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Naji Nehme v. SmithKline Beecham Clinical Laboratories, Inc.

MARSHAL: PLEASE RISE. HEAR YE. HEAR YE. HEAR YE. THE SUPREME COURT OF THE GREAT STATE OF FLORIDA IS NOW SESSION. ALL WHO HAVE CAUSE TO PLEA, DRAW NEAR, GIVE ATTENTION AND YOU SHALL BE HEARD. GOD SAVE THESE UNITED STATES, THE GREAT STATE OF FLORIDA AND THIS HONORABLE COURT. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

CHIEF JUSTICE: GOOD MORNING EVERYONE. JUSTICE WELLS IS RECUSED ON THIS CASE, AND THE COURT WILL TAKE A RECESS OF 3 OR 4 OR 5 MINUTES AFTER THIS CASE, IN ORDER TO HAVE THE FULL PANEL CONSTITUTED AFTERWARD, SO WITHOUT ANY FURTHER ADO, NAJI NEHME, VERSUS SMITHKLINE BEACHAM. YOU MAY PROCEED.

ON BEHALF OF THE PETITIONER NAJI NEHME, AS PERSONAL REPRESENTATIVE, THE ESTATE, AGAINST SMITHKLINE BEACHAM, AND WE ARE HERE TO DETERMINE WHETHER THE STATUTE CAN ENCARVE US MEDICAL DIAGNOSIS BY A MEDICAL PROVIDER.

ARE YOU TAKING THE POSITION THAT THE WORD IS AMBIGUOUS OR THAT IT HAS A PLAIN MEAN SOMETHING.

NO. WE BELIEVE IT HAS A PLAIN MEANING. TO CONCEAL IS TO HIDE FROM VIEW, BASED ON NARDONE, WHICH INDICATED THAT A DOCTOR'S CONSTRUCTIVE KNOWLEDGE THROUGH EFFICIENT DIAGNOSIS, THE WITHHOLDING OF THAT IS SUFFICIENT TO CONSTITUTE FRAUDULENT CONCEALMENT UNDER THE COMMON LAW, THAT THIS TERM CONCEALMENT DOES NOT REQUIRE ACTUAL INTENT, AND THAT THE LEGISLATURE WAS SIMPLY, YOU KNOW, WE KNOW THAT THE LEGISLATURE IS PRESUMED TO KNOW THE STATE OF THE LAW IN THE AREA IN WHICH THEY ARE LEGISLATING, AND AT THE TIME THAT THEY ENACTED THIS STATUTE, NARDONE WAS THE CASE ON MEDICAL MALPRACTICE.

COMING BACK TO THE ISSUE ABOUT AMBIGUOUS OR PLAIN MEANING, WOULDN'T THE ORDINARY PERSON, ON THE STREET, CON NOTE SOME INTENT BEHIND THE WORD "CONCEALMENT?" THAT IS THAT SOMEBODY IS ACTIVELY CONCEALING SOMETHING, THAT THEY KNOW ABOUT IT AND THAT THEY HAVE SOME INTENT TO CONCEAL WHATEVER IS THE OBJECT OF THE CONCEALMENT. WOULDN'T THAT BE THE ACCEPTED THING OUT THERE TODAY?

WELL, IT MIGHT BE, IN A CONTEXT WHERE YOU HAVE A FIDUCIARY RELATIONSHIP. IN OTHER WORDS, IF YOU LOOK AT THE PRODUCT'S LIABILITY STATUTE OF REPOSE, THE LEGISLATURE ACTUAL USED THE TERM WHERE THE DEFENDANT TAKES AFFIRMATIVE STEPS TO CONCEAL THE DEFECT N THAT SCENARIO, THE LEGISLATURE OBVIOUSLY DETERMINED THAT IT NEEDED TO STATE AFFIRMATIVE STEPS TO CONCEAL. THE DIFFERENCE IS, WHILE YOU MIGHT ASK SOMEBODY ON THE STREET ABOUT CONCEALING AN OBJECT OR SOMETHING LIKE THAT, WHEN WE ARE DEALING WITH HEALTHCARE PROVIDERS AS A FIDUCIARY DUTY THAT EXTENDS BEYOND THAT AND THEY ARE PRESUMED TO BE ON NOTICE AS TO THINGS NOT ONLY THAT THEY ACTUALLY KNOW BUT, UNDER NARDONE, WHAT THEY COULD LEARN THROUGH EFFICIENT DIAGNOSIS.

