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Humana of Florida, Inc. v. Jacob Thomas Tomlian

CHIEF JUSTICE: GOOD MORNING AND WELCOME TO THE MAY ORAL ARGUMENT CALENDAR. THE FIRST DAY OF THIS CALENDAR AT THE FLORIDA SUPREME COURT. WE ARE ESPECIALLY GLAD TO HAVE VISITING, WITH US, THE STUDENTS FROM THE PORT SALERNO ELEMENTARY SCHOOL. THEY ARE LED BY THEIR ASSISTANT PRINCIPAL, MR. LARRY GREEN, AND WE ARE CERTAINLY PLEASED TO HAVE ALL OF YOU HERE FOR THIS ORAL ARGUMENT, AS LONG AS YOU CAN BE WITH US. THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR IS HUMANA OF FLORIDA, AND VERSUS TOMLIAN.

I AM SYLVIA WALBOLT, AND I WILL BE SPEAKING ON BEHALF OF BOTH OF THE DEFENDANTS IN THIS CASE. THE FIRST ISSUE BEFORE THIS COURT IS WHETHER A PSYCHOLOGIST CAN TESTIFY IN A MEDICAL MALPRACTICE ACTION, NOT ONLY TO THE EXISTENCE OF ORGANIC BRAIN INJURY BUT, ALSO, TO THE CAUSE OF THAT INJURY. THE SECOND AND THE FIRST HAVE HELD THAT THE CAUSE OF ORGANIC BRAIN INJURY IS A MEDICAL SUBJECT THAT A NONMEDICAL EXPERT CANNOT TESTIFY TO. THE FOURTH HAS NOW HELD TO THE CONTRARY. IN HOLDING TO THE CONTRARY, THE FOURTH RELIED UPON FLORIDA STATUTE THAT DEFINES THE PRACTICE OF PSYCHOLOGY, BUT THE FOURTH MISREAD THAT STATUTE. THAT STATUTE ALLOWS PSYCHOLOGISTS TO DIAGNOSE AND TREAT PSYCHOLOGICAL ILLNESSES AND THE PSYCHOLOGICAL ASPECTS OF PHYSICAL ILLNESSES, INCLUDING DIAGNOSIS, ETIOLOGY, AND TREATMENT, BUT THE INCLUDING LANGUAGE NECESSARILY REFERS BACK TO THE PSYCHOLOGICAL ASPECT OF A PHYSICAL ILLNESS, BECAUSE OTHERWISE THE INCLUDING LANGUAGE WOULD SWALLOW THE WHOLE. IT WOULD ALLOW PSYCHOLOGISTS TO DO EVERYTHING A MEDICAL DOCTOR COULD DO.

IS THERE ANYTHING IN THE FLORIDA STATUTES THAT PRECLUDES A NEUROPSYCHOLOGIST THAT IS OTHERWISE QUALIFIED FROM TESTIFYING AS TO THE CAUSE OF BRAIN DAMAGE? IN OTHER WORDS, IS THERE ANY, THIS IS A MALPRACTICE CASE. ANYTHING IN THE MALPRACTICE STATUTE THAT WOULD PRECLUDE AN OTHERWISE QUALIFIED EXPERT FROM TESTIFYING?

NO, YOUR HONOR. SIMPLY, BY THE FACT THAT IT SPECIFICALLY SAYS WHAT A PSYCHOLOGIST CAN TESTIFY TO, WHICH IS PSYCHOLOGICAL ILLNESSES AND PSYCHOLOGICAL ASPECTS OF THE ILLNESSES, BUT, NO, IT DOESN'T GO ON IN THE NEGATIVE AND SAY YOU CAN'T TESTIFY TO A PHYSICAL JURY, BUT I SUGGEST THAT, IF THIS AFTERNOON THE LAW, THEN THE -- THAT, IF THAT WERE THE LAW, THEN THE STATUTE ON PSYCHOLOGY PRACTICE WOULD READ JUST LIKE THE STATUTE ON THE PRACTICE OF MEDICINE AND WOULD SAY CAN TESTIFY TO PSYCHOLOGICAL OR PHYSICAL INJURIES. YOU WOULDN'T NEED THE LIMITING LANGUAGE THAT IS IN THE STATUTE, WITH RESPECT TO PSYCHOLOGICAL ILLNESSES AND PSYCHOLOGICAL ASPECTS OF PHYSICAL ILLNESSES. THAT WOULD BECOME SURPLUS, MEANINGLESS.

CHIEF JUSTICE: JUSTICE SHAW HAD A QUESTION.

DO I UNDERSTAD THAT SEVERAL JURISDICTIONS, IF NOT THE MAJORITY OF JURISDICTIONS, ARE MOVING IN THE DIRECTION OF ALLOW ALLOWING THIS TYPE OF TESTIMONY, AND IF SO, WHAT DO YOU ATTRIBUTE THAT TREND TO?

I ATTRIBUTE, I HAVEN'T COUNTED THEM UP. I KNOW THE FOURTH DISTRICT SAYS THAT FLORIDA IS NOW IN THE MINORITY VIEW. WHAT I WOULD ATTRIBUTE THAT TO, JUSTICE SHAW, IS THAT NATIONWIDE AND CONTRARY TO FLORIDA, I MIGHT ADD, THERE IS A TREND TOWARDS LIBERALIZING WHAT EXPERT TESTIMONY CAN COME IN, AND WE KNOW THIS FROM THE TENSION

BETWEEN THIS COURT'S ADHERENCE TO A MORE STRINGENT TEST FOR LETTING EXPERT TESTIMONY IN, AND THE DECISION OF THE MANY OTHER STATES TO GO TO THE DALBARE STANDARD, WHICH IS A CASE BY CASE STANDARD FOR ADMITTING TESTIMONY, AND THEY HAVE JUST ALLOWED THIS ISSUE TO BE SUBSUMED WITHIN THAT BROADER MOVE TO DALBARE, BUT I WOULD SUGGEST, WITH RESPECT, JUSTICE SHAW, THAT THIS COURT SHOULD NOT SIMPLY SAY, WELL, THIS IS THE WAVE OF THE FUTURE, ANY MORE THAN IT WAS WILLING TO DO SO WITH RESPECT TO ABANDONING AND MOVING TO DALBARE, BECAUSE THERE ARE SERIOUS IMPLICATIONS FOR THE RELY ABILITY FOR THIS EXPERT TEST -- FOR THE RELIABILITY OF THIS EXPERT TESTIMONY, AND I THINK THIS CASE REALLY HIGHLIGHTS THAT. IN THIS CASE, THE ISSUE IS WHETHER OR NOT -- IS WHETHER A BABY WHO WAS BORN WITH CEREBRAL PALSY, WHICH IS OFTEN CAUSED BY A PRENATAL NEUROLOGICAL INJURY, WHETHER IT WAS THE CAUSE OF IT HERE OR WHETHER IT WAS THE HYPOXIC EVENT AT BIRTH, AND THE MEDICAL EXPERTS ALL ACKNOWLEDGE THAT IS A MEDICAL ISSUE, AND IN FACT THE PLAINTIFF'S OBSTECK RICKAL -- OBSTECK ALEX PUERTO-OBSTETRICAL EXPERT SAID THAT IS OUTSIDE OF EXPERTISE.

