03-134

PLEASE BE SEATED.

CHIEF JUSTICE: WE PRERBLT YOUR BEING READY TO GO ON THE NEXT -- WE APPRECIATE YOUR BEING READY TO GO ON THE NEXT CASE, SO WITHOUT ANY FURTHER ADO, IF FLEETWOOD HOMES, IF COUNSEL IS READY, YOU MAY PROCEED.

GOOD MORNING. KEVIN ASHLEY FOR PETITIONER REEVES AND I AM JOINT BY TWO COUNSEL. WE ARE HERE ARISEING OF A TRIAL COURT ORDER THAT DENIED WORKERS COMPENSATION IMMUNITY. BEFORE I GET TO THE TWO CERTIFIED QUESTIONS AND EXPLAIN HOW THIS COURT HAS ALREADY ANSWERED BOTH OF THOSE, MY FIRST ONE STARTS WITH A MORE FUNDAMENTAL ISSUE IN THIS CASE AND THAT IS JURISDICTION. IT IS OUR BELIEF THROUGHOUT THE CASE, INCLUDING BEFORE, AS SOON AS THE APPEAL WAS FILED, THAT THERE WAS NO JURISDICTION IN THE SECOND DCA, GIVEN RULE 9130. IT COMMENTS TO THE RULE, WHICH ARE VERY CLEAR.

THAT IS THE FIRST CERTIFIED QUESTION.

WELL, IT IS --

HOW ABOUT SETTING THE STAGE FOR US HERE. WE STARTED OUT WITH --.

IT STARTED OUT WITH, IN THE SENSE THAT IF THERE IS JURISDICTION, IN OUR POSITION THERE IS NO JURISDICTION FOR THESE QUESTIONS.

WE STARTED OUT WITH A RULE THAT WAS SUPPOSED TO STAND FOR EFFICIENCY AND THAT KIND OF THING AND HERE WE ARE AT THIS COURT LEVEL, AND THINGS SEEM TO BE AS MUDDLEED, SO HOW ABOUT SETTING THE STAGE FOR US AND WHAT ARE THE ISSUES?

CERTIFIED.

-- WHAT ARE THE ISSUES CERTIFIED?

THE FIRST ISSUE IS WHETHER THERE IS JURISDICTION. RULE 9.130 SAYS THERE IS ONLY JURISDICTION IN A WORKERS COMP IMMUNITY SITUATION, IF THE TRIAL COURT, ON THE FACE OF ITS ORDER, SAYS THAT WORKERS COMPENSATION IMMUNITY HAS BEEN REMOVED FROM THE DEFENDANTS.

SO WHAT KIND OF ORDERS WOULD THAT ENTAIL?

THAT WOULD ENTAIL AN ORDER WHERE A TRIAL COURT MAY SAY THAT THE TRIAL COURT DOES NOT BELIEVE THE DEFENDANTS FALL WITHIN THE WORKERS COMP STATUTE.

WOULD THAT BE IN A SITUATION WHERE THE COURT DETERMINES THAT A DEFENDANT IS LIABLE IN THE CASE?

I DON'T KNOW THAT THAT IS THE ONLY LIMITATION, BUT THAT CERTAINLY IS ONE EXAMPLE.

WORKERS COMP IMMUNITY IS KIND OF BOUND UP WITH THE MERITS, FOR FOR EXAMPLE IF IT IS AN INTENTIONAL TORT, THEN THERE IS NO IMMUNITY.

EXACTLY.

SO ARE YOU THEN SAYING IT IS LIMITED TO SAYING, IF THE COURT SAYS THIS WAS AN INTENTIONAL TORT, THERE WAS NO ISSUE OF FACT, AND I HIM ISSUING SUMMARY JUDGMENT ON BEHALF OF THE PLAINTIFF, ON THE ISSUE OF LIABILITY?

I THINK THAT IS ONE EXAMPLE. I THINK THERE IS ALSO AN EXAMPLE HERE, WE HAVE GOT TWO SITUATIONS WITH TWO MULTIPLE DEFENDANTS. TWO DEFENDANTS ARE COEMPLOYEES, AND THE COEMPLOYEES, OF COURSE THEY ARE NOT TALKING ABOUT INTENTIONAL TORT. WE ARE TALKING ABOUT GROSS NEGLIGENCE, SO THE COURT COULD, ALSO, SAY, THAT IN THE COURT'S VIEW, THAT THIS WAS GROSS NEGLIGENCE. I THINK THAT WOULD, ALSO, RESULT IN AN APPEALABLE ORDER.

THE ISSUE OF NONFINAL REVIEW OF THESE TYPES OF ORDERS, FIRST AROSE IN THE MANDICO CASE IN 1992. DIDN'T THIS COURT AT THAT TIME, KIND OF INDICATE THAT IT INTENDED A BROADER TYPE OF REVIEW, IN ORDER TO ADDRESS THE PROBLEM OF WORKERS COMP IMMUNITY, AND BEING ABLE TO ADDRESS THE ISSUE OF THAT IMMUNITY, BEFORE THE END OF THE CASE? ISN'T THAT WHY IT, SUA SPONTE AMENDED THE RULE ON ITS OWN?

JUSTICE CANTERO, I THINK THAT IN THE MANDICO CASE, THIS COURT SAID THAT FIRST OF ALL PROHIBITIONITION WAS NOT THE RIGHT WAY TO BRING APPEAL IN THIS KIND OF SITUATION. SECONDLY THAT THE COURT WANTED TO BE ABLE TO ADDRESS CONTROLLING ISSUES EARLY, BUT IN THIS SITUATION,, THE TRIAL COURT'S ORDER SIMPLY DENIES A MOTION FOR SUMMARY JUDGMENT.

LET ME FLESH THAT OUT FOR A MINUTE, BECAUSE WHAT I AM CONCERNED ABOUT IS THAT, A BE I HAVE SYMPATHIZED WITH THE LAWYERS, BECAUSE I THINK THAT WHAT WE HAVE SAID IS KIND OF A MISHMASH HERE, ABOUT WHAT WE ARE TRYING TO GET AT, AS FAR AS THIS APPEAL IS CONCERNED, BUT STARTING WITH MANDICO AND DATING BACK TO THE CASES IN THE '50s, WHAT WE ARE DEALING WITH FUNDAMENTALLY, IS A QUESTION OF SUBJECT MATTER JURISDICTION OF THE CIRCUIT COURT, CORRECT?

THAT'S RIGHT, JUSTICE.

OKAY. AND BECAUSE, IF WORKERS COMP APPLIES THEN THERE IS NO JURISDICTION IN THE CIRCUIT COURT. CORRECT?

WELL, JUSTICE WELLS, I BELIEVE, IF, I THINK THAT IS TRUE, AS LONG, IF IT IS CLEAR, IF IT IS BEYOND A REASONABLE DOUBT THAT THE ONLY ACTION WAS NEGLIGENCE.

LET'S STRIP THIS OF BEYOND A REASONABLE DOUBT. THAT SOUNDS SOMETHING CRIMINAL TO ME. IT SEEMS TO ME THAT, BECAUSE MANDICO WAS REALLY STRUGGLING WITH THE QUESTION OF HOW YOU DEAL WITH THIS MATTER OF JURISDICTION, THAT IT, WHAT WE HAVE GOT HERE, AND THEN WE WENT AHEAD, AND I KNOW YOU TOOK ISSUE WITH THIS IN YOUR BRIEFS, BUT WE HAVE SAID, SINCE MANDICO, WE HAVE SAID IN HE WILLER AND WE SAID IN TURNER, THAT WHAT WE ARE DEALING WITH IS A IMMUNITY FROM SUIT. WE DIDN'T SAY, WE DIDN'T DEAL WITH WHAT THE STATUTORY LANGUAGE IMMUNITY FROM LIABILITY, BUT IF YOU ARE DEALING WITH IMMUNITY FROM SUIT, AREN'T WE DEALING WITH SOMETHING THAT IS AKIN TO INSUFFICIENT SUFFICIENCY OF SERVICE OF -- INSUFFICIENCY OF SERVICE OF PROCESS OR ONE OF THESE INITIAL THRESHOLD QUESTIONS, IN WHICH THERE SHOULD BE A PRELIMINARY DETERMINATION BY THE COURT, AS TO WHETHER THERE IS OR ISN'T JURISDICTION, AND THAT IS WHAT THE APPELLATE COURT SHOULD HAVE THE ABILITY TO REVIEW. I MEAN, ISN'T THAT WHAT WE WERE REALLY TRYING TO GET AT IN MANDICO, THAT WE HAVE GOT A THRESHOLD ISSUE HERE OF JURISDICTION, AND WE HAVE GOT TO FIND A WAY THAT THE APPELLATE COURT IS GOING TO BE ABLE TO REVIEW THAT, BEFORE WE GO ALL OF THE WAY THROUGH A TRIAL AND THEN END UP FINDING THERE TO BE NO

JURISDICTION, BECAUSE OF THE FACT THAT WORKERS COMP APPLIES.

