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Timothy Thomas Koile v. State of Florida

THE NEXTCASE ON THIS MORNING'S DOC KET IS KOILE VERSUS STATE OFFLORIDA. I WILL SAY WE HAVE ONLY TWO CASES THIS MORNING, AND THE REASON FOR THAT IS THAT THE OTHER TWO CASES INVOLVED ATTORNEYS FROM SOUTH FL ORIDA AND THEY REQU ESTED CONTINUEANCES BECAUSE OF PROBLEMS STILL BEING FA CED DOWN IN SOUTH FLORIDA.

MY NAME IS M R. L UKAS HOW. I REPRESENT MR. COIL. I HAV E TWO QUE ST IONS CONSIDERED BEFORE THIS COURT, THE FIRST BEING WHETHER T HE R ESTITUTION S TATUTE , AUT HORIZES A REW AR D O F LOS T WAGES TO THE NEX T O F KIN , WHO VOLUN TARI LY ATT EN D T HE T RIAL AND T HE S EC ON D QUESTION BEING WHETHER THE SAME S TATUTE A UTHO RIZE S L OS T FUTURE WAGES TO T HE S TA TE .

SO WE ARE H ERE P UREL Y O N A M ATTER O F S TA TUTO RY CONSTRUCTION?

THAT IS CORRECT , AND T HE WAY THA T T HI S CASE DEV ELOPED BEL OW W AS THAT T HERE W AS A P LE A A GREEMENT, AND P AR T OF T HE PLEA AGREEMENT WAS THA T THE D EFENDANT A GREE D T O T HERE B EING R ES TI TU TION CON NE CTED WITH P ROBA TI ON , AND THA T T HE C OURT WAS T HEN G OI NG TO SET THE A MO UN T O F T HE R ESTITUTION.

THAT I S CORRECT.

OKAY. SO P UR ELY W HAT W AS T HE N LEF T FOR THE TRIAL J UD GE T O D O F FOLLOING THE PLE A AGR EEME NT AND THE ACCEPTANCE OF T HE PLEA WAS TO M AK E A DETERMINATION THAT AS T O WHAT STATUTE A LL OW ED I N T ERMS OF R ES TI TU TION ? > > THAT'S CORRECT.

OKAY. AND YOUR C HALL ENGE AS T O THE STA TE'S C LA IM F OR W AG ES F OR THE LOSS O F WAG ES R EALL Y R EVOLVE S A RO UN D WHE TH ER THE STATUTORY USE OF THE W OR D REIMBURSEMENT I S SOM EH OW H AS AN EFFEC T O N WHA T THE A MOUN T OF RES TITU TI ON FOR L OS T WAGES CAN BE ; AM I U NDERSTANDING YOUR AGREEMENT?

THAT WOULD BE THE T HR US T OF OUR ARGUMENT , T HAT' S CORRECT, YOUR H ONOR. WE WOULD S UBMIT T HA T T HE P RECISE USAGE OF THE WOR D REIMBURSE WAS D EL IB ER ATEL Y CHOSEN BY THE LEGISLATU RE , AND THAT THEY W ER E N OT ANTICIPATING THAT I N A CRIMINAL PROCEED ING T HAT A COURT WOULD ENGAGE I N W HAT WOULD GENERALLY B E A WRO NGFUL DEATH ACTION. WE ARE SUBMITTING THA T T HI S TERM REI MBUR SE O NLY S UB MITS TO PAST WAGES O F A VIC TI M WHO WAS STILL L IV I NG . I N THAT THE --

BUT THERE I S N O RESTRIC TION I N THE STATUTE FOR THAT. I MEAN , I 'M HAV I NG A D IFFICULTY SEEING T HE DIFFERENCE BETWEEN R EIMBURSEMENT O F LOS S O F WAG ES AND C OM PENSAT ION F OR LOSS OF W AG ES WHI CH GENERALLY TAKES I NT O CON SIDERATION THE A MO UN T O F PAST A ND F UT UR E LOS T I NCOM E.

I N SECTION 775 T HE RE I S N O ACK NO WLED GE MENT THAT THERE IS TO BE - - DO ES NOT CON SIDER O R C ONTE MP LATE FUTURE LOSSES. IT DOES I N THE W RONG FU L DEATH STATUTE REFER TO FUTURE LOSSES S EV ERAL T IMES BUT I N T HI S P AR TI CULA R STATUTE WE WERE SUBMITTING THAT L OST WAG ES W HI CH CAN B E EASILY C AL CULA TE D WHE N LOOKED AT I N THE P AS T C AN B E SOMETHING THAT A C RI MINA L TRIAL COURT C OULD DETERMINE WITH R EL

ACTIVE EASE.

YOU ARE SAYING THAT IF THERE WAS SOMEB OD Y THA T THE V ICTIM WAS RENDE R ED P ARAPLEGIC AS A RESULT O F THE D EFENDA NT 'S A CTIO N T HA T I T C OULD O NLY - - I T C OU LD ONLY C ONSI DE R P AS T LOS T W AGES , THE Y C OU LDN' T CONSIDER THAT THE PERSON WOULD NOT BE ABLE TO WORK FOR THE REST OF HIS O R H ER LIFE?

THEY COULD , YOUR HONOR, IF THE V ICTI M W AS STILL A LIVE T HERE WOU LD B E W E BELIEVE THE S TATUTE WOULD ALLOW FOR THAT.

BUT Y OU JUS T S AI D I T O NL Y CONTEMPLATES PAS T L OS S BECAUSE I T SAYS REI MBUR SE .

THAT I S CORRECT . AS FAR AS I F T HE V ICTI M IS STILL A LIVE THE Y WOU LD HAV E OTHER CIVIL REMEDIES.

SO Y OU R A RGUM EN T W OU LD B E , AGAIN, THAT IF S OM EB OD Y W AS RENDERED A PARAPLEGIC T HA T THE RESTITUTION STATU TE ONL Y CONTEMPLATES ANYTHING U P UNTIL THE TIM E O F THE D EFENDANT'S TRIAL A ND D OESN'T, IF THERE IS A CONTINUING LOSS OF IN COM E DOES NOT REQ UI RE THA T THA T B E - - DOES NOT A LL OW T HA T THAT BE INCLUDED.

NOT UNDER T HIS STATUTE, BUT IT W OU LD ALL OW FOR R EIMBURSEMENT OR PAYMENT O F COSTS, WHICH I S AGA IN A DIFFERENT PHR ASEOLOGY FOR THE N ECES SARY MEDIC AL AND RELATED EXPENSES. HOWEVER , A S T O THE S PE CI FI C ISSUE OF A WA RDIN G R ESTITUTION O R LOST W AG ES T O THE EST ATE , W OU LD A RG UE T HAT IT IS NOT CONTE MPLA TED I N THIS STA TUTE A ND M ORE PROPERLY BROUGHT AS A WRONGFUL DEATH A CTIO N W HERE THE COURT HAS MUC H M ORE GUIDANCE. THIS STATUTE IS VERY L IMITED .

BUT U ND ER T HE P OR TION WHERE YOU T ALK A BOUT PAY IN G REA SONABLE MEDICAL AND RELATED PROFESSIONAL SERVICES , I F I N T HE CAS E O F THE P AR APLEGI C LET 'S SAY .

YES.

WOULD T HE D EFEN DA NT B E LIABLE FOR F UT UR E MED IC AL S ERVICES A ND P RO FESS IO NA L SERVICES?

YES .

SO W HY T HE DIS TINC TI ON BETWEEN NUMBER ONE AND NUMBER T HREE ? JUST B AS ED O N T HE W OR D R EIMBURSE?