BUT ARE WE TESTIFYING UP FRONT THAT WHAT THERE IS BRAIN DAMAGE, AND WHAT WE ARE REALLY TRYING TO FIND OUT ARE WHAT THE RESULTS OF THIS BRAIN DAMAGE IS, AND HAS THE SCIENCE MOVED TO THE POINT OF RECOGNIZING THAT A PSYCHIATRIST CAN TESTIFY IN THAT FIELD?

NOT A PSYCHIATRIST, YOUR HONOR. PSYCHOLOGIST.

PSYCHOLOGIST.

PSYCHIATRIST HAS DIFFERENT LEVELS OF TRAINING.

RIGHT.

AND WITH RESPECT, NOBODY DISPUTED THAT THIS CHILD HAD CEREBRAL PALSY AND NOBODY DISPUTED THAT THIS CHILD HAD CEREBRAL PALSY AS A RESULT OF SOME TRAUMA, SOME INJURY TO THE BRAIN. THE QUESTION WAS, WAS THE CAUSE OF THE CEREBRAL PALSY, SOMETHING THAT HAPPENED NEUROLOGICALLY, PRENATAL, AS IS OFTEN THE CASE WITH CEREBRAL PALSY, OR WAS IT SOMETHING THAT HAPPENED AT BIRTH DUE TO A LACK OF OXYGEN.

IS IT CORRECT THAT THE MEDICAL DOCTORS TESTIFIED, BOTH FOR THE PLAINTIFF AND THE DEFENSE, THAT THE BRAIN DAMAGE WAS A RESULT OF A HYPE OBJECTION I CAN EVENT.

YES. THAT'S CORRECT. EVERYONE -- OF A HYPOXIC EVENT?

YES. JUSTICE WELLS, EVERYONE WOULD AGREE. THE DIFFERENCE WAS WHETHER IT WAS A HYPOXIC EVENT AT THE 24-TO-32 WEEK, IN UTERUS, OR WHETHER IT WAS A HYPOXIC EVENT AT THE TIME OF BIRTH, AND IF I COULD FOLLOW-UP ON THAT, I WANT TO MAKE AN ADDITIONAL POINT, WHICH IS WHEN THE MEDICAL DOCTORS TESTIFIED TO THAT, ALL OF THEM, BOTH THE DOCTORS FOR THE PLAINTIFF AND THE DOCTORS FOR THE DEFENDANT, ALL OF THEM TESTIFIED TO A DEGREE OF MEDICAL PROBABILITY. THE EXCLUDE OPINION HERE OF THIS PSYCHOLOGIST, WAS TO A DEGREE OF PSYCHOLOGICAL PROBABILITY, AND SO THE DECISION BELOW ALLOWS THIS ISSUE OF CAUSATION OF THE CEREBRAL PALSY, TO BE DETERMINED BY A JURY, TO A PSYCHOLOGICAL PROBABILITY NOT TO A MEDICAL PROBABILITY.

ARE WE NOT SEEMING TO IGNORE REALITY HERE? I REASK MY QUESTION, IN EXCLUDING TESTIMONY OF EXPERTS LIKE THIS, ARE WE NOT IGNORING THE REALITY OUT THERE, IN TERMS OF THE ACTUAL PERSONS THAT ARE DIAGNOSEING AND TREATING THESE CONDITIONS, AS I AM VERY CONCERNED. FOR EXAMPLE, YOU WOULD HAVE NO CAUSE TO KNOW THIS IN PARTICULAR BUT IN MOST OF THE RECORDS OF THE DEATH PENALTY CASES THAT WE SEE, IT IS FREQUENTLY THE PSYCHOLOGIST, AND ESPECIALLY THE NEUROPSYCHOLOGISTS, WHO ARE THE MAIN WITNESSES,

WITH REFERENCE TO TESTIFYING TO MENTAL ABNORMALITIES AND BRAIN DAMAGE, AND, ALSO, TO EXPLAINING THAT A LARGE MEASURE OF THE DIAGNOSIS THAT THEY DO IS THROUGH THEIR TESTING, AND I AM CONCERNED THAT OBVIOUSLY THE RULING IN THIS CASE, WHICH DEALS WITH SPECIFIC FACTS, THOUGH, WILL, ALSO, AFFECT TESTIMONY OF THESE EXPERTS IN A BROAD RANGE OF CASES, SO I AM CONCERNED THAT WE ARE IGNORING REALITY THAT, IN TODAY'S MARKET, WE, REALLY, HAVE A SUBSTANTIAL OVERLAP, NOW, AS EXEMPLIFIED BY THE FACT THAT CONDITIONS ONCE THOUGHT TO BE THE PRODUCT OF TRAUMA OR WHATEVER, NOW MAY BE ATTRIBUTED TO CHEMICAL I AM BALANCES AND CONDITIONS LIKE -- IMBALANCES AND CONDITIONS LIKE THAT, SO WE USUALLY HAVE A TEAM OF DOCTORS AND PSYCHOLOGIST, VARIOUS SPECIALTIES THAT SEE PEOPLE WITH CONDITIONS LIKE THIS, AND AREN'T WE IGNORING REALITY AND SAYING A PERSON ON THAT TEAM CAN'T TESTIFY IN THESE CASES?

YOUR HONOR, A NUMBER OF ANSWERS TO THAT QUESTION, WHICH WAS MULTIQUESTION. FIRST OF ALL, THIS DOCTOR WAS NOT EXCLUDED FROM TESTIFYING. HE TESTIFIED AT GREAT LENGTH, ABOUT ALL OF THE TESTING HE DID. HE TESTIFIED AT GREAT LENGTH ABOUT THE EXISTENCE OF THE ORGANIC BRAIN DAMAGE, AND I BELIEVE THAT IS USUALLY WHAT IS TESTIFIED TO IN THE DEATH PENALTY CASES, AND IF I COULD, THE NEUROLOGIST WHO TESTIFIED FOR THE PLAINTIFF DID SPECIFICALLY RELY ON THAT PSYCHOLOGICAL TESTING, SO I THINK THE QUESTION THAT THIS COURT HAS TO GRAPPLE WITH IS, ARE YOU PREPARED TO SAY THAT A Ph.D. PSYCHOLOGIST IS GOING TO BE ALLOWED TO TESTIFY, NOT JUST TO THE EXISTENCE OF THE ORGANIC BRAIN DAMAGE AND NOT JUST TO THE TESTING THAT HE DID, BUT TO EXPLAINING WHY IT COULD NOT HAVE BEEN CAUSED IN UTERO, AS THE CAUSE OF CEREBRAL PALSY USUALLY IS, AND I CANNOT GET AWAY FROM THAT IS A SPECIFIC ISSUE IN THIS CASE.

GIVEN THAT THE DOCTOR WAS ALLOWED, Ph.D. OR MD OR WHATEVER WAS ALLOWED TO TESTIFY EXTENSIVELY ABOUT ALL OF THOSE OTHER MATTERS.

YES.

