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LANE BANK V. SMITH SOUTHERN

KRONZER: I think we're here today, not on the question of whether or not a TC can find or render or enter a second judgment, the question of whether he can do so 35-36 days after a final judgment based on this type of motion. And coming from Harris Co., there is an inconsistency on how the two CA's govern that county and other counties. And not only that, there's an inconsistency with how other courts in other jurisdictions have handled it.

I believe that the CA's opinion in *Lane Bank*, as it stands, is also inconsistent with what this court said several years ago in *Scott & White Memorial Hosp v Schexnider*, and is inconsistent with what that court said when discussing about a post-judgment motion for sanctions, the propriety of it started off by saying that there are other motions that extend to TC's plenary jurisdiction. Those are not before us. We have this motion for sanctions. And other Courts: Waco, Holmerson, the Dallas CA has also taken this position that there is no magic to a motion for sanctions. It is not a rule 329b(g) motion that modifies, corrects or reforms a judgment.

PHILLIPS: It does change the judgment. If you're paying money out it's all the same.

KRONZER: Yes, if you're having in this case a second document. For example, if it was just a motion for sanctions. And remember the TC signed an order for sanctions the same day and then in the final judgment the resuscitation is very clear that the TC is incorporating the earlier summary judgment and its signed order for sanctions. The TC within its plenary jurisdiction clearly based on *Scott & White* could have signed an order for monetary sanctions and it would be enforceable.

ABBOTT: *Scott & White* was the non-suit case, right?

KRONZER: It was.

ABBOTT: So there was no judgment, right?

KRONZER: Yes it was. There was a final determination.

ABBOTT: What final judgment did the court sign in that case?

KRONZER: There was never a judgment signed. As I understand the facts of this case, there was a non-suit, and I believe it was a signed non-suit. I don't think we have that question of...

ABBOTT: With that being the case, looking at the first line of 329b(g), it talks about a motion to modify, correct or reform a judgment. And it seems just applying rules of English that that

would not apply to a non-suit situation. Would you agree with that?

KRONZER: Yes.

ABBOTT: In this particular case, however, there was a motion for sanctions filed, and submitted to the court a judgment proposal which was different than the original judgment entered by the court. Correct?

KRONZER: Yes.

ABBOTT: And since the judgment that was submitted to the court within the 30-day period was different from the original judgment, why would that not be categorized as a modified judgment?

KRONZER: I think without trying to get into a form verses substance _____ discussion, I think that we're not going to question, Could it have signed the second judgment 29 days later and we would be standing here. But when you read the motion for sanctions and entry of final judgment, there are 8 words that pertain to the proposed attached final judgment. It's not even mentioned in the conclusion. It is a motion for sanctions and at best a motion for entry of a final judgment. And I think first off it would be fair to categorize as if by all appearances this was one of those *English verses Union State Bank, _____ v. Ross* that a summary judgment is granted. It's very clear that in the motion for summary judgment they were addressing all causes of action and in their conclusion they asked for relief on all of the plaintiff's cause of action. That was granted.

ABBOTT: That was the original judgment?

KRONZER: The order.

ABBOTT: And then the one that your opposition submitted to the court for the final judgment, it was submitted to the court within the 30 day time period was a judgment that provided that in addition to granting them summary judgment would also grant them over $40,000 in sanctions?

KRONZER: Yes, I don't disagree with the fact that this judgment if it had been signed earlier, this isn't a *McKay v. McKenzie* situation, that if this had been signed on the 25th day after the first one, that it would not have been a subsequent judgment. It would not be enforceable in and of itself. I think where I'm disagreeing with you is that the specific words of 329 where they talk about motion to modify, correct or reform and the problem that the 1st and 14th court and other courts have had with the 14th, is that simply submitting a other judgment, according to some CAs isn't going to get you there to extend the TC's plenary jurisdiction.

OWEN: What if they had filed a motion and specifically asked the court to modify the

original judgment and include sanctions?

KRONZER: I don't see any problem with that in extending the TC's plenary jurisdiction.

OWEN: So the real question here, is whether we have that kind of motion or not?

KRONZER: I think so, if in fact this court is going to be consistent with *Scott & White* - and I'm not sure the 1st court agrees with this position, is that if this court starts with the proposition that yes, a motion for sanctions there is nothing magic about it, and it does not extend the TC's plenary jurisdiction, the motion for sanctions portion, then this court if that's true, that's what *Scott & White*, you meant what you said, then I think the only way...

