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Barry L. Berges v. Infinity Insurance Co.

THE NEXT CASE IS BERGES VERSUS HILLSBOROUGH COUNTY AND INFINITY INSURANCE COMPANY.

GOOD MORNING. MY NAME IS LEWIS ROSENBLOUM, AND I REPRESENT THE PETITIONER BARRY BERGES, AND WITH ME IS CO-COUNSEL FROM TAMPA, MICHAEL RYWANT. THIS IS A BAD FAITH ACTION FROM HILLSBOROUGH COUNTY, WHERE IT IS ALLEGED THAT INFINITY COMPANY FAILED TO SETTLE IN GOOD FAITH, TWO CLAIMS BROUGHT BY A GENTLEMAN NAMED JAMES TAYLOR, ONE FOR THE WRONGFUL-DEATH OF HIS WIFE AND ONE FOR BODILY INJURIES TO MISS HISS MINOR DAUGHTER, BOTH IN THE -- TO HIS MINOR DAUGHTER, BOTH IN THE SAME ACCIDENT. THERE ARE SEVERAL REASONS WHY WE SUBMIT THIS COURT SHOULD QUASH THE DISTRICT COURT DECISION WHICH REVERSED A JURY VERDICT FOR MR. BERGES, BUT AT THE VERY HEART OF OUR ARGUMENT IS THE HOLDING OF THE DISTRICT COURT THAT MR. TAYLOR, THE CLAIMANT, DID NOT SUBMIT A VALID SETTLEMENT OPPORTUNITY, BECAUSE AT THE TIME HE MADE HIS OFFER, HE HAD NOT BEEN APPOINTED PERSONAL REPRESENTATIVE OF HIS WIFE'S ESTATE, NOR HAD HE BEEN APPOINTED GUARDIAN OF HIS MINOR DAUGHTER'S PROPERTY. WE THINK THAT THAT IS A FUNDAMENTALLY-FLAWED HOLDING FOR SEVERAL REASONS. FIRST, JUST AS A VERY PRACTICAL MATTER, I DON'T BELIEVE THE WAY I READ INFINITY'S BRIEF, THAT IT ACTUALLY CONTENDS THAT MR. TAYLOR LACKED THE AUTHORITY ON THE DATE HE MADE HIS SETTLEMENT OFFER, TO NEGOTIATE ON BEHALF OF THE ESTATE OR FOR HIS DAUGHTER. I BELIEVE IT IS PRETTY MUCH CLEAR THAT IT IS PRETTY CLEAR IN THIS CASE, THAT HE DID HAVE THAT AUTHORITY. THE CONTINGENT THAT IS MADE BY THE INSURANCE --

IS THE DISPUTE HERE CENTERED ON THE FACT THAT INFINITY FAILED TO MAKE AN OFFER OF SETTLEMENT WITHIN THE PERIOD FROM MAY 2 TO JUNE 1, OF 1990, OR THAT INFINITY FAILED TO MAKE PAYMENT DURING THE PERIOD MAY 2 THROUGH JUNE 1?

THAT THEY FAILED TO MAKE PAYMENT, BUT PAYMENT, ALSO, THE PARTIES AGREED IN THEIR SETTLEMENT AGREEMENT, IF I COULD CALL IT THAT, THE PARTIES ACKNOWLEDGED AND AGREED THAT PAYMENT WOULD ALSO CONTEMPLATE THE PROPER COURT POINTS, EITHER AT THE ESTATE OR THE GUARDIANSHIP LEVEL, AND COURT APPROVAL, SO, REALLY, THIS IS NOTHING MORE THAN A FACTUAL DISPUTE. WE CONTEND THAT, INFINITY ACTED IN BAD FAITH BY FAILING TO CONCLUDE THE SETTLEMENT WITHIN THE DEADLINE.

LET ME ASK YOU A QUESTION. IF INFINITY HAD TIMELY SEND THE TAYLOR'S OFFER OF SETTLEMENT, AND EITHER THE PROBATE COURT OR THE GUARDIANSHIP COURT SUBSEQUENTLY REJECTED THE ARGUMENT, WHAT RECOURSE WOULD EITHER INFINITY OR BERGES HAVE? I MEAN, DO YOU HAVE ANY CASE LAW OR AUTHORITY TO SAY AT THAT POINT, IF INFINITY HAD CONCLUDED WRITTEN SETTLEMENT AGREEMENT SUBJECT TO THE COURT'S APPROVAL, THAT THERE WOULD HAVE BEEN ANY BENEFIT TO INFINITY OR BERGES, IF THE COURT, EITHER PROBATE OR GUARDIANSHIP, HAD REJECTED IT, BECAUSE WE ARE LOOKING AT A $20,000 SETTLEMENT TO WHAT HAS TURNED INTO ALMOST, IT WOULD BE A $2 MILLION JUDGMENT. SO IS IT TRUE OR NOT TRUE THAT, IF THE PROBATE COURT OR GUARDIANSHIP COURT HAD REJECTED THE OFFER AS BEING UNREASONABLE, THAT THERE WAS NO BENEFIT TO INFINITY OR BERGES?

I SUSPECT IN THAT CASE THERE WOULD BE NO SETTLEMENT, BUT THAT IS NOT WHAT HAPPENED. SEE, WHAT HAPPENED IS TAYLOR KNEW THAT HE NEEDED WHAT HE CALLED SPECIAL PAPERS, TO ACCOMPLISH THE SETTLEMENT, AND HE GAVE INFINITY A DEADLINE. THE PROBLEM IS INFINITY ACCEPTED THAT OFFER. THEY SAID WE WILL PAY YOU THE $10,000 ON THE WRONGFUL-DEATH

CASE AND WE WILL PAY YOU THE $10,000 ON THE GUARDIANSHIP, ON THE MINOR'S CASE, BUT INFINITY WENT FARTHER THAN THAT. THEY SAID WE WILL TAKE CARE, THROUGH OUR LAWYERS, OF GETTING THE GUARDIANSHIP SET UP AND GETTING THE COURT APPROVAL OF THE MINOR'S SETTLEMENT, AND WE WILL FOLLOW-UP, AND THAT WAS THE WORDS THE ADJUSTOR USED, WE WILL FOLLOW-UP WITH YOU, MR. TAYLOR, ON THE WRONGFUL-DEATH PAPERWORK THAT YOUR ATTORNEY HAS STARTED.

YOUR CASE, THE, CONCENTRATING ON JURISDICTION HERE FOR A MINUTE, IS THE CONFLICT CASE CAMPBELL GROUNDS OUT OF THE FIRST DISTRICT?

YES, SIR.

IS THAT THE CONFLICT CASE? NOW, GROUNDS WAS A VERY DIFFERENT CASE, WAS IT NOT, WHERE GEICO TOOK THE POSITION THERE, THAT THEY COULDN'T PAY ONE UNTIL THERE WAS SUIT FILED AND THAT THERE, THAT THEY DIDN'T EVEN MAKE AN OFFER IN THAT CASE. ISN'T THAT THE SITUATION?

AS I UNDERSTAND IN THE GROUNDS CASE, AND THE FACTS ARE LIMITED, THAT THE INSURANCE COUGH ANY TOOK THE -- INSURANCE COMPANY TOOK THE POSITION THAT THEY COOPERATE ACCEPT THE SETTLEMENT OFFER AND SETTLED THE CASE, BECAUSE COURT APPROVAL OF THE SETTLEMENT WAS REQUIRED, WHICH IS PRETTY CLOSE TO THE POSITION INFINITY HAS TAKEN IN THIS CASE, AND THE FIRST DISTRICT SIMPLY, IN ABOUT TWO SENTENCES, REJECTED THAT ARGUMENT AND SAID THAT, IF INSURANCE COMPANIES TOOK THAT POSITION, THERE WOULD NEVER BE A SETTLEMENT OF A MINOR'S CLAIM, SO THAT IS JUST ONE OF THE CONFLICT CASES. NOW, WE HAVE SEVERAL OTHER CASES ON OTHER ISSUES IN THIS CASE THAT WE HAVE CITED FOR CONFLICT, INCLUDING THE GRIFFIN CASE FROM THIS COURT THAT IS THE RELATION BACK, ESTATE CASE WHICH HAS NOW BEEN CODIFIED, WHICH HOLDS --

DOES IT INDICATE, I WAS LOOKING, I NOTICED IN THE BRIEFS, THAT YOUR OPPONENT SAYS THAT THERE IS A DISTINCTION, BECAUSE IN GROUNDS, THERE HAD BEEN NO OFFER MADE. IS THAT, IS THERE AN INDICATION IN THIS OPINION THAT AN OFFER HAD BEEN MADE?

