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United Contractors Corp. v. Maria Minerva Hernandez

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME BACK TO THE -- I SEE WE ARE PLAYING MUSICAL TABLES HERE. AT LEAST YOU ALL, AS JUSTICE HARDING SAYS, THEY HAVE SWITCHED TABLES. THE NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS UNITED CONTRACTORS VERSUS HERNANDEZ.

MAY IT PLEASE THE COURT. SHERRI WEISSENBORN ON BEHALF OF UNITED CONTRACTORS. THE ISSUE IN THIS CASE IS WHETHER THE THIRD DCA ERRED IN REVERSING A SUMMARY JUDGMENT, WHICH HAD BEEN ENTERED IN BEHALF OF THE UNITED CONTRACTORS, BASED UPON THE FACT THAT THE PLAINTIFF IN THE CASE HAD ACCEPTED A WORKERS COMP BENEFIT AND HAD AFFIRMATIVELY SOUGHT THAT BENEFIT.

LET ME MAKE SURE I UNDERSTAND THE FACTUAL CIRCUMSTANCES HERE. THERE WAS, ON BEHALF OF MARIA HERNANDEZ, THERE WAS A, AS THE SURVIVING SPOUSE OF THE DECEASED EMPLOYEE, THERE WAS A COMP CLAIM FILED.

CORRECT. AFTER WE FILED OUR ANSWER IN THE TORT CLAIM CASE, ALLEGING THAT THERE WAS, IN FACT, EXCLUSIVE REMEDY OF COMPENSATION, WORKERS COMPENSATION. MRS. HERNANDEZ WENT TO THE COMP COURT AND PROSECUTED A CLAIM IN THE COMP COURT, SIMULTANEOUSLY WITH THE TORT CLAIM GOING THROUGH THE DISCOVERY PROCESS. AT THE POINT IN TIME --

SO YOU HAD RAISED, AS A DEFENSE, THE STATUTORY EMPLOYER DEFENSE.

THAT IS CORRECT. AND SO THEY, THEN, OUT OF AN ABUNDANCE OF CAUTION, I GUESS, WENT TO COMP COURT, PROCEEDED IN COMP COURT, PROCEEDED IN TORT. WHEN WE DISCOVERED THEY HAD ACTUALLY ACCEPTED SETTLEMENT AT THE MEDIATION, WE, THEN, FILED OUR MOTION FOR SUMMARY JUDGMENT, AND AT THAT POINT THE COURT LOOKED AT IT AND RELIED UPON THE THIRD DCA CASES THAT WERE OUT AT THAT TIME, THE DELTA VERSUS CUNNINGHAM WHICH WE HAVE CITED IN OUR BRIEF, RELIED UPON CASES, THE MOSCAVITZ CASE FROM THIS COURT, AND WENT AHEAD AND GRANTED THE SUMMARY JUDGMENT.

WHO WERE THE PLAINTIFFS IN YOUR CASE?

IN MY CASE THE PLAINTIFFS WERE THE ESTATE BECAUSE IT IS A WRONGFUL-DEATH CASE, SO IT IS THE ESTATE AND, OF COURSE, WHAT THE ESTATE CAN SEEK IS THE WRONGFUL DAMAGES THAT WOULD, THEN, INURE TO THE BENEFIT OF THE CHILDREN. COMP, OF COURSE, IS NOT A TORT CLAIM. IT IS A STATUTORY. IT IS, IN FACT, YOU KNOW, IT IS TO THE ULTRA FROM A TORT-TYPE CLAIM, BECAUSE ITS PURPOSE WAS TO GO AHEAD AND GET MONEY INTO THE HANDS OF THE PEOPLE WHO NEED IT IMMEDIATELY.

I GUESS MY ULTIMATE QUESTION HERE IS WERE THE PLAINTIFFS DIFFERENT IN THE COMP CLAIM AND IN YOUR TORT CLAIM? BECAUSE AS I SEE THE PLEAD, THE PLEADINGS AND THE COMP CASE, WE HAVE MARIA HERNANDEZ.

THAT'S RIGHT, AND MARIA HERNANDEZ IS THE PERSON. WHAT HAPPENED IS THIS GENTLEMAN HAD CHILDREN ORIGINALLY IN CUBA. THOSE CHILDREN CAME TO THE UNITED STATES ABOUT THE TIME OF THE DEATH OR AT THE TIME OF THE DEATH, SO THEY HAD, AS WELL, A DUAL

PERSONAL REPRESENTATIVE OF THE ESTATE, BECAUSE THE OLDER CHILDREN WERE SEEKING, UNDER THE WRONGFUL-DEATH STATUTE, WHATEVER BENEFITS THEY WOULD BE ENTITLED TO. MARIA, THE DECEASED SPOUSE, AND THEY, I DON'T BELIEVE, WOULD HAVE BEEN ENTITLED TO EVERYTHING UNDER THE COMP STATUTE, BECAUSE THEY WERE ALREADY ABOVE THE AGE OF ENTITLEMENT.

SO THEY ARE NOT AFFECTED BY THIS CASE.

THAT IS CORRECT.

AND THEY ARE NOT AFFECTED BY THE RELIEF. THEIR CLAIM IS STILL ONGOING.

THEIR CLAIM IS STILL ONGOING. THAT IS CORRECT.

SO THE SUMMARY JUDGMENT WAS SIMPLY AGAINST MARIA AND THE MINOR CHILDREN?

THAT IS CORRECT, AND IN THAT INSTANCE, THE THIRD DCA, ALTHOUGH MARY AND THE MINOR CHILDREN HAD LAWYERS IN BOTH COURTS, THE THIRD DCA SAID THAT SHE COULDN'T HAVE CONSCIENCESLY MADE A CHOICE, AND THEREFORE WE ARE GOING TO REVERSE THE SUMMARY JUDGMENT.

BUT GOING BACK TO WHAT HAPPENED HERE WAS THAT THERE WAS THE WASH OUT OF THE COMP CLAIM FOR \$12,000.

THAT IS CORRECT.

AND THE WASH OUT ENDED UP WITH THE STIPULATION THAT SAID THAT NEITHER SIDE ADMITS OR DENNIS THE CLAIM AGAINST THE COMP CARRIER, BASICALLY, CORRECT?

THAT IS TRUE, BUT MARY, A IN THAT, IN THE COMP WASH OUT, CLAIMS, IN HER OWN AFFIDAVIT, THAT HE WAS IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME OF HIS INJURY, AND THAT IS AN AFFIDAVIT --

THAT WAS IN PURSUIT OF THE COMP CLAIM.

IN PURSUIT OF THE SETTLEMENT. THAT'S CORRECT. BUT NOW, IF SHE GOES BACK OVER TO TORT, SHE IS NOW SEEKING TO SAY HE IS A BUSINESS INVITEE AND THEREFORE I SHOULD GET TO COLLECT THEIR, WHICH ARE INCONSISTENT POSITIONS.

NOW, BUT, THERE WAS NO -- HOW OLD WERE THESE CHILDREN THAT WERE HER CHILDREN THAT WOULD CLAIM THROUGH HER?

HER CHILDREN WERE TEN AND NINE.

THEY WERE MINOR CHILDREN. THERE WAS NO LEGAL GUARDIANSHIP SET UP THAT COULD EXTINGUISH THEIR CLAIM, THE CLAIM THAT WAS IN EXCESS OF MORE THAN \$5,000.

