Earl Stewart, Jr. V. Raymond G. Ingalsbe

CHIEF JUSTICE: GOODM ORNING AG AIN, AND THE LAST CASE ON THIS MORNING'S CALENDAR IS E ARL STEWART VERSUS INGALSBE . YOU MAY PROCEED.

THIS CASE APPLIES TO PARTIES WHERE ONLY SETTLEMENTS WITH THE CONTINGENCY FEE CONTRACT HAS VARIOUS ALTERNATIVES. STEWART SETTLED WITH VARIOUS PLAINTIFFS, AND A FTER THE FIRST JUDGMENT FOR PLAINTIFFS WAS RE VERSED BY THE FIRST DIST RICT COURT OF APP EALS , WHICH ORDERED A NEW TRIAL, THE CASE WAS SETTLED FOR $35,000 , WHICH BY THE WAY --

LET ME ASK YOU THIS , THE LEVIN CASE , REALLY, HAD TO DO WITH THE FACT THAT THERE WAS SOME LITIGATION -INVOLVED ACTIVITY, SO THAT THE ATTORNEY WAS A WIT NESS AND WAS OUT OF THE CASE , CORRECT?

YES , YOUR HONOR , THE ATTORNEY WAS DISQUALIFIED .

BUT IF WE REVERSE THE FOURTH DISTRICT AND SAID THAT LE VINE STRETCHED ALLTHE WAY -- LEVIN STRETCHEDALL THE WAY TO ANY ALLEGATIONS OF TORT IOUS INTERFERENCE WITH AN ATTORNEY FEE CONTRACT , WEWOULD BE O PENING UP AS ARGUED BY YOUR OPPONENT BUT WHAT STRIKES ME AS OF BEING OF CONCERN , IS THE ENTIRE G AMUT OF CONTRACTS BETWEEN AN INSTIT UTIONAL DEFENDANT AND PLAINTIFFS, SO THAT THERE WOULD BE AN INTERRUPTION OF THE ATTORNEY/CLIENT RELATIONSHIP , ISN'T THAT RIGHT? I MEAN, ISN'T THAT THE E XTENT OF, THAT WE WOULD HAVE TO GO , TO SAY THAT LEVIN APPLIE D TO THIS CASE?

JUSTICE WELLS, THIS COURT HAS RECOGNIZED SINCE AT LEAST 1938 , AND VERY CLEARLY IN THE 19 54 SENTCO DECISION AND EVERY COURT HAS FOLLOWED THIS COURT'S DECISIONS THAT, THE PART IES ALWAYS HAVE THE RIGHT T O SETTLE THEIR CASE WITHOUT THEIR LAWYERS.

BUT THAT SEEMS TO ME, TO NOT ANS WER THE QUESTION OF THIS CASE , BECAUSE THE ISSUEIN THIS CASE I S WHETHER YOU CAN DO SOMETHING THAT IS AN INTENTIONAL INTERRUPTION WITH A LAWYER WITH A CONTRACT, AND THAT HAS NOT HING TO DO WITH WHETHER OR NOT A CASE WESTBOUND SETTLED.THAT HAS TO DO WITH WHET HER THE LAWY ER'S CONTRACT WITH THE CLIENT CAN BE THE SUBJECT OF A TORTIOUS INTERFERENCE CLAIM.

JUSTICE WELLS THAT , IS EXACTLY WHAT THE COURT ADDRESSED IN SENTCO I N 1 954 AND SAID THAT A CLIENT IS NOT REQUIRED TO GO TO TRIAL , SIMPLY BECAUSE THE CLIENT HAS A CONT INGENCY FEE ARRANGEMENT WITH, THE PLAINTIFF HAS A CONTINGENCY FEE ARRANGEMENT WITH HIS OR HER LAWYER.

BUT THERE IS ALSO THE COROLLARY PRINCIPLE THAT WAS N EVER OVERRULED B Y LEVIN, ISTHAT THE PA RTY OR A CLIENT DOESN'T HAVE THE RIGHT TO SETTLE IN A WAY THAT E ITHER COLUSIVELY OR PLAUSIBLY INTERFERES WITH AN OTHER CONTRACTUAL SITUATION.

YES.

SO WOULD YOU AGREE THAT THE PROVISION, WHEN THEY SETTLED, HAD SAID NO ATTORNEYS FEES. YOU ARE JUST GO ING TO HAVE TO, YOU ARE ON YOUR O WN, AND BECAUSE YOU REALLY DON'T HAV E TO PAY YOUR AT TORNEY ANYTHING, THAT , WOULD THERE BE A CAUSE OF ACTION ,

THEN , THAT MR. INGALSBE COULD HAVE BROUGHT AGAINST STE WART UNDER THOSE CIRCUMSTANCES , OR IS THAT , YOU SEE, WHAT I AM CONCERNED ABOUT IS THAT THIS BROAD I DEA THAT LEVIN JUST EXTENDS TO THIS ABSOLUTE IMMUNITY DURING, FOR SETTLEMENT , IS THE BR OA D THING. NOW IT GETS INTO THE F ACTS OF THIS CASE , BUT DO YOU , WHAT WOULD BE THE SITUATION , IF YOU T AKE THE WORST CASE SCENARIO AND THEY FRAUDULENTLY SAID YOU DON'T -ANYATTORNEYS FEES , WOULD THAT BE COVERED BY THE LITIGATION PRIVILEGE?

NO, YOUR HONOR.

SO LEVIN ISN'T SO BROAD. NOW, THEN , WE REALLY GET INTO, THEN, A VERY FACT-SPECIFIC CASE, WHICH I AM HAVING TROUBLE UNDERSTANDING WH Y WE WOULD TAKE THIS CASE , BECAUSE I T REALLY HAS TO DO WITH THE LEMON LAW AND THE SPECIFIC FACTS OF THIS CASE AND I T IS ON A MOTION TO DISMISS. WE DON'T EVEN REALLY KNOW ALL OF THE INS AND OUTS OF WHAT WENT ON. WHAT IS SO IMPORTANT A BOUT THIS FA CTUAL SC ENARIO, AS LONG AS YOU HAVE RECOGNIZED THAT YOU COULD HAVE CAUSE OF ACTION IN CASES WHERE THERE WAS FRAUDULENT, YOU KNOW , OR COLORADO US I HAVE -- OR COLUSIVE ATTEMPTS TO ELIMINATE A FEE.

LET ME START WITH A PREMISE FOR THE QUESTION. THE SPECIFIC QUESTION THAT IS CERTIFIED , RECOGNIZES THAT STEWART PAID ATTORNEYS FEES. THE PRINCIPLE THAT YOU INVOKED AT THE BEGINNING , YOUR HONOR , GOES BACK TO MILLER VERSUS SCOBIE, BUT THE CONUND RUM THAT IS CREATED BY THESE TWO PRINCIPLES, IS EXACTLY WHY I BELIEVE THE F O URTH DISTRICT CERTIFIED THE QUESTION , CERTAINLY WHY WE ASKED THE FOURTH DISTRICT TO CERT IFY THE QUESTION AND WHY WE BEL IEVE IT IS IMPORTANT , BECAUSE ON THE ONE HAND , JUSTICE WELLS , WE HAVE THERIGHT TO SETTLE , A PLAINTIFF AND DEFENDANT ALWA YS HAVE THE RIGHT TO SETTLE A CA SE. ON THE OTHER HAND , M ILLER V ERSUS SCO BIE TEACHES THAT THE SETTLEMENT MUST PROVIDE FOR ATTO RNEYS FEES, THAT THE PLAINTIFF HAD A LAWYER , OR AND THIS GETS BACK TO YOUR QUESTION, JUSTICE PARIENTE , OR THE PLAINTIFF HAS TWO O PTIONS. THEY CAN CONTIN UE THE CASE . THEY CAN CONTINUE TO LITIGATE THE CASE WITHOUT THE PLAINTIFF AND GET A DETERMINATION OF THEIR FEES. THAT IS WHAT MI LLER VERSUS SCOBIE WAS B THAT IS WHAT SENTCO WAS ABOUT . OR MOVE FOR A TORTIOUS ACT OF INTERFERENCE. WHEN THEY MOVED FOR ATTORNEYS FEES AND WE OBTAINED A SETTLEMENT WITHOUT PREJU DICE AND A FTER THEY EXCUSED THE $50,000 IN ATTORNEYS FEES, THE CASE WAS DISMISSED WITHOUT PREJUDICE. THEY DI DN'T APPEAL THAT. THEY DIDN'T SEEK TO CONTINUE THE CASE.

I GUESS WHAT I A M TROUBLED BY , THEN, IT DOESN'T REALLY SEE M THAT LEVIN SEEMS TO FIT INT O THIS WHOLE THING AT ALL.

I AM SO RRY . STARTED TO WANDER A BIT. I AM GOING TO GET BACK INTO THE SIT UATION F A PLAINTIFFHAS AN OFFER OF SETTLEMENT , THEY KNOW THAT THEY MUST PROVIDE FOR ATTORNEYS FEES OR THE ACTION WILL CONTINUE AGAINST THEM.

