Bernard Wendt v. Marvin Horowitz

MR. CHIEF JUSTICE: GOOD MORNING, AND WELCOME TO THE ORAL ARGUMENT CALENDAR FOR MARCH 7, FOR THE FLORIDA SUPREME COURT. WE ARE PARTICULARLY PLEASEDED TO HAVE THE LAW CLASS STUDENTS FROM SUSIE GROSSNER'S CLASS AT LEON HIGH SCHOOL. MS. GROSSNER IS CERTAINLY AN AMICUS AND A FRIEND OF THIS COURT. SHE WAS ONE OF THE FIRST TEACHER JUSTICE INSTITUTE PARTICIPANTS, AND WE HAVE, I THINK, ALMOST EACH ONE OF THE MEMBERS OF THIS COURT HAS BEEN TO LEON HIGH SCHOOL AND HER CLASS, AND WE NOTE THAT THEY ARE -- WON THE MOCK TRIAL COMPETITION FOR EIGHT CONSECUTIVE TIMES IN THE JUDICIAL CIRCUIT, SO CONGRATULATIONS. WE ARE GLAD TO HAVE EACH AND EVERYONE, AS WELL AS OUR OTHER VISITORS. MR. AUSTIN, THE CASE OF WENDT VERSUS HOROWITZ IS THE FIRST ON THE ORAL ARGUMENT CALENDAR. YOU MAY PROCEED.

GOOD MORNING, CHIEF JUSTICE AND MEMBERS OF THE COURT. I AM ROBERT AUSTIN FROM LEESBURG, APPEARING HERE ON BEHALF OF BERNARD WENDT, WHO IS THE PETITIONER IN THIS CASE. THIS CASE IS HERE BEFORE THE COURT, ON A WRIT OF CERSYEAR TO TRY TO RESOLVE -- CERTIORARI TO TRY TO RESOLVE THE CONFLICTS. SINCE THAT TIME, WE HAVE HAD THE CHANCE TO TRY TO REVIEW THE ISSUES IN THIS BASIC ACTION. THE THRESHOLD ISSUES WITH WHICH WE ARE CONCERNED IS WHETHER OR NOT PHYSICAL PRESENCE OF AN OUT-OF-STATE RESIDENT IS REQUIRED TO BRING THAT OUT-OF-STATE RESIDENT WITHIN THE PURVIEW OF OUR LONG ARM STATUTE. THE DISTRICTS ARE UNANIMOUS, WITH THE EXCEPTION OF THE FIFTH, THAT PHYSICAL PRESENCE IS NOT REQUIRED, IN ORDER TO INVOKE JURISDICTION, UNDER SECTION 48.193. EACH OF THE FOUR DISTRICTS HAS RULED THAT IT IS NOT, AND THIS COURT, IN THIS PAST YEAR, IN EXECUTEC, SAID LIKEWISE IT WAS NOT.

COULD YOU GIVE US A THUMBNAIL SKETCH OF THE FACTUAL BACKGROUND IN THIS CASE, SO THAT WE CAN HAVE SOMETHING TO PUT THE MEAT ON THE BONES, AS FAR AS CONSIDERING THE DIRECT ISSUE THAT WE HAVE HERE.

YES, SIR. THIS CASE AROSE OUT OF A COMPLAINT BROUGHT IN LAKE COUNTY, FLORIDA, ALLEGING FOR A CLASS ACTION FOR VIOLATION OF STATE SECURITIES LAWS. THE DEFENDANT IN THIS CASE WAS BERNARD WENDT. MR. WENDT RESPONDED TO THE COMPLAINT, IN WHICH IT WAS ALLEGED THAT HE HAD ALLEGEDLY SOLD UNREGISTERED SECURITIES AND WAS NOT A REGISTERED SECURITY DEALER IN THE STATE OF FLORIDA. MR. WENDT FILED A THIRD PARTY COMPLAINT AGAINST MR. HOROWITZ, IN WHICH HE ASSERTED THAT CERTAIN ACTIVITIES OF MR. HOROWITZ WERE WRONGFUL AND CAUSED HIM TO SUSTAIN DAMAGE, UNDER -- AS A TORT.

THIS IS THE REPTHAT IS BEFORE US. IS THAT CORRECT?

YES.

WAS IT EVER LITIGATED OR DISCUSSED, THE BASIS FOR RESPONSIBILITY ARISING FROM THAT RELATIONSHIP OR WHETHER THERE WAS A CAUSE OF ACTION FLOWING TO, FLOWING TO MR. WENDT, BECAUSE THE ATTORNEY HAS NOT BEEN HIRED BY MR. WENDT?

NO, SIR. THE ONLY ISSUES THAT ARE UP RIGHT NOW HAVE BEEN DETERMINED AT THE FIRST HEARING. THE COURT, THE TRIAL COURT, DENIED THE MOTION TO DISMISS, IF FOR LACK OF JURISDICTION. THAT NONFINAL ORDER WAS TAKEN TO THE FIFTH DISTRICT, WHICH REVERSED THE CASE IN THE OPINION WHICH IS BEFORE THIS COURT. THE MERITS OF THE CLAIM OF MR.

WENDT AGAINST MR. HOROWITZ HAVE NOT BEEN DETERMINED NOR HAVE THEY BEEN LITIGATED.

HAS IT PASSED THE MOTION STAGE OR YOU HIT THE JURISDICTIONAL ISSUE, FIRST, WITHOUT ADDRESSING ANY OF THE SUBSTANTIVE MOTIONS, THEN?

THAT WOULD BE CORRECT.

IS MR. WENDT AN INDEPENDENT CONTRACTOR, OR DOES HE WORK FOR K.D. TRIHN?

HE IS AN INDEPENDENT CONTRACTOR. HE HAD AN AGREEMENT WITH K.D. TRIHN, UNDER WHICH HE WOULD BE AN INDEPENDENT AGENT TO MARKET THEIR PROMISSORY NOTES HERE, IN FLORIDA, FOR LACK OF A BETTER WORD, AND SO HE WAS NOT AN EMPLOYEE, AND HE WAS AN AGENT OF K.D. TRIHN FOR THESE PURPOSES.

ALL OF MR. HOROWITZ'S ACTIVITIES OCCURRED IN THE STATE OF MICHIGAN.

YES, SIR, AS FAR AS PHYSICAL ACTIVITIES. AS FAR AS THE ACTIVITIES AND WHERE THE RESULTS OF THOSE ACTIVITIES OCCURRED, WE MAY NOT OBTAIN THAT THE EFFECT OF THOSE WERE RIGHT HERE, IN FLORIDA. AND THERE WERE TWO MAJOR ACTIVITIES. NOW, ONE --

DOES THIS BECOME A MATTER OF STATUTORY CONSTRUCTION, WHAT TORTIOUS CONDUCT IS?

YES, SIR, BUT THAT IS A HARD QUESTION TO ANSWER, THOUGH. IN THE CASE OF SILVER, BECAUSE JUSTICE LEWIS, AT THAT POINT, WAS THE ATTORNEY, AND JUSTICE PARIENTE WROTE THE OPINION, AND THAT CASE INVOLVED A LETTER THAT WAS SENT INTO THE STATE OF A DEFAMATORY NATURE, AND THE COURT, IN SILVER, HELD THAT THE ACTUAL TORTIOUS ACTIVITY DID NOT OCCUR, UNTIL THE LETTER WAS RECEIVED HERE, IN FLORIDA, AND SO IN THAT CASE, FOUND THAT THERE WAS TORTIOUS ACTIVITY HERE. LIKEWISE, WE MAY NOT OBTAIN THAT, IN THIS PARTICULAR INSTANCE, IT IS ALLEGED THAT MR. HOROWITZ SENT CERTAIN INFORMATION TO THE BANKING AND SECURITIES SECTION OF THE CONTROLLER'S OFFICE THAT WERE INCOMPLETE, MISLEADING AND ITS, -- AND OTHERWISE, AND THAT BY EXTRACTING CERTAIN VITAL INFORMATION FROM THAT, HE, THEN, MISLED THAT DEPARTMENT, AND THAT DID NOT OCCUR, UNTIL THEY RECEIVED THAT INFORMATION.

