>> SUPREME COURT OF FLORIDA
IS NOW IN SESSION.
PLEASE BE SEATED.
>> OKAY.
NEXT CASE ON THE DOCKET IS NORTH
BROWARD HOSPITAL V. KALITAN.
>> THANK YOU, YOUR HONOR.
MAY IT PLEASE THE COURT, DINAH
STEIN ON BEHALF OF NORTH BROWARD
HOSPITAL DISTRICT,
DR. ALEXANDER, AND WITH ME TODAY
IS MR. THOMAS VALDEZ WHO
REPRESENTS BERRY UNIVERSITY, AND
MR. VALDEZ HAS BEEN KIND ENOUGH
TO GIVE ME THE FULL TIME ON
BEHALF OF THE APPELLANTS.
AND WE'RE HERE TODAY ON DIRECT
APPEAL OF THE 4TH DISTRICT'S
DECISION FINDING THAT UNDER THIS
COURT'S PRIOR PRECEDENT IN STATE
OF McCALL V. UNITED STATES, IT
MANDATED A FINDING IN THIS
PERSONAL INJURY CASE THAT THE
STATUTE WAS UNCONSTITUTIONAL.
AND A PRIMARY REASON WE'RE HERE
BEFORE THIS COURT IS A KEY
FACTUAL DIFFERENCE BETWEEN THIS
CASE AND McCALL, AND THAT IS
THAT WE HAVE IN THIS CASE A
SINGLE CLAIMANT.
AND THAT IS EXTREMELY IMPORTANT
BECAUSE OF THE HOLDING TO THE
EXTENT THERE IS A MAJORITY
HOLDING IN McCALL AS TO
WHETHER THAT HOLDING APPLIES
HERE WHEN THERE'S NO PERCEIVED
CONSTITUTIONAL VIOLATION AS FAR
AS HAVING A CAP THAT TREATS
MULTIPLE CLAIMANTS DIFFERENTLY.
>> WELL, REMEMBER, McCALL WAS
A CERTIFIED QUESTION FROM THE
11TH CIRCUIT.
>> CORRECT.
>> SO WHEN YOU SAY WE DEALT WITH
THE CASE THAT WAS IN FRONT OF
US, BUT THE 4TH DISTRICT IS
SAYING THAT SAME REASONING, THAT
THERE WAS NO-- THE CRISIS, YOU
JUST CAN'T RELY FOR THE REST OF
THE LIFE OF A STATUTE ON A

CRISIS THAT EXISTED, YOU KNOW,
20 YEARS BEFORE.
BUT I DO, I MEAN, YES, IT WAS IN
A DIFFERENT POSTURE, BUT THE
FACT THAT IT WAS A CERTIFIED
QUESTION FURTHER EXPLAINS WHY
THE QUESTION WAS ANSWERED IN A
MORE NARROW WAY.
>> I DON'T DISAGREE WITH YOUR
HONOR.
IT WAS A CERTIFIED QUESTION.
I WOULD DISAGREE WITH THE WAY
THE PLAINTIFFS CHARACTERIZED
THAT IN THE SENSE THAT YOU JUST
LOOK AT THE ANSWER TO THE
CERTIFIED QUESTION AND,
ESSENTIALLY, IGNORE THE REST.
I MEAN, I THINK WHEN A CERTIFIED
QUESTION IS BEFORE THIS COURT,
IT'S PART OF THE CERTIFIED
PROCESS, BUT THE OPINION OR
WHICHEVER, HOWEVER FORM THE
OPINION IS IN STILL HOLDS-- YOU
READ IT THE SAME WAY YOU'D READ
ANY OPINION OR DECISION OF THIS
COURT.
AND THE CERTIFIED QUESTION
PROCESS, THE PROVISION ON
CERTIFIED QUESTIONS ONLY
REQUIRES THAT IT BE
DETERMINATIVE OF THAT PARTICULAR
CAUSE.
SO AGAIN, WE GO BACK TO-- AND
I'M NOT SAYING IT'S IRRELEVANT
THERE'S A CERTIFIED QUESTION,
BUT WE STILL HAVE TO LOOK AT THE
OPINION.
AND THEREIN IS THE KEY.
WE KNOW WE HAVE A PLURALITY
OPINION, AND WE HAVE-- IT'S A
2-3-2, AND WE HAVE RAISED THE
ISSUE, WHICH I'LL JUST TOUCH ON.
WE'VE RAISED THE ISSUE IF A
CONCURRENCE IN RESULTS CAN
PROVIDE THE ADDITIONAL VOTES AS
FAR AS ADDING TO PLURALITY FOR A
CONSTITUTIONAL MAJORITY.
BUT I'LL ASSUME FOR THIS
ARGUMENT, I'LL GO ON TO SAY THAT
IF IT CAN, THEN I THINK IT'S

VERY CLEAR AND THE PRECEDENT IS
CLEAR THAT WHEN WE HAVE A
DIVIDED OPINION, IT IS TO BE
READ VERY NARROWLY.
AND TO THE EXTENT THERE'S
PRECEDENTIAL VALUE, YOU HAVE TO
TAKE THE VARIOUS OPINIONS AND
OVERLAY THEM AND FIND AN
ANALYSIS--
>> BUT DOESN'T JUSTICE PARIENTE
IN HER CONCURRENT OPINION
ACTUALLY POINT OUT THOSE AREAS
WHERE THE, I BELIEVE, TWO OR
THREE OF US WHO AGREE WITH HER
OPINION AGREED WITH THE OTHER
OPINION.
>> I AGREE.
>> SO IT SEEMS TO ME IT'S A EASY
OVERLAY TO SEE WHERE ALL THE
POINTS OF AGREEMENT ARE, AND
THAT THAT-- THOSE POINTS OF
AGREEMENT ARE THE OPINIONS OF
THE COURT.
>> AND THAT IS WHY, AND I CAN'T
DISAGREE WITH THAT BECAUSE THERE
ARE EXPRESS PROVISIONS WHERE THE
CONCURRENCE IN RESULTS EXPLAINS
AGREEMENT.
SO WHAT I'M SAYING IS NOW I'M
MOVING ON TO THAT.
SO I'M MOVING ON TO THAT AND
SAYING, OKAY, LET'S TAKE THE
THREE DECISIONS, PERHAPS THE TWO
AND OVERLAY THEM AND SAY WHERE
IS THIS IN AGREEMENT--
>> I GUESS WHAT I'D LIKE YOU TO
ADDRESS IS--
>> YES.
>>-- WHY ISN'T THE SAME
REASONING WHETHER IT'S CALLED
PARTIAL PRECEDENT, PERSUASIVE
AUTHORITY, WHY ISN'T THE SAME
REASONING GIVE RISE TO THIS
STATUTE NOW BEING
UNCONSTITUTIONAL?
I MEAN, MAYBE-- I JUST WANT TO
SKIP RATHER THAN WHAT DOES
McCALL MEAN, WHY DOESN'T THE
REASONING OF McCALL APPLY
HERE?