JUSTICE WELLS, I THINK THE ANSWER TO THAT IS WE HAVE GOT A LITTLE BIT OF A DIFFERENT ANIMAL HERE, THOUGH, BECAUSE THE WORKERS COMPENSATION IMMUNITY ONLY I AMNIZES NEGLIGENT BE -- ONLY IMMUNIZES NEGLIGENT BEHAVIOR, AND AS THIS COURT HAS FOUND, GROSSLY NEGLIGENT BEHAVIOR IS EXPRESSLY NOT IMMUNIZED, THEN THERE HAS TO BE A DECISION EARLY, AND THE TRIAL COURT IS THE GATEKEEPER OF THIS. THE TRIAL COURT MAKES A DECISION EARLY, WHETHER OR NOT THERE IS ENOUGH EVIDENCE TO SAY, THAT YES, THIS CASE SHOULD GO FORWARD, BECAUSE IT IS UNCLEAR, BASED UPON THE FACTS, WHETHER OR NOT THIS IS SIMPLE NEGLIGENCE OR GROSS NEGLIGENCE OR PERHAPS EVEN CULPABLE NEGLIGENCE.

YOU HAVE AN EVEN BROADER QUESTION. I MEAN, TRADITIONALLY YOU HAVE ALWAYS LITIGATED, WHETHER SOMEBODY IS WITHIN THE COURSE AND SCOPE OF THEIR EMPLOYMENT AND WHETHER THERE IS A BORROWED SERVANT. TRADITIONALLY WE HAVE ALWAYS LITIGATED THOSE KINDS OF INCIDENTS, DO WE NOT?

WE DO.

AND THIS IS NOT AN UNUSUAL HYBRID, IS IT?

IT IS NOT AN UNUSUAL HYBRID. IT IS ONE THAT IS CREATED BY THE STATUTE. IT IS NOT LIKE QUALIFIED IMMUNITY, WHERE, AS JUSTICE CANTERO, I THINK, WAS REFERRING TO, WHERE YOU HAVE A COMPLETE SEPARATION OF THE TWO QUESTIONS. HERE WE CAN'T SEPARATE THE IMMUNITY QUESTION FROM THE FACTS, IN MANY CASES.

THAT IS WHY, IN THESE CASES, THERE, THEY ARE ALWAYS AT THE SUMMARY JUDGMENT STAGE, WHICH, LIKE IN THIS CASE WAS, AS I READ FROM THE SECOND DISTRICT'S OPINION, WAS YEARS OF DISCOVERY. WE ARE NOT LOOKING TO SOMETHING THAT JUST HAPPENED THAT WE CAN SOMEHOW, THE DAY AFTER IT IS FILED, THERE CAN BE A MOTION TO DISMISS AND DECIDE, IN THIS TYPE OF SITUATION THAT, THERE IS NO IMMUNITY OR THERE IS. BUT THERE ARE SITUATIONS, LET'S SAY, I MEAN, I WOULD THINK THAT, IN THE CASE OF CONTRACTORS, WHERE YOU HAVE GOT YOU KNOW, THE ISSUE OF STATUTORY EMPLOYER AND WHO, THAT THERE ARE A LOT OF CASES THAT, REALLY, MIGHT FIT INTO WHERE A DEFENDANT MAY NOT BE AS A MATTER OF LAW, THE EMPLOYER OR IS, THAT, REALLY, ARE SUSCEPTIBLE TO THIS RULE BEING APPLICABLE.

YES. THERE ARE CASES LIKE. THAT AND THE RULE IS, AS WE HAVE IT NOW IN THIS COURT'S OPINION IN HASTINGS VERSUS DEMING, IS VERY CLEAR, IF THE ORDER SAYS THAT THE DEFENSE OF WORKERS COMPENSATION IMMUNITY HAS BEEN REMOVED, THEN IT IS TIME TO HAVE ANEM. -- A

EEL.

LET ME ASK -- AN APPEAL.

LET ME ASK YOU THIS, THOUGH, IN THE CASE OF THE TRIAL JUDGE'S ORDER, WHEN THE TERM OF GROSS NEGLIGENCE PORTION, WITH THE EMPLOYEES, AND HE USES THE TERM AS A MATTER OF LAW, SO DOES THAT NOT SATS PHI -- SATISFY THE REQUIREMENT, NOT THE STATUTE BUT THE RULE, WHEN IT TALKS ABOUT REMOVING WORKERS COMP IMMUNITY AS MATTER OF LAW?

TWO ABS AS TO THAT -- TO ANSWER TO SAY. THAT FIRST OF ALL, THE RULE IS VERY CLEAR THAT WHAT HAS TO BE DECIDED AS MATTER OF LAW, IS THAT THE WORKERS COMPENSATION IMMUNITY IS NOT A DEFENSE THAT THE DEFENDANT HAS ANYMORE.

SO WHAT DID THIS JUDGE DECIDE, AS A MATTER OF LAW?

THIS JUDGE DECIDED, AS A MATTER OF LAW, ESPECIALLY WHEN YOU READ THIS ENTIRE THREE-PAGE ORDER, THAT, GIVEN THE DISPUTES IN THE WELL-DEVELOPED RECORDS, JUSTICE PARIENTE POINTED OUT, GIVEN THE DISPUTES IN THE WELL-DEVELOPED RECORD, HE COULD NOT DECIDE THAT WORKERS COMP IMMUNITY BELONGED TO THE DEFENDANTS, SO AS A MATTER OF LAW, WITH A GENUINE ISSUE OF MATERIAL FACT IN FRONT OF HIM, HE COULD NOT GRANT SUMMARY JUDGMENT.

BUT IT IS A PRETTY CONFUSING ORDER. BUT YOU ARE CONCEDING THAT, WHEN THEY GO TO, IF YOU GET TO GO TO TRIAL, THAT YOU, THAT YOU WILL NOT BE ABLE TO SAY THEY CAN'T ARGUE THAT THEY ARE NOT LICHBLT I MEAN, YOU AGREE THAT -- NOT LIABLE. I MEAN, YOU AGREE THAT YOU DID NOT GET SUMMARY JUDGMENT --

ABSOLUTELY. I THINK IT WOULD BE, FOR A MOTION OF SUMMARY JUDGMENT DENIAL ON BEHALF OF THE DEFENDANT, THAT THE MOTION FOR SUMMARY JUDGMENT BE GRANTED TO THE PLAINTIFF.

YOU ARE IN YOUR REBUTTAL TIME AT THIS POINT.

I WILL SIT DOWN.

YOUR HONOR, MY NAME IS JOHN FROST, ALONG WITH PETER VANDERMOON, ONE OF MY PARTNERS AND WE HAVE THE PLEASURE OF REPRESENTING FLEETWOOD HOMES OF FLORIDA, MICKY OLIVER AND MARVIN MILLER. JUSTICE PARIENTE, IN FOLLOWING UP ON THAT QUESTION, WE BELIEVE THAT THE TRIAL JUDGE DID EXACTLY WHAT WAS REQUIRED, IN THAT HE FOUND AS A MATTER OF LAW, WE DIDN'T HAVE THE WORKERS COMP IMMUNITY DEFENSE.

