Curtis Jones v. Martin Electronics, Inc.

PLEASE RIS E .

LADIES AND GENTLEMEN, THE FLORIDA SUPREME C OURT. PLEASE BE SEATE D .

W ELCOME A GAIN . THE NEXT CAS E O N THI S COURT'S DOCKET IS C UR TI S JONES V ER SU S MAR TI N ELECTRONICS. WHO IS GOING TO B E A RGUI NG FOR THE PETITIONER?

YOUR HONOR, I'M B OB C OX AND I WILL A EAR FOR THE PETITIONER.

THANK YOU. YOU MAY P ROCEED.

I WOULD LIK E T O S PRUCE MY CO-COUNSEL , TOM IRV IN A ND OF COURSE BEN CRU MP W IT H P AR KS AND CRUMP AND O UR C LIEN TS , CURTIS A ND ANN IE J ONES. IF I AM T O P ERSUAD E T HI S COURT OF ONE THING TODAY IT IS THA T THI S COU RT R EDUCES S IMPLY TO PRE SE RV IN G WORKPLACE SAFET Y A ND W HETH ER AFTER TODAY THERE WILL BE A NY TEETH IN T HE D ETER EN T FOR I NT EN TI ON AL E MP LOYE R MISCONDUCT OR W HETH ER EMPLOYERS WILL BE ALLOWED TO MANEUVER AN I NJ UR ED WORKE R INTO A HOB SO N' S CHOI CE . THE MONEY HE N EEDS T O F EE D HIS FAMILY OR G AMBLE ON A RISKY , DANGEROUS L AWSUIT WHERE T HE EMPLOYER KEE PS IMMUNITY FOR ALL C ONDU CT JUST SHO RT A N I NTEN TION AL TORT.

WELL, THE -- G O A HEAD.

I JUS T W ANT T O U NDER STAN D SOMETHING PROCEDURA LLY , I N THESE WORKERS' COMPENSAT ION CASES N ORMA LL Y AND I F SOMEONE IS INJURED, N OR MA LL Y DOES THE CAR RI ER S TART PAY ING F OR M ED ICAL EXP ENSE S OR DOES THE PER SO N' S P ERSONAL HEALTH I NS UR ANCE , DO THEY N ORMALLY U SE T HA T FIRST , B ECAU SE I G UESS O NE OF THE THINGS I HAVE A PROBLEM WITH HERE IS THIS GUY WAS S ER IOUSLY I NJ UR ED A ND THE W OR KERS ' C OM P CARRIER STARTED PAYIN G T HE BILLS, BUT IN A N OR MA L SITUATION, WOULD THOSE B IL LS HAVE BEEN P AI D B Y THE PERSON'S PERSONA L I NSURANCE CARRIER?

AS I UNDERST AND IT , NORMALLY IN A C AT AS TR OPHI C INJURY THE EMP LOYE R W IL L FILE THE NOTICE O F I NJ UR Y . AND THAT'S THE W AY I T WIL L P ROCEED NORMALLY AND THAT'S THE WAY IT PROCEEDED IN T HI S CASE. MR. JONES WAS IN THE HOSPITAL AND MARTIN ELECTRONICS FILED THE NOTICE.

SO IN A NORMA L , N OT A CATASTROPHIC, BUT ANY N OR MAL I NJURY ON THE JOB , T HE PERSON GETS TREATED T HR OUGH HIS OWN INSURANCE CAR RIER I S MY QUESTION OR T HROUGH THE COMPANY'S?

NORMALLY IT WOULD B E THROUGH THE COMPA NY 'SBECAUSE THAT IS THE LEGISLATIVE BARGAIN AND LET ME RETURN TO THAT BARGAIN BECAUSE I THINK WHAT THE Y ARE DOING HERE IS BASICAL LY CHANGING THE DEA L. EVERY COURT THAT HAS ANNUAL IDESED THIS QUESTION AND THIS -- ANALYZE D THIS QUESTION AND THIS COURT HAS S AID THE W ORSE RS - - WO RKERS' COMP S YSTE M. THEY GET E XP EN SE S AND A LIMITED RECOVERY AND T HE Q ID PROPER QUO IS THAT MANAGEMENT GETS IMMUNIT Y FOR ALL CONDUCT UP TO A ND JUST SHORT OF INTENTIONAL T OR TS . BUT T HIS COURT S AI D O VE R A ND OVER AGAIN I NTENTI ONAL T OR TS WERE NOT PART OF THAT BARGAIN , B UT M ANAG EMEN T G ET S A FRE E P AS S FOR E VE RYTH IN G UP T O A ND J US T S HO RT O F I NTENTIONAL CONDUCT, AND , M R. JOHNSON STILL

HAS IT.

CAN W E ADD RESS R EA LL Y WHAT WE ARE S PEAK IN G T O H ER E , AND THAT I S ADD ITIO NA L CONDUCT DURING THE PAYMENT OF BEN EF IT S W HERE T HE RE H AS BEEN SOME CON TR OV ER SY, S OM E CONFLICT AND THERE IS A CTUA L , A P RO CE ED IN G O R A CONTROVERSY IN LIT IG ATION WITH REGARD T O THOSE B ENEFITS. WE'RE NOT TALKING ABOUT JUST SIMPLY A CAS E WHE RE COM P B EGINS PAYING AND I T J UST GOES OUT ITS N ORMA L C OU RSE. PLEASE ADDRESS AND DIRECT YOUR ATTENTION IF YOU CAN T O WHY OR W HY NOT T HAT A CTIV IT Y OF ASSER TI NG A C LA IM F OR B ENEFITS D OE S N OT ALTER T HE SCENARIO IN CONNE CT ION W ITH WHAT WE ARE TALKING A BO UT AND CERTAINLY WE REC OGNI ZE THE INTENTIONAL T ORTS ARE D IFFERENT THA N N ON WO RKPL AC E INJURIES OR, YOU KNOW , NON WORK-RELATED, SOMETHIN G LIKE THAT. SO PLEASE DIRECT YOUR ATTENTION TO THAT.

BECAUSE TO I NTER PR ET IT THAT WAY, WOULD C HA NGE THE D EAL . THE DEAL W AS T HE E MP LO YE E GETS COMP AND THE EMPLOYE R GETS IMMUNIT Y F OR NEGLIGENCE. THEY STILL HAVE IT. THEY ARE NOT GOING TO GIVE IT UP. THE CONSIDERATION WAS THAT HE GOT COMP. HE SHOULD BE ENTIT LE D TO ENFORCE T HAT L EGIS LA TI VE DEAL BECAUSE I NT ENTI ONAL TORTS WERE NEVER A PART OF THAT BARGAIN.

LET'S J UST STOP I T A ND LET'S ASSUME IN THAT SNOIR YO THA T T HE - - S CE NA RI O T HA T THE C ARRIER FOR THE EMP LO YER HAD NOT MADE A B EN EFIT PAYMENT, HAD NOT M AD E A SINGLE PAYMENT OF ANY KIND AND YOU O N B EH AL F OF T HE INJURED WORKER HAD I NI TI ATED COMP PROCEED IN GS , D EM AN DING PAYMENT OF WAGE L OS S A ND MEDICAL BENEFITS. W OULD T HA T CAU SE A WAI VE R O F THE C LA IM FOR T HE C IRCU IT COURT ACTION?

NO , AND - -

SO YOU R P OS IT IO N I S T HERE IS NOTHING THAT T HE WORKER CAN DO THAT W OULD C AU SE A W AIVER OF THAT P OS ITIO N ? MAKE SURE WE UND ER ST AND SO WE ARE CLEAR .

B EC AU SE T HE E MP LOYE R ALWAYS GIVES U P T HE NEG LIGENCE. THAT IS A VERY V ALUA BLE PRICE. IF WE P ROVE A $ 50 M IL LI ON CASE.

YOU BETTER STAY BY THE MICROPHONE.

AND THEY P ROVE THEY CAN ALWAYS BE FRE ED FROM NEGLIGENCE. THE QUI D PR O QOU WAS Y OU GET COM P AND W E G ET F RE ED OM FRO M NEGLIGENCE.

YOUR P OSITION IS THERE IS NOTHING INCON SIST EN T A BOUT GETTING COMP A ND A LSO RET AINING T HE R IG HT W HICH I S NOT W IT HI N COM P T O A SUI T O R THE I NT EN TION AL CONDU CT O F T HE DEFENDANT?

OF C OURSE.

I'M JUS T WAN T T O MAK E SURE --

THAT REMED Y I S A N ADDITIONAL DETERENT S AN CT IO N THAT SERVES A VITAL P UBLI C PURPOSE.

