Helen M. Caruso v. Earl Baumle

MARSHAL: PLEASE RISE.

CHIEF JUSTICE: ALL RIGHT. APPRECIATE YOU BEING KRAED TO GO ON CRUISE ---BEING READY TO GO ON CARUSO VERSUS BAUMLE.

WE ARE HERE TODAY TO ASK THE COURT TO ANSWER THE CERTIFIED QUESTION IN AFFIRMATIVE AND THE SECOND IN THE NEGATIVE AND QUASH THE LOWER TRIBUNAL DECISION AND ENTER JUDGMENTS IN ACCORDANCE WITH THE VERDICT, AND THIS IS QUITE SIMPLY A CASE, YOUR HONORS, WHERE THE PLAINTIFFS CAME TO TRIAL AND WE WERE PREPARED AND WE DID PROVE UP OUR CASE ON LIABILITY AND DAMAGES, BUT THE DEFENDANT DID NOT, AND WE SUBMIT THAT IT IS FUNDAMENTALLY UNFAIR AND REVERSIBLE ERROR, TO HOLD THE DEFENDANT TO A DIFFERENT OR MORE LIBERAL BURDEN OF PROOF THAN THE PLAINTIFF.

CAN I ASK YOU A PRACTICAL QUESTION?

YES.

THESE CASES HAVE BEEN GOING ON SINCE 1972 '73, AND AS REAL PRACTICAL MATTER, THESE THINGS WERE ALWAYS RESOLVED AT THE TRIAL LEVEL. YOU WORK THESE THINGS OUT AND IT DOESN'T GO ON FOR YEARS AND YEARS. WHAT IS THE REAL PROBLEM IN THIS CASE?

THE REAL PROBLEM IS TWOFOLD, YOUR HONOR. THE FIRST IS THAT IT IS, WHAT HAS BEEN DONE HERE IS AT VARIANCE WITH THE STATUTE.

I WANT TO HE KNOW WHAT DOES THE RECORD SHOW WITH -- I WANT TO KNOW WHAT DOES THE RECORD SHOW WITH REGARD TO, COULDN'T THEY GET INFORMATION FROM THE PIP CARRIER? WHAT IS THE REAL PROBLEM, RATHER THAN WE ARE TALKING ABOUT ALL OF THESE SOPHISTICATED ISSUES, AND THIS IS A REAL SIMPLE PROBLEM THAT CAN BE HANDLED AT THE TRIAL LEVEL, AND THAT IS WHY I AM ASKING YOU TO ANSWER THE QUESTION WHY DID THIS THING DEVELOP?

TO ANSWER YOUR QUESTION, THE PROBLEM WITH WHAT THE COURT SUGGESTED EARLIER, IT WOULD BE TO HOLD THE DEFENDANT TO A MORE LIBERAL STANDARD OF PROOF. YOU KNOW, IF THE PLAINTIFF CAN'T PROVE THEIR CASE AFTER TRIAL, THE DEFENDANT SHOULDN'T BE ABLE TO DO SO, AND WHERE PARTIES DON'T STIPULATE, AND THERE IS NO DEBATE ABOUT THAT IN THIS CASE, THE PARTIES DID NOT STIPULATE, YOU HAVE TO COME TO TRIAL PREPARED TO PROVE YOUR CASE, AND EVERYTHING ABOUT WHAT THIS COURT HAS SAID ABOUT THE STATUTE THAT IT IS IN DEROGATION OF THE COMMON LAW, THAT IT HAS TO BE NARROWLY CONSTRUED AND SO FORTH, IS CONSISTENT WITH OUR INTERPRETATION OF THE STATUTE.

SO, LAW BECAUSE, RATHER THAN UNDERSTAND, YOU KNOW, WHY THIS THING DIDN'T GET RESOLVED, IS IT YOUR POSITION THAT WHATEVER COLLATERAL SOURCE RULE IS NO IN EFFECT REQUIRES THE COLLATERAL SOURCES GOING INTO EVIDENCE, THE JURY HEARS THEM, BUT THEY ARE TOLD, DO THEY DEDUCT IT THEMSELVES OR IS IT DEDUCTED POST VERDICT?

IN THE FIRST INSTANCE, ESPECIALLY IN A CASE LIKE THIS, WHERE BOTH PARTIES HAVE REQUESTED A JURY TRIAL, PER THE STATUTE, WHICH IS 627.736, I BELIEVE, SUBSECTION 3, IN THE

FIRST INSTANCE, WE HAVE GOT BOTH PARTIES REQUESTING A JURY TRIAL. YES, IT GOES TO THE JURY, BUT THE STATUTE --

NOBODY ARGUED AT TRIAL THAT THIS ISSUE SHOULD GO TO THE JURY, RIGHT? NOBODY ARGUED THAT.

WHAT HAPPENED VERY EARLY, YOU KNOW, I WOULD REFER TO THE COURT TO -- I WOULD REFER THE COURT TO SUPPLEMENTAL RECORD, I BELIEVE IT IS PAGE 799. THEISH --

THE ISSUE AT TRIAL WAS WHETHER THE JUDGE SHOULD CONSIDER IT DURING THE TRIAL OR AFTER THE TRIAL, BUT BOTH PARTIES ARGUED THE JUDGE SHOULD CONSIDER IT. ISN'T THAT RIGHT?

I DISAGREE WITH THE COURT'S CHARACTERIZATION, WITH ALL DUE RESPECT, AND, AGAIN, ON SUPPLEMENTAL ---.

WHERE DOES IT SAY --

PAGE 779 OF THE SUPPLEMENTAL RECORD. I WILL QUOTE FOR THE COURT NOW. THIS IS WHAT THE JUDGE SAID, WE CAN'T TELL THE JURORS ANYTHING ABOUT THE PIP. WE ARE NOT GOING TO TELL THE JURORS ANYTHING ABOUT THE PIP, AND WHEN IT BECAME PARENT TO TRIAL COUNSEL THAT -- APPARENT IT TO TRIAL COUNSEL THAT HE WASN'T GOING TO DO IT, HE WASN'T GOING TO LET IT GO TO THE JURY, THEN TRIAL COUNSEL SAID IT COULD GO TO THE JUDGE, BUT HERE IS THE KEY POINT. IT HAS TO BE DONE AT TRIAL AND ONLY BY ADMISSIBLE EVIDENCE AND NOT HEARSAY.

WHY IS THIS CASE, MAYBE I WILL, THIS IS SORT OF THE FLIP OF EVERYTHING, WE ARE TALKING NOW ABOUT WHETHER THERE WAS A WAIVER IN THIS CASE OR NOT, WHAT IS IT THAT THIS COURT SHOULD RESOLVE THAT IS SUCH A MATTER OF GREAT PUBLIC IMPORTANCE? WHAT IS IT THAT IS CONFUSING OR IS THERE SOMETHING CONFUSING TO TRIAL JUDGES AND ATTORNEYS OUT THERE, BUT HOW -- ABOUT HOW THESE STATUTES ARE TO BE CONSTRUED?

THANK YOU FOR THE QUESTION, YOUR HONOR. THAT IS VERY ABLY POINTED OUT BY THE LOWER TRIBUNAL'S DECISION THAT THERE IS CONFUSION AS TO THE TWO STATUTES REGARDING THE COLLATERAL SOURCE, WHICH EVEN IT PERCEIVED THERE WAS CONFUSION IN THEIR OWN CASE LAW ABOUT IT, SO NUMBER ONE, THERE IS CONFUSION THAT NEEDS TO BE CLEARED UP FOR ALL OF THE TRIAL LAWYERS IN FLORIDA --

I DON'T, OKAY, SO WHAT, USUALLY, AND AGAIN IT HAS BEEN A WHILE AND AS JUSTICE LEWIS SAID, THIS IS SOMETHING THAT SOMETIMES LAWYERS SAY, YOU KNOW WHAT? THERE ARE NUMBERS HERE. WE ARE JUST GOING TO SUBMIT IT ALL AND THEN POST TRIAL WE HAVE IT REDUCED, HAVE IT SUBTRACTED FROM THE VERY I CAN'T BECAUSE WE KNOW -- FROM THE VERDICT BECAUSE WE KNOW THE AMOUNT, AND WHAT ARE YOU SAYING THAT THE LAW REQUIRES THAT, IT BE DONE BY THE JURY?

