

ON THE NEXT CASE, JUSTICE
PARIENTE IS RECUSED.
THE NEXT CASE IS WENDT V. LA
COSTA BEACH RESORT CONDOMINIUM
ASSOCIATION.

[INAUDIBLE CONVERSATIONS]

>> YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT,
KEITH GRUMER ON BEHALF OF
PETITIONERS, MR. WENDT, WARNE
AND KENNY WENDT.

>> COULD YOU SPEAK INTO THE MIC
AND KEEP YOUR VOICE UP?

>> CERTAINLY, YOUR HONOR.
ON BEHALF OF THE PETITIONERS,
WARNE, WENDT AND WENDT.
THIS MATTER, AS YOU WERE JUST
PREVIEWED, INVOLVED A DISMISSAL
OF BOTH STATUTORY AND
CONTRACTUAL INDEMNIFICATION
CLAIMS.

WHAT HAPPENED HERE IS THAT THE
DIRECTORS SERVED A CONDOMINIUM,
A NOT-FOR-PROFIT ORGANIZATION AS
VOLUNTEERS.

THERE WAS AN INDIVIDUAL BY THE
NAME OF MR. CARIOTI WHO STOLE
RENTAL INCOME FROM CERTAIN
UNITS.

THERE WAS NO ALLEGATION IN THE
COMPLAINT AGAINST THESE
DIRECTORS, NOR WAS THERE A JURY
VERDICT FINDING THAT THESE
DIRECTORS EVER RECEIVED AN
IMPROPER PERSONAL BENEFIT, THAT
THEY EVER PERSONALLY OBTAINED OR
PARTICIPATED IN A CRIMINAL
ACTIVITY --

>> BUT THEY -- WEREN'T THEY
FOUND TO HAVE VIOLATED SOME
FIDUCIARY DUTY TO THE
CONDOMINIUM ASSOCIATION?

I MEAN, IT MAY NOT HAVE BEEN
STEALING MONEY, BUT IT WAS A
VIOLATION OF A DUTY, CORRECT?

>> HERE'S -- YES, THEY WERE

FOUND TO HAVE BREACHED THEIR FIDUCIARY DUTIES.

BUT HERE ARE THE PROBLEMS WITH THAT FINDING, AND THIS IS WHY THIS CASE POSITIONS ITSELF THE WAY IT DOES.

THE JURY WAS INSTRUCTED NOT ONLY ON IMPROPER BENEFIT, NOT ONLY ON CRIMINAL CONDUCT, BUT ALSO A REASONABLE MAN STANDARD.

AND I'M READING FROM THE JURY INSTRUCTIONS.

"A DIRECTOR FURTHER BREACHES HIS DUTY BY FAILING TO DO SOMETHING A REASONABLY CAREFUL PERSON WOULD DO UNDER LIKE CIRCUMSTANCES."

>> ARE YOU SUGGESTING THAT THE EVIDENCE HERE IS THAT THESE FOLKS WERE JOINED IN THE LITIGATION SOLELY AND EXCLUSIVELY BECAUSE THEY FAILED TO CATCH AND STOP THE WRONGDOING OF OTHER FOLKS?

>> IN THE WORDS OF THE CLOSING ARGUMENT OF THE ATTORNEY --

>> THAT'S JUST A YES OR A NO.

>> YES.

>> OKAY.

[LAUGHTER]

>> YES, YOUR HONOR.

TO QUOTE THE CLOSING ARGUMENT OF THE ASSOCIATION'S ATTORNEY, "ALL WE HAVE TO PROVE IS THAT THE BOARD OF DIRECTORS AND THE OFFICERS WERE ASLEEP AT THE SWITCH.

THEY WEREN'T PAYING ATTENTION TO WHAT WAS GOING ON."

THAT'S FROM THE TRIAL TRANSCRIPT, PAGE 1355A8.

SO WHAT WE HAVE HERE IS NOT 0850 PAREN 1, ACTIONS BROUGHT BY A THIRD PARTY.

WE HAVE PAREN 2, THE PORTION OF THE STATUTE WHICH APPLIES TO

ACTIONS BROUGHT BY THE CORPORATION ON ITS OWN BEHALF. THERE IS DISCRETIONARY INDEMNITY, AND WE SOUGHT THAT. THEN WE DROPPED TO THREE. THE ASSOCIATION ADOPTED IN ITS OWN BYLAWS A MANDATORY, MANDATORY INDEMNIFICATION PROVISION.

AND I'M READING FROM ARTICLE 12 OF THE BYLAWS.

"THE ASSOCIATION SHALL INDEMNIFY EVERY DIRECTOR AND EVERY OFFICER, HIS HEIRS AND PERSONAL REPRESENTATIVES AGAINST ALL LOSS, COST AND EXPENSE REASONABLY INCURRED BY HIM IN CONNECTION WITH ANY ACTION, SUIT OR PROCEEDING TO WHICH HE MAY BE MADE A PARTY BY REASON OF HIS BEING OR HAVING BEEN AN OFFICER OR DIRECTOR OF THE ASSOCIATION." AND NOW THE EXCEPTION.

"EXCEPT AS TO MATTERS WHEREIN HE SHALL FINALLY BE ADJUDGED IN SUCH ACTION, SUIT OR PROCEEDING TO BE LIABLE FOR OR GUILTY OF GROSS NEGLIGENCE, WILLFUL MISCONDUCT OR WILLFUL MISCONDUCT.

THE FOREGOING RIGHTS ARE IN ADDITION TO THOSE FOUND ELSEWHERE."

SO WE COME BACK TO WHEN THE ASSOCIATION BRINGS THIS ACTION, THEY DON'T ALLEGE WILLFUL MISCONDUCT, THEY DON'T ALLEGE CRIMINAL ACTS, THEY DON'T ALLEGE ANY OF THE EXCEPTIONS TO THIS RULE.

AND AT TRIAL I -- I WAS NOT PART OF THAT TRIAL TEAM, BUT AT TRIAL THE DIRECTORS OBJECTED TO THE JURY INSTRUCTIONS SPECIFICALLY FOR THE INCLUSION OF THE REASONABLE MAN STANDARD.

THAT REASONABLE MAN STANDARD
GETS THEM TAGGED FOR BEING
ASLEEP AT THE SWITCH.
AND WE COME BACK TO THE
UNDERLYING POLICY OF WHY WE HAVE
6070850 AND ITS COUNTERPART,
THE -- IN THE PROTECTION, THE
0831.

AND THE REASON FOR THAT POLICY
IS YOU WANT PEOPLE TO VOLUNTEER
FOR THESE BOARDS.

YOU WANT THEM NOT TO FACE THE
THREAT OF LITIGATION.

AND EXACTLY THE NIGHTMARE
ENVISIONED BY WHAT THE STATUTE'S
DESIGNED TO PREVENT --

>> NOW, LET ME JUST ASK YOU THIS
THOUGH.

UNDER SECTION TWO DON'T YOU HAVE
TO SHOW THAT THE PEOPLE ACTED IN
GOOD FAITH OR REASONABLY UNDER
THE CIRCUMSTANCES?

