SUPREME COURT OF FLORIDA

CASE NO. 73,729

DELTA AIR LINES, INC.,

Defendant/Movant,

vs.

HAROLD AGELOFF and CAROL AGELOFF, as Personal Representative of the Estate of SCOTT ALAN AGELOFF, Deceased,

Plaintiff/Respondent.

On Certification from the United States Court of Appeals for the Eleventh Circuit

MOVANT'S REPLY BRIEF

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A. Introduction

Delta argued in its initial brief that "net accumulations", as defined by the Florida Wrongful Death Act, does not include investment income. Delta acknowledged the Court's power to liberally construe the Florida Wrongful Death Act, but posited that the Court should not interpret the definition of net accumulations to include income from investments because it would result in double recovery of that income for the Plaintiffs. Delta argued that, as a result of the present value calculation, the estate or the survivors will receive all the saved income projected for the decedent at the time that it would have been saved. The beneficiaries are then able to reinvest the annual proceeds and duplicate the decedent's projected investments.

The Plaintiffs, in the Brief of Respondents on Certified Questions (hereinafter "Plaintiffs' Brief), have not disputed Delta's underlying legal theory. The Plaintiffs quarrel only with Delta's assertion that accounting for decedent's income from investments results in double recovery for the Plaintiffs. The Plaintiffs maintain that Delta has performed the present value reduction incorrectly -- that it does not yield an amount of money which will permit the beneficiaries to duplicate the decedent's projected investments. According to the Plaintiffs, excluding investment income will result in a diminution of the decedent's potential estate and a corresponding loss to the survivors.

The dispute, therefore, has been reduced to a mere mathematical computation -- the reduction to present value. Demonstrating that the present value calculation permits the beneficiaries to recapture lost investment income will dispose of the Plaintiffs' only argument that income from investments should be included in net accumulations. The following two demonstrations are based upon the analogies provided by the Plaintiffs in the Plaintiffs' Brief.

DEMONSTRATION 1
THE "SAVINGS IN A MATTRESS" FALLACY

The Plaintiffs contend that excluding investment income is akin to assuming that the decedent would "stuff all his savings in a mattress." The imagery is compelling because it draws upon a familiar illustration of the earning capacity of money and its tendency to depreciate if not properly employed. The analogy tends to reinforce the mistaken impression of the Plaintiffs, and the trial court,[1] that excluding investment income would similarly devaluate net accumulations.

The analogy, however, is inapplicable to the Florida Wrongful Death Act. The following table illustrates mathematically the fallacy of the attempted comparison. The demonstration assumes that a hypothetical decedent would have saved ten dollars a year over an expected lifespan of ten years (Column 1). Using the Plaintiffs' understanding of the discounting process in the absence of investment income, the unadjusted total of $100.00 would be reduced to present value. (Plaintiffs' Brief, p. 16.) Assuming a discount

[1]As pointed out by the Plaintiffs, the trial judge felt that if the decedent had been "taking income and putting it into his pocket, there wouldn't be an issue.''

rate of 7%, this method yields a present value of $50.83. (Column 2). Column 3 demonstrates the correct method of discounting the decedent's saved income under the Florida Wrongful Death Act. This method reduces each year's loss to present value individually. The sum of these figures is the amount of money, which if invested at the assumed discount rate, will duplicate the projected annual savings.

YEAR	COLUMN 1 ANNUAL SAVINGS PROJECTED FOR DECEDENT		COLUMN 2 "SAVINGS IN A MATTRESS" PLAINTIFFS' METHOD		COLUMN 3 FLORIDA WRONGFUL DEATH ACT
1	$10.00		$ 10.00		$ 9.35*
2	$10.00		$ 10.00		$ 8.73
3	$10.00		$ 10.00		$ 8.16
4	$10.00		$ 10.00		$ 7.63
5	$10.00		$ 10.00		$ 7.13
6	$10.00		$ 10.00		$ 6.66
7	$10.00		$ 10.00		$ 6.23
8	$10.00		$ 10.00		$ 5.82
9	$10.00		$ 10.00		$ 5.44
10	$10.00		$ 10.00		$ 5.08
		TOTAL	$100.00	TOTAL	$70.24
		PRESENT VALUE	$= \frac{\$100.00}{1.07^{10}}$		
		PRESENT VALUE	= $ 50.83	PRESENT VALUE	= $70.24

*For present value factors, see, Appendix, Table 1.

