

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

03-1259

”

CHIEF JUSTICE: WE APPRECIATE COUNSEL BEING READY AND WITHOUT ANY FURTHER HESITATION , JONES VERSUS FIGA.

MRS. JONES CAME UP FROM BRAID EPTON TODAY SO THAT SHE COULD WATCH OUR CASE. LET ME KIND OF GET RIGHT TO THE POINT . MAY IT PLEASE THE COURT. MY NAME I S GEORGE VAKA , AND I REPRESENT BETTY JONES.

HOW ABOUT THE TRIAL COURT ENTERED A SUMMARY JUDGMENT , AS I READ THE SUMMARY JUDGMENT ON, THE DUTY TO DEFEND, CORRECT?

YES.

AND HELD THAT THERE WAS A BREACH OF THE DUTY TO DEFEND , AS A MATTER OF LAW. ,,NOW, DID THE TRIAL JIM EVER REACH A DETERMINATION ACTION AS TO A DETERMINATION , AS TO WHETHER THERE WAS AN OBLIGATION TO INDEMNIFY?

I THINK THE JUDGE NEVER CAME OUT AND SAID THOSEWORDS , BUT THE JUDGE'S DETERMINATION OF A DOLLAR AMOUNT, A JUDGMENT AGAINST FIGA , IMPLICITLY DID THAT, YOUR HONOR . THERE CERTAINLY WAS EVIDENCE IN THE RECORD , FROM WHICH THE JUDGE COULD HAVE BEEN AFFIRMED AND IN M Y JUDGMENT, SHOULD HAVE BEEN AFFIRMED AT THE FIRST DISTRICT , FROM WHICH THE COURT COULD HAVE CONCLUDED

THAT IS WHAT I WANT TO UNDERSTAND. I WANT TO UNDERSTAND THAT THE BASIS OF THE OBLIGATION OF FIGA , STEMS FROM THE OBLIGATION OF THE INSURER , BASED UPON THE INSURER 'S BREACH OF THE DUTY TO DEFEND. IS THAT CORRECT?

IN THIS CASE IT WOULD HAVE BEEN FIGA 'S OWN BREACH OF THE DUTY TO DEFEND. DEALERS INSURANCE COMPANY BECAME INSOLVENT , BEFORE THIS LAWSUIT WAS BROUGHT, SO FIGA HAD ACTUALLY STEPPED INTO THE SHOES , AND IT WAS FIGA WHO

BUT, SO , THE THEORY UPON WHICH YOU PROCEEDED AGAINST FIGA , WAS NOT ON THE BASIS OF THE INSURER 'S OBLIGATION TO DEFEND, A BREACH OF CONTRACT, BUT ON THE BASIS OF THE BREACH OF A STATUTORY DUTY IMPOSED UPON FIGA?

WE ACTUALLY FILED A THREE-COUNT COMPLAINT, IN WHICH WE ALLEGED BOTH A VIOLATION OF THE STATUTORY DUTY AND A BREACH CONTRACT .

BUT WHAT I AM TRYING TO UNDERSTAND.

THE THIRD COUNT WAS A FIDUCIARY OBLIGATION.

WHAT I AM TRYING TO UNDERSTAND IN THIS CASE IS HOW HAD THERE IS , ARISING OUT OF A BREACH A DUTY TO DEFEND , AN OBLIGATION T O PAY MORE THAN \$25,000 , WHICH WAS THE LIMIT OF THE POLICY .

THEN LET ME ADDRESS THAT ISSUE FOR YOU , JUDGE WELLS. DON'T FORGET, FYING, A MAYBE YOU ARE CON FIGA, MAYBE YOU ARE CONFUSED BECAUSE FIGA DOESN'T MEN'S THAT PROVISION OF THE POLICY AT ALL , BUT THERE I S A SUPPLEMENTARY PAPTS PROVISION IN THE POLICY THAT SAYS

THAT GOES TO THE INTEREST. I AM CONCERNED ABOUT THEAMOUNT OF THE JUDGMENT. ANY AMOUNT OF JUDGMENT I N EXCESS OF THE LIABILITY LIMITS.

WELL , I THINK WHAT JUDGE LEWIS DID, IN OUR CASE , JUDGE LEWIS, I BELIEVE , ENTERED A JUDGMENT FOR \$299.9 THEN SAID THERE WAS INTEREST THAT RAN ON THAT, FROM THE DATE ORIGINAL UNDERLYING JUDGMENT.

JUST TO HELP ME OUT, TOO , IS THAT YOU HAVE , WOULD YOU AGREE THERE ARE TWO DIFFERENT SCENARIOS. WE SAY, OVER AND OVER , DUTY TO DEFENDED HI S BROADER THAN THE DUTY TO INDEMNIFY.

ABSOLUTELY.

THAT IS A BLACK LETTER OF THE LAW. HOWEVER, AN INSURANCE COMPANY OR FIGA, WHO REFUSES TO DEFEND , BASICALLY DOES I T ON ITS OWN RISK , IF THEIR ISSUE IS THERE IS NO COVERAGE, THEN, AND IT IS CLEAR THERE IS NO COVERAGE , THEN YOU KNOW , THEY DON'T DEFEND. ON THE OTHER HAND, HERE IT LOOKS LIKE THERE WAS SOME DETERMINATION MADE THAT THERE WAS COVERAGE. NOW , SO , THERE I S TWO DIFFERENT SCENARIOS , IF YOU HAVE A CASE WHERE THERE I S , WAS COVERAGE FROM THE OUTSET , AND A CASE WHERE THERE IS NO COVERAGE BUT, YET , MAYBETHEY SHOULD DEFEND , THEDAMAGES ARE , PERHAPS, GOINGTO BE DIFFERENT , SO, WHICHWHAT ARE WE DEALING WITH HERE? ARE WE DEALING WITH A CASE WHERE, IN FACT , THERE WAS COVERAGE BUT THEY JUST CHOSENOT TO DEFEND?

WELL , THAT CERTAINLY , FROM THE WAY I READ JUDGE LEWIS'S ORDER , THERE WERE CERTAIN AFFIRMATIVE DEFENSES THAT FIGA RAISED , THAT SAID WHY THERE WAS NO COVERAGE. FIGA NEVER TOOK ISSUE, TO THIS DAY HAS NEVER TAKEN ISSUE WITH OUR ANALYSIS CONCERNING THE OBLIGATION TO DEFEND. FIGA RAISED STATUTE OF LIMITATIONS , YOU WAITED TOO LONG , AS ONE DEFENSE , TWO , MATERIAL MISREPRESENTATIONIN THE APPLICATION , AND , ALTHOUGH THERE IS NO FORMAL PLEADING , AT THE HEARING ON THE MOTION FO R SUMMARY JUDGMENT, SAID , JUDGE, WEWOULD LIKE TO RAISE FAILURE TO COOPERATE.

BUT THOSE ALL GO TO COVERAGE.

RIGHT.

SO THAT IS THE QUESTION, SO THE QUESTION WAS , WAS THESUMMARY JUDGMENT ENTERED ON COVERAGE OR JUST ON THE DUTY TO DEFEND?

BOTH IN MY OPINION .

BUT YOU CAN'T , MATERIAL MISREPRESENTATION IS A FACTUAL QUESTION. HOW CAN THAT BE DECIDED ON SUMMARY JUDGMENT?

BECAUSE , UNDER THE FACTS OF THIS CASE , WHAT THE EVIDENCE WAS , WAS THAT THE APPLICATION THAT WAS SUBMITTED T O DEALERS INSURANCE COMPANY , ASKED FOR MR . PRATT'S AND A FELLOW BY THE NAME OF McCLENDON'S DRIVING ORDERS DRIVING RECORDS, WHETHER THEY HAD EVER BEEN CONVICTED OR WHATEVER. UNDER THAT APPLICATION , THERE IS THE RIGHT TO CHECK THE DRIVERS LICENSES.