AND SO BY BEING CONVICTED -- NOT
CONVICTED, BUT BY BEING FOUND
LIABLE, DOES THAT NEGATE ANY
FINDING THAT THEY ACTED
REASONABLY AND IN GOOD FAITH
THAT'S REQUIRED UNDER SECTION
TWO?

>> NO.

>> WHY NOT?

>> THAT QUESTION IS A QUESTION
FOR THIS PROCEEDING, NOT FOR
THAT PROCEEDING.

>> THAT'S WHAT I'M ASKING.

IF WHEN YOU DO THE
INDEMNIFICATION ACTION, ISN'T A
PART OF IT TO SHOW THAT YOU
HAVE, THAT THE DIRECTER ACTED
REASONABLY AND IN GOOD FAITH AND
ALL THAT?

>> YES.

>> THAT'S WHAT THEY WOULD ARGUE,
CORRECT?

>> YES.

>> AND THEN THE OTHER SIDE WOULD

ARGUE THAT THIS FINDING WOULD
NEGATE THAT OR NOT, IS THAT --
>> THEY CERTAINLY COULD ARGUE
THAT THE FINDING NEGATES IT --
>> OKAY.

>> -- BUT I DON'T BELIEVE THAT
IT DOES.

>> YOU'RE SAYING THAT THE 14TH
NEVER REACHED THAT, AND --
FOURTH NEVER REACHED THAT, AND
THAT'S AN ISSUE FOR ANOTHER DAY?
>> YES.

THE FOURTH DISTRICT WENT OFF THE
TRACK ON SUBSECTION ONE AND THEN
HAD A --

>> AND THEN ON THE STATUTORY
CLAIM, THE CONFLICT JURISDICTION
ISSUE IS WHETHER OR NOT UNDER
THE STATUTE CORPORATIONS CAN SUE
ITS OWN AGENTS OR DIRECTORS IN
THIS CASE, AND THEN THEY CAN
THEN SEEK INDEMNIFICATION FOR
THAT, IS THAT RIGHT?

>> THAT'S TURKEY CREEK, AND
THAT'S --

>> THAT'S THE CONFLICT ISSUE?

>> IT DOES PRESENT THAT
CONUNDRUM FOR CORPORATIONS.
ARE YOU GOING TO GO SUE YOUR OWN
OFFICERS, DIRECTORS OR AGENTS
WHEN YOU ARE GOING TO HAVE TO
PAY FOR IT?

AND THE MESSAGE OF THE
LEGISLATURE IN ADOPTING WHAT,
ESSENTIALLY, WAS VERBATIM THE
MODEL BUSINESS CORPORATION ACT
INDEMNIFICATION LANGUAGE WAS
DON'T DO IT UNLESS YOU'VE GOT
MALFEASANCE.

DON'T SUE YOUR OFFICERS OR
DIRECTORS MERELY BECAUSE YOU'VE
CHANGED BOARDS AND YOU DON'T
LIKE THEM.

OR BECAUSE SOMETHING BAD
HAPPENED.

BUT IT DID NOT HAPPEN AT THEIR

FAULT.

THERE HAS BEEN NO SHOWING IN THIS CASE THAT THESE DIRECTORS PARTICIPATED, KNEW OF A CRIMINAL ACT BY A THIRD PERSON.

AND THAT'S, ULTIMATELY, THE ISSUE FOR THIS INDEMNIFICATION LAWSUIT.

CAN THEY SHOW -- AND I'D SUGGEST BY THE CLOSING ARGUMENT THAT THEY MADE TO THE PREVIOUS JURY THEY'RE PROBABLY COLLATERALLY STOPPED FROM COMING UP WITH WHOLE NEW FACTS.

THEY DON'T HAVE THE FACTS THAT DEMONSTRATE THAT THESE DIRECTERS KNEW OF THIS ILLEGAL ACTIVITY.

AND IT IS THAT BASIS BY WHICH THEY WERE, THEY WERE FOUND LIABLE UNDER THE REASONABLE MAN STANDARD WHICH HAPPENS TO BE, WHICH WAS AND IS PRESENTLY BEFORE THE FOURTH ON THAT ISSUE.

BUT ON THE -- THIS INDEMNIFICATION ISSUE, THE FOURTH REJECTED ON A DISMISSAL.

>> WAS THAT AN ISSUE THAT WAS RAISED?

THERE WAS AN APPEAL FROM THE FINDING OF THE TRIAL COURT, CORRECT?

>> THIS CASE -- YES.

THIS CASE IS A VERY TANGLED WEB. IT HAS HAD THREE DIFFERENT APPEAL PROCEEDINGS, ONE OF WHICH WAS THE TRIAL COURT SET ASIDE ITS VERY OWN JURY VERDICT ON AN ALLEGED MARY CARTER AGREEMENT.

>> AND THAT WAS REVERSED?

>> THAT WAS REVERSED.

>> BUT THIS -- I MEAN, YOU SEEM TO BE PUTTING A LOT OF STORE IN THIS REASONABLE MAN STANDARD THAT YOU'RE TALKING ABOUT, AND SO WAS THAT SPECIFICALLY AN ISSUE THAT WAS RAISED?

>> THAT IS CURRENTLY THE ISSUE BEFORE THE FOURTH ON THE THIRD APPEAL EMANATING FROM THIS DISPUTE.

THE ACTUAL, THE FIRST APPEAL DEALT WITH A POST-TRIAL SETTING ASIDE A 1.540 RULING B.

THE SECOND APPEAL EMANATED FROM A SEPARATE LAWSUIT, THAT BEING THIS INDEMNITY WHICH IS BEFORE YOUR HONORS TODAY.

THE THIRD APPEAL IS ACTUALLY, WAS ACTUALLY THE APPEAL OF THE JURY VERDICT WHICH WAS STAYED PENDING THE 1.540B RULING.

AND THE, AND THESE PROCEEDINGS. SO THAT'S WHY THAT JURY INSTRUCTION IS CURRENTLY BEFORE THE FOURTH.

THE FACT THAT THEY INCLUDED THAT REASONABLE MAN STANDARD WHEN THAT'S NOT A BASIS FOR PERSONAL LIABILITY OF DIRECTERS UNDER ANY CIRCUMSTANCES.

IT VITIATES THE IMMUNITY UNDER 0831.

AND SO IT'S WITH THAT CONSIDERATION THAT THESE, THIS CASE STATED A CAUSE OF ACTION. BOTH UNDER THE STATUTE AND UNDER THE CONTRACTUAL LANGUAGE OF INDEMNITY.

AND BY THE ASSOCIATION'S OWN ADMISSION THAT THEY DON'T HAVE TO PROVE WRONGFUL CONDUCT, MERELY THAT THEY WERE ASLEEP AT THE SWITCH.

AND SO A NEW BOARD COMES IN, FINDS OUT ABOUT THIS THEFT, SUES THE WRONGDOER, MR. CARIOTI, AND MR. CARIOTI ENDS UP TESTIFYING AGAINST THESE DIRECTORS.

