Evelyn Barlow v. North Okaloosa Medical Center, Inc.

MARSHAL: PLEASE RISE. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING. WE AGAIN WANT TO WELCOME THOSE STOUDENTS FROM FAMU THAT -- THOSE STUDENTS FROM FAMU THAT ARE COMING OVER TO BE WITH US TODAY. THANKS FOR BEING HERE. WE WILL GO WITH THAT, TO THE NEXT CASE, EVELYN BARLOW VERSUS NORTH OKALOOSA MEDICAL CENTER, INC..

GOOD MORNING. IF THE PLEAS THE COURT, MY NAME IS STANLEY BRUCE POWELL, AND I AM HERE WITH MY PARTNER, MR. SWANICK. WE ARE HERE FROM A MEDICAL MALPRACTICE BINDING ARBITRATION UNDER 766.207, FLORIDA STATUTES.

COULD YOU GIVE A LICK ON THE JURISDICTION HERE. REFRESH US ON THE BASIS FOR JURISDICTION.

WE ARE HERE ON CONFLICT CERTIORARI FROM THE COURT OF APPEAL. I AM GOING TO TOUCH VERY BRIEFLY ON, THAT, AND THAT IS ONE OF THE REASONS WE ARE HAPPY TO BE HERE THIS MORNING, THAT WE ARE GOING TO MAKE THE SAME ARGUMENT, BASICALLY, THAT WE HAVE MADE ALL OF THE WAY UP, AND THIS IS THE COURT THAT WROTE THE DECISION ON ST. MARY'S HOSPITAL VERSUS PHILLIP, AND WE HAVE YET TO HAVE ANYBODY READ THIS CASE BUT NOW, SINCE THIS COURT WROTE IT, WE HOPE THAT WE READ IT RIGHT. THE FIRST DISTRICT COURT OF APPEAL IN ITS DECISION, AND I THINK THAT THE REASON THAT WE ARE HERE ON CONFLICT CERTIORARI, IS THAT ON THE FACE OF THAT DECISION, THEY EXPRESSLY HELD THAT MS. BARLOW, WHO IS A WIDOW BECAUSE OF THE MEDICAL MALPRACTICE, THAT HER DAMAGES WERE CONTROLLED BY AND LIMITED BY THE WRONGFUL-DEATH ACT. THAT FLIES IN THE FACE OF THIS COURT'S DECISION IN ST. MARY'S HOSPITAL VERSUS PHILLIPI.

THE CONFLICT BETWEEN DAMAGES, A NET AMOUNT NOT A GROSS AMOUNT, AND 766.207 SPECIFICALLY TALKS ABOUT NET ECONOMIC DAMAGES, AND ECONOMIC DAMAGES ARE FURTHER DEFINED, SO I AM HAVING TROUBLE UNDERSTANDING, ANYWAY, WHETHER YOU CALL IT UNDER THE -- WHETHER IT IS NET ACCUMULATIONS UNDER THE WRONGFUL-DEATH ACTOR NET ECONOMIC DAMAGES. I DON'T KNOW THAT YOU ARE IN ANY BETTER POSITION, BECAUSE THE EVIDENCE ESTABLISHED THAT THE SOCIAL SECURITY BENEFITS WERE, ANYTHING LOST WOULD HAVE BEEN OFFSET BY WHAT THE DECEDENT WOULD HAVE CONSUMED.

WE TAKE ISSUE OF THAT, BECAUSE AS THIS COURT HAS HELD, IN ST. MARY'S, THAT HAD THE, AND I WOULD AGREE WITH YOU, HAD THE LEGISLATURE SAID THAT THE WRONGFUL-DEATH ACT APPLIES. THIS COURT HAS HELD IT DOES NOT APPLY AND DOES NOT CONTROL THE DAMAGES THAT COULD HAVE LIKEWISE USED THOSE TERMS. THEY COULD HAVE SAID THE PLAINTIFF IS ENTITLED TO RECOVER NET ACCUMULATIONS AS SPECIFIED IN THE WRONGFUL-DEATH ACT. ONE OF THE PROBLEMS, I THINK, WHICH EXISTS IS WHAT DOES NET MEAN? I MEAN, THE STATUTE DOESN'T DEFINE T.

LET ME ASK YOU THIS QUESTION, SIRS, IF I MAY.

YES, SIR.

IS THERE ANY OTHER AREA OF LAW ANYWHERE THAT USES THE CONCEPT OF CONSUMPTION OR SPENDING, OTHER THAN NET ACCUMULATIONS THAT YOU ARE ARGUING?

NOT THAT I AM AWARE OF, BUT MY ARGUMENT ON THAT IS IT SPECIFICALLY TALKS ABOUT 80 PERCENT OF LOST EARNING CAPACITY, WHICH IS ONE OF OUR BIG ISSUES.

THIS STATUTE DOESN'T USE ACCUMULATIONS AS CONCEPT. IT USES NET ECONOMIC DAMAGES.

CORRECT.

SO THAT IS WHY I AM TRYING TO SEE IF THERE IS ANY OTHER AREA OF LAW, AND IT SEEMS TO ME THAT THAT IS A BIG DIFFERENCE BETWEEN CONCEPTS OF ACCUMULATION, WHICH IS THE CONCEPT THE FIRST DISTRICT USED, AND THE CONCEPT OF NET DAMAGES, WHICH IS WHAT THE STATUTE USED. THAT IS WHY I AM TRYING TO SEE, DO YOU KNOW OF ANY OTHER AREAS, WHERE THE CONCEPT OF USING SOMETHING UP IN ANY OTHER AREAS OF TORT LAW, SUPPLIES --

I DO NOT, JUSTICE, AND YOU COULD ALMOST TAKE NOTICE THAT MOST PEOPLE DON'T HAVE NET AC UNIFORM LATHSS. THEY SPEND EVERYTHING -- ACCUMULATIONS. THEY SPEND EVERYTHING THAT THEY MAKE, BECAUSE THEY DON'T HAVE ENOUGH TO COVER THEIR BILLS, AND IF THAT CONCEPT APPLIES HERE, WHY DON'T THEY SAY 80 PERCENT OF LOST EARNING CAPACITY, VERSUS WHAT JUSTICE PARIENTE JUST ASKED ME, VERSUS WHATEVER YOU HAVE LEFT OVER, AND YOU HAVE THE BURDEN ON YOU TO SHOW. THAT.

WHAT IS THE NET ECONOMIC DAMAGES? HOW DO YOU DISTINGUISH GROSS ECONOMIC DAMAGES FROM NET ECONOMIC DAMAGES?

THE STATUTE GIVES US NO ACCOUNT WHATSOEVER. DOES IT MEAN AFTER TAX? WHAT IS THE PURPOSE OF DEDUCTING 20 PERCENT?

THE QUESTION IS, TRYING TO GET YOUR TAKE ON THIS, WHAT IS YOUR RESPONSE?

IN MY VIEW, SINCE THE STATUTE IS IN DEROGATION WITH THE COMMON LAW, IT MEANS SJUTS WHAT IT SAYS, 80% -- JUST WHAT IT SAYS, 80 PERCENT OF LOST EARNING CAPACITY AND ANY NET FINANCIAL LOSS THAT WOULD HAVE OCCURRED, THAT WOULD NOT HAVE OCCURRED BUT FOR THE DEATH, IN OUR CASE.

WHAT WOULD BE A NET FINANCIAL LOSS, UNDER YOUR INTERPRETATION OF THAT PROVISION?

ANY LOSS OF MONEY THAT DID, THAT IT WOULD NOT HAVE OCCURRED BUT FOR, AS I SAY IN MY BRIEF, THE ONLY LIMITATION NOTE IN THE STATUTE IS THE SINE QUINON ROUTE. THAT IS THE ONLY LIMITATION ON WHAT CONSTITUTES NET DAMAGES. DID THEY OCCUR BECAUSE OF WHAT YOU ARE COMPLAINING OF, AND I AM GETTING MY ARGUMENT BACKWARDS, BUT THAT IS WHY WE SAY WE ARE ENTITLED TO THE SOCIAL SECURITY BENEFIT.

THAT IS WHAT, GO RIGHT DOWN TO THE FACTS OF YOUR CASE AND SHOW US WHERE THE FIRST DISTRICT WENT WRONG IN YOUR VIEW.

