

>> THE LAST CASE ON THE COURT'S
AGENDA TODAY, IS WAGNER VERSUS
KENNEDY LAW GROUP.

PARTIES READY TO THE PROCEED?
YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT.

MY NAME IS STEPHEN ROSENTHAL,
MY PARTNER, JOEL EATON, WITH THE
PETITIONER, THE WAGNER FIRM.

THIS CASE ON ITS FACE DEALS
WITH ATTORNEY FEES, AT ITS CORE
IS THE RIGHT OF WRONGFUL DEATH
SURVIVOR TO CHOOSE THE COUNSEL
OF HIS OR HER CHOICE.

THE DISTRICT COURT'S DECISION
BELOW ESSENTIALLY DESTROYS THAT
RIGHT.

>> LET ME ASK YOU THIS.

THIS IS A WRONGFUL DEATH
STATUTE.

IT SEEMS TO ME THAT, THERE'S
BEEN A LEGISLATIVE DECISION
THAT, WHEN YOU HAVE THESE KINDS
OF SITUATIONS, THAT THE PERSON,
THE ATTORNEY, WHO IS THE
ATTORNEY FOR THE ESTATE, THE
PERSONAL REPRESENTATIVE, REALLY
IS THE ENGINE DRIVING THE
TRAIN,
IS THAT NOT CORRECT?

>> I THINK THAT IS CORRECT, TO
SOME EXTENT.

THE STATUTE IS REMARKABLY,
UNCLEAR, AS TO THE ABILITY OF A
SEPARATE SURVIVOR, TO, HIRE HIS
OR HER OWN COUNSEL TO

PARTICIPATE IN THAT WRONGFUL
DEATH ACTION.

NO QUESTION THIS IS A STATUTORY
SCHEME TO SIMPLIFY WRONGFUL
DEATH ACTIONS.

IT IS CLEARLY NEVER MEANT TO TAKE
AWAY SURVIVOR PARTY IN INTEREST
RIGHT TO SEPARATE
REPRESENTATION.

>> WOULDN'T THAT BE THE CASE,
EVEN AFTER THE LAWSUIT'S FILED?
IN OTHER WORDS, TAKE THE
SITUATION, WHERE THIS CASE
WENT TO TRIAL. THESE ARE THREE
ADULT CHILDREN, AND YOU CLAIM
DIFFERENT, THEY HAD DIFFERENT
RELATIONSHIPS WITH THEIR
PARENTS, AND THEIR IS EACH OF
THEM GETS, THE STATE DOESN'T
HAVE A CLAIM, SURVIVORS HAVE
THE CLAIM.

AND NOBODY WOULD EVER SAY
THAT THE WAGNER FIRM COULDN'T
HAVE REPRESENTED THE TWO
SURVIVORS AND THE KENNEDY FIRM,
THE THIRD SURVIVOR AND THE
PERSONAL REPRESENTATIVE WOULD
HAVE ESSENTIALLY SAT THERE, AND
AT A TRIAL.

NOW HAS OUR LAW EVOLVED TO THE
EXTENT THAT, SAY, THE SAME
THING HAD HAPPENED AND THE JURY
HAD APPORTIONED, THEY
APPORTIONED FOR THE SURVIVORS,
THAT THE, LAWYERS FOR THE TWO
SURVIVORS WOULD NOT GET THEIR

FEE OFF OF THE ENTIRE PORTION
OF THEIR RECOVERY?

>> HAD THIS CASE GONE TO TRIAL,
HAD THIS CASE ACTUALLY BEEN
FILED AS AN ACTION IN THE FIRST
PLACE AND PROCEEDED AS YOU
SAID, YOUR HONOR, THE, EXISTING
LAW UNDER THIS COURT'S DECISION
IN WIGGINS, WHICH IS THE ONLY
CASE IN THE 30 PLUS YEAR
HISTORY OF THE WRONGFUL DEATH
ACT WHERE THIS COURT HAS
ADDRESSED ATTORNEY'S FEE ISSUE
WHATSOEVER.

WOULD HAVE PERMITTED WAGNER
FIRM TO GET A FEE OF
REPRESENTATION OF CLIENTS.

THIS IS ABSENCE OF --

>> BASED ON THEIR CONTRACT OR
BASED ON EQUITY.

>> IT IS NOT CLEAR --

>> I'M ASKING YOU, NO.

MANY OF US DID PERSONAL INJURY.
I REREAD WIGGINS THE LAW HAD
ALWAYS BEEN, THE PERSONAL
REPRESENTATIVE HAD TO BRING THE
CLAIM BUT IT IS IN ITEMIZED
VERDICTS.

THIS THING THAT HAS EVOLVED
WHERE SOMEHOW THE PERSONAL
REPRESENTATIVE GETS A FEE ON
THE WHOLE THING.

I GUESS WHAT I'M ASKING YOU
BECAUSE YOU'RE MAKING A POLICY
ARGUMENT, THAT THERE OUGHT TO
BE A RIGHT OF CONTRACT.

YOU'RE SAYING THAT IS ONLY TRUE
FOR, BEFORE YOU FILE SUIT.
AND I THINK THAT IS WHERE YOUR,
THE ARGUMENT, SEEMS TO ME,
WHATEVER IS, RULES ARE, THE
RULES SHOULD BE THE SAME BEFORE
AND AFTERWARDS.

>> IF WE WERE WRITING ON A
BLANK SLATE I COMPLETELY AGREE
THAT THE CONTRACT SHOULD
DETERMINE THE ATTORNEYS FEE.
INTERESTINGLY A FAIR READING OF
768.26 THIS ATTORNEY FEE
PROVISION, IT MERELY CODIFIES
THE COMMON LAW, COMMON FUND
DOCTRINE.

WHICH SAID IN EVENT AN ATTORNEY
REPRESENTS OTHER PEOPLE WITHOUT
A CONTRACT.

FILE SUIT AND PRODUCES A COMMON
FUND, WHICH BENEFITS THEM. THE
ATTORNEY IS ENTITLED
DESPITE ABSENCE OF A CONTRACT,
TO GET A FEE BASED ON THAT
RECOVERY.

>> NOTHING EVEN SAYS WHAT THE
PERSONAL INJURY SAYS.

768.26 JUST SAYS IT SHALL BE
PAID BY THE PERSONAL
REPRESENTATIVE.

>> SAYS WHO SHOULD PAY IT OUT
OF WHOSE RECOVERY IT COMES BUT
IT DOESN'T SAY TO WHOM IT
SHOULD BE PAID WHICH IS PART OF
THE DIFFICULTY FRANKLY I HAVE
WITH WIGGINS BECAUSE IT DOESN'T

ELUCIDATE THAT IN A CLEAR FASHION.

IT APPEARS --

>> BUT WIGGINS IS NOT THE ONLY CASE OUT THERE.

WIGGINS AND

>> CATAPANE FROM THE FOURTH DCA.

>> AND PEREZ, ALL THESE CASES ARE DEALING WITH PERSONAL REPRESENTATIVE ATTORNEY REPRESENTING, AND THE SURVIVORS IN THESE WRONGFUL DEATH SITUATIONS.

WHETHER WE'RE TALKING ABOUT HAVING FILED SUIT OR NOT.

AND THE WIGGINS COURT, SORT OF COMES DOWN, SAYING THAT, YES, THERE IS THIS MONEY THAT COMES OUT OF THE ENTIRE SETTLEMENT, LAWSUIT, WHATEVER IT IS.

THE ATTORNEYS FEES COME OUT OF THAT.

THERE SHOULD BE AN APPORTIONMENT OF THOSE ATTORNEYS FEES.

BUT IT SAYS, BASED ON THE WORK THAT IS DONE TO GET THIS POT OF MONEY.

ISN'T THAT REALLY WHAT WIGGINS SAYS?

>> I THINK WIGGINS CAN BE READ TO SAY THAT.

ON THE OTHER HAND THERE IS LANGUAGE IN WIGGINS THAT IS UNCLEAR.

ON PAGE, 450, IN THE COURT'S CONCLUSION SECTION, I'LL JUST READ THIS QUICK PARAGRAPH. IT SAYS WHEN SURVIVORS HAVE COMPETING CLAIMS AND ARE REPRESENTED BY SEPARATE ATTORNEYS, AWARDING ATTORNEYS FEE FROM A WRONGFUL DEATH SUIT, ARE COMMENSURATE WITH ATTORNEY'S WORK PROVIDES FOR PROPORTIONAL PAYMENT OF ATTORNEY FEES OUT OF ALL SURVIVORS OUT OF RESPECTIVE AWARDS.

FOR EXAMPLE, IF THERE ARE TWO COMPETING SURVIVORS, REPRESENTED BY TWO SEPARATE ATTORNEYS SUCCESSFULLY PROSECUTE CLAIM OUT OF JUDGMENT THE FEE SHOULD BE AWARDED OUT OF RESPECTIVE RECOVERIES.

