

>> ALL RISE.

GIVE ATTENTION SHALL BE HEARD,  
GOD SAVE THE UNITED STATES,  
GREAT STATE OF FLORIDA AND  
HONORABLE COURT.

>> LADIES AND GENTLEMEN, THE  
SUPREME COURT OF FLORIDA, PLEASE  
BE SEATED.

>> GOOD MORNING AND WELCOME TO  
THE FLORIDA SUPREME COURT.  
THE FIRST CASE ON TODAY'S DOCKET  
IS IN RE, AMENDMENTS, FLORIDA  
PROCEDURAL 1.442, COUNSEL.

>> THANK YOU, CHIEF JUSTICE,  
GOOD MORNING, YOUR HONORS, MAY  
IT PLEASE THE COURT, MY NAME IS  
BAILEY HOWARD AND I REPRESENT  
THE FLORIDA ASSOCIATION IN THE  
PROCEEDINGS.

AT THE HEART OF THE COMMENT IS A  
FRAMEWORK THAT WE ARE POSE THE  
COURT SHOULD USE TO EVALUATE ANY  
PROPOSED AMENDMENT AND THAT  
FRAMEWORK ULTIMATELY DERIVES  
FROM THE FLORIDA CONSTITUTION  
AND CONSISTS OF 3 QUESTIONS THAT  
ARE PRETTY STRAIGHTFORWARD.  
THE FIRST IS WHETHER THE  
AMENDMENT IS SUBSTANTIVE OR  
PROCEDURAL IN NATURE, THE SECOND  
IS TO A DEGREE INTERTWINED WITH  
THE FIRST AND IT ASKS WHETHER  
THE PROPOSED AMENDMENT IS  
CONSISTENT WITH ALL OF THE  
RELEVANT STATUTES WHICH ARE MORE  
THAN JUST SECTION 768.79  
ALTHOUGH THAT'S THE MOST  
FREQUENTLY REFERRED TO UNDER THE  
PROPOSAL FOR SETTLEMENT  
MECHANISM.

THERE ARE, FACTS OTHER STATUTE  
THAT USE AND THE RULE SHOULD --  
WHETHER IT WOULD FURTHER THE  
PURPOSES OF THE PROPOSAL FOR  
SETTLEMENT MECHANISM WHICH ARE  
TO ENCOURAGE SETTLEMENT AND  
REDUCE LITIGATION AND THE FJA'S  
POSITION HERE, YOUR HONOR, IF WE  
TAKE THE FRAMEWORK AND WE APPLY  
IT TO THE PROPOSED AMENDMENTS  
THE LOGICAL RESULT IS WHAT THE  
FJA ADVOCATES IN ITS COMMENT  
THAT THERE ARE SOME THINGS THAT

ARE INCONSISTENT WITH STATUTES AND NEED MINOR TWEAKS TO RESOLVE THEM AND THINGS THAT ARE SUBSTANTIVE AND HAVE POTENTIAL TO CREATE CONFUSION OR VARY FROM THE SUBSTANCE OF THE STATUTES THAT ARE ON POINT AND THERE ARE SOME THINGS THAT JUST DON'T MAKE SENSE FROM THE PERSPECTIVE OF FURTHERING THE PURPOSES AT THE PROPOSAL FOR SETTLEMENT MECHANISM.

SO TO BEGIN WITH, THE PROPOSED DIVISION SUBDIVISION C2C AND D ARE THINGS THAT THE COURT SHOULD APPROVE WITH MINOR MODIFICATIONS, PROPOSALS FOR SETTLEMENT EXCEPT VOLUNTARY DISMISSAL FOR PREJUDICE.

THE MINOR TWEAK THAT NEEDS TO HAPPEN IS THIS IS INCONSISTENT WITH SOME OF THE STATUTES.

THERE ARE STATUTE THAT IS PERMIT NON-MONETARY CONDITIONS TO BE USED, 70.001 SUBSECTION 4C, CONTEMPLATES NON-MONETARY CONDITION AND RULE 1.44 MYSELF TO THAT STATUTE SO THAT TWEAK IS NECESSARY.

FURTHERMORE, IT'S IMPORTANT TO KNOW -- YOU CAN'T DEMAND SOMETHING THAT YOU DON'T GET IN THE LAWSUIT.

PAYMENT IS A MONETARY CONDITION FOR A COUPLE OF REASONS.

IT'S ONE ENTERTAINED WITH A MONETARY CONDITION, THE EXISTENCE OF AN AMENDMENT REALLY EXIST THAT CAN BE PAID AND THE PARTY CAN RECEIVE IN THE LITIGATION BECAUSE THE OPPOSING PARTY CAN CONFESS JUDGMENT AND THE PARTY WOULD BE ENTITLED TO THE ENTRY OF A JUDGMENT ON THEIR BEHALF AS AN ADMINISTRATIVE MATTER FOR THE COURT TO CLOSE OUT THE CASE.

SO THAT'S A FACTOR THAT THIS COURT SHOULD CONSIDER WHEN IT'S DETERMINING WHETHER TO MAKE THOSE AMENDMENTS TO THE RULE.

>> DOESN'T THAT SORT OF EFFECTUATE AN END RUN AROUND JUDGMENT ENFORCEMENT PROCEEDINGS

AND, YOU KNOW, CONSTITUTIONAL PERMISSIBLE DEFENSES AGAINST ENFORCEMENT OF A JUDGMENT? AND IT IS ONE THING TO STIPULATE THAT A MONEY JUDGMENT IS IN ORDER, RIGHT, THAT'S WHY 768.79D REQUIRES THAT WE STATE THAT THE TOTAL AMOUNT OF A JUDGMENT AND THERE MAY BE OTHER DEFENSES TO THE ENFORCEMENT OF A JUDGMENT, DON'T YOU AGREE?

>> I DO AGREE, YOUR HONOR. THERE WILL BE DEFENSES BUT CONFESSING JUDGMENT THE PARTY ABANDONS AND WAIVES THEM. CONFESSION OF JUDGMENT WAS A WAY TO GET A JUDGMENT IN ANOTHER JURISDICTION ENFORCED IN YOUR JURISDICTION AND SO IN THAT SENSE IT'S STILL SOMETHING THAT WOULD BE AVAILABLE IN THE ACTION.