It is apparent that the Plaintiffs' method of calculating the present value of "savings in a mattress" is not equivalent to the present value computation required by the Florida Wrongful Death Act - even though investment income was not added to the decedent's savings in either method. The Plaintiffs' method understates the loss because $50.83 invested at the assumed discount rate *(7%)* will not yield $10.00 per year for 10 years.

The explanation for this mathematical dichotomy is found in the theoretical conflict between saving money in a mattress and reducing to present value. The "savings in a mattress" analogy illustrates, not the exclusion of income from investments, but the elimination of the time value of money. This is in direct conflict with the fundamental purpose of the present value computation which is to properly account for the time value of money. By requiring that net accumulations be "reduced to present money value" the Florida legislature has insured that the estate will receive the time value of the decedent's savings. The time value of the saved money is not a loss to the estate because it is provided for by the discounting process itself. Accordingly, excluding investment income from net accumulations under the Florida Wrongful Death Act is not analogous to saving money in a mattress.

DEMONSTRATION 2
THE IBM STOCK INVESTMENT

The Plaintiffs suggest that if it is assumed that the decedent would invest his projected savings in IBM stock, the income from that stock would be lost to the estate unless explicitly included in the net accumulations calculation. (Plaintiffs' Brief, p. 14.) Simple arithmetic quickly reveals this claim to be false. Starting with the same assumed savings of $10.00 a year for 10 years (Column 1), it is further assumed that the decedent would have invested these savings in IBM stock at an annual rate of 10%. The savings would have accumulated at 10% as shown in Column 2. The final number in Column 2 ($159.57) represents the expected value of the decedent's estate. Discounting the decedent's estate at 7% yields a present value of $81.02 (shown at bottom of Column 2). Column 3 indicates the cash flow which would be produced by investing the lump sum of $81.02 at the discount rate of 7% ($11.54 per year)[2]. These are the actual amounts which would be received by the survivors and which could then be reinvested in the IBM stock at 10%. Column 4 illustrates the cumulative effect of the reinvestment by the survivors.

[2] The figure of $11.54 (rounded from $11.535) represents the annual interest from the invested lump sum in addition to a proportional diminution of principal such that, after the payment of $11.54 in the tenth year, the award will be exhausted. In market terms, $11.54 per year is the annuity that could be purchased for $81.02 assuming an interest rate of 7% (not including any costs associated with administering the annuity).

INCLUDING INVESTMENT INCOME
(PLAINTIFFS' THEORY)

	PROJECTED ESTATE OF DECEDENT		BENEFITS TO SURVIVORS	
	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
YEAR	ANNUAL SAVINGS PROJECTED FOR DECEDENT	CUMULATED ANNUAL SAVINGS INVESTED IN IBM STOCK (10%)	ANNUAL CASH FLOW TO SURVIVORS ($81.02 INVESTED AT 7%)	REINVESTMENT OF SURVIVORS' BENEFITS IN IBM STOCK (10%)
1	$ 10.00	$ 10.00	$ 11.54	$ 11.54
2	$ 10.00	$ 21.00	$ 11.54	$ 24.23
3	$ 10.00	$ 33.10	$ 11.54	$ 38.20
4	$ 10.00	$ 46.41	$ 11.54	$ 53.56
5	$ 10.00	$ 61.05	$ 11.54	$ 70.45
6	$ 10.00	$ 77.16	$ 11.54	$ 89.04
7	$ 10.00	$ 94.87	$ 11.54	$109.48
8	$ 10.00	$114.36	$ 11.54	$131.97
9	$ 10.00	$135.79	$ 11.54	$156.71
10	$ 10.00	$159.37	$ 11.54	$183.92

