Frank C. Walker, Jr. v. Virginia Insurance Reciprocal

THE NEXT CASE IS WALKER VERSUS VERGE I KNOW YEAH INSURANCE. -- VIRGINIA INSURANCE.

MR. JACKSON.

IF IT PLEASE THE COURT, MY NAME IS PHIL JACKSON, AND I REPRESENT DR. WALKER AND PEDIATRIC ASSOCIATES, THE PETITIONERS THIS THIS CASE. I WOULD LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL, IF I COULD. THE I AM GOING TO PROCEED RIGHT INTO MY ARGUMENT AND FACTS, BECAUSE MY BRIEF ARGUED JURISDICTION. WE BE HERE, TODAY, BECAUSE WE BELIEVE THAT THE FIRST DISTRICT COURT OF APPEALERRED, IN REVERSING THE CIRCUIT COURT'S ORDER GRANTING SUMMARY JUDGMENT IN FAVOR OF DR. WALKER, WHERE THE RESPONDENT IN THIS CASE, VIR INSURANCE, FAILED TO FILE ITS COMPLAINT FOR CONTRIBUTION WITHIN THE ONE-YEAR LIMITATION PERIOD REQUIRED BY 768.3142.

DO YOU CONTEND THAT NONE OF THE MALPRACTICE SCREENING PROCEDURES APPLY, WHEN THERE IS CONTRIBUTIONS? IN OTHER WORDS THE PROCEDURE THAT YOUR CLIENT ENGAGED IN, IN FORMAL DISCOVERY AND ALL OF THE OTHER PARTS OF THAT PROCEDURE, DO NOT APPLY, PEOPLE SHOULD NOT BE INVOLVED IN THAT?

YES, YOUR HONOR, THAT IS OUR CONTENTION, AND I WOULD LIKE TO ADD THAT WE DID, IN FACT, PARTICIPATE IN THE PRESUIT PROCESS, BUT WE DID THAT BECAUSE WE ARE REQUIRED, UNDER CHAPTER 766, TO DO SO OR RISK STRIKING OF OUR DEFENSES.

I GUESS THAT IS WHAT I AM ASKING, IS IF THE PRESUIT SCREENING PROCESS APPLIES, THEN WHY WOULDN'T THE TOLLING PROCESS APPLY AS WELL?

WELL, OUR CONTENTION IS THAT IT DOESN'T APPLY, BUT WE DON'T HAVE ANY CONTROL, AS THE DEFENDANT, OVER HOW THE SUIT IS BROUGHT. THE PLAINTIFF CONTROLS HOW THE SUIT IS BROUGHT, AND ONCE --

BUT YOU COULD HAVE SAID ONCE THEY DID WHATEVER, THEIR LETTER OF INITIATION, SAYS WE ARE NOT RESPONDING, BECAUSE WE ARE BOUND BY THE CONTRIBUTION CLAIM, AND WE ARE NOT PARTICIPATING.

THAT'S TRUE, AND WE DID DO THAT, BUT THAT WAS EVENTUALLY AFTER THE PRESUIT PROCESS OCCURRED, AND WE DID RAISE THAT AS AN AFFIRMATIVE DEFENSE, WHEN THE COMPLAINT WAS EVENTUALLY FILED, MORE THAN A YEAR AFTER THEY SETTLED THAT CLAIM.

SO YOU WOULD WANT US TO SAY THERE IS A RULE OF LAW THAT NO PART OF THE PRESUIT SCREENING PROCESS APPLIES TO CONTRIBUTION CLAIMS.

YES, AND I THINK THAT WOULD BE PERFECTLY CONSISTENT WITH WHAT THE FLORIDA LEGISLATURE HAS SAID, IN PASSING BOTH 768.31 AND CHAPTER 766.

DON'T YOU THINK THERE ARE SOME DOCTORS THAT WOULD WANT THAT PROTECTION, EVEN IF IT IS A CONTRIBUTION CLAIM, OF WANTING TO HAVE, FOR THE VERY REASON THAT THE MALPRACTICE STATUTES WERE PUT INTO EFFECT, THAT THEY WOULD WANT TO HAVE THE FILTER OF THE SCREENING PROCESS, TO BE ABLE TO -- AS THEIR PROTECTION?

WELL, I THINK SOME DOCTORS WOULD, AND I -- WE CONCEDE THAT THE PRESUIT SCREENING PROCESS IS DESIGNED TO PROTECT AND HELP DOCTORS, BUT THE POINT IS THAT THE LEGISLATURE HAS CHOSEN, IN ITS WISDOM, FOR WHATEVER REASON, NOT TO INCLUDE THE PRESUIT SCREENING PROCESS IN CONTRIBUTION CLAIMS.

WHERE DO YOU COME -- IS THAT A STATUTORY CONSTRUCTION?

YES, YOUR HONOR, THAT IS.

DON'T THEY BROADLY DEFINE A CLAIM FOR MEDICAL MALPRACTICE AS A CLAIM ARISING OUT OF THE RENDERING OF MEDICAL CARE OR SERVICES?

YES, THEY DO, BUT -- AND THAT IS NOT WHAT A CONTRIBUTION CLAIM IS. A CONTRIBUTION CLAIM ARISES OUT OF THE PAYMENT OR THE LOSS OF MONEY, DUE TO THE NEGLIGENCE OF A JOINT TORTFEASOR, AND THAT IS WHAT A CONTRIBUTION CLAIM IS, AND THAT IS WHAT THIS CLAIM IS ABOUT. 9 FACT THAT THERE IS SOME -- THE FACT THAT THERE IS SOME UNDERLYING NEGLIGENCE IN THE MEDICAL MALPRACTICE FIELD IS JUST STANDARD FOR ANY CONTRIBUTION CLAIM. THERE IS NEGLIGENCE UNDERLYING ALL CLAIMS. IT DOESN'T HAVE TO BE MEDICAL NEGLIGENCE. IT COULD BE A NEGLIGENCE CLAIM, BASED ON AN AUTOMOBILE CASE OR AN ACCIDENT, SO THE UNDERLYING CLAIM DOES NOT DICTATE HOW THE CASE IS TO PROCEED, AT THE LEVEL THAT THE PLAINTIFFS FILED AT. THAT IS GUIDED BY THE CONTRIBUTION CLAIM STATUTE, 768.31.

BUT WOULD YOU AGREE, AT LEAST, THAT EVEN THOUGH THIS IS A CONTRIBUTION CLAIM, UNDERLYING THE CONTRIBUTION CLAIM, IS THE MEDICAL MALPRACTICE.

YES, JUSTICE QUINCE. WE ACKNOWLEDGE THAT.

SO WHY WOULDN'T IT BE A BETTER PRACTICE, TO GIVE EFFECT TO BOTH 766 AND 768, BY REQUIRING CASES INVOLVING AN UNDERLYING CLAIM OF MEDICAL MALPRACTICE, TO HAVE TO COMPLY WITH BOTH OF THESE STATUTES?

