Maggie Knowles v. Beverly Enterprises-Florida, Inc.

MR. CHIEF JUSTICE: GOOD MORNING, AND WELCOME TO THE FRIDAY ORAL ARGUMENT CALENDAR FOR THE FLORIDA SUPREME COURT. JUSTICE PARIENTE IS RECUSED IN THE FIRST CASE. THE FIRST CASE FOR ARGUMENT THIS MORNING IS KNOWLES VERSUS BEVERLY ENTERPRISE. MS. WALSH.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. JANE KREUSLER WALSH ON BEHALF OF PETITIONERS. MY TRIAL COUNSEL IS JEFFREY FENSTER FROM HOLLYWOOD, FLORIDA. WE ARE HERE TODAY TO CONSTRUE THE INTERPRETATION OF THE NURSING HOME STATUTE IN SECTION 400.0231, A STATUTE THAT THE LEGISLATURE CREATED TO CREATE THE PRIVATE CAUSE OF ACTION, EXPRESSLY BECAUSE IT DEEMED THAT THE REMEDIES THAT PREVIOUSLY EXISTED WERE INADEQUATE TO PROTECT THE RESIDENTS OF NURSING HOMES, PROTECT RESIDENTS THAT THEY SAW AS BEING FRAIL, WEAK, AND UNABLE TO PROTECT THEMSELVES AND FOR THAT REASON, USED THEIR POLICE POWERS TO ALLOW REPRESENTATIVES AND REPRESENTATIVES OF RESIDENTS TO BECOME PRIVATE ATTORNEY GENERALS TO ENFORCE THEIR RIGHTS. AS RESULT OF THE FOURTH DISTRICT'S REHEARING AND INTERPRETATION IN THIS CASE AND ITS INTERPRETATION IN FIRST HEALTH CARE VERSUS HAMILTON, WE NOW HAVE A SITUATION WHERE RESIDENTS WHO DIE BEFORE FINAL JUDGMENT ARE DEPRIVED OF ANY RIGHTS UNDER THIS STATUTE.

WHEN YOU SAY WHO DIE BEFORE FINAL JUDGMENT, YOU ARE SAYING EVEN IF A COMPLAINT HAS, IN FACT BEEN FILED. THEN WHAT HAPPENS?

NO, YOUR HONOR. THERE WOULD BE NO CAUSE OF ACTION UNDER THIS STATUTE. THAT THE PERSONAL REPRESENTATIVE WOULD BE SUBSTITUTED, AND IT WOULD HAVE TO PROCEED AS A NEGLIGENCE CASE, AND THAT WOULD HAPPEN, EVEN IF THE RESIDENT DIED IN THE MIDDLE OF TRIAL, BECAUSE THE FOURTH DISTRICT HAS SAID, UNDER NO CIRCUMSTANCES CAN THIS STATUTE BE INTERPRETED AS ALLOWING THE PERSONAL REPRESENTATIVE TO BRING A SURVIVAL ACTION.

WHEN WAS THIS?

IN 1998, YOUR HONOR.

AND AT WHAT POINT WAS THE PATIENT DECEASED AT THAT POINT?

THE PATIENT HAD DIED ABOUT A YEAR BEFORE THE COMPLAINT WAS FILED, SO WE DON'T HAVE THAT SITUATION HERE, BUT JUSTICE QUINCE BRINGS UP WHAT PROBABLY IS THE MOST GRAPHIC EXAMPLE OF WHY THE FOURTH DISTRICT'S INTERPRETATION WORKS SUCH AN INJUSTICE AND IS SO VIOLATIVE OF THE LEGISLATURE'S INTENT.

SO WHY, AT LEAST UNDER THAT SCENARIO, WHY WOULDN'T SECTION 46 BE APPLICABLE?

IT SHOULD BE APPLICABLE, YOUR HONOR.

AT LEAST ONCE THE COMPLAINT HAS BEEN FILED AND WE HAVE ALREADY STARTED THE ACTION.

IT SHOULDN'T MAKE A DIFFERENCE, YOUR HONOR. UNDER THE, UNDER 46.021, THE STATUTE SPECIFICALLY SAYS THAT NO CAUSE OF ACTION DIES WITH THE PERSON, AND THAT ALL CAUSES OF ACTION SURVIVE AND MAY BE COMMENCED, PROSECUTED AND DEFENDED IN THE NAME OF THE PERSON PRESCRIBED BY LAW. IN SECTION 400.023, WE HAVE SPECIFIC LANGUAGE.

THIS IS A STATUTORY CAUSE OF ACTION.

YES, IT IS, YOUR HONOR.

AND IT IS THERE FOR DEPENDENT ON THE LANGUAGE OF THE STATUTE IN EXISTENCE AT THE TIME THAT THE CAUSE OF ACTION ARISES.

THAT'S CORRECT.

AND NOW THERE HAS BEEN A CHANGE IN THE STATUTE, CORRECT?

YES, THERE HAS.

AND THE CHANGE IN THE STATUTE WOULD, PROVIDES THAT A PERSONAL REPRESENTATIVE COULD BRING, CAN BRING THIS STATUTORY CAUSE OF ACTION, CORRECT?

ARE YOU SPEAKING OF THE 2001 LEGISLATIVE AMENDMENT?

YES.

IT IS CLARIFIED THAT THE CAUSE OF ACTION WILL NOT DIE.

I GUESS THEREIN LIES THE QUESTION AS TO WHETHER THAT IS A CLARIFICATION OR WHETHER THAT IS A STATEMENT AS TO WHAT THE CURRENT STATUS IS TO, AND A CHANGE FROM THE FACT THAT THE FOURTH DISTRICT'S INTERPRETATION OF THE STATUTE WAS BASED UPON WHAT THE STATUTE MEANT AT THAT TIME. I MEAN, THEREIN LIES THE PUZZLE, RIGHT?

I AGREE, AND THAT IS WHAT I WOULD LIKE TO HELP YOUR HONORS WITH HERE, THIS MORNING.

WHY DON'T YOU START WITH THE LANGUAGE IN THE STATUTE, WHICH OBVIOUSLY, WAS IT AN UNANIMOUS COURT BELOW?

YES, JUDGE, WITH ONE JUDGE RECUSED.

YOU HAVE GOT AN IMPRESSIVE ARRAY OF UNANIMOUS JUDGES THERE, IN THE FOURTH DISTRICT, THAT HAVE STARTED OUT WITH THIS PROPOSITION THAT WE HAVE TO START OUT WITH.

I AGREE.

THAT THE LANGUAGE OF THE STATUTE IS WHAT WE TAKE TO BE THE INTENT OF THE LEGISLATURE, AND SO YOU ARE DEALING WITH SOME PRETTY EXPRESS LANGUAGE HERE.

I AGREE, YOUR HONOR.

SO HOW ABOUT COMING TO GRIPS WITH THAT? WE HAVE MANY SITUATION WHERE IS IT APPEARS TO BE INEQUITABLE THAT A DEATH OCCURS. THERE MAY BE DIVORCE AND SEPARATION SITUATIONS WHERE, BOY IF THE DEATH OCCURS, THE INEQUITIES OF WHAT HAPPENS, IN TERMS OF THE DISTRIBUTION OF WEALTH OR WHATEVER, MAY APPEAR TO BE INEQUITABLE, JUST BECAUSE THE DEATH OCCURRED, AS OPPOSED TO WHAT WOULD HAVE OCCURRED, IF THE LITIGATION WOULD HAVE CONTINUED OR SOMETHING LIKE. THAT BUT HOW ABOUT DEALING WITH THE THING THAT THE UNANIMOUS FOURTH DISTRICT DEALT WITH?