YOUR HONOR, I FEEL REASONABLY CERTAIN I HAVE THE CASE IN FRONT OF ME, IF YOU WILL JUST GIVE ME A MOMENT. I FEEL REASONABLY CERTAIN THAT AN OFFER WAS MADE TO SETTLE THE CASE.

I CAN SEE THAT. I JUST WANTED TO GET YOUR RESPONSE TO THAT.

IT WAS MADE, AND YOU KNOW, WE HAVE, AND I DON'T WANT THE COURT TO THINK THAT IS OUR ONLY JURISDICTIONAL CASE. WE HAVE, ALSO, ALLEGED CONFLICT WITH THE LINE OF CASES THAT THIS COURT HAS DECIDED ON THE DUTY TO ADVISE, WHICH IS ANOTHER ISSUE, BUT GETTING BACK TO THE, LET ME MAKE --

GETTING BACK TO THE MERITS, COUNSEL, CAN YOU EDUCATE ME ON THE FACTS. WHAT WAS THE REASON FOR THE TAYLOR DEADLINE OF MAY 27 AND JUNE 1?

HE TESTIFIED THAT HE USED A LONGER DEADLINE ON HIS DAUGHTER'S CLAIM, BECAUSE HE THOUGHT THERE WOULD BE MORE WORK INVOLVED WITH THE PAPERWORK.

WHAT WAS THE REASON FOR 25 DAYS ON THE FIRST ONE AND 30 DAYS ON THE OTHER ONE?

I DON'T THINK THERE WAS ANY ESTIMATE ABOUT THAT, BUT YOU KNOW, 30 DAYS IS AT LEAST, ACCORDING TO THE CASE LAW, WOULD SEEM LIKE A REASONABLE TIME. ALSO YOU HAVE TO UNDERSTAND THAT, WHEN MR. FRYER, THE ADJUSTOR, TOLD MR. TAYLOR HE WAS GOING TO PAY, HE PROMISED THAT HE WOULD TAKE CARE THE GUARDIANSHIP WORK, AND ACTUALLY ASSIGNED

IT TO A LAWYER IN ST. PETERSBURG NAMED CORTH, AND CORTH, ABOUT FIVE OR SIX DAYS BEFORE THE SETTLEMENT DEADLINE EXPIRED, CALLED MR. FRYER AND SAID I CAN'T GET THE WORK DONE BY THE DEADLINE, WHICH WAS AN OBVIOUS INVITATION TO MR. FRYER TO DO SOMETHING ABOUT EXTENDING THE DEADLINE, YET THE RECORD INDICATES THAT MR. FRYER DID ABSOLUTELY NOTHING.

FOR HOW LONG? FOR HOW LONG? MR. ROSENBLOUM, HOW LONG WAS THAT? THAT IS PART OF WHAT JUSTICE CANTERO IS SAYING IS THAT THE TIME FRAMES HERE SEEM TO BE AWFULLY SHORT, BECAUSE THERE WAS A LETTER SENT OUT THAT HAD THE WRONG ZIP CODE, A CLERICAL LETTER FROM CORTH, ON A LETTER FROM HIM THAT CAME OUT, I THINK IT WAS RECEIVED ON JUNE 20. BY MR. TAYLOR.

CHRONOLOGY SHOWS THAT MR. CORTH CALLED MR. FRYER ON MAY 23, TO TELL HIM THAT HE COULD NOT MEET THE DEADLINE. ON MAY 24 IS WHEN CORTH WROTE THE LETTER TO TAYLOR, AND THAT WAS CORTH'S MISTAKE NOT MR. TAYLOR'S.

I AGREE, BUT IF WE ARE TALKING ABOUT GOOD FAITH --

THE NEXT THING THAT IS IN THE INSURANCE COMPANY'S FILE IS MAY 30, WHEN THEY DID THEIR STANDARD 30-DAY REPORT, AND, OF COURSE, BY THAT TIME, ONE OF THE SETTLEMENT DEADLINES HAD ALREADY PASSED, AND IN THAT 30-DAY REPORT, THE SUPERVISOR TOLD MR. FRYER TO FOLLOW UP TIME DEMAND PRONTO.

AND THEN ELEVEN DAYS LATER, HE WRITES HIS LETTER, THE SETTLEMENT DEADLINE EXPIRED.

YES. THE DEADLINE EXPIRED ON THE FIRST, AND THEN ON THE ELEVENTH, TEN DAYS AFTER THAT, MR. TAYLOR'S LAWYER WROTE THE COMPANY AND SAID, WELL, YOU KNOW THE DEADLINES HAVE EXPIRED. THE DEAL IS OFF.

AND THEN NINE DAYS LATER TAYLOR RECEIVES THE LETTER WRITTEN BY CORTH ON THE 24th. THERE IS NOTHING I SEE ON THE RECORD THAT SAID OH, YOU ALL STILL WANT TO SETTLE THIS. THERE IS A BAD ZIP CODE. WE DIDN'T GET THE LETTER. CAN WE WORK IT OUT.

THE SETTLEMENT DEADLINE HAD EXPIRED.

I REALIZE IT HAD EXPIRED.

WITH ALL DUE RESPECT, THESE ARE FACTUAL ISSUES THAT THE JURY RESOLVED. THIS CASE WAS FULLY TRIED. WE HAVE GOT A 8,000 PABLING RECORD HERE -- 8,000 PAGE RECORD HERE.

DOESN'T THE RULE OF LAW ENCOURAGE A LAWYER LIKE CORTH NOT TO SETTLE, WHICH IS THE PURPOSE AFTER BAD FAITH LAW, BUT ALSO TO JOIN WITH THE INSURED AGAINST THE INSUROR, AND SECONDLY DOESN'T IT CREATE THE ALICE IN WONDERLAND SCENARIO THAT JUSTICE ALTENBURN DISCUSSES IN GUTIEREZ? THAT IT IS TO TAYLOR'S BENEFIT FOR THE INSURED NOT TO ACT TIMELY.

MY CLIENT IS MR. BERGES. HE IS THE INSURED, AND HE IS THE ONE THAT NEEDED THE PROTECTION. NOW, IT COULD BE THAT MR. TAYLOR AND HIS LAWYER WERE UP TO NO GOOD. I DON'T KNOW. BUT THE INSURANCE COMPANY OWES ITSFIED YOU SHALL YEAR OBLIGATION TO -- OWES ITS FIDUCIARY OBLIGATION TO MR. BERGES AND TO SETTLE THE CASE, IF IT IS REASONABLE TO DO SO, AND THE JURY WAS GIVEN THAT QUESTION, AND THEY DETERMINED THAT THE INSURANCE COMPANY BREACHED ITS FIDUCIARY OBLIGATION.

BUT IN REALITY, WASN'T IT TAYLOR'S ATTORNEY SWOOP, WHO FIRST NOTIFIED MR. BERGES THAT YOUR INSURANCE COMPANY, EXCUSE THE COLLOQUIALISM, MESSED UP, AND YOU HAVE GOT A

BAD FAITH TO START BALL ROLLING.

THERE IS AN UNDER CURRENT IN THE TRIAL FROM THE INSURANCE COMPANY THAT THIS WAS ALL, AND I WILL USE THEIR LANGUAGE, IT WAS ALL A SET UP, AND THE PLAINTIFF'S LAWYER, MR. BERGES'S LAWYER, FILED A MOTION IN LIMINE, AND THIS IS IN THE BAD FAITH CASE, TO PRECLUDE THE INSURANCE COMPANY FROM ARGUING THAT THIS WAS A SET UP OR A TRAP OR A TRICK, AND THE TRIAL JUDGE DENIED THE MOTION, SAID I WILL TAKE IT UP WHEN THE EVIDENCE IS PRESENTED, AND THEY NEVER PRESENTED ANY EVIDENCE TO THAT, SO YOU KNOW, WHATEVER ARGUMENTS MIGHT BE MADE THAT THERE WAS SOME, SOMETHING GOING ON BETWEEN MR. TAYLOR AND HIS LAWYER, TO TRY TO SET UP THE INSURANCE COMPANY, THAT WAS ALL, YOU KNOW, PROPERLY AIRED IN THE TRIAL COURT.

