John M. Gouty v. J. Alan Schnepel

MR. CHIEF JUSTICE: GOOD MORNING, AND WELCOME, AGAIN, TO THE ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT. I UNDERSTAND, NOW, WE HAVE BEEN JOINED BY A GROUP OF GATORS, FROM THE AGRICULTURAL LAW CLASS AT THE UNIVERSITY OF FLORIDA, REPRESENTING THE COLLEGE OF AGRICULTURE AND THE COLLEGE OF LAW, AND LED BY DR. MICHAEL ALEXA, AND WE ARE PLEASED TO HAVE YOU JOIN US THIS MORNING. THE NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDAR IS GOUTY VERSUS SCHNEPEL. MR. McCARTHY.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS ED McCARTHY. I AM HERE FROM THE JACKSONVILLE LAW FIRM OF ALLEN, BRINTON AND McCARTHY, AND WE ARE HERE ON BEHALF OF MR. GOUTY, WHO IS THE APPELLANT HERE. IN THIS CASE, IT INVOLVED MR. GOUTY AND MR. SCHNEPEL GOING TO A SHOOTING RANGE. WHEN MR. SCHNEPEL WAS DONE FIRING HIS GLORCK PISTOL, HE WAS PUTTING IT INTO A CARRY CASE AND FORGOT THERE WAS A BULLET IN IT. THE GUN WENT OFF AND WENT THROUGH MR. GOUTY'S ARM. MR. SCHNEPEL WAS SUED, AND WE PROCEEDED TO TRIAL WITH MR. SCHNEPEL, WITH GLOCK ON THE VERDICT FORM. THE JURY FOUND THAT MR. SCHNEPEL WAS 100 PERCENT LIABLE, THAT GLOCK HAD ZERO PERCENT LIABILITY. MR. SCHNEPEL MOVED FOR A SET-OFF OF THE SETTLEMENT, AFTER TRIAL, AND THE COURT, FINDING NO JOINT AND SEVERAL LIABILITY, BECAUSE MR. SCHNEPEL WAS FOUND 100 PERCENT RESPONSIBLE, ALLOWED NO SET OFF. IT WAS APPEALED. THE FIRST DCA REVERSED, WITH JUDGE VAN NORTWIG DISSENTING, AND THEY CERTIFIED A QUESTION OF GREAT PUBLIC IMPORTANCE, WHICH GOT US HERE.

LET ME ASK YOU, THERE IS A VARIATION, FIRST OF ALL, BASED ON THE DECISION IN WELLS, ALTHOUGH THERE IS NO QUESTION THAT NOBODY ASKED FOR A SET-OFF AS TO NONECONOMIC DAMAGES.

THAT'S CORRECT.

SO EVEN THOUGH, AT THE VERDICT FORM LOOSE, HE FOUND 10 ON PERCENT FOR ALL OF THE DAMAGE -- 100 PERCENT FOR ALL OF THE DAMAGES, BECAUSE OF THE THEORETICAL POSSIBILITY OF HIS BEING FOUND JOINTLY AND SEVERALLY RESPONSIBLE FOR NONECONOMIC ISSUES, THAT IS NOT A SET-OFF.

THAT IS NOT AN ISSUE, THE NONECONOMIC SET OFF IS NOT AN ISSUE.

THERE IS NO QUESTION THAT, IF DPLOCK HAD BEEN FOUND ANYWHERE, 1% -- IF DPLOCK HAD BEEN FOUND ANYWHERE, 1 PERCENT, 2 PERCENT, 3 PERCENT, THAT YOU WOULD HAVE FOUND ECONOMIC SET OFF.

WHAT IF GLOCK IS NOT ON THE VERDICT FORMAT ALL?

IF THEY WERE NOT ON THE VERDICT FORM, THEN THAT WOULD BE IN VIOLATION OF FABRE, AND YOU WOULD HAVE TO SEND IT BACK TO BE RETRIED.

WHAT IF NOBODY SUGGESTED THAT GLOCK WAS, ALSO, RESPONSIBLE FOR THIS, WITHIN THE CONTEXT OF THE CASE, SO NOBODY ASKED FOR GLOCK TO BE PUT ON THE VERDICT FORM.

WELL, UNDER FABRE, THEN, THAT IS THE CO-DEFENDANT'S BURDEN, IF THEY FAILED TO MEET

THAT BURDEN TO PUT THEM ON THE VERDICT FORM, THEN THERE WOULD BE NO JOINT AND SEVERAL LIABILITY.

SO YOU ARE SAYING UNDER THAT CIRCUMSTANCE, THERE WOULD BE NO SET OFF.

THAT'S CORRECT.

SO THIS IS THE TOTAL CHANGE IN WHAT THE LAW WOULD HAVE BEEN PRIOR TO FABRE, CORRECT? YOU HAVE NO QUESTION BUT THAT PRIOR TO FABRE, YOU WOULD HAVE HAD A SET-OFF, ACTUALLY, HOW MUCH WOULD YOUR SET OFF HAD BEEN, UNDER THE SAME CIRCUMSTANCES? PRIOR TO FABRE AND COMPARATIVE FAULT.

PRIOR TO COMPARATIVE FAULT, IT WOULD HAVE BEEN 7.681, IT WOULD HAVE BEEN AN ENTIRE SET OFF OF THE $126,000.

THAT WOULD HAVE BEEN PRIOR TO WELLS.

PRIOR TO THE WHOLE STATUTE, THE WHOLE THING WOULD HAVE BEEN SET OFF.

AND THE CLARIFICATION IN THE TALLAHASSEE MEMORIAL CASE, BUT WAS GOUTY PART OF THE CASE, WHILE IT WAS BEFORE THE JURY? FROM THE STANDPOINT WAS --

YOU MEAN GLOCK?

I MEAN GLOCK. WHEN DID SETTLEMENT TAKE PLACE?

THE SETTLEMENT TOOK PLACE A MONTH, TWO MONTHS BEFORE THE TRIAL.

SO THERE WAS NO REPRESENTATION OF THIS --

THAT IS CORRECT.

-- DEFENDANT IN THIS TRIAL.

RIGHT.

BUT BY REASON OF THE WAY THAT THE CASE LAW HAS COME DOWN, IT WAS ASSERTED THAT HE WAS A TORTFEASOR, AND PUT ON THE VERDICT FORM.

HE WAS PUT ON THE VERDICT FORM. IT WAS ASSERTED THAT HE WAS A TORTFEASOR, AND IT WAS THE DEFENDANT'S OBLIGATION TO MEET THE BURDEN, TO SHOW THAT HE WAS A TORTFEASOR, WHO WAS RESPONSIBLE, IN SOME WAY OR FASHION, FOR THIS INJURY, THAN BURDEN WAS NOT MET.

AND THE JURY WAS NOT APPRISEED, BY REASON OF THE STATUTE, OF ANY SETTLEMENT.

THAT'S CORRECT. YES. AND THAT IS THE WHOLE THING. THE SHIFT THAT IS GOING ON, FROM THE POLICY SHIFT THAT IS GOING ON, NOT JUST IN THIS STATE BUT THROUGHOUT THE NATION, AS REFLECTED IN THE BRIEFS, IS WE ARE MOVING FROM AN INDIVISIBLE INJURY, SINGLE-RECOVERY POLICY, TO A POLICY THAT JUDGMENT IS TO BE ENTERED ON THE BASIS OF FAULT. THAT IS THE MAJORITY OF THE STATES, IN ADOPTING COMPARATIVE FAULT, IN ABROGATEING WHOLLY, JOINT OR SEVERAL LIABILITY, AND THAT IS THAT, AND THAT IS WHAT OCCURRED IN THIS STATE, WHEN THEY PASSED 768.681, AND THAT IS HOW THIS COURT HAS INTERPRETED IT, IN WELLS AND FABRE, AND IT IS THE PURPOSE OF THAT STATUTE, IS FOR JUDGMENT TO BE ENTERED, ON THE BASIS OF FAULT, AND THAT PURPOSE WAS MET, IN THIS CASE.

