>> PLEASE RISE.
>> LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.
PLEASE BE SEATED.
>> THE NEXT CASE ON THE COURT'S CALENDAR IS PETER GENOVESE V. PROVIDENT LIFE & ACCIDENT INSURANCE.
>> GOOD MORNING.
BARD ROCKENBACH ON BEHALF OF THE PETITIONER, PETER GENOVESE.
I'D LIKE TO INTRODUCE AT COUNSEL TABLE MR. RICK VAN RUBY WHO IS MY TRIAL LAWYER ON THIS CASE.
IT'S PROBABLY NOT SURPRISING TO THE COURT THAT THE PARTIES IN THIS APPEAL HAVE COME AT THE ISSUE IN DISPARATE, FROM DISPARATE PERSPECTIVES.
THE RESPONDENTS HAVE APPROACHED IT WITH THE ASSUMPTION THAT THERE IS AN ATTORNEY/CLIENT PRIVILEGE AND HAVE CITED PROBABLY 70, 80 CASES --
>> WELL, BUT THERE IS AN ATTORNEY/CLIENT PRIVILEGE THAT'S A MATTER OF STATUTE.
>> WELL, THERE'S A --
>> THAT'S NOT ASSUMPTION.
>> NO.
>> THE QUESTION IS WHETHER THAT HAS BEEN IMPLIEDLY REPEALED FOR THIS CONTEXT, IS THAT CORRECT?
>> WELL, I WOULD SAY IT DIFFERENTLY.
I WOULD SAY THAT IN THEORY THERE

IS AN ATTORNEY/CLIENT PRIVILEGE
THAT EXISTS BECAUSE OF THE
RELATIONSHIP BETWEEN --
>> I DON'T UNDERSTAND WHAT'S
THEORETICAL ABOUT STATUTE.
>> IN THIS CASE --
>> I DON'T UNDERSTAND WHAT'S
THEORETICAL ABOUT A STATUTE THAT
ESTABLISHES AN ATTORNEY/CLIENT
PRIVILEGE IN A BROAD -- BROADLY
APPLICABLE WITH CERTAIN SPECIFIC
EXCEPTIONS.
>> PERHAPS I SAID IT
INCORRECTLY.
BUT WHAT I'M SAYING IS THAT IN
THIS CASE THE QUESTION IS
WHETHER THERE IS AN
ATTORNEY/CLIENT PRIVILEGE IN
THIS CASE BECAUSE OF THE WAY
THIS RELATIONSHIP EXISTS OR
BECAUSE OF THIS RELATIONSHIP.
YES, THERE IS AN ATTORNEY/CLIENT
PRIVILEGE.
IT EXISTS BECAUSE OF THE
RELATIONSHIP OF PARTIES UNDER
CERTAIN CIRCUMSTANCES.
IT WAS RECOGNIZED IN COMMON LAW
AND THEN CODIFIED IN THE
STATUTE.
BUT THE QUESTION HERE IS WHETHER
THERE IS AN ATTORNEY/CLIENT
PRIVILEGE UNDER THESE
CIRCUMSTANCES.
AND BY THESE CIRCUMSTANCES, I
MEAN A FIRST-PARTY INSURANCE
CLAIM, A BAD FAITH CLAIM FOR, IN

A FIRST-PARTY CONTEXT.
IN OTHER WORDS, THE INSURED IS SUING HIS INSURANCE COMPANY FOR BENEFITS, AND THEN AFTER THAT IS CONCLUDED THERE IS A BAD FAITH CLAIM ARISING OUT OF THE WAY THE FIRST CLAIM WAS HANDLED.
>> WHERE THERE IS A PRETTY, THERE IS A BIG DIFFERENCE IN THAT WHEN THE INSURED IS SUING HIS INSURANCE COMPANY OR HER INSURANCE COMPANY THE FIRST-PARTY BAD FAITH, THAT INSURED HAS TO GET THEIR OWN ATTORNEY.
IN A THIRD-PARTY BAD FAITH CASE WHEN THE, WHEN THE DEFENDANT IS SUED OR THE INSURED, THE INSURED'S ATTORNEY IS THE ATTORNEY THEN THAT THEY'RE SEEKING INFORMATION FROM.
SO THERE IS, IF IN THE COURSE OF THE LITIGATION THE FIRST PARTY LITIGATION THE INSURANCE COMPANY WHO IS DENYING COVERAGE HAS THEIR OWN SEPARATE ATTORNEY AND NO INSURED THINKS WHEN THEY ARE INVOLVED IN LITIGATION THAT THAT ATTORNEY ON THE OTHER SIDE IS THEIR FRIEND AND THAT THEY'RE GOING TO BE ABLE TO, YOU KNOW, DURING THAT LITIGATION SAY, WELL, TELL ME WHAT ELSE IS IN THE FILE.
>> TRUE.
>> SO I'M HAVING -- I MEAN, IN

TERMS OF THE ISSUE HERE ISN'T
THE QUESTION THAT AND WHY WE
DIDN'T, WE MAY HAVE DECIDED IT
IN RUIZ --
>> YES.
>> BUT WE DIDN'T EXPRESSLY
DECIDE IT BECAUSE IT WASN'T AT
ISSUE, THAT THERE IS A STATUTORY
PRIVILEGE?
AND SO THE QUESTION THAT WE HAVE
TO ACT IS WHETHER IN THE
ENACTMENT OF THE STATUTORY BAD
FAITH CASE WHETHER BY THE VERY
NATURE OF WHAT THAT BAD FAITH IS
THAT THE ATTORNEY/CLIENT
PRIVILEGE NECESSARILY HAD TO BE
OVERRULED OR WAIVED IN THIS
CIRCUMSTANCE?
BECAUSE I DON'T KNOW, YOU KNOW,
GOING BACK TO WHAT JUSTICE
KENNEDY SAYS, I DON'T KNOW HOW
ELSE YOU CAN AVOID THAT THERE'S
A SEPARATE ATTORNEY.
>> I THINK THAT THE BEST WAY I
CAN SAY IT IS THAT, AGAIN, THERE
IS -- IT'S NOT THAT WHETHER IT'S
BEEN OVERRULED OR BEEN WAIVED IN
SOME CIRCUMSTANCES, IT'S WHETHER
IT EXISTS, YOU KNOW, AT THE VERY
BEGINNING.
>> WELL, THEN LET ME ASK YOU
THIS WAY: IN A CASE WHERE I'M
BEING REPRESENTED OR SUED IN A
THIRD-PARTY CASE AND I HAVE MY
ATTORNEY, I CAN ASK MY ATTORNEY
I WANT TO SEE ALL OF THE -- I

COULD ASK THEM, YOU'RE
REPRESENTING ME, SO I WANT TO
SEE EVERYTHING, YOU KNOW, YOU'RE
WRITING LETTERS TO ME.
I ALSO WANT TO SEE WHAT YOU'RE
WRITING TO THE INSURANCE COMPANY
BECAUSE, YOU KNOW, YOU'RE ACTING
AS MY ATTORNEY.
THEORETICALLY IF THAT, THAT
OUGHT TO ALL BE PRODUCED BECAUSE
THERE IS NO ATTORNEY/CLIENT
PRIVILEGE, IT'S MY ATTORNEY.
>> CORRECT.
>> HERE DURING THE COURSE OF THE
FIRST-PARTY LITIGATION, YOU KNOW
THAT YOU WOULDN'T ASK, YOU WOULD
NOT ASK THE OTHER SIDE TO SAY
I'D LIKE TO SEE EVERYTHING ABOUT
YOUR, THE LETTERS YOU'RE WRITING
TO THE INSURANCE COMPANY.
YOU COULDN'T GET THAT AT THAT
STAGE.
>> WELL, THAT IS TRUE.
>> BUT THAT'S A BIG DIFFERENCE
TO ME.
>> IT IS A BIG DIFFERENCE.
WE HAVE TO GO BACK TO THE, BACK
TO THE BASICS, THOUGH, BECAUSE
WHAT THIS COURT DID IN RUIZ IS
TO RECOGNIZE THAT THERE IS, IT
IS INCORRECT TO THINK OF FIRST
PARTY AND THIRD-PARTY BAD FAITH
AS TWO DIFFERENT KINDS OF CASES.
THEY BOTH STEM FROM THE SAME
FIDUCIARY RELATIONSHIP BETWEEN
THE INSURANCE COMPANY AND THE