THAT LANGUAGE IS WHAT I THOUGHT JUSTICE PARIENTE WAS SAYING AT BEGINNING.

IF WAGNER FIRM REPRESENTED TWO SURVIVORS AT TRIAL THROUGHOUT AND KENNEDY FIRM REPRESENTED ANOTHER AND THERE ARE JUDGEMENTS AND THE COURT ALLOCATES AWARDS FOR EACH OF THOSE SURVIVORS AS THEY HAVE THE RIGHT TO BE ALLOCATED YOU LOOK TO THOSE PARTICULAR AWARDS TO PAY THE ATTORNEY'S FEES FOR THOSE SEPARATE CLIENTS.

>> LET'S LOOK AT JUST ANOTHER

SCENARIO.

BECAUSE I THINK, I'M HEARING
WHAT YOU'RE SAYING.

THAT IS HOW I READ OUR OPINION,
TO ADDRESS THAT, BUT WE MAY
HAVE CIRCUMSTANCES WHERE WE'VE
GOT A PR, AND THEY PROCEED WITH
A CASE AND ON THE MONDAY OR
FRIDAY BEFORE MONDAY TRIAL, TWO
SURVIVORS GO OUT AND GET A NEW
LAWYER.

THEN THE CASE SETTLES ON MONDAY
MORNING.

CERTAINLY UNDER THAT
CIRCUMSTANCE, THEN THE LAWYER
WHO BEEN PROVIDING
REPRESENTATION FOR THOSE
SURVIVORS, WOULD PROBABLY HAVE
A CLAIM, WOULD THEY NOT, TO
SOME OF THAT BECAUSE THEY HAVE
ALREADY TAKEN IT TO THE MORNING
AND THEN IT SETTLED?

>> I THINK THOSE WOULD BE
SUSPICIOUS CIRCUMSTANCES WITH
WHICH WOULD BE DIFFERENT.

>> DIFFERENT.

BUT, IT WOULD HAVE THAT
FLEXIBILITY, WOULD IT NOT?

>> I DO THINK SO.

AND I THINK WHAT IS INTERESTING
EVEN IF YOU WERE USING A PURELY
CONTRACT-BASED SYSTEM, THERE'S
A QUESTION, BASED UPON YOUR
HYPOTHETICAL AS TO WHETHER OR
NOT PR'S ATTORNEY WOULD BE
ENTITLED OR DISENTITLED TO THAT

FEE.

BUT THE SURVIVORS WHO HIRED
SEPARATE COUNSEL.

>> RIGHT.

>> WOULD CERTAINLY HAVE A RIGHT
TO SAY THEIR ATTORNEY CAME IN
AT LAST MINUTE WOULD NOT BE
ENTITLED TO THAT FEE AND THEIR
RECOVERY SHOULDN'T BE
DIMINISHED AS A RESULT.

PERHAPS THE ANSWER WOULD BE AS
TO PR'S COUNSEL AS TO OTHER
SURVIVORS WOULD GET A QUANTUM
MERUIT AWARD.

>> SEEMS TO ME LIKE A DIFFERENT
CIRCUMSTANCE.

WE HAVE TO HAVE SOME
CIRCUMSTANCE HERE.

IT CAN'T BE JUST PER SE
CONTRACTUAL BECAUSE WE COULD
FACE THAT CIRCUMSTANCE.

>> I THINK THAT'S CORRECT.

>> ISN'T THAT, THE POINT I
HAVE, AND I KNOW YOU MAKE A
STRONG ARGUMENT THAT, 768.26
WHICH IS WHAT IS RELIED ON,
LITIGATION ENDS ACCIDENTS ONLY
COMES IN ONCE THERE'S A LAWSUIT
THAT'S BROUGHT.

BUT A LAWSUIT'S FILED AND
THE SAME EXACT THING HAPPENED
HERE.

THERE IS A MEDIATION.

NOTHING ELSE HAPPENED.

FROM THE ISSUE OF REALLY, WHO'S
ON FIRST, AND WHAT OCCURS IN

THIS, I DON'T SEE HOW WE CAN HOLD THAT THERE IS JUST TWO DIFFERENT RULES THAT APPLY, JUST SIMPLY BECAUSE IN ONE, THE COMPLAINT WAS FILED, AND THE OTHER, THERE, ESPECIALLY HERE BECAUSE THERE WAS EVEN A MOTION IN THE PROBATE COURT FOR, TO APPROVE THE SETTLEMENT WHICH I'M NOT SURE WHY THAT HAD TO BE DONE.

BUT IT WAS DONE.

SO, HELP ME, YOU KNOW, WITH THIS IDEA, STRICT INSTRUCTION HOW ONE THING THIS LAWSUIT IS FILED BUT THE SAME EXACT THING HAPPENED.

IT IS A WHOLE DIFFERENT SCHEME, BUT THE DAY BEFORE, EVERYONE'S CONTRACTS ARE VALID.

IN OTHER WORDS, BUT THE DAY AFTER THEIR CONTRACT IS EFFECTED BY SOMETHING ELSE.

>> RIGHT. I GUESS I HAVE A COUPLE RESPONSES TO THAT.

FIRST OF ALL, I DON'T THINK THAT THERE SHOULD BE A DIFFERENCE BECAUSE I THINK THE WAY THE WIGGINS COURT HAS, OR AT LEAST, THE DISTRICT COURT IN THIS CASE HAS CONSTRUED THE WIGGINS OPINION, IS PROBLEMATIC.

I THINK THE CONTRACT SHOULD GOVERN.

I THINK 768.26 DOES NOT CHANGE

THAT IN ANY FASHION.

I THINK THE FAIREST READING OF THAT PROVISION IS REALLY DOES CODIFY THE COMMON FUND DOCTRINE.

I DON'T WANT TO GET TOO FAR AFIELD FROM YOUR QUESTION.

>> I THOUGHT YOUR ARGUMENT WAS, PEREZ WAS RIGHT, IF A LAWSUIT HASN'T BEEN FILED THE CONTRACT PREVAILS.

I THINK YOU'RE BEING A GOOD ADVOCATE AND A GOOD ADVOCATE FOR THE COURT WHICH IS THAT YOU RECOGNIZE THERE'S JUST THIS ARBITRARINESS OF SAYING THE LEGISLATURE INTENDED ONE WAY FOR ATTORNEY'S FEES TO BE SPLIT IF THERE IS THIS MAGIC FILING BUT THEY DIDN'T, I MEAN THE QUESTION IS DID THE LEGISLATURE REALLY CARE ABOUT ATTORNEY FEES OR DID THEY CARE ABOUT MAKING SURE THE INSURANCE COMPANY OR THE DEFENDANT WASN'T SUBJECT TO DIFFERENT LAWSUITS?

>> CERTAINLY THE LATTER.

AND I DON'T STAND HERE CONTENDING THAT, LEGISLATURE ENVISIONED TWO SEPARATE REGIMES.

EVEN IN THE JUDICIAL COMMISSION, THE BAR COMMISSION, THAT PROPOSED THIS STATUTE BACK IN 1969 THERE IS NO DISCUSSION WHATSOEVER, TO WHOM THE ATTORNEY FEES ARE PAID.

BUT WHAT'S IMPORTANT TO RECOGNIZE I THINK, IS THAT, IF YOU VIEW 768.26 CODIFYING COMMON LAW, THE LAST PROVISION, TALKS ABOUT, TO THE EXTENT THAT THERE ARE EXPENSES AND IN MY VIEW EXPENSES ARE DEFINED TO INCLUDE ATTORNEY FEES.

TO THE EXTENT EXPENSES ARE ATTRIBUTABLE TO SOLELY ONE SURVIVOR WHICH MIGHT ACCRUE IF YOU HAVE SEPARATE REPRESENTATION, TO PRESENT DAMAGES SIDE OF A CASE, FOR ONE SURVIVOR WHY THAT IS A, MORE, THERE IS GREATER ENTITLEMENT TO DAMAGES.

THEN THAT WOULD BE, CONSISTENT WITH THE COMMON FUND DOCTRINE. IN ADDITION TO THE COMMON FUND DOCTRINE DOESN'T APPLY, WHEN SEPARATE REPRESENTATION DOESN'T EXIST.

THE PEREZ DECISION HAS INTERESTING DISCUSSION OF COMMON FUND RULE AND NOTES THAT EXCEPTION.

