Allstate Indemnity Co. v. Joaquin Ruiz

MR. CHIEF JUSTICE

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR THIS MORNING IS ALLSTATE VERSUS RUIZ. MR. SHAW.

THANK YOU. MAY IT PLEASE THE COURT. DAVID SHELTON ON BEHALF OF THE PETITIONERS. THE QUESTION PRESENTED IN THIS APPEAL IS WHETHER RULE 1.280-B-3 WOULD BE APPLIED ACCORDING TO ITS UNAMBIGUOUS TERMS.

WOULD YOU FIRST GO INTO THE NATURE OF THE DOCUMENTS THEMSELVES. WHAT THEY ARE, SO THAT WE CAN HAVE A FULL ANALYSIS. ARE THESE DOCUMENTS THAT ARE, THAT YOU WOULD DESCRIBE AS COMING OUT AFTER CLAIM FILE THAT HAS BEEN SUBMITTED? SOMEONE, I SEND YOU A NOTE, SAY, I HAVE GOT A LOSS. PLEASE PAY IT. AND WHATEVER IS CREATED IN THAT FILE, THOSE COME FROM THAT KIND OF FILE OR SOMEWHERE ELSE?

NO. THEY ARE FROM THE INSURANCE COMPANY'S CLAIM FILE.

CLAIM FILE.

AND THERE ARE THREE GENERAL CATEGORIES OF DOCUMENTS THAT WE ARE TALKING ABOUT. THE FIRST AND FOREMOST --

HOW DO WE, IN CONNECTION WITH A BAD FAITH SITUATION, AND THAT IS WHAT WE ARE TALKING ABOUT, THE POSSIBLE BAD FAITH?

THAT IS ONE ELEMENT OF THE CASE. YES.

AND THE OTHER ELEMENT IS THE CLAIM ITSELF.

NO. THE OTHER ELEMENTS ARE A PROFESSIONAL MALPRACTICE CASE AGAINST MR. COB, THE INSURANCE AGENT. THERE -- AGAINST MR. COBB, THE INSURANCE AGENT. THERE IS VICARIOUS LIABILITY.

WHAT KIND OF INSURANCE CLAIM HAS BEEN PAID? THE INSURANCE CLAIM HAS BEEN PAID.

ALL WE ARE TALKING ABOUT IS A CLAIM, THEN, A BAD FAITH CLAIM AND A CLAIM AGAINST --

ALLSTATE INDEMNITY COMPANY. THAT WOULD BE CORRECT, YOUR OR.

AND AFTER LOOKING AT, I AM NOT SURE IF I AM SAYING IT CORRECTLY, THE COWANGA CASE AND BACK IN ITS HISTORY, THE CLAIM FILE, AS OPPOSED TO THE LEGAL FILE OR ITS FILE,ESNT APPEAR TO BE ANYWAY.

I DISAGREE WITH YOU AS REGARDS THE COWANGA CASE. ALL COMPANIES ARE ENTITLED TO ASSIGN WORK PRODUCT PROTECTION AND ATTORNEY/CLIENT PROTECTION.

WOULD YOU TURN WITH ME TO THE FOURTH DISTRICT'S OPINION, WHERE IT SAID THAT THE CLAIM FILES HAD ALREADY BEEN PRODUCED AND THAT THE ONLY OTHER FILES WERE LEGAL

DEPARTMENT FILES, AND THAT WAS WHAT WAS BEING -- EVERYTHING ELSE HAD BEEN PRO DUSD, AS I READ JUDGE OWN'S DECISION FROM THE FOURTH DISTRICT IN MANHATTAN NATIONAL LIFE, IN THE FOURTH DISTRICT, VERSUS COWANGA.

I BELIEVE THAT IN COWANGA, THAT THEY DO HAVE A RIGHT TO ASSERT WORK PRODUCT PRIVILEGE. PERHAPS IN THAT CASE THERE WAS NO WORK PRODUCT DOCUMENT IN THE CLAIM FILE, ITSELF.

IT DOESN'T MAKE A DIFFERENCE WHAT IT RELATES TO, IS WHAT I AM TRYING TO UNDERSTAND, BECAUSE THE CLAIM FILE HAD ALREADY BEEN PRODUCED, AS I READ THE FOURTH DISTRICT CASE IN MANHATTAN NATIONAL LIFE, AND THE ONLY THING THAT CAME UP HERE WAS THE LEGAL DEPARTMENT FILE, WHICH WOULD HAVE BEEN THE BAD FAITH LITIGATION, WHICH CERTAINLY YOU CAN STILL MAINTAIN THAT, BUT IS THERE NOT A DIFFERENCE BETWEEN THE CLAIM FILE, WHICH IS JUST BASIC INSURANCE BENEFIT FILE, AND A FILE THAT MAY RELATE TO BAD FAITH?

I DON'T THINK SO. I THINK WE CAN HAVE WORK PRODUCT IN BOTH. I THINK THIS IS A CASE WHERE THAT POINT IS MADE EQUALLY OR VERY WELL, BECAUSE THIS IS NOT ONLY A BAD FAITH CASE. THIS IS A CASE PRINCEBLY -- INCIPLY, I WOULD SUGGEST, OF A CLAIM OF MALPRACTICE AGAINST THE AGENT, AND THAT IS REALLY WHAT, IN MY OPINION, WAS BEING INVESTIGATED FOR PURPOSES OF THIS CLAIM. WHEN THE ACCIDENT WAS INITIALLY REPORTED, ON DECEMBER 27 OF 1996 THEY REPORTED IT TO MR. COBB. MR. COBB'S IMMEDIATE RESPONSE WAS YOU ARE NOT GOING TO HAVE COVERAGE FOR THAT, BECAUSE WE HAVE TAKEN THE BLAZER OFF THE POLICY, AND MR. AND MRS. RUIZ DID NOT ACCEPT. THAT THEY DECIDED TO FIGHT T THEY WANTED TO KNOW WHAT THAT WAS BASED UPON. MR. COBB HAD THAT BASED UPON A CHANGE FORM THAT HE FILLED OUT IN APRIL OF THAT YEAR. THEY WANTED TO SEE. THAT THEY SET UP A MEETING THREE DAYS LATER. THEY CAME IN AND GOT A COPY OF THAT. THEY WERE STILL UNHAPPY WITH THE FACT THAT THE BLAZER HAD BEEN REMOVED PURSUANT TO THE CLAIM FORM. ONE DAY LATER, THEY HAD A MEETING. MR. AND MRS. RUIZ HAD A MEETING WITH ALL STATE, WITH RESPECT TO THEIR CLAIM, AND DURING THAT PARTICULAR MEETING, THEY RAISED THE ISSUE THAT THEY FELT LIKE MR MR. COBB HAD MADE AN ERROR, AND --

IF THE CLAIM HAS BEEN PAID, IF YOUR REPRESENTATION THAT THEY ALREADY PAID THE INSURANCE CLAIM WHAT IS THE CLAIM FOR MALPRACTICE? THAT THE COMPANY HAS ALREADY MADE THE PAYMENT.

THEY ARE ASSERTING OTHER DAMAGES THAT FLOW FROM THE FACT THAT THE CLAIM WAS INITIALLY DENIED AND PAID LATER.

IS THAT THE BAD FAITH CLAIM OR IS THAT A MALPRACTICE CLAIM?

I BELIEVE IT IS BOTH HERE, BECAUSE THEY ARE TALKING ABOUT AN ISSUE THAT WAS MADE OR THE DECISION THAT WAS MADE ON THE CLAIM WAS BASED UPON WHAT MR. COBB D THE CHANGE FORM THAT HE COMPLETED AFTER MEETING WITH MRS. RUIZ IS THE BASIS FOR ALLSTATE INDEMNITY COMPANY'S DECISION TO INITIALLY DENY THE CLAIM.

