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**Philip C. D'Angelo, M.D. v. John J. Fitzmaurice**

CHIEF JUSTICE: D'ANGELO CF1 O VERZ VERSUS FITZMAURICE. CF1 O IF COUNSEL IS READY, YOU MAY CF1 O PROCEED. CF1 O

GOOD MORNING, YOUR HONORS. CF1 O MAY IT PLEASE THE COURT.O CF1 O MY NAME IS ESTHER GALICIA WITHO CF1 O THE FIRM OF HARMER DEAN, AND CF1 O WE REPRESENT PHILLIP D'ANGELO CF1 O PA. CF1 O THIS INVOLVES A VERDICT OF CF1 O \$378,000 AGAINST DR. D'ANGELO. CF1 O HE MOVED TO SET OFF FROM THAT CF1 O VERDICT, A TOTAL OF \$288,000O CF1 O THAT THE PLAINTIFF RECEIVED INO CF1 O A PRE-SUIT SETTLEMENT FROM THE CF1 O HOSPITAL, WHICH IS THE CF1 O FACILITY WHERE OUR DOCTOR CF1 O PERFORMED THE SURGERY WHICH CF1 O RESULTED IN THE SPONGE BEING CF1 O LEFT IN THE ABDOMINAL CAVITY. CF1 O

CAN I ASK THIS QUESTION. CF1 O UNDER THESE CIRCUMSTANCES,O CF1 O CERTAINLY THE PLAINTIFF COULD CF1 O NOT NONSETTLING DEFENDANT WAITED POST TRIAL, TO MOVE TO SET OFF OR EXCUSE ME, MOVE TO ADD THE SETTling PARTY AS A FABRE, AND THE COURT SAID NO. NOW, WE SUBMIT THAT, BECAUSE OF THAT, THE NONSETTLING DEFENDANT IS JOINTLY AND SEVERALLY LIABLE FOR 100 PERCENT OF THE VERDICT, SO IF IT SO HAPPENED THAT IN NASH, EXCUSE ME, IN NASH THE DEFENDANT COULD HAVE, WHICH WAS WELLS FARGO, EXCUSE ME, WELLS FARGO COULD HAVE THEN ADDED THE HOSPITAL BUT IT DIDN'T. IF THE HOSPITAL HAD SETTLED WITH THE PLAINTIFF, WELLS FARGO COULD HAVE SET OFF THAT FULL SETTLEMENT FROM THE 100 PERCENT VERDICT AGAINST THE SECURITY COMPANY. WHAT WE SUBMIT THE CASE LAW SAYS OR ACTUALLY DOESN'T SAY, IT DOES NOT PRECLUDE, IN A CASE WHERE THERE IS A VERDICT AGAINST A DEFENDANT WHO DOES NOT SEEK APPORTIONMENT WITH OTHER DEFENDANTS, IF THE CASE LAW PERMITS A FULL SET OFF. THIS COURT, IN GOUTE, ONLY PRECLUDES A SET-OFF, WHEN A JURY IS SPECIFICALLY ASKED TO, AND SPECIFICALLY DETERMINES THE FAULT OF THE SETTling PARTIES.

LET ME ASK YOU THIS, I MEAN, DON'T, WE HAVE GOT WHAT I WOULD SAY IS A 'TILOLOGY OF CASES HERE.

YES.

-- A TRILOGY OF CASES HERE.

YES.

WE HAVE GOT THE WELLS FARGO CASE AND THE TALLAHASSEE MEMORIAL CASE AND WE HAVE GOT GOUTE. NOW, IN THE TALLAHASSEE MEMORIAL CASE, THIS COURT MADE A DETERMINATION THAT THERE WAS TO BE RECOGNIZED, UNDER 768.81, A DISTINCTION BETWEEN ECONOMIC AND NONECONOMIC DAMAGES, IN THAT, WHERE THERE WAS THAT, NONECONOMIC DAMAGES, THE DIVISION MEANT THAT THAT WAS ALL THAT ONE OF THE DEFENDANTS OWED, AND SO A SET-OFF ONLY APPLIED AS TO ECONOMIC DAMAGES. THAT IS WHERE WE GOT TO IN WELLS. WOULD YOU AGREE?

YES, YOUR HONOR. AND THEN WE CAME ALONG WITH NASH, AND WE WERE DEALING WITH THE ISSUE OF WHAT HAPPENS, WHO HAS GOT THE BURDEN HERE, OF PLEADING AND PROVING THAT THERE IS TO BE AN APPORTIONMENT, AND WE HELD THAT THE DEFENDANT HAD THE BURDEN OF

PROVING THERE TO BE APPORTIONMENT, SO THAT WHERE THERE WAS TO BE AN APPORTIONMENT, WHICH WAS FOR THE NONECONOMIC DAMAGES, THE DEFENDANT HAD TO PROVE IT. AND PLEAD IT AND PROVE IT, AND THAT IS WHERE WE GOT IN NASH, WOULD YOU AGREE WITH THAT?

YES.

WE DIDN'T DEAL, THERE, WITH THIS PROPOSITION OF ECONOMIC DAMAGES, BECAUSE WELLS, WE ALREADY SET THAT ASIDE, CORRECT?

UM-HUM.

THEN WE CAME ALONG IN GOUTE, AND WE MERELY HELD THAT THERE WASN'T, THERE WAS A JUDICIAL FINDING OF NO LIABILITY ON THE PART OF THIS DEFENDANT, WHOEVER THEY WERE TRYING TO GET THE SET OFF FROM, AND SO WITH THAT JUDICIAL DETERMINATION, THAT PRIORITY WAS NOT A TORT -- THAT PARTY WAS NOT A TORTFEASOR. IS THAT CORRECT?

YES. SO THE TRILOGY IS THAT, WHERE YOU DON'T PLEAD AND PROVE THE PERCENTAGE OF LIABILITY ON THE PART OF SOME OTHER DEFENDANT, THEN YOU CANNOT GET AN APPORTIONMENT OF NONECONOMIC DAMAGES. ISN'T THAT, IF YOU REACH ANOTHER AND SAY YOU GET IT ANYWAY, THEN THAT DEFEATS THE WHOLE IDEA OF THAT NASH DECISION, DOES IT NOT?

WELL, RESPECTFULLY, I DISAGREE WITH YOUR OVERALL PRESENTATION OF THE CASES, AS FAR AS THE CONCLUSION IS CONCERNED. IN WELLS, THIS COURT, THE QUESTION THAT WAS POSED TO THIS COURT, WAS AS FOLLOWS, IS A NONSETTLING DEFENDANT IN A CASE TRIED UNDER SECTION 768.813. IN THAT CASE, THE DEFENDANT, AS WELL AS THE SETTLING DEFENDANTS, WERE ALL INCLUDED ON THE VERDICT FORM, SO THE CASE WAS TRIED UNDER THE COMPARATIVE FAULT STATUTE, AND JUSTICE WELLS, YOUR HONOR, IN THE SPECIALLY-CONCURRING OPINION, SPECIFICALLY NOTED IT IS MY VIEW THAT THE MAJORITY'S INTERPRETATION OF THESE STATUTES IS CORRECT IN CASES IN WHICH A JURY IS INSTRUCTED TO APPORTION FAULT IN ACCORDANCE WITH FABRE, WHICH INTERPRETS 768.781, SO IT IS OUR POSITION THAT, IN A CASE LIKE THE ONE WE HAVE TODAY, WHERE THE JURY WAS NOT ASKED TO APPORTION FAULT AND THE JURY OBVIOUSLY DOES NOT APPORTION FAULT BETWEEN THE SETTLING AND THE NONSETTLING DEFENDANT, WE DON'T DEAL WITH WELLS AT ALL, WE DON'T DEAL WITH THE WELLS SET OFF FORMULA, BUT INSTEAD WE GO TO AND REFER TO THE SET OFF STATUTES WHICH HAVE NOT BEEN ABROGATED.

