

>> ALL RISE.  
SUPREME COURT OF FLORIDA IS NOW  
IN SESSION.

PLEASE BE SEATED.

>> OUR LAST CASE FOR THE DAY IS  
SPECIAL V. WEST BOCA MEDICAL  
CENTER.

YOU MAY PROCEED.

>> MAY IT PLEASE THE COURT, I AM  
PHILIP BURLINGTON HERE ON BEHALF  
OF FRANK SPECIAL WHO IS THE  
PETITIONER AND WAS THE PLAINTIFF  
BELOW.

THIS CASE ARISES OUT OF MEDICAL  
MALPRACTICE ACTION, AND THE  
ISSUE BEFORE THE COURT IS THE,  
WHAT IS THE HARMLESS ERROR  
STANDARD IN CIVIL CASES IN  
FLORIDA AND HOW IT IS TO BE  
APPLIED IN THIS CASE.

>> YOU AGREE THAT EVEN IF WE  
FOLLOW DiGUILIO AS A CRIMINAL  
CASE, THE STANDARD HAS TO BE  
ADAPTED FOR A CIVIL CASE?

>> IT'S OUR POSITION THAT THE  
STANDARD SHOULD BE THE SAME AS  
IT IS FOR CRIMINAL CASES.

>> BUT IF YOU READ, BUT IF YOU  
READ DiGUILIO WHICH IS BASED ON  
CHAPMAN AND YOU READ CHAPMAN,  
CHAPMAN SAYS -- USES THE  
REASONABLE POSSIBILITY LANGUAGE  
AS A EQUIVALENT TO BEYOND A  
REASONABLE DOUBT LANGUAGE.  
AND SO MY CONCERN IS THAT WE  
DON'T WANT TO IMPORT A STANDARD  
IN A CRIMINAL, FROM A CRIMINAL  
CASE WITH CONSTITUTIONAL  
IMPLICATIONS.

I MEAN, I AGREE WITH OTHER  
ASPECTS OF WHAT YOU'VE ARGUED,  
BUT I'M JUST CONCERNED THAT WE,  
WE'VE GOT TO LOOK BACK AT HOW  
DiGUILIO CAME ABOUT.

SO WHY WOULDN'T THE STANDARD AT  
LEAST AS FAR AS THE BURDEN OF  
PROOF OR THE PARTY WHO IS THE  
BENEFICIARY OF THE ERROR BE  
SLIGHTLY DIFFERENT BECAUSE IT'S  
A CIVIL CASE?

>> UM, THERE'S AN EXCELLENT DISCUSSION IN THE FEDERAL THIRD CIRCUIT CASE CALLED McQUEENY IN WHICH THEY CONSIDER THE ARGUMENTS FOR AND AGAINST THAT PROPOSITION AND CONCLUDE THAT IT SHOULD BE THE SAME STANDARD. WHAT THEY DETERMINED WAS THAT THERE ARE, BASICALLY, TWO ARGUMENTS FOR SAYING THERE SHOULD BE A DIFFERENT STANDARD CIVIL TO CRIMINAL.

ONE OF THEM IS THAT THE BURDEN OF PROOF IS DIFFERENT, AS YOU INDICATED.

HOWEVER, AS DISCUSSED IN THAT CASE WHILE THERE MAY BE A FACIAL SYMMETRY IN SAYING THE BURDEN SHOULD BE DIFFERENT IN A CIVIL CASE WITH HARMLESS ERROR AS TO THE BURDEN OF PROOF, THERE'S NO LOGICAL SYMMETRY BECAUSE THE BURDEN OF PROOF IN CRIMINAL AND CIVIL CASES TO PROVE THE CLAIMS ARE A REFLECTION OF SOCIETY'S CONCERN FOR THE CERTAINTY OF CRIMINAL CONVICTIONS WHICH WOULD RESULT IN THE DEPRIVATION OF LIBERTY OR, AS WE'VE HEARD EARLIER TODAY, POSSIBLY LIFE. HOWEVER, THE BURDEN AS TO THAT ISSUE DOES NOT CORRELATE OR REFLECT SOCIETY'S CONCERN FOR THE LEVEL OF ERROR THEY ARE WILLING TO TOLERATE IN JUDICIAL PROCEEDINGS.

THERE SIMPLY IS NO LOGICAL CONNECTION.

AND, IN FACT, IN THE THIRD CIRCUIT CASE THAT SAYS THAT TO MAKE THE LEAP TO SAY THAT THE HARMLESS ERROR STANDARD SHOULD BE DIFFERENT WOULD COMPOUND SOCIETY'S SUPPOSED CONCERN WITHOUT ANY REAL LOGICAL BASIS.

>> WELL, I GUESS THERE -- BUT, YOU KNOW, AND I'LL LOOK AT THE THIRD CIRCUIT CASE.

MY CONCERN IS THIS: FIRST OF ALL, UNLIKE A CRIMINAL CASE

WHERE IT'S THE DEFENDANT WHO IS GOING TO BE ARGUING THAT SOMETHING ISN'T HARMLESS, AND THE STATE AS THE BENEFICIARY OF THE ERROR HAS TO PROVE THAT IT WAS HARMLESS BEYOND A REASONABLE DOUBT, RIGHT?

THAT'S WHAT THE STATE HAS TO DO. HERE WHAT WE HAVE IS THE IDEA THAT YOU, FIRST OF ALL, YOU MIGHT TAKE TECHNICAL ERRORS IN A TRIAL, AND YOU DON'T WANT A REVERSAL JUST BECAUSE OF A TECHNICAL ERROR.

BUT WE'RE GOING TO BE APPLYING A STANDARD THAT GOES BOTH WAYS, RIGHT?

PLAINTIFFS AND DEFENDANTS.

>> CORRECT.

>> THIS IS NOT A PLAINTIFF-FRIENDLY OR A DEFENSE-FRIENDLY ARGUMENT. THIS IS REALLY LOOKING AT THE LEVEL OF ERROR THAT YOU WANT TO TOLERATE.

AND I'M NOT SURE WHY IT ISN'T, AND, AGAIN, I'M NOT -- JUST TRY AND UNDERSTAND IT -- WHY IS THAT A BETTER POLICY ARGUMENT SINCE IT IS GOING TO GO BOTH WAYS TO SAY THAT THE PARTY THAT IS THE BENEFICIARY OF THE RECORD NEEDS TO PROVE MORE LIKELY THAN NOT THAT THE JURY VERDICT WOULD HAVE BEEN DIFFERENT?

AND THAT'S FOR EITHER SIDE.

AND I'M NOT SURE REALLY PRACTICALLY SPEAKING WHETHER SAYING MORE LIKELY THAN NOT VERSUS REASONABLE POSSIBILITY IS GOING TO CHANGE THINGS TOO MUCH, BECAUSE APPELLATE JUDGES SORT OF, YOU KNOW, AND YOU SEE CRIMINAL CASES, YOU'D KNOW THIS. THEY SORT OF CAN SAY AND WE FIND IT HARMLESS BEYOND A REASONABLE DOUBT, AND THAT'S THE END OF IT. SO HOW IS -- I GUESS AND THAT MIGHT BE THE OTHER QUESTION IS, HOW DO YOU SEE FUNCTIONALLY THE

DIFFERENCE OF SAYING A  
REASONABLE POSSIBILITY SO  
DIFFERENT FROM SAYING MORE  
LIKELY THAN NOT?

>> WELL, IF THIS COURT DEEMS  
THEM EQUIVALENT, THEN YOU'RE  
SORT OF ESSENTIALLY --

>> WELL, I'M NOT SAYING I'M TOO  
DIFFERENT.

BECAUSE THEY'RE TALKING ABOUT  
SOME COURTS MAY HAVE HAD AN  
EFFECT, ANOTHER USED  
PROBABILITY, ANOTHER USED  
POSSIBILITY, NOW WE HAVE MORE  
LIKELY THAN NOT.

I'M NOT SURE AS THE BRAIN OF THE  
APPELLATE JUDGE IS WORKING  
THROUGH IN THIS THAT IT'S GOING  
TO MEAN REAL LIFE --

>> WELL --

>> THAT MUCH OF IT?

>> WELL, AS THE COURT IN  
McQUEENY NOTED, IF YOU DO THE  
ANALYSIS THAT IT SHOULD BE THE  
SAME AS THE BURDEN OF PROOF,  
THEN IN CIVIL CASES WHERE THE  
STANDARD IS CLEAR AND CONVINCING  
THEN YOU'RE GOING TO HAVE TO USE  
ANOTHER, DIFFERENT STANDARD FOR  
HARMLESS ERROR, BUT IN THE --

>> AND THAT'S TRUE.

THE JIMMY RYCE ACT --

>> EXCUSE ME?

>> IN JIMMY RYCE ACTS YOU WOULD  
HAVE TO HAVE --

>> RIGHT.

>> OKAY.