THAT IS TRUE. THERE WAS NO LEGAL GUARDIANSHIP SET UP. I WOULD SAY THAT THERE DIDN'T NEED TO BE, BECAUSE, AGAIN, IF WE LOOK AT THE STATUTE ON GUARDIANSHIP, THE PARENT IS THE NATURAL, NUMBER ONE THE PARENT IS THE NATURAL GUARDIAN AND UP TO 5,000, THE PARENT CAN DO EVERYTHING THAT THE PARENT WANTS. REMEMBER, THIS CLAIM NEVER WENT ABOVE 5,000 BUT MORE IMPORTANTLY JUDGE, COMP SETS FORTH WHAT IT IS, WHO GETS BENEFITS AND HOW THEY GET THEM, AND IT IS REALLY THE BENEFIT GOES TO THE SPOUSE NOT TO THE CHILDREN. THE COMP COURT MAKES THE DETERMINATION, AS TO, BECAUSE THERE IS A PERCENTAGE BASIS SET FORTH WITHIN THE STATUTE.

BUT THE QUESTION HERE IS WHETHER THERE WAS AN ELECTION OF A REMEDY, AND WHAT I AM QUESTIONING IS THE FACT THAT THERE IS NO MENTION OF THE CHILDREN IN THE STELINGTSMENT -- IN THE SETTLEMENT, NOR IS THERE ANY LEGAL GUARDIANSHIP SET UP IN WHICH THE MOTHER WOULD BE ENTITLED TO RELEASE WHATEVER INTEREST THEY HAD IN EXCESS OF \$5,000.

I THINK WE HAVE TO LOOK AT THE STATUTE, THE GUARDIANSHIP STATUTE, AND I THINK WE HAVE TO LOOK AT THE POSITION THAT THEY ARE TAKING. THE GUARDIANSHIP STATUTE DOES NOT SAY THERE MUST BE A GUARDIAN AT THE POINT IN TIME THAT THE SETTLEMENT OCCURS. WHAT IT SAYS IS THAT THE COURT WHO IS GOING TO DETERMINE WHETHER OR NOT THE SETTLEMENT IS APPROPRIATE, MAKES THAT DECISION. THE GUARDIANSHIP IS SET UP FOR THE PURPOSES OF RECEIPT OF THE MONEY, ONCE IT COMES. AND AGAIN, IT IS TALKING ABOUT A CLAIM UNDER THE GUARDIANSHIP STATUTE, THAT IS BASICALLY PERSONAL INJURY, WRONGFUL-DEATH, AND IT IS ANOTHER TORT TYPE CLAIM, AND THAT IS UNDER 744.301 WHICH WAS NOT MENTIONED IN THE COURT BELOW OR IN THE BRIEF, BUT I DO WANT TO POINT OUT COMP IS NOT ONE OF THOSE INSTANCES. COMP SETS FORTH THAT THE CLAIM IS TO THE SPOUSE. IT REALLY IS THE CLAIM OF THE WORKER THAT THE SPOUSE IS, THEN, GOING TO RECEIVE THE BENEFITS THERE OF, BUT THE JUDGE --

IS THERE A PERCENTAGE THAT THE CHILDREN, THEN, GET UNDER THAT, IS A NONDISCRETIONARY PREDETERMINED AMOUNT?

THE COMP JUDGE HAS THE RIGHT, THERE IS A BASIS IN THE STATUTE THAT SAYS, AND I BELIEVE IT IS MAYBE 66 AND TWO-THIRDS PERCENT. PLEASE DON'T HOLD ME TO THE FIGURES, GOES TO THE SPOUSE, AND THEN THERE IS ANOTHER THIRD THAT GUESS TO THE CHILDREN AND IT IS DIVIDED UP, BUT IT STILL IS DISCRETIONARY WITH THE COMP JUDGE, PER THE STATUTE, BECAUSE HE GETS THE RIGHT TO OVERSEE AND DETERMINE WHETHER OR NOT IT IS, IN FACT, A FAIR SETTLEMENT, HOW THEY WISH TO DIVIDE IT UP, OR IF THE CHILDREN NEED SOME ADDITIONAL.

WELL, IS THERE A MAXIMUM OF DEATH BENEFITS TO GET PAID?

YES. \$100,000.

AND SO THE MAXIMUM TO THE CHILDREN --

IF I AM CORRECT ON THE 66 TWO-THIRDS THE 66 PERCENT WOULD GO TO THE MOTHER AND THE REMAINING TO GO TO THE CHILDREN TO HELP DEFRAY THE EDUCATIONAL EXPENSES AND ET CETERA, BECAUSE, OF COURSE, THE MOTHER IS OBLIGATED TO PAY FOR THOSE CHILDREN, FOR THEIR, NOT THEIR LIVELIHOOD.

BUT THE CHILDREN GOT AN AMOUNT FROM THE WASH OUT?

WE DON'T KNOW, BECAUSE IT DOESN'T GO SPECIFICALLY TO THE CHILDREN. AGAIN, THE COMP IS SET UP THAT IT GOES TO THE SPOUSE. THE SPOUSE IS, THEN, THE ONE WHO IS SUPPOSED TO SEE TO IT THAT THE CHILDREN ARE TAKEN CARE OF. IT IS NOT A SPECIFIC AWARD TO THE CHILDREN.

MY QUESTION IS GOISES -- MY QUESTION GOES TO THE FACT THAT 744.387 SAYS, WHEN A SETTLEMENT OF ANY CLAIM BY OR AGAINST A GUARDIAN, WHETHER ARISING AS A RESULT OF A PERSONAL INJURY OR OTHERWISE, SO IT IS A VERY BROADLY-WORDED STATTE, AND THEN IT SAYS NO SETTLEMENT AFTER AN ACCIDENT HAS BEEN COMMENCED BY OR ON BEHALF OF AWARD SHALL BE FFECTIVE, UNLESS IT IS PROVED BY THE COURT HAVING -- UNLESS IT IS APPROVED BY THE COURT HAVING JURISDICTION OF THE ACTION, BUT IT PROVIDES FOR A CLAIM OVER \$5,000.

RIGHT. THE PROBLEM IS IN THIS INSTANCE THE SETTLEMENT WAS A TOTAL OF \$12,000. EACH

CHILD AND THE MOTHER, BY THE DIVISION OF THE THREE, COULD HAVE, THEY WOULDN'T HAVE RECEIVED, BECAUSE \$1400, ALSO, CAME OUT, TOO --

BUT WE WOULD HAVE TO CONSTRUE THE STATUTE AS BEING SOMETHING THAT WOULD MEAN THAT ANY CLAIM THAT SOMEONE WALKED OUT WITH A RELEASE AND GOT FOR \$1,000, EVEN THOUGH OBJECTIVELY A CHILD HAD A CLAIM FOR \$100,000, COULD BE RELEASED BY THE PARENT. I DON'T THINK THAT -- I HAVE NEVER SEEN A CASE WHERE THIS COURT SAID THAT.

I THINK YOU ARE FORGOTING THAT THE JUDICIAL -- I THINK YOU ARE FORGETTING THAT THE JUDICIAL OFFICER, AND THE STATUTE GOES ON TO SAY THAT, THAT THE JUDICIAL OFFICER WHO IS PRESIDING OVER THE PROCEEDINGS, MAKES THE DETERMINATION AS TO WHETHER OR NOT THAT SETTLEMENT IS OR IS NOT FAIR, SO WHAT YOU ARE DOING IS SAYING SOME GUARDIAN, I THINK WHAT YOU ARE TRYING TO MAKE THE JUMP TO IS THERE HAD TO BE AN ADVOCATE THERE TO SAY TO THE JUDGE IT'S NOT FAIR. I THINK THE JUDGE HAS NO ABILITY TO SAY WAIT A SECOND. HOW CAN I APPROVE THIS WASH OUT OR THIS SETTLEMENT? NOBODY HAS COME IN. WHAT IS FAIR TO THESE CHILDREN? THAT IS REALLY WHAT YOU HAVE TO LOOK AT, AND WHEN WE TALK ABOUT THIS GUARDIANSHIP, BECAUSE IT DOESN'T SAY THE GUARDIAN OR THE PROBATE JUDGE GETS TO APPROVE THE SETTLEMENT. THE PERSON WHO STILL GETS TO APPROVE THE SETTLEMENT UNDER THAT STATUTE, IS THE JUDGE IN CHARGE OF THE PROCEEDINGS. IN THIS INSTANCE, IT IS A WORKERS COMP JUDGE.