DOESN'T IT SEEM LIKE WE ARE PARSING VERY FINELY, IF THAT SAME DOCTOR WHO HAS BEEN ALLOWED TO TESTIFY EXTENSIVELY, NOW, ABOUT THE CONDITION, IS ALL OF A SUDDEN GOING TO BE RULED OUT, WHEN HE OFFERS UP AN OPINION ABOUT THE OPERATIVE EVENT THAT MAY HAVE BROUGHT ABOUT THE CONDITION THAT HE HAS JUST BEEN ALLOWED TO TESTIFY TO, EXTENSIVELY?

THAT IS A MAJOR DIFFERENCE, HOWEVER, TESTIFYING TO EXISTENT IS SOMETHING A PSYCHOLOGIST DOES. THAT IS THE TESTING THEY DO, TO SHOW THAT THERE IS THIS PSYCHOLOGICAL DEFICIT.

IN THIS CASE, IN PARTICULAR, BECAUSE WE ARE DEALING BOTH WITH THE GENERAL PRINCIPLE IN THIS CASE, DR. CROWN, IN THE PROFFER, HAD A SPECIFIC REASON THAT WAS GROUNDED IN THE WAY, IN HIS TESTING AND HIS KNOWLEDGE OF THE BRAIN, AS TO WHY IT COULD NOT HAVE OCCURRED EARLIER, AND I DIDN'T SEE AHING IN THIS RECORD THAT WOULD TEST THAT THAT OPINION, WHICH IS THAT THIS CHILD HAD ALREADY GONE ON TO DEVELOP HIGHER-LEVEL FUNCTIONING AND THEREFORE, WHICH WOULD HAVE OCCURRED DURING THE TIME THAT THE CHILD WAS IN UTERO, THAT THAT WAS THE REASON THAT THIS DOCTOR COULD TESTIFY IN THIS CASE, THAT THE CAUSE WOULD HAVE HAD TO OCCUR AT BIRTH, SO WE HAVE GOT A SOUND BASIS IN THIS PARTICULAR NEUROPSYCHOLOGIST'S TRAINING AND THE TESTING, TO GIVE AN OPINION THAT THE JURY WAS ENTITLED TO HEAR, AND I GUESS I AM STILL SORT OF TRYING TO FIGURE OUT HOW WE COULD BE SAYING THAT A NEUROPSYCHOLOGIST CAN TESTIFY TO A MEDICAL CONDITION, THAT IS THE EXISTENCE OF BRAIN DAMAGE, BUT, UPON PROPER FOUNDATION, WOULD BE PER SE EXCLUDEED FROM TESTIFYING AS TO CAUSATION, IF THERE IS A BASIS IN THIS PARTICULAR NEUROPSYCHOLOGIST'S TESTING, BACKGROUND AND KNOWLEDGE, TO TESTIFY AS TO THIS.

BECAUSE IT IS AN ISSUE THAT REQUIRES MEDICAL EXPERTISE, AS THE PLAINTIFF'S OWN EXPERTS ACKNOWLEDGED.

WHY ISN'T BRAIN DAMAGE, THEN, WHICH IS A MEDICAL CONDITION, BRAIN DAMAGE, NOT MENTAL ILLNESS WHY ISN'T THAT, ALSO, A MEDICAL CONDITION? WHY, THEN, ARE WE ALLOWING NEUROPSYCHOLOGISTS TO TESTIFY TO THAT?

BECAUSE THAT IS EXACTLY WHAT PSYCHOLOGISTS DO. THAT IS EXACTLY WHAT THE DEFINITION OF PSYCHOLOGY IS, TO TEST EXISTENCE OF PSYCHOLOGICAL ILLNESSES. AND THAT IS EXACTLY THE TYPE OF ISSUE THAT PSYCHOLOGISTS ADDRESS THROUGH THEIR TESTING.

HAVEN'T WE, THOUGH, TRADITIONALLY TREATED PSYCHOLOGISTS AS BEING IN THE BEHAVIORAL SCIENCES, THAT IS THAT IT IS THE EXHIBITS, THE CONDUCT THAT IS OUT THERE, THAT THEY REALLY HAVE DEALT WITH, BUT IT HAS BEEN THIS TREND TOWARDS ESTABLISHING THAT, NO, THERE IS AN ORGANIC CAUSE IN MANY INSTANCES, NOW, AND THE PSYCHOLOGIST, NEUROPSYCHOLOGISTS HAVE CONTINUED TO BE PART OF THE TEAM THAT HAVE DIAGNOSED AND TREATED THESE CONDITIONS, AND IN FACT IN MANY INSTANCES, DON'T WE SEE THE MEDICAL DOCTORS SAYING THAT PERSON, THAT NEUROPSYCHOLOGIST PROBABLY ISN'T THE MOST KNOWLEDGEABLE ONE IN THIS PARTICULAR INSTANCE, AS FAR AS TAKING CARE OF THIS PATIENT OR --

EXCEPT IN THIS CASE, YOUR HONOR, WE HAD EXACTLY THE OPPOSITE. IN THIS CASE, WE HAD THE MEDICAL DOCTORS TESTIFYING THAT THIS ISSUE REQUIRED SPECIALIZED TRAINING OF A NEUROLOGIST, AND WE HAD, YES, IT WAS A TEAM, AND, YES, THE UROLOGIST FOR THE PLAINTIFF DID TESTIFY, IN PART, BASED ON DR. CROWN'S TESTING. THE QUESTION IS, IS WHETHER DR. CROWN, A NONMEDICAL DOCTOR, COULD GO FURTHER AND OPINE, JUST LIKE A MEDICAL DOCTOR, AS TO WHAT WAS THE CAUSE OF THE CEREBRAL PALSY, AND THAT IS THE ISSUE THAT IS BEFORE THIS COURT.

ARE YOU, THEN, TELLING US THAT, WHEN THE PSYCHOLOGISTS DO THIS TESTING, AND IF THIS TESTING DEMONSTRATES TO THEM SOME REASON WHY THEY HAVE GOT TO THE POINT THAT THEY HAVE GOTTEN TO, SHOULD WE SIT AND LISTEN TO THAT OPINION? BECAUSE THAT IS WHAT IT SOUNDS LIKE YOU ARE SAYING, THAT EVEN THOUGH THE TESTING DEMONSTRATES NOT ONLY THE MERE FACT THAT THERE IS, IN FACT, BRAIN DAMAGE, BUT THAT THAT MAY HAVE BEEN CAUSED BY A PARTICULAR ACT THAT WE SHOULD JUST IGNORE THAT.

BECAUSE THAT IS AN ISSUE THAT REQUIRES, IN THE CONTEXT --

SO YOU ARE SAYING THAT YOU CANNOT SHOW THAT IN THE TESTING, THAT ACTUALLY THE TESTING THAT PSYCHOLOGISTS DO WILL NOT SHOW WHAT MAY HAVE BEEN THE CAUSE OF THE BRAIN DAMAGE. THAT WOULD BE THE LOGICAL CONCLUSION WE WOULD HAVE TO REACH, IF WE ACCEPT YOUR PROPOSITION, WOULDN'T WE?

