>>> THE NEXT CASE IS MORALES VERSUS
ZENITH INSURANCE COMPANY.
>> MAY IT PLEASE THE COURT, GOOD
MORNING, YOUR HONORS.
MY NAME IS TRACY GUN.
I REPRESENT THE APPELLANTS IN
THIS CASE AND I HAVE RESERVED
FIVE MINUTES FOR REBUTTAL,
PLEASE.
THIS INSURANCE COVERAGE CASE IS
ON THREE CERTIFIED QUESTIONS
FROM THE 11TH CIRCUIT COURT OF
APPEALS.
THE FIRST RELATES TO A STANDING
ISSUE, THE SECOND A WORKER'S
COMPENSATION ISSUE AND THE THIRD
A SETTLEMENT RELEASE ELECTION OF
REMEDIES ISSUE.
ADDRESSING THE FIRST ISSUE I
THINK IS GOING TO BE VERY
STRAIGHTFORWARD AND I WON'T
SPEND VERY MUCH TIME ON IT.
THE MORALES FAMILY HAS A
JUDGMENT AGAINST THE INSURED
UNDER THE ZENITH POLICY AND AS A
JUDGMENT CREDITOR HAS STANDING
UNDER THIS COURT'S LAW AND--
>> LET ME ASK YOU ABOUT THAT
JUDGMENT BECAUSE I'M A LITTLE
CONFUSED HERE AS TO THIS
JUDGMENT WAS ENTERED AFTER THERE
WAS A SETTLEMENT?
WHAT HAPPENED HERE?
I'M A LITTLE CONFUSED.
>> YES, YOUR HONOR.
I'M NOT SURE IF YOU'RE REFERRING
TO THE WORKER'S COMPENSATION
SETTLEMENT?
>> YES.
>> OR -- OKAY.
YES, YOUR HONOR.
THE TIME LINE HERE IS PROBABLY
THE PLACE TO START.
THE ACCIDENT HAPPENS IN 1997.
WORKER'S COMP BENEFITS ARE
UNDISPUTED.
THERE'S NO QUESTION THAT
MR. MORALES WAS AN EMPLOYMENT
AND IN THE COURSE OF HIS
EMPLOYMENT.

THEY IMMEDIATELY BEGAN MAKING
COMP PAYMENTS.
IN 1997 MORALES FILED A STATE
TORT ACTION WHICH WAS DEFENDED
INITIALLY BY ZENITH UNDER AN
EMPLOYER LIABILITY POLICY.
>> AND IN THE STATE TORT ACTION,
WAS THE ALLEGATION OF AN
INTENTIONAL ACT--
>> NO, YOUR HONOR, THERE WASN'T.
>> SO THERE WOULD BE -- YOU
WOULD AGREE THAT IF OTHER THINGS
HAD NOT HAPPENED, THERE WOULD BE
NO WAY TO BE ABLE TO SUE THE
EMPLOYER JUST FOR NEGLIGENCE.
>> YOUR HONOR, ON THE PLEADINGS
AS THEY STAND IN THE STATE COURT
TORT CASE, THAT'S CORRECT.
THE JUDGMENT WAS FOR SIMPLE
NEGLIGENT.
THE QUESTION THAT YOU RAISE IS
EXACTLY WHAT WE ASSERT WAS THE
WRONG PATH THAT THE FEDERAL
DISTRICT COURT WENT DOWN, WHICH
IS ANALYZING WHETHER THE TORT
LIABILITY JUDGMENT WAS VALID.
AND IT'S OUR POSITION THAT THE
COURT IN THE COVERAGE CASE
SHOULD NOT BE ANALYZING THAT
ANYMORE, THAT THE COURT SHOULD
NOT ALLOW THE LIABILITY CARRIER
TO ASSERT TORT DEFENSES FOR ITS
OWN BENEFIT HERE AND IT DID NOT
ASSERT IN THE COVERAGE CASE.
>> SO IS THIS A BAD -- AN ISSUE
FOR BAD FAITH?
>> IT IS, YOUR HONOR.
AT THIS POINT THE BAD FAITH
CLAIM HAS BEEN ABATED, BUT
ULTIMATELY IT'S A COVERAGE CASE
TO DETERMINE WHETHER THE
EMPLOYER LIABILITY CARRIER WILL
HAVE COVERAGE FOR A STATE COURT
TORT JUDGMENT.
>> SO YOU'RE SAYING THAT THE
INSURANCE COMPANY SHOULD HAVE
CONTINUED TO DEFEND UNDER A
RESERVATION OF RIGHTS AND GOT
THE CASE DISMISSED?
I MEAN, IT SHOULD HAVE BEEN

DISMISSED.
IT'S AN ELECTION OF REMEDIES?
YOU CAN'T SUE THE EMPLOYER?
AND WHEN SHE SIGNED -- OR THE ESTATE SIGNED THE SETTLEMENT AGREEMENT, IT WAS AN ELECTION OF REMEDIES WITH RESPECT TO THE EMPLOYER AND THE CARRIER SO THE COVERAGE PROVIDES THE EMPLOYER, RIGHT?
>> YOUR HONOR, BOTH AS TO THE ELECTION OF REMEDIES DEFENSE AND THE COMP IMMUNITY DEFENSE, YES.
THOSE ARE TORT DEFENSES.
HAD THEY BEEN ASSERTED, THERE WOULD BE NO TORT JUDGMENT TO FIGHT ABOUT COVERAGE.
THE INSURANCE IN THIS CASE IS INSURANCE FOR A JUDGMENT THAT CANNOT BE CONTESTED.
THAT JUDGMENT IS VALID.
THAT JUDGMENT CAN BE SET ASIDE IN THIS CASE.
THE ISSUE IS WHETHER THE POLICY ISSUED BY THE ZENITH TO THE JUDGMENT DEBTOR, LONGS IRRIGATION, IS COVERED UNDER THE POLICY.
AND THE TYPE OF POLICY IS IMPORTANT.
ZENITH IN THIS CASE ISSUED A POLICY THAT HAD TWO COVERAGE PARTS, TWO PREMIUMS, TWO INSURING AGREEMENTS.
>> THAT'S WHERE YOU CAN BUY IT.
THAT'S WHERE THE MARKET IS.
>> RIGHT.
>> WHEN YOU'RE A BUSINESS OPERATOR, YOU GET COVERAGE A AND B.
BEEN THAT WAY FOR 100 YEARS.
>> AND THE IMPORTANT POINT OF THAT IS UNDER THE CASE LAW WE'RE TALKING ABOUT AN EMPLOYER LIABILITY POLICY.
>> EXACTLY.
I HOPE EVERYBODY UNDERSTANDS THAT.
>> WELL, I'M NOT SURE THAT EVERYBODY UNDERSTANDS THAT, YOUR

HONOR, BECAUSE THE CASE LAW
CITED BY THE DISTRICT COURT IN
THE FEDERAL DISTRICT AND BY
ZENITH IN THIS CASE IS ALL CGL
CASE LAW.
>> THAT'S BECAUSE THERE'S REALLY
NOT MUCH LAW WHEN IT COMES TO
ANALYZING THE LANGUAGES UNDER
THE EMPLOYER'S LIABILITY SECTION
OF THOSE POLICIES.
>> RIGHT.
>> SO THAT'S WHY FOLKS -- YOU
KNOW, WE TRY TO GET CASES THAT
TALK ABOUT WHAT WE'RE TALKING
ABOUT.
SO, I MEAN, IT'S NOT BECAUSE
THAT IT'S SOME CRAZY OUTLIER
LAW.
IT'S JUST THAT'S WHERE THE LAW
IS.
>> RIGHT, YOUR HONOR.
BUT I THINK IT'S IMPORTANT FOR
THE COURTS TO ANALYZE IT IN
TERMS OF WHAT TYPE OF COVERAGE
IT IS.
THAT'S WHAT THIS COURT SAID IN
THE TRAVELERS VERSUS PCL CASE.
CGL IS DIFFERENT IN A VERY
IMPORTANT WAY.
CGL COVERAGE NEVER COVERS
LIABILITY OF THE EMPLOYER TO THE
EMPLOYEE.
IT'S MEANT TO COVER LIABILITY TO
THIRD PARTIES AND THE PUBLIC.
>> RIGHT.
BUT THE SAME THING IS WITH YOUR
LIABILITY COVERAGE UNDER THE
EMPLOYER'S LIABILITY.
IT'S TO COVER THOSE THINGS THAT
ARE NOT COVERED BY COMP.
>> THAT'S NOT WHAT THE EXCLUSION
SAYS.
>> WELL, BUT WHAT EXCLUSION ARE
YOU RIDING ON?
>> WELL, THE EXCLUSION THAT
THEY'RE RIDING ON, THE EXCLUSION
SAYS -- AND LET'S START WITH THE
INSURING AGREEMENT.
I'M GOING TO ANSWER THAT
QUESTION.

