Sally Sarkis v. Allstate Insurance Co.

CHIEF JUSTICE: GOOD MORNING.

MARSHAL: LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE. COUNSEL IS READY TO GO ON THE FIRST CASE, SO WE WILL PROCEED RIGHT TO THE TOP OF THE DOCKET, WITH THE ANNOUNCEMENT THAT JUSTICE CANTERO IS RECUSED ON THIS FIRST CASE, BUT HE WILL RETURN TO THE BENCH, AND WE WILL HEAR ARGUMENT ON THE SECOND CASE IMMEDIATELY AFTER THE CONCLUSION OF THE ARGUMENT ON THIS CASE. YOU ARE READY TO GO? YOU MAY PROCEED. GOOD MORNING.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I AM JULIE LITTKY-REUBIN, AND I AM HERE ON BEHALF OF THE PLAINTIFF PETITIONER SALLY SARKIS. WE ARE HERE TO ASK THIS COURT TO QUASH THE DECISION BELOW AND TO FOLLOW THE PRECEDENT SET INITIALLY BY THE FOURTH DISTRICT AND FOLLOWED BY THE FIRST AND SECOND DISTRICTS, WHICH ALLOWS THE COMPUTATION OF A CONTINGENCY FEE RISK MULTIPLIER, WHEN COMPUTING A REASONABLE ATTORNEYS FEE UNDER THE OFFER-OF-JUDGMENT STATUTE. THERE ARE FOUR REASONS WHY WE ARE HERE ADVOCATING THIS POSITION TODAY. FIRST, BECAUSE THE PLAIN LANGUAGE OF THIS STATUTE ALLOWS --

WOULD YOU, HOPEFULLY YOU HAVE HAD AN OPPORTUNITY TO READ JUDGE ALTER BURN'S CONCURRING OPINION IN THE CASE THAT CAME OUT LAST FRIDAY AND WAS CIRCULATED AS ADDITIONAL AUTHORITY HERE. HE MAKES, TAKES A POSITION IN THIS, THAT A REASON FOR, THAT THIS COURT SAID IN QUANSTRUM FOR THE MULTIPLIER, THE BEDROCK REASON IS SO THAT ATTORNEYS WILL BE ATTRACTED TO TAKING CASES. DO YOU AGREE WITH THAT?

YES, YOUR HONOR.

THAT IS WHAT QUANSTRUM SAYS.

YES, YOUR HONOR.

NOW, THE SITUATION WITH THIS IS THAT THESE PLAINTIFFS ALREADY HAVE A LAWYER, RIGHT?

YES, YOUR HONOR.

SO WOULD YOU AGREE WITH HIS ANALYSIS OF THE STATUTORY CONSTRUCTION, OR WHAT IS YOUR POSITION ON THAT?

WELL, YOUR HONOR, IT IS MY POSITION THAT THE PLAIN LANGUAGE OF THE STATUTE CLEARLY ALLOWS FOR THE RISK MULTIPLIER, BASED ON WHAT IT SAYS IN PARAGRAPH SIX, REFERRING TO THIS COURT'S GUIDELINES, BUT --

BUT IT DOESN'T USE THE WORD "MULTIPLIER" CORRECT?

CORRECT.

NEITHER TO THE WORD GUIDELINES.

BUT IT REFERS TO THE FEE --

BUT IT DOESN'T USE THE WORD MULTIPLIER.

NO, YOUR HONOR, BUT THAT FACTOR, WHICH IS IN DVORAK, DEALS WITH THE RISK MULTIPLIER AT THE CORE. AT THE TIME THIS LEGISLATION WAS ENACTED, THE RISK MULTIPLIER WAS SOMETHING ALREADY WELL-ESTABLISHED AS FLORIDA LAW. THE ROWE CASE WAS DECIDED IN 1985 AND IT WAS REWRITTEN IN 1990, TO INCORPORATE WITH THE SUPREME COURT GUIDELINES. I DON'T FEEL, AND I WANT TO GET TO THIS, THAT ANY OF THE AUTHORITIES CRIED HAVE ACTUALLY FOUND THAT THE PLAIN LANGUAGE DOES NOT PROVIDE FOR THE MULTIPLIER. WHERE THE CRITICISM HAS COME IN, IN THIS FINDING, AS YOU HAVE ARTICULATED, JUSTICE WELLS, IS THE FINDING AND THE ALTERNATIVE JUSTICE STATUTE ARE SOMEHOW AT CROSS PURPOSES, BECAUSE EVEN THOUGH THE JUDGE THAT IS KIND OF THE PIONEER OF THIS MOVEMENT, HIS OBJECTION TO WHY HE DIDN'T FEEL THE RISK MULTIPLIER APPLIED WAS BASED ON THE FACT THAT HE FELT IT WAS A VIOLATION OF EQUAL PROTECTION AND HE FOUND IT WAS CROSS PURPOSE --

WHAT I UNDERSTAND JUDGE ALTENBURN CONCLUDED WAS PLAINLY THE INTENT OF THE OFFER-OF-JUDGMENT STATUTE IS TO REDUCE LITIGATION BY SETTLEMENT, CORRECT?

ABSOLUTELY.

AND THE INTENT OF THE MULTIPLIER IS TO ATTRACT LAWYERS, SO THAT THERE WILL BE LITIGATION. ISN'T THAT CORRECT?

WELL, THAT IS WHAT JUDGE ALTENBURN SAYS. THE PURPOSE OF THE MULTIPLIER, I DON'T THINK NECESSARILY AS HE ARTICULATES, IS TO ENCOURAGE LITIGATION. IT IS TO ENCOURAGE ACCESS TO THE COURTS. IT IS TO ENCOURAGE PEOPLE WHO HAVE MERITORIOUS CLAIMS AND CAN'T AFFORD TO BRING THEM, TO BE ABLE TO FIND AND ATTRACT COMPETENT COUNSEL. THE REASON WHY I DO NOT BELIEVE THAT THIS CONTINGENCY FEE RISK MULTIPLIER AND THE OFFER-OF-JUDGMENT STATUTE ARE AT CROSS PURPOSES, IS BECAUSE THEIR AIMS ARE ENTIRELY CONSISTENT. THE RISK MULTIPLIER ALLOWS AN ATTORNEY TO GET AN ATTORNEYS FEE AWARD, WHEN HE OR SHE TAKES A CASE ON A CONGRESSING ITENCY -- ON A CONTINGENCY FEE, WHICH AT THE OUTSET, WHILE MERITORIOUS, MAY NOT BE IN THE ECONOMIC BEST INTEREST OF THAT ATTORNEY TO TAKE. IT IS WELL-ESTABLISHED AND NO PRINCIPLE CAN DENY THAT IF YOU ARE MAKING A LIVING ON CONTINGENCY FEE WORK, YOU CAN'T AFFORD TO TAKE A CASE THAT IS NOT LIABLE TO GET YOU A CONTINGENCY RISK FEE. WHEN A CASE HAS MERIT BUT MAYBE NOT THE GREATEST CASEK NO, MA'AMCALLY, WE WANT LAWYERS TO TAKE IT. BELL WAS RECENTLY ARTICULATED IN 1999. THIS COURT REITERATED THE CONCEPT THAT THE MULTIPLIER CERTAINLY APPLIED IN CONTRACT AND TORT CASES. YOU DON'T NEED --

THE QUESTION, REALLY, COMES, IS AT THE POINT WHEN THE OFFER-OF-JUDGMENT STATUTE COMES INTO PLAY, THE PLAINTIFF HAS ALREADY PRETTY MUCH WON THE CASE, WON A PART OF HIS POSITION, ANYWAY, AND THE ATTORNEY IS GOING TO GET PAID SOMETHING, SO WHY, AT THAT POINT, DO YOU NEED TO DEAL WITH A MULTIPLIER?

