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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1088

TITLE BURLINGTON NORTHERN RAILROAD COMPANY, Petitioner V. ALAN WOODS AND CARA WOODS

PLACE Washington, D. C.

DATE November 4, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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BURLINGTON NORTHERN RAILROAD :

COMPANY, :

Petitioner :

v. : No. 85-1088

ALAN WOODS AND CARA WOODS :

- -x

Washington, D.C.

Tuesday, November 4, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

L. VASTINE STABLER, JR., ESQ., Birmingham, Ala.; on behalf of Petitioner.

JAMES O. HALEY, ESQ., Birmingham, Ala. on behalf of Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: Mr. Stabler, you may proceed whenever you're ready.

ORAL ARGUMENT OF

L. VASTINE STABLER, JR., ESQ.

ON BEHALF OF PETITIONER

MR. STABLER: Mr. Chief Justice and may it please the Court:

I do not believe that a recitation of the facts is important in this case, that is the facts with respect to the trial. In fact, the thrust of this particular petition lies on the premise that basically the facts don't matter.

By that I mean it really does not matter whether this judgment that Alan and Cara Woods obtained was based on impressive theories of liability and damages or not. It really does not matter whether the rulings of Judge Clemon which were attacked on the appeal were soundly grounded in established law or whether they were based upon less substantial bases.

And it really doesn't matter whether our appeal was substantial or frivolous. This petition is based upon the application of an Alabama statute that operates automatically in every case. Essentially, there are three conditions for the application of the

ten percent fee:

First, the appeal must be taken by a defendant, and it's the defendant in a case involving either money or property.

Second, the judgment must be superseded. I suppose a better word is stayed, because we have a procedure in Alabama where municipalities can stay a judgment without actually putting up a bond, and they are subject to this ruling just as much as private parties are who have to put a supersedeas bond up.

And third, it has to be affirmed. The affirmance has to be in toto. If there is an affirmance by modification in any way, then the affirmance penalty does not apply.

We have brought this petition on the first question based on a claim that this statute violates both the equal protection clause and the due process clause of the Fourteenth Amendment. I frankly believe that each of them, each of the clauses, is applicable.

QUESTION: Well, Mr. Stabler --

MR. STABLER: Yes.

QUESTION: -- wouldn't the first inquiry in point of logic be whether or not a federal court sitting in Alabama should apply this Alabama rule in this particular proceeding, which arose out of diversity

jurisdiction, rather than whether the statute is unconstitutional?

That doesn't necessary mean you would have to argue it would be that way.

MR. STABLER: Well, I'm arguing the other way to try and induce you to go the other way, Your Honor. And if I could explain my reasoning as to why I believe you should go to the constitutional question first, I'm aware of the rules of construction regarding constitutional questions, although we have constitutional questions both on the first question and the second question.

But this rule of construction is grounded on a policy of avoiding deciding questions you don't have to decide. Now, my pitch to you, so to speak, is that if you go to the question of federal-state relations first and if I'm fortunate enough to win, the question of the due process and equal protection is still there. You've got three or four cases in the hopper right now. We have some 40 or 50 appeals, by our count, where this penalty is applied in Alabama.

Mississippi has a similar statute and I assume they have a similar number.

The question --

QUESTION: That's always the case. I mean,

you're saying grasp the constitutional issues that you're likely to have to grasp sooner or later. That's certainly not -- that's just not the way we behaved in the past, anyway.

MR. STABLER: Well, Your Honor, there's another side to it --

QUESTION: Since we're going to have to face it tomorrow, we may as well face it today?

MR. STABLER: Well, there's another side to it, too, that you don't have to reach the question of the federal-state relations question if you decide the constitutional question. That is to say that if you -- and I'm optimistic enough to assume that I'm right on both questions.

If you decide that question, you're deciding a question you would never have to decide. And I'm saying that a mechanical application of the rule really runs counter to the policy of trying to decide as little as you have to decide.

And frankly, I would hope that you would reach the question of due process and equal protection, and I think if you will and if you decide it, this little Alabama statute will be gone and you will never have to face the Hanna versus Plumer question.

Now --

QUESTION: I suppose it's your argument, Mr. Stabler, but I just put my vote with the Chief Justice's. I would rather hear you argue the other point first, just in case you run into --

MR. STABLER: Well, I certainly want to do what you want me to do.

QUESTION: Well, there are nine members of the Court and I'm sure we would like to hear argument on both points, and by all means take your choice.

MR. STABLER: Well, I guess I'll take the coward's way out and follow your suggestion. I think the question of the federal-state relations question really has to be looked at analytically two ways:

First, as to whether it's a matter that's controlled by the federal rules, in which case it comes under Hanna versus Plumer. If not, then we have to delve further into the Erie policy considerations if it's not controlled by the federal rules.