JUST CUTTING TO THE CHASE.

YES.

A DEFENDANT WOULD LOOK AND SAY THAT DISNEY WORLD, WOULD SAY WHAT IF THEY ARE 1 PERCENT LIABLE, AND THIS EVENING THAT THE SETTLEMENT WAS PRETTY SUBSTANTIAL WITH ANOTHER DEFENDANT, \$500,000, AND THIS EVENING THEIR EXPOSURE IS GOING TO BE FAIRLY -- AND THIS EVENING THEIR EXPOSURE IS GOING TO BE FAIRLY, THEY DON'T KNOW, BUT WHAT YOU ARE SAYING IS IF THE DEFENDANT DOESN'T EXERCISE ITS OPTION TO ADD AND IMPROVE APPORTIONMENT, IT IS LIKE WHAT USED TO BE, BEFORE ALL OF THIS NIGHTMARE STATUTE STARTED. THAT IS YOUR POSITION.

THAT IS EXACTLY MY POSITION, YOUR HONOR. THAT IS EXACTLY RIGHT, AND THERE IS NOTHING WITHIN THE COMPARATIVE FAULT STATUTE THAT REQUIRES THE DEFENDANT TO EXERCISE THAT OPTION, AND BY THE SAME FOLK EN, THERE IS NOTHING WITHIN THE SET OFF STATUTES THAT -- BY THE SAME TOKEN, THERE IS NOTHING WITHIN THE SET OFF STATUTES THAT REQUIRES APPORTIONMENT IN RELATIONSHIP TO A SET-OFF.

DOES DOESN'T THAT MEAN THAT WE ARE GOING -- DOESN'T THAT SAY THAT WE ARE GOING TO BE WORSE OFF, IF THOSE THAT CRITICIZE THE SYSTEM NOW, DOESN'T THAT JUST INVITE MANIPULATION OF THE SYSTEM? SHOULDN'T WHATEVER WE DO, SHOULDN'T THERE BE SOME PREDICTABILITY, YOU KNOW, TO WHAT IS GOING ON? WHAT PART OF JUSTICE WELLS'S OUTLINED THE HOLDINGS OF THOSE THREE CASES, AND HE PAUSED EACH TIME, IN TERMS OF WHAT THE HOLDING AND ANALYSIS WAS, AND I THOUGHT YOU AGREED, THEN YOU ENDED UP SAYING THAT YOU DIDN'T AGREE, YOU KNOW, WITH HIS CONCLUSION FROM THAT, AND I AM HAVING DIFFICULTY, WHERE IN HIS OUTLINE, THAT THEY DIDN'T COME TO A LOGICAL CONCLUSION IN HIS HYPOTHETICAL?

WELL, I AGREE WITH WHAT EACH CASE HOLDS. I MEAN, BECAUSE THAT IS WHAT THEY HOLD, BUT MY POINT IS, THIS CASE THAT WE ARE DEALING WITH TODAY, DOES NOT FALL WITHIN THE FRAMEWORK OF WELLS, BECAUSE IT WAS NOT A CASE THAT WAS TRIED UNDER THE COMPARATIVE FAULT STATUTE. AS A RESULT --

WELL, THIS CASE WAS TRIED UNDER THE COMPARATIVE FAULT STATUTE.

NO, IT WAS NOT RESPECTFULLY, YOUR HONOR.

IT WASN'T? IN OTHER WORDS, IF YOU HAD ALLEGED THAT THERE WAS SOMEBODY ELSE RESPONSIBLE AND THE JURY WOULD NOT HAVE BEEN INSTRUCTED THEN, AND COMPARATIVE FAULT WOULD NOT HAVE APPLIED?

WELL, IF WE HAD DONE THAT, BUT IT WASN'T REQUESTED. THE JURY --

WHEN YOU SAY IT WASN'T TRIED UNDER THAT, CLEARLY THE COMPARATIVE FAULT STATUTE APPLIED TO THIS CASE, DID IT NOT?

ONLY IF WE --

HOW ELSE WOULD YOU HAVE THE RIGHT TO BRING SOMEBODY ELSE INTO THE CASE AND DO THAT, IF THE COMPARATIVE FAULT STATUTE DID NOT APPLY?

WELL, WE DIDN'T DO IT, THOUGH.

I UNDERSTAND YOU DIDN'T DO IT.

JUST LIKE IT WASN'T DONE IN NASH.

THAT DOESN'T MEAN THAT THE STATUTE DOESN'T APPLY. IS THAT YOUR POSITION, THAT YOU COULD NOT HAVE DONE IT?

YES. IT IS MY POSITION THAT WE COULD HAVE CHOSEN --

COULD IS DONE -- COULD HAVE DONE IT.

WE COULD HAVE --

BECAUSE THE COMPARISON FAULT STATUTE -- COMPARATIVE FAULT STATUTE WOULD APPLY. THE ONLY WAY THAT YOU COULD HAVE DONE IT IS BECAUSE THE COMPARATIVE FAULT STATUTE APPLIED, RIGHT?

WE, HOWEVER, CHOSE NOT TO ASSAULT. THE ONLY WAY WE COULD HAVE DONE IT IF WE HAD CHOSEN TO ASSERT. THEREFORE AS A CONSEQUENCE, WE ARE JOINTLY AND SEVERALLY LIABLE FOR THE ENTIRE AMOUNT OF THE VERDICT.

DOESN'T THAT OVERLOOK THE PROVISION OF 768.71, WHICH SAYS EXCEPT AS OTHERWISE SPECIFICALLY PROVIDED, THE PART, THIS PART APPLIES TO ANY ACTION FOR DAMAGES, AND SO IT SEEMS TO ME THAT THE SYSTEM, WHICH WAS SET UP HERE, DOES HAVE A TOTAL SIMM TRI, WHICH -- SYMMETRY, WHICH, WASN'T THAT SYMMETRY THAT THE TRIAL JUDGE APPLIED HERE? I MEAN, THE TRIAL JUDGE SAID, OKAY, YOU DIDN'T HAVE HIM ON THE -- HAVE THEM ON THE VERDICT FORM, SO YOU DON'T GET A SET-OFF FOR THE NONECONOMIC DAMAGES, BUT SINCE JOINT AND SEVERAL LIABILITY STILL APPLIES, AS FAR AS ECONOMIC DAMAGES, YOU DO, FOLLOWED THE FORMULA THAT WE APPROVED IN WELLS, CAME UP WITH A PERCENTAGE OF 33 PERCENT, AND THEN GAVE THE DEFENDANT A SET-OFF AGAINST THE NONECONOMIC, AGAINST THE ECONOMIC DAMAGES. WASN'T THAT WHAT THE TRIAL JUDGE DID?