BECAUSE THE MULTIPLIER, YOUR HONOR, REALLY COMES INTO PLAY LONG BEFORE THE OFFER OF JUDGMENT. AS THE FOURTH DISTRICT JUST POINTED OUT IN ISLAND HOPERS, THE OFFER OF JUDGMENT HAS BECOME COMMONPLACE IN LITIGATION, JUST AS WE ARE SURE THAT LITIGANTS WILL FILE REQUESTS TO PRODUCE, REQUESTS FOR ADMISSIONS, TAKE DEPOSITIONS. ATTORNEYS LITIGATING THESE CASES, ESPECIALLY THESE ALLSTATE CASES, WHICH THE FIFTH DISTRICT REALLY MADE NO BONES ABOUT, ESPECIALLY THESE CASES, ATTORNEYS AT THE OUTSET ENVISIONED THAT THEY MAY HAVE AN OPPORTUNITY TO ULTIMATELY RECOVER PROPOSAL FOR SETTLEMENT, TO RECOVER ATTORNEYS FEES.

THAT IS NOT THE PURPOSE OF THIS STATUTE THOUGH. I MEAN, THIS STATUTE IS TO ENCOURAGE SETTLEMENT, AND THE FACT THAT LAWYERS ARE GOING TO HAVE SOME SPECULATIVE IDEA THAT THEY ARE GOING TO STEP IN AND MAKE AN OFFER OF JUDGMENT AND GET 25 PERCENT MORE, THAT IS NOT THE PURPOSE OF THE STATUTE, IS IT?

THAT IS NOT THE PURPOSE OF THE OFFER OF JUDGMENT BUT THAT IS THE PURPOSE OF THE MULTIPLIER, AND THE OFFER OF JUDGMENT, BACK TO JUSTICE WINS'S QUESTION, IT IS NOT INCONSISTENT OR IN COMPATIBLE WITH THAT. ONCE THE ATTORNEY IS LITIGATING THE CASE AND TAKES SOME DEPOSITIONS AND DOES SOME DISCOVERY AND SEES WHAT THE CASE IS WORTH, THEN THAT ATTORNEY HAS THE OPPORTUNITY TO MAKE A REASONABLE SETTLEMENT OFFER, AND AT THAT POINT IN TIME, THEY, THEN, FILE THE PROPOSAL FOR SETTLEMENT WITH THE VERY REAL POSSIBILITY THAT THE DEFENDANT WILL ACCEPT IT. IN THIS CASE, ALLSTATE HAD THE 30 DAYS PROVIDED BY THE STATUTE, TO ACCEPT $10,000. MR. MOLL TEAR'S FEE WOULD HAVE BEEN $4,000. THE COST WOULD HAVE COME OUT OF THAT, BUT THE FACT THAT AT THE OUTSET AN ATTORNEY HAS THIS POSSIBILITY THAT HE OR SHE MIGHT GET A MULTIPLIER AND THEREFORE WILL REPRESENT A CLIENT, AND THE FACT THAT LATER ON HE, THEN, ADVISES THE CLIENT, LOOK, YOU SHOULD PROBABLY OFFER TO SETTLE THIS CASE FOR $10,000. IF WE DON'T, THEN WE WILL HAVE A CHANCE --

ONCE THE OFFER OF JUDGMENT IS MADE, THERE IS NO RISK OF NONPAYMENT ANY LONGER. ISN'T THAT RIGHT?

NO, YOUR HONOR, BECAUSE HE COULD VERY WELL LOSE.

IF HE TURNS DOWN THE OFFER OF JUDGMENT, BUT IF HE ACCEPTS THE OFFER, HE IS GOING TO GET PAID ON THE CONTINGENCY AMOUNT.

IF HE ACCEPTS THE OFFER, HE GETS PAID THE CONTINGENT AMOUNT. IF HE GETS $11,000 ON A $10,000 PROPOSAL FOR SETTLEMENT, HE DOESN'T GET HIS FEES AT ALL. HE GETS 40 PERCENT OF THE ELEVEN, HE DOESN'T BEAT -- HE DOESN'T MEET OFFER OF JUDGMENT TO ENTITLE HIM TO ATTORNEYS FEES, SO THERE IS STILL THE RISK OF OFFER OF JUDGMENT NOT GETTING THE ATTORNEYS FEES.

WHEN YOU DON'T GET YOUR OFFER OF JUDGMENT, YOU DON'T GET YOUR CONTINGENCY AMOUNT. IS THAT WHAT YOU JUST SAID?

IF YOU DON'T GET AN OFFER OF JUDGMENT, YOU DON'T GET THE COURT-AWARDED CONTINGENCY FEE. IF NOT, AFTER OFFER PER STATUTE, YOU ARE STILL HAVING A RISK OF NONPAYMENT THAT YOU MIGHT GET A ZERO OR THAT YOU MIGHT NOT GET YOUR ATTORNEYS FEES AWARDED AT ALL.

IF YOU ARE SUING ALLSTATE, YOU ARE GOING TO GET YOUR ATTORNEYS FEES. UNDER OUR CASE LAW AND UNDER 627.428.

WELL, I BELIEVE, YOUR HONOR, IF IT IS A COVERAGE ISSUE, YOU WOULD GET THE ATTORNEYS FEES. THIS IS AN UNINSURED MOTORIST CLAIM. I DON'T BELIEVE YOU WOULD GET THE ATTORNEYS FEES THERE. WHEN WE LOOK AT THE PLAIN LANGUAGE, AND I DON'T KNOW IF THIS COURT HAS GOTTEN PAST THE PLAIN LANGUAGE ISSUE, BUT EVEN JUDGE ALTENBURN DOESN'T SAY ANYTHING THAT THE PLAIN LANGUAGE OF THE STATUTE AND THE FIFTH DISTRICT DOESN'T SAY ANYTHING THAT THE PLAIN LANGUAGE OF THE STATUTE. IT IS THE HANG-UP OF THE CROSS PURPOSES, BUT IF YOU LOOK AT THE PURPOSE OF WHAT THE MULTIPLIER IS TO PROVIDE ACCESS TO THE COURTS FOR ECONOMICALLY-CHALLENGED PEOPLE, AND IF YOU LOOK AT THE PURPOSE OF THE OFFER-OF-JUDGMENT STATUTE, WHICH IS TO ENCOURAGE SETTLEMENTS, THOSE TWO ARE NOT ANTI-THETICAL. YOU CAN RECEIVE A MULTIPLIER AND STILL ENCOURAGE A REASONABLE

SETTLEMENT.

