03-630

THE NEXT CASE ON THE COURT'S DOCKET IS TRAVELERS INDEMNITY COMPANY VERSUS PCR INCORPORATED. GOOD MORNING.

GOOD MORNING YOUR HONORS AND MR. CHIEF JUSTICE. MAY IT PLEASE THE COURT. I AM ALLAN TAYLOR. WITH ME IS AND DREW DRIINGS BYE. WE REPRESENT TRAVELERS -- G AREN'T IGS -- GRISGBY. WE REPRESENT TRAVELERS INDEMNITY IN THE APPEALS FROM THE ELEVENTH CIRCUIT. THIS CASE IS A FOLLOW TO THIS COURT'S OPINION ALMOST FOUR YEARS AGO, IN TURNER VERSUS PCR, IN WHICH THIS COURT ALLOWED A DIRECT TORT ACTION TO GO FORWARD UNDER THE INTENTIONAL TORT EXCEPTION TO WORKERS COMPENSATION EXCLUSIVITY. NOW, THE QUESTION BEFORE THE COURT, BASICALLY, IS WHETHER THE EMPLOYERS LIABILITY INSURANCE POLICY COVERS THAT INTENTIONAL TORT CLAIM THAT WAS MADE AGAINST PCR.

LET ME ASK, TO BEGIN WITH, IN THIS EMEMPLOYERS LIABILITY POLICY, I TAKE IT FROM YOUR BRIEF THAT YOU WOULD CONTEND THAT THE ANALYSIS SHOULD BEGIN WITH THE PROVISION THAT IS HOW THE INSURANCE APPLIES.

YES, YOUR HONOR.

IS THAT CORRECT? BEGINNING WITH THAT ANALYSIS, AND IF, IN FOLLOWING THROUGH ON THE FACT THAT IT SAYS THAT IT IS ACCIDENT BY BODILY INJURY, HOW, WHAT IS THIS THIS POLICY INTENDED TO COVER, UNDER EMPLOYERS LIABILITY?

YOUR HONOR, INTENDED TO COVER BODILY ACCIDENT, AND THAT WOULD INCLUDE, UNDER THE LAW OF FLORIDA, ACTIONS AGAINST COME EMPLOYS, WHICH -- COEMPLOYEEESE, WHICH DO NOT REQUIRE AN INTENTIONAL STANDARD. THEY REQUIRE WHAT THIS COURT HAS RECOGNIZED AS AN ELEVATED LEVEL OF CULPABLE NEGLIGENCE, BUT IT IS NOT AN INTENTIONAL TORT STANDARD.

BUT DON'T THOSE POLICIES GENERALLY HAVE CROSS EMPLOYEE EXCEPTIONS SO THAT THEY DON'T EVEN COVER REINJURIES TO THE EMPLOYEE UNDER THE SAME EMPLOYER?

NO, THE POLICY DOES NOT.

DOES NOT CONTAIN THAT EXCEPTION?

NO, YOUR HONOR, AND THAT IS WHAT IT IS INTENDED COVER. ANOTHER EXAMPLE MIGHT BE IF AN ACTION WERE BROUGHT AGAINST A PRODUCT MANUFACTURER BY AN EMPLOYEE, FOR ALLEGEDLY CREATING A BAD MACHINE, AND THE PRODUCT MANUFACTURER BROUGHT SOME SORT OF INDEMNIFICATION ACTION BACK AGAINST THE EMPLOYER, SO THAT IS WHAT THE EMPLOYERS LIABILITY POLICY WAS INTENDED TO COVER.

I NOTICE NEITHER PARTY CITED ADD CASE THAT WE HAD UNDER ONE OF THESE POLICIES THAT JUST CAME OUT IN MARCH, HUMANA VERSUS HOME EMERGENCY SERVICES, WHICH WAS A CASE IN WHICH WE SET UP AN ANALYSIS THAT GOES, FIRST, TO THE, TO HOW THIS INSURANCE APPLIES. NOW, UNDER THAT ANALYSIS, WE WERE DEALING WITH WHETHER THE POLICY WOULD COVER THE LOSS OR DESTRUCTION OF EVIDENCE, AND WE HELD THAT IT DID NOT. WHICH, AGAIN, CAUSES ME TO WONDER WHAT THIS POLICY DOES, IN FACT, COVER. IF WE HAVE, AGREE WITH AN

ANALYSIS THAT IT DOES NOT COVER ACCIDENTS, SOMETHING THAT IS, BODILY INJURY BY ACCIDENT.

YOUR HONOR, WE AGREE THAT IT DOES COVER BODILY INJURY BY ACCIDENT.

BUT THAT WOULD AND WORKERS COMP, AND SO IT WOULD BE EXCLUDED. I TAKE IT THAT THAT IT WOULD NARROWLY, THEN, HAVE TO DO WITH THE OTHER EMPLOYEES.

IT IS GAP COVERAGE, YOUR HONOR. IT COVERS BODILY INJURY BY ACCIDENT TO AN EMPLOYEE, THAT IS NOT SUBJECT TO WORKERS COMP EXCLUSIVITY, BUT THIS CASE DOES NOT INVOLVE BODILY INJURY BY ACCIDENT. IN TURNER THAT, IS WHAT THIS COURT HELD.

WOULD IT COVER NONEMPLOYEE ACCIDENT ON THE PREMISES?

THAT WOULD BE UNDER THE GENERAL LIABILITY POLICY, YOUR HONOR. THE --

I AM STILL TRYING TO FIND OUT, THEN, WHAT DOES THIS COVER, IF IT DOESN'T COVER THIS? I AM TRYING --

YOUR HONOR, SECTION 440.11 ALLOWS AN EMPLOYER EMPLOYEE TO SUE, FOR EXAMPLE, A SUPERVISOR OR A COME EMPLOYEE OR FOR -- A COEMPLOYEE PLOOE, OR FOR EXAMPLE WHO HAVE -- A COEMPLOYEE, OR FOR EXAMPLE THOSE NOT COVERED UNDER NEGLIGENT ACTS AND THAT IS AN EXAMPLE WHERE THE EMPLOYER WOULD BE COVERED.

NOW, GOING BACK TO WHAT WE ARE TRYING TO LOOK AT HERE, WHICH IS THE INTERSECTION OF WHAT WE SAID IN TURNER, AND YOUR POLICY, YOU ARE SEEKING TO HAVE, YOUR PROVISION, YOUR EXCLUSION SAYS INTENTIONAL CONDUCTOR INTENTIONAL ACT?

IT IS INJURY INTENDED BY YOU, YOUR HONOR.

AN INJURY. OKAY. NOW, WE HAVE MADE THE DISTINCTION, AND WE MADE IT IN CTC AND OTHER CASES BEFORE THAT, THAT FOR AN INTENTIONAL TORT, YOU HAVE TO HAVE THE INTENT TO INJURY OR CAUSE HARM. IT IS NOT THE INTENT TO ACT THAT CREATES THE INTENTIONAL TORT. CORRECT?

THAT'S CORRECT, YOUR HONOR.

