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United Services Automobile Ass'n v. Raymond J. Behard MD

NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS USAA VERSUS BEHAR.

MR. ABBEY.

MAY IT PLEASE THE COURT. MY NAME IS DAVID ABBEY. I REPRESENT THE UNITED SERVICES AUTOMOBILE ASSOCIATION. IT IS A PLEASURE TO BE IN FRONT OF THIS COURT FOR THE SECOND TIME. THIS CASE AROSE, IN PINELLAS COUNTY, AS A RESULT OF A MOTOR VEHICLE ACCIDENT. THERE WAS AN OFFER OF JUDGMENT PROPOSED FOR SETTLEMENT THAT WAS SERVED, BY USAA, AND THE OFFER OF JUDGMENT WAS SERVED, PURSUANT TO RULE 1.442, EXCUSE ME, THE PROPOSAL FOR SETTLEMENT. THE OFFER OF JUDGMENT WAS SERVED, PURSUANT TO STATUTE 768.79. JUDGE LINDERMAN, WHO WAS THE CIRCUIT COURT JUDGE ON THE CASE, DETERMINED THAT USAA, ALTHOUGH A DEFENSE VERDICT HAD BEEN OBTAINED, WAS NOT ABLE TO HAVE THEIR COSTS OR THEIR ATTORNEYS FEES TAXED. EXCUSE ME. I AM GOING TO HAVE TO GET SOME WATER. JUDGE LINDERMAN DECIDEDED THAT THAT WAS TRUE. AS A RESULT OF U.S. AA NOT NOT ATTRIBUTING THE AMOUNT ATTRIBUTABLE TO SUSAN BEHAR AND WHAT WAS ATTRIBUTABLE TO HER HUSBAND, DR. RAYMOND BEHAR, AS A RESULT OF A MOTOR VEHICLE ACCIDENT.

IT SEEMS, AT THIS TIME, YOU ARE HERE ON A BASIS OF TWO PARTICULAR BASIS. YOU ARE SAYING WE SHOULD HEAR THIS CASE BECAUSE IT IS IN CONFLICT WITH ANOTHER CASE. IS THAT FAIR, DR. BEHAR AND ANOTHER CASE OF BODECK?

THIS IS IN A RAPIDLY RAPIDLY-DEVELOPING AREA OF LAW, AND THERE ARE TWO DISTRICT COURT DECISIONS. WE HAVE PLACED, IN THE APPENDIX OF THE REPLY BRIEF, A REPORT ON ALL OF THOSE 19 DECISIONS.

BUT DON'T WE HAVE TO LOOK AT THEM, AS FAR AS THE TIMING, AS TO WHICH FALL UNDER THE NEW RULE AND WHICH FALL UNDER THE OLD RULE. DO WE HAVE A PROBLEM WITH THAT INITIALLY THAT WE MUST GET AT LEAST ACROSS THAT HURDLE, JURISDICTIONALLY, AND IF NOT, THEN WE ARE JUST REACHING DOWN TAKING CASES, WHETHER IT HAS GOT THE SAME RULE OR A DIFFERENT RULE.

AND, JUDGE, WE, CERTAINLY, CITED TWO CASES, AND, HOWEVER, AT THE TIME THAT, IN FACT, WE SERVED OUR REPLY BRIEF, YOU WILL SEE THAT, OF THOSE 19 CASES, THEY ARE ALMOST EVENLY DIVIDED BETWEEN PRERULE CASES AND POST-RULE CASES, AND ALMOST, ALSO, EVENLY DIVIDED BETWEEN CASES WHERE FEES AND COSTS WERE TAXED AND CASES WHERE FEAST -- WHERE FEES AND COSTS WEREN'T TAXED.

WERE THEY SINGLE OR MULTIPLE PLAINTIFF CASES?

YES, YOUR HONOR. IN FACT THERE IS ONE CASE OUT OF THIS COURT THAT IS A 1994 DECISION, STATEBAR VERSUS LUMBERING, WHERE THERE WAS -- VERSUS LUMBERG, WHERE THERE WAS FEES AND COSTS TAXED.

ARE THERE ANY CASES CITED, UNDER THE NEW RULE OF MULTIPLE PLAINTIFFS AND SINGLE DEFENDANTS?

YOUR HONOR, THE ONES THAT ARE CITED, UNDER THE NEW RULE, ARE CASES NUMBER, AND THIS

IS IN THE PEPICS, AND THERE IS ---IN THE APPENDIX, AND THERE ARE MULTIPLE ONES WHERE THERE ARE MULTIPLE PARTIES. ON ONE IS THE SAFETY GLASS CASE, IN WHICH --

BUT THERE IS A DISTINCTION BETWEEN MULTIPLE PARTIES AND MULTIPLE PLAINTIFFS AND SINGLE DEFENDANTS.

WELL, YOUR HONOR, THERE WERE TWO PLAINTIFFS IN THE SAFETY GLASS CASE.

AND ONLY ONE DEFENDANT?

NO. THERE WERE ACTUALLY TWO DEFENDANTS IN THAT CASE, YOUR HONOR. BUT THE TWO PLAINTIFFS WERE ABLE TO TAX COSTS IN THAT CASE, BASED UPON THE NEW RULE. ALSO THERE WERE --

AGAIN, IS THAT VICARIOUS VICARIOUSLY-LIABLE DEFENDANT, THAT SITUATION? ONE DEFENDANT AND ANOTHER DEFENDANT THAT JUST PURELY VICARIOUS HAD NO OTHER OBLIGATION IN THE WORLD, OTHER THAN BASED UPON ONE OF THE OTHER DEFENDANTS' CONDUCT?

THAT IS TRULY ONE OF THE THEORIES THAT HAS BEEN SUPPORTED WHEN, IN FACT, MULTIPLE PARTIES HAVE BEEN ABLE TO TAX, IN SPITE OF THE FACT THERE BEING NO ALLOCATION UNDER THE RULE.

JUSTICE LEWIS, I THINK, THOUGH, IS ASKING A RATHER STRAIGHTFORWARD QUESTION, AND THAT IS THAT, IF YOU DRAW A BOX, AND YOU PUT THE INGREDIENTS OF THIS DECISION, AS FAR AS THE APPLICABLE RULE, THE ISSUE OF HAVING MULTIPLE PLAINTIFFS AND A SINGLE DEFENDANT, CAN YOU CITE, TO US, THE CONFLICTING CASE FROM ANOTHER DISTRICT COURT THAT INVOLVES ALL OF THE SAME INGREDIENTS THAT I JUST PUT IN THAT BOX. YOU KNOW, THE SAME RULE, MULTIPLE PLAINTIFFS, SINGLE DEFENDANT. IS THAT -- IN OTHER WORDS, SO THAT IS A RATHER STRAIGHTFORWARD, WE REALIZE, THAT STATUTES AND RULES AND ALL KINDS OF PARTIES, BUT CAN YOU JUST ANSWER THAT VERY STRAIGHTFORWARD QUESTION? IS THERE ANOTHER CASE INVOLVING THE SAME INGREDIENTS OF THIS DECISION HERE, AND THAT IS WHAT MATCHES UP?

