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Rodrigo Aguilera v. Inservices, Inc.

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. WILSON BARNES

CHIEF JUSTICE: LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED. GOOD MORNING EVERYONE. WELCOME TO THE FLORIDA SUPREME COURT. WE APPRECIATE COUNSEL BEING READY TO GO ON THE VERY FIRST CASE ON THE DOCKET, AND SO WITHOUT ANY FURTHER ADO, WE WILL CALL THAT CASE OF AGUILERA VERSUS IN SERVICES INC..

THANK YOU, YOUR HONORS. LAURIE WALDMAN ROSS. THIS IS A CASE THAT FAR EXCEEDS HUMANITY.

CAN I ASK YOU A QUESTION, BECAUSE IT IS NOT CLEAR TO ME FROM THE RECORD.

YES.

AT WHAT POINT DID YOUR CLIENT FIRST HAVE COUNSEL?

IT IS THIS -- IT IS ALSO NOT CLEAR FROM THE COMPLAINT, BUT IT LOOSE TO ME THAT HE HAD COUNSEL WITHIN ONE MONTH OF THE INJURY, MAY 24, 1999, BECAUSE THE COMPLAINT ALLEGES THAT HE ASKED FOR A REQUEST FOR ASSISTANCE IN WORKERS COMPENSATION PROCEEDINGS.

OKAY. SECONDLY, THE STATUTE, WORKMAN COMP STATUTE AT 440.25 SUBSECTION 4-G, AS WELL AS THE RULES 4.095 AND 4.065, HAVE PROCEEDINGS FOR EMERGENCY RELIEF, WHERE AT LEAST AS,ION WHAT THE REAL WORLD IS LIKE BUT AT LEAST AS PROVIDED UNDER THE STATUTE UNDER THE RULE, YOU CAN SEEK EMERGENCY RELIEF WITH A JUDGE OF COMPENSATION, SO LIKE IN THIS CASE, WHAT I AM TRYING TO FIGURE OUT, WAS THAT EVER SOUGHT, SECONDLY, IF NOT, WHY NOT, AND BECAUSE IT SEEMS LIKE YOUR BLOOD ALMOST BOILS FROM READING THE FACTS, AT LEAST AS ALLEGED IN THIS CASE, BUT IT GOES ON FROM MAY TO MARCH, BUT THERE IS NO EVIDENCE IN THE RECORD BEFORE MAY, THERE WAS ANY ATTEMPT TO SEEK THE EMERGENCY RELIEF PROVIDED UNDER THAT ACT.

JUST SO WE ARE CLEAR, THE REASON THERE IS NO EVIDENCE IN THE RECORD IS REMEMBER, THIS CASE CAME UP ON A MOTION TO DISMISS THE COMPLAINT. THAT IS WHAT WE ARE HERE ON, IS THERE ARE ALLEGATIONS IN THE COMPLAINT, A MOTION TO DISMISS WAS MADE, THE TRIAL COURT DENIED THE MOTION TO DISMISS, AND THE WORKERS COMP CARRIER APPEALED FROM THE ORDER DENYING THE MOTION TO DISMISS. SO WE NEVER GOT TO THE STAGE OF EVIDENCE ANIMATERS THAT YOU ARE ASKING ABOUT.

WHAT IS THE LEGAL ISSUE THAT THIS COURT SHOULD BE ADDRESSING?

THE LEGAL ISSUE FOR THIS COURT TO ADDRESS IS WHETHER AN INTENTIONAL INFLICTION CLAIM LIES AGAINST A WORKERS COMP CARRIER FOR OUTRAGEOUS CONDUCT, THAT GOES BEYOND THE STANDARDS OF HUMANITY.

THE THIRD DISTRICT HELD THAT THEIR COMPENSATION CARRIER IS NOT IMMUNE FROM ALL

ADDITIONAL TORTS.

TORTS.

SO ISN'T, IN THIS CASE, THE REAL SUFFICIENCY OF THE ALLEGATIONS IN THE COMPLAINT AS TO WHETHER THERE IS A CAUSE OF ACTION STATED IN ACCORD WITH THE McCARSON CASE, FOR INTENTIONAL --

THAT IS ONE OF THE ISSUES, BUT LET ME EXPLAIN WHY IT IS NOT, AND THAT IS REMEMBER THIS CAME UP, AGAIN, FROM AN ORDER DENYING A MOTION TO DISMISS. IF THE ORDER HAD GRANTED THE MOTION TO DISMISS, IF THE DEFENDANT HAD BEEN SUCCESSFUL, WE COULD HAVE AMENDED THE COMPLAINT, IN ORDER TO CURE POTENTIAL DEFICIENCIES IN THE COMPLAINT, BECAUSE CLEARLY THE FACTS SUPPORT FRAUDULENT CONDUCT, AS WELL AS SIMPLY AN INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM, BUT SINCE IT CAME UP FROM --

IT IS ONE OF THOSE UNUSUAL CASES THAT CAME UP BY ALLOWING THERE TO BE AN APPEAL.

CORRECT.

OKAY.

AND THEREFORE WE ALREADY IN THE ANOMOLOUS POSITION THAT THEY ARE POINTING OUT PLEADING DEFICIENCIES IN THE COMPLAINT, WHICH ORDINARILY WE WOULD HAVE BEEN ALLOWED TO CURE, IF WE HAD IN FACT LOST ON THE MOTION TO DISMISS, BUT BECAUSE WE WON ON THE MOTION TO DISMISS, WE ARE IN A WORSE POSTURE THAN IF WE HADN'T.

THAT STILL COMES BACK DOWN TO WHETHER THERE IS A SUFFICIENT BASIS IN THE COMPLAINT TO STATE A CAUSE OF ACTION.

YES, AND THE ANSWER IS THERE IS.

WELL, AS PART OF THAT, IS THE PROBLEM HERE, ALSO, WHETHER OR NOT THE ALLEGATIONS FALL WITHIN SIMPLY CLAIMS HANDLING OR WHETHER OR NOT THIS IS SOMETHING BEYOND CLAIMS HANDLING, AND IS THAT THE PROPER STANDARD IN DETERMINING WHETHER OR NOT THIS IS AN INTENTIONAL TORT?

ACCORDING TO THE CARRIER, IT IS IMMUNE, AND IT SAYS IT IN ITS BRIEF, FOR ALL INTENTIONAL CONDUCT, ALL INTENTIONAL CONDUCT. IT CONSIDERS ALL OF IT TO BE INTENTIONAL, ALL OF IT IS CLAIMS HANDLED.