YOU HAVE A DAMAGES ISSUE. YOU HAVE A CASE WHERE, SAY, IT IS CLEAR ON THE PLEADINGS

THAT THEY HAVE GOT TO DEFEND, BUT WHAT YOU REALLY KNOW IS IT IS A CASE FOR PUNITIVE DAMAGE ANSWER YOU DON'T HAVE TO INDEMNIFY . YOU HAVE GOT ONE SET OF DAMAGES. ON THE OTHER HAND, IF THERE IS COVERAGE, SO, WHAT ARE THE DAMAGES IN EITHER SITUATION , ASSUMING WE AGREE THAT THERE IS BREACHES HERE , HOW DO YOU CALCULATE THE DAMAGES? ONE, ASSUMING THERE IS COVERAGE. THE OTHER ASSUMING THERE SO NO COVERAGE BUT THEY SHOULD HAVE DEFENDED.

THERE IS , I THINK , TWO THINGS WE NEED TO LOOK AT , TWO THINGS WE NEED TO DISTINGUISH. THAT FIGA REFUSES TO DISTINGUISH AND HAS REFUSED TO DO SO IN ITS BRIEFS. ONE IS THE ISSUE OF COVERED CLAIM. THE SECOND IS THE ISSUE OF FIGA'S STATUTORY LIABILITIES. TWO DIFFERENT THINGS. THE COVERED CLAIM, ITSELF , UNDER THE LIABILITY POLICY , WOULD BE LIMITED TO \$25,000 LESS THE \$100 ESSENTIALLY DEDUCTIBLE . THERE, THEN , BECOMES THE ISSUE OF INTEREST ON THAT JUDGMENT. FIGA HAS IGNORED COMPLETELY

, WHICH ON THE \$25,000?

NO. ON THE FULL AMOUNT OF THE JUDGMENT.

THE FULL 57 MILLION?

UNDERSTOOD. THE FULL AMOUNT ON THE 75 MILLION, BECAUSE THE POLICY ITSELF

YOU ARE SAYING THAT FLOWS FROM THE POLICY OF INSURANCE.

IT FLOWS FROM THE POLICY OF INSURANCE AND LET'S NOT , ALSO , FORGET , THE ONLY REASON THAT IS AN INTERPRETATION OF THE POLICY , NOT AN INTERPRETATION OF THE STATUTE.

WELL , DIFFERENT STATUTE. FIGA HAS CONCEDED , IN ITS ANSWER BRIEF , THAT IT IS RESPONSIBLE FOR INTEREST ON JUDGMENTS TO WHICH IT IS JOINED. THE WHOLE REASON WHY FIGA WASN'T JOINED IN THE UNDERLYING JUDGMENT , JONES VERSUS PRATT , IS BECAUSE OF FIGA 'S MISCONDUCT IN ILLEGALLY DENYING A DEFENSE AND DENYING COVERAGE IN THE FIRST INSTANCE .

BUT THEY COULDN'T BE JOINED, EVEN IF THEY AGREED TO COVERAGE.

THEY COULD BE JOINED UNDER THE NONJOINER STATUTE, AFTER THE JUDGMENT WAS ENTERED AGAINST PRATT , BUT THE NONJOINER STATUTE SAYS THAT YOU CANNOT SUE AN INSURER WHO HAS DENIED COVERAGE OR RESERVED THE RIGHT TO DENY RESERVED RIGHTS TO DENY COVERAGE. IN THE SECOND DISTRICT IN QUEEN W QUEEN , WHICH WE CITED IN OUR BRIEF , SAYS NONJOINER APPLIES TO FIGA, SO THE STATE'S LAWYER LEGALLY HAD NO BASIS TO JOIN THE ESTATE'S LAWYER LEGALLY HAD NO BASIS TO JOIN FILING A LEGALLY THE ONLY WAY RIGHT THAT IT HAD TO JOIN FIGA WAS TO JOIN FIGA IN THAT UNDERLYING JUDGMENT.

REALLY HOW YOU COMPUTE JUDGMENT IS NOT BASIS FOR CONFLICT.

WHAT IS THE BASIS FOR CONFLICT?

I KNOW , JUSTICE CAN'T CAPITAL, YOU DIDN'T SEE ANY NEED FOR JUDGMENT . YOUR REASON IN G , THE FIRST DISTRICT RELIED UPON FERNANDEZ FOR FILING, A WHICH WAS A CASE OF FOR FILING, A WHICH WAS A CASE THAT SAID REFUSAL TO ACCEPT IT , THE OFFER TO SETTLE. FIGA PAID THE \$10,000 , WHICH WAS THE COVERED CLAIM, THEN THE FERNANDEZ CASE PROCEEDED SOLELY AS BAD FAITH CASE AGAINST FILING.

IT IS DISTINGUISHABLE , BUT HOW - - AGAINST FIGA.

IT IS DISTINGUISHABLE, BUT HOW IS IT IN CONFLICT? THOSE ARE TWO DIFFERENT THINGS.

MISAPPLICATION TO ANOTHER CASE THAT DOESN'T HAVE THE SAME MATERIAL FACTS.

THIS IS APPLICATION OF ONE OF OUR CASES, NOT OF ANOTHER DCA CASE. I DON'T THINK THAT WE HAVE EVER HELD THAT MISAPPLICATION CONFLICT APPLIES TO MISS APPLYING ANOTHER DCA'S CASE. ,,

HOW ABOUT GOING BACK AND ADDING THE THIRD DISTRICT DECISION, GIORDANO?

GIORDANO. WE NEED TO PROCEED IN TWO DIFFERENT CASES. YES, MR. JONES, YOU NEED TO PROCEED AGAINST MR. PRATT. YOU GAVE US TIMELY NOTICE. YOU GAVE THE SEVER TIMELY NOTICE. ONCE YOU OBTAIN YOUR JUDGMENT, THERE IS NOTHING YOU CAN DO. YOU CAN'T COLLECT AGAINST US. YOU DON'T HAVE A REMEDY. THAT IS THEIR POSITION.

GOING BACK TO JUSTICE CANTERO'S QUESTION, ISN'T THERE A CASE THAT SAYS THE FIRST DISTRICT HAS NOW SAID YOU CAN'T SUE FIGA, HE EVEN IF THEY HAVE NOT EVEN IF THEY HAVE NOT LIVED UP TO THE CONTRACTOR TO THE STATUTE, RELYING ON A THIRD DISTRICT CASE, SO IS THAT NOT A CONFLICT? WE NEED YOUR ANSWER.

THAT WAS A THIRD DISTRICT CASE AND THAT WAS JURISDICTIONAL. I NEED TO BE A LITTLE MORE UP TO SPEED ON THE JURISDICTIONAL ISSUE, PLEASE FORGIVE ME, AND THEY SAID YOU CAN'T SUE THEM, PERIOD, AND THAT IS WHAT THE FIRST DISTRICT HAS HELD IN MY CASE, NOT ONLY HAVE THEY SAID YOUR CLIENT HAS A BAD FAITH REMEDY. THEY SAID YOU HAVE NO REMEDY AT ALL AND IN THE CASE OF GIORDANO, THEY SAID THAT FIGA AGAIN REFUSES TO DEFEND AND ASSIGNMENT WAS BEGIN AND THE THIRD DISTRICT SAID THAT THAT WAS PROPER, SO THAT WAS WHERE THE CONFLICT AROSE.

