

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: FIRSTIER MORTGAGE COMPANY, aka REALBANC,
INC., Petitioner V. INVESTORS
MORTGAGE INSURANCE COMPANY

CASE NO: 89-1063

PLACE: Washington, D.C.

DATE: October 10, 1990

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IN THE SUPREME COURT OF THE UNITED STATES

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FIRSTIER MORTGAGE COMPANY, :
aka REALBANC, INC., :
Petitioner :
v. : No. 89-1063
INVESTORS MORTGAGE INSURANCE :
COMPANY :
- - - - -X

Washington, D.C.
Wednesday, October 10, 1990

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:00 p.m.

APPEARANCES:

JACK S. DAWSON, ESQ., Oklahoma City; on behalf of the
Petitioner.
JOHN P. ROBERTS, ESQ., Oklahoma City; on behalf of the
Respondent.

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P R O C E E D I N G S

(2:00 p.m.)

1
2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument now
4 on No. 89-1063, FirstTier Mortgage Company v. Investors
5 Mortgage Insurance Company.

6 Mr. Dawson, you may proceed whenever you're ready.

7 ORAL ARGUMENT OF JACK S. DAWSON

8 ON BEHALF OF THE PETITIONER

9 MR. DAWSON: Mr. Chief Justice, and may it please
10 the Court:

11 My client sued the insurance company over eight
12 policies of private mortgage insurance. They filed a motion
13 for summary judgment which was set for oral argument after
14 a lot of briefing. If you had been in the courtroom on
15 January the 26th, 1989, you would have heard Judge Bohanon
16 say, these policies should be and are cancelled. He said
17 these policies are void, and then he turned to me and Ms.
18 Dansby and said, the losing party has a right to appeal.
19 I don't think you'll get anywhere, but you may appeal my
20 decision.

21 And so Ms. Dansby and I went back to the office
22 and looked at rule 4(a)(2).

23 QUESTION: There was more in that colloquy, wasn't
24 there?

25 MR. DAWSON: Yes, Your Honor.

1 QUESTION: Than what you've just --

2 MR. DAWSON: And I'll -- and I will get to that
3 in just a minute.

4 QUESTION: Okay.

5 MR. DAWSON: Well, I'll get to it right now. He
6 said then -- back to Mr. Gray, who represented the defendant
7 -- I would like for you to prepare suggested findings of
8 fact and conclusion of law and I want you to point out for
9 me the evidence that you rely on and where I can find it in
10 the record. And he gave him 10 days to do that and then
11 said, and give your opposing counsel a copy of that and
12 then, Mr. Dawson, if you find any of those are in error,
13 you may point that out to me, also.

14 QUESTION: This was on a motion for a summary
15 judgment, wasn't it?

16 MR. DAWSON: Yes, Your Honor.

17 QUESTION: Does the district court ordinarily make
18 findings of fact and conclusions of law in a motion for
19 summary judgment?

20 MR. DAWSON: They don't have to, of course, under
21 rule 56. They don't have to at all. And I --

22 QUESTION: I'd always thought of findings of fact
23 as being something you have at the end of a bench trial
24 where there are contested facts.

25 MR. DAWSON: Yes, sir, and then I think the court

1 it required to under the rule. But I think under a motion
2 for summary judgement because we, the lawyers, are supposed
3 to set out in our briefs what the facts are, that it's --
4 I can't tell you what's ordinarily done. I'd say 50-50,
5 something like that. But anyway, it's not a requirement.

6 We went in -- went back, we filed our notice of
7 appeal and we said very specifically, we're appealing from
8 the announcement of a decision. We said the judgment has
9 not been entered and we said we're relying on 4(a)(2) and
10 so we thought we knew what we were doing. We studied this
11 and did this on purpose.

