

>> OKAY.

UP NEXT IS COBA V. TRICAM  
INDUSTRIES.

WHENEVER YOU'RE READY.

[BACKGROUND SOUNDS]

>> MORNING, YOUR HONORS.

I'M ROY WASSON REPRESENTING THE  
PETITIONER X THIS COURT SHOULD  
GRANT A NEW TRIAL, SHOULD ORDER  
A NEW TRIAL FIRST ON THE ISSUE  
OF JUROR GAMBOLA'S NONDISCLOSURE  
OF FIVE LAWSUITS, FIVE CIVIL  
ACTIONS AGAINST HIM INCLUDING  
TWO STILL PENDING AT THE TIME OF  
TRIAL.

HE DIDN'T MISUNDERSTAND THE  
QUESTION--

>> WELL, WHY DON'T WE START WITH  
THE CONFLICT ISSUE.

>> I BELIEVE THAT THERE IS ALSO  
A CONFLICT WITH THIS DECISION,  
WITH THE JUROR NONDISCLOSURE,  
BECAUSE THE--

>> WHY DON'T YOU FOLLOW HER  
SUGGESTION AND MAKE THE  
ARGUMENT--

>> [INAUDIBLE]  
THERE'S A CONFLICT IN THE  
INCONSISTENT VERDICT IN TWO  
RESPECTS.

FIRST OF ALL, AN INCONSISTENT  
VERDICT ABSOLUTELY, POSITIVELY  
HAS TO BE OBJECTED TO AT THE  
TIME OF THE VERDICT OR ELSE THE  
OBJECTION IS WAIVED, AND  
JUDGMENT SHOULD BE ENTERED IN  
FAVOR OF THE PARTY.

>> SO YOUR ARGUMENT HERE, THE WE  
AGREE WITH YOU THAT IT WAS  
WAIVED, THEN SHOULD BE AN  
AFFIRMANCE OF THE JUDGMENT, NOT  
A NEW TRIAL.

>> YES.  
IF YOU AGREE, ON THE OTHER HAND,  
WITH THE DEFENDANT THAT IT WAS  
NOT WAIVED BECAUSE--

>> WELL, I MEAN, IT WAS  
CERTAINLY NOT OBJECT-- EVERYONE  
AGREES IT WASN'T OBJECTED TO.  
>> RIGHT.  
>> BUT ON THE SECOND POINT--  
>> IF THERE IS SUCH A THING AS A  
FUNDAMENTALLY INCONSISTENT  
VERDICT THAT DOES NOT HAVE TO BE  
OBJECTED TO, THEN THE PROPER  
REMEDY SHOULD BE A NEW TRIAL  
BECAUSE ANYTIME THERE'S AN  
INCONSISTENT VERDICT, WE DON'T  
KNOW WHETHER THE JURY WAS RIGHT  
ON THE FIRST QUESTION OR RIGHT  
ON THE SECOND QUESTION.  
LIKE I SAY IN MY BRIEF, IF THE  
QUESTIONS HAD BEEN REVERSED AND  
THE FIRST QUESTION HERE WAS, WAS  
THERE NEGLIGENCE IN THE DESIGN  
OF THE LADDER AND THEY SAID,  
YES, AND THEN THE SECOND  
QUESTION, WAS THERE STRICT  
LIABILITY, DID THEY MARKET AN

EFFECTIVE PRODUCT AND THEY A  
SAID NO, WELL, THEN ACCORDING TO  
THE LOGIC OF THE DEFENDANTS,  
THEN THE ANSWER TO THE FIRST  
QUESTION SHOULD CONTROL,  
AND WE SHOULD GET A  
DIRECTED VERDICT ON THE  
SECOND QUESTION.

I MEAN, IT DOES NOT MAKE SENSE.  
YOU CAN'T TELL FROM JUST THE  
ORDER OF THE QUESTIONS WHICH OF  
THE TWO ANSWERS IS THE RIGHT  
ANSWER.

THERE HAS TO BE A NEW TRIAL ON  
THAT IF THE ISSUE IS NOT--  
>> RIGHT.

ASSUMING IN THIS CASE THAT THE  
DEFENDANT HAD OBJECTED, WHAT  
WOULD HAVE BEEN THE INSTRUCTION  
TO THE JURY?

BECAUSE, AGAIN, YOU AGREE IT WAS  
FUNDAMENTALLY INCONSISTENT.

DO YOU AGREE WITH THAT?

BECAUSE IN THIS CASE THERE  
WASN'T ANOTHER BASIS FOR  
NEGLIGENCE OTHER THAN THE DESIGN  
DEFECT.

I MEAN, THERE ARE CASES WHERE  
THE NEGLIGENCE MIGHT BE ON  
FAILURE TO WARN, AND SO THEN  
IT'S REALLY NOT EVEN  
INCONSISTENT BECAUSE THERE COULD  
BE NEGLIGENCE.

BUT HERE WHERE IT'S FOUNDED ON  
THE SAME, WHAT WOULD HAVE BEEN  
OR HAVE YOU THOUGHT ABOUT THAT,  
THE INSTRUCTION BACK TO THE  
JURY?

>> IT COULD BE VERY SIMPLE, AND  
I'VE SEEN THIS IN VERDICTS ALL  
THE TIME, IN VERDICT FORMS ALL  
THE TIME IN PRODUCT LIABILITY  
CASES, AND THAT IS IF YOUR  
ANSWER TO QUESTION NUMBER ONE  
IS, NO, DO NOT ANSWER QUESTION  
NUMBER TWO, BUT GO ON TO THE

FOLLOWING QUESTIONS.

AND THEY WILL NEVER GET TO

THE--

>> SO YOU WOULD INSTRUCT THAT,

WOULD YOU SAY-- WELL, IN THAT

ONE, QUESTION ONE WAS NO, SO

WOULD YOU THEN BE THE

INSTRUCTION BE YOU ANSWERED

QUESTION ONE NO, SO YOUR ANSWER

TO QUESTION TWO IS WRONG WHICH

IS WHAT THEY'RE SAYING?

>> THAT'S--

>> WHAT WOULD YOU HAVE ASKED--

ONCE THAT VERDICT FORM WAS THAT

WAY?

RIGHT, IT COULD HAVE BEEN SOLVED

IF YOU ENDED UP SAYING IF YOU

ANSWER THE FIRST QUESTION NO,

DON'T GO ANY FARTHER.

BUT IN THIS CASE NOT ONLY DID

THE JURY GO FARTHER, BUT THEY

AWARDED DAMAGES.

SO I'M ASKING YOU IF THE

DEFENDANT HAD OBJECTED TO THE  
VERDICT, I MEAN, TO THE VERDICT  
FORM AND YOU'RE BACK THERE WITH  
THE TRIAL JUDGE AND YOU'RE  
LOOKING AT THIS, WHAT WOULD HAVE  
BEEN THE PROPER-- WHAT WOULD  
THE JUDGE HAVE REINSTRUCTED THE  
JURY?

>> I DON'T KNOW THAT IT WOULD BE  
PROPER TO TELL THE JURY YOUR  
VERDICT IS INCONSISTENT, YOU  
HAVE TO DO IT--

>> I'M ASKING YOU, THOUGH,  
BECAUSE YOU'RE SAYING THERE'S A  
RULE THAT YOU HAVE TO OBJECT  
BEFORE THE JURY'S DISCHARGED.  
WELL, OBVIOUSLY, THAT RULE IS  
THERE TO PREVENT WHAT WE HAVE  
HERE.

SO, WHICH MEANS, IT MUST MEAN  
THAT THE JURY IS CAPABLE OF  
BEING REINSTRUCTED, YOU KNOW?  
IF THEY'RE NOT CAPABLE OF BEING

REINSTRUCTED, THEN IT IS  
SOMETHING-- NOT WHETHER IT'S  
PRODUCT LIABILITY, IT COULD BE  
ANYTHING, THEN IT'S SOMETHING  
THAT NEEDS A NEW TRIAL .