LET'S DO THAT.

AND THAT IS SOME VERY EXPRESS LANGUAGE IN THIS STATUTE.

LET'S DEAL WITH SECTION 400.0231. THE LANGUAGE SAYS ANY RESIDENTS, ANY RESIDENT WHOSE RIGHTS ARE VIOLATED, HAS A CAUSE OF ACTION, AND IT CONTINUES. THE ACTION MAY BE BROUGHT BY THE RESIDENT OR BY HIS GUARDIAN OR BY A PERSON OR ORGANIZATION ACTING ON BEHALF OF THE RESIDENT RESIDENT. THAT WAS THE LANGUAGE THAT WE SAY PLAINLY GIVES A PERSONAL REPRESENTATIVE, IN A SURVIVAL CAUSE OF ACTION, THE RIGHT TO ACT ON BEHALF OF THE RESIDENT. THE CAUSE OF ACTION FOR THE VIOLATION A CRUISE AT THE TIME OF THE VIOLATION.

EXCUSE ME. THAT DOESN'T GO ON TO TALK ABOUT WITH THAT PERSON WITH THE RESIDENT'S CONSENT?

OF A RESIDENT, WITH THE CONSENT OF THE RESIDENT OR HIS OR HER GUARDIAN. THAT'S CORRECT, YOUR HONOR. AND UNDER THE LAW, UNDER THE SURVIVAL STATUTE AND UNDER FLORIDA RULE OF CIVIL PROCEDURE 1.1208, A PERSON ACTING UNDER LAW, ON BEHALF OF ANOTHER INDIVIDUAL, IS AUTOMATICALLY SUBSTITUTED. THE PERSONAL REPRESENTATIVE, IN THE INSTANCE OF A SURVIVAL ACTION, COMES IN AS A MATTER OF LAW AND ACTS ON BEHALF OF THE RESIDENT, TO ENFORCE THE RESIDENT'S RIGHT, UNLIKE A WRONGFUL-DEATH ACTION WHICH THE LEGISLATURE HAS ADDRESSED IN THE PHRASE IN QUESTION HERE, WHERE THE PERSONAL REPRESENTATIVE IS NOT ACTING ON BEHALF OF THE DECEDENT. THE PERSONAL REPRESENTATIVE IS ACTING ON BEHALF OF THE SURVIVORS AND THE ESTATE. IT IS DIFFERENT. BUT --

IT SEEMS TO ME THAT, WITH THAT INTERPRETATION, YOU HAVE TAKEN OUT THE LANGUAGE IN THAT STATUTE AND TALKED ABOUT WITH THE RESIDENT'S CONSENT. THE STATUTE ACTUALLY SAID THAT ANOTHER PERSON OR THE GUARDIAN, WITH THE RESIDENT'S CONSENT, CAN BRING AN ACTION. AND HOW DO YOU GET THE RESIDENT'S CONSENT?

AS A MATTER OF LAW, BECAUSE THE SURVIVAL STATUTE SAYS THAT, AS A MATTER OF LAW, THE CAUSE OF ACTION SURVIVES AND MAY BE COMMENCED OR PROSECUTED, IN THE NAME OF THE PERSON PRESCRIBED BY LAW. THE PERSON PRESCRIBED BY LAW IS THE PERSONAL REPRESENTATIVE, AND AS MATTER OF LAW, THE PERSONAL REPRESENTATIVE SIMPLY COMES IN TO ASSUME THE RIGHT TO PROSECUTE THE DECEDENT'S CAUSE OF ACTION. WE ARE NOT CREATING A CAUSE OF ACTION HERE. ALL WE ARE DOING IS PROSECUTING A CAUSE OF ACTION THAT ALREADY EXISTS, AND RESPECTFULLY, YOUR HONOR, THE INTERPRETATION THAT WE ARE POSING TO THIS COURT TODAY IS EXACTLY WHAT THE LEGISLATURE HAD IN MIND, BECAUSE IF YOU LOOK AT THE EXPRESS INTENT OF THE LEGISLATURE, THESE STATUTES WERE MEANT TO SAFEGUARD RIGHTS OF INDIVIDUALS WHO COULDN'T PROTECT THEMSELVES. THEY PUT LANGUAGE IN HERE, INDICATING THAT ALL RESIDENTS SHOULD BE ABLE TO ENFORCE THOSE RIGHTS, WHETHER OR NOT THE RESIDENTS ARE LIVING OR DEAD AND WHETHER OR NOT THEY DAIS A RESULT OF THE VIOLATION OR NOT. AND THE PURPOSE WAS BECAUSE THE -- IT WAS MEANT TO PROVIDE THIS INCENTIVE FOR NURSING HOMES, TO CONTINUE VIOLATION OF THOSE RIGHTS.

WOULD YOU GO INTO THE, HAVE YOU FOUND ANY AUTHORITIES THAT WOULD DEAL WITH THE ISSUE OF THE INTERACTION OF THE SURVIVAL STATUTE AND A STATUTORY CAUSE OF ACTION, AS OPPOSED TO A COMMON LAW CAUSE OF ACTION. IS THERE ANY DISTINCTION BETWEEN THE TWO? BECAUSE WE ARE DEALING WITH A STATUTORY CAUSE OF ACTION THAT HAS BEEN MENTIONED.

YES.

IS THAT TREATED DIFFERENTLY, UNDER FLORIDA LAW, THAN A COMMON LAW CAUSE OF ACTION, WHEN IT COMES TO ANALYZING THE SURVIVAL STATUTE?

I DON'T THINK SO, YOUR HONOR. I CAN'T THINK OF A CASE, OFF THE TOP OF MY HEAD, THAT SPECIFICALLY DEALS WITH THE SURVIVAL STATUTE. THERE ARE MANY CASES THAT DEAL WITH

HAVING TO HARMONIZE INTER-RELATED STATUTES IN DIFFERENT ACTS. FOR EXAMPLE THIS COURT'S OPINION IN THE MUST LOW SKELETAL CASE -- THE MUSCULOTAL-SKELETAL CASE HARMNIZES, AND KEEP IN MIND THAT HAD, IN CONSTRUING LEGISLATIVE INTENT THAT, THE LEGISLATURE KNEW THE STATE OF THE LAW WHEN IT ENACTED THE STATUTE, AND WE KNOW IN THIS INSTANCE THAT THE SURVIVAL STATUTE HAD BEEN IN EFFECT MANY, MANY YEARS BEFORE THE LEGISLATURE CREATED THIS CAUSE OF ACTION IN 1980.

AREN'T YOU REALLY SAYING THAT THE LEGISLATURE DIDN'T EVEN NEED TO ADD THIS LANGUAGE THEN? THAT THERE WAS ALWAYS A RIGHT THERE.

THAT'S CORRECT, YOUR HONOR.