LET'S LOOK AT IT FOR A MINUTE. IF THE CLAIMS ADJUSTOR PHYSICALLY ASSAULTED YOUR CLIENT, THEN CLEARLY EVEN THOUGH THE RELATIONSHIP YOU KNOW, AROSE OUT OF THIS OBLIGATION UNDER THE WORKERS COMPENSATION LAW, I THINK IT WOULD BE VERY SURPRISING IF ANYBODY CLAIMED THAT THERE WAS A WORKERS COMPENSATION IMMUNITY TO A PHYSICAL ASSAULT BY A CLAIMS ADJUSTOR, BUT ALL OF THE RELATIONSHIPS INVOLVED HERE HAVE TO DEAL WITH DENYING MEDICAL BENEFITS, THAT CORRECT, OR ACCESS TO MEDICAL CARE.

ACCESS TO MEADOW-.

AS INVOLVED WITH THE -- ACK ACCESS TO MEDICAL --

OR AS INVOLVED WITH THE INSURANCE PROVIDING, THAT CORRECT?

THAT IS CORRECT.

AND HOW FAR DOES A SITUATION LIKE THAT FALL INTO THE CATEGORY OF AN INTENTION ANAL

TORT, THAT IS -- OF AN INTENTIONAL TORT. THAT IS, SINCE THE RELATIONSHIP IS, REALLY, ALL BOUND UP IN THIS INSURANCE CARRIER, OKAY, INSURED RELATIONSHIP, HOW CAN YOU CLASSIFY THAT AS AN INTENTIONAL TOWARD, WHEN WE ORDINARILY, AND I USE THAT SIMPLE EXAMPLE OF THE PUNCH IN THE NOSE --.

THAT IS THE EASY ONE.

THAT IS AN EASY ONE. HOW DO WE GET WAY OVER HERE, THOUGH, TO THE FACT THAT, IN THIS RELATIONSHIP, THE INSURANCE ADJUSTOR JUST DECIDES I HAVE JUST AM NOT GOING TO ALLOW YOU ACCESS TO THESE BENEFITS. GO TO THE WORKERS COMPENSATION COURT OR GO TO WHEREVER YOU CAN GO, HOW DOES THAT GET, FALL INTO THE CATEGORY OF AN INTENTIONAL TORT, SINCE IT ALL ARE A ROSES -- A RISES OUT OF THAT RELATIONSHIP?

LET ME POINT OUT THAT THIS IS A DIFFICULT ISSUE THAT COURTS HAVE SPLIT ALL OVER THE COUNTRY ON, AND THEY HAVE ALL EXAMINED, THIS IS NOT THE ONLY STATE WHICH HAS THE IMMUNITY PROVISIONS OR THAT HAS PROVISIONS FOR ADMINISTRATIVE REMEDIES, SUCH THAT THE COURTS HAVE APPEALS THINK THAT THEY ARE SUFFICIENT. NEVERTHELESS,IVITYMIZED SIX FACTORS THAT COURTS AROUND THE COUNTRY HAVE LOOKED AT, IN DETERMINING WHETHER OR NOT TO ALLOW CAUSE OF ACTION FOR INFLICTION OF WHAT THE CARRIER CALLS MISHANDLING. NUMBER ONE, DOMINGUEZ WAS INVOLVING A LIABILITY CARRIER, BUT NEVERTHELESS IT INVOLVES EXACTLY THE SAME PRINCIPALS. YOU HAVE UNEQUAL PARTIES WHERE ONE CREATES AND HAS POWER TO DO UNDO DAMAGE TO ANOTHER AND THE OTHER IS IMPOTENT TO RESIST.

GOING BACK TO JUSTICE BELL'S ORIGINAL QUESTION AND I AM SOMEWHAT CONCERNED ABOUT IT, IF, BY THE FIRST TIME THEY DENIED THE BENEFITS, THERE IS REDRESS TO THE WORKERS COMPENSATION COURT, WHICH IS WHY ISN'T THAT A FACTOR TO CONSIDER? YOU SAY THAT IS SOMETHING THAT CAN COME OUT. HOW WOULD IT COME OUT IN THE PLEADINGS? WOULD THAT BE AN AFFIRMATIVE DEFENSE THAT, WELL, THAT, SORT OF THAT YOU DID THIS TO YOURSELF, BECAUSE THE ATTORNEY SHOULD HAVE FILED, AND HOW DO YOU JUST, HOW DO WE IGNORE THAT?

WELL, YOU DON'T IGNORE IT, BUT HERE IS WHAT THE PROBLEM WITH THAT IS. ACCORDING TO THE COMPLAINT, WHAT HAPPENED WAS, WHEN THE EMERGENCY PETITION FOR ASSISTANCE WAS FILED, THE CARRIER CUT OFF ALL BENEFITS, CLAIMING THAT IT WASN'T A WORK-RELATED ACCIDENT. SO IT IS OVER. ORDINARILY, WHEN A CARRIER DENIES THAT, FRAN COOR AND OTHER CASES SAY THAT AN EMPLOYER IS ESTOPPED, ORDINARILY IF AN EMPLOYER SAYS IT IS NOT A WORK-RELATED INCIDENT, YOU ARE ALLOWED TO GO INTO COURT AND SUE BECAUSE THEY ARE ESTOPPED FROM CLAIMING IT. YOU CAN CLAIM IT IN TORT. BUT THE AND ONLYLOUS POSITION HERE COMES -- BUT THE ANOMOLOUS POSITION HERE COMES WHEN IT IS A WORKERS COMP CARRIER, IT STILL CAN PROVIDE SOME TYPE OF MEDICAL ASSISTANCE, BUT IT IS DOING IT IN A WAY THAT WE SAY IS MALEVOLENT, AND IN A WAY THAT THEY SAY IS JUST SOME TYPE OF NEGLIGENCE.

LET ME COMPLETE MY QUESTIONS THAT I STARTED WITH. YOU KNOW, RECOGNIZING THAT WHAT WE ARE DEALING WITH IS WHETHER THIS STATES A CAUSE OF ACTION. THIS COURT DIDN'T REACH THAT ISSUE IN SIBLEY, AND SO I AM CONCERNED ABOUT WHERE WE HAVE JURISDICTION IN THIS CASE, BECAUSE SIBLEY DIDN'T REACH THE ISSUE. PCR TURNER IS TOTALLY DIFFERENT, SO TELL ME.