BUT IS THAT THE CAUSE OF ACTION AGAINST YOUR CLIENT, AND THIS GOES BACK TO WHAT JUSTICE LEWIS IS ASKING. IT SEEMS TO ME THAT, FOR THERE TO BE -- TO TAKE YOUR ARGUMENT TO A LOGICAL CONCLUSION, THAT THERE WOULD HAVE TO BE A CONNECTION BETWEEN WHAT THE TORTIOUS ACTS WERE IN FLORIDA, ASSUMING THEY WERE RECEIVED BY THE DEPARTMENT OF THIS -- THESE ERRONEOUS OR MISREPRESENTATIONS, AND THE TORT IS BEING ALLEGED AGAINST MR. HOROWITZ, SO MAYBE IF YOU CAN JUST TAKE ME BACK ONE STEP AND EXPLAIN WHAT IS THE TORT THAT IS BEING ALLEGED AGAINST MR. HOROWITZ, AS OPPOSED TO JUST A SERIES OF, WELL, HE DID THIS, HE DID THIS, HE DID THIS. IT IS NOT AN ATTORNEY MALPRACTICE CASE, IS IT?

NOT NECESSARILY. WHAT WE ARE MAINTAINING, FIRST OF ALL, IS THAT MR. HOROWITZ COMMITTED A WRONGFUL ACT, BY SUBJECTING, BY ADVISING THE OTHER AGENTS THAT THE ACTIVITIES WHICH THEY WERE UNDERTAKING WAS PROPER.

YOU ARE ALLEGING A DIRECT MISREPRESENTATION TO MR. WENDT, THAT, THROUGH THE STATEMENTS TO THE DEPARTMENT, TO THE SECURITIES DIVISION OF THE STATE?

WELL, TWOFOLD. NUMBER ONE, MR. HOROWITZ ADVISED CERTAIN OTHER AGENTS, WHO WERE IN CONTACT WITH MR. WENDT, THAT THEIR ACTIVITIES WERE LEGAL AND DID NOT VIOLATE THE FLORIDA SECURITIES ACT, AND WE MAY NOT OBTAIN THAT MR. WENDT HAD A RIGHT TO RELY ON THAT INFORMATION THAT WAS GIVEN TO HIM BY THE CORPORATE, INDEPENDENT COUNSEL.

SECONDLY BUT MOST IMPORTANT, I THINK, IS THAT, WHEN MR. HOROWITZ SENT THE ERRONEOUS INFORMATION TO THE DEPARTMENT OF BANKING AND SECURITIES, THAT THIS HAD IT BEEN SUBMITTED CORRECTLY, WOULD HAVE STOPPED THE SALE OF SECURITIES AT ANY TIME. THIS WAS IN 1994. THESE ACTIVITIES BEGAN IN MARCH OF 1994. THE DEPARTMENT OF BANKING COMMENCED ITS INVESTIGATION IN JUNE OF 1994, AND CALLED UPON MR. HOROWITZ TO SUBMIT INFORMATION AS TO WHY THESE WERE OR WERE NOT EXEMPT SECURITIES.

BUT DO I UNDERSTAND THAT THERE ARE TWO CRITICAL ACTS THAT OCCURRED IN FLORIDA THAT YOU ARE RELYING UPON?

YES, SIR.

AND ONE IS A LETTER TO THE DEPARTMENT, AND THE OTHER IS WHAT?

HIS CONSTANT CONTACT WITH THE PEOPLE HERE, IN FLORIDA, CONTINUALLY ADVISING THEM THAT THESE ACTIVITIES WERE PROPER, UNDER FLORIDA LAW.

AND THOSE ARE TORTIOUS ACTS YOU ARE ALLEGING?

YES, SIR. BECAUSE THEY WERE IMPROPER. IT TURNED OUT THAT THEY WERE INCORRECT, AND THAT, AS HAS BEEN FOUND LATER ON, AT LEAST ALLEGED, AND WE WOULD, CERTAINLY, COME TO PROVE THAT HE WAS NEGLIGENT IN PROVIDING THIS INFORMATION, BECAUSE WHEN, IN FACT, THESE ACTIVITIES AND THESE NOTES DID NOT COMPLY WITH THE FLORIDA ACT.

YOU SEE WE ARE HAVING SOME DIFFICULTY SEPARATING OUT THE CAUSE OF ACTION BETWEEN YOUR CLIENT AND THIS ATTORNEY, AND THE JURISDICTIONAL ISSUE HERE, AND THAT IS A PROBLEM FOR US. SO COULD YOU TRACE, AS SPECIFICALLY AS YOU CAN, WHAT YOU CONSIDER TO BE THE RELATIONSHIP, THEN, BETWEEN YOUR CLIENT AND THIS LAWYER THAT GIVES RISE TO A DUTY ON THE PART OF THE LAWYER TO YOUR CLIENT, THEN, THAT THE BREACH OF THAT DUTY THAT WOULD CONSTITUTE A TORT, UNFORTUNATELY AT LEAST IN TRYING TO WORK OUT THE ANSWER TO THE PROBLEM ABOUT JURISDICTION, WE HAVE GOT TO EXAMINE THE NATURE OF THE CAUSE OF ACTION AND THE ALLEGED TORT, AND YOU CAN SEE WE ARE ALL HAVING SOME DIFFICULTY WITH THAT, AND SO, YOU KNOW, HYPOTHETICALLY, A LAWYER IN MICHIGAN OR WHATEVER COULD WRITE TO SOMEBODY IN THE STATE OF FLORIDA AND SAY, YOU KNOW, WATCH OUT FOR ALL THOSE FLORIDA LAWYERS. WE DON'T THINK FLORIDA LAWYERS ARE TRUSTWORTHY, AND AS A RESULT OF THAT, SOMEBODY IN FLORIDA COULD FIRE THEIR LAWYER, AND NOW WE HAVE A FLORIDA LAWYER FILING A LAWSUIT AGAINST A MICHIGAN LAWYER FOR SOMETHING IN THE PAST THAT WOULD NOT BE RECOGNIZED, SO HOW ABOUT FACTUALLY, WHERE IS THE RELATIONSHIP THAT GAVE RISE TO A DUTY AND THEN THE BREACH OF THIS DUTY, IN SENDING THE INFORMATION TO THE REGULATORY AGENCY IN FLORIDA. DO YOU UNDERSTAND WHAT I AM ASKING YOU TO TRACE MORE SPECIFICALLY?