SO HERE, THE, WHAT WE WERE, THE INTENTIONAL ACT IN, FOR TURNER OR PCR, I GUESS, PCR, WAS THE, WHATEVER THEY DID IN SETTING UP THIS, THE WAY THE BUSINESS WAS BEING OPERATED, SO THAT IT WAS SUBSTANTIALLY CERTAIN TO CAUSE HARM, BUT NOWHERE IN THE TURNER DECISION, DO WE SAY THAT A PREREQUISITE FOR THIS INTENTIONAL, TO MEET THE, YOU KNOW, THE EXEMPTION FOR WORKERS COMPENSATION, DID THERE HAVE TO BE AN INTENT ON THE PART OF THE EMPLOYER TO HARM THE EMPLOYEE, CORRECT?

IN TURNER, YOUR HONOR, WHAT THE COURT SAID WAS THAT THE INTENT TO INJURY IS IMPUTEED. AN INTENTIONAL TORT IS DEFINED AS A TORT IN WHICH THE RESULT IS INTENDED.

BUT EXCEPT FOR THE CASE SWINDLE, WHICH HAD TO DO, OR LANDIS, WHICH HAD TO DO WITH SEX ABUSE, WE HAVE NEVER TALKED ABOUT, IN ALL OF THE OTHER INSURANCE CASES, THAT IT IS JUST SYNONYMOUS WITH, THAT IF YOU HAVE THE, IF YOU ACT WITH HEIGHTENED ACT OF NEGLIGENCE, THAT THAT IS GOING TO EQUATE, FOR INSURANCE COVERAGE, WHAT INTENT TO HARM.

YOUR HONOR -- WITH AN INTENT TO HARM.

YOUR HONOR, AGAIN, AND WHAT THE COURT HELD IN TURNER, WAS THAT THIS WAS NOT A HEIGHTENED LEVEL OF NEGLIGENCE T RECOGNIZED CITING RESTATEMENT SECTION 8-A AND THE SPIFY VERSUS BAT AG ---IN THE SPIVEY VERSUS BATTAGLIA CASE, WHICH IS AN INTENTIONAL TORT WITH AN ELEVATED, RECKLESSNESS, GROSS RECKLESSNESS, INTENTIONAL INJURY, BUT ARE INTENTIONAL TORTS, BECAUSE THE LAW WILL NOT IN THOSE CASES, IMPUTE THE INTENT TO THE ACTOR, BUT THE COURT SAID THAT INTENT IS IMPUTED.

YOU ARE SEEKING TO HAVE THIS EXCLUSION APPLY WITH REFERENCE TO TURNER, BUT WHEN, I ASSUME THIS INSURANCE POLICY WENT INTO EFFECT BEFORE THE TURNER DECISION, DID IT NOT?

YES, YOUR HONOR.

SO WHAT WE HAVE TO BE LOOKING FOR, IS WHAT DID THE PARTIES CONTEMPLATE, WHEN THERE WAS AN INTENTIONAL TORT EXCEPTION, AND I THINK THAT, JUST LIKE THERE ARE CASES THAT YOU KNOW, WHERE YOU SAY YOU CAN'T INSURE AGAINST PUNITIVE DAMAGES, THAT THE CONTEMPLATION WAS SOMETHING WHERE AN EMPLOYER WOULD ACT YOU KNOW, AND STRIKE AN EMPLOYEE AND YOU KNOW, DO AN ASSAULT AND BATTERY, BUT THIS KIND OF SITUATION IS ONE STEP BELOW WHAT WE NORMALLY THINK OF AS AN INTENTIONAL TORT, DON'T YOU AGREE WITH THAT?

NO, YOUR HONOR, I DO NOT. BECAUSE THE DEFINITION THAT WAS RELIED ON IN TURNER, WAS A LONG-ESTABLISHED DEFINITION OF INTENTIONAL TORT UNDER THE LAW OF FLORIDA. IT TRACED BACK TO SPIVEY VERSUS BATTAGLIA AND TO THE RESECTION 8-A, AND IN TURNER, THIS COURT RECOGNIZED THAT ALLOWING SIMPLY WHAT WE CALL SUBJECTIVE INTENT TO INJURY, WOULD BE CALLED AN INTENTIONAL TORT, WOULD BE INSUFFICIENT, BECAUSE IT WOULD ENCOURAGE EMPLOYERS TO TURN A BLIND EYE TO THE RESULTS, THE SUBSTANTIALLY CERTAIN RESULTS, OF THEIR DELIBERATE DECISIONS TO CREATE DANGEROUS CONDITIONS IN PURSUANT OF PROFIT AND SPEED.

IT IS YOUR POSITION THAT THE RATIONALE OF TURNER WAS BUILT ON THE RECOGNITION OF THE INTENTIONAL TORT EXCEPTION.

YES, YOUR HONOR.

AND JUST CONTAINED WITHIN THAT, AND THAT BY HAVING AN INTENTIONAL TORT EXCEPTION HERE, YOU FALL WITHIN THAT SAME UMBRELLA OR IS THAT --

THAT IS OUR POSITION, YOUR HONOR. IN TURNER, THE COURT SAID THAT THE RESULTS, BECAUSE THEY WERE SUBSTANTIALLY CERTAIN, COULDN'T REASONABLY BE CALLED UNEXPECTED OR UNUSUAL. THAT IS THE SAME DEFINITION THIS COURT HAS ADOPTED FOR AN ACCIDENT.

THAT LEADS ME INTO THE QUESTION I WAS GOING TO ASK YOU ABOUT, REGARDLESS OF THE EXCLUSION FOR INTENTIONAL TORTS, CAN YOU ADDRESS YOUR, I THINK YOU HAD AN ALTERNATIVE ARGUMENT THAT THFSZ NOT A -- THAT THIS WAS NOT AN ACCIDENT THAT WAS COVERED BY THE POLICY.

THAT'S CORRECT, YOUR HONOR. AND WE TAKE THAT POSITION, BECAUSE THIS COURT HELD, IN TURNER, THAT, SINCE THE RESULTS COULDN'T REASONABLY BE CALLED UNEXPECTED, BUT IF THE RESULTS ARE NOT UNEXPECTED, IT IS NOT AN ACCIDENT, AND THAT WAS PART OF THE RATIONALE, AGAIN, IN TURNER.

SO HERE YOU ARE PARALLELING WITH, SORT OF THE RATIONALE OF THE WORKERS COMP LAW, TOO, WHICH IS A LAW THAT COVERS WORKPLACE ACCIDENTS.

THAT IS EXACTLY CORRECT, YOUR HONOR.

WHAT HAPPENS TO JUST TO ASK A BROADER QUESTION, THAT WE HAVE AN EMPLOYER THAT WANTS, OBVIOUSLY, TO HAVE COVERAGE FOR EVERY POSSIBLE POTENTIAL LIABILITY, HOW WOULD AN EMPLOYER GO GOOD, WOULD THERE -- GO ABOUT, WOULD THERE SIMPLY IN YOUR VIEW, AND SPECIAL UNDERWRITING FOR THIS KIND OF RISK? IN OTHER WORDS THAT, WOULD THIS HAVE TO BE ACTUALLY DESIGNATED AS CP -- PCR VERSUS TURNER? HOW WOULD, YOU HAVE DESCRIBED THE GENERAL LIABILITY POLICY AND ITS RANGE OF OPERATION, I THINK YOU HAVE DESCRIBED GENERALLY, WHAT THIS COVERAGE IS, ALSO, BUT ASSUMING THAT WE AGREE WITH YOU, HOW WOULD AN EMPLOYER GO ABOUT COVERING THEMSELVES, RECOGNIZING THAT, MAYBE WE COULDN'T GET ANYBODY TO SELL US COVERAGE FOR YOU KNOW, THE SPECIFIC INTENTIONAL ACTS, BUT CAN WE GET COVERAGE FOR THIS?