BUT AT THE END OF THE DAY THEY COULD NOT PROVE AND DID NOT PROVE THAT THEY KNEW, PARTICIPATED IN, ENGAGED IN

GROSS MISMANAGEMENT, WILLFUL MISCONDUCT.

AND IF WE GO THROUGH THE STANDARDS -- AND THERE ARE SPECIFIC STANDARDS IN THE STATUTE WHICH EXEMPT OR DENY INDEMNIFICATION -- THAT'S UNDER SUBPART FOUR, I'M SORRY, SEVEN. I MISSPOKE.

A, A VIOLATION OF CRIMINAL LAW, THERE'S NO ALLEGATION OF A CRIMINAL ACT BY THESE DIRECTORS, NOR WAS THERE PROVEN; B, A TRANSACTION FROM WHICH THE DIRECTER, OFFICER, EMPLOYEE OR AGENT DERIVED AN IMPERSONAL -- I'M SORRY, AN IMPROPER PERSONAL BENEFIT.

AGAIN, THE CLOSING ARGUMENT BY THE ASSOCIATION'S TRIAL LAWYER WAS WE DON'T HAVE TO PROVE THAT, WE ONLY HAVE TO PROVE THEY WERE ASLEEP AT THE SWITCH.

THAT MAY BE TRUE, BUT IT DOESN'T GET THEM OUT OF THEIR OBLIGATIONS UNDER INDEMNIFICATION AND, CANDIDLY, THE DIRECTER'S IMMUNITY.

SEE, A CASE OF A DIRECTER OR CIRCUMSTANCE INVOLVING 0834 WHICH IS INAPPLICABLE OR, D, WILLFUL MISCONDUCT OR CONSCIOUS DISREGARD FOR THE BEST INTERESTS OF THE CORPORATION.

IN A PROCEEDING BY OR IN THE RIGHT OF A CORPORATION TO PROCURE A JUDGMENT IN ITS FAVOR OR IN A DERIVATIVE ACTION.

WE DON'T HAVE THOSE CIRCUMSTANCES HERE.

THEY DON'T HAVE THE PROOF, AND LET ME JUST TAKE YOU BACK TO THE GENESIS OF THIS, IT'S THE DISMISSAL OF A COMPLAINT.

NEITHER SIDE ACTUALLY OTHER THAN HAVING PRIOR TRIAL HAD AN

OPPORTUNITY TO GENERATE OR DEVELOP ANY ADDITIONAL EVIDENCE. THE ONLY EVIDENCE WE DO HAVE IS THE PRIOR TRIAL WHERE THEY CONCEDED THEY HAD NONE OF THESE CIRCUMSTANCES.

AND BASED UPON THOSE CIRCUMSTANCES, BOTH STATUTORY AND THE CONTRACTUAL INDEMNITY SHOULD HAVE BEEN PROVIDED AS WELL AS THE ADVANCEMENT OF THE EXPENSES.

AND AT THE END OF THE DAY, DON'T SUE YOUR OFFICERS, DIRECTORS OR AGENTS OTHER THAN FOR MALFEASANCE.

AND THAT'S WHAT THE POLICY IS BEHIND THESE RULES.

AND UNLESS YOU CAN SHOW THOSE THINGS, DON'T SUE THESE PEOPLE. THEY VOLUNTEERED.

THIS EMANATES UNDER 617 AND THE 0831 BRINGS IN THE 607 WHICH IS THE GENERAL CORPORATE PROVISION. THAT'S WHY WE'RE HERE, AND UNLESS THERE'S ADDITIONAL COMMENTS, I'LL RESERVE MY TIME FOR -- THANK YOU.

>> THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MICHAEL MOSKOWITZ ALONG WITH MY PARTNER, SCOTT ZASLAV, REPRESENTING THE RESPONDENT, LA COSTA BEACH RESORT CONDOMINIUM ASSOCIATION, I'LL REFER TO THEM AS LA COSTA. I WANT TO GO THROUGH THE FACTS ON THE RECORD, BUT I WANT TO SKIP TO A VERY CRITICAL POINT THAT OPPOSES WHAT COUNSEL HAS JUST PRESENTED IN RESPONSE TO SOME OF THE QUESTIONS THAT JUSTICE LEWIS AND JUSTICE QUINCE ASKED BOTH IN THIS CASE AND IN THE PREVIOUS CASE.

I'M GOING TO SHOW TO YOU BASED

ON THE FACTS AND THE RECORD THAT
WHAT WE HAVE HERE THAT'S ALREADY
THE LAW OF THE CASE IS THAT
THESE PETITIONERS HAVE BEEN
FOUND LIABLE OF THE INTENTIONAL
TORT -- NOT THE NEGLIGENCE TORT,
THE INTENTIONAL TORT -- OF
BREACH OF FIDUCIARY DUTY, LAW OF
THE CASE, THAT THEY WERE FOUND
LIABLE OF HAVING --

>> WHAT -- YOU SAY THAT'S THE
LAW.

I THOUGHT HE SAID THAT IT WAS
STILL AN APPEAL PENDING ON THAT
PARTICULAR --

>> NOT ON THAT ISSUE, JUSTICE
QUINCE.

THERE ARE TWO APPEALS THAT CAME
OUT AS A RESULT OF THIS CASE.
FIRST WAS THE APPEAL WE'RE HERE
ON TODAY WHICH WAS THE DISMISSAL
OF THE COMPLAINT THAT THEY FILED
FOR INDEMNIFICATION.

THAT'S, OBVIOUSLY, WE'RE HERE TO
DECIDE THAT.

BUT THERE WAS ANOTHER APPEAL.
THIS CASE WENT THROUGH A JURY
TRIAL.

IT RESULTED IN A VERDICT AGAINST
THE PETITIONERS THAT THEY
BREACHED THEIR FIDUCIARY DUTY
AND THAT THEY WERE LIABLE.
THE JUDGE ENTERED AN ORDER
SETTING A NEW TRIAL, SET ASIDE
THE VERDICT NOT BASED ON
EVIDENTIARY REASONS, BUT BECAUSE
OF CERTAIN TECHNICAL REASONS.

>> LET ME ASK YOU THIS QUESTION
WHEN YOU SPEAK OF THE BREACH OF
FIDUCIARY DUTIES: CAN ONE
VIOLATE A FIDUCIARY DUTY BY
BEING NEGLIGENT?

>> YES.

AND A CASE CITED BY THEIR --

>> AND IF THAT IS THE CASE, THEN
YOU ARE NOT, YOU'RE NOT

FULFILLING THE, THE PROPERLY THE DUTIES OF A DIRECTER, SO WHY ARE YOU NOT THEN BEING SUED IN YOUR CAPACITY AS A DIRECTER BY VIRTUE OF THE CAPACITY?

NOT BECAUSE OF INDIVIDUAL WRONGDOING, BUT IN YOUR CAPACITY AS A DIRECTER?

ANY DIRECTER WHO'S INVOLVED WITH THIS, THIS CONDOMINIUM OR THIS CORPORATION OUGHT TO HAVE STOPPED THIS.

>> YES.