PHILLIPS: We didn't really say that. You have to take by the fact that we disapproved of another opinion and another part, and didn't disapprove of the...

KRONZER: I will agree that the opinion didn't turn on it. But in the first couple of paragraphs it was talking about motions not at issue here extend the TC's plenary jurisdiction. So if the court is talking about motions not at issue here extend the TC's plenary jurisdiction, then motions at issue here do not. Now that's an implication I agree. But for some reason this court started its opinion by saying, We don't have a motion that extends the plenary jurisdiction.

PHILLIPS: Let's go back to first principles. Why shouldn't this type of motion come in in *Check v. Mitchell*? What's different about it that it's worthy of a separate rule whether or not we recognize that separate rule or not?

KRONZER: I think in and of itself, it's because it's going back to Scott & White, and going with Check and going with McKay and McKenzie is that if an order for sanctions had been signed within 30 days, it's very clear from Scott & White that that's enforceable. It doesn't need a judgment to hit up the people _____(coughing). So we know that you don't need a judgment to make post-judgment sanctions, monetary sanctions enforceable.

PHILLIPS: Why isn't a motion for sanctions a motion to modify the judgment?

KRONZER: Because you do not have to have a judgment. You simply have to have an order. And CA's have distinguished between orders and judgments. And if in fact, you have to have a judgment, then you could not have a final judgment if you had a pending motion for sanctions.

PHILLIPS: We know it doesn't have to be in a judgment. But we also know it can be in a judgment.

KRONZER: Precisely. It can be.

PHILLIPS: But your rule would be anything that doesn't have to be in a judgment, and can be stand alone, a motion made within the plenary jurisdictions add that to the judgment must be acted on within the initial plenary jurisdiction of the TC to lose its power?

KRONZER: Depending upon what else was said in the motion concerning the judgment.

PHILLIPS: Well I'm just trying to get a kind of a neutral principle that will apply across-the-board. Because obviously the rule isn't crystal clear here.

KRONZER: And I think the problem with crystal clear is if you look at Lane Bank and its predecessor *Ramirez v. Williams Brothers Construction* and you look at the 14th opinion of *First National Bank Freeport Brazoswood*, those 2 courts couldn't even agree on whether this animal styled a motion to modify was in fact a motion to modify. You had two intervening CA's looking: one, who had to deal with it; and one later looking at that type of instance and disagreeing with its sister court. And you had a much, much more aggressive, much more voluminous type of motion talking about this post-judgment filing, as opposed to what I would characterize is that this is a motion to enter a judgment. And I would put to this court that if a judgment is signed, two weeks later I file a motion that says, To the Honorable Court, please sign the attached judgment, respectfully submitted Wally Kronzer, that that's not a motion to modify. And the reason I would put that is because 329(b) could sure be written a lot clearer if that's all the rule was, is that anything filed asking for a second judgment filed within 30 days gets you an extension of plenary jurisdiction.

HANKINSON: Your position is anything that asks for a second judgment within the time period, then is a 329 motion?

KRONZER: No, I would say that if in fact this, because the only thing in this motion that dealt with a second judgment was simply the request to render the attached, comma(?), proposed final judgment...

HANKINSON: It was a motion for sanctions and for rendition of final judgment with the attached proposed new judgment attached to it. So there was clearly a request that the judge do something to the judgment and sign a new judgment. Why doesn't that then suffice as a motion to modify?

KRONZER: I think two levels. One is, without saying the fact that CA's can't agree on that. I think that if that's all rule 329b was ultimately trying to say is, then it's a very convoluted rule if all you had to do, which is say: please sign the attached judgment.

HANKINSON: Well it's, Please sign the attached judgment, which includes changes from the earlier judgment. And by looking at the judgment you can see that it includes the sanctions that would be awarded if the court chose to grant the motion for sanctions. So by attaching it and saying, I know we have a judgment in this case, but please sign this judgment, which is different, doesn't that

come within the specific language of the rule that it is a motion to modify a previous judgment?

KRONZER: I don't think it does. Of course, we don't have an opinion that says, yes or no, and this court is going to have to do it.

GONZALES: Why not?

