>> THE COURT WILL NOW MOVE ON TO THE SECOND CASE ON THE DOCKET TODAY, ARCH INSURANCE COMPANY V. KUBICKI DRAPER.
[BACKGROUND SOUNDS]
>> GOOD MORNING, MAY IT PLEASE THE COURT, MR. CHIEF JUSTICE, EDWARD GUEDES ON BEHALF OF ARCH INSURANCE COMPANY, CO-COUNSEL BEN AND BRITNEY.
UNDER THE TRIPARTHEID RELATIONSHIP IN FLORIDA, AN INSURER'S INJURY ARISING FROM THE MALPRACTICE OF RETAINED COUNSEL REQUIRES A REMEDY.
WHETHER THAT REMEDY IS THROUGH A DIRECT ACTION FROM A MALPRACTICE BASED ON PRIVITY OR WHETHER IT'S UNDER A NON-CLIENT BENEFICIARY THEORY, A REMEDY SHOULD EXIST.
THE INSURER SHOULD HAVE THE SAME ACCESS TO THE COURTS TO REMEDY ITS INJURY AS ANY OTHER CLIENT.
WHAT I PROPOSE TO DO THIS MORNING, WITH THE COURT'S PERMISSION, IS TO ADDRESS THE ISSUE OF PRIVITY FIRST, THEN SUBROGATION AND THEN, TIME PERMITTING, THE NON-CLIENT BENEFICIARY--
>> COULD I ASK YOU, I'M SORRY TO INTERRUPT YOU, COULD I ASK YOU A QUESTION?
HAS THERE BEEN, I'M WONDERING IF THERE'S BEEN AN EVOLUTION A BIT OF YOUR POSITION IN THIS LITIGATION.
IT SEEMS LIKE, AND I'M WONDERING IF THIS EXPLAINS KIND OF THE CURSORY ANALYSIS THAT THE FOURTH DCA DID ON THIS QUESTION.
DID YOU INITIALLY BEGIN ARGUING THAT THERE WAS KIND OF AN INHERENT ATTORNEY/CLIENT RELATIONSHIP BASED ON THE, BETWEEN THE INSURER AND THE COUNSEL BASED ON THIS TRIPARTHEID RELATIONSHIP AND THE UNIQUE SITUATION, ETC., VERSUS TREATING IT MORE AS JUST A BASIC

KIND OF FACTUAL QUESTION AS TO WHETHER IN THIS PARTICULAR CASE BASED ON THE WAY THESE, THIS LAWYER, THIS LAW FIRM AND THIS INSURER HANDLED THIS CASE AND THE INTERACTIONS THAT THEY HAD, THAT THERE WAS AN ACTUAL ATTORNEY/CLIENT RELATIONSHIP FORMED?
I'M WONDERING, BECAUSE THE RECORD IS STRANGE THAT, YOU KNOW, THE LITIGATION GUIDELINES, THE CONTRACT BETWEEN YOUR CLIENT AND THE LAWYER ISN'T IN THERE.
SO I'M WONDERING, I MEAN, SO IS YOUR ARGUMENT-- IT SEEMS LIKE I'M SEEING NOW IN YOUR BRIEFS THAT YOU ARE MAKING AN ARGUMENT THAT IN THIS PARTICULAR CASE THERE WAS AN ATTORNEY/CLIENT RELATIONSHIP.
BUT IS THAT, HAVE YOU ALWAYS CONSISTENTLY MADE THAT ARGUMENT, OR DID IT INITIALLY START OUT AS MORE SAYING THERE WAS ALWAYS KIND OF AN IMPLIED OR INHERENT ATTORNEY/CLIENT RELATIONSHIP THERE?
>> I THINK OUR ARGUMENT HAS ALWAYS BEEN TIED TO THE EXISTENCE OF THE TRIPARTHEID RELATIONSHIP, AND I CERTAINLY WOULD BE RETICENT TO ASK THIS COURT TO MAKE A DECISION BROADER THAN IT NEEDS TO, TO RESOLVE THIS PARTICULAR CASE.
I'M NOT QUITE SURE WHY THE FOURTH CHOSE NOT TO DELVE INTO THE ISSUES THE WAY I THOUGHT THEY WOULD.
BUT IN A GREAT MANY SITUATIONS, GIVEN YOUR TYPICAL DUTY TO DEFEND POLICY THAT EXISTS IN THE MARKET, THE TRIPARTHEID RELATIONSHIP WILL GIVE RAISE TO THIS IDEA OF DUAL CLIENTS, CO-CLIENTS.
THE TRIPARTHEID RELATIONSHIP ARISES, AS YOUR HONOR KNOWS, THE MOMENT THAT THE INSURER RETAINS

COUNSEL TO REPRESENT THE
INTEREST INTERESTS OF AN INSURED
IN A PARTICULAR CLAIM.
AND COUNSEL, IN THAT SCENARIO,
TREATS THE INSURER, AS HAPPENED
IN THIS CASE, AS A CO-CLIENT.
NOT AS A SOLE CLIENT, BUT AS A
CO-CLIENT WITH THE INSURED.
AND WHEN WE THINK ABOUT WHAT
TRADITIONALLY CREATES AN
ATTORNEY/CLIENT--
>> YOU'RE SAYING THAT IN ALL
CASES?
>> NO.
I CAN IMAGINE SCENARIOS, CERTAIN
TYPES OF POLICIES, MAYBE A
NON-DUTY TO DEFEND A POLICY
WHERE THE SELECTION OF COUNSEL
AND THE PAYMENT OF LITIGATION
EXPENSES INITIALLY IS DONE BY
THE INSURED.
THE INSURED DOESN'T CONTROL THE
LITIGATION.
THAT'S CONTROLLED BY THE
INSURED.
SO THERE ARE SCENARIOS WHERE
THERE'S A TRIPARTHEID
RELATIONSHIP BECAUSE THERE'S AN
INSURANCE COMPANY INVOLVED THAT
MIGHT BE PAYING A CLAIM, BUT IT
DOESN'T GIVE RISE TO THE
CO-CLIENT RELATIONSHIP WITH
RESPECT TO THE RETAINED FIRM.
SO, AND CERTAINLY IN THIS CASE
WE CONTEND IT IS.
BUT IT DOESN'T, DEPENDING UPON
THE NATURE OF THE POLICY AND THE
DUTIES THAT WERE CREATED
THEREUNDER, IT MAY NOT.
>> SO WHEN THERE IS, WHEN THERE
ARE DUTIES RUNNING BOTH TO THE
INSURED AND TO THE INSURANCE
COMPANY, AS AN ATTORNEY/CLIENT
RELATIONSHIP SHOULDN'T THE
INSURED KNOW THAT?
DOESN'T THE, DON'T THE RULES
REQUIRE THAT THERE'S NOTICE
GOING SO THAT THE INSURED KNOWS
THAT?
>> THE RULE REQUIRES THAT THE