EXCEPT I WANT TO PROVE, JUSTICE LEWIS, THAT THIS WAS NOT A CIRCUMSTANCE WHERE THEY DID NOT STOP IT.

I WANT TO SHOW YOU IN A COUPLE OF MINUTES THAT THEY ARE THE DIRECT PARTICIPANTS IN THE THEFT THAT WAS INVOLVED --

>> DID THAT CASE IN WHICH THERE WAS LIABILITY IMPOSED, WAS THERE THAT FINDING?

>> WELL --

>> EASY QUESTION.

EASY QUESTION.

YOU CAN THEN EXPLAIN IT.

>> I'M GOING TO SHOW YOU UNDER LAW WHY THAT'S THE CASE.

>> THAT'S A YES OR NO ANSWER.

>> NO, SIR.

>> DID NOT.

OKAY, GO AHEAD AND EXPLAIN.

>> THERE'S ONLY AN INTERROGATORY VERDICT FORM THAT ASKS THE QUESTION, DID THE DEFENDANTS BREACH THE FIDUCIARY DUTY BOX? YES OR NO, BOX IS CHECKED.

>> NOT HOW THAT WAS BREACHED, IS WHAT YOUR SAYING.

>> THEY CITE IN THEIR IMPLIED BRIEF IS ON POINT.

HEALTH CARE FIFTH DISTRICT CASE, IN THAT CASE, NOW, MOST OF THE CASES SAY THAT BREACH OF

FIDUCIARY DUTY IS AN INTENTIONAL TORT.

THAT CASE SAYS THAT WE NOTE THAT ONE MAY FILE A CLAIM FOR BREACH OF FIDUCIARY DUTY AS EITHER A NEGLIGENT OR INTENTIONAL TORT. AND THEN IT GOES TO LOOK AT THE PRECISE NATURE OF THE CLAIMS ALLEGED TO DETERMINE WHICH ONE IT WAS.

SO YOU LOOK AT THE CLAIM THAT IS ALLEGED.

THE SECOND AMENDED COMPLAINT THAT WAS FILED AGAINST THE DIRECTORS WAS ATTACHED TO THEIR COMPLAINT FOR INDEMNIFICATION. IT'S AN EXHIBIT, IT'S PART OF THIS RECORD.

SO IF WE LOOK AT THAT, A ONE-COUNT COMPLAINT, THE BREACH OF FIDUCIARY DUTY.

YOU NEED ONLY LOOK AT PARAGRAPHS 18 AND 19, AND WHAT YOU SEE IS THAT THERE'S AN ALLEGATION AGAINST ALL THE DEFENDANTS, ALL THE DEFENDANTS THAT THEY APPROPRIATED FOR THEIR OWN USE OR BENEFIT, ASSETS OR OPPORTUNITIES BELONGING TO THE PLAINTIFF OR ALLOWING OTHERS TO DO SO.

THAT IF 19 IS THE MOST IMPORTANT, THAT THEY PARTICIPATED IN A COMMON SCHEME OR DESIGN THROUGH WHICH THEY APPROPRIATED FOR THEIR OWN USE AND BENEFIT WEEKS AND THE OPPORTUNITY TO PROFIT FROM THESE WEEKS ALL OF WHICH BELONGED TO THE PLAINTIFF.

THE DEFENDANTS, FURTHER IN THE SAME PARAGRAPH, CONCEALED THEIR ACTIONS FROM THE PLAINTIFF, ITS ACCOUNTANTS OR ATTORNEYS.

>> WELL, WHAT IT SOUNDS LIKE THEN IS THERE'S GOING TO BE A

REVERSAL OF THE OTHER CASE,
BECAUSE IF THEY'RE INSTRUCTED ON
WHETHER THEY FAILED TO USE
REASONABLE CARE, THAT'S NOT WHAT
THAT COMPLAINT SAYS.

>> BUT, ACTUALLY, THE
INSTRUCTION WAS BOTH.
THEY WERE INSTRUCTED ON THE
INTENTIONAL AND --

>> HOW CAN YOU INSTRUCT A JURY
ON NEGLIGENCE WHEN YOU'VE
ALLEGED AN INTENTIONAL ACTION?

>> I CONCUR, JUSTICE LEWIS.
I SUBMIT TO YOU THERE ARE NO
ALLEGATIONS, NOT A SINGLE
SENTENCE, SYLLABLE IN THE
ONE-COUNT SECOND AMENDED
COMPLAINT THAT ALLEGES
NEGLIGENCE.

SO WALKING THROUGH THE FACTS,
AND I'M GOING TO GO BACK TO THE
POINT I MADE.

JUSTICE QUINCE ASKED ME ABOUT
WHY IT'S THE LAW OF THE CASE.
WE HAVE A CIRCUMSTANCE IN WHICH
THERE WAS A VERDICT.
IT WAS THEN SET ASIDE.

IT WENT UP ON APPEAL TO THE
FOURTH DISTRICT.

THE FOURTH DISTRICT HAS RENDERED
AN OPINION ON THAT IN APRIL OF
2010.

AND IT REVERSED THE ORDER THAT
SET ASIDE THE NEW TRIAL.
IT REINSTATED THE VERDICT AND
INSTRUCTED THE COURT TO ENTER A
CORRECTED FINAL JUDGMENT AGAINST
THE DEFENDANTS WHO ARE THE
PETITIONERS HERE.

THAT FINAL JUDGMENT WAS ENTERED
IN SEPTEMBER OF 2010.

LET'S TALK ABOUT --

>> SO THERE'S NO OTHER APPEAL
OTHER THAN THIS APPEAL.

>> YES, YOUR HONOR.
LET ME EXPLAIN IT SPECIFICALLY.

THE FOURTH DISTRICT OPINION THAT I JUST MENTIONED, THE PETITIONERS SOUGHT TO BRING THAT TO THE SUPREME COURT.

THIS COURT DISMISSED THAT EFFORT.

SO THAT FOURTH DCA OPINION IS FINAL.

WITH RESPECT TO THE CORRECTED FINAL JUDGMENT THAT WAS ENTERED IN SEPTEMBER OF 2010, THEY TOOK AN APPEAL TO THE FOURTH DISTRICT ON THE CORRECTED FINAL JUDGMENT. THAT APPEAL WAS DISMISSED BY THE FOURTH DISTRICT COURT OF APPEALS AS UNTIMELY.

IT WAS FILED LATE.

SO WHAT WE HAVE IS A CORRECTED FINAL JUDGMENT THAT IS FINAL.

WE HAVE A FOURTH DCA OPINION THAT IS FINAL.

LET ME TELL YOU WHAT THAT FOURTH DCA OPINION SAYS THAT I SAY IS THE LAW OF THE CASE.

IT SAYS, QUOTE, "BREACHES OF FIDUCIARY DUTY ARE INTENTIONAL TORT," AND THAT IS PRECISELY THE NATURE OF THE ALLEGATIONS AGAINST THE THREE DEFENDANTS IN THIS CASE.

DIRECT QUOTE FROM THEIR FINDING WHICH IS THE LAW OF THE CASE.