JURISDICTION IS ALWAYS THE FIRST ISSUE THAT COMES UP. I HAVE ADDRESSED IT IN THE BRIEF, BUT THERE ARE TWO THINGS ABOUT SIBLEY WHICH SHOWS THAT IT IS ON POINT. NUMBER ONE, IN SIBLEY THE COURT SAYS YOU DO HAVE INTENTIONAL TORT CLAIMS. YOU CAN SUE A WORKERS COMP CARRIER FOR INTENTIONAL TORT CLAIMS. IN THAT CASE, WHAT YOU DEALT WITH WAS THE

EDITING OF A STATEMENT BY AN ADJUSTOR. CLAIMS HANDLING? SURE. SOMEBODY COULD ARGUE THIS IS SIMPLY CLAIMS HANDLING, BUT HE EDITED THE STATEMENT IN ORDER TO LEAVE OUT WHAT THE CLAIMANT SAID ACTUALLY OCCURRED. WHY? TO DEPRIVE BENEFITS! THAT WAS THE ISSUE. THIS COURT SAID YOU COULD HAVE AN INTENTIONAL INFLICTION CLAIM AND THAT 440.37, WHICH IS NOW 440.105, WAS NOT THE EX-CLUSIVE REMEDY, BY VIRTUE OF PENALIZING THE CARRIER.

DOES THE THIRD DCA SAY YOU COULD NEVER HAVE AN INTENTIONAL TORT?

THEY SAY THAT SIBLEY IS A DISTINGUISHABLE CASE, AND, AGAIN, THE THIRD DISTRICT SPLIT. THERE ARE SIMILAR DECISIONS ON BOTH SIDES OF THE THIRD DISTRICT.

BUT GETTING BACK TO JUSTICE WELLS'S QUESTION, IF THE THIRD DCA SIMPLY DISTINGUISHED SIBLEY, SAYING, WELL, THOSE ARE DIFFERENT FACTS HERE, THEN WHY IS THERE A CONFLICT WITH SIBLEY? IS THERE ANY PROPOSITION OF LAW IN WHICH THEY CONFLICTED WITH A PROPOSITION OF LAW THAT SIBLEY STATED?

SURE.

WHICH IS THAT?

STRAIGHT OUT AFTER FOOT NOTE IN WHICH JUDGE GURSTEN WAS TRYING TOITYMIZE EXACTLY WHAT THE REMEDIES ARE. -- TO ITEMIZE WHAT THE REMEDIES ARE. HE SAYS YOU HAVE GOT THE WORKERS COMP STATUTE AND HE SAYS THE CARRIER IS SUBJECTED TO PENALTIES UNDER 40.105.

THAT IS TRUE, ISN'T IT?

SURE, IT IS TRUE BUT EXACTLY THE POSITION THE COURT REJECTED IN SIBLEY UNDER 40.37.

DIDN'T THIS COURT ACKNOWLEDGE THAT THERE WAS THAT REMEDY BUT SAID THAT THERE WAS AN ADDITIONAL REALMDY>.

IT SAID IT WAS NOT AN EX-CLUSIVE REMEDY AND HERE IS JUDGE GURSTEN SAYING THAT THOSE ARE THE EXCLUSIVE REMEDIES. THAT IS WHAT THIS COURT HELD --

I AM SORRY, JUSTICE WELLS.

WOULD YOU COMMENT UPON AND I WOULD LIKE YOUR OPPONENT TO COMMENT UPON. IT SEEMS THE THIRD DISTRICT USED THE WRONG LEGAL STANDARD CONTRARY TO SIBLEY, WHEN IT STATED THAT THE ONLY REMAINING ISSUE TO BE CONSIDERED, PRIOR TO THE DISMISSAL, IS WHETHER THE PLAINTIFF'S OBLIGATION INVOLVED WRONGDOING INDEPENDENT OF THE WORKERS COMP STATUTE. SIBLEY MUST BE INDEPENDENT OF, BECAUSEION HOW YOU CAN ARGUE THAT TAKING A STATEMENT IN THE CLAIMS PROCESS IS, QUOTE, INDEPENDENT OF, SO TO ME IT SEEMS IT IS A WRONG LEGAL STANDARD THAT THEY ARE MEASURING.

IT IS THE WRONG LEGAL STANDARD. NOT ONLY DID THIS COURT NOT SAY IT IN SIBLEY BUT IN DOMINGUEZ, WHICH THE THIRD DISTRICT WROTE A LONG OPINION ON. THEY EXPRESSLY SAID YOU DON'T HAVE TO HAVE AN INDEPENDENT TORT, OTHER THAN INTENTIONAL INFLICTION. AGAIN, THAT WAS IN THE CONTEXT OF A DISABILITY CARRIER. BUT THIS COURT, UNANIMOUSLY, APPROVED DOMINGUEZ, AND IT LOOKED AT EXACTLY THE FACTORS I SAID EARLIER. EITHER AN INTENTIONAL INFLICTION IS AN INTENTIONAL TORT OR IT IS NOT.

BUT GETTING BACK TO THE QUESTIONS POSED, AS FAR AS THE ONLY GATHSS, THEY USED THE WRONG -- OBLIGATIONS, THEY USED THE WRONG STANDARD IN STATING THAT, BUT HERE WHAT IS THE LINE THAT IS CROSSED WITH AN INDEPENDENT ACTION OR INTENTIONAL TORT THAT IS

NOT CONSUMED IN THIS PROCESS? CERTAINLY AN ADJUSTOR PUTS THE TILE IN -- THE FILE IN A DRAWER, JUST IGNORES IT, AND CAN HAVE ANY VARIETY, BUT YOU SEE WHAT THE COURT IS STRUGGLING NOT TO STEP TOO FAR, BECAUSE YOU RUIN THE ENTIRE COMPENSATION SYSTEM, IF EVERYTHING IS CONVERTED INTO A TORT ACTION. WHAT IT? WE KNOW WE HAVE HERE, THE MANAGER WE WENT TO THE IME APPOINTMENT, INTERVENED TO THAT LEVEL, ANDION IF THAT IS PART OF A CLAIMS PROCESS, BUT THEN INSTRUCTED THE INSURED TO LIE TO THE LAWYER, BUT IS THAT SUFFICIENT?

THAT IS NOT WHAT WE HAVE GOT. THAT IS SOME OF WHAT WE HAVE GOT, BUT WE HAVE GOT A LOT MORE, SO LET ME EXPLAIN WHAT WE HAVE GOT, AND I MADE A LIST OF THESE. NUMBER ONE, THE ADJUSTOR CANCELLED THE PRESCRIPTION MEDICATION, AFTER HE WAS DIAGNOSED WITH THIS PROBLEM. THE ADJUSTOR CALLED AND CANCELLED THE PRESCRIPTION MEDICATION, WHICH WAS PRESCRIBED FOR HIM BY THE DOCTORS, TO CURE THE SUPPOSED INFECTION, SO THERE HE IS WITH A, EXCUSE ME, WITH A HOLE IN HIS BLADDER, WITH FECES COMING THROUGH IT AND THEY CANCELLED THE PRESCRIPTION MEDICATION.