>> THE STANDARD INSURING
AGREEMENT.
>> FOR EMPLOYER LIABILITY
COVERAGE, WHICH IS WE'RE GOING
TO COVER BODILY INJURY TO
EMPLOYEES.
EXACTLY WHAT WE HAVE HERE.
THE EXCLUSION SAYS THIS
INSURANCE DOES NOT COVER ANY
OBLIGATION IMPOSED BY A WORKER'S
COMPENSATION LAW.
WE KNOW THAT AS AN EXCLUSION
THAT HAS TO BE STRICTLY
CONSTRUED.
FRANKLY, ZENITH DOESN'T EVEN
ATTEMPT TO EXPLAIN HOW THIS
STATE COURT TORT JUDGMENT IS AN
OBLIGATION IMPOSED BY WORKER'S
COMPENSATION LAW.
THAT'S WHAT THE EXCLUSION SAYS.
THE EXCLUSION DOESN'T SAY WE'RE
NOT GOING TO PAY UNDER COVERAGE
B IF WE'VE ALREADY PAID UNDER
COVERAGE A.
WE'RE NOT GOING TO PAY FOR
NEGLIGENCE CLAIM.
>> THERE'S NOTHING IN THERE THAT
EXCLUDES ANY CLAIMS ARISING OUT
OF THE COURSE AND SCOPE OF
EMPLOYMENT?
>> NO, YOUR HONOR, BECAUSE
THAT'S A CGL EXCLUSION.
THERE ARE IN THE SITTING CASE
AND THE RAVALIA CASE AND
WILLIAMS CASE, THAT'S WHAT THE
EXCLUSION SAYS, BECAUSE IT'S A
CGL POLICY AND IT'S MEANT TO
COVER LIABILITY TO THE PUBLIC.
HERE, THE POLICY IS MEANT TO
COVER TORT JUDGMENTS TO
EMPLOYEES.
SO UNLESS YOU'RE GOING TO DO
WHAT THE DISTRICT COURT DID,
WHICH WE CLAIM IS ERROR, AND
LOOK AT WHETHER THERE SHOULD
HAVE BEEN SOME TORT DEFENSE TO
THAT JUDGMENT, FLORIDA LAW IS I
THINK PRETTY CLEAR -- AND I
DON'T THINK THEY REALLY DISPUTED
THIS GENERAL PRINCIPLE.

IN A COVERAGE CASE THE INSURANCE COMPANY CAN'T ASSERT A TORT DEFENSE ON ITS OWN BEHALF THAT IT NEVER--
>> IF -- THIS IS GOING TO SAY THAT IN ANY CASE THAT'S NOT EVEN GOING TO APPLY AS A DEFENSE TO COVERAGE IN ANY CASE NOW.
>> WHAT ISN'T, YOUR HONOR?
>> THAT -- THE EXCLUSION THAT YOU'RE RELYING ON, THAT THEY ARE RELYING ON.
THAT THAT'S NOT EFFECTIVE TO EXCLUDE COVERAGE FOR ANY OF THOSE CLAIMS.
>> WELL, YOUR HONOR, TO THE--
>> ANY CLAIM IN WHICH AN EMPLOYEE MAKES JUST A REGULAR CLAIM.
>> WHAT THE EXCLUSION SAID IS IT EXCLUDES AN OBLIGATION IMPOSED BY WORKERS COMPENSATION LAW.
>> IS THERE ANY CASE--
>> THERE IS.
>> THAT'S RIGHT ON THIS.
>> YES, THERE IS.
THIS IS ONE CASE.
IT'S A FLORIDA CASE.
IT'S A 4TH DCA CASE, WRIGHT VERSUS HARTFORD INSURANCE COMPANY.
IT'S THE ONLY EMPLOYER LIABILITY COVERAGE CASE.
WHAT WRIGHT HELD WAS THAT AN INSURANCE THAT ISSUED AN EMPLOYER LIABILITY POLICY LIKE THE POLICY HERE AND FAILED TO DEFEND, LIKE ZENITH DID HERE, HAD A DUTY TO COVER A TORT JUDGMENT IN FAVORED AN EMPLOYEE WHO HAD ALREADY SETTLED HIS WORKER'S COMP CLAIM.
IMPORTANTLY, IN WRIGHT THE TORT JUDGMENT WAS ALSO, BY ADMITTED LIABILITY ON SETTLEMENT.
IN THIS CASE THERE WAS A DEFAULT AND THE JUDGMENT WAS ENTERED YEARS LATER AFTER THE DEFAULT.
BUT WHAT--
>> DID IT MAKE ANY DIFFERENCE IN

WRIGHT -- I DON'T THINK I'M ON HERE.
DID IT MAKE ANY DIFFERENCE IN WRIGHT THAT IT WAS GROSS NEGLIGENCE?
>> YOUR HONOR, THE CLAIM THAT WAS MADE WAS FOR GROSS NEGLIGENT, BUT I DON'T THINK IT DOES BECAUSE OF WHAT THE COURT HELD.
IF YOU LOOK AT WHAT THE LOWER COURT DID IN WRIGHT, WHICH IS EXACTLY WHAT THE LOWER COURT DID HERE, THE TRIAL COURT HOLDING WAS THE TRIAL COURT GRANTED HARTFORD MOTION FOR SUMMARY JUDGMENT, RULING THAT THE EMPLOYER WAS ENTITLED TO IMMUNITY UNDER COMP LAW AND THAT COMP LAW PROVIDED THE EXCLUSIVE REMEDY.
THAT'S EXACTLY WHAT THE COURT DID HERE.
SO THE GROSS NEGLIGENCE REALLY DOESN'T MATTER BECAUSE THE TRIAL COURT FOUND THAT THERE SHOULD HAVE BEEN IMMUNITY.
SO IT WASN'T ENOUGH TO RISE ABOVE IMMUNITY, JUST LIKE THE REGULAR NEGLIGENCE CLAIMS HERE.
WHAT THE WRIGHT COURT HELD IN THE 4TH DISTRICT, OUR ONLY FLORIDA CASE THAT ADDRESSES THIS ISSUE, WAS TWO THINGS.
FIRST, THEY SAID YOU, TRIAL COURT, CANNOT APPLY A TORT DEFENSE SUCH AS COMP IMMUNITY FOR THE BENEFIT OF THE CARRIER IN THE COVERAGE CASE.
SO THAT WAS WRONG.
AND REVERSED THE TRIAL COURT RULING.
SECONDLY, THE COURT MADE A FURTHER HOLDING AS TO THE COVERAGE DEFENSE.
THERE'S A DIFFERENCE BETWEEN OBVIOUSLY THE TORT DEFENSE AND THE COVERAGE DEFENSE.
AND EVEN THOUGH THEY'RE PARALLEL, WHAT THE WRIGHT COURT

SAID WAS THE WORKER'S
COMPENSATION EXCLUSION IN
EMPLOYERS LIABILITY COVERAGE
PART TWO, EXACTLY THE SAME
EXCLUSION WE HAVE HERE, DOES NOT
APPLY TO THE CIVIL JUDGMENT
BECAUSE THE JUDGMENT
WAS NOT AN OBLIGATION IMPOSED BY
WORKER'S COMPENSATION LAW.
RATHER, THE JUDGMENT AROSE FROM
CLAIMS IN THE CIVIL ACTION AND
THE SETTLEMENT AGREEMENT AMONG
THE PARTIES, NEITHER OF WHICH
INVOLVED OBLIGATIONS IMPOSED BY
WORKER'S COMPENSATION LAW.
THE COURT IN WRIGHT DID EXACTLY
WHAT WE'RE ASKING THIS COURT TO
DO, EXACTLY WHAT THIS COURT HAS
DONE, EXCUSE ME, IN EVERY
INSURANCE COVERAGE EXCLUSION
CASE, WHICH IS STRICTLY CONSTRUE
THE POLICY AS WRITTEN BY THIS
INSURANCE COMPANY.
>> LET ME GO BACK TO AGAIN WHAT
YOU'RE SAYING ZENITH SHOULD HAVE
DONE.
>> YES.
>> THE INSURED GETS SUED, THE
EMPLOYER.
THERE'S ALREADY A SETTLEMENT OF
THE WORKER'S COMP--
>> NO, YOUR HONOR.
NOT AT THAT POINT.
>> OKAY.
BECAUSE THAT'S I GUESS WHEN THE
-- SO IT OCCURS -- AND SO BUT
THE -- ZENITH COMES IN TO DEFEND
THE TORT SUIT.
>> YES.
>> DOES NOT MOVE TO DISMISS?
>> THEY DO.
THEY MOVE TO DISMISS.
THEY DON'T ACTUALLY GET A RULING
ON THAT.
THEY NEVER FILE A SUMMARY
JUDGMENT MOTION.
THEY DEFEND FOR TWO YEARS.
THEY WITHDRAW FOR LACK OF
COOPERATION, WHICH WILL STILL BE
AN ISSUE.

