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Chester R. Morrissey, Jr. v. Thomas M. Owen

CHIEF JUSTICE: ALL RIGHT, THE NEXT CASE IS MORRISEY VERSUS OWENS. JUSTICE PARIENTE IS RECUSED ON THIS CASE.

MAY IT PLEASE THE COURT. I AM MARGARET GRAHAM FROM PALM BEACH, FLORIDA. I REPRESENT THE PETITIONERS, MR. AND MRS. MORRISEY. THEY WERE THE PLAINTIFFS BEFORE THE TRIAL COURT AND THEY WERE THE APPELLEES BEFORE THE FIFTH DISTRICT. THIS IS AN APPLICATION FOR REVIEW, BASED ON A CONFLICT OF THE FOURTH DISTRICT IN THIS CASE WITH THE DECISION OF THE FIFTH DCA IN HAMILTON, IN THE HAMILTON DECISION, AND, WE BELIEVE, WITH THE DECISION OF THIS COURT IN THE TOMPKINS CASE. JUST BRIEFLY, I THINK THE COURT IS AWARE, FROM OUR FACTUAL STATEMENTS. THEY ARE PRETTY DETAILED THAT THIS ARISES OUT OF AN ACCIDENT THAT OCCURRED ON I-95 IN PALM BEACH COUNTY. THERE WAS A DISABLED VEHICLE IN THE RIGHT DRIVEN BY VOGEL, WHO IS NOW SETTLED WITH US. OWEN DELIBERATELY RAMMED HIS TRACTOR-TRAILER RIG INTO MY CLIENT'S TRACTOR-TRAILER RIG, IN ORDER TO AVOID RUNNING OVER A LITTLE CAR THAT MOVED OVER INTO THE LEFT-HAND LANE.

LET ME ASK YOU THIS. WHAT IS THE SPECIFIC LANGUAGE IN THE FIFTH DCA CASE, THAT YOU SAY IS IN CONFLICT?

JUSTICE WELLS, IT IS WHAT I SAY IS IN CONFLICT WITH HAMILTON IS NOT LANGUAGE, BUT THE OTHER BASIS ON WHICH WE CAN HAVE CONFLICT, AND THAT IS APPLICATION OF A RULE OF LAW TO THE SAME SET OF FACTS, SO THAT, IN EFFECT I YOU HAVE ONE DECISION OVERRULING ANOTHER -- SO IN EFFECT, YOU HAVE ONE DECISION OVERRULING ANOTHER, AND HAMILTON SEEMS TO BE VERY MUCH SIMILAR FACTUALLY, TO THIS CASE, AND I WOULD SUGGEST TO YOU, FIRST OF ALL MAY I BACK UP ONE SECOND AND THEN I WILL TALK SOME MORE ABOUT THE CONFLICT, BUT THERE IS ONE POINT THAT I WANTED TO BRING UP TO THE COURT'S ATTENTION THIS MORNING THAT IS NOT IN THE BRIEFS BUT IT IS REFLECTED BY THE RECORD, AND THAT IS THAT, EARLY ON, IN THIS CASE, THE VOGEL DEFENDANTS MOVED TO AMEND THEIR ANSWER TO ASSERT A FABRE DEFENSE OF NEGLIGENCE ON THE PARTS OF DR. DAVIS AND FERNEU, WHO WERE THE TWO SURGEONS WHO PERFORMED THE SURGERY ON MY CLIENT. THEY DID TWO SURGERIES ON HIM. I THINK THE COURT IS AWARE THAT HE HAS HAD FOUR SURGERIES. ACTUALLY HE HAS HAD MORE THAN THAT SINCE THE DECISION, BUT HE HAD HAD FOUR SURGERIES SINCE THAT TIME. THE TRIAL COURT DENIED THAT MOTION ON THE BASIS THAT STEWART VERSUS HERTZ HAD, THAT THE ORIGINAL TORTFEASOR WOULD BE RESPONSIBLE, BUT IF YOU LOOK AT THE TRANSCRIPT, AT THE BEGINNING OF THE TRIAL, AT PAGE 23 OF THE TRANSCRIPT, WE HAD A MOTION IN LIMINE TO KEEP THE DEBTS FROM ASKING -- TO KEEP THE DEFENDANTS FROM ASKING DOCTORS QUESTIONS THAT BASICALLY WENT TO THE ISSUE OF WHETHER THE SURGERY THAT WAS PERFORMED BY DAVIS WAS MEDICALLY INDICATED OR NECESSARY OR MADE THE PLAINTIFF WORSE OFF THAN HE WAS PRIOR TO THE SURGERY, AND THE TRIAL JUDGE DENIED THAT MOTION, AND THERE WERE QUESTIONS THAT CAME IN AND EVIDENCE THAT CAME IN THAT SUGGESTED TO THIS JURY THAT THE REAL BASIS FOR MY CLIENTS' PROBLEMS -- FOR MY CLIENT'S PROBLEMS FOLLOWING THIS SURGERY IS THE FACT THAT IT WAS A FAILED BACK SYNDROME. IT WAS SOMETHING THE DOCTORS DID. AND I THINK THAT IS IMPORTANT, IN TERMS OF UNDERSTANDING THIS VERDICT AND WHAT, AT LEAST FROM MY PERCEPTION, WAS GOING ON. NOW, TO GET BACK TO YOUR QUESTION ON CONFLICT, JUSTICE WELLS, HAMILTON BASICALLY INVOLVES SUBSTANTIALLY THE SAME FACTS AS THIS CASE DID, IN THAT IT APPEARS, FROM THE OPINION, THE AWARD OF FUTURE ECONOMIC DAMAGES WAS OVER A TIME FRAME OF 43 YEARS, WHICH

APPEARS TO BE THE ENTIRE LIFE EXPECTANCY OF THE CLAIMANT OR PLAINTIFF IN THE CASE, AND OF COURSE, IT WAS NOT REDUCED TO PRESENT VALUE. THE BIGGER PROBLEM, AND, OF COURSE, HAMILTON FOLLOWED THIS COURT'S DECISION IN AUTO OWNERS VERSUS COMP KINCE, WHICH WE RESPECTFULLY SUBMIT, NO MATTER WHAT YOU DO WITH MY CLIENT, I THINK NEEDS TO BE CLARIFIED, PARTICULARLY IN VIEW OF THE LANGUAGE THAT IS STILL OUT THERE INJUSTICE, JUDGE ALTENBURN'S DECISION, IN THE LUDWIG CASE, AND LUDWIG, AS THE COURT WILL RECALL, IS A SECOND DCA CASE, WHERE JUDGE ALTENBURN SUGGESTED THAT, IN CERTAIN INSTANCES, THE STANDARD JURY INSTRUCTION ON PERMANENCY PROBABLY SHOULD BE MODIFIED.

