OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1288

TITLE JOHN V. EVANS, ET AL., Petitioners V. JEFF D., ET AL.

PLACE Washington, D. C.

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IN THE SUPREME COURT OF THE UNITED STATES

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JOHN V. EVANS, ET AL., :

Petitioners, :

V. : No. 84-1288

JEFF D., ET AL. :

- -x

Washington, D.C.

Wednesday, November 13, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 o'clock a.m.

APPEARANCES:

JAMES THOMAS JONES, ESQ., Attorney General of Idaho, Boise, Idaho; on behalf of the petitioners.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of petitioners.

WILLIAM T. COLEMAN, JR., ESQ., Washington, D.C.,; on behalf of the respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Evans against Jeff D., et al.

Mr. Jones, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES THOMAS JONES, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. JONES: Thank you, Mr. Chief Justice, members of the Court, may it please the Court, I am here today to ask the Court's assistance in restoring a valuable bargaining procedure for both plaintiffs and defendants, a procedure which has been effectively denied to civil rights litigants in the Ninth Circuit by the lower court's decision.

That is the ability to negotiate attorneys' fees along with all other elements of settlement in trying to secure the resolution of civil rights actions. This practical procedure which is taken for granted in almost all other civil actions and in civil rights cases outside of the Third and Ninth Circuits is essential to case settlement.

It produces a bottom line of settlement for the defendants, but it also can be a valuable bargaining chip for the plaintiffs. In this case, the respondents waived counsel fees to obtain the benefit of a

settlement which gave them, as the Ninth Circuit put it, "more than the District Court during earlier settlement hearings had indicated it was willing to grant." However, after using the fee waiver as a bargaining chip, the respondent's attorney appealed the fee waiver and the denial without binding or even looking for an abuse of discretion on the part of the trial judge, the Court of Appeals peremptorily struck the fee waiver from the settlement agreement, and in the process imposed a rule which virtually banned simultaneous negotiations of merits and fees.

The underlying tone of the opinion seems to hint that defense counsel were engaged in conduct that was unseemly or unethical. However, the record reflects that this was simply not the case. Defense counsel were just doing their job within applicable ethical guidelines. They were trying to settle the case in a manner which served their client agency's program goals, and at a bottom line cost which their client could live with.

Indeed, the trial judge specifically found that there has been no unethical conduct on the part of the parties. We are here because we believe the Ninth Circuit adopted an unworkable approach which will discourage settlement of these important cases.

Further, the entire decision was based on a faulty premise that special settlement rules apply to civil rights fee shifting cases.

This Court recently ruled in Merrick v. Chesny that no such special settlement rules exist, and therefore the lower court ruling must be reversed. This type of case presents a unique situation, because both sides are generally interested in improving conditions for the plaintiff class.

That is the primary reason why the Idaho Department of Health and Welfare agreed to provide more relief than the trial judge had indicated that he was going to grant, but this willingness to provide additional relief was expressly conditioned on a waiver of attorneys' fees.

QUESTION: General Jones, do you read the Ninth Circuit's opinion as being limited to class action situations where Rule 23 would apply?

MR. JONES: Justice Rehnquist, I read it as being applicable to all situations, not only class action cases but all situations.

QUESTION: What is the authority of the District Court to supervise the settlement of something that isn't a class action?

MR. JONES: Well, under Rule 16, the judge or

the parties can talk about settlement, pretrial conferences. I think in that context if somebody is being unfairly put upon, or if there is unethical conduct, I think that the matter can be brought to the attention of the District Judge.

QUESTION: I am sure it could be brought to the attention of the District Court. The question is, what can the Distric Judge do about it if it is brought to his attention. Supposing that A sues B in the United States District Court for the District of Idaho. It is not a class action, and the parties before trial simply file a stipulation for dismissal of the case because it has been settled.

Does the District Court have any authority to review that or pass judgment on it?

MR. JONES: I wouldn't think so, Your Honor. I think the only place where the District Judge really has any place in looking into a situation is where there is totally unethical conduct. If there is not unethical conduct, if the parties are operating within the rules of the game, like the people were here on both sides, I think they probably ought not to become involved in it.

I think it has just been an accepted practice that the people, as long as they are acting ethically, should be able to strike their bargain and negotiate an

agreement and a settlement, to not have the Court messing around with it and telling them, well, we don't like this --

QUESTION: General Jones, in the class action setting which I guess this was, is it your position that you could ethically have offered the respondents complete relief on the merits of all their claims? Now, that wasn't what happened here, but if you had offered complete relief on all their claims conditioned on a complete waiver of any attorneys' fees, would that have been ethical to propose?

MR. JONES: Justice O'Connor, I think it certainly would have been ethical. I think we could have offered them less than they were entitled to and a waiver of fees. They weren't obligated to take it. There is no rule that protects them from going to court and trying their case in front of a court, and as the amicus for the other side, I think the Legal Aid Society of New York said they were confronted with a situation where the City of New York sprung a fee waiver request along with a settlement on the merits on the eve of trial, and they said, we took them to trial and creamed them. We got not only our fees, but all the relief. And they have that option available to them. I think that there is --

QUESTION: Would the situation be any different in your view if there had been an assignment agreement by the plaintiffs below to their attorneys assigning any and all rights to attorneys' fees under Section 1988 to the attorneys?