AND SO THOSE DEFENSES WOULD STILL AVAILABLE BUT THE ACTIVE CONFESSING OF JUDGMENT PUTS THEM BEYOND A REACH, SO I DON'T THINK IT WOULD -- IT WOULD RAISE THE CONSTITUTION ISSUES, YOUR HONOR BRINGS UP IN THE CONTEXT TO AMENDMENT RULE 1.422 BUT THE REAL HEART OF THE COMMENT IS TO MAKE SURE THAT THERE'S CONSISTENCY WITH THE STATUTES. AND THAT SHOULD BE THE COURT'S FIRST CONCERN HERE, IS TO BE CONSISTENT WITH THE APPLICABLE STATUTES.

THE -- IT'S ALSO IMPORTANT TO REMEMBER THAT THE PARTIES CAN NEGOTIATE THEIR OWN SETTLEMENTS OUTSIDE THE CONTEXT OF THE PROPOSAL FOR SETTLEMENT MECHANISM, SO IF THERE ARE CONDITIONS THAT THE PARTIES WANT SUCH AS RELEASES OR CONFIDENTIALITY PROVISIONS, THE PARTIES COULD NEGOTIATE FOR AND OBTAIN THOSE OUTSIDE OF RULE 1.422 AND PROPOSAL FOR SETTLEMENT MECHANISM.

THE COURT'S AMENDMENTS IF IT DID NOT INCLUDE NONMONETARY CONDITIONS EXCEPT PERMITTED BY STATUTE WOULDN'T PLACE THOSE

CONDITIONS BEYOND PARTY'S REACH  
WHEN THEY ARE IMPORTANT TO  
PARTIES.

THE SECOND SET OF AMENDMENTS  
THAT THE FAJ HAS MATTERS TO  
COMMENT ON I SUPPOSE SUBDIVISION  
SECTION 2BE AND F WHICH INVOLVE  
THE INCORPORATION OF THE  
ATTORNEYS' FEES COSTS AND  
INTEREST IN THE AMOUNT OF  
PROPOSAL FOR SETTLEMENT.

HERE AGAIN WE HAVE CONFLICT WITH  
STATUTE AND THEY SAY THEY CAN'T  
INCLUDE THINGS OF THIS NATURE  
AND SOME SAY YOU MUST INCLUDE  
THEM IN SOME STATUTE, YOU CAN IF  
YOU WANT TO AND SO THERE'S AN  
ISSUE OF STATUTORY CONSISTENCY  
THERE.

THERE'S ALSO AS THE CIVIL  
PROCEDURE RULES COMMITTEE PULLS  
OUT IN THE COMMENT THERE'S  
INCONSISTENCY WITH THE LANGUAGE  
67.879 WOULD BE CONSTRUED TO  
INCLUDE ALL DAMAGES THAT WOULD  
BE AVAILABLE IN THE JUDGMENT IN  
AN ACTION.

BUT THAT'S IN SUBSECTION 7.78  
SUBSECTION 2.

THE COURT'S DECISION AS THE  
CIVIL PROCEDURE POINTED OUT AND  
INTERPRETED SECTION 6 OF THAT  
STATUTE BUT NOT SUBSECTION 2.  
SO THE SUBSTANCE OF THE LAW IS  
NOT NECESSARILY IN ALIGNMENT  
WITH WHAT THE RULES -- THE  
PROPOSED AMENDMENT TO THE RULE  
WOULD PROVIDE.

BUT THE -- THE OMITTED CASE IS  
WHAT ON POINT THERE BECAUSE THE  
STATUTE DOES NOT PROVIDE FOR ANY  
-- FOR ANYTHING BEYOND THE  
DAMAGES AT LEAST THE STATUTE ON  
POINT THAT I'M TALKING ABOUT  
HERE IS SELECTION 768.79 DOESN'T  
PROVIDE ANYTHING BEYOND THE  
DAMAGES TO BE IN THE PROPOSAL  
FOR SETTLEMENT.

OTHER STATUTES DO THINGS  
DIFFERENTLY AND SOMETHING THE  
COURT WOULD HAVE TO NOTE AS IT  
PROCEEDS WITH ANY AMENDMENT.

>> SO YOUR POSITION WOULD BE  
THAT WITH 768.79 BECAUSE IT DOES

PROVIDE FOR DAMAGES AS THE OFFER AND NOT ATTORNEYS' FEES AND COSTS, THAT IF WE HAD A RULE THAT REQUIRED INCLUSION OF ATTORNEYS' FEES AND COST IT WOULD BE SUBSTANTIVELY INCONSISTENT WITH THE STATUTE?

>> YES, YOUR HONOR, THAT'S A FAIR STATEMENT OF -- OF WHAT I'M SAYING.

>> IT WOULD ALSO BE VERY PROBLEMATIC WHICH YOU POINT OUT IN YOUR BRIEF, CORRECT?

>> YES, YOUR HONOR, IT WOULD.

>> IT WOULD BE VERY DIFFICULT TO PUT TOGETHER AN OFFER THAT -- MAYBE EASY TO ANTICIPATE THESE ARE THE LIKELY DAMAGES WE'VE HAD DISCOVERY, WE KNOW WHAT -- WHAT THOSE ARE, THIS IS OUR LIKELIHOOD OF SUCCESS, THIS IS WHAT WE THINK A JURY WOULD DO BUT IT WOULD BE REALLY HARD, I THINK, TO ANTICIPATE THE ATTORNEYS' FEES AND OTHER SIDE MIGHT GET AND THOSE KIND OF THINGS, WOULD YOU AGREE WITH THAT?

>> YOUR HONOR.

>> IT MAKES IT UNWORKABLE AS WELL?

>> YES, YOUR HONOR.

>> GO AHEAD.

>> I'M SORRY.

>> GO AHEAD.