TO LIMIT THE ISSUE, LET'S GET BACK TO, THE ISSUE THAT YOU ARE ALLEGING CONFLICT WITH IN GROUNDS, AND I THINK YOU STARTED OUT BY SAYING THAT YOU ARE NOT SURE WHETHER THE INSURANCE COMPANY IS CONTESTING THIS, AS TO WHETHER, WHEN YOU HAVE GOT EITHER A WRONGFUL-DEATH OR A MINOR INVOLVED, IT IS TO THE BENEFIT OF BOTH THE INSURANCE COMPANY AND TO THE PLAINTIFF NEGOTIATING, TO SAY THEY HAVE THE AUTHORITY TO MAKE THE OFFER. THERE IS A ACCEPTANCE CONTINGENT ON THE GUARDIANSHIP BEING SET UP AND APPROVED OR THE PERSONAL REPRESENTATIVE BEING SET UP, AND THAT SETTLEMENT BEING APPROVED. IS THAT, I MEAN, IS THAT, WHAT, REALLY, AS I AM UNDERSTANDING WHAT THE SECOND DISTRICT SAID, THEY SAID THERE COULDN'T AND VALID OFFER HERE, BECAUSE THERE WERE THESE REQUIREMENTS THAT YOU HAD TO FIRST SET UP THE GUARDIANSHIP.

THAT'S CORRECT. THEY HELD, AS TO BOTH WRONGFUL-DEATH SETTLEMENT AND THE GUARDIAN, MINOR'S SETTLEMENT, THAT THE CLAIMANT HAS TO HAVE THE REQUISITE POINTS AND COURT APPROVALS, BEFORE HE EVEN MAKES A SETTLEMENT OFFER, AND THIS IS GOING TO CREATE A TREMENDOUS ADMINISTRATIVE PROBLEM.

DID THEY HOLD THAT HE, THAT, BEFORE HE COULD, THERE COULD BE SETTLEMENT NEGOTIATIONS OR BEFORE IT CAN BE VALID OR ENFORCEABLE AS A MATTER OF LAW? I THINK THERE IS A DISTINCTION.

COURT HELD THAT, FOR IT TO BE A VALID SETTLEMENT OPPORTUNITY THAT REQUIRES THE INSURANCE COMPANY TO CONSIDER IT IN GOOD FAITH, THE CLAIMANT HAS TO HAVE THESE POINTS, AND THE COURT APPROVAL, WHICH MEANS, FOR EXAMPLE, IN THE CASE AFTER MINOR'S SETTLEMENT, THE PARENT HAS TO GO TO THE GUARDIANSHIP AND PROBATE COURT, BEFORE HE EVEN MAKES A SETTLEMENT OFFER, AND HAVE A GUARDIANSHIP SET UP AND GET THE COURT TO GIVE SOME KIND OF ADVISORY OPINION THAT THE SETTLEMENT OFFER IS AN APPROVED AMOUNT.

THERE WERE THREE DAUGHTERS HERE.

CORRECT.

AND THE, AS A MATTER OF FACT, THEY ALL HAD INDIVIDUAL CLAIMS WITHIN THE PROBATE ESTATE, WITHIN THE ESTATE, PROBATE.

THE MINOR DAUGHTERS WERE SURVIVORS, UNDER THE WRONGFUL-DEATH ACT.

SO THERE HAD TO BE SOME WAY, IN ORDER FOR THERE TO BE AN EFFECTIVE SETTLEMENT, THERE HAD TO BE A RELEASE THAT WOULD RELEASE ALL OF THOSE CLAIMS, CORRECT?

THAT'S CORRECT.

AND THAT WOULD HAVE TO BE PRESENTED TO THE PROBATE COURT.

THAT IS ALSO CORRECT.

OR THERE WOULD HAVE TO BE THE GUARDIANSHIP SET UP, SO THAT IT WOULD HAVE TO BE APPROVED BY A COURT. AND, NOW, AND THIS OFFER BY MR. TAYLOR, WAS, I AM SOMEWHAT CONFUSED WHO THAT WAS SUPPOSED TO BE ON BEHALF OF.

MR. TAILOR-MADE HIS OFFER ON BEHALF OF THE ESTATE, TO SETTLE THE WRONGFUL-DEATH CLAIM, AND ALSO ON BEHALF OF HIS MINOR DAUGHTER, HE WAS, OF COURSE, THE PARENT.

OF ONE DAUGHTER.

PARENT OF ONE DAUGHTER. HE WAS THE PERSONAL REPRESENTATIVE OR HAD APPLIED OR PETITIONED THE COURT TO BE APPOINTED PERSONAL REPRESENTATIVE, AND AS SUCH, HE WOULD BE THE PROPER PARTY TO BRING THE SUIT FOR HIMSELF, AS A SURVIVOR, AND FOR HIS DAUGHTERS. AND THE TESTIMONY, INCIDENTALLY, ALTHOUGH IT WAS CONFLICTING, THE EXPERT TESTIMONY THAT THE PLAINTIFF PRESENTED IS ALL OF THAT CAN BE ACCOMPLISHED, WITHIN THE DEADLINE THAT MR. TAYLOR ESTABLISHED, THAT COURTS WILL ACCOMMODATE THESE EMERGENCY HEARINGS AND PETITIONS.

BUT WHY WAS IT AN EMERGENCY?

WELL, IT IS AN EMERGENCY FOR THE INSURANCE COMPANY, BECAUSE THEY HAVE GOT A 30-DAY DEADLINE, AND THEY NEED TO PROTECT THEIR INSURED, BUT LET ME SAY, ALSO --

THE 30-DAY DEADLINE, THE ONE THAT TAYLOR IMPOSED, THE 30-DAY DEADLINE?

30 FOR ONE AND 27 FOR THE OTHER.

WHAT IF HE HAD SAID HERE IS AN OFFER FOR SETTLEMENT OF THE POLICY LIMITS. PAY ME WITHIN FIVE DAYS.

THAT WOULD NOT HAVE BEEN REASONABLE.

SO IT HAS GOT TO BE REASONABLE -- I AM TRYING TO GET YOUR POSITION. DOES IT HAVE TO BE A REASONABLE AMOUNT OF TIME FOR IT TO BE BAD FAITH NOT TO SETTLE?

YES. BUT IT IS GENERALLY A FACTUAL QUESTION. I SUPPOSE THERE COULD BE A DEADLINE THAT IS SO SHORT THAT, AS A MATTER OF LAW, IT WILL BE UNREASONABLE MR. CHIEF JUSTICE

THE MARSHAL HAS PUT ON THE LIGHT TO WARN YOU.

IF I WOULD, LET ME RESERVE MY REMAINING TIME. I CERTAINLY DON'T WANT TO WAIVE THE DUTY TO ADVISE ISSUE, BECAUSE WE THINK THAT IS CRITICAL.

CHIEF JUSTICE: WE REALIZE YOU FILED EXTENSIVE BRIEFS ON OTHER ISSUES. SO GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS TRACI GUNN AND I AM WITH FOWLER WHITE IN TAMPA, AND I REPRESENT THE INSURANCE COMPANY. THE PLAINTIFF HAS -- THE PETITIONER HAS GIVEN A CATASTROPHIC VIEW OF WHAT HAPPENED IN THIS CASE, BUT OUR POSITION BELOW IS THE FACTS ARE VERY NARROW, AND CERTAINLY THESE FACTS HAVE ALREADY BEEN DECIDED BY THIS COURT AND OTHER COURTS AROUND THIS STATE, AND I WAS GLAD TO HEAR JUSTICE WELLS RAISE THE JURISDICTIONAL ARGUMENT, BECAUSE WE CONTEND THAT THE GROUNDS IN FACT SUPPORTS THE --

WHAT ABOUT THE LANGUAGE IN THIS GEICO CASE OUT OF THE FIRST, WHICH SAYS, IN ADDITION,

APPELLANT CONTENDS THAT, SINCE NEVADA ILLS WAS A MINOR -- THAT, SINCE NEVILLS WAS A MINOR, HIS CLAIM COULD NOT HAVE BEEN SETTLED WITHOUT APPROVAL BY THE COURT.