WELL, BUT EVEN IF YOU ACCEPT THE FACT THAT THERE IS NO INTENT REQUIREMENT WHEN YOU ARE TALKING ABOUT CONCEALMENT, WOULDN'T THERE HAVE TO BE SOME KIND OF KNOWLEDGE ELEMENT TO THIS? I MEAN, WHEN YOU TAKE THIS BACK, TO THE MEDICAL TECHNICIAN WHO

ACTUALLY READ THE SLIDE, WOULDN'T YOU HAVE TO START WITH THERE WAS SOME KNOWLEDGE THAT THE READING OF THE SLIDE WAS INCORRECT?

WE DO NOT BELIEVE SO, BECAUSE THE PURPOSE IS NOT TO PUNISH THE DEFENDANT FOR INTENTIONAL MISCONDUCT. THE PURPOSE IS TO ENSURE THAT A DEFENDANT DOES NOT BENEFIT FROM THE WRONGDOING.

WHAT, EXACTLY, WAS WRONG HERE?

WHAT WAS WRONG WAS THAT THE EVIDENCE IS THAT, AT THIS STAGE, ANYWAY, AND THEY CERTAINLY HAVE THEIR OPPORTUNITY, I MEAN, SUMMARY JUDGMENT HASN'T BEEN DETERMINED, BUT OUR EVIDENCE IS THAT THE CELLS ON THE SLIDE WERE AS BIG AS A HOUSE THAT, IT WAS CLEARLY MISREAD, AND WHAT HAPPENED IS, BECAUSE OF THE UNIQUE NATURE OF HOW THESE LABORATORY TESTS ARE TAKEN AND CONVEYED, THE ACTUAL SLIDE IS NOT PART OF THE MEDICAL RECORDS. IT IS NOT SOMETHING THAT OUR CLIENT IS PRESUMED TO KNOW.

WELL, HOW DO YOU DIFFERENTIATE, THEN, BETWEEN A MISTAKE AND ACTUAL CONCEALMENT?

WELL, THAT WOULD GO TO WHAT NARDONE TALKS ABOUT WHAT A HEALTHCARE PROVIDER SHOULD KNOW OR KNOWS THROUGH EFFICIENT DIAGNOSIS, AND WE BELIEVE THAT THAT PHRASE, "EFFICIENT DIAGNOSIS", IN THAT CONTEXT, REFERS TO A SPECIALIST, HEALTHCARE PROVIDER, WHATEVER.

WOULDN'T THAT REQUIRE, THEN, EVERY DOCTOR TO GO BEHIND THE TECHNICIAN, WHO MAKE SURE THAT THE READING OF THE SLIDE WAS, IN FACT, A PROPER READING?

WELL, IF THE, IF THE SLIDE WERE PART OF THE MEDICAL RECORDS, WE WOULD BE ON NOTICE AS TO THEM, AND PERHAPS COULD HAVE, FOR EXAMPLE, OBTAINED A SECOND OPINION OR SOMETHING, BUT TO SAY, I MEAN, THIS IS A UNIQUE SCENARIO, BECAUSE THESE KINDS OF TESTS, AS I SAID, ARE NOT THE ACTUAL RAW DATA NOT CON VAID INTO THE MEDICAL RECORDS, AND THIS IS ALSO NOT A SITUATION WHERE WE ARE SAYING, IN EVERY NEGLIGENT DIAGNOSIS CASE, THIS CONCEPT WOULD APPLY, BECAUSE THESE ARE THE KINDS OF TESTS THAT ARE DONE AS PREVENTATIVE MEANS. IF SOMEONE ISN'T GOING IN WITH SIMPSOLS AND GETTING A DIAGNOSIS AND -- SYMPTOMS AND GETTING A DIAGNOSIS AND MAYBE OVER THE COURSE OF SIX MONTHS OR A YEAR THEY ARE PUT ON NOTE -- ON NOTICE THAT YOU NEED TO CHECK THIS OUT.

ISN'T THE GIST YOUR CAUSE OF ACTION THAT THERE WAS A NEGLIGENT READING OF THE SLIDE?

CORRECT.

THAT, AND THAT THE BASIS OF THAT IS THAT A REASONABLY PRUDENT PERSON READING THAT, SKILLED PERSON READING THAT SLIDE, KNEW OR SHOULD HAVE KNOWN WHAT WAS ON IT!

