Humana Worker's Compensation Services v. Home Emergency Services

CHIEF JUSTICE: THE NEXT CASE ON THE COURT'S DOCKET IS HUMANA WORKERS VERSUS HOME EMERGENCY SERVICES. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT.

CHIEF JUSTICE: YOU MAY PROCEED.

I AM DEBORAH POTTER KLAUBER ON BEHALF OF PETITIONERS, HUMANA WORKERS AND FLORIDA INSURANCE COMPANY. WE ARE HERE TODAY ON AN INSURANCE CUFF RAMMING ACTION, WHERE THE LANGUAGE OF THE POLICY -- ON AN INSURANCE COVERAGE ACTION, WHERE THE LANGUAGE OF THE POLICY IS CLEAR AND UNAMBIGUOUS. IN SUCH A CAUSE OF ACTION, IT IS THE LIABILITY OF THE INSURED, COUPLED WITH THE INTENT OF THE PARTIES, THE INSURED AND INSURANCE COMPANY, THAT DETERMINES WHETHER THERE IS COVERAGE.

WHAT HAVE THE DISTRICT COURTS HELD IN VARIOUS SITUATIONS? ANOTHER FOURTH DISTRICT COURT OF APPEAL ADDRESSED THIS ISSUE, THE QUESTION OF WHETHER IT IS COVERED UNDER A GENERAL LIABILITY POLICY. THE THIRD DISTRICT COURT OF APPEAL, IN THE LINCOLN CASES AND IN THE PRESENT ACTION, ADDRESS THIS, I AM SORRY, IN THE LINCOLN CASE, THE THIRD DISTRICT ADDRESSED THIS QUESTION IN THE CONTEST, AGAIN, OF A COMMERCIAL GENERAL LIABILITY POLICY, AND IN THE PRESENT CASE WE ARE TALKING ABOUT AN EMPLOYER'S LIABILITY ON WORKER'S COMPENSATION POLICY. IN THE FOURTH DISTRICT, THE --

IS THE LANGUAGE DIFFERENT, OF THE POLICIES?

THE LANGUAGE IS A LITTLE BIT DIFFERENT BUT I DON'T THINK SUBSTANTIVE DIFFERENT, WHERE IT MAKES ANY DIFFERENCE IN THE ANALYSIS. THE APPLICATION OF THE QUESTION TO WHETHER THERE IS A BODILY INJURY OR WHETHER EXPOLIATION OF EVIDENCE CONSTITUTES A LIABILITY CLAIM. I DON'T THINK ANY DIFFERENCE BETWEEN SIMILAR POLICIES AND THEIR LANGUAGE WOULD MAKE ANY DIFFERENCE IN THE COURT'S DETERMINATION. IN THE NORRIS CASE, BEFORE THE FOURTH DISTRICT, THE THE COURT DETERMINED THAT THE OCCURRENCE THAT GAVE RISE TO THE LAWSUIT WAS THE DESTRUCTION OF EVIDENCE. WHICH DID NOT CAUSE THE BODILY INJURY. THERE WAS ONLY ONE SENTENCE IN THE FOURTH DISTRICT'S OPINION THAT EVEN TALKED ABOUT BODILY INJURY AT ALL.

WE DON'T HAVE AN OCCURRENCE DEFINITION ISSUE IN THIS CASE?

NO, MA'AM, WE DO NOT.

BUT WAS OCCURRENCE, THERE, DEFINED AS ACCIDENT?

OCCURRENCE THERE WAS DEFINED AS AN ACCIDENT.

AND HERE IT SAYS ACCIDENT.

HERE IT SAYS BODILY INJURY CAUSED BY ACCIDENT OR BODILY INJURY CAUSED BY DISEASE. SO THERE WAS ONLY ONE SENTENCE IN THE NORRIS DECISION THAT DISCUSSED THE BODILY INJURY. THE COURT, THEN, TURNS TO A DISCUSSION OF WHETHER THIS MIGHT, THE LOSS OF THE

EVIDENCE IN THE NORRIS CASE WAS A VIDEOTAPE AND WHETHER THAT MIGHT CONSTITUTE PROPERTY DAMAGE AS DEFINED BY THAT PARTICULAR POLICY.

BEFORE YOU GET TOO FAR AWAY FROM THAT, ISN'T THERE SOME QUESTION, HERE, THOUGH, ABOUT THE POLICY LANGUAGE? BECAUSE AS I RECALL, A PART OF THE ARGUMENT IS THAT, BECAUSE OF BODILY INJURY LANGUAGE IS ALSO BEING SAID TO SAY ARISING OUT OF BODILY INJURY, SO IS THERE SOME QUESTION HERE ABOUT WHETHER OR NOT THE POLICY LANGUAGE IS A.M. BIG YOOURS?

-- IS AMBIGUOUS?

THE RESPONDENTS HAVE SUGGESTED THAT THE LANGUAGE IS AMBIGUOUS.

I WOULD SUGGEST TO THE COURT THAT -- IS NOT AM -- THE LANGUAGE IS AMBIGUOUS. I WOULD SUGGEST TO THE COURT THAT THE LANGUAGE IS NOT AMBIGUOUS. I WOULD SUGGEST THAT, IN THE CONTEXT OF EMPLOYEE POLICIES, THERE IS NO BODILY INJURY. A BODILY INJURY IS A BODILY INJURY, AN INJURY TO THE PART OF THE BODY.

BUT I THINK THE LANGUAGE THAT IS TROUBLESOME IS BECAUSE OF BODILY INJURY, AS OPPOSED TO ARISING FROM BODILY INJURY.

WELL, IN THIS POLICY, THE DAMAGE IS THAT THIS INSURANCE COMPANY AGREES TO -- THE DAMAGE THAT IS THIS INSURANCE COMPANY AGREES TO PAY IS BECAUSE OF DAMAGES OF BODILY INJURY TO THE EMPLOYEE. CERTAINLY THIS GENTLEMAN SUFFERED A BODILY INJURY. THERE IS NO QUESTION ABOUT THAT HERE, BUT THAT IS NOT WHAT BRINGS THIS EMPLOYER HOME EMERGENCY SERVICES INTO THE CASE. WITHOUT BODILY INJURY, HOME EMERGENCY SERVICES PROVIDED WORKER'S COMPENSATION INSURANCE AND THAT AGENCY PROVIDED COVERAGE TO THAT EMPLOYEE. WE ARE NOT HERE BECAUSE OF THE BODILY INJURY. WE, THE INSURANCE COMPANY AND WE, THE EMPLOYER, ARE NOT HERE BECAUSE OF THE BODILY INJURY.

ISN'T THAT REALLY, BUT YOU ARE HERE BECAUSE OF THE BODILY INJURY. THE DAMAGES THAT WOULD BE AWARDED IF THERE WAS A SUCCESSFUL ACTION WILL BE BODILY INJURY DAMAGES. YES, THE FACT IS THAT, BECAUSE THE ALLEGATION IS THAT YOUR CLIENT DESTROYED THE ABILITY TO PROVE A TRADITIONAL NEGLIGENCE CASE, THERE IS THIS OTHER CONCEPT THAT THE DAMAGES ARE EXACTLY THE SAME, AREN'T THEY?

I AGREE WITH THE MEASURE OF THE DAMAGES IS THE SAME, BUT THE LIABILITY AND THE REASON WHY HOME EMERGENCY SERVICES WAS BROUGHT INTO THE UNDERLYING SUIT WAS BECAUSE IT LOST THE LATTER, NOT BECAUSE OF THE -- IT LOST THE LADDER NOT BECAUSE OF THE INJURIES. THE INJURIES STANDING ALONE, WOULD NOT HAVE GIVEN RISE TO ANY CAUSE AGAINST HOME EMERGENCY SERVICES.