YES, SIR, AND TO ANSWER THE EARLIER QUESTION, MR. WENDT WAS AN INDEPENDENT AGENT OF K.D. TRIHN. K.D. TRIHN ENGAGED MR. HOROWITZ, TO RESPOND TO AN INQUIRY BY THE FLORIDA DEPARTMENT OF BANKING AND SECURITIES. WE MAY NOT OBTAIN THAT MR. HOROWITZ IMPROPERLY RESPONDED TO THAT INQUIRY AND, AS A RESULT OF HIS IMPROPER INQUIRY, IT SUBJECTED MR. WENDT TO LITIGATION WITH THIRD PARTIES, UNDER FLORIDA'S WRONGFUL ACT DOCTRINE. THAT SIMPLY STANDS FOR THE PROPOSITION THAT, IF A PERSON DOESN'T ACT, WHICH SUBJECTS A SECOND PERSON TO HAVE TO LITIGATE WITH A THIRD PERSON, THEN, IN THAT CASE, THE FIRST PERSON IS RESPONSIBLE FOR THE EXPENSES INCURRED IN THE SUBSEQUENT LITIGATION, AND THAT IS PRECISELY WHAT HAPPENED HERE. HAD MR. HOROWITZ PROPERLY FULFILLED HIS DUTY AND PROPERLY REPLIED TO THE STATE OF FLORIDA INQUIRY, IN ALL LIKELIHOOD, THERE WOULD NOT HAVE BEEN THE SUBSEQUENT LITIGATION WHICH SUBJECTED MR. WENDT TO THE TREMENDOUS EXPENSES AND COST OF HAVING TO SETTLE CLAIMS WITH THE SECURITIES PEOPLE, AND, NOW, WITH REGARD TO THE QUESTION AS TO WHETHER OR NOT THERE

WAS PRIVITY, WHETHER OR NOT IT GIVES RISE TO A CLAIM FOR MALPRACTICE, WE MAY NOT OBTAIN THAT MR. WENDT WAS AN AGENT OF K.D. TRIHN, AND AS THAT, HE HAD A RIGHT TO RELY ON THE INFORMATION THAT WAS BEING PROVIDED BY THE CORPORATE ATTORNEY TO THE OTHER AGENTS AND WAS IN THAT, AND WHEN THE CORPORATE ATTORNEY IMPROPERLY OPINED THAT THESE WERE NOT SECURITIES AND DID NOT HAVE TO BE REGISTERED, MR. WENDT HAD A RIGHT TO RELY ON THAT, AND AS A RESULT, HE SUSTAINED THE DAMAGE. THAT WAS THE DUTY. THAT WAS THE BREACH, AND THAT WAS THE DAMAGE ON BOTH TORTS.

SO IN ALL INSTANCES, AN ATTORNEY, A CORPORATE ATTORNEY FOR ANY BUSINESSES OR CORPORATIONS THAT, PERHAPS, ARE OUT-OF-STATE, BUT IF THOSE CORPORATIONS DO BUSINESS IN THE STATE OF FLORIDA, AND THE ATTORNEY ENDS UP ADVISING THE COMPANY ABOUT THEIR OPERATIONS IN FLORIDA, THAT WILL, ALSO, GIVE RISE TO LIABILITY OF THE ATTORNEY?

YES, SIR.

UNDER THIS JURISDICTIONAL SCHEME?

I THINK IT WOULD, BECAUSE IF HE STARTS OPINING AS TO FLORIDA LAW, HE HAS EVERY RIGHT TO FOLLOW, AS THE COURT TO SAY, TO REASONABLY EXPECT THAT HE IS GOING TO BE HAILED INTO COURTS, TO ANSWER TO ACTIVITIES ARISING OUT OF ACTIVITY ON HIS ADVISE IN -- ADVICE IN FLORIDA CASES.

ASSUMING THERE WAS JURISDICTION WITHIN THE CONSTITUTIONAL PARAMETERS, TO ALLOW HIM TO BE SUED IN FLORIDA, BUT GOING BACK TO JUSTICE WELLS'S QUESTION, AS FAR AS WHETHER AREN'T WE HERE, DEALING WITH WHAT DOES COMMISSION OF A TORTIOUS ACT MEAN, NOT WHAT WE THINK THAT A POLICY IS OR WHETHER FLORIDA SHOULD SUBJECT A FOREIGN CITIZEN INTO JURISDICTION HERE. I SEE YOU ARE INTO YOUR REBUTTAL, BUT ARE YOU ASKING US TO BROADLY CONSTRUE THE LONG-ARM STATUTE AND SAY THAT ANY TIME THE INJURY, THE FINAL ACT OCCURS IN FLORIDA, THAT THE INJURY, ITSELF, IS THE COMMISSION OF THE TORTIOUS ACT, OR ARE YOU SAYING THAT THERE HAS TO BE SOME INDEPENDENT TORTIOUS ACTS THAT OCCUR IN FLORIDA, SUCH AS THE SENDING OF LETTERS OR PHONE CALLS, BEFORE THAT SUBSECTION IS -- COMES INTO PLAY?

A LITTLE OF BOTH. FIRST OF ALL, IT IS VERY DIFFICULT TO DRAW THAT LINE BETWEEN THE TWO PRONGS. I MEAN, IT IS VERY DIFFICULT TO TAKE THE FIRST PRONG, WITHOUT NECESSARILY FALLING OVER TO THE SECOND, OR YOU WON'T BE ABLE TO GET ANY CAUSAL RELATIONSHIP BETWEEN THE TWO. FOR THESE PURPOSES, I CAN UNDERSTAND WHAT JUSTICE ANSTEAD IS TALKING ABOUT, BUT HERE, I THINK, WHAT WE HAVE ARE, TO ANSWER YOUR QUESTION, TWOFOLD. FIRST OF ALL, THERE WAS AN INJURY THAT OCCURRED IN FLORIDA, AND THAT WAS TO THE MANY INVESTORS THAT SUSTAINED DAMAGE BECAUSE OF THE VIOLATION OF THE FLORIDA ACT. A CODE PROVISION. AND SECONDLY, THERE WAS AN ACTUAL DELIVERY OF A DOCUMENT, IN FLORIDA, THAT WE ALLEGE WAS IMPROPER, AND THAT IS THE INFORMATION TO THE BANKING SECURITIES, WHICH WE WOULD EQUATE MUCH LIKE THE LETTER THAT WAS WRITTEN IN SILVER OR THE OTHER LETTER THAT WAS WRITTEN, I BELIEVE, UNDER THE OTHER DEFAMATORY CASES, WHERE LETTERS HAVE BEEN SENT TO FLORIDA, AND THE ACTUAL ACT WAS CONSIDERED TO BE THE DELIVERY.

HAD THERE ONLY BEEN THE INJURY IN FLORIDA, WOULD YOU BE TAKING THE SAME POSITION?

WELL, PERHAPS -- PROBABLY, TO BE TOTALLY FRANK, BUT I THINK IT IS COUPLED WITH THE OVERT ACT AND THE IMPROPER DELIVERY OF THE DOCUMENT TO THE STATE MAKES IT STRONGER. BECAUSE THEN YOU FIND YOURSELF OVER AS TO THE CONFLICT THAT MIGHT BE THERE AND TO WHICH THEY, CERTAINLY, ALLUDED TO, BETWEEN SUBSECTIONS B AND F, BUT I THINK WHERE WE ARE, HERE, IS WE HAVE TWO. WE HAVE AN INJURY, AND WE HAVE AN OVERT

ACT WHICH OCCURRED HERE, IN FLORIDA. THAT WAS A TORTIOUS ACT.

YOU ARE IN YOUR REBUTTAL.

THANK YOU, SIR.

MR. GOLDEN.

THANK YOU. MAY IT PLEASE THE COURT. MY NAME IS DALE GOLDEN, AND I REPRESENT MARVIN HOROWITZ AND HIS FIRM, WHICH ARE THE RESPONDENT IN THIS ACTION. THE FIRST THING I WANT TO DO IS RESPOND TO JUSTICE LEWIS'S QUESTION, REGARDING WHETHER OR NOT WE HAVE MADE A CHALLENGE TO WHETHER OR NOT MR. WENLT CAN ACTUALLY STATE A CAUSE OF ACTION AGAINST MR. HOROWITZ. INITIALLY, WHEN THE CASE WAS NOT DISMISSED AT THE TRIAL COURT, AT THE SECOND TIME, AND WHILE THE APPEAL WAS PENDING IN FRONT OF THE FIFTH DCA, WE DID FILE A MOTION TO DISMISS AND ARGUED, BASICALLY, THAT MR. WEBLT HAD NO PRIVITY WITH -- MR. WENDT HAD NO PRIVITY WITH MR. HOROWITZ AND THEREFORE COULD NOT SUE HIM, AS IN THE BARBER-ES PIN OWES A CASE, WHICH -- BARBER-ESPINOZA CASE, SO WE DID THAT THAT ARGUMENT. UNFORTUNATELY IT WASN'T WELL RECEIVED BY THE TRIAL COURT. WE ENDED UP FILING AN ANSWER AND WE STOOD ON THE AFFIRMATIVE DEFENSE.