As I see it -- and we made a note of this in our reply brief -- the difference between the parties is that they claim that there must be a direct conflict in the sense that there must be a word to be found in the federal rules of appellate procedure or a sentence which specifically prohibits an affirmance penalty for there to be a conflict between the state -- the federal

appellate procedure and the state.

We maintain that the scope of the rules is such that the subject matter is controlled. I think the words that we lifted from Hanna versus Plumer are "the situation is covered," or words to that effect. I think in the Walker case there was a reference to whether it is within the scope of the rules.

And I think that it is quite clear that the federal rules of appellate procedure specifically cover really all of the rules of procedure. I think it's interesting --

QUESTION: Well, you know, I think you have a hard time, going back to the result that the Court reached in Cohen versus Beneficial Loan, if you say that so long as the federal rules are kind of internally consistent and seem to deal with all the things these people thought about there's no place for a state statute.

Certainly that's not the approach the Court took in Cohen versus Beneficial Loan.

MR. STABLER: Well, I've got two distinctions from what you've said, Your Honor. The first is I think there is a very definite difference between the Rules of Civil Procedure and the Rules of Appellate Procedure. We noted in our briefs both Rule 1 and the comment to

Rule 1, which are to the effect that the Federal Rules of Appellate Procedure are controlling with respect to appellate rules.

There is no comparable phrase in the Rules of Civil Procedure. If I may use the analogy, it's a little like a contract which says, this is the entire agreement between the parties. It has that kind of provision.

I think the nature of the appellate rules are that they are contained, while there is much more interaction in civil rules with state substantive rules than is true in the appellate rules.

Secondly, though, Cohen was based upon a solid view that there was a state substantive policy that was being recognized. I brought to you perhaps the most graphic example of the substantive policy of the Code of Alabama or the Alabama legislature, dealing with the Alabama affirmance penalty. This is in title 12, which deals with courts.

It is in chapter 22, which deals with appellate proceedings; and it is in division 5, which deals with the disposition of appeals.

Now, if you are looking, as they did in Cohen, for a state policy which is a substantive policy, you will not find it. This code is adopted by the Alabama

legislature. They have organized this particular provision to come within a section of the code which serves a function quite the same as the function of the rules of appellate procedure.

That is quite different from Cohen. I was reading a comment by Justice Harlan in his concurring opinion in Hanna versus Plumer where he says at the end of the opinion that anyone practicing law at that time was aware of the substantive policies tied to the bonding statutes that were involved.

QUESTION: Of course, the substantive policy was to discourage strike suits. Here you could say that there is a substantive policy in Alabama to discourage delay on the part of defendants against whom a judgment has been rendered and who supersede the judgment.

MR. STABLER: Your Honor, I don't even think you go to that question until there is a determination of the scope of the appellate rules. If Hanna versus --

QUESTION: I thought your most recent argument was that Alabama has no substantive policy; it's just a point of appellate procedure. But an awful lot of points of procedure are based on substantive policy, as I continue to think Cohen versus Beneficial Loan was.

MR. STABLER: I agree with you. I was responding to Cohen versus Beneficial Loan, which is a

case that predates Hanna versus Plumer.

But I believe that the appropriate analysis in this particular case is to inquire first as to whether the Rules of Appellate Procedure are applicable. Now, you use the federal rule to set the amount of bond, not the state rule, the supersedeas bond. You use the federal rule, not the state rule, to control the interest that is to be assessed. You use the federal rule, not the state rule, when dealing with the question of whether there is a frivolous appeal under Rule 38.

Every incident of this appeal is controlled by the Rules of Appellate Procedure. And I submit that the Rules of Appellate Procedure are in scope complete and designed to control the subject matter of this appeal. Now, if I'm correct in that submission, Hanna versus Plumer itself recognizes that the substantive policies of the state are not necessarily to be controlling.

Now, if you go and say, well, the scope of the rules is not applicable, then we do look to the state policy. But there is no state policy here. Cohen versus Beneficial Loan dealt with a very complicated and erudite law, corporate law, which is certainly a complicated field and one in which procedure and substantive law have been traditionally mixed.

Here, all you've got to do is be on the right

side of the rule when the verdict comes in to be subject to this particular rule. It does not aid or abet any particular substantive rule of Alabama.

QUESTION: Well, I disagree with you, as I guess I've made myself clear. It seems to me it is very definitely based on a policy of Alabama that they want to discourage defendants such as your client, against whom a judgment has been rendered and who supersede the judgment, penalize them for delay.

MR. STABLER: Your Honor, you're leading me back to the other part, I believe. I don't want to leave it, leave the due process feature of my argument, but my response to that basically is that it is a policy which is unconstitutionally enforced.

QUESTION: But I thought -- I understood you to say there is no substantive policy behind the Alabama --

MR. STABLER: I do not think it is a substantive policy. There have only been two policies stated by the Alabama Supreme Court. One has to do with whether to deter frivolous appeals. That clearly is --

QUESTION: Well, what about the policy I mentioned. Do you think that's an unreasonable interpretation to put on the Alabama rule, that it was passed for the reason I suggested in a question a moment

ago?