RETAINED LAWYER SPECIFY THAT,
YES.
IT DOES NOT REQUIRE THE INSURER
TO DO THAT.
>> RIGHT.
>> IT REQUIRES THE RETAINED
LAWYER TO NOTIFY BOTH THE
INSURER AND THE INSURED WHAT THE
SCOPE OF THE RELATIONSHIP IS AND
WHERE ANY LOYALTIES LIE.
AND IN FACT--
>> RIGHT.
SO IN THIS CASE THE RECORD SEEMS
ABSENT OF THAT, AND IT SEEMS
LIKE I COULD SEE WHY THE TRIAL
COURT AND THE APPELLATE COURT
RULED THAT THE RECORD DOESN'T
SUPPORT SOME TYPE OF SEPARATE
ATTORNEY/CLIENT DUTY RUNNING
FROM THE LAWYER HIRED TO
REPRESENT THE INSURED.
THEN ALSO REPRESENTING THE
INSURANCE COMPANY IN THIS CASE.
>> WELL, I RESPECTFULLY, JUSTICE
POLSTON, I THINK THAT PLACES THE
BURDEN WHERE IT DOESN'T BELONG.
IN OTHER WORDS, IN THIS
SCENARIO, IN THIS SCENARIO ARCH
RETAINS THE LAW FIRM TO
REPRESENT ITS INSURED, SPEAR
SAFER.
THE RETAINED COUNSEL INFORMS THE
INSURED THAT ARCH HAS RETAINED
IT AND SAYS NOTHING MORE OTHER
THAN ATTACH THE STATEMENT OF
INSURED CLIENT'S RIGHTS.
WHICH DESCRIBES AT LENGTH ALL
THE WAYS THE INSURANCE COMPANY
IS GOING TO CONTROL THIS
LITIGATION.
THERE IS NO CLARIFICATION AS
REQUIRED EXPRESSLY BY THE RULE
THAT SAYS FROM THE RETAINED LAW
FIRM TO THE INSURER AND TO THE
INSURED.
BY THE WAY, OUR DUTIES ARE
SOLELY TO YOU THE INSURED.
THERE IS NOTHING THERE AND IT
PLACES THE BURDEN THAT IT IS
ABOUT INCUMBENT THE INSURER HAS

THIS WITH THE LAW FIRM.
>> I DON'T SEE -- WHAT IN THE RECORD SHOWS THAT THERE IS AN ATTORNEY-CLIENT RESPONSIBILITY FROM THE LAWYER TO THE INSURANCE COMPANY?
WHAT DOCUMENT?
>> THERE ARE NUMEROUS DOCUMENTS THAT REFLECT HOW THE RETAINED FIRM INTERACTED WITH THE INSURER.
>> THERE ARE REPORTING REQUIREMENTS -
>> THERE WERE MULTIPLE INFLUENCES OF RETAINED COUNSEL PROVIDING ADVICE ONLY TO THE INSURER.
LEAVING THE INSURED OUT OF THE
--
>> 1246 TO 1242.
1252-1258.
1263-72.
1275-89.
1290-91.
1295-96.
>> WHAT ADVICE IN THOSE RECORDS SITES IS THE LAWYER GIVING THE INSURANCE COMPANY?
>> THE ADVICE GIVEN TO THOSE LAWYERS IS HOW TO HANDLE THE CASE IN THE FOLLOWING MANNER FOR THE BEST POSSIBLE OUTCOME.
THE RECORD IS 1278 WHICH IS ONE OF THOSE CITATIONS?
>> THE RETAINED COUNSEL ADVISES ARCH ON ARCH'S EXPOSURE TO A POTENTIAL BAD FAITH CLAIM.
THE INSURANCE IS NOT COPIED ON THIS ANALYSIS.
WHAT WE HAVE IN EVERY INSTANCE, EVERY INDICATION ON THE INTERACTION OF THESE PARTIES IS EVERYONE UNDERSTOOD THAT RETAINED COUNSEL IS REPRESENTING THE INTERESTS OF BOTH ENTITIES.
WHEN YOU LOOK FOR ONE EXAMPLE IN THE RECORD IT WAS NECESSARY TO RETAIN AN EXPERT IN THIS CASE.
THE EXPERT UNDERSTOOD THAT ARCH WAS THE CLIENT, THE RETENTION

LETTER REQUIRED ARCH AS THE
CLIENT TO SIGN OFF ON THE
RETENTION OF THE EXPERT.
>> IN A DUTY TO DEFEND POLICY,
THE INSURANCE COMPANY WILL PAY
THE FEES OF THE LAWYER, CORRECT?
AND THE INSURANCE COMPANY IS
GOING TO BE PAYING FOR THE LOSS
AND THE INSURANCE COMPANY IS THE
ONE THAT SUFFERS DAMAGE IF THERE
IS MALPRACTICE, CORRECT?
>> CORRECT.
>> THAT WOULD BE TRUE WHETHER OR
NOT THERE IS ATTORNEY-CLIENT
RELATIONSHIP BETWEEN THE
INSURANCE COMPANY AND THE LAW
FIRM.
CORRECT?
>> CORRECT.
>> GIVEN THOSE FACTS, IN TERMS
OF WHAT THE RIGHT ANSWER IS, WHY
WOULD THE ABSENCE OF
ATTORNEY-CLIENT RELATIONSHIP
REALLY HAVE IMPACTS ON WHAT THE
RIGHT ANSWER IS FROM A POLICY
PERSPECTIVE, THE PARTIES IT PAYS
FOR THE LAWYER AND SUFFERS THE
LOSS AND SUFFERS THE DAMAGE ART
TO BE ABLE TO RECOVER.
WHEN THERE IS NO - NO CONFLICT
OF INTEREST INVOLVED.
>> WHEN CONFLICT OF INTEREST
ARISES A DIFFERENT AREA PRESENT
ITSELF IN THOSE ARE NOT THE FACT
IN THIS CASE BUT I THINK YOUR
HONOR IS CORRECT AND WHAT SOME
OF YOU HAVE DEALT WITH AS THEY
REACH THE SAME DECISION AND COME
TO THE CONCLUSION THAT THERE IS
A REMEDY THEY TURN TO
SEGREGATION.
>> IT SEEMS HIS QUESTION IS
GOING TO THE RESTATEMENT.
WHAT IS THE PRESIDENT?
IT WOULD BE AN INNOVATION, WE
HAVE A BASELINE IN FLORIDA THAT
YOU OWE DUTIES TO YOUR CLIENTS.
IF THIS GETS RESOLVED ON THAT
BASIS THERE IS NO NEW GROUND
BROKEN, AND ATTORNEY-CLIENT

