ORAL ARGUMENT -- 3/5/98
97-0498
TRINITY UNIVERSAL V. BLEEKER

TOWNSEND: I agree with what the respondent's told the CA, "This is not a *Stower*s case." It is not a *Stowers* case because the purpose of the *Stowers* doctrine is to protect the insured. The purpose is not to compensate the injured parties. Their being compensated is an incidental result of the *Stowers* doctrine, but that is not its purpose.

In this case the plaintiffs obtained a turn over order even though Bleeker himself had no complaints about Trinity's handling of the claims. The turn over order and the subsequent litigation was designed solely to obtain compensation for the injured parties. It had nothing to do with protecting Bleeker. Therefore, the *Stowers* doctrine should not apply.

I would like you to first consider the only written demand that was ever made in this case. We attached it to our application for writ of error at Tab E, Plaintiff's Exhibit 3, the April letter from Villegas. You will see in that letter that there is no express offer of a release at all. You will see that the word "settle" is not even used, and one of the witnesses at trial said, "That's almost conspicuous by its omission." Most important, you will see that the letter is very careful to say what will happen if Trinity does not honor the demand, but it nowhere says what will happen if Trinity does honor the demand and pay the money into the registry of the court.

ENOCH: The Hospital Lien statute says, "any settlement that does not take into account the hospital, is invalid?"

TOWNSEND: That's correct.

ENOCH: On the issue of the DTPA, the unconscionability, why is that not a viable cause of action?

TOWNSEND: We have three responses to the unconscionability argument. First of all, this court's decision in *American Physicians v. Garcia* said, "The DTPA does not apply to the handling of third party claims," which is what this is. All the prior decisions involve first-party lawsuits.

ENOCH: It basically just says that. There are many states that either have like a negligence claim or some have some sort of consumer protection or deceptive trade claim that exists out there. But why can't those exist simultaneously? What is it that says it just doesn't exist?

TOWNSEND: Other than this court's authority in *American Physicians* and *Allstate v. Watson* it goes to great links to talk about the interplay of the insurance code, and the DTPA. I cannot quote you a detailed policy response as to why it should not apply other than there are very different considerations in play when you're dealing with a first-party case than when you're dealing

with a third-party case. One of the issues being, which is my second response on unconscionability, that you measure unconscionability at the time of the transaction, which is when the insurance policy is purchased. This court has held that in the *Nikolai* case and also *Parkway v. Woodruff*. At the time the policy was purchased there was no gross disparity in value or the other indicia of unconscionability that this court has required.

The third argument we have on unconscionability is simply there is no evidence of causation. The CA itself rejected all of the DTPA claims on the grounds that there was no evidence that they had caused Bleeker any damages. But then at the tail-end of its opinion when it's thinking of the unconscionability claim, which was the other side's cross appeal, they just say, "It should have been submitted with no discussion of the causation problem whatsoever." All the arguments that apply to show there's no causation from any DTPA violations also apply to the unconscionability claim.

ENOCH: Ultimately, if there was not a settlement that requires the insurance company to respond, then Bleeker was subject to an excess judgment anyway, and that's the argument that there be no causation?

TOWNSEND: That's exactly the argument. I think that is why he was also satisfied with our handling of his claim, because he realized we had not caused him any damages he was not going to suffer anyway.

ENOCH: If the facts of the case had been that Bleeker would have accepted a settlement in excess of the policy limits, would that change the outcome on unconscionability on the causation issue?

TOWNSEND: In some circumstances, yes. In the facts of this case I don't think it would matter there. If you assume that a settlement offer was even made, the settlement offer was only on behalf of the Villarreals. It did not include the Ochoas. It did not include the hospitals. So Bleeker still would have had an excess judgment of more than $7 million against him even if he had told us to pay the Villarreal claim. Without proof that he is more harmed by a $7 million excess judgment than a $12 million excess judgment, I don't think he would have a claim under the facts of our case. Different situation, it's possible that they could show causation.

ENOCH: We could reach the decision in this case without reaching whether or not an unconscionability exists as a matter of law based on the facts of this case?