MR. STABLER: Your Honor, I don't think that the policy as you have stated it is anything more than a policy designed to protect the court system. It is not --

QUESTION: Well, you can say the same thing about the New Jersey provision in Cohen against Beneficial Loan.

MR. STABLER: Well, the case that comes to my mind, to respond to you, Your Honor, is the Gulf, Colorado case, which we cite, in which it was determined that when a railroad, bless them, was sued they had to pay attorney's fees.

The only identification -- attorney's fees to the plaintiff. The only identification -- it had nothing to do with the substantive dispute. It had to do with the identify of parties.

And I submit that that's true here, too, that it is not in -- the state of Alabama is not pursuing any substantive policy other than relating itself to the identity of parties.

And I submit that it's a violation of equal protection to single out a particular group, in this case defendants in certain classes of cases, and say that, if you exercise the rights of appeal, the right of

supersedeas, and you take in effect the access to a court, you submit yourself to a penalty. You are to pay a price for the access to the process of courts.

To my way of thinking --

QUESTION: Mr. Stabler, technically I suppose this affirmance penalty of Alabama is not a direct burden on the right to appeal, but rather a burden on obtaining a stay on a judgment pending appeal, right?

MR. STABLER: Well, I submit that the two can only -- can be separated no more than a steering wheel can be separated from a car, because if the defendants do not have some way to protect their litigated property in the event that they win it is a right that is -- the appeal right is of little value.

So I would submit to you that to distinguish them is more a matter of semantics than one of reality.

QUESTION: Do you think that the statute calls for anything more than a rational basis test?

MR. STABLER: I'm not sure I fully understand your question.

QUESTION: You've made an equal protection challenge and I assume that in most instances the Court has to apply some kind of test to evaluate an equal protection challenge. And unless there is some heightened standard for review, the Court would normally

apply a rational basis test.

MR. STABLER: Well, we submit that -- and we base it upon several cases, Rinaldi versus Yeager being the first -- that the right to appeal free of unreasoned distinctions, which brings equal protection into it, is a fundamental right.

QUESTION: Mr. Stabler, I think your quote from Rinaldi against Yeager on page 16 of your brief belies that contention. The quote that you have on page 16 reads this way:

"The Court has never held that the states are required to establish avenues of appellate review, but it is not fundamental" -- and you underscore that phrase -- that once established these avenues must be kept free of unreasoned distinction."

That doesn't say that the right of appeal is a fundamental right. It says it's fundamental that, once a right of appeal is established, it must be kept free of unreasoned distinctions. I think that's quite different.

MR. STABLER: That was a point I was attempting to make, Your Honor.

QUESTION: Well, I didn't think that was the point you were attempting to make.

MR. STABLER: No, it clearly is the point.

QUESTION: Well, what is the point?

MR. STABLER: The point is that if access to any court -- and I don't think it matters whether you are talking about the police court or you're talking about the circuit court or to an appellate court. The essence of both due process and equal protection is that the scales of justice must stand equal.

QUESTION: Well, that doesn't respond at all, I don't think, to my question. Do you agree that the right to appeal is not fundamental, but is only subject to a test for unreasoned distinctions?

MR. STABLER: I think that the right to an appeal free of unreasoned distinctions, that is a right to a fair and equal access to an appellate court, is a fundamental right.

QUESTION: Well, certainly Rinaldi does not support your statement at all.

MR. STABLER: Your Honor, well, I would disagree with that. North Carolina versus Pearce cites Rinaldi and I believe interprets it in the same fashion that I am myself.

I would submit to the Court, though it is a due process point, Boddie versus Connecticut, Justice Harlan makes a strong and eloquent statement in that case about the place in society, if you will, of

allowing access to courts, allowing evenhanded justice.

QUESTION: (inaudible) did you think was left after our opinion in United States against Crass?

MR. STABLER: Your Honor, I'm sorry, I don't know. I have not read the case.

But I am strong of the view that the integrity of the court system depends upon equality of treatment, and equal protection principles belong in the courts of appeals as much as any place I know, because if you do not have the principle of equality in the courts you've basically destroyed the essence of what they're all about.

I'm going to reserve the rest of the time for rebuttal.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Stabler.

We'll hear next from you, Mr. Haley.

ORAL ARGUMENT OF

JAMES O. HALEY, ESQ.

ON BEHALF OF RESPONDENTS

MR. HALEY: Mr. Chief Justice, may it please the Court:

I will address first the alleged conflict between the Alabama affirmance fee and Rule 38 of the Federal Rules of Appellate Procedure. As I understand

what Mr. Stabler's been saying is that it must be an irreconcilable conflict between the rule and the statute.