WELL, THE FIRST DISTRICT WENT WRONG IN OUR VIEW, IN AFFIRMING, BECAUSE THE WAY WE READ THIS COURT'S DECISION IN ST. MARY'S, IS THAT THE ONLY THING THAT ALLOWED THE STATUTE TO BE CONSTITUTIONAL, NAMELY CAPPING THE GENERAL DAMAGES, BECAUSE THE COMMENSURATE BENEFITS THAT THE COURT SAYS WE GOT AS A RESULT OF HAVING A BIG PART OF OUR DAMAGE POTENTIALLY TAKEN AWAY. YOU ALSO ADDRESSED, AND YOU USED THE TERM "THE FULL RANGE OF ECONOMIC DAMAGES." I DON'T KNOW EXACTLY WHAT THE COURT MEANT BY THAT, BECAUSE YOU DIDN'T ELABORATE ON WHAT WAS MEANT BY THAT, AND MAYBE THIS IS THE CASE THAT, TO TELL US ALL WHAT THAT MEANS. MY VIEW OF IT IS THAT, BECAUSE YOU

HAVE HAD YOUR GENERAL DAMAGES, YOUR DISFIGUREMENT, YOUR PAIN AND SUFFERING AND SO FORTH LIMITEDED BY LAW, THEN IT WOULD APPEAR, YOU KNOW, OTHERWISE TO BE AN UNEQUAL PROTECTION OF THE LAW ASAP APPLIES TO DOCTORS, THAT THE GUIDO PRO "AS -- THE QUID PRO QUO IS THAT YOU GOT WHATEVER ECONOMIC DAMAGES THERE IS.

THE STATUTE USES THE TERM NET.

IT USES THE TERM "NET", BUT IT DOESN'T DEFINE "NET".

WHO HAS GOT THE BURDEN OF PROVING WHAT IS THE NET ECONOMIC DAMAGES?

I WOULD ARGUE IT IS THE DEFENSE. IF I PROVE UP WHAT THE DAMAGES IS, AND THEY SAY SOMETHING SHOULD BE DEDUCTED FROM IT, THAT OUGHT TO BE THEIR BURDEN.

WELL, I THINK THEREIN LIES THE SORT OF THE RUB HERE, IS TO HOW ARE YOU GOING TO PROVE YOUR CLAIM, IF THE STATUTE HAS AN ELEMENT OF THAT CLAIM THAT SAYS IT IS TO BE A NET AMOUNT. THEN THE WAY I READ THE FIRST DISTRICT'S OPINION IS THAT THEY SAY THAT THE PLAINTIFFS HAVE GOT TO PROVE WHAT THE NET AMOUNT WAS.

THAT IS WHAT THAT OPINION HELD, AND, OF COURSE, WE DISAGREE WITH THAT, BECAUSE IN THE FIRST PLACE, THE STATUTE DIDN'T, DOESN'T GIVE US ANY REAL GUIDANCE ON HOW TO DO THAT, BECAUSE IT DOESN'T TELL WAS IT IS WE ARE SUPPOSED TO DEDUCT.

WELL, WHAT DID YOU PROVE? WHEN IT COMES TO THE ECONOMIC DAMAGES, WHAT DID YOU PROVE IN THE TRIAL COURT?

THE BIGGEST RUB THAT WE HAVE IN WHAT WE PROVED AND THE DISTRICT COURT OPINION OUGHT TO BE CORRECTED, BECAUSE IT SAYS WE DIDN'T CALL ANY EXPERTS BUT WE DID. WE CALLED STANDARD ECONOMIC EXPERT DR. ROBERT TURNER FROM FLORIDA STATE UNIVERSITY, AND LAY WITNESSES, TO PROVE UP WHAT MR. BARLOW'S EARNING CAPACITY WAS.

BUT AS FAR AS THE SOCIAL SECURITY BENEFITS ARE CONCERNED, WHAT DID YOU PUT ON BEFORE THE ARBITRATOR, THAT, INDICATED THAT AMOUNT?

WE PUT ON EVIDENCE WHICH WAS UNCONTRADICTED, SHOWING THE AMOUNT OF SOCIAL SECURITY BENEFITS THAT THE FAMILY, AS AN UNIT, RECEIVED, PRIOR TO HIM BEING KILLED. AND THE AMOUNT SHE RECEIVED AFTER HIS DEATH. OUR ARGUMENT IS THE NET DIFFERENCE IS A NET FINANCIAL LOSS, AS DEFINED UNDER THE STATUTE.

IN RESPONSE TO THE QUESTION THEY ARE ASKING YOU ABOUT NETS, DOES THE STATUTE NOT TELL US THAT WE ALL SET THE COLLATERAL AMOUNTS TO REACH THE NET?

YES, SIR, AND WE ARE DOING THAT BY THE COMPUTATION I JUST GAVE JUSTICE QUINCE. IN OTHER WORDS, THE AMOUNT SHE IS RECEIVING IS A COLLATERAL SOURCE OR CAN BE, UNDER THE STATUTE. THE DISTRICT COURTS SEEM TO THINK IT WASN'T, BUT UNDER THE COMPUTATION WE USED, WE WERE ONLY SEEKING TO RECOVER THE NET DIFFERENCE, BASED ON THE FACT THAT THE STATUTE USES THE SINE QUINON ROUTE, AND SAYS A FINANCIAL LOSS THAT WOULD NOT HAVE OCCURRED BUT FOR THE DEATH. AND MY ARGUMENT IS, IF HE WAS STILL ALIVE, IF THIS WRONG HAD NOT BEEN COMMITTED, ALL OF THAT MONEY WOULD STILL BE COMING IN TO THIS FAMILY UNIT.

WE ACCEPT THE FIRST DISTRICT'S DECISION HERE, THIS CONCEPT OF NET. I WOULD ASSUME, THEN, THAT WOULD MEAN THAT WE WOULD HAVE TO OFFSET WHAT A, JUST, THIS APPLIES, DOES IT NOT, WITH REGARD TO INJURIES AS WELL AS DEATH CASE?

I WOULD THINK THAT IT WILL.

SO THEN IF IT IS A NON-DEATH CASE, THEN WE WOULD HAVE TO, IF A MAN OR A WOMAN IS EMPLOYED AND IS INJURED, THEN WE WOULD HAVE TO START OFFSETTING WHAT HE OR SHE CONSUMES FROM HER OWN, HIS OWN OR HER OWN INCOME TO REACH A NET NUMBER, BECAUSE WE ARE TALKING ABOUT CONSUMPTION.

IF THAT CONCEPT IS SEND, YES, I THINK YOU WOULD. AND THEN I HAVE SERIOUS QUESTIONS, MYSELF. AS AN OLD TRIAL LAWYER, HOW THIS COULD BE CONSTITUTIONAL, BECAUSE IT SPECIFICALLY TALKS ABOUT 08 PERCENT OF LOST EARNING CAPACITY. WELL, THEY HAVE OBVIOUSLY, IN THEIR WISDOM, DEDUCTED 20 PERCENT FOR SOME REASON, AND IS THAT 80 PERCENT GOING TO ARE FURTHER CUT, LIKE IF I HAVE GOT $5 IN MY POCKET FROM MY PAYCHECK, IS THAT WHAT WE ARE TALKING ABOUT? I DON'T SEE HOW THAT COULD HAPPEN AND AT THE SAME TIME LIMIT YOUR GENERAL DAMAGES, WHICH THE POOR MAN'S PAIN AND SUFFERING IS BASICALLY WHAT HE GETS OUT OF THIS.

WAIT A SECOND. IF THE PERSON IS 'TIL ALIVE AND THEY ARE STILL CON -- IS STILL ALIVE AND THEY ARE STILL CONSUMING, SO THE NET ECONOMIC DAMAGE IS DIFFERENT, BECAUSE THEY ARE ALIVE AND STILL CONSUMING, SO THERE IS NO REASON TO SET IT OFF IN THAT SITUATION. IT IS NOT THE SAME IF SOMEBODY IS ALIVE VERSUS IF THEY ARE DECEASED OO.D I DON'T KNOW IF IT IS OR NOT. -- DECEASED.

I DON'T KNOW IF IT IS OR NOT.

IF MR. BARLOW WOULD HAVE LIVED, THE SOCIAL SECURITY BENEFITS WOULD HAVE CONTINUED, BUT LET'S ASSUME FOR SOME REASON THEY DIDN'T CONTINUE, HE WOULD STILL BE CONSUMING, SO HE WOULD NOT, THE ISSUE WOULD BE DIFFERENT THAN IT IS BECAUSE HE HAS DIED. THIS IS A MATTER OF COMMON SENSE!