I AM LOOKING AT PAGE 9 OF THE COMPLAINT AND COUNT FOUR, THE NEGLIGENCE ALLEGED IS THE NEGLIGENT BREACH OF A CONSIDERATE.

THE NEGLIGENCE IN -- OF A CONTRACT.

THE NEGLIGENCE IN COUNT FOUR -- IN COUNT SEVEN OF THE COMPLAINT, IT ALLEGES THE BREACH OF A CONTRACT, THE CONTRACTUAL AGREEMENT BETWEEN THE EMPLOYER AND EMPLOYEE TO MAINTAIN THIS LADDER. THE EMPLOYEE CAME TO THE EMPLOYER BY HIS ATTORNEY AND SAID I WANT TO PURSUE THIS POTENTIAL CAUSE OF ACTION AGAINST THE MANUFACTURER OF THE DISTRIBUTOR LADDER. WILL YOU PLEASE MAINTAIN THIS LADDER FOR ME, AND THE EMPLOYER AGREED TO MAINTAIN THE LADDER. THE EMPLOYER, THEN, SUBSEQUENTLY DESTROYED THE LADDER. ALLEGEDLY. THE LADDER IS MISSING. BUT COUNT SEVEN, THIS IS AN EMPLOYER'S LIABILITY POLLICY. COUNT SEVEN, REALLY, DOESN'T HAVE

ANYTHING TO DO WITH THE RELATIONSHIP BETWEEN THIS EMPLOYER AND THE EMPLOYEE, IN THAT CONTEXT. IF THIS WAS ANY OTHER THIRD PARTY AND THAT EMPLOYEE, THE INJURED PARTY, HAD GONE TO THE THIRD PERSON WHO WAS SOMEHOW IN CUSTODY OF THE LADDER, TO SAY PLEASE MAINTAIN THAT LADDER SO THAT I CAN PURSUE MY CAUSE OF ACTION, THERE IS NO NECESSITY, THERE IS NO NECESSARY RELATIONSHIP BETWEEN THE EMPLOYER AND AN EMPLOYEE, IN ORDER TO GIVE RISE TO THAT CAUSE OF ACTION.

WHY ISN'T IT CORRECT TO LOOK AT THIS WHOLE SPOILATION BUSINESS AS A NEGLIGENCE CLAIM? I MEAN THE CONTRACT, THE ASSUMPTION OF THE RESPONSIBILITY TO KEEP THE LADDER IS THE DUTY. THE LOSS OF THE LADDER IS THE BREACH OF DUTY. THE DAMAGES ARE WHAT YOU COULDN'T, WHAT YOU COULD GET IN PURSUING THE BODILY INJURY CLAIM. AND SO THAT IS THE DAMAGE ELEMENT OF A NEGLIGENCE CLAIM, AND ISN'T THAT THE PROPER WAY TO LOOK AT THIS?

A SPOILATION CLAIM HAS BEEN DEFINED BY THE COURTS OF FLORIDA AS A TORT CLAIM. IT IS A TORT CAUSE OF ACTION. IT FALLS WITHIN THE PARAMETERS OF THE GENERAL TORT DESCRIPTION. THERE IS, AT SOME POINT THERE, ARISES A DUTY ON THE PART OF THE PERSON IN CUSTODY OF THE PROPERTY, TO MAINTAIN THAT PROPERTY, BUT I THINK WHEN WE TALK ABOUT CUFF RELIGIOUS B, THE EM-- COVERAGE B, THE EMPLOYER'S LIABILITY COVERAGE THAT WE ARE TALKING ABOUT IN THIS CASE, WE ARE TALKING ABOUT COVERAGE THAT APPLIES WHEN AN EMPLOYER IS SOMEHOW INDEPENDENTLY RESPONSIBLE FOR THE INJURIES TO THE EMPLOYEE. THE BODILY INJURIES TO THE EMPLOYEE, I WOULD SUBMIT TO THE COURT. IN THE PRESENT ACTION, THE EMPLOYER IS NOT RESPONSIBLE FOR THE BODILY INJURIES, AND I WILL GIVE YOU A COUPLE OF EXAMPLES OF WHEN COVERAGE B APPLIES, TO ILLUSTRATE THIS. THE INJURED PERSONS AND EMPLOYERS ACROSS THE COUNTRY --.

WE ARE, RIGHT NOW, UNDER PART TWO, EMPLOYERS.

LIABILITY.

CORRECT.

PART ONE IS THE TRADITIONAL WORKER'S COMPENSATION.

WE ALL KNOW IT AND LOVE IT AND THAT IS WORKER'S COMPENSATION.

AND HE GOT COVERAGE UNDER --.

HE DID RECEIVE COVERAGE UNDER PART ONE FOR THE BODILY INJURIES THAT HE SUFFERED IN HIS EMPLOYMENT.

PART TWO WOULD TRADITIONALLY BE USED UNDER WHAT CIRCUMSTANCES?

PART TWO, THIS ISSUE YOUR HAS BEEN ADDRESSED BY A COUPLE OF COURTS ACROSS THE COUNTRY, WHERE INJURED EMPLOYEES AND EMPLOYERS HAVE CHALLENGED IT AS ILLUSIONRY. WHEN, EXACTLY, DOES THIS APPLY? IT DOESN'T APPLY TO THIS CASE. I WOULD LIKE TO CHALLENGE IT AND TAKE THE POSITION THAT THIS STUFF DOESN'T COVER US AT ANY TIME, AT ANY PLACE.

WHEN DOES IT APPLY?

BROADLY SPEAKING, IT APPLIES IN THE CONTEXT BETWEEN WHEN YOU HAVE GOT A WORKER'S COMPENSATION INJURY, WHICH IS COVERED BY COVERAGE A, AND AN ACTUAL, AN INTENTIONAL ACT ON THE PART OF THE EMPLOYER, SO THERE IS THIS GRAY AREA IN BETWEEN WHERE THE POLICY MIGHT APPLY. I CAN GIVE YOU TWO EXAMPLES. ONE IS WHEN AN EMPLOYER IS NOT ONLY

AN EMPLOYER. FOR EXAMPLE, UTILIZING AN ASSEMBLY LINE. THE EMPLOYER ACTUALLY MANUFACTURES PRODUCTS. WHEN THE EMPLOYER MANUFACTURES A PRODUCT AND HIS EMPLOYEE IS INJURED ON THE JOB BY THE PRODUCT, CERTAINLY WORKER'S COMPENSATION WOULD APPLY TO PROVIDE COVERAGE FOR THE INJURED EMPLOYEE, BUT AT THE SAME TIME WHEN THE EMPLOYER IS SUED AS A MANUFACTURER OF THE PRODUCT, IT WOULD PROVIDE COVERAGE IN THAT CIRCUMSTANCE. THERE THE EMPLOYER IS INDEPENDENTLY LIABLE FOR THE INJURIES TO THE EMPLOYEE. THE SECOND CIRCUMSTANCE DOESN'T INVOLVE, IT INVOLVES, STILL AGAIN, A INJURY TO THE EMPLOYEE, WHERE HE IS HE INJURED BY A PRODUCT UTILIZED ON THAT EMPLOYER'S ASSEMBLY LINE, AND HE SUES THE MANUFACTURER AND SAYS I HAVE GOT MY WORKER'S COMPENSATION COVERAGE, BUT YOU ARE A THIRD PARTY, YOU ARE NOT MY EMPLOYER, AND THE THIRD PARTY THEN TURNS AROUND AND COMES AFTER THE EMPLOYER.