RELATIONSHIP.
IF YOU GO THE RESTATEMENT ROUTE
WAS THE PRECEDENT FOR HOW THIS
COURT DECIDES WHETHER TO
ESSENTIALLY ADOPT A NEW RULE OF
LAW THAT IMPOSES DUTIES WHERE
THEY HAVEN'T PREVIOUSLY BEEN
RECOGNIZED BY OUR STATE'S LAW.
THE RESTATEMENT SAYS WHAT IT
SAYS, OTHER STATE SUPREME
COURT'S ON THAT PATH BUT WHEN
THIS COURT, TO RECOGNIZE A DUTY,
IF THEY ARE DISCOVERING THE
COMMON-LAW, HOW DO WE ANALYZE
THAT?
>> THIS REQUIRES UNDER THE
NONCLIENT BENEFICIARY THEORY THE
ANNOUNCEMENT OF A NEW RULE.
>> THERE IS NO PRECEDENT THAT IS
THE OUTSIDE OF THE WILL CONTEXT
OR THE PRIVATE PLACEMENT,
LAWYERS OWED DUTIES TO
NONCLIENTS AND THOSE CASES ARE
BASED ON THE INTENT OF THE
CLIENT BEING TO HELP THIRD
PARTIES AND I DON'T THINK IT IS
PLAUSIBLE TO ARGUE THAT THE
INSURED HAS AN INTENT IN THEIR
RELATIONSHIP WITH THE LAWYER.
>> THERE CERTAINLY COULD BE.
ONE OF THE REASONS ALLOWING THE
CLAIM OF THE INSURER AGAINST
RETAINED COUNSEL RIVERS
ALLEGATION OF MALPRACTICE, THAT
RECOVERY TO THE BENEFIT OF THE
INSURED AS WELL, BECAUSE OF THE
INSURANCE POLICY LIMITS, SHOULD
ARCH SUCCEED AND RECOVER ARE
REPLENISHED SO THERE IS EVEN
STILL A MUTUALITY OF INTEREST.
>> THE SERVICES IN THE WILL
CONTEXT, WHAT THE LAWYERS WORK
ON BEHALF OF THE CLIENT IS FOR
THE BENEFIT OF SOMEONE ELSE.
IN THE INTENT OF THE CLIENT.
>> WHAT JUSTICE CANTERO WROTE
WAS WHEN THE RELATIONSHIP WAS
RELATED, THERE WAS AN
EXPECTATION ON THE PART OF THE
LAWYER THAT ITS REPRESENTATION

IN THE ROUGH REPRESENTATION
WOULD BE RELIED UPON BY THIRD
PARTIES.
>> LET'S ASSUME FOR THE SAKE OF
ARGUMENT THAT THEY HAVEN'T
RECOGNIZED.
IT IS THE PUREST WORD OF COST
BENEFIT ANALYSIS.
WHAT SHOULD BE GUIDING US,
PEOPLE SENSE WHAT IS FAIR AND
WHAT IS THE RIGHT ANSWER, HOW --
TO THE EXTENT POSSIBLE, WHAT IS
THE MOST OBJECTIVE WAY FOR US TO
ANALYZE FOR THE SAKE OF ARGUMENT
THIS NEW DUTY RECOGNIZED AS A
MATTER OF FLORIDA LAW?
>> I AM SORRY, I APOLOGIZE,
TRADITIONAL TORT PRINCIPLES
GUIDE THIS ANALYSIS.
WE ALLOCATE HISTORICALLY UNDER
TORT LAW WE ALLOCATE RISK,
ALLOCATE LIABILITY AND REPLACE
THE BURDENS WHERE THEY BELONG
AND IN THIS INSTANCE, ONE THING
THAT HAS REMAINED UNANSWERED
THROUGHOUT THESE PROCEEDINGS, IF
IT IS PROVEN AT TRIAL THAT
RETAINED COUNSEL WAS NEGLIGENT,
COMMITTED MALPRACTICE, HOW ARE
THEY HELD ACCOUNTABLE?
>> THIS IS A BASIC PRINCIPLE.
WE ALLOCATE THE RISK, LIABILITY,
BASED UPON WHERE SOCIETY DEEMS
THE RISK TO BE BORN.
IN THIS INSTANCE IT IS
TRADITIONAL MALPRACTICE LAW.
ALL WE ARE DOING IS SUBSTITUTING
THE INSURER INTO THE SHOES OF
THE INSURED.
>> THAT IS WHAT SEGREGATION
DOES.
>> THAT IS WHY SISTER COURTS
HAVE CHOSEN THAT PATH BECAUSE
THE SEGREGATION PATH AVOIDS THE
HARRIER ISSUES OF
ATTORNEY-CLIENT RELATIONSHIP AND
CONFLICT, THEY STEP INTO THE
SHOES OF THE INSURED.
>> ANY FUTURE CASE YOU SHOULD
IMAGINE, THE SEGREGATION