SO I'M ASKING YOU HERE IF THE  
DEFENDANT OBJECTED, WHAT WOULD  
THE INSTRUCTION TO THE JURY HAVE  
BEEN?

>> JUST NOT HAVING THOUGHT ABOUT  
IT TOO MUCH BEFORE RIGHT NOW, I  
THINK THAT THE PROPER-- AND I  
HOPE THIS IS NOT EVADING THE  
QUESTION, THEN I'LL GO ON TO  
ANSWER DIRECTLY-- BUT I THINK  
THE PROPER THING FOR THE JUDGE  
TO DO IS TO REINSTRUCT THE JURY  
ON ALL THE ISSUES AND FIX THE  
VERDICT FORM SO IT DOESN'T  
HAPPEN AGAIN.

>> THE UNDERLYING PROBLEM HERE  
IS, THE IS SOURCE OF THE PROBLEM  
IS WITH THE VERDICT FORM WHICH



WAS, EVERYBODY AGREED TO.

>> YOU KNOW, I WOULD, IF I WAS  
THE DEFENDANT'S LAWYER AT THE  
TRIAL, I WOULD PROBABLY SAY,  
JUDGE, LET'S REINSTRUCT THE JURY  
ON ALL THE ISSUES, LET'S  
RESUBMIT A VERDICT, THIS TIME  
LET'S PUT NEGLIGENCE FIRST AND  
THEN SAY IF THEY ANSWER NO, THEN  
DON'T GO ON TO-- I DON'T KNOW.

>> WELL, THAT MAY BE, YOU KNOW,  
THAT MIGHT HAVE BEEN A FAIR  
ANSWER.

IF YOU KNOW THEY ALREADY  
ANSWERED YES, TO SAY DID THEY  
REALLY MEAN TO SAY YES TO  
NEGLIGENCE?

I MEAN, THAT'S NOT-- AND,  
AGAIN, IF IT WASN'T-- SOMETHING  
I WAS THINKING ABOUT BECAUSE,  
YOU KNOW, WE'VE ALL AS TRIAL  
LAWYERS HAD ISSUES WITH  
INCONSISTENT VERDICTS, AND I

THINK WE ALL THOUGHT THE RULE

WAS YOU HAD TO OBJECT.

BUT I JUST WAS WONDERING, AND I

THINK YOU'VE ANSWERED IT, AND

SO, YOU KNOW, THAT REINSTRUCTING

THE JURY OR DOING SOMETHING WITH

THE VERDICT FORM MIGHT BE THE

WAY.

>> MORE FUNDAMENTALLY LET ME

JUST ASK YOU THIS: I MEAN, WHAT

IS IT THAT YOU WOULD WANT?

I MEAN, OBVIOUSLY, THE RULE

PRESUPPOSES THAT YOU HAVE TO,

THAT WE SHOULD TRY TO FIX IT

SOMEHOW BECAUSE IT REQUIRES THAT

YOU OBJECT BEFORE THE JURY'S

DISCHARGED AS JUSTICE PERRY

MENTIONED.

IS THAT WHAT YOU REALLY WANT, OR

DO YOU WANT A NEW TRIAL--

>> I'D PREFER A NEW TRIAL ON ALL

ISSUES.

I STARTED OUT WITH MY FIRST

ARGUMENT ON THE JURY

NONDISCLOSURE.

>> I ASSUME THAT A TRIAL JUDGE  
AFTER SPENDING EIGHT WEEKS ON A  
PRODUCTS LIABILITY TRIAL AND  
IT'S DOWN TO THE WIRE AND IT CAN  
BE FIXED WITH THAT INSTRUCTION,  
ASSUMING THE JUDGE IS NOT GOING  
TO GO THE NEW TRIAL ROUTE AS  
YOU'RE GOING TO REQUEST, WHAT  
WOULD YOU SUGGEST THE  
INSTRUCTION BE?

I MEAN, I KNOW YOU MENTIONED  
THAT YOU WANT THE WHOLE  
INSTRUCTION, YOU WANTED THE JURY  
TO BE CHARGED AGAIN.

ISN'T THERE A SIMPLISTIC  
INSTRUCTION WHERE ONE CAN CAN  
TELL THE JURY, HOOK, YOU  
CANNOT-- LOOK, YOU CANNOT DO  
THIS ONE AND DO THIS ONE, YES,  
AND VICE VERSA?

IS THERE'S NO WAY WE CAN DO THAT

WITHOUT CAUSING PROBLEMS TO THE  
CASE?

>> IT SOUNDS REASONABLE TO ME  
WITHOUT HAVING THOUGHT IT  
THROUGH.

IT SOUNDS REPUBLICAN TO ME THAT  
YOU COULD-- REASONABLE TO ME  
THAT YOU COULD TELL THE JURY.

I DON'T KNOW-- YOU KNOW, IT  
SEEMS LIKE THAT WOULD, I MEAN,  
IT SEEMS REASONABLE THAT THAT  
WOULD SOLVE THE PROBLEM.

IT, SOMETHING ABOUT JUST TELLING  
THE THE JURY SPECIFICALLY ABOUT  
WHAT'S WRONG KIND OF STRIKES ME  
AS WRONG WAS I THINK-- BECAUSE  
I THINK THE TYPICAL THING IS  
JUST TO REINSTRUCT THE JURY ON  
ALL THE ISSUES.

>> RIGHT.

I MEAN, THE WHOLE THEORY BEHIND  
REQUIRING THAT THE OBJECTION BE  
VOICED BEFORE THE JURY IS

DISCHARGED IS SO IT CAN BE

CORRECTED, ISN'T IT?

I MEAN--

>> ABSOLUTELY.

>> ALL THOSE CASES, AND

THAT'S WHAT THE LAW SAYS.

IF YOU'RE NOT GOING TO ALLOW A

CORRECTION WITH SOME INSTRUCTION

AND IT'S JUST GOING TO BE A

QUESTION OF A NEW TRIAL, THEN

WHY REQUIRE THE OBJECTION AT

THAT POINT THAN AT ANY TIME?

[INAUDIBLE]

>> SO IT SEEMS TO ME THAT

THERE'S A PURPOSE IN THELY OF

OUR JURISPRUDENCE-- HISTORY OF

OUR JURIS PRIENS FOR REQUIRING

THE OBJECTION TO BE VOICED

BEFORE THE JURY IS DISCHARGED

BECAUSE IT CONTEMPLATES

SUBMITTING SOMETHING BACK TO A

JURY WITH ADEQUATE INSTRUCTIONS.

>> AND, I'VE CONVINCED MYSELF

NOW, JUSTICE LABARGA--

[LAUGHTER]

HAS CONVINCED ME THAT TELLING  
THE JURY YOU CAN'T DO IT THIS  
WAY, YOU'VE GOT TO ANSWER EITHER  
BOTH QUESTION ONE AND TWO YES OR  
NEITHER ONE.

>> WELL--

>> IF THAT WAS THE ORDER.

>> THE GIST OF MY QUESTION WAS  
HOW CAN WE DO THAT WITHOUT  
IMPLYING TO THE JURY THAT THE  
COURT PREFERS ONE VERDICT OR  
ANOTHER AND SO ON.

>> AND THAT'S WHY I WAS THINKING  
THE BEST WAY TO DO IT, TO KEEP  
FROM DOING THAT IS FIX THE  
VERDICT FORM BY SAYING IF YOU  
ANSWERED NO TO ONE, SKIP  
QUESTION TWO.

GO AND SIGN--

>> I THINK THE POINT, AND I  
PROBABLY--

>> THAT'S JUST NOT GOING TO WORK  
IN ALL CASES BECAUSE SOME CASES  
YOU MAY HAVE A SEPARATE BASIS  
FOR NEGLIGENCE FROM A CLAIM OF  
STRICT LIABILITY.

>> YES.

>> SO IT CAN'T BE THIS ALL CASES  
THAT FIXES IT.