THE FACTS OF WHAT GEICO DID IN THAT CASE WAS MAKE MISSOURI RESPONSE WHATSOEVER TO THE PLAINTIFF'S OFFER. THEY COMPLETELY EVADED AND IGNORED THE OFFER DURING THE TIME PERIOD AND THEN LATER TRIED TO JUSTIFY THAT BY SAYING, WELL, HE DIDN'T HAVE ANY STANDING TO MAKE A CLAIM ANYWAY, BECAUSE THERE WAS THIS GOVERNMENT LIEN OUT THERE AND THERE WAS A MINOR CLAIMANT, SO WE DIDN'T HAVE TO DEAL WITH THIS PERSON, AND WHAT GEICO SAYS IS YOU CAN'T DO THAT. YOU CAN'T JUST IGNORE THESE CLAIMANTS, BECAUSE THERE ARE THESE CONTINGENCIES TO SETTLEMENT, AND WHAT THE COURT SAYS IS, HAD IT AGREED TO SETTLE FOR THE POLICY LIMITS, IT COULD HAVE DONE SO, SUBJECT TO THE GOVERNMENT CLAIM. THAT IS HOW THEY DEAL WITH THE GOVERNMENT LIEN ISSUE. ON THE MINOR SETTLEMENT ISSUE, WHAT THEY SAY IS YOU CAN'T JUST IGNORE THESE SETTLEMENT PROPOSALS FROM MINORS AND FOR PEOPLE WHO HAVE OTHER CONTINGENCIES.

THE SAME THING, THAT YOU WILL HAVE TO SETTLE IT CONTINGENT ON COURT APPROVAL.

EXACTLY.

INSURANCE COMPANY CAN'T BE HELD IN BAD FAITH, IF THEY OFFER THE MONEY, CONTINGENT ON THE COURT APPROVAL AND THEY CAN'T GET THE COURT APPROVAL, IF THERE IS A TIME FRAME.

THAT IS EXACTLY WHAT HAPPENED HERE, JUSTICE PARIENTE, AND OUR POSITION IS THAT THERE IS A SPECTRUM OF TIME AND OF ACTIONS ON THE PART OF THE INSURANCE COMPANY. AN I JUST WANT TO MAKE SURE, SO WHEN WE SAY FACT-SPECIFIC, YOU DON'T READ WHAT THE SECOND DISTRICT SAID, THAT THERE WAS, EITHER BOTH NO DUTY TO ADVISE BERGES, OF THIS OFFER TO SETTLE FOR HIS POLICY LIMITS, OR TO PUT THE MONEY IN THEES ESCROW ACCOUNT, BECAUSE THAT WAS THEALITYTIVE. -- THAT WAS THE ALTERNATIVE.

RIGHT.

ALL THEY HAD TO DO WAS DEPOSIT IT INTO ANES ESCROW ACCOUNT.

RIGHT.

-- INTO AN ESCROW ACCOUNT.

RIGHT. THERE WAS NO --

THERE WAS NO DUTY TO INFORM, BECAUSE THE PERSONAL REPRESENTATIVE HADN'T BEEN SET UP, ISN'T THAT WHAT THE SECOND DISTRICT SETH SAID IN THIS CASE?

YES. THERE IS THE FAILURE TO SETTLE AND FAILURE TO ADVISE CLAIM, AND I THINK THE ANSWER MAY BE DIFFERENT FOR BOTH, SO IF I COULD ANSWER THAT SEPARATELY. ON THE FAILURE TO SETTLE CLAIM, GROUNDS ESTABLISHES THAT YOU CAN'T JUST IGNORE THESE CLAIMANTS. YOU CAN'T JUST IGNORE THESE PARTIES, BECAUSE THERE IS SOME CONTINGENCY THAT HAS TO HAPPEN BEFORE A RELEASE CAN BE ISSUED.

DO YOU AGREE WITH THAT PROPOSITION?

WE AGREE. WE DIDN'T VIOLATE THAT PROPOSITION HERE, AND IN FACT THE PLAINTIFFS HAVE ALSO CITED A CASE CALLED BATESKY OUT OF THE SECOND DISTRICT, WHICH HELD THAT AN OFFER TO A MINOR COULD BE ENFORCED FOR PURPOSES OF A SETTLEMENT STATUTE, AND WHERE I GET WHETHER I LOOK AT THOSE CASES IS REALLY -- WHERE I GET, WHEN I LOOK AT THOSE

CASES, IS REALLY WE HAD VALID NEGOTIATIONS AND A VALID SETTLEMENT OFFER. THERE IS JUST THESE THINGS THAT HAD TO HAPPEN AFTERWARDS TO MAKE IT CONSUMMATED, BUT UNFORTUNATELY WE CAN'T GO BACK AND OPEN UP THIS WINDOW BECAUSE MR. TAYLOR CLOSED IT, AND HE CLOSED IT BEFORE HE HAD THE ABILITY TO RELEASE OUR INSURED, AND THAT WAS OUR OBLIGATION WAS TO PROTECT OUR INSURED, BY GIVING HIM A VALID RELEASE. NOW, ON THE DUTY TO ADVISE ISSUE, THE QUESTION IS NOT DID HE HAVE THE AUTHORITY TO NEGOTIATE, DID WE HAVE THE RIGHT TO IGNORE HIM? THE QUESTION IS, IS THIS SOMETHING THAT THE INSURED NEEDED TO KNOW ABOUT TO BE ABLE TO PROTECT HIMSELF?

WHAT ABOUT THE HOLDING HERE, SAYS BECAUSE OUR REVIEW OF THE RECORD REVEALS THAT TAYLOR DID NOT PRESENT INFINITY WITH AN OFFER THAT WOULD PROTECT ITS INSURED, BERGES, WE HOLD THAT INFINITY CANNOT BE GUILTY OF BAD FAITH. TAYLOR HAD NEITHER BEEN APPOINTED PERSONAL REPRESENTATIVE NOR HAD HE OBTAINED COURT APPROVAL AT THE TIME HE MADE HIS OFFER. HOW DO YOU GET AROUND THAT THAT IS, YOU JUST ACKNOWLEDGE THAT THAT CAN'T POSSIBLY BE THE SITUATION, BECAUSE, AS YOU SAID THE GROUNDS, IT SAYS THE OPPOSITE, ISN'T THAT THE PROBLEM WITH THE, I MEAN, THERE MAY BE FACTS, YOU MAY HAVE A VERY GOOD FACT CASE, AND THERE MAY BE, BUT ON THIS PRINCIPLE OF LAW THAT WE WANT TO MAKE SURE THAT DOESN'T GET, BOTH FOR THE BENEFIT OF THE INSURED'S COMPANY AS WELL, THAT YOU WANT TO BE ABLE TO NEGOTIATE BEFORE YOU GO TO COURT. ISN'T THAT A PROBLEM?

CERTAINLY, YOUR HONOR, I CAN SEE THE FORECAST HERE, THAT THE PLAINTIFFS ARE MAKING, THAT THIS LANGUAGE FROM THE BERGES DECISION COULD BE MISUSED, AND MISINTERPRETED IN THAT WAY, AND THE EXTENT THAT THIS COURT BELIEVES THERE IS A NEED TO CLARIFY THAT, FRANKLY THEY FILED A MOTION FOR REHEARING CLARIFICATION IN THE SECOND DISTRICT ON THAT POINT AND I DIDN'T OPPOSE IT, BECAUSE THAT IS NOT OUR POSITION HERE, AND TO THE EXTENT THAT THIS COURT NEEDS TO CLARIFY AND RECONCILE THE LANGUAGE AND THE DECISION BELOW WITH GROUNDS, THAT DOESN'T ANN AFFECT, REALLY, THE OUTCOME OF THIS PARTICULAR CASE, AND CERTAINLY WE DON'T HAVE ANY OBJECTION TO THAT TYPE OF POLICY HOLDING HERE.

ONCE WE DECIDE THAT, THAT IS THAT THAT IS ERRONEOUS, THEN EITHER THE ISSUE WOULD BE SEND IT BACK, I MEAN IF THERE ARE OTHER ISSUES, THAT IS NOT REALLY OUR CONCERN.

MY POSITION IS THAT THERE AREN'T, BECAUSE THAT ISN'T THIS CASE THIS. CASE IS NOT A CASE WHERE WE IGNORED THAT, AND THOSE FACTS ARE IN THE RECORD BEFORE THIS COURT, AND I DO THINK THAT THE COURT COULD DECIDE IT AS A MATTER OF LAW, AS THE SECOND DISTRICT DID. THAT THE INSURANCE COMPANY'S DUTY, AS THIS COURT HAS HELD IN THE ZABROSKY CASE AND THE COTE CASE, IS THAT THEY DID.