WELL, I DON'T THINK WE ARE NECESSARILY TAKING THE POSITION THAT IT WOULD BE BETTER OR WORSE. WE ARE TAKING THE POSITION THAT THAT DECISION --

WOULDN'T YOU BE GIVING EFFECT -- WELL, THEN, LET ME PUT IT THIS WAY. WOULDN'T YOU BE GIVING EFFECT TO BOTH STATUTES, AS OPPOSED TO JUST GIVING EFFECT TO 768, UNDER YOUR INTERPRETATION OF THIS STATUTORY SCHEME?

IN THAT SCENARIO, YEAH, YES, YOU WOULD BE GIVING EFFECT TO BOTH STATUTES, BUT THE LEGISLATURE, IN ITS WISDOM, FOR SOME REASON DECIDED THAT THAT WASN'T GOING TO BE THE CASE.

AND YOU SAY THAT, AND YOU HAVE SAID THAT SEVERAL TIMES, AND YOU SAY THAT, BASED ON WHAT? WHERE DO YOU GET THAT THE LEGISLATURE, IN ITS WISDOM, CHOSE NOT TO DO HA?

IF YOU LOOK AT THE PLAIN READING OF BOTH STATUTES, YOU WILL SEE THAT, OF COURSE THE MEDICAL MALPRACTICE CLAIM ARISES OF THE RENDERING OR THE FAILURE TO RENDER MEDICAL CARE OR SERVICES. THAT IS NOT WHAT A CONTRIBUTION CLAIM IS, SO YOU HAVE GOT --

DON'T YOU HAVE TO GET TO THAT, IN ORDER TO GET TO THE CONTRIBUTION ISSUE?

YES. YOU MAY, BUT IF YOU LOOK AT HOW THAT STATUTE --

UNDER WHAT CIRCUMSTANCES WOULD YOU NOT HAVE TO SHOW THAT THE PERSON YOU ARE

TRYING TO GET CONTRIBUTIONS FROM HIS, IN FACT, A TORT PEACE OR IN THE MEDICAL MALPRACTICE?

YOU WOULD EVENTUALLY. BUT THE POINT IS THAT THAT IS WAY DOWN IN THE SUIT, AFTER IT HAS BEEN FILED AND AFTER DISCOVERY AND THE CASE GOES TO TRIAL. WE ARE TALKING ABOUT HOW DO YOU GET INTO COURT, BASICALLY, AT THIS POINT? AND YOU GET INTO COURT, BECAUSE YOU HAVE GOT TO SHOW, UNDER 768.31, THAT THERE WAS A LOSS DUE TO -- A LOSS OF MONEY OR DAMAGES, DUE TO THE ALLEGED NEGLIGENCE OF A COME TORTFEASOR. THAT IS -- OF A COTORTFEASOR. THAT IS HOW YOU FILE A CLAIM ON CONTRIBUTION.

WHICH IS BASICALLY THE SAME WAY YOU GET TO FILE YOUR CLAIM FOR MEDICAL MALPRACTICE, CORRECT?

NO. BECAUSE THE LEGISLATURE OBVIOUSLY KNEW THE DISTINCTION BETWEEN THOSE TWO THINGS, BECAUSE UNDER CHAPTER 766, AND I WOULD POINT THE COURT TO 766.2031, THE LEGISLATURE SPECIFICALLY SAID, OKAY, FOR CERTAIN CLAIMS, THESE -- FOR CERTAIN CLAIMS, THE MEDICAL MALPRACTICE PRESUIT SCREENING PROCESS WILL APPLY, AND FOR THOSE CERTAIN CLAIMS, IT LABELED 768.19 AND 768.28. 768.19, I BELIEVE, DEALS WITH STATUTE CLAIMS AND CASES 768.28 DEALS WITH MEDICAL UNCERTAINTY. AND THE STATUTES SAY, WHEN YOU HAVE GOT THOSE TWO CLAIMS, THE PROCESS SHOULD APPLY TO THOSE CLAIMS, AND THE PROCESS IN 766 WILL APPLY. THE LEGISLATURE CHOSE NOT TO MENTION 731, WHICH IS THE CONTRIBUTION STATUTE. THEY HAD EVERY OPPORTUNITY AT THAT POINT TO SAY WE WANT CONTRIBUTION CLAIMS TO BE INCLUDED IN THE TERM "MEDICAL MALPRACTICE --", AND THEY -- MALPRACTICE", AND THEY CHOSE NOT TO. THE COURT IS WELL AWARE OF THE MENTION OF ONE THING, AT LEAST THE APPLICATION OF ONE THING LEADS TO THE APPLICATION OF OTHER THINGS NOT MENTIONED, SO I THINK THAT THE LEGISLATURE SPECIFICALLY ADDRESSED THAT POINT, WHEN IT PASSED 766.203, AND I THINK THAT LEADS TO THE NEXT QUESTION. IT BEGS TO THE NEXT QUESTION. IF YOU HAVE GOT 766 CLAIM, AND YOU HAVE, ALSO, GOT A 768.31 CONTRIBUTION CLAIM, THEN WHAT STATUTE OF LIMITATIONS PERIOD APPLIES? DO YOU APPLY THE MEDICAL MALPRACTICE LIMITATION PERIOD, OR DO YOU APPLY THE 768 CONTRIBUTION STATUTE OF LIMITATIONS? I THINK THAT THE LEGISLATURE PROBABLY --

I DON'T THINK -- IS THERE A SERIOUS QUESTION HERE OF WHETHER OR NOT THE CONTRIBUTION STATUTE OF LIMITATIONS APPLIES? I THOUGHT THAT WHAT WE WERE TALKING ABOUT IS THAT IT DOES APPLY, BUT THAT, BECAUSE YOU HAVE TO GO THROUGH THE MEDICAL MALPRACTICE PRESUIT SCREENING, YOU HAVE THESE TOLLING PERIODS, NOT THAT THAT TIME DOESN'T APPLY.