>> WELL, THAT WOULDN'T BE  
INCONSISTENT.

THE VERDICT WOULDN'T BE  
INCONSISTENT THEN.

>> WELL, I UNDERSTAND, BUT YOU  
CANNOT COME DOWN WITH THAT KIND  
OF JUST BROAD BLANKET APPROACH,  
BECAUSE IT JUST WON'T WORK IN  
EVERY CASE.

>> NO, I MEANT, I'M SAYING HOW  
WE COULD FIX IT IN THIS CASE.

>> OKAY.

>> WELL, THE REASON BACK, LET'S  
GO BACK.

THE REASON TO THE OBJECTION, AS

JUSTICE LEWIS SAID, IS BECAUSE  
YOU WANT TO GIVE THE JUDGE AND  
THE JURY A CHANCE TO CORRECT IT.  
THE IDEA THAT SOMETHING'S  
FUNDAMENTAL-- WHICH YOU  
DISAGREE WITH, AND I ASSUME YOU  
AGREE WITH JUDGE SCHWARTZ'S  
DISSSENT-- IS THAT IT SORT OF  
GOES TO THE ESSENCE OF THE CASE,  
THAT IT'S NOT FIXABLE.  
AND I GUESS THE WHOLE REASON FOR  
MY COLLOQUY HERE WITH YOU WAS TO  
SAY THIS WAS FIXABLE, BUT  
SOMEONE HAD TO OBJECT TO IT.  
THE PERSON THAT, THE SIDE THAT  
WAS NOT BENEFITED BECAUSE IT WAS  
ALREADY, IT WASN'T LIKE THEY  
STOPPED AT ONE AND TWO.  
THEY OBVIOUSLY INTENDED TO GIVE  
THIS PLAINTIFF MONEY.  
THEY GAVE HIM MONEY.  
SO THEY THOUGHT THAT THEY WERE  
FINDING LIABILITY AND DAMAGES.



THAT JURY THOUGHT THAT, RIGHT?

>> RIGHT.

AND SO I BELIEVE IT WAS FIXABLE,  
AND IT COULD HAVE BEEN FIXED  
WITH INSTRUCTION AND, THEREFORE,  
THE OBJECTION NEEDED TO HAVE  
BEEN MADE AT THAT TIME,  
ABSOLUTELY.

>> AND WHAT I DON'T  
UNDERSTAND-- AND MAYBE SOME--  
YOU KNOW, ASSUMING THAT YOU'RE  
GOING TO DECIDE THAT THE JURY  
WAS RIGHT ON ONE, WRONG ON THE  
OTHER, HOW DO YOU PICK THE ONE  
THAT'S FAVORABLE TO THE SIDE  
THAT DIDN'T OBJECT?

>> YOU, I THINK WHAT WE'VE DONE  
IN PAST CASES WHERE THERE IS NO  
OBJECTION IS HERE YOU'RE NOT  
REALLY-- YOU'VE GOT A YES, A  
YES ON NEGLIGENCE, ALL RIGHT?  
SO WHEN YOU HAVE A YES ON  
NEGLIGENCE AND AN AMOUNT OF

DAMAGE IS AWARDED, THEN THE  
JUDGMENT SHOULD BE ENTERED IN  
FAVOR OF THE PLAINTIFF, OKAY?

>> BUT DOESN'T THE FACT OF THE  
INCONSISTENCY REALLY JUST MEAN  
THAT THE VERDICT IS INCOHERENT?  
AND BEING INCOHERENT, YOU CAN'T  
PICK WHAT PART OF IT YOU LIKE  
BECAUSE OF THE INCOHERENCE  
IN IT.

>> WELL, IT'S INCOHERENT, BUT IF  
YOU HAVE, YOU HAVE SOME VERDICT  
IN FAVOR OF THE PLAINTIFF, I  
THINK WHAT THE CASES HAVE DONE  
IF THERE'S NO OBJECTION TO THAT  
AND SO THERE'S NO, SO IT'S NOT  
REVIEWABLE ON APPEAL, IS WHEN  
THE JUDGMENT IS ENTERED  
CONSISTENT WITH THE SUM VERDICT  
FOR THE PLAINTIFF.

>> BEFORE WE USE UP ALL YOUR  
TIME, DO YOU WANT TO TALK A BIT  
ABOUT THE JURY SELECTION PART?

>> I DO.

THIS JUROR, GAMBOLA, HE HAD FIVE  
PENDING CASES.

HE DID NOT MISUNDERSTAND THE  
QUESTION-- HE DID NOT THINK  
THAT THE JUDGE WAS JUST ASKING  
ABOUT PRIOR PERSONAL INJURY  
CASES BECAUSE IN THE JURY  
INTERVIEW, WHICH I THINK I  
CONDUCTED AND WAS PRESENT FOR,  
HE WAS ASKED WHY DIDN'T YOU TELL  
US ABOUT ALL THESE FIVE CASES  
BEFORE, AND HE DIDN'T SAY I  
DIDN'T UNDERSTAND THE QUESTION,  
HE SAID, UM, I WASN'T-- I  
DIDN'T REMEMBER THEM.

I DIDN'T REMEMBER ALL OF THEM.

WHEN HE WAS ASKED, WELL, WHY  
DIDN'T YOU EVEN TELL US ABOUT  
THE ONES THAT WERE PENDING AT  
THE TIME OF TRIAL, HE SAID, OH,  
I WASN'T THINKING, I WASN'T  
THINKING ABOUT WHAT WAS PENDING,

I WAS THINKING ABOUT WHAT AM I  
GETTING INTO IN THIS.

HE, OBVIOUSLY, KNEW ABOUT THESE.

HE DID NOT MISUNDERSTAND THE  
QUESTION.

THE JUDGE PREVENTED US FROM  
GOING INTO THE AREA BY SAYING,  
NOW DON'T ASK THE, DON'T RE-ASK  
THE QUESTION THAT I'VE BEEN  
ASKING.

IN FACT, IN THE INSTRUCTION HE  
SAID, THE JUDGE EXPLAINED-- NOT  
REPEATING WHAT HE SAID-- FOR  
EXAMPLE, IF THEY SAY SOMETHING  
LIKE "I'VE NEVER BEEN INVOLVED  
IN LITIGATION BEFORE, I'VE NEVER  
BEEN SUED, THEY SAY NO, BUT THEN  
WHEN I ASK THEM A QUESTION, THAT  
SAME OR A SIMILAR QUESTION, IF  
THEY SAY YES, YOU HAVE A FREE  
REIN TO ASK THEM SPECIFIC  
QUESTIONS ABOUT THAT  
LITIGATION."

BUT HE MADE IT VERY CLEAR, DON'T  
BE ASKING THEM ABOUT LITIGATION  
IF THEY SAY NO ON THE VERDICT  
FORM AND THEY SAY NO TO MY  
QUESTION--

>> AND THE QUESTIONNAIRE.

>> NOT THE VERDICT FORM, THE  
QUESTIONNAIRE A.

>> QUESTIONNAIRE.

>> AND THAT QUESTIONNAIRE, BY  
THE WAY, IT MADE IT CLEAR THAT  
IT WAS NOT CASES THAT HAD GONE  
TO TRIAL.

IT SAID HAVE YOU, HAVE YOU SUED  
OR BEEN SUED, AND THIS INCLUDES  
CASES THAT HAVE NOT GONE TO  
COURT.

SO IT'S NONDISCLOSURE--

>> THE ONLY QUESTION THE JUDGE  
ASKED WAS HAVE YOU EVER BEEN  
SUED?

THAT WAS PRETTY MUCH IT?

>> IT WAS--

>> IS THAT WHAT THE  
QUESTIONNAIRE ASKED?

>> I THINK IT WAS MORE THAN  
THAT.

I THINK IT WAS-- LET ME-- I  
WROTE IT DOWN HERE.

I THOUGHT IT WAS HAVE YOU SUED  
OR BEEN SUED.