BUT THE CASE, AS IT FLOWED, IS THE JURISDICTIONAL ISSUE, FIRST, ANYWAY, SO WE HAVE TO ASSUME THE TORT. I ASSUME THAT IS THE POSTURE THAT WE MUST TAKE, IS TO ASSUME THAT THERE IS A VALID TORT FOR JURISDICTIONAL PURPOSES.

WE HAVE JURISDICTIONAL ARGUMENT, BUT WE HAVE TO MAKE THE JURISDICTIONAL ARGUMENT, FIRST, WITHOUT CONCEDING ANYTHING ON THE MERITS OF THE CASE, BUT, FIRST, I DON'T KNOW. I DON'T REALLY KNOW THAT THE COURT HAS TO AGREE THAT SOME SORT OF CAUSE OF ACTION HAS TO EXIST, IN ORDER TO ADDRESS THIS ARGUMENT. I THINK THAT IS ONE OF THE ISSUES IN THIS CASE AND WHY JURISDICTION IS NOT APPROPRIATE, UNDER THE LONG ARM STATUTE, BECAUSE THE CASE LAW DOESN'T SUPPORT IT, AS THE CASE LAW EXISTS. THE CASE LAW TALKS ABOUT IT, AS CITED BY THE PETITIONER IN THEIR VARIOUS BRIEFS. WHEN YOU ARE DEALING WITH NONRESIDENT ATTORNEYS, THERE ARE SIMPLY TWO GROUPS OF CASES WHERE THE ATTORNEY ENDS, EITHER ONE OR BOTH. THE FIRST IS A CASE LIKE LEVINSON, WHERE AN ATTORNEY OUT-OF-STATE SENDS AN INFLAMMATORY LETTER. THE COURTS GENERALLY HELD THAT THE TORTS ARE SUBJECT TO JURISDICTIONAL ACTION.

THIS DOESN'T BASE JURISDICTION ON WHETHER IT IS NEGLIGENCE OR INTENTIONAL TORT, EITHER WAY.

IT DOESN'T, BUT THIS COURT, LAST YEAR, SAID THAT IT DID FIND JURISDICTION, BASED ON A CONSPIRACY CLAIM AND A VIOLATION OF FLORIDA LAW, WHICH IS A LITTLE BIT DIFFERENT SITUATION. NOW, IN DOUGH VERSUS THOMPSON, ANOTHER CASE THAT WAS -- NOW, IN DOE VERSUS THOMPSON, ANOTHER CASE DECIDED BACK IN 1993 BY THIS COURT, IT ADDRESSED WHETHER AN OFFICER COULD BE HAULED INTO COURT AND THE COURT SPECIFICALLY SAID NO. IT SPECIFICALLY STATED THAT A CORPORATE OFFICER WHO COMMITS INTENTIONAL TORTS MAY, NONETHELESS, BE SUBJECT TO JURISDICTIONAL INTENTION IN THE STATE OF FLORIDA, SO THE COURT DID DRAW DISTINCTION BETWEEN THE NEGLIGENT TORT --

THAT IS A DIFFERENT SHIELD. IT IS RELATED BUT A DIFFERENT DOCTRINE, BECAUSE HELP ME IF YOU WILL. WOULD YOU AGREE THAT THE LEVINSON CASE, REALLY, THE ONLY DISTINGUISHING FACTOR, IF WE ASSUME AN UNDERLYING TORT, IS THAT THERE WAS AN INTENTIONAL TORT IN THE LEVINSON CASE, AND HERE IT IS BASED UPON NEGLIGENCE, BECAUSE BOTH WERE PREDICATED UPON THE DELIVERY OF A WRITING INTO THE STATE OF FLORIDA.

I THINK THAT THERE IS A BIT OF A DIFFERENT THERE, IN THAT THE PLAINTIFF WHO WAS SUING

THE ATTORNEY IN THAT CASE WAS THE DEFAMED PERSON IN THIS CASE. IN THIS CASE, THERE WASN'T ANY CONTACT BETWEEN MY CLIENT AND MR. WENDT.

ASSUMING THAT THERE IS AN UNDERLYING TORT. I UNDERSTAND YOUR ARGUMENT THOROUGHLY. ASSUMING IT IS AN UNDERLYING TORT, IT IS, REALLY, THE LEVINSON CASE ALL OVER AGAIN.

TO A CERTAIN EXTENT THAT IT IS, IN THAT IT IS BASED ON THE SENDING OF A DOCUMENT INTO FLORIDA. SO ON THAT LEVEL, IT IS. I THINK THERE IS A DISTINCTION TO BE MADE, WITHOUT GETTING BEYOND THE STATUTORY ARGUNIFORM AND -- ARGUMENT AND INTO THE SECOND PRONG OF THE TEST. THERE IS A DISTINCTION TO BE MADE ABOUT ONE WHO INTENTIONALLY SENDS SOMETHING INTO FLORIDA WITH AN INTENT TO J INJURY. AN INTENTIONAL TORT IS, CERTAINLY, SEPARATE FROM A NEGLIGENT TORT.

DO YOU SEE A DIFFERENCE BETWEEN A SITUATION WHERE, IF MR. HOROWITZ HAD SIMPLY DRAFTED THE LOAN DOCUMENTS IN MICHIGAN FOR USE IN FLORIDA, AND HE KNEW THAT THEY WERE GOING TO BE USED IN FLORIDA, BUT HIS SOLE RESPONSIBILITY WAS TO DRAFT THESE DOCUMENTS FOR HIS CORPORATION VERSUS HIS CLIENT CALLING HIM AND SAYING NOW YOU HAVE DRAFTED THESE DOCUMENTS. NOW THERE IS SOME QUESTIONS GOING ON IN FLORIDA, AS TO WHETHER WE ARE VIOLATING FLORIDA'S SECURITIES LAWS. I NEED YOUR HELP IN ESSENTIALLY RESPONDING, IN PRACTICING LAW IN FLORIDA, TO RESPOND TO THIS, AND SO THAT ATTORNEY EITHER SAYS, NO, THAT IS FLORIDA LAW IS NOT MY AREA. I AM GOING TO GIVE IT TO -- YOU BETTER GET A FLORIDA ATTORNEY, OR, YES, I WILL RESPOND. I WILL COME TO THE STATE, AND I WILL RESPOND, OR I WILL RESPOND THROUGH WRITING. IS THERE A DIFFERENCE BETWEEN THE SCENARIO OF, HERE, MR. HOROWITZ SIMPLY DRAFTING DOCUMENTS IN MICHIGAN, VERSUS INVOLVING HIMSELF IN AN INVESTIGATION ABOUT THE VARIOUS SECURITIES? DO YOU SEE THAT, IN TERMS OF WHETHER A TORTIOUS ACT IS COMMITTED IN FLORIDA?