SO DOES THAT MEAN, THEN, IN THIS CASE, THAT THERE WAS SUMMARY JUDGMENT FOR THE PLAINTIFF ON LIABILITY?

NO. AS IT RELATES, NO. WHAT IT SAYS IS WE DON'T HAVE THAT DEFENSE, AND SO THAT THERE IS, IN THAT REGARD, THERE WOULD BE THEIR CHANCE THAT THEY ARE GETTING, HE IS FINDING, SPECIFICALLY HE FINDS, IF YOU LOOK AT PARAGRAPH FOUR, AS INTENTIONAL TORT, IT SAYS THAT THE COURT FINDS THAT OLIVER COMMITTED INTENTIONAL ACTS OR THAT WAS SUBSTANTIALLY CERTAIN TO RESULT INJURE OR DEATH TO SCOTT REEVES. HE CLEARLY GOT IT ON THAT. WE COULDN'T THEN, AT TRIAL, SAY, HEY, HE DIDN'T COMMIT AN INTENTIONAL ACT, BECAUSE THIS COURT SPECIFICALLY FOUND IT.

I AM MISSING YOUR ARGUMENT, BECAUSE THE QUESTION THAT COMES TO US SPECIFICALLY STATES THAT THE TRIAL COURT INTENDS TO SUBMIT THE ISSUES OF GROSS NEGLIGENCE OR INTENTIONAL TORT, TO THE JURY AS A QUESTION OF FACT. THAT IS WHAT, I CAN'T FOLLOW THAT ARGUMENT AT ALL, THE WAY THEY PHRASED THE QUESTION, EVEN.

HE SAYS IF IT IS CLEAR THAT THE TRIAL COURT INTENDS TO SUBMIT THE ISSUE OF GROSS NEGLIGENCE OR INTENTIONAL TORT TO THE JURY AS A QUESTION OF FACT. THAT IS THE QUESTION THAT COMES TO THIS COURT. WE SUBMIT THAT THAT IS AN IMPROPER QUESTION, BECAUSE THAT WAS NOT AN ISSUE BELOW.

THAT IS THE QUESTION THEY CERTIFIED.

I UNDERSTAND THAT IS THE QUESTION THEY CERTIFIED, IF IT IS CLEAR, BUT HE NEVER ANYWHERE IN THE JUDGE'S OPINION, ANYWHERE DOES HE SAY THAT IS CLEAR. MATTER OF FACT HE SPECIFICALLY SAYS THAT THE TRIAL JUDGE FOUND, AS A MATTER OF LAW AND PUT IN THE NECESSARY WORDS, THAT SAID WE LOST THE IMMUNITY.

LET'S JUST SAY, GO AHEAD.

WHY WOULD HE, THEN, IF YOU ARE SAYING THAT THE SECOND DISTRICT IS ALREADY -- HAS ALREADY TOTALLY CONCLUDED THAT ISSUE, THEN FIND IT NECESSARY TO DISCUSS THIS CONCEPT OF CERTIORARI OR WHETHER YOU HAVE GOT A REVIEW. I HEAR WHAT YOU ARE SAYING BUT IT JUST DOESN'T MATCH WHAT HAS ACTUALLY HAPPENED HERE.

THAT IS WHY WE ARE SAYING YOU SHOULDN'T ANSWER THE QUESTION, BECAUSE WE DON'T THINK IT MATCHES WHAT HAS HAPPENED HERE, BUT HE SAYS BECAUSE THESE ISSUES AFFECT BUSINESSES THROUGHOUT FLORIDA AND AFFECT OUR JURISDICTION OVER TRIAL COURT ORDERS DECIDING THE ISSUE OF WORKERS COMPENSATION IMMUNITY, WE CERTIFIED THE FOLLOWING QUESTIONS AS QUESTIONS OF GREAT PUBLIC IMPORTANCE.

BUT EVERY TIME WE DECIDE OR A COURT DECIDES OR A JURY DECIDES AN ISSUE IN THIS AREA, I MEAN, IT HAS AN IMPACT. EVERY CASE HAS AN IMPACT.

I AGREE WITH YOU. THAT IS WHYION WHY WE GOT THESE CERTIFIED QUESTIONS, BECAUSE THE CERTIFIED QUESTIONS DON'T TRACE HIS VERY LOGICAL OPINION.

LET ME TRY TO COME AT THE CONCERN THAT I WAS EXPRESSING WITH MY QUESTIONS TO YOUR OPPONENT, AND THAT IS CAN OR IS, IF WE ASSUME THAT WHAT WE ARE DEALING WITH IS A MATTER OF SUBJECT MATTER JURISDICTION, IS THAT A MATTER WHICH IS TO BE DECIDED BY A JURY? IS JURISDICTION --

NO, SIR.

ARE THERE ANY OTHER INSTANCES IN WHICH JURISDICTION IS DECIDED BY A JURY?

NO. NO. AND WE DON'T BELIEVE IT SHOULD BE DECIDED HERE, AND IT ISN'T DECIDED HERE, AS JUSTICE, I MEAN, AS JUDGE ALTENBERND SAYS, THAT, WHERE THE PROBLEM OCCURS, IS THAT THE DEFENSE OF WORKERS COMP, REALLY, ISN'T THE TYPICAL DEFENSE, SO TO SPEAK.

BUT IN ORDER TO REACH THAT, DON'T WE HAVE TO RECEDE FROM SOME OF THE LANGUAGE THAT WE USED IN MANDICO AND WHATEVER THE NEXT CASE, HENDERSON, IN WHICH THIS COURT SAID THE ASSERTION THAT THE PLAINTIFF'S EX-CLUSIVE REMEDY THAT IT IS UNDER THE WORKERS COMPENSATION LAW IS AN AFFIRMATIVE DEFENSE, AND ITS VALIDITY CAN ONLY BE DETERMINED IN THE COURSE OF LITIGATION. THE COURSE HAS JURIES -- THE COURTS HAS JURISDICTION TO DECIDE THE QUESTION, EVEN IF IT IS WRONG. NOW, OBVIOUSLY THE COURT, LIKE IF THIS WAS AN ISSUE OF MINIMUM CONTACTS, WOULD HAVE THE JURISDICTION TO DECIDE WHETHER THERE WERE MINIMUM CONTACTS OR NOT, BUT THAT WOULD NOT BE A JURY QUESTION. I MEAN, IS THIS, ARE WE DEALING WITH A SIMILAR THING?

YEAH. YOU ARE DEALING WITH, I AGREE COMPLETELY, I THINK, AND WE DISCUSSED SOME OF THAT IN OUR BRIEF WHEN YOU TALK ABOUT WHAT IS WORKERS COMP, IS IT AN AFFIRMATIVE DEFENSE, AND WHAT JUSTICE ALTENBERND, I MEAN JUDGE ALTENBERND HAS DONE IS HE SET IT OUT AND GET WAS SHOULDN'T IT BE -- AND THE QUESTION WAS SHOULDN'T IT BE DECIDED EARLY. ABSOLUTELY IT SHOULD BE DECIDED EARLY, AND HE FOUND JURISDICTION BECAUSE THE COURT IS A GATEKEEPER, SHOULD DECIDE THAT ISSUE.