ARE YOU ATTEMPTING TO NOT DO ANYTHING AND MAKING ONE TELEPHONE CALL AND PUTTING THE FILE IN YOUR DRAWER FOR 30 DAYS AND NOT DOING ANYTHING. IS THERE A DIFFERENCE IN YOUR MIND? ARE YOU TRYING TO MAKE A DISTINCTION HERE?

WE DON'T HAVE THE CASE WHERE WE MADE ONE PHONE CALL AND PUT THE FILE IN THE DRAWER.

LET'S SAY YOU IGNORE TOTALLY OR YOU DON'T CAREY THROUGH AND YOU DON'T DO WHAT YOU ARE SUPPOSED TO DO TO SETTLE. ARE YOU SUGGESTING THAT THAT IS A DIFFERENT CRITERIA?

WELL, THERE ARE REALLY, THERE ARE THREE CASES ALREADY IN FLORIDA LAW THAT KIND OF ESTABLISHES SPECTRUM OF WHAT THE INSURANCE COMPANY DOES OR DOESN'T DO, AFTER THEY RECEIVE AN OFFER TO SETTLE OR AN OPPORTUNITY TO SETTLE OR A CLAIM THAT THEY MIGHT HAVE AN AFFIRMATIVE OBLIGATION TO MAKE A SETTLEMENT, AND IF I CAN DISCUSS THOSE CASES, I THINK WE CAN KIND OF PINPOINT WHERE THE LINE IS ALONG THAT SPECTRUM OF WHAT YOU CAN, WHAT YOU SHOULD AND SHOULDN'T BE REQUIRED TO DO AS THE INSURANCE COMPANY. WE HAVE THE GROUNDS CASE, IN WHICH THEY COMPLETELY IGNORED THE

SETTLEMENT OFFER. WE KNOW THAT YOU CAN'T DO THAT. ON THE OTHER SIDE OF THE SPECTRUM, WE HAVE THE HAURBOCK CASE, IN WHICH THE INSURANCE COMPANY PAID THE SETTLEMENT BEFORE GETTING COURT APPROVAL, AND THE THIRD DISTRICT SAID THAT THIS IS INEXPLICABLE, THAT THE INSURANCE COMPANY WOULD CONS YOU MATE A SETTLEMENT OR IT WASN'T A VALID SETTLEMENT. WE KNOW THAT THE INSURANCE COMPANY COULD STILL GET SUED.

OUR CASE WAS WHERE A DEFENDANT TOOK OFF WITH ALL OF THE MONEY, SO I DON'T THINK YOU ARE DEALING WITH THE SAME BALLPARK WITH AURBACK.

LET'S LOOK AT THE WILLIAMS CASE, WHERE THERE WAS A CLAIM BY SURVIVORS, NOT A PERSONAL REPRESENTATIVE OF THE ESTATE, THAT THE INSURANCE COMPANY SAID YOU ARE IN BAD FAITH FOR FAILING TO SETTLE WITH ME. ACTUALLY THERE WERE THREE INSURANCE COMPANIES IN THAT CASE, AND THEY DID THE RIGHT THING BY NOT SETTLING WITH YOU, BECAUSE HAD THEY SETTLE THE WITH YOU -- SETTLED WITH YOU, THERE WERE OTHER POTENTIAL CLAIMS OUT THERE. I THINK WHAT THIS COMES BACK TO IS WHAT IS THE INSURANCE COMPANY'S DUTY? IS IT TO PAY CLAIMS OR IS IT TO PROTECT THE INSURED, AND THE ONLY WAY THAT THE INSURED COULD HAVE BEEN PROTECTED IN THIS CASE IS BY INFINITY DOING WHAT IT DID, WHICH IS AGREE TO SETTLE. WE DIDN'T IGNORE IT. WE DIDN'T SAY WE WILL WAIT AND SEE. WE AGREED TO SETTLE. THIS IS A CASE WHERE WE HAD NO NOTICE FROM THE INSURED. WE HAD AN UNLISTED DRIVER. WE GET THIS NOTE FRIDAYS THE PLAINTIFF'S ATTORNEY.

AREN'T THESE ALL JURY ARGUMENTS? YOU MAKE A WONDERFUL ARGUMENT THAT THIS IS NOT BAD FAITH, AND THE JURY GETS THAT.

IT IS OUR OPINION THAT THE CASE SHOULD NEVER HAVE BEEN SUBMITED TO THE JURY. CERTAINLY YOUR HONOR, WE ARE ARGUING THAT AS A MATTER OF LAW THAT THERE WAS NO VALID OPPORTUNITY TO SETTLE, SO ON THE OBLIGATION TO SETTLE ISSUE, THEY CLOSED THE WINDOW BEFORE WE HAD AN OPPORTUNITY TO GET IN THERE, BECAUSE WE COULDN'T HAVE DELIVERED THIS PAYMENT. WE HAD TESTIMONY IN THIS CASE THAT IT IS PERFECTLY LOGICAL AND REASONABLE AND CUSTOMARY FOR THIS TO TAKE LONGER THAN 30 DAYS. JUSTICE ENGLAND CAME IN AND TESTIFIED.

DOESN'T THAT GO BACK TO JUSTICE PARIENTE'S QUESTION TO YOU ABOUT THE LANGUAGE AND THE SECOND DISTRICT OPINION? IF WE THINK THAT THAT LANGUAGE IS ERRONEOUS, THEN DON'T YOU GET BACK TO THE FACT THAT THIS ISN'T A MATTER OF LAW THAT HAS TO BE, THAT SHOULD HAVE BEEN DECIDED BY THE COURT, BUT IT BLCKS -- BUT IT BECOMES A MATTER OF FACT, BECAUSE YOU KEEP HAMMERING ON ALL OF THE FACTS OF THIS CASE, BUT SHOULDN'T THE JURY HAVE HAD, AND OF COURSE THEY DID, HAVE THE OPPORTUNITY TO DETERMINE WHETHER OR NOT THIS WAS BAD FAITH, BASED ON THOSE FACTS?

NO, YOUR HONOR. WE DON'T BELIEVE SO, AND THE REASON, I REALLY REGRET THE CONFUSION THAT HAS BEEN CAUSED BY THIS LANGUAGE FROM THE SECOND DISTRICT DECISION, BECAUSE WE NEVER SAID THAT THIS OFFER COULD NOT HAVE BEEN MADE OR IT WAS SOMETHING THAT WAS A NULLITY, WHICH WAS THE TYPE OF ARGUMENT MADE IN THE GROUNDS CASE AND IN THE WISCONSIN CASES THAT ARE CITED BY THE PLAINTIFF'S ATTORNEY, AND LET'S LOOK AT WHAT THE UNDISPUTED FACTS ARE AND HOPEFULLY THAT WILL HELP ME CLARIFY WHY THIS IS AS A MATTER OF LAW.

SO YOU DIDN'T RAISE ON THE SECOND DISTRICT THAT THERE WAS NO LEGAL OFFER BECAUSE MR. TAYLOR HADN'T BEEN APPOINTED THE GUARDIAN, SO THEY JUST CAME UP WITH THIS ON THEIR OWN?