WELL, I UNDERSTAND THAT. IF HE GOT A DREAD DISEASE, HE WOULD BE CONSUMING AT EVEN A FASTER RATE. HOW ARE WE GOING TO PROVE THIS?

IS THE WHOLE IDEAED THAT YOU WANT TO MAKE SURE THAT, WHEN LIABILITY IS ADMITTED, THAT A PLAINTIFF IS MADE WHOLE FOR ALL ECONOMIC LOSSES. BUT NOT MORE THAN WHOLE.

YES AND NO. BECAUSE IN ORDER, WHEN YOU ALL HELD IT TO BE CONSTITUTIONAL AND SAID IT IS OKAY TO CAP THESE COMMON LAW DAMAGES THAT WE ALL KNOW EXIST, IN RETURN FOR THE, QUOTE, FULL RANGE OF ECONOMIC SDAGES -- DAMAGES, RIGHT --

TO FULLY COMPENSATE SOMEBODY FOR --

-- IN MY VIEW OF THAT IS, YOU ARE TALKING ABOUT SOMETHING MORE THAN EXISTS IN THE ORDINARY CASE, BECAUSE YOU HELD IT CONSTITUTIONAL AND SAID IT IS OKAY TO CAP IT OVER HERE, BECAUSE YOU ARE GETTING A COMMENCE RAT BENEFIT OVER HERE THAT -- COMMENSURATE BENEFIT OVER HERE THAT YOU WOULD OTHERWISE NOT BE ENTITLED TO.

WHAT HAPPENS IF YOU AGREE TO ARBITRATE AND YOU DON'T GO TO TRIAL. ARE THE DAMAGES DIFFERENT?

YES.

HOW ARE THEY DIFFERENT?

BECAUSE THE WAY THE STATUTE READS, IF THEY OFFERED TO ADMIT LIABILITY, OF COURSE, IN THIS CASE THEY WERE ALLOWED TO TEST CAUSATION, WHICH IS ONE OF MY BIG POINTS THAT I

HAVEN'T GOTTEN TO YET, BUT IF THEY OFFER TO ADMIT LIABILITY AND WE ACCEPT IT, THE WAY WE VIEW IT, THEY ARE ACCEPTING RESPONSIBILITY FOR WHATEVER THE DAMAGES ARE THAT ARE SPECIFIED IN THAT STATUTE, WHICH ARE DIFFERENT FROM COMMON LAW DAMAGES, BECAUSE OTHERWISE THE SUPREME COURT, YOU FOLKS WOULD NOT HAVE SAID, HEY, IT IS OKAY TO CAP IT OVER HERE ON THE CONSTITUTIONAL CHALLENGE, BECAUSE YOU ARE GETTING, IN RETURN, ALL OF THESE OTHER BENEFITS, WHICH INCLUDE THE FULL RANGE, WHATEVER THAT MEANS, OF ECONOMIC DAMAGES. IMPLYING THAT THE FULL RANGE, LIKE IN A DEATH CASE, LOSS OF EARNING CAPACITY, YOU ORDINARILY WOULDN'T BE ENTITLED TO, UNDER A COMMON LAW DEATH CASE UNDER THE WRONGFUL-DEATH ACT.

LET ME ASK AWE QUESTION ABOUT THE SOCIAL SECURITY BENEFITS. IT SEEMS TO ME, AND CORRECT ME IF I AM WRONG, THAT THE COURT SEEMS TO DISTINGUISH BETWEEN SOCIAL SECURITY BENEFITS AND OTHER KINDS OF DAMAGES, BECAUSE THERE IS A PRESUMPTION THAT THE AMOUNT GIVEN FOR SOCIAL SECURITY BENEFITS IS A ZERO SUM AMOUNT, MEANING THAT WHATEVER IS GIVEN IN SOCIAL SECURITY BENEFITS IS ONLY DESIGNED TO PROVIDE FOR THE SUBSISTENCE OF THE PERSON. IT IS NOT SUPPOSEDED TO BE AN INCOME BUT IS INTENDED TO BE FULLY OFFSET BY THE COST OF LIVING, INCLUDING FOOD AND SHELTER, AND THEREFORE THE COURTS SEEM TO SAY THAT REGARDING SOCIAL SECURITY BENEFITS, THE PLAINTIFF MUST PROVE THAT THERE WOULD HAVE BEEN SOMETHING BEYOND THAT, THAT THEY HAVE TO KIND OF ALMOST REBUT A PRESUMPTION THAT ALL OF THAT, QUOTE/UNQUOTE INCOME FROM SOCIAL SECURITY, IS GOING TO BE USED UP IN THE COST OF LIVING.

THAT SEEMED TO BE WHAT THEY WERE SAYING, AND THEY ALSO DISTINGUISHED BETWEEN SOCIAL SECURITY RETIREMENT BENEFITS AND SOCIAL SECURITY DISABILITY BENEFITS, SAYING ONE WAS A COLLATERAL SOURCE AND THE OTHER WASN'T, UNDER THAT STATUTE. BUT AS I SAY, IT MAKES IT A LITTLE ROUGH ON US, KIND OF LEARNING BY ROTE AS TO WHO HAS TO PROVE WHAT AND SO ON AND SO FORTH, DEPENDING ON WHO WE REPRESENT.

IF THERE IS A ZERO NET SUM, THEN WHY ISN'T IT REASON BASKETBALL FOR US, IN INTERPRETING THE STATUTE THAT SAYS NET ECONOMIC DAMAGES AND DOESN'T DEFINE THE TERM, WHEN IT IS APPLIED TO SOCIAL SECURITY BENEFITS AS OPPOSED TO OTHER KINDS OF DAMAGES, THAT THERE IS A PRESUMPTION THAT ALL OF THAT MONEY IS GOING TO BE USED UP IN THE COST OF LIVING?

I DON'T KNOW BUT THERE AGAIN, YOU ARE DEALING WITH A CONENT, AS STATED WITH THE STATUTE, OF FINANCIAL LOSSES THAT WOULD NOT HAVE OCCURRED BUT FOR HIS DEATH, AND YOU CAN WALK IN ANY BARBERSHOP OR BEAUTY SHOP IN THIS TOWN OR ANY OTHER, AND SAY HERE IS A SITUATION. BEFORE, HE WAS WRONGFULLY KILLED, 15,000 DOLLARS WAS COMING IN. NOW HE IS KILLED. 7 HOW IT IS COMING IN. IS THAT A FINANCIAL LOSS THAT OCCURRED BECAUSE OF HIS DEATH, AND THE MAN ON THE STREET WILL TELL YOU, YES, IT IS.

BUT THAT IS WITHOUT TAKING INTO ACCOUNT THE PREVIOUS WORD "NET".

I UNDERSTAND.

SO WE HAVE GOT TO GIVE THAT TERM SOME MEANING, IT SEEMS TO ME.

BUT I THINK I HAVE, WHEN I TALK ABOUT NET BEING THE DIFFERENCE BETWEEN, AND THAT IS WHAT WE SAW BETWEEN WHAT THEY WERE GETTING AS A FAMILY, AND WHAT SHE IS GETTING NOW. THE NET IS THAT DIFFERENCE.

CHIEF JUSTICE: ALL RIGHT. YOU ASKED THE PARTIAL TO REMIND -- THE MARSHAL TO REMIND YOU OF YOUR REBUTTAL TIME, AND HE HAS TURNED THE LIGHT ON, ON THAT.

YES, SIR. I WANT TO REMIND YOU OF TWO THINGS REAL QUICK. THEY WERE ALLOWED TO CONTEST CAUSATION IN THIS CASE. THAT IS A BIG POINT OF OURS AND THE DISTRICT COURT

DIDN'T HOLD THAT AT ALL. WE HOLD THAT, WHEN YOU ADMIT LIABILITY, THE LEGISLATURE IS SUPPOSED TO KNOW THE LEGAL NAME OF THESE TERMS WHEN THEY USE THEM, THAT WHEN THE DEFENDANT ADMITS LIABILITY, THE EXPERT CANNOT BE USED TO PROVE THEY DIDN'T CAUSE THE DAMAGES AND THAT IS WHAT HAPPENED TO US HERE AND IT OUGHT TO BE CORRECTED, AND AT PAGE 25 OF OUR INITIAL BRIEF, I JUST WISH THE COURT WOULD READ THAT. THAT IS WHERE WE QUOTE THEIR TRIAL COUNSEL, WHO RECOGNIZED THIS. AND SAID ALL WE ASK IS THAT YOU CONSIDER THE TESTIMONY OF THE EXPERTS. THESE ARE THE CAUSE ACHES EXPERTS, AND -- THE CAUSATION EXPERTS. AND MAKE SOME DEDUCTION. THE ARBITERS GAVE US ZERO BECAUSE OF THAT TESTIMONY. THEY SAID HE WOULD NOT HAVE HAD ANY EARNING CAPACITY, BECAUSE IT WAS GOING TO MAKE HIM DISABLED. THEIR EVIDENCE ON THIS WAS INCOMPETENT TO PROVE THAT, UNDER GROSS VERSUS LIONS, AND THE RECORD CLEARLY SHOWS THAT, AND THIS IS OUR POINT OF APPEAL HERE ON THE MERITS.