YOUR HONOR, OUR POSITION, I WOULD ANSWER THAT IN TWO DIFFERENT WAYS. ONE, OF COURSE, IS THAT IT IS POSSIBLE TO WRITE ALMOST ANY LANGUAGE INTO A CONTRACT, BUT THE SECOND AND THE POINT THAT I THINK IS MORE IMPORTANT, IS OUR THIRD ARGUMENT HERE, WHICH IS THAT IT VIOLATES THE PUBLIC POLICY OF THE STATE OF FLORIDA, TO ALLOW INSURANCE IN THIS KIND OF A SITUATION. AGAIN, IN TURNER, THE COURT, CONCERNED WITH THE EMPLOYER TURNING A BLIND EYE AND CONCERNED WITH ENCOURAGING THIS KIND OF WILLFUL IGNORANCE, IF IT ALLOWED ONLY A SUBJECTIVE INTENT TO CONSTITUTE AN INTENTIONAL TORT, WAS CONCERNED WITH WHAT EMPLOYERS WOULD DO. WELL, ALLOWING INSURANCE FOR THAT SORT OF SITUATION --

SO IT WOULD BE THE SAME BAD PUBLIC POLICY AS ALLOWING COVERAGE FOR --

FOR PULLING A TRIGGER OR FOR RELIGIOUS DISCRIMINATION. EXACTLY.

IS GROSS NEGLIGENCE IS, AND I HAVE TO GO BACK AND LOOK AT ALL OF THESE DIFFERENT STANDARDS, BUT IT STRIKES ME THAT THE PUNITIVE DAMAGE STANDARD IS SOMEWHAT SIMILAR TO THE GROSS NEGLIGENCE STANDARD, AND YET YOU SAY THERE ARE POLICIES WRITTEN THAT ENSURE AGAINST IF AN EMPLOYEE, COEMPLOYEE IS ACTING WITH GROSS NEGLIGENCE, COVERS THAT.

YES, YOUR HONOR.

SO THE INSURANCE COMPANY RECOGNIZES THAT THERE ARE ALL OF THESE HEIGHTENED, BUT I DON'T THINK THERE IS AN INSURANCE POLICY, ARE THERE, THAT INSURE AGAINST PUNITIVE DAMAGES?

I DON'T BELIEVE THAT IS ALLOWED UNDER THE POLICY PART OF IT.

BUT WE HAVE GOT TO UNDERSTAND WHAT THE PURPOSE IS OF THE DAMAGES, AND HERE WE ARE REALLY TALKING ABOUT A PLAINTIFF THAT IS SEEKING COMPENSATORY DAMAGES NOT PUNITIVE DAMAGES, CORRECT?

WE ARE TALKING, HERE, ABOUT AN EMPLOYER THAT IS SEEKING TO RECOVER AGAINST ITS INSUROR. THE EMPLOYEES ARE NOT PART OF THIS CASE, OF COURSE. THEY WERE, BUT THEY WERE DISMISSED FROM THE CASE.

SO DO WE HAVE TO INTERPRET TURNER, THEN, SINCE IT WAS INTERPRETING THE INTENTIONAL TORT EXCEPTION, TO REQUIRE SOMETHING GREATER THAN GROSS NEGLIGENCE FOR THE LIABILITY OF THE EMPLOYER TO ATTACH?

I THINK TURNER CLEARLY DOES REQUIRE THAT, YOUR HONOR, AND RECOGNIZES THAT IT REQUIRES SUBSTANTIAL CERTAINTY, AND IN THE DISCUSSION OF SPIVEY VERSUS BATAGLIA AND THE STATEMENT, THE COURT, THE LINE IS DRAWN BETWEEN SUBSTANTIAL CERTAINTY IS THE

LEGAL EQUIVALENT OF INTENT, OF INTENDED RESULT, AND OTHER LEVELS, VERY HIGH LEVELS, PERHAPS, WHICH MIGHT BE RECKLESSNESS OR WILLFUL OR WANTON BEHAVIOR BUT ARE NOT IMPUTEED INTENT CASES, BECAUSE OF THE LEVEL OF CERTAINTY, AND THAT, I THINK, IS CLEARLY SET OUT IN TURNER.

LET ME ASK YOU THIS AS A HYPOTHETICAL. YOUR LIGHT WENT ON, BUT I JUST NEED TO KNOW. SAY WE HAVE AN AUTOMOBILE ACCIDENT, AND SOMEBODY HAS, IS DRUNK AT.20 OR HIGHER, AND WHAT THE -- AT .20 OR HIGHER, AND WHAT THE DEFENSE FINDS OUT IS THAT THEY HAVE DRIVEN AND HAVE 20 PRIOR ARRESTS FOR THAT, AND SO THE PLAINTIFF SUES NOT ONLY FOR THE NEGLIGENCE IN CAUSING THE ACCIDENT BUT, ALSO, SUES FOR PUNITIVE DAMAGES. DO YOU THINK THERE WOULD BE ANY INSURANCE COMPANY THAT COULD TAKE A POSITION THAT THE INTENTIONAL ACT EXCLUSION WOULD APPLY, EVEN THOUGH THE PLAINTIFF MIGHT ARGUE THAT THIS WAS, WHEN THIS DEFENDANT GOT INTO THE DRIVERS SEAT, AN ACCIDENT, AN INJURY WAS CERTAIN TO HAPPEN?

YOUR HONOR, I AM LOOKING QUICKLY FOR THE CASE, BECAUSE THIS COURT HAS HAD THAT CASE AND HAS HELD, ALREADY, THAT ALTHOUGH GETTING DRUNK MIGHT BE AN INTENTIONAL ACT, THE ACCIDENT, THE AUTOMOBILE ACCIDENT, AFTERWARDS, WAS NOT.

THIS IS IN A JOINT TORTFEASOR KIND OF ANALYSIS?

YES. THAT'S CORRECT, YOUR HONOR. AND I THINK THAT IS THE CORRECT RESULT, AND IT IS NOT INCONSISTENT WITH THE RESULT WE SEEK HERE.

YOU DO AGREE THAT THE EXCLUSION WE ARE TALKING ABOUT IN THIS CASE IS NOT AN INTENTIONAL ACT EXCLUSION. IT IS AN INTENTIONALLY CAUSED INJURY EXCLUSION, CORRECT?

THERE IS NO QUESTION ABOUT THAT, YOUR HONOR.

AND, ALSO, YOU DO AGREE THAT, IN ANALYZING CASES ACROSS THE COUNTRY THAT, THE ISSUE WITH REGARD TO WHETHER SOMETHING IS CONSIDERED, QUOTE, AN ACCIDENT, IT DEPENDS UPON THE VIEWPOINT THAT YOU OBSERVED THE EVENTS WHICH OCCURRED, AND IT DEPENDS UPON THE POINT OF THE INJURED OR THE POINT OF THE INSURED. THAT DISTINCTION.

