

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

Martin Bakerman v. The Bombay Co.
Docket Number: SC05-358

THE COURT WILL HEAR THE N E X T C A S E O F B A K E R M A N V E R S U S T H E B O M B A Y C O M P A N Y .
C H I E F J U S T I C E : G O O D M O R N I N G .

G O O D M O R N I N G . M A Y I T P L E A S E T H E C O U R T I ' M B A R B A R A G R E E N . I R E P R E S E N T M A R K B A K E R M A N . H E W A S I N J U R E D W H E N H E F E L L F R O M A L E T T E R .

L E T M E G E T T H E F A C T S O U T F R O M M Y U N D E R S T A N D I N G O F T H E M F R O M R E A D I N G T H E R E C O R D A N D T H A T I S T H A T T H E R E W A S N O I N T E R E S T T O T H I S A C C I D E N T , C O R R E C T ?

T H A T ' S C O R R E C T .

S O T H E S O L E T E S T I M O N Y A S T O H O W T H I S A C C I D E N T O C C U R R E D C A M E F R O M T H E P L A I N T I F F .
Y E S , Y O U R H O N O R .

J U S T I C E : A N D W H A T T H E P L A I N T I F F T E S T I F I E D T O W A S T H A T H E W A S S T A N D I N G O N T H E V E R Y T O P O F T H I S L A D D E R T R Y I N G T O G E T - - M O V E A B O X , R E A C H I N G U P T O M O V E A N D O N E B O X S H I F T E D A N D T H E N T H E N E X T T H I N G H E K N E W H E W A S O N T H E G R O U N D A N D L A Y I N G N E X T T O T H E L A D D E R . I S T H A T I T ? > > T H A T ' S P R E T T Y M U C H I T , Y O U R H O N O R .

J U S T I C E : H E D O E S N ' T R E A L L Y K N O W H O W T H I S A C C I D E N T , W H A T C A U S E D H I M T O F A L L , C O R R E C T ?

W E L L , H E K N O W S T H A T H E W A S S T A N D I N G O N T O P O F T H E L A D D E R T H A T T H E L A D D E R A L W A Y S S W A Y E D A N D S H O O K .

J U S T I C E : B U T A S F A R A S T H I S A C C I D E N T W A S C O N C E R N E D , A L L H E K N E W F R O M M Y R E A D I N G O F W H A T H E S A I D W A S T H A T H E W A S R E A C H I N G F O R T H E B O X A N D T H E N E X T T H I N G H E K N E W T H A T T H E L A D D E R W A S L A Y I N G N E X T T O H I M A N D H E W A S O N T H E F L O O R A N D W E D O N ' T H A V E A N Y E V I D E N C E I N T H I S R E C O R D A S T O T H E L A D D E R I T S E L F . T H E L A D D E R W A S G O N E . T H A T W A S O N E O F T H E I S S U E S I R E C O G N I Z E D B E L O W , B U T T H E R E W A S N ' T A N Y C O N T E N T I O N T H A T O T H E R T H A N T H E F A C T T H A T T H I S L A D D E R S W A Y E D T H A T T H E L A D D E R B R O K E O R T H E R U N G B R O K E O R T H E T O P O F T H E L A D D E R B R O K E O R A N Y T H I N G O F T H A T N A T U R E .

T H E R E I S N O C O N T E N T I O N T H A T T H E L A D D E R B R O K E B U T T H E R E A R E C O N T E N T I O N S A N D T H E R E I S A B U N D A N T E V I D E N C E T H A T T H E L A D D E R W A S U N S T A B L E A N D T H A T I T W A S T O O S H O R T F O R T H I S J O B .

J U S T I C E : N O W , O N E O T H E R T H I N G F R O M T H E R E C O R D F R O M M Y R E A D I N G O F I T I S T H A T P R I O R T O T H E T I M E , F R O M W H A T T H E P L A I N T I F F T E S T I F I E D T O T H A T B E F O R E H E F E L L F R O M T H E T O P O F T H E L A D D E R O N T H I S O C C A S I O N T H A T H E H A D S T O O D O N T H E T O P O F T H I S L A D D E R M O R E T H A N A D O Z E N T I M E S G E T T I N G S T O C K D O W N , C O R R E C T ?

MANY , MANY TIMES , YOUR HONOR. >> J USTICE: AND THAT HE HAD BEEN ON THI S P AR TI CU LAR LADDER HUNDREDS OF TIMES WAS HIS TES TIMONY.

YES, YOUR H ON OR . AND IT WAS ALS O T HE TESTI MONY F RO M A N E XP ER T WITNESS AND IT IS A LS O A FAIR INFERENCE FROM THE RECORD THAT BASED O N T HE DESCRIPTION OF THE C ON DITI ON OF THI S P AR TI CU LAR L ADDE R T HAT IT WAS C LE AR T HA T E VE RY TIME THE L AD DE R WAS USED I T WAS GOING T O GET WOR SE . BECAUSE THE WAY THE Y DESCRIBED THE M OVEMENT OF IT , THE EXPERT ENGIN EE R S AI D , WELL, THAT HAPPENS W HE N THINGS ARE COMING LOOSE AND THE MORE YOU USE A LAD DE R LIKE THAT, THE LOOSER T HINGS ARE GOING TO GET . >> JUSTICE: AND HE HAD U SE D THIS LADDER ON THIS PARTICULAR DAY A BUNCH OF TIMES.

YES, YOUR HONOR, A B UNCH OF TIMES ON THIS PARTICULAR DAY AND A BUNCH OF T IM ES BEFORE THAT. IT WAS USED EVERY DAY. IT WAS U SED EVERY T IM E A N EMPLOYEE OF B OM BA Y C OMPA NY HAD TO GET SOMETHING OFF O NE OF THE U PPER S HELV ES .

JUSTICE: LET ME ASK YOU A THRESHOLD QUESTION. I UNDERSTAND THAT YOU ARE BASING JURISDICTION O N CONFLICT WITH T URNE R AND T RAVELERS . BASED ON THE FAC T T HAT T HE 3RD DCA R EQ UIRE D C ON CEAL ME NT , LET 'S ASSUME FOR T HE MOMEN T THAT THERE IS CON FLECT ON THAT B ASIS . IN 200 3 , T HE L EGIS LATU RE AMENDED THE S TA TUTE T O IMPOSE A V IR TUAL C ER TA IN TY S TANDARD SO I'M N OT S UR E WHAT BENEFIT TO T HE L AW WE ARE GOING TO G IV E B Y TAK IN G THE CAS E A ND R ES OL VING T HE CONFLICTS SINCE THI S S UBSTANTIAL CERTAINTY STA ND ARRESTED DOESN'T EXIST ANY MORE AS O F 200 3.

THE BENEFIT TO THE L AW , YOUR HONOR, I S FOR THE CASES IN THE PIP EL INE BEFORE T HE AMENDMENT. IT HAS ALREADY B EE N R ULED THAT THE A ME NDME NT I S N OT R ETROACTIVE . >> JUSTICE: BUT THAT'S A LIMITED NUMBER OF C ASES ANDIT IS E VE N M ORE L IMITED IF YOU CONFINE IT TO THE T HIRD DISTRICT.

YES, BUT THERE IS N O REASON TO C ONFINE IT TO T HE THIRD DISTRICT. ALT HOUGH THERE WAS A C ASE THAT CAME OUT OF THE 3 RD D ISTRIC T JUST A WEEK O R T WO AGO THAT MR. B IA SOTT I CIT ED AS S UPLEMENTAL AUTHORITY AND IT COLLECTED A F AI RL Y SUBSTANTIAL NUMBER OF CAS ES FROM DIFFERENT DISTRICTS ALL HAVING THIS C ONCEAL ME NT REQUIREMENT . AND SO IT I S P RETT Y C LE AR THAT THERE ARE A S UBSTAN TI AL NUMBER OF C AS ES F RO M A LL O F THE DIFFERENT D ISTRIC TS THA T D O IMPOS E THI S R EQ UIRE ME NT THAT IS NOT A R EQ UIRE ME NT UNDER TURNER AND TRA VELERS . >> JUSTICE: W HAT DO YOU THINK FROM T UR NE R I S THE I NTENTIONAL TOR T THA T T HI S COURT REFERRED TO I N TUR NER? YOU KNOW, M OS T T OR TS I N THI S E XPERIENCE HAVE NAMED , MISREPRESENTATION , F RA UD A ND CERTAINLY INTENTIONAL TORTS , DEC EIT. WHAT WOULD Y OU LAB EL THI S TORT?