SO WHERE IN THE STATUTES? WE'RE DEALING W ITH W HA T T HE LEGISLATURE INTENDED. WHERE -- COULD YOU P OI NT T O US WITHIN THE STRUCTURE O F THE S TATUTE W HE RE T HA T I S CLEARLY SET F ORTH O R IS I T A P OLICY DECISION THAT YOU ARE MAKING?

WELL , C ER TAINLY IT IS FOUNDED ON ALL OF T HE P OLIC Y , BECAUSE THE DETERENT K EE PS WORKPLACE --

DOES THAT MEAN THERE ISN'T ANYTHING YOU CAN LOOK TO IN THE W OR KERS' C OMPENSATION LAW T HAT W OULD SUORT THIS ARGUMENT?

I THINK SO , YO UR HON OR , BECAUSE BASICALLY --

THERE ISN 'T A NY THING?

IF YOU I NT ERPR ETED T HE COMP ACT THAT WAY, THE EMPLOYEE WOULD HAVE TO GIVE UP NEG LI GENCE I N O RD ER T O PUR SUE THE I NT ENTI ONAL TORT. THERE IS NO Q UI D PRO QUO , BUT THE ARGUM ENTS A RE N OT INCONSISTENT.

SO YOU ARE ARGUING IT WOULD BE UNCONSTITUTIONAL IF IT WAS I NT ER PRETED T HA T W AY ?

WHAT --

WAIT , WAIT. S IR , F IR ST G ET B Y THE MICROPHONE. SECOND OF ALL TRY TO ANS WER MY QUESTION.

I'M SORRY.

SO Y OU R ARGUMENT W OULD BE THAT IT W OULD BE UNCONSTITUTIONAL B EC AUSE THE E MPLOYER NEVER HAD IMM UN IT Y FOR INT EN TI ONAL TOR TS , S O T O GIVE U P THE W ORKE RS ' COMPENSATION B ENEF IT S T O P URSUE AN INT EN TIONAL T ORT WOULD BE THE EMPLOYE E WAS NOT - - WAS G IV ING U P SOMETHING THAT HE NEVER H AD TO GIVE UP; IS THAT Y OUR ARGUMENT?

HE WOULD BE GIV IN G UP SOMETHING HE DIDN'T HAVE TO GIVE UP AND THEY ARE STI LL KEEPING WHAT THEY GOT . THEY ARE KEEPING THE IR E ND OF THE BAR GAIN. THEY KEEP IMM UNIT Y FOR NEGLIGENCE. THERE IS N O MUT UA L IT Y. IF THIS WAS A P RIVA TE CONTRACT WE WOULD S AY IT I S ELUSARY BECAUSE THEY G ET T O KEEP THE CONSIDERATION BUT WE HAVE T O GIVE UP WHAT WE GOT.

LET'S GO BACK TO T HE ORIGINAL CIRCUMSTANCE.IT IS YOUR POSITION THAT YOUCAN FILE BOTH A WORKERS' COMPENSATION CLAIM FOR BENEFITS, AND A LS O P RO CE ED F OR A T HIRD P ARTY A CTIO N I N CIRCUIT COURT , AND THE STATU TE AS INT ERPR ET ED BY THE DEFENSE WOULD SAY, WELL , REALLY WHAT YOU ARE DOING IS YOU ARE GOING TO P ER MIT T HE WORKERS TO GO AHE AD AND F IL E AND LITIG AT E ENT IR ELY THEIR E NTIRE WORKERS' COM PE NS ATION BENEFIT CLAIM, AND THE N T UR N EVERY CASE INTO AN INTENTIONAL TORT AND L ET THE WORKERS GO AHEAD AND PROCEED WITH THE L AWSUIT B ECAUSE THAT A FF IRMATIVE ACTION O F LITIGATING AND CLAIMING THOSE BEN EFIT S , Y OU ARE CERTAINLY NOT A SSERTING THA T THEY ARE ENTITLED T O- O H E I S ENTITLED TO BOTH. DOES THE DEFENDANT GET A N OFF SE T FOR T HOSE ?

THERE IS N O DOUBLE RECOVERY.

YOU SEE THE ARGUMENT COMING BACK IS T HAT YOU ARE TURNING EVERY COMP C LAIM INTO A THI RD -PAR TY C LA IM A S WELL, WHICH R EALLY DEF EA TS THE SYSTEM FOR WHICH IT W AS DESIGNED.

BUT WHEN I T C OURT D EC ID ED TURNER, THA T WAS A LWAY S T RU E AND WHEN T HE LEG ISLATURE KEPT THE INTENTIONAL T OR T EXCEPTION, WHICH THEY DID, THEY RESTRICTED IT. T HEY DID NOT R EQ UI RE THE EMPLOYEE TO LEK T B ET WEEN ONE OF THE TWO. -- E LECT BETWEEN ONE OF THE TWO. KENTUCKY DOES. WHEN THE L EGISLATURE T OO K THIS UP T HE NEXT YEAR , THE LEGISLATURE DID NOT I MPOSE THIS, BUT IN KEN TU CKY YOU HAVE TO PRO VE ONE OR T HE OTHER, BUT AT LEAST T HE EMPLOYEE GETS AN E NHAN CED BENEFIT IF HE CAN

PROVE T HE EMPLOYEE W AS GUI LTY O F INTENTIONAL CONDUCT. HERE THERE IS NO QUI D P RO QUO. AS LONG AS THEY GET T HE IR IMMUNITY FOR N EGLI GENCE , WE GET COMP. INTENTIONAL T ORTS WERE NEVER PART OF THAT DEAL AND IT IS NOT I NCONSI ST ENT. I KNO W I T WAS A N A CC IDEN T O R WASN'T AN ACCIDENT A RG UMEN T . THE ANSWER TO THAT IS FAR SMARTER THAN MY MIND IS IN THE NORTH C AROLINA SUPREME COURT. THE NORTH CAROLINA COURT SAID, YOU HAVE A D EF INIT IO N I N COM P O F DID THE E MP LOYE E E XPECT THE EVENT T O O CC UR . CURTIS JONES DID N'T K NO W THAT T HE H EXAN E V APOR S COU LD REACH T HE ELE CT RI C S YS TEM.

DOES THE CLAIM UND ER TURNER, DOES IT F AL L O UT SI DE THE COMP SYSTEM?

YES.

OKAY. AND S O STA TU TORY D EF ENSE I S - - ARE NOT E LI MI NA TE D , I MEAN COMMON-LAW D EF EN SES ARE NOT ELIMINATE D?

ABS OLUTELY NOT.

SO THA T T HE RE I S A DIFFERENCE BETWEEN PROCEEDING IN T HE TORT SYSTE M A ND P ROCEEDING U ND ERWORKERS' COMP?

ABSOLUTELY.

AND S O T HAT' S W HA T I 'M HAVING TROUBLE WIT H I S I T SEEMS TO M E T HA T O UR C AS E L AW HAS A LWAY S R ECOGNI ZE D THAT T HE RE I S A N ELE CTIO N O F R EMEDIES U NDER - - B EC AUSE O F THE FACT THA T T HERE I S A , I F YOU C OME WITHIN THE C OM P SYSTEM YOU GET T HE BENEF IT OF DOING AWAY WIT H THE ASSUMPTION OF THE R ISK AND C OMPARATIVE NEGLIGENCE , A ND THAT'S THE Q ID PRO - - QUID PRO QUO F OR THE COM IN G W ITHIN THE A UTOM AT IC P AYME NT REGARDLESS OF F AU LT . NOW, BUT Y OU DON 'T GET THE ADVANTAGE OF THE TOR T S YSTE M , AND SO THERE I SN'T T HI S I DE A OF AN E LECTIO N R EMED Y.

BUT ISN'T THE CON TR ACT , ISN'T THE D EAL , THEY H AD IMMUNITY FOR E VE RYTH IN G EXCEPT TRULY C UL PABL E CONDUCT. THEY KEEP T HA T IMM UN IT Y. WE DON'T G ET - - T HE C OURT SAYS W E G ET A LL OWED T O SUE I N TORT. WE DON'T. WE HAVE TO PROVE ONE OF THE MOST DIFFICULT PROOF STANDARDS IN THE LAW. THEY S TILL KEEP A VER Y VALUABLE ASSET. THEY HAVE A FREE P AS S F OR EVERYTHING SHORT OF TRULY CULPABLE CONDUCT. THAT IS VERY VALUABLE. THEY WON'T GIVE IT UP. THAT IS THE QUI D PRO Q UO F OR C OMP. IT WAS NOT THE QUI D P RO Q UO FOR INTENTIONAL TORTS BECAUSE THAT REQUIRES A N EXTRA SANCTION.

