Mary Chester v. Victor Doig, M.D.

THE NEXT CASE ON THE COURT'S DOCKET IS CHESTER VERSUS DOIG.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM JULIE LITTKY-RUBIN, HERE ON BEHALF OF MARY CHESTER, WHO IS THE CLAIMANT IN THE ACTION BELOW. THE FACTS HERE ARE PRETTY STRAIGHTFORWARD, AS INVOLVED THIS COURT. MRS. CHESTER'S HUSBAND, RICHARD, WAS A VICTIM OF MEDICAL MALPRACTICE. HE DIED AFTER HAVING HEART SURGERY. MRS. CHESTER, THEN, BROUGHT A MEDICAL MALPRACTICE CLAIM AGAINST THE SURGEON. SHE, ALSO, BROUGHT A CLAIM AGAINST THE ANESTHESIOLOGIST THE WHO WAS WORKING FOR THE HOSPITAL AND SO THE CLAIM WAS AGAINST THE HOSPITAL. IN PRESUIT, HALIFAX FAX HOSPITAL AND -- HALIFAX HOSPITAL AND MRS. CHESTER SETTLED WITHOUT ARBITRATION ON EITHER SIDE. DR. DOIG DID OFFER ARBITRATION, WHICH SHE ACCEPTED. THE MATTER WAS THEN ARBITRATED IN FRONT OF THREE ARBITRATORS, AND THE RESULT WAS THAT THE ARBITRATORS AWARDED HER APPROXIMATELY $210,000 IN ECONOMIC DAMAGES, $250,000 IN NONECONOMIC DAMAGES, WHICH WAS THE CAP, AND HER ATTORNEYS FEES.

DO WE HAVE A CONFLICT BETWEEN THESE STATUTES, IN THE LANGUAGE, THE SET-OFF STATUTE, AND THE 766.207? IS THERE A CONFLICT BETWEEN --

BETWEEN 766.207 AND THE SET-OFF STATUTES? THE CONTRIBUTION STATUTES? WELL, YOUR HONOR, LET ME ANSWER YOUR QUESTION THIS WAY. IF WE GO BACK TO THIS COURT'S OPINION IN ST. MARY'S VERSUS PHILIPPE, WHICH WAS DECIDED LAST SUMMER, THAT READS, IF WE HAVE A SET-OFF ARBITRATION STATUTE, SOMEWHAT OF A DIFFERENT ANIMAL, BECAUSE IF WE HAVE A MORE SPECIFIC STATUTE, WE USE THAT ONE RATHER THAN THE BROADER STATUTE, AND IF YOU RECALL IN THAT CASE WHERE IT CAME UP, THE DEFENDANT WAS ARGUING --

THERE WE HAD A CONFLICT BETWEEN THE DAMAGES THAT WERE IN THE WRONGFUL-DEATH ACT AND THE DAMAGES THAT ARE SET FORTH IN 207. RIGHT?

CORRECT.

NOW, BUT, DOESN'T THE SET OFF STATUTE SAY THAT IT PERTAINS TO ANY ACTION?

IT DOES SAY THAT, BUT THIS STATUTE IS VERY CAREFULLY CIRCUMSCRIBED, AND IF YOU LOOK, THERE ARE THREE SPECIFIC POINTS THAT I WANT TO POINT THE COURT TO, WHICH SHOW THAT THE LEGISLATURE SPECIFICALLY INTENDED TO INCLUDE CERTAIN ASPECTS OF OTHER STATUTES, AND NOT THE SET-OFF STATUTES. FIRST, THE IDEA THAT THERE IS A COLLATERAL SOURCE STATUTE, A PROVISION FOR COLLATERAL SOURCES IN 766, WHICH IS VIRTUALLY IDENTICAL TO THE COLLATERAL SOURCE STATUTE THAT IS IN SECTION 768, BUT THE LEGISLATURE SHOWS TO INCLUDE IT SPECIFICALLY IN THE MEDICAL MALPRACTICE STATUTE. CERTAINLY, UNDER THAT, THE RATIONALE THAT THE COURT MAY BE SUGGESTING, IT COULD HAVE JUST SAID, WELL, WE HAVE A COLLATERAL SOURCE STATUTE THAT IS GOING TO APPLY TO ALL ACTIONS, ALSO. SIMILARLY THE IDEA THAT THERE IS A PROVISION FOR CONTRIBUTION, UNDER SECTION 766.208-SUB6, WHICH IS INDEPENDENT FROM 768.31.

BUT ISN'T THE POINT THERE THAT THIS 207 DOES DEAL WITH COLLATERAL SOURCES, JUST AS UNDER THE WRONGFUL-DEATH ACT, THERE WERE DAMAGES AND HERE THERE ARE DAMAGES, BUT THERE ISN'T ANY PROVISION IN THIS SELF-CONTAINED STATUTE, HAVING TO DO WITH SET

OFF?

YOUR HONOR, I WOULD RESPECTFULLY DISAGREE AND POINT THE COURT TO 766.209, PARAGRAPH 3, SUB-B. IF YOU LOOK AT THAT SECTION, IT DEALS SPECIFICALLY WITH THE EFFECTS THAT PARTIES WILL SUFFER IF THEY REFUSE TO ACCEPT BINDING ARBITRATION. SUB-3 SAYS THAT, IF A DEFENDANT REFUSES THE CLAIMANT'S OFFER FOR VOLUNTARY BINDING ARBITRATION, THEN THE PLAINTIFF GETS TO GO TO TRIAL AND GET THE FULL EXTENT OF HIS OR HER DAMAGES AT TRIAL PLUS ATTORNEYS FEES AND PREJUDGMENT INTEREST. SUBPARAGRAPH-B THEN SAYS A CLAIMANT'S AWARD AT TRIAL SHALL BE REDUCED BY ANY DAMAGES RECOVERED BY THE CLAIMANT FROM ARBITRATING CODEFENDANTS, FOLLOWING ARBITRATION. IF THAT SECTION SPECIFICALLY ADDRESSES THE SET OFF, THEN MY ARGUMENT TO THIS COURT THAT THE LEGISLATURE SPECIFICALLY INCLUDED THOSE ASPECTS OF OTHER STATUTORY PROVISIONS WITHIN SECTION 766 FOR A SPECIFIC REASON AND SPECIFICALLY CHOSE NOT TO INCLUDE THESE SET-OFF PROVISIONS, PRIMARILY BECAUSE THE PLAINTIFF IS ALREADY SUBJECT TO SUCH A GROSS REDUCTION IN HER NONECONOMIC DWAGES, DOWN TO THE -- DAMAGES, DOWN TO THE 250 CAP THAT, PRESUMABLY, AND I DON'T HAVE AUTHORITY FOR THIS, BUT PRESUMABLY THE LEGISLATURE RECOGNIZED THAT THERE WON'T BE MANY SITUATION WHERE IS THIS WILL OCCUR, AND THEREFORE IT IS FAIR TO ALLOW THE PLAINTIFF, IT IS NOT A DOUBLE RECOVERY, AS SUGGESTED BY THE FIFTH DISTRICT, BECAUSE HOW CAN THERE BE A DOUBLE RECOVERY, WHEN THE PLAINTIFF DOESN'T EVEN GET A FULL RECOVERY? IT IS JUST ANOTHER ASPECT OF HER RECOVERY.

WHAT ARE THE PROVISIONS FOR CONTRIBUTION, IF THERE IS ARBITRATION? ARE THERE ANY PROVISIONS FOR CONTRIBUTION, IF THERE IS AN ARBITRATION?