THAT IS A TEST THAT BOTH FIRST AND THE SECOND HAVE ADOPTED. I MEAN, THEY HAVE ADOPTED A WHITE LINE RULE THAT SAYS WE ARE GOING TO TREAT THIS AS A MEDICAL ISSUE, AS WOULD NONMEDICAL DOCTORS.

WHAT DOES THE TERM NEUROPSYCHOLOGICAL ETIOLOGY MEAN? WHAT DOES THAT TERM, ITSELF, MEAN?

THAT IS NOT WHAT IS SAID IN THE STATUTE. THE STATUTE JUST USES THE WORD ETIOLOGY.

YEAH, BUT WHEN YOU GO UP TO THE BEGINNING OF THE WHOLE PHRASE, IT STARTS WITH NEUROPSYCHOLOGICAL DIAGNOSIS, ETIOLOGY, PROGNOSIS AND TREATMENT, SO THE WORD GOES WITH NEUROLOGICAL ETIOLOGY.

I DON'T THINK SO, JUSTICE QUINCE. I THINK ETIOLOGY RELATES BACK TO PSYCHOLOGICAL ILLNESSES OR PSYCHOLOGICAL ASPECTS OF ILLNESSES. YOUR HONOR, I AM INTO MY REBUTTAL TIME, AND I WANT TO JUST BRIEFLY, IF I COULD, ADDRESS THIS SECOND ISSUE, WHICH IS THE TWO-ISSUE RULE ISSUE THAT WE HAVE RAISED, BECAUSE THE DECISION BELOW, WE SUBMIT, CONFLICTS DIRECTLY WITH THIS COURT'S DECISION IN BARTH ON THE TWO-ISSUE RULE. THE DECISION BELOW SAID THAT THE TWO-ISSUE RULE DOESN'T APPLY WHERE, QUOTE, THERE IS ONLY ONE CAUSE OF ACTION, AND THAT IS WHAT THEY SAID BARTH SAID. BARTH DOESN'T SAY THAT. BARTH SAYS THE RULE DOESN'T APPLY WHERE THERE IS ONLY ONE CAUSE OF ACTION OR ONE SEPARATE AND DISTINCT DEFENSE THEORY, AND BARTH GOES ON TO MAKE IT CLEAR THAT YOU APPLY THE TWO-ISSUE RULE DIFFERENTLY, DEPENDING ON WHETHER IT IS AN APPEAL FROM A DEFENSE VERDICT OR WHETHER IT IS AN APPEAL FROM A PLAINTIFF'S VERDICT, AND THE FOURTH DISTRICT MISAPPREHENDED THAT POINT, AND IT CAUSED IT TO APPLY THE WRONG ANALYSIS. IT, IN FACT, APPLIED THE EXACT ANALYSIS THAT IT HAD APPLIED IN SHARL MAIN -- IN CHARLEMAIN, BASED ON THE SAME CASE, LABUE, IN WHICH THIS COURT SPECIFICALLY DISAPPEAR PROVED THOSE HOLDINGS, WHICH LOOKED ONLY TO THE MULTIPLE THEORIES OF LIABILITY, AND I THINK THE DECISION BELOW CANNOT BE LAID SIDE-BY-SIDE WITH THOSE DISAPPEAR PROVED CASES AND THUS CREATES -- WITH THOSE DISAPPROVED CASES AND THUS CREATES AN ELIMINATION AND I WOULD ASK THE COURT TO APPROVE AND BASE IT ON THAT DECISION AS WELL. THANK YOU, YOUR HONOR.

GOOD MORNING, YOUR HONORS. MAY IT PLEASE THE COURT. I AM TODD SCHWARTZ FOR THE PLAINTIFFS, THE APPELLEES IN THIS CASE.

MR. SCHWARTZ, WOULD IT BE YOUR POSITION THAT THIS PSYCHOLOGIST COULD TESTIFY AS TO AN OPINION AS TO WHETHER THIS BRAIN DAMAGE WAS A RESULT OF AN EPOXIC EVENT?

YES, YOUR HONOR, AND IN FACT HE DID TESTIFY, WITHOUT OBJECTION, TO THAT.

HE COULD TESTIFY AS TO THE FACT.

YES.

NOW, IT COULD BE, THE BRAIN DAMAGE COULD BE A RESULT OF SA PSI S, CORRECT?

I DON'T KNOW THAT THAT WAS DISCUSSED, YOUR HONOR.

JUST AS A MATTER OF GENERAL PRACTICAL.

I WOULD ASSUME SO, YOUR HONOR HONOR.

AND EPOXIC. IT COULD BE A RESULT OF SEMINAL INSUFFICIENCY IS, CORRECT?

I CAN TELL YOU THAT BOTH EXPERTS FROM BOTH SIDES, BEFORE WE HAD THE PSYCHOLOGIST COME IN, WERE UNDISPUTED IN THE CASE.

THE PROBLEM THAT I AM GETTING AT IS IT WOULD APPEAR THAT THE HYPE OXY AND THE CAUSE OF THE HYPOXY, WOULD BE A MATTER WHICH WOULD BE UNIQUELY WITHIN A MEDICAL EXPERTISE, WOULD IT NOT? I MEAN, THAT WOULDN'T HAVE ANYTHING TO DO WITH PSYCHOLOGY.

YOUR HONOR, THE PROBLEM IS THAT THE CAUSE OF THE HYPE OBJECTION I CAN EVENT -- OF THE HYPOXIC EVENT, EVERYBODY AGREES THAT THIS CHILD HAD BRAIN DAMAGE IN UTERO, CAUSED BY A LACK OF OXYGEN.

I AM TRYING TO GET TO MY CONCERN THAT WHAT WE ARE SETTING UP HERE, IS THE FACT THAT

WE ARE IN A MEDICAL MALPRACTICE CONTEXT IN WHICH THERE IS A BATTLE, REALLY, OF THE MEDICAL EXPERTS, PEOPLE THAT ARE TRAINED IN NEUROLOGY, TO ALLOW THAT TO BE TESTIFIED TO, BY SOMEONE WHO IS NOT TRAINED IN NEUROLOGY BUT TRAINED IN GENERAL PSYCHOLOGY AND THE REACTION TO MEDICAL EVIDENCE, AND THAT THE THING THAT DRIVES MY CONCERN IS THE FACT THAT IT WOULD SEEM PLAIN TO ME THAT A PSYCHOLOGIST COULD NOT TESTIFY AS TO THE CAUSE OF HYPOXIA, AND THEN WHY SHOULD THE PSYCHOLOGIST BE ABLE TO TESTIFY AS TO THE TIMG OF THE HYPOXIA?