ARE YOU ADVOCATING THAT, ALSO THAT YOU NEED TO CHANGE THE JURY INSTRUCTION ON PERMANENCY?

YOU HAVE TWO FORMER MEMBERS OF THE STANDARD JURY INSTRUCTIONS COMMITTEE HERE, ARGUING TODAY, MRS. HOFFMAN AND I WERE, BOTH, MEMBERS. WE HAVE TALKED ABOUT THAT, AND I THINK WE BOTH AGREE THAT THE INSTRUCTIONS PROBABLY NEED TO BE CLARIFIED. I THINK THEY ARE CONFUSING. I MEAN, WE DID THOSE INSTRUCTION INS '93, AND I DON'T THINK THEY HAVE BEEN LOOKED AT AGAIN.

DO YOU DEFINE ACTUAL MEANING OF PERMANENT INJURY?

NO, WE DO NOT, JUSTICE QUINCE AND YOU WILL LOOK, I LOOKED, AGAIN, THIS MORNING, AT THE STANDARD JURY INSTRUCTION. IT IS EITHER IN THE NOTES ON USE OR IN THE COMMENTS THAT THE COMMITTEE, AND, OF COURSE, THIS COURT APPROVES OUR INSTRUCTIONS BUT YOU DON'T PASS ON WHETHER THEY ARE NECESSARILY PROPER, AND THEY COME TO YOU WITH THE COMMENTS AND NOTES. WE POINT OUT, IN THE INSTRUCTIONS, THAT WE DON'T DEFINE WHAT REASONABLE MEDICAL PROBABILITY MEANS, AND THAT WAS CANDIDLY, ONE OF THE QUESTIONS THAT THE JURY ASKED IN THIS CASE WAS WHAT WAS THE MEANING OF THAT AND IT HAD TO DO WITH THE PERMANENCY INSTRUCTION.

THE JURY CAME BACK WITH A QUESTION?

YES. THEY DID.

WOULD YOU COME BACK TO HAMILTON, THOUGH. YOU WERE ADDRESSING JUSTICE WELLS'S QUESTION ABOUT THE CONFLICT. HAMILTON, ALSO, INVOLVED A JURY FINDING OF NO PERMANENCY. IS THAT CORRECT?

YES, YES, YOUR HONOR.

WAS IT THE SAME QUESTION THAT WAS POSED ON THE VERDICT FORM HERE, DO WE KNOW? THAT IS AS TO A FINDING OF PERMANENCY, WITHIN REASONABLE MEDICAL PROBABILITY, OR DOES THE OPINION MAKE THAT CLEAR OR NOT?

THE OPINION DOES NOT, YOUR HONOR, BUT I WILL TAKE TELL YOU, LOOKING AT THE CASE, THE CASE WAS A '97 FIFTH DCA OPINION. IT WAS THE APPEAL, GOSH, IT LOOKS LIKE THE APPEAL WAS FILED IN '94 IN THE FIFTH DCA, AND THE STANDARD JURY INSTRUCTION ON PERMANENCY CAME OUT IN '93, ALTHOUGH THIS COURT'S DECISION IN AUTO OWNERS, WELL, THAT WAS AUTO OWNERS VERSUS COMP KINCE WAS -- VERSUS TOMPKINS WAS '95, BUT I WILL TELL YOU, IF YOU GO BACK AND LOOK AT THE ORIGINAL PUBLICATION OF THE PERMANENCY THRESHOLD INSTRUCTION, THAT WAS PUBLISHED AS I RECALL, IN '93, IT CITED THE, AND I THINK TOMPKINS CAME FROM THE SECOND DCA, TOO. IT CITED THE APPELLATE DECISION, AS OPPOSED TO THE SUPREME COURT DECISION. THE NEW STANDARD JURY INSTRUCTION THAT I SAY NEW, IT IS NOT CHANGED, BUT IT IS, NOW THAT WE HAVE GONE TO LEXUS NEXUS PUBLISHING, IT NOW CITES THE COMMITTEE WENT BACK AND UPDATED THE CITATION TO THIS COURT'S DECISION IN AUTO OWNERS. AND ARE

THERE ANY OTHER QUESTIONS ABOUT HAMILTON?

WELL, WAS THE ISSUE, DID THE COURT STATE THAT THERE WAS AN ISSUE THAT, COULD THE JURY MAKE THIS AWARD, IN THE FACE OF NO FINDING OF PERMANENCY, AND IS THAT THE CONTEXT OF THE HOLDING OF HAMILTON, DESPITE THE FINDING OF NO PERMANENCY, THE JURY COULD AND THEN RELYING ON THIS --

RIGHT. ABSOLUTELY. AND WHAT HAPPENED IN THAT CASE, JUSTICE ANSTEAD, WAS THAT THE JURY, FOLLOWING THE JURY AWARD, THE TRIAL JUDGE ORDERED A REMIT TON OF THE FUTURE - - A REMIT ITEM OF THE FUTURE MEDICAL EXPENSES AND THE FUTURE LOSS OF EARNING ABILITY, ON THE BASIS THAT IT WAS NOT CONSIDERABLE, AND THE APPELLATE COURT REVERSED REVERSED. HAMILTON APPEALED THAT TO THE FIFTH DCA. THE FIFTH DCA REVERSED AND SAID HE DID PROVE FUTURE DAMAGES, INDEPENDENT OF A PERMANENT INJURY, AND THAT, YOUR HONOR, IS PRECISELY THE SITUATION.

IT IS THAT HOLDING, DECISION, THAT YOU ARE SAYING IS CONFLICTED WITH THE DECISION --

AND IT IS NOT SO MUCH, LET ME GIVE YOU THE EXACT, LUCKILY I DID BRING MY CONFLICT BRIEFS, BUT YOU HAVE SAID, THIS COURT HAS SAID YOU CAN HAVE CONFLICT, EITHER WHEN THE DECISIONS ARE IRRECONCILABLE OR WHEN THEY COLLIDE, SO AS TO CREATE AN INCONSISTENCY OF CONFLICT, AND WE CAN INVOKE CONFLICT JURISDICTION, EITHER WHERE YOU ANNOUNCE A RULE OF LAW THAT CONFLICTS OR YOU APPLY A RULE OF LAW, TO PRODUCE A DIFFERENT RESULT IN A CASE THAT INVOLVES SUBSTANTIALLY THE SAME CONTROLLING FACTS, AND IOWA I SUGGEST --

ISN'T IT THE HOLDING OF HAMILTON THAT, ON THE BASES OF THE RECORD EVIDENCE IN THAT CASE THAT THERE WAS SUFFICIENT EVIDENCE TO SUSTAIN THE CLAIM FOR FUTURE DAMAGES? ISN'T THAT THE HOLDING OF HAMILTON?

YES.

