Brian Jones vs ETS of New Orleans, Inc

MAY IT PLEASE THE COURT. I AM BARRY KEYFETZ, REPRESENTING CLARENCE JONES -- REPRESENTING BRIAN JONES. TAXABLE COSTS, WHICH IS A STATUTORY-TYPE OF LIMITATION. HOW WOULD COSTS BE LIMITED?

BE LIMITED BY HE REASONABLE AND NECESSARY.

-- BY REASONABLE AND NECESSARY.

SO TRAVEL EXPENSES, WOULD THAT BE PAID? TRAVEL EXPENSES FOR COUNSEL?

YES. YOU KNOW -- LET ME SAY THIS. YOU HAVE TO GET AWAY FROM THE CONCEPT OF PREVAILING PARTY AND TAXES BEING COSTS AGAINST AN ADVERSARY WHEN YOU WIN AND COSTS THAT YOUR CLIENTS ARE OBLIGATED TO PAY. IF YOU LOOK AT OPPOSING COUNSEL'S BRIEF ON PAGE 19, THEY SAY -- THEY SAY IT IS ONE THING FOR THE EMPLOYER CARRIER TO SHARE IN COSTS NECESSARILY REQUIRED. I AGREE. WE DON'T WANT THEM TO SHARE IN ANYTHING BUT COSTS NECESSARILY REQUIRED. NOR SHOULD MR. JONES SHARE IN ANYTHING EXCEPT COSTS NECESSARILY REQUIRED. BUT THESE CLIENTS ARE IN A COMMON VENTURE TO SECURE A PIE, THIS THIRD-PARTY PIE, WHICH THEY WILL, LATER, SHARE, AND IN SECURING THAT PIE, IT IS NECESSARY TO EXPEND COSTS THAT ARE NOT TAXABLE COSTS. TAXABLE COSTS ARE VERY, VERY LIMITED. AS AN EXAMPLE, YOU HAVE GOT AN EXPERT. YOU HAVE INVESTIGATE I HAVE COSTS. THESE ARE -- INVESTIGATIVE COSTS. THESE ARE, ALL, NECESSARY TO PURSUE WHATEVER CLAIM YOU HAVE.

WHAT WE HAVE IN A SITUATION, IS A COUNSEL WHO HAS BEEN ENGAGED BY THE INJURED CLIENT. THAT IS THAT COUNSEL. AND, THEN, WE HAVE THE EC, WHO HAS A LIEN AGAINST THOSE PROCEEDS, AND THE QUESTION, IN MY MIND, BOILS DOWN TO HOW YOU CAN COME OUT WITH A BASIS UPON WHICH, THOUGH THE EC IS GETTING THE BENEFIT OF THE EXPENDITURE COSTS, THE EC, REALLY, DOESN'T HIRE THAT COUNSEL. THAT COUNSEL WAS HIRED BY THE CLAIMANT. AND THERE ISN'T ANYTHING THAT IS DEFINED, OTHER THAN WHAT THIS COURT WOULD DEFINE, I TAKE IT, AS TO WHAT IS GOING TO COME WITHIN THIS BOUNDARY OF COSTS.

LET ME ANSWER THAT. HOW ABOUT SIMPLY REASONABLE AND NECESSARY? THE JONESES, ARE THEY ONLY GALTED FOR UNNECESSARY COMES -- ARE THEY OBLIGATED FOR UNNECESSARY COSTS, UNREASONABLE COSTS? ABSOLUTELY NOT. THESE PEOPLE ARE IN A COMMON VENTURE, AND THERE SHOULDN'T AND DIFFERENCE BETWEEN THEIR OBLIGATIONS, IN PAYING REASONABLE AND NECESSARY COSTS, IN PURSUING THE CLAIM.

WHAT COSTS WOULD FALL IN A GRAY AREA, IN YOUR OPINION, AS TO REASONABLE AND NECESSARY?

YOU MEAN THAT MAY NOT BE REASONABLE AND NECESSARY?

COULD -- REASONABLE PEOPLE COULD DISAGREE ON WHETHER IT IS REASONABLE AND NECESSARY. IS THERE A CATEGORY THERE?

I MEAN -- I DON'T KNOW. MAYBE A LAWYER'S MEALS OR SOMETHING, IF ANYBODY CHARGES FOR THAT. I DON'T. MAYBE THINGS LIKE POSTAGE. SOME FIRMS CHARGE FOR POSTAGE. I DON'T.

ARE BOTH COUNSELS, AGREEING, THEN, ON WHAT THE TERM REASONABLE AND NECESSARY MEANS?

NO. BUT IN THE END RESULT, THE COURT, THE TRIAL COURT, IF THERE IS ANY OBJECTION, CAN MAKE A DETERMINATION LIKE THEY DO IN ANYTHING ELSE, WHETHER IT IS REASONABLE AND NECESSARY. IF I HAVE A CLIENT -- I HAVE A CLIENT, WHETHER IT IS MR. JONES OR THE EMPLOYER CARRIER, AND I TELL THEM, LISTEN, I HAVE THIS COST OF $100, AND THEY SAY WAIT A MINUTE! I DON'T THINK THAT IS A PROPER COST.

THE LAWYER COULD HAVE HIRED, FOR INSTANCE, AN EXPERT IN SOME FIELD THAT, REALLY, WASN'T RELATED, IF IT WENT UNDER CLOSE SCRUTINY, TO WHATEVER THE CIRCUMSTANCES OF THIS WAS, AND A TRIAL COURT COULD DETERMINE OH, NO, I AM NOT GOING TO -- I AM NOT GOING TO HAVE ANYBODY PAY -- THE LAWYER MAY BE STUCK WITH IT, BECAUSE IT WAS HIS BAD JUDGMENT IN HIRING THAT KIND OF PECKS -- OF EXPERT. THAT IS MAYBE IT WAS A PSYCHOLOGICAL EXPERT WHO EVALUATES HOW COMP JUDGES REACT UNDER CERTAIN CIRCUMSTANCES OR SOMETHING, AND THEY CHARGE $10,000 FOR CONSULTING ON THAT, AND A TRIAL COURT JUDGE COULD EASILY SAY I AM NOT GOING TO ALLOW FOR AN EXPERT LIKE THAT. THE LAWYER IS GOING TO HAVE TO EAT THAT, IF HE DETERMINED. WOULD YOU AGREE?