INSURED.
AND IF YOU GO BACK TO THIS COURT ADOPTED FIRST FIDELITY CASUALTY V. TAYLOR, THE ANALYTICAL APPROACH IN FIDELITY V. TAYLOR.
AND WHAT THAT COURT SAID WAS THAT IN THE FIRST-PARTY BAD FAITH CASE WHAT IS BEING CONSIDERED, THE PERTINENT QUESTION, IT SAID, OR THE -- I CAN READ IT FOR YOU QUICKLY.
"THE PERTINENT ISSUE IS THE MANNER IN WHICH THE COMPANY HAS HANDLED THE SUIT INCLUDING ITS CONSIDERATION OF ADVICE OF COUNSEL."
NOW, IN ADOPTING THE THIRD DISTRICT OPINION IN TAYLOR, THIS COURT NECESSARILY ADOPTED THIS TRIPARTHEID RELATIONSHIP.
>> YOU'RE GIVING A GOOD ARGUMENT TO WHY FROM A POLICY POINT OF VIEW IT'S A GOOD THING.
IN OTHER WORDS, THE IDEA THAT IF THEY LOOK TO THEIR OWN ATTORNEY TO EVALUATE THE CLAIM VERSUS AN ADJUSTOR OR AN IN-HOUSE COUNSEL THAT SOMEHOW THAT IS GOING TO BE SHIELDED, BUT ANYTHING ELSE BECAUSE WE'VE SAID YOU CAN GET THE CLAIMS FILE.
I UNDERSTAND THAT FOR, FROM THE POINT OF VIEW OF PROSECUTING THE FIRST-PARTY BAD FAITH CASE.
BUT I'M ASKING YOU AND I DON'T KNOW THAT YOU'VE REALLY GIVEN A

SATISFACTORY EXPLANATION AND,
BELIEVE ME, I WANT --
>> I WANT TO GIVE YOU A
SATISFACTORY EXPLANATION.
>> THEY ALSO ENACTED AN
ATTORNEY/CLIENT PRIVILEGE
STATUTE THAT CERTAINLY EXISTS
DURING THE COURSE OF THE FIRST
PART OF THE LITIGATION WHILE
THERE'S STILL A COVERAGE
DISPUTE.
I THINK YOU'VE ACKNOWLEDGED
THAT.
>> YES.
>> SO YOU NOW GET TO SUE UNDER
624.155, AND WHAT YOU'VE GOT TO
BE ABLE TO ARGUE ANALYTICALLY IS
THAT THE ONLY WAY FOR THE
LEGISLATURE TO HAVE INTENDED FOR
IT TO BE ON AN EQUAL FOOTING
WITH THE THIRD PARTY IS, OH,
THAT THERE WAS AT THAT POINT NOW
THERE'S A WAIVER.
SO THAT THERE IS AN IMPLICIT
WAIVER OF THE ATTORNEY/CLIENT
PRIVILEGE BY THE ENACTMENT OF
624.155.
DOESN'T THAT HAVE TO BE, DOESN'T
THAT, YOU KNOW, WE'RE NOT --
THIS ISN'T COMMON LAW.
WE'VE GOT TO BE INTERPRETING
WHAT THE LEGISLATURE INTENDED TO
DO.
>> JUDGE, IF I CAN TRY TO
ADDRESS IT --
>> I THINK IT'S VERY IMPORTANT

THAT YOU DO.
>> AND LET ME KNOW IF I DON'T EXPLAIN IT OR DON'T MAKE THE POINT CLEARLY.
THE WAY THE THIRD DISTRICT DEALT WITH THIS IN TAYLOR WAS TO RECOGNIZE OR JUST TO NEVER RECOGNIZE THE ATTORNEY/CLIENT PRIVILEGE, BUT TO SAY THAT IT WASN'T THE ATTORNEY/CLIENT INFORMATION BETWEEN THE INSURANCE COMPANY AND THE INSURED -- BETWEEN THE INSURANCE COMPANY AND THIS LAWYER IN A FIRST-PARTY CLAIM IS SIMPLY NOT RELEVANT.
SO IT CAN'T BE PRODUCED.
IT'S NOT PRODUCIBLE NOT BECAUSE, NOT BECAUSE OF A PRIVILEGE, BUT BECAUSE IT'S JUST NOT RELEVANT.
THE ONLY ISSUES IN THE UNDERLYING CASE WITH COVERAGE AND DAMAGES.
NOW, WHEN THIS COURT ADOPTED THAT, THAT DECISION, IT TOOK WITH IT THE STONE CASE.
AND IF YOU LOOK AT THE WAY THIS COURT IDENTIFIED THE SCOPE OF WHAT'S DISCOVERABLE IN TWO DIFFERENT CASES ON PAGE LOOKS LIKE 1126 OF THE OPINION, THE COURT TOOK THE STONE DEFINITION OF THE SCOPE AND SAID THAT "IN A THIRD-PARTY CASE ALL MATERIALS INCLUDING DOCUMENTS, MEMORANDA CONTAINED IN THE INSURANCE

COMPANY'S FILE UP TO AND
INCLUDING THE DATE OF JUDGMENT
AND THE ORIGINAL LITIGATION
SHOULD BE PRODUCED."
WHEN IT CAME TO --
>> AND THAT WAS BASED ON WHAT?
ISN'T THAT BASED ON THE FACT
THAT THE PLAINTIFF AND THE
THIRD-PARTY SUIT REALLY IS
STANDING IN THE SHOES OF THE
INSURED?
AND THE INSURED WOULD HAVE BEEN
ENTITLED TO THAT BECAUSE THEY
WERE ON THE SAME SIDE AS IT WERE
WITH THE INSURANCE COMPANY.
SO ISN'T THAT WHY WE SAID THAT
IN THE THIRD-PARTY CONTEXT THAT
THE THIRD PARTY WAS ENTITLED TO
THAT ATTORNEY WORK PRODUCT?
>> YES.
>> NOT WORK PRODUCT, BUT --
>> ATTORNEY/CLIENT PRIVILEGE,
YES.
YOU'RE CORRECT, AND THE REASON
THAT THE COURT MADE THAT
DECISION WAS BECAUSE OF THE
FIDUCIARY RELATIONSHIP WHICH
EXISTED BETWEEN THE ATTORNEY AND
THE INSURANCE COMPANY -- NO,
BETWEEN THE INSURANCE COMPANY
AND THE INSURED.
>> BUT THAT DOES NOT EXIST WHEN
YOU'RE TALKING ABOUT A FIRST
PARTY.
>> WELL, THIS COURT SAYS IT
DOES.

>> WHEN?
>> IN RUIZ.
THE FIDUCIARY RELATIONSHIP STILL EXISTS.
WE STILL HAVE A TRIPARTHEID RELATIONSHIP.
WE HAVE, IN THE THIRD PARTY WE HAVE THE ATTORNEY REPRESENTING BOTH THE INSURED AND THE INSURANCE COMPANY.
BUT IN A FIRST-PARTY CLAIM WE HAVE, WE HAVE THE INSURANCE COMPANY WHO HAS A FIDUCIARY RELATIONSHIP WITH THE INSURED AND THEN HIRES AN ATTORNEY TO DEAL WITH THIS COVERAGE ISSUE, BUT IT CAN NEVER GO, IT CAN NEVER GET AWAY FROM ITS FIDUCIARY OBLIGATIONS TO THE INSURED.
>> BUT IN THE --
>> CAN I ASK YOU A QUESTION WITH REGARD TO AS WE'RE DOING THIS? WE SEEM TO BE GOING ROUND AND ROUND IN CIRCLES HERE.
IS THERE ANY OTHER AREA OF THE LAW -- FOR EXAMPLE, WHAT HAPPENS IF I'M A BANK AND I'M A TRUSTEE FOR A TRUST, FOR YOUR TRUST AND I DO CERTAIN THINGS WITH IT?
THEN I MAY HAVE LEGAL COUNSEL ON IT.
AND YOU THINK THAT I AS THE TRUSTEE HAVE DONE SOMETHING WRONG, CAN YOU GET TO THE ADVICE THAT MY ATTORNEY HAS GIVEN ME?