WHAT DOES IT RELATE TO WHEN IT SAYS BODILY INJURY OR DISEASE? WHERE WOULD THAT HAPPEN? IN OTHER WORDS WHERE WOULD IT BE THAT IT WOULD BE EXCLUDED BY WORKERS COMPENSATION AND YOU COULD SUE THE EMPLOYER, I GUESS MAYBE IF SOMEONE SAID IT IS ILLUSIONRY, I AM TRYING TO SEE WHEN IT WOULD HAPPEN.

THAT IS A GOOD QUESTION, YOUR HONOR, AND I HAVEN'T SEEN ANY CASE LAW THAT ADDRESSES TAKE IN PARTICULAR. MY RESPONSE WOULD BE PERHAPS THE MANUFACTURER OF A SIMILAR PRODUCT, WHEN YOU HAVE GOT ACCOMPANY THAT IS MANUFACTURING SOME KIND OF DANGEROUS PRODUCT AND THAT PRODUCT SOMEHOW ESCAPES AND INJURIES THE WORKER. NOT ONLY IN THE CONTEXT OF HIS RELATIONSHIP AS AN EMPLOYEE, BUT IN THE CONTEXT OF THAT EMPLOYER'S ROLE AS THE MANUFACTURER OF THE PRODUCT OR PERHAPS IN ALTERING THE PRODUCT. WE BRING IN THIS DANGEROUS PRODUCT AND WE ALTER IT AND TURN IT IS -- AND TURN IT INTO SOMETHING ELSE.

SO IF THE EMPLOYEE BUILDS A CAR AND HAPPENS TO DRIVE THE CAR AND GETS INJURED, HE CAN SUE THE --.

NO. I DON'T THINK IT WOULD BE. THIS ALL HAS TO OCCUR UNDER A WORKERS COMPENSATION AND EMPLOYER'S LIABILITY POLICY, IN THE CONTEXT OF EMPLOYMENT.

SO THIS IS DESIGNED, PART TWO IS DESIGNED TO COVER EMPLOYERS FROM LIABILITY TO THEIR EMPLOYEES.

CORRECT.

WHAT BUSINESS WAS HOME EMERGENCY SERVICES IN?

HOME EMERGENCY SERVICES WAS A SUBCONTRACTOR, A CONTRACTOR, MR. MILLION, FELL OFF OF A LADDER WHILE WORKING ON, I BELIEVE, I DON'T KNOW IF HE WAS PAINTING OR A CONSTRUCTION-TYPE JOB.

SO IN WHAT SERCK SUBSTANCES WOULD PART TWO TYPE OF INSURANCE APPLY TO HOME EMERGENCY SERVICES?

FOR HOME EMERGENCY SERVICES, I AM NOT EXACTLY SURE WHAT THEIR BUSINESS IS OR WHAT THEY MIGHT OR MIGHT NOT MANUFACTURER OR WHETHER THEY MIGHT UTILIZE PRODUCTS FROM OTHER MANUFACTURERS THAT THEY MIGHT ALTER OR AMEND IN THE PROCESS OF DOING THEIR CONSTRUCTION WORK. THAT IS THE BEST EXAMPLE I CAN GIVE. THE MANUFACTURING ASPECT OF IT OR A SITUATION WHERE IT TAKES A PRODUCT FROM ANOTHER MANUFACTURER AND ALTERS IT OR AMENDS IT FOR THE USE BY ITS EMPLOYEES, AND THEY ARE INJURED BY THAT. CERTAINLY THE EMPLOYEE MIGHT HAVE A CLAIM AGAINST A MANUFACTURER, BUT THE MANUFACTURER, THEN, MIGHT TURN AROUND TO THE EMPLOYER AND SAY YOU HAVE ALTERED MY PRODUCT. THERE FOR YOU ARE LIABLE IN THAT CAPACITY, AS OPPOSED TO IN YOUR

CAPACITY AS AN EMPLOYER OF THIS EMPLOYEE. THE TWO OTHER JURISDICTIONS THAT HAVE ADDRESSED THIS EXACT ISSUE ARE ILLINOIS AND L.A. IN BOTH OF THOSE CASES -- ARE ILLINOIS AND LOUISIANA. IN THE ILLINOIS CASE, IT IS ALMOST IDENTICAL FACTS TO THE PRESENT CASE. THE COURTS, BOTH, HELD THAT A CLAIM FOR SPOILATION OF EVIDENCE AGAINST AN EMPLOYER DOES NOT CONSTITUTE A BODILY INJURY, UNDER AN EMPLOYER'S LIABILITY POLICY. THE ILLINOIS COURT AGREED WITH THE INSURANCE COMPANY THAT THE DAMAGES THAT THE EMPLOYEE WAS SEEKING FROM THE EMPLOYER WERE NOT DAMAGES FOR BODILY INJURY. THE ACTION FOR SPOILATION, UPON THE BREACH OF A DUTY I TO PRESERVE, I AM SORRY, THE ACTION FOR SPOILATION IS PREDICATED UPON THE BREACH OF A DUTY TO PRESERVE EVIDENCE.

WHAT IF THE EMPLOYER, TOMORROW, WENT TO ITS INSURANCE AGENT AND SAID, YOU KNOW WHAT? THERE HAS BEEN THIS TORT OF SPOILATION OF EVIDENCE, AND IT HAS BEEN OUT THERE FOR 30 YEARS, AND I WANT TO PROTECT AGAINST IT. WHAT KIND OF POLICY WOULD THEY GET TO PROTECT AGAINST IT?

THAT IS A INTERESTING QUESTION. I THINK, IT IS EASIER TO GRASP, THE NOTION OF A SPOILATION OF EVIDENCE CLAIM, AS A PROPERTY DAMAGE CLAIM. IT, INDEED HERE, IN THIS EXAMPLE, AND IN ALL OF THE OTHER EXAMPLES, THE LOSS OF SOME PROPERTY. IN THIS CASE IT WAS THE LOSS AFTER TANGIBLE PIECE OF PROPERTY, A LADDER HERE. IN THE NORRIS CASE, AND I BELIEVE IT WAS IN THE DeJULIO CASE. I BELIEVE UNDER THE LIABILITY POLICY, WHERE THE EMPLOYER MIGHT BE RESPONSIBLE -- UNFORTUNATELY THE COMMERCIAL GENERAL LIABILITY POLICIES THAT HAVE ALL BEEN ADDRESSED HAVE ALL HAD EXCLUSIONS THAT SOMEHOW PREVENTED COVERAGE FOR THIS KIND OF CLAIM. AS AN INSURANCE AGENT, I DON'T KNOW WHERE THIS COVERAGE LIES.

BUT YOU HAVE, IN A COMMERCIAL GENERAL LIABILITY POLICY, ALWAYS EXCLUSIONS WITH REGARD TO INJURIES TO EMPLOYEES.

INJURIES TO EMPLOYEES AND INTANGIBLE PROPERTY.

ISN'T IT THE DESIGN OF ALL OF THESE THINGS, SO THAT WE DON'T HAVE OVERLAPPING COVERAGE, BUT THAT WE DO HAVE COVERAGE THAT WILL MEET AND PROTECT THOSE CONING IT ANANCY?

CERTAINLY -- CONTINGENCIES?

CERTAINLY FROM AN EMPLOYER'S PERSPECTIVE TO COVER ANYTHING THAT MIGHT ARISE. IT IS OUR ASSERTION THAT THE INSURANCE POLICY AS IT APPLIES HERE IS ONE WHERE THE EMPLOYER, ITSELF, IS SOMEHOW LIABLE FOR THE INJURIES TO THE EMPLOYEE, NOT THAT THE EMPLOYER IS NOT RESPONSIBLE BUT HERE THE EMPLOYER IS NOT RESPONSIBLE FOR THOSE INJURIES.