TOWNSEND: Very easily, because the demand in this case, such as it was, did not offer a release, did not use the word even "settle" to resolve the litigation, then no *Stowers* duty was invoked whatsoever by this court's precedence. To get around that, the plaintiffs then came in with testimony from Mr. Villegas that he orally offered a release. But his testimony is deficient for several different reasons. The first one being, as I just said, he represented only the Villarreals. By his own

admission, he did not make any demand on behalf of the Ochoas, couldn't make a demand for them because he didn't represent them. He couldn't represent them at that time because of conflict of interest. He admits that. Also, he hadn't talked to the hospital. So there is no indication that the hospitals were going to waive their lien, and in fact, two years later they still wanted the entire policy limits for their lien.

The second problem with the oral testimony comes from the fact that it had to have conditions for the alleged demand. This court just last month in a unanimous opinion, *State Farm v. Maldonado*, reiterated that a *Stowers* demand has to be unconditional. This demand by Villegas, if you even believe it was made, had two conditions that had to be in it. One is, that it would have to be recommended by attorneys ad litem and approved by the court because there were several minors involved. And both Villegas at trial and the trial judge himself admitted that this case cannot be settled with the ad litem's concurring in it. So that's one condition. The second condition being, that the hospitals were going to have to go away.

ENOCH: On that first condition, is it your position that no insurance company could be Stowered if there are minor children involved?

TOWNSEND: I think the way it can be done is simply to have a hearing in front of the TC with the ad litems, and just talk it through on the record that either plaintiffs' lawyer believes that it's in the best interest to settle for the policy limits; have the ad litems testify or just state on the record that, "we've reviewed matters, discussed it with the injured parties and we believe there are no more assets, so we believe that a settlement of the policy limits is appropriate." And the court can say, "if such a settlement is forthcoming, I will approve the settlement." At that point you can easily Stowerize an insurance company.

The other condition is that the hospitals were going to have to go away, because as you noted, the statute says they get priority and any release is invalid unless they've agreed to it in effect or been paid. The illogic of the respondent's position is so extreme that they've come into this court in their briefing and said, "We were going to give Bleeker a release even though all of the money was going to go to the hospital. We just wanted you to pay the money into the registry of the court. We know that the hospital is going to take the $40,000, but out of the goodness of our hearts, we were going to sign a release for Bleeker anyway."

PHILLIPS: What's wrong with paying all the money into the registry of the court? You knew from the moment this happened, that you first heard of this accident, that your money was gone?

TOWNSEND: That's correct, and that's the irony of this case. The irony is, we're being punished for placing Bleeker's interest above our own. We were trying to get a release from everybody, which was in his best interest.

PHILLIPS: Well how long do you get to do that - 6 years, 12 years?

TOWNSEND: No. I think when there is a steady record showing that we are continually trying to address this issue. It's certainly a different case from an insurance company that would write a letter and say, "don't talk to us, we're not going to do it." The record here indicates for more than a year a steady stream of correspondence from us to the other side saying, "get everybody in the court, tell us how to apportion this." Villegas himself wrote not only the client's, but the ad litems over a year after he claims the negotiations were over. We have correspondence from him saying, "The insurance company is still offering $40,000, please tell me how y'all think it should be apportioned." And those are facts that have led us to argue that you ought to require a written demand. There are three big reasons for that. One is, anytime you are in a *Stowers* case you are going to be dealing with things that occurred many, many years before, because there is going to be the underlying lawsuit and then there is going to be the *Stowers* lawsuit. So even if everybody's on the up and up memories are going to fade. That's just a fact of life. You're also going to have confusion about the terms: Was a release for everybody offered, or was it just for some people, those things? If it's in writing you can tell from the four corners. The fact of whether a demand is made to invoke the *Stowers* duty becomes a question of law. The jury can fight over whether it was reasonable or not to honor, but you don't have to have a fight about whether the demand or the duty was ever invoked.

PHILLIPS: In this instance, your client absolutely a judgment, is that clear from the record?

TOWNSEND: Actually there is evidence in the record that people were trying to investigate to determine the extent of his assets, and that was one part of the delay.

