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Cordette Woodham v. Blue Cross & Blue Shield of Florida, Inc.

CHIEF JUSTICE: NEXT CASE ON THE COURT'S ORAL ARGUMENT CALENDARS ROWELL VERSUS HOLT, THE PUBLIC YOU MAY PROCEED.

GOOD MORNING, YOURSAY IT PLEATD COUNSEL. ENT TTIOR, ROWE, ANDE, ALSO, WELCOME PROFESSOR JOSEPH LITTLE FROM THE UNIVERSITY OF FLORIDA S COUNSEL AMICI. PETITIONER ASKS THAT YOU REMAND FOR STRESS AND LOSS OF LIBERTY DAMAGES. JOHN ROWELL SAT IN JAIL FOR TWO WEEKS, BECAUSE HIS PUBLIC DEFENDER WAITED TO SHOW THE JUDGE EVIDENCE THAT WOULD IMMEDIATELY PROCLAIM HIS RELEASE RELEASE.

FAILED TO SECURE.

YES, YOUR HONOR, AS NOTED TO FOOTNOTE 6 OF THE SECOND DCA'S MIGHT NOT OPINION OF THE CASE. IT PRESENTS AN INTERESTING DEFINITION OF MALPRACTICE IN FLORIDA. IF LEGAL MALPRACTICE CAUSES CONFINEMENT, SHOULD THE MENTAL SUFFERING FROM THAT CONFINEMENT BE COMPENSABLE? THE WEIGHT OF LEGAL SCHOLARSHIP SAYS YES. THE AMERICAN INSTITUTE VIEWS THIS CASE AS A PERSONAL RATHER THAN AN ECONOMICY. THE INSTITUTE ADVISES RECOVERY FORL DISTRESS, UNDER THESE PARTICULAR CIRCS. PREEMINENT SCHOLARS ON LEGAL MALPRACTICE, INCLUDING MALIN AND SMITH, AGREE WITH THE INSTITUTE. SCHOLARS WHO HAVE ANALYZED REALM DAYS, INCLUDING DOBBSD FISHER AGREE WITH THE INSTITUTE. AND WE CAN LINEUP THE PUBLIC POL, WHICH FAVOR THE DAMAGES THAT AE H. C SNUL. COMPENSATION, EFFICIENCY, AND ACCOUNTABILITY.

WOULD YOU MAKE THIS A NARROW SESSION TO THE "IMPACT RULE", OR JUST TOTALLY REPEAL THE "IMPACT RULE"? OR HOW WOULD YOU GO ABOUT DOING THIS?

IF YOUR HONOR FOLLOWS PROFESSOR LITTLE'S ARGUMENT IN THES BRIEF, THE "IMPACT RULE" DOESN'TPPLY UNDER THESE CIRCUMSTANCES. IF WE FOLLOW WHAT THE SECOND DCA SUGGESTED, THE "IMPACT RULE" DOES APPLY BUT IT WAS APPLIED WITH MISGIVINGS, SO PETITIONER OUR HON TO CARVE AN EXCEPTION TO THE "IMPACT RULE". WE RESPECT THE VALE "IMPA CERTAINMST THERE ARE COUNTERVEILING PUBLIC POLLS WHICH SUPPORT THE "IMPACT RULE". WHICH I WILL ADDRESS IN A MINUTE MINUTE. WE DO NOT BELIEVE THOSE PARTICULAR PUBLIC POLICIES APPLY IN THIS PARTICULAR CASE, SO TO ANSWER YOUR QUESTION SUCCINCTLY, WE BELIEVE THE "IMPACT RULE" APPLIES IN LEGAL MALPRACE CASES OVERALL, AND WE ARE MERELY YOU CARVE AN EXCEPTION UNDER THESE VERY LIMITED CIRCUMSTANCES. ANOTHER JURY ACTUALLY WAS INSTRUCTED ON MENTAL PAIN AND SUFFERING DAMAGES?

YES, YOUR HONOR. THE OBJECTION REGARDING THE "IMPACT RULE", WAS, WHEN THE CRIMINAL LEGAL EXPERT TESTIFIED AS TO THE STANDARD OF CARE BEFORE THE TRIAL JUDGE, AND THE TRIAL JUDGE ALLOWED THE PAIN AND SUFFERING DAMAGES TO GO TO THE JURY, AND THAT --

WHAT WAS THE EVIDENCE OF, THAT WAS PRESENTED ON PAIN AND SUFFERING?

WELL, YOUR HONOR, IT SIMPLY IS THE PALPABILITY OF BEING CONFINED.

DID THE DEFENDANT TESTIFY AS TO WHAT EFFECT IT HAD ON HIM? WAS IT FROM THE DEFENDANT, I AM -- WELL, THE ORIGINAL DEFENDANT, THE PLAINTIFF IN THE MALPRACTICE

CASE?

THAT'S CORRECT, YOUR HONOR.

WAS THERE ANY MEDICAL TESTIMONY?

NOT TO MY KNOWLEDGE.

AND WHAT WAS THERE DISPUTED? HOW WAS IT DISPUTED? DID THE, IN THE MALPRACTICE CLAIM, DID THEY ARGUE FOR A DIFFERENT AMOUNT BEFORE THE JURY OF MENTAL PAIN AND SUFFERING DAMAGES, OR SAY THAT HE REALLY DIDN'T SUFFER?

NO, YOUR HONOR. IT WAS ADDRESSED BY THE DEFENSE, AS PURELY A LEGAL ISSUE, BASED UPON THE IMPACT DOCTRINE.

YOUR POSITION IS THAT THE "IMPACT RULE" DOES APPLY, BUT THIS IS AN EXCEPTION TO IT.

THAT IS PETITIONER'S POSITION YOUR HONOR. THE A.M. I CAN EYE'S POSITION IS -- THE AMICI'S POSITION IS THAT IT DOES NOT APPLY, AND THE SECONDARY POSITION OF THE AMICI IS THAT IT SHOULD BE CARVED. SO WE AGREE WITE Y THE AMICI, AND I BELIEVE THE LEGAL SCHOLARSHIP, INCLUDING THE AMERICAN LAW INSTITUTE STATEMENT, IN THE STATEMENT GOVERNING ATTORNEYS, WOULD AGREE THAT AN EXCEPTION SHOULD BE CARVED UNDER THESE CIRCUMSTANCES.

DO YOU EQUATE LOSS OF LIBERTY TO DEAF NATION AND INVASION OF PRIVACY?

