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COLUMBIA HOSPITAL V. MOORE

JUNG: We know from this court's decision in Auld that under the pre-1995 version of art. 4590i, prejudgment interest was included within the damage cap. The question before the court today is whether subchapter P of art. 4590i enacted in 1995 changed that result.

To set the stage, this court in June 1994 decided C&H Nationwide v. Thompson. And in that case held among other things that under the general prejudgment interest statute, prejudgment interest is to be awarded on future damages. Now that decision caused a great deal of _____ particular within the medical community. And so as part of its 1995 proposal to reform the medical liability act, the Texas Medical Assn proposed a limitation of prejudgment interest to past damages only. It also proposed a variety of other reforms in that bill, including an overall cap on a health care provider's liability for noneconomic damages of $250,000 and a per case cap on damages in health care cases.

As is often the case with tort reform legislation, this proposed bill underwent a negotiation process. And in the course of that, the further restrictions on the damage caps died as part of that negotiation process. The prejudgment interest component however was rewritten and ultimately became subchapter P. A provision was inserted to begin the accrual of prejudgment interest from the date of the injury rather than from the date of suit or 180 days after notice of claim as under the general prejudgment interest statute.

As the bill moved forward through the legislative process to enactment, these were the two and only two purposes of Subchapter P described to the legislature: to eliminate prejudgment interest on future damages; and to change the accrual rule in health care liability cases. There is no indication that the 1995 legislature intended to change the capping of prejudgment interest one way or the other.

HANKINSON: But the legislature also did not have the Auld decision at that point in time. That's a little bit of a bootstrap argument isn't it?

JUNG: The legislature did not have Auld, of course.

HANKINSON: At that point in time the only thing was out there was Rose v. Doctors Hospital in which this court had allowed an award of prejudgment interest in the face of challenges that in fact was capped. Basically what you're doing here is absent the Auld - you're taking the Auld decision back to 1995 and bootstrapping it even though it was decided 5 years later.

JUNG: The legislature knew that only if it had read this court's judgment, not its opinion in Rose.

HANKINSON: I understand that. But my whole point is that your argument hinges on taking the Auld decision and having it be on the books back to 1995. It's a bootstrap.

JUNG: It does not. It does not presuppose one way or the other what the legislature thought the capping status of prejudgment interest was before 1995.

HANKINSON: Why not? I thought that was just your argument.

JUNG: No. My argument is...

HANKINSON: I mean because arguably, Rose was on the books at that point in time. And if there's no legislative history with respect to anything except putting the cap on future damages, then the argument could be made that the legislature was making sure that prejudgment interest _____ on other damages.

JUNG: Only if one finds something in the purpose or history of the bill to suggest that that was the legislature's purpose. Whether or not a particular legislator or the legislature as a whole thought that prejudgment interest was or was not capped before 1995, there is nothing in the 1995 process to suggest that they thought that result was being changed or confirmed or affected in anyway.

HANKINSON: But they clearly intended in the amendment that prejudgment interest be awarded on past damages. There is mandatory language in Subchapter P.

JUNG: There is equally mandatory language in Subchapter K.

HANKINSON: I understand. But there is mandatory language in Subchapter P that prejudgment interest be awarded on past damages.

JUNG: That is correct.

O'NEILL: But that same mandatory language appeared in 5069.1.05 Sec. 6 that we said in Auld was subject to the cap.

JUNG: That is absolutely right.

ENOCH: Should the court consider the significance of the language in Subchapter P that says that prejudgment interest is to be calculated on the damages found by the trier of fact to distinguish it from the language in Subchapter K that says that there is a limit on the amount that can be awarded? Subchapter P seems to say that the judgment shall include the prejudgment interest on the damages found by the trier of fact as distinct from Subchapter P that doesn't refer to what's found by the trier of fact, but simply puts an upper limit on what the TC can award in determining past damages.

JUNG: I agree that that phrase is present in Subchapter P. However, I disagree as to the meaning to be ascribed to it. As of C&H Nationwide past verses future actual damages are no longer going to be submitted to the jury because it doesn't matter. And indeed if you look in today's PJC in a post 1995 case, you don't submit that. And so the point the legislature was making is that once again the fact finder would be determining past actual damages. They would be found by the trier of fact as such. The legislature cannot have been referring to whatever the amount is the jury puts in the blank that's what we're going to award prejudgment interest on. Why do I say that? Because there are a number of things that happen to that amount, wholly apart from the cap before it becomes a judgment. Contributory negligence is factored in. Proportionate responsibility is factored in. Settlement credits are factored in. And unless you are prepared to say remittitur may occur. And unless you are prepared to say if the jury awards $100 million, then regardless of remittitur or caps or settlement credits or anything else, we are going to award prejudgment interest on $100 million, then you can't ascribe that meaning to the term found by the trier of fact.