THAT IS WHAT THE STATUTE SAYS.

I WANT TO UNDERSTAND THAT, BUT CERTAINLY PARTIES COULD AGREE THAT IT COULD BE DONE BY THE JUDGE. THIS ISN'T FUNDAMENTAL RIGHTS WE ARE TALKING ABOUT HERE.

THE PARTIES CAN AGREE THAT IT CAN BE DONE BY THE JUDGE, BUT WHERE THE PARTIES DON'T AGREE, YOU HAVE TO BE PREPARED TO PROVE UP YOUR AFFIRMATIVE DEFENSE AT TRIAL. THIS IS EXACTLY WHAT THE STATUTE SAYS. -- TECHNICAL DIFFICULTIES HE]

SO SO THE ONLY DISPUTE IS WHETHER IT SHOULD BE PRESENTED TO THE JURY OUTSIDE THE PRESENCE OF THE TRIAL OR TO THE JUDGE OUTSIDE OF THE PRESS ENOF THE TRIAL.

IF I COULD BREAK IT DOWN, THE DIALOGUE, THE FIRST PART WHERE TRIAL COUNSEL SAID FOR THE PLAINTIFF, ABSOLUTELY NOT, IT IS THEIR AFFIRMATIVE DEFENSE. I MEAN, THEY ASKED, THE DEFENSE ASKED FOR A RIGHT, FOR A TRIAL BY JURY ON ALL MATTERS TRYABLE BY RIGHT. THEY ASKED FOR IT. IT IS NOT OUR BURDEN TO PROVE IT UP, SO WHEN THE TRIAL COURT ASKED TRIAL COUNSEL, YOU KNOW, ARE YOU GOING TO PUT THIS IN FRONT OF THE JURY, HE SAID NO. AS TO THE BALANCE OF THE RECORD THAT THE COURT JUST CITED TO, IT IS OUR POSITION THAT THE BEST THAT CAN BE SAID, AND THIS IS CRITICAL, THE BEST THAT CAN BE SAID ON THIS RECORD, IS THAT TRIAL COUNSEL AGREED THAT IT COULD BE SUBMITED TO THE JUDGE. THE STATUTE, IN THE WAY IT IS WORDED, WOULD HAVE PERMITTED THAT.

WAS THERE A PRETRIAL CONFERENCE IN THIS CASE?

YES, YOUR HONOR.

WERE THERE PRETRIAL STATEMENTS?

YES, YOUR HONOR.

CAN YOU TELL US WHAT WAS IN THE OR WHAT WERE IN THE PRETRIAL STATEMENTS AND THEN HOW THIS WAS ADDRESSED AT THE PRETRIAL CONFERENCE?

RIGHT. ON ITEM NUMBER EIGHT, I BELIEVE OF THE WITNESS LIST, COUNSEL FOR THE DEFENSE LISTED THE INSURANCE ADJUSTOR FOR UNDERWRITERS GUARANTEE, IN OBVIOUS ANTICIPATION OF THE FACT THAT THEY WERE GOING TO HAVE TO AUTHENTICATE THIS, THAT THERE WERE HEARSAY AND ADDITIONAL PROBLEMS THAT HAD TO BE MET. THERE WAS A STIB STIPLATION, I BELIEVE, AS TO AUTHENTICITY AS TO MEDICAL RECORDS BUT ONLY AS TO MED CRALL RECORDS, AND THAT BE -- TO MEDICAL RECORDS, AND THAT BEING THE CASE AND THE FACT THAT THEY HAD ASKED FOR A JURY TRIAL AND IT TALKS ABOUT AN INSTRUCTION THAT THE JURY IS TO BE GIVEN --

BUT NOBODY QUOTED THAT TO THE JUDGE, DID THEY? THEY NEVER QUOTED 627.736. THEY WERE BOTH UNDER THE ASUMPTION THAT 738 APPLIED. ISN'T THAT WHAT HAPPENED?

NO, THAT IS NOT WHAT HAPPENED AT ALL. LET ME CITE THE COURT TO SUPPLEMENTAL PAGES TO THE RECORD AND WE GAVE THE COURT A COPY OF MARION VERSUS SISSELL, AND IN THAT CASE, AMONG OTHER THINGS THAT THE COURT TALKS ABOUT, IT CONTAINS A COMPLETE JURY INSTRUCTION THAT IS SUPPOSED TO HAPPEN IN THIS CASE WHICH WAS NEVER WAIVED BY EITHER PARTY, AND IT CONTAINS THE ENTIRE TEXT OF THE STATUTE, AND WHEN IT BECAME APPARENT THROUGH SEVERAL COMMENTS OF THE TRIAL COURT JUDGE THAT HE WASN'T GOING TO LET IT GO TO THE JURY, COUNSEL FOR THE PLAINTIFF CORRECTLY SAID THAT THE JUDGE COULD DO IT BUT IT HAD TO BE DONE AT TRIAL, AND THAT EVIDENCE WAS PRESERVED, WAS --

YOU CERTAINLY PRESERVED THE ISSUE THAT IT HAD TO BE DONE AT TRIAL. I AM NOT ARGUING THAT. THAT SEEMS TO BE PRETTY CLEAR. WHAT I DON'T THINK YOU DID PRESERVE IS THAT IT HAD TO GO TO THE JURY, AND AND APPARENTLY -- AND APPARENTLY WHAT HAPPENED IS THAT BOTH COUNSEL AGREED TO WAIVE THAT IT GO TO THE JURY.

NEW YORK CITY YOUR HONOR. UNDER FLORIDA RUFL CIVIL PROCEDURE 1.430, IN ORDER TO HAVE A JURY WAIVER, YOU WOULD HAVE TO HAVE A WRITTEN STIPULATION. REMEMBER BOTH PARTIES EXPECTED A JURY TRIAL IN THIS CASE, OR YOU WOULD HAVE TO HAVE AN ABANDONMENT IN OPEN COURT, AND FRANKLY I DON'T THINK THAT EVER HAPPENED HERE, BUT STILL THE JUDGE COULD HAVE HEARD THE MATTER, HE COULD HAVE HEARD THIS ISSUE BUT IT HAD TO BE DONE AT TRIAL. WE MADE THAT VERY CLEAR. WHY IN THIS CASE? BECAUSE YOU WERE HOLDING THE DEFENDANT, IF --

YOUR MAIN POINT IS YOU CAN'T CONDUCT POST TRIAL DISCOVERY ON THESE ISSUES, RIGHT? THAT IT IS AN AFFIRMATIVE DEFENSE, AND THE DEFENDANT HAS TO PROVIDE THAT EVIDENCE AT THE TRIAL.

I THINK THE WAY TO ILLUSTRATE OUR POSITION MOST CLEARLY, JUSTICE CANTERO, WAS THIS, IF YOU, SUPPOSE IF THE SITUATION WERE REVERSED, AND THIS IS A VERY REAL SITUATION IN PLAINTIFFS' CASES, AND THE PLAINTIFF CAME TO TRIAL AND WE WENT THROUGH AND WE WERE PROVING UP OUR CASE ON LIABILITY AND DAMAGES, AND WE SAID YOU KNOW, WE FORGOT A MEDICAL BILL OR MEDICAL BILLS. NOW, WOULD IT BE OKAY IF WE DID THAT AFTER TRIAL, AND I SUBMIT TO THIS HONORABLE COURT, YOU WOULD HEAR A HEW AND CRY THAT THAT WAS NOT PERMISSIBLE THAT, THAT IS YOUR CASE-IN-CHIEF, THAT YOU HAVE GOT --

WERE THE ISSUES TO BE TRIED, LISTED IN THE PRETRIAL STATEMENT, AND WAS THERE A PRETRIAL ORDER ENTERED AFTER THE PRETRIAL CONFERENCE, AND DID IT LIST THE ISSUES TO BE TRIED, OR IN OTHER WORDS DO YOU HAVE ANY OTHER SORT OF COLLATERAL EVIDENCE OF WHAT THE PARTIES EXPECTED THE PROCEDURE TO BE OR IS THIS SOMETHING THAT WAS JUST SIMPLY OVERLOOKED, AND YOU KNOW, THAT WAS JUST NOT DEALT WITH VERY SPECIFICALLY? HELP ME WITH THAT.

