

>> THE NEXT CASE ON THE COURT'S
AGENDA, WALD V. GRAINGER.
YOU MAY PROCEED.

>> OKAY.

GOOD AFTERNOON.

I'M PERRY PENLAND.

MYSELF ALONG WITH RICK, WE
REPRESENT HOWARD WALD WHO IS THE
PLAINTIFF AND THE PETITIONER
HERE.

FACTUALLY, WE START WITH A VERY
SIMPLE CASE.

IT'S A AUTOMOBILE ACCIDENT.

THE DEFENDANT, GUS FELOS, BID AT
FAULT FOR THE ACCIDENT.

CASE WENT TO TRIAL NOT ON THE
ISSUE OF LIABILITY, BUT ON THE
ISSUE OF DAMAGES AND CAUSATION.

THE INJURIES TO MR. WALD WERE TO
HIS NECK, HIS BACK, RIGHT ELBOW,
RIGHT FOOT AND HIS RIGHT THIGH.

>> DON'T WE HAVE, REALLY, OUR
QUESTION HERE --

>> YES, SIR.

>> -- IS THAT WHEN CLAIMANTS
WITNESS -- AND OF NECESSITY IT
HAS TO BE OPINION ON THIS
PARTICULAR FACTOR, IT'S NOT A
FACT WITNESS, OPINION WITNESS --
TESTIFIES TO ACTS AND THEN ON
THE OTHER SIDE OF THE EQUATION
ANOTHER EXPERT TESTIFIES --
MAYBE NOT EXACTLY EXPERT, BUT
THAT THERE IS A PERMANENT
INJURY.

THE SOLE QUESTION IS, NUMBER

ONE, WHETHER THAT BINDS A JURY
AND WHETHER A JURY CAN REJECT
THAT TESTIMONY BECAUSE IN SOME
AREAS OF FLORIDA LAW IT'S
RECOGNIZED THAT OPINION
TESTIMONY DOES NOT HAVE TO
ALWAYS BE ACCEPTED.

AND THEN THE SECOND QUESTION IS,
THEN, IS THAT EXPERT ISSUE
IMPACTED BY THE QUESTION OF WHAT
KIND OF DAMAGES YOUR, OR
COMPLAINTS THAT YOUR CLIENT HAD
WITH REGARD TO THAT LEG?
AREN'T THOSE REALLY THE TWO
QUICK ONES?

I MEAN, THAT'S REALLY WHERE
WE'RE GOING HERE.

>> I THINK THAT'S EXACTLY RIGHT.

>> YEAH.

SEEMS TO ME THIS QUESTION IS, IS
IT AN EXCESSIVE JUDGMENT, NOT A
QUESTION OF EXPERT OPINION HERE.
AS I LOOK AT THIS OPINION BELOW
IT'S LIKE THE FIRST DCA'S SAYING
WITHOUT SAYING IT IS REVERSING
THIS BECAUSE OF THE AMOUNT OF
THE JUDGMENT, NOT BECAUSE OF THE
TESTIMONY.

>> WELL, LET ME START WITH THE
SECOND QUESTION FIRST.

>> OKAY.

>> THERE WAS A MOTION TO
REMITTITUR FILED BEFORE THE
TRIAL JUDGE.

THE JUDGE DENIED IT, AND THERE
WAS NO APPEAL --

>> I UNDERSTAND.

NO, NO, I UNDERSTAND.

>> SO I THINK THAT FROM A LEGAL STANDPOINT ANSWERS THAT QUESTION.

I THINK THIS COURT IN EASKOLD V. RHODES AND WEYGANT V. FORT MYERS LINCOLN MERCURY ANSWERED THE QUESTION ABOUT WHEN JURIES CAN DISREGARD EXPERT TESTIMONY.

WHAT THIS SAID WAS, AND IT'S GOOD LOGIC COMING FROM YOU, BUT IT WAS GOOD LOGIC WHICH IS A JURY CAN DISREGARD UNREFUTED EXPERT TESTIMONY IF THERE'S CONTRADICTORY LAY TESTIMONY.

AND I THINK THAT'S OUR STANDARD. AND HERE, YOU KNOW, WALD'S MAIN TREATING PHYSICIAN WAS A DOCTOR NAMED JACKSON TAN.

JACKSON TAN TESTIFIED THAT THIS UNUSUAL RIGHT THIGH INJURY WAS, FROM THE ACCIDENT, PERMANENT.

THE DEFENSE HAD DR. HOWARD HOGSHEAD TESTIFY, AND HE TESTIFIED THAT THE MOST PROBABLE CAUSE OF THE RIGHT THIGH INJURY WAS, IN FACT, THIS CAR ACCIDENT.

EVEN TAKES IT A STEP FURTHER AND SAYS THAT HE GIVES HIM A 3 PERCENT PERMANENT-PARTIAL IMPAIRMENT PURSUANT TO THE AMA GUIDELINES.

WHENEVER THE PLAINTIFF MOVED FOR A DIRECT ISSUE, DEFENSE COUNSEL -- AND I'LL TRY TO QUOTE

HER ACCURATELY -- SAID,

"DR. HOGSHEAD DID RELATE IT TO
THE CAR ACCIDENT."

SO IF THEY'RE IN THE TERMINOLOGY
OF EASKOLD IF THERE'S THAT
CONTRADICTORY LAY TESTIMONY THAT
A JURY CAN BASE A DECISION ON,
SURE, THEY CAN DISREGARD
EXPERTS.

BUT HERE UNUSUAL CONDITION IS
THE NERVE INJURY.

PLAINTIFF'S DOCTOR SAYS IT'S
PERMANENT, DEFENSE DOCTOR SAYS
IT'S PERMANENT, AND I THINK IT'S
UNDERSTANDABLE THE JUDGE GRANTED
THE REPRESENTATION MADE BY
DEFENSE COUNSEL AT TRIAL THAT
HER OWN DOCTOR RELATED THE
CONDITION TO THE ACCIDENT.

>> BUT IS THERE ANYTHING
ABOUT -- TO ME, THAT THE CAUSE
OF THAT, QUOTE, NERVE INJURY WAS
TWO DIAMETRICALLY OPPOSED
OPINIONS WHICH IS THAT ONE IS
SAYING THESE ARE BACK INJURIES
AND IT'S A MOTOR NERVE INJURY
THAT, YOU KNOW, COULD CAUSE
NUMBNESS AND, YOU KNOW, LOSS OF
MOTOR FUNCTION.

AND WHAT THE DEFENSE EXPERT IS
SAYING IS THAT IT'S A SEAT BELT
INJURY THAT HAS RESULTED IN A
SENSORY IMPAIRMENT TO THE NERVE.
SO THEY'RE REALLY TALKING ABOUT
TWO DIFFERENT INJURIES, AND THAT
WAS MY CONCERN ABOUT I THINK

THERE'S A LOT OF THINGS THE FIRST DISTRICT MAYBE WOULD RATHER HAVE NOT SAID BECAUSE I THINK THEY MADE SOME PRETTY BROAD STATEMENTS, BUT LOOKING JUST AT THIS CASE IT SEEMS LIKE THE TWO EXPERTS WERE NOT, YOU KNOW, IT'S NOT LIKE THEY BOTH SAID, YEAH, THE NECK INJURY IS PERMANENT.

ONE GAVE IT A 5 PERCENT, THE OTHER GAVE IT A 10 PERCENT.