OWEN: Then what does it mean?

JUNG: It means found by the trier of fact. Meaning that it must be found by the trier of fact. Meaning that we go back to what we had before C&H Nationwide where the jury found separately the amount of past actual damages and the amount of future actual damages. But that has to be found by the trier of fact. And if for example in a health care case, I don't submit them separately, then I don't get any prejudgment interest. It's the same as it was under Cavenar. That's what found by the trier of fact means.

There is no reference in the legislative history by the proponents, opponents, sponsors, or anyone else in the legislature to the damage cap as applied to prejudgment interest.

In all, this court took the 1977 legislatures complete abject silence regarding the subject of punitive damages to mean that punitive damages were not included in the 1977 cap. Here, the 1995 legislatures complete abject silence on the subject of damage caps should be taken to mean that the 1995 legislation did not alter the damage caps.

As I have indicated, Subchapter P and K each contain mandatory language. Subchapter P says that it applies notwithstanding the general prejudgment interest statute. It does not say that it applies notwithstanding subchapter K. Looking at the flip side, Subchapter K says that it exempts medical, hospital and custodial expenses. It does not say that it exempts prejudgment interest.

This court's duty is to harmonize the two...

BAKER: Is there a reason for that, that there's a difference between economic damages and other damages and they only excluded economic damages, but prejudgment interest is not one of those?

JUNG: Well prejudgment interest is certainly economic damage...

BAKER: But it's "defined as civil liability damages."

JUNG: But this court held in Auld that prejudgment interest goes with the category of damages to which it corresponds. And for that reason, the plaintiff does get prejudgment interest on medical, hospital and custodial expenses. Following that rationale if prejudgment interest on the other capped component of damages goes with those damages, then it like they is subject to the cap unless the legislature says well now we are going to treat prejudgment interest differently and here in 1102(b) in 1995 we're going to add the words...

BAKER: Do I understand then you're saying hospital, medical and custodial care damages, whatever they might be, are entitled to prejudgment interest without regard to a cap?

JUNG: That's right.

BAKER: Whatever other there that are past damages subject to prejudgment interest, that's a cappable entity?

JUNG: Prejudgment interest on uncapped damages is uncapped. Prejudgment interest on capped damages is capped. The court must harmonize the two statutes if reasonably possible. Now that does not mean allowing each statute to operate to its maximum possible extent in every circumstance. If that can be done there's no need even to begin the process of harmonization. What is meant by harmonization is to give each statute a significant...

HANKINSON: Your position is that prejudgment interest on uncapped damages means uncapped?

JUNG: That is what Auld says.

HANKINSON: And that's your position with respect to subchapter P as well?

JUNG: Yes. Nothing in subchapter P was intended to change that one way or another. The two subchapters can be harmonized just as this court did in Auld. You allowed prejudgment interest in healthcare liability cases. You limit it to past actual damages only. You accrue it from the date of injury, but you allow it only up to the point where the damages plus the prejudgment interest equals the article K issue, the subchapter K cap. That gives both statutes...

PHILLIPS: Doesn't that somewhat impede the criminal purpose behind prejudgment interest which is to take into account of the cost of money and encourage a defendant who may have to pay these damages to hurry up with trial preparation?

JUNG: I think it's fair to say that it would somewhat impede that purpose. But the

question is, is that purpose counterbalanced by the purpose of subchapter K to limit and render damages more predictable. The fact of the matter is, the prejudgment interest is no more predictable than the damages based on which the prejudgment interest is calculated. And so if you cap the damages and don't cap the prejudgment interest, you have largely recreated the situation of predictability and nonaffordability of insurance coverage that were the evils addressed by subchapter K.

HANKINSON: Why is that? If the amount of the damages is capped then you know what the maximum or the noneconomic loss is going to be, and you also know what the interest rate is and when the interest begins to run. I mean that sounds very predictable to me. I don't understand your argument.

JUNG: It is predictable after judgment. It is somewhat predictable after an injury occurs and you can predict how long it's going to take...