IN LOOKING A T T HE RE SEEMS TO BE CASE LAW T HA T G OES BOTH WAYS IN THE OTHER STATES, T HAT IS THA T Y OU'V E G OT CONNE CTICUT , A ND N ORTH CAROLINA AS YOU M ENTI ONED THAT SAY T HAT Y OU C AN P UR SU E BOTH AND THEN Y OU H AVE ARKANSAS AND SOME OTHER STATES THAT SAY THAT YOU CAN'T . ARE YOU SAYING THAT T HE DIFFERENCE IN THE STATES THAT SAY THAT YOU C AN AND T HOSE THAT SAY Y OU C AN 'T L IE IN WHA T T HE S TA TUTE SAY S A ND THAT'S WHAT I, A GA IN , O R I S IT A P OL IC Y D ECISIO N O F T HE COU RT AS T O W HAT ELE CTIO N OF REMEDIES WOULD MEAN I N T HA T CONTEXT ? > > J US TICE P ARIENTE, I'V E READ THEM ALL , AND I'M SUR E YOU HAVE, IT JUST SEEMS T O BE A CHOICE BETWEEN CONSISTENCY AND THE PUBLI C PURPOSE OF DET ER ING WOR KPLACE. IN NORTH CAROLINA , CONNECTICUT, NEW JERSEY , THE COURT SAYS HOW CAN A N INJURED W ORKER G IVE UP T HE MONEY HE NEEDS TO S PO FE RT HIS FAMIL Y - - S UP PO RT H IS FAMILY TO TAKE A R ISKY T HR EE OR FOU R- YEAR L AW SU IT O N T HI S IMP OSSIBLE STAND ARD? THEY SAY HE WON'T DO IT. AND BECAUSE HE WON'T D O I T , THERE IS N O D ET EREN T F OR EMPLOYER M ISCONDUCT A ND THA T SANCTION IS A V ITAL P UBLI C PURPOSE.

BUT THIS I S WHAT I W AN T TO MAKE SURE. THAT SOUNDS LIKE A LEGISLATIVE DETERMINATI ON

. THAT'S WHY I KEEP ON TRYING TO GET YOU BACK T O W HE THER THERE IS L AN GUAGE W IT HIN OUR W ORKERS' COM PENSATION STATUTE THAT WOULD SUP PO RT YOUR INT ER PRETATION O F T HA T P ARTICULAR A RGUMENT.

I THINK IT I S , BECAU SE I F T HE LEG ISLATURE I NT ENDE D F OR THE EMP LOYEE T O G IVE U P B OT H NEGLIGENCE AND INT EN TI ON AL T ORT I N E XCHANG E F OR COMP , THEY WOULD HAVE SAID THAT. T HE LEGISLATURE WHEN IT MODIFIED TURNER AFTER THIS COURT'S DECISION, SPECIFICALLY KEPT THE INTENTIONAL TORT E XCEP TI ON AS A S EP AR AT E R IG HT , B UT T HE BASIC DEA L I S C OM P FOR NEG LIGENCE.

NOW, YOU CAN'T - - YOU 'V E PUT ELECTION O F REM ED IE S BY NEGLIGENT SUIT A ND W OR KE RS ' COMPENSATION CLAIM. IF I AS A WORKER , AM INJUR ED BY THE NEGLIGE NCE O F M Y EMP LOYER , I C AN 'T B RING A LAWSUIT A GAINST MY E MP LOYE R FOR NEGLIGENCE, CAN I ?

NO, YOU CAN'T.

THERE IS NO ELECT IO N O F REMEDIES THERE.

THERE IS NO ELECTION AT ALL.

THE ONLY TIME W E H AV E ALIED ELECTION OF R EMED IE S WAS WHERE IT WAS AN ISSUE O F WHERE THE E MP LOYE R/ EM PL OY EE WAS IN THE COURSE AND SCOPE OF HIS EMP LO YMENT AND BY O R NOT A ND B Y F ILIN G THE LAWSUIT AND STATING T HAT T HE EMPLOYEE WAS NOT WITHI N T HE COURSE AND SCOPE. IT W AS - - I T W OULD BE INC ONSISTENT TO THEN C LA IM WORKERS' COMPENSATION, CORRECT?

ABSOLUTELY RIGHT. IT HAS ALW AY S B EEN A LI ED TO ENT IT LEMENT. WHETHER YOU ARE IN THE SYSTEM OR NOT, BUT YOU ARE STILL IN THE SYSTE M B ECAUSE THERE IS NO DOUBT H E WAS INJURED ON THE JOB. THE QUESTION IS : I S T HERE A N ADD ITIONAL DET ER EN T SAN CT IO N FOR D EL IB R AT MIS CO ND UC T AND THIS COURT SAYS T HERE WAS AND THE LEGISLATURE, ALTHOUGH THEY RESTRICTED IT THEY KEPT IT. THE L EGIS LATURE DID NOT TAKE AWAY THE RIGHT TO COMP , THE BASIC DEAL MUST STAY I N PLACE. THEY ARE CHANGING THE DEA L.

WELL , THE CAS ES S AY THA T T HE PLAINTIFF CAN P ASSI VE LY RECEIVE BEN EFIT S A ND S TILL HAVE AN I NTENTI ON AL T OR TS CLAIM, CORRECT?

CORRECT.

SO T HAT A RE YOU SAYIN G THAT HE H AS TO FEED H IS FAMILY AND ALL OF THAT , B UT HE IS GOING T O B E R EC EI VI NG C OMPENSATION FROM EITHER THE CARRIER OR THE EMPLOYE R IN THE MEANTIME ALL O F THA T I S REQUIRED UNDER THE CURRENT CASE LAW IS THAT HE NOT FIL E A CLAIM FOR W OR KERS ' COMPENSATION AND CLAIM THAT THIS WAS AN ACC IDENT. HE CAN R EC EIVE ALL OF THE BENEFITS THAT THE CARRIER GIVES HIM AND STILL R ETAI N THE RIGHT TO FILE AN INTENTIONAL TORT CLAIM.

YOU ARE G IVIN G THE EMPLOYER'S LAWYER A WEAPON. THE E MP LO YE R' S LAWYER CAN SAY, DEN Y B ENEF IT S A ND H E WILL SAY DENY BEN EF IT S A ND FORCE HIM TO GIVE UP HIS INTENTIONAL T ORT EXCEPTION, BECAUSE THE EMP LO YER' S LAWYER MUST PROTECT HIS CLIENT'S P OCKETBOOK. IF HE G ETS A S WORD T HA T SAYS HE CAN PUT THE EMPLOYER IN THE COR NER A ND S AY C HO OS E , INTENTIONAL TORTS OR BENEFITS, H E W ILL D EN Y B ENEFITS. IF THE EMPLOYER EVER FIL ES THE T URNER CASE HE W ILL S TO P PAYING BENEFITS AND S AY Y OU ELECTED. THAT'S IN THEIR E CO NOMI C INTEREST TO DO THAT. THEY WILL TAKE THAT WEAPON AND USE IT AND YOU C AN'T BLAME T HE M B ECAUSE T HAT' S THEIR JOB.

IS IS T HE RE A NY K IN D O F STATUTE THAT WOULD P RO VI DE SANCTIONS TO THE INSURANCE

CARRIER FOR D EN YI NG COM PENSATION , WO RKERS' COMPENSATION BENEFITS THATARE OBVIOUSLY AVA IL ABLE?

NOT THAT I KNOW OF. YOUR HONOR, I SEE MY TIM E IS UP. LET ME JUS T CONCL UD E BRIEFLY.I ASK YOU T O JOIN YOUR COLLEAGUES ON THE COURTS OF CONNECTICUT, NEW JERSEY , NORTH CAROLINA , L OU IS IA NA A ND NORTH CAR OL INA T HA T H AVE ANALYZED THIS. I COMMEND TO YOU THE IR OPINIONS BUT IN T HE F INAL ANALYSIS, I K NO W T HAT YOU CAN REACH EITHER R ESULT IN THIS CASE A ND J US TIFY I T. THE REAL QUESTION IS THIS : WILL Y OUR O PINION B E A DETERENT T O E MPLO YE R MISCONDUCT O R A N I NV IT ATIO N T O E MPLO YE R M IS CHIE F T O CAPRICIOUSLY D ENYI NG BENEFITS AND GAI NING AS A N INTENTI ONAL ACT IMMUNITY THAT THE LEGISLATURE NEVER GAVE IN THE C OM PA CT . > > THANK YOU VERY M UCH. M R. JOHNSON?