IF WE CONSTRUE IT THAT WAY, AREN'T WE IN EFFECT, THEN, SAYING THAT THIS PART OF THE LEGISLATION HAS NO MEANING?

NO. ABSOLUTELY NOT. THIS PART OF THE LEGISLATION WAS CRITICAL, AND IT WAS ENACTED IN 1986, TO CORRECT A LOOPHOLE IN THE STATUTE THAT EXISTED WHEN A RESIDENT DID DIE, AS A RESULT OF THE VIOLATION, AND IN THAT INSTANCE, THAT RESIDENT WOULD BE DENIED THE REMEDIES, UNDER THE NURSING HOME ACT, BECAUSE THE WRONGFUL-DEATH ACT WOULD CONTROL. THAT IS THE SITUATION THAT IS ADDRESSED IN THE FIRST HEALTH CARE VERSUS HAMILTON CASE, OUT OF THE FOURTH DISTRICT, THAT ALSO IS PENDING IN THIS COURT.

WELL, ARE YOU SAYING THAT, IN EFFECT, UNDER THIS STATUTE, THAT THE NURSING HOME PEOPLE THAT DAIS A RESULT OF ABUSE OR NEGLECT IN THE NURSING HOME, REALLY, GET SOMETHING EXTRA THAT OTHER WRONGFUL-DEATH VICTIMS DON'T RECEIVE?

THAT'S CORRECT.

THAT IS THAT, IN THE ORDINARY WRONGFUL-DEATH SITUATION, SURVIVAL DAMAGES NO LONGER APPLY.

EXACTLY.

IT IS LIMITED TO WRONGFUL-DEATH.

THAT IS EXACTLY MY POINT, AND THE THIRD DISTRICT CASE, THE BOMB SCENE CASE THAT WE CITED IN OUR BRIEF, DEALS WITH A STATUTE THAT ENACTED RIGHTS FOR DEVELOPMENTALLY-DISABLED PEOPLE. THE THIRD DISTRICT HELD THAT THERE WAS A CAUSE OF ACTION, UNDER THAT STATUTE, THAT COULD BE BROUGHT BY THE PERSONAL REPRESENTATIVE, AND INTERESTING INTERESTINGLY, THAT STATUTE CONTAINS NO LANGUAGE, MENTIONING A PERSONAL REPRESENTATIVE IN ANY INSTANCE AT ALL, INDICATING AND FORTIFYING OUR ARGUMENT THAT THE STATUTE, AS IT WAS ORIGINALLY ENACTED, DID AFFORD A SURVIVAL CAUSE OF ACTION TO RESIDENTS. WHAT IT DIDN'T DO WAS TO GIVE THEM THE REMEDIES UNDER THE STATUTE, IN THE EVENT THAT THE VIOLATION, THAT THE DEATH WAS CAUSED BY THE VIOLATION, AND THAT IS WHAT THAT AMENDMENT WAS DESIGNED TO CORRECT. IF YOU LOOK AT THE LEGISLATIVE HISTORY, IT BEARS OUT THIS INTERPRETATION. IT IS QUOTED AT LENGTH IN OUR BRIEF, AND THE LEGISLATORS WERE VERY CLEARLY SAYING, AND THEIR WORDS WERE THIS IS TO CREATE A NONLY IN THE LAW THAT EXISTS -- AN ANOMALY IN THE LAW THAT EXIST THES WHEN A RESIDENT DIES IN A VIOLATIVE SITUATION. THESE PEOPLE NEED TO BE PROTECTED. THEY ARE FRAIL. THEY NEED TO HAVE ENFORCED, BY PEOPLE ON THEIR BEHALF -- IN THIS INSTANCE THE PERSONAL REPRESENTATIVE, WHO IS COMING IN TO ASSUME THE STANDING OF THE RESIDENT WHO HAS DIED, IN ORDER TO ENFORCE THE LEGISLATORS' EXPRESSED INTENT.

SO YOU WERE NOT SAYING EARLIER, WHEN WE WERE TALKING ABOUT THE ORIGINAL LANGUAGE OF THE STATUTE THAT THE ORIGINAL STATUTE, THAT THE PERSONAL REPRESENTATIVE COULD

COME IN TO STAND AND BRING A CAUSE OF ACTION.

THAT IS WHAT JUSTICE ANSTEAD --

JUST TO ANSWER THIS OTHER QUESTION, YOU SAID THAT THE LAW ENACTED IN 1986 WAS NECESSARY.

NOT FOR MY PURPOSES. IT SERVES A PURPOSE OF CORRECT AGO LOOPHOLE IN THE LAW WHERE THERE ISN'T A CAUSE OF ACTION, IN THE INSTANCE IN WHICH THE VIOLATIVE ACTION DIDN'T RESULT IN A CAUSE OF DEATH AND THE VICTIM DIED. SO I THINK THE ARGUMENTS DO JIVE. IT IS IMPORTANT HERE TO REMEMBER THAT WE ARE TALKING ABOUT A REALM EATIAL STATUTE. AS A REALM EATIAL STATUTE, THIS COURT MUST CONSTRUE IT WITH THE CAUSE OF ACTION PROPERLY. AT THIS TIME I WOULD LIKE TO RESERVE THE REST OF MY TIME FOR REBUTTAL.

MR. MAJOR.

MAY IT PLEASE THE COURT. MY NAME IS EDWARD PRIETO, AND I AM HERE ON BEHALF OF THE RESPONDENT.

THE DAY BEFORE THIS PERSON DIED, DID A CAUSE OF ACTION EXIST?

THAT HE HAD A CAUSE OF ACTION UNDER THE NURSING HOME STATUTE, CORRECT, SIR, HE DID.

AND WHERE, IN THE NURSING HOME STATUTE, DO YOU SAY THAT THE LEGISLATURE REPEALED APPLICATION OF THE SURVIVAL STATUTE?

WHEN THEY AMENDED THE STATUTE IN 1986, TO SAY THAT THE PERSONAL REPRESENTATIVE HAS A CAUSE OF ACTION, EXPLICITLY WHEN THE CAUSE OF DEATH RESULTED FROM A DEPPTATION. -- A DEPRIVATION.

WHY WAS THAT NOT ADDRESS THAT SITUATION, TO PROVIDE A WRONGFUL-DEATH CAUSE OF ACTION, BECAUSE I DON'T SEE THAT IT MENTIONS REPEAL OF ITS APPLICATION OR APPLICATION OF THE SURVIVAL STATUTE.

WELL, IF YOU LOOK AT THE WRONGFUL-DEATH STATUTE AND THE NURSING HOME STATUTE, YOU WILL SEE THAT THEY, REALLY, THEY OPERATE PRETTY MUCH THE SAME. IF YOU HAVE INJURIES, WHICH DID NOT CAUSE A DEATH, AND THE WRONGFUL-DEATH STATUTE, OBVIOUSLY THOSE INJURIES CAN BE PROCEEDED UNDER A COMMON LAW NEGLIGENCE CLAIM. IF THOSE INJURIES DO CAUSE DEATH THEN YOU HAVE WRAPPED YOURSELF UNDER THE WRONGFUL-DEATH CLAIM. UNDER THE NURSING HOME CLAIM, IF YOU HAVE INJURIES THAT DID NOT CAUSE DEATH, THAT CAUSE OF ACTION IS NOT EXTINGUISHED BY FOREVER. THAT CONTINUES ON THE CLAIM. NOW, WHAT HAPPENS IN THOSE CASES --

YOU ARE SAYING THAT THE STATUTORY CAUSE OF ACTION CONTINUES AS A COMMON LAW CLAIM?