HOW DOES A DEFENDANT ASSESS WHETHER THE OFFER OF SETTLEMENT IS REASONABLE OR NOT, IF THE DEFENDANT DOES NOT KNOW WHETHER MULTIPLIER IS GOING TO BE APPLIED OR NOT? IN A REGULAR CONTINGENCY FEE, YOU PRETTY MUCH HAVE AN IDEA OF WHAT THE CONTINGENCY FEE IS GOING TO BE, CORRECT?

CORRECT, AND IT IS NO MATTER OF CONTEST WHAT THE FEE IS GOING TO BE, BECAUSE THAT IS BETWEEN THE PLAINTIFF AND THE ATTORNEY, BUT IN THE SETTING OF THE OFFER OF JUDGMENT, IF WE ARE ALLOWED, IF THIS COURT FINDS THAT THE RISK MULTIPLIER IS A FACTOR, THEN THE DEFENDANT OBVIOUSLY HAS TO ASSUME THAT KIND OF A RISK AND KNOW THAT THAT IS A POSSIBILITY. NOW, THIS IS NOT TO SAY THAT WE ARE AT ALL ADVOCATING THAT THE CONTINGENCY FEE RISK MULTIPLIER SHOULD APPLY IN EVERY CASE INVOLVING A SUCCESSFUL OFFER OF JUDGMENT. ABSOLUTELY NOT. PART OF THE OFFER-OF-JUDGMENT STATUTE GIVES THE TRIAL COURT GREAT DISCRETION TO EVALUATE AND, A MILLION DIFFERENT WEAPONS IN HIS ARSENAL, TO EVALUATE WHETHER OR NOT, WHAT IS A REASONABLE FEE AND WHETHER A MULTIPLIER SHOULD BE ASSERTED, AWARDED.

NORMALLY THE RISK MULTIPLIER LOOSE AT THE CHANCES OF SUCCESS AT THE OUTSET OF THE LITIGATION. IN CASES THAT HAVE LOOKED AT WHETHER A RISK MULTIPLIER SHOULD BE APPLIED, DO, DOES THE COURT LOOK AT THE LIKELIHOOD OF SUCCESS AT THE TIME THE OFFER OF JUDGMENT IS MADE OR AT THE OUTSET OF LITIGATION OR AT WHAT POINT IN TIME?

WELL, YOUR HONOR, IT IS AT THE OUTSET OF LITIGATION, AND THEN THE INTERESTING THING ABOUT THE OFFER-OF-JUDGMENT STATUTE --

ISN'T THAT WHERE MAYBE THE PROBLEM IS, AS FAR AS IN THE APPLICATION OF THE RISK MULTIPLIER. MAYBE YOU COULD SORT OF BRING IT BACK TO THIS CASE, AS TO WHETHER THERE IS ANY CLAIM OR WHETHER, HOW THIS WAS EITHER FAIRLY OR UNFAIRLY APPLIED AGAINST ALLSTATE IN THIS CASE, IN DETERMINING A REASONABLE FEE, AND I WOULD LIKE YOU TO SPECIFICALLY ADDRESS THIS IDEA THAT, IF A CASE IS HARD, YOU KNOW, DISPUTED LIABILITY, THAT THERE IS LANGUAGE IN DVORAK THAT TALKS ABOUT THE FEE SHOULD BE ADJUSTED DOWNWARD, BECAUSE THE DEFENDANT MAY HAVE ACTED REASONABLY IN REJECTING THE OFFER, WHEREAS A CONTINGENCY MULTIPLIER GOES UP, THE HARDER THE CASE IS, AND COULD YOU SORT OF, HOW DOES, IN REAL LIFE HOW DOES THAT WORK AND HOW DID IT WORK IN THIS CASE?

WELL, YOUR HONOR, AT THE OUTSET, THE ATTORNEY SITS DOWN AND EVALUATES WHAT THE CLAIM LOOKS LIKE WHEN THE PLAINTIFF COMES IN THE DOOR. IN THIS CASE THE ATTORNEY KNEW HE HAD A $100,000 POLICY. HE CERTAINLY KNEW HIS CLIENTS CLAIMS WERE NOT GOING TO BE WORTH $100,000, SO HE KNEW WITH ALL STATE ON THE OTHER SIDE HE WAS GOING TO HAVE TO LITIGATE THIS CASE AND HE ALSO KNEW THE TORT CASE HAD A $20,000 LIABILITY POLICY, WHICH HE KNEW WOULD BE TENDERED, AND WITH THE CLIENT'S $20,000 IN PIP AND MED PAY, HE KNEW THIS WAS GOING TO START OUT AS A $35,000 DEFICIT SITUATION BEFORE HE EVEN GOT INTO LITIGATION, SO HE TAKES ALL OF THIS INTO ACCOUNT AND SAYS TO THE CLIENT YOU KNOW, I WANT TO BE ABLE TO REPRESENT YOU AND YOUR CASE IS NOT WORTH MORE THAN $10 OR $15,000 MORE THAN THIS, IS MY ESTIMATION, BUT WITH THE POSSIBILITY OF A MULTIPLIER, I AM GOING TO TAKE YOUR CASE AND WITHOUT IT, I CAN'T TAKE IT. HE STARTS TO LITIGATE THE CASE AND DOES HIS DISCOVERY AND REALIZES THAT $10,000 WOULD BE A FAIR AMOUNT. HE THEN MAKES THAT AS A PROPOSAL FOR SETTLEMENT. ALLSTATE, I BELIEVE, MADE ONE FOR $8,000. THEY THEN GO TO THE JURY. THE JURY IS THE FINAL ARBITER OF WHAT A REASONABLE SETTLEMENT WOULD HAVE BEEN. THE JURY IN THAT CASE SAYS YOU GUYS WERE BOTH WRONG. THIS CASE THE NET EFFECT OF IT WAS REALLY WORTH ABOUT $80,000, SO NOW MR. MOLL HE TEAR, WHO AFFORDED MISS SARKIS THE OPPORTUNITY AND WITHOUT THE PROMISE OF A