YOU ARE ABSOLUTELY RIGHT, BUT IF YOU TAKE THE SCENARIO THAT WE HAVE BEEN TALKING ABOUT, WHERE YOU DESCRIBE THIS CONTRIBUTION CLAIM AS A MEDICAL MALPRACTICE CLAIM, THEN WHICH ONE APPLIES? IF YOU ARE GOING TO CALL IT A MEDICAL MALPRACTICE CLAIM, BROUGHT THROUGH A CONTRIBUTION CLAIM, WHICH IS WHAT THE FIRST DISTRICT COURT SAID IN THE LOWER COURT AND WHAT VIR IS ARGUING IN THEIR BRIEF, WELL, THEN, DO YOU APPLY THE STATUTE OF LIMITATIONS ASSOCIATED WITH A MEDICAL MALPRACTICE CLAIM, AND IF YOU DO, THEN THE CASE IS OUT, BECAUSE IT IS TWO YEARS, UNDER 766, OR UNDER 9511, PERTAINING TO A MEDICAL MALPRACTICE CLAIM, IF THAT IS WHAT YOU ARE GOING TO CALL IT, THEN TWO YEARS HAVE LONG RUN ON THEIR CLAIM. THE ONLY WAY THAT A VIR CAN PROBABLY MAKE THIS CLAIM IN THIS CASE, IS THROUGH 768.3 1RTION THE CONTRIBUTION STATUTE. -- 768.31, THE CONTRIBUTION STATUTE. IN AN EFFORT TO JUSTIFY THE DECISION, THE FIRST DISTRICT COURT, AS I SAID, BLURRED THE DISTINCTION BETWEEN THE TWO CLAIMS, A CLAIM FOR MEDICAL MALPRACTICE BROUGHT BY A CLAIMANT, AN INJURED PARTY, AND THE CLAIM OF A JOINT TORTFEASOR, SEEKING TO RECOVER A SHARE OF THE LOSS, WHERE THAT LOSS WAS PAID IN A MALPRACTICE SUIT. IT IS OUR POSITION THAT THE FIRST DISTRICT COURT'S OPINION AND JUSTIFICATION IS SIMPLY NOT SUPPORTED BY THE PLAIN LANGUAGE OF THE STATUTES IN QUESTION. THE NATURE OF DI -- OF VIR'S COMPLAINTS IN THIS CASE, IS PLAINLY EVIDENCE BY

THE COMPLAINT IT FILED. IT FILED A COMPLAINT FOR CONTRIBUTION COMPLAINT AND, ALSO, THE BASIS FOR VIR'S CLAIM, IN ITS COMPLAINT, IS THAT IT PAID MORE THAN ITS PRO RATA SHARE OF THE COMMON LIABILITY OF THE PERSONS RELEASED IN THE UNDERLYING CLAIM, SO CLEARLY VIR KNEW IT WAS FILE AGO CONTRIBUTION CLAIM, AT THAT PARTICULAR POINT. THE FIRST DISTRICT COURT, ALSO, ATTEMPTS TO BLUR THE DISTINCTION BETWEEN THE MEDICAL MALPRACTICE CLAIM AND THE CLAIM THAT WAS BROUGHT IN THIS CASE, BY SAYING THAT THE PUBLIC POLICY CONSIDERATIONS ARE THE SAME. WELL, THAT IS SIMPLY NOT TRUE. THERE ARE PUBLIC POLICY CONSIDERATIONS ASSOCIATED WITH THE 768.31, THE CONTRIBUTION CLAIM, AND WITH 766, MEDICAL MALPRACTICE CLAIMS, AND THE FIRST DCA JUST SIMPLY IGNORED THE POLICY CONSIDERATIONS OF 768. SECOND, THE IMPLICATION OF CHAPTER 766 GOALS AND POLICY CONSIDERATIONS, ARE ALREADY TAKEN CARE OF, AT THE TIME THAT A MEDICAL -- EXCUSE ME -- THAT A CONTRIBUTION CLAIM IS BROUGHT. SPECIFICALLY THE CULLING OF MERITLESS MEDICAL MALPRACTICE CLAIMS HAS ALREADY BEEN ACCOMPLISHED, BY THE PAYMENT OF A SETTLEMENT OR A JUDGMENT TO THE INJURED PARTY BELOW.

BUT THAT MAY NOT HAVE -- THAT MAY NOT BE NECESSARILY TRUE, WITH REGARD TO AN INDIVIDUAL DOCTOR, BECAUSE THEY HAVE NOT GONE THROUGH THAT PROCESS. IS THAT SOMEONE ELSE, THE HOSPITAL MAY HAVE PAID, BUT THE INDIVIDUAL PHYSICIAN HAS NOT GONE THROUGH THAT PROCESS.

WELL, THAT IS TRUE, BUT THE MEDICAL -- THE WAY THAT I UNDERSTAND THE GOALS OF CHAPTER 766, IS TO MAKE SURE THAT THE CLAIMANT IS PROPERLY COMPENSATED FOR THE INJURY THAT THEY RECEIVED, AND THAT IT IS PROMPTLY DONE, WITHOUT GOING THROUGH THE PROCESS OF FILING A LAWSUIT AND GOING THROUGH DISCOVERY AND HAVING A TRIAL, AND IN THE CASE AFTER CONTRIBUTION CLAIM, THOSE THINGS HAVE ALREADY TAKEN PLACE. THAT INJURED CLAIMANT HAS ALREADY BEEN COMPENSATED FOR THE DAMAGE THAT IS HE OR SHE RECEIVED.

I THOUGHT THAT THE REASON, THOUGH, IS TO SORT OUT FRIVOLOUS CLAIMS, IS THE PURPOSE OF THE 766, TO GET RID OF FRIVOLOUS CLAIMS. YOU SEEM TO BE SAYING THAT, WHILE THE LOGIC IS THERE TO SCREEN THESE KINDS OF CASES FOR THE PUBLIC, THAT THERE IS NO REASON OR LOGIC, AND YOU MAY BE RIGHT, THAT THERE IS NO REASON OR LOGIC TO SCREEN OR GO THROUGH, WHEN ANOTHER MEDICAL HEALTH CARE PROVIDER PRESENTS THAT CLAIM, THAN IS ESSENTIALLY WHAT YOU ARE SAYING.

WELL, I AM SAYING THAT THAT DOESN'T -- THAT SEEMS TO BE THE CASE. THERE IS -- THERE MUST BE SOME OTHER, AND I THINK THERE MUST BE SOME CASE LAW OUT THERE, THAT SAYS THAT IT IS IN PLACE, ALSO, TO HELP PROTECT THE DOCTOR. TO MAKE SURE THAT THAT IS NOT A FRIVOLOUS CLAIM BROUGHT BEFORE HIM, BUT THE CLAIM THAT THEY SPECIFY AS BEING THE ONE PROTECTED BY THE STATUTE, IS THE MEDICAL MALPRACTICE CLAIM, NOT NECESSARILY THE CONTRIBUTION CLAIM, AND I WOULD DISTINGUISH, MAKE THAT DISTINCTION BETWEEN THE TWO CLAIMS, AND IN REGARD TO THOSE POLICY CONSIDERATIONS. WHILE I AM ON THE SUBJECT OF POLICY CONSIDERATIONS, THE FIRST DCA CLOSES, IN ITS OPINION, BY STATING THAT THERE ARE NO GOOD POLICY REASONS DISTINGUISHING BETWEEN THE TWO CLAIMS AT ISSUE, AND WITH ALL DUE RESPECT TO THE FIRST DISTRICT COURT, I THINK WE ARE AT THE POINT WHERE THIS IS NO LONGER A POLICY DECISION. IT IS JUST A STRAIGHT INTERPRETATION OF STATUTES. THE LEGISLATURE HAS CLEARLY SPOKEN, BY THE TERMINOLOGY IT USED IN THE STATUTES. THE LANGUAGE OF THE STATUTES ARE CLEAR AND UNAMBIGUOUS, AND CONVEY CLEAR MEANING, AND THUS THE STATUTES MUST BE GIVEN THEIR PLAIN AND ORDINARY MEANING.

