Rolando Villazon v. Prudential Health Care Plan, Inc.

ASSISTANCE, THE FINAL CASE TO THE ORAL ARGUMENT CALENDAR THIS MORNING IS VILLAZON VERSUS PRUDENTIAL.

MAY IT PLEASE THE COURT. JIM BLECKE AND STEVEN DEUTSCH ON BEHALF OF THE VILLAZON FAMILY. I WOULD LIKE TO TALK ABOUT TWO HEALTHCARE PROVIDERS, TWO HEALTH MAINTENANCE ORGANIZATIONS, TWO HEALTH DELIVERY SYSTEMS.

WOULD YOU SPEAK UP OR PULL THE MIKE UP, PLEASE.

I AM SORRY. WHAT I WOULD LIKE TO DO IS TALK INITIALLY, AS A PREDICATE TO THE ARGUMENT --

LET ME, BECAUSE YOUR TIME IS FLEETING, I WANT TO UNDERSTAND THE BASIS OF YOUR CASE AS TO PRUDENTIAL. I READ YOUR BRIEF, AND THE PLEADING IS BASED UPON AN ALLEGATION THAT THERE WAS A NONDEL GABL DUTY. IS THAT -- A NONDELAGABLE DUTY. IS THAT CORRECT?

YES AND A CLAIM OF RESPONSIBILITY THAT NOT ONLY ENCOMPASSES NONDELEGABLE DUTY BUT THE BASIS AS WELL.

WHAT DID YOU PLEAD AS A BASIS TO YOUR CLAIM? IS IT APPARENT AGENCY OR ACTUAL AGENCY THAT IS THE BASIS OF YOUR CLAIM?

ALL OF THE ABOVE, IF YOU WILL. THE RELATIONSHIP BETWEEN PRUDENTIAL AND ITS PRIMARY CARE PHYSICIAN, IS ONE THAT DOES INVOLVE A SIGNIFICANT LEVEL OF CONTROL OR RIGHT OF CONTROL. IT IS AN ACTUAL AGENCY RELATIONSHIP. IT IS, ALSO, HAS ELEMENTS OF APPARENT AGENCY, IN THAT THESE FOLKS ARE HELD OUT BY PRUDENTIAL AS PRUDENTIAL PHYSICIANS, BUT THE BOTTOM LINE, REGARDLESS OF WHETHER IT IS ACTUAL AGENCY, APPARENT AGENCY, OR WHETHER, INDEED, FOR PURPOSES OF SUMRARY -- SUMMARY JUDGMENT, THESE FOLKS ARE INDEPENDENT CONTRACTORS, REGARDLESS OF THE LABEL PLACED UPON THEM. PRUDENTIAL UNDERTOOK TO PROVIDE COMPREHENSIVE HEALTHCARE, AND IT IS RESPONSIBLE FOR THOSE IT OBTAINS, WHETHER THEY DO SO BY WAY OF EMPLOYMENT AGREEMENT OR BY WAY OF CAVATATION AGREEMENT. THE ONLY DISTINCTION, AND A DISTINCTION IN MY MIND WITHOUT A DIFFERENCE --

WOULD PRUDENTIAL BE DIFFERENT THAN A HOSPITAL?

WHEN YOU SAY DIFFERENT THAN A HOSPITAL, IT DEPENDS ON WHETHER OR NOT THE HOSPITAL AGREES TO PROVIDE COMPREHENSIVE HEALTHCARE AND I THINK THE ANSWER TO THAT QUESTION COMES FROM, AND I WILL ANSWER THE COURT THIS WAY, AND WHETHER THERE IS THE ANSWER YOU ARE LOOKING FOR, I AM NOT CERTAIN, BUT I WILL ANSWER IT IN THIS WAY, IN THE CASE OF IRVING VERSUS DOCTORS HOSPITAL, JUSTICE ANSTEAD CONCURRED IN A PIN THAT WAS CONCURRED, THEY TALKED ABOUT NONDELEGABLE DUTY, AND THE QUESTION THERE WAS WHETHER OR NOT THE HOSPITAL AGREED TO PROVIDE HEALTHCARE SERVICES, AND IT WAS AN IMPLIED AGREEMENT AND THAT WAS ONE OF MANY ISSUES IN THE CASE, BUT THE DIFFERENCE THERE IS THERE WAS A QUOTEATION IN THAT CASE FROM A OL 1922 -- FROM AN OLD 1922 CASE OUT OF VIRGINIA, A AND IN READING UPON, THIS I THOUGHT HOW APPROPRIATE. THE CASE, NOT QUITE ALL BUT NONETHELESS ON POINT, DEMONSTRATES WHAT I BELIEVE ARE FUNDAMENTAL

LEGAL PRINCIPLES, AND IN THIS CASE IT SAYS --

IF WE FIND, IF WE AGREE WITH YOU ON THE AGENCY ISSUE, DOES THAT PRESOLVE THE PREEMPTION ISSUE?

WELL, -- DOES THAT RESOLVE THE PREEMPTION ISSUE?

WELL, PROBABLY, IF YOU RESOLVE IT AGAINST ME, IF YOU RESOLVE THE VICARIOUS ISSUE BEGINS ME, PREEMPTION BECOMES MOOT. THERE IS NO LIABILITY. BUT THE PREEMPTION IN THIS CASE IS AN ISSUE THAT WAS NOT INVOLVED WITH ANY OF THE PROBLEMS THAT WE ARE ALL AWARE OF THAT DO OCCUR WITH HEALTH MANTIENCE ORGANIZATIONS, THAN IS DENIAL OF BENEFITS AND COST CONTAINMENT, TO THE DETRIMENT OF THE PATIENT THERE. IS QUITE A BIT OF CONTROVERSE ANY THIS AREA, AND I KNOW THAT THE COURT IS WELL AWARE OF. THAT THIS CASE DOES NOT INVOLVE THAT. WHETHER OR NOT A DENIAL OF BENEFITS, IF, FOR EXAMPLE, SUSAN VILLAZON HAD BEEN DENIED SPECIALTY CONSULTATION OR DENIED A REQUIRED TEST, IT MIGHT BE ARGUED, I DON'T THINK EFFECTIVELY, BUT THAT IS THE CASE THAT AT LEAST GETS US INTO THAT MIXED ELIGIBILITY DECISION. WAS THE DENIAL OF A BENEFIT DONE BECAUSE, BECAUSE OF A MEDICAL DECISION, OR WAS IT DONE AS A COST CONTAINMENT DECISION?

WHAT I AM CONCERNED ABOUT, IS THAT AS I UNDERSTAND THIS ERROR, AND CORRECT ME, PLEASE -- THIS RECORD, AND CORRECT ME, PLEASE, THAT THIS, THAT SHE FOUND THESE DOCTORS. SHE WAS REFERRED BY HER SISTER TO THESE DOCTORS. AND SHE WAS WITH THESE DOCTORS OR THIS DOCTOR PRIOR TO THE TIME THAT SHE BECAME, THAT THEY WERE PAID, AS FAR AS THE HMO.