YES, YOUR HONOR. IN 766.208, SUB-B, I DON'T HAVE THAT. I APOLOGIZE, YOUR HONOR. I DON'T HAVE THE TEXT OF THAT STATUTE RIGHT IN FROCHT ME.

JUST OFF THE TOP OF YOUR HEAD. I THINK YOU ARE PROBABLY FAMILIAR WITH T.

THE CONTRIBUTION IS VERY SIMILAR TO THE CONTRIBUTION IN 768.31, WHERE YOU NEED TO SHOW SOME SORT OF A BAD FAITH SETTLEMENT ON BEHALF THE DEFENDANT, WHERE YOU NEED TO GO AFTER SOME OTHER PERSON. THERE IS INDICATION THAT NONARBITRATION DEFENDANTS ARE SUBJECT TO THAT STATUTE. BUT THE POINT IS THAT THE LEGISLATURE SPECIFICALLY ADDRESSED CONTRIBUTION T SPECIFICALLY ADDRESSED COLLATERAL SOURCES. IT SPECIFICALLY ADDRESSED SET OFFS, WITH RESPECT TO DEFENDANTS WHO REFUSE TO ARBITRATE. IT JUST DID NOT ADDRESS THIS PARTICULAR SITUATION, BECAUSE IT INTENDED FOR IT NOT TO BE INCLUDED.

IF YOU, WHAT DO YOU MAKE OF THE LANGUAGE IN 766.208-H, THAT SAYS EACH DEFENDANT WHO SUBMITS TO ARBITRATION UNDER THIS SECTION SHALL BE JOINTLY AND SEVERALLY LIABLE FOR ALL DAMAGES, IT SAYS, PURSUANT TO THIS SECTION? IF WE TAKE, AGAIN, YOU WOULD AGREE THAT, BEFORE, WITHOUT THE STATUTE AND BEFORE FABRE, THAT THERE IS CASES LIKE THIS WOULD BE, YES, OF COURSE THERE IS A SET-OFF FOR SETTLING DEFENDANTS, SO TAKE ME TO, IF THAT SECTION HAS ANY SIGNIFICANCE, IN TERMS OF OUR WELLS ANALYSIS FOR THIS CASE.

SURE, YOUR HONOR. THE IDEA IN THIS SECTION ABOUT MAKING THESE DEFENDANTS JOINTLY AND SEVERALLY LIABLE, REALLY DOES HE REMEMBER ADD INDICATE THE NEED FOR A WELLS -- ERADICATE THE NEED FOR A WELLS-TYPE DETERMINATION, BECAUSE THESE DEFENDANTS, IF THE DEFENDANTS ARE GOING TO BEAR THIS BURDEN OF ALL OF THE DAMAGES, THEN IT IS JUST NOT NECESSARY TO COME UP WITH ANY APPORTIONMENT OF FAULT, WHICH IS THE OBJECTION THAT THE DEFENDANT HAS IN THIS CASE.

THERE IS NO PROVISION FOR APPORTIONMENT OF FAULT FOR PARTIES THAT ARE OR FOR SETTLING DEFENDANTS.

NO. CORRECT.

IT IS ONLY -- WHAT IF THIS, IS THERE A PROVISION FOR APPORTIONMENT OF FAULT FOR ALL THOSE WHO SUBMIT TO ARBITRATION?

NO. AND IT, REALLY, THAT JOINTLY AND SEVERALLY LIABLE DOES HE REMEMBER ADD INDICATE THE NEED FOR -- DOES ERADICATE THE NEED FOR SUCH A PROVISION. IT DOES NOT APPLY. THE ONLY INSTANCE WHERE, IF THIS COURT WERE NOT IN AGREEMENT WITH THE PLAINTIFF'S PROVISION, THAT THERE IS NO PROVISION FOR SET OFF, AND THAT MRS. CHESTER, THERE SHOULD BE NO SET OFF. IF THIS COURT WERE TO FIND THAT THERE SHOULD BE SOME SET OFF BECAUSE IT DOESN'T SET WELL, THE IDEA IS, AND THIS IS WHERE PART OF THE WELLS'S ANALYSIS WOULD COME IN, THE PRINCIPLE BEHIND WELLS, THE IDEA WOULD, THEN, BE THAT THE ARBITRATORS SHOULD, THEN, MAKE A FINDING OF THE ENTIRETY OF THE PLAINTIFF'S DAMAGES, THE FULL AMOUNT OF THE ECONOMIC DAMAGES, THE FULL AMOUNT OF THE NONECONOMIC DAMAGES, AND THEN, FROM THAT AMOUNT, WHICH ADMITTEDLY IN THIS CASE WE DON'T HAVE, IT WAS NOT FOR THE LACK OF TRIAL COUNSEL'S TRYING F YOU LOOK AT PAGE 25 OF THE TRANSCRIPT, TRIAL COUNSEL MR. LYDLE ASKED THAT THEY MAKE THIS FINDING BUT THEY CHOSE NOT TO.

BUT THERE THEY GO ON TO TRIAL AGAINST ANOTHER DEFENDANT. IS THAT THE PARALLEL MODEL THAT YOU ARE USING, TO BASE THAT THEORY ON?

THE THEORY WOULD BE, JUST LIKE THIS, JUST LIKE IN THE WELLS CASE, IF YOU LOOK AT THE STATUTE, IT DOES NOT TALK ABOUT ECONOMIC DAMAGES AND COMING TO THE CONCLUSION, BUT THAT IS THE LOGICAL WAY TO HANDLE THAT STATUTE, SIMPLY, SIMILARLY HERE, WE HAVE A SIMILAR SITUATION. THAT, IF THERE IS GOING TO BE A SET-OFF ALLOWED, THERE MUST BE A SET-OFF ALLOWED FROM THE FULL AMOUNT OF THE DAMAGES. WE MUST BE ALLOWED TO COMPARE APPLES TO APPLES.

DID THE DEFENDANT IN THIS CASE HAVE A RIGHT TO ANY CONTRIBUTION FROM ANOTHER PARTY, AFTER THE ARBITRATION AWARD?

NO. I DON'T BELIEVE SO.

YOU READ ME A PROVISION, WHEN I ASKED YOU BEFORE, AND YOU SAID THERE SEEMED TO BE A PROVISION FOR --

IT DOES ADDRESS CONTRIBUTION.

OKAY. BUT IT DOESN'T APPLY IN THIS SITUATION, AND WHY NOT?

I DON'T BELIEVE THAT IT DOES, THAT THE TEXT OF THAT STATUTE DOES APPLY IN THIS INSTANCE, AND QUITE HONESTLY, YOUR HONOR, I DON'T HAVE THE TEXT IN FRONT OF ME, AND I REALLY CAN'T ANSWER YOUR QUESTION SPECIFICALLY, BUT THE POINT --

THAT SUBSECTION OF THE STATUTE, I THINK, STARTS OUT WITH, IF THERE ARE TWO OR MORE DEFENDANTS IN ARBITRATION. IS THAT WHY YOU SAY IT DOESN'T APPLY?

YES. THAT WOULD MAKE SENSE.

LET ME ASK YOU THIS, WHAT ABOUT IF, WHAT WOULD HAPPEN, UNDER YOUR THEORY, IF, RATHER THAN SETTLING WITH THE HOSPITAL, THEY HAD GONE AHEAD TO JUDGMENT AGAINST THE HOSPITAL AND GOTTEN AN AWARD, UNDER THE ESTATE DAMAGES, FOR THE NONECONOMIC LOSSES OF $2 MILLION, NOW, AND THEN THERE WAS AN ARBITRATION WITH THE DOCTOR. WHAT WOULD BE THE SITUATION THERE, AS FAR AS ANY SET OFFS ARE CONCERNED?