YES.

OKAY. SO THE BASIS OF YOUR CAUSE OF ACTION IS THE SAME AS THE BASIS FOR ESTABLISHING CONCEALMENT. ISN'T TAKE CORRECT?

RIGHT.

SO THAT INTERPRETATION, THEN, OF THE STATUTE, THEN THERE IS NO REASON TO HAVE A DIFFERENCE BETWEEN NEGLIGENCE AND CONCEALMENT.

THAT IS WHAT THE FOURTH DISTRICT INDICATED IN THE MANGONE CASE THAT, THERE WAS NO REASONABLE BASIS TO CONCLUDE THAT THE NEGLIGENT ACTOR CONCEALMENT HAD TO BE

SEPARATE, AND AGAIN, WHAT IS DIFFERENT HERE IS THE RAW DATA IS ESSENTIALLY CONCEALED AS, YOU KNOW, FROM THE PATIENT.

DOESN'T THAT RENDER THE STATUTE A NULLITY? THE DIFFERENCE, THE DISTINCTION THAT THE STATUTE, YOU WOULD HAVE TO AGREE THAT THE STATUTE IS TRYING TO DRAW SOME DISTINCTION.

CERTAINLY.

AND TRYING TO SAY THAT YOU GET A LONGER PERIOD OF TIME, IF THERE, TO FILE THE ACTION, IF THESE THREE ELEMENTS EXIST, THAN YOU WOULD IN THE ORDINARY RUN-OF-THE-MILL MALPRACTICE CASE? ISN'T THAT CORRECT?

CORRECT.

AND IT REALLY, ACTUALLY, WHAT YOU ARE TALKING ABOUT, YOU SAY THIS IS UNIQUE BUT IT IS NOT UNIQUE. THIS IS EXACTLY WHAT HAPPENS ANY TIME THAT SOMEONE READS SLIDES, WHETHER, OR A PAP SMEAR OR ANY OTHER KIND OF DIAGNOSIS, THE SLIDES STAY AT THE LABORATORY, SO ESSENTIALLY, AND THE SAME THING WITH X RAYS. THOSE AREN'T PART OF A PATIENT'S MEDICAL RECORDS, SO BECAUSE ARE SAYING IS THAT SOMEHOW THAT, IN ALL THOSE CASES THAT, ALL THOSE CASES WOULD CONSTITUTE CONCEALMENT AS A MATTER OF LAW.

NO. WE ARE NOT SAYING THAT ALL CONCEALMENT IS A MATTER OF LAW. PART OF THE STATUTE'S PURPOSE HERE, WHILE WE RECOGNIZE THAT A STATUTE OF LIMITATIONS AND A STATUTE OF REPOSE HAVE HARSH CONSEQUENCES, THEY DO NOT HAVE TO BE CONSTRUED IN THAT MANNER, AND THERE HAS TO BE SOME ELEMENT OF FAIRNESS TO THE PLAINTIFF, BECAUSE YOU ARE PUTTING THE PLAINTIFF IN A SITUATION WHERE THERE IS NO WAY THAT THEY CAN KNOW THIS.

LET ME COME BACK TO JUSTICE QUINCE'S QUESTION ABOUT KNOWLEDGE. HOW CAN YOU CONCEAL SOMETHING THAT YOU MISSED? THAT IS HOW CAN YOU CONCEAL SOMETHING, THE VERY CLAIM HERE IS THAT THE EXPERT MISSED, THE DEFENDANT MISSED WHAT WAS THERE. NOW, I REALIZE IN THIS CASE, THE FIFTH DISTRICT HAS WRITTEN AN OPINION THAT SAID THIS THING WAS HUGE OR WHATEVER. BUT NEVERTHELESS WHAT YOUR CLAIMING HERE IS THAT THOSE TWO THINGS WERE MISSED. NOW, AS A FOLLOW-UP TO JUSTICE QUINCE'S QUESTION THAT, IS YOUR CLAIM THAT THEY MISSED IT, AND WHEN YOU SAY THEY MISSED IT, YOU MEAN THEY DIDN'T KNOW ABOUT IT. THEY COULDN'T SEE IT, SO HOW COULD THEY CONCEAL SOMETHING THAT THEY DIDN'T KNOW ABOUT?

