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COURT OF APPEALS  
STATE OF NEW YORK

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ANDINO,

Respondent,

-against-

No. 56

MILLS,

Appellant.

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20 Eagle Street  
Albany, New York  
April 24, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this  
2 afternoon's calendar is appeal number 56, Andino v. Mills.  
3 Counsel.

4 MR. O'SHAUGHNESSY: May it please the court, Tim  
5 O'Shaughnessy from Transit. I'd like to reserve two  
6 minutes for rebuttal.

7 When a police officer is healthy and retires his  
8 or her pension begins the very next day. When the police  
9 officer's eligible for ADR benefits, the ADR benefits begin  
10 the very next day after the police officer retires, and  
11 they continue until the end of the police officer's life,  
12 seamlessly without a gap between the years in which the  
13 police officer would have been earning salary and the years  
14 when the police officer would have been earning retirement  
15 benefits.

16 When CPLR 4545 was extended to public employees  
17 in 1984, the assembly committee reports explicitly stated  
18 that it contemplated that ADR benefits would be a  
19 collateral source. Now plaintiff raises three arguments in  
20 opposition. The first is that ADR benefits actually  
21 replace ordinary disability retirement benefits or that ADR  
22 benefits were intended as a reward for being injured in an  
23 accident - - -

24 JUDGE STEIN: Can I ask about - - -

25 CHIEF JUDGE DIFIORE: How does that - - - oh,



1           excuse me.

2                   JUDGE STEIN:   Go ahead.

3                   CHIEF JUDGE DIFIORE:   How does that account for  
4           the fact that there's this view that the ADR benefits are  
5           intended as a show of gratitude, how does that account for  
6           whether or not that can be an offset category to category?

7                   MR. O'SHAUGHNESSY:   Well, Your Honor, frankly, we  
8           believe that - - - that it's not relevant.   What happened  
9           in 1940 when the legislature first came up with ADR  
10          benefits is that it decided, for reasons that aren't really  
11          recorded, that when someone is in - - - injured by an  
12          accident in the line of the duty they get a three-quarters  
13          pension, injured in the line of duty but not by an accident  
14          or injured not in the line of duty they'd get a fifty  
15          percent pension.

16                   JUDGE STEIN:   So what accounts for that twenty-  
17          five percent?

18                   JUDGE FAHEY:   So the - - - but that isn't  
19          entirely accurate.   Isn't it - - - I mean you get a fifty  
20          percent pension after twenty years, but if they work  
21          thirty-seven-and-a-half years they get a higher pension,  
22          don't they?

23                   MR. O'SHAUGHNESSY:   Well, that's a service  
24          pension.   That's if they're healthy.

25                   JUDGE FAHEY:   That's an ordinary service pension.



1 MR. O'SHAUGHNESSY: Well, we have to be careful.

2 JUDGE FAHEY: Okay, go ahead.

3 MR. O'SHAUGHNESSY: Call that a service pension  
4 and then there's an ordinary disability pension - - -

5 JUDGE FAHEY: Right.

6 MR. O'SHAUGHNESSY: - - - and accident disability  
7 pension. So the - - -

8 JUDGE FAHEY: But my point is is that is if they  
9 work for their full life in the job they get a seventy-five  
10 percent pension, and they also get a seventy - - - well, it  
11 might - - - might not be seventy-five, but it's around  
12 there, that number. And then if they're injured in the  
13 line of duty they immediately get a seventy-five percent  
14 pension.

15 MR. O'SHAUGHNESSY: Well, actually the - - -

16 JUDGE FAHEY: Am I correct about that?

17 MR. O'SHAUGHNESSY: The service pension I believe  
18 is about fifty percent. It comes after a minimum of twenty  
19 years. Ordinary disability - - -

20 JUDGE FAHEY: Well, does the service pension - -  
21 - I would disagree with you on it. It is fifty percent  
22 after twenty years. And then if you work - - - I say this  
23 as a son of a policeman who worked thirty-six years and got  
24 something over seventy percent when he retired from the  
25 Buffalo Police Department.