THEY'RE TALKING ABOUT TWO DIFFERENT TYPES OF INJURIES.

>> TO USE A BIT OF A CLICHE, IT'S NOT THAT THEY'RE TALKING ABOUT APPLES AND ORANGES, THEY'RE TALKING ABOUT DIFFERENT PLACES ON THE APPLE THAT THE INJURIES HAPPEN.

IF YOU LOOK AT WHAT DR. HOGSHEAD SAID, AND I SET IT OUT AT GREAT LENGTH IN MY BRIEF, THE NERVE COMES OFF THE BACKBONE, COMES OFF THE SPINE, IT CROSSES ABOUT BELT LEVEL.

HE KNOWS THAT BECAUSE THAT'S WHAT DR. HOGSHEAD SAID HE GOT HURT AND THEN GOES DOWN THE RIGHT SIDE.

IT'S THE SAME NERVE.

THE ONLY THING THE DOCTORS DISAGREE ON IS WHERE, FROM WHERE THE NERVE EXITS THE SPINE TO THE --

[INAUDIBLE]

WHERE ON THAT PATHWAY IT GOT INJURED.

DR. TAN SAYS THAT IT'S A RADICULAR INJURY, AND HE SAYS THAT WOULD BE THE BAD ONE. BUT HE SAYS I DON'T THINK IT'S AN INJURY AT THE SPINE, I THINK IT'S THE SEAT BELT THAT INJURED THIS NERVE.

THAT'S REALLY WHAT DR. HOGSHEAD SAYS.

SO WE'RE TALKING ABOUT THE SAME NERVE TRAVELING FROM SPINE TO THIGH.

THE ONLY DIFFERENCE IS REALLY WHERE ALONG THE NERVE IT WAS IMPACTED AND INJURED.

I THINK IT'S THE SAME INJURY.

NOW, CERTAINLY THERE'S A LOT OF ARGUMENT ABOUT WAS MR. WALD'S NECK AND/OR BACK PERMANENTLY INJURED.

DEFENSE TAKES A POSITION IT'S PRE-EXISTING ARTHRITIS, THE GUY'S HEAVY SET, IT'S DEGENERATIVE.

PLAINTIFF SAYS, NO, IT'S FROM THE ACCIDENT, AND THE JURY MADE THE DECISION THAT THEY MADE. THOUGHT SOMEBODY HAD A QUESTION, SORRY.

BUT I THINK THAT WHEN YOU LOOK AT THE FACTUAL ASPECT OF THIS CASE, THE FACTUAL ASPECT OF THIS CASE IS THERE IS NO FACTUAL DISPUTE ABOUT THE PERMANENCY OF

THE INJURY AND THE RELATIONSHIP
TO THE ACCIDENT.

>> WELL, THERE IS, DOES SEEM TO
BE AN ARGUMENT HERE THAT'S BEING
MADE IS THAT EVEN IF YOU ACCEPT
THAT THERE'S A PERMANENT INJURY
TO THE THIGH --

>> YES.

>> -- THAT BECAUSE THERE WERE NO
DAMAGES REQUESTED FOR THE THIGH
INJURY, THAT YOU COULD NOT
TRANSLATE THAT THIGH PERMANENT
INJURY INTO THE DAMAGES THAT
WERE AWARDED FOR INJURIES TO THE
NECK AND THE BACK.

>> WELL, THAT WOULD BE, THAT
WOULD BE FOOTNOTE NUMBER ONE OF
THE FIRST DISTRICT'S OPINION.
AND IN FOOTNOTE NUMBER ONE I
BELIEVE WHAT THE FIRST DISTRICT
SAID WAS SIGNIFICANTLY BASED
UPON A PLAIN READING OF THE
STATUTE.

IT APPEARS THE JURY WOULD BE
PRECLUDED FROM AWARDED DAMAGES
BASED ON THE PERMANENCY OF THE
THIGH INJURY BECAUSE THE INJURY
DID NOT CAUSE PAIN, SUFFERING,
MENTAL ANGUISH OR INCONVENIENCE.
AND I WOULD RESPECTFULLY URGE
THAT THE FIRST DISTRICT WAS AT
ERROR FOR TWO REASONS.

NUMBER ONE, THAT'S NOT WHAT A
STATUTE SAYS.

THE STATUTE SAYS A PERSON CAN
RECOVER -- AND THIS IS IN MY

REPLY BRIEF, I BELIEVE ABOUT
PAGE 7 -- JUST WANT TO MAKE SURE
I QUOTE THE STATUTE CORRECTLY.

I DON'T HAVE IT RIGHT HERE, AND
I DON'T WANT TO BELABOR --

>> JUST TELL US WHAT YOU
BELIEVE, IN ESSENCE, THE STATUTE
SAYS.

>> WE'VE SO LONG REFERRED TO
THIS AS THE NO-FAULT THRESHOLD
STATUTE.

AND THAT'S WHAT IT IS, IT'S A
THRESHOLD.

THE WAY THE STATUTE READS, IF
THE PLAINTIFF HAS A PERMANENT
INJURY IN WHOLE OR IN PART, THEN
THE PLAINTIFF CAN RECOVER
DAMAGES -- NOT ECONOMIC
DAMAGES -- FOR ALL THE
PLAINTIFF'S INJURIES REGARDLESS
IF THE INJURY'S PERMANENT OR
NOT.

AS LONG AS YOU HAVE THAT ONE
PERMANENT INJURY.

>> ANY DAMAGES FOR PAIN AND
SUFFERING HAVE TO BE CAUSALLY
RELATED.

>> ABSOLUTELY.

>> THIS IS A FAR-FETCHED
HYPOTHETICAL AND MAYBE IT
DOESN'T HOLD OUT, BUT LET'S SAY
THAT THE FIRST INJURY THAT IS
REPORTED IN AN ACCIDENT IS IF
SOMEBODY HAS INJURED THEIR
WRIST.

>> UH-HUH.

>> BUT THEN THREE DAYS LATER
THEY START TO FEEL THE ONSET OF
LOW-BACK PARALYSIS, AND
EVENTUALLY SOMETHING HAPPENS AND
THEY'RE A PARAPLEGIC, LOWER
EXTREMITY.

THE JUDGE SAYS I DON'T KNOW IF
THE PARAPLEGIA'S RELATED TO THE
ACCIDENT, BUT THE BROKEN WRIST
HAS RESULTED IN SOME LOSS OF
FUNCTION, SO I'M GOING TO AWARD,
I'M GOING TO DIRECT THE VERDICT
ON PERMANENCY ON THE WRIST.
NOW, AT WHAT POINT WOULD THE
JURY AT LEAST KNOW THAT THEY'RE
NOT -- THEY STILL HAVE TO FIND
THAT THE BULK OF THE DAMAGES
WHICH WOULD BE THE ECONOMIC AND
NON-ECONOMIC DAMAGES FOR THE
MAJOR INJURY HAS TO BE RELATED
TO THE ACCIDENT.

AND I THINK THAT'S WHAT THE
DEFENDANT IS ARGUING THAT
SOMEHOW THEY WERE PRECLUDED FROM
BEING ABLE TO MAKE THIS ARGUMENT
THAT THE BULK OF THE INJURIES
WERE NOT RELATED TO THE ACCIDENT
BY THE JUDGE'S DIRECTED VERDICT
ON PERMANENCY.

>> WELL, STARTING WITH THE END
OF THE TRIAL FIRST AND --

>> DO YOU LIKE MY HYPOTHETICAL,
FIRST OF ALL?