ABSOLUTELY. ABSOLUTELY!

ALL RIGHT. UNDER YOUR -- ALL RIGHT.

IN ANY OF THESE.

WE ARE HERE, BECAUSE I UNDERSTAND THE PRACTICAL EFFECT OF THIS, IT WAS AN EQUITABLE DISTRIBUTION PROCEEDING IN FRONT OF THE CIRCUIT COURT.

YES.

SO, REALLY, THE EQUITABLE DISTRIBUTION FORMULA THAT WAS CODDFIED SINCE THE NICOLLO CASE, REALLY, HAS TO DO WITH WHETHER THE EMPLOYEE GOT, IN TERMS OF THE SETTLEMENT, $50,000, IN THIS CASE, LESS THAN THE FULL VALUE OF THE CLAIM.

YES.

AND THEN WHAT THE CIRCUIT COURT IS SUPPOSED TO DO IS LOOK AT WHAT THE CLIENT'S NET RECOVERY IS.

RIGHT.

NOW, HERE THE ANOMALY, I GUESS YOU WOULD ARGUE, WITH THE SECOND DISTRICT'S CASE, IS THAT THE CLIENT'S NET RECOVERY WAS ATTORNEYS FEES, THE $50,000 LESS ATTORNEYS FEES AND COSTS.

YES.

WE WOULD BE, IF WE ACCEPT THE SECOND DISTRICT'S ARGUMENT, WOULD BE, REALLY, CREATING AN ARTIFICIAL NET RECOVERY, WHICH WOULD BE SOMETHING LESS THAN GROSS RECOVERY.

YES.

SOMETHING MORE THAN NET RECOVERY.

YES. THAT IS A GOOD POINT. BECAUSE WHAT HAPPENED, THIS COURT, IN NICOLLA, YOU TALKED ABOUT, OF COURSE, EXPENSES, AND WHAT HAPPENED AFTER NICOLA, IS THIS COURT CODDFIED THE COURT'S DECISION IN NICOLA. EXCEPT THAT THERE BE ANY NEED FOR COMPARATIVE. THERE IS NO NEED FOR ANY COMPARATIVE. WE JUST LOOK AT THIS COMPLETE RATIO, AND IT WOULD NOT MAKE SENSE FOR THE LEGISLATURE TO DO THAT AND THEN TURN AROUND AND SAY, WITHOUT SPECIFYING IN THE STATUTE, AND THEY DON'T, WOULD BE TO SAY YOU PAY ATTORNEYS FEES, BUT REGARDING COSTS, WORKERS COMP CARRIER, YOU PAY THE LIMITED AMOUNT OF TAXABLE COSTS AND THE PLAINTIFF PAYS EVERYTHING, THEN.

BECAUSE I WAS REREADING 440.39, BOTH SUBSECTION 2 AND 3-A, AND THERE IS, REALLY, TWO DIFFERENT CONCEPTS THAT IS GOING ON. ONE HAS TO DO WITH THE ULTIMATE CAP. IN OTHER WORDS HOWEVER MUCH YOUR CLIENT RECOVERS, IF THEY KEEP ON GETTING, BOTH, THE PERCENTAGE OF 6 THE PAST AND -- OF THE PAST AND THE FUTURE, AT SOME POINT IT IS EXHAUSTED AT WHATEVER LEVEL, AND THAT LEVEL IS THE CAP, CORRECT?

RIGHT.

ALL RIGHT. THAT IS ONE CONCEPT. THEN THE SECOND CONCEPT IS WHEN A PLAINTIFF GETS OR A CLAIMANT GETS 100% OF THEIR -- THE FULL VALUE. SAY IN THIS CASE THEY GOT $600,000.

RIGHT.

THERE IS, STILL, SOME COST SHARING THAT GOES ON.

RIGHT.

THEN WE HAVE THE THIRD CONCEPT, AND I GUESS WHAT I WANT -- WHICH IS WHAT WE ARE DEALING WITH, HERE, EXEQUITABLE DISTRIBUTION, ARE WE BOUND TO SAY THAT, WHATEVER THE CAP IS, THAT IS THE -- YOU KNOW, WHERE YOU GET TO REIMBURSE UP TO WHATEVER THAT CAP IS, IS THE SAME AS COST SHARING, IS THE SAME AS EQUITABLE DISTRIBUTION? ARE WE GOING TO USE THE SAME, IN FACT, DEFINITION OF WHAT COSTS ARE, FOR ALL THREE CONCEPTS?

YES. I THINK. YES.

BUT ARE WE BOUND TO DO THAT?

I AM NOT SURE THERE IS A BIG DISTINCTION.

ISN'T THE MORE --.

I AM SORRY.

WHY DON'T YOU THINK THERE IS A BIG DISTINCTION.

WE ARE TALKING ABOUT COSTS. AND HOW DO WE GET, REALLY, THE WAY THE FORMULA, WE HAVE TO GET TO THE NET RECOVERY, AND THE QUESTION IS WE CLEARLY TAKE AWAY ATTORNEYS FEES, AND THEN THE QUESTION IS WHAT COSTS DO WE TAKE AWAY AND HAVE BOTH PARTIES SHARE IN.

AND YOUR CLIENT, OR YOUR CO-COUNSEL'S CLIENT, THEIR NET RECOVERY, UNLESS THEY CONTEST, AGAIN, THE REASONABLE AND NECESSARY EXPENSES, IS MORE THAN TAXABLE COSTS.

