Appellate Hearing
MARCIA RHODES & others vs. AIG DOMESTIC CLAIMS, INC. & others
2009-9-0619
Transcription – January 12, 2010

All rise.

THE COURT:

Good morning. I'm Justice Cypher. To my right is Justice Berry. To my left is Justice Trainor. We are the panel for the first case today. After the first case, we will take a very, very brief recess to just re-constitute the panel when Justice Kafker will come out and replace Justice Berry.

We have today as our first case 09P-0619 and I would just like to remind everyone that we have read your briefs and we are familiar with your facts. Each side is limited to 15 minutes. We do keep time. I understand that in this case, which is Marcia Rhodes and others versus AIG Domestic Claims and others that the appellants have asked for an additional five minutes. We'll just see how things go. We are always a little flexible. So, with that, we will begin.

MR. PRITZKER:

Your Honor, just to clarify, it was AIGDC, the appellee, who asked for the additional five minutes. The appellants then asked only if you grant it for them that we get it as well.

THE COURT:

All right.

MR. PRITZKER:

And, with that, my name is Fred Pritzker. With me is Margaret Pinkham. We represent the appellant, the Rhodes family, plaintiffs below.

There are three areas that I wish to cover.

The Trial Court's errors in law post-judgment for not following the clear mandate of Chapter 93A.

Secondly, the Trial Court's errors of law pre-judgment for not following those same mandates.

And thirdly, the obvious errors of not ruling a willful or knowing violation against Zurich because of the inordinate passage of time, without which either a tender or a settlement to the plaintiffs was offered. The plaintiffs are seeking doubling of the underlying

judgment which the plaintiffs obtained of $11.365 million.

THE COURT:

Now if you look at Judge Gants' rationale for--

MR. PRITZKER:

Yes, Your Honor.

THE COURT:

-- deciding as he did not to use the judgment as the basis for the doubling, what would you say is the point… where's the point he went astray in that reasoning?

MR. PRITZKER:

There are two points Your Honor. The first is on the post-judgment ruling. He found and I'll quote, *"It makes no sense to multiply the judgment because the insurers' conduct did not force the trial that yielded that judgment."* That's found in the Order Page 63; the appendix is page 79. That ruling is not supported by any citations. It's just his finding that it makes no sense to find that way. That's an extraordinary statement, especially in light of Granger versus JWS, which found exactly the opposite. That was a post-judgment willful and knowing violation where the Court doubled the underlying judgment.

Now I know that my opponents will argue, yes, but that was a judgment against the insurer, but I would like to read if I can from that case. On page 682, and I think this is very telling, the Supreme Judicial Court in 2001 said the following: *"The legislature directed that, whereas here, a plaintiff obtains a judgment against an insurer subject to multiple damages."* Well, the plaintiff has done that. We have a judgment of willful and knowing misconduct.

THE COURT:

Is the continuum in this case only limited to the dialectic of interest on the judgment as Judge Gants did it versus the doubling of the full judgment? It seems to me that part of the balance on whether there's been a failure in the process may be calibrated so that it is not necessarily as what you would say is a low of 900 which is doubled or rather it's as high as the full amount of the 11.3 judgment from the trial?

Isn't there, even accepting your theory, should there not be calibration so that it may not be the full amount of the judgment?

MR. PRITZKER:

No, Your Honor, there is no discretion in this according to the legislation which was amended in 1989 in which I was about to refer to as I continue reading. *"If a plaintiff that obtains a judgment against an insurer subject to multiple damages because it acted in*

bad faith in denying reasonable settlement, the plaintiff's underlying claim, the defendant insurer, 'shall be,' subject to, 'multiplication of the judgment secured by the plaintiff on the underlying claim.'"

Now there's only one judgment that was secured by the plaintiff on the underlying claim -- that is the claim arising out of the occurrence (which is an interesting language that the statute uses as it's insurance language on the automobile accident for $11.365 million). It is a mandatory provision in Chapter 93A.

THE COURT:

Judge Gants seems to bifurcate the whole analysis from August 2003 that plaintiff makes a settlement offer, and then but bifurcates it at the time of the trial.

MR. PRITZKER:

Yes.

THE COURT:

As if the pre-trial matters are not calibrated in weighing the failure to negotiate and settle in good faith, is that right?

MR. PRITZKER:

Yes, he does, and no that is not right.

THE COURT:

Why?