WELL, YOUR HONOR, THAT IS AN INTERESTING IF WE LOOK AT THE MIAMI HERALD PUBLISHING CASE, WHICH WAS THE NEGLIGENT DEAF NATION -- DEFAMATION CASE IN WHICH THIST CAON TO THE IMPACT DOCTRINE, THAT WAS A SIMPLE NEGLIGENCE CASE, SO WE DO HAVE FLORIDA PRECEDENT FOR THEPOSITION OF CARVING AN EXCEPTION IN A SIMPLE NEGLIGENCE CASE. NOW, INVASION OF PRIVACY, CASON VERSUS BASKIN, 1944, PROVIDES A VERY INTERESTING SPECTRUM, IF YOU WILL, REGARDING INTENT, BECAUSE THE QUESTION IN MY MIND IS CAN YOU HAVE NEGLIGENT INVASION OF PRIVACY? HUM. INTERESTING POINT. BUT WE KNOW THAT THERE IS AN EXCEPTION TO THE "IMPACT RULE" FOR INTENTIONAL TORTS. NOW, THIS WASN'T AN INTENTIONAL TORT. THIS WAS SIMPLE NEGLIGENCE. BUT IF WE ANALOGIZE TO CASON VERSUS BASKIN, AND WE SAY THAT THERE IS SUCH A THING AS NEGLIGENT INVASION OF PRIVACY, THEN THIS CASE DRAWS STRONG SUSNANCE FROM CAVON VERSUS BASKIN ---FROM CASON VERSUS BASKIN, BECAUSE LIBERTY IS EXPRESSLY STATED IN THE CONSTITUTION, SO IF WE ARE GOING TO CARVE AN EXCEPTION FOR INVASION OF PRIVACY AND WE EXTEND THAT INVASION OF PRIVACY TO A NEGLIGENT INVASION,THIS CASE HAS EVENR GROUNDS FOR CARVING AN EXCEPTION TO THE IMPACT DEN IN CASE ONE VERSUS BASKIN.

SO YOUR ARGUMENT HERE IS THAT THE-KNOW CASON VERSUS BASKIN.

SO YOUR -- DOCTRINE THANN VERSSSKIN.

SO YOUR ARGUMENT HERE IS THAT THE CONSTITUTIONAL RIGHT PROVIDES A BASIS FOR CARVING AN EXCEPTION, OR THE IMPACT?

YES, WE ARGUE THAT IT PROVIDES AN UNIQUE CIRCUMSTANCE FOR INVASION OF PRIVACY, YES, WEE ARGUING THAT THE CONSTITUTIONAL RIGHT PROVIDES A BASIS. WE ARE, ALSO, ARGUING THAT CONFINEMENT, ITSELF, PROVIDES A BASIS, AND OUR ARGUMENT ON THAT POINT, YOUR HONOR, IS THAT CONFINEMENT IS TANTAMOUNT TO A PHYSICAL IMPACT. CONFINEMENT IS PALPABLE, FREEDOM OF MOVEMENT IS RESTRI.EN'S FREEDOM OF CHOICE . E PERSON'S -S RESTRICTED.THESVACY IS INVADED. THEY ARE PUT ON AN IS SCHEDULE. OTSE WHAT THEY WANT

TO EAT. THEY CANNOT CHOOSE WHEN TO SLEEP WHEN THE LIGHTS GONE ON AND OFF. THEY CANNOT CHOOSE WHO THEIR RE IN NEAS ET CETERA, ET CETERA. ET CETERA. IN OTHER WORDS CONFINEMENT IS RECOGNIZELARS IN OTHER STATES THAT HAVE COMPLETELY ABROGATED THE "IMPACT RULE". SIMILARP THOSE THAT CONFINEMENT IS TANTAMOUNT TO A PHYSICAL IMPACT.

I THOUGHT THAT YOUR ARGUMENT WAS THAT YOU WEREG THE EXCEPTION, AND YOU WERE GIVIG THE POLICY REASONS.WERE YOU GOING TO ADDRESS THE WHYE POLICY REASONS THAT GAVE RISE TO THE "IMPACT RULE" IN THIS STATE, ARE NOT PRESENT IN THIS KIND OF --

YES, AND I WILL PROCEED TO THAT FOR YOUR HONOR'S BENEFIT AT THIS POINT. THE IMPACT DOCTRINE COMES ALONG AND ASKS PLEA VALID QUESTIONS, WHICH IS WHY WE HAVE THE IMPACT DOCTRINE. FIRST, CAN WE PROVE THE DISTRESS? SECOND, CAN WE MEASURE THE DISTRESS? THIRD, CAN WE LIMIT POTENTIAL LITIGATION? LET'S LOOK AT THE FIRST QUESTION. CAN WE PROVE THE DISTRESS? THAT IS THE PUBLIC POLICYION, THE FIRST PUBLIC POLICY QUESTION UNDER THE IMPACT DOCTRINE. IN THIS CASE, WITH THESE FACTS, WE CAN PROVE TES.E PUBLNDRD REASONABLY FORESEE THAT JAIL WOULD RESULT FROM A DROP BELOW THE MINIMUM STANDARD OF CARE. THAT IS REASONABLY FORESEEABLE.

THAT IS NOT PROVEN DISTRESS. THAT IS AN ISSUE OF DUTY AND FORESEEABILITY. SAR F SEMANTICS AS TO HOW WE DEFINE THE WORD "PROOF".

LET'S GO BACK TO THIS, BECAUSE THE QUESTION ON THE "IMPACT RULE", WAS IT THAT THE COURT REALLY WAS IMPLICITLY SAYING THAT, WHEN YOU HAVE A BYSTANDER AND THERE HAS BEEN A PRIMARY ACCIDENT, THAT IT MAY NOT BE FORESEEABLE THAT THERE BE OTHER PEOPLE THAT WOULD WITNESS AND EXPERIENCE FEAR, SO IT WAS REALLY SOME FORM OF A DUTY FORESEEABILITY ANALYSIS THAT IS ABSENT HERE?

WELL, YOUR HONOR, IN CHAMPION VERSUS GRAY, YOU HAVE THE BYSTANDER, THE ZONE OF DANGER ANALYSIS. THAT IS NOT WHAT WE HAVE HERE, BECAUSE WE DON'T HAVE A PIE STANDER THIS. CASE IS EVEN STRONGER. WE HAVE A DIRECT RELATIONSHIP BETWEEN THE ATTORNEY AND THE CLIENT -- WE DON'T HAVE A BYSTANDER. THIS CASE IS EVEN STRONGER. WE HAVE A DIRECT RELATIONSHIP BETWEEN THE ATTORNEY AND THE CLIENT, SO IT DOES N THETY OF TORT, AND BECAUSE THIS CASE INVOLVES A FREE STANDING DUTY, IN OTHER WORDS THIS ISN'T A CIRCULAR TORT, LIKE A NEGLIGENT INFLECTION OF EMOTIONAL DISTRESS WHERE THE DUTY IS TO AVOIDTAL DISTRESS.S WHAT I CALLACULAR THIS ISRT. IN THIS CASE, WE HAVE LEGAL MALPRACTICE. WE HAVE A FREE-STANDING, INDEPENDENT LEGAL DUTY OF THE MENTAL DISTRESS. AND THAT IS WHY LEGAL SCHOLARSHIP IG THAT, IN THIS CASE, FORESEEABILITY IS A GOOD ANALYSIS FOR PROVING DISTRESS.