>> THAT'S GOOD.

[LAUGHTER]

I THINK THAT IS A GOOD EXAMPLE

BECAUSE --

>> WELL, I MEAN, THAT WOULD BE A SITUATION OF SORT OF SAYING THIS IS A MINOR PERMANENT INJURY. THE MAJOR ONE WAS REALLY IN DISPUTE.

>> RIGHT.

>> AND, THEREFORE, I MEAN, IT SEEMS LIKE THEY'RE REALLY MAKING MORE OF AN EXCESSIVENESS ARGUMENT, THIS IS TOO MUCH PAIN AND SUFFERING TO GIVE FOR INJURIES THAT WERE --

>> WELL, I DEFINITELY FEEL THEY'RE MAKING AN ARGUMENT THAT THE MONEY WAS JUST TOO MUCH. IT WAS A MILLION DOLLARS.

BUT I DON'T THINK THAT ARGUMENT IS PRESERVED FOR APPEAL BECAUSE THE REMITTITUR WASN'T TAKEN UP IN APPEAL.

>> IS ANY OF THIS PRESERVED FOR APPEAL?

>> IN MY OPINION?

>> WELL --

>> NOT A LOT.

>> I HAVE A HARD TIME SEEING A CONNECTION BETWEEN ANYTHING THE FIRST DISTRICT SAID HERE AND SPECIFIC POINTS THAT WERE ARGUED TO THE TRIAL COURT.

YOU PROBABLY AGREE WITH ME.

[LAUGHTER]

>> [INAUDIBLE]

>> I KEEP HEARING THAT WAIVER WORD.

>> WELL, FOR INSTANCE, ON THE POINT WE'RE TALKING ABOUT INVOLVING THIS FOOTNOTE --

>> YES.

>> -- A POINT, AN ARGUMENT ABOUT THAT WAS NOT MADE TO THE TRIAL COURT, WAS IT?

>> NO, SIR.

WELL, THERE WAS --

>> REPEAT THAT QUESTION WHEN OPPOSING COUNSEL --

>> SO THE ISSUE ABOUT WHETHER THERE COULD BE, YOU KNOW, THE QUESTION OF WHETHER THE JURY NEEDED FURTHER INSTRUCTION, AND I GUESS THE DEFENSE DIDN'T ASK FOR FURTHER INSTRUCTION.

>> CORRECT.

LET ME GO BACK TO YOUR EXAMPLE. I THINK THAT'S A PRETTY GOOD HYPOTHETICAL.

NOW, YOU HAVE THE PERMANENTLY-INJURED WRIST. YOU HAVE THE PARALYSIS.

IS IT FROM THE ACCIDENT, IS IT NOT FROM THE ACCIDENT, WAS THERE SOME PRE-EXISTING CONDITION THAT WAS AGGRAVATED?

OUR STANDARD JURY INSTRUCTIONS INSTRUCT JURIES YOU AWARD DAMAGES THAT ARE A RESULT OF THE ACCIDENT.

I'M NOT PHRASING IT EXACTLY, BUT THE DAMAGES INSTRUCTIONS LIKE 6.2, THEY TALK ABOUT TO AWARD DAMAGES THAT ARE DIRECT AND

PROXIMATE RESULTS OF THE
ACCIDENT.

MY PHRASING'S NOT EXACTLY, BUT
THE THOUGHT'S THERE.

MOVING BACK IN TIME, IF YOU
WILL, INTO THE GUTS OF THIS
TRIAL THE BATTLEFIELD, IF YOU
WILL, WAS THE PERMANENCY OF
MR. WALD'S NECK AND BACK, YOU
KNOW?

PLAINTIFF PUT ON EVIDENCE,
PLAINTIFF MADE HIS BEST
ARGUMENTS, DEFENSE PUT ON
EXPERTS, DR. HOGSHEAD TESTIFIED
AT LENGTH THE NECK ISN'T
PERMANENT, HERE'S WHY.

THE BACK ISN'T PERMANENT, HERE'S
WHY.

DR. UTZ, WHO'S A RADIOLOGIST IN
JACKSONVILLE, HE TESTIFIED
LOOKING AT THE FILMS IT'S NOT
PERMANENT -- EXCUSE ME, IT'S NOT
PERMANENT.

DEFENSE COUNSEL ARGUED THE NECK
IS NOT PERMANENT.

THE DEFENSE COUNSEL IN CLOSING
ARGUMENT ARGUED THE BACK WAS NOT
PERMANENT AND, THEREFORE, DON'T
AWARD MONEY FOR IT.

SO YOU COULD MAKE THOSE
ARGUMENTS IN A CASE EVEN IF
PERMANENCY IS NOT DISPUTED AS TO
SOME OTHER BODY PART.

AND THAT IS WHAT, IN FACT, WAS
DONE HERE.

>> SO ALL THE PERMANENCY DID WAS

GET THE PLAINTIFF IN THE DOOR
FOR BEING ABLE TO MAKE
ADDITIONAL ARGUMENT --

>> CORRECT.

>> -- BUT THEY WEREN'T, THE
DEFENSE WASN'T PRECLUDED FROM
SAYING THE BACK AND NECK -- I
DON'T THINK IT WAS AN ISSUE OF
PERMANENCY -- DID NOT COME FROM
THE ACCIDENT.

BECAUSE I DON'T THINK ANYONE --

>> I THINK THERE IS AN ISSUE OF
PERMANENCY AND CAUSATION FROM
THE DEFENSE STANDPOINT.

DR. HOGSHEAD TESTIFIED, I
BELIEVE, THAT THE PLAINTIFF
DOESN'T HAVE A PERMANENT INJURY
AS TO THE NECK OR THE BACK.

BASICALLY, THE ARGUMENT IS -- TO
USE LAYMAN'S TERMS -- IT'S
ARTHRITIS.

THAT WAS THE ARGUMENT.

>> BUT THEY ALSO ARGUED THAT THE
NECK AND THE BACK WERE NOT
PERMANENT INJURIES, AND THAT THE
NECK AND THE BACK INJURIES WERE
NOT A PART OF, CAUSED BY THE
AUTOMOBILE ACCIDENT.

>> YEAH.

THAT WAS THOROUGHLY LITIGATED IN
THIS CASE.

THAT WAS THOROUGHLY LITIGATED.

WHAT WAS A GIVEN, WHAT WAS NOT
THE BATTLEFIELD WAS THE RIGHT
THIGH PERMANENT INJURY.

THAT WAS ALL BUT A GIVEN.

IF YOU LOOK TO THE TRANSCRIPT
AND YOU LOOK AT DEFENSE
COUNSEL'S OPPOSITION TO THE
MOTION FOR DIRECTED VERDICT,
IT'S A HALF A DOZEN LINES.
AND IF THERE WAS REALLY AN ISSUE
ABOUT THE THIGH INJURY, WE HEAR
ARGUMENTS IN THIS CASE FROM THE
RESPONDENT --

[INAUDIBLE]

>> ISN'T THE SUM AND SUBSTANCE
OF WHAT WAS PRESENTED TO THE
TRIAL COURT IS THAT PERMANENCY
IS A JURY ISSUE?

>> PERMANENCY IS A JURY ISSUE IF
THERE'S FACTS IN DISPUTE ABOUT
PERMANENCY.

>> WHATEVER.

