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Sears Authorized Termite & Pest Control, Inc. v. Shelley J. Sullivan

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS SEARS VERSUS SULLIVAN. JUSTICE PARIENTE IS RECUSED IN THIS CASE.

GOOD MORN, YOUR HONORS. MAY IT PLEASE THE COURT. I AM ARTHUR KLEIN. MY PARTNER, WITH MY PARTNER JOHN TURNER. WE ARE REPRESENTING PETITIONER DEFENDANT SEARS. THIS CASE, OF COURSE, INVOLVES THE SCOPE OF OR APPLICATION OF AN ARBITRATION CLAN A PEST CONTROL AGREEMENT. SULLIVAN CLAIMS SHE WAS BITTEN BY SPIDERS, AFTER SEARS HAD TREATED HER HOUSE FOR SUCH INSECTS, AND APPARENTLY BITTEN AGAIN, AFTER SEARS HAD RETREATED HER HOUSE. ALL THE PEST CONTROL APPLICAN APPLICATIONS CAME AFTER SHE HAD SIGNED A PEST CONTROL AGREEMENT THAT CONTAINED AN ARBITRATION CLAUSE, AND THE ISSUE, OF COURSE IS WHETHER HER CLAIM MUST BE ARBITRATED, AS THE TRIAL COURT HELD, AND, OF COURSE, WE BELIEVE OR WHETIT IS OUTSIDE THE SCOPE OF THE CONTRACT AND THUS THE ARBITRATION CLAUSE, AS THE FOURTH DISTRICT HELD.

IS IT YOUR POSITION THAT THE ONLY OBLIGATION THAT SEARSHAD TO PROTECT HER FROM BROWN RECLUSE SPIDERS OR WHATEVER, WAS UNDER S CONTRACT. CAN YOU HEAR ME?

YES. YES. I COULDN'T FOR A SECOND. NOW I CAN. THANK YOU.

I WANT TO BE SURE THAT YOU CAN. I APOLOGIZE. BUT IS THAT YOUR POSITION?

OUR POSITION --

THE ONLY DUTY THAT SEARS HAD WAS UNDER THIS CONTRACT, IN TERMS OF THE DUTY THAT SHE ENDS UP SAYING WAS VIOLATED?

ABSOLUTELY. AND WE RECOGNIZE THAT THE COMPLAINT SAYS A NUMBER OF THINGS, AND WHILE THE COMPLAINT DOES REFER TO THE CONTRACTORE FACT THAT A CONTRACT EXISTED, I THINK, WITH ALL DUE RESPECT, YOUR HONORSMULOAT THE SUBSTANCE OF THIS, AND THE ONLY OBLIGATION AND THE ONLY BREACH INVOLVED IN THIS CASE, AND I DON'T KNOW WHETHER IT IS A TORT OR A BREACH OF CONTRACT. I DON'T KNOW WHETHER TO LABEL THIS PARTICULARLY SIGNIFICANT, IS AN OBLIGATION THAT AROSE OUT OF THIS CONTRACT TO ONTROL PESTS. MRS. SULLIVAN SAYS THAT WE DIDN'T CONTROL THEM ADEQUATELY, THAT WE WERE BOUND TOR ADD INDICATE, APPARENTLY, EVERY SINGLE SPIDER. SEARS POSITION IS, OF COURSE, THAT CONTROL, WHICH IS THE CONTRACT LANGUAGE, MEANS SOMETHING LESS THAN THAT.

D YOU AGREE THAT, IF THE SEARS TRUCK THAT WENT OUT TO THE HOME TO DO THIS WORK RAN OVER THIS LADY, THAT IT WOULD NOT BE SUBJECT TO THIS ARBITRATION?

NO. THEN I BELIEVE IT WILL BE SUBJECT TO SIF EARTH. I THINK THAT WOULD BE A SYFERT CASE OR WHAT I WOULD CALL WRONG OUTSIDE THE PRINCIPLE OBJECTI HAVE OF THE CONTRACT.

HOW ABOUT IN THEY USED OVER, MORE CHEMICALS TN NECESSARY, AND SOMEHOW IT BECAME A TOXIC SITUATION AND IT CREATED THE DEATH OF AN OCCUPANT?

THAT, O COURSE, IS MICHAELS OR SOMETHING SIMILAR TO MICHAELS AND I THINK THAT, WHILE A CLOSER QUESTION, I THINK THAT IS PROBABLY, ALSO, WOULD FALL WITHIN SYFERT, BECAUSE THE DISTINCTION TO US AND THE DISTINCTION THAT WE ARE ATTEMPTING TO MAKE HERE, IS

THAT ALL SHE CIMS IS THAT WE DIDN'T ADEQUATELY PERFORM THE CONTRACT, AND THIS IS EITHER INTERPRETATION, PERFORMANCE, BREACH OF CONTRACT, AND NOTHING MORE THAN THAT. SHE IS CLAIMING AN INJURY THAT ONLY RELATES TO THE FACT THAT WE ALLEGEDLY DID NOT DO OUR JOB, THE JOB THAT WE CONTRACTED TO DO DO.

HOW DOES THE EXCESS PERFORMANCE THAT JUSTICE LEWIS JUST ASKED YOU ABOUT FALL OUTSIDE OF WHAT YOU ARE ADVOCATING AND INTO SYFERT?

I AM SORRY.

HE ASKED, IF YOU WERE THERE O APPLY THESE CHEMICALS, AND YOU OVER APPLY IT, YOU INDICATED THAT THAT WOULD BE A CLOSER QUESTION AND MORE AKIN TO SYFERT.

YES.

BUT WHY IT, BECAUSE -- BUT WHY WOULD IT, BECAUSE YOU ARE STILL PERFORMING THE CONTRACT.