LET ME ASK YOU, IN ORDINARY AND OTHER LEGAL MALPRACTICE SETTINGS, SAY THAT SOMEBODY MISSES THE RUNNING OF THE STATUTE OF LIMITATIONS, THERE IS NOT A CLAIM THAT CAN BE RAISED FOR THE PLAINTIFF'S MENTAL DISTRESS FOR THE FACT THAT THE CLAIM WASN'T FILED.

ABSOLUTELY TRUE, YOUR HONOR, AND THAT IS BECAUSE THE PUBLIC POLICY SUPPORTS THE EX- CONTRACTING DAMAGE INS THAT PARTICULAR SCENARIO. THAT IS AN ECONOMIC INJURY, RATHER THAN A PERSONAL INJURY, WHICH EVOLVES FROMA PHYSICAL CONFINEMENT, AND SO THAT IS A COMPLETELY DIFFERENT SCENARIO. THAT IS EXACTLY WHY THE AMERICAN DE TUT -- LAW INSTITUTE TAKES NO POSITION ON OTHER MALPRACTICE CASES WHICH FALL WITHIN A CIVIL CONTEXT, BUT IN A CRIMINAL DEFENSE CONTEXT, WHERE A PHYSICAL CONFINEMENT IS VOFT, THAT IS -- IS INVOLVED, THAT IS TANTAMOUNT TO A PHYSICAL IMPACT, AND WITH THE LAW REGARDING ATTORNEYS, BECAUSE THERE IS A PHYSICAL CONFINEMENT AS OPPOSED TO THE EXAMPLE THAT YOU RAISED, AN ECONOMIC IMPACT INJURY, THAT THE ECONOMIC SHOULD APPLY IN THOSE CASES BUT IT SHOULD NOT APPLY IN THE VERY LIMITED FACTS WHICH IS INVOLVING

PHYSICAL CONFINEMENT, WHICH IS TANTAMOUNT TO AN IMPACT.

SO YOUR FIRST POINT OF THE THREE POINTS IS THE STRESS, SO THE STRESS, YOU WOULD DEMONSTRATE THE STRESS, SIMPLY FROM THE CONFINEMENT, ITSELF?

YES, YOUR HONOR, AND NOT ONLY THAT, BUT AS WE MOVE TO THE SECOND QUESTION, THE SECOND PUBLIC POLICY QUESTION SUPPORTING THE "IMPACT RULE". CAN WE MEASURE THE DISTRESS? ABSOLUTELY. BECAUSE A CONFINEMENT IS MEASURED IN TERMS OF TIME. I THINK OF THE COUNT OF MONTE CRISTO, CHALKING THE JAIL WALL, THE PRISON WALL AS TO THE NUMBER OF DAYS HE IS SITTING IN PRISON, IN THAT FRENCH PRISON, AND WE SAY WE CAN MEASURE THE MENTAL DISTRESS IN TERMS OF TIME. E PERSON IS IN THE JAIL FOR 30 MINUTES, THAT MAY BE NOMINAL DAMAGES. IF THE PERSON IS IN JAIL, SUCH AS PETITIONER ROWELL, FOR TWO WEEKS THAT, MAY BE \$16500 THAT THE FACT FINDER CAN REASONABLY MEASURE. IF THE PERSON IS IN JAIL FOR MONTHS, PERHAPS A HIGHER SUM. AND BEYOND THAT, WE HAVE PROCEDURAL SAFEGUARDS, TO PROTECT AGAINST LARGE DAMAGE WARDS. WE HAVE REMIT I TOUR, AND WE HAVE THE RIGHT TO -- WE HAVE REMITITUR, AND WE HAVE PROCEDURAL COURT, IF THERE IS A DAMAGE AWARD IN THESE PARTICULAR CASES.

IF WE APPROVE THE DAMAGE AWARD HERE, HOW WILL WE BE ABLE TO AVOID EXTENDING IT TO OTHER SITUATIONS, ESPECIALLY IN CRIMINAL REPRESENTATION, MALPRACTICE CASES? LET'S SAY THAT WE END UP WITH A CASE WHERE THE DEFENDANT EVENTUALLY, AFTER YEARS OF APPEAL, WINS HIS CASE ON SOME LEGAL POINT, AFTER GOING THROUGH A SERIES OF LAWYERS? NOW SUES THE FIRST LAWYER AND SAYS I WOULDN'T HAVE HAD THIS THING HANGING OVER MY HEAD FOR SIX OR SEVEN YEARS, IF YOU HAD SIMPLY LOOKED UP THE LAW LIKE THE THIRD LAWYER FINALLY DID AND WON MY CASE ON APPEAL, AND I HAVE BEEN SUFFERING EMOTIONAL DISTRESS FOR ALL THIS TIME. ARE WE GOING TO HAVE DISTRESS DAMAGES, NOW, IN A SITUATION LIKE THAT? AS A RESULT OF AND PROVING THIS ELEMENT OF DAMAGES HERE?

YOUR HONORS, THE ANSWER TO YOUR HONOR'S QUESTION IS ONLY IF THERE IS A CONFINEMENT. OKAY. SO WHAT WE SAY HERE IS --

WELL, ARE YOU SAYING THAT A PERSON THAT HAS THESE CRIMINAL PROCEEDINGS HANGING OVER HIS HEAD, DOESN'T SUFFER EMOTIONAL DISTRESS?

WELL, THE COURT HAS ALREADY SELF-LIMITED THE FACT SCENARIO IN STEELE VERSUS KEHOE: LET ME MAKE A DICHOTOMY HERE. WE HAVE TO DISTINGUISH PRETRIAL DETAINING SCENARIOS, WHICH IS THE THE ONE HERE, WITH CONVICTION SCENARIOS, SUCH AS THE ONE WE HAVE HERE. IN CONVICTION SCENARIOS, WE HAVE THE STEELE VERSUS KEHOE SITUATION, WHICH SAYS THAT THAT PERSON CAN'T EVEN SUE FOR MALPRACTICE, UNLESS THEY FIRST OBTAIN POST-CONVICTION RELIEF R Y WIN AN APPEAL AND ACQUITTAL SO THAT IS A PRETRIAL FILING CONDITION FOR EVEN FILING MALPRACTICE, THE CONDITIONS STATED. SO THIS SCENARIO COULD NEVER ARISE, BECAUSE STEELE VERSUS KEHOE WOULD NEVER ALLOW IT, IN YOUR HONOR'S SCENARIO. CHIEF CHIEF YOU ARE IN YOUR REBUTTAL.

THANK, YOUR HONOR. MAY IT PLEASE THE COURTS. COUNSEL. MY NAME IS TODD LAST PER HERE -- MY NAME IS TODD RASPER HERE, FOR THE RESPONDENT. -- MY NAME IS TODD VRASPIR HERE, FOR THE RESPONDENT, JULIANNE HOLT, OFFICE THE PUBLIC DEFENDER.

IS THERE A CONCERN OF FRAUD?