APPROACH AND ADOPTION OF THE
RESTATEMENT?
WOULD IT PLAY OUT DIFFERENTLY?
>> MY CRYSTAL BALL DOES NOT
EFFICIENT THAT EFFICIENTLY.
IN REVIEWING ALL THE AVAILABLE
CASE LAW IT STRIKES ME THAT AT
THE CORE, WHAT ALL THE OTHER
COURTS HAVE LOOKED AT WHETHER
THEY GET TO THE END, WHETHER
THEY DO IT THROUGH SEGREGATION
OR DO IT TO THE NONCLIENT
CONCEPT IT IS THE SAME CLAIM
THAT THERE WAS A DUTY OF
CONFIDENCE OWED TO A PARTY.
I DON'T SEE HOW THAT SHOULD
CHANGE DEPENDING UPON THE CASE
WHETHER IT IS DIRECT PRIVITY
SCENARIO.
>> AT LEAST ON ITS FACE YOU ARE
ALLEGING IT IS DIFFERENT FROM
SAYING YOU OWED A DUTY TO ME AND
YOU BREACHED THAT DUTY BY DOING
XYZ VERSUS THE SEGREGATION
CONTEXT, THE DUTY TO THE
INSURER, DUTIES AND THE ONLY
ACTS THAT CAN BE RELEVANT ARE
THE INSURED.
IF THE INTERESTS WERE ALIGNED IN
THE FIRST PLACE WHICH IS A
PREDICATE FOR WHETHER THERE
WOULD BE A DUTY IN THE FIRST
PLACE, DOES IT END UP BEING THE
SAME CONDUCT THAT IS AT ISSUE?
>> I BELIEVE SO.
CERTAINLY IN THIS CASE THE
INTERESTS WERE EXACTLY ALIKE.
I AM WELL INTO MY REBUTTAL.
>> YOUR RESERVE AND.
OBSERVANT.
>> GOOD MORNING.
MAY IT PLEASE THE COURT.
WHEN HE WAS CHRIS CARLISLE AND
I'M HERE ON BEHALF OF KUBICKI
DRAPER.
WITH ME ARE BRAD MCCORMICK AND
KEVIN VILAS.
ONE OF THE STARTING POINTS NEEDS
TO BE WHAT EXACTLY ARE THEY
ASKING FOR AND WHAT CAN THIS

COURT DO ABOUT IT?
THE NATURE OF THE TRIPARTITE RELATIONSHIP DOES NOT RISE TO THE LEVEL OF CREATING A DUTY OR OBLIGATION BETWEEN THE INSURED AND THE LAW FIRM BUT WHAT IS CLEAR OR NOT CLEAR IS ON THE FIRST PAGE A INITIAL BRIEF THEY SUGGEST UNDER THE TRIPARTITE RELATIONSHIP BOTH THE LAW FIRM AND THE INSURED WERE CLIENT AND THE ATTORNEY CLIENT RELATIONSHIP.
IN THE REPLY BRIEF, THERE ARE SITUATIONS THAT CONCEIVABLY EXISTS WHERE A SOUL REPRESENTATION OF THE INSURED DOES OCCUR AND THERE WOULDN'T BE THIS RIGHT TO SUE MALPRACTICE, YOU SEAT IN THE REPLY BRIEF AND YOU SEE THAT IN THE FIRST CERTIFIED QUESTION AND ONE OF THE POINTS WE MADE WAS HOW BROADLY ARE WE GOING TO ATTACH TO THIS IN A SEPARATE MATTER, WHAT IS THE CERTIFIED QUESTION.
>> LET ME GIVE YOU A HYPOTHETICAL.
SAY AN ASSIGNED LAWYER REPRESENTING MALPRACTICE TOTALLY MISSED THE STATUTE OF LIMITATIONS NO QUESTION ABOUT IT.
THERE'S A TOTAL LOSS, 5 MILLION.
POLICY LIMITS ARE 3, THE INSURED IS ON THE HOOK FOR TWO.
THE INSURANCE COMPANY TENDERS THE THREE.
WHAT THEN IS THE RESPONSIBILITY OF THE LAW FIRM AND WHO DO THEY HAVE TO PAY?
DOES THE CLIENT GET TWO.
>> THAT IS AN INTERESTING QUESTION.
I THINK SO ALSO.
AS FAR AS THE DUTIES, I'M TRYING TO FOLLOW YOUR SCENARIO IN TERMS OF WHAT WE ARE TALKING ABOUT AND IN TERMS OF THE FACTS OF THIS CASE IT WAS WITHIN POLICY LIMITS

WHICH WASN'T ADDRESSED.
>> POLICY LIMITS ARE NOT
SUFFICIENT SO WHAT HAPPENS IN
THAT SITUATION?
DOES THE CLIENT GET TWO AND THE
INSURANCE COMPANY GET THREE.
>> CLIENT HAS THE ABILITY TO SUE
FOR LEGAL MALPRACTICE.
>> ASKING HOW MUCH.
AND ASKED THE CLARIFIED
QUESTION.
ARE YOU ASSUMING THERE IS NO
ATTORNEY-CLIENT RELATIONSHIP
WITH THE INSURER?
WE KNOW IF IT IS ESTABLISHED
THERE'S ATTORNEY-CLIENT
RELATIONSHIP --
>> THE QUESTION BECOMES OUR CASE
AND THESE ARE FACTUALLY BASED
CONSIDERATIONS WHICH THE COURT
HAS RECOGNIZED THROUGH THE YEARS
AT THE SEGREGATION ISSUE COMES
INTO PLAY BUT POTENTIALLY AGAIN
--
>> YOUR ANSWER THEN IS THE
CLIENT GETS TWO AND SEGREGATION
GETS THREE.
>> BASED ON YOUR HYPOTHETICAL,
THE SEGREGATION RIGHTS WOULD
THEN --
>> OPERATIONAL LAW, PERTINENT TO
HOW IT WORKS.
WHY SHOULD WORK DIFFERENTLY IN
THAT SCENARIO THAN WHERE YOU
SETTLE WITHIN POLICY LIMITS BUT
STILL HAVE HARM CAUSE BY THE
MALPRACTICE THING LAWYER.
>> THE HARM SUFFERED BY THE
CLIENT WHEN IT SETTLES WITHIN
POLICY LIMITS THEY ARE NOT
DAMAGED FINANCIALLY.
>> WHY SHOULD THE INSURANCE
COMPANY NOT STEP INTO THE SHOES
AND BE ENTITLED TO SUE THROUGH
THE CLAIM FOR THE AMOUNT PAID.
>> FOR SEVERAL REASONS.
>> LET'S ASSUME THOSE POLICY
LIMITS INSTEAD OF 5 IS 10.
>> AND, IS THE WHOLE 5.
WHAT SHOULD BE INSURANCE COMPANY