1 MR. O'SHAUGHNESSY: That's - - - that's correct.

2 JUDGE FAHEY: Right.

3 MR. O'SHAUGHNESSY: Because it's the based on the  
4 final-year salary, and the salary continues to go up. So  
5 the fact of the matter is the difference between ADR and  
6 ORD is meaningless under the Oden and Bryant rule because  
7 all you do is you look at the category of the jury's awards  
8 and the category of the award - - - or of the collateral  
9 benefit. In this case - - -

10 JUDGE FEINMAN: Well, but what about - - - so at  
11 - - - and correct me if I have this wrong, but at twenty  
12 years, right, if the person had made twenty years they  
13 could retire and continue to get - - - without any sort of  
14 discount on their pension, to - - - to earn outside income.  
15 I mean you have all these police officers who go out and  
16 get second careers, whether as investigators for the Legal  
17 Aid Society or a DA's office, wherever they may go. They  
18 get second careers. How does that factor in here?

19 MR. O'SHAUGHNESSY: Well, the only way it factors  
20 in is that this shows you that the ADR covers both lost  
21 earnings and lost pension because once you - - - the  
22 individual on ADR retirement passes that twentieth year  
23 they also, just like someone with a service pension, have  
24 no limit on the outside income they can earn.

25 JUDGE FEINMAN: So - - - so turning to our



1 particular individual.

2 MR. O'SHAUGHNESSY: Yes.

3 JUDGE FEINMAN: She goes out. She's not quite at  
4 twenty years, right?

5 MR. O'SHAUGHNESSY: Right.

6 JUDGE FEINMAN: And should this - - - the way we  
7 look at this transform at some point when she does hit  
8 twenty years in terms of how - - -

9 MR. O'SHAUGHNESSY: Well, it doesn't.

10 JUDGE FEINMAN: You know, how does that - - - how  
11 does that get calculated in?

12 MR. O'SHAUGHNESSY: It doesn't because of the  
13 terms of an ADR pension and the terms of ADR benefits.  
14 They start and they seamlessly go. They - - - they  
15 increase throughout the period the plaintiff was - - -  
16 would have been working and into the period to the end of  
17 the plaintiff's life and the period when the plaintiff  
18 would have been retired. So - - -

19 JUDGE WILSON: Let me try Judge Feinman's  
20 question in a different way. You're - - - as I understand  
21 it, you're saying that the ADR benefits, let's say after  
22 the twentieth year, are compensating for two things, both  
23 the pension that's been lost and the earnings that the  
24 person could have been made while the person was working in  
25 some other employment like a private security guard.



1 MR. O'SHAUGHNESSY: Well, actually, up until the  
2 twentieth year - - -

3 JUDGE WILSON: No, but I'm asking about after.

4 MR. O'SHAUGHNESSY: Okay. If I - - - if I - - -

5 JUDGE WILSON: Go ahead.

6 MR. O'SHAUGHNESSY: Your - - - your question was  
7 that two things happen afterwards, and what my answer is,  
8 actually they replace lost earnings before the twentieth  
9 year, and they have a cap on outside earnings. And they  
10 have the requirement that the disabled officer must come in  
11 for a medical exam if - - - if requested. Then once you  
12 the twentieth year in which the theoretical police officer  
13 stops working, stops earning salary, and starts getting  
14 retirement benefits and pension, then the accident  
15 disability benefits continue seamlessly and that  
16 requirement about the pension and showing up for a medical  
17 exam is removed because now we're in the years when the  
18 person would have been earning a pension and would not have  
19 had a limit on - - -

20 JUDGE FAHEY: But see, the fundamental - - -  
21 there's a - - - I think there's a fundamental disconnect.  
22 A pension is not a wage. A pension is an income that you  
23 receive based upon either the - - - your wage plus your  
24 time - - - years of service. That's how a pension is  
25 calculated. Each of the various forms the pensions take,



1 here there's a form, each of those various - - - four  
2 different terms - - - types, each of those various forms  
3 are all based on some combination of a formula based on  
4 what your wages were and what the time you had in and then  
5 this benefit is given to you. But you're requiring us to  
6 say in your argument that pensions are equivalent to wages  
7 and therefore you would get an offset in both categories.  
8 And I'm having a hard time with that for - - - for me to  
9 see that because you can either have an offset - - - a full  
10 offset for pensions because they're equivalent and it's in  
11 line with our case law in Oden, or it's equivalent to a  
12 wage and you might be eligible for an offset there. But it  
13 can't be the same thing.