THERE MUST BE SOME CASE LAW ON
THAT WITH REGARD TO
ATTORNEY/CLIENT PRIVILEGE.
>> YES.
IN THE, ONE OF THE BRIEFS, I'VE
FORGOTTEN WHICH ONE, I CITED
THREE CASES.
GINSBERG V. PACHTER ALL THREE OF
WHICH INVOLVE A TRUSTEE AND A
TRUST WITH A BANK, FIRST UNION
IS A BANK CASE.
AND IN ALL THREE OF THOSE CASES
THE THE COURTS FOUND THAT IT WAS
AN EXCEPTION TO THE
ATTORNEY/CLIENT PRIVILEGE --
>> ON WHAT BASIS.
>> BECAUSE THERE'S A FIDUCIARY
OBLIGATION BETWEEN THE TRUSTEE
AND THE --
>> WAS THERE A STATUTORY
EXCEPTION?
>> YES, UNDER 4A.
>> THERE WAS A -- THAT READS
WHAT?
>> THERE IS NO LAWYER/CLIENT
PRIVILEGE UNDER THIS SECTION
WHEN THE SERVICES OF THE LAWYER
WERE SOUGHT OR OBTAINED TO
ENABLE OR AID ANYONE TO COMMIT
OR PLAN TO COMMIT WHAT THE
CLIENT KNEW WAS A FRAUD.
>> WELL, IN THOSE CASES DO YOU
HAVE TO ALLEGE FRAUD FOR THE
TRUST?
>> NO, IT'S JUST A BREACH OF
FIDUCIARY DUTY.

>> THAT ONE WAS USED, AND THOSE ARE THE CASES THAT WERE THERE.
>> YES.
>> AND IT'S YOUR VIEW THAT THE DUTY BY AN INSURANCE COMPANY IN THE FIRST-PARTY CONTEXT IS TANTAMOUNT TO THAT TRUST AND FIDUCIARY DUTY FOR A TRUST, IN A TRUST RELATIONSHIP?
>> YES.
>> ARE THERE ANY OTHERS THAT --
>> THERE WAS A SUPREME COURT OF ALASKA CASE CITED IN RUIZ --
>> I MEAN, ARE THERE ANY OTHER RELATIONSHIPS?
I'M SEARCHING FOR THOSE BECAUSE THE DUTY OF GOOD FAITH AND FAIR DEALING IS IT TRULY A FIDUCIARY?
IS IT LESS THAN A FIDUCIARY?
IS IT THE SAME?
I THINK THOSE ARE ISSUES THAT WE'RE GOING TO HAVE TO ADDRESS HERE BECAUSE I THINK IN ALL HONESTY READING THE RUIZ CASE AND EVEN WRITING IT, IT WASN'T WRITTEN TO ADDRESS ALL OF THESE ATTORNEY/CLIENT PRIVILEGE ISSUES.
>> THAT WASN'T PART OF THE RUIZ CASE.
BUT IT WAS PART OF THE TAYLOR CASE THAT WAS ADOPTED.
AND TAYLOR JUST FOUND THAT THERE IS, THAT THERE'S A RELATIONSHIP THERE THAT HAS TO BE, THAT HAS TO BE, IT HAS TO BE FIDELITY IN

THE RELATIONSHIP.
I WANT TO GET BACK TO WHAT I
WAS --
>> SO THEN IT COMES UNDER THE
EXCEPTION TO THE STATUTE IS WHAT
YOU'RE SAYING.
>> THAT'S ONE WAY TO LOOK AT IT.
THE OTHER WAY TO LOOK AT IT IS
IT DOESN'T EXIST AT ALL BECAUSE
OF THE RELATIONSHIP.
IT'S THE TRIPARTHEID
RELATIONSHIP THAT EXISTS --
>> IT MUST EXIST AT ONE POINT
BECAUSE YOU AGREE THAT IN THE
DIRECT LITIGATION THE INSURED
CANNOT OBTAIN ADVERSARY
COUNSEL'S COMMUNICATIONS WITH
THE CARRIER, CORRECT?
>> CORRECT --
>> SO IT DOES EXIST AT ONE
POINT.
>> CORRECT.
I WOULD SAY IT'S NOT BECAUSE OF
THE ATTORNEY/CLIENT PRIVILEGE,
THOUGH, IT'S SIMPLY BECAUSE AS
TAYLOR SAID, THAT INFORMATION IS
NOT RELEVANT.
WHY IS IT DISCOVERABLE IF IT'S
NOT RELEVANT?
IT BECOMES RELEVANT WHEN --
>> WELL, IT COULD.
I MEAN, THEORETICALLY IT COULD.
I MEAN, IF THE LAWYER HAS
INFORMATION ABOUT FACTS THAT, I
MEAN, IT COULD BE RELEVANT.
I MEAN --

>> I CAN'T IMAGINE HOW.
I KNOW THAT THERE ARE ONLY TWO ISSUES IN A COVERAGE CASE.
ONE IS COVERAGE, AND THE OTHER IS DAMAGE.
>> WELL, IT DEALS WITH FACTS.
IT DEALS WITH FACTS OF THE CASE, AND I'M A LAWYER, AND I WRITE TO THE COMPANY, AND I TELL THE COMPANY UNFACTUAL INFORMATION THAT DESTROYS THEIR -- THAT'S MATERIAL.
I THINK YOU'RE GOING TO SUFFER IF THAT'S THE ONLY DISTINCTION HERE.
>> OKAY.
WHAT I WANTED TO GET BACK AT WAS THE WAY THIS COURT DEFINED THE SCOPE OF THE DISCOVERY IN RUIZ BECAUSE WHAT IT DID WAS IT TOOK THE, IT TOOK THE STONE DEFINITION -- I'M SORRY, I CAN'T GET BACK THERE.
IT TOOK THE STONE DEFINITION AND ADDED TO IT THE -- IT SAYS THE UNDERLYING DISPUTED, ALL THE DOCUMENTS, MATERIALS THAT WAS CREATED UP TO AND INCLUDING THE DATE OF RESOLUTION ON THE UNDERLYING DISPUTED MATTER AND PERTAINED -- THIS IS THE PART THE COURT ADDED --
IT OCCURRED TO ME WHAT THE COURT WAS DISCUSSING OR WAS SAYING THE ISSUES OR THE INFORMATION THAT CAN BE

OBTAINED, IS THE, DOCUMENTS
THAT PERTAIN TO THE LIABILITY
OF THE COMPANY.
NOT THE LIABILITY OF THE
INSURED.
THAT'S NOT AN ISSUE BUT THE
LIABILITY OF THE COMPANY.
THE COURT HAD TO HAVE ADDED
THAT PHRASE TO THE STONE
DEFINITION, OR STONE SCOPE OF
DISCOVERY FOR SOME PURPOSE.
AND, IF IT ADDED COVERAGE
BENEFITS LIABILITY, OR DAMAGES,
THEN ITS CONTEMPLATING
LIABILITY OF THE INSURANCE
COMPANY IS SOMETHING THAT IS
DISCOVERABLE.
AND, LIABILITY WILL BE
DETERMINED, LIABILITY IN THE
UNDERLYING CASE.
THE LIABILITY IS DETERMINED BY
LOOKING AT, AMONG OTHER THINGS,
THE ATTORNEYS, THE ATTORNEY'S
INFORMATION THAT WAS GIVEN TO
THE INSURANCE COMPANY THAT
UNDER THIS SCENARIO THE LAW
PROVIDES YOU, YOU HAVE TO HAVE
COVERAGE.
AND, IN TAYLOR THEY
SPECIFICALLY STATED THAT ONE OF
THE ISSUES IS, HOW THE
INSURANCE COMPANY HANDLED
ADVICE OF COUNSEL.
SO, IF WE'RE GOING TO, AS RUIZ
SAYS, EQUATE THE RIGHT TO
PURSUE, IF WE'RE GOING TO HAVE