ON THE OTHER HAND, IF IT WAS AN INTENTIONAL ACT, IT WOULD BE EXCLUDED AS INTENTIONAL ACT, AND IF WAS NOT AN INTENTIONAL ACT, IT WOULD BE UNDER PART ONE, WORKERS COMPENSATION.

THAT'S CORRECT.

SO IT IS --

THE WORKERS COMPENSATION APPLIES, CERTAINLY, TO NEGLIGENT ACTS BY THE, ACTUALLY THERE IS NO FAULT, SO IT APPLIES TO ACTIONS WHERE THE EMPLOYEE IS INJURED. IT IS OUR POSITION THAT, IN THIS CASE, THAT THAT WAS THE APPROPRIATE COVERAGE. WHERE THE EMPLOYEE WAS INJURED, FAULT WAS NOT AN ISSUE, AND HE WAS PROVIDED WITH INSURANCE COVERAGE FOR THAT INJURY. WHERE THERE IS INTENTIONAL ACT, CLEARLY THERE IS NO

COVERAGE. THE INSURANCE COMPANIES WOULDN'T BE CERTAINLY ALLOWED TO INSURE AGAINST INTENTIONAL CONDUCT.

WHAT IS WRONG WITH THE REASONING OF THOSE CASES THAT HAVE HELD THAT, SINCE IT IS THE BODILY INJURY DAMAGES THAT THE EMPLOYEE LOSES, AS A CONSEQUENCE OF THE EMPLOYER'S ACTION HERE, AND YOU HAVE AGREED THAT THAT IS THE MEASURE OF DAMAGES, THAT THIS IS A BODBLY INJURY HE HAVE -- A BODILY INJURY EFFECT HERE. WHAT IS WRONG WITH THAT REASONING? HIT THAT HEAD ON.

WHAT IS WRONG WITH THAT REASONING IS THAT THAT IS NOT THE RISK THAT THE INSURANCE COMPANY UNDERTOOK WHEN THEY WROTE THIS POLICY. THE RISK THEY UNDERTOOK WAS TO INSURE FOR BODLY INJURIES THAT WERE -- BODILY INJURIES THAT WERE CAUSED BY THE EMPLOYERS, THE BODILY INJURIES THAT BROUGHT THE EMPLOYERS INTO THE LAWSUIT, THAT SOMEHOW THE EMPLOYERS WERE INDEPENDENTLY LIABLE FOR THE INJURIES TO THE EMPLOYEE.

BUT YOU CAN'T COME UP WITH ONE, SOMEHOW THAT, REALLY IS IN REAL LIFE, SOMEHOW WHERE THE EMPLOYER WOULD BE BROUGHT IN, SUED BY THE EMPLOYEE, AND IT WOULD BE COVERED UNDER PART TWO?

THE EXAMPLE THAT I CAN GIVE IS THE MANUFACTURING EXAMPLE.

IF YOU WANT TO PAUSE NOW, FOR YOUR REBUTTAL.

THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS JOEL PERWIN. I AM COUNSEL FOR THE HOME EMERGENCY SERVICES. THE EXISTING HYPOTHETICAL, WHICH I THINK SERVES AS A PARADIGM FOR THE WHOLE ARGUMENT, LET'S ASSUME THAT THE EMPLOYEE, MR. MILLION, WHILE THE SPOILATION CLAIM IS PENDING AGAINST MY CLIENT, SETTLES FOR A SMALL AMOUNT, WITH ONE OF THE UNDERLYING TORTFEASORS, KELLER LADDERS OR HOME DEPOT. IT IS NOT GOING TO GET A LOT OF MONEY BECAUSE THE LADER MISSING, BUT TO BUY ITS PEACE, THEY PAY HIM A COUPLE OF THOUSAND DOLLARS. THE QUESTION IS WHETHER, IF WE COLLECT IN A SPOILATION CLAIM, THAT WOULD CONSTITUTE A SET-OFF AGAINST OUR RECOVERY, THERE FOR OUR INSURER WOULD BE THE BENEFICIARY OF THAT SETTLEMENT. I DON'T THINK THERE IS ANY QUESTION THAT HE THE ANSWER TO THAT QUESTION IS YES, BECAUSE THE -- THAT THE ANSWER TO THAT QUESTION IS YES, BECAUSE THE DAMAGES ARE EXACTLY THE SAME O.

ARE THEY JOINT TORTFEASORS?

THEY ARE JOINT TORTFEASORS. ACCORDING TO THE ONE COURT WHICH HAS ADDRESSED THE ISSUE, WHICH HAS CITED THAT THEY ARE JOINT TORTFEASORS, BUT THAT IS NOT THE CRITERION. I WOULD SUGGEST THAT THE CRITERION UNDER CHAPTER 768, IS THAT THE DAMAGE RESPECT THE SAME. IF THERE IS A PAYMENT OR SETTLEMENT FOR THE SAME DAMAGES, IT IS AVAILABLE AS A SET-OFF AGAINST THE RECOVERY IN THE SPOILATION CLAIM.

MR. PERWIN, BY SUGGESTING THAT THE CAUSE OF ACTION OR A SET-OFF MAY BE AVAILABLE, THEN SUPPOSES OR ASSUMES THAT THE LANGUAGE IN AN INSURANCE CONTRACT MATCHES TO PROVIDE PROTECTION FOR IT, SO THAT IS THE ONE I THINK WEER REALLY, BECAUSE OF THIS LANGUAGE, HOW DO WE APPLY THIS PARTICULAR LANGUAGE, WHICH IS NOT, I WOULD HOPE YOU WOULD AGREE, ABSOLUTELY CRYSTAL CLEAR, THAT IT APPLIES TO SPOILATION CASE, BUT HOW, WHAT IS THE CONSTRUCTION THAT HAS TO BE PLACED TO BRING THAT IN?

I AM SORRY. THE REASON I AM MAKING THE ARGUMENT IS BECAUSE THE LANGUAGE IS THE

SAME. DAMAGES BECAUSE OF BODILY INJURY. THE CRITICAL LANGUAGE OF THE POLICY DOES FOCUS ON THE CHARACTER OF THE DAMAGES, AND THAT IS WHAT ESTABLISHESET APPROPRIATE OF THE SET OFF. LET ME -- ESTABLISHES THE PROPRIETY OF THE SET OFF. LET ME GIVE YOU AN EXAMPLE. COMPENSATION WAS PAID TO MR. MILLION, THE WORKER IN THIS CASE. UNDER SECTION 443.9, IT HAS A LIMIT OF THE PAYMENTS UNDER PART B OF THE POLICY FOR LIABILITY, BUT ONLY IF THE DAMAGES ARE THE SAME. 768.041, QUOTE, THE SAME TORT FOR THE SAME DAMAGES. IT HAS A COMP LINK. THE ONE CASE -- SORRY.

LET ME ASK YOU THIS. I MEAN, I UNDERSTAND YOU WANT TO GO TO SECTION B, BUT SECTION A IS THE PROVISION AS TO WHAT THIS INSURANCE APPLIES TO, PERIOD.

NO.

WELL, IT IS WHAT IT SAYS. IT SAYS "HOW THIS INSURANCE APPLIES. THIS EMPLOYERS LIABILITY INSURANCE APPLIES TO BODILY INJURY BY ACCIDENT." WELL, MY QUESTION TOE YOU IS THAT IF YOU ASSUME, FIRST YOU HAVE GOT TO FIGURE OUT IN READING THIS POLICY, WHAT THIS POLICY APPLIES TO, THAT, THERE A CONFLICT, THEN, WITH JUDGE KLEIN'S OPINION OUT OF THE FOURTH DISTRICT?