THE CLOSEST YOU C OULD COME TO THI S I S A N UNCONSENTED TOUCHING. IT WOULD BE A BATTERY. I THINK , B EC AUSE T HE Y ARE BASICALLY W ITHO UT T OUCHIN G HIM, THEY ARE B AS IC AL LY PUSHING HIM TO THE FLOOR FROM THIS LADDER .

JUSTICE: WOULD THAT B E A N INTENTIONAL TORT? YOU ARE ALLEGING IT WOULD BE AN INTENTIONAL TORT?

YES, YOUR HONOR, THE COMPLAINT ALLEGED IT WOULD BE AN INTENTI ONAL TOR T .

J USTICE: THE N WHY WOULDN'T THE C OM PA RATI VE FAU LT NOT A PP LY I N INTENTIONAL TORT CASES?

IT SHOULD HAVE , YO UR HONOR, IT S HO UL D N OT H AV E APPLIED, AND T HA T Q UITE HONESTLY SHO UL D H AV E B EE N T O THE C OM PARA TIVE N EG LIGE NCE INSTRUCTION SHOULD NOT HAVE BEEN GIVEN BUT IT WASN'T OBJECTED TO. IT W AS -S IM PL Y A N E RROR T HA T HAS

BEEN WAIVED.

JUSTICE: IN THIS AREA OF WORKERS' COMP WHICH WAS DESIGNED TO RESOLVE CASES AT THE ADMINISTRATIVE LEVEL NO FAULT THAT KIND OF THING IT SEEMS LIKE IF NOT A BRIGHT LINE AT LEAST AN AREA WHERE PEOPLE KNOW THIS NEGLIGENCE OR NOT THEN BASICALLY WE ARE GOING TO DESTROY THE WORKERS' COMPENSATION SCHEME BECAUSE ANY PLAINTIFF CAN NOW SAY EVEN THOUGH THIS LOOKS LIKE NEGLIGENCE IT REALLY WASN'T BECAUSE THE EMPLOYER KNEW OR SHOULD HAVE KNOWN, IT IS ALMOST AS IF WE ARE SAYING IT IS VERY NEGLIGENT THEN YOU CAN GO INTO COURT BUT IF IT IS ONLY SOMEWHAT NEGLIGENCE THEN YOU DON'T GET TO GO INTO COURTS SO NEITHER PLAINTIFFS NOR DEFENDANTS OR JUDGES HAVE ANY KIND OF IDEA WHAT FALLS INTO WHICH PLACE.

WELL, I THINK THE OTHER COURTS IN OTHER STATES THAT HAVE APPLIED THE SUBSTANTIAL CERTAINTY TEST HAVE USED A THREE-PART TEST, AND APPLIED IT TO JUST A LIMITED NUMBER OF CASES. THEY HAVE HAD ACTUAL KNOWLEDGE BY THE EMPLOYER OF THE DANGEROUS CONDITION. WE CERTAINLY HAD THAT HERE. THE STORE MANAGER KNEW, THE DISTRICT MANAGER KNEW. THE STORE MANAGER SAID TO THE DISTRICT MANAGER ON A NUMBER OF OCCASIONS, THIS LADDER IS UNSAFE, IT DOESN'T FIT THE SPACE. YOU CAN'T OPEN IT UP. IT IS RICKETY, IT SWAYS, IT IS NOT TALL ENOUGH. SOMEBODY IS GOING TO GET HURT.

JUSTICE: AND THE EMPLOYEES DID?

PARDON ME?

JUSTICE: AND THE EMPLOYEE KNEW. THIS WAS NOT A HIDDEN DEFECT OR PROBLEM?

YES.

JUSTICE: EVERYBODY KNEW THAT THIS LADDER WAS A PROBLEM?

EVERYBODY KNEW AND HE WAS AFRAID AND HE TESTIFIED THAT IF HE REFUSED TO GET UP ON THAT LADDER HE WOULD LOSE HIS JOB.

CHIEF JUSTICE: WHAT ARE THE OTHER TWO PRONGS?

KNOWLEDGE THAT INJURY TO THE EMPLOYEE WAS SUBSTANTIALLY CERTAIN TO OCCUR. YOU'VE GOT THAT HERE. THE JURY FOUND THAT HERE AND THE JURY FOUND THAT BASED ON NOT JUST ADDING UP A NUMBER OF SMALL RISKS OVER A LONG PERIOD OF TIME AS HAPPENS IN SOME OF THE CASES.

JUSTICE: IT SEEMS TO ME THAT IS JUST A CIRCULAR TEST BECAUSE THE TESTS WE ARE PROVING SUBSTANTIALLY CERTAIN TO OCCUR IS WHETHER IT IS SUBSTANTIALLY CERTAIN TO OCCUR.

I AGREE THAT THE CHOICE OF LANGUAGE IS UNFORTUNATE BUT WHAT YOU HAVE SPECIFICALLY IN THIS RECORD I EXPECT TESTIMONY THAT THIS LADDER IS GOING TO GET WORSE AND WORSE AND WORSE AND CONNECTIONS GET LOOSE AND LOOSER AND IT GETS LESS AND LESS STABLE.

JUSTICE: BUT THE CONNECTIONS HAD NOTHING TO DO WITH THIS CASE, RIGHT, THAT WE KNOW ABOUT. THE RECORD DOESN'T DISCLOSE THAT THE CONNECTIONS HAD ANYTHING TO DO WITH THIS CASE?

I THINK IT IS A FAIR INFERENCE FROM THE RECORD, YOUR HONOR. I THINK IT IS A FAIR INF

ERENCE THAT THE EMPLOYEE, MR. BAKERMAN AND HIS SUPERVISOR BOTH TESTIFIED THAT ANY TIME YOU STOOD ON THE TOP OF THAT LADDER YOU HAD TO HOLD ON OR IT WOULD Wobble AND SWAY BECAUSE IT WAS SO RICKETY.

JUSTICE: IN THE NAME OF COMMON SENSE ANYBODY KNOWS WHEN YOU STAND ON THE TOP OF THE LETTER YOU'VE GOT TO HOLD ON TO SOMETHING.

TO KEEP YOUR BALANCE, BUT IN ADDITION WHAT THEY SAID NOT JUST THAT THEY WOULD SWAY BUT THAT THE LADDER WOULD SWAY. THE LADDER WOULD SHAKE.

LET ME ASK YOU THIS. IN THE CASES THAT WE TALKED ABOUT IN TURNER, WOULD YOU AGREE IN TURNER WHAT LEAST SAID THAT THIS WOULD BE SUBSTANTIAL THAT WHAT EVER CONDUCT WAS THE FOCUS OF IT HAD TO BE GREATER THAN GROSS NEGLIGENCE. >> YES, YOUR HONOR, YOU'D SAY THAT.

JUSTICE: AND THERE IS NO ALLEGATION HERE IN THIS COMPLAINT THAT OF GROSS NEGLIGENCE, WAS THERE, OF RECKLESSNESS?

THE COMPLAINT ALLEGED INTENT IF I MAY, YOUR HONOR.

JUSTICE: IT ALLEGED, I'VE GOT IT RIGHT HERE. YOU DON'T HAVE TO GET IT. BUT IN CONNECTION, WHICH TURNER WAS RESTING ON, THAT WAS A FAILURE TO WARN CASE, RIGHT?

NO, NOT ENTIRELY, YOUR HONOR.

JUSTICE: BUT IT WAS BASICALLY A FAILURE TO WARN BECAUSE CONNELL MADE A BIG DEAL OUT OF THE FACT THAT THE EMPLOYEE DID NOT KNOW.

CONNELL MADE A BIG DEAL OUT OF THAT BUT CONNELL ALSO MADE A BIG DEAL OUT OF ONE OF THE FLIGHT ATTENDANTS WHO CALLED HER FIANCÉE BEFORE THE TRAGIC FLIGHT TOOK OFF AND SAID I'M SCARED TO DEATH. WE'RE HAVING THIS SAME PROBLEM WITH THE ENGINE. IT IS NOT SAFE, AND HE TOLD HER QUIT NOW. DON'T COME HOME ON THAT PLANE, AND SHE DIDN'T AND SHE DIED ON THE PLANE, AND THEY LET HER CASE PROCEED.