I UNDERSTAND ALL OF. THAT THIS IS ALL JUST LIKE THROWN TOGETHER AND LUMPED TOGETHER, WHEN IT SHOULD BE SOMEHOW SEPARATED. NOW, THAT IS WHAT I AM NOT UNDERSTANDING. IF THE CLAIM WAS PAID, WHAT ARE THE NATURE OF DAMAGES THAT ARE CLAIMED, AND IN AN INSURANCE AGENT MALPRACTICE CASE, CAN YOU HELP ME WITH THAT?

I BELIEVE THAT THE PLAINTIFFS ARE CLAIMING THAT THEY ARE ENTITLED TO OTHER ECONOMIC LOSSES, AS A RESULT OF HAVING TO PAY FOR THE REPAIRS TO THE CAR ON THEIR OWN, BEFORE ALLSTATE INDEMNITY COMPANY PAID THEIR COLLISION BENEFITS AS REIMBURSEMENT. I DISAGREE WITH THAT ELEMENT OF DAMAGES, BECAUSE THAT IS -- BUT THAT IS WHAT THEY ARE PURSUING, AND THEY ARE PURSUING THAT VIGOROUSLY AGAINST MR. COBB.

MAYBE YOUR OPPONENTS CAN CLARIFY WHAT YOU ARE CLAIMING, BECAUSE I DON'T SEE YOU HAVE A CLAIM.

DID ALLSTATE PRODUCE CERTAIN PARTS OF THIS CLAIMS FILE AND ASSERTING OTHER PARTS WERE WORK PRODUCT, BASED ON ON THE FACT THAT THEY WERE INVESTIGATING A CLAIM FOR THAT THE AGENT WAS NEGLIGENT?

THAT IS THE PLAINTIFF'S CLAIM THAT THEWAS MALPRACTICE.

BUT ALLSTATE, THEN, DID GIVE SOME OF ITS CLAIM LE UP?

YES. HE VAST MAJORITY OF THE ENTIRE CLAIMS FILE WAS PDUCE. IT WAS ONLY THREE KEY ELEMENTS OF THE CLAIMS FILE THAT WAS WITHHELD. ONE KEY POINT BEING THE STATEMENT THAT ALLSTATE TOOK OF MR. COBB, AND AT THE TIME THAT THEY TOOK HIS STATEMENT ON JANUARY 7 OF 1997, THERE HAD ALREADY BEEN THIS MEETING WHERE MR. AND MRS. RUIZ HAD CLAIMED THAT THE AGENT HAD MADE AN ERROR AND THAT THE FOCUS WAS THEN ON THAT YOUR AGENT HAD MADE A MISTAKE, AND SO THE INVESTIGATION WAS DID OUR AGENT MAKE A MISTAKE?

SO WOULD ALLSTATE INDEMNITY BE LIABLE FOR THE MALPRACTICE OF THEIR AGENT?

NOT ALLSTATE INDEMNITY. ALLSTATE INSURANCE COMPANY WOULD. MR. COBB IS AN AGENT OF ALLSTATE INSURANCE COMPANY.

AND MAYBE THIS CASE, THE FACTS OF THE CASE ARE UNIQUE. WHAT WE NEED TO LOOK AT IS THE BROADER QUESTION FIRST, I GUESS, OF WHETHER THE STANDARD THAT THE FOURTH DISTRICT SET FOR WORK PRODUCT, WHICH WOULD HAVE BEEN PRESUMABLY APPLICABLE TO ALL CASES, IS TOO STRICT A STANDARD. IS THAT GETTING BACK TO THE ISSUE THAT --

EXACTLY. I THINK WE NEED TO LOOK AT THE BIGGER PICTURE AND DECIDE WHAT THE ISSUE OR WHAT THE STANDARD SHOULD BE, WHETHER IT IS MAJORITY APPROACH FROM THE FIRST SECOND AND FIFTH, OR THE MORE NARROW APPROACH FROM THE FOURTH DISTRICT. WE WOULD SUGGEST THAT THE MAJORITY APPROACH IS MORE TEXTUALLY ACCURATE, WHEREAS THEY LOOK AT IT FROM THE STANDPOINT OF WHETHER THE LITIGATION WAS FORESEEABLE, AND I BELIEVE THAT EQUATES WITH THE ANTICIPATION OF LITIGATION.

ISN'T LITIGATION ALWAYS FORESEEABLE? IN THIS DAY AND TIME, YOU KNOW, THERE COULD BE LITIGATION ABOUT ANYTHING, SO LET'S GO BACK TO WHAT DOES THE RULE SAY?

IT SAYS ANTICIPATION OF LITIGATION.

OKAY. AND THEN WHAT DOES IT PROVIDE IN TERMS OF ATTORNEY/CLIENT AND WORK PRODUCT? IN OTHER WORDS WHAT DOES IT PROTECT?

WELL, CERTAINLY ATTORNEY/CLIENT IS ABSOLUTELY PROTECTED. THE WORK PRODUCT PRIVILEGE, THOUGH, CAN'T BE OVERCOME BY SHOWING A NEED AND UNDUE HARP.

-- UNDUE HARDSHIP.

WHAT IS THE PROBLEM WITH JUST ENFORCING THE RULE JUST AS IT IS WRITTEN, AND HELP ME WITH THE, WHO HAS THE INITIAL BURDEN. DOES IT WORK THIS WAY? THAT IS THAT ONE SIDE MAKES THE REQUEST FOR DISCOVER, AND THEN IU INVOKE THE WORK PRODUCT OR ATTORNEY/CLIENT PRIVILEGE, THEN THE BURDEN IS ON YOU TO DEMONSTRATE THAT SOMETHING IS, INDEED, WORK PRODUCT OR ATTORNEY/CLIENT PRIVILEDGE. IS THAT CORRECT?

I BELIEVE SO.

SO THE BASIC FRAMEWORK OF THE RULE YOU AGREE WITH, IS THAT RIGHT?

YES. WE HAVE TO MAKE AN INITIAL SHOWING.

WHAT HAPPENED IN THIS CASE THAT IS ANY DIFFERENT THAN JUST STRAIGHTFORWARD APPLICATION OF THAT RULE? THAT IS THAT THE TRIAL COURT AND THEN THE APPELLATE COURT GRAPPLED WITH WHETHER, WHAT IS YOUR BURDEN, IF YOU HAVE TO SHOW THAT SOMETHING IS WORK PRODUCT? WHAT -- DO YOU HAVE TO SHOW WE PREPARED THAT DOCUMENT IN ANTICIPATION OF LITIGATION? IS THAT THE BURDEN?

THAT'S CORRECT.

DO YOU ACCEPT THAT?

WE DO ACCEPT THAT.

WHAT IS THE PROBLEM WITH JUST INTERPRETING THE RULE AS IT IS WRITTEN, TAN THAT IS THAT, IF YOU INTERPRETHE RULE AS IT IS WRITTEN, THAT MEANS YOU HAVE TO PROVETHT, TO THE JUDGE OR, JUDGE, WE PREPARED THIS PARTICULAR DOCUMENT OR WE DID THIS PARTICULAR THING, BECAUSE WE WERE ANTICIPATING LITIGATION? SOMEBODY SAID TO SOMEBODY ELSE OR WHATEVER, YOU KNOW, WE MAY GET SUED HERE, AND TO PROTECT OURSELVES, AND ANTICIPATE THAT THERE IS GOING TO BE THAT LAWSUIT, LET'S DO THESE THINGS. AND DOESN'T THAT CONTRAST, THOUGH, WITH ORDINARY BUSINESS PRACTICES THAT MAY BE OUT THERE? YOU HAVE GOT TO PROCESS CLAIMS. RIGHT? AND YOU DON'T ALWAYS PROCESS CLAIMS IN ANTICIPATION OF LITIGATION, BECAUSE YOU ARE GOING TO PROCESS ALL THE CLAIMS, AND THE OVERWHELMING, I WOULD ASSUME, THAT 99% ENOF THE CLAIMS THAT ARE PROCESSED ARE PROCESSED AND TAKEN CARE OF. ONLY SOME OF THEM END UP IN LITIGATION. IS THAT CORRECT?