LET'S GET BACK TO THE DAMAGE SITUATION. LET ME ASK YOU IF YOU COULD TELL ME WHERE MY THEORY WOULD BE WRONG IN ADDRESSING IT THIS WAY. YOU HAVE HAD YOU WOULD HAVE THE \$25,000 YOU WOULD HAVE THE \$25 CAP OR THE COVERAGE, ITSELF, THE LIABILITY COVERAGE. YOU, THEN, HAVE THE SUPPLEMENTARY PAYMENTS THAT WOULD THEORETICALLY BE UNLIMITED, BECAUSE THE POLICY DOESN'T CONTAIN A LIMITATION BUT WE HAVE A STATUTE THAT LIMITS US TO \$300,000. SO WHY WOULD THIS NOT, I HAVE A DIFFICULT TIME FINDING HOW JUDGE LEWIS FOUND HIS DAMAGES, BUT WHY WOULD IT NOT BE CORRECT THAT YOU WOULD HAVE \$25 PLUS THE INTEREST ON THE FULL AMOUNT AS ON THE \$25,000 PLUS THE INTEREST ON THE FULL AMOUNT AS THE LAW HOLDS, UP TO THE \$300 CAP, AND INTEREST UP TO ONLY THE ADJUDICATED AMOUNTS THAT WOULD ONLY BE AGAINST FIGA, INTEREST. WHAT WOULD BE WRONG WITH THAT ANALYSIS?

I DON'T THINK THERE IS ANYTHING WRONG WITH THAT ANALYSIS. I DON'T KNOW THAT THAT CONSIDERS ALL OF THE ASPECT OF OUR CASE. FIRST THING IS THAT FIGA HAS NEVER ASSERTED THE SITUATION THAT YOU HAVE JUST ANTICIPATED. IF IT HAPPENED, THEY WAIVED T SECOND IS THERE ARE TWO-WAYS FOR FIGA TO PAY IN THIS CASE. ONE IS THE SUPPLEMENTARY PAYMENTS PROVISION. THE OTHER IS UNDER CHAPTER 35, WHICH THEY HAVE CITED IN THEIR BRIEF.

BUT THAT MUST BE A JUDGMENT AGAINST FLYING AT.

THAT GETS US BACK TO AGAINST FIGA.

THAT GETS US BACK TO OUR POSITION, WHICH IS WAIT A MINUTE. IT IS MANIFESTLY UNJUST TO ALLOW THEM TO COMPLETELY DUCK THEIR STATUTORY OBLIGATION, NOT ACT IN CONFORMANCE OR COMPLIANCE WITH IT BUT TO ACT COMPLETELY AGAINST IT AND VIOLATE IT AND THEN COME OUT IN A POSITION IN WHICH THEY ARE BETTER THAN HAD THEY

YOU ARE TALKING EQUITIES NOW. I AM TRYING TO MAKE THE STATUTE

NO, THAN HAD THEY COMPLIED WITH THEIR ONLY TORY COMPLIED WITH THEIR ON PLIINGTORY OBLIGATION WITH THEIR OBLIGATION TO REPRESENT MR. PRATT.

BUT CASES AGAINST TYINGA.

I UNDERSTAND THAT, BUT THOSE CASES DO NOT TALK ABOUT WHAT HAPPENS WHEN YOU OBTAIN A JUDGMENT AGAINST FIGA 'S INSURER, WHERE THERE HAS NOT BEEN A N IMPROPER DENIAL O F COVERAGE. FIGA, THEN, GETS JOINED INTO THAT JUDGMENT, AS IS AUTHORIZED UNTHE NONJOINDER STATUTE.

THAT HASN'T HAPPENED HERE.

IT COULDN'T HAPPEN. IT WOULD HAVE BEEN FRIVOLOUS FOR THE ESTATE'S LAWYER TO EVEN GO FORWARD WITH THAT, BECAUSE UNDER UNDER THE NONJOINDER STATUTE, SINCE FIGA DENIED COVERAGE, HE COULD NEVER JOIN THEM.

AFTER THE PROCEEDINGS SUPPLEMENT AL, IF FIGA HAD BEEN JOINED, THEN THAT WOULD BE ANOTHER ISSUE AGAINST FIGA, BUT THAT DIDN'T HAPPEN. THERE WAS ASSIGNMENT IN A SEPARATE LAWSUIT, SO AS WE STAND HERE, THE ONLY JUDGMENT AGAINST FIGA IS THE ONE IN THE CIRCUIT COURT.

I DON'T DISAGREE WITH YOU, JUSTICE LEWIS.

THAT IS MY PROBLEM.

BUT THE PROBLEM I HAVE IN ACCEPTING THAT POSITION IS IT REWARDS FIGA FOR VIOLATION OF ITS STATUTORY DUTIES. IT ACTUALLY PUTS THEM IN A MUCH MORE ADVANTAGEOUS POSITION THAN HAD THEY COMPLIED WITH THE VERY STATUTE AND DONE THE EXACTTHING THAT THIS LEGISLATURE, THE LEGISLATURE THAT PASSED THIS STATUTE SAID THEY WERE SUPPOSED TO DO, WHICH IS TO PAY COVERED CLAIMS TO AVOID FINANCIAL HARDSHIP.

LET ME ADDRESS YOU ARE TALKING ABOUT LOGIC AND JUSTICE. YOUR CLAIM IS PRATT'S CLAIM. IS THAT CORRECT?

MY CLIENT HAS TWO CLAIMS. MY CLIENT BRINGS HER CLAIM, BOTH SHE PROCEEDED TO A JUDGMENT AGAINST PRATT AND NOW SHE WANTS TO BE PAID BY FIGA. FIGA SAYS GO POUND SAND. YOU DIDN'T MOVE IN A TIMELY FASHION.

PRATT KNEW THAT HE WASN'T BEING REPRESENTED B Y FIGA, BACK WHEN THE SUIT WAS INITIAL LAY FILED, RIGHT? INITIALLY FILED, RIGHT? HE HAD ONE YEAR TO RESPOND.

NO, JUSTICE, I WOULD DISAGREE WITH THAT.

WHY IS THAT?

IF YOU LOOK AT THESUMMARY JUDGMENT ON THE STATUTE OF LIMITATIONS, THEY OMITTED IT FROM FIGA'S BRIEF, ONE, YOU HAVE T O, UNDER THE STATUTE, GIVE NOTICE TO THE SEVER WITHIN A YEAR OF WHEN THE INSOLVENT INSURER IS ACTUALLY DECLARED TO BE INSOLVENT. FIGA'S POSITION WAS, IF YOU DON'T GIVE THAT NOTICE TO THE SEVER, YOU ARE OUT. OKAY. THIS BREACH OF STATUTORY OBLIGATION DIDN'T OCCUR UNTIL EIGHT MONTHS AFTER THAT DEADLINE HAD PASSED, SO FIGA 'S ARGUMENT WAS, BASED ON THE STATUTE OF LIMITATIONS IN THE FIGA STATUTE, IT I S A HARSH RESULT, IS WHAT THEY TOLD JUDGE LEWIS, BUT YOUR CAUSE OF ACTION IS BARRED BY THE STATUTE OF LIMITATIONS, EVEN THOUGH IT ACCRUED AFTER

THE STATUTE OF LIMITATIONS WOULD HAVE ACTED TO BAR IT. WHICH MAKES NO LEGAL SENSE WHATSOEVER. I AM BARRED BEFORE THE CAUSE OF ACTION ACCRUES. THEIR ARGUMENT WAS AND JUDGE LEWIS WAS INCREDULOUS WITH THIS, ARE YOU TELLING ME THAT MR. PRATT WAS SUPPOSED TO SUE FIGA, EIGHT MONTHS BEFORE HE WOULD HAVE HAD ANY BASIS TO KNOW THAT THEY WERE GOING TO DENY COVERAGE TO HIM, AND THAT WAS THE ARGUMENT THAT WAS MADE BY FIGA, SO OUR ARGUMENT IS THAT, SINCE THE FIGA STATUTE IMPOSES A STATUTORY OBLIGATION UPON FIGA, IT STEPS INTO THE SHOES AND ASSUMES ALL THE DUTIES OF THE INSURER, THAT IS A STATUTORY LIABILITY, AND IF IT VIOLATES THAT STATUTORY LIABILITY, HE THE FOUR-YEAR STATUTE OF THE FOUR-YEAR STATUTE OF LIMITATION INS 95.11 SUBSECTION 3-F, IS THE PROPER ONE TO APPLY. THAT IS WHY I SAID AT THE BEGINNING IT IS IMPORTANT TO DISTINGUISH.

