# Charles B. Higgins v. State Farm Fire & Casualty

NEXT CASE ON THE ORAL ARGUMENT CALENDAR IS HIGGINS VERSUS STATE FARM, AND INGLES VERSUS STATE FARM. WOULD YOU? THESE CASES ARE CONSOLIDATED. ARE WE GOING TO DO HIGGINS VERSUS STATE FARM FIRST AND THEN I THINK ALWAYS VERSUS STATE -- AND THEN INGALLS VERSUS STATE FARM?

WE WOULD HAVE THEM --

YOU WILL HAVE 14 MINUTES UP AND THROUGH THE REBUTTAL, UNTIL THE REBUTTAL.

WE HAVE SPLIT THAT UP. MR. CHIEF JUSTICE

BE CAREFUL OF YOUR TIME.

YES, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS JOHN WIEDERHOLD. APPARENTLY THIS NEVER CAME UP TO THE FLORIDA SUPREME COURT, SO CONSEQUENTLY THE FOURTH DISTRICT COURT OF APPEAL FELT THAT THAT QUESTION SHOULD BE BEFORE THIS COURT. IN ADDITION -- YES.

IS THAT THE REAL QUESTION? THAT IS BEING ASKED OF THIS COURT. ARE WE JUST TALKING ABOUT WHETHER OR NOT, IN A DECLARATORY JUDGMENT ACTION, THAT YOU CAN DETERMINE FACTUAL ISSUES, OR IS IT, RAE, WHETHER HAD, IN A DECLARATORY JUDGMENT -- OR IS IT REALLY, WHETHER, IN A DLAERTORY JUDGMENT ACTION, YOU CAN DETERMINE -- DECLARATORY JUDGMENT ACTION, YOU CAN DETERMINE THE ULTIMATE FACTUAL ISSUE?

I THINK IT GOES DEEPER THAN JUST A SIMPLE FACTUAL QUESTION. WHAT IT DOES HERE, YOUR HONOR, IS OBVIOUSLY I REPRESENT HIGGINS WHO WAS THE DEFENDANT BELOW. HIGG -- HIGGINS TESTIFIES. THERE WAS AN AMENDED COMPLAINT AND MR. HIGGINS TESTIFIED. HIS TESTIMONY, IN PART, ALLEGED NEGLIGENCE. THE LADY COMES OUT WITH THE GUN. HE KNOCKS THE GUN OUT OF HER HAND. SHE FALLS TO THE GROUND, AND SHE SAYS, AT HER TESTIMONY AT THAT POINT, I GOT INJURED, SO THEN THE NEXT QUESTION THEN BECOMES THE PLAINTIFF'S ATTORNEY IN THAT CASE REPRESENTING MS. INGALLS. HE AMENDS THE COMPLAINT TO SUE ONLY FOR NEGLIGENCE. HE DOESN'T WANT TO GO FURTHER THAN THAT. HE DOESN'T WANT TO GO FOR ASSAULT AND BATTERY, PUNITIVE DAMAGES OR ANYTHING ELSE, BECAUSE BASED ON THE TESTIMONY OF MR. HIGGINS, HE, IN TURN, THAT IS INGALLS' ATTORNEY AMENDED THE COMPLAINT TO ALLEGE ONLY NEGLIGENCE. NOW, GETTING TO THE POINT IN ANSWERING YOUR HONOR'S QUESTION, IS, YES. WHAT HAPPENS THEN IS WE HAVE ONE CAUSE OF ACTION. THAT IS TO SAY NEGLIGENCE ONLY, PLED AGAINST MY CLIENT, BASED ON MR. HIGGINS'S TESTIMONY. STATE FARM, HIS INSUROR --

BUT IN REAL LIFE, THE PLEADING IS USUALLY DONE TO GET WITHIN THE COVERAGE. ISN'T THAT RIGHT?

WELL, IT MAY BE BY THE PLAINTIFF, BUT I REPRESENT THE DEFENDANT, YOUR HONOR, AND I DON'T -- IF THE -- MS. INGALLS AND HER ATTORNEY IS DOING THAT, SO MUCH THE BETTER FOR MY CLIENT OBVIOUSLY, BUT WHAT I WANT TO KEEP REMINDING THE COURT, AND IN THE FOURTH DISTRICT, IN THEIR OPINION, NOT ONCE DID THEY POINT OUT THE FACTS, THE TESTIMONY, EITHER BY DEPOSITION OR TRIAL, THAT MY CLIENT --

IT WORKS TO THE BENEFIT OF YOUR CLIENT, ALSO, IF IT COMES WITHIN THE COVERAGE.

OBVIOUSLY. BECAUSE THEN HE HAS COVERAGE, BUT THEN YOU HAVE TO LOOK AT THE OVERALL SCHEME OF THINGS, AND YOU SAY WHERE, FIRST OF ALL, WHERE IS THERE A COVERAGE DISPUTE AT ALL? WHAT NEEDS TO BE CONSTRUED, I SHOULD SAY, UNDER THE POLICY? WHAT PROVISION UNDER THE POLICY, AND I SAY THERE IS NONE. SOUCH AS IN THE -- SUCH AS IN THE BERTAMPCO CASE AT THE FOURTH DISTRICT, THAT WAS A LIQUOR LIABILITY, AND STATE FARM RELIES UPON THAT, THAT WAS A LIQUOR LIABILITY EXCLUSION AND AN ASSAULT AND BATTERY EXCLUSION. THE SPRNS COMPANY IN THAT CASE -- THE INSURANCE COMPANY IN THAT CASE STIPULATED AND AGREED THAT NO FACTS THAT HAD TO BE DETERMINED IN THE UNDERLYING CASE WOULD HAVE TO BE DETERMINED IN THAT COMPLAINT FOR DECLARATORY RELIEF, TO INTERPRET THE LIQUOR LIABILITY PROVISION AND THE ASSAULT AND BATTERY PROVISION. IN THIS CASE, OBVIOUSLY THE FACTS ARE TOGETHER. THERE IS COMMON FACTS. FACTS THAT HAVE TO BE DECIDED UNDER THE UNDERLYING CASE. ALSO, NATURALLY, WOULD HAVE TO BE DECIDED IN THE COMPLAINT FOR DECLARATORY RELIEF, WHICH GETS BACK TO JUSTICE QUINCE'S QUESTION. THAT IS TO SAY THE INSURANCE COMPANY, THEN, TAKES CONTROL OF THE LITIGATION, AND THEN PROVIDES TO -- AND THEN PROCEEDS TO PRESENT AND TO FASHION WHAT THEY PERCEIVE SHOULD BE THE PLAINTIFF'S CASE TO THEIR ADVANTAGE AND IN THE MANNER AND FASHION THEY WANT TO DO IT. NOW, WHY SHOULD THEY BE ABLE TO DO THAT AT ALL, WHEN MY CLIENT HAS ONLY BEEN SUED FOR NEGLIGENCE? WHY SHOULD THEY SAY THIS IS AN INTENTIONAL ACT? MY CLIENT WASN'T SUED FOR AN INTENTIONAL ACT.

WHAT WOULD HAPPEN IN THIS CASE, IF THE, IF THE LIABILITY CASE WAS TRIED? TERE WOULD BE AN INTERROGATORY THAT WOULD SAY WAS YOUR CLIENT NEGLIGENT, AND WAS THAT A CAUSE OF DAMAGES, AND THE JURY ANSWER IS YES.

THAT'S CORRECT.

AT THAT POINT, IS THE INSURANCE COMPANY IN POSITION TO INSTITUTE A DECLARATORY JUDGMENT ACTION ON COVERAGE, OR IS THAT THE END OF THE COVERAGE DISPUTE?