WELL, RESPECTFULLY, THE TRIAL JUDGE ACTUALLY USED A HYBRID OF THE WELLS FORMULA, BECAUSE HE USED THE 33 PERCENT FROM \$200,000 SETTLEMENT PORTION OF THE SETTLEMENT, AS OPPOSED TO THE ENTIRE AMOUNT OR FULL VALUE YOUTHFUL THE SETTLEMENT, IT WAS -- WHICH WAS \$288,000, BECAUSE PART OF THE SETTLEMENT INCLUDED THE DISCHARGE OF HOSPITAL EXPENSES WITH THE HOSPITAL.

THAT IS A CALCULATION. I GUESS THERE IS --

YES.

-- THERE IS TWO ABSOLUTE POSITIONS, WHICH IS NO SET OFF, WHICH IS WHAT THE PLAINTIFF IS SAYING, BECAUSE THERE WAS NO FINDING OF LIABILITY, BECAUSE THEY WEREN'T ON THE VERDICT FORM AND NOTHING WAS ESTABLISHED. YOURS IS COMPLETE SET OFF, AND WHAT JUSTICE WELLS SAYS, WHY ISN'T IT APPROPRIATE, WHERE THEY ARE NOT ON THE VERDICT FORM, TO GO BACK TO THE WELLS FORMULA? WHICH I GUESS NEITHER OF YOU WANT TO HAVE?

WELL, AS A FALLBACK, WE WOULD ACCEPT THE WELLS -- [LAUGHTER]

WE WOULD ACCEPT THE WELLS CALCULATION, BUT IT WOULD BE A DIFFERENT NUMBER. IT WOULD BE 33 PERCENT FROM THE --

YOU ARE SAYING THE HOSPITAL BILL IS PART --

IS PART OF THE OVERALL SETTLEMENT, SO THE FULL VALUE OF THE SETTLEMENT WAS \$288,000 INSTEAD OF \$200,000, SO THE 33 PERCENT SHOULD BE TAKEN FROM THE GREATER NUMBER, BUT, AGAIN --

IT SEEMS TO ME THAT WHAT YOU ARE ARGUING HERE IS THAT 768.81, REALLY, IS ONLY APPLICABLE IF THE DEFENDANT MAKES THAT APPLICABLE TO A NEGLIGENCE CASE? BECAUSE YOU ARE SAYING THAT YOUR CLIENT DID NOT ATTEMPT TO HAVE THE JOINT TORTFEASOR PUT ON THE VERDICT FORM, DIDN'T ARGUE THAT THIS PERSON WAS AT FAULT, AND SO BECAUSE THAT DID NOT HAPPEN, 768.81 IS NOT APPLICABLE, SO THIS IS REALLY JUST A STATUTE THAT IS APPLICABLE IF THE DEFENDANT CARES TO MAKE IT APPLICABLE. IS THAT WHAT YOU ARE REALLY SAY SOMETHING.

YES, AND THAT WAS THE WHOLE PURPOSE OF THE STATUTE, BECAUSE IT WAS THE RESULT OF THE CASE THAT JUSTICE PARIENTE MENTIONED, WHERE YOU, WHERE A DEFENDANT WHO IS ONLY FOUND 1 PERCENT LIABLE, ENDS UP PAYING THE FULL 1 ON 0 PERCENT OF THE JUDGMENT -- THE FULL 100 PERCENT OF THE JUDGMENT, BECAUSE OF THE JOINT AND SEVERAL LIABILITY.

WHEN WOULD A DEFENDANT EVER WANT TO DO?

I AM SOREY?

WHEN WOULD THE DEFENDANT WANT TO BRING IN THE NEGLIGENCE OF A JOINT TORTFEASOR,

CLEARLY WHEN THERE IS AN ISSUE AS TO THE AMOUNT OF THE SETTLEMENT ANT DAMAGES INVOLVED IN THE CASE ARE GOING TO BE PREDOMINANTLY ECONOMIC, WHICH THERE IS A SET-OFF REGARDLESS, UNDER WELLS, OR WHETHER THE DAMAGES ARE GOING TO BE PREDOMINANTLY NONECONOMIC, FOR WHICH THERE IS AN APPORTIONMENT AND YOU ARE ONLY RESPONSIBLE FOR YOUR PERCENTAGE OF FAULT, SO THERE IS A WHOLE COMBINATION OF VALUABLES THAT GOES INTO THE ULTIMATE DETERMINATION BY A DEFENDANT AS TO WHETHER HE OR SHE WANTS TO TAKE ADVANTAGE OF THE COMPARATIVE FAULT STATUTE.

BUT THE REALITY IN THIS CASE WAS WAS THE COMPARATIVE -- CASE WAS THE COMPARATIVE NEGLIGENCE OF THE HOSPITAL WAS IN FACT BEFORE THIS JURY, JUST NOT FOR THE ENTIRE CONCLUSION, BECAUSE IT IS YOUR CONTENTION THAT THE HOSPITAL IS SOLELY RESPONSIBLE FOR THE NEGLIGENCE IN THIS KAY. MY -- IN THIS CASE. MY CLIENT WAS NOT NEGLIGENT AT ALL.

THAT'S RIGHT. WE DID USE THE EMPTY CHAIR DEFENSE, WHICH HAS BEEN FOR SEVERAL YEARS, IN THIS STATE.

CHIEF JUSTICE: THE MARSHAL SAYS YOUR LIGHT IS ON. YOU ARE IN YOUR REBUTTAL.

I WANT TO SUMMARIZE BRIEFLY, THE PLAINTIFF HAS URGED THAT THIS COURT'S DECISION IN GOUTE, PRECLUDES A SET-OFF, BECAUSE THE -- PRECLUDES A SET OFF -- PRECLUDES A SET-OFF FROM THE HOSPITAL, BECAUSE WE SAY THAT IT ONLY PRECLUDES A SET-OFF WHEN THERE HAS ONLY BEEN EXPRESSED A DETERMINATION BY THE JURY THAT THE JOINT TORTFEASOR WAS NOT AT FAULT.

IT WASN'T AN ISSUE BECAUSE THEY WEREN'T ON THE VERDICT FORM IN GOUTE AND THE BROAD FORM OF THE VERDICT COULDN'T HAVE DEALT WITH THAT SITUATION.

THAT'S CORRECT, YOUR HONOR, AND THIS CASE HAS NOT BEEN ADDRESSED TO DATE BY THIS COURT. WE SUBMIT THAT, BASED ON THE REASONING OF THE COURT'S DECISION IN GOUTE, WITH RESPECT TO JOINT AND SEVERAL LIABILITY AND ITS RECOGNITION THAT JOINT AND SEVERAL LIABILITY DOES OR EXCUSE ME, ITS RECOGNITION THAT THE SET OFF STATUTES ARE ALIVE AND WELL WHEN IS THERE JOINT AND SEVERAL LIABILITY, AS IS THE CASE HERE, THEN THE SET OFF STATUTES APPLY AND PERMIT A FULL 1 ON 0 PERCENT SET OFF. -- A FULL 100 PERCENT SET OFF.

CHIEF JUSTICE: THANK YOU. GOOD MORNING.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS JOEL EATON. I REPRESENT THE FITZMAURICES.