MR. JONES: I don't think it should make difference on the outcome of this case, because that is a matter between the client and the attorney. What the attorney --

QUESTION: Does it alter the ethical considerations at all in the propriety of making an offer of settlement?

MR. JONES: As between the parties, I don't see that it alters the ethical arrangements at all. I think the biggest part of the problem that you have in these cases is the ethical considerations between the plaintiffs and the plaintiffs' attorneys, but again, that is something that has to be resolved between them before the state bar association. It is not something that ought to be coming up in Rule 23 settlement considerations.

QUESTION: Mr. Attorney General, you said earlier that if there are no ethical considerations, then the Court shouldn't get into it, but except as you now suggest that the bar association might get into it

later, how else would the ethical factors be flushed out? You are dealing on the one hand with lay persons who are the class and the lawyer on the other hand. Is there not a disparity of understanding of the realities that calls for some kind of inquiry?

MR. JONES: Well, Your Honor, I think that there has to be an inquiry to make sure in the settlement conference that the plaintiff class is not being put upon, that is, this is not some kind of a sweetheart deal, that they are being shortchanged on their relief at the gain of the lawyers. I think that has to be looked into, but as far as the arrangements that they have for making payment of the fee so long as they don't impinge upon the share of the agreement that goes to the class, I think you ought to leave them to their own devices.

So, I think that some inquiry has to be made to make sure that the rights of the class are not being impinged upon, but --

QUESTION: Would you think the situation would be any different if the class was made up entirely of minors under the age of -- whatever the age was of the particular state, 18 or 21? Would there be any greater obligation to protect the class of minors than the class of adults?

MR. JONES: I think to an extent you have got to have a little greater review and make sure the settlement is being fair to the class as the trial judge did here. The trial judge looked at it at the hearing on the settlement and said it looks as if the clients are being treated very fairly, said no unethical conduct in this case, and I think that is the type of review. The Ninth Circuit said that the judge did not conduct that kind of reveiw, or they didn't give him credit for it, but he did. He looked at it, and he said the clients were treated fairly, no unethical conduct, so he approved it, and I think --

QUESTION: You are not challenging, then, the idea that the trial judge who is supervising the whole situation can appropriately inquire into the fee? You don't question that then?

MR. JONES: No, I don't question that. I am saying that he can look into the fee, and he can look into the arrangements so far as they impinge on the class, but other than that, I don't know that there is any need to do so.

QUESTION: And the looking into would be for the benefit of the class.

MR. JONES: Yes, to do like the trial judge did here and say, yes, this is fair to the class. If

the plaintiff's council took half of the relief, then I think that the trial judge should look at it very carefully, but that was not the case here. We are not advocating that that should be the case.

QUESTION: In a rate case, for example, there have been class actions involving utility rates. It was won. Whether reported accurately or not, I don't know. But the average yield to the numbers of the class was said to be $8.58 per person, and the lawyers got $250,000. On the face of it, that would seem shocking, but maybe they earned the $250,000 to get $8.58 average for $10,000 or $20,000 or $30,000 utility ratepayers.

MR. JONES: I see nothing wrong with the Court looking at that and saying, well, it is justifiable, we will approve the settlement, but that is not what happened in this case. In this case, the people got -- the plaintiff class got more than it was entitled to in exchange for a fee waiver. The plaintiff's counsel appealed. The Ninth Circuit said, well, this is not acceptable.

We can't have simultaneous negotiations of merits and fees, and they struck the fee waiver, leaving the rest of the agreement in place, and we simply don't believe that the Ninth Circuit decision which bans contemporaneous resolution of case merits and related

fees except in unusual circumstances can be supported either on legal or practical grounds.

The rule is in conflict with this Court's holding in Merrick v. Chesny. The Ninth Circuit based the ban on a supposed Congressional intent to apply special settlement rules in civil rights cases. However, Merrick makes it clear that no such special rules exist. In fact, civil rights cases are subject to the same public policy which favors settlement, and it is fairly clear from the experience in the Third Circuit and elsewhere that this ruling is directly in conflict with that policy. Some commentators are concerned that simultaneous negotiations can cause problems and soul-searching for plaintiff's counsel, but litigation in general has its share of problems, soul-searching, and heartburn for counsel for all parties, and offers of judgment which include fees can cause all of these same problems, yet this Court in Merrick held that simultaneous offers of judgment are permissible, and not violative of any Congressional intent, and the same reasoning, the same rationale ought to apply to simultaneous negotiations between the parties.

It appears clear that the Ninth Circuit improperly interpreted the Congressional intent, and erroneously banned simultaneous negotiations. It was

also based on this mistaken interpretation of Congressional intent in Section 1988 that the Court felt it had the authority to strike the fee waiver while leaving the rest of the agreement in place. And we would ask the Court to reverse on both grounds.

QUESTION: Do you think our recent holding on the Rule 68 case has any impact on this situation at all?

MR. JONES: Certainly, Your Honor, the whole underpinnings of the Court's decision was that there was some special rule that applied in civil rights cases which allowed the judge to enter an order that says, well, you don't negotiate the fee portion along with the merits portion. The Court specifically said that the legislative intent gives us the ability to require bifurcated negotiations, and the Merrick case makes clear that that is not the case.