Of course, we recognize that the federal courts have rulemaking power. We never have questioned that. We never have questioned the fact, and I don't think he has, that the legislature of Alabama has legislative power.

But does our affirmance fee conflict irreconcilably with the federal rules? We say it does not, for several reasons. The first is, the federal rules do not have any provision awarding any affirmance fee for an unsuccessful appeal. Now, there is a difference between an unsuccessful appeal and an appeal taken for the purpose of delay or frivolously. We're not talking about the delay appeals necessarily, although that is one of the functions of the affirmance fee, is to prevent delay appeals. Our Supreme Court has so held.

But it goes further, and there is a reason that there is no conflict, one of the reasons, between the Alabama affirmance fee and Rule 38. Rule 38, just the rule does not go as far as the affirmance fee does.

QUESTION: Well, if the purpose of the penalty is to discourage frivolous appeals, I'm not sure I

understand why you think that wouldn't conflict with Rule 38 of the Federal Appellate Rules.

MR. HALEY: To that limited extent, it might, to that limited extent. But our statute is broader than that.

QUESTION: Well, if the purpose is also to compensate for delay in obtaining the judgment, then it serves as some kind of a supplement to post-judgment interest in that regard, is that right?

MR. HALEY: No, ma'am, it does not, because we do have a provision for post-judgment interest.

QUESTION: Yes, and so this penalty is a supplement to that in effect.

MR. HALEY: Right. Our Supreme Court has said that one of --

QUESTION: Is that right?

MR. HALEY: -- the purposes of it is to give to a winning plaintiff some additional compensation. That's one of the reasons it's been assigned.

QUESTION: Then why wouldn't it conflict with appellate, federal appellate procedure Rule 37(n), Section 1961 of Title 28 combined?

MR. HALEY: I don't believe that the Federal Rules have preempted completely the state affirmance fee. If we go back to Erie, we find one of the purposes

of the procedural versus substantive provisions is to discourage forum shopping.

Now, I might mention this at this time, because in their brief, both in amicus curiae brief and in the appellant's brief, they have referred to the fact that this is a windfall for the plaintiff. In our brief we attempted to show that there was not in fact any windfall.

Now, under the federal rules, even though they hold against the appealing defendant, the interest rate is not the 12 percent that they have been talking about all the time. You do not get 12 percent in the federal courts.

Today, if an appeal -- if a judgment is rendered in a federal court, the interest rates, the post-interest rates on that judgment is 5.75 percent, 5.75 percent, instead of the 12 percent that they're talking about.

Well, the interest rates in the state court -- and we're getting to the question now as to whether or not the federal rule -- I mean, the federal courts should enforce the Alabama affirmance fee. If a citizen of Alabama files a suit against an Alabama corporation or citizen of Alabama and wins the case and the case is appealed, then he gets 12 percent interest and 10

percent affirmance fee.

That may look like a windfall, but I think our brief shows it's really not.

QUESTION: Well, you want us to carry over the affirmance fee into federal court. Why shouldn't we carry over the 12 percent into federal court, too?

MR. HALEY: Well, we did not ask for that, Your Honor. That's all the reason.

QUESTION: That's the next case?

MR. HALEY: Well, not from us, no. We've never thought about it, to be honest with you.

QUESTION: But in theory, you think that's just as supportable? I mean, after all, there's nothing inconsistent between 5.75 and 12. 12 is just something on top of it. You get the 5.75 and you get something more.

MR. HALEY: You can look at my hair and see that this is not the first time that I've ever stood before a court, but I'll have to admit that you threw one at me that I haven't thought about. And when I try to answer something off the top of my head, I usually find that I have to eat my words later.

No, in answer to your question, since you have brought it up, I don't see that there is any difference. Really, I don't see that offhand there is.

But again, we have never asked for it. We have always asked -- you know, that brings us, I think, to the real crux of this whole thing, and that is that -- and there's one statement in one of the cases here, I think Justice Powell wrote it, where he says that, of some 100 rules, every one of them is written for some purpose, and just about every rule and every statute that we have in Alabama or anywhere else pertaining to litigation, tort litigation or contract litigation or what-not, it favors to some extent a plaintiff or a defendant.

Right now we know that we've got invoked all over this country -- today in Alabama we are having an election of a governor, which you all know about, and one of the hottest issues in this election is tort reform. And when the election is over, regardless of who wins, there's going to be a lot of tort reform bills introduced in the legislature, attempting to give the plaintiff some advantages in some instances and the defendant some advantages in some instances.

So you have to mesh them all together and do what Vastine said, come up with what's just and right. Well, what's just and right in requiring a defendant who has had his day in court, has been unsuccessful in his motion to dismiss or his motion for summary judgment, directed verdict, the jury has found against him, been

unsuccessful in his motion for a new trial, unsuccessful on his motion for a judgment NOV -- the plaintiff now has a judgment.