BUT I'M NOT -- I'M SAYING WHAT
THEY ARGUED.

THEY JUST SAID TO THE TRIAL
COURT, ESSENTIALLY, PERMANENCY
IS ALWAYS A JURY ISSUE.

>> THE FIRST DISTRICT, THE WAY I
READ THE OPINION BELOW IN THE
FIRST DISTRICT PERMANENCY IS
ALWAYS A JURY --

>> SO WHAT JUSTICE --

>> I'M TALKING ABOUT WHAT
HAPPENED IN THE TRIAL COURT.
THE ARGUMENT THAT THE DEFENSE
MADE IN THE TRIAL COURT WAS
ESSENTIALLY NOTHING MORE THAN
PERMANENCY IS ALWAYS A JURY
ISSUE.

>> YES.

>> IT WAS NOTHING MORE SPECIFIC THAN THAT KIND OF GENERALIZED STATEMENT THAT NO SPECIFIC REASON --

>> YES, I FOLLOW YOU NOW.

YES, SIR.

>> OKAY.

THE DEFENSE GAVE THE TRIAL COURT NO SPECIFIC REASON THAT IT SHOULD REJECT THE MOTION FOR DIRECTED, FOR JUDGMENT ON THE PERMANENCY ISSUE.

>> THE RESPONDENT MAKES AN ARGUMENT BEFORE THIS COURT THAT THE DEFENSE COUNSEL MADE REFERENCE TO DR. HOGSHEAD'S REPORT AND THAT THE REPORT VARIED FROM DR. HOGSHEAD'S TESTIMONY.

BUT I DON'T THINK THAT CAN GIVE RISE TO A FACTUAL DISPUTE TO THE JURY FOR A VERY SIMPLE REASON. DR. HOGSHEAD'S REPORT WAS NEVER IN EVIDENCE.

SO, THEREFORE, IF THE JURY NEVER HAD THE REPORT, HOW COULD THAT CREATE A JURY ISSUE?

THE REPORT IS IN THE RECORD, I BELIEVE IT'S ATTACHED TO A MOTION TO LIMIT TESTIMONY.

SO THE REPORT'S IN THE RECORD, BUT IT'S NOT, IT WAS NEVER BEFORE THE JURY FOR THE JURY TO SAY, WELL, GOSH, THE REPORT SAYS X, AND THE DOCTOR SAYS Y. SOMETHING'S NOT RIGHT.

THAT WAS NEVER PART OF THE TRIAL.

>> AND YOU ARE WELL INTO YOUR REBUTTAL IF YOU WANT TO SAVE ANY TIME.

>> IF THERE'S ANY QUESTIONS, I'LL BE DELIGHTED TO ANSWER THEM NOW, OR I CAN JUST SAVE IT FOR REBUTTAL.

>> ALL RIGHT, THANK YOU.

>> MAY IT PLEASE THE COURT, MY NAME IS SUSAN OOSTING, AND I REPRESENT THE RESPONDENT IN THIS CASE, ATHENA GRAINGER, WHO IS SUCCESSOR TO MR. GRAINGER WHO PASSED AWAY UNRELATED TO ANYTHING IN THIS CASE.

I GUESS I CAN JUST START WITH THE QUESTIONS, OR -- FIRST, I GUESS TO ADDRESS JUSTICE CANADY'S QUESTION AS TO WHETHER THIS ISSUE HAS BEEN WAIVED, AND IT IS TRUE THAT THE DEFENSE COUNSEL'S RESPONSE WAS VERY BRIEF BECAUSE THE JUDGE RULED VERY QUICKLY.

THIS WAS ALL IN THE CONTENTS OF MOTION AT THE CLOSE OF EVIDENCE AND AT THE END OF THE DAY, BUT WHAT DEFENSE COUNSEL DID SAY AND I HAVE THE TRANSCRIPT HERE IS, WE STILL THINK THAT A JURY CAN ACCEPT OR REJECT ANY TESTIMONY AND ANY RESPECTIVE EVIDENCE, AND WE WOULD ARGUE THAT THE DIRECT VERDICT ON THE ISSUE OF

PERMANENCY SHOULD NOT BE ISSUED.

NOW, THAT DOESN'T SOUND --

>> CAN I ASK A QUESTION?

>> YES, SIR.

>> DID DEFENSE COUNSEL RECOGNIZE THAT DEFENSE COUNSEL'S OWN WITNESS HAD STATED THAT IT WAS A PERMANENT INJURY?

>> YES, YOUR HONOR, I BELIEVE --

>> OKAY.

SO IN CANDOR THE DEFENSE LAWYER WAS CANDID WITH THE COURT.

THAT'S WHAT THAT EVIDENCE WAS.

>> WELL, AND I WOULD LIKE TO ADDRESS WHAT DR. HOGSHEAD'S OPINION REALLY WAS, BUT JUST VERY BRIEFLY --

>> WELL, COULD YOU ANSWER MY QUESTION?

IS THAT TRUE?

>> YES.

DEFENSE COUNSEL DID RECOGNIZE THAT DR. HOGSHEAD FOUND AN AREA OF NUMBNESS ON THE RIGHT THIGH. AND DR. HOGSHEAD TESTIFIED AT LENGTH THAT AS TO THIS PARTICULAR PLAINTIFF, MR. WALD, THERE WERE TWO POTENTIAL CAUSES. AND THE FIRST POTENTIAL CAUSE WAS WHAT HE CALLED THE BELT BUCKLE INJURY.

>> DID THE DOCTOR TESTIFY, THE DEFENSE DOCTOR, ULTIMATELY THAT THIS WAS RELATED TO THE ACCIDENT?

>> HE TESTIFIED THAT IT COULD

HAVE BEEN THE BELT BUCKLE OR IT
COULD HAVE BEEN THE SEAT BELT
BASED ON MR. WALD GIVING A
HISTORY OF WEARING THE SEAT
BELT --

>> FROM THE ACCIDENT?

>> -- HE SAID IT PROBABLY COULD
BE RELATED.

THAT'S WHAT HE SAID.

"IT PROBABLY COULD BE RELATED."

AND THEN THE DEFENSE COUNSEL
ASKED, "YOU'RE GIVING HIM THE
BENEFIT OF THE DOUBT?"

HE SAID, "YES, I'M GIVING HIM
THE BENEFIT OF THE DOUBT."

LATER ON HE TESTIFIED VERY
CLEARLY THAT IN HIS OPINION THIS
THIGH NUMBNESS EQUATED TO A 1
PERCENT IMPAIRMENT.

THERE WAS NO AMBIVALENCE ABOUT
THAT.

THE AMBIVALENCE IN HIS TESTIMONY
WAS AS TO THE CAUSATION.

WELL, IT COULD HAVE BEEN THIS OR
IT COULD HAVE BEEN THAT, BUT
GIVING HIM THE BENEFIT OF THE
DOUBT MR. WALD TOLD HIM HE HAD
AN IMMEDIATE ONSET OF THIGH
NUMBNESS WHICH WAS NOT REFLECTED
IN HIS EMERGENCY ROOM RECORDS --

>> WELL --

>> -- THAT WAS A CONFLICT.

>> DID THE ATTORNEY EVER ARGUE
THAT THIS SHOULDN'T BE, THAT NO
DIRECT TESTIMONY SHOULD BE
ENTERED HERE BECAUSE THERE WAS

SOME AMBIVALENCE ABOUT WHETHER
OR NOT THIS WAS, IN FACT, A
PERMANENT INJURY?