VALUE OF DECEDENTS ESTATE = $159.37

TOTAL BENEFITS TO SURVIVORS = $183.92

PRESENT VALUE 7% DISCOUNT = $ 81.02

The figure of $183.92 at the bottom of Column 4 is the total benefits received by the survivors if they reinvest the earnings from their award in IBM stock over the projected lifespan of the decedent. Note that this figure overstates the projected value of the decedent's estate. ($159.37) The difference between the projected estate ($159.37) and the total benefits ($183.92) represents the Plaintiff's double recovery of the 10% investment income.

In contrast, Delta's present value as calculated in Demonstration 1 ($70.24) may be invested at the discount rate to yield an amount equal to the decedent's projected savings ($10.00/year - shown in Column 3 below). These annual benefits can then be invested in the IBM stock. The resulting benefit to the survivors under the annuity method ($159.37) is equivalent to the decedent's projected estate.

EXCLUDING INVESTMENT INCOME
(DEFENDANT'S THEORY)

	PROJECTED ESTATE OF DECEDENT		BENEFITS TO SURVIVORS	
	COLUMN 1	COLUMN 2	COLUMN 3	COLUMN 4
YEAR	ANNUAL SAVINGS PROJECTED FOR DECEDENT	PRESENT VALUE OF SAVINGS (7%)	ANNUAL CASH FLOW TO SURVIVORS ($70.24 INVESTED AT 7%)	REINVESTMENT OF SURVIVORS' BENEFITS IN IBM STOCK (10%)
1	$ 10.00	$ 9.35	$ 10.00	$ 10.00
2	$ 10.00	$ 8.73	$ 10.00	$ 21.00
3	$ 10.00	$ 8.16	$ 10.00	$ 33.10
4	$ 10.00	$ 7.63	$ 10.00	$ 46.41
5	$ 10.00	$ 7.13	$ 10.00	$ 61.05
6	$ 10.00	$ 6.66	$ 10.00	$ 77.16
7	$ 10.00	$ 6.23	$ 10.00	$ 94.87
8	$ 10.00	$ 5.82	$ 10.00	$114.36
9	$ 10.00	$ 5.44	$ 10.00	$135.79
10	$ 10.00	$ 5.08	$ 10.00	$159.37
		$ 70.24		

PRESENT VALUE
7% DISCOUNT = $ 70.24

TOTAL BENEFITS
TO SURVIVORS = $159.37

B. Recreating the Decedent's Estate Prior to Discounting Is Not an Objective of the Net Accumulations Formula

The two demonstrations above assume that the present value of net accumulations represents a lump sum equivalent to the annual residual income projected for the decedent. The Plaintiffs, however, argue that this initial premise is mathematically incorrect.[3] The Plaintiffs then assert that Delta's present value reduction is

[3] "Delta's argument ... is based on a fundamental misconception of the reduction to present value calculation." Plaintiffs' Brief, pp. 7, 10.

correct only for injury cases and cannot be used to compute damages in a wrongful death action. (Plaintiffs' Brief, p. 20.)

The Plaintiffs contend that the proper method of computing net accumulations is to first determine the probable value of the decedent's estate. Using this procedure, the Plaintiffs must calculate what each year's saved income will be worth at the end of the decedent's life expectancy. This single lump sum representing the future value of the annual cash flows must then be reduced to present value.

The underlying assumption of the Plaintiff's procedure is that the award of net accumulations under the Florida Wrongful Death Act was intended to recreate the decedent's estate prior to discounting. In fact, the Plaintiffs explicitly argue that "[t]he 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..." (Plaintiffs' Brief, p. 8.)