YOU SAY, WELL, IT'S A SINGLE
CLAIMANT.
BUT THE ARBITRARINESS OF
LIMITING ECONOMIC DAMAGES TO
THE, OF THE MOST NON-ECONOMIC TO
TWO OF THE MOST INJURED PEOPLE?
>> OKAY.
AND SO THAT'S-- ABSOLUTELY.
BECAUSE, YOUR HONOR, ABSOLUTELY
IN THE CONCURRENCE AND RESULT
ALLUDED TO THAT ARBITRARINESS AS
WELL.
BUT AGAIN, READING THIS-- AND
WE'VE READ YOUR CONCURRENCE AND
RESULT VERY CAREFULLY, AND IT
WAS VERY THOROUGH AND CAREFULLY
WORDED.
THERE IS A LOT OF WORDING IN
THERE THAT TALKS ABOUT-- AGAIN,
THERE'S NO QUESTION THAT THE
THREE CONCURRING JUSTICES--
>> I GUESS WHAT I WANTED, GET
PAST IT.
WE-- GET PAST IT, AND LET'S
ASSUME THAT IT'S JUST YOU'RE
ARGUING THAT THE 4TH DISTRICT
DECLARED THE STATUTE
UNCONSTITUTIONAL, THOUGHT THAT
McCALL PROVIDED THE REASONING,
AND NOW WE'RE HERE TO SEE
WHETHER THAT REASONING IS
FLAWED.
IS THERE A RATIONAL BASIS FOR
THIS CAP ON DAMAGES IN THE YEAR
2016 WHEN THERE'S BEEN-- BASED
ON A CRISIS THAT WAS SAID TO
EXIST 20 OR 30 YEARS AGO?
>> OKAY.
AND I'M GOING TO, BECAUSE NOW WE
HAVE RATIONAL BASIS, AND WE HAVE
WHAT THE 4TH DISTRICT CALLED THE
VERTICAL APPLICATION.
SO THERE'S TWO DIFFERENT
ANALYSES.
I'M GOING TO START WITH THE
VERTICAL APPLICATION.
AND I'LL SAY THIS MUCH, I DON'T
KNOW THAT-- I THINK THE
CONCURRENCE WAS EXTREMELY CLEAR
IN THE HORIZONTAL APPLICATION.

IT SAID REPEATEDLY WE FIND THIS
ARBITRARY AND UNFAIR--
>> THIS WAS A HORIZONTAL
APPLICATION CASE.
>> CORRECT.
>> IT'S A CASE INVOLVING--
>> CORRECT.
>> SUR SHRIVERS.
>> WHAT I MEAN IS MULTIPLE
CLAIMANTS.
BUT I'M GOING NOW TO THE MORE
SEVERELY ARGUMENT WHICH I WANT
TO DISCUSS.
OKAY.
THE CONCURRENCE, IN FACT, EVERY
JUSTICE ON THIS COURT IN
McCALL AGREED THAT ST. MARY'S
V. PHILIPPE APPLIED, HAD DIRECT
APPLICATION.
THAT IS WHERE THE
UNCONSTITUTIONALITY WAS AGREED
TO BY THE FIVE.
AND IN THAT CASE, THE COURT
STRUCK A CAP-- OR DIDN'T STRIKE
A CAP, IT REINTERPRETED A
STATUTE TO ALLOW MULTIPLE
CLAIMANT CAPS.
NOW, ST. MARY'S V. PHILIPPE AND
THIS COURT'S CASE IN ASHARTE
BOTH NECESSARILY REJECTED THE
ARGUMENT THAT A CAP IS
UNCONSTITUTIONAL FOR
DISCRIMINATE AND RETREATING MORE
SEVERELY INJURED PEOPLE
DIFFERENTLY.
>> DID ASHARTE, IN THAT CASE,
DID IT INVOLVE ARBITRATION
PROCEEDING?
>> IT DID, YOUR HONOR.
>> OKAY.
SO DOESN'T THAT THEN ALSO FACTOR
INTO AN ANALYSIS IS THAT IT IS A
QUESTION OF WHAT'S BEING GIVEN
UP AND WHETHER YOU HAVE THIS
OTHER REMEDY, AND BECAUSE OF
THIS OTHER REMEDY YOU HAVE
CERTAINTY IN RECOVERY, THOSE
KINDS OF THINGS, DOESN'T IT
TOTALLY CHANGE THE PARADIGM
UNDER WHICH THE ANALYSIS IS

CONDUCTED?
>> JUSTICE LEWIS, I WOULD AGREE
WITH YOU COMPLETELY AS TO ACCESS
TO COURTS.
I THINK THAT IS A VERY KEY
PROVISION OF ACCESS TO COURTS.
BUT ASHARTE, IT WAS AN
ARBITRATION CASE, AND IT MOSTLY
DISCUSSED ACCESS TO COURTS AND
DID FIND THAT TO BE A VERY
CRITICAL ASPECT OF IT.
BUT WHEN YOU MOVE ON TO EQUAL
PROTECTION AND JUST WHETHER
GROUPS ARE TREATED DIFFERENTLY,
I DON'T KNOW THAT THAT-- OR I
WOULD DISAGREE THAT THAT REALLY
COMES INTO PLAY SO MUCH BECAUSE
IF SOMEONE'S BEING TREATED
UNFAIRLY, THEY'RE BEING TREATED
UNFAIRLY ACROSS THE BOARD.
NOW, THE DISSENT IN ASHARTE TOOK
SERIOUS ISSUE WITH THE SEVERITY
OF INJURY PROBLEM, BUT THAT WAS
IN DISSENT.
AND THE PHILIPPE CASE RECOGNIZED
IN A FOOTNOTE THAT IT WASN'T IN
CONFLICT WITH ASHARTE BECAUSE IT
DEALT WITH THE SEVERITY OF
INJURY SITUATION.
MY POINT BEING THAT McCALL DID
NOT RECEDE FROM ASHARTE OR
PHILIPPE.
THOSE ARE THIS COURT'S
PRECEDENT.
AND FOR THE 4TH DISTRICT TO SAY
THAT NOW IT'S GOING TO BE BOUND
BY THIS HOLDING AS WELL, I
BELIEVE IS INCORRECT.
AND I WILL SAY THIS MUCH MORE
BEFORE GOING ON TO WHAT YOUR
HONOR ASKED ME TO DISCUSS WITH
RATIONAL BASIS.
I WOULD SUBMIT THAT IF TO THE
EXTENT THIS COURT, IT'S AN OPEN
ISSUE TO ADDRESS-- WHICH I DO
BELIEVE IT STILL IS-- I WOULD
SUBMIT THAT I BELIEVE JUSTICE
POLSTON'S DISSENT, THERE WAS
SOME AMICUS BRIEFS IN THIS CASE
INCLUDING THE FLORIDA JUSTICE