I THINK CERTAINLY THERE CAN BE A DISTINCTION DRAWN BETWEEN MR. HOROWITZ SIMPLY DRAFTING DOCUMENTS, SENDING THEM TO HIS CANADIAN CLIENTS AND HIS CANADIAN CLIENTS, THEN, BRINGING THEM INTO THE STATE OF FLORIDA, AS OPPOSED TO MR. HOROWITZ DRAFTING A LETTER AND SENDING IT TO FLORIDA OR MR. HOROWITZ MAKING A TELEPHONE CALL INTO THE STATE OF FLORIDA. CLEARLY HE IS HAVING A MORE DIRECT INVOLVEMENT IN THE STATE OF FLORIDA.

HE WAS REPRESENTING IT THIS CORPORATION IN FLORIDA, FOR THE PURPOSE OF THIS SECURITIES INQUIRY, WASN'T HE?

RIGHT. I BELIEVE THAT THAT IS A VERY IMPORTANT ELEMENT OF THIS CASE, IN THAT HE WAS, AT ALL TIMES, REPRESENTING HIS CANADIAN CLIENTS AND NOT REPRESENTING MR. WENDT, AND HIS ACTIONS IN FLORIDA WERE SOLELY ON BEHALF OF HIS CLIENTS.

NOW WE GET INTO EITHER THE CORPORATE SHIELD QUESTION OR THE QUESTION OF WHETHER THERE IS A CAUSE OF ACTION. MR. WENDT HAS -- LET'S STICK TO, AGAIN, ASSUMING THERE IS A CAUSE OF ACTION, AND SETTING ASIDE THE CORPORATE SHIELD QUESTION, SIMPLY THE ISSUE AS TO WHETHER THOSE -- WOULD YOU CONSIDER THOSE TO BE TORTIOUS ACTS WITHIN FLORIDA, OR IS IT YOUR POSITION THAT, IN ORDER FOR SUBSECTION D TO TAKE EFFECT, MR. HOROWITZ WOULD HAVE HAD TO BE PHYSICALLY PRESENT IN THE STATE? IN OTHER WORDS HE WOULD HAVE HAD TO COME DOWN AND MEET WITH THE BROKERS. HE WOULD HAVE -- IS THAT HOW YOU CONSTRUE THE LONG-ARM STATUTE?

I THINK THE PROBLEM INHERENT IN THAT ARGUMENT, IF I AM TO MAKE THAT ARGUMENT, THAT MR. HOROWITZ HAD TO BE PHYSICALLY PRESENT IN THE STATE OF FLORIDA. I BELIEVE THAT THAT, AS A SINGLE ISSUE, HAS BEEN DECIDED BY THIS COURT IN THE EXECU-TECH CASE. IT IS NOT AVAILABLE FOR JURISDICTION, UNDER B, SO FOR ME TO STAND HERE BEFORE YOU AND SAY,

LOOK, I DON'T THINK MR. HOROWITZ SHOULD BE SUBJECT TO PERSONAL JURISDICTION BECAUSE HE DIDN'T EVEN STEP FOOT IN FLORIDA, I CERTAINLY THINK THAT IS CONTRARY TO WHAT THE COURT'S RULING WAS IN EXECU-TECH, AND THE MORE IMPORTANT ISSUE TO LOOK AT IS WHETHER OR NOT SOMEONE CAN BE SUBJECT TO JURISDICTION IN FLORIDA FOR ACTIONS TAKEN SOLELY ON BEHALF OF A CLIENT.

BUT THAT IS NOT THE BASIS OF ANY CONFLICT, BECAUSE THAT WOULD BE JUST A QUESTION OF THE APPLICATION OF DOE V THOMPSON.

TO A CERTAIN EXTENT, RIGHT, BUT I THINK, UNDER THE CIRCUMSTANCES AND THE FACTS OF THIS CASE, I THINK THAT A DISTINCTION CAN BE DRAWN FROM EXISTING CAUSE LAW THAT TALKS ABOUT INTENTIONAL TORTS VERSUS NEGLIGENT TORTS. I THINK THAT DOES GO BACK, AGAIN, TO WHETHER OR NOT A CONFLICT EXISTS AND WHAT THE BASIS OF THAT CONFLICT IS IN THE DISTRICT COURTS, AND AS POINTED OUT IN THE VARIOUS BRIEFS, SOME OF THE DISTRICT COURTS HAVE COMMITTED A DISTINCTION BETWEEN THE NEGLIGENT TORTS AND INTENTIONAL TORTS, WHILE THE OTHER FIFTH DCA HAS SPECIFICALLY HELD THAT, REGARDLESS OF WHETHER IT IS A NEGLIGENT TORT OR INTENTIONAL TORT, YOU HAVE TO BE PHYSICALLY PRESENT IN FLORIDA, AND I THINK THAT THAT ISSUE, TO A CERTAIN EXTENT, HAS BEEN DETERMINED BY THE COURT. SPECIFICALLY WHAT I AM SAYING IS THAT, UNDER EXECU-TECH, THE COURT HAS RULED THAT, IF YOU COMMIT AN INTENTIONAL ACT OUTSIDE OF FLORIDA THAT CAUSES DAMAGES INSIDE OF FLORIDA, YOU CAN BE SUBJECT TO JURISDICTION. WHAT I AM SAYING IS THAT THE COURT SHOULD NOT EXTENT THAT TO NEGLIGENT ACTS TAKEN BY AN OUT-OF-STATE ATTORNEY SOLELY ON BEHALF OF HIS CLIENT.

WHY NOT? LET'S TAKE A DIFFERENT HYPOTHETICAL THAT IS A LITTLE CLEARER, PERHAPS, IN TERMS OF THE LIABILITY OF THE ATTORNEY BUT ASK YOU TO DISTINGUISH THAT HERE. LET'S PROPOSE THAT THE COMPANY, WITH THE LAWYER, IS TRYING TO INDUCE AN INVESTOR IN THE STATE OF FLORIDA, AND HAS TOLD THE INVESTOR, IN FLORIDA, THAT THIS INVESTMENT SCHEME IS PERFECTLY LEGAL, UNDER THE LAWS OF THE STATE OF FLORIDA, AND WANTS HIM TO INVEST AND SAYS, YOU KNOW, WE HAVE GIVEN THIS TO OUR LAWYERS SEVERAL TIMES, AND OUR LAWYER HAS ASSURED US THAT THIS SITUATION IS COMPLETELY LEGAL AND ABOVE BOARD IN THE STATE OF FLORIDA, AND AS A MATTER OF FACT, WE WANT YOU TO CALL OUR LAWYER AND ARRANGES FOR A TELEPHONE CONFERENCE, AND THEY DO CALL THE LAWYER, AND THE LAWYER SAYS, YES, THAT'S RIGHT. I RENDERED AN ADVISORY OPINION TO MY CLIENT, AND I LOOKED UP THE REGULATIONS IN FLORIDA, AND I -- THAT IS EXACTLY WHAT I SAID, THE INVESTOR GOES AHEAD AND MAKES THE INVESTMENT THAT TURNS OUT NOT TO HAVE BEEN VALID, AND SO THE INVESTOR, NOW, SUES THE LAWYER, TOO, AS WELL AS THE -- NOW, DISTINGUISH THAT FROM WHAT WE HAVE HERE.

WELL, I THINK THAT ACTUALLY IS SOMEWHAT SIMILAR TO WHAT WE HAVE HERE. AND THE CONCERNS I HAVE WITH GIVING FLORIDA JURISDICTION TO A NONRESIDENT ATTORNEY IS THAT, TO ME THE PROPER CAUSE OF ACTION FOR THE FLORIDA RESIDENT WOULD BE AGAINST THE PRINCIPLE PAL AND NOT THE AGENT. THE ACTION WOULD BE AGAINST THE PRINCIPAL. IF THE PRINCIPAL, THEY BE, THOUGHT THAT THEY HAD GOTTEN INCORRECT LEGAL ADVICE OR HAD BEEN THE VICTIM OF AN ACT OF NEGLIGENCE BY THEIR ATTORNEY, THEY COULD CERTAINLY RING BRING A INDEMNITY CLAIM AGAINST THEIR ATTORNEY, BUT WHAT WE ARE TALKING ABOUT IS ESSENTIALLY A FLORIDA RESIDENT CAN BRING A DIRECT ACTION OVER A NONRESIDENT AGENT, AS OPPOSED TO SIMPLY SUING THE PRINCIPLE, AND LETTING THE PRINCIPLE BRING ITS OWN INDEMNITY CLAIM AGAINST THE AGENT.