BUT OUR RULE, AND BECAUSE I THINK THIS ISSUE OF SUBJECT MATTER JURISDICTION, WE ARE IN A WHOLE OTHER SITUATION ABOUT HOW THESE RULES APPLY, BUT I HAD UNDERSTOOD AND WHAT JUDGE ALTENBERND SAID IS, ALTHOUGH WE SAID THERE IS THE DEFENSE OF WORKERS COMPENSATION IMMUNITY, WHAT IT REALLY IS, IN THIS CONTEXT, AS OPPOSED TO SOME OF THE OTHERS WE HAVE TALKED ABOUT, AS FAR AS WHO IS A STATUTORY EMPLOYER OR WHETHER THEY ARE IN THE COURSE AND SCOPE OF THEIR EMPLOYMENT, MANY OTHER SITUATIONS THAT

COULD BE PRETTY SIMPLE FACTUAL SITUATIONS. IN THIS CASE, THE ISSUE IS, ARE THERE FACTS THAT ARE IN DISPUTE, AS TO WHETHER THIS WAS AN INTENTIONAL ACTOR ON THE PART OF THE EMPLOYEES, GROSS NEGLIGENCE? THE JURY, TYPICALLY, THOSE ARE CASES, I MEAN, EXCEPT FOR ONE WHERE THERE IS CLEAR LIABILITY, AND THERE IS A DEFAULT, THOSE ARE GOING TO BE JURY QUESTIONS. I MEAN, YOU ARE GOING TO, YOU KNOW, IF YOU HAVE TO GO TO TRIAL, YOU ARE GOING TO END UP SAYING THIS WASN'T INTENTIONAL. SO THOSE ARE LITIGATED BY A JURY. IS THAT CORRECT?

THAT'S CORRECT.

AND, SO, ALTHOUGH WE HAVE CALLED IT A DEFENSE OF WORKERS COMPENSATION IMMUNITY, AS JUDGE ALTENBERND POINTED OUT, IT IS DIFFERENT THAN THE IMMUNITY THAT, FOR EXAMPLE, A YOU KNOW, A POLICE, YOU KNOW, IN A CIVIL RIGHTS CASE MIGHT HAVE, IT IS DIFFERENT IN KIND, CORRECT?

YES. THAT'S CORRECT.

OKAY. SO WHAT I AM HAVING TROUBLE WITH, WITH WHAT I THOUGHT THAT WHAT WE DID, WHEN WE AMENDED THE RULE AND CHANGED WHERE, AS A MATTER OF LAW WENT, IS THAT WE WANTED TO PREVENT DENIALS FROM SUMMARY JUDGMENT, WHERE THERE WAS STILL FACTUAL ISSUES IN DISPUTE, FROM, OR AT LEAST ASSERTED TO BE IN DISPUTE, FROM COMING UP TO THE APPELLATE COURTS. IS THAT NOT WHAT YOU UNDERSTOOD WE WERE DOING?

THAT IS WHAT, AND I THINK THAT IS EXACTLY WHAT JUSTICE ALTENBERND FOUND HERE, JUDGE ALTENBERND FOUND HERE, WHEN HE SAID THERE ARE NO DISPUTED ISSUES OF FACT AS TO THAT ISSUE. THERE MAY BE DISPUTED ISSUES OF FACT OF FACTUAL THING THAT IS DON'T RELATE TO WHETHER IT WAS OR WAS NOT AN INTENTIONAL TORT.

BUT DIDN'T, BY JUDGE ALTENBERND SAYING THAT WE ARE GOING TO EXAMINE THESE CASES WHERE WE THINK THE RECORD IS FACTUALLY WELL-DEVELOPED, BUT IF THERE ARE NOT FACTUALLY WELL-DEVELOPED, THEN WE WON'T, REALLY PUT THE APPELLANT AT COURTS IN -- APPELLATE COURTS IN SORT OF A TWO-PRONGED POSITION WHERE THEY HAVE JURISDICTION OVER NONFINAL ORDERS, ONE WHERE THEY FIRST HAVE TO DECIDE HOW FACTUALLY DEVELOPED THE RECORD IS, WHICH GETS THEM INTO, I MEAN, HOW MANY YEARS WERE YOU IN LITIGATION BEFORE THIS?

IT WAS FILED IN 1993.

YEAH. SO THEY THEN HAVE TO LOOK AT TEN YEARS OF LITIGATION, TO DECIDE HOW FACTUALLY WELL-DEVELOPED IT, AND THEN STOP EVERYTHING FOR SEVERAL MONTHS TO A YEAR, TO DECIDE A CASE THAT MAYBE ONE APPELLATE COURT SAYS IT IS FACTUALLY WELL-DEVELOPED AND THE OTHER SAYS IT IS NOT?

I DON'T THINK YOU EVEN HAVE TO GO THAT FAR IN THIS CASE. OKAY. FIRST OF ALL, I BELIEVE THAT THE RECORD IS CLEAR THAT HE FOUND THE NECESSARY LANGUAGE AS A MATTER OF LAW, THAT THERE WAS NO WORKERS COMP IMMUNITY. YOU REVIEW THAT OR THE APPELLATE COURT REVIEWS THAT DE NOVO, SO THEY CAN LOOK AT THE ENTIRE SITUATION AND DECIDE WHETHER THAT JUDGE WAS RIGHT OR WRONG.

AND, AGAIN, TELL ME, AGAIN, WHAT YOU THINK THAT JUDGE MEANT, AND AS I UNDERSTAND IT THE PARTIES DRAFTED THIS ORDER, BY SAYING THAT THERE WAS NO, THAT SOMETHING IS A MATTER OF LAW. WHAT DID THE JUDGE DECIDE?

WHAT I BELIEVE THE JUDGE DECIDED, WAS THAT THE CONDUCT HERE, AS MATTER OF LAW, DID NOT ALLOW THE WORKERS COMP IMMUNITY DEFENSE.

SO THEREFORE, YOU WOULD HAVE TO GO, IF THE NEXT STEP WAS, IF IT WASN'T APPEALED, YOU WOULD GO TO DAMAGES?

YES. AND IN THIS CASE, THOUGH, WHAT HAPPENS --

I THINK THEY WOULD BE HAPPY TO HEAR, I THINK THEY WOULD HAVE BEEN HAPPY TO HEAR THAT.

THEY HAVE GOT TO ARGUE THAT IT DIDN'T DO THAT, IN ORDER TO SAY THAT THIS COURT DOESN'T RULE. THAT IS WHAT THEY HAVE TO SAY, IN ORDER TO SAY THAT YOU CAN'T RULE. BECAUSE THE POINT BEING THAT, AS YOU LOOK AT WHAT HE FINDS, IS HE FINDS THAT, AND THEN THE SECOND ISSUE IS, EVEN IF HE DOESN'T FIND THAT, I THINK THAT THE SECOND DCA HAD CERT JURISDICTION ON THIS SITUATION.

BACK TO WHAT JUSTICE LEWIS SAID, IF IN FACT THE CERTIFIED QUESTION REFLECTS WHAT WAS PASSED UPON, YOU WOULD AGREE THAT, IF A JUDGE SAYS THERE ARE DISPUTED ISSUES OF FACT AS TO WHETHER THE EMPLOYER'S ACTIONS RISE TO THE LEVEL OF INTENTIONAL CONDUCT AND DENNIS SUMMARY JUDGMENT BASED ON THAT -- AND DENIES SUMMARY JUDGMENT BASED ON THAT, YOU WOULD AGREE THAT IS NOT REVIEWABLE UNDER THE NONFINAL ORDER SECTION OF A 9.330?

IF HE MERELY SAID I DENY THE MOTION FOR SUMMARY JUDGMENT, I DON'T THINK IT --

NO. I SAID DECIDING THAT THERE HAS BEEN ISSUES, SOMEONE CONTENDS THAT IT IS INTENTIONAL. THEY SAY IT IS NOT. I FIND FIND THERE ARE MATERIAL ISSUES OF DISPUTED FACT, AS TO WHETHER THIS CONDUCT IS INTENTIONAL OR NOT. THEREFORE I AM SUBMITTING IT TO THE JURY, SUMMARY JUDGMENT DENIED.

IF HE SAID THAT, THAT WOULD BE CLEAR THAT I THINK THAT IS NOT APPEALABLE, UNLESS IT MAY BE, UNDER 9.130, IT MAY BE APPEALABLE UNDER CERT.