YOUR HONOR, BECAUSE IN THIS CASE, I DON'T KNOW THAT YOUR GENERAL QUESTION IS A FAIR ONE, BUT IN THIS CASE, EVERYBODY AGREED THAT THE CAUSE OF THE HYPOXIA WAS JUST OXYGEN DEPRIVATION IN UTERO. THE DEFENDANT SAID IT HAPPENED 8-TO-12 WEEKS BEFORE HE WENT TO THE HOSPITAL. THE PLAINTIFFS CONTENDED IT OCCURRED DURING THE BIRTHING PROCESS, BUT IT WAS JUST OXYGEN DEPRIVATION. OUR EXPERT NEUROPSYCHOLOGIST WAS NOT ASKED TO TESTIFY NOR DID WE PROFFER HIS TESTIMONY AS TO THE CAUSE OF THE HYPOXIC INSULT. THE ONLY TESTIMONY THAT WE ADDED AND EXCLUDED BECAUSE HE WASN'T A MEDICAL DOCTOR, WAS TO OPINE THAT HIS FUNCTIONAL AND BEHAVIORAL DEFICITS THAT HE IS MANIFESTING TODAY COULD NOT HAVE OCCURRED IN THAT EARLIER GESTATIONAL PERIOD. THAT IS PRECISELY --

HOW DOES THAT DIFFER FROM THE TIMING OF THE INCIDENT?

BECAUSE, YOUR HONOR, HE IS NOT SAYING I AM LOOKING AT AN MRI, WHICH GOES TO YOUR QUESTION IN SAYING THIS BLIP ON THE MRI OF PERI VENT RICKLAR LUPO MALAYSIA, HE DOESN'T A SAY THAT. -SAID NEUROPSYCHOLOGY IS THE STUDY OF BRAIN FUNCTION AND THE RELATION OF BRAIN FUNCTION AND BEHAVIOR, APARTMENT TUT, PERFORMANCE, THE GROSS AND FINE MOTOR SKILLS, AND THAT IS THE THINGS THAT THESE NEUROPSYCHOLOGISTS TEST, AND THAT IS WHAT HE TESTED ON THIS BOY AND IT WAS STARTLING. AGAIN, WE DON'T CONTEST THAT WE ARE DOING VOODOO SCIENCE OR FRYE STUFF IN THIS CASE.

WOULD YOU AGREE THAT YOUR OPPONENT -- WOULD YOU AGREE WITH YOUR OPPONENT THAT ORDINARILY A NEUROPSYCHOLOGIST WOULD NOT NORMALLY BE ABLE TO TESTIFY ABOUT CAUSATION OR AS TO TICKLAR DAMAGE.

AS TO THE PROFFER OF DR. CROWN'S SPECIFIC QUALIFICATIONS, EXPERIENCE, AND THE RULE 702 COMPETENCY OF EXPERT DETERMINATION, I DON'T KNOW THAT WE CAN SAY. THAT HE DIDN'T PROPOSE TO TESTIFY TO THE PRECISE MEDICAL CAUSE OF THE INSULT. THAT WAS NOT THE SUBJECT MATTER OF HIS EXCLUDED TESTIMONY. I WILL GO ON, THOUGH, HOWEVER, YOUR HONOR, AND WE HAD TO BRIEF FOR THIS CASE. WE SURVEYED ALL JURISDICTIONS, AND AS JUSTICE SHAW INDICATED WHY THE TREND TOWARD ALLOWING THIS TESTIMONY? IT IS NOT SIMPLY A TREND, IN FACT, YOUR HONORS, BUT EVERY JURISDICTION THAT HAS CONSIDERED THE PRECISE QUESTION OF WHETHER A NEUROPSYCHOLOGIST OR A PSYCHOLOGIST CAN OPINE MEDICAL CAUSATION SPECIFICALLY, WHICH IS AGAIN, NOT, WE ARE DEALING WITH, HERE, IN THIS CASE WITH DR. CROWN ABOUT, BUT COULD A NEUROPSYCHOLOGIST IN A HYPOTHETICAL CASE, HAVE THE EXPERTISE FROM SOMEWHERE, TO BE ABLE TO OPINE THE MEDICAL CAUSE OF BRAIN INJURY, WHICH IS REALLY I GUESS, WHAT THE CONFLICT CASES ARE DEALING WITH IN GENERAL TERMS. EVERY SINGLE JURISDICTION THAT HAS ADDRESSED THAT ISSUE HAS SAID THEY CAN'T, AND THE JURISPRUDENTIAL BASIS FOR THAT HOLDING IS RULE OF EVIDENCE.

DO YOU AGREE THAT, IN A MEDICAL MALPRACTICE CASE, WOULD THERE HAVE TO BE SOME KIND OF PREDICATE BEFORE THE PSYCHOLOGIST COULD TESTIFY, AND WHAT WOULD BE THAT PREDICATE?

YOUR HONOR, NOT AS AN ADVOCATE IN THIS CASE BUT JUST AS A LAWYER LOOKING AT THIS QUESTION AND RESPONDING TO THE COURT'S QUESTION, WE HAD A NEUROLOGIST HERE WHO

GAVE THAT PREDICATE OBVIOUSLY AND GAVE THE TESTIMONY, BUT COULD A NEUROPSYCHOLOGIST --

LET'S SAY YOU HADN'T PUT ON ANYBODY.

CORRECT.

-- BUT THE NEUROPSYCHOLOGIST. COULD HE JUST TESTIFY AS TO HOW IT HAPPENED, WHEN IT HAPPENED, AND THE RESULT OF IT?

I UNDERSTAND, YOUR HONOR. I AM NOT SURE THIS IS THE RIGHT CASE TO DECIDE THAT ISSUE, GIVEN THE RECORD REALLY WASN'T DEVELOPED FACTUALLY AND MEDICALLY IN THAT REGARD, BUT LET ME ANSWER IT THIS WAY. ASSUME THAT A NEUROPSYCHOLOGIST HAD ORIGINALLY PLANNED TO GO TO MEDICAL SCHOOL, AND ASSUMING THAT HE HAD TAKEN THREE AND-A-HALF YEARS OF MEDICAL SCHOOL, LOVED THE COURSES ON NEURODEVELOPMENT, BRAIN INJURY, CEREBRAL PALSY, ANATOMY, WAS GOING TO BE THE WORLD'S FOREMOST NEURONEUROLOGIST BUT FOR WHATEVER THE REASON DROPPED OUT AND DECIDED TO JUST BECOME A PSYCHOLOGIST. HE WOULD HAVE THE TRAINING, I SUBMIT, AND THE EDUCATION, I SUBMIT, PERHAPS NOT THE PRACTICAL EXPERIENCE AND CERTAINLY NOT THE MEDICAL DEGREE BUT HE WOULD CERTAINLY BE OTHERWISE COMPETENT ON A PROPER RECORD AND PROFFER, TO RENDER THE CAUSATION OPINION BECAUSE OF HIS ACADEMIC TRAINING, BECAUSE WE ARE DEALING WITH HERE WITH WHAT IS THE JURISPRUDENTIAL BASIS BY WHICH YOU NEED TO JUDGE THIS ISSUE OF COMPETENCY?

ARE WE TALKING ABOUT WEIGHT OR ADMISSIBILITY?

I AM TALKING ADMISSIBILITY, YOUR HONOR, BECAUSE RULE 702 GOES TO THE COMPETENCY. CAN THIS EXPERT EVEN GET ON AND OPINE ON THE SUBJECT MATTER THAT HE PROPOSES TO?

CHIEF JUSTICE: JUSTICE LEWIS, I BELIEVE, HAD A QUESTION FOR YOU.