They don't stand in the relationship of plaintiff and defendant any more. Now they stand in the position of debtor and creditor. And who can ever say that it's wrong to require a debtor to pay if he doesn't turn over the money? Now, that's what we're here on.

The judgment has been rendered, it's final. Everything has been done except the possibility of reversal on appeal. Alabama law says, well, here you are, you've got a judgment rendered against you; we're going to give you your option. We're going to let you make the decision, what you want to do.

You can pay it, you can appeal it without a supersedeas, or you can supersede it, and if you are unsuccessful then you're going to have to pay the ten percent penalty.

QUESTION: Mr. Haley, may I interrupt you right there for a moment. Do you think Alabama could say to the federal judicial system, you must provide for stays of judgments, or do you think the federal rules could decide, we won't authorize stays, just as we have a different interest rate?

MR. HALEY: Justice, I would never say that

Alabama can tell a federal court what it's got to do, no, sir. I don't think so, in answer to your question.

QUESTION: So that if the federal judicial system did not itself authorize stays and it doesn't authorize supersedeas in quite the same way that Alabama does, then there would be no basis for a ten percent penalty, even though there were appeals and unsuccessful appeals?

It's the ten percent, as I understand it, and as you say in your own brief, it's compensation for the stay of execution. But that's something that's granted by the federal court, rather than the state court. And therefore -- and then just so you get my thought fully in mind, if the federal court doesn't have to grant the stay in the first place, why does it have to grant the particular kind of stay that Alabama does, namely one that carries a ten percent penalty with it?

MR. HALEY: Well, I will readily admit that their position is much stronger on that issue than on the due process issue. I would admit that. And what I can say to you is is what the status of the cases at this time is.

The Fifth Circuit, before there was a division between the Fifth and the Eleventh, in two cases upheld the Alabama affirmance fee in diversity cases. Later,

they did in a Mississippi case, that went up from Mississippi, hold that there was an irreconcilable conflict between the Mississippi statute and the Alabama and the federal rule.

They held that, and by so doing they stated that they were not applying the Fifth Circuit's Alabama affirmance fee any more.

But the Eleventh Circuit had held prior to that that the Alabama affirmance fee was not in conflict with the rules and was not unconstitutional. And then after -- it was the Affholder case that's referred to in both briefs -- the Fifth Circuit's ruling, then the Eleventh Circuit was asked to reconsider its previous holdings, because the Eleventh Circuit had changed its ruling on it. And that was the case of Jackson versus Magnolia Brokerage Company, and then there was our case.

And they asked -- the Eleventh Circuit then, a panel, adhering to their former rule, as they are required to do, refused to overrule their former position. And then a petition for an en banc reconsideration was filed, and it was overruled. And that case came to this Court by writ of -- a petition for a writ of certiorari, which was denied.

But in the petition for a writ of certiorari,

they based their contentions solely on the fact that there was an irreconcilable conflict between the rule, the federal rule, and the affirmance fee statute.

I have made a list of some of the things here that I think justify a distinction between the -- I mean, reasons why both rules can be held applicable. In the first place, our rule, our affirmance fee, is mandatory. Rule 38 and affirmance the statute have different fields of operation.

Alabama in McAnnally versus Levco held directly that -- and we do have a Rule 38 that's almost identical to the federal Rule 38, and in this case of McAnnally versus Levco, Inc., 456 Southern 2d 66, our court held that there was a field of operation for both the statute and the rule, and applied the damages, ten percent, and then applied damages for the wrongful taking of the delaying tactics.

In that case, what they did, they filed an appeal and just never did -- and filed a supersedeas bond, but never even prosecuted the appeal at all. In that case, our court held that they were liable on both of them.

If there are no more questions on that, I will get to what I consider the crux of the case, on the due process. Now, fortunately we have a Supreme Court

case. It's an old case, yes, but this statute's old, too.

This statute has been in force in Alabama for 166 years. I haven't been around 166 years. I've been around a long time. But I cannot find any record anywhere that any Supreme Court Justice has ever held or said that there was no reason for not applying the affirmance fee statute.

In that period of time, of course, we've had many legislative sessions to meet, and to my knowledge no legislature as yet -- maybe tomorrow after the election, but so far I don't think any legislative proposal has ever been made to change it.

Well, that's got to indicate something. It must indicate that it works pretty good to me. I know that you can't get grandfathered constitutional rights, but if it's been working to the satisfaction of the people of Alabama for 166 years it sounds pretty good.

But Justice Holmes decided this issue, Your Honors, in 1916 in an identical case from the State of Kentucky, on almost an identical statute. Now, they have said in their brief, and they didn't argue it -- they have said in their brief that Justice Holmes did not really base it on a constitutional question. But yet, in their petition for writ of certiorari at page 9

in a footnote they say this:

"The Supreme Court many years ago held that the imposition of a penalty for filing a supersedeas bond does not violate due process principles. Louisville & Nashville Railroad versus Stewart."