12 Then we get the letter from the circuit court that
13 said, please brief the issue of whether we had jurisdiction
14 because -- excuse me -- Judge Bohanon was considering
15 findings of fact and conclusions of law. We --

16 QUESTION: You don't think you would have been at
17 any risk if you had delayed filing your notice of appeal
18 until after the formal entry of judgment, do you?

19 MR. DAWSON: The only risk that I see as a trial
20 lawyer is the risk of misdocketing, the risk of mailing it
21 late, the risk of running up a deadline. You -- when you're
22 trying these lawsuits, and you'll occasionally lose some of
23 them, you need to appeal, you wake up at night and you
24 think, oh, have I filed a motion. You never wake up at
25 night thinking I filed it too early. You're -- you know,

1 you're always worried about getting it on file or is it
2 docketed right or is the mail going to run. So, that's the
3 decision.

4 There's also another reason for getting these in
5 early if -- it's like playing football. Once you lose one
6 game or win one game, you want to focus on the next game as
7 soon as possible. And that's the way Ms. Dansby and I
8 looked at it. When we came back from the hearing of Judge
9 Bohanon, we had lost this case in a trial court. Judge
10 Bohanon, in his decision -- you can read it in the appendix
11 --

12 QUESTION: Yes, but you certainly can mark your
13 trial -- your desk calendar to file notice of appeal later.
14 You don't dismiss it entirely from your mind, do you?

15 MR. DAWSON: No, Your Honor, you don't. It's
16 constantly on your mind. And seriously, you wake up in the
17 middle of the night sometimes wondering, when am I supposed
18 to file it and am I going to get it done on time.

19 QUESTION: Well, if you mark your desk calendar,
20 you won't wake up in the middle of the night.

21 MR. DAWSON: Well, I do. And you just do. You
22 can take all the steps that you want to to try to get it
23 docketed on time and you still want -- you just worry until
24 it's done. And usually it gets done. Usually there is no
25 problem.

1 But you want to also focus on the next -- the next
2 step and so we then started to focusing on the appeal after
3 Judge Bohanon ruled. And in his ruling, he says, there's
4 no doubt in my mind, there is absolutely no doubt in my mind
5 about this case. And he said that immediately after he
6 said, Mr. Gray -- or Mr. -- he told us to help him prepare
7 some findings of fact which would support him. His very
8 next sentence is, there's no doubt in my mind -- there is
9 absolutely no doubt in my mind about what I'm going to do
10 in this case.

11 QUESTION: That settles it.

12 MR. DAWSON: Well, then we get the letter from
13 the supreme -- from the court of appeals. We brief it, and
14 then they send us back an order which is essentially a
15 sentence long that says, we don't have jurisdiction because
16 the announcement was not a final decision as described by
17 28 U.S.C. 1291. The announcement was not final.

18 Our point is -- well, I guess we have really two
19 points. Number one, it's not supposed to be final. There's
20 no call for it to be final. The rule doesn't require it to
21 be final.

22 And two, in our case, if you want to -- if you
23 want to write the word "final" into the rule, this was a
24 final decision. It disposed of all of the issues. It --
25 for all of the parties.

1 QUESTION: 1291 certainly speaks in terms of a
2 final decision, doesn't it?

3 MR. DAWSON: Final decision. Yes, Your Honor.
4 And I think -- and Professor Moore -- I agree with him and
5 it is pointed out by opposing counsel -- Professor Moore
6 says Rule 428 talks about announcement which will result in
7 an final decision or a final judgment. I think --

8 QUESTION: Well, surely, the case wasn't ready
9 for review in a -- by an appellate court based on Judge
10 Bohanon's oral statement. There weren't any findings of
11 fact; there weren't any conclusions of law. And he said
12 that he certainly had some more things to do to make his
13 decision reviewable.