14 MR. O'SHAUGHNESSY: Well, Your Honor, I disagree  
15 that it can't be the same thing.

16 JUDGE FAHEY: Okay.

17 MR. O'SHAUGHNESSY: It covers both time periods,  
18 and it treats the period where the police officer is  
19 earning a salary in one manner and - - -

20 JUDGE FAHEY: You understand what I'm saying,  
21 though? At least - - - at least the nature of the  
22 argument.

23 MR. O'SHAUGHNESSY: I do understand.

24 JUDGE FAHEY: The pension is a benefit that  
25 you're given as a result of the time you've put in. I - -



1 - and the - - - the legislature can put any restrictions  
2 they want on it, which they've done with these various  
3 restrictions. It's not the same as a wage which you get  
4 based on whatever - - - on hours that you worked and you're  
5 given compensation immediately for that.

6 MR. O'SHAUGHNESSY: But every - - - it - - - it  
7 has been - - - it's a very nice benefit, really, that these  
8 police officers get.

9 JUDGE RIVERA: Yeah, but - - -

10 MR. O'SHAUGHNESSY: I realize that they are  
11 injured, of course.

12 JUDGE FAHEY: Yeah, yeah.

13 MR. O'SHAUGHNESSY: But what it does is it puts  
14 them in - - -

15 JUDGE RIVERA: Well, they may earn it but they  
16 don't necessarily get it, right? Because if they are found  
17 to be capable and fit to work - - -

18 MR. O'SHAUGHNESSY: That's right. It - - - it  
19 can be taken away.

20 JUDGE RIVERA: - - - it will be reduced by the  
21 amount - - -

22 MR. O'SHAUGHNESSY: It can be taken away.

23 JUDGE RIVERA: - - - they make or if they don't  
24 what they could have made, correct?

25 MR. O'SHAUGHNESSY: That's correct. But the



1 point - - - the point is that it puts them in a position  
2 that they would have been had they continued - - -

3 JUDGE RIVERA: So not - - - let me just - - -  
4 just to follow that up, so then it's not in that sense  
5 earned and can't be reduced or eliminated for a period of  
6 time if they're found to be able to actually work, correct?  
7 That's the point of your potential - - -

8 MR. O'SHAUGHNESSY: That's correct.

9 JUDGE RIVERA: - - - annual medical exam?

10 MR. O'SHAUGHNESSY: That's correct. That's  
11 correct. Although then they - - - I guess they would go  
12 back to work, and they could still qualify for a pension.  
13 But that's - - - I think that's a thing that happens - - -

14 JUDGE RIVERA: Rarely.

15 MR. O'SHAUGHNESSY: - - - very rare. Yes.

16 JUDGE RIVERA: Think so.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 Counsel.

19 MR. SHOOT: May it please the court, my name is  
20 Brian Shoot. I'm here for the plaintiff. The point I  
21 think Judge Fahey was making is one that this Court made  
22 back in 1946, the Giannettino case that's cited. That was  
23 the one with the - - - the part where I've talked about in  
24 our brief is that pensions are presumed to be, in the words  
25 of the Court, "Full and adequate compensation was not



1 received at the time of the rendition of such services."  
2 The legal presumption is that the pension is a payment for  
3 those services that were previously provided. In  
4 Giannettino, the facts were that - - -

5 JUDGE RIVERA: But what are we to make of the  
6 fact that indeed if they're found able to be employed that  
7 it can be reduced and in fact reduced to zero?

8 MR. SHOOT: I think what it means is, amongst  
9 other things, that you certainly don't have - - - use the  
10 term match. They are different. They're different in a  
11 material sense in two different ways, apart from all the  
12 technical differences. They're different in one sense, and  
13 that is that with the award, the tort award, the - - -  
14 should the plaintiff die next week, next year those  
15 payments will continue towards the end of the term to her  
16 children. The award for ADR continues for life however  
17 long or short that might be, meaning that if she dies  
18 before the end of the term her children receive nothing.  
19 The other - - -