THAT IS TRUE OF THE ONE DOCTOR. DR. SARNO WAS WHAT IS KNOWN THE INDUSTRY AS THE GATEKEEPER OR PRIMARY CARE PHYSICIAN. SHE WENT TO DR. SARNO BEFORE PRUDENTIAL, THE PRUDEPTION HMO CAME INTO PLAY. THE PROGRAM THAT SHE WAS UNDER WITH HER EMPLOYER, BY COINCIDENCE, WAS A PRUDENTIAL PLAN, BUT THE PRUDENTIAL PLAN THAT WAS IN EFFECT PRIOR TO THE HMO BEING IN EFFECT, WAS A -- WAS A PRUDENTIAL INSURANCE PLAN, WHERE PRUDENTIAL, AS AN INSURANCE COMPANY, SIMPLY PAID FOR DOCTOR VISITS, AND THAT, OF COURSE, THE MATERIAL DIFFERENCE. IF PRUDENTIAL WAS AN INSURANCE COMPANY PAYING DOCTOR BILLS, IT WOULD HAVE NO LIABILITY FOR THOSE DOCTORS. THAT IS AN OBVIOUS POINT EASILY CONCEDED. ONCE PRUDENTIAL STOPPED BEING AN INSURANCE COMPANY AND BECAME THE HEALTHCARE PROVIDER, IT, THEN, TOOK ON THE RESPONSIBILITY OF PROVIDING COMPREHENSIVE HEALTHCARE, AS OPPOSED TO SIMPLY PAYING FOR IT.

JUST GOING BACK TO WHERE JUSTICE WELLS IS GOING, I AM HAVING THE SAME PROBLEMS OF UNDERSTANDING WHAT WOULD BE THE COMMON LAW CAUSE OF ACTION HERE. I MEAN, IF PRUDEX-EMPLOYED DR. SARN -- IF PRUDENTIAL EMPLOYED DR. SARNO, THEN THEY ARE VICARIOUSLY LIABLE UNDER THE LAW, AND I DON'T SEE THAT THERE IS A PREEMPTION ISSUE THAT THIS WOULD BE PREEMPTED BY ARISSA, BECAUSE THIS IS CLEARLY AN ISSUE OF MEDICAL NEGLIGENCE. IF YOU ALREADY CONCEDED THAT THEY ARE THE INSURANCE COMPANY, WE HAVEN'T YET DEVELOPED A CAUSE OF ACTION THAT WOULD SAY WHY THE INSURANCE COMPANY WOULD BE LIABLE. SO, NOW, WHAT WE ARE REALLY GETTING INTEREST IS WHETHER, IN THE STATE OF FLORIDA, THE FIRST TIME THAT WE WOULD RECOGNIZE A CAUSE OF ACTION ARISEING OUT OF THE, EITHER, BECAUSE OF THE STATUTE THAT WAS PASSED ON HEALTH MAINTENANCE ORGANIZATIONS BY THE FLORIDA LEGISLATURE, WHICH DOESN'T SAY THERE IS ANY CAUSE OF ACTION, OR GETTING BACK TO JUSTICE SHAW'S QUESTION, UNDER SOME TRADITIONAL THEORY OF VACANCY.

IT IS VERY TRADITIONAL, AND THE REASON THAT I WANTED TO GO BACK TO TO THIS OLD 1922 DECISION IS BECAUSE THE DEFENDANT IN THAT CASE WAS COINCIDENTALLY A HOSPITAL AND TRAINING SCHOOL. IT IS GENERALS INSIDE, -- IS JENKINS VERSUS CHARLES ONE. THE HOSPITAL

WAS UNDER CONSIDERATE TO RENDER CARE AND TREATMENT FUEL COMPANY EMPLOYEES. HERE IS A HOSPITAL THAT HAD A CONTRACT WITH AN EMPLOYER TO PROVIDE HEALTHCARE FOR ITS EMPLOYEES, AND THE PLAINTIFF WAS AN EMPLOYEE, BROKE HIS ARM AND SOUGHT TREATMENT. AND A RADIOLOGIST NEGLIGENTLY TREATED THE PLAINTIFF AND LITIGATION DEVELOPED, BACK IN THE EARLY '20s. MALPRACTICE CASES WERE GOING ON EVEN BACK THEN, AND THE HOSPITAL CONTENDED IT WAS NOT LIABLE, BECAUSE THE RADIOLOGIST WAS AN INDEPENDENT CONTRACTOR. Z THE COURT REJECTED AND STATED AND THIS IS AN INTERPRETATION ADOPTED BY THE FOURTH DISTRICT. A CONTRACT BY THE INDEPENDENT CONTRACTOR CANNOT BE MAINTAINED. THE RADIOLOGIST WAS EMPLOYED BY THE DEFENDANT TO PERFORM WORK IN DISCHARGE OF ITS OWN CONTRACT AND IN UNDERTAKING TO DIAGNOSIS -- TO DIAGNOSE AND TREAT INJURY. IT WAS NEVER RELEASED UNDER THE OBLIGATION OF THE CONTRACT. A MAN CANNOT AVOID HIS CONTRACT BY PERFORMANCE ON A STRANGER. WE ARE ALL FAMILIAR WITH THE ROOFING CASES, BUT HERE IS A MEDICAL MALPRACTICE CASE, AND THE REASON I LIKE THIS CASE AND THE REASON I BRING IT TO THE COURT'S ATTENTION, IS BECAUSE THERE, UNLIKE IRVING AND UNLIKE A TRADITIONAL MALPRACTICE CLAIM AGAINST A HOSPITAL, WHERE IT IS AT ISSUE THAT THE HOSPITAL IS RESPONSIBLE FOR SOME OR ALL OF THE DOCTORS. HERE THERE WAS A CONTRACT TO PROVIDE FOR MEDICAL CARE.

DO YOU HAVE TO GO THROUGH 766 AGAINST PRUDENTIAL? DID YOU HAVE TO FILE A NOTICE OF MEDICAL MALPRACTICE?

YES. THEY ARE A HEALTHCARE PROVIDER. THEY WENT THROUGH PRESUIT.

LET ME COME AT THIS IN A LITTLE BIT OF A DIFFERENT WAY, BECAUSE IF YOU THINK THERE IS A LITTLE BIT OF A BLANK LOOK ON MY FACE, WHAT I AM TRYING TO GRAPPLE WITH HERE, IS THAT I PERCEIVE YOUR POSITION TO BE THAT THIS ISSUE ABOUT THE LIABILITY OF THE HMO IS A SEPARATE ISSUE, AND THAT THAT ISSUE DOES NOT INVOLVE THE APPLICATION OF ARISSA.

ARISSA, IN MY JUDGMENT, IN MY OPINION, HAS NEVER HAD ANYTHING TO DO WITH THIS CASE. AND THE ONE THING THAT I --

I AM TRYING TO DEAL WITH THE ISSUE THAT WE HAVE BEFORE US IS THE PREEMPTION ISSUE, IS THAT CORRECT?

ACTUALLY I SHOULD ASK THE COURT THAT QUESTION, BECAUSE WE RAISED TWO CONFLICTS, ONE OF WHICH HAD TO DO WITH NONDELEGABLE DUTYANT OTHER HAD TO DO WITH -- DUTY, AND THE OTHER HAD TO DO WITH ARISSA.

I AM TRYING TO FIND OUT HERE AND MAYBE THERE WAS A SUMMARY JUDGMENT ENTERED, FINDING THAT HUH NO COMMON LAW CAUSE OF ACTION, AND THAT DESPITE THE CASE LAW OR ARGUMENTS OR WHATEVER, THAT IS THAT YOU JUST DON'T STATE A CAUSE OF ACTION HERE. IF YOU CAN'T PROVE THAT YOU HAVE A LEGAL CLAIM TO BEGIN WITH, AND THAT OBVIOUSLY IS ONE WAY THAT THE CASE WOULD GO AWAY, AND THE APPLICATION OR INTERPRETATION OR PREEMPTION, WITH REFERENCE TO ARISSA WOULD NOT EVEN COME INTO PLAY IN THAT CIRCUMSTANCE S THAT CORRECT?