DO YOU AGREE THAT, IF YOU JUST LOOK AT THE SET OFF STATUTE, YOU HAVE A HARD TIME, ACTUALLY HAVE A HARD TIME GETTING TO WELLS OR YOUR POSITION IN THIS CASE?

NOT IF YOU -- NOT IF YOU TAKE WELLS INTO ACCOUNT. THE LANGUAGE --

I SAID IF YOU DON'T. IF YOU JUST READ THE LANGUAGE OF THE STATUTE.

WELL, NO, IF YOU JUST GO WITH THE LANGUAGE OF THE STATE STAUT, THE FIRST PROGRAM IS -- OF THE STATUTE, THE FIRST PARAGRAPH IS SAYING JOINT AND SEVERAL LIABILITY. THERE ARE TWO PEOPLE WHO ARE JOINT AND SEVERALLY LIABLE, IN THE SET OFF PARAGRAPH OF THE STATUTES. THE SECOND PARAGRAPH SAYS THAT IT IS THE DEFENDANT WHO HAS TO SHOW THE BURDEN. A BUT, AGAIN, BEFORE THE WELLS COMPARATIVE FAULT, YOU JUST ADMITTED THAT THERE WOULD HAVE BEEN A SET-OFF FOR THE ENTIRE VERDICT, SO THE VERY FACT OF SOMEONE ELSE SETTLING WOULD HAVE ESTABLISHED JOINT AND SEVERAL LIABILITY. CORRECT?

THAT IS TRUE, BEFORE 768.81 AND ALL THAT. YES.

ALL I AM ASKING YOU IS JUST LOOK AT THE LANGUAGE OF THE SET OFF STATUTE, YOU DON'T REALLY GET TO WHERE YOU HAVE TO GO IN THIS CASE.

IF YOU LOOK AT IT PRIOR TO THE PASSING OF 768.81, THAT IS CORRECT, BECAUSE THE COMMON LAW ACKNOWLEDGED JOINT AND SEVERAL LIABILITY EVERYWHERE. IT PRESUPPOSED, AND THAT IS HOW THE STATUTES WERE DRAFTED, THEY PRESUPPOSED THE EXISTENCE OF JOINT AND SEVERAL LIABILITY.

AFTER THE COMPARATIVE FAULT STATUTE WAS DRAFTED, THERE WAS NO CHANGE IN ANY OF THE THREE SET OFF STATUTES.

AS FAR AS I KNOW, THAT'S CORRECT.

AND UP TO THE PRESENT TIME, AFTER WELLS, EVEN IN LIGHT OF JUSTICE ANSTEAD'S CONCURRENCE, IT SAID THE LEGISLATURE, IF THEY WANT TO DO SOMETHING, TO BRING THIS INTO HOW THEY CONSIDER IT TO BE BROUGHT INTO CONFORMITY, HASN'T CHANGED THE SET OFF STATUTE.

IT HAS NOT CHANGED THE LANGUAGE OF THE SET OFF STATUTES, BUT WHEN YOU HAVE TO READ THE LATER-DRAFTED STATUTE, IN, AS IF THEY KNEW THESE OTHER STATUTES WERE EXISTING, AND YOU HAVE TO READ THEM TOGETHER, TO THE EXTENT THAT IT CAN BE LOGICALLY READ TOGETHER, AND THAT IS WHAT THIS COURT, AT LEAST FOUR MEMBERS OF THIS URT -- THIS COURT, DID IN THE WELLS DECISION, IN ADDRESSING THE NONECONOMIC DAMAGES, AND THAT IS THEY READ THAT 768.81 IS -- AND GATES JOINT AND SEVERAL LIABILITY, EXCEPT IN THREE SPECIFIC SCENARIOS, AND THAT IS THE LESS THAN $25,000, THE INTENTIONAL TORT, AND THEN THE DEFENDANT IS MORE, EQUAL TO OR MORE LIABLE THAN THE PLAINTIFF, IN THOSE THREE SCENARIOS, AND THIS COURT INTERPRETED THAT, READ WITH THE SET OFF STATUTES, AND SET -- AND SAID THAT, UNDER THE SET OFF STATUTES, THEY PRESUPPOSE THE EXISTENCE OF JOINT AND SEVERAL LIABILITY. NOW THERE IS A WAY TO DETERMINE WHETHER OR NOT JOINT AND SEVERAL LIABILITY EXISTS, EVEN AFTER SETTLEMENT, AND SO THEY ARE MORE NARROWLY CONSTRUED THAN THEY WERE PREVIOUSLY, AND IT IS IN -- THE KEY LANGUAGE, OTHER THAN THE FIRST PARAGRAPH THAT SAYS THEY HAVE TO BE JOINTLY AND SEVERALLY LIABLE, THE SECOND PARAGRAPH OF THE SET OFF STATUTES, SAY THAT THE DAMAGES, IT IS THE DEFENDANT'S BURDEN TO SHOW A RELEASE WAS GIVEN IN DAMAGES AND IN PARTIAL SATISFACTION OF THE DAMAGES SUED FOR. AND THIS COURT DETERMINED, IN DECIDING ON THE NONECONOMIC DAMAGE ISSUE, IT DETERMINED THAT THAT LANGUAGE IS FROM THE PERSPECTIVE OF THE NONSETTLING DEFENDANT, MEANING THAT THE LANGUAGES IN PARTIAL SATISFACTION OF THE DAMAGES THAT THE PLAINTIFF SUED THE NONSETTLING TORTFEASOR, THAT IS HOW THIS

INTERPRETED, THIS COURT INTERPRETED IT, TO ALLOW NO SET OFF FOR THE NONECONOMIC DAMAGES. IT IS DETERMINED THAT, FOR NONECONOMIC DAMAGES, BECAUSE A NONSETTLING DEFENDANT CAN NEVER BE RESPONSIBLE FOR A SETTLING DEFENDANT'S NONECONOMIC DAMAGES, THE SETTLEMENT DOLLARS FOR THE NONECONOMIC DAMAGES CANNOT BE IN PARTIAL SATISFACTION OF THE DAMAGES THAT THE PLAINTIFF SUED THE NONSETTLING DEFENDANT FOR. AND THAT IS EXACTLY HOW THIS COURT NEEDS TO READ THAT.

THAT IS BECAUSE JOINT AND SEVERAL LIABILITY STILL ATTAINED TO ECONOMIC DAMAGES.

YES, SIR. THE DOCTRINE OF JOINT AND SEVERAL LIABILITY IS STILL AVAILABLE TO ECONOMIC DAMAGES. AND THAT IS HOW THE STATUTE SPECIFICALLY READS. IT SAYS THE DOCTRINE OF JOINT AND SEVERAL LIABILITY, AND THE DOCTRINE REQUIRES THAT TWO PARTIES BE FOUND JOINTLY AND SEVERALLY LIABLE FOR THAT TO OCCUR, AND IT IS THE JURY WHO HAS TO DETERMINE THIS. IT IS THE JURY WHO HAS TO DETERMINE IF THE DAMAGES ARE LESS THAN $25,000 OR MORE THAN $25,000, UNDER THE STATUTE. IT IS THE JURY WHO HAS TO DETERMINE IF THE PERCENTAGE OF FAULT OF A DEFENDANT IS LESS THAN THAT OF THE PLAINTIFF, TO SEE IF JOINT AND SEVERAL LIABILITY APPLIES. IT IS THE JURY THAT HAS TO DECIDE IF ONE PARTY HAS ANY FAULT, AND IF THE JURY FINDS ONE PARTY 100 PERCENT AT FAULT, THEN THE DOCTRINE OF JOINT AND SEVERAL LIABILITY SAYS THAT THERE IS NO JOINT AND SEVERAL LIABILITY.