THAT IS WHAT NARD ON. NE TALKS "B" AND ADMITTEDLY NARDONE DOES NOT CONSTRUE THIS LANGUAGE, BUT IT STATES THE COMMON LAW CONCEALMENT CONCEPT AND SPECIFICALLY CONCLUDED THAT, WHERE A DOCTOR FAILED TO CONVEY INFORMATION THAT WAS IN DIAGNOSIS.

BUT ISN'T THE OTHER LANGUAGE IN NARDONE WHICH YOU HAVEN'T MENTIONED, WHICH IS THAT, LET ME JUST READ IT TO YOU "WE DO RECOGNIZE THE FIDUCIARY CONFIDENTIAL RELATIONSHIP OF PHYSICIAN IMPOSEING A DUTY TO DISCLOSE, BUT THIS IS A DUTY TO DISCLOSE KNOWN FACTS AND NOT CONJECTURE AND SPECULATION ABOUT POSSIBILITIES." DOESN'T THAT STATEMENT SAY THAT YOU CAN'T CONCEAL WHAT YOU DON'T KNOW, AND THE ONLY DUTY TO DISCLOSE THAT A DOCTOR HAS IS TO DISCLOSE SOMETHING THAT HE KNOWS ABOUT?

WELL THERE, IS CERTAINLY CONTRADICTORY LANGUAGE IN THAT CASE, AND IN FACT THAT, I BELIEVE, IS THE BASIS FOR WHY THE FIFTH DISTRICT CERTIFIED IT HERE.

IN FACT THERE WAS NO ISSUE ABOUT EFFICIENT DIAGNOSIS IN NARDONE, CORRECT?

WELL, THERE WAS A QUESTION OF CAUSE.

BUT THAT EFFICIENT DIAGNOSIS LANGUAGE, THAT WAS REALLY DICTUM, BECAUSE THAT REALLY DIDN'T CONCERN THE ISSUE AT HAND IN NARDONE, ISN'T THAT CORRECT?

WELL, I DON'T BELIEVE THAT IS TRUE BECAUSE THE QUESTION IN THAT CASE WAS WHETHER A PARTICULAR PROCEDURE HAD AN EFFECT THAT WAS ADVERSE ON THE PATIENT, AND THAT DIAGNOSIS AS TO WHETHER THAT PRORT PROCEDURE HAD A -- WHETHER THAT PROCEDURE HAD AN EFFECT OR WAS A CAUSE IN A CHILD'S DETERIORATION, WAS IN ESSENCE A FORM OF DIAGNOSIS, AND IT WAS, I MEAN, THE FACTS OF THAT CASE WHERE THE CHILD WENT IN WITH SOME PROBLEMS, THERE WAS A SERIES OF SURGICAL PROCEDURES, THE CHILD IMPROVED, THEN THERE WAS A PROCEDURE WHERE THE CHILD DEMISED, DID NOT DEMISE BUT THE CHILD'S CONDITION DETERIORATED RAPIDLY AND THEN WAS DISCHARGED, AND THE QUESTION WAS THAT ONE PROCEDURE WAS, WERE THE PARENTS TOLD THAT THAT PROCEDURE OCCURRED, AND DID IT HAVE ANY RELATIONSHIP, AND IN THAT CASE, THEY DID NOT REVEAL TO THE PARENTS THAT POSSIBLE CAUSATION WHICH WOULD INVOLVE AN ELEMENT OF DIAGNOSIS, AND THAT WAS THE QUESTION. OF COURSE THEY DIDN'T RESOLVE IT ULTIMATELY. THEY SIMPLY CERTIFIED THE QUESTIONS BACK TO --

HOW DO YOU TAKE THE FACT THAT THE STATUTE, BECAUSE WE ARE STILL DEALING WITH A STATUTORY CONSTRUCTION, AND WHAT THE LEGISLATURE INTENDED TO DO IF THE STATUTE REPOSE SAYS FRAUD, CONCEALMENT OR INTENTIONAL MISREPRESENTATION, SO THAT FRAUD, YOU WOULD AGREE, CERTAINLY INVOLVES ACTUAL KNOWLEDGE.

YES.

