



Supreme Court Oral Arguments

Fathi Yusuf , et al.,

v.

Mohammad Hamed, et al.

July 9, 2013

***Transcribed by:
Cheryl L. Haase, RPR***

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

FATHI YUSUF AND UNITED)
CORPORATION,)
)
Appellants/Defendants,) S.Ct. Civ No. 2013-CV-0040
)
v.) Re: Super. Ct. Civ No. 2012/370
)
MOHAMMAD HAMED By His)
Authorized Agent WALEED)
HAMED,)
)
Appellee/Plaintiff.)

For the Court:

Justice Rhys S. Hodge, Presiding
Justice Maria M. Cabret
Justice Ive Arlington Swan

For the Appellant: Joseph DiRuzzo, III, Esq.

For the Respondent: Joel H. Holt, Esq.
Carl Hartmann, Esq.

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1 JULY 9, 2013

2 JUSTICE HODGE: We will now proceed with the
3 matter of Mohammad Hamed -- of Fathi Yusuf and
4 United Corporation v. Mohammad Hamed and Waleed Hamed,
5 No. 40 of 2013.

6 Counsel, do you wish to reserve any --

7 MR. DIRUZZO: Yes, I would, Your Honor. I
8 would reserve four minutes for rebuttal time.

9 JUSTICE HODGE: Very well. You may proceed.

10 MR. DIRUZZO: And good morning. I'm Joseph
11 DiRuzzo on behalf of the appellants, United Corporation and
12 Fathi Yusuf, may it please the Court.

13 Justices, this case is about an improperly
14 issued preliminary injunction. The Superior Court
15 incorrectly turned an ordinary commercial dispute between
16 two purported partners into an extraordinary case when it
17 granted the extraordinary relief to the plaintiff below.

18 JUSTICE SWAN: What is the dispute between
19 the parties that you say turned a dispute into an
20 extraordinary -- what was the nature of the dispute?

21 MR. DIRUZZO: The nature of the dispute is
22 whether the -- there is whether the nature, scope and extent
23 of the oral agreement between Fathi Yusuf and Mohammad Hamed
24 in the 1980s is both enforceable today, and gives the
25 plaintiff below the result that he seeks.

1 It's our position that, no, he does not get
2 the relief that he seeks and wants.

3 JUSTICE SWAN: Isn't this an ongoing dispute?

4 MR. DIRUZZO: Well, to the extent that the
5 parties are --

6 JUSTICE SWAN: And it transpire more than
7 twenty years?

8 MR. DIRUZZO: I'm sorry?

9 JUSTICE SWAN: You said it began in the
10 1980s, am I correct?

11 MR. DIRUZZO: The alleged oral agreement was
12 in the 1980s, correct.

13 JUSTICE SWAN: And isn't one the
14 brother-in-law of the other?

15 MR. DIRUZZO: They are, yes. They're --

16 JUSTICE SWAN: So they are closely related.

17 MR. DIRUZZO: Yes, they are.

18 JUSTICE SWAN: All right. Uncles, niece and
19 nephew, or uncles, nephews --

20 MR. DIRUZZO: Cousins.

21 JUSTICE SWAN: -- and cousins and everybody.

22 MR. DIRUZZO: Yeah.

23 JUSTICE SWAN: So it's one big family that
24 have a colossal dispute, am I correct?

25 MR. DIRUZZO: That is true, but that colossal

1 dispute was in the context of a commercial dispute. This
2 is not a colossal dispute over the custody of a child or a
3 house; this is a commercial dispute between family members
4 over a commercial business.

5 JUSTICE SWAN: Well, it -- it's more than
6 that, because over the years they have acquired tremendous
7 real estate also.

8 MR. DIRUZZO: And to the extent that real
9 estate was acquired, that real estate was -- was acquired in
10 corporate solution within a de jure or de jure Virgin
11 Islands entities which stated shareholders, for example,
12 plus enterprises, which is the subject of the derivative
13 lawsuit which is cited in the record.

14 JUSTICE SWAN: Let me ask you this: Can you
15 really separate United Corporation from the Plaza Extra
16 stores?

17 MR. DIRUZZO: Can you?

18 JUSTICE SWAN: I'm asking you. I'm asking
19 you whether or not if you can really and honestly sep --
20 isn't it true that all of it is intertwined with each other,
21 irrespective of what the legal documents might show?

22 MR. DIRUZZO: Well, Your Honor, I'll phrase
23 it this way: United Corporation and Plaza Extra, it's held
24 in corporate solution. There -- it can be no dispute. To
25 the extent that the plaintiffs want --

1 JUSTICE SWAN: Who own the Plaza Extra
2 stores?

3 MR. DIRUZZO: Now, are you talking about the
4 dirt itself, the property, plant and equipment, or -- or the
5 Plaza Extra trade name? Because --

6 JUSTICE SWAN: No, no, no, I'm talking about
7 the stores, the stores, --

8 MR. DIRUZZO: Okay. Well, the -- the --

9 JUSTICE SWAN: -- the stores.

10 Because, as I understand it,
11 United Corporation, the United Corporation has a trade name,
12 and that trade name is what?

13 MR. DIRUZZO: Plaza Extra.

14 JUSTICE SWAN: Right.

15 MR. DIRUZZO: Yes.

16 JUSTICE SWAN: And this -- and so from that
17 Plaza Extra, we have three stores.

18 MR. DIRUZZO: True, but the dirt underneath
19 the Plaza Extra Sion Farm, that is owned by
20 United Corporation. The dirt underneath Tutu, that's just a
21 normal commercial lease. And the dirt underneath
22 Plaza Extra West on St. Croix, that's owned by Plessen
23 Enterprises.

24 JUSTICE SWAN: All right. Well, let me ask
25 you this --

1 JUSTICE CABRET: Well, let --

2 JUSTICE SWAN: Yes. Go ahead, Justice
3 Cabret.

4 JUSTICE CABRET: Thank you, Justice Swan.

5 You, or Mr. Yusuf, concedes that there was an
6 oral agreement at the inception. How -- how does he term
7 this oral agreement? What does he call it?

8 He denies that it's a partnership --

9 MR. DIRUZZO: Sure. Well, I'll phrase it to
10 say, first of all, based on the record before us --

11 JUSTICE CABRET: But isn't he -- I'm sorry.
12 Let me make myself clear.

13 MR. DIRUZZO: Okay.

14 JUSTICE CABRET: I think he's denying it at
15 this stage, but he has previously indicated that there was a
16 partnership. And in your, as you began your argument, you
17 indicated, well, there was an agreement. I want to know,
18 what happened to the agreement? When did they agree to
19 disagree?

20 MR. DIRUZZO: Well, I -- I will put it this
21 way: First of all, the statements from Fathi Yusuf that it
22 was a quote, unquote, partnership, that is a statement of a
23 layperson not versed in the laws.

