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96-1179
STATE FARM LLOYDS V. MALDONADO

DODSON: The issue in this case is in many ways very straight forward. Can litigants in an underlying liability claim fabricate the damage findings such that they are going to bind an insurer after they've resolved their own dispute? And in the context of this case are they going to be allowed to do it so as to enrich an admitted tort feasor to the tune of a couple of million dollars? I submit that the answer to both these questions ought to be no, and that this court has already held that in various decisions that have led up to this particular appeal.

I will only touch briefly on the general outline of the facts in this case. After Ms. Maldonado had left the employment of Mr. Robert, he slandered her, he defamed her, he called her a prostitute, he called her a thief, he got sued. State Farm provided a defense. As the discovery progressed, Mr. Robert's credibility evaporated. The plaintiff's lawyer filed a offer of settlement, a written one which had an extremely short fuse and which was in excess of the policy limits, which State Farm provided.

At the time that the offer of settlement expired, the deal was cut. This deal first of all resolved everything that was in dispute as between Ms. Maldonado and Mr. Robert; provided that he would pay $1 million; that they would go down and let the judge enter a judgment; and after that judgment they would see how they could enrich themselves additionally at the expense of State Farm. Ms. Maldonado was to receive first the $1 million and splitting any money thereafter.

GONZALEZ: Wasn't the settlement for $1.3 million?

DODSON: The offer of settlement was for $1.3 million. Under the terms of the agreement which was worked out between Mr. Robert and Ms. Maldonado, he paid $1 million.

GONZALEZ: He gave her a check. Has that been cashed?

DODSON: Yes, that has been paid. And that is one of plaintiff's exhibits in the record. Basically what happened in the course of this agreement is that the same liability that Mr. Robert would have had had the settlement proposal been accepted was all that he was ever liable to pay, and it was very clear that there was never an offer to settle within the policy limits, the $300,000 limits that State Farm had.

At the time of trial, if you call it that, Mr. Robert was not present. Mr. Leon, who had been appointed to represent him and paid for by State Farm, appeared and asked no questions, offered no witnesses, made no opening statement. And the reason that he did it was quite clear and he said it on the record: "He did not want to mess up the agreement that was _____ his client's liability," which he feared could have been even greater than the $1 million that was actually

out of his pocket.

ENOCH: You said there was no offer within the policy limits. The issue here is where the insured says: "I'll pay some of this, and I want the insurance company to pay its policy limits." Now, why is that not an offer to settle within the limits of the policy?

DODSON: On its literal face, it is not. The settlement demand exceeds the policy limits. The court has in Garcia recognized that that should be an open question as to whether there ever could be any liability for an insurer in this type of situation.

ENOCH: Would it be your view that unless the total offer is within the policy limit, an insurance company should have no duty to reasonably settle a case where simply its payment of the policy limits would have resolved the dispute?

DODSON: Let me tell you, that's not a question that this court can decide in this case. There are some questions regarding that situation. But the only holding that the court can make, I think, that you can reach, is what's going to be the role of proximate causation, and if such cause of action exist? And I think it has to be very clear that unless an insurer had that duty and was negligent in failing to make such a settlement, and that negligence caused damages to the insured, there couldn't be any recovery. So the question is on the proximate causation issue, what would those damages have to be?

I think it's very clear that what you would have to have is a cost to the insured which exceeded that lowest settlement offer, that required him to pay more than the least offer that would have come out of his pocket. In this case if there is such a cause of action, there is no proximate causation because the least amount of settlement that was ever proposed would require Mr. Robert to pay $1 million, and that's all he paid. The other judgment against him was meaningless. By the time that trial had been held, by the time that judgment entered, he had completely insulated himself, he had completely insulated his estate from any additional liability beyond $1 million that had been paid.

There is a suggestion in plaintiff's reply brief to the effect that well Ms. Maldonado could make a claim against his estate. If the implication is that, the estate could somehow be liable to pay such a demand, that is absolutely contradicted by the record, because both the original and the amended agreements between Mr. Robert and Ms. Maldonado provided that all the benefits of this agreement would inure to the heirs and executors of his estate. Not only was there no possibility of Mr. Robert ever incurring any additional damages, there's no possibility of his estate having any additional damages.