>> SO IF WE ARE GOING TO SAY IT  
HAS TO BE SYMMETRICAL WITH A  
BURDEN OF PROOF OR FACTUAL  
ISSUES IN THE TRIAL COURT, THEN  
IT WILL HAVE TO BE VARIABLE  
DEPENDING UPON THE NATURE OF THE  
CASE EVEN AMONGST THE CIVIL,  
THERE'LL BE VARIATION.  
BUT AS TO THE PRACTICAL EFFECT,  
IT IS VERY DIFFICULT TO  
ESTABLISH ANY STANDARD THAT IS  
GOING TO DO ANYTHING MORE THAN  
GUIDE DILIGENT JUDGES TO APPLY A

UNIFORM TEST.

AND CANDIDLY, PART OF THE PROBLEM IS THAT, OBVIOUSLY, WE ARE ALL CONCERNED WITH THE APPEARANCE OF UNIFORMITY, PREDICTABILITY.

AND IF WE HAVE CASES THAT USE A VARIETY OF STANDARDS AS WE CURRENTLY HAVE NOW AND AS THE FOURTH DISTRICT'S OPINION CLEARLY ELABORATES, THERE IS THE PERCEPTION WHEN CERTAIN DISTRICTS USE MORE THAN ONE --

>> NOW, I HAVE NO -- I MEAN, I THINK WE NEED TO HAVE ONE STANDARD, USE SAME WORDS. YOU KNOW, WHETHER AN APPELLATE JUDGE INTERPRETS IT DIFFERENTLY, WE CAN'T CONTROL.

BUT I THINK I JUST WENT TO THE QUESTION WHAT'S WRONG WITH THE MORE LIKELY THAN NOT STANDARD VERSUS REASONABLE POSSIBILITY? THAT'S REALLY ALL MY --

>> WELL, IT CERTAINLY IS A MORE STRICT STANDARD, AND PRESUMABLY THAT WOULD FACTOR IN TO THE ADMITTEDLY COMPLEX DISCRETIONARY CALCULUS THAT APPELLATE JUDGES WOULD ENGAGE IN.

BUT I CANNOT TELL YOU ANYTHING CLEARER THAN THAT AS TO HOW IT WOULD CHANGE.

IT WOULD MEAN THERE'D BE MORE REVERSALS PRESUMABLY --

>> WELL, YOU OBVIOUSLY THINK IT WILL MAKE A DIFFERENCE ON WHETHER THIS CASE SHOULD HAVE BEEN REVERSED IF WE USE REASONABLE POSSIBILITY VERSUS MORE LIKELY THAN NOT, OR YOU WOULDN'T BE UP HERE ON IT.

>> WELL, I -- CERTAINLY, I WOULD LIKE A MORE LIBERAL STANDARD TODAY, AND I WOULD ADD THAT I DO BELIEVE THAT THE FOURTH DISTRICT WAS WRONG IN CONCLUDING EVEN UNDER THE STANDARD THEY ADOPTED THAT WE DID NOT HAVE A SITUATION OF HARMFUL ERROR.

THEIR SUMMARY OF THE EVIDENCE THAT WAS EXCLUDED IS, FRANKLY, A LITTLE TRUNCATED BECAUSE THEY ESSENTIALLY PRESENTED AS WE WERE ALLOWED TO ARGUE THESE STATISTICS IN OUR CLOSING ARGUMENT.

THAT'S THE EQUIVALENT OF HAVING EXAMINATION OF THEIR EXPERT. BUT WHAT IS NOT POINTED OUT IN THE OPINION IS THAT WHAT WE WERE ABLE TO GET IN THE PROFFER THROUGH THE CROSS-EXAMINATION OF THEIR AFE EXPERT WAS THAT IF THE NUMBERS AS TESTIFIED TO DR. EDELMAN EXISTED LONG TERM -- AND DR. EDELMAN ADMITTED IT WAS OVER 17 YEARS THAT HE HAD ONE TO TWO A YEAR -- THAT NOT ONLY WAS IT 20 TIMES THE REGULAR RATE, BUT THAT HE WOULD HAVE TO ACKNOWLEDGE THE PROBABILITY THAT THEY WERE OVERDIAGNOSING AFE. AND THERE IS NO -- THAT TESTIMONY EXISTS NOWHERE ELSE. IN FACT, DR. EDELMAN, WHEN ASKED ABOUT IT -- ALTHOUGH HE ACKNOWLEDGED THAT IT WOULD INDICATE A HIGHER FREQUENCY THAN THE NATIONAL -- RATES, HE SPECIFICALLY DENIED IT INDICATED OVERDIAGNOSIS.

AND BECAUSE OF THE UNCERTAINTY REGARDING THIS CONDITION, IT IS CLEARLY ONE THAT IS NOT UNDERSTOOD, IT IS A DIAGNOSIS OF EXCLUSION, IT IS ONLY TO BE REACHED WHEN THE PRACTITIONER ELIMINATES ALL OTHER REASONABLE DIAGNOSES.

THEY DO NOT KNOW, AND THE JURY WOULD NOT KNOW DOES THIS INDICATE, I MEAN, IS THIS SOMETHING THAT COULD BE SUBJECT TO ENVIRONMENTAL CLUSTERS LIKE WE HAVE, WE SEE LAWSUITS ALL THE TIME ABOUT CERTAIN AREAS BEING PRONE TO THINGS BECAUSE OF LEAKAGE IN THEIR WATER? I MEAN, THERE WAS NO EXPLANATION

OF THAT.

AND THAT WAS ABSOLUTELY  
ELIMINATED --

>> BUT ISN'T THE EXPLANATION IS  
THAT HE WAS TALKING OFF THE TOP  
OF HIS HEAD ABOUT NUMBERS, AND  
IS THERE ANY EVIDENCE THAT THE  
NUMBERS THAT DR. EDELMAN SAID  
HAD ANY BASIS IN REALITY?

>> THEY HAD BASIS IN HIS  
PERSONAL EXPERIENCE.

>> WELL, I UNDERSTAND.

I UNDERSTAND THAT HE SAID IT.  
I DON'T QUESTION THAT.

BUT IS THERE ANY, ANY  
INFORMATION THAT BACKS THAT UP  
OTHERWISE THAT THEY, WHOEVER  
"THEY" HAPPENED -- YOU'RE  
TALKING ABOUT, HAD MADE THESE  
DETERMINATIONS THAT AFE HAD  
OCCURRED AT THIS HOSPITAL IN  
THESE NUMBERS THAT WOULD BE WELL  
OUT OF LINE WITH WHAT WOULD BE  
EXPECTED BASED ON THE GENERAL  
EXPERIENCE?

>> HE TESTIFIED THAT HE  
PERSONALLY MADE THIS DIAGNOSIS  
ONE TO TWO YEARS.  
HE WAS THE PULMONARY SPECIALIST.  
HE WAS THE CHAIRMAN OF THE  
HOSPITAL BOARD.

THIS IS A MAN WHO --

>> BUT THERE WOULD BE  
DOCUMENTATION ABOUT THAT,  
WOULDN'T THERE?

>> EXCUSE ME?

>> WOULDN'T THERE BE  
DOCUMENTATION ABOUT THAT?  
DID YOU HAVE NO DOCUMENTATION  
ABOUT ANY OF THAT?

>> WELL, WE WOULD, I GUESS, HAVE  
HAD TO ASK A VERY BROAD  
DISCOVERY REQUEST FOR ALL  
MEDICAL RECORDS --

>> I'VE SEEN THOSE BEFORE.

>> EXCUSE ME?

>> I HAVE SEEN SUCH BROAD  
REQUESTS BEFORE.

>> RIGHT.

BUT WHEN YOU HAVE THE PERSON WHO

MADE THE DIAGNOSIS IN THIS CASE  
TESTIFY AS TO THEIR PERSONAL  
EXPERIENCE AND THAT ONE TO TWO  
TIMES A YEAR FOR 17 YEARS HE AS  
THE PULMONARY SPECIALIST IN THE  
HOSPITAL, AS THE PERSON WHO MADE  
THE DIAGNOSIS, HE DID IT THAT  
MANY TIMES, THAT -- IT WAS  
ADMISSIBLE EVIDENCE.

NOBODY'S EVER CHALLENGED THAT.  
AND HE'S THE ONE MAKING THE  
DIAGNOSIS.

HE'S THE ONE WE'RE CHALLENGING.  
SO REGARDLESS OF --

>> WHEN YOU'RE -- I DON'T  
UNDERSTAND.

YOU SAY YOU'RE CHALLENGING HIM.  
HE'S NOT A DEFENDANT IN THE  
CASE.

>> NO.

BUT HE --

>> HE WAS YOUR WITNESS.

IS THAT CORRECT?

YOU CALLED HIM AS A WITNESS?

>> WELL, HE WAS AN ADVERSE  
WITNESS.

YOU CAN CLEARLY SEE FROM HIS  
TESTIMONY --

>> I UNDERSTAND THAT.

>> -- HE WAS AN ADVERSE WITNESS.