And then they say this further: "We contend that modern principles of due process, discussed infra, called into question the continued validity of Stewart." What he said in his petition was that it's been decided against him in Stewart, but this Court's going to have to overrule Stewart in order to rule in his favor.

Well, Stewart -- I don't know what Justice Holmes decided, really had in mind, what was before him. But I do know this: In the syllabus -- and I realize what the function of a syllabus is, but this is a 1916 case. The syllabus of the case says: "Due process provision of the Fourteenth Amendment does not require a state to provide for suspension of judgments pending appeal, nor preventing its making it costly in case a judgment is upheld, nor is due process denied by adding ten percent, as is done under the statute of Kentucky, on the amount of judgment if the same is affirmed."

And in this case, he affirmed both the ten

percent penalty and the interest provided by the law of Kentucky. And in his opinion he discussed one or two matters, and then he said:

"The first of the other objections is that the Court of Appeals was not authorized to add ten percent damages on the amount of the judgment as it did. But the railroad company obtained a supersedeas and the law of the state makes ten percent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where ultimately the judgment is upheld."

QUESTION: May I ask this question? Was that a substantive due process decision by Justice Holmes?

MR. HALEY: Your Honor?

QUESTION: Was it a due process decision? It was not equal protection, was it?

MR. HALEY: He doesn't say.

QUESTION: He doesn't mention equal protection?

MR. HALEY: He does not.

QUESTION: Then I suggest it may have been decided on the basis of substantive due process, that had not been rejected in 1916 to the extent that we are now very careful about applying it.

MR. HALEY: Well, I realize that, but this has never -- our Supreme Court has relied on it. We cited a case where our Supreme Court relied on it on a due process challenge. Mr. Stabler considered it a due process decision when he filed his petition.

I'm sort of reluctant to argue some of these deep questions here before a Court that decides them every day and you wrote the opinions and you know them. But as I read them and as I read this one -- it even antedates me.

But you can read it better than I can, that's what it is. That's what it is.

QUESTION: It was a money judgment, wasn't it?

MR. HALEY: Yes, it was a money judgment. It was a money judgment in an FELA case.

I think what Vastine really contends is that the contention probably was -- it's not in the opinion and it's not in the syllabus -- that, the FELA being a federal statute, the state could not change the measure of damages by imposing a ten percent penalty. If that's what their contention was, it ruled against them on that, too.

That's the only two constitutional grounds, and I don't think that that would be constitutional. I

think it would be inapplicable to the particular type of case.

QUESTION: What about the equal protection issue in this case?

MR. HALEY: The equal protection issue is that this applies to every defendant against whom a money judgment is obtained. It makes no discrimination as between the types of defendants. It applies to rich and to poor, to corporate, to individuals, to residents and to foreign corporations.

It applies to everybody. I do not see any discrimination. I cannot see any discrimination.

QUESTION: What about non-money judgments?

MR. HALEY: Well, we've got two other statutes that bring that into play, Your Honor. One is --

QUESTION: Well, neither one of them put a ten percent charge on for losing.

MR. HALEY: Yes, sir, they do. Yes, sir, they do.

QUESTION: What do they say?

MR. HALEY: We've got one that provides a ten percent penalty if you -- it's a different statute -- if you are sued for possession of real property and lose and you keep it over, sort of like your Lindsey case.

QUESTION: Yes.

MR. HALEY: And the other is that if you are sued for personal property and you don't surrender it and take your chances on appeal, it does -- you're talking about does it -- well, there are --

QUESTION: What about I sue to prevent my neighbor from keeping -- trespassing on my property, and I lose and I appeal and I lose? Do I have to pay ten percent? Of what?

MR. HALEY: Well, if you appeal that would be an injunction proceeding, of course.

QUESTION: Yes. But the loser in an ordinary injunction suit appeal doesn't pay any penalty?

MR. HALEY: But he has to give a bond to indemnify the other party against damages.

QUESTION: Well, that may be so, but he hasn't got -- he doesn't have to do anything more than to satisfy the supersedeas requirements.

MR. HALEY: That's right, and I cannot conceive how your damages could be determined in an injunction.

QUESTION: Well, you could just say there will be a penalty.

MR. HALEY: Sir?

QUESTION: A penalty could just be provided for taking what might be considered a frivolous appeal.

MR. HALEY: Well, it would have no relationship whatsoever to the damages involved, if it did.

QUESTION: Well, can one get a stay as a matter of right from an injunction in Alabama, the same way one can get a stay as a matter of right by posting a bond and superseding a money judgment?

MR. HALEY: No, you cannot, you cannot. You can get a stay only by making an application for it, and if it's granted then the judge sets the amount of the bond that he's got to give in order to obtain the stay. It can be obtained that way and only that way.