THAT IS CORRECT, AND I WOULD SAY THAT, IN THE UNIQUE OR IN THE ROUTINE CASE, THAT IS EXACTLY WHAT WOULD HAPPEN.

WHY DON'T WE ASSUME THAT, IN A SENSE, BOTH OF THESE STATEMENTS ARE, REALLY, TOO BROAD, ONE WAY OR ON THE OTHER, FROM THE DISTRICT COURTS? THAT IS THAT IF YOU HAVE ONE STATEMENT THAT SAYS, WELL, IF THERE IS ANY POSSIBILITY OF LITIGATION, THEN IT IS PROTECTED BY WORK PRODUCT AUTOMATICALLY. ISN'T THAT TOO BROAD?

I DISAGREE. I THINK THE FORESEEABILITY TEST, WHICH IS WHAT THE SECOND AND THE FIRST HAVE ADOPTED, IS MORE CONSISTENT WITH THE TEXT OF THE RULE. SO YOU THINK THAT IS GOING TO PROTECT, WON'T THAT JUST PROTECT EVERYTHING THEN?

BUT MY POINT IS THAT THAT IS ONLY THE FIRST PART OF THE EQUATION. AS YOUR HONOR AND I HAVE DISCUSSED, THERE IS A SECOND STEP THAT THIS PARTICULAR PROTECTION CAN BE OVERCOME BY -- WHY WOULD YOU EVEN GET TO THE SECOND STEP, THOUGH, BECAUSE THE ISSUE THAT YOU ARE LITIGATING NOW IS WHAT THE FIRST STEP IS, AND YOU TOLD ME THAT THE BURDEN YOU HAVE IS DEMONSTRATING TO A TRIAL COURT JUDGE THAT YOU PREPARED THAT MATERIAL IN ANTICIPATION OF LITIGATION.

MY POINT IS THAT --

WHAT IF YOU DIDN'T PREPARE IT IN ANTICIPATION OF LITIGATION?

OBVIOUSLY THERE WOULDN'T BE ANY WORK PRODUCT PROTECTION THERE, BUT WITH RESPECT TO THE COMPETING STANDARDS THAT ARE OUT THERE, OUR POSITION IS THAT THE COURT

SHOULD ADOPT THE STANDARD THAT WOULD BE THE MOST ENCOMPASSING, WITH RESPECT TO THE FIRST ISSUE, BECAUSE YOU ALWAYS HAVE THE SECOND ISSUE TO CORRECT THE PROBLEM. YOU HAVE GOT THE COMPETING INTEREST THES OF THE LITIGANTS. YOU ALWAYS HAVE THE SECOND PART, THE NEED AND UNDUE HARDSHIP IS NOT ENOUGH TO OVERCOME THAT INITIAL SHOWING AND GET THE DISCOVERY THAT THEY MAY NEED FOR PURPOSES OF THEIR CASE. I THINK THE PUBLIC POLICY ARGUMENTS ARE IN FAVOR OF THE MAJORITY APPROACH.

WELL, IF YOU DO THAT, HAVEN'T YOU REALLY ELIMINATED ANY BURDEN TO SHOW THAT SOMETHING HAS BEEN PREPARED IN ANTICIPATION OF LITIGATION?

NO. WE REGULAR RECOGNIZE THAT, IN THE -- WE RECOGNIZE THAT, IN THE ROUTINE CASE, IN THE INSURANCE CASE WE WOULDN'T HAVE A PROBLEM. WE WOULDN'T HAVE AN ISSUE HERE, BUT BECAUSE THIS IS NOT ROUTINE. THIS IS A UNIQUE CASE WHERE THE DATA THAT WAS REPORTED SAID THAT YOU ARE NOT THE GOING TO HAVE COVERAGE FOR THIS BECAUSE IT WAS REMOVED FROM THE ORIGINAL POLICY AND THE CLAIMS FOR ERRORS MADE HERE IS NOT THE ROUTINE COVERAGE HERE, WHERE THE ADJUSTOR WOULD HANDLE IT AND LOOK AT THE VEHICLE.

SO THE THINGS THAT YOU DID HERE WERE THING THAT IS YOU ORDINARILY WOULDN'T DO.

NO. IN AN ORDINARY COLLISION CLAIM, THE ADJUSTOR WOULD INSPECT THE AUTOMOBILE, WOULD HAVE A REPAIR ESTIMATE MADE. THERE WOULD BE SOME KIND OF DISCUSSIONS AS TO WHETHER IT CAN BE REPAIRED OR NOT, AND THEN THERE WOULD BE AN OFFER MADE. THAT WOULD BE THE ROUTINE COLLISION CLAIM.

WHY, BY THE VERY NATURE OF THE CLAIM HERE, IF IT IS ALLEGED THAT THE AGENT MADE A MISTAKE, WHY WOULDN'T THE INSURANCE COMPANY SAY, WELL, LET'S FIND OUT IF HE MADE A MISTAKE? AND IF WE ARE RESIE FOR THAT, BECAUSE OF A PARENT AGENCY OR WHATEVER IT IS, THEN WE WILL PAY THE CLAIM? APPARENTLY THAT IS WHAT OCCURRED HERE. WHY WASN'T THAT JUST ROUTINE NATURE OF THAT PARTICULAR CLAIM?

BECAUSE THERE ARE TWO DIFFERENT ALLSTATE ENTITIES INVOLVED. ALLSTATE INDEMNITY COMPANY HAS THE OBLIGATION TO PAY UNDER THE POLICY, IF THERE IS COVERAGE. ALLSTATE INSURANCE COMPANY HAS THE OBLIGATION TO PAY BUT THEY JUST MADE A MISTAKE. ALLSTATE INSURANCE COMPANY, THE INSURANCE ADJUSTOR IS THE ONE THAT TOOK THE STATEMENT FROM MR. COBB.

WHO DO YOU REPRESENT?

I REPRESENT ALL THREE.

THERE IS NOT A CONFLICT AMONGST THREE OF THOSE?

ISN'T REALLY WHAT WELL ARE HERE TRYING TO FIGURE OUT IS WHETHER THERE NEEDS TO BE A CLARIFICATION OF THE, OF WHAT IS SET FORTH IN THE RULE BETWEEN SUBSTANTIAL AND IMMEDIATE AND FORESEEABLE? I MEAN, ISN'T THAT WHERE THE DIFFERENCES ARE, BETWEEN THE DISTRICTS?

THOSE ARE THE TWO COMPETING STANDARDS. I WOULD SUGGEST --

IS THERE, IN REAL LIFE, WHEN YOU GO BEFORE A JUDGE IN WEST PALM BEACH, A DIFFERENCE IN THE WAY THAT THAT IS BEING APPLIED AND THE WAY IT IS BEING APPLIED IN GAINESVILLE?