24 Second, and directly answering your question,
25 the nature of the relationship, the best way I could phrase

1 this, a very difficult way to characterize it, is at best
2 Mohammad Hamed made a capital contribution, and in turn
3 received an income stream similar to an annuity. But that
4 does not make him a de jure or de facto partner.

5 You want -- if the Court wants to look at it
6 as a financing arrangement, that's fine. If you want to
7 look at it as an annuity, that's fine too. But all the
8 hallmarks of a partnership are not there. The mutual
9 control, all the things that you think of when you're a
10 typical partner between two attorneys in a law firm, that is
11 not here. And that's why, at the bottom of this case, the
12 allegations that Fathi Yusuf and Mohammad Hamed had an oral,
13 well, partnership agreement, are highly, highly disputed.

14 JUSTICE HODGE: Okay. You -- you call it a
15 joint venture. Are you now backing away from that, even, --

16 MR. DIRUZZO: Well, that --

17 JUSTICE HODGE: -- and now it's an annuity?

18 MR. DIRUZZO: Well, that's -- that's my best
19 way to -- to describe or couch, which is why we characterize
20 it as an almost uncharacteristic or uncharacterizable
21 agreement. It almost defies your typical definitions
22 because it is so out of the ordinary, an agreement that by
23 its -- Mr. Mohammad Hamed's own terms, was to last forever.
24 a definite term of forever.

25 But taking a step back, Your Honors, going

1 back to what this case is about, the Court should look at
2 Joint Appendix Page 50 at Point 6 and 7, what the plaintiff
3 below actually pled. He pled and asked for, in his claims
4 for relief, an award of compensatory damages against the
5 defendants jointly and severally, and at 7, a judicial
6 determination that it is not practical to continue the
7 partnership with Yusuf, so that Yusuf's partnership
8 interests should be disassociated from the business,
9 allowing Mohammad to continue the partnership without him.

10 And this is key, because if the -- the Court
11 were to turn its attention to Page 32 of my opponent's brief
12 at Footnote 28, they say, quote, In fact, Hamed asked the
13 Court to find that he is entitled to, quote, buy out, close
14 quote -- buy out Yusuf, close quote, and operate the
15 business without him, pursuant to 26 PIC Sections 121 sub 5.

16 And the point I make is this: If in taking
17 the plaintiff's position, for sake of argument in the case,
18 if these are purported 50/50 partners, well, then, it
19 follows that 50/50 partners have equal rights under the
20 Virgin Islands Code under the Uniform Partnership Act. It
21 is a two-way street. There should be a symmetry here.

22 So --

23 JUSTICE SWAN: Well, but hold up one minute,
24 because, you see, because unlike in a regular business
25 partnership dealing at arm's length, we have here two

1 families that are very close. The sister is married -- the
2 sister of one family is married to the so-called other
3 partner, and for years they dealt with each other as
4 partners. Their sons understand that.

5 MR. DIRUZZO: I will actually dispute that.

6 JUSTICE SWAN: And -- well, I'm telling you
7 what is in the record, in parts of the record. That is
8 being said that the Court have to consider that you have
9 their sons having certain supervisory positions. You have a
10 breakdown in the operation of the stores, the two on
11 St. Croix and the one over here, and they are dealing not
12 with paper, but in terms of a very close, very close,
13 they're taking each other's word for it, as Mr. Yusuf like
14 to say.

15 So, you know, this is not really a
16 partnership where you sat down and you drafted up an
17 agreement between the parties. This is a family business,
18 and they were all one operating these stores.

19 Now, their sons might have had -- might have
20 been assigned certain tasks, but it still came around to the
21 operation of the stores.

22 MR. DIRUZZO: Well, while that may be true --

23 JUSTICE SWAN: And I don't see how that you
24 can say that it was not a partnership.

25 MR. DIRUZZO: Well --

1 JUSTICE SWAN: Even if there's not a
2 partnership, though, the Judge entered a preliminary
3 injunction, am I correct?

4 MR. DIRUZZO: Yes.

5 JUSTICE SWAN: And that is what is appealed
6 before us.

7 MR. DIRUZZO: That is correct.

8 JUSTICE SWAN: Now, a preliminary injunction
9 is basically to maintain the status quo.

10 MR. DIRUZZO: But the status quo was not
11 maintained here.

12 JUSTICE SWAN: Well, but that's what the
13 Judge did. And I'm simply saying is that the order of the
14 Judge where he directed that when checks are supposed to be
15 written, both are sides are supposed to cosign the checks,
16 and what he's really doing is maintaining the status quo
17 until you can have a full-blown hearing on the merits. He
18 has discretion.

19 Where is the abuse of the Judge's discretion
20 in maintaining the status quo for the operation of these
21 businesses, wherein that they will continue to operate;
22 wherein that everybody will be able to look at each other;
23 and so that you can get to the full-blown hearing?

24 MR. DIRUZZO: And the abuse of discretion is
25 replete in this report. One, that the trial court below

1 took after-the-fact testimony in affidavit that the opposing
2 side was shut out of bank accounts, without giving us due
3 process of law and without considering that the reason that
4 this happened is because Wally Hamed and his brother Mafi
5 Hamed wrote a check from a related entity and stole
6 \$460,000. That's the first thing.

7 The second thing is that a trial court, by
8 definition, abuses its discretion when it makes an error of
9 law. There are numerous error of law below, both at the
10 legal level and in the way the trial court conducted --

11 JUSTICE SWAN: Okay. Before your time
12 expires, I need to know, since this is just a preliminary
13 injunction and it was not a full hearing on the merits of
14 the case because the Judge attempts to maintain the status
15 quo, has the Judge set a date for -- for -- for completion
16 of discovery, and a trial date where you can --

17 MR. DIRUZZO: We don't have anything. We
18 don't have a discovery order. We don't have anything.

19 JUSTICE SWAN: Well -- well, let me ask you
20 this: To the extent that there was an interlocutory appeal
21 as we have here before us, --

22 MR. DIRUZZO: It's not stated --

23 JUSTICE SWAN: -- does that in any way impede
24 the Court from going ahead and setting this thing down for a
25 hearing, or at least the conduct of discovery so that you

1 can have a full hearing, --

2 MR. DIRUZZO: Absolutely not.

3 JUSTICE SWAN: -- since this is just in terms
4 of a preliminary injunction?

5 MR. DIRUZZO: Absolutely not. There is a
6 motion to stay below, but that was a motion to stay the
7 order. And it's black letter law that, absent a motion to
8 stay and granting relief, an interlocutory order and an
9 interlocutory appeal does not stay the action below. That's
10 black letter law. But -- and I will eat into my rebuttal
11 time, and I believe this point is very important --

12 JUSTICE HODGE: Well, let me ask you this,
13 though. Has anybody asked the Court specifically down below
14 to set discovery dates and a hearing date so that we can
15 have a full hearing on the merits, since you only dealt with
16 the preliminary injunction?

17 MR. DIRUZZO: The only thing that's happened
18 is that the trial court below stayed discovery, you know,
19 stayed all discovery when we attempted, prehearing, to take
20 some depositions and to get to the root and to get into some
21 of the testimony.