Another ground for reversal is that the rule adopted below is an unreasonble deterrent to settlement, and contrary to the strong public policy in favor of out of court resolutions of controversies, bifurcated negotiations place the defendants in a quandary. If he settles, the settlement confers prevailing party status on the plaintiff which in turns subjects the defendant to attorneys' fees even in a frivolous case or a

nuisance case.

The present case is even more difficult, because the extra relief granted by the defendant could result in greater liability for attorneys' fees if the respondent were to later claim that he obtained an excellent result. If the defendant is prohibited from negotiating or even discussing fees, he can't properly evaluate settlement options, and of course defendant's counsel is in a quandary, too, and he is in an uncomfortable position because he can't do an adequate job of advising or counseling his client with regard to settlement.

QUESTION: Mr. Jones, in this case injunctive relief was sought, but if damages were sought in a class action, and the plaintiffs entered into a contingent fee agreement with their attorney, would it be appropriate for the defendants to propose settlement contingent upon giving up the contingency fee?

MR. JONES: They could probably propose that, Your Honor, but --

QUESTION: You think that is ethical?

MR. JONES: I suppose it is --

QUESTION: No interference with contractual relations or anything of that kind?

MR. JONES: I think they could propose it, but

they certainly are not in a position to compel the other side to accept it. The other side could say, that is clearly a violation of --

QUESTION: How does that differ from the assignment at the outset of any right to attorneys' fees under Section 1988?

MR. JONES: Well, I think again there is a difference because the other side is intruding into the arrangement between counsel and the party, and I think --

QUESTION: Could the same be said if there were a contractual assignment ahead of time of any attorneys' fees rights?

MR. JONES: Well, the other side, the defendant is not attempting to become involved in the relations between the client and the party. I think it would be rather ineffective. I think they are in a position where they say they want to -- you know, you make whatever arrangements you want to. But I don't see that it has any real effect on the case that we have here at hand. The rule that was adopted by the Ninth Circuit doesn't take into account the defendant's need to have a bottom line for settlement, and of course this Court determined that that was an important element both in the Herrick case and in White v. New Hampshire Department of Employment, where this Court specifically

refused to adopt the rule which was adopted in this case by the Ninth Circuit.

QUESTION: Mr. Jones, in the typical contingent fee case where the plaintiff's lawyer has taken the case on a contingency, and his fee is going to depend on how much he recovers, I suppose that he can -- the defendant could surely propose a settlement to him, say we will pay you client X dollars, and if that is X dollars whereas the attorney thinks that he will make more money if it is 2X, he may turn it down. Isn't there almost the same possibility of a conflict of interest in just the typical contingency arrangement?

MR. JONES: Certainly. There is a conflict of interest any time when there is not enough money to go around between the client and his attorney, and the people have got to work those out, those situations, day after day, and I don't think it is really a problem that should be presented to this Court. Let them work it out.

QUESTION: Mr. Attorney General, something you said there, if there isn't enough to go around. Even if there is an abundance of result to go around, the ethical problem that is argued by the Ninth Circuit is still present as between the client and the lawyer, is it not? That is something they have to work out between

them.

MR. JONES: The problem is always there, and they have always got to work it out between themselves, but if we get the Ninth Circuit and everybody else involved in the process, it is going to bog the courts down to a point where we won't be able to get these cases moving through the courts.

QUESTION: Well, in Merrick against Chesny, for example, our Rule 68 case, if the Ninth Circuit rule applied there, would you say there might not have been a settlement? It might have interfered with the settlement.

MR. JONES: That is very likely the case. Those things have to be worked out between the parties and their attorneys. They shouldn't be worked out between the court. The court sets the rules and says you can offer simultaneous relief on both the merits and the fees, and I think the Court has done its job. One thing that I haven't mentioned is the fact that the rule below will not allow the use of the fees as a bargaining chip, and it is an important bargaining chip. It is a chip that belongs to the plaintiff, not his attorney, and he ought to be able -- the plaintiff ought to be able to use it to his advantage. This case is a prime example where additional relief was granted in exchange

for that attorney fee bargaining chip. There was another case recently here in the District of Columbia in the D.C. Circuit, a 1985 decision, Moore against the National Association of Securities Dealers, and the Court of Appeals held that it was proper to bargain away fees in exchange for Merrick's relief, and the Court refused to follow the rule below or the rule in the Brandini case.

Thank you.

CHIEF JUSTICE BURGER: Thank you, Mr. Attorney General.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

MR. WALLACE: Mr. Chief Justice, and may it please the Court, Rule 23 of the Federal Rules of Civil Procedure require judicial approval of a settlement in a class action, but that has generally been regarded as protective of the members of the class rather than protective of attorneys' fees for counsel of the class.

Congress could have specified in the civil rights attorneys fees award statute, Section 1988 of Title 42, that reasonable attorneys' fees must be awarded in every case, and that this cannot be weighed

in a settlement of a civil rights case. It did not so provide, but we have assumed that the contention on the other side is based on the proposition that in light of the policies behind Section 1988 that statute should be interpreted as imposing a limitation on the ability to waive or compromise fees, because otherwise, as Justice Rehnquist has suggested in his questioning, it is difficult to see any other basis on which there can be a rejection by the Court of a settlement the parties have agreed to any more than they would have been required to litigate in the first place.

