IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 73,729

DELTA AIR LINES, INC.,

Defendant/Petitioner.

-vs-

HAROLD AGELOFF and
CAROL M. AGELOFF, etc., et al.,

Plaintiffs/Respondents,
_______________________________/

FILED
SID J. WHITE
APR 17 1989
CLERK, SUPREME COURT
By______
Deputy Clerk

BRIEF OF RESPONDENTS ON CERTIFIED QUESTIONS

See substitution filed June 14

~~SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402~~

Robert M. Montgomery, Jr. etc.

and
Philip M. Burlington, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Plaintiffs/
Respondents

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PREFACE

This cause is before the Court on a certified question from the United States Court of Appeals for the Eleventh Circuit. Consistent with this Court's terminology, the brief will refer to Delta Airlines, Inc. as the Movant or as **"Delta".** For ease of reference, the Plaintiffs will be referred to as the Estate, and the Decedent, Scott Allen Ageloff, will be referred to as "Ageloff". The following designations will be used:

(R-) - Federal Record, Volume No., Document No., Page No.

(SR) - Federal Supplemental Record, Volume No., Document No., Page No.

(A) - Movant's Appendix

(AA) - Estate's Appendix

STATEMENT OF THE CASE AND FACTS

The Estate adopts and incorporates the Joint Statement of Facts provided this Court by the United States Court of Appeal for the Eleventh Circuit, with the following clarifications and additions.

Delta approves of the Joint Statement of Facts, but seeks to avoid the testimony of the economic expert it presented at trial, Dr. Hartley Mellish (Movant's Brief pg. 1). Once examined, it is apparent why Delta wishes to avoid his testimony since it is diametrically opposed to Delta's arguments regarding the calculation of net accumulations. Dr. Mellish consistently testified that a proper calculation of net accumulations required

consideration of the increase in the value of the Decedent's projected savings. He testified as follows (R8-72-65-66, 83):

> Net estate accumulation needs to take into account the amount of accumulations, the savings, if you will, and what happens to those savings; the increase in the value of those assets purchased with those savings. It needs to take into account what happens, what would probably happen to those accumulations, after retirement from the labor force....
>
> Net accumulation rates, because net accumulation is a bit different than savings. Net accumulation is the result of your level of savings. It is also a result of the increase in the value of the assets that those savings are put into.
>
> Nationally, for example, as I said, let's assume the 19% figure. That is a function of the rate of savings. Actually, nationally, the level of savings is less than 10%. It varies from one year to the next. It is typically between 5 and 10%. The net accumulation figure of 19%, that is a result of the savings rate and the income in the value of the assets....

AS noted in the Joint Statement of Facts, the Plaintiff's economic experts calculated net accumulations based on the assumption that Ageloff would have reinvested his (projected) savings in his family's company, Kidsworld, or a similar company (A8-9). This assumption was based upon demonstrated facts that Ageloff had consistently invested in his company. Dr. Mellish assumed that Ageloff's savings would be invested in government securities (A9). He testified (R8-72-84, 119):

> I took into account a return on the savings, a risk-free rate of return, since I have also reduced future losses to present value at a risk-free rate....

> Q. Dr. Mellish even though you had Brenda's documentation of a higher savings, you took 25%; is that correct, sir?
>
> **A.** That's correct.
>
> Q. What did you invest these savings in, at what rate?
>
> A. Risk-free return.
>
> Q. Which was that?
>
> **A.** Government securities.
>
> Q. Which was what?
>
> A. Government securities.
>
> **Q. 8%, 10%?**
>
> **A.** Today, depending on the maturity, 5 to 7% market rate except my method is based on a real rate of return.

Thus, Delta's own expert testified contrary to their position regarding the proper calculation of net accumulations.

The trial judge rejected Defendant's argument on this point stating, in pertinent part (R4-69-131, R5-70-137-138):

> THE COURT: Have you pulled the legislative history on the wrongful death statute? I did. I pulled it off the tape. I can't find anything in the legislative history that would support that interpretation. I have the tapes from the Florida legislature where it was drafted. I have the two original drafts with the notes on it. I can't find anything in support of that interpretation, but I will listen to your arguments
>
> ...I have reviewed the language of the statute, and I looked through all the legislative history which I have from a prior case. It is this court's view point that I do not feel this particular type of situation was a type contemplated by the statute when they decided to exclude investments.

> Basically, we have an individual taking his income, placing it back in his company. That is not the type of investment I think they contemplated. And in my viewpoint, to exclude that type of evidence would be to, in effect, jeopardize or deprive the injured party of a benefit of the tortfeasor. As I review the legislative history of the statute, the whole contemplation was to make good economic loss.
>
> Here, the man, if he had been taking income and putting it into his pocket, there wouldn't be an issue. Here, he was putting it back in the company to generate more income. It is my viewpoint, it is a jury question on the issue. The motion is denied.