WELL, I WOULD LIKE TO RESPOND AND SAY THAT WOULD BE THE END OF THE COVERAGE DISPUTE, BASED ON THE ALLEGATIONS AGAINST MY CLIENT. HOWEVER, IN RESPONSE TO THAT QUESTION, SHOULD SOMETHING COME OUT AT THE TIME OF THE TRIAL, FROM THE TESTIMONY OF MS. INGALLS, THAT MY CLIENT ALLEGED ASSAULTED AND BATTERED HERE, IN ADDITION TO THE NEGLIGENCE THAT I TALKED ABOUT, THAT IS THE GUN INCIDENT, WHERE HE TRIED TO KNOCK IT OUT OF HER HAND, THEN AT THAT POINT, STATE FARM WOULD BE IN A POSITION TO FILE A COMPLAINT FOR DECLARATORY RELIEF, OR, AS I SUGGESTED IN THAT, AND I REALIZE IT IS DICTA, BUT THE EMPLOYERS VERSUS LAVENDAR CASEY CITED, THE THIRD DISTRICT CASE, AND I CAN TELL YOU I HAVE NEVER SEEN IT CITED AND I HAVE BEEN DOING DEFENSE WORK FOR A NUMBER OF YEARS AND I HAVE TRIED TO INTERVENE IN A LOT OF CASES, AND I HAVE NOT BEEN SUCCESSFUL IN VERY MANY.

BUT THE WHOLE PROBLEM COMES DOWN TO THE FACT THAT, IF THE INSURANCE COMPANY IS GOING TO BE BOUND BY A DETERMINATION, THEN CERTAINLY THE INSURANCE COMPANY IS, HAS TO HAVE THE RIGHT TO CROSS-EXAMINE THE WITNESSES, TO MAKE ARGUMENT, TO DO ALL OF THE THINGS TO CONTEST THOSE ISSUES, NOT JUST IF SOMETHING HAPPENS TO COME UP IN THE RECORD.

WELL, YOUR HONOR, I DON'T DISAGREE WITH THAT CONCEPT, IF MY CLIENT WAS BEING SUED FOR NEGLIGENCE UNDER THE CIRCUMSTANCES. AS I UNDERSTAND IT, AND WHAT THE CASE WOULD HAVE BEEN PRESENTED, AT TRIAL, HAD WE GONE TO TRIAL IN THE UNDERLYING CASE, THERE WOULD AND SLICE, IN THERE, OF THE SFACKTS OF WHEN THIS LADY -- OF THE FACTS OF WHEN THIS LADY SAYS SHE WAS INJURED. NOW, SHE SAYS SHE WAS INJURED WHEN MY CLIENT TRIED

TO KNOCK THE GUN OUT OF HER HAND. HOWEVER, GOING BACK TO THE SITUATION THAT I HAD WITH THE LEAVENEDER CASE -- THE LAVENDER CASE, STATE FARM CAN SIT THERE AND MONITOR THE UNDERLYING CASE, AND IF THE PLAINTIFF IN THIS CASE, MS. INGALLS, TESTIFIES THAT, YEAH, MR. HIGGINS WENT FURTHER THAN THAT AND DID SOMETHING ELSE WHICH CAUSED MY INJURY, STATE FARM AT THAT POINT ALTHOUGH I DON'T AGREE WITH THE CONCEPT, I BELIEVE THEY PROBABLY WOULD BE ABLE TO EITHER FOLLOW DEC ACTION OR SUBMIT SPECIAL VERDICT INTERROGATORIES, AS WAS SUGGESTED IN THE LAVENDER CASE, FOLLOW THE -- MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL.

THANK YOU YOUR HONOR. MR. CHIEF JUSTICE

MR. DECKERT.

GOOD MORNING, YOUR HONORS. I REPRESENT PATRICIA INGALLS AND REPRESENTED HER IN THE CIRCUIT COURT AND IN THE DEC ACTION.

LET ME ASK YOU A QUESTION. DO YOU CONSTRUE THE FOURTH DISTRICT DECISION AS CONSTRUEING A BRIGHT-LINE RULE THAT, ANY TIME THAT THERE IS A COVERAGE DISPUTE THAT, THE COVERAGE ISSUE HAS TO BE TRIED FIRST?

NO, I DO NOT.

SO, CANAL INSURANCE COMPANY, THE SUPREME COURT CASE, CERTAINLY ANTICIPATES THAT THERE ARE GOING TO BE CIRCUMSTANCES WHERE THE DECLARATORY JUDGMENT ACTION IS TRIED FIRST.

I BELIEVE SO.

CORRECT? SO WHAT IS THE, WHAT, IF YOU WERE WRITING THIS DECISION, WHAT AND CERTAINLY WE KNOW THAT ISSUES OF FACT CAN BE DECIDED IN DECLARATORY JUDGMENT ACTIONS, WHAT WOULD YOU BE SAYING THAT THE LAW IS IN THIS AREA, CONCERNING WHERE THERE ARE COVERAGE DISPUTES AND WHERE AN INSURANCE COMPANY WANTS THE COVERAGE ISSUE RESOLVED?

THANK YOU. I THINK I KNOW EXACTLY WHAT I WOULD SAY, AND WHAT I WOULD SAY WOULD EMPHASIZE YOUR OPINION IN PE -- BERTAMPCO, AND THAT IS THE LANGUAGE WHICH IS NOTED IN THE COMMENTARY WHAT WAS AT ISSUE IN THE BERTAMPCO CASE, AND THAT IS MATTERS OF LIQUOR LIABILITY AND ASSAULT AND BATTERY WHICH WERE INHERENT IN THE POLICY AND COULD BE DETERMINED COMPLETELY AND TOTALLY INDEPENDENTLY OF THE FACTS AND CIRCUMSTANCES OF THE UNDERLYING ACTION, AND AS WAS NOTED, THE INSURER CONTENDS THAT NEEDS BASIS TO DETERMINING COVERAGE REQUIRES RESOLUTION OF THE ISSUE OF WHETHER INSURED'S CONDUCT WAS INTENTIONAL, WHICH IT CONCEDES IS A FACT COMMON TO THE UNDERLYING ACTION. SO MY ANSWER TO JUSTICE PARIENTE'S QUESTION WOULD BE THAT, WHEN THE CIRCUMSTANCES RELIED UPON BY THE CARRIER TO DENY COVERAGE ON THE CLAIM ARE INHERENT IN THE UNDERLYING FACTS AND CIRCUMSTANCES OF THE INCIDENT SUED UPON IN THE UNDERLYING CLAIM, THAT MUST BE DETERMINED FIRST, AND THE FALLY IS OF NOT DOING THAT -- AND THE FALL AY IS OF NOT DOING THAT -- -- FALLACY OF NOT DOING THAT IS A CARRIER CLAIM, A SIMPLE NEGLIGENCE CLAIM. I DON'T AGREE WITH WHAT MR. WIEDERHOLD SAID HAPPENED AT TRIAL, BUT THESE KINDS OF CONTROVERSY IS THAT, WHEN THESE FACTS ARE SO INHERENT IN THE UNDERLYING ISSUES OF THE CASE, OF THE UNDERLYING CLAIM, THAT CLAIM GETS TRIED FIRST.

LET ME ASK YOU THIS THEN. ASSUMING THAT WE DECIDE THAT THEY HAD A DUTY TO DEFEND,

AND THAT THE INDEMNITY PORTION OF THIS DECLARATORY JUDGMENT ACTION SHOULD WAIT UNTIL THE UNDERLYING CASE HAS BEEN DECIDED, SO YOU HAVE STATE FARM COMING INTO THE DEFENDANT'S INSURED. IT IS INSURED IN ORDER TO HAVE COVERAGE, NEEDS, NEEDS THIS ACTION TO FALL INTO A NEGLIGENCE CAUSE OF ACTION, CORRECT? AND THE INSURANCE COMPANY, OUTSIDE OF DEFENDANTING ITS INSURED, WANTS THIS TO -- OUTSIDE OF DEFENDING ITS INSURED WANTS THIS TO FALL INTO A WILLFUL ACT, SO DOWN THE ROAD THEY ARE NOT GOING TO HAVE TO INDEMNIFY, SO HOW DO YOU DEFEND SOMEONE, WHEN YOUR INTEREST, ACTUALLY, IS SORT OF ADVERSE TO WHAT THE DEFENDANT'S INTERESTS WOULD BE IN THIS?

