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CINCINNATI LIFE V. CATES

JABINSKY: In Dec. 1993, the Northwestern Group filed the motion for summary judgment based on 4 separate grounds. The grounds were set forth in the motion. They were argued and briefed. And the TC considered and ruled on all 4 of those grounds. The TC expressly granted 2 of the grounds, and expressly denied 2 of the grounds. The 2 grounds that were denied were the statute of limitations and no damages grounds. On appeal the Northwestern group properly raised and preserved by cross point the 2 grounds that were denied to support affirmance of the TC's judgment. And the CA declined to consider those 2 grounds, which is why we are here today. We believe the CA erred in not considering those 2 grounds and in remanding the case without first considering those 2 grounds.

It's important to note that with respect to these 2 grounds they were set forth in the motion. They were argued by the parties. They were briefed by the parties. They were presented to the TC. They were contemplated and ruled on by the TC. They became part of the final judgment. They were also properly raised and preserved on appeal. We believe that under existing current case law and summary judgment principles, that these grounds should have been considered and all these factors that I've just stated all justify considering these grounds. In other words I believe that under current summary judgment principles that a summary judgment ground must be contemplated and ruled on assuming it's been properly raised and preserved for an appellate court to consider it and I believe we've met all those criteria.

Alternatively if contemplated and ruled on means contemplated and granted which the CA concluded that it did to which I disagree, then I believe under Rule 81c that 81c rather is broad enough to encompass appellate review of any properly raised and preserved ground even though the TC does not expressly rule on it. And I think this case is a good example of why the summary judgment rules should not be so inflexible.

CORNYN: So it doesn't make any difference if the TC actually denies the ground, or I guess the other alternative would be the TC grants the summary judgment without reference to the specific grounds?

JABINSKY: I think the results the same. Because if a TC grants for example a broad summary judgment, I believe that under the rationale of the current case law it's presumed that the TC considered all grounds. If the TC grants a summary judgment on one ground without considering the other grounds, I believe under the current law and I realize there is some disagreement on it, but under the current law the other grounds must be remanded so the TC can first consider and rule on them. But the rationale being that the TC had not yet considered them.

CORNYN: So the 3rd alternative would be as you just stated where the TC grants let's say the first ground, and doesn't reach the other 3. We couldn't render a judgment, we would have to remand it?

JABINSKY: I believe under the current state of the law if the order grants it on ground A without mentioning ground B, C and D, then under the current state of the law, that it would have to be remanded. I don't think our case falls under that scenario because the TC specifically denied our other 2 grounds. So there would be no reason to remand it because the TC had already considered those grounds.

The summary judgment ground that can end this case today is the statute of limitations.

BAKER: In your case if we agree do we have to send this back to the CA to rule on the grounds that the TC specifically denied?

JABINSKY: If you agree with my position I do not believe it should be remanded to the CA. I believe the SC should consider the ground because there is statutory and case law authority to do that.

BAKER: Rule 180?

JABINSKY: I think 180 is the statutory authority. And I believe the Rogers v. Racane(?) case which is a 1989 SC case involved a situation where the SC reviewed summary judgment grounds not considered by the CA before remanding it to the state courts. So I think there is authority for this court to review those grounds.

The statute of limitations ground would end this case today. This suit involves the acts of an agent. And this agent sold numerous insurance policies to the respondents. Six of those insurance companies are involved in this suit, and the others are not. With respect to the Northwestern group, the insurance policies were sold in 1987. They all lapsed a few months later in 1987 or 1988. The causes of action that had been asserted in this case are all 2 year causes of action. And the lawsuit was not filed until November, 1992.

In this particular case there were 4 motions for summary judgment that were granted and they were all filed and granted at different times. So in effect there are 4 summary judgment records. The Northwestern group filed its motion for summary judgment first. Their summary judgment record shows that the only check written to the agent for insurance premiums was dated Feb. 1988. And that's page 370 of the transcript. And the record also shows that the agent stopped collecting cash from the respondents in 1988, which is page 722 of the transcript. The record also shows that the respondents last talked to the agent in 1989, which is page 222 of the transcript. The respondents argue that that last conversation really took place in 1990 to avoid the statute of limitations, but there is no inference in the record to support that. The page they cite to 1) was never presented to the TC, and therefore not reviewable on appeal; but more so 2) if you read that whole page which is page 222 of the record, that whole page clearly shows that the last conversation with the agent took place in 1988. Also there was a conversation that took place in 1989. There was a confrontation that took place between the respondent and the agent in 1989, but no earlier than 1988, and it's that confrontation which is critical to this case. The respondent confronted the agent because of the lack of correspondence from these insurance companies. And the respondent confronted the agent because he was concerned that the policies had lapsed and that he had been scammed. And his exact words were: "What the hell is going on? Look man, something ain't right here!" To which the agent respondent: "Well go do what you've go to do." And this confrontation took place in either 1988 or 1989. And with a 2 year statute of limitations and the law suit being filed in Nov. 1992, even if you apply the discovery rule, the claims are barred by limitations.