TO STEP INTO THE SHOES, THE OBLIGATION, THAT WOULD HAVE OCCURRED ON WHAT DATE?

THAT WOULD HAVE OCCURRED WHEN FIGA TOOK OVER THE HANDLING OF CLAIMS AGAINST DEALERS.

CHIEF JUSTICE: THE MARSHAL HAS, JUST SO YOU ARE CLEAR ON YOUR TIME, A COUPLE OF MINUTES AGO REMINDED YOU OF YOUR REBUTTAL.

BEFORE YOU SIT DOWN, WAS THERE ANY DECLARATORY JUDGMENT ACTION HERE? WAS THERE ANYONE FILED A SUIT TO DETERMINE FIGA'S OBLIGATION TO DEFEND HERE?

NO. FIGA CONSIDERED IT AND REJECTED AND HAS SINCE ARGUED THAT IT WAS MR. PRATT'S OBLIGATION TO FILE A DECLARATORY JUDGMENT ACTION, NOTWITHSTANDING THE FACT THAT THE ALLEGATION IN THE COMPLAINT FELL SQUARELY WITHIN THE INSURANCE COVERAGE AND NOT WITHIN ANY EXCLUSION. JUSTICE BELL, LET ME ANSWER YOUR QUESTION BECAUSE I HAVE HAD A CHANCE NOW TO LET IT GO THROUGH. FIGA BREACHED ITS STATUTORY OBLIGATION ON MAY 1 OF 1996, WHEN IT SENT THE LETTER TO MICHAEL PRATT SAYING WE ARE NOT DEFENDING YOU, SO THE STATUTE OF LIMITATIONS WOULD HAVE COMMENCED TO RUN ON THAT DAY, AND THAT STATUTE OF LIMITATIONS, SINCE IT WAS A BREACH THE STATUTORY DUTY, WAS A FOUR-YEAR STATUTE OF LIMITATIONS. THE ONE-YEAR STATUTE OF LIMITATIONS INVOLVES THE COVERED CLAIM, WHICH MRS. JONES PERFECTED BECAUSE SHE DID FILE WITH THE SEVER AND SHE SUED PRATT WITHIN THE ONE YEAR.

I DO HAVE, I JUST WANT TO MAKE SURE.

YES, YOUR HONOR.

ARE THE MEASURE OF DAMAGES, DIFFERENT IF WE FIND OR IF WE FIND THAT JUDGE LEWIS CONSIDERED THERE WAS COVERAGE, VERSUS THAT THERE WAS NEVER ANY COVERAGE BUT THEY STILL FAILED TO DEFEND?

UNDER THE CAR SELL VERSUS FIGA UNDER THE CAR A SELL VERSUS FIGA - - UNDER THE CAROUSEL VERSUS FIGA CASE, IT HAS ALL FORESEEABLE DAMAGES ARISE !!ING FROM THAT BREACH, SO WHETHER THERE WAS SUBSTANTIVE INDEMNITY COVERAGE, WHETHER THERE WAS AN OBLIGATION TO INDEMNIFY OR NOT, AT LEAST FROM MY READING OF THE KAUR SELL CASE, IT - - OF THE CAROUSEL, DOESN'T REALLY MAKE A DIFFERENCE. ALL OF THE NATURE OF BREACH WOULD BE FROM THE APPROPRIATE DAMAGES.

SO \$5 MILLION, IF HE HAD BEEN DEFENDED, IT WOULD HAVE BEEN - - SO THE \$75 MILLION, IF HE HAD BEEN DEFENDED, IT WOULD HAD NO VERDICT AGAINST HIM, SO HE HAS THE \$75 MILLION?

IT IS UNDENIED THAT MICHAEL PRATT MAINTAINS HE DIDN'T OWN THE VEHICLE AND MICHAEL PRATT MAINTAINED HE DIDN'T OWN THE VEHICLE. ALL FIGA HAD TO DO WAS TO HIRE SOMEBODY

LIKE MR . BUSH TO COME AND SAY MICHAEL PRATT DIDN'T OWN THE VEHICLE AND THEN THE BURDEN WOULD SHIFT TO PROVE IT , BUT SINCE FIGA DIDN'T DEFEND , THAT CLAIM I S NOW MERGED INTO THE \$75 MILLION JUDGMENT.

HE DIDN'T HAVE T O OWN THAT VEHICLE BECAUSE IT COVERS ANY VEHICLE.

ANY VEHICLE ARISING OUTOF THE OWNERSHIP , MAINTENANCE OR USE .

HE WOULDN'T HAVE HAD TO HAVE OWNERSHIP.

THE ISSUE IS OWNERSHIP. THAT IS THE ONE IN DISPUTE.

YOU ARE SAYING HE WOULDN'T HAVE HAD A JUDGMENT . THAT IS WHAT I THOUGHT , DIFFERENT FROM THE WAY YOU CALCULATE DAMAGES FROM THE WAY JUSTICE LEWIS IS ASKING YOU, YOU START WITH THE COVERAGE PLUS THE INTEREST YOU SAY , ON THE \$75 MILLION, THOSE ARE THE TWO ELEMENTS , VERSUS YOU SAY, NO , START AND SAY \$75 MILLION IS THE MEASURE OF DAMAGES. THAT IS TWO ENTIRELY DIFFERENT THINGS.

WE HAVE SAID THAT FIGA IS RESPONSIBLE TO PAY, AND I AM NOT SURE , MAYBE I HAVEN'T ARTICULATED IT IN A S ARTFUL OF A FASHION ASSETS OF YOU HAVE, WHAT WE HAVE SAID IS FIGA IS RESPONSIBLE TO PAYTHE FULL AMOUNT OF THE JUDGMENT , CREED RAMSEY, THE CASE CEDE RAMSEY , THE WASHINGTON CASE WHICH IS THE CASE THAT WE ARE DEALING UNDER , THAT FIGA IS NOT ENTITLED TO IMMUNITY FOR NOT PERFORMING THE STATUTE OR VIOLATING IT. FIGA ONLY GETS IMMUNITY FOR PERFORMANCE , AND IT HAS INTEREST O N THE FULL AMOUNT OF \$75 MILLION , UNTIL UNDER THE TERMS OF THE POLICY IT TENDERS THE \$25,000 OR , UNDER CHAPTER 25, IT SATISFIES THE ENTIRE JUDGMENT.

CHIEF JUSTICE: NATURE HAS TAKEN ITS COURSE AND WE HAVE USED UP ALL OF YOUR TIME. THANK YOU VERY MUCH. GOOD MORNING.