WAS THIS PRESCRIPTION ACTUALLY, WAS IT PRESCRIBED BY THEIR PHYSICIAN? I MEAN THE CARRIER'S PHYSICIAN?

NO. THIS WAS THE FIRST STEP. THIS WAS PRESCRIBED BY THE HOSPITAL, THE EMERGENCY PHYSICIAN AT THE HOSPITAL FOR HIM. THAT WAS STAGE ONE.

IS THAT CANCELLATION OF PRESCRIPTION, DOES THAT VIOLATE ANY PART OF THE WORKERS COMP LAW?

DOES IT VIOLATE? ION. ION.

IS A CARRIER, UNDER THE WORKERS COMP SCHEME, AUTHORIZED OR NOT AUTHORIZED TO CANCEL PRESCRIPTIONS?

ION THE ANSWER TO THAT QUESTION UNDER THE WORKERS COMP SCHEME.

ISN'T THAT PRETTY CRUCIAL, BECAUSE IF A CARRIER IS AUTHORIZED TO DO IT, THEN WHAT HAS OCCURRED HERE THAT WOULD MAKE IT AN INDEPENDENT TORT?

WELL, I CAN'T ANSWER THE QUESTION, SO, BUT I WOULD FOLLOW UROLOGIC. IF THE CARRIER IS, IN FACT, AUTHORIZED TO DO THE LEGAL, THE LIST OF THINGS THAT, THEN WHAT YOU ARE GOING TO SAY IS THAT ALL CLAIMS AGAINST CARRIERS IN MANAGING CLAIMS, NO MATTER WHEN THEY OCCUR, NO MATTER HOW REMOTE, NO MATTER WHAT PERIOD OF TIME, NO MATTER WHAT THEY DO, IS GONNA BE IMMUNE. THAT IS WHAT THE RULING OF THIS COURT HAS TO BE.

DOESN'T THE STATUTE SPECIFICALLY EXCEPT FROM LIABILITY OF THE CARRIER, BAD FAITH CLAIMS? DOESN'T IT SAY NOTWITHSTANDING THE PROVISIONS OF SECTION 624.155, NOTWITHSTANDING THAT THE LIABILITY OF A CARRIER TO AN EMPLOYEE OR TO ANYONE ENTITLED TO BRING SUIT IN THE NAME OF THE EMPLOYEE, SHALL BE AS PROVIDED IN THIS CHAPTER, WHICH SHALL BE EX-CLUSIVE AND IN PLACE OF ALL OTHER LIABILITY.

AND THE CRITICAL LANGUAGE THERE IS "IN THIS CHAPTER", BECAUSE THIS CHAPTER ONLY APPLIES TO ACCIDENTAL INJURY. IT HAS NEVER BEEN APPLIED TO INTENTIONAL ACTS BY THE CARRIER, TAKEN OR INTENTIONAL ACTS BY ANYBODY, INTENTIONAL ACTS BY ANYBODY.

ISN'T WHEN YOU ASSERT A BAD FAITH CLAIM AND PART OF THE BAD FAITH STATUTE SAYS NOT ATTEMPTING IN GOOD FAITH TO SETTLE CLAIMS, WHEN UNDER ALL THE CIRCUMSTANCES, IT COULD AND SHOULD HAVE DONE SO, HAD IT ACTED FAIRLY AND HONESTLY TOWARD THE INSURED AND WITH DUE REGARD FOR HIS OR HER INTEREST, ISN'T THAT AN INTENTIONAL ACT?

AREN'T BAD FAITH CLAIMS BY DEFINITION, INTENTIONAL ACTS?

BAD FAITH CLAIMS ARE, BY DEFINITION, INTENTIONAL ACTS, BUT THIS IS NOT INVOLVING FAILURE TO SETTLE WITHIN THE POLICY LIMITS THIS. IS FAR BEYOND THAT. REMEMBER, YOU HAVE GOT AN EXTREMELY WEAK PERSON IN VERY POOR PHYSICAL CONDITION, WHO THE CARRIER HAS COMPLETE AND TOTAL CONTROL OVER, SO I WOULD LIKE TO GO BACK TO, BECAUSE I ONLY WENT THROUGH FACTOR NUMBER ONE, AND THAT WAS AT THE VERY BEGINNING. AT THE VERY BEGINNING.

I GUESS WHAT IS IMPORTANT WHEN YOU OUTLINED THESE FACTORS, WAS WHAT THE CARRIER DID IN ALL THESE THINGS, AUTHORIZED UNDER THE STATUTE OR NOT AUTHORIZED UNDER THE STATUTE?

I DON'T BELIEVE THESE KINDS OF THINGS CAN BE AUTHORIZED UNDER THE STATUTE, AND TAKEN AS A WHOLE, THEY STATE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION, AND I WILL TELL YOU WHERE I WOULD DRAW THE LINE AND THEN I SIT DOWN.

DO YOU AGREE THAT, IN YOUR PROPOSITION, THAT IS REGARDLESS OF WHETHER THERE IS ANY ADDITIONAL PHYSICAL INJURY TO THE CLIENT THAT, SIMPLY YOUR POSITION IS THERE HAS TO BE NO RELATION BETWEEN THE INDEPENDENT TORT IN ANY PHYSICAL INJURY, THAT IT CAN SIMPLY BE EMOTIONAL DISTRESS.

THAT, CAN --

NOT SIMPLY. I DON'T MEAN TO BE HARSH ABOUT THAT BUT I MEAN THAT IS ALL.

OUR CAUSE OF ACTION IS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, WHICH IS AFTER THE INITIAL INJURY AND WHICH IS, OF COURSE, INDEPENDENT FROM THE INITIAL INJURY TARNKS CAME ABOUT AS A RESULT OF -- INJURY, AND IT CAME ABOUT AS A RESULT OF MANY THING THAT IS THIS CARRIER DID. IT ORDERED THE MEDICAL TESTS, ORDERED BY ITS OWN PHYSICIANS. THAT IS WHAT THE ADJUSTOR DID. IT CUT OFF BENEFITS ENTIRELY, FOUR DAYS AFTER THEY WERE TOLD THAT IT WAS AN EMERGENCY BECAUSE THE PLAINTIFF'S URINE SMELLED LIKE FECES. THEY ORDERED TESTING FOR TESTS OUTSIDE THE AREA WHICH WAS UROLOGICAL TESTING, AFTER THE DIAGNOSING BY THEIR OWN PHYSICIANS, AND REQUIRED THIS PARTICULAR PLAINTIFF TO SUBMIT TO TESTS COUNTERINDICATED BY HIS CONDITION, SO IF YOU HAVE GOT A HOLE IN YOUR BLOOD HE -- IN YOUR BLOOD HE -- IN YOUR BLADDER, YOU DON'T SEND SOMEBODY TO YOUR A GASTROENTEROLOGISTS AND HAVE THEM FORCE TUBES DOWN YOUR BLADDER. THE PAIN IS EX-KRURBIATING.