SO THE IDEA IS THAT ONLY IF YOU ARE ACTUALLY PAYING MORE THAN YOUR PROPORTIONAL SHARE OF THE DAMAGES, WHICH WOULD OCCUR IF YOU -- WHEN THE ECONOMIC DAMAGES ARE ASSESSED, ON THE BASIS OF JOINT AND SEVERAL, SHOULD THERE BE A SETTLEMENT? IS THAT CORRECT?

THERE SHOULD ONLY BE A SET-OFF -- A SET-OFF, IS THAT CORRECT?

THERE SHOULD ONLY AND SET OFF --

IF YOU ARE ONLY PAYING WHAT YOUR PORTION SHARE OF THE DAMAGES WOULD BE.

THAT IS, LITTLE, THE GOAL OF THE COMPARISON FAULT STATUTE.

THE ECONOMIC DAMAGES, THE REASON THERE WOULDN'T BE A SET-OFF IN THE INDICATES IF, FOR EXAMPLE, SCHNEPEL WAS FOUND TO BE LESS AT FAULT -- IS SCHNEPEL THE DEFENDANT?

SCHNEPEL WAS THE DEFENDANT. GLOCK WAS THE --

GOUTY. DID THEY SAY -- WERE THEY CLAIMING COMPARATIVE NEGLIGENCE ON GOUTY?

AFTER THE SETTLEMENT WITH GLOCK, THEY CONCEDED NO FAULT ON GOUTY'S PART.

IN 24 SITUATION, THOUGH, THERE -- IN THIS SITUATION, THOUGH, THERE WOULD NEVER HAVE BEEN THE CASE WHERE THE SCHNEPEL'S LIABILITY OR PERCENTAGE OF FAULT WOULD HAVE BEEN LESS THAN THE PLAINTIFF'S, BECAUSE THERE WASN'T --

THAT IS TRUE WHEN WE GOT TO THE JURY. WE DIDN'T KNOW IF THAT WAS TRUE, WHEN WE SETTLED WITH GLOCK.

BUT THE ESSENCE OF THIS BATTLE COMES DOWN TO WHETHER OR NOT YOU LOOK AFTER THE JURY VERDICT COMES IN --

THAT'S RIGHT.

-- OR WHETHER YOU ARE GOING TO SAY THAT, BECAUSE THESE PEOPLE PAID, IN ORDER TO GET A

RELEASE FROM THIS SAME TORT LIABILITY, THAT REQUIRES THE SET OFF STATUTE TO COME INTO EFFECT. I MEAN THAT IS THE ESSENCE OF --

THAT IS TRUE, AND IF THIS COURT CHOSE TO FOLLOW THE LATTER, THAT YOU JUST SUGGESTED, IT WOULD BE ADDING A FOURTH EXCEPTION THAT IS NOT EXPRESSED IN 768.81, A FOURTH EXCEPTION TO THE ABROGATION OF THE JOINT AND SEVERAL LIABILITY, AND THAT IS IF YOU HAVE A SETTLEMENT THAT, BECAUSE OF THE SET OFF STATUTES, YOU AUTOMATICALLY CREATE JOINT AND SEVERAL LIABILITY FOR ECONOMIC DAMAGES, AND THAT IS NOT -- THAT IS NOT IN THE STATUTE. THE SET ON OFF STATUTE, THIS COURT HAS, ALREADY, SAID PRESUPPOSED THE EXISTENCE OF JOINT AND SEVERAL LIABILITY, BY DEFINITION, PRESUPPOSING THE JOINT AND SEVERAL LIABILITY TO NOT -- THE ENTITY THAT PRESUPPOSES IT CANNOT CREATE THE EXISTENCE OF JOINT AND SEVERAL LIABILITY. AND IF THE COURT CHOSE TO DO THAT LATTER PART OF SAYING THE SETTLEMENT AUTOMATICALLY CREATES THE JOINT AND SEVERAL LIABILITY, BY VIRTUE OF THE JOINT -- THE SET OFF STATUTES, THEN THAT WOULD BE CREATING THIS FOURTH EXCEPTION, WHERE THE SET OFF STATUTES, THEMSELVES, PRESUPPOSED THE EXISTENCE OF JOINT AND SEVERAL LIABILITY, BUT IT WOULD BE CREATING IT, WHICH CANNOT HAPPEN. ACCORDING TO HOW THIS COURT HAD RULED, IN WELLS. IN FACT, THE -- IT IS THE JURY WHO HAS TO DECIDE, UNDER THE SET-UP THAT THE LEGISLATURE HAS GIVEN US, IT IS THE JURY THAT HAS TO DECIDE ALL THESE POINTS.

WELL, ACTUALLY, IT COMES DOWN TO WHAT JUDGE VAN ORWICK SAID, IN WHO IS GOING TO GET A WINDFALL.

TRUE, BECAUSE THERE IS A WINDFALL. THERE IS NO QUESTION ABOUT IT, AND THERE IS A WINDFALL, EITHER WAY, AND SO IT IS NOT EVEN -- IT IS WHO IS GOING TO GET THE GREATER WINDFALL, BECAUSE EITHER WAY, IT IS MORE THAN THE SINGLE RECOVERY, SO ARE WE GOING TO ARBITRARILY PLACE, YOU KNOW, A NUMBER OF HOW MUCH MORE OR ARE YOU GOING TO GO BACK AND SAY THE PURPOSE OF THIS STATUTE, THE POLICY, THE WHOLE -- WE ARE MOVING AWAY FROM THE SINGLE RECOVERY POLICY. WE ARE MOVING TOWARDS FINDING FAULT OR AWARDING DAMAGES, BASED ON THE PERCENTAGE OF FAULT.

THE POLICY, I MEAN, YOU COME DOWN TO, DON'T YOU, AS TO WHETHER THE PLAINTIFF IS GOING TO GET MORE, IN THE TOTALITY OF SETTLEMENTS AND JURY VERDICTS, THAN WHAT HAS NOW BEEN DETERMINED TO BE THE AMOUNT OF DAMAGES THAT HAVE BEEN SUFFERED, VERSUS THE IDEA THAT NOW THERE HAS BEEN A JURY DETERMINATION THAT ONE PERSON WASN'T A TORTFEASOR.

THAT'S RIGHT.

THAT IS THE THEORY.

RIGHT. AND WHO MORE RIGHTLY TO GET THAT WINDFALL, THE ONE WHO COMMITTED, WAS FOUND 100 PERCENT RESPONSIBLE FOR INJURING THIS PERSON OR THE ONE WHO WORKED OUT A SETTLEMENT THAT HAPPENED TO END UP BEING BENEFICIAL TO THEM IN THE END RUN.

IN THIS CASE, BECAUSE OF WELLS, THE PLAINTIFF IS ALREADY GETTING A WINDFALL ON THE NONECONOMIC DAMAGES.