14 MR. DAWSON: Well, I think that his decision was
15 reviewable at that time, because he didn't have to enter --
16 he could have changed his mind and just said I'm just not
17 going to do findings of fact and conclusions of law. We did
18 -- we would have -- everybody would want to see a journal
19 entry entered, so you would have the 30 days start to run
20 from that time, but even that can be waived by the parties,
21 as the Bankers Trust case --

22 QUESTION: Now, Mr. Dawson, you're not arguing it
23 was reviewable at the time of the oral -- every case covered
24 by this rule is not reviewable at the time of the oral
25 announcement, because that clearly speaks to orders that are

1 not yet final.

2 MR. DAWSON: I was only --

3 QUESTION: They're all prejudgment and oral
4 announcements.

5 MR. DAWSON: Yes, Your Honor. And I think that
6 --

7 QUESTION: That's the whole purpose of the rule.

8 MR. DAWSON: That's correct. I think that under
9 an extreme circumstances that that ruling could have been
10 reviewable at that time. I don't think it's even necessary
11 to reach that, because we didn't -- I truly thought that we
12 were going to have a journal entry of judgment. That starts
13 our time to run --

14 QUESTION: But the rules doesn't say anything
15 about journal entries. It talks about oral announcements.

16 MR. DAWSON: Yes, Your Honor. And an oral
17 announcement of a decision --

18 QUESTION: And the question is whether this was
19 an announcement within the meaning of that rule. That's
20 the whole issue, isn't it?

21 MR. DAWSON: Yes, Your Honor.

22 QUESTION: Now, Mr. Dawson, do you think that a
23 rule of appellate procedure can make appealable something
24 which 1291 does not make appealable?

25 MR. DAWSON: No, Your Honor. And I'd --

1 QUESTION: So, it would have to be a final
2 decision before it could be appealed?

3 MR. DAWSON: It would have to be an appealable
4 decision.

5 QUESTION: Well --

6 MR. DAWSON: Interlocutory or collateral.

7 QUESTION: Yes, yes.

8 MR. DAWSON: -- or something like that.

9 QUESTION: 1291, 1292.

10 MR. DAWSON: Yes.

11 QUESTION: You know, the rule itself could not
12 enlarge what's appealable.

13 MR. DAWSON: That's correct, Your Honor.

14 QUESTION: No, but the rule doesn't purport to do
15 that. It speaks to the date at which the thing becomes
16 appealable, which is after it becomes final and that's when
17 the oral -- that's when the notice of appeal becomes
18 effective under the rules.

19 MR. DAWSON: That's correct. At that point, the
20 --

21 QUESTION: So, it's perfectly clear there's no
22 finality before the judgment was entered, no appealability.
23 It couldn't have been. You couldn't change the act of
24 Congress. But if your notice of appeal was followed the day
25 after it became a final, if the rule provided that's when

1 it becomes effective, that's the end of the ball game, isn't
2 it?

3 MR. DAWSON: I'm sorry, Your Honor, I didn't
4 follow.

5 QUESTION: If your notice of appeal becomes
6 effective as soon as the judgment becomes final, which is
7 what the rule says --

8 MR. DAWSON: Yes, sir.

9 QUESTION: -- then, of course, you have a -- then
10 a final judgment to appeal.

11 MR. DAWSON: Yes, sir.

12 QUESTION: Just what the rule says. That's all.

13 MR. DAWSON: That's correct. And that's our
14 position is if we just -- if you'll let us, the lawyers that
15 are trying the cases and appeal them, follow the rules as
16 they're written, and if they're enforced as they're written,
17 then they'll be effective and it will be -- make my job a
18 lot simpler. This Court is committed to practical, common
19 sense construction of statutes and rules. And if there is
20 a -- if there is any way to interpret a rule in past
21 decisions, you've been committed to the rule that we will
22 interpret it to save an appeal, not to facilitate its loss.
23 And so even if you want to -- even if you have to interpret
24 this rule, I think that that's the way it should be looked
25 at first.