MR. PRITZKER:

In fact, well, for one thing, as most cases find in Hopkins specifically states where there's a continuum of activity from an insurer, it is treated as one violation. What the Judge finds is two separate violations and then analyzes each of those violations.

THE COURT:

Right. By saying that as for the first violation not proof that the plaintiffs would have accepted pre-trial.

MR. PRITZKER:

I'm going to deal with that in a moment, but that was the second to answer Judge Cypher's original question, that was the second error of Judge Gants' is when he found and I'll quote there as well that *"in order for the plaintiffs to prevail not only did the plaintiff have to show willful and knowing misconduct violations of 176D, but for the plaintiff to prevail"* and I'm quoting, *"she must not only prove that the insures failed to make a prompt reasonable settlement offer, but that if it had, plaintiffs would have*

accepted that offer and settled."

That just plain is not the law. The Hopkins case says exactly the opposite. It stands for the law that the insurer's obligations are not dependent on the willingness of plaintiff to accept a hypothetical offer.

THE COURT:

Do you have any and you may have these in your brief, cases from outside our jurisdiction on similar statutes or similar interpretations that would support your position.

MR. PRITZKER:

I have it neither at hand or I believe on this point is there any citation in the brief.

THE COURT:

OK.

MR. PRITZKER:

But, I have to tell you that Judge Gants' recognizing that Hopkins made this ruling, finds that Hopkins was overruled by the Hershenow case.

Well, first of all, Hershenow isn't an insurance case. Secondly, Hershenow did not overrule Hopkins, Hershenow found that there was no nexus between the violation in that case (which was a collision damage waiver case for automobile rental agreements), that there was no nexus between the violation and any injury with which the plaintiff in Hershenow suffered.

That is totally consistent with the Hopkins case where they acknowledge that there has to be a direct injury from the violation of 176D, and it is no different than the Rhodes case where the Court, although it didn't analyze it this way, found injury.

The Court on pages 64 and 65 of the Appendix found in two separate places that the Rhodes family testified how angry they were at the defendants for not paying any attention to them for over two years, and then on the next page finds that the Rhodes family suffered the frustrations of litigation which are extended whenever litigation is in its process.

What the Judge refuses to do is then find that caused any damage because he takes a statement from Harold Rhodes that Harold Rhodes would have accepted $8 million at mediation three weeks before the trial, and he extrapolates that to say, therefore, the plaintiffs never would have taken an offer if it were offered in a timely fashion.

But that, first of all, is not the law and secondly, Hopkins, which actually deals with that in a funny way, in Hopkins, the plaintiffs did take a late reasonable settlement offer so there

never was a judgment, but in Footnote 16, Hopkins says, *"If the plaintiffs had not accepted the settlement, then the measure of damage would be different,"* and we're not deciding that.

It doesn't talk about whether or not the violation caused an injury and whether that that would be erased, only whether the measure of damages is different. However, the statute also specifically deals with that.

THE COURT:

Would it be the case because there is a clear pattern as Judge Gants found, there's a clear pattern of a willful failure to offer a settlement in this case?

MR. PRITZKER:

Yes.

THE COURT:

Would it be the case if you had such a clear pattern, in any case, in which the injured plaintiff is forced to go to trial that, in extensive pattern, I might even say, but assuming we have such a pattern, would it be the case then where the plaintiff is forced to go to trial that the 93A-176D, that it will always be the judgment at least or doubled or trebled?

MR. PRITZKER:

If there's a willful violation and if there is an underlying judgment arising from the underlying appearance, yes.

THE COURT:

Well in this case the Judge found a willful violation.

MR. PRITZKER:

Yes, he did.

THE COURT:

But he just ... it's a question so if you might look at it as liability and damages as one might in a tort case, he found liability. There is liability, now the question is liability for not good faith, so now there's liability. My question is assuming that you have that--

MR. PRITZKER:

Yes.

THE COURT:

--an extensive period and therefore giving rise to a liability because of a failure to settle,

would it then lead ineluctably to the position that whenever you have that and there was a trial that the damage is at least the judgment?

MR. PRITZKER:

Yes. If there is an injury that has been caused by the violation. Now the post-judgment, it's easy. He found an injury and, in fact, he calculated it, we believe he miscalculated it.

THE COURT:

But his injury is based the loss of interest.

MR. PRITZKER:

The loss of interest.

THE COURT:

Basically, it's, in a way, it's award of interest.