THAT IS MY WHOLE POINT, IS THEY GET A WINDFALL, REGARDLESS, AND IF WE ARE DEFINING IT ON TRYING TO LIMIT THE WINDFALL, THEN IT BECOMES AN ARBITRARY DECISION, AND THAT IS WHY YOU CAN'T DEFINE IT THAT WAY. YOU HAVE TO LOOK AT IT AS IT IS A JUDGMENT ENTERED ON THE BASIS OF FAULT, AND THAT IS WHERE -- THAT IS THE WHOLE POLICY SHIFT. THAT IS WHAT HAS OCCURRED HERE, AND I AM INTO MY REBUTTAL TIME.

THANK YOU.

STEP DOWN.

MR. BROWN.

GOOD MORNING. THIS CAN BE MADE VERY COMPLEX, BUT IN TRUTH IT IS VERY, VERY SIMPLE. AND I WOULD LIKE TO READ THE STATUTE, AND WE ARE GETTING LOST, A LITTLE BIT, ON HE CAN WITTS AND CERTAIN OTHER ISSUES. -- ON WE CANITYS AND CERTAIN OTHER ISSUES. -- ON EQUITIES AND SEVERAL OTHER ISSUES OF DAMAGES. THE COURT SHALL ENTER JUDGMENT AGAINST EACH PARTY LIABLE. "JUDGMENT AGAINST EACH PARTY LIABLE". WELL, THE ONLY PARTY LEFT IS THE NONSETTLING DEFENDANT. ON THE BASIS OF SUCH PARTY'S PERCENTAGE OF FAULT AND NOT ON THE BASIS OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY. THAT IS STATEMENT NUMBER ONE, AS TO NONECONOMIC DAMAGES. PROVIDED THAT, WITH RESPECT TO ANY PARTY WHOSE PERCENTAGE OF FAULT EQUALS OR EXCEEDS THAT OF A PARTICULAR CLAIMANT, THE COURT SHALL ENTER JUDGMENT, WITH RESPECT TO ECONOMIC DAMAGES, AGAINST THAT PARTY -- THAT IS THE NONSETTLING PARTY -- ON THE BASIS OF THE DOCTRINE OF JOINT AND SEVERAL LIABILITY. SO MY POINT BEING THAT THE LEGISLATURE DID NOT SAY THAT THERE MUST BE A FINDING THAT THESE PARTIES ARE JOINT TORTFEASORS OR EVEN THAT THEY ARE JOINT TORTFEASORS. WHAT THE LEGISLATURE SAID IS THAT, IF YOU ARE A NONSETTLING DEFENDANT, YOU GO TO TRIAL AT THE TIME OF ENTRY OF JUDGMENT, YOUR SET OFF AS TO ECONOMIC DAMAGES WILL BE DETERMINED, WILL BE DETERMINED, BASED UPON THE PRINCIPLES OF JOINT AND SEVERAL LIABILITY.

BUT IN -- YOU WOULD AGREE THAT, LET'S ASSUME THERE IS COMPARATIVE NEGLIGENCE AS AN ISSUE IN THIS CASE, AND YOUR CLIENT IS FOUND, THEN, 45 PERCENT AT FAULT, AND THE PLAINTIFF IS FOUND 55 PERCENT AT FAULT. IS THERE A VERDICT ENTERED, AS TO ECONOMIC DAMAGES, ON THE BASIS OF JOINT AND SEVERAL LIABILITY?

NO.

WOULD YOU BE ENTITLED TO A SET-OFF?

NO.

SO, THEN, NOW WE GO TO THE QUESTION, THEN, HOW IS IT THAT -- ISN'T IT TRUE THAT WE HAVE GOT TO DETERMINE WHETHER THERE IS, IN FACT, JOINT AND SEVERAL LIABILITY, ON THE BASIS OF WHAT THE VERDICT SAYS, YOU WOULDN'T KNOW, BEFORE YOU -- THE VERDICT WAS ENTERED, WHETHER YOU WERE OR WERE NOT GOING TO BE HELD LIABLE, ON THE BASIS OF JOINT AND SEVERAL LIABILITY.

VIS-A-VIS THE PLAINTIFF. IN OTHER WORDS, WE ARE HERE, TODAY, FOR STATUTORY CONSTRUCTION.

VIS-A-VIS THE PLAINTIFF, BUT YOU STILL WOULDN'T GET THE BENEFIT OF THE SET OFF, UNDER THAT SCENARIO. THAT IS YOU OR EVEN THOUGH YOU ARE COMPARING YOUR FAULT WITH THE PLAINTIFF, IF YOUR FAULT IS LESS THAN THE PLAINTIFF, EVEN ON ECONOMIC DAMAGES, YOU ARE NOT LIABLE, ON THE BASIS OF JOINT AND SEVERAL LIABILITY.

YES. THE VERDICT DETERMINES THE APPLICABILITY OF THAT EXCEPTION TO 768.81. THE VERDICT BETWEEN THE PLAINTIFF AND DEFENDANT TRIGGERS WHETHER OR NOT THE DEFENDANT IS JOINTLY AND SEVERALLY LIABLE FOR ECONOMIC DAMAGES. TRUE. BUT IT IS CLEARLY STATED, IN THE STATUTE, NOT TO BE RELEVANT, AS TO WHETHER THERE IS JOINT AND SEVERAL LIABILITY VERSUS A CO-DEFENDANT, WHO HAS SETTLED, IF YOU FALL WITHIN THE STATUTORY SCHEME OF JOINT AND SEVERED LIABILITY. IN THIS CASE, WE ADMITTED LIABILITY, BUT WE DID NOT PLEAD COMPARATIVE NEGLIGENCE. THEREFORE THERE WAS NO CONCEIVABLE SCENARIO, FROM THE

JURY VERDICT, IN WHICH WE WOULD NOT HAVE BEEN GOVERNED BY THE STATUTE. WE WERE NECESSARILY TO BE JOINTLY AND SEVERALLY LIABLE, WITH THE CO-DEFENDANT, AND WE WERE NECESSARILY GOVERNED BY A SET-OFF ON THE BASIS, AS STATED IN THE STATUTE, OF JOINT AND SEVERAL LIABILITY, ON THE FACTS OF THIS PARTICULAR CASE. THEN, IF WE GO TO THE SET OFF STATUTES, AND, AGAIN, I AM TRYING TO AVOID ANY CONFUSION THAT MAY HAVE BEEN RAISED IN THE MINDS OF THE COURT, 45 -- 4601.5 AND 768.041, ARE IDENTICAL, AS TO WHAT IS IMPORTANT TO THIS RESOLUTION. SUBSECTION ONE OF THOSE STATUTES DEALS WITH THE SITUATION OF THE EFFECT OF A SELTHMENT ON THE REMAINING DEFENDANT, IN TERMS OF LIABILITY. SUBSECTION TWO, IN BOTH INSTANCES, IS THE OPERATIVE SECTION THAT DEALS WITH, WELL, HOW DO YOU DEAL WITH THE SET OFF ISSUE, AND IN BOTH CASES THE STATUTES SAY THE FOLLOWING. AT TRIAL -- WELL, AGAIN, AT TRIAL, THE ONLY PARTY PRESENT IS THE NONSETTLING DEFENDANT -- IF ANY PERSON SHOWS THE COURT THAT THE PLAINTIFF OR HIS LEGAL REPRESENTATIVE HAS DELIVERED A WRITTEN RELEASE OR COVENANT NOT TO SUE, TO ANY PERSON, IN PARTIAL SATISFACTION OF THE DAMAGES SUED FOR, THE COURT SHALL SET OFF THIS AMOUNT FROM THE AMOUNT OF ANY JUDGMENT TO WHICH THE PLAINTIFF WOULD BE OTHERWISE ENTITLED, AT THE TIME OF RENDERING JUDGMENT, SO THE KEY, THERE, IS NOT JOINT LIABILITY. THERE IS NO MENTION OF JOINT LIABILITY. THE KEY IS PAYMENT OF --

UNDER THAT, WOULDN'T YOU SAY, SINCE YOU HAVE FOUND -- FOUND 100 PERCENT LIABLE FOR, BOTH, ECONOMIC AND NONECONOMIC DAMAGES, WHY WOULDN'T YOU BE ENTITLED TO A SET-OFF FOR THE WHOLE AMOUNT OF THE SETTLEMENT?