THE COOPERATION ISSUE WAS REALLY
THE BIG DEFENSE ALL ALONG UNTIL
WE GOT TO SUMMARY JUDGMENT IN
THE DISTRICT COURT PROCEEDINGS
HERE.
AFTER THEY WITHDRAW THEIR
DEFENSE, AFTER TWO YEARS OF
DEFENDING IT, AFTER THE CASE HAS
BEEN PENDING FOR -- IT WAS FILED
IN 1999.
THE WORKER'S COMP SETTLEMENT WAS
NOT UNTIL 2003.
SO THE TORT CASE HAD ALREADY
BEEN PENDING BY THE TIME THE
WORKER'S COMP--
>> IT WAS STILL PENDING?
>> IT WAS STILL PENDING, YOUR
HONOR.
THIS WAS NOT A SITUATION -- IF
THE COURT HAS FURTHER QUESTIONS
ABOUT THE EXCLUSION, I'M HAPPY
TO ADDRESS THEM, BUT IF WE CAN
TALK ABOUT THE--
>> I JUST WANT TO UNDERSTAND THE
REAL WORLD.
WE'VE GOT LACK OF COOPERATION,
WHICH ISN'T BEFORE US AT THIS
POINT.
>> RIGHT.
RIGHT.
AND, YOUR HONOR, I WOULD--
>> SO LET'S ASSUME NO LACK OF
COOPERATION.
>> YES.
>> THEY SHOULD HAVE MOVED FOR
SUMMARY JUDGMENT TO SAY THIS IS
NOT -- THIS IS COMP IMMUNITY.
>> RIGHT.
>> OKAY.
AND THEN AT ANY POINT IF THE
COURT DISAGREES, THEN ZENITH IS
OBLIGATED TO CONTINUE UP TO SAY
THAT THIS IS -- THIS IS NOT
COVERED UNDER LIABILITY.
>> CORRECT.
>> BUT I GUESS WHAT I'M ASKING
IS CAN SOMEHOW THERE BE COVERAGE
CREATED BY THE ACTIONS OR
INACTIONS OF THE INSURER?
IS THAT WHAT WE'RE SAYING HERE?

THAT'S MY CONCERN.
-- NO, YOUR HONOR.
THIS IS NOT A COVERAGE BY ESTOPPEL ARGUMENT.
THIS JUDGMENT IS A TORT JUDGMENT ENTERED BY A STATE COURT IN A CIVIL CASE.
IT IS NOT A JUDGMENT IMPOSED BY WORKER'S COMPENSATION LAW.
IT'S A JUDGMENT FIXING LIABILITY FOR AN EMPLOYEE'S INJURIES AGAINST AN EMPLOYER, WHICH IS EXACTLY WHAT THE EMPLOYER'S LIABILITY INSURANCE--
>> WHAT'S GOING TO HAPPEN?
I MEAN, AS WE WALK THIS THROUGH, YOU HAVE A COMP CLAIM AND THEN EVERY EMPLOYEE HAS A THIRD --
HAS A TORT CLAIM.
AND UNDER THIS COVERAGE YOU'RE GOING TO HAVE TO DEFEND IT.
AND THERE'S NOT AN EXCLUSION FOR THAT EVENT.
>> RIGHT.
THERE'S NOT IN THIS POLICY AN EXCLUSION FOR THAT.
I DON'T KNOW WHETHER OTHER POLICIES -- I MEAN, THEY HAD A NUMBER--
>> THIS IS PRETTY STANDARD.
>> THEY HAD A NUMBER OF BRIEFS FILED THAT ARGUED IT NEVER COVERED NEGLIGENCE CLAIMS AGAINST EMPLOYERS.

>> CORRECT.
I UNDERSTAND.
THAT'S WHAT YOU'RE SAYING THIS TURNS INTO.
>> RIGHT.
>> BECAUSE THIS IS STANDARD LANGUAGE.
>> AND LET'S -- IN TERMS OF THE PRACTICALITIES, YOUR HONOR, THE TORT CASE WAS FILED IN 1999.
THEY DEFENDED IT UNTIL 2002.
IN THAT TIME THEY NEVER GET THE DISMISSAL.
SUPPOSEDLY THIS COMP IMMUNITY IS SO OBVIOUS FROM THE FACE OF THE

COMPLAINT.
I DON'T KNOW WHY YOU WOULD NEED THE INSURED'S COOPERATION TO ESTABLISH ANY OF THAT.
APPARENTLY YOU HAD IT FOR THE FIRST COUPLE YEARS IT WAS PENDING.
THEY NEVER GOT THE INSURED OUT.
AND THAT'S WHY IF THE INSURANCE COMPANY NEVER GETS THE INSURED OUT BASED ON THESE TORT DEFENSES, THEY CAN'T COME IN IN THE COVERAGE CASE AND ASSERT THE TORT DEFENSES FOR THEIR OWN BENEFIT IN THE COVERAGE CASE.
IT'S PRETTY WELL-ESTABLISHED FLORIDA LAW THAT THE INSURANCE COMPANY CAN ASSERT--
>> IS WRIGHT REALLY SO CLEAR?
BECAUSE I DID NOT INTERPRET WRIGHT AS YOU ARE, AS BEING SO LIMITED.
I TEND TO THINK ALONG THE LINES JUSTICE LABARGA.
BACK AT THAT TIME IT WAS MUCH MORE EXPANSIVE.
IT'S BEEN CONTRACTED NOW.
>> RIGHT.
WELL, AND IT COULD BE THAT IF THE LAW HAS -- THE SUBSTANTIVE TORT IMMUNITY HAS CHANGED, THEN THE POLICY EXCLUSION NEEDS TO BE CHANGED.
I THINK THAT WRIGHT IS CLEAR IN TWO ASPECTS.
AND ZENITH SAYS WRIGHT IS JUST KIND OF IN LEFT FIELD AND REALLY IT'S NOT CONSISTENT WITH FLORIDA LAW.
WRIGHT IS THE ONLY EMPLOYER LIABILITY COVERAGE CASE.
WRIGHT SAYS THE TRIAL COURT WAS WRONG IN THE COVERAGE CASE.
NOT AN ISSUE ANYMORE.
THE JUDGMENT IS WHAT IT IS.
THEN THEY SAY ON REMAND MAKE NO MISTAKE.
THIS WORKER'S COMP EXCLUSION DOES NOT APPLY.
AND THE 11TH CIRCUIT CORRECTLY

EXPLAINED THAT WAS NOT MERE
DICTA.
THAT WAS A HOLDING OF THE 4TH
DCA.
WHY DIDN'T THE DISTRICT COURT
HERE FOLLOW IT?
REALLY THREE CASES, THREE CGL
CASES, A CASE CALLED SINNI, A
CGL CASE.
IMPORTANTLY, -- AND I DON'T KNOW
THAT I MADE THIS CLEAR IN THE
BRIEF, THAT COURT THOUGHT WRIGHT
WAS A CGL CASE AND SAYS TWICE AT
LEAST IN ITS OPINIONS THAT
WRIGHT INVOLVED A CGL POLICY.
SO NEVER MADE THAT DISTINCTION
WE'RE ASKING THE COURT TO MAKE
HERE.
IN THAT CASE AND THE REVRATO
CASE, THERE WAS AN EMPLOYER
LIABILITY EXCLUSION IN THE CGL
POLICY.
AND REALLY THE COURT DIDN'T
SEPARATE ITS ANALYSIS OF THE
TWO.
THE COURT SAID THIS IS GOING TO
BE EXCLUDED UNDER EITHER OR
BOTH.
AND IN BOTH CASES, ANOTHER CGL
CASE RELIED UPON BY ZENITH AND
THE DISTRICT COURT, THE EMPLOYER
IN THOSE CASES FAILED TO GET
COMP COVERAGE AT ALL.
SO THERE WAS AN OBLIGATION
IMPOSED BY WORKER'S COMPENSATION
LAW IN THOSE CASES BECAUSE
STATUTORILY THE EMPLOYER WAS
PENALIZED FOR NOT COMPLYING WITH
THE COMP STATUTE, UNLIKE HERE
WHERE IT'S A STATE COURT TORT
JUDGMENT ENTERED BY A CIRCUIT
COURT THAT DOESN'T HAVE
JURISDICTION TO CREATE
OBLIGATIONS IMPOSED BY
COMPENSATION LAW.
>> YOU'RE ALREADY IN YOUR
REBUTTAL TIME.
>> ALL RIGHT.
THANK YOU.
JUST BRIEFLY, YOUR HONOR, THE

ELECTION OF REMEDIES ISSUE, THE
TORT CLAIM WAS NOT MERELY
HYPOTHETICAL.
AT THAT POINT IT WAS AN EXISTING
CLAIM.
I BELIEVE THE SETTLEMENT
AGREEMENT IS VERY CLEARLY -- THE
TITLE OF IT SAYS PURSUANT TO THE
COMP WASH-OUT STATUTE.
IT REPEATEDLY REFERS THROUGHOUT
TO THE WORKER'S COMPENSATION ACT
AND BENEFITS UNDER THE ACT.
THE ELECTION OF REMEDIES ISSUES,
IT'S OUR POSITION THAT THIS
AGREEMENT ON ITS FACE APPLIES
ONLY TO THE COMP CLAIM.
EVERYBODY KNEW THE TORT CLAIM
WAS OUT THERE.
IT'S NOT MENTIONED IN HERE.
THERE'S NO CALL FOR DISMISSAL OR
APPROVAL IN THE TORT CASE.
>> YOU'RE SAYING EVEN IF IT IS,
IT DOESN'T MATTER, I THOUGHT IS
WHAT YOUR POINT IS.
>> I AM.
YES.
>> SO IT DOESN'T MATTER THAT
THEY INTENDED TO ONLY ALLOW THEM
TO PROCEED IN -- UNDER WORKER'S
COMP.
IT WAS THE FAILURE TO COME IN
AND GET THE TORT CLAIM
DISMISSED.
AND IF YOU HAD--
>> YES.
>> IF YOU HAD AN INSURED THAT
WAS COOPERATING, THEY WOULD
EXPECT AT LEAST TO HAVE A
DEFENSE UNDER THE POLICY SO THEY
DON'T GET SUED TWICE.
>> YES.
AND UNLESS THE COURT -- I MEAN,
I CAN RELY ON THE BRIEF FOR THE
ELECTION OF REMEDIES ARGUMENTS
BECAUSE I'M WELL INTO MY
REBUTTAL TIME UNLESS THE COURT
HAS FURTHER QUESTIONS.
THANK YOU.
>> MAY IT PLEASE THE COURT,
ELLIOTT SHIRK ON BEHALF OF