I BELIEVE THAT SUBSTANTIAL AND IMMINENT IS A MUCH HIGHER STANDARD. I POSITION IT CAN BE APPLIED IN A MUCH STRICTER FASHION, SO THAT WORK PRODUCT PROTECTION WOULD NOT BE AN AFFORDED TO THE SAME DEGREE WITHIN THE COUNTIES IN THE FOURTH DISTRICT, AS IT

WOULD IN OTHER PARTS OF THE STATE, AND I THINK THAT THE SUBSTANTIAL AND EMINENT --

BUT WE DON'T HAVE ANY IMPERICAL EVIDENCE IN THIS RECORD TO ESTABLISH THAT.

THE ONLY THING THAT WE HAVE IS THE CASE LAW OUT THERE WHERE, IF YOU ARE IN THE FIRST OR THE SECOND, THEY ARE GRANTING WRITS OF CERTIORARI AND QUASHING THE ORDERS, WHEREAS IN THE FOURTH THEY ARE NOT.

THANK YOU. MR. CHIEF JUSTICE

YOU ARE IN YOUR REBUTTAL, MR. SHELTON.

PHILLIP PARISH AND AT MY SIDE IS TRIAL COUNSEL HENRY SIDE EN. -- HENRY SEIDEN, REPRESENTING THE RUIZES. WHETHER THE CAR THAT IS INVOLVED IN THE ACCIDENT IS COVERED, AND THAT IS WHAT THEY DID HERE WAS INVESTIGATE TO SEE WHETHER IT WAS COVERED ON OR NOT, IF THEY ANTICIPATE THE CLAIM IMMEDIATELY AND YOOT FORESEEABLE -- AND USE THE FORESEEABILITY TEST, THEY ARE SAYING THE CLAIM WAS DENIED BECAUSE IT WASN'T COVERED, BUT THEY HAVE GOT AN OBLIGATION TO SEE WHETHER THE INSUREDS MADE THE MISTAKE OR THEIR OWN EMPLOYEE-AGENT MADE THE MISTAKE, OR WHETHER THERE IS SOME MISTAKE IN THE TRANSMISSION OF THE INSURANCE AGENT AND MAYBE ALLSTATE MADE A MISTAKE IN ITS COMPUTER FILES.

TALKING ABOUT THE STANDARDS HERE, THE CHIEF JUSTICE HAS EXPRESSED THAT WE HAVE THE EXPRESSION OR ARTICULATION IN THE DIFFERENT DISTRICT COURTS OF APPEAL DECISIONS. ISN'T THE OTHER STANDARD, THAT IS IMMINENT, DOESN'T THAT APPEAR TO BE, REALLY, TWO RESTRICTIVE, IN THE SENSE THAT THAT SOUNDS LIKE, IF THE LAWSUIT IS GOING TO BE FILED TOMORROW, THEN, AND WE GO AHEAD AND NOW WE HAVE JUST EVERYTHING CLASSIC. SOMEBODY HAS TO SAY, THEN, YOU KNOW, THEY TOLD US THAT THEY WERE GOING TO SUE US TOMORROW, AND SO WHY ISN'T THE RULE THAT IS WRITTEN, WORKABLE? THAT IS THAT THE RULE CONTEMPLATES THAT JUDGES WILL TAKE THE LANGUAGE FROM THE RULE AND IF THERE IS A CHALLENGE TO DISCOVERY, AND THE INVOCATION OF THE WORK PRODUCT DOCTRINE OR THE ATTORNEY/CLIENT PRIVILEGE, AND THE JUDGE HAS TO DECIDE, UNDER THE LANGUAGE OF THE RULE, WHETHER OR NOT THESE MATIALS WERE PREPARED IN THE NORMAL OR ROUTINE KOURBS, OR WHETHER -- COURSE OF BUSINESS OR WHETHER THEY WERE PREPARED IN ANTICIPATION OF LITIGATION, IS THERE ANYTHING ABOUT THE LANGUAGE OF THE RULE THAT IS A PROBLEM?

WELL, IT HAS BEEN RECOGNIZED TO BE SOMEWHAT OF A PROBLEM BY THIS COURT, AND BY THE UNITED STATSD SUPREME COURT, ITSELF, THAT THE -- AND BY THE UNITED STATES SUPREME COURT, ITSELF, THAT THE PHRASE "IN ANTICIPATION OF LITIGATION", IT GOES ON A CASE-BY-CASE BASIS, AND THAT IS WHY MANY COURTS HAVE UTILIZED IT ON A CASE BY CASE APPROACH. THERE IS SOME USE OF THE WORD IMMINENT, DEFINED TOO MUCH BY A TEMPORAL ASPECT OF THAT WORD AS OPPOSED TO A REAL AND PALPABLE ASPECT OF THE FACT THAT ALMOST GETTING OVER THE SUBSTANTIAL ASPECT OF IT, THAT IT COULD BE, IT COULD CAUSE SOME PROBLEMS, BUT THE REAL PURPOSE HERE, ANY WORD THAT YOU USE TO DESCRIBE "IN ANTICIPATION OF LITIGATION" MAY CAUSE SOME PROBLEMS IN THAT REGARD. CERTAINLY I TK YOU PUT YOUR FINGERN THEPROBLEM WITH USING THE WORD "FORESEABLE" AND CERTAINLY AS WITHRESPECT TO THE CLAIM IN REGARTO THE INSURANCE COMPANY HAS A DUTY TO INVESTIGATE. THEAN'T SAY EVERY TIME THERE IS A CLAIM FILED THAT IT IS FORESEEABLE SEEBL THAT THERE IS -- FORESEEABLE THAT THERE IS GOING TO BE LITTION. IF YOU GO TO THE RULE, IN ANTICIPATION OF LITIGATION, IT IS VERY CLEAR THAT THAT IS MODIFIED, IN THE CASE LAW AND THE TENANTS, THAT, IF A DOCUMENT IS PREPARED IN THE ORDINARY COURSE OF BUSINESS AND NOT IN ANTICIPATION OF LITIGATION, THEN IT IS NOT COVERED BY THE WORK PRODUCT DOCTRINE.

LET ME TRY TO SEPARATE OUT THAT THIS IS AN UNDERLYING BAD FAITH CASE, FROM THE ORDINARY SITUATION. THIS CASE INVOLVES AN AUTOMOBILE ACCIDENT RESULTING FROM THE

INSURED'S USE OF THIS BLAZER.

CORRECT.

AND THE PLAINTIFFS WENT TO PRODUCE OR REQUEST ALLSTATE TO PRODUCE ITSAIM FILE THAT OCCURRED IN THE INVESTIGATION OF THE ACCIDENT. WOULD ANYBODY IN ANY JUDGE, IN ANY PART OF THE STATE, SAY, WELL I DON'T KNOW IF AT THE POINT WHEN THEY STARTED DEVELOPING THIS CLAIMS FILE AFTER THE ACCIDENT, THAT IT WAS, LET ME SEE, WHETHER THEY ANTICIPATED LITIGATION OR WHETHER THEY WERE HELPING TOETTLE OR WHAT DAY OF THE WEEK IT WAS, IT WOULD BE RECOGNIZED TO BE WORK PRODUCT, WOULDN'T IT, AND SOMEONE WOULD HAVE TO SEE SHOE AN EXCEPTION?

WHETHER -- WOULD HAVE TO SHOW AN EXCEPTION?