THAT IS NOT A JURISDICTIONAL ISSUE. WE HAVE JURISDICTION. IF THAT IS THE DOCTRINE, THEN WE SHOULD APPLY THE LAW IN THIS CASE. WOULD YOU AGREE WITH ME? IT SEEMS THAT WHAT YOU ARE SAYING IS THE CORPORATION HAS DONE SOMETHING IN THE STATE, AND THAT IS THE JURISDICTIONAL ISSUE, WHICH WE ARE TALKING ABOUT TODAY, BUT THEN WE HAVE GOT A

SEPARATE QUESTION, AS TO THE PERSONAL RESPONSIBILITY OF AGENT, WHO WAS NOT LOCATED -- THAT IS NOT A JURISDICTIONAL ISSUE, THEN, WOULD YOU AGREE WITH THAT?

WE ARE TALKING ABOUT INTERTWINEING AND A CAUSE OF ACTION AND TRYING TO KEEP THEM SEPARATE. THAT IS WHY I GAVE YOU A DIFFERENT EXAMPLE THERE. IF WE ASSUME, AS WE MUST, THAT THEIR PLEADINGS ARE CORRECT AND THAT THERE IS A CAUSE OF ACTION, THEN WHY WOULDN'T THERE BE JURISDICTION, UNDER THE SCENARIO THAT I GAVE YOU, AND AS YOU SAID, YOU FEEL THAT IT IS ANALOGOUS TO THE SITUATION THAT YOU HAVE HERE.

AND THE REASON, AGAIN, THAT I DON'T BELIEVE THERE IS JURISDICTION, IT GOES BACK INTO THE AGENCY ARGUMENT, IS BECAUSE I DON'T THINK THAT AN AGENT WHO ACTS SOLELY ON IN A FORUM ON BEHALF OF HIS CLIENT, IS CERTAINLY JURISDICTION.

BUT IF THEY DID ALL OF THE THINGS THAT THE PRINCIPLE DID, THAT THEY WOULD BE SUBJECT TO JURISDICTION HERE, WOULDN'T YOU AGREE? YOU HAVE SAID THAT THE PRINCIPLE IS OPERATING IN THE STATE, BECAUSE THEY ARE TRYING TO INDUCE THE INVESTOR AND GOING THROUGH THAT, AND THE AGENT, NOW, KNOWS ALL OF THAT AND, REALLY, IS HAVING ALL OF THE SAME ACTS, VIRTUALLY FOR THE SAME PURPOSE. IT IS JUST A PARTY OF WHETHER OR NOT, AS YOU SAID, THE AGENT IS GOING TO BE -- WHETHER THERE IS GOING TO BE A CAUSE OF ACTION AGAINST THE AGENT, UNDER THAT.

WELL, THE REASON THAT I DRAW A DISTINCTION, IN THIS ENTIRE SITUATION, IS BECAUSE WHAT WE ARE TALKING ABOUT IS PERSONAL JURISDICTION. THE PRINCIPLE DERIVED A DIRECT PECUNIARY BENEFIT FROM THE FLORIDA INVESTOR. THE FLORIDA INVESTOR GIVES HIM MONEY. MY CLIENT DOESN'T HAVE A STAKE IN THAT TRANSPORTATION. -- IN THAT TRANSACTION. MY CLIENT DOESN'T HAVE A STAKE IN THAT TRANSACTION.

THE LAW IS A LITTLE MURKY OUT THERE ABOUT PROFESSIONAL LIABILITY, IN TERMS OF WHEN THE PROFESSIONAL KNOWS THAT A THIRD PARTY IS GOING TO RELY ON THE PROFESSIONAL ADVICE, RIGHT HAD, AND SO OBVIOUSLY LINES ARE -- RIGHT, AND SO OBVIOUSLY LINES ARE STILL BEING DRAWN OUT THERE AS TO LIABILITY.

RIGHT.

AND THIS GETS TO THE CONNECTION BETWEEN THE CAUSE OF ACTION AND WHETHER THERE IS JURISDICTION.

I UNDERSTAND WHAT YOU ARE SAYING, JUSTICE ANSTEAD, AND IT KIND OF GETS TO THE WHOLE MAX MITCHELL CASE THAT TALKS ABOUT LIABILITY AND ACCOUNTS AND ENGINEERS AND THINGS LIKE THAT, BUT BEFORE THIS COURT DECIDED SUBSEQUENT LEGAL MALPRACTICE CASES AND PRIVITY AND THE COURT STUCK TO THE PRIVITY REQUIREMENT, WITH THE LIMITED EXCEPTION OF THE THIRD PARTY BENEFICIARY, SO I THINK VERY CLEARLY THAT THIS COURT HAD AN OPPORTUNITY TO EXTEND ATTORNEY MALPRACTICE AND CAUSES OF ACTION FOR FORESEEABLE PLAINTIFFS, AS I GUESS YOU CAN CALL THEM, AND CHOSE NOT TO DO THAT, SO, AGAIN, I THINK IT DOES COME BACK TO WHETHER A NONRESIDENT ATTORNEY, ACTING SOLELY ON BEHALF OF HIS AGENT, AND THERE IS NO DISPUTE ABOUT THE TACT THAT -- ABOUT THE FACT THAT HE WAS ACTING SOLELY ON BEHALF OF HIS CLIENT, AND DOESN'T HAVE ANY PERSONAL JURISDICTION OVER HIM, WHEN HE DOESN'T HAVE ANY DIRECT, PECUNIARY INTEREST IN THE TRANSACTIONS AT ISSUE.

YOU ARE SAYING THIS WOULD BE BROAD, TOO. WE HAVE GOT PROFESSIONALS ALL OVER THE COUNTRY, NOW, THAT ARE ADVISING OUT-OF-STATE CORPORATIONS.

THAT GETS BACK TO WHAT WAS INDICATED EARLIER, IN THAT I THINK YOU WOULD HAVE A SITUATION THAT, ANY TIME A CORPORATE LAWYER, WHETHER HE IS AN INDEPENDENT

CONTRACTOR OR IN-HOUSE COUNSEL, WELL, MAYBE THERE WOULD BE A DISTINCTION. I DON'T KNOW THAT IT IS A DISTINCTION, WITHOUT ANY REAL SIGNIFICANCE, BUT ANY TIME A CORPORATE ATTORNEY WITH A NONRESIDENT CLIENT, HAS CORPORATE AGENTS IN FLORIDA THAT ARE -- THEY ARE REACTING ON ANYTHING THAT IS DONE, IT WOULD SEEM THAT HE WOULD BE RESPONSIBLE FOR ANY PERSONAL ACTION ON BEHALF OF HIS CLIENT.

WHAT IF MR. WENLT SENT A LETTER STATING THAT THIS IS AN AUTHORIZED TRANSACTION. IT IS EXEMPT UNDER THE FLORIDA SECURITIES LAW. EVERYTHING ELSE WOULD HAVE STAYED THE SAME. HE IS STILL PAID BY THE CORPORATION. WOULD THAT CHANGE THE CIRCUMSTANCES ON JURISDICTION THEN?

IN MY OPINION IT WOULD NOT.

IT WOULD NOT.