NO, NO, YOUR HONOR, BECAUSE SECTION A IS ONLY ONE FORM OF COVERAGE. FOR COMP COVERAGE, WE ARE TALKING ABOUT SECTION B.

I AM TALKING ABOUT PART TWO, SECTION A, HOW THIS INSURANCE APPLIES.

PART TWO SECTION A DETERMINES THE APPLICATION OF THE COMP BENEFITS. SECTION B DETERMINES THE APPLICATION OF THE LIABILITY.

WE ARE TALKING ABOUT --

NO. NO. THIS EMPLOYERS LIABILITY INSURANCE APPLIES TO BODBLY INJURY BY ACCIDENT. HOW -- TO BODILY INJURY BY ACCIDENT. HOW THIS INSURANCE APPLIES UNDER PART B OF THE EMPLOYERS LIABILITY INSURANCE.

I AM SORRY. I UNDERSTAND. THE EMPLOYERS LIABILITY BY ACCIDENT IS THE EXACT MEASURE OF DAMAGES THAT ARE COMPENSATED FOR IN THE SPOILATION CLAIM, AND THE PART B SECTION SAYS WE WILL PAY THOSE DAMAGES, BECAUSE OF BODILY INJURY.

BUT JUDGE KLEIN MAKES THE POINT, AS I UNDERSTAND THE FOURTH DISTRICT'S CASE, AND SAYS THAT, IN FACT, THAT IS NOT HOW, THAT WHAT IS RECOVERED IN A SPOILATION DAMAGES HAS BEEN DETERMINED BY THE DISTRICT COURTS TO BE A RECOVERY OF A PROPERTY LOSS. I MEAN, THAT IS, THEREIN LIES THE DIFFERENCE, IT NOT? IN THIS CONCEPT?

THE DIFFERENCE, JUDGE, JUSTICE WELLS, IN THE THERE I HAVE LIABILITY, WHICH LEADS YOU TO THE SAME DAMAGES IN THIS PARTICULAR SPOILATION CASE, BUT THERE IS NOTHING IN THE POLICY THAT SAYS THAT, IF YOUR BOTTOM LINE IS THE PAYMENT OF BODILY INJURY DAMAGES, THERE IS ONLY COVERAGES, YOU GET TO IT THIS WAY BUT NOT IF YOU GET TO IT THIS WAY.

LET ME CHANGE YOUR LIMIT ALTHA YOU STARTED OUT WITH, THAT A HOME EMERGENCY SERVICES WAS A PARTY TO THE TYPICAL NEGLIGENCE SUIT, AS WELL AS HOME DEEP, ET CETERA. AND THERE ARE PARTIES TO THAT SUIT, NOT A WORKMANS COMP, JUST A STRAIGHT OUT NEGLIGENCE CASE, AND IN THE MIDST OF THAT SUIT, THE LADDER COMES UP MISSING, TO USE A COLLOQUIALISM. OKAY. THE REMEDIES RECOGNIZED BY CALIFORNIA AND OTHER STATES, ARE NOT RECOGNIZING SPOILATION AS A SEPARATE CLAIM, BUT RECOGNIZING THERE ARE REMEDIES WITHIN THE ACTION, ITSELF, TO, REBUTTABLE PRESUMPTIONS AND OTHER REMEDIES, TO ALLOW THE CASE TO GO FORWARD AND SUFFER THAT LOSS. WHY, DISTINGUISH THAT FROM, FOR ME, ON

THE LIABILITY. DO YOU UNDERSTAND MY QUESTION THAT I AM ASKING?

SURE. AND MY ANSWER IS THAT, BECAUSE OF THE LANGUAGE OF THIS PARTICULAR POLICY, THAT DISTINCTION IS NOT DETERMINATIVE OF THE LIABILITY OF THE INSUROR, BECAUSE THE -- OF THE INSURER, BECAUSE THE ONLY THING --

THE NEGLIGENCE IS THE LOSS OF THE LADDER NOT THE INJURY TO THE PARTY.

BUT THE POLICY DOESN'T COVER, BASED ON THE ACT OF NEGLIGENCE. IT PAYS BASED ON THE DAMAGES. THE DAMAGES ARE FOR BODILY INJURY. I AM SORRY.

BUT TAKING WHAT HAS JUST BEEN ASKED, IF YOU HAD TRIED TO SUE AT THE BEGINNING AND SAY THE LADDER IS THERE AND YOU WENT AND SUED KELLER AND HOME DEPOT, AND YOU SUED THE HUMANA, THE LADDER WAS THERE, WHAT WOULD HAPPEN? THERE WOULD BE NO LIABILITY, CORRECT? LADDER IS THERE. SUE FOR NEGLIGENCE.

IMMUNE. THEIR EMPLOYER, THEY ARE IMMUNE. THEY DID NOT NOTHING OUTSIDE THEIR CAPACITY AS EMPLOYER.

NOT COVERED UNDER PART TWO.

NOT COVERED AT ALL.

THEY ARE OUT OF THE LAWSUIT.

THEY ARE, BECAUSE WE HAVE NO INDEPENDENT ACT OF NEGLIGENCE, APART FROM THE INDEPENDENT ACT OF EMPLOYER, AS EMPLOYER.

SO PART TWO WOULD NEVER COME INTO PLAY.

CORRECT. THEY ONLY COME INTO PLAY IF WE HAVE AN INDEPENDENT BASIS EXTRINSIC TO THEIR CAPACITY AS EMPLOYER.

WHICH HAS NOTHING DO -- WHICH HAS NOTHING TO DO WITH THEIR NEGLIGENCE IN CAUSING THE ACCIDENT.

BUT HAS TO DO WITH THE LIABILITY OF THE EMPLOYER FOR THE BODILY INJURY DAMAGES. THEY HAVE PICKED UP THE TAB ON THAT. NO MATTER HOW YOU GET THERE, THERE IS NOTHING THAT SAYS YOU HAVE TO GET THERE THIS ROUTE AS OPPOSED TO THIS ROUTE.

WELL, THEN, WHAT IS, GOING BACK BACK TO, MAYBE YOU ANSWERED THIS QUESTION THAT SAYS THIS LIABILITY INSURANCE APPLIES TO BODILY INJURY BY ACCIDENT. NOW, DO WE HAVE TO, THEN, GET BACK TO DEFINE WHAT THE ACCIDENT WAS IN THIS CASE? WAS IT THE ACCIDENT, THE FALL FROM THE LADDER OR WAS THE ACCIDENT THE LOSS OF THE, OR THE LOSS OF THE LADDER?

WELL, IT IS BOTH, AND THERE IS NOTHING IN THIS POLICY THAT HAS TO SAY, STATES THAT IT HAS TO BE THE EX-CLUSIVE CAUSE OR THE ONLY CAUSE. THAT IS THEIR INTERPRETATION.

SO IF WE ACCEPT THE ARGUMENT AND YOUR CLIENT IN THIS CASE INTENTIONALLY DESTROYED THE LADDER AND THAT COULD BE PROVEN, THERE BY THAT WOULD BE A MECHANISM IN WHICH YOUR CLIENT COULD FORCE THE INSURANCE TO COME IN AND COVER THE CASE, BECAUSE INTENTIONALLY HE HAS CREATED A SPOILATION.

ABSENT SOME OTHER EXCLUSION IN THE POLICY FOR COVERAGE FOR INTENTIONAL CONDUCT, WHICH I THINK WOULD KICK IN.