I THINK THE DIFFERENCE IS YOU ARE STILL PERFORMING THE NATURE OF THE CONTRACT, WHICH IS DOING SOMETHING HERE, AND SOMETHING IN THE NATURE OF PERFORMING THAT CONTRACT, THAT CREATES A SO-CALLED COMMON LAW WRONG. I THINK THAT WAS EXACTLY THE QUESTION IN SYFERT, I MAY HAVE MISPRONOUNCED IT. THE COMPANY IN SYFERT BUILT THE HOUSE. IT WAS A CONTRACT THAT SOMETHING WAS PERFORMED. THEURSE F PERMING THAT EVIDENTLY SOME DUCT WORK WAS PUT IN WRONG AND WHAT HAPPENED WAS SOMEBODY DIED, AND MICHAELS IS A SWLAR TYPE CASE. MICHAELS APPARENTLY -- IS A SIMILAR TYPE CASE. MICHAELS THEY DID EITHER OVERLY APPLY OR APPLY SOMETHING TOXIC, AND I BELIEVE IT WAS PROPERTY DAMAGE RATHER THAN PERSONAL INJURY, BUT THERE AGAIN, I THINK THE DISTITION IS THAT SOMETHING HAS GONE WRONG, BND A MERE FAILURE TO PERFORM THE CONTRACT. IN YOUR EXAMPLE, JUSTICE LEWIS, I ASSUME YOU ARE SAYING OR GREG THAT THEY PROBABLY KILLED E BUGS. AND THAT BEING SO, THEY HAVE PERFORMED THE CONTRACT AND THE WRONG THAT YOU ARE TALKING ABOUT IN YOUR HYPOTHETICAL, WOULD BE SOMETHING BEYOND THAT, BEYOND THE MERE BREACH OF DUTY. THE TEST THAT, AND I AM SURE JUSTICE ANSTEAD KNOWS FAR BERNIE DO, BUT THE TEST THES THAT WE GOT OUT OF READING SYFERT MANY TIMES, IS THAT THE TEST IS WHETHER THERE IS A SUBSTANTIAL NEXUS, WHETHER THE CLAIM INVOLVES A NEXUS OR A SIGNIFICANT RELATIONSHIP TO THE CONTRACT, AND IN THIS INSTANCE, THAT IS ALL IT INLVES. THERIS NOTHING ELSE, NO MATTER OW YOU PARCE THIS COMPLAINT, NO MATTER HOW YOU TALK ABOUT THE PLEADINGS, AND I KNOW COUNSEL, I AM SURE, WILL SPEAK FOR HIMSELF, BUT IT SEEMS TO BE AN EFFORT TO PLEAD AROUND PONZIO, WHICH IS STILL GOOD LAW, THE PROBLEM AND THE PROPOSITION IS THAT THE TEST IS WHETHER IT COMES WIIN THE NEXUS OR THE SCOPE OR THERE IS A LOT OF WORDS YOU CAN DOWH IT, INEXTRICABLY INTERTWINED WITH THE CONTRACT, AND I DON'T SEE HOW YOU CAN LOOK AT THE FACTS IN THIS CASE AND REACH ANY OTHER CONCLUSION, WITH ALL DUE RESPECT TO THE FOURTH DISTRICT, THAN THAT THIS I NOT A COMMON LAW TORT. THIS IS REALLY ONLY A BREACH OF CONTRACT UNDER ANY WAY YOU LOOK AT IT.

SO WHEN A CONSUMER CALLS SEARS AND WANTS THEM TO DO THIS PEST CONTROL, AND THEY END UP SIGNING ONE OF THESE CONTRACTS, IN ESSENCE THEY ARE SAYING THAT I DON'T HAVE A RIGHT TO GO TO COURT, THAT WE ARE SIMPLY GOING TO ARBITRATE.

IN SOME CIRCUMSTANCES.

THE DISPUTE.

I DON'T KNOW. WE ARE NOT SAYING NEVER. WE ARE SAYING THAT, IN SOME CIRCUMSTANCES, A SYFERT-TYPE CIRCUMSTANCE, A MICHAELS-TYPE CIRCUMSTANCE, WOULD ACCEPT THE

PROPOSITION THAT THERE IS A COURT CASE, BUT, YES, I THINK IN THIS CASE, WHERE THE DISPUTE INVOLVES THE PERFORMANCE OF THE CONTRACT, I THINK YOU LOOK TO THE NATURE OF THE WRONG, THE NATURE OF THE ALLEGED WRONG, RATHER THAN TO THE NATURE OF THE INJURY, AND I THINK THAT IS WHAT SYFERT STANDS FOR. WE READ SYFERT WITH ALL DUE RESPECT, IT TO SAY THAT THERE IS A PLACE FOR ARBITRATION OF TORT CLAIMS, AND THE PLACE IS WHERE THE CLAIM INVOLVES PERFORMANCE OF THE CONTRACT. THE -- YES, THAT IS, I THINK, WHAT WE ARE SAYING, THAT IN THIS CASE, AND WHICH IS VIRTUALLY THE SAME CASE AS SYFERT, I AM SORRY, AS PONZIO, WHICH THIS COURT DID NOT QUASH IN SYFERT AND I THINK VERY CAREFUL NOT TO DO SO, THERE REMAINS A PLACE FOR CASES LIKE THIS AND BASICALLY INVOLVE ONLY THE PERFORMANCE OF THE CONTRACT FOR ARBITRATION. I THINK THIS IS CONSISTENT WITH, CERTAINLY, THE LAW OF FLORIDA. YOU KNOW, I DON'T MEAN TO SPOUT PLATTUDES, BUT ARBITRATION IS STILL FAVORED. THE FLORIDA LEGISLATURE, UNLIKE A NUMBER OF OTHER STATES, HAS NOT BANNED ARBITRATION IN PERSONAL INJURY ACTIONS, AND SYFERT, I THINK, AGAIN MADE IT VERY CLEAR THAT THERE WERE INSTANCES IN WHICH ARBITRATION COULD BE PERMITTED, UNDER CONTRACTS, EVEN THOUGH THERE WERE SO-CALLED TORTS OR YOU CAN CALL IT A TORT, FOR PERSONAL INJURIES, AND FOR THOSE REASONS, WE THINK THAT THIS CASE, I THINK IN ALL DUE RESPECT, THE FOURTH DISTRICT MYSELF ANALYZED THE NATURE OF THE CLAIM. WHETHER THEY LOOKED ONLY TO THE COMPLAINT, WITHOUT REALIZING WHAT WAS INVOLVED, THIS CASE ACTUALLY, IN OUR JUDGMENT, WOULD EVEN BE ARBITRABLE UNDER MICHAELS, BECAUSE I BELIEVE MICHAELS USES LANGUAGE THAT TESTS THE ARBITRABILITY AS HAVING TO DO WITH THE OBJECT OF THE CONTRACT, AND THE LANGUAGE IN MICHAELS SAYS THAT, IF THE CLAIM HAS TO DO WITH THE OBJECT OF THE CONTRACT, THEN IT IS ARBITRABLE, AND SO UNDER ANY TEST AND UNDER ALL THE LAW AS WE ARE AWARE OF IT IN FLORIDA, WE BELIEVE THAT THIS CLAIM, THIS PARTICULAR LAWSUIT, WAS SUBJECT TO ARBITRATION, AND UNLESS YOUR HONORS HAVE SOME FURTHER QUESTION, I WILL TAKE THE RISK OF QUITTING EARLY! MR. CHIEF JUSTICE