YOUR HONOR, MY POSITION IS, AND I WILL CLEARLY STATE IT. ANY TIME YOU HAVE MULTIPLE PLAINTIFFS INVOLVED IN A CASE, YOU HAVE CONFLICT WITH THIS CASE, BUT SPECIFICALLY THE FACTUAL CIRCUMSTANCES IN WHICH IT IS A POST AMENDMENT CASE, AND THERE IS MULTIPLE PLAINTIFFS AND ONE DEFENDANT IS THE SPRUCE CREEK CASE, FOUND AT THE FIFTH DCA.

OKAY.

AND THAT IS A SEPTEMBER 1999 CASE THAT WAS DECIDED AFTER THE ORAL ARGUMENT, OR, EXCUSE ME, AFTER THE TRIAL COURT RENDERED ITS DECISION.

LET ME ASK -- LET ME MOVE YOU TO ASSUMEING THAT WE HAVE CONFLICT JURISDICTION, THAT IF -- THE SECOND DISTRICT IS CORRECT THAT A DERIVATIVE CLAIM IS A SEPARATE CLAIM. CORRECT? I MEAN --

I HAVE NO DISPUTE WITH THAT, YOUR HONOR. JUST LIKE IF --

IN FACT, IF YOU DON'T BRING IT WITHIN THE STATUTE OF LIMITATIONS PERIOD, IT IS BARRED BY THE STATUTE OF LIMITATIONS, BUT IT IS AN INDIVIDUAL.

THAT'S CORRECT, AND THERE IS AN ISSUE THAT SAYS, IN A MOTOR VEHICLE CASE, THEY ABSOLUTELY MUST BE BROUGHT AT THE SAME TIME, AND THAT IS CITED IN BOTH OUR --

FROM THE THEORY OF A DERIVATIVE CLAIM, WHICH IS A DISTINCT CLAIM, THE INDIVIDUALS INVOLVING A SPOUSE, AS HERE, SHOULD BE ABLE TO MAKE AN INDEPENDENT DETERMINATION OF WHETHER TO ACCEPT OR REJECT AN AMOUNT 6 OF MONEY OFFERED, IF THAT PERSON IS GOING TO BE SUBJECT TO THE CONSEQUENCES, ESPECIALLY MONETARY ATTORNEYS FEES, IF IT IS NOT ACCEPTED. WHY ISN'T THAT GOOD POLICY?

JUDGE, THAT IS PART OF OUR ARGUMENT. IT IS NOT GOOD POLICY. IT IS NOT GOOD GOOD POLICY, FOR THE REASON THAT, BEYOND THE TRIAL COURT, WHO IS JUDGE LINDERMAN, BASED ON THE REASONING THAT THE COURT JUST EXPRESSED, DETERMINED THAT THERE WAS A RIGHT OF SEPARATE EVALUATION, PURSUANT TO THE SECOND SENTENCE OF 1442. THAT IS THE FIRST TIME THAT RIGHT OF SEPARATE EVALUATION, IN ALL OF THE LITIGATION THAT OCCURRED, UP UNTIL THE TIME, UNDER THE OLD OFFER OF JUDGMENT RULE, UNDER THE MULTIPLES STATUTES, HAD EVER BEEN RECOGNIZED BY ANY FLORIDA COURT. THAT THEORY AND THOSE THOUGHTS WERE INCORPORATED BY THE SECOND DISTRICT, IN THEIR OPINION, THE FIRST TIME IT WAS ACCEPTED BY ANY DISTRICT COURT IN THE STATE OF FLORIDA. IN FACT, THE SECOND DISTRICT HAS TAKEN IT SO FAR THAT, IN THEIR MOST RECENT OPINION, WHERE THE STATUTE DOESN'T EVEN APPLY, THAT SAYS, EVEN WHEN THE STATUTE DOESN'T APPLY, THERE IS A RIGHT OF SEPARATE EVALUATION, AND IF, IN FACT, THERE IS NO SEPARATE ALLOCATION, THEN, IN FACT THERE, IS A VIOLATION OF IT. NOW, LET ME TELL YOU WHY IT IS NOT GOOD POLICY. , TO BEGIN WITH, THIS COURT IN PROMULGATING RULES -- EXCUSE ME -- THE RULES OF CIVIL PROCEDURE COMMITTEE, THAT I SAT ON AT THE TIME THAT WE WROTE THIS RULE, DURING THE YEARS THAT IT WAS, IN FACT, UNDER CONSIDERATION, BECAUSE THIS COURT HAD ASKED THE COMMITTEE TO LOOK AT IT, ARE IN THE BUSINESS OF PROMULGATING PROCEDURAL RULES, IN ORDER TO ENFORCE SUBSTANTIVE RIGHTS. AS THIS COURT HAD RECOGNIZED, IN THE STATE FARM DECISION, WHICH WAS DETERMINED IN 1994, THERE ARE ONLY TWO ELEMENTS, UNDER THE STATUTE, 768.79, WHICH HAVE TO BE MET, IN ORDER FOR A PARTY TO HAVE A SUBSTANTIVE RIGHT TO ATTORNEYS FEES AND COSTS. NUMBER ONE IS THAT AN OFFER, PURSUANT TO THE STATUTE, HAD BEEN SERVED. TWO IS THAT IT HADN'T BEEN ACCEPTED. AND NUMBER THREE IS THAT THE ECONOMIC REQUIREMENTS OF THAT STATUTE WERE MET. THAT IS IT. THAT IS THE WHOLE BALL OF WAX. SO WHAT OCCURS IS --

BUT IN REAL LIFE, WHAT IS GOING ON HERE, CORRECT ME IF I AM WRONG, IS THAT THE USAA DOESN'T WANT TO DIVIDE THAT OFFER, BECAUSE, IN ALL PROBABILITY, THE DERIVATIVE CLAIM WILL BE ACCEPTED. ISN'T ISN'T THAT WHAT IS GOING ON?