>> BUT THE DEFENSE WAS NOT  
RELYING ON HIM TO, ON THE ISSUE  
OF LIABILITY IN THIS CASE.

>> WELL, THEY HAD TO BECAUSE HE  
TESTIFIED --

>> WHAT DO YOU MEAN THEY HAD TO?

>> BECAUSE HE TESTIFIED IT WAS  
HIS DIAGNOSIS.

HE IS THE PULMONARY SPECIALIST.

>> BUT HIS DIAGNOSIS IS NOT THE  
QUESTION.

THE QUESTION IS WHAT CONDITION  
EXISTED.

WHAT HAPPENED?

ISN'T THAT THE QUESTION?

>> NO.

THE DIAGNOSIS IS CRITICAL.

OUR THEORY OF LIABILITY WAS THAT  
THERE WAS A PROBLEM WITH  
ANESTHESIA, IT WAS DONE TOO HIGH



ON THE LEVEL, IT AFFECTED THE  
RESPIRATORY SYSTEM OF THE  
DECEDENT --

>> I DON'T SEE HOW DOCTOR,  
DR. EDELMAN'S EXPERIENCE AND  
WHAT HE THOUGHT ABOUT THAT AFTER  
IT HAPPENS, AFTER IT HAPPENED  
HAS TO DO WITH WHETHER IT  
HAPPENED THE WAY YOU SAID IT  
HAPPENED.

>> WELL, WE'RE NOT CHALLENGING  
IN THE -- I MEAN, THIS TESTIMONY  
DOES NOT CHALLENGE WHATEVER  
FACTUAL TESTIMONY ABOUT THIS  
INCIDENT.

BUT THIS WAS AN INCIDENT WHERE  
IT WAS ADMITTED THAT THERE WAS  
NO EVIDENCE ON AUTOPSY.

SO THEY SAY ONLY 25% OF AFE  
PATIENTS RESULT IN NO SIGNS IN  
AUTOPSY.

ADDITIONALLY, THERE'S NO  
PULMONARY EDEMA.

TESTIMONY WAS THAT HAPPENS IN  
OVER 90% OF THE CASES.

WE ARE TRYING TO PROVE THE FACT  
THAT THIS WAS NOT A PROPER  
DIAGNOSIS, AND WHEN THE PERSON  
WHO MADE THAT DIAGNOSIS  
TESTIFIES AS TO HIS PERSONAL  
EXPERIENCE AND HIS PERSONAL  
EXPERIENCE VASTLY OUTNUMBERS --

>> BUT TO SHIFT FROM THIS A  
LITTLE BIT, WHAT WAS YOUR THEORY  
ABOUT WHAT CAUSED THE PATIENT TO  
KIND OF SPIRAL DOWNWARD IN THE  
WAY THAT SHE DID?

WHAT WAS YOUR THEORY ABOUT WHAT  
ACTUALLY CAUSED IT IF IT WASN'T  
AFE?

>> SHE WAS GIVEN A SPINAL  
ANESTHESIA.

IT'S OUR POSITION IT WAS DONE  
TOO HIGH ON THE SPINE, AND IN  
THAT SITUATION WHAT CAN HAPPEN  
IS YOU CAN ELIMINATE THE ABILITY  
OF THE RESPIRATORY SYSTEM TO  
FUNCTION.

AND THAT THAT CAUSED THE  
RESPIRATORY SYSTEM TO BREAK

DOWN, AND THEY DID NOT RESPOND PROPERLY, AND THAT SENT HER INTO A CARDIAC ARREST.

AND THE CODE WAS NOT HANDLED PROPERLY WITH RESPECT TO FLUIDS, EPINEPHRINE AND OTHER SPECIFIC TREATMENTS.

THAT WAS OUR THEORY OF THE CASE. THEIR DEFENSE WAS, OH, THIS IS AFE, YOU CAN'T DO ANYTHING ABOUT IT.

WHEN THIS HITS, SHE'S DEAD. I MEAN, THERE'S REALLY NOTHING THEY COULD DO.

SO WE HAD TO ATTACK THAT DIAGNOSIS.

AND THE MISDIAGNOSIS WAS CRITICAL TO ELIMINATING THEIR PRIMARY DEFENSE.

NOW, THEY DID DEFEND ON THE THEORY THAT EVERYTHING WE DID IN ANESTHESIA WAS PROPER, BUT THE AFE WAS CLEARLY --

>> BUT LET ME GO, WHY DID THE PLAINTIFF PUT ON DR. EDELMAN?

>> WE PUT ON DOCTOR --

>> BECAUSE WHAT YOU SAID WAS I THOUGHT THAT IT WAS SORT OF ATTACKING THE DEFENSE BY SAYING THAT THESE, ALL THESE DOCTORS RUSHED TO THE JUDGMENT THAT IT WAS AFE EVEN BEFORE THERE WAS AN AUTOPSY.

>> CORRECT.

>> SO YOU REALLY, I THINK THE QUESTION THAT JUSTICE CANADY ASKED EARLIER WAS YOU REALLY PUT HIM ON SO YOU COULD CROSS-EXAMINE HIM ON THIS OVERDIAGNOSIS.

ISN'T THAT WHY, THE REASON HE WAS PUT ON?

>> CERTAINLY, WE DID.

>> OKAY.

SO HE WASN'T A HELPFUL -- I MEAN, HE WAS AN ADVERSE WITNESS BECAUSE YOU WERE TRYING TO DISPROVE THE DIAGNOSIS THAT HE GAVE OF AFE.

AND YOU CROSS-EXAMINED HIM, AND

YOU WERE ALLOWED TO  
CROSS-EXAMINE HIM FULLY ON THE  
FACT THAT HE PROBABLY, IN THIS  
HOSPITAL, THAT HE WAS  
OVERDIAGNOSING AFE, RIGHT?

>> CORRECT.

>> OKAY.

SO NOW GOING BACK TO THE  
HARMLESS ERROR ISSUE.

I GUESS I AM HAVING -- IF WE  
LOOK AT THE PROFFER, BECAUSE  
THAT SHOWS WHETHER, IF THAT HAD  
BEEN USED, WHETHER THERE WAS ANY  
REASONABLE POSSIBILITY OF A  
DIFFERENT VERDICT.

>> OKAY.

>> OKAY.

SO YOU'RE SAYING WE LOOK AT THAT  
PROFFER, AND IF THAT PROFFER AND  
THE CROSS-EXAMINATION HAD BEEN  
DONE, WHAT WOULD -- HOW IS THERE  
A REASONABLE POSSIBILITY OF A  
DIFFERENT RESULT?

>> BECAUSE THEIR AFE EXPERT WHO  
SAID, OH, THIS WAS AFE DESPITE  
THE FACT THERE WAS NOTHING ON  
AUTOPSY, NO PULMONARY EDEMA, HE  
ADMITTED IN THAT PROFFER THAT IF  
THESE NUMBERS WERE ACCURATE --  
AND WE GOT THE NUMBER FROM THE  
HOSPITAL ITSELF SO THAT'S NOT AT  
ISSUE -- THEN HE WOULD PROBABLY  
HAVE TO ADMIT THAT THEY WERE  
OVERDIAGNOSING THE CONDITION.

>> BUT HIS OPINION THAT IT WAS  
NOT, THAT IT WAS AFE WAS NOT  
BASED ON THE DOCTOR'S DIAGNOSIS,  
IT WAS BASED ON CLINICAL THINGS  
THAT YOU HAVEN'T CONTESTED ABOUT  
WHETHER WHAT SHE LOOKED LIKE AT  
THE TIME OF THE SPINAL, SPINAL  
ANESTHESIA, RIGHT?

THERE WERE THINGS IN THE RECORD  
THAT HE BASED IT ON.

HE WASN'T BASING IT ON  
DR. EDELMAN'S DIAGNOSIS --

>> YES, HE WAS.

IF YOU LOOK AT HIS TESTIMONY,  
ONE OF THE THINGS HE RELIES ON  
HEAVILY IS HE SAYS ALL THE

PHYSICIANS WHO WERE INVOLVED  
CONCLUDED IT WAS AFE.  
THIS WAS A TOTALLY CLINICAL  
DIAGNOSES, AND HE RELIED HEAVILY  
ON THAT FACT.

>> AND, AGAIN, AND I THINK WE'RE  
NOT REALLY -- NO ONE'S ARGUED  
THAT IT SHOULDN'T -- WELL,  
SOMEONE IS, BUT IT WASN'T A  
PROPER SUBJECT FOR  
CROSS-EXAMINATION.

I'M JUST TRYING TO SEE HOW  
THERE'S A REASONABLE POSSIBILITY  
THAT IF HE HAD THEN BEEN  
CONFRONTED WITH THE TWO A YEAR  
WHICH I -- SEEMS TO ME LIKE A  
GUESSTIMATE, NOT REALLY BASED ON  
ANY ACTUAL FACTS IN THE  
RECORD -- THAT THAT JURY WOULD  
HAVE SAID, OH, MY GOODNESS, THIS  
REALLY WASN'T AFE, THIS WAS AN  
OVERDIAGNOSIS.