22 But absent that, there's been no ruling on
23 the outstanding 12(b) motions, there's been no discovery
24 conference, there's been no discovery exchange, there's been
25 no initial disclosures. So the case below is effectively at

1 a standstill, which makes why this preliminary injunction is
2 so much more problematic, because it's not like we will have
3 a hearing and the trial on the merits is in the next week or
4 two or month. Huh-uh. The way I see it, and the way the
5 trial court is proceeding, we're probably not going to get a
6 trial on the merits, if we're lucky, within the next
7 two-and-a-half years. And I think that's being generous.

8 JUSTICE CABRET: Mr. Diruzzo, --

9 MR. DIRUZZO: Yes, Your Honor.

10 JUSTICE CABRET: -- very quickly, does
11 Mr. Yusuf want the entire pot of gold at the end of the
12 District Court rainbow?

13 MR. DIRUZZO: I'm sorry, say that again,
14 sir -- say that again, ma'am?

15 JUSTICE CABRET: Does Mr. Yusuf want all of
16 the money that is in the District Court, being held in
17 escrow in the District Court case?

18 MR. DIRUZZO: Does -- well, if the answer --
19 if the question is, do we believe that -- that the claim is
20 legally unenforceable, and that would necessitate that the
21 result would be --

22 JUSTICE CABRET: That was not my question.

23 JUSTICE SWAN: No, no, no, no, no. The
24 question --

25 JUSTICE CABRET: My question -- don't --

1 please don't speak for me.

2 MR. DIRUZZO: Okay.

3 JUSTICE CABRET: My question is, does
4 Mr. Yusuf claim that entire escrow, the entire escrow funds
5 in the District Court?

6 JUSTICE SWAN: How much is it, \$43 million?

7 MR. DIRUZZO: Yes.

8 Mr. Yusuf has not gone on record as to saying
9 that either way, but I would represent to this Court,
10 assuming -- assuming that what Mr. Mohammad Hamed had was an
11 annuity, then there would have to be an accounting as to
12 what is the actual value of the annuity income stream, which
13 may, but --

14 JUSTICE CABRET: You realize that this is the
15 first time I've heard the word "annuity" --

16 MR. DIRUZZO: I --

17 JUSTICE CABRET: -- and I've been -- it
18 appears nowhere in your brief.

19 MR. DIRUZZO: I understand, but it is the
20 best way I can characterize this --

21 JUSTICE CABRET: It's like your arguments are
22 like a moving target.

23 MR. DIRUZZO: Well, I will put it as it's the
24 best way that I can characterize this interesting joint
25 venture agreement arrangement, but the -- annuity is the

1 best way I can conceptualize how one would value -- value
2 the agreement in the contract.

3 JUSTICE SWAN: No, no, no, no, no. There's
4 nothing about any kind of annuity here. That's a concoction
5 that you must have come up with.

6 But let me ask you this: This \$43 million
7 came from where?

8 MR. DIRUZZO: Forty-three million came from
9 the, among other places, came from the operations of the
10 grocery stores.

11 JUSTICE SWAN: The three grocery stores.

12 MR. DIRUZZO: Yes.

13 JUSTICE SWAN: Right. The three grocery
14 stores, the \$43 million was generated by the three grocery
15 stores, and which for rolling years they have been operating
16 as if they are partners. They have made -- Mr. Yusuf has
17 said all through this that they were partners, or a
18 partnership. Now, you might call it a joint venture and all
19 of that, but their conduct, their actions, their signing of
20 checks, all of these things seems to come to fruition.

21 MR. DIRUZZO: No, absolutely not, Justice,
22 and I'll tell you why. Because the true acid test as to
23 whether someone actually believes they're a partner, as to
24 whether their bona fide belief is actually the case, is not
25 when it's in their best economic interest to do so; it's

1 when they take that position when it's in their economic
2 disinterest to do so.

3 So when Mohammad Hamed says that he is a
4 partner with Fathi Yusuf and he's entitled to half of the
5 Plaza Extra stores, my question to the collective wisdom
6 here is, where was he since 1986 on any form representing
7 that he owed to any governmental agency any tax on his half
8 of these profits? He was nowhere. And to any allegation
9 that he didn't have to file a return during the pendency of
10 the criminal case, an allegation I'd say is, as a matter of
11 law, is wrong because he should have filed the return, and
12 at best he could have taken the Fifth on it, but that
13 doesn't excuse, from 1986 to when the arrest was, there was
14 no income tax return. There was no statement to a
15 government agency against his economic interest.

16 JUSTICE SWAN: Well, what you are saying --
17 what basically you are saying is that there are so many
18 multi issues in this case, involving the criminal cases in
19 the District Court, the other case -- other cases in which
20 there is a deposition by Mr. Yusuf, and all of these
21 interlocking and intertwining issues, how you could -- and
22 all the Judge say, I'm going to put a stay on this, why is
23 it that your client don't want to give the Superior Court
24 judge the opportunity to go full blast and resolve all of
25 these issues? Because -- and not only because --

1 MR. DIRUZZO: Because --

2 JUSTICE SWAN: -- of the amount of money
3 involved, but the -- but the conduct of the parties over a
4 period of time, --

5 MR. DIRUZZO: Because --

6 JUSTICE SWAN: -- how they dealt with each
7 other; the businesses that they operating.

8 MR. DIRUZZO: All I can say is all you need
9 to do is look into the audience. These families are at
10 odds. They are now at war with each other. It is --

11 JUSTICE HODGE: Excuse me. They're sitting
12 on opposite sides, you mean?

13 JUSTICE SWAN: Absolutely.

14 MR. DIRUZZO: And -- and -- and that is
15 exactly the point. You have taken the Hatfields and the
16 McCoys and slammed them together in a dispute in a business.

17 JUSTICE SWAN: No, no, no, no, no, no. He
18 said it's a preliminary injunction, Attorney. It's not --
19 it's not a permanent injunction nor final adjudication on
20 the merits of the case. He did this in order to, as far
21 from his perspective, the Judge used his discretion and he
22 said, you know, It's not a matter -- because I have to save
23 these businesses at least until I get the opportunity to
24 hear everything full blown and give everybody an opportunity
25 to be heard. What he has done is attempt to maintain the

1 status quo in the operation of these all three stores.

2 MR. DIRUZZO: Save the businesses from what?

3 This is a money damages case. If these businesses go
4 over -- go under, and to the extent this is an at-will
5 partnership that can be resolved at will --

6 JUSTICE SWAN: Then all the more reason why
7 the judge below should be given an opportunity to expedite
8 this case or move full speed ahead and have a final trial on
9 the merits of everything to determine, one, if there is a
10 partnership at all, and he will be able to evaluate the
11 credibility of the witnesses, which we can't do.