YES, WE B ELIEVE T HA T WAS DELIBERATELY CHOSEN. IN OTHER WORDS , I T IS N OT - - WE D ON 'T U ND ER THE STA TU TE REI MBURSE SOMEONE FOR SOMETHING THAT IS GOING TO OCCUR IN THE FUTURE.WHEN I RETURN TO M Y O FFICE I CAN FILL OUT A FORM T OD AY T O BE REIMBURSE D FOR MY T RAVE L EXPENSES. HOWEVER, IF THE STATE WERE TO FRONT THE MONEY T HE Y WOULD BE PAYIN G I N A DV ANCE MY EXPENSES. I CAN'T B E REI MB UR SE D FOR SOMETHING AHEAD O F TIME.

S O H OW DOE S T HA T SQU AR E WITH THE PART OF THE STA TUTE THAT TALKS A BO UT T HA T DEFINES THE VIC TI M A ND INCLUDES IT A S A VICTI M T HE PERSON 'S E ST AT E I F THA T PERSON IS D ECEASE D F RO M T HI S C RIMINAL ACTIVIT Y ?

W ELL , T HE VIC TI M I S DEFINED AS THE E ST AT E ONL Y IF T HE V ICTI M O F THE O FF ENSE IS DEC EASE D , B UT I T I S T HE NEXT OF KIN I S T HE V ICTI M I F T HE VIC TIM I S D ECEA SE D AS A RESULT OF THE E VE NT . THERE IS A DISTI NCTION. IN OTHER WORDS, THE ESTAT E IS NOT THE VIC TIM WHE RE T HE VICTIM IS DECEASE D AS A RESULT OF THE OFF EN SE . THE STATUTE IS VER

Y P L A I N I N S E C T I O N 4 --

I T S A Y S T H E E S T A T E I F T H E V I C T I M I S D E C E A S E D .

R I G H T . B U T T H E N A G A I N W H E N I T D I S C U S S E S --

B U T D O Y O U M E A N Y O U A R E S A Y I N G T H A T T H A T S E C T I O N O N L Y A L I E S I F T H E V I C T I M I S D E C E A S E D B U T N O T D U E T O T H E C R I M I N A L A C T I V I T Y O F T H E D E F E N D A N T ?

T H A T W O U L D B E O U R I N T E R P R E T A T I O N .

S O I N T H A T S I T U A T I O N T H E N Y O U A R E S A Y I N G T H A T T H E P E R S O N A L R E P R E S E N T A T I V E W A S T H E W R O N G P E R S O N T O B R I N G T H E C L A I M F O R F U T U R E S U O R T , L O S S O F S U P P O R T T H A T I F T H E C H I L D R E N H A D B R O U G H T I T W O U L D H A V E F I T U N D E R A N Y P A R T S O F T H I S S T A T U T E ?

N O , Y O U R H O N O R , S E C T I O N 4 , S U B 4 O N L Y A L L O W S T H E N E C E S S A R Y F U N E R A L A N D R E L A T E D S E R V I C E S T O T H E N E X T O F K I N . T H E Y A G A I N W O U L D B E A B L E T O B R I N G A W R O N G F U L D E A T H A C T I O N W H I C H W E B E L I E V E I S T H E A P P R O P R I A T E R E M E D Y I N T H I S C A S E .

S O I T S E E M S T H A T W H O E V E R W R O T E T H E S T A T U T E I N T H E L E G I S L A T U R E S I N C E T H E N E X T O F K I N C O U L D N ' T N O R M A L L Y W O U L D N ' T B E T H E R I G H T P E R S O N T O B E S E E K I N G M O N E Y F O R F U N E R A L E X P E N S E S I T W O U L D B E T H E E S T A T E O R T H E P E R S O N A L R E P R E S E N T A T I V E S O W E A R E T O P R E S U M E W H O E V E R W R O T E T H I S S T A T U T E D I D N ' T R E A L L Y K N O W T H E L A W A B O U T H O W E X P E N S E S A R E R E C O V E R E D ? I M E A N , A N D I ' M A S K I N G T H A T -- B E C A U S E I T S E E M S T H A T I T I S O F C O U R S E I F Y O U L A Y T H I S S I D E B Y S I D E W I T H T H E W R O N G F U L D E A T H S T A T U T E I T S H O W S M A N Y , M A N Y V A R I A T I O N S B E T W E E N T H E W R O N G F U L D E A T H S T A T U T E . D I D T H E W R O N G F U L D E A T H S T A T U T E P R E C E D E T H I S S T A T U T E ? > > W E L L , T H E S T A T U T E H A S R E M A I N E D T H E S A M E S I N C E 1 9 9 9 .

W H E N W A S T H E S T A T U T E F I R S T P U T I N T O E F F E C T ?

T H A T I D O N ' T K N O W .

W A S N ' T T H A T S O M E T I M E S W E L O O K A T T H A T F O R S T A T U T O R Y C O N S T R U C T I O N H O W T H E Y U S E D S I M I L A R T E R M S R E L A T E D T O S T A T U T E S ?

T H A T I S C O R R E C T . H O W E V E R , W E T H I N K , T H O U G H , T H A T I F T H I S S T A T U T E W E R E A L I E D B Y I T S T E R M S I T W O U L D S E E M T H A T T H E L E G I S L A T U R E I S L E A V I N G T H I S W R O N G F U L D E A T H , T H E R E W A R D I N G O F F U T U R E L O S T I N C O M E T O A V E H I C L E O F T H E W R O N G F U L D E A T H S T A T U T E . T H A T W O U L D B E T H E P R O P E R W A Y T O R E C O V E R S U C H A N A W A R D . W E T H I N K T H I S I S N O T T H E A P P R O P R I A T E P L A C E I N A R E S T I T U T I O N H E A R I N G F O R A T R I A L C O U R T W H I C H H A S S O V E R Y L I T T L E G U I D A N C E A S E V I D E N C E D B Y T H E F A C T T H A T T H E 5 T H D C A D I D S E N D T H I S B A C K T O T H E T R I A L J U D G E T O I N C L U D E L O S S E S O R T A X C O N S E Q U E N C E S , E X P E N S E S , S O F O R T H A N D S T I L L E V E N W I T H T H E L I T T L E D I R E C T I O N F R O M T H E 5 T H D C A W E D O N ' T T H I N K T H A T T H E T R I A L C O U R T H A S E N O U G H G U I D A N C E T O A S S E S S A N A W A R D O F L O S T D A M A G E S .

B U T T H E P R O B L E M H E R E I S Y O U H A V E T W O C O N C E P T S U N D E R T H E W R O N G F U L D E A T H S T A T U T E . O N E I S T H E L O S S O F N E T A C C U M U L A T I O N W H I C H I S F O R A N E S T A T E A N D T H E O T H E R I S L O S S O F S U O R T W H I C H I S F O R S U R V I V O R S , A N D W H A T T H E S T A T U T E U S E S I N S U B S E C T I O N 3 I S J U S T F O R I N C O M E L O S T , S O T H E Y D O N ' T E V E N -- W H I C H W O U L D B E A G R O S S A M O U N T , N O T A N E T A M O U N T .

T H A T ' S C O R R E C T , S T R I C T L Y S P E A K I N G , Y E S .

A N D Y O U P E R C E I V E T H A T T H E D E D U C T I O N S T H A T T H E 5 T H D I S T R I C T C O N T E M P L A T E D I S P A R T

OF THIS REIMBURSEMENT ; IS THAT WHAT YOU PERCEIVED , RATHER THAN THE CONCEPT OF NET ACCUMULATIONS THAT WE ALL ALY IN WRONGFUL DEATH ACTIONS?