The Plaintiffs' premise that the jury must "recreate the decedent's estate" prior to discounting conflicts with the plain language of the Florida Wrongful Death Act. Recreating the decedent's estate was not the objective of the legislature in adopting the net accumulations formula. Section 768.21(6)(a), Fla. Stat. (1985) does not direct the finder of fact to recreate the decedent's estate. Nor does §768.18(5), Fla. Stat (1985) define net accumulations as the "value of the decedent's probable estate." Certainly, the legislature could have easily expressed the simple objective of recreating the decedent's estate without a detailed itemization of recoverable income.

Section 768.18(5) of the Florida Wrongful Death Act clearly defines net accumulations as a portion of expected business or salary income -- the earnings that can reasonably be earmarked as destined to remain in the estate. The statute does not mention determining what the value of these earnings would be at the end of the decedent's life expectancy. In short, the probable value of the decedent's estate is simply irrelevant to the determination of net accumulations.

The undisputed purpose of the Florida Wrongful Death Act is to compensate survivors for losses resulting from the decedent's death. The objective of the damage calculation, therefore, should be to "make the Plaintiffs whole" by providing them with benefits equivalent to what they have lost. As shown in Demonstration 2, the Plaintiffs' method of recreating the estate prior to discounting does not accomplish this objective.

C. Discounting the Annual Savings Stream Accomplishes the Objective of the Net Accumulations Formula

To arrive at a present value which is equivalent to the projected losses, each year's residual income must be discounted individually from the time that the loss is incurred. This method of computing present value of an annual income stream is known as discounting a future annuity.

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[4] Despite Plaintiffs' declarations to the contrary, this method is a "generally accepted" mathematical reality. "Discounting is the term given to the set of techniques used to compute present values. Present values may be computed for future single payments or future annuities." Fundamentals of Managerial Finance, 2d ed., Raymond P. Neveu 1985, p. 254. This method was used by the Plaintiffs' third economist, Dr. Goldstein, who did not testify at trial.

As the Plaintiffs indicated, the annuity method is used to compute the present value of lost earning capacity. Since net accumulations is by definition nothing more than lost savings capacity (where savings are normally a percentage of earnings), the fact that the same discounting method may be used for both earning capacity and net accumulations is not a mere coincidence. In both personal injury and wrongful death cases, the fundamental economic assumption of damage computation is that human labor is an income producing asset that may be capitalized in the same way as any other asset. In the context of estimating the loss of human labor, there is no qualitative difference between personal injury and wrongful death. See, Use of Economic Expert Testimony in Tort Cases, Michael A. Davis, The Florida Bar Journal, p. 32 (April, 1989).

The Plaintiffs' also argue that the annuity method is inappropriate for reducing net accumulations to present value, because the present value computation should result in a sum which can be invested to yield the "amounts of the pecuniary benefits at the times in the future when they would have been received." (Plaintiffs' Brief, p. 18.) The Plaintiffs reason that since their losses do not occur on an annual basis, but only once at the end of the decedent's life expectancy, the figure that must be reduced to present value should be equivalent to the probable value of the decedent's estate. (Plaintiffs' Brief, pp. 8, 21.)

The Plaintiffs, however, have overlooked the fact that the legatees of the estate are not the claimants -- that the estate is the only claimant for net accumulations under the Florida Wrongful Death Act. If the decedent had lived, the pecuniary benefits to the estate would have been received on an annual basis, not as a lump sum at the end of the decedent's life. (Only the legatees experience the loss of inheritance as a single occurrence at the end of the decedent's life expectancy.) Clearly, the legislature has cast the estate as a claimant -- a claimant entitled to the lost annual contributions it would have received had the decedent lived in the same way that dependent survivors are entitled to lost annual contributions for support. The annuity method, therefore, properly reduces these annual contributions to present value.

Most importantly, the annuity method makes the estate **and** the legatees "whole" by exactly replicating the earnings that have been lost as a result of the decedent's death. As shown in Demonstration 2, the annuity method replaces the Plaintiffs' lost benefits - including any losses attributable to the time value of money. Stated differently, the annuity method accurately recreates the decedent's probable estate after discounting to present value.