RIGHT.

IN THIS CASE, SO WE UNDERSTAND WHAT IT MEANS, THE DIFFERENCE IS THERE WAS 4.1% OF THE TOTAL IS WHAT --

YEAH. YOU KNOW, IT IS SORT OF CONFUSING. MAYBE I CAN MAKE IT EASIER THIS WAY. THE NET RECOVERY -- IT STARTS AT $.

,000. YOU TAKE AWAY 20,000 ATTORNEYS -- IT STARTS AT 50,000 AND YOU TAKE AWAY 20,000 ATTORNEYS FEES AND IT IS 30,000. THE QUESTION IS DO WE TAKE AWAY $400,000 FOR THE TAXABLE COSTS OR -- OR DO WE TAKE AWAY $500,000 --

YOU MEAN $5,000. THE DIFFERENCE IS 4.1 PERCENT. IT IS NOT LIKE THEY LOSE ALL 4,000 OF THIS. IT IS A FINISH.

NO. BUT IT DOESN'T MAKE SENSE, IN THE STATUTORY SCHEME, TO SAY THAT THEY DON'T PAY THEIR PRO RATA SHARE OF THESE OTHER EXPENSES, AND WHAT POSSIBLY WILL HAPPEN, THEN, IS, INSTEAD OF YOUR HAVING A COMMON PURPOSE, AND YOU WILL RECALL, IN THE NICOLA CASE, THIS COURT SPECIFICALLY SAID, IN SUING THE TORTFEASOR, THE WORKER AND COMP CARRIER SHARE A COMMON INTEREST IN OBTAINING THE FULL AMOUNT OF DAMAGES. RATHER THAN THAT, IF YOU ACCEPT THEIR PROPOSITION, WHAT YOU ARE GOING TO HAVE IS A SITUATION WHERE THE PLAINTIFF MAY SAY, WELL, WAIT A MINUTE. I HAVE GOT TO SPEND THIS $5,000 OF COSTS BUT IT IS, REALLY, GOING TO BENEFIT THE OTHER FELLOW. MAYBE WE SHOULDN'T INCREASE THE PIE LIKE. THAT NOW, OPPOSING COUNSEL TALKS ABOUT WE HAVE THIS COLORADO QI -- COLLOQUY ABOUT JOE LAWYER IN THEIR FEE AND AN ARGUMENT THAT YOU ARE, HEAVENS TO BETSY, YOU ARE GOING TO SPEND THIS EXTRA MONEY TO INCREASE THIS PIE. ISN'T THAT WHAT THEY ARE SUPPOSED TO DO? THEY ARE WORKING TOGETHER IN COMMON, AGAINST THE THIRD PARTY TORTFEASOR, TO INCREASE THE PIE.

I GUESS WHAT I AM GETTING TO, IF THAT DOESN'T BENEFIT THE EMPLOYEE, IF A LAWYER OVER SPENDS THE CASE, THAT, WHEN THE CLAIMANT GETS HIS THIRD PARTY RECOVERY, THEY ARE GETTING MUCH LESS, AND SO --

ABSOLUTELY SO.

AND THAT ARGUMENT, IT SEEMS, IS --

ABSOLUTELY. THERE IS A CAP ON IT, BUT APART FROM THAT, WHO IS ADVANCING THE MONEY? YOU KNOW, IF YOU ARE CONCERNED ABOUT THE INTEGRITY OF THE LAWYER, WHO IS ADVANCING THE MONEY? IT IS THE LAWYER, AND WHEN YOU LOSE, WHO IS GOING TO LOSE? WELL, YOU KNOW, THE PLAINTIFF WAS ADVANCED THE MONEY OR THE LAWYER, WHO WAS ADVANCED THE MONEY, SO THERE IS, CERTAINLY, A BIG CAP, IN TERMS OF THAT. NOBODY WANTS TO SPEND MONEY UNNECESSARILY, BUT IF ANYBODY CHALLENGES THAT THEY HAVE SPENT MONEY UNNECESSARILY, THEY CAN. ANYMORE QUESTIONS? THANK YOU.

GOOD MORNING. MY NAME IS ROBERT LeVINE, AND, TODAY, I REPRESENT ETS OF NEW ORLEANS, THE RESPONDENT IN THIS CASE. MAY IT PLEASE THE COURT, I WOULD LIKE TO BEGIN MY COMMENTS WITH AN OBSERVATION. ONE THAT SEEMS TO BE DEEMPHASIZED BY MY COLLEAGUE. AND THAT IS THE PURPOSE OF FLORIDA STATUTE, SECTION 440.39, PARTICULARLY 3-A. THAT STATUTE WAS NOT ENACTED FOR THE PURPOSE OF ENHANCING A PLAINTIFF'S OPPORTUNITY FOR THIRD PARTY RECOVERY. THAT STATUTE WAS NOT ENACTED TO RELIEVE A CLIENT FROM COSTS THAT HE IS CONTRACTUALLY OBLIGATED TO PAY WITH HIS ATTORNEY. THAT IS THE FLORIDA WORKERS COMPENSATION LIEN STATUTE. THE PURPOSE, THE PRIMARY PURPOSE OF THAT STATUTE IS TO BRING MONIES FROM THE TORTFEASOR BACK TO THE EMPLOYER CARRIER. THE CONCEPT IS ONE OF TRANSFERRING RISK. UNDER WORKERS COMPENSATION, LIABILITY IS NOT AN ISSUE. COVERAGE IS THE ISSUE. THE EMPLOYER CARRIERS PROVIDE ALL REASONABLE MEDICAL NECESSARY BENEFITS, AS WELL AS LOST WAGES. IN THE THIRD PARTY ACTION, FAULT IS AT-RISK. AND THE CONCEPT OF THE LEGISLATURE IS THAT VIA THE LIEN, THE RISK OF THE LOSS IS TRANSFERRED FROM THE CARRIERS AND THE SELF-INSURED EMPLOYERS, SUCH AS ETS IN THIS

CASE, TO THE PARTY THAT DID SOMETHING WRONG. THERE IS A BALANCING THAT, OVER TIME, THE LEGISLATURE HAS GIVEN US, AND IT HAS BEEN A STRUGGLE.