PHILLIPS: I can see if a client has some possibility of future assets why you would very much want your insurance company to work as hard as possible to structure some negotiation that would minimize your exposure. But had you paid this money into the registry of the court within the 25 days or whatever it was, that at least now the testimony is there was an offer ________________, there would have been in all likelihood no further action against your client?

TOWNSEND: I don't think that's true. Given the testimony, it's best reading for the other side. The 4 or 5 Villarreals would have gone away. But there were two other Villarreals. There were all the Ochoas, and there were the hospitals. The Ochoas who never made a demand were found by the jury to have over $7 million in damages.

PHILLIPS: Then they would have been facing absolute judgment proof?

TOWNSEND: That's correct. But here's the rule the plaintiffs want you to adopt. They want you to say that an insurance company has to give the money to the first person who makes a demand. As long as the first demand could conceivably go for policy limits, then the first one to make a

demand gets everything. They are explicit about that.

PHILLIPS: They also say you could discharge by putting it in the registry?

TOWNSEND: For those people. At the time that was done, the Ochoas hadn't even filed suit yet. The only suit on file was by the Villarreals, and in fact, I don't believe there had even been a service of process at that time.

ENOCH: If there's a question of liability, if the *Stowers* duty is a duty to settle, to not be negligent when failing to settle within policy limits, is the *Stowers* duty discharged by an insurance company faced with a demand paying money in the registry of the court?

TOWNSEND: See, I don't think so. I think this is the catch 22 that they were working on the *Soriano* case. I think they wanted us to pay the money into the registry for the Villarreals. Maybe the Villarreals were going to give a release, that's what they say at trial, but maybe the hospital was going to take the money and the Villarreals were still going to pursue us. But leaving that aside, the Ochoas then are clearly free under *Soriano* to come in and go after Bleeker, get their judgment, and then take an assignment or a turnover and say that we were negligent under *Stowers* for giving the money where the Villarreals could get it.

Soriano says that you have the right to settle with the first come if it's a reasonable settlement. But it does not eliminate the possibility that the second come is going to challenge that settlement. And I think under the circumstances of this case, and the venue we were in, we would be right back here with maybe a $7.5 million claim against Trinity rather than $12 million, but we would be in the same boat.

Let me make one other point, to stress to you the irony of this case. Under our insurance policy, we had the right to in the defense when we tendered limits, (the policy is clear, when we pay the limits the duty to defend expires) we could have said to Bleeker, "We're paying the money into the court, we are out of here, good luck defending those other claims by the Ochoas pro se, but that's life." But we didn't do that. We stayed in the case, we tried to negotiate, we tried to get him a release from everybody, which is not only what he wanted, but Villegas himself said was in his best interest. And we shouldn't be punished for that.

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RESPONDENT

WATKINS: We are here on a case which again I suggest attempts to move the focal between the balance of power between an insurance company and its insured. And we are having a hard time trying to find where that fulcrum(?) ought to be. It slides back and forth and it has for the last 30 years as to what is the balance of power between an insurance company and its insured as to who is going to control, manage and take care of the litigation?

This is a first-party claim. There is no doubt about that. They can say that the first-party claim relates to how they deal with the third-party, but this is a first-party claim, a claim which has been taken over by a creditor, but that doesn't change the nature of the cause of action. The real question here is, what is the power of the insured to protect themselves against its insurance company if in fact the insurance company is negligent and fails to settle within a proper demand? And I suggest to you that that fulcrum(?) should not be moot that it ought to stay right where it is right now and that the insurance company doesn't need any more protection, and that the insured does need more protection.

As some of you know, I represent insureds sometimes who are Fortune 500 insureds, who have a hard time getting along with their insurance company and trying to get them to settle within policy limits. It is not always the insolvent who happens to be in this situation. Bad facts make for bad law. And these folks getting killed and maimed is bad facts. And the plaintiffs' lawyers representing them in the TC have a duty to try to collect from wherever they can, and we can't fault them for that, and that's not one of the issues here in this case. The turnover is a final judgment which cannot be collaterally attacked here. And if they think that because Mr. Bleeker testified that that cause of action didn't exist, that should have arisen in the turnover case, just like it did in the _______ case, which is relied upon by the other side.