SO I GUESS I THOUGHT WE WERE DEALING WITH THAT CASE, AND YOU ARE SAYING, NO, WE ARE DEALING WITH THE CASE WHERE THE JUDGE SAID YOU ARE OUT OF HERE, FROST. THE NEXT STEP IS DAMAGES.

YEAH. BECAUSE IT SAYS MAY, THE QUESTION IS MAY A DISTRICT COURT REVIEW A NONFINAL ORDER DENYING, QUOTE, AS MATTER OF LAW, A MOTION FOR SUMMARY JUDGMENT, ON THE ISSUES OF WORKERS COMPENSATION IMMUNITY, IF IT IS CLEAR, CLEAR, NOW, THAT THE TRIAL COURT INTENDS TO SUBMIT THE ISSUE OF GROSS NEGLIGENCE OR INTENTIONAL TORT TO THE JURY AS A QUESTION OF FACT. THAT IS THE QUESTION.

AND YOU SAID, BUT THAT DIDN'T HAPPEN IN THIS CASE.

THAT IS WHAT OUR POSITION IS, IS THAT IT DID NOT HAPPEN, AND JUSTICE, I MEAN JUDGE ALTENBERND DOESN'T SAY IT HAPPENED, EITHER. HE BASICALLY FINDS, WHERE HE SAYS IN HERE, BECAUSE HE GETS TO THE POINT WHERE HE SAYS JURISDICTION. HE SAYS,, HE TALKS ABOUT THE RULE, AND HE TALKS ABOUT THAT, AND THEN HE SAYS OUR JURISDICTION DILEMMA IS PREDICATED ON THE FACT THAT WORKERS COMPENSATION IMMUNITY IS NOT USUALLY A DEFENSE AT TRIAL. HE SAYS EACH PARTY HAS ARGUMENTS ON THIS, AND SAYS THAT THE APPELLANTS ARGUE THAT THE TRIAL COURT OF BAY HASTINGS AND HAS SPECIFICALLY STATED THAT THE DEFENSE OF WORKERS COMPENSATION IMMUNITY IS NOT AVAILABLE AS A MATTER OF LAW.

SO IS HE BASING THAT STATEMENT, IS JUDGE ALTENBERND BASING THAT STATEMENT ON, WHEN

WE GET BACK TO THE ORDER THAT THE TRIAL JUDGE ENTERED, THAT PARAGRAPH 5 ON THE SECOND PAGE OF THE ORDER, HE TALKS ABOUT THE FACTS OF THIS CASE, AND THE ALLEGATIONS OF THE PLAINTIFF, VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF, CREATE A FACTUAL BASIS FOR A COMPOSITE OF CIRCUMSTANCES, WHICH, TAKEN TOGETHER, CONSTITUTED AN IMMINENT OR CLEAR AND PRESENT DANGER, AMOUNTING TO MORE THAN NORMAL AND USUAL APPAREL, AND ENDS THE PARAGRAPH SAYING THESE CIRCUMSTANCES, TAKEN IN COMBINATION, PRESENTED A HIGH-RISK OF SERIOUS INJURY, SO ARE YOU SAYING, THEN, THAT THAT PARAGRAPH INDICATES THAT THE TRIAL JUDGE FOUND GROSS NEGLIGENCE ON THE PART OF THESE EMPLOYEES, AND THEREFORE WORKERS COMP IMMUNITY IS NOT APPLICABLE? IS THAT WHAT YOU ARE --

WAIT A MINUTE. IF YOU SAY THAT, YOU HAVE TO READ PARAGRAPH 4, WHERE HE SAYS YOU DISPUTE ALL OF THOSE. HE SAYS YOU DISPUTE.

CHIEF JUSTICE: LET JUSTICE QUINCE'S QUESTION BE ANSWERED BY THE COUNSEL. THAT IS DO YOU UNDERSTAND --

I UNDERSTAND THE QUESTION, AND I THINK WHAT HE SAYS IS, HE GOES ON TO SAY, IN THAT SAME OPINION, HE SAYS WE ARE CONVINCED THAT THE SUPREME COURT UNDERSTANDS THESE POLICY DISTINCTIONS AND INTENDS FOR THE DISTRICT COURTS TO HAVE JURISDICTION TO REVIEW CASES SIMILAR TO THIS CASE. AND THIS CASE, THERE ARE UNDOUBTEDLY FACTUAL QUESTIONS IN DISPUTE. HOWEVER, BECAUSE THE STANDARDS OF CARE APPLICABLE TO GROSS NEGLIGENCE, CULPABLE NEGLIGENCE, AND INTENTIONAL TORT ARE VERY LIMITED, THE DISPUTED FACTS IN THIS CASE DO NOT ACTUALLY CREATE DISPUTES CONCERNING THE MATERIAL ISSUES. BECAUSE THIS, ON PARAGRAPH 4, IN THIS ORDER, HE FINDS, HE DOES SAY THEY ARE DISPUTES, JUSTICE LEWIS, BUT HE GOES ON TO SAY THE ACTS COMPLAINED OF IN THE INSTANT CASE WERE NOT AS EGREGIOUS AS THOSE PRESENT IN THE CASE CITED IN THE DEFENDANT'S MOTION.

WHAT HAPPENS IN THIS CASE, IT SEEMS TO ME THAT WE ARE JUST GOING AROUND IN CIRCLES ABOUT THIS, AGAIN. WHAT HAPPENS IN THIS CASE, IF THESE ISSUES OF GROSS NEGLIGENCE, FOR INSTANCE, ARE SUBMITED TO THE JURY, IN AN INTERROGATORY VERDICT, AND THE JURY FINDS THAT THERE WASN'T GROSS NEGLIGENCE? SO UNDER THE PECULIAR CIRCUMSTANCES OF A CASE LIKE THIS, DOESN'T THAT MEAN THAT WORKERS COMPENSATION IMMUNITY WILL APPLY? IN OTHER WORDS UNLESS THE PLAINTIFF CAN ESTABLISH THAT LEVEL, AND IF I UNDERSTAND IT, THE TRIAL COURT SAYS THOSE ARE STILL DISPUTED ISSUES, SO IF A JURY COMES BACK, AND THEY FIND THAT THE PLAINTIFF HAS NOT ESTABLISHED GROSS NEGLIGENCE, THEN DOESN'T THAT AUTOMATICALLY MEAN THAT THERE IS WORKERS COMPENSATION IMMUNITY IN THE CASE? SO I AM HAVING, I MEAN, ISN'T THAT RIGHT?

WELL, THAT IS WHAT IS GOING TO HAPPEN. WE DON'T THINK WE OUGHT TO GET THERE. WE THINK THE TRIAL JUDGE HAS SAID --

I UNDERSTAND, BUT I AM HAVING TROUBLE WITH READING THIS ORDER, AS SAYING I WILL FINDING THAT THERE WAS GROSS NEGLIGENCE, UNDER THE, ALL THE FACTS THAT WE HAVE HERE, AS A MATTER OF LAW. IN OTHER WORDS, I AM RESOLVING THE ISSUE OF GROSS NEGLIGENCE, AS CONTEMPLATED BY THE WORKERS COMPENSATION STATUTE, AND THEREFORE YOU WOULD, YOU DON'T NEED A JURY, THEN, TO, IF THE JUDGE IS DETERMINING AS A MATTER OF LAW THAT WOULD NEVER GO ON A VERDICT FORM, BECAUSE THAT ISSUE HAS BEEN RESOLVED AS A MATTER OF LAW.

HOW DO YOU TAKE HIS LANGUAGE AS AN ORDER THAT SAYS THIS, SAYS THAT THE FACTS OF THIS CASE AND THE ALLEGATIONS OF THE PLAINTIFF, VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLFER, CREATE A BASIS FOR -- FAVORABLE TO THE PLAINTIFF, CREATE A BASIS FOR FACTUAL

CIRCUMSTANCES WHICH TOGETHER FIND EVIDENCE OF A CLEAR AND PRESENT DANGER, FROM UNUSUAL APPAREL --

BUT HASN'T HE SAID BY THAT, THAT THE PLAINTIFF AS PRESENT ADD PRIMA FACIE CASE AND THAT THEY HAVE GOT ENOUGH PROOF TO GET TO A JURY ABOUT THIS. OBVIOUSLY THIS ORDER IS NOT THE EASIEST THING IN THE WORLD TO READ, BUT IF HE ENDS UP CONCLUDING THAT, DO YOU AGREE THAT HE HAS ENDED UP CONCLUDING THAT THIS IS GOING TO BE SUBMITED TO A JURY?