AND IF THE EMPLOYER WERE TO BRING THE CASE --

AND IF THE EMPLOYER WERE TO BRING THE CASE --

-- WHAT DOES THE EMPLOYER, THEN, REMIT BACK TO THE EMPLOYEE?

UNDER FLORIDA STATUTE 449 SUBPART 4, THE EMPLOYER GETS FIRST BITE AT THE APPLE. IN OTHER WORDS THE EMPLOYER GETS BACK THE BENEFITS THAT IS PAID, THE FUTURE BENEFITS, AND ITS FEES, AND COURT COSTS REMAINDERMENT TO GO TO THE CLAIMANT.

SO THEY DON'T GET BACK -- YOUR ARGUMENT WOULD BE, THEN, THAT, IF THE EMPLOYER BROUGHT THE LAWSUIT, THEY WOULDN'T GET BACK THEIR REASONABLE COSTS. THEY WOULD JUST BE RESTRICTED, ALSO, TO TAXABLE COSTS?

IN FACT THAT IS MORE THAN JUST MY ARGUMENT. THAT IS THE HISTORY OF THE STATUTE. THE FLORIDA WORKERS COMPENSATION ACT WAS ENACTED IN 1935. AT THE TIME INJURED WORKERS HAD A CHOICE. PURSUE WORKERS COMPENSATION OR PURSUE THE TORTFEASOR. IF THE CLAIMANT CHOSE TO PURSUE WORKERS COMPENSATION, THE ENTIRE RIGHT TO SUE THE TORTFEASOR VESTED IN THE EMPLOYER CARRIER. THE EMPLOYER WAS TO GET THE MONEY BACK. IF THERE WAS ANY REMAINDER, IT WOULD GO TO THE CLAIMANT. THERE WERE, HOWEVER, ABUSES. WE TALK ABOUT THE BIG INSURANCE COMPANIES, I SUPPOSE, IN THE '30s AND '40s. THAT IS WHAT OCCURRED. BECAUSE THE ORIGINAL EMPLOYER CARRIER WAS ALLOWED TO KEEP THE ENTIRE AMOUNT OF EXPENSES AND LATER THE LEGISLATURE CHANGED THE WORDING OF THE ACT TO INCLUDE COURT COSTS. WE BELIEVE THE STATUTORY CHANGE HAD A SPECIFIC PURPOSE, AND IT DID.

LET'S SAY YOU HAD A LARGER CASE, WHERE YOU HAD PAID OUT MILLIONS OF DOLLARS, AND YOU HAVE SOMEONE, SUCH AS COUNSEL IN THIS CASE, THAT WORKED UP THE CASE, DID A TREMENDOUS JOB, PROBABLY VERY CREDIBLE LIABILITY, WORKED IT UP THROUGH EXPERTS, AND THEN MADE A PRESENTATION, DIDN'T REACH COURT. IT IS A SETTLEMENT. IF WE ARE DEALING WITH TAXABLE COSTS, SO THEREFORE THERE WOULD BE NO TAXABLE COSTS, AND THEREFORE NO RECOVERY OF ANY AMOUNTS WOULD BE THE LOGICAL ARGUMENT, WOULD IT NOT?

WELL, IN PART. IF THE CASE IS SETTLED BEFORE THE LAWSUIT IS FILED, I BELIEVE THERE WOULD BE NO COSTS THAT ONE WOULD NORMALLY CONSIDERED TAXABLE. IF, HOWEVER --

HOW WOULD THERE BE COURT COSTS, BECAUSE THERE IS NOTHING IN COURT?

IF IT IS SETTLED BEFORE, RIGHT.

THERE FOR THERE WOULD BE ZERO SUBTRACTION IN THAT AREA.

YES.

SO THEN THE CARRIER WOULD JUST GET ALL OF THE MONEY BACK, AND THE INJURED EMPLOYEE WOULD EAT EVERY EXPENSE THAT IS INVOLVED.

YES AND NO. LET US RECALL THAT THE PURPOSE OF THE TERMINOLOGY COURT COSTS AND ATTORNEYS FEES IS FOR THE PURPOSE OF PLUGGING INTO A FORMULA TO DETERMINING THE LIEN. THE BALANCING THAT OCCURRED IN 1951, TO THE LEGISLATURE, WAS TO LET THE EMPLOYEES BRING THEIR LAWSUIT AND TO HAVE SOME PERCENTAGE COME BACK TO THE

CARRIERS, BECAUSE I SUPPOSE IT IS NOT A FAIR TAKING OF THE RIGHT TO SUE, IF THE CARRIER GETS ALL THE MONEY, AND THE CLAIMANT GETS VIRTUALLY NOTHING.

IT IS CLEAR THAT WORKERS COMP DOES NOT PAY FOR ALL OF THE INJURIES THAT THE EMPLOYEE HAS SUSTAINED. YOU WOULD AGREE WITH THAT?

THAT'S TRUE.

JUST MEDICAL AND WAGE ASPECT OF THAT CLAIM.

THAT'S CORRECT. THAT'S CORRECT. IN THIS CASE, FOR EXAMPLE, THE EMPLOYER CARRIER PAID ALMOST $125,000. I UNDERSTAND THAT THERE MAY BE SOME QUESTIONABLE LIABILITY, BUT, AGAIN, THE PURPOSE, HERE, IS A BALANCE OF THE LEGISLATURE THAT IT HAS CREATED, FOR RISK TRANSFER AND TO SHARING, BECAUSE, HERE, MR. JONES TOOK HOME THE LION'S SHARE OF HIS NET RECOVERY. THE CARRIER TOOK HOME 4.1% AND WILL TAKE HOME ONLY 4.9%.