THEY WERE COVERED THE WHOLE 5
INSTEAD OF THE MALPRACTICE THING
LAWYER ENTIRELY WALKING AWAY
FROM THIS.
>> FOR VARIOUS REASONS FLORIDA
LAW DEALING WITH SEGREGATION OR
ASSIGNMENTS IN THIS CONTEXT THAT
IS NOT ALLOWED.
OF THE COURT WISHES TO CHANGE
THE NATURE OF THE LAW THAT
EXISTED IN THAT STATEMENT
OBVIOUSLY IT CAN.
IN THE CONTEXT OF A SETTLEMENT
WITHIN POLICY LIMITS, WHAT HARM,
THE HARM TO THE CLIENT, THE
INSURED, HOW IS THAT HARM BEING
TRANSFERRED TO THE INSURANCE
COMPANY WHEN THE CLIENT WHO PAID
PREMIUMS, RECEIVED THE BENEFIT
OF THIS BARGAIN WHO HAD A CLAIM
SETTLE WITHIN POLICY, WILL NOT
BE ASSIGNED.
>> THAT ARGUMENT WILL BE TRUE IN
ANY CIRCUMSTANCE - THE REASON
FOR THIS --
>> SAYING IN THOSE CIRCUMSTANCES
--
>> THERE IS A SUBROGATION CAUSE
IN THE POLICY.
>> THE IMPACT OR EFFECT OF THAT
CLAUSE DEPENDING ON THE
INDIVIDUAL CIRCUMSTANCE WHICH
GOES BACK TO THE UNDERLYING
PREMISE OF THE REASON WE ARE
HERE TODAY.
THIS COURT ADOPTED RULES TALKING
ABOUT HOW THE PARTIES DEFINED
THE NATURE OF THEIR RELATIONSHIP
BASED ON CONTRACT AND
UNDERSTANDING OF THE PARTIES.
THE CONTENTION IS ACCEPTED BY
MANY OTHER COURTS THROUGHOUT THE
UNITED STATES, THE COMMISSION IN
2002 ADOPTED BY THIS COURT IN
2003 WHERE THAT WAS PLAINLY
ACKNOWLEDGED.
>> WE HAVE OUR RULES THAT PUT A
DUTY ON THE LAWYER TO LET BOTH
THE INSURER AND THE INSURED, I
DON'T SEE ANY COMPLIANCE WITH

THAT, NOTHING IN THE RECORD THAT SUGGESTS THAT.
>> NOW.
>> THE DEFAULT RULE -- THAT THERE WILL BE A PRESUMPTION TO REPRESENT BOTH THAT HE WILL BE ON THE HOOK TO REPRESENT BOTH.
>> WHAT IT REQUIRES A LAWYER TO DO.
>> WHAT YOU SHOULD BE DOING IS DESPITE ALL THE EVIDENCE, ALL THE CONVERSATIONS, ALL THE RELATIONSHIP, ALL THE CORRESPONDENCE DESPITE THE DOCUMENTS THEMSELVES, WE ARE GOING TO PUNISH YOU FOR SCREWING UP AT NOT FULFILLING THIS DUTY.
>> THIS WHOLE THING IS ABOUT BEING PUNISHED FOR SCREWING UP.
>> HOW YOU PROTECT THAT RIGHT - IN ANSWER TO YOUR QUESTION ON THAT POINT, AGAIN.
THE QUESTION BECOMES AT THAT POINT WHAT IS THE NATURE OF THE RELATIONSHIP.
WHAT ARE THE RIGHTS THAT ARE APPLICABLE, WHERE THE INSURANCE COMPANY HAS THE RIGHT TO CONTROL THIS.
ALL THE THINGS, ESTABLISHING THIS RELATIONSHIP SEEM REMARKABLY THIN.
THE INSURANCE COMPANY WE WOULD ALL AGREE UNDER THE LAW AND THE RULES, TO CONTROL THE NATURE OF THAT RELATIONSHIP.
OF THE INSURANCE COMPANY THROUGH A LETTER OF UNDERSTANDING, THROUGH THE GUIDELINES WHICH DON'T SEEM TO BE IN THE RECORD, IF THESE THINGS WERE DONE WE MIGHT HAVE A DIFFERENT CASE.
IF WE HAD A CLEARLY ESTABLISHED SITUATION WHERE PRIVITY WAS THERE, WHAT IS THE NEED TO RESOLVE THIS QUESTION?
>> ALL THOSE ARGUMENTS MAKE SENSE TO ME AND I TEND TO AGREE WITH YOU BUT I'M CONCERNED ABOUT

THE RECORD SITES YOUR OPPOSING COUNSEL JUST THREW OUT THERE INCLUDING ADVICE GIVEN TO THE FAITH CLAIM.
>> IT WASN'T POINTED OUT ARE EMPHASIZED IN THEIR BRIEF BUT I DON'T RECALL IT BEING THAT EXPLICIT.
EVEN IF IT WAS, ONE SITE OR ONE LETTER MENTIONED IN THE CONTEXT OF YEARS TO CONTROL THIS ISSUE THAT IS A FACTUAL ISSUE.
WE HAVE THEIR INITIAL RECORD, SUPPLEMENT THE RECORD, 2101 IS THE INITIAL REPORT TO THEM FROM KUBICKI DRAPER SAYING OUR CLIENT, THE ACCOUNTING FIRM.
THE POINT BEING DO THE PARTIES IN THIS, IN ANY SITUATION LIKE THIS HEAVY.
TO CLARIFY WERE SET FORTH THE NATURE OF THEIR RELATIONSHIP?
OF COURSE THEY DO.
WHEN THEY DON'T DO THAT LIKE HAPPENED IN THIS CASE SHOULD THEY COME TO THIS COURT AND SAY WE HAD THE RIGHT TO DO IT, WE HAD THE ABILITY OVER THE YEARS TO SPECIFY WHAT OUR RIGHTS WERE AND WHETHER WE CAN SEE SUE FOR MALPRACTICE AND THE NATURE OF OUR RELATIONSHIP, WE DIDN'T DO THAT BUT BECAUSE THEY FAILED IN THEIR DUTY TO INFORM US OR CLARIFY THIS WE ARE ASKING YOU TO BAIL US OUT.
>> IF YOU ARE EACH ARGUING, YOU ARE ARGUING FOR ONE PRESUMPTION, IT SEEMS BESIDE THE CAN POINT TO A SPECIFIC RULE THAT PLACES A DUTY ON IN THIS CASE THE LAW FIRM TO CLARIFY IT SEEMS THEY ARE BETTER OFF BUT IT SEEMS THERE ARE QUESTIONS ABOUT THE RESTATEMENT VIEW, THE CERTIFIED QUESTION IS WRITTEN IN A WAY THAT IF THE COURT DECIDED TO ADOPT THAT VIEW AND SAY THERE IS A DUTY TO A NONCLIENT IN THIS CONTEXT IT WOULD BE A GOOD USE