NO. OUR ARGUMENT WAS NEVER THAT WE DIDN'T HAVE AN OBLIGATION TO NEGOTIATOR

DISCUSS DISCUSS EVERYTHING WITH MR. TAYLOR. OUR ARGUMENT ALL ALONG WAS WE HAD A SETTLEMENT, AND THAT THE ONLY THING LEFT TO HAPPEN WAS THE PERSONAL REPRESENTATIVE APPOINTMENT, THE LETTERS OF ADMINISTRATION AND THE COURT APPROVAL, SO WE HAD NEVER TAKEN A POSITION THAT THIS WAS NOT A PERSON WHO WE HAD AN OBLIGATION TO DEAL WITH. WE HAVE TAKEN A POSITION AND IN FACT, MR. TAYLOR TOOK THE POSITION AND WON IN THE TORT CASE, THAT NO SETTLEMENT COULD HAVE BEEN REACHED IN THIS CASE, AND WHAT HE ARGUED IN THE TORT CASE, WE WENT IN THE TORT CASE, MR. BERGES WENT IN THE TORT CASE AND SAID HEY THERE, IS A SETTLEMENT. YOU CAN'T SUE ME ANYMORE, AND MR. TAYLOR SAID I COULDN'T HAVE SETTLE THIS CASE. HERE IS MY WINDOW FOR SETTLING THESE POLICY LIMITS. I NEVER HAD THE OPPORTUNITY TO RELEASE YOU. SETTLEMENT WASN'T ON BEHALF OF YOU. THE SETTLEMENT LOCKED IN TERMS AND THE MINOR CHILDREN DISAPPROVED OF THE SETTLEMENT. HE SAID IT WAS IMPOSSIBLE FOR ME TO SETTLE THIS CASE, AND THAT IS THE REASON WE REACH INTO THIS --

LET ME GET BACK AND CLARIFY THIS. IS ONE OF THE TERMS OF THE OFFER TO SETTLE JUST THAT THEY COULD PUT THE MONEY ANES KROU -- MONEY ANES ESCROW ACCOUNT? THAT IS AN ALTERNATIVE.

IT IS HARD TO READ INTO IT, BECAUSE THAT WAS A HANDWRITTEN OFFER MADE BY THE INSURED. WHAT IT SAID, HE SAID I WOULD BE HAPPY TO PUT IT IN A SPECIAL ACCOUNT UNTIL SHE TURNS 18, IF THAT IS WHAT YOU WANT, AND IF IT TAKES SPECIAL PAPERS TO BE FILED IN COURT FOR THIS, I WILL WORK WITH YOUR LAWYERS TO HANDLE IT.

COULD YOU ADDRESS THE DUTY TO ADVISE?

CERTAINLY.

DID MR. TAYLOR, WAS HE EVER NOTIFIED IN THIS 30-DAY PERIOD, THAT THERE WAS A SETTLEMENT OFFER, AND HOW DO YOU GET AROUND THE, AGAIN, THE HOLDING OF THE SECOND DISTRICT, THAT THERE WAS NO DUTY TO ADVISE, BECAUSE THIS WASN'T A LEGALLY OFFER?

I THINK THERE IS A DIFFERENCE BETWEEN -- A LEGALLY PROPER OFFER?

I THINK THERE IS A DIFFERENCE BETWEEN THE TYPE OF OFFER THAT YOU CAN MAKE THAT IS CONTINGENT AND THE TYPE OF OFFER THAT YOU CAN MAKE, WHICH WILL RESULT, IF ACCEPTED, IN A LEGALLY-BINDING SETTLEMENT AGREEMENT, AND WE HAVE ALREADY HAD A HOLDING IN THIS CASE THAT THIS WAS NOT THE TYPE OF OFFER IN THE TORT CASE, THAT COULD RESULT IN A LEGALLY-BINDING SETTLEMENT AGREEMENT. MAYBE USING THE TERM "OFFER" IN TWO DIFFERENT WAYS IS CAUSING SOME CONFUSION HERE. THE DUTY, AS IT IS STATED BY THIS COURT IN BOSTON COLONY, IS TO ADVISE THE INSURED OF A SETTLEMENT OPPORTUNITY, AND AS THE POWELL COURT EXPLAINED, THE REASON FOR THAT IS THAT IF THE INSURANCE COMPANY IS NOT GOING TO SETTLE THE CASE, THE INSURED CAN GO OUT AND ROUND UP $10,000 AND SETTLE IT, HIMSELF. THERE ARE SEVERAL REASONS WHY THAT DUTY WASN'T VIOLATED HERE, AND THE FIRST IS, ALTHOUGH THERE WERE GORB YEASS GOING ON -- NEGOTIATIONS GOING ON AND ALTHOUGH MR. TAYLOR HAD THE ABILITY UNDERGROUND, TO MAKE AND NEGOTIATE SETTLEMENT CLAIMS, THERE WAS NOTHING THAT WASN'T DONE DURING THIS TIME PERIOD, THAT INFINITY DIDN'T DO, IN ORDER TO PROTECT HIMSELF, SO THERE WAS NO DUTY TO ADVISE HIM, BECAUSE THERE WAS NO GENUINE OPPORTUNITY TO SETTLE THE CASE.

WHY COULDN'T HE HAVE BORROWED $10,000 AND PLACED IT IN ESCROW OR GO TO FAMILY MEMBERS AND BORROW IT OR TO HIS BANK AND SETTLE THE CASE?

WE HAVE DIFFERENT CASES ON APPEAL OF WHAT THAT MIGHT HAVE MEANT, IN TERMS OF, WELL, YOU CAN PUT IT IN AN ACCOUNT IN MY NAME, WHICH STILL WOULD HAVE BEEN DELIVERING MONEY TO THIS PERSON WITHOUT A RELEASE.

SO NO OFFER TO SETTLE.

YES. NO, THIS IS THE LANGUAGE. IT SAYS, ON THE DAUGHTER'S CLAIM, I AM READING, QUOTING FROM THE OFFER. THIS MONEY IS FOR MY DAUGHTER. I WILL BE MORE THAN HAPPY TO PUT IT IN A SPECIAL ACCOUNT UNTIL SHE TURNS 18, WHICH IS NOT THE SAME TYPE OF THING AS PUT IT INES ESCROW UNTIL I CAN RELEASE YOU, IF THAT IS WHAT YOU WANT, AND IF IT TAKES SPECIAL PAPERS TO BE FILED IN COURT FOR THIS, I WILL WORK WITH YOU.

I KEEP GETTING LOST, IN WHAT ABOUT THESE OTHER TWO DAUGHTERS? WHERE DO THEY STAND?

THIS IS WHAT HAPPENED, YOUR HONOR. ONE CHILD WAS IN THE CAR WITH THE MOTHER. THE MOTHER DIES. THE CHILD IN THE CAR IS INJURED. OKAY. SO THAT CHILD HAS AN INJURY CLAIM OF HER OWN. ALL OF THE CHILDREN HAVE SURVIVOR CLAIMS.

RIGHT.

ALL OF THE CHILDREN ARE MINORS, SO THE ONE MINE OR DAUGHTER, CHRISTINA, WHO IS IN THE CAR, HER INJURY CLAIM CANNOT BE RELEASED, UNTIL THE COURT APPROVES A SETTLEMENT AND THE GUARDIAN IS APPOINTED. LIKEWISE --

ARE THESE ALL THREE MINOR DAUGHTERS?

ALL OF THE CHILDREN WERE MINOR CHILDREN, YES, YOUR HONOR.

SO THERE WOULD HAVE TO BE AN APPROVAL OF ALL THREE DAUGHTERS EXECUTING RELEASES?

INCLUDING THE CLAIMS MADE IN THE WRONGFUL-DEATH CASE.

ON BEHALF OF --

ON BEHALF OF THEIR MOTHER. BUT WE HAVE A WRONGFUL-DEATH AND AN INJURY CLAIM, BOTH INVOLVING MINOR CLAIMANTS.

BUT THE FATHER IS THE NATURAL GUARDIAN IN ALL CASES, IS THAT CORRECT?

YES, YOUR HONOR, AND HE WAS ULTIMATELY APPOINTED PERSONAL REPRESENTATIVE OF THE ESTATE, AND THAT TAKES US TO REALLY THE ONLY ARGUMENT THAT THE PLAINTIFFS HAVE TRIED TO RESURRECT, WHICH IS WHAT WE KEEP COMING BACK TO.