NO, YOUR HONOR. WHAT USAA DOESN'T WANT TO DIVIDE IS THE SAME REASON THAT NO PARTY, WHEN THEY ARE MAKING AN OFFER TO AN OPPOSING SIDE, DON'T WANT TO DIVIDE. THEY DON'T WANT THEM DIVIDED, BECAUSE YOU HAVE A PEACEFUL LITIGATION, IF ALL OF THE PARTIES ON THE OTHER SIDE DECIDE TO DO IT, AND THAT IS CONTRARY TO THE PURPOSE OF THE RULE. WHAT I WOULD LIKE TO DO, YOUR HONOR, IF I COULD, AND I AM CONTINUING MY RESPONSE TO YOUR QUESTION, IS THAT, AFTER THIS COURT ISSUED ITS OPINION IN 1994, IT SAID IN THE SAME CIRCUMSTANCES THAT WE ARE HERE FOR, TODAY, UNDER THE STATUTE WHICH WE RELIED ON, IN MAKING OUR OFFER OF JUDGMENT, WE ARE ENTITLED TO FEES AND COSTS, BECAUSE WE MET THE 25 PERCENT AND BECAUSE WE MADE A TIMELY OFFER. THERE WAS A CASE IN FRONT OF THE SECOND DISTRICT, AND IT IS THE TWITTY CASE, REPORTED IN AUGUST OF 1996, AND ALTHOUGH IT WAS A TOTALLY SEPARATE PANEL OF THE SECOND DISTRICT THAN THE LATER CASES, THE PURPOSE OF THE SEPARATE ALLOCATION IS CLEARLY SET FORTH IN THIS OPINION. IT SAYS, IN THIS CASE THERE ARE MULTIPLE DEFENDANTS THAT MADE AN OFFER TO MULTIPLE PLAINTIFFS. ONE OF THE DEFENDANTS WAS DISMISSED. THE OTHER ONE RECEIVED A VERDICT THAT WAS LESS THAN A TOTAL OFFER, BUT THE SECOND DISTRICT REFUSED TO TAX COSTS AND ATTORNEYS FEES, UNDER THE STATUTE, BECAUSE THEY SAID IT IS IMPOSSIBLE TO DETERMINE THE AMOUNT ATTRIBUTABLE, THE MAGIC WORDS THAT, LATER, FIRST APPEAR IN FLORIDA LAW IN THIS RULE IN THE TWITTY CASE, TO EACH OFFEREE, IN ORDER TO MAKE A FURTHER DETERMINATION WHETHER THE JUDGMENT AGAINST ONLY ONE OF THE OFFEREES, WITH A JUDGMENT OF $2500 IS 25 PERCENT

LESS THAN THE OFFER ON HER BEHALF.

COULD THAT PERSON, IN THIS DERIVATIVE CLAIMS CASE, COULD THAT PERSON, IN FACT, ACCEPT AN OFFER WITHOUT THE MAIN PARTY?

LET ME TELL YOU ABOUT THIS LITIGATION, JUST LIKE ANY LITIGATION, WHETHER IT IS A LOSS OF CONSORTIUM OR NOT. IF THEY DECIDE NOT TO JOIN IN IT, THEN THEY ARE SUBJECT TO THE RULES OF CIVIL PROCEDURE.

BUT THE QUESTION IS, THOUGH, COULD SHE HAVE ACCEPTED AN OFFER FROM USAA?

IF USAA MADE A SEPARATE OFFER TO HER, WHICH USAA DID NOT.

BUT THE OFFER THAT WAS SENT BY USAA DID INCLUDE HER --

ABSOLUTELY. IT SAID --

AREN'T WE TALKING ABOUT WHETHER THERE IS A LEGAL OFFER, UNDER THE RULE, AND YOU HAVE, HERE, A HUSBAND AND WIFE THAT ARE TOGETHER. WHAT IF THE HUSBAND AND WIFE ARE SEPARATED? WHAT IF IT IS A WRONGFUL-DEATH CLAIM WITH MULTIPLE CLAIMANTS? ARE YOU SAYING THAT USAA COULD JUST SERVE ONE OFFER, UNDER THE READING OF THE RULE, AND THE --

AS --.

> AND BE ABLE TO GET ATTORNEYS FEES, IF ALL OF THE ELEMENTS ARE ACCEPTED?

IF THE CLAIMS ARE MET. IF IT WAS A REASONABLE OFFER AND NUMBER TWO, IF IT WAS OFFERED. WE WOULDN'T BE HERE IF, ON THE OTHER HAND, AND WE NOTED IN THE BRIEF, THERE WAS AN OFFER THAT WENT THE OTHER WAY, THAT THE HUSBAND AND WIFE, DR. AND MRS. BEHAR, DID TO USAA FOR $75,000. NOW, BASED ON THIS COURT'S OPINION, AS LONG AS YOU CAN DO THE MATH, IF THEY WOULD HAVE COME BACK, BOTH OF THEM, AND GETTING 125 PERCENT OF THEIR JOINT DEMAND ON USAA, THEY WOULD HAVE BEEN ABLE TO TAX THEIR COSTS AND ATTORNEYS FEES, TOO, AND AS TO THE ECONOMIC DAMAGES THAT THEY ASKED, AT THE TIME THAT THIS CASE, IN FACT, WAS SUBMITTED TO THE JURY, THAT IS CERTAINLY SOMETHING THAT ARGUABLY COULD HAVE OCCURRED IN THIS CASE, AND WHAT I AM ATTEMPTING TO CLARIFY IS THE PURPOSE OF THE LANGUAGE IN THE RULE WAS VERY CLEAR. WHAT IS IT? NOT TO CREATE A SEPARATE SUBSTANTIVE RIGHT UNDER THE RULE. IT IS TO CREATE A PROCEDURAL DEVICE, TO ALLOW WILL COURTS TO KNOW WHO MET THE ECONOMIC REQUIREMENTS, WHEN, IN FACT, THE CASE WAS OFFER, AND THAT COULD NOT BE DONE IN TWITTY. BECAUSE IT COULD NOT BE DONE IN TWITTY, THE DETERMINATION WAS MADE THAT THE SUBSTANCE OF THE STATUTE WAS NOT MET, AND WITHIN MONTHS OF THE TWITTY CASE, THIS COURT ADOPTED SUBSECTION THREE OF 1442, IN WHICH THOSE SAME WORDS SHOWED UP, THAT, IN FACT, IF THERE IS A JOINT PROPOSAL, THAT IT NEEDS TO BE MADE WITH, IN FACT, THE AMOUNT ATTRIBUTABLE, STATED, TO EACH PARTY. AS THIS COURT RECOGNIZED IN THE STATE FARM CASE IN 1994, HOWEVER, WHEN THERE IS A DEFENSE VERDICT, THE MATH CAN BE DONE. HENCE THE VIOLATION, IF ANY WAS TECHNICAL. AND, IN FACT, THE CASES THAT ENFORCE MULTIPLE PROPOSALS, HAVE DETERMINED THE SAME THING. AND THOSE INCLUDE THE LATER CASES THAT WERE CITED IN THE REPLY BRIEF, IN WHICH JOINT PROPOSALS WERE ENFORCED, AS LONG AS THE COURT CAN PERFORM THE MATH, UNDER 627, SECTION 78. I, ALSO, WILL NOTE THAT, IN FACT, THE TRIAL COURT MADE A FINDING WHICH WAS NOT INTERFERED BY THE SECOND DISTRICT, THAT, IN FACT, THAT THERE WAS A TIMELY OFFER, AND THE RESULT OF THIS CASE WAS LESS THAN 25 PERCENT OF THE OFFER, AS TO BOTH PLAINTIFFS. AGAIN --

YOU ARE WELL INTO YOUR REBULINGS TIME.