OF YOUR TIME TO EXPLAIN WHY
APPLYING THE NORMAL CRITERIA THE
COURT WOULD APPLY IN DECIDING
WHETHER TO RECOGNIZE A DUDE LIKE
THAT, WHY WE SHOULDN'T DO IT.
>> THIS COURT HAS PUT FORTH THE
RULES, YOU CAN DO WHATEVER THE
COURT WISHES TO DO, BE
DRAMATICALLY CHANGING THE LAW
THAT HAS EXISTED IN THE STATE OF
FLORIDA FOR MANY YEARS AS
RECOGNIZED 20 YEARS AGO BY THIS
COURT.
HE WOULD TAKE A CONSIDERATION
WHERE PARTIES, WE DON'T TRUST
YOU TO DIVINE THESE THINGS AND
YOU ARE DOING WHAT I MENTIONED
BEFORE BY SAYING WHERE THE FAULT
LIES IF THIS WAS NOT COMPLIED
WITH.
THE POINT BEING --
>> WITH THE RESTATEMENT THE
ATTORNEY-CLIENT THING GOES OUT
THE WINDOW AND THAT IS THE
POINT.
>> YOU WISH TO CREATE A NEW
CAUSE OF ACTION THAT NEVER
EXISTED AND FOR THE BEFORE BASED
ON THE RESTATEMENT.
CAN YOU DO THAT?
OF COURSE YOU CAN.
BUT SUBSECTION G APPLIES TO THIS
PARTICULAR CIRCUMSTANCE AND
SUGGEST THAT YOU SHOULDN'T,
WHICH AGAIN --
>> RESTATEMENT, WHATEVER THE
MERITS OF THE RESTATEMENT
PETITION MIGHT BE THE ONLY
QUALIFIER ON THE RESTATEMENT IS
WHERE THE INTERESTS ARE ALIGNED.
IF THEY ARE NOT ALIGNED THERE IS
NO DUTY BUT THE RESTATEMENT
SEEMS TO CLEARLY CONTEMPLATE
THAT IN THE ABSENCE OF A
CONFLICT THERE WILL BE A
NONCLIENT BENEFICIARY DUTY.
>> IT CONTEMPLATES ONE PORTION
OF THE RULE BUT IF I MAY FROM
SUBSECTION G IN 51 THAT YOU'RE
REFERRING TO, IF THE LAWYER

RECOMMENDS ACCEPTANCE OF A
SETTLEMENT OFFERED JUST BELOW
THE POLICY LIMITS AND THE
INSURER ACCEPTS THE OFFER THE
INSURER MAY A LOT -- MAY NOT
SEEK THE CLAIM THAT A COMPETENT
LAWYER IN THE CIRCUMSTANCES
WOULD HAVE ADVISED THE OFFER BE
REJECTED.
ALLOWING RECOVERY IN SUCH
CIRCUMSTANCES WOULD ALLOW
INTEREST IN REJECTION OF A
SELECT OFFER BENEFICIAL TO THE
INSURED TO ESCAPE POSSIBLE
LIABILITY.
>> DOES THAT SAY THE ONLY REASON
YOU HAVE TO OFFER THAT IN THE
FIRST PLACE WAS MALPRACTICE THAT
PRECEDED IT?
THAT SEEMS LIKE MORE WHETHER
THERE WAS BRIEF OF A DUTY
QUESTION VERSUS A STANDING
QUESTION WHICH IS WHAT WE'RE
LOOKING AT.
>> ONE OF THE PROBLEMS I
SUGGESTED THROUGHOUT THIS IS THE
TRIPARTITE RELATIONSHIP CAN TAKE
ON MANY FORMS.
THE INDIVIDUAL CIRCUMSTANCES CAN
BE VARIED BASED ON WHETHER IT IS
WITHIN POLICY LIMIT OR NOT.
WHETHER THERE WAS CLEAR FIND A
MALPRACTICE WHICH WASN'T THE
CASE OR NOT.
THERE ARE A LOT OF THINGS THAT
CAN OCCUR.
TO SUGGEST 1-SIZE-FITS-ALL, TO
ANSWER THIS QUESTION.
THE ONE BEFORE YOU IN THE
AFFIRMATIVE, IS TO IGNORE THE
NUANCES, IGNORE THE PARTIES CAN
CONTROL THEIR RELATIONSHIP AND
ALLOW A MALPRACTICE SUIT WITHOUT
ANY DISTINCTIONS DESPITE THE
FACT THAT THEY MADE SOME
DECISIONS TODAY.
>> DO YOU CONCEDE THERE IS
PRIVITY OF CONTRACT BETWEEN THE
LAW FIRM AND THE INSURER?
>> KNOW.