THAT'S CORRECT. IF WE HAVE NO CAUSE OF ACTION, ARISSA IS MOOT.

DID THAT HAPPEN HERE? HAS THERE BEEN A JUDGMENT ENTERED INTENSE AGAINST YOU, STATING THAT YOUR -- ENTERED AGAINST YOU, STATING THAT YOUR COMPLAINT DID NOT FIND STATE A CAUSE OF ACTION FOR SUMMARY RELIEF?

YES. THE SUMMARY JUDGE RULED THAT WE HAD NO CLAIM FOR VICARIOUS LIABILITY, THAT THERE WAS NO EVIDENCE OF EXPRESS OR ACTUAL AGENCY, NO EVIDENCE --

I AM TRYING --

AND THAT THIS THEORY OF NONDELEGABLE DUTY HAS MOVED FURTHER FROM THE LAW.

LET ME ASK WAS THERE, ALSO, A SUMMARY JUDGMENT ENTERED, ON THE BASIS THAT THERE WAS A PREEMPTION HERE, AND THEREFORE THAT YOU COULDN'T PROCEED, ON --

YES.

-- THE SDMAS.

YES, BOTH THE TRIAL JUDGE AND THE THIRD DISTRICT RULED AGAINST US ON BOTH ISSUES, THAT AND IT IS CERTAINLY CLEAR IN THE THIRD DISTRICT'S OPINION THAT THEY WERE DECIDING BOTH ISSUES ADVERSE TO US, AND IT IS TRUE THAT BOTH ISSUES WERE, BOTH, RAISED AND DECIDED AT THE TRIAL COURT LEVEL.

YOUR THEORY NOW, BEFORE US, IS, FIRST OF ALL, THAT YOU DO HAVE A VIABLE COMMON LAW CLAIM, AND YOU ARE DISCUSSING THE AUTHORITY THAT YOU BASE THAT ON.

YES, YOUR HONOR.

AND THAT ONCE YOU GET TO THAT POINT, THEN THAT DOES AWAY WITH THE PREEMPTION ISSUE, BECAUSE THAT COMMON LAW CLAIM WOULD NOT INVOLVE AN INTERPRETATION OF THE ARISSA STATUTORY SCHEME. IS THAT YOUR --.

YES, BUT I MAY BE MISUNDERSTANDING THE COURT'S QUESTION. IF I DO NOT HAVE A COMMON LAW CLAIM, THEN PREEMPTION IS NO LONGER AN ISSUE. IF I HAVE A COMMON LAW CLAIM, WHICH I CERTAINLY BELIEVE I DO, I THINK THE LAW IS OVERWHELMINGLY CLEAR ON THAT POINT, AND THAT HAS BEEN ONE OF MY FRUSTRATIONS IN THE CASE, QUITE FRANKLY, IS I DON'T SEE AN HMO EXCEPTION TO THE GENERAL RULE. I THINK THIS COURT AND THE THIRD DISTRICT HAS CREATED A EXCEPTION TO THE COMMON LAW THAT FINDS NO BASIS IN, EITHER, THE RECORD OR THE LAW, TO SUPPORT IT. BUT --

BUT YOUR COMMON LAW CLAIM WOULD SOLELY BE BASED ON THE ACTUAL CONTRACT, SO THAT IF A QUESTION OF LAW, UNDER OUR CASE LAW, IS TO BE RESOLVED, BASED ON THE CONTRACT, YOU DON'T HAVE ANY OTHER EVIDENCE TO PRESENT OR DIDN'T PRESENT IN THIS RECORD, CORRECT?

WE HAVE EVIDENCE, AND WE HAVE ARGUED IT, THAT THERE IS ACTUAL CONTROL AND THE RIGHT OF CONTROL AND THAT WE DO HAVE SUFFICIENT EVIDENCE TO AT LEAST CREATE A JURY QUESTION AND SURVIVE SUMMARY JUDGMENT ON THE AGENCY ISSUES, BUT THOSE ISSUES ARE NOT ADDRESSING THE THIRD DISTRICT'S OPINION, AND I PURPOSE USFULLY PUT THOSE ISSUES AT THE END OF MY BRIEF, BECAUSE THOSE ARE ISSUES THAT MAY OR MAY NOT BE REACHED BY THE COURT, IN DEALING WITH THE TWO ISSUES WHERE THERE IS CONFLICT ALLEGED, NAMELY ARISSA AND NONDELEGABLE DUTY, SO THOSE ISSUES WERE RAISED AND WE LOST, WHETHER OR NOT THIS COURT WILL GO INTO THAT AREA IN RESOLVING THIS HIM BE IN -- THIS WILL BE IN THE COURT'S DISCRETION. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL.

THAT BEING THE CASE, UNLESS THERE ARE OTHER SPECIFIC QUESTIONS, I THINK I MIGHT, I DON'T HAVE A GOOD POINT TO WIND UP ON, SO LET ME LISTEN TO THE OTHER SIDE AND ADDITIONAL QUESTIONS FROM THE COURT AND RESERVE TIME FOR REBUTTAL. MR. CHIEF JUSTICE

THANK YOU. MR. ZIGLER.

MAY IT PLEASE THE COURT. STEVEN ZIEGLER, ON BEHALF OF PRUDENTIAL HEALTHCARE. LET ME JUST CLARIFY, IF I MAY, THAT THERE WERE BASICALLY FOUR DIFFERENT ISSUES BELOW HAD. THE COURT RULED SUMMARY JUDGMENT IN PRUDENTIAL'S FAVOR ON THE ISSUE OF VICARIOUS RESPONSIBILITY IN RELATION TO THE NONDELEGABLE DUTY.

WHY DOES SRISSA HAVE ANYTHING TO DO WITH WHETHER THERE IS A COMMON LAW CAUSE OF ACTION WHICH CAN BE PLED AGAINST PRUDENTIAL ON A VICARIOUS LIABILITY BASIS IN THIS CASE? IT SEEMS TO ME THAT THE PEAGRAHM CASE OUT OF THE U.S. SUPREME COURT IS WHETHER OR NOT YOU ARE FILING A CAUSE OF ACTION FOR BREACH OF FIDUCIARY STATUTE, UNDER THE ARISSA STATUTE, BUT THAT IS NOT WHAT IS GOING ON.

IT HAS NO APPLICABLE DUTY. YOUR HONOR, THIS HAS TO DO WITH THE RELATES-TO TEST, JUST A BROAD PROVISION UNDER ARISSA, WHICH STATES THAT ALLSTATE LAWS WITH RELATIONSHIP TO A HEALTHCARE PLAN ARE KPEMENTD, AND THE PEAGRAHM DEALT WITH CAUSE NINE UNDER A HEALTHCARE PLAN AND WHETHER OR NOT THERE IS A FIDUCIARY DUTY, BASED ON CONTRACTS. THE AETNA CASE DECIDED IN JUNE 2001 AND THE ASHCROFT CASE DECIDED JUST A FEW WEEKS AGO, BOTH ANALYZED THE PEAGRAHM CASE AND HOW IT IS APPLICABLE TO THESE CASES AND GOES TO THE ANALYSIS OF WHY THE TWO-PHASE TEST APPLIES.