KRONZER: Because I think that the purposes of 329b, in talking about the motions to modify, correct or reform, and I think how some of the courts have talking about the substance of it, is the idea of a sail in the judgment. And I think there's a certain feeling of notice to it. I think if 329 simply means is you really don't have to - I mean anything filed that would ask for a second judgment would be a motion to modify, first off, I think we would have a problem that this court has said, and I can't recall the opinion, but kind of the *Check* type cases, is that if you're simply filing a motion for a second date, that's not going to be good enough. So we can't simply say filing a second motion within trial courts plenary jurisdiction gets you an extension, because this court has differentiated between the judgment as whether it's a substantive change or material change. This court has said that changing dates is not a material change.

HANKINSON: Does it make any difference that this is a request for additional relief that the TC did not have before it when it signed the first judgment? Does that make any different that we've now come in - for example, coming in and filing a new pleading post-judgment and saying, I would like for you to now include the relief associated with this particular pleading that you didn't know about before. Does that make any difference under 329?

KRONZER: I think it does to some degree. It's almost kind of like getting back to CJ's things about what is a motion for sanctions, is what this judgment did was taking two existing acts and melt(?) them together. It did not do anything differently than melt these existing acts together. And I would agree that in *McKay v. McKenzie*, you had that same situation where summary judgment had been granted, a non-suit was signed on other cause of action, and 20-some odd days the TC signed a final judgment that said, It's final. And I would contend that that wasn't necessary, but the TC did. But the TC clearly did within the plenary jurisdiction. That's not a extension of plenary jurisdiction case. That's simply, when do we start the appellate time table.

ENOCH: Excepting what 329b says, could you articulate a rule that would assist the courts to determine that this is something that seeks to correct or modify a judgment and something that does not?

KRONZER: I think in doing so this court is going to have to clear up the discrepancy between the 1st and 14th court and other courts on form verses substance. And you can almost go back to those opinions and try to find what this was - I mean what is a motion to modify. Because courts are looking at the same thing and can't agree. I think to say that it's a motion to modify, correct or reform, I'll be honest with you, if in fact all you have to do is file, Please enter attached judgment,

respectfully submitted, why are we bothering to have modified, correct, reform?

ENOCH: Didn't *Check* basically do away with those distinctions and simply say, If there's a correction of the judgment at all it extends the appellate time table? Does *Check* just really say, what you're doing is saying do something different with this judgment, you can extend the appellate time table and after all it's only a matter of 90 days or so, 105 days as opposed to 30, and it's not that big of a deal?

KRONZER: On its face it might not be. But again, *Check* was clearly done within the 30 days. *Check* was the TC's plenary jurisdiction extended was which judgement are we going to start counting from. And obviously a TC on sua sponte regardless of motions within its plenary jurisdiction can sign another judgment. It has that power under the Texas Rules of Civil Procedure. The question is, What motion that a party files kicks the appellate timetable longer and allows TC's to do things on the 31st day as opposed to the 30th day. And there is a distinction in the rules that TC's can do things on their own without motions within 30 days. *Cheek* is a good example of that, not on its own motion, but that it can sign another judgment.

I don't think *Cheek* is a motion to modify, reform, correct case for purposes of determining plenary jurisdiction extension.

ENOCH: So what should the rule be?

KRONZER: I think that the motion that has to be filed, and there has to be a motion. The rule is very specific, the TC cannot extend its own plenary jurisdiction, that the motion has to be sitting there providing notice. And I would agree with the 14th CA on this, it's not the form, but they would have to point out why, what it is that we are doing.

BAKER: Well here there was a separate motion "to make, enter a final judgment" wasn't there?

KRONZER: No. In the motion for sanctions and entry or rendition of the final judgment, at the last sentence of the first paragraph it also included the words "Smith Southern moves for sanctions and rendition of the attached, proposed final judgment. In the conclusion of that motion, there is no mention of the judgment which could open a whole line of questioning of "Gee do you have to pray for this animal for it to be a motion to modify?" All they prayed for if we are going to call it conclusion or prayer is Sign this sanctions order. I don't think we need to get into that argument of how specific a prayer is. But in their conclusion, they didn't ask for it. They said, Sign this sanctions order. And in passing in the first paragraph, By the way enter this judgment. Now I just don't think that's a 329b motion to modify.

HANKINSON: What if they had filed a motion for sanctions, and then filed a separate motion to modify the judgment which said, In the event the court grants sanctions, please modify the

judgment to include the sanctions order?

KRONZER: I think that passes _____ test.

ABBOTT: What about this. The motion that was filed says, Defendant's motion for sanction and for rendition of final judgment. What if they just styled it, Motion for sanction and for modification of final judgment?