SO WHEN COUNSEL FOR THE PETITIONERS --

>> I'M SORRY, I'M -- FORGIVE ME IF THIS IS JUST SHOWS A LACK OF KNOWLEDGE ABOUT THIS, IS THAT THE SAME CASE AS THIS CASE?

>> NOT THIS APPEAL.

IT'S THE SAME PARTIES, AND IT'S THE SAME CASE.

>> THE SAME CASE.

>> SAME CASE.

SAME IDENTICAL CASE.

TWO APPEALS.

OKAY?

>> WERE YOU READING FROM THE
OPINION THAT'S DATED APRIL 14TH?

>> YES.

I'LL EVEN DIRECT YOU TO THE
PAGE.

>> THEY ARISE OUT OF THE SAME
DISPUTE, BUT THEY'RE SEPARATE
CASES, AREN'T THEY?

>> WELL, ONE CASE WAS THE CASE
IN WHICH THE --

>> AND THAT'S OTHER, WHAT YOU'RE
SAYING, AND THIS WAS A SEPARATE
ACTION FILED FOR
INDEMNIFICATION.

>> WELL, THAT'S NOT THE SAME
CASE.

>> I APOLOGIZE.

>> DON'T COME IN TALKING ABOUT
LAW OF THE CASE APPLIED ON A
DIFFERENT CASE.

NOW, COLLATERAL, MAY BE.

>> I UNDERSTAND.

>> BUT NOT LAW OF THE CASE.

>> WELL --

>> I GUESS MY QUESTION WASN'T SO
FAR OFF.

>> YOU'RE CORRECT.

I APOLOGIZE.

BUT MY POINT IS, HOW CAN THEY
NOW ARGUE THAT THEY DID NOT
DERIVE A PERSONAL BENEFIT?

HOW CAN THEY NOW ARGUE THAT IT
WAS NEGLIGENCE?

HOW CAN THEY NOW ARGUE THAT THEY
WERE MERELY ASLEEP AT THE SWITCH
WHEN THERE'S BEEN ALREADY A
FINAL ADJUDICATION BY JUDGMENT
AND AN APPELLATE DECISION THAT
SAYS TO THE CONTRARY?

THAT'S THE POINT I REALLY WANTED
TO MAKE.

I THINK THAT THEY'RE BOUND BY
THAT.

I APOLOGIZE IF I USED THE LAW OF
THE CASE.

ALL I'M SAYING IS IT'S

DISINGENUOUS TO STAND HERE TODAY AND ARGUE DIFFERENTLY THAN WHAT THE RECORD IS AND WHAT THE FINAL PRODUCT IS.

THAT'S REALLY WHAT WE'RE TALKING ABOUT.

WHAT I WANT TO GET TO IS WHAT IS THE PUBLIC POLICY IN THIS STATE AS EVIDENCED BY THIS COURT'S DECISIONS AND THE COURTS OF THE VARIOUS DCAs REGARDING INDEMNIFICATION.

BECAUSE THIS WAS THE QUESTION RAISED BEFORE, AND I DON'T WANT TO WADE --

>> THIS CASE HAS NOTHING TO DO WITH THE CASE BEFORE US.

>> RIGHT.

BUT WHAT IS THE DIFFERENCE BETWEEN BASICALLY STEALING AND BEING CRIMINALLY CONVICTED OF STEALING?

THE ONLY DIFFERENCE IS ONE WASN'T CHARGED BY THE STATE OF FLORIDA, BUT INTENTIONAL TORTS IN CRIMINALITY ARE ALMOST ON THE SAME LEVEL IN TERMS OF THE LAW. AND WHAT IS THE PUBLIC POLICY? WHY, THEY CANNOT GET INDEMNIFICATION.

AND WHILE COUNSEL ARGUES THE PROCEDURAL ASPECTS OF THE DISMISSALS, BECAUSE THERE IS NO BASIS UPON WHICH THEY CAN PLEA ANY COURSE OF ACTION TO GET INDEMNIFICATION WHEN THEY HAVE BEEN FOUND LIABLE OF INTENTIONAL TORT.

NO RELEVANT FACTORS HAVE BEEN TAKEN INTO CONSIDERATION UNDER WHICH ANY JUDGE COULD MAKE THAT FINDING.

SO THE FIRST QUESTION, AND THIS RESPONDS, JUSTICE LEWIS, TO THE QUESTION YOU ASKED BEFORE, AND THAT IS WHAT IS THE POLICY

REGARDING CONTRACTS AND
MANDATORY INDEMNIFICATION?
AND COUNSEL CITES A BYLAW
PROVISION.

THIS COURT HAS DECIDED THAT
ISSUE, AND THIS COURT DECIDED
THAT ISSUE IN 1985 IN PENTHOUSE
NORTH ASSOCIATION V. LOMBARDI.
OKAY?

NOW, COUNSEL MIGHT SAY THAT
PREDATES THIS STATUTE, BUT IT
DEALS WITH THE CONTRACTUAL
INDEMNIFICATION CITING OTHER
CASES ON THE SAME ISSUE.

IT WAS A BREACH OF FIDUCIARY
DUTY CASE IN WHICH THE
ASSOCIATION TO THE DIRECTORS,
AND THIS COURT SAID, AND I
QUOTE, THE FACT THAT THIS IS AN
ACTION FOR BREACH OF FIDUCIARY
DUTY AND UNJUST ENRICHMENT
FURTHER CONVINCES US THAT THE
INDEMNIFICATION ARGUMENT MUST
FAIL.

WE AGREE WITH THE FOLLOWING
ANSWER FROM CENTURY VILLAGE TO A
SIMILAR CONTENTION BY A LESSOR.
ACCEPTING THE LESSOR'S
CONTENTION WOULD AMOUNT TO
ACCEPTING THE INCONGRUOUS THEORY
THAT ALTHOUGH THE CONDOMINIUM
ASSOCIATIONS MAY BE SUCCESSFUL
IN THEIR LITIGATION, THEY WOULD
NEVERTHELESS HAVE TO SATISFY
THEIR OWN JUDGMENT IN ADDITION
TO PAYING THE LESSOR'S COST.
THE LAW WILL NOT SANCTION SUCH
AN ANOMALY.

>> THAT HAS BEEN THE LAW, SO
WITH RESPECT TO CONTRACT IF WE
WERE TO ACCEPT THE PETITIONER'S
ARGUMENTS, THIS COURT WOULD NEED
TO SAY THAT WE ARE DECIDING THAT
PUBLIC POLICY WILL ALLOW
INDEMNIFICATION FOR INTENTIONAL
TORTS BY CONTRACT.

AND I SUBMIT TO YOU THAT THAT FLIES IN THE FACE OF PUBLIC POLICY ON EVERYTHING.

AND LET ME SAY THE FOLLOWING --
>> WOULD YOU AGREE THAT IF THIS WERE NOT THE INTENTIONAL CONDUCT THAT YOU'VE, YOU'VE ASSERTED AND YOU'VE ARGUED AND YOU'VE QUOTED, IF THIS, IF THIS WERE ONLY THE FAILURE TO CATCH SOMEBODY DOING SOMETHING WRONG, ASLEEP AT THE SWITCH, FAIL TO USE REASONABLE CARE, YOUR POSITION WOULD NOT PREVAIL, DO YOU AGREE WITH THAT?