SO, THE STATUTE WOULDN'T BE ANY DIFFERENT THAN THE COMMON LAW. NOW, ASSUMING THAT THE COURT DOESN'T AGREE WITH THAT OR FEELS SOMEHOW CONSTRAINED BY WIGGINS THAT IT CAN'T GO THAT WAY, WHICH I SUBMIT THERE IS FLEXIBILITY IN WIGGINS, TO ANSWER YOUR QUESTION, JUSTICE

PARIENTE, THE, IF YOU'RE GOING TO LOOK AT 768.26 AND SAY THE LEGISLATURE IMPOSED A NEW REGIME HERE FOR DEALING WITH ATTORNEY'S FEES, EVEN, AS TO CASES WHERE THERE IS SEPARATE COUNSEL, DESPITE THE FACT IT DOESN'T SAY ANYTHING ABOUT IT, YOU NEED TO CONSTRUE IN ACCORDANCE WITH THE PURPOSE OF THE STATUTE, WHICH WAS, FIRST OF ALL, TO THE EXTENT, IT IS FOR THE BENEFIT OF THE REAL PARTIES IN INTEREST.

768.17 SAYS THAT THE SURVIVORS ARE PEOPLE FOR WHOM THIS STATUTE WAS CREATED IF YOU'RE DOING THAT I SUBMIT YOU CAN'T GO BEYOND WHAT IT SAYS. IT IS SO CLEAR THAT LITIGATION EXPENSES AND ACTION THAT IS CONTEMPLATED ARE WHAT ACTIVATES THE SWITCH OF THE STATUTE.

>> LET ME ASK YOU.

I THOUGHT THAT, AS PART OF YOUR ARGUMENT, CORRECT ME IF I'M WRONG, THAT SECOND DCA, INTERPRETED WIGGINS TOO NARROWLY IN THAT, IT FOUND THAT IT HAS TO BE COMPETING INTERESTS OR CONFLICTING INTERESTS.

BECAUSE IT WASN'T CONFLICTING THEREFORE YOUR CLIENT WAS NOT ENTITLED TO A FEE.

IS IT YOUR POSITION THAT IS TOO

NARROW AND REALLY THAT, YOUR CLIENT'S HELPED CONTRIBUTE TO THE FUND AS IT IS.

OUR POSITION THAT WOULD BE A SECOND BASIS FOR THIS COURT TO.

QUASH THE

DECISION IRRESPECTIVE THE QUESTION OF THE STATUTORY CONSTRUCTION.

IF WIGGINS SAYS THAT COUNSEL WHO PRODUCED, WHO DO WORK FOR THEIR CLIENTS, PURSUANT TO VALID FEE AGREEMENTS ARE ENTITLED TO BE PAID, THEN, THE SECOND DISTRICT'S, OPINION, SAYING THAT YOU NEED TO SOMEHOW SHOW SOME CONFLICT THAT, PERSISTED TO THE POINT OF ACTUAL CONFLICT, FOR EXAMPLE --

>> LET ME ASK, I WANT TO STOP AT THAT ONE. STATEMENT, WHERE YOU SAID, THAT THE ATTORNEY WHO DOES WORK FOR HIS CLIENT, IF THE WORKS FOR THE CLIENT DOES HAVE TO, BE RELATED TO THEIR, DISTRIBUTION OR, APPORTION, THE POT.

WE'RE TALKING ABOUT THE SETTLEMENT AMOUNT HERE, THE 1.2 MILLION DOLLARS, CORRECT?

AND, DOESN'T WIGGINS, REALLY, SAY, THAT ATTORNEY, A SEPARATE ATTORNEY, IS ENTITLED TO A PORTION OF THE ATTORNEY'S FEES, AND THAT APPORTIONMENT IS BASED ON THE WORK THAT THAT ATTORNEY

DOES, TO GET US TO THIS POT
THAT WE'RE TALKING ABOUT?

>> WELL, MY POSITION WOULD BE
THAT, IN ONE OF THESE CASES AS
SOON AS A SURVIVOR HIRES
SEPARATE COUNSEL, YOU HAVE A
CONFLICT.

I MEAN, THAT IS THE JUST
REALITY OF THESE SITUATIONS.
IF THE SURVIVOR DOESN'T TRUST,
AS WAS EVIDENT IN THIS CASE,
HIS BROTHER, TO, SIGN A FEE
AGREEMENT WITH THAT BROTHER'S
COUNSEL --

>> BECAUSE HE WAS, YOU SEE, TO
ME, THERE HAS, THAT DOESN'T
HAVE TO BE ANYTHING IN THE
RECORD THAT REALLY DEMONSTRATES
A CONFLICT BECAUSE --

>> THERE WAS IN THIS CASE.

>> YOU LOOK AT THE CASE OF THE
LADY WHO DIED, WHO HAD THE
HUSBAND AND, TWO CHILDREN WITH
THIS HUSBAND, AND THEN SHE HAS,
TWO CHILDREN FROM A PREVIOUS
MARRIAGE.

IT IS CLEAR TO ME THAT, AND
THAT, COURT SAID, THAT, AS TO
THE LIABILITY PORTION, THE
ATTORNEY FOR THE REPRESENTATIVE
WAS ENTITLED TO, YOU KNOW, THE
FEE FOR THAT.

BUT THEN, WHEN IT CAME TO THE
DISTRIBUTION, THEY BEGAN TO,
GIVE THE CHILDREN FROM THE
PREVIOUS MARRIAGE A DIFFERENT

AMOUNT, CORRECT?

>> RIGHT.

THAT IS THE WIGGINS CASE.

>> SO THAT ATTORNEY, ACTUALLY CONTRIBUTED AND, DID WORK TO MAKE SURE THAT THOSE CLIENTS GOT THEIR FAIR SHARE, OF THE DISTRIBUTION, CORRECT?

I CAN UNDERSTAND IN THOSE KIND OF CIRCUMSTANCES.

ATTORNEY GETTING A PORTION OF THE ATTORNEY'S FEES.

I'M STRUGGLING

WITH A SITUATION WHERE AN ATTORNEY SUCH AS IN THIS CASE THE NEGOTIATION FOR THE SETTLEMENT WAS DONE BY THE, ATTORNEY FOR THE PERSONAL REPRESENTATIVE.

AND BEFORE, I DON'T SEE THAT THERE WAS A QUESTION ABOUT WHO WAS GOING TO GET THE MONEY BECAUSE, WILL SAID, THREE BROTHERS WERE EACH SUPPOSED TO GET A THIRD.

WHERE IS THE CONFLICT HERE?

>> LET ME TRY TO ADDRESS SOME OF THOSE THINGS.

FIRST OF ALL, THE SETTLEMENT, THE MEDIATION WHICH PRODUCED THE \$1.23 MILLION SETTLEMENT WAS NOT JUST PROCURED AND NEGOTIATED BY COUNSEL FOR THE PERSONAL REPRESENTATIVE.

>> WELL THERE IS NOTHING IN

THIS RECORD THAT SAYS OTHER THAN THE OTHER ATTORNEY'S ATTENDANCE AT MEDIATION.

>> WELL ,THAT'S CORRECT, EXCEPT FOR, WELL, THERE IS ALSO A LETTER WRITTEN IMMEDIATELY AFTER THE MEDIATION.

THE REASON THERE ISN'T MORE IS THAT THE MEDIATION PRIVILEGE WAS INVOKED BY THE KENNEDY LAW GROUP, SO THAT THE WAGNER FIRM WAS NOT PERMITTED TO PUT ON TESTIMONY ABOUT EXACTLY WHAT WENT ON DURING THE MEDIATION. IT IS UNDERSTAND BUT, YOU KNOW, WE STAND HERE HANDCUFFED AS FAR AS DEVELOPMENT OF THAT PART OF THE RECORD.

WHAT THERE IS ABOUT CONFLICT IN THIS RECORD, PUTTING ASIDE MY ARGUMENT AD MINITIO.

THERE IS SOME SORT OF CONFLICT THAT COULD BE RECOGNIZED BY THE COURT, YOU HAVE A SITUATION WHERE THE BROTHERS REFUSED TO SIGN THE FEE AGREEMENT WITH THE WAGNER FIRM, TWO OF THE THREE BROTHERS.

THAT, ONE OF THE BROTHERS, LARRY, WHO WAS REPRESENTED BY MR.^BRENNAN OF THE WAGNER FIRM EARLY ON, IMMEDIATELY SENT LETTER, LEARNING ABOUT THE FIRST SETTLEMENT, \$200,000, SETTLEMENT WHICH HE DID NOT PROCURE OR SEEK A FEE ON

OBJECTED TO THAT.

AND, TURNED OUT LATER --

>> EVENTUALLY THE WHOLE THING
WENT THROUGH THE PROBATE COURT
AND NOTHING MORE WAS DONE.

THERE WAS NO APPEAL OF THE
PROBATE COURT'S DECISION.

NOW WE GET TO THIS POINT.

>> THAT'S CORRECT.

BUT THERE IS ALSO, A MOTION
FILED, WITHIN A FEW DAYS OR A
WEEK AFTER THAT, TO, DIVEST
GARY ELMORE, THE PERSONAL
REPRESENTATIVE OF THAT STATUS.
IN THAT MOTION THERE IS LITANY
OF ALLEGATIONS OF MISCONDUCT.