ZENITH.
IT'S IMPORTANT TO VERY CAREFULLY
LAY OUT WHAT HAPPENED HERE.
IT'S CLAIM FOR SIMPLE NEGLIGENT
ONLY.
IT DOESN'T PRETEND TO BE
ANYTHING ELSE.
WE DEFENDED LAWNS.
WE RAISED THE STATUTORY
EXCLUSION IN OUR ANSWER AND
AFFIRMATIVE DEFENSES AND IN OUR
MOTION TO DISMISS, AND THE
MOTION TO DISMISS WAS DENIED.
THAT'S AT DOCUMENT 7610 WHICH
WAS SENT TO THIS COURT.
IT'S AN UNEXPLAINED ORDER.
WE DON'T KNOW WHY IT WAS DENIED.
BUT IT WAS PENDING IN OUR
AFFIRMATIVE DEFENSES.
>> THAT WOULD HAVE BEEN
APPEALABLE, RIGHT?
THAT ORDER?
>> THE ORDER DENYING THE MOTION
TO DISMISS MIGHT HAVE BEEN
REVIEWABLE ON CERTIORARI,
PERHAPS.
>> I THOUGHT IT'S A--
>> OR -- PERHAPS IT WAS.
>> IT WOULD HAVE BEEN.
>> IT WOULD HAVE BEEN.
THE RECORD IS SILENT AS TO WHY
THAT DIDN'T HAP.
THE MOTION TO WITHDRAW SPEAKS
VOLUMES ON THE COUNTLESS EFFORTS
THAT ZENITH MADE TO FIND THE
INDIVIDUAL.
COULD NOT BE LOCATED.
>> THAT'S NOT THE ISSUE HERE.
>> I UNDERSTAND, YOUR HONOR.
BUT IT'S -- IT WASN'T THAT WE
ABANDONED THE MOTION TO DISMISS
OR ABANDONED ANYTHING OF THE
CASE.
>> I DON'T THINK THEY'RE SAYING
THAT THIS IS COVERAGE BY
ESTOPPEL, THAT YOU STAYED INTO
IT FOR A COUPLE YEARS.
BUT PLEASE GO INTO, IF YOU
WOULD, HER ARGUMENT ON THE
UNDERLYING COVERAGE AND HOW IT'S

DESCRIBED IN THIS POLICY AND THE DISTINCTION BETWEEN THE TYPES OF POLICIES.
>> YES, SIR.
LET ME START BY SAYING THE DISTINCTION BETWEEN THE TYPES OF POLICIES IS OF NO MOMENT ON THIS ISSUE BECAUSE THE WORKER'S COMPENSATION EXCLUSION IN THESE CGL POLICIES IS SUBSTANTIALLY IDENTICAL TO THE EXCLUSION IN OUR POLICY.
THE REASON THAT WE'RE TALKING ABOUT CGL POLICIES IN THOSE TWO CASES IS THOSE EMPLOYERS DID NOT HAVE WORKER'S COMP INSURANCE.
THEY FAILED IN THEIR STATUTORY OBLIGATION TO HAVE ANY COVERAGE TO BEGIN WITH.
THE ONLY POLICIES THEY HAD WERE CGL POLICIES AND THOSE POLICIES HAD EXCLUSIONS AND THE COURT APPLIED -- AND I WOULD -- I THINK IT'S IMPORTANT TO NOTE THE THIRD DISTRICT'S DECISION, WHICH WAS A FIRST DECISION ON THIS ISSUE, UNDER HEAD NOTE ONE, PAGE 891 OF THE OPINION, SAID WE FIND BOTH EXCLUSIONS APPLY.
THERE'S NO LACK OF CLARITY.
THE THIRD DISTRICT SAID ON THE ORDINARY NO COVERAGE FOR EMPLOYEES UNDER CGL AND THE WORKER'S COMPENSATION EXCLUSION.
>> BUT YOU HAVE WRIGHT.
>> WE HAVE WRIGHT AND THEN WE HAVE INDIAN HARBOR.
>> BUT WRIGHT CLEARLY -- AND THIS IS WHAT I GUESS -- WHETHER IT'S -- I DON'T THINK IT'S A SUBTLETY.
YOU GOT AN EMPLOYER WHO HAS PURCHASED -- HAS DONE WHAT HE OR SHE IS SUPPOSED TO DO, WHICH IS TO GET THIS POLICY, GET WORKER'S COMP AND IT HAS -- IT'S STANDARD THAT YOU'RE GOING TO GET BOTH OF THOSE.
YOU -- THE WORKER'S COMP PORTION IS -- YOU KNOW, THEY DON'T WORRY

ABOUT DEFENDING BECAUSE IT'S
STATUTORY AND AT SOME POINT EVEN
THOUGH THIS GUY HAS NOT
COOPERATED, THEY SETTLE UNDER
THE WORKER'S COMP CLAIM.
ZENITH COULD HAVE DECIDED --
AGAIN, WE'RE NOT LOOKING AT
WHETHER THE INSURED DID GOOD OR
BAD.
LET'S ASSUME THEY WERE DOING
EVERYTHING POSSIBLE.
HE STILL HAS THE STATE COURT
CASE PENDING AND HE SHOULDN'T BE
LIABLE UNDER THAT BECAUSE IT'S
-- AS YOU SAID, IT'S SIMPLE
NEGLIGENCE.
BUT THEY -- AND THIS IS THEIR
CLAIM FOR DOWN THE ROAD.
THEY SAY THAT WE DON'T HAVE TO
DEFEND YOU BECAUSE THERE'S NO --
YOU KNOW, THERE'S NO LIABILITY
HERE.
DON'T THEY STILL HAVE TO -- IN
THE ORDINARY COURSE, DON'T THEY
HAVE TO DEFEND AND GET A
DISMISSAL OF THAT CASE FOR THEIR
INSURED?
>> WELL, THAT ISN'T WHAT ZENITH
DID.
THAT'S WHAT HAPPENED IN WRIGHT
AND I'LL BE HAPPY TO TALK ABOUT
WRIGHT.
>> BUT AS FAR AS THE IDEA ABOUT
WHETHER THERE IS A TORT JUDGMENT
RIGHT NOW AGAINST THE INSURED.
NOW, THERE MAY BE HE GOT IT
BECAUSE HE DESERVED IT BECAUSE
HE DIDN'T COOPERATE AND THAT'S
-- MISS GUNN IS SAYING THAT'S A
DEFENSE TO THE BAD FAITH CASE,
BUT HOW IS THAT NOT A TORT
JUDGMENT, THAT AT THIS POINT IS
NOT IS EXCLUDED FROM THE PLAIN
LANGUAGE OF THE POLICY?
I'M JUST -- AND SO HELP ME WITH
THAT.
>> I'M GOING TO TRY TO ANSWER.
>> OKAY.
>> JUSTICE LEWIS'S QUESTION AND
YOUR QUESTION IN THE SAME WAY AT

THE SAME TIME.
FIRST OF ALL, THE REASON THEY GOT A JUDGMENT, THE REASON THE PLAINTIFF GOT A JUDGMENT AGAINST LAWNS WAS BECAUSE AFTER ZENITH SETTLED -- AND I'LL BE HAPPY TO TALK ABOUT WHAT THE ELECTION OF REMEDIES CLAUSE SAYS IN THE SETTLEMENT.
THE LAWNS DISAPPEARED.
THE COURT GRANTED A MOTION TO WITHDRAW.
AFTER THAT, ZENITH SETTLED.
HAD BEEN PAYING WORKER'S COMPENSATION BENEFITS THROUGHOUT.
AFTER THAT ZENITH SETTLED WITH THE PLAINTIFF AND THE ELECTION OF REMEDIES CLAUSE SAYS, THIS IS PAGE 44, THIS SETTLEMENT --
FIRST IT SAYS PURSUANT TO FLORIDA STATUTES, IN EXCHANGE FOR CONSIDERATION, CLAIMANT WAIVES ALL RIGHTS TO BENEFITS UNDER THE WORKER'S COMPENSATION.
ACTUALLY RECEIVED MAXIMUM BENEFITS AT THAT POINT.
FURTHER, FURTHER, THIS SETTLEMENT AND AGREEMENT SHALL CONSTITUTE AN ELECTION OF REMEDIES BY THE CLAIMANT WITH RESPECT TO THE EMPLOYER AND THE CARRIER AS TO THE COVERAGE PROVIDED TO THE EMPLOYER.
SO ZENITH DOESN'T ABANDON THE PLAINTIFF.
ZENITH SETTLES WITH THE PLAINTIFF.
THEN THE PLAINTIFF WENT BACK INTO COURT 18 MONTHS LATER, MOVED FOR SANCTIONS AGAINST THE UNREPRESENTED AND DISAPPEARED EMPLOYEE.
ALL DEFENSES WERE STRICKEN AT THAT POINT, INCLUDING THE STATUTORY EXCLUSION DEFENSE.
AND THEN THEY HAD A ONE-DAY TRIAL AGAINST AN EMPTY CHAIR AND GOT $9.5 MILLION IN DAMAGES.
SO THAT'S WHAT HAPPENED IN THIS