WHERE IT SAYS THERE FOR THE AWARD FOR FUTURE DAMAGES WAS CONSISTENT WITH THE RECORD EVIDENCE?

YES. IT WAS.

AND THE HOLDING OF THE FOURTH DISTRICT IN THIS CASE IS THAT THERE WAS INSUFFICIENT RECORD EVIDENCE TO SUSTAIN THE CLAIM FOR FUTURE DAMAGES, OVER THE ENTIRETY OF THE LIFE EXPECTANCY?

THE PROBLEM WITH -- EXPECTANCY?

THE PROBLEM WITH THAT, JUSTICE WELLS, IS, YES, THE FOURTH DISTRICT SAYS THAT, BUT WHAT THE FOURTH DISTRICT, ALSO, SAYS, AND WHAT AT LEAST TO MY READING OF THE OPINION, WHAT IS -- TO MY READING OF THE OPINION, WHAT IS IMPLICIT OF ITS OPINION IS THAT YOU CANNOT SUSTAIN AN AWARD OF FUTURE ECONOMIC DAMAGES FOR THE BALANCE OF A PERSON'S LIFE AND WORK LIFE WHICH WE HAD TWO DIFFERENT FUTURE AWARDS HERE, WITHOUT A FINDING OF PERMANENCY, AND THIS COURT DID NOT GO THAT FAR, IN ITS DECISION IN AUTO OWNERS.

BUT THAT IS, THAT DETERMINATION OF WHETHER THERE IS SUFFICIENT RECORD EVIDENCE IS A VERY FACT-SPECIFIC SITUATION. WOULD YOU HAVE US SAY THAT, IN EVERY INSTANCE, EVEN THOUGH THERE IS NO PERMANENCY, THAT THERE CAN BE A RECOVERY OF FUTURE DAMAGES OVER THE PERSON'S LIFE EXPECTANCY? USE THAT BE THE RULE THAT YOU WOULD HAVE COME OUT OF THIS SITUATION?

THAT IS NOT WHAT YOU HAVE SAID IN AUTO OWNERS. WHAT YOU SAID IN AUTO OWNERS, IS IF THERE IS PROOF WITH REASONABLE CERTAINTY, AND WE QUARREL WITH THE DECISION OF THE FOURTH DISTRICT ON TWO BASES. FIRST OF ALL, I DO THINK THAT, NO MATTER WHAT, THIS COURT SHOULD ADDRESS THE ISSUE THAT I MENTIONED BEFORE THAT, I THINK, IS BROUGHT UP IN THE LUDWIG CASE AND THAT IS CAN YOU HAVE AN AWARD FOR PERMANENT, I AM SORRY, FOR FUTURE DAMAGES FOR THE BALANCE OF A PERSON'S LIFETIME, WITHOUT A FINDING OF PERMANENCY? THAT IS ONE ISSUE THAT I SUBMIT SHOULD BE ADDRESSED. THE SECOND ISSUE IS, SHOULD THESE JURY INSTRUCTIONS BE MODIFIED, AND I BRING THAT UP. SOME OF THE CASES THAT WE HAVE CITED, THE COURTS HAVE GONE AHEAD AND GIVEN MODIFIED INSTRUCTIONS, BUT I THINK AS A PRACTICAL MATTER, MRS. HOFFMAN AND I, AS LAWYERS, AND THIS COURT, FROM REVIEWING CASES, AWARE OF THE FACT, IF IT IS NOT IN THE STANDARD JURY INSTRUCTION BOOK, IT FREQUENTLY IS NOT GOING TO GET DONE OR IT WILL GET DONE IN ENTLY, AND WHEN I R, WHEN YOU LOOK AT THE CASES, I THINK -- INENTLY -- INEPTLY, AND WHEN YOU LOOK AT THE CASES, AND WHICH I THINK THIS COURT HAS DONE, THERE IS NO DISPUTE THAT MY CLIENT WAS ON A MORPHINE PUMP. IF YOU ARE ON A MORPHINE PUMP, YOU ARE NOT GOING TO WORK, PARTICULARLY DRIVING A FURNITURE FURNITURE-MOVING TRUCK OVER LONG HAULS. THE PHYSICIANS RELATED, A NUMBER OF THE PHYSICIANS SAID THAT HE WAS PERMANENTLY INJURED. WE MOVED FOR A DIRECTED VERDICT ON THE ISSUE OF PERMANENCY AND THE ISSUE OF WHAT THE TRIAL JUDGE SAID. HE ESSENTIALLY DENIED IT. HE SAID I AM NOT GOING TO RULE ON THAT NOW.

DID HE HAVE SOME JURY PRIOR TO, DOESN'T THIS ADD ANOTHER ELEMENT TO THIS PERMANENCY? ON YOU DO YOU FACTOR THAT IN, THE FACT THAT --

THIS CASE WAS REALLY AN AGGRAVATION CAUSATION CASE. IT WASN'T, IN MY OPINION, A PERMANENCY CASE, BECAUSE THERE IS NO ISSUE THAT THERE IS A PERMANENT INJURY. THE ISSUE IN THE CASE IS, WHAT CAUSED HIS PERMANENT INJURY, AND THE AGGRAVATION ISSUES, AND I THINK THE AGGRAVATION JURY INSTRUCTION TREMENDOUSLY BOTHERED THIS JURY. YOU CAN TELL THERE IS ABOUT 30 PAGES OR MAYBE NOT QUITE THAT MUCH, 20 PAGES AT THE END OF THE MR. CHIEF JUSTICE

YOU NEED TO BE AWARE THAT YOU ARE --

I KNOW AND I REALIZE THAT, AND I APOLOGIZE.

WITH NO FINDING OF PERMANENCY REALLY, HOW DOES THAT ACCORD WITH THE LEGISLATURE'S DETERMINATION THAT EACH PARTY PAYS FOR ITS DAMAGES, AND HERE YOU HAVE GOT PREEXISTING DAMAGE AND NO PERMANENCY?

WELL --

YOU ARE ASKING FOR AN AWARD OF PERMANENT DAMAGE.

