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03-1601

THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS INDEMNITY INSURANCE COMPANY OF NORTH AMERICA VERSUS AMERICAN AVIATION. GOOD MORNING.

MAY IT PLEASE THE COURT. HUGH GRIFFIN ON BEHALF OF THE PLAINTIFF/APPELLANTS/MOVEANTS ON THIS CASE, PROFILE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA. WE HAVE CERTIFIED QUESTIONS TODAY FROM THE ELEVENTH CIRCUIT, ALL GOING TO THE FAMOUS OR INFAMOUS, DEPENDING ON YOUR POINT OF VIEW, I GUESS, ECONOMIC LOSS DOCTRINE.

IF YOU WOULD GIVE US, JUST FOR THE SETTING OF THIS PARTICULAR CASE AND THE QUESTIONS THAT HAVE BEEN POSED, A VERY BRIEF THUMBNAILED SKETCH OF THE FACTS.

WELL, THE FACTS ARE ALL IN THE COMPLAINT. AND AS JUSTICE LEWIS POINTED OUT IN AN EARLIER CASE, THAT IS WHAT WE ARE HERE ON. WE ARE HERE ON THE ALLEGATIONS OF PROFILE INDEMNITY'S COMPLAINT, INDEMNITY IS A SUBGEE OF PROFILE, FOR THE PART OF THE WHOLE DAMAGE THAT OCCURRED.

WE HAVE THE REPAIR OF AN AIRCRAFT.

WE HAVE A REPAIR OF AN AIRCRAFT, THAT A SUBSEQUENT PURCHASER OF THE AIRCRAFT.

SUBSEQUENT PURCHASER OF THE AIRCRAFT.

BUT GIVE US, AGAIN, WHAT HAPPENED HERE.

RIGHT. RIGHT. WELL, WHAT HAPPENED WAS THE PLANE, AFTER IT WAS PURCHASED BY PROFILE, AND PROFILE RELYING ON THE CERTIFICATIONS THAT AMERICAN HAD MADE AS TO WHAT INSPECTIONS IT HAD DONE AND SO FORTH, IN PURCHASING THE PLANE AND OPERATING IT, AND DECIDING WHAT MAINTENANCE TO DO, AS IT WAS LANDING THE AIRCRAFT, THE LANDING GEAR FAILED, CAUSING DAMAGE TO OTHER PARTS OF THE AIRCRAFT, THE LANDING GEAR, THE FUSELAGE, WINGS, ET CETERA.

DID THE COMPANY MAINTAIN THE ENTIRE AIRCRAFT OR JUST LANDING GEAR?

THE CERTIFICATION IS NOT IN OUR APPENDIX. IT IS ATTACHED TO OUR COMPLAINT. LISTS ALL THE WORK THAT THEY DID, AND IT IS QUITE SPECIFIC, REMOVE BOTH RETRACTORS FOR 30-MONTH AND INSTALL CERT TAG AND SEAT TAGS AND THAT WAS DONE IN REQUIREMENT WITH THE MANUFACTURERS SPECIFICATIONS AND SAR'S, AND WE KNOW THE CLAIM IS THAT THAT WAS NOT WHAT HAPPENED. THAT THE ACTUATOR OR FROM THE MECHANISMS WERE PUT IN BACKWARDS, CONTRARY TO THE MANUFACTURER'S RECOMMENDATIONS AND THAT CAUSED THE COLLAPSE.

MY QUESTION IS, WAS AMERICAN, WHEN THE PLANE WAS ENTRUSTED TO AMERICAN AVIATION, THEY WERE, THEIR CONTRACT PROVIDED FOR THEM TO INSPECT AND MAINTAIN THE ENTIRE AIRCRAFT, NOT JUST LANDING GEAR?

THERE IS A LOT MORE THAT THEY DID BESIDES THE LANDING GEAR. THEY DID 150-HOUR PRIMARY INSPECTION IN ACCORDANCE WITH OVERALL INSPECTIONS, AND THEN THEY DID ALL KINDS OF SPECIFIC WORK ON THE AIRCRAFT.

IS THAT ALL LAID OUT IN THE COMPLAINT?

IT IS ALL LAID OUT IN THE ATTACHMENT TO THE COMPLAINT, WHICH IS WHAT I AM HOLDING IN MY HAND HERE, WHICH IS THE CERTIFICATION, THE SAR, THIS IS OUT OF THE LOGBOOK OF THE AIRCRAFT, ITSELF.

THEN WE HAVE A SUBSEQUENT PURCHASER, THAT CORRECT?

WE HAVE A SUBSEQUENT PURCHASER.

GIVE US, IF YOU COULD START WITH --

NOT IN PRIVITY. NO PRIVITY HERE.

LET'S START WITH WHAT IS THE BASIS FOR A CAUSE OF ACTION BY A SUBSEQUENT PURCHASER, AND I THINK IN MY MIND, THE ANALOGY NAME THINKING OF NOW, IS AN AUTOMOBILE MECHANIC, FOR INSTANCE, THAT MAKES A REPAIR TO THE MUFFLER OF A CAR.

RIGHT.

MR. JONES PICKS UP THE CAR AND OWNS IT FOR SIX MORE MONTHS, WITH NO COMPLAINTS, AND HE SELLS IT, THEN, TO MR. SMITH, AND NOW THE MUFFLER FALLS APART, AND, ALSO, DAMAGES SOME OTHER PART OF THE CAR. NOW, HOW IS IT THAT MR. SMITH, WHO DIDN'T CONTRACT FOR THOSE REPAIRS, HAS AN ACTION BACK AGAINST THE MECHANIC THAT WORKED FOR SOMEBODY ELSE? WHAT IS, HELP ME, LET'S START WITH WHAT IS THAT CAUSE OF ACTION?

WELL, IT IS A CAUSE OF ACTION IN NEGLIGENCE, OR SOMEONE WITHIN THE FORESEEABLE ZONE OF RISK OF YOUR NEGLIGENCE.

SO A SUBSEQUENT PURCHASER OF AN AUTOMOBILE WOULD HAVE A CAUSE OF ACTION AGAINST THE MECHANIC, FOR A PRIOR OWNER?

WELL, WE SAY --

I AM ASKING THAT, BECAUSE I AM A LITTLE SURPRISED AT THAT.

I THINK THIS CASE HAS A LOT MORE TO IT THAN THAT.

WHAT IS THE LEGAL BASIS, FOR THE CAUSE OF ACTION? IS IT, IT IS A NEGLIGENCE ACTION?

IT IS A NEGLIGENCE ACTION.

AND ALLEGES A DUTY AGAINST A PRIOR MECHANIC.

RIGHT.

EVEN THOUGH THERE IS NO PRIVITY THERE.

RIGHT. RIGHT.

AND IS THAT, HAS THAT BEEN RECOGNIZED IN FLORIDA, THAT IS THE OBLIGATION OF A MECHANIC, REALIZING THIS IS AN AIRCRAFT AND WE HAVE GOT FAA, AND I KNOW YOU ARE GOING TO ADD THAT LATER TO THAT, BUT TAKING THIS SIMPLE EXAMPLE, HAS A CAUSE OF ACTION BEEN RECOGNIZED IN FLORIDA, BY A SUBSEQUENT PURCHASER OF AN AUTOMOBILE, FOR INSTANCE? AGAINST THE MECHANIC FOR THE PRIOR OWNER?

WELL, WE CITED IN THE REPLY BRIEF ON PAGE TWO, THREE CASES INVOLVING AUTOMOBILE MECHANICS. TWO OF THEM DID NOT INVOLVE A THIRD PARTY, BUT ONE OF THEM DID. I THINK IT IS AIM VERSUS STATE FARM MUTUAL AUTOMOBILE PASSENGERS' NEGLIGENT REPAIR CLAIM AGAINST THE INSURANCE COMPANY THAT CONTROLLED THE REPAIR.