MR. PRITZKER:

It is an award of interest.

THE COURT:

I know. I know.

MR. PRITZKER:

That's only what they're subject to. Once they are subject to injury, then the Court mandates, since this is the punitive aspect of the statute, this is not compensatory to the Rhodes family, it is to deter the insurers.

THE COURT:

So, that goes to my question, assume that we have a case where liability has been found, which we do.

MR. PRITZKER:

Yes. Yes.

THE COURT:

Is it then...would you say that taking Granger, Hopkins, and Clegg, that the mutual principle must be that the damage is the judgment at least and then whether it's doubled or trebled?

MR. PRITZKER:

Yes, that is right.

THE COURT:

So that's the rule that's a per se rule in a way, isn't it?

MR. PRITZKER:

Well...

THE COURT:

If you have liability?

MR. PRITZKER:

As to liability, yes, but once again there has to be injury.

THE COURT:

Well, that's all the strange language in 93 and Hershenow or injury and what injury and things like that.

MR. PRITZKER:

Well that's right, but I suggest to the Court that the language of 93A is not ambiguous. It is clear and it is mandatory, and so I believe that since the Judge found post-judgment, both a violation, injury, and damage and there was an underlying judgment arising out of the occurrence which is the accident, then he should have and must have doubled the underlying judgment. If I can, Your Honor, since I'm only--

THE COURT:

Yeah, go ahead.

MR. PRITZKER:

--had a minute left, I'd like to go on to Zurich for a moment if I could.

THE COURT:

Absolutely.

MR. PRITZKER:

And, as to Zurich, I would just like to state that given the rulings of or I should say the findings of fact in this case, it is our position that the Court, as a matter of law, should have found a willful and knowing violation of Zurich, a violation of 176D.

By the end of November 2002, not 2003, but 2002, ten months after accident, Zurich had all of the information which it needed in order to determine that its $2 million policy limits would be exhausted.

What did it have? Well it's agent, Crawford and Company, its third party administrator, Your Honor, may I--

THE COURT:

Yes, go on.

MR. PRITZKER:

--proceed. Its third party administrator had already found or valued the case at $5 million and continued to do so throughout the life of Zurich's involvement with this case. That appears in Exhibit 66C, and following, where Crawford finds that the case has a value in excess of $5 million and that was never varied. You can find that, Your Honor, starting on Pages 3678 and following in the Appendix.

Crawford and Company, a third party administrator, also started advising, much early than November of 2002, that Zurich reserve $2 million which was its policy limits.

THE COURT:

Well a couple of questions about that and Judge Gants finds a fact, and this is in the record at 24 and 25, he says though that although we also even have the plea by the truck driver in November, and there was this analysis by Crawford, but he considers on page 25 of the record, nine of his findings, that the written demand with the day-in-the-life video didn't come until August 03, and that was important to him, I think, in terms of the fact that there was not.

MR. PRITZKER:

It was very important to him. Unfortunately, it totally ignores the mandate of 176D.

THE COURT:

Well, just because a company has an internal investigation that values it at five to ten which it was I think had done, does that mean that it's a willful violation not to settle?

MR. PRITZKER:

No.

THE COURT:

To the full amount of the policy?

MR. PRITZKER:

Clearly not. I was going to head in a little different direction. Under 176D, it requires the insurer to be proactive. What if the plaintiff had never made a demand? Does that mean that the insurer is excused from its obligations to promptly offer a reasonable settlement once liability is there? They have to be proactive.

So we have the internal guidelines of Zurich. We have the mandates of 176D. The Court totally ignores what its agent, Crawford and Company, and its quasi agent defense council were doing, and starts to trigger his evaluation of the timing on the plaintiff's demand.

In fact, he finds, the Trial Court finds himself that the defense counsel had the medical information that Zurich seem to have been looking for several months before plaintiffs' demand because plaintiffs had produced it as part of the discovery, but he doesn't deal with that.

And so, it is our position, there's an awful lot more than I could go into, but I will rely on my brief to do so, that Zurich really should be tapped for not five months or three months that Judge Gants says is OK between November of 03 and January of 04 when the tender occurred, but it is really should have been 14 months earlier and, as a matter of law, that creates a willful and knowing violation. If I could just conclude Your Honor--

THE COURT:

Yes.

MR. PRITZKER:

The statutory scheme, as amended in 1989, focuses on punishment and deterrence of large powerful insurance companies so that consumers like Mrs. Rhodes cannot be bullied into accepting low or no settlements.