>> SEEMS TO ME THAT IF OUR, IF
OUR, STATEMENT IN WIGGINS,
THAT SURVIVORS HAVE THE RIGHT
TO THEIR OWN ATTORNEY, AND
CONTINGENCIES ARE VALID, AND I
DON'T UNDERSTAND, WHAT THE
STATE'S INTEREST IS IN ALTERING
CONTRACTUAL RIGHTS?

I GUESS WHAT I'M, SAYING THERE
HAS TO BE AN ACTUAL CONFLICT
AND THIS GOES BACK TO JUSTICE
POLSTON'S QUESTION, IN ORDER
FOR THERE TO BE SOME DIFFERENT
ALLOCATION OF FEES, SEEMS LIKE
IT PROMOTES DISHARMONY AS
OPPOSED TO, THIS IS ALL ABOUT
MONEY FOR THE ATTORNEY.

LET'S FACE IT AT THIS POINT.

AS OPPOSED TO SAYING, IF EVERY
ATTORNEY, HAS THE RIGHT TO

THEIR CONTRACT, WITH THE SURVIVOR AND SURVIVOR GETS TO CHOOSE IT, THAT IS THE PERSONAL REPRESENTATIVE, IN SOME CASES, MAY GET MORE, IN SOME CASES MIGHT NOT, BUT THEY DON'T AUTOMATICALLY GET IT ALL.

>> LET ME TRY --

>> ISN'T THAT BETTER THAN TRYING TO MANUFACTURE THIS DISCORDANCE THAT MIGHT HAVE EXISTED OR EXCITE NIGHT NOT HAVE EXISTED FOR THIS ATTORNEY FEES THING.

>> AS YOU HAVE A SYSTEM WHICH THE DISTRICT COURT OPINION DOES CONFLICT AT CENTER, WHETHER OR NOT THE ATTORNEYS FOR THE SURVIVORS HAVE A RIGHT TO A FEE IT DOES CREATE PERVERSE INCENTIVES.

>> ISN'T THERE ANOTHER SIDE TO THIS? ON THE OTHER HAND IF EVERY ATTORNEY IS ENTITLED TO A PORTION OF THE FEE, EVERY SURVIVOR, I CAN GO OUT AND GET MY ATTORNEY.

I DON'T HAVE ANY PROBLEM WITH WHAT IS GOING ON.

I BRING MY ATTORNEY IN AND MY ATTORNEY SITS THERE AND, YOU KNOW, THEN IT IS ENTITLED TO A FEE.

>> I THINK JUSTICE LEWIS'S POINT DEALS WITH THAT TYPE OF SITUATION.

THE RULE DOESN'T HAVE TO BE SO GENEROUS THAT ANY SURVIVOR HAPPENS TO HAVE A BROTHER OR SISTER ATTORNEY, BRING THEM IN ALL OF SUDDEN GET THEM A FEE WHICH WOULD OTHERWISE GO TO THE PERSONAL REPRESENTATIVE'S COUNSEL WHO WAS DOING ALL THE WORK.

MORE IMPORTANTLY THIS IS NOT JUST ABOUT ATTORNEY FEES.

THIS IS ABOUT, RIGHT NOW IN THE LAW OF THE SECOND DISTRICT, ANY ATTORNEY WHO CONSULTS THE LAW WILL SEE THAT THEY HAVE NO OPPORTUNITY TO GET UNLESS THERE IS A CLEAR CONFLICT THAT THEY'RE GOING TO BE ABLE TO ESSENTIALLY DOCUMENT, MANUFACTURE, AND, MANUFACTURE, NOT IN THE PEJORATIVE SENSE, AND NOT WAIVE IN ANY WAY OR NOT TAKE ANY ACTION THAT CAN BE CONSTRUED AS WAIVING.

THAT IS PROBLEMATIC.

YOU'RE ALREADY PROCEEDING ON CONTINGENCY.

DOING SO NO GUARANTY HAVING HELPED PRODUCE THE CONTINGENCY, NOT GET PAID A DIME WILL PRECLUDE SURVIVORS GETTING COUNSEL.

>> WILL GET PAID BUT NOT JUST AS MUCH.

>> UNDER THE DISTRICT COURTS THEY WON'T GET PAID AT ALL.

WAGNER FIRM DID DO WORK,
BECAUSE THE COURT SAID THERE
ISN'T ENOUGH OF A CONFLICT
WE'RE NOT SATISFIED WITH IT,
YOU'RE NOT ENTITLED TO
ANYTHING, SO THEY DIDN'T GET
PAID.

>> IF WE LOOK AT THIS RECORD,
WOULD THIS RECORD DEMONSTRATE
THAT THE WAGNER FIRM DID
ANYTHING THAT CONTRIBUTED TO
THE MONEYS THAT WERE CORRECTED
COLLECTED?

>> IN THIS RECORD THERE IS
NOTHING THAT YOU CAN POINT TO
NOT COVERED BY MEDIATION
PRIVILEGE.

AT HEARING, FEE HEARING,
MR. BRENNAN ATTEMPTED AND ASKED
TO BRING OUT TESTIMONY
CONCERNING FROM OTHER WITNESSES
INCLUDING OPPOSING COUNSEL, AND
THE INSURANCE COMPANY'S COUNSEL
AND HIMSELF ABOUT WHAT
TRANSPIRED AND WHAT HIS ROLE
WAS DURING THAT MEDIATION. IT WAS
OBJECTED TO.

SEE I'M RUNNING OUT OF TIME.

>> I HAVE A QUESTION.

MAY I ASK IT?

IS THERE, DANGER IN, OR, SOME
POSITIVE IF WE WOULD LOOK AT
THIS, AND WE'RE TALKING ABOUT,
SURVIVORS.

CERTAINLY MINOR CHILDREN, WOULD
HAVE THEIR OWN PERSONAL CLAIMS.

BUT THEY MUST COME THROUGH THE PERSONAL REPRESENTATIVE, AS OPPOSED TO LOOKING AT SURVIVORS WHO MERELY PARTICIPATED FROM THE ESTATE IN DRAWING A DISTINCTION BETWEEN THOSE? IS THERE, IS THERE DANGER, IS THERE, IS THAT AN ALTERNATIVE?

HERE WE'RE DEALING WITH ADULTS. I MEAN, WE CERTAINLY SEE THAT, A CHILD, YOU KNOW, THE LONGER, YOU HAVE DIFFERENT AMOUNTS FOR SURVIVORS, IF YOU HAVE THAT INDIVIDUAL CLAIM.

DO YOU UNDERSTAND WHAT I'M ASKING?

>> I'M NOT SURE I DO.

BECAUSE OBVIOUSLY BY DEFINITION A SURVIVOR IS SOMEBODY WHO HAS A CLAIM.

>> I UNDERSTAND.

BUT THEY HAVE INDIVIDUAL CLAIMS FOR THEIR OWN PARTICULAR PERSONAL LOSSES THAT COME THROUGH.

>> CORRECT.

>> OKAY. IF YOU'RE JUST GOING TO BE A BENEFICIARY OF ESTATE, IN A DIFFERENT CATEGORY.

>> I AGREE. THAT IS RIGHT.

>> I'M ASKING IS THERE A REASON TO DRAW A DISTINCTION BETWEEN THOSE TYPES OF SURVIVORS? OR IS THAT DANGER, ARE WE

CREATING A PROBLEM IF WE LOOK AT THOSE KINDS OF THINGS?
>> YOU KNOW, IF YOU'RE JUST TALKING ABOUT SOMEBODY WHO DOESN'T HAVE A CLAIM BUT ONLY A RESIDUAL BENEFICIARY OF THE ESTATE --

>> RIGHT.

>> I DON'T THINK THE ATTORNEY FOR THAT PERSON, I DON'T THINK IT WOULD CREATE PROBLEMS DRAWING A LINE THERE.

WE'RE TALKING ABOUT THE SURVIVORS.

THEY ARE THE REAL PARTIES IN INTEREST.

>> CAN I CLARIFY THAT?

THE ADULT CHILDREN UNDER AN AMENDMENT, I GUESS, AT LEAST, 20 YEARS AGO, ACTUALLY, IF THERE IS NO SURVIVING SPOUSE, THEIR CLAIM IS PAIN AND SUFFERING.

>> THESE CHILDREN DID HAVE CLAIMS.

>> DERIVED FROM THE WILL WHERE THEY GOT ONE-THIRD, ONE-THIRD, ONE-THIRD.

>> THAT'S WHY THE ESTATE SETTLEMENT FOR \$200,000 ALLOCATED BY THE KENNEDY LAW GROUP TO THE ESTATE SATISFIES THE ESTATE'S CLAIM.