On page 13 of its Brief, Delta represents that the present value calculation in this case was intended to yield a "lump sum which is mathematically equivalent to the prospective annual losses projected for the estate.'' No such calculation was ever made below by any economic expert. Indeed, all of the economic experts were consistent in reducing the net accumulations to present value. They took the value of the net accumulations Ageloff would have left in his Estate at the conclusion of his life expectancy (the year 2030) and reduced that number to present money value **(R5-70-148, R6-71-32, R8-72-85).**

For example, after determining the projected amount of Ageloff's Estate at the conclusion of his life expectancy, Dr. Goffman testified regarding the reduction to present value as follows **(R5-70-145):**

> We are talking about a sum of money [net accumulations], a sum of money that needs to be in a fund in the year 2030; roughly 44 years from now. Yet, we have to determine an amount of money now, which if invested in the most secure manner possible, would yield that [amount] **44** years from now.

None of the experts characterized their calculations as yielding the equivalent of "prospective annual losses" of the Estate.

In fact, contrary to its statement on page 13 of its brief, **Delta's counsel stated at trial that the relevant calculations** did not involve determining any damages on an annual basis, but rather the present value of the net accumulations in the year 2030 (R8-72-158):

> MR. BARWICK: Your Honor, let me object to this line of questioning. We are not dealing here today with employing the dollar amount on an annual basis. We are trying to establish the present value of today of a net accumulation in the year 2030. So, there are two different concepts or principles all together.

As noted previously, the trial court rejected Delta's position regarding the computation of net accumulations, and permitted the jury to consider the expert testimony regarding the rate of return on the projected savings of Ageloff. The jury instructions incorporated the statutory definition of net accumulation contained in Fla. Stat. §768.18(5) (SR2-76-11-12). The jury was also instructed to reduce any future loss it found to present value (SR2-76-13). Dr. Goffman's testimony was that the net accumulations reduced to present value were approximately $1,970,000 (A8). Dr. Cunitz testified that the present value was approximately $2.8 million, and Dr. Mellish testified to approximately $280,000 (A9-10). The jury returned a verdict in the amount of $1,000,000 (A10).

On appeal to the Eleventh Circuit, Delta raised numerous issues of State and Federal law (AA1-12). Delta raised the

issue, now certified to this Court, regarding the appropriate method of computing net accumulations. Delta also contended that Federal law did not permit expert testimony regarding different methods of predicting inflation, but that the Court should have required the jury to apply the below-market-discount rate.

In the Eleventh Circuit's opinion, it determined that since this was a diversity case Federal Law did not govern the method for predicting the effects of inflation. However, the Court noted that the U.S. Supreme Court's recent decision in MONESSEN SOUTHWESTERN RAILWAY CO. v. MORGAN, 108 S.Ct. 1837 (1988), declined to require a particular method for determining the effect of inflation on future losses. The court then stated (AA12):

> As we read the standard COASTLINE R.CO. v. GARRISON, 336 So.2d 423 (Fla. 2d Dist. Ct. App. 1976) Florida accords substantial discretion to the trial court to determine which, of several methods, the jury must use in calculating present value. If the parties are not in full agreement on the applicable Florida law, such questions may be included in the certificate to the Florida Supreme Court.

Additionally, the Eleventh Circuit specifically noted that Delta's legal position regarding the computation of net accumulations was inconsistent with the testimony of its expert, Dr. Mellish (AA8, fn. 27 [last paragraph]).

After additional proceedings, the Eleventh Circuit certified the following questions to this Court:

> 1. Does the definition of Net Accumulations under Fla. Stat. §768.18(5) of the Florida Wrongful Death Act:

(a) include investment income?

(b) exclude the investment return on future savings of a Decedent as constituting "income from investments continuing beyond death?"

2. Under the Florida Wrongful Death Act, should determination of the future inflationary effects on prospective net accumulations be calculated upon the (i) below-market-discount method, (ii) the case-by-case method, (iii) the total offset method?

SUMMARY OF ARGUMENT

The statutory definition of net accumulations does not exclude investment income from projected savings since it only excludes income on investments continuing beyond death. That express exclusion is clearly only intended to prevent recovery for interest on investments that existed prior to the Decedent's death. Those amounts do not constitute a loss to the Estate and, therefore, should not be compensated by the tortfeasor. However, income on the projected savings of the Decedent does constitute a loss to the Estate and, in order to make the Estate whole, the tortfeasor should be liable for those amounts. This is consistent with generally accepted economic principles. Moreover, if the legislature intended to exclude all investment income from the determination of net accumulations, it would have simply said so rather than limiting that exclusion to investment income continuing beyond death.

The inclusion of investment income on projected savings does not result in a double recovery. Delta's argument on that point is based on a fundamental misconception of the reduction to

present value calculation. Delta's own economic expert at trial testified that in order to properly determine net accumulations one must consider the savings rate and the accumulation rate, which is predicated on the return generated by the savings. The Plaintiff's economic experts also testified to that economic principle. The inclusion of investment income on projected savings is necessary in order to accurately recreate the Estate as the Decedent would have left it had he not died prematurely as a result of the Defendant's tortious conduct. Delta's argument would not accurately recreate the accumulation of an estate, but rather is based on the erroneous "Savings in a Mattress" theory of net accumulations. None of the economic experts testified consistent with Delta's theory for the simple reason that it is not supported by generally accepted economic and mathematical principles. The reduction to present value calculation does not create the mathematical equivalent of a lost income flow in this case because the income generated by the present cash value must be reinvested and accumulated in order to achieve the amount of net accumulations at the time of the Decedent's projected death. Thus, the language of the statute, generally accepted principles of tort law, and economic and mathematical standards require that income from the projected savings of the Decedent should be considered by a jury in determining net accumulations.