>> I DON'T WANT TO SAY IT WOULDN'T PREVAIL.

I WOULD SAY THE FOLLOWING, THE TRIAL COURT UNDER THAT JUNCTURE WOULD HAVE TO LOOK AT ALL THE RELEVANT CIRCUMSTANCES.

I WOULD AGREE TO THAT.

>> ALL RIGHT.

>> BUT AGAIN, IN ORDER TO FIND THAT SCENARIO, I ASK THE FOLLOWING, I ASK SOMEBODY HERE TO POINT TO THE RECORD THAT'S BEFORE US AND SAY THOSE ALLEGATIONS EXISTED, THOSE FACTS WERE SHOWN AND THAT WAS THE FINDING.

THAT'S NOT THE CIRCUMSTANCE.

>> LET ME ASK YOU THIS, HOW DO WE FACTOR IN -- THESE DEFENDANTS DID PREVAIL, HOWEVER, ON A COUNTERCLAIM, DIDN'T THEY?

>> YES.

>> AND SO DOES THAT, THE FACT THAT THEY PREVAILED ON A COUNTERCLAIM, DOES THAT COME INTO PLAY AT ALL IN THIS INDEMNIFICATION --

>> WE STILL HAVE A JUDGMENT OF OVER \$400,000 JOINTLY AND SEPARATELY AGAINST EACH OF THOSE DEFENDANTS.

IT WAS APPROXIMATELY \$25,000.

IT WAS NOT A SIGNIFICANT
COUNTERCLAIM MONETARILY OR
SUBSTANTIVELY.

SO THAT DOES NOT PLAY INTO
ANYTHING, AND BY THE WAY, THAT
HAS NOTHING TO DO -- THEY HAVE
NOT ASKED FOR OR ASSERTED
INDEMNIFICATION.

THEY'VE NOT SUED ON THAT, IT'S
NOT PART OF THE RECORD.

BUT LET ME TALK ABOUT PUBLIC
POLICY FOR THE MOMENT CONSISTENT
WITH EVERY CONTRACT, WITH EVERY
STATUTORY ISSUE THAT THE COURTS
HAVE ADDRESSED.

FIRST OF ALL, PETITIONERS DO NOT
CITE TO A SINGLE CASE IN THE
STATE OF FLORIDA OR A SINGLE
CASE ANYWHERE IN THE UNITED
STATES IN WHICH A PERSON WHO HAS
BEEN FOUND LIABLE FOR AN
INTENTIONAL TORT RECEIVES
INDEMNIFICATION.

NOT A SINGLE CASE.

THEY DO SITE CASES WHERE,
OUTSIDE THE STATE OF FLORIDA
WHERE DURING THE COURSE OF A
CASE A PERSON CAN RECEIVE
ADVANCEMENT OF FEES AND COSTS
EVEN THOUGH THEY ARE DEFENDANTS
IN AN INTENTIONAL TORT
ALLEGATION.

DURING THE COURSE OF THE CASE.
BUT NOT WHERE IT'S ALREADY BEEN
DETERMINED, AND THEY ARE LIABLE.
AND THE REASON WHY THEY CAN WE
SEE SUCH ADVANCEMENT IN FLORIDA
STATUTE EVEN POTENTIALLY
AUTHORIZES THAT IS THERE IS
PROCEDURE SET UP WHERE THERE CAN
BE REQUIREMENT OF A BOND IN CASE
THEY LOSE.

BUT THAT IS A POTENTIAL.
BUT THAT'S NOT WHAT WE'RE
DEALING WITH.

NOT A SINGLE CASE ALLOWS

INDEMNIFICATION WHERE A PERSON'S FOUND LIABLE.

LET'S TALK ABOUT PUBLIC POLICY ON INDEMNIFICATIONS AND RELEASES IN TERMS OF INTENTIONAL TORTS. COMMON LAW ADDRESSED BY THE FOURTH DCA IN THE APPEAL WE'RE HERE ON TODAY.

IT ALLOWS ININDEMNIFICATION WHERE THE PARTY IS 100% FAULTLESS.

THAT'S THE REQUIREMENT.

IF YOU'RE 1% AT FAULT, YOU CANNOT RECEIVE COMMON LAW INDEMNIFICATION.

SO THAT'S BEEN THE FLORIDA LAW ON THAT.

CAN YOU GET INDEMNIFICATION AGAINST YOUR OWN NEGLIGENCE? YES.

THE LAW IN FLORIDA SAYS IT IS. HOWEVER, THE CASES SAY IT IS DISFAVORED, AND THEY WILL ONLY ALLOW IT IF LANGUAGE IS CLEAR AND EXPRESSES AN INTENT TO INDEMNIFY IN CLEAR AND UNEQUIVOCAL TERMS AGAINST THE INDEMNITY'S OWN WRONGFUL ACTS. AND, AS A MATTER OF FACT, AS THE CASE WE CITED IN OUR BRIEF, THE McKEE CASE, WHICH SAID USING GENERAL LANGUAGE ANY AND ALL ACTS IS INSUFFICIENT IN ORDER TO GET INDEMNIFIED AGAINST YOUR OWN NEGLIGENCE, THERE MUST BE CLEAR AND VERY SPECIFIC LANGUAGE, AND UNDER THOSE CIRCUMSTANCES IT WILL BE ALLOWED, OTHERWISE IT IS DISFAVORED.

THE HORIZON CASE THAT THEY CITE, ALSO, TALKS ABOUT LEASES.

AND THE HORIZON CASE WHICH THEY CITED IN THEIR REPLY BRIEF WHICH I TALKED ABOUT EARLIER SAYS SPECIFICALLY YOU CANNOT EXCLUDE A RELEASE.

RELEASES OF INTENTIONAL TORTS
ARE ALSO NOT ALLOWED.

NOT ONLY INDEMNIFICATIONS, BUT
ALSO RELEASES.

ON PAGES 14-15 OF OUR BRIEF, WE
CITE MANY, MANY CASES IN THE
STATE OF FLORIDA WHERE THESE
COURTS DO NOT ALLOW
INDEMNIFICATION FOR INTENTIONAL
TORTS.

AND IN THIS CASE, AS I SAID,
AGAIN, COLLATERAL ESTOPPEL HAS
ALREADY BEEN DECIDED WITH
RESPECT TO THEM.

THEY HAVE BEEN FOUND LIABLE OF
AN INTENTIONAL TORT, BREACH OF
FIDUCIARY DUTY.

>> ARE YOU GOING TO ADDRESS THE
CONFLICTS ISSUE AT SOME POINT?

>> YES.

IT'S, THERE'S A VERY INTERESTING
QUESTION, JUSTICE.

ONE, WAS THERE CONFLICT TO BEGIN
WITH, SHOULD THIS COURT HAVE
ACCEPTED DISCRETIONARY
JURISDICTION?

OR SHOULD THIS COURT TODAY
DETERMINE THAT IT WAS
IMPROVIDENTLY GRANTED?