MAY IT PLEASE T HE C OURT. I'M FRED J OHNSON. I R EPRESENTATIVE MARTI N ELECTRONICS.WITH ALL DUE RESPECT TO MR. COX' ARGUMENT, I DON'T THINK THIS IS R EA LL Y G OO D ABO UT TRYING T O PRO VIDE A D ETERENT. THIS IS ABOUT ELECTION OF REMEDIES AND WHETH ER O R N OT THAT LONG-ES TA BLIS HE D POLICY , THAT DOCTRINE OF L AW IS GOING TO S TA ND .

YOU R O ONENT PRESE NTS A VERY I M PA SSIO NE D PLE A T HI S MORNING AND DO YOU SEE I T ALSO AS A P OLICY KIND O F DECISION WHY THE COURTS I N DIFFERENT STATES HAVE GONE IN DIFFERENT DIRECTIONS OR IS THERE A DIFFERENCE IN THE UNDERLYING STATUTES?

THERE IS N O - - I T HINK I T I S A POLICY. IT IS A POLICY DECISION. ONE THING I WOULD SAY TO YOU IF YOU READ T HE WOO DS ON C AS E FROM N OR TH C AROLIN A YOU WILL SEE THAT IN THAT CAS E ALTHOUGH THE PLAINTIFF PETITIONED FOR BENEFITS SHE HAD NEVER ACTUALLY R ECEI VE D A NY B EN EFIT S AND THA T' S THE DISTINCTION THAT WOULD B E - - MAY OR M AY N OT B E A LI CABL E BUT IT SEEMS IMP OR TANT TO M E BECAUSE THE REAL QUESTION IN THIS CASE IS CAN Y OU T AK E INCONSISTENT POSITIONS.

THAT'S WHAT I WOULD LIKE TO FOCUS ON B EC AU SE I 'M N OT AS CLEAR THAT THI S I SN'T A STATUTORY CONSTRUCTION ARGUMENT AS EITHER YOU O R MR. COX IN THIS W AY . FOR THERE TO BE A N ELE CT ION OF REMEDIES T HE R EMED IE S MUST BE INCONSIST ENT. > > THAT'S CORRECT. > > AND I T S AY S A ND C OEXISTENT.

AN EST OP PE L A RGUM EN T.

HERE IF T HE L EG ISLA TU RE , IT IS A QUESTION OF W HETHER THE LEGISLATURE THAT DID NOT PLACE INT EN TIONAL T ORTS WITHIN THE IMMUNITY P ROVISION INTENDED , THEREFORE, WHEN THE I NJ UR Y WAS A R ESULT OF I NTENTI ON AL A CTS , BUT A CC ID EN TAL FROM THE POINT O F VIEW OF THE EMPLOYEE WHO DIDN'T INTEN D IT, FOR T HA T E MPLOYE E T O GET WORKERS' COM PENSATION BENEFITS, AS W EL L A S T O H AV E THE E MPLO YE R NOT , Y OU KNOW , ENJOY IMMUNITY. SO IT DOESN'T L OOK TO M E LIKE THE L EGIS LA TU RE MANDATED AN ELECTION , B UT THAT THESE WERE C UMULATIV E REMEDIES. IN OTHER WORDS, THE WORKER GETS HIS BENEFIT S FRO M THI S C ATAS TROPHIC INJURY , A ND DOES NOT THE EMP LOYER , I T SAYS DOES NOT ENJOY IMMUN IT Y FOR I NT ENTI ONAL A CT IO NS A ND WHY ISN'T THAT , I GUESS , I N F AIR R EA DING , O F T HE STA TU TE , I MEAN WHAT IS T HERE IN T HE STATUTE THA T WOULD SAY T HA T THAT ISN'T WHAT THE LEGISLATURE INTENDED?

I THINK WE CAN A GREE T HA T INTENTIONAL ACT F AL LS OUTSIDE OF WORKE RS ' C OM P , BUT W E ALS O CAN A GREE THA T IT IS NOT SPECIFICA LLY S ET FORTH IN THE STATU TE.

LET ME SAY IF A N I NTENTIONAL ACT F AL LS OUTSIDE WORKERS' COMP FOR I MMUNITY PURPOSES B ECAUSE YOU ARE NOT SAYING THA T I F YOU WERE - - A CTED INTENTIONALLY AND T HE W OR KE R HADN'T ELECTED TO P UR SU E BUT INSTEAD BUT THEY W ANTE D WORKERS' COMP T HE N Y OU W OULD DENY WORKERS' COMP B EN EFIT S ON THE G RO UNDS THA T M Y CLI ENT'S

ACTIONS WER E T OO EGREGIOUS TO BE I N T HE RE. THEY'VE GOT TO SUE US IN TORT.

COULD HAEN THAT WAY.

SO YOU THI NK THAT THE LEGISLA TURE I NT ENDED T O D EN Y IMMEDIATE BENEFITS F OR WORKERS' COMPE NS ATION THE MORE OUTRAGEOU S T HE EMPLOYER'S ACTIONS WERE ? > > I THINK I T C OU LD H AEN THAT WAY.

ISN'T THAT WHE RE T HE INCONSISTENCY IS, BECAUSE AS I SAID, N ORMA LL Y THE ISSUE IS WHETHER SOMEONE IS ELIGIBLE OR N OT. YOU WOULD BE SAY IN G T HA T T HE EMPLOYEE IS NOT E LI GIBL E F OR W ORKERS' COM PE NSATION BENEFITS BECAUSE THE ACT WAS I NTENTIONAL, BUT B Y ELE CT IN G WORKERS' COMPE NSATION BENEFITS THE EMPLOYEE IS ESSENTIALLY SAID THE A CT IONS WER E A CCIDENTAL A ND T HAT' S WHY THEY ARE GETTING BENEFITS.

I THINK YOU HIT O N I T RIGHT THERE. THE IN CONSIS TE NCY COM ES ABOUT BECAU SE I N C OM P Y OU ALLEGE THAT IT WAS A N ACCIDENT WITHIN THE COURSEAND SCOPE O F EMPLOYMENT , AND YOU GET YOUR N O-FA UL T BENEFITS. WHAT THE P ET IT IONERS ARE SUGGESTING IS THAT YOU CAN DO THAT AND GET THO SE N O-FAULT B ENEFIT S AND T HE N EITHER S IM UL TA NEOUSL Y O R THEREAFTER YOU CAN S AY W AI T A MINUTE. I'M GOING TO M AK E ALLEGATIONS OF INTENTIONAL ACT AND YOU'VE GOT T O UNDERSTAND NO ONE IS S AYIN G , ALTHOUGH M R. COX W AS QUI TE C YNICAL ABOUT H OW B AD THE INDUSTRY IS, NO ONE IS SAYING THAT MAR TI N ELE CTRONICS INTENDED TO BLOW UP THEIR BUILDING AND SHU T DOWN THEIR P RODUCTION. THEY ARE SAYING I T WAS A N ACCIDENT IN THE CONTEXT O F T HE TUR NE R STA NDAR D. SO T HE I N CO NS IS TENC Y , I F YOU WILL, COMES ABO UT F RO M C ALLING IT A N A CCID EN T FOR PURPOSES OF WORKERS' COMP AND CALLING IT A N I NTENTIONAL ACT FOR PUR PO SE S OF THE T OR T S UIT. THAT'S THE IN CO ND IT IONS CONSISTENCY.