HE HAS ENDED UP --

I MEAN, THE ISSUE OF GROSS NEGLIGENCE.

ION THE ANSWER TO THAT, BECAUSE HE SPECIFICALLY FINDS THE COURT FINDS, THAT OLIVER COMMITTED INTENTIONAL TORT.

DO YOU AGREE THAT, IF WE SHOULD READ THE ORDER, AS THAT HE HAS FOUND THAT THIS WILL BE SUBMITED TO THE JURY, BECAUSE THE PLAINTIFF HAS GOT ENOUGH EVIDENCE ON THE ISSUE OF GROSS NEGLIGENCE, TO GET IT TO A JURY, THEN THIS SHOULD NOT FALL IN THE CATEGORY OF CASES THAT WE INTENDED TO HAVE THIS PROMPT REVIEW IN THE DISTRICT COURTS OF APPEAL, IF THE JUDGE HAS FOUND THAT THIS DOESN'T FALL IN THE ROUTINE CATEGORY CONTEMPLATED, YOU KNOW, BY THIS MORE EFFICIENT PROCESS OF HAVING REVIEW, BECAUSE IN MOST CASES, YOU CAN TELL IF THEY WERE DOING SOMETHING IN THE COURSE OF THEIR EMPLOYMENT OR THAT THIS -- IF THERE ARE DISPUTED ISSUES OF FACT, IN THE NATURE OF THE IMMUNITY THAT IS CLAIMED HERE, IN THE AVOIDANCE OF THAT IMMUNITY, YOU KNOW, IN A CASE OF GROSS NEGLIGENCE, MAY OFTEN TURN ON A JURY'S FINDINGS OF WHETHER GROSS NEGLIGENCE ACTUALLY EXISTED, BECAUSE THOSE ARE THE CASES THAT ALMOST ALWAYS ARE SUBMITTED FOR FACTUAL RESOLUTION, BY A JURY, ARE THEY NOT?

YES, YOUR HONOR, BUT HOW DO YOU DEAL WITH THIS SECOND PART, WHICH, WHERE THERE IS INTENTIONAL TORT OF FLEETWOOD, AND HE SPECIFICALLY FINDS THE COURT FINDS, THAT OLIVER COMMITTED INTENTIONAL ACTS OR THAT WERE SUBSTANTIALLY CERTAIN TO RESULT INJURE OR DEATH TO SCOTT REEVES. THAT IS SPECIFIC FINDING OF FACT.

I AGREE, BUT THIS COMES BACK TO HOW WE INTERPRET THAT ORDER, BUT YOU WOULD AGREE, OR WOULD YOU NOT, THAT, IF WE READ IT TO MEAN THAT HE IS SAY, YES, THERE IS ENOUGH EVIDENCE THERE. THEREFORE I CAN'T GRANT SUMMARY JUDGMENT, AND THAT THIS IS GOING TO TURN, THEN, ON THE JURY'S DECISION OF WHETHER OR NOT GROSS NEGLIGENCE EXISTED, THAT THAT WOULD NOT FALL IN THE CATEGORY OF THE KIND OF ORDER THAT WE CONTEMPLATED, SHOULD HAVE IMMEDIATE REVIEW?

I AGREE WITH THAT, BUT I WOULD GO FURTHER TO SAY THAT, IF YOU LOOK AT JUDGE ALTENBERND'S OPINION, THE TRIAL JUDGE SPECIFICALLY INDICATED THAT IT WAS GOING, THIS ORDER WAS GOING TO GET APPEALED, AND THAT IS WHY WE THINK HE PUT THE HATER OF LAW IN THERE -- THE MATTER OF LAW IN THERE, BECAUSE THAT IS WHAT WAS GOING TO GET APPEALED.

WASN'T IT, REALLY, BOTH PARTIES ASSERTED, NO MATTER WHAT CAME OUT OF IT? THAT WAS A MISTAKE THAT THE PARTIES MADE, ASSERTING THAT NO MATTER WHAT HAPPENED, EITHER PARTY COULD TAKE AN APPEAL. DIDN'T THAT OCCUR DURING THIS HEARING?

I THINK IT MAY HAVE. I WAS NOT AT THAT HEARING. I JUST GOT HIRED ON THE APPEAL PART OF THIS, JUSTICE LEWIS, BUT I THINK --

TAKE MY WORD IT DID.

-- IT DID. BUT CLEARLY IT IS GETTING BACK TO THE ORIGINAL QUESTION THAT WAS ASKED BY JUSTICE WELLS, IN TALKING ABOUT WHAT SHOULD BE THE ROLE OF COURTS IN THIS. THIS ISSUE SHOULD BE DECIDED EARLY ON, BECAUSE THE PROBLEM IS, IF THERE IS WORKERS COMP IMMUNITY, IF YOU DECIDE IT AFTER THE TRIAL, YOU REALLY HAVEN'T DONE ANYTHING FOR THE BUSINESS.

WHAT ARE YOU GOING TO DO, HAVE A SEPARATE TRIAL, THEN, AND CREATE THIS UNUSUAL SITUATION, WHERE YOU ACTUALLY HAVE A SEPARATE TRIAL ON THE ISSUE OF GROSS NEGLIGENCE? YOU KNOW, ALMOST IMMEDIATELY, AND THEN --

I THINK WHAT YOU ARE GOING TO DO IS WHAT JUDGE ALTENBERND HAS SAID IN HERE, ONE OF TWO THINGS. ONE IS THAT YOU HAD, THE APPELLATE COURT TAKES JURISDICTION, EITHER UNDER THE RULE 9.130 OR UNDER CERTAIN, AND LOOKS AT IT ON THE BASIS DE NOVO, AS HE HAS DONE HERE, AND SAYS AS A MATTER OF LAW, THERE ARE NOT FACTS IN DISPUTE HERE THAT WOULD EVER GET THIS TO RISE TO THAT LEVEL.

BUT THEN WE WOULD HAVE TO AMEND THE PROCEDURES, YOU SEE, AND MAYBE THAT IS A VERY GOOD PROCEDURE. MAYBE WE NEED A SCREENING DEVICE LIKE WE HAVE, THE LEGISLATURE CREATED FOR PUNITIVE DAMAGES, WHERE YOU HAVE, BUT THAT IS NOT WHERE THE RULE IS NOW, AND IT SEEMS, AGAIN, AND I GO BACK TO WHERE I SEE THE PROBLEM IN WHAT JUDGE ALTENBERND IS SAYING, IS THAT THE APPELLATE COURT WOULD HAVE TO DETERMINE, BECAUSE OF THE NATURE OF THIS TYPE OF IMMUNITY BEING LINKED INTO WHETHER THE DEFENDANT COMMITTED INTENTIONAL OR GROSS NEGLIGENT ACTS, IS TO DECIDE AT WHAT POINT, DID THE RECORD GET SUFFICIENTLY DEVELOPED, SO THAT IT IS NOW READY FOR NOT JUST SUMMARY JUDGMENT BY THE TRIAL COURT BUT BY, FOR RESOLUTION BY THE APPELLATE COURT, AND THAT SEEMS, YOU KNOW, SO, WOULDN'T THAT HAVE TO HAPPEN, IN ORDER TO MAKE JUDGE ALTENBERND'S THEORY WORKABLE?

CHIEF JUSTICE: WE ARE GOING TO HAVE TO CLOSE WITH YOUR ANSWER TO THAT.