REFORM INSTITUTE AND FLORIDA
HOSPITAL ASSOCIATION WHICH GIVE
A VERY COMPELLING DISCUSSION OF
WHY SUCH A RULE SHOULD NOT BE
ADOPTED FOR CAPS BECAUSE IT IS
VERY OVERREACHING, AND IT'S VERY
RESTRICTIVE ON THE LEGISLATURE.
BECAUSE, ESSENTIALLY, IT'S VERY
DIFFICULT TO IMAGINE ANY KIND OF
LIMITATION ON DAMAGES THAT'S NOT
GOING TO AFFECT MORE SEVERELY
INJURED PEOPLE OR MORE SEVERELY
DAMAGED PEOPLE.
AND THOSE KINDS OF RULINGS
SOMETIMES HAVE VERY BROAD,
UNINTENDED CONSEQUENCES WHICH
THERE'S A REASON, I WOULD
SUBMIT, THAT THIS COURT'S
PRECEDENT SO FAR-- WITHOUT
DISCUSSING McCALL-- HAS BEEN
TO REJECT THOSE ARGUMENTS.
NOW, TO MOVE TO RATIONAL BASIS.
BOTH THE, OBVIOUSLY, THE
PLURALITY FOUND THAT THERE WAS
NEVER A RATIONAL BASIS FOR THE
CAP STATUTE.
THE CONCURRENCE AND RESULT
DISAGREED WITH THAT RATIONALE
BUT DID INDICATE THAT THERE MAY
NO LONGER BE A MEDICAL
MALPRACTICE CRISIS.
SO, FIRST OF ALL, I DON'T KNOW,
I DON'T KNOW THAT THAT'S ENOUGH
FOR AN ACTUAL MAJORITY, A
CONSTITUTIONAL MAJORITY THAT HAS
PRECEDENTIAL VALUE.
AND SO OUR POINT ON THIS IS
THIS: IF WE'RE GOING TO FIND
THAT THE CRISIS IS OVER OR THAT
THERE WAS NEVER A CRISIS OR SO
FORTH, IT NEEDS TO BE DONE WITH
EVIDENCE IN AN ADVERSARY
PROCEEDING TO DETERMINE WHETHER
AND WHEN THIS IS THE CASE.
AND THE PROBLEM WITH THIS AND
PARTICULARLY IN A CASE LIKE THIS
IS IF THE CRISIS-- OR IF, LET'S
SAY THE MAJORITY OF THIS COURT
DECLINED TO FIND THAT THERE WAS
NEVER A CRISIS, THEN THERE MAY

HAVE BEEN A CRISIS AT SOME
POINT.
THERE WAS A CRISIS AT SOME POINT
PRESUMABLY.
THIS INJURY IN THIS CASE
OCCURRED IN 2007.
I THINK WE CAN MAKE A
PRESUMPTION THERE VERY WELL
STILL MAY HAVE BEEN A CRISIS
GOING ON THEN.
AND BY THE TIME THIS CASE WAS
TRIED IN 2011, WE'RE NOW NEARLY
A DECADE INTO THE CAP STATUTE.
WE'VE HAD THE 3RD DISTRICT AT
THAT POINT HAD APPLIED IT IN THE
WAYNEGRAB V. MILES CASE, AND
THESE DEFENDANTS WENT INTO THIS
TRIAL RELYING AND THINKING THAT
THEY HAD A CAP.
AND I RAISE THIS BECAUSE WE'VE
BROUGHT TO THE COURT'S ATTENTION
A LINE OF CASES WHERE THIS COURT
HAS FOUND IN CERTAIN INSTANCES
THAT THE PEOPLE HAVE RELIED ON A
STATUTE.
AND IF THE STATUTE WAS ONLY
UNCONSTITUTIONAL AS TO FORM AS
OPPOSED TO THE LEGISLATURE'S
ABILITY TO FIRST ENACT IT, THEN
IT WILL IN CERTAIN INSTANCES
GIVE PROSPECTIVE EFFECT TO THE
DECISION FINDING THE LEGISLATION
UNCONSTITUTIONAL.
NOW, THE 4TH DISTRICT HELD THAT
THAT WAS FOR THIS COURT TO DO,
AND THEY MAY BE RIGHT.
BUT WE'VE SAID REPEATEDLY THAT
HERE IT WAS VERY UNFAIR TO HAVE
THIS CAP APPLY IN THE BEGINNING
AND THEN TAKEN AWAY.
AND THE EQUITIES OF THAT, I
THINK, ARE EVEN MORE PRONOUNCED
IN THIS CASE.
AND I'M NOT GETTING INTO THE
ALTERNATIVE ISSUE, BUT THE CAP
IRONICALLY IN THIS CASE, I
THINK, INCREASED THE DAMAGES AT
TRIAL BECAUSE IT CAME INTO THE
TRIAL.
AND THIS WENT FROM BEING-- AND

I'M NOT DOWNGRADING THE
PLAINTIFF'S INJURIES, BUT THIS
WAS NOT A BRAIN INJURY CASE
GOING INTO TRIAL.
BUT TO GET TO THE HIGHER CAP,
THE MILLION DOLLAR CAP WHICH WAS
APPLIED HERE, THE PLAINTIFFS
BROUGHT THAT INTO THE TRIAL OVER
EMPHATIC OBJECTION, OVER
DIRECTED VERDICT MOTIONS.
EVEN A TRIAL COURT AGREED THAT
THERE WAS NO EVIDENCE OF A BRAIN
INJURY.
BUT THAT ISSUE WENT TO THE JURY.
THE JURY FOUND A BRAIN INJURY
AND EVEN ASKED-- SENT A
QUESTION TO THE COURT DURING ITS
DELIBERATIONS REGARDING WHAT
WOULD HAPPEN IF THEY DIDN'T SAY
YES TO THE BRAIN INJURY
QUESTION, IF THEY COULD STILL
AWARD PUNITIVE DAMAGES WHICH HAD
NOTHING TO DO WITH THIS CASE.
SO THERE IS THE ALTERNATIVE
ARGUMENT--
>> WELL, DID THEY KNOW THERE WAS
A CAP?
>> THEY SHOULDN'T HAVE.
>> OH, OKAY.
BECAUSE I THOUGHT YOU-- SO I'M
TRYING TO UNDERSTAND WHAT THE
RELIANCE WAS.
ARE YOU SAYING THAT IN THIS CASE
THERE WASN'T A BASIS FOR A
MILLION DOLLARS IN PAIN AND
SUFFERING?
>> THAT WAS-- YES.
THAT WAS ACTUALLY THE ORIGINAL
APPEAL, BECAUSE THE ORIGINAL
APPEAL WAS BEFORE McCALL.
PLAINTIFFS APPEALED THE
APPLICATION OF THE CAP, AND THE
DEFENDANTS APPEALED THE MILLION
DOLLAR CAP.
AND THE ALTERNATIVE ARGUMENT
THAT I THINK GOT LOST IN THE 4TH
DISTRICT WAS AT LEAST SEND THIS
BACK, BECAUSE BY PUTTING BEFORE
THE JURY-- THE JURY WASN'T TOLD
OF THE CAP, BUT IT WAS TOLD TO