BECAUSE I SIMPLY BELIEVE THAT, AS LONG AS MR. HOROWITZ IS ACTING ON BEHALF OF HIS CLIENT, I THINK HE CAN'T BE SUBJECT TO JURISDICTIONAL ACTS TAKEN ON BEHALF OF HIS CLIENT. THERE IS TALK ABOUT HOW, IF YOU COMMIT AN INTENTIONAL TORT, THEN YOU CAN BE SUBJECT TO JURISDICTION, REGARDLESS OF WHETHER YOU ARE AN AGENT OR ON YOUR OWN.

YOU ARE TALKING ABOUT JURY DICTION UNDER 1-B, FOR THE TORTIOUS ACT, BECAUSE ONCE YOU GET INTO THE SITUATION WHERE THE ATTORNEY IS ACTUALLY DOING A SERIES OF TRANSACTIONS IN FLORIDA, THEN YOU ARE POSSIBLY UNDER SUBSECTION A. CORRECT?

CORRECT.

AND, UNDER THAT SUBSECTION, YOU ARE NOT SAYING THERE IS ANY CORPORATE SHIELD.

NO. CLEARLY --

SO WHAT WE ARE, REALLY, DOING, WITH THIS CORPORATE SHIELD, IS ARE YOU INTERPRETING THE "PERSONALLY" ASPECT OF THE LONG-ARM STATUTE FOR SUBSECTION B, SAYING THAT THEY HAVE GOT TO PERSONALLY COMMIT A TORTIOUS ACT IN FLORIDA? IS THAT WHAT YOU ARE --

I THINK THAT IS WHAT WE ARE SAYING, AND, AGAIN, IF YOU GO BACK AND REVIEW THIS COURT'S OPINION IN DOE, IT TALKS ABOUT A PERSON WHO IS BEING SUBJECT TO PERSONAL JURISDICTION CANNOT BE SUBJECT TO PERSONAL JURISDICTIONS AS FLORIDA ACTIONS TAKEN --

WHAT DID THE EMPLOYEE IN DOE DO IN FLORIDA? IS IT -- IT DOESN'T SEEM TO BE VERY CLEAR IN THE OPINION, WHETHER THERE WERE ACTUALLY TORTIOUS ACTS WITHIN FLORIDA OR WHETHER HE WAS ACTING WHEREVER HE WAS, LOUISIANA AND TEXAS, AND IT HAD AN AFFECT IN FLORIDA, SO HERE IT DIDN'T REALLY DEAL WITH THE QUESTION OF SOMEBODY PERSONALLY COMMITTING TORTIOUS ACTS, BY SENDING LETTERS, RESPONDING TO COMMUNICATION, ACTUALLY DEALING WITH FLORIDA. DO YOU AGREE WITH THAT?

I AGREE. THERE WASN'T AN ALLEGATION. THE ONLY ALLEGATION, AS I RECALL IN THAT CASE, WAS THAT THE PRESIDENT WAS NEGLIGENT IN NAILING TO HAVE PROPER ON -- IN FAILING TO HAVE PROPER SECURITY MEASURES IN THE STORE.

BUT THOSE WEREN'T IN FLORIDA.

RIGHT. THERE IS A CASE, THE FIRST DCA CASE IN 1997, THAT DEALS WITH MORE OF THIS ISSUE USE, AND THAT IS THE CASE THAT -- WITH THIS ISSUE, AND THAT IS THE CASE THAT INVOLVES A TENNESSEE DOCTOR THAT DID AN X RAY OR SOME SORT OF DIAGNOSTIC TEST ON A PATIENT AND FAILED TO DIAGNOSE CANCER, AND THE FIRST DCA SAID HE IS A TENNESSEE DOCTOR AND HE IS

AN EMPLOYEE AND ACTING AS AN EMPLOYEE OF A CORPORATION.

THAT IS WHEN IT WAS ACTED UPON AND THE JUDGE SAID HE WOULD EXTENT DOE V THOMPSON TO THAT SITUATION.

I THINK HE CON OCCURRED WITH THE END -- I THINK HE CONCURRED WITH THE END RESULT BUT HE DIDN'T AGREE WITH THE RESULT ON THE INSIDE.

WOULD YOU RESPOND SPECIFICALLY TO MR. AUSTIN'S CONTENTION THAT THERE WAS AN ACT, HERE, THAT OCCURRED IN FLORIDA?

RIGHT. THAT KIND OF GOES BACK, AGAIN, TO A SITUATION WHERE MR. HOROWITZ DIDN'T SAY, HEY, I THINK I WILL DRAW UP A LETTER AND I WILL PICK UP THE PHONE AND CONTACT MR. WENDT. THIS IS A SITUATION WHERE THE STATE OF FLORIDA CONTACTED ONE OF THE FLORIDA AGENTS OF K.D. TRIHN. THAT AGENT, THEN, CONTACTED K.D. TRIHN. K.D. TRIHN, THEN, CONTACTED MR. HOROWITZ AND SAID YOU NEED TO CALL HIM. YOU NEED TO CALL THE STATE OF FLORIDA, AND HE REACTED IN THAT MANNER. THIS IS NOT A SITUATION WHERE HE PICKED UP THE PHONE AND JUMPED OUT OF THE CHAIR AND DECIDED TO START WRITING LETTERS. ALL OF THESE ACTIONS IN THIS PARTICULAR CASE WERE ACTIONS THAT HE TOOK, WITH REGARD TO HIS PARTICULAR CLIENT.

THAT WILL ALWAYS BE THE CASE, UNLESS THE ATTORNEY IS ACTING ON HIS OWN BEHALF. THAT WILL ALWAYS BE THE CASE.

THE COURTS LIMITS PERSONAL JURISDICTION TO OUT-OF-STATE ATTORNEYS TO ATTORNEYS THAT REPRESENTED FLORIDA CLIENTS, AS OPPOSED TO ATTORNEYS WHO REPRESENTED CANADIAN CLIENTS AND MADE A PHONE CALL TO A FLORIDA AGENT OF THE CLIENT. I MEAN, THE CASE LAW IS VERY CONSISTENT ON THAT POINT. LIKE I SAID EARLIER, IT IS TWO CATEGORIES. IF YOU COMMIT AN INTENTIONAL TORT, WE ARE GOING TO SAY THAT YOU ARE SUBJECT TO JURISDICTION. IF YOU ARE PERFORMING ACTS SOLELY ON BEHALF OF YOUR CLIENTS, THEN WE ARE NOT GOING TO. THERE IS THE EDISON BROTHERS CASE, WHICH IS THE CASE THAT AN OUT-OF-STATE ATTORNEY REPRESENTED HIS CLIENT, WITH REGARD TO A FLORIDA MATTER, AN OUT-OF-STATE, NOT AN ACTION IN FLORIDA, AND IN THAT CASE, THE DEFENDANT ATTEMPTED TO SUE THE OUT-OF-STATE LAWYER, AND THE COURT SAID NO, BECAUSE HE WAS ACTING SOLELY ON BEHALF OF THE CORPORATION.

I BELIEVE YOUR TIME HAS EXPIRED. THANK YOU VERY MUCH. MR. AUSTIN. REBUTTAL.