This Court should follow the lead of the United States Supreme Court and not mandate a particular method of predicting future inflationary trends for purposes of calculating future damages. Each method can be criticized since there is no precise

method of making those predictions and each method has certain flaws. In view of the fact that the legislature has specified the damages available for the Estate in a wrongful death case, the legislature is the appropriate body to require a particular method of determining future damages.

POINTS ON APPEAL

POINT I

PROJECTED INVESTMENT INCOME OCCURRING AFTER THE DEATH OF THE DECEDENT IS A PROPER ELEMENT OF NET ACCUMULATIONS AS DEFINED IN FLA. STAT. §768.21(6)(a).

POINT II

THIS COURT SHOULD NOT LIMIT EXPERT TESTIMONY REGARDING FUTURE INFLATIONARY EFFECTS ON NET ACCUMULATIONS TO A SPECIFIC METHOD OF DETERMINING FUTURE INFLATIONARY EFFECTS.

ARGUMENT

POINT I

PROJECTED INVESTMENT INCOME OCCURRING AFTER THE DEATH OF THE DECEDENT IS A PROPER ELEMENT OF NET ACCUMULATIONS AS DEFINED IN FLA. STAT. §768.21(6)(a).

Introduction:

An analysis of the language utilized in Fla. Stat. §768.21(5) clearly demonstrates that the legislature only intended to exclude from the calculation of net accumulations income on investments that existed prior to the death of the Decedent. Applying generally accepted principles of statutory construction, that definitional statute cannot reasonably be

interpreted to exclude investment income on projected savings. To accept such a construction would, as the trial court noted, unfairly deprive the Estate of a foreseeable loss; and would be contrary to economic realities.

The argument presented by Delta is inconsistent with the testimony of each economic expert who testified at trial, including Dr. Mellish, Delta's own expert. While the issue before this Court is a question of law, the fact that Delta could apparently find no economist to testify consistent with its theory demonstrates that the result it seeks is illogical and contrary to accepted economic principles.

Having no expert testimony to support its argument, Delta's counsel attempts to be an economic expert in its brief, but makes critical errors in doing so. For example, Delta's argument that including the investment return on the Decedent's projected savings would result in a double recovery is mathematically wrong. Delta's own economist utilized an investment return on Ageloff's projected savings in order to determine the net accumulations. Obviously, he had no interest in authorizing a double recovery for the Estate. As discussed infra, pg. 17-21, there is no double recovery as a result of the method used for determining net accumulations in this case. Delta's argument on this point is based on a fundamental misconception of the reduction to present value calculation. In fact, if Delta's arguments are accepted, the result would be an unjustifiable reduction of the net accumulations.

The lanquage of the statute does not exclude investment income on projected savings:

Fla. Stat. §768.18(5) provides the following definition of net accumulations:

> "Net accumulations" means that part of the decedent's expected net business or salary income, including pension benefits, that the decedent probably would have retained as savings and left as part of his estate if he had lived his normal life expectancy. "Net business or salary income" is the part of the decedent's probable gross income after taxes, excluding income from investments continuing beyond death, that remains after deducting the decedent's personal expenses and support of survivors, excluding contributions in kind.

Initially, it should be noted that the "net business or salary income" is based on the Decedent's probable gross income. "Gross income" has been defined by the Florida legislature (for purposes of taxation and finance) to include investment income, Fla. Stat. §196.012(10).

> "Gross income" means all income from whatever source derived, including, but not limited to, the following items, whether actually owned by or received by, or not received by but available to, any person or couple; earned income, income from investments, gains derived from dealings in property, interest, rents, royalties, dividends, annuities, income from retirement plans, pensions, trusts, estates and inheritances, and direct and indirect gifts.

This is the generally accepted definition of "gross income," see 26 U.S.C. §61(a). It is, of course, settled law that words in a statute are given their customary meaning unless the legislature specifically directs to the contrary, CITIZENS OF STATE v. PUBLIC SERVICE COMMISSION, 425 So.2d 534 (Fla. 1982); SOUTHEASTERN

FISHERIES ASSOCIATION, INC. v. DEPARTMENT OF NATURAL RESOURCES, 453 So.2d 1351 (Fla. 1984). The legislature has not directed to the contrary in this case.

Thus, it appears clear that the legislature intended all income to be considered for purposes of determining net accumulations, subject to appropriate deductions and the exclusion regarding investments continuing beyond death. That exclusion, called the "Express Exclusion" by the Eleventh Circuit, bolsters this analysis. Unless the term "gross income" was intended to include investment income, there would be no reason to specifically exclude "income from investments continuing beyond death."

The Express Exclusion is clearly intended to exclude only investments which are income producing at the time of Decedent's death, because only those investments would continue beyond the Decedent's death. If, as Delta argues, the legislature intended to exclude all investment income, it could have done so very simply by stating that net business or salary income is that part of Decedent's probable gross income (after taxes and other deduction), excluding income from investments. There would be no reason to include the phrase "continuing beyond death" if all investment income was intended to be excluded.