-- EXCRUCIATING.

IS A CARRIER ALLOWED TO GO TO THOSE EXAMINATIONS AND THOSE KINDS OF THINGS?

I DON'T BELIEVE THAT A CARRIER IS PRIVILEGED TO DO THESE TYPE OF THINGS, BECAUSE THEY ARE NOT, REMEMBER, THE PURPOSE OF THE WORKERS COMP SCHEME IS A GUIDO PRO ". IN RETURN FOR SPEEDY -- A GUIDO -- A QUID PRO QUO. THE CARRIER IS DOING SOMETHING IN A QUID PRO QO POSITION, IN IN-RETURN FOR THIS.

CHIEF JUSTICE: YOU ARE USING UP YOUR REBUTTAL TIME.

THANK YOU, YOUR HONORS.

I AM JOSH TURNER HERE THIS MORNING, YOUR HONORS, ON BEHALF THE RESPONDENTS. THE DECISION OF THE THIRD DISTRICT SHOULD BE APPROVED, AT LEAST INSOFAR AS THE RESULT IS CORRECT. IF ANYTHING, "ESTABLISHES THAT A WORKERS COMPENSATION CARRIER MIGHT HAVE

EXPOSURE AT COMMON LAW TO ANY LIABILITY WHATSOEVER.

SO YOUR POSITION IS, THEN, THAT THERE IS NO, NO INTENTIONAL TORT LIABILITY FOR YOUR CARRIER?

IF YOU READ, IF YOU READ THE STATUTE, THAT IS WHAT IT APPEARS THE LEGISLATURE'S INTENT WAS.

AND SO WHAT DID SIBLEY STAND FOR, THE OPPOSITE PROP POSITION?

WELL, SIBLEY, SIBLEY IS AN ODD CASE, BECAUSE SIBLEY DID NOT, SIBLEY DID THOUGHT ACTUALLY -- DID NOT ACTUALLY CONSTRUE SECTION 440.11 SUB4. THE IT DECIDED, WITHOUT REFERRING TO THE STATUTE, THAT THERE WAS AN INDEPENDENT REMEDY, BUT RESPECTFULLY, I THINK --

THEY WERE DISCUSSING, IN SIBLEY, 440.37, RIGHT?

CORRECT. CORRECT. CORRECT.

THE PREDECESSOR TO 105.

CORRECT.

AND SAYS, AS I READ IT CLEARLY, THAT THAT IS NOT, THAT 440.307 IS NOT THE EXCLUSIVE REMEDY, AND THAT YOU COULD, IN FACT, HAVE AN INTENTIONAL TORT AGAINST A CARRIER.

THAT IS RIGHT, AND RESPECTFULLY, SIBLEY IS WRONGLY DECIDED. SIBLEY OVERLOOKS THE IMPORT OF SECTION 440.11 SUB-4. SECTION 440.11 SUB-4 WAS ENACTED IN 1982. THAT WAS ENACTED BEFORE, EXCUSE ME, AFTER --

WHICH SUBSECTION ARE YOU TALKING ABOUT? WHAT IS THE SUBSTANTIAL OF IT?

THE SUBSTANCE OF IT IS THAT IT STATES, NOTWITHSTANDING, AS JUSTICE CANTERO REFERRED TO, NOTWITHSTANDING THE PROVISIONS OF SECTION 624.155, THE LIABILITY AFTER CARRIER TO AN EMPLOYEE OR TO ANYONE ENTITLED TO BRING SUIT IN THE NAME OF THE EMPLOYEE, SHALL BE AS PROVIDED IN THIS CHAPTER, WHICH SHALL BE EXCLUSIVE AND IN PLACE OF ALL OTHER LIABILITY.

MR. LERNER, THE, OUR BAD FAITH LAW IN FLORIDA, REALLY, HAS NEVER BEEN INTERPRETED AS INTENTIONAL TORTS, HAS IT?

I CAN'T ANSWER THAT QUESTION, JUDGE. I AM NOT, JUSTICE.

WILL YOU ASSUME WITH ME THAT THOSE CASES ARE TRIED ON THE BASIS OF YOU BRINGING IN EXPERTS IN CLAIMS HANDLING AND THEY SAYS PHI AS TO THE GOOD FAITH OR BAD FAITH, THAT THAT SON AREA OF THE LAW, BUT THE THING THAT CONCERNS ME HERE IS THAT, DID THE THIRD DISTRICT USE THE WRONG MEASURING STICK TO MEASURE THE COMPLAINT, AND BY THE QUESTION THAT I RAISED BEFORE, BECAUSE IT SEEMS TO ME THE THIRD DISTRICT IS SAYING THAT THIS IS WHAT WE ARE GOING TO MEASURE IT BY IS WHETHER THESE ALLEGATIONS INVOLVE WRONGDOING, INDEPENDENT OF THE COMPENSATION CLAIM.

THE THIRD DISTRICT DID THAT, AND THAT, I AM SUGGESTING, IS AN ANALYSIS THAT THE COURT, UNDER THE STATUTE, DID NOT NEED TO ENGAGE IN.

BUT THAT IS WHAT THEY MEASURE THIS COMPLAINT ABOUT, AND IN SIBLEY CERTAINLY YOU WOULD AGREE, WAS PART OF THE CLAIMS PROCESS, WAS IT NOT, THE CONDUCT THERE SOME.

SURE.

OKAY. SO THAT WE CAN UNDERSTAND WHERE ARGUMENTS ARE, AND IT MAY BE SIBLEY IS WRONGLY DECIDED. THAT MAY BE.