KRONZER: And everything else stay the same? Unlike Justice Hankinson's situation, I think they were getting more back to the form verses substance and I would still be saying the same thing, that simply having modification of the title as the 14th CA said, isn't enough, you have to look at least to the body of the motion.

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RESPONDENT

MINKS: The respondent's position I think is clearly set forth in our brief. I primarily would like to answer any questions that the court might have about that brief.

ENOCH: I asked Mr. Kronzer for a rule. And it seems to me his rule that he proposed would have two parts. One is, to avoid the problem of a trial judge just arbitrarily extending the appellate timetable by entering a new judgment for no other purpose than to extend the appellate timetable, Mr. Kronzer proposes a rule that says, That a motion must be filed. And two, to have the motion to be meaningful at all under 329b, it must at least be notice to the parties that a change to the judgment is being sought. What's wrong with that rule and how would that apply in this case?

MINKS: I must confess the significance of such a rule may be too subtle for me to pick up on. I frankly don't understand why such a rule would not result in the respondent prevailing in this matter. The respondent did within 30 days file a motion for a new judgment that included the relief earlier requested with a slight modification of that relief including a Mother Hubbard clause, which is unrelated to the sanctions requesting additional sanctions...

HANKINSON: But you did file a motion that requested additional relief that was not before the TC at the time the TC signed the original judgment?

MINKS: Right.

HANKINSON: Why doesn't that make a difference? Why isn't this something different when you come in and say to the TC after the judgment has been entered: I know you took care of all this judge that was in the pleadings and you granted my summary judgment motion, but now I'm here and what I want you to do is something else that you didn't have before you. Why isn't that something different than a motion to modify?

MINKS: First, the extension of plenary power with respect to the concept of modifying judgments I think is more general related to the opportunity of the parties in the court to address without the _____ threat of loss of plenary jurisdiction. Any type of request after final deposition of the case.

HANKINSON: Well what if you filed an amended pleading at that point in time and went and said, By the way, I would like to have judgment. On this particular claim I forgot to put my medical expenses in and here's my pleading on medical expenses, so now I would like to have this additional relief, judge. You've already given me the relief I wanted. Would that be a motion to modify?

MINKS: I don't see any reason why it wouldn't be. It may not be a very meritorious motion, but the TC needs to have the ability to consider whatever request for relief are brought to its attention. And if a motion is filed 15, 20, 25 days after rendition of the judgment and it is of some kind of specific character that really doesn't affect the procedure by which the TC will go about considering it, it puts the TC in a very difficult position. As far as I know, there is really no authority to suggest that that ought to be the rule.

HANKINSON: This isn't a correction or a reformation, right?

MINKS: I would respectfully disagree.

HANKINSON: Do you think it's a correction?

MINKS: It's a modification.

HANKINSON: We've got three different things. We _____ the motions that modify, correct or reform a judgment. And this is not a motion to correct, right, because you're not claiming there was a mistake in the original judgment?

MINKS: I would say of those three, I would characterize it as a motion to modify.

HANKINSON: And what does modify mean?

MINKS: To change.

HANKINSON: In any way?

MINKS: Yes.

HANKINSON: Including to grant additional relief that had not been previously requested?

MINKS: Absolutely. In fact if the change requested is not even substantial...

GONZALES: It could be material or immaterial, just any change?

MINKS: Any change whatsoever, and that's clearly set forth in this court's holding in *Check*. I think that's the case that's in...

HANKINSON: What if your motion, and we've got some case law in this, we have case law that says that if your motion for sanctions was on file before the judgment was signed, not ruled on by the judge, the judge loses the power to rule on it after the 30 days.

MINKS: Right.

HANKINSON: But you're saying if we come in late on the 29th day and file the motion for sanctions, that that suffices as a motion to modify the judgment in and of itself?

MINKS: Absolutely.

HANKINSON: It doesn't have to be a motion to modify or change a judgment. A motion for sanctions styled as such is sufficient because that means you're asking for additional relief?

MINKS: I would say so. A couple of points on that. First, I think that rule 329 on its face is constrained in those motions that are filed after the judgment. So the question of whether there might be some outstanding relief that wasn't addressed really doesn't extend the court's plenary power. And so, that situation - a motion for sanctions or anything else that was pending prior to the rendition of first judgment certainly would not invoke any kind of extension of the court's plenary power.