ARE YOU ADVOCATING, THEN, NOT FOR A BRIGHT-LINE RULE THAT NEUROPSYCHOLOGISTS CAN TESTIFY TO WHATEVER MEDICAL DOCTORS TESTIFY TO, CONCERNING BRAIN DAMAGE, BUT A CASE BY CASE ANALYSIS?

YES, AND THAT IS EXACTLY WHAT CRUSE DID, YOUR HONOR. WHAT CRUSE SAID IS FIRST OF ALL PSYCHOLOGY HAS CERTAINLY ADVANCED EONS AS, CERTAINLY, NEUROPSYCHOLOGY HAS, BUT MORE IMPORTANTLY, WE THINK WE MADE A MISTAKE THERE, IN THE ROSARIO CASE, AND THAT THE PROPER WAY TO APPROACH THIS JUDICIALLY IS BY USING 702. AN EXPERT CAN BE COMPETENT BY EDUCATION, BUT WITHOUT EDUCATION AN EXPERT CAN BE COMPETENT BY A WHOLE HOST OF OTHER THINGS.

BUT DON'T WE HAVE, FIRST OF ALL, IS A PSYCHOLOGIST COVERED BY 766? DID YOU HAVE TO FILE A PRESUIT SCREENING?

PSYCHOLOGISTS? NO. NO.

AND UNDER 766, WHICH YOU HAD TO PROCEED UNDER, SUING THE DOCTOR AND THE HOSPITAL.

YES. YES.

THERE IS A DEFINITION OF AS EXPERT, CORRECT?

CORRECT. AND THAT DEFINITION TIES INTO WHAT, WHO IS A HEALTHCARE PROVIDER.

YES, IT DOES, EXCEPT THAT IT DEFINES AN EXPERT, FOR PURPOSES OF RENDERING A STANDARD OF CARE OPINION, NOT IN TERMS OF ANY ISSUE IN A MEDICAL MALPRACTICE CASE, BUT IF YOU WANT TO ASSIGN NEGLIGENCE TO A SPECIFIC POSITION SCHEDULED UNDER 766 AS A HEALTHCARE PROVIDER, YOU NEED A SIMILAR LICENSED PHYSICIAN.

THAT PARSS THAT PRETTY FINELY DOESN'T IT?

I AM SORRY?

THAT PARSES THAT PRETTY FINELY, DOESN'T IT?

YES, AND TO GET BACK TO YOUR QUESTION, JUSTICE ANSTEAD, IT IS A MORE NARROW RULE. CRUSE SAID IN THE FOURTH DISTRICT THAT IT IS A BROAD RULE SAG YOU CAN'T AND CERTAINLY THEY HAD THAT IN THIS CASE. EVERY EXPERT QUALIFICATION DETERMINATION MUST START WITH RULE 702.

THIS IS NOT A NEUROPSYCHOLOGIST WHO IS ATTEMPTING TO TESTIFY TO THE CAUSE OF BRAIN DAMAGE, BUT YOU ARE REALLY SAYING THAT THIS NEUROPSYCHOLOGIST, WHO IS QUALIFIED TO TESTIFY TO THE TIMING OF THAT EVENT.

THAT IS PRECISELY CORRECT, YOUR HONOR, AND EVEN FURTHER, HE WAS QUALIFIED TO TESTIFY TO THE TIMING FROM THE STANDPOINT OF FUNCTION. HIS EXPERTISE, NOT FROM THE STANDPOINT OF HE IS GOING TO LOOK AT AN MRI LIKE A MEDICAL DOCTOR NEUROLOGIST AND SAY I THINK THERE IS BRAIN DAMAGE THAT OCCURRED OR DIDN'T OCCUR AT X POINT IN TIME. HE IS ONLY SAYING I DID WHAT I DO AS A NEUROPSYCHOLOGIST. I TESTED THE YOUNG MAN'S FUNCTION. THERE WERE CERTAIN TASKS HE COULD DO THAT HE DOES BETTER THAN FOUR OUT OF FIVE OF US IN THIS ROOM THIS MORNING. THAT COULD NOT HAVE HAPPENED, HAD THIS BOY SUFFERED THE HYPE JECTION I CAN INSULT THAT WE ALL AGREE HE SUFFERED IN UTERO, AT THE TIME THE DEFENDANT SUGGESTS IT OCCURRED.

SO WHAT IS HAPPENING HERE IS THAT WE ARE USING, WHEN WE TALK AS TO CAUSATION, WE ARE SOMETIMES TALKING ABOUT FORENSIC CAUSATION. ACTUALLY IN THE MEDICAL FRAME, SOMEONE IS IN AN AUTOMOBILE ACCIDENT AND THEY WERE FUNCTIONING FINE BEFORE.

RIGHT.

NOW AFTERWARDS, THEY ARE NOT FUNCTIONING FINE. THE MEDICAL DOCTOR WOULD LOOK TO SEE WHAT HAPPENED DURING THAT, FROM BEFORE AND AFTER, TO SEE WAS THERE A LOSS OF OXYGEN, AND THAT, AND THE CAUSE, BUT, REALLY WHEN WE ASKED EITHER PSYCHOLOGISTS OR DOCTORS WHAT IS THE CAUSE OF THE BRAIN DAMAGE, WE ARE THINKING THEY AOING TO SAY, WELL, WITHIN A REASONABLE DEGREE OF MEDICAL PROBABILITY IT WAS THE AUTOMOBILE ACCIDENT.

CORRECT.

WHICH REALLY ISN'T A MEDICAL OPINION.

CORRECT. NO, IT IS NOT.

SO I THINK THAT, AGAIN, IN TERMS OF THIS SITUATION, AND IN TRYING TO PUT TOGETHER WHAT WE ARE TALKING ABOUT, THE THE STANDARD OF CARE WAS -- ABOUT, THE STANDARD OF CARE WAS, ASSUMING THAT THE CARE WAS BELOW THE STANDARD OF CARE, WHICH YOU AGREE IS A MEDICAL OPINION OF WHETHER HE EXERCISED REASONABLE CARE IN HOW HE TREATED THIS WOMAN.

YES, AND THAT IS REQUIRED BY STATUTE.

AND YOU ARE NOT SAYING THAT YOUR NEUROPSYCHOLOGIST COULD TESTIFY AS TO ANYTHING ABOUT HOW THE CARE RENDERED TO THIS PARTICULAR, IN THIS CASE WAS, CORRECT?

AND THE LEGISLATURE HAS TOLD US PRECISELY IN THAT AREA HE CAN'T.

AND AS TO THE ISSUE OF SPECIFICALLY HOW DID HE GETS THIS BRAIN DAMAGE, HOW, IN A MEDICAL SENSE, THAT IT WAS A HYPOXIC EVENT, WE ARE NOT FACED WITH THAT PARTICULAR QUESTION, BECAUSE YOU SAY IT WAS STIPULATED.

EVERYBODY STIPULATED AND AGREED AND TESTIFIED THAT HE SUFFERED A HYPE OBJECTION I CAN EVENT IN -- A HYPOXIC EVENT IN UTERO AND WAS DEPRIVED OF OXYGEN FOR TOO LONG A PERIOD OF TIME.