THANK YOU. MR. KLEIN. MR. GROSSMAN.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I AM HERE ON RESPONSE OF THE RESPONDENT SHELLEY SULLIVAN. I WAS THE TRIAL LAWYER AND I AM APPEARING HERE, TODAY, ON BEHALF OF SEY SULLIVAN.

UNDER THE CIRCUMSTANCES HERE, IF YOUR CLIENT HAD BEEN UPSET BECAUSE I STILL HAVE BUGS CRAWLING AROUND, ARBITRATE IT?

I THINK THAT THE ISSUE THAT YOU ARE HITTING ON IS THE ISSUE THAT YOU OBVIOUSLY, JUDGE ANSTEAD, WROTE ABOUT IN SYFERT. WHAT WAS THE INTENT OF THE PARTIES? DID THEY INTEND TO ARBITRATE CLAIMS INVOLVING PERSONAL INJURIES?

WELL, AGAIN, BUGS CRAWLING AROUND, SO YOUR ANSWER WOULD BE THAT WOULD BE SUBJECT TO ARBITRATION.

I WILL GIVE YOU A PERFECT EXAMPLE. I AGREE WITH YOU, YOUR HONOR, IF --

BUT IF THEY BITE, THEN IT IS NOT SUBJECT TO ARBITRATION. IS THAT WHERE THE LINE IS DRAWN, AND IF SO, WHY SO?

THANK, YOUR HONOR. I THINK -- THANK YOU, YOUR HONOR I THINK WHAT WE ARE DEALING WITH HERE IS PLACES WHERE ARBITRATION SHOULD FLOW FROM. ARBITRATION SHOULD FLOW FROM THE CONTRACT. CLEARLY IT WAS THE PARTY'S INTENT THAT RETREATMENT WOULD OCCUR, IF THERE WERE BUGS STILL FLOATING AROUND THE HOUSE. THE PRICE, ISSUES SUCH AS PERFORMANCE, THIS IS NOT PERFORMANCE. THIS IS A COMMON LAW DUTY, AND THAT IS WHY SYFERT AND JUSTICE ANSTEAD TALKS ABOUT THE DUTIES. MERELY HAVING A CONTRACT ISN'T THE KEY HERE. WHAT IS THE KEY IS WHERE DOES THE DUTY FLOW FROM?

BUT LET ME TRY IT THIS WAY. SYFER. IT WAS A SITUATION IN WHICH THE BASIC CONTRACT WAS FOR THE SALE OF A HOUSE. RIGHT?

YES, YOUR HONOR.

AND YOU WOULD AGREE THAT, WHAT WE, IF WE ARE DEALING WITH THE INTENT OF THE PARTIES, THAT BASICALLY WHAT WE ARE INVOLVED IN, THEN, IS MATTER OF CONTRACT CONSTRUCTION. CORRECT?

YES, YOUR HONOR.

NOW, IN SYFERT, WE HAD A CONTRACT WHICH SAID THAT ANY CONTROVERSY OR IM ARISING UNDER OR RELATED TO THIS AGREEMENT OR WITH RESPECT TO ANY CLAIM ARISEING BY VIRTUE OF ANY REPRESENTATION ALLEGED. NOW, THAT WAS THE SALE OF THE HOUSE.

YES, YOUR HONOR.

CORRECT? DIDN'T HAVE ANYTHING TO DO WITH COVERING SOMETHING THAT HAD TO DO WITH THE DUCTS IN THE HOUSE, UNLESS THERE HAD BEEN SOME KIND OF REPRESENTATION THAT WOULD HAVE BEEN MADE SPECIFICALLY TO THAT. CORRECT?

YES, YOUR HONOR. YOU SEE, THE PBLEM WE DON'T KNOW IN SYFER. IT IS WHAT WERE THE REPRESENTATIONS. SYFER. IT IS A MUCH BROADER ARBITRATION CSE THAN IN THIS CASE.

BUT IT WAS INVOLVING A DIFFERENT MATTER. IT DIDN'T HAVE ANYTHING TO DO WITH PERFORMANCE. DID IT?

WELL, OBVIOUSLY WHEN YOU BUILD A HOME, SOME OF THE ESSENTIAL ELEMENT OF BUILDING THE HOUSE IS THAT YOU ARE GOING TO BUILD THE HOUSE AND PERFORM ALL --

BUT THE LANGUAGE OF THE ARBITRATION PROVISION DIDN'T HAVE ANYTHING, DIDN'T SAY ANYTHING ABOUT PERFORMANCE.

NO, IT DID NOT. IT TALKED ABOUT ARISING OUT OF OR RELATING TO, WHICH IS GENERALLY A BROAD SCOPE.

RIGHT.

BUT THEN IT, ALSO, INCLUDED LANGUAGE UNDER THE FEDERAL ARBITRATION ACT, WHICH IS NOT APPLICABLE HERE.