WELL, JUDGE, THAT IS A GREAT QUESTION. I DIDN'T WRITE THESE STATUTES, AND THIS RAISES A VERY INTERESTING POINT THAT, I THINK, I HOPE I CAN HELP THE COURT UNDERSTAND WHY WE ARE HERE AND WHY WE HAVE THIS PROBLEM. FLORIDA HAS NOT ADOPTED PURE COMPARATIVE FAULT. ALL OF THE CASES, AND I MEAN ALL OF THEM, IF YOU WANT TO TAKE THE TIME TO READ ALL THESE CASES, FROM ALL OVER THE COUNTRY, THAT THEY CITE, THEY ARE PURE COMPARATIVE FAULT SITUATIONS. HAD FLORIDA ENACTED PURE COMPARATIVE FAULT, THEN THIS PROBABLY WOULD -- THIS PROBLEM WOULD NOT ARISE. ALL OF THOSE CASES SAY IF THERE IS PURE COMPARATIVE FAULT, MEANING YOUR JOINT AND SEVERAL LIABILITY IS COMPLETELY ABOLISHED AND YOU ARE ONLY LIABLE FOR YOUR PERCENTAGE OF ALL DAMAGE, ECONOMIC AND NONECONOMIC DAMAGES, THEN THE SET OFF ISSUE DOESN'T ARE A RISE, BECAUSE YOU ARE ONLY LIABLE FOR YOUR SHARE. WELL, IN FLORIDA, CONFUSING THE LEGISLATURE ONLY PARTIALLY INVOLVES JOINT AND SEVERAL LIABILITY, SO ACCORDINGLY, WE ARE ONLY LIABLE FOR OUR SHARE, APPLYING THE STANDARDS THAT ALL OF THE STATES HAVE ANNOUNCED, OF NONECONOMIC DAMAGES, BUT CONSISTENTLY WITH THE PREEXISTING LAW, TO THE EXTENT THAT WE ARE JOINTLY AND SEVERALLY LIABLE FOR ECONOMIC DAMAGES, WE STILL GET A SET-OFF.

AND THAT IS PRECISELY THE ISSUE THAT WE DEALT WITH, IN TALLAHASSEE MEMORIAL VERSUS WELLS, WAS COMING TO GRIPS WITH WHETHER THE FABRE DOCTRINE AND THIS JOINT -- WHETHER IT APPLY TO NONECONOMIC -- WHETHER IT APPLIED TO NONECONOMIC AS WELL AS ECONOMIC OR JUST AS THE STATUTE REFLECTED, IT WAS JUST DEALING WITH NONECONOMIC DAMAGES.

ABSOLUTELY, SIR, AND YOUR RULING WAS NOT EQUIVOCAL. IT WAS ABSOLUTELY CLEAR, AS TO ECONOMIC DAMAGES, THE SET OFF STATUTES REMAIN APPLICABLE. PERIOD. WELL, WE ARE LIABLE, JOINTLY AND SEVERALLY LIABLE, UNDER THE STATUS OF THIS CASE, IN WHICH WE ADMITTED LIABILITY, WE ARE MORE LIABLE, NECESSARILY, THAN THE PLAINTIFF. WE ARE JOINTLY AND SEVERALLY LIABLE. WE ARE TO BE ASSESSED, BASED ON JOINT AND SEVERAL LIABILITY, AND THEREFORE THE SET OFF STATUTES ARE APPLICABLE. PERIOD. THERE IS NO MEANINGFUL DEBATE, AFTER THE WELLS DECISION ON THAT SUBJECT. JUDGE -- JUSTICE ANSTEAD, I READ YOUR CONCURRING OPINION, BEFORE I STEPPED UP HERE, ONCE AGAIN, AND I AM EXPRESSING THE SAME CONCERN THAT YOU HAD. IT IS UNNECESSARILY CONFUSING THAT WE

HAVE A STATUTE THAT DISTINGUISHES BETWEEN ECONOMIC AND NONECONOMIC DAMAGES, IN TERMS OF JOINT AND SEVERAL LIABILITY, THERE BY CREATING AN ECONOMIC SITUATION, BUT THAT IS THE SITUATION THAT EXIST AT THIS TIME, AND THEREFORE THE WELLS DECISION IS CORRECT. INTERESTINGLY, THE ONLY OTHER STATE THAT HAS THAT DICHOTOMY, THE DISTINCTION BETWEEN ECONOMIC AND NONECONOMIC DAMAGES, THE ONLY OTHER STATE IS CALIFORNIA, AND THE SUPREME COURT OF CALIFORNIA, IN MacCONSUME BETTER VERSUS WELLS, RULED -- IN MacCUMBER VERSUS WELLS, RULED IDENTICALLY IN THIS CASE AND THE SNELL CASE. YOU ARE JOINTLY LIABLE FOR ECONOMIC, NONECONOMIC, THEY HAVE A SIMILAR SET OFF STATUTE. SAME EXACT HOLDING AS THIS COURT, SO IN OUR VIEW, THE STATUTES ARE CLEAR. YOUR DECISION IN WELLS IS CLEAR. AND CORKLY THE FIRST DISTRICT COURT OPINION WAS CORRECT. -- AND ACCORDINGLY THE FIRST DISTRICT COURT OPINION WAS CORRECT. I WOULD LIKE TO MOVE ON TO THE ESTOPPEL ISSUE, UNLESS THERE ARE ANY QUESTIONS ON THAT FIRST POINT. I THINK THE ESTOPPEL ISSUE IS VERY IMPORTANT. I THINK THE INTEGRITY OF OUR SYSTEM IS VERY IMPORTANT, AND IT IS VERY IMPORTANT THAT THE PUBLIC PERCEIVE THAT LAWYERS DON'T TALK OUT OF BOTH SIDES OF THEIR MOUTH, AND I AM NOT -- CERTAINLY NOT ACCUSING THAT IN THIS CASE, BUT WHAT HAPPENED IN THIS CASE AND IS LIKELY TO HAPPEN IN ANY SIMILAR CASE, IS THE PLAINTIFF PLEADS, FILES A PROPOSAL FOR SETTLEMENT, WHICH IS ACCEPTED, ALL WITHIN THE PARAMETERS OF THE TRIAL COURT, AND GETS $137500, FROM SOMEONE THAT THEY HAVE CLAIMED IS LIABLE. THEN THEY TURN AROUND AND ARGUE, FORCIBLY THAT, THAT PERSON IS NOT LIABLE, SO THAT THEY CAN GET MORE MONEY AND, PERHAPS, GET A WINDFALL DOUBLE RECOVERY. AND THE LAW IS VERY CLEAR THAT YOU CAN'T DO THAT. THIS COURT, VARIOUS DISTRICT COURTS, HAVE REPEATEDLY HELD THAT WE JUST DON'T WANT PARTIES DOING THAT IN FLORIDA.