The rationale for the Express Exclusion is based on traditional tort concepts of causation. The income from investments which existed at the time of Decedent's death do not constitute a loss to the Estate and, therefore, the Defendant should not be liable for their value. In its opinion in this

case, the Eleventh Circuit, albeit in dicta, explained the rationale for excluding income from investments which existed prior to the Decedent's death (AA11):

> The Express Exclusion may well mean merely that, with respect to assets which are income-producing at the time of the decedent's death, the tortfeasor has no responsibility for compensating or reimbursing the estate for the value of the earnings which that investment would have produced after the decedent's death. This construction seems plausible in that no recovery from the tortfeasor would be necessary since the income from decedent's existing investments would continue beyond his death. A savings account that a decedent owns at his death, for instance, continues to pay interest after his death. That interest is credited to the account periodically by the savings institution, and becomes part of the estate. Consequently, the income on those savings would not be part of the estate recovery, because none of that income has been lost to the estate by reason of the decedent's death.

That reasoning obviously does not justify exclusion of the income from the Decedent's projected savings since that constitutes a loss to the Estate. This conclusion is consistent with the language of the Express Exclusion. The Decedent's projected savings over his life expectancy do not exist at the time of the Decedent's death and, therefore, cannot continue beyond his death. Thus, the income which would be generated by those funds and retained in the Decedent's Estate at the end of his life expectancy are not subject to the Express Exclusion.

A simple example clarifies this analysis. Assume that the Decedent had invested his savings prior to his death in IBM stock and had expressed an intention to do so in the future. Any

income (or return) generated by the IBM stock owned by the Decedent at the time of his death would not constitute an economic loss to the Estate as a result of the tortfeasor's conduct. Therefore, it should not be included as a part of the net accumulations. However, in determining the Decedent's net accumulations based on his projected savings which would be invested in IBM stock, it would defy logic and economic reality not to consider the income or return on the stock. That income would be generated subsequent to the Decedent's death until the date that, but for the tortfeasor's conduct, the Decedent would have died.[1] The loss of that projected savings, i.e., the stock and its income, would constitute a loss to the Estate since, but for the tortfeasor's conduct, the Decedent would have accumulated those funds in his Estate. This analysis is consistent with the language of the statute, tort concepts of causation and settled principles of economics.

Delta's "Savings in a Mattress'' theory of net accumulations:

Contrary to the language of the statute and the simple logic of compensating the Estate for the loss of net accumulations,

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[1]As noted in the Eleventh Circuit's opinion (AA10):

> Delta concedes that the relevant time period for calculating the recovery in a wrongful death case is the decedent's life expectancy.

See §768.18(5), quoted supra, pg. 11.

recoverable element of damage. The flaw in Delta's argument is apparent from its broad statement that "passive income is never lost as a result of the Decedent's death" (Movant's Brief pg. **14).** That statement is a half truth. The passive income from the investments which existed at the time of Decedent's death are, as noted by the Eleventh Circuit, not lost to the Estate and that is the rationale behind the express exclusion. However, Delta is wrong in saying that all passive income is not lost to the Estate since the passive income on the projected savings which the Decedent would have retained in his Estate is lost, and that loss was caused by the Defendant's tortious conduct.

As each economic expert found in this case, once it is determined that the Decedent would have saved a certain portion of his projected earnings, it is necessary to determine the form in which those savings would be retained. Dr. Mellish, Delta's expert, hypothesized that the Decedent's savings would be invested in risk-free government securities **(R8-72-119).** The Plaintiff's experts testified that, consistent with his past behavior, Ageloff would have invested his savings in his family's company, Kidsworld, or a business similar to that **(A8-9).**

Clearly, in order to recreate the Decedent's accumulation of an estate, generally accepted economic principles require the assumption that the projected savings be placed in some form of investment. The income that would accrue from those investments constitutes a part of the savings. Delta's expert, Dr. Mellish, testified that while the level of savings in the United States is typically between 5% and **10%,** the accumulation rate is

approximately 19% to 25% because of the income or increase in value of the savings investments (R72-83).

Delta, however, seeks to disavow the testimony of every expert below regarding the economic principles governing the determination of net accumulations. It argues that to recreate the **loss** to the Estate, it must be conclusively presumed that the Decedent's projected savings would generate no income. In essence, Delta wants to compel the fact-finder to assume that the Decedent would have stuffed his annual savings in a mattress where it would produce no income. Under Delta's theory, in order to determine net accumulations, we would calculate the amount of cash that the Decedent would stuff in his mattress each year of his life expectancy. Then, at the conclusion of the Decedent's life expectancy, we would dump out the mattress (or perhaps mattresses), count the money, and reduce that sum to present value.