SO IN ESSENCE, THE COVERAGE HERE THAT YOU ARE ASKING IS NOT, AS JUSTICE PARIENTE SAYS, IS NOT SIMPLY FOR THE NEGLIGENCE OF THE INJURY TO YOUR CLIENT. YOU, ALSO, WANT COVERAGE FOR THE NEGLIGENCE IN THE MISPLACEMENT OF A LADDER.

WE WANT COVERAGE FOR THE DAMAGES, WHICH IS THE OPERATIVE CONTRACTUAL LANGUAGE, WHICH DOESN'T FOCUS ON THE NATURE OF THE WRONGFUL ACTOR ON THE NATURE OF THE CONDUCT. IT FOCUSES ON THE LIABILITY FOR BODILY INJURY DAMAGES! AND UNLESS IT SAYS THAT THE CAUSE OF ACTION HAS TO BE THE SEOUL, COUNSEL SAID --.

SO THAT IF YOU TOOK YOUR ARGUMENT, AN INTENTIONAL ACT FOR THE LOSS OF THE LADDER WOULD NOT AND INTENTIONAL ACT UNDER THE EXCLUSION OF THE POLICY, BECAUSE IS T IS NOT RELATING TO THE INJURY OF THE PARTY, WHICH YOU ARE SAYING IS THE DAMAGE. IT RELATES TO THE LOSS OF THE LADDER.

MAY OR MAY NOT, DEPENDING ON THE EXCLUSION, AND WE WOULD DEBATE THAT QUESTION, BUT WHEN COUNSEL SAYS THIS LANGUAGE ONLY COVERS BODILY INJURY CAUSED BY THE EMPLOYER INDEPENDENTLY, SHE IS MAKING, I AM SORRY, SHE IS READ AGO POLICY WHICH IS NOT THIS POLICY! THIS POLICY DOESN'T -- SHE IS READING A POLICY WHICH IS NOT THIS POLICY! THIS POLICY DOES NOT ADDRESS WHAT DESTRUCTION TOOK PLACE OR WHETHER IT TOOK PLACE AT THE HANDS OF SOMEONE ELSE. IT FOCUSES ON THE NATURE OF THE DAMAGES. NOW, IF IT IS NOT AN UNDERLYING PERSONAL INJURY CASE. SAY IT IS A PROPERTY DAMAGE CASE OR A LIABLE CASE, THEN THE DESTRUCTION OF THE EVIDENCE UNDER THIS LANGUAGE IS NOT GOING TO KICK IN COVERAGE FOR THE SPOILATION CLAIM, AND --

BUT DOESN'T THIS COME DOWN TO IS THE ACCIDENT, DOES THE ACCIDENT HERE, THE LOSS OF THE LADDER, OR IS THE ACCIDENT THE FALL FROM THE LADDER, AND THE FACT IS IT NECESSARILY, THE ACCIDENT HERE HAS GOT TO BE THE LOSS OF THE LADDER. I MEAN, THAT IS THE POINT THAT I READ JUDGE KLEIN MAKING, IS THAT THE LOSS OF THE LADDER BEING THE DAMAGE, AND THE DAMAGES ARE THIS INTANGIBLE BENEFICIAL INTEREST IN THE LADDER.

BUT THE ASSUMPTION OF THAT QUESTION, WITH ALL RESPECT, IS THAT IT HAS TO BE ONE OR THE OTHER. IT HAS TO BE THE EX-CLUSIVE CAUSE, AND THAT IS LANGUAGE THAT DOES NOT EXIST IN THIS POLICY.

BUT THAT IS WHAT I KEEP COMING BACK TO, IS WE HAVE GOT, DON'T WE HAVE TO, FIRST, DETERMINE WHAT THIS INSURANCE POLICY APPLIES TO!

YES, AND WHAT WE ARE TOLD IS THAT IT APPLIES TO BODILY INJURY BY ACCIDENT, WHICH WE HAVE, AND IT APPLIES TO DAMAGES BECAUSE OF BODILY INJURY, WHICH ARE EXACTLY THE DAMAGES THAT ARE PAYABLE IN THE SPOILATION CLAIM. AND THE DAMAGES, YOUR HONOR, BECAUSE OF THE BODILY INJURY BY ACCIDENT, ARE AN ELEMENT OF THAT SPOILATION CLAIM. THE UNDERLYING LIABILITY MUST BE PROVED, AND THE UNDERLYING DAMAGES MUST BE PROVED. AND WITHOUT QUESTION, AS EVERYONE ADMITS, THOSE DAMAGES ARE MEASURED, PRECISELY. THAT IS WHY I STARTED WITH THIS SET OFF ARGUMENT. THAT IS WHY YOU GET THE SET OFF FOR A SETTLEMENT WHICH WE MAKE WITH THE TORT. THAT IS WHY THERE IS A COMP CLAIM.

MR. PERWIN, IT APPEARS THAT WHERE WE ARE HAVING DIFFICULTY IS THAT YOU ARE REALLY CONCENTRATING ON PARAGRAPH B, WHAT WE WILL PAY, THE DAMAGES RECOVERABLE, AS OPPOSED TO PARAGRAPH A, WHICH IS IN GENERIC TERMS IS THE COVERAGE CLAUSE. THAT IS WHERE YOU NEED TO DIRECT US. THAT IS WHERE I THINK WE ARE HAVING DIFFICULTY WITH, IS THAT PARAGRAPH A IS THE COVERAGE CLAUSE, AND THAT IS WHAT WE ARE TALKING ABOUT HERE, NOT WHAT THE DAMAGES ARE, BUT IS IT WITHIN THE BASIC COVERAGE OF THE POLICY.

OKAY.

THAT IS WHAT I AM TRYING TO UNDERSTAND. THAT IS WHERE WE ARE STRUGGLING, BECAUSE WE CERTAINLY UNDERSTAND YOUR ARGUMENT AS TO B THAT, THOSE DAMAGES MAY BE WITHIN IT, BUT HOW DO YOU DEAL WITH THE BASIC COVERAGE CLAUSE?

BECAUSE, BECAUSE THE APPLICATION TO BODILY INJURY BY ACCIDENT IS AN ELEMENT OF THIS PARTICULAR SPOILATION CLAIM, AS OPPOSED TO ONE WHICH IS, IN WHICH THE UNDERLYING CLAIM IS FOR PROPERTY DAMAGE OR LIABLE OR SLANDER. IN THIS PARTICULAR CASE, THE GRAPH AMOUNT OF THE CAUSE OF ACTION -- THE GRAVAMENT OF THE CAUSE OF ACTION AND SPOILATION FOR THE CAUSE OF ACTION IS BODILY INJURY BY ACCIDENT. THAT IS A NECESSARY ELEMENT OF THE SPOILATION CLAIM, AND THERE IS NOTHING IN PART A WHICH SAYS THAT THE ACTION FOR BODILY INJURY BY ACCIDENT HAS TO ARISE THIS WAY. IT HAS TO HAVE BEEN DONE BY THE EMPLOYER, HIMSELF, AS OPPOSED TO THIS WAY. THE SPOILATION CLAIM IN THIS CASE ENCOMPASSES AND IS DEPENDENT UPON, AND ITS DAMAGES ARE MEASURED BY A BODILY INJURY BY ACCIDENT!

BUT HOW DO YOU RELATE WITH THE, USING ANOTHER PHRASE, DO YOU HAVE AN INTERVENING, INDEPENDENT TORT ALLEGED BY YOUR CLIENT? ISN'T THAT CORRECT?

YES.