THANK YOU, YOUR HONOR. REFERRING THE COURT TO PAGE 81 OF THE RECORD, THE DEFENSE LISTED THE PIP ISSUE AS ONE TO BE TRIED, AND OF COURSE THEY HAD REQUESTED IN THEIR AFFIRMATIVE DEFENSE, A TRIAL BY JURY ON ALL ISSUES SO TRYABLE, SO --

IT WAS LISTED ON THE DEFENDANT'S PRETRIAL STATEMENT.

AS AN ISSUE OF FACT TO BE TRIED.

YOU KNOW, BY THE JURY, AND MOREOVER, YOU KNOW, THEY PUT THE ADJUSTOR ON THE WITNESS LIST, SO I MEAN, THEY RECOGNIZED THAT THERE WERE HEARSAY AND FOUNDATIONAL PROBLEMS INHERENT. THEY KNEW IT WAS COMING AT TRIAL, AS FAR AS THAT GOES. THE PROBLEM IS THEY DIDN'T PREPARE FOR TRIAL, AND THAT LED THE COURT, I THINK, INVITED THE COURT INTO ERROR, AND PERMITTED THIS POST TRIAL PROCEDURE, WHICH IS NOT ENVISIONED BY THE STATUTE. LET ME SUGGEST TO THE COURTS WHY THIS IS VERY IMPORTANT, BECAUSE EVERYTHING WE ARE TAUGHT ABOUT TRYING CASES HAS TO DO WITH THIS ISSUE OF FINALITY AND WHY THERE IS A NEED TO GET THIS THING OVER WITH, AND THERE --

LET ME ASK YOU A QUESTION, WAS THE, WAS THERE ANY JURY INSTRUCTION CONFERENCE, WHERE IT WAS DISCUSSION AS TO WHETHER TO GIVE A COLLATERAL SOURCE INSTRUCTION?

NO. NOT, IT IS NOT TO MY KNOWLEDGE, YOUR HONOR. I THINK THAT WOULD HAVE BEEN THE BURDEN OF THE DEFENDANT, BECAUSE THAT WAS THEIR AFFIRMATIVE ISSUE, AND IF THEY WANTED TO PROVE IT UP, THEY SHOULD HAVE HAD AN INSTRUCTION ON IT. THEY ASKED FOR A JURY TRIAL ON IT.

SO THE JURY HEARD ABOUT ALL THESE MEDICAL BILLS, AND YOU GOT, YOUR CLIENT WAS AWARDED DAMAGES FOR ALL THE MEDICAL BILLS, CORRECT?

I BELIEVE SO.

BUT YET PIP PAID THE MAJORITY OF THEM.

I BELIEVE PIP DID PAY IT, BUT --

DOESN'T, YOU KNOW, I SEE YOUR ANALOGY, BUT I AM TRYING, I MEAN, YOU KNOW, THAT THERE, THE DEFENDANT IS ENTITLED TO A SET-OFF FOR THOSE PIP BENEFITS.

IT IS AN AFFIRMATIVE DEFENSE, LIKE ANY OTHER AFFIRMATIVE DEFENSE, AND IF YOU START SAYING THAT AFFIRMATIVE DEFENSES CAN BE PROVEN AND DISCOVERY CAN BE DONE POST TRIAL, YOU ARE OPENING THE DOOR FOR A LOT OF PROBLEMS. ALL AGAINST THE GRAIN OF FINALITY, AND I WAS SEARCHING FOR, LIKE, AND AWAY TO EXPLAIN THIS, THE MET FORE IS THAT OF A -- THE METAPHOR IS THAT OF A CONTEST, AND I AM EXPANDING ON YOUR QUESTION HERE, AND LIKE ANY CONTEST IT REWARDS THOSE WHO PREPARE AND PENALIZES THOSE WHO DON'T.

IT, ALSO, SOMETIMES, REWARDS THOSE THAT ARE GREEDY AND PENALIZES THOSE WHO CAN'T GET THE INFORMATION, SO IT CUTS BOTH WAYS. AS YOU DEFEND THESE CASES, YOU GO OUT AND YOU SUBPOENA THE RECORDS FROM THE PIP CARRIER. OF COURSE THAT IS AN EVER CHANGING LIST, CORRECT?

YES, YOUR HONOR.

AS THE BILLS ARE SUBMITTED.

YES.

SO WE HAVE AN ADJUSTOR SITTING IN OHIO, ADMINISTERING, PAYING CLAIMS ON PIP ON ACCOMPANY THAT DOES BUSINESS IN FLORIDA. THEY HAVE WRITTEN THE POLICY HERE, SO WHAT WE ARE SAYING IS THAT WE HAVE TO BRING THAT ADJUSTOR DOWN, BECAUSE YOU CAN'T GO AND DEPOSE HIM BECAUSE THAT MAY BE A CHANGING LIST. YOU CAN'T DEPOSE THE ADJUSTOR TO VERIFY THEM, BECAUSE IT IS A CHANGING LIST, A WASTE OF TIME, SO IT CREATES A PRACTICAL PROBLEM. THAT IS MY CONCERN IS WHAT IS THE PRACTICAL PROBLEM HERE, BECAUSE IN TRYING THESE CASES FOR LOTS OF YEARS FROM A DEFENSE SIDE AND THE PLAINTIFF'S SIDE, YOU HAVE THESE PRACTICAL PROBLEMS. NOW, DOES THIS STATUTE, ONE THAT IS SO RIGID THAT IT CREATES A SITUATION THAT A DEFENSE CANNOT BE, CANNOT BRING A CURRENT, UPDATED LIST, BY WAY OF A DEPINGSZ OR SOMETHING -- OF A DEPOSITION OR SOMETHING, THEY DON'T HAVE ANY WAY TO ACCESS TO THE WITNESS OUT-OF-STATE, SO THEREFORE THEY CAN'T GIVE THEIR SET OFF.

I THINK THEY CAN DEPOSE THE ADJUSTOR.

WE HAVE GOT DISCOVERY CUT OFFS.

WERE THESE BILLS PAID BY PIP AS LISTED ON EXHIBITS BY THE PRETRIAL STATEMENT OF THE DEFENDANT?

I DON'T RECALL. MAYBE THAT IS A POINT I CAN TOUCH ON IN REBUTTAL.

ISN'T, IN THE BRIEF OF THE FLORIDA DEFENSE LAWYERS ASSOCIATION, IT SAYS THAT, IN THE PRETRIAL ORDER, THAT ANY OBJECTIONS AS TO AUTHENTICITY WERE TO BE MADE PRETRIAL AND THAT HAD, IN FACT, WAS NOT DONE, SO THE OBJECTION BY THE PETITIONER AT TRIAL TO AUTHENTICITY WAS WAIVED, BECAUSE IT WASN'T MADE IN THE PRETRIAL SUBMISSIONS.

I SUBMIT THAT THAT IS INCORRECT, YOUR HONOR. I MEAN, THEY LISTED THE ADJUSTOR ON THE PRETRIAL LIST.

I MEAN, THE LIST OF EXHIBITS WAS, WERE THE DOCUMENT SHEETS THAT THE PETITIONER OBJECTED TO, BEFORE GOING IN TO THE INJURY. WERE THEY LISTED AS EXHIBITS AND PROVIDED PRETRIAL?

MY MY LIST OF REC -- MY RECOLLECTION IS, SEE, THESE DOCUMENTS WERE BEING FOREAGED OUT FROM SOME STORAGE PLACE ON THE LAST DAVE TRIAL, WHICH I THINK IS THE REAL ROOT OF THE PROBLEM HERE IS LACK OF PREPAREDNESS LED TO THIS ERROR, BUT I AM PRETTY SURE

THE DOCUMENT WE SAW AT TRIAL WAS NOT THE SAME ONE THAT WE HAD SEEN BEFORE, SO WE COULDN'T HAVE ANTICIPATED EVERY OBJECTION ABOUT IT, BUT THEY KNEW, THEY KNEW THAT THERE WAS A HEARSAY PROBLEM OR THEY WOULDN'T PUT THE ADJUSTOR ON THE LIST, AND TRULY YOU KNOW, IF THEY REALLY PERCEIVED THAT THERE WAS SOMETHING WRONG ABOUT SOME STIPULATION AS TO AUTHENTICITY, YOU WOULD HAVE HEARD A HEW AND CRY IN THE RECORD AT TRIAL. IT WOULD BE EVIDENT. THEY WOULD HAVE SAID MORE ABOUT IT, BUT MR. CHIEF JUSTICE

THE MARSHAL TURNED ON A WARNING LIGHT TO REMIND YOU THAT YOU ARE NOW INTO YOUR REBUTTAL TIME, JUST TO BE SURE THAT YOU UNDERSTAND THAT.