JUSTICE: CUNNINGHAM WAS ALSO A FAILURE TO WARN CASE, WAS IT NOT?

IN WHAT ONE?

JUSTICE: CUNNINGHAM THAT WE RELIED ON.

YES, YOUR HONOR.

JUSTICE: WHAT BOTHERS ME I GUESS AS MUCH AS ANY THING ELSE IS I CAN'T CONCEIVE OF HOW AS IN GLEROFFER IN THE STATE OF FLORIDA WOULD NOT HAVE A CASE THAT WOULD GO TO THE JURY IF STANDING ON A LADDER AND FALLING OFF OF IT IS THE TYPE OF CONDUCT WE WERE TALKING ABOUT IN TURNER THAT WOULD REMOVE COMPELLING IMMUNITY. HOW COULD THAT BE?

IT IS NOT STANDING ON AN ORDINARY LADDER. WHAT YOU'VE GOT HERE IS YOU'VE GOT A LADDER THAT IS SUPPOSED TO BE A FRAME THAT HAS TO BE USED IN THE CLOSED POSITION SO INSTEAD OF THE LEGS FITTING FLAT ON THE FLOOR THEY ARE JUST THE TIP OF THE TIP OF ONE SIDE OF THE LEGS IS ON THE FLOOR. YOU'VE GOT NO RUBBER FEET ON THE BOTTOM OF THE LADDER. YOU'VE GOT A LADDER THAT IS COMING APART THAT IS SHAKY AND RICKETY AND YOU'VE GOT A LADDER THAT IS TOO SHORT FOR ITS JOB AND YOU'VE GOT A LADDER THAT EVERY TIME IT IS USED IS GETTING WORSE. NOW, I THINK I CERTAINLY HOPE

THAT THOSE CASES ARE RARE. SO I DON'T THINK IT IS GOING TO BE EVERY ROOFER AND IT IS CERTAINLY NOT GOING TO BE ANY ROOFER, EVERY ROOFER AFTER 2003.

CHIEF JUSTICE: I JUST WANT TO MAKE SURE, YOU GAVE TWO OF THE THREE. IS THERE A THIRD?

I'M SORRY, YOUR HONOR. AND WE HAVE THAT HERE. THE EMPLOYEE WAS REQUIRED TO CONTINUE TO PERFORM THE DANGEROUS TASK. THE RECORD IS CLEAR THAT THE DISTRICT MANAGER REFUSED TO AUTHORIZE REPLACEMENT OF THE LADDER. THE EMPLOYEES HAD TO USE THE LADDER AND MR. BAKERMAN WAS CONVINCED THAT HE WOULD BE FIRED IF HE DIDN'T GET THE LADDER, BECAUSE THAT'S WHAT THEIR JOB WAS. THIS WAS ONE OF THOSE STORES WHERE THE ITEMS ONE OF EACH ITEM IS JUST ON DISPLAY OUT IN THE MAIN PART OF THE STORE AND IF YOU WANT THAT ITEM YOU HAVE TO ASK THE SALESPERSON AND THE SALESPERSON GOES BACK SO EVERY TIME SOMEBODY WANTED TO BUY SOMETHING THEY HAD TO GO BACK IN THE STORE ROOM.

NOW, IN THE CASE THAT HAS JUST COME OUT OF THE 3RD, THAT TO ME DOES NOT SEEM LIKE A SUBSTANTIAL CERTAINTY CASE. THERE IS NO EVIDENCE IN THAT CASE THAT THE EMPLOYEER KNEW OF THE MISSING BARRIER AND THAT IT MAY EVEN BE THAT THE PLAINTIFF THEMSELVES HAD TAKEN OFF AND BASICALLY -- SO DO YOU WANT TO COMPARE OR CONTRAST THAT CASE WITH THIS CASE?

I THINK IT DEPENDS ON WHETHER YOU READ THE MAJORITY OPINION OR THE DISSENT. BECAUSE THE DISSENT FOCUSES ON CONSTRUCTING THE FACTS MORE FAVORABLY TO THE PLAINTIFF, AND POINTS OUT THAT THERE WAS EVIDENCE THAT THE COURT OVERLOOKED. THE DISSENT SAYS, YOU KNOW, THEY HAVE THIS GOOD POLICY ON PAPER ABOUT NOT REMOVING SAFETY DEVICES AND STUFF BUT, IN FACT, THE SAFETY DEVICE WAS REMOVED, HAD BEEN REMOVED AND THERE WAS SOME EVIDENCE I BELIEVE FROM WHICH IT COULD BE INFERRED THAT THE EMPLOYEER KNEW THAT IT HAD BEEN REMOVED. CAFFUS, IF YOU ACCEPT THE MAJORITY OPINIONS, CHARACTERIZATION OF IT, THEN I THINK THAT THIS CASE IS MORE A GREGG REGIONAL THAN THAT.

CHIEF JUSTICE: DID YOU FILE A SUPPLEMENTAL AUTHORITY?

YES, MR. BIA SO IT FILED A SUPPLEMENTAL AUTHORITY. HE BEAT ME TO THE PUNCH.

JUSTICE: SO THIS ISN'T A CASE OF CONCEALMENT OR DECEIT OR MISREPRESENTATION. IT IS SIMPLY A CASE WHERE THERE WAS AN UNSAFE WORK CONDITION WHERE THE EMPLOYEE HAD TO CHOOSE TO EITHER NOT GET UP ON THE LADDER OR QUIT.

BUT IT IS AN UNSAFE WORK CONDITION THAT GOT WORSE EVERY TIME. IT IS NOT JUST THE SAME UNSAFE THING BEING REPEATED.

JUSTICE: BUT AGAIN THERE IS NO MISREPRESENTATION, CONCEALMENT?

NO, NO MISREPRESENTATION OR CONCEALMENT OR TRULY AN INTENTIONAL TORT? AND THE ONLY THING THAT THE EMPLOYEE KNEW ABOUT THE DANGEROUS CONDITION THE EMPLOYEE HAD TO MAKE THE DECISION DO I WANT TO CONTINUE CLIMBING UP THIS LADDER I KNOW IS DANGEROUS AND MAY CAUSE ME INJURY, AND WE ARE JUST GOING TO LET THE JURY DECIDE THE NEGLIGENCE ISSUE THERE SO IT IS REALLY NOT TRULY AN INTENTIONAL TORT IN THE TRUE SENSE OF THE WORD.

UNDER THE OBJEC TIVE SUBSTANTIAL CERTAINTY TEST WHERE THE TEST IS WHETHER THE EMPLOYEER KNEW OR SHOULD HAVE KNOWN THAT INJURY TO THE EMPLOYEE WAS SUBSTANTIALLY CERTAIN TO OCCUR AND THAT'S THE TEST FOR AN INTENTIONAL TORT THAT THIS COURT SET OUT IN TURNER AND IN TRAVELERS VERSUS PCR. IF THAT'S THE TEST THIS

I S AN I N T E N T I O N A L T O R T .

JUSTICE: BUT IF WE ACCEPT YOUR ARGUMENT BASICALLY ANY GROSS NEGLIGENCE CASE WHERE AN EMPLOYEE IS SUBJECT TO AN UNSAFE WORK CONDITION THEY ARE GOING TO BE ABLE TO UNDER YOUR THEORY BRING AN INDEPENDENT CAUSE OF ACTION OUTSIDE OF WORKMAN'S COMP IF IT IS AN UNSAFE WORK CONDITION.

NO, YOUR HONOR , GROSS NEGLIGENCE IS NOT ENOUGH AND I HATE TO GET INTO SEMANTICS.

I THINK SEMANTICS ARE IMPORTANT. WHAT IS THE DIFFERENCE BETWEEN THIS BEING A GROSS NEGLIGENCE , DISREGARD FOR THE SAFETY OF THE EMPLOYEE, AS OPPOSED TO AN INTENTIONAL TORT?

THE DIFFERENCE I THINK, YOUR HONOR, COMES DOWN TO I THINK MOST SIGNIFICANTLY THAT THE CONDITION GETS WORSE AND WORSE AND WORSE EACH TIME THAT THE LADDER IS USED.