WELL, I DON'T - - I BELIEVE THAT THIS 5TH DCA SHOULD HAVE ANSWERED THE CERTIFIED QUESTIONS NEGATIVELY IN BOTH CASES. I DON'T THINK THEY SHOULD HAVE SENT IT BACK TO DETERMINE WHAT THE --

WHAT THE SUBTRACTI ONS SHOULD HAVE BEEN?

BUT IT WAS UNDER A THEORY OF REIMBURSEMENT IS WHY THEY SENT IT BACK ; IS THAT YOUR PERCEPTION OF THIS?

YES, THAT IS MY PERCEPTION, YES, THAT THIS SUBSECTION 3 HERE WOULD ALY ALLOW THAT AND DISAGREEING WITH THE 5TH INTERPRETATION THAT IT DOES NOT HAVE TO DO WITH FUTURE LOST INCOME.

SO YOU WOULD AGREE , THOUGH, SINCE THE VICTIM'S NEXT OF KIN, THAT THE NEXT OF KIN AT THE VERY LEAST COULD GET WHAT THE INCOME LOST BY THE VICTIM UNTIL THE TIME OF A RESTITUTION HEARING ? IN OTHER WORDS, IT IS ESTABLISHED THAT THE CHILDREN HAD SUFFERED THAT THEY HAVE LOST , BECAUSE OF THE DEATH OF THE VICTIM , AND SO THAT'S A TANGIBLE LOSS , THE LOSS OF SUPPORT , AND IT MAY NOT HAVE BEEN PRESENTED THAT WAY AND THAT MAY BE AN EVIDENTIARY PROBLEM THE STATE HAS , BUT YOU WOULD AT LEAST CONCEDE UNDER THIS THAT IF THEY DID NOT RECEIVE SUPPORT FROM THE TIME OF HIS DEATH UNTIL THE TIME OF THE RESTITUTION HEARING THAT THAT WOULD COME UNDER YOUR REIMBURSEMENT, CORRECT?

THAT IS CORRECT. THEY COULD RECOVER FOR THAT.

BUT THAT WOULD REALLY LEAVE YOU WITH SORT OF AN ONSENSICAL SITUATION IN WHICH IF THEY DIDN'T HAVE THE RESTITUTION HEARING FOR 15 YEARS THE NIT WOULD BE A MUCH GREATER AMOUNT AND SO IT SEEMS TO ME THAT THE REGULAR , COMMON LOOKING AT WHAT THE LEGISLATURE DID HERE WAS THAT THEY WERE REIMBURSING THE ESTATE FOR WHAT THE ESTATE WOULD HAVE BEEN EXPECTED TO HAVE AS INCOME ASSUMING THIS FELLOW LIVED OUT HIS NATURAL LIFE. I MEAN --

AGAIN, THIS STATUTE IS SO AS COMPARED TO THE WRONGFUL DEATH STATUTE.

BUT YOU ARE NOT ATTACKING THIS ON SOME CONSTITUTIONALITY VAGUENESS BASIS . YOU ARE DOING THIS ON A STATUTORY CONSTRUCTION BASIS.

TRUE . BUT , AGAIN WE ARE TRYING TO DETERMINE WHAT THE LEGISLATURE'S INTENT WAS AND WE DON'T BELIEVE THAT - - WE BELIEVE THAT IF THE LEGISLATURE INTENDED THE TRIAL -- THE CRIMINAL TRIAL COURT TO BE ENGAGING IN SUCH A SPECULATIVE ENDEAVOR THAT THEY WOULD HAVE PROVIDED MUCH MORE GUIDANCE AND THEY WOULD HAVE USED , INCLUDED SUCH TERMS AS FUTURE LOSS OF INCOME AND HERE THEY DIDN'T. WE ARE SUGGESTING THAT WHEN WE ARE TALKING ABOUT REIMBURSEMENT OF LOST INCOME IT IS REFERRING TO UP TO THAT POINT. WHAT HAS PREVIOUSLY OCCURRED. THE WORD REIMBURSE IS TO PUT INTO A PURSE WITH A PREFIX WITH SOME TYPE OF PAYMENT FOR WHAT HAS ALREADY OCCURRED.

WITH THAT , IF THE VICTIM LIVED AND I PROBABLY HAVE SAID THIS ALREADY, BUT THIS IS MORE TANGIBLE AND BECAUSE PARAPLEGIC , COULD NOT WORK THE REST OF HIS OR HER LIFE , YOU ARE SAYING THAT THE ONLY THING THAT THE VICTIM COULD RECEIVE IN A RESTITUTION HEARING AS OPPOSED TO A CIVIL ACTION FOR DAMAGES WOULD BE WHAT EVER TIME THAT THE RESTITUTION TOOK PLACE , JUST THE LOST INCOME UP TO THAT POINT?

THAT WOULD BE THE INTERPRETATION THAT WE ARE ADVANCING, YES.

LET ME ASK THAT OUTSIDE OF THE LOST WAGES, LET'S SAY THE PARAPLEGIC AND THERE IS ONGOING PHYSICAL THERAPY REQUIRED, ONGOING MEDICAL EXPENSES, THEN IF WE ACCEPT YOUR ARGUMENT LET'S SAY SOMEBODY IS PLACED ON PROBATION FOR TEN YEARS THAT THE ONLY THING THAT THAT PERSON COULD BE REQUIRED TO PAY WOULD BE THOSE MEDICAL -- REIMBURSE WOULD BE THOSE MEDICAL EXPENSES INCURRED UP TO THE DATE OF SENTENCING OR DETERMINATION OF RESTITUTION.

WELL, THE STATUTE AGAIN SAYS TO PAY THE NECESSARY MEDICAL AND RELATED PROFESSIONAL SERVICES.

THEY USE A DIFFERENT TERM.

THEY USE A DIFFERENT TERMINOLOGY, PAY THE COSTS WHEREAS IN NUMBER THREE THEY DELIBERATELY USE THE TERM REIMBURSE WHICH IS TO, YOU KNOW, DISTINGUISHABLE FROM PAY THE COSTS. THAT'S WHY WE ARE HINGING MUCH OF OUR ARGUMENT ON THAT DISTINCTION.

JUSTICE LEWIS HAD A QUESTION.

WE REALLY DON'T EVEN GO INTO THE POINT OF THE RESTITUTION HEARING. I MEAN, THE INCOME LOSS OCCURS AS OF -- TERMINATES THE INCOME LOSS AS OF THE DATE OF DEATH, BUT THERE IS NOTHING IN HERE THAT EVEN TAKES OR IS THERE THAT GIVES US THIS PERIOD BETWEEN THE CRIMINAL EVENT OF THE DEATH AND THE HEARING ITSELF?

NOT SPECIFICALLY.

THERE IS NOTHING IN HERE THAT COVERS THAT.

RIGHT. THAT'S NOT SPECIFICALLY, AND I WOULD POINT OUT THAT --

I MEAN IF IT ENDS AT THE TIME OF DEATH THERE IS NO INCOME THAT IS TO BE EARNED AFTER ONE IS DECEASED.

THAT IS TRUE.

WHAT WOULD YOU BE REIMBURSING THEN?

WE THINK THE CIVIL COURT WOULD BE THE APPROPRIATE AVENUE TO PURSUE ANY ADDITIONAL RECOVERIES. WE JUST DON'T THINK THAT THE LEGISLATURE INTENDED THE CRIMINAL RESTITUTION HEARING TO INVOLVE ITSELF.