Delta's theory is obviously at odds with economic realities since it cannot validly be presumed that every Decedent will simply stuff their savings in a **mattress.**[2] As every economic expert testified at trial, a proper determination of net accumulations must take into consideration the nature of the

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[2]/**If** a defendant could demonstrate that a decedent did, in fact, stuff all his savings in a mattress, this calculation might be appropriate. In that situation, whether there would be a return on the decedent's savings would be a question of fact. There was no evidence of mattress stuffing in the case **sub** judice.

investment in which the projected savings are placed and the return on that investment. Delta's argument ignores this simple economic reality and attempts to artificially reduce the net accumulations based on an unreasonable assumption. Statutes should not be construed to cause an absurd result, McKIBBON v. MALLORY, 293 So.2d 48 (Fla. 1974); TOWERHOUSE CONDOMINIUM, INC. v. MILLMAN, 475 So.2d 674 (Fla. 1985). Certainly, in view of the reasonable construction of the Express Exclusion suggested by the Eleventh Circuit, the unreasonable interpretation claimed by Delta should be rejected.

The inclusion of income from projected savings does not result in a double recovery:

Delta's claim that the inclusion of investment income will result in a double recovery to the Estate is based on a false characterization of the present value reduction. In its brief, Delta claims that the reduction to present value "yields a lump sum which is mathematically equivalent to the prospective annual losses projected for the estate", and results in a "lump sum [which] may be invested to yield a cash flow duplicating the annual losses" (Movant's Brief pg. 13). These statements are mathematically false and are diametrically opposed to the statement made by Delta's counsel at trial (A8-72-158):

> We are not dealing here today with employing the dollar amount on an annual basis. We are trying to establish the present value of today of a net accumulation in the year 2030. So, there are two different concepts or principles altogether.

Delta's counsel is now taking a different tack in its brief in an attempt to persuade this Court that the inclusion of investment income would result in double recovery. However, an analysis of the concepts of net accumulation and reduction to present value reveal that Delta's position on the appeal is simply without merit.

The definition of "net accumulations" in Fla. Stat. §768.18(5) clearly contemplates that the Estate should be awarded the amount the Decedent would have left as part of his Estate if he had lived his normal life expectancy. As discussed above, this is calculated by projecting the Decedent's savings (and the return thereon), and determining the amount that would be left in his Estate at the conclusion of his normal life expectancy (in this case the year 2030). That lump sum is the loss to the Estate. However, because it is a pecuniary loss to be suffered in the future, it must be reduced to present value, see Florida Standard Jury Instruction 6.10; BRADDOCK v. SEABOARD AIRLINE RAILROAD CO., 80 So.2d 662 (Fla. 1955).

The reduction to present value concept is defined as ("Illinois Standard Jury Instruction 34.05, Mortality Tables as Evidence of Damages-Death Case."):

> "Present cash value" means the sum of money needed now, which, together with what that sum will earn in the future, will equal the amounts of the pecuniary benefits at the times in the future when they would have been received. [Emphasis supplied.]

That definition is consistent with the testimony at trial of Dr. Goffman regarding his reduction to present value of the net accumulations, quoted, *supra*, pg. 4.

The reduction to present value calculation utilizes the following variables: the amount of the future sum (the net accumulations), the date that loss will be suffered (the end of the Decedent's normal life expectancy), and a selected discount **rate.**[3] In this case, both Dr. Goffman and Dr. Cunitz utilized a 7% discount rate, while Dr. Mellish used a variable rate (AA4). The reduction to present value yields a sum which, invested now at the selected discount rate, will result in the principal sum as of the future date. Essential to the calculation is the assumption that the return or income on the investment will be reinvested each year, i.e., compounded.

Thus, the reduction to present value necessarily assumes that the present value of the net accumulations will be invested and the income reinvested (at the same rate of return) continuously in order to achieve the "net accumulations" that would have existed at the conclusion of the Decedent's normal life expectancy. Thus, the return generated by the present value is not the equivalent to any annual loss to the Estate nor is it a double recovery. It is simply necessary in order that the Estate receive full recovery of the future economic loss.

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[3]/**For** the actual formula see JONES & LAUGHLIN STEEL CORP. v. PFEIFER, 462 U.S. 523, 537, fn. 21 (1983).

None of the economic experts who testified in this case stated that investment of the present value of the net accumulations would yield the "mathematical equivalent to the prospective annual losses projected for the estate'' (Movant's Brief pg. 13). Such an assertion is absurd since the net accumulations are not an annual loss, but rather a lump sum loss. As indicated in his statement to the trial judge, quoted supra, pg. 5, Delta's counsel understood this distinction at trial, but apparently has become confused during the appellate process.

Delta is apparently confusing the concept of net accumulations with lost earning capacity. As noted by the United States Supreme Court in JONES & LAUGHLIN STEEL CORP. v. PFEIFER, 462 U.S. 522 (1983), the determination of an award for impaired earning capacity is designed to compensate the worker for the diminution in his or her stream of income (462 U.S. at 533). Using the reduction to present value calculation (because that loss is to be suffered in the future), it is possible to determine a lump sum which, if invested, would produce the mathematical equivalent of the annual losses in earning capacity. However, that determination requires a different mathematical computation than that applied in the case sub judice. As noted in PFEIFER, supra, (at pg. 537-38), in order to duplicate the lost stream of income, it is necessary to determine the lost earnings for each year of the worker's projected employment expectancy and then reduce each of those annual losses to present value. The reduction to present value calculation is necessarily made as to each annual installment because that element of loss

is treated as being suffered in each of the future years, and not at the conclusion of the worker's life expectancy as are net accumulations, see also, DEAKLE v. JOHN E. GRAHAM & SONS, 756 F.2d 821 (11th Cir. 1985).