THIS ISN'T THE PENNSYLVANIA SUPREME COURT. THAT WAS THE CASE THAT WENT UP OR THEY ACCEPTED AFT PEAGRAM'S POSITION -- AFTER THE PEAGRAM'S POSITION, AND THAT WAS THE CLASSIC MEDICAL TREATMENT CASE, AND THE U.S. SUPREME COURT DIDN'T SAY THIS HAS NOTHING TO DO WITH PEAGRAM. THEY REMANDED, IN LIGHT OF THEIR DECISION IN PEAGRAM, AND SO YOU ACT AS IF IT IS TOTALLY CLEAR THAT 502, I GUESS, IS 514, THAT THE STANDARDS THAT WOULD GOVERN BOTH ARE NOT RELATED AT ALL, BUT IN TRUTH, THE LAW IS STILL IN A STATE OF FLUX, AS TO WHETHER THAT IS ONE BROADER OR ONE IS NARROWER. ISN'T THAT TRUE?

I THINK CLEARLY THESE TWO TESTS ARE DIFFERENT AND 514 IS A MUCH BROADER TEST.

THE FACT IS THAT YOU CAN'T BRING, IF YOU WERE SUING PRUDENTIAL FOR THIS CASE AND ASSUMING THAT THIS DOCTOR WORKED FOR PRUDENTIAL, NO ONE IS TELLING ANYONE TO BRING THAT IN FEDERAL COURT, CORRECT?

MALPRACTICE -- CORRECT? MALPRACTICE CASE, PRUDENTIAL EMPLOYEES SARNOW.

AND OUR POSITION IS, IF IT IS A STAFF MODEL HMO, IN WHICH A PHYSICIAN IS EMPLOYED BY THE PLAN, THEN THERE WOULD BE NO DEFENSE OF THE AGENCY, UNDER COMMON LAW OR UNDER ARISSA.

IF THE LEGISLATURE DECIDED AS A COMMON LAW IN THE STATE OF FLORIDA, AS TEXAS HAS DONE, TO MAKE HMOs LIABLE, VICARIOUSLY, FOR THE ACTIONS OF ITS DOCTORS, THERE IS NOTHING TO INDICATE, IN PEAGRAM OR ANY OF THE OTHER CASES, THAT THAT WOULD HAVE BEEN A LAW THAT WOULD BE PREEMPTED PIE ARISSA, IS THERE?

THE ONLY CASE ON THE ISSUE OF THE STATUTE BEING PASSED IS THE CORPORATE HEALTH CASE. THAT SPECIFIC IDENTICAL LAW WAS BROUGHT BEFORE THE FLORIDA LEGISLATURE AND REJECTED, AS WELL AS THE LAW, SO I THINK IT IS A DIFFERENT ISSUE THAN WE HAVE HERE, WHERE YOU HAVE A COMMON LAW CLAIM, BASED ONLY ON THE ADMINISTRATION OF THE PLAN.

ARE THE, THE COMMON LAW CLAIM SEEMS, TO BE, TO BE BASED UPON THE RELATIONSHIP WITH PRUDENTIAL AS THE HEALTHCARE PROVIDER. IT HAS NOTHING TO DO WITH THE RELATIONSHIP OF THE HEALTHCARE PROVIDER TO THE BENEFICIARY OF THAT PLAN!

ACTUALLY, YOUR HONOR, IT IS BASED UPON THE CERTIFICATE OF COVERAGE BETWEEN THE MEMBER AND PRUDENTIAL, WHICH HAS BEEN IMPLEMENTED BY THAT CONTRACT.

I AM TALKING TO THE CONTRACT THAT DEFINES WHAT A DOCTOR CAN AND CANNOT DO, JUST AS IF PRUDENTIAL HAD A HOSPITAL THAT THEY OPERATED UNDER A CONTRACT. HOW IS THIS ANY DIFFERENT? ARE WE LOOKING TO THE CONTRACT BETWEEN THE PRUDENTIAL AND THE BENEFICIARY, TO OUTLINE THE PARAMETERS OF THE AGENCY RELATIONSHIP?

WE START, WE MUST START WITH THE CONTRACT BETWEEN THE MEMBER, BECAUSE AS MR. BLECKE SAID, IF THIS WAS AN INSURANCE SITUATION, WE WOULDN'T HAVE. THAT YOU COULD GO TO WHATEVER DOCTOR YOU WANTED AND THE DOCTOR WOULDN'T NEED TO REFER FOR AN MRI. YOU COULD GO TO WHATEVER PHYSICIAN YOU WANTED AND THEY COULDN'T SUE FOR THAT. THAT IS WHAT MR. BLECKE STATED, BUT THIS CLAIM RESTRICTS THE CHOICES TO CERTAIN PROVIDERS AND ALLOWS THE HMO TO AUTHORIZE OR NOT AUTHORIZE CERTAIN TESTS. BECAUSE OF THAT, THEN IT MUST NECESSARILY RELATE TO THE ADMINISTRATION OF THE PLAN. THAT IS IMPLEMENTED --

THAT IS ACTION BASED UPON THE DOCTOR HAS NOTHING, WITHIN HIS RELATIONSHIP UNDER THE CONTRACT BETWEEN A PRUDENTIAL AND A BENEFICIARY. THAT CAN HAVE NOTHING TO DO WITH THE DOCTOR, BECAUSE THE DOCTOR IS NOT A PARTY TO THAT AGREEMENT. A DOCTOR MUST BE A PARTY TO AN AGREEMENT, BEFORE YOU CAN EVEN ANALYZE WHAT THAT DOCTOR CAN OR CANNOT DO. WOULDN'T THAT BE CORRECT?

NO, I THINK IT IS IN REVERSE ACTUALLY, BECAUSE I THINK YOU WOULDN'T HAVE A CONTRACT WITH A DOCTOR, UNLESS YOU HAD AN HMO SET UP AND THEN YOU WOULD HAVE A CONTRACT WITH A DOCTOR. OTHERWISE YOU WOULD HAVE A PROVIDER --

DO THE PLANS BETWEEN PRUDENTIAL AND A BENEFICIARY CONTROL THE RIGHTS AND OBLIGATIONS OF A DOCTOR?

NO. THEY CONTROL THE RIGHTS BETWEEN THE MEMBER AND THE HMO, AND THEN THAT IS IMPLEMENTED WITH THE DOCTOR.

BUT A SEPARATE CONTRACT, IS THERE NOT, BETWEEN PRUDENTIAL AND THE DOCTOR?

YES.

SHOULD WE NOT LOOK TO THAT RELATIONSHIP TO DETERMINE WHETHER THERE IS A CONTROLLING FACTOR OR A RIGHT TO CONTROL OR WHATEVER THE AGENCY MAY BE? IT MAY END UP IN YOUR FAVOR, BUT ISN'T THAT THE BASIC DOCUMENT THAT CONTROLS THE DOCTORS AS TO RELATIONSHIP?

AS TO THE ISSUE OF CONTROL OR RIGHT OF CONTROL THAT DOCUMENT WITH THE PROVIDER, IS THE ONE THAT WOULD BE APPLICABLE, TO SEE WHAT THOSE CONTROLS ARE, BUT IN THIS CASE WHAT WE ARE SEEING IS IN PARTICULAR, THE HMO DOCUMENT WITH THE MEMBER HAS CERTAIN RULES AND REGULATIONS THAT THEY ARE COMPLAINING CREATES A CAUSE OF ACTION, AND THEY ARE SAYING THAT THE RIGHT TO CONTROL THE DOCTOR AND HOW DO YOU DO THAT THROUGH HAVING A LIST OF PARTICIPATING PROVIDERS OR THE RIGHT TO CERTAIN TESTS, IT THAT SOMEHOW MEANS THAT THE HMO CONTROLS THE PRACTICE OF MEDICINE. MR. CHIEF JUSTICE

JUSTICE SHAW HAD A QUESTION.