1 I would ask the Court to -- I think we're more or
2 less committed to using this word "final" and "finality" as
3 it's applied to judgments and so forth. But then to try to
4 apply that term to oral announcements is really going to
5 cause a lot of problems. Wright and Milliner, talking about
6 final judgments quoted Judge Frank in the Second Circuit
7 1942 and he said this term finality is a slithery, tricky
8 word and there's not much finality to the definition of
9 finality. I think this Court has recognized that it's --
10 and has called it a twilight zone, the use of the word
11 finality is a twilight zone. Subject to perpetual debate,
12 a jungle of doubt -- those words have been used about the
13 word "finality."

14 So if you want to -- that's the reason I suggested
15 earlier that the word "appealability" is a lot easier to
16 deal with in this context than finality is.

17 QUESTION: I just don't understand that argument,
18 because appealability and finality are the same thing.
19 Appealability is after the judgment becomes final. All you
20 do is postpone the effective date of the notice. It doesn't
21 change the date of appealability or the date of finality.

22 MR. DAWSON: Well, there is -- there is -- there
23 are a slim bunch of cases which is called the collateral
24 order doctrine. If this order sounds the death knell for
25 the case regardless of whether it's final. Take a double

1 jeopardy type thing --

2 QUESTION: Yeah, but if it's a collateral order
3 doctrine, then it's final when it's entered. But you don't
4 have to rely on that.

5 MR. DAWSON: Well --

6 QUESTION: As I understand your position it's just
7 it -- it doesn't become final until the judgment's entered.
8 But -- notice of appeal is treated as if it were filed the
9 day -- the next day.

10 MR. DAWSON: Yes, Your Honor. In our simple case
11 that we have there, that is absolutely true.

12 QUESTION: And that's what the rule says.

13 MR. DAWSON: Yes, sir. That is very simply our
14 position, and I'll reserve the rest of my time.

15 QUESTION: Thank you, Mr. Dawson.

16 Mr. Roberts, we'll hear now from you.

17 ORAL ARGUMENT OF JOHN R. ROBERTS

18 ON BEHALF OF THE RESPONDENT

19 MR. ROBERTS: Mr. Chief Justice, and may it please
20 the Court:

21 I would respectfully propose that this case
22 involved two basic issues to this appeal. The first is what
23 is the meaning of a final judgment, under section 1291 and
24 the second is what is the purpose and effect of rule 481
25 under the Federal rules of appellate procedure?

1 By enacting section 1291, Congress mandated that
2 appellate -- appellate jurisdiction be limited to final
3 decisions. This evolved into what is commonly referred to
4 as the final judgment rule, which requires a party must
5 ordinarily raise all claims of error in a single appeal
6 following a final judgment along the merits. And there's
7 -- I would propose that there's several advantages to the
8 final judgment rule.

9 The first advantage would be it avoids the
10 appellate courts' and the trial courts' looking at the same
11 issue at the same time. It allows -- it avoids the
12 appellate courts' interference --

13 QUESTION: Mr. Roberts, that's not involved by
14 your opponent's theory here. There's no jurisdiction in
15 the appellate court until the notice of appeal becomes
16 effective.

17 MR. ROBERTS: That's correct, Your Honor.

18 QUESTION: And it doesn't become effective 'til
19 the judgment becomes final.

20 MR. ROBERTS: That's correct, Your Honor. And our
21 position is the judgment became effective on March 3d at
22 the time that the court entered its memorandum opinion and
23 the judgment was entered.

24 QUESTION: And also the notice of appeal became
25 effective on that same date under the rule.

1 MR. ROBERTS: That's correct, Your Honor. That's
2 what the --

3 QUESTION: Well, then how is there any danger of
4 both courts having jurisdiction at the same time?

5 MR. ROBERTS: Well, I was just advocating some
6 policy arguments in favor of the single judgment rule. If
7 --

8 QUESTION: But they have nothing to do with this
9 case. Because it was at least -- I think you just agreed
10 to that, because the only relevant date is the March 3d
11 date.