IS THAT DETERMINATION SUBJECT TO AN ABUSE OF DISCRETION WHERE YOU HAVE CHILDREN, AS IN THIS INSTANCE, THAT COULD HAVE \$100,000 TIED UP REALLY.

I BELIEVE IT WOULD BE, THE CHILDREN, BECAUSE COMP IS NOT FOR THE CHILDREN, IT IS KNOW THE WORKER, THAT I THINK THEN, THAT IT MAY VERY WELL BE AN ABUSE OF DISCRETION TEST ON THE JUDGE AS TO WHETHER OR NOT THE SETTLEMENT HE DID HIS JOB, BUT I DON'T BELIEVE, YOU KNOW, IT REALLY IS AN AND CREWS OF DISCRETION. I THINK THAT HE IS THE ONE THAT HAS THE OPPORTUNITY TO MAKE THAT CHOICE. CERTAINLY YOU COULD LOOK AT IT AND SAY THAT, IF HE SAID I AM NOT GIVING ANYTHING TO THE CHILDREN THAT, IS AN ABUSE OF DISCRETION.

IF YOU SEE A JUDGE, FOR \$1,000, WIPING OUT A POSSIBLE CLAIM OF THE CHILDREN FOR \$100,000 --.

BUT YOU HAVE GOT -- HERE IS THE PROBLEM. IT WAS A CONTROVERTED CLAIM, AND THE PARTIES GOT TOGETHER IN A SETTLEMENT, AND IT WAS DETERMINED THAT IT WAS IN HER BEST INTEREST, AND THE INTEREST OF THE CHILDREN, AND WE ARE GOING BEYOND WHAT THE COMP JUDGE HAD BEFORE HIM OR CONSIDERED, AND THAT WASN'T THE ISSUE. WE HAVE GOT TO GO BACK TO WHAT THE ISSUE WAS, AND THAT IS COMP IS SUPPOSED TO BE EXCLUSIVE. YOU CAN'T TAKE THE, THE LAW HAS TRADITIONALLY BEEN YOU CAN'T TAKE EXCLUSIVE INCONSISTENT POSITIONS. THAT HAS HAPPENED.

WHERE IS ANY CLAIM OF THE CHILDREN RELEASED?

THE CHILDREN, THE MOTHER, AS THE NATURAL GUARDIAN, BROUGHT THE BENEFIT --

IS THERE SOME LANGUAGE IN THERE THAT SAYS ANY CLAIM FOR THESE CHILDREN?

IT SAYS THE CLAIMS THAT WERE BEFORE THE WORKERS COMP BOARD, ALL CLAIMS, AND THE CHILDREN WERE --

I THOUGHT YOU TOLD ME THE CHILDREN DIDN'T HAVE ANY CLAIMS.

I AM SAYINGS THE CHILDREN, AS BENEFICIARIES, THE CHILDREN ARE NAMED IN THE PETITION, OKAY, SO THECHILDREN ARE NAMED IN THE PETITION AS BEING BENEFICIARIES, SO SHE IS FILING ON BEHALF OF HERSELF AND ON BEHALF OF HER CHILDREN, PURSUANT TO THE COMP LAW.

MR. POLLACK IS TRYING TO GET YOUR ATTENTION.

PARDON ME. JUST ONE THING I WANT TO EXPLAIN TO YOU ABOUT WORKMAN'S COMPENSATION. THAT IS A ENTIRELY DIFFERENT FIELD OF LAW. OKAY. THE WORKMAN'S COMPENSATION LAW IN FLORIDA, SAYS THAT, IF AN INJURED WORKER IS, A WORKER IS KILLED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT, YOU PAY HIS WIDOW A CERTAIN PERCENTAGE OF HIS WAGES, AND YOU PAY TO HIS WIDOW, A CERTAIN PERCENTAGE OF HIS WAGES FOR EACH CHILD HE LEFT IN MINORITY. SO THIS IS DONE AUTOMATICALLY, AND THAT COMES BEFORE THE COMP JUDGE. THE COMP JUDGE, THEN, ORDERS, IF HE RULES WITH THEM, HE ORDERS A CERTAIN AMOUNT OF COMPENSATION TO BE PAID, AND THAT IS ALL FIGURED OUT MATHEMATICALLY. THERE IS NO DISCRETION HERE AS TO WHAT THE END RESULT IS. UNFORTUNATELY YOU DO HAVE SETTLEMENT, AND THE SETTLEMENTS HAVE TO BE APPEARED PROVED BY THE -- APPROVED BY THE COURT, AND THE COURT APPROVES THE SETTLEMENT, AND IN THIS CASE SHE FILED A PETITION TOxD COLLECT WORKMAN'S COMPENSATION FOR HER AND THE CHILDREN, AND HER CHILDREN, AND THEN, OF COURSE, SHE SETTLED IT, AND THE AMOUNT WAS APPROVED BY THE COMMISSIONER THE JUDGE OF INDUSTRIAL CLAIMS. NO GUARDIANSHIP EVER APPEARS IN THE JUDGE OF INDUSTRIAL CLAIMS COURT. MR. CHIEF JUSTICE

YOU ARE GOING TO USE UP ALL YOUR TIME, MR. PAPY.

I WANTED TO EXPLAIN AND THAT IS THE REASON WHY WE HAVE A STATUTE.

BUT HOW DO WE KNOW, FROM THE DOCUMENTS THAT WE HAVE IN THIS RECORD, THAT THE JUDGE ACTUALLY CONSIDERED, WHEN APPROVING THE SETTLEMENT, THAT THESE PERCENTAGES WERE GOING TO GO TO THE CHILDREN?

TO THE CHILDREN? I MEAN, BECAUSE THEREIS NOTHING IN ANY OF THE DOCUMENTS THAT WE SEE, OTHER THAN THE FIRST ONE REQUESTING ASSISTANCE, THAT HAS ANYTHING ABOUT THESE CHILDREN IN IT.

YOU WOULDN'T KNOW FROM THE RECORD, ITSELF, BUT THE JUDGE, OF COURSE, APPROVING A SETTLEMENT. THE SETTEMENT WAS MADE ON BEHALF OF THE WIDOW AND THE CHILDREN. THAT IS WHAT THE SETTLEMENT WAS FOR. AND I ARE OUR POSITION IS -- AND OUR POSITION IS THERE IS A STATUTE THAT SAYS THAT IF YOU ARE INJURED, AND YOU MAKE WORKMAN'S COMPENSATION CLAIM AGAINST YOUR EMPLOYER, YOU CANNOT THEN TURN AROUND AND SUE IN TORT. YOU ARE A STATUTORY EMPLOYER. THE REASON FOR THAT IS THE COMP LAW PROVIDES THAT, IF YOUR EMPLOYER DOES NOT PROVIDE YOU WITH WORKMAN'S COMPENSATION, THEN YOU ARE A STATUTORY EMPLOYER, WHICH MEANS THE PERSON WHO EMPLOYED YOUR EMPLOYER, HAS TO COME FORTH AND PAY YOUR WORKMAN'S COMPENSATION, ALTHOUGH YOU DIDN'T WORK FOR HIM. THAT IS THE REASON WHY THE STATUTE GIVES YOU IMMUNITY FROM TORT LITIGATION, AND THIS CASE WAS HANDLED THE WAY ALL WORKMAN'S COMPENSATION CASES ARE HANDLED IN FLORIDA. AT THIS TIME, THEY WENT, THEY DECIDED ON A SETTLEMENT AMONGST PARTIES, AND I PRESUME THAT THEY HAD, WE KNOW THEY HAD A HEARING, AND A JUDGE APPROVED IT. AND NOW THEY SAY, WELL, WAIT A MINUTE. WE SHOULD NOT BE BOUND BY THAT. WE SHOULD BE ABLE TO ARGUE AND THE WORKMAN'S COMPENSATION COURT -- ARGUE, IN THE WORKMAN'S COMPENSATION COURT, THAT HE WAS KILLED IN THE COURSE OF HIS EMPLOYMENT, AND THEN WE SHOULD BE ABLE TO SUE IN TORT HIS STATUTORY EMPLOYER AND SAY, NO, HE WAS NOT INJURED AND DID NOT DAIS A RESULT OF HIS EMPLOYMENT.