IF THIS HAD BEEN PROSECUTED AS A THIRD PARTY ACTION, WHAT WOULD BE YOUR RESPONSE?

I AM NOT SURE WHAT YOU MEAN PIE THIRD PARTY ACTION.

IF THE HOSPITAL, THEY HAD FILED THE LAWSUIT AGAINST THE HOSPITAL AND THEY HAD GONE THROUGH ALL THE PROCESS AND THE HOSPITAL SAYS, NO, I AM BRINGING THIRD PARTY ACTION THAT THIS DR. WALKER RESPONSIBLE FOR THE DAMAGES WHICH ARE BEING CLAIMED AGAINST ME, WHAT WOULD HAPPEN THEN? IS THAT --

I AM NOT SURE THAT THAT CASE HAS HAPPENED IN THIS STATE. I KNOW THAT I THINK THAT ANOTHER CASE, IN MY RESEARCH, THAT WAS THE PARTICULAR SITUATION, AND I THINK WHAT WOULD HAPPEN IS THAT DR. WALKER WOULD HAVE BEEN BROUGHT IN BY THE HOSPITAL AND THE PRESUIT PROCESS WOULD START, ON BEHALF DR. WALKER, BUT THAT IS BECAUSE, I THINK, THE WHOLE CLAIM, AT THAT POINT, IS STILL A MEDICAL MALPRACTICE CLAIM, BECAUSE IT IS STILL WITHIN THE REALM OF THE ALLMANS CASE AGAINST THE HOSPITAL.

HOW IS THE THIRD PARTY DEFENDANT DIFFERENT FROM THE VYING AIRS LIABILITY, AS OPPOSED TO PURE CONTRIBUTION?

I AM NOT REALLY SURE HOW THAT MIGHT PLAY OUT AND WHAT THE DIFFERENCES IN THOSE CLAIMS WOULD BE. THERE PROBABLY WOULDN'T BE MUCH DIFFERENCE, BUT I GUESS THE POINT THAT I AM TRYING TO MAKE IS, WHEN YOU HAVE GOT THIS, IT IS UNDER THE UMBRELLA OF A 766 CLAIM, THEN THAT UMBRELLA COVERS EVERYBODY, AND THE PRESUIT PROCESS WOULD PROBABLY COVER EVERYBODY, IN THAT SORT OF THIRD PARTY CLAIM SITUATION. BUT HERE THAT IS NOT THE CLAIM AT ALL. THE CLAIM MADE BY THE ALLMANS AGAINST THE HOSPITAL ENDED, BACK IN 1995, I BELIEVE, OR '93, SO YOU KNOW, THERE IS A CERTAIN TIME PERIOD, HERE, WHERE THERE IS NO SUIT INVOLVED, UNDER ANY OF THE SCENARIOS THAT YOU GAVE.

YOU ARE IN YOUR REBUTTAL TIME.

I GUESS, THEN, THAT IT WOULD BE A GOOD OPPORTUNITY FOR ME TO SIT DOWN, AS WELL. THANK YOU.

MAY IT PLEASE THE COURT. I AM MICHAEL CALLAHAN. I REPRESENT THE RESPONDENT. IF I MIGHT, FIRST OF ALL, RESPOND TO FOUR ISSUES THAT WERE RAISED BY QUESTIONS I HAVE HEARD HERE OF THE PETITIONER.

IF YOU COULD -- LET ME FOLLOW-UP ON JUSTICE LEWIS'S LAST WE QUESTION AND TAKE -- LAST QUESTION. TAKE ME INTO HOW 24 WORKS IN REAL -- HOW THIS WORKS IN REAL LIFE NOW. YOU HAVE GOT A SITUATION IN WHICH PLAINTIFF SENDS A NOTICE OUT TO DOCTOR AND HOSPITAL, AND AFTER GOING THROUGH THE PLAINTIFF'S PRESCREENING, THE PLAINTIFF DETERMINES THAT THEY ARE ONLY GOING TO SUE THE HOSPITAL, BECAUSE THE EVIDENCE INDICATES THAT THIS WAS NURSES' NEGLIGENCE, AND SO IT PROCEEDS. IT HAS BEEN THROUGH PRESUIT SCREENING AGAINST THE DOCTOR, BUT HE PROCEEDS ONLY AGAINST THE HOSPITAL, THE PLAINTIFF DOES. THE DOCTOR OR THE HOSPITAL SAYS, NO, I WANT CONTRIBUTION FROM THE DOCTOR. NOW, UNDER YOUR THEORY, DOES THE HOSPITAL HAVE TO GO BACK THROUGH PRESUIT SCREENING?

ITS DOES, BECAUSE OF THE BENEFITS AFFORDED THE DOCTOR BY THE ACT, WHICH ARE INDEPENDENT OF THOSE BENEFITS THAT ARE PROVIDED TO THE PLAINTIFF.

EVEN THOUGH THE PLAINTIFF HAS ALREADY BEEN THROUGH A PRESUIT SCREENING.

THE PLAINTIFF HAS RECEIVED THE BENEFIT OF THE ACT, BUT REMEMBER THE DOCTOR IS ENTITLED TO CONSIDERATION --

THE DOCTOR HAS ALREADY RECEIVED PRESUIT SCREENING, IN THAT THE PLAINTIFF HAS BEEN THROUGH IT WITH THE GOOD, AND THE -- WITH THE DOCTOR, AND THE HOSPITAL HAS BEEN THROUGH IT. EVERYBODY HAS BEEN THROUGH IT.