12 MR. ROBERTS: That's correct, Your Honor.

13 I might just briefly make a few statements of what
14 the record indicates of the hearing on January the 26th,
15 1989. The court did say, I find that the policy should be
16 entered cancelled as void for one of bad faith and fraud.
17 However, the trial court asked IMI, the respondent, to
18 submit proposed findings of fact and conclusions of the law,
19 which were not required but nevertheless the court requested
20 that. And the trial court specifically stated on the record
21 that it will look to what IMI submits as suggestions, as --
22 and only suggestions only.

23 And the court specifically stated that it reserved
24 the right to modify, add to, delete, and write its own
25 findings of fact and conclusions of law and --

1 QUESTION: Mr. Roberts, isn't that true of every
2 case covered by this rule, that when an oral announcement
3 is made, the judge can always change his mind?

4 MR. ROBERTS: Absolutely.

5 QUESTION: Well, then what case does the rule
6 cover if it doesn't cover this case?

7 MR. ROBERTS: I can't disagree with you, Your
8 Honor. I -- the court on March 3d, 1989 entered its
9 memorandum of appeal --

10 QUESTION: No, but on -- earlier than that, on
11 January 26th, it made an oral announcement, didn't it?

12 MR. ROBERTS: Yes, it did.

13 QUESTION: Did it make an oral announcement within
14 the meaning of this rule?

15 MR. ROBERTS: I submit it did not. It didn't say
16 this was a final decision --

17 QUESTION: But the rule doesn't require him to
18 say it's a final decision.

19 MR. ROBERTS: All --

20 QUESTION: The word "final" -- final doesn't
21 appear on the rule.

22 MR. ROBERTS: That's true.

23 QUESTION: And what is the point of the rule, if
24 it isn't just postpone the effective date of the notice
25 until after the decision becomes final? Isn't that exactly

1 what the rule is intended to do?

2 MR. ROBERTS: Rule 4(a)(2)?

3 QUESTION: Rule 4(a)(2), yes.

4 MR. ROBERTS: Well, there have been three -- the
5 lower courts have apparently taken three different looks at
6 4(a)(2). The first was that at any time that a -- that a
7 premature appeal to a nonfinal order will be firmed up, so
8 to speak, at the time that the court earns its final order.
9 Other courts have taken the position that rule 4(a)(4) is
10 the only exception to 4(a)(2), so that -- so that when you
11 have tolling motions filed, that a new notice appeal has be
12 filed then. I would --

13 QUESTION: 4(a)(4) isn't involved. We don't have
14 a tolling motion here.

15 MR. ROBERTS: That's right.

16 QUESTION: Okay.

17 MR. ROBERTS: I would propose that the correct
18 rule is that the announcement of a decision can only be an
19 announcement of the final decision, and the purpose of
20 4(a)(2) is when you do not have either the separate document
21 required under the rule 4(a)(6) or a delay in the court's
22 filing on a civil docket in rule 4(a)(6). The reason I
23 submit that is the commentary says that rule 4(a)(2) was
24 designed to afford civil litigants the protection afforded
25 4(b) under the criminal procedure.

1 This Court in Limpkey held that when a defendant
2 was convicted and -- sentenced, he then filed a notice of
3 intent to appeal, and it was subsequently entered -- the
4 tradition was subsequently entered on the clerk's docket.
5 This Court held that that was valid appeal. I would
6 respectfully submit that that's the correct interpretation
7 of --

8 QUESTION: So you would agree -- you would in
9 effect treat the rule as though it read instead of after
10 the announcement of a decision or order, after the
11 announcement of a final judgment?

12 MR. ROBERTS: The --

13 QUESTION: But before the formal entry of the
14 judgment it shall --

15 MR. ROBERTS: Exactly, under rule 4(a)(6). That's
16 what -- that's what we would propose the interpretation of
17 rule 4(a)(2) is.

18 QUESTION: And I suppose you would make the
19 argument that if that isn't what it means, it would not
20 continue "but before the entry of the judgment or order."
21 It would say but before -- "but before the final judgment
22 shall be treated after such final judgment."