WASN'T THERE ALSO EVIDENCE THAT, AT THE TIME OF THE INCIDENT THE DECEDENT HAD BEEN RETIRED FOR TEN YEARS?

YES, SIR, BUT ALSO THE UNDISPUTED EVIDENCE SHOWED HE WAS IN GOOD HEALTH. HE WALKED INTO THE HOSPITAL WITH THIS MILD HEART ATTACK. HE CUT DOWN A TREE ABOUT THREE OR FOUR DAYS BEFORE, A HUGE PINE TREE. THERE WAS NOTHING WRONG WITH HIM.

COULD THE ARBITRATORS TAKE INTO ACCOUNT THE FACT THAT HE HAD BEEN RETIRED FOR TEN YEARS AND HE PROBABLY WOULDN'T EARN ANY MONEY DURING THE REST OF HIS LIFE, BECAUSE HE HAD DECIDED TO RETIRE?

I DON'T THINK THAT IS ALLOWED, BECAUSE JUST LIKE A CHILD OR AN OLD PERSON, OR A HOUSEWIFE, IT IS LOSS OF EARNING CAPACITY, AND THE EVIDENCE CLEARLY SHOWED HE HAD A CAPACITY TO MAKE UP TO $20 AN HOUR. HE WAS A SKILLED AIR CONDITIONING TECHNICIAN THAT DID THESE BIG DUCTS AND THINGS FOR BUILDINGS LIKE THIS. I SAVE THE REST OF MY TIME FOR REBUTTAL.

MAY IT PLEASE THE COURT. MY NAME IS WILLIAM TAMES. I REPRESENT NORTH OKALOOSA MEDICAL CENTER. WE DISAGREE AND BASICALLY WITH THE FACTS HERE, ON FEBRUARY 28, 1999, MR. BARLOW SUFFERED A STROKE, AND THAT CAUSED INTERCRANIAL BLEEDING. WE ADMITTED LIABILITY FOR NOT DETECTING THAT BLEEDING SOONER, BUT THE EVIDENCE AT THE ARBITRATION WAS THAT EVEN HAD WE DETECTEDED THAT BLEED AT THE EARLIEST POSSIBLE TIME THAT, STROKE HAD ALREADY CAUSED SIGNIFICANT DAMAGE AND DISABILITY TO MR. BARLOW, AND THAT WAS UNREBUTTED.

> YOUR HONOR, BY CHOOSING ARBITRATION, THE PLAINTIFF GETS SEVERAL BENEFITS. THEY HAVE A, WE HAVE TO PAY THEIR ATTORNEYS FEES AND COSTS, WHICH WOULD NECESSARILY --

SO YOU ARE SAYING YOU ADMITTED LIABILITY IN CAUSING HIS DEATH.

YES. FOR NOT DETECTING THE BLEED WHICH CAUSED HIS DEATH. THAT'S CORRECT, YOUR HONOR.

BUT NOT, BUT YOU SHOULD, AND THIS GOES TO THE NONCONFLICT ISSUE, BUT NOT, BUT EVEN THOUGH YOU ADMIT LIABILITY, THE IDEA IS THAT YOU CAN STILL CONTEST THE CAUSATION OF ANY DAMAGE, ALL DAMAGES?

WELL, I DON'T KNOW IF IT IS ALL DAMAGES, BECAUSE IN THIS CASE, WHAT WE ARE CONTESTING WAS DID HE HAVE AN EARNING CAPACITY PRIOR TO OUR NEGLIGENT ACT? AND THAT IS WHERE THE EVIDENCE FROM THE EXPERTS CAME IN. WHAT THE EXPERTS TESTIFIED TO --

LET ME ASK YOU, SAY IT WAS A FAILURE TO DIAGNOSE CANCER CASE AND YOU ADMIT LIABILITY, THE FAILURE TO DIAGNOSE CANCER, WHICH, THEN, PUTS THE PLAINTIFF, AGAIN, TO GET A CAP

ON ECONOMIC, NONECONOMIC DAMAGES. CAN YOU ARGUE, IN ONE OF THESE ARBITRATIONS, THAT THEY WOULD HAVE DIED ANYWAY? OR IS THERE SOME LIMITATION ON WHAT YOU ARE ABLE TO ARGUE, CONCERNING, NOT NEGLIGENCE, BECAUSE IT SAYS ADMITTING LIABILITY. LIABILITY INCLUDES MORE THAN JUST NEGLIGENCE.

WELL, WHEN THE LEGISLATURE DEFINED THE ECONOMIC DAMAGES, THEY SAID A FINANCIAL LOSS WHICH WOULD NOT HAVE OCCURRED BUT FOR THE INJURY GIVING RISE TO THE ACTION, AND IN THIS CASE, THE INJURY WAS OUR FAILURE TO DIAGNOSE PROPERLY, THIS INTERCRANIAL BLEED. BUT FOR THIS, IF WE HAD DONE EVERYTHING PERFECTLY, THE EVIDENCE WAS THAT HE WOULD HAVE STILL HAD SIGNIFICANT DISABILITY.

HAVE YOU REALLY ANSWERED, THOUGH, SJUTSTIS'S QUESTION, WITH REFERENCE TO HAVING CONCEDED LIABILITY, CAN YOU NOW AVOID THAT CONCESSION, BY MAKING AN ARGUMENT AS TO WHAT WOULD HAVE OCCURRED NATURALLY OR WHATEVER, AND BY CONCEDING LIABILITY, YOU ARE RECEIVING THE BENEFIT OF HIS SCHEME, SO HELP US WITH REFERENCE TO THE ABILITY TO CONCEDE LIABILITY, GET THE BENEFIT OF THIS PARTICULAR PROCEDURE UNDER THE ACT, AND THEN AT LEAST IT COULD BE ARGUED THAT YOU ARE TRYING TO MAKE AN END RUN AROUND THAT, TOO. BY SAYING, WELL, YEAH, WE CONCEDED LIABILITY, BUT NOT REALLY RESPONSIBILITY FOR THE CONSEQUENCES OF OUR NEGLIGENCE. I AM HAVING A LITTLE DIFFICULTY OF HOW YOU ARE DRESSING THAT UP.

WELL, I BELIEVE THAT, UNDER THE CON ACCEPT OF APPORTIONMENT, IF THERE IS SIGNIFICANT EVIDENCE THAT WOULD ALLOW THE FINDER OF FACT, AS THEY DID IN THIS CASE, OCCASION, TO APPORTION THE DAMAGES BETWEEN WHAT WAS CAUSED BY THE NEGLIGENT ACT AS OPPOSED TO WHAT EXISTED PRIOR TO ANY NEGLIGENCE OCCURRING, I BELIEVE THEY CAN DO THAT, AND I BELIEVE WE ARE PERFECTLY ENTITLED TO ARGUE THAT.

WAS THERE A SPECIAL VERDICT THAT, SEE, I, NOW, SO YOU WOULD SAY IF SOMEONE WAS IN AN AUTOMOBILE ACCIDENT, AND THEN THERE WAS SOME SUBSEQUENT MEDICAL MALPRACTICE, THAT EVEN THOUGH YOU ADMIT LIABILITY FOR THE AMOUNT PRACTICED, THAT YOU OUGHT TO BE ABLE TO ARGUE TO THE ARBITRATORS THAT NOT ALL OF THE DAMAGES FLOW FROM IT, BUT WHAT IS THE PROCEDURE, THEN, WOULDN'T THERE HAVE TO BE A SPECIAL INTERROGATORY, AND YOU KNOW, AS TO WHAT IT IS YOU ARE WILLING TO BE ADMITTING TO, AND WHAT IT IS THAT YOU ARE SAYING WE ARE NOT ADMITTING THAT WE CAUSED ALL THE DAMAGES, JUST DAMAGES THAT YOU KNOW, FLOW FROM OUR NEGLIGENCE, NEGLIGENT ACT?