JUSTICE: AND IT DOESN'T MATTER WHETHER OR NOT THE EMPLOYEE IS AWARE OF IT?

I DON'T THINK IT DOES MATTER WHETHER THE EMPLOYEE IS AWARE OF IT , BECAUSE THIS IS NOT A FAILURE TO WARN CASE. THERE ARE TWO DUTIES , YOU KNOW? IN YOUR ORDINARY NEGLIGENCE CASE, FOR EXAMPLE, THERE IS A DUTY TO WARN OF THE DANGEROUS CONDITION BUT THERE IS ALSO A DUTY NOT TO HAVE THE DANGEROUS CONDITION. AND EVEN IF YOU WARN OF THE DANGEROUS CONDITION THERE IS STILL A QUESTION OF WHETHER THE CONDITION WAS SO DANGEROUS THAT IT SHOULDN'T HAVE BEEN THERE AT ALL . >> JUSTICE: SO IF WE TAKE JUSTICE --.

CHIEF JUSTICE: SHE IS SO INTO HER REBUTTAL.

JUSTICE: REAL QUICK SO IF WE TAKE JUSTICE WELLS ' EXAMPLE YOU HAVE A SAFE LADDER BUT EMPLOYEE REGULARLY STANDS ON TOP OF THE LADDER WHICH EVERY BODY KNOWS IS DANGEROUS AND THE LADDERS HAVE A WARNING ON THEM, DON'T STAND ON THE TOP , BUT THE EMPLOYER ALLOWS THE EMPLOYEE TO DO THAT ON A REGULAR BASIS AND THE EMPLOYEE FALLS OFF UNDER YOUR THEORY THAT WOULD ALSO BE OUTSIDE WORKMAN'S COMP ?

NO , BECAUSE THAT'S NOT A DANGEROUS CONDITION CREATED BY THE EMPLOYER AND THAT'S NOT A CONDITION THAT GETS MORE DANGEROUS EACH TIME IT HAPPENS. THE OTHER CONCERNMENT ISSUE AND THEN I'LL SIT DOWN BECAUSE I WOULD LIKE A MINUTE FOR REBUTTAL , BUT THE OTHER THING IS THAT IF YOU SAY YOU CAN NEVER HAVE IT WHEN THE EMPLOYEE KNOWS , YOU ARE READOPTING CONDUCTOR NEGLIGENCE AS AN ABSOLUTE DEFENSE AND THAT'S SOMETHING NOT EVEN THE FLORIDA LEGISLATURE HAS DONE. THANK YOU .

MAY IT PLEASE THE COURT , ROBERT BIASOTTI REPRESENTING THE BOMBAY COMPANY. WITH ME AT COUNSEL TABLE IS CHRISTINE DAVIS.

JUSTICE: WAS THE JURY INSTRUCTED IN THIS CASE THAT IT HAD TO FIND MORE THAN GROSS NEGLIGENCE?

THEY WERE INSTRUCTED THAT IT HAD TO BE SUBSTANTIALLY CERTAIN TO CAUSE DEATH OR INJURY WHICH IS RIGHT OUT OF THE TURNER CASE AND THEY WERE ALSO I DON'T REMEMBER THE EXACT WORDS BUT IT HAD TO BE MORE THAN - - SOMETHING MORE. I DON'T REMEMBER THE EXACT WORDS BUT THERE WAS A SECOND SENTENCE TO THE JURY INSTRUCTION.

JUSTICE: I ASKED MISS GREEN SEVERAL QUESTIONS . MY QUESTION FOR YOU AND THIS IS

WHY I THINK IT IS A DIFFICULT CASE FOR US IS : THIS DID GO TO THE JURY. THE JURY WAS GIVEN THE STANDARD AS WE ADOPTED THEM IN TURNER , AND THE JURY CAME BACK AND RULED IN FAVOR OF THE PLAINTIFF . WHY DOESN'T INQUIRY END THERE?

I THINK FOR THE SAME REASON I GUESS THE SAME REASON THAT YOU HAVE A DIRECTED VERDICT IN ANY CASE. I MEAN , THE TURNER STANDARD IS MORE THAN JUST SUBSTANTIALLY CERTAIN TO CAUSE DEATH OR INJURY. AS JUSTICE WELLS POINTED OUT. IT SAYS IN THE OPINION IT HAS GOT TO BE MORE THAN GROSS NEGLIGENCE. IT HAS TO RISE TO THE LEVEL OF CULPABLE NEGLIGENCE AND IT ANALYZES THE SUBSTANTIALLY CERTAIN TO CAUSE DEATH OR INJURY TO CULPABLE NEGLIGENCE WHICH IS A CRIME. AND THE WHOLE POINT OF NOT JUST THIS CASE BUT WE CITE A HALF DOZEN CASES IN CE TURNER OUT OF MOST OF THE DISTRICTS , THE MOST RECENT BEING THE CASUS CASE. THE OLD STATE FIRE PROOFING CASE, THE LAST VERSION OF THE JULIA NO CASE WHICH WAS THE BUMP IN THE FLOOR CASE. THE BOTTOM LINE IN THESE CASES IS IN ORDER TO EVEN GET TO THE JURY YOU HAVE TO SHOW SOMETHING MORE THAN GROSS NEGLIGENCE.

JUSTICE: WOULD YOU ANSWER THE -- I MEAN REALLY THE FUNDAMENTAL QUESTION WE ARE HERE ABOUT IS WHETHER CONCEALMENT IS PART OF THE TEST AND CAN YOU GO BACK TO TURNER AND POINT TO THE LANGUAGE THAT YOU THINK CONCEALMENT IS A CRITICAL ELEMENT?

I WOULD SAY TWO THINGS. FIRST OF ALL, I DON'T THINK CONCEALMENT IS AUTOMATICALLY A PART OF THE TEST. >> THAT IS WHERE THE 3RD DISTRICT HAS APPLIED HERE , A COVER UP AND CONCEALMENTS SO ALL I AM ASKING IS CAN YOU SHOW ME IN TURNER WHERE THAT WAS AN ELEMENT OF THE ANALYSIS?

WHAT THE TURNER CASE SAYS IS AS IT STEPS THROUGH THE FOUR CASES THAT ARE CITED . I DON'T HAVE THEM IN FRONT OF ME HERE , BUT , ANYWAY , IT TALKS ABOUT A COMMON THREAD OF CONCEALMENT THAT EXISTED IN THE FOUR EXAMPLES THAT ARE IN TURNER .

JUSTICE: THAT'S WHAT THE THIRD DISTRICT SAID. DID WE SAY THAT IN TURNER?

YOU SAID THAT IN TURNER.

JUSTICE: SO THAT'S THE LANGUAGE YOU ARE RELYING ON.

AND I WILL SAY THAT THE COURT DIDN'T COME OUT AND SAY YOU MUST HAVE CONCEALMENT OR YOU CAN'T HAVE A CASE. WHAT THE COURT SAID, THOUGH , THERE HAS TO BE SOMETHING GREATER THAN GROSS NEGLIGENCE. CONCEALMENT WOULD MEET THAT TEST. AND THAT'S WHY A LOT OF THESE CASES TALK ABOUT CONCEALMENT.

JUSTICE: BUT THE PROBLEM IS DO YOU HAVE TO HAVE THAT IN ORDER TO HAVE SOMETHING MORE THAN GROSS NEGLIGENCE? AND THAT'S WHAT THE THIRD DISTRICT SEEMS TO BE SAYING THAT YOU HAVE TO HAVE CONCEALMENT BY THE EMPLOYER IN ORDER TO DEMONSTRATE THAT THIS IS A SUBSTANTIAL CERTAINTY CASE.