AND ISN'T THE, YOUR OPPONENT CORRECT, THAT THE KEY HERE, IN THIS CASE, IS THAT THE ERADICATION OF SPIDERS OR, WAS, IN FACT, THE PERFORMANCE THAT WAS DEGREED TO UNDER THIS CONTRACT? -- WAS AGREED TO UNDER THIS CONTRACT?

THE ERADICATION OF SPIERS IS AMONGST OTHER PESTS. CORRECT.

THAT WAS THE PERFORMANCE. THAT WAS THE GIST OF THE CONTRACT.

THE GIST OF THE CONTRACT, YOUR HONOR, OBVIOUSLY IS THAT SEARS CLAIMS THAT THEY CAN ERADICATE PESTS ONCE A YEAR, AND THEY GO AHEAD AND SELL THESE PEOPLE THROUGHOUT THE STATE OF FLORIDA THIS ONE TIME PER YEAR.

AND THE FAILURE ON THE PART OF SERIOUS, WAS THAT IT DIDN'T ERADICATE THE SPIDERS.

THAT'S CORRECT.

SO IT DIDN'T PERFORM.

WELL, HERE IS HOW I WANT, AND I HOPE THE COURT UNDERSTANDS. THE DUTY SUED UPON IN A NEGLIGENCE ACTION IS NOT THE CONTRACTUAL PROMISE. THE DUTY SUED UPON IN A NEGLIGENCE ACTION CAN BE A COMMON LAW DUTY. THE MERE FACT THAT PARTIES ARE BROUGHT TOGETHER BY A CONTRACT DOES NECESSITATE THAT YOU MUST INTERPRET THE PERFORMANCE OF THE CONTRACT. IN OTHER WORDS WHAT WE HETO LOOKAT, IN AN ASH TRABL ISSUE, IS -- IN AN ARBITRABLE ISSUE IS DOES THE CONTRACT BREACH THE PERFORMANCE THAT WE ARE LOOKING AT? I SUGGEST TO THE COURT THAT IN SYFERT AS WELL ASN MICHAELS, THE ISSUE BECOMES IS, I CALL IT THE UMBILL CORD THEORY, CAN THIS CAUSE OF ACTION SURVIVE WITHOUT THE CONTRACT? MY ANSWER TOOU IS YES, AND THE REASON IT CAN IS BECAUSE THESE WERE COMMON LAW DUTIES. THE COMMON LAW DUTY TO PERFORM AN ACT IN A NONNEGLIGENTSHION IS WHAT WE HAVE ALLEGED IN THE COMPLAINT.

BUT HOW, THOUGH, IN TERMS OF THIS BEING LINKED TO THE CONTRACT, LET ME WORK ANOTHER, I ASSUME THIS, ALSO, WAS TO ERR ADD INDICATE TERMITES. IS THAT RIGHT?

YES, YOUR HONOR.

AND SO WHAT THE HOMEOWNERS WERE SEEKING WS A PROTECTION, IN ONE HYPOTHETICAL, AGAINST TERMITES.

YES.

AND THE DANGER, OF COURSE, OF THE TERMITES, IS THAT, IF YOU DON'T ERADICATE THEM, THEY WILL CHEW UP ALL THE WOOD, AND YOU HAVE A FILE POOIL OF DUST IN THE PICTURE THERE -- A PILE OF DST IN THE PICTURE THERE, SO IF SEARS DIDN'T CARRY OUT ITS DUTY O ERR ADD INDICATE THE TERMITE BUGS, AS THEY TOOK UNDER THE CONTRACT, THEN THE CAUSE OF ACTION OR THE CLAIM BY THE HOMEOWNERS WOULD HAVE BEEN FOR THE DESTRUCTION OF THE HOUSE BECAUSE OF THE TERMITES, AND I ASSUME YOU WOULD AGREE THAT WOULD CLEARLY BE SUBJECT TO ARBITRATION. IS THAT RIGHT?

YES, I WOULD. YES, YOUR HONOR.

NOW, IF THAT WOULD BE SUBJECT TO ARBITRATION, IF WE LOOK AT THE ELIMINATING THE BROWN RECLUSE SPIDERS, WELL, THEY DON'T EAT THE WOOD. OKAY. AND SO, BUT, WHAT THEY DO IS YCAN BITE PEOPLE, CHILDREN AND ADULTS.

YES, SIR.

AND OBVIOUSLY THEY CAN BE VERY DANGEROUS. SO THE PROTECTION THAT THE HOMEOWNERS WERE SEEKING THERE WAS WE DON'T WANT BROWN RECLUSE SPIDERS BITING US, AND THAT IS WHAT THEY WERE SEEKING FROM SEARS, BY THIS CONTRACT, SO NOW, WHEN THEY GET BITTEN BY THE PIDES, ST AS THE HOUSE GETS DESTROYED BY TERMITES, WHY ISN'T THEIR CAUSE OF ACTION, REALLY, LIMITED TO HAVING THIS ARBITRATED, JUST LIKE THE DAMAGE WOULD HAVE BEEN FROM THEM NOT ELIMINATING THE TERMITES? I AM HAVING DIFFICULTY SEEING IN THAT IS NOT A PARALLEL THAT SHOULD CONTROL HERE.

THE OBJECT OF THESE CONTRACTS AS DRAFTED BY SEARS, SO IT HAS TO BE CONSTRUED AGAINST THE DRAFTER, IS FOR PROTECTION OF THE PROPERTY. IN OTHER WORDS, IN MICHAELS, THE COURT SAYS THE REASON WHY THE ARBITRATION, WE HAVE THE SAME EXACT CLAUSE IN MICHAELS AS WE DO HERE, YOUR HONOR. PONZIO IS DIFFERENT AND I WANT TO MAKE THAT CLEAR. PONZIO IS A MUCH BROADER CLAUSE, AND EVEN THE FIFTH DCA NOTED THAT WHEN

THEY REVIEWED THE MICHAELS DECISION. THE DIFFERENCE HERE IN THE MICHAELS COURT IS THE DIFFERENCE HERE IS THE SPRAYING OF THIS CHEMICAL FOR THE PROTECTION OF THE PROPERTY NOT THE PROTECTION OF THE PEOPLE. IF SEARS INTENDS TO MAKE THESE CLAUSES OVERLY BROAD AND TO ENCOMPASS PERSONAL INJURY CLAIMS AS JUSTICE OVERTON SAID, WHY DON'T THEY MAKE IT REAL SIMPLE? JUST MAKE IT REAL SIMPLE THIS CONTRACT PROVIDES FOR THE EXTINGUISHMENTS OF YOUR RIGHT TO A JURY TRIAL.

