AND TO CONTACT OTHER CUSTOMERS OF OURS.

AND TO DO THINGS THAT WERE UNRELATED TO A BREACH OF CONTRACT CLAIM.

AND SO THE LEGISLATOR HAS SAID THAT THE VERY PURPOSE OF AWARDING ATTORNEYS FEES TO DEFENDANTS IS TO PREVENT

HAPPENING WHAT HAPPENED IN THIS
CASE.

THANK YOU.

>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.

THAT'S THE CONCLUDING CASE ON
TODAY'S DOCKET.

>> ALL RISE.