WOULD YOU TELL US THE UNDERLYING REASON FOR WHY THIS ISN'T A FACTUAL ISSUE FOR THE JURY, ONCE YOU GET PAST THIS ISSUE THAT YOU HAVE CONCEDED, AND IF I UNDERSTAND IT YOU HAVE CONCEDED, AND WE APPRECIATE YOUR CANDOR IN DOING THAT, THAT GROUNDS IS RIGHT, THAT IS THAT THE LANGUAGE IN THE SECOND DISTRICT'S OPINION THAT SAID YOU CAN'T EVEN MAKE AN OFFER, UNTIL YOU GO GET APPOINTED THE GUARDIAN AND GET APPOINTED THE PERSONAL REPRESENTATIVE, AND GET, APPARENTLY GET THE COURT TO APPROVE YOU MAKING AN OFFER IN THIS AMOUNT AND YOU KNOW, SO YOU -- WHY AREN'T THE REST OF THESE ISSUES, THOUGH, ISSUES THAT PROPERLY BELONG BEFORE A JURY IN A BAD FAITH CLAIM, AND WHERE THE INSURANCE COMPANY SAYS, LOOK, WE DID EVERYTHING REASONABLE. LOOK AT WHAT WE DID. AND THE OTHER SIDE PUTS ON EVIDENCE THAT, MY GOD, WHEN THE INSURANCE COMPANY GOT IN OFFER, THAT THEY SHOULD HAVE SAID HALLELUJAH AND THE INSURANCE ADJUSTOR SHOULD HAVE TAKEN THE MONEY OUT OF HIS OWN POCKET AND RAISED RIGHT OVER IN A CASE LIKE THIS -- AND RACED RIGHT OFFER AND IN A CASE LIKE THIS, AND GIVEN IT RIGHT UP. IN A HEARING LIKE THIS, WHY AREN'T THESE ALL FACTUAL ISSUES THAT ON ONE SIDE THERE IS A PRIMA FACIE BAD FAITH CLAIM, AND ON THE OTHER SIDE THERE IS A VERY GOOD DEFENSE THAT

WE RESPONDED RIGHT AWAY AND WE WERE TRYING TO SETTLE THIS, AND JURIES HAVE TO RESOLVE THESE THINGS. WHY ISN'T IT THAT KIND OF CASE?

THE REASON IT IS THE FAILURE TO SETTLE CLAIM VERSUS FAILURE TO ADVISE CLAIM, AND IT IS BECAUSE THE FAILURE TO SETTLE IS A LEGAL IMPOSSIBILITY. REALLY. IF YOU READ THE JURY INSTRUCTION IT SAYS "COULD AND SHOULD HAVE SETTLED." AND IF YOU READ THE STATUTE, IT SAYS "COULD HAVE ATTEMPTED TO SETTLE".

WHAT IS THE LEGAL IMPEDIMENT? I THINK THAT IS WHAT HE IS ASKING FOR.

THE LEGAL IMPEDIMENT IS THEY COULD NOT HAVE RELEASED THE INSURED DURING THE TIME OF THE GUARDIANSHIP POINTS.

THIS IS --

YES. YES. THE ONLY ARGUMENT THAT THEY HAVE IN THAT IS IT COULD HAVE RELATED BACK.

SO YOU ARE MAINTAINING A POSITION --

YES.

-- THAT UNTIL THE SURVIVING FATHER HAD BEEN APPOINTED THE PERSONAL REPRESENTATIVE AND HAD THE AUTHORITY, THEN, TO SIGN A RELEASE, THAT THE, ANY OFFER THAT HE SUBMITTED WAS REALLY A NULLITY.

NO. NO.

OKAY. WELL, THEN, I AM HAVING TROUBLE HERE. I THOUGHT YOU WERE SAYING HE COULDN'T LEGALLY DELIVER HIS PARTY OF THIS BARGAIN, i.e. A RELEASE.

WE COULDN'T CONSUMMATE A SETTLEMENT WITH HIM. THEREFORE THE FACT THAT A SETTLEMENT DIDN'T HAPPEN WAS NOT A BREACH OF ANY DUTY.

BUT YOU ARE SAYING THE REASON, THE REASON THAT YOU COULDN'T DO THAT --

THE REASON IS LEGAL IMPOSSIBILITY. WE COULD NOT HAVE SETTLED.

BECAUSE OF HIS NOT HAVING ALREADY BEEN APPOINTED THE PERSONAL --

BUT THAT DOESN'T CONFLICT WITH GROUNDS, BECAUSE WHAT GROUNDS SAYS IS YOU CAN'T IGNORE THEM. YOU CAN'T JUST SAY THAT THE OFFER YOU MADE WAS A NULLITY, AND AGAIN WE GO BACK WITH THE IDEA OF CAN YOU NEGOTIATE WITH THESE PEOPLE AND DO YOU NEGOTIATE WITH THEM TO ACCEPT AN OFFER OF CLAIM AND MAKE AN OFFER OF CLAIM, AND I REFER TO THE POWELL CASE --

WHAT ARE YOU, OR ARE YOU MAKING A CONCESSION? JUSTICE ANSTEAD ASKED YOU, YOU MADE THE STATEMENT YOU HAVE MADE A CONCESSION. WHAT CONCESSION HAVE YOU MADE OR HAVE YOU MADE A CONCESSION?

I DON'T BELIEVE I HAVE MADE A CONCESSION, BECAUSE I THINK THAT OUR POSITION ALL ALONG HAS BEEN CONSISTENT WITH GROUNDS, WHICH IS I THINK OUR POSITION IS MORE THAT THERE IS NO CONFLICT WITH GROUND, BUT TO THE EXTENT THAT THIS COURT READS OR THAT ANYBODY IN THE FUTURE READS THE SECOND DISTRICT CASE TO SAY THAT YOU CAN JUST IGNORE THESE OFFERS, YOU CAN IGNORE THESE CLAIMS, FROM THESE PEOPLE WHO DON'T HAVE THE ABILITY TO CONSUMMATE A SETTLEMENT, THAT THAT IS INAPPROPRIATE, THAT THAT WOULD BE IN CONFLICT WITH GROUNDS, AND FRANKLY THAT THAT SHOULD BE DEALT WITH IN A CASE IN

WHICH IT AFTER ROOISZ, WHICH ISN'T THIS CASE. -- IN WHICH IT ARISES, WHICH ISN'T THIS CASE.

SO YOUR POSITION, IF I CAN TRY TO SUMMARIZE IT, IS THAT YOU ARE NOT IN VIOLATION OF GROUNDS, BECAUSE YOU DIDN'T IGNORE MR. TAYLOR AND YOU NEGOTIATED WITH MR. TAYLOR, AND IN FACT YOU SAY YOU REACHED SOME KIND OF AN AGREEMENT WITH MR. TAYLOR, SUBJECT TO THE ADMINISTRATION OF THE ESTATE. HOWEVER, YOU DIDN'T COMMIT BAD FAITH, BECAUSE THERE WAS NO FAILURE TO, QUOTE/UNQUOTE, SETTLE, BECAUSE AS A MATTER OF LAW, YOU COULD NOT CONSUMMATE A SETTLEMENT UNTIL THE ADMINISTRATION PAPERS HAVE BEEN COMPLETED.

THAT IS WHAT I HAVE BEEN TRYING TO SAY!

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END ON YOUR AGREEMENT. GO AHEAD.

I APOLOGIZE. YOUR BRIEF ON PAGE 14, SAYS THE TRIAL COURT REFUSED TO ALLOW INFINITY THAT THE BAD CLAIMS WERE THE RESULT OF A SET UP BETWEEN THE PLAINTIFF AND BERGES. YOUR OPPONENT SAID THE OPPOSITE, THAT IT WAS DENIED. WHAT IS YOUR VERSION?

THE COURT RULED DURING TRIAL, AND WE TRIED TO GET INTO THE HE HAVE, AND I AM -- INTO THE EVIDENCE, AND I AM SORRY I DON'T HAVE THE REPORT CITES HERE. THAT WOULD GO BACK TO A FACTUAL REASON, AND THE REASON --

AS FAR AS WHAT MR. ROSENBLOUM SAID.

ON THE DUTY TO ADVISE ISSUE.

THE SET-UP ISSUE. SECONDLY, DID THE UNDERLYING JURY IN THE BERGES CASE, DID THEY KNOW THE AMOUNT OF THE AWARD? WAS THAT ALLOW IN?

YES. IF YOU LOOK AT THE STANDARD INSTRUCTION, IT TELLS THE JURY AND THEY INSERT THAT INTO THE VERDICT FORM FORM.

DID THE JURY KNOW OF -- INTO THE VERDICT FORM.

DID THE JURY KNOW OF THE UNDERLYING VERDICT AMOUNT?

YES.

CHIEF JUSTICE: COUNSEL. HOW MUCH TIME DOES COUNSEL HAVE?