MULTIPLIER, NOW HE GETS TO COLLECT ON AN OFFER OF JUDGMENT AND ASKED THE JUDGE, YOUR HONOR, BECAUSE I HAD SUCH A HARD CASE AT THE OUTSET, I WOULD LIKE YOU TO CONSIDER MY MULTIPLIER. NOW, THE JUDGE HAS IT WELL WITHIN HIS RIGHTS, UNDER THE CURRENT STATE OF THE LAW EVERYWHERE BUT IN THE FIFTH DISTRICT, TO SAY I AM GOING TO CONSIDER YOUR MULTIPLIER, I AM NOT GOING TO AWARD IT OR I AM GOING TO AWARD IT, BUT THE FACT IS THAT, ONCE THE OFFER IS MADE, THERE IS A WHOLE NEW SET OF FACTORS THAT COME INTO PLAY THAT THE JUDGE MAY CONSIDER, AND IN SUBPARAGRAPH 7, SUBPARAGRAPH B OF SECTION 768.79, THE FACTOR IS THE MERIT OF THIS CLAIM, SO THEN THE TRIAL COURT IS ALLOWED TO LOOK AT WHAT THE ATTORNEYS FEE PICTURE WAS AT THE TIME THE PROPOSAL WAS MADE. IN THIS CASE, THE JUDGE OBVIOUSLY FELT THAT $10,000 WAS A FAIR PROPOSAL. IT WAS UNREASONABLY REJECTED AND BECAUSE MR. MOLL TEAR HAD MADE A REASONABLE OFFER OF SETTLEMENT, HE WAS AWARD THE FEES IN THIS CASE.

WHAT DOES, IT GOES TO THE ISSUE OF WHAT DOES IT LOOK LIKE AT THE OUTSET, THAT BECAUSE OF THE FACTOR OF THIS BEING A CONTINGENCY, WHERE THERE WAS A RISK OF NONPAYMENT, THAT THAT GOES TO, THAT IS THE CONTINGENT NATURE GOES TO WHAT A REASONABLE HOURLY RATE WAS, SO THAT IF THERE WAS TESTIMONY THAT, IN A SITUATION WHERE YOU HAVE A CONTINGENT FEE, THE HOURLY RATE IS, REALLY, FAIR HOURLY RATE SHOULD BE MORE THAN WHAT WOULD BE NORMAL, IF THERE WAS A PAYING CLIENT. I MEAN, BECAUSE ISN'T THAT WHAT THE RULES REGULATING THE FLORIDA BAR AND THE FACTOR OF CONTINGENT VERSUS FIXED, REALLY, GOES TO, AND NOT A MULTIPLIER, BUT AS TO WHETHER THE HOURLY FEE SHOULD BE ADJUSTED UPWARD BECAUSE OF THE CONTINGENT NATURE OF THE CLAIM?

YES, YOUR HONOR. THAT IS CERTAINLY A BIG FUNDAMENTAL ASPECT OF HOW A REASONABLE FEE IS DETERMINED, BUT THE IDEA THAT, WHEN AN ATTORNEY AT THE OUTSET HAS SOME NOTION THAT HE OR SHE MAY GET THIS RISK MULTIPLIER AND THEREFORE TAKES THE CASE, THAT IS STILL NOT AN INCOMPATIBLE CONCEPT WITH THE IDEA THAT A PROPOSAL FOR SETTLEMENT MAY ULTIMATELY BE FILED. I WANT TO TOUCH ON SOME POINTS BECAUSE I AM RUNNING OUT OF TIME. AS FAR AS EQUAL PROTECTION GOES, THIS EQUALLY APPLIES TO PLAINTIFFS AND DEFENDANTS. IF A DEFENDANT WANTS TO TAKE ON A CONTINGENCY FEE AND SOMEHOW HAVE A BIG BONUS WHEN THE CASE IS RESOLVED TO THE CLIENT'S SATISFACTION, THERE IS NOTHING PROHIBITING THAT AND SO FAR THE JUDGE DID NOT FIND AN EQUAL PROTECTION PROBLEM WITH THIS. IT MEETS THE PLAIN LANGUAGE OF THE STATUTE MEETS CONSTITUTIONAL MUSTER. ADDITIONALLY, IF THIS COURT FINDS THAT THE MULTIPLIER APPLIES, THE HE HAVE IN THIS CASE CERTAINLY SUPPORTED THE A WARD OF THE MULTIPLIER, UNDER ALL OF THESE FACTS WITH A $100,000 COVERAGE, SOFT TISSUE INJURIES, THE PREEXISTING CONDITIONS AND THE PRIOR ACCIDENTS, ALL OF THE EVIDENCE WAS MET. IF THE COURT HAS NO MORE QUESTIONS AT THIS POINT TIME, I WOULD LIKE TO SAVE THE REST OF MY TIME FOR REBUTTAL. THANK YOU.

CHIEF JUSTICE: GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS CHUCK HALL. I AM AN ATTORNEY WITH FOWLER WHITE BOGGS AND BANKER. ALONG WITH RICHARD SHERMAN, I REPRESENT ALLSTATE INSURANCE COMPANY, THE RESPONDENT. WITH THE AMICUS SUPPORT OF THE FLORIDA CHAMBER OF COMMERCE, REPRESENTED BY ROY YOUNG AND THE FLORIDA DEFENSE LAWYERS, REPRESENTED BY MISS WENDY LOOMISH, WE WOULD ASK YOU AFFIRM THE FIFTH DISTRICT CASE. BEFORE I GO MUCH FURTHER, LET ME APOLOGIZE FOR MY VOICE. I HAVE BEEN HACKING AND WHEEZING ALL WEEKEND AND WILL KEEP MY DISTANCE AS MUCH AS POSSIBLE TODAY.

PLAIN LANGUAGE BEFORE -- PLANK LANGUAGE OF THE STATUTE. WOULD YOU DEAL WITH THAT ARGUMENT.

PLAIN LANGUAGE OF THE STATUTE. WE DIDN'T HEAR IT FROM THE BRIEFS OF THE PETITIONER. WE DIDN'T HEAR IT DURING THEIR ARC UNIT, BUT THE OFFER OF JUDGMENT IS A -- DURING THEIR ARGUMENT, BUT THE OFFER OF JUDGMENT IS A PENAL STATUTE, DESIGNED TO DETERMINE SOMETHING THAT IS DETRIMENTAL FOR UNNECESSARILY GOING TO THE COURTS.

I THOUGHT IT WAS OFFER OF SETTLEMENT.

IT IS DESIGNED TO PENALIZE APPROPRIATE DEFENDANTS WHEN THERE ARE OFFERS TO SETTLE. THERE ARE NOTES THAT, BECAUSE IT IS A PENAL STATUTE, IT MUST BE NARROWLY CONSTRUED AND TRADITIONAL RULES OF CONSTRUCTION SAY THAT, COURTS CANNOT IMPOSE SANCTIONS, THAT THE LEGISLATURE DID NOT AUTHORIZE. SO WITH THAT SCOPE OF ANALYSIS IN PLACE, WE LOOK AT THE LANGUAGE OF THE STATUTE. THE LEGISLATURE DID NOT SAY TRIAL COURTS CAN APPLY CONTINGENCY RISK MULTIPLIERS.