WHERE IS THERE REA LLY A N INCONSISTENCY IF WE V IEW IT FROM THE STANDPO IN T O F T HE EMPLOYEE SAYING I'M A T LEA ST ENTITLED T O T HE SE STA TUTORILY P ROVI DE D F OR BENEFITS UNDER THE WORKERS' COMP SCHEME A S I WOULD B E ENT ITLED T O I NS URAN CE B ENEFITS FOR INSTA NC E , AND I MAY BE E NT IT LE D T O E VE N M OR E IF I C AN PRO VE T HE SE ADDITIONAL ACTS , YOU KNO W , BY THE EMPLO YE R , B ECAU SE WHAT - - ONE O F THE CON CERN S I HAVE , IT S EEMS T O M E THA T WHEN A JURY , FOR INS TA NC E , FINDS FOR THE E MP LOYE R I N T HE INTENTI ON AL CAS E , T HE Y ARE NOT SAYING T HA T T HE EMPLOYER IS FRE E OF ANY RESPONSIB ILITY FOR COMPENSAT ING THAT EMPLOYE E. REALLY WHAT THEY ARE SAYING IS THA T W E F IN D T HA T , N O , T HAT'S ALL THAT THE E MP LO YE E IS ENTITLED TO IS T HE WORKERS' COMPENSATION BENEFITS. THAT THIS W AS N' T THE OUTRAGEOUS OR T HE INTENTION AL T HING , A ND S O BUT UNDER T HE WAY WE WOULD H AV E T HI S , THE RE WOULD NEVER B E THA T OORTUNITY FOR THAT TO HAEN. SO WHY, I T HINK I T W AS T HE CHIEF JUSTICE THA T A SKED A QUESTION ABOUT WHETHER THIS WAS A CUM ULAT IV E S CHEM E AND ISN'T IT REALLY A C UM ULAT IV E SCHEME? WHY IS T HE RE ANY INCONSISTENCY IN SAYING AT THE OUTSE T I'M A T LEAST ENT ITLED TO T HESE B ENEF IT S , BECAUSE IT HAENED O N T HE JOB, AND THIS IS W HA T WORKERS' COMP, Y OU K NO W , WAS ORDINARILY ASSIGNED TO C OVER , AND I MAY B E , I F I C AN PRO VE THI S V ER Y H IG H REQ UIRE MENT THAT THE LEGISLATURE HAS SAID, I MAY BE ENTIT LE D TO E VEN MORE, AND O F C OU RS E THE EMPLOYER, IF IT W AS HELD LIABLE UNDER THAT E VE N MOR E WOULD BE ENTITLE D T O ANY O FF SE T FOR T HOSE INITI AL B ENEF ITS THAT WERE P AID. WHY WOULDN'T THAT BE A BETTER READING OF THE STATUTORY SCHEME?

I UNDERSTAND YOUR QUESTION. THE REASON IT WOULDN'T BE A BETTER READING IS B EC AUSE THE EMPLOYER, T HE EMP LO YER G ETS N OT ONL Y I MMUN IT Y F OR NEGLIGENCE, HE GET S ONE O F THE THINGS HE GETS FOR PAYING THE P RE MI UM S A ND PROVIDING THESE BENEFIT S IS NOT TO BE SUB JECT T O T HE T ORT SYSTEM. IT I S A N U NWIELD Y S YS TE M A ND IT IS EXP EN SIVE . I CAN READ QUO TE S FRO M T HIS COURT THAT TALKS ABOUT HOW THE PURPOSE OF

WORKERS' COMP IS D EFEATED I F EXC EPTIONS ARE CONSTRUED B RO AD LY AND WHAT YOU ARE SAYIN G , J US TICE ANSTEAD IS THAT E VERY CASE THEY WILL GET TWO BITES A T THE A LE. EVERY CASE THEY WILL GET THEIR WORKERS' COMP AND THE Y WILL GET THE B ENEFIT S A ND THEN IF T HEY C AN P RO VE SOM E MORE EGREG IOUS C ONDU CT . NOT T RUE INTENT AS WE KNO W IT IS NOT TRUE I NT ENT. IT IS A N OBJEC TI VE S TA NDAR D , BUT THEN THEY CAN GO INT O COURT AND Y OU 'V E DEF EA TE D WORKERS' COMP , BEC AUSE T HE PERSONNEL --

BUT THAT'S WHAT THE LEGISLATURE HAS PROVIDED. THE LEG ISLATURE H AS PROVI DE D , WE'VE GOT THIS O RD IN AR Y S CHEME , A ND THE N IF Y OU CAN PROVE THIS VERY E LE VATE D SITUATION HERE, YOU CAN G ET EVEN MOR E , O KA Y , B UT I N OTHER WORDS IT REALLY I S A DAMAGES ISSUE, I S I T N OT? THAT IS , T HA T Y OU W OULD BE ENTITLED TO THE SAME DAMAGES YOU WERE ENT ITLED T O UND ER W ORKERS' COMPE NSATION , B UT MORE. I MEAN , U NDER THE INTENTIONAL?

YES, SIR. I ASSUME YOU'RE TALKINGABOUT THE L ATEST L EGIS LATION THAT WAS PUT I N PLA CE I N RESPONSE TO --

WELL , T HE L EGISLATURE HAS ALWAYS HAD S OM E E XCEP TION S IN THE WORKERS' C OM P SCH EM E F ROM DAY O NE .

YES. I T HI NK A RG UEAB LE Y YES, B UT I WOULD SUGGEST WIT H ALL DUE RESPECT IT HAS BEEN PRETTY MUCH A CREATURE OF THE C OURT SYSTEM, THIS EXC EPTION.

BUT UNDER YOUR S CHEME THEN, WHAT YOU ARE S AYIN G I S THAT IF AN EMP LOYE E H AS A NY REASON TO BEL IE VE T HA T T HERE MIGHT BE SOM E I NTEN TI ONAL CONDUCT BASED O N HOW W E HAV E INTERPRETED INTENTIONAL CONDUCT, THAT THE E MPLO YEE THEN HAS TO C OM E O UT O F POCKET WITH ALL MED ICAL EXPENSES, ALL LIVIN G EXPENSES UNTIL I T H AS B EE N DETERMINED WHE TH ER O R N OT THE E MP LO YER DI D , I N F AC T , I NTENTIONALLY ACT ? T HAT'S WHERE WE WOU LD B E LEFT UNDER YOU R S CENA RI O , RIGHT?

I THINK I WOULD AGREE WITH YOU. I WOULD AGREE WITH YOU, Y OU WOULD BE LEFT AND IT WOULD IN A F AC T M AK E T HE CAS E T HA T FALLS OUTSIDE OF WORKERS' COMP THE R AR E EXC EP TION , WHICH THIS COURT HAS S AI D THAT'S THE P URPO SE , A ND V IRTUALLY EVERY WOR KP LA CE ACCIDENT SHOULD B E C OVER ED UNDER COMP.

AND EVERY W ORKPLACE ACCIDENT REALLY IS, ISN'T IT? I MEAN, WHETHER THERE I S INTENTIONAL CONDUCT OR JUST NEGLIGENT CONDUCT THE Y A RE ALL COVERED U NDER THE WORKMAN'S C OM P C OMPE NS ATION ACT, CORRECT?

YES, YES.

SO WHY S HOUL D -- I G UE SS I T GOES B ACK T O JUS TICE ANSTEAD'S QUESTION WHY SHOULD THE EMPLO YE E BE P UT TO THE TROUBLE O F H AV IN G T O G O OUT OF P OC KE T W HE TH ER H E D EFINITELY I S E NT ITLE D TO THE W ORKERS' COMPE NS ATION BENEFIT EVEN IF IT IS DETERMINED IT WAS A NEGLIGENT ACT?

I T HI NK J US TI CE Q UINC E I N RESPONSE TO YOUR QUESTION I WOULD SAY THAT ARE YOU S UGGESTING THAT YOU SHOUL D TREAT A SLIGH TLY I NJUR ED EMPLOYEE DIFFERENT T HA N A D EVASTATEDLY INJURED EMPLOYEE?

NO, THAT'S WHAT YOU A RE SUGGESTING.

NO, I AM NOT E ITHER. I'M S UGGESTING Y OU S HO UL D TREAT THEM BOTH EXACT LY THE SAME.

BOTH BEING ENTITLED T O WORKERS' COMP ?

AND I F THE Y GO T O WORKERS' COMP T HEN THA T' S THEIR REMEDY.

WHAT I U ND ERST OO D T HE - - THIS T O F AL L UPO N I S THA T WHERE WE CAM E DOW N W IT H TURNER AND I NT EN TI ON AL T OR TS IS THAT T HA T DEF IN ITIO N TAKES THIS OUT OF T HE R EA LM OF BEING AN ACC ID EN T . > > E XACTLY.

AND THAT T HE W ORKERS ' COM P STA TUTE P ROVI DE S COVERAGE WHEN T HERE I S AN A CCIDENTAL INJ UR Y. NOW, THAT'S W HAT I UNDERSTOOD .