IF EVERYBODY HAS BEEN AFFORDED THE PROTECTION OF IT IN EVERY GIVEN SCENARIO, THEN I WOULD AGREE WITH THE COURT. HOWEVER, IF THE PARTY HAS NOT YET BEEN GIVEN THAT BENEFIT, AS IS IN THIS CASE, THEN I THINK THE --

I DON'T SEE WHERE THAT PROVISION IS, IN THE STATUTE, THAT THE -- I MEAN, WHAT, THE ONLY THING THAT THE DOCTOR, AT THAT POINT, IS BEING SUED FOR, AS YOUR OPPONENT SAYS, IS FOR CONTRIBUTION. NOW, THE CONTRIBUTION CLAIM IS UNDERLYING A MEDICAL MALPRACTICE CLAIM, AND THAT IS TRUE, REGARDLESS OF WHEN IT IS BROUGHT. BUT THE FACT IS THAT WHAT WE END UP WITH IS A SITUATION IN WHICH, IF THE HOSPITAL GETS ANOTHER PRESUIT SCREENING, I MEAN, THIS THING JUST GOES ON FOREVER, BECAUSE THEN YOU BRING ANOTHER CONTRIBUTION CLAIM AND GO THROUGH ANOTHER PRESUIT SCREENING, AGAINST SOME OTHER, ANESTHESIOLOGIST THE, AFTER YOU HAVE ALREADY BROUGHT IN THE --

THE DISTINCTION I WOULD MAKE IS THAT, IN A SCENARIO WHERE THE PARTIES ARE PRESENT IN THE FIRST PROCEEDING, BY WHATEVER PROCEDURAL VEHICLE THEY ARE BROUGHT IN, I THINK THAT YOU MAKE A GOOD POINT. HOWEVER, IN A SITUATION WHERE THE DEFENDANT IS INTRODUCED TO THE PROCEEDINGS FOR THE FIRST TIME, AS IN THIS CASE, AND WHERE THE ACTS OF NEGLIGENCE ARE DISTINCTLY DIFFERENT FROM THAT ACCUSED OF THE HOSPITAL THAT, DOCTOR IS ENTITLED TO AND AFFORDED THE PROTECTIONS OF THAT ACT, TO SEEK ARBITRATION, TO GET THE BENEFIT OF DISCOVERY AND SO FORTH, AND TO GET IT TRUNCATED, IF POSSIBLE, THROUGH THE PRESUIT SCREENING PROCESS.

WE KNOW THAT IS NOT EXPLICIT. ALL RIGHT. IN OTHER WORDS, WHEN I SAY IT IS NOT EXPLICIT, SOMEBODY DIDN'T THINK OF THE SCENARIO AND THEN WRITE IT DOWN IN THE STATUTE.

WE ARE HERE BECAUSE THE STATUTE IS INCONSISTENT WITH THE CONTRIBUTION ACT, AND COMPREHENSIVELY, QUITE OBVIOUSLY, IT IS NOT.

THE LEGISLATURE ORDINARILY TAKES, WHAT, FOR LACK OF A BETTER EXPRESSION, THE CLASSIC SCENARIO, AND THAT IS REALLY WHAT OCCURS WITH MEDICAL MALPRACTICE, IS IT NOT, THE CLASSIC SCENARIO? THE PATIENT IS THE ONE COMPLAINING, AND SO THE PATIENT IS THE ONE THAT PUTS THE DOCTOR ON NOTICE, AND SO THE PATIENT GOES THROUGH -- IN OTHER WORDS THE INJURED PATIENT, AND I AM HAVING THE SAME DIFFICULTY THAT JUSTICE WELLS IS, CONCEPTUALLY, YOU KNOW, TRYING TO ESPECIALLY, IN THE EXAMPLE THAT HE GIVES, WHERE THE DOCTORS HAVE ALREADY GONE THROUGH THAT, YOU ARE SAYING THAT IS NOT THE SITUATION YOU HAVE HERE.

NOT AT ALL IN THIS CASE.

AND THAT THAT IS WHAT DISTINGUISHES -- WHAT ABOUT THE LIMITATIONS ISSUES ISSUE, YOU KNOW -- ISSUE, YOU KNOW, THAT IS WRAPPED UP IN THIS, THOUGH, TOO, THAT WE SEEM TO GET EVEN MORE COMPLICATED THAN, IF WE ARE GOING TO TALK, NOW, ABOUT APPLYING THE LIMITATIONS TO OR EXTENDING THE LIMITATIONS PERIOD, ISN'T THERE A PROBLEM, AS WE GO AGO AND EXTEND THIS ALL THE -- AS WE GO ALONG AND EXTEND THIS ALL THE WAY ALONG?

I DON'T BELIEVE SO, AND AS COUNSEL CORRECTLY POINTED OUT, IT DOESN'T MATTER HOW LONG THE PROCEDURE TAKES. YOU STILL HAVE A YEAR, REGARDLESS OF THE INITIAL STATUTE OF LIMITATIONS, TO PROCEED WITH YOUR CONTRIBUTION, WHETHER FROM SETTLEMENT OR FROM JUDGMENT, AND, OF COURSE JUDGMENT DOESN'T APPLY TO THIS PARTICULAR SITUATION. IT IS SETTLEMENT, BUT IN ANY EVENT, THAT YEAR IS ABSOLUTE, AND YOU STILL HAVE THAT YEAR, SO THERE IS NO CONFLICT WITH THE STATUTE OF LIMITATIONS, HERE, AT ALL.

SO THERE IS NO LIMIT TO HOW LONG IT HAS BEEN, IN TERMS OF THE LIABILITY OF THE PHYSICIAN, AND WHAT DO WE HAVE, NOW, IS IT A TWO-YEAR, WITH A FOUR-YEAR CAP? IS THAT THE MADCAL MALPRACTICE STATUTE?

YOU HAVE A TWO-YEAR, WITH A FOUR-YEAR REPOSE, AND THEN SOME EXTENSIONS FOR JUVENILES.

EVEN THOUGH THE STATUTE OF REPOSE IS PASSED, A PHYSICIAN CAN STILL BE ON THE HOOK IN A CONTRIBUTION CLAIM?

WELL, UNFORTUNATELY, THAT IS THE CONTEXT IN WHICH IT WAS PRESENTED IN SOME OF THE CASES IN OTHER STATES THAT WERE CITED BY THE FIRST DISTRICT. WE DON'T HAVE THAT PROBLEM. THAT DOES PRESENT AN ADDITIONAL PROBLEM, I GRANT YOU, NOT ONE IN THIS CASE, BUT IT IS ONE THAT DID COME UP IN OTHER STATES AND ONE THAT THEY WRESTLED WITH. THERE WERE NUMEROUS DISENTS IN ONE OR TWO OF THOSE CASES.

WHAT WOULD BE THE ANSWER HERE, IN FLORIDA? IN OTHER WORDS IF THE STATUTE OF REPOSE, ASSUME IT IS FOUR YEARS, AND THEN THE CONTRIBUTION CLAIM IS BROUGHT SIX YEARS LATER.