THIS OTHER SETTLEMENT WAS PURELY INDIVIDUAL THREE BOYS, THREE GROWN MEN'S CLAIMS AS

SURVIVORS UNDER THE STATUTE.

>> EACH COULD BE IN DIFFERENT AMOUNTS?

>> CORRECT. OF COURSE.

>> THANK YOU.

>> MR. ^HEARN.

>> MAY IT PLEASE THE COURT.

I'M STEVE HEARN REPRESENTING THE KENNEDY LAW GROUP HERE.

AS THE COURT POINTED OUT ALREADY WE'RE DEALING WITH TWO DIFFERENT ISSUES HERE THE ONE WHICH THE COURT GRANTED CONFLICT JURISDICTION, THE QUESTION OF THE WRONGFUL DEATH STATUTE APPLIES BEFORE OR AFTER THE FILING OF A LAWSUIT.

THE TANGENTIALAL ISSUE ADDRESSED BY THE DISTRICT COURT OF APPEAL AND BY THE TRIAL COURT IS WHETHER YOU REQUIRE A COMPETING CONFLICTING INTEREST OF A SURVIVOR BEFORE THAT SURVIVOR'S COUNSEL CAN SEEK COMPENSATION FROM WHAT I'M GOING TO CALL THE CONTINGENCY FEE POOL.

>> CAN I ASK A QUESTION, I GUESS TO GO TO THE MORE EXTREME SITUATION THAT I WAS BRINGING UP.

YOU AGREE THAT IN THIS CASE THE 1.23 MILLION WAS NOT TO THE ESTATE, IT WAS FOR SURVIVORS?

>> I DON'T AGREE NECESSARILY WITH THAT, YOUR HONOR.

IN FACT, IF YOU LOOK AT THE COURT RECORD, THE HEARING, THE PROCEEDINGS ON APPROVAL OF THE SETTLEMENT, I AGREE I DON'T KNOW WHY THEY DID IT, COUNSEL FOR THE KENNEDY LAW GROUP SAID I'M NOT SURE WHAT MR. WAGNER IS SAYING OR WANTS.

>> WHAT IS ESTATE'S CLAIM HERE?

>> THE ESTATE IN MY OPINION HAD VERY NOMINAL CLAIM.

I WASN'T INVOLVED AT THAT POINT.

>> THE CLAIM HERE, SURVIVORS CLAIM AS ADULT CHILDREN FOR THE PAIN AND SUFFERING, EACH INDIVIDUAL PAIN AND SUFFERING FOR LOSS OF THEIR PARENTS, CORRECT?

>> YES. I'M SORRY.

>> IF IT WENT TO TRIAL, WAS THERE, THE WAGNER LAW FIRM, WOULD THEY BE ALLOWED TO, REPRESENT, THE TWO SURVIVORS THAT, THEY HAD FEE AGREEMENTS WITH?

OR WOULD, WOULD THE TRIAL COURT SAY NO, PERSONAL REPRESENTATIVE, YOU'RE REPRESENTING ALL THE SURVIVORS, UNTIL YOU SHOW ME THERE IS ACTUAL CONFLICT?

>> OUR POSITION IS, YOUR HONOR, IF THERE ARE COMPETING CLAIMS, THERE HAS TO BE SHOWING OF COME THE POOHING CLAIMS.

>> IT GOES, THERE IS A LAWSUIT,
ALL RIGHT?

>> YES, YOUR HONOR.

>> THERE IS UNLIMITED COVERAGE,
\$20 MILLION OR \$100 MILLION.
AND THERE IS I UNDERSTAND WE'RE
DEALING WITH FINE LAW FIRMS
HERE BUT SOMEBODY GETS THE, THE
PERSONAL REPRESENTATIVE ENDS UP
WITH THE LAWYER THAT
ADVERTISING, NOT THAT THAT
MIGHT NOT BE A GOOD LAWYER.

>> I UNDERSTAND.

>> BUT THE OTHER SURVIVORS WHO
ARE, YOU KNOW, VERY CLOSE, THEY
GET, THE PEOPLE THAT ARE IN THE
TOP, LAWYERS IN THE STATE.
AND IT GOES TO TRIAL, WITH,
THEM REPRESENTING THEIR OWN
CLIENT.

PERSONAL REPRESENTATIVE
DOESN'T, THERE IS NOTHING IN
THE WRONGFUL DEATH STATUTE THAT
SAYS, THAT THE LAWYER FOR THE
PERSONAL REPRESENTATIVE IS,
PREEMPTS THE INDIVIDUAL
SURVIVORS'S CHOICE OF WHO HE OR
SHE WANTS FOR AN ATTORNEY.

>> I AGREE WITH YOU ON THAT,
YOUR HONOR.

>> SO IT GOES TO TRIAL AND, THE
IN THE TRIAL, WHAT HAPPENS IS,
THE TWO BROTHERS, NOT GARY, BUT
THE TWO BROTHERS, EACH GET
\$500,000. AND, GARY, HIS OWN
CLAIM IS HE,

MAY HAVE HAD SOME OTHER ISSUES,
HE ONLY GETS 200,000.

THERE IS \$1,250,000.

HOW DOES UNDER YOUR OPINION IN
WIGGINS, DOES A PERSONAL
INJURY, PERSONAL
REPRESENTATIVE'S ATTORNEY, WHO
ALSO REPRESENTED GARY AND THERE
IS NO CLAIM ON THE ESTATE.

GET, START OUT GETTING FIRST 30
OR 40% OF \$1.25 MILLION?

>> NO, YOUR HONOR.

BECAUSE THE SCENARIO YOU JUST
GIVEN ME IS A COMPETING CLAIM.
YOU JUST SAID THE OTHER TWO
BROTHERS HAVE THEIR LAWYERS
THERE, SEEKING DIFFERENT
AMOUNTS OF MONEY THAN THE ONE
BEING SOUGHT BY GARY.
AND THAT'S NOT WHAT WE HAVE
HERE.

>> THEY'RE NOT REALLY COMPETING
BECAUSE THERE IS ALL
THE MONEY IN THE WORLD.
THEY ALL WANT AS MUCH MONEY AS
THEY CAN GET.

THEY'RE NOT COMPETING.

THIS IS A, DEFENDANT THAT HAS
ENDLESS RESOURCES.

>> BUT THEY'RE COMPETING
AGAINST EACH OTHER BECAUSE
THEY'RE SAYING MY CLIENT GETS
MORE BECAUSE HIS MOM LOVED HIM
MORE.

>> SAY THE LAWYER FOR GARY JUST
WASN'T AS GOOD AND JUST SO

HAPPENED THERE IS SOME THINGS
IN HIS PAST THAT MADE IT NOT AS
GOOD A CLAIM.

THE TWO LAWYERS DIDN'T TRY TO
DENIGRATE GARY.

>> UNFORTUNATELY THAT IS NOT
SOMETHING YOU'RE GOING TO BE
ABLE TO TELL FROM THE VERDICT.
IT SAYS I GIVE X TO ONE, X TO
ONE AND X TO THE THIRD.

IN THAT INSTANCE --

>> IN THAT SITUATION, DOES A
PERSONAL REPRESENTATIVE GET A
FEE ON A MILLION \$250,000?

>> THERE ARE COMPETING CLAIMS
ON THREE BENEFICIARIES
SEPARATELY REPRESENTED BY
COUNSEL.

THAT'S NOT WHAT WE HAVE IN THIS
CASE.

>> WHY NOT?

EACH THE ADULTS AS SURVIVORS
HAVE MERITS TO THEIR OWN
INDIVIDUAL RELATIONSHIPS MERITS
TO THEIR OWN CLAIMS, CORRECT?

>> YES, YOUR HONOR.

>> OKAY. IF THEY HAD GONE
TO TRIAL, LIKE
THIS, THEY WOULD HAVE RECEIVED,
WHATEVER THE FEE ON THEIR
AMOUNT, YES?

YOU'RE SHAKING YOUR HEAD YES?

>> I WAS SHAKING, FOLLOWING
YOUR QUESTION.

>> ALL RIGHT.

AND SO IF THEY GO TO TRIAL,

THAT SCENARIO, THEY HAVE DIFFERENT AMOUNTS AND THEY HAVE DIFFERENT INTERESTS, DIFFERENT RELATIONSHIPS EVERYONE OF THEM, SOME HAVE MOVED AWAY WHEN THEY WERE 16 AND NEVER SAW THE PARENTS.

THAT KIND OF THING.

DO THOSE LAWYERS, WHO REPRESENT SURVIVORS, NOT THE PR, GET THEIR FEE OR DOES THE PR GET A FEE ON EVERY --

>> THAT AGAIN IS COMPETING CLAIM SITUATION.

>> WHY IS IT NOT A COMPETING CLAIM?

BECAUSE IT IS OR IS NOT, AT THE OUTSET BASED UPON WHO THEY ARE IN THE RELATIONSHIPS.