AND THESE MEDICAL DOCTORS LOOKING AT MRI'S OR CAT SCANS, THEY ARE -- OR CT SCANS, THEY ARE NOT SAYING IT WAS CAUSED IN THE FOURTH MONTH OR AT BIRTH -- MR. CHIEF JUSTICE JUSTICE SHAW HAD A QUESTION.

-- WE ARE LOOKING AT THEIR PARTICULAR EXPERTISE, TO SEE WHETHER WE CAN --

THAT'S RIGHT, AND THAT IS WHY WE HAD THE NEUROLOGIST SAYING THAT IS WHAT AND WHY. BUT THE ISSUE OF TIMING COMING DOWN TO WHAT DOES IT MEAN WHEN IT IS IN THE WHITE MATTER VERSUS THE GRAY MATTER AND WHAT STATISTICALLY HAPPENS, VERSUS, AS JUSTICE QUINCE POINTS OUST, THE FUNCTIONAL -- POINTS OUT, THE FUNCTIONAL. WETEST FUNCTIONAL. THAT IS WHAT WE DO. THAT IS WHAT MEDICAL DOCTORS REFER TO US AND REFER PATIENTS TO US TO DO. I MEAN, THIS MAN TEACHES DOCTORS AT MEDICAL SCHOOLS IN FUNCTION.

CHIEF JUSTICE: JUSTICE SHAW.

DO I UNDERSTAND THAT IT IS YOUR POSITION THAT, AS FAR AS THE ADMISSIBILITY OF THE TESTIMONY OF A PSYCHOLOGIST IS CONCERNED, IT WOULD HAVE TO BE JUDGED ON A-TO-CASE BASIS, DEPENDING -- ON A CASE-TO-CASE BASIS, DEPENDING ON THE INDIVIDUAL TRAINING OF THAT PSYCHOLOGIST. IF HE HAD MORE TRAINING TOWARDS MD-TYPE TRAINING, THEN HE COULD TESTIFY AS TO CAUSE.

RIGHT.

BUT IF HE DIDN'T, THEN HIS TESTIMONY WOULD BE LIMITED. IS THAT --

THAT'S CORRECT, YOUR HONOR, AND I WOULD SUBMIT TO YOU AND I FOUND CASES FROM OTHER JURISDICTIONS THAT HAVE EVEN HELD THAT MEDICAL DOCTORS WITH BE IN -- CAN BE INCOMPETENT TO OPINE STRICTLY THE CAUSE OF BRAIN DAMAGE, CERTAIN MEDICAL DOCTORS. FOR EXAMPLE TAKE SOMEONE WHO WENT TO MEDICAL SCHOOL BUT FAILED THE COURSES THAT DR. CROWN PROBABLY TAUGHT HIM IN NEURODEVELOPMENT, AND HE IMMEDIATELY SHIED AWAY AND SAID I AM ONLY GOING TO PRACTICE TREATING ANXIETY AND PANIC DISORDERS FOR THE REST OF MY CAREER, PEOPLE WHO ARE DEPRESSED DEPRESSED. I WANT TO STAY AS FAR AWAY FROM CP BABIES AND BRAIN INJURIES AND ALL OF THAT COMPLEX STUFF AS I CAN. I SUBMIT TO YOU THAT A MEDICAL DOCTOR, JUSTICE SHAW, WOULD NOT BE COMPETENT TO OPINE, WHICH IS WHAT YOU ARE TALKING ABOUT, WHICH IS THE MEDICAL CAUSE OF AN ORGANIC BRAIN INJURY, SO IT DOES DEPEND ON THAT, TOO.

WHAT WE ARE TALKING ABOUT IS WEIGHT, RATHER THAN ADMISSIBILITY. WE ARE RESTRICTING IT TO WHETHER THIS PSYCHOLOGIST CAN, IN FACT, TESTIFY, NOT HOW THE JURY WOULD JUDGE

HIS TESTIMONY, BUT, AS I UNDERSTAND YOUR APPROACH, IT WOULD BE ON A CASE-BY-CASE BASIS WHICH SEEMS TO BE RATHER CUMBERSOME, AND THAT ONE TESTIFIED, WELL, I TOOK THIS EXTRA 6-WEEKS COURSE OR THIS EXTRA 6-MONTHS COURSE, AND A JUDGE IS GOING TO BE A TRIAL JUDGE, IS GOING TO BE BALANCING THIS IN EACH CASE. IS THAT YOUR POSITION?

TO DETERMINE ADMISSIBILITY, YOUR HONOR, AND IF THE QUESTION AS IN THIS CASE IS NOT STRICTLY AS TO WHETHER THE PSYCHOLOGIST ON PINES THE MEDICAL -- OPINES THE MEDICAL CAUSE OF SPECIFIC BRAIN DAMAGE, I WOULD SUGGEST THAT WOULD BE THE BEST APPROACH UNDER 702, AND I WILL TELL YOU THAT AN ENGINEER, WHEN HE HAS A DEGREE IN ENGINEERING, TAKES THE STAND IN A CONSTRUCTION CASE, IF THE ENGINEER IS STRICKEN AS BEING INCOMPETENT ON A PARTICULAR ISSUE. WAIT A MINUTE. YOU HAVE NEVER WORKED WITH SKAF OILDZ -- WITH SCAFFOLDS, SIR. HOW CAN YOU TESTIFY IF YOU HAVE JUST WORKED ON BRIDGES?

CAN, IF WE SAID THAT A NEUROPSYCHOLOGIST COULD TESTIFY AS TO CAUSATION, IN A BABY BRAIN DAMAGE CASE, WOULD IT FOLLOW THAT, THEN, THE NEUROPSYCHOLOGIST COULD SIGN THE LETTER THAT IS ATTACHED TO THE NOTICE OF INTENT, OR DO YOU HAVE TO HAVE A MEDICAL DOCTOR?

AGAIN, THE NOTICE OF INTENT AND THE REQUIREMENT OF A TYPE OF EXPERT GOES TO IF YOU ARE GOING TO OPINE AND ALLEGE A BREACH OF THE STANDARD OF CARE.

NO. IT SAYS MEDICAL NEGLIGENCE IN THE STATUTE, AND NEGLIGENCE HAS TO INCLUDE CAUSATION, DOES IT NOT?

CORRECT.

THAT IS ONE OF THE ELEMENTS OF CAUSATION OF NEGLIGENCE.

I AGREE WITH YOU, YOUR HONOR, BUT THAT IS NOT WHAT, YOU NEED, IN ORDER TO OPINE THAT SOMEBODY WAS GUILTY OF MEDICAL NEGLIGENCE, YOU NEED AN AFFIDAVIT FROM A SIMILAR MEDICAL HEALTHCARE PROVIDER.

THE STATUTE SAYS REASONABLE GROUNDS TO SUPPORT THE CLAIM OF MEDICAL NEGLIGENCE.

TRUE.