WE HAVE THE ORIGINAL DAMAGE. THEN WE HAVE AN INTERVENING TORT, INDEPENDENT OF A PHYSICAL INJURY TO THE CLIENT, THAT INTERVENES IN THIS PORTION, AND ONLY WITH THAT INDEPENDENT TORT, DO YOU CREATE ANY LIABILITY FOR YOUR CLIENT, BECAUSE IF YOUR CLIENT HAD NOT MISPLACED THE LADDER, THERE WOULD BE NO INDEPENDENT TORT. THERE WOULD BE NO CAUSE OF ACTION FOR SPOILATION, AND THERE WOULD BE NO NEED TO REQUEST THE INSURANCE COMPANY TO STEP THEY.

WHICH WOULD PRESENT A PROBLEM TO ME, IF THIS POLICY SAID BODILY INJURY BY ACCIDENT, CAUSING BODILY INJURY DAMAGES, UNLESS THAT ARISES BY VIRTUE OF AN INTERVENING TORT, SUCH AS SPOILATION, WHICH CREATES A SECOND STEP IN THE LIABILITY PROCESS. DOESN'T MEAN THE FIRST STEP ISN'T NECESSARY, WHICH ALSO HAS TO BE SATISFIED IN ORDER TO PROVE LIABILITY FOR SPOILATION. IF THE CONTRACT SAID ALL OF THAT, THE EXISTENCE OF AN INTERVENING TORT WOULD BE A REAL SERIOUS PROBLEM TO ME, BUT REMEMBER WE DIDN'T DRAFT THIS CONTRACT. IT HAS GOT TO BE CONSTRUED IN OUR FAVOR, AND THERE IS NOTHING IN THIS CONTRACT THAT SAYS HOW YOU GET TO THAT, THOSE BODILY INJURY DAMAGES. YOU MAY GET THEM BY VIRTUE OF AN INTERVENING ACT OF NEGLIGENCE. IT MAY BE AN ACT OF NEGLIGENCE BY SOMEBODY ELSE OR BY THIS EMPLOYER. IT MAY BE AN ACT OF NEGLIGENCE WHICH GIVES RISE TO AN INDEPENDENT CAUSE OF ACTION. ALL SORTS OF THINGS THAT COULD HAPPEN. BUT WHATEVER THEY ARE, IF THE BOTTOM LINE IS THAT THERE IS AN INJURY BY ACCIDENT UNDER PART A, AND THE RESULT, END RESULT IS BODILY INJURY DAMAGES, TO WHICH THE, WHICH THE EMPLOYER HAS TO PAY, WE ARE COVERED. THOSE ARE THE ONLY CRITERIA, AND THERE IS NO CHALLENGE TO ANY OF THE OTHER CRITERIA WHICH GUMPBS THIS POLICY. SUMS THE EMPLOYER MUST -- WHICH GOVERNS THIS POLLICY. SUMS THE EMPLOYER MUST LEGALLY PLAY. ARISE OUT OF EMPLOYMENT. CLAIMS OF THE CAPACITY OF THE EMPLOYER AND ALL OF THOSE ARE SATISFIED. THIS LANGUAGE, TOO, IS SATISFIED, CONSTRUED IN THE LIGHT MOST FAVORABLE TO COVERAGE, AND THE TWO NONFLORIDA CASES WHICH HAVE ADDRESSED THIS POINT AND I HAVE TO ADMIT HAVE COME OUT THE OTHER WAY, HAVE NOT APPLIED THE RULE IN FLORIDA THAT YOU CAN CONSTRUE MOST FAVORABLY TO THE INSURED. THEY ARE BOTH DE NOVO CASES IN WHICH THE COURT ITSELF, INDEPENDENTLY UNDERTOOK TO EXAMINE THE LANGUAGE OF THE POLICY. ONE DOES SAY IT IS UNAMBIGUOUS. YOU HAVE TO ADMIT THAT. BUT I DON'T SEE HOW IT CAN BE UNAMBIGUOUS IN LIGHT OF THIS CONTEXT, IN LIGHT OF THE CONSTRUCT WHICH I HAVE SUGGESTED HERE, WHICH IS EQUALLY CONSISTENT WITH THE CONTRACTURAL LANGUAGE IN THIS CASE. AND I --.

MR. PERWIN, I AM STILL HAVING TROUBLE DISTINGUISHING BETWEEN PART ONE AND PART TWO, BECAUSE AS WE HAVE DISCUSSED PART TWO SAYS THIS EMPLOYERS LIABILITY INSURANCE APPLIES TO BODILY INJURY BY ACCIDENT OR BODILY INJURY BY DISEASE. WELL THAT, IS THE SAME DEFINITION IN PART ONE UNDER THE WORKERS COMPENSATION INSURANCE, AND UNDER PART TWO, IT ALSO SAID THE BODILY INJURY MUST ARISE OUT OF AND IN THE COURSE OF THE INJURED EMPLOYEE'S EMPLOYMENT BY YOU. THAT SEEMS TO BE THE SAME KIND OF WORKERS COMP INSURANCE AS IN PART ONE. WHAT IS THE DISTINGUISHING FEATURE OF THE TWO TYPES OF INSURANCE?

THE DISTINGUISHING FEATURE IS THAT THE EMPLOYER MUST BE LIABLE UNDER PART TWO IN A CAPACITY OTHER THAN AS HIS EMPLOYER, SO PART ONE RELATES TOE ALL THE CIRCUMSTANCES IN WHICH AN EMPLOYER IS ENTITLED TO WORKERS COMP IMMUNITY, WITHIN THE CONTEXT OF HOW THE ACCIDENT OCCURRED. PART TWO, WHICH IS NOT INCONSISTENT WITH IT, RELATES TO ALL OF THE OTHER CONTEXTS. COUNSEL DID GIVE A FEW EXAMPLES OF HOW IT DID OCCUR. SHE IS RIGHT. AND THIS IS ANOTHER EXAMPLE. THIS IS A PRIME EXAMPLE IN WHICH THE EMPLOYER IS RESPONSIBLE FOR REASONS OTHER THAN IN HIS CAPACITY.

IT WOULD ALSO BE, ARGUABLY, RESPONSIBLE UNDER PART TWO, FOR EXCEPTION TO THE WORKERS COMP, LIKE A WILLFUL --

RECKLESS, WILLFUL.

THAT'S RIGHT. AND ISN'T THAT WHAT THIS POLICY REALLY IS DESIGNED TO DO?

NO, SIR, IT ISN'T.

GIVE YOU A BLANKET COVERAGE FOR WHAT YOU COULD BE, YOU ARE GOING TO BE LIABLE TO YOU UNDER WORKERS COMP OR YOU COULD BE LIABLE UNDER AN EXCEPTION TO THE WORKERS COMP.

NO, SIR. THERE IS NOTHING IN THE POLICY LANGUAGE WHICH PRESCRIBES AN INCONSISTENCY BETWEEN ONE AND TWO, TO THE EXTENT THAT, IF YOU ARE COVERED UNDER ONE YOU ARE NOT COVERED UNDER TWO. THE EMPLOYEE CAN BE LIABLE IN TWO DIFFERENT CAPACITIES. HE CAN BE LIABLE AS EMPLOYER FOR WORKERS COMP. HE CAN BE LIABLE BECAUSE HE DID SOMETHING WRONG INDEPENDENTLY INDPART TWO, AND HE IS NOT PAYING DOUBLE. HE HAS GOT A COMP LIEN UNDER PART ONE, ON ANYTHING HE HAS TO PAY UNDER PART TWO. I THINK HE HAS ALSO GOT A SET-OFF, IF WE SETTLE WITH THE UNDERLYING TORTFEASOR, WHICH IS THE HYPOI BEGAN WITH. WE KNOW THEY -- WHICH IS THE HYPOI BEGAN WITH. WE KNOW THEY ARE GOING -- WHICH IS THE HYPO I BEGAN WITH. WE KNOW THAT HIS EMPLOYER, THAT IF THERE IS A SETTLEMENT WITH ONE OF THE UNDERLYING TORTFEASORS, WE GET A SET-OFF, AND THE REASON IS THAT, WITH ALL OF THIS DISCUSSION ABOUT THE NATURE OF THE CAUSE OF ACTION, THE INTERVENING ACTS, THE BOTTOM LINE UNDER THIS CONTRACT IS DAMAGES BECAUSE OF BODILY INJURY, EVEN UNDER PART A, THE ACCIDENT ARISES -- EXCUSE ME.