ANSWER THE QUESTIONS ABOUT THE
CATASTROPHIC INJURY DAMAGES, ONE
OF THEM BEING IS THERE, I'M
REPHRASING THE CAP STATUTE, BUT
ORGANIC BRAIN INJURY.
I THINK THE CAP STATUTE SAYS A
BRAIN INJURY THAT CAUSES AN
EPISODIC DISORDER.
>> WHAT-- THIS PERSON WENT IN
FOR CARPAL TUNNEL SURGERY, AND
HER-- THERE WAS AN UNDISCOVERED
PERFECT RATED--
>> HER ESOPHAGUS.
>> YES. SOFT GUS.
THE HOSPITAL DIDN'T--
>> CORRECT.
>>-- FIND IT.
SHE LEFT AND SHE WENT INTO A
COMA?
>> SHE WAS PUT IN A
MEDICALLY-INDUCED COMA AFTER--
>> OKAY.
AND THEN SHE CAME OUT, AND
WHAT'S, WHAT WAS THE EVIDENCE OF
HER INJURIES?
>> THERE WAS EVIDENCE, THERE WAS
PLENTY OF EVIDENCE OF EMOTIONAL
INJURIES--
>> BUT WHAT WAS HER PHYSICAL
SITUATION?
>> THE PHYSICAL SITUATION EVEN
THE-- THERE WAS AN EXPERT WHO
TESTIFIED ON BEHALF OF THE
PLAINTIFF WHO AGREED THERE WAS A
SPINAL CORD INJURY.
SHE'S NOT PARALYZED, BUT THERE
WAS AN INSULT TO THE SPINE WHICH
CAUSED SOME ISSUES.
BUT HE SAID BUT THERE'S NO BRAIN
DAMAGE.
THAT WAS HIS TESTIMONY AT TRIAL.
AND NOBODY TESTIFIED AS TO
ORGANIC BRAIN DAMAGE.
AND EVEN THE TRIAL COURT AGREED
AT THE DIRECTED VERDICT MOTION
STAGE THIS IS SILLY.
IF THEY FIND A BRAIN INJURY, I'M
TAKING IT AWAY AFTER TRIAL, BUT
I'M GOING TO DO THIS SO THE 4TH
DOESN'T REVERSE ME.

AND THEN WHEN THE JURY CAME BACK
WITH THE $4 MILLION VERDICT AND
SAID THERE'S A BRAIN INJURY,
THAT-- THE DEFENDANTS APPEALED
THAT.
SO THAT'S, AGAIN, THE IRONY OF
THIS CASE IS THE CAP NOT ONLY
THE DEFENDANTS WENT IN RELYING
ON IT THINKING IT WAS A GOOD LAW
AND IT HAD BEEN GOOD LAW, BUT
THEN THE VERDICT BECAME, I
BELIEVE, HIGHER BECAUSE OF IT.
ONE OTHER POINT I WANTED TO MAKE
BECAUSE, CERTAINLY, THAT'S A
VERY IMPORTANT ALTERNATIVE
ARGUMENT, BUT THE COURT ALSO
REFUSED TO APPLY THE CAP TO THE
HOSPITAL DISTRICT.
THERE'S NO CASE LAW ON THAT.
THE HOSPITAL DISTRICT, OF
COURSE, IS A SOVEREIGN, AND TO
THE EXTENT THAT IT WAS GOING
INTO THIS CASE WITH THE REST OF
THEM, THERE IS A PROVISION IN
THE CAP STATUTE THAT SAYS THIS
DOESN'T APPLY WHERE THE
SOVEREIGN IMMUNITY STATUTE
APPLIES.
AND OUR POSITION IS THAT ALL
THAT MEANS IS THAT THE SOVEREIGN
IMMUNITY ISN'T WAIVED TO THE
EXTENT THAT A SOVEREIGN IS
LIABLE FOR HALF A MILLION OR A
MILLION DOLLARS, BUT THAT IT--
THE CEILING ON THE JUDGMENT IS
THE SAME AS ALL THE OTHER
DEFENDANTS.
BECAUSE OTHERWISE IT'S AN ABSURD
RESULT.
BROWARD COUNTY-- NORTH BROWARD
HOSPITAL DISTRICT HAS TO GO OUT
IN THE OPEN MARKET AND GET
INSURANCE AS WELL AND SO FORTH.
NOW, ON THE CROSS-APPEAL--
>> WAIT, I'M SORRY.
THE NORTH-- SO THERE'S A, YOU
HEARD THE LAST CASE.
>> YES.
>> DO THESE HOSPITAL DISTRICTS,
THEY GET INSURANCE FOR THEIR,

EVEN THOUGH THEY'RE SUBJECT TO
SOVEREIGN IMMUNITY?
>> THEY DO, BECAUSE ONCE THE
CLAIMS BILL IS GRANTED AND AS WE
KNOW, OF COURSE, THEY ARE--
>> THE INSURANCE COMPANY?
>> YEAH.
IT COMES BACK TO THE HOSPITAL
DISTRICT.
SO, YES.
NOW, THERE WERE ALTERNATIVE
ARGUMENTS AS WELL AS FAR AS
OTHER REASONS FOR FINDING
UNCONSTITUTIONALITY.
THE 4TH DISTRICT NEVER GOT TO
THOSE BELOW.
THE APPELLANTS HERE WERE IN THE
AWKWARD POSITION OF HAVING TO
RAISE THEM EVEN THOUGH IT WASN'T
ADDRESSED BELOW, AND I'M TALKING
ABOUT ACCESS TO COURTS, JURY
TRIAL AND SEPARATION OF POWERS
RATHER THAN WAIT FOR HAVING TO
ADDRESS THEM IN A REPLY BRIEF.
SO I'LL SAY THIS MUCH AS FAR AS
ACCESS TO COURTS, AND I'LL GO
QUICKLY UNLESS I'M STOPPED WITH
QUESTIONS.
ACCESS TO COURTS, WE HAVE VERY
CLEAR PRECEDENT IN ASHARTE.
IT'S NO DIFFERENT THAN THIS CASE
IN FINDING ACCESS ON THE SECOND
PRONG WHICH IS THE OVERPOWERING
NECESSITY AND THE ALTERNATIVE OF
ADDRESSING IT.
ON RIGHT TO A JURY TRIAL,
THERE'S REALLY VERY LITTLE
PRECEDENT ON THAT.
I BELIEVE THIS COURT STATED THE
NEST BE IN LASKY, THE LASKY CASE
THAT IT'S NOT GOING TO FIND
VIOLATION OF A JURY TRIAL RIGHT
ABSENT AB PROBASE OF A COMMON
LAW RIGHT BECAUSE IT'S JUST TOO
RESTRICTIVE ON THE LEGISLATURE.
>> I JUST WANT TO, I JUST WANTED
TO REMIND YOU YOU'RE WELL INTO
YOUR REBUTTAL.
>> THANK YOU, YOUR HONOR.
>> [INAUDIBLE]