JUSTICE, I THINK THERE IS A GREAT CONCERN FOR FRAUDULENT CASES, PARTICULARLY IN THIS CONTEXT, FROM THE STANDPOINT OF PARTICULARLY WHAT OPPOSING COUNSEL HAS STATED, THAT THE IMPACT, AS FAR AS THE EMOTIONAL OR PSYCHOLOGICAL DAMAGES, IT IS OUR POSITION, ARE NOT AS PROVABLE AND NOT AS MEASURABLE AS WHAT HAS BEEN PRESENTED TO THE COURT.

HOW COULD YOU SAY THAT, IF YOU LOCK SOMEONE IN A CAGE, THAT WE ARE GOING TO TREAT THAT DIFFERENTLY THAN IF YOU SLAP THEM IN THE FACE? HOW DO YOU DRAW A DISTINCTION BETWEEN THOSE TWO?

YOUR HONOR, I THINK THE DISTINCTION IS THAT WHAT THE LAW HAS BEEN, IN THE STATE OF FLORIDA, AND AS JUSTICE, CHIEF JUSTICE WELLS HAD POINTED OUT, THAT THIS WAS A CASE THAT THE PLAINTIFFS IN THE LOWER COURT AND THE TRIAL COURT HAD BROUGHT, BASED ON SIMPLE NEGLIGENCE, AND THE SIMPLE NEGLIGENCE COUNT HAD BEEN TRIED BEFORE A JURY, AND A JURY IN THE TRIAL COURT, AT THE TRIAL LEVEL, HAD DETERMINED THAT IT WAS SIMPLE NEGLIGENCE. NOW, AS FAR AS A REMEDY AND WHETHER OR NOT PERSON IN THE ION OF PETITIONER ROWELL, THEY HAVE AN ADE REMEDY, T COULD HAVE BEEN CHOSEN IS THAT RL HAVEED, D OF LENCEFOR MALPRACTICE, THERE COULD HAVE BEEN ALLEGATIONS OF ANY TYPE OF WILLFULNESS, WANTONNESS OR MALICE.

AGAIN, THAT BEGS TO DIFFER AWE BECAUSE IT IS NOT WILLFUL OR WANTON. IT COULD BE SO OUTRAGEOUS IT MAY BECOME, BUT AS I WAS LOOKING IN THE AREA OF LAW IN FLORIDA AS REGARDS THE IMPACT DOCTRINE, IT WAS THAT IT WAS SOME KIND OF SUPERIOR INTELLECT THAT WOULD TELL US THAT WE DIDN'T WANT SOMEBODY WALKING DOWN THE STREET SCREAMING SOMEONE'S NAME AND THEN THAT PERSON ALLEGEING MENTAL DISTRESS, AND WE ARE FEARFUL THAT THAT IS GOING TO HAPPEN. IT IS A NEBULOUS CONCEPT, BUT HERE WE HAVE THE CONCRETE, THE TANGIBLE EXISTENCE AFTER PERSON PLACED IN A CAGE, AND I AM TRYING, I AM REALLY STRUGGLING WITH HOW THAT IS DIFFERENT FROM SMACKING SOMEBODY IN THE FACE.

I WOULD HAVE TO RELY ON THE PRINCIPLES OF THE IMPACT DOCTRINE, JUSTICE LEWIS, FROM THE STANDPOINT OF THAT IT IS NOT A PHYSICAL, DISCERNABLE, IDENTIFIABLE IMPACT ITSELF. IT IS NOT A PHYSICAL, DISCERNIBLE TRAUMA EVENT FROM THAT STANDPOINT.

HOW ABOUT IF I WOULD NEGLIGENTLY BUILD A WALL AROUND YOUR PROPERTY AND YOU WALK INTO IT AND YOU HIT YOUR HEAD. CAN YOU GET PAIN AND SUFFERING THEN?

THAT WOULD BE, I BELIEVE, AN ECONOMIC DAMAGES FROM THAT STANDPOINT.

OKAY.

WHY ISN'T THIS A LOGICAL EXTENSION OF CUSHERSUSLOYD?

BOY THAT, IS AR HONOR, BECAUSE INSTHES AND THE COURT HAVE READ, THE PROBLEM IN TRYING TO DISTINGUISH OR ASSIMILATE BOTH THE CUSH DECISION AND THE TANNER DECISION, IT IS HARD TO DO AND IT IS EASY TO DO. IT IS HARD TO DO, FROM THE STANDPOINT THAT, AS FAR AS A PACT OR ANY TYPE OF AN IMPACT THAT WASD, H AS IN THE, THE CASE THAT THE COURT HAD HANDED DOWN AND, AT THE END OF 2001, WITH, YOU KNOW, WHAT WAS ALLEGED TOE A CONDOM OR SOMETHING IN A COKE CAN, AND ACTUALLY TAKING A DRINK OF IT, THAT, ITSELF, WAS THE IMPACT. THE CURB CASE AND THE TANNER CASE, DEALINGH CHILDREN AND THE WRONGFUL BIRTH ASPECT OFT, AND THE NEGLIGENCE AND THE STILLBIRTH, IN THAT CASE, THE WAY IT IS SIMILAR TO AND FOLLOWING THE "IMPACT RULE" IN THE STATE OF FLORIDA, IS THAT THAT IS A SITUATION WHERE IT IS PURELY AN EMOTIONAL, PSYCHOLOGICAL. THERE REALLY IS HARDLY ANY TYPE OF ECONOMIC DAMAGES FROM THAT STANDPOINT, AND IT IS AN IMPACT OR IT IS A PSYCHOLOGICAL AND EMOTIONAL IMPACT ON THE PARENTS, THEMSELVES, BECAUSE I BELIEVE IT WAS THE CUSH CASE, YOUR HONOR, WHERE THERE WAS TESTIMONY IN THAT CASE WHERE THE PARENTS HAD, THE TESTIMONY SHOWED THAT THE PARENTS HAD TAKEN SO MANY DIFFERENT STEPS TO PREVENT WHAT HAD ACTUALLY HAPPENED.

DON'T YOU THINK THE LOSS OF LIBERTY IS JUST AS SIGNIFICANT AS THE INTEREST?

I DO NOT MEAN TO DOWNGRADE THE LOSS OF LIBERTY, JUSTICE STHAU, BECAUSE THAT -- JUSTICE SHAW, BECAUSE THAT IS SOMETHING THAT IS IMPORTANT. HOWEVER, I BELIEVE IN THE WILLIAMS CASEY CITED IN MY BRIEF U.S. SUPREME COURT CASE, THE MERE NEGLIGENCE OR THE LACK OF DUE CARE IS NOT A VIOLATION OF LIFE OR LIBERTY OR PROPERTY. AND WE DO NOT BELIEVE THAT TO BE THE EXTENT OF JUST MERE NEGLIGENCE, AND SO SIMPLE NEGLIGENCE WAS FOUND IN THIS CASE, BY THE JURY AND THE TRIAL COURT, AND, ALSO, AFFIRMED BY JUSTICE VALUEENT I IN THE SECOND -- VALENTE IN THE SECOND DCA.