HANKINSON: But it's no less predictable than trying to judge the amount of the noneconomic loss. I mean obviously until the case is resolved no one knows exactly what the trier of fact is going to decide or what someone is going to settle the case for. But the reason for capping the noneconomic loss was to be able to tell what the outside limit would be on liability. I fail to see why if it works for noneconomic loss, if the cap works there, why prejudgment interest at a set rate beginning to run on a set period of time on a maximum amount of damages isn't equally predictable from the beginning?

JUNG: It's not a set rate of time when you measure the period of time from injury to judgment. That could be a year. It could be 15 years.

HANKINSON: But I don't know exactly how much the fact finder is going to award a noneconomic loss if any either.

JUNG: That's correct. And because of that, the legislature enacted subchapter K in 1977. It regarded it as intolerable that we not know that at the time of policy underwriting.

HANKINSON: And my point is is that we know just as much about prejudgment interest as we know about the maximum amount that can be awarded under the cap.

JUNG: I have to disagree with you. We know that the cap is X. Let's say it's $1.5 million. We don't know whether the prejudgment interest is going to be 10% of that amount, or 20%, of 50% or 100%.

HANKINSON: But we know what the rate is, and we know the date that it's going to begin running. And we also know that the parties in the litigation are going to be making economic judgment throughout the litigation with respect to when to settle the case, and there is some control on the part of the parties with respect to the running of prejudgment interest. So it doesn't seem to

me to be such a wild out there, who knows what's going to happen kind of number.

JUNG: It may not be as unpredictable as noneconomic damages were in 1977. And the legislature was willing to tolerate a certain degree of unpredictability in the medical, hospital and custodial expenses. But the fact remains that capping of prejudgment interest which this court held to be part of subchapter K in Auld furthers the purpose of predictability and affordability.

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RESPONDENT

O'NEILL: Mr. Frankel. I agreed with your position in Auld. Why am I not bound by the majority opinion? What's changed since Auld?

FRANKEL: In footnote 13, the majority said we're not deciding...

O'NEILL: I understand. We said we were not going to decide the question. But doesn't the analysis lead us to the same conclusion? In other words, what is different about subchapter P from 5069-1.06, section 6? They are both mandatory. Get me there with the analysis. Wouldn't the opinion have to be written the same way as the dissent in Auld to get to your construction of subchapter P here?

FRANKEL: I don't believe so. In fact, I think much of what's said in the majority opinion in Auld supports the rationale we're arguing for here.

O'NEILL: Take me through that.

FRANKEL: Start with the analysis of how you reconcile the conflict between the two statutes in Auld. After concluding with what to debate, a 5-4 decision on whether damages are even covered under the cap, the issue that the majority had to deal with was what happens when you've got this conflict. Both _____ the statutes have mandatory language, neither references the other. What do you do? Justice Abbot's opinion says you look at the more specific over the general. He relied on statutory construction principles.

O'NEILL: But didn't we pretty much establish that if you look at statutory construction, you can use that either way.

FRANKEL: That's certainly what J. Hankinson said in the dissent. I guess those who were on the majority didn't feel that way because that - if you look at the opinion and try to say how did they reconcile the difference - what do you do when you've got a conflict. I believe the basis for the majority was statutory construction principles and the unique aspects of 4590i in self containing language. But that was really the ultimate rationale which was criticized by the minority. And then in the dissenting opinion what Justice Hankinson pointed out was, okay if you want to use a different statutory construction principle, and this is the one J. Cohen accepted in the majority opinion in the

CA in this case, let's look at a different statutory construction principle. That's a later enacted statute. The principle there. That principle again favors our position in this case and it's the basis for J. Cohen's reconciliation of the difference when you have two conflicting statutes.

So in that context, I think both the majority and the dissenting opinion all favor the result here.

O'NEILL: But I'm still confused. Again, the language is mandatory, so I don't see any substantive difference in the provision that we're addressing. And when subchapter P was enacted, the legislature didn't have the benefit of our decision in Auld.

FRANKEL: They didn't. And that I think raises the issue that both opposing counsel raised and J. Hankinson asked about. What does that mean? What do you do if in 1995 the legislature doesn't speak to this one way or the other? And I think we all agree those are the facts. So do you infer therefore they were clairvoyant and believe that some day the SC was going to decide that damages meant prejudgment interest under subchapter K, or did they think the opposite. Did they think that it was a part of damages under subchapter K because depending on the answer to that question, you have some incite as to the meaning of the absence of discussion in enacting subchapter P.