>> I'LL SAY ONE FINAL POINT.
IF THIS COURT WERE TO APPLY ANY OF THE ACCESS TO COURTS OR JURY TRIAL ISSUES, I JUST-- IT WOULD PROBABLY HAVE TO BE REMANDED AS FAR AS THE HOSPITAL DISTRICT.
AS WAS STATED IN A PRIOR ORAL ARGUMENT TODAY, THE HOSPITAL DISTRICT IS A SOVEREIGN, AND I THINK THERE'D HAVE TO BE A FINDING WHETHER THERE WAS A COMMON LAW RIGHT PRIOR TO THE ENACTMENT OF THE CAP.
SO I WILL SAVE THE REST FOR REBUTTAL, AND I THANK YOU FOR YOUR TIME.
>> MAY IT PLEASE THE COURT, I'M PHILIP BURLINGTON HERE ON BEHALF OF SUSAN KALITAN.
WITH ME IS NICOLE SIEGEL WHO HAS WORKED WITH ME THROUGHOUT THE CASE.
TO START FROM THE FACTUAL PART FIRST, THE JURY MADE A SPECIFIC FINDING IN THE LANGUAGE OF THE VERDICT LINE WAS NOT CONTESTED.
AND THAT IS WAS THERE A SEVERE BRAIN OR CLOSED HEAD INJURY EVIDENCE BY SEVERE EPISODIC NEUROLOGICAL DISORDER.
THERE WAS EVIDENCE PRESENTED ON THAT WITHOUT OBJECTION.
THERE WAS EVIDENCE THAT NOT ONLY HAS SHE SUFFERED ICU PSYCHOSIS, POST-TRAUMATIC STRESS SYNDROME, SHE ALSO HAS VERY SIGNIFICANT MEMORY LIMITATIONS, COGNITIVE DIFFICULTIES.
AND IT WAS TESTIFIED THAT THAT AROSE OUT OF THOSE PSYCHIATRIC CONDITIONS.
>> CAN YOU HELP ME WITH THE DIFFERENCE BETWEEN THE STATUTE THAT WAS AT ISSUE IN ASHARTE WHICH WAS 1993 WHICH WAS, HAD A CAP ON MONETARY NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE CLAIMS AND THE STATUTE THAT WAS ENACTED IN 2003?
I MEAN, MY UNDERSTANDING WAS

THIS CAP ON NON-ECONOMIC DAMAGES
HAS BEEN THE LAW FOR AT LEAST
TWO DECADES.
IS THERE A-- I MEAN, IN OTHER
WORDS, THE QUESTION, BECAUSE
MS. STEIN WAS TALKING ABOUT
WHETHER THERE WAS A CRISIS IN
2003.
WHAT WAS THE CHANGE IN THE
STATUTE BETWEEN ASHARTE AND THE
TIME THIS CASE WAS TRIED WITH
REGARD TO THE CAP ON
NON-ECONOMIC DAMAGES FOR MEDICAL
MALPRACTICE CASES?
>> THERE WAS NO GENERIC CAP ON
MEDICAL MALPRACTICE ACTIONS
UNTIL IT WAS PASSED IN 2003.
WHAT WAS ADDRESSED IN ASHARTE
AND ALSO IN PHILIPPE WERE THE
CAPS ON NON-ECONOMIC DAMAGES
THAT AROSE IN THE CONTEXT OF THE
MEDICAL MALPRACTICE ARBITRATION
SCHEME WHICH IMPOSED A $250,000
CAP IF YOU CONSENTED TO
ARBITRATION.
>> I THOUGHT-- I'M LOOKING AT
ASHARTE, IT SAYS THE PLAINTIFF'S
NON-ECONOMIC DAMAGES ARE LIMITED
TO A MAXIMUM OF 250 PER
INCIDENT.
YOU'RE SAYING THERE WASN'T A
CAP?
>> THERE WAS A CAP IF YOU AGREED
TO PURSUE THE ARBITRATION
SCHEME.
THERE WAS A $250,000 CAP--
>> OKAY.
BUT NOT IF YOU, IF YOU WENT TO
TRIAL, THERE WAS NO CAP.
>> IF YOU WENT TO TRIAL, THERE
WAS A CAP.
IF YOU REJECTED ARBITRATION, AND
THAT WOULD BE $350,000.
IF THERE WAS NO ARBITRATION
OFFER AND IT JUST WENT TO TRIAL
AS WHAT I'LL CALL A NORMAL CASE,
THERE WAS NO CAP ON MEDICAL
MALPRACTICE DAMAGES UNTIL 2003.
THE-- WHICH IS ONE OF THE
REASONS WHY ASHARTE AND

PHILIPPE, WHILE THEY ARE
SIGNIFICANT ON SPECIFIC
CONSTITUTIONAL ISSUES, ARE NOT
COMPELLING ON THE ISSUE BEFORE
THIS COURT EITHER IN McCALL OR
HERE, BECAUSE THEY WERE BASED ON
A 1988 TASK FORCE THAT CAME UP
WITH TWO PRIMARY PROPOSALS
INCLUDING THE PRE-SUIT
PROCEDURES AND A ARBITRATION
SCHEME WHICH, WHILE THE
LEGISLATURE DESCRIBED IT AS
VOLUNTARY, THIS COURT
SUBSEQUENTLY NOTED IN PHILIPPE
IT WAS NOT VOLUNTARY BECAUSE
ONCE, FOR EXAMPLE, THE DEFENDANT
OFFERED ARBITRATION, THE
PLAINTIFF HAD NO CHOICE BUT TO
FACE A CAP ONE WAY OR THE OTHER.
BUT IT WAS AN ENTIRELY DIFFERENT
CAP, IT WAS AN ENTIRELY
DIFFERENT FACTUAL PREDICATE.
IT WAS A PERCEIVED CRISIS IN
1988, NOT IN 2003 WHICH IS THE
ANALYSIS THIS COURT HAD TO
ENGAGE IN, BECAUSE THAT IS WHEN
THE CAP IN THE McCALL WAS
ENACTED.
AND SO WE'RE LOOKING AT, FROM
THE ORIGINAL TASK FORCE OF 1988
TO THIS COURT'S DECISION IN
McCALL WAS ALMOST 30 YEARS.
SO THE FACTUAL PREDICATE WAS
DIFFERENT, AND THE ANALYSIS WAS
DIFFERENT.
AND TO GET TO, PERHAPS, THE MEAT
OF THE CONSTITUTIONAL PART, THIS
COURT ANSWERED AN UNAMBIGUOUS
CERTIFIED QUESTION THAT IT
REPHRASED AND FOUND THAT THE
768.118 NON-ECONOMIC DAMAGE CAP
WAS UNCONSTITUTIONAL AS A PLIED
TO-- EXCUSE ME, WRONGFUL DEATH
MEDICAL MALPRACTICE CLAIMS.
IT DID NOT LIMIT THE QUESTIONS,
NOR THE ANSWERS TO MULTIPLE
CLAIMANT SITUATIONS, AND THERE
WERE MULTIPLE RATIONALES FOR THE
CONCLUSION, MOST OF WHICH HAD
NOTHING TO DO WITH THAT PART.