REIMBURSE THE VICTIM FOR INCOME LOST BY THE VICTIM AS A RESULT OF THE OFFENSES OR IT DOESN'T STOP ON THE DAY OF THE OFFENSE. IT IS JUST SIMPLY SAYING IT IS GOING TO -- AND IF THEY USE PAY YOU WOULD AGREE THIS WHOLE THING WOULD BE IN A DIFFERENT POSTURE BUT YOU'RE REALLY AGAIN AS TO SUBSECTION 3, RELYING ON THE TERM REIMBURSE.

AND WE'RE SUGGESTING THIS IS TO ALIVING VICTIM, NOT TO A DECEASED VICTIM. IT WOULD NOT MAKE --

DOESN'T THE DEFINITION OF VICTIM PRECLUDE THAT ARGUMENT? ISN'T THE DEFINITION OF VICTIM BROAD ENOUGH TO INCLUDE THE ESTATE AND NEXT OF KIN IF THE VICTIM DIES?

IF THE VICTIM DIES THEN THE RECOVERY IS LIMITED .

JUST GETTING TO YOU SAYING THIS SHOULD BE ONLY TO THE VICTIM , AND NOT TO ANYBODY ELSE, BUT IT SEEMS TO ME THAT THE LEGISLATURE PRECLUDED THAT ARGUMENT BY SPECIFICALLY DEFINING THE TERM VICTIM IN THE STATUTE TO INCLUDE THE ESTATE AND THE NEXT OF KIN IF THE VICTIM IS DECEASED.

THE ESTATE IF THE VICTIM IS DECEASED. AND WE'RE ARGUING THAT HE IS DECEASED FROM SOME CAUSE OTHER THAN THAT WAS RELATED TO THE OFFENSE.

I UNDERSTAND THAT, BUT I'M ADDRESSING YOUR ARGUMENT THAT IT IS ONLY THE VICTIM OF THE CRIME , AND IF THE VICTIM DIES THAT'S IT , THERE IS NO OTHER RECOVERY AND THE STATUTORY DEFINITION SEEMS BROADER THAN THAT .

WELL , I WOULD DISAGREE WITH THAT INTERPRETATION INsofar as sub 3 goes BECAUSE THE VICTIM IN THAT CASE, IF THE VICTIM CAN MEAN AN ESTATE IN EVERY SITUATION THE STATUTE WOULDN'T MAKE SENSE. YOU CANNOT SAY REIMBURSE THEM OR IF THE VICTIM MEANING THE ESTATE SUFFERS A PHYSICAL INJURY AND A STATE CAN'T SUFFER A PHYSICAL INJURY THE CONTEXT HAS TO DETERMINE HOW WE ARE TO USE THE WORD VICTIM.

WELL, YOU HAVE USED UP MOST OF YOUR REBUTTAL TIME. YOU MAY WANT TO SIT DOWN. YOU HAVE CERTAINLY RAISED SOME VERY INTERESTING STATUTORY CONSTRUCTION ARGUMENTS THIS MORNING. MISS DAVENPORT . >> MAY IT PLEASE THE COURT , I REPRESENT THE STATE OF FLORIDA. IT IS OUR POSITION THAT THIS STATUTE IS VERY CLEAR. IT IS BROAD. IT IS DESIGNED TO COVER EXACTLY THIS TYPE OF SITUATION. IT SAYS WE ARE GOING TO REIMBURSE THE VICTIM FOR INCOME LOSS BY THE VICTIM AS A RESULT OF THE OFFENSE. THIS VICTIM WAS MURDERED AS A RESULT OF THE OFFENSE. WE HAD TESTIMONY HE WOULD HAVE WORKED UNTIL HE WAS 60 AND HE WENT THROUGH ALL OF HOW MUCH HE EARNED.

LET'S GO BACK . THE STATE'S ARGUMENT IS THIS IS A PLAIN AND UNAMBIGUOUS STATUTE.

YES.

THEN HELP ME WITH THE FOLLOWING : THAT THEY USE THE WORD PAY FOR SUBSECTIONS 1 AND 2 AND THEY USE THE WORD REIMBURSE FOR SUBSECTION 3 . NOW , WHY WOULD N'T THEY JUST USE PAY THE VICTIM FOR INCOME LOSS, WHY WOULD N'T THEY USE REIMBURSE FOR THAT SECTION , BECAUSE WE ARE AGAIN YOU ARE SAYING IT IS A CLEAR STATUTE SO EVERY TIME WE SAY OVER AND OVER IF THE LEGISLATURE USES DIFFERENT LANGUAGE WITHIN THE SAME STATUTE THEN WE'VE GOT TO ASSUME THAT THERE WAS SOME REASON THAT THEY USED IT. SO TELL ME HOW DO WE GET AROUND THAT ARGUMENT THAT THEY USE A DIFFERENT WORD REIMBURSE WHICH USUALLY TENDS TO LOOK RETROSPECTIVELY .

BECAUSE I THINK IF THEY WOULD HAVE SAID PAY THE COSTS OF INCOME LOSS IT WOULD N'T HAVE MADE MUCH SENSE. BY SAYING PAY THE COSTS IT ALSO ENCOMPASSES WHEN YOU HAVE THIRD-PARTY COSTS. IF YOU LOOK AT NUMBERS ONE AND TWO IT TALKS ABOUT PHYSICAL AND OCCUPATIONAL THERAPY AND MEDICAL COSTS AND THINGS LIKE THAT. I THINK THEY USE THAT LANGUAGE TO AVOID AN ARGUMENT, WELL , HE HAD INSURANCE SO HE DIDN'T HAVE TO PAY THAT COST SO IT IS NOT , YOU KNOW , HE IS NOT REIMBURSED FOR THAT BECAUSE HE DIDN'T PAY IT AND THE MEDICAL INSURER ISN'T A VICTIM. I THINK THEY USED THE LANGUAGE TO AVOID THAT KIND OF A PROBLEM VERSUS REIMBURSING THE INCOME LOSS IS SOMETHING THAT'S PERSONAL TO THE VICTIM HIMSELF . SO THEY USE THE WORD REIMBURSE. HE LOST IT WHEN HE WAS MURDERED AND IT IS ALL WE HAD AN EXPECTED COME IN AND SAY THIS IS HOW MUCH IT WAS . >> IS IT NET , GROSS , WHAT'S YOUR POSITION ON THAT?

IT IS OUR POSITION IT SAYS INCOME LOST THAT MEANS INCOME. WHEN PEOPLE SAY INCOME THEY REFER TO THEIR GROSS INCOME. THEY DON'T SAY INCOME LESS MY LIVING EXPENSES AND TAXES AND HOW MUCH DEDUCTIONS I TOOK.

INCOME CAN BE DEFINED AS GROSS INCOME OR NET INCOME SO WHY ISN'T INCOME HERE WHEN YOU CONSIDER THE CONTEXT OF THE STATUTE YOU ARE REALLY TRYING TO DO, WHICH IS DETERMINE WHAT HE WOULD HAVE BROUGHT HOME TO MAKE THAT IT REALLY MEANS NET INCOME, NOT GROSS INCOME?

WELL, FOR ONE THING IN THE WRONGFUL DEATH STATUTE THEY SAY NET ACCUMULATIONS SO I THINK THE LEGISLATURE DOES KNOW HOW TO DEFINE THE NET AND HOW TO TAKE THINGS OUT. I THINK IF YOU USE THE WORD INCOME, THE COMMON UNDERSTANDING OF WHAT THAT MEANS IS YOUR GROSS INCOME.