THEY DON'T HAVE TO FIGHT EACH OTHER TO BE COMPETING, DO THEY?

>> IT IS NOT A COMPETING CLAIM BECAUSE THE EVIDENCE IN THIS CASE, DETERMINED BY THE TRIAL COURT JUDGE WAS THAT NOTWITHSTANDING WHAT THE ATTORNEY SAID, SHE ELECTED TO BELIEVE WHAT THE ACTUAL CLIENTS SAID AND THEY SAID WE AGREED 100% OF THE TIME.

>> KIND OF INHERITED THE SITUATION, THAT ONCE ONE OF THE SURVIVORS GETS AN ATTORNEY, TO PROTECT THAT SURVIVOR'S INTEREST AND RIGHTS, THAT THERE IS A CONFLICT, OR, COMPETING

CLAIM OR WHATEVER IS NECESSARY,
TO ENTITLE THAT ATTORNEY TO GET
COMPENSATED FOR WHAT THE
ATTORNEY DOES.

IN SOME WAY? BECAUSE, OTHER
WAYS, THIS KIND OF DYNAMIC
HERE, WHETHER, WHERE, IF YOU
ARE, A SURVIVOR, BUT NOT THE
PR, AND YOU'RE CONCERNED ABOUT
WHAT'S GOING ON, AND MAYBE YOU
DON'T HAVE CONFIDENCE IN THE
LAWYER, I DON'T KNOW THAT IS
WHAT WENT ON HERE BUT YOU DON'T
HAVE CONFIDENCE IN THE PR'S
LAWYER OR WHATEVER MAKES YOU
UNEASY ABOUT THE IMPACT THAT,
THE THESE PROCEEDINGS ON YOUR
RIGHTS AS INDIVIDUAL SURVIVOR,
THEN YOU GO TO A LAWYER, AND IT
IS LIKE, WELL, YOU KNOW, YOU
WHO HAVE WE GOT TO STRUCTURE
THERE, SO THAT WE CAN HAVE
PROSPECTS BEING PAID?

I THINK, ISN'T IT, DOESN'T IT
CREATE THE POTENTIAL HERE UNDER
THIS RULE THAT HAS BEEN
FASHIONED BY THE SECOND
DISTRICT, THAT, THE SURVIVORS,
ARE GOING TO HAVE A HARD TIME
GETTING, REPRESENTATION, MAYBE
IN CASES WHERE THEY NEED IT AND
ARE CERTAINLY ENTITLED TO HAVE
IT.

>> AND IN CASES WHERE THEY NEED
IT AND THEY CAN EXPRESS THIS
COMPETING CLAIM AND IT

IS BROUGHT FORWARD AS IN THE FIVE OR SIX CASES ACTUALLY ALLOCATED FEES, THAT IS EXACTLY WHAT HAPPENS.

THE ATTORNEY, EXERCISES THAT JUDGMENT, NO, I CAN'T REPRESENT THE EX-HUSBAND WHO HAS NOT BEEN IN THE PICTURE FOR FIVE YEARS. OF COURSE HE NEEDS SEPARATE COUNSEL.

IN THIS SCENARIO, NUMBER ONE THE RECORD WILL SHOW BOTH ATTORNEYS WERE HIRED SHORTLY AFTER THE ACCIDENT THAT EVENTUALLY KILLED BOTH PARENTS. THERE WAS NO, DISCUSSION OR INDICATION THAT ONE PARTY DIDN'T TRUST THE OTHER ATTORNEY.

THEY DIDN'T KNOW EACH OTHER. IN FACT THE ONE SON THEY'RE CLAIMING HATED HIS BROTHER, WANTED HIS BROTHER TO HIRE THE SAME LAWYER.

>> THERE IS SOME REASON, THERE IS SOME REASON THEY WENT OUT AND GOT SEPARATE COUNSEL THAT'S TROUBLE.

IF, IF THAT, THEY HAD TO TAKE EXTRA STEPS AND THEY HAD TO, THEY MADE A CHOICE THAT, I MEAN IT IS JUST INHERENT THEY ARE UNCOMFORTABLE WITH WHAT IS GOING ON OTHERWISE THEY RIDE-ALONG ON THE COATTAILS THAT ARE THERE.

>> AND THERE ARE TWO OTHER LEVELS OF PROTECTION OF THESE SURVIVORS, BOTH UNDER THE WRONGFUL DEATH STATUTE AS WELL AS UNDER THE CASE LAW. THE FIRST LEVEL IS THE ONE THAT MR. BRENNAN REFERRED TO WHEN HE WAS ARGUING THAT THE WRONGFUL DEATH STATUTE DOES APPLY. AND THAT IS, THE, THE NEED TO SEEK APPROVAL OF A SETTLEMENT IF A BENEFICIARY OBJECTION. THE COURT CAN GO IN THERE AND SAY NO. YOU AS PR HAVE NOT BEEN DOING THE CORRECT THING. I'M NOT GOING TO APPROVE THE SETTLEMENT THAT YOU JUST AGREED TO ON BEHALF OF THESE SURVIVORS.

>> IT DOES STATE UNDER 768.25, THIS GOES BACK TO THE WHILE AN ACTION UNDER THIS ACT IS PENDING, THERE IS REALLY EVEN A QUESTION AS TO WHETHER HOW THAT WOULD OCCUR, AN ACTION WASN'T PENDING. BUT, IN FURTHER IN WHAT JUSTICE CANDY HAS ASKED YOU, WHAT DO YOU MAKE OF OUR STATEMENT, IN WIGGINS, THAT REGARDLESS WHETHER A COURT ACTION MUST BE FILED IN THE NAME OF THE ESTATE, SURVIVORS ARE STILL ENTITLED TO BE REPRESENTED BY COUNSEL OF THEIR CHOICE?

AND I AM STRUGGLING HERE, TO UNDERSTAND WHAT THE STATE'S INTEREST IS IN ALTERING, VALID, CONTRACTS, ENTERED INTO BETWEEN SURVIVORS, AND THEIR ATTORNEYS, EITHER BEFORE OR AFTER A LAWSUIT WAS BROUGHT.

AND, YOU KNOW, IF THEY WANTED TO SAY, LISTEN, THIS WAS A CLEAR LIABILITY CASE, SO, LAWYERS WOULD BE SIGNING UP TO TRY TO REPRESENT AS MANY OF THE SURVIVORS AS YOU COULD.

WOULDN'T BE SIGNING UP TO REPRESENT THE ESTATE, AS YOU SAID IT IS NOMINAL.

SO I AM CONCERNED THAT WE HAVE OR THE SECOND DISTRICT HAS TURNED THE STATUTE ON ITS HEAD TO SOMEHOW PREJUDICE SURVIVORS FOR WHOSE BENEFIT THIS WRONGFUL DEATH STATUTE WAS CREATED.

AND ALSO, TO, THERE IS NO INDICATION THAT THE LEGISLATURE INTENDED TO INTERFERE WITH CONTRACTUAL RIGHTS, EITHER, CERTAINLY NOT BEFORE AN ACTION WAS FILED.

SO HELP ME WITH THAT?

>> YOUR HONORS. I WILL.

THE PIERSON CASE CITED BY OPPOSING COUNSEL IN THE REPLY BRIEF, RECENT DECISION, FOCUSES ON THE FACT THAT THIS STATUTE CREATE AS FIDUCIARY DUTY SAME AS DUTY OF TRUSTEE OR PERSONAL

REPRESENTATIVE TO TAKE ACTIONS
ON BEHALF OF THESE SURVIVORS IN
A GOOD-FAITH BASIS AND FOR THE
BENEFIT OF THE SURVIVORS.

SO THERE IS A DUTY OUTSTANDING
THERE, A LIABILITY OUTSTANDING
THAT THIS PR HAS TO FASHION AND
HAS TO SATISFY.

IF THERE ARE NO COMPETING
CONFLICTS, NO COMPETING
INTERESTS, YOU HAVE TO LOOK TO
WHAT WAS THE REASON FOR THIS
WRONGFUL DEATH STATUTE.

THE REASON FOR THE STATUTE WAS,
TO AVOID, MULTIPLE CLAIMS BY
MULTIPLE PARTY, INSURANCE
COMPANIES HAVING TO DEAL WITH
MULTIPLE LAWYERS COMING AT
THEM, TRYING TO SEEK
PREFERENTIAL TREATMENT.

THESE ARE ALL THINGS I'M NOT
SAYING.

IT IS OUT OF THE CASE LAW, THAT
THE --

>> SAID IT WAS REALLY THE DEAL
WITH MULTIPLE LAWSUITS.

IT WAS TO, I MEAN THE STRUCTURE
OF IT SAYS THERE WILL BE ONE
LAWSUIT TO DEAL WITH THESE
THINGS.