Now, settlement efforts usually involve the art of compromise, and we recognize that in the context of fee award statutes, settlement negotiations can present ethical difficulties for the plaintiff's counsel, not the least of which is the danger that relief for the client's substantive claims might be sacrificed in favor of the fee award, and our starting pcint in this case is that it should not be assumed that Congress resolved this problem, or that the Court should resolve it by automatically placing the fee award in the favored status in which it would be removed altogether from the settlement negotiations, and the plaintiff's counsel would have nothing left to discuss compromise about except the plaintiff's substantive claims.

That is resolving the ethical dilemma by elevating the attorneys' fee award to a favored status, and in the absence of direction by Congress that it intended to do that, we believe that that isn't the proper resolution to be assumed.

And another important perspective in this case begins with the Court's recognition last term in Merrick against Chesny that settlements would be discouraged if the defendants were unable to make offers that would extinguish their total liability, including their liability for fees, which can be a very sizeable ingredient.

QUESTION: Rule 68 pushes the ethical problem to the extent that there is one right onto the plaintiff and his lawyers, does it not?

MR. WALLACE: That is our position, Mr. Chief Justice. Now, ordinarily, in these settlement discussions, the defendant's counsel's ethical obligations, and there is more than one counsel's ethical obligations to consider here, the defendant's counsel's ethical obligation ordinarily is in negotiations to try to minimize his client's liability in whatever way he can.

And what we caution against is open-ended ambiguity about the extent to which and the

circumstances in which the defendant's counsel must compromise that duty to minimize his client's obligation in favor of other concerns, because that kind of ambiguity would seriously threaten the viability of the settlement process itself, and would lead to relatively routine efforts to invite judicial second guessing of the fairness of the settlement terms.

In our experience, that kind of second guessing really requires an inquiry which approaches a trial on the merits, and if you are going to have that kind of second guessing, there isn't much point in trying to settle the case in the first place.

QUESTION: Mr. Wallace, do you suggest that Rule 23 in class actions offers no source of authority for the Court to make any inquiry under any circumstances and to the appropriateness of the fee waiver proposal in the settlement?

MR. WALLACE: We don't go that far, Your Honor. We don't think that the arguments in this case are limited to class actions for the most part, but we do think that while Rule 23 is primarily concerned with protecting the members of the class, one possible source of concern is whether in the long run the members of the class would be deprived of opportunities to have their claims presented, and if you had a situation where there

was a vindictive effort to discourage counsel from representing the members of the class by giving them an offer that they can't refuse contingent on waiver of fees just to teach counsel that they had better not bring such cases, for example --

QUESTION: Do you think the circumstances in this case would be sufficient to at least enable the District Court to look at it where it is made on the eve of trial, and only injunctive relief was sought, and the relief granted was substantial in the settlement. Is that enough to permit the District Court under Rule 23 to look at it anyway at the request of the attorneys on the other side?

MR. WALLACE: Well, I hate to say no. To look at it in the sense that if an allegation was properly made that came within the standard this Court adopted in Franks against Delaware, an allegation that there was something really improper here in this offer, after all, the plaintiffs were not required to accept the offer. The fact that it was the eve of trial meant that they presumably were ready to go to trial, and a settlement negotiation -- our main point is that the Court really should minimize the extent of judicial cabining or intrusion or second guessing of settlement negotiations, because it becomes a long and unedifying inquiry into

who said what to whom when, and after all, the settlement is something that both sides agreed to and were not forced to agree to.

Now, there are categories of cases where the choices are less difficult than they are in this kind of a class action seeking only injunctive relief where there won't be any monetary award to divide between counsel and his clients as they see fit where the clients aren't someone who can afford to pay the cost themselves, as would often be the case if you had a promotion case or something else seeking injunctive relief. And the situation is aggravated a little bit in this particular case because there is really no guardian of the clients separate from this lawyer who is representing them. He himself is the guardian -- there is no client for him to discuss it with.

That, of course, is not the defendant's fault, and I don't mean to criticize plaintiff's counsel for an admirable job here. But this particular problem is partly of his own making in the way he chose to handle this case, but even so, a judgment has to be made on whether to accept a settlement offer in light of what he perceives to be the strength of the case and the client's overall best interest not only in the relief sought in this case, but in the possibility that future

representation can be secured for this class of clients if that becomes a serious problem.

QUESTION: Mr. Wallace, before you sit down, counsel for the respondent contends there is only one question properly before the Court, and that is the waiver question. I take it from your argument that you believe the simultaneous negotiation question also is before this Court.

MR. WALLACE: Well, I thought the Ninth Circuit rested its decision on the impropriety of simultaneous negotiation in this case.

QUESTION: Have you looked at respondent's brief? Of course you have.

MR. WALLACE: Yes.

(General laughter.)

MR. WALLACE: I will let them shape their argument as they see fit.

QUESTION: It is a very good brief, but doesn't it make the point that only the waiver issue is here?

MR. WALLACE: As they argue their case, but they are defending a judgment which addressed it on the proposition that only in rare circumstances would simultaneous negotiation be permissible.

QUESTION: May I ask you one question, too,

Mr. Wallace? You argue in substance here that the District Court did not abuse its discretion by approving the settlement as it was tendered to it. Would it have been within the District Court's discretion to disapprove of the settlement within your judgment, simply -- maybe not this particular one, but simply on the ground that it made no allowance for fees at all, and that plaintiffs obviously are entitled to something, and the class has no resources with which to pay them? Would that ever be a permissible exercise of judgment in your view of discretion?