BUT DOESN'T THAT REQUIRE SOME PRIVITY BETWEEN THE PARTY ASSERTING THE RIGHTS, UNDER THIS SCENARIO? I MEAN, FOR EXAMPLE, IT HAPPENS ALL THE TIME. WE ARE PERMITED TO ARGUE IN THE ALTERNATIVE. SO THAT IS WHERE I AM A LITTLE FALLING APART. USUALLY THESE -- THE ESTOPPEL CASES OR ESTOPPEL, IN PAY OR JUDICIAL ESTOPPEL, ALL OF THESE KINDS OF THINGS REQUIRE THAT THERE BE SOME NEXUS BETWEEN THE PARTY SEEKING TO ASSERT THE ESTOPPEL AND THE PARTY YOU ARE SEEKING TO BENEFIT FROM. HERE YOU DON'T HAVE ANY RELATIONSHIP BETWEEN THOSE TWO. THAT IS WHERE I RUN INTO A PROBLEM THAT ANALYSIS HERE.

YES, SIR. BUT IF YOU LOOK AT THOSE CASES, DETRIMENTAL RELIANCE ON THE PART OF MY PARTY, IS NOT REQUIRED FOR JUDICIAL ESTOPPEL. IT IS A DOCTRINE THAT JUST SAYS THAT YOU CANNOT TAKE INCONSISTENT POSITIONS, AS A MATTER OF PUBLIC POLICY. IT IS JUST NOT SOMETHING WE WANT DONE IN OUR COURTS.

HAS THAT BEEN APPLIED IN PLEADING IN THE ALTERNATIVE? I MEAN, WE APPLY A RULE LIKE THAT, IF WE APPLY A RULE LIKE THAT, THEN YOU ARE NOT GOING TO BE ABLE TO ARGUE AGAINST MULTIPLE DEFENDANTS. I MEAN, THAT JUST SEEMS TO BE AN UNWORKABLE RULE. I CAN SEE THAT, IN A SITUATION WHERE YOU MAY NOT BE ABLE TO SAY ONE IS AN EMPLOYEE IN ONE CASE AND YOU LOSE THAT CASE AND THEN CHANGE AND MAKE AN ALLEGATION THAT THE PERSON IS SOMETHING ELSE, BUT HERE WE ARE TALKING ABOUT THE ARGUMENT THAT THIS PARTY IS AT FAULT OR THAT PARTY IS AT FAULT, AND TRADITIONALLY AT COMMON LAW, IT HAS ALWAYS BEEN PERMITTED TO DO THOSE ARGUMENTS.

OF COURSE YOU CAN, UNTIL THERE IS A RESOLUTION, BUT ONCE THERE IS A RESOLUTION, YOU ARE NO LONGER --

THAT IS NOT A JUDICIAL RESOLUTION TO THAT FACT. THAT IS NOT A JUDICIAL DETERMINATION. HOW DOES THAT PLAY?

WELL, JUDGE, THIS WAS NOT REALLY BRIEFED SO MUCH IN THIS COURT AS IT WAS IN THE DISTRICT COURT, BECAUSE THEY RAISED THE POINT IN THE DISTRICT COURT, BUT IF YOU LOOK

AT THE CASES, MANY OF ESTOPPEL CASES ARE SETTLEMENT CASES. TWO THAT ARE CITED IN MY BRIEF, FIRST DISTRICT COURT CASES ARE THE LAMBERT CASE AND THE CROWDER CASE. LAMBERT CASE, THE PLAINTIFF SUED THREE DEFENDANTS IN ALABAMA, AND CONTENDED THAT THEY WERE LIABLE. COMES BACK TO FLORIDA AND MAKES AN UM CASE AND CONTENDS THAT TWO OF THEM WERE NOT LIABLE, AND ATTEMPTS TO GET UNINSURED MOTORIST COVERAGE ON THAT BASIS. THE COURT SAYS YOU CAN'T DO THAT. YOU PREVIOUSLY TOOK A POSITION. YOU HAVE GOT TO BENEFIT FROM IT BY WAY OF SETTLEMENT, NO JUDGMENT IN THAT CASE, AND YOU CAN'T DO THAT.

BUT IN THAT SITUATION, THE UM CARRIER IS SUBGAITED TO THE RIGHTS OR TO THE POSITION OF THOSE TORTFEASORS AND ESSENTIALLY IS OPERATING AS THE INSURANCE CARRIER FOR THOSE TORTFEASORS, SO I DON'T SEE THAT ANALOGY REALLY APPLIES HERE. HERE YOU HAVE NO NEXUS BETWEEN THE TWO AT ALL.

WELL, THE REASON, CERTAINLY, JUDGE, MY CLIENT WAS VERY MUCH AFFECTED BY THE SETTLEMENT IN THE SENSE THAT I HIM, NOW, BEING ASKED TO PAY DOUBLE FOR SOMETHING THAT THEY HAVE ALREADY RECOVERED. AND STRATEGICALLY, WHAT OCCURRED IN THIS CASE, FOR EXAMPLE, THE PLAINTIFF PLEADS ALL ALONG THAT GLOCK IS LIABLE. THEY HAVE AN EXPERT. IN FACT, AND THIS IS OUTSIDE THE RECORD, ONE MONTH BEFORE THE TRIAL, ALL OF A SUDDEN DPLOCK IS GONE. I AM GLOCK IS GONE. I AM LEFT IN THE DILEMMA OF TRYING TO PROVE THAT GLOCK IS AT FAULT.

THAT IS A PRACTICAL PROBLEM. THEY COULD DO THAT AT TRIAL, IT WOULD SEEM, AND THAT CREATES AN UNWORKABLE AND UNLIVABLE SITUATION FOR A LAWYER TO SHOW UP AT TRIAL, AND ALL OF A SUDDEN THE CASE HAS CHANGED. THAT, I CAN APPRECIATE COMPLETELY.

GOING BACK TO LAMBERT, IT WAS IMPORTANT BECAUSE, I BELIEVE AT THAT TIME WHETHER YOU HAD UM COVERAGE WAS DEPENDENT ON THE TOTAL AMOUNT OF COVERAGE AVAILABLE FOR THE VARIOUS TORTFEASORS, NOT SO MUCH THAT THEY WERE IN THE SHOES. THE CROWDER CASE, FOR EXAMPLE, THERE WERE TWO SUCCESSFUL WORKERS COMP CASES, AND THEY TOOK THE POSITION THAT THE FIRST ONE WAS, THERE WAS AN IMPAIRMENT WITH THE FIRST ONE AND THE SECOND ONE, THEY SAID I AM NOT IMPAIRMENT WITH THE SECOND ONE, AND, AGAIN, THAT WAS BASED ON A SETTLEMENT, AND THE COURT SAID YOU CAN'T DO. THAT I BRIEFLY ADDRESS THE FIRST DISTRICT SORT OF SAID, WELL, YOU KNOW, YOU MIGHT BE RIGHT, BUT YOU DIDN'T PRESERVE THIS BY GETTING AN APPELLATE RECORD OF THE EVIDENCE. WELL, WHAT HAPPENED WAS, PRIOR TO TRIAL, I MOVED THE COURT, THAT THE ESTOPPEL WOULD BE APPLIED AND THAT THE PERCENTAGE OF FAULT WOULD BE FOR THE DEFENDANT, NOT WHETHER OR NOT GLOCK WAS LIABLE. NO. AT THAT POINT, WHAT AM I SUPPOSED TO DO? I HAD THE RULINGS OF THE COURT. THERE IS NOTHING I COULD HAVE DONE. THERE IS NO EVIDENCE NECESSARY FOR THIS COURT OR FOR ANY OTHER COURT TO RULE. WHAT THE ISSUES WERE, TO DETERMINE HOW THE ISSUES WERE GOING TO BE DETERMINED. POST TRIAL I MOVED FOR THAT, THERE BY GAVE THE COURT, AGAIN, A CHANCE TO CORRECT ITS ERROR, SO YOU CAN APPEAL FROM AN INTERLOCUTORY ORDER THAT PLEAS TO A FINAL JUDGMENT. THAT IS ALL THAT IS CLEAR, AND IF THE COURT --

LET ME UNDERSTAND YOUR POSITION AT TRIAL WAS THAT GLOCK IS GOING TO BE ON THE VERDICT FORM, AND THE JURY SHOULD FIND THAT GLOCK IS RESPONSIBLE. 100 PERCENT.