WE RECOGNIZE HERE THAT THIS COURT IS IMPUTED TO DO THAT VIEWPOINT BECAUSE OF THE NATURE OF THE ACTION AND ITS SUBSTANTIAL CERTAINTY, THAT THAT INSURED INTENDED THIS INJURY.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU, YOU ARE IN YOUR REBUTTAL TIME, SO IF YOU WANT TO PAUSE NOW.

THANK, YOUR HONOR.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. JOHN DUVAL FOR THE APPELLEE, PCR.

COULD YOU AT THE OUTSET, ADDRESS JUSTICE LEWIS'S LAST QUESTION, WHERE HE IS TALKING ABOUT THE SPECIFIC LANGUAGE OF THE EXCLUSION.

I THINK, JUSTICE LEWIS'S LAST QUESTION RECITES PRECISELY WHAT JUDGE PAUL FOUND, WHEN HE LOOKED AT 30 YEARS OF TORT LAW IN FLORIDA, WHICH HAS SAID YOU CAN DO AN INTENTIONAL ACT AS IN CLOUD. YOU CAN DO AN INTENTIONAL ACT BUT NOT INTEND THE CONSEQUENCES, THE HARM, THE RESULT, AND THAT IS PRECISELY WHAT THE CHIEF JUSTICE DREW A DISTINCTION IN TURNER, BY DISTINGUISHING BETWEEN THE NEW SUBSTANTIVE

STANDARD, WHERE AN EMPLOYER DELIBERATELY INTENDED TO INJURY, AND IN THAT CASE THERE IS NO QUESTION THAT THE INTENTIONAL LANGUAGE HERE WOULD EXCLUDE COVERAGE, AND THE SECOND PRONG, WHICH IS WHAT WE HAVE IN TURNER, WHICH IS THE EMPLOYER SLOO KNOWN THE OBJECTIVE STANDARD, AND THAT IS WHAT WE ARE ARGUING ABOUT, AND AS JUDGE PAUL FOUND IN HIS WELL-REASONED DECISION, THE FAILURE OF TRAVELERS TO ADOPT A PROVISION FOR EXCLUSION, WHICH RECOGNIZED THE DIFFERENCE BETWEEN A CONSTRUCTION OF WORKERS COMPENSATION LAW AND TORT LAW, IS WHAT MAKES AT THE VERY LEAST, THIS PROVISION --

LET ME SAY THAT I HAVE A CONCERN BEFORE THAT, IF THAT IS WHAT WE ARE TALKING ABOUT HERE, IF YOU ASSUME THAT, IN DEALING WITH THIS VERY KIND OF POLICY, EMPLOYERS LIABILITY AND WORKERS COMP POLICY, THAT THIS COURT HAS SAID THAT, TO DETERMINE WHETHER THERE IS COVERAGE, AS OUR THRESHOLD EXAMINATION, WE MUST CONSTRUE SECTION A OF PART TWO, THE PROVISION THAT EXPLAINS HOW THIS INSURANCE APPLIES. NOW, IF YOU ASSUME THAT IS WHAT WE HAVE SAID THAT THE FIRST THRESHOLD ANALYSIS IS, AS TO THIS VERY KIND OF POLICY, AND THEN YOU SEE THAT THIS COVERS ACCIDENT BY INJURY, AND THEN YOU TURN TO TURNER, AND TURNER SAYS THAT INJURY IS DEFINED, UNDER THE COMP ACT, AS PERSONAL INJURY OR DEATH BY ACCIDENT, ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT. ACCIDENT IS FURTHER DEFINED AS ONLY AN UNEXPECTED OR UNUSUAL EVENT. CONVERSELY THEREFORE, UNDER THE PLAIN LANGUAGE OF THE STATUTE, IT WOULD APPEAR LOGIC TO CONCLUDE THAT, IF A CIRCUMSTANCE IS SUBSTANTIALLY CERTAIN TO PRODUCE INJURY RESULT, IT CANNOT BE SAID THAT THE RESULT IS UNEXPECTED OR UNUSUAL AND THUS AN EVENT SHOULD NOT BE COVERED UNDER THE WORKERS COMP IMMUNITY. NOW, IT SEEMS TO ME THAT, TO GET, WE NEED TO HAVE SOME CONSISTENCY. I MEAN, THESE CASES --

WELL, WITH ALL DUE RESPECT, JUSTICE WELLS THAT, IS THE FALLACY THAT WE WOULD ASSERT IN TRAVELERS ARGUMENT HERE. THEY ARE TRYING TO SAY WE NEED SOME CONSISTENCY BETWEEN APPLICATION OF TORT LAW AND APPLICATION OF WORKERS COMP, AND THIS COURT HAS SPECIFICALLY SAID, IN SWINDLE, AND IN CTC, MOST RECENTLY, IN 1998 OPINION, ACTUALLY NOT MOST RECENTLY, A FEW MONTHS AGO IN CODIAS VERSUS TRAVELERS, THAT YOU DON'T DEFINE THE TERMS THE SAME, THAT THERE IS A DISTINCTION THAT, THERE IS NOT A PARALLELISM. THIS COURT, IN CT --

WE HAVE GOT TO DEFINE "ACCIDENT", WITHIN THE CONTEXT OF THE POLICY, BECAUSE, IN ORDER TO GET, YOU DON'T EVER GET TO THE EXCLUSION, UNDER OUR ANALYSIS THAT WE CAME OUT WITH ON THIS POLICY IN MARCH, UNTIL YOU COME TO THE CONCLUSION AS TO WHAT ACCIDENT "INJURY BY ACCIDENT" MEANS.

BUT THE LAW OF THIS COURT, WITH RESPECT TO CONSTRUCTIONS OF INSURANCE POLICY, IS THAT YOU READ THE TERMS OF THE POLICY TOGETHER. YOU READ THE TERMS OF BODILY INJURY BY ACCIDENT, WITH THE TERMS OF EXCLUSION, AND THE EXCLUSIONARY PROVISION IN THIS POLICY, FAILS TO PROVIDE, FAILS TO PROVIDE THE EXCLUSION THAT THEY ARE SEEKING, WHERE THERE IS NO SHOWING OF SPECIFIC INTENT TO CAUSE THE INJURY. AND THIS COURT HAS SAID THAT, IN CONSTRUING INSURANCE POLICIES, YOU DON'T USE THE SAME CONSTRUCTION OF FORESEEABILITY, WHICH IS WHAT THE COURT USED IN TURNER AND -- ISN'T IT CORRECT THAT -- IN THE TURNER AND --

IF THIS IS CONNECT, THERE IS NO BODILY INJURY COVERAGE TO START WITH.