BUT HAVE THEY EVER, ANY STATUTE THAT HAS BEEN INTERPRETED TO ALLOW A MULTIPLIER, HAS ANY STATUTE EVER USED THE MAGIC WORDS "MULTIPLIER"?

NO, YOUR HONOR, THEY HAVE NOT, BUT TO MY KNOWLEDGE, THIS IS THE ONLY STATUTE THAT IS PENAL INNATE. THE OTHER STATUTES -- IN NATURE. THE OTHER STATUTES --

I GUESS THAT IS MAYBE TRYING TO ACCEPT WHAT THE PURPOSE OF THE STATUTE IS. I HAVE ALWAYS THOUGHT THE IDEA WAS TO TRY TO SEE WHETHER WE COULD PROMOTE SETTLEMENT OF CASES. I MEAN, MY PERSONAL VIEW ON THIS STATUTE IS THAT IT HAS CAUSED MORE LITIGATION THAN IT HAS PROMOTED SETTLEMENT, BUT BE THAT AS IT MAY, ISN'T THAT DAVE RENT ISSUE THAN WHETHER IT IS A PENAL STATUTE. IT IS A STATUTE THAT SAYS LET'S PROMOTE SETTLEMENT. LET'S LET BOTH PLAINTIFFS AND DEFENDANTS LOOK AT AND OFFER, AT THE TIME IT IS MADE, AND HAVE TO GO BACK TO THEIR CLIENT AND SAY TO THEIR CLIENT, AT THE TIME THAT OFFER IS MADE, YOU KNOW, YOU CAN EITHER ACCEPT THIS AMOUNT, AND WHEN A PLAINTIFF IS SITTING THERE, AND AS A DEFENDANT MAKES AN OFFER OF $1,000 ON A CASE THAT IS MAYBE WORTH $100, THEY SAY YOU KNOW, IF WE LOSE, YOU ARE GOING TO HAVE TO PAY THE ATTORNEYS FEES, SO ISN'T THE IDEA THAT EACH CLIENT ASSESSES WHAT IS THE POSSIBILITY OF THE ATTORNEYS FEES BEING ASSESSED AT THE TIME THAT THE OFFER IS MADE?

I AGREE WITH THAT, YOUR HONOR. THE POINT OF THE PENAL NATURE OF THE STATUTE, I GUESS, IS HOW YOU CHARACTERIZE THE CARROT AND THE STICK. AND IN TRADITIONAL STATUTORY CONSTRUCTION ANALYSIS, PENAL STATUTES ARE CONSTRUED NARROWLY.

BUT DIDN'T WE EVEN CROSS THE BRIDGE OF WHETHER THERE IS REALLY A PENAL STATUTE IN DVORAK, WHEN THE ISSUE IS WHETHER THERE SHOULD BE ENTITLEMENT, IF SOMEBODY ACTED REASONABLY, AND THE MAJORITY AT THAT POINT SAID IT DOESN'T GO TO ENTITLEMENT. IT IS A PURE MATHEMATICAL CALCULATION.

MY READING OF THAT CASE DOES NOT DECLARE THIS TO BE A REMEDIAL STATUTE OR SOMETHING THAT SHOULD BE BROADLY CONSTRUED TO PROMOTE SOME DESIGNATED BENEFIT. MY READING OF THAT CASE IS THAT THE LEGISLATURE HAS CREATED A PENALTY. IN FACT, THEY USED THAT WORD IN THE STATUTE, ITSELF. I THINK THEY CALL

IN ADJUSTING THE FEE UPWARD OR DOWNWARD, WHAT ARE THE RELEVANT CRITERIA ON THAT?

THE LEGISLATURE GAVE US EXCELLENT GUIDANCE ON THAT REGARD. THEY POINTED OUT THAT YOU CAN ADJUST IT, BASED UPON THE RELATIVE LACK OF MERIT IN A CASE. YOU CAN ADJUST IT BY THE NUMBER OF OFFERS MADE. THE LEVEL OF DISCLOSURE, I THINK, WHICH BOTHERED JUSTICE BELL. HOW DO YOU KNOW, BASED UPON WHICH WAS DISCLOSED AT THAT TIME?

WHAT ARE YOU ADJUSTING? THE STATUTE DOESN'T ACTUALLY DELINEATE THE FACTORS. YOU

ARE CONSIDERING GETTING TO THE MONETARY AMOUNT, DOESN'T IT? THEN IT REFERS YOU OVER TO THE RULES OF THIS COURT, WHICH --

WE BELIEVE WHAT YOU ARE ADJUSTING, YOUR HONOR, IS THE AMOUNT OF APPROPRIATE TIME AND THE RATE, AND I THINK JUSTICE PARIENTE, YOU CAME UP WITH AN EXCELLENT QUESTION, AND THAT IS JUDGES, MENTALLY, INCREASE THE HOURLY RATE PAID TO ATTORNEYS WHO ARE WORKING ON CONTINGENCY FEE CASES. THEY DON'T ATTEMPT TO DIVINE WHAT CORPORATE AMERICA, WHO PAYS HOURLY, IS PAYING, BECAUSE THOSE RATES ARE NOT $350, LIKE THE TRIAL JUDGE AWARDED HERE, AND SO A TRIAL JUDGE DOES HAVE GREAT FLEXIBILITY UNDER THE STATUTE THE LEGISLATURE HAS CRAFTED, TO PERHAPS DEEM THIS ATTORNEY'S EFFORTS WORTH $4 ON 0 AN HOUR OR $300. -- $400 AN HOUR OR $300.

WOULD YOU BE HERE TODAY IF WE HAD THIS ISSUE, INSTEAD OF CALLING THIS A CONTINGENCY RISK MULTIPLIER, THE JUDGE SAID THIS IS A CONTINGENT CASE AT THE TIME THIS LAWYER TOOK THE CASE. THEY KNEW ALLSTATE HAD A FIRM POLICY OF NOT SETTLING, AND THEREFORE A REASONABLE HOURLY FEE WOULD BE $500?

IF THERE WAS EVIDENCE THAT JUSTIFIED AN HOURLY RATE [TECHNICAL DIFFICULTIES] INDICATED THAT IT HAS TO BE APPLIED. I MISSPOKE. WHAT I SAID IS --

BE CONSIDERED.

WHAT I SAID WAS THAT PRECEDENT FROM THIS COURT SAYS THAT, AS CASES GET MORE DIFFICULT, THOSE ARE THE CASES WHERE IT IS APPROPRIATE FOR THE COURT TO UTILIZE THE HIGHER MULTIPLIERS.