23 MR. ROBERTS: (Inaudible), Your Honor --

24 QUESTION: If they didn't mean a final -- if they
25 didn't mean a final decision or order in the first part of

1 4(a)(2), they wouldn't have had to refer to entry of the
2 judgment or order in the second part. They could have just
3 said final judgment in the second.

4 MR. ROBERTS: That's the literal reading of the
5 rule. And it also purports --

6 QUESTION: But even in that could any such
7 decision or order would be really final? If it's before the
8 judgment is entered, the judge can always modify it,
9 couldn't he? Before --

10 MR. ROBERTS: The judge can always modify it.
11 That's correct, Your Honor.

12 QUESTION: So, it would never be final.

13 MR. ROBERTS: I believe that's correct.

14 QUESTION: Do you think that's customary for a
15 district court, at least in your practice, in Oklahoma City,
16 to order the making of findings of fact and conclusions of
17 law when he decides to grant a motion for summary judgment?

18 MR. ROBERTS: I would submit it's very
19 appropriate, for the reason is the trial court realizes that
20 an appellate court may look at his ruling on motion for
21 summary judgment and what findings of fact did the court
22 rely upon in reaching its decision and what statutory case
23 --

24 QUESTION: But I thought our motion for summary
25 judgment was limited to cases where there were no disputed

1 questions or fact, that the district court -- if the
2 district court has to find the fact on any sort of
3 conflicting evidence, then it's not appropriate for summary
4 judgment.

5 MR. ROBERTS: Oftentimes on summary judgment there
6 may be an interpretation of a given set of facts, and the
7 trial court -- I would submit the trial court to protect
8 the record might want to enter findings of fact and
9 conclusions of law.

10 QUESTION: Well, there may not be disputed facts
11 but there are certainly facts on a summary judgment. How
12 can you decide a question of law without knowing what those
13 facts are? If there's a -- so for everybody -- what they
14 in effect -- the court's going to say to grant summary
15 judgement is that everybody is agreed about what the facts
16 are.

17 MR. ROBERTS: But the facts are undisputed, Your
18 Honor.

19 QUESTION: Yes.

20 MR. ROBERTS: And in this case the court entered
21 I believe 23 findings of fact and 15 conclusions of law.
22 The findings of fact in this case were very detailed as far
23 as what were in the insurance applications and what was
24 relied upon, and various factual basis. I would anticipate
25 that the court thought that it was going up on appeal and

1 give some guidance to the Tenth Circuit.

2 QUESTION: But I presume everyone of those factual
3 -- it was really factual statements by the district court.
4 He wasn't finding on the basis of conflicting evidence, but
5 he was just setting forth the facts that the parties agreed
6 were facts. Wouldn't that be the case in the motion for
7 summary judgment?

8 MR. ROBERTS: I would submit the record reflects
9 that he asked for findings of fact from IMI. FirstTier
10 proposed their findings of fact. The court said on the
11 record it was going to write its own judgment and its own
12 findings of fact, which it apparently did on March 3d. And
13 that's what the record reflects.

14 I would submit that it -- that the court did not
15 -- was not required to submit findings of fact on a ruling
16 on a motion for summary judgment. But in this case it did
17 so. I assume it felt it should in order to protect the
18 record on appeal that the Tenth Circuit was going to be
19 looking at it.

20 QUESTION: I take the Tenth Circuit has not ruled
21 on the pending appeal with reference to the second filing?

22 MR. ROBERTS: It has not. The oral argument, I
23 believe, was held in May of this year and the -- it has been
24 briefed, oral argument was held in May, and we've heard
25 nothing from the Tenth Circuit on the subsequent appeal.

1 QUESTION: There is the potential that if we
2 ruled, our ruling would be moot.

3 MR. ROBERTS: There is that potential, because
4 the Tenth Circuit could rule on merits at any time, I
5 assume. We've heard nothing from the Tenth Circuit with
6 regard to that second appeal.