THE ONLY NONMEDICAL CASE THAT COMES TO MIND WOULD BE ECHEVERRI, WHERE THEY CITED THE CASE AND IT WAS A D.O.T. CASE, AND THERE WERE THE STATUTE OF REPOSE ON DESIGN, AND THE COURT APPLIED THE STATUTE OF REPOSE, OVER THE CONTRIBUTION ACT, OR, IN THAT CASE, THE 768.28 ACT, APPLYING THE THREE-YEAR STATUTES OF THE STATE, SO IN THAT CASE THEY DID SENSIBLY, I THINK, APPLY THE STATUTE OF REPOSE, BECAUSE YOU ARE DEALING WITH FACTS THAT ARE DEAD, 16, 17 YEARS OLD. WE DON'T HAVE THAT PROBLEM HERE. IT IS A PROBLEM, I CONCEDE, THAT COULD BE CREATED BY YET ANOTHER TWIST AND TURN IN THIS COMPLICATED ACT, AND AS I POINT OUT, IN FURTHER RESPONSE TO WHAT YOU RAISED, JUSTICE ANSTEAD EARLIER, THIS COURT HAS HAD TO WRESTLE WITH WHAT IS A MALPRACTICE CLAIM, UNDER THIS ACT, NUMEROUS DECISIONS, THREE, SINCE THIS THING CAME UP IN THE FIRST DISTRICT. THIS COURT HAS HAD TO WRESTLE REPEATEDLY OVER OTHER CONFLICTS, INCLUDING THE STATUTE OF REPOSE IN LESCO VERSUS HILL AND VERSUS PAR HAM, IN WHICH THIS COURT DECIDEDED THAT A STATUTE WOULD BE CONSISTENT WITH THE NOTICE OF REPOSE IN THE FIRST DISTRICT'S CASE, SO IN THE SCENARIO WHERE WE ARE PROCEDURALLY, WHERE WE DID EVERYTHING TIMELY, MY CLIENT FILED ITS CLAIM TIMELY, IT SIMPLY WAS FACED WITH A TERRIBLE DILEMMA OF SAYING, IF WE FILE A STRAIGHT CONTRIBUTION ACTION, WE ARE GOING TO GET A DISMISSAL AND SANCTIONS FROM THE BAR FOR DOING THIS TO THIS DOCTOR. AND IF WE DON'T, AND WE GO THROUGH THE ACT, WE FACE SOME POTENTIAL THAT THEY MIGHT SOMEDAY SEEK A DISMISSAL, AT THE TIME THAT IT WAS DONE, BECAUSE DISNEY WAS THE LAW. THERE DIDN'T SEEM TO BE THAT MUCH FOR US TO DO IT THAT WAY. UNFORTUNATELY, WENDELL CAME DOWN THREE MONTHS LATER AND PROVIDED THE DEFENDANTS, WHO HAD WILLINGLY PARTICIPATED WITH THE VEHICLE, TO THEN ASSERT THE STATUTE OF LIMIT AGENCIES -- LIMITATIONS, WHICH FRANKLY I THINK THEY THREW IN WITH A BUNCH OF OTHER DEFENSES, ROUTINELY.

ARE YOU SAYING THERE WAS A WAIVER OF THEIR VOLUNTARY PARTICIPATION? WAS THAT AN ISSUE BELOW?

I RAISED THAT EARLIER: IT DIDN'T SEEM TO BE -- TO BECOME A FIRST DISTRICT ISSUE, BUT IT DIDN'T SEEM FAIR TO LATER SAY, BY THE WAY, THE STATUTE AND PLIRTION EVEN THOUGH WE PARTICIPATED. I DON'T HAVE AN ANSWER TO THAT. THERE IS NO CASE ON IT. IT DOESN'T SEEM EQUITABLE, BUT THAT IS EXACTLY WHAT HAPPENED HERE.

WITH REGARD TO WE UNDERSTAND THAT CERTAINLY THE CONTRIBUTION ACTIONS CERTAINLY WERE NOT PERMITTED AT COMMON LAW, AND IT IS WITHIN OUR PRACTICE PERIOD THAT, IF ADOPTED, THE CONTRIBUTION STATUTE, IT TOTALLY IS A CREATURE STATUTE, AND THEN WE LOOK AT THE 766.203, AND IT MAKES REFERENCE TO SOVEREIGN IMMUNITY AND WRONGFUL-DEATH ACTIONS AND THOSE, BUT IT DOES NOT MENTION AN ACT UNDER THE CONTRIBUTION STATUTE, ITSELF.

ACTUALLY I THINK WHAT IT MENTIONS IS IT MENTIONS THE INJURY PART OF THE DEATH STATUTE, 768.18 AND THE NEXT STATUTE, 768.28, WHICH IS THE SOVEREIGN IMMUNITY STATUTE. IRONICALLY IT DOESN'T MENTION THE WRONGFUL-DEATH ACT. IT DOESN'T MENTION THE GUARDIANSHIP ACT. IT DOESN'T MENTION A LOT OF OTHER ACTS THAT NOBODY CAN ASSERT AND BRING UNDER THE MED MAL ACT.

SO OTHER THAN A WRONGFUL-DEATH SITUATION, THE STATUTE WOULD NOT APPLY EITHER.

I WOULD AGREE. YOU WOULD HAVE TO RESORT TO OTHER LANGUAGE IN THE ACTOR HOPE YOU CAN FIND AN INHERENT BASIS FOR IT SOMEWHERE IN THE MED MAL ACT. I BELIEVE THERE ARE TWO DIFFERENT ONES, AND WE MIGHT BE ABLE TO THINK OF OTHER STATUTES THAT ARE CLEARLY INVOLVED IN THE MED MAL ACT THAT WEREN'T MENTIONED THERE. I DON'T THINK THAT IS A VALID CLAIM. I WOULD, ALSO, LIKE TO MENTION THAT IN THE INITIAL POINTS RAISED BY THE COURT, THAT IT IS VERY CLEAR THAT, WHAT INSTIGATED THIS CASE WAS THE APPLICATION OF WENDELL TO THE CASE THREE MONTHS AFTER THIS WAS LONG SINCE IN ACTION. IT WAS ACTUALLY AFTER THE SUIT WAS FILED, AND WE WERE IN LITIGATION, THAT WENDELL AROSE, AND IT WAS ONLY THEN THAT THE AFFIRMATIVE DEFENSE WAS RAISED BY THE PARTY.

AGAIN, I GUESS I WANT TO GO BACK TO THIS, FOR YOUR CASE, SINCE YOU WERE LOOKING IT HE BIGGER POLICY, BUT IN TERMS OF YOUR CASE, IS THERE THE NOTION THAT THERE CAN BE WAIVER OR ESTOPPEL APPLIED TO NOT TIMELY -- TO PARTICIPATING VOLUNTARILY IN THE PRESUIT SCREENING AND THEN NOT RAISING, IN A TIMELY MANNER, THE STATUTE OF LIMITATIONS DEFENSE?