I AM NOT SURE I UNDERSTAND YOUR ANSWER TO JUSTICE LEWIS'S QUESTION, BECAUSE WHAT HE SAID THAT, IN THAT SITUATION, THAT THE EMPLOYEE WOULD HAVE TO EAT ALL OF THOSE EXPENSES, AND YOU SAID NO, THAT THAT IS NOT TRUE.

IF I SAID THAT, I MISSPOKE. I THOUGHT YOU WERE GOING TO GO ON TO EXPLAIN, BUT THE ANSWER TO HIS QUESTION, REALLY, IS YES.

YES.

HE WOULD HAVE TO, UNDER YOUR INTERPRETATION OF THE STATUTE.

YES. THERE IS --

HOW ABOUT GOING ON? WE CALL THIS EQUITABLE DISTRIBUTION OR WHATEVER, AND HOW DOES THAT SQUARE WITH, YOU KNOW, EQUITABLE APPORTIONMENT HERE? LET'S TAKE -- LET ME ADD A FACT TO THAT HYPOTHETICAL.

OKAY.

LET'S SAY THAT THE LAWYER THAT IS WORKING HARD ON THAT CASE, ALSO, RECOGNIZES THAT THE LAWYER THAT REPRESENTS THE EMPLOYER CARRIER IS A VERY FINE, EXPERIENCED LAWYER, AND THAT NOT ONLY DOES WORKERS COMP BUT, ALSO, DOES SUBSTANTIAL TRIAL WORK.

YES.

AND SO HE ASKED THAT LAWYER FOR HIS ASSISTANCE, AND THAT LAWYER COMES OVER AND SAYS, WELL, YOU ARE RIGHT. WE HAVE GOT A BIG STAKE IN THIS, AND HERE IS SOME CREATIVE IDEAS THAT I HAVE, AND THEY INCLUDE THE HIRING OF THESE EXPERTS.

CORRECT.

AND THE HIRING OF THOSE EXPERTS, THEN, MAKE A BIG DIFFERENCE, AND IT WAS DONE AT THE VERY URGING OF THE EMPLOYER CARRIER'S LAWYER. YOU KNOW WHO ASSISTED, IN A LOGICAL WAY, HERE, SINCE THERE IS A BIG STAKE THAT THE EMPLOYER CARRIER.

YES. AN I AM HAVING DIFFICULTY UNDERSTANDING WHY THOSE COSTS, THEN, SHOULDN'T BE SHARED IN THE SAME EQUITABLE WAY AS THE REST OF THE AWARD.

PERMIT ME TO PROVIDE YOU AN EXAMPLE, FROM MY OWN PRACTICE, JUST A MONTH AGO. AN

INJURED WORKER WAS INJURED WHEN 15,000 VOLTS ARCED AND HE HAD FAIRLY TREMENDOUS BURNS. THE THIRD PARTY CASE IS ONGOING. AS IT APPROACHED TRIAL, THERE WAS A REQUEST FOR A PARTICULAR EXPERT. THE CLAIMANT'S ATTORNEY CALLED ME AND SAID WE WOULD, REALLY, LIKE A PARTICULAR TYPE OF DOCTOR, TO TIE EVERYTHING UP ON THE STAND. AT THAT POINT, WE HAD TO MAKE A DECISION. I ADVISED MY CLIENT THAT, UNDER THE DUTY OF COOPERATION, UNDER SUBSECTION 7, I DIDN'T THINK THEY HAD TO GO SO FAR AS TO PAY FOR A DOCTOR THAT IS NOT REASONABLY AND MEDICALLY NECESSARY, UNDER THE WORKERS COMPENSATION STATUTE. HOWEVER, BECAUSE OF THE COMMON INTEREST TO MAXIMIZE, WE MADE THE DISCRETIONARY CALL, UNDER WORKERS COMPENSATION, TO PAY FOR A DOCTOR THAT WE MIGHT OTHERWISE NOT, TO PROVIDE FOR THIS WITNESS, BECAUSE WE WANT TO MAXIMIZE RECOVERY, AS WELL. IT IS POSSIBLE. RECOGNIZE THAT, UNDER THE ATTORNEY-CLIENT CONTRACT, THE NET AMOUNT IS THE NET AMOUNT, REGARDLESS, WHETHER WE ARE THERE OR NOT. IF THERE ARE $A THOUSAND IF COSTS -- IF THERE ARE $5,000 IN COSTS UNDER THE CONTRACT AND YOU SELECT OUT $20,000 IN FEES AND $5,000 UNDER THE CONTRACT, THERE IS NO MORE MONEY TO BE TAKEN.

I ASSUME THAT YOUR JUDGMENT WAS, YES, LET'S HAVE THAT EXPERT, BECAUSE WE RECOGNIZE THAT IS GOING TO INCREASE OUR RECOVERY UNDER THE CASE, SO, UNDER JUSTICE LEWIS'S QUESTION, WHY SHOULD THE EMPLOYEE SUBSIDIZE THIS ENTIRE RECOVERY, INCLUDING THE PART THAT GOES TO THE EMPLOYER? WHY SHOULD THE EMPLOYEE SUBSIDIZE AT ALL, AS IN THE HYPOTHETICAL THAT JUSTICE LEWIS GAVE YOU? DOES THAT -- CERTAINLY THAT IS NOT EQUITABLE. I THINK WE, ALL, WOULD AGREE, BUT DOES IT MAKE GOOD LEGISLATIVE POLICY THAT THE EMPLOYEE WOULD HAVE TO SUBSIDIZE THE ENTIRE PURSUIT FOR THE RECOVERY? A PERCENTAGE OF WHICH EVERYBODY KNOWS, IS GOING TO GO TO THE CARRIER?