BUT YOU ARE SAYING, THEN, THAT NO PERSONAL INJURY CLAIMS COULD BE SUBJECT TO ARBITRATION, IN THIS CIRCUMSTANCE. IS THAT BECAUSE ARE SAYING?

NO.

ISN'T, YOU ARE TALKING ABOUT PROPERTY PROTECTION, NOW, WHAT DAMAGE DO BROWN RECLUSE SPIDERS DO TO PROPERTY?

YOUR HONOR, LET ME GIVE AWE EXAMPLE OF HOW THE SPRAYING COULD CAUSE PROPERTY DAMAGE. IN OTHER WORDS, WHEN THEY CONTRACTED, WHEN SEARS CONTRACTED WITH MISS SULLIVAN, MISS SULLIVAN CERTAINLY WAS NOT AN EXPERT ON WHAT THESE BUGS MAY OR MAY NOT DO. WHAT SHE WAS BUYING WAS ONE-YEAR PROTECTION FROM PESTS. IN THERE THEY LIST ABOUT NINE DIFFERENT PESTS. SHE DOESN'T KNOW WHAT IS GOING TO HAPPEN LATER ON, DHIS IS AN EXTINGUISHMENT OF A RIGHT LATER ON, BECAUSE AT THE TIME SHE DIDN'T HAVE THE BROWN RECLUSE SPIDER.

WERE BROWN RECLUSE SPIDERS INCDED IN THOSE NINE?

YES. I THINK YOU ARE TALKING ABOUT THE NINE PESTS?

YES. SAID THAT THEY SAID NINE.

I THINK IT IS AROUND NINE. YES.

WAS THAT A BREACH OF THE CONTRACT AT THAT POINT, THAT THE SPIDERS REMAINED?

I AM SORRY, SIR?

WAS THAT A BREACH OF THE CONTRACT, IF SPIDERS REMAINED AT THAT POINT?

YES, BECAUSE WHAT COUD HAVE HAPPENED THERE IS SHE COULD HAVE ASKED THEM TO COME BACK AND RETREAT THE PROPERTY. THEY COULD HAVE SUBJECTED THAT CLAIM TO ARBITRATION. GOING BACK TO YOUR QUESTION AND JUSTICE SHAW'S, THE REAL KEY ISSUE HERE IS, AS YOUR HONOR POINTED OUT IN SYFERT, WHAT IS THE INTENTION OF THE PARTIES? THIS COURT IS NOW LOOKING AT IT, I SUBMIT, THE CASE HAS NOW BEEN REVERSED. THE RIGHT TO TRIAL BY JURY SHALL REMAIN INVIOLETE. THAT IS IN OUR CONSTITUTION. NOW WE HAVE THE RIGHT TO PRESERVE THE RIGHT TO TRIAL BY JURY, BY LOOKING AT THE INTENT OF THE PARTIES.

WHEN YOU SAY "THIS PROVISION" IN YOUR ARGUMENT, IS BROADER THAN PONZIO, BT WHAT DO YOU DO WITH THE LANGUAGE THAT SAYS ANY CONTROVERSY OR CLAIM BETWEEN THEM, IT DOESN'T SAY ANY PROPERTY DAMAGE CLAIM. IT DOESN'T SAY ANY CONTRACT CLAIM. IT SAYS ANY CLAIM YES, --

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YES, YOUR HONOR. WHAT YOU SAID BEFORE IS IT IS BROADER THAN PONZIO, I CONTEND HA IT CAME OUT OF THE ARTICLES. PONZIO DIDN'T DEFINE IT IN ARTICLES. IT SAID IN DETERMINATION OR PERFORMANCE OF ANY PROVISION, AND PONZIO, ALSO, USES THE WORDS THAT NO LAWSUIT

SHALL APPLY. IN OTHER WORDS THERE IS LANGUAGE IN PONZIO THAT IS VERY CLEAR. MISS SULLIVAN DID NOT CONTRACT AWAY HER RIGHT TO TRIAL BY JURY FOR PERSONAL INJURIES. THEY COULD DO THAT. I DON'T MEAN TO INSINUATE, JUSTICE ANSTEAD, THAT YOU COULD NOT DO. THAT.

WITH THE TERMITE, IF IT BIT HER, AND SO NATURALLY THEY CONTEMPLATED ERADICATING THE TERMITES, SO, BUT, NOW WE HAVE A DISTINCTION, AND THAT IS THAT, IF THE IS A PROPERTY DAMAGE FROM THE TERMITES, THAT IT WOULD BE ARBITRATED. YOU HAVE AGREED TO THAT. BUT IF THE TERMITES, THAT, YOU KNOW, SHE FELL ASLEEP ON THE FRONT PORCH OR SOMETHING, AND YOU KNOW, THAT WE HAVE GOT TO BE CAREFUL ABOUT OUR VISUAL, LOOKING AT THESE THINGS, BUT IN ANY CASE, YOU KNOW, THEY GOT IN HER SHOE, AND SO HERE WE GO WITH NOT JUST A BITE, BUT THE TERMITES, YOU KNOW, AND THOSE TERMITES WEREN'T SUPPOSED TO BE THERE, SO YOU ARE SAYING THAT, IF THE TERMITES DESTROYED THE HOUSE, IT HAS TO BE ARBITRATED. BUT IF THE TERMITES THAT WERE SUPPOSED TO BE ERADICATED COVERED HER FOOT INSIDE HER SHOE AND SHE HAD TO GO TO THE HOSPITAL AND WHATEVER, THAT THAT WOULD NOT HAVE TO BE ARBITRATED. NOW, WHY, I AM HAVING DIFFICULTY SEEING WHY THE ONE DAMAGE FROM THEIR BREACH OF THEIR OBLIGATION TO ERR ADD INDICATE THE TERMITES WOULD BE, AND -- ERADIVCATE THE TERMITES, BUT THE OTHER CASE WOD NOT BE, THEN WHY NOT?