>> THANK YOU, YOUR HONOR. IT WOULD BE DIFFICULT NOT TO JUST ANTICIPATE THOSE THINGS BUT LITIGATE THEM AFTERWARDS. AS WE HAVE EXPLAINED IN THE COMMENT, WHEN YOU GO TO DETERMINE WHETHER THE PROPOSED FOR SETTLEMENT AMENDMENT SHOULD BE ENFORCED AND WHETHER YOU'RE ENTITLED TO ATTORNEYS' FEES YOU HAVE TO HAVE A MINI TRIAL ABOUT THE DAMAGES THAT YOU WOULD HAVE GOTTEN ANYWAY. WHAT'S THE POINT OF SETTLING IF YOU'RE GOING TO HAVE A MINI TRIAL ANYWAY?

THE THIRD SET OF AMENDMENTS THAT THE FJA WOULD LIKE TO COMMENT UPON, THE PROPOSED AMENDMENTS

FOR THE JOINT PROPOSED IN  
SUBDIVISION C5 AND THERE THE  
PROPOSED AMENDMENT WOULD KEEP A  
SETTLING PARTY IN THE LITIGATION  
AND THAT'S THE -- I WILL REST ON  
THE COMMENT OTHERWISE EXCEPT TO  
THE EXTENT THIS COURT HAS  
QUESTIONS ABOUT IT BUT THAT'S  
THE THING THAT I WOULD REALLY  
LIKE TO EMPHASIZE TO THIS COURT  
IS THAT THE PROPOSED AMENDMENT  
TO SUBSECTION C5, KEEP A PARTY  
THAT WAS WILLING TO SETTLE IN  
THE LITIGATION, THEY FORCED THEM  
TO STAY IN AND THAT PARTY WOULD  
THEN HAVE TO PROCEED AND  
LITIGATE THE CASE AS IN A SORT  
OF STATEMENT IF YOU'LL EXCUSE ME  
FOR MAKING ONE.

SO THIS DOESN'T ENCOURAGE  
SETTLEMENT.

IN FACT, IT PREVENTS SETTLEMENT  
BECAUSE NOW THAT THIS PARTY  
WILLING TO SETTLE IS KEPT IN THE  
CASE.

AND IT'S UNCLEAR FROM THE RULE  
WHAT WOULD HAPPEN IF THAT PARTY  
THEN SETTLES THE FOLLOWING DAY  
IN A NON-RULE 1.442 NONPFS  
RELATED SETTLEMENT ON THE SAME  
TERMS BECAUSE NOW THE PARTIES  
KNOW THOSE WERE ACCEPTABLE TERMS  
FOR THE PARTY TO SETTLE ON AND  
DIDN'T SETTLE ON THAT BASIS,  
WHAT HAPPENS, THE RULE DOESN'T  
ANSWER THE QUESTION.

>> MY QUESTION AND I THINK  
JUSTICE LAWSON HE COVERED IT  
PRETTY WELL AND I THINK YOU  
COVERED THE ATTORNEYS' FEES PART  
OF IT, THE THING ABOUT THE  
OFFERS, THE WHOLE HISTORY OF IT  
-- I WAS IN PRACTICE IN THE  
MID-80'S WHEN WE STARTED THE  
OFFER AND EVERY YEAR IN THE  
LEGISLATURE, WOULD WE MEDDLE  
WITH IT AND YOU HAVE THE  
DIFFERENT STATUTES, DIFFERENT  
RULES AND YOU HAVE TO LOOK AT  
THE YEAR WHEN THE ACCIDENT  
HAPPENED, KIND OF THE SAME THING  
AS STACKING UNINSURED MOTOR  
INSURANCE.  
EVERY YEAR, ONE YEAR YOU HAVE

STACKING, THE NEXT YEAR YOU  
DON'T HAVE STACKING AND IT GOES  
ON AND ON AND WE KEEP MEDDLING  
WITH IT.

A LOT OF LAWYER'S MALPRACTICE  
AND SETTLED A CASE WHEN THEY HAD  
STACKING AND THEY DIDN'T LOOK AT  
THE STATUTE.

SAME THING HERE.

I REMEMBER A CASE IN BROWARD  
COUNTY IN THE BEGINNING OF THE  
JUDGMENT THING WHERE YOU COULD  
ACCEPT THE JUDGMENT IN TRIAL.

IN FACT, WE ACCEPTED AFTER  
SELECTING A JURY AND IT WASN'T  
ONE TO OUR LIKING SO WE TOOK IT.  
BUT NOW YOU'VE GOT -- YOU DO IT  
IN 60 DAYS OR 30 DAYS, IT WAS  
TEN DAYS FOR A WHILE.

YOU HAVE TO LOOK AT THE YEAR  
WHEN IT WAS ENACTED AND THE  
RULES ENACTED.

IT'S ALL VERY CONFUSING AND FOR  
SOMETHING THAT WAS DEVICE TO  
PROMOTE SETTLEMENT AND TAKE  
CASES OUT OF THE JUDICIAL SYSTEM  
AND GET THEM SETTLED AND MOVING  
ON, IT'S JUST -- THIS IS JUST  
ADDING MORE COMPLICATIONS SEEMS  
TO ME TO AN AREA CONFUSING AREA  
OF LAW.

THE ATTORNEYS' FEES PART OF IT  
IS MIND BLOWING TO ANYONE WHO  
HAS PRACTICED IN THE AREA.

WE KNOW WHAT'S GOING TO HAPPEN  
THERE, THE CASE IS NOT GOING TO  
SETTLE, YOU'RE NOT GOING TO  
PROMOTE ANYTHING AND THE LAST  
THING YOU MENTIONED ABOUT JOINT  
PARTIES.

YOU ARE ALWAYS GOING TO HAVE ONE  
PARTY WHO HAPPENS TO BE IN  
PRIVITY OF WHATEVER HAPPENED  
WITH SOME PRODUCT, IT'S A SMALL  
PLAYER WHO IS NOT GOING TO WANT  
TO SETTLE.

AND -- AND THAT WILL STOP  
SETTLEMENT.

SO I DON'T KNOW HOW THIS  
PROMOTES ANYTHING.