I HAVE GOT A QUESTION ON THIS. IT IS AGAINST THE PUBLIC DEFENDER. ARE THEY, YOU SAID THAT, WELL, IF THEY PROVED WILLFULNESS, THAT WOULD AND DIFFERENT STORY, BUT JUST, AT LEAST FOUGHT THE PUBLIC DEFENDERS IN THIS STATE, ARE THEY SUBJECT TO THE \$100,000 IMMENT LIMITATION UNDOVEREI-- THE \$100 LIMITATION UNDER SOVEREIGN IMMUNITY, OR ARE THEY OUTSIDE OF THAT?

I BELIEVE THERE WAS A DECISION HAND DOWN BY THIS -- HANDED DOWN BY THIS COURT THAT ADDRESSED THE PARRATINO DECISION AS LONG AS THE ACTIONS ARE NOT WILLFUL OR WANTON, THEN THEY WOULD BE IMMUNE --

IF WE SHOWED THAT THE PUBLIC DEFENDER ACTED WILLFULLY, IS WE WOULD ACTUALLY TAKE THAT PUBLIC DEFENDER OUTSIDE OF THE PROTECTION OF SOVEREIGN IMMUNITY THAT IS THE LIMITATION AND THE RESPONSIBILITY OF THE OFFICE FOR THOSE DAMAGES, CORRECT?

I DON'T KNOW, JUSTICE PARIENTE, IF THIS COURT WOULD BE DOING T OBVIOUSLY IT IS BEING DONE IN SECTION 1983 -- DOING IT. OBVIOUSLY IT IS BEING DONE IN SECTION 1983 CASES, EVEN WHEN THEY ARE OPERATING OUTSIDE THE LAW, IT IS IN THE SOURCE AND SCOPE, BUT THE CONDUCT IN THIS PARTICULAR CASE WOULD BE WILLFUL AND WANTON.

YOU ARE REPRESENTING THE OFFICE OF THE PUBLIC DEFENDER.

NOT INDIVIDUA, WOUL IN THE INDIVIDUAL ATTORNEY'S INTEREST TO HAVE A HIGHER STANDARD OF WILLFULNESS, IN TERMS OF THEIR PROTECTION, CORRECT?

THAT'S CORRECT, YOUR HONOR.

E OTHER QUESTION THAT I HAVE IS THAT YOU DON'T DISPUTE, WE HAVE GOT HERE, DUTY, AND WE HAVE GOT FORESEEABILITY, AND WOULD YOU AGREE WITH THAT? I MEAN, IF SOMEBODY IS, HE OR SHE OWED THE DUTY TO THE CLIENT. IT WAS AN ATTORNEY CLIENT RELATIONSHIP.

THE DUTY, I AGREE WITH YOU, JUSTICE.

WE ARE NOT TALKING HERE ABOUT A STRATEGY THING. THIS WAS SOMETHING WHERE WE HAD ONE OF THOSE VIDEOTAPED REMOTE HEARINGS AND THE PIECE OF PAPER WAS SUPPOSED TO BE GIVEN TO THE JUDGE AND IT WASN'T GIVEN, CORRECT? WE ARE TALKING ABOUT, NOT ALMOST LEGAL MALPRACTICE, JUST SORT OF -- SCREW UP.

SIMPLEE.

SIMPLE NEGLIGENCE. THERE IS NO QUESTION IT IS F THIS GUY ISN JAIL. F THEYN'T THEY ARE GOING TO DO, IT THAT THIS GUY IS GOINGTINUE TO STAY INOE DON'T HAVE FORESEEABILITY ISSUES, RIGHT?

I BELIEVE WE DO, JUSTICE PARIENTE, WITH ALL DUE RESPECT. YOU KNOW, IT IS CLEAR THAT THE PROFESSIONAL MALPRACTICE CASES, THERE IS A DUTY. FOR EXAMPLE, THE HUMANA CASE, THE RJ VERSUS HUMANA CASE THAT THIS COURT DECIDED ON THE MISS DIAGNOSIS OF HIV POSITIVE ON THE MISDIAGNOSIS OF. IV -- MISDIAGNOSIS OF HIV POSITIVE. IS THERE -- IF THERE IS A

PROFESSIONAL MISDIAGNOSIS ON THE PART OF A DOCTOR OR LAWYER, THAT THAT IS GOING TO CAUSE PSYCHOLOGICAL DAMAGES? I DON'T BELIEVE SO.

LET'S TAKE THE CASE WHERE IT IS NOT A PUBLIC DEFENDER. IT IS A PRIVATE ATTORNEY WHO HAS THOUSANDS OF CASES AND SIMPLY FORGET TO SHOW UP OVER AND OVER, TO REPRESENT THIS PERSON, AND THE PERSON SPENDS A MONTH EXTRA, JUST HYPOTHETICALLY, AND WAS NEVER SUPPOSED TO EVEN, YOU KNOW BE INCARCERATED. AND THE PERSON IS NOT EMPLOYED, AND THAT SITUATION, ESSENTIALLY WHAT YOU ARE SAYING, IT WOULD BE FORESEEABLE THEY ARE GOING TO BE INCARCERATED FOR A MONTH. IT IS NOT FORESEEABLE THAT THERE ARE GOING TO BE DAMAGES THAT ARE GOING TO FLOW FROM THAT, IN THE FORM OF THE PERSON BEING IMPROPERLY CONFINED FOR A 30-DAY OR 60-DAY OR LONGER PERIOD OF -- OR 60-DAY OR LONGER PERIOD OF TIME? -- OR 60-DAY OR LONGER PERIOD OF TIME?

AT WHAT POINT DO WE FORESEE THE FORESEEABILITY ASPECT OF IT?

FROM THE "IMPACT RULE", IF IT IS NOT GOING TO BE TOO MUCH, ABOUT HOW MUCH MONEY WE ARE GOING TO GIVE. IT WAS TO PREVENT SPECULATIVE CLAIMS OR FRAUDULENT CLAIMS. WE DON'T HAVE THAT HERE. I GUESS I AM JUST TRYING TO UNDERSTAND WHAT POLICY OF THIS "IMPACT RULE" WOULD BE SERVED BY EITHER EXTENDING IT TO THIS SITUATION, IF WE TAKE MR. LITTLE'S POSITION IS, WHICH IT DOESN'T APPLY AT ALL, OR CARVING OUT AN EXCEPTION, WHAT POLICY OF V GRAY WOULD WE BE PROMOTING?