THAT WAS A DEFINITE PART OF BOTH
OPINIONS REGARDING THE PRIOR
PRECEDENT FROM PHILIPPE THAT AN
AGGREGATE DAMAGE CAP WAS
NECESSARILY UNFAIR TO TREAT
SIMILAR PEOPLE BECAUSE WHAT
HAPPENED IS PEOPLE-- IT WAS ALL
DEPENDENT ON HOW MANY CLAIMANTS
YOU HAD, HOW MUCH THEY GOT AND
THEIR INDIVIDUAL LOSSES WERE,
ESSENTIALLY, DISREGARDED.
IN THE SENSE OF DETERMINING
MAGNITUDE.
THAT WAS A SEPARATE ISSUE FROM
WAS THERE A REASONABLE
RELATIONSHIP BETWEEN THE CAP AT
ISSUE AND THE LEGITIMATE STATE
PURPOSE.
AND AS FIVE JUSTICES ON THIS
COURT DETERMINED, THERE WAS NO
RATIONAL RELATIONSHIP BECAUSE
THE ACT AS PASSED HAD NO
MECHANISM FOR ANY REDUCTION IN
EXPOSURE TO THE INSURANCE
COMPANIES TO BE PASSED ON TO THE
PHYSICIANS IN THE FORM OF
REDUCED COVERAGE.
THERE WAS A PROVISION THAT
CREATED THE FLORIDA OFFICE OF
INSURANCE REGULATION TO
CALCULATE WHAT WAS DESIGNATED A
PRESUMED FACTOR.
IT HAD NO EFFECT ON PREMIUMS.
IT WAS, ESSENTIALLY, AN ACADEMIC
EXERCISE.
IT WAS PERFORMED FOR A FEW
YEARS, AND THEN IT WAS REPEALED
IN 2011 AS BEING OBSOLETE, WHICH
IS AN IRONIC TERM FOR SOMETHING
THAT NEVER HAD, FRANKLY, AN
EFFECTIVE PURPOSE TO BEGIN WITH.
BUT THE POINT IS THERE WAS NO
CONNECTION, THERE WAS NO
RATIONAL CONNECTION THERE.
THEN WE GET TO THE QUESTION WAS
THERE A FACTUAL PREDICATE FOR
THE CRISIS IN THE FIRST PLACE.
THAT IS WHERE THIS COURT
DIFFERED IN THE WAY OF THE
MAJORITY THAT ULTIMATELY

ANSWERED THE CERTIFIED QUESTION.
AND THAT IS WHETHER IT WAS VALID
WHEN IT WAS FIRST PASSED IN 2003
BASED ON THE FACTUAL PREDICATE
THE LEGISLATURE HAD BEFORE IT OR
WHETHER THAT CRISIS NO LONGER
EXISTED.
AND THE QUESTION OF WHETHER WE
HAVE TO PRESENT AN ENTIRELY
SEPARATE RECORD, I SUBMIT, IS
MERITLESS.
THIS COURT MADE THOSE
DETERMINATIONS, BUT MORE
IMPORTANTLY, THE INJURY TO
MICHELLE McCALL, WHEN SHE
DIED, WAS IN 2006.
THE INJURY TO MY CLIENT WAS IN
2007.
IF THE CAPS WERE DEEM CANNED UP
CONSTITUTIONAL-- DEEMED
UNCONSTITUTIONAL EVEN IF YOU
LIMIT IT TO THE FACT THAT NO
MEDICAL MALPRACTICE-- EXCUSE
ME-- MEDICAL MALPRACTICE CRISIS
STILL EXISTED, IF IT DIDN'T
EXIST IN 2006, IT DIDN'T EXIST
IN 2007 WHEN MY CLIENT SUFFERED
HER INJURIES.
WE HAVE ALSO RAISED ACCESS TO
COURTS AND THE RIGHT TO JURY
TRIAL.
THEY WERE RAISED IN THE 4TH
DISTRICT.
THE 4TH DISTRICT'S OPINION
EXPLICITLY NOTES THAT IT DID NOT
NEED TO ADDRESS THEM.
THIS COURT NOTED IN FOOTNOTE TWO
OF THE PLURALITY THAT BECAUSE OF
THE FACT THAT WRONGFUL DEATH
DAMAGES AT ISSUE DID NOT
PRE-EXIST THE '68 CONSTITUTION
EITHER IN COMMON LAW OR BY
STATUTE, THE ACCESS TO COURTS
ARGUMENT AND THE RIGHT TO JURY
TRIAL WERE PROBABLY
INAPPROPRIATELY CONSIDERED OR
SHOULDN'T BE CONSIDERED.
THAT IS NOT THE CASE AS TO THE
PERSONAL INJURY CLAIMS.
AND I WOULD SUBMIT THAT WHILE

THE EQUAL PROTECTION ARGUMENT
THAT THE 4TH DISTRICT FOUND
COMPELLING TO THE POINT OF
SAYING IT WOULD BE DISINGENUOUS
TO HOLD THAT McCALL DOES NOT
APPLY TO PERSONAL INJURY--
>> SO LET ME JUST GO BACK TO
THE-- BECAUSE IF THERE'S NO
RATIONAL RELATIONSHIP TO,
BETWEEN CAPPING DAMAGES AND
REDUCING PREMIUMS, THAT'S A--
THEN IT'S UNCONSTITUTIONAL AS A
DUE PROCESS VIOLATION, RIGHT?
>> CORRECT.
>> OKAY.
BECAUSE THE OTHER, THE EQUAL
PROTECTION ARGUMENT GOES TO,
WELL, WHY DO MEDICAL MALL
PLAQUES CLAIMANTS, WHY IF THEY
HAVE A CATASTROPHIC INJURY,
THEY'RE LIMITED, AND SOMEONE WHO
HAS A AUTOMOBILE ACCIDENT WITH
THE SAME INJURY IS NOT LIMITED.
SO IT'S A DIFFERENT-- EQUAL
PROTECTION IS DIFFERENT FROM THE
CRISIS ISSUE.
IS THAT CORRECT?
BE IN OTHER WORDS, THE-- WHEN
WE HAD McCALL, ONE OF THE
ISSUES WAS THAT YOU HAD SOMEBODY
DIED, AND IF THEY HAD FIVE
SURVIVORS, THEY GOT THE SAME
AMOUNT AS IF THERE WAS ONLY ONE
SURVIVOR, CORRECT?
>> CORRECT.
>> HERE THE EQUAL PROTECTION
ARGUMENT IS WHAT?
>> THE EQUAL PROTECTION ARGUMENT
HERE IS THAT THE CAP DOES NOT
HAVE A REASONABLE RELATIONSHIP
TO THE LEGISLATIVE--
>> OKAY.
WELL, THAT'S WHAT, I GUESS, I'M
QUESTIONING.
IS THAT AN EQUAL PROTECTION
ARGUMENT, OR IS THAT A DUE
PROCESS ARGUMENT?
MAYBE I'M MISSING SOMETHING
WITH--
>> WELL, THERE WAS AN OVERLAP.