The Trial Court's focus on the large underlying judgment and the potential windfall to them is misplaced. The strained effort of the Trial Court to avoid imposing punitive damages of double the underlying judgment, as clearly mandated, should be reversed.

THE COURT:

Thank you very much.

MR. PRITZKER:

Thank you for your attention.

THE COURT:

OK.

MR. ZELLE:

Good morning, Your Honors.

THE COURT:

Good morning. We'll start over.

MR. ZELLE:

We'll start over. Obviously, I'm sharing time with the counsel for Zurich here.

THE COURT:

Right. You're the counsel for AIG?

MR. ZELLE:

I'm the counsel for National Union.

THE COURT:

All right. Why don't you begin and have you decided--

MR. ZELLE:

Well, probably, I decided the case in 15 minutes going 8 and 7, so--

THE COURT:

OK. Well, we can roughly approximate it 10 and 10.

MR. ZELLE:

Very good, thank you Your Honors.

Let me say that the issues presented here are numerous but I have time to here to focus only on two; both of which we submit this Court should affirm Judge Gants' rulings.

Judge Gants correctly applied Chapter 93A's injury requirement in finding that to award any damages under 93A, there must be a causal connection between the deceptive conduct and an injury or loss suffered by the plaintiff.

Secondly, we ask this Court to affirm Judge Gants' decision that by multiplying the actual damages suffered by the plaintiff, as a result of post-verdict conduct, the loss of use of money, he conformed to the statutorily prescribed mandate for multiplying actual damages to determine punitive damages.

THE COURT:

But the statute is not talking, it seems to me, just about actual damages in the traditional 93A mode. It's talking about, in effect, what is the punishment for a failure to settle.

And so let me focus you on this. If you didn't have that statute, it may be in the interest of an insurance company, and adverse to the injured plaintiff, to sit the money.

Because, if the only damage that's going to be awarded is interest for the amount to time that the insurance company keeps the money in its possession, by a willful failure to

settle, it is enjoying the use of that money and accruing interest.

And so it seems to me that the legislature was making an in terrorem effect here with a very heavy bottom which is it has to be a willful, deliberate, continuing failure which forces the plaintiff to go to trial.

So tell me, why wouldn't it be in the interest of an insurance company to force, by not settling, a trial and then the only penalty is the interest which they're accruing anyway?

MR. ZELLE:

Your Honor, if an insurance company through unfair and deceptive practices forces a trial...

THE COURT:

Which the Judge found and which I think it's pretty in this case it wouldn't probably be not...I think we should take that as given, it's going to be hard to set that one aside.

MR. ZELLE:

My point, Your Honor, is that if the insurance company forces a trial and--

THE COURT:

Which happens in this case...

MR. ZELLE:

Well, that's not what happened in this case. Judge Gants specifically wrote that the multiplication of the judgment against the trucking defendants makes no sense because it was not National Union's conduct that forced that trial or that led to that judgment.

But to answer your point, Your Honor, you are correctly stating I believe, the intent of the statute: if an insurance company's bad faith compels a trial that yields a judgment (and that was the language used by Judge Gants), if that insurance bad faith forced the judgment, then the judgment is to be what is multiplied and that was the case in Granger. Plaintiffs here suggest that Judge Gants ignored the holding of the Supreme Court in Granger.

I submit quite to the contrary that, in Granger, the Supreme Judicial Court affirmed a multiplication of an underlying judgment against USF&G, on a bond claim, because USF&G forced the plaintiff, in that case, was J&S Insulation. It was a plaintiff, in counterclaim, forced that party go to trial to get a judgment on the bond claim.

Therefore, it was entirely appropriate to award as multiple damages two times the judgment.

I draw this Court's attention to the three cases that led to the 1989 amendment of the statute to insert the language multiplying the judgment arising out of the same and underlying transaction or occurrence.

Those cases are Bertassi, Trempe, and Wallace. Each of those cases resulted in judgments against an insurance company, because it was pre-statute, the judgment against the insurance company wasn't multiplied as punitive damages, rather it was just a loss of the use of money.

There is no appellate decision, since the amendment of the statute, that has affirmed a punitive damage award under 93A that involved a multiple of a judgment against a third party.

THE COURT:

Are there any reversing?