NO. THE STATUTORY CAUSE OF ACTION CONTINUES ON WITH THE ALLEGATIONS PURSUANT TO A COMMON LAW NEGLIGENCE CLAIM. THAT IS EXACTLY WHAT WOULD HAVE OCCURRED IN THIS VERY CASE.

WHAT YOU ARE SAYING THEN IS THAT THE STATUTORY CAUSE OF ACTION IS GONE, BUT THAT THE DECEDENT, WHAT SURVIVES AS A COMMON LAW CAUSE OF ACTION.

EXACTLY.

AGAIN, I AM ASKING YOU WHERE, IN THE STATUTE, DOES IT SAY THAT THE STATUTORY CAUSE OF ACTION IS GONE?

I THINK YOU HAVE TO INTERPRET THE LANGUAGE OF THE '86 AMENDMENT TO INDICATE THAT, BECAUSE IF YOU LOOK AT THE SPILL MAN DECISION, OKAY -- --

SO YOU ARE SAYING BY EXPLICIT LANGUAGE IT DOESN'T REPEAL THE STATUTE.

I AGREE --

IT DOES SAY, BY IMPLICATION, REPEALS THE APPLICATION OF THE SURVIVAL STATUTE THEN.

THERE ARE YOU A NUMBER OF THINGS, YOUR HONOR, THAT IF YOU LOOK AT THE RESIDENTS' RIGHTS, UNDER THE NURSING HOME STATUTE, YOU WILL SEE MANY RIGHTS OUT THERE THAT ARE VERY PERSONAL TO THAT RESIDENT.

NOW, I WOULD ASSUME THAT IN ALL ACTIONS, COMMON LAW OR OTHERWISE, THAT THEY ARE PERSONAL TO THE INJURY. HOW IS THAT DIFFERENT?

IT IS DIFFERENT IN THAT THE NURSING HOME STATUTE PREVENTS, ALLOWS THE PREVAILING PARTY TO GET ATTORNEYS FEES AND COST, AND WHAT YOU HAVE --

WE ARE TALKING ABOUT THE CAUSE OF ACTION. WE ARE NOT TALKING ABOUT THE ATTORNEYS FEES AND COSTS. THIS IS A QUESTION OF THE CAUSE OF ACTION, IS IT NOT?

IT IS.

SO LET'S TALK ABOUT THE CAUSE OF ACTION.

OKAY. WELL, I AM SORRY. YOUR QUESTION, AGAIN, SIR?

AGAIN, THE QUESTION IS ARE WE TALKING ABOUT THE REPEAL, BY IMPLICATION, OF APPLICATION OF THE STATUTE? WE ARE REPEALING THE SURVIVAL STATUTE BY IMPLICATION, HERE, TO THIS STATUTORY CLAIM.

IN MY OPINION, YOUR HONOR, BEFORE THE '86 STATUTE, THE PERSON COULD NOT BRING A STATUTORY CAUSE OF ACTION UNDER THE NURSING HOME STATUTE. IF YOU LOOK AT THE SPILLMAN DECISION, WHERE THEY LIST OUT THE REASONING BY LEGISLATURE KENNEDY, AS TO WHY THEY WERE AMENDING THE STATUTE, HE SPECIFICALLY SAYS IN MY HOME COUNTY THIS IS EXACTLY WHAT HAPPENED. THE PERSON WAS TREATED SO BADLY THAT HE DIED, AND IF THEY DIE, IF THEY ARE TREATED SO BADLY THAT THEY DIE, THEY CAN'T BRING A CAUSE OF ACTION, SO THIS AMENDMENT WOULD ALLOW THE PR TO BRING THE CAUSE OF ACTION.

SURE. AGAIN, ADDRESSING THE WRONGFUL-DEATH CAUSE OF ACTION, WHICH IS DIFFERENT THAN THE ACTION, THAN A SURVIVAL ACTION, IS IT NOT?

IT IS, YOUR HONOR. IT, YOUR HONOR. BUT THEN IN THAT RESPECT, YOU HAVE TO GO TO SEE WHAT THE ACTUAL RESIDENTS' RIGHTS ARE. OKAY.

SO YOU WOULD AGREE THAT THIS AMENDMENT, EVEN ACCORDING TO LEGISLATIVE HISTORY, WAS TO ADDRESS A SITUATION TO PROVIDE A WRONGFUL-DEATH CAUSE OF ACTION.

THE, WHAT THE AMENDMENT, WHAT THE AMENDMENT DID WAS ALLOW THE PR TO BRING A CAUSE OF ACTION, IF THEIR NURSING HOME CAUSED THE RESIDENT'S DEATH. THAT IS EXACTLY WHAT THE LANGUAGE, WHAT THE AMENDMENT SAID.

IT IS A WRONGFUL-DEATH CAUSE OF ACTION. CAUSE OF ACTION IS A WRONGFUL-DEATH.

RIGHT NOW THERE IS A SPLIT OF AUTHORITY AS TO WHETHER OR NOT THE DAMAGES ARE LIMITED UNDER THE WRONGFUL-DEATH ACT. I THINK THAT IS BEFORE THIS COURT ON A DIFFERENT CASE, BUT, YES, IF THERE IS A DEATH, THEN IT IS GUIDED, WE BELIEVE, BY THE WRONGFUL-DEATH ACT. NOW, IN GETTING BACK TO WHAT I WAS SAYING, IF YOU LOOK AT THE RESIDENTS' RIGHTS, IN 400.022, OKAY, YOU WILL SEE THAT MANY OF THEM ARE VERY PERSONAL TO THE RESIDENT. FOR INSTANCE, ONE OF THE RIGHTS THEY LISTED IN THEIR BRIEF WAS 400.022-1-H-4, I BELIEVE, WHICH IS NOT REALLY A RESIDENT RIGHT. WHAT IT IS, IT SPELLS OUT WHAT IS TO OCCUR, ONCE A RESIDENT DIES AND THE FUNDS HAVE TO BE TRANSFERRED TO THE ESTATE WITHIN 30 DAYS. THE ACTUAL RIGHT IS THE RIGHT TO MANAGE HIS OR HER OWN AFFAIRS. IT IS NOT, IN 1, 2, 3 AND 4. 1, 2, 3, AND 4 SPELL OUT WHAT THE PROCEDURES ARE TO TAKE PLACE AND WHAT THE TIME FRAME IS, SO THAT IS NOT A RESIDENT RIGHT. THEY MAKE THE POINT THAT THAT RIGHT, SINCE IT DOESN'T ACCRUE, CAN NEVER CAUSE A RESIDENT'S DEATH, BUT THAT SPECIFICALLY IS NOT A RIGHT.

HOW DOES THAT REASONING MATCH UP WITH THE FACT THAT THE LEGISLATURE NOW HAS AMENDED THE STATUTE, IS THAT CORRECT?

IT HAS, YOUR HONOR.

AND ALLOWED A PERSONAL REPRESENTATIVE TO BRING AN ACTION FOR THE VIOLATION OF ANY OF THESE RIGHTS?