INTENTIONAL MISREPRESENTATION, INVOLVES AN ELEMENT OF INTENT, SO I DON'T KNOW WHAT THE EXACT PHRASE IS, BUT THE FACT THAT THOSE ARE PUT ALL TOGETHER, DOESN'T THAT, AGAIN, INDICATE AN INTENT ON THE LEGISLATURE'S PART THAT THIS ALL BE SOMETHING WHERE THE HEALTHCARE PROVIDER HAS DONE SOMETHING AFFIRMATIVE OR KNOWS ABOUT IT AND FAILS TO CONVEY SOMETHING THAT THEY KNOW ABOUT?

WELL, WE HAVE CITED THREE STATUTES IN OUR BRIEF, WHERE THE LEGISLATURE HAS INCLUDED LANGUAGE RELATING TO WHAT WE WOULD CALL, GENERICALLY THE FRAUDULENT CONCEALMENT CONCEPT. TWO OF THEM INVOLVING NURSING HOMES, SAY FRAUDULENT CONCEALMENT TOGETHER, NOT DISJUNKTIVELY AS THEY DO HERE. THE THIRD IS A LIABILITY PROVISION AS IN THE SAME STATUTE THAT WE ARE DEALING WITH HERE, AND IT TALKS ABOUT AFFIRMATIVE STEPS TO CONCEAL, SO WE HAVE CITED CASES FROM THIS COURT, WHERE IT HAS ANALYZED STATUTES SUCH AS THIS BY COMPARING THEM TO OTHER STATUTES AND THE SORT OF COMMON SENSE PRINCIPLE IS WHERE THE LEGISLATURE WANTS TO BE CLEAR THAT, IN THIS CASE INTENTIONAL CONDUCT IS WHAT IS REQUIRED, THEY KNOW HOW TO SAY IT, AND THEY DID NOT SAY IT HERE.

WHAT, THE FACT THAT THEY ALSO USED THE WORD "PREVENTED THE DISCOVERY." THAT DOESN'T CON NOTE TO YOU SOME TYPE OF ACTION, EITHER AN AFFIRMATIVE INTENT OR KNOWING ABOUT SOMETHING AND FAILING TO DO SOMETHING ABOUT IT?

I DON'T BELIEVE ANYBODY HAS ARGUED THAT, BUT IN THIS CASE, WHETHER IT WAS INTENTIONAL OR NOT, THE CONCEALMENT OF THE RAW DATA PREVENTED US FROM MAKING ANY CONNECTION, BECAUSE, OF COURSE, IT PREVENTED DISCOVERY OF THE JURY, WHICH -- OF THE INJURY, WHICH UNDER TANNER VHARTOG REQUIRES NOT ONLY THE KNOWLEDGE OF THE PHYSICAL CONDITION BUT KNOWLEDGE OF THE REASONABLE POSSIBILITY OF MEDICAL NEGLIGENCE.

YOU TALK ABOUT FAIRNESS IN THIS CASE, AND OBVIOUSLY ANY TIME THAT SOMEBODY CAN'T BRING A CAUSE OF ACTION BECAUSE THEY DIDN'T KNOW ABOUT IT BEFORE THE STATUTE

EXPIRED, THERE IS UNFAIRNESS, BUT YOU HAVE CONCEDED THAT STATUTES OF REPOSE CAN BE CONSTITUTIONALLY IMPOSED.

YES.

HERE IS A SITUATION WHERE, IN 1994, THERE WAS A PAP SMEAR, CERVICAL CANCER WAS DIAGNOSED IN '97. WHAT HAPPENED IN '95 AND '96? WERE THERE PALP SMEARS IN THOSE YEARS?

THERE IS NO EVIDENCE IN THE RECORD THAT THERE WERE. NOW, THEY RELY ON TESTIMONY OF MY CLIENT, WHERE HE HAD SOME CONCERN, AFTER SHE WAS DIAGNOSED, AND THEY SAY, AH-HA, HERE IS EVIDENCE OF KNOWLEDGE OF THE INJURY, SUFFICIENT TO ESSENTIALLY DEFEAT OUR RESPONSE TO THEIR AFFIRMATIVE DEFENSE.

IN OTHER WORDS THAT THE CANCER WAS ACTUALLY DISCOVERED WITHIN THE FOUR-YEAR TIME PERIOD.