MR. ZELLE:

There are, Your Honor. In fact, well, not so much reversing, but upholding the contrary principle in the Cohen versus Liberty Mutual case, which was decided by this Court.

The plaintiffs, the Trial Court said, despite the fact that there was a $90,000 judgment against the policy holder and despite the fact that Liberty Mutual's deceptive conduct or Liberty Mutual's conduct was found to be deceptive, what the Court said, identically to what Judge Gants ruled here, is that Liberty's wrongful conduct, which was a bad faith denial of coverage, did not cause the $90,000 judgment to enter against its policy holder.

Therefore, the Court said, I will not multiply that judgment against the policyholder, a company called AGL. What will be multiplied, as Judge Gants multiplied here, was the actual damages caused by the insurance company's wrongful denial. In that case, the wrongful denial deprived the policyholder of $20,000 in insurance coverage. That's what was multiplied.

In this case, what Judge Gants ruled, was that the unfair deceptive conduct, after the verdict, caused the delay and deprived the plaintiffs or the loss of the use money.

Ultimately plaintiffs were paid, and I want to refer to what Judge Freed said in the...the name of the case escapes me, but the Supreme Judicial Court, Judge Freed, writing for the Court, said that the statute was not intended to punish insurance companies who ultimately get it right.

And that's what National Union did here. They were on speaking to the post-verdict conduct, they were unfair and deceptive in terms of delaying settlement, but they ultimately settled the case.

They got it right and therefore the statute did what it was intended to accomplish, it encouraged the settlement, even after there was a deceptive conduct. Judge Gants got it right because he multiplied the damages caused by the delay, caused by the deceptive conduct.

He did not multiply damages wholly unrelated to the deceptive conduct and I briefly want to note Your Honors that constitutional issues are implicated and it's clear to me at least that Judge Gants recognized that if what is being multiplied is an unrelated judgment against the third party.

THE COURT:

I may...it's always helpful to hear both sides, everyone one learns, but...so my questions is, I'm looking...if I look at Record at 75 of Judge Gants', he says, *"In view of all these factors, AIGDC hence National offer of 7 million on December 17th 2004 was response to the 93A letter, which included the Zurich 2 million was not only unreasonable but insulting,"* and he goes on to say, *"No reasonable insurer could have concluded that a 40% discount of the judgment was reasonable."*

I'm confused by that, so help me out because that it seems to me that is in December '04, so why isn't why would then...it may very well be as you got through this, but why would it then be that one is limited to just the interest?

MR. ZELLE:

Because the damages that were caused by what Judge Gants found to be not only unfair but insulting.

THE COURT:

But when those always be the damages, what else could there be? I have a judgment that says that I'm entitled to x dollars in every single case. It's clear that if you don't give my x dollars, I am losing the interest and its present use, so it can't be that that's the...we have two...Mr. Pritzker is saying in order to be doubled, the judgment you're saying they're going to be just the interest.

MR. ZELLE:

Let me respond by pointing out that there's a difference that perhaps is not clearly addressed in the amendment to the Chapter 93A statute, between Chapter 93A and 176D, the statute of course that imposes obligations to fairly treat their policyholders.

In a straight 93A case, the judgment against the defendant, the 93A defendant, is always the judgment based on that defendant's conduct, whether it's a breach of contract, a tort, antitrust or violation of the consumer protection statute, that's 93A.

The wrinkle that I submit isn't contemplated at least in a clear way by the amendment is

what happens when it's a violation of 93A only by virtue of the fact that it's a violation of 176D.

What this Court ruled in or noted in the Cohen versus Liberty Mutual case is that the language of the statute in this respect, the reference to the same and underlying transaction or occurrence is ambiguous when it's considered in the insurance context because in that case, you don't have a judgment, you are not multiplying a judgment against the party who is the violator of Chapter 93A.

Let me simply sum up by saying that the responsibility of this Court, as I'm sure you recognize, is not to try to unwind what Judge Woodlock in the Federal Court ruled last year in the Rule versus Fort Dodge Animal Hospital case was a less than intellectually coherent development of the injury requirement of 93A.

If we had all day, we could try, perhaps, succeed in construing a seamless history of the development of that injury requirement. But, we don't have all day and that isn't what this Court's responsibility is.

This Court responsibility is simply to determine whether Judge Gants correctly applied the law as it currently stands. The current state of the law is set forth in Hershenow. It's set forth in the Ianacello (sp?) case, and with respect to the multiplication of the damages, I submit that this Court can look at Granger and see that that does set forth the current state of the law.