IF I CAN JUST HAVE A SECOND FOR PODIUM ASSISTANCE HERE, I HAVE LEARNED HOW TO DO IT. THANK YOU. I AM RICHARD BUSH. FROM TALLAHASSEE. I DO REPRESENT FIGA , AND I WOULD LIKE TO SAY THAT I AM SORRY THAT THE EIGHTH GRADECLASS IS FOR BECAUSE I COULD HAVE GIVEN A LESSON ON WHAT HAPPENS WHEN YOU LEAVE YOUR HOMEWORK AT HOME. I HAVE FILED WITH THE COURT THIS MORNING EARLIER , A CASE THAT DROPPED OFF OF OUR BRIEF WHEN WE CUT AND PASTETED ON IT LAST NIGHT. IT WAS CITED BEFORE THE FIRST DCA AND CALLED FIGA VERSUS JONES.

SO YOU HAVE DONE I T BY SUPPLEMENTAL AUTHORITY?

I DID. I FILED IT WITH THE COURT.I GAVE IT TO MR . VAKA THIS MORNING. IT WAS ONE THAT WAS BRIEFED THIS MORNING AND BRIEFED IN ORAL ARGUMENT AND IT IS CALLED FIGA VERSUS JONES.

CHIEF JUSTICE: HAVE YOU ALL AGREED TO WHETHER IT CAN BE DISCUSSED OR NOT TODAY OR NOT?

WE HAVEN'T DISCUSSED IT AT ALL.

CHIEF JUSTICE: WE AREGOING TO HAVE TO PROBABLY TAKE IT ON THE BASIS OF A SUPPLEMENTAL. YOU FILED THAT THIS MORNING? EYE FILED IT THIS MORNING. I APOLOGIZE TO THE COURT .

HOW ABOUT GOING THROUGH THE EXERCISE HERE , OF TELLING US, FIRST OF ALL , IN SORT OF A SPOON -FEEDING FASHION , YOUR VIEW OF FIGA'S STATUTORY RESPONSIBILITY.

SURE.

AND THEN TAKE US INTO THIS CASE AND THEN TELL US WHAT HAPPENED HERE.

THANK YOU , JUDGE , I WILL. FIRST OF ALL , AS I SAID IN THE FIRST SIX PAGES OF MY BRIEF , I DON'T THINK THAT THERE IS ANY JURISDICTION HERE. CLEARLY GIORDANO AND FERNANDEZ ARE BOTH THEIR DCA CASES , AND GIORDANO CITED TO FERNANDEZ AND RELIED ON FERNANDEZ IN DETERMINING THAT YOU CAN'T HAVE A STATUTORY CAUSE OF ACTION AGAINST FIGA .

FOR BAD FAITH.

FOR BAD FAITH.

FOR BAD FAITH OR FOR ANYTHING THAT IS NOT A COVERED CLAIM. A COVERED CLAIM.

LET'S GET INTO THAT JUST A LITTLE BIT , IF WE CAN. ANYTHING THAT IS NOT A COVERED CLAIM. IT IS A COVERED CLAIM, IF AN INSURED , IF I AM INSURED BY A CARRIER AND I HAVE AN ACCIDENT, AND THERE IS NO DISPUTE ON COVERAGE , THEN FIGA IS SUPPOSED TO COME AND DEFEND ME. DO YOU AGREE WITH THAT?

THAT IS TRUE IF IT IS COVERED CLAIM, THEN UNDER THE POLICY AND UNDER THE STATUTE , FIGA HAS A DUTY TO COME IN AND DEFEND.

YOU CAN'T SUE MONEY TO GET THE MONEY I HAVE LOST?

YOU CAN'T SUE FIGA IN A SEPARATE ACTION OUTSIDE OF

HOW DO I GET MY MONEY?

THE SAME WAY , BY THE WAY , IN FIGA VERSUS GARCIA AND THE SAME WAY IN THE HERER - HERRERA CASE, WHICH WAS CITED. IN BOTH CASES IT IS JUDGE QUINCE'S ANSWER, IN BOTH CASES REGARDING THE FIGA CASE WITHIN THE ALLOWABLE TIME, THE PLAINTIFF BROUGHT A DECK ACTION TO DETERMINE THEIR RIGHTS UNDER THE POLICY, TO DETERMINE

WHAT IS THE RELIABLE TIME?

THAT IS UNDER 95.11-5- D IS ONE YEAR AFTER THE DEADLINE.

WHY ISN'T THAT AN ISSUE FOR THE TRIAL COURT TO RESOLVE IN THIS CASE? THAT IS , IF YOU ARE GOING TO ASSERT THAT, IN THIS CASE , THAT THIS CLAIM IS DEFEATED , BY SOME TIME REQUIREMENT, YOU KNOW, SET OUT IN A STATUTE OR A STATUTE OF LIMITATIONS OR WHATEVER

JUDGE LEWIS SHOULD HAVE. THIS IS THE TIME LINE.

LET'S , ALL I AM TALKING ABOUT , WAIT A MINUTE. WAIT A MINUTE. YOU ARE WAY AHEAD OF ALL OF US.

I AM SORRY.

YOUR ANSWER ERRING QUESTIONS THAT HAVEN'T BEEN ASKED YET. OKAY. SLOWDOWN A LITTLE BIT. LET'S , BECAUSE IT IS NOT HELPFUL TO US AND THE CONCERNS WE HAVE. LOORT.

SO AN ACTION WAS FILED HERE.

CORRECT.

RIGHT.

TIMELY .

NOW , DID YOU , NOW , YOU ARE , NO. I KNOW THAT YOU ARE NOW IN THE CATEGORY WITH MY WIFE , OF BEING ABLE TO READ MY MIND, SO I APPRECIATE THAT VERY MUCH , BUT.

SORRY , JUDGE.

LET'S PAUSE FOR A MINUTE . AN ACTION WAS FILED AGAINST FIGA, IS THAT CORRECT , IN JUSTICE LEWIS 'S DIVISION?

IT WAS. THAT ACTION WAS UNTIMELY FILED.

I TAKE IT THAT THERE WAS AN ASSERTION ON THE BEHALF OF FIGA. WERE YOU THE TRIAL LAWYER?

I WAS IN THAT SUMMARY JUDGMENT, I WAS.

AND SO THERE WAS AN ASSERTION BY FIGA , ALL RIGHT , THAT THIS WAS AN UNTIMELY AND A BARRED ACTION , I TAKE IT .

CORRECT.

IS THAT CORRECT? ALL RIGHT. AND NOW , WAS THAT ISSUE SUBMITTED TO JUDGE LEWIS?

IT WAS.

AND DID JUDGE LEWIS MAKE SOME DEFINITIVE RULING ON THAT?

HE DENIED OUR MOTION FOR SUMMARY JUDGMENT , BECAUSE HE COULDN'T UNDERSTAND THE STATUTE , BECAUSE HE COUCHED IT IN THE TERMS OF HIS WIFE.

HE MADE A RULING , THOUGH , DID HE NOT?

HE DENIED OUR MOTION FOR SUMMARY JUDGMENT PERIOD.

SO WHERE , NOW , WE HAVE A JUDGE IN A COURT , ALL RIGHT , WHO HAS DENIED A MOTION FOR SUMMARY JUDGMENT . ALL RIGHT . NOW , ORDINARILY , IF I UNDERSTAND IT CORRECTLY, IT THAT MEANS THE SUIT MOVES FORWARD. IS THAT CORRECT?

IT DID.

SO WHAT HAPPENED NEXT , IN JUDGE LEWIS'S COURT?

HE RAISED IT ON APPEAL IN THE FIRST DISTRICT COURT OF APPEAL , SAYING ED NOT REACH IT IN THE SUBSEQUENT , BECAUSE THAT SUMMARY JUDGMENT WAS FILED TWO YEARS PRIOR TO THE COURT ORDER IN THIS CASE.

THE FIRST DISTRICT DID NOT REACH THAT ISSUE , DID IT?

THE FIRST DISTRICT SPECIFICALLY SAID BECAUSE OF REACHING THE NO COMING SABL CLAIMS ISSUE COGNIZABLE CLAIMS ISSUE , THAT IT DID NOT REACH IT IN THIS CASE.