IF YOU HAD A STRAIGHT CONTRACT BETWEEN THE BENEFICIARY AND THE INSURANCE COMPANY, SAYING WE WILL, IF YOU ARE INJURED, WE WILL TAKE TAKE CARE OF YOU. OBVIOUSLY THAT WOULD NOT FALL UNDER THE FEDERAL ACT, WOULD IT?

IF THERE WAS A MATTER OF STRICTLY ONLY PAYMENT, THAT WOULD BE A SEPARATE AND DISTINCT FROM THIS CASE, YES. IF YOU HAD --

OKAY. SO WHAT CHANGES THIS, THE NATURE OF THIS BEAST, IS THAT THE HMO HAS THIS GATEKEEPER. IS THAT THE CRITICAL THING THAT CHANGES THE NATURE OF IT?

IF THE GATEKEEPER, WHAT THEY CONTEND IN THEIR COMPLAINT IS IT IS THE GATEKEEPER. IT IS, ALSO, THE FACT THAT YOU HAVE TO GIVE CERTAIN, YOU CAN ONLY USE CERTAIN OTHER PARTICIPATING PROVIDERS AND, ALSO, THAT YOU HAVE TO HAVE CERTAIN TESTS TO PROVE --

THAT IS THE NATURE OF THE GATEKEEPER, ISN'T IT? YOU HAVE TO USE THEIR DOCTORS AND THE ONES THAT THEY RECOMMEND.

WHAT THEY ARE SAYING IS THAT YOU HAVE AN AGENCY RELATIONSHIP BECAUSE OF THE FACT THAT YOU PUT THESE THINGS IN, INTO THE PLAN,, WHICH THEN, YOU IMPLEMENT IN THE PROVIDER CONTRACT. OUR POSITION IS THEY ARE INDEPENDENT CONTRACTOR PHYSICIANS. HOWEVER, IF YOU ARE GOING TO CLAIM, WE SAY WE DON'T CONTROL ANYTHING. WE CAN'T CONTROL THE PRACTICE OF MEDICINE BECAUSE ONLY THE LICENSED MEDICAL PROVIDERS CAN. IF THAT IS THE ALLEGATION THAT YOU ARE GOING TO BASE CLAIM AGAINST US ON THESE ITEMS IN THE HMO DOCUMENT, WELL, THEN, IT OBVIOUSLY INVOLVES THE ADMINISTRATION OF THE PLAN, BECAUSE IF WE HAD A STRAIGHT INSURANCE PRODUCT, WE WOULDN'T HAVE A LAWSUIT TO BEGIN WITH.

BUT CAN YOU STILL HAVE YOUR COMMON LAW TORTS AND CONTRACTUAL ACTIONS, DESPITE THE NATURE AFTER CONTRACT? THE GATE KEEPING NATURE OF IT.

I UNDERSTAND. THE ISSUE HERE IS, I THINK IT IS IMPORTANT WHAT THE COURT NOTICED RIGHT AWAY WAS THAT THERE ARE NO CASES ANYWHERE IN THE COUNTRY, CITED BY THE APPELLANT, THAT STANDS FOR THE PROPOSITION THAT THERE IS A COMMON LAW, NONDELEGABLE DUTY, EITHER BY COMMON LAW CONTRACTOR BY STATUTE AGAINST INDEPENDENT PRACTICE ASSOCIATION IN AN HMO. I THINK THE CASES IN THE HOSPITAL CONTEXT ARE APPROPRIATE. AND IN THE IRVING CASE, THAT MR. BLECKE SIGHTED, SPECIFICALLY TALKS ABOUT -- SIGHTED, SPECIFICALLY -- SIGHTED, SPECIFICALLY -- CITED, SPECIFICALLY STATES THAT HE WALKED INTO THE HOSPITAL EMERGENCY ROOM, HE HAS NO PATIENTS OF HIS OWN, HE DOES NOT MAINTAIN THE BILLING RECORDS AND GAVE NO CARE. IN 1982 THE HOSPITAL PHYSICIAN HAD THE SAME EXACT SET UP.

NOW, SUPPOSE THE BENEFICIARY OF THIS CONTRACT, WHEN YOU REALLY BOIL IT DOWN, IS MOST IN NEED OF HIS CONTRACTUAL AND COMMON LAW CAUSES OF ACTION, WHEN THE HMO IS TELLING HIM WE ARE NOT GOING TO TREAT YOU, BECAUSE OUR GATEKEEPER SAYS THAT THAT DOESN'T FALL WITHIN WHAT WE ARE SUPPOSED TO DO FOR YOU.

YOUR HONOR, IN THE RE DEFORMITY -- IN THE REED, WHICH IS A CASE WHERE THE HOSPITAL HAS BY LAWS AND CERTAIN REQUIREMENTS FOR THEM TO DO, THE COURT SAYS HE HAVE THEN A HOSPITAL SETTING WHERE YOU ARE PROVIDING COMPREHENSIVE HEALTHCARE, BUT BECAUSE THEY ARE INDEPENDENT CONTRACTED PHYSICIANS, STAFF PHYSICIANS, IT IS VERY MUCH DIFFERENT THAN THE IRVING CASE, WHERE YOU HAVE CONTROL OVER THEM AND WE ARE SAYING THE SAME THING HERE. IN A SITUATION THE STAFF MODEL THAT, IS ONE THING WE EMPLOYEE. IF A HOSPITAL CANNOT HAVE A NONDELEGABLE DUTY, HOW CAN A STAFF OF HMO PHYSICIANS WHO CONTRACT, AND MOST OF THEM ARE THIS WAY, WITH THOUSANDS AND THOUSANDS ARE PROVIDERS ACROSS THE STATE, HOW COULD THEY HAVE A NONDELEGABLE DUTY FOR EVERY LAB TEST, EVERY TEST THAT IS RUN THROUGHOUT STATE?

WHY ISN'T THIS CASE LIKE NOEL AS FAR AS THE RELATIONSHIP BETWEEN THE CHILDREN MEDICAL SERVICES AND THEIR PHYSICIANS? IN LOOKING AT THE INDICIA THAT THIS COURT

LOOKS AT, TO DETERMINE WHETHER THERE WAS AN INDEPENDENT CONTRACTOR RELATIONSHIP OR AGENCY, CAN YOU TELL ME WHAT IS DIFFERENT ABOUT THE RELATIONSHIP BETWEEN PRUDENTIAL AND ITS DOCTORS, THAT, THEN, THE CMS AND WHAT WERE STATED TO BE INDEPENDENT CONTRACTORS, IN THAT CASE?