CASE.
WHAT HAPPENED IN WRIGHT WAS THAT
THE PLAINTIFF, THE INJURED
EMPLOYEE, SUED FOR GROSS
NEGLIGENCE.
SUED FOR GROSS NEGLIGENCE.
MADE AN ALLEGATION THAT WOULD
HAVE AND LIABILITY OUTSIDE OF
THE WORKER'S COMPENSATION.
>> GO BACK, IF YOU WOULD, DO THE
PREDICATE FOR THIS AS TO THE
COVERAGE UNDER THIS EMPLOYER'S
LIABILITY.
WHAT -- MISS GUNN SAYS THAT THE
ONLY THING THAT ZENITH TRIES TO
RELY ON IS THE ONE SENTENCE THAT
TALKS ABOUT LIABILITIES THAT
ARISE UNDER THE WORKER'S COMP
STATUTES OR SOMETHING TO SUCH
EFFECT.
WHAT DO YOU SAY THE COVERAGE
PROVISION OR THE EXCLUSION SAYS
SPECIFICALLY?
>> I'LL READ IT TO YOU, YOUR
HONOR.
IT'S IN THE FEDERAL RECORD AT
97-1, PAGE 6.
QUOTE, ANY OBLIGATION IMPOSED BY
A WORKER'S COMPENSATION
OCCUPATIONAL DISEASE
UNEMPLOYMENT COMPENSATION OR
DISABILITIES LAW OR ANY SIMILAR
LAW.
ANY OBLIGATION IMPOSED BY
WORKER'S COMPENSATION LAW.
THAT'S WHAT IT SAYS.
>> THAT DOES NOT SAY ANY ACTION
ARISING OUT OF THE COURSE AND
SCOPE OF THE EMPLOYMENT OF THE
CLAIMANT.
>> THAT'S CORRECT, BECAUSE WE
HAVE THE EMPLOYER LIABILITY--
>> NO.
NO.
I UNDERSTAND.
BUT SHE SAYS THAT LANGUAGE DOES
NOT, DOES NOT COVER WHAT WE'RE
TALKING ABOUT BECAUSE THAT
APPLIES TO REQUIREMENTS UNDER
THE STATUTE -- AND THIS IS NOT A

REQUIREMENT UNDER THE STATUTE.
IT'S A -- HE'S AN EMPLOYEE.
>> I UNDERSTAND THAT THAT IS THEIR ARGUMENT.
>> OKAY.
>> AND THE REASON THAT ARGUMENT IS WRONG, I THINK IS BEST EXPLAINED IN THE FEDERAL DISTRICT COURT'S ORDER IN THIS CASE.
BECAUSE THE CLAIM IS FOR SIMPLE NEGLIGENCE -- LET'S PUT IT ANOTHER WAY.
BECAUSE IT IS A WORKPLACE ACCIDENT INJURY; THAT IS, NO INTENTIONAL TORT, NO GROSS NEGLIGENCE, IT IS AND ALWAYS WILL BE A WORKER'S COMPENSATION CLAIM.
THAT IS WHAT IT IS.
IF YOU SUE FOR GROSS NEGLIGENCE, LIKE IN WRIGHT, THAT IS NOT A WORKER'S COMPENSATION CLAIM.
THAT IS A VIABLE TORT CLAIM ON ITS FACE.
AND WHAT THE INSURER DID IN WRIGHT WAS NOT DEFEND.
ON THE FACE OF THE PLEADING WAS A VIABLE TORT CLAIM AND THE INSURER WALKED AWAY FROM THAT.
>> BUT LET ME GO BACK TO MY QUESTION.
I UNDERSTAND THAT DISTINCTION, ALTHOUGH IT'S -- READING THE OPINION DOESN'T SEEM TO -- IT DOESN'T SEEM TO BE BASED ON THE GROSS NEGLIGENCE DISTINCTION.
JUST -- AND -- SO ARE YOU SAYING WRIGHT IS CORRECT?
OR--
>> WHAT I'M SAYING IS IF WRIGHT MEANS WHAT THE DISTRICT JUDGE SAYS IT MEANS, IT'S CORRECT.
IF WRIGHT MEANS THAT REVARETO AND INDIAN HARBOR, WHICH CAME AFTER WRIGHT FROM THE SAME DISTRICT COURT OF APPEALS AND ADOPTED THAT CASE LOCK, STOCK AND BARREL, IN WHICH THE COURT SAID BOTH EXCEPTIONS APPLY, THE

STANDARD EMPLOYEE EXCLUSION AND
THE WORKER'S COMPENSATION
EXCLUSION.
IF WRIGHT MEANS THAT THIS CAN
HAPPEN, WITH THE SITUATION YOU
HAVE IN FRONT OF YOU TODAY, THAT
AN INSURER CANNOT DEFEND BECAUSE
THE EMPLOYER DISAPPEARS, THE
INSURER CAN SETTLE AND STILL BE
LIABLE, THEN IT'S WRONG.
>> BUT YOU'RE ADDING A LAYER
THAT -- AND I HAVE TO LOOK BACK
AT THE CERTIFIED QUESTION.
I THOUGHT THERE WAS A -- I
DIDN'T KNOW IT HAD -- IT PUT IN
THERE SOMETHING ABOUT THE
INSURED'S -- THE FAILURE TO
COOPERATE.
IS THAT WITHIN THE CERTIFIED
QUESTION?
>> NO.
>> WHAT MISS GUNN SAYS IS YOU
MAY WIN BECAUSE OF THAT, BECAUSE
OF THE FAILURE TO COOPERATE THAT
CAN'T BE BAD FAITH IF THE
INSURED HASN'T COOPERATED.
BUT I'M LOOKING AT A SITUATION
WHERE YOU GOT A COOPERATING
EMPLOYER WHO BUYS -- DOES
EXACTLY WHAT THEY'RE SUPPOSED TO
DO UNDER THE LAW AND THEY BUY
THIS POLICY AND THE WORKER'S
COMP PAYMENTS ARE MADE, BUT THE
LAWYER FOR THE -- OR ANOTHER
LAWYER SUES IN COURT, SUES IN
SIMPLE NEGLIGENCE.
IS THE POSITION OF THE INSURANCE
COMPANY -- DO THEY HAVE AN
OBLIGATION TO DEFEND TO GET THAT
CASE DISMISSED?
OR BECAUSE THERE IS NOT THAT
COVERAGE, CAN THEY WALK AWAY
FROM THE DEFENSE OF THAT CLEARLY
NONMERITORIOUS LAWSUIT?
>> LET ME FIRST ANSWER BY SAYING
THAT IS WELL BEYOND THE
CERTIFIED QUESTION, BUT THE --
WE AGREE WITH THE DISTRICT COURT
THAT IN A SITUATION IN WHICH A
SIMPLE NEGLIGENCE CLAIM IS

FILED, IT IS BEYOND THE SCOPE OF THE COVERAGE.
IT'S BEYOND THE SCOPE OF THE WORKER'S COMPENSATION COVERAGE.
NOW, AN INSURER CAN ELECT TO DEFEND.
>> BUT THEY DON'T HAVE TO.
>> IN A PURE SENSE, IF AN INSURER REFUSED TO DEFEND, A COMPLETELY NONMERITORIOUS CLAIM FOR SIMPLE NEGLIGENCE, NOTHING MORE IN THE COMPLAINT, AND THE PLAINTIFF WENT FORWARD AND GOT AN EMPTY CHAIR RECOVERY AGAINST THE EMPLOYER, THE PLAINTIFF WOULD HAVE A CLAIM AGAINST TO RECOVER AGAINST THE EMPLOYER.
THE INSURER WOULD NOT THEN BE ON THE HOOK FOR A CLAIM THAT -- THEY HAD NO OBLIGATION TO DEFEND AND THAT IS EXPRESSLY EXCLUDED FROM COVERAGE IN THE POLICY.
>> SO WHEN AN EMPLOYER GETS SUED IN COURT, THE INSURANCE COMPANY LOOKS TO SEE IS THIS A GROSS OR INTENTIONAL NEGLIGENCE.
IF IT'S NOT, THEY GO, LISTEN, GOODBYE, I DO NOT HAVE TO DEFEND.
AGAIN, TO ME THAT'S IMPORTANT.
AND THAT MAY BE THE CORRECT ANSWER.
NO, THEIR OBLIGATION TO DEFEND IN THAT CASE IS NOT BROADER THAN THEIR COVERAGE.
>> IT MIGHT BE UNWISE AND THERE MAY BE CONTRACTS WITH BROADER DUTY TO DEFEND CLAUSES AND SUCH THAT WOULD MAKE IT UNWISE FOR AN INSURER TO RISK THAT.
AND OF COURSE ZENITH DIDN'T DO THAT.
BUT WHAT THE INSURER DID IN WRIGHT WAS SIMPLY REFUSE TO DEFEND A CLAIM FOR GROSS NEGLIGENCE.
AND AS A RESULT, WHAT -- THIS IS THE LANGUAGE THAT THEY'RE RIDING ON.
I THINK IT'S IMPORTANT.