AND I WILL JUST SAY LEAVE WHAT'S  
BROKEN ALONE, WE WILL FIGURE OUT  
HOW TO PUT THE PIECES BACK  
TOGETHER, WE GET THE GORILLA

GLUE.

LEAVE US ALONE.

>> UNLESS THE COURT HAS ANY  
FURTHER QUESTIONS, I WILL YIELD  
MY REMAINDER TIME TO THE COURT.

>> I DO.

I UNDERSTAND YOUR POINT WITH THE  
SUBSECTION THAT DEALS WITH ADDS  
ATTORNEYS' FEES AND COSTS THAT  
NEEDS TO BE INCLUDED IS  
INCONSISTENT WITH THE STATUTE SO  
THAT WOULD BE INAPPROPRIATE  
BECAUSE IT WOULD CHANGE  
SUBSTANTIVE LAW.

ON THE JOINT PROPOSAL, YOUR  
POSITION IS THAT THE STATUTE  
USES THE SINGULAR PARTY AND THAT  
THAT PRECLUDES A JOINT PROPOSAL.  
WHAT ABOUT THE STATUTE THAT SAYS  
THAT THE SINGULAR INCLUDES THE  
PLURAL IN INTERPRETING ALL THE  
STATUTES AND THE PLURAL INCLUDES  
THE SINGULAR AS THE CONTEXT  
PERMITS.

WOULDN'T THAT ALLOW FOR THAT  
WORD AT LEAST TO BE PLURAL  
PARTIES?

>> YES, YOUR HONOR, EXCEPT THAT  
WHAT SECTION 1.01 SAYS IS THAT  
THE SINGULAR INCLUDES THE PLURAL  
AND THE PLURAL INCLUDES THE  
SINGULAR WHERE IT MAKES SENSE  
FOR IT TO DO SO.

IN THIS CONTEXT IT DOESN'T  
REALLY MAKE SENSE FOR IT TO DO  
SO.

THE READING DOESN'T FLOW  
NATURALLY FROM THE TEXT OF  
CERTAINLY SECTION 76..79 AND  
MECHANISM STATUTES AS WELL  
BECAUSE THE -- ALL OF THE  
PROBLEMS THIS COURT HAS  
ARTICULATED AND THAT ARE COMMON  
ARTICULATES AND CONCERNS THAT I  
THINK ALL OF THE COMMENTERS  
SHARE WITH THE JOINT PROPOSALS.

THERE'S A POTENTIAL FOR  
CONFUSION AND THERE'S --

>> LET ME JUST ASK YOU ABOUT  
THAT BECAUSE IT SEEMS TO ME THAT  
THERE'S SOME TYPES OF  
LITIGATION, SOME SITUATIONS  
WHERE A JOINT PROPOSAL WOULD BE  
APPROPRIATE AND WOULD PRECLUDE

GAMESMANSHIP AND SOME WHERE IT WOULD INAPPROPRIATE IN THAT IT WOULD ALLOW FOR GAMESMANSHIP AND THERE ARE SOME WHERE INDIVIDUAL PROPOSALS MIGHT BE SUBJECT TO GAMESMANSHIP IN SOME TYPES OF SUITS AND THEY ARE OUTLINED IN THE BRIEF.

THE QUESTION IS WOULD IT BE INCONSISTENT WITH SUBSTANTIVE LAW WHICH IS JUST VERY GENERAL TO SAY IF SOME SMART PEOPLE LIKE -- LIKE Y'ALL COULD FIGURE OUT IN THIS TYPE OF LAWSUIT A JOINT PROPOSAL IS APPROPRIATE AND THIS TYPE A SINGLE IS APPROPRIATE AND THEN HAVE THAT LAID OUT BY RULE IN TERMS OF THE PROCEDURE BY WHICH WE WILL TAKE A THE GENERAL STATUTE AND MAKE IT APPLICABLE TO VARIOUS LAWSUITS AND TO ME THAT'S THE THING A PROCEDURAL RULE SHOULD DO AND NOT INCONSISTENT WITH THE STATUTE AT ALL.

IT IMPLEMENTS IT WITH THE PROCEDURAL.

DO YOU VIEW THAT, SOMETHING LIKE THAT, WOULD YOU VIEW AS SUBSTANTIVE OR PROCEDURAL, THAT WOULD BE THE QUESTION?

>> YOUR HONOR, I WOULD VIEW THAT AS SUBSTANTIVE MATTER BECAUSE OF THE WAY SECTION 768.79 ARRANGES THE MATTER, BECAUSE IT DOESN'T FLOW NATURALLY FROM THE STATUTE. IT'S NOT AN IMPLICATION OF THE WAY THAT SECTION 768.79 WORKS.

768.79 -- CHIEF JUSTICE, I'M OUT OF TIME.

>> YOU CAN KEEP GOING.

>> THANK YOU, CHIEF JUSTICE.

THE WAY 768.79 IS SUPPOSED TO WORK, QUICK SIMPLE, UP-DOWN SETTLEMENT OFFER AND THERE ARE CASE THAT THE JFA COULDN'T DISPUTE AND YOUR HONOR POINTED OUT WE DO DISCUSS THOSE IN THE COMMENTS.

BUT TO THE EXTENT IT WOULD BE USEFUL IN A CASE, THAT'S SOMETHING THAT WOULD BE MORE APPROPRIATE FOR NONPFS SETTLEMENT NEGOTIATIONS AND

WOULD EMBARK ON PER ADMITTED  
CASE CANNON, IT'S SOMETHING THAT  
THE STATUTE DOES NOT CONSIDER,  
IT'S A VOID IN THE STATUTE  
NEITHER PROVISION OR A STATUTE  
IT'S NOT THERE AND THE COURT  
SHOULD NOT VARY FROM THE  
SUBSTANTIVE STATUTES AND IF  
THERE ARE NO FURTHER QUESTIONS,  
YOUR HONOR, YOUR HONORS.

>> THANK YOU.

>> GOOD MORNING, CHIEF JUSTICE,  
MAY IT PLEASE THE COURT, I  
SUPPOSE I HAVE 15 MINUTES TO TRY  
TO EXPLAIN WHY WE SHOULD FIX A  
BROKEN SYSTEM AND I WILL  
CERTAINLY DO MY PART.