THEY HAVE ALLOWED -- THAT'S RIGHT. WHAT THEY HAVE DONE, NOW, IS THEY HAVE A COMPLETELY-WRITTEN STATUTE AND ALLOWED FOR A SURVIVAL CLAIM NOW, WHICH IS DIFFERENT THAN WHAT THEY DID IN 400.2 --

I AM TRYING TO STATE YOUR ARGUMENT THAT, IN NO CASE WAS THE LEGISLATURE TO HAVE VIOLATION FOR DAMAGES IN SOME OF THESE RIGHTS SURVIVE. OBVIOUSLY THE LEGISLATURE HAS NOW DECIDED LET THEM ALL SURVIVE. IS THAT KRET RIOT?

-- IS THAT RIGHT?

YES, YOUR HONOR. YOU WILL SEE THAT THERE ARE NO MORE EVIDENCE OF NEGLIGENCE PER SE. IT RECEIVED OF NEGLIGENCE.

WHEN I HEARD YOUR FIRST EXCHANGE WITH JUSTICE LEWIS, I UNDERSTOOD YOU TO SAY THAT, WITH THE 1986 AMENDMENT, THAT THE LEGISLATURE HAD AN INTENT TO NO LONGER HAVE THE SURVIVAL STATUTE APPLY TO THESE CAUSES OF ACTION FOR VIOLATION OF THESE RIGHTS, AND IS THAT YOUR POSITION?

NO. NO. IF I SAID THAT, THAT WAS A MISSTATEMENT ON MY PART.

YOUR POSITION IS THAT THERE WAS A LIMITATION IN THE STATUTE, TO BEGIN WITH, IS THAT CORRECT?

THAT'S CORRECT, YOUR HONOR.

PERSONAL --

THAT'S CORRECT, YOUR HONOR, BECAUSE IF YOU LOOK, AGAIN, IF YOU LOOK AT THE REASONS WHY THE LEGISLATURE AMENDED IT IN '86, IF YOU LOOK AT THAT SPILLMAN DECISION, LEGISLATURE KENNEDY, THERE IS A COUPLE OF QUOTATIONS FROM THE HOUSE, TELLING THEM WHY IT IS THEY ARE AMENDING IT, AND HE CLEARLY INDICATES THAT THE REASON WHY HE IS

AMENDING IT IS BECAUSE, IF THE NURSING HOME TREATS THE PERSON SO BADLY THAT THEY DIE, THERE IS NO CAUSE OF ACTION. WE WANT TO AMEND THIS TO INCLUDE THE PR, TO BE ABLE TO FILE A CLAIM, IF THE RESIDENT DIES, AND COLLECT FEES AND COSTS. IN FACT, THE TWO COURTS THAT HAVE LOOKED AT THIS VERY SAME LANGUAGE, WHICH IS THE HAMILTON DECISION AND SPILLMAN DECISION, WHICH BOTH SIDES ARE BRIEFED IN OUR BRIEFS, YOU WILL SEE THAT BOTH OF THOSE COURTS HAVE LOOKED ALTHOUGH THERE WERE DIFFERENT ISSUES THAN THE ONE BEFORE THE COURT TODAY, BOTH OF THOSE COURTS LOOKED AT THIS STATUTE AND SAID THE LANGUAGE IS PLAIN AND CLEAR. IT IS UNAMBIGUOUS.

I WOULD ADVISE YOU THAT, IF YOU ALL ARE SPLITTING YOUR TIME, YOU NEED TO BE AWARE OF YOUR TIME, BECAUSE YOU HAVE A TOTAL.

OKAY. THANK YOU, YOUR HONOR. LET ME JUST SAY ONE THING, AND THEN I WILL GIVE THE FLOOR TO MR. MAJOR. REGARDLESS OF WHETHER THE LANGUAGE IS AMBIGUOUS OR PLAIN, WE STRONGLY URGE THAT IT IS VERY CLEAR ON THE SUBJECT UPON WHICH IT SPEAKS. IF YOU TAKE A LOOK AT APPENDIX NUMBERICS WHICH WE HAVE ATTACHED TO OUR ANSWER BRIEF BEFORE THE COURTS OF APPEAL, PAGES 11 AND 64 EXPLAIN TO YOU AND TELLS YOU WHY THEY HAD THEIR DAY IN COURT ON THE STATUTORY VIOLATIONS, BECAUSE IF YOU TAKE A LOOK AT THAT, YOU WILL SEE THAT, FROM THE VERY BEGINNING OF THIS CASE, PLAINTIFF'S COUNSEL CALLED NURSING HOME EXPERTS. THEY CALLED A NURSING HOME ADMINISTRATOR THAT TESTIFIED ON THIS CASE. THEY ALL TESTIFIED AD NAUSEAM ON VIOLATION OF RESIDENTS' RIGHTS.

THEN WE DON'T NEED TO DECIDE THE ISSUE THAT IS BEFORE US, IF YOU ARE SAYING THAT THIS CASE WAS ALREADY TRIED. ALL THOSE ISSUES WERE TRIED, THEN WE DON'T REALLY NEED TO ANSWER THIS THEN.

THAT IS EXACTLY MY POINT, YOUR HONOR. IF YOU GET BEHIND THE LANGUAGE. IF YOU GET BEHIND THE LEGISLATIVE INTENT. IF YOU GET BEHIND ALL THAT STUFF. IF YOU LOOK AT THE NUTS AND BOLTS OF THIS TRANSCRIPT AND SEE WHAT WAS PRESENTED TO THIS JURY, THEY WERE ASKED THE QUESTION "WAS THERE NEGLIGENCE, YES OR NO?" NOW, THE JUDGE INSTRUCTED THE JURY THAT VIOLATION OF THESE RESIDENTS' RIGHTS WAS NEGLIGENCE NEGLIGENCE. WE DIDN'T GET TO THAT INSTRUCTION, BUT THEY SAID VIOLATION OF THESE RIGHTS IS NEGLIGENCE. PLAINTIFF'S COUNSEL STATED OVER AND OVER THAT THAT IS EASY. THE JUDGE WILL INSTRUCT YOU ON THAT AND UP AND DOWN AND PARADE OF VIOLATION OF RIGHTS BEFORE THAT JURY, THE JURY WAS ASKED WAS THAT NEGLIGENCE? BEFORE THEY GET TO THAT, THEY HAVE GOT TO ANSWER THE FIRST HOOP, AND THAT IS VIOLATION OF RIGHTS, SO IT IS CONSISTENT WITH NO NEGLIGENCE BUT VIOLATION OF RIGHTS. THANK YOU.

MAY IT PLEASE THE COURT. SCOTT MAJOR, ALONG WITH MR. PRIXET-. -- PREITY-. WE HAVE THREE -- PRIETO. WE HAVE THREE BASIC POSITIONS IN THE LANGUAGE, BECAUSE WHILING IT IS CLEAR AND A NICE ACADEMIC DISCUSSION ABOUT WHAT THE INTENT OF THE STATUTE AND THE LEGISLATIVE HISTORY MEANT --

WOULD YOU SPEAK TO JUSTICE LEWIS'S QUESTION, AS I UNDERSTAND THE LINE OF QUESTIONING - AS TO THERE IS VERY CLEAR SURVIVAL STATUTE, AND THAT NO CAUSE OF ACTION SHALL NOT GO FORWARD. ISN'T THAT CORRECT? I MEAN, IT SAYS NO CAUSE OF ACTION.