THE PROBLEM, AGAIN, AND I AM INTO MY REBUTTAL, SO I WANT TO ANSWER THIS QUESTION AND SIT DOWN, BECAUSE THERE ARE SOME ISSUES ON CROSS, OR THERE IS NO CROSS PETITION, BUT I WILL WANT TO ADDRESS THEM. THE PROBLEM, JUSTICE SHAW, WAS THE AGGRAVATION. THERE IS NO DISPUTE HE HAD BACK INJURIES PRIOR TO THIS ACCIDENT. THERE IS, ALSO, NO DISPUTE, IF YOU READ THE TESTIMONY OF HIS TREATING PHYSICIAN, DR. POWERS, THAT PRIOR TO THIS ACCIDENT, HE DIDN'T REQUIRE STEROID INJECTIONS. HE DID NOT REQUIRE TREATMENT BY A NEURO SURGEON. HE DID NOT REQUIRE A LOT OF THINGS THAT HE REQUIRED AFTER THIS, AND THERE WAS MEDICAL TESTIMONY THAT VERY CLEARLY SAID THAT THE PROBLEMS HE EXPERIENCED NOW WERE CAUSED BY OUR AGGRAVATION, AND THIS IS, AGGRAVATION IS AN IMPORTANT AREA OF THE LAW, BECAUSE AT LEAST WHAT I AM SEEING NOW, IN MANY CASES THAT I HANDLE, IS THAT, IN ALL THESE CASES, IF THERE IS THE SLIGHTEST THING THAT IS WRONG

WITH A PLAINTIFF TO BEGIN WITH, THE DEFENSE SAYS SHE OR HE WAS THAT WAY TO BEGIN WITH, AND, AGAIN, I THINK THE AGGRAVATION JURY INSTRUCTIONS PROBABLY NEED CHIRIR CLARIFICATION. I WOULD -- CLARIFICATION. I WOULD LIKE TO SAVE MY REMAINING TIME. HOW MUCH TIME DO I HAVE, JUSTICE? OKAY. THANK YOU VERY MUCH.

EXCUSE ME. SHE HAS USED 15.8, SO SHE HAS GOT 3 AND-A-HALF LEFT APPROXIMATELY.

GOOD MORNING. MAY IT PLEASE THE COURT. I AM NANCY HOFFMAN HERE, REPRESENTING THE RESPONDENT, MR. OWEN. I WANT TO MENTION ONE THING RIGHT OFF THE BAT, AND THAT IS THE QUESTION OF WHETHER ANY JURY INSTRUCTIONS NEED TO BE MODIFIED OR REWORKED IS NOT THE ISSUE BEFORE THIS COURT THIS MORNING. THE FACT THAT WE MAY HAVE CHATTED ABOUT IT HAS ABSOLUTELY NOTHING TO DO WITH WHETHER THIS COURT SHOULD MAKE ANY DECISION THIS MORNING, AS TO WHETHER THESE JURY INSTRUCTIONS SHOULD BE MODIFIED. PERHAPS THEY SHOULD, BUT THERE WAS NO, THERE IS NO ISSUE BEFORE THE COURT REGARDING JURY INSTRUCTIONS. THERE WAS NO DISPUTE, SO THAT WAS NOT ANY ISSUE THAT HAS BEEN PRESERVED FOR APPELLATE REVIEW.

REFRESH OUR MEMORIES WHILE WE ARE SITTING HERE RIGHT NOW, AS FAR AS WHAT THE INTERROGATORY VERDICTS ASKED, BOTH ABOUT PERMANENCY AND THEN WITH REFERENCE TO THE AWARDS OF FUTURE DAMAGES, WHETHER THE INTERROGATORY VERDICTS LISTED PERIODS OF TIME IN THE FUTURE, SO THAT WE ARE REFRESHED AS TO THE CONTEXT OF THE HOLDING HERE.

RIGHT. RIGHT. THE FIRST QUESTION ON THE VERDICT FORM WAS THE QUESTION WAS THERE NEGLIGENCE ON THE PART OF SO-AND-SO, WHICH WAS A LEGAL CAUSE OF DAMAGE. I THINK THEY USED THE WHOLE THING, LOSS, INJURY OR DAMAGE TO THE PLAINTIFF, AND THE JURY ANSWERED THAT QUESTION YES. THERE WERE, THEN, THE QUESTIONS, WELL, I DON'T THANK YOU. I WANT TO GET THE ORDER CORRECTLY. THE NEXT QUESTION, THEN, HAD TO DO WITH THE PERCENTAGES OF NEGLIGENCE. WE HAD NEVER CONTENDED THAT THE PLAINTIFF WAS NEGLIGENT IN ANY WAY. IT WAS A QUESTION OF APPORTIONMENT OF NEGLIGENT AMONG THE DEFENDANTS. THEN THE AMOUNT OF MEDICALS IN THE PAST. AMOUNT OF LOST EARNINGS IN THE PAST. AND THESE WERE ALL FILLED IN BY THE JURORS, WITH THE FIGURES ALMOST DOWN TO THE PENNY REQUESTED BY THE PLAINTIFF. WHAT IS THE AMOUNT OF THE FUTURE DAMAGE, FUTURE MEDICALS? AND THE AMOUNT IS GIVEN, AND IT IS SPREAD OVER 30 YEARS.

AND WHAT IS THE SIGNIFICANCE IN THE CONTEXT OF THIS RECORD OF 30 YEARS, IF ANY?

30 YEARS, I BELIEVE, WAS HIS LIFE EXPECTANCY.

OKAY. GO AHEAD. THEN --

THEN THE NEXT QUESTION WAS PRESENT VALUE. THEN THE NEXT QUESTION WAS LOST EARNING CAPABILITY TO BE SUSTAINED IN THE FUTURE. TWENTY YEARS WAS GIVEN, AND THAT I BELIEVE, WAS HIS REMAINING , RETIREMENT. PRESENT VALUE OF THOSE DAMAGES, AND THEN THE NEXT QUESTION IS QUESTION NUMBER SEVEN ON THE VERDICT FORM, WHICH IS DID HE SUSTAIN A PERMANENT INJURY WITHIN A REASONABLE DEGREE OF MEDICAL PROBABILITY, AS A RESULT OF THE INCIDENT IN QUESTION. VERY SIGNIFICANT. AND THE ANSWER TO THAT IS NO. THEN THEY TOTAL IT UP. NOW, IT'S OUR CONTENTION, AND I THINK, REALLY, THE ONLY REASONABLE INTERPRETATION, PARTICULARLY GIVEN THE QUESTIONS THAT THE JURORS ASKED DURING THEIR DELIBERATIONS, WHAT THEY ARE SAYING BY THIS VERDICT IS THIS GENTLEMAN HAD A LOT OF PROBLEMS, AND THERE IS, AND I FULLY AGREE THERE IS NO QUESTION BUT WHAT, AT THE TIME OF TRIAL, HE WAS PERMANENTLY DISABLED AND IS TODAY. THE JURY FOUND, PRESUMABLY BY ANSWERING YES TO THE FIRST QUESTION, THAT THIS ACCIDENT, WHICH WAS A MINOR IMPACT, AS WE POINTED OUT IN THE BRIEF, THE PASSENGER IN THE PLAINTIFF'S TRUCK DIDN'T EVEN FEEL IT, SO IT WAS NOT A BIG SMASH. THE JURY APPARENTLY FOUND THAT, YES, THIS ACCIDENT CAUSED

A FLARE UP, PERHAPS, OF HIS BACK INJURIES, HIS PRIOR BACK INJURIES, BUT THAT IT DID NOT, THAT THE ACCIDENT WAS NOT A CAUSE OF THESE TREMENDOUS FUTURE MEDICALS AND THE FACT THAT HE WAS PERMANENTLY DISABLED.