AND I THINK YOU'V E SAI D THAT, JUSTICE W EL LS . YOU SAID IT I N , I BEL IEVE YOU SAID IT I N T HE CAS E O F TRA VELERS VERSUS P CR I N Y OU R DISSENT, A ND I T HI NK J USTI CE Q UINCE IN H ER DIS SENT A GREE D WITH YOU, AND HERE' S WHAT YOU SAID: JUS TI CE W ELLS , I N YOUR DISSENT YOU S AI D I F IN D IT I NC OM PA TIBL E W ITH C OMMON SENSE AND LOGIC TO HOLD THAT THE SAME D EATH S A ND INJ UR IE S ARE NOT CAUSED BY A N ACCIDENT FOR PURPOSES OF EMPLOYER'S LIABILITY FOR WORKERS' COMPENSATION IMMUNITY FROM COM MON- LA W LIABILITY , B UT ARE C AU SE D B Y ACCIDENT FOR PURPOSES OF THE SAME EMPLOYER HAVIN GI NG COMMON-LAW LIABILITY WHICH IS COVERED BY A N E MP LOYE R' S LIABI LITY INSURANCE P OLICY ALYING ONLY TO INJURIES CAUSED BY ACCIDENTS.

BUT NOW THE CASE YOU A RE QUOTING FROM IS A G EN ER AL LIABILITY P OLICY.

JUSTICE BELL WROTE T HE MAJORITY OPINION AND JUSTICE BELL EXPLAINED THE BASIS FOR IT WAS T HA T YOU C ONST RU E INSURANCE POLIC IES DIFFERENTLY THAN YOU CONSTRUE STATUTES.

BUT LET'S GO BACK TO THA T BASIC QUESTION. IT SEEMS TO ME THA T I N THE DISCUSSION, THE CONCEPT O F ACCIDENT HAS D EVEL OPED I N THE REVERSE AND I T H AS D EE FL ED -- DEVELOPED FROM A D ISCUSSION OF THE NONIMMUNITY FROM INTENTIONAL TORTS BECAUSE COULD YOU DIRECT OUR A TT EN TION TO T HE PRECISE S TATU TO RY P ROVI SION THAT SAYS WORKERS' COMPENSATION BENEFITS ARE PAID ONLY IF THERE IS A N A CCIDENT AS O OSED T O C AS ES WHICH H AVE DRAWN T HE DISTINCTION BET WEEN INTENTIONAL TORTS D IS CU SSIN G THE EXCLUSIVE REMEDY.

I THINK AS CLOSE A S I T COMES IS IT DEFINES ACCIDENT.

BUT T HAT' S I N T HE DEFINING WHAT IS N OT AN INT ENTIONAL TORT.

RIGHT.

BECAUSE YOU LOOK AT THE REQUIRED B ENEF ITS S ECTION AND I T DOES NOT REA D A S NORMAL, QUOTE , NOR MA L I NSURANCE POLICIES SAYIN G WE WILL PAY IN C ASE OF ACCIDENT. IT DOESN'T SAY THAT , DOES IT?

NO.

SO Y OU D ON'T F IN D THE WORD DEFINING OF THE PAYMENTS IN THE STATUTE?

YOU DON'T. YOU DON'T.

AND ALSO LET ME A SK ABOUT THE OTHER QUESTION. Y OUR ARG UM ENT WOULD LEAD US TO CONCLUDE T HAT I F A N INJURED WORKER PRO CEED ED WITH AN INTEN TION AL A CT CLAIM AND L OST IN C IR CU IT COURT, THE JURY SAID , NO , THAT'S JUST NEGLIGE NCE , Y OU ARE OUT BECAUSE THAT'S AN ELECTION OF REMEDIES AS W EL L , WOULDN'T YOU?

I WOULD ABSOL UTELY SAY THAT AND I WOULD CITE Y OU TO THE CASE OF I T HINK I T' S - - I

THINK IT I S T HE H UN E VERSUS T OM ASON WHE RE T HA T VERY THING HAENED AND THE FIRST DCA S AID , H EY , Y OU SUED IN CIR CU IT COURT CLAIMING I DON 'T R EMEM BE R I F THEY CLAIMED THEY WEREN'T I N THE COURSE AND SCOPE OF THEIR EMPLOYMENT.

THAT'S A DIFFERENT STORY. I THINK WE GET I NTO P RO BLEMS IF WE START M IXIN G COURS E AND SCOPE O F EMPLOYMENT WITH INTENTIONAL ACT BECAUSE ONE IS I NCON SI ST ENT WHE RE AS T HE INTEN TIONAL ACT YOU ARE STILL WITHIN THE COURSE AND SCOPE OF YOUR EMPLOYMENT. YOU ARE JUST F IGHT ING ABOUT HOW T HE ACC IDENT HAENED. NOT WHETHER Y OU WERE AT W ORK OR INJURED AT WORK.

I W OULD D IS AG REE WITH YOU , YOUR HONOR, AND THE REASO N I WOULD SAY THAT IS B EC AUSE EVEN T HO UG H T UR NE R IMP UTES INTENT , I T HINK JUS TI CE WELLS I N H IS D IS SENT A LS O IN T HE CASE O F TUR NE R V ER SU S PCR IN TAL KI NG A BOUT - - I N THAT C AS E JUS TI CE WEL LS S AI D THAT THE R EA L D ISTI NC TION I S THAT AN ACCIDENT, THERE I S INTENT TO HARM.

THE PROBLEM, A ND JUS T , THE PROBLEM IN C IT ING THE DISSENT IS THAT IT IS A DISSENT.

BUT - -.

B UT G O A HE AD . CONTINUE.

IT IS A D IS SE NT.

IT I S P ROBABLY A VER Y GOOD DISSENT .

I WOULD STIPULATE T O THAT.

B UT I THO UG HT JUS TICE QUINCE AND JUS TI CE W EL LS DID MAKE A VERY G OO D D ISSENT . BUT WITH ALL DUE RES PECT T O WAS IT J US TI CE B ELL O R C ON TEAR A WHO W RO TE THE MAJORITY?

ANYBODY WANT T O J UM P U P?

NO. IT I S H IS FAU LT .

IT IS P ROBABLY A JOI NT EFFORT.

THAT C AS E T UR NE D O N THE INSURANCE POL IC Y CONSTRUCTION PRECEDENCE T HAT SAY YOU CON ST RU E A P OLIC Y AGAINST THE INS URAN CE COMPANY AND IN FAVOR O F COVERAGE. IN THIS CAS E I F Y OU R EA D SOME OF T HIS COURT'S DECISIONS T HEY SAY , B UT I N WORKERS' COMP , Y OU D O N OT FAVOR THE E MPLOYE R OR THE EMPLOYEE. YOU TAKE A NEU TRAL P OSITION.

LET ME , THOUGH , T RY T O UNDERSTAND THIS. LET'S TALK ABOUT ELIGI BI LITY. I AM A N EMP LO YEE THA T' S B EE N NEGLIGENTLY INJURED.

CORRECT.

I HAVE HOW M AN Y CHO ICES DO I HAVE?

ONE.

WHAT I S THAT?

THIS POSTER IS WRONG. YOU HAVE ONE C HOICE. WORKERS' COMP .

SO THERE ISN 'T A NY REA L ELECTION OF REM EDIES THAT GOES ON THERE?

NO.

THE ONLY TIME T HAT W E' VE ALIED THAT HAS BEEN , AGAIN , WHETHER IT IS AN ELIGI BI LITY QUESTION. SOMEONE SAYS I'M N OT I N T HE C OURSE A ND S COPE. THEY ARE TRYING TO GET OUT OF COMP SO T HE Y SUE T HE EMPLOYER. THEY ARE RECOGNIZING THEY CAN'T THEN GO BACK , COR RECT? THOSE ARE I N T HE --

YOU A LY - - .

BECAUSE IT W AS A N E LIGIBILITY ISSUE. IF YOU ARE NOT W ITHIN T HE COURSE AND SCOPE OF EMPLOYMENT YOU ARE NOT E LIGIBLE.

NOW, G ETTING BACK H ERE AND THIS IS TO ME S TILL T HE CRUX OF I T IS T HA T I N T HE CASE O F S OM EBODY WHO HAS BEE N INJUR ED B Y O UTRA GE OU S LY -- O UT RAGE OUS ACT S OF T HE EMPLOYER SHORT OF I NT EN T B UT SUB STANTIALLY C ERTA IN T O CAUSE HARM , THE RE I S I N TERMS OF ELIGIBILITY FOR C OMP BEN EFITS Y OU ARE A T LEAST CON CEDING T HA T T HA T EMPLOYEE WOULD HAV E T WO POS SIBLE COURS ES T O T AK E , CORRECT?

THAT'S CORRECT.