MR. EATON, YOU WOULD AGREE THAT JUDGE BLUE'S DECISION HAS AN ERRANT STATEMENT IN IT, WHERE IT SAYS THAT THE JURY DETERMINED THAT 100 PERCENT OF THE FITZMAURICES' DAMAGES WERE ATTRIBUTED TO DR. D'ANGELO, WHEN THIS CASE WAS TRIED UNDER THE STANDARD VERDICT FORM, WHICH WAS, WAS THERE NEGLIGENCE ON THE PART OF D'ANGELO, WHICH WAS A LEGAL CAUSE, A LEGAL CAUSE, AND ALSO TO TRY IT UNDER THE STANDARD JURY INSTRUCTIONS, WHICH SAYS TO THE EFFECT THAT IT, THE CAUSE OR A CONTRIBUTING CAUSE. I MEAN, IT WAS, THERE WASN'T A FINDING THAT THIS PERSON WAS 100 PERCENT RESPONSIBLE. THERE WAS A FINDING OF 100 PERCENT OF THE DAMAGES OF THE AMOUNT, BUT NOT OF THE LIABILITY. YOU WOULD AGREE WITH THAT, WOULDN'T YOU NOT?

-- WOULD YOU NOT?

I DON'T AGREE THAT THE STATEMENT IS AN ERRANT STATEMENT, YOUR HONOR. I THINK YOU ARE TALKING ABOUT A SIMM ANTIC DECISION. -- THE POINT, O'CLOCK THAT THERE WAS A FINAL --

THE POINT BEING THAT THERE WAS A FINAL DECISION.

THAT REALLY DOES MAKE A DIFFERENCE THOUGH, IF THERE WAS A LEGAL CAUSE, BECAUSE IN GOUTE WE HAD A JUDICIAL DETERMINATION THAT A PERSON WASN'T A TORTFEASOR. HERE THERE ISN'T THAT DETERMINATION, AND SO THE ONLY WAY THAT THERE WOULDN'T BE A SET-OFF OF ECONOMIC DAMAGES, IS IF WE JUST TURNED A BLIND EYE TO THE SET OFF STATUTE. I MEAN, THIS CASE WAS TRIED AS WE TRIED THEM FOREVER, AND WHAT WE RECOGNIZED IN WELLS, WAS THAT 768.81 CHANGED THE LANDSCAPE, AS FAR AS NONECONOMIC DAMAGES WERE CONCERNED, BUT DIDN'T CHANGE THE LANDSCAPE, AS FAR AS ECONOMIC DAMAGES WERE CONCERNED. FOR A SET-OFF. BECAUSE THERE IS STILL JOINT AND SEVERAL LIABILITY. IS THAT RIGHT?

THAT'S CORRECT, YOUR HONOR, BUT GOUTE SAYS THAT THE SET OFF STATUTES PRESUPPOSE THE EXISTENCE OF MULTIPLE DEFENDANTS JOINTLY AND SEVERALLY LIABLE FOR DAMAGES. NASH SAYS THE DEFENDANT HAS THE BURDEN OF PLEADING AND PROVING THE JOINT AND SEVERAL LIABILITY OF ANOTHER PARTY, A NONPARTY IN THIS CASE.

THERE IS TWO DIFFERENT THINGS GOING ON, AND YOU WOULD, IN A SENSE, GOUTE, WHATEVER THE CERTIFIED QUESTION WAS AND HOWEVER WE WORD IT, THE FACTS IN GOUTE ARE DIFFERENT FROM THESE FACTS, WHICH IS NOW WHAT WE HAVE TO CONFRONT IS WHEN A -- CONFRONT IS WHEN A DEFENDANT ELECTS NOT TO HAVE BENEFITS FROM THE JOINT AND SEVERAL LIABILITY STATUTE, DOES IT GO BACK TO PRE768? IN OTHER WORDS, AND YOU WOULD AGREE BEFORE THIS WHOLE THING STARTED, THIS CASE TRIED THIS WAY, THERE WOULD, THAT THEY WOULD BE ENTITLED TO A 100 PERCENT SET OFF. DO YOU AGREE WITH THAT?

WHAT DO YOU MEAN BY THAT? BEFORE IT WHOLE THING STARTED, 768.81? SURE. SURE. THERE WAS A TIME WHEN THERE WAS JOINT AND SEVERAL LIABILITY AND THE SET OFF STATUTES AFFECTED CONTRIBUTIONS BETWEEN JOINT AND SEVERAL TORTFEASORS.

AND DOES THIS CORRECTLY DEAL WITH THE SITUATION WHERE THE DEFENDANT DOESN'T PUT THE PERSON ON THE VERDICT FORM OR THE ENTITY, AS TO WHAT HAPPENS, NOT UNDER JOINT AND SEVERAL LIABILITY, WHICH THEY ARE NOT ASKING FOR, BUT UNDER THE SET OFF STATUTE?

YES, IT DOES. NASH DOES.

WHAT IS THAT?

NASH WAS THE CASE IN WHICH THE DEFENDANT ATTEMPTED, AFTER THE CASE HAD BEEN TRIED BUT NEVER HAD PLED THE LIABILITY OF A NONPARTY TO PUT THE NONPARTY ON THE VERDICT FORM, AND AFTER THIS COURT WENT THROUGH THE BURDEN ASSIGNMENT, BURDEN ON THE DEFENDANT TO PLEAD AND PROVE THE LIABILITY, AND THEREFORE YOU HAVE GOT TO DO IT BEFORE TRIAL, IT WENT ON TO SAY THAT BECAUSE THE DEFENDANT DID NOT PLEAD AND PLEAD THE LIABILITY OF A NONPARTY, IT WAIVED ANY RIGHT TO APPORTIONMENT --

APPORTIONMENT THOUGH --

-- AND THEREFORE THERE WAS NO SET OFF UNDER THE SET OFF STATUTES!

BUT IT WAS TALKING ABOUT THE NONECONOMIC. NASH ONLY DEALT WITH NONECONOMIC DAMAGES.

ABSOLUTELY CORRECT, YOUR HONOR. GOUTE GOES ON TO SAY, HOWEVER, THAT THE DEFENDANT HAS THE BURDEN TO PLEAD AND PROVE THE LIABILITY OF THIS NONPARTY. HE MUST DEMONSTRATE THAT THERE IS A JOINT AND SEVERAL TORTFEASOR OUT THERE, AND IN GOUTE HE PLED IT, THE DEFENDANT PLED IT BUT DIDN'T PROVE IT, AND THE COURT SAID ABSENT PROOF THE

EXISTENCE OF A JOINTLY LIABLE TORTFEASOR, NO SET OFF AGAINST ECONOMIC DAMAGES. NOW, THE ONLY DIFFERENCE --

IS IT TRUE THAT WHAT THE COURT SAID IN GOUTE THAT THERE THE JURY SPECIFICALLY FOUND THE SETTLING DEFENDANT NOT LIABLE AND THEREFORE THERE COULD BE NO SET OFF, THE COURT DID NOT CONSIDER THE SITUATION WHERE THE JURY DID NOT CONSIDER THE SETTLING DEFENDANT'S LIABILITY AT ALL?

THAT'S CORRECT, YOUR HONOR, AND I SUPPOSE THAT IS WHY WE ARE HERE TODAY, BUT THAT HAS TO BE A DISTINCTION WITHOUT A DIFFERENCE, BASED ON THE UNDERLYING RATIONALE OF JUSTICE PARIENTE'S DECISION FOR THE UNANIMOUS COURT, IN GOUTE.

SO THAT BASICALLY ELIMINATES THE IMPACT OF THE SET OFF STATUTES.