ENOCH: If you have a hospital lien statute that says, "Any settlement that does not satisfy the hospital is invalid," then how do you have a demand within the policy limit that settles the case?

WATKINS: I cannot understand how a recorded lien can have anything to do with the policy limits. In other words, it's not valid that the settlement is not valid as far as the hospital company is concerned. But the settlement offer from my client is certainly valid. That statute has to apply to whether or not the insurance company has the power to divest the hospitals of that money. It doesn't have anything to do with whether or not I can enter into an agreement with the insured, and say to him, "I'm going to release my claim if you will pay the money into the registry of the court." Now does that in anyway put the company in jeopardy? It does not.

OWEN: What was the motivation for your client to do that?

WATKINS: Because this lawsuit needed to be over.

OWEN: But they wouldn't get any money for the release?

WATKINS: Oh, we don't know that. The testimony is that if you put the $40,000 into the registry of the court there is going to be a fight between all the claimants, including the hospitals, and a negotiation could have very likely have taken place, which would not have subjected Mr. Bleeker to any excess judgment.

OWEN: How much were the hospital bills?

WATKINS: Way past.

ENOCH: The hospital bills are way past that. The limits are just $40,000. Could the hospital make a claim against the insurance company for those funds directly?

WATKINS: Not if the money is paid into the registry of the court. The hospital is fully protected, the money is there, they've got all their liens, there's no problem.

ENOCH: But the hospital still has to litigate over their entitlement to the funds?

WATKINS: That's correct.

ENOCH: So they haven't resolved their dispute?

WATKINS: That's correct.

ENOCH: And the insurance company's obligation is to pay the funds on behalf of the insured to the extent that they can settle this case?

WATKINS: Certainly. I mean they can pay that into the registry of the court and settle my case, get rid of $4.5 million worth of liability for their insured by paying that $40,000 and interplead the hospital, interplead the other claimants, and they are free. They walk away.

ENOCH: Does a hospital have a cause of action to the extent of all the hospital bills that were incurred on behalf of the Villarreals?

WATKINS: Yes.

ENOCH: So the insurance company could not have settled the hospital's claim against Bleeker by paying the money into the registry of the court. They could only have settled the Villegas claim on that?

WATKINS: That's right. But they would have protected themselves from the hospital.

ENOCH: Irrespective of protecting themselves, the *Stowers* duty is to protect their insured, but not be negligent if they fail to settle?

WATKINS: That's right.

ENOCH: So in your view they have satisfied their obligation to their insured to not be

negligent in the settlement if the moment the first demand comes in it will settle the one claimant, they must pay the funds there to not be negligent? Don't we have to evaluate whether or not there is an opportunity to settle all of the hospital's claims, all of the Villegas claims, and unless that can't occur should have settled earlier as opposed to later? I guess what I am trying to say is, Villegas says you should have paid the money to us immediately. The insurance company says, "Now wait a minute, we could satisfy it by having paid it, but our obligation to our insured is to try and settle all of the claims, not just some of them, and so we don't want to pay this into the registry of the court based on this one. We want to hold back and see if we can work out a better deal." Now how is that a breach of the *Stowers* duty?

WATKINS: Because the plaintiff gets to go to the jury and say, "Was that a stupid thing to do?" What the petitioner in this case wants to say is they don't ever want to go to a jury. And goodness knows having been in Hidalgo county, I understand sometimes you don't want to go to a jury. But that's our system. The question is, who determines whether or not they were reasonable? Do we say there is no issue, no fact? And what this case is about, is a safe harbor for the insurance company to not have to write a check. And every time we put another limit on the *Stowers* doctrine, we move the power to the company to sit back on the money and not write it.

OWEN: If we do what you say, the incentive is going to be to dump the insured isn't it? It's going to be to pay the $40,000 and walk away, isn't that going to be the practical effect?

WATKINS: They already have the right from this court to dump the insured.