>> BECAUSE I DON'T-- I SEE
EQUAL PROTECTION AS BEING, IT
DOESN'T-- THAT SOMEBODY IS
BEING TREATED UNEQUALLY FROM
SOMEONE IN A DIFFERENT POSITION
WHICH WOULD BE A PLAINTIFF WHO
HAD THE SAME EXACT INJURY, BUT
IT WAS A, BECAUSE THEY WERE IN A
CAR ACCIDENT AS OPPOSED TO FOUND
THEIR WAY INTO A HOSPITAL.
>> BUT THE DIFFERENCE IS, IS
THAT HERE WHEN A
CATASTROPHICALLY-INJURED PERSON
IS INJURED-- AND THIS WAS NOT
THE CASE IN ASHARTE OR IN
PHILIPPE BECAUSE THIS WAS THE
ARBITRATION--
>> THIS ISN'T REALLY AN
UNFRIENDLY QUESTION.
I'M JUST TRYING TO GET BETWEEN
RATIONAL BASIS AND
PROTECTION.
>> OKAY, THERE IS NO--
>> SAY THIS AUTOMOBILE ACCIDENT
HAPPENED AND SHE ENDED UP WITH
AN-- AN AUTOMOBILE ACCIDENT,
SHE ENDED UP WITH A CARPAL
TUNNEL INJURY, RIGHT?
SAY SHE HAD AN AUTOMOBILE
ACCIDENT.
>> RIGHT.
>> OKAY.
SHE GOES TO THE HOSPITAL, AND
THEN THIS HAPPENS.
SHE CAN GET ALL THE DAMAGES FROM
HER, IF THERE'S SUFFICIENT--
FROM THE AUTOMOBILE ACCIDENT IF
THERE'S SUBSEQUENT MALPRACTICE,
CORRECT?
>> SHE WAS AWARDED--
>> SHE WOULD BE ABLE TO GET IF
THERE WAS AN AUTOMOBILE
ACCIDENT-- THE.
>> CORRECT.
>> OKAY?
SHE COULD GET ALL HER DAMAGES.
BUT BECAUSE SHE GOT THESE
DAMAGES BECAUSE SHE WENT TO THE
HOSPITAL, HER DAMAGES ARE
LIMITED.

>> CORRECT.
>> THAT'S-- ISN'T THAT THE
EQUAL PROTECTION ARGUMENT?
THAT SOMEBODY, A SIMILAR
PLAINTIFF HAVING THE SAME INJURY
IS NOT BEING TREATED EQUALLY?
>> WELL, THERE WAS ALSO THE
ARGUMENT OF THE
CATASTROPHICALLY-INJURED
COMPARED TO THE LESS
CATASTROPHICALLY-INJURED.
AND WHILE THAT WAS REJECTED IN
THE EARLIER DECISIONS, IT WAS IN
THE CONTEXT OF AN ARBITRATION
WHERE THERE WERE COMMENSURATE
BENEFITS FOR SOMEBODY WITH
CATASTROPHIC INJURIES, AND
THAT--
>> WELL, ALL OF THIS GOES TO THE
REASON THE INSURANCE COMPANY,
YOU KNOW, THE DOCTORS DON'T GET
THE BENEFIT OF THE REDUCED
PREMIUM.
>> CORRECT.
THERE IS NO RATIONAL
RELATIONSHIP BETWEEN TREATING
HER DIFFERENTLY THAN ANY OTHER
MEDICAL MALPRACTICE PATIENT,
BECAUSE THERE'S NO CONNECTION TO
A LEGITIMATE PUBLIC PURPOSE,
BECAUSE THERE'S NO CONNECTION IN
IN REDUCING PREMIUMS.
SO THAT IS AN ADDITIONAL
BASIS--
>> WELL, THAT'S A SECOND, THAT'S
A FREE-STANDING RATIONAL BASIS,
TRADITIONAL RATIONAL BASIS--
>> CORRECT.
>>-- WITHOUT LOOKING AT EQUAL
PROTECTION.
>> CORRECT.
NOW, WHEN WE GET IN TO THE
ACCESS TO COURTS, I WOULD SUBMIT
SMIPT IS DIRECTLY ON POINT, AND
THAT IS A CASE WHERE THERE WAS A
CRISIS, ALLEGEDLY, ON LIABILITY
INSURANCE GENERALLY FOR TORT
ACTIONS.
LEGISLATURE PASSED AN ACT,
CAPPED ALL ECONOMIC DAMAGES AT

450,000.
THIS COURT, IN RELATIVELY SHORT
ORDER, REJECTED THAT AS A
VIOLATION OF ACCESS TO COURTS
NOTING THAT THERE WAS ABSOLUTELY
NO COMMENSURATE BENEFIT AND THAT
THE LEGISLATURE CANNOT DO IT IN
THE ABSENCE OF AN OVERPOWERING
NECESSITY AND NO REASONABLE
ALTERNATIVE BENEFIT.
HERE THERE IS NO REASONABLE
ALTERNATIVE BENEFIT TO MY CLIENT
FOR THIS REDUCTION.
YOU HAVE DETERMINED THAT THE TWO
JUSTICES HAVE DETERMINED IN 2003
THERE WAS NO CRISIS, THREE MORE
HAVE DETERMINED THAT THERE
CERTAINLY IS NOT ONE NOW, AND
SO, THEREFORE, THERE IS NO
OVERPOWERING NECESSITY.
SO THERE IS AN OVERLAP.
BUT I SUBMIT SMITH IS DIRECTLY
ON POINT.
AND, FRANKLY, IT IMPOSES A
HARSHER STANDARD AND A
HARSHER-- STRICTER STANDARD.
BECAUSE AS NOTED IN SMITH,
RATIONALITY IS NOT EVEN AN ISSUE
WHEN THE LEGISLATURE DOES NOT
PROVIDE AN ALTERNATIVE REMEDY
AND ABOLISHES A COMMON LAW
RIGHT.
AND IT SPECIFICALLY DETERMINED
THAT A DAMAGE CAP, WHILE IT
DOESN'T ELIMINATE A COMMON LAW
CAUSE OF ACTION, DOES CHANGE IT
TO THE POINT THAT THE ACCESS TO
COURTS PROVISION IS IMPLICATED.
SO UNDER THAT ANALYSIS-- AND
THEN THEY ALSO HAVE A,
ADMITTEDLY BRIEF, STATEMENT IN
THERE THAT A PLAINTIFF WHO GOES
TO COURT AND GETS A VERDICT OF A
MILLION DOLLARS AND COMES BACK
AND HAS IT REDUCED TO 450 IS NOT
ENJOYING THE RIGHT TO JURY TRIAL
AS WE HAVE UNDERSTOOD IT.
I UNDERSTAND IT WAS NOT A
DETAILED ANALYSIS, BUT IT IS IN
THE OPINION.