IF THEY DON'T CHOOSE TO INVOKE THEIR REMEDIES UNDER 768.81, IT DOES. NASH SAYS YOU WAIVE IT. NOW --

BUT THE PROBLEM THAT I HAVE, MR. EATON, WITH THAT THEORY, IS THAT WHATEVER IS DETERMINED TO BE THE APPORTIONMENT, ON THE VERDICT FORM, IS NOT GOING TO AFFECT WHAT HAPPENS AS FAR AS ECONOMIC DAMAGES ARE CONCERNED, BECAUSE THERE IS STILL JOINT AND SEVERAL LIABILITY ON ECONOMIC DAMAGES, AND THE APPORTIONMENT ON THE VERDICT FORM DOESN'T HAVE ANYTHING TO DO WITH THAT.

GOUTE SAYS THAT THERE IS NO SET OFF, UNLESS YOU PROVE THAT SOMEBODY ELSE WOULD BE JOINTLY AND SEVERALLY LIABLE. IT REQUIRES A FINDING OF LIABILITY ON THE PART OF THE HOSPITAL IN THIS CASE.

BUT WE HAVE GOT, IN ALL RESPECT FOR YOUR INTERPRETATION OF GOUTE, THE QUESTION THAT WAS CERTIFIED AND WHAT THE FACTUAL SITUATION WAS, WAS WHERE A JURY MADE A FINDING. NOW, YOU ARE STAYING IS A DISTINCTION WITHOUT A DIFFERENCE, BUT WE DID NOT ADDRESS THE GLOBAL ISSUE, WHICH IS WHEN A DEFENDANT DOESN'T PUT THE ENTITY ON THE VERDICT FORM, AND THERE ARE MANY CASES, OBVIOUSLY IF YOU HAD A CASE THAT WAS WORTH \$3 MILLION, AND YOU HAD SETTLED WITH THE MORE RESPONSIBLE DEFENDANT, AND GOT \$100,000 SETTLEMENT, YOU WOULD BE VERY, VERY HAPPY, IF THE DEFENDANT DIDN'T PUT ANYONE ELSE ON THE VERDICT FORM. YOU WOULD, BECAUSE THEN YOU WILL GO BACK AND WHAT THEY ARE SAYING IS HAVE JOINT AND SEVERAL LIABILITY, AND THEY WILL BE LIABLE FOR THE WHOLE THING, SO THAT, YOU KNOW, IN TERMS OF WHO IS TO BENEFIT AND WHETHER WE ARE DEALING WITH STATUTORY CONSTRUCTION, I AM HAVING PROBLEMS, UNDERSTANDING THAT, IF THE DEFENDANT DOESN'T INVOKE THE BENEFITS OF A STATUTE THAT WAS MEANT TO BENEFIT THE DEFENDANT, WHY YOU DON'T GO BACK TO SQUARE ONE, WHICH IS THE WAY IT WAS BEFORE 768.61.

LET'S START WITH, I WANT TO CUT TO THE CHASE HERE. LET'S START WITH THE PROPOSITION THAT WELLS AND NASH CLEARLY PRECLUDE ANY SET OFF AGAINST NONECONOMIC DAMAGES IN THIS CASE. AND LET'S ARGUE THE QUESTION WHETHER GOUTE GIVES THIS DEFENDANT THE OPTION TO REJECT 768.81'S ESTABLISHMENT OF SEVERAL LIABILITY FOR NONECONOMIC DAMAGES, IN FAVOR OF AN ABROGATING JOINT AND SEVERAL LIABILITY. I DIDN'T MAKE THAT VERY CLEAR. FOR YEARS THE DEFENSE BAR SAYS IT READ JOINT AND SEVERAL LIABILITY. I CAME UP HERE AND ARGUED THE WOOD VERSUS DISNEY WORLD CASE. THE COURT REFUSED TO ABOLISH JOINT AND SEVERAL LIABILITY. THE LEGISLATURE FINALLY ABOLISHED JOINT AND SEVERAL LIABILITY IN PART, IN FAVOR OF SEVERAL LIABILITY. MY PLAINTIFF SETTLES WITH THIS HOSPITAL ON THE BASIS THAT THE HOSPITAL'S LIABILITY FOR NONECONOMIC DAMAGES IS ONLY SEVERAL, BECAUSE THE LAW IS 768.81 IS THAT, IF THEY PLEAD AND PROVE THE LIABILITY OF A NONPARTY, THEIR LIABILITY IS ONLY SEVERAL. I SETTLE MY CASE WITH THE HOSPITAL, BASED ON WHAT THE LAW IS. THE DEFENDANT NOW COMES IN THIS COURT AND SAYS, NO, 768.81 IS NOT

THE LAW OF FLORIDA. ALL IT DOES IS GIVE THE DEFENDANT AN OPTION! WE CAN OPT OUT OF WHAT THE LEGISLATURE DID WHEN IT ABROGATED JOINT AND SEVERAL LIABILITY, AND WE CAN CHOOSE TO GO BACK UNDER THE OLD SYSTEM THAT WE COMPLAINED ABOUT FOR DECADES, AND SAY AH-OH, NOW WE ARE SUBJECT TO JOINT AND SEVERAL LIABILITY, BECAUSE WE DIDN'T COMPLY WITH NASH, DELIBERATELY SO.

CAN YOU RESPOND TO JUSTICE WELLS'S QUESTION, WHICH IS YOU ALSO KNEW AT THE TIME THAT YOU SETTLED, THAT THERE WAS NOT, THAT THERE WAS STILL JOINT AND SEVERAL LIABILITY, REGARDING ECONOMIC DAMAGES. YOU KNEW THAT AS WELL, BECAUSE THAT IS WHAT IT SAYS IN THE STATUTE, SO WHY ISN'T JUSTICE WELLS'S SUGGESTION CORRECT THAT AS TO ECONOMIC DAMAGES, YOU CAN STILL SET OFF?

BECAUSE WE KNEW THAT THAT THIS DEFENDANT CHOSE TO WAIVE ANY RIGHTS IT HAD UNDER 76 -- ANY RIGHTS IT HAD UNDER 768.81, TO PROVE THAT THIS HOSPITAL WAS JOINTLY AND SEVERALLY LIABLE AS A TORTFEASOR.

BUT THE SET OFF IS NOT UNDER 768.81. THE SET OFF IS UNDER THE SET OFF PROVISIONS OF THE STATUTE, CORRECT?

YES, BUT THEY WERE ENACTED AT A TIME WHEN JOINT AND SEVERAL LIABILITY WAS THE LAW.

BUT THEY WERE, THEY ARE STILL ON THE BOOKS. RIGHT?

IF THEY WEREN'T ON THE BOOKS, THIS COURT WOULDN'T HAVE HAD TO DECIDE WELLS AND NASH AND GOUTE.

THAT IS SORT OF --

OKAY. HERE IS THE DILEMMA THAT THIS POSITION PRESENTS TO THE PLAINTIFF. THE PLAINTIFF SETTLES UNDER SEVERAL LIABILITY BECAUSE THAT IS THE LAW OF FLORIDA. JOINT AND SEVERAL LIABILITY DOESN'T EXIST WITH RESPECT ANYMORE, UNLESS THE DEFENDANT GETS A FINDING OF LIABILITY AGAINST A JOINT TORTFEASOR. THEY WALK IN TWO DAYS BEFORE TRIAL AND SAY, JUDGE, WE WITHDRAW OUR MOTION TO AMEND TO ADD THE HOSPITAL AS A FABRE DEFENDANT, BECAUSE WE NOW WANT TO OPT BACK INTO THE SYSTEM THAT THE LEGISLATURE ABROGATED. AND WE WANT THIS CASE TO BE A JOINT AND SEVERAL LIABILITY CASE, AT WHICH POINT THE PLAINTIFF SAYS, TWO DAYS BEFORE TRIAL, WELL, IF THAT IS WHAT THEY ARE GOING TO DO, I WANT TO TAKE THE BENEFIT OF 768.81, AND I WANT TO PLEAD AND PROVE THE LIABILITY OF THE HOSPITAL WITH WHOM I HAVE SETTLED IN AS LITTLE AMOUNT AS POSSIBLE!