I think the most analogous situation that we have is the Rule 68, the offer of judgment rule. Now, this Court has had two cases, important cases which have been thoroughly discussed, on the offer of judgment rule. I think that's almost an analogous situation. It places -- that rule places upon the plaintiff the burden of making the decision as to whether or not he is going to go forward with the lawsuit, because under that rule the defendant can at any time not less than ten days prior to trial date make an offer of judgment.

And the plaintiff, at that time he hasn't tried his case. He probably hasn't even finished his discovery. But yet he's got to within ten days decide

whether or not he's going to settle that case for the amount of the offer.

And if he doesn't do it, then he's subjected to all costs incurred by the defendant after that offer is made.

In this case, the defendant has already had his day in court. He's had due process, sure. He has had due process and he's had his day in court and he's lost. So he is confronted with the same proposition. The plaintiff now is saying to him: You pay the judgment or suffer the ten percent affirmance fee penalty.

I see no difference. And this Court has said in as strong language as you possibly could say it that one of the main purposes of the offer of judgment rule is to encourage settlements and to discourage protracted litigation, bring it to an end.

QUESTION: Mr. Haley, may I ask this question. If the plaintiff in this case, for example, had lost and believed that the district court had given erroneous instructions, he could have appealed under the Alabama law, couldn't he?

MR. HALEY: Yes, you can appeal from a ruling on a motion.

QUESTION: Yes.

MR. HALEY: A ruling on a motion for a new trial.

QUESTION: But that plaintiff also would have had his day in court, and you seem to be arguing that if one has a day in court at the trial level that that's all that's necessary.

MR. HALEY: No, sir, I didn't mean to say that. No, sir, I didn't mean to say that at all. If I gave that impression, it's wrong. I have never said that they don't have a right to appeal.

I don't think it's a fundamental right to appeal, but under our law they are given the right to appeal. But when they are given a right that fundamental law does not guarantee to them so far as constitutional principles are concerned, they have to meet the requirements of the law.

QUESTION: Right, so that both sides may appeal, but a losing defendant pays a penalty if his appeal is not successful?

MR. HALEY: Well --

QUESTION: Suppose the Supreme Court of Alabama had decided this case four to three. No one would have suggested that the appeal lacked merit. It didn't lack enough merit.

MR. HALEY: That's right. What would be --

QUESTION: I was wondering whether you --

MR. HALEY: Yes, sir, I think it's fair, yes, sir. I think it's fair because where is the incentive for a losing plaintiff to take a losing appeal? In the first place, he's got to give a bond to make the appeal. He's got to buy a copy of the record. He's got to employ or pay an attorney to take the appeal.

And then if he wins, all he's done is he's thrown it back into court to try his case. And if he loses it, it's all for naught.

But the defendant has the benefit. If the defendant loses and still pays the penalty, he still has had the benefit of that money during that period of time. Now, there's where the quid pro quo comes into play, that the plaintiff -- the defendant has got a quid pro quo. They are keeping the money.

The plaintiff wants it, he needs it. Just look at the Eleventh Circuit case in here. Here is a man who is a machinist. According to the Eleventh Circuit's opinion which I referred to, he was permanently disabled, permanently rendered less able to work and make a living. He had had two operations.

He needed his money when he got his judgment. Now, who is taking advantage of whom? The defendant comes to him after that, and we know what happens. You

know it happens, too. He comes: Well, you've got a judgment for $300; I can appeal it. I need my money, I need my money. Well, we're going to appeal it unless you knock off something.

Well, say they don't put that in there, but they most likely would. Who has got the upper hand on those dealings? Are they dealing on an equal basis? No. The defendant has got the advantage because they have got the money and they are holding it. He's needing it. He's going to have to wait for it, and under the economic conditions that we've had in the last several years.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Haley.

Mr. Stabler, do you have something more? You have eight minutes remaining.

REBUTTAL ARGUMENT OF

L. VASTINE STABLER, ESQ.,

ON BEHALF OF PETITIONER

MR. STABLER: Yes, Your Honor, I do.

I would like to comment on several points that were made during the last part. I suppose the first one is to deal with L&N versus Stewart. I suppose that in our petition for certiorari we too relied upon the syllabus that it was a due process case. But we have

since obtained a copy of the briefs, which I assume you have judicial notice of here, and it is quite clear from the briefs that that case was basically a case involving the scope of the Federal Employers Liability Act, somewhat like the Bombalis case which was decided about that time.

It was a state court case dealing with an FELA action, and the question was not the constitutionality of the statute, but whether, because it was an FELA statute, it was preempted by federal law. And I will cite you to the assignment number one that's in the plaintiff's -- I mean, in the railroad's brief, which I believe is the total argument presented to Justice Holmes on that point.

The opinion says the question is whether or not they are, I believe the word is, "authorized," what is authorized to apply the ten percent. The holding in the case is that it is a state procedural matter, I might add, Your Honor, a procedural matter, and thus was not to be included within the Federal Employers Liability Act.