The only evidence that was out there at the time as to whether damages was part of subchapter K or not was the Rose judgment and the briefs arguing for rehearing on rehearing to _____ prejudgment interest from the judgment. You had the TMA saying in 1987 that they thought prejudgment interest was unrestrictive and uncapped as of 1987. You had no discussion of prejudgment interest in the initial legislation back in the 1970's. And on that record it's hard to believe that the legislature was deciding in 1995 that prejudgment interest was part of the damages cap...

O'NEILL: But on that same record we interpreted the same mandatory language in Auld. And that's what I'm having trouble with figuring out - I mean I agreed with you in Auld. I was part of the dissent. But I don't know how we get away from the majority's construction there.

FRANKEL: And what I'm saying is that, not asking to revisit this at whether damages are part of the cap or not, although I think that's highly debatable, but if you look at what do you do if it is part of the cap. How do you reconcile two conflicting statutes and bring purpose to both of them? The answer is either statutory construction principles which 5 justices thought was the answer in Auld, and if you use that method of analysis you affirm the court below in this case, or you could argue for some type of harmonization. You might say that was part of the rationale in Auld. But again here if you harmonize the statutes, the way you harmonize them is to say damages are limited by the cap, that actual damages are limited by the cap. That serves part of the purpose of subchapter K. Prejudgment interest is not limited by the cap. That serves the purpose of subchapter P. And it's only in these rare instances the worst of cases, the big damage death cases, that you even run into this conflict. As the majority said in Auld, most of the time you just add the prejudgment interest after

the actual damage award and you don't have a problem until you hit the cap.

In response to J. O'Neill's question. I think the principle set out by the majority in Auld - I know you didn't necessarily agree with it in the dissent, but if you want to say how do you reconcile this with Auld, you say you use the same analysis as the majority used in Auld and use the same statutory construction principle and get to the result that we're arguing for in this case.

Similarly, I think the analysis...

HANKINSON: Now you've just given us the general framework. I don't understand how - translate that into what the opinion would look like. Talk specifically about these two provisions and how you would use the statutory construction principles which leads us to that result and none other.

FRANKEL: The later enacted rule is the one that you mentioned in the dissent and that J. Cohen mentioned in the majority opinion the court below in this case. That one I think is self explanatory: 1995 v. 1977. The specific verses general analysis that was the basis for reconciling the conflict between the two statutes in Auld, the way I see that being argued in the opinion is to say that this cap statute 4590i(k) deals with a cap of all damages. The prejudgment interest statute, subchapter P, deals with only one category, a very narrow category of damages, that is prejudgment interest only, and only on past damages. The same generalization of statutory construction principles used in Auld, I think lead to the result of affirming the court below in this case.

O'NEILL: But there is no more specificity in P as to the intent of making prejudgment interest mandatory than there was with 5069-1.056.

FRANKEL: And it's not that kind of specificity that was the basis for Auld either. You're right. All three of the statutes, the old general prejudgment interest statute that was at a play...

O'NEILL: I don't understand how your more specific controls works here anymore than it didn't work in Auld.

FRANKEL: It did work in Auld. What I think the court said in Auld was to say you have this general prejudgment interest statute. It applies to all kinds of things, all kinds of case. You have a specific cap statute that only applies in medical malpractice cases, and only applies to certain kinds of damages. The latter is more specific than the general prejudgment interest statute, and therefore...

O'NEILL: That was the dissent.

FRANKEL: No. I believe that is the majority opinion that J. Abbott authored. The dissent in fact J. Hankinson and you took issue with the whole notion of statutory construction and pointed out if you want to use a statutory construction rule the latter enacted rule would lead to the opposite

result. But the general verses specific, if you look at how did the court resolve the conflict once they decided there was one they said, the specificity of 4590i(K) is greater than the general language in 5069, the general prejudgment interest statute. And therefore...

O'NEILL: But it's just specific as a temporal matter. I mean it's specific as to past or future as opposed to specific as to...

FRANKEL: Well it's also specific as to kind. The damages capped applies to all kinds of damages: noneconomic damages, and even lost wages that include some economic damages. The prejudgment interest statute subchapter P is very specific: only past damages Mr. Young says doesn't apply if the damages are uncapped damages. But it's clearly more specific. It only deals with a much more specific range of kinds of damages than the general cap. The same analysis that was used by the majority saying the prejudgment interest statute applies to all kinds of cases, but 4590i only applies to malpractice cases, and only in specific circumstances; therefore, that's how we resolve the conflict. I'm not saying I agree with the analysis, or the result in Auld, but if you're concerned about being consistent, I believe the rationale of Auld supports the result here.