SPECTOR: I'm still not clear at the time of the settlement offer did State Farm understand that Roberts would pay $1 million, and they were being asked to furnish the other $300,000?

DODSON: The record never indicates that State Farm was made aware of Robert's willingness to do that. It's certainly not explicit in there. I was re-reading Mr. Leon's testimony last night, in it appears that it was only the day before the settlement offer was to expire, Nov. 14, that there was a discussion between Mr. Leon, Mr. Stone who was Mr. Robert's personal counsel, and Mr. Robert. And at that point they began to express some willingness among themselves for him to fund the million dollars. I do not recall anywhere in the record where that willingness was communicated to State Farm.

When this case went to trial, there was only one damage finding that was made other than attorney's fees. Nothing was submitted with respect to the contract issue. With respect to the issue on negligence, the jury only found $300,000, and that was in response to negligence issue.

The TC, and this was affirmed by the CA, essentially held that the underlying judgment was sufficient to establish without a jury finding the contractual damages and was further sufficient as a matter of law to establish the Stowers, the negligence damages. This falls squarely within the face and contrary to this court's pronouncements in the Gandy decision.

GONZALEZ: How about the argument that you failed to preserve the Gandy point?

DODSON: If Gandy only stands for the limited proposition that certain types of assignments will not be permitted, there was no Gandy point to preserve. If that was all that Gandy stood for, it would become an interesting side note only of historical interest and something to be used only against lawyers who are not clever enough to have read it, and do what was done here, and not have an assignment. If on the other hand, the court meant what it said when it said, "In the absence in a fully adversarial trial, the damages cannot be proven up simply by reference to the proceedings in the court below and the judgment which is entered, then the Gandy issue is completely preserved." These are the reasons why Gandy disallowed this are the same issues that was pointed out by this court in the Elbor(?) decision when the Mary Carter agreements were prohibited. And it's worth looking at, those same concerns that this court expressed because they are completely applicable here.

The court disfavored partial settlement arrangements that promote rather than discourage further litigation. Why would Ms. Maldonado or Mr. Robert ever shy away from further litigation if they had hopes of collecting millions and millions of dollars? Would it skew the trial process? Well take a look at two prime movers in this. We've already talked some about the behavior of Mr. Robert who first said, "Well she's not a thief," and then when it's convenient after he sued he says: "She is a thief." And then after it is convenient for him to say otherwise in the current litigation he says: "She's not a thief, I never thought she was."

Consider also the posture of another witness, Steven Boyd, attorney for Mr. Robert. He sets up a situation where he has a time demand, its only written a short time before the

offer is to expire. At the same time he is sending letters claiming under his own signature that these facts show actual malice on the part of Mr. Robert. And then they do the deal. And when he comes to testify not only is he there as a fact witness saying what a nice guy Mr. Robert is and he was just sick and confused. He's also there as a expert testimony providing testimony regarding coverage in a case that he's got an interest in. Skew the trial process? I think that's exactly what we have here.

PHILLIPS: You admitted earlier though Mr. Leon testified that had he actively participated or found a way for his client to participate, the judgment could have been worse? And if there is going to be Gandy leaves open situation where you can have a Stowers type of action could that never be a legitimate trial strategy? Must you always go for the adversarial process even if it's going to result in a worse eventual outcome for your client and for the carrier?

DODSON: That possibility of a worse eventual outcome for the client, which is the only person that Mr. Leon can represent, was never present here when they went to trial. By the time they went to trial, they had in place an agreement that had capped his liability. It was never going to get any worse for him. Life could only get better. So in a situation where you already have this agreement in place, I don't think you never have a fully adversary trial.

Mr. Leon talked at one point before this deal was cut about the possibility of just contesting damages. But that's not what happened when they got to trial. He did not make an opening statement. He did not put on witnesses. He did not cross-examine. We have a copy of the transcript of the testimony from the underlying trial and basically when you get down to it, the CPA who was brought in says: "Well in my opinion damages could be as much as $2 million." I submit, you don't have to be a very good trial lawyer to be able to figure at some shot at cross-examining that sort of testimony. But the reason that Roland didn't, and it's clear from his trial testimony in this case, is not because he thought he was going to make it worse for his client, he knew he couldn't make it worse for his client. His client had been capped in his liability. He didn't want to mess up this good settlement that they had.