LET ME, FIRST, TALK ABOUT THE HE CAN WITTS INVOLVED, BECAUSE I AM NOT SURE I DO AGREE WITH YOU, JUDGE ANSTEAD. FIRST OF ALL, WE COULD TURN THE QUESTION AROUND, IS IT FAIR FOR EMPLOYER CARRIERS TO PAY FOR EXPERTS THAT THEY DON'T THINK NEED TO BE HIRED? BUT --

THAT CAN BE RESOLVED UNDER THE REASONABLE AND NECESSARY ASPECT OF IT, CAN IT NOT?

IT COULD BE. HOWEVER, IN THIS COURT, IN THE NICOLA DECISION, SAID FOR THE EFFICIENCY OF THE RESOLUTION PROCESS, THE FEWER VALUABLES ARE BETTER, AND ALL WE -- THE FEWER THE VARABLES, THE BETTER, AND -- THE VARIABLES, AND ALL WE ARE GOING TO -- THE FEWER THE VARIABLES, THE BETTER, AND SO ALL WE ARE GOING TO LOOK AT --

EXCUSE ME. THE LEGISLATURE, AT THE TIME THEY AN AFFIXED THIS LEGISLATE -- THEY AFFIXED THIS LEGISLATION, COURT COSTS CHANGE EVERYDAY. WE VEST WITH A TRIAL COURT JUDGE AND WE ADD THINGS AND SUBTRACT THINGS, AND WITH THAT KIND OF CONCEPT AND AS JUSTICE LEWIS POINTS OUT, COURT COSTS DON'T EVEN GET INVOLVED, IF YOU GO THROUGH THE LENGTHY SETTLEMENTS IN THE CASE.

BUT IT DOES PROVIDE US SOME CERTAINTY, AND WE CAN FOLLOW THE COMMON LAW AND WE CAN FOLLOW THE STATUARY OTHER CHANGES -- THE STATUTORY CHANGES, TO KNOW WHAT THAT IS. JUSTICE, YOU MADE THE POINT ABOUT THE CAP, AND THIS, I THINK, ALSO APPLIES TO JUSTICE ANSTEAD'S COMMENTS AS WELL. THE CAP IS HOW MUCH MONEY THE PLAINTIFF TAKES HOME. WE ARE NEVER GOING TO TAKE HOME MORE THAN THAT, AND THAT CAP EXISTED, EVEN WITHOUT COST SHARING, AS IN --

WHERE IS THE CAP, THEN? THE SETTLEMENT OR THE RECOVERY LESS ATTORNEYS FEES AND WHAT? WHAT IS THE --

ALL THE EXPENSES.

SO --

YES.

TELL ME WHAT LANGUAGE IN THIS STATUTE THAT YOU HAVE COME UP WITH. JUST QUOTE IT EXACTLY.

OKAY.

IS IT IN 3-A?

IT IS IN 3-A.

AND IT SAYS WHAT?

OKAY. ONE MOMENT. ALL RIGHT. IN THE -- ONE, TWO, THREE, FOURTH SENTENCE, STARTING WITH "SUBJECT", "SUBJECT TO RECOVERY, AFTER COSTS AND ATTORNEYS FEES HAVE BEEN DEDUCTED." THIS LANGUAGE EXISTED, REGARDLESS OF THE COST SHARING THAT WE ARE TALKING ABOUT TODAY.

SO IN THAT PART, BECAUSE IT SAYS "AFTER COSTS AND ATTORNEYS FEES", YOU WOULD AGREE THAT COST IS MORE THAN TAXABLE COSTS.

I WOULD CONCEDE. THAT YES. I THINK IN REAL DOLLAR TERMS, IT IS IMPOSSIBLE TO ASK A PLAINTIFF TO GIVE MONEY BACK TO A CONSIDERIER THAT DOES NOT HAVE IT -- TO A CARRIER THAT DOES NOT HAVE IT.

SO NOW WE GO DOWN THAT STATUTE, AND IT GETS TO THE EQUITABLE DISTRIBUTION PORTION, AND WHAT YOU SAID, IS THAT, WITH NICOLA, YOU GO FULL VALUE OF THE CLAIM. I FORGET WHETHER IT IS ENUMERATE OR OR DENOMINATOR.

WITH DENOMINATOR, IT WOULD BE FULL RECOVERY. WITH ENUMERATE OR, IT WOULD BE THE FULL VALUE.

NET RECOVERY, THOUGH, IS IT NOT THE SAME THING AS THE FULL AMOUNT RECOVERED, LESS ATTORNEYS FEES AND COSTS, BECAUSE THAT IS ALL IT SAYS THERE. IT SAYS" THE CARRIER SHALL BE RESPONSIBLE FOR COSTS IN JUDGMENT, UNLESS" IF THEY HAVEN'T RECOVERED THE FULL VALUE, THEN YOU GO TO LOOK AT NET RECOVERY, AND ISN'T NET RECOVERY, WE DON'T NEED TO WORRY ABOUT THIS TAXABLE COSTS CONCEPT. NET RECOVERY IS WHAT YOU RECOVERY, LESS ATTORNEYS FEES AND COSTS? I GUESS WHAT I AM HAVING TROUBLE WITH IS WHY WE EVEN HAVE TO WORRY ABOUT ANOTHER PORTION, WHICH TALKS ABOUT COURT COSTS, WHEN THE EQUITABLE -- IT SEEMS LIKE THE EQUITABLE DISTRIBUTION PORTION, AS PLAINTIFFS CAN BE, THAT YOU USE NET RECOVERY?