ENOCH: Can a plaintiff *Stowers* an insurance company by merely saying, "Insurance Co., I don't want you holding the money, I want somebody else to hold the money?" Can I come forward and say, "My complaint against you is not that you didn't pay me the money, it's just that rather than paying into the registry of the court, you held the money?"

WATKINS: Plaintiff can say to the insurance company, "I want to *Stowerize* you and you can comply with my request that I am attempting to Stowerize you by paying the money into the registry of the court." It's a valid request. It's a valid offer of settlement. It gives to the company the opportunity to get rid of $4.5 million in this case worth of liability by paying the money into the registry of the court.

HECHT: And dump its client without getting a release, without even trying to get a release?

WATKINS: They are getting a release for $4.5 million.

HECHT: There was not even a release for that. It was just paid into the registry of the court.

WATKINS: Then that's the question, whether or not you say the Stower's letter has to have magic words.

PHILLIPS: Well let's assume that they were going to get a release. Bleeker is $4.5 million to the good, but is he really better served by having unlimited hospital demands and more Villarreal than all Ochoas out there with unsatisfied claims, and the insurance company regardless of Mr. Townsend's _____ pretty well protected by *Soriano*?

WATKINS: Is he better served, is the question for the jury? And in this case, the evidence is conclusive, he is better served. We can't say, "Well we don't have the right here to decide, I wonder what I would have done if I'd been on that jury." And the question was, were they negligent and was that a proximate cause? And that assumes all the questions that both justices have just asked me about about what happens when the payment of the money.

PHILLIPS: You are always better served if you can buy $40,000 worth of insurance and figure out a way to get $10 to $20 million worth of protection out of it.

WATKINS: What I am saying is the $40,000 is a target clearly. And the question is, where does the insurance company put the target? Do they put it right on the back of Mr. Bleeker, or by writing the check do they move the target over to the courthouse where the $40,000 becomes the target and Mr. Bleeker doesn't become the target?

PHILLIPS: And he's absolutely judgment proof. But what if you're somebody that actually has a little extra money, a small college account, or a small business wouldn't you want your company to try to do their best to get more than one release?

WATKINS: And that was the issue in front of the jury. The question is, was it negligence? And the jury decided it was. And the question for this court, is there any evidence that it was negligence? And there is evidence it was negligence.

HECHT: What is it? How can it possibly be negligent to try to get your insured off the hook?

WATKINS: I can have good motives and commit negligence all the time. And in this case, by not paying the $40,000, they kept alive $4.5 million worth of liability.

HECHT: There was $7 million, but you just dumped him in the grease fire.

WATKINS: This court's already said they can do that. If you say they can't, then that means they also cannot and somebody has to test whether or not it's negligence to either do it or not do it, and that's the jury's job.

HECHT: So actually Mr. Townsend is exactly correct: whether they paid it or whether they didn't pay it somebody would be in here arguing one side or the other of *Soriano* saying, "Well they shouldn't have in this case, they could have, *Soriano* gives them the right, but they shouldn't have in this case $80 million; or they should have in this case $80 million." But however it comes out it still comes out to $80 million.

WATKINS: *Soriano* says, if they make a decision that the amount of money compared to the liability of the one claim that they've got, they as a matter of law cannot be negligent by making that payment. In this case they could have gotten rid of $4.5 million worth of liability by a $40,000 payment. They are absolutely protected by *Soriano* from those other claimants.

PHILLIPS: Are you saying you're here arguing to protect the insureds, not just Mr. Bleeker here, you are here for the policy holders of Texas?

WATKINS: That's correct.

PHILLIPS: But what it seems to me it gets down to, is the way you protect the policyholders of Texas is by making sure that they have free assignment of claims against their own company regardless of what the course of action the insurance company takes. I don't understand any other protection you're offering. You say the jury is the ultimate protection. You're not offering to us in any way the structure of conduct by which an insurance company behaves in a way that...short of litigation, the way the insurance company behaves that can maximize its discharge of its duties to its insured?

WATKINS: I'm asking you not to give the insurance company any more protection than you give me when I practice law in which I am going to have to go to a jury to attest to whether or not I did it right or not, or give me when I drive home from this courthouse in my automobile in which I am going to have to go to a jury to determine whether or not I drove the car right or not. There is no reason to say to the insurance company,"Once we've given them that choice to say you can either settle with the first one or not settle with the first one, we need to have somebody to say they did it wrong if they do it wrong." Under our system, that's the jury.