WELL, IN THIS CASE, WE HAD TWO SEPARATE ORDERS ENTERED PRIOR TO THE ARBITRATION, WHERE WE DISCLOSED THAT THESE EXPERTS WERE GOING TO TESTIFY AS TO THIS ISSUE. THAT BEING THAT YOU KNOW, BEFORE THE NEGLIGENT ACT OCCURRED, HE WAS ALREADY DISABLED. THEREFORE DID NOT HAVE AN EARNING CAPACITY TO LOSE. SO THAT, AND FOR THE ARBITRATORS, THEY KNEW THAT ISSUE WAS GOING TO BE RAISED.

SO YOU DEMONSTRATED, LET ME SEE IF I UNDERSTAND CORRECTLY WHAT YOU ARE SAYING. YOU DEMSFRATEDED THAT -- YOU DEMONSTRATED THAT, FROM THE POINT THAT THE CRANIAL BLEEDING STARTED RTIOND HE WAS DISABLED AND THEREFORE -- STARTED, HE WAS DISABLED AND THEREFORE LOST THE EARNING CAPACITY, AND THEREFORE THERE WAS NOTHING THAT YOU COULD HAVE DONE TO STOP THE CRANIAL BLEEDING. IS THAT IN ESSENCE WHAT YOU DEMONSTRATED TO THE ARBITRATOR?

JUSTICE, WE DEMONSTRATED THAT, IF WE HAD DETECTEDED THAT BLEEDING AT THE EARLIEST POSSIBLE OPPORTUNITY.

AS SOON AS IT HAPPENED.

AS SOON AS IT HAPPENED. THERE WOULD HAVE BEEN NO NEGLIGENCE. THAT STROKE HAD

ALREADY CAUSED HIM A SIGNIFICANT DISABILITY THAT PRECLUDED HIM FROM HAVING ANY SUBSTANTIAL EARNING CAPACITY.

IS THIS DISABILITY THE SAME AT TOTAL DISABILITY?

NO, IT IS NOT. IT IS NOT.

SO, BY AWARDING NOTHING, THE ARBITRATORS ARE SAYING HE WAS TOTALLY DISABLED FROM THE TIME OF THAT STROKE.

WELL, WHAT THE EVIDENCE WAS, BEFORE THE ARBITRATION PANEL, WE HAD TWO EXPERTS. ONE WAS DR. CHIN, WHO WAS A BOARD-CERTIFIED NEURO SURGEON, AND HE SAID IF HE HAD BEEN PROPERLY TREATED, HE WOULD HAVE HAD COMPLETE LEFT-SIDED PRALEDZ. DOCTOR MAHAFFEY IS A BOARD-CERTIFIED. HE TESTIFIED THAT IF THERE HAD BEEN NO NEGLIGENCE, DECEDENT WOULD HAVE SURVIVED AND HE WOULD HAVE HAD SIGNIFICANT MORE ABILITY, EVEN IF THE INTERCRANIAL BLEEDING HAD BEEN DISCOVERED AT THE EARLIEST POSSIBLE TIME, AND BY SIGNIFICANT MORB IDENTITY, THAT IS DEEND -- MORBIDITY, THAT IS DEFINED AS SEVERITY WITH ANY TYPE OF GAINFUL EMPLOYMENT, GOING BACK TO 50 PERCENT, AND THAT WAS UNREBUTTED.

GOING BACK TO THE FAILURE TO DIAGNOSE CANCER. CAN YOU, UNDER THE MEDICAL MALPRACTICE SCHEME, ADMIT LIABILITY OR NEGLIGENCE FOR FAILING TO DIAGNOSIS CANCER AND STILL ARGUE TO THE ARBITRATORS THAT THE DECEDENT WOULD HAVE DIED ANYWAY?

WELL, I SUPPOSE THAT, BY MY ANALYSIS, YOU COULD ARGUE THAT, HAD WE DIAGNOSED THE CANCER AT THE EARLIEST POSSIBLE OPPORTUNITY, HE STILL WOULD HAVE DIED.

AND SO THEREFORE, YOU ARE BACK TO A FULL-BLOWN LIABILITY TRIAL, EVEN THOUGH YOUR CAP, BECAUSE YOU ARE ADMITTING THE NEGLIGENT ACT? WHY WOULDN'T THE STATUTE SAY, YOU KNOW, IF YOU ADMIT NEGLIGENCE, WE ARE GOING TO NOW CAP THE DAMAGES AS OPPOSED TO ADMIT LIABILITY.

IF WE ADMIT LIABILITY FOR NOT DISCOVERING THE CANCER AT THE EARLIEST --

NEGLIGENCE AND CAUSATION ARE ELEMENTS OF LIABILITY.

RIGHT. THOSE ARE TWO SEPARATE THINGS, I BELIEVE.

THEY MAKE UP LIABILITY. NEGLIGENCE AND CAUSATION. GOT TO HAVE BOTH. RIGHT?

RIGHT.

NEGLIGENCE THAT WAS THE LEGAL CAUSE OF INJURY.

AND IN THIS CASE, THE NEGLIGENCE WAZ -- NEGLIGENCE WAS THE FAILURE TO DEFECT THE -- TO DETECT THE BLEED WHICH CAUSED HIS DEATH, BUT PRIOR TO THAT HE WAS ALREADY DISABLED. A HYPOTHETICAL EXAMPLE. WHAT IF HE HAD A 20-YEAR-OLD. HE HAD BEEN BASICALLY IN A VEGETATIVE STATE SINCE BIRTH, AND CERTAINLY, AND WE GAVE HIM THE WRONG MEDICATION IN THE HOSPITAL AND KILLED HIM. OKAY. WE ADMIT LIABILITY FOR DOING THANED MIGHT LIABILITY FOR CAUSING HIS -- AND ADMIT LIABILITY FOR CAUSING HIS DEATH. UNDER THE PETITIONER'S ARGUMENT, THEY COULD SAY THAT YOU OWE US 50 YEARS' WORTH OF LOST EARNING CAPACITY AND WE SAY NO. WE PUT ON AN EXPERT TO SAY THAT THIS GUY WOULD HAVE NEVER COME OUT OF THIS VEGETATIVE STATE, BUT YOU KNOW, THAT WOULD GIVE A WINDFALL TO THE PLAINTIFF, TO ACCEPT THAT ARGUMENT.

COULD YOU CIRCLE BACK TO THE ALLEGED CONFLICT ISSUE.

YES.

GIVE US YOUR TAKE ON THE DECISION OF THE FIRST DISTRICT'S AND WHETHER WE HAVE JURISDICTION AND THEN YOUR ARGUMENT ON THE MERITS OF THAT.

YOUR HONOR, I DON'T BELIEVE THAT THERE IS A CONFLICT. ST. MARY'S CASE BASICALLY SAID THAT, THE ARBITRATION DAMAGES ARE CONTROLLED BY THE MEDICAL MALPRACTICE ACT NOT THE WRONGFUL-DEATH ACT. IT DIDN'T SAY THAT YOU SHOULDN'T USE YOUR COMMON SENSE.

LET ME MAKE SURE I UNDERSTAND. 207.7-A, WHICH WE ARE TALKING ABOUT, NET ECONOMIC DAMAGES, THAT DEFINITION.

YES.

THAT IS THE ONLY GUIDELINE FOR WHATEVER DAMAGES SOMEBODY RECOVERS OF AN ECONOMIC NATURE.

CORRECT.

WHETHER YOU DIE OR DON'T DIE, IS THAT CORRECT?

CORRECT. CORRECT.

IT SPECIFICALLY GOES DOWN IN TERMS OF TALKING ABOUT OFFSETTING COLLATERAL SOURCE PAYMENTS.

CORRECT.

NOW, THE FIRST DISTRICT CITED THE CONCEPT OF CONSUMPTION, DID IT NOT?

CORRECT.

AND WHAT DID IT CITE AS AUTHORITY FOR DISCUSSING THAT? IT CITED THE WRONGFUL-DEATH ACT, DID IT NOT?

CITED THE WRONGFUL-DEATH ACT.