I THINK IT COULD IN THIS CASE, BECAUSE THE PARTIES ARE IDENTICAL, AND THE ISSUES ARE IDENTICAL. WE HAVE ARGUED THAT BEFORE. I FRANKLY DON'T REMEMBER WHETHER IT WAS IN THE INITIAL BRIEFS. IT WAS NOT PART OF THE DECISION BY THE FIRST DISTRICT, BUT THAT IS A MATTER THAT WE HAVE ARGUED IN THIS CASE, AND I JUST CAN'T PINPOINT AT THIS MOMENT WHERE, IN THE RECORD, THAT IS, BUT I JUST DON'T RECALL. I WOULD LIKE TO STATE THAT, FROM A POLICY POINT OF VIEW, THIS COURT DEALT WITH THE VERY ISSUE IN ITS DECISION IN PAR HAM, TWO STATEMENTS OR THREE STATES WERE MADE IN THAT DECISION, WHICH, I THINK ALTHOUGH THAT WAS ARECTFIX OF THE STATUTE OF REPOSE, WITHIN THE MED MAL ACT, 95.11, WITH THE ACT, ITSELF, THIS COURT SAID WE ARE OBLIGATED TO CONSTRUE THE STATUTE OF REPOSE IN CONJUNCTION WITH THE REQUIREMENTS OF 766, AND, OF COURSE, I AM ASKING THIS COURT TO CONSTRUE TWO STATUTES IN THE VERY SAME MANNER. THIS COURT, ALSO, SAID THAT THE TWO STATUTES MUST BE BROUGHT INTO SYMMETRY, SO THAT PRESUIT REQUIREMENTS DON'T IMPEDE ACCESS TO COURTS, AND CITED ARTICLE I SECTION 21. I THINK THAT IS NO LESS TRUE IN THIS CASE, AND, ALSO, THE COURT SAID THAT WE SHOULDN'T CHOOSE FORM OVER SUBSTANCE, TO ALLOW A SUIT TO BE TIME BARRED. THAT HAS BEEN A PRINCIPLE THROUGHOUT THESE CASES, WHERE CONFLICTS WERE ARE A RISING BETWEEN TWO SEPARATE STATUTES, AND IT SAID ESPECIALLY WHEN A PARTY COMPLIES WITH A PROCEDURE OR STATUTORY PREDICATE, AND IN THIS CASE A PREDICATE, WHICH I THINK ANY REASONABLE ATTORNEY WOULD HAVE CHOSEN UNDER THESE CIRCUMSTANCES, SO AND FINALLY I POINT OUT THAT THE COMPLAINANT COULD HAVE FILED HIS COMPLAINT IN THAT CASE TIMELY AND NOT BEEN BARRED BY THE STATUTE OF REPOSE, BUT FOR THE FACT THAT THE PRESUIT REQUIREMENTS WERE IMPOSEED UPON THEM AND THEY WEREN'T THROUGH THAT -- THEY WENT THROUGH THAT ROUTE. ALSO LIKE LIKE TO POINT OUT THIS THIS COURT REWORDED THAT ISSUE AS TO WHEN DOES THE ACTION COMMENCE, RATHER THAN THE DISTRICT COURT'S REWORDED STATING AT ISSUE IN THIS CASE, AND THAT STRIKES ME AS PARTICULARLY RELEVANT HERE, BECAUSE BOTH 95.11 AND THE CONTRIBUTION ACT USE THE PHRASE "COMMENCED", AND I SEE NO REASON WHY THIS COURT SHOULD NOT DETERMINE THAT PARTICIPATING IN THE ACT IS COMMISSION. IT DOESN'T HAVE TO BE FILING A SUIT SEPARATELY. COMMENCING WAS DETERMINED, IN PAR HAM, TO MEAN BEGINNING THE NOTICE PROCESS AND GOING THROUGH THE PRESUIT PROCESS, IN WHICH THIS CASE HAS RULED, IN NUMEROUS DECISIONS, THAT THERE IS A TIME OUT, THAT THE ACTION IS TOLD. -- IS TOLLED.

LET ME ASK YOU THIS. I DIDN'T FIND A LOT OF CASE LAW IN THIS PARTICULAR AREA. WHAT IS THE GENERAL PRACTICE, IN THIS KIND OF SITUATION? DO PEOPLE GO THROUGH THE PRESUIT REQUIREMENT, OR DO, YOU KNOW, ONLY FILE A CONTRIBUTION ACTION? IS THERE ANY PRACTICE --

UNTIL WENDELL, I KNOW OF NO SITUATION IN WHICH HE WOULDN'T GO THROUGH THE CONTRIBUTION ACT. A PRIOR HOLDING, THE ONLY CASE THAT STATED ON IT WAS THE FOURTH DISTRICT OPINION THAT SAID CONTRIBUTION GOES THROUGH THE MED MAL ACT, AND SO THAT OCCURRED. FRANKLY, BECAUSE I WAS HANDLING THIS CASE AT THE TRIAL LEVEL, IT NEVER EVEN OCCURRED TO ME, TO FILE A SEPARATE CONTRIBUTION ACT. HAD THAT BEEN DONE, WE MAY STILL BE HERE, BUT WE MIGHT BE HERE ON THE ISSUE OF MY SANCTIONS AND MY DISMISSAL, FOR HAVING BROUGHT AN ACTION WITHOUT GIVING THOSE DOCTORS THE BENEFIT OF THE MED MAL ACT, THAT THEY WOULD HAVE SO FRANKLY INSISTED ON, I CAN ASSURE YOU.

SO IN EVERY CLAIM THAT COMES OUT OF TALLAHASSEE MEMORIAL VERSUS WELLS AND ALL OF THOSE MYRIAD OF FABRE CLAIMS, THEY HAVE ALL GOT TO GO THROUGH PRESUIT SCREENING.

INITIALLY ANY CLAIM INVOLVING THE SUBSTANCE OF MEDICAL MALPRACTICE DOES. AND I GRANT YOU THE COMPLICATIONS ARE MYRIAD, NOT ONLY JUST BECAUSE OF THE MED MAL ACT BUT BECAUSE OF THIS COURT'S DECISION IN WELLS, DETERMINING HOW MUCH OF ECONOMIC AND NONECONOMIC DAMAGES HAVE TO BE APPORTIONED AND WITH WHOM AND UNDER WHAT CIRCUMSTANCES, NOT TO MENTION FABRE. IT BECOMES A GRAPH ON A VERY LARGE CHART. LET ME, ALSO, MENTION, IF I MIGHT, THAT THERE WERE SEVEN POINTS MADE BY THE FIRST DISTRICT, ALL OF WHICH ARE, I THINK, LOGICAL AND WELL-FOUNDED. PURSUIT POLICY REASONS, THE CONTRIBUTION ACT IS MERELY PROCEDURAL AND NOT SUBSTANTIVE, AND WE HAVE ARGUED THAT TO PREVAIL, YOU STILL HAVE TO PROVE MEDICAL MALPRACTICE. OBVIOUSLY THAT IS TRUE HERE. CERTAINLY THE WORDING OF ACT IS SUCH THAT I CAN QUOTE IT. I DON'T NEED TO, BUT THERE ARE NUMEROUS REFERENCES IN THIS ACT. ALL CLAIMS AND ALL PARTIES AND EVERY CLAIM AND EVERY ALLEGATION OF MEDICAL NEGLIGENCE, IF YOU READ THE NUMEROUS REFERENCES IN MY BRIEF, NO ATTORNEY READING THAT WOULD, WITHOUT A LOT OF GUTS, FILE AN ACTION OUTSIDE OF THE CONTEXT OF THAT ACT. AND FINALLY, THE COURT POINTED OUT THAT THESE ACTS, THESE STATUTES OF LIMITATIONS NEED TO BE READ TOGETHER, AND IT IS ILLOGICAL TO NOT GIVE THE DEFENDANT DOCTORS THE BENEFIT OF THAT ACT, IN A CONTRIBUTION ACT, WHEN YOU HAVE TO GIVE IT TO THEM, IF YOU SUE THEM DIRECTLY. I THINK THAT IS ALL I HAVE. THANK YOU VERY MUCH.