THANK FOR YOU RAISING THAT POINT. THE POINT THAT WE MAKE, IN THIS POINT OF APPEAL IN THIS CASE, IS THAT THE PLAINTIFF CHOOSES WHAT CLAIMS THE PLAINTIFF CHOOSES TO MAKE. BASED UPON THOSE CLAIMS, IF THE CARRIER BELIEVES THAT THEY FALL WITHIN EXCLUSIONS OF ITS POLICY, THEN THE CARRIER HAS A RIGHT TO ASSERT THAT BELIEF. NOW, HOW DO THEY RESOLVE IT? WELL, IN THIS PARTICULAR CASE, THEIR ASSERTION WAS THAT THE CLAIMS MADE WERE BASED UPON NOT COVERED, BASED UPON CERTAIN EXCLUSION INS HIS POLICY. THOSE EXCLUSIONS BASICALLY INVOLVE THE QUESTION OF THE INTENT OF THE INSURED TO CAUSE THE INJURIES CLAIMED AND WHETHER THE INJURIES CLAIMED WERE CAUSED BY WILLFUL OR INTENTIONAL ACTS. THAT IS THE ESSENCE OF THE FACT QUESTIONS, MIXED QUESTION FACT OF LAW, ULTIMATE FACT QUESTION THAT, THE COVERAGE DEFENSES OR COVERAGE ASSERTION WAS BASED UPON. THERE IS NO WAY FOR THOSE QUESTIONS TO BE ANSWERED, UNTIL THE EVIDENCE HAS BEEN PRESENTED, AS TO WHAT THE PLAINTIFF CLAIMED.

SO YOU ARE, THEN, ADVOCATING THE POSITION THAT THE SECOND DISTRICT TOOK IN THE MARKHAM CASE? WHICH IS THAT YOU CAN DECIDE THE RIGHT TO DEFEND PRETRIAL, BUT IF THE INDEMNITY QUESTION INVOLVES THE ULTIMATE QUESTIONS IN THE LAWSUIT, YOU HAVE TO WAIT UNTIL THE LAWSUIT HAS BEEN RESOLVED.

YES, YOUR HONOR. I THINK, AND THERE IS NO QUESTION THERE IS CONFLICTING VALUES AT STAKE HERE. JUDGE SHARP MENTIONS IT IN HIS DISSENT IN CONDE. IT IS MENTIONED IN THE IRVING AND BOND CASES. WHO MAKES THE ULTIMATE DETERMINATION OF CAUSE, IF THE ULTIMATE DETERMINATIONS WERE NOT COVERED? IN THE ATTEMPTS TO DELVED THEMSELVES, THERE IS A BROADER COVERAGE TO INDEMNITY, AND THEY ARE PERMITTED THAT, AND I THINK THE COMBINATION OF WHAT CANAL SAID AND WHAT LAVENDER SAID IS HOW TO DEAL WITH THIS. YOU CAN HAVE THE CARRIER FILE ITS DEC ACTION. YOU CAN HAVE THOSE ACTIONS CONSOLIDATED. THEN THE TRIAL JUDGE DETERMINES THE ORDINARILY PROGRESS OF THE TRIAL OF THOSE TWO CASES. MY SUGGESTION WOULD BE THAT THE PLAINTIFF GETS TO TRY ITS PLAINTIFF'S CASE NOT THE CARRIER AS HAPPENED IN THIS CASE. THIS CARRIER GOT TO TRY THIS CASE AS AN ASSAULT AND BATTERY CASE AND IT WAS NOT AN ASSAULT AND BATTERY CASE. PLAINTIFF TRIES ITS CASE. DEFENDANT DEFENDS ITS CASE. CARRIER'S LAWYER MAKES A GOOD FAITH DEFENSE FOR THAT CLIENT, BASED UPON THE CLAIMS ASSERTED NOT CLAIMS THAT MIGHT HAVE BEEN ASSERTED OR COULD HAVE BEEN ASSERTED.

WELL, BUT WHAT PRACTICALLY GOES ON, DOESN'T IT, IS THAT THE CARRIER HAS GOT $100,000 POLICY. AND IF THE CARRIER, AND THERE IS A $A 00,000 -- A $500 JURY, NOW THE CARRIER -- AND THERE IS A $500 INJURY, NOW THE CARRIER -- AND THERE IS A $500,000 INJURY, NOW THE CARRIER DOESN'T HAVE THE ABILITY TO GO AHEAD AND SETTLE THAT CLAIM BECAUSE IT DOESN'T KNOW WHETHER THERE IS COVERAGE OR NOT, UNTIL THERE IS A DETERMINATION MADE OF THOSE ISSUES, SO IN ORDER TO FACILITATE THAT, SHOULDN'T THEY GO AHEAD AND TRY THE DEC ACTION FIRST, AND THAT WAY EVERYBODY HAS GOT ALL THEIR CARDS ON THE TABLE, AS TO WHETHER THERE IS OR ISN'T COVERAGE?

I RESPECTFULLY SUBMIT THAT THE PROBLEM THERE IS THAT, UNDER THE DEC ACTION, THE CARRIER HAS THE BURDEN OF PROOF. HAS TO PRESENT ITS CASE. SO WHAT CLAIM IS IT PRESENTING? WHAT EVIDENCE IS IT GOING TO PRESENT AS TO WHAT THE UNDERLYING IS

CLAIMED? IT IS GOING TO PRESENT ITS VERSION OF THE CLAIM.

THAT IS TRUE, WHETHER IT GOES FIRST OR SECOND.

HOWEVER, WHEN THE PLAINTIFF PRESENTS ITS CASE, NOW THAT IS THE EVIDENCE THAT IS PRESENTED. THE JURY MAKES ITS FINDINGS, BASED UPON THAT EVIDENCE. NOW, IF THE CARRIER, AND THAT IS WHERE WE GOT A LITTLE INTERRUPTED -- MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL.

IF THE CARRIER BELIEVES, BASED ON ITS TRIAL AND VERDICT, BELIEVES THAT IT HAS BASIS FOR DENIAL, I WILL GIVE AN EXAMPLE, THEY PRESENTED NO CAUSE WHATSOEVER OF MEDICAL CAUSATION. NOW, IT IF WE FIND AGAINST US AND THE CARRIER HAS DAMAGES AND IF THE CARRIER BELIEVES THERE WERE WILLFUL ACTS AND THAT WAS NOT WHAT CAUSED THE DAMAGE OR THAT WAS WHAT CAUSED THE DAMAGE, THEN THEY CAN BRING IN THOSE WILLFUL ACTS, MUCH LIKE A CARRIER CASE WOULD BE DONE, THAN IS HOW I THINK IT OUGHT TO BE DONE. MR. CHIEF JUSTICE

THANK YOU. MS. RUSSO.

MAY IT PLEASE THE COURT. ELIZABETH RUSSO FOR THE RESPONDENT STATE FARM FIRE AND CASUALTY. THERE ARE TWO ISSUES THAT THE FOURTH DISTRICT PRESENTED FOR THIS COURT. THE FIRST ONE IS WHETHER A DECLARATORY ACTION MAY BE USED TO DETERMINE FACT ISSUES ON WHICH INSURANCE COVERAGE DEPENDS AND I THINK --

MS. RUSSO, AS WE GO INTO THIS CERTAINLY WE KNOW THAT FACTS ARE DETERMINED IN VIRTUALLY EVERY COVERAGE CASE. THIS ALMOST APPEARS TO BE A SPRRBL ISSUE TO GET DOWN TO -- A SUPERFICIAL ISSUE TO GET DOWN TO WHAT IS REALLY GOING ON, AND TAKE AN INTERSECTIONAL COLLISION. IT HAPPENS EVERY DAY IN EVERY CITY OF EVERY COUNTY AROUND THIS STATE. WHO RAN THE RED LIGHT AND HOW WAS WERE YOU GOING AND DID YOU RUN IT. MY GOODNESS, WHY COULDN'T THE INSURANCE COMPANY TAKE THE POSITION THAT THE DRIVER WAS GOING SO VERY FAST THAT THEY WENT THROUGH THE INTERSECTION IN SUCH A RECKLESS AND INTENTIONAL MANNER THAT THERE WOULD BE NO COVERAGE, SO THEREFORE WE WOULD TRY EVERY ONE OF THESE CASES AS A COVERAGE CASE FIRST, WITH THE INSURANCE COMPANY PRESENTING ALL OF THE ADVERSE FACTS AND HOW AWFUL AND NASTY THIS WAS OR THE REVERSE, THAT I DON'T HAVE A DUTY TO DEFEND THIS BECAUSE MY INSURED DIDN'T RUN THAT READ LIGHT, SO I AM GOING TO GO IN AND LET'S TRY THAT FIRST, SO WHAT IS GOING TO HAPPEN WITH THESE CASES, IF WE TURN THEM UPSIDE DOWN, THAT HAS NOT BEEN OCCURRING IN FLORIDA, AT LEAST AS LONG AS I HAVE BEEN A LAWYER IN FLORIDA? THAT IS MY CONCERN. IT JUST TURNS EVERYTHING ON ITS HEAD.