ATTORNEYS FEES AS REQUIRED BY THE CONTRACTUAL RELATIONSHIP.

AND HERE JU DGE FARMER'S OPINION STATES WE AGREED TO PROVIDE 33 AND ONE-THIRD PERCENT.WHE N WE FOUND OUT THECONTRACT WENT UP TO 40 , THEY WANT MORE.

NO. THE CONTRACT EITHER SAYS THAT AM OUNT OR A COURT-AWARDED FEE , WHICHEVER IS G REATER , SO YOU DIDN'T COMPLY WITH T HEIR CONTRACT. THAT IS THE WHOLE POINT.

WE COMPLIED WITH THE CONTINGENCY PO RTION OF CONTRACT.

THE CONTRACT SAYS WHICHEVER IS GR EATER , EITHER/OR.

WE HAVE NO IDEA WHAT THAT $300 WOULD BECO ME. I WOULD LIKE TO TALK ABOUT THE $300 PER HO UR.

I THOUGHT THAT WAS THETHIRD OPTION, IF THERE WAS--

- - A JUDGMENT. THEY ARE PLEA DING , TH OUGH , I F YOU LOOK AT THE COMPLAINT, THEY WANT THE $300 QUANTUM MERIL.

WHAT I AM TRUBLINGD BY IS THAT , SI NCE 1954 -- WHAT I AM TROUBLED BY IS THAT , S INCE 1954 , WE HAVE HAD AWHOLE LOT OF ACTION WITH THE LAW, THE LEMON LAW , AND THECASE OUT OF THIS COURT WHICHSAYS THAT, IF A CLIENT FIRES A LAWYER BEFORE THE HAPPENING OF THE CONTINGENCY, RIGHT UP THROUGH THE JURY BEING OUT THAT, THE LAWYER DOESN'T GET AN ATTORNEYS, A CONTINGENCY FEE. NOW , THERE IS ALL THIS , THI NG THAT IS HAVE DEVELOPED , WHICH ARE BU ILT -IN METHODS BY WHICH AN INSTITUTIONAL LITIGATION DEFENDANT CANSTEP IN AND REALLY HA RM NOT JUST THIS CASE BUT , REALLY, I T FOR FUTURE CASES , THE ATTORNEY/CLIENT RELATIONSHIP . THAT IS WHAT B OTHERS ME ABOUT EX TENDING LEVIN IN THIS SITU ATION.

IF I MI GHT, THIS GOES TO THE REST OF JUSTICE PARIENT E'S QUESTION. IF YOU ALLOW PAR TIES ONLY SETTLEMENT, UNLESS THE COURT DETERMINES NOT TO ALLOW PARTIES-ONLY SETTLEMENT . IF YOU ALLOW FOR PARTIES-ONLY SETTLEMENTS , THE DEFENDANT HAS TWO CHOICES IN A PARTIES-ONLY SETTLEMENT, I N TWO CONTEXTS , EITHER PROVIDING FOR ATTORNEYS FEES AND HOPING IT IS EN OUGH TO SATISFY THE PLAINTIFF'S LAWYER AND REALIZING THERE IS A WHOLE C LEVER R ANGE OF CHARGE THAT IS A LAWYER CAN ARGUE FOR. IT IS NOT A LEMON LAW CASE . I DON'T KN OW WHY THAT IS IN THE FOURTH DISTRICT'S OPINION, BUT IT IS P URELY UNFAIR TRADE PR ACTICES CASE. YOU CAN PRO VIDE FORATTORNEYS FEES AND HOPE THATIS ENOUGH. IF YOU ARE WRONG , YOU ARE GOING TO GET SUED FOR TORTIOUS INTERFERENCE F YOU ARE WRON G, YOU ARE NOT GOING TO PROVIDE FOR ATTORNEYSFEES AND END UP WITH AN ACTION AGAINST YOU, SO YOU END UP IN THIS PUSH-PULL CON UNDRUM THAT, AND THAT I S WHAT THIS M AKES IT IMPORTANT , LEGAL FA CTS NOTWITHSTANDING.

IS THERE AN ALTERNATIVE , I MEAN THAT YOU COULD PROVIDE FOR ATTORNEYS FEES B UT IN A T LT T AF MANNER -- BUT IN AN ALTERNATIVE MANNER THAN WAS CALLED FOR. THE $300 AN HOUR IS A SETTLEMENT THAT THE LAWYER DID NOT APPROVE OF.

ACT UALLY , JUSTICE QU INCE , NOT , BECA USE THE PARTICULAR LANGUAGE IN THE CONTRACT IS THAT, IF YOU SETTLE WITHOUT OUR APPROVAL, YOU ARE GOING TO OWE US $300 PER HOUR QUANTITY UP MERIL. IT DO ESN'T SAY IF YOU SETTLE WITHOUT KNOWING ABO UT IT.

HO W CAN IT BE YOUR APPROVAL IF YOU DON'T KNOW ABOUT IT?

DOESN'T IT SAY IF YOU SETTLE AGAINST OUR ADVICE?

THANK YOU FOR CORRECTING ME, JUSTICE CANTERO . A GAIN , THEY WERE NEVER ASKED , SO IF YOU APPLY THE CONTRACT ACCORDING TO ITS LIT RAL T ERMS AS -- LITERAL T ERMS AS THEY ARE INSISTING THAT YOU HAVE TO, THIS IS OUT SIDE THAT CONTRACTUAL CL AUSE.

ALTERNATIVELY , THE COURTWOULD IMPOSE FEES PURSUANTTO THE STATUTE , CORRECT, ANDSO THE DEFE NDANT , WHAT BOTHERS ME ABOUT THIS, IS THAT THE DEFEND ANT, THEN , G ETS T O CHOOSE WHICH OF THE ALTERNATIVES, U NDER THE CONTINGENCY FEE CONTRACT , THAT HE IS WILLING TO PAY FOR .

JUSTICE QUINCE , LET ME ANSWER THAT ON THE FACTS OF THIS CASE , W HICH IN THE MAJORITY OP INION AND A S SET FORTH IN THE PA PERS, WAS STEWART AGREED TO P A Y WHAT THE LESUEURS TOLD THEM THAT THEY OW ED THEIR LAWYER. A S THE MAJORI TY OPI NION SAYS,

WHEN THEY FIRST LEARNED OF THE TE RMS OF THE CONTINGENCY FEE CONTRACT, THEY UN DER THAT TO 40 PERCENT AND THEY PAID $10, 000 IN APPELLANT ATTORNEYS FEES.

SO THERE WAS NEVER ANY DISCUSSION OF THE FEES P URSUANT TO STATUTE.

THERE WAS NEVER ANYINDICATION THAT WE WOULD , THAT STEWART WOULD HAVE KNOWN WHAT THE $300 PER HOUR Q UANTUM MER IT WOULD HAVE COME TO.

BUT LET AGO PARTY INVOLVED IN LITI GATION THAT HAS N O R IGHT TO INTERMETTLE WITH WHAT IS GOING ON BETWEEN SOMEONE ELSE AND THEIR ATTORNEY, YOU AREASKING TO METTLE IN THAT ANDSET THE TERMS OF IT , SO THAT IS THE PRO BLEM , THAT WHEN YOU BECOME INVOLVED IN THAT,YOU ARE ARGUING FOR POSITION THAT YOU ARE EN TITLED TO CONTROL THAT, SO IF YOU WAN TED TO DEAL WITH THE PLAINTIFF HERE AND PAY THEM AND THEY MISREPRESENTED SOMETHING , MAYBE YOU JUST BOUGHT A PIG IN A POKE,MAYBE , BECAUSE THAT IS THE OUTSIDE OF YOUR ARGUMENT , YOU ARE SAYING BECAUSE YOUDID THAT AND I THINK IMPROPERLY SO UNDER THESE CIRCUMSTANCES , THEN YOU ALSO HAVE THE RIGHT TO GO IN AND DICTATE WHAT THE LAWYERS ' RELATIONSHIP IS , AND I HAVE A DIFFICULT T IME UNDERSTANDING THAT .

LET ME ANSWER THAT QUESTION VERY SPECIFICALLY , JUSTICE LEWIS. AS JUDGE G R OSS POINTS OUT IN HIS DISSENT, THE LAWYER'S REMEDY IS AGAI NST THEIR CLIENTS.THEY HAVE , THE CONTRACTUAL--

THAT PERMITS, THEN, ADEFENDANT TO TAKE ADVANTAGE OF SOMEONE ELSE AND THEN YOUWALK AWAY WHEN YOU HAVE CREATED THE PROBLEM, ANDLEAVE THE LAWYER , LITIGATION BETWEEN THE LAWYER AND HISCLIENT. THAT IS REALLY A FINE SITUATION, ISN'T IT?