THEY ALREADY ESTABLISHED THAT  
THROUGH THE CROSS-EXAMINATION,  
AND THEY WERE PERMITTED TO ARGUE  
IT.

AND SO WHEN WE LOOK AT HARMLESS  
ERROR, WE DO LOOK AT WHAT THE  
JURY DID HEAR.

AND SO I'M HAVING A BIT OF A  
PROBLEM WITH HOW IT'S --

>> DR. EDELMAN WAS THE MAN WHO  
DIAGNOSED IT.

HE'S THE PULMONARY EXPERT AT THE  
HOSPITAL.

OUR THEORY ON THIS WAS THAT THEY  
OVERDIAGNOSED AT THE HOSPITAL.

HE'S THE LEAD GUY, THE OTHER  
DOCTORS FOLLOWED HIM.

THAT HE WAS THE ONE WHO SAID ONE  
TO TWO A YEAR FOR 17 YEARS.

>> AND THAT CAME INTO EVIDENCE.

>> EXCUSE ME?

>> IT CAME INTO EVIDENCE.

AND IT WAS, IT WAS -- RIGHT?

AND HE WAS CROSS-EXAMINED ABOUT  
THAT OR EXAMINED ABOUT THAT.

>> YES.

BUT HE DENIED THAT IT INDICATED  
OVERDIAGNOSIS.

THEIR EXPERT CONCEDED THAT IT DID REFLECT OVERDIAGNOSIS IF THOSE NUMBERS ARE ACCURATE. AND THIS UNDERMINES NOT ONLY DR. EDELMAN WHO WAS THE LEADING -- IF WE HADN'T PUT HIM ON, THEY WOULD HAVE CLAIMED HE DIDN'T PROVE OUR CASE BECAUSE WE DIDN'T PUT ON THE DOCTOR WHO DIAGNOSED IT.

AND HE WAS THE ONE WHO SAID, HE ADMITTED IT WAS 20 TIMES.

I THINK THE EXPERT SAID IT WAS 30 TIMES THE NATIONAL AVERAGE. SO EVEN IF YOU GIVE A FUDGE FACTOR TO HIS NUMBERS, IT'S STILL WAY ABOVE THE NATIONAL AVERAGE, AND THIS IS THE DIAGNOSIS OF EXCLUSION, AND I WOULD LIKE TO RESERVE WHATEVER I CAN --

>> BEFORE YOU SIT DOWN, I JUST, WOULD YOU PLEASE ADDRESS WHETHER THERE ARE ANY FLORIDA STATUTES THAT OUGHT TO BE CONSIDERED IN REACHING THE CONCLUSION WITH REGARD TO WHETHER THE STANDARD -- NOT THE BURDEN, BUT THE STANDARD, FROM CRIMINAL AND CIVIL CASES -- OUGHT TO BE THE SAME, OUGHT NOT BE THE SAME AND WHY?

>> WELL, 1911, OBVIOUSLY, THE 59041 WAS PASSED.

THAT APPLIES TO CIVIL.

'39 WAS THE 942 STATUTE, CRIMINAL.

THAT ONE TALKS ABOUT WHETHER IT PREJUDICES THE SUBSTANTIAL RIGHTS OF A PARTY.

IN 1976 THEY PASSED THE EVIDENCE CODE WHICH INCLUDED ANOTHER STATEMENT REGARDING HARMLESS ERROR.

SO THE MOST RECENT EXPRESSION OF THE LEGISLATURE AS TO CIVIL CASES IN THE EVIDENCE CODE, AND IT VIRTUALLY TRACKS IDENTICALLY THE LANGUAGE OF THE CRIMINAL STATUTE WHICH SAYS IT HAS TO

ADVERSELY AFFECT THE SUBSTANTIAL RIGHTS OF THE PARTIES.

SO -- AND I WOULD ALSO ADD THERE'S SOME CASE LAW, ALTHOUGH IT'S IN THE CONTEXT OF CERTIORARI CASES, THAT HOLDS THAT THE PHRASE MANIFEST -- EXCUSE ME, NOT MANIFEST, MISCARRIAGE OF JUSTICE IS TO BE CONSTRUED AS WHERE THERE'S ADVERSE EFFECT ON THE SUBSTANTIAL RIGHTS OF THE PARTY. SO I BELIEVE THERE'S A UNIFORMITY, ALBEIT THERE IS PERHAPS SOME VARIATION IN THE OLDEST EXPRESSION BY THE LEGISLATURE.

BUT AS TO THE MOST RECENT ONE, IT IS VIRTUALLY IDENTICAL. THANK YOU.

>> GOOD MORNING, IRENE PORTER ARGUING ON BEHALF OF DR. BAUZ AND HIS MEDICAL ASSOCIATIONS. WE'VE AGREED TO SHARE OUR TIME WITH WEST BOCA'S COUNSEL. WE STILL MAINTAIN THAT THE EVIDENCE WAS PROPERLY EXCLUDED. WE RECOGNIZE THAT THE FOURTH DISTRICT DISAGREED WITH US, BUT THE FACTS ON WHY WE MAINTAIN IT WAS PROPERLY EXCLUDED AND WHY IT WAS -- IF IT WASN'T PROPERLY EXCLUDED, ALSO SHOW WHY IT WAS HARMLESS.

THERE WAS NO CLAIM IN THIS CASE THAT DR. EDELMAN'S DIAGNOSIS AFTER THE FACT WAS NEGLIGENT OR CAUSED ANY HARM TO THE PATIENT. THE CLAIM WAS SOLELY AS TO ANESTHESIA COMPLICATIONS AND WHETHER THE ANESTHESIOLOGIST DID SOMETHING CORRECTLY.

>> WELL, I MEAN, IT WAS. WHAT WAS THE CAUSE, I MEAN, THAT'S THE --

>> YES.

>> WHAT WAS THE CAUSE OF THIS INDIVIDUAL'S DEATH?

>> YES.

AND MY POINT IS WAS IT

ANESTHESIA COMPLICATIONS OR WAS IT THE AFE?  
BUT NO ONE WAS CLAIMING THAT WHAT DR. EDELMAN DID OR DIDN'T DO WHEN HE DECIDED IN HIS OPINION THAT HE WAS TREATING THE PATIENT THERE WAS AFE, THAT THAT CAUSED ANY HARM TO THIS PATIENT --

>> NO, I DON'T THINK THAT -- AND I KNOW YOU REALIZE WHAT IT IS. IT'S NOT THAT.

IT'S THAT IF YOU HAVE AFE, THERE'S NO MALPRACTICE.

SO THE IDEA THAT IF IN A PARTICULAR HOSPITAL EVERY TIME THERE'S A DEATH AND WITHOUT EVEN WAITING FOR THE AUTOPSY THEY ARGUE, THEY SAY, OH, IT'S AFE, THEY SORT OF JUMP TO THIS CONCLUSION, THE IDEA THAT THEY'RE OVERDIAGNOSING IT LEADS A JURY TO THINK, YOU KNOW WHAT? WE'RE QUESTIONING THIS DIAGNOSIS THAT DR. EDELMAN GAVE OF AFE BECAUSE HE'S ALWAYS DOING IT. HE'S BEEN DOING IT FOR THE LAST 20 YEARS.

AND SO HE'S COMING IN TO HELP HIS FELLOW DOCTORS AFTER THE FACT.

THAT'S -- I MEAN, THAT'S THE RELEVANCE OF IT.

AND I DON'T REALLY SEE HOW, THE FACT THAT THE DIAGNOSIS -- I MEAN, THEY'RE ATTACKING THE DEFENSE THAT IT'S AFE.

>> YES.

EXCEPT THAT WE DID NOT PRESENT DR. EDELMAN AS OUR CAUSATION WITNESS --

>> BUT --

>> AND NOR DID THEY RELY ON --

>> SO WOULD YOU SAY IT WAS IMPROPER TO CROSS-EXAMINE DR. EDELMAN ON THAT?

>> ACTUALLY, WE DID OBJECT COMPARED TO HIS GUESSTIMATES AND THE CORRECT NUMBER OF BIRTHS WHICH HE HAD WAY OFF --

>> WELL, THE HOSPITAL COULD HAVE SOLVED ALL THIS, COULDN'T THEY HAVE, BY BRINGING IN WHAT THE ACTUAL STATISTICS WERE?

>> AND I THINK THAT WAS OUR POINT BELOW, THAT THAT'S WHY WE FELT IT WAS IMPROPER.

WE WOULD HAVE HAD TO MAKE THIS WHOLE CASE OVER WHAT DID DR. EDELMAN DO PROPERLY, WAS HE DIAGNOSING OTHER CASES PROPERLY?

>> I MEAN, HE COULD HAVE SAID I DON'T KNOW.

>> HE DID, IN FACT, SAY HE DIDN'T HAVE THE STATISTICS.