D. The Court Need Not Choose a Discounting Method to Hold that Investment Income Should Not Be Included in Net Accumulations

Although the parties have relied on two different discounting methods to present their positions, the Court is not asked to rule that any specific method is required by Florida law. Delta has juxtaposed the two methods throughout its argument only for the sake of greater clarity. In reality, the Plaintiffs' method of discounting a single payment and Delta's method of discounting an annuity are mathematically equivalent. The two methods will obtain the same result, provided that the time value of money is properly applied to the Plaintiffs' method.[5] Both methods are capable of reflecting the inclusion or exclusion of investment income.

Discounting a single lump sum at the end of the decedent's life expectancy has an additional and unnecessary step -- determining the future value of the decedent's annual earnings at the end of his life expectancy. When investment income is eliminated, the procedure is equivalent to the mathematical inverse of the annuity method (i.e. equivalent to performing the annuity method backwards).[6] Using the annuity method eliminates this redundant step and the opportunity to add in the investment income. The annuity method, therefore, is better for demonstrative purposes and more appropriate for the purpose sought to be accomplished -- replacement of losses. The annuity method, however, is not essential to the Court's holding that Florida law prohibits the addition of investment income to net accumulations.

E. Delta's Argument Is Not Inconsistent With Its Position at Trial

The Plaintiffs assert that Delta has reversed its previous position regarding investment income because its own expert economist testified to investment income, and because Delta's counsel objected to a question regarding an annuity.

The statement made by Delta's counsel while raising an objection was taken out of context. The question objected to was as follows:

> [I]s it acceptable, in support or otherwise, to put $100,000 -- somebody needs $10,000 today --

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5 See, Appendix, "Adjusting the Single Payment Equation."

6 See, Appendix, Table 1.

> over a period of 30 years, to take $100,000, put it in the bank [at 10%], and they get $10,000 for the remainder of their life, without touching the principal? Is that sound economic calculations? (R8-72-158).

The question posed by Plaintiffs' counsel describes a perpetuity -- a perpetual annuity. Fundamentals of Managerial Finance, 2d ed., Raymond P. Neveu 1985, p. 267. This is a very different concept than discounting an annuity which calculates the lump sum which will yield the annual cash flows while proportionally consuming the principal. The court in Stewart v. Atlantic Gulf & Pacific Co., 9 F.Supp. 344 (S.D. Fla. 1934) held that the present value of lost earnings is **not** a sum which, when invested at the discount rate, will produce income equal to the plaintiff's annual loss without invading the principal. "There must be a proportional annual diminution of the principal, so that the principal will also be expended over the life expectancy." Id. Accordingly, Delta's objection at trial was well-founded and completely consistent with Delta's position on appeal.

Additionally, the Plaintiffs point out that Delta's expert economist, Dr. Mellish, testified to a return on the decedent's savings. The Plaintiffs argue -- not that Delta waived its right to appeal the inclusion of investment income -- but that Delta's position must be wrong if Delta's own expert included investment income in his calculation of net accumulations. Contrary to the Plaintiffs' assertion, Dr. Mellish did not consistently testify to the "proper calculation of net accumulations". Dr. Mellish merely testified to net accumulations as they had been defined at that time by the trial judge. Clearly, after the trial judge's ruling, Delta was left with no choice but to present evidence of investment income. Had Dr. Mellish failed to include investment income, his credibility would have been exposed to attack on the grounds that he had excluded an element of damage which the judge had ruled was not to be excluded.

F. The Term "Gross Income" Does Not Include Investment Income

The Plaintiffs seek to give the words "gross income" found in the definition of "net business or salary income" the specialized meaning they have been given in the Internal Revenue Code and the Homestead Exemption provisions of the Florida Statutes. Plaintiffs' Brief, pp. 11-12. The Plaintiffs contend that this meaning, which includes investment income, is the "plain and ordinary meaning" which must be given to words of "common usage". **See**, Southeastern Fisheries Association, Inc. v. Dept. of Natural Resources, 453 So.2d 1351 (Fla. 1984).