AS THE CHAIR OF THE CIVIL  
PROCEDURE RULES COMMITTEE, WE --  
WE CONSIDER A LOT OF ARE  
PROPOSALS INTERNALLY AND THIS  
ONE CAME TO US FROM THIS COURT.  
WE DID CONSIDER IT AND I WANT TO  
POINT OUT THIS WAS IN OUR  
COMMENT, THIS IS AN IMPORTANT  
FACT FOR THIS COURT TO CONSIDER.  
THIS WAS A FAIRLY UNANIMOUS  
COMMITTEE VOTE ON THE COMMENT  
THAT THE CIVIL COURTS THAT THE  
COMMITTEE PROVIDED.

THERE WERE VERY SPIRITED DEBATES  
BECAUSE THE RULES DO AFFECT  
PRACTICE AREA, PRACTITIONERS AND  
LITIGANTS DIFFERENTLY.

THERE'S NO QUESTION THAT RULE  
4.22 APPLIED IN CURRENT FORM OR  
AS THE PROPOSAL SEEKS TO APPLY  
IT WILL HAVE RESULT OUTCOME  
DIFFERENCES FOR DIFFERENT  
GROUPS.

NOT WITHSTANDING OUR COMMITTEE,  
VERY BROAD DIVERSE GROUP OF  
LAWYERS AND JUDGES WERE ON BOARD  
WITH THE COMMENT WE PROVIDED.  
THAT COMMENT STRIVE TODAY REALLY  
DO ONE THING, TRYING TO MAKE  
THIS RULE, IT IS A BROKEN RULE,  
IT'S AWKWARD RULE, THERE'S  
ISSUES, THERE'S ALWAYS GOING TO  
BE GAMESMANSHIP.

WE CAN'T WRITE A RULE.

WE TRIED TO ELIMINATE ALL GAMES.

WE TRIED TO WRITE THE BEST RULE

WE CAN.

THE COMMENTS THAT WE PROVIDED REALLY STRIVE TO GIVE THE COURT SOME GUIDANCE AS TO HOW BEST TO ACCOMPLISH THE PURPOSE OF THE STATUTE, 768.79 AND THAT'S FOR SETTLEMENTS EARLY, SETTLEMENTS OF CASES THAT SHOULD SET THAT WILL ARE CLOGGING THE DOCKETS OF OUR COURTS THAT ARE OVERCROWDED.

THERE WAS A COMMENT AND SOME DISCUSSION A FEW MOMENTS AGO ABOUT YOU CAN ALWAYS STEP OUTSIDE OF THIS PROCEDURE AND JUST SETTLE THE CASE.

THAT'S TRUE BUT THIS IS A CARROT AND STICK FUNCTION THAT THAT CONVERSATION -- THE OTHER CONVERSATION, A NORMAL SETTLEMENT CONVERSATION DOESN'T HAVE.

>> BUT -- ON THE ATTORNEYS' FEES ISSUE THAT JUSTICE LAWSON AND I WERE TALKING ABOUT EARLIER, HOW DOES THAT SETTLE CASES? IF ANYTHING, I WOULD THINK IT WOULD STOP IT.

I GUESS IN A PERSONAL INJURY SETTING, YOU HAVE YOUR STANDARD CONTRACT BEFORE FILING SUIT, 33 AND ONE-THIRD PERCENT FEE?

>> THAT'S WHAT I UNDERSTAND.

>> ONE SUIT IS 40%?

>> I THINK THEY'RE ALL INDIVIDUAL.

I DON'T DO PERSONAL PLAINTIFFS INJURY --

>> THAT SEEMS TO BE THE CASE JUST FOR PURPOSE OF THE QUESTION PLUS COSTS AFTER THAT AND THAT'S OBVIOUSLY NOT DETERMINABLE.

SO CLIENT -- YOU SETTLE THE CASE FOR A HUNDRED GRAND, THE CLIENT, THE CASE IS IN SUIT, LAWYERS ENTITLED TO 40% AND THE CLIENTS GET 60%, \$60,000, LESS COSTS.

THAT'S ALREADY KIND OF BUILT IN. WHEN YOU START OTHER CASES WHERE WE GO BY HOURLY FEES AND THINGS LIKE THAT, THAT'S WHEN IT GETS REALLY COMPLICATED AND THOSE CASES ARE USUALLY DETERMINED COLLATERALLY LATER IN A SEPARATE HEARING WHERE A JUDGE NEEDS TO MAKE FACTUAL FINDINGS AS TO THE

FEES ARE REASONABLE AND NECESSARY AND THAT KIND OF THING.

HOW DOES ADDING THAT IN THERE -- WHY WOULD A LAWYER SETTLE A CASE WHEN HIS FEE MAY NOT BE ANYWHERE NEAR WHAT IT MAY BE IF HE HAD A HEARING LATER ON?

>> I UNDERSTAND THE QUESTION AND LET ME SEE IF I CAN ANSWER IT THIS WAY.

IN THE CONTEXT OF THOSE CONVERSATIONS I WOULD JUST SAY IN PRACTICE THERE'S TYPICALLY A CONVERSATION THAT GOES ON IN ADDITION TO JUST GENERAL EXPERIENCE.

IT'S A -- YOU'RE IN THE PRETRIAL MOTION STAGE, THE CASE HAS BEEN LITIGATED FOR FOUR MONTHS. MOST LAWYER THAT IS PRACTICE IN THE AREA SHOULD HAVE A GENERAL SENSE HOW MUCH TIME HAS BEEN SPENT ON THE CASE AND HOW MUCH FEES ARE REASONABLE AND I WOULD JUST SAY FROM PERSONAL EXPERIENCE, THAT CONVERSATION TYPICALLY HAPPENS IN THE NORMAL SETTLEMENT CONVERSATION CONTEXT. THE RULE WHETHER IT'S A FEES INCLUDED PROPOSAL OR A NO-FEES PROPOSAL AS THE CIVIL RULES COMMITTEE SUGGESTS SHOULD REMAIN IN THE RULE COULD ACCOUNT FOR THAT.