YES, YOUR HONOR. I THINK THE REASON THAT I BROUGHT UP THAT ISSUE IS OUT THERE, IS THAT THERE ARE THE OLD FLORIDA SUPREME COURT CASES THAT SAID YOU COULDN'T USE DEC ACTION TO SAY DETERMINE FACT ISSUES IN INSURANCE CUFF RANG CASES, AND THERE IS A CONCERN BY THE FOURTH DISTRICT THAT THOSE BE OVERRULED EXPLICITLY OR SOMETHING BE DONE WITH THOSE, BUT IT IS INTERESTING THAT YOU BRING THAT UP AS AN EXAMPLE, BECAUSE I THINK THAT WHERE THESE COVERAGE DISPUTES COME UP OR WHERE YOU SEE THEM MOST OFTEN OVER THE HISTORY OF THE JURISPRUDENCE, WHEE THERE ARE PROBLEMS, ARE IN THESE INTENTIONAL ACTS, AS IN BATTERY. YOU SEE THEM COME UP UNDER THE HOPE OWNERS OR SOMETIMES THE -- UNDER THE HOMEOWNERS OR SOMETIMES THE COMMERCIAL WHERE THERE IS A BATTERY OF SOME TYPE OR SOME VIOLENT ACT AND THEN IT GETS ARCKTIZED AS NEGLIGENCE. WHAT YOU DON'T SEE FOR ALL THESE AND I WAS GOING TO USE IT AS AN EXAMPLE OF WHY IT IS NOT A PROBLEM. WHAT YOU DON'T SEE IS A LOT OF DEC ACTIONS WHERE INSURANCE COMPANIES ARE TRYING TO SAY THIS WAS AN AUTOMOBILE ACCIDENT, BUT I WANT TO CHARACTERIZE IT AS AN INTENTIONAL AUTOMOBILE ACCIDENT, THAT THE DEFENDANT

INTENTIONALLY RAN INTO THAT PLAINTIFF, SO THAT I WON'T HAVE TO PAY, SO I AM GOING TO FILE A DEC ACTION ON IT. I MEAN, FOR ALL THE YEARS THAT THE, THESE INTENTIONAL ACTS CASES HAVE BEEN COMING UP, NO ONE, NO INSUROR HAS TRIED TO BRING ONE IN AN AUTO CASE.

PRECISELY BECAUSE THEY HAVE HAD NOT HAD THE -- THEY HAVE NOT HAD THE PROBLEM THAT I FORESEE IF YOU TURN IT ON ITS HEAD. THAT IS EXACTLY WHERE YOU ARE HEADED, IF YOU TURN IT ON ITS HEAD ON ALL THESIS CASES. IT HAS NOT BEEN IN THAT AREA, AND THE ISSUE AS TO WHETHER YOU CAN DECIDE FACT, IN MY MIND WAS DECIDED LONG AGO, AND THAT IS NOT EVEN THE ISSUE WHAT THEY ARE DEALING WITH HERE. THAT IS PRECISELY TURNING IT ON ITS HEAD. JUSTICE WELLS SAYS TO PROTECT THE CARRIER? AND RESULTING IN SOMETHING THAT IS BALANCED AND FAIR FOR EVERYBODY.

YOU ARE CORRECT THAT COMPETING INTERESTS SHOULD BE BALANCED, BUT THE PRESUMPTION THAT ALL INSURANCE COMPANIES ARE GOING TO BRING ACTION IN BAD FAITH AND BRING DEC ACTIONS FROM FAILING TO HAVE TO PAY. WHERE IT COMES UP IS IF THERE IS SOME EVIDENCE OF AN EXCLUSION BEING APPLICABLE, AND THE PROBLEM THAT IS BEING PRESENTED HERE IS, HEN THERE IS SUCH EVIDENCE, THEY ARE REFERRING TO IT AS STATE FARM PUTTING ON ITS EVIDENCE THAT THIS WAS A BATTERY OR SOMETHING. STATE FARM DIDN'T MAKE ANY OF THIS UP. STATE FARM BROUGHT ON NO EVIDENCE OF ITS OWN. IT WAS ALL FROM PETITIONER INGALLS TESTIFIED AT THIS TRIAL AND THE DEFENDANT.

BUT YOU DO AGREE THAT, IF WE ACCEPT YOUR POSITION, IT WOULD AUTHORIZE THAT TYPE OF PROCEDURE. DO YOU NOT?

IT WOULD AUTHORIZE AN INSURANCE COMPANY TO BRING A DEC ACTION.

IN A RED LIGHT SITUATION, THE ONE I JUST DESCRIBED TO YOU, IT WOULD AUTHORIZE THAT.

IT WOULD AUTHORIZE THAT, BUT IT, ALSO, WOULD ALLOW THE TRIAL COURTS TO HAVE DISCRETION AS TO WHETHER THAT DEC ACTION SHOULD BE TRIED FIRST OR SHOULD BE TRIED AFTERWARDS. WHICH IS WHAT WAS SUGGESTED IN THE CANAL VERSUS REED CASE THAT, THE TRIAL COURTS HAVE DISCRETION TO DECIDE IT. MR. CHIEF JUSTICE

JUSTICE QUINCE.

A DEC ACTION IS BASICALLY TO DECLARE THE RIGHTS AND STATUS OF PARTIES. CORRECT? WHAT ARE YOUR RIGHTS?

OR OBLIGATIONS.

UNDER A PARTICULAR CONTRACT, AS IN THIS CASE AN INSURANCE CONTRACT. CORRECT?

YES, YOUR HONOR.

WHAT CLAUSE OF THE INSURANCE CONTRACT ARE WE CONSTRUING HERE? BECAUSE IT SEEMS TO ME THAT IT IS CLEAR THAT THE INSURANCE COMPANY IS LIABLE, IF IT IS A NEGLIGENCE ACTION. THE INSURANCE COMPANY IS NOT, IF IT IS A WILLFUL ACT. THE POLICY IS PRETTY CLEAR ON THOSE TWO THINGS. SO WHAT ARE WE CONSTRUING, UNDER THE POLICY HERE?

YOU ARE NOT, YOU DON'T HAVE TO CONSTRUE ANY OF THE POLICY PROVISIONS. YOU SIMPLY HAVE TO HAVE FACTUAL DETERMINATION AS TO WHETHER THE ACTIONS THAT WERE INVOLVED HERE WITH WILLFUL AND INTENTION -- WERE WILLFUL AND INTENTIONAL OR MALICIOUS.

SOUGHT EXCLUSION THAT JUSTICE WELLS TALKED ABOUT HERE ARE WE NOW GOING TO PREEMPT THE PLAINTIFF'S CASE AND ALLOW THE INSURANCE COMPANY TO NOW BRING THE CASE?