YOU SEE, THE PROBLEM THAT I HAVE WITH THAT, MR. EATON, IS THE FACT THAT, WHATEVER, WHOEVER IS ON THE VERDICT FORM, IS NOT GOING TO HAVE ANY FACT ON THE ECONOMIC DAMAGES, AND SO IF THEY DO IT, I MEAN, WHAT THEY HAVE DONE HERE IS THAT THEY HAVE WAIVED THEIR RIGHT BY NOT HAVING THEM ON THERE, TO, UNDER NASH, TO AN APPORTIONMENT OF THE NONECONOMIC DAMAGES, BUT THE ECONOMIC DAMAGES, UNDER OUR CASE LAW, ALWAYS REMAINED THE SAME, BECAUSE THE LEGISLATURE SAID THAT JOINT AND SEVERAL LIABILITY STILL APPLIES.

NOT IF THE HOSPITAL IS FOUND ZERO PERCENT AT FAULT. GOUTE, SO HERE IS THE DILEMMA THAT THIS PRESENTS TWO DAYS BEFORE TRIAL, WHEN SHE WITHDRAWS HER MOTION TO AMEND TO ADD A FABRE DEFENDANT. JUDGE, THE PLAINTIFF SAYS, OKAY, I WANT TO PUT THE HOSPITAL ON THE VERDICT FORM AND PROVE ZERO PERCENT LIABILITY. I WANT A FINDING OF ZERO PERCENT LIABILITY AGAINST THIS HOSPITAL, SO THAT THERE WILL BE NO SET OFF UNDER GOUTE. DOES THAT MAKE ANY SENSE? WHEN HAS A PLAINTIFF EVER BEEN REQUIRED TO PLEAD AND PROVE THE NONLIABILITY OF A NONPARTY TO A LAWSUIT, BUT IF YOU EXCEPT THIS DEFENDANT'S CONTENTION THAT THEY CAN OPT OUT OF COMPARATIVE FAULT AND BACK INTO JOINT AND

SEVERAL LIABILITY THAT, IS WHAT YOU ARE GOING TO HAVE.

BUT ISN'T THAT ONLY A PROBLEM IF YOU WANT TO RECEIVE COMPENSATION GREATER THAN WHAT A JURY DETERMINES TO BE THE ECONOMIC LOSS?

THIS COURT HAS SAID, IN ALL THREE OF THE DECISIONS IN THIS TRILOGY, THAT THE SETTLEMENT OF A CASE CAN'T BE COMPARED TO THE JUDGMENT, BECAUSE SETTLEMENTS ARE MADE FOR ALL KINDS OF DIFFERENT REASONS, OTHER THAN -- -- ALL KINDS OF DIFFERENT REASONS, OMPB --

HOW, UNDER YOUR SCENARIO, A PLAINTIFF NOT MADE WHOLE, IF THE ECONOMIC DAMAGE IS DETERMINED BY A JURY? I THINK THAT IS WHAT JUSTICE WELLS WAS ASKING.

THAT IS THE OLD DOUBLE RECOVERY ACTION, AND THIS COURT HELD THAT A PLAINTIFF SHOULD NOT GET DOUBLE RECOVERY, AND THAT IS THE COURT'S POSITION THREE TIMES.

DIDN'T WE ADDRESS IT IN THE CONTEXT OF NONECONOMIC DAMAGES?

YES.

AND ISN'T IT REALLY A VERY DIFFERENT CONTEXT OF NONECONOMIC DAMAGES BECAUSE KNOWNS ARE KNOWN. -- BECAUSE THOSE ARE KNOWN. NONECONOMIC DAMAGES, PAIN AND SUFFERING, THOSE ARE VERY PALATABLE, BUT WHAT THE PLAINTIFF PACE OUT IN CASH BECAUSE OF A KNOWN INJURY, SO IF IT IS KNOWN TO BE \$250,000, WHY SHOULDN'T THE PLAINTIFF RECOVERY \$500,000?

BECAUSE THIS NONPARTY MAY NOT HAVE BEEN A JOINT TORTFEASOR. IT IS THEIR BURDEN TO PROVE THAT THERE WAS A JOINT TORTFEASOR. THAT IS WHAT GOUTE SAYS. NOW, IF YOU ARE GOING TO MAKE A DISTINCTION BETWEEN THAT CASE AND THIS CASE, YOU WILL HAVE ENDORSED THE DEFENDANT'S POSITION THAT THEY CAN OPT IN OR OUT OF THE LAW OF FLORIDA, REPRESENTED BY 768.81. IN ORDER TO GET BACK UNDER JOINT AND SEVERAL LIABILITY, AND I DON'T SEE HOW THIS COURT CAN LEGITIMATELY SAY THAT THE LEGISLATURE DIDN'T STATE THE LAW OF FLORIDA HERE, WHEN IT ENACTED THE COMPARATIVE FAULT STATUTE AND ABROGATED JOINT AND SEVER LIABILITY, THAT ALL IT DID WAS GIVE THE -- JOINT AND SEVERAL LIABILITY, THAT ALL IT DID WAS GIVE THE DEFENDANT AN OPTION TO OPT BACK INTO PARTICIPATION, UNDER JOINT AND SEVERAL LIABILITY.

BUT ON THE OTHER HAND, AREN'T YOU ASKING IF THE DEFENDANT CHOOSES NOT TO BE OPTED OUT OF THE APPORTIONMENT STATUTE?

WHY CAN'T THE PLAINTIFF OPT BACK IN THEN, AND PROVE THE NONLIABILITY OF THE HOSPITAL IN THIS CASE AND NOT GET THE SET OFF? THAT IS THE PART I DON'T UNDERSTAND. THIS OPT, IF THEY CAN OPT IN OR OPT OUT, WHY CAN'T THE PLAINTIFF OPT BACK IN?

WHAT WOULD BE THE EFFECT, IF THE PLAINTIFF IN THE SETTLEMENT BEFORE TRIAL, APPORTIONED ALL OF THE SETTLEMENT PROCEEDS IN AGREEMENT WITH THE TWO NONECONOMIC DAMAGES? WHAT WOULD, IN OTHER WORDS, TAKE THAT AS A HYPOTHETICAL HERE, IF THAT HAD --

THAT HAS BEEN ADDRESSED BY THE WELLS DECISION, YOUR HONOR, AND THE PLAINTIFF CAN'T DO THAT ANYMORE. THE APPORTIONMENT IS EFFECTED AUTOMATICALLY BY THE LAWSUIT AND THE JUDGMENT AND THE LAWSUIT THAT IS ALREADY TRIED, PURSUANT TO THE ECONOMIC AND NONECONOMIC DAMAGES THAT ARE AWARDED, SO I THINK THAT QUESTION HAS BEEN ANSWERED AS WELL, AND THERE IS ANOTHER CASE UP HERE, AND FINALLY THIS NOTION THAT THE FORGIVENESS OF THE HOSPITAL DEBT CAN BE TREATED AS A COLLATERAL SOURCE AND OFFSET UNDER THE COLLATERAL SOURCE STATUTE, I BELIEVE THIS COURT PUT THAT QUESTION TO REST

IN CHESTER VERSUS DOYLE. IT WAS A 766 CASE NOT A 768 CASE, BUT THE COLLATERAL SOURCE STATUTES ARE EXACTLY THE SAME IN THOSE TWO CHAPTERS, AND THE COURT HELD THAT SETTLEMENT WITH A HOSPITAL IS NOT A COLLATERAL SOURCE WHICH HAS TO BE SET OFF -- WHICH HAS TO BE SET OFF UNDER THE COLLATERAL SOURCE STATUTE, AND I THINK THAT QUESTION HAS ALREADY BEEN PUT TO REST. THERE IS ANOTHER ISSUE HERE. THERE WAS A JOINT OFFER OR PROPOSAL FOR SETTLEMENT IN THIS CASE BY THE TWO PLAINTIFFS TO THE TWO DEFENDANTS.