WHY WOULD IT NOT, THEN, APPLYING THE OTHER ELEMENTS OF THE STATUTE, AT SOME POINT LEVEL OUT? BECAUSE THESE ARE JUST FACTORS THAT ARE ALL BEING CONSIDERED, ACCORDING TO GUIDELINES THAT ARE SET FORTH, AND THERE MAY BE CASES, AND WHERE IT DOESN'T APPLY AT ALL, BECAUSE THE RELEVANT MARKET CRITERIA MAY NOT REQUIRE THE APPLICATION. DOES THAT MEAN YOU CAN NEVER DO IT, IF JUST BECAUSE MAYBE SOMETIMES IT APPLIES AND SOMETIMES IT DOESN'T?

I THINK THERE ARE TWO QUESTIONS THERE AND LET ME GO TO THE FIRST ONE.

PROBABLY SO.

THE FIRST ONE IS, IN THE SITUATION WHERE IT IS A DIFFICULT CASE, PRECEDENT FROM THIS AND OTHER COURTS WOULD REQUIRE THE JUDGE TO STRONGLY CONSIDER USING A HIGH MULTIPLIER. BUT UNDER THE SAME CRITERIA, IT WOULD REQUIRE THE JUDGE TO REDUCE THE FEE, SO YOU HAVE ONE SET OF AUTHORITY TELLING HIM TO RAISE IT AND ONE SAYING TO LOWER IT. AND THAT IS CONFLICT. THAT IS NOT WHAT --

DOES THAT NOT, JUST, THEN, GIVE THE TRIAL JUDGE THAT DISCRETION AND BASED UPON ALL OF THE FACTS, TO MAKE THOSE FACTUAL DECISIONS AND COME TO A CONCLUSION, AND IF THERE IS NO SUBSTANTIAL EVIDENCE, IT WOULD LEAVE IT IN THE HANDS OF THE TRIAL JUDGE, NOT THE PLAINTIFF OR THE DEFENDANT. IS THAT A BAD RESULT?

THE LEGISLATURE CREATED A SITUATION, UNDER THE STATUTE, WHERE THE TRIAL JUDGE IS DETERMINING THE PENALTY TO BE IMPOSEED ON A LOSING PARTY AND GAVE IT VERY CLEAR CITE YEAR YEAH AS TO WHEN TO -- CRITERIA AS TO WHEN TO LOWER IT, IN CASES SO THAT THE PUNISHMENT IS NOT TOO SEVERE. REMEMBER WE ARE DISCUSSING, HERE, PRESSUREURING A LITIGANT TO FOREGO THEIR CONSTITUTIONAL RIGHT TO HAVE THE JUDICIAL RESOLUTION OF THEIR DISPUTE.

LET ME GO BACK TO THIS. SO GIVEN THAT, AND YOU HAVE HERE, YOU HAVE A CASE WITH ALL STATE, WHERE THE FIFTH DISTRICT ALL AGREES THAT THEY HAD, I DON'T KNOW WHERE IT CAME FROM THIS -- CAME FROM IN THE RECORD BUT A FIRM POLICY OF NOT SETTLING THEIR CASE. YOU HAVE A LAWYER REPRESENTING ALLSTATE. THERE IS A $100,000 POLICY. THIS GUY IS OFFERING TO SETTLE FOR $10,000. YOU GO BACK TO YOUR CLIENT AND SAY, YOU KNOW, THERE HAS NOW BEEN OFFER OF JUDGMENT. NOW YOU ARE GOING TO BE FACED WITH SUBSTANTIAL ATTORNEYS FEES. IN FACT, YOU ARE GOING TO BE FACED WITH THE POSSIBILITY OF TWICE WHAT AN HOURLY RATE MIGHT BE. WHY ISN'T THAT A TOOL IN PROMOTING SETTLEMENT, TO SAY NEXT TIME, THAT CASE MAYBE, THAT IS WORTH $10,000 OR MORE, SHOULD BE SETTLED, JUST AS IF ON THE OTHER SIDE, ALLSTATE COULD HAVE GONE AHEAD AND SAID YOU KNOW WHAT? THIS CASE IS LIKELY TO COME UP WITH A ZERO BECAUSE OF THESE SET-OFFS. WE ARE GOING TO LOW-BALL IT, AND WE ARE GOING TO MAKE A $250 ON OFFER, AND THEN THIS -- WE ARE GOING TO MAKE A $2500 OFFER, AND THEN THE PLAINTIFF'S ATTORNEY GOES BACK TO SAY $2500 ISN'T MUCH. NOT ONLY ARE YOU GOING TO LOSE BUT YOU ARE GOING TO END UP LOSING ALL YOUR MONEY, BECAUSE THE ATTORNEYS FEE IS GOING TO BE SUBSTANTIAL. IT IS GOING TO WIPE YOU OUT.

LET ME SAY THAT ALLSTATE DOES NOT HAVE A POLICY NOT TO SETTLE CASES. IN FACT THE DEFENDANT'S OWN EXPERT SAYS THAT HE HAS SETTLED CASES. THAT CAME FROM THE PETITIONER'S BRIEF, THIS "FIRM POLICY", BUT GOING TO YOUR POINT, IF THE, REMEMBER AT COMMON LAW, THERE WAS NO RIGHT TO RECOVER AN ATTORNEYS FEE FROM A LITIGANT IN A CIVIL MATTER LIKE THIS. THE LEGISLATURE CHANGED THAT. IF THEY WANTED TO COMPLETELY CHANGE IT, THEY COULD HAVE PASSED A FEE ENABLING STATUTE, SO THAT ALL UM CLAIMS GET ATTORNEYS FEES. THEY CHOSE ONLY TO PUNISH THOSE DEFENDANTS WHO UNREASONABLY EXERCISE THEIR RIGHT TO HAVE A COURT RESOLVE THEIR DISPUTES, AND IN THOSE CASES, WHERE THE DEFENSE IS VERY GOOD, THEY HAVE SAID IN THEIR CRITERIA, FEES SHOULD BE LOWER, AND THIS COURT HAS RECOGNIZED THAT, AND SO NOW BOOT STRAP MULTIPLIER IN CONTINGENCY ASPECT OF THE BAR RULES, THE JUDGE CONTINUING TO EVALUATE PROPOSALS, IN THIS CASE THE DEFENDANT SUBJECTED TO WHAT I MIGHT CALL ATTORNEY FEE MULTIPLIER BLACKMAIL. WE TAKE THIS DEAL OR BECAUSE WE HAVE SUCH A REALLY GOOD DEFENSE IN THIS CASE, A JUDGE MIGHT AWARD THIS ATTORNEY TWO AND-A-HALF TIMES A FAIR FEE!

AND WHAT IS ON THE OTHER SIDE, WHEN A DEFENSE ATTORNEY WITH THE DEFENDANT'S APPROVAL, MAKES THESE VERY, VERY LOW OFFERS THAT HAVE BEEN APPROVED BY ALL THE APPELLATE COURTS, AS IF THEY ARE ALMOST NOMINAL, PUTS THE PLAINTIFF IN THE SAME EXACT SITUATION?