I think generally speaking and considering that it is really a question of substance rather than form, that any kind of request...

HANKINSON: So even if your motion did not include the language, And for rendition of final judgment, and it had only been styled a motion for sanction, that that would be sufficient to comply with 329b(g)?

MINKS: I would say so. But to be sure, that's not even the situation here. There was a specific request for rendition of a new judgment that had changes to it, albeit perhaps not substantial to even the relief that was granted before.

HANKINSON: I'm just trying to understand how your rule would play out since we're focusing on the award of sanctions.

MINKS: I think in any suggestion that sanctions is of such special character that the TC has some specially narrow emergency window in which it must deal with such a request is something

for which there is no authority...

HANKINSON: Why is it too much to ask for parties to have their motions on file and get them ruled on within 30-days after a judgment? What's wrong with that? Why doesn't that help us further the finality of judgments and for a trial judge to be able to look at all the relief that's been requested within a reasonable period of time? Why is that a bad rule?

MINKS: Even if the rule were that and the parties had this obligation, they get mailed some judgment, they don't know what day it's going to come out, they get the judgment, for whatever reason they are on it, they open their mail, they immediately file some kind of motion for sanctions, that still gives the TC only 30 days which is a relatively short period of time in which to rule.

HANKINSON: Well why shouldn't the party have the obligation, the pleadings had been on file in this case for a long time, the defendant was aware of the conduct of the lawsuit throughout, why is too much to ask the party to have their motion on file at an earlier point in time in litigation?

MINKS: It occurs to me that the propriety of seeking such relief kind of depends in many cases on whether you're entitled to judgment in the first place. Certainly in this case, it would have been premature to suggest to the court contingently that not only are we entitled to summary judgment, but we should have some sanctions as well. Probably a more orderly presentation would be to determine first whether the court agrees with the defendant's position on the merits.

I would like to address a couple of points. Very generally, I think that all of the cases that have been suggested to the court as representing some rule that plenary power is not extended by this motion really don't even address that question at all. There is no holding to that effect. There's no ____ to that effect. There's no suggestion. In particular, the *Scott & White* case, I just want to emphasize really has absolutely nothing to do with the question that's before the court right now. But the sole question there had nothing to do with the court's extension...

HANKINSON: Do you agree that the gist of the cases that your opponent relies upon all seem to come down on the side of sanction motions need to be dealt with within 30 days after a judgment?

MINKS: Absolutely not. I would respectfully disagree with that position as more particularly set forth in our brief. Everyone of those cases is distinguishable, not on some fine point, but really the question was not even raised in those cases. For example in *Scott & White* the sole question in that case was whether the non-suit deprived the defendant of the ability to seek sanctions at all. It wasn't a question of whether the request for sanctions extended some kind of timetable. As far as I recall, there wasn't even a timing issue involved in that case at all. There is some language that suggests something about there might be some motions regarding extension of time. They are not before this court.

I think in context that really simply means that here's something else that is

clearly it's not an issue here at all. We're simply looking at the effect of a 162 non-suit on the ability to seek sanctions. And really the case goes absolutely no further. There's no implication about anything concerning the extension of plenary power.

ENOCH: In answer to one of Justice Hankinson's questions, the argument that a motion for sanctions that's pending before the judgment is entered, is simply one of the claims for relief that gets overruled by the judgment, and merely because claims of relief aren't granted, that's does not automatically extend the time for appeal of the judgment or the plenary power of the TC?

MINKS: Absolutely.

ENOCH: But we do recognize that motions for new trials can be prematurely filed, the judgment hasn't been entered. But they know what's coming. And so they file a motion for new trial, not knowing the judgment hasn't been entered. Then the judgment is entered inconsistent with the question of a motion for new trial. If we move away from a motion that assails the judgment to simply a claim for relief that would change the judgment in some way, do we create a problem where this jurisprudence that talks about a prematurely filed motion extends the appellate timetable?

MINKS: I must confess that I'm generally familiar with that subject matter. I think it's distinct from the one to be addressed here. It occurs to me that where there is a request for a new trial, that's clearly a mistaken expectation that there's some judgment coming. There's not a situation where there's just some loose request for relief laying about. That specifically contemplates this judgment and there is no implication that it's been overruled by operation of the judgment. So I really don't think that that's really a situation at all. And again, if I recall correctly, Rule 329 specifically with respect to these motions to modify, apply to motions that have been filed after rendition of the judgment in the question. Perhaps that language alone would certainly clarify the distinction there.