7 Well, to conclude we would -- we would ask the
8 Court to follow that interpretation with respect to rule
9 4(a)(2).

10 And if the Justices have no further questions --

11 QUESTION: Thank you, Mr. Roberts.

12 MR. ROBERTS: Thank you.

13 QUESTION: Mr. Dawson, do you have rebuttal?

14 REBUTTAL ARGUMENT OF JACK S. DAWSON

15 ON BEHALF OF THE PETITIONER

16 MR. DAWSON: Just one point on rebuttal and it
17 kind of begs the question because I don't think that the
18 oral announcement had to be final. But U.S. v. Schaefer
19 Brewing Company we learned in that that it's a find -- the
20 court should look at the actions of all the parties to see
21 whether or not it was a final announcement. And for that
22 reason I --

23 QUESTION: I don't understand what final -- well,
24 your approach to 4(a)(2) requires us to decide what is an
25 announcement, that is, you say there can be an announcement

1 that is not a final announcement. Well, suppose the judge
2 says I intend to rule this way on the matter.

3 MR. DAWSON: I would not call that an announcement
4 of a decision. He's telling you what he intends to do.

5 QUESTION: That's not enough.

6 MR. DAWSON: And I would not call that a decision.
7 I think you'd have to wait until he ruled.

8 QUESTION: It has to be a current ruling?

9 MR. DAWSON: I think so, sir. And --

10 QUESTION: But not necessarily a final rule? I
11 mean, he says you know, I'm ruling this way. I may change
12 my mind before I enter it, but for the time being that's my
13 ruling. Is that an announcement?

14 MR. DAWSON: Yes, sir.

15 QUESTION: It is, even though he can still change
16 it?

17 MR. DAWSON: Even he doesn't say he can change
18 his mind --

19 QUESTION: Yeah.

20 MR. DAWSON: -- he can change his mind. He can
21 change his mind 10 days after he enters the judgment. So
22 in that context, it isn't final. The final that I'm talking
23 about is does it dispose of all the issues, does it dispose
24 of all the parties -- that type of finality.

25 QUESTION: What if this had been a bench trial,

1 Mr. Dawson, not a motion for summary judgment and at the
2 close of the bench trial, the judge says -- he looks at his
3 notes and he says, I'm going to find for the plaintiff and
4 against the defendant, and outlines very generally what he
5 thinks the facts are. And then he turns to the plaintiff's
6 lawyer and says, now, plaintiffs submit findings of fact and
7 conclusions of law. The defendants have a certain time to
8 object to them, et cetera. Is -- is that final under the
9 rule within your view?

10 MR. DAWSON: Yes, sir. Particularly --

11 QUESTION: Even though findings of fact on
12 contested issues and possible objections to them and the
13 district court changing his mind after he sees the
14 objection?

15 MR. DAWSON: The district court can always change
16 his mind. That doesn't --

17 QUESTION: Well, then -- then it really doesn't
18 sound terribly final, does it?

19 MR. DAWSON: Well, because it -- well, it's not
20 final. Even after he enters the judgment as I said earlier,
21 he can change his mind. In 10 days -- within 10 days, sui
22 sponte, under rule 59, he can change his mind and completely
23 reverse himself without a motion. And so under that
24 concept, whether the judge can change his or her mind, it
25 shouldn't fit into the finality formula. The --

1 QUESTION: But there's something still incomplete
2 to be done there, a whole segment of a case to be finished.

3 MR. DAWSON: Yes, sir. There -- well, the last
4 segment of the case. There are some what I would call
5 ministerial duties.

6 QUESTION: Well, I don't think findings of fact
7 certainly are necessarily ministerial duties. The judge can
8 rule for you from the bench and yet you've given it --
9 questions of fact and maybe the plaintiff wants one set of
10 facts found, the defendant wants another. And the trial
11 judge looks back at his notes, maybe as a transcript, and
12 he doesn't go along with the plaintiff on some of the
13 findings of fact.