HOW IS THIS CASE DISTINGUISHED BETWEEN WILLIS SHAW EXPRESS?

I ACKNOWLEDGE THAT THIS HAS BEEN DECIDED AGAINST ME IN WILLIS SHAW EXPRESS, BUT I WANT THE COURT TO KNOW THAT THE ARGUMENT I HAVE MADE IN THIS CASE IS INTELLECTUALLY HONEST AND SINCERE, IN THAT -- INTELLECTUALLY HONEST AND SINCERE, IN THAT I THINK THE COURT NEEDS TO ADDRESS THE PROBLEM, AND I WOULD LIKE TO SPEND THE LAST THREE MINUTES THAT I HAVE --

THE PROBLEM IS IN YOUR APPEAL, YOU MAKE AN ARGUMENT ABOUT HOW WE SHOULD NOT GO BACK AND OVERRULE OR RECEDE FROM GOUTE AND THOSE CASES WHICH ARE SO RECENT, GOUTE 2001, AND YOU SAY THE INKING HAS -- THE INK HAS BARELY DRIED ON G ONLY UMPLT FE - - ON GOUTE. ARE WE NOT TO STAND HERE UNDER WILLIS SHAW?

NO. I WANT THE COURT TO UNDERSTAND THAT MY ARGUMENT IS INTELLECTUALLY HONEST AND SINCERE, AND I THINK THE COURT, IN OPPRESSIVE AND BUSINESS, HAS NOT THOUGHT THIS PROBLEM THROUGH ADEQUATELY AND THOROUGHLY, AND IT HAS CREATED A STRAIGHT JACKET FOR LAWYERS WHICH PREVENTS MAKING RATIONAL SETTLEMENT OFFERS UNDER THE OFFER-OF-JUDGMENT STATUTE. BY REQUIRING SEPARATE PLAINTIFFS AND SEPARATE DEFENDANTS TO MAKE SEPARATE OFFERS TO EACH OF THE SEPARATE PARTIES IN THE CASE, YOU HAVE PUT A STRAIGHT JACKET ON LAWYERS. IN EVERY OTHER CONTEXT THAT I AM AWARE OF, AN OFFEROR IS THE MASTER OF THE TERMS OF HIS OFFER, AND YOU NEED TO RETHINK AND GIVE SOME FLEXIBILITY IN MAKING THESE OFFERS OF JUDGMENT, OR THIS STATUTE SIMPLY WILL NOT WORK. TAKE FOR -- SIMPLY WILL NOT WORK. TAKE FOR EXAMPLE WE HAVE A DEFENDANT, INDIVIDUAL DOCTOR AND HIS PA WHO ARE DEFENDANTS IN THE CASE. THEY ARE JOINT AND SEVERALLY LIABLE BECAUSE THE PA IS LIABLE FOR THE DOCTOR'S ACTIONS.

THAT ISSUE OF SOMEONE VICARIOUSLY LIABLE, WAS THAT WILLIS?

NO.

THAT IS NOT WILLIS, BUT THE FIFTH DISTRICT JUST READ WILL TOYS MEAN THAT YOU HAVE GOT TO MAKE SEPARATE PROPOSALS TO EACH DEFENDANT IN THAT SITUATION, BECAUSE THAT IS WHAT -- JUST READ WILLIS TO MEAN THAT YOU HAVE GOT TO MAKE SEPARATE PROPOSALS TO EACH DEFENDANT IN THAT SITUATION, BECAUSE THAT IS WHAT IS STATED IN WILLIS. MY ARGUMENT IS BROAD, WITH A HUSBAND AND WIFE OUGHT TO BE ABLE TO SAY, LOOK, I DON'T WANT TO MAKE SEPARATE PROPOSALS FOR SETTLEMENT TO YOU BECAUSE I DON'T WANT I DON'T WANT YOU -- BECAUSE I DON'T WANT YOU TO ACCEPT ONE AND SETTLE ON THE OTHER CASE.

CAN'T YOU MAKE OFFERS CONTINGENT UPON ACCEPTING BOTH?

NO, YOU CAN'T, NOT UNDER WILLIS SHAW EXPRESS.

YOU CAN MAKE AN OFFER TO THE HOSPITAL IN THIS CASE THAT WE ARE NOT GOING TO ACCEPT YOUR OFFER OF \$200,000, UNLESS YOU ALLOCATE IT IN THIS MANNER.

WE ARE TALKING ABOUT PROPOSAL FOR SETTLEMENT WITH THE DOCTORS, THE NEGLIGENT

DOCTOR THAT WE FILED AGAINST.

WHAT NEEDS TO BE CHANGED? STATUTE, RULES OR --

THE RULE.

THE LANGUAGE IN THE RULE.

IT IS THE LANGUAGE IN THE RULE. THE BAR DID A SLOPPY JOB OF DRAFTING THE RULE IN THE FIRST PLACE. IT CREATED AN ENORMOUS AMOUNT OF CONFUSION UP HERE.

THEY THOUGHT THEY WERE SOLVING SOMETHING, SO ISN'T IT YOUR REMEDY TO GO BACK AND GET RULE AMENDED? ANOTHER RULE IS BEFORE THE COURT RIGHT NOW WITH AN AMENDMENT, PROPOSED CHANGE, TO CLEAR UP SOME OF THESE PROBLEMS BUT NOT ALL OF THEM. HOW CAN THESE TWO DEFENDANTS NOT MAKE A JOINT OFFER TO MY DEFENDANT? IT IS A JOINT DOCTOR AND PA. IS HE GOING TO OFFER HALF? THE DEFENDANT OUGHT TO BE ABLE TO SAY I DON'T WANT TO MAKE SEPARATE OFFERS TO YOU. YOU CAN ACCEPT ONE --

COULD THE CODEFENDANTS WHO ARE NOT VICARIOUSLY LIABLE MAKE A SINGLE OFFER? COULD THAT BE THE CASE?