THANK YOU. REBUTTAL.

THANK YOU, YOUR HONOR. I WOULD JUST LIKE TO FOLLOW UP ON A COUPLE OF THINGS THAT WERE BROUGHT UP, IN MR. CALLAHAN'S ARGUMENT. WITH REGARD TO THE WAIVER ARGUMENT THAT JUSTICE PARIENTE QUESTIONED HIM ABOUT, THAT PARTICULAR ARGUMENT WAS NOT MADE IN THE TRIAL COURT BELOW. IT WAS RAISED FOR THE FIRST TIME, AT THE FIRST DISTRICT COURT LEVEL, AND THE FIRST DISTRICT COURT, THEY DIDN'T REJECT IT. IT IS NOT CLEAR. THEY DID NOT ADDRESS THAT IN THEIR OPINION, BUT WITH REFERENCE TO THAT ARGUMENT, YES, WE DID PARTICIPATE IN THE PRESUIT PROCESS, BUT, AGAIN, THAT WAS BECAUSE WE WERE REQUIRED TO, JUST LIKE HE CLAIMS THAT HE WAS SUPPOSED TO ENGAGE IN UNDER 766, THE PLAINTIFF CONTROLS HOW THE SUIT IS BROUGHT. IF THE PLAINTIFF FILES A NOTICE OF INTENT, THEN WE HAVE THE SAME RISKS THAT HE DOES, TO FOLLOW THE PRESUIT REQUIREMENTS, SO THAT IS WHY WE ENGAGED IN THAT PARTICULAR PROCESS.

THAT IS NOT NECESSARILY THE CASE, IS IT? FOR EXAMPLE, SOMEONE HAS A SLIP AND FALL SITUATION IN A DOCTOR'S OFFICE. IT HAS NOTHING TO DO WITH MEDICAL TREATMENT, AND SOMEONE, FROM SOME REASON, STARTS THE ACT. THE DOCTOR WOULD NOT SAY EXCUSE ME, THIS IS NOT MEDICAL MALPRACTICE. THIS IS A PREMISES LIABILITY CASE AND HAS NOTHING TO

DO WITH IT. WE ARE NOT GETTING INVOLVED HERE. IS -- ARE YOU SUGGESTING THAT, UNDER THAT SCENARIO, THAT A PHYSICIAN WOULD HAVE TO PARTICIPATE IN THE PRESUIT, JUST BECAUSE --

I BELIEVE THEY DO, UNDER THE STATUTE. THEY CAN MOVE TO DISMISS, BASED ON A FAILURE TO -- IN OTHER WORDS, IT IS SORT OF A CONVERSE ARGUMENT. THEY HAVE TO ENGAGE IN IT, BUT THEN THEY CAN, LATER, MOVE FOR SUMRARY JUDGMENT, AS WE DID, OR DISMISSAL.

CAN THEY JUST DENY IT AND SAY THIS IS NOT A CLAIM WITHIN THE ACT. CAN THEY NOT SAY THIS IS WHAT OCCURRED, AS A PRACTICAL MATTER ON THE STREET?

I THINK CHAPTER 76, THERE IS A PROVISION THAT ADDRESSES WHEN YOU NEED TO ENGAGE IN THE PRESUIT PROCESS, AND I DON'T HAVE IT IN FRONT OF ME RIGHT NOW, BUT --

IF THEY HAVE AN AUTOMOBILE ACCIDENT AND THE DOCTOR'S OFFICE PARKING LOT, AND THEY START THIS, YOU HAVE GOT TO GO THROUGH THE WHOLE SCENARIO?

I THINK, URGED THE RISKS THAT THE RESPONDENT HAS SAID, YOU KNOW, YOU WOULD BE HARD-PRESSED NOT TO PARTICIPATE IN IT, BECAUSE YOU COULD RISK STRIKING OF YOUR DEFENSES OR, IN HIS CASE, STRIKING OF THE COMPLAINT, BUT AS A DEFENDANT, YOU WOULD HAVE THE RISK OF GETTING YOUR DEFENSES STRUCK, AND BEING BROUGHT BEFORE THE BAR, I ASSUME. SO I THINK THE RISKS GO BOTH WAYS. AND THAT IS ONE OF THE REASONS WHY WE HAVE PARTICIPATED IN THE PRESUIT PROCESS HERE. ALSO I WANTED TO MENTION, BECAUSE MR. CALLAHAN SAID THAT WE HAD RAISED, FOR THE FIRST TIME, THE AFFIRMATIVE DEFENSE, AFTER WENDELL, THE AFFIRMATIVE DEFENSE LIMITATIONS, AFTER WENDELL CAME OUT. THAT IS NOT TRUE. WE DID RAISE THAT FROM A DEFENSE, IN ANSWER TO OUR COMPLAINT. WHY WE DIDN'T RAISE THE ISSUE BEFORE WENDELL CAME OUT, I AM NOT REALLY SURE. I WASN'T WORKING ON THE CASE AT THAT PARTICULAR TIME, BUT WHEN I GOT INVOLVED IN THE CASE AT MY LAW FIRM, I LOOKED AT THE CONTRIBUTION STATUTE, AND NOTICED THAT THEY HAD NOT FILED WITHIN THE ONE-YEAR PERIOD, AND THEN, WITHIN, MAYBE, A COUPLE OF WEEKS OR A MONTH, THE WENDELL CASE CAME OUT, VERIFYING WHAT MY THEORY WAS, REGARDING POSSIBLE SUMMARY JUDGMENT IN THE CASE, AND THAT IS WHY WE FILED OUR MOTION FOR SUMMARY JUDGMENT AT THAT TIME.

I BELIEVE YOUR TIME IS UP, COUNSEL.

THANK. JUDGE, I WOULD JUST LIKE TO CLOSE AND SAY THAT WE ASK THAT THIS COURT REVERSE THE OPINION OF THE FIRST DISTRICT COURT OF APPEAL. THANK YOU.

THANK YOU. THE COURT WILL TAKE ITS MORNING RECESS AT THIS POINT. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE. THE MARSHAL: PLEASE RISE.