The Plaintiffs' definition, however, is a technical meaning intended for use in the specific context of taxation. The words "gross income" have meaning apart from this specific usage. The court in Johnson v. Johnson, 248 So.2d 195 (Fla. 4th DCA 1971) held that "[t]he term 'gross income' does not carry a definite and inflexible meaning under all circumstances..." Id. at 196. Since the words "gross income" are not purely technical, their meaning must be derived from the context in which they are used. Alsop v. Pierce, 19 So.2d 799 (Fla. 1944). The intent of the legislature ultimately controls the meaning that must be attributed to the words "gross income." See, Alsop, supra.

The legislature did not intend to transplant the tax meaning of ''gross income" into the Florida Wrongful Death Act. The underlying intent of the Florida Wrongful Death Act, to compensate, is not compatible with the intent of taxation, to raise **revenue.**[7]

Moreover, the legislative history of the Florida Wrongful Death Act suggests that the meaning of "gross income" was not intended to include investment income. In describing net accumulations, the Florida Law Revision Commission, in its Recommendations and Report on Florida Wrongful Death Statutes, used the words "earnings" and "income" interchangeably:

> The future accumulations theory, however, requires that the jury determine the amount of the decedent's net earnings he would have saved and left at his death as part of his estate. (emphasis original) Recommendations and Report on Proposed Revision of Florida Wrongful Death Statutes, Florida Law Revision Commission, December 1969, p. 32

"Earnings" are defined as "the gains of a person derived from his services or labor without the aid of capital." Black's Law Dictionary 456 (5th ed. 1979). "Earned income" is defined as "[i]ncome derived from one's own labor or through active participation in a business as distinguished from income from, for example, dividends or investments." Black's Law Dictionary 687 (5th ed. 1979).[8]

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[7] Additionally, the tax meaning of gross income (the total income before taxes) results in an oxymoron when substituted into the phrase "gross income after taxes."

[8] For tax purposes, the distinction between earned and unearned income has lost much of its original importance. Black's Law Dictionary 456 (5th ed. 1979).

Accordingly, the word "income" in the phrase "gross income" should not be given its tax meaning, but should be interpreted in accordance with legislative intent to correspond to the meaning of "earnings" -- a meaning which does not include investment income.

Even if the words "gross income" included investment income, the phrase immediately following ''gross income" -- "excluding income from investments continuing beyond death" -- would restrict net accumulations to "the part" of the decedent's income which is not investment income. See, §768.18(5) Fla. Stat.

G. Summary

Other than the Plaintiffs misplaced reliance on the words ''gross income", the Plaintiffs have failed to indicate to the Court where investment income is specifically included in the definition of net accumulations. The only conclusion, therefore, under the undisputed tenets of statutory construction is that net accumulations does not include investment income.

As to whether the Florida Wrongful Death Act specifically <u>excludes</u> investment income, the Plaintiffs have conceded that the statutory definition of net accumulations excludes <u>some</u> investment income. (Plaintiffs' Brief, p. 15.) The Plaintiffs also agree with the proposition that income may be derived from capital even if the owner of the capital is absent or deceased. The Plaintiffs merely draw an artificial distinction between capital obtained prior to death, and capital obtained after death. The Plaintiffs support this distinction only with vague references to "generally accepted mathematical and economic principles". Although the Plaintiffs never demonstrated these principles, they claim that the principles will establish that excluding investment income deprives the Plaintiffs of benefits they would have received had the decedent lived his normal life expectancy. Delta has demonstrated those principles and shown that they do not support the Plaintiffs' position. Accordingly, the Court should hold that the definition of net accumulations excludes investment income as constituting "income from investments continuing beyond death."

DATED this 12th day of May, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail this 12th day of May, 1989 to Philip Burlington, Esq., Law Offices of Edna Caruso, P.A., Suite 4B, Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401 and Kathlyn G. Fadely, Esq., U.S. Department of Justice, Torts Branch, Civil Division, P.O. Box 14271, Washington, D.C. 20044-4271.

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