I DON'T KNOW IF THERE IS ANY POLICY THAT WOULD BE PROMOTED, YOUR HONOR, BY EG THIS AND CARVING OUT AN EXCEPTION FROM THE "IMPACT RULE" OR TREATING IT AS IT BEING THE "IMPACT RULE" NOT BEING APPLICABLE, FROM THE STANDPOINT THAT I BELIEVE THAT THE CASES THAT WOULD COME OUT OF THIS, FROM THE STANDPOINT OF FILINGS WITH RESPECT TO YOU KNOW, POTENTIAL OR ALLEGATIONS OF DAMAGES BEING FORESEEABLE, WOULD NOT BE LIMITED JUST TO THIS MALPRACTICE SITUATION. IT, AS SIMILAR TO THE HUMANA CASE, IT COULD NOT JUST BE LIMITED TO THE PRETRIAL DETAIN' CASE. IT WOULD HAVE TO BE EXTENDED TO THOSE CASES WHERE, AND NOT JUST A SITUATION WHERE THERE WAS ONE, TWO, OR THREE STEPS THAT A PUBLIC DEFENDER HAD MISSED. IT WOULD HAVE TO BE EXTENDED TO THE ENTIRE CRIMINAL DEFENSE ARENA, IF YOU WILL, YOUR HONOR, AND IT IS JUST NOT PERTAINING TO AND I BELIEVE JUSTICE ANSTEAD WAS HITTING ON THIS, OF THE ASPECTS OF, AFTER SOMEBODY GOES THROUGH TRIAL, YOU KNOW, THEY HAVE BEEN CONVICTED AND NOW THEY TRY TO SUE THEIR ATTORNEY FOR INEFFECTIVENESS OF COUNSEL OR MALPRACTICE, THIS -- THAT THEY NEED THEIR CONVICTION TO BE OVERTURNED TO DO THAT. I SEE THIS OCCURRING EVEN PRIOR TO THAT.

CHIEF JUSTICE: JUSTICE SHAW HAD A QUESTION.

OPPOSING COUNSEL HAS DRAWN A DISTINCTION BETWEEN ECONOMIC INJURY AND PERSONAL INJURY. DO YOU RECOGNIZE THAT DISTINCTION, AND IF YOU DO, HOW DO YOU ADDRESS IT?

I BELIEVE, YOUR HONOR, THAT THERE IS A DISTINCTION BETWEEN ECONOMIC AND PERSONAL, AND THE CASES DO TALK ABOUT IT. THE ECONOMIC CASES ARE OBVIOUSLY WHEN IT INVOLVES PROPERTY, THE DAMNED ASPECTS PERTAIN TO THE CASON CASE, WITH IT, AND ALSO WITH THE OTHER CASE THAT DEALS WITH THE DEAF NATION -- DEFAMATION, THE MIAMI HERALD CASE AND THE PRIVACY CASES.

WHERE DOES THIS CASE FALL WITHIN THAT?

I DON'T BELIEVE IT FALLS WITHIN THOSE PARAMETERS, WITH RESPECT TO BEING THAT PERSONAL OF AN INJURY, BECAUSE IN THIS CASE, WE ARE TALKING ABOUT SIMPLE NEGLIGENCE, AND IT IS NOT LIKE IT WAS -- THERE WASN'T A REMEDY AVAILABLE FOR THE PETITIONER ROWELL IN THIS CASE, TO HAVE OBTAINED ANY TYPE OF ECONOMIC OR PSYCHO-EMOTIONAL OR PSYCHOLOGICAL -- OF EMOTIONAL OR PSYCHOLOGICAL DAMAGES. THEY EXPECT THE IMPACT OF

THE DUTY OF WHAT WAS OR WAS NOT DONE BY THE PUBLIC DEFENDERS OFFICE, ACTUALLY ROSE TO THE LEVEL OF BEING MALICIOUS, AND THAT WAS NOT CHOSEN, BUT THAT WAS A REMEDY WHICH WAS CHOSEN NOT TO GO OR FOLLOW BY PETITIONER ROWELL IN THIS CASE.

HOW WOULD YOU ADDRESS, I GATHER FROM COUNSEL'S STATEMENT, PROFESSOR LITTLE'S POSITION THAT WE ARE NOT EVEN TALKING ABOUT THE "IMPACT RULE".

WELL, THE, AND THAT WOULD GO TO THE ASPECT OF DUTY AND FORESEEABILITY BUT AS THIS COURT POINTED OUT, I BELIEVE IN THE HUMANA CASE, THAT THE FORESEEABILITY ASPECT OF IT CLEARLY THERE WAS A DUTY HERE. THERE WAS AN ATTORNEY CLIENT RELATIONSHIP THAT HAD BEEN ESTABLISHED. THEN YOU GET TO THE QUESTION OF WHETHER IT IS SOMETHING THAT IS FORESEEABLE OR NOT. MY UNDERSTANDING OF THE REASON WHY THE "IMPACT RULE" IS IN EXISTENCE IN THE STATE OF FLORIDA AND HAS BEEN IN OTHER STATES ACROSS THE UNITED STATES, IS FROM THE STANDPOINT THAT IT TAKES OUT THAT FORESEEABILITY ASPECT OF IT, WHERE IT MAKES IT IRRELEVANT. WE ARE NOT LOOKING AT THE FORESEEABILITY. WE ARE SAYING THAT THESE DAMAGES WHICH ARE OUT THERE IN A SPIRITUAL ASPECT, AND THEY ARE HARD TO, AS JUSTICE LEWIS HAD INDICATED EARLIER, THAT THAT IS ALL TAKEN OUT OF IT AND THE REASON WHY THE "IMPACT RULE" IS HERE IS THERE HAS TO BE GUESSESSABLE, SIGNIFICANT PHYSICAL INJURY OR IMPACT, TO MAKE SURE THAT THESE TYPES OF DAMAGES ARE NOT AS SPECULATIVE AS WHAT THEY COULD BE, AND IT IS NOT ONLY FROM THE STANDPOINT OF, AS OPPOSING COUNSEL HAS STATED, OF BEING PROVABLE, BUT, ALSO, FROM THE STANDPOINT, FROM THE PUBLIC POLICY ASPECTS, OF BEING DISPROVEABLE.

BUT WHERE YOU HAVE GOT THE PHYSICAL ACT OF SOMEONE BEING LOCKED UP OR INCARCERATED, THE LOSS OF LIBERTY, DON'T YOU HAVE, IT IS NOTHING SPECULATIVE ABOUT THAT.

WELL, THERE IS NOTHING SPECULATIVE WITH RESPECT TO THAT THEY MAY INCUR OR MAY SUFFER ANY TYPE OF EMOTIONAL OR PSYCHOLOGICAL DAMAGES FROM THAT STANDPOINT, BUT THEN AGAIN, ALSO ON THE RJ VERSUS HUMANA CASE THERE, IS REALLY NOTHING SPECULATIVE, FROM THE STANDPOINT OF IF YOU ARE MISDIAGNOSED WITH THE HIV POSITIVE VIRUS --

PRESUME EMOTIONAL STRESS THERE, AS YOU COULD IN WRONGFUL-DEATH. WOULD THE SAME PRINCIPLE APPLY?