WELL, THE ANSWER TO THAT IS, AGAIN, IT IS GOING TO BE DISCRETIONARY WITH THE TRIAL COURTS, DEPENDING ON THE EVIDENCE, BUT WHAT THE PLAINTIFF AND DEFENDANT ARE SUGGESTING HERE, AS THEY WERE IN THE UNDERLYING CASES, THE PLAINTIFF IS SAYING ALL I HAVE TO DO, EVEN IF SOMEONE COMES AND INTENTIONALLY SHOOTS ME IN THE HEAD, I HAVE TO JUST FILE A NEGLIGENCE COMPLAINT, AND I CALL IT NEGLIGENCE, AND THEN THE DEFENDANT IS RELYING ON HIS OWN TESTIMONY THAT OH, I NEVER INTENDED TO CAUSE ANY INJURY, AND IT JUST ALL HAPPENED BY ACCIDENT. SO THAT IS WHAT THE PLAINTIFF AND DEFENDANT WANT TO YOOB, AND YET THERE IS INDEPENDENT EVIDENCE THAT CAME FROM THIS PLAINTIFF, FOR EXAMPLE, WHEN SHE HER INITIAL MEDICAL RECORDS AND WHEN SHE WENT AND SWORE OUT HER POLICE COMPLAINT, AND AS LEGAL SECRETARY OF 20 YEARS TYPED HER OWN FIRST COMPLAINT WITHIN A MONTH OF THE INCIDENT HAPPENING, WHERE SHE IS DESCRIBING ABOUT BEING BODY SLAMMED UP AGAINST THE DOOR AND SLAPPED AND THROWN DO THE GROUND AND -- THROWN TO THE GROUND AND INJURIES HAPING FROM THAT. WHAT IS THE OBLIGATION OF THE INSURANCE COMPANY TO PAY JUST CLAIMS BUT ALSO, AS THIS COURT POINTED OUT IN BERGER, WHAT DOES THIS COMPANY HAVE THE OBLIGATION TO PAY OR NOT TO PAY?

YOU THERE FOR BELIEVE SHOULD BE THE LAW IS THAT THE TRIAL JUDGE IN EACH CASE EXERCISES DISCRETION AS TO WHETHER TO TRY THE CASE FIRST OR NOT. IN A CASE, YOU SAY MANY OF THESE CASES DEAL WITH THE QUESTION OF WHETHER SOMETHING IS INTENTIONAL OR NEGLIGENT. WHAT WOULD BE THE GUIDELINES FOR THE TRIAL JUDGE, IN, WHERE THE FACTS ARE INTERTWINED, AS THEY ARE IN A CASE WIKE LIKE THIS, WHAT WOULD THE -- IN A CASE LIKE THIS, WHAT WOULD BE THE GUIDELINES IN A CASE LIKE THIS TO BE, WHERE THE JUDGE IS TO DECIDE WHETHER THE COVERAGE CASE IS TO BE TRIED FIRST OR AFTER THE PLAINTIFF BRINGS --

I THINK THE CONSIDERATION IS OFTEN, IS OFTEN THE SAME, WHICH IS EVERYBODY HAS AN INTEREST IN FINDING OUT WHETHER THERE IS GOING TO BE COVERAGE OR NOT, AND I DON'T AGREE THAT THESE FACTS ARE INTHER TWIND AND LET ME EXPLAIN WHY -- ARE INTERTWINED AND LET ME EXPLAIN WHY.

SO THEREFORE, IN EXERCISING DISCRETION WHAT YOU WOULD SAY THE LAW SHOULD BE IS THAT, BECAUSE EVERYONE HAS AN INTEREST IN DETERMINING COVERAGE FIRST, THAT SHOULD BE THE DEFAULT RULE, THAT IS COVERAGE GETS TRIED FIRST?

WELL, I THINK DIFFERENT FACTS CIRCUMSTANCES, MAY GIVE RISE TO DIFFERENT THINGS, BUT IT MAY BE A GOOD DEFAULT RULE, WHICH IS THIS COURT HAD AN AMENDMENT TO ASK FOR IT TO BE RAPIDLY REVIEWED.

MY PROBLEM IS WHAT HAPPENED TO ALL OF THE LAW THAT SAYS CLEARLY THE OBLIGATORS' INTEREST TO FILE A COMPLAINT IS GREATER THAN THE DUTY TO DEFENDED HIS THE DUTY TO INDEMNIFY. WOULDN'T YOU SAY THE FACTS GO OUT THE DOOR, WHEN YOU SAY THAT, WHETHER THE FACTS ARE INTERTWINED OR NOT, REALLY THE COVERAGE GETS TRIED FIRST IS THE DEFAULT RULE, REALIZING AS JUSTICE WELLS POINTED OUT, THAT IF THERE IS COVERAGE, THERE MAY BE A PROBLEM WITH SETTLEMENT, BUT HOW DOES THAT TIME-HONORED PRINCIPLE WORK IN THIS NEW WORLD OF TRYING COVERAGE FIRST?

AS HAPPENED IN THIS CASE, WE DID, AS SOON AS THERE WERE ALLEGATIONS OF NEGLIGENCE, THE INITIAL COMPLAINT JUST ALLEGED ASSAULT AND BATTERY. WHEN THERE WERE, WAS AMENDED TO ALLEGE NEGLIGENCE, THE INSURANCE COMPANY UNDERTOOK THE DEFENSE UNDER RESERVATION OF RIGHTS, AND HAS CONTINUED TO PROVIDE THE DEFENSE, AND I THINK THAT THE RULE SHOULD WORK. WE WILL HAVE TO CONTINUE TO PROVIDE THE DEFENSE, BECAUSE IN SOME CASES, THE COVERAGE ISSUE MAY BE COMPLETELY UNRELATED. AS, FOR EXAMPLE, WHERE AN INSURED HAS MADE MATERIAL MISREPRESENTATIONS IN THE APPLICATION OR SOMETHING THAT HAS NOTHING DO WITH THE UNDERLYING DISPUTE. BUT THE INSUROR IS GOING TO HAVE TO PROVIDE THE DEFENSE, UNTIL THERE IS A ULTIMATE DETERMINATION, THAT

THERE IS NO COVERAGE UNDER THIS POLICY. AND SOMETIMES THE CASES GO ON SIMULTANEOUSLY AND SOMETIMES THE JUDGE, THE TRIAL JUDGE MAY DECIDE, AS IN THIS CASE, LOOK, LET'S FIND OUT WHAT THE JURY IS GOING TO MAKE OF THIS EVIDENCE OF WHAT THE PLAINTIFF ALLEGED THIS INCIDENT WAS ALL ABOUT.

ARE YOU SAYING THAT, THEN, AFTER THEY FIND OUT THAT THERE IS NO COVERAGE UNDER THE COVERAGE CASE, THAT THEY GO ON AND DEFEND MR. HIGGINS IN THE LIABILITY CASE?

NO. IF IT IS ULTIMATELY DETERMINED WITH AN APPELLATE AFFIRMANCE AND NO FURTHER REVIEW, IT IS AT FINAL JUDGMENT OF NO COVERAGE, THEN IT HAS BEEN DETERMINED THAT THIS INCIDENT, WHATEVER IT IS, DOES NOT FALL WITHIN THE POLICY, AND THEREFORE THE DUTY TO DEFEND ALSO, DETERMINENATES. -- TERMINATES AT THAT POINT, BECAUSE THE INSURED DIDN'T PAY FOR THAT COVERAGE AND DIDN'T PAY FOR THAT, I MEAN, I RECOGNIZE THAT IT IS BROADER THAN THE DUTY TOYS DEFEND, WHICH IS WHY YOU HAVE TO, UNTIL YOU -- THAN THE DUTIES TO DEFEND, WHICH UNTIL YOU HAVE THAT INFORMATION, YOU ARE GOING TO HAVE TO PROVIDE THE DEFENSE. IN THE CONDE CASE, UNTIL YOU GET IT RESOLVED AND IT IS HULTLY DETERMINED THAT THERE IS NO COVERAGE, THE INSURED IS PAYING FOR DEFENSES WHERE THERE WAS NEVER REALLY ANY COVERAGE, TO BEGIN WITH, AND THERE IS REALLY A LIMITED NUMBER OF THESE CASES. IT ISN'T IN EVERY INSURANCE CASE AS I SAY, THAT THE INSUREDS BRING DEC ACTIONS AND TRY TO RAISE WHATEVER, I WILL TRY TO SAY THAT HE WAS DRIVING TOO FAST FAST. THERE IS ALWAYS SOME FACTUAL BASIS TO TRY TO BRING IT UP.