A AN EQUAL RIGHT TO PURSUE A BAD FAITH CASE IN A THIRD PARTY AND FIRST PARTY CLAIM WE CAN'T HAVE EQUAL RIGHT TO PURSUE A CLAIM IF WE HAVE A DIMINISHED RIGHT TO DISCOVER THE CLAIM. THEY HAVE TO BE EQUAL IN ALL RESPECTS.
AND PART OF THE PROBLEM THAT WE'VE BEEN DEALING WITH FOR THE LAST, I DON'T KNOW, 20 YEARS OR SO, WITH FIRST PARTY BAD FAITH CASES IS THAT THE COURT HAS CONTINUALLY RECOGNIZED THAT THERE'S FIDUCIARY OBLIGATION IN A FIRST PARTY CLAIM AS THERE IS IN A THIRD PARTY CLAIM BUT THEN, CONTINUALLY REDUCED, HAD A DISPARATE TREATMENT OF THE DISCOVERY THAT WAS AVAILABLE FROM THAT PERSON.
SO --
>> DO YOU THINK THERE SHOULD BE, IF ASSUMING THAT THERE IS EITHER AN IMPLIED WAIVER OR A RELEVANCY THING, DO YOU THINK THEN THERE HAS TO BE SOME WAY TO ESTABLISH, FOR EXAMPLE, THE INSURANCE COMPANY SAYS, WELL I RELIED ON THE ADVICE OF COUNSEL, THAT THAT WOULD THEN, AT THAT POINT IF THEY SAY THAT, IT BECOMES, DISCOVERABLE?
OR IF YOU LIMIT AND SAY, WE WANT ALL CORRESPONDENCE DIRECTED TO THE INSURED

ATTORNEY'S EVALUATION OF THE
VALUE OF THE CLAIM?
I MEAN IS THERE SOMETHING SHORT
OF, I JUST GET EVERYTHING THAT
IS, THAT THERE HAS TO BE SOME
DEMONSTRATION THAT OF SOMETHING
MORE?
>> WITH REGARD TO THE ADVICE OF
COUNSEL, IF THAT WAS A DEFENSE,
THEN IN THE INSURANCE COMPANY
WOULD BE INTERJECTING THEIR
ATTORNEY/CLIENT PRIVILEGE AS AN
ISSUE.
>> RIGHT.
>> SO IT WOULD BE WAIVED
AUTOMATICALLY.
>> THAT ISSUE SAYING WELL, THEY
JUST CAN'T SAY THAT, THEY CAN'T
JUST SAY THAT?
>> IF THEY SAID THAT, I'M SURE
ON THE INSURED'S SIDE THEY
WOULD BE HAPPY.
THAT WOULD WILL BE A GOOD THING
THEN THE INSURANCE COMPANY
WOULD HAVE WAIVED THE
ATTORNEY/CLIENT PRIVILEGE IN
THAT RESPECT.
DID I ANSWER YOUR QUESTION?
>> YOU HAVE USED SUBSTANTIALLY
ALL OF YOUR TIME IF YOU WANT
REBUTTAL.
>> A MINUTE LEFT?
THANK YOU.
>> MAY IT PLEASE THE CUT.
JOHN MEAGER AND STEVE MEAGHER
FROM SHUTTS & BOWEN WE HAVE THE

PRIVILEGE OF REPRESENTING PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY IN THIS APPEAL AND ANSWERING CERTIFIED QUESTION AND THE ANSWER SHOULD BE NO TO THE FOURTH DCA'S QUESTION WHETHER THE RATIONAL OF THE RUIZ CASE WHICH DEALT SOLELY WITH WORK PRODUCT WITH CREATURE OF JUDICIARY AND JUDICIAL BRANCH SHOULD BE EXTENDED TO MODIFY, ALTER OR ABROGATE WHICH IS WHY GENOVESE HERE SEEKS.
ATTORNEY/CLIENT PRIVILEGE ESTABLISHED SUBSTANTIVE LAW IN FLORIDA LEGISLATURE IN 90.502.
WITH ALL DUE RESPECT TO REGARDS PRIVILEGE QUESTION BEING SUBSTANTIVE LAW THE COURT DOES NOT HAVE THE AUTHORITY TO ABROGATE THE CLEAR INTENT OF THE LEGISLATURE.
JUSTICE PARIENTE, WITH REGARD TO YOUR QUESTIONS TO COUNSEL WHERE IS THE STATUTORY ANALYSIS WHAT HAS BEEN PROVIDED WE HAVE THE BENEFIT AFTER RUIZ WAS PUBLISHED IN 2005, HAVING FOUR SEPARATE DISTRICTS COURTS OF APPEAL ALL CONSIDER RUIZ, CONSIDER THIS EXACT QUESTION THAT IS THE EXISTENCE OR NON-EXISTENCE OF THE ATTORNEY/CLIENT PRIVILEGE IN

FIRST PARTY BAD FAITH,
PERFORMED THEIR ANALYSIS ALL
WITH KNOWLEDGE OF THE OTHER AND
ALL SUPPORT OUR POSITION THAT
THE ATTORNEY/CLIENT PRIVILEGE
STILL STANDS.
>> BUT MY PROBLEM WITH MOST OF
THOSE CASES IS, SEEMS LIKE MOST
OF THE ANALYSIS WAS, DID WE IN
RUIZ DEAL ATTORNEY/CLIENT
PRIVILEGE?
AND CLEARLY WE DIDN'T BECAUSE
IT WASN'T AT ISSUE.
SO, I DON'T, I MEAN I DON'T GET
MUCH ASSISTANCE, NOT THAT I
UNDERSTAND THEY ALL REACHED
THAT CONCLUSION AND I AGREE, IF
RUIZ DID NOT COVER IT BUT DOES
THAT ANSWER THE STATUTORY
QUESTION, WHICH, FIRST OF ALL,
IN THIS CASE, WHEN THEY
PRODUCED, WHEN YOUR COMPANY
PRODUCED ORIGINAL CLAIMS FILE,
YOU DID PRODUCE DOCUMENTS THAT
WERE BETWEEN THE INSURED, THE
INSURANCE COMPANY AND IN-HOUSE
COUNSEL?
>> YES.
FOR SOME OF THOSE DOCUMENTS
WERE IN-HOUSE COUNSEL DURING
THE CLAIMS PROCESS, NOT SHUTTS
& BOWEN'S FILE WHICH IS WHAT IS
AT ISSUE HERE WERE PRODUCED.
>> UNDER YOUR THEORY, THEY
WOULD, WOULD PROVIDENT BE ABLE
TO CLAIM ATTORNEY/CLIENT

PRIVILEGE AS TO THEIR HOUSE
COUNSEL?
>> OH, YES, YES, YOUR HONOR.
>> SO THEY DID WAIVE THAT
VOLUNTARILY?
>> ACTUALLY THERE WAS IN CAMERA
INSPECTION, DONE BY THE PRIOR
TRIAL COURT JUDGE, JUDGE
CRAFTON AND HE RULED ON CERTAIN
OBJECTIONS AND MADE CERTAIN
FINDINGS.
IT IS NOW THE SECOND TRIAL
COURT JUDGE WE'RE HERE ON, EVEN
THOUGH THOSE DOCUMENTS WITHHELD
WERE CLEARLY HELD TO BE
ATTORNEY/CLIENT PRIVILEGE THERE
IS NO QUESTION ABOUT THAT NICK,
IT WAS A BLANKET PRODUCE THEM
ALL INCLUDING OUTSIDE COUNSEL'S
FILE WITHOUT REGARD TO IN CAMERA
INSPECTION OF CONTENT.
>> SO THEN MY QUESTION WOULD
BE, IF THEY ASKED FOR, ANY AND
ALL CORRESPONDENCE BETWEEN
PROVIDENT AND SHUTTS & BOWEN,
CONCERNING THE EVALUATION OF
THE CLAIM, NOT OF THE DEFENSE,
NOT OF, IN OTHER WORDS, THAT
YOU, SHUTTS & BOWEN, AS THEY
WOULD USE AN ADJUSTER, AS THEY
WOULD USE IN-HOUSE COUNSEL,
WOULD THAT, WOULD THERE BE THEN
THE SAME WAY THAT THE JUDGE
LOOKED AT IN-HOUSE COUNSEL, TO
DECIDE THAT THAT WAS, BY USING
SHUTTS & BOWEN IN THAT WAY,