YOUR HONOR, IT IS DIFFERENT FROM THE STANDPOINT, BECAUSE THE -- AS YOU COULD IN WRONGFUL BIRTH. WOULD THE SAME PRINCIPLE APPLY?

YOUR HONOR, IT IS DIFFERENT FROM THE STANDPOINT, BECAUSE THE WRONGFUL BIRTH DIFFER FROM THE REASONS OF THE PARENTS TAKING THE STEPS NOT TO INCUR WHAT HAD OCCURRED IN EITHER ONE OF THOSE CASES. YOU ARE DEALING WITH CHILDREN. I BELIEVE AT THAT TIME, THAT PUBLIC POLICY ALMOST DICTATED OR MANDATED THAT THE DAMAGES THAT A PARENT WOULD SUFFER FROM THAT TYPE OF A SITUATION, EVEN WITH THE STEPS OR BECAUSE OF THE STEPS THAT WERE TAKEN TO AVOID THE PARTICULAR SITUATION, THAT AT THAT POINT IN THE "IMPACT RULE" SHOULD NOT BE APPLIED TO THAT CASE OR THOSE LINE OF CASES.

UNDER OUR JURISPRUDENCE, AFTER MR. ROWELL HAD GOTTEN RELEASED, HE STARTED TO GET NIGHTMARE IN THE EVENING AND SOUGHT THE ASSISTANCE OF A PSYCHIATRIST, AND HE STARTED TO GET STOMACH PROBLEMS, AND HE HAD TO BE HOSPITALIZED. OUR JURISPRUDENCE, EVEN UNDER THE CHAMPION V GRAY TYPE OF CASES, WOULD ACTUALLY ALLOW THE RECOVERY.

UNDER THE HUMANA CASE, I DON'T BELIEVE OUR JURISPRUDENCE WOULD ALLOW THAT, YOUR HONOR.

YOU DON'T THINK THAT THEY MANIFEST PHYSICAL SYMPTOMS, THAT THAT HAS GOTTEN

SOMEONE AROUND THE "IMPACT RULE"?

YOU ARE GETTING CLOSER TO GETTING AROUND THE "IMPACT RULE". I WILL AGREE WITH YOU, JUSTICE PARIENTE, AND IF THERE IS SOME TYPE AFTER MANIFESTATION, AND OBVIOUSLY THIS DOESN'T FOLLOW THE LOGIC OF THE REASONING IN THE HUMANA CASE, BECAUSE IN THAT CASE, THERE WAS, YOU KNOW, THE HYPERTENSION. THERE WERE ACTUALLY MEDICAL BILLS. THERE WAS MEDICAL TREATMENT THAT WAS RENDERED.

THERE SEEMS TO BE, AS I THINK WAS APPOINTED OUT IN SOME OF THE PAST CASES, THIS DICHOTOMY THAT SOME USE THE "IMPACT RULE" TO SAY THERE ACTUALLY HAS TO BE AS JUSTICE LEWIS SAYS, SOME PHYSICAL CONTACT, VERSUS THE QUESTION OF WHETHER THERE HAS TO BE A MANIFESTATION AFTER PHYSICAL INJURY, AND I GUESS BOTH OF THOSE GOING TO THE IDEA THAT WE WEREN'T TO -- WE WANT TO BE, WE WERE CONCERNED, BACK WHENEVER CHAMPION WAS DECIDED, THAT WE WERE GOING TO BE GETTING THESE SPECULATIVE CLAIMS THAT, REALLY, WE COULDN'T, WE DIDN'T HAVE A WAY TO TEST THEIR VALIDITY, AND SO REALLY, THE CASES HAVE GONE BOTH WAYS, AS FAR AS SAYING WHETHER YOU NEED A PHYSICAL INJURY OR ACTUALLY HAVE TO HAVE HAD AN IMPACT, THAT IS A TOUCHING. CORRECT?

YEAH. I BELIEVE, I THINK THES CASE THAT WAS HAND DOWN BY THE FOURTH DCA IN '92, HAD ADDRESSED THAT, OF TRYING TO CLARIFY THE CONFUSION FU KNOETE IMPACT REFERRED TO SOMETHING PHYSICAL AT THE TIME OF THE ACCIDENT OR SOME TYPE OF PHYSICAL INJURY OR SUFFERING, AS FAR AS PSYCHOLOGICAL TRAUMA, AFTER THE FACT. AND THE REYNOLDS CASE HELD THAT THE "IMPACT RULE" PRECLUDES RECOVERY FOR DAMAGES, FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, UNLESS THE EMOTIONAL DISTRESS ARISES DIRECTLY FROM THE PHYSICAL INJURY SUSTAINED BY THE PLAINTIFF IN THE IMPACT, SO FOLLOWING THE COURT'S OR JUSTICE PARIENTE'S REASONING, I WOULD AGREE WITH YOU THAT THERE WOULD BE SOME TYPE OF MANIFESTATION OR AT LEAST HAVE TO BE SOME TYPE OF MANIFESTATION OR PHYSICAL IMPACT ITSELF. BUT IN THIS CASE, I DON'T BELIEVE THAT WE HAVE EITHER ONE.

WELL, CONCEPTUALLY, THOUGH, DOESN'T PROFESSOR LITTLE'S SUGGESTION REALLY PROVIDE US WITH A BETTER MODEL FOR HOW TO TREAT THIS, WHEN WE TALKED ABOUT THE "IMPACT RULE", MANY TIMES IN THE PAST, WETALKED ABOUTT IETFGACTIONT ALL ORG A T. HERE THERETS .WE JUST TALKING ABOUT AN ELEMENT OF DAMAGE? AND THAT IS WHAT SHOULD BE THE APPROPRIATE ELEMENTS OF DAMAGES FOR A RECOGNIZABLE CAUSE OF ACTION, SO WHAT, WHY ISN'T THE MODEL PROVIDED BY PROFESSOR LITTLE, REALLY, A MUCH BETTER MODEL FOR US TO ADOPT AND ANALYZE IN THIS ISSUE HERE, AND THEN SIMPLY DECIDE WHAT ARE THE APPROPRIATE ELEMENTS OF DAMAGE THAT WE ARE GOING TO ALLOW IN A SITUATION LIKE THIS?

THAT IS A GOOD QUESTION, JUSTICE ANSTEAD. BUT I BELIEVE THAT, WITH PROFESSOR LITTLE'S MODEL, WITH ALL DUE RESPECT, PROFESSOR, WOULD ESSENTIALLY ABROGATE THE "IMPACT RULE", AND THIS COURT HAS HELD, IN THE MANY CASES THAT IT HAS REAFFIRMED THE "IMPACT RULE", AND IF THIS COURT IS WILLING TO GET RID OF THE "IMPACT RULE", THEN THAT WOULD BE THE MODEL TO FOLLOW, BUT IF YOU START GOING TO THE MODEL THAT PROFESSOR LITTLE HAS OR IS ATTEMPTING TO HAVE THIS COURT ADOPT, THAT YOU ARE ESSENTIALLY ABROGATING OR WOULD POTENTIALLY ABROGATE THE "IMPACT",E THE DUTY AND THE FORESEEABILITY TEST, I MEAN, I SEE THIS SPILLING OVER INTO NOT ONLY FROM THE STANDPOINT OF, YOU KNOW, LEGAL MALPRACTICE, NOT LIMITED TO JUST, IF YOU WANT TO CALL LOSS OF LIBERTY DAMAGES, BUT SPILLING OVER INTO OTHER AREAS, SUCH AS MR. CHIEF JUSTICE

YOU ARE, YOU HAVE USED YOUR TIME.