20 JUDGE WILSON: Isn't - - - isn't that a function  
21 of how you structured the - - - essentially the award that  
22 is - - - as I understood the jury award, there were dollar  
23 amounts - - - nominal - - - you know, today's dollars,  
24 nominal dollar amounts to be awarded right now and the - -  
25 - pursuant to some agreement you decided they would be paid



1 over a period of time. Is that - - -

2 MR. SHOOT: No, not quite.

3 JUDGE WILSON: Is that right?

4 MR. SHOOT: The only part - - - the requirement  
5 that it be paid over a period of time is CPLR Article  
6 50(b).

7 JUDGE FEINMAN: Yeah.

8 MR. SHOOT: The only agreement that was made was  
9 in each instance the jury essentially rounded up the amount  
10 given by the plaintiff's - - -

11 JUDGE FAHEY: I thought you were talking about  
12 the choice that a - - - that a recipient makes on what  
13 benefit - - - what type of benefit they receive. So, you  
14 know, the benefit can live on after you take a reduced  
15 amount, and that applies to ADR.

16 MR. SHOOT: Oh, yes. Yes.

17 JUDGE FAHEY: That's what I thought you were  
18 talking about before there.

19 MR. SHOOT: No, yeah. But you're - - - you're  
20 right of course, Your Honor, that - - -

21 JUDGE FAHEY: Yeah.

22 MR. SHOOT: - - - under the ADR benefits the - -  
23 - if the person wants a death benefit they can essentially  
24 pay for it by taking - - -

25 JUDGE GARCIA: At a fundamental level, though,



1 doesn't it seem like if the jury is awarding you lost  
2 pension benefits and you're getting a pension something has  
3 to be offset there?

4 MR. SHOOT: Well, I - - - I appreciate but they -  
5 - - we have a statute that puts the burden on the party  
6 seeking - - - seeking the reduction.

7 JUDGE GARCIA: But they were going to get  
8 something. Now they're getting this award. It seems to me  
9 the rest is math. The rest is figuring based on the  
10 seventy-five percent or what the expectancy was, figuring  
11 out the value of what you were going to get versus the  
12 value of this award. That's just a calculation to me. But  
13 as a fundamental matter, I don't see how you can say an  
14 award for lost pension isn't offset by pension benefits.

15 MR. SHOOT: Two reasons, Your Honor. One is with  
16 the statute. I don't mean the legislative history, I mean  
17 the statute. The statute - - - it's at page 33 of my brief  
18 if you don't have a copy handy. The statute provides that,  
19 "In order to find that any future cost or expense will with  
20 reasonable certainty be replaced or indemnified by the  
21 collateral source, the court must find that the plaintiff  
22 is legally entitled to the continued receipt of such  
23 collateral source pursuant to a contract or otherwise  
24 enforceable agreement."

25 Here's the part, "Subject only to the continued



1 payment of a premium and such other financial obligations  
2 as may be required by such agreement." You've just heard  
3 this is the - - - these payments are subject to a non-  
4 financial determinate, i.e. appearing under 13-254(a) of  
5 the Administrative Code for that examination. And, yes,  
6 Judge Rivera, I - - - to my knowledge, it is rare that a  
7 person who been deemed - - - yes, to be honest, in this  
8 case she's really disabled. I don't see that happening but  
9 nonetheless - - -

10 JUDGE STEIN: Well, but if she's - - - but if  
11 she's gotten an award for lost earnings and the reason why  
12 she's not getting this ADR benefit before her normal  
13 retirement eligibility is because she's unable to work and  
14 in fact she is able to work and she goes out and she earns  
15 money, then why isn't that a double recovery?

16 MR. SHOOT: Because the statute - - - I didn't  
17 write the statute. The statute says - - - and remember it  
18 replaces a Common Law rule where there were no deductions.  
19 This is the line the legislature has drawn - - - not in the  
20 legal history, in the statute itself, "Subject only to the  
21 continued payment of a premium and such other financial  
22 obligations as may be required by such agreement." Now if  
23 the City in its wisdom decided it will not have any  
24 requirement, it will rewrite its requirements so as not to  
25 impose a non-financial obligation, that would be different.