>> YES, YOUR HONOR.

>> AND WHERE'S THAT?

>> THAT'S CONTAINED IN DEFENSE
COUNSEL'S STATEMENT WHICH IS, IN
EFFECT, THE JURY INSTRUCTION AS
TO EXPERT TESTIMONY WHICH IS
DEFENSE COUNSEL SAID JURY CAN
ACCEPT OR REJECT ANY TESTIMONY
AND ANY RESPECTIVE EVIDENCE.

AND THAT'S JUST --

>> WAIT A MINUTE, I DON'T THINK
THAT WAS IN RESPONSE TO WHAT THE
CHIEF JUSTICE ASKED.

>> YES, YOUR HONOR.

>> WHERE IS IT THAT IT SAYS
"AMBIVALENT"?

>> DEFENSE COUNSEL DID NOT SAY
AMBIVALENT.

DEFENSE COUNSEL REFERENCED THE
JURY INSTRUCTIONS --

>> BUT BY SAYING THAT YOU CAN
ACCEPT OR REJECT ANY EVIDENCE
DOESN'T PINPOINT FOR ANYONE WHAT
WAS WRONG WITH THE EVIDENCE
HERE, DOES IT?

>> HE SAID THAT SHE DID SAY
ALTHOUGH DR. HOGSHEAD'S
TESTIMONY HAS BEEN THAT HE DOES
FOR THE BENEFIT -- MEANING THE
BENEFIT OF THE DOUBT -- RELATED.

SO, IN FACT, AGAIN THE TRIAL
JUDGE, ATTORNEY AT TRIAL WAS
REFERRING TO THE JUDGE'S FOR THE

BENEFIT OF THE DOUBT RELATING --

YES, YOUR HONOR.

>> WHAT WE DON'T HAVE IN THAT JURY INSTRUCTION BUT WHAT WE HAVE IN CASE LAW IS THAT THERE HAS TO BE A REASONABLE BASIS IN EVIDENCE TO REJECT OTHERWISE UNCONTRADICTED TESTIMONY, WOULD YOU AGREE WITH THAT?

>> ABSOLUTELY, YOUR HONOR.

>> I THINK WHAT IS THE PROBLEM WITH WHAT THE FIRST DISTRICT SAID AND HOW IT'S ARGUED IS THAT YOU -- AND YOU JUST SAID IT -- THAT THERE WAS NOT ANY AMBIVALENCE AS TO THE PERMANENCY OF THE INJURIES, BUT THERE WAS, QUOTE, AMBIVALENCE AS TO THE CAUSE OF THE NUMBNESS.

AND I LOOKED IN THE ARGUMENT OF DEFENSE COUNSEL TO SEE IF SHE WOULD SAY, LISTEN, WE'RE COMING AT THIS, WE'RE TALKING ABOUT TWO DIFFERENT TYPES OF INJURIES, AND HE'S REALLY TALKING ABOUT SOME SEAT BELT OR IT COULD BE THE SEAT, AND THEY'RE TALKING ABOUT LUMBAR RADICULOPATHY AND, THEREFORE, IT'S CONTRADICTORY. IT'S NOT THE SAME TESTIMONY. SOMETHING LIKE THAT, BUT THAT WASN'T MADE.

AND SO THE ARGUMENT SEEMED TO ME, AND I THOUGHT THAT WAS WHAT JUSTICE CANADY HAD ASKED AND JUSTICE LEWIS, IS THE ARGUMENT

TO SAY PERMANENCY IN CAUSAL
RELATIONSHIPS ARE ALWAYS A JURY
QUESTION.

THAT'S NOT THE LAW, IS IT?

>> NO, YOUR HONOR, BUT THE WORD
"ALWAYS" DOES NOT APPEAR IN THE
FIRST DISTRICT'S OPINION.

AS THIS COURT KNOWS, PRECEDENT
IS -- I'M REACHING FOR THE
OPINION.

>> I THINK WE ALL ASSUME WHEN
YOU SAY PERMANENCY IS A JURY
QUESTION THAT DOESN'T SAY
PERMANENCY IN THIS CASE WAS A
JURY QUESTION BECAUSE OF A, B,
AND C.

>> WELL, YOUR HONOR, MANY CASES
SAY PERMANENCY IS A JURY
QUESTION, SAY NEGLIGENCE IS A
JURY QUESTION.

BUT THE OPINION IS UNDERSTOOD IN
THE CONTEXT OF THE FACTS RECITED
IN THE OPINION.

>> BUT YOU GO ON TO SAY --

[LAUGHTER]

"AFTER PERMANENCY IS A JURY
QUESTION, A JURY IS FREE TO
WEIGH THE CREDIBILITY OF EXPERT
WITNESSES AS IT DOES ANY OTHER
WITNESSES AND REJECT EVEN
UNCONTRADICTED TESTIMONY."

BUT JUST A FEW MINUTES AGO YOU
AGREED WITH JUSTICE PARIENTE
THAT THAT IS NOT THE CASE.

THAT A JURY CANNOT REJECT OUT OF
HAND UNCONTRADICTED TESTIMONY.

>> IN THE ABSENCE OF SOME OTHER EVIDENCE OF RECORD.

>> BUT THE POINT IS IF THERE'S SOMETHING ELSE IN THE RECORD THAT'S INCONSISTENT WITH IT, THEN IT'S CONTRADICTED.

THIS STATEMENT IS LIKE -- IF IT CAN, IF A JURY REJECTS UNCONTRADICTED TESTIMONY, IF THERE'S NOTHING THAT CONTRADICTS IT, IT DOESN'T SEEM LIKE THERE'S CONFIDENT EVIDENCE FOR THE JURY'S DETERMINATION.

>> WELL, THE STANDARD, OBVIOUSLY, IS THAT THE DIRECTED VERDICT SHOULD NOT BE GRANTED UNLESS THE EVIDENCE AND ALL INFERENCES WHICH REASONABLY COULD BE MADE FROM THE EVIDENCE LEAD TO ONLY ONE CONCLUSION. AND IF THIS COURT FEELS THAT THE LANGUAGE OF THE OPINION IS WHAT BROAD, WE WOULD SUBMIT THE HOLDING IS STILL CORRECT BECAUSE THE OPINION RECITES --

>> HOW IS THE HOLDING CORRECT IF NO, IF THERE'S NO PRESERVED ISSUE FOR THE FIRST DISTRICT TO REACH THESE CONCLUSIONS ON? BECAUSE IF THE TRIAL COURT NEVER WAS PRESENTED WITH AN ARGUMENT THAT WOULD HAVE JUSTIFIED THE REJECTION OF THE MOTION FOR THE DIRECTED VERDICT ON PERMANENCY, SO THEY'D NEVER GIVEN A REASON TO REJECT IT, THEN WHY SHOULD

THE REVERSE -- WHY SHOULD THE TRIAL COURT, THE FIRST DISTRICT'S DECISION TO REVERSE THE TRIAL COURT WHEN THE TRIAL COURT WAS NEVER GIVEN A REASON IT WAS WRONG, WHY SHOULD THE FIRST DISTRICT BE UPHELD?