>> NO PRIVITY OF CONTRACT?
NOT TALKING ABOUT LAWYER CLIENT
RELATIONSHIP --
>> THIS PARTICULAR CIRCUMSTANCE
WHEN THE TRIAL JUDGE -- THEY
SAID THERE WASN'T, THAT IS THE
--
>> ARE YOU SAYING THE INSURED
DID NOT CONTRACT WITH THE LAW
FIRM?
>> THERE WAS NO --
>> EFFICIENT TO CREATE -- ARE
YOU SAYING THE INSURER DID NOT
CONTRACT WITH THE LAW FIRM?
>> THERE WAS NO CONTRACTUAL
RELATIONSHIP SUFFICIENT TO
CREATE AN OPPORTUNITY --
>> YOU CONCEDE THE INSURER DID
CONTRACT --
>> THEY NEED TO PAY THE FEES TO
THE LAW FIRM AND TO REQUEST -
>> THAT WOULD BE A CONTRACT.
>> WITH THE TRIPARTITE
RELATIONSHIP, COMPLICATIONS GO
BEYOND THAT.
>> THE REALITY IS IF THE INSURER
HAD STIFFED THE LAW FIRM ON THE
FEES THERE WOULD HAVE BEEN A
SUIT BASED ON CONTRACTUAL
RELATIONSHIP WITH THE INSURER.
>> THEY WOULD DO THAT.
THE QUESTION IN THIS CASE
BECOMES WHETHER OR NOT THAT
RELATIONSHIP WHETHER IT COMPLIES
WITH GUIDELINES, DO CERTAIN
THINGS IT IS EFFICIENT TO CREATE
A DUAL CLIENT RELATIONSHIP AND
WHETHER OR NOT PRIVITY OF
CONTRACT IS SUFFICIENT TO ALLOW
THAT RELATIONSHIP TO EXIST WHICH
THE TRIAL COURT FOUND NO AND
LOOKING AT THE CASE IS, WHAT DO
WE HAVE LEFT TO SUGGEST THIS
RELATIONSHIP EXISTED, A LETTER
FROM EXPERT THAT WAS NOT A PARTY
TO THE SUIT, CLARIFYING COMMENTS
DURING THE POSITION OF MANY
YEARS OF LITIGATION THERE WERE
CERTAIN RESPONSIBILITIES.
>> WHAT IS THE BASELINE TEST

LEGALLY FOR WHETHER THERE IS
ATTORNEY-CLIENT RELATIONSHIP?
JUST THE BLACK LETTER TEXT?
>> DON'T KNOW IF THERE'S A BLACK
LETTER TEST.
>> ONE IS THE SUBJECTIVE INTENT
OF THE WOULD BE CLIENTS AND
LOOKING AT THE BEHAVIOR OF THE
CLIENT AND THE LAWYER, WHY ISN'T
THERE AT A MINIMUM A FACTUAL
DISPUTE ON THIS RECORD AS TO
THIS OBJECTIVE IN TIME OF THE
CLIENT BUT EVEN IF YOU THINK THE
RIGHT THING TO BE LOOKING AT IS
THE OBJECTIVE, YOU WIFE A
MINIMUM OF FACTUAL DISPUTE?
>> THEY SUGGEST IN FOOTNOTE
THERE ARE FACTUAL DISPUTES.
WHETHER THE NATURE OF THE
RELATIONSHIP IS AS CLEARLY
DEFINED AS IT SHOULD HAVE BEEN,
GIVEN THAT POINT IN THE
LITIGATION WHICH IS GOING ON FOR
YEARS.
THEY FIND THE RELATIONSHIP IS
LACKING.
THE FACTUAL AND LEGAL QUESTION
DEPENDING ON CIRCUMSTANCES AND
UNDERSTANDING OF THE PARTIES.
THAT IS THE REALITY OF IT.
HOW WHEN WE HAVE SUCH A
FACTUALLY BASED CONSIDERATIONS
FOR THE TRIPARTITE RELATIONSHIP
AND WHAT IT MEANS CAN WE ANSWER
A CERTIFIED QUESTION THAT IS SO
BROAD AND TAKE NONE OF THIS INTO
CONSIDERATION --
>> CAN I ASK YOU A QUESTION, I'M
INTERESTED IN YOUR ASSERTION
THAT WE SHOULD NOT CREATE A NEW
DUTY FOR THE LAW FIRM.
I RECOGNIZE THERE ARE PLENTY OF
CASES OR INSTANCES IN WHICH THIS
COURT CREATED NEW LEGAL DUTIES
FOR A NEW CAUSE OF ACTION.
WHEN YOU IMPOSE ON PEOPLE THAT
NEVER HAD A DUTY BEFORE THAT CAN
RESULT IN LIABILITY.
THE DUTY WE ARE TALKING ABOUT IS
A DUTY TO PROVIDE LEGAL

REPRESENTATION, A DUTY THIS LAW FIRM HAS, THEY DID THAT FOR THE CLIENT.
>> THE DUTY EXISTS IN THIS CASE. IN AN INSTANCE WHERE THE PARTY WAS HARMED IS NOT THE CLIENT. IT SEEMS TO ME IT IS A SMALL LEAP TO SAY THE DUTY ARE TO BE OWED, WHAT IS HARMED BY THE BREACH OF DUTY, IT DOESN'T SEEM LIKE THE SAME THING AS CREATING A NEW DUTY.
>> I UNDERSTAND THE NATURE OF TRYING TO RECOGNIZE THE POLICY, IF THERE IS TRULY SOMETHING THAT WENT WRONG THERE SHOULD BE A REMEDY FOR IT.
EVEN YOUR QUESTION GOES TO THE COMPLEXITY OF WHAT YOU ARE SEEKING TO CREATE.
UNDER WHAT CIRCUMSTANCES DOES THIS ARISE, WITH OPPOSING COUNSEL IN THE REPLY BRIEF.
ARE YOU LIMITING THE QUESTION AND SAYING WHEN IT IS CLEAR THAT A RELATIONSHIP HAS BEEN CREATED THEN THEY HAVE THE ABILITY TO DO THIS.
ARE WE SUGGESTING IT EXISTS IN CERTAIN CIRCUMSTANCES WHEN THE CASE IS SETTLED WITHIN POLICY LIMITS, THESE ARE THE PROBLEMS WHEN IT GOES DOWN THIS ROAD.
WE ARE TRYING TO FIND AN ANSWER TO THIS PROBLEM.
>> IT IS POSSIBLE THAT -- IT IS CLEAR THAT THE LAWYER OWES A DUTY TO THE INSURED, IT IS POSSIBLE THAT THE INSURER WILL BECOME AN INCIDENTAL BENEFICIARY OF EVERYTHING THE LAWYER DOES ON BEHALF OF THE INSURED.
WHETHER THE SIGNIFICANCE OF IMPOSING A NEW DUTY, EVERY DECISION IN THE CASE, AND THE INTERESTS OF THE ONE, CLEARLY THE ONE CLIENT THEY HAVE INSURED BUT ALSO THE ENTITY THEY NOW OWE A RECOGNIZED DUTY TO, IT ADDS TO THE EQUATION OF THINGS THAT NEED