ARE WE ASSUMING, IN YOUR HYPOTHETICAL, THAT THERE WAS NO OFFER BY EITHER PARTY TO ARBITRATE?

NO. THAT THE DOCTOR ASH TRAITS.

ARE WE ASSUMING THAT HALIFAX HOSPITAL DID NOT ASK MRS. CHESTER?

CORRECT.

IN THAT INSTANCE, YOUR HONOR THERE, IS NOT A SET-OFF, BECAUSE THE ONLY SET OFF THAT THE LEGISLATURE PROVIDES FOR IS IN 209.3, THAT IF THE DEFENDANT CHOOSES TO ARBITRATE, THEN WE GO ON AND AN ARBITRATION IS SET OFF FROM THAT AWARD, FROM THAT UNLIMITED AWARD, BUT IF WE LOOK AT SUB-2 OF 209, IF NEITHER PARTY AGREES TO BINDING ARBITRATION, THE CLAIM PROCEEDS TO TRIAL AND THAT IS IT, BUT, AGAIN, I UNDERSTAND WHAT THE COURT'S CONCERN IS. THE IDEA IS, IF THAT WERE THE CASE, THEN WE WOULD HAVE FULL COMPUTATION OF THOSE DAMAGES, AND THEN WHAT WE WOULD DO IS WE WOULD TAKE THE $2 MILLION AWARDED IN NONECONOMIC DAMAGES. WE WOULD, THEN, APPLY THIS $150,000 SET OFF, AND THEN YOU WOULD TAKE DR. DOIG --

I AM SAYING THAT YOU HAVE GOT THE FULL AWARD. YOU WENT TO JURY VERDICT AGAINST THE HOSPITAL. THEN YOU WENT TO ARBITRATION AND GOT THE 250 AS TO THE DOCTOR. WOULD THE DOCTOR'S 250 BE SET OFF AGAINST THE HOSPITAL'S TWO MILLION?

I DON'T BELIEVE THE STATUTE ALLOWS FOR THAT. NO, YOUR HONOR.

SO WE JUST DO AWAY WITH, IF ANYBODY GOES TO ARBITRATION, UNDER YOUR THEORY, YOU JUST DO AWAY WITH THE SET OFF STATUTE.

IF ANYBODY GOES TO ARBITRATION, WHO, UNDER THE OTHER SCENARIOS, IF A DEFENDANT GOES TO ARBITRATION, I MEAN, IF A DEFENDANT DOES NOT GO TO ARBITRATION AFTER IT WAS OFFERED THEN A SET-OFF APPLIES, SPECIFICALLY IN THAT PARAGRAPH, THAT THE CLAIMANT'S AWARD AT TRIAL SHALL BE REDUCED BY ANY DAMAGES RECOVERED BY THE CLAIMANT, ARBITRATING DEFENDANTS FOLLOWING ARBITRATION, THEN THE ANSWER IS YES.

WOULD YOU HAVE THE SET OFF IF MORE THAN ONE DEFENDANT GOES TO ARBITRATION?

IF MORE THAN ONE DEFENDANT GOES TO ARBITRATION, THEN YOU ARE LIMITED WITHIN THE CONTEXT OF THE ARBITRATION, BECAUSE THEN THE PARTIES ARE JOINTLY AND SEVERALLY LIABLE, AND I DON'T WANT TO ADDRESS THE PEROT INCIDENT LANGUAGE IN THE STATUTE BECAUSE I DON'T THINK THAT ISSUE IS PROPERLY BEFORE THIS COURT TODAY, BUT THAT WOULD RAISE A RELATED ISSUE TO THE ISSUE THAT WAS BEFORE THIS COURT IN PHILLIP.

SO -- IN PHILIPPE.

SO YOUR INTERPRETATION OF THE LANGUAGE THAT TALKS ABOUT BEING JOINTLY AND SEVERALLY LIABLE, YOU ARE ONLY JOINTLY AND SEVERALLY LIABLE WITH THE DEFENDANTS WHO ARE, ALSO, IN ARBITRATION.

ABSOLUTELY.

SO IF JUST ONE DEFENDANT GOES TO ARBITRATION, THAT LANGUAGE IS NOT APPLICABLE.

CORRECT. I MEAN, IN MANY CASES, THE STARK CASE WHICH FOUND THE ARBITRATION CONSTITUTIONAL, THERE IS ONLY ONE CLAIMANT AND DEFENDANT, SO PERHAPS THAT LANGUAGE IS GRATTUIT TUESDAY AND MUST APPLY HERE, THAT ASSUMPTION -- GRATUITOUS

AND MUST APPLY HERE, THAT ASSUMPTION IS, DOESN'T APPLY HERE.

206, IT SAYS ANYTHING PURSUANT TO THIS OR SECTION 207, SHALL HAVE AN ACTION FOR CONTRIBUTION AGAINST ANY NONARBITRATING PERSON WHOSE NEGLIGENCE CONTRIBUTED TO THE INJURY. TELL ME WHAT THAT MEANS.

WELL, IT DOES SEEM, TO ME, THAT THAT WOULD MEAN THAT DR. DOIG MIGHT HAVE AN ACTION AGAINST HALL TAX AND -- HALIFAX AND NOT A SET-OFF AGAINST THE PLAINTIFF'S RECOVERY, AND THAT WOULD MAKE SENSE, BECAUSE THE PLAINTIFF HAS BEEN LIMITED TO THE $250,000, IRRESPECTIVE OF WHAT THE TOTAL AMOUNT OF HER DAMAGES IS, SO PERHAPS DR. DOIG'S REMEDY IS AGAINST HALIFAX AND NOT AGAINST -- BUT, AGAIN, INTERPRETING THE CONTRIBUTION STATUTE AS IT HAS BEEN INTERPRETED BEFORE, I DON'T KNOW IF THAT WOULD BE THE CASE, WITHOUT --

ISN'T HALIFAX GOING TO SAY, IF THERE IS A CONTRIBUTION ACTION, THAT WE HAVE ALREADY PAID THE CLAIMANT, AND SO YOU KNOW, HOW IS THAT CONTRIBUTION ACTION GOING TO WORK, IN TERMS OF IS IT EFFECTIVELY A SET-OFF PROVISION?

IT IS. THE IDEA THAT IT IS A SET-OFF PROVISION, SOMETHING BETWEEN THESE NONARBITRATING DEFENDANTS, WHICH THE NATURE OF THIS HYBRID REMEDY IS OBVIOUSLY NOT SPECIFICALLY COUNTENANCE BY THIS STATUTE, BUT AS TO THE PLAINTIFF WHAT IS HERE BEFORE THIS COURT TODAY, THERE IS NOTHING THAT INDICATES THAT THERE SHOULD BE A SET-OFF AGAINST THE ARBITRATING DEFENDANTS, WHAT THE ARBITRATING DEFENDANT HAS MADE.