THAT THEY HAD WAIVED THE ATTORNEY/CLIENT PRIVILEGE IN THIS --
>> I DON'T THINK IT IS A WAIVER QUESTION, YOUR HONOR.
I THINK WHAT, IF A CLIENT USES AN OUTSIDE COUNSEL OR INSIDE COUNSEL FOR BUSINESS VISOR, THAT IS NOT LEGAL ADVICE AND NEVER FALLS UNDER 90.502.
THAT IS NOT THE ANALYSIS THAT FALLS WITHIN ANY EXCEPTION OF THE ATTORNEY/CLIENT PRIVILEGE.
90.502 ONLY PERTAINS TO LEGAL ADVICE.
THE INSURANCE COMPANY IF IT WANT TO RELIES, MY LAWYER TOLD ME TO DENY THIS CLAIM, THAT AS RECOGNIZED IN XCEL INSURANCE AND HIGGINS AND SCOMA THESE ARE THE CASES THAT FOLLOWED RUE WEST, INTERPRETING RUIZ,
THAT IS A WAIVER OF INFORMATION.
IF THAT IS BUSINESS ADVICE THAT IS NOT PROTECTED BY 90.502 THAT IS DONE IN CAMERA INSPECTION BY JUDGES.
UP TO THIS DATE YOU GIVE EVERYTHING.
SO THOSE, THOSE, YOU KNOW SAFEGUARDS, IF YOU WILL, OF THE ABUSE OF THE ATTORNEY/CLIENT PRIVILEGE STILL EXIST TODAY.
ALL THE TOOLS IN THE TOOL BOX ARE THERE.
UNDER 90.502.

THERE IS NO REASON OR BASIS TO
EXTEND TO EFFECT THAT.
IN FACT, THE CASE HERE WE HAVE A
CASE WHERE THE INSURANCE
COMPANY FILED DECLARATORY
JUDGEMENT ACTION.
PAYING WITH RESERVATION OF
RIGHTS.
ONLY UPON THE INSURED SAYING
HEY, YOU CAN'T KEEP PAYING ME
AND STILL FILE YOUR DECLARATORY
JUDGMENT ACTION AND GOT SUMMARY
JUDGEMENT ON THOSE GROUNDS.
WE HAVE FILED THE TRAINS SCRIPT
OF THE HEARING ON THAT SUMMARY
JUDGEMENT WHERE YOU SEE
PROVIDENT'S ATTORNEY SAYING WE
WANT TO KEEP PAYING TO AVOID
BAD FAITH LIABILITY.
WE HAVE, WEEK BEFORE TRIAL.
BUT IN DAY BEFORE TRIAL, THE
CASE, THE JUDGE AGREES WITH
DR.^GENOVESE'S
COUNSEL, THEY DISMISS THE
CASE.
WE APPEAL THAT.
IN ORDER TO GET JUDICIAL
DETERMINATION WE DENY THE CLAIM.
THAT WAS ONLY WAY THE COURT
SAID WE COULD DO IT.
HERE WAS QUESTION OF INSURED
NOT TAKING YES FOR AN ANSWER.
THAT SHOWS YOU AGGRESSIVE USE
OF THE BAD FAITH STATUTE AND
THE OFFENSIVE USE OF IT,
AGAINST INSURANCE COMPANIES.

I MEAN IT IS NOT ALL, BIG BAD
INSURANCE COMPANIES, SURE.
THE RULES HAVE TO BE FAIR
THOUGH.
AND HERE, IT ALL STEMS BACK TO,
THE RELATIONSHIP, MY
RELATIONSHIP WITH DR. GENOVESE
IS NOT FIDUCIARY AND MY CLIENT
IS NOT FIDUCIARY.
YOU ASKED THAT QUESTION, JUDGE
LEWIS, IS IT SOMETHING LESSER?
IT IS, JUDGE.
THE HIGGINS COURT WHICH IS THE
FIFTH DCA OPINION CAME DOWN
THIS YEAR I WOULD SUGGEST TO
YOU, JUSTICE PARIENTE, EACH ONE
OF THOSE OPINIONS GOES BEYOND
WHETHER RUIZ IS LIMITED AND
EACH ADDS TO THE DISCUSSION.
EXCEL INSURANCE FOR INSTANCE,
INVOLVES STATUTORY CONSTRUCTION
ISSUES YOU PRESENTED.
IT IS MORE THAN WE JUST DIDN'T
DECIDE IT.
WITH REGARD TO THAT THE FOURTH
DCA PUT IT BEST I THINK IT SAID
BY ADDING THIS CAUSE OF ACTION,
THIS CIVIL RIGHT OF ACTION
AGAINST AN INSURANCE COMPANY BY
ITS INSURED IT CREATED AN
OBJECTIVELY DETERMINEABLE
STANDARD OF CONDUCT, THAT IS TO
BE GIVEN IN A JURY INSTRUCTION,
READ TO THE JURY AND FOR THEM
TO DECIDE IT.
NOW THAT IN NO WAY CREATES THE

CLASSIC FIDUCIARY RELATIONSHIP
THAT --
>> IT CREATES WHAT THE STATUTE
SAYS, AND THAT IS, DUTY OF FAIR
DEALING AND GOOD FAITH.
I'M TRYING TO DETERMINE, IS
THERE ANY LAW THAT CAN BRIDGE
THE GAP AND, I ASSUME WHAT
YOU'RE SAYING, IS THAT THIS IS
NOT THE SAME, OR DO YOU
DISAGREE WITH COUNSEL'S
ARGUMENT AS TO THE STATUS OF AN
ATTORNEY/CLIENT PRIVILEGE IF
THERE IS A TRUST, A FIDUCIARY
SITUATION?
CLEAR, NOT THIS ONE BUT A
TRUST.
DO YOU AGREE WITH HIS ANALYSIS?
>> NOT AT ALL.
>> OKAY.
>> IF YOU TAKE A LOOK AT FIRST
UNION v. WHITENER AND FIRST
UNION v. TIERNEY, EXPLAINED
IN THE BRIEF, JUSTICE HIRED
COUNSEL AS FIDUCIARIES,
ARGUABLY A FIDUCIARY
RELATIONSHIP, IN SUIT BY IT
BENEFICIARY AGAINST THE TRUSTEE
THE COURT TOOK 90.502 AS THE
TEMPLATE AND EXAMINED THE FACTS
BASED ON THAT ANALYSIS.
SAID, OKAY THE TRUSTEE NORMALLY
WILL HIRE COUNSEL TO REPRESENT
ITSELF AND WILL HAVE TO
ATTORNEY/CLIENT PRIVILEGE OF
QUOTE, PERSONAL COUNSELS AS A

AGAINST THE BENEFICIARY OF THE TRUST.
UNLESS, WE TAKE A LOOK AT THESE DOCUMENTS AND WE GO DOWN TO ANOTHER EXCEPTION, UNDER THE RULE LOOK AT COMMON INTEREST EXCEPTION IN 90.5024-E.
ATTORNEY CONSIDERING MATTERS FOR THE BENEFICIARY, THEN THOSE ARE UNDER 90.502-E, PRODUCEABLE IN THIS CASE.
>> THAT WOULD BE THE CATEGORY HERE.
THERE WOULD BE STATUTORY PROVISION WITH REGARD TO THOSE THINGS WITHIN WHICH THE INSURANCE COMPANY IS REQUIRED TO DEAL FAIRLY AND IN GOOD FAITH.
WHY WOULD THAT NOT BE THE SIMILAR ONE, THE UNDERLYING PREMISE, NOT OVERALL PREMISE THAT YOU'VE NOW REACHED, WHY WOULD THAT NOT BE THE SAME IN INSURER SITUATION UNDER THE STATUTE, NOT BEFORE.
>> JUDGE I THINK THAT ANALYSIS WOULD BE THE SAME.
>> THAT IS THE SAME.
OKAY.
>> LOOK AT IT.
LOOK AT FIRST PARTY CASE.
YOU HIRE SHUTTS & BOWEN TO REPRESENT ON A CLAIM FILE.
OKAY.
IN LOOKING LATER ON IN THE BAD