ENOCH: What is the difference between the good settlement he had and the cap to his liability?

DODSON: That's exactly...he had capped his liability.

ENOCH: I understood you to say that Mr. Leon said, "He didn't ask the questions because he was afraid of messing up the agreement," and you said he couldn't have messed up the agreement because Mr. Robert already had a cap?

DODSON: That's right. He couldn't have. But that's what he testified his concern was.

ENOCH: What I understood from the briefing was, Mr. Leon said, "if I had asked the questions and did anything, then his cap might have gone away."

DODSON: He expressed that concern. That was what he was concerned about.

ENOCH: So wouldn't it have been a legitimate trial strategy to protect the insured's position to keep the cap in force?

DODSON: He protected his client's interest brilliantly. I have no complaint about the limited issue of did he take care of his client? That's not a problem here. The problem is when you try to take that protection for his client, that shield and turn it into a sword, or a club to beat State Farm over the head with. Because let's face it if we go back what evidence do they have of damages? No jury findings that have been followed. No jury findings with respect to the contract. They just aren't there. Under these situations, the court has to be more concerned with simply the matter of being a forum for resolving disputes between two litigants.

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RESPONDENT

CONSTANT: The briefing here by the petitioner in its application for writ is based upon fiction. That is the factual basis in the statement of facts upon which all the briefing it made, is entirely a fabrication. There are 4 fabrications I want to talk to the court about because I think they are essential to deciding the case. And the first fabrication is, State Farm assumes in all its briefing without citation to any evidence, that State Farm was not in charge of the defense of this case when it was tried on Nov. 25. At some place, sometime they lost control and they weren't in charge. And the underlying fabrication is that Mr. Robert took over, he was in charge, he was running the defense. That's all absolutely false. First of all, State Farm had the duty to take the defense. Second of all, State Farm hired Mr. Leon, Thornton & Summers to defend the case. State Farm then wrote to Mr. Robert, the insured, and said: "This is your lawyer. We've chosen him for you and you do exactly what he says and you give him your full cooperation."

PHILLIPS: Are you saying the Tilley doctrine is a fiction?

CONSTANT: No. What I am saying is that, in this case, State Farm was always in charge of the defense and Mr. Robert didn't take over and didn't do anything about it.

PHILLIPS: But we're talking about who Mr. Leon, the hired attorney, owed his duty to. He may have been making decisions, but it's who's interest he was working for. And I personally find it somewhat _____...I resent you coming in and saying the word "fabrication", and I'm waiting for you to say a lie in the record, and then it appears what we're doing is just having an argument about the appropriate legal standard or about who's calling the shots between an attorney and his client, which doesn't seem to me to rise to the level of a rather strong _____.

CONSTANT: I apologize to the court if I have acted badly by saying it was a fabrication. But...

PHILLIPS: It's a misunderstanding.

CONSTANT: It was a misunderstanding. That is, there is no testimony in this case that Mr. Robert at any time gave the lawyer any instructions whatsoever, or that he took any action whatsoever that interfered with State Farm's control of the defense. And the reason I think that is important is because State Farm's briefing here is that the entire briefing is based on the idea that Mr. Robert did something wrong, and that in the trial of the case there wasn't an actual trial, but in fact there was some sort of agreement that's not stated anywhere, that there's no evidence directly of, but that there's just some sort of agreement here and that was done.

PHILLIPS: Is an insurance company bound by the attorney it hires to represent one of its insureds by any of the conduct that that attorney may have taken?

CONSTANT: They should certainly be at least not allowed to attack the conduct, if the conduct we're talking about is the quality of the defense of the lawsuit. Now if the quality of the defense of the lawsuit, which is what they are saying is: he should have examined, and he should have cross-examined and offered testimony if there is something wrong with the way it was done, if the quality is poor, if the quality is bad, and State Farm is saying, "Because he didn't do it, therefore, we're off the hook and we have no contractual obligation at all." Saying, "There they are bound not to come in and complain the defense which we've provided, the lawyer which we hired did such a bad job, that there really wasn't an adversarial trial, there wasn't any examination of the witness...