AS OPPOSEED TO WHAT I -- NOW SUPPOSE, WHAT I AM SAYING, AND THEN I WILL LEAVE YOU ALONE ON THIS ONE, IS ASSUMING THERE HADN'T BEEN A SETTLEMENT WITH HALIFAX, OKAY, AND THIS ARBITRATING DEFENDANT, OKAY, HAD THE AWARD AGAINST HIM, AND PAID THE AWARD, AND THEN WENT UNDER THIS SECTION AGAINST HALIFAX, AND GOT A RECOVERY, AGAINST HALIFAX, FOR SOME PORTION OF THIS AWARD, THEN THE CLAIMANT WOULD NOT HAVE BEEN ABLE TO GET ANY AWARD AGAINST HALIFAX, WOULD IT, BECAUSE I WOULD ASSUME THAT THEORETICALLY ANY OBLIGATION THAT HALIFAX HAD TO THE CLAIMANT WOULD HAVE BEEN SATISFIED BY THE CONTRIBUTION. I AM TRYING TO FIGURE OUT THE SCHEME. OBVIOUSLY, AS WE ALL ARE, BUT IS THAT --

I THINK THAT WHAT THE ARGUMENT TO THAT WOULD BE IS THAT, IF ALL OF THESE STATUTES ARE, THEN, GOING TO HAVE TO WORK TOGETHER, AND IF YOU DON'T FEEL THAT THOSE THINGS CAN BE RECONCILED, THEN I THINK THAT, IF THERE IS A FULL COMPUTATION OF MRS. CHESTER'S DAMAGES, THEN ALL OF THESE THINGS ARE RESOLVED BECAUSE THEN THE SET OFF COMES FROM DR. DOIG AND IT IS A DONE MATTER, AND I AM GOING TO SAVE THE REST OF MY TIME FOR REBUTTAL. THANK YOU VERY MUCH.

THANK YOU. MR. CHIEF JUSTICE: MS. CAROL.

GOOD MORNING. I AM HERE WITH JIM SMITH ON BEHALF OF DR. DOIG, AND LET ME JUST RESPOND TO THE QUESTIONS THAT WERE RAISED BY THE PANEL.

BEFORE YOU DO THAT, LET ME ASK YOU A QUESTION. WHY ISN'T THIS MATTER, IN TAKING INTO CONSIDERATION THIS COURT'S RECENT DECISION IN ST. MARY'S HOSPITAL, ANSWERED BY THE LANGUAGE WHICH IS THE INTRODUCTORY LANGUAGE IN 766.207 WHICH SAYS ARBITRATION, PURSUANT TO THIS SECTION, SHALL PRECLUDE RECOURSE TO ANY OTHER REMEDY BY THE CLAIMANT AGAINST ANY PARTICIPATING DEFENDANT. THE WHOLE SCHEME BEING INTENDED TO ONLY PERTAIN TO THOSE WHO, DEFENDANTS, WHO CHOOSE TO PARTICIPATE IN THE ARBITRATION? BECAUSE THE SENSE OF THE PHILIPPE DECISION IS THAT THIS IS A SCHEME WHICH, IN EFFECT, DOES HARM THE CLAIMANT, EVEN IF THE CLAIMANT ACCEPTS IT, BECAUSE IT SETS A $350,000 OUTSIDE CAP ON WHAT THE CLAIMANT CAN RECOVER IN ECONOMIC DAMAGES, SO THIS

SCHEME OUGHT TO ONLY GO TO THOSE WHO PARTICIPATE, AND WE OUGHT NOT TO APPLY A SET-OFF OR ANY OTHER STATUTES TO IT. WHY ISN'T THAT THE REASONING THAT SHOULD APPLY HERE?

WELL, YOUR HONOR, WHAT YOU WOULD HAVE TO, THEN, RULE, IS ONE OF THE FUNDAMENTAL PRINCIPLES UNDERLYING SET OFF IS TO PRECLUDE DOUBLE RECOVERY BY A PLAINTIFF. I SUPPOSE YOU WOULD BE SAYING, IF THAT WOULD BE ACCEPTABLE IN THE ARBITRATION CONTEXT.

WHAT I AM ASKING YOU IS WHY ISN'T THAT PART OF THE TRADE-OFF HERE, THAT THE LEGISLATURE ENACTED, AND THIS COURT APPROVED FOR THE CONSTITUTIONALITY OF LIMITING THE ACCESS TO THE COURTS FOR OBTAINING YOUR FULL DAMAGES, UNDER ARBITRATION THAT IT ONLY DEALS WITH THE PARTICIPATING DEFENDANT, WHICH IS AS STATED IN THIS INTRODUCTORY LANGUAGE IN THE STATUTE?

WELL, I SUPPOSE THEN I LOOK AT THE CONTRIBUTION PROVISION THAT IS IN ARBITRATION STATUTE, AND THAT PROVISION SEEMS TO CONTEMPLATE A RIGHT TO THE SAME RIGHT OF CONTRIBUTION THAT IS GIVEN TO NONARBITRATING DEFENDANTS, YOUR HONOR. AND THEY ARE STILL BOUND, THOSE DEFENDANTS ARE STILL BOUND BY THE SAME RULES AND CASE LAW, REGARDING WHETHER YOU CAN ACTUALLY PURSUE CONTRIBUTION, WHICH IS YOU CAN ONLY PURSUE CONTRIBUTION, IF IT IS A BAD FAITH SETTLEMENT, SO I AM --

WHAT I AM PUZZLED ABOUT, AND ESPECIALLY IN LIGHT OF WHAT THIS COURT HAS NOW SAID IN THAT CASE, IS THAT I UNDERSTAND THE PROVISION 208, HAVING TO DO WITH CONTRIBUTION, BUT WE HAVE DEALT WITH THIS AS A SELF-CONTAINED PROVISION, AND CONTRIBUTIONS ARE NOT SET OFF WITHIN THIS STATUTE, ANY OF THESE SECTIONS.

I DO NOT READ ST. MARY'S AS, REALLY, ADDRESSING ANY OF THESE SET OFFS, AND I RECOGNIZE THE COURT'S RATIONALE IN WELLS, BUT ALL ST. MARY'S WENT TO IS WHAT ELEMENTS OF DAMAGES ARE GOING TO BE AVAILABLE, WHEN PARTIES AGREE TO ARBITRATION. THAT DAVE RENT ISSUE, WHOLLY DISTINCT FROM A SETTLEMENT SET OFF AND WHETHER SET OFF SHOULD APPLY, AND I, ALSO, WE RELYLY ON THE WELLS'S -- WE RELY ON THE WELLS POSITION'S DECISION, ALSO, BY THIS -- THE WELLS'S DECISION, ALSO, BY THIS COURT, AND WE RECOGNIZE THE SET OFF, ESPECIALLY AS TO ECONOMIC DAMAGES, BECAUSE THERE IS JOINT AND SEVERAL LIABILITY FOR THAT. IT DOES NOT APPLY TO THE NONECONOMIC, BECAUSE IT IS SEVERAL LIABILITY, SO WE BELIEVE UNDER THE WELLS'S DECISION, WHICH ALLOWED FOR ECONOMIC AND IT APPLIED THE COLLATERAL SOURCE STATUTE SIMULTANEOUSLY WITH THE SET OFF STATUTE, THERE IS NO REASON THAT HAS BEEN ADVANCED BY THE PLAINTIFFS, TO TREAT THESE TWO GROUPS, ARBITRATING DEFENDANTS AND NONARBITRATING DEFENDANTDY>. I THINK YOU MAY BE ADDRESSING SOME OTHER PROBLEMS, IF YOU --

HOW DO WE GET TO THE JOINT AND SEVERAL LIABILITY FOR THIS DEFENDANT?

THIS DEFENDANT, YOUR HONOR, UNDER THIS ARBITRATING DEFENDANT UNDER THE ARBITRATION STATUTE, IS JOINTLY AND SEVERALLY LIABLE FOR NONECONOMIC, FOR STATUTE, FOR NONECONOMIC AND ECONOMIC DAMAGES THAT ARE CLAIMED AND PROVEN IN THE ARBITRATION CONTEXT, BUT YOU HAVE GOT TO REMEMBER, OF COURSE, ARBITRATION STATUTE DOES IMPOSE THAT CAP OF 250 FOR NONECONOMIC DAMAGES. OF COURSE THERE IS NO CAP FOR ECONOMIC.