AND I DON'T THINK YOU CAN INFER
FROM THAT THAT DOESN'T MEAN
THERE ARE GOING TO BE MULTIPLE
LAWYERS.

>> UNFORTUNATELY THE POSITION
BEING TAKEN BY THE APPELLANTS

THAT THERE CAN'T BE MULTIPLE
LAWSUITS, APPELLANTS.

UNTIL THE LAWSUIT IS FILED IT
IS FREE-FOR-ALL.

ANY SURVIVOR CAN COME AFTER
ANYTHING.

>> YOU CERTAINLY, WELL, THEY
COULD.

IN OTHER WORDS, COULD HAVE BEEN
SOMEONE FOUND OUT THERE WAS
ONLY \$200,000 AND THEN, TWO
MILLION AND, YOU KNOW, THERE
WAS, THE PARENTS WERE
TRAGICALLY KILLED, SO, AGAIN,
EVERYBODY'S LOOKING AT THAT.

THE INSURANCE COMPANY IS
SITTING THERE AND YES, IT IS TO
THEIR ADVANTAGE TO KNOW THAT
EVERYONE IS GOING TO AGREE,
BUT, CAN YOU, WOULD YOU TELL ME
WHETHER THE INSURANCE COMPANY,
JUST LET'S SAY LARRY WANTED TO
LEAVE THE STATE, AND LARRY WAS
INTERESTED IN A RELEASE OF HIS
ACTION, FOR \$10,000.

COULD LARRY, BECAUSE HE WAS
GOING, AND HE IS A
MULTIMILLIONAIRE.

HE DIDN'T CARE ABOUT THE MONEY.
COULD THE, COULD THE DEFENDANTS
SETTLED WITH LARRY AS SURVIVOR
OR WOULD THEY HAVE TO GO
THROUGH, NO LAWSUIT WAS FILED,
AND HE IS AN ADULT MALE.

OR WOULD THEY HAVE TO GO
THROUGH THE PERSONAL

REPRESENTATIVE?

>> THEY WOULD HAVE TO GO THROUGH THE PERSONAL REPRESENTATIVE PURSUANT TO THE PIERSON CASE.

NOW THE PERSONAL REPRESENTATIVE --

>> IS THAT OUT OF OUR COURT, YOUR HONOR?

>> NO, I BELIEVE THIRD DISTRICT COURT OF APPEAL.

I MAY BE WRONG ON THAT.

WHAT PIERSON SAYS, AS LONG AS SEPARATE SETTLEMENT DOESN'T PREJUDICE RIGHTS OF OTHER BENEFICIARIES, IT IS OKAY TO ENTER INTO IT.

THE SCENARIO YOU GAVE ME, PERSONAL REPRESENTATIVE WILL NOT HAVE ANY REASON TO REFUSE TO ENTER A SETTLEMENT FOR LARRY FOR \$10,000 AS LONG AS THERE IS MULTIMILLION DOLLARS.

IF YOU FLIP THAT, LARRY, YOU'RE ONE SCARED US THE MOST BECAUSE YOU HIRED BIG, BAD LAWYER, WE'LL GIVE YOU 1.5 OUT OF THE \$1.6 MILLION IN COVERAGE, LARRY CAN'T SETTLE AND GO AWAY WITHOUT THE PERSONAL REPRESENTATIVE AGREEING AND THE PR CAN'T DO IT, BECAUSE THEY HAVE A FIDUCIARY DUTY TO ALL THE BENEFICIARIES.

AND THAT'S THE PURPOSE OF, ONE OF THE PURPOSES OF

WRONGFUL-DEATH STATUTE IS
YOU'VE GOT TO HAVE ONE PERSON
IN COMMAND, IN CONTROL WHO IS
LIABLE AND RESPONSIBLE FOR THE
CONDUCT OF THE LAWSUIT.
IF THESE COMPETING CLAIMS COME
UP, YES, IT IS CLEAR THAT
PARTY, AS CATAPANE, I'M NOT SURE
HOW TO SAY IT EITHER, SAYS, IF
IT COMES TO THE POINT WHERE THE
LAWYER CAN NOT REPRESENT ALL
THE INTERESTS OF BENEFICIARIES,
THERE IS CASE LAW SAYS FROM
THAT POINT ON THE LAWYER IS NOT
ENTITLED TO A FEE FROM THE
CONFLICTED PARTIES, FROM THAT
POINT ON THE LAWYER CAN'T
REPRESENT THOSE INDIVIDUALS,
AND THAT IS WHEN YOU GET INTO
THE CATAPANE ALLOCATION
REFERENCED IN WIGGINS.
THE COMMENT IN WIGGINS, THE
RIGHT TO HAVE COUNSEL YOU
REFERENCED EARLIER, THAT IS IN
CONTEXT THROUGH THE REST OF THE
OPINION IN ANOTHER PARAGRAPH,
THE PHRASE THAT COMES UP
REPEATEDLY, COMPETING CLAIMS.
COUNSEL READ THE CONCLUSION,
WHEN PARTIES HAVE COMPETING
CLAIMS THEY'RE COMPETING CLAIMS
THEY'RE ENTITLED TO SEPARATE
COUNSEL.
WE HAVE NOT DISPUTED THAT AT
ALL.

>> CAN WE ASSUME IN THIS CASE

THERE WAS ONLY \$10,000 POLICY
AND GOT THREE PEOPLE MAKING THE
CLAIM.

IS THAT, WOULD THAT THEN,
EVERYTHING ELSE BEING THE SAME,
WOULD THAT THEN CREATE A
COMPETING CLAIMS?

>> NOT IF THE THREE PEOPLE
BEFOREHAND, DURING AND
AFTERWARDS ARE SAYING, I MIGHT
BE ABLE TO ARGUE MORE FOR YOU,
BROTHER I LOVE YOU, I WILL
AGREE TO ONE-THIRD, ONE-THIRD,
ONE-THIRD ALL THE WAY THROUGH.

>> THAT IS ONLY IF THEY DON'T
HAVE COUNSEL.

THEY GET COUNSEL ON THIS.

>> THEY GET COUNSEL AND GO TO
THEIR LAWYER AND SAY, WELL, I
WANT YOU TO LOOK AT THIS
LAWYER, AND I KNOW YOU MIGHT
TELL ME I'M ENTITLED TO MORE
BUT I'M GOING TO AGREE WITH MY
BROTHERS I WANT ONE-THIRD,
ONE-THIRD, ONE-THIRD ALL THE
TIME SHOULD THAT LAWYER BE
ALLOWED TO SAY, DON'T WORRY
ABOUT IT, SIGN HERE I GET
ONE-THIRD CONTINGENCY OUT OF
YOUR FEE AND THE PR DOESN'T?
THAT IS THE DISTINCTION HERE.
BY ESTABLISHING OR CONFIRMING
THIS COMPETING CLAIM CONCEPT
YOU GIVE THE LAWYER THE ABILITY
TO SAY --

>> I THINK WHAT YOU'RE DOING,

YOU WANT TO ESTABLISH THAT
THERE CAN BE NO COMPETING CLAIM
UNTIL THEY'RE LIKE FIGHTING
WITH ONE ANOTHER AND JUSTICE
CANADY'S QUESTION IS
PREMISED ONCE YOU HAVE SEPARATE
COUNSEL OR DESIRE FOR SEPARATE
COUNSEL, IF AT THAT POINT YOU
WANT TO CONTINUE THIS MAGIC
WORD OF COMPETING CLAIM,
I'M NOT SURE I GO THERE, IF YOU
WANT TO USE IT YOU CAN'T GET
THERE UNTIL THEY'RE SHEETING
EACH OTHER, FILING LAWSUITS
AGAINST ONE ANOTHER AND THAT
KIND OF THING.

>> I THINK YOU HAVE TO GO A
STEP FURTHER THAN THAT JUSTICE
AND LOOK AT THE PURPOSE FOR
HIRING A LAWYER.

IF YOU LOOK AT REMOVAL PETITION
FILED IN THIS CASE BY
MR. BRENNAN, THREE DAYS AFTER
HE FIRST ANNOUNCED HIS
APPEARANCE IN THE CASE THE
REMOVAL SAID I WANT HIM
REMOVED, TOOK A CAR.

DIDN'T PUT THE MONEY INTO THE
ESTATE AND DISTRIBUTED THESE
PROCEEDS WITHOUT PAYING A
MEDICAL LIEN.

THERE WAS NOTHING THERE TALKING
ABOUT APPORTIONMENT.

IT ALL DEALT WITH
ADMINISTRATION OF THE ESTATE
AND THINGS THAT THE PR DID IN

CONJUNCTION WITH ADMINISTRATION OF THE ESTATE.

>> THAT IS NOT A CONFLICT?

>> THAT IS NOT A CONFLICT, YOUR HONOR.