THAT IS WHAT THE LANGUAGE SAYS. YES.

RIGHT. AND SO IT DOESN'T DIFFERENTIATE BETWEEN COMMON LAW CAUSES OF ACTION OR STATUTORY CAUSES OF ACTION, AND IF YOU ARE GOING TO NEGATE THAT VERY CLEAR DIRECTION OF THE SURVIVAL STATUTE, THEN THERE NEEDS TO BE EXPRESS LANGUAGE IN THE STATUTE THAT DOES THAT. WHY IS THAT NOT PRETTY LOGICAL?

WELL, YES, YOUR HONOR. THE QUESTION, THOUGH, IS BASED ON THE PREMISE THAT THE

PERSONAL REPRESENTATIVE HAD THAT CAUSE OF ACTION. IT IS THE RESPONDENT'S POSITION THAT 46.021, THE SURVIVAL CLAIM OF ACTION, AROSE, AND THEN THEY GRANTED, IN '86, THE RIGHT OF THE PERSONAL REPRESENTATIVE, TO BRING THAT CAUSE OF ACTION, WHEN THE DEATH RESULTED. THEY CERTAINLY KNEW HOW TO SAY IT THE OTHER WAY. IF YOU LOOK AT 415, THEY KNEW HOW TO SAY "WHETHER OR NOT THE DEATH RESULTED."

BUT IF YOU PLACE THE FIRST EMPHASIS, HERE, ON THE SURVIVAL STATUTE, WHICH WOULD SEEM TO ME TO BE LOGICAL, IT SAYS NO CAUSE OF ACTION SHALL DIE WITH THE PERSON.

IF YOU LOOK AT THE MALPRACTICE ACT, FOR EXAMPLE, IF YOU DON'T HAVE A WIFE AND YOU DON'T HAVE A SPOUSE, YOUR CAUSE OF ACTION DIES. I MEAN THERE ARE --

WHY IS THAT?

WELL, THEY DECIDED --

THEY EXPRESSLY STATE THAT.

THAT'S CORRECT.

BUT THIS DOESN'T EXPRESSLY STATE ANYTHING ABOUT THAT.

IT PRESUMES, IF YOU PRESUME THAT THE CAUSE OF ACTION EXISTED BEFORE, THEN THERE IS A HURDLE, AND I GUESS I GET BACK TO, EVEN IF THERE IS A HURDLE, THE STATUTE IS CLEAR. WE DON'T GET TO THE DISCUSSION OF WHETHER THERE IS AN IMPLIED REPEAL OR NOT. IF YOU BELIEVE THAT THE STATUTE IS CLEAR, WE CAN SAY WE BELIEVE WHAT THE LEGISLATURE MEANT. WE CAN SAY WE THINK THEY MEANT SOMETHING ELSE, BUT THE REALITY IS, UNDER FORSYTH AND SOME OF THE OTHER CASES, IF THE STATUTE LANGUAGE IS CLEAR WHEN THE DEATH RESULTS, AND IN ORDER TO GIVE IT ANY KIND OF MEANING, YOU HAVE TO READ IT IN LIMITATION FASHION, WE CAN'T CREATE A REMEDY THAT DOESN'T EXIST. IN THIS CASE --

THE POINT IS IT IS NOT CREATING A REMEDY THAT DOESN'T EXIST. GO BACK TO THE ANALYSIS THAT THE CHIEF JUSTICE IS ASKING ABOUT, AND THAT IS THE DAY BEFORE THIS PERSON DIED, THERE WAS A CAUSE OF ACTION.

THAT'S CORRECT. YOU ARE RIGHT.

AND THEN THE DAY THEY DIE, WE LOOK, THERE IS A SURVIVAL STATUTE THAT SAYS THAT NO ACTION THAT THE ACTION SURVIVES. YOU STILL HAVE THAT CAUSE OF ACTION. DO YOU AGREE WITH THAT?

YES. I AGREE.

AND SO WE HAVE TO READ, DO WE NOT, THAT PHRASE THAT WAS PLACED IN THE STATUTE IN '86, TO SAY THAT THERE IS NO CAUSE OF ACTION ACTION? WHEN IN FACT THERE IS A CAUSE OF ACTION. WHAT IS WRONG WITH THAT ANALYSIS?

I CAN'T ARGUE WITH THAT REPEAL OF ACTION. IT IS SOUND AND RESPOSITIVE ISSUES, BECAUSE I THINK THE LANGUAGE IS CLEAR, AND YOU GET INTO THE BRIEFS, WE CAN'T GET INTO THE LEGISLATIVE HISTORY AND LEGISLATIVE CONSTRUCTION, IF WE LOOK AT THE PLAIN MEANING. THE PLAIN MEANING SAYS "WHEN THE DEATH RESULTS." AND COME CORROBORATE WHAT MR. PRIETO RAISED, WHETHER YOU ANSWER IT IN THE AFFIRMATIVE OR NEGATIVE, AND WE OBVIOUSLY BELIEVE YOU SHOULD ANSWER IT IN THE NEGATIVE, WE BELIEVE THAT, IF THEY HAD THEIR DAY IN COURT AND IT WAS A ZERO VERDICT AS SET THEY DON'T HAVE A RIGHT TO COME BACK AND GET A NEW TRIAL, SO INDEPENDENT OF WHETHER YOU AFFIRM THIS DECISION AND

ANSWER THE QUESTION IN THE AFFIRMATIVE OR NEGATIVE, WE BELIEVE THAT THEY THEIR DAY IN COURT.

WHAT ABOUT THE PETITIONER'S ARGUMENT THAT THE ORIGINAL LANGUAGE OF THE STATUTE, EVEN BEFORE THE SECTION WAS PUT IN CONCERNING THE PERSONAL REPRESENTATIVE, THAT THE PERSONAL REPRESENTATIVE ACTUALLY HAD THE RIGHT TO BRING AN ACTION AS THE GUARDIAN OR THE OTHER -- I FORGOT THE LANGUAGE EXACTLY IN THE STATUTE. IT TALKS ABOUT SOMEONE ELSE BRINGING AN ACTION ON BEHALF OF THE RESIDENT. SO HOW DO YOU RESPOND TO THAT ARGUMENT, AND THE SECOND PART OF THE ARGUMENT BEING THAT THE NEW LANGUAGE WAS ONLY PUT THERE FOR THIS NARROW LOOPHOLE?

IT IS OUR POSITION THAT, 46.021 CREATES A NEGLIGENT SURVIVAL COMMON LAW CAUSE OF ACTION. YOU HAVE A CAUSE OF ACTION. 46.021 IS NOT A CAUSE OF ACTION. IT IS A ENABLING STATUTE. IT SAYS NO CAUSE OF ACTION DIES. YOU HAVE A COMMON LAW NEGLIGENCE CAUSE OF ACTION. THE ENABLING STATUTE OF 46.021, I THINK THAT EXISTS. I THINK WHAT THEY DID IS THE PERSONAL REPRESENTATIVE DOES NOT HAVE A STATUTORY CAUSE OF ACTION PRIOR TO 1986. IT IS OUR POSITION THAT THEY ADDED THE STATUTORY CAUSE OF ACTION IN 1986, WITH THE PROVISO THAT THE CAUSE OF DEATH MUST COME FROM THE DEPRIVATION OR INFRINGEMENT OF THE RESIDENT'S RIGHTS.