AND I WOULD SUGGEST THAT IF THEY HAVE RESPECTFULLY I READ IT DIFFERENTLY AND THAT'S HOW I SAID IT IN MY BRIEF. I THINK THAT WHAT THEY ARE DOING IS LOOKING AT THIS ON A CASE-BY-CASE BASIS AND TRYING TO SEE WHAT THE CONCEALMENT --

CHIEF JUSTICE: LET'S JUST GO THROUGH EXACTLY WHAT THEY SAY, BECAUSE THE LAST TWO PARAGRAPHS COULDN'T BE ANY CLEARER TO ME. THEY FIRST CITE FROM TURNER THAT WE SAID THAT THERE WAS A THREAD, A COMMON THREAD OF EVIDENCE THAT THE EMPLOYER TRY TO COVER UP THE DANGER AND THEN THEY GO ON AND SAY THAT ELEMENT IS MIS-

NG HERE. HERE AS I N E M E R G E N C Y O N E T H E D A N G E R O U S C O N D I T I O N W A S E V I D E N T A N D T H E R E W A S N O C O N C E A L M E N T O F T H E D A N G E R. F O R T H A T R E A S O N , W E C O N C L U D E T H A T T H E E V I D E N C E W A S L E G A L L Y I N S U F F I C I E N T T O S U P P O R T L I A B I L I T Y U N D E R T H E I N T E N T I O N A L T O R T E X C E P T I O N. F O R T H A T R E A S O N. T H A T I S T H A T T H E D A N G E R W A S E V I D E N T T O T H E E M P L O Y E E A N D T H E R E W A S N O C O N C E A L M E N T .

I W O U L D S U G G E S T T H A T I S T W O D I F F E R E N T T H I N G S. T H E Y S O R T O F G O H A N D I N H A N D B U T T H E Y A R E R E A L L Y Q U I T E D I F F E R E N T. Y O U C A N H A V E C O N C E A L M E N T W H E R E I T I S N O T A N O B V I O U S D A N G E R. Y O U C A N H A V E A N O B V I O U S D A N G E R W I T H O U T C O N C E A L M E N T. I N T H I S C A S E W H E R E Y O U A R E T A L K I N G A B O U T A W O B B L E Y L A D D E R W H I C H I H A V E I N M Y H O U S E A N D P R O B A B L Y H A L F O F T H E P E O P L E I N T H I S R O O M H A V E , M O S T P E O P L E K N O W Y O U A R E N O T S U P P O S E D T O C L I M B U P A W O B B L E Y L A D D E R.

JUSTICE: W E S E E M T O B E G O I N G A W R Y H E R E , B U T R E A L L Y W H A T W E A R E L O O K I N G T O I S D O W E H A V E A P R I N C I P L E O F L A W T H A T H A S B E E N M I S S T A T E D B Y T H E 3 R D D I S T R I C T ? A S T H E C H I E F J U S T I C E J U S T Q U O T E D F O R T H A T R E A S O N T H E A B S E N C E O F W H A T I S M I S S I N G , M I S S I N G E L E M E N T S O T H A T ' S W H A T W E A R E T A L K I N G A B O U T A N D Y O U M A Y S T I L L W I N W I T H O U T T H A T. S O T H A T ' S W H A T W E W A N T T O T A L K A B O U T.

I W O U L D N O T B E O P P O S E D T O A C L A R I F I C A T I O N O F T H A T. I T H I N K T H A T T H E T U R N E R S T A N D A R D I S A N D H A S B E E N S I N C E 2 0 0 0 T H A T I T H A S T O R I S E T O A L E V E L W O R S E T H A N G R O S S N E G L I G E N C E. T H A T ' S T H E S A M E S T A N D A R D T H A T C O U R T S L O O K A T A L L O F T H E T I M E T O D E T E R M I N E W H E T H E R T H E R E S H O U L D O R S H O U L D N ' T B E P U N I T I V E D A M A G E S G O I N G T O A J U R Y .

C H I E F J U S T I C E : W O U L D Y O U A G R E E T H E N I F W E C L A R I F I E D T H A T T H A T Y O U W O U L D A R G U E O N A N A L T E R N A T I V E G R O U N D T H A T T H E F A C T S I N T H I S C A S E , R E G A R D L E S S O F I F T H E R E W A S N O C O N C E A L M E N T O R T H A T I T W A S E V I D E N T T O T H E E M P L O Y E E S D O N O T R I S E T O T H E L E V E L O F T H E S U B S T A N T I A L C E R T A I N T Y ?

T H A T ' S E X A C T L Y C O R R E C T .

C H I E F J U S T I C E : B U T N O W T H I S I S W H E R E T H E H A R D T H I N G I S A N D G O E S B A C K T O W H A T J U S T I C E C A N T E R O S A Y S W H E R E I S T H A T L I N E W H E R E I T B E C O M E S A S A M A T T E R O F L A W A S O P P O S E D T O A F A C T U A L D I S P U T E ? I M E A N , H O W M A N Y T I M E S W A S T H E E M P L O Y E R T O L D I N T H I S C A S E T H A T T H I S W A S A N E X T R E M E L Y D A N G E R O U S S I T U A T I O N , T H I S L A D D E R W A S U N S A F E , I T C O U L D N O T B E U S E D A N D T H E E M P L O Y E R T H R O U G H I T S M A N A G E R J U S T S A I D T O O B A D E S S E N T I A L L Y ?

I T H I N K T H E A N S W E R I S T H A T Y O U A R E N O T G O I N G T O C O M E U P W I T H A B R I G H T - L I N E A N S W E R T O T H I S. T H E R E I S N O T G O I N G T O B E A S T R A I G H T L I N E Y O U A R E G O I N G T O D R A W. I T I S T H E S A M E C O N C E P T T H A T I S U S E D I N P U N I T I V E D A M A G E S . I T I S N O T A D I F F I C U L T C O N C E P T T O S A Y I T H A S G O T T O R I S E T O T H E L E V E L O F C U L P A B L E N E G L I G E N C E. I T H A S G O T T O B E M O R E T H A N G R O S S N E G L I G E N C E. T H A T ' S W H A T T U R N E R S A Y S. >> J U S T I C E : T H A T I S N O T W H A T T H E T H I R D D I S T R I C T D I D H E R E. T H E T H I R D D I S T R I C T I N T H E L A N G U A G E J U S T R E A D T O Y O U S A I D T H E R E I S T H I S E L E M E N T I S M I S S I N G A N D T H E N F O R T H A T R E A S O N T O H O L D T H A T. S O I T M A Y B E T H A T T H I S I S J U S T A R E M A N D T O C O N S I D E R T H I S C A S E W I T H O U T T H A T A S A P R I N C I P L E O F L A W . T H A T ' S W H A T W E A R E S T R U G G L I N G W I T H.

A N D I W O U L D P O I N T T H E C O U R T T O S O M E O T H E R C A S E S A S W E L L T O L O O K F O R. T R Y I N G T O C L E A N T H I S U P , B E C A U S E T H I S I S N O T U N I Q U E T O T H E T H I R D D I S T R I C T. T H E F O U R T H D I S T R I C T I N T H E A L L S T A T E S F I R E P R O F I N G C A S E W H I C H I N V O L V E D A N E M P L O Y E E T H A T W A S K I L L E D I N T H E S C A F F O L D I N G F E L L.

J U S T I C E : I R E C O G N I Z E T H A T T H E 3 R D , 2 N D A N D T H E 5 T H , I M E A N E V E R Y B O D Y I S S T R U G G L I N G W I T H H O W I N T H E W O R L D T O A P P L Y T U R N E R T O T H E P R E - 2 0 0 3 C A S E S , B U T W H A T I R E A D

AND I TAKE IT WHAT YOU ARE SAYING IS THAT IN THE PRECEDING PARAGRAPH TO WHAT JUSTICE PARIENTE WROTE THE THIRD DISTRICT SAYS OF PARTICULAR INTEREST HERE, AND THAT IS FOCUSING ON THIS PARTICULAR CASE IS THAT THE PARTICULAR INTEREST HERE IS THE LACK OF CONCEALMENT.

I AGREE. I MEAN, THAT'S THE POINT AND IT IS THE TWO THINGS. IT IS THE LACK OF CONCEALMENT AND THE FACT THAT IT IS AN OBVIOUS DANGER. AND --.