THANK, YOUR HONOR. JUSTICE LEWIS, JUST TO EXPAND UPON YOUR QUESTION, I THINK YOU COULD TAKE THE ADJUSTOR'S DEPOSITION OUT SIDE OF THE 100-MILE LIMIT, AND READ IT IN AT TRIAL, AND I THINK AS TO ANY CHANGE THAT OCCURRED IN THE PIP PAYMENTS, YOU COULD CROSS-EXAMINATION THE PLAINTIFF ABOUT IT. I WOULD LIKE TO USE MY REMAINING TIME FOR REBUTTAL. THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM ELIZABETH WHEELER. I REPRESENT THE RESPONDENT, EARL BAUMLE IN THIS CASE.

COULD YOU TELL US HOW THIS ISSUE WAS SET OUT IN THE PLEADINGS AND THEN HOW IT WAS TREATED IN THE PRETRIAL STATEMENTS? OR PRETRIAL HEARING. OR PRETRIAL ORDER. YOU KNOW, BEFORE WE GET TO THIS TRIAL SCENARIO.

YES, YOUR HONOR. THE DEFENDANT DID ASSERT A PIP SET OFF, IF YOU WANT TO CALL IT THAT, IN THE ANSWER TO THE COMPLAINT.

WAS ANY PARTICULAR STATUTE CITED?

I BELIEVE THAT 627.736, OR IT MAY HAVE BEEN JUST A GENERAL REFERENCE TO PERSONAL INJURY PROTECTION BENEFITS.

YOU ARE NOT SURE OF. THAT'S ALL RIGHT. OKAY. YOU GO AHEAD THEN.

NO, I AM NOT. BUT WHETHER THE ORDER CAME DOWN SETTING THE CASE FOR TRIAL, THE PARTIES WERE REQUIRED TO SUBMIT WITNESS EXCHANGE, ACTUALLY, WITNESS AND EXHIBIT LISTS, PRIOR TO THE TRIAL, AND THEY WERE REQUIRED TO NOTE ON THOSE EXHIBITS, ANY SPECIFIC OBJECTIONS, AND IN FACT THE TRIAL ORDER SAID THAT OBJECTIONS NOT LISTED WERE WAIVED.

OKAY. WHAT WITNESSES OR EXHIBITS WERE LISTED, INSOFAR AS WE CAN TELL, WITH REFERRENCE TO THIS ISSUE?

THE DEFENDANT LISTED A REPRESENTATIVE OF THE PIP CARRIER. THE DEFENDANT ALSO LISTED THE PIP PAY OUT SHEETS AND OTHER DOCUMENTATION RELATING TO THE PIP PAYMENTS. THERE WAS NO --

HOW SPECIFICALLY DID THEY LIST THE PIP PAY OUT SHEET, BECAUSE THAT IS A CHANGING DOCUMENT?

YOUR HONOR, I AM SORRY. I KNOW THAT I REFERRED TO IT IN MY BRIEF, AND I AM SURE THAT THERE WAS A PINPOINT CITATION TO THE RECORD IN MY BRIEF, AND I JUST CAN'T TELL YOU SPECIFICALLY, BUT I BELIEVE IT WAS VERY SPECIFICALLY LAID OUT, PIP PAYMENT LEDGERS, MAYBE EVEN A COPY OF THE POLICY.

I MEAN BY DATE OR, BECAUSE THAT IS A CHANGING DOCUMENT.

NO, IT WAS NOT BY DATE. IT WAS NOT BY DATE, AND IN FACT, WHEN THIS HAPPENED, JUST SO THAT YOU KNOW, THIS REFERENCE TO THE EVER CHANGING PIP PAYMENTS, THE PIP PAYMENTS WERE NOT EXHAUSTED AS TO CRYSTAL GRUBS, YOU BELIEVE UNTIL -- GRUBS, UNTIL APRIL 2000, JUST IMMEDIATELY PRIOR TO THE TRIAL, SO THIS WAS INDEED A CHANGING DOCUMENT, UP UNTIL APRIL.

SO THAT DOCUMENTATION WAS LISTED AS AN EXHIBIT.

THE DOCUMENTATION WAS INDEED LISTED AS EXHIBIT.

WHAT EFFORT WAS MADE AS TO THE UTILIZATION OF THOSE EXHIBITS AT TRIAL AND SPECIFICALLY THIS ONE?

WHAT HAPPENED, THE PLAINTIFF SPECIFICALLY NOTED, AND YOU WILL SEE IT IN THE RECORD IN HANDWRITING, THE PLAINTIFF SPECIFICALLY NOTED AN OBJECTION AS TO RELEVANCE, AS TO THE PIP DOCUMENTATION. THAT WAS THE ONLY OBJECTION THAT WAS REGISTERED. THERE WAS NO OBJECTION BASED ON HEARSAY, THERE WAS NO OBJECTION BASED ON AUTHENTICITY. SO --

MAYBE I AM MISSING SOMETHING. DID YOU, THEN, TRY TO PUT THE DOCUMENT INTO EVIDENCE DURING THE TRIAL?

YES, YOUR HONOR. IN FACT, THAT IS WHAT STARTED THIS WHOLE THING, BECAUSE -- I DID NOT DO IT. I WAS NOT THE TRIAL ATTORNEY, BUT THE RECORD SHOWS THAT THE TRIAL ATTORNEY FOR THE DEFENDANT, WENT OUT, IT SEEMS LIKE IT WAS AT THE END OF THE DAY, AND SAID TOMORROW I WANT TO BE SUBMITTING THIS, AND THE JUDGE SAID, NO, THAT IS SOMETHING TO BE DEALT WITH POST TRIAL, AND THEN MR. BYRD HERE, WAS THE TRIAL ATTORNEY FOR THE PLAINTIFF, AND HE WAS THE ONE WHO BROUGHT UP, WELL, WHAT IS SHE GOING ON DO? WELL, I OBJECT. THAT IS NOT AUTHENT IB.

SO IF YOU TRIED TO PUT -- AUTHENTIC.

SO IF YOU TRIED TO PUT IT INTO EVIDENCE AND IT WASN'T ALLOWED INTO EVIDENCE, YOU AGREE IT SHOULD BE DONE DURING TRIAL, CORRECT? THAT IS THE WAY THE STATUTE --

YOUR HONOR, THERE, THE BEST WAY FOR ME TO ANSWER YOUR QUESTION IS I BELIEVE THAT 627.736 HAS LANGUAGE IN THIS THAT SAYS, THAT IF THE PLAINTIFF SUBMITS MEDICAL BILLS AT TRIAL, THEN EVIDENCE OF THE PIP PAYMENTS WILL, IT DOESN'T SAY EVIDENCE WILL COME IN BUT IT SAYS THE TRIER OF FACT WILL NOT AWARD DAMAGES FOR WHICH PIP HAS PAID OR PAYABLE.

BUT THEY CHANGED IT. IT USED TO BE, FOR EVERYBODY, THAT YOU WOULDN'T HEAR PIP OR THE WORD COLLATERAL SOURCE, AND THEN THE JUDGES WERE DOING IT, AND THEN FOR SOME REASON, WHETHER IT WAS THE INSURANCE COMPANY OR THE PLAINTIFF, SAID, NO, WE WANT IT ALL IN FRONT OF THEM, AND THEN THE STATUTE CHANGED FOR AUTOMOBILE ACCIDENTS THAT SAID, NO, YOU PUT THE WHOLE THING IN FRONT OF THE JURY. WE ARE NOT GOING ON HAVE THEM, YOU KNOW, THEY WON'T AWARD IT, SO I GUESS MY QUESTION IS, IF YOU PUT IT INTO EVIDENCE AND YOU ARE NOW ALLEGING THAT THERE WAS A WAIVER THAT IT WASN'T AUTHENTIC, HOW COME THAT WASN'T THE ISSUE ON APPEAL?