AND THOSE HOLDINGS WERE NOT
REJECTED IN ASHARTE, NOR IN
PHILIPPE, BECAUSE THEY WERE NOT
AT ISSUE BECAUSE THERE WERE
COMMENSURATE ARE BENEFITS IN THE
ASH STRAIGHT SCHEME FOR--
ARBITRATION SCHEME FOR A
CONFESSION OF FAULT, CHEAPER
MEANS OF PROVING AND PROMPTER
PAYMENT IN ADDITION TO OTHER
BENEFITS.
WE HAVE NONE OF THAT HERE.
THERE'S ABSOLUTELY NO
COMMENSURATE BENEFIT.
THIS LADY SIMPLY IS JUST
SUFFERING LESS THAN HER FULL
COMMON LAW RIGHT BECAUSE SHE HAD
SUCH CATASTROPHIC INJURIES.
AND THE 4TH DISTRICT IN KALITAN
WAS VERY CLEAR THAT LD BE
DISINGENUOUS-- AND I'M NOT
CRITICIZING CO-COUNSEL, EXCUSE
ME, OPPOSING COUNSEL, BUT THAT'S
THE WAY THEY DESCRIBED IT, TO
SAY THAT EQUAL PROTECTION WOULD
BE APPLIED DIFFERENTLY IN A
PERSONAL INJURY ACTION THAN IN A
WRONGFUL DEATH ACTION.
SO ABSENT FURTHER QUESTIONS, I
WOULD REQUEST THAT THIS COURT
SIMPLY APPLY McCALL--
>> IT APPEARS THAT YOUR
OPPOSITION HAS, AT LEAST THIS
MORNING, HAS SUGGESTED THAT
THERE ARE OTHER ISSUES WITH
REGARD TO SUFFICIENCY OF THE
EVIDENCE, AND THAT THAT'S
SOMETHING THAT THIS COURT OUGHT
TO BE LOOKING AT.
>> YES.
I UNDERSTAND THAT.
AND LET ME ADDRESS THAT THEN.
THE EVIDENCE WAS PRESENTED
THROUGH OUR MEDICAL EXPERTS AND
A PSYCHIATRIST REGARDING THE
CONDITION OF MY CLIENT AS A
RESULT OF BEING PUT IN A COMA
BE, BEING IN ICU, THE TRAUMA OF
IT.
IT WAS NOT OBJECTED TO AT TRIAL.

AND, CANDIDLY, THERE WAS
SOMETHING SAID TWO YEARS BEFORE
WHICH I REGRET, IT SHOULD NOT
HAVE BEEN SAID.
IT WAS SAID BY A DIFFERENT TRIAL
LAWYER.
NOBODY RAISED THAT AT THE TIME
OF TRIAL.
THE EVIDENCE WENT IN, THE
DEFENSE MADE THEIR MOTIONS FOR
DIRECTED VERDICT.
THEY WERE ULTIMATELY DENIED
BECAUSE THIS PSYCHIATRIST
TESTIFIED THAT THIS WOMAN HAS
SUFFERED SIGNIFICANT PROBLEMS.
SHE HAS, SHE HAS SEIZURES, SHE
HAS MENTAL LIMITATIONS ON HER
FOCUS AND CONCENTRATION, SHE HAS
MEMORY PROBLEMS--
>> OKAY.
SO THE EVIDENCE WAS THERE, AND
THEN THAT ARGUMENT WAS PRESENTED
TO THE DISTRICT COURT BELOW?
>> YES, IT WAS.
>> AND DID THE DISTRICT COURT
ENTER A RULING WITH REGARD TO
THAT?
>> I THINK THE 4TH DISTRICT
ULTIMATELY DETERMINED IT DIDN'T
NEED TO REACH IT BECAUSE OF ITS
RULING ON THE CAP.
SO AS MUCH AS I WOULD LIKE TO
RELY ON THAT, I DON'T THINK I
CAN.
BUT THE EVIDENCE WAS PRESENTED.
THE JURY MADE A DETERMINATION.
I WOULD NOTE THAT THE LANGUAGE
ON THE VERDICT FORM P IS NOT IN
THE FORM OF ORGANIC BRAIN
DAMAGE.
IT TALKS ABOUT BRAIN INJURY OR
CLOSED HEAD INJURY THAT RESULTS
IN EPISODIC NEUROLOGICAL SEQUEL
LIE OR SOMETHING ALONG THOSE
LINES.
AND I THINK THE TESTIMONY THAT
WAS PRESENTED FELL CLEARLY
WITHIN THAT.
AND THEY WERE ENTITLED TO
PRESENT OPPOSING EVIDENCE.

THEY DID NOT OBJECT TO THE FORM
OF THE VERDICT AND, THEREFORE,
THAT WAS SUFFICIENT EVIDENCE AS
THE TRIAL COURT FOUND, AND THIS
COURT SHOULD NOT REJECT IT.
BUT THIS COURT WOULD HAVE TO
REACH IT IF IT CHOSE TO
DETERMINE THAT McCALL OR ANY
OTHER CONSTITUTIONAL PROVISION
DOES NOT BAR THE CAP IN THIS
CASE.
THANK YOU.
>> TO ADDRESS JUSTICE PARIENTE'S
QUESTIONS REGARDING COMPARING
THIS CASE TO, PERHAPS, AN AUTO
ACCIDENT, THAT WASN'T ARGUED
BELOW, AND I'M GUESSING THE
REASON WHY IS BECAUSE OF THIS
COURT'S PRIOR DECISION IN MISS
RAH HI WHICH I UNDERSTAND I
BELIEVE YOUR HONOR DISSENTED IN.
BUT THAT IS THE LAW OF THIS
COURT.
>> BUT IT JUST-- AND I DIDN'T
WANT REALIZE THAT DEALT WITH
THIS SITUATION.
IT IS TRUE THAT IF THIS
PLAINTIFF HAD HAD A CARPAL
TUNNEL INJURY AS A RESULT OF AN
AUTO ACCIDENT AND THEN HAD
MEDICAL MALPRACTICE COMMITTED ON
HER IN THE HOSPITAL AND ENDED
UP, ALTHOUGH-- AND I'VE
MINIMIZED HER DAMAGES.
I'M READING WHAT THE 4% DISTRICT
SAYS ABOUT IT.
IT SEEMS PRETTY SIGNIFICANT,
RIFE TIME DAMAGES, THAT SHE
COULD-- LIFETIME DAMAGES, THAT
SHE COULD HAVE COLLECTED HER
ENTIRE DAMAGES BECAUSE THE
ORIGINAL TORTFEASOR IS
RESPONSIBLE FOR IT, IS THAT
CORRECT?
>> I THINK THAT'S RIGHT.
>> OKAY, SO THE QUESTION--
[AUDIO DIFFICULTY]
ARGUMENT BETWEEN
SIMILARLY-SITUATED PLAINTIFFS.
>> AND I'M GOING TO SAY THIS,

AND I'M NOT TRYING TO GET OUT OF
IT.
THIS HAS NEVER BEEN ADDRESSED
BELOW.
>> OKAY.
>> I WOULD SAY THIS IS SOMETHING
THAT THE COURT HAS RECOGNIZED AS
A NECESSARY CONSEQUENCE OF
LEGISLATION AND THAT IT'S BEEN
ALLOWED IN THE PAST, AND IT
DOESN'T OFFEND EQUAL PROTECTION.
SO UNLESS YOUR HONORS HAVE
ADDITIONAL QUESTIONS, I
APPRECIATE THE ADDITIONAL TIME.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.