>> AND, AGAIN, HE COULD HAVE SAID I DON'T KNOW, BUT HE DIDN'T.

ISN'T THAT -- I THOUGHT THE EVIDENCE --

>> NO, NO.

DR. EDELMAN TESTIFIED IN A DEPOSITION OFF THE CUFF, I THINK I SEE ONE OR TWO --

>> WELL, WAIT A MINUTE.

OFF THE CUFF, IT'S TESTIMONY. IT'S UNDER OATH, AND HE MADE A STATEMENT.

HE COULD HAVE SAID IF HE DID NOT KNOW, I DON'T KNOW.

>> RIGHT.

>> BUT HE DIDN'T DO THAT.

HE MADE THE STATEMENT.

>> YES.

>> OKAY.

>> DURING THE DEPOSITION HE ALSO SAID I WAS ESTIMATING, I WASN'T -- HADN'T COME PREPARED FOR ALL OF THAT.

AND HE ALSO SAID THERE WERE 10-20,000 BIRTHS A YEAR WHICH WAS GROSSLY EXAGGERATED AS WELL.

>> BUT BETWEEN THEN AND THE TRIAL, THOUGH, SINCE HE OBVIOUSLY KNEW AFE DIAGNOSIS WAS CRITICAL TO THE CASE, HE COULD HAVE BEEN ABLE TO BE PREPARED TO SAY, YOU KNOW, I GAVE THAT ESTIMATE, BUT I'VE NOW GONE BACK, AND I REALIZE, FIRST OF



ALL, THERE ARE NOT 18,000 BIRTHS AT OUR HOSPITAL, THERE ARE ONLY 2200.

AND JUST -- AND EVEN THOUGH I THOUGHT I WAS SEEING ONE OR TWO A YEAR, I REALIZE IT WAS ONLY ONE OR TWO IN THE LAST 20 YEARS.  
>> RIGHT.

AND, AGAIN, DR. EDELMAN, WE DIDN'T PRESENT HIM, AND HE DID NOT DO THAT, AND HE DIDN'T KNOW HOW MANY BIRTHS THERE WERE. HE WAS TOLD AT TRIAL, AND THIS WAS THE PLAINTIFF CALLING HIM FOR THAT.

SO WHEN WE GOT TO DR. DILDEE, DR. DILDEE IN HIS PROFFER -- HE DID NOT, BY THE WAY, SAY I'M GOING TO OPINE THERE'S AN OVERDIAGNOSIS.

HE SAID I REALLY COULDN'T UNLESS I TOOK AN INDEPENDENT REVIEW OF OLD RECORDED INCIDENCES AND WHETHER THERE WAS STRONG DATA. AND BECAUSE DR. DILDEE, IN FACT, WAS A DOCTOR THAT HAD BEEN INVOLVED IN LOOKING AT ACTUAL MEDICAL RECORDS AND CLINICAL SIGNS IN A REGISTRY WHERE THEY WERE LOOKING FOR THE CLASSIC FORM OF AFE.

AND HE TESTIFIED, LOOK, WE HAD PEOPLE FROM ALL OVER THE NATION SUBMIT CASES, AND WE EXCLUDED ABOUT A THIRD OF THEM.

SO HE DIDN'T RELY ON ANY DOCTOR'S DIAGNOSIS.

HE DOES HIS OWN INDEPENDENT. HE HAD NOT REVIEWED THE HOSPITAL RECORDS, HE HAD NOT DONE THE STATISTICAL ANALYSIS AT ALL.

>> DOESN'T THAT GO TO THE CREDIBILITY OF WHAT HE SAID RATHER THAN THE ADMISSIBILITY WHEN HE MAKES A STATEMENT ABOUT NUMBERS?

>> I -- NO.

I THINK THAT MY POINT THERE WAS THAT DR. DILDEE'S OPINION WAS NOT BASED ON ANY STATISTICAL

ANALYSIS.

>> WELL, AGAIN --

>> FROM THE HOSPITAL.

>> BUT, AGAIN, IT'S BASED UPON HIS PERSONAL KNOWLEDGE OF BEING AN EXPERT IN THE FIELD, IS WHAT I THOUGHT IT WAS.

AND, CERTAINLY, IT COULD BE ATTACKED THAT MAYBE HE'S WRONG, BUT IT DIDN'T CHANGE WHAT HIS NUMBERS, WHAT HE SAID THE NUMBERS WERE, DID IT?

>> HE HAD THE NATIONAL STATISTICAL NUMBERS.

>> RIGHT.

>> HE HAD NOT, UM, REVIEWED DR. EDELMAN'S DEPOSITION TESTIMONY, NOR HAD HE REVIEWED THE TRIAL, UM, TRANSCRIPT WHEN DR. EDELMAN --

>> I MEAN, WHAT DOES THAT HAVE TO DO WITH ADMISSIBILITY?

I'M MISSING THE -- WHAT'S THE EVIDENTIARY PROBLEM BECAUSE HE HADN'T DONE THAT?

HE CANNOT EXPRESS HIS OPINION AS AN EXPERT ON WHAT HE KNOWS.

>> WELL, OUR POINT IS THAT -- AND WE MAINTAIN IT WAS PROPERLY EXCLUDED BECAUSE IT WAS TALKING ABOUT SOMETHING THAT HE HAD NOT TAKEN INTO CONSIDERATION IN HIS DIAGNOSIS.

HE LOOKED AT THE CLINICAL FACTS. AND I THINK THAT ALSO SHOWS WHY IT'S HARMLESS IN THIS CASE BECAUSE, AGAIN, WE HAD ALL OF THE SAME EVIDENCE OUT OF DR. EDELMAN.

NOW THE PLAINTIFF WANTS TO ARGUE THAT PERHAPS HAVING AN EXPERT REITERATE THAT IF THIS NUMBER WAS RIGHT AND THAT NUMBER WAS WRONG --

>> EDELMAN COULDN'T SAY, LISTEN, WHEN I WAS DIAGNOSING ONE OR TWO A YEAR, I WAS WAY HIGHER THAN THE NATIONAL STATISTICS WHICH WOULD GIVE ME A CONCERN THAT I WAS OVERDIAGNOSING.

THAT'S WHAT THEY WANTED TO USE  
THE CROSS-EXAMINATION OF  
DR. DILDEE FOR, RIGHT?

>> DR. EDELMAN DID, IN FACT, SAY  
IF WE TOOK -- THE PLAINTIFF WENT  
THROUGH AND PUT CHARTS UP, AND  
LET'S ASSUME THE HOSPITAL'S  
INTERROGATORY'S RIGHT IN THE ONE  
TO TWO PER YEAR.

AND HE WAS ASKED TO COMPARE  
THOSE NUMBERS, AND WOULD THAT BE  
AS MANY AS 40-80 TIMES THE  
NATIONAL AVERAGE, WOULD THAT BE  
AN EPIDEMIC, AND DR. EDELMAN  
TESTIFIED, YES, THAT WOULD BE  
ALARMING.

WE HAVE DR. EDELMAN HIMSELF  
SAYING, YES, THAT WOULD, IN  
FACT, BE ALARMING.

SO WHEN WE TALK ABOUT WHAT IS  
DR. DILDEE'S, WELL, IF THERE WAS  
RECORDED INCIDENTS AS OPPOSED TO  
SOMEBODY'S RECOLLECTION I'D  
SAY MAYBE OVER THE LONG RUN --

>> I GUESS, TO ME, EVEN THOUGH  
HE MADE THAT STATEMENT THAT YOU  
JUST SAID ABOUT BEING ALARMING,  
BUT HIS BASIC TESTIMONY WAS, YOU  
KNOW, I SEE ONE OR TWO OF THESE  
A YEAR.

WE HAVE 10,000 BIRTHS AT THIS  
HOSPITAL, AND SO IT SEEMS TO ME  
THAT WHILE HE MAY HAVE  
ACKNOWLEDGED IF THAT WAS THE  
CASE, HE WAS BASING HIS OPINION,  
HE WAS MAKING HIS STATEMENT  
BASED ON FACTS OF ONE OR TWO A  
YEAR AND 10,000.

AND I THINK IT'S REALLY  
DIFFERENT IF YOU HAVE SOMEONE  
ELSE WHO COMES IN AND SAYS YOU  
HAVE 2200 AND ONE OR TWO A YEAR,  
THAT'S AN OVERDIAGNOSIS.

YOU DON'T SEE THAT THERE'S A  
QUALITATIVE DIFFERENCE IN THAT?

>> WELL, DR. EDELMAN, WHEN HE  
GAVE THOSE ANSWERS WHEN HE WAS  
ASKED FOR THE COMPARISON WITH  
THE STATISTICS, IT WASN'T BASED  
ON THE 10-20,000 BIRTHS.

THE PLAINTIFF WAS, IN FACT,  
ASKING LET'S TAKE THE ACTUAL  
NUMBER OF BIRTHS FROM THE  
INTERROGATORIES OF 2200 A YEAR,  
AND WHAT YOU SAID, YOU SAW ONE  
TO TWO.