YOUR HONOR, THE, WELL, THE PROBLEM IS THE JUDGE DID NOT ACCEPT IT. THE JUDGE ONLY ACCEPTED IT FOR IDENTIFICATION PURPOSES, BUT AT THE TRIAL, YOUR HONOR, THERE WAS NO ASSERTION BY THE PLAINTIFFS, THAT 627.736 WAS THE APPLICABLE STATUTE, AND I HAVE GOT SOME, I DO HAVE PINPOINT CITATIONS TO THE RECORD --

AGAIN, USING THE ANALOGY, IF YOU TRY TO PUT SOMETHING IN EVIDENCE AND YOU KNOW THE STATUTE DOES NOT ONLY ALLOW YOU TO DO IT BUT IT IS AN AFFIRMATIVE DEFENSE, AND THE JUDGE DOESN'T ALLOW IT, WHY, THAT IS A SEPARATE ISSUE FROM WHATEVER WE ARE HERE ON, WHICH I AM STILL TRYING TO FIGURE OUT WHAT IT IS.

YOUR HONOR, I AGREE THAT THIS CASE SHOULD NOT BE BEFORE THIS COURT. THAT HAS BEEN MY POSITION ALL ALONG, IS THAT THE CASE SHOULD NOT BE BEFORE THIS COURT.

BUT YOU SEE, THE PROBLEM IS JUDGE SHARP HORBS IS THE FIFTH DISTRICT -- JUDGE SHARP, WHO IS OUT OF THE FIFTH DISTRICT AND HAS BEEN DEALING WITH THESE CASES, I FELT THE REASON SHE WANTED IT IN FRONT OF US OR THE PANEL, WAS WHAT THERE WAS SOME CONFUSION AS TO WHETHER THESE ISSUES SHOULD BE TREATED DURING THE TRIAL OR POST TRIAL. I WOULD AT LEAST ASK FOR THIS ANSWER, DO YOU AGREE THAT THE APPLICABLE STATUTE, WHATEVER, WHETHER THERE IS WAIVER OR YOU KNOW, IN THIS CASE, REQUIRES THAT IT BE PRESENTED TO THE TRIER OF FACT, AND THAT THOSE AMOUNTS NOT BE AWARDED. IS THAT, IS THE STATUTE CLEAR, OR DO YOU AGREE, THEN, THAT IT IS SOMETHING WE REALLY DO NEED TO STRAIGHTEN OUT ABOUT THAT ISSUE, WHICH IS REALLY THE ISSUE THAT THE WHOLE STATE WOULD BE CONCERNED ABOUT, RATHER THAN WHATEVER HAPPENED IN THIS TRIAL.

WELL, UNFORTUNATELY, YOUR HONOR, I THINK YOUR QUESTION HAS A LOT OF SUBPARTS, AND I DON'T MEAN, I WOULD LIKE TO TRY AND ADDRESS IT AS ADEQUATELY AS I CAN. ONE ISSUE IS WHO IS THE TRIER OF FACT. AND MANY INSTANCES, AND IN MOST INSTANCES, THE JURY IS THE TRIER OF FACT. BUT WITH RESPECT TO THIS ISSUE, I DON'T THINK THAT YOU CAN LOOK AT THE ISSUES RELATING TO THE STATUTES, WITHOUT LOOKING TO THE CONTEXT OF THE CASE. AND IN THIS CASE, YOUR HONOR, IT WAS CLEAR THAT EVERYONE ASSUMED THAT 768.76 WAS THE APPLICABLE COLLATERAL SOURCE STATUTE, AND THAT THE ISSUE OF THE SET OFF WOULD BE ADDRESSED BY THE COURT, AND NOT BY THE JURY. AND I HAVE GOT MULTIPLE CITATION TO SAY THE RECORD.

YOUR POSITION AT THE TRIAL WAS THAT IT SHOULD BE DETERMINED BY THE COURT AFTER THE TRIAL?

THAT WAS THE EXPECTATION, ABSOLUTELY, YOUR HONOR.

AND WHAT RULE OF PROCEDURE OR STATUTE AUTHORIZES A DEFENDANT TO CONDUCT POST TRIAL DISCOVERY ON DAMAGES?

I DON'T THINK IT IS POST TRIAL DISCOVERY ON DAMAGES, SO MUCH AS IT IS POST TRIAL DISCOVERY ON THE PAYMENTS, PURSUANT --

IS THIS A COLLATERAL SOURCE SET OFF AFFIRMATIVE DEFENSE?

I THINK THERE IS A ASSUMPTION THAT IT IS, YOU KNOW --

YOU ANSWERED A QUESTION EARLIER THAT SAID YOU HAD ASSERTED AN AFFIRMATIVE DEFENSE OF COLLATERAL SOURCE SET OFF.

IT WAS LISTED AS A DEFENSE. ION, BECAUSE OF THE NO -- I DON'T KNOW, BAUFER THE NO FAULT STATUTE, YOUR HONOR -- BECAUSE OF THE NO STALL STATUTE, YOUR HONOR, AND IT HASN'T BEEN BRIEFED AND I AM BRINGING IT UP FOR THE FIRST TIME, IT SAYS THE PLAINTIFF SHALL HAVE NO RIGHT TO DAMAGES FOR WHICH HAS PAID OR IS PAYABLE.

WHAT LAW ON DISCOVERY ALLOWED POST TRIAL DISCOVERY ON THIS ISSUE?

I THINK HE HAD INHERENT AUTHORITY, AND I GET TO THAT, YOUR HONOR, BY VIRTUE OF THE

FACT THAT THIS, THE PARTIES AGREED THAT THIS WAS A POST TRIAL PROCEEDING. WHEN YOU LOOK TO THE PRACTICALITIES OF THE SITUATION --

A POST TRIAL MOWING PROEING IS ANOTHER ISSUE. A UGE -- A POST TRIAL PROCEEDING IS ANOTHERISH EW. THE -- IS ANOTHER ISSUE. THE JUDGE CAN SAY I AM GOING TO CONSIDER THIS POST TRIAL AND YOU ALL COME BACK IN ANOTHER WEEK AND I WILL CONSIDER THE ISSUE, BUT THAT IS DIFFERENT FROM SIX MONTHS OF DISCOVERY WHERE YOU CAN GO AND TAKE DEPOSITIONS AND HAVE REQUESTS FOR ADMISSIONS ON THE ISSUE OF ONE OF THE AFFIRMATIVE DEFENSES.

PART OF IT, I THINK THAT THE JUDGE'S RATIONALE IN THIS CASE, AND I THINK IT IS REFLECTED IN THE RECORD, IS AT LEAST PARTIALLY BASED SIMPLY ON ISSUES OF JUDICIAL ECONOMY, BECAUSE HE ABSOLUTELY MADE THE STATEMENT, WE MIGHT NOT EVEN GET TO THAT ISSUE, IF THE JURY DOESN'T AWARD ANY DAMAGES, THEN THE COLLATERAL SOURCE ISSUE GOES AWAY, AND SO --

IF HE IS TRYING TO BE ECONOMICAL, DIDN'T HE SHOOT HIMSELF IN THE FOOT BY ORDERING DISCOVERY? ISN'T THE MOST ECONOMICAL THING TO DO IS SAY RIGHT AFTER THE JURY VERDICT COMES IN, WE ARE NOW GOING TO HOLD A HEARING ON COLLATERAL SOURCE AND I WILL ISSUE THE JUDGMENT RIGHT THERE. ISN'T THAT PROMOTING JUDICIAL ECONOMY?

TO A CERTAIN EXTENT, SO FAR AS THE COURT IS CONSIDERED FROM THE PARTY'S STANDPOINT, IT CERTAINLY DOES REQUIRE THE PARTIES TO CONTINUALLY GET SOME KIND OF, IF YOU SAY THAT THERE HAS TO BE SOME KIND OF EVIDENCE, AND REMEMBER, YOUR HONOR, THIS WAS A SITUATION WHERE THE DEFENDANT CAME TO TRIAL NOT UNDERSTANDING THAT THERE WAS ANY NECESSITY TO HAVE A WITNESS THERE, TO HAVE ANY KIND OF AUTHENTICATED PIP LOG, BECAUSE THAT ISSUE HAD BEEN WAIVED BY THE. MR. .