THERE ARE TWO THINGS TO BE SAID THERE. FIRST OF ALL, THE LIEN IS ONLY FOR THE AMOUNT OR PERCENTAGE AMOUNT, LESS COURT COSTS, INCLUDING REASONABLE ATTORNEYS FEES. THAT COMES IN THE SECOND SENTENCE. MY PROBLEM WITH THIS LAST SENTENCE, IS IT IS NOT AN EXACT CODIFICAITON OF NICOLA, NOR IS IT A PERFECT ONE. IF YOU READ NICOLA, WHICH IS REALLY WHERE YOU USE THE NET RECOVERY TO FULL VALUE RATIO, NOT THE COMPARATIVE PERCENTAGE CONCEPT. IT IS TALKING ABOUT WHICH COSTS WERE RAISED. I DON'T HAVE A PROBLEM WITH THE FORMULA, AND THIS IS DIFFERENT FROM THE CAP. THE FORMULA REQUIRES THAT THE CARRIER TAKE ONLY A PART HOME. IT IS NOT, REALLY, IN REAL-LIFE TERMS, A SHARING OF THE EXPENSES. IT IS TAKING WHAT THE PLAINTIFF HAS AND GIVING SOME PORTION OF IT, AND THE FORMULA INCLUDES, NOW, COSTS. COURT COSTS. THAT IS --

THAT IS WHERE I GUESS I AM HAVING TROUBLE, BECAUSE THE FORMULA DOESN'T, AT THAT POINT -- THAT PART OF THE STATUTE DOESN'T SAY ANYTHING ABOUT COURT COSTS. IT ACTUALLY SAYS --

YES, JUSTICE, BUT I BELIEVE IT MUST BE READ IN PARI MATERA, WHICH IS A DIFFICULT LANGUAGE IN THE STATUTE TO READ.

WHAT WE ARE CONFRONTED WITH IS A MATTER OF STATUTORY CONSTRUCTION, CORRECT?

YES.

AND IN THE CONCEPT OF TAXABLE COSTS, MEANING CHAPTER 57 COSTS, IS NOT SOMETHING THAT APPEARS IN 440, IS IT? I MEAN IT DOESN'T APPEAR IN 39. THEY DON'T TALK ABOUT IT TAXABLE.

IN 440.39? CORRECT. THEY USE THE WORD "COURT COSTS COSTS."

CORRECT. AND SO AT BEST, IT IS AMBIGUOUS. IN TERMS OF WHAT COSTS THEY ARE REFERRING TO, BECAUSE IF -- BECAUSE, IN -- IF THEY WERE REFERRING TO 57 COSTS --

YES.

-- THEN THEY WOULD SAY THAT SPECIFICALLY, CORRECT?

THEY COULD. AND AFTER NICOLA, THEY COULD, HAVE SAID AND AFTER EXPENSES AS WELL, OR IN 1983, WHEN THE SHARING OF COSTS WAS BROUGHT BACK INTO THE STATUTE, THEY COULD HAVE SAID IT. REMEMBER WE ARE CONSTRUEING 440.3-A, BUT IT HAS AN IMPACT ON SUBSECTION 2, AS WELL AS 3 AND 4.

TO ME, IF CHAPTER 57 COSTS ARE, AS EVERY LITIGATE OR IN THE TORT FIELD KNOWS, ARE VERY ISOLATED TYPE OF COSTS.

ABSOLUTELY.

AND THERE ARE ALL SORTS OF OTHER COSTS. TRAVEL EXPENSE, GOING TO GET AN EXPERT, HAVE AN EXPERT.

DEPOSITIONS AND TRANSCRIPTS.

RIGHT. AND SO, IF THIS WAS GOING TO BE LIMITED TO JUST COURT COSTS, AS DEFINED WITH CHAPTER 57, WOULDN'T IT HAVE TO BE IN THIS CHAPTER?

WELL, I BELIEVE IT IS, YET NOT WITH REFERENCE TO CHAPTER 57. THAT IS THE AMENDMENT FROM 1947. IT WAS ORIGINALLY EXPENSES. THE LEGISLATURE CHANGED IT TO COURT COSTS. IT REMAINED THERE UNTIL 1974, WHEN ALL COSTS WERE TAKEN OUT, AND THEN IT WAS BROUGHT BACK AS COURT COSTS WERE INCLUDED BY THE LEGISLATURE IN 1983. IT REMAINS THERE TODAY.

ARE YOU SAYING THAT, WHATEVER THE CONSTRUCTION SHOULD BE, IT SHOULD HAVE BEEN THE SAME SINCE 1947. WHATEVER IT WAS.

I BELIEVE IN 19 --

THAT WOULD BE ONLY TAXABLE COMESS?

I BELIEVE SO, YES.

-- COSTS?

I BELIEVE SO, YES.

CAN YOU EXPLAIN THE SUPREME COURT CASE OF 1955, BOMAR VERSUS AETNA CASUALTY AND SURETY, AT SO.2D 694, WHERE THE PLAINTIFF WENT TO TRIAL AND GOT TAXABLE COSTS BACK FROM THE TORTFEASOR AND, THEN, WAS TRYING TO SEEK ADDITIONAL COSTS FROM THE CARRIER, AND THIS COURT SAID "WE AGREE WITH THE APPELLANT, WITH REFERENCE TO THE TAXATION OF ITS PRO RATA SHARE OF THAT PART OF THE COURT COSTS, WHICH WERE NOT TAXED AGAINST THE DEFENDANT". HOW WE WERE TO COME UP WITH THAT THEN? YOU ARE FAMILIAR WITH THAT CASE.

EXCUSE ME?

ARE YOU FAMILIAR WITH THAT CASE?

YES, I AM. IN FACT, IN LOOKING AT THAT CASE, I, PROBABLY, READ IT 5 TIMES, AND EVEN -- READ IT 15 TIMES, AND EVEN WENT SO FAR AS TO GO BACK TO SOME OF THE PREVIOUS DECISIONS, TO SEE WHAT THE COURT MEANT THERE.