12 And I tell you something, Attorney. I am
13 looking as to why the trial judge ought to be able to do
14 this. I have here from June, from the joint exhibit, from
15 the joint appendix from Page 840 over to Page 859, and
16 something is glaring about Mr. Yusuf's testimony. He seems
17 to remember what he wants to remember. He seem to go off on
18 a tangent whenever he's asked certain questions, don't
19 answer directly. He wants to say what he wants to say.

20 And for somebody who has been in this
21 business operating these, so close to the business, he has a
22 tendency to say, Well, let me give you an example. He say,
23 Oh, I -- or permit me to explain. He said, I don't know, I
24 don't know. And we are talking here about, you know, maybe
25 \$8 million, \$750,000.

1 Then we go over to Page 850. He wants you to
2 look at the paper and say yes or no, is there anything in
3 the papers that say that? No.

4 Then you go down, Excuse me. You want to
5 talk to me about my cousin, you're talking to me. You need
6 the truth from me.

7 And all along, many of the questions that are
8 asked of him, he always seems to suggest that, Well, maybe.
9 I don't know. I -- I -- I can't -- not that he can't
10 remember, he doesn't use those words, but he uses the
11 functional equivalent of those words. And as I review his
12 transcript of his testimony, for all intents and purposes,
13 not only his but a lot of the other affidavits, there is
14 seems to be a colossal issue here called credibility that we
15 can't resolve, that need to be resolved by the trial court.

16 MR. DIRUZZO: It needs by the trier of fact.

17 JUSTICE SWAN: The trier of fact is the trial
18 court, --

19 MR. DIRUZZO: No.

20 JUSTICE SWAN: -- not us.

21 MR. DIRUZZO: The trier -- the trier of fact
22 is the jury, the very jury that they asked --

23 JUSTICE SWAN: But when -- when -- when I say
24 the trial court, I mean it has to go down there. Whether
25 it's judge or jury, the trial court determine the

1 credibility issues. If it's a jury, then the jury
2 determines. If it's a judge, then the judge determines
3 that. But for all intents and purposes, the only thing that
4 you're appealing before us is that preliminary injunction by
5 the Court, and it's a matter of whether or not the Court has
6 abused its discretion in entering that. And I've been
7 hearing a whole lot, but not too much.

8 JUSTICE HODGE: Okay. Attorney DiRuzzo,
9 you've gone over ten-and-a-half minutes, and I've allowed
10 it, but I just wanted to ask you, are you claiming that the
11 bond -- the bond that was set --

12 MR. DIRUZZO: The bond, the \$25,000 bond?

13 JUSTICE HODGE: Yeah.

14 MR. DIRUZZO: Uh-huh.

15 JUSTICE HODGE: Are you claiming that, at
16 least the amount that's secured by the interest that Hamed
17 would have in the escrow funds, are you claiming that it's
18 illusory because he's not entitled to the funds, or because
19 it's in escrow and can't be reached?

20 MR. DIRUZZO: Because if the final
21 determination is made that the statute of frauds or statute
22 of limitations applies, then the possibility -- I'll put it
23 this way: If me and my brother are fighting over half a
24 piece of pie, and if I'm right I get all the pie, his half
25 that he claims, well, if I'm right, I have nothing to --

1 that's securing the bond. That's why they needed to place a
2 bond far in excess of \$25,000 after a bond hearing, which we
3 were never provided notice, and which we didn't put any
4 record evidence into. There would have to be a subsequent
5 hearing and then --

6 JUSTICE HODGE: Where in the law is there a
7 requirement that there be a separate hearing?

8 MR. DIRUZZO: I would submit that Judge
9 Easterbrook's opinion in re: Johnson, the Third Circuit
10 opinion that --

11 JUSTICE HODGE: Where under Rule 65 is it
12 required to have a separate hearing?

13 MR. DIRUZZO: It is not, I will admit, it
14 does not say that is required in Rule 65(c) that a hearing
15 per se is required, but I believe the case law is out there
16 that establishes a bond hearing is required, especially when
17 the initial preliminary junction hearing was devoted to the
18 merits and there was no discussion as to the level and
19 propriety of the bond.

20 JUSTICE HODGE: Okay. Thank you.

21 MR. HOLT: Good morning.

22 JUSTICE HODGE: Good morning.

23 MR. HOLT: If it please the Court, my name's
24 Joel Holt. I represent Mohammad Hamed, along with Carl
25 Hartmann, who's sitting at counsel's table with me.

1 You know, in this appeal, we really think you
2 come back to what the standards are: Was there clear error
3 in the findings of fact, and was there an abuse of
4 discretion in entering the injunction so that you would keep
5 the status quo until this trial could come forward.

6 And to address a concern that Judge Swan had,
7 this case was filed in September. A remand was taken -- I
8 mean, excuse me, it was removed to the District Court where
9 it stayed up there for about six --

10 JUSTICE HODGE: Yeah, I saw that removal.

11 MR. HOLT: When it came back, it was in front
12 of Judge Donohue. Judge Donohue then reassigned it to Judge
13 Brady. So Judge Brady wasn't even on the bench when this
14 case got started. Judge Brady was reassigned this case in
15 early January after the second --

16 JUSTICE SWAN: January of this year.

17 MR. HOLT: Yes, after the second TRO was
18 filed on January 9th. We were up trying to get Judge
19 Donohue to give us a hearing, and he assigned it to Judge
20 Brady because the case had been originally assigned to Julio
21 Brady, and Judge Donohue realized, since Judge Julio Brady
22 was no longer on the bench, there was no reason for him to
23 accept the conflict assignment, and he sent it back to, in
24 this case, to Judge Douglas Brady.

25 He held a hearing very promptly, and in your

1 questions about Rule 26, they wanted to take depositions
2 immediately. I said, No problem, just give us -- let's do
3 Rule 26 self-disclosures so we know what the documents are,
4 and they wouldn't do that. They wanted to proceed with the
5 depositions without going through the Rule 26 process. And
6 under Rule 26(f), you can't do that. You can't do any
7 discovery until you've done the disclosures. And that's
8 when Judge Brady intervened and said, Okay, until you're
9 doing your disclosures, I'm not going to allow depositions.

10 But he held the hearings, and then we all
11 worked very hard on getting findings of fact in. We -- it
12 took us about three weeks to get the transcript. We got our
13 findings of fact in, and then the ruling came. The appeal
14 was taken. But this case really could be ready for trial
15 fairly quickly, because the amount of work that went into
16 the liability issue of this case is pretty much done. And
17 the issues in this case really aren't about money. The
18 issues in this case are what do we do with this partnership?
19 How -- how do we address this partnership? And in our
20 complaint we think you address it one way. He's already
21 stated what relief I'm seeking.

22 But the question here today is, is the
23 injunction properly in place so that we can preserve the
24 status quo while we get to the merits of the case?

25 JUSTICE SWAN: Well, that's what I've always

1 thought, but let me ask you this, because it seems to me as
2 if that all of these other collateral cases that would
3 impinge on what went on here, and all of the affidavits, all
4 of the depositions already taken, that the Judge, I believe
5 in his -- in his wisdom, he said that, you know, Let me put
6 as the -- hold the status quo on this, but in the meantime I
7 will put in such measures as not to prejudice the operation,
8 where all the litigants on both sides will know exactly what
9 is happening with the operation of these businesses.