-- THE CIVIL ARENA. THANK YOU.

CHIEF JUSTICE: COUNSEL, FOLLOWING UP ON THAT LAST COMMENT, HOW WOULD THIS BE CONTAINED IN LEGAL MALPRACTICE, TO JUST LIBERTY INTERESTS? I MEAN, CERTAINLY YOU

HAVE A TERMINATION OF PARENTAL RIGHTS, AND DO YOU GO INTO COURT AND CLAIM THAT THE LAWYER'S NEGLIGENCE RESULTED IN THE TERMINATION OF MY RIGHT TO MY CHILD, AND THAT IS EQUALLY AS TERRIFYING A THOUGHT AS LOSS OF LIBERTY, ISN'T IT?

YES, YOUR HONOR, BUT THAT IS AN ECONOMIC INJURY. THAT IS NOT A PERSONAL INJURY. THE DAMAGES THERE, YOU HAVE AN ATTORNEY AND A CLIENT, AND THE DAMAGES ARISE EX-CONTRACT U. THEY ARISE FROM CONTRACT. IN THIS PARTICULAR CASE, 9 THE DAMAGES ARISE FROM PERSONAL CONFINEMENT -- THE DAMAGES ARISE FROM CONFINEMENT.

I THOUGHT YOU COULD SUE THE LAWYER IN TORT. ANOTHER DAMAGES ARE EXCONTRACTU. THEY ARE DIFFERENT. THE AMERICAN LAW INSTITUTE RECOGNIZES CONFINEMENT, ONLY, AS AN. THE DAMAGES ARE PERSONAL INJURY DAMAGES. THEY ARE NOT EXCONTRACTU. THAT IS THE DISTINCTION THAT IS BEING MADE. THE MORE INTERESTINGTHET,F YOU WILL, YOUR HONOR, IS THE WRONGFUL ADOPTION SCENARIO. THAT HAS BEEN A SITUATION THAT IS DECIDED IN THE STATE OF NEW JERSEY, WHICH IS A STATE THAT HAS ABROGATED THE "IMPACT RULE", AND IN THE WRONGFUL ADOPTION SCENARIO, THE COURT INTERESTINGLY, AND I AM NOT SURE I AGREE WITH THE COURT, BUT THE COURT SAID THAT THE DAMAGES WERE PERSONAL INJURY DAMAGES IN A WRONGFUL ADOPTION CONTEXT. I AM NOT SURE THAT I AGREE WITH THAT, AND I AM NOT SURE THAT THE AMERICAN LAW INSTITUTE WOULD AGREE WITH THAT, BUT WHEN YOU HAVE A CONFINEMENT THAT IS TANTAMOUNT TO A PHYSICAL IMPACT, THAT IS AS IF THERE IS A PERSONAL INJURY THAT HAS OCCURRED, BY REASON OF THE CONFINEMENT. NOT BY REASON OF A BREACH OF THE CONTRACT BETWEEN THE ATTORNEYANT CLIENT.

WELL, YOU, IT SEEMS TO ME THAT WE HAVE BEEN DOWN THE PATH IN FLORIDA, FOR A LONG TIME, IN MALPRACTICE ACTIONS, THAT WE CAN DESIGNATE THEM AS FLOWING, AS CONTRACT-TYPE DAMAGES, BUT THEY ARE ACTUALLY WHAT THE THEORY HAS TURNED OUT TO BE, IS A TORT THEORY, AND THE SAME IS IN SUING AN ABSTRACT OR. WOULDN'T YOU AGREE WITH THAT?

YES, YOUR HONOR.

WE HAD A BIG ARGUMENT, FOR A LONG, SEVERAL YEARS, SINCE I HAVE BEEN HERE, ON WHETHER THE ECONOMIC LOSS RULE APPLY TO THOSE CLAIMS -- RULE APPLIED TO THOSE CLAIMS. WE DON'T WANT TO GET BACK INTO THAT ARGUMENT, DO WE WE?

THAT'S CORRECT, YOUR HONOR, AND THIS CASE GOES TO WHETHER WE HAVE ANALYZED THE CASE IN TERMS OF THE FIRST ELEMENT, WHICH IS DUTY, OR IN TERMS OF THE FOURTH ELEMENT, WHICH IS DAMAGES, AND I AM SUGGESTING TO YOUR HONOR THAT WE HAVE TO ANALYZE IT IN TERMS OF THE FOURTH ELEMENT, WHICH IS DAMAGES, BECAUSE IF WE ANALYZE IT IN TERMS OF THE FIRST ELEMENT WHICH IS DUTY, THEN WE RUN INTO THE SLIPPERY SLOPE WHICH YOUR HONOR IS ASKING ABOUT, BUT IF WE ANALYZE IT IN TERMS OF DAMAGES, WHICH IS THE FOURTH ELEMENT, WHICH ISEN C WHICH THE DAMAGE AROSE, WE ARE LOOKING AT EXCONTRACTU, AND WE ARE LOOKING AT PERSONAL INJURY DAMAGES, IN THIS ONE LITTLE CONTEXT, CONFINEMENT, AND THE REASON WE ARE LOOKING AT PERSONAL INJURY DAMAGES IN THIS ONE LITTLE CONTEXT, IS BECAUSE CONFINEMENT IS TANTAMOUNT TO A PHYSICAL IMPACT. IN SOME CIRCUMSTANCES, A PHYSICAL IMPACT IS HARSHER THAN A CONFINEMENT, BUT IN MANY --

SO REALLY, THE, YOUR ARGUMENT IS GOING TO ZLINGT DOWN TO THE FACT THAT, IN REAL LIFE, WHERE YOU HAVE CONFINEMENT, YOU DO HAVE A IMPACT, AND THEREFORE YOU SHOULD BE ABLE TO RECOVER THESE DAMAGES. ISN'T THAT WHERE YOU END UP?

YOUR HONOR, I WISH I COULD SAY THERE IS A IMPACT, BUT IN THE WORLD OF THEORY, IT IS THE SAME THING AS AN IMPACT, YOUR HONOR. IT IS THE FIRST COUSIN TO IMPACT. IN SOME CIRCUMSTANCES, LIFE IMPRISONMENT, MANY COURTS HAVE SAID THAT IT IS WORSE THAN AN IMPACT.

CHIEF JUSTICE: THANK YOU, COUNSEL.

THANK YOU.

CHIEF JUSTICE: THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.