THESE ARE THE INSTRUCTIONS ON
REMAND LANGUAGE FROM WRIGHT,
WHICH IS WHAT THEY'RE -- THE
ENTIRE CASE STANDS OR FALLS ON.
ON REMAND THE COURT WILL BE
CONFRONTED WITH THE REMAINING
COVERAGE ISSUES, WHETHER IT'S
EMPLOYERS LIABILITY COVERAGE
EXTENDED TO INCLUDE WRIGHT'S
CIVIL ACTION.
THE WORKER'S COMPENSATION
EXCLUSION IN THE EMPLOYER'S
LIABILITY COVERAGE RELIED UPON
BY THE TRIAL COURT DOES NOT
APPLY TO WRIGHT'S CIVIL ACTION
BECAUSE THE SETTLEMENT JUDGMENT
WAS NOT IMPOSED BY WORKER'S
COMPENSATION LAW.
RATHER, IT AROSE FROM CLAIMS IN
THE CIVIL ACTION AND THE
SETTLEMENT AGREEMENT BETWEEN THE
EMPLOYEE AND EMPLOYER.
>> WHEN THEY END UP WITH THAT,
THEY SAY NOTHING BECAUSE IT'S
GROSS NEGLIGENCE.
>> OF COURSE IT ISN'T.
IT'S A CLAIM FOR GROSS
NEGLIGENCE.
IT CAN'T MEAN ANYTHING ELSE.
THAT WAS THE ONLY QUESTION
BEFORE THE COURT.
IT WAS NO ISSUE AS TO WHETHER IT
WAS A VIABLE TORT CLAIM BECAUSE
IT WAS ON ITS FACE.
AND THAT'S WHY IN INDIAN HARBOR
WHEN THE COURT HAD A SIMPLE
NEGLIGENCE CASE SOME YEARS
LATER, THE COURT ADOPTED
REVARATO AND MADE NO REFERENCE
TO WRIGHT.
WHETHER WRIGHT'S AN OUTLIER OR
ANY OTHER THINGS DOESN'T REALLY
MATTER BECAUSE IT CAN'T MEAN
ANYTHING OTHER THAN WHAT IT
MEANS ON THE FACE OF THE
OPINION.
IT CAN'T MEAN ANYTHING ELSE.
THAT'S WHY THIS -- THE JUDGMENT
IN THIS CASE IS NOT A TORT
JUDGMENT.

IT IS A JUDGMENT FOR LIABILITY
ON A CLAIM AGAINST AN EMPLOYER
FOR SIMPLE NEGLIGENCE.
AND WHAT THIS WOULD UNLEASH --
THE SPRING THAT WOULD BE
UNLEASHED HERE IS VERY OBVIOUS
FROM YOUR QUESTIONS, JUSTICE
PARIENTE.
A PLAINTIFF COULD SUE A SHAKY
EMPLOYER, NOT NOTIFY THE
INSURANCE COMPANY AT ALL.
THE SHAKY EMPLOYER DISAPPEARS.
THE -- OR PUTS UP NO VIABLE
DEFENSE.
THE PLAINTIFF RECOVERS AN EMPTY
CHAIR AND THEN AN INSURANCE
COMPANY GETS A $9.5 MILLION
JUDGMENT ON ITS DESK THE NEXT
DAY.
THAT'S NOT WHAT WAS MEANT BY
SAYING THAT A TORT JUDGMENT IS
INDEPENDENT OF THE WORKER'S
COMPENSATION LAW.
THAT'S CERTAINLY NOT WHAT THE
FOURTH DISTRICT WAS
CONTEMPLATING IN WRIGHT -- IN
WRIGHT.
AND THEN WHEN YOU PILE ON TOP OF
THAT IN THIS CASE THE ELECTION
OF REMEDIES, BECAUSE IT'S ALL
PART OF THE SAME STORY HERE, IN
TERMS OF WHAT AN INSURANCE
COMPANY IS SUPPOSED TO DO, IS
THAT ZENITH WENT THE EXTRA MILE
IN DEFENDING, RAISED THE ISSUE
AND FOUGHT THE CASE UNTIL ITS
CLIENT DISAPPEARED AND COULDN'T
GO FORWARD, PAID OUT FULL
WORKER'S COMPENSATION BENEFITS
AND SETTLED WITH AN ELECTION OF
REMEDIES.
IT ELECTED ONLY WORKER'S
COMPENSATION BENEFITS.
THERE'S NOTHING MORE THAT AN
INSURER CAN DO TO PROTECT ITSELF
AND SUCH INTERESTS AS--
>> YOU MENTIONED INDIAN HARBOR,
BUT I THINK WHAT MISS GUNN --
INDIAN HARBOR WAS UNDER A
COMMERCIAL GENERAL LIABILITY

POLICY.
NOW, SHE SAYS THAT THE LANGUAGE
OF THE EXCLUSIONS ARE DIFFERENT
IN THE CGL POLICIES FROM THE
WORKER'S COMP--
>> INDIAN HARBOR IS ANOTHER CASE
IN WHICH THE EMPLOYER DIDN'T
HAVE WORKER'S COMPENSATION
INSURANCE.
>> WE'RE DEALING WITH A
DIFFERENT POLICY.
>> BUT AN ALMOST IDENTICAL
EXCLUSION.
WE ALL KEEP TALKING ABOUT AT
FOOTNOTE 7.
THIS IS HOW THE COURT CONSTRUES
THE LIABILITY POLICY.
IN MOST CASES, THE BENEFITS
PROVIDED UNDER THE WORKER'S
COMPENSATION LAW WILL BE THE
INJURED EMPLOYEE'S EXCLUSIVE
REMEDY.
HOWEVER, A WORKER'S COMPENSATION
POLICY IS ISSUED TOGETHER WITH
AN EMPLOYER'S LIABILITY
INSURANCE WITH THE LATTER
INTENDED TO SERVE AS A GAP
FILLER PROVIDED PROTECTION TO
THE EMPLOYER IN SITUATIONS WHERE
THE EMPLOYEE HAS A RIGHT TO
BRING A TORT ACTION DESPITE THE
PROVISIONS OF THE WORKER'S
COMPENSATION STATUTE.
THAT'S WHAT THE EMPLOYER'S
LIABILITY PROVISION IS FOR,
EXACTLY THE SITUATION THAT WAS
BEFORE THE COURT IN WRIGHT,
WHICH IS WHY I'M SO COMFORTABLE
THAT'S WHAT THE CASE HAS TO
MEAN, MEANING GROSS NEGLIGENCE.
BUT THE EXCLUSION IN INDIAN
HARBOR CASE IS EXACTLY THE SAME
AS THE EXCLUSION IN THIS CASE.
QUOTE, FROM PAGE 679 OF THE
OPINION, ANY OBLIGATION OF THE
INSURED UNDER WORKER'S
COMPENSATION DISABILITY BENEFITS
OR ANY SIMILAR LAW.
IT'S THE SAME EXCLUSION.
SO ALTHOUGH IT'S IN A CGL

POLICY, THE COURT IN REVARATO
AND THE SAME COURT IN INDIAN
HARBOR ON THE OTHER SIDE OF
WRIGHT APPLIES THE EXACT SAME
LANGUAGE AS EXISTS IN MY POLICY
HERE TO EXCLUDE.
>> LOOKING AT THE CERTIFIED
QUESTION, ISN'T YOUR BEST ISSUE
ISSUE -- CERTIFIED QUESTION
THREE, WHICH IS IF THE ESTATE'S
CLAIM IS NOT BARRED BY THE
WORKER'S COMP EXCLUSION AND,
AGAIN, BECAUSE -- NOT THE BAD
FAITH/GOOD FAITH, BUT JUST WHAT
HAD HAPPENED, WHY DOESN'T THE
RELEASE OTHERWISE PROHIBIT THE
ESTATE FROM COLLECTING THE TORT
JUDGMENT?
IN OTHER WORDS, AND MAYBE THAT'S
WHAT YOU WERE ALLUDING TO
EARLIER.
ISN'T THE REAL KEY THAT THAT
PLAINTIFF EVEN THOUGH THAT CASE
WAS PENDING COULD NOT GO AHEAD,
SETTLE THE CLAIM AND THEN SAY
I'M ELECTING AND I'M RELEASING
ALL CLAIMS?
IS THAT -- SO WHAT ABOUT
CERTIFIED QUESTION THREE?
>> THE ELECTION OF REMEDIES, AS
I SAID, IS--
>> I MEAN, ISN'T THAT--
>> IT'S AN INTEGRAL PART OF THE
STORY ON THE COVERAGE.
>> BECAUSE IT HAPPENED AFTER THE
LAWSUIT WAS FILED.
>> IT HAPPENED WHILE THE LAWSUIT
WAS PENDING, AFTER WE HAD
WITHDRAWN AND THEN 18 MONTHS
LATER WITHOUT TELLING THE JUDGE
ABOUT THE SETTLEMENT, THE
PLAINTIFF WENT IN AND GOT THE
EMPLOYER'S DEFENSES STRICKEN,
GOT A DEFAULT JUDGMENT ON
LIABILITY AND TRIED A CASE ON
DAMAGES.
AND, YES, ABSOLUTELY.
THAT'S AN INDEPENDENT BASIS FOR
UPHOLDING THE DISTRICT COURT'S
DECISION.