10 And basically, for all intents and purposes,
11 this might not be compensable as money damages, because
12 we're not talking about money as such, we're talking about
13 saving the business, which is a different issue altogether
14 from the profits of the business and saving the business.
15 And the Judge is saying, I have to save the business so as
16 to give me an opportunity to resolve this thing on the
17 merits.

18 And I gather from his order, that's what he
19 has done. And he has invoked his discretion, he has put a
20 status quo, he has allowed the businesses to continue to
21 operate pending a final resolution of this matter.

22 That's my understanding of it.

23 MR. HOLT: Well, that's what we think he did.
24 We think --

25 JUSTICE SWAN: So why -- why should not this

1 case go back down to the Judge, have him to put in the
2 discovery, the Rule 26 discovery schedule, move it along
3 expeditiously since it involves injunctive relief, which is
4 expedited on the court's calendar, and have a trial date in
5 record time?

6 MR. HOLT: That was --

7 JUSTICE SWAN: Based on how this Judge, this
8 Judge Brady, has handled this matter, and the expedited way
9 in which he has handled it, I have no reason to believe that
10 he wouldn't expeditiously move to resolve these cases. Not
11 these cases, but this case.

12 MR. HOLT: And -- and we want it
13 expeditiously resolved. These parties need to figure out
14 how to get to the next step in their life.

15 JUSTICE HODGE: Attorney Holt, since it's not
16 claimed that Mr. Yusuf is without the means to satisfy any
17 money judgment that could be rendered, why is money damages
18 a sufficient remedy in this case?

19 MR. HOLT: Okay. Well, you have three things
20 which Judge Brady addressed. The, first of all, you have
21 the violation of statutory rights. In other words, we have
22 a right to manage the business under the partnership, joint
23 management and so that's a right, and he found that there
24 were recurrent violations of that right. And that's why --
25 by the way, I didn't discuss the Anderson case in my brief,

1 but they pointed that out in the reply, but that's what the
2 Anderson case was. If there is real chance of repeated
3 violations of statutory rights, which we have here, then
4 that's one reason for granting the injunction. Because it's
5 not just a monetary thing, it's how do you manage this
6 business? How does a partner have the right to continue to
7 manage this business to make sure it stays in place?

8 JUSTICE HODGE: Even in the winding up of it?

9 MR. HOLT: Even in the winding up. As a
10 matter of fact, Judge Brady says that in his order, that I
11 want to see these stores survive, or manage the dissolution
12 of it. Either way.

13 And secondly, in Judge Brady's opinion he
14 actually has a footnote where he questions whether or not
15 Mr. Hamed will really even have a realistic chance to figure
16 out where the money goes and to collect it. And he
17 specifically talks about an \$800,000 amount of money
18 that's -- that was owed, it's not been paid; a 2.7 million.

19 And so the answer to your question is, no,
20 I'm not sure the money will be there. And as a matter of
21 fact, if you remember in the testimony when we asked where
22 the 2.7 million went, Mahar Yusuf, the president of United,
23 said, We bought land in the Virgin Islands. But when we
24 came back for the second hearing and we showed him the
25 deeds, no, they didn't buy the land with that money. They

1 bought the land previously. The land was used for a
2 mattress company in the States. So I'm not so sure that it
3 will be collectible.

4 But you come back to your first issue, which
5 is -- which is the violation of statutory rights, and then
6 you go to your third issue, which is tension in the
7 workplace. And in this case, Wally Hamed testified about
8 all of the problems going on, and he talked about
9 specifically threatening with physical harm; intimidating to
10 leaving stores; threatening to take us off the checks;
11 threatening to close down the east store or the west store.
12 And that tension was one of the focuses of Judge Brady
13 findings where he actually talked about the police having to
14 come and to deal with it. So what he decided was he was
15 going to put into place, You're going to run this like
16 you've always run it.

17 So those are really the three reasons: The
18 repeated violation of the rights under the Partnership Act;
19 the possibility that the money won't be there; and third of
20 all, the tension within the business and how that that's
21 going to hurt the business. And in all of these, he cited
22 case law on every type of case that supported that. As a
23 matter of fact, he went to case -- he went to two cases
24 where there were actually family situations like this where
25 the Court said this is particularly ripe for injunctive

1 relief. He even went further, because one of those cases
2 said we may even need a receiver if they can't get along.
3 This should give them incentive to get along until we get to
4 the end of the case.

5 So monetary damages won't do it, because I
6 think we -- as a matter of fact, you know, I think that the
7 June -- the June 29th letter, I think it was, that they put
8 in the record on the motion to stay where they asked the
9 taxing authorities to rescind the tax grant that we got
10 saying our taxes were paid, I mean, that gets you to the
11 level -- why would they care if our taxes were paid or not?
12 Why would they care if a sum of money was deemed to pay the
13 partnership taxes? They would only care because they are
14 trying to get Mr. Mohammad get in such a deep hole that --

15 JUSTICE HODGE: They say he didn't step up
16 and enter into the criminal action and say, Okay, I'm part
17 of this. Why come after the fact and say --

18 MR. HOLT: I haven't yet -- I haven't yet
19 seen anybody volunteer to go into a criminal case. And, you
20 know, they talk about all these representations in the
21 criminal case. There weren't any representations in the
22 criminal case. There was silence. And there weren't --
23 they went out of their way, all of them, not to file tax
24 returns so they wouldn't be making statements.

25 JUSTICE HODGE: Let me ask, what's your

1 theory against United Corporation?

2 MR. HOLT: Well, United Corporation is the
3 entity --

4 JUSTICE HODGE: Are they willing to defend --
5 are they enjoined in any action, in this action?

6 MR. HOLT: Yeah, this injunction went across
7 the board on any operating accounts, some of -- most of
8 which are -- all of which are in United's name, so United's
9 a necessary party. And in the complaint, we put that out,
10 they are a necessary part because they are --

11 JUSTICE HODGE: Isn't that a little much, if
12 you claim that United -- there's no partnership with United.
13 United is a separate corporation. Why enjoin them in this
14 alleged partnership?