THANK, YOUR HONOR. I -- YOU ARE WELL INTO YOUR REBUTTAL TIME.

THANK, YOUR HONOR. I WILL SAVE THE REST.

MAY IT PLEASE THE COURT. I AM DAVID MANNEY, AND I SHOULD LIKE, FIRST OF ALL, TO ADDRESS MYSELF TO THE QUESTION THAT WAS PROPOUNDED BY JUSTICE LEWIS. I CAN FIND NO CASE IN CONFLICT. THE ONLY TWO CASES THAT WERE CITED, AS THE BASIS FOR CONFLICT JURISDICTION OF THIS COURT, WERE CASES INVOLVING THE APPLICATION OF THE STATUTE, WHICH THIS RULE SUPERSEDED BY ITS TERMS, WHEN IT WAS ADOPTED IN 1997. NOW, I WOULD LIKE TO DEAL, THEN, WITH THE BOX THAT JUSTICE ANSTEAD REFERRED TO. BECAUSE, IN FACT, IF YOU LOOK AT WHAT IS IMPLICATED BY THIS PARTICULAR RULE, WHAT YOU ARE SEEING IS THE QUESTION OF UNALLOCATED OFFERS. IN OTHER WORDS, WE HAVE A POSSIBILITY, HERE, MATH MATTCALLY, OF A SINGLE OFFER, TO A SINGLE OFFER', AND THEN YOU HAVE -- TO A SINGLE OFFEREE. AND THEN YOU HAVE A SINGLE OFFER TO MULTIPLE OFFEREES, AND BY THE WAY THE SINGLE OFFEROR AND THE SINGLE OFFEREE ARE NOT INVOLVED. WE HAVE MULTIPLE POSSIBILITIES, SINGLE OFFEREE TO MULTIPLE OFFEROR. AND SINGLE OFFEREE TO SINGLE OFFEREE AND, THIRD, MULTIPLE OFFERORS TO MULTIPLE OFFEREES. AND YOU HAVE THE SPRUCE CREEK CASE, WHERE TWO PLAINTIFFS IN THAT CASE MADE THE OFFER TO A SINGLE DEFENDANT, AND THE DISTRICT COURT OF APPEAL HELD THAT IT WAS A MATTER OF INDIFFERENCE TO THE DEFENDANT AS TO THE APPLICATION OF THE DEFENDANT MAKING THE OFFER, BECAUSE THE DEFENDANT WOULD BE ENTITLED TO A RELEASE, IN THE EVENT THAT HE ACCEPTED THE OFFER BY THE PLAINTIFFS, SO THE FACT THAT THE PLAINTIFFS HAD NOT ALLOCATED THAT OFFER WAS A MATTER OF INDIFFERENCE, AND THAT IS A PHRASE THAT IS FREQUENTLY USED, AND LET'S COME BACK TO EXAMPLE ELSE OF -- OF EXAMPLES OF SINGLE OFFEROR AND MULTIPLE OFFEREES. YOU HAVE THE SINGLE DEFENDANT HARRIS, WHO OFFERED TO THE GOLDSTEINS AN OPPORTUNITY TO SETTLE. THE CLAIMS OF THE GOLD STEENS WERE -- OF THE GOLDSTEINS WERE DIFFERENT. THERE WAS A FAILURE TO ALLOCATE THE OFFER, AND THAT WAS THE END OF THE MATTER.

OPPOSING COUNSEL SEEMS TO ACKNOWLEDGE THESE, BUT HE SEEMS TO BE POINTING TO WHERE WE HAVE GOT A CIRCUMSTANCE WHERE THERE IS A ZERO DEFENSE VERDICT, AND THAT, SOMEHOW, WE SHOULD TREAT THAT DIFFERENTLY UNDER THIS RULE, BECAUSE MY GOODNESS, LOOK. THEY HAVE GOT NOTHING. AND WE CAN DO THE MATH, AND IT IS NOT ONE OF THESE THINGS, DO THEY GET ENOUGH. DO THEY GET 25 PERCENT? THEY GOT NOTHING. THAT SEEMS TO BE WHERE HE IS HEADED. WHAT IS YOUR RESPONSE TO THAT? HOW SHOULD WE LOOK AT THAT, IN THIS SCENARIO?

STRANGELY ENOUGH, I WAS MOVING MY HEAD OVER TO THE RIGHT SIDE, WITH NO PARTICULAR REASON, EXCEPT FOR THE FACT THAT JUSTICE PARIENTE AND JUSTICE QUINCE HAD ASKED THE QUESTIONS THAT ARE SIGNIFICANT TO ANSWERING THAT, AND THAT IS IT WAS A POINT RAISED BY THE SECOND DISTRICT COURT OF APPEAL, IN A RHETORIC QUESTION. IF NOT MRS. BEHAR, THEN WHO IS TO EVALUATE HER CLAIM? AND THE POINT, HERE, IS THAT HER CLAIM WAS SEPARATE, AND WE NEVER WILL KNOW WHETHER OR NOT MRS. BEHAR HAD THE OPPORTUNITY TO EVALUATE THE OFFER THAT WAS BEING MADE TO HER, WITH RESPECT TO HER CLAIM FOR CONSORTIUM, BECAUSE, IN THIS CASE,S THERE WAS NOT AN ALLOCATION, SO WE DON'T KNOW AT THIS POINT WHETHER OR NOT, HAD THE OFFER BEEN MADE TO HER IN A DIFFERENTIATED ORAL INDICATED FORM, SHE WOULD HAVE ACCEPTED IT. THE POINT IS, IF YOU MAKE AN UNALLOCATED OFFER, AS A PERSON, FOR WHATEVER REASON, YOU CAN BE EITHER THE DEFENDANT OR THE PLAINTIFF IN THOSE CASES, UNDER THOSE CIRCUMSTANCES, IF THERE IS A SEPARATE CLAIM, AS IN THIS CASE, FOR CONSORTIUM, WE DON'T KNOW WHETHER OR NOT SHE WOULD HAVE ACCEPTED THAT OFFER.

BUT ISN'T IT CORRECT THAT, IN THIS INSTANCE, THE PLAINTIFFS MADE AN UNDIVIDEDED DEMAND OF $395,000, AND SO, NOW, NEITHER SIDE WAS, REALLY, TREATING THIS -- THESE AS SEPARATE CLAIMS FOR PURPOSES OF THIS RULE. ISN'T THAT RIGHT?

AND THAT IS WHAT SPRUCE CREEK SAYS, AS A MATTER OF INDIFFERENCE TO THE DEFENDANT.

BUT DOES THAT, REALLY, MAKE MUCH SENSE UNDER THIS RULE? I MEAN, WHY ISN'T EVERYBODY, IF THERE IS GOING TO BE AN ASSESSMENT OF ATTORNEYS FEES, SHOULDN'T BOTH THE PLAINTIFF AND THE DEFENDANT BE IN A POSITION TO EVALUATE THE INDIVIDUAL CLAIMS ON THE BASIS OF WHETHER OR NOT THAT CLAIM IS -- SHOULD BE OR SHOULD NOT BE SETTLED?