PHILLIPS: No guidance to say, "If you have multiple claims that are clearly in excess of the policy limits, you have 6 months to try to work something out and then you put it into the registry." No further guidance like that?

WATKINS: I think that's a legislative question for the legislature to _______.

PHILLIPS: It's not a question of ordinary care? That always goes to a jury.

WATKINS: I think that's the system. And I suggest it's not a bad system in this case. I think it's absolutely logical to go into court and say, "You could have put the $40,000 in there, would

that have protected the insured," that's the proximate cause issue. And was it negligent not to? That's the negligence issue in that issue. And them somebody is going to have to answer that question.

PHILLIPS: So you're telling me if the Ochoas come into your law office and the money is gone, you are going to tell them the insurance company did exactly the right thing, paying it all to those other folks?

WATKINS: I'm going to read that quote out of *Soriano*. And I'm going to say, "was it negligent to pay the $40,000 when I got rid of $4.5 million worth of the outstanding claims?"

OWEN: Why wouldn't you proceed to get a judgment against Bleeker and then get an assignment from Bleeker of his claims against the insurance company and say you were negligent for settling with the Villarreals and not the Ochoas?

WATKINS: Because this court has already said that cause of action does not exist.

ENOCH: The truth of the matter if there is responsibility of the insurance company to always go to the jury if they don't pay the first claim, *Soriano* doesn't become a "may," *Soriano* becomes a "shall." The insurance company shall pay the first demand that's made in multiple demand claims that exceed the policy limits because the only protection - we know from *Soriano* that the insurance company can't be liable for having paid on the first claim? We do know that it's a question of fact if they failed to pay that first claim. It's a question of fact as to whether or not paying that claim was negligence? So an insurance company, the only thing they do know in a multiple claim circumstance where any of the claims exceed the policy limits, is they must pay the first one that gets there even if the demand is not to pay the individual making the demand?

WATKINS: They must act reasonably when that demand comes in.

ENOCH: To avoid having six people decide whether or not they did it not negligently, they've got to pay the first one?

WATKINS: That's what *Stowers* says. *Stowers* says that duty exist. The petitioners in this case are trying to carve out additional safe harbors where the company doesn't have to write the check.

SPECTOR: Could you discuss the DTPA claim and what is in the record that supports the DTPA claim?

WATKINS: The question about unconscionability has to do with the issue of the fact that the insurance company never told either their insured to give him the option of whether or not he wanted to settle. They didn't even tell the insured about the settlement offer. They didn't tell the

insured's lawyer about the settlement offer. During the window of time when this $4.5 million worth of claim could have been settled by sending $40,000 over to the registry of the court, they told neither their insured to give him the option nor did they tell the insurance lawyer that they had hired to represent him about the settlement offer. That's evidence of negligence, that's evidence of unconscionability, that's evidence of a violation of DTPA.

WATKINS: Mr. Townsend tells us that the DTPA deals with consumer transactions and that you've got to have a transaction at issue in order for an unconscionability claim to arise, and that the transaction in this case occurred when Mr. Bleeker purchased his insurance. This all happened after the fact, after the actual transaction, the purchase of the insurance had occurred, which he says makes the unconscionability claim not viable as a matter of law. Would you respond to that?

WATKINS: The law is that clear about laundry list violations. That a violation of a specific list in the laundry list has to have occurred at the time that the transaction was entered into. I'm not sure the law is that clear nor should it be that the unconscionability really relating to that section of the DTPA relates only to misrepresentations of things that occurred at the time of the inception of the contract.

HANKINSON: But if the unconscionability claim is designed to look at situations where there is unequal bargaining power, a great disparity in the bargaining power, doesn't that imply that some sort of consumer transaction must occur in connection with the conduct that's being complained about?

WATKINS: That's correct.

HANKINSON: And this transaction had already concluded. We don't have any bargaining going on here. We don't have money changing hands. We don't have the purchase of goods or services at this point in time.