WELL, NO. MY POSITION WAS, AT TRIAL, BECAUSE OF THE COURT'S RULING, THAT YOU SHOULD FIND GLOCK LIABLE, AND YOU SHOULD DECIDE WHAT PERCENTAGE AMONGST THE DEFENDANTS. MY CLIENT HAD ADMITTED LIABILITY. BUT, JUDGE, MY POSITION, WHAT I WANTED MY POSITION TO BE AT TRIAL, IS GLOCK IS LIABLE. THE COURT HAS DETERMINED THAT THE PLAINTIFF CAN'T DENY THAT GLOCK IS LIABLE, AND THE ISSUE IS WHAT IS THE PERCENTAGE OF FAULT. A DEFENDANT IS PLACED IN A TERRIBLE POSITION --

SO YOU WANTED A POSITION, YOU WANTED THE COURT'S POSITION TO BE, WELL, THERE IS NO WAY THAT THERE COULD BE A ZERO FINDING OF RESPONSIBILITY ON THE PART OF GLOCK.

RIGHT. THAT SHOULD HAVE BEEN AN IMPOSSIBILITY, AND THE ISSUE SHOULD HAVE BEEN WHAT ARE THE PERCENTAGES. HAD THAT OCCURRED, AND IF THAT WERE THE RULING OF THIS COURT PROSPECTIVELY, THEN THIS WHOLE DILEMMA WOULD NEVER COME UP, BECAUSE YOU WOULD ALWAYS HAVE SOME LIABILITY ON THE PART OF THE SETTLING DEFENDANT, AND THAT IS THE WAY IT SHOULD BE. THE PLAINTIFF HAS GAINED THE BENEFIT FROM THE JUDICIAL PROCESS, AND THEY SHOULD BE ESTOPPED TO ATTEMPT TO GET A DOUBLE WINDFALL RECOVERY FROM THE DEFENDANT. SO I WANTED TO MAKE THAT POINT, BECAUSE, ALTHOUGH THE PRIMARY FOCUS OF THE COURT MAY BE THE SET OFF ISSUE, I THINK THAT ONE IS VERY IMPORTANT AS WELL. I HAVE PRETTY MUCH CONCLUDED.

WHAT WOULD BE, UNYOUR SCENARIO, WHAT WOULD BE INSTRUCTION BY THE TRIAL COURT, BE TO -- WOULD IT MATTER MOUCH HOW MUCH THE SETTLEMENT -- HOW MUCH THE SETTLEMENT WAS, WHETHER OR NOT IT WAS A $100 NUISANCE SETTLEMENT OR A MILLION DOLLAR SETTLEMENT?

THE AMOUNT OF SETTLEMENT WOULD WOULDN'T BE ADMISSIBLE, UNDER -- WOULDN'T BE ADMISSIBLE, UNDER WELL-RECOGNIZED LAW.

IF THE PLAINTIFF DIDN'T SETTLE WITH ANYBODY, WE WOULD REQUIRE THE JUDGE TO SAY WHAT TO THE JURY?

A SIMILAR INSTRUCTION WHEN THERE HAS BEEN A FINDING OF LIABILITY OR ABS OF A DEFENSE, THERE IS A STANDARD INSTRUCTION THAT SAYS THE COURT HAS FOUND AND NOW INSTRUCTS YOU THAT -- WHATEVER THE FINDING HAS BEEN, SO IN THIS CASE IT WOULD BE THAT THE COURT HAS FOUND AND NOW INSTRUCTS YOU THAT GLOCK IS LIABLE.

BUT THE SET OFF STATUTE SPECIFICALLY PROVIDES THAT YOU ARE NOT TO ADVISE THE JURY THAT THERE HAS BEEN ANY TYPE OF SETTLEMENT. WITH -- SETTLEMENT, WITH ANY OTHER PARTY.

YES, SIR, THAT IS TRUE, BUT THIS IS IN A DIFFERENT CONTEXT, CREATED BY THIS STATUTORY SCHEME OF 768.81, AND IF WILL IS ESTOPPEL, HOW ELSE COULD YOU DO IT? PRACTICALLY OTHER THAN TO INSTRUCT THE JURY THAT THEY ARE LIABLE. NO COMMENT ON THE PERCENTAGE OF LIABILITY, THE DEGREE OF LIABILITY, AND IT IS YOUR JOB TO, JURY, TO DETERMINE THE PERCENTAGE OF LIABILITY, RATHER THAN HAVE THE ANOMALY --

I GUESS TO HAVE THE ALTERNATIVE WOULD BE THAT A SETTLING DEFENDANT SHOULDN'T BE ON THE VERDICT FORMAT ALL. ALTHOUGH, YOU KNOW, YOU RUN INTO -- COME FULL CIRCLE TO THE HEADACHES OF FABRE, WITH THAT FACT THAT YOU HAVE GOT TO, FOR NONECONOMIC PURPOSES, ASSESS SOME FAULT OF ALL OF THE GLOBAL DEFENDANTS.

I AGREE, ON ONE POINT, WITH MY LEARNED OPPONENT, AND THAT IS THAT THIS -- IT WOULD BE A LOT BETTER FOR EVERYONE, IF WE HAD PURE COMPARATIVE FAULT, AND THAT MAY BE THE TREND, AND THAT MAY BE WHERE MOST OF THE STATES ARE MOVING. UNFORTUNATELY WE DON'T HAVE THAT IN FLORIDA AT THIS TIME. AND IF WE DID, THEN THIS PROBLEM WOULDN'T BE A PROBLEM.

SHOULD WE CONCEDE, UNDER THAT SITUATION, THAT, WELL, YOU STILL WOULD BE ARGUING -- WOULDN'T YOU STILL BE ARGUING THE ESTOPPEL POINT?

YES. THAT I WOULD. BUT THE SET OFF ISSUE, I AM SORRY JUDGE.

OKAY. THAT DOESN'T REALLY ANSWER TO JUSTICE WELLS'S FIRST QUESTION OR MAYBE IT DID. YOU ARE AGREEING, YOU ARE SAYING, REGARDLESS WHETHER THERE WAS COMPARATIVE FAULT, PURE, ON BOTH, THAT YOUR POSITION IS THAT ANY SETTLING DEFENDANT SHOULD BE ON THE VERDICT FORM.

OH, YES.

AND SHOULD BE -- THE JUDGE SHOULD INSTRUCT THAT THEY ARE FOUND TO BE AT FAULT.

YES. AND THAT IS THE ONLY EQUITABLE WAY TO DO IT AND THE ONLY WAY TO DO IT, CONSISTENT WITH ALL FLORIDA LAW AND CONCERNING ESTOPPEL. TO ALLOW OTHER -- IN VARIOUS CONTEXTS, THIS COURT HAS SAID WE DON'T WANT JURIES TO BE PURPOSELY MISLED BY THE PROCEDURE.

WOULDN'T IT BE, THEN, IF YOU SETTLED FOR $100, BE SOMETHING THE JURY SHOULD HEAR, SO THAT THEY KNOW IT WASN'T A REAL FINDING OF FAULT?