In summary, the inclusion of the investment return on projected savings does not result in a double recovery to the Estate. Calculating the rate of return on the Decedent's projected savings is necessary in order to accurately determine what the Decedent would have left in his Estate as "net accumulations." It simply cannot logically be presumed that all of the Decedent's savings would be stuffed in a mattress. Once the value of the net accumulations as of the time of the Decedent's projected death is determined, that amount must be reduced to present value. That calculation simply determines what sum invested now at a prescribed rate of return will equal the net accumulations at the time of the Decedent's projected death. The income generated by the investment of that amount is not a windfall to the Estate, but rather must be reinvested and compounded in order for the Estate to be wholly compensated for the loss of net accumulations. For that reason, there is no double recovery.

The inclusion of investment income earned on projected savings in the determination of net accumulations is consistent with Florida case law:

Although there is no Florida case specifically addressing the statutory language at issue, Florida case law is consistent with the proposition that the inclusion of investment income from

the projected savings of the Decedent is a valid element of loss to the Estate in a wrongful death case. In FLORIDA EAST COAST RAILWAY CO. v. HAYES, 64 So. 504 (Fla. **1914),** the Court construed a prior Florida statute governing wrongful death which provided that "the jury shall give such damages as the party or parties may have sustained by reason of the death of the party killed", Fla. Stat. **§768.02(1883).** The Court approved as a valid element of damage (64 So. at 505):

> The present worth of the decedent's life to an estimated prospective estate that he probably would have earned and saved after becoming of age and during his life expectancy to be left at his death. A determination of the proper amount of such damage requires a consideration of the contingency whether the decedent probably would have lived to become of age and to some given time afterwards, as well as an estimate of the value of the estate he probably would have earned and saved after he would have become of age, and would probably have left at the end of his life expectancy, and also an estimate of the present money value of the decedent's life to the estimated prospective estate.

See also, JACKSONVILLE ELECTRIC CO. v. BOWDEN, 45 So. 755 (Fla. 1907); FLORIDA EAST COAST RAILWAY CO. v. HAYES, 64 So. 504 (Fla. 1914). Clearly, this Court considered that a valid element of damage was the amount of the Estate which the Decedent would have left, but for the premature death caused by the tortfeasor. In order to recreate the loss of value to the Estate, income on the projected savings must be considered. To exclude that income would require acceptance of the unrealistic "Savings in the Mattress" theory.

The inclusion of investment income in determining the loss to the Estate was discussed in SMITH v. LASSING, 189 So.2d 244 (Fla. 4th DCA 1966). In that case, the decedent was described as "an astute business woman, frugal and modest in habit." The jury returned a verdict in her favor and one of the defendants appealed claiming that the award was grossly excessive. The Fourth District clarified the essential question facing the jury as (189 So.2d at 246):

> How much, from the evidence, would Mrs. Lassing have accumulated in her estate via her skill and efforts, using the enumerated criteria, in the period from the date of her accidental death to the day of her expected normal death, reducing the result to its present money value?

The court determined that the jury could properly consider investment income in making that determination stating (189 So.2d at 247):

> On the issue of damages the jury was properly instructed that the amount should be fixed by determining the amount that the decedent, if she had lived, would probably have accumulated from her probable future earnings and saved during her life expectancy and thereby left at death. The measuring of the damages necessarily involves consideration of all of the facts which directly pertain to the decedent's earnings in the past, her age, health, business capacity, education, habits, experience, energy, morals, social adaptability, skill and environment and her present and future prospects of business success at the time of her death and her thrift and probable duration of life. None of these factors require exclusion of evidence of earnings of the deceased from investments, management of rental property and management of capital. The court did not err in admitting such evidence.

> Defendant appears to contend furth[er] that the decedent was not gainful[ly] employed and thus could not be deemed to have any earnings. Earnings may be forthcoming even though not realized by the sweat of the brow and even through not denominated as salary consequent to being in someone's employ. Some people labor for others, some are self-employed, others realize their living by investments and trading of assets, and in all such cases income or earnings may be accumulated in an estate within the proper bounds for consideration as allowable damages in wrongful death actions. The definition of earnings in such cases is not strict.. The more critical factor is the savings which are accumulated.

The Fourth District rejected the "Savings in the Mattress" concept of recovery (*Ibid*):

> It [the jury] was not bound, as defendant contends, merely to subtract her expenses from income, multiply the difference by life expectancy found in the tables and reduce the result to its present money value.

SMITH was not decided under the current wrongful death statute, but rather under its predecessor which provided that the jury should award the estate such damages as were suffered by reason of the decedent's death, 189 So.2d at 246. Thus, the court in SMITH was not faced with the construction of the phrase "income from investments continuing beyond death", nor did the defendant make that specific argument. However, that case is certainly authority for the proposition that under generally accepted tort principles, investment income on projected savings should be considered in order to properly determine the loss to the Estate. Delta's claim that the analysis of SMITH is unsound, is based on the erroneous premise discussed *supra*, pg. 17-21,

that a double recovery would occur if the return on projected savings is considered.