THE ONLY SITUATION IN WHICH A RULE, AND I BELIEVE THIS WAS THE WAY THE RULE WAS INITIALLY WRITTEN, THE ONLY SITUATION IN WHICH SEPARATE OFFERS HAVE TO BE MADE IS WHEN THE COMPARATIVE FAULT STATUTE IS IMPLICATED AND YOU HAVE GOT SEVERAL LIABILITY AND NOT JOINT AND SEVERAL LIABILITY. AND SOME DEFENDANTS MAKE IT IN AND SOME DEFENDANTS MAKE IT OUT. THOSE YOU HAVE TO SORT OUT. IN ALL OTHER CASES, WHERE YOU HAVE GOT A HUSBAND AND WIFE WHO MAY WANT TO SETTLE THEM ALL OR NOTHING OR TWO DEFENDANT WHO ARE VICARIOUSLY LIABLE, YOU OUGHT TO GIVE THE LAWYER SOME FLEXIBILITY. LAWYERS CAN GET CASES SETTLED, IF YOU LET THEM FASHION THEIR OWN OFFERS OF SETTLEMENT. YOU PUT THEM IN A STRAIGHT JACKET. MR. McGRANE TOLD ME ON THE WAY OUT HE HAS GOT A CASE IN WHICH HE HAD TO MAKE TWELVE SEPARATE OFFERS OF JUDGMENT, IN ORDER TO AVOID HIS ENO RESPONSIBILITY UNDER THIS CASE, AND I WOULD RESPECTFULLY URGE THE COURT TO GIVE THIS MATTER SOME ADDITIONAL THOUGHT. THANK YOU.

THANK YOU.

CHIEF JUSTICE: COUNSEL AND MR. MARSHAL, HOW MUCH TIME IS LEFT? ABOUT THREE MINUTES.

LET ME ASK THE QUESTION, WOULD YOUR POSITION ENTITLE SOMEONE WHO HAS BEEN INJURED, A PLAINTIFF, TO EVER CONTEST THE JOINT AND SEVERAL LIABILITY UNDER THE STATUTE, OR WHAT, YOU ASSERT THAT THE DEFENDANT HAS THE RIGHT TO EITHER SAY THIS APPLIES OR THIS DOESN'T APPLY, PUT THEM ON THE VERDICT, NOT PUT THEM ON THE VERDICT. IF YOU COME IN FOR A FULL SET OFF AND THE PLAINTIFF SAYS THAT IS NOT A JOINT AND SEVERALLY LIABLE PERSON OR ENTITY, DO THEY HAVE AN OPPORTUNITY TO PROVE THAT AT SOME POINT IN TIME?

WELL, THAT WOULD HAVE HAD TO HAVE BEEN DONE DURING THE COURSE OF THE TRIAL. I DON'T THINK IT CAN BE DONE POST TRIAL.

SO YOU ARE SAYING THAT THE PLAINTIFF CAN INSIST, EVEN WITH SOMEONE YOU HAVE SETTLED WITH, WOULD GO ON THE VERDICT FORM. THAT IS THE REMEDY?

SUPPOSEDLY. THE STATUTE IS SILENT AS TO WHO SHOULD ACTUALLY IMPLEMENT IT, BUT IT WAS ENACTED ORIGINALLY, AS EVERYBODY RECOGNIZES, FOR THE DEFENSE, GIVEN THE BURDEN OF THE DISNEY WORLD CASE.

THE ARGUMENT THAT IS MADE IS THAT REALLY, ALTHOUGH THAT WAS THE UNDERLYING REASON FOR THE STATUTE, TO, REALLY, CURE UP SOME CERTAIN IN HE CAN ITS, THAT -- INEQUITIES THAT, WE DON'T HAVE JOINT AND SEVERAL LIABILITY ANYMORE. WE HAVE GOT THE STATUTE, AND THIS GOES BACK TO, REALLY, WHAT JUSTICE ANSTEAD WAS ASKING BUT IN A DIFFERENT WAY, WHICH IS THAT THE COMMON LAW DOCTRINE DOESN'T EXIST.

RESPECTFULLY, I THINK IT DOES, AND IN LISTENING TO ALL OF THE QUESTIONS, I THINK I HAVE COME UP WITH A DIFFERENT WAY TO PRESENT IT. I THINK EVERYBODY IS IN AGREEMENT THAT, REGARDLESS OF WHETHER WE USE OR DON'T USE 768.81, THERE IS JOINT AND SEVERAL LIABILITY, AS FAR AS ECONOMIC DAMAGES ARE CONCERNED. NOW, THIS COURT, IN, EXCUSE ME, IN NASH, BECAUSE THE DEFENDANT DID NOT INCLUDE A THIRD PARTY ON THE VERDICT FORM, AND WAIVED OR DIDN'T PLEAD AND PROPERLY PROVE THE THIRD PARTY'S FAULT, THIS COURT, IN NASH, SAID, AND ONLY SAID THAT THAT PARTY DEFENDANT COULD NOT APPORTION FAULT, WITH RESPECT TO NONECONOMIC DAMAGES. IN EFFECT, THE COURT, IN NASH, HELD THAT THE DEFENDANT'S LIABILITY FOR NONECONOMIC DAMAGES WAS JOINT AND SEVERAL. NOW, NASH, UNLIKE OR CONTRARY TO WHAT COUNSEL HAS INDICATED, NEVER ADDRESSED THE SET OFF ISSUE. I HAVE SKIMMED THROUGH THE WHOLE CASE AGAIN. I MEAN, THIS CASE DID NOT INVOLVE UNDER LYING SETTLEMENT. SET OFF WAS NOT AN ISSUE AT ALL. SO WE SUBMIT THAT WHEN, AS IN NASH AND AS IN THIS CASE, 768.81 DOESN'T APPLY, EITHER BECAUSE THE DEFENDANT INTENTIONALLY CHOSE NOT TO EXERCISE THAT OPTION OR BECAUSE THE DEFENDANT CHOSE OR THE DEFENDANT FAILED TO PROVE THE NEGLIGENCE OF THE NONPARTY, THE DEFENDANT'S LIABILITY WITH RESPECT TO NONECONOMIC DAMAGES, IS JOINT AND SEVERAL, AND THIS COURT, IN GOUTE, RECENTLY RECOGNIZED THAT THE SET OFF STATUTES ARE ALIVE AND WELL IN EVERY INSTANCE IN WHICH THE DEFENDANTS' LIABILITY IS JOINT AND SEVERAL, AND TO QUOTE THE COURT IN GOUTE, IT SAID WE HAVE DETERMINED THAT THE SET OFF STATUTES APPLIED ONLY WHERE THE LIABILITY CONTINUED TO BE JOINT AND SEVERAL. THE COURT GOES ON TO SAY, WHEN ANALYZING JUDGE ANSTEAD'S CONCURRING OPINION IN WELLS, THE GOUTE UNANIMOUS COURT SAID, IF THE DEFENDANT IS REQUIRED TO PAY DAMAGES ON THE BASIS OF JOINT AND SEVERAL LIABILITY, THAT DEFENDANT'S RIGHT OF SET OFF REMAIN UNCHANGED. SO, AGAIN, IT IS OUR POSITION THAT, BECAUSE THERE HAS NOT BEEN AN APPORTIONMENT OF FAULT IN THIS CASE, THERE HAS NOT BEEN AN APPORTIONMENT WITH REGARD TO ECONOMIC VERSUS NONECONOMIC DAMAGES, THE DEFENDANT'S LIABILITY IN THIS CASE FOR THE ENTIRE JUDGMENT, IS JOINT AND SEVERAL, AND THEREBY TRIGGERING THE SET OFF STATUTES, ENTITLING THE DEFENDANT TO A FULL SET OFF. AS FAR AS THE MR. CHIEF JUSTICE

WE ARE GOING TO HAVE TO, SO WE HAVE ALREADY GONE OVER ON THAT, SO THANK YOU BOTH VERY MUCH. THE COURT WILL NOW STAND IN RECESS.

MARSHAL: PLEASE RISE.