>> YOUR HONOR, RESPECTFULLY WE BELIEVE THAT THE TRIAL COURT AND IN THE DIALOGUE THAT HAD TO DO WITH THE MOTION FOR DIRECTED VERDICT IT WAS IMPLICIT THAT THE DEFENSE COUNSEL WAS INVOKING THE JURY VERDICT INSTRUCTIONS, THE STANDARD OF JUDGING EXPERT TESTIMONY AND THE MORE IMPORTANT POINT, YOUR HONORS, IS REALLY THAT THERE WAS AMPLE EVIDENCE FROM WHICH A JURY COULD FIND THAT THE PLAINTIFF --

>> BUT SO THERE WAS NO OBLIGATION ON THE PART OF THE DEFENSE ATTORNEY TO POINT OUT TO THE COURT WHY, WHAT THE CONTRADICTORY EVIDENCE WAS IN ORDER TO DEFEAT A MOTION FOR DIRECTED VERDICT?

>> YOUR HONOR, WE BELIEVE THAT THE DEFENSE COUNSEL DID PRESENT THE ISSUE AS TO WHY IT SHOULDN'T BE A DIRECTED VERDICT BECAUSE BY SAYING THAT THE JURY WAS ENTITLED TO LOOK AT ALL THE EVIDENCE IN THE CASE, THE DIRECTED VERDICT -- THE PLAINTIFF ONLY BASED IT ON THE

FACT THAT DR. HOGSHEAD GAVE
MR. WALD A 3 PERCENT IMPAIRMENT
TO HIS THIGH.

DR. TAN GAVE HIM NO IMPAIRMENT
TO HIS THIGH, SO, I MEAN --

>> LET ME ASK YOU, CAN I ASK ONE
QUESTION?

OKAY, GREAT.

THANKS.

[LAUGHTER]

AS TO THE ISSUE OF PERMANENCY
AND FIRST YOU SAY, SAID THAT
THAT'S A JURY ISSUE.

IN THE STANDARD JURY
INSTRUCTIONS, PERMANENCY IS AN
ISSUE, RIGHT?

>> YES, YOUR HONOR.

IF THE PERMANENCY ISSUE HAD NOT
BEEN TAKEN AWAY FROM THE
INJURY --

>> RIGHT.

>> -- IT WOULD HAVE BEEN PART --

>> THAT'S PART OF THE STANDARD
JURY INSTRUCTIONS.

>> YES, YOUR HONOR.

>> BUT THAT'S NOT WHAT WAS GIVEN
HERE.

>> NO, YOUR HONOR.

THERE WAS NO INSTRUCTION AS TO
PERMANENCY, AND MORE
IMPORTANTLY --

>> DID THE DEFENSE COUNSEL ASK
FOR A JURY INSTRUCTION ON
PERMANENCY?

>> NO, YOUR HONOR, BECAUSE THE
TRIAL COURT HAD RULED THERE WAS

A --

>> WELL, THEY CLEARLY RULED AS TO THE THIGH INJURY BUT NOT AS TO THE NECK AND BACK, SO WHY DIDN'T THEY ASK FOR SOME KIND OF CLARIFYING JURY INSTRUCTION ON PERMANENCY ON THOSE INJURIES?

>> I BELIEVE, YOUR HONOR, THAT IN THE CONTEXT OF THE TRIAL DEFENSE COUNSEL'S HANDS WERE TIED.

THE JUDGE SAID THAT THEY WERE FREE TO ARGUE ABOUT THE PERMANENCY, BUT THERE WAS THE JURY VERDICT AND THE JURY INSTRUCTIONS WERE REQUIRED TO BE CHANGED BASED ON THE DIRECTED VERDICT THAT WAS GRANTED.

AND THAT WAS THE HARM THAT WAS DONE IN THIS CASE, THAT THE JURY NEVER HAD THE OPPORTUNITY TO CONSIDER THE QUESTION OF PERMANENT INJURY CAUSED BY THE ACCIDENT.

>> SO YOU WOULD AGREE THAT THE INJURIES TO THE THIGH, BACK AND NECK ARE ALL TIED TOGETHER, THAT YOU CAN'T SEPARATE THOSE OUT. IF THERE'S PERMANENCY AS TO ONE AND IT WAS CORRECT TO HAVE A DIRECTED VERDICT ON THE PERMANENCY AS THE THIGH INJURY, THEN YOU MUST ACCEPT THE PERMANENCY AS TO THE OTHER INJURIES AS WELL?

>> YOUR HONOR, NO.

WE WOULD SAY AS THAT THE PLAINTIFF SAYS IN THIS CASE, PERMANENCY IS A THRESHOLD INJURY.

AND ONCE THE JUDGE DIRECTED A VERDICT THAT THE THIGH INJURY WAS PERMANENT, THEN ALL OF THE DAMAGES, ECONOMIC AND NON-ECONOMIC, THAT WERE CAUSED BY INJURIES RELATED TO THE ACCIDENT COULD BE CONSIDERED BY THE JURY.

>> YEAH, BUT THE ONLY WAY IS THE THRESHOLD.

BEFORE THERE WAS NO FAULT, YOU WOULD STILL AS PLAINTIFF HAVE TO SHOW THAT NON-ECONOMIC DAMAGES IN THE FUTURE --

>> YES.

>> -- WERE RELATED TO THE ACCIDENT.

>> YES.

>> SO IF THE JURY HAD ACCEPTED THE ARGUMENT THAT THIS WAS DEGENERATIVE DISK DISEASE WHICH, YOU KNOW, IS STILL A VERY PAINFUL THING WHETHER IT'S AGGRAVATED BY THE ACCIDENT OR PRE-EXISTING AND FOUND IT WAS NOT RELATED, THEN YOUR ARGUMENT WOULD HAVE BEEN, YOU KNOW, THAT THERE WAS NO BASIS FOR THE JURY'S VERDICT BECAUSE THERE'S NO EVIDENCE THAT THESE OTHER INJURIES WERE PERMANENT. AND THAT'S, I THINK, WHERE THE

PROBLEM IS FOR EITHER NOT REQUESTING SOMETHING MORE SPECIFIC, TO ASK IN THE SPECIAL VERDICT WHAT WERE YOUR PAIN AND SUFFERING INJURIES RELATED TO THE NECK AND BACK, WHAT WAS, YOU KNOW, AND HOW MUCH WAS THE THIGH AS UNDER ONE THEORY THEY WERE ALL TOGETHER.

SO I JUST DON'T SEE HOW -- MAYBE IT'S A COMBINATION OF THINGS BASED ON THE ARGUMENT MADE HAVE THE TRIAL JUDGE ERRED IN NOT, IN FINDING PERMANENCY.

BUT THEN BEYOND THAT HOW IT TOOK ANYTHING AWAY FROM THE DEFENDANT BEING ABLE TO ARGUE JUST WHAT YOU'RE SAYING, THAT ALL THE BULK OF EVERYTHING THEY'RE CLAIMING ISN'T RELATED TO THE ACCIDENT.

>> WELL, AND DEFENSE COUNSEL DID ARGUE THAT, BUT THE IMPORTANT POINT HERE IS THAT BY HAVING BREACHED THE THRESHOLD, THE THRESHOLD IS GONE DUE TO A NONSYMPTOMATIC, THE JURY THEN WAS ENTITLED TO CONSIDER NON-ECONOMIC DAMAGES FOR THE BACK AND NECK WITHOUT EVER ASKING OR FINDING WHETHER IT WAS PERMANENT OR NOT.

OBVIOUSLY, THEY HAD TO BE CAUSALLY RELATED.