WERE THEY RELIABLE UNDER THE WORKER COMP LAW AND THE STATUTORY EMPLOYER?

WE WOULD BE THE STATUTORY EMPLOYER. THAT WAS TH WHOLE ARGUMENT, THAT WE WERE THE STATUTORY EMPLOYER, ECAUSE WE WERE THE CONTRACTOR THAT HIRED THE CONTRACTOR FOR WHOM HE WORKED.

MY QUESTION IS, IN THE RELEASE DOCUMENTS, WAS THERE --

NO. WE WOULD NOT BE A PARTY TO THAT RELEASE DOCUMENT AT ALL, BECAUSE IN THE WORKMAN'S COMPENSATION COURT, SHE WENT DIRECTLY AGAINST HIS EMPLOYER AND NOT AGAINST THE STATUTORY EMPLOYER. IF HE COULD NOT COLLECT UNDER HIS EMPLOYER, BECAUSE THEN HE WOULD HAVE A WORKMAN'S COMPENSATION CLAIM AGAINST THE STATUTORY EMPLOYER.

SO WHAT LEGAL IMPACT DOES THIS RELEASE DOCUMENT HAVE AGAINST YOUR CLIENT, INsofar AS DETERMINING THAT YOUR CLIENT IS THE STATUTORY EMPLOYER OR NOT? ANYTHING? HAVE ANY LEGAL CONSEQUENCE? HAVE YOU MADE SOME ADMISSION?

NO. BECAUSE WE ARE NOT A PARTY TO THAT.

SO IT HASN'T HAD, IT DOESN'T HAVE ANY IMPACT ON YOU.

NO. IT DOES NOT HAVE ANY IMPACT UPON ME, EXCEPT THAT THE STATUTE SAYS THAT WORKMAN'S COMP IS A EXCLUSIVE REMEDY AND THAT YOU CANNOT SUE EITHER YOUR EMPLOYER OR YOUR STATUTORY EMPLOYER. YOU CAN'T GO UP THE CHAIN. IF YOU HAVE WORK -- FOR -- EXCEPT FOR WORKMAN'S COMPENSATION.

REGARDLESS OF THE SETTLEMENT, IF YOUR CLIENT IS DETERMINED TO BE THE STATUTORY EMPLOYER, AND THAT THIS WAS IN THE COURSE AND SCOPE OF THE EMPLOYMENT, THERE WOULD BE NO CLAIM?

THERE WOULD BE NO CLAIM, NO, SIR, THE STATUTE ABSOLUTELY BARS IT.

BUT THAT IS STILL A VIABLE DEFENSE, EVEN UNDER THE THIRD DISTRICT'S RULING. IS THAT CORRECT?

I THINK IT WOULD STILL BE A DEFENSE, BUT WE HERE HAVE AN ELECTION OF REMEDIES.

I UNDERSTAND THAT. BUT THIS IS STILL A VIABLE DEFENSE, REGARDLESS OF THE THIRD DISTRICT'S RULING. DO YOU AGREE WITH THAT? MR. CHIEF JUSTICE

YOU ARE GOING TO BE OUT OF YOUR REBUTTAL TIME.

THANK YOU, JUDGE. MR. CHIEF JUSTICE

I UNDERSTAND. MR. LEVY.

MAY IT PLEASE THE COURT. I AM JAY LEVY ON BEHALF OF THE HERNANDEZES. I THINK, WHEN WE ANALYZE THE POSITION OF THE PARTIES HERE, IT IS VERY IMPORTANT TO SEPARATE FACT FROM FICTION. WE NEED TO GO BACK, AND WE NEED TO LOOK AT TWO DIFFERENT THINGS. THE SITUATION IS DIFFERENT, WITH REGARD TO MOTHER AND WITH REGARD TO CHILDREN. JUSTICE QUINCE, WITH REGARD TO THE RECORD, THE ONLY MENTION, THE ONLY MENTION IN ALL OF THESE WORKERS COMPENSATION DOCUMENTS OF THE CHILDREN, ARE IN THE CHILDREN OF THE INITIAL PETITION. THEY APPEAR NOWHERE ELSE.

IN THE NORMAL WORKERS COMP CASE, WHERE THE MOTHER AND MINOR CHILDREN, AND IF YOU GO THROUGH SOME KIND OF SETTLEMENT LIKE THABS, DO YOU NORMALLY HAVE -- LIKE THAT, DO YOU NORMALLY HAVE, IN THE ACTUAL SETTLEMENT, SOME MENTION OF THE CHILDREN, AND DO YOU HAVE TO, IN THE SETTLEMENT, GO THROUGH THOSE STATUTORY PERCENTAGES OR IS THAT LEFT TO THE MOTHER TO DO?

WELL, 40.10 LEAVES IT TO THE JUDGE TO DECIDE IN HIS DISCRETION WHAT EVERYBODY IS GOING TO GET. THERE MUST BE MENTION OF THOSE CHILDREN IN THAT ORDER. THE ORDER IS THE FINAL DECISION. IT IS WHAT CONTROLS.

IN THIS CASE THE CHILDREN --

-- GET NOTHING.

NO. THE CHILDREN COULD HAVE COME BACK TO GET FURTHER WORKERS COMPENSATION BENEFITS?

THE CHILDREN HAVE THE RIGHT TO FILE A CLAIM FOR WORKERS COMPENSATION DEATH BENEFITS, IF THE MATTER OCCURRED THROUGH THE COURSE AND SCOPE --

BUT ISN'T THAT WAS WHAT WAS DONE HERE IN THE PETITION?

NO, YOUR HONOR, BECAUSE THERE IS NO -- THE PETITION BROUGHT BY THE MOTHER NAMES THEM. YES.

YOU THINK, THOUGH, THAT LEGALLY, YOU WOULD BE ON SOUND GROUND, IF YOU BROUGHT A SECOND PETITION AGAINST THE EMPLOYER IN THE WORKERS COMPENSATION COURT, TO GET BENEFITS ON BEHALF OF THE CHILDREN? COULD IT BE DONE? NO. IT COULD NOT BE DONE.

WHY IS THAT?

IT COULD NOT BE DONE, BECAUSE THIS ACCIDENT DID NOT OCCUR IN THE COURSE AND SCOPE, AND THEREFORE THEIR CIVIL REMEDY IS WHAT THEY MUST PURSUE. THERE HAS NEVER BEEN A FINDING THAT THIS ACCIDENT OCCURRED WITHIN THE COURSE AND SCOPE.