>> WELL, THE QUESTIONNAIRE READ,  
ASKED THE JURORS IF THEY OR  
THEIR FAMILY MEMBERS HAD EVER  
BEEN SUED OR SUED SOMEBODY ELSE.

>> BOTH.

>> THAT'S THE QUESTION.

BUT THEN DURING THE TRIAL THE  
COURT ASKED, HAVE YOU EVER BEEN  
SUED?

THE PROBLEM IS THE WORD "SUED"  
WAS NEVER DEFINED.

AND IN MY EXPERIENCE, I'VE FOUND  
THAT PEOPLE DON'T REGARD LIKE,  
FOR EXAMPLE, UNEMPLOYMENT  
COMPENSATION CLAIMS OR WORKER'S

COMPENSATION CLAIMS OR SOCIAL SECURITY DISABILITY CLAIMS, THEY DON'T CONSIDER THOSE AS SUING SOMEBODY.

THEY SEE SUING AS A JUDGE IN A BLACK ROBE IN A COURTROOM.

>> JUROR GAMBOLA HAD BEEN IN MORTGAGE FORECLOSURES TWO OR THREE TIMES.

HE SAID THERE'S ALWAYS SOMETHING HAPPENING TO MY HOUSE IN THE JURY INTERVIEW.

HE HAD BEEN SUED FOR A MEDICAL BILL.

HE KNEW, HE KNEW HE HAD BEEN SUED.

AND HE DIDN'T SAY, OH, WHEN THE JUDGE ASKED HIM WHY DIDN'T YOU REVEAL THIS, HE DIDN'T SAY, OH, I DIDN'T WANT-- I THOUGHT YOU MEANT ONLY PERSONAL INJURY CASES, HE SAID, OH, I WASN'T THINKING ABOUT THAT WHICH FIVE

CASES INCLUDING TWO THAT WERE

GOING ON--

>> WELL, BUT THAT COULD MEAN, I  
MEAN, WHEN YOU LOOK AT IT ALL IN  
CONTEXT, WHAT WAS SAID THERE,  
THE EMPHASIS ON WHAT THE JUDGE  
SAID ON PERSONAL INJURY CASES  
IS, IT SEEMS TO ME, AN IMPORTANT  
PART OF THE CONTEXT THAT YOU'VE  
GOT TO LOOK AT WHEN YOU EVALUATE  
WHAT WAS SAID SUBSEQUENTLY,  
ISN'T THAT RIGHT?

>> WELL, AND WE PROBABLY WOULD  
HAVE GONE INTO IT, BEEN MORE  
SPECIFIC IF THE JUDGE HADN'T  
HAVE EXPRESSED DEEPLY HIS  
DISPLEASURE ON A COUPLE OF  
OCCASIONS WITH REPEATING, YOU  
KNOW, GOING INTO AREA THAT IS HE  
WENT INTO UNLESS THE JUROR SAID,  
YES, UNLESS THEY ANSWERED YES.

>> BUT THERE'S SOMETHING BETWEEN  
WHETHER YOU'RE GOING TO UPSET



THE JUDGE AND WHETHER YOU HAVE A  
PERSONAL INJURY CASE.

ISN'T THERE THE OBLIGATION ON  
EITHER SIDE TO SAY, WELL, HAVE  
YOU EVER BEEN SUED SPECIFICALLY  
THOUGH, YOU KNOW, I WANT ANY  
TYPE OF LITIGATION AND FOLLOW UP  
ON IT RATHER THAN JUST LEAVE  
THAT QUESTION AS A UP IN THE  
AIR?

>> WELL, IT WOULD HAVE BEEN, IT  
WOULD HAVE BEEN BETTER TO DO IT  
THE OTHER WAY.

>> BUT THAT'S ONE OF THE PRONGS,  
ISN'T IT, THAT THE ATTORNEY  
EXERCISES DUE DILIGENCE?

>> YES.

BUT THE DUE DILIGENCE, I THINK  
IT WAS SATISFIED BECAUSE YOU  
DON'T HAVE TO ESTABLISH THAT THE  
CASE WAS A PERSONAL INJURY CASE.  
AND THE THREE FACTORS I WANT TO  
POINT OUT FROM THE ANSWER BRIEF

ON PAGE 29 THAT I AGREE WITH,  
THESE FACTORS INCLUDE REMOTENESS  
IN TIME-- WHICH THESE WERE NOT  
REMOTE, TWO WERE EXISTING AT  
TIME-- THE CHARACTER AND  
EXTENSIVENESS OF THE  
LITIGATION-- THE GUY HAD FIVE  
OTHER CASES-- AND THE JUROR'S  
POSTURE IN THE LITIGATION.

HERE THE JUROR WAS A DEFENDANT  
IN ALL THESE, AND AS A DEFENDANT  
WHETHER IT'S A PERSONAL  
INJURY-- THIS IS WHAT I WAS  
GETTING TO ON THE TYPE--

>> MET ME JUST WARN YOU, YOU'RE  
INTO YOUR REBUTTAL TIME.

YOU'VE GOT ABOUT TWO MINUTES  
LEFT.

>> I'LL WRAP IT UP WITH ONE  
SENTENCE HERE, THAT AS A  
DEFENDANT IN FIVE CASES WHETHER  
THEY'RE PERSONAL INJURY CASES OR  
OTHER KIND OF CASES, THE GUY

THAT'S BEING SUED IS GOING TO BE  
THE GUY THAT SYMPATHIZES WITH  
THE DEFENDANT, AND SO A NEW  
TRIAL SHOULD BE GRANTED ON ALL  
ISSUES.

THANK YOU.

>> MAY IT PLEASE THE COURT, MY  
NAME IS CINDY PUBLISH CON, AND  
I'M HERE ON BEHALF OF THE  
DEFENDANT TODAY, AND I'M  
HERE WITH JEFFREY MAUERS WHO WAS  
ONE OF THE TRIAL ATTORNEYS IN  
THIS CASE.

I'M GOING TO START WITH THE  
INCONSISTENT VERDICT AND,  
HOPEFULLY, I CAN CLEAR UP SOME  
OF THE CONFUSION ON THAT.

OUR ARGUMENT HAS NOTHING TO DO  
WITH WHICH QUESTION COMES FIRST  
ON THE VERDICT FORM.

IT HAS NOTHING TO DO WITH THAT.  
OUR ARGUMENT WOULD BE THE SAME  
WHETHER THE QUESTION CAME FIRST

OR SECOND.

OUR ARGUMENT IS BASED SIMPLY ON  
FLORIDA PRODUCTS LIABILITY LAW.  
AND UNDER THE LAW NO MATTER WHAT  
THEORY OF LIABILITY YOU PURSUE,  
YOU MUST SHOW THAT THE PRODUCT  
CONTAINS A DEFECT, AND THAT  
APPLIES WHETHER IT'S STRICT  
LIABILITY, NEGLIGENCE OR IMPLIED  
WARRANTY.

AND THE ONLY EXCEPTION IS WHERE  
THE PLAINTIFF ATTEMPTS TO PROVE  
A INNOCENT FAILURE TO-- A  
NEGLIGENT FAILURE TO WARN.

IN THIS CASE THAT DIDN'T HAPPEN.  
THE ONLY THEORY PURSUED BY THE  
PLAINTIFF WAS NEGLIGENT DESIGN  
AND STRICT LIABILITY ON--

>> BUT HERE'S A QUESTION FOR  
YOU.

I WAS THINKING ABOUT IT IN A  
NEGLIGENCE CASE.

WHAT IF, AND I'M NOT SURE WHY

SOMEONE WOULD DO IT, BUT THERE  
WERE TWO QUESTIONS.

WAS THE DEFENDANT NEGLIGENT AND  
THEN ANOTHER QUESTION, DID THE  
DEFENDANT FAIL TO USE REASONABLE  
CARE WHICH IS, I MEAN, I THINK  
WHAT YOU'RE SAYING IS THE  
SPECIFIC FACT IS ALL YOU NEED TO  
KNOW.