We believe that the cause of action would have accrued in 1987 or 1988 when these policies lapsed. We believe that even if the discovery rule is applied, the discovery rule tolls limitations until a plaintiff discovers or should have discovered based on reasonable diligence, the nature of the injury. And according to case law under the discovery rule that cause of action will accrue when the claimant is put on notice to check for injury or realizes he has sustained harm. If you fail to undertake further inquiry, the limitations are not tolled. They will begin. We believe that this confrontation in 1988 or 1989 regardless of the year began the running of limitations because the agent all but told the respondent to undertake further inquiry when he said: Go do what you've got to do. And this lawsuit was filed more than 2 years after that point. In fact it was filed 3-4 years later. We believe that the final judgment should be affirmed. The TC's final judgment should be affirmed based on that cross point.

There was an affidavit filed by one of the respondents that attempts to controvert these facts. That affidavit was filed in Aug. 1994, and that was 6 months after our summary judgment hearing, and 3 months after the summary judgment order was signed by the court. It was actually filed in connection with one of the other motions for summary judgment and certainly no leave of court was ever granted for it to be filed in connection with our summary judgment evidence. And therefore that affidavit is not summary judgment evidence with respect to the Northwestern group.

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BURGESS: May it please the court. My name is Ralph Burgess and I am here on behalf of petitioner Mid Continent Life Ins. Co. As Mr. Jabinsky has mentioned, the TC granted summary judgment to the Northwestern petitioners and the other defendants below on 2 specific grounds. The TC granted summary judgment with respect to Mid-Continent on those 2 grounds, plus an additional 2 grounds, which were based on the facts that Mid-Continent had terminated the agency relationship between it and Gail Butler some 11 months before the respondents met with the agent. And additionally based on the fact that no policies were ever issued by Mid-Continent to any of the respondents.

The CA erred with respect to reviewing Mid-Continent's summary judgment because it held that each ground for relief must support the judgment independent of the other grounds. In short, the CA ruled that when a TC grants summary judgment on the basis of specific grounds, each specific ground must by itself and without reference to the other specific grounds in the order support the judgment.

That error forms the basis of our points of error 1-5. Our 6th point of error is identical to the first point of error by the Northwestern Group. And I'm not going to address that. Mr. Jabinsky has argued that and will present more on that.

Now as this court is familiar in Lear Siegler v. Perez, the court stated that the burden on a defendant moving for summary judgment was to disprove as a matter of law one of the essential elements of each of the plaintiff's causes of action. In this case the plaintiffs have alleged causes of action for violations of the DTPA, and the Texas Insurance Code. They have alleged causes of action for negligent processing and handling of policies, negligent hiring and supervision of the agent, failure to warn of the agent's actions, and breach of the duty of good faith and fair dealing.

Now I will concede that each of the grounds stated in the Mid-Continent summary judgment will not by itself negate an essential element of each of those causes of action. But when the specific grounds set forth in the judgment are read together, the cumulative effect is that an essential element of each of the plaintiff's causes of action has been negated in compliance with our burden under the Lier Siegler case. I use as an example of this in the first grounds the TC stated that as a matter of law Gail Butler had no actual, apparent or implied authority on behalf of defendant Mid-Continent to commit any of the actions or make any representations complained of by the plaintiffs in the lawsuit, and therefore, such actions are not imputed to such defendant, and defendant is not liable to the plaintiffs for such representations.

Now the CA in its opinion has stated that the first ground has not addressed whether Butler was acting within the scope of the agency relationship at the time of any representation as is required by this court's ruling in Celtic Life v. Coates. But the 4th ground specifically states that as a matter of law no agency or employment relationship existed between the agent Butler and defendant Mid-Continent at the time of any representations by Gail Butler to plaintiffs. So when you read those in connection with one another they negate the essential element of vicarious liability which the plaintiffs must prove in order to prevail on their DTPA and insurance code violations.