SO YOU ARE SAYING THAT THAT LANGUAGE IN THE ARBITRATION STATUTE, ABOUT JOINT AND SEVERAL LIABILITY, APPLIES TO ALL DEFENDANTS, WHETHER THEY ARE A PART OF THE ARBITRATION OR NOT?

NO, YOUR HONOR. I BELIEVE, IF YOU LOOK AT THAT STATUTE CLOSELY, I BELIEVE THAT IT SAYS TO DAMAGES ASSESSED UNDER THIS SECTION, SO IT IS IN ARBITRATION, BUT THIS IS THE POINT

THAT I THINK IS MADE IN THE CASES, AND I BELIEVE THE FIFTH DISTRICT MADE THIS POINT. THE PLAINTIFF, BICEPING TO GO INTO ARBITRATION, HAS MADE A DECISION TO ACCEPT THE NEGATIVE SIDE THAT YOU ARE GOING TO BE CAPPED AT THE 250 FOR YOUR NONECONOMIC DAMAGES. THE PLAINTIFF IN THIS CASE COULD HAVE -- IT WOULD HAVE BEEN A LITTLE BIT DIFFERENT SITUATION, IF THEY HAD NOT SETTLED WITH HALIFAX, FOR EXAMPLE. THEY COULD HAVE GONE ON TO TRIAL OR THEY COULD HAVE EVEN GONE ON TO TRIAL WITH DR. DOIG, BUT IF THEY HAD GONE ON TO TRIAL AGAINST HALIFAX, THEY WOULD HAVE SET A NEW CAP, YOU KNEE S SEE, FOR NONECONOMIC.

BUT ISN'T THAT CAP THAT IS IN THAT STATUTE IS APPLICABLE ONLY TO ARBITRATION?

YES.

IT DOESN'T SET THE CAP FOR THE CASE.

THAT'S EXACTLY RIGHT, YOUR HONOR. THAT IS EXACTLY RI. WE AGREE.

AND AGAINST THIS DEFENDANT.

YES.

BUT ISN'T THE DEFENDANT IN THE SAME BOX, AND THANK IS WHAT -- ISN'T THAT WHAT THE CHIEF JUSTICE IS ASKING YOU, THEN, THAT THAT, THAT THIS, REALLY, IN TERMS OF THAT SECTION OF THE STATUTE, THAT THE ARBITRATION PROVISION IS SORT OF A TOTAL PACKAGE, AND THE DEFENDANT CAN'T COMPLAIN ABOUT IT AND THE CLAIMANT CAN'T COMPLAIN ABOUT IT AND THAT THERE MAY BE SOME CONSEQUENCE, YOU KNOW, LATER, THE CLAIMANT HAS A TRIAL AND GETS THE TOTAL DAMAGES DETERMINED IN A TRIAL, OR THESE SITUATIONS WHERE THEY WORK OUT SEPARATE SETTLEMENTS WITH OTHER DEFENDANTS, BUT IN ESSENCE, THE DEFENDANT THAT GOES INTO AN ARBITRATION LIKE THIS, IS SIMPLY NOT ENTITLED TO A SET-OFF, BECAUSE THIS IS A PACKAGE DEAL, JUST AS IT IS A PACKAGE DEAL FOR THE CLAIMANT TO HAVE THIS SHARP LIMITATION. I MEAN --

NO.

-- SORT OF ASKING THE SAME QUESTION THAT JUSTICE WELLS ASKED YOU BEFORE.

I UNDERSTAND, YOUR HONOR, AND --

OBVIOUSLY WE ARE STRUGGLING AS MUCH AS YOU ALL ARE.

AND WE HAVE TAKEN THE POSITION TO READ THE STATUTES IN PARA MATERIA, THE NEGLIGENCE STATUTE THAT DO PROVIDE SET OFFS.

WITH CAPS AND SET OFFS, THEY ARE INHERENTLY IN CONFLICT WITH ONE ANOTHER. THEY DON'T SEEM TO WORK, IF YOU TRY TO LOOK AT THESE, BECAUSE IF YOU RESOLVE A CASE BEFORE GOING TO ARBITRATION, IT SEEMS THAT YOU, THEN, TOTALLY ELIMINATE ANY CAPACITY FOR GOING THROUGH THAT ARBITRATION PROCESS. I MEAN, IT JUST IS COUNTERPRODUCTIVE, BECAUSE YOUR SETTLEMENT WILL WIPE OUT WHAT YOU RECEIVE IN THE ARBITRATION, SO WHY WOULD YOU EVER USE THAT STATUTE, SO IT SEEMS IF WE DO THIS, WE WILL BE HE MAKESCLATEING -- EMASCULATING THE LEGISLATION STATUTE THAT THE LEGISLATURE DESIRES UP HERE. EYE SUPPOSE WHAT WE ARE LOOKING AT IS THERE IS NOTHING IN THE ARBITRATION, IF YOU ARE TREATING IT AS A SELF-CONTAINED STATUTE THERE, IS NOTHING THERE THAT SAYS SPECIFICALLY THAT NO SET OFF WILL BE PERMITTED.

BUT I GUESS, FOLLOWING UP ON WHAT JUSTICE LEWIS IS SAYING AND JUST SEEING HOW THIS

WOULD PLAY OUT, LET'S ASSUME THAT THE DAMAGES IN A CASE ARE MAINLY NONECONOMIC, BECAUSE THAT IS WHERE THIS IS GOING TO BE MOST FELT, AND THE PLAINTIFF SETTLES WITH A PARTY FOR AND GET $2 MILLION, AND IT IS ALL NONECONOMIC DAMAGES. WHAT -- WHAT IF THEY GET INTO THE ARBITRATION? -- WHAT DO THEY GET IN THE ARBITRATION?

THEY HAVE SETTLED FOR 2 MILLION.

THEY GET NOTHING.

THAT IS WHAT JUDGE HARRIS WAS SAYING, IN HIS HYPOTHETICAL, IF THEY TOOK HALIFAX TO TRIAL AND GOT 500, THEN THEY TOOK THE CODEFENDANT TO ARBITRATION FOR THE 250, THEY ARE NOT ENTITLED TO THAT 250, AND THAT IS AN ISSUE THAT I --

THAT IS A BASIC PROBLEM AND, AT THE VERY LEAST, WOULD REQUIRE US TO REWRITE THE STATUTE TO SAY THAT, THAT THEY WOULD HAVE TO GO AND ACTUALLY FIND THE TOTAL AMOUNT OF DAMAGES AND THEN GO DOWN AND THEN YOUR SET OFF WOULD BE DOWN THERE, WHICH WOULD JUST BE REWRITING THE STATUTORY SCHEME.

I GUESS THE WAY THAT THE FIFTH WAS INTERPRETING THAT IS THAT THERE CAN ONLY BE ONE RECOVERY. YOU CAN ONLY PROVE ONE SET OF YOUR NONECONOMIC DAMAGES. HOW DO YOU DO THAT? THE PLAINTIFF CHOOSES. THEY CAN GO TO TRIAL. THEY CAN SETTLE. THEY CAN GO TO ARBITRATION. THEN, ONCE YOU HAVE THAT AMOUNT SET, THAT ESTABLISHES THE CAP THAT YOU OPERATE WITH. IN THE OVERALL CASE.

WHAT YOU HAVE GOT --

I HIM SORRY. WHAT IS YOUR QUESTION?

IN OTHER WORDS YOU SAID IF THEY CHOSE TO GO TO ARBITRATION THAT, THAT IS GOING TO BE A CAP.

AS TO THAT DEFENDANT IN ARBITRATION.

THAT IS WHY WE ARE SAYING, SURELY IT CAN'T BE A CAP.