There is no evidence that the legislature intended to exclude income on projected savings from the calculation of net accumulations:

It is a settled principle of statutory construction that unless there is overwhelming evidence of a contrary legislative intent, the language of the statute controls its interpretation, ST. PETERSBURG BANK & TRUST CO. v. HAMM, 414 So.2d 1071, 1073 (Fla. 1982). As discussed above, the language of the statute is clear and, as construed by the Eleventh Circuit, produces a reasonable result. The trial judge in the case sub judice reviewed the legislative history materials and found nothing to support Delta's argument. The only legislative materials that Delta offers in support of its position is the Recommendation and Report on Proposed Revision of Florida Wrongful Death and Survival Statute (hereafter "Report"), submitted by the Florida Law Revision Commission (hereafter "Commission"). Delta seizes on one passage in that report. However, that statement is taken out of context and clearly does not reflect any legislative intent.

The passage relied upon by Delta is contained in a section of the Commission's report entitled "Survey of American Death Acts and the Florida Acts" (Report pg. 25). In the concluding paragraph of that section, the commission states that the current Florida position is that probable future accumulations to the Estate are determined based on "probable business income without

regard to possible investment income" (Report pg. **32).** Delta concedes that that statement, if intended to describe the current state of Florida law, is poorly supported if not mistaken (Movant's Brief pg. **12).** In that, Delta is correct since the sole authority cited by the commission for that statement is LOUISVILLE AND N.R. COMPANY v. JONES, **34 So. 246** (Fla. **1903).** JONES held only that it is improper for the jury to consider investment income as an element of loss to the estate when there is no evidence that the Decedent had ever accumulated any investments. As discussed in SMITH v. LASSING, supra, 189 So.2d at **246,** JONES cannot be construed as holding, as a matter of law, that investment income is irrelevant to a determination of the lost accumulations to the Estate.

Putting aside that the Commission's statement is unsupported by any Florida authority, it is even more apparent that the statement does not constitute any evidence of legislative intent. The passage at issue is contained in a section of the report titled "Survey of American Death Acts and the Florida Death Acts" (Report pg. 25), which constituted solely a discussion of the current state of the law on wrongful death statutes. In the section of the report entitled "Recommendations for Revision" there is no mention of investment income, nor is there any discussion regarding the meaning of the phrase "Excluding income from investments continuing beyond death" (Report pgs. **41-43).** Therefore, the only part of the Report which could properly be relied upon as reflecting legislative intent does not provide any

guidance on this issue. The only relevant passage is an erroneous characterization of prior Florida case law.

It is respectfully submitted that the Commission's Report provides absolutely no guidance regarding legislative intent on the issue before this Court. Even assuming arguendo, that the report is of any probative value on this issue, certainly it does not constitute sufficient overwhelming evidence of legislative intent to overrule the clear language of the statute, see ST. PETERSBURG BANK & TRUST CO. v. HAMM, supra.

Conclusion:

In summary, the language of the statute, generally accepted tort principles, and economic reality require the consideration of investment income arising from projected savings in the calculation of net accumulations under Fla. Stat. §768.18(5). The inclusion of that element of damage does not result in a double recovery. To exclude it would, as noted by the trial court, unfairly deprive the Estate of compensation for an element of loss. This is further supported by the testimony of each economic expert, including Delta's. For these reasons, the Certified Questions designated 1(a) and (b) should both be answered "no."

POINT II

THIS COURT SHOULD NOT LIMIT EXPERT TESTIMONY REGARDING FUTURE INFLATIONARY EFFECTS ON NET ACCUMULATIONS TO A SPECIFIC METHOD OF DETERMINING FUTURE INFLATIONARY EFFECTS.

Relying primarily on CULVER v. SLATER BOAT CO., 722 F.2d 114 (5th Cir. 1983) (en banc), Delta argues that expert testimony regarding future inflationary effects should be limited to the below-market-discount method. It should be noted that in the Eleventh Circuit's opinion in this case it states (AA1, fn. 38):

> We recognize, without deciding, that the Fifth/Eleventh Circuit's en banc decision in CULVER v. SLATER BOAT CO., 722 F.2d 114 (5th Cir. 1983) may now be in doubt since MONESSEN requires the District Court in a federally based action to submit to the jury which method it will use in determining the discount rate. Rejecting JONES & LAUGHLIN STEEL CORP. v. PFEIFER, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) as holding that "the judge rather than the jury is to determine the discount rate in...[federal] actions." MONESSEN, 486 U.S. at ---108 S.Ct. at 1846, 100 L.Ed.2d 362. MONESSEN declares that "[i]t is therefore permissible for the judge to recommend to the jury one or more methods of calculating present value so long as the judge does not in effect pre-empt the jury's function...[provided the judge's instructions] do not 'subject the jury's estimate to...rigid mathematics limitatio[n]' ...." 486 U.S. at ----, 108 S.Ct. at 1846, 100 L.Ed.2d 362 (citation omitted).