IS THE FOURTH DISTRICT HOLDING THIS TO BE EXCESSIVE, AS A MATTER OF LAW? IS THAT ESSENTIALLY WHAT THEIR HOLDING MEANS?

AS A MATTER OF LAW, I SUPPOSE THEY WOULD HAVE TO, BECAUSE THAT IS THEIR, I MEAN, ON THIS RECORD THEY ARE SAYING THAT, BASED ON THIS RECORD --

ON THIS RECORD, THE MATTER WAS AN ISSUE AS TO WHETHER THE JURY VERDICT SHOULD BE SET ASIDE PRESENTED TO THE TRIAL COURT?

OH, YES.

AND THE TRIAL COURT HELD THAT IT SHOULD NOT.

RIGHT. RIGHT.

AND SO THEY DENIED A MOTION FOR A NEW TRIAL.

THAT'S CORRECT.

SO THE MATTER COMES TO THE DISTRICT COURT ON THE BASIS THAT THERE IS, THE BASIC ATTACK HAS TO BE THAT, EITHER IT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

OR EXCESSIVE.

OR EXCESSIVE. AND WHAT DO WE READ THE DISTRICT COURT HELD, AS A LEGAL MATTER?

THE DISTRICT COURT HELD THAT THE EVIDENCE OF INJURY COULD NOT BE, COULD NOT SUPPORT, WITHIN A REASONABLE CERTAINTY, THE FUTURE DAMAGES, GIVEN THE FACT THAT THE JURY HAD CONCLUDED THAT THIS ACCIDENT DID NOT CAUSE THE PERMANENT INJURY, OF WHICH MR. MORRISSEY WAS SUFFERING AT THE TIME OF TRIAL.

IF IT KICKED HIM OVER, IF YOU HAVE GOT A TRUCK DRIVER THAT IS DRIVING, AND MOST TRUCK DRIVERS THAT I KNOW HAVE BAD BACKS TO START WITH, AND HE HAS BEEN DRIVING FOR 20 YEARS, BUT HE CONTINUES TO DRIVE, AND BECAUSE OF THIS ACCIDENT, NOW, HE CAN NO LONGER DRIVE.

WELL, THAT IS A BIT OF AN OVERSIMPLIFICATION OF THE RECORD JUSTICE SHAW. IT HAS TO BE, BECAUSE --

YOU DETERMINED IT WAS A FLARE UP OF HIS CONDITION, AND IT SEEMS TO ME THAT THE JURY FOUND A LITTLE BIT MORE THAN A FLARE UP.

HE WENT BACK TO WORK. HE KEPT GOING. AFTER THIS ACCIDENT, HE AND HIS BOSS KEPT ON GOING AND THEY MOVED FURNITURE FOR THE REST OF THE DAY. HE WORKED FOR ANOTHER 30 DAYS.

IT WAS EVIDENCE, THOUGH, BEFORE THE JURY THAT WENT BOTH WAYS ABOUT THAT, ISN'T THAT --

THERE IS EVIDENCE THAT WENT BOTH WAYS, AND MY POINT IS THAT THE JURY'S FINDING OF NO PERMANENCY MEANS SOMETHING. EYE WANT TO COME BACK TO JUSTICE WELLS'S QUESTION, AND WHETHER, BECAUSE HE ASKED YOU WITH REFERENCE TO WHETHER THERE, REALLY, THE

DISTRICT COURT'S OPINION STOOD FOR THE FACT THAT THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THESE AWARDS, AND YOU ANSWERED YES.

YES, I DID. NOW, LET --

NOW, LET ME, MY QUESTION IS, DID ANYBODY ASSERT HERE THAT THE PROBLEM WAS AN INCONSISTENCY IN THE VERDICT?

OH, YES. ABSOLUTELY.

NOW WE ARE, AND AREN'T WE TALKING, NOW, IF WE ARE GOING TO TALK ABOUT AN ISSUE OF INCONSISTENCY, THAT IS A SEPARATE LEGAL ISSUE, IS IT NOT, FROM THE ISSUE OF WHETHER OR NOT THERE WAS EVIDENCE TO SUSTAIN THE AWARD?

BOTH ISSUES WERE RAISED.

SO, BUT, THE DISTRICT COURT OF APPEAL DID NOT BASE ITS DECISION ON ANY INCONSISTENCIES IN THE VERDICT. IS THAT CORRECT?

LET ME GET THEIR IMPACT LANGUAGE. WE -- THEIR EXACT LANGUAGE. WE CONCLUDE THAT THE VERDICT WAS INCONSISTENT AND EXCESSIVE AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A NEW TRIAL ON CAUSATION AND DAMAGES, SO THE FOURTH DISTRICT REACHED BOTH ISSUES.

SO IN ANSWER TO THE EARLIER QUESTION, YOU ARE, NOW, ASSERTING THAT, IN ADDITION TO THE SUFFICIENCY OF THE EVIDENCE ISSUE, YOU BELIEVE THE DISTRICT COURT, ALSO, BASED ITS DECISION ON AN INCONSISTENCY IN THE VERDICT FORM?

WELL, IT IS ALMOST IMPOSSIBLE TO SEPARATE THE TWO, BECAUSE THE PROBLEM PERCEIVED BY THE FOURTH DISTRICT WAS THAT, HOW CAN YOU HAVE A JURY FIND THAT THERE WAS NO PERMANENCY, THAT YES, HE WAS INJURED, BUT THE ACCIDENT WAS NOT THE CAUSE OF THIS PERMANENT CONDITION? HOW CAN YOU HAVE A JURY THAT HAS REACHED THAT EVIDENCE, WHICH IS SUPPORTABLE? THERE IS A LOT OF MEDICAL TESTIMONY IN THIS RECORD THAT WOULD SUPPORT THAT CONCLUSION, THAT THE, THAT THIS ACCIDENT DID NOT CAUSE THE PERMANENT INJURY. HOW CAN YOU HAVE THE JURY MAKE THAT FINDING OF FACT AND THEN AWARD, ORDER THE DEFENDANT TO PAY FOR ALL OF THE FUTURE DAMAGES, WHEN THE ONLY EVIDENCE OF THE NEED FOR THOSE FUTURE DAMAGES IS INEXTRICABLY INTERTWINED OR IS BASED SOLELY UPON THIS SAME CONDITION WHICH THE JURY FOUND WAS NOT CAUSED BY THIS ACCIDENT?

BUT THIS IS JUST AN ARTICULATION OF THE INCONSISTENT VERDICT ISSUE, IS IT NOT?

IT IS THE SAME. IT IS THE SAME, IT IS THE SAME ISSUE, REALLY.