I KNOW, AND THE OPINION, ON SOME PARTS, AND I THINK IT HAS BEEN INTERPRETED AND THAT IS WHY THERE IS CLARIFICATION NEEDED BY THIS COURT, THAT I THINK PEOPLE ARE THINKING THAT THAT IS A PEROT INCIDENT CAP. AS TO THE CAE, OF COURSE I DON'T THINK THAT IS WHAT WAS MEANT BY THE OPINION F YOU READ IT REALLY CLOSELY, I THINK THEY WERE TRYING TO LIMIT IT TO THE ARBITRATION CONTEXT, BUT I THINK WHAT THE FIFTH DISTRICT'S OPINION IS TRYING TO DO IS SET THERE IS ONE RECOVERY FOR NONECONOMIC AND THE PLAINTIFF HAS THE CHOICE ON HOW TO SET THAT UP. SEE, IN THIS CASE, THAT IS WHY THIS COMES DOWN TO THE, REALLY, TWO ISSUES. ARE YOU GOING TO APPLY A SET-OFF A FUNDAMENTAL QUESTION, ARE YOU GOING TO APPLY IT TO MEADW MALL ARBITRATION, AND IF YOU DO, TO WHAT EXTENT, AND THE WAY THE FIFTH READ IT AND THE COURT MILE DISAGREE, OF COURSE IN THE SET OFF -- THE COURT MAY DISAGREE, OF COURSE IN THE SET OFF PROVISION, IT IS THE DEFENSE THAT CREATES SEVERAL OTHER ISSUES.

DON'T YOU END UP WITH THE SITUATION THAT JUSTICE LEWIS HAS POSITED, AND THAT IS WHY IN THE WORLD WOULD A DEFENDANT WITH A SERIOUS CLAIM EVER GO TO ARBITRATION, THEN, KNOWING THAT ANY, THE OTHER RECOVERIES THEY MAKE IN SETTLING AGAINST THE OTHER DEFENDANTS, THAT THERE IS, IN EFFECT, GOING TO BE A CAP THAT IS GOING TO BE APPLIED TO THAT, AND IT IS JUST GOING TO BE A DISINCENTIVE TO ARBITRATION, AS OPPOSED TO THE INCENTIVE THAT THE LEGISLATURE WAS TRYING TO SET UP WITH THESE TRADE-OFFS AGAINST BOTH SIDES. THE DEFENDANT OBVIOUSLY GETS THE TRADE-OFF. THERE IS THIS SUBSTANTIAL

LIMITATION, EVEN THOUGH THEY MIGHT HAVE TO PAY. THE CLAIMANT GETS THE BENEFIT THAT, WELL, THIS IS AN EASIER WAY TO PROCEED, AND THEY RECOVER SOMETHING HERE.

THE PLAINTIFF'S POSITION BELOW WAS THAT A SET-OFF APPLIES IN ARBITRATION, THEN, WHAT YOU WOULD DO IS YOU WOULD BE ALLOWED TO PROVE UP ALL YOUR DAMAGES AND THEN HAVE A SET-OFF APPLY TO THAT NUMBER, AND THE RESPONSE TO THAT, I THINK, IS THE FIFTH THOUGHT MAYBE THAT IS REASONABLE BUT IT IS NOT IN THE STATUTE, AND, AGAIN, THAT IS WHERE THAT PEROT INCIDENT DOES COME INTO PLAY, BECAUSE THE FIFTH RELIED ON THE 250 PER INCIDENT, IN THE CASE, AS A RATIONALE FOR SAYING YOU CAN ONLY HAVE A TOTAL RECOVERY OF 250 IN NONECONOMIC, IF YOU GO --

FROM THE CLAIMANT'S STANDPOINT, THE PROBLEM WITH THE STATUTE IS NOT THE 250. THE PLOB WITH THE STATUTE IS -- THE PROBLEM WITH THE STATUTE IS 3.

, IN THAT IF THE CLAIMAN, IF HE DEFENDANT -- IS THE 350, IN THAT IF THE CLAIMANT REQUESTS ARBITRATION AND THE DEFENDANT REJECTS, IT THAT THE MOST DEFENDANT CAN GET FROM THE CLAIM IS 350 AGAINST THE DEFENDANT THAT OFFERED TO DO IT. AND IF THAT IS GOING TO BE GLOBALLY APPLIED THEN, THEN YOU SET UP SITUATION IN WHICH ONE DOCTOR OVER HERE MAKES AN OFFER TO ARBITRATE AND CAPS IT FOR EVERYBODY. NOW, THAT CAN'T APPLY.

NO. NO. YOU ARE RIGHT, YOUR HONOR, AND I APOLOGIZE IF I MADE IT SOUND THAT WAY, BECAUSE I DO NOT AGREE WITH THAT. THAT CANNOT BE. THAT IS NOT EQUITABLE. THAT IS WHY I DO RESTRICT IT TO ARBITRATION. BUT THIS CASE IS SUCH AN UNIQUE CIRCUMSTANCE, BECAUSE YOU HAVE GOT ONE DEFENDANT WHO WENT TO ARBITRATION AND SETTLEMENT. HE NEVER WENT IT TRIAL. HE NEVER HAD A JURY DETERMINATION OF ALLOCATION OF FAULT, AND I GUESS THAT IS THE QUESTION. WHAT DO YOU DO WHEN THERE HAS BEEN NO ALLOCATION OF FAULT? YOU CAN'T APPLY THE WELLS ANALYSIS.

AND THERE HAS BEEN NO DETERMINATION OF WHAT THE ACTUAL DAMAGES ARE, EITHER. > RIGHT. RIGHT. BUT, SEE, I THINK THAT IS WHY THE FIFTHSAID THE ONLY DETERMINATION YOU HAVE UNDER THESE CIRCUMSTANCES, THE DETERMINATION BY THE ARBITRATION PANEL, WHICH THE PANEL IS RESTRICTED TO THE 250 CAP. THAT MAKES IT UNIQUE IN OTHER CASES. THAT IS NOT WHAT YOU HAVE HERE. THE ONLY DETERMINATION OF NONECONOMIC DAMAGES IS DAMAGES WITHIN THE ARBITRATION AWARD AND THE ARBITRATION PANEL.

WHICH IS AN ARTIFICIAL LIMITATION.

WELL, THAT'S RIGHT, YOUR HONOR, SO I MEAN, YOU COULD TAKE THE OPTION, WELL, UNDER THESE CIRCUMSTANCES, IS PLAINTIFF ALLOWED TO GO AHEAD AND PROVE UP ALL DAMAGES AND THEN TAKE THE SET OFF AGAINST THAT, OR DO YOU SIMPLY RELY ON WHAT THE FIFTH IS SAYING AS, WELL, A DECISION WAS MADE, AND UNDER THESE CIRCUMSTANCES, YOU HAD A SETTLEMENT WITH A CODEFENDANT. YOU HAD ARBITRATION WITH THE OTHER. THE ONLY FORMAL DETERMINATION OF NONECONOMIC DAMAGES WAS IN ARBITRATION, BUT ACTUALLY IN THIS CASE RECALL, BUT THE SETTLEMENT AGREEMENT WITH HALIFAX SPECIFICALLY SAID THAT IT WAS FOR ECONOMIC DAMAGES ONLY AND THAT, ALSO, MAKES THE CASE, I THINK, UNIQUE.

WHAT ABOUT THE APPELLANT'S ARGUMENT HERE IS THAT THAT LANGUAGE, REALLY, DOESN'T SAY THAT THESE ARE ECONOMIC DAMAGES, AS WE USE THE TERM, IN TERMS OF ECONOMIC VERSUS NONECONOMIC DAMAGES. YOU ARE SAYING THAT THIS IS, REALLY, MONEY DAMAGES THAT WE ARE WILLING TO GIVE YOU, WITHOUT AY SAYNG WE ARE AT FAULT OR AT BLAME.