BUT THE POINT, I UNDERSTAND JUSTICE PARIENTE'S QUESTION, IS THAT CAN THERE BE A DIVISION MADE BY A COMP JUDGE THAT IS GOING TO ALLOW A SETTLEMENT ON BEHALF OF THE SPOUSE THAT WOULD NOT NECESSARILY INCLUDE THE CHILDREN WHO WERE BEING, WHO THE PETITION CLAIMS THROUGH?

I WOULD HAVE A HARD TIME ACCEPTING, AS A MATTER OF FACT, THAT A JUDGE COULD HAVE MULTIPLE BENEFICIARIES IN FRONT OF HIM AND NOT ALLOCATE BENEFITS TO ALL OF THOSE BENEFICIARIES IN SOME FORMAT. THE QUESTION BEING, IS IT POSSIBLE, CHIEF JUSTICE? YES, IT IS/ GIVE ALL TO ONE PARTY AND NONE TO ANOTHER, BUT SINCE ALL PARTIES ADMITTEDLY SUFFERED A LOSS, IT WOULD, DEFY CREDULITY TO DO IT THAT WAY. THAT IS WHY I HAVE DIFFICULTY IN RESPONDING TO YOUR QUESTION. LEGALLY, I SUPPOSE HE COULD, BUT THE POINT HERE IS, AND I GUESS WHO IN THIS CASE WAS WATCHING THE CHILDREN? WHO WAS PROTECTING THEIR INTERESTS? AND TO FOLLOW UP ON YOUR INTERPRETATION OF JUSTICE PARIENTE'S QUESTION, THAT PUTS MOTHER AND CHILDREN ADVERSE. WHO IS WATCHING THE CHILDREN, BECAUSE YOU ARE SAYING MOTHER GETS EVERYTHING. CHILDREN GET NOTHING. AND THAT IS ALL THE MORE REASON WHY THERE HAD TO BE A GUARDIANSHIP UNDER 744.387. THE COURT BELOW INDICATED THAT THERE WAS NOTHING IN THAT STATUTE THAT INDICATED THAT IT DID NOT APPLY TO WORKERS COMPENSATION.

THEORETICALLY THIS ACCIDENT SHOULD BE PURSUED BY THE ESTATE.

IN THE COMP CASE?

RIGHT.

THE STATE DOES NOT HAVE STANDING IN COMP. IT WOULD BE BROUGHT --

BUT IN THE COMMON LAW ACTION, THE ESTATE IS BRINGING THE ACTION.

CORRECT.

IN PROTECTING THE CHILDREN'S INTEREST, THE ESTATE IS, WAS AN ESTATE SET UP?

I UNDERSTAND THERE TO BE AN ESTATE. BUT THE ESTATE, BUT IF THERE WAS AN ESTATE SET UP, THEN IT WOULD BE OBLIGATORY, MANDATORY, SHALL, WHATEVER WORD YOU WANT TO USE TO REQUIRE A GUARDIAN TO REVIEW THIS, WHATEVER TERM YOU WANT TO USE, AND TO BE PERFECTLY CANDID WITH THE COURT, I DON'T THINK ANY GUARDIAN, ANY JUDGE, WHEN THERE WAS MONEY ON THE TABLE IN EXCESS OF \$100,000, FOR THE CHILDREN COULD HAVE EVER ACCEPTED THIS AS BEING IN THEIR BEST INTEREST. THAT IS THE BOTTOM LINE HERE, AND HAVING THAT AS THE BOTTOM LINE, THERE WAS NO ONE PROTECTING THEIR INTEREST.

YOU ARE SAYING THE JUDGE DIDN'T KNOW AT THE WASH OUT HEARING THAT THERE WERE CHILDREN?

ABSOLUTELY NOT. I DON'T KNOW WHETHER HE KNEW. I DON'T EVEN KNOW IF THERE WAS A HEARING, YOUR HONOR.

WE ARE NOT HERE TO SET ASIDE THE WORKERS COMPENSATION SETTLEMENT, BECAUSE IT SEEMS TO ME THAT WOULD BE WHAT YOU WOULD HAVE TO DO, MAKING THE ARGUMENT YOU ARE MAKING. ARE YOU CONCEDING THAT THERE WAS AN ELECTION OF REMEDIES FOR MARIA?

NO. NO.

THEN LET'S TAKE YOUR BEST SHOT OMARI A, AS TO WHY HER FILING AND ACCEPTANCE OF WORKERS COMPENSATION BENEFITS DIDN'T CONSTITUTE AN ELECTION OF REMEDIES FOR THE WORKERS COMPENSATION.

FIRST LET'S GO BACK TO BASICS. THEIR POSITION IS THAT THEY ARE A STATUTORY EMPLOYER. THAT REQUIRES SEVERAL THINGS TO OCCUR. THE FIRST ONE OF WHICH IS THAT, AT THE TIME OF THE INJURY, HE WAS DOING WORK DELEGATED FROM THE EMPLOYER, FROM THE STATUTORY EMPLOYER, TO THE ACTUAL EMPLOYER. WE HAVE CONTENDED, AND THE THIRD DISTRICT DIDN'T REACH THIS POINT BECAUSE THEY DIDN'T HAVE TO, BUT WE HAVE ALWAYS CONTENDED THAT THERE CAN BE NO FINDING THAT THERE IS A STATUTORY EMPLOYER. ALL OF THE EVIDENCE IN THIS RECORD INDICATED THAT THE PLACE WAS CLOSED ON THE DAY IN QUESTION. NOW, HE WAS ON THE PREMISE, BUT HE SHOULDN'T HAVE BEEN THERE, BUT HE COULD NOT HAVE, AS A MATTER OF LAW, ON THESE FACTS, HAVE BEEN PERFORMING DELEGATED WORK. IF HE IS NOT PERFORMING DLEGATED WORK, THEN THEY ARE NOT THE STAT EMPLOYER, AND THERE IS A FACTUAL SCENARIO PRESENT IN THIS CASE WHICH WOULD ALLOW HIM TO BE EMPLOYED BY CA, MAKE A COMP CLAIM AND THEY NOT BE THE STATUTORY EMPLOYER, AND THAT IS EXACTLY WHAT HAPPENED IN THIS CASE, SO I NEVER CONCEDED AND WE HAVE NEVER CONCEDED BELOW, WE HAVE NEVER CONCEDED AT THE THIRD DISTRICT, AND WE DO NOT CONCEDE HERE THAT THEY ARE A STAT EMPLOYER BECAUSE, IN FACT, THEY ARE NOT, BUT OVERLOOKING THAT ISSUE AND GOING TO THE ELECTION OF REMEDIES, THERE ARE MANY CASES DEALING WITH ELECTION OF REMEDIES, BUT THEY REQUIRE TWO THINGS. THEY REQUIRE SOMEWHERE THAT THERE BE AN AGREEMENT SOMEHOW, THAT THE CLAIM OCCURRED WITHIN THE COURSE AND SCOPE. NOW, THE ONLY AFFIDAVIT, AND I BELIEVE JUSTICE QUINCE, THIS WAS YOUR FIRST QUESTION, THE ONLY AFFIDAVIT IN THIS CASE THAT I HAVE SEEN WAS, WOULD, WAS THAT WHICH ACCOMPANIED THE INITIAL CLAIM. I HAVE BEEN LOOKING THROUGH THE AFFIDAVIT SUBMITTED IN SUPPORT OF THE STIPULATION, AND I DON'T SEE WHERE IT INDICATES THAT MY CLIENT CONTENDED IN THAT STIPULATED AFFIDAVIT SUPPORTING THE SETTLEMENT OF THE MATTER, THAT SHE AGREED THAT THIS MATTER WAS WITHIN THE COURSE AND SCOPE, WAS WITHIN THE COURSE AND SCOPE OF

EMPLOYMENT. NOT ONLY DOES IT RESERVE DEFENSE JUSTICE WELLS, BUT IT SPECIFICALLY RESERVES THIS COURSE AND SCOPE ISSUE AND IT AGREES THAT IT HAS NEVER BEEN RESOLVED. MR. CHIEF JUSTICE

CHIEF JUSTICE SHAW HAD A QUESTION.