CHIEF JUSTICE: THE PROBLEM I HAVE WITH IT THEN WE ARE REALLY SAYING OR ARE WE THAT THE MORE AGGREGIOUS THE CONDITION THE LESS LIABILITY AND THE MORE IN !!! INFREQUENT WARNINGS OF THE DANGEROUS CONDITION THE LESS LIABILITY, AND, YOU KNOW, WE HAVE SO MANY CASES WHERE THE EMPLOYER, YOU KNOW, DOESN'T KNOW, KNEW OR SHOULD HAVE KNOWN AND THAT'S A NEGLIGENCE CASE, BUT, YOU KNOW, TO ME AND I GUESS IT IS ALL HOW THE EVIDENCE IS PRESENTED WHICH I WOULD ASSUME HAS TO BE IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF IS THAT THIS -- BOTH THE STORE MANAGER AND THIS BAKERMAN HAD COMPLAINED NOT ONLY THAT THE LADDER WAS TOO SHORT. IT WAS TOO SHORT FOR THE JOB OF REACHING UP TO ONE OF THE HIGHER SHELVES BUT IT WAS DANGEROUS, AND IT WAS IN BAD CONDITION AND IT SWAYED, AND IT SAID DESPITE THE REPEATED COMPLAINTS AND REQUESTS TO BUY A NEW LADDER THAT AREA SUPERVISORS DID NOT AUTHORIZE THE EXPENDITURE OF FUNDS TO REPLACE IT. THOSE ARE THE FACTS THE JURY HEARD.

THOSE ARE THE FACTS IN THE LIGHT MOST FAVORABLE TO THE PLAINTIFF.

CHIEF JUSTICE: SO WHAT IS IT THAT DOESN'T MAKE THIS A SUBSTANTIALLY CERTAIN ACCIDENT TO HAPPEN?

IT MAKES IT A BEST GROSS NEGLIGENCE. WHAT THE QUESTION THAT WAS ASKED AT THE THIRD DISTRICT IN THIS CASE, I THINK IT WAS BY JUDGE SWARTZ WAS COULD THE STORE MANAGER HAVE BEEN CHARGED WITH A CRIME FOR WHAT HE DID. AND IN MY VIEW THE ANSWER IS PLAINLY NO. THIS IS NOT A CRIME. IT IS NEGLIGENCE. MAYBE EVEN GROSS NEGLIGENCE.

JUSTICE: WAS THE JURY IN THIS CASE INSTRUCTED THAT SUBSTANTIAL CERTAINTY HAD TO BE GREATER THAN GROSS NEGLIGENCE? >> I DON'T BELIEVE IT WAS. I'M SORRY, I DON'T HAVE THE -- THERE WERE TWO PARTS TO THE JURY INSTRUCTION. IT READ THAT IT HAD TO BE SUBSTANTIALLY CERTAIN TO CAUSE DEATH OR INJURY AND I THINK THEY SAID IT HAD TO BE MORE THAN --.

JUSTICE: THE MERE POSSIBILITY?

MORE THAN A MERE POSSIBILITY.

JUSTICE: BUT GROSS NEGLIGENCE WAS NEVER DEFINED?

CHIEF JUSTICE: WAS THAT JURY INSTRUCTION ASKED FOR AND DECLINED?

I DON'T BELIEVE IT WAS.

CHIEF JUSTICE: MISS GREEN WAS HONEST ENOUGH TO SAY THAT THE ISSUE OF COMPARATIVE NEGLIGENCE WAS NOT RAISED. IT SEEMS LIKE THERE IS AN ISSUE OF DEFECTIVE JURY INSTRUCTIONS THAT SOMETHING THAT SHOULD HAVE BEEN RAISED AND ARGUED IN THE 3RD DISTRICT AND THEN TO US.

WELL, WE ARE NOT QUIBBLING. WE DIDN'T COMPLAIN ABOUT THE JURY INSTRUCTIONS OR THEY DIDN'T. WE ARE SUGGESTING THAT IN LINE WITH ALL OF THE CASES FRANKLY THAT WE CITE

IN OUR BRIEF THAT HAVE BEEN CITED IN THE LAST FIVE YEARS I THINK FROM ALL OF THE VARIOUS DISTRICTS THAT INVOLVE DEATHS , THAT INVOLVE , YOU KNOW , THERE WAS A PLASTER IN THE PIC - - PACHECO, A PLASTERER WHO WAS ELECTROCUTED IN THE WAREHOUSE THE DEFENDANTS FORGOT TO TELL HIM THAT THE POWER WAS STILL ON. HE GET SELECTROCU TED . THE COURT SAID THAT'S NOT MORE THAN GROSS NEGLIGENCE. THE BYERSCASE WAS THE DEBRIS LEANING CASE AFTER ANDREW WERE A MAN STEALS A BACKHOE AND RUNS INTO A TREE AND KILLS ONE OF HIS COWORKERS. NOT MORE THAN GROSS NEGLIGENCE.

CHIEF JUSTICE: BECAUSE IF YOU FORGET TO TELL SOMEBODY , THAT'S NEGLIGENCE. IF YOU KNOW OF THE DANGER AND YOU IGNORE IT , THEN THERE IS AN INTENTIONAL CONDUCT. IN OTHER WORDS, THIS EMPLOYER, I MEAN THAT'S HOW I ASSUME IT WAS ARGUED TO THE JURY. HAD A CHOICE. THEY WERE CONFRONTED WITH BEING TOLD THAT THIS WAS AN EXTREMELY DANGEROUS CONDITION THAT SOMEBODY WAS GOING TO GET HURT , AND KNOWING THAT, KNOWING IT THEY IGNORED IT . NOW , YOU KNOW , WHETHER THAT IS CRIMINALLY LIABLE, I'M NOT SURE THAT IS WHETHER THAT COULD BE A CRIME IS THE STANDARD FOR THE SUBSTANTIAL CERTAINTY, BUT IT SEEMS TO ME THAT THE QUALITY , THAT'S WHY I HAVE PROBLEMS WITH THAT CASE BECAUSE I THINK THAT IS DIFFERENT IN TIME FROM THE FACTS HERE BECAUSE IF THE FACTS ARE AS WE HAVE BEEN TALKING WHICH IS NUMEROUS COMPLAINTS AND AN ACTUAL REFUSAL TO BUY A LADDER KNOWING THAT THIS LADDER COULD NOT PERFORM ITS TASK WITH SOMEBODY IN A SAFE MANNER, THAT SOONER OR LATER , THIS ACCIDENT HAD TO HAVE OCCURRED.

TWO THINGS.

CHIEF JUSTICE: BUT ISN'T THAT HOW IT WAS ARGUED TO THE JURY? >> IT WAS , AND THE JURY , THAT'S HOW IN PART WHY THE JURY FOUND COMPARATIVE NEGLIGENCE AT THE END OF THIS. IN FACT , I WOULD WELCOME YOU TO GO BACK AND READ THE TRANSCRIPT WHERE MR. BAKERMAN SAYS, HE COMPLAINED. HE, IN FACT , TESTIFIES THAT HE NEVER ACTUALLY FILED THE FORMAL COMPLAINT AND HE NEVER COMPLAINED TO THE STORE MANAGER WHAT HE SAID WAS, GEE, THIS LADDER IS WOBBLEY, AND HE SAID HE SAID THAT ENOUGH TIMES HE FIGURED SHE KNEW BUT HE NEVER ACTUALLY COMPLAINED THAT THE LADDER WAS WOBBLEY .

JUSTICE: IT THOUGHT IT WAS WAS TAKEN AS A FACT THAT SOMEONE AT LEAST HAD REPORTED TO THE MANAGER AND DISTRICT, I MEAN , WHAT THIS INDIVIDUAL HAD DONE IS NOT NECESSARILY THE SCOPE OF THE KNOWLEDGE OF AN EMPLOYEE , CORRECT?

I UNDERSTAND.

JUSTICE: THAT THE CASE OR NOT?

I SHOULDN'T BE HERE ARGUING THE FACTS AND I'M NOT HERE ARGUING THE FACTS .