LET ME BEG TO D IFFER WITH THAT PORTRA YAL , JUSTICEWELLS , AND I APPRECIATE YOUR QUESTION AND DON'T THINK THAT I DON'T , BUT THERE IS NOTHING IN THIS RECORD TO SHOW THAT STEWART TO OK ADVANTAGE OF ANYBODY OR THAT THE PLAINTIF FS WERE LED ALONG BY THE NOSE TO DO ANYTHING. AS I STARTED TO SAY AT THE BEGINNING , THEY WON $21,000.

WHEN YOU SAY THERE IS NOTHING THIS REC ORD , ARE N'T WE ON A MO TION TO DISMISS?

WHEN WE ARE DECIDING ALEGAL IS SUE.

BUT IT IS ALREADY , WH ATIS IN THIS RECORD IS AL READY PRETTY BA D. THE LETTER THAT IS ATTACHED TO THE COMPLAINT SAYS , WHEN ALL THE SMOKE IS SETTLED , THE ONLY ONES COMING OUTAHEAD ARE OUR LAWYERS, BECAUSE THEY ARE GETTINGPAID. AS I SAID EARLIER , THE ONLY SURE WI NNERS ARE OUR TWO LAWYERS, WHO ARE THE ONLY O NES GETTING PAID.NOW, THAT MAY HAVE BEEN TRUE FOR STEWART'S LAWYER , BUT THE LAWYER FOR THE PLAI NTIFF WAS ON A CONTINGENT FEE AND WAS ONLY GOING TO GET PAID IF THERE WAS A COURT-ORDERED FEE OR SOME T YP E OF SETTLEMENT THAT PRO VIDED FOR HIS FEE , SO TO ME , THIS GOES BACK TO THIS ISSUE THAT YOU , YOU KNOW , THAT YOU CONCEDED EARLIER, WHICH IS THAT THEY HAVE A RIGH T TO SETTLE IN A WAY THAT DOE SN'T COLORADO U SIVELY OR FRAUD -- COLUSIVELY OR FRAUDULENT DEPRIVE ATTORNEYS OF THEIR PROPER FEES , BUT IT SEEMS TO ME THAT T HERE IS CERTAINLYENOUGH TO FIT THIS CASE , UNDER THOSE CIRCUMSTANCESWHERE THERE IS IMPROPRIETYG OING ON IN THE WAY THAT THE CLIENT IS APPROACHED AND TO MAKE IT SOUND LIKE IT IS ONLY THE LAWYERS THAT ARE GOING TO COME OUT A HEAD , AND SO CERTAINLY ENOUGH TO GET PAST A MOTION TO DISM ISS.

LET ME A NSWER THAT QUESTION IN TWO DIFFERENTWAYS. F IRST , RHETORICALLY, IF THAT WERE SO , WHY DID THE LAWYERS NOT INV OKE THEIR RIG HTS UNDER SENTCO AND SEEK TO CONTINUE THE ACTION TO GET A FEE DETERMINATION O N THEIR ALLEGED QU ANTUM MERIT WITH RIGHTS. THAT IS WHAT THIS COURT SAID THE RE MEDY IS, IF IN DEED IS THERE SOME THING

COL USIVE OR FRAUDULENT IN THE SETTLEMENT , AND I S UBMIT THAT THEY DID BECAUSE IT WASN'T COLU SIVE OR FRAUDULENT AND THAT THEY COULD SHOW IT WAS IN GOOD FAITH, AND SECONDLY , THIS GOES TO YOUR EXPRESSION OF DISCOMFORT WITH WHAT THIS RECORD SHOWS. REMEMBER THAT THIS IS PURELY A LITIGATION PRIVILEGE AND NOT ON THE SUFFICE I OF THECLAIM , AND I REC -- ON THE SUFFICIENCY OF THE CLAIM, AND I RECOGNIZE THE TWO ISSUES HAVE BECOME J OINED BECAUSE OF THE MAJO RITY AND DIS SENTING OPINIO N, BUT ACTUALLY THIS WENT UP TO THE FOURTH DISTRICT ONLY ON THE DISSENTING OPINION. IT DID NOT MEET THE TORTIOUS CLAIM FOR INTERFERENCE AND WE WEIG HED IT RIGH T FOR THE W RONG REASON. THE WA Y IT CA ME OUT IN THE T WO OPINIONS , PARTICULARLY IN THE MAJORITY , I THINK THE T RIAL COURT WAS BEING W RONGFOR THE RIGHT REASON IN THAT ISSUE.

SO IF WE DECIDE, AND IT SEEMS TO ME THAT , AND I DON'T WANT TO U SE THE WORD CON CEDE, BUT THAT IS WHAT I WAS HAVING TROUBLE WITH, THAT TWO THINGS ARE BEING JUMBLED TOGETHER, WHICH IS THAT THE LITIGATION PRIVILEGE OF LEVIN , REALLY , TO ME DOESN'T HAVE TO DO WITH THIS C ASE T HA S TO DO WITH WHAT, WHEN WE L OO K AT ALL OF OUR CASE LAW ABOUT ATTORNEYS FEES AND WHETHER PARTIES CAN SETTLE, WHERE THIS CASE F ALLS IN THAT, UNAFFECTED BY LEVIN.

ACTUALLY I WAS GOING QUITE OTHER DIRECTION, IN THAT THE QU ESTION CERTIFIED IS THE LEVIN QUESTION, ANDJUSTICE LEWIS , ACCEPTINGEVERYTHING THAT YOU SAID ALTHOUGH I WOULD BEG MY RIGHT TO DISAGREE , BEAR IN MIND THAT I THINK JUDGE G ROSS GOT IT EXACTLY RIGHT. WHEN YOU ARE TALKING ABOUT THE LITIGATION PRIVILEGE , YOU ARE NOT TALKING ABOUTTHE MA TTER A FTER PART Y'S RIGHT. I THINK HE QUITE COR RECTLY SAYS NO ONE HAS THE RIGHT TO COMMIT LIAB LE. NO ONE HAS THE RIGHT TO COMMIT SLANDER NO. ONE HAS THE RIGHT T A KING THEFACTS OF LEVIN TO MANIPULATIVELY GET A LAWYER DISCONFIDENCE . -- DISQUALIFIED.

LET ME ASK YOU A QUESTION AND I REALIZE THAT YOU ARE IN YOUR REBUTTAL TIME. TAKE A HYPOTHETICAL WHERE THIS SETTLEMENT OFFER HAD BEEN CONVEYED TO THE PLAINTIFF'S LAWYER, AND THE PLAINTIFF'S LAWYER HAD CONVEYED THIS, THEN , TO THECLIENT, TO THE PLAINTIFF , AND SAID , NOW , WE DON'T RECOMMEND THIS , AND AS A MATTER OF FACT , IF YOU ACCEPT THIS , THIS WILL B E AGAINST OUR AD VICE , AND YOU WILL STILL BE LIABLE TO US , BECAUSE THIS DOESN'T PROVIDE FOR WHAT WE CONSIDER TO BE THE ATTORNEYS FEES THAT WE CONTRACTED FOR IN THIS SCENARIO. WHAT WOULD HAVE BEEN THE RIGHTS OF THE PARTIES UNDER THAT SCEN ARIO , IF IT PLA YED OUT AND THE PLAINTIFF INSISTED ON GOING FORWARD WITH THE SETTLEMENT O N THOSE T ERMS.

JUSTICE AN STEAD , THAT SHOWS EXA CTLY THE HOLE IN INGLES BEE AND THE BROWNPOSITION, BECAUSE THAT GIVES, THAT $300 PER HOUR IS PR ETTY DARNED CLO SE TO GI VING THE PLAINTIFF 'S LA URA HAMMERLOCK TO PREVENT THE PLAINTIFF WHO WANTS TO SETTLE , WHO WANTS TO WALK AWAY FROM LITIGATION AND NEGO TIATION , FROM WALKING AWAY WITH THEDEFENDANT , FROM DO ING THAT , BECAUSE THE DIFF ERENCEBETWEEN THE CLAUSE IN THE E LLIS R UBEN CASE WHICH WE SENT UP IN OUR CLAUSE O F AUTHORITY WHICH WE SENT U P LAST WEEK , THAT YOU CAN'T DARE SETTLE WITHOUT OUR CONSENT, AND IF YOU DARE SETTLE WITHOUT OUR CONS ENT,YOU ARE GOING TO OWE US $300 PER HOUR , AND THE VICTORY ESSENTIALLY IS N'T. THAT IT PREV ENTS A HAMMERLOCK, TO PREVENT THE PLAINTIFF WHO WANTS TO SETTLE ON THEIR OWN, FROM DOING SO.