1 But there's the statute. That's what it says. If I may in  
2 the short time - - -

3 JUDGE RIVERA: But - - - but in Oden, we made  
4 clear that the - - - you're right, this is in derogation of  
5 the Common Law. We've said we read it narrowly and  
6 strictly and so forth. But Oden made clear that the point  
7 is to avoid duplicative remedies, right? That's - - -

8 MR. SHOOT: The point - - -

9 JUDGE RIVERA: That's what you're trying to  
10 avoid. So aren't we back to, as Judge Garcia pointed out,  
11 she's getting money as a pension and you've got something  
12 that seems very obvious on its face that works as at least  
13 a pension. Maybe it doesn't work as lost earnings, but it  
14 works as a pension. So I'm - - - I'm having difficulty  
15 following your argument.

16 MR. SHOOT: The legislature wanted to end double  
17 recoveries but not at any cost. And it clearly drew the  
18 line both in terms of the burden of proof that - - - and in  
19 terms of the statutory standard that any gray area is not  
20 going to be deducted. And if it's sub - - - very simply,  
21 if it's subject to a non-financial obligation that - - -  
22 the statute says there's no deduction. The - - - if the -  
23 - - the legislature could have drafted the statute  
24 differently. It could have drawn that line differently,  
25 but it didn't.

1 JUDGE RIVERA: I guess on the most basic level  
2 looking at the cases the statutory framework and - - - and  
3 the purpose of 4545, the point is she's going to get money  
4 upon immediate retirement. This category of retirees get  
5 ADR benefits. It's making up for any earnings they would  
6 have had but for this injury that induces the disability  
7 that then makes them unable to work. If they're able to  
8 work that amount of money is reduced, perhaps to zero. And  
9 once they hit a particular time frame, which would have  
10 been the point in time in service they could get a pension,  
11 they get this money. It's not reduced in any shape or  
12 form. It sounds very much like a pension then, and I just  
13 seem - - - I'm having great difficulty getting past that to  
14 understand your argument.

15 MR. SHOOT: Your Honor, may I suggest - - - in  
16 the - - - the short time I have here, you've had two polar  
17 positions presented in the briefs. I want to suggest in  
18 the short time I have here, I'm not conceding anything, I'm  
19 suggesting a mid-ground if you should disagree with me.

20 JUDGE RIVERA: Okay.

21 MR. SHOOT: There is a middle ground here. My  
22 adversary said something just now that I found somewhat  
23 surprising that was not relevant, not relevant supposedly,  
24 why the seventy-five percent, not fifty percent, not  
25 relevant. I think it's very relevant. You've just had, of



1 course, a four-three two spirited decisions on the  
2 intricacies of that added twenty-five percent. What does  
3 it represent? It certainly doesn't represent greater  
4 economic loss. The loss is the same regardless of how the  
5 injury is sustained. It doesn't represent - - - cannot  
6 represent the greater services that is expected from the  
7 seventy-five percent ADR officer as opposed to the fifty  
8 percent. The only explanation - - - the only explanation  
9 that anyone has ever suggested is the explanation that the  
10 City itself successfully urged in the Walsh case to this  
11 Court, "The rationale for accidental disability - - -  
12 accidental benefits as opposed to ordinary benefits is that  
13 the public owes a greater debt of gratitude to those public  
14 servants who suffer death or disabling injuries as a result  
15 of performing their duties."

16 JUDGE RIVERA: So let's say we agree - - - let's  
17 say we agree with you it can still serve as a pension. So  
18 what do we make of it? Are you saying that you only deduct  
19 a certain percentage of the ADR as the offset?

20 MR. SHOOT: What I'm saying is that - - -

21 JUDGE RIVERA: Or are you going with the - - -

22 MR. SHOOT: - - - it's - - - it's simply not what  
23 the statute intended and wrong and unfair to take an amount  
24 that is given to you as a reward and to now - - -

25 JUDGE RIVERA: Well, I thought you were arguing



1 that the - - -

2 MR. SHOOT: The twenty-five percent.

3 JUDGE RIVERA: Yes. Well, that's what I'm asking  
4 you.

5 MR. SHOOT: Yes.

6 JUDGE RIVERA: What do we make of the twenty-  
7 five? Let's say we agree with you on that. Is your point  
8 then that twenty-five percent should not be counted in the  
9 offset?