THERE SEEMS TO BE A CASE RIGHT ON POINT, BASED UNDER YOUR THERE I HAVE HOW WE ANALYZE THE STATUTE, IS IT NOT?

IT IS DIRECTLY ON POINT? AT THE TIME OF MY BRIEF, I DID NOT BELIEVE SO. I HAVE NOT READ IT IN SEVERAL MONTHS, SO IF I MADE ERROR, THAT IS MY APOLOGY.

CAN I ASK A QUESTION, WITH REGARD TO THIS TAXABLE COST, AS WELL? BECAUSE IT HAS BEEN ASSERTED IN SOME OF THE PAPERS FILED WITH THIS, THAT, REALLY, IF WE ARE TALKING ABOUT TAXABLE COSTS, IT IS, REALLY, A NO-BRAINER, BECAUSE IT IS REALLY NOT A TAXABLE COST TO ANYONE, BECAUSE IT IS THE LOSING PARTY THAT WILL BE PAYING THE TAXABLE COSTS, SO IF WE ARE JUST TALKING ABOUT TAXABLE COSTS, IT IS NOT WHAT THE EMPLOYEE NOR THE CARRIER IS, REALLY, CONCERNED WITH.

IF IT GOES ALL THE WAY THROUGH JUDGMENT, YES.

SO IT SHOULDN'T, REALLY, EVEN PLAY A PART IN OUR ANALYSIS, BECAUSE IT IS NOT A "X" FACTOR THAT IS AN ULTIMATE RESPONSIBILITY OF EITHER PARTY. IT IF IT IS A THIRD PARTY, IT IS LIMITED, SO THEREFORE IT MUST BE SOMETHING OTHER THAN THAT, BECAUSE IF IT IS TAXABLE COSTS, SOMEONE IS PAYING FOR IT, ANYWAY.

NO, SIR, BECAUSE I UNDERSTAND THE LOGIC OF WHAT YOU ARE SAYING, BUT, AGAIN, IT IS A DISTINCTION BETWEEN THE CAP AND THE FORMULA, EVEN THOUGH THE COSTS COULD BE A PART OF THE FORMULA, AND THAT IS, REALLY, WHAT WE ARE TALKING ABOUT IS THE FORMULA, AND I KNOW THIS COURT HAS CITY OF HOLLYWOOD VERSUS LOMBARDI, TO BE HEARD LATER, AND THAT CASE WILL BRING UP SOME OF THESE ISSUES. IS IT, WHEN FIGURING THE CAP, IS IT A PERCENTAGE OF A PERCENTAGE, AND PERHAPS THE LEGISLATURE WILL VISIT THIS ONCE AGAIN, YET THE LAST TIME THE LEGISLATURE VISITED THIS, COURT COSTS WERE INCLUDED IN THE STATUTE, AND IT IS OUR BELIEF THAT THE SECOND DISTRICT WAS CORRECT IN CONCLUDING THAT COURT COSTS MEANS TAXABLE COSTS.

WHAT ABOUT WHAT JUSTICE LEWIS IS SAYING, WHICH IS THAT IF YOU GET TAXABLE COSTS ONLY WHEN YOU GO TO TRIAL, AND YOU GO TO TRIAL AND YOU ARE SUCCESSFUL, THAT IS WHEN THOSE GET RECOVERED, AND THOSE GET RECOVERED FROM THE LOSING PARTY, THEN, UNDER YOUR THEORY, SINCE YOU SAID IF IT GOES -- IF IT SETTLES, THERE MAY NOT BE ANY TAXABLE COSTS, THE CARRIER NEVER SHARES IN ANY TYPE OF COSTS, AND ISN'T THAT WHAT BOWMAN, REALLY, THAT IS WHY BOWMAN IS SO IMPORTANT, BECAUSE THAT IS WHAT HAPPENED IN

BOWMAN, THE CARRIER SAID, WELL, YOU GOT YOUR TAXABLE COSTS. WE SHOULDN'T HAVE TO SHARE IN ANY ADDITIONAL COSTS, AND OUR COURT SAID, NO, YOU HAVE TO PAY THE COURT COSTS THAT WERE NOT TAXED AGAINST THE DEFENDANT.

AGAIN, IT COMES DOWN TO HOW TO FIGURE A. L.A. LET US REMEMBER THAT, FOR NINE YEARS, COSTS WAS NOT PART OF THIS AT ALL, YET THERE WAS STILL A FORMULA IN THAT CASE. THERE WAS, FIRST A STRAIGHT 50% RECOVERY AND THEN A STRAIGHT 100% RECOVERY, THEN THE LEGISLATURE FOUND THAT THAT WAS NOT A REASONABLE RESULT, AND IN BALANCING CAME BACK TO THIS LANGUAGE THAT DOES SAY "COURT COSTS ". I AM NOT SURE I ANSWERED YOUR QUESTION, JUSTICE.

YOU ARE NOT, BECAUSE YOU ARE SAYING THAT WOULD ONLY BE TAXABLE COSTS, BECAUSE WHAT WE ARE ASKING IS, IN MOST CASES, THE ONLY TIME TAXABLE COSTS HAVE A SIGNIFICANCE IS WHEN THE PLAINTIFF PREVAILS, AND THERE WOULD BE NO NEED FOR COST SHARING. THEY WOULD GET IT FROM THE THIRD PARTY DEFENDANT.

THERE ARE TAXABLE COSTS, WHEN THE PLAINTIFF FILES THE LAWSUIT, AND THOSE, I THINK, WOULD BE INCLUDED, BUT DISCRETIONARY COSTS SHOULD NOT BE.

THANK YOU VERY MUCH. REBUTTAL?

I HAVE NO REBUTTAL.

THANK YOU VERY MUCH, COUNSEL, FOR HELPING US. WE WILL BE IN RECESS UNTIL TOMORROW MORNING.