WE HAVE HEARD A NUMBER OF THING RESPECT A NUMBER OF THINGS BUT THIS COURT IS GOING TO CONSTRUE THE TERMS OF A CONTRACT. IN OTHER WORDS, THIS COURT SHOULD NOT ELEVATE ARBITRATION PROVISIONS ON A HIGHERIN THIT SHOULD ANY OTHER CONTRACT CLAUSES. SEVERABILITY, UNCON SHUNABILITY. THE COURT SHOULD LOOK AT THE CLAIM AND SAY WHAT DID THE CONTRACT INTEND TO DO. WHAT DID MS. SULLIVAN CONTRACT WITH SEARS TO ELIMINATE THE PEST CONTROL? THERE ARE CERTAIN CAUSES OF ACTION THAT SHOULD BE COVERED BY THIS, AND THOSE CAUSES OF ACTION AS YOUR HONOR HAS PICKED UP IN THE SYFERT PROVISION, IS WHAT ARE THE PARTIES CONDITION? THEY ARE THOUGHT TORT DAGES. THEY ARE CONTRACT DAMAGES. CONTRACT DAMAGES WILL NOT BE ALLOWED. LOSS OF PROPERTY DAMAGES COULD NOT BEALLOWED. THEY ARE LOOKING AT THIS LIKE THIS, TO SAY NO TRIAL TO JURY SHALL EXIST FOR PERSONAL INJURIES ARISING OUT OF THE CONTRACT.

BUT DOESN'T THE CASE LAW SAY IF WE DON'T DO WHAT WE ARE SUPPOSED TO DO UNDER THIS CONTRACT AND YOU ARE HURT BY THAT, IT IS SUBJECT TO ARBITRATION?

IT SNT SAY THAT, YOUR HONOR.

ISN'T THAT THE ESSENCE OF WHAT THE ARBITRATION PROVISION IS HERE? THAT IS IF WE DON'T DO WHAT WE ARE OBLIGATED TO DO UNDER THIS, AND THAT IS WHY I TALKED ABOUT THEERMITE EXAMPLE, BEFORE, WHICH YOU SEEM TO AGREE THAT, DO YOU AGREE THAT, IF THE TERMITES DAMAGE THE HOUSE --

YES.

-- THAT THAT WOULD HAVE TO BE ARBITRATED. TELL ME, AGAIN, WHY IT IS THAT, WHEN THEY BREACH THE CONTRACT IN THAT INSTANCE, AND IT RUTS IN PROPERTY DAMAGE -- AND IT RESULTS IN PROPERTY DAMAGE, THAT IT HAS TO BE ARBITRATED, BUT WHEN THEY BREACH IT AND IT RESULTS IN A SORE FOOT, IT DOESN'T HAVE TO BE ARBITRATED.

FIRST OF ALL, WE ARE TALKING OUT WHERE DOES THE RIGHT FLOW FROM? DOES IT FLOW STRICTLY FROM THE CONTRACTOR DOES IT FLOW FROM THE DUTY THAT IS IMPOSED TO PERFORM AN ACT IN A NONNEGLIGENT FASHION? WE DID KNOW THE CITE TO THE CONTRA. WE PLED STRICTLY A COMMON LAW COUNT OF NEGLIGENCE. THE SAME COMMON LAW NEGLIGENCE THAT WAS PLED IN MICHAELS AS IT WAS IN SYFERT.

WELL, IF THE NEIGHBOR CAME OVER AND WAS SITTING ON THE PORCH AND HAD HER SHOE AND ALL OF THAT, THERE WOULDN'T BE ANY CAUSE OF ACTION AGAINST SEARS BY THE NEIGHBOR, WOULD THERE?

OH, I BELIEVE THERE WOULD BE.

YOU MEAN THERE IS A DUTY OWING FROM SEARS TO THE NEIGHBOR?

IF I COME OVER TO THE HOUSE AND YOU HAVE PAINTED THE HOUSE WITH CHEMICALS THAT ARE TOXIC, ALL RIGHT, LET'S ASSUME THAT YOU CONTRACTED PAINT YOUR HOME, AND I COME OVER AND I BECOME OVERCOME BY THE CHEMICALS, AND EITHER I AM, DIE OR I AM SEVERELY INJURED --

BUT NOW YOU HAVE PUT SOMETHING DANGEROUS THERE IN AN AFFIRMATIVE WAY. WHEN WE ARE TALKING ABOUT REMOVING SOMETHING, ISN'T THAT A LIMITED OBLIGATION TO THE PEOPLE THAT YOU CONTRACTED TO REMOVE?

NO. I DON'T BELIEVE SO. BECAUSE WHAT YOU ARE DOING HERE IS IT WOULD BE LIKE YOU DON'T, IF YOU ARE CAGING AN ANIMAL THAT WAS DANGEROUS AND YOU FAIL TO PUT THE LOCK ON IT, THE MERE FACT THAT YOU PERFORM HALF OF YOUR DUTY ISN'T THE FULL DUTY. THE DUTY HERE IS TO MAKE SURE THAT YOU DO THE PEST EXTERMINATION ERADICATION IN A NONNEGLIGENT FASHION.

IF THE NEIGHBOR CAME OVER AND GOT BIT BY A BROWN RECLUSE SPIDER, ARE YOU SAYING SEARS WOULD BE LIABLE?