WOULD YOU, ALSO, ADDRESS THE 2001 AMENDMENT, BECAUSE IT APPEARS THAT THE FOURTH DISTRICT CAME OUT WITH ITS OPINION, AFTER THE LEGISLATURE OF 2000 HAD ENDED, AND IN THE VERY NEXT LEGISLATURE, THEY, THEN, CORRECTED, OR WHAT IS WRONG WITH THE ARGUMENT, I GUESS, THAT CORRECTED THIS DECISION, SAYING, NO, THAT IS WRONG. WE REALLY INTENDED THAT THERE IS A SURVIVAL ACTION HERE. TELL ME WHAT IS WRONG WITH THAT REASONING, FROM YOUR PERSPECTIVE THE LEGAL IMPROPRIETY WITH THAT THOUGHT.

YOU KNOW, YOU CAN LOOK AT IT EITHER WAY, BUT IT IS OUR POSITION THAT LOOKING AT THE NEW STATUTE SHOWS THEY KNEW HOW TO WRITE, TO CREATE THE CAUSE OF ACTION, WHETHER OR NOT THERE WAS A DEPRIVATION, JUST LIKE IN 415. THEY CHOSE HAD, IN 400.023 NOT TO DO. THAT THEY CHOSE, IN 415.1111, WHICH IS THE ABUSE AND NEGLECT STATUTE, TO SAY WHETHER OR NOT, SO THE LEGISLATURE IS PRESUMED TO KNOW THE DIFFERENCE. IF ANYTHING, THE NEW STATUTE SHEDS LIGHT ON THE OLD STATUTE AND SAYS, HEY, THEY KNOW THE DIFFERENCE. THEY CLEARLY KNOW THE DIFFERENCE BECAUSE THEY WROTE THAT LANGUAGE. IF IT WAS SO CLEAR, THEY WOULD NOT NEEDED TO HAVE CLARIFY IT.

WHATEVER PRINCIPLE OF LAW THAT SAYS THAT YOU CAN LOOK WHEN THE LEGISLATURE CHANGES IT IN RESPONSE TO SOMETHING THAT HAS OCCURRED, THAT THEY CAN CLARIFY THEIR ORIGINAL INTENT. I AM AWARE OF CASE LAW ON THAT. WOULD YOU AGREE THAT THERE HIS CASE LAW THAT SAYS THAT?

YES.

I AM NOT AWARE OF CASE LAW THAT SAYS THE OPPOSITE THAT YOU HAVE JUST POSITIVE FORCED. WOULD I BE ABLE TO FIND CASE LAW THAT SUPPORTS THAT?

ACTUALLY IT IS THE LATTER. WE CITED IN OUR BRIEF, I THINK IT IS THE METROPOLITAN CASE BUT IT MAY BE THE SUPPLEMENTAL AUTHORITY THAT WE PRESENTED, AND I THINK IT GOES TO THE FORUM, AND I THINK THAT SUBMISSION WAS THAT YOU CAN LOOK TO THE SUBSEQUENT STATUTE TO DETERMINE WHAT THEY INTENDED IN THE PREVIOUS STATUTE, BUT I CAN'T ARGUE WITH YOU THAT IT IS CERTAINLY A DOUBLE-EDGED ARGUMENT, WHEN YOU DEAL WITH THAT ISSUE. FOR THE REASONS WHICH WE HAVE ESPOUSED IN OUR BRIEFS AND IN THE BRIEFS OF THE AMICUS THAT ARE BEFORE THIS COURT, WE WOULD ASK THIS COURT TO DECLINE JURISDICTION IN THIS CASE IF, IN FACT, THE COURT DECIDES TO ACCEPT JURISDICTION IN THIS CASE TO ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE, AND EITHER WAY, TO AFFIRM THE REINSTATEMENT

OF THE ZERO VERDICT, FINDING THAT THE PLAINTIFF HAD ITS DAY IN COURT. IF THERE ARE NO FURTHER QUESTIONS, WE WILL YIELD THE REST OF OUR TIME OF THE ARGUMENT. WE THANK YOU.

REBUTTAL?

MY OPPONENTS MADE A VERY IMPORTANT CONCESSION HERE THIS MORNING, AND THAT WAS THAT THE RESIDENTS HAD A CAUSE OF ACTION FOR THE VIOLATION, UNTIL THE RESIDENT DIED. THEY, ALSO, MADE A VERY IMPORTANT CONCESSION IN THEIR BRIEF, ON PAGE 26, WHERE THEY ARE TALKING ABOUT HARMONIZEING THE SURVIVAL STATUTE AND THE STATUTE THAT WE ARE TALKING ABOUT HERE, TODAY. AND THEY SAY, AND I QUOTE, THE TWO SECTIONS CAN BE QUIETESTLY HARMONIZED. IF ONE SIMPLY REALIZES THAT SECTION 46.021 DOES NOT CREATOR WHOLLY, OR MODIFY ANYTHING, IT MERELY PROVIDES THAT, IF AN ACTION EXISTS PRIOR TO THE DEATH OF THE REAL PARTY IN INTEREST, IT DOES NOT DIE WITH THAT PARTY'S DEATH. I COULD NOT HAVE CAPSULIZED OUR ARGUMENT BETTER THAN THEY DID ON PAGE 26 OF THEIR BRIEF.

WELL, COME BACK TO, AND HELP ME WITH THE PROPOSITION, AND CLARIFY YOUR POSITION HERE AS TO WHETHER OR NOT THIS LANGUAGE WAS NEEDED IN THE STATUTE, IN 1986, WHEN THE STATUTE WAS AMENDED, AND THIS LANGUAGE ABOUT THE PERSONAL REPRESENTATIVE BEING ABLE TO BRING AN ACTION UNDER THE STATUTE, IF THE PATIENT DIES AS A RESULT OF THE MISTREATMENT OR ABUSE OR VIOLATION, BECAUSE IF I UNDERSTOOD YOUR EARLIER ANSWER, IT WAS THAT THIS LANGUAGE WASN'T NECESSARY AT THE TIME, BECAUSE THE PERSONAL REPRESENTATIVE COULD ALWAYS BRING AN ACTION FOR A VIOLATION OF THE RIGHTS UNDER THE STATUTE, SO HELP ME.