WHAT WOULD KEEP SOME COMPANIES FROM DOING THAT, AS LONG AS THEY CAN SAY YOU CAN BRING A DEC ACTION, AS LONG AS THERE IS A DETERMINATION TO BE MADE OF WHAT HAPPENED.

BUT HERE --.

ASSUMING THAT THERE IS.

THEN AGAIN.

I GET BACK TO WE ARE DETERMINING THE PLAINTIFF'S CASE IN THIS DEC ACTION, IF ANY TIME THERE IS ANY FACTUAL ISSUE, YOU CAN JUST BRING A DEC ACTION, AND IT DOESN'T INVOLVE A CONSTRUCTION, AT ALL, OF THE INSURANCE POLICY. OF -- I AM HAVING A HARD TIME SEEING HOW THIS WOULD NOT APPLY ACROSS THE BOARD, ANY TIME THERE IS ANY KIND OF QUESTION ABOUT THE EXTENT OF THE COVERAGE. EVEN IF YOU AGREE, THAT THIS FALLS WITHIN, SAY, THE NEGLIGENCE PORTION OF THE INSURANCE POLICY, BUT THERE IS SOME OTHER FACTUAL ISSUE THAT MAY LIMIT THE INSURANCE COMPANY COMPANY'S LIABILITY, YOU GET TO DETERMINE IT IN A DEC ACTION. ISN'T THAT WHAT YOU END UP WITH, IF WE ACCEPT YOUR ARGUMENT?

NO. IT IS GOING TO BE THE CASES WHERE THE COVERAGE ISSUE IS THE ULTIMATE, THERE IS GOING TO BE COVERAGE OR NO COVERAGE, NOT COVERAGE FOR PART AND NOT COVERAGE FOR THE REST. FOR EXAMPLE HERE WE HAD A NEGLIGENT DEFENDANT, WHEN THERE WAS A SUIT BROUGHT AGAINST THE EX-WIFE AS WELL AS ON NEGLIGENCE CLAIMS. CLEARLY WE HAD THE DUTY TO DEFEND THERE, AS WE STILL HAD THE DUTY TO DEFEND MR. HIGGINS, UNTIL IT IS DETERMINED THAT THERE IS NO COVERAGE, BUT IT IS GOING TO BE THE ULTIMATE QUESTION. THERE IS NO COVERAGE AT ALL OR THERE IS.

SO WHY WOULDN'T IT BE A BETTER RULE TO SAY THAT, IF, IN FACT, YOU ARE CONSTRUEING A PROVISION OF THE POLICY AND IT INVOLVES DEC ACTIONS AND IT INVOLVES QUESTIONS, THAT YOU CAN IN FACT BRING IT IN A DEC ACTION AND IF IT DOES NOT DETERMINE THE INSURED'S CASE, YOU CANNOT BRING IT IN A DEC ACTION.

THIS IS WHERE THE CASE IS INTERTWINED AND A GOOD EXAMPLE OF THIS. THEY ARE NOW CHARACTERIZING AS NEGLIGENCE THIS CONDUCT. THE QUESTION IN THE DEC ACTION, WAS THE

CONDUCT INTENTIONAL OR MALICIOUS? IT DOES NOT OVERLAP WITH WHAT IS GOING TO BE BROUGHT, IF THAT IS THE UNDERLYING CASE WERE TRIED FIRST, THE QUESTION THAT IS GOING TO BE PRESENTED IS, AS JUSTICE PARIENTE POINTED OUT, WAS THERE NEGLIGENCE ON THE PART OF MR. HIGGINS, WHICH WAS A LEGAL CAUSE OF LOSS, INJURY OR DAMAGE TO THE PLAINTIFF? NOW, WHO IS GOING TO PUT ON ANY EVIDENCE IN THAT CASE OF ANYTHING OTHER THAN HOWEVER IT IS THEY TRY TO CHARACTERIZE IT THERE, SO THAT THE QUESTION WILL BE YES. NO ONE IS ASKING THEM, MORE THAN THAT, WELL, WAIT A MINUTE. WASN'T IT, ALSO, INTENTIONAL? WASN'T IT ALSO -- AND SO HOW HAS ANYTHING BEEN ANSWERED THEN? NO ONE HAS PUT ON ANY EVIDENCE OF EVERYTHING THAT HAPPENED, ONLY -- I DON'T EVEN KNOW HOW THEY WOULD TRY THE CASE.

SO ACTUALLY WHAT YOU ARE SAYING IS, IF A CASE REALLY GOT BROUGHT, THE JURY WOULD HEAR WHATEVER THE FACTS WERE, AND THE JURY COULD VERY WELL FIND THAT MR. HIGGINS WAS JUST NEGLIGENT. THE INSURANCE COMPANY WOULD BE BOUND TO PAY THE CLAIM.

BUT IT IS SORT OF LIKE A LESSER-INCLUDED OFFENSE OF A CRIME. I MEAN WAS HE, THAT IS ALL, THEY ARE NOT GIVING ANY DEFINITIONS OF EXPECTED OR INTENDED.

WHERE DOES THAT STATEMENT COME FROM? A LESSER-INCLUDED OFFENSE, WHEN NEGLIGENCE AND INTENTIONAL TORT ARE TWO SEPARATE AREAS OF OUR CIVIL LAW?

WELL, PERHAPS THAT IS A BAD ANALOGY. WHAT I AM SUGGESTING, THOUGH, IS THAT THE JURY ISN'T GOING TO BE GIVEN ANY INSTRUCTIONS OR ASKED TO FOCUS ON OR THINK ABOUT THE QUESTIONS OF DID HE EXPECT OR INTEND THE INJURIES OR WAS HE ACTING WITH WILLFULNESS ANIMALIES IN CAUSING THE INJURIES?

THE REAL PROBLEM HERE, IS THE FACT THAT ALL PARTIES AREN'T JOINED IN THE SAME ACTION. SO THAT YOU HAVE A DETERMINATION ONE TIME, ON THE SAME FACTS, AS TO WHETHER THERE IS OR IS NOT, THIS WAS OR WASN'T AN INTENTIONAL TORT. I MEAN, THE WAY THAT YOU COULD DO, GET AROUND THAT PROBLEM, WAS THE DEC ACTION AND THE PERSONAL INJURY ACTION WOULD BE TRIED AT THE SAME TIME.

I SUBMIT THAT THAT PROBABLY IS NOT IN THE BEST INTERESTS OF THE INSUREDS OR, REALLY, OF ANYBODY TO IT, BECAUSE THE INSURANCE COMPANY IS STILL GOING TO HAVE TO PROVIDE THE DEFENSE, AND THAT HAPPENS FREQUENTLY.

IGHT.

BUT THEN THE INSURANCE COMPANY IS ALSO GOING TO HAVE TO TELL THE JURY, FIRST OF ALL, THAT THERE IS INSURANCE, BECAUSE THAT IS WHY THEY HAVE TO DECIDE THAT, WHICH IS GENERALLY BAD. YOU ARE GOING TO HAVE TO HAVE THE INSURANCE COMPANY --

AREN'T YOU GOING TO HAVE THE INSURANCE COMPANY, IF THEY ARE BOTH INVOLVED ANYWAY?

THE COVERAGE CASE IS WHAT THEY ARE DECIDING. WHAT YOU USUALLY TRY TO DO IS NOT HAVE THEM DECIDE LIABILITY AND INSURANCE AT THE SAME TIME.

BUT TH PROBLEM IS YOU COULD VERY EASILY END UP WITH INCONSISTENT DETERMINATIONS BY TWO JURIES, BECAUSE REGARDLESS OF WHO GOES FIRST OR SECOND, THE FACT IS NOBODY CAN BE BOUND BY A JUDGMENT THAT THEY DON'T HAVE AN OPPORTUNITY TO CONTEST. AND SO WHAT WE SHOULD BE STRIVING FOR IS A WAY THAT YOU GET THESE FACTS DETERMINED ONE TIME, AND THEN EVERYBODY HAS HAD A CRACK AT IT, AND THERE IS OR ISN'T COVERAGE ON THE BASIS OF THAT DETERMINATION.