WELL, I THINK THERE IS A BIG DIFFERENCE IN THAT CASE. I THINK IT IS MUCH MORE AKIN TO A STAFF MODEL HMO, IN THAT THEY WERE STAFF PHYSICIANS. THEY WERE EMPLOYED THERE. THE HRS CONTROLLED ALL OF THE MEDICAL CARE, THE WAY THEY DID THE MEDICAL CARE. THEY SUPERVISED THE MEDICAL CARE AND IN FACT, THE COURT WENT ON TO SAY THAT THE CONCLUSION WAS BUTTRESSED BY H.R.S.'s ACKNOWLEDGMENT THAT THE MANUAL BETWEEN THEM CREATES AN AGENCY RELATIONSHIP, SO IN THAT SITUATION, THEY WERE ESSENTIALLY STAFF PHYSICIANS, WHICH IS VERY DIFFERENT THAN WE HAVE HERE. I THINK THIS, IN AN IPA SETTING --

BUT DOESN'T THAT BRING YOU RIGHT BACK TO JUSTICE LEWIS'S QUESTION, WHICH IS DON'T YOU HAVE TO LOOK AT WHAT THE RELATIONSHIP OR THE AGREEMENT WAS BETWEEN THE ACTUAL HMO AND THE DOCTOR, TO DETERMINE WHETHER OR NOT THERE WAS REALLY AN ACTUAL OR APPARENT AGENCY RELATIONSHIP?

YES. ON COMMON LAW AGENCY, YOU DO, AND THAT CONTRACT IS CLEAR. THERE WAS NO GENUINE ISSUE OF MATERIAL FACT IN THIS CASE. JUST LIKE THE GROUP CONTRACT, THAT CONTRACT CLEARLY SPECIFIED THAT THE PHYSICIANS WERE INDEPENDENT CONTRACTORS.

BUT THAT DOESN'T ANSWER THE QUESTION, DOES IT? THE WAY A PARTY MAY CHARACTERIZE THEMSELVES IS NOT CONTROLLING AS TO THE LEGAL RESULT. YOU WOULD AGREE WITH THAT?

WELL, IN THIS CASE, THOUGH --

WOULD YOU AGREE THAT THE WAY THE PARTIES IDENTIFY THEMSELVES IS NOT THE CONTROLLING ELEMENT, THAT YOU HAVE TO GO BEYOND THAT?

WELL, I THINK THE CASE LAW IS THAT THE CONTRACTUAL CASE LAW COMES FIRST. IF THE ANSWER IS CLEAR IN THE KEITH CASE, THEN YOU DON'T HAVE TO GO FURTHER. THAT IN THIS CASE THE CONTRACT WAS CLEAR, AND EVEN IF YOU DO GO FURTHER, DR. SARNOW TESTIFIED AND MADE IT CLEAR IN REQUEST FOR ADMISSION THAT IS HE DID NOT IN ANY WAY HAVE HIS MIDCAL PRACTICE CONTROLLED BY PRUDENTIAL. HE TESTIFIED THAT HE WAS AN INDEPENDENT CONTRACTOR AND HE SAW A NUMBER OF PATIENTS FROM PRUDENTIAL AND OTHER HMOs. HE SAW PRIVATE PATIENTS AND MEDICARE PATIENTS. HE WAS A PRIVATE PHYSICIAN THAT MAINTAINED HIS OWN --

THE MERE FACT AN AGENT MAY SEE OTHER PATIENTS, DID DOES THAT MERE FACT ELIMINATE AN AGENCY HERE?

I THINK THE ISSUE IS, IN LOOKING AT THAT CONTRACTUAL LANGUAGE, AND IT IS DIFFERENT THAN THE CASES IN WHICH YOU HAVE A GENERAL CONTRACT AND A SUBCONTRACTOR, AND -- A GENERAL CONTRACTOR AND A SUBCONTRACTOR AND YOU HIRE THE GENERAL CONTRACTOR TO DO SOMETHING AND SOMETHING GOES AMISS BY THE SUBCONTRACTOR, THAT YOU ARE NOT AWARE OF AN INDEPENDENT CONTRACTUAL RELATIONSHIP. HERE THE MEMBER KNOWS UP FRONT AND THE ONLY WAY THEY CAN TELL THEM IS TO TELL THEM THROUGH THE CONTRACT THAT THESE ARE INDEPENDENT CONTRACTED PHYSICIANS AND THEN, IN ACTUAL PRACTICE, THE SAME THING OCCURS, BECAUSE WHEN YOU GO INTO A PHYSICIAN'S OFFICE, AND IN THIS CASE MRS. ZILL A SON HAD -- MRS. VILLAZON HAD AN INDEPENDENT RELATIONSHIP WITH THE DOCTOR AND SHE KNEW THAT HAD HE A PRIVATE OFFICE AND SHE KNOWS IT IS NOT A STAFF MODEL. IT DOESN'T SAY PRUDENTIAL HMO ON THE SIDE. THEY ARE NOT WEARING SIGNS LIKE. THAT.

LET'S ASSUME THAT SHE HAD GONE TO THIS PHYSICIAN BEFORE AND HE BECAME A STAFF PHYSICIAN FOR PRUDENTIAL, THEN ACCORDING TO UROLOGIC AND REASONING, THEN THEY STILL HAD NO OBLIGATION, BECAUSE SHE HAD CONSULTED HIM BEFORE. IS THAT BECAUSE ARE SAY SOMETHING.

I THINK IT CHANGES THE NATURE OF THE RELATIONSHIP.

SO IT WOULD NOT BE VICARIOUS LIABILITY, HAD THIS -- INDIVIDUAL NOT BEEN PLACED ON A STAFF POSITION AND PRINTIOND TOLD HIM EVERYTHING TO DO, BUT BECAUSE SHE HAD SEEN HIM BEFORE, THAT THERE WASN'T AN AGENCY RELATIONSHIP.

I THINK THEY HAVE GONE TO A STAFF MODEL HMO AND NOW THE SITUATION IS DIFFERENT, WHERE CLEARLY THERE WILL BE AN INDICIA THAT HE IS NOW AN EMPLOYEE.

DR. SARN ON YOU WAS NOT JUST -- DR. SARNOW WAS NOT JUST DOING WORK FOR PRUDENTIAL, SDPLEKT.

CORRECT.

AS FAR AS LOOKING AT WHETHER HE WAS AN INDEPENDENT CONTRACTOR IS THAT SIGNIFICANT OR DOES THAT MATTER?

I THINK WHAT IS SIGNIFICANT IS THE CONTRACTUAL LANGUAGE THAT THE MEMBER SEES AND THE MEMBER KNOWS THAT IT IS AN INDEPENDENT CONTRACTOR. I JUST THINK THAT --

AGAIN, THE CASE LAW, WITH ALL DUE RESPECT TO YOUR ARGUMENT, DOES SEEM TO LOOK AT THE RELATIONSHIP BETWEEN, FOR THIS COMMON LAW AGENCY ISSUE, IS THAT THE ISSUE OF THE RIGHT OF CONTROL THAT PRUDENTIAL WOULD HAVE OVER DR. SARNOW, SO THIS CASE TO ME WOULD BE MUCH STRONGER FOR THE PLAINTIFF, IF THIS TEST THAT WAS RECOMMENDED BY SOME OTHER CONSULTANT, WHICH WAS NEVER COMMUNICATED, I GUESS, TO DR. SARNOW, HAD BEEN DR. SARNOW'S RECOMMENDATION AND DR. SARNOW SAID SHE NEEDS A BIOPSY AND THEY WENT TO PRUDENTIAL AND PRUDENTIAL SAID WE ARE NOT GOING TO GIVE HER A BIOPSY. WE HAVE OUR OWN DOCTOR WHICH HAS MADE A DECISION THAT SHE DOESN'T NEED THE BIOPSY. UNDER THOSE CIRCUMSTANCES, I THINK IF YOU ARE UP HEARSAYING THAT PRUDENCE SHOULD, UNDER ARISSA, PREEMPTED ACTION, I THINK YOU HAVE GOT A CLASSIC CASE, BUT THIS IS NOT A CASE WHERE WE HAVE AN INDEPENDENT ACT OF PRUDENTIAL.