YES.

IS WORKERS COMP YOUR AREA OF EXPERTISE? DO YOU DO CONSIDERABLE PRACTICE IN THAT AREA?

I DO CONSIDERABLE APPELLATE PRACTICE IN WORKERS COMP. I THINK I HAVE TRIED ONE CASE IN MY LIFE IN COMP.

IS IT UNUSUAL, CAN YOU ANSWER THIS QUESTION, IS IT UNUSUAL TO HAVE THIS TYPE OF AN ORDER, WHERE THE CHILDREN ARE NOT MENTIONED?

MY EXPERIENCE --

YOU HAVE GOT AN UNUSUAL ORDER IN A COMP CASE?

THE CHILDREN AREN'T MENTIONED BECAUSE THE JUDGE HAS THE DISCRETION TO CONTROL WHO GETS WHAT, AND THEREFORE THERE IS ALWAYS THE DILL ENIATION AS TO WHO GETS WHAT, SO, YES, MY INTERPRETATION OF THIS ORDER IS, SINCE THE CHILDREN WERE NOT MENTIONED THEY GET NOTHING, BECAUSE, AGAIN, 440.16 SAYS MAY ALLOCATE IN ANY MANNER THAT HE CHOOSES. HE HAS THAT ULTIMATE DISCRETION AND I BELIEVE THAT THE ORDER THAT THIS COURT IS LOOKING AT CONTAINS THE ULTIMATE ALLOCATION THAT THESE CHILDREN ARE NOT GETTING ANY MONEY IN THIS CASE, AS AS A RESULT, IF YOU DON'T GET ANYTHING, ON BASIC ELECTION OF REMEDIES LAW, THERE ARE TWO THINGS THAT HAVE TO HAPPEN. YOU HAVE TO MAKE A CLAIM AND YOU HAVE TO GET MONEY AS A RESULT OF THAT CLAIM. OKAY. THIS CASE, AS TO MOM, IS AN ABERRATION. IT IS DIFFERENT FROM HE EVERY OTHER CASE, BUT AS FOR -- FROM EVERY OTHER CASE, BUT AS TO THE CHILDREN THEY GOT MULTIPLE MONEY STARTING WITH WILLIAMS IN THIS CASE. AS TO A CLAIM FOR MONEY, THAT IS WHY THE CHILDREN ARE HERE, FLAT-OUT. NO MONEY. CLAIM. NO ELECTION.

ARE THEY NAMED WHEN SHE BRINGS THE INITIAL CLAIM? ARE THEY CAPTIONED UNDER THAT CLAIM?

NEVER CAPTIONED AFTER. THAT NO MENTION IN THE STIPULATION, NO INDICATION OF HOW MUCH. NO MENTION WHATSOEVER WHEN THEY APPROVED THE STIPULATION. NO MENTION WHATSOEVER. I THINK IT IS SOUND THAT THE CHILDREN WERE NOT INCLUDED PERIOD, BUT EVEN IF THERE WERE SOME INTENT AND EVEN IF THIS COURT WERE TO HOLD THAT THE CHILDREN WERE INCLUDED, AND I DON'T SEE HOW YOU COULD, BUT EVEN IF THEY WERE, THEY ARE ENTITLED TO THAT GUARDIAN TO PROTECT THEIR INTEREST. EITHER WAY, HEADS THEY WIN, TAILS WE LOSE. THAT IS WITH THE CHILDREN. THE CHILDREN ARE NOT THE PROBLEM HERE. AS JUST -- AS JUSTICE PARIENTE MENTIONED, THE MOTHER IS WHY WE ARE HERE. IN EVERY ADJUDICATION OR STIPULATION, THIS CLAIM IS WITHIN THE COURSE AND SCOPE.

COULD YOU EXPLAIN, BECAUSE I DIDN'T GET, THIS MAYBE IS A SUBTLETY OR NOT A SUBTLETY. I DO KNOW THE DIFFERENCE BETWEEN STATUTORY EMPLOYER, BUT IF THE CLAIM WAS BROUGHT AGAINST THE EMPLOYER IN WORKERS COMPENSATION COURT AND THE PESONAL WRONGFL-DEATH CASE IS NOT BEING BROUHT AGAINST THE EMPLOYER BUT AGAINST UNITED CONTRACTORS. IS THAT BECAUSE ARE SAYING? THAT THERE IS A DIFFERENT, IT IS NOT EVEN THE SAME DEFENDANT IN THE CASE?

IT DOESN'T DEPEND ON THE FACT THAT THERE WAS A DIFFERENT DEFENDANT. THEY HAVE RELY ON THE DELTA CASE. UNFORTUNATELY A CASEY HAD LOST IN THE THIRD DISTRICT. BUT WHAT IS REQUIRED IS THAT THE WORK THAT IS BEING PERFORMED, WHEN THE INJURY OCCURRED, BE WITHIN THE SCOPE OF A DELEGATED WORK FROM THE STATUTORY EMPLOYER TO THE EMPLOYER. IN OTHER WORDS, GENERALLY A CONTRACTOR, SUBCONTRACTOR SITUATION FORM THE CONTRACTOR PAR TAKES OF COMMUNITY. HE CAN ONLY GET WHEN RECOVERY, ALL OF THIS ELECTION IS ONLY ONE RECOVERY, SO THE STATUTORY IS UNDERLYING IMMUNITY, UT FOR THAT STAT EMPLOYER TO GET THAT IMMUNITY, THE WORK HAS TO BE PERFORMED WITHIN THE COURSE AND SCOPE OF THAT WHICH IS DELEGATED. I SUBMIT TO THE COURT THAT HERE THERE IS --

AGAIN, YOU ARE SAYING THAT HE COULD HAVE BEEN WORKING FOR HIS EMPLOYER BUT NOT WITHIN THE --

-- DELEGATED WORK RESPECT AND IF HE IS NOT DOING THE SUBCONTRACTED WORK, THEY ARE NOT A STAT EMPLOYER.

DO YOU AGREE, THOUGH, THE ISSUE AS TO WHETHER UNITED CONTRACTORS IS A STATUTORY EMPLOYER CAN BE LITIGATED IN THE REMEDY ACTION, OR IS THERE --

IF THERE IS NO REMEDY ACTION, IT DOES NOT MATTER. IT IS NOT A VIABLE APPOINTMENT, JUSTICE ANSTEAD. IF THERE IS NO ELECTION OF REMEDIES, THERE IS NO DISCUSSION TO HAVE THIS ABOUT STAT EMPLOYER EMPLOYER.

AS FAR AS MRS. HERNANDEZ IS CONCERNED, SHE PURSUED A CLAIM, AND SHE, IN FACT, SHE RECEIVED BENEFITS FROM A CLAIM. NOW, IN ORDER FOR YOUR POSITION TO PREVAIL, THE THIRD DISTRICT STATEMENT CITES CIRCUMSTANCES WHICH SAID THE WILLIAMS -- CITES CASES WHICH SAID THAT THE WILLIAMS CASE THAT, THE REMEDY MUST BE PURSUED TO A DETERMINATION OR A CONCLUSION ON THE MERITS. IS THAT YOR POSITION? I MEAN, IT WOULD HAVE TO GO ALL THE WAY TO DETERMINE NATION?