WATKINS: Well we have the delivery of an insurance policy by a consumer who is buying an insurance policy.

HANKINSON: And that occurred all before this conduct occurred?

WATKINS: And if you are going to say that the unconscionability section relates to only those things that the laundry list relates to and adds nothing to them, then I think you are absolutely right. I suggest that's bad policy.

HANKINSON: What would be the basis, how could the DTPA be interpreted to apply in a circumstance like this, taking into account the language in the statute that defines what an unconscionability claim is?

WATKINS: I would suggest that unconscionability has to do with by measuring what's delivered verses what was paid for it.

OWEN: How much did Bleeker receive in legal services under his insurance policy?

WATKINS: I don't know. For our purposes let's assume a whole lot, because they did hire a lawyer and he defended him, and they did a whole lot of work. I think there is good value. I would have to give that up. But there's good value in the defense of the case for Mr. Bleeker in this case. No complaint about the attorney trying the case that they didn't do a good job on that.

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REBUTTAL

TOWNSEND: On the DTPA claim, I would like to point out that it is their burden of proof and the evidence in the record is that Bleeker's own personal lawyer who was advising him at this time when he heard about the demands later said, "I would not have wanted the insurance company to accept those demands, because it didn't give Bleeker complete release?" So if there is any evidence in this case on this issue at all it would be that Bleeker would not have suffered any damages by her not telling him about the so-called demand.

I think also there's been a kind of a premise missed in the respondent's argument here. The whole argument is premised on the idea there really was a settlement demand ever made and we dispute that, not just because of some of the incredibility of Villegas' testimony, but the letter itself which doesn't say that, but the statute - 55.007 of the Property Code - is very clear: A release of a cause of action is not valid unless the hospital is paid in full before the release is signed or the hospital is a party. Villegas could not have offered a valid release without having the hospital somehow on board, and he admitted he had not talked to the hospital and did not talk to them until after that window had expired.

I think y'all understand this from your questions, but let me just give you a hypo on these *Soriano* issues. And let me also say first, too, when all this was going on in our case *Soriano* was not on the books yet. It happened later. So we were in the dark as all this is going on. Think about the example of a car wreck and somebody's got a broken leg, and there is a brain-damaged baby. With today's jury verdicts a broken leg is obviously going to be work $40,000. And they race in and they make the demand. Are we supposed to pay the $40,000 for the broken leg, and then tell the insured, "You've got this brain damaged baby problem out there, you know good luck - defendant pro se and the rest of your life you've got that $20 -30 million judgment against you?" Or do we at least have the right to try to see if we can wrap everything up into a package?

PHILLIPS: If you were to have such a duty, you can't dispute your right as to wait around until the case gets tried and see how you do. You would have to be very pro active, and how would such a duty be shaped? Wouldn't that also buy you a jury trial?

TOWNSEND: I don't think it should buy you a jury trial when you have the facts of our case, where the evidence is clear month after month after month that we're corresponding with the other side saying, "Here are our limits, tell us when you've got everybody in the court, here they are we are ready to pay, please come get them," and they won't do it. And that's the other fallacy of this whole argument that somehow this was a bona fide release. Well why is the window of time so short? Why is it one month to honor this demand that the hospital is going to get the money anyway? It's obviously designed solely to set up the insurance company in this case.

SPECTOR: If you had a single plaintiff who offered to settle for the policy limits and the letter said, "We will release our claims if you deposit the money into the registry of the court," would that be a valid claim?

TOWNSEND: If there are no hospital liens or the hospital liens are taken care of, yes, it would.

SPECTOR: I am just saying their offer is to give you a release in return for your depositing the money in the registry of the court?

TOWNSEND: With a single claimant, yes.

PHILLIPS: The hospital lien is up to the amount of your coverage, but not over?

TOWNSEND: Right, because otherwise the release is invalid by statute. They can't give you what they are offering you. And that's the one thing this court has always been adamant about on the *Stowers* duty is you have to offer a release that will end the litigation. And I'm not asking for magic words. That's why I pointed out, he didn't even say "settle."