WHETHER THAT WERE THE CASE, YOUR HONOR, THE USE OF WORDS SUCH AS "POSSIBLE AND FORESEEABLE" IN THE FIFTH DISTRICTS AND WORKMEN'S COMPENSATION, WHEN COMBINED WITH THIS COURT'S OPINION IN COWANGA, COULD HAVE RESULTED THROUGHOUT THE STATE IN SITUATIONS WHERE INSURANCE COMPANIES LIKE ALLSTATE COME IN, AND SAY IT WAS IMMEDIATELY FORESEEABLE IN THIS INSTANCE --

I AM NOT ASKING YOU ABOUT WHAT LABEL WE PUT ON IT. I AM SAYING THAT, IN REAL LIFE WORLD, AN ACCIDENT OCCURS. THE INSURANCE COMPANY'S INVESTIGATION OF AN ACCIDENT IN AN ORDINARY AUTOMOBILE ACCIDENT CASE, WOULD BE CLAIMED TO BE WORK PRODUCT AND WOULD HAVE TO MEET ONE OF THE EXCEPTIONS. IT IS ONLY BECAUSE THIS IS A BAD FAITH CASE THAT THIS ISSUE OF GETTING THE CLAIMS FILE IS EVEN -- COMES UP!

MY POSITION, YOUR HONOR, IS IT IS NOT WORK PRODUCT. THE INITIAL INVESTIGATION PERIOD BECAUSE INSURANCE COMPANIES ARE IN THE BUSINESS OF INVESTIGATING CLAIMS. THEY HAVE A REQUIREMENT UNDER THE STATUTE, 621 ..155 UNDER THE ADMINISTRATIVE CODE AND THEIR OWN CLAIMS MANUALS.

SO WHEN AN INSURANCE COMPANY GOES AND TAKES STATES FROM WITNESSES RIGHT AFTER AN ACCIDENT, IT IS, AND THE PLAINTIFF TRIES TO GET THOSE WITNESS STATEMENTS, YOU ARE SAYING THAT THE INSURANCE COMPANY COULDN'T PROPERLY CALL THOSE WORK PRODUCTS?

AT THEIR BEST, YOU HAVE TO WAIT UNTIL THE BAD FAITH CLAIM EXISTS, IN ORDER TO GET IT.

THAT IS WHAT I SAID. I WAS ASKING YOU, JUST AS A GENERAL PROPOSITION, THAT "SUBSTANTIAL AND EMNINT" WOULD NEVER BE AN ISSUE, IF THERE WERE AN ORDINARY ACCIDENT, A THIRD PARTY, A STRANGER TO THIS WHOLE TRANSACTION WAS SUING FOR INJURIES. DO YOU AGREE WITH THAT, THAT WITNESS STATEMENTS OR THE LACK AFTER CLAIMS FILE IS EXACTLY WHAT -- OR THE LIKES OF A CLAIMS FILE IS EXACTLY WHAT YOU WOULD THINK ABOUT, WHEN YOU THINK ABOUT A CLAIMS STATEMENT.

IF YOU AREN'T DEALING WITH A CLAIMS STATEMENT.

IN A BAD FAITH ACTION. SO YOU ARE DEALING WITH COWANGA ANHE E.

I AM SORRY I TOOK A WHILE TO AGREE WITH YOU ON THAT POINT. I THINK THAT COWANGA FIRST OF ALL, ALL IT DECIDED WAS WHETHER THE WORK PRODUCT DOCTRINE APPLIED IN --

WOULD YOU AGREE THAT IT, ALSO AND -- APPLIED TO THE CLAIMS FILE?

MY RECOLLECTION OF THE FOURTH DISTRICT'S OPINION, AND THIS IS REALLY SAD AND WILL SHOW YOU WHAT TIME WILL DO, BECAUSE I WAS INVOLVED ON BEHALF OF THE INSURANCE

CARRIER, A AND I REMEMBER THAT THE FOURTH DISTRICT'S OPINION MADE SOME REFERENCE TO WHAT IT WAS CALLED, BUT I DON'T RECALL THAT THE DECISION THERE CAME DOWN TO THAT POINT T IF, IN FACT, IT, DID THEN -- THAT POINT. IF, IN FACT, IT, DID THEN I WOULD AGREE WITH YOU.

LET ME READ IT TO YOU. LEGAL FILES AND CORRESPONDENCE PERTAINING TO THE FLORIDA DEPARTMENT OF INSURANCE. SOUNDS LIKE THE BAD FAITH FILE, DOESN'T IT?

YES, YOUR HONOR, AND IT IS ALSO IMPORTANT TO REMEMBER THAT, IN THAT CASE, THE TRIAL COURT HAD RULED ABSOLUTELY THE ATTORNEY/CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE WERE ABROGATED BY THE ENACTMENT OF THE STATUTE, AND THIS COURT, IN COWANGA SAIERLY NWITH RESPECT TO THE ATTORNEY/CLIENT PRIVILEGE AND WITH RESPECT TO WORK PRODUCT, YOU WOULD HAVE TO APPLY IT AND MAKE A SHOWING OF NEED AND UNDUE HARDSHIP. MY POINT, I GUESS, IS THAT THESE TWO RULES ALMOST MELD, IN THE CASE OF THE FIRST POINT OF BAD FAITH INSURANCE CLAIM, THAT BECAUSE AN INSURANCE COMPANY IS IN THE BUSINESS OF INVESTIGATING AND IS REQUIRED BY THE STATUTE TO INVESTIGATE THAT MAYBE THE UNDUE NEED AND HARDSHIP MELTS AWAY OR IS SUBSUMED WITHIN THE FACT THAT IN THE INVESTIGATION OF THE CLAIM, AT LEAST UP UNTIL THE POINT WHERE A DETERMINATION ON COVERAGE IS MADE, IS NOT SOMETHING, IS SOMETHING THAT THE INSURANCE COMPANY DOES IN THE REGULAR COURSE OF ITS BUSINESS AND IS REQUIRED TO DO AND THEREFORE ON THE NOT TO BE PROTECTED BY WORK PRODUCT DOCTRINE, AND I THINK THAT THERE IS A LOT OF UNCERTAINTY OUT THERE, AMONGST THE TRIAL COURTS IN THE VARIOUS DISTRICTS, IN HOW TO APPLY THAT TO A PARTY IN BAD FAITH.

CLEARLY THAT HAD BEEN DONE, TO DETERMINE WHETHER THE AGENT HAD SCREWED UP OR NOT.

ABSOLUTELY.

AND IF WE DIDN'T HAVE THE BAD FAITH CASE, AND WE ONLY HAD AN ISSUE OF WHETHER MR. COBB WAS RESPONSIBLE FOR PROFESSIONAL MALPRACTICE, HIS OWN INSURANCE COMPANY'S TAKING OF A STATEMENT FROM HIM TO DETINE IF HE HAD SCREWED UP OR NOT, WOULD BE A CLASSIC WORK PRODUCT STATEMENT.

YES, IT WOULD, BUT THAT IS NOT REALLY WHAT WE ARE DEALING WITH HERE. WE ARE DEALING WITH THEIR TAKING A STATEMENT OF THEIR OWN EMPLOYEE, TO DETERMINE WHETHER THEIR OWN EMPLOYEE, IN FACT, MADE THE MISTAKE OR THE INSUREDS MADE A MISTAKE, AND THAT IS PART OF THEIR INVESTIGATION, WHICH THEY ARE REQUIRED TO DO UNDER THE LAW, AND THEREFORE, BECAUSE IT IS PART, IT IS WHAT THEY DO IN THE ORDINARY CONDUCT OF THEIR BUSINESS, IT IS NOT WORK PRODUCT.

BECAUSE OF THE NATURE OF THE CLAIM THAT YOU ARE ASSERTING, RATHER THAN --

BECAUSE IT IS A BAD FAITH CLAIM, YES.