NO, THAT IS NOT MY POSITION. MY POSITION IS VERY SIMPLE. IF THERE IS AN ADJUDICATION THAT IS IN THE COURSE AND SCOPE, IT IS A DEAD ISSUE. IT IS DECIDED IN THE COURSE AND SCOPE. THE SITUATION A RISES WHEN THERE IS NOT -- ARISES WHEN THERE IS NOT A FINAL RESOLUTION, AS OCCURRED HERE. IT IS OUR POSITION THAT THE CASE LAW IS CLEAR THAT, WHEN THAT SITUATION OCCURS, THERE MUST BE SOME SORT OF AN AGREEMENT OR STIPULATION THAT THE COURT, THAT THE CLAIM OCCURRED WITHIN THE COURSE AND SCOPE. IN MANY OF THESE CASES THEY ARE SETTLED, THE ZMINGTSMENT CREATES TO RECEIVE THE BENEFITS, BUT IN THOSE SETTLEMENTS, MR. CHIEF JUSTICE, IN THOSE SETTLEMENTS, THERE IS AN ACKNOWLEDGMENT THAT IT OCCURRED WITHIN THE COURSE AND SCOPE. WHERE THIS CASE DEPARTS AND WHERE THAT TRAIN ENDS, IS IN THIS CASE THERE IS A SPECIFIC RESOLUTION AND NEVER AN AGREEMENT ON THE COURSE AND SCOPE ISSUE. THIS CASE LINES UP WITH THE FIRST DISTRICT'S CASE, IN, I GUESS, GREEN VERSUS MAHARAJ OF INDIA. IN THOSE CASES YOU SET OFF THE THIRD PARTY BENEFITS WITH THE OTHER AWARD, BECAUSE --

YOUR POSITION IS DIRECTLY CONTRARY TO THE POSITION OF THE FOURTH DISTRICT IN MICHAEL. IN MICHAELS? NO, YOUR HONOR.

WHICH SAYS THAT, IF YOU PURSUE IT, AND YOU ACCEPT IT, THEN YOU HAVE ELECTED YOUR REMEDY.

JUDGE, IN THE MICHAEL CASE, THERE IS NO INDICATION IN THAT DECISION THAT THERE WAS NOT AN AGREEMENT THAT THAT CLAIM FELL IN WORKERS COMPENSATION, WHEN THE MATTER WAS SETTLED ON APPEAL IN THE MICHAELS CASE, FOR \$6500, THERE IS NOTHING IN THE MICHAEL

OPINION THAT INDICATES THAT ISSUE WAS RESERVED. BICEPING THAT MONEY, HE, THEN, AGREED, BY, SINCE HE DIDN'T RESERVE THE ISSUE, THAT THE CLAIM WAS PROPERLY BEFORE WORKERS COMPENSATION. THIS CASE IS DIFFERENT. IN THIS CASE, IT WAS A SPECIFIC RESOLUTION, AND A NONADJUDICATION OF THAT ISSUE, AND TO BE PERFECTLY HONEST, I WOULD GO AS FAR TO SAY THAT WE COULD SUE CA CIVILLY IN THIS MATTER, BECAUSE THERE WAS NEVER AN AGREEMENT AND NOTHING BINDING THAT WORKERS COMPENSATION CONTROLLED. THERE WAS NO STIPULATION AS TO COURSE AND SCOPE OF EMPLOYMENT, AND THEREFORE WE COULD SUE THEM CIVILLY AN THIS WOULD BE A SET-OFF, AND I WOULD SUBMIT TO THE COURT THAT, IF WE COULD SUE CA CIVILLY, THEN WHY COULD WE NOT SUE THE STATUTORY EMPLOYER, ALSO? THERE IS SIMPLY NO ELECTION WITHOUT AN ADJUDICATION, WITHOUT A STIPULATION SOMEWHERE, THAT SAYS THIS CLAIM WAS IN THE COURSE AND SCOPE.

YOU WOULD AGREE SHE COULD NOT PURSUE FURTHER COMP BENEFITS FROM --

SHE HAS, THERE IS A RELEASE ON THAT. OKAY. THERE IS A RELEASE OF COMP BENEFITS, SO THAT IS NOT EVEN --

AND A CONSIDERATION FOR THAT RELEASE IS THE PAYMENT OF COMP BENEFITS.

THAT IS CORRECT. OF A DISPUTED CLAIM THAT THE WITNESS HAS TESTIFIED, BY AFFIDAVIT, BOTH LAWYERS -- MR. CHIEF JUSTICE

JUSTICE QUINCE HAD A QUESTION.

YOU JUST SAID THAT YOU COULD SUE THE STATUTORY EMPLOYER, UNITED CONTRACTORS, CORRECT?

YES.

BUT I THOUGHT EARLIER YOU SAID THAT YOUR SUIT WAS BASED ON THE FACT THAT THEY WERE NOT THE STATUTORY EMPLOYER. WHICH IS IT? ARE THEY OR ARE THEY NOT THE STATUTORY EMPLOYER HERE?

WE DON'T AGREE THAT THEY ARE A STATUTORY EMPLOYER. OKAY. BUT WE SAY THAT, EVEN IF THEY WERE A STATUTORY EMPLOYER, AND WE ARE ONLY REALLY TALKING ABOUT MOM HERE, BUT IF THEY WERE A STATUTORY EMPLOYER, WE SAY THAT WE COULD STILL SUE THEM, BECAUSE WITHOUT AN AGREEMENT AS TO THE COURSE AND SCOPE ISSUE ANYWHERE, THERE IS NO COMP IMMUNITY HERE. THERE HAS TO AND AGREEMENT SOMEWHERE, THAT THIS ACCIDENT IS WITHIN THE COURSE AND SCOPE.

WHY COULDN'T THEY DEFEND THE WRONGFUL-DEATH CASE ON SAYING THAT IT WASN'T A COURSE AND SCOPE? I MEAN, JUST BECAUSE YOU SUE IN, YOU KNOW, IN THE CIRCUIT COURT, DOESN'T MEAN THAT, IF THEY HAD COMP IMMUNITY, THAT IT IS ELIMINATED. WHY WOULDN'T THEY STILL HAVE THE ABILITY TO LITIGATE, THEN, SINCE THERE HAS BEEN NO DETERMINATION THAT THIS WAS A COURSE AND SCOPE CLAIM, AND THEN YOU ARE OUT THAT WAY? I AM NOT SAYING YOU WOULD BE, BUT THAT IS AN ISSUE OF FACT AS OPPOSED TO AN ELECTION OF REMEDIES ISSUE.

YOU ARE OBVIOUSLY RAISING AN ISSUE THAT THEY HAVEN'T RAISED. I HAVE TO THINK ABOUT THAT FOR A SECOND.

I THOUGHT THAT WAS ALONG THE LINE OF WHAT JUSTICE ANSTEAD SAID.

YOU ALL HAVE RAISED IT BUT I HAVEN'T SEEN IT IN THEIR BRIEF, AND I DON'T WANT TO MISS SPEAK HERE. IT IS THE WAY YOU PHRASE THE QUESTION, POSSIBLE THAT THAT ISSUE COULD BE

LITIGATED, OKAY, BUT I WOULD HAVE TO THINK OUT THE PERMUTATION, WHICH I DON'T HAVE TIME TO DO HERE. MY UNDERSTANDING IS FROM THIS RECORD THAT, IF THERE IS NO ELECTION OF REMEDIES, AND IT IS, WELL, I GUESS THE WAY YOU PUT IT COURSE AND SCOPE IS AN OPEN ISSUE. YES. YES. AS YOU PHRASE THE QUESTION. YES, YOUR HONOR.

WHAT IS YOUR POSITION, RELATIVE TO THE CHILDREN NOT BEING MENTIONED? ARE YOU SAYING THAT IT IS OVERSIGHT, OR ARE YOU SAYING THAT IT WAS A CONSCIOUS CHOICE NOT TO LITIGATE THEIR INTERESTS AT THAT POINT?