THE OFFER OR CAN MAKE IT A NO FEES PROPOSAL AND THEN THEY LEAVE THE OFFERING TO TAKE IN THAT OFFER AND SPLITTING UP WHATEVER THAT CONTINGENCY FEE AMOUNT WOULD BE WITH THE LAWYER. THEY CAN RESOLVE THAT LATER OR THEY CAN MAKE IT A FEE AWARD AND EXPLAIN.

I'M OFFERING PLAINTIFF, YOUR CLAIM IS WORTH 10,000, I'M GOING TO OFFER 15,000 OR 10,000 AND THAT'S GOING TO INCLUDE FEES.

I DON'T KNOW THAT THERE'S A REQUIREMENT IN THE STATUTE THAT A FREE PROPOSAL THAT INCLUDES AN OFFER FOR FEES IS ONLY

PERMISSIBLE TO FEES.

THEY CAN MAKE THAT PROPOSAL AND

THEY CAN WORK THAT OUT IN THE PROPOSAL.

THE OFFER TO THE INDIVIDUAL LITIGANT IS GOING TO GET THE 10,000 AND THE PROPOSAL IS WE WILL GIVE THE LAWYERS 50,000. IT'S A 60,000-DOLLAR OFFER OF JUDGMENT SPECIFICALLY OUTLINING WHO GETS WHAT AMOUNT.

SO I THINK THEY CAN WORK AROUND THOSE ISSUES AND THAT GETS TO THE ULTIMATE GOAL OF RESOLVING THE CASES REALLY AND THE CASES THAT SHOULD SETTLE.

JUSTICE LAWSON, YOU WERE ASKING QUESTIONS ABOUT THE JOINT PROPOSAL.

THAT'S AN INTERESTING -- THAT'S AN INTERESTING RULE BECAUSE THIS IS BRAND-NEW RULE.

THE SUPREME COURT'S PROPOSAL TO CREATE C5 IS A BRAND-NEW RULE AND OUR COMMITTEE STUDIED THE GORKA AND WE'VE -- WE'VE SORT OF INTERPRETED THE SUPREME COURT'S PROPOSAL THAT WE ARE HERE TO TALK ABOUT AS BEING ESSENTIALLY WHAT THE DESCENT WAS PROPOSING IN GORKA, JEFF JUSTICE.

I THINK JUSTICE LAWSON THERE'S A WAY TO DO IT AND THAT'S WHAT WE PROPOSE, WE PROPOSE, TAKE THE CONSTRUCT AND MAKE IT APPLY TO ONLY PARTICULAR TYPES OF CASES WHERE IT'S WORKABLE, CURRENT C4 IN THE RULE APPLIES TO CASES WHERE THERE'S UNDIFFERENTIATED DAMAGES, CASES WHERE THOSE PARTIES ARE GOING TO BE ALIGNED AND WHAT WE'VE PROPOSED CONSISTENT WITH THE GORKA DESCENT APPROACH OR, YOU KNOW, TO MAKE THE OFFER AVAILABLE TO THOSE TYPES OF CLAIMS, ALLOW AN OFFER OR TO MAKE IT CONDITION ON MUTUAL ACCEPTANCE AND IF -- IF ONE PARTY ACCEPTS AND THE OTHERS DON'T, THAT ONE PARTY IS EXCUSED, WILL NOT BE SUBJECT TO THE SANCTIONS AVAILABLE UNDER 768.79.

THAT WAS THE COMMITTEE'S BEST EFFORT IN THAT AMOUNT OF TIME TO COME UP WITH A WORKABLE RULE AND

AVOID LIKE WE SAID, THEY ARE GOING TO BE GAMES, LITIGANTS WILL LIKELY COME UP WITH MORE CREATIVE WAYS TO DO THAT.

>> WELL, AT THE END OF THE DAY WHOEVER LOSES IS GOING TO LITIGATE.

I MEAN, THAT'S JUST THE REALITY OF WHO WE ARE, RIGHT, IF YOU LOSE ONE OF THOSE RULE STATUTORY ISSUES, THEN WHOEVER LOSES IS GOING TO LITIGATE.

I THINK THE PURPOSE AT LEAST AS FAR AS I'M CONCERNED OF HAVING THESE RULES PROPOSED IS TO ELIMINATE THE MAGNITUDE AND THE BODY OF LAW OUT THERE THAT COULD POSSIBLY BE LITIGATED AND TO TRY TO ELIMINATE SOME OF THAT.

I AGREE WITH JUSTICE VARGAS THAT THIS IS BROKE.

THE LAW IN THIS AREA IT'S A MESS, IT'S AN ABSOLUTE MESS IN MY PERSPECTIVE.

I FOR ONE WOULD LIKE TO SEE CHANGE MADE TO MAKE ILL WORKABLE AND ENCOURAGE SETTLEMENTS. SO THAT'S THE PURPOSE AT LEAST FROM MY PERSPECTIVE.

>> RIGHT, I THINK THAT'S A FAIR POINT JUSTICE PAULSON, I THINK YOU'RE RIGHT.

WHOEVER LOSES ON THE PROPOSAL FOR SETTLEMENT PROCESS IS GOING TO LITIGATE IT BECAUSE WHAT'S AT STAKE, WHETHER FOR THE FEES OR POTENTIAL MALPRACTICE CLAIMS.

>> CAN I ASK YOU, I'M SORRY?

>> YES.

AND I DON'T KNOW IF YOU WERE JUST TRYING TO BE DIPLOMATIC IN YOUR FILING BUT IS IT YOUR POSITION THAT ON THIS ISSUE, THE JOINT PROPOSAL THAT THE PROPOSED RULE ACTUAL CONFLICTS WITH OUR COURT'S SUBSTANTIVE INTERPRETATION OF THE LAW TO THE EXTENT THAT IT SEEMS LIKE THE MAJORITY'S POSITION IN GORKA AND THEY KEPT BOUNCING BACK AND FORTH BETWEEN THE STATUTE AND THE RULE BUT ONE WAY OF READING GORKA IS TO SAY THAT THIS STATUTE ITSELF REQUIRES, YOU

KNOW, OFFERS THAT CAN BE ACCEPTED INDIVIDUALLY AND I COULDN'T -- IT SEEMED LIKE YOU CAME CLOSE TO WHAT YOU ARE SAYING THAT WHAT WE PROPOSED WOULD CONFLICT BUT I JUST WANTED TO SEE IF YOU WANT TODAY CLARIFY THAT?