SO IT WAS THE EXACT SAME  
ANALYSIS.

IT WASN'T JUST, IT WASN'T  
DR. EDELMAN COMMENTING ON --

>> SO DID DR. EDELMAN  
ACKNOWLEDGE THAT HE WAS  
INCORRECT IN SAYING THAT THE  
NUMBER OF BIRTHS THAT TOOK PLACE  
AT THE HOSPITAL AND THE NUMBER  
OF THESE ASF BIRTHS THAT TOOK  
PLACE?

>> WHEN HE WAS PRESENTED WITH  
THE ACTUAL NUMBER OF BIRTHS, HE  
SAID, YES, I WAS INCORRECT,  
OBVIOUSLY.

YOU WENT AND GOT THIS NUMBER.  
IT SHOWS ME I'M NOT A  
STATISTICIAN, AND I WAS JUST  
GUESSING, BASICALLY.

SO -- BUT WE HAD ALL THAT  
NOTWITHSTANDING WHETHER IT'S  
CORRECT OR NOT, AND, OF COURSE,  
WE DIDN'T HAVE THE RECORD.  
AND HE HAD GROSSLY MISCALCULATED  
HOW MANY BIRTHS --

>> BUT HE STOOD BY HIS  
DIAGNOSES, CORRECT?

>> DR. EDELMAN?

>> YES.

>> YES, HE DID.

DR. EDELMAN DID.

BUT HE DID SAY WE DID HAVE  
EVIDENCE THAT WOULD BE ALARMING  
IF THOSE STATISTICS WERE CORRECT  
BASED ON WHAT WITH YOU'VE GIVEN  
ME, AND NOTHING THAT DR. DILDEE  
COULD SAY ABOUT, WELL, IF I HAD  
A RECORDED INSTANCE AND I LOOKED  
AT STRONG DATA, YES, IT WOULD BE  
OVERDIAGNOSIS.

THAT'S NOT GOING TO CHANGE.

THAT'S NOT ADDING ANYTHING ELSE.

AND, PLUS, DR. DILDEE ALSO SAID  
IN THE PROFFER I CANNOT TELL YOU

WHAT THE INCIDENCE RATE IS AT THE HOSPITAL.

I CAN'T TELL YOU WHETHER IT'S OVERDIAGNOSED, MISDIAGNOSED UNLESS I UNDERTAKE A REVIEW OF ALL THE --

>> THAT WASN'T THE POINT OF HIS TESTIMONY, AS I UNDERSTOOD IT. IT WAS TO ADDRESS THE NATIONAL STANDARDS, AND THIS IS WHAT THE NATIONAL STATISTICS SHOW US. IS THAT -- I DIDN'T THINK THAT THE POINT OF THE QUESTION WAS AT ALL WHAT YOU JUST SUGGESTED. OKAY, SO HE'S NOT APPLYING IT TO EXACTLY WHAT HAPPENED HERE, BUT HE'S -- THIS IS A QUESTION THAT GOES TO THE BASIS, THE HEART OF THAT DIAGNOSIS, IS WHAT I UNDERSTOOD IT TO BE.

AM I WRONG?

>> YEAH, AND MAYBE I DON'T UNDERSTAND.

HIS, HE DID TALK ABOUT HOW RARE IT IS AND WHAT KIND OF --

>> THAT'S WHAT I MEAN.

OKAY.

>> AND THEN HE LOOKED AT THE CLINICAL.

THAT'S WHERE THE NATIONAL STATISTIC CAME IN.

>> OKAY.

>> THANK YOU.

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

MIKE MITTELMARK ON BEHALF OF BOCA WEST MEDICAL CENTER AND LISTENING TO THESE ARGUMENTS THIS MORNING ON CRIMINAL LAW I KNOW THAT LIFE AND LIBERTY IS AT STAKE.

WHAT WE HAVE IN THIS CASE IS A TRAGEDY.

A WOMAN DID LOSE HER LIFE AT WEST BOCA MEDICAL CENTER SHORTLY AFTER SHE GAVE BIRTH.

I DON'T WANT TO HAVE MY COMMENTS ON HARMLESS ERROR BELITTLED ON THAT FACT BECAUSE THAT IS THE BOTTOM LINE IN THIS CASE.

A FOUR-WEEK TRIAL DID ACCOMPLISH EVERYTHING THAT THE PLAINTIFF WANTED TO ACCOMPLISH AND EVERYTHING DEFENSE WANTED TO ACCOMPLISH AND AT THE END OF THE DAY IF YOU LOOK AT THE TOTALITY OF THIS EVIDENCE WHICH IS WHAT THE INITIAL COURT DCA PANEL DID AND WHAT THE ENTIRE PANEL DID, THEY LOOKED AT WHETHER OR NOT THERE IS A MISCHARACTER OF JUSTICE UNDER SECTION 59.

>> WHY DON'T WE LOOK AT THE POSSIBILITY OF AN EFFECT ON THE JURY?

CAN YOU STILL MAKE THE SAME ARGUMENT THAT BECAUSE THIS WAS CROSS-EXAMINATION ON A POINT THAT REALLY THE QUESTION OF DR. ADELMAN WAS SORT OF A FUZZY NUMBER, THAT THE JURY WOULD HAVE HEARD THAT AND REALLY NOT MADE A DIFFERENT DECISION BECAUSE WE DON'T KNOW WHETHER THEY ENDED UP FINDING THE PLAINTIFF HADN'T PROVEN IT WAS NEGLIGENCE OR THAT THE DEFENDANT PROVED IT WAS AFE. IT COULD HAVE BEEN EITHER SO IF YOU WANT TO JUST ADDRESS, LET'S ASSUME A STRICT OR STANDARD. DOES IT MAKE A DIFFERENCE IN THIS CASE?

MR. BURLINGTON AND HIS CLIENT SEEMED TO THINK IT WOULD OR THAT IT SHOULD BE REVERSED UNDER EITHER STANDARD.

SO WHAT IS YOUR TAKE ON THE SIGNIFICANCE?

>> MY TAKE IS EVEN UNDER THE REASONABLE POSSIBILITY STANDARD THAT YOU ARE SUGGESTING THAT THERE WAS NO MISCHARACTER OF JUSTICE.

>> BUT WHEN YOU THROW IN THIS MISCARRIAGE OF JUSTICE, IT'S A TERM THAT WE USE SOMETIMES IN FUNDAMENTAL ERROR.

I KNOW IT'S IN THE STATUTES BUT WE HAVE TAKEN TO BURLY OUT AND USE DIFFERENT LANGUAGE SO LET'S

JUST STAY WITH THERE IS NO  
REASONABLE POSSIBILITY OF AN  
EFFECT ON THE VERDICT.

THAT IS WHAT I'M ASKING YOU.

>> SO HERE WE GO.

DR. ADELMAN TESTIFIES THAT HE  
SEES ONE OR TWO A YEAR AND HE  
SEES 10,000 OR 20,000 BIRTHS A  
YEAR AND HE TESTIFIES IN THAT  
TRIAL THAT HE DOESN'T KNOW --

>> AND BY THE WAY IN TERMS OF  
HIM SAYING THAT HE WOULDN'T KNOW  
HOW MANY BIRTHS A YEAR BECAUSE  
HE IS NOT AN OBSTETRICIAN, THAT  
ANY TIME THERE WOULD BE A  
DIAGNOSIS OF AFE OR A PULMONARY  
ISSUE HE AS THE CHIEF WOULD BE  
CALLED IN SO HIS ESTIMATE ON THE  
BIRTHS IS WHAT HE HAS OBSERVED  
AS A PULMONOLOGIST AND IT IS  
MORE RELIABLE ISN'T IT?

>> YES AND I JUST WANT TO POINT  
OUT THE FACT THAT DR. ADELMAN IS  
NOT AN EMPLOYEE OF WEST BOCA  
MEDICAL CENTER.

WEST BOCA MEDICAL WAS NEVER SUED  
FOR NEGLIGENCE.

IT WAS SIMPLY BY DR. BAUZ.

>> THAT'S NOT AN ISSUE.

AS I UNDERSTAND MUCH IS RAISED  
ABOUT WHO IS RESPONSIBLE FOR  
WHO.

WE ARE LOOKING AT THE STANDARD  
FOR HARMLESS ERROR AND SOME  
OTHER ISSUES AND ADMISSIBILITY  
OF EVIDENCE.

THESE QUESTIONS AREN'T GEARED  
TOWARD WHO IS RESPONSIBLE.

IT'S EVIDENTIARY.

THAT WOULD BE YOUR BEST BET TO  
STAY WITH THOSE BECAUSE WE ARE  
NOT TRYING TO POINT A FINGER AT  
ANYBODY IN OUR QUESTION.

>> WHEN I HEAR THE PHRASE "THEY  
OVERDIAGNOSIS AFE" WEST BOCA  
MEDICAL CLINIC --

>> WE UNDERSTAND THAT WEST BOCA  
WASN'T SUED FOR OVERDIAGNOSIS.