BUT THAT'S WHERE THE RUB IS ON THIS, BECAUSE IT WOULD SEEM TO TEND TO LENGTHEN SUORT TO THE ARGUMENT THAT THIS ISN'T TO BE BROAD, YOU KNOW, WRONGFUL DEATH STATUTE. THIS IS REALLY A MUCH MORE NARROW IDEA THAT WE DON'T HAVE PAIN AND SUFFERING IN THIS OR THOSE KINDS OF THINGS THAT WE ARE REALLY JUST, THAT THEY WERE TRYING TO GET CONCRET E LOSSES DETERMINED AND NOT BE ABLE TO AWARD MORE THAN WHAT WOULD HAVE OCCURRED IF THE PERSON HAD LIVED DURING HIS OR HER LIFE.

RIGHT. THERE IS CERTAINLY NO INTENT TO GIVE A WINDFALL TO THE VICTIM, BUT I THINK IT IS DESIGNED --

BUT WHAT WE ARE DOING -- GO AHEAD.

NEXT OF KIN IS NOT DEFINED IN THE STATUTE, CORRECT?

THAT'S CORRECT.

SO NEXT OF KIN, BY OPERATION OF COMMON LAW I WOULD ASSUME, COULD BE A FOURTH REMOVED THIRDCOUSIN, NO RELATIONSHIP REALLY FOR SUORT, BUT UNDER THOSE CIRCUMSTANCES IF THE DEATH IS AS A RESULT OF THE OFFENSE THEN YOU COULD HAVE A FOURTH COUSIN COULD GET INCOME LOST BY THE FOURTH COUSIN WHICH WOULD BE NONE, BECAUSE THERE WOULD BE NO RELATIONSHIP FOR INCOME OR SUORT RUNNING TO THIS OTHER PERSON, WOULD THERE NOT?

WELL, IT IS INCOME LOST BY THE VICTIM SO WHO IS AWARDED --

BUT VICTIM IS DEFINED IN THE CASE OF VICTIM'S NEXT OF KIN IF VICTIM IS DECEASED. SO IS IT LOST BY THE THIRDCOUSIN?

I THINK IT IS INCOME LOST BY THE VICTIM WHO IS DECEASED.

IT DOESN'T SAY THAT EITHER. IT JUST SAYS VICTIM.

THE PERSON WHO LOST INCOME BECAUSE OF THE CRIME WAS THE DECEASED PERSON. I DON'T THINK YOU CAN ONLY REIMBURSE THE DECEASED PERSON OR HIS ESTATE IF HE HAD TO HAVE BEEN SUORTING SOMEBODY.

BUT THE PROBLEM AGAIN, AND, YOU KNOW, I DON'T KNOW. I ASSUME THAT WHAT I HAVE ALWAYS ASSUMED WITH THIS RESTITUTION STATUTE IS THAT IT ACTUALLY REIMBURSED, QUOTE, VICTIMS FOR SORT OF NONTRADITIONAL THINGS. I REMEMBER THERE WAS A CASE WHERE THE S TO REL OST SOMETHING AND SOME THINGS THAT AREN'T NORMALLY THOUGH

OF IN A NORMA L L AW SU IT T HA T YOU COULD G ET AND W ER E CAUSILY RELATED IS A LIT TL E MORE FLEXIBLE.

RIGHT.

THERE IS , I MEA N THE QUESTION ABOUT WHERE I T WOULD COME ABOUT, L IK E H ER E YOU WOULD HAVE I ASS UM E THAT THE ESTATE WOULD WANT TO BRING A W RO NGFU L D EA TH ACT ION. HOW WOULD T HAT WORK? WOULD THERE BE - - W HAT I F I N T HIS CASE THE N EXT OF K IN I S , YOU K NOW , ARE T WO OF THE CHILDREN AND THEY ARE AWARDED THE M ONEY R AT HE R THAN BECAUSE YOU ONLY HAVE THE ESTATE N OW , WHI CH M AY NOT BE A PRO CL AIM A NT , AND THEN THE WRO NG FU L D EA TH C AS E OTH ERS AEAR. HOW DO THE TWO WORK? IS T HERE S ET OFF S? . > > IN THE RES TI TU TI ON STATUTE THEY SET OFF THE RESTITUTION AWARD AGA IN ST THE WRONGFUL D EATH.

WHAT IF T HE NEX T O F K IN S THAT CLAIM IT IN THE RES TITUTION ARE TWO OF THE CHILDREN AND THE O TH ER T HREE WHO GO TO THE W RONG FU L D EA TH ACT ION ARE D IFFERENT O NES? HOW WOULD THA T WORK?

I THINK THAT I S S OMETHING THAT WOULD HAVE TO B E RESOLVED IN THE CIVIL COURTS. I THINK THE FAMILY C OU LDN'T AGREE ON WHERE THE MONEY IS SUOSED TO GO THAT THE Y WOULD BRING A N A CTION F OR CONTRIBUTION.

IN T HIS CASE , L ET 'S ASSUME WE SUSTA IN T HI S . I T IS NOW T HE FAT HE R O F T HE VICTIM THAT GOT THE RESTITUTION AWARD?

WELL, THE FATHE R AND MOTHER OF THE VICTIM GOT A R ESTITUTION AWARD FOR T HE IR OWN LOST WAGES.

S O W HO W OULD G ET THI S MONEY?

THE AWARD OF T HE L OST INCOME OF THE VICTIM WENT T O THE EST AT E.

THE PER SONAL REPRESENTATIVE WHO WOULD THEN HAVE T O DIS TR IB UT E I T HOW? I MEAN, THA T W OULD H AVE T O GO THROUGH THE STATE?

THAT WOULD G O T HROUGH THE REGULAR STATE, YES. THE ESTATE HAS BEEN AWARDED THE R ESTITUTION. THE PRO BATE COURT WOULD BE THE ONE TO DIV ID E U P H OW THAT WOULD WORK.

IT MIGHT B E T HA T THO SE CLAIMING LOST SUORT WOULDN'T EVEN BE ABLE TO GET IT BECAUSE THEY SAY, WELL , THIS IS JUST C OMING IN FOR LOST INCOM E A ND W E D ON 'T , YOU KNOW, IT WOULD J UST G O TO THE ESTATE AND N OT T O T HE -- THOSE THA T WER E - - I M EAN I DON'T KNOW. IT S EE MS T O M E T HE RE ARE PROBLEMS, THOUGH.

THAT WOULD B E WORKE D O UT IN THE PROBATE C OU RT B EC AUSE THERE IS AN AWARD T O THE ESTATE. THE PROBA TE COURT W OULD HAVE TO DECIDE WHO GETS THI S MONEY. IN THIS CASE THERE ARE FIV E CHILDREN AND I WOULD IMAGINE IT WOULD B E SPL IT UP A MO NG THEM. IN THE CASE OF SOMEONE WHO LEFT EVERYTHING TO THEIR CAT THEN, Y OU KNOW , THE PRO BATE COURT WOULD H AVE TO W OR K THAT OUT.

WHAT DOES T HE T RIAL C OU RT DO IF -- I N T HI S CAS E YOU AARENTL Y HAD THE MILLION DOLLARS INSURANCE AND THE WIFE A C ODEF EN DA NT S O THI S IS AN A BNOR MA L CAS E A ND I N A LOT OF THE CASES THERE I S N O ESTATE OPENED UP.

EVERYBODY HAS A N ESTAT E , SO THEY WOULD O PE N ONE U P I F THERE WAS AN AWARD T O T

HE ESTATE I WOULD IMAGINE IS HOW THAT WOULD WORK IN A PRO BATE COURT.