IT'S CERTIFIED AS A QUESTION
BECAUSE IT WAS RAISED ON APPEAL
ONLY AS A RIGHT FOR THE WRONG
REASON DEFENSE.
IT WAS NEVER REACHED IN THE
DISMISSAL ORDER.
WE RAISED IT AS AN ADDITIONAL
REASON WHY WE SHOULD WIN SHOULD
THE COURT DISAGREE ON THE
FLORIDA LAW QUESTION.
SINCE EVERYTHING WAS BEING
CERTIFIED, IT'S BEFORE YOU NOW.
THERE'S NO QUESTION UNDER
FLORIDA LAW, NO NEW ISSUE TO
DECIDE, NO CONFLICT TO RESOLVE.
IT WAS ON THE FACE OF THE
AGREEMENT.
IT DID TWO THINGS.
IT ELECTED WORKER'S
COMPENSATION.
THAT'S THE PART THAT I READ
EARLIER.
AND IT TOOK THE BENEFITS THAT
THE INSURER HAD PAID OUT, WHICH
SHOULD HAVE ENDED THE CASE RIGHT
THERE.
THE ONLY REASON IT CONTINUED IS
BECAUSE THE PLAINTIFF WENT BACK
INTO COURT AND OBTAINED A
DEFAULT JUDGMENT.
>> I HAVE SOME CONCERNS WITH
YOUR POSITION WITH REGARD TO
STANDING.
IF THIS -- IF THE CLAIMANT, WHO
IS THE ONLY CLAIMANT RECOGNIZED
UNDER FLORIDA LAW, IS NOT THE
ENTITY, THE ESTATE, TO HAVE
STANDING, WHO WOULD?
>> WELL, JUSTICE LEWIS, I
UNDERSTAND THAT IN GENERAL AND
UNDER THE STATUTE FLORIDA IS THE
ONE WHO HAS A TORT JUDGMENT.
THE QUESTION IS IT'S NOT A
MECHANICAL QUESTION.
MERELY SECURING A TORT JUDGMENT
DOESN'T NECESSARILY IN EVERY
CASE GIVE THE SECURER OF THE
TORT JUDGMENT STAND TO GO BRING
IT.
UNLIKE A COPELAND SITUATION,

THIS WASN'T REPRESENTING THE
EMPLOYER'S INTEREST.
>> WELL, EVEN IN THAT CASE YOU
DON'T HAVE TO HAVE THE INSURED
EVEN AS A PARTY.
>> I UNDERSTAND, YOUR HONOR.
>> OKAY.
>> WE HAVE A JUDGMENT FOR SIMPLE
NEGLIGENCE.
AND THIS--
>> WELL, WE HAVE A JUDGMENT.
WE CAN TALK ABOUT THE OTHER.
BUT WHEN SOMEONE SAYS I HAVE A
JUDGMENT AGAINST THIS INSURED
AND YOU PROVIDED COVERAGE, I
MEAN, YOU MAY NOT, BUT WHY DO
THEY NOT HAVE STANDING TO MAKE
THAT ASSERTION?
THERE'S A POLICY BEEN ISSUED.
IT'S IN THE NAME OF THE ENTITY
AGAINST WHICH THEY HAVE A
JUDGMENT.
AND THE STANDING -- I'M MISSING
IT.
>> BECAUSE WE'RE TALKING ABOUT
THE EMPLOYER'S LIABILITY
SECTION.
>> WHO HAS STANDING TO SEEK TO
ENFORCE THIS JUDGMENT AGAINST AN
ALLEGED INSURER?
WHO?
WHAT ENTITY?
>> THE EMPLOYER.
THE EMPLOYER.
>> ONLY THE EMPLOYER?
>> ONLY THE EMPLOYER.
>> WELL, THE EMPLOYER DOESN'T
EXIST.
UNDER FLORIDA LAW DON'T WE
RECOGNIZE THAT THE PARTY
ACTUALLY INJURED THAT WILL
ULTIMATELY HAVE AN INTEREST TO
ASSERT THAT CLAIM DIRECTLY?
>> WELL, JUSTICE LEWIS, THAT'S
REALLY TO ME ONE OF THE GREAT
IRONIES OF THIS CASE, IS BECAUSE
EVERYTHING YOU'RE SAYING IS
GENERALLY THE LAW, BUT THE THIRD
PARTY'S INTEREST IN THIS
INSURANCE POLICY IS UNDER THE

WORKER'S COMPENSATION CLAUSE.
THAT'S WHERE THE--
>> NO.
IT'S UNDER THE LIABILITY POLICY.
THAT'S WHAT THEY'RE ASSERTING,
THE EMPLOYER'S LIABILITY.
>> THEY'RE ASSERTING IT.
MY POINT IS PURE STANDING.
>> I UNDERSTAND.
WE CAN SEPARATE OUT SURGICALLY
AND I'M HAPPY TO DO THAT.
>> WELL, I THINK YOU HAVE TO.
>> THE JUDGMENT THAT THEY'RE
PURPORTING TO ASSERT AS THE
BASIS FOR STANDING IS A JUDGMENT
FOR A WORKER'S COMPENSATION
INJURY.
THAT'S WHAT IT IS.
THAT'S WHAT IT IS AS A MATTER OF
LAW BECAUSE IT WAS A CLAIM FOR
SIMPLE NEGLIGENCE.
SO ON THE FACE OF THE PLEADINGS
AND JUDGMENT AS INCORPORATING
THE PLEADINGS, THEY'RE TRYING TO
ENFORCE SAYING I HAVE STANDING
TO TAKE MY UNLAWFUL WORKER'S
COMPENSATION JUDGMENT AND USE IT
AS A BASIS FOR A CLAIM UNDER THE
EMPLOYER'S LIABILITY SECTION
WHICH IS LIMITED ON ITS FACE TO
CLAIMS THAT ARE NOT WITHIN THE
WORKER'S COMPENSATION COVERAGE.
>> WELL, THAT MAY BE THE
ULTIMATE DETERMINATION, BUT THE
QUESTION TO AT LEAST ASSERT THAT
IT IS NOT, NO ONE HAS THAT
STANDING.
YOU DON'T HAVE A JUDGMENT.
>> WHETHER THE EMPLOYER EXISTS
OR NOT, IN FACT AND IN LAW, THAT
AGREEMENT, THE EMPLOYER'S
LIABILITY AGREEMENT, AS
MISS GUNN HERSELF WOULD SAY ON
THE MERITS, IS AS BETWEEN THE
EMPLOYER AND THE INSURER.
THOSE ARE THE -- THAT'S THE ONLY
ENTITY THAT WOULD HAVE STANDING
TO ENFORCE A -- ENFORCE THE
POLICY UNDER THAT PROVISION,
WOULD HAVE TO BE THE EMPLOYER

BECAUSE OTHERWISE YOU WOULD BE
SAYING ULTIMATELY THAT THIS
INSURANCE COMPANY AND EVERY
INSURANCE COMPANY THAT'S FACED
WITH THIS KIND OF BIZARRE
SITUATION WOULD HAVE TO DEFEND,
WOULD HAVE TO DEFEND LAWSUITS,
WOULD BE SUBJECT TO LAWSUITS BY
PLAINTIFFS WHO SECURE JUDGMENTS
IN SIMPLE NEGLIGENCE.
I UNDERSTAND WE MIGHT WIN THOSE
LAWSUITS.
WE SHOULD WIN THOSE LAWSUITS.
BUT TO CONFER STANDING ON A
PLAINTIFF WHO SLIPS INTO THE
COURTHOUSE AND GETS A JUDGMENT
FOR SIMPLE NEGLIGENCE TO THEN
SUE THE INSURER EVERY TIME
DOESN'T MAKE ANY SENSE AT ALL.
AND THAT THEY SHOULD BE--
>> WELL, NOR DOES IT MAKE SENSE
THAT NO ONE HAS STANDING.
>> THE EMPLOYER HAS STANDING.
IF THEY CAN GET A JUDGMENT
AGAINST THE EMPLOYER AND SAY
THAT IT'S A VIABLE JUDGMENT,
THEY CAN'T SAY THAT THE EMPLOYER
DOESN'T HAVE STANDING.
>> THE EMPLOYER MAY SAY KISS
OFF, I HAVE NO INTEREST IN GOING
FORWARD WITH THIS.
REALLY THIS ARGUMENT TO ME IS
ALMOST -- IT'S NOT THERE.
I UNDERSTAND YOUR OTHER
ARGUMENTS, BUT--
>> I UNDERSTAND, JUSTICE LEWIS,
AND IT'S OBVIOUSLY ONE OF THE
REASONS THAT WAS CERTIFIED
BECAUSE THE ENTIRE PACKAGE WAS
CERTIFIED HERE BECAUSE ON THE
COVERAGE ISSUE AND ELECTION OF
REMEDIES ISSUE.
>> THANK YOU.
>> THANK YOU.
>> REBUTTAL.