There's been a suggestion that there's some split in the appellate courts concerning this issue. And I think that that split, the suggestion of it is illustrated by this first *Freeport* opinion in the 14th CA and the *Ramirez* opinion in the 1st. There is a distinction between those cases, but it's not one that bears maturely on the issue that's before the court here. The dispute between those circuits relates to the suggestion by the minority courts to the effect that there is some need to go in and to weigh the substance of these motions that are styled: The Motion to Modify. And in the 1st *Freeport* case for example, the issue there was that the request for relief was not really a modification at all, but simply a reversal fundamentally of what was requested before. And it wasn't merely a modification of the relief that was already granted. Here, in contrast, this is not a suggestion of reversal of what was done originally. It's a supplementation, augmentation of what was done before.

I don't think that the 1st *Freeport* court would have a problem in doing exactly what the 1st CA did in this case. There is a dispute there, but it's outside the scope of the issue that's

before the court here.

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REBUTTAL

BAKER: Mr. Kronzer, would you say yes or no to this question that a motion to change an existing judgment has to be meritorious before it would extend the time based on 329b(g)?

KRONZER: Yes, if by definition meritorious that it was...

BAKER: That you know you're going to get that relief?

KRONZER: Or in good faith that you feel that there is a reasonable reason for you filing it. It may be that you don't have a snowballs chance...

BAKER: Well in this case, as you commented earlier, there's a one-line statement in the motion for sanctions: And please enter a final judgment in this case. Which you could argue, well that's no good because they already had a final judgment; therefore, it doesn't operate to implicate rule 329b. So why does it have to be a meritorious motion if you file, Think, I've got some more things to put in there, but you're wrong?

KRONZER: I guess I was speaking more to the ethical implications that what you should file to the court should always...

BAKER: Well I think most lawyers think everything they file is in good faith. They are proved wrong sometimes.

KRONZER: I do agree that the motion that has to be filed seeking a change, modification correction, or reform has to be valid. It has to create a change. But I think that in all fairness going back to my analogy of, Please sign enclosed judgment; respectfully submitted, doesn't meet the test of 329b.

BAKER: Just by virtue, that statement is in a transmittal letter?

KRONZER: The only reason it's not a transmittal is you sign: Respectfully submitted, and put a certificate of service on it.

GONZALES: But there, there's no change. What if there's a slight change, would that be enough? According to Mr. Minks it would be. An immaterial change is enough?

KRONZER: I think that the *Check* opinion sure says that, that there has to be a material - in other words, I think that the analogy and I can't remember which Justice talked about it, if the

court on its own signed a judgment that was exactly the same and it simply the changed the date, that that's not going to do it. The court has said that. So the question is, What kind of change is going to get there? And actually in *Check*, that was a pre-judgment. There was some motion. I can't remember if it was the Request for Findings of Fact or something, but there was a motion that was filed prior to judgment that this court said, is effective at the time of judgment even though it was prematurely filed.

The problem is that contrary to Mr. Minks' statement is that there are two givens: one is, that there are CA's that do not agree on what is a motion to modify.

OWEN: What's wrong with the Corpus Christi CA's opinion in *Scheppler*? They said, we're going to liberally construe the rule, and if granted, would result in a change in the judgment, then it suffices under 329b. What's wrong with that holding?

KRONZER: I think in the abstract there is nothing wrong with that. But again, as I recall from the actual physical motion that was presented in that, it was not simply: Please sign the attached. It is that sanctions went farther than that. And as I understand was much more exhaustive.

OWEN: But the court's holding was, We're going to liberally construe the rule, and if the effect of the motion, if granted, is to change the judgment, that's good enough. We're not going to get into the fine-tuning of what they asked for. If the motion would result in a different judgment if granted, then the time is extended. What's wrong with that?

KRONZER: I don't think there's anything wrong with it per se. But the question is, How do you get there? And the problem is that that is the rule. The 14th CA in the *First Freeport* when Mr. Minks had characterized it as a reversal that they were asking for a judgment that was a reversal, well the 1st CA said, Well isn't a reversal a materially different judgment? And I would say, that if in fact, the rule is simply that any new judgment that's different is a motion to modify, as opposed to corrected or reformed, then the rule can be better written. And that is the problem that this court has is that there are intermediate CA's that are not consistent on their application of what is a motion to modify, and that this is not one regardless of the test that is applied.