WHICH IS THE ONLY PLACE I AM AWARE OF, AND PLEASE DIRECT ME IF THERE ARE OTHERS, BECAUSE I AM JUST NOT AWARE OF THEM, WHERE YOU GET INVOLVED IN OTHER CONSUMES, OTHER THAN ACCUMULATIONS. OTHER THAN NET. IT IS NOT THE NET WE ARE TALKING ABOUT. IT IS THE ACCUMULATIONS. WHAT OTHER AREA OF ANY LAW IN ANY STATE DOES CONSUMPTION USE TO MEASURE WHAT YUREK NO, MA'AM I CAN DAMAGES ARE -- WHAT YOUR ECONOMIC DAMAGES ARE, OTHER THAN CONSUMPTION. THAT IS THE QUESTION TO ME.

THE ECONOMIC TORT PRINCIPLE IS THAT YOU ARE SUPPOSED TO COMPENSATE THE VICTIM FOR THE DAMAGES THEY HAVE, WOULD NOT HAVE SUSTAINED BUT FOR THE NEGLIGENT ACT. AND THAT IS WHAT WE HAVE HERE.

LET ME MAKE SURE I UNDERSTAND. THERE WAS MONEY COMING IN BEFORE.

CORRECT.

AND THERE WAS LESS MONEY COMING IN AFTERWARDS.

CORRECT.

BUT THEY SAID AH-HA BUT HE WOULD HAVE EATEN ALL OF THAT AWAY, WHAT IS THE DIFFERENCE IF WE HAVE A PERSON LIVING AND WE SAY, WELL, HE IS GOING TO USE THAT FOR FRIVOLOUS THINGS. HE IS GOING TO GO TO THE BEACH WITH IT, AND THAT IS REALLY NOT GOING TO BE THERE FOR HIM TO HAVE. I MEAN, THERE IS NOT AN ACCUMULATION CONCEPT OF A CON ASSUMPTION THAT I AM AWARE OF, IN ANY TORT CONCEPT, OTHER THAN THE WRONGFUL-DEATH ACT. THAT IS WHY I AM TRYING TO COMMUNICATE MY QUESTION AND I AM STRUGGLING WITH T.

YOU ARE RIGHT. THAT IS THE ONLY PLACE I KNOW IN FLORIDA LAW IS UNDER THE WRONGFUL-DEATH ACT, BUT COMMON SENSE AND FLORIDA GENERAL TORT PRINCIPLES ARE THERE TO PUT YOU IN AS GOOD A POSITION, BUT FOR THE NEGLIGENT ACT HAVING OCCURRED. IN THIS CASE, MR. AND MRS. BARLOW RECEIVED SOCIAL SECURITY RETIREMENT BENEFITS OF APPROXIMATELY $16,000. WHEN HE DIED, SHE GOT HIS BENEFIT, WHICH WAS $11,000. AND COMMON SENSE, I BELIEVE, DICTATES THAT THE $5,000, IF HE WOULD HAVE LIVED, WOULD HAVE BEEN CONSUMED IN THE ORDINARY COURSE OF LIVING FOR FOOD, CLOTHING, EXPENSES AND THINGS LIKE THAT.

YOU SEE, THE LOGIC OF IT MAYBE I COULD UNDERSTAND, IF YOU WOULD TALK ABOUT THE PAYMENT, ITSELF, BUT WHEN YOU START TALK IN TERMS OF CONSUMPTION IS WHERE I HAVE DIFFICULTY WITH IT, BECAUSE ANY KIND OF ECONOMIC SITUATION, YOU ARE GOING TO TAKE IT AND USE IT FOR SOME KIND OF CONSUMPTION, SO IF YOU WANT TO USE THE RULE THAT SOCIAL SECURITY BENEFITS MAY BE DIFFERENT IN SOME WAY, I COULD SEE THAT, BUT I AM REALLY HAVING DIFFICULTY WITH THIS CONSUMPTION, WHEN WE HAVE THIS COURT HAS SPECIFICALLY SAID YOU DON'T USE THE WRONGFUL-DEATH MEASURES, AND THAT IS THE ACCUMULATION CONCEPT.

LET ME ASK YOU THIS. IS YOUR OPPONENT CORRECT THAT HE CALLED AN EXPERT, THAT THE FIRST DISTRICT MISTAKEN, WHEN IT SAYS SHE WAS FREE TO CALL EXPERT WITNESSES, JUST AS THE MEDICAL CENTER DID. IS THAT AN INCORRECT STATEMENT?

IN PART. THEY CALLED EXPERTS AND ECONOMISTS AND THINGS LIKE. THAT THEY DID NOT CALL ANY EXPERT WITNESSES TO REBUT DR. CHIN OR DOCTOR MAHAFFEY, AND THOSE WERE THE PEOPLE --

WAS THERE TESTIMONY ON BOTH SIDES, AS TO WHAT THE NET ECONOMIC LOSS WAS?

YES, THERE WAS. YES, THERE WAS, ON THAT ISSUE.

WHAT WAS THE BASIS OF THE EXPERT'S CONCLUSIONS AS TO WHAT THE NET ECONOMIC LOSS WAS? WHAT WAS THE PREDICATE FOR THAT?

WELL, THE, DR. RAFFA, WHO IS OUR EXPERT, TESTIFIED THAT, BASICALLY THE SURVIVING SPOUSE ENDS UP RECEIVING THE HIGHER OF EITHER HER BENEFIT OR HIS BENEFIT. BECAUSE OF HIS DEATH, SHE ENDED UP RECEIVING HIS BENEFIT, BUT THERE WAS NO EVIDENCE PUT FORWARD TO SHOW THAT, ANYTHING ABOUT CONSUMPTION. I DON'T BELIEVE THERE WAS ANY TESTIMONY ON THAT, EITHER WAY.

WHAT DID THEIR EXPERT TESTIFY?

VERY SIMILAR TO WHAT OUR EXPERT TESTIFIED TO.

IF I CAN GET BACK TO THE ISSUE OF JURISDICTION.

YES.

YOU ARGUE THERE IS NO CONFLICT WITH ST. MARY'S. ST. MARY SAYS THAT YOU DON'T USE THE WRONGFUL-DEATH ACT. YOU USE CHAPTER 766, AND THE FIRST DCA IN THIS CASE, APPEARED TO

RELY ON SECTION 768.21, AND SECTION 768.185, AND CITED TO SOME CASES, EXPLAINING NET ACCUMULATIONS UNDER THE WRONGFUL-DEATH STATUTE, SO IT SEEMS TO BE APPLYING THE WRONGFUL-DEATH ACT, CONTRARY TO WHAT ST. MARY'S SAID YOU ARE ARE SUPPOSED TO DO. IS THAT A CONFLICT?

I BELIEVE THAT THAT IS THE ONLY REASON WHY THERE WOULD BE A CONFLICT IN THIS CASE, WOULD BE BECAUSE OF THOSE SPECIFIC CITES TO THE WRONGFUL-DEATH STATUTE. HOWEVER, I DON'T THINK THAT IT REALLY MAKES A DIFFERENCE, WHEN YOU GO BACK TO THE TERMS CONTAINED IN THE MEDICAL MALPRACTICE STATUTE, WHICH ARE NET ECONOMIC DAMAGES AND DEFINING ECONOMIC DAMAGES, THEMSELVES, ARE THOSE WHICH WOULD NOT HAVE OCCURRED --

I TRY NOT TO CONFUSE THE MERITS WITH JURISDICTION. I AM JUST TRYING TO DETERMINE WHETHER WE HAVE JURISDICTION HERE, BECAUSE IF THERE IS NO CONFLICT, WE DON'T PASS GO, WE JUST DISMISS THE CASE, BUT IF WE HAVE CONFLICT, THEN WE HAVE TO GET TO THE MERITS AND DETERMINE WHETHER NET ECONOMIC DAMAGES EQUALS NET ACCUMULATIONS OR NOT BUT I AM TRYING TO DETERMINE IF THERE IS A CONFLICT HERE THAT WOULD GIVE US JURISDICTION WITH THE CASE.

I DON'T BELIEVE THAT THERE IS, YOUR HONOR.

HOW CAN WE LET THAT LANGUAGE IN THE FIRST DISTRICT STAND? IF SO, TWO PLUS TWO EQUALS FOUR I HOPE, STILL.

I UNDERSTAND WHAT YOU ARE SAYING.

SO HOW CAN WE LET THAT, IT SEEMS TO ME YOU ARE BEING VERY CANDID WITH US IN SAYING THE FIRST DISTRICT WAS IN ERROR IN MAKING EXPRESS REFERENCE TO THE WAY THAT THEY DID. I THINK YOU ARE ARGUING THAT, PERHAPS THE OUTCOME OF THE CASE --

WOULD HAVE BEEN THE SAME.