HELP US WITH -- BY THE PLAINTIFF.

HELP US WITH, IS IT YOUR POSITION THAT THE WAY THIS SHOULD HAVE WORKED IS THAT YOU PUT IN THIS DOCUMENTATION AS TO THE PIP PAYMENTS AND THE MEDICAL BILLS PAID THROUGH THAT, AND THAT, THEN, THE PLAINTIFF WOULD NOT HAVE BEEN ABLE TO PUT INTO EVIDENCE, THOSE MEDICAL BILLS THAT WERE PAID BY PIP, AND THEREFORE THOSE WOULD HAVE BEEN EXCLUDED FROM CONSIDERATION BY THE JURY? IS THAT --

YOUR HONOR, I AM NOT SURE I UNDERSTAND THE QUESTION.

WELL, A MINUTE AGO, IN RESPONDING EITHER TO A QUESTION OR MAKING YOUR ARGUMENT, YOU MADE SOME STATEMENT THAT YOU BELIEVE THAT IT WASN'T EVEN AN AFFIRMATIVE DEFENSE, BECAUSE THE PLAINTIFF, UNDER THE STATUTE AND THE NO FAULT SCHEME, WAS NOT ENTITLED TO DAMAGES FOR BENEFITS PAID UNDER PIP, AND THAT THEREFORE, ONCE IT IS DEMONSTRATED THAT THOSE BILLS ARE PAID BY PIP, THAT THERE IS NO ENTITLEMENT BY THE PLAINTIFF. NOW, I AM REALLY FOLLOWING UP TO THAT STATEMENT THAT YOU MADE, AND SO I AM NOT SURE. MAYBE THAT WAS JUST A CASUAL STATEMENT YOU WERE MAKING, OR IS THAT, I GUESS THAT IS --

HOW ABOUT TAKING A FIRM GRIP ON HOW YOU THINK THIS THING SHOULD WORK, WHEN WE KNOW THAT THERE HAVE BEEN INJURIES AND MEDICAL TREATMENT, OBVIOUSLY, AND THEN SOME OF THE BILLS HAVE BEEN PAID BY PIP, SOME OR ALL OF THE BILLS HAVE BEEN PAID BY PIP. HOW IS THIS ISSUE TO BE RESOLVED IN THE COURTS, WHEN A PERSONAL INJURY CLAIM, THEN, IS MADE?

YOUR HONOR, I THINK THAT, FOR THE MOST PART, NOW, AND WHAT I WOULD LIKE TO DO IS TALK TO YOU ABOUT CUSTOM AND PRACTICE.

CAN'T YOU TALK ABOUT THE STATUTES, WHICH IS WHY WE ARE HERE? THERE ARE TWO STATUTES, ONE IS RELATED TO GENERAL TORT ACTIONS, AND THE OTHER PERTAINS TO PERSONAL INJURY ACTIONS INAUDIBLE ACCIDENTS.

YES, YOUR HONOR.

THEY ARE IN CONFLICT, BECAUSE THE TORT PROCEDURE SAYS THAT THE JURY DOESN'T REDUCE THE AMOUNT, AND THE SPECIFIC ONE SAYS THEY SHALL REDUCE IT. ISN'T THAT WHY WE HAVE THIS CASE, TO MAKE SURE THAT WE ARE CLEAR ABOUT THAT IT IS REALLY, IT IS NOT THE 6768.76 THAT APPLIES -- IT IS NOT THE 768.76 THAT APPLIES. IT IS THE MORE SPECIFIC ONE.

THAT, THAT IS THE REASON WHY THE CASE WAS CERTIFIED TO THIS COURT, YOUR HONOR, BUT THAT WAS NOT THE ISSUE THAT WAS DECIDED BY THE FIFTH DISTRICT. WHAT THE FIFTH DISTRICT SAID WAS THEY REFERRED BACK TO THEIR ALLSTATE VERSUS SCOTT DECISION, AND IF YOU --.

YOU I AM ASKING YOU, AS SOMEONE, WE HAVE ALL THE DEFENSE GROUP IN HERE, WHAT IS CORRECT? IS IT SHOULD BE THE RULE OF LAW INAUDIBLE ACCIDENT CASES, SO WE HAVE THE SAME RULE APPLYING. DO YOU PUT IT IN, AND THE JURY DEDUCTS IT, OR IS IT DONE POST-JUDGMENT? WHAT, IT IS NOT A QUESTION YOU CAN PICK AND CHOOSE. WHICH ONE IS IT?

YES. YOUR HONOR, I THINK THAT THE LITERAL WORDING OF THE STATUTE SUGGESTS THAT IT CAN BE PRESENTED AT THE TRIAL.

LITERAL, IT IS THE ACTUALLY, THERE IS NO --

YOUR HONOR, THE REASON WHY I AM HESITATING IS MY CONCERN, YOUR HONOR, IS THAT THERE HAS BEEN A PRACTICE THAT HAS DEVELOPED OVER THE YEARS, AS ONE OF THE COURT MEMBERS HAVE, HAS SUGGESTED. THE PRACTICE HAS BEEN THAT THIS, EVEN INAUDIBLE ACCIDENT CASES, THE PRACTICE HAS BEEN, AND I THINK THIS WAS TRUE EVEN BEFORE 768.76 WAS ADOPTED, THAT THE PARTIES WOULD, THAT IT WOULD BE HANDLED POST TRIAL BY THE COURT.

WELL, THEN, NOW WE ARE -- SO WE WRITE AN OPINION THAT SAYS ALTHOUGH THE STATUTE AND THE JURY INSTRUCTIONS, THE I MEAN, THE JURY INSTRUCTIONS ARE CLEAR THAT IN THIS CASE YOU SHOULD REDUCE THE AMOUNT OF COMPENSATION THAT THE PLAINTIFF IS OTHERWISE ENTITLED ON ACCOUNT OF BENEFITS, AND THAT IS WHAT B SAYS, BUT WE SHOULD ALWAYS SAY IF THE PARTIES AGREE, THEY CAN HAVE IT REDUCED POST TRIAL?

EXCEPT, YOUR HONOR, THERE HAS BEEN A PRACTICE THAT HAS DEVELOPED WHERE THE PARTIES HAVE GONE IN. THERE HASN'T BEEN A HANDWRITTEN STIPULATION. THE PARTIES HAVE GONE IN WITH THE ASSUMPTION THAT IT WAS GOING TO BE HANDLED POST TRIAL, AND NOW THIS COURT HAS COME DOWN WITH --

ARE YOU SAYING THAT THERE SHOULD BE AN OPINION THAT WE SHOULD BASE IT ON WHAT WE THINK MIGHT BE GOING ON OUT THERE?

YOUR HONOR, I GUESS THE PROBLEM THAT I HAVE IS THAT THIS DAYS CASE IS NOT THE PROPER CASE FOR -- IS THAT THIS CASE IS NOT THE PROPER CASE IF THIS COURT TO DEAL WITH THAT ISSUE, BECAUSE IT WAS NEVER AN ISSUE BEFORE THE TRIAL COURT. THE ISSUE BEFORE THE TRIAL COURT, AND YOUR HONOR, IF I CAN JUST --

WELL, HOW DO YOU SAY, REALLY, THAT IT WAS NOT AN ISSUE BEFORE THE TRIAL COURT, WHEN THE RECORD THAT IS BEFORE US, SAYS THAT THE TRIAL JUDGE SAYS, EMPFATCALLY, YOU ARE NOT GOING TO PUT THIS INFORMATION BEFORE THE JURY. THIS IS SOMETHING THAT WE ARE GOING TO DO LATER, AND HE LEFT, IT SEEMS TO ME, NO OPTION FOR EITHER PARTY AT THAT POINT.