>> YES, WE REMAINED DIPLOMATIC BUT THE WAY I UNDERSTAND THE COMMENT ON THIS ISSUE IS THIS COURT'S PROPOSAL AND SEEMS TO BE GORKA DECENT, THE RULE IN GORKA. GORKA SAID YOU CAN'T MAKE AN OFFER OF JUDGMENT OF PROPOSAL BECAUSE THERE'S NO OPPORTUNITIES TO INDEPENDENTLY EVALUATE FOR EACH OFFEREE WHAT YOU'RE ACCEPTING.

>> AND YOU VIEW THAT AS A INTERPRETATION OF THE STATUTE. IF GORKA IS BEING LIMITED TO INTERPRET THE RULE BUT THAT'S A SEPARATE QUESTION?

>> OUR COMMITTEE DIDN'T SEE THIS AS AN ISSUE OUTSIDE OF THE PURVIEW OF THE COURT'S DUE. WE DIDN'T TAKE A POSITION WHETHER GORKA GOT IT RIGHT OR WRONG, GORKA MAJORITY CONTROLS. SO IF YOU --

>> I THINK THE QUESTION IS -- ISN'T GORKA INTERPRETING NOT JUST THE RULE BUT ALSO THE STATUTE?

>> ABSOLUTELY, I'M SORRY. IT IS INTERPRETING THE STATUTE.

>> AND TO THE EXTENT THAT IT DID, THEN, ARGUABLY WE CAN'T USE A RULE TO OVERRIDE A SUBSTANTIVE INTERPRETATION OF THE STATUTE?

>> THAT WOULD BE CORRECT. WE DIDN'T TAKE A POSITION ON THAT, THE COMMITTEE, SUBCOMMITTEES, WE DIDN'T EVALUATE AT THAT LEVEL. WE DO THINK THAT THIS COURT CONSISTENTLY GORKA COULD MAKE THE RULE.

WE JUST THINK THAT ADOPTING THE CURRENT RULE WOULD --

>> LET ME ASK YOU THIS, COUNSEL. GIVEN THE WAY ALL THESE THINGS INTERACT, ALL OF THE

COMPLEXITIES, THE QUESTIONS ABOUT WHAT'S SUBSTANTIVE AND WHAT'S PROCEDURAL, COULDN'T A CASE BE MADE FOR IT BEING TIME FOR THE LEGISLATURE TO LOOK AT THIS AND ADDRESS THESE QUESTIONS AND TRY TO -- TRY TO COME UP WITH CHANGES THAT WOULD ADDRESS THE PROBLEMS THAT HAVE ARISEN AND THEN THEY CAN, YOU KNOW, SUBSTANCE THEIR ARENA AND THEY CAN MAKE THE SUBSTANTIVE CHOICES AND THEY CAN LISTEN TO LOOM THAT COME IN WITH THEIR DIFFERENT PERSPECTIVES.

SO WHAT -- WHAT DO YOU SAY ABOUT THAT AS BEING REALLY A MORE EFFECTIVE WAY TO SOLVE WHATEVER PROBLEMS, SOME OF WHICH ARE SUBSTANTIVE THAT EXIST IN THIS ARENA.

>> IF WE HAD A MAGIC BUTTON, WE COULD ENSURE THE LEGISLATURE, ABSOLUTELY, CHIEF JUSTICE. WE ARE WORKING WITH THE RULES THAT WE HAVE.

I MEAN, SO I'M ALSO INVOLVED WITH THE COVID-19 TASK FORCE. WE KNOW THERE'S THE WORK GROUPS ON JUDICIAL RESOLUTION, IMPROVED RESOLUTION OF CASES. OUR COURTS ARE IN A PROBLEM RIGHT NOW.

THEY ARE SUFFERING. THE TRIAL COURTS ARE BACKLOGGED NOW MORE THAN THEY WERE TWO YEARS AGO BECAUSE OF COVID.

IF WE WAIT TILL --

>> MAYBE THAT WOULD DO BETTER. MAYBE SOMETHING THAT WE HAVEN'T THOUGHT OF, ANY OF US.

>> I THINK THEY SHOULD.

CERTAINLY THAT'S AN APPROPRIATE VEHICLE BUT FOR RIGHT NOW WE AS THE RULES COMMITTEE BELIEVE WE SHOULD WORK WITH THE RULES THAT WE HAVE AND IN RESPONSE TO THE PROPOSAL, WE JUST PROVIDED OUR RESPONSE AND COMMENTS TO TRY TO ALIGN THEM WITH THAT PURPOSE, WITH THAT FUNCTION.

AS A PRACTICAL MATTER AND THIS IS WHY I RAISED THE COMMITTEE'S COMPOSITION IN THE FRONT END, WE

HAVE LAWYERS AND JUDGES FROM ALL WALKS, FROM ALL AREAS OF PRACTICE AND I THINK THE CONSENSUS IS YOU NEED THE VEHICLE, YOU NEED PROPOSALS FOR SETTLEMENT.

THEY CAN BE EFFECTIVE IF THEY CAN BE USED IN A MATTER THAT ARE GOING TO BE USED.

AS A PRACTICAL MATTER IF YOU DON'T INCLUDE NON-MONETARY TERMS WHICH COMMITTEE FELT STRONGLY SHOULD REMAIN IN THE RULE, AS A PRACTICAL MATTER A LOT OF DEFENDANTS ARE NOT GOING TO USE THEM.

>> YOU MENTIONED THE LIENS RIGHT.