WELL, AGAIN, AND WHY I THINK HAVING THE DEC -- THESE CASES ARE REALLY FAIRLY UNIQUE,

THESE BATTERY VERSUS NEGLIGENCE CASES. IF YOU GO THROUGH THE LAW, YOU WILL SEE THAT THEY ARE THEIR OWN LITTLE JENRE, AND I THINK IF YOU TRIED TO -- THEIR OWN LITTLE GENRE, AND I THINK IF YOU TRIED TO TRY ALL OF THAT AT ONES, BETWEEN WHAT MS. INGALLS HAD TO SAY ALL AT ONCE WITH WHAT MR. HIGGINS HAD TO SAY, IF YOU ADMITTED THOSE FACTS ACTS, BUT IF YOU TRIED -- ADMITTED THOSE ACTS, BUT IF YOU TRIED ALL OF THAT AT ONCE AND THE JURY IS TRYING TO DECIDE THAT SOMEBODY IS CONTENDING THAT IT WAS NEGLIGENCE AND SOMEBODY WAS TRYING TO CONTEND THAT IT WAS --

BUT SOMEBODY, THE PROBLEM IS SOMEBODY HAS GOT THE RIGHT OF CROSS-EXAMINATION IN THE PRESENTATION OF ARGUMENT, AND BECAUSE OF THE FACT, THE WAY THAT THE INSURANCE CONTRACT PROVIDES BOTH A DEFENSE AND INDEMNITY, YOU DO HAVE A CONFLICT BETWEEN THOSE PROVISIONS, BECAUSE THE DEFENSE IS, SHOULD BE MAINTAINING THAT THERE IS COVERAGE, AND THE INSURANCE COMPANIES MAINTAIN THAT THERE IS NOT. IN MY EXPERIENCE, THERE IS A LOT OF THIS TYPE OF THING THAT COMES UP IN HOMEOWNERS POLICIES, IN GUN CASES, QUITE OFTEN, ISN'T THAT RIGHT?

BUT, YES AND NO. THAT IS TRUE. WHAT I AM SAYING IS IT IS THESE TYPES OF CASES. IT IS NOT IN AUTO CASES OR A WHOLE UNIMAGINABLE SET OF CASES OUT THERE. IT IS THESE TYPES, AND THE PROBLEM IS THAT YOU CAN'T REALLY FIND THAT AN ACT WAS BOTH NEGLIGENT AND INTENTIONAL OR MALICIOUS.

SO WHAT SHOULD --

YOU REALLY CAN'T.

WHAT WOULD THE RULE BE? WHAT SHOULD WE SAY? WHAT WOULD THE RULE BE, CONCERNING THESE DEC ACTIONS, AND WHEN YOU CAN BRING THEM UNDER WHAT CIRCUMSTANCES?

I WOULD STILL LEAVE IT DISCRETIONARY WITH THE TRIAL COURT, RECOGNIZING THAT THEY MAY WELL OFTEN EXERCISE THEIR DISCRETION IN HAVING THE DEC ACTION TRIED FIRST IN THESE ASSAULT AND BATTERY GUN TYPE CASES, TO FIND OUT FOR EVERYBODY RIGHT UP-FRONT, BECAUSE THE ONLY PEOPLE WHO ARE CHARACTERIZING IT AS NEGLIGENCE, AS JUSTICE, AS JUDGE GRIFFIN POINTED OUT IN ACONDE, NOBODY WOULD POINT OUT THE BODY SLAM H SLAPPING AND ALL -- BODY SLAPPING AND THESE CIRCUMSTANCES, BUT FOR THE NEGLIGENCE. THE QUESTION IS WHETHER HE BATTERED HER OR USED REASONABLE CARE IN HAVING HIS HAND COME ACROSS HER FACE. IT IS JUST ONLY REASON FOR PUTTING THAT FALLS LABEL "NEGLIGENCE" ON IT IS BECAUSE YOU ARE TRYING TO ACTIVATE INSURANCE COVERAGE.

YOU ARE CALLING IT A FALSE LABEL, AND IS ISN'T THE PROBLEM WITH HAVING THE INDEPENDENT PROCEDURES AS THEY ARE NOW, WOULDN'T YOU ALWAYS HAVE SOMEBODY IN A POSITION OF SAYING THIS WAS UNFAIR TO ME. THE DEFENDANT, FOR INSTANCE,, IF AFTER THERE IS A DEC ACTION, IT IS DETERMINED THAT THERE WAS SOME INTENT OR MALICIOUSNESS AND THEREFORE THE COVERAGE DOESN'T APPLY, NOW, LATER, GOES TO A TRIAL, WHERE THE PLAINTIFF DOES CLAIM THAT IT WAS NEGLIGENT AND THEY END UP WITH A JUDGMENT AGAINST THAT SAME DEFENDANT. NOW THE DEFENDANT SAYS, WELL, THE FACT THAT THAT WAS DETERMINED BY A SEPARATE JURY IN A DEC ACTION DOESN'T RELIEVE ME OF THIS JUDGMENT THAT HAS BEEN OBTAINED AGAINST ME IN A NEGLIGENCE ACTION BROUGHT BY A PLAINTIFF, BECAUSE YOU HAD TWO DIFFERENT FACT FINDING BODIES, FIND CONFLICTING FACTS, SO WHY ISN'T THE RESOLUTION BY THE SAME JURY? JURIES ALL THE TIME, SORT OUT WHAT THE UNDERLYING MOTIVATIONS ARE AND CONSEQUENCES. WHY WOULDN'T A SINGLE ACTION, IF YOU HAD THIS CONFLICT SITUATION, IN WHICH THE SAME JURY DETERMINES THOSE ISSUES, BE THE MOST SATISFACTORY, SO THAT YOU DON'T HAVE THOSE INCONSISTENT RESULTS OR CRIES OF UNFAIRNESS?

I DON'T THINK YOU WOULD EVER HAVE, IN YOUR HYPOTHETICAL, I DON'T THINK YOU ARE GOING

TO HAVE THE PLAINTIFF GO AND BRING A NEGLIGENCE SAYS -- NEGLIGENCE CASE, BECAUSE THERE IS NO REASON FOR THEM TO DO. THAT IT WOULD NEVER BE CALLED A BATTERY AND NEGLIGENCE, IF THERE IS NO INSURANCE COVERAGE TO BE GOT. THEY OULD SUE FOR THE BATTERY AND GET WHATEVER MONEY THEY CAN FROM THE DEFENDANT. I AM SUGGESTING THAT THE PROBLEM OF DOING IT ALL AT ONCE IS THAT YOU NOW HAVE THE INSURANCE, FIRST OF ALL YOU ARE TELLING THE JURY THAT INSURANCE IS INVOLVED AND SECONDLY, ON THE COVERAGE ASPECTS OF THE CASE, YOU HAVE THE INSURANCE COMPANY BRINGING FORWARD ALL THE EVIDENCE THAT THERE IS, AS THERE WAS IN THIS CASE, THAT THERE WERE INTENTIONAL VIOLENT ACTS INVOLVED. MR. CHIEF JUSTICE

YOUR TIME IS UP, MS. RUSSO. THANK YOU VERY MUCH.

THANK YOU. MR. CHIEF JUSTICE

REBUTTAL.

WOULD YOU RESPOND TO THAT LAST COMMENT, AND THAT IS AS WE ARE TRYING TO FIND A CORRECT SOLUTION TO ALL OF THIS.

TO CORRECT THE POTENTIAL RESULT?

INDEED, IF, ONCE IT IS DETERMINED THAT THERE IS NO COVERAGE, THAT A PLAINTIFF WOULD HAVE NO IN SENT I HAVE -- INCENTIVE TO GO FORWARD WITH A NEGLIGENCE ACTION.