BUT THEY ANSWER THAT THEY WERE  
NEGLIGENT, BUT THEY-- BUT, NO,  
THEY DIDN'T FAIL TO USE  
REASONABLE CARE.

OR THEY-- SO--

>> WELL--

>> THAT'S A, BUT YOU'RE DEALING  
WITH IS THAT NOT AN INCONSISTENT  
VERDICT?

>> WHAT I'M SAYING IS THE  
QUESTION ON THE STRICT LIABILITY  
CLAIM IS WHETHER THE PRODUCT  
CONTAINS A DESIGN DEFECT.

>> AND WHAT'S THE QUESTION ON

THE NEGLIGENCE?

>> WAS THERE NEGLIGENCE.

>> WHAT'S-- IN THE DESIGN OF  
THE PRODUCT?

>> YES, RIGHT.

>> OKAY.

HOW DO WE KNOW, HOW DO WE KNOW  
THAT THE JURY WASN'T INTENDING  
TO FIND THAT THEY WERE NEGLIGENT  
IN THE DESIGN OF THE PRODUCT,  
THAT THEY DIDN'T THINK THEY  
NEEDED TO THE ANSWER BOTH  
QUESTIONS?

I MEAN, THAT'S THE PROBLEM,  
WHETHER-- AND I LIKE THE WAY  
JUSTICE CANADY SAID IT, IT'S NOT  
WHETHER IT'S INCOHERENT,  
INCONSISTENT, IT'S LIKE  
SOMETHING IS, THE JURY WAS  
CONFUSED.

THEY WERE CONFUSED BY THE  
INSTRUCTION, THEIR ANSWER, WE  
DON'T KNOW BECAUSE NO ONE

BROUGHT IT UP TO THE JUDGE  
BEFORE THE JURY WAS DISCHARGED.  
YOUR CLIENT OR YOUR ATTORNEY IN  
ALL DUE DEFERENCE B AGREED TO  
THE JURY VERDICT FORM AND,  
AGAIN, COULD HAVE MAYBE BEEN  
SOLVED IF THERE HAD BEEN IF YOU  
ANSWER THIS NO, YOU DON'T GO ANY  
FARTHER, BUT THAT'S NOT WHAT  
HAPPENED.

>> OKAY.

AGAIN, GETTING BACK TO-- THE  
JURY'S DECIDING DIFFERENT THINGS  
ON WHETHER THERE WAS A DESIGN  
DEFECT UNDER THE STRICT  
LIABILITY CLAIM AND WHETHER  
THERE'S NEGLIGENCE, WHETHER  
THERE'S NEGLIGENCE.

NEGLIGENCE IS THE FAILURE TO USE  
REASONABLE CARE.

THE DEFINE DEFECT-- DESIGN  
DEFECT QUESTION HAS TO DO SOLELY  
WITH WHETHER THE PRODUCT IS

UNREASONABLY DANGEROUS.

SO A JURY COULD PROPERLY  
CONCLUDE THAT THE DEFENDANT WAS  
NEGLIGENT IN THE DESIGN OF THE  
PRODUCT BUT THAT REGARDLESS OF  
THE NEGLIGENCE THE DEFENDANT  
MANUFACTURED A PRODUCT THAT WAS  
NOT UNREASONABLY DANGEROUS.

SO YOU CANNOT HAVE IN FLORIDA A  
NEGLIGENTLY-DESIGNED  
NON-DEFECTIVE PRODUCT.

>> DO YOU HAVE--

>> IT'S TWO DIFFERENT QUESTIONS  
THAT THE JURY--

>> BUT YOU DON'T HAVE A PROBLEM  
WITH, WITH THE SUGGESTIONS THAT  
HAVE BEEN MADE EARLIER THAT WHEN  
ONE FINDS THEMSELVES IN THIS  
SITUATION, THAT THE THING TO DO  
GIVE THE RESOURCES-- GIVEN THAT  
RESOURCES THAT HAS BEEN EXTENDED  
TO TRY THE CASE, PERHAPS SIX,  
ACCEPT, EIGHT WEEKS, I'VE HAD AS



LONG AS TEN WEEKS WHEN I WAS A  
TRIAL JUDGE, GIVEN THOSE  
RESOURCES THAT THE THING TO DO  
IS TO TRY TO CORRECT IT AT THAT  
MOMENT WHILE THE JURY'S STILL  
THERE AND PERHAPS IT'S ONE OF  
THOSE, OH, WE DIDN'T GET THAT  
AND GO BACK IN THERE AND FASHION  
SOME KIND OF INSTRUCTION BETWEEN  
THE LAWYERS AND THE JUDGE WHERE  
YOU CAN INSTRUCT THE JURY TO GO  
BACK AND TRY AGAIN WITHOUT  
ACTUALLY HINTING ONE THING OR  
THE OTHER?

I MEAN, THAT COULD HAVE BEEN  
DONE HAD AN OBJECTION BEEN MADE.

>> BUT WHAT I'M SAYING IS NOT  
THAT THE ANSWERS TO QUESTIONS  
ARE INCONSISTENT BECAUSE, AGAIN,  
THE JURY CAN FIND THAT THE  
PRODUCT DID NOT CONTAIN A DESIGN  
DEFECT MEANING THAT THE PRODUCT  
ITSELF WAS NOT UNREASONABLY

DANGEROUS YET ALSO FIND THAT THE  
DESIGN WAS SUBSTANDARD.

WHAT MAKES IT INCONSISTENT IS  
THE LAW.

THE LAW APPLIES TO THESE TWO--

>> I BUT IT'S STILL AN  
INCONSISTENT VERDICT, RIGHT?

>> IT'S AN INCONSISTENT VERDICT  
UNDER THE LAW, YES.

>> WELL, OKAY.

WE'RE TALKING ABOUT THE LAW  
HERE.

SO GIVEN THAT, WHY SHOULDN'T YOU  
HAVE TO OBJECT WHEN THAT VERDICT  
COMES BACK?

>> BECAUSE THERE'S NOTHING FOR  
THE JURY TO CORRECT.

THE JURY COULD PROPERLY HAVE  
DECIDED--

>> WELL, TO COME UP WITH A  
CONSISTENT VERDICT.

>> BUT IT'S FOR THE JUDGE TO  
APPLY THE LAW TO THIS VERDICT,

TO THE FINDING.

>> BUT HOW DO WE-- BUT THE  
UPSIDE LYING QUESTION HERE--  
UNDERLYING QUESTION HERE HAS TO  
DO WITH WHAT THE JURY HAS FOUND,  
AND THERE'S AN INCONSISTENCY IN  
WHAT THEY HAVE FOUND WITHIN THE  
FRAMEWORK IMPOSED BY THE LAW.

I'M JUST STRUGGLING TO  
UNDERSTAND WHY THAT'S NOT SO.  
AND IT SEEMS TO ME THAT THE JURY  
CAN CORRECT THAT IF THEY ARE  
PROPERLY INSTRUCTED AND ARE  
GIVEN A PROPERLY FRAMED VERDICT  
FORM THAT THERE WOULD BE  
PERFECTLY APPROPRIATE FOR THE  
JURY TO GO BACK AND CORRECT IT.  
AND SO I DON'T UNDERSTAND WHY  
THAT COULDN'T BE DONE.

>> WELL, I MEAN, FOR A DIFFERENT  
REASON IT COULDN'T BE DONE IN  
THIS CASE, BECAUSE UP UNTIL I  
THINK NOW THE PLAINTIFF HAS

ALWAYS CONTENDED THAT THERE WAS  
A NEGLIGENT FAILURE TO WARN  
CLAIM.

IF YOU READ THEIR BRIEF BEFORE  
THE THIRD DISTRICT AND IF YOU  
READ THE ARGUMENTS IN THE TRIAL  
COURT, THEY HAVE ALWAYS ARGUED  
THAT THERE WAS EVIDENCE OF  
NEGLIGENCE.