I AM NOT CERTAIN THAT I AGREE WITH YOU THAT IT IS THE SAME ISSUE, BECAUSE YOU MAY HAVE CASES WHERE THERE WILL BE EVIDENCE THAT A PARTICULAR KIND OF DAMAGE WILL CONTINUE INTO THE FUTURE.

WELL, I DON'T THINK THAT THE FOURTH DISTRICT HELD OR INTENDED TO HOLD, AND I DON'T ADVOCATE, MYSELF, THAT THERE CAN NEVER BE A SITUATION WHERE THERE MAY BE SOME SUBSTANTIAL FUTURE DAMAGES OR --

WHAT WAS THE HOLDING IN HAMILTON?

WELL, HAMILTON --

WHAT WAS THE SCENARIO IN HAMILTON?

HAMILTON DID NOT INVOLVE A SITUATION OF CAUSATION. I THINK THAT IS WHY OUR CASE DOES NOT, REALLY, CONFLICT WITH HAMILTON. HAMILTON WAS A STRAIGHTFORWARD, WHAT, WAS THERE SUFFICIENT EVIDENCE OF DAMAGES TO SUPPORT WHAT THE JURY DID, BUT THERE WAS NOT AN ISSUE OF WHETHER THE INJURIES WERE CAUSED BY OUR DEFENDANT OR WHETHER THEY HAD PREEXISTED OR WERE CAUSED BY SOME OTHER FASHION, AND SO THAT, REALLY, ISN'T THE SAME THING AT ALL, AND THERE MAY --.

WHY COULDN'T THE JURY HERE HAVE FOUND, FOR INSTANCE, THAT, ALTHOUGH THERE WAS ALREADY A PERMANENT CONDITION, THAT THIS PLAINTIFF SUFFERED, THAT PREEXISTED, AND WOULD LAST, YOU KNOW, THROUGHOUT THE PLAINTIFF'S LIFE, THAT THE NEED FOR FURTHER MEDICAL ATTENTION AND THE DISABILITY FROM WORK WAS BROUGHT ON BY THE AGGRAVATION. THEREFORE A JURY SAYING, WHEN FACED WITH A QUESTION ABOUT PERMANENCY, SAID, WELL, YOU KNOW WE BELIEVE THERE WAS ALREADY A PERMANENT CONDITION, UNDER OUR UNDERSTANDING OF THE MEDICAL TESTIMONY, BUT INsofar AS THE DISABLING NATURE OF IT, AND THAT KIND OF THING, THAT THAT CAME ABOUT AS A RESULT OF THE AGGRAVATION. COULD A JURY HAVE FOUND THAT, UNDER THE EVIDENCE THAT WAS PRESENTED HERE?

WELL, NOT LEGALLY.

WHAT IS ILLEGAL ABOUT THAT?

I SAID, WELL, THE FINDING OF, IF THE JURY IS FINDING THAT THE INCIDENT, THAT THIS ACCIDENT DID NOT CAUSE THE PERMANENT INJURY, THEN HOW --

WHAT IF THE DOCTOR TESTIFIED THAT THERE IS AN UNDERLYING CONDITION THAT HAS BEEN THERE, AND WOULD HAVE ALWAYS BEEN THERE FOR THE REST OF THAT PERSON'S LIFE, NO MATTER WHETHER THIS ACCIDENT HAPPENED OR NOT, BUT THAT IT WAS UNDER CONTROL, INsofar AS AFFECTING THAT PERSON PERSON'S WORK, AND THE NEED FOR ADDITIONAL MEDICAL CARE, BUT THAT WITH THIS ACCIDENT, THERE WAS NOW A NEED FOR MEDICAL CARE, AND IT BECAME DISABLING.

THE DOCTOR WHO TESTIFIED TO THAT WAS THE SURGEON WHO PERFORM THE SURGERIES. THERE WAS A LOT OF OTHER MEDICAL TESTIMONY, INCLUDING THE PLAINTIFF'S OWN PREVIOUS TREATING PHYSICIANS, WHO SAID THIS ACCIDENT COULD NOT BE THE CAUSE OF THE PAIN AND SO FORTH, THAT THIS GENTLEMAN IS UNDERGOING NOW, BECAUSE HE WENT BACK TO WORK FOR A MONTH.

THERE WAS NO FINDING OF FUTURE PAIN AND SUFFERING, WAS THERE?

WELL, NO, BUT, THOUGH, OF COURSE NOT. BUT ABOUT THE PAIN AND --

WHY COULDN'T THE JURY HAVE DECIDED THEIR VERDICT, ON THE BASIS OF THE THEORY THAT I JUST POSTULATED TO YOU? COULD A JURY HAVE DONE THAT?

I DON'T SEE HOW A JURY COULD FIND THAT, PERHAPS I AM BEING OVER SIMPLICITY -- OVER SIMPLISTIC, BUT I DON'T THINK SO. I THINK, IN ORDER FOR THERE TO BE AN AWARD, IN ORDER FOR THE JURY TO FIND THAT THERE WAS A PERMANENT JURY CAUSED BY THE ACCIDENT, THERE MUST BE EVIDENCE OF THAT, AND I AM NOT SAYING THAT THERE ISN'T. THE JURY COULD HAVE FOUND. THEY COULD HAVE RELIED. THEY COULD HAVE BELIEVED THE TESTIMONY OF THIS ONE DOCTOR, AND THEY COULD HAVE BELIEVED THE PLAINTIFF'S TESTIMONY OH, WELL, I WENT BACK TO WORK BUT I DIDN'T REALLY FEEL GOOD, BUT THEY DIDN'T. THEY FOUND THERE WAS NO PERMANENCY, AND THAT IS WHY THE AWARD, THEN, THERE WAS NO EVIDENCE OF ANY OTHER

KIND OF MEDICAL PROBLEM THAT COULD HAVE BEEN CAUSED BY THE ACCIDENT, OTHER THAN THIS BACK INJURY, AND -- THIS BACK INJURY, AND THIS BACK INJURY WAS PREEXISTING, AND THE JURY HAD TO HAVE FOUND THAT. THAT IS, REALLY, I --

YOU COULD NEVER HAVE A PERMANENT INJURY, THEN, IF YOU HAVE A PREEXISTING CONDITION. IS THAT BECAUSE ARE SAYING?

NO. I AM NOT SAYING THAT THAT AT ALL. I AM SAYING THAT THERE WAS CONFLICTING --

WELL, IF YOU HAVE A PREEXISTING CONDITION THAT AMOUNTS TO A PERCENTAGE OF DISABILITY, HOW COULD YOU HAVE A PERMANENT DISABILITY FROM A SUBSEQUENT ACCIDENT? THAT IS WHAT I AM GETTING OUT OF YOUR ARGUMENT, WHETHER THAT IS WHAT YOU ARE SAYING OR NOT.