However, what distinguishes Granger from this case at bar, which was recognized by Judge Gants is in Granger, it was a judgment against USF&G, it was conduct of USF&G that led to that judgment and therefore it was appropriate to multiply the judgment. Thank you.

THE COURT:

Thank you counsel.

MS. MORKAN:

Good morning. May it please the Court, my name is Linda Morkan. I'm an attorney with Robinson and Cole. With me this morning is Attorney Greg Varga and together we represent the appellee Zurich American Insurance Company. Your Honors, the Trial Court entered judgment in favor of Zurich in this case, principally on two grounds.

The first is that Judge Gants held that Zurich's tender of its full policy limits, that $2 million in January of 2004, which was roughly 8 weeks after liability and damages had become reasonably clear in this case, he found out that was not a violation of 176D.

Independently, Judge Gants held that, even if Zurich had violated 176D, that there was no injury to the plaintiffs caused by that violation, because the refusal of AIG to settle

within that timeframe, those again that roughly eight-week period, meant that the plaintiffs had suffered no change in their situation.

They experienced the exact same emotional distress or loss of use of those settlement funds that they would have even if Zurich had paid that $2 million in November '03.

Now, the plaintiffs claim error in both of those rulings, but interestingly, the plaintiffs claim error as a matter of law, they had steadfastly disclaimed any reliance on a factual error in this case. So what that means for this Court, in reviewing Judge Gants' decision, is it, it takes all of the facts, as found by Judge Gants, in what was a very lengthy and thorough memorandum of decision. This Court will take...

THE COURT:

An understatement.

MS. MORKAN:

Yes. Would take all those facts, and then, in order to find for the plaintiffs, would have to say that, as a matter of law, the only legal and logical conclusion one can find from those facts, as found by Judge Gants, is that Zurich violated 176D and this record just would not support that construction.

Now, the reason that I focus on the type of error that the plaintiff claims is because the Supreme Judicial Court has held that the determination of when the liability and damages are reasonably clear and the determination of what is a prompt and fair settlement offer are questions of fact, and again the plaintiffs says that they're not challenging any of the factual findings of Judge Gants, so that means this Court then is we'll look at this from the framework of...

THE COURT:

I think the plaintiff is arguing on that, it's a not so easy argument I think. Zurich was aware once Crawford is writing his letters that were...got to at least a 10 to 15 I think was the original one case here, and so once you know that, once you know in August that you have the driver basically I think and must have collateral estoppel at that point once you have the guilty plea to the reckless driving. I don't know it doesn't matter, but at that point that the offer should have been forthcoming at that point. I think that's the argument.

MS. MORKAN:

Well, I understand Justice Berry and I think you got it right to with your question to Attorney Pritzker about what about the additional findings of Judge Gants. He didn't stop there. That wasn't the end of this record.

And so what Judge Gants' has asked to do as the fact finder in this case is to take all of

the facts and come to a reason to conclusion. And what he determined here is that based on all of the facts, it was not reasonably clear of liability and damages, were not reason...

As far as it can...

THE COURT:

I'm sorry, I misspoke, it was 5 to 10 at that point, not 10 to 15.

MS. MORKAN:

Correct, that was the initial reserve that they have done the claim, but Judge Gants held that that based on all of the facts, the circumstances of this case, it was not until mid-November 2003 that liability and damages became reasonably clear.

So that's what I think of it as the trigger day, that's when the responsibility for Zurich to settle attached.

He went on to look at the facts and circumstances of the case and said, Zurich did not actually make it its offer until January of 2004, and the plaintiffs don't concede that that is the proper terminal date.

So what this Court is looking at then is that window of eight weeks, of roughly eight weeks, between November '03, December, and January '04.

As Judge Gants held in his findings, he also again took in the context, the timing, that's the end of the year holidays.

And so, while internal machinery at Zurich was set in motion to obtain approval or the authorization to approve the full policy limits...

THE COURT:

Judge Gants finds in Record Appendix at Page 28 that he calls it the first triggering document was the transmittal letter for Mills that you strong the language than before--

MS. MORKAN:

Yes.

THE COURT:

-- and so my question is, would we have to find that that what he found as a fact was the first triggering document and this supports what you're saying, I'm just asking...

MS. MORKAN:

Sure.

THE COURT:

But, the first triggering document is in November of '03, hence, you'd have to say that that was clearly, would we have to say that's clearly erroneous?