THEY HAVE ADMITTED THROUGHOUT THAT PRUDENTIAL HAS DONE NOTHING WRONG.

IF WE FIND VICARIOUS LIABILITY HERE, ANY HMO, THERE REALLY WOULD BE NO DIFFERENCE BETWEEN AN ITA MODEL AND A STAFF PHYSICIAN MOLD HMO IN THE STATE OF FLORIDA, CORRECT?

THAT IS ESSENTIALLY WHAT HAPPENED, BUT, YEAH, IF THE COURT FOUND THERE WAS A NONDELEGABLE DUTY OR CASE LAW UNDER STATE GROUNDS, IT WOULD TURN THE HMO INTO A STAFF MODEL.

THAT HAS NOTHING TO DO WITH THE POLICY OF ARISSA. I KNOW YOU ARGUED THAT IT WOULD, BUT THE DECISION IS AS TO WHETHER THE HMO SHOULD BE LIABLE FOR THE NEGLIGENCE OF THE DOCTORS THAT THEY EMPLOYEE OR CONTRACT WITH, REALLY HAS NOTHING TO DO WITH ARISSA, DOES IT?

IT DOES, BECAUSE UNDER THE STAFF MODELS, YOU DON'T HAVE TO LOOK TO THE PLAN AT ALL TO ESTABLISH LIABILITY. UNDER THE IPA, YOU HAVE TO LOOK TO THE PLAN. IF THEY DIDN'T HAVE THE CONTROLS AND REQUIREMENTS IN THE PLAN THAT THEY ARE RELYING ON TO SUE

PRUDENTIAL, THEN THEY WOULDN'T HAVE THE CASE. THEY WOULD ASSUME THAT YOU WENT AND GOT THE HEALTHCARE WHEREVER YOU WANTED.

ISN'T THAT WHAT YOU ARE DOING WITH THE STAFF MODEL? UNDER THE PARTICULAR PLAN, THAT THE PLAN CUTS THE DOCTOR A PAYCHECK, IN THE SAME WAY, THEN THAT, THE PROVISIONS OF THE PLAN MAY MAKE THE DOCTOR AN AGENT IN OTHER WORDS IF YOU ARE SAYING THE SAME THING IN A DIFFERENT WAY, ARE YOU NOT?

NOT BECAUSE, IN A STAFF MODEL THE PHYSICIANS ARE EMPLOYED.

HOW DOES IT GET TO BE A STAFF MODEL? ANOTHER HMO BUYS A BUILDING, SETS IT UP, BUYS THE EQUIPMENT, EMPLOYEES THE PHYSICIANS AND EMPLOYEES THE NURSES AND THEY CONTROL THE MEDICAL CARE.

THAT IS ALL WRITTEN DOWN SOMEPLACE, ISN'T IT?

BUT, YOUR HONOR, IT IS DIFFERENT FROM THE PLAN DO YOU WANT THAT, IN AN IPA HMO, WHERE THEY PUT IN REQUIREMENTS WHICH ARE SPECIFICALLY BEING ATTACKED HERE THAT, REFER OUT, YOU HAVE TO USE CERTAIN PROVIDERS. THE HMO CAN DO. THAT ONE IS AN EMPLOYEE/EMPLOYER SITUATION AND ONE IS SET UP BY A PLAN DOCUMENT THAT, AS THEY SAY, GOVERNS THE RULES BY WHICH THE MEMBER CAN ACCESS HEALTHCARE, AND SO I THINK THEY ARE TWO TOTALLY DIFFERENT SITUATIONS.

AND IF, NOW, UNDER PEAGRAM, IF THEY DID THAT, YOU WOULD AGREE THAT THE U IS -- THAT THE US SUPREME COURT HAS SAID THAT A BREACH OF DUTY UNDER THE PLAN, TO PROVIDE TREATMENT, IS NOT SUBJECT TO ARISSA TOTAL PREEMPTION, SDPLEKT.

NO.

YOU CAN'T BRING THAT CAUSE OF ACTION IN THE FEDERAL COURT, IF PRUDENTIAL FAILED TO PROVIDE NECESSARY MEDICAL CARE TO MRS. VILLAZON, CORRECT?

NO. THE ONLY THING THAT PEAGRAM HELD IS THAT THERE IS NO FIDUCIARY CAUSE OF ACTION UNDER SECTION -- IT IS NOT A SECTION 514 CASE.

IF IT HAD NOTHING DO, IT HAS GOT TO BE UNDER THE STATE COURT SYSTEM.

WE BELIEVE IN THE CASES IN MOST OF THE MIDDLE DISTRICT CASES OF FLORIDA, IT COULD BE REMOVED UNDER PROVISION 502.

UNDER PEAGRAM.

IT HAS NOTHING DO WITH THE SECTIONS OF ARISSA. IT IS 1109. IT IS SEPARATE. ASHLEY AND PEAGRAM PROVED THAT IT HAS NOTHING TO DO WITH THE PROVISIONS OF ARISSA UNDER WHICH WE HAVE SOUGHT RELIEF UNDER THIS CASE. IN THE RELATES-TO TEST, AND THIS COURT HAS FOUND THAT, UNDER THE RELATES-TO TEST, BECAUSE THE THEORY OF THE REGULATION AND THE PLANANT REGULATION ANSWER RULES UNDER WHICH THEY ARE BASING THEIR CAUSE OF ACTION, IT IS PREVENTED. PEAGRAM, THE CASES INVOLVING CRAGANY, ASHBURN, ALL OF THE CASES SUSTAIN THAT THERE IS NOTHING DO WITH THIS AND SUSTAIN THE ISSUES, AND I THINK 514 IS A GOOD LAW AND I WOULD URGE THE COURT TO TAKE A LOOK AT THOSE TWO MIDDLE DISTRICT OPINIONS. MR. CHIEF JUSTICE

THANK YOU VERY MUCH. REBUTTAL?

IF I FAYE MAYE, THE STAFF -- IF I MAY, THE STAFF MODEL AND THE IPA ARE IDENTICAL IN ALL

MATERIAL RESPECTS, BOTH IN MEDICAL DIRECTORS, BOTH HAVING DETAILED PHYSICIAN MANUALS THAT GOVERN THE PHYSICIANS' CONDUCT, BOTH HAVE PEER REVIEW, RISK MANAGEMENT, REALIZATION REVIEW AND COST OF CONTAINMENT. BOTH HAVE GATEKEEPERS, PRIMARY CARE PHYSICIANS, BOTH REQUIRE HMO PRIOR APPROVALS FOR ANY REFERRALS FOR SPECIALTY CARE. THEY ARE IDENTICAL IN EVERY RESPECT. THEY ALL PROVIDE QUALITY HEALTHCARE. WHAT, THEN, IS THE DIFFERENCE? THE STAFF MOLD, THE DOCTOR HAS A CONTRACT -- THE STAFF MODEL, THE DOCTOR HAS A DOCTOR THE DOCTOR HAS A CONTRACT THAT PAYS HIM WEEKLY, MONTHLY OR SOME OTHER BASIS, AND HE IS CALLED AN EMPLOYEE, FOR WHATEVER REASON. THEY SAY OUR DOCTOR AN INDEPENDENT CONTRACTOR AND WE LABEL HIM AN INDEPENDENT CONTRACTOR, AND BECAUSE WE PUT A DIFFERENT LABEL ON OUR DOCTOR, THAT AND SOLVES US OF ALL RESPONSIBILITY AND ACCOUNTABILITY, AND I FIND THAT TO BE VERY FRIGHT LINK, AND -- FRIGHTENING, AND I HOPE THAT IS EQUALLY FRIGHTENING TO THIS COURT.