BUT HOW DOES THIS WORK AS FAR AS THIS IS PART OF A PLEA AGREEMENT, AND AS PART OF AS THIS A CONDITION OF PROBATION, THE PAYMENT OF THE RESTITUTION?

I DON'T BELIEVE SO. I THINK HE JUST MADE IT A JUDGMENT, BECAUSE THE ORDER ITSELF READS, YOU KNOW, FOR WHICH SOME EXECUTION ISSUES SO I DON'T BELIEVE IT IS MADE A CONDITION OF PROBATION IN THIS PARTICULAR CASE ALTHOUGH IT IS CERTAINLY A POSSIBILITY IT CAN BE.

DOES THE STATUTE PROVIDE FOR EXECUTION ISSUE JUDGMENTS IN FAVOR OF NONPARTIES TO THE PROCEEDINGS?

WELL, THEY ARE PARTIES TO THE PROCEEDINGS UNDER THE RESTITUTION STATUTES. THEY ARE BENEFICIARIES AS VICTIMS.

I'M ASKING ABOUT THAT, BECAUSE HOW DO WE RESOLVE ISSUES FOR INSTANCE LIKE RES JUDICATA OR ESTOELBY JUDGMENT? IN OTHER WORDS, IF THESE PEOPLE COME IN AND PARTICIPATE IN THE RESTITUTION HEARING AND, YOU KNOW, FOR INSTANCE THEY SAY, YOU KNOW, WE THINK, JUDGE, WE'RE ENTITLED TO \$50,000 AND THE JUDGE SAYS, WELL, I'VE LISTENED TO THE PROOF YOU'VE SUBMITTED BUT I DON'T THINK IT PROVES UP THAT MUCH. SO HE SAYS, I'LL GIVE YOU \$50,000 UNDER WHAT YOU HAVE SUBMITTED. SO LATER THEY DO FILE A WRONGFUL DEATH ACTION.

RIGHT.

AND NOTICE, BOY, THEY BRING EVERYTHING ON THE BAND WAGON AND THE OTHER SIDE NOW SAYS THAT THE DEFENDANT'S SIDE SAYS WAIT A MINUTE, YOU KNOW, THIS WAS ALL LEGALLY, YOU KNOW, DISPUTED AND ALL TRIED OUT OVER IN THE CRIMINAL COURT RESTITUTION PROCEEDINGS, AND SO YOU CAN'T GET ANY MORE THAN THE JUDGE OVER THE REALLIOWED YOU. NOW, WHAT'S THE EFFECT THEN OF THE RESOLUTION OR EVEN THE NONRESOLUTION OF THE -- ALL OF THESE ISSUES THAT YOU SAY POTENTIALLY CAN BE BROUGHT BEFORE THE CRIMINAL COURT JUDGE? IS THERE A FULL RES JUDICATA EFFECT?

I DON'T BELIEVE THERE WOULD BE BECAUSE THE VICTIMS AREN'T PARTIES TO THE CRIMINAL ACTION.

AREN'T WE THEN REALLY COMING APART AT THE SEAMS THEN IF WE'VE GOT SOMETHING THAT IS GOING TO BE SO INPRECISE THAT IT IS LIKE WHEN WE TALK ABOUT HOMESTEAD, THE FLORIDACAMELEON, AREN'T WE TALKING ABOUT THIS THING IS REALLY CHANGING COLORS AND FLAVOR AND EFFECT AND BUT WHAT I AM CONCERNED ABOUT IS WOULD YOU AGREE THAT TRADITIONALLY, AT LEAST, RESTITUTION WAS NOT INTENDED TO SUBSTITUTE FOR CIVIL PROCEEDINGS TO AWARD FULL DAMAGES THAT MAY HAVE BEEN INCURRED TO WHOEVER? WOULDN'T YOU AGREE THAT TRADITIONALLY THAT WAS NOT THE CASE?

I WOULD AGREE THAT IT IS NOT A SUBSTITUTE EVEN NOW. HE IS NOT GIVING PAIN AND SUFFERING DAMAGES AND LOSS OF SHORT DAMAGES AND THINGS LIKE THAT.

WHY NOT?

BECAUSE IT IS NOT PROVIDED FOR IN THE RESTITUTION STATUTE.

YOU AGREE THERE WOULD HAVE TO BE A VERY EXPLICIT PROVISION IN THE RESTITUTION STATUTE IF SOMETHING LIKE THAT WERE TO BE ALLOWED?

YES, I THINK IF THE LEGISLATURE INTENDED FOR THEM TO BE ABLE TO GET PAIN AND SUFFERING DAMAGES THAT THAT WOULD HAVE TO BE WRITTEN OUT IN THE RESTITUTION STATUTE.

IF WE ARO VE THE SE KINDS OF DAMAGES , AREN'T WE REALLY SAYING, WELL , YOU KNOW , THE Y ARE ALL OWING SOME OF THIS KIND OF THING AND WE CAN'T QUITE , YOU KNOW , DEFINE IT BECAUSE THE LANGUAGE IS BROAD , AND SO WE ARE JUST GOING TO HAVE TO LET THIS THING DEVELOP. NOW, DEPENDING ON HOW FAR A PROSECUTOR WANTS TO GO IN TERMS OF SEEKING , YOU KNOW , THESE KINDS OF DAMAGES ?

I THINK THE LANGUAGE IS BROAD AND I THINK IT IS STILL LIMITED BY THE STATUTE. THE PROSECUTOR CAN'T SAY IN THIS CASE HE SUFFERED A LOT SO LET'S COMPENSATE THE ESTATE FOR THE PAIN AND SUFFERING DAMAGES. THE PROSECUTOR IS STILL LIMITED BY THE SPECIFIC PROVISIONS IN THE RESTITUTION STATUTE AS TO WHAT KIND OF RESTITUTION CAN BE ORDERED AND ONE OF THE THINGS THAT CAN BE ORDERED IS THE LOST INCOME .

IS RESTITUTION A CRIMINAL SANCTION OR IS IT A CIVIL SANCTION?

IT IS A CRIMINAL PROCEEDING. I WOULD SAY IT IS A CRIMINAL --

YOU COULDN'T HOLD HIM IN JAIL FOR FAILURE TO BE ABLE TO PAY THE RESTITUTION , COULD YOU?

WHEN YOU ENFORCE A RESTITUTION ORDER YOU HAVE TO CONSIDER THE DEFENDANT'S ABILITY TO PAY.

ALL RIGHT. AND --

BUT THERE ARE CRIMINAL , YOU KNOW, THERE IS A CRIMINAL HAMMER THAT GIVES YOU AN EXTRA IMPULS TO PAY RESTITUTION.

OKAY. ONE OTHER QUESTION . THERE HAS BEEN AN ARGUMENT HERE ABOUT WHAT THE DICTIONARY DEFINITION OF REIMBURSEMENT IS .

I THINK REIMBURSEMENT MEANS TO PAY BACK SO I THINK YOU ARE REIMBURSING THE VICTIM FOR INCOME LOST. LIKE YOU SAID IN THIS CASE IF HE HAD BEEN PARALEGIC OR LET'S SAY HE SUFFERED AN INJURY IN A ROBBERY ATTEMPT AND THE EVIDENCE SHOWED THAT HE WOULDN'T BE ABLE TO WORK FOR A YEAR. I THINK EVEN THE DEFENSE WOULD CONCEDE THAT YOU WOULD PAY THE VICTIM THE LOST WAGES FOR THAT YEAR. WELL, IF THE RESTITUTION HEARING TOOK PLACE NINE MONTHS INTO THAT YEAR , YOU DON'T STOP THE RESTITUTION AT THAT POINT. I MEAN, YOU CAN'T CONSTRUCT THE STATUTE IN A WAY THAT IT DOESN'T MAKE SENSE. AND THE INTENT OF THE LEGISLATURE IS TO MAKE THE VICTIMS WHOLE.