SO IT RULED ON WHETHER OR NOT , WHERE WERE THERE THREE LEGAL CLAIMS STATED, THREE CLAIMS STATED LET'S JUST GET NUMBERS RIGHTNOW. WERE THERE THREE CLAIMS STATEED?

THERE WERE.

ALL RIGHT. AND THE DCA RULED THAT NONE OF THOSE WERE COGNIZABLE CLAIMS. IS THAT CORRECT?

YES, SIR .

ALL RIGHT. NOW, AND REALIZING WE HAVE AN ISSUE ABOUT JURISDICTION , WOULD YOU WALK US THROUGH THOSE THREE CLAIMS AND DEMONSTRATE WHY THEY ARE NOT, QUOTE , COMING SABL CLAIMS. COGNIZABLE CLAIMS. WHAT WAS THE FIRST AND THE SECOND.

I AM GOING TO DO WHAT MY WIFE TOLD ME TO DO THIS MORNING, WHICH WAS TO TAKE A DEEP BREATH AND SLOWDOWN. THE FIRST CLAIM IS A BREACH OF CONTRACT CLAIM, SAYING THAT FIGA BREACHED ITS DUTY TO PRATT. THERE ARE NO CLAIMS BY BETTY JONES , ONLY AS AS I GO KNEE OF -A S ASIGNEE OF PRATT. THE SECOND CLAIM , I AM SORRY , THE FIRST ONE I S FIGA BREACHED ITS CONTRACT WITH PRATT , THE INSURING AGREEMENT. THE SECOND ONE IS FIGA BREACHED ITS STATUTORY DUTY TO PRATT TO DEFEND, AND THE THIRD CLAIM IS THAT , ADDING COUNTS ONE -THROUGH-50 INTO THE THIRD COUNT , SAYS THAT ALL OF THESE AMOUNT TO A BREACH OF FIDUCIARY DUTY .

ALL RIGHT. NOW , DID , AS PART OF THE CLAIMS ' CLAIM , THAT PRATT ASSIGNED ANY CLAIM THAT HE HAD TO THE PLAINTIFF IN THIS ACTION?

IN EVERY INSTANCE , PRATT ASSIGNED WHATEVER RIGHTS HE HAD , BE THEY WHAT THEY MAY.

RIGHT.

WE CONTEND NONE, THAT H E ASSIGNED THOSE TO BETTYJONES , AND SHE BROUGHT THEM , SHE BROUGHT NO CAUSE OF ACTION ON HER OWN BEHALF , ONLY SHE BROUGHT PRATT 'S CAUSES OF ACTION AGAINST FIGA, FOR FAILURE T O DEFEND , FAILURE TO INDEMNIFY , AND FAILURE TO PAY.

NOW, WHAT IS THE DEFECT IN THE FIRST CLAIM?

ALL OF THE CLAIMS ARE OUTSIDE OF THE STATUTE OF LIMITATIONS .

WELL , YOU HAD A LEGAL RULING AGAINST YOU ON THAT AND THE DCA DIDN'T TOUCH IT , IS THAT RIGHT?

CORRECT. IT WAS NOT PART OF JUDGE LEWIS'S FINAL ORDER.

SO ASIDE FROM THAT TIME LIMITATION, WHAT IS THE DEFECT IN THE FIRST CLAIM?

NONE OF THE CLAIMS ARE COVERED. THAT IS THE, THAT IS WHAT THE FIRST DCA SAID.

COVERED BY WHAT?

COVERED BY , ARE COVERED CLAIMS BY THE POLICY. A COVERED CLAIM DOES NOT ORIGINATE BY COMMON LAW IN FLORIDA.IT DOESN'T ORIGINATE

I AM HAVING TROUBLE ANDNOW I AM DOING THE INTERRUPTING, BECAUSE SORT OF THE WAY I READ THE OPINION OF THE FIRST DISTRICT , THEY ARE TALKING ABOUT THIS IMMUNITY

PROVISION IN THE STATUTE HERE, AND JUST SAYING THAT THAT IMMUNITY PROVISION JUST WIPES OUT, I DON'T READ ANY DISCUSSION ABOUT COVERAGE. IS THERE A DISCUSSION ABOUT COVERAGE?

THE SENTENCE SAYS THAT, BECAUSE THESE ALLEGATIONS ARE NOT COVERED CLAIMS UNDER THE ACT, THERE ARE NO COMING SABL THERE ARE NO COGNIZABLE CAUSES OF ACTION.

WHERE DOES IT SAY THAT?

IN THE FINDING OF THE COURT. RIGHT HERE.

ARE YOU TALKING ABOUT WHERE IT SAYS APPELLEE'S CLAIMS FOR DAMAGES AS ALLEGED ARE NOT COVERED OBLIGATIONS UNDER THE FIGA ACT?

WHAT THE CONCLUSION OF THE FIRST DISTRICT WAS, AFTER CITING TO SAYING THAT THE LEGISLATURE HAS TREATED FIGA DIFFERENTLY FROM THE INSOLVENT INSURANCE COMPANIES IT PAYS CLAIMS FOR BY PROVIDING VARIOUS LIMITATIONS ON CLAIMS.

HOW DO WE GET THIS JOINDER, AND I APPRECIATE JUSTICE WELLS READING THAT SENTENCE, WHICH READS IN FULL, APPELLEE'S CLAIMS FOR DAMAGES AS ALLEGED, NOT COVERED OBLIGATIONS UNDER THE FIGA ACT AND ARE BARRED BY FIGA'S IMMUNITY PROTECTION.

CITING TO FERNANDEZ.

AND SO THAT IS WHERE, NOW, WE SEEM TO REALLY BE MIXING APPLES AND ORANGES AND GRAPE FRUITS AND ALL OF THIS, YOU KNOW, BECAUSE WE HAVE ALL OF THIS. WE HAVE ONE SITUATION IN FERNANDEZ, WHICH TALKS ABOUT BAD FAITH AND WHATEVER, KIND OF THING, BUT WE HAVE A DIFFERENT SITUATION, IF I UNDERSTAND IT, IF WE TAKE ALL THREE OF THESE CLAIMS AS ALLEGED. WE ARE NOT TALKING ABOUT THREE CLAIMS OF BAD FAITH, ARE WE?

WE ARE.

WE ARE.

EACH ONE OF THEM ARE IN BAD FAITH.

SO ALL THREE OF THOSE CLAIMS ARE JUST A BAD FAITH CLAIM IN SHEEP'S CLOTHE SOMETHING.

THEY ARE. THIS IS STRICTLY PAY NO ATTENTION TO THOSE ALLEGATIONS BEHIND THE CURTAIN. THAT IS EXACTLY WHAT THIS COMPLAINT IS.

I WAS UNDER THE IMPRESSION THAT FLORIDA HAD FOLLOWED UNDER THE BAD FAITH CONCEPT AS SORT OF A DUTY OF CARE, AS MORE AFTER TORT DUTY THAN A CONTRACT DUTY, AND OUR BAD FAITH CASE LAW FOR AS LONG AS OUR ARMS, IT TELLS US THAT YOU HAVE CERTAIN STANDARDS, AND IF YOU DON'T DO THINGS, BEHAVE BY WAY OF SETTLEMENT THAT, IS WHAT FERNANDEZ WAS, THAT WE JUST DIDN'T NEGOTIATE IN GOOD FAITH NEGOTIATIONS. THAT IS THE BAD FAITH, IS IT NOT?

THAT AND MUCH MORE. DUTY TO DEFENDED HIS CONSIDERED BAD FAITH BY THE KELLY DECISION THAT WE HAVE CITED.