-- ON THE MERITS, BUT THAT IS A DIFFERENT ISSUE FROM THE CONFLICT OF JURISDICTION. WE HAVE THE STATEMENT IN THE FIRST DISTRICT OPINION, WOULDN'T YOU AGREE?

YES. YES.

WE APPRECIATE THAT CANDOR.

LET ME ASK THIS QUESTION WITH REGARD TO NET, JUST WORD "NET" UNDER FLORIDA LAW AND TORT LAW. I AM AWARE THAT WE OFFSET COMPARATIVE NEGLIGENCE AND WE OFFSET SOME COLLATERAL SOURCES TO REACH NET. ARE THERE ANY OTHER TYPES THAT YOU ARE A WEAR OF ANYWHERE, EVEN IN OTHER STATES IN TORT LAW THAT, ARE USED TO REACH A NET NUMBER, OTHER THAN THOSE TYPES OR THOSE ELEMENTS?

WELL, IN THIS CASE, AS FAR AS SPECIFIC LAWS OR STATUTES? HONESTLY, I HAVE NOT RESEARCHED THAT. SO I DO NOT KNOW THE ANSWER, AS FAR AS OTHER STATES. I THINK JUST GENERAL PRINCIPLES OF TORT LAW, WOULD SUGGEST THAT YOU KNOW, YOU REDUCE IT BY AN ELEMENT SUCH AS CONSUMPTION.

WHAT, AGAIN, THAT IS WHAT I AM LOOKING FOR. IS THERE SOME PLACE THAT WE REDUCE ANYTHING BY CONSUMPTION FOR NET? THAT IS FAIRLY --

ISN'T THE LAW REALLY THE OPPOSITE OF THAT?

PARDON?

ISN'T THE LAW REALLY THE OPPOSITE OF THIS USE OF THAT CONCEPT OF CONSUMPTION? IF YOU TALKED ABOUT THE LAWS OF EARNINGS OR EARNING CAPACITY, YOU COULD NOT OFFSET WHAT THAT IS, BY SAYING THAT, OF COURSE, HE WOULD HAVE SPENT ALL OF HIS EARNINGS ON CONSUMPTION. ISN'T THAT RIGHT?

I THINK YOU JUST SIMPLY HAVE TO GO BACK TO THE TERM "ECONOMIC DAMAGES", AS DEFINED IN 766.2033.

I AM TALKING ABOUT JUSTICE LUTZ IS FOCUSING SPECIFIC -- JUSTICE LEWIS IS FOCUSING SPECIFICALLY ON TRYING TO HAVE YOU ARTICULATE FOR US, ANY LAW ANYWHERE THAT HAS SORT OF ADOPTED THIS CONSUMPTION OFFSET TO A CLAIM OF ECONOMIC DAMAGES.

I AM NOT AWARE OF ANY.

OKAY. AGAIN, WE APPRECIATE YOUR CANDOR.

I AM NOT AWARE OF ANY.

ALL RIGHT.

AND GOING BACK TO THE, SEVERAL ARGUMENTS HERE, YOU KNOW, THEIR ARGUMENT, ONE, IS THAT ALL FINANCIAL LOSSES IN ARBITRATION SHOULD NOT BE SUBJECT TO ANY OFFSET FOR CON SUGES, AND THAT WOULD SUGGEST THAT A CLAIMANT WHO AGREES TO SUBMIT DAMAGE TO SAY ARBITRATION WOULD BE ENTITLEDED TO SOME SORT OF A WINDFALL, AND I THINK THAT THE LAW IN THE STATE OF FLORIDA, AS BY THIS COURT IN WEBER VD OLLINS AND WEBER V DAVIS, YOU CAN COME UP WITH A RESULT.

YOUR ARGUMENT, WITH REGARD TO THE MERITS, WOULD BE THAT THE OUTCOME IS THE SAME, REGARDLESS OF THE LAW AND ALL OF THAT. WOULD YOU SUMMARIZE YOUR VIEW OF ALL OF THAT, THAT THE OUT COULD WOULD HAVE BEEN THE SAME -- OUTCOME WOULD HAVE BEEN THE SAME, SPECIFICALLY TALKING ABOUT SOCIAL SECURITY BENEFITS.

IT WOULD HAVE BEEN EXACTLY THE SAME, BUT FOR OUR FAILURE TO DIAGNOSE THE INTERCRANIAL BLEED THAT CAUSED HIS DEATH, HE WOULD HAVE LIVED. HE WOULD HAVE STILL BEEN CONSUMING AND PROBABLY PETITIONER IS RIGHT. HE WOULD HAVE CONSUMED MORE, BECAUSE HE WOULD HAVE BEEN DISABLED MORE. BUT THEN AGAIN, HIS ECONOMIC DAMAGES WOULD HAVE BEEN A LOT HIGHER, BECAUSE HE WOULD HAVE HAD A LOT MORE MEDICAL EXPENSES AND ATTENDANT CARE AND THINGS LIKE THAT THAT HE COULD RECOVER, BUT ONCE AGAIN, IT GOES BACK TO WHAT ARE YOUR NET ECONOMIC DAMAGES. AND I THINK YOU HAVE TO, YOU KNOW, INTERPRET THE RULE, THE TERM NET, BY USING THE ESTABLISHED LEGAL PRINCIPLES, AND I THINK THAT WAS ARTICULATED.

SAY SOMEBODY IS 25, WHO IS YOU KNOW, WORKING, AND THIS IS, I GUESS, WOULD BE MUCH MORE SIGNIFICANT IN A CASE SUCH AS THIS, WORKING AS A STOCKBROKER IN MAKING $100,000 A YEAR, AGE 25, AND IS, DIES AS A RESULT OF WRONGFUL-DEATH. AS A RESULT OF THE NEGLIGENCE OF A MEDICAL PROVIDER, AND WOULD HAVE LIVED UNTIL AGE 65. ARE YOU SAYING THAT THE, EVEN IF IT IS NOT SOCIAL SECURITY BENEFITS BUT IF IT WAS LOSS OF EARNINGS, THAT IF YOU CAN PROVE THAT THAT STOCKBROKER WAS CONSUMING ALL, EVERY SINGLE AMOUNT THAT HE OR SHE EARNED, THAT THE PLAINTIFF WOULD BE ENTITLED TO ZERO ECONOMIC DAMAGES?

I BELIEVE THAT YOU WOULD HAVE TO, BECAUSE UNDER THOSE SPECIFIC CIRCUMSTANCES, TO NOT DO SO WOULD BE AN INCREDIBLE WINDFALL FOR THE WIFE OR WHOEVER, BECAUSE YOU

ARE TALKING HE IS MAKING $100,000 A YEAR AND THERE IS NO --

THE WINDFALL THAT THEY LOST THEIR SPOUSE AND, NOW, IS GETTING ONLY $250,000 IN PAIN AND SUFFERING THAT, IS THE WINDFALL? TO THE SPOUSE?

WELL, WHEN YOU PUT IT THAT WAY, THAT CERTAINLY IS A CAP, BUT THAT MAY BE AN UNFAIR HYPOTHETICAL, BECAUSE HE MIGHT HAVE BEEN MAKING $100,000 A YEAR AND CERTAINLY WOULD HAVE RETIREMENT AND GOING TO HAVE ACCUMULATIONS AND THINGS LIKE THAT, BUT YOU KNOW, IF --

YOU ARE SAYING BASICALLY IT WOULD GO BACK. YOU WOULD HAVE TO USE NET ACCUMULATIONS, EVEN THOUGH WE SPECIFICALLY SAID, IN ST. MARY'S YOU SHOULDN'T USE NET ACCUMULATIONS.

I BELIEVE YOU WOULD HAVE TO USE GENERAL TORT PRINCIPLES, WHICH WOULD INCLUDE THAT CONCEPT, YES, YOUR HONOR.

CHIEF JUSTICE: ALL RIGHT. WITH THAT, YOUR TIME IS UP. WE THANK YOU VERY MUCH.

THANK YOU.

CHIEF JUSTICE: MR. MARSHAL, HOW MUCH TIME IS LEFT FOR REBUTTAL? OKAY. VERY BRIEFLY.

VERY QUICKLY, YOUR HONOR, DR. RALPH A, WHO WAS THEIR CON -- DR. RALPH A, WHO WAS THEIR CON -- DR. RAFFA, WHO WAS THERE ECONOMIST, WAS ASSUMING WAGES OF $100,000 A YEAR.