MAY IT PLEASE THE COURT. I WANT TO GO BACK TO THE JURISDICTIONAL ISSUE AGAIN WITH GROUNDS, BECAUSE I KNOW IT IS IMPORTANT. IN THE BERGES OPINION, AT PAGE 5, AND THIS IS WHEN THE COURT WAS TALKING ABOUT THE MINOR'S CLAIM, THE COURT SAYS, "QUOTE, TAYLOR WAS WITHOUT AN ABILITY OF A BINDING OFFER TO SETTLE. HE COULD NOT REACH A SETTLEMENT WITHOUT THE COURT'S PRIOR APPROVAL, AND HE REVOKED INTENT, ET CETERA, BUT THIS IS WHERE IT SAYS THE SETTLEMENT OF A MINOR'S CLAIM COULD NEVER BE ACCOMPLISHED, IF THE INSURANCE COMPANY TOOK THIS ATTITUDE. ALL SETTLEMENTS MUST BE NECESSARILY SUBJECT TO COURT APPROVAL. IN MY OPINION THAT IS A DISTRICT CONFLICT. THE FIRST DISTRICT IS SAYING YOU CAN HAVE A SETTLEMENT SUBJECT TO COURT APPROVAL, AND THE SECOND DISTRICT IN THE INSTANT CASE, STATES THAT YOU HAVE TO HAVE PRIOR APPROVAL OF THE SETTLEMENT, BEFORE MAKING A SETTLEMENT OFFER THAT IS VALID.

WITH REGARD TO THE DAUGHTER'S CLAIM, EVEN IF WE NEEDED THE GUARDIANSHIP TO BE ESTABLISHED, WAS THAT PART OF WHAT THE INSURANCE COMPANY WAS OFFERING TO DO, IS TO GO AHEAD AND DO THE WALK THROUGH, AS OCCURS IN MANY CASES, WHERE DEFENSE COUNSEL

WILL JUST WALK THE SETTLEMENT THROUGH, AND THEY WILL HAVE THE NATURAL PARENT THE GUARDIAN?

THAT IS EXACTLY WHAT HAPPENED.

AND SO IT DIDN'T OCCUR BECAUSE THE INSURANCE COMPANY DIDN'T DO WHAT THEY WERE SUPPOSED TO DO. IT WAS NO FAULT OF SOMEONE ELSE?

THAT'S CORRECT. WHAT THE INSURANCE COMPANY AGREED TO DO, MR. FRYER, THE ADJUSTOR, TOLD MR. TAYLOR THEY WOULD TAKE CARE OF THE GUARDIANSHIP WITH THEIR OWN LAWYERS AND THAT THEY WOULD FOLLOW-UP WITH MR. TAYLOR CONCERNING THE ESTATE.

OKAY, WELL, BUT IF THE MINOR SETTLEMENT FOR HER OWN PERSONAL INJURY CLAIMS IS GOING TO BE MORE THAN $5,000, THERE HAS TO BE A LEGAL GUARDIAN APPOINTED.

THAT'S CORRECT, AND OUR TESTIMONY FROM EXPERT WITNESS LEON HANDLY, HE TESTIFIED THAT GUARDIANSHIP AND COURT APPROVAL COULD HAVE BEEN ACCOMPLISHED, WITHIN THE DEADLINE ESTABLISHED BY MR. TAYLOR. THERE WAS ALSO TESTIMONY THAT, IF IT COULD NOT BE ACCOMPLISHED WITHIN THE DEADLINE, THAT INSURANCE COMPANIES ROUTINELY GET EXTENSIONS OF TIME FROM THE CLAIMANT OR IN THIS CASE, THERE WAS THE ALTERNATIVE OF PLACING THE MONEY INTO THIS INTEREST-BEARINGES ESCROW ACCOUNT, AND THERE WAS CONFLICTING -- INTEREST-BEARING ESCROW ACCOUNT, AND THERE WAS CONFLICTING EXPERT TESTIMONY AS TO WHETHER THAT WAS A FEASIBLE QUESTION. I WANT TO ADDRESS ONE OTHER POINT. THE INSURANCE COMPANY KEEPS INSISTING THAT THEY COULDN'T POSSIBLY DELIVER A CHECK TO MR. TAYLOR UNTIL HE HAD HIS COURT APPOINTMENT AND COURT APPROVAL, YET THE RECORD SHOWS ON MAY 15, WHILE THIS OFFER WAS PENDING, THE INSURANCE COMPANY ISSUED A CHECK TO MR. TAYLOR FOR THE PROPERTY DAMAGE CLAIM ON THE VEHICLE, AND THE EVIDENCE SHOWS THAT THE VEHICLE WAS TITLED IN MRS. TAYLOR'S NAME, SO CLEARLY THAT WAS PROPERTY OF THE ESTATE, YET FOR $1,000, THE INSURANCE ON COMPANY DIDN'T HAVE ANY PROBLEM PAYING THAT TO MR. TAYLOR. ALL RIGHT. ON THE DUTY TO ADVISE, WE HAVE TALKED A LOT ABOUT WHETHER YOU HAVE A DUTY TO COMMUNICATE SETTLEMENT OFFERS, AND IN GUTIERREZ, WHICH WE HAVE ALSO CITED FOR CONFLICT, THIS COURT SAID THAT THE INSURANCE COMPANY HAS A DUTY TO COMMUNICATE SETTLEMENT OPPORTUNITIES, AND WE RESPECTFULLY SUBMIT THAT THE INSURED OUGHT TO BE ABLE TO DECIDE FOR HIMSELF WHETHER IT IS A VALID SETTLEMENT OPPORTUNITY, BUT MOREOVER, THE INSURANCE COMPANY HAS A DUTY TO NOTIFY THE INSURED ABOUT THE POSSIBILITY OF AN EXCESS JUDGMENT AND GIVE HIM SOME ADVICE ABOUT HOW TO AVOID IT, AND ACCORDING TO THE SHAH CASE, WHICH THIS COURT DECIDED IN 1938, THAT DUTY ARISES NOT WHEN THERE IS A SETTLEMENT OFFER BUT AS SOON AS THE INSURANCE COMPANY HAS REASON TO KNOW THAT IT IS POSSIBLY AN EXCESS CASE, AND IN THIS CASE, THAT HAPPENED ON APRIL 30, THREE DAYS BEFORE THE SETTLEMENT OFFER, AND THAT IS THE POINT IN TIME THAT INFINITY KNEW THAT LIABILITY, AND THIS IS A QUOTE FROM THE RECORD, WAS 100 PERCENT. THE DRIVER WAS DRUNK. THE DAMAGES WERE HUGE.

YOU ARE GOING WELL OVER YOUR TIME, BUT I DO WANT TO, WHY ISN'T THE CASE WHERE THE COURT SHOULD RULE, AS A MATTER OF LAW, THAT THE INSURANCE COMPANY DID ACCEPT THE OFFER AND DID ALL THAT WAS REASONABLY POSSIBLE TO HAVE THAT EXECUTED? IN OTHER WORDS JUST RESPOND TO THAT BRIEFLY. DIDN'T THE INSURANCE COMPANY, IN ESSENCE, SAY YOU GOT IT, AND WE WILL ASSIST YOU NOW, IN DOING ALL THE ADMINISTRATIVE THING THAT IS HAVE TO BE DONE?

AND LET ME, WITH THE COURT'S INDULGENCE, LET ME QUOTE ONE SENTENCE FROM THE TRIAL JUDGE. HE SAID, WELL DID NOT INFINITY ASSUME SOME OBLIGATION FOR AFFECTING THAT, AND THEN DROP THE BALL? AND THAT IS EXACTLY, YOUR HONOR, WHAT THEY DID. THEY DID MAKE SOME DEGREES, BUT THEN THEY DROPPED THE BALL. THEY DIDN'T GET THE GUARDIANSHIP

ESTABLISHED. THEY DIDN'T FOLLOW-UP WITH MR. TAYLOR AS THEY HAD PROMISED ON THE ESTATE. THEY DIDN'T GET AN EXTENSION OF TIME. THEY DIDN'T DEPOSIT THE MONEY INTO THEES ESCROW ACCOUNT. THEY DIDN'T HAVE ANY KIND OF DIARY SYSTEM. THEY DIDN'T HAVE ANY CLAIMS PROCEDURES IN EFFECT FOR HANDLING BIG CLAIMS, SO THAT WAS A JURY QUESTION IN OUR OPINION.

CHIEF JUSTICE: ALL RIGHT. THANK YOU ALL VERY MUCH. THE COURT IS GOING TO TAKE ITS MORNING 15-MINUTE RECESS BEFORE HEARING THE NEXT CASE. WE WILL BE IN RECESS FOR 15 MINUTES.

MARSHAL: PLEASE RISE.