HIS THEORY IS WORKABLE, BECAUSE YOU CAN LOOK AT THIS CASE UNDER 9.130 AND SAY THAT IT DID DO THAT, OR UNDER CERT REVIEW, YOU CAN ALWAYS LOOK IT. YOU CAN LOOK AT IT FROM THE STANDPOINT OF IRREPARABLE HARM, BECAUSE THEY HAVE GOT TO GO THROUGH THE TRIAL AND THEN SAY WORKERS COMP DID APPLY AND I HIM SORRY WE PUT YOU THROUGH THIS.

WOULDN'T EVERY DEFENDANT LIKE TO BE ABLE TO ARGUE THAT GOING THROUGH A TRIAL IS IRREPARABLE HARM.

BUT THIS COURT HAS SAID THAT WORKERS COMP IMMUNITY IS IMMUNITY FROM SUIT, NOT FROM, IMMUNITY FROM SUIT, WHICH IS DIFFERENT THAN IMMUNITY FROM CERTIFICATION.

CHIEF JUSTICE: WE ARE GOING TO HAVE YOU TO CLOSE ON THAT NOTE. THANK YOU VERY MUCH. HOW MUCH TIME LEFT FOR REBUTTAL? MY GOODNESS, NINE AND-A-HALF MINUTES.

CAN YOU EXPLAIN IN SOME OF YOUR TIME WHAT FACTUAL ISSUES REMAIN, WHAT ARE THE DISPUTED ISSUES OF FACT REGARDING WHETHER THE EMPLOYER COMMITTED AN INTENTIONAL TORT, YOU KNOW, HOW MANY TIMES THE, WHAT DO YOU CALL IT, THE CART HAD BUMPED INTO THE PULL AND WHETHER THIS EMPLOYEE HAD EVER BEEN ASSIGNED TO THAT TABLE BEFORE, THAT KIND OF THING.

SURE I CAN. THE FACTS ARE BASICALLY THIS. THIS GENTLEMAN, MR. REEVES, THIS IS THE FIRST DAY HE HAD WORKED AT THIS SPECIFIC WORK STATION. THIS IS A LARGE WAREHOUSE TYPE OPERATION, IF YOU WILL, AND THEY ARE BUILDING MOBILE HOMES. THE FORKLIFT OPERATOR IS DRIVING THE FORKLIFT. IT HAS THREE 600-POUND ROLLS OF METAL ROOFING SHOOTING MATERIAL ON IT THAT ARE LIFTED 14 FEET IN THE AIR, BECAUSE THAT IS THE ONLY WAY HE CAN

NAVIGATE TO GET FROM WHERE HE NEEDS TO COME INTO THE BUILDING TO WHERE HE NEEDS TO TAKE THE MATERIAL. THE PROCESS OF DOING THIS, HE HAS TO GO BY THIS WORK STATION WHERE MR. REEVES IS, THIS WORK STATION WHERE MR. REEVES THERE, IS NO PLACE FOR HIM TO GO TO ESCAPE. HE HAS TO STAY THERE. THE OTHER FACTS ARE, BECAUSE IT IS ELEVATED 14 FEET IN THE AIR ON THE RIGHT SIDE OF WHERE THE FORKLIFT OPERATOR IS GOING, WITH THE ROLLS IN FRONT OF HIM, WHICH IS A VIOLATION OF THE EMPLOYERS' SAFETY PROGRAM AND OF OSHA AND OF THE FORKLIFT OPERATORS MANUAL THAT THE FORKLIFT COMPANY, THE MANUFACTURER'S MANUAL, WHEN IT IS 14 FEET UP IN THE AIR THERE IS A PULL OVER HERE ON THE RIGHT SIDE. HE HAS GOT FOUR TO SIX INCHES TO THREAD THAT NEEDLE, SO THE WAY THEY HAVE DEVISED FOR HIM ON DO THIS IS THEY HAVE PAINTED A YELLOW LINE ON HIS LEFT ON THE FLOOR. HE LOOKS DOWN AT THE YELLOW LINE TO PASS THERE.

I AM FAMILIAR WITH THE FACTS AS STATED IN THE OPINION. MY QUESTION IS, THE FACTS AS YOU HAVE JUST REITERATED THEM, ARE THOSE UNDISPUTEED?

THOSE ARE UNDESPITEPUTED FACTS.

SO IN THE CASE -- UNDISPUTED FACTS.

SO IN THE CASE OF UNDISPUTED FACTS, THE COURT FINDS THAT I FIND AS MATTER OF LAW THAT YOU DO NOT HAVE WORKERS COMP IMMUNITY, THAT YOU HAVE ESSENTIALLY COMMITTED A TORT, WHY IS THAT NOT APPEALABLE UNDER THE NONFINAL ORDER RULE?

I THINK THAT IS APPEALABLE UNDER THE NONFINAL ORDER RULE, IF THE COURT HAS SAID AS A MATTER OF LAW YOU HAVE COMMITTED AN INTENTIONAL TORT, YOU HAVE NO IMMUNITY.

THERE IS NO FACTS LEFT FOR THE JURY TO DECIDE ON THIS PARTICULAR ISSUE. YOU HAVE JUST ADMITTED THAT, THAT ALL OF THE FACTS ARE UNDISPUTED.

I THINK THERE ARE OTHER FACTS. FOR EXAMPLE HOW MANY TYPES THIS POLE HAD BEEN STRUCK. THAT PUTS US BACK INTO TURNER, BECAUSE THIS POLE HAD BEEN STRUCK BEFORE. THIS FORKLIFT OPERATOR HAD STRUCK IT.

YOU WERE PRESENTING, NOW, YOUR SIDE OF THE CASE.

THAT'S RIGHT.

OTHER SIDE SEES IT DIFFERENTLY, DO THEY NOT?

BUT ON A MOTION FOR SUMMARY JUDGMENT THAT, IS EXACTLY WHAT THIS JUDGE DID.

I AM NOT ASKING, THE QUESTION THAT HE ASKED ARE WHAT ARE THE DISPUTES, AND IT SEEMS MR. WALKER'S CLIENT HAS DISPUTE ADD AWFUL LOT OF THAT, THEN YOU ARE GIVING US YOUR VIEW IN YOUR BEST LIGHT.

THAT'S RIGHT. I AM SORRY. I THOUGHT I UNDERSTOOD THE QUESTION TO BE WHAT ARE THE DISPUTED ISSUES?

LET ME TURN BACK UP LIKE A BAD PENNY WITH MY CONCERN, AND THAT IS THAT, IF WE ACCEPT THAT THERE IS A RESOLUTION HERE, BY A JURY OR BY A JUDGE, THAT THERE WAS NO, THAT THIS IS WORKERS, FIST WITHIN WORKERS COMP THE RESULT OF IT THAT FACTUAL DETERMINATION OR THE DETERMINATION AS A MATTER OF LAW, IS THAT THE CIRCUIT COURT DOES NOT HAVE JURISDICTION OVER THIS DISPUTE. ISN'T THAT CORRECT? ISN'T THAT THE RESULT?

I THINK THAT IS THE RESULT, THE PRACTICAL RESULT, YES.

BUT WHAT WE HAVE DONE IN ALL OF THIS LAW IS THAT WE HAVE CREATED A PROCESS IN WHICH WE ARE GOING TO HAVE A JURY DETERMINATION, AS TO WHETHER A CIRCUIT COURT HAS SUBJECT MATTER JURISDICTION. HAVEN'T WE?

WELL, JUSTICE WELLS, I SEE A LITTLE DIFFERENTLY THAN THAT. I THINK WHAT WE HAVE DETERMINED IS THAT, WHERE THERE ARE FACTUAL ISSUES IN DISPUTE, THE JURY IS GOING TO MAKE THAT DETERMINATION IN AN INTERROGATORY VERDICT FORM. IF THE JURY DETERMINES THAT THIS WAS SIMPLE NEGLIGENCE, THEN THIS CASE IS OVER.