WELL, I THINK THAT IT IS ENTIRELY POSSIBLE THAT YOU COULD HAVE A JURY FIND THAT SOMETHING HAD AGGRAVATED IT. IT MAY HAVE BEEN THE NEED FOR THE MEDICAL, IS WHAT WE ARE TALKING ABOUT, THE NEED FOR THE MEDICALS, AND THE FACT THAT THE PLAINTIFF CAN NO LONGER WORK. WAS THAT CAUSED BY THIS ACCIDENT? WAS THAT A PERMANENT CONDITION, CAUSED BY THIS ACCIDENT? THE COURT, THE JURY SAID, YES, IT IS PERMANENT, OR, EXCUSE ME, SAID, NO, IT IS NOT PERMANENT, BUT, YES, IT IS THE CAUSE OF THE FUTURE DAMAGES, AND SO THIS, TO ME, SAYS THAT THIS JURY WAS VERY CONFUSED.

CHIEF JUSTICE: JUSTICE LEWIS --

LET'S GET BACK TO THAT ASPECT OF IT. DO YOU AGREE OR DO YOU DISAGREE, WITH REGARD TO THE STANDARD OF APPELLATE REVIEW, FOR AN INCONSISTENT VERDICT AND ONE THAT IS EXCESSIVE? ISN'T THERE A DIFFERENT STANDARD FOR THOSE TWO, IF I AM LOOKING AT A VERDICT, IS IT INCONSISTENT ON APPEAL, AS OPPOSED TO JUST AN EXCESSIVE OR INADEQUATE VERDICT. AREN'T THOSE DIFFERENT STANDARDS?

IN THIS CASE, IT SEEMS, PERHAPS SO, YES, BUT I AM JUST SAYING --

THAT IS WHY I AM TRYING TO GET TO THE ANALYSIS, AND HERE, IF WE ARE TALKING ABOUT AN INCONSISTENT VERDICT, IT IS MY UNDERSTANDING THAT YOU ARE REQUIRED TO BRING THAT TO THE ATTENTION OF THE JURY BEFORE THEY ARE DISCHARGED, AND THEN DID THAT HAPPEN HERE, AND WAS THE JURY REINSTRUCTED IN SOME WAY?

WAS VOCIFEROUSLY BROUGHT TO THE ATTENTION OF THE COURT AND THE DEFENSE COUNSEL BEGED THE JUDGE TO REINSTRUCT THE JURY, AND THE JUDGE SAID NO AND DID NOT DO IT. DID NOT.

BUT THE HOLDING OF THIS CASE IS THAT, UNDER THE FACTS OF THE INSTANT CASE, READING FROM THE DISTRICT COURT'S OPINION AT 1022 UNDER THE FACTS OF THE INSTANT CASE, A FINDING OF A PERMANENT JURY IS ESSENTIAL TO -- OF A PERMANENT INJURY IS ESSENTIAL TO ESTABLISH THESE DAMAGES WITH REASONABLE CERTAINTY. THAT IS THE HOLDING OF THIS CASE.

THAT IS THE, THE REASON THAT IT MAKES A DIFFERENCE IN THIS CASE IS THAT, UNLIKE ANOTHER CASE, LET'S SAY, THERE WAS NO OTHER TYPE OF INJURY IN THIS CASE THAT COULD HAVE, THAT, THE EVIDENCE IN THIS CASE WAS THAT THE NEED FOR THE FUTURE DAMAGES WAS SOLELY BECAUSE OF THE BACK PROBLEM. THERE WERE NO OTHER INJURIES. FOR EXAMPLE, IF, IN ADDITION TO AGGRAVATING HIS BACK, LET'S JUST ASSUME THAT THE JURY THOUGHT THAT, WELL, THIS ACCIDENT HURT HIS BACK TO SOME DEGREE. IF, IN ADDITION TO THAT, IT HAD, ALSO, BROKEN HIS LEG OR CAUSED, YOU KNOW, HE HAD A BRAIN INJURY OR SOMETHING LIKE THIS, THEN, IF THE EVIDENCE AS TO THE NEED FOR FUTURE MEDICAL TREATMENT HAD TO DO WITH THAT INJURY, THEN THAT WOULD, IT WOULD BE SUSTAINABLE, BUT WHAT THE COURT, WHAT THE

FOURTH DISTRICT IS SAYING HERE IS THERE WAS NO OTHER INJURY. THE ONLY INJURY IN THIS CASE THAT WAS PRESENTED AS REQUIRING THIS FUTURE TREATMENT AND SO FORTH, WAS THIS BACK INJURY. IT WAS INEXTRICABLY INTERTWINED, AND IT IS LIKE, WHEREAS IN THE LADNER CASE, THEY TALKED ABOUT IT BEING AN INJURY, INDEPENDENT OF THE CONDITION WHICH THE JURY FOUND WAS NOT CAUSED BY THE ACCIDENT, BUT HERE, THERE WAS NO OTHER. IT WAS ALL INTERTWINED. IT WAS THE BACK THAT CAUSED THE PROBLEM. IT WAS THE BACK THAT THE JURY FOUND WAS NOT CAUSED BY THE ACCIDENT. NOW, I KNOW I HAVE PROBABLY GONE ON TOO LONG ON THIS POINT IN MY JURISDICTIONAL BRIEF,. I MADE THE POINT AND I STILL FEEL THIS WAY, EVEN THOUGH I REALIZE THE COURT HAS ACCEPTED JURISDICTION. I BELIEVE THAT THIS CASE DOES NOT CONFLICT WITH TOMPKINS. I THINK THE COURT WAS TRYING TO FOLLOW TOMPKINS, AND SIMPLY WAS APPLYING IT TO THE SPECIFIC FACTS OF THIS CASE, THE SAME WITH THE MELBOURNE CASE. IT, THAT WAS A DIFFERENT TYPE OF CASE. IT HAD A DIFFERENT ISSUE, AND IT'S ALL VERY FACT-SPECIFIC. IN THIS CASE, I THINK THAT THE FOURTH, WHAT THE FOURTH DISTRICT WAS SAYING IS THAT THE RECORD HERE, AND THE EVIDENCE SUPPORTING THE CLAIM FOR DAMAGES WAS SUCH THAT THERE WAS NO, THERE WAS NOT SUFFICIENT EVIDENCE TO ESTABLISH, WITH A REASONABLE CERTAINTY, THAT THERE WAS ANY OTHER INJURY CAUSED BY THE ACCIDENT, OTHER THAN THIS DOCUMENTED PREVIOUS ADDITION.