YES. AND WHAT HAPPENED WAS, WHEN, AND THE REASON WHY HIS TESTIMONY DOES NOT SUPPORT THAT, IS HIS TESTIMONY WAS SHE WAS DIAGNOSED INITIALLY WITH CANCER AND WAS TOLD IT WAS STAGE ONE CERVICAL CANCER. WITHIN A MONTH, THEY TOLD HIM IT WAS STAGE FOUR, AND HE SAID YOU KNOW, JUST FROM WHAT HE HAD SEEN ON THE INTERNET, HOW CAN IT GO FROM STAGE ONE TO STAGE IV? THERE IS SOMETHING UP HERE? THERE WAS NEVER ANY PROPOSITION THAT THE INITIAL ONSET OF CANCER WAS SOMETHING THAT HE HAD ANY REASON TO ASSOCIATE WITH THE POSSIBILITY OF ME ON-OF MEDICAL NEGLIGENCE, WHICH IS -- OF MEDICAL NEGLIGENCE, WHICH IS REALLY WHAT WE ARE DEALING WITH HERE WHEN HIS TESTIMONY WAS VERY SPECIFIC, GOING FROM THE TIME FRAME FROM STAGE ONE TO STAGE FOUR, KNEW IT COULDN'T DO THAT IN A MONTH.

WAS THAT THE ISSUE THAT THEY WOULDN'T HAVE KNOWN ABOUT IT WITHIN A FOUR-YEAR PERIOD?

IT IS IN HIS DEPOSITION. THERE ARE NO FINDINGS. IT IS ADDRESSED IN THE BRIEFS. THE NEGLIGENT DIAGNOSIS CANNOT AS A MATTER OF LAW, CONSTITUTE CONCEALMENT.

LET ME ASK YOU.

WHEN WAS --

WILL YOU SPEAK TO THE ISSUE AS TO WHICH VERSION OF THE STATUTE APPLIES?

WELL, ALL ALONG IT HAS BEEN ARGUED AS THE '96 AND IT WAS THEIR AFFIRMATIVE DEFENSE. BEFORE THIS COURT, THEY HAVE NOW SAID IT IS THE '993, AND -- THE '93, AND I CAN SEE THERE IS A BASIS FOR THAT ARGUMENT. THE PROBLEM IS WHETHER IT WOULD HAVE BEEN HANDLED DIFFERENTLY, I DON'T KNOW, BUT IT WOULD APPEAR THAT, YES, THE '93 WOULD APPLY, BUT THAT IS NOT THE WAY IT WAS ARGUED, EITHER IN THE TRIAL COURT OR IN THE FIFTH DISTRICT.

HOW WOULD THAT IMPACT THE CERTIFIED QUESTION, THEN, IF WE APPLY THE '93 VERSION?

WE DON'T BELIEVE IT WOULD CHANGE IT, BECAUSE OUR POSITION IS THAT IT IS THE SAME, THAT THEY WERE PREVENTED FROM DISCOVERING THE INJURY, MEANING THE INITIAL ONSET OF THE CANCER, BECAUSE WE HAD NO REASON THEN TO SUSPECT THAT THERE WAS MEDICAL NEGLIGENCE ASSOCIATED WITH THE ONSET THEY RELY ON THE DEPOSITION TESTIMONY RELATING TO HIS CONCERN ABOUT HOW QUICKLY IT WENT FROM STAGE ONE TO STAGE FOUR.

CHIEF JUSTICE: THE MARSHAL HAS REMINDED YOU THAT YOU ARE INTO YOUR REBUTTAL TIME, IF YOU WANT TO PAUSE NOW. JUSTICE QUINCE HAS A QUESTION.

JUST A QUICK QUESTION. WHEN, ACTUALLY, DID THE PETITIONER DISCOVER THAT THE MEDICAL TECH HAD, IN FACT, MISREAD THE SLIDE?

I DON'T BELIEVE THE RECORD SHOWS THAT AT THE PRESENT TIME, BECAUSE, AGAIN, THE TRIAL COURT'S ANALYSIS WAS SIMPLY AS A MATTER OF LAW, AND THAT IS THE WAY IT WAS ARGUED. THERE IS SOME DISCUSSION AND THERE WAS SOME COLLOQUY ABOUT PREVENTING ATTORNEY/CLIENT PRIVILEGE AT THE DEPOSITION OF MY CLIENT, AND THOSE FACTS WERE NOT DEVELOPED, SO I DO NOT BELIEVE THAT IS IN THE RECORD.