FAITH CASE AND GOING TO 90.502
THEY SAY FIRST OF ALL WHO IS
THE CLIENT HERE?
IS DR.^GENOVESE IS THE CLIENT?
DR.^GENOVESE IS NOT THE CLIENT.
>> EVERYBODY AGREES.
>> IS IT COMMON INTEREST?
NO.
THERE IS NEVER COMMON INTEREST
AS CHIEF JUSTICE QUINCE
POINTED OUT IN THE CLASSIC
EXCESS JUDGMENT THIRD PARTY
CASE I HAVE THE CLIENT
IDENTIFICATION ISSUE.
IN THE THIRD PARTY CASE IS
NEVER CLIENT NOR COMMON
INTEREST SHARED.
THEY DO NOT GET THEM AT ANY
POINT IN TIME.
>> NOT EVEN A SUBSEQUENT
ANALYSIS, UNDERANALYSIS HERE
IS WHAT YOU'RE SAYING?
>> OKAY.
>> LET ME ASK YOU THIS OTHER
QUESTION.
>> THERE IS NO TEMPORAL ASPECT
I MUST POINT OUT TO THE
ATTORNEY/CLIENT PRIVILEGE.
THERE IS NO DATE ON WHICH IT
APPLIES OR NOT APPLIES.
THAT IS WHAT RUIZ WAS DEALING
WITH AND, IT WAS UNDERSTANDABLE
BECAUSE, WORK PRODUCT WAS THE
ONLY ISSUE RAISED IN RUIZ.
THEY WERE DEALING WITH
IMMEDIACY OF LITIGATION.

WHOLE DIFFERENT CIRCUMSTANCE.
>> LOOK AT ONE OTHER STATEMENT.
>> SURE.
>> THE DISTRICTS COURTS OF APPEAL IN THE BAD FAITH CONTEXT HAVE HELD THAT WHAT AN INSURANCE COMPANY DOES WITH ADVICE OF COUNSEL IS AN ISSUE THAT'S INVOLVED.
LET'S DEAL WITH IT.
>> JUDGE --
>> YOU'RE SHAKING YOUR HEAD.
>> IT IS IN SOME OF THE CASE LAW.
LET'S TAKE A LOOK AT IT SEE IF THAT SOMEHOW THEN BECOMES AN ISSUE BECAUSE IF THE, WHAT THE ADVICE HAS GIVEN, ADVICE GIVEN BY COUNSEL, IS AN ISSUE IN THE UNDERLYING CASE IS THAT AN EXCEPTION, IS IT NOT?
>> IF THE INSURANCE COMPANY AFFIRMATIVELY DEFENDS ITSELF BY SAYING MY LAWYERS TOLD ME TO DO IT, THEN THE ATTORNEY/CLIENT PRIVILEGE IS OPEN AND FAIR GAME.
BUT THIS STATE HAS NEVER --
>> WHAT IS THE, BEEN WAIVED BY ASSERTING IT AS A DEFENSE, IS THAT THE --
>> YES.
IT'S AN AFFIRMATIVE STATEMENT.
NOT SIMPLY BY DENYING THE BAD FAITH OCCURS WHICH OCCURS IN EVERY CASE.

BY SAYING NO, THE BAD FAITH
DIDN'T OCCUR.
IT IS NOT BECAUSE WE WERE RIGHT
OR HAD SOME REASONABLE BASIS
FOR DEFENSE BUT BECAUSE, SHUTTS
& BOWEN TOLD US NOT TO PAY THIS
CLAIM.
>> WE RELIED ON THIS OUTSIDE
COUNSEL IN YOUR EVALUATION.
>> WE AFFIRMATIVELY STATE THAT,
JUDGE, THAT IS CLASSIC WAIVER.
THAT IS RECOGNIZED IN EXCEL
INSURANCE AND THE HIGGINS CASE.
>> HUMOR ME A LITTLE BIT HERE.
>> SURE.
>> I CAN'T FATHOM A CASE WHERE
AN INSURANCE COMPANY WOULD SAY,
NO, WE DIDN'T RELY ON COUNSEL.
I JUST CAN'T.
IN A BAD FAITH CONTEXT AND
QUESTIONS COME OUT THEY START
ASKING ABOUT DECISIONING MAKING
AND WHO MADE THE DECISIONS, SAY
NO, WE DIDN'T LISTEN TO THE
ATTORNEY SAID.
WON'T IT ALWAYS BE THEY
FOLLOWED ADVICE OF THEIR
COUNSEL?
>> JUDGE, YES IS THE ANSWER BUT
YOU CAN NOT TRAP AN INSURANCE
COMPANY INTO WAIVING ITS
ATTORNEY/CLIENT PRIVILEGE.
>> I KNOW.
>> I SUPPOSE YOU COULD ASK ANY
LITIGANT, DID YOU RELY ON YOUR
LAWYER'S ADVICE.

>> I DON'T KNOW THAT YOU CAN.
I DON'T KNOW IN OTHER CONTEXTS
THAT YOU CAN ASK THAT KIND OF
QUESTION.
>> I DON'T THINK THE INSURANCE
CONTEXT IS ANY DIFFERENCE,
JUDGE.
NOTHING IN 624.155 STATES THE
LEGISLATURE IN ANY WAY INTENDED
TO ABROGATE THE ATTORNEY/CLIENT
PRIVILEGE.
>> I AGREE WITH THAT.
HOW ABOUT IN THE LANGUAGE OF
DECISIONS THAT TALK ABOUT --
>> LOOK AT TAYLOR CASE, WHAT
WE'RE DOING YOU APPROVED
TAYLOR.
THIS IS THE BOOTSTRAP ARGUEMENT
THAT TAYLOR RULES.
TAKE A LOOK AT THE SHORT-SHRIFT
ANALYSIS GIVEN IN TAYLOR WHICH
ANALYZES ONLY THIRD PARTY
CASES, OKAY, TO THEIR
STATEMENT, TO THE COURT'S
STATEMENT THAT THE
ATTORNEY/CLIENT PRIVILEGE IS, I
WANT TO GET THE EXACT, THE
EXACT STATEMENT.
TAYLOR SAYS, THE
ATTORNEY/CLIENT PRIVILEGE IS
COMMONLY RENDERED INAPPLICABLE
IN THESE SITUATIONS.
AND THEN IT CITE AS FOOTNOTE.
YOU KNOW WHAT SUPPORT IT HAS
FOR THAT?
IT HAS THREE CASES.

THE ALASKA SUPREME COURT, HAD
TO GO PRETTY FAR AFIELD TO FIND
SOMETHING THAT SUPPORTS THEM.
INTO THE WILDS OF ALASKA, WHICH
IS, BY THE WAY,, A CRIME FRAUD
EXCEPTION CASE IF ONE LOOKS AT
THAT.
THIS ISN'T A CRIME FRAUD
EXCEPTION CASE AT ALL.
BY THE WAY UNTIL THEIR REPLY
BRIEF IN THIS COURT THAT WAS
NEVER RAISED AS ISSUE.
IT WAS ACTUALLY, ADMITTED NOT
TO BE AN ISSUE IN THEIR INITIAL
BRIEF.
CRIME FRAUD REQUIRES AN
EVIDENTIARY HEARING BEFORE YOU
IN FRONT OF THE TRIAL JUDGE
BEFORE YOU GET IN CAMERA REVIEW.
NONE OF THOSE PROCEDURES WERE
FOLLOWED.
THEIR ATTEMPT TO HAMMER THAT
ROUND PEG INTO A SQUARE HOLE
DOESN'T WORK HERE.
WITH REGARD TO THE ALASKA CASE
THAT PROVIDES NO HELP.
IT IS A CRIME FRAUD EXCEPTION.
AND CLEARLY WE HAVE THAT IN
OUR, IN OUR STATUTE.
YOU CAN TRY THAT.
OKAY?
AND THE TWO MONTANA CASES THAT
THEY FOUND, IN THERE, THERE WAS
NO STATUTE, STATUTORY ANALYSIS
QUESTION OF THE EVIDENCE CODE.
DOESN'T APPEAR THAT THEIR