THE, BUT THE COURT, THE COURT, THE POINT THAT THE COURTS, ALL OF THE COURTS SINCE 1982 HAVE OVERLOOKED, IS SINCE THE IMPORT OF THIS SEPARATE PROVISION OF THE STATUTE THAT PROVIDES FOR CARRIER IMMUNITY, AND RECALL THAT THE ONLY REASON THAT THERE IS EMPLOYER IMMUNITY, IS BECAUSE THE STATUTE ALLOWS FOR IT. IT IS BECAUSE OF THE DEFINITION OF INJURY, WHICH REFERS TO THE WORD "ACCIDENT", WHICH IS CLEARLY SOMETHING THAT IS NOT INTENTIONAL, AND --

LET ME ASK YOU THIS QUESTION. IF WE HAD THE SITUATION WHERE THIS MANAGER CAME ON, A HEALTH MANAGER, WHICH I ASSUME IS IN ADDITION TO THE ADJUSTOR, AND THE INDIVIDUAL WAS AT THE HOSPITAL TO GO THROUGH AND HAVE SOME SORT OF SURGICAL PROCEDURE AND THIS PERSON COMES UP AND MAKES FALSE REPRESENTATION ANSWER SAYS THE DOCTOR CALLED AND SAID THAT YOU DON'T NEED THIS AND YOU ARE FINE AND ALL OF THE REPORTS SAY THAT YOU ARE FINE, SO YOU CAN GO ON HOME AND ON THE WAY HOME, THE INDIVIDUAL DIES BECAUSE OF NOT GOING THROUGH WITH THE PROCEDURE AT THE HOSPITAL, WOULD THERE BE RESPONSIBILITY UNDER THOSE CIRCUMSTANCES? AND INTENTING, INTENTING TO INTERVENE IN THAT CARE AND TO DIVERT THE FLORIDA CITIZEN AWAY FROM CARE. IS THAT SUFFICIENT TO STATE AN ACTION UNDER WORKERS COMP, UNDER THIS THEORY OF AN INDEPENDENT TORT?

NOT ACCORDING TO WHAT THE LEGISLATURE HAS SAID IN THIS STATUTE, NO, YOUR HONOR. THIS STATUTE IS ABSOLUTE, AND IT IS VERY CLEAR --

NO MATTER HOW EGREGIOUS AND CERTAINLY JUSTICE LEWIS HAS GIVEN ABOUT AS EGREGIOUS AN EXAMPLE AS THERE COULD BE, THAT IS THAT ORDINARILY YOUR REACTION TO THAT WOULD BE THAT THAT PERSON HAS CAUSED THE DEATH OF THIS PARTICULAR INDIVIDUAL, AND YET YOU ARE SAYING THE ONLY LIABILITY UNDER THE LAW, WOULD BE UNDER THE WORKERS COMPENSATION ACT, THAT RIGHT?

ACCORDING TO WHAT THE LEGISLATURE HAS TOLD US.

SO IF WE HAVE THE CLAIMS ADJUSTOR AUTHORIZED BY THE MANAGER AND AUTHORIZED BY THE CEO OF THE INSURANCE COMPANY, TO GO OUT AND BEAT THE HECK OUT OF THE CLAIMANT, BECAUSE HE HAS BEEN A PAIN IN THE REAR END, THERE WOULD BE NO TORT LIABILITY OR CIVIL LIABILITY FOR THAT?

NO. I THINK THAT FALLS INTO THE SAME CATEGORY AS THE SEXUAL HARASSMENT CLAIMS AGAINST AN EMPLOYER DUE THAT ARE --

WHERE IS THERE THAT EXCEPTION IN THE STATUTE?

THE, THERE IS NO EXCEPTION IN THE STATUTE. HOWEVER, WHEN YOU TALK ABOUT AN ASSAULT, A PHYSICAL ASSAULT, THAT IS SO REPUGNANT TO OUR CIVILIZED SOCIETY.

ISN'T THAT WHAT WE ARE DOING NOW. LET'S SAY, THEN, IF WE ARE GOING TO TALK ABOUT IT SEEMS TO ME THAT IS ABOUT -- TALK ABOUT WHAT JUSTICE LEWIS DESCRIBED, THAT SEEMS TO ME TO BE ABOUT AS REPUGNANT AS YOU CAN GET. IF THEY SAY THIS CLAIMANT HAS BEEN A PAIN IN THE BUTT AND SO WE ARE GOING TO FIX HIM AND SO HERE IS WHAT WE ARE GOING TO AGREE TO DO, AND SO OVER THE PERIOD OF A YEAR, THEY MAKE THIS PERSON'S LIFE MISERABLE, AND THEY OBVIOUSLY INTENTIONALLY --

I UNDERSTAND THAT, JUDGE. JUSTICE.

YOU DON'T AGREE THAT CONDUCT LIKE THAT WOULD CREATE CIVIL LIABILITY OUTSIDE THE BOUNDS OF THE WORKERS COMPENSATION STATUTE?

THE STATUTE SAYS THE LIABILITY OF A CARRIER SHALL BE EXCLUSIVE AND IN PLACE OF ALL OTHER LIABILITY.

THIS IS JUST PARALLEL, IS IT NOT, WITH THE SAME SITUATION, WITH REFERENCE TO AN EMPLOYER, AND THAT IS THAT JUST AS THERE MAY BE EXCEPTIONS WITH REFERENCE TO THE CONDUCT OF AN EMPLOYER, THERE MAY BE EXCEPTIONS WITH REFERENCE TO THE INTENTIONAL CONDUCT OF THE CARRIER.

THAT IS A QUESTION I WOULD LIKE TO ADDRESS, BECAUSE AS I READ THE STATUTE, THE ANSWER IS, NO, THE CARRIER'S IMMUNITY, AS PROVIDED BY THE LEGISLATURE, IS BROADER.

THIS COURT HAS ALREADY HELD, IN THE CASE THAT YOU SAY WAS WRONGLY DECIDED, IT HAS ALREADY CROSSED THAT LINE, HAS IT NOT?

THIS COURT, THIS COURT DID NOT SPECIFICALLY CONFRONT THE LANGUAGE OF 440.11 SUB-4 IN THAT CASE, AND --

BUT THE BROAD PRINCIPLE DECIDED IN THAT CASE WAS THAT THEY ARE, NOTWITHSTANDING --

SURE. SURE.

SO ARE YOU, AND THIS IS FAIR GAME, YOU KNOW, ARE YOU GOING TO ATTEMPT TO CONVINCE US TO RECEDE FROM THAT?

I AM SUGGESTING --

THAT IS FAIR GAME.

-- THAT YOU SHOULD RECEDE FROM SIBLEY, AND HERE IS WHY, NOTHING, THE CASES THAT ARE CITED IN THE BRIEF, AND ARE THE ONLY CASES THAT STAND FOR THE PROPOSITION THAT THE CARRIER IMMUNITY IS CONCOMITANT WITH EMPLOYER IMMUNITY, WERE DECIDED BEFORE SUB4 WAS ENACTED.

YOU ARE SAYING THAT PRESENTS A LEGISLATIVE INTENT THAT AN INSURANCE CARRIER HAS GREATER IMMUNITY THAN THE EMPLOYER?

AS YOU READ THE STATUTE, YOUR HONOR, I AM.

WHERE IN THE LEGISLATIVE HISTORY IS THERE ANYTHING WHERE THERE WAS AN INTENT TO GRANT INSURANCE CARRIER GREATER IMMUNITY THAN THE EMPLOYER? I DON'T UNDERSTAND THE POLICY OF LOGIC.