AND I THINK THAT WAS WHAT WAS THE PROBLEM OF HAVING THIS CASE UP HERE, AS FAR AS USING SUBSTANTIAL AND IMMINENT. THE CONCEPT OF SUBSTANTIAL AND IMMINENT, IN MOST SITUATIONS, WHERE A, SOMEONE GOES OUT AND INVESTIGATES AFTER AN ACCIDENT, LITIGATION MAY BE TWO YEARS AWAY AND THREE YEARS AWAY, BUT A GOOD COMPANY THAT IS LOOKING AT A CLAIM OR AN INSURANCE COMPANY IS GOING TO, OF COURSE, INVESTIGATE AS PART OF THEIR THEIR BUSINESS RIGHT AWAY, THAT THEY DON'T EXPECT THAT THAT IS GOING TO BE INFORMATION THAT IS GOING TO BE AVAILABLE IN THE COURSE OF DISCOVERY OF A GARDEN VARIETY LAWSUIT.

RIGHT. THE CHANCES THAT THIS CASE -- AND THIS CASE IS A TWO-HEADED MONSTER HERE SOMEWHAT. WE HAVE THE CONFLICT OF THE DISTRICT COURTSANT TERMINOLOGY THAT THEY

APPLY TO THE -- OF THE DISTRICT COURTS, AND THE TERMINOLOGY OF THE LANGUAGE "IN ANTICIPATION OF LITIGATION", AS JUSTICE ANSTEAD POINTS OUT COULD MEAN ANYTHING IN THIS DAY AND AGE, AND FOURTH DISTRICT USING "SUBSTANTIAL AND IMMINENT". OPPOSE ON THAT, WHAT WE HAVE HERE IS A FIRST PARTY BAD FAITH CLAIM, AND WE HAVE SPECIFIC DOCUMENTS IN A CLAIMS FILE, TO WHICH WE CLAIM INTILTIONMENT, AND WE BE -- WE CLAIM ENTITLEMENT, AND WE BELIEVE THAT IN THE SENSE WORK PRODUCT DOES NOT APPLY, OR IF IT DOES APPLY, BY THE VERY NATURE OF THE OBLIGATIONS BETWEEN THE INSURANCE CARRIER AND THE INSUREDS, THEN THE UNDUE HARDSHIP PRONG OR EXCEPTION SHOULD KICK INS, AND WE HAVE ASKED THE COURT TO -- SHOULD KICK IN, AND WE HAVE ASKED THE COURT TO CLARIFY, IN ADDITION TO DECIDING THE ISSUE OF HOW TO INTERPRET THE "IN ANTICIPATION OF LITIGATION" PRONG.

YOU ARE SAYING IN A CASE WITHOUT THE CLAIMS FILE, YOU CAN'T REALLY PROVE WHETHER THE INSURANCE COMPANY ACTED IN BAD FATE OR NOT, AND THAT -- IN BAD FAITH OR NOT, AND THAT, OF COURSE, IS IN A THIRD PARTY BAD FAITH, AND YOU ARE SAYING THE SAME CONCEPT SHOULD ---.

IS BEEN RECOGNIZED IN COURTS THROUGHOUT THISOUNY THAT, IT IS THE BEST AND MOST OBVIOUS, ACCORDING TO THE UNIVERSITY OF CHICAGO LAW REVEAL ARTICLE THAT IS IN THE BRIEF, THE BEST AND MOST OBVIOUS PROOF OF WHETHER THE INSURANCE COMPANY DISCHARGED ITS OBLIGATIONS, AND REMEMBER NOW, AFTER TWO YEARS AGO WITH TALENT TO INVEST, THE INSURANCE COMPANY -- WITH TALENT TO INVEST, THE INSURANCE COMPANY HAS CURED ANY PROBLEM, WITH RESPECT TO IF IT DIDN'T PROPERLY DISCHARGE ITS DUTIES.

WOULD YOU EXPAND ON THE ROLE, IF ANY, THAT, LET'S ASSUME IN THIS CASE, INSTEAD OF HAVING THE FIRST PARTY CLAIM, BY THE PARENT INSURED, AGAINST THE INSUROR AND THE AGENT AND POTENTIALLY THE AGENT'S INSUROR, THAT YOU HAD THE ACCIDENT THAT OCCURRED, AND YOU HAD A THIRD PARTY THAT CLAIMED THAT YOUR CLIENT, YOU REPRESENT THE INSURED, RIGHT?

RIGHT.

THAT YOUR CLIENT WAS NEGLIGENT, AND NOW THAT THIRD PARTY IS ASKING FOR PRODUCTION OF THE SAME FILE. WHAT WOULD BE THE OUTCOME, IN YOUR VIEW, INSOFAR AS THE WORK PRODUCT CLAIM THAT HAS BROUGHT UP, TO PREVENT THE PRODUCTION OF THAT FILE TO A THIRD PARTY?

THEY WOULD GET IT, AFTER THE UNDERLYING LAWSUIT WAS OVER. THAT IS THE STATE OF THE LAW. AFTER THE UNDER LYING LAWSUIT IS OVER, THEY ARE GOING TO GET THE CLAIMS FILE, AND THEY ARE GOING TO GET THE DEFENSE ATTORNEY'S FILE. USUALLY THE CLAIM IS, THEN, ASSIGNED TO THE THIRD PARTY CLAIM. THEY DON'T EVEN HAVE TO HAVE AN ASSIGNMENT ANYMORE.

IN OTHER WORDS AFTER A BAD FAITH, A THIRD PARTY BAD FAITH CLAIM INSURES MATURES.

THIS THIRD PARTY BAD FAITH CLAIM HAS ALREADY MATURED, AND SO IT IS THE APPROPRIATE TIME TO OBTAIN THOSE DOCUMENTS.

BY NOW, IF WE STA WITH THE PROPOSITION, THEN, THAT THAT IS SORT OF BASED ON THE PROMISE THAT, ONCE YOU ARE NOW TALKING ABOUT BAD FAITH, THAT ANYTHING THAT IS ACCUMULATED IN THE FILE AND DONE, IN ANTICIPATION OF DEFENDING A BAD FAITH CLAIM, IS PROTECTED UNDER THE WORK PRODUCT PRIVILEGE. IS THAT RIGHT?

AFTER THE BAD FAITH CLAIM IS BROUGHT, YES.

IF THAT IS THE PROMISE OF THAT, AND WE HAVE HERE THAT MATTURING IMMEDIATELY OF A FIRST PARTY BAD FAITH CLAIM, THEN WHY WOULDN'T THIS FILE BE PROTECTED? BY ANALOGY --

IT IS NOT PROTECTED, WE SAY, UNTIL THE LAWSUIT THAT THE FIRST PARTY CLAIM HAS FILED, OR AT THE VERY LEAST, UNTIL A CLAIM, A DENIAL OF THE COVERAGE. THERE HAS TO BE A COVERAGE DETERMINATION MADE BY THE INSURANCE CARRIER, AND HERE IT WAS MADE, AND THIS ALL HAPPENED WITHIN ABOUT TWO OR THREE WEEKS OF THE ACCIDENT, AND THOSE ARE THE THREE DOCUMENTS THAT ARE ISSUED HERE.

WAS THERE ANY INITIAL DENIAL OF COVERAGE?

NOT UNTIL AFTER THESE THREE DOCUMENTS THAT WE ARE DISCUSSING HERE HAD ALREADY BEEN NOT PRODUCED BUT CREATED, AND WE ARE TALKING ABOUT THE TYPES OF THINGS THAT THE COURTS AROUND THE COUNTRY HAVE SAID ARE PARTICULARLY IMPORTANT IN FIRST PARTY BAD FAITH CLAIMS, TALKING ABOUT A STATEMENT OF THE AGENT WHO, IN THIS CASE HAPPENS TO BE THE INSURED'S EMPLOYEE, WHICH I THINK MAKES THE SITUATION BETTER FOR US RATHER THAN WORSE FORM WE ARE TALKINGING -- WE ARE TALKING ABOUT A COMPUTER DIARY WHICH SHOWED THE TIMES THAT THERE WAS ANY CONTACT BETWEEN THE INSURED AND THE CARRIER, AND WE ARE TALKING ABOUT A MEM ---.