I have addressed the other grounds and how they negate other elements of cause of action in the application for writ. And I do not want to just belabor the point on that. But another problem with the opinion is that it goes further than merely requiring each ground to independently negate an essential element. It also requires a defendant to negate the possibility of a fact issue on some element not before the court. And I am reading from page 10 of the opinion where the court says: "The determination that no policies were issued by Mid-Continent does not negate the possibility of conduct that enticed the plaintiffs to give money to Butler for the purpose of purchasing such policies. The determination that no agency or employment existed at the time the representations were made did not negate prior conduct by the principal that may have clothed Butler in an apparent agency."

Now as we've pointed out in the application in this case the respondents have not pled apparent authority. The CA mentions that it was briefed and presented and therefore that issue has not been preserved. But the only mention of apparent authority is in the heading of the motion for summary judgment. There is no discussion of the argument and it certainly is not mentioned in their petition. But I would point out to the court as it is well aware in the case of City of Houston v. Clear Creek Basin Authority, this court stated: that specifically no longer must the movant negate all possible issues of law in fact that could be raised by the non-movant in the trial court but were not. So I would argue that in addition to applying the wrong standard in terms of not being able to interpret the specific grounds together, the court has gone further and has violated this court's opinion in City of Houston v. Clear Creek.

Finally I would point out that this holding by the CA has further ramifications beyond the summary judgment issues here in the sense that it would ensure that a company such as Mid-Continent that terminates an agent will never be able to get a summary judgment in a case like this because we can never negate the possibility of there having been an apparent agency. And the effect of that would be that it would actually increase the company's liability for the agent's actions after he's been terminated in the sense that now the company no longer has any control over the agent, he's been terminated, and yet they are still liable for these possible apparent agents.

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RESPONDENT

LAWYER: May it please the court. I would like to first address this issue of whether the alternative grounds in this case are reviewable either by the CA or by this court on appeal. Those obviously in this case are the statute of limitations and the no damage grounds that the TC denied and that the CA chose not to consider. And I think it may surprise the court as to how much the parties actually agree on and if I address that briefly it may hone down where I think we are with this case. I think the petitioners have graciously conceded that under the existing cases that discuss this issue in the recent years, the alternative grounds in terms of what these cases hold are not to be reviewed on appeal unless they were considered and ruled on by the TC. At the same time I have to agree from reading those cases that all of the ones at least that I have read, and I'm talking about State Farm and Delaney and the others dealt with fact situations where the trial judge granted one of the grounds, granted summary judgment on one of the grounds, and simply didn't mention the alternative grounds. And in our case the TC did have presented to it argument and motions and briefs on these alternative grounds. And the order did on the one hand grant on certain grounds and specifically denied on the other grounds. So we do have that agreement.

I also understand that if this court takes the position that this was a final summary judgment, that a majority of this court in the opinions that I have read have indicated that it's appropriate. Particularly where there's a record to support it, and where there's a need to resolve it, and where the TC considered these alternative grounds to go ahead and rule on them. And I'm not here to argue any policy reasons why that should not be the law if this court is faced with a final summary judgment where the TC considered the alternative grounds, and his order denied it. And that's where I think the petitioners and the

respondents are chasing different rabbits in this case. Because the clearest reason why the alternative grounds in this case are not reviewable is because the TC's orders on the summary judgments are not final. They don't resolve all issues as to all parties. Because as we raised in our responses to the motion for summary judgment and in our appellate briefs and as the CA's concluded in its opinion, the TC's orders did not reach the plaintiff's claims against the companies themselves. And I'm talking about primarily the negligence claims: failure to supervise, and to process the paperwork and so forth that the agent was handling over this 3 year period, and to warn the plaintiffs.

BAKER: In the case of Mid-Continent do you disagree that the record shows that Mr. Butler was terminated by them 1 year before and you allege that same claim against Mid-Continent that you are talking about now?

LAWYER: I do, and I plan to address them separately in a moment. But simply stated I think there's a fact issue that there was in fact actual authority at the time the agent dealt with my clients because the summary judgment proof shows that what Mid-Continent did was put their agent on inactive status. They didn't terminate him by their own records until after he had sold the polices to my folks and started taking money from them, and apparently sticking it in his pocket. So I do disagree with that. The CA did not address actual authority but certainly there is an issue according to the CA on apparent authority. And if I have time I would like to address that in a little more detail.