SO, THEN, EVERY CASE IN WHICH FIGA MAKES A COVERAGE DECISION THAT IS INCORRECT IS A BAD FAITH CASE AND NOBODY HAS A REMEDY TO THAT.

EVERY CASE IN WHICH, AND I CAN MAKE IT BROADER THAN THAT AND EVEN MORE PAINFUL FOR US, FOR YOUR ANALYSIS. EVERY CASE WHICH IS NOT ABOUT A COVERED CLAIM UNDER THE

POLICY BUT SPRINGS UP ABOUT A GUARANTY ASSOCIATION -'S MISHANDLING OF A CLAIM , IS A BAD FAITH CASE , AND EVERY STATE IN THIS COUNTRY , INCLUDING THIS STATE , HAS RULED THAT A MISHANDLING O F THE CLAIM IS NOT COGNIZABLE AND IS NOT A COVERED CLAIM.

SO WHAT WE SHOULD DO IS HAVE FIGA IN THEIR BEST INTEREST, IF THEY DO NOT DO WHAT THE STATUTE SAYS, THEY STEP INTO THE SHOES OF THE INSURED AND ARE SUPPOSED TO STEP I N AND DEFEND AND ARE GIVEN SIX MONTHS BUT DON'T DO ANYTHING AND DO NOT LIVE UP TO ONE SINGLE OBLIGATION , AND I F ANYBODY TRIES TO SUEYOU , IT I S BAD FAITH AND WE ARE IMMUNE .

NO.

YOU CAN ONLY SUE FIGA FOR DEC ACTIONS , IS THAT YOUR POINT?

AND THERE WAS PLENTY OF TIME TO DO THAT.

YOU SAID ONE OF THECOUNTS WAS THE DUTY TO INDEMNIFY , RIGHT?

THE BREACH OF THE STATUTORY DUTY TO DEFEND.

I THOUGHT YOU SAID AND THE DUTY, AND THE FAILURE TO INDEMNIFY .

TO SETTLE. CORRECT .

SO IN THIS CASE IF IT IS TIMELY, WHAT I S , WASN'T THERE A DETERMINATION THAT THERE WAS COVERAGE?

NO. THERE NEVER HAS BEEN A COVERAGE DETERMINATION , AND IN ANY BAD FAITH CASE , UNLIKE ALICE IN WONDERLAND , WHERE IT IS TRIAL LATER AND COVERAGE FIRST, IT IS COVERAGE FIRST AND BAD FAITH LATER .

IS MY UNDERSTANDING CORRECT THAT WHAT JUDGE LEWIS'S SUMMARY JUDGMENT DID, WAS MADE A DETERMINATION AS A MATTER OF LAW, THAT THERE WAS A DUTY TO DEFEND. IS THAT CORRECT?

HE DID EXPRESSLY STATE, IN PARAGRAPH ONE , THERE WASA DUTY TO DEFEND.

OKAY. AND THEN HE WENT FORWARD FROM THERE , BUT DID NOT ACTUALLY DEAL WITH THE ISSUE OF WHETHER OR NOT THERE WAS THE OBLIGATION TO INDEMNIFY .

CORRECT. HE SAID , THE NEXT PARAGRAPH , THERE WAS A \$75,000 JUDGMENT , ERGO THERE \$75 MILLION.

\$75 MILLION. I AM SORE I \$75 MILLION VERDICT JUDGMENT . ERGO THERE IS LIABILITY.

BUT YOU WOULD , BUT HE DID MAKE A FINDING AND MAYBE THIS HAS TO GO BACK , THAT HE SAYS ANY PURPORTED MISREPRESENTATION CONCERNING THE INSURANCE CAPATION - - APPLICATION , DO NOT PROVIDEA BASIS FOR THE DEFENDANT TO AVOID A POLICY, BECAUSE IT SAYS THE DEFENDANT DID NOT REASONABLY RELY UPON SUCH MISREPRESENTATION INS ISSUING AND MAINTAINING THE POLICY, SO NOW YOU ALSO ALLEGE FAILURE TO COOPERATE BUT THERE IS NO FINDING ON THAT, SO IT LOOKS LIKE THERE AREN'T THE FINDINGS THATWOULD BE NECESSARY FOR COVERAGE, BUT TAKE , LET ME , JUST BEAR WITH ME FOR A MINUTE AND LET'S ASSUME THATYOU HAVE A SITUATION HERE,WHERE THERE IS COVERAGE , WHERE JUDGE LEWIS DECIDES , THE TRIAL COURT DECIDES YOUR COVERAGE DEFENSES WER E NOT PROPER. THERE IS COVERAGE. OKAY . NOW , YOU CERTAINLY WOULD AGREE THAT A JUDGMENT COULD THEN BE

ENTERED AGAINST FOR YOU THE \$25,000 LESS THE \$100 , CORRECT?

CORRECT.

NOW , WHAT ABOUT THE SUPPLEMENTARY PAYMENTS? MR . VAKA SAYS THAT THAT IS A PROVISION OF THE POLICY , IN WHICH FIGA STEPS , AND THAT THAT ALLOWS INTEREST ON THE \$75 MILLION JUDGMENT, UNTIL THE \$25 HOW IT IS PAID. WHAT IS YOUR POSITION ON THAT?

IF THE , IF FIGA HAD DEFENDED , SUPPLEMENTARY PROVISION IS THE SAME AS THE STATUTORY PROVISION. IF WE DEFEND, BECAUSE W E HAVE ELECTED T O HONOR OUR OBLIGATION TO DEFEND , THE N THE , IT IS TRUE THAT THE STATUTORY INTEREST UNDER BOTH , IS A COVERED CLAIM UNDER SUPPLEMENTARY PROCEEDINGS , SUPPLEMENTARY PAYMENT PROVISION UNDER THEPOLICY, AND FIGA RECOGNIZES THAT IT HAS AN OBLIGATION TO PAY , SEPARATELY, IF THERE IS A JUDGMENT AGAINST FIGA . IF IT DEPENDS. AND THE IF I T DEFENDS.

WHAT ABOUT MR . VAK As , THERE YOU GO BACK TO IT IS NOT A QUESTION OF BAD FAITH. IT IS A QUESTION THAT WAS IT WAS ANTICIPATED THAT FIGA WOULDN'T HAVE TO BE LIABLE FOR SOME UNANTICIPATED TORT THEORY. ON THE OTHER HAND , IF THERE WAS NO QUESTION OF COVERAGE FROM THE OUTSET , ALL RIGHT , BUT FIGA CHOOSES TO DEFEND , NOT TO DEFEND , THEN NOW YOU ARE SAYING THAT , AGAIN , IT GOES TO WHAT MR . VAKA WAS SAYING, BECAUSE YOU ARE NOT IN THERE , THE JUDGMENT CAN'T BE ENTERED AGAINST YOU , AND NOW YOU ACTUALLY GET, YOU ARE A WADE VOIDING SOMETHING THAT AVOIDING SOMETHING THAT THE STATUTE AND THE POLICY RECOGNIZES THAT FIGA SHOULD HAVE TO PAY , WHICH IS THIS SUPPLEMENTARY PAYMENT , THE INTEREST ON THE JUDGMENT.

SIMPLE ANSWER IS THAT IS CORRECT.THE MORE COMPLEX ANSWER IS WE MADE A DETERMINATION , UNLIKE ANYTHING ARGUED IN THIS BRIEF, WE MADE , IN THE APPELLANT 'S BRIEF , THERE WAS NO IN ACTION.THERE WAS NO RAMSEY CONDUCT HERE. WE INVESTIGATED THE CASE. WE SENT PEOPLE OUT TO TALK. WE DID EVERYTHING WE COULDDO , AND WE THINK THAT , HAD THERE BEEN DECLARATORY JUDGMENT ACTION AND HAD A COVERAGE CASE BE EN TRIED TO DETERMINE IF WE OWED THE \$25,000, AND THERE WASSUFFICIENT TIME UNDER THE STATUTE AND UNDER

BUT YOU COULD HAVE BROUGHT THE DECLARATORY JUDGMENT ACTION.