HOW IS THAT , IF YOU HAD A CONTINGENCY FEE , FOR INSTANCE, OF SAYING WE ARE GOING TO WORK HARD BEFORE WE FILE A LAW SUIT AND ALL THIS TIME, OUR FEEL BE JUST 20 PERCENT , BUT IF WE ARE NOT, IT IS GOING TO GO UP TO 30 , ONCE, WE AND THEY HAD , THEY HAD TO FILE , WE REN'T ABLE TO SETTLE, SO NOW WE HAVE A FILED SUIT. THEY HAVE A PROVISION FOR A 30 PERCENT FEE. NOW THEY GET AN OFFER FROM THE DEFENDANT , AND IT IS A20 PERCENT FEE. AND THE LAWYER SAYS , NO , I HAVE GOT A CLEAR CONTRACTUAL RIGHT TO THE 3 0 PERCENT FEE ,

AND MY VIEW OF THE DAMAGESAND THE LIABILITY IN THIS CASE, ARE CLEAR-CUT , AND IAM NOT GOING TO WAIVE MY 10 PER CENT. WHY SHOULD THE LAWYER BE FORCED TO WAIVE WHAT HE CONTRACTUALLY BARGAINED FOR , AND AS YOU SAY , YOU HAVE DESCRIBED IT AS A HAMMER KIND OF THING. WHY SHOU LD THE LAWYER BE FORCED TO WAIVE WHAT WAS CLEARLY BAR GAINED FOR IN THAT ARRANGEMENT?

I DON'T KNOW THAT THIS CASE SHOWS A WAIVER OF A PERCENTAGE FEE , AND I THINK --

I AM TR YING TO ANALOGIZE . YOU SAY IT IS A HAMM ER.

YES. I UNDERSTAND. THE LAWYER IS CONTRACTUALLY ENTITLED TO THE CONTINGENCY FEE, TO WHAT THIS C OURT HAS RECOGNIZE ED IN ITS RULES AND THE RULES THAT REGULATE THEFLORIDA BAR , AS LEGITIMATE , LAWFUL, I AM TALK ING ABOUT THE DIFFERENCE BETWEEN I GET MY PERCENTA GE WHICH COMESOUT OF THE RECOVERY. THERE IS NO WAY TO OFFER A 20 PERENT. IT COMES OUT OF THE RECOVERY , AND IN THAT SITUATION THE LAWYER WOULD BE CONTRACTUALLY ENTITLED TO TAKE IT OUT OF THE RECOVERY , AND I SUSPECT THAT THE COURT W OULD HAVE DONE SO IN THIS CASE AND IT WASN'T BECAUSE WE NOT ONLY PAID THE PLAINTIFF BUT WE PAID $40,000 FOR APPELLANT FEES , BUT THE DIFFERENCE BETWEEN THE COMING OUT OF THE PROCEEDS AND THE $300 PER HOUR, WHICH OFFERS THEPLAINTIFFS IN A NEGATIVE VALUE CASE , IF YOU WILL , IS IT PREVENTS THE PLAINTIFF WHO WISH TOES SETTLE ON THEIR OWN THERE. IS A CLEAR POLICY SITUATION THAT IS BEFORE THE COURT AND I UNDERSTAND THE DIFFICULTIES OF IT , BUT THE CONUNDRUM THAT IS CREATED BY ALLOWING PARTIES-ONLY SETTLEMENTS AND REQUIRING THOSE SETTLEMENTS PROVIDE FOR ATTORNEYS FEES , THE ONLY ALTERNATIVE TO DO WHAT IS LEFT , WOULD BE FOR ME T O B RING THE LAWYERS INTO THE PARTY SETTLEMENT AND SAY WHAT DO YOU THINK YOU ARE O WED, WHICH , OF COURSE, THEN GIVES THE LAWYERS A SEAT AT THE TABLE AND DENNIS THE PARTIES-ONLY SETTLEMENT.

COULD YOU , AS A PART O F THAT, SETTLE THE UNDERLYING DISPUTE AND MAKE THE ATTORNEYS FEES CONTINGE NT ON WHAT THE COURT WOULD DETERMINE WERE THE STATUTORILY - REQUIRED SNEEZE.

THAT IS WHAT I A M SAYING THEY ULTIMATELY DO.

COULD THAT IN FACT HAPPEN?

IT COULD , BUT IF THE PARTIES SETTLING ON THEIR OWN ARE REQUIRED TO BRING THE LAWYERS INTO THE SETTLEMENT PROCESS --

NO , WITHOUT BRINGING THELAWYER INTO IT, THAT A PART OF THE WH OLE SETTLEMENT IS THAT YOU GET $35,000, AND WE WILL PA Y WHAT THE COURT SAYS IS THE FEE FOR THIS SITUATION.

JUDGE, I UNDERSTAND THAT ULTIMATELY BRIN GS THE LAWYERS INTO THE COURT PROCEEDING TO DETERM INE THE FEE AND DEF EATS THE RIGHTS OF PARTIES-ONLY SETTLEMENTS. THUS FAR THE LAW ONLY REQUIRES THE PARTIES TO PROVIDE FOR ATTORNEYS FEES. IF WE THROW, THE PARTIES WOULD HAVE THE OP TION OF THROWING IT IN FRONT OF THECOURT.I QUESTION WHETHER YOU CAN IMPOSE A FLAT REQUIREMENTTHAT THEY DO SO , BECAUSETHAT, AG AIN, BRINGS THE LAWYERS BACK TO THE TABLE.

NOT THAT IT IS REQUIRED BUT THAT IS A POSSIBILITY.

I DON'T SEE WHY I T WOULDN'T BE .

I HAVE DIFFICULTY WITH THE WHOLE CONCEPT THAT YOU ARE PRESENTING , AND THAT SEEMS

THAT YOU ARE TRYING TO PLACE BLAME IN OTHER LOCATIONS, AND YOU HAVE A DEFENDANT WHO HAS TR EATED PEOPLE IMPROPERLY , THEY COULD HAVE RESOLVED THAT BEFORE LAWYERS EVER GOT INVOLVED AND THEY MAY DO THAT 100 TIMES AND PEOPLE WALK AWAY WITH P E NNIES , AND THEN THEY FACE A SITUATIONWHERE SOMEONE SAYS I INTEND TO EN FORCE MY RIGHTS AND ITHINK THE LAW PROTECTS ME AND THEY SEEK THE ADVICE OF COUNSEL , SO NOW THE INSTITUTIONAL DEFE NDANT CRIES FOUL THAT NOW WE ARE GOING TO HAVE TO DEAL WITH ALAWYER. THAT IS AWFUL. S O I THINK IT IS A CONUNDRUM NOT OF THIS DEFENDANT'S OWN MAKING, SO I HAVE DIFFICULTY ACCEPTING THAT , SOMEHOW UNDER THESE K INDS OF SCENARIOS, PARTICUL ARLY IN A CASE OF UNFAIR TR ADE PRACTICES, THAT IT IS ALL THE FAULT OF THE BAD GUYS WHO WANT TO HOLD SOMEONE TO A STATUTORY REMEDY, SO I HAVE DIFFIC ULTY WITH THAT.

JUSTICE LE WIS , IAPPRECIATE THE QUESTION , AND IF ANYTHING THAT I HAVE SAID HAS BEEN INTERPRETED AS PLACING ANY KIND O F BL AME G AME , I DID NOT M E AN TO CREATE THAT IMPRESSION.I WOULD LIKE TO LEAVE YOU WITH THE TH OUGHT , WITH THIS CASE BEFORE YOU ON , AND ALL OF THESE OT HER VERY TROUBLING CONSIDERATIONS ASIDE.THE QUESTION IS , I F SETTLEMENTS ARE RE LATED T O , ARE RELATED TO LITIGATION , NO ONE CAN SAY THAT THEY ARE NOT, IF SETTLEMENTS ARERELATED TO LITIGATION, IF PARTIES HAVE A RIGHT TO SETTLE WITHOUT THEIR LAWYERS, AND IF SOMETHING THAT COULD BE C A LLED TORTIOUS INTERFERENCE OC CURS IN THE COURSE OF DOING S O -- INTERFERENCE O C CURS IN THECOURSE OF DO ING SO , DOES THAT PROHIBIT PARTIES FROM COMMITTING LIABLE , SLANDER , OTHER FORMS OF TORTIOUS INTERFERENCE, AND ALL BECAUSE THE OVERRIDING POLICY OF PROTECTING PARTIES IN LITIGATION IS SO STRONG , DOESN'T THE LITIGATION PRIVILEGE PROVIDE IMMUNITY F ROM SU IT? THAT IS THE QUESTION , AND THE RIGHTFUL N IECE AND WRONGFUL NESS -- THE RIGHTFULNESS AND WRONGFULNESS AND WHO MAY B E TO BLAME IS ALL SET ASIDE .

YOU HAVE EXCEEDED YOUR TIME, BUT WITH THAT I HAVE TO ASK IF YOU DID RE FER TO THE E LLIS REUBIN CASE , OTHER THAN THE PART I N THE CONTRACT THAT THE PARTIESHAVE THE RIGHT TO ZLIN GT WITHOUT THEIR ATTORNEY THING , YES , YO U HAVE TO SETTLE , THAT SEEMS TO RECOGNIZE THAT THERE IS, CAN BE A CAUSE OF ACTION FOR TORT IOUS EN TER ATTORNEYS WITH A BUSINESS RELATIONSHIP, AND IT SO STATES, S O , AND I APPRECIATE YOUR HAVING FILED IT, BUT IT SEEMS THAT IT RUNS CONTRA RY TO YOUR POSITION HERE.