BAKER: Isn't that issue though in the context of the policy whether there was an actual trial or not as opposed to whether Mr. Leon's representation was negligent or not; would you agree those are two different things?

CONSTANT: Yes, I do agree that those are two different things.

BAKER: And he can be absolutely nonnegligent and do exactly what he did. But the question is whether it was an actual trial or a policy right to provide coverage?

CONSTANT: What I am suggesting to the court is that if in fact, although I've cited several cases that indicate what happened was a actual trial because there wasn't any agreement about the outcome; either liability or damages, but what I'm suggesting to the court is that if this isn't a natural trial, then the responsibility for that is with State Farm the insurance company and not with its insured.

BAKER: Because of the control argument you're making?

CONSTANT: Yes, because they are controlled, because it's their duty to control and run it, because they did in fact run it, because all the discussions about strategy were with State Farm, none

of it was with Robert, and Robert never made any instruction whatsoever.

HANKINSON: Who is the attorney's client, the insurance company or the insured?

CONSTANT: The attorney's client it appears to me is both in this situation: that is for the trial of the case, he certainly owes full loyalty to Mr. Leon.

HANKINSON: What happens if the insurance company and the insured's interest become adverse during the course of the representation, to whom does the attorney owe the duty?

CONSTANT: To the insured. And if in fact State Farm came to the conclusion as they said in their letter on Nov. 22, that in fact some deal has been cooked up and there is going to be an agreed judgment, State Farm there has the opportunity if they desire to do so to replace that counsel. If they think there's not going to be a real fair trial, they're not really going to get to prove it up, it seems to me they have the right to replace counsel right then and substitute other counsel who will see to it that there is an actual trial. Instead they sat back and watched this trial occur and then afterwards made no complaint about it, didn't file a motion for new trial, didn't appeal it, didn't make an effort to stop that from occurring, they were in control, and then they say: "Well as a result of that, we don't have any contractual liability because there wasn't an actual trial."

SPECTOR: Going back to my question. Is there anything in the record that State Farm knew they were being asked for the policy limits as part of the settlement offer? In other words, that Robert would pay $1 million and State Farm was being asked to settle for $300,000?

CONSTANT: The testimony is undisputed that on Oct. 2, the offer was made to settle for $1.3 million; one witness said it was $300,000 from State Farm and $1 million from the insured. Now, when the insured was actually told on the 14th, 1) you're in serious trouble this case has more value than $50,000 we told you before; and in fact, it's so bad you should pay $1 million. The first time he was told that was on Nov. 14, the day before the deadline. And he was told that by Mr. Leon. There isn't any testimony after that directly that Mr. Leon said specifically to the insurance company: "He has agreed to do that." And no one asked about it because...I think it was a nonissue in the case. It was understood that they were aware that that's why they were going through the process on the 15th of making a decision whether or not to pay the $300,000. That's why their claim committee on the 15th made the decision $300,000 should be paid. There wouldn't be any reason to do that but for the fact that they understood that the situation was if they paid it the case would be settled. And there is testimony of Mr. Leon's conversation with them on the 5th, about what's going to be done in the case. That's all there is. Nobody actually stood up and said: "We didn't know about it," and nobody said: "We told them about it." We sort of assumed that.

HECHT: State Farm tried to intervene?

CONSTANT: Yes. State Farm came on the 25th and asked to intervene as a party and wanted

to be a party in the test. And I think what that demonstrates is that they at least, what they said on the record then was, "We think there's going to be an agreed judgment", which wasn't true. That's not what was going on. With that belief what they could have done and should have done if they thought that something bad was going to happen that wasn't proper, a good defense wasn't going to be put on, they surely could have fired that lawyer and got another one. They could have objected to the visiting judge or they could have asked for a continuance. There was no interest with regard to Mr. Robert in having a big judgment against him. It is not a good thing to have a large judgment against you. Although, State Farm suggests that this was something that he was really looking forward to and he would be happy to have a large judgment.

PHILLIPS: As the deal was structured, the bigger the judgment against him...

GONZALEZ: The better for him.

CONSTANT: The way the deal was structured was, he paid $1 million. And what he got in exchange was a covenant that they would not execute...

BAKER: Did they record it?