WE COULD BUT WE DON'T HAVE AN OBLIGATION TO DO THAT.

YOU KNOW, THEN , IF YOU DIDN'T, THEN WHY SHOULDN'T YOU BE IN A SITUATION, IF THERE IS COVERAGE, AGAIN, NOW, YOU KNOW , I AM NOT SURE AND I GO BACK , KNOWING THAT THE DUTY TO DEFENDED HIS GREATER THAN THE DUTY TO INDEMNIFY , IT DOESN'T LOOK LIKE JUDGE LEWIS MADE A DETERMINATION ON THE DUTY TO INDEMNIFY.IT SEEMS THAT WE WOULD B E PREMATURE, BUT IF WE QUASH THE FIRST , ASSUMING WE FIND JURISDICTION AND WE QUASHTHE FIRST DISTRICT , SAYING THOSE ARE COGNIZABLE CLAIMS AGAINST FIGA, THEN IT GOES BACK TO JUDGE LEWIS TO DETERMINE IF COVERAGE EXISTED , THEN IT IS AN ISSUEABOUT WHAT DAMAGES ARE ALLOWABLE , AND IT SEEMS TO ME THAT WE DON'T GET INTO THAT ISSUE IN THIS CASE BECAUSE IT IS PREMATURE.

IF YOU FOLLOW THAT COURSE OF ACTION, THAT IS WHAT WILL HAPPEN. I HAVE TO TELL YOU THAT YOU WILL REVERSE YOUR PRIOR DECISION INS THIS STATE , FERNANDEZ AND GIORDANO , AND YOU WILL BE THE FIRSTSUPREME COURT IN THE UNITED STATES TO DO THAT, BECAUSE EVERY OTHER SUPREME COURT IN INTERPRETING THEIR OWN GUARANI ASSOCIATION STATUTE , HAS GUARANTY ASSOCIATION STATUTE, HAS LOOKED TO THIS STATE AND HAS CITED TO EITHER FERNANDEZ OR ITS PREDECESSOR .

A BAD FAITH CASE, WHICH IS ENTIRELY A QUESTION OF WHETHER , IF YOU HAVEN'T SETTLED ,

SHOULD YOU HAVE SETTLED. ARE YOU TELLING ME THE CASE IS INVOLVED WHERE SOMEONE OUT LIGHT RIOT WAS DENIED OUTRIGHT WAS DENIED COVERAGE AND THEY STEPPED AWAY FROM THEIR OBLIGATIONS AND SAID THAT IS JUST TOO BAD , TO THE PLAINTIFF?

THE GIORDANO CASE WAS THAT CASE. THE GIORDANO CASE, THAT IS WHY I DON'T THINK THERE IS ANY CONFLICT. THE THIRD DCA LOOKED AT IT AND SAID THIS IS FERNANDEZ ALL OVER AGAIN.

WAIT A MINUTE. IN THE GIORDANO CASE , THEY SAID SPECIFICALLY THAT YOU CAN HAVE A CONTRACT ACTION. ANOTHER GIORDANO CASE SAID SPECIFICALLY THAT FIGA HAD , FIRST OF ALL , ACKNOWLEDGED IT WAS A COVERED CLAIM, THAT FIGA STEPPED UP AND DID DEFEND, AND THEN FIGA MADE A DETERMINATION THAT ILLINOIS FUND HAD AN OBLIGATION TO THE FIRST \$150,000 SO ILLINOIS CAME IN AND DEFENDED AND THEN WHEN THERE WAS A ZULINGTSMENT, FIGA SAID WE ARE NOT - - A SETTLEMENT, FIGA SAID WE ARE NOT GOING TO PARTICIPATE IN THAT SETTLEMENT , BUT CLEARLY THERE THEY SAID YOU HAVE DONE YOUR DUTY , BECAUSE YOU HAVE DONE YOUR DUTY TO DEFEND. THAT WAS

THAT WAS A COVERED CLAIM.

THAT WAS BECAUSE THERE WAS A COVERED CLAIM. THERE HAS NEVER BEEN A DETERMINATION , NOT ONCE, THAT THIS WAS A COVERED CLAIM.

IF YOU ARE NOT FLYING A YOU ARE STATE FARM IN THIS SITUATION AND YOU WALK AWAY FROM THIS CASE AND IT IS ALLEGED, WHAT IS ALLEGED IN THIS CASE , AND STATE FARM , CAN IT COME IN TWO YEARS LATER AND SAY , OOPS, WE WANT TO RELITIGATE?

NO.

WHY IS FIGA DIFFERENT? YOU ARE BOUND BY , ARE YOU NOT , ALL OF THE FINDINGS THAT ARE IN THAT JUDGMENT AGAINST YOUR INSURED , WITH REGARD TO THE OPERATION , THE NEGLIGENCE, THE WHO DID WHAT AND TO WHOM. THOSE KINDS OF THINGS?

IF WE HAD AN OPPORTUNITY TO DEFEND AND WE DID NOT , WE ARE BOUND. UNLIKE THE STATEMENT THAT IS MADE AT PAGE

DID FIGA NOT RECEIVE A COPY OF THE COMPLAINT HERE?

FIGA RECEIVED A COPY OF THE COMPLAINT , AND FIGA - -

YOU ARE NOT SUGGESTING THAT FIGA DID NOT HAVE AN OPPORTUNITY TO DEFEND.

FIGA HAD PLENTY OF OPPORTUNITY TO DEFEND. IT CHOSE TO NOT DEFEND AND IT CHOSE TO DENY COVERAGE AND IT HAD GOOD AND RIGHTEOUS REASONS TO DO THAT AND HAD THERE NOT BEEN A DECLARATION IN THE TRIAL IN THE GARCIA AND CONTEMBO CASE , BOTH OF THOSE ACTIONS THE DEC ACTION WAS FILED IN THE COMPLAINT AGAINST FIGA, WITHIN THE ONE-YEAR PERIOD OF TIME. IT WAS WIDE OPEN HERE.

IS WHAT YOU ARE SAYING IS THE DISTINGUISHING FACTOR HERE, FROM GIORDANO , IS THE STATEMENT IN THE GIORDANO OPINION THAT, SINCE FIGA DID NOT DISPUTE THAT THE WRONGFUL-DEATH ACTION WAS A COVERED CLAIM, THEN FIGA HAD NO DISCRETION AS TO WHETHER TO DEFEND ITS INSURED?

CORRECT. AND IT DID DEFEND. IT DID TEE UP AND DEFEND.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO CLOSE ON THAT NOTE. YOU FILED A SUPPLEMENTAL AUTHORITY THIS MORNING.

I DID. I WOULD ASK THE COURT TO LOOK AT EXHIBIT 19. YOU ASKED THE FIRST DISTRICT COURT OF APPEAL TO SEND YOU OVER THE ADDITIONAL RECORD. CHIEF CHEE WE ARE NOT GOING TO BE ABLE TO GO OVER IT BUT WE WILL. THANK YOU VERY MUCH, AND THERE IS NO TIME. WE USED YOUR TIME, TOO , SO WE APPRECIATE BOTH OF YOU , ESPECIALLY , IN TRYING TO HELP THE COURT AND RESPONDING TO OUR CONCERNS AND INQUIRIES . THE COURT WILL NOW STAND IN RECESS.

MARSHAL: PLEASE RISE. ,, ,, ,,