MR. WALLACE: The circumstances in our view would have to be much more aggravated than is shown or alleged here.

QUESTION: Assuming they are quite aggravated.

MR. WALLACE: Well, the hypothetical that I suggested would be a vindictive effort to try to deny legal representation for this class of persons in the future by giving them an offer they can't refuse in this case contingent on a waiver in order to teach the attorneys a lesson. That kind of thing --

QUESTION: But short of that, you say there is never discretion to disapprove a settlement.

MR. WALLACE: I don't see a source of it, Mr.

Justice.

QUESTION: Your response would mean that if the Court thought the fee was grossly exorbitant, the Court would have a function then also?

MR. WALLACE: Well, under Rule 23 it would have a concern with whether the attorney was favoring himself as against members of the class.

CHIEF JUSTICE BURGER: Mr. Coleman.

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR, ESQ.,
ON BEHALF OF THE RESPONDENTS

MR. COLEMAN: Mr. Chief Justice, and may it please the Court, the basic issue here is whether Idaho's settlement offer made just seven days before trial which on the merits gave plaintiffs everything they had asked for but demanded that they waive all counsel fees, created an inappropriate ethical situation for plaintiff's counsel and contravened the very purpose of the Civil Rights Act with respect to fees of 1976, which was to provide fees to available plaintiffs to encourage private counsel to represent individuals seeking to vindicate constitutional rights.

QUESTION: Mr. Coleman --

MR. COLEMAN: Now, we have been --

QUESTION: Mr. Coleman, I take it that what you are saying would be just as true of an action

brought under the Farmers and Packers and Stockyards Act, Fair Labor Standards Act, where Congress has provided for attorneys' fees.

MR. WALLACE: I would have to look at the Acts, Your Honor. The Acts are different, but in this case Congress made the judgment in 1976 after two years of investigation that there were civil rights being violated. Most of the defendants were plaintiffs for poor people, and they couldn't get counsel.

QUESTION: Well, your brief, your response brief doesn't cite Merrick against Chesny, which we decided last June. In that case we said there is no evidence, however, that Congress in considering such in 1988 had any thought that civil rights claims were to be on any different footing than other civil claims so far as settlement is concerned.

MR. WALLACE: That is true, but I hope you would agree that if the state here had acted under Merrick and under Rule 68, filed this proposal as the judgment and said no counsel fees, I think you, Justice Powell, certainly in your concurring opinion in -- in a case, the Delta Airline case, and you, Your Honor, would say that an offer made in a civil rights case where all the defendant offered was an injunction, that that would be an inappropriate offer under Rule 68, and would not

bring Rule 68, and you, Mr. Justice Powell, said that under those circumstances the Court, if it accepted the judgment, would thereafter impose a regional counsel.

QUESTION: I repudiated in Merrick my statement in Delta.

MR. COLEMAN: Justice Powell, I think, has not repudiated it, and I think that is clear.

(General laughter.)

MR. COLEMAN: I think you can't read Rule 68, which says that after two and a half years of litigation in a case where the plaintiffs resisted a motion for summary judgment, where they had all this discovery, where they wrote a pretrial conference memorandum, and the plaintiff's lawyer comes into court on March 22nd ready to try the case, and at that point the state says, I will give you everything you want, namely, these children who in 1980 when this suit started were placed in facilities with adults, many of whom had been charged with sexually molesting children. The evidence makes it clear if you look at Page 64 and 65 of the record that the state didn't even have a child psychiatrist.

The state admits that these children being under these conditions actually were worse off. It also admits that if a state had discharged its responsibility as you indicated that they should in the case out of

Pennsylvania where you held that mentally held people had the right to get minimum treatment, that under those circumstances these people would have been treated.

At that point, when the plaintiff lawyer who had gotten everything he wanted, and the state knew when this was suit was filed that the plaintiff's lawyers could not be paid by the plaintiffs, they were poor, they were indigent, they also knew there would never be a pot of money because this was for an injunction only. They also knew because the Idaho legal aid asscciation gets federal funding, that under the federal statute they cannot charge the plaintiff a fee, but yet under your cases, if you are successful, they can get a counsel fee, and at that stage what does a lawyer do? Can a lawyer look himself in the face and say I have gotten all the relief for my client. If I reject it and I go to trial, even if I win, it will be two or three months later. It will be a year and a half on appeal, and my children during that time will continue to be raped --

QUESTION: Can I interrupt you with a question, Mr. Coleman? You asked what the plaintiff's counsel could do. Let me ask you what the defendants might do in the situation in which after the trial has gone on for about 90 days and they investigate it

carefully and they by golly they're right, we should make some changes here, and there are $300,000 in our budget we can use, and we will cure up the problem, but we need the whole $300,000 to solve the problem, and the only way we can settle the case is if we get them to waive fees.

If we have to put in $75,000 for fees, why, we just can't settle. What should the defendant's lawyer do?

MR. COLEMAN: That didn't happen in this case, Your Honor.

QUESTION: Well, I know, but I mean that is the kind of problem it seems to me we have to think about.