CONSTANT: It's not in the record that they did so.

BAKER: So what did they agree not to record for abstract?

CONSTANT: No. If you will look at the agreement in May, 1991, which is the final agreement in the matter, the only one we've got in the record that is complete, there is nothing that prevents them from abstracting the judgment, there is nothing which prevents them from filing a claim with his estate after his death. And that's important because in this case, it was known that the insured was dying, he was expected to be dead by Sept. 1992. This wasn't just something in the future. He had a fatal disease. And there was nothing that could prevent them from filing a claim should he go to the bankruptcy court. If he had to do that, there's nothing to prevent it there. But the most important was there was nothing to prevent the abstract.

BAKER: Is a slander-defamation claim is chargeable in a bankruptcy?

CONSTANT: I don't know that.

BAKER: Why isn't it?

CONSTANT: I don't have the answer to whether it is or is not.

GONZALEZ: Let's get back to the CJ's question. It was to his interest that the court assess damages as high as possible because he was going to possibly recoup the $1 million and share in

anything extra after he recouped the million dollars. Is that correct or not?

CONSTANT: Yes. But it's correct because if there was negligence on the part of State Farm, if he had no agreement with them, that is that he was going to have to pay part of whatever he recovered to the plaintiff, then he would have gotten it all. So agreeing to give something to some other party, the plaintiff didn't encourage him to sue.

PHILLIPS: What about as far as proving up his damages and the state of the law at that time of his trial he is a lot better off with a larger judgment than a small judgment?

CONSTANT: Only if one is better off being in debt in a position where you can sue somebody to recover it, if that's a good thing. I think most people would agree that that's not a good thing, that it would have been much better for him if what had happened is, the case is either settled for $1.3, or that after he made the agreement they went down and tried the case and he was found not liable because he didn't slander her, or that the judgment was found under $300,000...

PHILLIPS: But still, he's out $1 million under either one of those scenarios with no possibility of recoupment by him or his estate?

CONSTANT: He is out $1 million. He doesn't have any complaint about that because he voluntarily paid the money, he is out the money, but he's out the money because of the situation, not because of State Farm's conduct. He doesn't have any lawsuit. He would of at least had the matter over with. So making the agreement didn't encourage him to sue. What encouraged him to sue was their negligence.

ENOCH: It seems to me the only issue in this case is the Stower's obligation of the insurance company. The question was was this a settlement within the policy limits; and clearly the only demand is $1.3, the idea the $1 million comes from the insured, and $300,000 from the insurer. It appears to me from all that's been argued so far is that the $1.3 was not an unconditional settlement demand. It really appears to be $1.3 with the assignment of whatever comes at the end of this lawsuit claims to be made and apparently the cooperation of Mr. Robert to I guess not interfere in some way with the lawsuit to prove up damages against State Farm. Mr. Leon apparently felt that if he participated in any way, he might mess up the deal. It sounds an awful lot like even if we accepted that an insurance company could be Stowered by the insurer offering to pay whatever is demanded in excess of the policy limits, this had so many conditions or unwritten conditions, or implied conditions that there is just no way you could say this was and unconditional offer to settle within the policy limits.

CONSTANT: I believe the statement of facts will not _____ that out because there is not anything that indicates there was anything conditional about the offer.

ENOCH: But didn't Mr. Leon say that he couldn't participate in the trial for fear that

he would mess up the agreement?

CONSTANT: What he said was, "I didn't want to put on any evidence because I did not want to jeopardize what I already had accomplished with Curtis Robert." That's all the testimony there is. He doesn't explain what he means by that or how cross-examining a witness could have jeopardize anything, because Mr. Robert had already paid $1 million for the contract. So whatever the agreement provided, he had all the benefits of it right then and there. And there was no provision in any agreement that he wouldn't cross-examine. The court was saying that there was all these conditions, one of them being that Mr. Robert wouldn't interfere with the trial of the case. That's not correct. There is no evidence that either Mr. Robert or Mr. Leon on his behalf or anybody else ever agreed about how they would defend the case, whether they would or wouldn't call witnesses, whether they would or wouldn't cross-examine, or anything whatsoever with regard to the trial of the case. The offer was unconditional. It was made on Oct. 2, and at that time the offer was settle for $1.3 million.