SO IS, I'M SORRY, A INNOCENT  
FAILURE TO WARN.

SO IF THAT WAS THEIR ARGUMENT,  
THERE'S NO WAY TO CORRECT A  
VERDICT UNDER THAT SCENARIO.

>> WELL, IF THERE WAS ED--  
THAT'S THE THING--

>> THE ARGUMENT THAT THERE WAS,  
BUT THERE BUDGET.

>> BUT IT'S NOT FOR THEM TO MAKE  
THE ARGUMENT.

IF YOU'VE GOT THE OBJECTION, YOU  
SAY THAT'S INCONSISTENT.

WE OBJECT.

AND THEN YOU EXPLAIN TO COURT  
THE WAY IT NEEDS TO BE PROPERLY  
FRAMED.

NOW, AND AGAIN, IF THE COURT  
DOESN'T DEAL WITH IT  
APPROPRIATELY BASED ON SOMETHING  
THAT THE OTHER SIDE SAYS, THEN  
YOU'VE GOT AN ISSUE FOR APPEAL.  
BUT YOU DIDN'T OBJECT.

AND IT SEEMS TO ME THAT THE  
GENERAL RULE HERE WHEN THERE'S  
AN INCONSISTENT VERDICT, AM I  
NOT CORRECT--

>> GENERAL RULE, YES.

>> THE GENERAL RULE IS YOU'VE  
GOT TO OBJECT.

BUT FOR SOME REASON THE CASE LAW  
SAYS WE'VE GOT A DIFFERENT RULE  
FOR THESE CERTAIN TYPES OF  
PRODUCT LIABILITY CASES.

NOW, I DON'T REALLY UNDERSTAND  
THE RATIONALE FOR THAT, AND IT  
SEEMS TO ME THAT ALL OF THIS

COULD HAVE BEEN CORRECTED--  
WELL, IT COULD HAVE BEEN  
CORRECTED IF THE VERDICT FORM  
HAD BEEN DONE CORRECTLY TO BEGIN  
WITH, AND THEN IT COULD HAVE  
BEEN CORRECTED IF AN OBJECTION  
HAD BEEN MADE AT TRIAL.  
AND I DON'T UNDERSTAND WHY WE  
CHARGE INTO THIS CONTEXT THE  
CIVIL CONTEXT WITH THE  
FUNDAMENTAL ERROR DOCTRINE WHICH  
WE DON'T USE THAT OFTEN IN CIVIL  
CASES THE LAST TIME I CHECKED.  
THAT COMES UP IN CRIMINAL CASES,  
BUT IT'S-- I'M NOT SAYING IT  
NEVER HAPPENS IN A CIVIL CASE,  
BUT THAT'S NOT-- ORDINARILY IN  
A CIVIL CASE IF YOU'VE GOT, IF  
SOMETHING'S HAPPENED, YOU DON'T  
OBJECT.  
YOU, YOU KNOW, IT'S GONE.  
UNPRESERVED, YOU LOSE ON IT.  
SO I DON'T UNDERSTAND WHY WE

SHOULD VARY FROM THE GENERAL  
RULE ABOUT INCONSISTENT VERDICTS  
AND THE REQUIREMENT OF  
CONTEMPORANEOUS OBJECTION AND  
PRESERVATION OF THE ISSUE IN  
THIS PARTICULAR CONTEXT.

WHY DOES CAN IT MAKE ANY SENSE  
TO DO IT, HAVE ONE RULE FOR THE  
JEOPARDY OF CASES BUT NOT IN  
THIS LIMITED CONTEXT?

>> OKAY.

LET ME SEE IF I CAN, HOPEFULLY,  
EXPLAIN IT A LITTLE BIT  
DIFFERENTLY.

I THINK WE CAN ALL AGREE IS AT  
THE HEART OF A PRODUCT LIABILITY  
CASE IS THE REQUIREMENT OF A  
DEFECT.

AND THAT QUESTION IS ASKED IN  
THE STRICT LIABILITY QUESTION.  
THE SITUATION, I THINK, WOULD BE  
DIFFERENT IF WITHIN THE  
FRAMEWORK OF THE NEGLIGENCE

QUESTION THE JURY, IT ALSO  
INCORPORATED THE CONCEPT OF A  
DESIGN DEFECT MEANING THAT THE  
PRODUCT WAS UNREASONABLY  
DANGEROUS, BUT IT DOESN'T.

THE ONLY THING THE NEGLIGENCE  
QUESTION IS DIRECTED AT IS THE  
CONDUCT OF THE DEFENDANT--

>> YOU KNOW WHAT?

YOU KNOW WHAT?

YOU HAVE ACTUALLY, AND I DON'T  
KNOW IF YOU MEANT TO DO THIS,  
BUT YOU MADE ME THINK THAT THERE  
COULD BE A RATIONAL REASON FOR  
THE JURY VERDICT.

[INAUDIBLE]

>> WELL, BUT IT'S-- THIS  
DOESN'T HELP YOU BECAUSE--

[LAUGHTER]

IT'S A, AND IT'S ALWAYS BEEN  
INTERESTING TO ME BECAUSE, YOU  
KNOW, ABOUT THIS UNREASONABLY  
DANGEROUS STANDARD.



IT WAS SUPPOSED TO TAKE  
NEGLIGENCE OUT OF IT, BUT YET WE  
USE THE WORD "UNREASONABLE."  
BUT THEN WE USE THE WORD  
"DANGEROUS."

AND THE DEFECT HERE ALLEGEDLY  
WAS WHAT?

WHAT DID THE PLAINTIFF SAY THE  
DEFECT WAS?

[INAUDIBLE]

>> OKAY.

SO THEY MIGHT HAVE THOUGHT THAT  
THAT DESIGN WAS ONE THAT WAS  
NEGLIGENT, THAT THEY FAILED TO  
USE REASONABLE CARE, AND THAT A  
CAUSE INJURED.

BUT THEY SAY, WELL, I DON'T KNOW  
THAT IT'S NOT-- MAYBE THEY  
THOUGHT A PRODUCT HAS TO BE  
LIKE, YOU KNOW, SOMETHING OTHER  
THAN A LADDER TO BE TO  
UNREASONABLY DANGEROUS.

SO ISN'T THAT A REASON,

ACTUALLY, TO SAY THEY COULD HAVE  
RATIONALLY ANSWERED NEGLIGENCE  
BUT NOT DESIGN DEFECT?

>> THAT'S EXACTLY--

>> BUT THEN YOU HAVE, BUT THEN  
THE POINT IS THAT NOT ONLY IS IT  
NOT INCONSISTENT, BUT WHERE DO  
YOU GET, WHERE DO YOU GET A  
JUDGMENT FOR YOU?

>> UNDER THE LAW.

BECAUSE, I MEAN, POST-VERDICT  
ALL THE TIME THE JUDGE IS ASKED  
TO CORRECT THE VERDICT BASED ON  
THE LAW.

>> WHAT LAW ARE YOU TALKING  
ABOUT?

IT SAYS THAT IF THERE'S NOT  
STRICT LIABILITY, THERE CAN'T BE  
NEGLIGENCE.

I'M NOT SURE I UNDERSTAND  
THAT--

>> WELL.

>> BECAUSE THE TERM

"UNREASONABLY DANGEROUS" IS  
DIFFERENT THAN THE TERM "FAILURE  
TO USE REASONABLE CARE."

AND, YOU KNOW, WE HAVE NEVER  
SAID THAT IT HAS TO BE THAT  
THERE'S GOT TO BE A DESIGN  
DEFECT BEFORE YOU CAN HAVE  
INNOCENT FAILURE TO DESIGN--  
NEGLIGENT FAILURE TO DESIGN.

WHAT LAW IS THAT?