THAT'S CORRECT, YOUR HONOR, AND HERE THERE CLEARLY IS BODILY INJURY BY ACCIDENT, UNDER THE TERMS OF THE CONSTRUCTION OF THE INSURANCE COVERAGE CASES, NOT UNDER THE TERMS OF THE TORT CASES. THAT IS THE WHOLE, THE FALLACY, WE SUGGEST, IN TRAVELERS REASONING, AND WHAT THIS COURT PUT TO REST IN THE CTC CASE, WHEN IT RECEDED FROM ITS PRIOR POSITION IN GARY OTIS AND SAID THAT TORT LAW, EXCUSE ME, YOUR HONOR HAD, THAT

TORT LAW PRINCIPLES DO NOT CONTROL JUDICIAL CONSTRUCTION OF INSURANCE CONTRACTS.

BUT THOSE PRINCIPLES ARE ALL IN THE GENERAL INSURANCE CONTEXT. THEY DON'T, NONE OF THOSE CASES SPEAK TO THE WORKMANS COMPENSATION CONTEXT, CORRECT, THE CASES YOU JUST CITED, NONE OF THOSE WERE WORKMANS COMP CASES, IS THAT CORRECT?

THAT'S CORRECT.

AND JUDGE PAUL, IN HIS OPINION, SEEMS TO HIT IT ON PAGE 7 OF HIS ORDER. HE SAYS, WHILE THESE CASES INVOLVE A DIFFERENT ISSUE, THEY NEVERTHELESS THE CAST DOUBT ON THE THEORY THAT INTENTIONAL CONDUCT UNDER THE WORKMANS COMP SCHEME, IS IDENTICAL TO INTENTIONAL CONDUCT, WHEN THOSE TERMS ARE USED IN THE INSURANCE CONTRACT, AND ESSENTIALLY YOUR POSITION IS YOU DON'T, DO NOT THINK THAT INTENTIONAL CONDUCT WITHIN THE WORKMANS COMP SCHEME, SHOULD BE THE SAME UNDER A WORKMANS COMP/EMPLOYERS LIABILITY POLICY.

EXACTLY, YOUR HONOR, BECAUSE, GIVEN THIS COURT'S OPINION IN TURNER, WHICH FOLLOWS TO PRIOR OPINIONS -- TWO PRIOR OPINIONS, IN WHICH THIS COURT SAID, IF THE PLEADINGS WERE CORRECT, LAWTON WAS ONE, THEN WE WILL HOLD AN INTENTIONAL TORT, WITHOUT SPECIFIC INTENT, GIVEN THIS, THAT THIS COURT'S LANGUAGE IN TURNER AND ITS PRIOR HOLDINGS, TRAVELERS DID NOT ADAPT THE POLICY TO SPECIFICALLY INCLUDE AN INJURY THAT WAS NOT SHOWN BY, TO BE BY SPECIFIC INTENT.

SO YOUR POSITION IS, WHETHER THIS SAME LANGUAGE WAS IN A GENERAL COMMERCIAL LIABILITY POLICY, AS OPPOSED TO A WORKMANS COMP/EMPLOYERS LIABILITY POLICY, MAKES ABSOLUTELY NO DIFFERENCE.

ABSOLUTELY NO DIFFERENCE. BECAUSE THE CONSTRUCTION THAT THIS COURT HAS SAID APPLIES, IS THE SAME, AND THAT IS THAT, WHEN AN INSURED FAILED TO DEFINE A TERM IN THE POLICY, THE INSUROR CANNOT TAKE THE POSITION THAT THERE IS A NARROW RESTRICTIVE COVERAGE, WHICH IS WHAT TRAVELERS IS TRYING TO DO HERE.

LET'S GO TO TWO DIFFERENT ASPECTS OF WHAT YOU ARE SAYING. ONE WAY, YOU ARE SAYING THAT THERE IS, FIRST OF ALL, A DIFFERENCE, IF THEY HAD USED THE WORD "INTENTIONAL ACT EXCLUSION", VERSUS "INTENTIONALLY CAUSED INJURY", CORRECT?

YES.

SO THAT, UNDER THE EXCLUSIONARY PART, IF IT IS NOT AN INTENTIONALLY-CAUSED INJURY, IT IS NOT EXCLUDED, AND THEREFORE WHAT YOU SAID, IS ANYTHING ELSE WOULD BE AN ACCIDENT, UNDER THIS POLICY?

THAT'S CORRECT, YOUR HONOR.

IS IT DIFFERENT, WOULD IT BE DIFFERENT, IF THEY HAD WRITTEN THE EXCLUSION AS AN INTENTIONAL ACT EXCLUSION?

WELL, THEY CERTAINLY COULD HAVE BROADENED IT, YOUR HONOR. I AM NOT GOING TO TRY TO WRITE THEIR POLICY, BUT ONE EXAMPLE IS THE ALLSTATE POLICY THAT IS IN THE ALLSTATE VERSUS SL, WHERE COVERAGE WAS UPHELD BY DISTRICT JUDGE DAVIS IN THE SOUTHERN DISTRICT, WHERE THEY SAID, WHICH BODILY INJURY WHICH MAY REASONABLY BE EXPECTEDED TO RESULT FROM THE INTENTIONAL OR CRIMINAL ACT OF AN INJURED PERSON. OR WHICH, IN FACT, WAS INTENDED, SO THERE COULD BE BROADER LANGUAGE WHICH WOULD COME CLOSER THAN THE LANGUAGE HERE.

BUT GOING BACK TO THE ISSUE AS TO WHETHER THE REST OF THE PIE IS THAT ANYTHING ELSE THAT IS NOT AN INTENTIONALLY CAUSED INJURY, IS AN ACCIDENT, WE, THOUGH, HAVE DEFINED "ACCIDENT", AS SOMETHING THAT IS NOT EXPECTED OR INTENDED, FROM THE POINT OF VIEW OF THE INSURED.

RIGHT.

NOW, IF, IN, AND MAYBE I AM GOING TO GET INTO THE FALLACY THAT YOU SAID I AM NOT SUPPOSED TO GET INTO HERE, BUT IF WE HAVE DEFINED AN ACCIDENT IN TURNER, AS BEING, SAYING THAT IS NOT AN ACCIDENT, BECAUSE IT WASN'T, BECAUSE IT WAS EXPECTED, AND HOW CAN THIS BE AN ACCIDENT, AND IT IS REALLY NOT, SO REGARDLESS, AND GOING BACK TO JUSTICE CANTERO ASKED THIS, WHAT IS YOUR ANSWER TO WHETHER, WHY IS THERE COVERAGE AS AN ACCIDENT AS OPPOSED TO I MAY AGREE THAT THERE IS NOT AN EXCLUSION BECAUSE IT IS NOT AN INTENTIONALLY CAUSED INJURY. I AM HAVING A LITTLE PROBLEM WITH HOW IT IS AN ACCIDENT.

BECAUSE TO USE THAT DEFINITION OF ACCIDENT, YOUR HONOR, YOU GO TO THE TORT DEFINITION OF FORESEEABILITY. AS IN SWINDLE, IN THIS COURT'S OPINION, WHERE THE GUN DISCHARGED, WHERE AFTER AN ALTERCATION, THE FELLOW COMES UP, STICKS A LOADED GUN IN THE WINDOW WITH HIS FINGER ON THE TRIGGER, AND IT DISCHARGES, AND THE COURT SAID THAT, IN THAT INSTANCE, THAT THERE WOULD NOT BE COVERAGE, BECAUSE IT WAS NOT AN INTENTIONAL ACT. IN THE SAME WAY IN PHOENIX INSURANCE VERSUS HELTON, WHERE HE DROVE THE CAR INTO THE CROWD, SO THESE ARE INTENDED --

IN TURNER, WE SAID THAT THIS WAS A SITUATION WHERE THE INJURY WAS SUBSTANTIALLY CERTAIN TO PRODUCE INJURY OR DEATH, SO BY DEFINITION, WASN'T INJURY FORESEEABLE?