Just before the 28th, lawyer Leon testifies he got an extension. There was some deadline on it. He got an extension of time on it. And the extension of time was placed in writing on a letter dated Nov. 11, that said: "$1.3 million." And from Oct. 2 to Nov. 15, at 5:00 p.m., when that deadline was erased, the offer was always $1.3 without any condition whatsoever about any sort of _____. There's not a word of that.

The agreement with regard to the sharing of the proceeds, and that sort of thing between Maldonado and Robert all occurred on the 15th, after it became clear that State Farm was not going to respond before the deadline, that they weren't going to make any offer regarding the matter at all. Then after 5:00 p.m., they proceeded to through the details of the agreement and load up an agreement either that evening or soon thereafter but made the agreement. So there was nothing conditional about it at all.

HECHT: The agreement not to execute on Robert's personal assets, that didn't include the $1 million. The $1 million check was cashed?

CONSTANT: Yes it was cashed and it was payed prior to the trial of Nov. 25. The other assumptions, which is the agreement itself meant that the insured suffered no damages. And that's not correct for the reasons I stated, which was there was nothing to prevent them from abstracting the judgment and there was nothing to prevent them from filing a claim against the estate. The agreement which was made also did not violate the contract whatsoever. The only provisions State Farm reports in the contract...

GONZALEZ: Can you speak to us as to why you think *Gandy* does not apply?

CONSTANT: I think Gandy does not apply because there wasn't any fraud whatsoever by the insured or any conduct by the insured at all that was bad with regard to the defense of this case.

And, the insured was never in control, that State Farm was always in control of it. So whatever the quality of the defense of the case, that's a matter laid at the door of State Farm and they ought not to be allowed to come in and say...

GONZALEZ: I know you argue that. But under Tilley, the attorney's loyalty was to the insurer. So you can't have it both ways. You seem to imply that even though under Tilley and the jurisprudence of Texas, the attorney hired by the insurance company's loyalty was due to the insured. State Farm had control. State Farm could have fired him, and therefore, because they could have fired the attorney whose loyalty was to the insured, therefore, State Farm can not now complain. Is that the base of your argument?

CONSTANT: Yes. They were responsible for the defense. Under Tilley, the failure in this case to cross-examine witnesses or put on witnesses does not...there is no indication except this one statement by counsel about why he didn't want to jeopardize what he had accomplished...

GONZALEZ: How about the attempted intervention by State Farm to protect their own interests?

CONSTANT: As I understand it, that's not the way it was done. For instance, you can't just march into somebody else's lawsuit and intervene and have State Farm as a party in the case. But what they had a right to do was control the defense, which they did. If they thought it wasn't being defended right they could have got in there and defended it differently. It doesn't appear to me that in following Tilley and honoring the duty to your client, that there's anything helpful here about not cross-examining witnesses and not putting on witnesses.

HANKINSON: Under the agreement between Maldonado and Robert, there was an upside to Robert with a large verdict in the case. Correct? I mean there was an upside under the contract between those two parties.

CONSTANT: I don't think that is correct because the upside you're talking about is created by the opportunity for the insured to sue his insurance company for negligence. Mr. Robert was given an opportunity not by the agreement, but by the negligence of State Farm. The agreement discouraged it because the agreement required him to give away part of what he might actually be able to recover against his insurance company.

HANKINSON: But if his insurance company would then have to pay the $1 million eventually, plus he was going to split whatever there was above the $1 million, there's an upside to Mr. Robert under that agreement.

CONSTANT: The insurance company wasn't going to have to pay the $1 million, which he paid and the agreement didn't make them liable for the $1 million he paid. They would be liable only for what they owed on the contract and for negligence. And so the agreement that they made

didn't produce a situation that wasn't there before. That is produce a situation where now he can recover damages if the judgment gets real big, whereas before, he couldn't. He was always in the situation where if the damages got very large and he had a negligence claim, that he could pursue it. The agreement didn't make the damages greater and it didn't improve his situation with regard to his upside in terms of getting it. In fact it decreased it in the sense that after $1 million half of that had to go to somebody else. So it wasn't something that encouraged him to sue. If they had defended the case and gotten a $300,000 judgment, the matter would have been over with, or anything under $1.3 would have been over with. He had no damages assuming they paid the contract.