HAVE THEY NOT ALREADY PAID THAT, WHEN THEY PAID THE WORKMAN'S COMP?

YES, SIR.

AND ISN'T IT TRUE THAT, AT THE TIME OF THE LOSS OF THE LADDER, YOUR CLIENT WAS NO LONGER, I MEAN THE EMPLOYEE WAS NO LONGER AN EMPLOYEE. I THOUGHT THAT IS WHAT THE FACTS OF THE CASE --

THEY DON'T GET THAT COMP LIEN UNLESS I AM RIGHT.

UNLIKE THE QUESTIONS JUSTICE PARIENTE ASKED OPPOSING COUNSEL, THERE HAS BEEN NO

OTHER INJURY BYPRODUCT OF THE EMPLOYER OR ANYTHING ELSE LIKE THAT. THE DAMAGES ARE STILL THE SAME DAMAGES FROM THE ONE FALL FROM THE LADDER THAT WAS CARED FOR UNDER THE WORKMANS COMP CLAIM.

YES, SIR, AND THAT IS EXACTLY WHY THEY ARE COVERED, BECAUSE THE KEY CONTRACTUAL LANGUAGE FOCUS IS ON THE NATURE OF THE KAGES. DAMAGES FOR BODILY INJURY --

BUT HASN'T THAT BEEN PAID UNDER THE WORKMANS COMP, PART ONE?

YOUR RECOVERY UNDER WORKMANS COMP IS NEVER CLOSE TO WHAT YOU MAY WELL YET --

THAT MAY WELL BE MY QUESTION UNDER RECOVERY, BUT HAS THE OBLIGATION UNDER WORKMANS COMP, THE EMPLOYER'S OBLIGATION UNDER THE FACTS OF THIS CASE, CONCERNED AN ACCIDENT DURING THE JOB.

YES, AND IF THERE IS A SET OFF, WHICH THEY WILL CLAIM, AND THEY ARE RIGHT, THEY ONLY GET THAT SET OFF IF THE DAMAGES ARE THE SAME, AND IF THE DAMAGES ARE THE SAME, UNDER A AND B, BECAUSE THEY BOTH FOCUS ON PERSONAL INJURY DAMAGES, THEN THE COURT, THIRD DISTRICT COURT ON BANK, HAD TO BE CORRECT IN LINCOLN -- ON BANC, HAD TO BE CORRECT IN LINCOLN.

WE ARE GOING TO HAVE TO END ON THAT POINT. COUNSEL. REBUTTAL?

THE QUESTION ISN'T WHY WE ARE HERE. THE QUESTION IS WHY HOME EMERGENCY SERVICES IS THE DEFENDANT IN THE UNDERLYING LAWSUIT, AND THE ANSWER TO THAT IS BECAUSE OF THE SPOILATION OF THE EVIDENCE AND THE LOSS OF THE LADDER.

ARE WE HERE ON A COVERAGE OR LOSS OF THE LADER?

IT IS BOTH.

HAS ANYONE MADE THE ARGUMENT THAT THOSE TWO MIGHT BE RESOLVED DIFFERENTLY?

THAT ARGUMENT HAS NOT BEEN MADE AT ANY POINT. ORIGINALLY THE TRIAL COURT AGREED WITH THE SUMMARY JUDGMENT THAT, THERE WAS NO COVERAGE. THEREFORE NO DUTY TO DEFEND AND THE CASES PROCEEDED, PROCEDURALLY FROM THAT PERSPECTIVE. A SPOILATION OF EVIDENCE CLAIM IN FLORIDA IS SOME THINGS AND IT IS NOT SOME THINGS. WHAT IT IS AN INDEPENDENT ACTION. WHERE THE PARTY IS UNABLE TO PROVE THE CASE DUE TO THE LOSS OF THE EVIDENCE. IT IS NOT A BODILY INJURY OR BODBLYLY -- OR BODILY INJURY BY DISEASE. THE DAMAGES ARE ECONOMIC. THEY ARE NOT BODILY IN NATURE.

LET'S GO BACK TO THAT PART. IF THEY PROVE THEIR CASE, WHAT WOULD BE THE DAMAGES BE? WHAT KIND OF MEASURE --.

THE DAMAGES IS THE SAME.

I THOUGHT YOU SAID THAT WERE FINANCIAL.

I DON'T QUESTION THE DAMAGES BEING THE SAME AS WHATEVER THE DAMAGE WAS FOR HIS BODILY INJURIES, BUT THE MEASURE OF THE LIABILITY THAT GIVES RISE TO THE DAMAGE IS DIFFERENT. ONE IS A BODILY INJURY CLAIM AND ONE IS A FINANCIAL OR ECONOMIC CLAIM. I WOULD LIKE TO BRIEFLY GO THROUGH THE COURTS THAT ADD V ADDRESSED THIS ISSUE IN THE COMMERCIAL CONTEXT AND IN THE EMPLOYER'S GENERAL LIABILITY CONTEXT. IN ONE SENTENCE, THE OCCURRENCE THERE, HERE I WOULD SUBMIT THE ACCIDENT, IS THE DESTRUCTION OF THE EVIDENCE, WHICH DID NOT CAUSE BODILY INJURY. IT CAUSED SOME

DIFFERENT ECONOMIC DAMAGE. THE COURT THEN TURNED TO DISCUSS THE PROPERTY DAMAGE. IN THE DeJULIO CASE OUTFIT FOURTH DISTRICT YEARS AGO, THERE IS NO DISCUSSION OF EVEN A BODILY INJURY. THE COURT, THERE, SOLELY DISCUSSES THAT THE COVERAGE APPEARS TO BE BASED ON PROPERTY DAMAGE IN A SPOILATION CLAIM. IN THE DISSENT IN THE LINCOLN CASE, THREE JUDGES DISSENTING IN THE THIRD IN THE U.N. BUNK DECISION, WHILE THE FALL IS A OCCURRENCE OR ACCIDENT, IT IS NOT THE OCCURRENCE OR ACCIDENT THAT GIVES RISE TO THE SPOILATION CLAIM. THAT OCCURRENCE OR ACCIDENT IS THE LOSS OF THE LADDER. THE MIDDLE DISTRICT OF FLORIDA, IN THE COUNSEL CASE, ADDRESSED THE ISSUE VERY BRIEFLY. THERE IS NO DISCUSSION AT ALL OF BODILY INJURY. AGAIN IT ONLY DISCUSSES THIS FROM THE PERSPECTIVE THAT THE LOSS OF THE PROPERTY MIGHT BE A PROPERTY DAMAGE CLAIM. THE, MY TIME IS UP. BUT BRIEFLY THE ILLINOIS COURT HAS ADDRESSED THE ISSUE.

CHIEF JUSTICE: WE HAVE GOT THE ILLINOIS COURT'S ADDRESS OF IT THAT. WE THANK YOU BOTH VERY MUCH. THE COURT IS GOING TO TAKE A TEN-MINUTE RECESS, BEFORE HEARING THE NEXT CASE. WE WILL STAND IN RECESS.

MARSHAL: PLEASE RISE.ccccccccccc