BAKER: One counsel talked about the limitations question. In your view does the limitations question cut across all defendants?

LAWYER: No your honor. Only one movant, that's the Northwestern Group has even brought that up on appeal. And it would only apply to one plaintiff if it were a good argument, which I will be happy to address if time permits.

ENOCH: I'm a little bit confused. Was the judgment that came before the CA a final judgment?

LAWYER: I say that it was not.

ENOCH: Now is that what you're representing here is this was not a final judgment to begin with, and we're coming up now on appeal and you're continuing that argument as the respondent saying: Look SC this was not a final judgment to begin with, and that's the reason why we cannot address these denied claims at this point?

LAWYER: That's absolutely correct. And it's the Novack v. Stevens case, and there was a number of cases after that clearly state than order denying a summary judgment motion is not appealable. And there are 3 exceptions to that rule, two of them deal with...

ENOCH: I'm not talking about the denial. The TC granted the summary judgment in this case. You're saying that granted summary judgment was not a final judgment?

LAWYER: I'm saying that the judgment that was entered by the TC or the order, I think it was actually named a judgment at the end, did not dispose of all issues and all parties. That's been our contention all along.

ENOCH: Now Mafridge(?) is a case that attempted to address that. If this court determines that that initial judgment our of the TC was a final judgment, do you still win? I mean do you still get an affirmance of the CA's opinion up here?

LAWYER: I think I do in this case because if this court reaches the statute of limitations and the no damage issue it's clear that there are fact issues. So our position in this case is if this court considers the issue is nonreviewable obviously the CA should be affirmed. But even if it does consider them reviewable on the record in this case, the CA's opinion is still sustained.

ENOCH: Can you tell me why you say the order that was appealed by the CA was not a final order? What was it missing that it had to have to be a final order?

LAWYER: Because it resolved the issues although the CA disagreed, the order purportedly resolved the issues on the authority of this agent, and on the DTPA and insurance code issues, the motions for summary judgment and therefore the order did not reach the claims as we pled, that the companies themselves have liability primarily on a negligence theory in addition to any conduct on the part of this agent. Because over this 3-year period of time they allowed him to pocket the money and let these policies lapse.

HECHT: But in Mafridge(?) we held that if the order is final on its face, the fact that the motion didn't address all the claims of parties is simply error. It doesn't mean that the judgment's not final.

LAWYER: And the law that I've read and that I rely on your honor and this was addressed not directly by the CA, but the Hood v. Amarillo Nat'l Bank case which is a per curium opinion of this court about 3 years ago I think in 1991, clearly stated that: If a summary judgment order does not resolve all issues as to all parties, it's interlocutory and it's not appealable. And the article by Judge Hitner and Ms. Liberator that the court referred to in its opinion discusses that at length I think at page 55. There's also a Tyler writ denied case, in that it was _____ that clearly said that if the order does not dispose of all theories of recovery it is not a final summary judgment, and therefore, not appealable. So that is the clearest basis in our view as to why these issues are not reviewable.

Now if this court chooses to review them, and I will address the ones that were mentioned on the statute of limitations ground. Northwestern is the only movant that has brought that up and it would only arguably apply to Mr. Cates' Jr. in this case, the gentlemen who purchased the policies. Because as they brief themselves, neither the beneficiary nor the insured knew any of the operative facts about dealings with this agent even after this suit were filed. So if there is a statute of limitations argument it would only apply to one plaintiff. This suit was filed in Nov. 1992. I will agree that there are 2 year statute of limitations on these causes. So did the cause of action accrue any earlier than Nov, 1990? As this court's well aware they would at least on this affirmative defense of the statute of limitations have to conclusively establish both that the cause of action arose or accrued within 2 years, and negate the discovery rule completely.

BAKER: Will you refresh my memory. Is the law that you're alleging limitations that the movant defendant has to anticipate the unpled discovery rule and _____? Or does he get to wait until you come back with your response?

LAWYER: You're talking about the nonmovant's burden to plead the discovery rule?

BAKER: Yes.

LAWYER: That is true according to Woods v. Mercer when a case goes to trial, but at the summary judgment stage, the burden is still on the movant to establish as a matter of law that the cause of action is barred. Woods v. Mercer itself limits its holding to trial. And then Krueger v. Groll, which is a 1990 writ denied case out of the 14th District CA, clearly states that the burden does not shift until you are at the trial stage. So at the point that the court rule on these motions it...