15 MR. HOLT: Because United actually has
16 physical possession of partnership assets.

17 JUSTICE HODGE: Because what?

18 MR. HOLT: Because United has physical
19 possession of partnership assets.

20 JUSTICE HODGE: So you hold up everything
21 because of that?

22 MR. HOLT: No, United Corporation owns the
23 shopping center, and when -- when the injunction was issued
24 and there was a question about that being held up, we
25 immediately stipulated to something saying that's not the

1 case at all, and United Corporation, which owns its own
2 Shopping Center, is operating completely independent of this
3 injunction, with no restraint whatsoever. And that was --

4 JUSTICE SWAN: But let me ask you this,
5 though. Based on what I have read, it appears that
6 United Corporation, the so-called business entity, is owned
7 solely by Mr. Yusuf in one part of the record; another part
8 is, Well, it may not be so. But Mr. Yusuf is in a position
9 where, because of his interest in the three stores, and
10 United Corporation, if he owns that, there seems to be a
11 tremendous amount of linkage, linkage between those three
12 stores and United Corporation. They might have their own
13 articles of incorporation, it might be a separate so-called
14 business entity, but when you have the same principal,
15 particularly ownership, common ownership with United and
16 these stores, there's tremendous amount of moving back and
17 forth, particularly when it comes to funds --

18 MR. HOLT: Yes. And, you know, --

19 JUSTICE SWAN: -- and money.

20 So even if United Corporation is not a party
21 to this lawsuit, because of it -- because of its connection
22 to Mr. Yusuf, who is a party in this, and here this United
23 Corporation is doing business as what? What's the -- what's
24 the -- what is their name, what is their --

25 MR. HOLT: Plaza Extra.

1 JUSTICE SWAN: Plaza Extra. Plaza Extra is
2 their what? Is their trade name.

3 MR. HOLT: Right.

4 JUSTICE SWAN: Plaza Extra.

5 The name of these stores is what?

6 MR. HOLT: Plaza Extra Supermarkets.

7 JUSTICE SWAN: Absolutely. There's a
8 tremendous linkage between both, --

9 MR. HOLT: Right.

10 JUSTICE SWAN: -- and I don't see how you can
11 separate the one from the other.

12 You know, they can have all -- the fact is is
13 that they might be separated because of legal papers, but is
14 the operation of both really separate when you have
15 commonality of ownership?

16 MR. HOLT: Well, you know, I don't think that
17 they even know which store they want to give. Because in
18 their complaint where United Corporation sued Wally Hamed,
19 they actually allege in there that in 1986, the plaintiff,
20 United, through its shareholder and then president, entered
21 into an oral agreement, almost suggesting that United is the
22 partner. But certainly they admit that Mr. Yusuf was their
23 agent in reaching all their agreements.

24 JUSTICE HODGE: Do you agree that the Court
25 pierced the corporate veil in this as the --

1 MR. HOLT: I don't think there's any need to.
2 I think Judge Brady addressed that in his findings where he
3 talked about just because you use the corporate form for the
4 partnership doesn't mean it is not a partnership. And so
5 the corporation can continue to own the shopping center,
6 they can continue to send notices and try to collect rent
7 from the supermarket. And -- and they do function
8 separately. They have their own -- they do have a fairly
9 large shopping center with many tenants which has nothing to
10 do with this. So there's no need to pierce the corporate
11 veil.

12 JUSTICE HODGE: Let me ask, on the escrowed
13 account, the \$43 million that's in escrow, what's the status
14 of that right now?

15 MR. HOLT: Well, it's about 36 million right
16 now. 6.5 million of that money was used to pay the last tax
17 payment due under the criminal case.

18 In the criminal case, tax returns were not
19 filed, but quarterly payments were made. But at the end --

20 JUSTICE HODGE: The taxes that your client
21 paid recently, did it come from that fund or from a
22 different fund?

23 MR. HOLT: They came from that fund. What
24 happened was the 6.5 million was -- the Marshal Service
25 removed it from the Banco Popular account to United so it

1 could be -- it was specifically designated to pay those
2 taxes, so we're now using money from the profit account --

3 JUSTICE HODGE: The Court approved that?

4 MR. HOLT: Excuse me?

5 JUSTICE HODGE: The Court approved your
6 client's payment of the taxes from the escrowed amount?

7 MR. HOLT: Well, in the criminal case, the
8 Marshal, which really is the monitor, approved the
9 disbursing of the money so the taxes could be paid, and the
10 taxes were paid. Now, there's a question --

11 JUSTICE HODGE: My question basically goes to
12 it. If it was determined that the -- that Mr. Yusuf was
13 wrongfully enjoined, and he's entitled to damages to collect
14 it from the bond, how can he collect it from that escrow
15 amount?

16 MR. HOLT: Well, I think the escrow amount's
17 going to go out of escrow in about ten days, but it was
18 still -- they each have a right, it's joint profits, and he
19 would be able to collect it from that joint profits. That
20 escrow fund will end.

21 JUSTICE HODGE: Will that depend on the
22 determination in this case that he is entitled to it?

23 MR. HOLT: Excuse me?

24 JUSTICE HODGE: Will it depend on the
25 determination in this case that he is in fact a partner and

1 is entitled to half of it?

2 MR. HOLT: Yes. Yes.

3 JUSTICE HODGE: So if he loses on that, and
4 the Court determines that there was no partnership,
5 therefore there's no protection for him --

6 MR. HOLT: Then Mr. Yusuf gets all the money.
7 There's no damages. Where's the damage? He just gets it
8 all. In other words --

9 JUSTICE HODGE: He gets it all because it was
10 his to begin with, if the Court so ruled. So where does he
11 get the protection on the bond?

12 MR. HOLT: Well, you see, that's why in the
13 brief that I wrote, I said they didn't raise the sufficiency
14 of the bond on the details, because in the court below they
15 didn't do anything. But then in their motion for
16 reconsideration, they tried to come up with a laundry list
17 of items where they thought they'd have damages. They
18 didn't even mention what you said. What they mentioned was
19 they couldn't get rent, which of course is irrelevant
20 because rent belongs -- is an asset of the landlord, not the
21 tenant. They talked about some legal fees, but they didn't
22 put any evidence in of those legal fees, and we put in
23 evidence that those legal fees would not be incurred. They
24 put in the net -- they said we're going to lose the net
25 equity, but all they did is they had an accountant say the

1 net equity is X. He didn't say they would lose it.

2 And then the final items he said, We want to
3 fire three people, so we have to be indemnified against
4 their salaries. And I pointed out, if you fire three
5 people, you're going to have to fire three -- hire people to
6 do their three jobs. They're all managerial employees.

7 So we think the \$25,000 protects them on
8 their analysis of the damages, and we responded to all of
9 that in the reply to their motion on the bond. And they
10 didn't file a response to that. In other words, they filed
11 a motion for reconsideration. We opposed it. They didn't
12 file a reply.

13 And so we think that the 25,000 is a
14 sufficient sum.

15 JUSTICE HODGE: But the Court didn't went
16 ahead and said, Well, additionally it's secured by an
17 additional sum.

18 MR. HOLT: Right.

19 JUSTICE HODGE: Is it really proper, if you
20 have a dispute concerning a fund, --

21 MR. HOLT: Right.

22 JUSTICE HODGE: -- is it proper to say, Well,
23 we'll secure your interest if you are successful by this
24 disputed fund, which may or may not be you have any interest
25 in at the end?

1 MR. HOLT: You know, I think you have to come
2 back and say, did the Judge error in making that finding?
3 Because if you recall, they said in their pleadings that my
4 client was entitled to 50 percent of the profits, and
5 everyone agrees that those are the profits in there.