WELL, THEN YOU GET INTO STRATEGY. IT WOULDN'T, PROBABLY, BE ADVISEABLE FOR A PLAINTIFF TO DO THAT AND PUT THEMSELVES IN THAT POSITION. BUT WHAT IS REALLY INTERESTING IS THAT --

YOUR TIME -- I AM SORRY. YOUR TIME IS UP. THANK YOU VERY MUCH. REBUTTAL?

THANK YOU, YOUR HONOR. JUSTICE WELLS AND JUDGES PARIENTE WERE HITTING ON THE POINTS. HIS PROPOSAL WAS AN UNWORKABLE SCHEME. IF YOU -- NO MATTER WHAT SETTLEMENT YOU HAVE, THAT THAT AUTOMATICALLY DETERMINES THAT THEY ARE LIABLE, NOBODY WOULD SETTLE, BECAUSE, THEN, WHEN THEY GO TO COURT, THEY KNOW THAT, EVEN IF IT IS A FRIVOLOUS, IF IT IS A SETTLEMENT BECAUSE IT A FRIVOLOUS PART, THEY COULDN'T AFFORD TO HAVE THAT SETTLEMENT, BECAUSE WHEN YOU GET TO THE JURY, THE JURY IS BEING INSTRUCTED THAT THAT SETTLING DEFENDANT IS ALREADY LIABLE, AND SO THAT WOULD NEVER WORK, AND IT WOULD NOT ENCOURAGE THE SETTLEMENT. THAT IS EXACTLY THE SAME THAT THE LEGISLATURE AND THESE COURTS ARE TRYING TO ENCOURAGE, TO LIMIT THE DOLLARS GOING INTO ALL OF THESE COURT SYSTEMS. SO IT IS AN UNWORKABLE, AND NOT ONLY THAT IS HE DIDN'T PROVIDE THE TRANSCRIPT. HIS MOTION WAS A MOTION FOR CLARIFICATION. HE DIDN'T -- AND THAT IS, REALLY, A MOTION IN LIMINE, AND YOU HAVE TO OBJECT AT TRIAL. HE HAS GOT TO, EVEN, SHOW THE BURDEN, THAT HE MET THE INITIAL BURDEN TO SHOW THAT THERE WAS FAULT ON GLOCK'S PART. HE HADN'T SHOWN THAT. SO I DON'T REALLY THINK THAT IS AN ISSUE. I WOULD LIKE TO ADDRESS A COUPLE OF THINGS, STATEMENTS HE SAID -- YES, MA'AM.

I AM TRYING TO UNDERSTAND THAT POINT, THE LACK OF TRANSCRIPTS. I MEAN, IF THE POSITION IS THAT IF YOU SETTLE, THE JUDGE SHOULD BE TELLING THE JURY YOU ARE AT FAULT, AND WE, NOW, KNOW THAT THEY DIDN'T FIND GLOCK AT FAULT, THAT CERTAINLY PREJUDICED THEM FROM THAT NOT HAPPENING. HOW WOULD A TRANSCRIPT, CHANGE THAT, ONE WAY OR ANOTHER?

HIS MOTION FOR CLARIFICATION WAS ACTUALLY AN ESTOPPEL. A MOTION THAT WE SHOULD BE ESTOPPED FROM ARGUING THAT GLOCK IS AT FAULT. THAT WAS THE ACTUAL MOTION. AND THAT, GOING TO --

ESTOPPED FROM GLOCK WASN'T AT FAULT.

I AM SORRY. THAT WASN'T AT FAULT. YES. AND SO THAT IS WHAT HIS MOTION STATED.

WE DON'T KNOW WHAT YOU ARGUED.

RIGHT. EXACTLY. AND WE DON'T KNOW WHAT THEY ARGUED, WHETHER HE MET HIS BURDEN OR NOT. THAT IS THE WHOLE POINT. HE COULD HAVE GOTTEN A STIPULATION OF FACTS AND AVOIDED IT THAT WAY, AND THIS COURT HAS RECOGNIZED THAT, BUT HE DIDN'T DO THAT, SO WE ARE LEFT WITH NOT KNOWING, ESSENTIALLY. AS TO THE SET OFF ISSUE, HE NOTED A COUPLE OF THINGS THAT I JUST WANT TO CORRECT. ONE IS HE SAID THAT NO OTHER STATES HAVE DEALT WITH THIS ISSUE, EXCEPT CALIFORNIA, HAS A SIMILAR STATUTORY SCHEME, AND OHIO HAS A SIMILAR STATUTORY SCHEME, AND THE OHIO SKIES CASE, NOW, I AM NOT SURE -- OHIO CASE, NOW, I AM NOT SURE -- I FOUND THE SCHEME, I AM QUOTING FROM THE '98 CASE AND I AM NOT SURE WHICH STATUTE IS REFERRED TO, BUT IT DEALT WITH THIS EXACT ISSUE, AND IT STATED THAT GRANTING A NONSETTLING TORTFEASOR AN AUTOMATIC SET OFF WOULD SUBSIDIZE TORTIOUS CONDUCT. IT SEEMS ONLY LOGICAL THAT PARTY FOUND TO HAVE ACTED ALONE IN CAUSING THE HARM SHOULD NOT BE ENTITLED TO A REDUCTION IN THE DAMAGE AWARD. THAT IS THE OHIO SUPREME COURT, AND THE CASE THAT WE CITED IN OUR BRIEF IS FEDHOLTZ VERSUS PELLER, SUPREME COURT OF OHIO. IN THIS CASE, THE CALIFORNIA COURTS SCHEME IS SOMEWHAT SIMILAR BUT VITALLY DIFFERENT ON TWO POINTS. ONE, FOR ALL ECONOMIC DAMAGES, THERE IS JOINT AND SEVERAL LIABILITY THERE. IT DOESN'T ADDRESS IT HERE. OURS IS MUCH MORE NARROWED, WITH REGARD TO ECONOMIC DAMAGES, BUT FAR MORE IMPORTANT IS --

I JUST WANT TO GET -- UNDER CALIFORNIA STATUTE, UNDER ANY SCENARIO, THEY ARE JOINT AND SEVERALLY --

THAT'S RIGHT. PERCENTAGES DON'T COUNT. UNDER THE SET OFF STATUTE, THE CONTRIBUTION STATUTE THERE HAS A KEY DISTINCTION, AND THAT IS THE LANGUAGE WHEN ANOTHER PARTY HAS CLAIMED, THE SETTLING PARTY HAS CLAIMED TO BE LIABLE IT CLAIMS TO BE, SO THE PLEADINGS UNDER THAT STATUTE DEFINE WHETHER THERE IS A SET-OFF OR NOT, BECAUSE WHETHER THEY ARE CLAIMED TO BE LIABLE OUR STATUTE DOES NOT HAVE THAT LANGUAGE. IT IS COMPLETELY SUCCINCT. ANOTHER CORRECTION IS HE, ALSO, STATED THAT ALL OF THE STATUTES THAT WE REFERRED TO ARE PURE COMPARATIVE FAULT, AND THAT IS NOT TRUE. FOR EXAMPLE, DELAWARE HAS A STATUTORY SCHEME THAT HAS THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT AND JUST REGULAR CONTRIBUTE OTHER NEGLIGENCE, BUT JOINT AND SEVERAL LIABILITY STILL APPLIES, AND THE DELAWARE SUPREME COURT ADDRESSED THIS EXACT ISSUE, WHERE A PLAINTIFF --

I AM SORRY, MR. McCARTHY, BUT I THINK YOUR TIME IS UP. WE HAVE YOUR BRIEFS. WE APPRECIATE COUNSEL'S -- COUNSEL'S ASSISTANCE WITH THIS MATTER.

THANK YOU.