TWO PO INTS. FIRST, IT DOESN'T AD DRESS THE LITIGATION PRIVILEGE. THE INDIVIDUAL WHO ACHIEVED THE SETTLEMENT WAS NOT ONE OF THE PARTIES. H E WAS A THIRD PARTY BROUGHTIN TO D O THAT , A NO NLAWYER THIRD PARTY BROUGHT IN TO DOTHAT. I DON'T KNOW WHY LITIGATION PRIVILEGE WASN'T ADDRESS ED BUT IT WAS N'T. IT IS ADDR ESSED BEFORE YOU AND IN TER MS OF THE TORTIOUS INTERFERENCE ACT IN THAT DECISION, LOOK AT WHAT THE COMPLAINT IN THAT CASE SAYS THAT THIS THIRD PARTY ENTER LOWER D HE NEGOTIATED A SETTLEMENT -- THIS THIRD PARTY INTERLOWER DID. HE NEGOTIATED A SETTLEMENT AND OFFERED THE PLAINTIFF A JOB FOR LIFE AND OFFEREDHUSH MONEY THAT HE COULD FUNNEL TO THE LAWYERS AND TOLD, IF I MIGHT, YOUR HO NOR , PLEERX TOLD THE PLAINTIFF DON'T TELL YOUR LAWYERS A BOUT THIS . -- IF EVER THERE WERE A TOFERT DEFEAT THAT, IS THIS CASE.

I GU ESS WE GET INTO THE PROBLEM, THEN, WHERE IT DEPENDS UPON THE FACTS OF THIS CASE , A S OPPOSED TO AN ABSOLUTE IMMU NITY FROM CA USE OF ACTION FOR TORTIOUS INTERFERENCE.

TORTIOUS INTERFERENCE D THE CERTIF IED QUESTION AS KS THIS COURT DOES THE LITIGATION PRIVILEGE AP PLY TO PARTIES-ONLY SETTLEMENTS, WHERE CONTINGE NCY FEE CONTRACTS ARE INVOLVED. AS I SAID , THE TWO OPINIONS IN THE FOURTH DISTRICT HAVE MERGED THOSE IS SUES , BUT THEY ARE EASILY SEPARABLE , BECAUSE EVEN IF THERE IS SOMETHING FOUND TO BE AM ISS IN DOI NG THIS , THE QUESTION IS WHE THER THIS IS RELATED TO THE LITIGATION. THANK

YOU .

CHIEF JUSTICE: THANK YOU VERY MUCH.

MAY IT PLEASE THE COURT. I AM RI CK KUPFER , REPRESENTING THE RESPONDENTS, AND I THINK THAT I CAN SUMMARIZE OUR POSITION , REALLY, IN JUST A COUPLE OF SENTENCES. FIRST , OF COUR SE THE DEFENDANT HAS THE RI GHT TO SETTLE DIRECTLY WITH THEPLAINTIFF , WITHOUT CONS ENT OF THE PLAINTIFF'S ATTORNEY , B UT THE WHOLE POINT HERE IS THAT, BY DOIN G SO , THE DEFENDANT CANNOT TORTIOUS LY ENTICE THE PLAINTIFF TO BREACH FEE CONTRACT THAT THE PLAINTIFF HAS WITH THE PLAINTIFF'S OWN ATTORNEY , BY REDUCING THE FEE , ESPECIALLY A FTER SIX Y EARS OF LE GA L WORK LIKE IN THIS CASE.

BUT WE HAVE THE MI LLER CASE, I THIN K IT IS, THAT SAYS IF YOU DON'T PROVIDEFOR ATTORNEYS FEES, THE LITIGATION CAN CONTIN UE, SO YOU REALLY HAVEN'T SETTLEDTHE CASE, S O HO W IS A DEFENDANT AND A PLAINTIFFWHO ARE TRYING T O RES OLVE THEIR DIFFERENCES ON THEIR OWN AS APPARENTLY WE HAVE S AID FOR MA NY , MANY YEARSTHEY HAVE A RIGHT TO DO , IF THEY HAVE TO INCLUDE APROVISION FOR ATTORNEYS FEES , HOW ARE THEY GOING TO DO IT, IF WE ARE THEN GOING TO SAY , SINCE YOU DID PROVIDE A PROVISION FOR ATTORNEYS FEES , YOU HAVE NOW TORTIOUS LY INTERFERED WITH THE ATTORNEYS FEE CONTRACT?

ALL THEY HAVE TO DO IS FOLLOW THE CONTRACT AND NOT DEPART FROM THE CONTRACT ANDTHERE HAS BEEN N O INTERFERENCE, AND I THINK AS JUSTICE QU INCE INDICATED BEFORE, IT IS NOT A COMPLICATED MATT ER TO JUST SAY WE ARE SETTLE FOR A SPECIFIED SUM OF MO NEY AND WE WILL LEAVE THE FEE ISSUETO THE COURT, JUST LI KE THE CONTRACT SAYS, BECAUSE NORMALLY WHEN YOU HAVE A PREVAILING PARTY TYPE OF ATTORNEY FEE ST ATUTE AND THE DEFENDANT OFFERS A CERTAIN AMOUNT OF MONEY T O SETTLE THE CASE AND NOT HAVE TO GO TO TR IAL, THE PLAINTIFF IS GENERALLY CONS IDERED TO BE THE PREV AILING PARTY UNDERSUCH A STA TUTE AND IS ENTITLED TO A COURT-AW ARDED FEE.

DO WE KNOW, I N THIS CONTRACT, THE RE WAS AN A , A B AND A C. ARE YOU SEE KING , IN TERMS OF WHAT YOU ARE SAYING S HOULD HAVE HAPP ENED , WAS FOR B OR C , FOR STEWART TO HAVE PROVIDED FOR B OR C?

I THINK C IS , THAT IS THE $300 AN HOUR PROVISION, ANDI THINK UNDER THE , I DON'T THINK THAT CONTINGENCY HAS ACTUALLY OCCURRED IN THIS CASE, BECAUSE AS JUSTICE CANCAN'T BROUGHT O U T, WHAT THAT SAYS IS THAT THAT CONTEMPLATES THAT THELAWYERS ARE STILL GOING TO BE IN THE LO OP.

S O IT ISN'T KRE THEN.

I DON'T THINK IT IS C.

SO B, WHICH IS THE AMOUNT SET BY THE COURT UNDER THE ATTORNEYS FEE STATUTE.

IT IS THE AMOUNT SET BY THE COURT.

IF IT IS GREATER THAN THE 40 PERCENT.

IF IT IS GR EATER THAN THE PERCENTAGE.

SO WHY WOULD THAT BE , I GUESS THE QUESTION IS WHY DOES IT HAVE TO AND TORTIOUS INTERFERENCE ACTION?I MEAN, IF THE IDEA THAT , UNDER THIS, OUR PRIOR CASE LAW , THE Y HAVE TO PROVIDE FOR ATTORNEYS FEES AND PRESUMABLY ATTORNEYS FEES ASSET FORTH IN THE CONTRACTOR THE APPLIC ABLE STATUTE , WHY ISN'T THIS JUST AN INCOMPLETE COMPLIANCE WITH THE REQUIR EMENT THAT ATTORNEYS FEES BE PROVIDED FOR ? IN OTHER WO

RDS I AM THINKING OF, LIKE, A PIP CASE , WHERE , WHICH IS WHERE YOU HAVE ASMALL AMOUNT OF MON EY. THE ALLSTATE GETS IN TO UCH WITH THE IN JURED PARTY AND SAYS HOW MU CH ARE YOU OUT OF POCKET ? 10,000. WE WILL ADD A LITTLE BIT ON THERE AND JUST , LE T'S SEE , WELL GIVE ATTORNEYS FEES, A CONTINGENT FEE ATTORNEYSFEES, AND THAT IS HOW THEY SETTLE. IT SEEMS TO ME YOU WOULD HAVE A REMEDY TO GO BACK TO COURT AND SAY, LOO K, THIS IS JUST AN INCOMPLETE AGREEMENT. THIS IS WHAT MY CONTRACT ACTUALLY SAYS. NOW ENFORCE MY CONTRACT.

WELL , ONE PRO BLEM HE RE, AND I AM NOT S U RE IF THIS EXISTED IN THAT MIL LER VERSUS SCOBIE CASE, IS THAT THE CLIENT SIGNS A REAL IZE AND SETTLEMENT PAPERS, WHICH RELEASED ALL CL AIMS AGAINST INGALSBE. ALL CLAIMS WOULD INCLUDE A STATUTORY ATTORNEYS FEE, AND ALSO I WOULD LIKE TO SAYTHAT, IF WE HAVE, INSTEAD OF A TORTIOUS INTERFERENCE CASE , WHAT WE REALLY SHOULD HAVE IS A MILLER V ERSUS SKOB I KIND OF A CASE - - SC OBIE CASE AG AINST THE DEFENDANT, THEN WE SHOULDN'T HAVE BEEN DISMISSED WITH PREJUDICE. WE SHOULDN'T HAVE BEEN SMICHED DISMISSED WITHOUT PREJUDICE.