YOU KNOW, ONCE AGAIN, THE MOST RECENT KASICH FIND THAT RAISES THAT QUESTION IS THE SECOND -- THE MOST RECENT CASE THAT I CAN FIND THAT RAISES THAT QUESTION IS THE SECOND DISTRICT COURT OF APPEAL, DANER CONSTRUCTION, AND THAT, WHERE AN UNDIFFERENTIATED OR UNALLOCATED OFFER IS MADE, AND WHETHER IT IS A MATTER OF INDIFFERENCE AS TO WHO RECEIVES THE OFFER, AS TO HOW THE PARTIES ARE GOING TO DIVIDE UP THE RESPONSIBILITIES, OR, AS IN THE CASE OF THE PLAINTIFFS, DIVIDE UP THE CASH, THE COURT, IN DANNER CONSTRUCTION'S APPEAL, SUGGESTS THAT WE ARE NOT GOING TO ALLOCATE, NOW, THAT IS GOING TO RESULT IN THE ABILITY TO RECOVER ATTORNEYS FEES. IT DOES SEEM, CLEARLY THAT, THE RULE, ITSELF, PROVIDES FOR ALLOCATION ALONG THE LINES THAT YOU HAVE SUGGESTED. THE SECOND DISTRICT COURT OF APPEAL HAS RAISED THAT ISSUE, RHETORICALLY, AT THIS POINT, BUT SO FAR THE QUESTION THAT YOU HAVE JUST ASKED ME IS ONE WHICH HAS NOT YET BEEN DEALT WITH, BY ANY OF THE DISTRICT COURTS OF APPEAL, WHICH BROUGHT ME BACK TO WHAT JUSTICE ANSTEAD AND JUSTICE LEWIS SAID EARLIER, WHICH IS SHOW US A CONFLICT. THERE IS NONE. THE DISTRICT COURTS OF APPEAL, RIGHT NOW, ARE WORKING OUT THIS PROBLEM, AND THEY ARE WORKING IT OUT IN THE BOX THAT I HAVE SUGGESTED, THAT IS AS TO THE THREE POSSIBILITIES, ALTHOUGH, IN THAT BOX THAT I HAVE SUGGESTED, THOSE THREE POSSIBILITIES NOT BEING WORKED OUT IN TERMZ TERMS OF -- IN TERMS OF PLAINTIFF VERSUS DEFENDANT, BUT IN TERMS OF OFFEREE VERSUS OFFERORS OR MULTIPLES.

WHAT ABOUT THE SITUATION ON THE GROUND, SO TO SPEAK? THE PLAINTIFFS, HERE, WERE REPRESENTED BY THE SAME LAWYER. IS THAT CORRECT?

YES, SIR.

AND IF WE COULD CALL UP, IN OUR VIEW SCREENS, YOU KNOW, THE LAWYER FOR THE DEFENDANT, CALLING UP THE LAWYER FOR THE PLAINTIFFS, AND SAYING, YOU KNOW, I WILL GIVE YOU $300,000 FOR THIS CASE, ISN'T THAT THE REAL SITUATION THAT EXISTS, AND THAT IS THAT WE HAVE GOT A TYPICAL CLAIM, WHERE THE ONE PARTY IS HURT, OF THE MARRIED COUPLE. YOU HAVE GOT THE DERIVATIVE CLAIM. THEY ARE REPRESENTED BY THE SAME LAWYER, AND WHEN THEY TALK ABOUT SETTLEMENT, THE LAWYER IS NOT GOING TO CALL THEM UP AND SAY, WELL, WE WILL GIVE YOU THIS MUCH FOR THE DERIVATIVE CLAIM AND WE WILL GIVE YOU THIS MUCH FOR THE MAIN CLAIM. THEY ARE GOING TO SAY WE HAVE EVALUATED THIS, AND HERE IS THE OFFER FOR SETTLEMENT, AND WHAT DO WE DO TO THE LAW, WHEN WE DEAL WITH A SITUATION LIKE THIS, AND IT SEEMS TO BE CONTRARY TO, SORT OF, GOOD SENSE, AS FAR AS WHAT IS HAPPENING ON THE GROUND?

WELL, YOU ARE LEARNING COLLEAGUES ON THE LEFT, YOUR HONOR, MIGHT DISAGREE WITH WHETHER OR NOT IT IS CONTRARY TO GOOD SENSE, BECAUSE THAT PROCESS IS WHAT, REALLY, DROVE THE DECISIONS, IN THE STATUTE, UNDER THE STATUTE, EARLIER, THAT IS THAT HUSBAND AND WIFE ARE AN UNITTY, WHERE THERE IS NO DIFFERENTIATION BETWEEN THE CLAIMS THAT THEY ARE MAKING, AND AS PRACTICAL MATTER, THAT MIGHT BE TRUE TODAY, BUT LITERALLY SPEAKING THE CLAIMS ARE DIFFERENT, AND IT IS THAT ANALYSIS IN VIRTUE YOURLY -- IN VIRTUALLY EVERY OTHER ONE OF THE POSSIBILITIES.

BUT IF THE PLAINTIFFS ACCEPT THE OFFER, NOBODY WOULD BE AROUND, SAYING, WAIT A MINUTE, NOW WE WANT TO RESCIND THAT OFFER, BECAUSE THE FLORIDA SUPREME COURT OR

THE SECOND DISTRICT HAS TOLD US THAT IT HAD TO BE SEPARATE. AND I AM SURE PLAINTIFFS HAD, IN A SITUATION LIKE THAT, WOULD BE SAYING, HUH-UH. WAIT A MINUTE. WE HAVE ALREADY ACCEPTED IT, AND WE HAVE GOT YOU NAILED ABOUT. THAT ARE WE OPENING OURSELVES -- THIS HAS BEEN A -- THE LITIGATION, OVER THIS STATUTE, AND THEN THE RULES THAT -- IT IS, LIKE, THE TAIL WAGGING THE DOG, THAT WE HAVE ENDED UP IN SOME HORRENDOUS SITUATIONS, WHERE IT HAS, REALLY, BEEN EMBARRASSING TO THE COURTS, HOW THESE, AND SO HELP US, A LITTLE BIT, WITH THAT, THAT WE GET SOME CONSISTENCY OUT OF THIS AND MAKE SOME SENSE, SO THAT IT DOESN'T APPEAR TO BE GAMES MAN SHIP IS THE ULTIMATE ANSWER HERE.