>> SO WHAT IS THE POINT TO  
PRODUCE DR. ADELMAN'S TESTIMONY

IN THE INTERROGATORY INTEREST AND SPECIFICALLY HOW MANY BIRTHS HAD BEEN DELIVERED AND THEN THEY HAMMER IN THEIR CLOSING ARGUMENT THE STATISTICAL ANOMALIES.

>> THAT WAS BASED ON -- THEY WERE ABLE TO MAKE THOSE CLOSING ARGUMENTS BASED ON DR. ADELMAN'S TESTIMONY THAT THEY INTRODUCED.

>> ALSO IT WAS DR. DILDEEE'S TESTIMONY THAT THE NATIONAL AVERAGE IS SOMEWHERE BETWEEN ONE AND 8000 EVEN DR. DILDEEE TESTIFIED IN HIS CROSS-EXAMINATION, LET'S ASSUME IT'S ONE IN 20,000 SO THE JURY IN ADDITION TO HEARING THE DEFENSE FROM DR. BAUZ AND WEST BOCA MEDICAL CENTER ALSO HAD -- AND IT'S A TWO-PRONGED.

>> I AM A LITTLE PUZZLED BY THAT RESPONSE BECAUSE CLEARLY THE FOURTH DCA COURT DISTRICT QUALIFIED JUDGES, SOMETHING HAD BEEN ERRONEOUSLY EXCLUDED. SOMETHING DID NOT COME IN THAT OUGHT TO HAVE.

THAT IS WHAT THE COURT BELOW HELD.

AM I CORRECT?

>> YES YOU ARE CORRECT.

THERE IS NO ARGUMENT IN BOCA.

>> WHAT DIDN'T COME IN WAS THE CROSS-EXAMINATION THAT THERE WERE ONE OR TWO A YEAR AND THAT WOULD HAVE BEEN AN UNUSUALLY HIGH AFE INCIDENT AND SO NOW IS IT PROPER THAT WE AT LEAST HAVE, THAT WE ACTUALLY KNOW WHAT THE CROSS-EXAMINATION WOULD HAVE BEEN?

SO TAKING THAT, WHAT I'M ASKING IS IF THERE IS STILL NOT A REASONABLE POSSIBILITY?

>> BECAUSE WE HAVE ALL READ THE PROFFER.

DR. DILDEEE GOES ON TO SAY IT DOESN'T MATTER WHETHER WEST BOCA MEDICAL CENTER HAS AN OPEN



DIAGNOSIS.

WHAT MATTERS IN THIS CASE HERE  
AND IN THIS CASE HERE, IT WAS  
AFE.

>> I ASKED MR. BURLINGTON  
WHETHER HE BASED IT IN PART ON  
THE CLINICAL DIAGNOSES OF THE  
OTHER DOCTORS.

DID HE BASE HIS OPINION ON WHAT  
THE OTHER DOCTORS HAD DIAGNOSED?

>> HE HADN'T EVEN READ  
DR. ADELMAN'S --

>> I THOUGHT DR. ADELMAN'S  
DIAGNOSIS WAS NOT IN THE RECORD?

>> IT WAS IN THE RECORD.

>> WAS IT IN THE HOSPITAL  
RECORDS?

>> I THOUGHT WHAT YOU ASKED WAS  
WHETHER HE BASED HIS OPINION ON  
THAT AND HE BASED HIS OPINION ON  
HIS INDEPENDENT REVIEW AND ON  
HIS EDUCATION AND TRAINING.

>> I UNDERSTAND THAT WASN'T PART  
OF WHAT HE BASED IT ON, THE  
CLINICAL DIAGNOSIS OF THE  
DOCTORS RIGHT AFTER THE INCIDENT  
OCCURRED?

>> OKAY SO THE ANSWER TO THAT  
QUESTION IS YES BUT HE ALSO HAD  
A PLETHORA OF OTHER EVIDENCE  
WHICH THE FOURTH DCA REVIEWED AS  
THEY ARE REQUIRED TO DO IN ANY  
CASE INVOLVING HARMLESS ERROR.

>> WE LOOK AT EVERYTHING AND  
WHAT THE EFFECT OF THIS  
CROSS-EXAMINATION WOULD HAVE  
BEEN.

AND I ACTUALLY AM NOT SURE THAT  
IT WOULD HAVE MADE MUCH  
DIFFERENCE AND THAT IS WHY I'M  
ASKING FOR BOTH SIDES OF THIS.  
I THINK THEY GOT MOST OF WHAT  
THEY NEEDED TO GET THROUGH  
DR. ADELMAN AND DR. DILDEE AND  
I'M NOT SURE WHAT PART OF THE  
CAUSE WAS REALLY AFFECTING THE  
JURY.

>> THAT IS WHAT THE JUDGE  
LEVINSON FOUND AND WHAT JUDGE  
TAYLOR FOUND AND ON THE PANEL

WHAT JUDGE GROSS FOUND AND --  
>> BUT REMEMBER, THERE ARE  
DIFFERENT STANDARDS.  
THEY WERE USING IT MORE LIKELY  
THAN NOT AND I THINK MAY BE THE  
PANEL DECISION WOULD BE BUT FOR  
SO WHAT I WAS ASKING YOU IF WE  
GO TO THE DIGUILIO STANDARD.  
IS THERE A REASONABLE  
POSSIBILITY THAT WOULD HAVE  
AFFECTED THE JURY VERDICT?  
YOU WOULD REALLY ARGUE ANY UNDER  
ANY STANDARD IT WOULDN'T  
CORRECT?  
>> IN THIS PARTICULAR CASE HE --  
>> WHICH IS WHY I'M NOT SURE THE  
STANDARDS MAKE A DIFFERENCE  
BECAUSE THESE APPELLATE JUDGES  
COME TO THESE CONCLUSIONS THAT  
WE DON'T KNOW WHAT THE JURY  
FOUND SO WE ARE TRYING TO PUT  
OUR BEST SPIN ON IT.  
WOULD THIS HAVE BEEN THE KIND OF  
EVIDENCE THAT COULD HAVE REALLY  
TURNED THE CASE AROUND?  
AND YOU SAID IT'S A FOUR-WEEK  
TRIAL SO WE ARE SUPPOSED TO LOOK  
AT ALL THE EVIDENCE OVER A  
FOUR-WEEK PERIOD AND WHETHER  
THIS BIT OF CROSS-EXAMINATION  
WOULD HAVE CHANGED WHAT MIGHT  
HAVE AFFECTED THE JURY VERDICT.  
>> WELL, JUDGE LEVINSON IN THE  
ORAL ARGUMENT SAID THIS IS NOT A  
GAME-CHANGER.  
>> HE SAID THAT JUDGE FARMER HAD  
A DIFFERENT -- AND AGAIN I THINK  
THE ISSUE IS IT SHOULD HAVE COME  
IN AND DID IT MAKE A DIFFERENCE.  
>> CORRECT AND THE ANBAHN PANEL,  
THE NINE JUSTICES IN THE FOURTH  
DCA UNANIMOUSLY CONCLUDED IT  
SHOULD HAVE COME IN UNDER  
HARMLESS ERROR AND IT'S MORE  
LIKELY THAN NOT THEY USED  
SECTION 59.0 FOR ONE STANDARD  
AND THE 90.041 STANDARD THAT  
WOULD SUBSTANTIALLY AFFECT THE  
RIGHTS OF THE ADVERSE PARTY.  
>> WHAT THEY DID NOT USE WAS THE

DIGUILIO, AM I CORRECT?  
>> THEY REJECTED IT.  
THAT IS WHAT I'M ASKING.  
UNDER THAT STATUTE -- I MEAN  
THAT STANDARD, THE FACT THAT  
THERE MAY BE OTHER EVIDENCE,  
EVEN OVERWHELMING EVIDENCE, DOES  
NOT ESCAPE.  
IF AN ERROR HAS BEEN COMMITTED  
THE PARTY THAT HAS COMMITTED IT  
IS EVALUATED AS TO WHETHER THEY  
CONTRIBUTED TO IT.  
WHETHER THE JUDGES WILL FOLLOW  
THE LAW IS NOT SOMETHING THAT IS  
HERE.  
OUR JOB IS TO ANNOUNCE WHAT THAT  
IS AND AS CLEARLY AS POSSIBLE SO  
FOLKS CAN FILE IT IN THE COURTS  
AND WHETHER THEY WILL OR NOT I  
GUESS IS ANOTHER QUESTION.  
>> WHAT THE FOURTH DCA DID  
CONCEDE IS THE EFFECT ON THE  
FACTFINDER AND THAT IS SOMETHING  
THAT THIS COURT ANNOUNCED IN  
DIGUILIO.  
>> BUT IT'S NOT A WEIGHING OF  
THE EVIDENCE.  
YOU START TALKING ABOUT ALL THE  
SUBSTANTIAL EVIDENCE ON THE  
OTHER SIDE, THAT'S NOT THE  
DIGUILIO STANDARD.  
THE LAW IS AS LONG AS YOUR ARM  
ISN'T IT?  
JUST BECAUSE THERE IS  
SUBSTANTIAL EVIDENCE THE OTHER  
WAY DOESN'T MEAN THAT YOU TAKE A  
RIDE ON THIS.  
IT'S A PRETTY HEAVY BURDEN ISN'T  
IT?  
>> ACCORDING TO DIGUILIO THE  
STATE HAS TO PROVE BEYOND A  
REASONABLE DOUBT THAT THERE WAS  
NO INFLUENCE ON THE FACTFINDER  
THEREBY CONTRIBUTING.  
>> DID NOT CONTRIBUTE TO THE  
REASONABLE POSSIBILITY?  
>> I'M SAYING BASED ON  
EVERYTHING LOOKING AT THE  
TOTALITY OF THIS ENTIRE CASE,  
NOT BECAUSE IT WAS CUMULATIVE