OKAY. THERE IS A DIFFERENCE. THE PERSONAL REPRESENTATIVE HAS ALWAYS HAD THE RIGHT TO BRING A SURVIVAL CAUSE OF ACTION, MEANING AN ACTION FOR THE VIOLATION, WHERE THE VIOLATION DID NOT CAUSE THE DEATH. THAT RIGHT HAS ALWAYS EXISTED IN THIS STATUTE SINCE 1981, WHEN IT WAS ORIGINALLY ENACTED. WHAT DIDN'T EXIST AND WHAT CHANGED IN 1986 WAS THE RIGHT TO RECOVER DAMAGES ON THE RESIDENT'S BEHALF, WHEN THE RESIDENT DIED AS A RESULT OF THE VIOLATION, BECAUSE IN THAT INSTANCE, THE SURVIVAL ACTION WOULD DIE, AND THE REMEDY WOULD BE AUTOMATICALLY REPLACED WITH THE REMEDIES UNDER THE WRONGFUL-DEATH ACT. THIS LANGUAGE, AND THE LEGISLATURE SAID SO, THIS LANGUAGE WAS MEANT TO CORRECT THAT DEFICIENCY, SO THE RESIDENT IN THAT INSTANCE, WHERE THE VIOLATION CAUSED THE DEATH, WOULD BE AFFORDED THE EXPANDED REMEDIES UNDER THE NURSING HOME ACT, AND NOT THE MORE LIMITED REMEDIES UNDER THE WRONGFUL-DEATH ACT. AND, AGAIN, IF YOU LOOK AT THE LEGISLATIVE HISTORY, IT BEARS OUT THAT INTERPRETATION. IF YOU LOOK AT THE FIFTH DISTRICT'S OPINION IN SPILLMAN, IT BEARS OUT THAT INTERPRETATION AND, ALSO, IN THE EARLIER PART OF THE OPINION, TALKS ABOUT HOW THERE IS A SURVIVAL CAUSE OF ACTION EXISTING UNDER THE STATUTE, IN 1980 AND BEFORE 1986 AND THAT WHAT NEEDED TO HAPPEN WAS AN AMENDMENT TO CORRECT THE DEFICIENCY, WHEN THE RESIDENT DIED AS A RESULT OF THE VIOLATION, AS THE RESIDENT HAD IN THE SPILLMAN CASE. IT IS IMPORTANT --

THAT INTERPRETATION, THEN, WHEN YOU SAID EARLIER THAT IT, IF YOU HAD ALREADY BROUGHT THE ACTION AND THEN DIED, SOMEHOW YOU HAD LOST THIS ACTION. IT CAN'T BE TRUE, THEN, IF YOU ALWAYS HAVE, IF THE PERSONAL REPRESENTATIVE ALWAYS HAD THE RIGHT, UNDER THE STATUTE, SINCE 1980, TO BRING THIS KIND OF ACTION, SO CERTAINLY IF IT HAD STARTED, WE WOULDN'T HAVE A PROBLEM, CORRECT?

NO. THAT IS NOT CORRECT, YOUR HONOR. IT SHOULD BE CORRECT, BUT AS A RESULT OF THE FOURTH DISTRICT'S DECISION IN THIS CASE THERE, IS NO SURVIVAL CAUSE OF ACTION, SO AS SOON AS THE RESIDENT DIES, REGARDLESS OF WHETHER OR NOT THE ACTIONS ALREADY BEEN BROUGHT, THE CAUSE OF ACTION DIES, AND IT IS REPLACED BY THE WRONGFUL-DEATH REMEDY,

IF THE PERSON DIED AS A RESULT OF THE VIOLATION. IF THE PERSON DID NOT DAIS A RESULT OF THE VIOLATION, THE CAUSE OF ACTION UNDER THE NURSING HOME ACT, IS EX-ING IT QIRBD, AND -- EXTINGUISHED, AND ALL THE PERSON IS LEFT WITH IS THE COMMON LAW NEGLIGENCE REMEDIES.

WHAT ABOUT JUDGE WARNER'S STATEMENTS THOUGH? YOU WOULD AGREE THAT THE RIGHTS UNDER THIS STATUTE WHICH SHE OUTLINES IN.022 AND.02 ARE ALL PERSONAL RIGHTS. THOSE CANNOT BE ENFORCED FOR SOME TYPE OF DAMAGES, BECAUSE THEY WERE BREACHED AFTER THE PERSON DIED, DID THEY?

I DON'T AGREE WITH THAT, YOUR HONOR.

YOU THINK THAT THEY COULD BE SUED BECAUSE THERE WAS A RIGHT TO ORGANIZE AND PARTICIPATE IN A GROUP FACILITY, AND THAT THERE WOULD BE A CAUSE OF ACTION AFTER THE PERSON DIES?

YES, YOUR HONOR. IF YOU LOOK AT THE PURPOSE OF THE STATUTE, IT IS MEANT TO BE A GLOBAL ENACTMENT, TO PROTECT ALL RESIDENTS, NOT JUST RESIDENT WHO HAS BEEN SUBJECT TO THE VIOLATION. IT IS MEANT TO BE A PRIVATE ATTORNEY GENERAL. IT IS MEANT TO PROVIDE DISINCENTIVE. NOW, WHAT THE DIFFERENCE IN YOUR HYPOTHETICAL WOULD BE, THERE MAY BE NOT ANY ACTUAL DAMAGES, AND THERE PROBABLY WOULDN'T BE ANY, BECAUSE THERE WOULDN'T BE ACTUAL DAMAGES, COMPENSATORY DAMAGES CAUSED BY THAT VIOLATION, BUT WHAT WOULD HAPPEN --

IT DOES SEEM TO ME THAT THAT BREAKS DOWN, WHEN YOU CONSIDERED THE DISTINCTION WHICH WE CAME ABOUT IN THE LATE '670S '70s BETWEEN A -- IN THE LATE '70s, WHEN WE TALKED ABOUT A WRONGFUL ACTION AND WRONGFUL-DEATH ACTION ACTION. THE WHOLE INTENT THERE WAS THAT YOU HAD POLICY DAMAGES, WHICH WERE GOING TO IN YOUR TO THE BOENAU-WERE GOING TO INURE TO THE BENEFIT OF THE BENEFICIARIES OF THE ESTATE, PEOPLE WHO WERE, IN THEORY, ALSO DAMAGED BY WHAT HAD HAPPENED.

CORRECT.

IT IS THE INTENT OF THIS STATUTE, QUITE CLEARLY, IS TO DEAL WITH PROBLEMS AT THE NURSING HOME THAT WOULD BE PERSONAL AND BENEFIT OF RESIDENT WHILE THE RESIDENT WAS STILL ALIVE.

OUR THEORY, YOUR HONOR, IS THAT THE PURPOSE IS MUCH MORE GLOBAL THAN THAT, AND IT IS TO PROTECT NOT JUST THAT RESIDENT BUT ALL RESIDENTS. WE LIVE IN THE STATE OF FLORIDA, WHICH HAPPENS TO HAVE A POPULATION OF MANY MORE ELDERLY PEOPLE THAN ANY OTHER STATE IN THIS COUNTRY. WE HAVE MORE NURSING HOMES THAN MOST STATES IN THIS COUNTRY. WE, ALSO, IN LIGHT OF THE LEGISLATIVE HISTORY, EVEN IN THIS 2001 STATUTE, ARE IN A SITUATION WHERE RIGHTS ARE CONTINUING TO BE ABUSED, AND THESE PEOPLE NEED PROTECTION.

THANK YOU MS. WALSH.

WE WOULD ASK THAT THE FOURTH DISTRICT QUESTION BE QUASHED AND THE QUESTION ANSWERED IN THE AFFIRMATIVE AND A NEW TRIAL BE GRANTED AND THE FABRE DECISION BE STRICKEN. THANK YOU.

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.