SO THA T' S D IF FERENT. SO SOMEHOW THA T'S D IFFERENT AND N OW THE I SS UE I S ARE THOSE TWO COURS ES , A RE T HE Y EXCLUSIVE COURSES O R A RE THEY JOINT C OU RSES ? THAT IS , THA T T HE LEGISLATURE D IDN' T MAK E A N EMP LOYEE WHO HAD BEE N H AR MED THIS WAY N OT ELI GI BL E F OR BENEFIT S BU T I T SAI D T HE IMMUNITY OF THE E MPLO YE R W ASN'T GOING TO E XT EN D F OR TORT IMMUNITY.

UNDER THE C URRE NT C ASE LAW OF THIS STA TE THE Y HAV E TWO COURSES UNTIL SUC H T IM E AS THEY M AK E A N ELE CT IO N UNDER THE STANDAR DS S ET FORTH B Y T HI S C OURT IN T HE R OBINEAU V ERSUS W ILLIAM S WHICH WAS A 1 93 6 CA SE .

AND THAT'S B ASED O N A N ESTOEL ARGUMENT, A FAIRNESS. ESTOEL IS A F AIRNESS THING.

IT SAYS YOU C AN 'T T AK E INCONSISTENT POSITIONS INVOLVING THE SAME F ACTS .

AND WHAT IS THE DET RIME NT TO THE EMPLOYER, BECAUSE THAT'S PART O F THE REASON BEHIND THE ELECTION OF REMEDIES. THERE IS SOME D ETRIMENT . THERE IS NOT JUST INCONSISTENCY ON THE EMPLOYEE'S PART BUT THE DETRIMENT TO THE EMPLOYEE. WHAT'S THE DETRIMENT T O T HE E MPLOYER?

THE D ET RIME NT I S B Y ASSERTING THAT IT I S I N THE COURSE AND SCOPE OF THE E MPLOYMENT A CC IDEN T A ND STIPULATING TO THAT , T HE N THE BENEF IT S F LO W AND T HE EMPLOYER PAYS THOSE BEN EF IT S AND NOW AFTER THOSE BENEF IT S HAVE BEEN PAI D T HE Y W AN T T O SAY, NO , R EA LLY I T W AS N'T A N ACCIDENT. IT WAS T HI S S ERIE S O F CONDUCTS WHICH MEETS THE TURNER TEST TO BE AN INTENTIONAL ACT. THAT'S HOW - - T HA T' S W HY I T IS TO THE DET RIMENT O F THE EMPLOYER BECAUSE THEY A RE NOW B ASED UPO N T HI S C HANG E IN LABEL, WHE RE T HE Y SAI D I T IS A N ACC ID EN T BUT I T IS NOT AN ACCIDENT THE E MPLOYER IS THEN SUBJECT TO H AVING PAI D THEIR PREMIUM S A ND P AI D THEIR BENEFITS AND ALL O F THOSE THINGS AND THEY ARE STILL SUBJECT TO THE U NCERTAINTIES OF THE TOR T SYSTEM.

JUSTICE CAN TERO ?

LET ME A SK YOU THI S. LET'S NOT T ALK ABOUT AN EMPLOYEE FOR A S EC ON D AND THE USUAL IN A NOTH ER C AS E A NTION C ASE . CAN SOMEONE FILE A L AW SU IT AGAINST THE C OMPANY A ND S AY Y OU INT ENTI ON ALLY INJ URED M E , C OUNT ONE, A ND C OUNT T WO , YOU NEGLI GENT LY INJ UR ED M E , A ND AT SOM E POI NT I N THE TRI AL YOU HAVE TO MAK E AN ELECTION OF REMEDIES BUT C AN YOU FILE THE LAW SUIT I TSELF ALLEGING BOTH?

CERTAINLY YOU CAN FILE THE LAWSUIT.

SO ISN'T T HA T T HE DIFFERENCE BETWEEN T HIS KIN D OF CAS E AND A N ORMA L CAS E OUTSIDE THE WOR KERS ' COMPENSATION ARENA THA T I N THOSE CASES W E D O A LLOW PEOPLE T O F IL E I NC ONSI STEN T CLAIM S?.

SURE.

THEY HAVE TO MAKE AN ELECTION OF REMEDIES AT SOM E POINT IN THE TRIAL B UT T HE Y DON'T HAVE TO MAKE AN ELECTION WITHOUT KNOWINGWHAT THE EVIDENC E A T T RIAL PRESENTS.

RIGHT, RIGHT. WELL, IF YOU THINK ABOUT IT , THAT HAENS ALL OF THE TIME. ALTERNATIVE P LEADIN G.

SO I SN'T I T A N U NFAI RN ES S THEN WHEN YOU ARE AN EMPLOYEE SEEKING W ORKE RS ' COMPENSATION CLAIMS BEFORE THE EVIDE NCE HAS B EEN GATHERED TO DETERMINE WHETHER THIS IS REALLY AN INTENTIONAL ACT , YOU HAVE T O ELE CT W OR KE RS ' COM PENS AT IO N ONCE YOU DO THAT Y OU HAV E WAI VED ANY CLAIM THAT IT WAS AN INTENTIONAL TORT.

I WOULD SAY , NO , A ND THE REASON I WOULD SAY N O T O YOUR QUESTION IS BECAUSE IF YOU THINK ABOUT I T IN A CIVIL A CT ION Y OU'V E G OT TWO COUNTS. NEGLIGENCE AND INTENTIONALACT. WHEN YOU GET INTO THE LITIGATION PROCESS, L ET'S ASSUME HYPOTHETICALLY T HE CASE SETTLES , AND THE Y C OM E IN AND P AY . NEVER , NEV ER D OES SOM EONE COME IN AND S AY , YEA H , I 'M GOING TO PAY YOU $ 100, 00 0 FOR M Y N EGLI GE NCE , A ND Y OU GET TO KEEP THAT. NOW WE'RE GOING TO GO TO COURT AND LET Y OU T AK E A SHOT, IF YOU W IL L , O F P RO VE N AND INTEN TIONAL ACT. NEVER HAENS AND THAT' S I N EFFECT WHAT THEY ARE ASKING TO HAEN HERE T O S AY WE GET OUR NEGLIGENCE MONEY AND NOW WE WANT TO TAKE A S HO T A T THE BIGGER PIE.

BUT, AGAIN , A ND I SN 'T WHAT IS H AENING IS T HA T Y OU GO AHEAD A ND Y OU A RE PAYING ALL OF THESE BENEFITS , AND THEN THERE IS JUST ONE L ITTLE SLIP AND IT WAS AN ISSUE ABOUT ATTENDANT C AR E WHICH WAS PROBABLY A REL ATIVE SMALL AMOUN T O F WHAT WAS SUSTAINED , A ND NOW ALL OF THE SUD DE N YOU 'R E SAYING, WELL , THAT'S IT. IF WE H AV E STO ED I T RIG HT THERE THEN THE EMPLOYE R - - EMPLOYEE AT THAT POINT HAS TO SAY DO I C ON TI NUE MY BENEFITS OR DO I PURSU E M Y LAWSUIT?

WELL, THERE WAS JUST A SMALL DISPUTE OVER NOT EVE N ATTENDANT BENEFITS OVER THE HOURLY PAYMENT FOR THOSE. I T WAS E VE N SMALLER THA N Y OU SUGGEST.SO IT WAS R EALLY TINY. ALL I CAN TELL YOU I S T HAT AT T HE TIM E M R. JON ES AND HIS FAMILY HAD BEN EF IT ED O F T HREE LAW F IR MS R EPRE SE NTING HIM, OKAY , AND T HE Y C HOSE , WITH ADVICE OF COUNSEL , T O AVAIL THEMSELVES OF THE W ORKERS' COM P S YS TE M A ND IN SO DOI NG S IGN THE STIPULATION THAT IT WAS AN ACCIDENT.

JUSTICE QUI NCE H AS --

IT WAS B AS IC ALLY T HE S AME QUESTION. WHAT WAS THE EMPLOYER -- EMPLOYEE SUOSED TO D O A T THE POINT W HE RE Y OU H AV E B ASICALLY PAID A NUM BE R O F BEN EFITS U ND ER W OR KERS ' COMPENSATION WHILE THE PERSON WAS -- H E W AS U NCONSCIOUS FOR A L ONG

PERIOD OF TIME, CORRECT, AND YOU PAID ALL OF T HE BENEF IT S , AND THEN THIS ONE ISS UE COMES U P A ND THE E MPLO YE E W ANTS WHATEVER HOURL Y RAT E THIS PERSON WAS ASKIN G T O B E ADJUSTED. ISN'T THIS S IMILAR T O THA T WIELD I ND USTRIE S C AS E W HERE THE LADY ASKED ABO UT H AV IN G HER PAY ME NTS M AD E I N A DIFFERENT MANNER? I MEAN, AND W E S AI D T HA T W AS F INE. SHE DIDN'T ELECT B EN EFIT S? NOT U S BUT THE SUP REME COURT.