WHAT WAS THE NEGLIGENT CAUSE OF ACTION ON THAT CASE?

NEGLIGENCE ON THE PARTY IN CHARGE OF REPAIR. THE PASSENGER WAS HELD TO BE WITHIN THE FORESEEABLE ZONE OF DANGER OF THE NEGLIGENCE.

WE ARE NOT HERE, THE DEFENDANT DIDN'T MOVE TO DISMISS FOR FAILURE TO STATE A CAUSE OF ACTION IN TOTAL. AS I AM UNDERSTANDING, WE ARE HERE BECAUSE THE TRIAL COURT, THE DISTRICT COURT, AND THEN IT WAS CERTIFIED UP, SAID THERE WAS NO CAUSE OF ACTION, BECAUSE THE ONLY LOSS WAS ECONOMIC.

RIGHT.

BECAUSE THERE WASN'T REALLY, IF THIS HAD, IF THIS LANDING GEAR HAD FAILED AND THEN INJURED A PASSENGER ONBOARD, WHO, THEN, HAD SUED THE PRIOR MECHANIC, NOBODY WAS ARGUING THAT THERE WOULDN'T BE A DUTY RUNNING ON THE PART OF THAT MECHANIC.

RIGHT. RIGHT.

OR MAYBE THEY WOULD HAVE, BUT WE HAVE GOT TO LOOK AT IT THAT ECONOMIC LOSS, THAT YOUR CLIENTS SUSTAINED, WHAT MAKES THAT DIFFERENT, IN TERMS OF DID IT GO TO DUTY OR IS THAT WHAT THE ECONOMIC LOSS RULE IS BASED ON, OR COULD YOU TELL US HOW YOU WOULD DEFINE THE ECONOMIC LOSS RULE AND WHY IT IS NOT APPLICABLE IN THIS CASE.

WELL, BECAUSE IS THERE TWO POLICIES BEHIND IT. NUMBER ONE, IF THE PARTIES HAVE A CONTRACT, AND YOU KNOW, THEY HAVE THE ABILITY TO ALLOCATE THE LOSS WITHIN THE CONTRACT, THE CASES HAVE SAID WE ARE GOING TO LEAVE THEM TO THEIR CONTRACT. WE ARE NOT GOING TO LET YOU GET OUT OF YOUR CONTRACT BY SOME ALLEGATION OF NEGLIGENCE, BUT MOREOVER, IN YOUR HONOR'S OPINION IN MORANTZ AND IN YOUR HONOR'S OPINION IN CONTEXT, IT EXPANDS THE NATURE OF THE CLAIM BEYOND NEGLIGENCE T EXPANDS THE COMMON LAW. IT ALLOWS RECOVERY WITHOUT NEGLIGENCE, EVEN IF THERE IS ALL DUE CARE.

LET ME ASK YOU THIS, IF --

OUR OPPONENTS ARE TRYING TO SAY THIS IS A PRODUCTS CASE BECAUSE SERVICE WAS RENDERED TO A PRODUCT BUT THERE IS NO LAW THAT SAYS THAT.

LET ME GIVE YOU ANOTHER POLICY ARGUMENT AND ASK YOU TO RESPOND TO IT. AND IT IS, IT MAYBE FALLS ON THIS ISSUE OF DUTY. IF THE LAWSUIT HAD BEEN WITH THE PARTY THAT HAD CONTRACTED WITH AMERICAN, THEN THEIR CLAIMS WOULD HAVE BEEN LIMITED, UNLESS THERE WAS PERSONAL INJURY, WOULD HAVE BEEN LIMITED TO THE REMEDIES UNDER THE CONTRACT, CORRECT?

WELL, I STILL THINK YOU WOULD HAVE A NEGLIGENT REPRESENTATION EXCEPTION.

LET'S LEAVE THAT ASIDE.

YOU WOULD BE WITHIN THE PARAMETERS OF THE POLICIES BEHIND THE ECONOMIC LOSS DOCTRINE. YOU WOULD HAVE ONE OF THE ELEMENTS.

WHY SHOULDN'T SOMEBODY THAT IS IN A MORE ATTENUATED POSITION, BE ABLE TO RECOVER

MORE THAN SOMEBODY THAT IS IN A CONTRACTURAL RELATIONSHIP? WHY SHOULD THAT OCCUR?

BECAUSE THEY HAVE NO OTHER REMEDY. I MEAN --

WHY SHOULD THE REMEDY, IN TERMS OF WHAT AMOUNTS OF MONEY THEY SHOULD RECOVER, THEN, BE ANY GREATER THAN THE ORIGINAL CONTRACTING PARTY'S?

BECAUSE THE FUNDAMENTAL POLICY OF ALL THE LAW, IS THAT, WHERE THERE IS A LOSS, IT SHOULD BE PLACED ON THE PARTY WHOSE NEGLIGENCE CAUSED THE LOSS.

THERE IS NO WAY TO GET WHERE YOU WANT TO GO, WITHOUT RECEDING FROM CASA CLARA.

I THINK SO, BECAUSE CASA CLARA WAS A PRODUCTS CASE.

WE HAVE TO RECEDE FROM CASA CLARA AND AFM COMBINED, RIGHT?

I THINK MORANTZ HAS ALREADY RECEDED FROM AFM, SO YOU DON'T NEED A CONTRACT CASE. THESE ARE A CONTRACT POSITION. AFM INVOLVED A CONTRACT BETWEEN THE PARTIES.

IT WAS SERVICES AS OPPOSED TO PRODUCT.

RIGHT. RIGHT. I DON'T HAVE ANY CONTRACT AND I DON'T HAVE ANY PRODUCT, SO I DON'T FALL, REALLY, THIS CASE DOESN'T FALL IN EITHER OF THOSE SCENARIOS.

CASA CLARA WAS A MANUFACTURER AND YOUR DEFENDANT, YOUR CLIENT IS NOT A MANUFACTURER. AFM WAS CERTAINLY FOUND, IN TERMS OF SAYING THAT SOMEBODY WHO HAS GOT AN AD IN THE YELLOW PAGES AND IT IS MIXED UP, IS GOING TO BE LIMITED TO CONTRACTUAL DAMAGES THERE. IS NOTHING STARTLING ABOUT THAT. WE DIDN'T NEED TO BE TALKING ABOUT ECONOMIC LOSS RULE.

RIGHT. THAT THAT IS WHAT YOU SAID IN THE MORE ANTS OPINION -- IN THE MORANTZ OPINION.

WHAT ABOUT WHEN, LET'S SAY THERE IS A AIRCRAFT AND THERE IS PHYSICAL DAMAGE TO THE AIRCRAFT. THAT IS ONE.

THAT IS ONE.

WHAT ABOUT IF THE AIRCRAFT WAS ON THE WAY TO DELIVER GOODS FOR SALE, AND BECAUSE OF THE CRASH, THE GOODS COULD NOT HAVE BEEN DELIVERED? DO YOU NOW HAVE LOST PROFIT CLAIM?

THERE IS, I MEAN, THIS WAS AN AIR CHARTER SERVICE. PROFILE IS AN AIR CHARTER SERVICE, SO THIS AIRPLANE WAS OUT OF SERVICE FOR A LONG TIME. THAT IS PART OF THE CLAIM.

SO YOU WOULD HAVE THE LOSS PROFITS THAT YOU WOULD HAVE GAINED. AND --

RIGHT.

-- WHAT ABOUT IF THERE WOULD HAVE BEEN, WHAT IF THERE WAS ANOTHER TYPE OF CASE, SAME, SIMILAR FACTS, BUT THERE WERE PASSENGERS ON THE PLANE, NO INJURIES, BUT THE PASSENGERS MISSED THEIR POINTS, AND THEY COULD NOT SELL THEIR GOODS, AND THEN THEY HAD LOST PROFITS. WOULD THE PASSENGERS, THEN, BE WILL TO RECOVER?

WELL, I MEAN, I GUESS IT WOULD JUST BE A STANDARD TORT ISSUE OF HOW FAR ARE WE GOING TO CARRY THIS WITH A RISK OF HARM?

SO THE MECHANICAL DUTY, NOT ONLY TO THE CONTRACTING PARTY, THE COMPANY THAT OWNS THE AIRCRAFT, BUT, THEN, THE COMPANY THAT SELLS THE AIRCRAFT TO, AND THEN THE PASSENGERS IN THE COMPANY THAT SELLS THE AIRCRAFT TO.

WELL, I MEAN THAT, IS OBVIOUSLY ANOTHER CASE.

WELL, BUT, AREN'T THOSE ALL THING THAT IS WE NEED TO CONSIDER, WHEN WE SAY WE ARE JUST GOING TO RECEDE FROM CASA CLARA, AFM AND ALL OF THESE OTHER CASES, DON'T WE HAVE TO CONSIDER THE CONSEQUENCES OF THAT?

OBVIOUSLY, THOUGH YOU SAID IN MORANTZ THIS ISSUE OUGHT TO BE DECIDED, ONE CASE AT A TIME, BUT I GUESS THE ISSUE ABOUT SOMEBODY LIKE US THIS IS NOT SOMEBODY WHO JUST CAME ALONG. WE ARE SOMEBODY THAT, UNDER THESE FEDERAL AVIATION REGULATIONS, HAD A RIGHT TO BELIEVE ON THE LOG THAT THEY MADE.

WE HAVE GOT ALL OF THESE CASES OUT THERE. AIRPORT RENT-A-CAR, AND I AM SYMPATHETIC, AS YOU KNOW, TO THE PLAINTIFF'S POINT OF VIEW, BUT IN THIS CASE THE BUSES, AND THIS COURT APPLIED THE ECONOMIC LOSS RULE.

WHAT YOU WROTE IS THE RULE HAS GONE TOO FAR. THAT IS WHAT YOU SAID IN COMPUTECH.

I WANT TO GO BACK AND THE PALLOW CASE SORT OF EXEMPLIFIES IT, BECAUSE AS I UNDERSTAND AND I THINK THE CONCEPT OF DUTY, WHICH IS THE FUNDAMENTAL CONCEPT IN TORT LAW, THAT YOU HAVE LOOKED AT THE ZONE OF RISK, AND, AGAIN, IF THIS DEFENDANT --

WHEN YOU PUT THAT IN YOUR LOGBOOK AND THE FAR, THE REGULATION SAYS THAT GOES TO THE NEW BUYER THAT, LOGBOOK GOES TO THE BUYER.

I AM TRYING, BUT PAHLOW, THIS IS A NEGLIGENT INSPECTION. THIS ONE, IF THE ALLEGATION IS THEY PUT THE PART IN BACKWARDS, THAT IS DIFFERENT THAN NOT INSPECTING IT PROPERLY. AND IN PALLOW, SOME OF THE DAMAGES CLAIM, GOING BACK TO WHAT JUSTICE CANTERO SAID IN HIS PREVIOUS QUESTION, WAS THAT I THINK THEY CLAIMED THAT THERE WAS SUSHI AND THERE WAS LOSS OF PROFITS OF THE SUSHI, AND MAYBE THAT WASN'T PALLOW.

THERE WAS NO OTHER PROPERTY CLAIM IN PALLOW.

THERE WAS NO OTHER PROPERTY, BUT WEREN'T THEY CLAIMING LOSS OF PROFITS DAMAGES, AND ISN'T THAT WHERE WE GET INTO THE REAL PROBLEM, WHEN WE ARE DEALING ONLY WITH THE ECONOMIC SIDE? THAT IS THAT, IF YOU TAKE CONTRACT LAW AND THE RULE OF HADLEY VERSUS BECKINGDALE ABOUT WHAT IS FORESEEABLE, AND YOU HAVE THAT EXPANSIVE CONCEPT OF DAMAGES IN TORT LAW, BECAUSE THERE ISN'T A CONTRACT LIMITING IT, BUT YET FORESEEABILITY OF THE TYPE OF DAMAGES ISN'T NORMALLY WHAT WE TALK ABOUT IN TORT LAW CLAIMS, BECAUSE USUALLY WE ARE TALKING ABOUT PERSONAL INJURIES, SO HOW WOULD WE BE ABLE TO, IF WE SAID IT IS APPROPRIATE THAT THEY SHOULD BE ABLE TO SUE, BECAUSE IT IS NOT A MANUFACTURER AND IT IS NOT A BREACH OF CONTRACT ACTION, BUT THAT THE NATURE OF THE DAMAGES RECOVERED, HAVE TO BE, SOME OF THE CONTRACT PRINCIPLES WOULD SEEMINGLY HAVE TO APPLY TO LIMIT THOSE TYPES OF DAMAGES, DO YOU SEE ANY ROOM FOR A POLICY THAT PUTS THE PROGRAMMERS IN, WHEN IT COMES TO WHAT ARE THE TYPES OF DAMAGES YOU CAN RECOVER?

WELL, I GUESS I DON'T. I MEAN, I DON'T THINK THAT IS REALLY THE ISSUE ON WHICH OUR COMPLAINT WAS DISMISSED, BUT YOU KNOW --

THAT IS ANOTHER, THAT IS NOT AN ISSUE FOR US IN ANY --

I DON'T THINK THE ISSUE YOU RAISED, YOUR HONOR, IS LIMITED TO THIS CASE. I MEAN, IF I RUN MY CAR INTO YOUR TRUCK AND YOU WERE ON YOUR WAY TO DELIVER SOME GOODS, I MEAN --

I GUESS IF WE ARE GOING TO DECIDE --

I DON'T KNOW THAT IT IS PARTICULAR TO THIS CASE.

I GUESS IF WE ARE GOING TO DECIDE ON A NARROW BASIS, HAVEN'T WE ANSWERED VIRTUALLY EVERY QUESTION ALREADY, IN A PRIOR CASE? WE SAID THAT ECONOMIC LOSS RULE ANDPRISES TO PURCHASES AND WE SAID IT IN A CONTRACT SITUATION, SO IF WE ARE GOING TO BASE IT ON THE NARROW FACTS OF THIS CASE, I GUESTS THE ONLY THING IS TO DECIDE WHETHER THIS WAS PROPERTY OR NOT, YOU HAVE INSPECTED THE ENTIRE PLANE NOT JUST LANDING GEAR, SO IF WE ARE GOING TO MAKE A NARROW DETERMINATION, ISN'T THE ANSWER THAT WE HAVE ALREADY ANSWERED THESE QUESTIONS?

I THINK THE ANSWER IN MORANTZ WAS WE HAVE GONE TOO FAR WITH THIS DOCTRINE. LET'S BRING IT BACK TO ITS ROOTS, WHICH IS WHAT YOU SAID IN THE PRODUCT REAL ABILITY LAW.

WE DIDN'T RECEDE FROM CASA CLARA AND WE DIDN'T RECEDE FROM AFM. ARE WE GOING TO BE REVIEWING IT EVERY COUPLE OF YEARS AND DECIDE SHOULD, TWO YEARS FROM NOW WE SHOULD RECEDE FROM IT OR WE SHOULD STICK WITH MORANTZ AND THAT IS AS FAR AS WE NEED TO GO.

I AM SAYING WE ARE WITHIN MORANTZ. I AM NOT ASKING YOU TO GO BEYOND MORANTZ, WHICH IS TO ADHERE TO THE PRINCIPLES YOU STATED THERE. THIS HAS ITS ROOTS IN PRODUCT RELIABILITY, BECAUSE THAT WAS TOO LARGE TO BE JUST ECONOMIC LOSS. WE HAVE GOT TO PROVE ALL OF THAT. WE CANNOT JUST ALLEGE IT.

CHIEF JUSTICE: THE MARSHAL HAS INDICATED THAT YOU ARE IN YOUR REBUTTAL TIME, IF YOU WANT TO PAUSE AND SAVE YOUR REBUTTAL TIME.

I WANT TO MAKE ONE MORE COMMENT THAT, NEGLIGENCE IS AN EXCEPTION TO ALL OF THAT, AND WE FEEL THAT IS VERY STRONG IN THIS CASE, UNDER SECTION 552 AND UNDER THE FAR. IF THERE WAS A DUTY HERE --

UNDER THE HORNBECK LAW, DOESN'T IT HAVE TO BE SOMEBODY THAT YOU KNOW IS GOING TO RELY ON YOUR REPRESENTATIONS, NOT YOU REASONABLY SHOULD HAVE KNOWN OR SOMEBODY WITHIN THE ZONE OF RISK BUT SOMEBODY THAT YOU KNOW IS GOING TO RELY ON THE MISREPRESENTATION, AND THAT CAUSE OF ACTION HAS BEEN LIMITED TO A VERY FINITE SET OF CIRCUMSTANCES.

WELL, 552, SUBSECTION 3, WHERE THE INFORMATION TO BE CONVEYED WAS PART OF A PUBLIC DUTY AND CLEARLY THIS, UNDER THE FEDERAL AVIATION REGULATIONS, THIS WAS PART OF AMERICAN'S DUTY TO MAKE --

THIS WASN'T DONE. THESE REPAIRS WEREN'T MADE OR INSPECTIONS MADE INCIDENTAL TO THIS SALE, THOUGH, WERE THEY?

NO, THEY WERE NOT. THEY WERE NOT. BUT ALL THAT IS REQUIRED UNDER THE RESTATEMENT IS THAT THE REPRESENTATION BE MADE AS PART OF A TRANSACTION IN WHICH THE PERSON MAKING THE REPRESENTATION HAS A PECUNIARY INTEREST, WAS PAID MONEY, AND THAT CLEARLY IS HERE, AND THEN THE DUTY RUNS TO ANYONE IN A CLASS OF PERSONS, WHOSE BENEFIT THE DUTY HAS CREATED, AND, AGAIN, UNDER THE FAR'S, WHERE THAT LOGBOOK HAS TO STAY WITH THAT AIRPLANE AND GO TO THE SUBSEQUENT PURCHASER, THAT CLEARLY WE WERE WITHIN THE SCOPE OF THAT DUTY.

THANK YOU. GOOD AFTERNOON.

GOOD AFTERNOON. MAY IT PLEASE THE COURT. I AM JOHN MURRAY FOR AMERICAN AVIATION. MR. CHIEF JUSTICE, YOU ASKED MY OPPONENT FOR AN OUTLINE OF THE FACTS, AND I WOULD LIKE TO GIVE YOU A BRIEF OUTLINE, IF I MIGHT. AMERICAN AVIATION IS ACCOMPANY IN BROOKSVILLE, THAT, AMONG OTHER THINGS, REPAIRS AIRPLANES. IT HAS FAA CERTIFICATION TO DO SO. IN THE CASE AT BAR, THEY REPAIRED AN AIRCRAFT ON NOVEMBER 29, 1996. AND ATTACHED TO THE COMPLAINT, IS A RATHER LENGTHY LOGBOOK ENTRY THAT IS REQUIRED BY THE REGULATIONS, THAT EXPLAINS, IN A GREAT A DETAIL, THE WORK THAT AMERICAN DID ON THE AIRPLANE. THE CULMINATION OF THAT ENTRY SAYS "AIRCRAFT WAS TEST FLOWN AND IS APPROVED FOR RETURN TO SERVICE". SO JUSTICE CANTERO, IN ANSWER TO YOUR QUESTION, ABSOLUTELY THE AIRPLANE ITSELF, WAS WHAT WAS WORKED ON. THE AIRPLANE WAS WORKED ON AS AN UNIT AND WAS RETURNED TO SERVICE. NOW, THE COMPLAINT ALLEGES THAT --

AND WHO WAS THE OWNER THAT CONTRACTED FOR THAT?

I KNOW THE ANSWER TO THAT, YOUR HONOR, BUT THAT IS NOT OF RECORD.

OKAY. ALL RIGHT. BUT IT WASN'T, OBVIOUSLY --

IT WAS NOT PLAINTIFF. NOR ANY OF PLAINTIFF'S PRIVYS. IT WAS AN UNRELATED ENTITY, AND THERE --

THIS WASN'T DONE INCIDENTAL TO A SALES TRANSACTION.

NEW YORK CITY YOUR HONOR. IT WAS NOT. THERE IS ABSOLUTELY NO CONTRACTUAL.

THEN WHEN DID THE TRANSFER OF THE AIRCRAFT TAKE PLACE, OR DO WE KNOW THAT?

THAT IS NOT IN THE RECORD, EITHER, YOUR HONOR.

DO WE KNOW WHETHER IT WAS YEAR OR MONTHS?

YES, WE DO. WE KNOW THAT THE REPAIR OCCURRED IN NOVEMBER 1996. NOW, THE REPAIR THAT WAS DONE, WAS TO, WAS FOR AN INSPECTION. IT IS REQUIRED EVERY 30 MONTHS ON THE MECHANISM THAT RAISES AND LOWERS THE AIRCRAFT LANDING GEAR. ONE WEEK SHY OF 30 MONTHS, THE ACCIDENT OCCURRED, SO IT WAS NEARLY THREE YEARS, YOUR HONOR, BETWEEN THE TIME THE AIRCRAFT WAS WORKED ON AND THE TIME THAT IT INCIDENT THAT WE ARE HERE -
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WE ARE NOT TO DECIDE THE ELEVENTH CIRCUIT'S CASE FOR THEM, SO IF YOU COULD TURN YOUR ATTENTION, NOW, TO THOSE CERTIFIED QUESTIONS, AND LET ME, AND START WITH THE LAST ONE FIRST. HAVEN'T WE, AS FAR AS A NEGLIGENT MISREPRESENTATION, EXCEPTED THAT OUT OF THE ECONOMIC LOSS RULE?

WELL, PERHAPS, YOUR HONOR, BUT I THINK THAT THE ISSUE THAT YOU HAVE TO LOOK AT, IS THE DAMAGE OR LACK THEREOF THAT WAS CAUSED, CLEARLY, IF THERE WERE PERSONAL INJURY, IF THERE WERE PROPERTY DAMAGE TO OTHER PROPERTY, PERHAPS WE COULD TALK IN TERMS OF NEGLIGENT MISREPRESENTATION UNDER SECTION 552 OF THE RESTATEMENT. THAT IS ABSENT HERE.

BUT WOULDN'T THAT BE A DIFFERENT QUESTION? THAT IS IN TERMS OF WHETHER OR NOT THERE IS LIABILITY BETWEEN THESE PARTICULAR PARTIES IN A NEGLIGENT MISREPRESENTATION.

I AM SORRY, YOUR HONOR. I DON'T QUITE UNDERSTAND YOUR QUESTION.

IN OTHER WORDS AREN'T WE TALKING NOW JUST ABOUT THE SUFFICIENCY OF ALLEGATIONS HERE AS A COMPLAINT, AS TO NEGLIGENT MISREPRESENTATION, OR ARE WE TALKING ABOUT THE RELATIONSHIP BETWEEN THE PRODUCTS LIABILITY RULE AND WHETHER IT SHOULD BE APPLIED IN A NEGLIGENT REPRESENTATION SCENARIO? JUSTICE WELLS'S QUESTION WAS THAT, HAVEN'T WE ALREADY RULED IN A NEGLIGENT MISREPRESENTATION SITUATION, THAT THE PRODUCTS RULE SHOULD HAVE ALREADY BEEN APPLIED. LET'S START WITH THAT.

LET'S START WITH THAT, AND OBVIOUSLY YOU ARE TALKING ABOUT COMPUTECH, AND THOSE SITUATIONS WERE UNIQUE, BECAUSE THOSE WERE SITUATIONS WHERE THE PLAINTIFF CONTRACTED DIRECTLY WITH ACCOMPANY THAT EMPLOYED PROFESSIONAL ENGINEERS, AND THEY WERE THE ENTITIES THAT WERE GETTING THE BENEFIT OF THE PROFESSIONAL SERVICE. AND THAT IS NOT THE CASE HERE. HERE, YOU HAVE A SITUATION WHERE A MECHANIC DID WORK ON A AIRPLANE, AND SOMEONE VERY FAR DOWN THE LINE IS CLAIMING INJURY BECAUSE OF IT.

REALLY, THE SENSE OF WHAT WE HAVE WRITTEN ALONG THAT LINE, WAS ALONG THE BASIS THAT WE ARE NOT GOING TO ALLOW, WE MADE A DETERMINATION THAT WE WERE NOT GOING TO ALLOW THE MAX MITCHELL AND THE FIRST TITLE, THE ABSTRACT COMPANY CASES, THOSE CASES TO COME WITHIN THE ECONOMIC LOSS DOCTRINE. I MEAN, ISN'T THAT BASICALLY WHERE WE HAVE ENDED UP?

I THINK PERHAPS IT IS, YOUR HONOR. AND THE TWO POINTS THAT I WANT TO MAKE ABOUT THAT, IF I COULD, NUMBER ONE, THE PALLOW CASE AND THE ROCKY MOUNTAIN HELICOPTER CASE, WHICH WE CITED IN OUR BRIEF, ARE BOTH VERY INSTRUCTIVE. THOSE WERE SITUATIONS WHERE, SOMEONE OTHER THAN THE PLAINTIFF, CONTRACTED WITH THE PROFESSIONAL FOR SERVICES. AND THE ECONOMIC LOSS RULE WAS HELD TO BE APPROPRIATE THERE.

COULD YOU DISTINGUISH AND JUST WANT TO MAKE SURE THAT WE ARE ALL ON THE SAME PAGE, IF YOU HAD TO, KNOWING THE COURT'S JURISPRUDENCE, CASA CLARA, BACK AND FORTH, AND EVEN IN RESPONSE TO BOTH CERTIFIED QUESTIONS AS WELL AS ALL OF THEM, TO SAY GIVE US THREE SENTENCES AS TO WHAT THE ECONOMIC LOSS RULE IS, WHAT WOULD YOU TELL US?

THE ECONOMIC LOSS RULE.

IF YOU COULD HELP US WRITE THIS OPINION BUT WITH FAIR KNOWLEDGE OF WHAT WE HAVE ALREADY SAID OR HAVEN'T SAID.

YOUR HONOR, THERE IS A PRETTY GOOD JURISPRUDENCE ON THAT ISSUE.

IT HAS BEEN VERY CRITICIZED, CRITICAL.

IT HAS, ALTHOUGH I WOULD SAY EAST RIVER, FP&L AND CASA CLARA STAND AS ECONOMIC LOSS RULE TO THIS STATE, BUT IT IS MY UNDERSTANDING THAT ESSENTIALLY WHEN THERE IS DAMAGE THAT IS ECONOMIC TO THE PRODUCT, ITSELF, THERE CANNOT BE A CAUSE OF ACTION IN COURT BECAUSE OF THAT LESS. THE REASON --

AS I UNDERSTAND, THERE WAS A MANUFACTURER AND THEY WERE IN CONTRACTURAL PRIVITY.

NO. I DON'T THINK I AGREE WITH THAT, BECAUSE IT WAS THE CHARTERER, I BELIEVE, THAT WAS THE PLAINTIFF IN THAT CASE AND THE SHIPBUILDING COMPANY THAT BUILT THE TURBINE --

BUT AS TO LAW HANDLED THIS, IT WAS DICTA BECAUSE THERE WASN'T ANY CONTRACT?

I THINK THERE CERTAINLY WERE CONTRACTS AND I MAY BE MISTAKEN, BUT I JUST DON'T BELIEVE THERE WAS PRIVITY.

AND THE THIRD THING WAS THAT, IN EAST RIVER, WASN'T THE DAMAGE JUST TO THE TURBINES, WHICH WAS THE PROPERTY, AND WHEN THEY TALKED ABOUT THE OTHER PROPERTY, THE PROPERTY WAS WHAT WAS DAMAGED.

THAT'S CORRECT.

OKAY. SO YOU WOULD SAY, SO WHERE IS IT THAT, WHEN IT IS NOT A MANUFACTURER, SO IN OTHER WORDS THIS DEFENDANT, YOUR CLIENT, WOULD NEVER HAVE BEEN LIABLE IN STRICT LIABILITY, CORRECT?

CREDIBILITY.

SO THE POLICY, EVEN IF YOU HAD BEEN SUED IF SOMEBODY, GOD FORBID, HAD BEEN INJURED THIS THIS AIRCRAFT AND YOU HAD BEEN SUED, YOU WOULD ONLY BE SUED IN NEGLIGENCE, NOT IN STRICT LIABILITY, CORRECT?

DEPENDING ON THE FACTS BUT ESSENTIALLY YOU ARE CORRECT, YOUR HONOR.

AND YOU RECOGNIZE THAT THE LAW WOULD ALLOW, AT LEAST SUBJECT TO SOME LIMITATIONS ON DUTY, YOUR CLIENT TO BE SUED, IF THERE WAS A PERSONAL INJURY THAT HAD RESULTED FROM THIS CRASH.

YES.

YOU HAVEN'T, YOU DIDN'T TRY TO DISMISS IT, BASED ON THAT THERE WAS NO DUTY RUNNING.

NO. NO, YOUR HONOR.

SO WE ARE REALLY DEALING HERE, WITH THE FACT THAT FORTUNATELY FOR EVERYBODY, THERE WAS, QUOTE, ONLY ECONOMIC LOSSES.

ABSOLUTELY, AND IT IS, THERE IS A CASE, A CALIFORNIA CASE THAT WE CITED IN THE BRIEF, THAT EXPLAIN THAT IT IS NOT THE LUCK OF THE PLAINTIFF AND THE ACCIDENT OCCURRING, WHETHER THERE WAS INJURY OR PROPERTY DAMAGE THAT DRAWS THE DISTINCTION FOR THE ECONOMIC LOSS RULE PURPOSES. I LOOK AT IT AS IF IT WERE A DISAPPOINTED BUSINESS EXPECTATION. IF I BUY SOMETHING FROM SOMEONE AND I AM COMMERCIAL OPERATOR AS PROFILE WAS, WE HAVE A COMMERCIAL ARM'S LENGTH TRANSACTION, AND IF I AM DISAPPOINTED OR IF SOMETHING IS WRONG WITH THE PROPERTY, THAT IS A BUSINESS CONSIDERATION THAT THE COURTS HAVE SAID THE CONTRACT SHOULD TAKE CARE OF.

BUT LET'S SAY IT WAS SOMETHING, A CONSUMER PRODUCT, AND IT CAME AND I BROUGHT IT OVER TO SOMEONE ELSE'S HOUSE AND THAT PRODUCT EXPLODED AND DIDN'T INJURE ME BUT IT DAMAGED ALL OF THE PROPERTY AROUND ME IN MY HOUSE, YOU ARE SAYING THE ECONOMIC LOSS RULE WAS INTENDED TO LIMIT THE LIABILITY IN THAT SITUATION?

NO, I AM NOT, BECAUSE IN THAT SITUATION, I BELIEVE THERE WOULD BE DAMAGE TO OTHER PROPERTY. IF THE HOUSE WERE DAMAGED, ONE OF THE CASES THAT WE CITED EXPLAINS THAT DAMAGE TO OTHER PROPERTY WOULD BE THE KIND OF DAMAGE YOU WOULD EXPECT, IF A MECHANIC WORKED ON THE BRAKES OF A TRUCK, AND THE BRAKES FAILED, AND THE TRUCK RAN INTO A HOUSE AND DAMAGED THE HOUSE. THAT IS OTHER PROPERTY.

GOING BACK --

LET ME RETURN, IF I COULD, TO THESE QUESTIONS. AND THE FOURTH QUESTION WAS WHETHER PROVIDING A CERTIFIED MECHANICAL SERVICES FALLS WITHIN THE CATEGORY OF PROFESSIONAL

SERVICES EXCEPTION TO THE ECONOMIC LOSS DOCTRINE. NOW, WOULD YOU AGREE THAT WE HAVE AN EXCEPTION FOR PROFESSIONAL SERVICES?

I WOULD, YOUR HONOR.

AND WOULD YOU AGREE THAT THESE MECHANICAL SERVICES FALL WITHIN THAT EXCEPTION?

I WOULD NOT.

OKAY. WHY NOT?

I THINK THAT THE THE MORNINGSIDE CASE DID A RATHER LENGTHY ANALYSIS OF WHAT IS AND WHAT IS NOT A PROFESSIONAL. THIS COURT RELIED UPON THE STATUTE OF LIMITATION, IN ORDER TO DEFINE PROFESSIONAL. THE GARDEN VERSUS PRYOR CASE WAS VERY INSTRUCTIVE, I THINK. ESSENTIALLY A PROFESSIONAL MEANS SOMEBODY THAT IS A FOUR-YEAR-DEGREE PERSON, WHO HAS NO OTHER WAY TO PRACTICE HIS PROFESSION EXCEPT ACHIEVING A FOUR-YEAR DEGREE AND BEING LICENSED BY THE STATE. NOW, OBVIOUSLY WHAT THE PLAINTIFF HAS RAISED IS MECHANICS ARE VERY KNOWLEDGEABLE PEOPLE. THEY HAVE GOT TO PASS SKILL AND KNOWLEDGE REQUIREMENT TESTS, BEFORE THEY CAN BE LICENSED TO BE A MECHANIC.

YOU WOULD AGREE THAT DRAWING THAT KIND OF LINE, THOUGH, IS PRETTY ILLOGICAL, TO SAY THAT A MECHANIC CAN CAUSE SOMETHING TO HAPPEN, BUT SOMEBODY THAT IS AN ARCHITECT CAN WORK ON THE SAME PROJECT, THAT THE ECONOMIC LOSS RULE WOULD GIVE THEM THE BENEFIT, AND THE MECHANIC, I MEAN, IT SEEMS TO ME THAT IS PRETTY TOUGH.

WELL, YOUR HONOR, I AM NOT SURE IF IT IS OR NOT. I THINK IT IS A REASONABLE DECISION OR DISTINCTION TO MAKE, AND I THINK THE DISTINCTION HAS TO BE MADE, BECAUSE IF WE LEAVE OPEN THE ISSUE OF WHAT IS PROFESSIONAL, THEN I THINK ANYBODY THAT IS REQUIRED TO BE LICENSED BY THE STATE, A COSMETOLOGIST THE, A REAL ESTATE AGENT, ANYBODY CAN BE CONSIDERED A PROFESSIONAL, IF THEY HAVE TO HAVE REQUIREMENTS TO PASS KNOWLEDGE EXAMS.

WHY SHOULD WE NOT LOOK TO, THOUGH, THE WORK THAT THEY ARE DOING, BECAUSE YOU COULD HAVE THE MECHANICAL ENGINEER, ACTUALLY, PERFORM THE SAME MECHANICAL SERVICES, AND WHY SHOULD IT BE LIMITED SOLELY, TO THE EDUCATIONAL REQUIREMENT? I THINK IS REALLY WHERE HE IS GOING WITH THIS. THAT IS SORT OF REALLY ARTIFICIAL. IT HAS NO LOGIC, IT HAS NO MEANING, AND THERE IS NO JUST RESULT. IT JUST SEEMS TO BE AN ARTIFICIAL NOMENCLATURE.

WELL, YOUR HONOR, THE, IN THIS PARTICULAR CASE, ONE OF THE THING AS THAT WE HAVE RAISED IN OUR BRIEF, IS THE FACT THAT THE MECHANICS, THEMSELVES, NEED NOT BELIESENSED, SO SUPPOSE THIS WORK WAS DONE BY A NONLICENSED MECHANIC, WOULD IT MAKE A DIFFERENCE WHETHER HE WAS A LICENSED MECHANIC OR NOT? I DON'T THINK IT SHOULD. I THINK THAT WE NEED TO FALL BACK ON THE TRUE DEFINITION OF PROFESSIONAL, AS WAS DONE IN MORNINGSIDE, AND WAS DONE IN GARDEN.

IN CONNECTION WITH NUMBER ONE IN CONNECTION WITH QUESTION FOUR, BECAUSE QUESTION ONE ASKS WHETHER THE ECONOMIC LOSS DOCTRINE APPLIES TO THE ALLEGED TORTS, IF THE DEFENDANT PROVIDED SERVICE TO A PRODUCT RATHER THAN TO HAVE SOLD A PRODUCT. NOW, AFM DIDN'T DEAL WITH SERVICES TO A PRODUCT, CORRECT?

CORRECT.

SO SINCE SERVICES TO A PRODUCT IS OUTSIDE OF THE STRICT LIABILITY OF SOMEBODY WHO PROVIDES SERVICES TO A PRODUCT, IS NOT STRICTLY LIABLE IN TORT, WHICH WAS THE

ESSENTIAL REASON THAT THE ECONOMIC LOSS RULE WAS AT LEAST ELABORATED ON BY THE U.S. SUPREME COURT, IN EAST RIVER, WHY, AND BECAUSE THE OTHER, THE PROPERTY EXCEPTION DOESN'T MAKE SENSE, BECAUSE YOU ARE NOT SUPPLYING PROPERTY AS IF YOU ARE RENDERING SERVICES. WHY ISN'T IT A BETTER DECISION, TO SAY THAT, IN TAKING ONE AND FOUR TOGETHER THAT, WHEN THERE ARE SERVICES TO A PRODUCT, THAT, OR SERVICES RENDERED THAT RESULTS INJURE, THAT THAT IS NOT, THEN, TO BE WITHIN THE SCOPE OF THE ECONOMIC LOSS RULE, WHICH IS LIMITED TO MANUFACTURERS OR SUPPLIERS OF PRODUCTS?

WELL, YOUR HONOR, I THINK THE AMICUS MADE AN EXCELLENT POINT IN ITS BRIEF, AND I THINK THAT THE BETTER REASON RULE WOULD BE THAT, IF THE SERVICES PROVIDED TO THE PRODUCT AS OPPOSED TO ABOUT THE PRODUCT, I THINK AMICUS WORDED IT, THAT IF IT WAS WITH THE MANUFACTURER ASSEMBLY OR REASSEMBLY OF A PRODUCT, THEN THE ECONOMIC LOSS RULE SHOULD APPLY. ON THE OTHER HAND --

THOSE PEOPLE WILL NEVER BE, AND I GUESS THE PROBLEM THERE IS THAT THOSE PEOPLE OFTENTIMES, ARE NEVER IN CONTRACTUAL PRIVACY, AND AGAIN, IN ALL DUE RESPECT FOR YOUR RECOLLECTION OF THE EAST RIVER, I AM FAIRLY SURE THAT THEY WERE, BECAUSE THEY TALKED EXTENSIVELY ABOUT THE CONTRACTUAL RELATIONSHIP THAT EXISTED, AND THE FACT YOU KNOW, AGAIN, YOU HAVE IMPLIED WARRANTY OF MERCHANTABILITY, WHEN YOU ARE IN DIRECT PRIVACY. THAT IS A CAUSE OF ACTION. YOU CAN'T GET THAT IMPLIED WARRANTY OF MERCHANTABILITY. SOMEONE WHO IS APPLYING SERVICES, IT IS VERY RARE THAT THERE WILL BE A CAUSE OF ACTION AGAINST THEM, EXCEPT IF THERE IS INJURY OR DAMAGE TO SOMETHING, AGAIN, TO A PERSON, AND NOW WE GO BACK TO THAT IT SEEMS TO ME WE WOULD HAVE TO DIRECT, HAVE A DIFFERENT POLICY REASON FOR WHY WE WOULD WANT TO PROTECT THAT SITUATION, AND THAT IS WHAT I WOULD LIKE TO ASK YOU, IF YOU HAVE, AND I REALIZE IT IS NOT THE CERTIFIED QUESTION, BUT WHETHER THE ISSUE SHOULD BE FOCUSED ON WHAT DAMAGES, REALLY, ARE RECOVERABLE, UNDER A SITUATION WHERE THE, A PERSON SERVICES A PRODUCT, SHOULD THEY BE ANY GREATER THAN WHAT SHOULD HAVE EXISTED, THAN THOSE IN DIRECT CONTRACTUAL PRIVACY. SHOULD THEY BE LIMITED BY THE FORESEEABILITY CONCEPT THAT, IF YOU COULD SHOW THAT IT IS A CONTRACTING PARTY THAT DID NOT FORESEE THIS TYPE OF DAMAGE, THAT THE SUBSEQUENT PURCHASER SHOULD NOT HAVE BEEN IN ANY GREATER POSITION? I MEAN, HAVE YOU THOUGHT OF ANYTHING LIKE THAT, THAT IS REALLY A DIFFERENT TYPE OF LIMITATION BUT IT, REALLY, IS WHAT THE THIRD DISTRICT WAS CONCERNED ABOUT IN PALLOW WITH THE LOSS OF PROFITS.

YOU ARE TALKING ABOUT, AS I UNDERSTAND YOUR QUESTION, YOU ARE TALKING ABOUT A MECHANISM THAT WOULD LIMIT THE RECOVERY OF DAMAGES, AS OPPOSED TO LIMIT THE CAUSE OF ACTION.

CORRECT.

NO. I HAVEN'T THOUGHT ABOUT THAT, BUT YOU ASKED ABOUT POLICY CONSIDERATIONS, AND LET ME SAY THAT THERE IS ABSOLUTE POLICY CONSIDERATIONS HERE TO DEAL WITH ECONOMIC LOSS. I THINK THEY ARE LAID OUT IN THE SEMINOLE CASES. THE ISSUES THAT WE DEAL WITH HERE ARE THE COSTS OF AIRCRAFT REPAIR. I THINK THAT IS A HUGE INDUSTRY IN FLORIDA, AND THIS IS THE TYPE DAMAGE THAT MECHANICS, MAINTENANCE SHOPS CAN'T ENSURE AGAINST, BECAUSE THE COMPLETED OPERATIONS POLICY ALWAYS EXCLUDES DAMAGE TO THE PRODUCT, ITSELF. THIS IS EXCLUSIVELY A BUSINESS RELATIONSHIP. YOU TALKED ABOUT PRIVACY OF CONTRACT, AND WE POINTED OUT IN OUR BRIEFS THAT, EVEN THOUGH, WELL, IN THE COURT BELOW, IN THE TRIAL COURT --

HOW DO WE KNOW THAT? IN OTHER WORDS YOU JUST SAID SOMETHING ABOUT INSURANCE DOESN'T COVER IT. IS THAT IN THE RECORD, AND YOU WERE VERY HONEST EARLIER, TO SAY SOMETHING WASN'T IN THE RECORD. DO WE HAVE A SUFFICIENTLY -DEVELOPED RECORD ABOUT

WHAT INSURANCE POLICIES COVER OR DON'T COVER?

NO, NO, YOUR HONOR, AND I HAVE SAID THAT JUST AS A MATTER OF COMMON KNOWLEDGE, FRANKLY.

LET ME ASK YOU, LET'S SAY IT IS AN AUTOMOBILE MECHANIC. HE REPLACES A TIRE AND DOESN'T PUT THE HUBCAPS ON, AND THE PERSON DRIVES OFF, AND THE WHEELS FALL OFF, AND IT COMPLETELY TOTALS THE CAR AND CAUSES PERSONAL INJURY. IS IT YOUR POSITION THAT IN THE STATE OF FLORIDA, THE ONLY LIABILITY OF THE MECHANIC WOULD BE WHAT?

CONTRACTUAL.

CONTRACTUAL.

YES, YOUR HONOR. THERE WAS NO INJURY. THERE WAS NO EXTRANEIOUS PROPERTY DAMAGE, THEN THE REMEDY WOULD BE CONTRACTUAL.

THAT WAS REMEDIED BY ONLY THE ECONOMIC LOSS RULE?

THAT IS WHAT WE ARE HERE ABOUT TODAY. I DON'T KNOW IF I --

WOULD THERE HAVE BEEN A COMMON LAW REMEDY, PRIOR TO A LIMITATIONS OF ECONOMIC LOSS RULE?

I DON'T KNOW THE ANSWER. WHAT YOU ARE ASKING IS COULD THAT PLAINTIFF SUE IN COURT PRIOR TO EAST RIVER, AND I SIMPLY DON'T KNOW THE ANSWER TO THAT, YOUR HONOR. I SUSPECT HE COULD OR EAST RIVER WOULD NOT BE SUCH A PIVOTAL CASE. THE, YOUR HONOR, THE ONE THING I WANTED TO MAKE SURE THAT EVERYBODY UNDERSTOOD, AND WE RAISED IN OUR ELEVENTH CIRCUIT BRIEF, THE FACT THAT PLAINTIFF DOES HAVE CONTRACTUAL REMEDIES. NUMBER ONE, PLAINTIFF HAS THE ABILITY TO SHIFT THIS LOSS TO MANAGE THIS RISK, OF A DEFECTIVE AIRPLANE, AT THE TIME HE PURCHASES THE AIRPLANE. HE CHOSE NOT TO DO. THAT THE PLAINTIFF HAD THE OPPORTUNITY TO PURCHASE INSURANCE. THE LOSS OF USE INSURANCE, MECHANICAL BREAKDOWN INSURANCE. HE CHOSE NOT TO DO THAT.

THESE ARE ALL COLLATERAL SOURCE ISSUES, IS IT NOT? IF SOMEONE WANTS TO INSURE A PARTICULAR LOSS, THOSE ARE ALL COLLATERAL SOURCES. THEY DON'T GO TO THE UNDERSTANDING LIABILITY. FOR EXAMPLE, HAD THEY PURCHASED SOME KIND OF INSURANCE AND YOUR CLIENT WAS AT FAULT, NONETHELESS THERE MAY HAVE BEEN SOME OFFSETS, BUT THAT WOULD NOT HAVE PRECLUDED THE INJURED PARTY FROM RECOVERY, WOULD IT?

WELL, THE ECONOMIC LOSS RULE SHOULD, IF IT IS APPLIED.

I AM TALKING ABOUT YOU ARE SAYING THERE ARE OTHER WAYS TO SHIFT THE LOSS. MY POINT IS THAT THEORIES ALL COLLATERAL SOURCES, AND WOULD NOT HAVE PRECLUDED THE PLAINTIFF FROM MAKING RECOVERY, WOULD IT?

WELL, THE, WHETHER IT WOULD PRECLUDE THE PLAINTIFF FROM MAKING RECOVERY UNDER THE ECONOMIC LOSS RULE, WE THINK THAT THE ECONOMIC LOSS RULE IN ITS OWN RIGHT, SHOULD PRECLUDE THE RECOVERY.

YOU MADE THE STATEMENT, AND MAYBE I MISUNDERSTOOD YOUR STATEMENT, THAT THE POLICY REASON, COULD HAVE OBTAINED INSURANCE LOSS.

RIGHT.

MY QUESTION IS WHETHER THE INSURED DID OR DID NOT PURCHASE INSURANCE, THE INJURED PARTY, WHAT DOES THAT HAVE TO DO WITH THE LIABILITY OF A TORTFEASOR?

IN CASA CLARA, THE POINT WAS MADE THAT HOMEOWNERS ARE A VERY SYMPATHETIC CLASS, AND I WANT THE COURT TO UNDERSTAND THAT WE ARE DEALING NOT WITH A SYMPATHETIC CLASS HERE. THE PLAINTIFF IN THIS CASE AND OTHER PLAINTIFFS THAT ARE SIMILARLY SITUATED, HAVE THE ABILITY TO PROTECT THEMSELVES COLLATERALLY OR OTHERWISE, AND IF THEY HAD INSURANCE AS THEY DID IN THIS CASE, THEY HAVE SHIFTED THE RISK OF LOSS TO A PROFESSIONAL LOSS-TAKER.

DID YOU AT ALL IN THE CASE BELOW, ARGUE FOR DISMISSAL OF, THIS IS A NEGLIGENCE ACTION, A NEGLIGENCE PER SE ACTION.

CORRECT.

WARRANTY ACTION, WAS THIS A WARRANTY ACTION, ALSO?

YES, IT WAS.

NOW, DID YOU MAKE AN ARGUMENT IN THE COURT BELOW, THAT THESE CASES SHOULD BE, THESE COUNTS SHOULD BE DISMISSED ON ANY BASIS, OTHER THAN THE ECONOMIC LOSS RULE?

NO, YOUR HONOR. WE ARGUED THAT ALL THE TORT CLAIMS SHOULD BE DISMISSED, BASED UPON THE ECONOMIC LOSS RULE.

SO IS THAT AN ADMISSION THAT THESE ARE GOOD CAUSES OF ACTION BUT FOR THE ECONOMIC LOSS RULE?

I DON'T KNOW THE ANSWER. I MEAN, I GUESS IF THE ECONOMIC LOSS RULE DIDN'T BAR --

THE ECONOMIC LOSS RULE IS NOT APPLICABLE TO THIS PARTICULAR KIND OF ACTION, THESE ARE GOOD CAUSES OF ACTION.

WELL, CERTAINLY THEY WOULD BE ABLE TO SUE NEWS TORT, IF THE ECONOMIC LOSS RULE DIDN'T APPLY.

JUST ONE THING, I WANT TO CORRECT MYSELF, AND YOU WERE CORRECT THAT THERE WAS A CHARTER IN EAST RIVER. NOW, THEY TALK ABOUT, BUT THE DEFENDANT WAS THE MANUFACTURER, SO I STAND CORRECTED. I AM NOT SURE WHY THEY TALK EXTENSIVELY ABOUT WHAT THE CONTRACTUAL SITUATION, BUT IT DOES NOT LOOK LIKE THEY WERE IN A CONTRACTUAL PRIVITY, SO I STAND CORRECTED.

MY FEEBLE MEMORY. THANK YOU.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO CLOSURE ARGUMENT ON THAT HAPPY NOTE. THANK YOU VERY MUCH. COUNSEL, MR. MARSHAL. TWO AND-A-HALF MINUTES.

LET ME ASK YOU THIS, AS FOLLOW-UP TO COUNSEL'S LAST ARGUMENT, AND WHY ISN'T IT CORRECT THAT THE PURCHASER HERE, OF THIS PRODUCT, IS IN A POSITION TO PROTECT ITSELF, BY, ONE, INSPECTING THE PRODUCT PRIOR TO THE SALE, INCORPORATING IN THE PRICE PAID FOR THE PRODUCT, ANY CONCERNS THAT GIVE RISE BY THAT INSPECTION. IF THAT INSPECTION, UPON THE, AT THE TIME OF SALE, IS ERRANT, THEN PROTECT, THEN THERE WOULD BE A DIFFERENT SITUATION, WOULD THERE NOT, THAN SOMEBODY BACK IN HISTORY, HAVING DONE SOMETHING WRONG, AS FAR AS PROTECTING YOU, YOUR CLIENT, AGAINST THIS LOSS?

WELL, THERE IS NO, I MEAN THERE, IS NO DENYING THERE WAS SOME INSURANCE HERE. THAT IS WHY I HAVE TWO CLIENTS, BUT YOU KNOW, WE ALLOW SUBROGATION CLAIMS.

I AM NOT TALKING ABOUT THE INSURANCE. MY UNDERSTANDING OF THE ECONOMIC LOSS RULE IS BASED UPON THE BENEFIT OF THE BARGAINING.

THEY MADE AN ALLEGATION IN THEIR BRIEFS THAT WE SHOULD HAVE DONE SOMETHING, WE SHOULD HAVE DONE OUR OWN INSPECTION AND CAUGHT THIS, BUT THIS IS A 30-MONTH INSPECTION, WHEREBY ALL OF THIS LANDING GEAR IS TAKEN APART, AND AS COUNSEL STATED, IT DIDN'T QUITE MAKE IT. IT DIDN'T QUITE LAST 30 MONTHS AND WE DEPENDED THAT IT WOULD.

BUT HE CAN RELY ON IT.

THAT IS AN INTERVENING CAUSE, AND ANOTHER ISSUE FOR ANOTHER DAY.

I HAVE A PROBLEM, IF WE FIND THAT THIS IS COVERED BY THE ECONOMIC LOSS RULE, ABOUT THE MISREPRESENTATION AND HOW IT IS FOUNDED ON THE FACT THAT THERE WAS NEGLIGENCE IN THE WAY THE LANDING GEAR WAS PUT IN, SO ISN'T THIS REALLY, IN THIS CASE, SOMETHING WHERE YOU ARE TRYING, ASSUMING IT APPLIES, THAT YOU ARE REALLY JUST GETTING AROUND THE ECONOMIC LOSS RULE BY SAYING BECAUSE IT IS IN A LOG, THAT IT IS, RISES TO THE LEVEL OF A NEGLIGENT MISREPRESENTATION, WHEN THE ESSENCE OF YOUR CAUSE OF ACTION IS THAT THERE WAS NEGLIGENCE IN THE WAY THE LANDING GEAR WAS PUT BACK IN.

I THINK IT IS, I MEAN THE NEGLIGENT MISREPRESENTATION IS THAT WE HAVE DONE A 30-MONTH INSPECTION ON THIS. IT IS FINE. YOU DON'T HAVE TO DO ANYMORE MAINTENANCE AND TAKE IT APART AGAIN FOR 30 MONTHS. AS COUNSEL SAID, IT ALMOST MADE, IT BUT OUR ALLEGATION IS WE RELIED ON THAT, IN DETERMINING HOW, WHAT MAINTENANCE WE WOULD DO ON THE AIRCRAFT, AND WE DID NOT DO A 30-MONTH INSPECTION, WHEN 30 --

BUT REPRESENTATION, I AM SORRY WE DON'T HAVE THAT DOCUMENT, I DON'T THINK, BUT THE REPRESENTATION --

WE DIDN'T PUT IT IN OUR BRIEFS. I AM SORRY. ANOTHER REPRESENTATION THAT THAT SERVICE WAS DONE NOT A REPRESENTATION THAT IT WAS DONE IN A PROPER MANNER? OR IS THAT INFERRED?

THAT IS ANOTHER ALLEGATION, IT WAS DONE IN NEGLIGENTLY AND PUT IN BACKWARDS. THAT IS PART OF OUR CASE, BUT --

RIGHT.

-- WHAT I AM SAYING ON THE PART OF OUR CASE IS WE DID IT. YOU HAVE GOT 30 MONTHS, AND WE DON'T HAVE TO WORRY ABOUT THIS, AND WE RELIED ON IT.

CHIEF JUSTICE: OKAY. AS WITH YOUR OPPONENT, WE HAVE CONSUMED ALL OF YOUR TIME WITH OUR QUESTIONS. WE THANK BOTH OF YOU FOR ANSWERING ALL OF OUR QUESTIONS. THE COURT WILL NOW STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.