MR. COLEMAN: Well, what would happen would be that there would be negotiations, and if it is a fact that the state after three months of trial finally realizes since the day the complaint was filed they were violating the constitution --

QUESTION: I am saying three months after a complaint is filed, they study it, and they say, we think the best thing to do --

MR. COLEMAN: Well, I think the facts of this case are very interesting. The plaintiff's lawyer here was responsible. When the law suit was filed, and there

was a claim against the educational defendants, those educational defendants acted just the way you suggested. After all, they were officers of the -- they have taken an oath to defend the constitution. They looked at the facts, and they immediately said we will settle and we will give you what you ordered, and at that point the plaintiff's counsel said I will not claim a fee because you acted responsibly.

On the other hand, the mental defendants said, no, they resisted, they took you through ever possible cause.

QUESTION: But why wasn't the same ethical problem presented to the plaintiff lawyer at the first settlement proposal by the educational defendant?

MR. COLEMAN: Well, that is -- no you have put your finger on it, Mr. Justice Stevens. The court below misconstrued the ethical problem. The court below, on Page 91 of the joint appendix says that the ethical problem which it thought had been put before the Court was whether a plaintiff when he represents -- a plaintiff's lawyer when he represents a plaintiff can say in this case I won't charge a fee. Obviously a plaintiff's lawyer can do that. But the ethical issue is just the opposite. Can the defense lawyer under the facts of this case tell the plaintiff's lawyer I will

give you everything you want, but you have to give up the statutory right which Congress gave you. And the plaintiff's lawyer, very responsible, he didn't back off. He said at least put that before the judge.

QUESTION: Mr. Coleman, to what extent can the state bar associations regulate this problem as a matter of ethics? I mean, why should we place some limitation on the ability to settle if these ethical dilemmas can be addressed appropriately by bar association requirements and regulations?

MR. COLEMAN: Well, Justice O'Connor, the problem is that that does not take care of the part of the case where Congress by statute has said if you successfully settle the case you are entitled to a counsel fee. The bar association, to the extent they have --

QUESTION: Well, but, of course, Merrick versus Chesny rather undercuts that argument, doesn't it?

MR. COLEMAN: I would disagree, Your Honor. It is clear when you read Rule 68 that if the state had said, I agree that the damages are $100,000, and I file a statement under Rule 68, but there will be no counsel fees, at that pcint, I don't think Merrick versus Chesny would say that case is settled. The rule says you have

to make provision for costs and now you, Judge Rehnquist, and you, Chief Justice, have said that includes counsel fees in a civil rights case. I think there it would not be an -- you wouldn't have the problem. You only have the problem here because they didn't do that. But once --

QUESTION: The defendant's offer in Merrick against Chesny was not the way you just hypothesized it. It wasn't that we will pay you $100,000 with no attorneys' fees. It was, we will pay you $100,000 for everything, and it is up to you to decide.

MR. COLEMAN: And the court below found that with respect to that, that what they got in -- what -- after suit was $50,000, and that the counsel fees incurred prior to the time that the offer was made was only $32,000, so therefore by arithmetic $82,000 is less than $100,000. In that case the defendant had made an appropriate offer, but if you had found or the court below had found that pre the tendering of the judgment, that counsel fees were $100,000, then you would have said, I hope, that under those circumstances that was not an offer which complied with Rule 68.

QUESTION: There have been several suggestions, including some of our questions from the bench, that this is a matter for the organized bar to

deal with, but how does it get to the organized bar?

MR. WALLACE: Well, it so happened -- well, it would get to it -- it so happens that the three organized bars that have looked at the situation have all said that is inappropriate in this type of case for the defendant to make that type of offer.

QUESTION: I am not talking about the generality but the specific -- some party must bring the particular case to the attention of the bar association if there is to be an evaluation of the appropriateness of the particular case. Is that not so?

MR. COLEMAN: Oh, yes, but what has happened, Your Honor, this has come up. This is the latest ploy on the part of government to completely thwart civil rights lawyers. You bring a lawsuit. You do all the discovery. If you try the case, you are going to win. You are going to be entitled to counsel fees. They then put an offer before you which says, I will give you everything you want. At that point, you know, in Brown, before that case was argued, if the states have said to Mr. Justice Marshall I will give you everything you want, you will get a decree, word for word the decree entered in 1955.

At that point, anybody has to say I will take that, but if in the meantime Congress has passed a

statute saying that you are entitled to counsel fees, the state at that stage ought not to be able to thwart the counsel fees by saying, but you are not entitled to counsel fees.

And I would like to spend some time talking about what this case is not about, Your Honor. This case is not about simultaneous negotiation of fees. I asked you to read Pages 23A and 25A to the appendix to the petition for cert, where the Ninth Circuit case is set forth. The judge says two times, we do not say that in all instances simultaneous bargaining of fees is improper. What we do say, that on the facts of this case this ought not to have happened.

And Justice O'Connor, I think it is relevant that this is a class action. Suppose the other thing. Suppose the state said --

QUESTION: Mr. Coleman, before you go on, the Court of Appeals did not adopt a per se rule. I agree with your reading of the --

MR. COLEMAN: That's right.

QUESTION: But it went on to say that the rule in the Ninth Circuit was that there must be a showing of unusual circumstances and then proceeded to find that there were no such unusual circumstances in this case.

MR. COLEMAN: And they also cite a case where

they approved of the fee, even though it had been negotiated simultaneously.