NO, BECAUSE IN T HA T C ASE THEY DID NOT GO IN AND SAY IT WAS A N ACC ID ENT A ND STIPULATE IT WAS AN ACCIDENT WHICH IS WHAT WE'VE GOT H ERE AND THE JUDGE OF THE INDUSTRIAL CLAIMS - -

I S THA T A COR RECT REP RESENTATION OF THIS RECORD? THERE IS A FORM THAT' S USED IN EVERY CASE AND THAT'S T HE BLOCK THAT'S USED TO C HE CK WHETHER ARE W E D IS PU TI NG WHETHER THIS IS A C OM P CLA IM OR NOT. ISN'T THAT REALLY WHAT T HA T FORM IS FOR?

YES.

SO NOW YOU ARE T RYIN G T O TURN THAT INT O A N INTENTIONAL CLAIM , S TA TE ME NT THAT THIS IS AN ACC ID ENT. IS THAT REALLY A F AI R CHARACTERIZATION WITH THE OTHER ARGUMENTS?

I THINK IT IS A FAI R CHARACTERIZATION, B ECAU SE THIS COUNTRY IS RUN ON FORMS. EVERYTHING IS A F ORM. A FOR M MORTGAGE , A FOR M NOT E , A FORM LEASE AND C ON TRACT. TO SUGGEST BECAUSE IT WAS A FORM IT CARRIES SOME L ES SE R WEI GHT, I WOU LD S AY I DON'T THINK SO . > > Y OUR T IME , W ITH OUR H ELP , IS EXPIRED.

THANK YOU.

R EBUTTA L ?

MAY IT PLEASE THE C OURT. I'M ATTORNEY B EN JA MI N C RUMP . MY CLIENT , C URTI S JONES , ASKED ME TO ASK Y OU T O CONSIDER THESE F OUR P OINTS WHILE Y OU D EL IBER AT E . FIRST, H E A SKED T HAT Y OU CONSIDER THE I SS UE O F D OU BL E COMPENSATION AS A M OO T ISS UE , B ECAUSE THE $ 1. 2 MIL LI ON THAT WAS PAID FOR M ED IC AL EXPENSES AS A RESULT OF THE EXP LOSION WHERE HE LOST H IS EARS, HIS H AN DS A ND ALM OS T 70% OF H IS B OD Y W AS S O B AD LY BURNT THAT HE C AN 'T P ER SP IR E AS THE DOC TO RS H AVE S TATED IS ALMOST POTENTIALLY F ATAL EACH AND EVERY DAY OF HIS LIFE. THAT $ 1. 2 M IL LION WOU LD B E P AID BACK TO THE WOR KE RS ' COMPENSATION CARRIER OR SET ASIDE FROM A NY V ER DICT T HAT IS RECEI VED . S O THERE IS N O D OU BL E COMPENSATION ISSUE. SECONDLY, HE W OU LD ASK YOU C ONSIDER THAT THE REASON THIS K ON T V O VERSE I - - CONTROVERSY IS BEFORE THE COURT IS BECAUSE OF THE H E GREEJ YUS CONDUCT O F M AR TI N ELECTRONICS WHO HAD BEE N WARNED BY THEIR OWN SAF ET Y DIRECTOR THAT THE BUILDING WAS GOING TO EXPLODE I F T HEY DIDN'T SHUT IT DOWN AND REPAIR IT AND THE FACT THAT SIX MONTHS PRIOR ONE OF THEIR BUILDINGS HAD EXPLODED. THEY REFUSED T O D O SO. THE B UILDING EXPLODE D . M ISS L INDA LINDS AY W AS KILLED AND CURTIS JON ES WAS CATASTROPHIC AL LY I NJUR ED A ND WHILE HE WAS FIGHTING FOR HIS LIFE MARTIN ELE CT RO NICS DENIED HIM AND HIS FAM IL Y RIGHTFUL BENEFITS DUE T O THEM TO KEEP THEM FRO M BEING HOMEL ESS AND FORCED HIM T O LITIGATE AND THE JUD GE I N COMPENSATION C LA IMS T HA T T HE BENEFITS WERE RIGHTFULLY AND LEGALLY DUE TO HIM SO THE E LECTION W AS BY M AR TI N ELECTRONICS WHEN THEY DENIED HIM THE BENEFITS. ANYTHING THAT C URTIS JONES DID WAS A R EA CTIO N T O T HE H E G REEJ YUS - - E GR EGIO US CONDUCT OF M AR TI N ELECTRONICS. THIRDLY HE WOULD ASK THAT YOU CONSIDER WHAT THE NORTH CAROLINA SUPREME COURT DID WHEN THEY H ELD I N WHI TS ON THAT I T I S N OT I NCON SIST EN T TO ASSERT T HAT A N INJ UR Y T HAT OCCURRED AS A RESULT OF THE SAME CONDUCT WAS BOT H AS A RESULT OF T HE ACCIDENT GIVEN RISE TO THE REM ED IE S PROVIDED BY THE A CT AND AN INTENTIONAL T OR T , MAK IN G THE EXCLUSI VITY PROVISION OF T HE ACT UNAVAILABLE TO BAR A CIVIL ACTION . AND F INALLY , C UR TI S J ON ES

WITH ALL OF THE DIG NITI Y A ND G RACE THAT IS LEF T I N HIM A SKS THE COURT TO D O J USTICE , NOT JUST FOR HIM BUT FOR T HE N EXT FLORIDA CIT IZEN WHO SE CATASTROPHICALLY INJUREDBECAUSE H IS EMPLOYER C HO OS ES T O EXERC IS E W IL LFUL BLINDNESS AND THEN DENY HIM BENEFITS AS A WAY OF MANIP ULATING T HE E MP LO YE E T O HAVE TO LIT IGAT E AND GIV E U P HIS RIGHTS T O B RING H IS EMP LOYER INTO C OU RT T O A SK FOR - - ANSWER T O HIS E GREGIOUS CONDUCT.

PRIOR TO THE IMPLEMENTATION OF WORKM AN'S COMPENSATION, YOUR CLIENT'S RIGHT WOULD HAVE BEE N T O FILE A CIV IL S UI T F OR INTENTION AL TORT A ND NEGLIGENCE, CORRECT?

YES, SIR.

AND DURING THE PENNE D E VENSY OF THAT SUIT HE WO ULD NOT BE ENTITLED TO P AY ME NT S OF MONEY, CORRECT ?

F RO M THE E MP LO YER?

I DON'T THINK THAT I S CORRECT, YOUR HONOR. I THINK T HE S YS TE M I S --

NO , PRI OR T O THE IMPLEMENTATION OF WORKMAN'S COMPENSATION, Y OU R CLI ENT' S BENEFIT OR RIGHTS U NDER T HE COMMON-LAW WOULD HAVE BEEN TO FILE A CAUSE O F ACT IO N A T LAW AND H E COULD NOT HAVE OBTAINED ANY MONEY F RO M T HE EMPLOYER UNT IL T HA T L AW SUIT WAS COMPLETED?

YES, SIR , YOUR H ON OR . ABSOLUTELY. YES, SIR . AND I N C ON CL USIO N , H E A SK S THAT YOU THINK ABOUT T HE FLORIDA CITIZEN W HO I S G OING TO B E C AT ASTR OP HI CA LL Y INJURED AND THE FACT T HA T I F W E RULE I N F AV OR O F M AR TI N E LECTRONICS THEN THE INTENTIONAL TORT R EMED Y WIL L BECOM E A R EM EDY I N N AM E ONL Y , A ND IN C ONCL US ION I Q UOTE YOU, JUSTICE WELLS, WHEN Y OU S AID THAT THE L AW M UST CONFORM T O COMMON SENSE AND LOGIC OF A P AR TI CU LA R CAS E OF WHICH IT IS T O B E A LIED AND IN T HI S P ARTI CULA R CAS E IF YOU A LY C OM MO N SENSE , NOT T EC HNICAL N UA NCES , YOU WILL ARRIVE AT JUSTICE.

THANK YOU VERY MUCH. THE C OURT W IL L B E I N R ECES S . UNTIL 9:00 T OMORROW MORNING. THANK YOU TO B OT H PAR TI ES .

PLEASE R IS E .