>> YOU'RE REALLY TAKING ISSUE WITH THE INTERPRETATION OF THE STATUTE THAT SAYS ONCE YOU REACH

THAT THRESHOLD THEN YOU CAN
CONSIDER ALL THE ECONOMIC,
NON-ECONOMIC DAMAGES.

>> NO, YOUR HONOR, I'M SAYING
THAT'S EXACTLY THE POINT.

>> [INAUDIBLE]

>> ONCE THE THIGH INJURY
BREACHED THE THRESHOLD, THEN THE
JURY COULD AWARD NON-ECONOMIC
DAMAGES FOR THE BACK INJURY.

AND, IN FACT, IF YOU TAKE THE
NUMBERS THAT THE PLAINTIFF PUT
UP ON THE BOARD, THE PLAINTIFF
SAID --

>> BEYOND THE NUMBERS THE
QUESTION IS, IS THAT AN ARGUMENT
THAT WAS EVER MADE?

>> TO THE TRIAL JUDGE?

>> THAT THE JURY WAS ENTITLED TO
AWARD NON-ECONOMIC DAMAGES EVEN
IF THEY FOUND THAT THE BACK
INJURY WAS NOT PERMANENT?
THAT'S TRUE.

>> SO YOU DISAGREE WITH FOOTNOTE
ONE OF THE OPINION OF THE FIRST
DISTRICT.

>> I THINK THAT FOOTNOTE ONE IS
SOMEWHAT INARTFUL.

HOWEVER, I DON'T THINK IT'S
EITHER DISPOSITIVE -- IT'S
CERTAINLY NOT DISPOSITIVE.

IT'S REALLY NOT EVEN RELATIVE TO
THE HOLDING OF THIS CASE.

I DON'T DISAGREE WITH FOOTNOTE
ONE TO THE EXTENT THAT A JURY
SHOULDN'T AWARD DAMAGES.

IF YOU HAVE AN INJURY, QUOTE,
FOR WHICH YOU'RE NOT HAVING ANY
PAIN, INCONVENIENT SUFFERING OR
SCARRING OR WHATEVER, WELL, THEN
HOW IS THE JURY TO AWARD
DAMAGES?

THAT'S LIKE SAYING --

>> WELL, IT COULD HAVE KILLED
YOU.

>> -- THEY COULD GIVE YOU
NOMINAL DAMAGES.

>> HE COULDN'T HAVE CHILDREN
SITTING ON HIS LAP BECAUSE IT
WAS VERY UNCOMFORTABLE.

>> THAT'S VERY INTERESTING, YOUR
HONOR, BECAUSE THE PLAINTIFF'S
COUNSEL SHOWED THE JURY A
PICTURE OF MR. WALD WITH HIS
GRANDSON, WITH HIS YOUNGEST SON
ON HIS LAP AT THE VERY BEGINNING
OF MR. WALD'S TESTIMONY.

SO THREE YEARS BEFORE THE TRIAL
MR. WALD DID HAVE CHILDREN
SITTING ON HIS LAP.

BUT, AND THAT'S SOMETHING ELSE
THE JURY COULD TAKE INTO
CONSIDERATION.

THE JURY COULD TAKE INTO
CONSIDERATION WHAT WE CONTEND
ARE THE -- THE JURY COULD HAVE
FOUND THE THIGH INJURY ITSELF
WAS NOT PERMANENT, AND THAT'S
THE CRUX OF THIS.

THERE WAS EVIDENCE THAT THERE
WAS NO PERMANENT THIGH INJURY,
MERALGIA PARESTHETICA.

>> YOU PRESENTED THE WITNESS.

I SAY YOU, I MEAN THE DEFENSE,
PRESENTED THE EXPERT WITNESS
THAT'S REQUIRED TO ADDRESS
MEDICAL ISSUES, CORRECT?

>> YES, YOUR HONOR.

>> AND THAT MEDICAL EXPERT
VOICED THE SAME OPINION WITH
REGARD TO PERMANENCY AS DID THE
PERSON WHO WAS TREATING, I
ASSUME, THE PLAINTIFF, IS THAT
CORRECT?

>> YOUR HONOR, WITH ALL DUE
RESPECT --

>> FOR PERMANENCY.

>> NO, YOUR HONOR, THEY WERE
DIAMETRICALLY OPPOSED.

>> WELL, I --

>> DR. TAN AWARDED ZERO FOR A
THIGH INJURY.

>> DID HE SAY THERE'S ANY
PERMANENCY?

>> DR. TAN SAID THERE WAS NO
INJURY TO HIS LEG.

>> THE --

>> OKAY, EXCUSE ME, YOUR HONOR.

>> WE'RE TALKING PAST EACH
OTHER.

DID HE NOT SAY IT'S A
RADICULAR-TYPE INJURY?
IT FLOWS FROM THE BACK?

>> DR. TAN SAID THAT.

>> RIGHT.

AND DID HE NOT SAY THAT'S
PERMANENT?

>> YES, HE SAID --

>> OKAY.

>> [INAUDIBLE]

>> WELL, NO, THE NERVE.

THE INJURY TO THE NERVE.

THE QUESTION AS TO WHERE ON THE NERVE MAY BE UP IN THE AIR, BUT THE QUESTION THAT NERVE AND PAIN IS PERMANENT.

BY BOTH DOCTORS.

>> YOUR HONOR, WITH ALL DUE RESPECT DR. HOGSHEAD TESTIFIED THAT MR. WALD HAD AN AREA OF NUMBNESS, NO PAIN, THAT WAS LOCALIZED AND DID NOT RADIATE. DR. HOGSHEAD SAID THERE WAS NO EVIDENCE OF RADICULOPATHY. DR. TAN SAID HE HAD AN INJURY TO HIS BACK AND HIS NECK FOR WHICH HE AWARDED 17 PERCENT, AND WHEN HE WAS ASKED ABOUT THE THIGH, HE SAID THE PAIN IN HIS THIGH IS CAUSED BY THE RADIATION FROM THE BACK INJURY.

>> MAYBE WE'RE GOING AROUND IN CIRCLES BECAUSE I THOUGHT THAT WHAT WAS ASKED EARLIER WAS THE PROBLEM WITH NOW MAKING THIS ARGUMENT, IT'S NOT THE ARGUMENT THAT WAS MADE TO THE TRIAL JUDGE.

THE TRIAL JUDGE WAS SIMPLY TOLD, YEAH, IT'S A PERMANENT INJURY, BUT IT'S FOR THE JURY TO DECIDE. AND THAT'S, YOU KNOW, AND THEN -- SO WE'RE NOW WE JUST KEEP ON MAKING THE ARGUMENTS

THAT MAYBE COULD HAVE BEEN MADE AT THE TRIAL LEVEL BUT WEREN'T MADE.

AND THEN REVERSING BECAUSE OF THINGS THAT WEREN'T ARGUED OR WEREN'T, YOU KNOW, PUT BEFORE THE TRIAL JUDGE.

>> YOUR HONOR, AGAIN, IN THE CONTEXT OF THE ARGUMENT THAT WAS MADE WE BELIEVE THAT DEFENSE COUNSEL SIGNIFICANTLY AND SUBSTANTIALLY AND AS REQUIRED ALERTED THE TRIAL JUDGE AS TO WHAT WAS THE PROBLEM WITH THIS DIRECTED VERDICT.

>> I MEAN, ISN'T THE PROBLEM, THOUGH, AND YOU SAID THE PROBLEM IS ONCE THERE'S THAT THRESHOLD, THEY CAN ARGUE NON-ECONOMIC DAMAGES FOR OTHER INJURIES --

>> ABSOLUTELY, YES.