10 MR. SHOOT: Correct. And that the middle ground  
11 then, Your Honor, is - - -

12 JUDGE GARCIA: Wasn't - - - I'm sorry.

13 MR. SHOOT: - - - is that the fifty percent, the  
14 two-thirds of the seventy-five percent is calculated - - -  
15 you can't take - - -

16 JUDGE GARCIA: Because weren't we struggling in  
17 those other cases with the fact that you could have a  
18 police officer who was heroically - - - you know, injured  
19 in a heroic way saving someone and it's a line of duty  
20 fifty percent and an officer who steps on a pothole and  
21 gets seventy-five percent?

22 MR. SHOOT: Yes, but, Your Honor, and - - - but I  
23 wouldn't suggest that because there's one problem in the  
24 law to now magnify it. I can't understand the rationale of  
25 saying we are taking your reward and redistributing it to



1 the person who injured you. That's what we're doing with  
2 that money.

3 JUDGE GARCIA: But as I understand it - - -

4 MR. SHOOT: If you understand - - -

5 JUDGE GARCIA: - - - you're trying to justify  
6 this twenty-five percent as some extra thing when I think  
7 when we were struggling originally to see the justification  
8 for giving an extra twenty-five percent to the person who  
9 steps in the pothole and not the person who runs into the  
10 burning building.

11 MR. SHOOT: No, I - - - I'm not disagreeing with  
12 - - - I think both the majority and dissent said with  
13 perhaps different degrees of enthusiasm that this was a  
14 matter that the legislature should attend to. I'm not  
15 disagreeing. I'm saying that it's fundamentally wrong to  
16 simply take the reward from a person who's been injured for  
17 her service now give it to the person who injured her.

18 JUDGE RIVERA: So then - - - so then without  
19 doing any high-level math please, how does that affect the  
20 calculation that - - -

21 MR. SHOOT: It's - - -

22 JUDGE RIVERA: - - - was done here?

23 MR. SHOOT: It's very simple. Their economist  
24 said that the total ADR benefits throughout her entire life  
25 were 2.554 million dollars.



1 JUDGE RIVERA: Okay.

2 MR. SHOOT: The set-off - - - if that's the  
3 middle line you choose would be they get a settlement of  
4 two-thirds of that, fifty percent of - - - and that would  
5 be the total. You can't have more than that I would  
6 suggest. Two-thirds of the 2.54, which comes out to be  
7 approximately 1.7 million dollars, Your Honor.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 What about this apportionment argument?

10 MR. O'SHAUGHNESSY: I'm forced to say there's  
11 absolutely no basis in the law for that. First of all, it  
12 would be unpreserved. In the Supreme - - - this was not  
13 raised in the Appellate Division and in the Supreme Court  
14 we had a collateral source hearing. We called an  
15 economist. He said I calculate this to be the accident  
16 disability retirement benefits, and I say that they should  
17 be set off against the jury's awards in this manner.  
18 Plaintiff did not call an economist, so there's absolutely  
19 no contrary position in the record as to how the - - -

20 JUDGE FEINMAN: Yeah, but that - - - that's  
21 getting into the weeds of - - - of what this particular  
22 record is and not really telling us what the rule - - - the  
23 general rule should be.

24 MR. O'SHAUGHNESSY: Well - - -

25 JUDGE FEINMAN: It may be that they have a



1 failure of proof when it goes back if it goes back.

2 MR. O'SHAUGHNESSY: No, I'm saying it's - - -  
3 it's - - - what you just heard is unpreserved. You - - -  
4 there - - - you won't find in this record anything about  
5 let's just knock a third off of the ADR finding.

6 JUDGE RIVERA: But let me ask you about the  
7 Appellate Division's decision to - - - where it says, "The  
8 jury's award for future loss of pension benefits, however,  
9 should have been offset by the total amount that plaintiff  
10 was projected to receive under that disability pension  
11 effectively reducing the category damages to zero." Can  
12 you just explain that calculation - - -

13 MR. O'SHAUGHNESSY: Well, that's because the - -  
14 -

15 JUDGE RIVERA: - - - to me?

16 MR. O'SHAUGHNESSY: - - - Appellate Division  
17 rejected our argument that the ADR benefits should be  
18 applied to the future earnings as well. So that - - -  
19 that's why they limit it to that - - - to the future lost  
20 pension. And in fact, the ADR benefits are greater than  
21 the - - - the future lost pension. The ADR benefits,  
22 however, are less, much less, than the combination of the  
23 lost earnings and the lost pension. So if the Court agrees  
24 with us that ADR benefits should be set off against both we  
25 go back to the collateral source hearing.