IN MOST INSTANCES THAT'S CORRECT, AND IT WOULD ONLY BE IN A LIMITED CIRCUMSTANCE. THE SOLUTION THAT I THINK WOULD BE A GOOD SOLUTION IS THAT SUGGESTED IN THE LAVENDER CASE. NOW, THE UNDERLYING CASE WOULD BE TRIED FIRST. THE INSURANCE COMPANY WOULD BE THERE IN ATTENDANCE AT THE TRIAL NOT PARTICIPATING AT THAT POINT THEN. TWO THINGS COULD OCCUR. EITHER DEPENDING ON WHAT THE TESTIMONY WAS OF MS. INGALLS, WHAT THE TESTIMONY, WHAT THE TESTIMONY OF MR. HIGGINS WAS, AND THEN AT THAT POINT, THE INSURANCE COMPANY COULD HAVE EITHER THE OPPORTUNITY TO SUBMIT SPECIAL VERDICT INTERROGATORIES OR, IF THERE WAS NO TESTIMONY THAT WAS BROUGHT OUT AT THE TIME OF TRIAL BY THE PLAINTIFF ATTORNEY OR BY THE DEFENSE ATTORNEY, THEN STATE FARM SHOULD BE GIVEN THE OPPORTUNITY TO BRING OUT THOSE FACTS THAT THEY THINK --

DON'T YOU HAVE TO AGREE THAT CANAL INSURANCE VERSUS REED WAS AN INSTANCE IN WHICH THIS COURT WAS DEALING IN AT LEAST IMPLIEDLY APPROVING THAT THE DEC ACTION COME FIRST AND THEN THE APPEAL COMING FROM THE DEC ACTION.

YES.

THAT SPECIFICALLY HELD THAT THERE ISN'T DIDN'T HAVE TO MEAN THAT THERE OUGHT TO AND AUTOMATIC STAY, THEN, OF THE UNDER LYING, SO WE WOULD HAVE TO RECEDE FROM --

I DON'T THINK THAT IS NECESSARILY TRUE. IN THE REED DECISION, AS I RECALL, THE QUESTION WAS WHETHER THE GENTLEMAN, THE PASSENGER WAS AN EMPLOYEE OF OR NOT AN EMPLOYEE, AND THEREFORE THAT EXCLUSION APPLIED. I THINK THIS SITUATION IS A LITTLE DIFFERENT, AND YOU DO NOT HAVE TO RECEDE FROM IT. SOME CASES, FOR INSTANCE, AND I GO BACK TO THE BERTAMPCO AGAIN, BECAUSE THAT SITUATION IS TOTALLY DIFFERENT. THAT WAS THE FACTS WERE FOR THE UNDERLYING CASE, WERE, DID NOT HAVE TO BE DECIDED IN THE COMPLAINT FOR DECLARATORY RELIEF SO --

BUT THE PLAINTIFF AND DEFENDANT, AND THEN THE INSURED, BOTH HAVE AN INTEREST IN PROVING THAT A GUY WAS IN THE SCOPE, WHEREAS THE INSURANCE COMPANY IS MAINTAINING

THAT HE WASN'T IN THE SCOPE. I MEAN, THERE ARE A LOT OF DIFFERENT VARIETIES OF THIS, IN WHICH YOU HAVE THOSE, AND THAT WAS SORT OF CANAL, BUT LET ME ASK YOU THIS.

YES.

IF WE JUST UPHELD THE, WHERE THIS COURT WAS, IN CANAL INSURANCE COMPANY, OR IN THE OLD COLUMBIA CASUALTY COMPANY CASE, THEN THAT WOULD SOLVE YOUR PROBLEM, WOULDN'T IT, AND THAT WE WOULD HAVE --

IT CERTAINLY WOULD, YOUR HONOR.

YOU WOULD GO BACK TO WHERE YOU WOULD HAVE TO GARNISH THESE THINGS.

YES. THAT'S TRUE. IF I CAN SAY ONE FINAL THING, WITH REGARD TO THE DUTY TO DEFEND, IN THESE CIRCUMSTANCES, RIGHT WHEN THE DEC ACTION IS BROUGHT, YOU HAVE THE CIRCUMSTANCE WHERE THE INSURED IS NOT, THE DEFENSE TO THE INSURED IN THE DEC ACTION IS NOT BEING PROVIDED. THEN YOU GO BACK TO THE UNDERLYING CASE, ASSUMING THAT STATE FARM PREVAILS IN THE DEC ACTION, AND THEN, IN THE UNDERLYING CASE, THE INSURED IS REQUIRED TO PROVIDE ITS OWN DEFENSE AGAIN. IT COULD CONCEIVABLY TRY OR DEFEND TWO CASES, WITHOUT THE INSURANCE COMPANY DEFENDING. YES.

IN THIS CASE, DIDN'T THE INSURANCE COMPANY BRING IN THE PLAINTIFF, IN THE DECLARATORY JUDGMENT ACTION?

YES. YES. THEY BROUGHT IN BOTH THE DEFENDANT AND THE PLAINTIFF.

SO WHAT IS THE EFFECT, THEN, OF THE JURY VERDICT IN THE DECLARATORY JUDGMENT ACTION THAT SAYS THAT THIS WAS A WILLFUL ACT AS OPPOSED TO A NEGLIGENT ACT? DOES THE PLAINTIFF, NOW, NOT HAVE A CAUSE OF ACTION FOR NEGLIGENCE?

THE PLAINTIFF DOES.

THE PLAINTIFF STILL DOES?

IT IS A PRESERVED CAUSE OF ACTION, HAS NOT THAT IS THE ABSURD RESULT THAT I CAN'T RECALL.

THE PARTIES IN IT, ALL THE PRINCIPLES OF RES ADJUDICATA DON'T APPLY HERE?

NO. THEY DON'T APPLY HERE. BECAUSE NEGLIGENCE WASN'T TRIED. CAUSATION WASN'T TRIED. THAT IS THE RESULT WE ARE TALKING ABOUT. YOU COULD WIN ON AN INTENTIONAL ACT, BECAUSE OF THE CERTAIN EVENTS THAT OCCURRED THAT NIGHT, BUT YET SOME OF THEM COULD BE NEGLIGENCE, AND THEN IF WE TRIED THE NEGLIGENCE CASE SEPARATE, THEN MY CLIENT, MR. HIGGINS, WOULDN'T HAVE A DEFENSE. HE WOULD GO BACK TO THE INSURANCE COMPANY AND SAY, LOOK, THERE IS A VERDICT AGAINST ME AND A JUDGMENT. I WANT YOU TO PAY IT. THEY WOULD SAY NO. BUT THEN THAT WOULD CREATE WHOLE OTHER SERIES OF LAWSUITS.

MR. DECKERT, ARE YOU GOING TO HAVE REBUTTAL?

I AM SORRY I TOOK HIS TIME. THANK YOU.

EVERYBODY IS HAVING THIS TROUBLE AND MY POSITION IS THE SOLUTION IS THE LAVENDER APPROACH. I WOULD LIKE TO COMMENT ON TWO THINGS. ONE, WE TALK ABOUT THE CONDE SHOOTING. THE FACTS IN THAT SHOOTING WERE ACKNOWLEDGED WHAT HAPPENED. IT HAD TO

DO WITH A DEAL AND WE HAD THAT. GEPHARDT IS A SMARTER AND MORE APPLICABLE ANALOGY THAN WHAT WE ARE DEALING W THE SITUATIONS THAT YOU WERE YOU HAVE RAISED, I BELIEVE, IN THE QUAGMIRE IS SIMPLY HOW DO YOU DO THIS ONCE? AND IN MY OPINION TO DO IT ONCE YOU HAVE THE DEBATE ACTION PENDING AND THAT'S ALL RIGHT. IF THIS EVENING THE FACTS SUPPORT A FINDING OF LAW THAT THE CLAIM IS IN NO WAY GOING TO BE NEGLIGENCE, MOVE FOR A SUMMARY JUDGMENT AND GET IT. OKAY. THAT IS THEIR REMEDY. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. YOUR TIME IS UP. THE COURT WILL TAKE ITS MORNING RECESS AND BE IN RECESS FOR 15 MINUTES. THANK YOU, COUNSEL, VERY MUCH.