IT CLEARLY WAS, AND IN THE TERMS OF TORT LAW, IT WAS FORESEEABLE, AND WHAT I AM SUGGESTING, YOUR HONOR, IS THAT, IN CTC AND THE OTHER CASES INVOLVING INSURANCE CONTRACT CONSTRUCTION, THIS COURT HAS SAID THAT THE IDEA OF FORESEEABILITY SIMPLY DOESN'T APPLY. THAT, BECAUSE YOU CONSTRUE THE TERMS OF THE POLICY AGAINST THE INSUROR, BECAUSE YOU CONSTRUE THE EXCLUSION TERMS --

WEREN'T THOSE CASES INTENTIONAL TORT DEFINITION CASES?

WELL, THEY ARE CONSTRUCTION CASES, WITH RESPECT TO THE NATURE OF THE POLICY.

BECAUSE THE ISSUE NOW, WAS WHETHER THIS WAS AN ACCIDENT, AND AN ACCIDENT, UNDER MOST DEFINITIONS, IS SOMETHING THAT IS UNEXPECTED, AND IF IT IS SOMETHING THAT IS SUBSTANTIALLY CERTAIN TO PRODUCE INJURY, HOW CAN WE SAY IT IS UNEXPECTED?

WELL, YOUR HONOR, YOU READ THAT TERM "ACCIDENT", WITHOUT THE FORESEEABILITY, NUMBER ONE, AND NUMBER TWO, YOU HAVE TO LOOK AT THE POLICY TOGETHER WITH THE EXCLUSIONARY PROVISION, AND AS JUDGE PAUL SAID, WHEN YOU VIEW IT WITH THE EXCLUSIONARY PROVISION, WHICH THEY HAVE INSERTED THERE, TAKEN TOGETHER, THERE IS AN AMBIGUITY WITH RESPECT TO WHETHER IT SHOULD INCLUDE AN INTENTIONAL ACT AS DEFINED BY TURNER, WITHOUT SPECIFIC INTENT TO INJURY.

BUT IF WE DON'T AGREE THAT YOU HAVE TO JUST GO AND SAY WHATEVER IS AN INTENTIONALLY CAUSED INJURY IS AN ACCIDENT UNDER THIS POLICY, AND YOU GO, YOU WERE MENTIONING THE CASE WHERE SOMEONE DRIVES A VEHICLE INTO A CROWD, AND THERE WAS OR WASN'T COVERAGE?

IN THAT CASE, THEY SAID THERE WAS NO COVERAGE. I AM SORRY, THAT, IN THAT CASE, THEY SAID THAT THE POLICY EXCLUSION THAT THE INJURY WAS NOT CAUSED INTENTIONALLY, AND

THEREFORE, THERE WAS COVERAGE UNDER THE POLICY, WHICH PROVIDED FOR BODILY INJURY CAUSED BY INTENTIONALLY BY THE INSURED.

SO THERE WAS NO ISSUE IN THAT CASE ABOUT WHETHER IT FELL WITHIN THE DEFINITION AFTER ACCIDENT. THE ISSUE WAS WHETHER IT WAS AN INTENTIONAL TORT OR NOT.

THAT'S CORRECT. AND UNDER THE ACCIDENT PROVISION WITHIN THE POLICY, YOU HAD TO GET OVER THAT HURDLE BEFORE YOU GET TO THE EXCLUSION. THE EXCLUSION WAS WHAT WAS BEING ASSERTED. AND SIMILARLY IN CLOUD, WHERE THE INSURED PUSHED THE CAR OUT OF THE WAY AND INJURED THE PERSON IN THE CAR. CLEARLY THERE WAS AN INTENTIONAL ACT AND THE INSURANCE COMPANY SOUGHT TO SAY THERE WAS NO COVERAGE BECAUSE IT WAS AN INTENTIONAL ACT. NEVERTHELESS THE COURT SAID THAT THEY WOULD FOLLOW THE MAJORITY RULE AND THAT COVERAGE WAS NOT EXCLUDED WHERE THERE WAS AN INTENTIONAL ACT BUT DID NOT INTENTIONALLY CAUSE THE INJURY. AND THAT, YOUR HONOR, IS PRECISELY WHERE WE GET BACK TO, IN TERMS OF THE TURNER CASE, WE SUGGEST.

WHAT DO YOU SAY ABOUT THEIR PUBLIC POLICY ARGUMENT HERE, THAT THIS WOULD BE TANTAMOUNT TO APPROVEING INSURANCE COVERAGE FOR INTENTIONAL ACTS?

THE CASE THAT MOST COVERS THAT ACT, PRECISELY DRAWS WHAT THIS COURT DREW IN TURNER,AND THAT IS TWO TYPES OR TWO TIERS, ONE WHERE THERE WAS A SPECIFIC INTENT TO INJURY, AND ANOTHER WHERE IT WAS SUBSTANTIALLY CERTAIN TO OCCUR. AND IN HARSAI, THE PRESENCE OF INSURANCE WOULD ENCOURAGE THOSE WHO DELIBERATELY HARM ANOTHER, IT WAS SAID BY THE COURT. HOWEVER, IN CASES WHERE INTENT IS INFERRED FROM SUBSTANTIAL CERTAINTY OF THE INJURY, IT HAS LESSER CERTAINTY ON THE TORTFEASORS ACTIONS BECAUSE IT DOES NOT SHOW THE INTENT OF THE TORTFEASORS PURPOSE. AND IN THAT CASE, THAT COURT SAID PUBLIC POLICY DOES NOT PROHIBIT AN EMPLOYER FROM INSURING AGAINST COMPENSATORY DAMAGES, AND OF COURSE AS THIS COURT POINTED OUT IN BAL HARBOUR, UNLIKE RELIGIOUS DISCRIMINATION CASES, HERE THERE ARE POSSIBLE REMEDIES, INCLUDING CRIMINAL REMEDIES WHICH WOULD BE BROUGHT TO BEAR, SO THEREFORE IT WOULD NOT INSURE AGAINST PUBLIC POLICY, AS A COMPENSATORY LOSS AS WE HAVE HERE. PROFESSOR ROSS SAID ALL INSURANCE WAS CONDEMNED, BECAUSE IT ENCOURAGED WRONGFUL ACTION, BUT WHEN THE COURTS BEGAN RECOGNIZING THAT THE PURPOSE OF INSURANCE WAS TO COMPENSATE THE INDIVIDUALS, RATHER THAN TO DETER THAT, THE IDEA OF LIABILITY INSURANCE WAS ACCEPTED AND, IN DEED, ENCOURAGED, AND THAT --

ARE YOU FAMILIAR WITH THE RECENT AMENDMENT TO THE WORKERS COMPENSATION LAW?

I AM, YOUR HONOR.