6 JUSTICE HODGE: Then what's to hold it? Why
7 not just go ahead and said, I find, based on this and this,
8 he's entitled to it now? You agree that there's going to be
9 a long dispute on the merits.

10 MR. HOLT: Entitled to it now? Well, right
11 now the U.S. Government has a check on it. When the
12 criminal case is resolved and the Marshal no longer has a
13 hold on it, then it could be released. But the question is,
14 is Mr. Yusuf going to try to seize it all, or are we going
15 to release it 50/50?

16 JUSTICE HODGE: Right. There's a dispute as
17 to that. Does he gets it all, or is there a partnership and
18 it's 50/50?

19 MR. HOLT: Well, I think you've got to go
20 back and look at what's in the record. I mean, they --

21 JUSTICE HODGE: I understand, but then the
22 whole meaning of the lawsuit is meaningless. Then why have
23 a lawsuit if you've already determined that he's entitled to
24 half of it because he admitted it in a deposition?

25 MR. HOLT: Well, we did move --

1 JUSTICE HODGE: As I understand, basically --

2 MR. HOLT: We did move for summary judgment,
3 and the judge denied it.

4 JUSTICE HODGE: And that was --

5 MR. HOLT: Oh, yeah, we moved. He said, Let
6 them do their depositions first. Let them do their
7 discovery. But, yes, we think that will be the outcome.

8 When you're coming right back to it, in the
9 end, you know, it's not just about that. This lawsuit's not
10 just about that -- that money. I mean, these stores are
11 very viable important stores, and who operates them is part
12 of -- is part of the lawsuit.

13 JUSTICE HODGE: And who -- whether there's a
14 partnership and who owns it is critical.

15 MR. HOLT: Right.

16 JUSTICE HODGE: And that's what the Court is
17 going to determine.

18 MR. HOLT: And if there's a partnership, then
19 how do we dissolve it if you dissolve it? Are there rights
20 where one partner can move the other person out under the
21 Partnership Act?

22 JUSTICE SWAN: Well, let me ask you a very
23 pointed question. We talk about a partnership partnership,
24 we raise the issue of the statute of limitation, we raise
25 this issue and that issue, but it -- wasn't this -- the

1 parties' conduct, their action, their working
2 collaboratively over a period of years, money flowing back
3 and forth and so forth and so on, can we -- can we ignore
4 the fact that this was an ongoing -- whenever it started or
5 commenced, it's an ongoing relationship, business
6 relationship, that they had over a period of years?

7 So we don't know, we can't say, well, the
8 partnership, maybe it were not intended to be a partnership,
9 but did their overt conduct, their action, the management of
10 the stores, all of these activities that both of them, and
11 the interrelationship, the family relationship, wouldn't all
12 of these things seem to -- would not have to be the Judge
13 have to look at this to determine whether or not there was a
14 partnership, whether or not -- and look at the
15 pronouncements of the -- of the parties over a period of
16 years? We have people making statements saying that I am
17 partners, and the other instances saying, Well, you know, I
18 don't think so. It's a joint venture.

19 All of these things would have to be
20 resolved, but the fact is that I don't think that this is a
21 cut-and-dried case like when you and I decided to write and
22 draft a partnership agreement to practice law. This is
23 vastly different.

24 MR. HOLT: Yes.

25 JUSTICE SWAN: Another thing, too, is who is

1 the one that proposed the dissolution agreement of the
2 partnership?

3 MR. HOLT: Well, Mr. Yusuf sent letters
4 saying he wanted to dissolve the partnership.

5 JUSTICE SWAN: All right. Okay. Even though
6 it was not signed or anything, would somebody saying -- if I
7 don't have a partnership with you, why would I want to even
8 raise an issue of dissolving that partnership?

9 MR. HOLT: Well, you see, nobody really
10 wanted -- "dissolving" means we're going to close the stores
11 and sell everything at a sale and all -- and all go home.
12 What they wanted to do is send us out of the partnership.

13 JUSTICE SWAN: No, no, no, I'm just simply
14 saying that to the extent that if you are claiming that
15 there's no partnership at all, --

16 MR. HOLT: Right.

17 JUSTICE SWAN: -- that we had a joint
18 venture, that -- despite all the factual representations to
19 the contrary, if somebody going to go over and say, I am
20 going to -- I'm sending you a letter through my lawyer, my
21 lawyer is authorized to draft a dissolution agreement
22 dissolving the partnership, why would I want to talk about
23 dissolving a partnership if there is no partnership?

24 MR. HOLT: That's exactly right. And if you
25 read it, it wasn't really dissolving. It was trying to

1 split it.

2 JUSTICE SWAN: Yeah, I know. I know.

3 MR. HOLT: It was --

4 JUSTICE HODGE: But -- but did you agree
5 that, you know, was there a dispute as to whether the Court
6 should have accepted even looking to that, since it was in
7 fact a settlement agreement on the 408, was that --

8 MR. HOLT: It wasn't really dissolving. The
9 Court found that --

10 JUSTICE HODGE: I thought you basically had
11 tried to argue that the Court didn't really rely on that --

12 MR. HOLT: Right. The Court found that -- it
13 laid fourth the historical background, which was consistent
14 with other evidence in the case and therefore was
15 admissible, and did not admit it for purposes of any how
16 we're going to divide this up or who should get what.

17 And, you know, it is a complicated web. And,
18 you know, the west store is actually gives you the whole
19 thing. The west store is owned by -- the land is owned by a
20 company called Mt. Plessen. Each family owns 50 percent of
21 the stock. There's no lease with the store. The store is
22 operated by Plaza Extra. I mean, that shows you how much
23 all of this has been put together without any paperwork
24 really thinking this day might come and this is going to
25 happen.

1 And we're going to test that Partnership Act
2 and see if we can't sit down one day and work it out, which
3 really would be the best solution.

4 JUSTICE HODGE: That's all, since you --

5 MR. HOLT: Okay.

6 JUSTICE HODGE: Okay. You can go ahead and
7 wrap it up. Make your final --

8 MR. HOLT: Wrap mine up?

9 JUSTICE HODGE: Just wrap up your argument.

10 MR. HOLT: My wrap-up is basically, I don't
11 think that Judge Brady made any clear error in any of his
12 findings of fact, and he didn't abuse his discretion in
13 trying to hold the business together until he could have a
14 trial or a trial could had to resolve this on the merits.
15 And we respectively submit, under the standards of review
16 and the applicable law, there's no abuse of discretion.

17 JUSTICE HODGE: And the standard of review is
18 abuse of discretion.

19 MR. HOLT: Yes. The findings of fact
20 are review for clear error --

21 JUSTICE SWAN: The preliminary injunction.

22 MR. HOLT: Ultimately on the injunction,
23 applying all of it is abuse of discretion.

24 JUSTICE HODGE: Thank you.

25 We'll still give you three minutes. You

1 didn't take that up, so use your three minutes.