>> WELL, I MEAN, THE LAW STEMS  
FROM--

[INAUDIBLE]

THE LAW STEMS FROM--

[INAUDIBLE]

V. BRACH AND DECKER AND-- BLACK  
AND DECKER AND THAT IN EVERY  
PRODUCT LIABILITY CASE--

[INAUDIBLE]

YOU DO NEED A DESIGN-- DEFECT  
WHICH IS DINED AS THE PRODUCT--

[AUDIO DIFFICULTY]

BUT THAT'S WHERE IT STEMS FROM.

THERE IS NO SUCH LEGAL CONCEPT  
IN FLORIDA AS A  
INNOCENTLY-DESIGNED,  
NONDEFECTIVE PRODUCT.

IT DOESN'T MATTER HOW NEGLIGENT  
THE MANUFACTURER WAS IN  
DESIGNING THE PRODUCT.

IF THE PRODUCT ITSELF IS NOT  
DEFECTIVE, THERE CAN BE NO  
LIABILITY FOR THE NEGLIGENCE.

THAT'S ALL THAT WE'RE SAYING.

>> SO YOU'RE ACTUALLY SAYING

THAT WE'RE SUPPOSED TO--

BECAUSE I HAVE TO LOOK AT THOSE  
QUESTIONS.

I NEVER KNEW, I THOUGHT WEST WAS  
A CASE THAT WAS

CONSUMER-FRIENDLY TO LESSEN THE  
BURDEN ON A PLAINTIFF AND  
INTRODUCE STRICT LIABILITY.

BUT I DIDN'T KNOW THAT IT EVER  
SAID, I MEAN, WHAT YOU'RE REALLY  
SAYING IS THAT THERE NEVER

SHOULD BE IN A PRODUCT LIABILITY  
CASE WHERE THE PLAINTIFF DOES  
NOT ARGUE SOMETHING OTHER THAN  
DESIGN DEFECT, THERE SHOULD  
NEVER-- THE NEGLIGENCE THEORY  
SHOULD NEVER BE PURSUED.

IS THAT WHAT YOU'RE SAYING?

>> I'M NOT SAYING IT SHOULDN'T  
BE PURSUED BECAUSE IF THE JURY  
DOES ANSWER YES TO THE CERTAIN  
LIABILITY QUESTION--

>> WELL, WHY DO THAT IN.

>> THE PLAINTIFFS CHOOSE TO DO  
THAT BECAUSE YOU CAN GET AN  
EVIDENCE ON NEGLIGENCE AND MAKE  
THE MANUFACTURER LOOK BAD.

IT'S DIFFERENT IF YOU'RE JUST  
FOCUSING ON THE DESIGN.

>> SO WHY NOT JUST ASK THE  
QUESTION LIKE MR.WATSON WAS  
SAYING, OR WERE THEY NEGLIGENT  
IN THE DESIGN OF PRODUCT?  
AND AT THE END OF IT GO TO

DAMAGES.

WHY DO YOU NEED, IF THEY'RE  
WILLING TO TRY TO PROVE-- WHICH  
IS SUPPOSE TO BE A HIGHER  
SATURDAY-- WHY WOULD YOU EVER  
GO TO THE NEXT QUESTION OF  
DESIGN DEFECT?

>> AGAIN, IT'S THEIR THEORY.  
THEY'RE THE ONES WHO PLED AND  
TRIED TO PROVE BOTH STRICT  
LIABILITY AND NEGLIGENCE, AND  
THEIR VERDICT FORM INCLUDED BOTH  
STRICT LIABILITY AND NEGLIGENCE.

>> AND YOU AGREED TO THAT.

>> WELL--

>> OR DID YOU?

>> I DON'T HAVE A PROBLEM WITH  
THE VERDICT.

I DON'T THINK THERE'S ANYTHING  
WRONG WITH THE VERDICT.

WHERE THEY PLEAD-- I'M SORRY,  
WITH THE FORM OF THE VERDICT.

>> I THINK THAT'S EXACTLY WHAT

YOU HAVE.

I UNDERSTAND YOUR ARGUMENT THAT TO BE ABLE TO HAVE LIABILITY UNDER FLORIDA LAW, ULTIMATELY, YOU HAVE TO BE ABLE TO FIND THAT THERE'S A DEFECTIVE PRODUCT NO MATTER WHAT THEORY YOU FOLLOWED. BUT THIS VERDICT FORM DID NOT BREAK OUT WAS THERE A DUTY, WAS THERE A BREACH OF THE DUTY, WAS THERE CAUSATION FOR BREACH, AND THAT'S WHERE IT WOULD HAVE COME IN THAT PRODUCED A DEFECTIVE PRODUCT.

SO, YOU KNOW, I THINK TO GET TO YOUR POINT WHICH I UNDERSTAND THAT YOU HAVE SOME SUBSTANCE TO THE POINT, BUT THIS FORM DOESN'T ACCOMMODATE THAT.

BECAUSE IT'S JUST, YOU KNOW, WAS THERE NEGLIGENCE AND WAS THE PRODUCT DEFECTIVE?

>> BUT IT'S ALSO A FORM THAT THE

PLAINTIFF-- I MEAN, THE FORM  
THAT YOU'RE SUGGESTING IS A FORM  
THAT THE PLAINTIFF WOULD NEVER  
AGREE TO.

>> THAT'S NOT THE POINT.

THE POINT'S NOT WHETHER THE  
PLAINTIFF AGREES TO IT, THE  
POINT IS WHAT DO YOU HAVE TO DO  
TO HAVE A CLEAR VERDICT FORM?  
SO IT'S NOT A QUESTION OF  
WHETHER MR. WASSON AGREES OR  
DISAGREES.

I IMAGINE THERE'D BE A LOT OF  
THINGS HE WOULDN'T AGREE WITH ON  
THAT YOU MAY WANT.

>> BUT I DON'T THINK IT'S A FORM  
THAT THE TRIAL COURT WOULD HAVE  
SUBMITTED.

AND I DON'T THINK IT'S IMPORTANT  
TO NOTE THAT AT THE TIME, WELL,  
AT THE TIME THAT THE JURY WENT  
TO DELIBERATE, THE DIRECTED  
VERDICT MOTIONS HADN'T EVEN BEEN



HEARD AND DECIDED.

SO AT THE TIME THAT THE FORM WAS  
SUBMITTED TO THE JURY AND THE  
JURY WENT TO DELIBERATE, AGAIN,  
THEY WERE STILL ARGUING THAT  
THERE WAS A FAILURE TO WARN  
CLAIM.

SO I DON'T SEE HOW IN THE  
CONTEXT OF THE PROCEDURE OF THIS  
CASE YOU CAN EVEN SUBMIT A  
VERDICT LIKE THAT.

>> WELL, BUT IT DOESN'T SAY  
NEGLIGENCE WITH REGARD TO  
FAILURE TO WARN.

THE VERDICT FORM DOES NOT  
SEPARATE THAT OUT.

YOU CAN'T--

>> THE VERDICT FORM JUST SAYS  
"NEGLIGENCE."

>> RIGHT.

SO I CAN UNDERSTAND YOUR  
ARGUMENT HAD IT SAID THAT.

THAT'D HAVE BEEN A DIFFERENT

ARGUMENT.

BUT, AGAIN, THE VERDICT FORM  
MOMENTUM SEGREGATE THOSE, AND  
THAT'S-- YOU GET INTO A PROBLEM  
WITH THE FORM OF THE VERDICT AND  
WHAT IS RETURNED.

>> WELL, THE THEORIES IN THE  
JURY INSTRUCTION ON NEGLIGENCE,  
THE JURY WAS INSTRUCTED ON  
NEGLIGENT DESIGN, MANUFACTURE  
AND FAIL.

SO, AGAIN, YOU HAVE OTHER  
THEORIES THAT--

>> THEY WERE NOT--

>> THAT ARE NOT--

>> THEY WERE NOT INSTRUCTED ON  
WARNING?

>> THEY WERE NOT INSTRUCTED ON  
WARNING.

>> WELL, THEN HOW'S THAT PART OF  
THE CASE IF THE JURY'S NOT  
INSTRUCTED ON IT?