I THINK SEARS IS NO DIFFERENT THAN ANY OTHER PROVIDER OF A SERVICE. IF THE PROVIDER OF THE SERVICE IS NEGLIGENT, AND I AM CAUSED TO SUFFER INJURY BY THEIR NEGLIGENCE, I MAY NOT HAVE PRIVACY WITH THEM, BUT I CAN SUE THEM FOR STRICT LIABILITY. I CAN SUE THEM FOR OTHER CAUSES OF ACTION. I DO BELIEVE THAT THERE IS A CAUSE OF ACTION, WHERE ONE HAS A DUTY. NOW, YOU ARE SAYING THE DUTY ISN'T OWED DIRECTLY TO ME, BUT YOU BROUGHT THIS UP IN SYFERT, YOUR HONOR. YOU SAID, WHAT HAPPENS IN THE EVENT THAT SOMEBODY CAME OVER AND VISITED THESE FOLKS AND, AS A RESULT OF THE, OF NOXIOUS FUMES IN THE GARAGE, THE NEIGHBOR WAS KILLED? I THINK THEY WOULD HAVE A CAUSE OF ACTION --

BUT THAT IS A DIFFERENT SITUATION FROM BEING BITTEN BY A SPIDER.

WHAT THIS COURT --

AND JUSTICE ANSTEAD SAID YOU HAVE INTRODUCED SOMETHING INTO THE HOUSE THEN. A BUT YOU HAVE NEGLIGENTLY PERFORMED A DUTY, AND THE DUTY IS NOT SOLELY TO THIS PERSON. THE DUTY IS TO MAKE SURE THAT BECAUSE YOU ARE DOING, YOU ARE ERADICATING THESE PETS, IS NOT HALF ERADICATION. IT IS NOT CONTROLLING THESE BUGS. IT IS KILLING THEM, AND IF YOU DON'T KILL THEM, IT IS VERY LIKELY THAT SOMEBODY IS GOING TO WALK INTO THAT HOUSE AND SOME YOUNG KID FROM ACROSS THE STREET MAY GET BIT BY A BROWN RECLUSE SPIDER AND DIE, AND I THINK CERTAINLY THIS COURT WOULDN'T WANT A LIMITATION OF LIABILITY THAT SAYS, IF YOU VISIT OTHER PEOPLE'S HOMES AND A NEGLIGENT ACT OCCURS ON THE PART OF A SUPPLIER OF SERVICES, YOU CAN'T SUE THEM.

THE NEIGHBOR COULD SUE SEARS, AND IT WOULD BE IN TORTS, OBVIOUSLY, WOULDN'T IT?

YES. I DON'T SEE HOW OR WHY THIS COURT SHOULD LIMIT THE, A NONPARTY TO A CONTRACT, AS TO NOT HAVE A CAUSE OF ACTION FOR A DUTY THAT IS BREACH. IT IS A COMMON LAW DUTY, THE DUTY TO PERFORM A SERVICE IN A NONNEGLIGENT FASHION. NOW, WHAT I THINK THIS COURT, AGAIN, NEEDS TO LOOK AT IS THE SIMILARITIES OF THE CASE TO SYFERT. IN THIS CASE

WE DID PLEAD TO NEGLIGENCE AND WE DID PLEAD TO COMMON LAW DUTY TO WARN. I KNOW OPPOSING COUNSEL MADE THE MONTAGE THAT OUR CLAIM IS A WAY TO DANCE AROUND THE PROVISION OF THE CONTRACT. THAT IS NOT TRUE. YOU NEED TO DEAL WITH THE TERMS OF THE CONTRACT HERE, IN ORDER TO DETERMINE WHETHER THEY WERE NEGLIGENT. DID THEY OR DID THEY THOUGHT KILL THE BUG? IF THEY DIDN'T KILL THE BUGS, THEY BREACHED THEIR DUTY. THAT IS OUR POSITION, JUDGE. FINALLY IF I MAY, THE RIGHT TO TRIAL BY JURY IS SOMETHING THAT I THINK THIS COURT HAS FOCUSED ON PREVIOUSLY, AND TODAY I WANT TO ASSERT THE FACT THAT THIS IS A SIGNIFICANT, CONSTITUTIONAL RIGHT. THE LANGUAGE OF OUR CONSTITUTION SAYS IT SHALL REMAIN INVIOLENT. THAT MEANS SACROSANCT AND THE PARTIES SHOULD KNOW, BEFORE THEY ENTER INTO AN AGREEMENT, THERE SHOULD BE LANGUAGE THAT SAYS YOU ARE HERE BY GIVING UP A RIGHT TO A TRIAL BY JURY AND YOU ARE ALSO GIVING UP YOUR INTENTION TO BRING TRIAL FOR DAMAGES. THE LANGUAGE, THEREFORE, SAYS CONSEQUENTIAL LOSS OF PROFITS, THAT IS ENVISIONED ONLY A CONTRACT CLAIM AND NOT A TORT CLAIM. THANK YOU, YOUR HONORS. R. CHIEF JUSTICE

THANK YOU, COUNSEL. REBUTTAL?