YOU WOULD HAVE US MORE OR LESS FOLLOW THE LEAD OF THE FEDERAL COURTS IN SORT OF A CASE BY CASE, GOING BY THE FEDERAL RULE. IS THAT NOT CORRECT?

I AM NOT UNCOMFORTABLE WITH A CASE BY CASE APPROACH. IN THE BRIEF, I INDICATED THERE HAS BEEN SOME UNCOMFORTABLENESS EXPRESSED BY THE TRIAL COURTS AROUND THE COUNTRY THAT IT TAKES A LOT OF TIME. ONE OTHER APPROACH THAT I ECOMMENDED IS THE CLAIM DETERMINATION OR DENIAL APPROACH WHICH IS THAT THE URANCE COMPANY HAS TO COME IN, AS A STATUTORILY OBLIGATED TO DO AND MAKE ITS INITIAL INVESTIGATION, AND THEN IT COMMUNICATES A DECISION TO THE INSURED ON WHETHER IT IS INSURED OR NOT COVERED OR COVERED, AND EVERYTHING AT LEAST PRIOR TO THAT TIME WOULD BE PRESUMPTIVELY DISCOVERABLE AND PRESUMPTLY NOT COVERED BY THE WORK PRODUCT DOCTRINE, THAN IS THE APPROACH THAT HAS BEEN TAKEN BY MANY COURTS.

ONE OF THE DIFFICULT PROBLEMS THAT WE HAVE IS THAT, AS YOU PRESENT ANOTHER CONTEXT AS WE HAVE BEEN TALKING ABOUT, A THIRD PARTY BAD FAITH AND WHETHER YOU ARE TALK BAG FIRST PARTY BAD FAITH AND AN ORDINARY CLAIM BY AN INSURED AGAINST AN INSUROR, OTHER TORT CLAIMS, YOU KNOW, OF PRIVATE BUSINESSES, YOU KNOW, THAT IMMEDIATELY WHILE IT IS FRESH, INVESTIGATE, AND THE DIFFICULTY OF DRAWING LINES THERE, THAT WHILE WE HAVE SEEN THE ATTRACTIVENESS OF THE CASE BY CASE APPROACH, IS THAT IT ALLOWS TO YOU DEAL WITH --

FLEXIBILITY.

-- CONTEXT, AS OPPOSED TO TRYING TO SET OUT A STRICT RULE.

BUT I THINK THE THIRD PARTY, THE GROUND HAS PRETTY WELL BEEN PLOWED WITH RESPECT TO THE THIRD PARTY APPLICATION OF THE WORK PRODUCT DOCTRINE, AND I DON'T THINK THERE IS ANYTHING MORE ABOUT THAT, BUT WHEN YOU TAKE THE DISTRICT OPINION IN COWA IN WHICH. GA AND WHAT YOU ARE SEEING AND -- IN COWANGA AND WHAT YOU ARE SEEING IN THE DIFFERENT INSURANCE CARRIERS IS THAT EVERYTHING IS WORK PRODUCT AND NOTHING IS DISCOVERABLE.

THAT IS ONLY ASSUMING THAT YOU LOOK AT THOSE CASES AND ASSUME THAT COWA AM IN. GA WAS A PRO -- ASSUME THAT COWANGA IS A PRODUCTION OF THAT CLAIMS FILE, ISN'T THAT TRUE?

PERHAPS A CLARIFICATION ON THAT POINT AS WELL AS WHAT, PRECISELY, WAS DECIDED BY COWANGA AND WHAT WASN'T. IN COWANGA, THE QUESTION WAS WAS THERE A WORK PRODUCT CREATED BY THE WORK PRODUCT CONGRESS TRINH? IT IS FOR -- A WORK PRODUCT DOCTRINE? IT IS FOR TREATMENT BY THE COURTS.

YOU ARE NOT ASKING US TO REVISIT THIS ISSUE ABOUT WHETHER A FIDUCIARY RELATIONSHIP CAME INTO PLAY OR NOT, AS WAS DECIDEDED IN THAT CASE?

I QUITE FRANKLY, THINK THAT ASPECT OF THE OPINION IS INCORRECT AND OUTDATED.

BUT THAT, REALLY, IS NOT WHAT HAS OCCURRED IN THIS CASE H THAT IS NOT THE PROBLEM OR THE ISSUE THAT HAS BEEN PRESENTED TO US IN THIS CASE BY THESE TWO STANDARDS.

I -- ONLY TO THE EXTENT THAT, WHEN YOU ANALYZE THE STANDARDS IN THE CONTEXT OF A FIRST PARTY AND THE PROBLEM IS THAT WE HAVE THE CONTEXT OF THIS CASE, THEN I THINK THAT YOU HAVE TO ACKNOWLEDGE THAT THERE IS. La FERRET, WITHOUT SAYING IT, ACKNOWLEDGES IT, AND I DON'T KNOW HOW TO HAVE THE STEPS THAT THE INSURANCE COMPANIES HAVE APPLIED IN La FERRET, AND WHETHER THAT IS SOMETHING THAT THE COURT WANTS TO REACH OR WILL REACH IN THIS CASE, I GUESS, REMAINS TO BE SEEN. I WOULD RECOMMEND THAT THE LAW COULD BE, CERTAINLY BE CLARIFIED AND THAT YOU KNOW, ANY CONCEPT THAT AN INSURED AND INSUROR AND A FIRST PARTY BAD FAITH CLAIM ARE NOT IN A FIDUCIARY RELATIONSHIP, IS OUTDATED.

DO YOU AGREE, THAT, THEN, AS A GENERAL PROPINGS OF LAW, SAYING "SUBSTANTIAL AND IMMINENT IMMINENT" AS THE WAY YOU DEFINE "IN ANTICIPATION OF LITIGATION" IN OTHER BAD FAITH CASES, IS SIMPLY TOO RESTRICTIVE A STANDARD? BECAUSE, AGAIN, IT WOULD ALLOW STATEMENTS THAT ARE TRADITIONALLY CONSIDERED BY EVERYONE, TO BE PROTECTED, SUCH AS WITNESS STATEMENTS FOLLOWING A ACCIDENT TO BE PRODUCED, IF THE LITIGATION WASN'T SUBSTANTIAL AND IMMINENT.

I THINK OUTSIDE OF THE CONTEXT ACTION THE FIRST PARTY -- OUTSIDE OF THE CONTEXT OF THE FIRST PARTY BAD FAITH CLAIMS, I THINK ANY WORDS THEY CHOOSE TO USE, I DON'T THINK THE WORD SUBSTANTIAL ISN'T A PROBLEM P IF THE USE OF THE WORD "IMMINENT" IS SEIZED UPON, TOO, FINALLY BY A TRIAL COURT, I COULD SEE INSTANCES WHERE THAT, OUTSIDE OF THE CONTEXT OF FIRST PARTY BAD FAITH, WHERE THAT COULD CREATE SOME PROBLEMS. MR. CHIEF JUSTICE

THANK YOU, MR. PARISH.

THANK YOU. MR. CHIEF JUSTICE

REBUTTAL?

IT SOUNDS LIKE YOU ARE PARTWAY THERE. YOU HAVE GOT ALMOST A CONCESSION THAT IT WASN'T IMMINENT, AT LEAST. MAYBE A LITTLE OVERLY DRAMATIC.