BUT WHAT I AM CIRCLING AROUND IN MY HEAD, IS I AM TRYING TO THINK OF ANY INSTANCES, OTHER KINDS OF CASES, IN WHICH WE HAVE SAID THAT YOU RAISE AN AFFIRMATIVE DEFENSE, THE MATTER OF SUBJECT MATTER JURISDICTION. WHETHER THAT IS AN AFFIRMATIVE DEFENSE OR WHETHER THAT IS SOMETHING THAT IS A THRESHOLD ISSUE. LIKE, AS I SAY, THE MINIMUM CONTACTS OF THE COURT HAVING JURISDICTION OVER SOMEONE THAT IS IN MASSACHUSETTS.

JUSTICE WELLS, I UNDERSTAND YOUR QUESTION, AND THIS COURT HAS PREVIOUSLY HELD THAT THIS IS AN AFFIRMATIVE DEFENSE.

LET ME GET BACK TO THE TRIAL JUDGE'S ORDER THAT WAS ENTERED HERE. HOW DO YOU GET AROUND THE LANGUAGE THAT THE TRIAL JUDGE ACTUALLY SAYS THAT THE EMPLOYER COMMITTED AN INTENTIONAL ACTOR ONE THAT WAS SUBSTANTIALLY CERTAIN TO RESULT INJURE OR DEATH? -- INJURE I OR DEATH? HOW IS -- IN INJURE OR DEATH -- INJURE OR DEATH? HOW IS NOT THAT AN INTENTIONAL ACT?

JUSTICE QUINCE, I THINK THE WAY YOU GET AROUND IT IS THAT IS THE PHRASE, I THINK YOU HAVE GOT TO READ THAT ENTIRE PARAGRAPH, AND EACH OF THESE PARAGRAPHS START OR HAVE CONCLUDED WITH THEM, HAVE THE FACTS OF THIS CASE AND THE ALLEGATIONS OF THE PLAINTIFF, VIEWED IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF. THAT APPEARS TWO TIMES IN THIS ORDER, AS DOES THE STATEMENT THAT, GIVEN THE VIOLATIONS ALLEGED BY THE PLAINTIFF, AND IT SAYS IN PARENTHESIS, WHICH ARE DISPUTED BY DEFENDANT BUT WHICH MUST BE ACCEPTED AS TRUE ON A MOTION FOR SUMMARY JUDGMENT. I THINK THAT --

WHY DOES THE JUDGE, I AM HAVING A PROBLEM WITH THE LANGUAGE HE SAYS THE COURT FINDS. THAT THE EMPLOYER COMMITTED AN INTENTIONAL ACT.

YOUR HONOR, I THINK HE IS SAYING THE COURT FINDS, GIVEN THE PROCEDURAL POINT WHERE WE ARE IN THE CASE, AND ON A MOTION FOR SUMMARY JUDGMENT --

HOW MANY MOTOR VEHICLESS FOR SUMMARY JUDGMENT -- HOW MANY MOTIONS FOR SUMMARY JUDGMENT WERE BEFORE THE COURT AT THAT TIME?

THIS IS A MOTION FOR SUMMARY JUDGMENT ON EACH THE COUNTS OF THE COMPLAINT, BUT THERE HAD BEEN NO PREVIOUS MOTIONS FOR SUMMARY JUDGMENT.

JUST A MOTION FOR SUMMARY JUDGMENT ON THE DEFENDANT'S SIDE, CORRECT? THERE WAS NOT A MOTION FOR SUMMARY JUDGMENT BY THE PLAINTIFF, SEEKING A RULING THAT AS A MATTER OF LAW --

THAT'S RIGHT.

-- THEY HAD ESTABLISHED GROSS NEGLIGENCE, IS THAT CORRECT?

THAT'S CORRECT.

AND SO THE ONLY MATTER THAT WAS BEFORE THE TRIAL COURT, WAS A MOTION FOR SUMMARY

JUDGMENT BY THE DEFENDANT, SEEKING A RULING THAT WORKERS COMPENSATION IMMUNITY DID APPLY, BECAUSE THERE WAS NO GROSS NEGLIGENCE IN THE CASE, IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

AND THE ACTIONS OF THE TRIAL COURT WERE JUST TO DENY THAT RELIEF, IS THAT RIGHT?

THAT'S RIGHT.

BUT YOU WOULD AGREE THAT THE ORDER IS CONFUSING.

I WOULD AGREE WITH THAT.

BUT THAT IS THE ONLY MOTION THAT WAS BEFORE THE COURT.

THAT WAS THE ONLY MOTION THAT WAS BEFORE THE COURT, RIGHT.

WHO PUT THAT MOTION BEFORE THE COURT?

MY UNDERSTANDING, AND I ALSO WAS NOT THE TRIAL LAWYER. I UNDERSTAND FROM THE TRANSCRIPT, THAT BOTH OF THE PARTIES SENT ORDERS TO THE JUDGE AND THE JUDGE CUT AND PASTETED, OR THE JUDGE'S OFFICE CUT AND PASTETED AND THAT IS HOW THE ORDER RESULTED.

ORDER BY COMMITTEE.

IT APPEARS SO.

LET ME ASK A QUESTION AND I DON'T KNOW THAT ANYONE HAS TALKED ABOUT IT BEFORE, BUT IT IS CLEAR AND YOU WOULD AGREE THAT YOU CANNOT APPEAL FINDINGS OF FACT, IS THAT CORRECT?

I WOULD AGREE WITH THAT.

THIS ENTIRE ORDER, IT SEEMS TO ME IT IS A ORDER, NIGHT JUDGMENT, NOT A PARTIAL FINAL JUDGMENT, AND YOU ARE TALKING ABOUT FINDING OF FACTS, THE ACTUAL ORDER IS NOTHING OTHER THAN DENIED. DENIED. GRANTED. GRANTED. HOW DOES A MATTER OF LAW, SO I DON'T SEE THIS, EVEN IF IT HAD, OF BEING AN APPEALABLE ORDER.

I AGREE JUSTICE LEWIS. I HAVE OPENED THAT PAGE TO MAKE THAT EXACT POINT, BECAUSE NOT ONLY IS THAT THE SITUATION HERE, BUT, AGAIN, ALL THAT, AND I JUST WANT TO TOUCH REAL QUICKLY ON TWO POINTS BEFORE MY TIME IS UP. MR. FROST REFERRED TO THE CERTIORARI JURISDICTION. THERE IS NOTHING EXTRAORDINARY ABOUT THIS ORDER. THIS HAPPENS THOUSANDS OF TIMES A DAY, WHERE SUMMARY JUDGMENT IS SIMPLY DENIED, AND THAT IS ALL IT SAYS HERE UNDER ORDERED AND ADJUDGED T SAYS DENIED.

DON'T YOU AGREE THAT THE ORDER IS SOMEWHAT AMBIGUOUS AND I SAW THE MOTION TO LIMIT THE JURISDICTION BACK TO THE TRIAL COURT, TO THE AMBIGUITIES THAT IS CAUSING ALL OF US PROBLEMS. WAS THERE OPPOSITION TO THAT MOTION?

THERE WAS NOT OPPOSITION TO THAT MOTION, NO, AND I AGREE THAT IT IS SOMEWHAT OF A CONFUSING ORDER AND THIS IS THE SECOND POINT I WANTED TO MAKE BEFORE MY TIME IS UP, AND THAT IS WHEN THIS COURT DECIDED IN HASTINGS VERSUS DEMING, THE DECISION IT HAD, IT OVERRULED THE CITY OF LAKE MARY VERSUS FRANKLIN, AND IN THAT SITUATION, IT WAS UNCLEAR WHY THE TRIAL COURT HAD DENIED THE MOTION FOR SUMMARY JUDGMENT, AND THIS COURT SAID WE ARE NOT GOING TO GRANT INTERLOCUTORY APPEAL IN THAT SITUATION.

CHIEF JUSTICE: OKAY. WE WILL END ON THAT NOTE. WE HANG THANK YOU ALL, ESPECIALLY -- WE THANK YOU ALL, ESPECIALLY FOR RESPONDING TO OUR QUESTIONS.

THANK YOU.