YOU ARE SAYING IT WAS CRANIAL AND HE MIGHT HAVE BEEN DISABLED, IF SOMEONE ADMITS LIABILITY BUT IT IS CLEAR BEFORE THEY ENTER THE HOSPITAL, THEY WERE ALREADY IN A VEGETATIVE STATE, HOW WOULD YOU WRITE THAT, SO THAT IT WOULD BE CLEAR THAT THAT WOULDN'T, YOU KNOW, JUST BECAUSE YOU ADMIT LIABILITY, YOU ARE NOT RESPONSIBLE FOR ANY DAMAGES.

THIS IS A CLASSIC CASE, AS MOST OF THESE CASES ARE, OF CONCURRING CAUSE, WHERE THE NATURAL CAUSE, THE MEDICAL MALADY CONCURS WITH THEIR NEGLIGENCE TO KILL THIS MAN. IF YOU WILL LOOK AT THE LETTER THEY SENT ME, WHICH IS IN THE RECORD, WHERE THEY ADMITTED LIABILITY, THEY WEREN'T WEASEL AROUND ON IT. THEY ADMITTED LIABILITY. IT WASN'T UNTIL WE GOT INTO THIS AND WE EVEN FILED A MOTION TO WITHDRAW OUR ACCEPTANCE, AND THE ADMINISTRATIVE JUDGE SAID THERE IS NO PROVISION FOR THAT. THESE PEOPLE CAME IN AND CONTESTED CAUTION, WHICH IS A POLICY MATTER THAT YOU SHOULDN'T ALLOW, BUT IN THIS SPECIFIC CASE, THE EVIDENCE WAS INCOMPETENT, UNDER GROSS VERSUS LIONS, FOR THEM TO APPORTION IT. THEY AWARDED NOTHING. ZERO.

JUSTICE WELLS, LET ME ASK YOU, THE FIRST ISSUE, ARE THE ISSUE THAT WE HAVE BEEN TALKING ABOUT ON THE NET. FRED RALPH A TESTIFIED AS -- FRED RAFFA TESTIFIED AS ONE EXPERT. YOU HAD AN EXPERT. TELL ME AGAIN, WHAT WAS THEIR BASIS FOR THEIR TESTIMONY, AS TO WHAT THE NET ECONOMIC LOSS WAS?

I DON'T REMEMBER THOSE FIGURES.

NOT THE NEWSPAPERS BUT HOW DID THEY ARRIVE AT WHAT A NET WAS?

AS TO THE LOSS OF EARNING CAPACITY, LIKE I SAID, DR. RAFFA USED MINIMUM WAGE AND THE ATTORNEY USED WHAT WAS TESTIFIED TO, $20 AN HOUR AS TO LOSE OF EARNING CAPACITY, AND THEY USED THEIR MAGIC IN ORDER TO DEDUCE PRESENT VALUE UNIFORMITY AS TO SOCIAL

SECURITY, DR. RAFFA TOOK THE SAME POSITION THAT THEY ARE STILL TAKING NOW, AND THAT IS THAT IT IS NOT A NET FINANCIAL LOSS. THAT SHE NOW GETS HIS BENEFIT, WHICH IS HIGHER THAN WHAT HER BENEFIT WOULD BE.

WHAT DID YOUR EXPERT SAY?

MY EXPECT TOOK THE SAME TACK WE DID AND SAID NET FINANCIAL LOSS BEING DEFINED AS ONE THAT WOULD NOT HAVE OCCURRED BUT FOR THE DEATH, AS THE DIFFERENCE BETWEEN THE TWO FIGURES.

YOU BASICALLY TREATED THIS AS A STATUTE WHICH HAS COLLATERAL REDUCTIONS.

YES, SIR. YES, SIR.

AND THAT WOULD REACH YOU AT THE NET.

IN FACT, THIS COURT HAS AFFIRMED, AS RECENTLY AS FEBRUARY, IN CHESTER VERSUS DORY, THAT THE ONLY DEDUCTIONS MADE IN THIS IS FOR COLLATERAL SOURCES. THAT IS WHAT THAT CASE HOLDS.

ONE LAST QUESTION. YOU, IN RESPONSE TO JUSTICE CANTERO'S QUESTION EARLIER, WHEN HE ASKED YOU ABOUT THE FACT THAT THE EVIDENCE WAS THAT THE VICTIM HERE, YOUR CLIENT, WAS RETIRED AND HAD NO INTENTION TO RETURN TO WORK. WHY COULDN'T THE ARBITRATORS HAVE CONCLUDED THAT THERE WOULD BE NO LOSS OF EARNINGS?

BECAUSE UNDER OUR LAW, IT DOESN'T MATTER IF YOU ARE ONE-YEAR-OLD, IF YOU ARE A NONWORKING HOUSEWIFE OR A 85-YEAR-OLD, UNITED STATES SUPREME COURT JUSTICE, YOU HAVE AN EARNING CAPACITY.

YOU HAVE AN EARNING CAPACITY, BUT IN THE ORDINARY CASE, FOR INSTANCE, IF YOU ARE PROVING LIFE EXPECTANCY AND YOU HAVE GOT A DISABILITY OF 50 PERCENT OR SOMETHING, AND YOU ARE ARGUING THE LOSS OF THAT EARNING CAPACITY, WOULDN'T THE JURY OR THE EXPERTS ORDINARILY COME TO GRIPS WITH THAT, BY SAYING, WELL, THE WORKING LIFE, BEFORE RETIREMENT, WOULD BE SO MANY YEARS, AND HE WOULD EARN, AND ISN'T YOUR ANSWER, REALLY, CONTRARY, THEN, TO WHAT THAT CONCEPT OF DAMAGES IS, THAT WHEN THEY REACH RETIREMENT AGE, AND STOP WORKING, THAT THAT, THEN, WOULD TERMINATE THAT EXPECTATION OF THE EARNINGS.

OF THE EARNING CAPACITY.

RIGHT.

NO, SIR, I DON'T BELIEVE.

IN OTHER WORDS, YOU WOULD BE ENTITLED TO, IF YOU ARE GOING TO WORK UNTIL YOU ARE 70, THAT YOU HAVE THIS EARNING CAPACITY, BUT THEN AFTER 70, WHEN YOU RETIRE, YOU ARE ENTITLED TO WHAT? THE SAME EARNING CAPACITY THAT, BEFORE AGE 70?

ACCORDING TO THEM, NOTHING.

I AM NOT ASKING ACCORDING TO THEM. I AM ASKING ACCORDING TO YOU AND WHAT THE PRESENT LAW IS ABOUT THAT.

I THINK THE PRESENT LAW IS THAT EVERY HUMAN BEING, REGARDLESS OF AGE, HAS SOME CAPACITY ON EARN. NOW, DO FACTORS SUCH AS AGE HELP? ENTER INTO IT?

FACTUALLY THE OTHER SIDE COULDN'T ARGUE THAT THIS PERSON, EVEN THOUGH THEY HAD A LIFE EXPECTANCY OF 87, WOULD RETIRE AT 665 OR 70, AND THAT -- AT AGE 65 OR 70, AND THAT THAT WOULD BE THE ONLY LOSS THAT THEY WOULD SUFFER, IN TERMS OF FUTURE EARNING CAPACITY. THAT WOULD NOT BE ABLE TO ARGUE. THAT ANOTHER LAW IN FLORIDA, JUSTICE ANSTEAD, MY UNDERSTANDING IS THAT LOSS OF EARNING CAPACITY AS A LOSS OF DAMAGE, GOES FOR AN ENTIRE LIFETIME, AND THERE IS A SUPREME COURT CASE ON IT.

FACTUALLY, THE JURY COULD NOT DECIDE TO THE CONTRARY THAT, THAT EARNING CAPACITY WOULD END AT RETIREMENT.

THE ONLY LIMITATION ON THE JURY, AS THEY ARE INSTRUCTED, TO CONSIDER THE LIFE TABLES. THAT IS IT. BUT THERE IS A SUPREME COURT CASE WHERE THEY FACTORED OUT THAT LOSS OF EARNING CAPACITY ALL THE WAY UNTIL LIFE EXPECTANCY THAT. IS THE ONLY RESERVATION ON IT, TO MY KNOWLEDGE, UNDER FLORIDA LAW.

VERY GOOD. WE THANK YOU ALL FOR RESPONDING TO OUR QUESTIONS.

THANK YOU.

THANK YOU VERY MUCH.