QUESTION: Do you think that would be a proper rule, that there had to be a showing of unusual circumstances?

MR. COLEMAN: No. Well, I think that is a separate question. I would certainly say that's not my case. I don't have to convince you that the simultaneous rule is correct in order to prevail here.

QUESTION: But you might have to, Mr. Coleman, if that issue also is here.

MR. COLEMAN: Well, if that is the second -- if you want to decide the case on two issues, then I will have to go to bat, and I would certainly say I would urge you to reread the briefs of the Legal Defense Fund, the Bar Association of New York, and the other associations that are involved in this type of litigation, and they will tell you that what is happening today is creating havoc among those that are supposed to be representing in these cases, and that this is the point. The fact that there are 44 Attorney Generals of the States here, the fact that the Solicitor General of the United States is represented here demonstrates that this is a way that the government feels it can thwart the 1976 Act.

QUESTION: Well, Mr. Coleman, you say the simultaneous negotiation isn't here. I take it then that you think it is only the insistence upon a waiver of fees that is here.

MR. COLEMAN: Actually, it was the original -- under these circumstances, after two and a half years of litigation, this type of proposal, but even --

QUESTION: Which is to waive your fees.

MR. COLEMAN: Not quite, Your Honor. Even then, the plaintiff's lawyer and indeed at that time the defendant's lawyer acted very responsibly. If you look at Page 104 of the joint appendix and read Paragraph 25, it says this is so if approved by the court. When it went before the court below, with all due respect to the judge, he misconstrued the issue. He says the issue is whether plaintiff is acting improper.

QUESTION: But you don't -- I take it you don't contend that the defendant's lawyer should not say to a plaintiff's lawyer I want to make you an offer of settlement on the merits, and also on your attorney's fees.

MR. COLEMAN: I would say that -- he could say that and he could say how many hours have you spent, what is your hourly rate, and he did not make any -- this is -- you give it all up. This is not a case which

says I think you only should get $10,000, I think you should only get $25,0000. This is a case where he says nothing. He says that after two and a half years of litigation, your cases have held that if you settle a case, you are entitled to a counsel fee. And even then, and I repeat this, he didn't just let it stay there. He said, well, why don't we put it to the judge, and the judge misconstrued what was put to him.

QUESTION: Well, suppose the defendant's lawyer says here is an offer on the merits and here is an offer of your attorney's fees, and they negotiate back and forth, and the plaintiff's lawyer finally agrees on both, and then the settlement is approved, except that the plaintiff's lawyer then says it was unfair, it was unfair, it put me in a bad spot, and I think I should have an additional award of fees.

MR. COLEMAN: Well, that is not this case, Your Honor. I would give you the other case. I will just asked you if --

QUESTION: How about my case --

MR. COLEMAN: And, Justice O'Connor, I read -- because this is a class action. If the agreement had been that the fee paid should have been $25,000, the judge under the class action rules would have to look at it, and the judge said, no, I think the reasonable fee

is $10,000. The one thing is clear, that the plaintiff's lawyer could not say one of those circumstances, Your Honor, forget the settlement, I will try the case.

QUESTION: But what if the plaintiff's lawyer says, look, judge, go ahead and approve the settlement on the merits, but I think I am entitled to a hearing on what a reasonable fee would be?

MR. COLEMAN: We think under the 1976 statute and under the class action rules, Rule 23, at that point the federal district judge has the responsibility of setting a reasonable fee.

QUESTION: So the fact that the plaintiff signed the settlement on his fee should not bar the judge from setting another fee.

MR. COLEMAN: I think the judge clearly has a duty to look at it, and the judge certainly would take into consideration that what -- the amount suggested, but after two and a half years of litigation --

QUESTION: Itis more than suggested. It is what they both agreed on.

MR. COLEMAN: Yes, it is what they agreed to, that he would consider that as one of the factors, and particularly when you consider it, as I understand the cases, when, if it is too much, the judge has a duty to

adjust it downward.

QUESTION: Then a defendant in a case subject to the 1976 Act, if he wants to concede a single issue on the merits, is bound to pay some attorneys' fees. Is that right?

MR. COLEMAN: Well, the 1976 Act says --

QUESTION: Could you answer yes or no?

MR. COLEMAN: The answer is, Your Honor, I can tell you what the statute says. The statute says the Court may award, and it is highly possible, and this goes to a frivolous claim. That is the reason why I just can't say yes or no. If the judge makes a determination that this was a frivolous claim, and therefore for nuisance reasons it was settled for $1,000 or something like that, then I don't think the judge has to pay the fee, but the judge has to look at it. He has to -- he or she --

QUESTION: Supposing that the plaintiff brings ten different claims, and the defendant says I don't think nine of them are any good, but I will grant you -- I will stipulate to relief on the 10th. Does that mean that the court under your view is going to automatically be able to award attorneys' fees?

MR. COLEMAN: The court would consider it. I am pretty sure the judge would reread Justice Powell's

opinion in Hensley which says that you have to consider the facts, and there are 12 factors set forth in those cases. Justice Powell has made clear that if you have six claims, you win five of them and lose on one, that the court can take that into consideration.

QUESTION: But Hensley was a case that was tried, I believe. I am talking about a case that is settled before trial.