IN THE FEW MOMENTS THAT I HAVE LEFT, I WANTED TO ADDRESS THAT LAST LITTLE ASPECT. WHAT WE HAVE TO RECALL, HERE, IS THAT MR. JOE HER MAN, A FLORIDA RESIDENT, RECEIVED A COMPLAINT, AN INQUIRY. HE SIMPLY SENT THE DOCUMENTS UP TO K.D. TRIHN, WHO, AS MR. GOLDEN SAID, ASKED HOROWITZ TO HANDLE IT. HOROWITZ, THEN, SENT THE LETTER, ON BEHALF OF MR. HER MAN. HE WAS THE RESPONDENT IN THAT CASE. WHILE K.D. TRIHN MAY HAVE HAD SOME ANSWER LATER OR PERIPHERAL INVOLVEMENT IN IT, THE ACTUAL RESPONDENT TO THE INQUIRY WAS A FLORIDA RESIDENT, AND WHEN HE DID THAT, HE MADE, IN ESSENCE, AN APPEARANCE BEFORE A FLORIDA ADMINISTRATIVE BODY, WHICH, IN ESSENCE, IS THE PRACTICE OF LAW IN FLORIDA, EVEN COMING OVER THERE UNDER SUBSECTION A, AS HAS BEEN ALLUDED TO, AND AS A PROFESSIONAL, HE OWES A RESPONSIBILITY TO THOSE PEOPLE. NOW, INTERESTING, LATER ON, WITHOUT GETTING INTO THAT, WE WILL FIND THAT MR. WENDT AND HIS CLIENTS WERE PART OF THE OVERALL GROUP WHOSE NAMES HAD BEEN REDACTED OR AMOUNTS HAD BEEN REDACTED FROM THAT INQUIRY. SO FOR AN ATTORNEY TO COME IN AND SAY I, REALLY, WAS DOING THIS ON BEHALF OF SOMEONE ELSE, THAT WOULD BE ALMOST LIKE AN ASSOCIATE IN A LAW FIRM SAYING, WELL, I JUST DID IT BECAUSE THE BOSS TOLD ME SO. WE CANNOT ESCAPE OUR PROFESSIONAL RESPONSIBILITY, BY TRYING TO SAY WE WERE, REALLY, DOING IT FOR SOMEONE ELSE, WHEN WE MAKE AN EFFORT TO APPEAR BEFORE A FLORIDA ADMINISTRATIVE

AGENCY, SO I THINK IN THIS PARTICULAR CASE, TO ANSWER WHERE WE WERE EARLIER, THAT GIVES THIS CASE A FAR GREATER DISTINCTION AND, AS FAR AS THE ITEMS HERE, WITHOUT GOING INTO THE SECOND PRONG, AND I DON'T THINK THERE IS ANY QUESTION THAT MR. HOROWITZ WAS -- COMMITTED A TORT IN FLORIDA ON TWO FRONTS. NUMBER ONE, THE IMPROPER ADVICE AND THEN GIVING A MISREPRESENTATION TO A FLORIDA AGENCY. I WON'T BE SO BOLD AS TO ASK -- IS MY TIME OUT?

THE APPEARANCE BEFORE THE FLORIDA AGENT, IF A CLIENT ASKS THE OUT-OF-STATE LAWYER FOR INFORMATION, AND IN ORDER TO GET A CLARIFICATION OR AN ANSWER TO THAT IS, THE OUT-OF-STATE LAWYER WRITES TO THE AGENCY AND SAYS WHAT IS THE POSITION? IS THAT AN APPEARANCE BEFORE THAT AGENCY?

PERHAPS NOT, IN THAT CASE, BUT WHEN YOU GO AHEAD AND MAKE AN AFFIRMATIVE REPRESENTATION OF THE FACTS, THEN THAT IS, IN ESSENCE, AS IF THERE HAD BEEN AN ADMINISTRATIVE COMPLAINT AGAINST MR. HER MAN, AND MR. HOROWITZ, THEN, FILED A RESPONSE AS TO WHY THESE DOCUMENTS OR NOTES WERE NOT SUBJECT TO THE SECURITIES ACT. THAT IS AN AFFIRMATIVE DEFENSE. IT IS NOT WHERE WE CALLED AND THIS IS WHERE MY CLIENT HAS ASKED ME "A". WOULD YOU PLEASE TELL ME WHETHER OR NOT THAT IS A SITUATION WHERE HE WOULD BE WRONG OR OTHERWISE, BUT IN THIS PARTICULAR CASE HE TOOK THE AFFIRMATIVE POSITION THAT THEY WERE RIGHT AND HE, THEN, DID NOT PROVIDE THE AGENCY WITH ALL OF THE INFORMATION THAT IT SHOULD HAVE HAD, IN ORDER FOR IT TO MAKE ITS DETERMINATION. WHETHER THAT WAS SUBSEQUENT ARE OTHERWISE -- WHETHER THAT WAS INTENT OR OTHERWISE, I DON'T KNOW. BUT IF YOU DON'T INCLUDE REDACTED AMOUNTS, AS TO WHETHER THE ATTORNEY WAS EXEMPT OR NOT EXEMPT, THEN I WOULD SUGGEST TO YOU THAT THAT IS CERTAINLY TORTIOUS.

AS TO A SHIELD OB, AS IN DOE V THOMPSON, HOW DO YOU SAY IT DOESN'T APPLY IN THIS CASE? ARE YOU SAYING IT DOESN'T APPLY, BECAUSE IT DOESN'T APPLY TO INDEPENDENT CONTRACTORS WHO ARE PROFESSIONALS, OR IT DOESN'T APPLY, BECAUSE THERE WERE TORTIOUS ACTS, IN THE FORM OF SENDING LETTERS IN THAT WASN'T PRESENT IN THE DOE CASE? WHAT IS THE -- WHERE IS --

A LITTLE OF BOTH. WHAT WE HAVE, HERE, IS FIRST OF ALL HE HAD A LETTER OF RETAINER, THAT SAID THAT -- THAT WAS A VERY LIMITED RETAINER. HE WAS NOT ONE THAT WAS IN-HOUSE COUNSEL OR OTHERWISE, AND HIS INVOLVEMENT WAS SUBJECT TO THE OTHER, TO WHAT HIS LETTER WAS, BUT I THINK THE IMPORTANT SITUATION WE HAVE TO REMEMBER, BY LOOKING AT THE RESTATEMENT OF THE OTHER DOCUMENTS THAT, AN AGENT IS NOT NECESSARILY AND SOLVED OF PERSONAL RESPONSIBILITY, BY THE MERE FACT THAT HE IS AN AGENT. HE CAN WEAR TWO HATS. HE CAN BE AN AGENT, AND HE CAN BE OTHERWISE, BUT --

BUT IN DOE V THOMPSON, WE DIDN'T SAY THAT HE COULDN'T BE SUED. WE JUST SAID THAT HE COULDN'T BE SUED IN FLORIDA, UNDER FLORIDA'S LONG-ARM STATUTE, BECAUSE PERSONALLY COMMITTING AN ACT DID NOT OCCUR, IF SOMEBODY WAS EMPLOYED BY THAT COMPANY. ISN'T THAT HOW YOU READ DOE V THOMPSON?

MORE OR LESS, BUT HERE WE HAVE A LITTLE BIT DIFFERENT SITUATION, BECAUSE THE COMPANY, IN ESSENCE, QUOTE, HIRED MR. HOROWITZ TO REPRESENT MR. HER MAN, AND ONCE HE DID THAT, IT DIDN'T MATTER WHO PAID HIM. HE, THEN, HAD A PROFESSIONAL RESPONSIBILITY, JUST LIKE AN INSURANCE COMPANY. AN INSURANCE COMPANY CAN'T HIDE BEHIND A LAWYER. HERE HE HAD A PROFESSIONAL RESPONSIBILITY TO MR. HER MAN TO DO IT RIGHT, AND HE DIDN'T DO THAT, AND AS RESULT OF THAT, MR. WENLT WAS INJURED.

YOUR TIME WILL BE UP WHEN THE RED LIGHT COMES ON

IT IS COMING UP.

THE RED LIGHT HAS NOW SAVED YOU, MR. AUSTIN.

I HAVE TO LEAVE THE PODIUM. THANK YOU VERY MUCH THIS MORNING.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.