BAKER: _____ scenario is they allege that the only summary judgment evidence in the record is that the agent _____ case knew about the problem before the 2 years reported suit was filed. And that's the only date in there.

LAWYER: And I would like to address that.

BAKER: Don't you have to respond and say: no, the discovery rule applies that this is what it is and they've got to come back and _____?

LAWYER: Yes your honor and we did in the response to the motion for summary judgment, and so forth. In fact what the record shows is when Mr. Cates, Jr. was being deposed and he was asked when was the latest this conversation took place with the agent, the last conversation when Mr. Cates says: Hey, what's going on? and the agent said: Do what you need to do. It's clear that Mr. Cates testified that that happened either in 1980 or 1989. He was asked that simple question: When was the latest time this conversation took place? The answer was probably 1989 or 1990; I don't know. And through a series of other questions he says: I don't know exactly when it was. And in answer to the issue that was raised in the reply by Northwestern and counsel mentioned earlier, that particular page of Mr. Cates' testimony was clearly before the court when the first motion for summary judgment were heard. Northwestern itself attached that page of his testimony to their own motion in support of it. It was also before the court, that's a transcript 222 as counsel indicated, it was also before the court in Jackson National materials in support of its motion at 563 of the transcript months before the court heard and actually ruled on these first round of motions. So there's no question that the court had before it the testimony of Mr. Cates that this last conversation if you want to say that's when the statute should have started _____ could have been in 1990. Not only that they asked him: do you remember whether it was winter or summer? No. So if this court has to accept as true the testimony favorable to Cates, and indulge all reasonable inferences in his favor and resolve all doubts in his favor, it's clear or at best there is a fact issue that this conversation with the agent took place in...

BAKER: What he didn't know happened after the date _____ _____.

LAWYER: What happened your honor was when they had this conversation whether it was in 1990, or 1991, or when it was Mr. Cates started checking with the insurance department and ultimately wrote the insurance companies and that was in Nov. 1991 when the companies wrote him back and said: these policies have been lapsed and then he determined that there was a fictitious post office box listed in his name that this agent was taking the payments at. So I think at the earliest possible point this conversation with the agent would start the statute I think under the discovery rule Mr. Cates had a reasonable amount of time to make the inquiries to the insurance companies which he did because the agent obviously wasn't going to tell him what was going on.

So I don't think there's a problem with the statute of limitations even if this court reviews it. And I certainly don't want to run from that. And again the discovery rule as far as it not being pled is simply not a problem under the case law. The no damage contention is limited to just 2 of the plaintiffs. They concede that Ed Cates, Jr. who purchased the policy and paid some $6,000-10,000 over this 3-year period to the agent when he would get some kind of notice that indicated that the policy premium was due, he would call the agent, the agent would say I will take care of it, the coverage is okay, would take his cash and obviously was not tending to his business. But it does apply as I understand it to Mr. Cates, Sr. who is the beneficiary of the policy and Mr. Ward who was the insured. But those gentlemen, start with Mr. Cates, Sr., he was the beneficiary of about $500,000 worth of life insurance coverage on these policies that were issued. He no longer is. Now Mr. Ward is still alive. He has not died. He has some medical conditions and he's uninsurable at this point. But Mr. Cates, Sr. because of

the conduct of the agent and the companies no longer has the coverage that he is a beneficiary of. We also pled obviously the element of mental anguish. So there's no negating of damages as a matter of law. And the same reasoning applies to Mr. Ward. He was an insured to the tune of about $500,000 at one point, and because of the acts of the agent he no longer is. So there's certainly damages that have been pled with respect to those two and that are provable.

Briefly the Mid Continent points: First of all apparent authority was raised. I think we pled it. We pled in our petition that agent Butler was acting within the scope and course of his authority for these companies. We didn't use the word "parent," or "actual" we just said authority. But to the extent it wasn't in the petition it was raised clearly in our responses to the motion for summary judgment and in our briefs. So that's not a new issue. I have admittedly some problem following Mid Continent's reasoning as to its own order. And if you will recall they got the summary judgment granted on the same 2 grounds that the others did and the additional grounds about there being no policy, and as the TC found no agency relationship or employer relationship between Mr. Butler and Mid Continent.