It is respectfully submitted, that this Court should follow the lead of the United States Supreme Court and not require, as a matter of law, that a particular method of predicting future inflationary trends be imposed in civil actions. If such a method is to be imposed, it should be done by the legislature especially where, as here, the cause of action is governed by

statute. Since the Wrongful Death Act is statutory and the damages are delineated therein, any mandatory method for determining those damages should be promulgated by the legislature and not the courts.

In JONES & LAUGHLIN STEEL CORP. v PFEIFER, supra, the United States Supreme Court declined to mandate a particular method stating (462 U.S. at 546):

> The litigants and the amici in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy. We are not persuaded, however, that such an approach is warranted.

In fact, the court rejected the decision of the Third Circuit requiring the use of the total offset method of predicting inflation, stating (462 U.S. at 550):

> Although such an approach has the virtue of simplicity and may even be economically precise, we cannot at this time agree with the court of appeals for the Third Circuit that its use is mandatory in the federal courts. Naturally, Congress could require it if it chose to do so. And nothing prevents parties interested in keeping litigation costs under control from stipulating to its use before trial. But we are not prepared to impose it on unwilling litigants....

Furthermore, as noted in the Eleventh Circuit's opinion in this case, the United States Supreme Court recently ruled that the trial court must submit to the jury the method to be used in determining the discount rate, although the trial judge is permitted to recommend a method.

In CULVER supra, the Fifth Circuit (which then included the Eleventh Circuit) determined that the below-market-discount method must, as a matter of law, be applied when computing the effect of future inflationary trends on the computation of future damages. The primary policy consideration appeared to be simplicity and minimization of trial time, and not, as Delta suggests that the case-by-case method was misleading to juries. In fact, the majority opinion noted that (722 F.2d at 120):

> The case by case method sacrifices efficiency and simplicity for pursuit of a "delusive exactness."

Noting the simplicity of the below-market-discount rate, the court recognized that even establishing an appropriate below-market-discount rate is difficult (722 F.2d at 121):

> Economists do not yet fully understand the relationship between inflation and interest.

It would appear that the court's decision in that case was motivated more by a balancing of the burden of expert economic testimony against its inexactitude (722 F.2d at 119, 120):

> No one can accurately predict the course of future inflation....
>
> Whether or not the science of economics continues to be dismal it is assuredly in this regard conjectural.

In SEABOARD COASTLINE RAILROAD CO. v. GARRISON, 336 So.2d 423 (Fla. 2d DCA 1976), a wrongful death case, the plaintiff's economic expert testified by utilizing the case-by-case method for considering the effects of inflation. The defendants argued on appeal that the trial court erred in permitting that expert to testify regarding the effects of inflation. However, the Second

District upheld the trial court's ruling, noting that Florida Standard Jury Instruction 6.10 required reduction of future damages to present value. The court stated (336 So.2d at 425):

> Yet, the standard jury instruction fails to mention any specific interest rate. The matter is for determination by the jury within reasonable limits. And, expert opinion on the proper discount rate is commonly received for this purpose. [Citations omitted.]

The court also noted that the expert's testimony "fell within guidelines we have outlined and the trial court was eminently correct in permitting his expert testimony on the subject" (336 So.2d at 426). In BOULD v. TOUCHETTE, 349 So.2d 1181 (Fla. 1977), this Court approved the decision in GARRISON, supra, and noted that (1185) "inflation has become a fact of life within the experience of everyone."

Delta argues that this Court should mandate the below-market-discount method of predicting inflation, and criticizes the testimony of Plaintiff's experts below who utilized that method. As is apparent from the Federal cases discussed above, each method can be criticized on various grounds. However, simply choosing one method as a matter of simplicity is not warranted. In this respect it should be noted that the trial below was not an extended proceeding. Certainly, if a trial judge finds that a case is getting bogged down because of testimony on a particular subject, he or she may limit that testimony in the interest of expediency. Additionally, if a method is used in an imprecise or misleading manner, that can properly be addressed on cross-examination. These concerns,

however, do not justify imposing one particular method, when each has flaws.

Conclusion:

Therefore, consistent with the United States Supreme Court, this Court should decline to require one particular method for predicting future inflation in wrongful death actions. For that reason, this Court should answer the second certified question by stating that no particular method for determining future inflationary effects on prospective net accumulations is required under Florida's Wrongful Death Act.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished to THOMAS E. ICE, ESQ., 9636 N.E. 2d Ave., Ste. C, Miami Shores, FL 33138; and KATHLYN G. FADELY, ESQ., U.S. Department of Justice, Torts Branch, Civil Division, P.O. Box 14271, Washington, D.C. 20044-4271, by mail, this 10th day of April, 1989.

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY, P.A.
P.O. Drawer 3626
West Palm Beach, FL 33402
and
Philip M. Burlington, Esq. of
EDNA L. CARUSO, P.A.
Suite 4-B/Barristers Bldg.
1615 Forum Place
West Palm Beach, FL 33401
(407) 686-8010
Attorneys for Plaintiffs/
Respondents

By:
PHILIP M. BURLINGTON

GGA/AGELOFF.BRF/gg