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REBUTTAL

PHILLIPS: In Gandy and every other case like this I have seen, the insured is sort of left high and dry. And they are trying to cut the best deal they can on their own because the insurance company is _____. Here State Farm provided an attorney who either thought this up or participated in it, or condoned a process that at least as I understand the law was legal at the time and under _____ for more damages you got. the better your ____ damages at the next trial. Why shouldn't an insurance company be estopped by the conduct of its insured that's done with the participation of the attorney provided by the insurance company?

DODSON: As this court pointed out in Tilley, and in footnote 6 in the Garcia(?) decision and as it says in the Bible, "We can't serve two masters," and we put not only insurance defense counsel but the entire adversarial system upon which we've relied for not just resolving disputes but producing justice at risk were we to allow the argument which is being made by Mr. Constant. There's no question that Mr. Leon understood exactly where he stood in this. As he said at a long-term client, State Farm, "that what we were doing was not in their best interest." There are times conceivably where they are walking along the same path - insured and insurer - and the attorney doesn't have to make any decisions.

ABBOTT: Why couldn't the insurance company have fired him and brought in another attorney?

DODSON: That would be a fun lawsuit for the plaintiffs. They go in and perhaps set aside this ruling after he has managed to cap his liability, at least possible settlement proposal and thereby exposing traditional money, exposure beyond that which would it could have had otherwise. You might have a real good lawsuit there. Putting then to posture and say: Well this deal might be good for you, but it's not good for us, therefore, we're not going to permit it.

ABBOTT: That would have been a lawsuit by the insured against the insurance company for that conduct?

DODSON: That would have been that.

ABBOTT: So then is this a situation where the insurance company is trying to decide which of two bad consequences it wants to choose in this case? They can either fire the attorney, bring in another one, have a better result for the insurance company, but maybe get sued down the road. Before they could go ahead and just stick with this attorney and what he's doing and maybe win it on appeal here?

DODSON: Clearly the first option where an insurance company is in the litigation involving his insured, taking a position and working actively against it, that would be _____. Does that lead people without a remedy? Well, I guess there's two issues that we have here. One, at some point we've got a contract issue, although there are no findings of damages under the contract issue. Possibly, let's assume that when Mr. Leon was there when these agreements were being made, after 5:00 p.m. when the settlement proposal expired, at that point that somehow he could give permission, or that somehow what he did did not lead Mr. Robert in violation of the contractual provision that no insureds will assume an obligation for a current expense without our consent. Let's assume that he gave that consent. In this case, there would still be contractual issues as to why they should not recover.

PHILLIPS: Are you saying if there is a demand in excess of this settlement, the insured can never pay off any part of that without the insurance company's permission even if the insurance company is willing to tender its maximum policy limits as part of the bargain?

DODSON: I hesitate to say never. In the context of this case it certainly ought not.

PHILLIPS: If the answer is not never, and if you can sometimes do that, then can an insurance company have an attorney have a settlement with _____, then they go to trial, and if that trial had been adversarial, it might still have complied with the policy? By the attorney sitting back and saying nothing it rendered it nonadversarial, which then under Gandy might excuse the insurance company from any obligation. Can an insurance company provide that kind of representation to a client who is escaping liability?

DODSON: It's not uncommon for an insurance company appointing counsel to allow the insureds to choose their own counsel. In the context of this case where the adversity had already been established, it is very clear, that because of the agreement that had been reached, that Mr. Leon could not possibly give a consent on behalf of the insurance company. That is something that is generally beyond the limited authority that an attorney has. If they have the express authority to do it, that's fine. He didn't have it here.

ENOCH: If we follow the Stower's line of cases, that the duty on the insurance company never arises if there's not a demand within the policy limits, we stick with that holding. And there was never a demand in this case within the policy limits to settle the case. Then all these other issues

we've discussed go away?

DODSON: Absolutely. Given the stink that's on this case, this is the sort of thing, sort of issue which is obviously broader than the dispute between the parties. There are public policy. There are public value questions here. And to rule the way the plaintiff's are asking you to do sets very bad values for us to follow.