YOUR HONOR, IT IS A PRINCIPLE OF STATUTORY CONSTRUCTION, THAT WHERE THE LANGUAGE OF THE STATUTE IS CLEAR, THE, THERE IS NO NEED TO GO BEYOND IT, AND THIS STATUTE SAYS THE LIABILITY OF THE CARRIER, AND WE DISCUSS THIS ON PAGES 4-THROUGH-7 OF OUR BRIEF.

IF WE ACCEPT YOUR ARGUMENT, THEN THAT WOULD ALSO MAKE THEM IMMUNE FROM CRIMINAL LIABILITY, AS JUSTICE ANSTEAD SAID, SO A CLAIMS ADJUSTOR COULD MAKE IT ENGROSSER, COULD TAKE A GUN -- EVEN GROSSER, COULD TAKE A GUN AND KILL THE PERSON, AND UNDER YOUR ARGUMENT, THE CLAIMS ADJUSTOR IS IMMUNE BECAUSE HE IS A CLAIMS ADJUSTOR. IS THAT THE ARGUMENT YOU ARE MAKING?

THAT IS TAKING IT TO AN EXTREME. "ALL" IS YOUR ARGUMENT.

THAT IS WHAT IT SAYS, YOUR HONOR.

WHAT I AM CONCERNED ABOUT IS, IN THAT ARGUMENT, AND I READ YOUR BRIEF, IS THAT THE THIRD DISTRICT DIDN'T DECIDE THIS CASE ON THAT BASIS.

THAT'S RIGHT. THAT'S RIGHT.

AND THERE IS, AS I CAN SEE IN MY SURVEY, CONFLICTING WITH -- IN MY SURVEY, THERE ISN'T ANYTHING THAT IS CONFLICTING WITH THIS ISSUE AND SO WE WOULD HAVE TO HAVE JURISDICTION ON SOME OTHER BASIS.

I DON'T THINK THERE IS JURISDICTION. I DON'T THINK THIS COURT HAS JURISDICTION.

HOW ABOUT SPEAKING TO WHAT YOUR OPPONENT TALKED ABOUT, AS FAR AS CAUSE OF ACTION IN THIS CASE.

THE CAUSE OF ACTION DOES NOT RISE TO THE LEVEL OF AN INDEPENDENT TORT, BECAUSE IT IS CLAIMS HANDLING. IT IS BAD, BUT IT IS AIMED AT DETERMINING MEDICAL NECESSITY AND OCCUPATION RELATEDNESS, AND THAT IS WHY THE CARRIER IS PERMITTED TO DO THE THINGS THAT THEY HAVE DONE.

LOOKING AT THIS VERY CAREFULLY, WHAT WOULD YOU PICK OUT AS THE MOST EGREGIOUS THING THEY HAVE ALLEGED ABOUT THE CONDUCT OF THE CARRIER, SO THAT WE CAN PERHAPS LOOK AT THE MOST EGREGIOUS AND SAY, WELL, DOES THAT MEASURE UP? WE HAVE BEEN USING A LOT OF HYPOTHETICALS, YOU KNOW, WITH YOU HERE, FOR INSTANCE, SO THAT WE CAN EXAMINE AND SAY, WELL, DOES THAT REALLY RISE TO THE LEVEL OF WHAT WE ORDINARILY CONSIDER AS AN INTENTIONAL TORT? WHAT IS THE MOST EGREGIOUS THING THEY SAY THAT THE CARRIER DID?

IT IS NOT A WELL PLEADED ALLEGATION, BUT IT, LIE REGARDING AVAILABLE BENEFITS AND SUGGEST TO THE TOIES EMPLOYER THAT THE COVERAGE WASN'T THERE. RORN THAT, THAT THEY DELAYED OR DENIED PRESCRIPTION ANSWER DELAYED OR DENIED REFERRALS TO MEDICAL SPECIALISTS, THEY DELAYED OR DENIED MEDICAL CARE, THEY DELAYED OR DENIED MEDICAL BENEFITS, INSISTED UPON PAINFUL TESTING. ALL OF THAT.

WHAT ABOUT GOING TO THE ACTUAL EXAMINATION AND HAVING THE CLAIMANT GO THROUGH THESE PROCEDURES THAT WERE CONTRADICT KATEED? THAT IS NOT A -- CONTRA INDICATEED? THAT IS NOT AN OUT -- US ALLEGATION? -- AN OUTRAGEOUS ALLEGATION?

NO, YOUR HONOR, IT IS PERMITTED, BECAUSE THE CARRIER IS ENTITLED TO DETERMINE MEDICAL NECESSITY AND RELATION TO THE OCCUPATION.

BUT DOES A CARRIER HAVE THE EXPERTISE TO DETERMINE WHAT KIND OF MEDICAL PROCEDURES A CLAIMANT SHOULD HAVE?

PRESUMABLY THE CARRIER IS INFORMED IN THE PROCESS OF ADJUSTING THE CLAIM, AND --

BY WHOM?

INFORMED, INFORMED BY PHYSICIANS AND, AND, AND, AND BY THE STATE OF KNOWLEDGE IN THE FIELD. I MEAN, THESE TESTS THAT WERE ORDERED, I MEAN, IT IS NOT SUGGESTED THAT THE, THAT THE EMPLOYEE WAS ASKED TO HAVE A CHEST X RAY OR A, OR SOME EXAMINATION OF THE

HEART.

IT ALLEGED THEY WERE CONTRAINDICATED AND THAT THEY WERE VERY PAINFUL TO THE CLAIMANT. BUT THAT SEEMS TO ME, TO BE SOME PRETTY OUTRAGEOUS CONDUCT THAT, A CARRIER WOULD STEP IN AND DECIDE WHAT KIND OF PROCEDURE SHOULD BE DONE. I MEAN, THIS IS THE INDIVIDUAL CARRIER. THIS WASN'T THE PHYSICIAN THAT THE CARRIER HAD EMPLOYED, WAS IT?

WELL, I DON'T BELIEVE, YOUR HONOR, THAT THE ADJUSTOR, THE ALLEGATION IS THAT THE CARRIER DID THIS, BUT --

THEN PART OF THE PROBLEM HERE IS THAT SOME OF THOSE ARE CONCLUSORY ALLEGATIONS. THE ORDER FROM THE THIRD DCA DIRECTS A TRIAL COURT TO ENTER A FINAL ORDER, WHICH I ASSUME MEANS WITH PREJUDICE. HOW IS THAT SUPPORTED? WHY SHOULD NOT THE PLAINTIFF IN THIS CASE OR THE APPELLANT, BE ABLE TO AMEND THEIR COMPLAINT? WHY WOULD IT BE ON A GRANTING OF A MOTION TO DISMISS? WE TYPICALLY DO THAT WITH LEAVE TO AMEND? WHY SHOULD NOT MR. AGUILERA BE ABLE TO AMEND THEIR COMPLAINT, TO TRY TO STATE A CAUSE OF ACTION?