JUSTICE CANTERO HAS A QUESTION.

IN THIS CASE THERE WAS NEXT OF KIN?

YES.

WHY DIDN'T THE JUDGE ALY THAT PART OF THE STATUTE PROVIDING FOR NEXT OF KIN?

THE NEXT OF KIN WERE AWARDED DAMAGES FOR THEIR OWN LOST WAGES AS A RESULT OF THEIR ATTENDANCE AT TRIAL. THE AWARD OF LOST WAGES OF THE VICTIM WENT TO THE ESTATE.

RIGHT. BUT IT SEEMS , A ND YOU ARE SAYING THE STATUTE IS C LEAR , THE DEFINITION O F VIC TI M SAYS THE V IC TI M ALS O INCLUDES THE VICTIM'S ESTAT E IF THE VICTIM IS DECEA SE D AND THE VICTI M'S N EXT OF K IN IF THE VICTIM IS D EC EA SED AS A RESULT OF THE OFFENSE. SO WHY UNDER THA T S EC TI ON WOULDN'T THE JUDGE AWA RD T HE DEC EDENT 'S LOST I NCOM E T O THE N EXT O F K IN A ND N OT T O THE ESTATE?

I THINK HE COULD HAVE.

OKAY . WHY MUST HE N OT ? I MEAN, ISN'T T HAT C LE AR ? I MEAN YOU ARE SAYIN G T HE STATUTE IS CLEAR SO IF IT I S CLEAR IT SEEMS TO CLE AR LY PROVIDE THA T IT GOES TO THE NEXT OF KIN AND NOT T O T HE ESTATE? S DPLI THINK THE S TA TUTE PROVIDES IT COULD GO TO EITHER ONE DEPENDING ON THE CIRCUMSTANCES.

ON THE C IRCUMSTANCES HERE WAS THE VICTIM IS DEC EA SED AS A RESULT OF THE OFFENSE?

RIGHT.

SO WOULDN'T T HAT D ICTATE THAT IT BE A WARD ED T O THE NEXT OF KIN ?

BUT I T IS N OT L IMIT ED T O THE NEXT O F K IN . THE ESTATE AND THE NEXT OF KIN ARE BOTH D EFIN ED AS VICTIMS .

BUT IF THE PUR POSE I S REIMBURSEMENT FOR LOSS , WHA T'S THE PURPOSE OF AWAR DING IT TO THE ESTATE AND NOT TO THE NEXT OF K IN ? > > I T HI NK HE DID I T I N T HI S PARTICULAR CASE BECAUSE THERE ARE CHILDREN WHO ARE BENEFICIARIES OF THE ESTATE.

WHAT'S THE PURPOSE OF THE STATUTE IF THERE ARE NEXT O F KIN AND THE D EC EDEN T D IE S ASA RESULT OF THE OFFENSE A ND THE PURPOSE OF THE S TATUTE IS T O PRO VIDE RES TITU TI ON FOR THE V ICTIM W HICH INCLUDES THE VICTIM' S F AM IL Y IF THE V IC TIM D IES H ER E , WHAT'S THE PURPOSE OF A WARDING THAT RESTITUTION TO THE ESTAT E O F T HE D ECEDEN T RATHER THAN T HE NEXT OF KIN?

BECAUSE THE ESTATE IS GOING TO MAK E T HE VICTI M WHOLE. THE ESTATE IS ONE OF T HE VICTIMS AS I T I S D EF INED I N THE STATUTE. THE NEXT OF KIN ARE V IC TIMS AS WELL.

ISN'T WHA T H AENS OFT EN IN THIS CASE, THOUGH , THERE IS NO F OR MA L E STAT E O PENE D AND THE V IC TIM' S N EX T O F KIN COME OUT OF POCKET F OR EXPENSES PARTI CU LAR L Y FUNERAL EXPENSES A ND W HA T THIS S TATUTE A LL OW S I S THAT'S THE WAY I EXPERIENCE IT AS A T RIAL JUD GE I S THA T YOU WOULD AWA RD TO THE NEXT OF KIN WHO P AID T HE \$ 5, 00 0 FOR THE F UN ER AL ?

RIGHT.

ISN'T THE WIFE HERE ONE OF THE NEXT OF KIN?

SHE IS BUT S HE I S EXCLUDED FROM THE RESTITUTION AWARD.

ON WHAT BAS IS ?

BECAUSE SHE MURDERED HER HUSBAND.

I U ND ERST AN D BUT W AS I T A PUBLIC -- IT DID N' T SEE M LIKE THE JUDGE REALL Y EXPLAINED THE REASONS THAT EVEN THOUGH AND IT SEEMS LIKE TO ME T HAT'S KIND O F LIKE A BEHIND THE SCENES RAINY FOR N OT AWAR D IN G T O THE NEXT OF KIN BECAUSE T HA T WOULD INCLUDE THE W IFE BUT IT SEEMS TO ME THAT THE REASON YOU DON'T AWAR D I T T O THE WIFE

IS NOT BECAUSE SHE IS NOT NEXT OF KIN BUT BECAUSE IT WOULD PROVIDE AN ABSURD RESULT IN THE STATUTE AND THERE IS A PUBLIC POLICY AGAINST REWARDING CRIMINAL DEFENDANTS FOR MURDERING PEOPLE?

RIGHT.

BUT OTHERWISE THE CHILDREN ARE CERTAINLY NEXT OF KIN AND THEY DESERVE REIMBURSEMENT UNDER THE STATUTE.

THEY DO, YES.

BUT THE JUDGE DIDN'T EXPLAIN THAT.

I THINK IT WAS A ARRANT, BUSINESSSED ON THE PEOPLE WHO CAME IN AND TESTIFIED WHAT EXACTLY WAS GOING ON. THE PERSONAL REPRESENTATIVE CAME IN AND SAID, YOU KNOW, I HAVE OPENED THE ESTATE. THE CHILDREN ARE THE BENEFICIARIES.

BUT YOU SEE THAT WOULD JUST BE CONTRARY TO THE STATUTE AS WELL BECAUSE THE ESTATE IS SUBJECT TO THE CLAIMS OF CREDITORS FOR INDIVIDUAL NEXT OF KIN MAY NOT BE.

THAT'S TRUE.

SO I MEAN THIS WHOLE THING JUST SEEMS AS THOUGH IT IS JUST HAS NOT FOLLOWED THE STATUTE FROM THE OUTSET.

WELL, I THINK IT IS LEFT TO THE DISCRETION OF THE TRIAL COURT.

YOU SEE, THAT'S WHERE I AM HAVING A LITTLE TROUBLE, YOU KNOW, OF COURSE WE HEAR ALL OF THE TIME WHETHER THIS IS A STATUTORY CONSTRUCTION CASE OR WHETHER IT WILL BE LEDGES LATING FROM THE BENCH IN TERMS OF WHAT WE DO AND WE'VE GOT A CASE HERE THAT WHERE PROBATION AND THIS CAN BE A CONDITION OF PROBATION SO DON'T WE HAVE TO CONSTRUCT THIS STATUTE NARROWLY, RATHER THAN BROADLY IN TERMS OF IT BEING - - BECAUSE IT HAS CRIMINAL CONSEQUENCES DON'T WE HAVE TO DO THAT?

YES.