I WOULD SUBMIT TO YOU THE
FOLLOWING, THAT THERE WAS A
CONFLICT IN VERBIAGE IN OPINION
BUT NOT IN DECISION, OKAY?

AND THAT, CLEARLY, THAT COULD BE
SEEN TODAY BETTER THAN AT ANY
TIME, AND HERE'S THE REASON WHY.
THE TURKEY CREEK CASE IS DURING
THE PENDENCY OF THE PROCEEDINGS,
EXACTLY WHAT I JUST REFERENCED A
FEW MOMENTS AGO.

IT WAS NOT AT THE CONCLUSION OF
THE PROCEEDINGS.

AND DURING THE TURKEY CREEK
CASE, THEY ASKED FOR THE
PROPOSITION THAT THE COURT CAN
GO BACK AND LOOK AT ALL THE

CIRCUMSTANCES TO DETERMINE WHETHER A PARTY SHOULD OR SHOULD NOT RECEIVE INDEMNIFICATION FOR FEES AND COSTS.

THAT'S THE DECISION OF TURKEY CREEK.

IN OUR PARTICULAR CIRCUMSTANCE AND WHY THEY'RE TOTALLY DISTINGUISHABLE, WE HAVE A SITUATION IN WHICH THE PARTIES HAVE ALREADY BEEN FOUND LIABLE FOR THE WRONGFUL ACTS OF BREACH OF FIDUCIARY DUTY.

>> THAT SOUNDS LIKE THE ARGUMENT HAVING TO DO WITH MAYBE COUNTERCLAIMS OR NOT.

I THOUGHT THE CONFLICT ISSUE WAS WHETHER OR NOT A DIRECTOR CAN BRING AN INDEMNIFICATION CLAIM ON THE SUIT BROUGHT AGAINST THEM BY THE CORPORATION.

>> THE, IN DICHTER, YOU LOOK AT THE OPINION, TURKEY CREEK SAYS THAT NORMALLY THESE CASES ARE SITUATIONS IN WHICH A DIRECTOR SEEKS INDEMNIFICATION BY HAVING BEEN A DEFENDANT BY A THIRD PARTY.

HOWEVER, WE BELIEVE THAT THE LANGUAGE IN THE STATUTE CONTEMPLATES AND ALLOWS A SCENARIO WHERE YOU CAN SEEK INDEMNIFICATION EVEN WHEN THE ASSOCIATION IS SUING YOU.

THAT'S NOT IN THEIR HOLDING.

HOWEVER, I AM SAYING THE FOLLOWING, EVEN IF THAT IS TRUE AND EVEN IF STATUTE PERMITS THAT, IT IS NOT APPLICABLE TO INTENTIONAL TORTS BECAUSE THAT VIOLATES THE PUBLIC POLICY OF THE STATE OF FLORIDA.

>> WELL, THEN YOU GET TO THE MERITS.

EVEN IF YOU GET TO THE MERITS WHETHER IT'S PERMISSIBLE FOR

THAT SITUATION TO OCCUR, THEN ON THE MERITS OF THIS CASE, THERE SHOULD BE NO REMEDY.

>> YES, SIR.

THAT'S EXACTLY THE CASE.

AND THAT'S WHY I SAY WHEN YOU LOOK AT THE FACTS AND THE RECORD BEFORE US, AT THE END OF THE DAY THE QUESTION FOR THIS COURT IS AS FOLLOWS: NUMBER ONE, WHETHER IT'S BY A THIRD PARTY OR YOUR OWN ASSOCIATION; NUMBER ONE, CAN A PARTY RECEIVE INDEMNIFICATION IF THEY HAVE BEEN FOUND LIABLE OF AN INTENTIONAL TORT?

AND WHEN YOU'RE TALKING ABOUT THEFT, IMPROPER PERSONAL BENEFIT, I SUBMIT TO YOU THAT IT RISES ALMOST TO THE LEVEL OF CRIMINALITY AND WE'RE ALMOST, ALMOST TALKING ABOUT THE SAME THING.

HOW CAN WE NOW CHANGE THE PUBLIC POLICY AND SUGGEST THAT WE ARE GOING TO ALLOW A PARTY TO BE INDEMNIFIED AGAINST THEIR OWN INTENTIONAL ACTS?

AND I SAY TO YOU THERE'S NO DISTINCTION.

THIRD PARTY OR IN-HOUSE SUIT. THERE'S NO DISTINCTION ON THIS POINT OF LAW.

IT CANNOT BE ALLOWED UNDER ANY CIRCUMSTANCE, AND THAT'S BEEN THE LAW IN THIS STATE FOR A VERY, VERY LONG TIME.

SO AT THE END OF THE DAY, WHY WAS THIS DISMISSED?

COUNSEL WOULD, I'M SURE, ARGUE AND DISMISS WITHOUT -- IT'S REALLY VERY RARE.

ADMITTEDLY, IT IS.

BUT WHAT DOES THE LAW SAY?

>> LET ME ASK YOU THIS.

IF THEY ATTACH WHAT THIS COMPLAINT IS AND IN AN AMENDED

COMPLAINT WOULD SAY, HOWEVER,
WHEN THE CASE WAS PRESENTED FOR
TRIAL, HERE'S WHAT THE JURY WAS
INSTRUCTED AND THAT THE ACTION
BELOW WAS ACTUALLY AMENDED AND
THAT WE WERE HELD RESPONSIBLE
FOR BEING ASLEEP AT THE SWITCH
OR FAILING TO USE REASONABLE
CARE, AND THE CASE WAS NOT
DECIDED UPON BLAH, BLAH, BLAH.
WHY SHOULD THEY NOT BE PERMITTED
TO AMEND AND PRESENT THIS TO THE
TRIAL COURT?

>> COLLATERAL ESTOPPEL OR RACE
JUDICATA.

AND THAT IS THE FOURTH DISTRICT
HAS ALREADY SAID THE BREACH OF
FIDUCIARY DUTY WAS AN
INTENTIONAL TORT.

THAT'S THE MOST DIRECT ANSWER I
CAN GIVE YOU.

IN ADDITION TO WHICH YOU LOOK AT
WHAT THE ALLEGATIONS OF THE
SECOND AMENDED COMPLAINT WERE,
THERE'S NOT A SINGLE ALLEGATION
OF NEGLIGENCE OR THE LIKE.

>> WELL, I MEAN, COMPLAINTS CAN
BE AMENDED DURING THE
PROCEEDINGS --

>> THIS IS A SECOND AMENDMENT
COMPLAINT.

THAT PROCEEDING'S TERMINATED.

>> I UNDERSTAND.

>> SO WE --

>> YOU HAVE NOW EXHAUSTED YOUR
TIME.

>> WE BELIEVE THAT THE DECISION
BELOW SHOULD BE AFFIRMED.

THANK YOU.

>> THANK YOU.

>> WITH ALL DUE RESPECT TO
MR. MOSKOWITZ, THERE IS A THIRD
APPEAL CURRENTLY IN THE FOURTH
EMANATING FROM THE LA COSTA V.
WENDT, CARIOTI LAWSUIT.