EVIDENCE BUT IT WAS AFE OR NOT AFE, BUT LOOKING AT THE TOTALITY OF PROFFER OF DR. DILDEEE DID NOT AFFECT THE VERDICT THEREBY CONTRIBUTING TO THE VERDICT. IT HAD NO EFFECT ON THE FACT, WHETHER IT WAS A REASONABLE POSSIBILITY STANDARD OR MORE LIKELY THAN NOT STANDARD IS JUDGE GROSS ARTICULATED. AND BASED ON THAT, I WOULD REQUEST THAT THIS COURT AFFIRM THE JUDGMENT IN FAVOR OF DR. BAUZ AND WEST BOCA IN THIS CASE.

>> THANK YOU FOR YOUR ARGUMENTS. REBUTTAL?

>> I WOULD LIKE TO MAKE TWO POINTS.

>> YOU CAN HAVE ANOTHER TWO AND A HALF MINUTES.

>> WOULD YOU RESPOND TO THEIR ARGUMENT?

THIS MAKES NO DIFFERENCE AND IS ESSENTIALLY SAYING IT WAS EXCLUDED AND IT WAS ERROR, SO WHAT?

THE EVIDENCE IS SO CLEAR.

>> PERHAPS THE BEST EVIDENCE OF HOW SIGNIFICANT THIS WAS THE LENGTH OF WHICH THEY WENT TO HAVING THIS EXCLUDED.

DR. DILDEEE, WHO WAS THEIR EXPERT, NEVER REVIEWED DR. ADELMAN'S DEPO AND I HAVE NEVER READ A MEDICAL MALPRACTICE TRIAL WHERE THE EXPERT DOESN'T EVEN READ THE DEPO OF THE DOCTOR ARE DIAGNOSED THE CONDITION TO WHICH HE IS TESTIFYING.

THIS WAS ARGUED WHEN THEY TRIED TO EXCLUDE THE TESTIMONY ON APPEAL THAT THE HOSPITAL HADN'T TRIED TO DEFEND THE PATIENT FOR EXCLUSION AND THE DOCTOR HAS MADE AN EFFORT, ALBEIT A TOKEN, TO JUSTIFY THAT CLEARLY IT WAS A LEGAL ERROR BUT THEY DID NOT HAVE HIM READ THAT DEPO BECAUSE THEY ARGUED OH HE DID NOT RELY

ON IT.

HE DID NOT READ IT.

THEY DID THAT INTENTIONALLY  
BECAUSE THEY KNEW THE POWER OF  
HIS TESTIMONY AND DR. ADELMAN  
DOES NOT HAVE TO BE A  
STATISTICIAN TO TESTIFY IN HIS  
PERSONAL EXPERIENCE IN THE  
NUMBER OF TIMES HE HAS DIAGNOSED  
AFE.

IT'S UNDISPUTED WHO HAD BIRTHS  
THERE SO THERE'S NO SPECULATION  
WHETHER DR. ADELMAN WAS EXACTLY  
RIGHT OR NOT.

HE WAS OFF BY 20 OR 30 TIMES THE  
NATIONAL RATE.

>> IN ALL THE HARMLESS ERROR  
CASES, WE HAD CASES WHERE  
SOURCES CAME IN AND WE FOUND  
THAT IN VALERA.

THE RIGHT TO REMAIN SILENT.  
WHAT YOU'RE ASKING US TO DO IS  
TO SAY THAT BECAUSE OF THAT  
PAGE, CROSS-EXAMINATION DIDN'T  
COMMENT IN THE FOUR-WEEK TRIAL,  
THAT EVEN IF IT WAS AN ERROR  
THAT WAS HARMFUL, AND I JUST  
CAN'T -- I'M HAVING TROUBLE.  
IT'S NOT LIKE SOMETHING DAMAGING  
CAME IN THAT CHANGED THE WAY  
THIS CASE WAS GOING TO GO.  
IT'S THAT SOME PART OF THE  
CROSS-EXAMINATION WAS NOT HEARD  
AND I AM JUST, YOU KNOW IT'S A  
HARMLESS ERROR AND JUST NOT  
REVERSING FOR WHAT IS RELATIVELY  
QUOTE SMALL ERRORS.

I AM NOT SEEING, AND AGAIN SO  
JUST GOING BACK TO JUSTICE  
LEWIS' QUESTION ABOUT -- YOU  
SAID THEY WENT TO GREAT LENGTHS.  
THAT IS NOT REALLY THE WAY WE  
WOULD EVALUATE IT.

WHAT IS IT THAT WOULD HAVE  
CHANGED THE WAY JURY WOULD HAVE  
LOOKED AT IT ONCE THEY HEARD  
DR. DILDEEE'S CROSS-EXAMINATION?

>> WAS THE CONCESSION THAT YOU  
WOULD HAVE TO TESTIFY THAT THEY  
OVERDIAGNOSED AND I WOULD ADD

THAT IT'S A MEDICAL MALPRACTICE  
IN THE DECISION WHICH WAS THE  
ONE REGARDING --

THIS COURT STATED THAT WHEN THE  
CRITICAL ASPECT OF THE CASE IS  
THE WEIGHT OF EXPERT TESTIMONY A  
RULING IN THAT CASE ADMITTING  
ERRONEOUS EVIDENCE WAS LAWFUL  
AND WE CITED THE WETHAM CASE.

>> BECAUSE HE BOLSTERED HER  
TESTIMONY WITH SAYING, I SPOKE  
TO LOTS OF OTHER PEOPLE WHO ALL  
AGREED WITH ME.

>> CORRECT, BUT IT WAS STILL  
CUMULATIVE OF HER OPINION WHICH  
HE ADHERED TO DESPITE  
CROSS-EXAMINATION.

IN THE WORK-COMP CASE THERE WERE  
ONCOLOGISTS AND DOCTORS  
TESTIFYING TO CAUSATION AND  
DETERMINED THE TOXICOLOGIST WAS  
NOT QUALIFIED TO GIVE THAT  
TESTIMONY.

THE COURT REVERSED.

THIS IS A CLASSIC BATTLE OF THE  
EXPERTS AND WHEN THEIR EXPERT  
ADMITS THAT THESE NUMBERS WOULD  
INDICATE OVERDIAGNOSIS AND THEN  
HE ADHERES TO HIS OPINION WHICH  
THEY CLAIM STRIKES AT THEIR  
POSITION, WE WOULD SAY IT  
ACKNOWLEDGES THAT HE WAS LOCKED  
INTO THIS POSITION OF NOT BEING  
REASONABLE.

WE DON'T HAVE TO PROVE A PERRY  
MASON MOMENT BUT THE ONLY OTHER  
THING I WANT TO SAY IS THAT  
FORMER CHIEF JUSTICE TRAYNOR  
WROTE A TREATISE ON HARMLESS  
ERROR WHICH IN DIGUILIO THIS  
COURT DESCRIBES AS THE MOST  
PERCEPTIVE ANALYSIS AND HE ALSO  
RECOMMENDED A UNIFIED STANDARD  
CIVIL TO CRIMINAL.

SO I BELIEVE THE CASE LAW IS  
SUPPORTIVE OF THAT AND THERE ARE  
MANY COURTS THAT DO NOT THAT I  
WOULD SUGGEST THAT THIS COURT  
SHOULD REVIEW THOSE CASES  
ESPECIALLY IN THE QUEENIE CASE

BECAUSE IT GOES TO THE VARIOUS  
CONSIDERATIONS THAT THIS COURT  
DEEMS THEM TO BE REASONABLE.  
IT IS A VERY GOOD BASIS FOR  
CONCLUDING THAT NOT ONLY  
SIMPLICITY BUT IN OUR CASE THE  
LANGUAGE THE RELEVANT STATUTES  
ARE CONSISTENT AND SHOULD BE  
APPLIED.

FOR THAT REASON WE BELIEVE  
REVERSAL IS APPROPRIATE.

>> THANK YOU FOR YOUR ARGUMENTS.  
THE COURT IS ADJOURNED.

>> ALL RISE.