SO IN DOING THAT, SHOULDN'T WE AS OOSSED TO SAYING, WELL, THIS IS JUST, BECAUSE THIS WAS A SEVERAL MILLION DOLLAR AWARD. SAY THE LEGISLATURE NEEDS TO FIX THIS STATUTE, BUT RIGHT NOW IN ITS CURRENT FORM WE NEED TO FOLLOW AS MUCH AS WE CAN THE EXACT LANGUAGE USED BY THE LEGISLATURE AND CONSTRUCT IT NARROWLY; ISN'T THAT THE BETTER RESULT? AND THEN LET THE LEGISLATURE TAKE A LOOK AT IT AND FIND OUT WHAT THEY REALLY INTENDED TO, YOU KNOW, HAVE IF THEY HAD A BROADER INTENT THEN THEY CAN AMEND THE STATUTE TO MAKE SURE, ISN'T THAT A BETTER THING FOR THIS COURT TO DO?

I THINK YOU CAN'T CONSTRUCT IT SO NARROWLY THAT IT MAKES NO SENSE, AND YOU CAN'T CONSTRUCT IT SO NARROWLY THAT WE JUST Toss OUT NUMBER THREE ALL TOGETHER WHICH IS BASICALLY WHAT THE DEFENSE POSITION IS. CLEARLY THERE IS AN INTENT HERE TO REIMBURSE FOR LOST INCOME, AND THAT'S WHAT THE TRIAL COURT DID. IN THIS CASE WE HAD THE EXPERT COME IN. HERE IS HOW MUCH HIS INCOME WOULD HAVE BEEN. HE COULD HAVE AWARDED IT TO THE NEXT OF KIN. HE CHOSE TO AWARD IT TO THE ESTATE. IS THAT AN ABUSE OF DISCRETION? THERE IS NOT EVEN AN ARGUMENT ABOUT THAT.

EXCEPT THAT IT SAYS, IT INCLUDES THE VICTIM'S ESTATE IF THE VICTIM IS DECEASED AND THE VICTIM'S NEXT OF KIN IF THE VICTIM IS DECEASED AS A RESULT OF THE OFFENSE. SO IT

SEE ME TO ME THAT IT IS USING NEXT OF KIN FOR WHERE THE VICTIM DIED AS A RESULT OF THE OFFENSE ; WHERE AS IF THE VICTIM'S ESTATE , IF THE VICTIM DIES UNRELATED TO IT. THAT WAS AN ARGUMENT MADE HERE, WHICH WOULD HAVE , OF COURSE , A GAIN CHANGED WHAT THE NATURE WOULD BE OF THE DAMAGES THAT YOU WOULD AWARD DEPENDING ON IF THE NEXT OF KIN OR THE ESTATE . >> BUT I DON'T THINK IT IS THE VICTIM'S ESTATE IF THE VICTIM IS DECEASED NOT AS A RESULT OF THE OFFENSE . I DON'T THINK YOU CAN READ THAT INTO THAT. I THINK IF THE VICTIM IS DECEASED ANY TIME THAT THE ESTATE IS A VICTIM. I THINK THE NEXT OF KIN IS A MORE NARROW CATEGORY. THEY ARE ALSO A VICTIM IF THE DECEASED - -

CLEARLY IN SUBSECTION 4 THEY SPECIFICALLY TALK ABOUT SITUATIONS WHERE BODILY INJURY RESULTS IN DEATH AND THEN THEY SAY NECESSARY FUNERAL AND RELATED EXPENSES.

RIGHT.

BECAUSE IT IS SO DIFFERENT WHEN SOMEONE DIES VERSUS LIVES IN TERMS OF THESE OTHER CATEGORIES , IT WOULD SEEM THAT THE PRUDENT THING WOULD BE TO REALLY SEPARATE IT OUT, WHAT IS INTENDED TO BE RECOVERED IF THE VICTIM DIES AS A RESULT OF THE OFFENSE .

IT COULD HAVE BEEN WRITTEN DIFFERENTLY AND ACCOMPLISHED THAT. THE QUESTION IS DOES IT HAVE TO BE WRITTEN DIFFERENTLY TO ACCOMPLISH THAT?

MOST OF THE SEBECOME VERY THEORETICAL BECAUSE MOST OF THE TIMES SOMEBODY HAS KILLED SOMEBODY THEY ARE NOT GOING TO BE GETTING OUT OF PRISON ANY TIME SO NOT TO WORRY ABOUT WHETHER THERE IS GOING TO BE A RESTITUTION AWARD.

ESPECIALLY IN A LARGE AWARD LIKE THIS. JUST TO SUM UP , IF THE ESTATE PAID FOR THE FUNERAL IT WOULDN'T MAKE SENSE THAT THE FUNERAL EXPENSES WOULD GO TO THE NEXT OF KIN BECAUSE THE GUY DIED AS A RESULT OF THE OFFENSE. SO YOU HAVE TO ALYSOME COMMON SENSE RESULTS HERE. IF THERE ARE NO FURTHER QUESTIONS WE WOULD ASK THE COURT TO ANSWER THE CERTIFIED QUESTIONS IN THE AFFIRMATIVE. THANK YOU .

VERY BRIEFLY , IN RESPONSE TO THIS STATE'S POSITION THAT WE ARE ASKING THIS COURT TO TOTALLY THROW OUT SUB 3 THAT IS NOT TRUE. WE'RE JUST ASKING THAT IT BE RESTRICTED TO PAST LOSST INCOME.

AND YOU ARE NOT MAKING THE ARGUMENT THAT IT SHOULD HAVE BEEN THE NEXT OF KIN OR SHOULDN'T HAVE BEEN THE ESTATE ? NOR DOES THE CERTIFIED QUESTION TALK ABOUT THAT. THE CERTIFIED QUESTION REALLY TALKS ABOUT WHETHER YOU CAN INCLUDE A FUTURE LOST INCOME?

THAT'S CORRECT. WE DID POINT OUT THAT WE BELIEVE THE 5TH DID - - IF THEY WERE TO AWARD ANYTHING IT SHOULD HAVE BEEN TO THE NEXT OF KIN ALTHOUGH WE ARE NOT CONCEDING THEY SHOULD HAVE BUT IT SHOULD HAVE BEEN TO THE NEXT OF KIN.

THAT IS NOT ENCOMPASSED IN THE CERTIFIED QUESTION?

NO , BUT THAT'S IN FACT WHAT THEY DID. THE STATE POINTED OUT THAT PAIN AND SUFFERING WAS NOT EXPRESSLY PROVIDED FOR IN THE STATUTE AND THAT'S OUR POINT EXACTLY NOR IS FUTURE INCOME AS FUTURE INCOME IS IN THE WRONG FULDEATH STATUTE, AND FINALLY , I JUST WANT TO POINT OUT THAT 77.5021 IN REGARD TO INTERPRETING STATUTES THAT WHEN THERE IS LANGUAGE THAT IS SUSCEPTIBLE TO DIFFERENT CONSTRUCTION IT SHOULD BE CONSTRUED MOST FAVORABLY TO THE ACCUSED AND WE WOULD ASK THAT THE COURT DO

THAT I N THIS CASE AND A SK THAT THE COURT WOULD ANSWER NEG ATIVELY THE TWO QUE ST IONS CERTIFIED BY THE 5TH DISTRICT. THANK YOU.

THANK YOU VERY MUC H . FOR B OTH SID ES BEING V ER Y WELL PREPARED ON THIS C AS E. THE COURT W ILL TAKE THE C AS E U NDER ADV ISEMENT AND THE COURT WILL BE IN RECESS UNTIL 9:00 TOMORROW M OR NI NG .

THE MARSHAL: PLEASE RISE .