PRIVILEGE WAS STATUTORY.
SO WE DON'T GET INTO THAT SEPARATION OF POWERS ARGUMENT THAT WE HAVE HERE.
ALSO ONE OF THE ELEMENTS THAT WAS CONCEDED BY THE PARTIES IN THAT CASE, UNDER THEIR COMMON LAW WAS WHETHER THE TRIAL COUNSEL'S RECOMMENDATIONS HAD BEEN RECOGNIZED.
I MEAN THAT WAS UNDER THE LAW OF THEIR STATE.
BUT THAT IS NOT THE CASE HERE.
HERE, IT IS WHETHER UNDER ALL THE FACTS AND CIRCUMSTANCES YOU ACTED FAIRLY TO THE INSURED.
YOU KNOW WHAT?
I DON'T NEED A LAWYER TO PRODUCE THAT.
I CAN PUT ON MY CLAIMS PROFESSIONALS SAY WHAT WAS DONE AND WHY AND PUT ON A PROFESSIONAL.
>> THE REASON IN RUIZ WE UNDERSTOOD THAT THE QUOTE, BEST EVIDENCE IS THAT, IN ANY KIND OF BAD FAITH LITIGATION, YOU KNOW, YOU CAN GET, SAY YOU CAN'T GET AN EXPERT TO SAY ANYTHING, WHETHER IT IS GOOD FAITH OR NOT.
BUT THE QUESTION IS, WHAT'S IN THAT CLAIMS FILE?
SO WHAT MY CONCERN BECOMES, AGAIN, AND YOU SEEM TO BE SAYING IT IS NOT ALL OR NOTHING

WHICH IS THAT, YOU TAKE THE
DEPOSITION OF THE CLAIMS
ADJUSTER AND YOU ASK THE CLAIMS
ADJUSTER, WHAT DID YOU DO
BEFORE YOU DECIDED TO DENY THIS
CLAIM?
THEY SAY, WELL, I FIRST, WE HAD
A CLAIMS MEETING.
WHO WAS AT THE CLAIMS MEETING?
MY IN-HOUSE COUNSEL WAS AT THE
CLAIMS MEETING.
DID ANYONE ELSE COMES TO THE
CLAIMS --?
YES.
AND IT WAS, ATTORNEY SO-AND-SO.
AND, WHAT WAS DISCUSSED AT THAT
CLAIMS MEETING? AT THAT
POINT --
>> OBJECTION, YOUR HONOR.
>> IT IS OBJECTION.
>> ATTORNEY/CLIENT PRIVILEGE.
I INSTRUCT THE WITNESS NOT TO
ANSWER.
>> NOW DO WE GO TO IN CAMERA
INSPECTION TO SEE WHETHER THERE
WAS ANY DOCUMENTS PRODUCED?
>> YOU COULD.
YOU COULD.
>> SO YOU'RE SAYING REALLY
HERE, THAT THE BIG ISSUE,
DOESN'T LOOK LIKE, THAT THE
STEPS SHOULD HAVE BEEN, YOU
CAN'T JUST GET EVERYTHING BUT
YOU MIGHT BE ABLE TO GET A LOT
MORE THAN NOTHING BUT THERE'S
GOT TO BE IN CAMERA INSPECTION

AND YOU'VE GOT TO IDENTIFY THE CLASSIFICATION OF CASES, I MEAN OF DOCUMENTS, LIKE DOCUMENTS THAT EVALUATE THE CLAIM? DOCUMENTS THAT, OTHER THAN THE LEGAL THEORIES AND LEGAL ADVICE, THAT A LAWYER THAT IS ACTING MORE AS A, WHO, AS THE ADVISOR TO THE INSURANCE COMPANY, THAT MAY NOT HAVE THEIR IN-HOUSE COUNSEL.
LIKELY THOSE WOULD BE PRODUCEABLE?
>> THOSE PROTECTIONS THAT YOU ARE CONCERNED ABOUT ARE ALREADY IN PLACE.
TRIAL JUDGES ALL THE TIME ARE REVIEWING PRIVILEGE LOGS TO DETERMINE THAT EXACT ISSUE.
ALL RIGHT, AS TO WHETHER BUSINESS ADVICE OR LEGAL.
THERE IS NO NEED TO CREATE ANY NEW RULE THAT CHANGES THAT.
THAT TOOL IS ALREADY THERE.
BECAUSE, IT'S THE LEGISLATURE THAT HAS DONE THIS WEIGHING.
EVERYONE IS CONCERNED ABOUT, YOU USED THE TERM BEST EVIDENCE.
BUT, BEST EVIDENCE, BEST EVIDENCE OR GREAT EVIDENCE HAS NEVER BEEN A REASON TO ABROGATE THE ATTORNEY/CLIENT PRIVILEGE.
>> WHAT I'M SAYING AGAIN, TRULY TRYING TO PUT THIS ON EQUAL FOOTING THE WAY THAT YOU WIN OR

LOSE A BAD FAITH CASE FOR THE
MOST PART IS SEEING WHAT IS
SAID IN THE LETTERS AND THE
CLAIMS EVALUATION OF THE, IN
THE ADJUSTING OF THE CLAIM.
I MEAN, HAVING JUST, IF YOU,
TALK TO AN INSURANCE ADJUSTER
WITHOUT HAVING THEIR NOTES, AND
THEIR, CONTEMPORARY --
>> THEY GET THAT UNDER RUIZ.
>> RIGHT.
THAT'S WHY WE UNDERSTOOD THAT.
NOW IN THIS SITUATION, IT'S HOW
CLOSE, THAT WE ARE, IF WE, RULE
IN FAVOR OF THIS
ATTORNEY/CLIENT PRIVILEGE IS
NOT ABROGATED AND WASN'T
WAIVED, WE STILL HAVE TO BE
VERY CLEAR THAT ATTORNEY/CLIENT
PRIVILEGE JUST DOESN'T MEAN
EVERY BIT OF CORRESPONDENCE
THAT GOES BETWEEN THE ATTORNEY
AND THE CLIENT.
>> OF COURSE, JUDGE.
AND THERE'S A LEGION OF CASE
LAW ON THAT.
BUT I WANT TO MAKE ONE
IMPORTANT POINT HERE, AND THAT
IS, DON'T GIVE SHORT-SHRIFT TO
THE IN-HOUSE COUNSEL'S LEGAL
OPINIONS BEFORE IT EVER GETS TO
ME BECAUSE THE LEGISLATURE HAS
WAIVED THE SEW SIGHAL BENEFIT
OF CANDOR.
CANDOR TO YOUR LAWYER.
HOW MANY CASE, HOW MANY CLAIMS

NEVER GET DENIED BECAUSE THE IN-HOUSE COUNSEL HAS THE FREEDOM KNOWING THAT HER DOCUMENT WILL NOT BE BLOWN UP EIGHT FEET HIGH IN FRONT OF A JURY AND SUBSEQUENT BAD FAITH LITIGATION TO GIVE THEIR CLIENT ALL OF THE WART THE ON THE FILE?
THAT IS THE MOST IMPORTANT THING.
FOR, ME AS OUTSIDE COUNSEL TO BE ABLE TO TELL MY CLIENT IN A CASE WHAT A BAD CASE IT HAS OR GOOD CASE IT HAS, WITHOUT FEAR THAT I'M SEWING THE SEEDS OF MY CLIENT'S DESTRUCTION IN A BAD FAITH CASE.
>> HOW ABOUT, IF I AS AN INSURANCE COMPANY, I'M GOING TO START A COMPANY TOMORROW, I'M GOING TO HIRE MEMBERS OF THE FLORIDA BAR TO EVALUATE EACH CLAIM?
YOU CAN CALL THEM WHAT YOU WANT.
THEY ARE IN OUR VERNACULAR AN ADJUSTER OR MANAGING THE FILE BUT, WHAT HAPPENS THEN?
>> WELL, WE GO RIGHT INTO JUSTICE PARIENTE'S CONCERN YOU SAY, HEY, WAIT A SECOND, JUDGE, THE I'M THE PLAINTIFF NOW, NOT MY NORMAL ROLE, HEY, THEY CAN'T DO THAT THEY'RE TRYING TO HIDE, CREATE A ATTORNEY/CLIENT