ENOCH: Another discussion in Auld was not strictly that, but this notion what is prejudgment interest. It's one thing to say it will be awarded. It's another thing to say well, what is it and prejudgment interest acts like damages. It's sort of the present value of money. It was sort of a recognition that at the time the injury occurs whatever your damages are but over the course of time there ought to be a factor that _____ paid in present day money - the amount should be a different amount paid now because a dollar is worth less than it was years ago when the accident occurred. But it was this notion that it was damages even though the statute said you're going to award prejudgment interest that's as far as it goes. So what is it if it's damages, then we look at a statute that says this is how we are going to treat damages in this case, certain damages are capped, certain damages are not. This is not one of the enumerated items for which damages are not capped, so it must be capped here. If you look at that analysis then you come to this statute, subchapter P. Is there something in the language of subchapter P that would say that even though prejudgment interest is a form of damages, subchapter P is clearly indicating that these damages are not to be capped as well as damages enumerated in subchapter K that are not to be capped. What language in P gives us assistance in getting over that argument in Auld?

FRANKEL: It's the significance of the absence of the language. I think your saying, your question that since there wasn't a specific exception in 4590i for prejudgment interest, therefore, it must be part of the cap. And I don't think the majority opinion in Auld uses that analysis. In fact you rejected that analysis with respect to punitive damages and said, just because it's not mentioned doesn't mean that it wasn't intended to be included. So again you get to 1995 and you say, what was the legislature thinking when it said nothing about prejudgment interest. I believe the answer to that is they were thinking prejudgment interest was not part of the damages cap. And so infer from the absence of any language that says that it's included as part of the cap, or someone that tries to reconcile it. Why did they pass the legislation? They passed it with respect to the cap to affirm the status quo whatever that was. I submit that the status quo as viewed by the TMA, by this court, and

there is not a shred of evidence to the contrary that anyone else viewed it differently, was that the cap did not include prejudgment interest. It was not viewed as damages.

You asked a question earlier to opposing counsel about the specificity in subchapter P saying, you award prejudgment interest on past damages found by the trier of fact. I submit that language itself suggests that the legislature was distinguishing between prejudgment interest and damages. One is awarded by the court on the basis of fact findings - the damages. And that's how we do prejudgment interest in every case in this state. The judge awards prejudgment interest, not the jury, and it's done at a set rate, predictably depending on how long the case has been pending, and that distinction in subchapter P itself to me is recognition that the legislature thought there was a difference between interest and damages. At least as of 1995.

HECHT: Do you know if there was any discussion of the Auld type issues in the 2001 session?

FRANKEL: Not that I know. But there may have been. J. Phillips you raised an issue about the purpose of the prejudgment interest statute. And in the briefs there is a lot of discussion about whether the decision by the CA would subvert the purpose of the cap. There's not much discussion about what about this competing purpose of prejudgment interest. And I think you pointed out the great concern that we would have. And that is that if you adopt the argument they are making, you are saying to health care providers, insurance companies, delay as long as you want, especially in these big cases where a cap might be in play, because you get to keep the money, you get to use the money...

O'NEILL: Well that same thing applied in Auld though as well. We crossed that bridge in Auld as well didn't we?

FRANKEL: You crossed the bridge with respect to a circumstance that in Auld was a dying breed. It was a statute that was essentially out of commission or _____ out of commission at the time you decided...

O'NEILL: But what I'm saying is those concerns didn't sway us there.

FRANKEL: And as I reiterate, I think that the analysis really did not turn on competing purposes. The analysis in that case turned on this very narrow statutory construction principle. That was what J. Abbott used to resolve this conflict. As I say, I think if you look beyond that and say what are the underlying purposes and how do we serve those purposes when we try to reconcile these differences that you have to consider the affect of a rule that says prejudgment interest doesn't run. You can delay as long as you want, use the money, and then claim in the name of lower premiums and the medical care crisis that it's fair to do so. It's not fair in any other context.

HANKINSON: Do you know if pre-Auld under the old statute, the pre-1995 statute was prejudgment interest regularly being awarded on all damages, or was the general practice to cap?

Do you have any idea?

FRANKEL: No. During the 10 years before Auld, I maybe handled 6 or 10 medical malpractice cases for plaintiffs. I'm trying to think of how many of those hit the cap. I will say, I was not aware in talking to plaintiff's bar of successful efforts to cap damages using the Auld analysis prior to 1995. Even after 1995 looking at subchapter P.