IT DOESN'T PUT THE PLAINTIFF IN THE SAME SITUATION. A PLAINTIFF AT THAT POINT, CAN SAY I HAVE A WORTHLESS CASE OR ESSENTIALLY WORTHLESS CASE, AND I SHOULD ACCEPT THIS OFFER, OR THEY SHOULD SAY I HAVE A VALID CASE.

I AM TALKING ABOUT THE CASES WITH THE DIFFICULT LIABILITY.

CORRECT.

BUT WHERE THE DAMAGES ARE CATASTROPHIC, AND AN OFFER IS MADE OF, SAY, $5,000. WHAT, I MEAN, IT IS JUST, I GUESS WHAT I WANT TO GET BACK TO IS WE ARE TALKING POLICY, AND WHETHER THE WAY THESE ATTORNEYS FEES ARE AWARDED, IS PROMOTING, AND THAT IS WHAT I WANT TO GET BACK TO, IS PROMOTING SETTLEMENT OR IS IT WORKING AGAINST IT?

I WOULD SUBMIT IT WORKS AGAINST, IT JUDGE, BECAUSE IT CREATES THE DESIRE FOR CLAIMANT'S ATTORNEYS TO ENGAGE IN MULTIPLIER RULEET. I WILL MAKE MY OFFER OF JUDGMENT AT A TIME WHEN THEY DON'T KNOW WHAT IS REALLY GOING TO HAPPEN. I KNOW MY CLIENT IS GOING TO HAVE SURGERY IN A MONTH. THEY DON'T. I WILL TAKE $10,000 TODAY. THEY HAVE SURGERY. THE MULTIPLIER, THE OFFER IS EXPIRED. THE DEFENSE HAS MISSED THE

OPPORTUNITY, AND THE CASE NOW HAS TREMENDOUS VALUE. IS THAT WHAT HAPPENED IN THIS CASE?

THE RECORD DOESN'T DEMONSTRATE THAT IN THIS CASE. WHAT THE RECORD DEMONSTRATES IN THIS CASE IS THAT IT WAS A VERY DIFFICULT CAUSATION CASE, BUT THE JURY FOUND CAUSATION, AND AS A RESULT OF THAT, THE ATTORNEYS FEE AWARD APPROXIMATELY MATCHED THE DAMAGES THAT THE PLAINTIFF WAS ENTITLED TO.

COULD YOU ARTICULATE YOUR EQUAL PROTECTION ARGUMENT?

YES, YOUR HONOR. THE STATUTE, ON ITS FACE, SAYS IT APPLIES TO PLAINTIFFS AND DEFENDANTS. BUT IN ITS USE, IT APPLIES TO THE BENEFIT OF PLAINTIFFS ALMOST EXCLUSIVELY IF NOT EXCLUSIVELY, AND THAT IS BECAUSE OF THE FUNDAMENTAL NATURE OF LITIGATION. A PLAINTIFF, IN LITIGATION, IS SEEKING TO CREATE A LITIGATION FUND, MONEY FROM WHICH THEY WILL PAY THEIR LAWYER AND BE COMPENSATED FOR THEIR DAMAGES. A DEFENDANT TRIES TO KEEP THE STATUS QUO, AND THERE IS NO FUND CREATED, AND SO THERE IS NO EFFECTIVE WAY FOR A DEFENDANT TO USE A CONTINGENT AGREEMENT, BECAUSE IF THE DEFENSE IS SUCCESSFUL, THERE IS NO FUND FOR THAT LAWYER TO GO OUT AND TO UTILIZE TO PAY HIS OR HER FEE. DIFFERENT RULES. DIFFERENT TREATMENT FOR TWO PARTIES TO THE SAME LITIGATION, WITH THE SAME CONCERNS, AND THERE IS NO LOGICAL REASON THAT PLAINTIFFS ATTORNEYS SHOULD BE REWARDED BY A TWO AND-A-HALF TIMES ATTORNEYS FEE MULTIPLIER, AND DEFENDANTS WILL NEVER BENEFIT FROM THAT, SO WHAT IT MEANS IS THE COST OF LITIGATION FOR DEFENDANTS IS GOING TO BE STATISTICALLY HIGHER THAN IT WOULD BE FOR PLAINTIFFS, BECAUSE PLAINTIFFS ARE NOT GOING TO BE SUBJECTED TO THESE LARGER ENHANCED AWARDS, AND WE BELIEVE THAT THAT IS UNFAIR. WE, ALSO, BELIEVE THAT IT AFFECTS ACCESS TO THE COURTS INAPPROPRIATELY, AND I THINK THAT THAT IS PART OF WHAT JUDGE ALTENBURN EXPRESSED IN HIS OPINION. HE, HE SUPPORTED A STATUTORY CONSTRUCTION THAT AVOIDS THESE CONSTITUTIONAL ISSUES. AND WE HAVE SUGGESTED THAT THIS COURT SHOULD DO THE SAME.

ISN'T YOUR ARGUMENT, THOUGH, ON THE CONSTITUTIONAL BASIS, THAT THAT STATUTE, THEN, BECAUSE OF THE DIFFERENCE IN JUST WAY THE FEE AGREEMENTS ARE STRUCTURED, IS ALWAYS THE CASE, EVEN IF IT IS JUST A STRAIGHT CONTINGENCY CONTRACT, YOU ARE GOING TO RUN INTO SITUATIONS WHERE THE RELEVANT CRITERIA, IF YOU READ THE STATUTE, EVEN WITHOUT A MULTIPLIER, IS SOMETHING THAT IS TAKEN INTO ACCOUNT AND MAY PUSH THE HOURLY RATE HIGHER THAN THE DEFENSE LAWYER, SO I MEAN, IT IS FUNDAMENTALLY THE ENTIRE STATUTE, THEN, MUST FALL.

WHAT WE ARE SUGGESTING IS THAT YOU CAN AVOID THAT, BY ENGAGING IN TRADITIONAL STATUTORY CONSTRUCTION. IF YOU DON'T BOOT STRAP THE MULTIPLIER IN, AND YOU JUST USE HOURLY RATES TIMES HOURS THAT WERE APPROPRIATELY EXPANDED -- EXPENDED BECAUSE THE DEFENDANT DIDN'T TERMINATE THE LITIGATION.

SO YOU ARE ARGUING THAT IT IS NOT ONLY THE MULTIPLIER BUT A CONTINGENT FEE CONCEPT.

NO, SIR. I MISSPOKE, IF I SAID THAT. WHAT I AM SAYING IS THAT, IF YOU BOOT STRAP THE MULTIPLIER IN, THEN PLAINTIFFS ARE RECEIVING THOSE AWARDS IN LITIGATION, AND DEFENDANTS ARE NOT.