>> SO THE ARGUMENT THEN IS \$1 MILLION FOR, WHAT, PROBABLY NONPERMANENT INJURIES IS EXCESSIVE, AND THAT ARGUMENT WASN'T, I DON'T SEE THAT BEING MADE HERE.

BUT THE EXCESSIVENESS OF THE AMOUNT IF IT WERE JUST FOR THE THIGH INJURY AND SOMEHOW THEY WERE PRECLUDED FROM ARGUING THE AMOUNT AS TO THE OTHER INJURIES.

IT SEEMS LIKE IT'S AN EXCESSIVENESS ARGUMENT, NOT A PERMANENT -- A QUESTION OF THE PERMANENCY.

>> WELL, YOUR HONOR, THE VERDICT MAY OR MAY NOT BE EXCESSIVE IN TERMS OF IF THERE WERE A PERMANENT INJURY, THE JURY WOULD BE ENTITLED TO CONSIDER ALL OF HIS DAMAGES.

THE PLAINTIFF ASKED FOR FIVE MILLION, AND THE JURY ONLY AWARDED, ONLY AWARDED, YOU KNOW, 780,000.

SO IF YOU FIGURED IT OUT, THEY COULD HAVE SAID IT WAS THE \$10 AN HOUR FOR FIVE YEARS.

THE JURY COULD HAVE FOUND IN THEIR CALCULATIONS THAT THE BACK AND NECK THAT HE WAS CLAIMING THE DAMAGES FOR WASN'T A PERMANENT INJURY.

BUT THEY COULD STILL AWARD HIM NON-ECONOMIC DAMAGES.

SO, YES, YOUR HONOR, WE WOULD SAY THAT IF THE THRESHOLD ISSUE, THE DIRECTED VERDICT OF THE THRESHOLD WAS ERRONEOUS AND WE BELIEVE IT WAS, THEN THE JURY WITHOUT BEING ASKED WHETHER THERE WAS A PERMANENT INJURY ON THE VERDICT FORM SHOULD NOT HAVE BEEN ALLOWED, AND IN THE STANDARD VERDICT FORM THERE IS. THE QUESTION IS, WAS THERE AN INJURY CAUSED BY THE ACCIDENT? THEN IT'S WHAT ARE YOUR ECONOMIC DAMAGES.

THE NEXT QUESTION IS, WAS THERE A PERMANENT INJURY?

AND THEN YOU GET TO NON-ECONOMIC DAMAGES.

>> AND AGAIN WAS THERE SOME OBJECTION TO THAT FORM?

>> TO THE VERDICT FORM NOT HAVING THE QUESTION OF PERMANENCY ON IT?

>> YES.

>> YOUR HONOR, AGAIN, THE JUDGE -- I BELIEVE THE TRIAL COUNSEL IN THE CONTEXT OF THE ARGUMENT IN THE JUDGE'S RULING THIS WAS THE VERDICT FORM THAT WAS A RESULT OF THE ERRONEOUS DIRECTED VERDICT.

SO WE WOULD ASK THIS COURT THAT WHETHER OR NOT THERE ARE SOME ISSUES OF LANGUAGE IN THE OPINION BE OF THE FIRST DISTRICT, BUT WE BELIEVE THE HOLDING IS CONSISTENT WITH THIS COURT'S RULINGS IN EASKOLD AND WEYGANT WHERE THERE'S CONFLICTING TESTIMONY, A DIRECTED VERDICT ISN'T PROPER.

AND WE DO BELIEVE THIS IS WHAT THIS SAYS, SO WE WOULD SAY THAT IN ANY EVENT THIS CASE SHOULD BE SENT BACK TO BE RETRIED.

>> THANK YOU VERY MUCH.

>> THANK YOU VERY MUCH.

>> I THINK THE STARTING POINT IN THIS ANALYSIS IS REALLY WHAT HAPPENED IN FRONT OF THE TRIAL JUDGE WHENEVER THE MOTION FOR DIRECTED VERDICT WAS MADE.

AND IN THAT, IN DEFENSE
COUNSEL'S OPPOSITION TO THE
MOTION VERY LITTLE WAS SAID.
DEFENSE COUNSEL ACKNOWLEDGES
THAT AS TO CAUSATION THAT
DR. HOGSHEAD RELATED THE
PLAINTIFF'S RIGHT THIGH INJURY
TO THE ACCIDENT IN QUESTION AND
THEN GRANTED THE MOTION FOR
DIRECTED VERDICT.
AND HOW THE FIRST DISTRICT CAN
CRITICIZE THE TRIAL JUDGE FOR
NOT SUBMITTING THE ISSUE OF
CAUSATION TO THE JURY WHEN
DEFENSE COUNSEL ADMITTED
CAUSATION WAS THERE I WOULD
RESPECTFULLY URGE IS ERROR.
SO MANY OF THE ARGUMENTS THAT
WE'VE SEEN FROM THE RESPONDENT
ARE NOT PRESERVED FOR APPEAL.
THESE ARE ARGUMENTS THAT THERE'S
FACTUAL DISPUTES ABOUT THINGS
THAT WERE SAID.
NONE OF THAT WAS EVER MADE TO
OUR TRIAL JUDGE IN THIS CASE.
NONE OF THAT WAS EVER MADE, AND
SO TO CRITICIZE THE TRIAL JUDGE
FOR IN THE MARINARI V. SLEIMAN
CASE THIS COURT BACK IN 1957
MADE WHAT I THOUGHT WAS A VERY
CRYPTIC REMARK ABOUT YOU MUST
MAKE YOUR COMPLAINTS KNOWN TO
THE TRIAL COURT BECAUSE YOU
CAN'T EXPECT THE TRIAL JUDGE TO
ANTICIPATE YOUR DESIRES.
AND I THINK THAT'S GREAT

LANGUAGE BECAUSE YOU CAN'T
CRITICIZE THE TRIAL JUDGE FOR
RELYING IN PART UPON WHAT THE
DEFENSE COUNSEL SAID WHICH WAS
DOCTOR-RELATED CAUSATION RELATED
TO THIGH TO THE ACCIDENT.

AND TAKING IT A STEP FURTHER,
DEFENSE COUNSEL HAD A GOOD
REASON TO TAKE THAT POSITION.

HER OWN WITNESS RELATED THE
THIGH INJURY TO THE ACCIDENT.

WHAT I THINK THIS CASE IS REALLY
ABOUT IS THAT THE FIRST DISTRICT
COURT OF APPEAL WENT TOO FAR.

THIS COURT SETS FORTH THAT
ARGUMENT THAT JURIES CAN
DISREGARD EXPERT TESTIMONY IN
THE FACE OF CONFLICTING LAY
TESTIMONY.

THE FIRST DISTRICT SAYS JURIES
CAN DISREGARD EXPERT TESTIMONY,
THEY LEAVE OUT THE SECOND PART
OF THAT PHRASING WHICH I THINK
IS SO IMPORTANT AND WHICH IS WHY
THE FIRST DISTRICT ERRED IN THIS
CASE.

>> AND WE THANK YOU VERY MUCH,
BOTH OF YOU, FOR YOUR ARGUMENTS
HERE TODAY.

THE COURT WILL BE IN RECESS
UNTIL TOMORROW MORNING.

>> PLEASE RISE.