MS. MORKAN:

It's clearly erroneous as obviously the standard, I think what Attorney Pritzker is arguing is in essence although they say they're not arguing facts, is that that trigger date of 11/03 was incorrect, that Judge Gants erred in setting the trigger date at 11/03.

In fact, I believe I'm not misstating Attorney Pritzker. He said in argument it should have been some 14 months earlier. Well, that's not what Judge Gants tell...

THE COURT:

I generally answered it as if you know because of these comprehensive findings--

MS. MORKAN:

Yes.

THE COURT:

--it's like...was the October 23rd Crawford letter to Gants, defense counsel, was about also in the stream because I know there's some sort of confusion as to what went to AIGDC, hence, National Union, was this October letter transmitted? Does the record show that?

MS. MORKAN:

I think what Judge Gants was saying was all of this information...

THE COURT:

No. I'm sorry I'm asking does the record confirmed that that was transmitted to AIGDC and National Union or do we not know. I just don't know.

MS. MORKAN:

I don't know, I'm sorry. But getting into that time period that was the time period that Judge Gants really saw this confluence of events, leading to the point where he said by mid-November that was it for Zurich.

Zurich should have known mid-November '03 that liability and damages were reasonably clear. In order for the plaintiffs to say that that date was incorrect, they would have to establish to this Court's satisfaction that that was clearly erroneous.

They haven't argued that in their brief and we haven't responded to it as a clearly erroneous argument because that isn't--

THE COURT:

Can you tell me if, I'm now reading, it tells me that there was this conference call in November which were in November '03, which...

MS. MORKAN:

That was the date around it.

THE COURT:

OK. So therefore on that AIG's Complex Director, Satriano, participated in that call.

MS. MORKAN:

Correct.

THE COURT:

So, therefore, this a mega call at the very same time that this Crawford document, the first triggering document occurs.

MS. MORKAN:

And that's when Zurich's representative stated during that conference call that she believes that the $2 million would be put on the table by Zurich, and that she was then going to seek approval from her higher ups in order to do that, that's what triggered the next eight-week period before the tender of the $2 million was actually made.

So, in essence, what the plaintiffs are asking this Court, although they disclaim factual errors, is they're asking this Court to retry the facts, they're asking this Court to go back, look at all of the facts that Judge Gants found and pick and choose the ones that are most favorable to them. And that's to include --

THE COURT:

What are we to do if just inherently there are some contradictory findings or findings that could be interpreted as contradictory that could affect a legal conclusion?

MS. MORKAN:

I think your Honor that it's not just as simple as contradictory findings that this Court will look at it as a question of does the evidence support Judge Gants' decision.

Even if there were some contradictory findings, which the plaintiffs haven't claimed, I think the decision is still amply supported by the evidence overall that he'd reached the right legal conclusion in this case.

THE COURT:

With all due respect counsel, how can a contradictory finding be supported by the evidence?

MS. MORKAN:

Well, I'm sorry, his overall conclusion is supported by the evidence, so that even if some of the underlying evidence, if some of the underlying findings were contradictory, and I don't believe that they are, they haven't claimed to be, but even if they were, that doesn't diminish the overall support for Judge Gants' decision.

Just briefly, I wanted to touch on his independent ground, which is that the plaintiffs under Hershenow still have to show an injury even if Zurich had violated 176D.

It was incumbent on them to show how they were injured by that violation and Judge Gants found in this case, and again it was because of the unique circumstances and facts of this case having a primary insurer and an excess insurer that under the circumstances it could not...the evidence showed that the plaintiffs were not injured even if there was a violation.

THE COURT:

I would think that if I were the plaintiff in this case or I wouldn't, whether it's the primary or secondary excess, if I have and his family suffered such tragic consequences of an accident, I'm injured when this thing is dragging out.

MS. MORKAN:

Absolutely, Your Honor.

THE COURT:

So I don't really know that we need to. I think your colleague pointed out there's somewhat confusion on injury in fact, injury 93, injury 93A, injury...I'm not sure that we need to wander into that morass, but I could sure as heck see that while this is being prolonged because of a failure to settle that it causes what is a recognizable injury.

MS. MORKAN:

I don't disagree with you, Your Honor. If there are no other questions? Thank you.

THE COURT:

No. Thank you very much counsel. We'll now take a short, very short recess to reconstitute our panel.