YOU ARE?

I AM.

SO IT SEEMS TO ME THAT THE, WITHOUT LOOKING AT THE HISTORY ON THIS, IT LOOKS LIKE THE LEGISLATURE HAS REALLY OVERRULED TURNER, IN TERMS OF NOW SAYING IT HAS TO BE VIRTUALLY CERTAIN TO RESULT INJURE, AND THAT THEY HAVE TO HAVE DELIBERATELY CONCEAL OR MISREPRESENT THE DANGER. AND, REALLY, YOU DON'T NEED TO, IT SEEMS TO ME THAT IF THAT IS THE CASE, IT IS GOING TO BE A VERY NARROW SITUATION.

I DON'T READ IT THAT WAY, YOUR HONOR. I READ IT AS THE LEGISLATURE HAS MADE MORE SPECIFIC, WHAT IS REQUIRED TO BE SHOWN, IN TERMS OF PRIOR ACTIONS, AND THAT, PROBABLY, BLEEDS INTO THE NEXT CASE, RATHER THAN THIS ONE, BUT I DON'T BELIEVE IT OVERRULES TURNER.

FOR YOUR SITUATION, BUT IF WE HAD SAID VIRTUALLY CERTAIN, AGAIN, AT THAT POINT, YOU NO LONGER, IF SOMETHING IS VIRTUALLY CERTAIN TO OCCUR WITH YOUR ACTION, CAN YOU CONCEIVE OF A SITUATION WHERE THAT WOULD EVER BE AN ACCIDENT?

I THINK YOU CAN FIT WITHIN, I THINK EMPLOYEES WILL ATTEMPT TO FIT WITHIN THE NEW DEFINITION OF THE LEGISLATURE, TO OBTAIN CAUSES OF ACTION.

THEY HAD MIFER A CAUSE OF ACTION BUT THE QUESTION IS WHETHER THE EMPLOYER WILL BE ABLE TO GET IT COVERED.

IT IS CERTAINLY A TOUGH ERODE, BUT I THINK THAT THE CASE, THAT THERE MAY BE CASES, EVEN UNDER THIS HEIGHTENED LANGUAGE UNDER THE NEW STATUTE, WHICH ATTEMPTS TO CONSTRUE THIS COURT'S CASE IN TURNER.

LET ME EXPLORE THE PUBLIC POLICY ARGUMENT WITH YOU AGAIN. IN TURNER, THE COURT SEEMED CONCERNED ABOUT WHAT IT THOUGHT WERE THE EGREGIOUS FACTUAL CIRCUMSTANCES IN THAT CASE. FOR EXAMPLE, APPELLANTS PRESENTED EVIDENCE OF AT LEAST THREE OTHER UNCONTROLLED EXPLOSIONS AT PCR IN JUST UNDER TWO YEARS, TO SUPPORT THEIR CLAIM THAT PCR KNEW OF A HIGH-RISK OF INJURY OR DEATH ON NOVEMBER 22 TLARNKS IS A LOT OF OTHER FACTS IN THE OPINION, WHICH SEEMED TO INDICATE THAT PCR NEW THAT -- KNEW THAT, WHEN YOU COMBINE THESE CHEMICALS, EXPLOSIONS OCCUR, AN EXPLOSIONS CAN INJURY PEOPLE. WHY SHOULD THE PUBLIC POLICY OF THE STATE BE TO ENSURE AGAINST AN EMPLOYER'S KNOWING USE OF EXPLOSIVES, WITHOUT LETTING THE EMPLOYEES KNOW ABOUT THE HIGH-RISK INVOLVED AND LETTING THEM OPT OUT?

WELL, THOSE EXPLOSIONS, THE OPINION, OF COURSE, TOOK THE ALLEGATIONS OF THE AMENDED COMPLAINT AND THE EXPLOSIONS WERE ACTUALLY CONTAINED WITHIN A CONTAINER. THERE WAS NO INJURY OR SUGGESTION OF INJURY TO ANY OTHER EMPLOYEE. THIS WAS THE FIRST INSTANCE IN WHICH THIS HAS OCCURRED, SO THE FACTS AS ALLEGED IN THE COMPLAINT, SOUND A LITTLE MORE DAMNING TO THE EMPLOYER, BUT FOR THE SAME REASON THAT ANY EMPLOYER SHOULD BE ABLE TO BUY LIABILITY INSURANCE, FOR COMPENSATORY DAMAGES, BECAUSE THOSE, THE, IT IS TO THE BENEFIT, NOT ONLY OF THE EMPLOYER BUT TO THE EMPLOYEE, BECAUSE IF YOU TAKE AWAY AND SAY, AS A MATTER OF PUBLIC POLICY, INSURANCE CANNOT COME WHERE YOU HAVE EITHER SUBSTANTIAL CERTAINTY OR GROSS NEGLIGENCE OR WHEREVER YOU WANT TO PUT THE BAR. THEN YOU RISK HAVING INJURED WORKERS, WITHOUT BEING COMPENSATED, A BECAUSE VERY FREQUENTLY, AS THE COURT KNOWS, EMPLOYEES IN THIS SITUATION SIMPLY GO OUT OF EXISTENCE, AND WITHOUT INSURANCE, THEY WOULD HAVE NO COMPENSATION.

WE ALREADY HAVE A PUBLIC POLICY AGAINST INSURING INTENTIONAL TORTS, SO EMPLOYERS CANNOT INSURE THEMSELVES AGAINST BATTERY, AGAINST AN EMPLOYEE, OR DEAF OR ANY OTHER -- OR DEFAMATION OR ANY OTHER INTENTIONAL TORT AGAINST AN EMPLOYEE, SO WHY SHOULDN'T THERE BE A PUBLIC POLICY SAYING WHERE INJURY IS TO BE CERTAIN TO OCCUR AND THE EMPLOYER KNOWS ABOUT IT, YOU CAN'T INSURE AGAINST THAT, EITHER.

BECAUSE, YOUR HONOR, I WOULD RESPECTFULLY SUGGEST THAT THAT IS NOT WHERE THE LINE SHOULD BE DRAWN, IN TERMS OF PROTECTING THE WORKER, BECAUSE THAT IS THE PURPOSE OF THE INSURANCE IS TO PROTECT NOT ONLY THE EMPLOYER BUT THE INDIVIDUAL, AND BY MAKING THE DISTINCTION THAT THIS COURT MADE IN TURNER, CERTAINLY WHERE YOU HAVE A SUBJECTIVE TEST, AND YOU SHOW THAT THERE IS A KNOWING INTENT AS IN THE TORTS YOU ARE TALKING ABOUT, THAT IS ONE LEVEL, BUT SUBSTANTIAL CERTAIN IS AN OBJECTIVE TEST, WHERE THERE IS NO SHOWING OF A SPECIFIC INTENT, AND CERTAINLY IN THOSE CASES, INSURANCE SHOULD BE PERMITTED.

BUT IN TURNER, DID WE REDUCE THE STANDARD OF LIABILITY FROM INTENTIONAL TORT TO

SOMETHING LOWER, OR ARE WE JUST INTERPRETING WHAT INTENTIONAL TORT MEANT?