WELL, BECAUSE THEY DID THAT ONCE. THEY VOLUNTARILY DISMISSED THE ORIGINAL COMPLAINT, RECOGNIZING THAT IT WASN'T SUFFICIENT, AND AS THE TRANSCRIPT OF THE HEARING BEFORE THE TRIAL COURT REFLECTS, CONSULTED WITH APPELLATE COUNSEL, WHO WROTE THE AMENDED COMPLAINT, AFTER REVIEWING THE LAW, SO THEY PUT THEIR BEST SHOT ON PAPER, WHEN THEY WROTE THAT COMPLAINT.

BUT I THOUGHT YOUR POINT WAS, NO MATTER WHAT THEY ALLEGED, BECAUSE OF SUBSECTION 4, THERE IS NO CAUSE OF ACTION.

THAT IS ONE OF MY POINTS. MY SECOND POINT IS THAT, IF THE COURT DISAGREES AND THAT SIBLEY IS WRONGLY DECIDED, AND THAT THERE IS A SECTIONAL TORT EXCEPTIONS, THE -- A SBENKTSAL TORT EXCEPTION, THE -- AN INTENTIONAL TORT EXCEPTION, THE COURT BELOW WAS CORRECT IN DETERMINING THAT THERE IS NO INDEPENDENT TORT ALONG ALLEGED IN THIS CASE.

COULD YOU HELP ME WITH THIS AND PLEASE INDULGE ME JUST FOR ONE MOMENT AND I REALLY NEED YOUR HELP HERE. THAT IS THAT, IF WE ASSUME THAT SIBLEY IS THE LAW TO FOLLOW AND THAT SIBLEY OCCURRED DURING THE CLAIMS PROCESS, IF WE MAKE THOSE ASSUMPTIONS, I MEAN, THAT SEEMS TO BE A FAIR ASSUMPTION, AND RECOGNIZING THAT NO COURT WANTS TO THRUST THE ENTIRE COMP PROCESS INTO A TORT SYSTEM, THAT THERE HAS TO BE SOME LINES, WHERE WOULD THE LINES BE DRAWN? COULD YOU HELP US WITH DRAWING THOSE LINES, AND I REALIZE YOU HAVE TAKEN, THERE ARE, THAT THERE IS NO CLAIM WHATSOEVER, BUT COULD YOU ASSIST US AND WHERE IS THAT LINE.

AND THIS COURT'S DECISION IN DOMINGUEZ, THIS COURT'S DECISION IN MARC CARSON, AND -- IN McCARSON, AND THE CASES FROM ALABAMA THAT THE PETITIONERS CITE ARE HELPFUL, AND THE FACTORS THAT ARE PRESENT IN THOSE CASES THAT AREN'T PRESENT HERE, ARE EXTORTION OR COERCIVE CONDUCT. THERE IS NO ALLEGATION IN THIS CASE THAT ANY OF THE BAD THING THAT IS ARE ALLEGED ON THE PART OF MY CLIENT, WERE DONE WITH THE INTENT OF ATTEMPTING TO GET THE EMPLOYEE TO GIVE UP A BENEFIT OR TO ENTER INTO A DISADD VANITY AGE US SETTLEMENT OR TO DO ANY OF THAT. THAT WAS WHAT WAS THE PRESENT IN, WHAT WAS, THAT WAS WHAT WAS PRESENT IN DOMINGUEZ. THAT WAS WHAT WAS PRESENT IN THE, IN FACT IN THE ALABAMA CASES THAT ARE CITED. THE COURT, SUPREME COURT OF ALABAMA SAYS THERE IS CLEARLY A STANDARD BEYOND WHICH THE CARRIER HAS TO GO, AND THE STANDARD IS EXTORTION AT CONDUCT AND THE IMBALANCED, THE DISPROPORTIONATE RELATIONSHIP BETWEEN THE EMPLOYER AND THE CARRIER IS IMPORTANT, AND THAT IS NOT PRESENT HERE. AS JUSTICE BELL POINTED OUT, IT IS ALLEGED IN THE COMPLAINT THAT COUNSEL WAS PRESENT

THROUGHOUT THIS PROCESS AND IN FACT, COUNSEL INSULATED THE EMPLOYEE FROM THE CARRIER AND CAN ONLY WONDER, AS JUSTICE BELL DOES, WHY COUNSEL DIDN'T SEEK AN INJUNCTION, DIDN'T INVOKE THE REMEDIES THAT ARE AVAILABLE. THERE ARE EMERGENCY REMEDIES WHICH ARE AVAILABLE UNDER THE COMPACT.

IS THAT SOMETHING WHICH SHOULD BE PLED AROUND IN THE INITIAL PLEADING, OR IS THIS SOMETHING THAT IS GOING TO HAVE TO BE DEVELOPED, AS TO WHAT WAS HAPPENING, AS --

CERTAINLY IN ORDER TO STATE THE CLAIM FOR INTENTIONAL INFLICTION, THESE THINGS SHOULD BE PLEADED, AND WHAT IS HAPPENING HERE, IS THAT WE ARE NOW IN THE SECOND APPELLATE COURT, AND WE ARE BEING PENALIZED, BECAUSE THE TRIAL COURT MISTAKENLY DENIED OUR MOTION TO DISMISS.

CHIEF JUSTICE: WE ARE GOING TO END ON THAT NOTE, BECAUSE YOUR TIME HAS BEEN CONSUMED, WITH THE HELP OF OUR QUESTIONS. WE THANK YOU VERY MUCH. COUNSEL, MR. MARSHAL, HOW MUCH TIME? [LAUGHTER] IF YOU HAVE GOT A BOTTOM LINE POINT TO MAKE.

I HAVE GOT A BOTTOM LINE POINT. THE PARAMETERS OF THE TORT ARE FOUND IN THE POINT OF OUTRAGE. THE TRIAL COURT ACTS AS IT IS GATEKEEPER. THE STANDARD IS EXTREMELY HIGH, AND IN THE EVENT THAT THE STANDARD IS NOT MET THERE, IS A APPELLATE REMEDY FROM AN ORDER DENYING A MOTION TO DISMISS AND FROM AN ORDER DENYING A MOTION FOR SUMMARY JUDGMENT, IF THE EVIDENCE IS INSUFFICIENT. THANK YOU.

CHIEF JUSTICE: THANK YOU BOTH, ESPECIALLY FOR BEING RESPONSIVE TO OUR INQUIRIES.