YOUR HONOR, NO ONE EVER ARGUED, AND I THINK THE RECORD SHOWS, THAT MR.BERG WAS NOT IN ANY WAY FLENSED BY WHAT THE JUDGE -- INFLUENCED BY WHAT THE JUDGE SAID, AND I HIM LOOKING AT PAGE 323 OF THE RECORD WHERE DEFENSE COUNSEL SAID, PARDON ENME, THE JUDGE SAYS THIS IS ONE OF THE COLLATERAL SOURCES THAT WE ARE GOING TO DEDUCT AFTER THE TRIAL. MR. BYRD SAYS, NO, THE STATUTE, BUT THEN HE SAYS, YOU ARE CORRECT, YOUR HONOR, THE STATUTE SAYS THAT IS HOW THE COURT IS TO DO IT. THEN, AFTER THE TRIAL, WHEN THE DEFENDANT MOVED FOR THE SET OFF, MR. BYRD FILED A RESPONSE TO THAT MOTION, OBJECTING TO IT AND SAYING, AND I AM ON PAGE 190 OF THE RECORD, THE CURRENT COLLATERAL SOURCE STATUTE PROVIDES THAT THE COURT NOT THE JURY, SHALL DEDUCT THOSE COLLATERAL SOURCES PROVEN BY THE DEFENDANT FROM ANY JURY VERDICT.

WHO SAID THAT? WHICH, COUNSEL FOR THE PLAINTIFF OR DEFENDANT?

THAT WAS COUNSEL FOR THE PLAINTIFF IN HIS WRITTEN RESPONSE TO THE MOTION FOR SET OFF. IT IS IN THE RECORD AT PAGE 190.

POST TRIAL MOTION, RIGHT?

IT WAS A POST TRIAL MOTION. THEN, AT THE HEARING, THERE WAS A HEARING WHERE --

BUT DURING THE COURSE, DURING THE ACTUAL COURSE OF THE TRIAL, THAT DAY WHEN THE DEFENDANT ATTEMPTED TO PUT IN THOSE DOCUMENTS, WASN'T IT THE PLAINTIFF'S POSITION THAT DAY, THAT HE HAD TO DO THAT BEFORE THE JURY?

IT WAS, YOUR HONOR. HIS POSITION WAS ALWAYS, AND I BELIEVE THAT THIS WAS SIMPLY A TRIAL TACTIC, YOUR HONOR, I BELIEVE THAT WHAT HAPPENED HERE HAD NOTHING TO DO WITH ANY SUBSTANTIVE ISSUE, THAT IT WAS A TRIAL TACTIC, WHEREBY THE PLAINTIFF --

YOUR DEFENDANT HAD, IN FACT, PLED THAT, AN AFFIRMATIVE DEFENSE, THAT THESE DOCUMENTS, THAT THESE AMOUNTS SHOULD NOT BE AWARDED BY THE JURY.

THAT'S CORRECT.

RIGHT?

AND CAME TO THE TRIAL, PREPARED WITH COPIES OF THE PIP LOGS, TO GIVE THEM TO THE JUDGE, DO WHATEVER WAS GOING TO BE DONE, AND AT THAT POINT, IS WHEN THE ISSUE CAME UP, AND EVERYONE WAS IN AGREEMENT THAT IT WOULD BE HANDLED --

WAS IN THE END WHAT THE PIP LOG SHOWED WAS THAT THE PIP COVERAGE HAD BEEN EXHAUSTED?

CORRECT. AND YOUR HONOR, THERE WAS NO SURPRISE TO THE PLAINTIFFS BY THIS. THEY KNEW THAT THEIR PIP HAD BEEN EXHAUSTED. THEY KNEW THAT THEIR PIP HAD BEEN PAID.

AND SO REALLY, WHAT HAPPENED IN THIS TRIAL BEFORE JUDGE BAKER, RIGHT?

YES.

AND JUDGE BAKER WAS TRAVELING UNDER THE MISAPPREHENSION, ACCORDING TO THE FIFTH DISTRICT, WHICH APPEARS TO BE IN THE RECORD, THAT THIS WAS SOMETHING THAT COULD BE DONE BY THE COURT AFTERWARDS. ISN'T THAT RIGHT?

ION IF THAT IS --

BUT AT ANY RATE, HE MADE SOME REMARK HERE, THAT YOU KNOW, I WILL DO THIS AFTERWARDS.

YES. YES.

GET ON, GET ON DOWN AND GET THIS CASE FINISHED.

YES.

AND IN FACT, AT THE END OF THE DAY, THE AMOUNT WAS SET OFF.

YES.

IS THAT RIGHT?

YES.

OKAY. I JUST WANTED TO GET IT STRAIGHT IN MY HEAD WHERE THIS ALL ENDED UP.

SO WHAT WAS LEFT TO BE DISCOVERED? I MEAN, IF YOU SAY THAT THE DOCUMENTS THAT YOU HAD INDICATED THAT THE PIP PAYMENTS HAD BEEN EXHAUSTED, WHAT WAS LEFT FOR POST TRIAL DISCOVERY?

NOTHING, YOUR HONOR. THE ONLY THING THAT HAD TO BE DONE WAS DUE TO MR. BYRD'S INSISTENCE THAT IT HAD TO BE AN AUTHENTICATED PIP LOG, THERE WAS, A DEPOSITION, THE PARTIES TRAVELED DOWN TO MIAMI TO TAKE A DEPOSITION OF THE PERSON WHO HAD THE FILE, TO JUST CONFIRM THAT THE PAYMENTS HAD BEEN MADE, AND THIS WAS, IT WAS, IT ALL GOES BACK TO THE AUTHENTIESITY OBJECTION THAT IS AT TRIAL, AFTER IT WAS WAIVED IN THE PRETRIAL STIPULATE.

YOU SAID IT WAS WAIVED. HOW WAS IT SPECIFICALLY WAIVED? BECAUSE ISN'T IT TRUE THAT YOUR CLIENT DID LIST ADJUSTOR AS A WITNESS, SO WOULDN'T IT BE TRUE THAT IF YOU ARE LISTING THE ADJUSTOR AND YOU ARE LISTING THE EXHIBIT, THAT YOU ARE GOING TO CALL THE ADJUSTOR TO --

THE LISTS WERE DONE BEFORE THE OBJECTIONS WERE NOTED, SO AT THE TIME THAT THE LISTS WERE MADE, YOU ARE CORRECT. THE DEFENDANT LISTED THE ADJUSTOR, LISTED THE PIP LOGS. BUT THEN, WHEN THE PLAINTIFF COMES IN AND ONLY NOTES AN OBJECTION AS TO RELEVANCY, NOTHING AS TO AUTHENTICITY --

BUT ISN'T IT UNREASONABLE TO ASSUME THAT IF YOU HAVE NOT DELETED THE WITNESS OR YOU HAVE NOT APPROACHED THE PLAINTIFF AND SAID ARE WE GOING TO STIPULATE, AS WE DO ON MEDICAL RECORDS ALL THE TIME, CAN WE STIPULATE TO MEDICAL RECORDS, YEAH, WE WILL INTRODUCE THEM AND THERE IS A BIG STACK OF NOTEBOOK RECORDS AND IT WAS HANDED TO THE JUDGE AND HANDED TO THE JURY, AND EVERYONE HAS IT, BUT IN THIS CASE PLAINTIFF SAYS TO COUNSEL CAN WE GO AHEAD AND STIPULATE TO THE AUTHENTICITY OF THIS SO WE DON'T HAVE TO BRING THE ADJUSTOR UP, AND IF IT WAS NOT DONE, IS IT NOT FAIR TO ASSUME THAT PLAINTIFF'S COUNSEL COULD REASONABLY RELY AND OBJECT, IF SOMEBODY DID NOT COUP AND AUTHENTICATE?

YOUR HONOR -- COME UP AND AUTHENTICATE?

YOUR HONOR, I WISH I COULD ANSWER THAT QUESTION. I WASN'T THERE, BUT I DON'T THINK THAT THAT IS DONE TIPSLY CHRI, IN PRAC -- TYPICALLY, IN PRACTICE.

YOU ARE SAYING THE PRETRIAL PRACTICE HERE WAS JUST TO NOTE OBJECTIONS THAT YOU DID PRESERVE.

AND THE ORDERED THAT -- AND THE ORDER SAID THAT OBJECTIONS NOT MADE WERE WAIVED. CHIEF WITH YOUR HELP, WE HAVE EXHAUSTED MR. CHIEF JUSTICE

WITH YOUR HELP, WE HAVE EXHAUSTED YOUR TIME. HOW MUCH TIME ON REBUTTAL? THREE OR FOUR MINUTES.