I THINK YOU MADE A TWO-PRONGS OR TWO LEVELS OF INTENTIONAL TORT. ONE, KNOWING THE SUBJECTIVE LEVEL, AND THE OTHER, SUBSTANTIALLY CERTAIN, KNOWN OR SHOULD HAVE KNOWN, AND SO IN EFFECT, YOU MADE A CATEGORY OF INTENTIONAL TORT THAT WAS EASIER TO PROVE AND PREVAIL ON, AND ONE THAT DID NOT REQUIRE A SHOWING THAT THE EMPLOYER HAD THE INTENT TO INJURY.

CHIEF JUSTICE: WITH OUR HELP, YOUR TIME.

THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME? THREE MINUTES.

THANK YOU, YOUR HONOR.

COUNSEL, COULD YOU ADDRESS IN THIS PUBLIC POLICY KIND OF SITUATION, ARE YOU AWARE OF ANY LOCATION WHERE IT IS AGAINST PUBLIC POLICY THAT AUTOMOBILE COVERAGE APPLIES WHERE SOMEONE HAS BEEN DRINKING OR IS INTOXICATED? THAT IS AGAINST PUBLIC POLICY.

I PERSONALLY AM NOT AWARE OF THAT.

ARE YOU AWARE OF ANY CASES, FOR EXAMPLE, PEOPLE FIRING WEAPONS IN A POPULATED AREA IN A HUNTING SITUATION, AND IT IS MISDIRECTED, AND IT STRIKES SOMEONE, OF BEING AGAINST PUBLIC POLICY, FOR THE DISCHARGE OF FIREARMS COVERING IT?

I THINK THAT THE ANSWER TO THAT WOULD PROBABLY BE NO, YOUR HONOR.

SO I AM HAVING DIFFICULTY IN UNDERSTANDING WHY, WHEN YOU HAVE GOT SOMEONE ENGAGED IN LEGITIMATE BUSINESS AND, IF THEY ARE A FOOL, THEY HAVE GOT WORKERS COMPENSATION, BUT IF THEY ARE A DOGGONE FOOL, THEY HAVE NO COVERAGE, IT IS AGAINST PUBLIC POLICY, AND WE CAN'T LET THESE PEOPLE BE COVERED. I AM HAVING REAL DIFFICULTY IN UNDERSTANDING THAT CONCEPT, WHEN IT IS TO PROTECT AN EMPLOYER. YOU AGREE THEY DIDN'T INTEND WITH A SPECIFIC INTENT, TO HURT THIS FELLOW.

YOUR HONOR, AS A MATTER OF LAW, THEY INTENDED, BECAUSE THAT IS WHAT THIS COURT HAS CONCLUDED.

AS A MATTER OF LAW, IF I FIRE A WEAPON AND THAT WEAPON MAY, MAY, CLEARLY IT IS FORESEEABLE THAT SOMEONE IS GOING TO BE STRUCK BY THE PROJECTILE COMING OUT OF THAT WEAPON, HOW IS THAT DIFFERENT?

THIS IS MORE THAN FORESEEABILITY, YOUR HONOR. THAT IS THE POINT. ALL OF THE 30 YEARS OF TORT HISTORY THAT COUNSEL HAS CITED WERE FORESEEABILITY CASES N SWINDLE, THIS COURT AMEND THE CERTIFIED QUESTION, TO MAKE IT CLEARLY THAT -- CLEAR THAT IT WASN'T DEALING WITH A SUBSTANTIAL CERTAINTY CASE. TURNER IS A SUBSTANTIAL CERTAINTY --

FIRE AGO WEAPON, PROJECTILE, IS SUBSTANTIALLY CERTAIN TO DO DAMAGE IF IT STRIKES SOMEONE.

I THINK THE COURTS WOULD SAY THAT, IF YOU FIRE A WEAPON INTO A DROUD -- A CROWD, YES THAT, IS A INTENDED INJURY, EVEN IF YOU DIDN'T MEAN TO HIT THE PERSON YOU HIT. ON THE OTHER HAND, IF YOU FIRE A WEAPON WHILE YOU ARE HUNTING, AND YOU HAPPEN TO HIT SOMEBODY.

IN A POPULATED AREA.

BUT YOU ARE NOT FIRING IT INTO A CROWD, AND COURTS HAVE DRAWN, AND THOSE ARE ALL FACT-SPECIFIC CASES AND COURTS HAVE DRAWN --

BUT AGAIN, WE ARE TALKING ABOUT PUBLIC POLICY AGAINST COVERAGE FOR BAD BEHAVIOR, ARE WE NOT?

WE ARE TALKING ABOUT PUBLIC POLICY SEEKING TO AVOID COVERAGE THAT WILL ENCOURAGE A PARTICULAR INTENTIONAL BAD BEHAVIOR, AND THAT IS WHAT THIS COURT FOUND IN TURNER.

HOW WOULD COVERAGE HERE, ENCOURAGE THIS EMPLOYER TO BLOW UP EMPLOYEES? I AM MISSING THAT.

BECAUSE WHAT THIS COURT FOUND IN TURNER, WAS THAT THE EMPLOYER WAS RACEING TO MEET A DEADLINE. IT PUT PROFIT, AND THE COURT SAID THIS, IT PUT PROFIT AHEAD OF EMPLOYER SAFETY. IF THE COST TO THE EMPLOYER OF DOING THAT IS SPREAD TO OTHER EMPLOYERS, THEN A PROFIT MAXIMIZING EMPLOYER WILL DO IT MORE OFTEN.

SO ALL THE FORD MOTOR CASES, THE PINTO CASES, THE, THERE SHOULDN'T HAVE BEEN INSURANCE TO COVER THE COMPENSATORY PART OF THEIR ACTIONS?

YOUR HONOR, I DON'T WANT TO OPINE. ION THE FORD MOTOR CASES.

BUT THAT IS WHAT WE HAVE. YOU HAVE GOT SO MANY CASES WHERE YOU HAVE GOT A LEVEL OF PUNITIVE DAMAGES, BUT NEVERTHELESS IT IS STILL AN ACCIDENT, FROM THE POINT OF VIEW OF THE COMPENSATION, THAT IS BEING AWARDED.

BUT THIS COURT HAS SAID AND THIS IS A WORKERS COMPENSATION RELATED POLICY, THAT THIS IS NOT AN ACCIDENT. LET ME, IF I MAY, READ FROM CTC.

CHIEF JUSTICE: VERY BRIEFLY.

IT SAYS IN SOME CASES THE QUESTION OF WHETHER THERE IS AN ACCIDENT, WILL BE DECIDED AS A MATTER OF LAW, SUCH AS IN CASES WHERE THE INSURED'S ACTIONS ARE SO INHERENTLY DANGEROUS OR HARMFUL THAT INJURY WAS SURE TO FOLLOW. THAT IS THIS CASE, BECAUSE THAT IS WHAT THIS COURT HELD IN TURNER AND THEREFORE NO ACCIDENT AND IT IS THERE FOR CONTRARY TO PUBLIC POLICY TO INSURE THIS CASE.

CHIEF JUSTICE: ALL RIGHT. WE WILL HAVE TO CONCLUDE ON THAT NOTE. WE THANK YOU ALL VERY MUCH.