ONE EASY REQUIREMENT, ALWAYS, IS TO INSIST UPON ALLOCATION, AND DON'T DO WHAT THE DISTRICT COURTS OF APPEAL HAVE BEEN DOING, NAMELY TRYING TO DETERMINE WHETHER OR NOT A VIOLATION TO MAKE AN UNALLOCATED OFFER IS TECHNICAL, IN THE SENSE THAT NO HARM WAS DONE OR NOT. I MEAN, THAT IS A QUICK ANSWER TO THE QUESTION. STICK TO THE LETTER OF THE RULE. BUT WHAT THE DISTRICT COURTS OF APPEAL HAVE BEEN TRYING TO DO IS SAY, LOOK, FOR EXAMPLE, IF THERE ARE TWO CLAIMS ASSERTED AGAINST TWO DEFENDANTS, AND THEY ARE BOTH DIFFERENT TYPE CLAIMS AND PROCEED UNDER DIFFERENT THEORIES AND THE LIABILITY IS NOT JOINT AND SEVERAL, AND THE MULTIPLE PLAINTIFFS MAKE AN OFFER TO THE MULTIPLE DEFENDANTS, WITHOUT ALLOCATING, THEN THE CONSEQUENCES OF DOING THAT IS THE RIGHT OF CONSTRUCTION OF THE DEFENDANTS TO EVALUATE THE PROPOSAL OF THE SETTLEMENT AND THEREFORE YOU CAN'T RECOVER, UNDER THE RULE. NOW, THE QUICK ANSWER TO ALL OF THIS IS THAT, RATHER THAN TO LOOK AT THE JOINT AND SEVERAL LIABILITY OR THE PSYCH AIRS LIABILITY -- OR THE VICARIOUS LIABILITY SITUATION, WHERE THE FAILURE TO UPHELD IS NOT HARMFUL, IN THE FUTURE WE MUST SAY WITH REGARD TO MAKING AN OFFER TO TWO DEFENDANTS WHO ARE JOINT AND SEVERALLY LIABLE,. YES, MA'AM.

THE WHOLE PURPOSE OF THIS RULE WAS TO ENCOURAGE SETTLEMENT, AND IF YOU TAKE USAA'S POSITION AND THE REAL WORLD, OUT THERE, DEFENDANTS DON'T WANT TO SETTLE. UCHINGT A HUSBAND AND -- YOU HAVE GOT A HUSBAND AND WIFE TOGETHER, WITH THE HUSBAND AND NOT THE WIFE, AND AS A PRACTICAL MATTER, PEOPLE DON'T GO TO TRIAL, AGAIN, UNLESS SOMEBODY IS SPRAED AND YOU, REALLY, DO HAVE TWO SEPARATE LAWYERS, WHERE THEY GO THE CONSORTIUM CLAIM, WE ARE GOING TO STICK TO OUR GUNS AND WE ARE GOING FORWARD ON THE CONSORTIUM CLAIM BUT NOT THE MAIN CLAIM, SO ARE WE CREATING A LEGAL FICTION THAT, REALLY, WON'T HELP PROMOTE SETTLEMENT? IT SEEMS LIKE ALL WE HAVE DONE WITH THIS RULE IS HAD A LITTLE COTTAGE INDUSTRY OF, YOU KNOW, AN OFFER OF SETTLEMENT CASES. I MEAN WE, PROBABLY, HAVE, YOU KNOW, JUST DOZENS OVER THE YEARS. ARE WE, REALLY, HELPING THE MATTER, ARE WE GETTING CASES SETTLED, BY THESE RULES, OR ARE WE, REALLY, JUST CREATING LITIGATION, AFTER THE OFFERS AREN'T SETTLED? THAT IS A BROADER QUESTION, BUT IT, REALLY, CONCERNS ME, BECAUSE YOU ARE RIGHT. THE LETTER OF THE RULE SAYS PARTY, AND I UNDERSTAND THE POLICY REASON. I JUST DON'T KNOW, IN THE REAL WORLD, HOW THAT IS GOING TO HELP TO TRY TO SETTLE CLAIMS, IF WE HAVE DEFENDANTS MAKING ALLOCATED OFFERS TO A HUSBAND AND WIFE, AND SOMEONE DECIDES, YOU KNOW WHAT? I AM GOING TO GO WITH -- TAKE THE CONSORTIUM CLAIM, AND I AM GOING TO GO TO TRIAL ON THE MAIN CLAIM, AND THAT IS NOT WHAT THE DEFENDANT INTENDED TO DO, AND THAT IS NOT GOING TO SETTLE THE CASE.

BUT IT MAY BE THAT THE TIME IS RIGHT, AGAIN, FOR THIS COURT TO REVISIT THE ISSUE OF THE FORM OF THIS RULE. I AM FULLY PREPARED TO ARGUE THAT, AS A MATTER OF FACT. I AM HERE, TODAY, TO SAY THAT THERE IS NO CONFLICT. THAT THE CASES HAVE BEEN UNIFORMLY APPLIED. THAT THERE ARE REGULAR DISTINCTIONS BETWEEN HARMFUL AND NONHARMFUL FAILURE TO ALLOCATE. BUT THE LANGUAGE IS COLLAPSE I. I AM NOT BURDENED WITH HAVING BEEN ONE OF THOSE WHO PARTICIPATED IN ITS PREPARATION, SO I CAN LOOK AT IT AND SAY IT IS CLUMSY LANGUAGE, TO TALK ABOUT JOINT PROPOSALS, WHEN I AM NOT SURE JOINT PROPOSAL HAS BEEN DEFINED IN THE RULE. I THINK IT IS CLUMSY TO PUT THE LANGUAGE IN A HISTORY, ALTHOUGH I

WOULD CERTAINLY SAY THAT, IN THE ADOPTION 6 OF THIS PARTICULAR RULE THAT, -- IN THE ADOPTION OF THIS PARTICULAR RULE, THAT THE FABRICATING SITUATION IS NOT IN THE RULE. I CAN'T SAY THAT IT HAS HELPED ALL THAT MUCH, BUT ON THE OTHER HAND WE ARE SEEING LIVE DISCUSSION. WE ARE SEEING DISCURSIVE ANALYSIS IN THE COURTS OF APPEAL, ALL OF WHICH SEEM TO BE TRYING TO RESOLVE THIS RULE, AND IT STRIKES ME THAT THIS RULE IS BEING RESOLVED, THROUGH THE ACRUSION OF JUDICIAL ACTIVITY, AND I WOULD SUGGEST TO YOU THAT ULTIMATELY IT IS GOING TO BE A GOOD RULE. I WOULD NOT SUGGEST, AT THIS TIME, TO REVISIT IT. WHAT WE ARE SEEING, HERE, IS SOMETHING NEAR AND DEAR TO THE HEART, AND THAT IS ATTORNEYS FEES, AND IF STRIKES ME THAT IF WE ARE SEEING THEISH YOUTHFUL ATTORNEYS FEES BEING DISCUSSED, WE ARE, ALSO, SEEING SOMETHING VERY, VERY IMPORTANT, THE FEE SHIFTING THAT WE HAVE BEEN TALKING ABOUT FOR YEARS IN THE BAR IS, IN A SENSE, BEING OPERATED HERE, AND THE FEE SHIFTING MAY BE SOMETHING WITH RESPECT TO THE PROLIFERATION OF LITIGATION. THIS RULE IS AN ATTEMPT TO DO THAT, AND I THINK THE RULE IS A RIGHT STEP. WHETHER IT IS THE FINAL STEP IS ANOTHER MATTER, BUT, YOU KNOW, I --