I THINK THE CONCERN THAT I HAVE IN TRYING TO MAKE THIS HAPPY BA LANCE THAT PRESERVES THE ABILITY OF PARTIES TO S ETTLE , IS THAT IN TORTIOUS ENTER ATTORNEYS, YOU YOU ARE -- TORTIOUS INTERFERENCE, YOU ARE T ALKING AB OUT PUNITIVE DAMAGES AND ALL SO RTS OF OTHER THINGS, IF IT IS CLEAR THAT YOU ARE TRYING TO GET JUST WHAT YOU ARE ENTITLED TO UNDER THE CONTRACT, THEN THAT IS , I THINK, A DIFFERENT STORY , BUT IF YOU JUST K EEP TOUT AS TORTIOUS INTERFERENCE, THEN THE DEFENDANT WOULD BE SUBJECT TO POTENTIAL PUNITIVE DAMAGES.

I THINK THAT WHAT MY C LIENT SHOULD BE ENTITLED TO HERE IS WHAT THE CONTRACT PROVIDED, WHICH MEANS THAT THEY SHOULD BE ENTITLED , YOU K NOW , THE ALL-IMPORTANTTHING, I THINK , THE BOTTOM LINE P U BLIC PO LICY CONSIDERATION IN THIS APP EAL , THAT A LAWYER'S REASONABLE EXPECT TAT IONS UNDER A V ALID FEE CONTRACT , IS SOMETHING THAT THE COURT S HAVE GOT TO PROTECT, FOR THE SAKE OF THE P UBLIC , AND ESPECIALLY FOR A CONSUMER CASE.

IS IT YOUR POSITION THAT THEY, THEN, SHOULD BE REQUIRED TO PAY THE $30 ON AN HOU R, WHAT EVER THAT HOURLY RATE IS?

NO. I DON'T BELIEVE THAT THAT PROVISION APPL IES TO WHAT HAPPENED IN THIS CASE.

SO WHAT ARE YOU ARGUING SHOULD HAVE APPLIED? WHICH OF THE PROVISIONS? ANOTHER PROVISION THAT SAYSTHAT THEY ARE ENTITLED TO A COURT-AWARDED FEE OF WHATEVER THAT TURNS OUT TO BE , IF IT - -

HERE IN THE TRIAL COURT , I WILL TRY TO MAKE A REAL QUICK HYPOTHETICAL. PARDON MY CONCERN TRYING TO FIT THIS IN. IN ALL OF THESE CASE S NOW , THERE ARE THESE OFFERS OF SETTLEMENTS , IN THIS CASE THE DEFENDANT WA NTING TO GETATTORNEYS FEES IF THEY GO AND PREV AIL. IT SEEMS LIKE YOU ARE GOING TO C REATE AN IN HERENT CONFLICT OF INTEREST. THE PLAINTIFF WANTS TO SETTLE BECAUSE THEY DON'TWANT THE RISK OF HAVING TO PATE DEFENDANT'S ATTORNEYS FEES. BUT YET YOU BRING THE ATTORNEY IN FOR THE PLAINTIFF IN THE NEGO TIATION PROCESS , THE ATTORNEY WANTS TO GO FOR WARD TO GET MORE.YOU SEE THE DYNAMICS? BECAUSE OF THE OFFER OF SETTLEMENT. A CONFLICT.

THEN THE $3 00, BECAUSE THEN IF THE ATTORNEY HAS BEEN BROUGHT IN AND IF THEY ADVISED AGAINS T A SETTLEMENT AND THEY SETTLED THE CASE ANYWAY, THEN THE CONTRACT SAYS THE LAWYERS ARE ENTITLED ONLY TO $300 AN HOUR.

AGAINST THE CLIENT.

AGAINS T THE CLIENT.

UNDER C. BUT THERE ARE CASE , I MEAN , I THINK WE HAVE HAD AND I THOUGHT THEY WE RE IN THE CONTEXT, MOST OF THEM AR ISE IN THESE INSURANCE CASES, WHERE WE HAVE ACKNOWLEDGED THERE IS CONFLICT AND THEN JUST SAY IT IS FOR THE COURTTO DETERMINE THE AMOU NT OF THE FEE. AREN'T THERE CASES OUT OF THIS COURT ABOUT THAT ISSUE? THAT IS WHERE YOU KNOW , THE PLAINTIFF SETTLES .

YE S.

AND YET THE ATTORNEYS FEE ISSUE CAN 'T JUST BE --

GENERALLY UNDER A PREVAILING PARTY, PIP CASESOR ANY TYPE OF PREVAILING PAR TY CASE, IF THER E IS A SETTLEMENT, IF THE DEFENDANT SETTLES A CASE INSTEAD OF GOING TO TRIAL, THAT E VENT CREATES THE RIGH T TO THE STATUTORY FEE. NOW , THEY CAN, ASSUMING THAT THE SETTLEMENT DOE SN'T WAIVE IT LIKE IT DID HERE. THE ZLINGT MENT JUST WAIV EDTHE RIGHT. -- THE SETTLEMENT JUST WAIVED THE RIGHT. BUT I THINK HE SPECIALLY IN A CON SUMER LAW CASE LIKE, THIS WHERE THE LAWYER KN OWS GOING INTO IT THE D AMAGES ARE SMALL. THE JURY CAME BACK WITH $20,000 , WHICH IS PROB ABLY NOT FAR OFF WHAT IT SHOULD BE. THE ONLY FINANCIAL INC ENTIVE THAT A LAWYER HAS TO TAKE A CASE LIKE THIS , IS THE PROSPECT OF HOPE FULLY WINNING AND BEING ENTITLED NOT JUST TO A STATUTORY AWARD BUT TO A CONTINGE NCY MULTIPLIER, WHICH BY THE WAY , DISTINGUISH S THE OFFER-OF-JUDGMENT STATUTETHAT YOU MENTIONED BECAUSEYOU DON'T GET A CONTINGENCY MULTIPLIER.

LET ME ASK YOU THIS, IF WE R ULED IN YOUR FAVOR, IF WE UP HELD THE FOURTH DISTRICT, DO WE HAVE TO RECEDE OR NARROW LEVIN? BECAUSE LEVIN HAS GOT SOME PRETTY BROAD LANGUAGE.

I THINK THAT LEVIN NEEDSTO BE CLARIFIED , TO BE HONEST. L EVIN SAYS T WO DIFF ERENT THING INS THE SAME OPINION. MY COLLEA GUE IS RELYING ON CERTAIN VERY BROAD LAN GUAGE IN LEVIN , AS DID JUDGE GROSS IN HIS DISSENTING OPIN ION, WHICH SAYS THAT, IF THE ACT IS RELATED T O THE LITIGATION PROCESS , THAT IT FALLS WITHIN THE UMBRELLA OF THE PRIVILEGE, BUT THEN AT ANOTHER PO INT IN THE LEVINCASE, THIS COURT SAYS THAT ONLY IF THE ACT IS AN ACT THAT IS REQUIRED OR PERMITTED DURING THE COUR SEOF THE JUDICIAL PROCEEDING. I THINK THAT IS A LITTLE NARROWER. I THINK THAT IS THE BE TTER T EST.

AS MR . SCHERKER SAID , LIABLE AND SLANDER ARE NEVER PERMITTED DURING THE COURSE A FTER JUDI CIAL PROCEEDING BUT FOR THE LITIGATION PRIVILEGE.

WELL, YOU ARE PER MITED --

IN OTHER WO RDS THE LITIGATION PRI VILEGE EXISTTO SAY EXEMPT SOMEONE F ROM OTHERWISE TORTIOUS BEHAVIOR.

BUT THERE IS, WHAT IS PERMITTED , YOU ARE , ALLEGATIONS ARE PERMITTED TO BE MADE IN PLEADINGS. STATEMENTS ARE ALLOWED TO BE M ADE IN COURT. LET ME G IVE A HYPOTHETICAL. LET ME SAY I AM IN COURT AGE CROSS-EXAMINING A WITNESS -- IN COURT, AND I AM CROSS-EXAMINING A WITN ESS AND THAT WITNESS SAYS SOMETHING THAT I KNOW IS WRONG AND I GET A LITTLE OVER EXUBERANT IN COURT AND I ATT ACK HIS ANCESTORY , PARDON ME BUT I AM MAK ING A POINT.THAT FALLS WITHIN THE SCOPEOF THE PRIVILEGE , BUT NOW LET SAY I REALLY LOSE IT AND WALK UP TO THE WITNESS AND P UNCH HIM IN THE NO SE.

SO YOU ARE SAYING LEVIN ONLY I AMNIZES S L ANDER ANDLIABLE.

NO.I AM HIM - - ONLY IMMUNIZESSLANDER AND LI ABLE.

NO.I AM SAYI NG IN THE COURSE OF LITIGATION, IF I AM PURSUED FOR BREAKING THAT WITNESS'S K NOWS.