14 MR. DAWSON: That's correct. I totally agree with
15 that. And as I said, final decision doesn't mean it can't
16 be changed. Final --

17 QUESTION: Well, I thought you were -- earlier
18 you indicated you really didn't care whether -- it wasn't
19 critical whether this oral announcement was a final judgment
20 or not.

21 MR. DAWSON: I don't think it is. Well --

22 QUESTION: And -- because you say the rule can --
23 under the rule what you're appealing is the judgment when
24 he enters it.

25 MR. DAWSON: That's correct.

1 QUESTION: Because the rule says the -- your prior
2 filing will be considered filed on the day the judgment is
3 entered.

4 MR. DAWSON: On the day the judgment is entered
5 and that is what you really appeal from. And if the
6 judgment springs from the oral announcement and is the same
7 --

8 QUESTION: So, you aren't appealing. You aren't
9 -- you're really in effect -- under the rule you aren't
10 appeal his oral announcement. You're appealing --

11 MR. DAWSON: No, Your Honor.

12 QUESTION: -- his final judgment.

13 MR. DAWSON: Absolutely. That's what you appeal.
14 You just get to file it before he actually enters the
15 judgment and it springs to life as he files it -- the
16 judgment. Of course, if he changes or she changes her mind
17 before the journal entry of judgment is filed, then your
18 appeal could be moot or you may have to file a new --

19 QUESTION: All he has to do is say, listen, here's
20 my bottom line. You win; you lose. I will tell you why
21 later.

22 MR. DAWSON: That's correct.

23 QUESTION: Then you can file your --

24 MR. DAWSON: -- file your notice of appeal.

25 QUESTION: Right then and there and wait for a

1 year, waiting on the judge.

2 MR. DAWSON: Yes, sir. And then when he or she
3 files that journal entry, then the circuit court -- it
4 becomes effective --

5 QUESTION: But you certainly can't say that what
6 he has to -- you have to do after his oral announcement is
7 just ministerial, like just making up a piece of paper and
8 filing it.

9 MR. DAWSON: Well --

10 QUESTION: It certainly isn't ministerial. It's
11 -- he's going -- you fellows are going to have to do a lot
12 of work and the judge is going to have to do a lot of work.
13 He says I may revise or I may not take any of your
14 submissions. I may make my own.

15 MR. DAWSON: Maybe ministerial was a poor choice
16 of words.

17 QUESTION: Well, I take it this is not the kind
18 of case where the clerk without awaiting the direction of
19 a court can enter judgment under rule 58, or was it? Was
20 it a judgment which denied all relief?

21 MR. DAWSON: Yes. Yes, Your Honor, it was. And
22 It seems like to me that the clerk could have done that and
23 if you look at the docket sheet --

24 QUESTION: Acting under rule 58?

25 MR. DAWSON: Yes, sir, I think that the clerk

1 could have done that in this case. It didn't happen. And
2 in our district it just doesn't happen. The clerk just
3 doesn't do that. I don't know why, but they just don't.

4 QUESTION: 58 talks about a decision.

5 MR. DAWSON: Yes. But that just isn't our
6 practice and so I really don't have any experience with
7 that. But under the rule it looks like that could have
8 happened in this case.

9 If there's nothing further, then I'm through.

10 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Dawson.

11 The case is submitted.

12 (Whereupon, at 2:27 p.m., the case in the above-
13 entitled matter was submitted.)

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CERTIFICATION

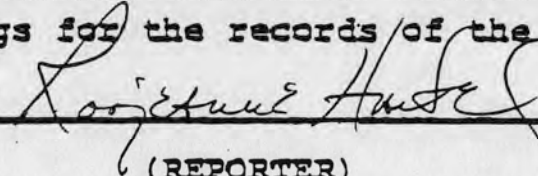
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