CHIEF JUSTICE: I'M TAKING THIS FROM THE 3RD DISTRICT'S OPINION, BAKERMAN AND THE STORE MANAGER HAD COMPLAINED TO THE AREA SUPERVISOR THAT THE LADDER WAS TOO SHORT AND DANGEROUS SO THE OBVIOUSLY EVEN THOUGH THEY FOUND AGAINST - - FOR YOU TO DETERMINE THAT WAS A FACT . >> I'M NOT CHALLENGING THE FACTS. THEY ARE WHAT THEY ARE. I GUESS WHAT YOU TALKED ABOUT , JUSTICE PARIENTE , ABOUT THE CASSUS CASE , I WOULD REFER YOU TO THE DISSENT BY JUDGE KRULP AND HE DISENTS AND SAYS I THINK THERE ARE FACT ISSUES HERE AND THAT AT THE END OF THIS LAST PARAGRAPH HE SAYS BUT THIS IS NOTHING LIKE BOMBAY VERSUS BAKERMAN. THAT WAS JUST A COMMON , EVERY DAY LADDER AND THE DANGER WAS OBVIOUS. SO HE DISTINGUISES IT , EVEN THOUGH THE MAJORITY RELIES ON IT. HE ALSO RELIES ON IT AND SAYS THIS CASE ISN'T THAT. AND I THINK THAT IS THE POINT.

JUSTICE: IS THAT MAYBE THOUGH A VALID LEGAL ANALYSIS, BECAUSE IN TURNER AND YOU

ARE DEALING WITH CHEMICALS THAT MAY HAVE SOME KIND OF UNUSUAL COMBINATION TO PRODUCE AN EXPLOSION, IS A LADDER, IS A COMMON PART, ARE THOSE THINGS MAYBE IN A DIFFERENT LEGAL CATEGORY?

ABSOLUTELY, AND I HESITATED TO SAY THAT THERE SHOULD BE SOME SORT OF DANGEROUS INSTRUMENTALITY OR SOMETHING LIKE THAT BUT THESE CASES INVOLVE CHEMICALS AND POISONS AND AIRPLANES THAT AREN'T BEING MAINTAINED REALLY BAD, DANGEROUS THINGS THAT EMPLOYERS ARE CONSIDERING KNOWN DANGERS FROM THESE EMPLOYEES. THAT'S CULPABLE NEGLIGENCE OR AT LEAST CULPABLE NEGLIGENCE THAT CAN GO TO A JURY.

CHIEF JUSTICE: THERE IS IN PRODUCT LIABILITY LAW A THEORY OF HAZARD RISK ANALYSIS, AND THE GREATER THE HAZARD IS THE LESS THAT YOU SORT OF LOOK AT PROBABILITIES SO THAT IF SOMEBODY, YOU KNOW, IF SOMETHING BLOWS UP EACH AND EVERY TIME SOMEONE WILL DIE THEN, YOU KNOW, THAT'S A GREAT HAZARD AND IT MAY NOT BE THAT THE RISK OF IT HAPPENING IS THAT GREAT. I DON'T KNOW, AND THAT MAY BE I DON'T KNOW IF THAT'S THE WAY YOU ARGUED IT, BUT HERE THAT IS LADDER, THE WORST THAT IS GOING TO HAPPEN IS LIKE THIS GUY GOT, I AM NOT DEMEANING HIS INJURIES BUT A FRACTURED PIECE, YOU KNOW, AND HE MIGHT HAVE ESCAPED WITHOUT ANY INJURY BUT DO YOU THINK THAT'S A THING WE HAVE TO LOOK AT WHETHER THE HAZARD IS ONE THAT IS SUBSTANTIALLY CERTAIN TO PRODUCE DEATH OR SERIOUS INJURY BEFORE IT GETS TO THE TURNER STANDARD?

I WOULD SUGGEST THAT AS THE HAZARD BECOMES MORE DANGEROUS THAT THE EMPLOYER HAS AN ADDED RESPONSIBILITY TO TAKE CARE, TO GIVE NOTICE, TO LET PEOPLE KNOW ABOUT SAFETY PRECAUTIONS.

CHIEF JUSTICE: THE MORE OUTFRAGES THE CONDUCT.

THE MORE THE BURDEN IS ON THE EMPLOYER BUT THE WOBBLEY LADDER OR RIPPING A CARPET. I TYPE ON MY COMPUTER ALL DAY DOES MY EMPLOYER, ARE THEY SUBSTANTIALLY CERTAIN I MIGHT GET CARPAL TUNNEL SYNDROME? DOES THAT GO TO THE JURY EVERY TIME? THAT ERODES WORKERS' COMMUNITY.

CHIEF JUSTICE: BY FOCUSING ON THE INSTRUMENTALITY WHICH I DIDN'T READ THIS CASE AS BEING A FOCUS ON THAT AND MAY ASK MISS GREEN TO ADDRESS IT, I AM SORT OF INTERESTED IN THAT POSITIVE APPROACH.

THERE IS CERTAINLY A THREAD, ANOTHER THREAD.

CHIEF JUSTICE: THERE IS ANOTHER THREAD?

YES, ANOTHER THREAD.

CHIEF JUSTICE: WE ARE GOING TO SEW THIS ALL UP.

WE ARE LEAVING A WHOLE FABRIC - FABRIC HERE. >> OF THAT KIND OF HEIGHTENED DANGERS. PEOPLE ON HIGH SCAFFOLDS, WINDOW WAS HERSON'S. I THINK THERE IS A CASE PERHAPS MISS GREEN CITED WHERE A MAN IS HANGING OUT THE WINDOW AND THE EMPLOYER WON'T LET HIS WORKER HOLD ON TO HIM AND HE FALLS OUT THE WINDOW. THAT'S DANGEROUS STUFF. I WOULD POINT THE COURT BACK TO THE GENESIS OF THIS WHOLE SUBSTANTIALLY CERTAIN WHICH CAME FROM THE SPIVEY VERSUS BATTAGLIA CASE 30 YEARS AGO OUT OF THIS COURT AND REFERRED TO AGAIN IN THE D'AMARIO CASE. THE DETERMINATION OF TORTS WHICH COMES UP WITH THIS SUBSTANTIALLY CERTAIN TO CAUSE INJURY GIVES ONE EXAMPLE OF WHAT IS SUBSTANTIALLY CERTAIN TO CAUSE INJURY. THAT EXAMPLE THAT THE YGIVIE IS THERE IS A MAN IN THE OFFICE. ANOTHER MAN WANTS TO KILL

HIM. HE THROWS A BOMB IN THE OFFICE. THE MAN'S SECRETARY IS IN THE OFFICE AS WELL. HE DOESN'T INTEND TO HURT THE SECRETARY BUT SHE GETS KILLED. THEY ARE GOING TO IMPUTE THAT BECAUSE IT IS SUBSTANTIALLY CERTAIN TO CAUSE INJURY. THAT'S THE GENESIS OF WHERE THIS CAME FROM IN THE RESTATEMENT OF TORTS IN 1965. SOMETHING THAT IS REALLY BAD, SOMETHING THAT IS SUBSTANTIALLY CERTAIN TO CAUSE INJURY AND I DON'T THINK IT WAS MEANT TO INCLUDE A WOBBLE LADDER OR A RIPPED CARPET OR, YOU KNOW, A STUBBED TOE OR SOMETHING LIKE THAT. SOMETHING THAT IS OPEN AND OBVIOUS TO THE EMPLOYEE. HAD THIS EMPLOYEE WENT TO HIS SUPERVISOR AND SAID, LOOK, THIS LADDER IS DANGEROUS. I'M NOT GOING UP IT, AND THE EMPLOYER SAID GO UP IT OR YOU ARE FIRED, AND HE WENT UP IT AND THEN FELL OFF IT, I THINK YOU WOULD HAVE A SLIGHTLY DIFFERENT CASE. >> JUSTICE: ESSENTIALLY THAT'S WHAT IS HERE. THAT IS REALLY WHAT IS HERE.

BUT THAT DIDN'T HAPPEN, THOUGH. THERE ARE NO FACTS THAT SAY THAT. WHAT WE KNOW AND WHAT JUSTICE WELLS IS ABSOLUTELY CORRECT WE DON'T KNOW EXACTLY HOW HE FELL OFF THE LADDER. HE WASN'T TOLD GO UP AND OR YOU ARE FIRED. THERE IS NO TESTIMONY LIKE THAT IN THIS RECORD. THIS IS A COMMON WOBBLER LADDER WHICH THE TESTIMONY IS THIS GEN TL EMAN WENT UP 40 TIMES A YEAR.

JUSTICE: WE WOULD BE REALLY GOING FAR A FIELD TO SAY YOU MUST BE THREATENED BY YOUR EMPLOYER BEFORE THIS APPLIES. I CAN GO WITH YOUR OTHER DISCUSSION ON THE HAZARDS, BUT I JUST I FAIL TO SEE THE IMPORTANCE OF THE THREAT TO FIRE.