I DON'T KNOW WHICH ONE IT WAS BUT I SAY TO YOU IT DOESN'T MATTER. THEY ARE NOT MENTIONED. THAT IS THE CONCRETE FACT THAT WE HAVE, AND NOT BEING MENTIONED THEY ARE NOT A PART OF THE SETTLEMENT PERIOD, AND IF, AS THE CHIEF JUSTICE ASKED ME, IT WAS POSSIBLE THAT THE SETTLEMENT ONCE THEY GET NOTHING, THEN THAT SHOULD HAVE BEEN SET FORTH AS BEING IN THEIR BEST INTEREST IF YOU BUY THE ARGUMENT THAT THE COMP JUDGE IS SITTING THERE TAKING INTO CONSIDERATION THE BEST INTEREST OF THE MINOR CHILDREN, A VERY DUBIOUS ASSUMPTION, SINCE -- A VERY DUBIOUS ASSUMPTION, SINCE THEY ARE NOT MENTIONED ANYWHERE, THEN OUR POSITION IS THAT THEY GOT THIS CASE CORRECTLY. THEY DECIDED THE CASE CORRECTLY. IT WOULD BE JUST A SUBSTANTIAL AND HUGE PROBLEM TO DEPRIVE THE MINOR CHILDREN OF ANY OPPORTUNITY TO MAKE A RECOVERY, WHEN THEY GOT NOTHING IN WORKERS COMPENSATION. THERE IS NO ELECTION OF REMEDIES AS I UNDERSTAND THE LAW, AND AS DEFINED IN THE CASES CITED IN THE BRIEF, BECAUSE IN THIS CASE, THERE IS NO FINDING THROUGH A DETERMINATION, THAT THIS WAS IN THE COURSE AND SCOPE, AND THERE IS NO STIPULATION OR WHETHER EXPRESS OR IMPLIED, THROUGH THE ACCEPTANCE OF BENEFITS, THAT THIS MATTER IS WITHIN THE COURSE AND SCOPE.

DO THE CHILDREN HAVE ANY KIND OF REMEDY? IF THEY ARE NOT, WE ALL AGREE THEY ARE NOT MENTIONED IN THE STIPULATION AND THE ORDER IN THE WORKERS COMP. DO THEY OR DID THEY HAVE ANY REMEDY CONCERNING THAT?

I BELIEVE THAT, AFTER 30 DAYS THOSE WORKERS COMPENSATION CASES ARE FINAL AND BINDING, AND IT IS NOT LIKE A 1.540 MOTION IN CIVIL COURT, WHERE YOU CAN FILE A MOTION TO VACATE AND SET ASIDE. IN ANY EVENT, THERE IS MORE THAN ONE YEAR, BUT THERE IS NO SIMILAR REMEDY IN COMPENSATION THAT ALLOWS YOU TO VACATE THE ORDER, ONCE IT BECOMES FINAL, AND THIS WOULD NOT BE A BASIS FOR --

BEFORE IT BECAME FINAL? BEFORE IT BECAME FINAL, WHO WOULD HAVE HAD STANDING TO COME IN AND SAY, WELL, THIS ORDER DOESN'T TAKE CARE OF THE CHILDREN?

MOM. MOM WOULD HAVE HAD STANDING, BUT YOU SEE, THERE IS NO GUARDIAN. THAT IS THE WHOLE -- I MEAN, WE CAN GO AROUND AND AROUND, YOUR HONOR, AND EXPLAIN THIS THING, BUT THE SAME PERSON IS, IF YOU TAKE THE POSITION THAT MOM IS THEIR NATURAL GUARDIAN AND SHE HAS THEIR BEST INTEREST, SHE IS THE SAME PERSON GETTING ALL THE MONEY. SHE HAS GOT AN INHERENT AND NATURAL CONFLICT WITH THE CHILDREN. THERE IS NO BASIS WHY AN INDEPENDENT GUARDIAN SHOULD NOT HAVE BEEN APPOINTED. IN CONCLUDING, THERE IS NOTHING HERE THAT SHOWS AN IMPLIED -- YES, YOUR HONOR.

JUST TO FOLLOW UP ON THAT STATEMENT, WHO HAS THE BURDEN OF ASKING THE WORKERS COMP JUDGE TO APPOINT ONE, IF YOU SAY THERE SHOULD HAVE BEEN ONE APPOINTED?

I DON'T BELIEVE THAT THE JUDGE APPOINTS THE GUARDIAN. THE STATUTE REQUIRES THE PROBATE COURT, AS I READ IT.

WHO HAS THAT BURDEN TO GO TO THE PROBATE COURT TO MAKE SURE THAT ONE IS APPOINTED?

I THINK THE JUDGE'S BURDEN IS TO SAY THAT WHAT DOES THE GUARDIAN SAY? AND WHEN THE

JUDGE FINDS THERE IS NO GUARDIAN, END OF PROCEEDINGS. YOU GO OUT AND GO AHEAD GET -- YOU GO OUT AND GET A GUARDIAN. END OF PROCEEDINGS. THE STATUTE SAYS LOOK, WHERE IS THE GUARDIAN, AND IF THERE IS NO GUARDIAN, YOU GO DOWN AND BRING A GUARDIANSHIP AND ANSWER THE QUESTION. MR. CHIEF JUSTICE

THANK YOU, COUNSEL.

WE RESPECTFULLY REQUEST MR. CHIEF JUSTICE

REBUTTAL?

THE WIFE FILED WORKERS COMPENSATION BENEFITS FOR HERSELF AND FOR HER CHILDREN. THERE IS NO QUESTION ABOUT THAT. NOW, THE EMPLOYER OF THE DECEASED FILED A NOTICE OF THE INJURY, SAYING THE MAN WAS INJURED IN THE COURSE AND SCOPE OF HIS EMPLOYMENT. THE ONLY EMPLOYMENT HE HAD THERE WAS WORKING UNDER UNITED CONTRACTORS. THERE IS NO QUESTION ABOUT THAT.

BUT WAIT A MINUTE, COUNSEL, IT APPEARS THAT HE WAS THERE ON A DAY OFF, AS I READ THE DECISION, AND SOMETHING HAPPENED WITH, OUT BY A ROCK PIT OR SOMETHING AND WITH A BULLDOZER OR GRADER. YOU ARE SAYING IT IS IMPOSSIBLE THAT THIS PERSON COULD HAVE NOT BEEN WORKING IN THE COURSE AND SCOPE OF ANYTHING, FOR THE DEFENDANT IN THIS CASE, WHICH IS UNITED, IS THAT YOUR POSITION?

THE EMPLOYER OF THIS MAN CLAIMED THAT HE WAS ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT AT THE TIME AND FILED PAPERS TO THAT IN THE WORKMAN'S COMPENSATION COURT.

IN THE COURSE AND SCOPE, THOUGH, WITH CA. WHO WAS HIS EMPLOYER.

AND CA WAS WORKING FOR UNITED CONTRACTORS AT THAT LOCATION. THE QUESTION IS, OF COURSE, ONE OF THE QUESTIONS THEY DID RAISE, IN ALL HONESTY, IS WHETHER OR NOT HE WAS ACTUALLY WORKING AT THAT MOMENT OR WAS HE JUST SITTING ON THE JOB, BUT HE WAS PAID FOR THAT DAY BY CNA, AS A RESULT OF THE CONTRACT THAT UNITED CONTRACTORS HAD WITH THEM. THEY PAID HIS SALARY FOR THAT DAY. MR. CHIEF JUSTICE

THANK YOU. COUNSEL, YOUR TIME IS UP. THANK YOU VERY MUCH. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE.