Bay Anesthesia, Inc. v. Darlene Aldrich

MARSHAL: 345R PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: APPRECIATE YOUR BEING READY. WITHOUT ANY FURTHER ADO, WE CALL BAY ANESTHESIA VERSUS DARLENE ALDRICH.

MAY IT PLEASE COUNSEL AND YOUR HONORS. I ASSUME THAT THE COURT IS FAMILIAR WITH THE BASIC FACTS OF THE CASE AND WILL NOT DWELL UPON THOSE INITIALLY. THE FIRST OF THE THREE ISSUES THAT I WOULD ASK THE COURT TO ADDRESS IS FLORIDA STATUTE 768.13 AND ITS APPLICATION TO THIS PARTICULAR SET OF FACTS.

BEFORE YOU START WITH THAT ARGUMENT, WAS THERE ANY KIND OF MOTION FOR A DIRECTED VERDICT OR ANYTHING LIKE THAT, MADE BY YOUR CLIENT, AT THE CLOSE OF THE EVIDENCE?

NO, YOUR HONOR, THERE WAS NOT.

OKAY.

WITH RESPECT TO THE STATUTE, YOUR HONOR, MEMBERS OF THE COURT, THERE ARE THREE BASIC QUALIFICATIONS FOR THE STATUTE'S APPLICATION. WE SUBMIT THAT TERESA CRUSE, WHO WAS THE NURSE ANESTHETIST IN THIS EMERGENCY ROOM, QUALIFIES UNDER TWO OF THESE THREE QUALIFICATIONS FORM WE SUBMIT THAT SHE WAS -- QUALIFICATIONS. WE SUBMIT THAT SHE WAS, FOR THIS PARTICULAR CIRCUMSTANCE, AMEND EMPLOY OF THE HOSPITAL. WE ADMIT THAT SHE WAS A PERSON LICENSED TO PRACTICE MEDICINE.

GETTING, FIRST THINGS FIRST AS TO WHETHER SHE WAS A.M. EMPLOYEE OF THE HOSPITAL.

YES.

-- AS TO WHETHER SHE WAS AN EMPLOYEE OF THE HOSPITAL.

YES.

SHE WASN'T AN EMPLOYEE OF THE HOSPITAL AS WE NORMALLY DEFINE THE TERM EMPLOYEE, WAS SHE?

IT DEPENDS ON THE DEFINITION, AND DIFFERENT DEFINITIONS.

WAS SHE EMPLOYED BY THE HOSPITAL AS AMEND EMPLOY?

UNDER THE CONTRACT, SHE WAS NOT EMPLOYED IN THE SENSE THAT THE HOSPITAL WAS PAYING HER.

SHE WAS EMPLOYED BY BAY ANESTHESYEAH.

SHE WAS, IN THAT SENSE OF WHO WAS PAYING HER, SHE WAS EMEMPLOYED BY BAY ANESTHESIA, CORRECT.

AND THE SOCIAL SECURITY WAS WITHHELD BY BAY ANESTHESIA?

THEY WERE.

AND THE W-ON 2 CAME FROM -- AND THE W-2 CAME FROM BAY ANESTHESIA?

I AM NOT SURE. THEIR AGREEMENT WAS ASAP INDEPENDENT CONTRACTOR, AS WELL, I BELIEVE.

HOW WAS THIS INITIALLY PRESENTED TO THIS COURTA?

AT THE DEFENSE AND IT WAS PRESENTED AT THE CLOSE OF THE PLAINTIFF'S CASE, BY ASKING FOR A DIRECTED VERDICT ON THE RECKLESS DISREGARD STANDARD. THE COURT HELD THAT THE RECKLESS DISREGARD STANDARD WAS NOT APPLICABLE, AND THEN, AT THE CLOSE OF THE ENTIRE CASE, THAT MOTION WAS RENEWED. ON THE RECKLESS DISREGARD STANDARD ALONE, NOT ON THE ENTIRETY OF THE EVIDENCE OR THE GREATER FORCE AND EFFECT.

BUT THE AFFIRMATIVE DEFENSE SET OUT THAT SHE WAS AN EMPLOYEE OF THE HOSPITAL?

YES.

DID YOU HAVE AN AFFIRMATIVE DEFENSE THAT SHE WAS A PERSON LICENSED TO PRACTICE MEDICINE?

NO.

WHEN WAS THAT ISSUE RAISEED?

FOR THE FIRST TIME, WHEN, IN MOTION FOR REHEARING BELOW, WHEN THE COURT --

IN THE DISTRICT COURT?

IN THE DISTRICT COURT, WHEN THE COURT MODIFIED THE LANGUAGE OF THE STATUTE AND SAID PHYSICIAN, LICENSED TO PRACTICE MEDICINE IN THE STATE OF FLORIDA, INSTEAD OF PERSON LICENSED TO PRACTICE MEDICINE IN THE STATE OF FLORIDA.

SO HOW DID YOU PRESERVE THAT ISSUE IN THE TRIAL COURT, TO BE ABLE TO RAISE THAT ON APPEAL?

WE RAISED THE APPLICATION OF THE STATUTE.

YOU DIDN'T RAISE IT IN THE TRIAL COURT. YOU DIDN'T RAISE IT IN YOUR BRIEFS, I GUESS, IN THE DISTRICT COURT, YOU DIDN'T RAISE IT AT ORAL ARGUMENT?

WE DID NOT. WE DID NOT.

WHAT IS AMBIGUOUS ABOUT THE TERM EMPLOYEE?

IT HAS DIFFERENT MEANINGS AND DIFFERENT CONTEXTS. THIS COURT HAS HELD, IN DETERMINING WHETHER PAPER BOYS, THE KEITH CASE, WHETHER PAPER BOYS WERE EMPLOYEES UNDER THE CIRCUMSTANCES OF THAT CASE, JUDGE ANSTEAD, IN ANALYZING THAT, SAID THAT THE CONTEXT OF THE CASE, AND THE PUBLIC POLICIES OF THE STATUTE, TO BE APPLIED IN THE CONTEXT OF THE CASE, ARE USEFUL AND IMPORTANT IN DETERMINING WHETHER OR NOT SOMEONE IS OR IS NOT AN EMPLOYEE.

HAS THE LEGISLATURE RECENTLY CHANGED THE STATUTE?

IT HAS, YOUR HONOR.

ISN'T THAT JUST A FURTHER INDICATION, THOUGH, THAT AS TO THE MEANING OF THE STATUTE AT THE TIME THAT IS%NENT HERE, THAT YOUR CLIENT -- THAT IS PERTINENT HERE, THAT YOUR CLIENT, BY THIS EXPLICIT AGREEMENT BETWEEN BAY ANESTHESIA AND THE HOSPITAL, WAS NOT AN EMPLOYEE?

NO, YOUR HONOR. I DON'T AGREE WITH THAT.

I REALIZE. BUT HELP ME WITH THE -- ARE BOTH ENACTMENT OF THE LEGISLATION AND YOU KNOW, THE ACTUAL FACTS THAT IT IS LIKE YOU TOLD ME THAT YOU MADE A MOTION FOR A DIRECTED VERDICT ON THE EMPLOYEE STATUS. HOW COULD A TRIAL COURT JUDGE, IN THE FACE OF AN EXPLICIT AGREEMENT THAT SAYS, IN ESSENCE, THIS, YOU WILL NOT BE CONSIDERED AN EMPLOYEE, AND THAT YOU ARE AN INDEPENDENT CONTRACTOR, EVER GRANT A DIRECTED VERDICT ON AN ISSUE LIKE THAT?

BECAUSE THE CRITICAL AND THE MOST COMMON ELEMENT TO ESTABLISH AN EMPLOYEE/EMPLOYER RELATIONSHIP IS CONTROL OR THE RIGHT OF CONTROL, AND IN THIS CASE, YOUR HONOR, THE CONTROL WAS ABSOLUTE.

NOW, JUDGE MINOR SEEMS TO HAVE ACCEPTED YOUR ARGUMENT IN HIS DISSENT IN THIS CASE, IS THAT CORRECT?

YES, YOUR HONOR.

AND JUDGE MINOR SEEMS TO BASE THIS ON THE FACT THAT, AT LEAST IN THE PART, THAT YOUR CLIENT WAS SUMMONED TO THE OPERATING ROOM, THAT SHE WAS IN SOME OTHER PART OF THE HOSPITAL, BUT IS THAT REALLY SIGNIFICANT? DID DOES IT MATTER THAT THOSE -- DOES IT MATTER THAT THOSE KINDS, THAT SHE MAY HAVE WORKED IN OTHER PARTS OF THE HOSPITAL, IN ADDITION TO THE EMERGENCY ROOM? I AM NOT SURE. I AM TRYING TO FOLLOW THE ARGUMENT ABOUT WHY, IN THIS INSTANCE, SHE WAS AN EMPLOYEE OF THE HOSPITAL.

THE IMPORTANCE, ALTHOUGH IT IS OF SOME IMPORTANCE, IS THAT HER JOB TYPICALLY REQUIRED HER TO PROVIDE ANESTHESIA SERVICES IN THE HOSPITAL'S OPERATING ROOM. THIS WAS AN UNUSUAL SITUATION FOR HER TO BE TAKEN FROM HER NORMAL DUTIES, WHICH WERE TO PROVIDE ANESTHESIA SERVICES IN THE OPERATING ROOM, AND BROUGHT INTO THE EMERGENCY ROOM FOR THE SPECIFIC PURPOSE OF HELPING TO TRY TO STABILIZE THIS YOUNG MAN.

BUT ISN'T THE PURPOSE IN 1988, WHEN THE STATUTE WAS PASSED, WAS THERE WAS A CRISIS IN EMERGENCY ROOM CARE, AND SO THE STATUTE WAS PASSED, TO GIVE A, SORT OF A QUASI-IMMUNITY TO EMERGENCY ROOMS WHO PRESUMABLY WERE HAVING PROBLEMS OBTAINING INSURANCE COVERAGE, YOU KNOW, AND WITH THE PROVISO THAT THEY WOULD MAKE SURE THAT THEY WOULD TREAT PEOPLE THAT CAME TO THERE, SO ONCE THE HOSPITAL SET THIS UP SO THAT THIS BAY ANESTHESIA IS AN INDEPENDENT CONTRACTOR WITH SEPARATE, YOU KNOW, PRESUMABLY SEPARATE INSURANCE. THERE IS NO INDEMNIFICATION, THE ALTERING, THE COMMON LAW TO SAY THAT SOMEBODY CAN BE HELD TO A STANDARD OTHER THAN JUST NEGLIGENCE, IT JUST DOESN'T SEEM TO FIT WITHIN WHY THE STATUTE WAS PASSED. WHAT I SEE AS THE PLAIN LANGUAGE "EMPLOYEE" THAT, DIDN'T REALLY NEED DEFINITION. COULD YOU ADDRESS THAT, THAT IT WOULD NOT FULFILL THE PURPOSE OF THE STATUTE AT THAT TIME AND AS IT EXISTED UP UNTIL THE LEGISLATURE CHANGED IT, YOU KNOW, IN THE LAST COUPLE OF YEARS.

I WILL BEGIN WITH EXHIBIT B. IT SAYS EMERGENCY PROVIDERS ARE OFTEN FACED WITH CIVIL LAWSUITS BROUGHT ON BEHALF EMERGENCY CARE PATIENTS, MANY OF WHICH MAY NOT BE THE

DIRECT RESULT OF SUBSTT STANDARD CARIBOU RATHER -- -- OF SUBSTANDARD CARIBOU -- OF SUBSTANDARD CARE, BUT RATHER THE INDIVIDUAL EMERGENCY OF THE SITUATION. AND I NOW MOVE TO PARAGRAPH TWO, WHICH SAYS IT IS THE INTENT OF THE LEGISLATURE TO PROVIDE AVAILABILITY OF EMERGENCY CARE, BY PROVIDING IMMUNITY FROM CIVIL LIABILITY, TO HOSPITALS AND TRAUMA CENTERS, AND THE MEDICAL EMERGENCY CARE PROVIDERS RENDERING CARE THERE IN, TO MEDICAL EMERGENCY PATIENTS, UNLESS SUCH CARE IS RENDERED WITH DISREGARD TO THE HEALTH OR LIFE OF THE PERSON. THE SECOND QUESTION, AS I UNDERSTOOD IT, DEALS WITH THE IMPORT OF THE CONTRACT. THE CONTRACT IS IMPORTANT, BUT IT WILL NOT, PL METH BE -- IT WILL NOT BE ENFORCED, IF THE PRACTICE OF THE PARTIES SHOWS THAT THE LANGUAGE OF THE CONTRACT IS, IN FACT, A FACADE.

WHY DON'T THEY JUST USE, THEN, THEY SHOULD HAVE JUST USED THE LANGUAGE "OR ANY MEDICAL CARE PROVIDER, PROVIDING SERVICES IN AN EMERGENCY ROOM." WHY WOULD YOU USE EMPLOYEE? WHY WOULD IT HAVE TO BE AN EMPLOYEE OF THE HOSPITAL?

BECAUSE STIPULATIONS, AS THIS COURT HAS RECOGNIZED IN CASES, LEGISLATORS DON'T ALWAYS ACT WITH ABSOLUTE PRECISION, AND I WOULD SUGGEST, AS JUSTICE ANSTEAD BROUGHT UP, THAT THE AMENDMENT OF THE STATUTE, IN FACT, IS A RESPONSE TO THIS CASE, AND THAT IT IS THE LEGISLATURE'S WAY OF SAYING THIS IS WHAT WE MEANT.

IS THAT WHAT IS IN THE LEGISLATIVE HISTORY?

OF THE AMENDMENT, THE RECENT AMENDMENT? NO, YOUR HONOR. I DON'T BELIEVE THAT THIS CASE WAS MENTIONED IN THE LEGISLATIVE HISTORY.

WHAT IS MENTIONED IN THE LEGISLATIVE HISTORY?

I AM SORRY, YOUR HONOR. I DON'T HAVE THAT HISTORY FROM FRONT OF ME -- IN FRONT OF ME AND I DON'T SPECIFICALLY RECALL. I CAN'T ANSWER IT WITHOUT --

YOU ARE SPECULATING, THEN, TO SAY IT WAS IN RESPONSE TO THIS CASE.

YES, YOUR HONOR.

SPEAKING OF THAT, I AM CONCERNED, I KNOW THAT THE FIRST DISTRICT CERTIFIED THIS AS BEING A QUESTION OF GREAT PUBLIC IMPORTANCE, BUT SEEING THAT THE STATUTE HAS NOW CHANGED, AND IT WOULD COVER THE SITUATION, SEEING THAT THE STATUTE EXISTED FROM 1988 UNTIL THIS CASE, WITHOUT ANYBODY HAVING PROBLEMS WITH INTERPRETING IT, WHAT, IN THE WORDS OF, THEN, FORMER ATTORNEY RAUL CANTERO, WHAT IS SO IMPORTANT ABOUT THIS CASE?

WELL, YOUR HONOR, THERE ARE CONSTITUTIONAL ISSUES THAT DO MAKE THE CASE IMPORTANT. THAT IS THE, WHETHER OR NOT THE EQUAL PROTECTION CLAUSE IS VIOLATED BY THIS APPLICATION OF THIS STATUTE IN THIS CONTEXT.

YOU JUST SAID, THIS IS NOT, THERE IS NO PROTECTED RIGHTS, IF ANYTHING, THE PROTECTED RIGHT IS THE PLAINTIFF'S RIGHT TO ACCESS TO THE COURT AND THE DIMINISHED STANDARD THAT YOU ARE SEEKING, YOU KNOW, OR THE HEIGHTENED STANDARD, BUT AS FAR AS THE, SO IT IS ONLY A QUESTION OF WHETHER THERE IS A REASONABLE PACES FOR DISTINGUISHING BETWEEN EMPLOYEES -- BASIS FOR DISTINGUISHING BETWEEN EMPLOYEES OF HOSPITALS AND OTHER INDIVIDUALS THAT MAY BE RENDERING CARE IN THE SETTING OF THE EMERGENCY ROOM, CORRECT? I MEAN, THAT IS ALL WE HAVE TO LOOK AT. IF THERE IS A REASON FOR THAT.

YES, YOUR HONOR.

AND THE REASON WHICH IS AS I SUGGESTED, WHICH IS THAT THERE IS MORE AFTER CRISIS IN TERMS OF THE HOSPITAL AND THEIR NGE EMERGENCY ROOM, THAN -- IN THEIR EMERGENCY ROOM, THAN THERE WAS NO OTHER PROVIDERS WHO MAY BE PROVIDING CONTRACT SERVICES TO THE EMERGENCY ROOM.

THAT APPEARS TO BE THE IMPORT OF THE PREAMBLE TO THE STATUTE. THE QUESTION OF EMPLOYMENT, I THINK, WE HAVE REASONABLY COVERED, AND THAT IS IT IS THE ACTUAL APPLICATION OF THE PARTIES, THE WAY IN WHICH THE PARTIES CONDUCT THEIR BUSINESS WITH ONE ANOTHER, AS OPPOSED TO THE LANGUAGE OF THE CONTRACT THAT ULTIMATELY WILL CONTROL, AND OF THE VARIOUS ELEMENTS OF THE PARTY'S CONDUCT, IT IS MOST CRITICAL THAT IT IS EITHER CONTROL OR THE RIGHT OF CONTROL. EVEN IF ACTUAL CONTROL ISN'T DPERD, IF THE RIGHT OF CONTROL IS WILL -- ISN'T EXERCISED, IF THE RIGHT OF CONTROL IS THERE, THAT WILL BE ENOUGH, BUT HERE WE HAVE, AND AS JUDGE MINER SAID IN HIS DISSENTING OPINION, CONTROL WAS ABSOLUTE.

BUT THAT MIGHT MAKE THEM AN AGENT FOR THE HOSPITAL FOR CERTAIN PURPOSES AT WHICH TIME DOESN'T MAKE THEM AN EMPLOYEE OF HOSPITAL, DOES IT?

YES, YOUR HONOR, FOR PURPOSES OF THIS STATUTE, IT DOES.

WHAT WAS THE CONTRACTOR THE STATUTE OR THE COURSE OF DEALING, THAT ALLOWED DR. GRIFFIN TO DIRECT WHAT THE NURSE WOULD BE DOING AND TO OVERRULE THE NURSE'S PREFERENCE FOR THE TYPE OF PROCEDURE SHE WANTED TO CONDUCT?

THE FIRST THING WE NEED TO LOOK AT IS THE FACT THAT THE CRNA PROTOCOL, WHICH IS INCORPORATED THROUGH THE MEDICAL STAFF BY LAWS INTO THE CONTRACT, THAT IS THE CONTRACT BETWEEN THE PARTIES INCORPORATES THE MEDICAL STAFF BY LAWS. THE MEDICAL STAFF BY LAWS INCORPORATES THE PROTOCALL FOR THE CRNA. IT IS PART OF THE APPENDIX, YOUR HONOR. THAT PROTOCOL SAYS THAT THE CRNA WILL PERFORM HER DUTIES WITH THE SUPERVISION OR WITH THE CONSENT OF THE SUPERVISING PHYSICIAN. IN THIS CONTEXT, THIS EMERGENCY ROOM PHYSICIAN WAS THE SUPERVISING PHYSICIAN. WITH RESPECT TO THE PHRASE "PERSON LICENSED TO PRACTICE MEDICINE", WHILE IT IS COMMON TO USE THAT PHRASE TO REFER TO PHYSICIANS, I SUBMIT THAT THAT PHRASE, IN AND OF ITSELF, HAS NO, IT IS, NO LEGALLY-DEFINED MEANING, AND --

DOESN'T CHAPTER 457 OR AND OTHER STATUTES, SPECIFICALLY DEFINE PHYSICIAN AS A PERSON LICENSED TO PRACTICE MEDICINE?

AND A PHYSICIAN IS A PERSON LICENSED TO PRACTICE MEDICINE. I DON'T DISPUTE THAT, YOUR HONOR.

AND THEY DEFINE NURSE AS A PERSON LICENSED TO PRACTICE NURSING ACTIVITIES OR SOMETHING LIKE THAT?

THAT IS THE NURSING LICENSING STATUTE DOES USE THAT LANGUAGE. BUT THE PROVISION OF ANESTHESIA IS THE PROVISION OF MEDICINE. I DON'T THINK THERE CAN BE ANY DISPUTE ABOUT THAT. THIS CRNA IS LICENSED, AND SHE IS A PERSON, SO IF ONE SIMPLY TAKES THE LANGUAGE OF THE STATUTE, A PERSON LICENSED TO PRACTICE MEDICINE, THAT LANGUAGE APPLIES TO THIS LADY, PARTICULARLY WHEN ONE LOOSE AT THE PURPOSES OF THE STATUTE. AGAIN, IF THE STATUTE, THE STATUTE DOES NOT DEFINE A PERSON LICENSED TO PRACTICE MEDICINE. THE LEGISLATURE COULD HAVE DEFINED IT AND DID NOT DEFINE T.

THE FACT THAT THE LEGISLATURE LATER AMENDED THE STATUTE TO INCLUDE ALL HEALTHCARE PROVIDERS, DOESN'T THAT INDICATE THAT THE LEGISLATURE INTENDED OR AT LEAST DID INCLUDE SOMETHING LESS THAN ALL HEALTHCARE PROVIDERS, BEFORE IT AMENDED THE

STATUTE?

NO, YOUR HONOR. I THINK JUST OPPOSITE. IN MY READING, THE LEGISLATURE WAS SAYING WE INTENDED ALL HEALTHCARE PROVIDERS TO COME WITHIN THAT TERM, AND THAT HAS NOW BEEN QUESTIONED. THAT HAS NOW BEEN BROUGHT INTO QUESTION, SO WE ARE GOING TO AMEND THE STATUTE TO CLARIFY THAT.

AT THE TIME THAT THE STATUTE WAS ORIGINALLY PROMULGATED, I ASSUMED THERE WAS EVIDENCE BEFORE THE LEGISLATURE ABOUT HOSPITALS AND DOCTORS AND HOSPITAL EMPLOYEES BEING SUED, WAS THERE THAT KIND OF INFORMATION PRESENTED TO THE LEGISLATURE THAT WOULD HAVE INCLUDED OTHER PEOPLE, SUCH AS BAY ANESTHESIA OR THE NURSE HERE?

YES, YOUR HONOR. I MEAN, THERE WAS A COMMITTEE. I WISH I COULD RECALL THE NAME OF IT. THAT WAS CREATED FOR THE PURPOSE OF STUDYING THE ISSUE AND REPORTING TO THE LEGISLATURE, AND THAT COMMITTEE USED THE TERM "HEALTHCARE PROVIDERS", WHEN IT, THERE WERE AREAS WHERE PHYSICIANS WOULD BE REFERRED TO SPECIFICALLY, BUT IT WAS NOT UNCOMMON TO REFER TO HEALTHCARE PROVIDERS IN THE EMERGENCY ROOM. SO THE TERMS WERE BOTH USED.

SO IF THE TERM "HEALTHCARE PROVIDERS", YOU AGREE, IS A NONAMBIGUOUS, BROADER TERM THAN EMPLOYEE, DOESN'T --

IT IS.

-- THAT INDICATE THAT, AT THE TIME THAT THE LEGISLATURE, IN CHOOSING THE WORD EMPLOYEE, WHICH DESPITE WHAT YOU SAY HAS A PRETTY WELL RECOGNIZED FERM DEFINITION, -- TERM DEFINITION, INTENDED TO LIMIT THIS STATUTE THAT CHANGES THE COMMON LAW TO SPECIFIED INDIVIDUALS AND NOT TO ANYONE WHO HAPPEN TO BE IN THE EMERGENCY ROOM PROVIDING EMERGENCY ROOM CARE?

I DON'T BELIEVE THAT TO BE TRUE, YOUR HONOR.

I GUESS YOU CAN'T, BECAUSE --

I DO NOT BELIEVE THAT TO BE TRUE. I BELIEVE THAT, IF ONE TAKES --

I GUESS YOUR ARGUMENT IS MORE THAT THE HEALTHCARE PRACTITIONER EQUALS A PERSON LICENSED TO PRACTICE MEDICINE, NOT THAT IT EQUALS EMPLOYEE.

TAKEN TOGETHER, IT COVERS, I THINK THOSE TWO QUALIFICATIONS, TAKEN TOGETHER, COVER THE WATERFRONT, AND I THINK THAT WAS THE LEGISLATIVE INTENT. I THINK THAT, WHEN THEY PUT THOSE TWO QUALIFICATIONS BACK-TO-BACK, THEY THOUGHT THEY HAD COVERED THE WATER FRONT.

WELL, THEN, WHO WOULD BE EXCLUDEED?

BEG PARDON?

WHO, IF IT WAS THEIR INTENT, THEN, TO COVER THE WATERFRONT, SO THEN ANYBODY, AGAIN, THEIR INTENT WAS INSTEAD OF USING TERMS "EMPLOYEE" AND "SOMEONE LICENSED TO PRACTICE MEDICINE", THEIR ACTUAL INTENT WAS, YOU SAY, TO COVER ANYBODY THAT WAS IN THE EMERGENCY ROOM.

AS THEY SAID, YOUR HONOR, TO PROMOTE THE AVAILABILITY OF MEDICAL CARE.

THAT IS YOUR ARGUMENT, THAT ANYBODY IN THE EMERGENCY ROOM WOULD BE SUBJECT TO WILLFUL DISREGARD STANDARD, IF THEY MET THE OTHER CRITERIA.

ANYBODY BEING EMERGENCY CARE PROVIDERS. IF THEY COME WITHIN EMERGENCY CARE PROVIDERS, THEN THE ANSWER TO YOUR QUESTION, YOUR HONOR, WOULD BE YES.

CHIEF JUSTICE: WE ARE INTO YOUR REBUTTAL TIME.

I AM SORRY.

CHIEF JUSTICE: I KNOW YOU WANT TO SAVE A COUPLE OF MINUTES AT LEAST.

YES, AND I DIDN'T WANT TO ABANDON THE OTHER POINTS. THEY ARE IMPORTANT.

CHIEF JUSTICE: WE REALIZE THE BRIEFING IS EXTENSIVE. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS LEWIS ROSEN BLAUM AND ALONG WITH DON -- ROSENBLOUM, AND ALONG WITH DON HINKLE, WE REPRESENT THE RESPONDENTS. I WANT TO MAKE A POINT THAT I THINK OUR POSITION WAS ADEQUATELY STATED BY JUSTICE PARIENTE, THAT NOT ONLY IS THIS A PLAIN AND UNAMBIGUOUS, NONCONTROVERSIAL STATUTE, IT HAS NOW BEEN AMENDED BY THE LEGISLATURE, SO IF THERE IS A PROBLEM IN THE INTERPRETATION, AND WE CERTAINLY DON'T AGREE WITH THAT, THAT PROBLEM HAS BEEN CORRECTED BY THE LEGISLATURE.

ASSUMING, FOR THE SAKE OF YOUR REMAINING TIME, THAT WE DON'T DISCHARGE JURISDICTION, WHAT BOTHERS ME ABOUT THIS CASE IS THAT THIS NURSES ESSENTIALLY HAD TO ACT UNDER THE DIRECTION OF THE PHYSICIAN. THE NURSE WANTED TO IMPOSE SOME KIND OF PROCEDURE WHICH SHE FELT MORE COMFORTABLE WITH, MAYBE SHE FELT THAT THAT WAS MORE APPROPRIATE. THE PHYSICIAN OVERRULED HER AND SAID, NO, I WANT YOU TO USE THIS, ANOTHER PROCEDURE, AND IT WAS THAT PROCEDURE THAT ULTIMATELY ARGUABLY LED TO THE PATIENT'S DEATH, AND SO WHY SHOULDN'T WE CONSIDER HER AN EMPLOYEE, UNDER THE CIRCUMSTANCES THAT OCCURRED HERE IN?

SEVERAL REASONS. FIRST OF ALL, WHAT, THE QUESTION YOU ARE ANSWERING CONTEMPLATES SOME KIND OF BORROWED SURFANT OR BORROWED EMPLOYEE THEORY. THAT WAS THAT WAS NEVER PRESERVED IN THE TRIAL COURT. THE MOTION THAT BAY ANESTHESIA MADE FOR DIRECTED VERDICT, WAS BASED SOLELY ON EQUAL PROTECTION GROUNDS. THE ARGUMENT WAS THAT, UNLESS THE COURT INCLUDED MS. CRUSE AS AN EMPLOYEE, IT WOULD VIOLATE EQUAL PROTECTION. THERE WAS NEVER AN ARGUMENT MADE THAT MS. CRUSE WAS A BORROWED SERVANT. FURTHER MORE, TO THE EXTENT THAT WAS A FACTUAL ISSUE WHICH MAY HAVE BEEN THE CASE, THERE WAS NEVER ANY REQUEST BY JURY INSTRUCTION OR OTHERWISE, TO SUBMIT THAT ISSUE TO THE JURY.

SO THEY DID NOT, DID THEY ARGUE THAT SHE WAS AN EMPLOYEE?

THE ARGUMENT ON DIRECTED VERDICT, WHICH BEGINS AT PAGE 1844, STATES AS FOLLOWS, YOUR HONOR, THIS IS A REALLY VERY ELEGANT EQUAL PROTECTION ARGUMENT, IN ITS SIMPLICITY. IT GOES ON TO ARGUE THAT, IF SHE IS NOT AN EMPLOYEE, THEN IT VIOLATES EQUAL PROTECTION.

SO THEY DID ARGUE THE EMPLOYEE, BUT YOU ARE SAYING THAT IT WOULD BE MORE SPECIFICALLY BE THAT, REALLY, IT IS NOT AN EMPLOYEE SITUATION. IT IS AN AGENCY, IT IS UNDER A BORROWED SURGEON, THEY BECOME THE AGENT OF THE HOSPITAL FOR CERTAIN PURPOSES.

THEY SIMPLY ARGUED THAT THERE WAS NO RATIONAL BASIS TO EXCLUDE HER. THEY NEVER

ARGUED SHE IS A BORROWED EMPLOYEE OR AN AGENT, BECAUSE DR. GRIFFIN HAD THE RIGHT TO CONTROL HER WORK.

AND YOUR ARGUMENT WOULD BE THAT, IF THAT HAD BEEN, IF THE JUDGE HAD CONSIDERED THAT, IN THIS CASE, THAT THE BEST WOULD HAVE BEEN A JURY QUESTION.

EXACTLY. NOW, ON THE FACTS, ON THE FACTS, YOU KNOW, AN INDEPENDENT CONTRACTOR IS RESPONSIBLE FOR HER END PRODUCT, SO TO SPEAK. THE DETAILS OF THE WORK HERE, WERE LEFT UP TO NURSE CRUSE.

BUT DON'T, I GUESS, AGAIN, AND I REALIZE YOU KNOW, THE STATUTE SEEMS FAIRLY CLEAR, BUT DOESN'T IT LEAD TO SOMEWHAT OF A, I DON'T WANT TO SAY ABSURD RESULT, BECAUSE THAT, BUT AS APPLIED TO THE FACTS OF THIS CASE, YOU HAVE GOT THIS WOMAN WHO SAYS I DON'T THINK YOU SHOULD DO THIS TYPE OF PROCEDURE. I WANT TO DO THE OTHER ONE, AND NOT ONLY, THEY BES, AFTER SHE DOES IT -- THEN, AFTER SHE DOES IT, SAYS TO HIM,ION THAT THIDZ RIGHT. -- SAYS TO HIM,ION THAT -- I DON'T KNOW THAT I DID THIS RIGHT. YOU BETTER CHECK IT OUT, AND HE IS HELD TO A STANDARD OF GROSS NEGLIGENCE AND SHE IS ONLY HELD TO A STANDARD OF NEGLIGENCE.

THAT GETS BACK TO THE QUESTION IS THERE A RATIONAL BASIS TO DISTINGUISH, AND, YES, THERE IS. WE KNOW FROM THE LEGISLATIVE HISTORY, WE KNOW FROM THE LEGISLATIVE STAFF ANALYSIS, FOR WHATEVER IT IS WORTH, AND I THINK WE KNOW, JUST ANECDOTALLY, THAT THE PROBLEM THAT WAS BEING ADDRESSED IN 1988, THERE WAS AN EMERGENCY ROOM CRISIS, WHERE THE INSURANCE PREMIUMS WERE GOING THROUGH THE ROOF, AND BECAUSE OF THAT, SOME HOSPITALS WERE CLOSING THEIR EMERGENCY ROOMS, AND THEY WERE HAVING A HARD TIME GETTING DOCTORS TO APPEAR IN THE EMERGENCY ROOM, BECAUSE THEY WERE SUFFERING FROM THE SAME PROBLEM SWHRNS PREMIUMS, SO THERE -- WITH INSURANCE PREMIUMS, SO THERE IS DEFINITELY A RATIONAL BASIS TO --

DOES THAT INCLUDE PEOPLE LIKE BAY ANESTHESIA IN THAT ANALYSIS?

THERE IS NO MENTION OF ANY SPECIFIC INSURANCE CRISIS IN ANY OF THE LEGISLATIVE HISTORY THAT AFFECTED AUXILIARY HEALTHCARE PROVIDERS LIKE NURSE CRUSE. IT WAS THE DOCTORS AND THE HOSPITALS WHO APPARENTLY WERE SUFFERING THE MOST, SO THAT WAS A VALID DISTINCTION, I WOULD SUBMIT, TO SINGLE THEM OUT IN THIS STATUTE.

SO JUST BECAUSE IN THIS CASE, IT SORT OF LEADS TO THE FACT THAT YOU WOULD THINK THAT THE DOCTOR SHOULD HAVE HAD A LOWER STANDARD THAN, BECAUSE HE IS, REALLY, MORE ACTIVELY MAKING THE DECISION, THAT IS JUST NOT SOMETHING WE SHOULD CONSIDER AS TO HOW IT ACTUALLY PLAYS OUT IN THIS CASE. IT MAKES NO SENSE TO GIVE THE DOCTOR MORE --.

THE WAY THE FACTS AROSE THAT YOU DESCRIBE, THE FACT THAT HE CALLED NURSE CRUSE IN AND ADMITTED SHE WAS A SPECIALIST AND THEN DECIDED NOT TO FOLLOW HER ADVICE, KIND OF MAKES IT A LITTLE INCONSISTENT UNDER THE FACTS, BUT THE STATUTE SPEAKS FOR ITSELF.

WAS THERE AN ARGUMENT MADE THAT, BY BAY ANESTHESIA, THAT SHE WASN'T NEGLIGENT BECAUSE SHE WAS FOLLOWING THE DIRECTION OF THE DOCTOR, AND THAT, BECAUSE SHE DID ASK FOR CONFIRMATION AND THAT THERE WAS REALLY, I MEAN, WAS THAT AN ARGUMENT, OR THAT THERE WAS A SUPERSEDING CAUSE, WAS, WERE ANY OF THOSE ARGUMENTS PURR USED BY BAY ANESTHESIA?

I DON'T RECALL IF THEY MADE THAT ARGUMENT. I DON'T THINK THEY TRIED TO BLAME IT ON DR. GRIFFIN.

NOTHING WOULD HAVE PREVENTED HER FROM SAYING I WASN'T NEGLIGENT BECAUSE LOOK

WHAT I DID. I TOLD THE DOCTOR THAT I WAS, THIS WAS THE PROCEDURE I RECOMMENDED. HE MADE ME DO THIS PROCEDURE, AND APHID IT, YOU KNOW, I WASN'T COMFORTABLE, AND I, THEN, DID THE THING, THAT A REASONABLE NURSE ANESTHETIST WOULD DO. I GAVE THAT MY CONCERNS AND EXPRESSED IT TO THE DOCTOR. NOTHING PRECLUDEDED THAT.

NEW YORK CITY AND HERE IS HOW IT BROKE OUT FACTUALLY. DR. GRIFFIN AS THE SO-CALLED CAPTAIN OF THE SHIP, MADE THE DECISION TO HAVE AN ORAL IN TUBEATION RATHER THAN A NASAL IN TUBEATION THAT NURSE CRUSE RECOMMENDED BUT DR. GRIFFIN DID NOT PERFORM THE PROCEDURE. IN FACT HE TESTIFIED THAT HE DID NOT PROCEDURE REMEMBER THE PROCEDURE, OTHER THAN THAT IT WENT WELL. WELL, OBVIOUSLY, IT DIDN'T. DR. GRIFFIN WAS NOT THE ONE THAT IMPROPERLY IN TUBE EIGHTED THE PATIENT THROUGH THE ESOPHAGUS. NOW, HE DID CHECK IT, BUT APPARENTLY EVERYBODY HAD ON THE EMERGENCY TEAM HAS A ROLE IN CONFIRMING WHETHER THE IN TUBEATION WAS CORRECTLY PERFORMED, AND HERE THE EVIDENCE SHOWED THAT THEY MADE MISTAKES THERE, TOO, SO YOU KNOW, THAT IS HOW IT ARE A ROSE -- THAT IS HOW IT A ROSE FACTUALLY, SO DR. GRIFFIN DIDN'T DIRECT NURSE CRUSE TO IN TUBE ATE THE PATIENT THROUGH THE ESOPHAGUS. SHE IS THE ONE THAT UNFORTUNATELY DID THAT OR THE EVIDENCE SHOWS THAT.

THE CLAIM WAS BASED ON NEGLECT IN THE WAY THAT THE IN TUBEATION WAS DONE, NOT IN THE CHOICE OF WHETHER IT WAS A NASAL OR THROAT IN TUBEATION.

THAT'S CORRECT. IT WAS NOT ONLY THAT THE INCORRECT PERFORMANCE OF THE IN TUBATION, BUT THEN THE FAILURE TO DETECT IT, AND THAT IS WHERE DR. GRIFFIN'S LIABILITY -- IT WAS NOT ALLEGED THAT DR. GRIFFIN WAS GUILTY OF MALPRACTICE FOR MAKING THE CHOICE TO DO AN ORAL RATHER THAN NASAL. HIS LIABILITY WAS BASED ON HIS FAILURE TO DETECT THAT THE IN TUBATION TUBE HAD BEEN INSERTED IMPROPERLY.

WAS THERE ANY ATTEMPT HERE, TO MAKE A CLAIM FOR INDEMNIFICATION OR IN OTHER WORDS, A CLAIM OVER AGAINST THE DOCTOR FOR TAKING CHARGE OF THE NURSE ANESTHESIOLOGIST?

I DON'T THINK SO. IN FACT, THE DEFENDANTS, AND I AM NOT SAYING THIS CRITICALLY AT ALL, PRESENTED A COMMON FRONT AT TRIAL, AS TO MOST OF THE ISSUES.

THERE WAS NO ATTEMPT TO GET CONTRIBUTION HERE?

NO. NO.

THEY DIDN'T --

I DON'T RECALL ANY CLAIMS --

THEY DIDN'T RAISE COMPARATIVE NEGLIGENCE?

BAY, THIS IS ONE OF THE ISSUES, AND I DON'T WANT TO GET INTO WHAT THE PETITIONER DIDN'T ADDRESS IN ORAL ARGUMENT. BAY DID TRY TO ASSERT COMPARATIVE PORTION -- COMPARATIVE APPORTION OF FAULT, THAT THERE WAS A WRONG DOMPLT.

WAS THAT 40/60? DIDN'T THE JURY COME BACK WITH A 60 AGAINST THE HOSPITAL AND A 40 AGAINST BAY?

AGAINST BAY, AND BAY HAD ALLEGED, BAY WANTED TO PUT THE NAMES OF THE DECEDENT AND DECEDENT'S EMPLOYER, WHO ALLEGEDLY CONTRIBUTED TO THE INDUSTRIAL ACCIDENT , ON VERDICT FORM, AND THAT IS AN ISSUE THAT PETITIONER DIDN'T ADDRESS.

BUT THE VERDICT FORM DID BREAKDOWN THE NEGLIGENCE BETWEEN BAY AND THE HOSPITAL.

IT DID, AND WHEN THE DISTRICT COURT OF APPEAL HELD, AS MATTER OF LAW, THAT THERE WAS NO LIABILITY ON THE HOSPITAL'S PART, THEN THAT PLACED 100 PERCENT OF THE FAULT ON THE BAY ANESTHESIA.

I GUESS IT IS THE PROCEDURAL POSTURE. YOU SAY THEY PRESENTED A COMMON FRONT. JUST HAVE TO AGAIN MAKE SURE, BUT THE REASON THAT THE PRIMARY REASON THAT THEY SAID THAT THE HOSPITAL WASN'T LIABLE, WAS BECAUSE NOT ONLY DID THEY FIND THAT THERE WAS NOT A GROSS NEGLIGENCE STANDARD BUT THAT THERE WAS NO CAUSATION UNDERGOING.

THAT'S CORRECT -- UNDER GOING.

THAT'S CORRECT.

HOW DOES THAT -- TO GOING.

THAT'S CORRECT.

-- TO GOODING.

HOW DOES THAT NOT APPLY TO THE HOSPITAL?

WE DON'T DISAGREE WITH THE COURT'S RULING, BUT WE ARE NOW LEFT WITH 100% JUDGMENT AGAINST A PRIVATE COMPANY, AS OPPOSED TO A 60 PERCENT JUDGMENT AGAINST AGAINST A GOVERNMENTAL ENTITY, SO AS A PRACTICAL MATTER, THE OUTCOME WAS NOT HARMFUL TO THE PLAINTIFF, BUT NOWHERE DURING THE COURSE OF THE PROCEEDINGS, DID BAY MAKE THE ARGUMENT THAT JACKSON MADE, AND THAT IS THAT THERE WAS NO LEGAL CAUSATION. THE JACKSON MADE A DIRECTED VERDICT MOTION ON THAT POINT. BAY DID NOT. JACKSON AND EAT. THAT BAY DID NOT. SO BAY -- JACKSON APPEALED THAT AND BAY DID NOT, SO BAY SIMPLY HAS NOT RAISED THAT IN ANY COURT, INCLUDING THIS ONE.

WHEN YOU READ THE FIRST DISTRICT'S OPINION, UNTIL YOU GET TO THE FOOTNOTE OF JUDGE WOLF, YOU ARE KIND OF SHAKING YOUR HEAD, GOING I DON'T GET THIS.

WELL,ION WHAT THE STRATEGY CONCERNS, I HAVE NO WAY OF KNOWING -- WELL, I DON'T KNOW WHAT THE STRATEGY CONCERNS, I HAVE NO WAY OF KNOWING, AND FRANKLY I DON'T WANT TO BE CRITICAL OF THAT, BECAUSE WE THOUGHT IT WAS A CASE OF CONFLICTING EVIDENCE AND THE BATTLE OF THE EXPERTS AND SO FORTH, AND YOU KNOW, WE FRANKLY --

YOU WOULD AGREE WITH WHAT JUDGE WROF SAID.

-- WHAT JUDGE WOLF SAID.

OF COURSE WE DO NOW, BUT THEN THAT WAS A MAJOR ISSUE AND YOU JUST NEVER KNOW. IF THERE ARE NO FURTHER QUESTIONS, I JUST WANT TO BRIEFLY MENTION, ON ISSUES TWO AND THREE, PETITIONER DIDN'T HAVE TIME TO ADDRESS THEM, BUT I JUST WANT TO COMMENT THAT THEY ARE OBVIOUSLY OUTSIDE THE SCOPE OF THE CERTIFIED QUESTION, AND WE ARE NOT EVEN MENTIONING --

ISSUE TWO IS BRINGING UP THAT THE TRIAL COURT SHOULD HAVE PUT THE EMPLOYER ON THE VERDICT FORM.

AND THE DECEDENT.

AND THE DECEDENT, AS HAVING CAUSED HIS OWN INJURIES ORIGINALLY.

CORRECT.

ALL RIGHT.

AND WAS THERE EVIDENCE PRESENTED ON THOSE POINTS?

WELL, THE TRIAL JUDGE DIDN'T ALLOW THAT. HE RULE, THE TRIAL JUDGE RULED, AS A MATTER OF LAW, THAT THE INITIAL WRONGDOERS WERE NOT GOING TO BE PLACED ON THE VERDICT FORM, SO THERE WAS REALLY NO NEED TO PROFFER THAT EVIDENCE. THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH. OKAY. WE WILL GIVE YOU TWO MINUTES.

ALL RIGHT. JUSTICE QUINCE, THE EVIDENCE WAS PROFFERED ON THAT POINT, SO THERE WAS A PROFFER MADE IN THE TRIAL COURT ON THAT ISSUE. THE CLAIMS AGAINST THE ANESTHESIOLOGIST WERE THAT, AND AGAINST MS. CRUSE WAS THAT THIS SHOULD HAVE BEEN A NASAL IN TUBATION NOT AN ORAL IN TUBATION, AND THAT IT SHOULD NOT HAVE BEEN A RAPID SEQUENCE IN TUBATION, THAT IS AN IN TUBATION USING AN ANESTHETIC. THEY COMPLETELY PARALYZED THE PATIENT. THOSE WERE TWO AREAS THAT THE NURSE ANNETTETIS SAID I WOULD RATHER DO A NASAL IN TUBATION -- THAT THE NURSE ANESTHESIOLOGIST SAID I WANT TO DO A NASAL IN TUBATION AWAKE AND THE PHYSICIAN THEN RAISED AN OBJECTION.

WAS THAT RAISED, THEN, THAT ANYTHING THAT SHE DID WAS A CONSEQUENCE OF HER DIRECTION FROM THE DOCTOR?

IT WASN'T SEPARATELY PLED AFFIRMATIVE DEFENSE, BUT THE EVIDENCE WAS THERE. SHE JUSTIFIED HER CONDUCT IN HER TESTIMONY, BY SAYING --

YOU DIDN'T MAKE A CLAIM FOR INDEMNIFICATION OVER, AGAINST, BECAUSE OF THAT.

WE DID NOT. YES, YOUR HONOR. WE DID NOT. I THINK MY TIME IS PROBABLY UP.

CHIEF JUSTICE: THANK YOU ALL VERY MUCH. THAT WILL CONCLUDE THE ARGUMENTS FOR TODAY AND THE COURT WILL STAND IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING. THANK YOU.

MARSHAL: PLEASE RISE.