I SEE THE HUSBAND AND WIFE, AND THE PLAINTIFFS DON'T WANT A PIECEMEAL SETTLEMENT. THEY WANT IT SETTLED, ONCE AND FOR ALL, THAT THE CONSORTIUM CLAIM, WHICH IS USUALLY THE LESSER CLAIM, THAT MONEY WILL BE TAKEN, AND THEY WILL GO TO TRIAL ON THE MAIN CLAIM AND NOT HAVE ACCOMPLISHED ANYTHING? IS THAT, REALLY, WHAT WE -- WHAT WE COULD END UP HAVING?

I THINK IT IS, ALWAYS, A GOOD IDEA TO SETTLE A CLAIM, WHETHER YOU SETTLE A WHOLE SUIT OR NOT. IT IS ALWAYS HELPFUL TO SETTLE THE ENTIRE SUIT, BUT IF YOU WANT TO MAKE A RULE, AND THIS COURT HAS THE POWER TO DO SO, THAT SAYS BEFORE WE ARE GOING TO ALLOW FEE SHIFTING TO TAKE PLACE, WE MUST HAVE THE TYPE OF OFFER THAT WILL RESULT IN THE RESOLUTION OF THE ENTIRE LAWSUIT.

BUT CAN IT WORK? I MEAN, THAT IS THAT THE DEFENDANT, REALLY, ISN'T THE ONE THAT HAS THIS INTEREST IN ALLOCATING THE AMOUNT FOR THE SEPARATE CLAIMS. JUST LIKE THESE CASES THAT HAVE TALKED ABOUT, YOU KNOW, WHO HAS THE INTEREST HERE. ORDINARILY I WOULD EXPECT THAT THE DEFENDANT, WHO HAS EVALUATED THE CLAIM, COMES UP WITH A TOTAL AMOUNT, IS GOING TO SAY TO THE PLAINTIFF YOU ALLOCATE IT. THAT IS THAT YOU ARE THE ONE THAT HAS THE INTEREST IN THAT. WE DON'T CARE. AND THAT IS THE REALITY, THAT THEY DON'T CARE, SO NOW YOU HAVE A RULE THAT SAYS THEY ARE GOING TO HAVE TO ALLOCATE IT, AND IF YOU SAY WE ARE GOING TO ALLOCATE IT, AND IF WE ARE GOING TO DO IT WITHOUT ASKING THE PLAINTIFFS, WHICH IS WHAT WE ORDINARILY DO, AND THEREFORE THE PLAINTIFFS, YOU DO THE ALLOCATION. WE ARE GOING TO GIVE YOU A POT OF MONEY, SO NOW WE ALLOCATE IT, AND WE SAY, WELL, WE ARE GOING TO GIVE, GEE, 25 PERCENT OF THE CLAIM, THEN, TO THE DERIVATIVE CLAIM, AND AS JUSTICE PARIENTE INDICATED, WELL, WELL, NOW, THE ONE PARTY WHO IS INDIVIDUALLY EVALUATING IT, SAYS THAT SOUNDS GREAT TO ME. I DON'T THINK THE LAWYER EVALUATES IT AND SAYS I DON'T THINK WE COULD GET THAT MUCH FOR THE DERIVATIVE CLAIM, YOU KNOW, FROM A JURY, AND, BUT, I THINK WE CAN DO BRER, YOU -- BETTER, YOU KNOW, ON THE MAIN CLAIM, SO WE WILL GRAB -- THE DEFENDANT IS GOING TO SAY WAIT A MINUTE! I DON'T, REALLY, WANT YOU TO EVALUATE IT SEPARATELY AND ACCEPT IT OR REJECT IT SEPARATELY. AND SO WE ARE GOING TO END UP WITHOUT ANY OFFERS BEING MADE, BECAUSE IT IS NOT GOING TO WORK THAT WAY, OTHER THAN IT WORKING OUT A SETTLEMENT IN AN INFORMAL WAY THAT DOESN'T INVOLVE THE ATTORNEYS FEES,, TO BEGIN WITH, SO HAVEN'T WE, REALLY, SHOT OURSELVES IN THE FOOT, THEN, IF THAT IS WHERE WE END UP? BECAUSE A DEFENDANT DOESN'T CARE.

WELL, WE ARE -- THERE ARE SEVERAL THINGS THAT I WOULD SUGGEST HAVE BEEN IMPLICATED BY THE ANALYSIS YOU HAVE JUST ADVANCED. THE FIRST THING IS AN EQUAL PROTECTION ARGUMENT, BECAUSE YOU WOULD CLEARLY AGREE, I THINK, THAT IF YOU SUED MULTIPLE DEFENDANTS, AND THE PLAINTIFF MADE AN OFFER TO SETTLE WITH THESE MULTIPLE

DEFENDANTS, EACH DEFENDANT WOULD WANT TO KNOW HOW MUCH HE WAS GOING TO HAVE TO PAY, IN ORDER TO INDEPENDENTLY EVALUATE THE SETTLEMENT PROPOSAL THAT HAS BEEN MADE, AND THAT IS WHAT FABRE IS ALL ABOUT. THAT IS THEORETICALLY, FROM WHAT I HAVE HEARD, THE WHOLE PURPOSE OF THE RULE. NOW, IF THAT IS TRUE, AND IT MAY BE, WHAT IF YOU HAVE MULTIPLE PLAINTIFFS THAT ARE NOT NECESSARILY JOINED BY THE CONSORTIUM, THAT IS BY VIRTUE OF THE MARITAL RELATIONSHIP. WOULD THAT THE BE ABLE TO INDEPENDENTLY EVALUATE THE PROPOSAL THAT HAS BEEN MADE TO THEM? I CAN SEE A SITUATION WHERE YOU HAVE A PERSON INVOLVED WHO MAKES AN ASSERTION OF NEGLIGENCE WITH RESPECT TO THE TWO, WHICH ARE NOT NECESSARILY RELATED, AND I AM THINKING ABOUT THE MULTIPLE PLAINTIFF SITUATION.