YEAH. BUT THEY COULD JUST HAVE DONE THEIR STANDARD SETTLEMENT AGREEMENT AND YOU PEOPLE GO AHEAD AND DESIGNATE THE TWO, BUT THEY SPECIFICALLY CHOSE TO DESIGNATE ECONOMIC DAMAGES. I MEAN, THEY KNOW THE DIFFERENCE BETWEEN ECONOMIC AND NONECONOMIC AND IF YOU LOOK AT THE ALLEGATION, THERE WASAN LLOCAION MADE BY THE

PLAINTIFF IN THIS CASE IN THE SETTLEMENT AGREEMENT.

ONE OF THE ARGYUMTHS YOU MADE EARLIER IS THE WHOLE IDEA THAT THE CLAIMANT SHOULD NOT GET A DOUBLE RECOVERY, AND THAT IS WHY WE NEED TO HAVE THESE SET OFFS. I MEAN, WITHOUT ANY ALLOCATION OF FAULT AND WITHOUT ANY DETERMINATION OF THE TOTAL AMOUNT OF DAMAGES, THAT THE QLAMANT IS -- THAT THE CLAIMANT IS, REALLY, OWEDIN THIS SITUATION, HOW DO WE MAKE A DETERMINATION THAT THERE WOULD AND DOUBLE RECOVERY, BECAUSE THEY GETS HER SETTLEMENT AMOUNT AND THE ARBITRATION AMOUNT?

WELL --

I AM HAVING A LITTLE ROLEM WITH. THAT HOW DO WE KNOW THERE WOULD AND DOUBLE --

FIRST THERE HAS BEEN A DETERMINATION OF DAMAGES, UNDER THE CIRCUMSTANCES OF THIS CASE. TE ARBITRATION, HE WENT TO ARTRATION, AND THE ONLY FORMAL DETERMINATION WAS AT 250. IF SHE HAD TAKEN HALIFAX TO TRIAL, THEY WOULD HAVE HAD A NEW NUMBER TO WORK WITH.

IS THAT NUMBER THAT IS DETEMIED BY THE ARBITRATION PANEL, A REAL DETERMINATION OF THIS CLAIMANT'S TAL DAMAGES, ORE DAMAGES THAT THIS PARTICULAR DEFENDANT SHOULD PAY? I AM HAVING A LITTLE PROBLEM WITH THAT, ALSO. WHAT DOES THAT AWARD REALLY MEAN?

WITH THE CAP, YEAH. IT IS NOT THE ACTUAL DAMAGES CLAIM.

AND YOU AGREE THAT YOUR CLIENT HAS NO CONTRIBUTION CLAIM IN THIS CIRCUMSTANCE.

RIGHT.

WHERE THERE IS A GOOD FAITH SETTLEMENT.

EXACTLY.

IS THAT CORRECT?

THAT'S RIGHT. AND OUR POINT IS, OKAY, SO THEY ARE IN THE SAME STATUS AS A NONARBITRATING PARTY, A DEFEANT, THEY HAVE NO RIGHT OF CONTRIBUTION, UNLESS THEY CAN FOLLOW THE STRICT REQUIREMENT, AND THAT IS VERY DIFFICULT TO DO SO THAT, IN TURN, JUSTIFIES THE SET OFF.

BUT YOUR CLIENT HAS A CHOICE, WHICH IS TO SAY THAT NOT OFFER TO ARBITRATE, GO TO TRIAL, HAVE THE WHOLE AMOUNT DETERMINED, AND THEN ANY OTHER DEFENDANT WOULD BE ABLE TO --

THAT'S EXACTLY RIGHT. THERE ARE INCENTIVES AND THERE ARE DISINCENTIVES FOR BOTH THE PLAINTIFF AND THE DEFENDANT, WITH RESPECT TO ARBITRATION.

THE PROBLEM WITH THE FIFTH DISTRICT'S OPINION IS IT SEEMS LIKE THE DEFENDANT GETS THE BEST OF BOTH WORLDS, WHICH DOESN'T SEEM TO BE WHAT WAS INTENDED BY THIS STATUTE, WHICH WAS TO FAVOR THE DEFENDANT, YOU KNOW, A TO THE DETRIMENT OF THE PLAINTIFF.

SUPPOSE WHAT THE PROBLEM, THOUGH, I MEAN, I UNDERSTAND, AND I CERTAINLY AGREE THERE ARE INCENTIVES AND DISINCENTIVES, AND SHOULDN'T IT BE ONE OF THE FACTORS THAT GO INTO ARBITRATION AND IT IS A ISOLATED SCHEME, BUT THE PROBLEM IS THERE IS NO PROVISION IN THE ARBITRATION STATUTE THAT SPECIFICALLY SAYS NO SET OFF WOULD BE ALLOWED, AND

WHEN U TURN TO THAT, YOU TURN TO GENERAL STATUTORY CONSTRICTION -- CONSTRUCTION, AND YOU LOOK AT THE OTHER STATUTES UNDER THE GENERAL NEGLIGENCE THAT APPLY, AND YOU READ THEM INPARAMATERIA, TO TRY TO HARMONIZE THESE STATUTES, AND THAT IS WHAT THIS COURT DOES AND HAS TO DO TO MAKE SENSE OF IT.

WHY WOULDN'T THE CONTRIBUTION PORTION TAKE CARE OF THAT? IN THER WOR THE CONTRIBUTION PROVISIONS, THAT IF HERE IS A PROBLEM, THERE CAN BE CONTRIBUTION. THE STATUTE GIVES YOU A SPECIFIC RIGHT TO CONTRIBUTION. BUT IF THERE HAS BEEN A SETTLEMENT, AND IT IS A GOOD FAITH SETTLEMENT --

-- THEN YOU DON'T HAVE THAT. BUT THAT IS THE SAME SITUATION THAT YOU HAVE, EVEN OUTSIDE OF ARBITRATION. I AM SAYING EVEN OUTSIDE, WHEN YOU HAVE A NONARBITRATING DEFENDANT, AND SO YOU ARE TREATING THEM DIFFERENTLY THEN. NOW, MAYBE YOU CAN SAY IS THERE A REASON FOR DOING THAT, BECAUSE OF ARBITRATION, BUT WE ARE SAYING THAT YOU HAVE TO MAKE A DECISION, THEN, THAT IT IS GOING TO BE JUSTIFIED TO HAVE SUCH DISPARATE TREATMENT BETWEEN THE TWO GROUPS.

JUSTICE QUINCE, DO YOU HAVE A QUESTION?

I AM STILL STRUGGLING WITH THIS DOUBLE RECOVERY. I DON'T THINK YOU EVER ACTUALLY EXPLAINED WHY THIS WOULD BE A DOUBLE RECOVERY.