THE PROBLEM THAT I AM HAVING, WITH READING OF THIS OPINION, IS THAT THAT LANGUAGE, AT AN APPELLATE LEVEL, IS GENERALLY PIGEON HOLE WITHIN -- PIGEON HOLED WITHIN THE CATEGORY OF BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AS OPPOSED TO HAVING THE COURT OF APPEALS KIND OF SITTING IN SECOND JUDGMENT OF THAT MATTER. I MEAN, THAT IS, I DON'T KNOW THAT THERE IS AN ANSWER REQUIRED TO THAT, BUT IT JUST IS, I WILL ASK YOUR OPPONENT ABOUT THAT.

CHIEF JUSTICE: YOUR TIME IS EXPIRED NATURALLY. THANK YOU VERY MUCH.

MAY IT PLEASE THE COURT. JUSTICE LEWIS, GOING TO YOUR QUESTION, ABOUT INCONSISTENCY OF THE VERDICT, I JUST WANT TO CALL YOUR ATTENTION TO SOME LANGUAGE IN LUDWIG V LADNER, THAT SEEMS TO GO AGAINST THAT, IN LUDWIG, IT WAS NOT BROUGHT TO THE COURT'S ATTENTION THAT THERE WAS AN INCONSISTENCY, BUT THE COURT, THERE, HELD THAT, DESPITE THAT FACT, THAT IT COULD STILL, IT WAS STILL PRESERVED AND COULD BE REVIEWED ON APPEAL. THE CASES DO, GENERALLY, THOUGH, SAY, IF IT IS AN INCONSISTENT VERDICT, YOU HAVE TO CALL IT TO THE COURT'S ATTENTION, BEFORE THE JURY IS DISCHARGED, AND THERE IS NO QUESTION, IF YOU READ, I THINK IT IS PAGE 2348 AND FOLLOWING OF THE TRANSCRIPT IN THIS CASE, YOU WILL SEE THE NUMEROUS QUESTIONS THE JURY ASKED, AND THIS JURY WORKED VERY HARD TO REACH A VERDICT THAT WE THINK IS SUPPORTED.

WELL, ISN'T THE HOLDING OF THE FOURTH DISTRICT WHAT I READ TO YOUR OPPONENT THAT, UNDER THE FACTS THE INSTANT CASE, A FINDING OF PERMANENT INJURY IS ESSENTIAL TO ESTABLISH THESE DAMAGES WITH REASONABLE CERTAINTY, UNDER THE FACTS OF THIS CASE. ISN'T THAT WHAT THE HOLDING --

THAT IS, IN PART, WHAT THEY SAY, YES. THAT IS, I WOULD AGREE THAT IS PART OF THE HOLDING, AND THEY DO SAY, AS MRS. HOFFMAN POINTS OUT IN THE BEGINNING OF THE OPINION, THAT THE VERDICT WAS INCONSISTENT AND EXCESSIVE AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A NEW TRIAL ON CAUSATION AND DAMAGES, AND THE NEW TRIAL WAS ONLY LIMITED TO CAUSATION AND DAMAGES. IN OTHER WORDS PERMANENT, THE PERMANENCY ISSUES AND THE DAMAGES ISSUES. ANOTHER FOURTH DISTRICT DOES NOT SAY YOU CANNOT RECOVER FUTURE DAMAGES, WITHOUT A FINDING OF PERMANENCY. DOES IT?

NOT EXPRESSLY, BUT WHAT THEY DO, JUSTICE HARDING, IS, AND, AGAIN, I GO BACK TO HAMILTON, AND I WANT TO POINT OUT A COUPLE OF THINGS TO THE COURT ABOUT HAMILTON.

DO THEY CITE TOMPKINS?

THEY CITE TOMPKINS.

AND ALL THAT LANGUAGE THAT JUSTICE OVERTON PUT IN THERE, THAT THERE WAS NO NECESSITY FOR FINDING OF PERMANENCY TO AWARD FUTURE DAMAGES?

CORRECT. BUT THEY GO ON, AND THEY SAY, BUT YOU CAN'T, YOU CAN'T AWARD THEM FOR THE BALANCE OF THE LIFE.

BUT WHEN THE EVIDENCE DOES NOT SUPPORT THAT.

I THINK THAT COMES BACK TO THE, AT LEAST WHAT I GET FROM JUSTICE ANSTEAD'S QUESTIONS, IS, IT IS A JURY FUNCTION TO DECIDE WHETHER THERE IS EVIDENCE THERE TO SUPPORT IT, AND THE PROBLEM IN THIS --

WHAT IS OUR STANDARD OF REVIEW, IN THAT, ON THATISH WITHDREW?

IF IT IS, AS JUSTICE WELLS IS SUGGESTING, AND THAT IS IT IS A MANIFEST WEIGHT OF THE EVIDENCE ISSUE, WHICH SAYING IS THERE REASONABLE EVIDENCE TO PROVE SOMETHING, I THINK, IS A MANIFEST WEIGHT OF THE EVIDENCE ISSUE, THEN IT IS WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE MOTION FOR NEW TRIAL, AND ALL OF THESE THINGS WERE THE BASIS OF THE MOTION FOR NEW TRIAL THAT WAS FILED BY BOTH DEFENDANTS.

AND SO THE DISTRICT COURT DETERMINED THAT THE TRIAL JUDGE ABUSED THE DISCRETION.

YES, SIR.

AND WHAT IS OUR STANDARD OF REVIEW OF THE DISTRICT COURT OPINION?

YOU KNOW WHAT? CAN'T ANSWER THAT RIGHT NOW.

WELL, DID THE DISTRICT COURT DO THAT? DID THE DISTRICT COURT SAY THAT WE ARE DECIDING THIS ON THE BASIS OF THE MANIFEST WEIGHT OF THE EVIDENCE?

WHAT THEY SAY IS THE VERDICT WAS INCONSISTENT AND EXCESSIVE, AND THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT A NEW TRIAL ON CAUSATION AND DAMAGES. THEY DO NOT USE THE LANGUAGE "MANIFEST WEIGHT OF THE EVIDENCE EVIDENCE", BUT I HAD NOT CONSIDERED THE SUGGESTION THAT JUSTICE WELLS MAKES, AND THAT IS THAT, WHEN YOU REALLY TALK ABOUT IS THERE REASONABLE EVIDENCE TO SUPPORT IT, AREN'T YOU TALKING ABOUT A MANIFEST WEIGHT OF THE EVIDENCE? I THINK I HAVE A FEW SECONDS MORE, AND I JUST WANT TO POINT OUT TO THE COURT THAT, IN THE HAMILTON CASE, AND I THINK IT IS FACTUALLY VERY, VERY SIMILAR TO THIS CASE, IN HAMILTON, THERE IS NO PERMANENT INJURY, BUT THERE IS EVIDENCE THAT, FOR THE REMAINDER OF THE MAN'S WORK LIFE HE HAS HAD A DIMINUTION IN EARNING CAPACITY. THANK YOU.