I MEAN, YOUR ARGUMENT IS GOING

ALL OVER THE PLACE.

IF THE JURY WASN'T INSTRUCTED ON  
A NEGLIGENT FAILURE TO WARN, HOW  
CAN YOU MAKE AN ARGUMENT THAT  
THAT'S WHAT THE JURY VERDICT  
REPRESENTS?

THEY WEREN'T ALLOWED TO DO THAT.

>> I'M NOT SAYING-- I DIDN'T  
THINK I WAS SAYING THAT'S WHAT  
THE JURY VERDICT--

>> I THINK THAT'S EXACTLY WHAT  
YOU SAID.

THE NEGLIGENT FAILURE TO WARN IS  
STILL OUT THERE, AND THAT'S WHY  
THIS WAS SUBMITTED TO THE JURY  
IN THIS FORM.

>> WELL, IT'S STILL OUT THERE  
BECAUSE IT WAS A PLED THEORY.  
AND LIKE I SAID--

>> WELL, IT CAN'T BE OUT  
THERE--

>> THE DISTRICT WAS CLAIMING--

>> HOW CAN IT BE OUT THERE IF

THE JUDGE DOES NOT INSTRUCT THE  
JURY THAT THAT'S WHAT THE ISSUE  
IS?

>> I DON'T THINK IT CAN BE.

ALL I'M SAYING IS THAT THAT'S  
WHAT THEIR ARGUMENT WAS.

>> NO, THAT'S YOUR ARGUMENT.

>> I DON'T THINK IT CAN BE.

AGAIN, I THINK THAT THIS CASE IS  
LIMITED SOLELY TO DESIGN DEFECT.

AT THE TIME THE VERDICT WAS  
SUBMITTED TO THE JURY, THE COURT  
HADN'T YET HEARD THE DIRECTED  
VERDICT MOTION.

>> BUT THE COURT DIDN'T INSTRUCT  
THE JURY THAT THEY COULD FIND ON  
A NEGLIGENT FAILURE TO WARN.

IF YOU JUST-- YOU'RE THE ONE  
THAT BROUGHT THAT UP.

>> BUT IT DOES DESTRUCT THEM ON  
NOT ONLY DESIGN, BUT THE FAIL ON  
DISTRIBUTION.

SO, I MEAN, IT'S THE SAME THING.

THERE MIGHT HAVE BEEN

WARNINGS--

>> NO, IT'S NOT.

A DUTY TO WARN IS NOT THE SAME

AS SALE OR DISTRIBUTION CAN.

DISTRIBUTION.

YOU'RE STARTING TO MIX ALL THESE

THINGS TOGETHER.

THESE ARE DISTINCT THEORIES OF

LIABILITY.

>> WELL, AGAIN, I MEAN, IT'S OUR

POSITION THAT THE VERDICT ITSELF

IS LEGALLY INCONSISTENT BECAUSE

IT'S NOT SUPPORTED BY THE LAW,

AND GIVEN THAT IT WAS

FUNDAMENTALLY INCONSISTENT

BECAUSE THERE WAS NO DESIGN

DEFECT THAT THE ERROR IS

PRESERVED AND CAN BE ARGUED

POSTVERDICT.

AND ON--

>> I DON'T UNDERSTAND HOW IS THE

ERROR PRESERVED?

>> I'M SORRY.

I MEANT TO SAY THAT IT CAN BE  
ARGUED ON APPEAL WITHOUT THE  
OBJECTION.

AND ON THE ISSUE OF-- OH.

AND THE ONE THING I WOULD ALSO  
LIKE TO SAY IS THAT THE SOLUTION  
TO THE INCONSISTENT VERDICT,  
THIS WAS AN ALL-OR-NOTHING  
APPEAL FOR US.

WE SOUGHT ONLY A DIRECTED  
VERDICT.

WE DID NOT SEEK THE NEW TRIAL,  
AND SO IF THE COURT DOES  
DISAGREE WITH OUR POSITION ON  
THE INCONSISTENT VERDICT, THEN  
THE REMEDY WOULD BE TO REINSTATE  
THE--

>> SO YOU DON'T WANT, YOU'RE  
HAPPY WITH THE AMOUNT OF  
DAMAGES, I MEAN, BASICALLY.

>> YES.

WE WILL ACCEPT THE VERDICT,

LET'S PUT IT THAT WAY.

>> THANK YOU.

>> THANK YOU.

>> REBUTTAL?

YOU'VE GOT A MINUTE AND 17  
SECONDS.

>> WELL, THE DEFENSE, THEY WANT  
A DIRECT VERDICT BECAUSE THEY  
SAY THE JURY'S FINDING OF NO  
DEFECT ENTITLES THEM TO A  
DIRECTED VERDICT ON NEGLIGENCE.

BUT YOU DON'T GET A DIRECTED  
VERDICT UNLESS THERE IS NO  
EVIDENCE THAT WOULD SUPPORT A  
JURY VERDICT.

AND HERE THERE IS EVIDENCE OF  
ONE OF THE DOCTORS THAT THERE  
WAS A DEFECT IN THE LADDER,  
OKAY?

SO, BUT THE VERDICT WE KNOW IS  
INCONSISTENT AND IT'S WRONG, BUT  
THAT TESTIMONY OF OUR EXPERT  
SUPPORTS THE NEGLIGENCE FINDING.

THEY DON'T GET A DIRECTED  
VERDICT JUST BECAUSE THE JURY  
GOT IT WRONG AND ANSWERED ONE  
QUESTION WRONG THAT THEY SHOULD  
HAVE ANSWERED THE OTHER WAY.

NO DIRECTED VERDICT BECAUSE  
THERE WAS EVIDENCE TO SUPPORT  
THE VERDICT.

>> WELL, DO YOU AGREE THAT THERE  
CANNOT BE A NEGLIGENT FAILURE  
TO, NEGLIGENT DESIGN UNLESS  
THERE IS A DESIGN DEFECT UNDER  
PRODUCT LIABILITY?

ENTER I DISAGREE WITH THAT  
BECAUSE.

>> I DISAGREE WITH THAT BECAUSE,  
AS COUNSEL SAID, THERE'S A  
DEFINITION OF STRICT LIABILITY  
THAT REQUIRES IT TO BE A  
DEFECTIVE PRODUCT UNREASONABLY  
DANGEROUS, WHATEVER THAT MEANS  
X. IF YOU FAIL TO USE REASONABLE  
CARE THAT RESULTS IN AN INJURY



TO SOMEONE, THEN THAT THAT

SATISFIES THE--

>> SHE SAYS THAT OUR CASE LAW,  
WEST, ROYAL, DECKER DISAGREES  
WITH WHAT YOU'RE SAYING WITH  
WHAT I THOUGHT THE LAW, WHAT THE  
LAW WAS.

>> WELL, I DON'T THINK IT  
SUPPORTS THAT POSITION, AND I  
THINK THE FACT THAT CASES AND DO  
GO TO THE JURY ON BOTH  
NEGLIGENCE AND STRICT LIABILITY  
AND DESIGN DEFECT CASES  
ESTABLISHES THAT THERE CAN BE  
NEGLIGENCE WITHOUT MEETING THE  
STRICT LIABILITY TEST.

>> WAS WEST CITED IN THIS, IN  
THEIR BRIEF?

>> I'M SORRY, WHAT?

>> WEST V. CATERPILLAR?

>> NO, I DON'T BELIEVE THAT WAS  
CITED.

>> OR ROYAL DECKER?

I'M NOT SEEING IT IN THERE.

>> I DON'T BELIEVE SO.

>> OKAY.

BECAUSE I DIDN'T THINK-- OH,

WAIT, HERE'S ROYAL.

ROYAL IS THERE.

ROYAL VERSUS BLACK AND DECKER.

>> ROYAL IS THE THE MAIN ONE.

>> THANK YOU FOR YOUR ARGUMENTS.

COURT'S IN RECESS UNTIL TOMORROW

MORNING AT 9:00.