MR. COLEMAN: Well, the case that came out of the Second Circuit which held that you could get counsel fees even though the case was settled says that you have the right to counsel fees, and I think that it is something the judge would look at. I mean, what you are saying, Your Honor, if you file the lawsuit and the day after you file there is a settlement, that obviously that is different from a case where you have a two and a half year litigation. It depends upon the fact, and this Court has made it clear that in each case the judge has the responsibility of looking, and we say here he has the responsibility because of the Act of 1976, he had the responsibility because this was a Rule 23 proceeding, and he had the responsibility because Paragraph 25 said that it was subject to his approval, and he misread his obligation at that point, and he never tried to prove the case.

QUESTION: I take it what you are saying is that the stipulation of the two counsel cannot foreclose the trial court's exercise of discretion.

MR. COLEMAN: I would say that the stipulation of two counsel cannot completely foreclose the trial judge's discretion in a Rule 23 case and in a case where Congress has a statute which specifically says that people are entitled to counsel fees.

QUESTION: What if this were not a Rule 23 case, were not a class action. Would the judge still have the power to approve the settlement in your view?

MR. COLEMAN: If it were --

QUESTION: Just an individual claim, three or four people sued for damages or injunctive relief.

MR. COLEMAN: Is it a civil rights suit?

QUESTION: A civil rights suit but not a class action.

MR. COLEMAN: Well, under those --

QUESTION: What would be the source of the judge's authority to disapprove a settlement.

MR. COLEMAN: Well, it wouldn't come about that way, Your Honor. What it would come about, there would be a settlement.

QUESTION: But the settlement is that I will offer to pay -- to give something, buy a Cadillac for

your client, say, and I won't give you anything in fees, and they say I will agree to it. The client says, I would rather have the Cadillac than the job. Can the judge interfere with that settlement?

MR. COLEMAN: Well, the judge cannot -- at that point the answer is no, Your Honor, but in addition --

QUESTION: And no fees to the lawyer. No fees to the lawyer.

MR. COLEMAN: Well, in addition, Your Honor, you realize that once that happens your cases have said at that point there arises a cause of action which you never had before, namely, to file a motion under the 1976 Act, and at that time the judge --

QUESTION: Even if the settlement agreement says in so many words the plaintiff waive any claim to fees, and that is a condition of the settlement. You still -- you say that nevertheless the lawyer has a suit for fees.

MR. COLEMAN: No, I don't know. I would say that plaintiff has a suit under the Act. That doesn't mean he is going to win.

QUESTION: I understand your position in the class action setting, but I have a lot of difficulty knowing how to move from that into the individual --

MR. COLEMAN: Well, the individual case is a harder case. I have two or three strings to my bow. I lose one in the private action, but I still say that what happens is -- well, it is quite clear. If they settle the case privately and said nothing about counsel fees, it is clear that under the Act of 1976, you are entitled to get counsel fees. If --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, Mr. Coleman.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 1:00 o'clock p.m. of the same day.)

AFTERNOON SESSION

(12:59 P.M.)

CHIEF JUSTICE BURGER: Mr. Coleman, you may resume.

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,
ON BEHALF OF THE RESPONDENTS - RESUMED

MR. COLEMAN: Mr. Chief Justice, and members of the Court, this case is not about the defendant's lawyer being able to complain that he was misled or that he was mistaken that the plaintiffs were not going to make a claim for a counsel fee, and contrary to what General Jones said, the plaintiff's lawyer could not have rejected the fee and tried the case, because he had received in the offer everything he would have gotten as a result of the trial.

It is not about privileged lawsuits, and there are plenty of remedies to take care of that. In this case, the Court must apply the 1976 Act and the settlement in the Rule 23 context.

In conclusion, I speak here in furtherance of the inherent decency in our society which free people worldwide admire. Despite over 200 years of successes, there are still poor people in this country whose constitutional rights are violated who have no resources to pay for lawyers. Unfortunately, the legal profession

has not developed in the tradition of Abraham Lincoln, who as Carl Sandburg tells us in "Lincoln Prairie Years" one day represented the Illinois Central for an enormous fee, and the next day represented an improverished criminal defendant for $5.

Today's successful private practitioners often do not devote any time to representation before, who cannot afford to pay fees. Congress recognized this problem in the civil rights context, and opted to handle it in a particular way. It did not create a governmental bureaucracy where poor people could go to have their cause prosecuted conscientiously by a government employee.

It did not set up a voucher system in which the government would pay the private lawyer win, lose, or draw, nor did it create a system in which the poor could select a private lawyer and have the government pay the lawyer if he prevail as is the case with the Special Prosecutor's Act under which high public officials get their fees paid by the government if they are successful.

Instead, Congress placed the task of representing indigent civil rights plaintiffs upon private lawyers, many of whom are young and not employed by the large law firms who can absorb the cost. This

Court must not permit the states and the federal government to block their one chance to receive compensation at the end of a difficult litigation.

We should admire, not penalize the lawyers at Idaho Legal Aid who recognize their responsibility to accept a favorable merged settlement rather than take selfish action to protect their fees. It is a sad day of this Court penalizes such ethical and gracious acts, and this is not an issue that you can leave to the Bar Association, because for good or worse Congress has placed responsibility on the courts since it enacted the Act of 1976.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:02 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#84-1288 - JOHN V. EVANS, ET AL., Petitioners V. JEFF D., ET AL.

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BY Paul A. Richardson

(REPORTER)