WHAT IF SOMEBODY RELIABLE ON THE STAND SAYS THIS DEFENDANT AT THE GROCERYSTORE HIT ME AND THAT IS WHY I BROUGHT THIS CAUSE OFACTION FOR BA TTERY , AND HE IS LYIN G ON THE STAN D AND THAT IS PROV EN, THAT NOW BEYOND THE LITIGATION STAGE BECAUSE IT IS PROHIBITED?

NO. IT FALLS WITHIN THE LITIGATION STAGE.

YOU ARE ENTITLED TO A FEE BUT THIS DOESN'T INVOLVE ONLY THOSE CASES. WHAT ABOUT A PATIENT THAT IS SUE AGO DOCTOR , TO GET DO WN TO THE -- THAT IS SUING A DOCTOR. YOU GET DOWN TO THE COURTHOUSE AND THE DOCTOR WALKS OUT IN THE HALL WITH THE PATIENT AND SAYS, LI STEN , IF YOU WILL , WELL WILL SETTLE THIS CASE IF YOU -- WE WILL SETTLE THIS CASE IF YOU WILL DISCHARGE YOUR LAWYER, AND THEN WE WILL TAKE CARE OF THE LAWYER, BUT YOU HAVE GOT TO, THE LAWYER DOESN'T WANT TO SETTLE, SO WE HAVE GOT TO GET ARRIVED THE LAWYER FI RST. NOW , WOULD THAT -- WE HAVE GOT TO GET RE ID OF THELAWYER FIRST . NOW , WOULD THAT BE --

I THINK THAT I S LIKE IN THE FARISH CASE , THAT THIS COURT SAID 15 YEARS AGO WAS TORTIOUS IN THE FARISH. WHERE ONE PARTY IN ADVERTISES THE OTHER PARTY TO DISCHA RGE THEIR ATTORNEY ENTIRELY, MA YBE THERE IS BAD FEELINGS GOING BETWEEN THEDEFENDANT , AS IS IN THIS CASE BECAUSE THIS DEFENDANT HAS BEEN SUED BY THESELAWYERS A NUMBER OF TIMES.

SO THE LAWYER S IN THIS CASE, A FTER THE SETTLEMENT DEPEND THEY GO TO THE COURT ALA THE MILLER CASE AND SAY , LOOK, NOTWITHSTANDING THE SETTLEMENT, WE ARE ENTITLED TO OUR FEES.

NO , THEY DID NOT. THEY FI LED A TORTIOUS INTERFERENCE .

SHOU LDN'T THIS BE ANALYZED IN THAT K IN D OF A CONTEXT AND NOT IN THE CONTEXT OF A TORTIOUS INTERFERENCE, BECAUSE LEVIN DOES HAVE SUCH BROAD LANGUAGE, BUT YET SOME OF THE COUNTERVEILING CONCERNS THERE ARE BUT CAN BE ADDRESSED IN KIND OF A MILLER TYPE ANALYSIS?

IF ALL OF THE CONC ERNS CAN BE ADDR ESSED IN A MILLER TYPE O F CASE , AND THE MILLER DOES CONT AIN THAT LANGUAGE BUT I HAVEN'T SEEN ANY CASES AFTER MILLER, WHERE THEY ACTUALLY DISC USS THE , PROCEDURALLY HOW THIS , THEY FOLLOW THROUGH AND STILL TRYTO GET THEIR FEE WHEN ALL OF THE RELEASE DOCUMENTS HAVE BEEN FILED.

IS THAT SOMETHING THAT YOU STATE YOUR CLIENT , ATTORNEYS DID NOT FEEL THEY COULD CONTINUE IN THAT CASE BECAUSE IT WAS AL READY , THERE WAS A RELE ASE AND DISMISSAL.

RELEASES AND SETTLEMENTS HAD BEEN EXECUTED.

IN TERMS OF THIS LITIGATION PRIVILEGE , IN TRYING TO GO BACK IN THE POLICY OF WHAT WE ARETALKING ABOUT, IT USES LANGUAGE, IT SAYS IT ONLY EXTENDS TO ACTION THAT IS ARE IN PROSECUTING OR DEFENDING A LAWSUIT, AND IT W OULD SEEM TO ME THAT THAT, REALLY, IS WHY IT IS SO BROAD, BECAUSE YOU SHOULD BE ABLE TO DO , YOU KNOW, WHATEVER YOU NE ED TO DO IN TERMS OF ACTUALLY TRYING A CASE OR DEFENDING A CASE , IS THERE , BUT DO YOU SEE THAT SETTLEMENT IS SUES ARE , REALLY , JUST GOVERNED BY THIS WH OLE OTHER SERIES OF CASES THAT STA RTED IN , ABOUT WHETHER PART IES CAN SETTLE OR NOT AND WHAT PROVISIONS FOR ATTORNEYS FEES SHOULD BE MADE? I KNOW , IN OTHER WO RDS , WOULD YOU

JUST SAY THAT LEVIN DOESN'T COVER ISSUES RELATING TO THE SETTLEMENT OF A LAWSUIT , OR ARE YOU TRYING, ARE WE GOING TO SLICE SOME BRED HE RE?

IT IS HARD , BECAUSE YOU MIGHT, MAYBE DEFAMATORY STATEMENTS ARE MADE D URING A SETTLEMENT MEDI ATION HEARING.

ISN'T THAT A SEPARATE, AREN'T MEDIATION , ISN'T THERE A SEPARATE STATUTE OFTHAT, MEDIATION?

LE T'S SAY IT IS NOT A MEDIATION.IT IS JUST AN INFORMAL SETTLEMENT MEETING. IT IS H ARD , REALLY , TO COVER E VERY POSS IBLE HYPOTHETICAL THAT CAN COME UP WITH ONE CATCHPHRASE THAT IS GOIN G TO WORK AND JUST BE FAIR -- .

SO WHAT IS THE R ULE OF LAW THAT YOU WOULD HAVE US ANNOUNCE IN THIS C ASE?

WELL , I JUST THINK THAT THE NARR OWER LANGUAGE THAT ALREADY EXIS TS IN THE LEVINCASE IS THE M OR E SENSIBLE LANGUAGE, BECAUSE INSTEAD OF , ANYTHING CAN ARGUABLY HAVE A N EXUS TO LITIGATION.

SO WHAT WOULD YOU , HOWWOULD YOU PHRASE IT THEN?

I THINK THAT THE ACT THAT IS REQUIRED OR PERMITTEDDURING THE COURSE OF A JUDICIAL PROCEEDING, THIS COURT PROBABLY WENT TH ROUGH A SIMILAR PROCESS AT THE TIME LEVIN WAS DECIDED BECAUSE YOU DIDN'T WANT TO COME UP WITH A RU LE THAT WAS TOO BROAD BUT YOU WANTED TO COVER THE FACTS OF THAT CASE.

PERJURY WOULD BE INCL UDEDWITHIN THAT IMMUNITY .

PERCENTAGE RY IS PERMIT -- PERJURY IS AGAINST THE LAWAND SOMEBODY CAN BE CRIMINALLY PROSECUTED, MAYBE EVEN T H OUGH THEY ARE CIVILLY PROTECTED.

ARE YOU ABLE TO ENUNCIATE HOW --

I A M NOT SURE JUST HOW R IGHT OFF OF THE TOP OF MY HEAD RIGHT NOW , I COULD ENUNCIATE A PERFECT RULE THAT WOULD APPLY. S AYING THAT SETTLEMENT PROCEEDINGS ARE UNRELATED TO THE LITIGATION, I AM NOT SURE IF THAT IS THE ANSWER.

WHY CAN'T YOU NARROW IT TO INTERFERENCE WITH AN ATTORNEY FEE CONTRACT , PERIOD.

THAT IS ANOTHER WAY OF COMING, THAT INTERFERINGWITH THE FEE CONTRACT , S IMPLY , WHE THER IT IS DONE IN A SETTLEMENT OR IN THE HALLWAY OF THE COURTROOM DURING A RECESS IN TRIAL . E ITHER WAY , THAT IS NOTSOMETHING THAT IS PERMITTED NORMALLY , DURING THE COURSE OF LITIGATION.

WHY ISN'T IT SATISFACTORY JUST TO HAVE THE CONTRACTUAL ACTION BY THE ATTORNEY AGAINST HIS CLIENT? WHY ISN'T THAT POLICY WE ISS , A BETTER POL ICY THAN -- POLICY WI SE, A BETTER POLI CY THAN BROADENING THE LEVIN RULE HERE?

FOR ONE THIN G, IN A CONTRACTUAL ACTION, THERE ISNO CONTINGENCY MULTIPLIER , WHICH IS REALLY THE LURE THAT GETS PLAINTIFFS'ATTORNEYS TO ACCEPT THESE VERY SMALL DAMAGES CASES , AND I THINK THAT , IF YOU ELIMINATE THAT FINANCIAL INCENTIVE , THEN YOU ARE GOING TO HAVE CONSUMERS THAT ARE UNREPRESENTED IN THESE KIND OF CASES AGAINST OUGHT 'DEALERSHIPS THAT O N -- AGAINST A UTO DEALERSHIPSTHAT ARE WELL FINANCE ED . THEY HIRE GOOD LAWYERS LIKE MR. SCHERKER , AND IF AN INSTITUTIONAL AGRE EMENT -- AND IF A N INSTITUTIONALDEFENDANT CAN COME IN AFTERSIX YE ARS AND PULL THE RUG OUT FROM

UNDER THE LAWYER.