I WILL BE BRIEF BUT TRY TROOI TO TAKE THE REMAINING I AM -- BUT WILL TRY TO TAKE THE REMAINING TIME THAT I HAVE TO ANSWER JUSTICE PARIENTE ABOUT HOW IT SHOULD BE HANDLED AND TRY TO ANSWER JUSTICE LEWIS'S CONCERNS ABOUT HOW IT SHOULD BE DONE --

BEFORE YOU DO THAT AND OBVIOUSLY WE HAVE GOT TO REEXAMINE THE RECORD AND WHATEVER, BUT IT SEEMS TO ME THAT YOUR OPPONENT HAS PAINTED ADD PICTURE YOUR HERE THAT THIS WAS VIRTUALLY RESOLVED PRETRIAL, THAT THE ONLY OBJECTION TO THIS DOCUMENTATION OF THE PIP PAYMENTS THAT WAS PRESERVED WAS RELEVANCY. OBVIOUSLY UNDER THE STATUTORY SCHEME, IT HAS RELEVANCY. AND SO WHY ISN'T THAT THE END OF THE MATTER?

WELL, YOU KNOW, ON THE RESPONDENT'S OWN RATIONALE, THERE IS A LOT OF TALK ABOUT WHAT THE COMMON PRACTICE IS. YOU KNOW, THAT --

I HIM TALK BTH COMMON PRACTICE. I AM TALK -- I AM NOT TALK BTH COMMON PRACTICE. I AM TALKING ABOUT IN THIS CASE -- TALKING ABOUT THE COMMON PRACTICE. I AM TALKING ABOUT IN THIS CASE YOU HAVE A PRETRIAL, YOU HAVE PRETRIAL STATEMENTS, YOU HAVE A PRETRIAL ORDER. NOW ARE YOU TELLING ME, NO, THAT NONE OF THESE THINGS WERE RESOLVED THERE, AND THAT --

THEY LISTED --

-- AS FAR AS THIS DOCUMENTATION IS CONCERNED, THAT ALL OBJECTION TO SAY THAT DOCUMENTATION WERE PRESERVED?

I THINK THEY WERE, I MEAN, IN THE PRETRIAL --

WHAT WAS THE RELEVANCY OBJECTION, THEN, WHAT WAS, IF ALL OBJECTION WERE PRESERVED, WHY WAS THAT ONE SINGLED OUT?

WELL, PROBABLY TO DO WITH HE HADN'T SEEN THE PARTICULAR DOCUMENT THAT THEY WERE GOING TO TRY TO INTRODUCE AT TRIAL, AND IN THE PRETRIAL STATEMENT, THEY LISTED IT AS AN ISSUE OF FACT TO BE TRIED, AND IF YOU WANT TO TALK ABOUT THE COMMON PRACTICE ABOUT THE STIPULATION, YOU KNOW TO DO THIS --

I JUST WANT TO TALK ABOUT THE RELEVANCY, AND THAT IS THAT --

THAT AN OLD PIP LOG MIGHT NOT BE RELEVANT? EYE ASSUME THAT, IF YOU ARE GOING TO HAVE PRE --.

I ASSUME THAT, IF YOU ARE GOING TO HAVE ANY PRETRIAL PRACTICE HAVE ANY ADVOCACY AT ALL THAT, YOU LIMIT WHAT IS TO BE TRIED AND ESPECIALLY AS TO EXHIBITS, SO WHY SHOULDN'T WE TAKE THIS RECORD TO INDICATE THAT THE ONLY OBJECTION THAT WAS PRESERVED TO THAT WAS A RELEVANCY OBJECTION. HELP ME WITH THAT.

RIGHT. IT IS BECAUSE THE PIP LOG, I BELIEVE THERE IS SUSPICION THAT IT MIGHT HAVE BEEN

OUT-OF-DATE AND THEREFORE WOULD HAVE BEEN DISPOSI HAVE P IN A GENERAL SENSE IN AN ABUNDANCE EVER CAUTION ELICITED A RELEVANCY OBJECTION, BUT THEY PUT IN THE PRETRIAL THAT IT WAS AN ISSUE OF FACT TO BE TRIED, AND IF YOU WANT TO TALK ABOUT THE FACT THAT IT IS COMMON PROCEDURE THAT IS DONE --

YOU ARE GOING TO THE COMMON PROCEDURE, AND YOU HAVEN'T GOTTEN ME PAST, IF THE ONLY OBJECTION THAT IS NOTED, OTHERWISE THE PRETRIAL PROCEDURE, IT SEEMS TO ME, HAS NO EFFECT OR EFFICACY IN THIS SITUATION, SO WHY SHOULDN'T WE LIMIT OUR EXAMINATION HERE, INSOFAR AS ANY OBJECTION TO THAT LOG, TO JUST RELEVANCY OBJECTION?

WHEN THEY PUT THE ADJUSTOR ON THE LIST AND ITEM MADE, I THINK THAT WE FIGURED THAT THEY WOULD LAY THE PROPER PREDICATE UNDER 90.803.

I AM NOT TALKING ABOUT THE ADJUSTOR. I HIM TALKING ABOUT THE EXHIBIT AND -- I AM TALKING ABOUT THE EXHIBIT AND THE PRETRIAL PROCEDURE THAT WAS INVOKED IN THIS CASE. YOU ARE SAYING THERE WAS NO PRETRIAL PROCEDURE, THAT WAS OR DID NOT EXIST IN THE NINTH CIRCUIT AT THAT TIME. THIS WAS TRIED IN THE NINTH CIRCUIT.

THERE WAS A PRETRIAL STATEMENT WHICH BOTH --

SO THAT RELY VAENTS OBJECTIONALLY-RELEVANCY OBJECTION REALLY HAS NO -- SO THAT RELEVANCY OBJECTION REALLY WHOSE NO MEANING.

I THINK IT WAS THAT THEY TRIED TO INTRODUCE AN OUT-OF-DATE PIP DOCUMENT.

YOU WAIVED NO OTHER OBJECTIONS.

WE THOUGHT THEY WERE GOING TO PROVE IT UP AT TRIAL. JUSTICE PARIENTE, TOO HOW THE STATUTES IS TO BE INTERPRETED IN A PRACTICAL MATTER, THE STATUTE SAYS THAT IT IS TO BE SUBMITTED TO THE TRIER OF FACT, JUDGE OR JURY, SO THAT IS WHAT IS TO BE DONE IN THE FIRST INSTANCE, ABSENT A WAIVER. YOU CAN HAVE IT DONE IN FRONT OF A JUDGE, BUT IT HAS TO BE DONE BY COMPETENT, ADMISSIBLE EVIDENCE AND NOT HEARSAY. IF IT IS TO BE DONE AND IF IT IS TO BE SENT TO A JURY, THERE SHOULD AND INSTRUCTION AND THE LANGUAGE OF THE INSTRUCTION IS SIMPLY NOT TO AWARD OR DEDUCT PIP BENEFITS AS PAID OR PAYABLE, BUT JUSTICE LEWIS'S CONCERN ABOUT THE PROCEDURE THAT IS TO BE FOLLOWED, THERE IS AN IMPLICIT NOTION THAT ALL THAT HAS TO BE DONE AND ONCE, AND I SUBMIT IT IS A SLIPPERY SLOPE, ONCE YOU STARTAL YOU ALLOWING POST TRIAL -- START ALLOWING POST TRIAL PROCEDURE, YOU SIMPLY CALL THE ADJUSTOR, BUT IT IS VERY POSSIBLE THAT THE PLAINTIFF PRESENTING A BILL, THEN YOU WOULD HAVE TO RECALL THE PLAINTIFF AND THERE COULD BE MORE THAN ONE ADJUSTOR ON THE FILE. THAT IS VERY COMMON.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO TO TA IT AT THAT, BECAUSE WE HAVE GONE -- TO TAKE IT AT THAT, BECAUSE WE HAVE GONE WELL OVER THE TIME. THANK YOU. THE COURT WILL NOW STAND IN RECESS.

THANK YOU.

MARSHAL: PLEASE RISE.