WE HAVE 100 YEARS-PLUS OF CASE LAW THAT TALK ABOUT WHETHER SOMEBODY IS ON THE PAYROLL, WHETHER SOMEBODY HAS THEIR OWN OFFICE OR AN OFFICE THAT IS MAINTAINED BY AN EMPLOYER ARE THE CLASSIC INDICIA OF WHETHER THERE IS AN INDEPENDENT CONTRACTOR RELATIONSHIP OR AN AGENCY RELATIONSHIP. FROM THE POINT OF THE PERSON THAT GETS INJURED, THEY MAY THINK, AND THEN THEY HAVE NO CONTROL OVER HOW IT WAS SET UP. THEY GET RECOVERY IN ONE CASE AND, YOU KNOW, VICARIOUS BASIS, AND IN THE OTHER THEY DON'T, BUT THERE IS NOTHING THAT SAYS THAT YOU CAN'T SET UP YOUR RELATIONSHIP TO IMMUNIZE YOURSELF FROM VICARIOUS LIABILITY, AS LONG AS IT IS DONE IN A PROPER WAY, AND YOU ARE NOT ALLEGING ANY INDEPENDENT ACTIONS HERE OF PRUDENTIAL, IN TERMS OF CAUSING MRS. VILLAZON TO HAVE SUBSTANDARD MEDICAL TREATMENT. YOU ARE NOT SAYING DR. SARNOW WAS, HIMSELF, AN INCOMPETENT PHYSICIAN, THAT THERE WAS A BIOPSY TEST THAT PRUDENTIAL WAS TOLD ABOUT THAT IT DIDN'T AUTHORIZE, THAT ANYTHING TO DO WITH THE GATEKEEPER FUNCTION WAS IMPROPER IN THIS CASE.

THAT IS ALMOST CORRECT. MY ONLY HESITATION IS THAT I THINK THE MEDICAL NEGLIGENCE BY THE PHYSICIAN WAS SYSTEMIC TO THE HMO MODEL.

YOU ARE ALSO NOT CLAIMING HERE THAT PRUDENTIAL PUT OUT A BROCHURE THAT GAVE THE APPEARANCE THAT THIS WAS A STAFF MODEL AND TOLD YOU OR TOLD THE BENEFICIARY OR THE PATIENT OR WHATEVER THESE ARE OUR DOCTORS, YOU KNOW, HAND-SELECTED AND HAND-CONTROLLED OR WHATEVER, AND THEN THAT THEY HAD A SEPARATE DEAL. YOU ARE NOT SAYING THAT --

ACTUALLY THE PLAN DOCUMENTS DO REFER TO THE PRUDENTIAL'S SELECTION OF THESE PHYSICIANS AND THE HIGH QUALITY AND THAT THEY ARE PRUDENTIAL DOCTORS AND WHAT HAVE YOU AND BURIED IN ALL OF THAT IS A STATEMENT THAT THEY ARE INDEPENDENT CONTRACTORS, WHICH IS WHAT THEY RELY ON, SO I THINK THOSE DOCUMENTS ARE A FAR CRY FROM THE WAY IT HAS BEEN DESCRIBED, BUT I THINK JUSTICE LEWIS'S QUESTION, THOUGH, WAS, REALLY, THE, BROUGHT HOME THE POINT THAT IT IS THE CONTRACT BETWEEN THE PHYSICIAN AND THE HMO THAT REALLY DETERMINES THEIR RELATIONSHIP. IT IS A 12-PAGE CONTRACT T GOES INTO SOME DETAIL, AND ONE OF THE POINTS, COUNSEL MENTIONED THERE IS A BIG DIFFERENCE BETWEEN AN IPA AND A STAFF IS THAT THE STAFF BUILDS ITS OWN BUILDINGS AND ALL OF THAT. I DON'T KNOW THAT THAT IS NECESSARILY TRUE, BUT I DO KNOW THAT, IN THIS CASE THAT, DR. SARNOW WAS GOVERNED BY A CONTRACT THAT GAVE PRUDENTIAL THE RIGHT TO INSPECT AND MAKE SURE THAT HIS OFFICE MET THEIR CRITERIA, AND HE WAS NOT ALLOWED TO EVEN CHANGE OFFICES, WITHOUT PRUDENTIAL LOOKING AT HIS NEW SPACE AND MAKING SURE IT COMPLIED AND THAT ALL OF THE REQUIREMENTS THAT PRUDENTIAL HAD. THE CONTROL FACTOR IS CRITICAL, AND LET ME MAKE ONE OTHER POINT, WITH RESPECT TO YOUR QUESTION, JUSTICE PARIENTE, ABOUT PRUCARE PRUCARE'S INVOLVEMENT. PRUCARE WAS VERY MUCH INVOLVED IN THIS WOMAN'S TREATMENT. DR. SELIG HAD TO CALL PRUCARE TO GET PRIOR

APPROVAL TO SEND HER TO DR. SAP, SO THAT SPECIALTY REFERRAL WAS DONE AND HAD TO BE DONE WITH PRUCARE'S INVOLVEMENT. THEY DID AUTHORIZE IT. WE ARE NOT COMPLAINING THAT THEY FAILED TO AUTHORIZE OR THAT THEY REFERRED HER TO SOMEONE IN A NEGLIGENT FASHION OR DELAYED TREATMENT. BUT THEY WERE VERY MUCH INVOLVED IN HER CARE. THE PROBLEM THAT DEVELOPED IS ONE THAT IS FUNDAMENTAL TO THIS WHOLE SYSTEM, AND IF I COULD CONCLUDE, I WOULD LIKE TO CONCLUDE ON THIS POINT. HEALTH MAINTENANCE ORGANIZATIONS AGREE TO PROVIDE HEALTHCARE. I SAY IT OVER AND OVER AGAIN. I SAY IT OVER AND OVER AGAIN IN THE BRIEF, BUT THAT IS SUCH A FUNDAMENTAL DIFFERENCE BETWEEN WHAT WE HAVE GROWN UP USED TO, WHERE INSURANCE COMPANIES MERELY PAY THE BILLS. WHEN I GO TO A DOCTOR, I HAVE THE DOCTOR/PATIENT RELATIONSHIP AND I AGREE TO PAY HIM, OR I AGREE TO SUBMIT HIS BILL TO AN INSURANCE COMPANY. HE HAS NO RELATIONSHIP WITH THAT INSURANCE COMPANYMENT HE MAY TAKE ASSIGNMENT OF BENEFITS, BUT HIS DUTIES, HIS LOYALTIES ARE TO ME AND ME ALONE, BECAUSE I HAVE RETAINED HIM. I PAY HIS BILL--. MR. CHIEF JUSTICE

YOUR TIME IS UP.

THAT IS NOT THE CASE WITH THE HMOs AND IF I DO NOTHING ELSE IN ALL OF THIS, I HOPE THE COURT APPRECIATES THE DIFFERENCE BETWEEN THE TWO AND APPLIES LAW TO THE CASE. MR. CHIEF JUSTICE

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