IF THE SETTLEMENT PROVISION SAYS IT DOES NOT PROVIDE FOR ATTORNEYS FEES , AND IF A CLIENT SETTLES WITHOUT A LAWYER , ATTORNEYS FEES SHOULD BE DETERMINED BY THE COURT.

I THINK THAT WOULD BE A SENSIBLE PROVISION TO PUTINTO A CONTRACT , AL THOUGH I HAVE READ A LOT OF FEECONTRACTS , AND I DON'T THINKI HAVE EVER SEEN PROVISION LIKE THAT.

WOULD YOU AGREE THAT, IN A SITUATION , SEE WE WERE DEALING WITH HAPT ALTHA JUSTICE ANS TEAD G AVE TO MR . SCHERKER, WHICH IS THAT -- A HYPOTHETICAL THAT JUSTICE ANSTEAD GAVE TO MR . SCHERKER, WHICH SAID THAT THE ATTORNEYS, THE CASE WAS $100,000 AND AT SOME PO INT THE DEFENDANT APPROACHES THE CLIENT AND SAYS WE CANSETTLE THIS FOR $50,000 , AND THERE IS A CONTINGENT FEE OF WHATEVER IT IS , YOU WOULD AGREE IN THOSE SITUATIONS , ABSENT SOME F URTHER BEHAVIOR ON BEH ALF OF THE DEFENDANT , THAT THE CLIENT, THEN , I S JUST BOUND TO PAY WHATEVER THE CONTINGENT FEE S.

PERCENTAGE FEE. RIGHT . Y ES. I WOULD AGREE T O THAT.

SO THIS REALLY ONLY ARISES IN THOSE SITUATIONS WHERE THERE ARE STATUT ORY, IMEAN, THE PROB LEM AR ISES MAINLY WHERE THERE ARE STATUTORY FEES .

THAT IS AT LE AST IN OUR CASE, THAT IS WHER E THE PROBLEM ARISES.

I GUESS WE CAN'T TELL FROM THE RECORD, BUT IT WOULD APPEAR THAT , AT ONE POINT THAT THE , STEWART WAS ACT UALLY TRYING TO COMPLY WITH THE STATUT E, BECAUSE WHEN THEY , THE CLIENT DIDN'T REALLY KNOW WHAT THE , NOT WITH THE STATUTE, WITH THE CONTRACT, BECAUSE AFTER THEY FIRST OFFERED A CERTAIN AMOUNT, THEN THEY FO UND OUT THE ATTORNEY FEES PART OF THE CONTRACT ACTUALLY PROVIDED FOR MO RE, THEY ACTUALLY PROVIDED FOR MORE MONEY THERE.

WELL , I THINK THAT MR . STEWART KNEW THAT THERE WAS A STATUTORY RIGHT TO A FEE , BECAUSE HE HAS BEEN DEFENDANT IN THESE KINDS OF CASES BEFORE THE. HE, H IMSELF , OBTAINED A N APPELLANT ATTORNEYS FEE AWARD IN THE FIRST APPEAL IN THIS CASE, B ASED U PON THESAME STATUTE THAT WE ARE ENTITLED TO A FEE A WARD, MY CLIENTS ARE ENTITLED TO A FEE AWAR D, I THINK , NOW , A FTER THE SETTLEMENT , SO , NO , I THINK THAT HE SWEETENED THE POT HERE AND OFFE RED EVEN MORE MONEY THAT THE JURY CAME BACK WITH , BECAUSEWHAT HE IS DOING IS REALLOCATING MORE MONEY AWAY FROM THE LAWYERS.

IN OTHER WORDS WHAT YOUR ALLEGATIONS ARE, THE W H OLE INTENT OF THIS WAS TO TRY TO GET AR OUND PAYING WHAT HE K NEW WOULD BE A PRETT Y SIGNIFICANT ATTORNEYS FEES UNDER --

THE COMPLAINT IN THE TORTIOUS INTERFERENCE CASE ALLEGES THAT STEWART'S INTENT HERE WAS TO MALICIOUSLY INTERFERE AND TO DEPRIVE THE ATTORNEYS AFTERWHAT HE KNEW WAS THE FULL VALUE OF THEIR CASE .

WHAT WOULD HAVE BEEN THE POSITION OF THE PLAINTIFF'S LAWYER, IF THIS SETTLEMENT OFFER HAD BEEN MADE THROUGHOUT LAWYER ? AND THE LAWYER CONVEYED IT TO HIS CLIENT AND SAID, OF COURSE, THIS IS NOT ACCEPTABLE TO ME , YOUR LAWYER, BECAUSE THEY ARE C UTTING US OUT OF A FEE EVEN THOUGH YOU ARE GETTING , PERHAPS WHAT , BUT THE CLIENTS AID I WANT TO SETTLE THAT , AND THEY GAVE THE LA URA WRITTEN DIRE CTION T O SETTLE FOR THAT. THE LAWYER, HAVING TOLD THEM, NOW, IF YOU GO FORWARD WITH THAT, YOU ARE GOING TO BE ON THE HO OK , YOU KNOW, TO ME.

RIGHT.

NOW , IS THAT, WHAT WOULD , HOW WOULD THAT HAVE PLAYED OUT?

I THINK PROBABLY THE ATTORNEYS WOULD HAVE SAID $35,000 IS A PRET TY GOOD SETTLEMENT FOR THIS , BUT WE WANT YOU TO LEAVE OUR FEE TO LET THE COURT DECIDE , AND IF THAT IS NOT SOMETHING THAT MR . STEWART FINDS ACCEPTABLE, THEN THERE IS THIS PROVISION IN OUR FEE CONTRACT. YOU NEED TO KNOW ABOU T. AND AT LEAST THE CLIENT , NOW , IS MAKI NG AN INTELLIGENT DECISION, KNOWING THAT T HERE IS A $300 AN HOUR PROVISION IN THERE.

BECAUSE THEY MAY HAVE BEEN ABLE TO SHOW THAT THOSE $300 WOULD HAVE WIPED OUT THEIR $35,000.

WHICH IS WHY IT IS BETTER TO HAVE LAWYERS INVOLVED IN THE SETTLEMENT PROCEDURE , BUT THIS CLIENT PROB ABLY D IDN'T REALIZE TH AT THERE WAS ANY STATUTORY RIGHT TO A FEE AT ALL , BECAUSE THEY WERE UNREPRES ENTED AT THIS HEARING.

THERE IS ANOTHER, I THINK , LURKING ISSUE HERE THAT NEITHER OF YOU HAVE ADDRESSED , AND I DON'T KNOW IF WE SHOULD ADDRESS IT. IS THAT IF THERE IS NO LITIGATION PRIVILEGE AND WE GO TO THE CAUSE OF ACTION IN THIS CASE , WERE ALL OF THEELEMENTS OF THE CA USE OF ACTION PRESENT? DO WE NEED TO REACH THAT ISSUE?

NEITHER THE TRIAL COURTNOR THE FOU RTH DCA ADDRESSEDTHAT I SHALL EW , AND IT HAS NOTHING TO DO WITH THE CERTIFIED QUESTION.

I THOUGHT THE DI SSENT ADDRESSED IT. ANOTHER DISSENT MAY HAVE ADDRESSED IT.

BUT YOU SEEM TO HAVE CONCEDED THAT , PERHAPS THE BEST TYPE OF CAUSE OF ACTION IS, REAL LY, ONE THAT WOULDJUST ALLOW THE LITIGATION , FOR THE COURT JUST TO DETERMINE THE ATTORNEYS FEE , IF IT QUANTITY ADEQUATELY PROVIDED FOR IN THE SETTLEMENT, THEN YOU DON'THAVE TO WORRY ABOUT THOSE CAUSE OF ACTION.

IF THE LAWYERS ARE ST ILL PERMITTED TO GO BA CK INTO COURT AS THE Y WOULD B E NORMALLY AFTER WINNING A CASE AND HAVE A FEE HEARINGAND GET THEIR, IF THEY ARE ENT ITLED TO IT , HAVE A CONTINGENCY FEE MULTIPLIER, BECAUSE THAT IS REALLY THE ONLY INCENTIVE FOR ANY LAWYER TO GET INVOLVED IN ACASE LI KE THIS, THEN , YES , I THINK THAT IS REASONABLY INVOLVED IN A TORTIOUS INTERFERENCE ACTION. Y ES. WE WOULD RESPECTFULLY REQUEST THAT THE MAJORITY OPINION OF THE FOURTH DCA BE APPROVED.

CH IEF JUSTIC E: THANK YOU.

MARSHAL: PLEASE RI SE.