PRIVILEGE WHERE NONE EXISTS.
TAKE A LOOK AT THESE DOCUMENTS
IN CAMERA.
>> WHY DOES IT NOT EXIST IF THE
IN-HOUSE COUNSEL SITUATION?
THEY SIT RIGHT ACROSS THE DESK,
RIGHT ACROSS AISLE IN ANOTHER
CUBICLE.
THEY CALL HIM IN-HOUSE COUNSEL
AND HIM SOMETHING ELSE.
>> NATURE OF THE ADVICE SOUGHT.
>> ISN'T THAT LEGAL ADVICE?
ANYTIME YOU SAY, UNDER THIS
CONTRACT YOU DON'T OWE THE
MONEY, ISN'T THAT LEGAL ADVICE?
>> NO.
>> IT IS NOT?
>> I CAN GIVE YOU AN EXAMPLE.
>> WHERE DOES THE LINE DRAW SO
WE KNOW.
>> I DON'T THINK THERE IS A LINE.
I'LL GIVE YOU A GREAT EXAMPLE
THE CLAIMS ADJUSTER GETS A FILE
AND POLY THEY DIDN'T PAY THE
PREMIUM, NO LONGER IN FORCE.
CLAIM DENIED.
NO LEGAL ADVICE.
>> HAVE TO BE, WAIT A MINUTE.
HAVE TO BE.
HAVE THEY SATISFIED THE
CANCELLATION REQUIREMENTS?
THERE IS STATUTE ON
CANCELLATION OF INSURANCE
POLICIES.
SO, NO, I CAN'T AGREE WITH YOU
ANY TIME, THAT IS ONE OF THE

FUNDAMENTAL, DID THEY COMPLY
WITH THE STATUTE WITH REGARD TO
NOTICE OF THE CANCELLATION OF
THE POLICY?
IS THAT NOT A LEGAL ISSUE?
>> THAT WOULD BE, JUDGE.
AND THEREFORE --, I'M SAYING
THAT, NOT ALL CASES, NOT ALL
DENIED CLAIMS GO TO LAWYERS.
I CAN TELL YOU THAT.
AND I KNOW IN YOUR EXPERIENCE
YOU KNOW THAT TOO.
A LOT OF, THE CASES THAT GO TO
ME OF COURSE ARE ONES THAT,
THERE WAS A LEGAL QUESTION
RAISED.
SO THERE IS A BIG UNIVERSE OF
CLAIMS OUT THERE THAT WE NEVER
SEE.
YOU KNOW, THE VAST MAJORITY,
OVER 90%, MY LAST HEARING, OF
CLAIMS ARE PAID.
OKAY.
SO ALL OF THOSE ARE EITHER WITH
LEGAL ADVICE AND PAID OR
WITHOUT LEGAL ADVICE AND PAID
BUT THEY NEVER GET TO ME.
SO THE NATURE OF IT, JUSTICE
PARIENTE'S CONCERN AND YOUR
CONCERN THAT THE INSURANCE
COMPANY IS GOING TO SET UP THIS
MOCK, YOU KNOW, LAW FIRM TO DO
ITS CLAIMS ADJUSTING, HA-HA,
YOU CAN'T GET IT.
WHEN THEY READ THE BRIEFS, THEY
WILL SAY THAT IS PRODUCEABLE.

IF IT GOES UP TO THE APPELLATE
COURSE, THE SOUTHERN BELL v.
DEASON CASE, IN 1984 YOUR
HONOR'S OPINIONS LOOKING
EXACTLY THAT.
LOOKING AT SOUTHERN BELL'S
ATTORNEY/CLIENT PRIVILEGE
CLAIM, OKAY WHICH OF THESE
REQUESTS WERE FOR LEGAL ADVICE
AND WHICH OF THESE REQUESTS
WERE FOR BUSINESS ADVICE.
IT IS DONE, I DON'T WANT TO SAY
EVERY DAY BUT A COMMON TRIAL
COURT ROUTINE FUNCTION.
THIS QUESTION SHOULD BE
ANSWERED NO.
90.50 SHOULD REMAIN SACROSANCT
AND PROCEDURES AND IT.
>> AND YOU SAY THERE IS ENOUGH
GUIDANCE FOR TRIAL COURTS TO
FOLLOW THIS AND SEPARATE OUT
THESE KINDS OF ISSUES THAT ARE
VERY FACT INTENSE TIFF?
>> YES, JUDGE, THERE.
>>^THANK YOU, YOUR HONORS.
>> THANK YOU.
REBUTTAL?
>> THERE SEEMS LIKE, YOU WERE
ON AN ALL OR NOTHING THING.
IT SEEMS THAT THERE'S, FROM
PROVIDENT'S VIEW, SAY, LISTEN,
THERE MAY BE, MAYBE THERE IS
SOME OF THIS CORRESPONDENCE
THAT WOULD FALL WITHIN, NOT
FALL WITHIN.
WAS THERE A IN CAMERA INSPECTION

SOUTH FOR CORRESPONDENCE OF
SHUTTS & BOWEN?
APPARENTLY IT HAD BEEN SOUGHT
OR THE IN-HOUSE LEGAL COUNSEL'S
CORRESPONDENCE?
>> I DON'T BELIEVE SO, YOUR
HONOR.
>> IT WAS NEVER SOUGHT?
>> IT WAS NEVER SOUGHT.
>> THAT SEEMS LIKE, HALF A LOAF
IS BETTER THAN NOTHING?
>> SURE.
THAT WOULD BE ONE WAY TO
APPROACH THIS.
AND I, BUT I WANT TO PUT IT
INTO CONTEXT THAT MIGHT EXPLAIN
WHY THAT WOULDN'T REALLY BE
SUFFICIENT.
WE HAVE ALL BEEN TALKING ABOUT
WHAT HAPPENS IF THE LAWYER
GIVES THE ADJUSTER ADVICE, AND
WE, PEOPLE WANT TO GET THAT TO
SEE WHAT WAS GIVEN.
WHAT IF, WE CAN ALL AGREE THAT
THE INSURANCE COMPANY HAS A
DUTY OF GOOD FAITH TO THE
INSURED.
WHAT IF THE ADJUSTER TELLS THE
LAWYER, STALL ON THIS CASE?
I'VE HEARD THAT THE INSURED IS
POOR, OR IS IN ECONOMIC
DISTRESS OR IS SICK AND DYING,
THIS CASE WILL HAVE A LOT LESS
VALUE ONCE HE IS DEAD?
THEN THE LAWYER, GOES AHEAD AND
DOES THAT.

NOW, THE INSURANCE COMPANY AT THAT POINT, IF ATTORNEY/CLIENT PRIVILEGE IS ALL SACROSANCT, THEN THE INSURANCE COMPANY HAS USED ITS LAWYER AS A TOOL TO VIOLATE ITS DUTY TO THE INSURED, AND THE INSURED CAN NEVER KNOW ABOUT IT.
>> YOU DON'T THINK, ADJUSTER TELLING THE ATTORNEY WHERE THERE IS I THINK UNDER WHAT WAS SET UP THAT WOULDN'T, THAT'S THE INSURANCE COMPANY, THEY'RE NOT GIVING LEGAL ADVICE.
THEY'RE EVALUATING THE CLAIM.
THAT WOULD BE AN IN CAMERA INSPECTION AND THAT WOULD BE PRODUCEABLE.
>> IF THERE ARE STANDARDS FOR THE IN CAMERA INSPECTION, THEN THE, THE TRIAL COURT COULD LOOK AT IT AND UNDERSTAND HOW TO PUT IT IN CONTEXT.
THE COURT WOULD PROBABLY HAVE TO CREATE THOSE STANDARDS IN SOME WAY TO GIVE GUIDANCE AS TO WHAT WOULD BE PRODUCEABLE, AND WHAT ISN'T PRODUCEABLE.
BUT, THE BETTER SOLUTION WOULD BE TO ALLOW ALL THAT INFORMATION TO GO TO THE PERSON WHO HAS THE FIDUCIARY RELATIONSHIP WITH THE INSURANCE COMPANY, BECAUSE ALL THEY THE INSURED, AND THE ATTORNEYS DON'T HAVE A RELATIONSHIP,

FIDUCIARY RELATIONSHIP, THE
INSURED HAS ONE, WITH THE
INSURANCE COMPANY.
AND THAT IS THE CONDUIT THROUGH
WHICH THE DOCUMENTS FLOW.
THANK YOU.
>> THANK YOU VERY MUCH.
THANK BOTH OF YOU FOR YOUR
ARGUMENTS.