THAT JURY VERDICT IS CURRENTLY

UNDER REVIEW.

>> UNDER WHAT KIND OF PROCEEDING WAS THAT?

>> IT WAS TAKEN ONCE THE VERDICT CAME DOWN AND STAYED FOR PRACTICALLY TWO AND A HALF YEARS WHILE --

>> WHAT WAS THE CASE THAT WAS DECIDED IN APRIL OF 2010?

>> THE CASE THAT WAS DECIDED IN THE APRIL --

>> THAT WAS THE FOURTH DISTRICT REINSTATING THE VERDICT, CORRECT?

>> THAT WAS EMANATING, THAT WAS -- LA COSTA'S APPEAL OF THE ORDER GRANTING A NEW TRIAL UNDER THE 1.540B MOTION FINDING THAT THERE HAD BEEN FRAUD --

>> OKAY.

ONCE THAT WAS SENT BACK TO THE TRIAL COURT, WHAT HAPPENED?

>> THE APPEAL THAT WAS ORIGINALLY FILED FROM THE JURY VERDICT STARTED MOVING AGAIN. AND THAT IS NOW BEING BRIEFED NOT BY --

>> SO ARE YOU SAYING THERE WAS NO ENTRY OF ANOTHER, OF A FINAL JUDGMENT AFTER THE 2010 FOURTH DISTRICT OPINION?

>> JUDGE ROSENBERG THEN ENTERED -- YES, HE DID ENTER ANOTHER FINAL JUDGMENT. BUT THE --

>> BASED ON THE JURY VERDICT.

>> AND THE FOURTH DISTRICT REMAND, YES.

>> OKAY.

>> NOW, AS TO --

>> NOW, IF -- THAT MAY STILL BE OPEN, BUT WHY WHEN COUNSEL, I THINK CORRECTLY, SAYS WHEN YOU ATTACH SOMETHING TO YOUR COMPLAINT, IT BECOMES PART OF THAT COMPLAINT.

AND THE DOCUMENT THAT WAS ATTACHED BY THE CLAIMANTS HERE PLED THEM OUT OF A CAUSE OF ACTION BECAUSE IT SAYS IT'S AN INTENTIONAL -- THAT'S WHAT THE ARGUMENT IS.

WHY IS THAT INCORRECT?

>> WELL, ADMITTEDLY, WE SHOULD BE PERMITTED TO AMEND AT THE VERY LEAST TO IDENTIFY THAT THEY WERE PROVIDED WITH THE REASONABLE MAN STANDARD AND A CONCESSION BY THE ASSOCIATION AT TRIAL.

THEY COULD NOT PROVE IMPROPER BENEFIT OR CRIMINAL CONDUCT. SO WHAT THE ARGUMENT IS, IS A BOOT STRAP.

WE'VE GOT THIS FINDING OF BREACH, WE'VE GOT CASE LAW THAT SAYS IT'S AN INTENTIONAL TORT, BUT DON'T LOOK BEHIND THE MIRROR OR BEHIND THE CURTAIN WHERE THE ACTUAL ARGUMENT TO THE JURY WAS A REASONABLE MAN STANDARD.

>> WELL, BUT IF THAT IS UPHELD, THIS CURRENT APPEAL, IT SEEMS TO ME YOU'RE BACK TO THE SAME PROBLEM AS BEFORE, AND THAT IS THE RACE JUDICATA EFFECT OF THAT RACE WITH THE PLEADINGS THAT YOU HAD.

>> OH, I WOULD CONCEDE THAT.

>> OKAY.

>> BUT IT'S STILL PENDING --

>> OKAY.

>> -- AND --

>> WELL, PENDING IN WHAT POSTURE?

BECAUSE, YOU KNOW, YOU BOTH -- IT SEEMS TO ME YOU'VE SAID TWO DIFFERENT THINGS.

THEY SAY THAT EVEN THE APPEAL FROM THAT FINAL JUDGMENT AFTER REMAND WAS DISMISSED, BUT YOU SAY THAT IT'S STILL PENDING.

>> IF I HAD THE CASE NUMBER
THAT'S PENDING, I WOULD GIVE IT
TO THE COURT.
IF THE COURT WISHES --
>> YOU'RE TELLING US THAT IT WAS
NOT DISMISSED?
>> THERE IS A THIRD APPEAL
CURRENTLY BRIEFED BEFORE THE
FOURTH.
>> AND SO THAT THE FINAL
JUDGMENT IS STILL ALIVE FOR
APPELLATE PURPOSES.
>> YES.
>> THIS IS FOR THE FOURTH, NOT
THIS COURT.
>> CORRECT.
>> SO THERE'S NO RACE JUDICATA
THAT HAS ARISEN FROM THAT CASE.
>> I BELIEVE SO.
>> IT'S NOT FINAL.
>> I CONCUR.

AND THEN, UM, THE ONLY OTHER
POINT THAT I'D LIKE TO ADDRESS
IS AT SOME POINT THERE WAS SOME
VISITING OF THE COMPULSORY
COUNTERCLAIM ISSUE THAT WAS
DISCUSSED EVER SO BRIEFLY IN
SECTION NINE OF THE STATUTE
WHICH TALKS ABOUT THE NATURE OF
THESE PROCEEDINGS.
IT SAYS UNLESS A CORPORATION'S
ARTICLES OF INCORPORATION
PROVIDE OTHERWISE,
NOTWITHSTANDING THE FAILURE OF A
CORPORATION TO PROVIDE
INDEMNIFICATION DESPITE ANY
CONTRARY DETERMINATION OF THE
BOARD OR THE SHAREHOLDERS IN THE
SPECIFIC CASE, A DIRECTER,
OFFICER, EMPLOYEE OR AGENT OF
THE CORPORATION WHO IS OR WAS A
PARTY TO A PROCEEDING.
AND THAT'S ONE OF THOSE UNIQUE
ISSUES THAT FLORIDA HAS AND,
BASICALLY, TRACKED THE MODEL ACT
"IS OR WAS," AND I'LL TELL YOU

DELAWARE DOESN'T HAVE THAT "OR
WAS."

YOU HAVE TO BRING IT BACK TO THE
TRIAL JUDGE WHO TRIED THE
INITIAL LAWSUIT.

APPRECIATE THE COURTESY.

>> WHAT -- I'M TRYING TO FIGURE,
WHAT IS IT THAT YOU'RE JUST
SAYING IS THAT YOU CAN STILL ASK
FOR INDEMNIFICATION DESPITE ALL
OF THAT?

>> IT'S NOT A COMPULSORY IN THAT
PROCEEDING, "IS OR WAS."
IT IS NOT PART OF THAT
PROCEEDING.

THANK YOU VERY MUCH, YOUR HONOR.

>> WE THANK YOU FOR YOUR
ARGUMENT.

WE THANK BOTH SIDES FOR YOUR
ARGUMENT.

THAT IS THE FINAL CASE ON OUR
DOCKET TODAY.

COURT IS ADJOURNED.

>> PLEASE RISE!

COURT IS NOW IN RECESS.