I AM GOING TO TELL YOU. EVERY CASE, YOU LOOK AT THE FACTS BEFORE YOU, AND WHAT YOU HAVE IN THIS CASE IS YOU HAVE TWO DEFENDANTS. YOU HAVE THE HALIFAX. THE PLAINTIFF SETTLED WITH HALIFAX. YOU HAVE DR. DOIG. THE PARTIES AGREED TO ARBITRATE. NOBODY WENT TO TRIAL. THERE WAS NEVER A JUDICIAL OR JURY DETERMINATION OF DAMAGES, BUT WHEN THE PLAINTIFF DID HAVE A CHOICE, NOW, YOU MAY SAY, WELL DEFENDANT MAKES THE OFFER TO ARBITRATE AND THE PLAINTIFF, YOU KNOW, CAN'T WIN EITHER WAY. YOU MAY BE SUGGESTING. BUT THEY DO HAVE A CHOICE THOUGH AND PLAINTIFF MADE THE CHOICE IN THIS CASE, TO GO TO ARBITRATION, AND WHAT THAT DOES, IT SETS THE AMOUNT, UNDER THESE CIRCUMSTANCES, IT SETS THE AMOUNT FOR NONECONOMIC DAMAGES, WHICH IS AT 250, WHICH IS AT 250 SO YOU GO BY THAT IN ESTABLISH ESTABLISHING THE TOTAL RECOVERY, IN WHICH JUDGE HARRIS WAS SAYING THE TOTAL RECOVERY THAT SHE CAN GET UNDER THESE CIRCUMSTANCESANT MIX-MAXED CIRCUMSTANCES THAT SHE HAS CHOSEN IS A REMEDY, AND SHE CAN'T RECOVER THAT TWICE. SO THAT IS WHY YOU WOULD HAVE THE DOUBLE RECOVERY. I BELIEVE THAT IS THE RATIONALE AND YOU LOOK PUZZLED. MR. CHIEF JUSTICE: I BELIEVE YOUR TIME IS UP. THANK YOU VERY MUCH. REBUTTAL?

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. WITH ALL DUE RESPECT TO OPPOSING COUNSEL, I THINK IT IS VERY DIFFICULT FOR HER TO ANSWER JUSTICE QUINCE'S QUESTION BECAUSE THERE IS NO LOGICAL ANSWER. MRS. CHESTER HAS ALREADY AGREED THAT SHE IS NOT GOING TO GET A FULL RECOVERY, SO IT IS IMPOSSIBLE FOR HER TO GET A DOUBLE RECOVERY. IF SHE HAD GONE TO TRIAL AND, UNDER JUSTICE PARIENTE'S SCENARIO, RECOVERED $2 MILLION IN DAMAGES. HERE SHE ONLY RECOVERED 250 FROM DR. DOIG AND 150 IN A COMBINED SETTLEMENT WITH HALIFAX HOSPITAL. 400,000. SHE HSN'T GOTTEN A DOUBLE RECOVERY. THE FIFTH DISTRICT OPINION MAKES IT IMPOSSIBLE FOR THE PLAINTIFF TO EVEN GET THE DIMINISHED RECOVERY THAT THE LEGISLATURE HAS PROVIDED FOR. HOWEVER WE READ THIS PIN I DON'T KNOW, IT SPECIFIC -- THIS OPINION, IT SPECIFICSLY SAYS PLAINTIFF HAS AGREED TO A SPECIFIC AWARD TO THE NONECONOMIC DAMAGES FOR THE INCIDENT TO BE LIMITED TO $250,000. CERTAINLY WHAT I HAVE HEARD IN THESE QUESTIONS, MANY OF YOU JUSTICES AGREE THAT CERTAINLY WE CANNOT HAVE THIS BE THE LAW, THAT A PLAINTIFF AGREES TO GO TO ARBITRATION AND GETS A 250 LIMITATION OF HER DAMAGES, AND THEN ANY OTHER SETTLEMENT, SHE GETS TAKEN AWAY FROM THAT, SO SHE WALKS AWAY WITH $300,000 ON A CLAIM THAT COULD HAVE BEEN WORTH 2 MILLION. THERE IS NO INCENTIVE FOR PLAINTIFF TO ARBITRATE AND THERE IS A GREAT

INCENTIVE FOR DEFENDANTS TO SAY DR. DOIG, IF YOU HAVE MULTIPLE, DR. DOIG'S OFFER WAS EXCELLENT. WE DON'T HAVE TO OFFER ANY MONEY. SHE CAN GO TO TRIAL, BECAUSE --

DOES DOUBLE RECOVERY, REALLY, HAVE ANYTHING TO DO WITH SETTLEMENT? I MEAN, THE SETTLMEN COULD HAVE BEEN THE HOSPITAL HAD NO LIABILITY OR THAT COULD HAVE BEEN ON THE BASIS THAT THAT WAS THE FULL AMOUNT OF THE CLAIM. I MEAN, WE DON'T KNOW.

NO, WE DON'T KNOW, AND IF THIS COURT WANTS TO KNOW, THEN WHAT WE NEED TO DO, IF YOU DON'T AGREE THAT THERE IS NO SET OFF IN THIS STATUTE, WHICH WE STEADFASTLY MAINTAIN, BUT IF THIS COURT DOESN'T AGREE, THEN WHAT WE MUST DO IS REMAND TO THE ARBITRATORS, TO FIND OUT, TO COMPUTE, AS A JURY WOULD, THE FULL AMOUNT FOR NONECONOMIC DAMAGES AND THEN TAKE INTO ACCOUNT ALL OF THE SET OFFS AND EVERYTHING AND THEN DO THE REDUCTION, AND MY INSTINCTS TELL ME THAT, WHEN THAT BECOMES THE CASE, THAT THE 250 SHE RECOVERED WOULD BE THE 250 THAT SHE ENED UP WITH AS SHE AGREED TO, WHEN SHE WENT FOR BINDING ARBITRATION.

IF YOU DO ALL THAT, THEN WHAT IS THE POINT WITH SETTLING AND GOING THROUGH ARBITRATION, BECAUSE THEN YOU END UP WITH YET ANOTHER PROCEDURE TO DETERMINE WHO GETS TO PAY WHAT.

NO, YOUR HONOR. I JUST MEAN IN THE CONTEXT OF ARBITRATION, PERHAPS THIS COURT SHOULD SAY THAT AN ARBITRATOR, WE RECOGNIZE, AS THIS COURT, WE RECOGNIZE THAT THE PLAINTIFF'S DAMAGES WILL ULTIMATELY BE LIMITED TO $250,000, BUT WE ENCOURAGE YOU ARBITRATORS TO COMPUTE THE FLL MOUNT, SO THAT WE DON'T HAVE TO GO BACK AGAIN.

WHAT YOU ARE SAYING IS THAT THERE OUGHT TO AND PROCEDURE N WHICH OU WULDAKEA DETERMINATION AFTER A SETTLEMENT OF THE FULL AMOUNT OF DAMAGES, IN ORDER TO MAKE AN EQUITABLE DISTRIBUTION.

YES AND NO. I THINK WHAT I AM REALLY SAYING IS THAT THE ARBITRATION, THE ARBITRATORS DIDN'T BELIEVE THERE WAS A SET-OFF, SO THEY DIDN'T COME UP WITH THE FULL A DAMAGES, AS A JURY WOULD AT TRIAL. WHENEVER WE LOOK AT SET OFFS OR COMPUTATIONS AT A TRIAL, THEN WE GO THROUGH WHAT THE FULL AMOUNT OF THE DAMAGES WERE, LIKE IN A SOVEREIGN IMMUNITY SITUATION, WHERE THE JURY COMPUTES THE ENTIRE AMOUNT OF THE DAMAGES, AND THEN IT IS REDUCED DOWN TO THE $100,000 STATUTORY CAP.

THAT IS YOUR FALL BACK PROVISION.

YES, YOUR HONOR.

THE FIRST POSITION IS IT DOESN'T PERTAIN, BUT THEN THE FALL BACK IS YOU WOULD HAVE TO GO AHEAD AND REQUIRE THE ARBITRATORS TO DO WHAT YOU WOULD REQUIRE A JURY TO DO.

THAT IS OUR POSITION. THANK YOU VERY MUCH. MR. CHIEF JUSTICE: THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE. THE COURT WILL TAKE ITS MORNING RECESS. WE WILL BE IN RECESS FOR 15 MINUTES.