WELL, THE SAME THING AGAIN, BUT THE SAME THING WOULD BE TRUE OF A CONTINGENT FEE. DEFENSE, FIXED FEE, AND IT IS AT A LOWER HOURLY RATE. CONTINGENT FEE, WE KNOW BY THE GUIDELINES, THAT BECAUSE IT IS THE CONTINGENT NATURE OF IT, THAT YOU MAY ENHANCE SOMEWHAT, SO THAT CREATES, EVEN WITHOUT A MULTIPLIER, THAT CREATES A DIFFERENCE IN AN HOURLY RATE.

BUT IT IS NOT A 250 PERCENT PENALTY. THE MULTIPLIER --

WHAT DIFFERENCE DOES IT MAKE IF IT IS 1 PERCENT OR NO PERCENT, IF IT IS AN EQUAL PROTECTION VIOLATION. IT IS NOT THAT IT TAKES $10,000 AS OPPOSED TO $5,000, IS IT?

IF, IF THE HOUR, IF THE EVIDENCE SUPPORTS HOURLY DIFFERENCES, THEN THAT IS A FACTUAL DISPUTE, BUT BY CREATING A DEVICE THAT ARTIFICIALLY INCREASES ONE SIDE'S FEES, THAT IS WHERE WE FEEL THE PROBLEM IS.

BUT THE CONTINGENT FEE DOES THAT AS WELL AND OUR GUIDELINES, DOES IT NOT? UNDER THE GUIDELINES.

NOT UNLESS THE MULTIPLIER, IF ALL THE JUDGE IS GOING TO DO IS GIVE $350 AN HOUR INSTEAD OF $200 AN HOUR MR. CHIEF JUSTICE

WE ARE GOING TO HAVE TO END ON THAT NOTE. YOUR TIME EXPIRED. WE THANK YOU FOR YOUR ARGUMENT AND RESPONSES TO OUR QUESTIONS.

SURE.

CHIEF JUSTICE: HOW MUCH TIME FOR REBUTTAL?

I THINK THREE MINUTES.

MAY IT PLEASE THE COURT. JUSTICE LEWIS, IN RESPONSE TO YOUR QUESTION, CERTAINLY A CONTINGENCY FEE, WHEN IT IS ULTIMATELY COMPUTED BY THE HOUR, SOMETIMES AN ATTORNEY ENDS UP WITH $900 AN HOUR. SO THAT IS, YES, THAT IS THE EQUAL PROTECTION ISSUE.

BUT MY UNDERSTANDING OF THE EQUAL PROTECTION ARGUMENT, AND CORRECT ME IF I AM, ARE THAT AN EQUAL PROTECTION ISSUE HERE IS THAT, SINCE DEFENSE COUNSEL WILL ALWAYS BE PAID IN ORDER TO TAKE THE CASE ON AN HOURLY BASIS, THE INTENT OF THE MULTIPLIER IS TO ATTRACT COUNSEL TO TAKE THE CASE. THEN THERE, IT DEFIES AN IRRATIONAL BASIS, TO SAY THAT YOU ARE GOING TO GIVE A MULTIPLIER TO PLAINTIFF'S COUNSEL, BECAUSE IT DOESN'T EQUALLY APPLY TO THE INTENT OF THE STATUTE, WHICH IS TO ATTRACT COUNSEL TO THE DEFENSE. IS THAT NOT CORRECT?

WELL, THE POINT OF THE MULTIPLIER IS TO ATTRACT PEOPLE. THE POINT OF THE OFFER-OF-JUDGMENT STATUTE IS TO PROMOTE REASONABLE SETTLEMENTS. THE LANGUAGE OF THE STATUTE APPLIES EQUALLY TO PLAINTIFFS AND DEFENDANTS, AND IS THE EXAMPLE I USED BEFORE. IF A DEFENSE COUNSEL SAYS TO ALLSTATE, LISTEN, I WILL REPRESENT YOU. I WILL TAKE $50 AN HOUR INSTEAD 6 OF MY USUAL -- INSTEAD OF MY USUAL $150 AN HOUR, IF THAT IS ALLOWED, THEN HOW COULD THAT STATUTE NOT BE APPLIED EQUALLY?

THERE HAS NEVER BEEN A DEMONSTRATION THAT DEFENSE COUNSEL FOR AN INSURANCE COMPANY IS, CANNOT BE HIRED ON AN HOURLY BASIS. ISN'T THAT RIGHT?

I AM SORRY.

I MEAN, THERE, IT IS JUST, AS A PRACTICAL MATTER, THERE COULD BE NO DEMONSTRATION THAT IN A COMMUNITY IN FLORIDA, YOU CANNOT HIRE A DEFENSE COUNSEL ON AN HOURLY-RATE BASIS. THAT IS THE WAY IT WORKS.

RIGHT. BUT IF YOU ARE PAID EVERY MONTH AND YOU ARE PAID YOUR EXPENSES EVERY MONTH, THEN YOU SHOULDN'T BE ENTITLED TO A MULTIPLIER BECAUSE YOU HAVEN'T ASSUMED THE RISK

OF NONPAYMENT, LIKE A CONTINGENCY FEE LAWYER HAS. I WANT TO READ FROM ALLSTATE VERSUS SARKIS, JUST TO CORRECT THE FACTUAL RECORD. FURTHER BECAUSE ALLSTATE IS THE DEFENDANT AND HAS A FIRM POLICY NOT TO SETTLE CASES, THIS CASE WOULD LIKELY GO TO TRIAL WITH THE ATTORNEY HAVING TO FINANCE COSTS, SO YOU HAVE READ THAT OPINION CORRECTLY. AS FAR AS WHAT THE STATUTE ACTUALLY PROVIDES, THERE IS A MENTION OF THE STATUTORY GUIDELINES IN THE OFFER-OF-JUDGMENT STATUTE, IN ALL OF THE CASES CITED BY ALL OF THE RESPONDENT'S BRIEFS. THEY ARE ALL DISTINGUISHABLE IN SOME WAY. THIS CASE SPECIFICALLY REFERENCES THE BAR GUIDELINES, WHICH ALLOW FOR A CONTINGENT FEE. THE POLICY OF THIS COURT, AS BOTH JUSTICE LEWIS AND JUSTICE PARIENTE EXPRESSED, TO THINK IN ABSOLUTES IS KIND OF A SCARY WAY TO THINK. THERE MAY BE 99 OUT OF 100 CASES THAT DON'T WARRANT A RISK MULTIPLIER AFTER THE OFFER OF JUDGMENT IS COMPUTED, BUT IN THE ONE CASE WHERE IT APPLIES, THIS COURT SHOULD ALLOW THE TRIAL COURT THAT DISCRETION TO MAKE SUCH AN AWARD.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO CLOSE ON THAT NOTE FOR YOU, TOO, BECAUSE YOUR TIME HAS EXPIRED. THANK YOU BOTH VERY MUCH. JUSTICE CANTERO WILL BE RETURNING TO THE BENCH MOMENTARILY, AND WE WILL PROCEED ON THE NEXT CASE.