AND SO IF THE, THERE IS A DEFENDANT SENDS BACK AND SAYS, A DOCTOR THAT SAYS THIS BABY'S BRAIN DAMAGE HAD NOTHING DO WITH THE DELIVERY PROCESS, YOU DON'T THINK THAT WOULD SOMETHING THAT COULD BE ATTACHED TO THE RESPONSE TO THE NOTICE OF INTENT?

ON THE ISSUE SIMPLY OF NOT THAT HE DEVIATED FROM THE STANDARD OF CARE APPLICABLE TO HIM BUT AS TO THE CAUSATION QUESTION?

AS TO WHETHER IT WAS MEDICAL NEGLIGENCE OR NOT.

I AM SPLITTING THE TWO ELEMENTS UP, FOR THE PURPOSES OF YOUR QUESTION. I DON'T THINK HE COULD, BUT THE LEGISLATURE HAS -- BECAUSE THE LEGISLATURE HAS SPECIFICALLY TOLD US, SAY THIS DOCTOR DEVIATED FROM THE STANDARD OF CARE APPLICABLE TO HIM BECAUSE HE IS NOT THE SAME TYPE OF PROVIDER. COULD HE SAY I FEEL THESE BABY'S INJURIES OCCURRED AT A CERTAIN POINT IN TIME? CERTAINLY, FROM THE STANDPOINT OF TIME, BUT COULD HE TESTIFY FROM THE STANDPOINT OF CAUSATION? IT IS ON A CASE-BY-CASE BASIS. ANY EXPERT, JUST BECAUSE YOU ARE HOLD UP A DEGREE DOESN'T MEAN YOU ARE COMPETENT TO GET IN THE COURTHOUSE DOORS AND SERVE AS AN EXPERT. I DON'T KNOW THAT YOU CAN MAKE A CATEGORICAL DETERMINATION IN THIS CASE, CERTAINLY, BECAUSE WHAT WE ARE DEALING WITH IS REAL SIMPLE AND REAL TIGHT. IT IS THE TIMING OF INJURY FROM A FUNCTIONAL

STANDPOINT. THAT IS WHAT NEUROPSYCHOLOGISTS DO. THERE IS NOBODY MORE COMPETENT TO DO IT THAN A NEUROPSYCHOLOGIST AND CERTAINLY THIS NEUROPSYCHOLOGIST. YOUR HONOR, WITH THE MINUTE I HAVE REMAINING, I WILL BRIEFLY TOUCH ON THE SECOND POINT. IT WASN'T A BASIS FOR CONFLICT, BUT THEY HAD RAISED THE TWO-ISSUE RULE. THEY RAISED IT BELOW. IN BARTH, FOOTNOTE 7, THIS COURT SPECIFICALLY DID NOT DISAPPROVE LABUE, AND THE FOURTH DISTRICT'S OPINION, WHICH WAS THEN OFFERED BY JUSTICE ANSTEAD, SAID WE ARE NOT GOING TO SPLIT UP SINGLE CAUSES OF ACTION ELEMENTS. YOU DON'T HAVE TO MAKE A FINDING OF THE JURY OR HAVE SEPARATE ITEMIZED INTERROGATORIES. WE HAVE GONE AWAY FROM INTERROGATORY VERDICT FORMS IN THE STATE OF FLORIDA, IN ORDER TO PRESERVE IT.

THE LAW AS TO THE BRAIN DAMAGE IS SHOWING, I KNOW THE FOURTH HAD A RULE AND THEN THEY CEDED FROM IT. RE IS -- THEN THEY CEDED FROM IT. THERE IS NOTHING OUT OF FIFTH OR CASE LAW ON IT WITH SUCH AN AREA AS THIS. WERE YOU ABLE TO FIND ANYTHING FROM EITHER OF THOSE DISTRICTS, OVER THE LAST --.

NO, YOUR HONOR. IN FACT, THERE REALLY ARE, THE FOURTH ANNOUNCED A BLANKET PROHIBITION. IF YOU NOT A MEDICAL DOCTOR, YOU CAN'T OPINE IN THE AREA OF CAUSATION, PERIOD, END OF STORY. THREE WEEKS LATER, I BELIEVE IT WAS THE FIRST THAT DECIDED AND JUST FOLLOWED SUPPINELY AND SAID YOU COULDN'T PREDICATE THE FUTURE CONDITION OF A BRAIN. ALL OF THIS PRECEDES WHERE WE HAVE GONE IN THE LAST 17 YEARS IN THE PRACTICE OF NEWER OTHER PSYCHOLOGY. THE OTHER DISTRICT CASE, I BELIEVE IT IS THE SECOND, ALL THEY DID WAS SUMMARILY AFFIRM A JUDGE OF COMPENSATION CLAIMS ORDER. THERE WAS NO EVIDENCE OF BRAIN INJURY IN THE CASE, AND SO HE SAID YOU CAN'T BRING IN A FIRE-PSYCHOLOGIST TO COME -- IN A NEUROPSYCHOLOGIST TO COME IN AND SAY I FOUND BRAIN INJURY.

CHIEF JUSTICE: YOU ARE OUT OF TIME. THANK YOU. MS. WALBOLT.

JUST BRIEFLY, YOUR HONOR. FIRST OF ALL, WE DO HAVE TO DEAL WITH THIS CASE THAT HAS A PARTICULAR SET OF FACTS, AND I SUBMIT THAT JUSTICE WELLS IS EXACTLY RIGHT THAT, THIS PARTICULAR CASE, INVOLVING WHAT IS THE CAUSE OF CEREBRAL PALSY IN A NEWBORN BABY, IS UNIQUELY WITHIN THE MEDICAL EXPERTISE OF MEDICAL DOCTORS, AND I SUBMIT THAT EXACTLY WHY THE PROFFERED OPINION HERE WAS NOT TO A DEGREE OF MEDICAL PROBABILITY, WHICH IS THE STANDARD THAT ALL OF THE MEDICAL DOCTORS TESTIFIED TO. IT IS, WAS TO A DEGREE OF PSYCHOLOGICAL PROBABILITY, SO IF THIS DECISION STANDS, YOU WILL HAVE A JURY BEING ALLOWED TO DECIDE CAUSATION IN A MEDICAL MALPRACTICE ACTION, BASED ON A DEGREE OF MEDICAL PROBABILITY, NOT PSYCHOLOGICAL PROBABILITY, NOT MEDICAL. SEVERAL OF YOU ASKED QUESTIONS THAT I WANT TO ANSWER ALL AT ONCE AND IN ONE WAY, AND THAT IS THAT, ALTHOUGH THE COURT SUBMITTED THAT THIS WAS TO BE DONE ON A CASE-BY-CASE BASIS, IT IS IMPORTANT TO REALIZE THAT WHAT THE COURT DID WAS HOLD THIS TESTIMONY SHOULD HAVE BEEN ADMITTED. IT DID NOT SEND IT BACK TO THE TRIAL COURT, TO DEVELOP THE RECORD, TO MAKE A DETERMINATION WHETHER, IN THIS PARTICULAR INSTANCE, THIS PSYCHOLOGIST SHOULD BE ALLOWED TO TESTIFY.

CHIEF JUSTICE: I THINK YOUR TIME IS UP, MS. WALBOLT. THANK YOU VERY MUCH. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.