THIS IS A STORY THAT PEOPLE USE THIS LADDER 40 TIMES A DAY SEVEN DAYS A WEEK FOR YEARS AND HE WASN'T THE ONLY ONE. HE WAS AN ASSISTANT MANAGER BY THE WAY. HE HAD PEOPLE WORKING FOR HIM THAT WERE USING THE SAME LADDER.

CHIEF JUSTICE: AND THAT'S A DIFFERENT BASIS YOU USED THAN THE 3RD DISTRICT USED. JUSTICE CANTERO?

WHAT IF THIS LADDER STILL EXISTED AND NOW SOMEBODY ELSE HAS BEEN INJURED ON IT. DOES THAT NOW SATISFY SUBSTANTIALLY CERTAIN?

I THINK THAT GOES TO CULPABILITY IF YOU HAVE REPEATED INJURIES. THERE ARE THE CASES THAT TALK ABOUT THAT WHEN YOU ARE ON NOTICE THAT THERE ARE A NUMBER OF CASES THAT SAY YOU DON'T HAVE TO HAVE MULTIPLE ACCIDENTS BUT IF YOU DO EVEN A BOBBLE Y - - WOBBLER LADDER I THINK THAT MIGHT GO TO CULPABILITY.

JUSTICE: WHAT ABOUT ONE PERSON?

AT ONE TIME? THE FACTS IN THIS CASE AFTER THE ONE PERSON WAS HURT AND THEY GOT RID OF THE LADDER AND GOT A NEW ONE.

CHIEF JUSTICE: THEY SHOULD REALLY WHEN THEY ARE TOLD OF A HAZARD YOU WOULD HOPE THAT THEY DO THE RIGHT THING WHICH IS TO MAKE THE WORKPLACE SAFE FOR THEIR WORKERS. RIGHT?

YES, YOUR HONOR.

CHIEF JUSTICE: WHETHER THEY ARE LIABLE IN COURT OR WORKERS' COMP, WE HOPE THAT EMPLOYERS ARE ENCOURAGED BY REGULATIONS TO HAVE A SAFE WORKPLACE.

I AGREE BUT I DON'T WANT TO AND I SEE MY TIME IS UP BUT JUST MY ONE LAST SENTENCE IS I DON'T WANT TO LOSE SIGHT OF THE FACT THAT THIS IS WORKERS' COMP IMMUNITY. THIS ISN'T A STRAIGHT NEGLIGENCE CASE. THERE ARE RECIPROCAL RIGHTS THAT ARE BEING TRADE

D IN HERE AND THAT SHOULDN'T B E LOST SIGHT OF A ND THAT'S THE TURNER STANDARD.

CHIEF JUSTICE: THA NK YOU. MISS GREEN?

JUSTICE: MIS S GREEN , LET ME ASK YOU THIS. THERE WAS SOME D IS CUSSION WHEN MR. BIA SO TT I WAS UP HERE ABOUT THE FACT THAT THE EMPLOYER KNEW ABOUT THIS WOBBLEY LADDER. DIDN'T DO A NYTHING ABOUT I T. IT SEEMS LIKE IF W E M AD E THAT THE STANDARD THAT IS NOW EVEN MORE THAN G ROSS NEGLIGENCE THAT YOU KNEWABOUT IT AND Y OU D IDN' T D O A NYTHING ABOUT I T AND N OW EVERY N EGLIGENCE CASE IS GOING TO TURN INTO AN INTENTIONAL TORT CASE WHEN THE EMPLOYER KNEW ABOUT A DANGEROUS CONDITION B UT DID NOT R EPAIR T HE DAN GERO US CONDITION, A SLIP AND F AL L CASE, A NY KIND OF D ANGE ROUS CONDITION O N PROPERTY , IF THE EMPLOYER KNEW ABOUT IT, IT IS NOW AN I NTE N TI ONAL TORT CASE .

NO , YOUR HONOR, BEC AUSE H ERE THERE IS TESTIMONY THA T NOT ONLY THAT HE KNEW ABOUT THE DANGEROUS CONDITION BUT THAT THERE IS T ESTI MONY T HAT HE SAW THE LADDE R , A ND T HERE IS COMMON SENSE NOT I N ADDITION TO THE EXPERT TESTIMONY IS THE LONGER T HE LADDER IS U SED THE WOR ST T HE LADDER IS GOING TO GET .

JUSTICE: BUT THERE IS ALSO EVIDENCE IN T HI S R EC OR D BY MIS S GOT S CHA LK T HA T -- G OTTSCHALK THAT NO O NE E LS E HAD F AL LE N O FF O F THE L ARDE R AND THE LADDER W AS U SED SEVEN D AYS A WEEK A ND S HE USED THE LADDER.

YES, YOUR HONOR, AND I T GOT WORSE AND WORSE T HE M OR E IT WAS USE D.

CHIEF JUSTICE: BUT DOESN'T THAT TESTIMONY AND MAYBE IT IS A QUE STIO N O F THE JURY GO TO YOUR SECON D ELEMENT THAT IN THIS C ASE GIVEN THE LENGTH OF T IME THIS LADDER WAS USED WIT HO UT INJURY THAT THIS WAS N OT A N INJURY THAT WAS SUBSTANTIALLY C ERTAIN TO OCCUR A ND I SN 'T T HE T YP E O F HAZARD IT IS , THA T I S L IK E AGAIN THE HOL E I N THE RUG O R THE LADDER VER SU S A N ELECTRICAL W IR E SOM EH OW G O I NTO THE ANA LY SIS ?

NOT IF THE JURY H AD EVIDENCE FROM WHICH IT C OULD CONCLUDE THAT E VERY TIME THE LADDER WAS USED IT GOT WORSE.

JUSTICE: DID THE JURY , WERE THEY INSTRUCTED ON THE DIFFERENCE BETWEEN GROSS N EGLIGENCE AND T HE S UBSTANTIAL CERTAINTY?

I'M SO GLAD Y OU ASKED THAT, YOUR HONOR, B ECAUSE THE T ER M G ROSS N EGLI GE NCE WAS N OT USED. BUT I DON 'T THINK THAT REALLY HAS A LOT OF MEA NING TO A L AY J UR Y. WHAT THE JURY - - .

JUSTICE: WELL, T UR NE R MAKES IT VERY IMPORTANT WE'RE NOT TALKING GROSS. IT HAS T O BE MORE T HAN G ROSS NEGLIGENCE SO HOW WAS THIS -- BECAUSE I READ T HE J UR Y INSTRUCTIONS AND I WAS WONDERING HOW WAS T HI S J UR Y I NFORMED AND I R EA LIZE I T WASN'T NECESSARILY OBJ EC TED TO. I'M CONCERNED HOW DID T RIAL COURTS DEAL WITH THIS , BECAUSE IF YOU LOOK AT THIS INSTRUCTION IT DOES NOT APPEAR TO ME THAT THE JURY WAS TOLD IT HAS TO B E MO RE THAN GROSS NEGLIGENCE.

THE JURY WAS T OLD I T HAS TO BE MORE THAN J UST A P ROBABILITY.

JUSTICE: IT HAS TO BE MORE THAN S IMPL E NEGLIGENCE?

NO , S IM PLE N EG LIGENCE I S POSSIBILITY, AND THEN PROBA BILITY GETS YOU MOR E TOWARDS - - .

JUSTICE: BUT YOU AGREE THEY WEREN'T TOLD WHAT GROSS NEGLIGENCE WAS AND THAT IT HAD TO BE MORE THAN GROSS NEGLIGENCE?

NO, YOUR HONOR, THEY WEREN'T AND NOBODY ASKED FOR THAT. NOBODY ASKED FOR THAT INSTRUCTION.

CHIEF JUSTICE: WITH OUR HELP YOU HAVE USED UP YOUR TIME. THANK YOU VERY MUCH. THANKS TO BOTH SIDES FOR AN INFORMATIVE, LIVELY ORAL ARGUMENT AND THE COURT WILL TAKE THIS CASE UNDER ADVISEMENT AND WE WILL BE IN RECESS UNTIL 9:00 TOMORROW MORNING.

THE MARSHAL: PLEASE RISE .