IT HAS NOTHING TO DO WITH RECOVERY OF THE WRONGFUL-DEATH PROCEEDS.

IT HAS TO DO WITH HOW THEY'RE HANDLING ESTATE ADMINISTRATION.

THAT LAWYER HAS THE RIGHT TO PURSUE THE PR.

THE LAWYER HAS THE RIGHT TO COLLECT FEES FROM A PR WHO GOES WRONG AND DOES WRONG.

AND THAT FEE IS TOTALLY SEPARATE FROM THE POT OF MONEY, CONTINGENCY FEE POT COLLECTED AS A RESULT OF THE WRONGFUL DEATH LAWSUIT.

IT IS NOT AN AUTOMATIC CONFLICT WITH RESPECT TO THE WRONGFUL DEATH CASE THAT AN HEIR FEELS THAT TRUSTEE OR PR IS DOING SOMETHING WRONG.

>> IN MOST OF THE SITUATIONS THE PERSONAL REPRESENTATIVE IS THERE AND THEY'RE DEALING WITH A STATE ADMINISTRATION.

THAT IS WHAT THE PROBATE COURT IS DOING.

THERE WAS REALLY, I DON'T KNOW IF THERE WAS AN ESTATE TO ADMINISTER BUT AGAIN, THE WILL WAS CLEAR.

THE INTEREST OF THE PROBATE

COURT IS, ESSENTIALLY
NONEXISTENT, WHEN, THE CLAIMS
ARE CLAIMS OF SURVIVORS WHO ARE
ADULT CHILDREN.

THAT MONEY DOESN'T PASS THROUGH
THE PROBATE COURT.

DOES IT?

>> THE PROBATE COURT DOES NOT
HAVE JURISDICTION OVER THE
SURVIVORS'S BENEFIT.

THE PROBATE COURT DOES HAVE
JURISDICTION OVER THE PERSONAL
REPRESENTATIVE REGARDING
ENFORCEMENT OF THAT PR'S
FIDUCIARY DUTIES TO INTERESTED
PERSONS.

THE STATUTE'S DEFINE IT.

>> IN THE WAY THE LAWSUIT IS
BEING HANDLED?

>> YES, YOUR HONOR.

I CONTEND THAT IF A PERSONAL
REPRESENTATIVE IS HIRING
SOMEONE WHO IS UNQUALIFIED, WHO
IS FOULING UP I THINK A
BENEFICIARY HAS EVER RIGHT TO
GO TO THE PROBATE COURT --

>> THEY NORMALLY WOULDN'T WORRY
ABOUT IT BECAUSE THEY HIRED
THEIR OWN ATTORNEY SO THEY KNOW
THEIR OWN INTERESTS ARE GOING
TO BE PROTECTED.

>> BY VIRTUE OF GOING TO THE
PROBATE COURT WHO SAYS YOU'RE
DOING THINGS WRONG OR HIRING A
LAWYER THAT SAYS YOU'RE DOING
THINGS WRONG.

THAT IS COMPETING INTEREST.

I'M SORRY.

>> WOULD YOU AGREE A LAWYER FOR SURVIVOR WHO CONTRIBUTES TO THE RECOVERY IS ENTITLED TO A FEE?

>> I THINK THAT IS EXACTLY WHAT, FOR EXAMPLE, THE GARCES DECISION SAYS.

IT GOES TO ONE OF YOUR QUESTIONS EARLIER, JUSTICE

LEWIS, WHAT IF THERE ARE TWO LAWYERS WHO PARTICIPATE, AND, IS IT BASED ON A PERCENTAGE.

DO THEY EACH GET THEIR CONTINGENCY FEE?

THEY BOTH CONTRIBUTED AT TRIAL, INCREASING AMOUNT RECOVERED?

IN GARCES THERE WAS ATTORNEY FOR EACH CO-PR.

YOU GOT TO LOOK AT WHAT THEY DID, HOW THEY CONTRIBUTED TO THE AMOUNT.

THE WIGGINS CASE SAYS THE SAME THING.

THE WIGGINS SAYS MISS SHIFTBERG --

>> YOU'RE SAYING UNDER FLORIDA LAW, THE ANSWER IS YES?

>> YES.

>> BUT YOUR CONTENTION FACTUALLY HERE IN THIS CASE THE APPLE ANTS DID NOT DO THAT.

>> THAT'S RIGHT, YOUR HONOR. THEY REFERENCED MEDIATION AND, THE COURT GAVE MR. BRENNAN THE OPPORTUNITY TO PROFFER

EVIDENCE.

WHAT WOULD YOU HAVE TOLD ME HAD
I NOT PRECLUDED THIS?

HE PUT ON ONE ANSWER, SAYING
THAT THE MEDIATION, WE
DISCUSSED THAT IT WAS TO BE
INTENDED TO BE THE BENEFIT OF
THE SURVIVORS AND NOT THE
ESTATE.

HE HAD EVERY RIGHT TO PROFFER
EVIDENCE ELSEWHERE.

HE DID NOT DO SO.

>> THE RULE THAT HAS BEEN
ADOPTED BY THE SECOND DISTRICT
REALLY FORECLOSES LOOKING AT
THIS, AT THE ISSUE OF WHAT THE
LAWYER CONTRIBUTED TO THE
RECOVERY OF THE FUNDS, IF THERE
IS NO CONFLICT.

I MEAN, ISN'T THAT CORRECT?

THEY DON'T EVEN GET THERE.

THEY COULD HAVE CONTRIBUTED ALL
SORTS OF THINGS AND MADE A,
MIGHT HAVE, THEN, BEEN PIVOTAL,
THAT THEIR ROLE MIGHT HAVE BEEN
PIVOTAL IN SECURING A
SETTLEMENT.

IF THERE IS NOT THE CONFLICT.

THEN THEY GET NOTHING.

>> THAT'S RIGHT, YOUR HONOR.

IN FACT THE CASE LAW ON OTHER
ISSUES, WHERE IN FACT THERE IS
NOT A CONTRACT WITH A PR, WHERE
EACH PARTY HAS ITS OWN LAWYER.
EVEN THERE WHERE ONE LAWYER
CONTRIBUTES SUBSTANTIALLY, THE

CASES SAY THAT LAWYER CAN NOT EXPECT TO BE PAID OUT OF THE OTHER SIDE.

IT MAY NOT SOUND FAIR OR EQUITABLE AND AT LEAST A RULE LAWYERS KNOW AND FOLLOW.

THAT LAWYER WILL KNOW I DON'T HAVE A CONTRACT FOR BOTH PRS. I'M NOT REPRESENTING A STATE. IF I EXPECT TO GET CONTINGENCY FEE OUT OTHER PARTY'S PROCEEDS I'M WRONG.

WON'T MATTER I'M PIVOTAL OR I DO EVERYTHING IN THE ENTIRE CASE, I'M NOT GOING TO GET A FEE FROM THE OTHER SIDE.

LIKEWISE, I THINK CATAPANE AND WIGGINS BOTH SAID IN THE ABSENCE OF REASON TO HAVE COMPETING CLAIM.

AGAIN THE TRIAL COURT --

>> FORGIVE ME IF I'M MISSING SOMETHING HERE.

THE WAGNER LAW FIRM IS NOT WANTING A FEE FROM THE OTHER SIDE.

THEY'RE WANTING A FEE OUT OF THE RECOVERY OF THEIR CLAIM.

>> THEY ARE WANTING A --

>> THIS IS NOT ABOUT MONEY FROM THE OTHER SIDE.

THAT REALLY HAS NOT NOTHING TO DO WITH WHAT WE'RE HERE.

>> IT IS JUST AN EXAMPLE OF INSTANCES WHICH APPLICATIONS OF THE RULES HERE MAY NOT SEEM

EQUITABLE BUT THEY'RE THE
RULES.

>> IT SOUNDS EQUITABLE TO ME.
SHOULDN'T NECESSARILY GET MONEY
FROM THE OTHER SIDE.

THERE IS CERTAIN EQUITY FROM
THAT.

WHAT STRIKE STRIKES ME NOT SO
EQUITABLE CAN'T GET MONEY FOR
YOUR OWN SIDE WHEN BASED ON
THIS RULE ABOUT CONFLICT THAT
THE SECOND DISTRICT COME UP
WITH.

LET ME SAY THIS, TO YOU AND TO
THE OTHER COUNSEL HERE.

I THINK BOTH SIDES HERE HAVE
DONE AN EXCELLENT JOB IN
BRIEFING THIS AND ARGUING IT.

I APPRECIATE THE GOOD --

>> WITH THAT, YOU HAVE USED
MORE THAN YOUR TIME.

I THANK YOU BOTH FOR YOUR
CONTRIBUTIONS HERE TODAY.

AND, THE COURT WILL NOW BE IN
RECESS UNTIL NEXT MONTH.

>> PLEASE RISE.