1           Our economist said what - - - well, I'm just  
2 going to take - - - I figured out actually for past and  
3 future it's 2.8 million of ADR benefits, and since the lost  
4 earnings period comes first I'm going to apply it to lost  
5 earnings. And there's a little bit left, so it wipes out  
6 lost earnings. And there's a little bit left to wipe out  
7 the award for pension. There are many other ways it might  
8 have been done, different economists might have done it,  
9 but that's the way - - - that's the only way it was done by  
10 an economist - - -

11           JUDGE RIVERA: So - - - so - - -

12           MR. O'SHAUGHNESSY: - - - in this record so  
13 that's the way it should stay.

14           JUDGE RIVERA: That - - - that's the evidence  
15 you're presenting that it should be first apply it to the  
16 future lost earnings. If there's anything left from the  
17 ADR then you apply it to the pension?

18           MR. O'SHAUGHNESSY: Yes, because - - -

19           JUDGE RIVERA: Am I understanding correctly?

20           MR. O'SHAUGHNESSY: - - - because they are  
21 offsetting that both.

22           JUDGE RIVERA: Rather than aggregating the future  
23 lost earnings and the future lost benefits award and then  
24 just subtracting from that the total ADR?

25           MR. O'SHAUGHNESSY: Well, it - - -



1 JUDGE RIVERA: Does it matter?

2 MR. O'SHAUGHNESSY: Right, I think in another  
3 case another economist might have done that or they might  
4 have had an economist from the plaintiff and an economist  
5 from the defendant and they might have slugged it out about  
6 the proper way to do it.

7 JUDGE RIVERA: I guess this is what I'm not  
8 understanding.

9 MR. O'SHAUGHNESSY: But that didn't happen here.

10 JUDGE RIVERA: Aren't we just coming up with a  
11 rule? You're saying this will vary from economist to  
12 economist that's in these collateral source hearing?

13 MR. O'SHAUGHNESSY: It may. It may. But no - -  
14 - no - - - neither we nor the plaintiff challenged below  
15 the method of setting off the ADR benefits against the  
16 jury's awards. So the only questions before this court  
17 today are are ADR benefits a collateral source to be set  
18 off against lost earnings and are ADR benefits a collateral  
19 source to be set off against the lost service pension.

20 JUDGE RIVERA: So we don't have to do any  
21 calculations? We don't have to send it back down to be  
22 recalculated?

23 MR. O'SHAUGHNESSY: Right.

24 JUDGE RIVERA: I thought that you said that the -  
25 - -



1 MR. O'SHAUGHNESSY: If - - - well, if there's any  
2 recalculation necessary. It depends. If the Court agrees  
3 with us - - -

4 JUDGE RIVERA: Yes.

5 MR. O'SHAUGHNESSY: - - - that they both offset -  
6 - -

7 JUDGE RIVERA: Yes.

8 MR. O'SHAUGHNESSY: - - - then the work has  
9 already been done at the collateral source hearing and  
10 there's nothing else to do about it.

11 JUDGE RIVERA: As it stands.

12 MR. O'SHAUGHNESSY: Right.

13 JUDGE RIVERA: Because you presented the  
14 evidence.

15 MR. O'SHAUGHNESSY: Right.

16 JUDGE RIVERA: And we have the numbers.

17 MR. O'SHAUGHNESSY: Right. Because our economist  
18 presented it on the basis that there's a set off for both  
19 lost earnings and lost pension.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. O'SHAUGHNESSY: Thank you.

22 MR. SHOOT: Your Honor, may I just give a record  
23 citation?

24 CHIEF JUDGE DIFIORE: Yes.

25 MR. SHOOT: 1013.



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CHIEF JUDGE DIFIORE: Thank you.

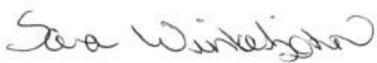
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Andino v. Mills, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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