THANK YOU. IF I MAY, I WILL TRY AND BE BRIEF. I THINK WE ARE KIND OF GETTING INTO A LITTLE BIT OF A SEMANTIC EXERCISE, AND I DO WANT TO MAKE A FEW POINTS. FIRST OF ALL, I THINK IT IS PRETTY WELL SETTLED, AND I AM NOT OPPOSING THE RIGHT TO TRIAL BY JURY, BUT I THINK IT CAN BE WAIVED, AND THAT, IN THE QUESTION OF INTENT, REALLY BOILS DOWN TO, AND I AGREE WITH MR. GROSSMAN IN THIS RESPECT, CERTAINLY BOILS DOWN TO THE LANGUAGE OF THE CONTRACT, SO WE ARE BACK TO LOOKING AT THE LANGUAGE OF THE CONTRACT AND THE ARBITRATION CLAUSE, TO DETERMINE THE RIGHTS HERE. LET ME DIGRESS FOR ONE MINUTE AND SAY THAT I DON'T NECESSARILY AGREE THAT THIS CLAUSE, WHICH WAS THE SAME CLAUSE AS IN MICHAELS, IS NECESSARILY NARROWER THAN THE CLAUSE IN PONZIO, AND I THINK ONE OF THE REASONS IS THAT SYFERT, WHICH DEALT WITH THE SO-CALLED, WITH THE PONZIO CLAUSE, WHICH IS WHAT I GUESS WE GENERICALLY CALL THE BROADER CLAUSE, CLEARLY READ IN THE WORDS PERFORMANCE AND BREACH AND IN ANALYZING IT AND DETERMINING WHETHER YOU HAD A SUBSTANTIAL NEXUS AND IN DETERMINING WHETHER THE WRONG HAD A SIGNIFICANT RELATIONSHIP TO THE CONTRACT, SO I THINK FOR ALL INTENTS AND PURPOSES AFTER SYFERT, THE CLAUSES ARE PRETTY MUCH THE SAME. EVEN IF THEY ARE NOT, THIS CASE CLEARLY INVOLVES THE PERFORMANCE BREACH, INTERPRETATION OF THIS CONTRACT. THE CONTRACT SAYS, AND I THINK MR. GROSSMAN HIGHLIGHTED THAT, THE CONTRACT SAYS SEARS HAS THE DUTY TO CONTROL CERTAIN PESTS. WHAT DOES CONTROL MEAN? MR. GROSSMAN SAYS IT MEANS TO KILL EVERY SINGLE SPIDER THAT EVER COMES NEAR THE HOUSE IN THE COURSE OF A YEAR, AND, OF COURSE THAT IS A RETREATMENT PROVISION IN THE CONTRACT. SEARS SAYS, NO, IT MEANS JUST TO CONTROL HIM, TO DO THE BEST WE CAN. NOW, THAT IS, TO ME, A CLASSIC CASE, A CLASSIC SITUATION OF INTERPRETATION, PERFORMANCE, OR BREACH OF A CONTRACT. SOMEBODY IS GOING TO WIN ON THAT BASIS. BUT IT CALLS FOR LOOKING AT THE CONTRACT, AND, NO, WITH ALL DUE RESPECT, THE ONLY DUTY SEARS HAD IS THE DUTY THAT WAS MADE BY EXECUTION OF THAT CONTRACT. THIS IS NOT A COMMON LAW DUTY. THIS IS A DUTY TO CONTROL THE PESTS IN MRS. SULLIVAN'S HOUSE. THAT IS WHAT WAS ALLEGEDLY BREACHED HERE. NO, MR. GROSSMAN DIDN'T PLEAD THE CONTRACT, BUT HE DID SAY, AND HIS COMPLAINT DOES SAY THAT THERE WAS A CONTRACT. IN PARAGRAPH 8, I BELIEVE IT IS, SAYS THAT MRS. SULLIVAN CONTRACTED WITH SEARS FOR THE CONTROL OR, I THINK HE SAID, ERADICATION OF PESTS, SO WE HAVE TO COME RIGHT BACK AND CLOSE THIS CIRCLE, WITH ALL DUE RESPECT, YOUR HONOR, THIS IS, WHETHER IT IS A ROSE BY ANY OTHER NAME, THIS IS A CASE OF WHETHER SEARS HAS BREACHED THIS CONTRACT, THE CONTRACT DUTY TO CONTROL PESTS, IT IS A PONZIO CASE. IT IS A CASE IN WHICH PONZIO WAS BLESSED BY THIS COURT. THIS COURT, IN SYFERT, WAS VERY CAREFUL NOT TO SAY THAT THERE COULD NEVER BE JURY TRIALS IN PERSONAL INJURY CASES, BUT IT CAREFULLY DEFINED THE SITUATIONS UNDER WHICH ARBITRATION COULD EXIST. MR. CHIEF JUSTICE

JUDGE QUINCE HAD A QUESTION.

LET'S ASSUME THAT A CONSUMER CALLS SEARS AND WANTSIS SAME PEST CONTROL SERVICE. OKAY. AND FOR WHATEVER REASON, THE STANDARD CONTRACT ISN'T SIGNED BUT SEARS, IN FACT, COMES OUT, PURCHASES THE SAME THING THEY DID HERE, AND THE SAME THING HAPPENS. WOULD THERE BE A COMMN LAW? COULD THE PERSON WHO IS INJURED BRING AN ACTION CLAIMING MAKING THESE SAME CLAIMS OF NEGLIGENCE, ET CETERA?

NO.

AGAINST SEARS?

THAT IS BASICALLY WHAT THIS COMPLAINT SAYS, AND I THINK --

I AM SAYING BUT NO CONTRACT HAS BEEN SIGNED.

NO CONTRACT.

NO CONTRACT.

THAT IS A GOOD QUESTION. PROBABLY YES. WHETHER A PEST CONTROL COMPANY WOULD AGREE TO CONTROL PESTS WITHOUT SUCH AN AGREEMENT IS ANOTHER ISSUE, BUT, YEAH, I PRESUME THAT SHE COULD FIND SOMEONE THAT WOULD COME IN, WITHOUT CONTRACT AT ALL, AND SPRAY. I GUESS I DON'T KNOW THE ANSWER TO THAT QUESTION. I THINK YOU COULD ARGUE IT BOTH WAYS, BUT I THINK WE HAVE TO RETURN TO THIS ONE FOR A MINUTE, BECAUSE THERE WAS THE CONTRACT, AND WHETHER MRS. SULLIVAN COULD HAVE FOUND A BETTER DEAL OR IFFERENT CONTRACTOR NO CONTRACT SHE DID SIGN IT, AND THE ARBITRATION CLAUSE WAS THERE, AND I THINK THAT IS HERE YOU HAVE TO GO ALONG WITH THE LAW THAT INTERPRETS IT, WHEN YOU GO TO THE QUESTIONS OF INTENT. I THINK THAT IS ABOUT ALL I HAD TO SAY, UNLESS YOUR HONORS HAVE ME FURTHER QUESTIONS. MR. CHIEF JUSTICE

THANK YOU, MR. KLEIN. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THE CASE. THE COURT WILL BE IN RECESS.