>> THANK YOU, YOUR HONORS.
HE ARGUED THAT OUR ENTIRE CASE
RISES AND FALLS ON THIS ONE
SENTENCE OF REMAND LANGUAGE IN

WRIGHT.
THE WRIGHT CASE IS IMPORTANT.
IT'S THE ONLY -- FLORIDA CASE
ADDRESSING THE ISSUE.
OUR CASE RISES AND FALLS ON THE
PLAIN LANGUAGE OF THE POLICY
THEY ACTUALLY ISSUED, WHICH SAYS
THE EXCLUSION, THE ONLY POSSIBLE
BASIS FOR VOIDING COVERAGE HERE,
IS FOR ONLY AN OBLIGATION
IMPOSED BY WORKER'S COMP--
>> LET ME ASK YOU ABOUT THAT.
I'M JUST HAVING TROUBLE
UNDERSTANDING YOUR
INTERPRETATION OF THAT CLAUSE
BECAUSE SEEMS LIKE TO ME THAT AN
OBLIGATION BASED ON A SIMPLE
NEGLIGENCE CLAIM CAN'T BE
ANYTHING OTHER THAN AN
OBLIGATION IMPOSED BY WORKER'S
COMPENSATION LAW.
I MEAN, THAT'S WHAT WE'RE
TALKING ABOUT HERE.
>> YOUR HONOR, I THINK THAT'S
WHAT THEIR ARGUMENT IS.
YOU'VE KIND OF CHANGED THE
POLICY LANGUAGE A LITTLE BIT IN
YOUR QUESTION.
>> BUT WHAT DOES THIS EXCLUSION
COVER?
NOW, I UNDERSTAND WE INTERPRET
THESE THINGS STRICTLY.
>> RIGHT.
>> BUT REASON DOES NOT GO OUT
THE DOOR.
I MEAN, WE HAVE TO LOOK AT ALL
OF THIS IN CONTEXT.
AND WHAT -- YOUR INTERPRETATION
OF IT, WHAT DOES IT LEAVE?
IT COVERS NOTHING.
THE EXCLUSION COVERS NOTHING.
>> IF YOU LOOK AT THE OTHER
PARTS OF THE EXCLUSION, IT'S A
WORKER'S COMPENSATION DISABILITY
OR OTHER TYPE OF BENEFITS LAW.
ANY OBLIGATION IMPOSED BY THAT
TYPE OF LAW, WHICH IS DIFFERENT
THAN AN OBLIGATION IMPOSED BY
STATE COURT TORT LAW UNDER THE
WRONGFUL DEATH ACT.

AND OF COURSE THIS IS JUST ONE
OF MANY EXCLUSIONS IN THE
POLICY.
IT'S THE ONLY ONE THAT
SUPPOSEDLY APPLIES HERE.
THE CGL COVERAGE EXCLUSION IS
MORE SIMILAR TO THE LANGUAGE
THAT YOU USED IN YOUR QUESTION,
WHICH IS INJURIES THAT ARISE
UNDER OR DUTIES THAT ARISE UNDER
WORKER'S COMPENSATION LAW AS
OPPOSED TO BEING IMPOSED BY,
OBLIGATIONS IMPOSED BY.
AND THE COURTS IN--
>> BUT THE WORKER'S COMPENSATION
LAW IMPOSES AN OBLIGATION FOR
SIMPLE NEGLIGENCE CLAIMS.
>> YES, YOUR HONOR.
>> AND THAT'S WHAT IS -- THAT'S
WHAT IS AT ISSUE HERE, A SIMPLE
NEGLIGENCE CLAIM.
>> WHAT'S AT ISSUE HERE IS A
TORT CASE FOR SIMPLE NEGLIGENCE
THAT MAY WELL SHOULD HAVE BEEN
DISMISSED.
WE'LL NEVER KNOW THAT.
AND WE CAN'T -- THAT'S THE EXACT
ARGUMENT HERE, YOUR HONOR.
YOU'VE HIT IT ON THE HEAD.
NEITHER THE DISTRICT COURT IN
THE FEDERAL DISTRICT NOR THIS
COURT SHOULD BE READDRESSING THE
SUBSTANTIVE BASIS FOR THE
INSURER'S TORT LIABILITY IN THIS
COVERAGE CASE.
THAT'S EXACTLY WHAT THE WRIGHT
COURT SAID.
>> BUT WHAT ABOUT THE -- HIS
ARGUMENT CONCERNING THE ACTUAL
RELEASE ITSELF?
>> YES, YOUR HONOR.
>> THAT IT SEEMS TO ME THAT IN
THAT RELEASE HE CHOSE HIS
REMEDY, AND SO THE INSURANCE
COMPANY SHOULD NOT BE ON THE
HOOK FOR BOTH HAVING HIM CHOSE
THE WORKER'S COMPENSATION REMEDY
AND NOW YOU WANT THEM TO PAY
THIS SIMPLE NEGLIGENCE JUDGMENT.
>> YOUR HONOR, THERE'S A COUPLE

REASONS WHY -- MULTIPLE REASONS
WHY WE WOULD ASK THIS COURT TO
REJECT THAT ARGUMENT.
FIRST YOU HAVE TO LOOK AT THE
ACTUAL LANGUAGE OF THE
SETTLEMENT AGREEMENT.
IT'S A STATUTORY WASH-OUT
SETTLEMENT.
IN THE STATUTE ONLY APPLIES TO
COMP BENEFITS.
THE LANGUAGE OF THE SETTLEMENT
AGREEMENT THROUGHOUT REFERS TO
CHAPTER 440, BENEFITS ENTITLED
FOR THE SPECIFIC PURPOSE OF
DISCHARGING ANY FURTHER
LIABILITY FOR BENEFITS UNDER
WORKER'S COMPENSATION LAW.
ALL BENEFITS THEY ARE OR MAY BE
ELIGIBLE OR ENTITLED TO UNDER
CHAPTER 440.
PURSUANT TO SECTION 440.420, THE
ACCELERATED BENEFITS.
ONCE WE KNOW YOU'RE ENTITLED TO
COMP, YOU CAN JUST WASH IT OUT
UNDER THIS.
THIS SETTLEMENT AGREEMENT
DOESN'T REFER ANYWHERE TO THE
TORT CASE.
WE'VE CITED NUMEROUS CASES
ADDRESSING THE ELECTION OF
REMEDIES ELEMENTS.
>> WHAT WOULD YOU HAVE TO PUT IN
THERE, THAT THIS ALSO COVERS ANY
SIMPLE NEGLIGENCE TORT CASE?
>> YES, YOUR HONOR.
YOU WOULD HAVE TO DO EXACTLY
WHAT YOU DID AS TO THE PENDING,
NONHYPOTHETICAL TORT CASE,
EXISTING TORT CASE, DID EXACT
LIL WHAT YOU DID AS TO THE CAMP
CLAIM, SAY THAT A JUDGE HAS TO
APPROVE IT.
ACKNOWLEDGE ITS EXISTENCE
ANYWHERE IN THIS AGREEMENT.
AND WHAT THE COURT IN THE JONES
CASE COURT HELD WAS THAT
ELECTION OF REMEDIES DOESN'T
JUST HAPPEN JUST BECAUSE YOU GET
COMP BENEFITS AND THAT DOESN'T
PRECLUDE YOU FROM ALSO ASSUMING

IN TORT.
THERE ARE ELEMENTS THAT HAVE TO BE PROVEN.
IT PRESUPPOSES A CONSCIOUS INTENT TO REJECT THE TORT CLAIM.
IN THE JONES CASE THE CLAIMANT IN THAT CASE CHECKED A LITTLE BOX THAT SAID, YES, I ACCEPT THAT THIS IS A PURELY COMPENSABLE INJURY.
THAT'S NOT A CONSCIOUS INTENT TO REJECT A TORT CLAIM.
THEY DIDN'T EVEN HAVE A TORT CLAIM IN THE JONES CASE.
HERE WE ACTUALLY HAVE A TORT CLAIM.
SECOND, IT HAS TO BE THE ENTITLEMENT TO COMP BENEFITS HAS TO BE PURSUED TO A DETERMINATION OR CONCLUSIONS ON THE MERITS.
THAT'S FROM JONES.
>> YOU'VE WELL EXCEEDED YOUR TIME.
>> YES, YOUR HONOR.
IN SHORT, YOUR HONOR, WE WOULD SIMPLY ASK THAT THE COURT ANSWER ALL THREE CERTIFIED QUESTIONS AND FIND THAT THERE IS COVERAGE UNDER THE POLICY.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
COURT IS ADJOURNED.
>> ALL RISE.