IF THE PLAINTIFF HAS GOT A JUDGMENT AND THE JUDGMENT WAS SOB SATISFIED, I'M TALKING ABOUT -- SET ASIDE THE RULE FOR A MINUTE, THE SETTLEMENT ISSUE, IF THE JUDGMENT WAS THERE AND THE CHECK IS TO BE CUT IN SATISFACTION OF THE JUDGMENT, HOW DOES THE CHECK GET CUT, WHO IS IT MADE OUT TO, IS IT MADE TO THE PLAINTIFF ONLY OR IS IT MADE TO THE PLAINTIFF, PLAINTIFF'S LAWYER, ANY PROCEEDING LAW FIRM AND ALL LIEN HOLDERS ALL INCLUDED IN THE NAME OF THE CHECK?

>> THAT'S A GREAT QUESTION. UNFORTUNATELY I HAVEN'T SEEN A LOT OF CHECKS CUT IN LITIGATION. AS I UNDERSTAND IT JUSTICE WHEN THERE'S A CHECK CUT FOR A CASE THAT HAS MEDICAL NEEDS AND ISSUES OF THAT SORT, THERE'S STILL A RECOURSE AGAINST THE PAYOR OF THE CHECK IF THERE ARE UNPAID LIENS AND THOSE ARE CONCERNS THAT WERE RAISED BY THE COMMITTEE, THE SUBCOMMITTEE AND THOSE NONMONETARY CONDITIONS.

>> IT'S MATTER OF SUBSTANTIVE LAW?

>> THE EFFECT THAT YOU WOULD NEED THE NONMONETARY CONDITION.

>> WHAT DOES THE CHECK SAY AND WHEN DOES THE JUDGMENT GET SATISFIED, ALL THAT'S A MATTER

OF SUBSTANTIVE LAW NOT  
PROCEDURE?

>> WELL, I THINK THE SAME COULD  
BE SAID FOR RULES ABOUT THE  
PROCESS, PROCEDURAL RULES ARE  
GOING TO NECESSARILY --

>> WHETHER A JUDGMENT IS  
SATISFIED BY A CHECK THAT'S CUT  
IN A CERTAIN WAY AND WHO IS ON  
IT, I THINK THE LIENS AND HOW  
THAT GETS SATISFIED AND WHETHER  
OR NOT HOW YOU ACTUALLY PAY  
THAT, WHETHER IT'D BE BY  
SETTLEMENT OR IN SATISFACTION OF  
A JUDGMENT, HOW THAT GETS DONE  
SEEMS TO BE A MATTER OF  
SUBSTANTIVE LAW SO THE ISSUE ON  
NONMONETARY ITEMS, THE RELEASE  
AND ALL THOSE DIFFERENT THINGS  
SEEMS MORE SUBSTANTIVE THAN IT  
DOES PROCEDURALLY.

>> I SEE I HAVE ABOUT 8 MINUTES  
LEFT --

>> YOU CAN KEEP GOING.

>> THANK YOU, CHIEF JUSTICE.

768.79 DOES NOT EXPRESSLY,  
DOESN'T MENTION NONMONETARY  
TERMS.

IT'S SILENT AS NONMONETARY  
TERMS.

STARTING WITH THAT, THERE'S NO  
CONFLICT BECAUSE IT'S SILENT.

THE STATUTE IS SILENT ON THAT  
FRONT.

AND JUST LIKE IN THE WHITE  
VERSUS STAKE AND AISLE CASE, WE  
WOULD SUGGEST THAT'S AN  
APPROPRIATE APPROACH HERE.

LOOK AT THE PURPOSE AND FUNCTION  
OF THE RULE.

THESE PROPOSALS FOR SETTLEMENT  
WHETHER IT'S DEALING WITH THE  
LIEN ISSUE OR NONMONETARY TERMS  
OR RELEASE, THESE ARE THE SORTS  
OF GUARANTY THAT IS THE  
DEFENDANTS OFFERS IN PRACTICE.  
IN REALITY LITIGATING EVERY DAY  
ARE GOING TO WANT TO GET IN MANY  
CASES.

SO IF NOT HAVING THAT ABILITY  
WHICH SHOULDN'T -- IT DOESN'T  
COST THE PLAINTIFF ANY MORE.

WE AGREE THERE'S A WHOLE LOT OF  
CASES THAT TALK ABOUT DON'T ASK

FOR A GENERAL RELEASE THAT --  
THAT ASKED THE OFFEREE TO GIVE  
UP SOMETHING OUTSIDE OF THE  
LITIGATION.

THERE'S A TON OF CASES THAT TALK  
ABOUT.

WHAT WE ARE TALKING ABOUT IS  
RESOLVING WHAT'S AT STAKE HERE,  
WHETHER IT'S THE MEDICAL LIEN  
ISSUE AND RELEASE TO THE CLAIMS,  
THAT'S IMPORTANT AS A PRACTICAL  
MATTER.

THAT WOULD BE CONSISTENT WITH  
THE FUNCTION AND PURPOSE OF THE  
STATUTE AND THE COMMITTEE FELT  
STRONGLY WOULD MAKE THE  
PROPOSALS FOR SETTLEMENT --

>> ONE BIG ONE IS  
CONFIDENTIALITY AGREEMENTS THAT  
A LOT OF PEOPLE REQUEST.  
WOULD THAT BE CONSIDERED  
SUBSTANTIVE?

>> I MEAN, THERE COULD BE  
SUBSTANTIVE COMPONENTS TO WHAT  
THE CONFIDENTIALITY AGREEMENT  
COULD OR COULD NOT PERMIT BUT  
THE INCLUSION OF IT IS A  
NONMONETARY TERM THE COMMITTEE  
FEELS THAT IT IS NOT SUBSTANTIVE  
BECAUSE IT'S NOT CREATING A  
RIGHT OR A RULE THAT'S  
INCONSISTENT WITH THE STATUTE,  
THE STATUTE IS SIGH LEAPT ON IT.  
IT'S A TOOL TO GET TO THAT END  
GAME WHICH IS GET THE CASES  
SETTLED.

WITH THAT, CHIEF JUSTICE, I  
APPRECIATE THE TIME.

>> THANK YOU, COUNSEL.  
THANK BOTH OF YOU FOR YOUR  
ARGUMENTS AND COMMENTS IN THIS  
CASE.