2 MR. DIRUZZO: Okay.

3 JUSTICE HODGE: Or four minutes. Sorry,
4 four.

5 MR. DIRUZZO: And let me go back to the point
6 I was -- I was -- I was trying to get at before.

7 Footnote 28, where the plaintiffs ask and assert that the
8 Court find that he's entitled to buy out Yusuf, okay, well,
9 since partners are supposed to have the same rights, there
10 should be symmetry under the UPA, well, to the extent in the
11 event that there is a counterclaim, Fathi Yusuf would then
12 be able to claim that he is entitled to what? Buy out
13 Hamed. What are we getting back to, buying someone out?
14 That's a money damages case.

15 This case is not about irreparable injury,
16 it's about a money damages case. It's three grocery stores
17 that can be valued. An economist or forensic accountant can
18 come in and put a value on it. This is not a piece of art,
19 a piece of land --

20 JUSTICE SWAN: Hold on, hold on, hold on,
21 hold on, hold on, hold on, because my reading, particularly
22 of Wright and Miller and a couple of other things, they make
23 a distinction when they talk about money damages as to the
24 value of the business if you break it up, or whether or not
25 if you're destroying the business. Destroying the business

1 is a vastly different thing from the value of the business,
2 and you got to make that clear. And court case -- case law
3 make it abundantly clear that when you're talking about
4 businesses and you're talking about money damages, where you
5 say, Well, it's compensable in money damages, you got to be
6 very careful because here we are talking more than just
7 money damages. We're talking about possibly the destroying
8 of the source.

9 MR. DIRUZZO: But when you have an at-will
10 partnership, you cannot force partners to continue,
11 so that --

12 JUSTICE SWAN: I understand all of that.

13 MR. DIRUZZO: But the remedy is to dissolve,
14 and by definition a dissolution of a partnership means that
15 the business is closed, that the assets are divvied up,
16 liabilities are paid, it is wound up in the appropriate
17 orderly course, and that there is a value that's assigned
18 for the business at that point in time.

19 JUSTICE SWAN: Well, you know --

20 JUSTICE HODGE: What's wrong if someone
21 simply says, Instead of dissolving it and closing the
22 business, I'd like to buy him out and continue the business?
23 What's -- what's the difference?

24 MR. DIRUZZO: Well, the difference, there is
25 no difference insofar as it goes back to it's about money.

1 It's not about irreparable injury. There are three subsets
2 of cases that the Third Circuit --

3 JUSTICE SWAN: No, no, no, no, no, no, no,
4 no.

5 JUSTICE HODGE: Well, how about the cases
6 that are cited saying you have a right to the management
7 rights?

8 MR. DIRUZZO: Anderson -- Anderson is a
9 Section 1983 case where -- where Attorney Rohn was followed
10 by the VIPD. That's a constitutional case.

11 JUSTICE HODGE: Talking about partnership
12 cases that says you have a right in the management, and
13 therefore that is not compensable by damages.

14 MR. DIRUZZO: I -- I would say that would
15 make every partnership, LLC, triple LC, that would make
16 every business dispute, every ordinary business dispute an
17 extraordinary case. That cannot be the right answer. The
18 exception would swallow the rule.

19 JUSTICE SWAN: Well, you know, one -- one of
20 the things that I think is being missed here is that it's a
21 vastly different thing, and I keep driving home this point,
22 it's a vastly different thing to say, Well, the -- the --
23 the -- the businesses were X, Y, Z, but I think we are
24 talking more than that here. We are talking about the
25 conduct of certain individuals that's pernicious and

1 inimical to the business itself, and the survival of the
2 business. Survival of the business. And something that's
3 pernicious to the operation of the business is vastly
4 different from the value of the business. The value of the
5 business is compensable in money damages under the
6 preliminary injunction, but when you're talking about the
7 conduct, the ongoing conduct of the parties, that is -- that
8 seems to result in the demise of the business, --

9 MR. DIRUZZO: But --

10 JUSTICE SWAN: -- that's when the Judge ought
11 to step in and say, Let me maintain the status quo until we
12 can have a full-blown hearing on the merits.

13 MR. DIRUZZO: That would make every
14 management dispute where one manager of an LLC or one
15 partner in a partnership claims that the other is doing
16 something that inhibits the value --

17 JUSTICE SWAN: Oh, no, no, no, no. Attorney,
18 you're being too simplistic. We are not talking -- we are
19 talking about where huge amount of money, operation over a
20 period of time, disputes over a period of time. We're not
21 talking about a single dispute today, so then we got to
22 dissolve the business that you would like to make it in a
23 simplistic fashion. But where you have disputes that are
24 ongoing over a period of time, a huge amount of money is
25 involved, there's accusation that some folks are using

1 five-point-something million dollars, or
2 seven-point-something million dollars without -- without
3 authorization from the other partner, and all of these
4 things, this is what I'm talking about.

5 This is not just a simple thing. I'm talking
6 about over a period, over a period of time where it begin to
7 affect the operation of the business, and -- and -- and
8 probably the life of the business. That's what we're
9 talking about, not a single incident.

10 MR. DIRUZZO: No, Justice Swan, here's why
11 you get this wrong, because you are talking about impairing
12 the value of the business based on malfeasance on a
13 going-forward basis.

14 JUSTICE SWAN: No, no, no, I'm not talking
15 about -- I'm not talking about the valuation of the business
16 at all, I'm simply saying is that when the Judge enters the
17 TRO, perhaps what he was talking about is survival of the
18 business because of the conflict. You are now telling
19 me that --

20 MR. DIRUZZO: But what's the point?

21 JUSTICE SWAN: -- there's a tremendous amount
22 of conflict going on, so what he's saying is that, Let me
23 stop everyone and let me get a grasp of this thing until
24 such time as I have an opportunity to resolve the entire
25 issues on the merits and enter a permanent injunction.

1 MR. DIRUZZO: The -- the reason to do that
2 would be to save the business. What do you save the
3 business from? You save the business from decreasing in
4 value. You don't save the business so that partners who are
5 at odds with each other can continue to be at odds at each
6 other to continue running a business, because they hate each
7 other. That does not serve the public interest. That does
8 not preserve value.

9 This case is a money damages case.

10 JUSTICE SWAN: Then maybe the Judge ought to
11 have or to put somebody in there to run the whole thing
12 until it could be resolved on the merits, and perhaps that
13 would be a better idea.

14 MR. DIRUZZO: Well, I would submit, based on
15 the case law, based on the facts and based on the standards
16 of review, and particularly the de novo review as to issues
17 of law that are present in this case, the trial court made
18 error and this court should vacate the decision involved and
19 remand for a full trial without the preliminary injunction
20 and the (inaudible).

21 Thank you very much.

22 JUSTICE HODGE: Thank you. The matter will
23 be submitted.

24 --oOo--

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I, CHERYL L. HAASE, REGISTERED PROFESSIONAL REPORTER,
Christiansted, St. Croix, U.S. Virgin Islands, do
hereby certify that the foregoing transcript was transcribed
to the best of my ability.

Dated this 13th day of December, 2013.

Cheryl L. Haase, RPR