The last issue I would like to briefly mention has to do with really the Auld rationale in asking the court to at least consider whether the analysis of damages as prejudgment interest was right, wrong, or not. And what I would ask you to look at is look at the majority opinion in Auld with respect to punitive damages and the rationale for that opinion. The rationale is the medical insurance crisis was not caused by punitive damages. It was not an issue because you couldn't even insure for punitive damages. It was the concerns expressed by the Keeton commission that generated 4590i, were for pain and suffering, expenses and loss of earnings, not punitive damages. And finally because the Keeton commission discussion of damages didn't reference punitive damages and the commission's findings were expressly adopted by the legislature, the majority said it's unlikely the legislature intended for punitive damages to be part of the cap.

If you take the words 'punitive damages' in your majority opinion in Auld and substitute prejudgment interest, you would get to the same result. If you use that same rationale, you would get to the same result. Namely prejudgment interest is not part of the 4590i cap.

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REBUTTAL

HANKINSON: Was it your experience or are you aware at all whether or not Rose was the more typical case, pre-Auld in terms of prejudgment interest being awarded on all damages that were contained in a judgment, or were the courts regularly capping prejudgment interest as a matter of practice pre-Auld?

JUNG: In terms of what the TC's were doing, I don't know. I will tell you that in every case before Auld people like me would be arguing one side, and people like Mr. Frankel would be arguing the other, and we would both have no case law specific to the subject to look at until the lower opinion came down in Auld.

HANKINSON: Were the courts then awarding, as in Rose, prejudgment interest just being including in the judgment awarded?

JUNG: I have not been involved in enough cases that actually went to judgment that I could say that there was a pattern at the present.

The law is very clear on governmental units, that prejudgment interest is within the cap. And that has been true for a number of years. Also by 1995, the legislature was

undoubtedly aware of the Cavenar decision in 1985, which held emphatically and categorically that prejudgment interest was indeed a form of damages.

If you polled 182 members of the 1995 legislature, is prejudgment interest capped in health care cases, I don't know how that poll would have come out. I suspect I don't know would have been the leading answer. But the point being, that I agree with Mr. Frankel. There was no intent by the 1995 legislature to change that status quo whatever it was. We now know in the aftermath of Auld what that status quo was. The 1995 legislature may or may not have known that...

HANKINSON: That seems to be that bootstrap problem. They may or may not have known, therefore, we should attribute legislative intent again that they intended to cap these damages. I have a real hard time with that.

JUNG: No. Therefore, you should not attribute to them any legislative intent in 1995 one way or another with respect to the cap. That is my position.

The argument that the specific controls the general, in fact I think it's a losery to say that one or the other of the subchapters is the more specific. On the one hand, subchapter P is specific to prejudgment interest, but is not specific to whether there are any limitations on the prejudgment interest. On the other hand, subchapter K is specific as to whether there are limitations...

HANKINSON: But that's not the analysis that we used in Auld. We looked specifically at the nature of the damage and the cause of action. We used the specific verses general a little bit differently.

JUNG: You used specific verses general as to the subject matter of the case. And you said article 4590i was intended to be the bible for health care liability cases as opposed to 5069-1.05. Here what you have. In 1995 was the legislature saying we are going to customize art. 5069-1.05 and implant it into the medical liability act to take the place in health care liability cases of the general rule that we were previously applying. So you have a customized version of art. 5069 becoming subchapter P, and...

HANKINSON: It is a specific provision of 4590i that references prejudgment interest where it's not referenced any place else,

JUNG: That is correct. At the same time subchapter K is the specific provision of art. 4590i. The reference says damage caps which are not referenced anywhere else.

HANKINSON: And there's no reference to prejudgment interest as we indicated in Auld?

JUNG: Right. K makes no reference to prejudgment interest. P makes no reference to damage caps. I don't think you can say that either one of them is the more specific.

O'NEILL: Can we read anything into the fact that the legislature did nothing to the statute in response to our Auld decision?

JUNG: I think you can. Medical malpractice was not the hottest topic of the last legislative session. But certainly the legislature had the Auld case before it and took no action to amend the statute.

Finally a word about the later enacted statute rule. Under the gov't code, that is the statutory construction rule of last resort. That applies when you can't reach the correct result from the text, when you can't reach the correct result from the purpose or history, and you have nothing left to look at other than which statute is the later. In the Glen Jones case, which I argued a number of years ago, this court held that the statutory purpose can even override the express statutory text when necessary. We don't believe that's necessary here, but we think you ought to focus on the purpose.