I DON'T THINK THE ENTIRE STATEMENT OF THE STANDARD BY THE FOURTH DISTRICT GOES TOO FAR. I THINK IT IS TOO OVERLY RESTRICTIVE, AND I THINK THAT IS INCONSISTENT.

WHAT ABOUT THE APPROACH, AND I SAY THAT AS IF WE KNOW IT HAS BEEN WRITTEN DOWN IN SIMPLE LANGUAGE, BUT WHICH SEEMS TO BE THAT THEY ALLOW A HUGE AMOUNT OF DISCRETION TO THEIR TRIAL COURTS JUST TO TRY TO TAKE THE SENSE OF THE RULE AND APPLY IT IN AN INDIVIDUAL CASE, BECAUSE OF THESE VARYING CONTEXT THES OF THINGS ARISE -- CONTEXTS OF THINGS ARISEING. IS THAT A WORKABLE SOLUTION?

THANK IS WHAT WE ARE ASKING FOR IS THAT THIS COURT TELL THE JUDGES IN THE DCA'S TO APPLY THOSE RULES AS WRITTEN AND TO MAKE A FACTUAL DETERMINATION IN A CASE AS TO WHETHER OR NOT THAT WAS THE CASE, WHETHER IT WAS DONE IN ANTICIPATION OF LITIGATION. I THINK, ONCE YOU GET INTO STANDARDS SUCH AS SUBSTANTIAL AND IMMINENT, I THINK YOU ARE GOING BEYOND THE TEXT OF THE RULE. I THINK YOU ARE ADDING DIFFICULTIES AND ADDING RESTRICTIONS THAT SHOULDN'T BE THERE. I THINK COWANGA HAS BEEN DISCUSSED --

DO YOU AGREE, UNDER THESE CIRCUMSTANCES, THAT THE DISCUSSION YOU ARE HAVING ABOUT WHAT STANDARDAPPLIES PRESUMES THAT IT IS WORK PRODUCT. DO YOU AGREE WITH THAT PREMISE? THAT IS THE FUNDAMENTAL. MUST BE. IT MUST FIRST BE WORK PRODUCT, TO EVEN GET INTO A DISCUSSION, BECAUSE IF IT IS NOT WORK PRODUCT, IT HAS NO PROTECTION AT ALL. YOU WOULD AGREE WITH THAT.

I THINK THERE MUST BE AN ASSERTION OF THE PRIVILEGE.

IT MUST EXIST, TO EVEN GET INTO AN ANALYSIS.

I THINK THE PARTY HAS TO BELIEVE, TO ASSERT THAT THAT EXISTS, IN ORDER FOR THE TRIAL JUDGE TO APPLY A STANDARD TO IT.

SO THEN THE ONLY TIME IT BECOMES AN ISSUE IS IF THE MATERIAL CAN BE LEGALLY CLASSIFIED AS WORK PRODUCT.

THAT'S CORRECT.

OKAY. SO THEN ALL OF THE REST OF THIS DISCUSSION, WHETHER IT IS IMMINENT OR ALL OF THOSE THINGS, IS TOTALLY IRRELEVANT, IF THE DOCUMENTS HERE ARE NOT LEGALLY WITHIN THE CATEGORY OF WORK PRODUCT. DO YOU AGREE WITH THAT?

I DON'T THINK YOU CAN MAKE THAT DETERMINATION, UNTIL YOU DETERMINE WHAT STANDARD YOU CAN APPLY TO MAKE THE DETERMINATION.

IS THAT STANDARD USED IN THIRD PARTY BAD FAITH LITIGATION THAT, FIRST, GET THE CLAIM FILE, YOU MUST ESTABLISH ALL OF THOSE FACTORS ON, OR IS IT JUST NOT WORK PRODUCT?

THIRD PARTY BAD FAITH IS A ENTIRELY DIFFERENT ANIMAL, BECAUSE WE HAVE A FIDUCIARY RESPONSIBILITY TO OUR INSURED IN THOSE CASES.

AND YOU WOULD, THEN, SUGGEST THAT 624.155 AND 626.954-1 DO NOT CREATE A FIDUCIARY RELATIONSHIP AT ALL THEN?

YES, AND I BELIEVE THAT IS EXACTLY WHAT THE COURT HAD TO GRAPPLE WITH IN THE COWANGA CASE AND THIS COURT SAID, NO, IT DIDN'T CHANGE THAT. IT HAS ALWAYS BEEN THE DEBTOR/CREDITOR RELATIONSHIP AND THE STATUTE DOESN'T CHANGE THAT, AND THREE TIMES SINCE COWANGA, THIS COURT HAS REPEATED THAT, THAT IT IS EITHER ADVERSARIAL OR A DEBTOR/CREDITOR RELATIONSHIP, AND THIS IS REPEATED IN THIS CASE. I AM FINE. I THINK THE TRIAL COURTS ARE OUT THERE, AND I THINK THEY DON'T HAVE A PROBLEM APPLYING THAT TO TICKLAR CASES. THEY KNOW THAT THE INSURANCE COMPANY CAN ASSERT THESE PARTICULAR PRIVILEGES, AS LONG AS THEY PROVE THEM, AND IN THIS MATTER IT WAS THE STANDARD OF PROOF THAT WE HAD TO CARRY, IN ORDER TO NOT SUBMIT THOSE DOCUMENTS.

AND THE DETERMINATION THAT HAS TO BE MADE IS BY A TRIAL JUDGE LOOKING AT THE DOCUMENTS AND MAKING A DETERMINATION AS TO WHETHER THIS IS SOMETHING THAT IS AN ORDINARY COURSE OF BUSINESS DOCTRINE OR THIS IS SOMETHING THAT WAS DONE BY BAD FAITH CLAIM WAS COMING DOWN THE PIKE?

WELL, NOT ONLY THAT, BUT IN THE SENSE THAT IT IS NOT AN ORDINARY CLAIM, AND I SUBMIT THAT THIS WAS NOT AN ORDINAY CLAIM HERE, BECAUSE OF THE PROBLEMS THAT WE HAD, BECAUSE OF THE ASSERTIONS THAT WERE BEING MADE THAT THE AGENT COMMITTED NEGLIGENCE AND HAD MADE AN ERROR IN THE WAY HE HANDLED THE CHANGE FORMS.

SO YOU ARE NOT LIMITING IT TO BAD FAITH. WHAT YOU ARE SAYING IS ANY TYPE OF LITIGATION IS COMING, I MEAN, IT IS EVIDENT THAT THIS WAS A DOCUMENT THAT WAS PREPARED FOR THAT PURPOSE.

THAT'S CORRECT. THIS, THE STATEMENT THAT WAS TAKEN HERE WAS NOT TAKEN IN A ROUTINE COLLISION CLAIM. IT WAS TAKEN BECAUSE THESE ASSERTIONS ANALOGY ASIANS WERE BEING MADE AND HAD -- AND ALLEGATIONS WERE BEING MADE AND HAD TO BE MADE. IT IS NO DIFFERENT THAN A SLIP AND FALL IN WINN-DIXIE, WHERE THEY ADVISE THE INSURANCE COMPANY THAT THERE IS A PROBLEM AND THE INSURANCE COMES IN AND HE TAKES A STATEMENT OF THE EMPLOYEE. ALLSTATE IS THE EMPLOYEE AND IN DEMTORE OF PAUL COBB -- AND INDEMNITOR OF PAUL COBB AS AN AGENT OF ALLSTATE. MR. CHIEF JUSTICE

THANK YOU, MR. SHELTON. THANK YOU, COUNSEL, FOR YR ASSISTANCE.