TO BE THOUGHT ABOUT IN TERMS OF EVERY DECISION.
MOST OF THE TIME THERE WON'T BE A CONFLICT AND THINGS WORK OUT. IS SOMETHING SIGNIFICANT ABOUT GOING A DUTY TO THE INSURANCE COMPANY.
>> ALSO, I AM JUST ABOUT OUT OF TIME, THE POLICY YOU ARE TALKING ABOUT ON WHAT IS ON A LAWYER'S MIND IS POINTED OUT, IF YOU CREATE A SITUATION WHERE THEY ARE ADEQUATELY REPRESENTING THE NEEDS, THE RIGHT OF THE INSURED IN POLICY LIMITS, WHAT GOES THROUGH THE LAWYER'S MIND DURING THE NEGOTIATIONS DURING THE COURSE OF THAT LAWSUIT KNOWING I WILL BE SECOND-GUESSED LATER DOWN THE ROAD BY THE INSURANCE COMPANY WHICH CREATES THE ABILITY TO DO SO.
THAT IS A SIGNIFICANT FACTOR THAT WEIGHS INTO THIS, AND THE SUGGESTION THE PUBLIC POLICY IMPACT THE DECISION, IT IMPACT THE INSURANCE COMPANY BUT YOUR SCENARIO OR WHAT I BROUGHT FORTH, WHEN THAT IS THE CASE, YOU SHOULD NOT CREATE THIS NEW DUTY, SHOULD RELY ON THE ABILITY OF THE PARTIES THEMSELVES AS IT IS DONE THROUGHOUT OUR HISTORY TO CREATE THIS AND NOT ANOTHER EXCEPTIONS THE PRIVITY REQUIREMENT.
>> DOESN'T THE RESTATEMENT DEAL WITH THAT DILEMMA BY SAYING THERE IS ONLY RECOVERY OR POTENTIAL RECOVERY AND NO CONFLICT OF INTEREST --
>> THE CONFLICT OF INTEREST IN THESE CASES --
>> THE STATUTE OF LIMITATION --
>> THE RESTATEMENT SAYS WHAT IT SAYS AND WE GO BACK TO THE PARADIGM CASE, POTENTIALLY THE RECOVERY IN ACCESS TO THE PROCESS, THERE'S AN INHERENT CONFLICT WE ARE NOT GOING TO

EXTEND.
>> THEY ADOPTED THE RESTATEMENT POSITION.
>> I WOULD SUGGEST -- ALSO TAKEN INTO ACCOUNT THE INDIVIDUAL RELATIONSHIPS, THE STATE IS NOT TO THE TRIPARTITE RELATIONSHIP CREATES DUAL CLIENT.
THANK YOU VERY MUCH.
>> LET ME ADDRESS MY REMAINING 2 MINUTES AND 42 SECONDS THE POINTS.
I WILL START WITH CHIEF JUSTICE KENNEDY.
NOT ONLY WAS THERE A CONTRACTUAL RELATIONSHIP BETWEEN THE INSURED AND COUNSEL, THEY COUNTERCLAIMED FOR FEES.
THERE WAS CLEARLY A RELATIONSHIP AND THEY HAVE NOT DISPUTED AN EXISTING RELATIONSHIP, THEY WERE SUBJECT TO THE BILLING GUIDELINES, THERE WAS A CONTRACTUAL RELATIONSHIP.
>> DO YOU DISPUTE WHEN THE COURTS TALK ABOUT WHETHER THERE WAS PRIVITY THAT THEY WERE BAKING INTO THAT THE CONCEPT OF ATTORNEY-CLIENT RELATIONSHIP, IT WAS INSUFFICIENT MERELY TO SAY THERE WAS A CONTRACT BETWEEN THE INSURANCE COMPANY --
>> BAKED INTO THE NOTION OF A CONTRACTUAL AGREEMENT IN ESPINOZA IS THIS IDEA THAT THERE IS SOME CLIENT ATTORNEY RELATIONSHIP, THERE IS SOME DUTY ON THE PART OF COUNSEL TO REPRESENT THE INTERESTS OF THE PERSON WITH WHOM THEY ARE IN A CONTRACT AND THAT IS THE CASE HERE, THEY WERE REPRESENTING THE INTERESTS AND THE RECORDS WILL SHOW THAT.
MY COLLEAGUE ASKS WHAT DOCUMENTS ARE IN THE RECORD THAT COUNSEL UNDERSTOOD THEY ARE REPRESENTING ARCH, THEIR INTAKE IS IN THE RECORD, RECORD 2063.
THEIR INTAKE SHOWS THE INSURED,

THE INSURED SAFER AS THE INSURED
AND IT SHOWS ARCH AS THE CARRIER
CLIENT.
THEY UNDERSTOOD EVEN ON THIS
LIMITED RECORD THEY UNDERSTOOD.
I WILL LEAVE THE COURT WITH ONE
SUGGESTION.
>> WOULDN'T YOU AGREE IF YOU ARE
BASING YOUR ARGUMENT ON
ATTORNEY-CLIENT RELATIONSHIP
BETWEEN THE INSURANCE COMPANY
AND THE LAW FIRM, SUMMARY
JUDGMENT WOULD NOT HAVE BEEN
APPROPRIATE?
YOU CAN POINT TO THINGS IN THE
RECORD THAT WOULD GO THE LONG
WAY --
>> THAT'S WHY WE INCLUDED THE
POSSIBILITY THE COURT MAY NOT
FEEL FULLY COMFORTABLE TO
CONCLUSIVELY SAY ABSOLUTELY
THERE WAS PRIVITY WITH A CLIENT
AND ATTORNEY.
THAT IS LESS THE CASE WITH THE
OTHER TWO THEORIES, SUBROGATION
--
>> THE OTHER TWO THEORIES --
>> I WAS TRYING TO SOFT-PEDAL
THE POSITION.
I AM OUT OF TIME.
I SUGGEST THE COURT REVIEW THE
DECISION FROM THE FIFTH DCA.
IT PRESENTS AN INTERESTING
ANALOGOUS -- WE ASK THAT YOU
REVERSE THE FOURTH DISTRICT'S
DECISION AND RE-MANNED.
>> WE THANK YOU FOR YOUR
ARGUMENTS AND THE COURT WILL NOW
BE IN RECESS FOR ABOUT TEN
MINUTES.