The CA obviously considered all four of those grounds because it discussed them in the opinion. And I know that speaks for itself. There are 2 things the CA held that I think clearly reject all of Mid Continents claims about why they should still be entitled to summary judgment. One of those conclusions was that there was evidence of at least apparent authority in this case. I still say there's plenty of evidence of actual authority but the CA didn't address that.

If there's evidence of apparent authority there's a fact issue before the court and that's why the CA rejected the ground on the no authority that this agent didn't have any authority to misrepresent anything. It also fully explains why they rejected the TC's finding that there was no agency relationship or employer relationship between the agent and the company because clearly if there's apparent authority or an apparent agency those are negated. The same thing for the fact that no policy was issued. That does not as the court showed negate apparent authority for this agent to represent that there was coverage.

The CA also concluded that the TC's order did not dispose of all claims against or as to all parties dealing again with these claims against insurance companies. That rejects flatly the second ground of Mid Continent and that is that the company didn't violate the DTPA or the insurance code. It just doesn't reach the question of whether these companies were negligent in failing to uncover and warn about what was going on with this agent.

As far as apparent authority there is again some evidence in the record. Mid Continent accepted some blood samples and admit in their letter to Mr. Cates in 1991: Yes we did get some blood samples on Mr. Ward. Agent Butler would come around sign him up on these policies and get him to a physical and so forth and send it in. So they accepted the blood samples, the agent would show Mr. Cates the checks that he purportedly had written to Mid Continent to cover the checks that Mr. Cates had written to agent Butler. There's no proof in the record that Mid Continent accepted or endorsed that check because obviously or at least apparently the agent was putting it in his own pocket. There is plenty of evidence in the record as to that.

So our position just simply put is that under existing law Novack without abrogating the clear rule that a summary judgment order that does not dispose of all parties and all issues is not filed. It's interlocutory. This court need not reach the review of these alternative grounds. But if you do on the record that this court has it's clear that Northwestern hasn't established as a matter of law both that the cause of action accrued longer than 2 years before suit, and certainly not as a matter of law as to when Mr. Butler or Mr. Cates should have discovered his injury, which again was in 1991 according to the record.

But if this court gets to those issues then we are confident that the result is going to be the same. The CA opinion or judgment that the case has to be remanded to the TC for resolution is fully sustainable and should in fact be affirmed.

BAKER: Did the CA remand because they found a fact issue, or because it was an interlocutory order as you argue now?

LAWYER: I think they said both. They cite the Novak case and the general rule.

BAKER: You don't have a point of error here in response to them that well we don't get to hear it at all because it's interlocutory?

LAWYER: I'm not sure how directly we discussed that in our response to the application. I want to think that we did cite Novak and the rule that you cannot appeal a summary judgment order that...I know we cited the general rule.

BAKER: If that's your only rule is that Novak is that if it's a denial you can't appeal it. It does say it's interlocutory. It's your point that because he denied the 2 grounds that makes that order interlocutory, and that you can't appeal it?

LAWYER: Because the motions themselves and the TC's order did not even get to the negligence questions against the companies it was never resolved by the TC and those are still pending and that the case just simply never should have been dismissed.

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REBUTTAL

JABINSKY: First of all the issue of whether or not the final judgment was interlocutory or final is not before the court. It was never raised as a point of error for this court. It was never even briefed in the brief that was filed and the TC concluded that this was not interlocutory. The reference to the Novak case has nothing to do with whether or not the final judgment was interlocutory or final because in our case the summary judgment was not denied. It was granted. And there just happened to be 2 grounds of that summary judgment in which sought review of to support affirmance of the TC's judgment.

Number 2, the issue of when this last conversation takes place is easily resolved by reading page 222 of the record, because both counsels are citing to that page as to when they believed the last conversation took place. And I think its clear it's 1989 and that page speaks for itself.

But nonetheless the confrontation took place in 1989 and there's no dispute over that. And that confrontation is set forth on page 224 of the record.

Finally with respect to this no damage point of error comically although seriously 2 of the respondents testified in their deposition which was filed 1 year after the lawsuit or which was taken 1 year after the lawsuit was filed that they had never authorized suit to be filed on their behalf. They didn't even know that they were parties to a lawsuit when I was deposing them until I informed them during the deposition, they didn't even know there was a lawsuit. They testified they weren't seeking any money for damages from any of the defendants. They both testified they didn't even know why they were a party to a suit never mind sitting across the table from me answering my questions. So clearly those facts show that regardless of whether or not they may have suffered damages they sure aren't seeking any recovery from any of the petitioners that are before this court.