WE ARE TALKING ABOUT, YOU KNOW, THIS CASE, AS WELL AS POLICY. WHICH, I THINK, IS, REALLY, WHAT GIVES RISE TO THE ARGUMENT OF YOUR OPPONENT, ABOUT, WELL, IS ANY OF THIS RELEVANT, BECAUSE WE OFFERED THIS BIG POT OF MONEY TO SETTLE, FOR BOTH OF THEM, AND THE JURY RETURNS ZERO FOR EACH OF THEM, AND SO, UNDER ANY WAY THAT YOU LOOK AT IT, IF THIS IS 25 PERCENT LESS, NO MATTER HOW, YOU KNOW, YOU FASHION THIS KIND OF THING, SO THE QUESTION IS DO WE LOOK AT THAT, AFTER, YOU KNOW, THE SETTLEMENT HAS BEEN EXTENDED, ANALYSIS, TO ANSWER THIS QUESTION OR NOT?

I CAN -- I CAN'T SAY IT ANY BETTER THAN JUDGE LINDERMAN AND THE DISTRICT COURT OF APPEALS SAID IT. IF YOU ARE GOING TO HAVE THIS TYPE OF INDEPENDENT RIGHT IN MRS. BEHAR, THE RIGHT OF CONSORTIUM, IF NOT MRS. BEHAR EVALUATE THAT CLAIM, WHO, AND SHE OBVIOUSLY NEVER HAD A CHANCE TO EVALUATE THE $125,000 -- WHAT PART OF THE $125,000 AND ONE DOLLAR SETTLEMENT PROPOSAL THAT WAS MADE FOR HER CLAIM. I DON'T KNOW IF AND NOR DO ANY OF US HERE KNOW THAT, IF IT WAS $125,000 FOR HER AND $1 FOR HER HUSBAND, WE DON'T KNOW WHETHER SHE WOULD HAVE ACCEPTED THAT.

DON'T WE DIFFERENTIATE THAT, AND REQUIRE THAT, IN 30 DAYS, IF THE PLAINTIFFS NEED THAT FOR ALLOCATION PURPOSES, THAT IS A THAT MAYBE THEY ARE GOING THROUGH A DIVORCE, THAT THEY WOULD SUGGEST IT BE ALLOCATED, AND WOULDN'T THAT, REALLY, BE A BETTER WE TO HANDLE IT?

TO ACHIEVE THE RESULT YOU ARE UNDERTAKING, YOU WOULD HAVE TO AMEND THE RULE. UNDER THE RULE, THE RESULT IS THE ONLY CORRECT APPLICATION OF THE RULE AND, CERTAINLY, THE OBTHAT HAS BEEN CONSISTENT. A -- THE ONE THAT HAS BEEN CONSISTENT.

EXCUSE ME. IF THEY HAD ADD THE LANGUAGE TO B, AS TO THE PORTION THAT ISCAL INDICATED, WOULD THAT CHANGE THE OUTCOME?

I AM SORRY. I MISSED THAT. TOO THE OFFER HAD CONTAINED THE LANGUAGE TO BE APPORTIONED, AS THE PLAINTIFFS MAY INDEPENDENTLY DESIRE, WOULD THAT CHANGE THE RESULT OF THIS CASE?

IT MAY HAVE. I DON'T KNOW. BECAUSE WE ARE BOTH SPECULATING ON. THAT I DON'T KNOW WHAT WOULD HAVE HAPPENED. BUT I SEE MY TIME IS UP AND JUSTICE WELLS IS LOOKING AT ME, SO THANK YOU.

MR. AND I.

A QUICK -- MR. ABBEY.

IN 1986, THE OFFER OF JUDGMENT STATUTE WAS ENACTED BY THE LEGISLATURE. AT LEAST TWO OF THE JUSTICES ON THE BENCH, WHILE DISTRICT COURT JUDGES, RECOGNIZE THE PURPOSE OF THAT, WAS TO RESOLVE ALL LITIGATION, TO RESOLVE ALL CLAIMS OF ALL PARTIES. AS PART OF THAT, THE RULE, THE RULE, SPECIFICALLY SAYS A PROPOSAL MAY BE MADE BY OR TO ANY

PARTY OR PARTIES AND BY OR TO ANY COMBINATION OF PARTIES, PROPERLY IDENTIFIED IN THE PROPOSAL. THAT IS THE FIRST SENTENCE OF SUBSECTION III. WE DIDN'T DO ANYTHING WRONG. WE CAN MAKE ANY MULTIPLE -- THIS CASE IS NO DIFFERENT THAN ANY MULTIPLE PARTY LITIGATION. IT DOESN'T MAKE ANY DIFFERENCE THAT IT IS HUSBAND AND WIFE. IT DOESN'T MAKE ANY DIFFERENCE THAT IT IS DEFENDANT TO PLAINTIFF OR PLAINTIFF TO DEFENDANT OR OFFEREE OR OFFERORS. THERE IS NO DISTINCTION IN SUBSECTION III OF THE RULE. WE DID IT JUST RIGHT. WHAT DID WE VIOLATE? THE SECOND SENTENCE OF SUBSECTION III, WHICH SAYS THE AMOUNT ATTRIBUTABLE TO EACH PARTY SHOULD BE SEPARABLE STATED. WE, IF WE CAN MAKE A JOINT OFFER, UNDER THIS RULE AND UNDER THE STATUTE, WHY DO WE NEED TO ATTRIBUTE IT? WE NEED TO ATTRIBUTE IT, BECAUSE TWITTY WAS DETERMINED MONTHS BEFORE THIS RULE WAS WRITTEN, AND IT SAYS, AS PROCEDURALLY, YOU BETTER BE DIVIDING THIS UP, SO THE COURT CAN DECIDE WHETHER YOUR 25 -- WHETHER YOU ARE 25 PERCENT MORE OR 25 PERCENT LESS. THIS COURT DID NOT ESTABLISH A SEPARATE PROCEDURAL SUBSTANTIVE RIGHT, IN THE SECOND SENTENCE. WHAT THIS COURT DID WAS SAY WE ARE GOING TO ESTABLISH A PROCEDURE THAT GIVES FAIR WARNING TO ANYBODY THAT SEEKING FEES OR COSTS UNDER THIS STATUTE, THAT YOU HAVE GOT TO DIVIDE IT UP, SO A COURT IS NOT FACED WITH WHAT THE TRIAL COURT HAD AND WHAT THE DISTRICT COURT HAD IN TWITTY. THEY CAN'T DECIDE WHO WON. WHEN WE HAD A DEFENSE VERDICT IN THIS CASE, THE STATE FARM CASE APPLIES, THE SAME WAY THAT THIS COURT AFFIRMED THE DECISION FOR THE AWARD OF FEES UNDER THE STATUTE IN 1994. AND BECAUSE WE GOT A DEFENSE VERDICT, THERE WAS NO PREJUDICE TO THE PLAINTIFFS IN THIS CASE THAT DID NOT OBJECT TO THE FORM OF THE OFFER WITHIN 30 DAYS AND, IN FACT, SERVED AN IDENTICAL ONE WITHIN MONTHS AFTER THAT. THANK YOU MUCH. MR. CHIEF JUSTICE: THE COURT WILL TAKE ITS MORNING RECESS. THE COURT WILL BE IN RECESS FOR 15 MINUTES. THE MARSHAL: PLEASE RISE.