He subsequently cited the Dickenson case, which we've cited in our reply brief, in which he cited it for that proposition. There is not one mention of any constitutional issue other than the issue of

preemption or supremacy clause under the FELA and that Act.

And I do not believe that that case -- I know it was not argued and it was not decided on any question dealing with due process.

I would also like to take issue with Mr. Haley's reference that this does not represent a windfall for the plaintiff. By definition, a jury has determined what the damages in this case are. They were determined to be quite a bit, I might add, in this case.

There is no finding of any sort of any additional damages to the plaintiff. There has been no trial to that. It is an arbitrary matter.

Mr. Haley said that there had been a question that there was the loss with respect to the use of money during the time between trial and appeal. The interest statutes are there under the state and the federal. I might add, Justice Scalia, I do believe the interest statute is in a different situation, because the federal statute there is far more specific than the issue you have here.

And I might add --

QUESTION: Still, interest on a voluntary loan is one thing. Interest on an involuntary loan is

something else. One person shouldn't have the right to get money from somebody else so long as he pays the going rate of interest if the other person doesn't want to loan it.

And the statute here simply says, if you owe the money you owe it, if the other fellow doesn't want to lend it to you at 5.75 or whatever a rate is, pay ten percent if you keep it. It seems fair to me.

MR. STABLER: Yes, sir, I quite agree. In fact, the National Marine Cooks case probably would indicate that, if there were no protection, probably both as to the property protection of a bond and the protection of interest, that it may be unconstitutional to stay.

I'd not deciding that case, but certainly there's a suggestion that there's a constitutional issue if these provisions are not allowed.

QUESTION: Well, is this case really much different from, say, a provision that the loser on appeal has to pay the other side's attorneys fees?

MR. STABLER: Well, it could be the same or it could be different, Your Honor. I believe that if we look at the cases --

QUESTION: Well, at least that's one of the hazards you have to, an appellant has to watch out for.

If he loses on appeal, he's going to have to pay the other guy's attorney's fees.

MR. STABLER: Attorney's fees statutes are attached to specific substantive laws and are upheld when they support a substantive policy represented by those particular acts.

QUESTION: Well, the substantive policy might be we want to discourage frivolous appeals.

MR. STABLER: Well, I would cite to you the Gulf, Colorado case, which said that it is indeed unconstitutional just to say because you are a railroad you have to pay attorney's fees.

QUESTION: Well, that's a different case.

MR. STABLER: Well, it is the only case that I know of where attorney's fees are assessed, not because of the substance of the claim, but because of the identify of the parties.

QUESTION: Well, I agree with that.

MR. STABLER: And that's what we have here, is that the penalty is related to the identity of the parties. And for that reason, I think the case is highly persuasive.

QUESTION: Why the identity of the parties?

MR. STABLER: Pardon?

QUESTION: Why the identity of the parties?

MR. STABLER: Because it relates not to any particular case, but relates to the mere fact that you're a defendant in a suit dealing with money or property.

QUESTION: And you lose.

MR. STABLER: And lose.

QUESTION: And you got a stay.

MR. STABLER: And you got a stay.

QUESTION: Yes. Would it be unconstitutional for the state to have a statute that says you must pay your judgment unless you get a bond to secure the judgment, instead of a supersedeas, and the bond premium shall always be ten percent of the amount of the judgment and then it's nonrecoverable? Would that be unconstitutional?

MR. STABLER: I can't --

QUESTION: It's like a bail bond.

MR. STABLER: -- see the constitutional problem there. Of course, whether the bond premium is appropriate in relation to the risk, I suspect that potentially --

QUESTION: Well, you know, the ten percent is a fairly customary figure, I guess, with bail bonds, isn't it?

MR. STABLER: I'm happy to say I've never had

to get a bail bond, and I don't --

QUESTION: Well, my practice was more diverse than yours.

(Laughter.)

QUESTION: You meant for yourself.

MR. STABLER: Well, there's precious few things I can say on my own behalf, but that's one of them.

QUESTION: But that's one of them.

MR. STABLER: I would like to say, since Lindsey versus -- I mean, Rinaldi versus Yeager, there was some discussion, in my judgment Lindsey versus Normet is virtually on all fours with this case in terms of the equal protection.

That case was a double bond penalty. This is ten percent. It was related to a specific substantive rule in Illinois, which is articulated in the opinion very, very clearly, dealing with the problems of getting tenants out, and there were problems going both ways. It was found to be punitive. It was a violation of equal protection.

It was, as is in this case, a price that is charged for access to a court.

CHIEF JUSTICE REHNQUIST: Your time has expired, Mr. Stabler.

The case is submitted.

(Whereupon, at 12:00 o'clock noon, the oral argument in the above-entitled case was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#85-1088 - BURLINGTON NORTHERN RAILROAD COMPANY, Petitioner V.

ALAN WOODS AND CARA WOODS

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BY Paul A. Richardson

(REPORTER)