GOOD MORNING. I WILL REFER TO MY CLIENT AS SBCL. WITH ME ARE MY CO-COUNSEL REPRESENTING PREMIER LABORATORIES AND THEIR EMPLOYEES, AND DR. BUCKY HURT SCHUTSKY. I WOULD LIKE TO TAKE ABOUT 20 MINUTES AND REFER TO MY CO-COUNSEL FOR THE REMINDER OF THE TIME, IT I MAY.

CAN YOU CLARIFY AS TO WHO THE THREE DEFENDANTS ARE AND IF THEY ARE HERE IN DIFFERENT SITUATIONS IN THE CASE.

YES, MA'AM. SBCL IS THE REFERENCE LABORATORY TO WHOM THE SLIDES WERE REFERRED TO INTERPRETATION. AT THAT POINT IN TIME, SBCL CONTRACTED ANATOMIC PATHOLOGY TO PREMIER LABORATORIES, SO THE SLIDE WAS, IN TURN, TURNED OVER, THIS SLIDE AND MANY OTHER ANATOMIC TISSUE SPECIMENS WERE TURNED OVER TO PREMIER LABORATORY, WHO DID THE ACTUAL ANALYSIS. THEIR CYTO TECHNICIAN, MRS. LANIHAN, WAS THEIR EMPLOYEE, AND DR. SCHUTSY WAS A PATHOLOGIST EMPLOYED AT THE TIME.

NO PATHOLOGIST?

NO PATHOLOGIST READ THE SLIDE.

DON'T YOU START OUT WITH THE POSITION TO BEGIN WITH, THAT THERE IS SORT OF AN ASSUMPTION HERE THAT THE PLAINTIFF NEVER GOT TO KNOW ABOUT THE WRONGFUL ACT THAT ACTUALITYLY LED TO -- THAT ULTIMATELY LED TO A DETERIORATED CONDITION OF THE DECEASED PERSON, SO WE HAVE A SITUATION WHERE, THEY NEVER EVEN KNEW THAT THEY HAD A CAUSE OF ACTION TO SUE FOR, BECAUSE OF THE CIRCUMSTANCES HERE. IS THAT, I MEAN, ISN'T THAT A STARTING POINT WITH THIS STATUTE OF REPOSE?

IT IS, YOUR HONOR.

I AM NOT SAYING IT IS DIFFERENT FROM OTHER STATUTE OF REPOSES, BUT ISN'T THAT THE STARTING POINT?

IT IS A STARTING POINT, BUT I THINK THE ISSUE THAT YOU POSE WOULD RELATE TO ANY MISDIAGNOSIS CASE, BECAUSE THAT IS THE NATURE OF A MISDIAGNOSIS.

THAT IS WHAT I SORT OF WANT TO GO INTEREST IS SHOULD THAT BE A FACTOR IN WHETHER WE FIND THIS PHRASE TO BE, THIS WORD TO BE AC BILLUATION OR -- AMBIGUOUS OR THE PHRASE TO BE AMBIGUOUS IN OUR INTERPRETATION? SHOULD REWE FIND THAT THIS IS REALLY A VERY -- SHOULD WE FIND THAT THIS IS REALLY A VERY UNFAIR OUTCOME THAT SOMEBODY LOSES A CAUSE OF ACTION BEFORE THEY EVEN GET TO FIND OUT THAT THEY HAVE A CAUSE OF ACTION? DOES THAT HAVE ANY BEARING ON OUR INTERPRETATION OF THE PHRASE HERE?

I DON'T THINK IT HAS A BEARING ON THE OUTCOME OF THE CASE FOR THIS REASON. NEGLIGENT DIAGNOSIS IS JUST ANOTHER FORM OF MALPRACTICE. BY THE NATURE OF THE STATUTE OF REPOSE, WHEN MEDICAL MALPRACTICE OF ANY KIND IS NOT DISCOVERED DURING THE STATUTE OF REPOSE, AND IN ACTION BROUGHT WITHIN THE PERIOD, ABSENT CONCEALMENT OBVIOUSLY, THE PATIENT SUFFERS A HARSH RESULT, AND SO I DON'T THINK THAT THERE IS ANY

JUSTIFICATION IN LOOKING AT A NEGLIGENT MISDIAGNOSIS, SEPARATELY, SEPARATE AND APART FROM ANY OTHER TYPE OF MEDICAL NEGLIGENCE, THAT SIMPLY IS NOT DISCOVERED DURING THE REPOSE PERIOD. THE STATUTE OF REPOSE, AFTER ALL, BY PRONOUNCEMENTS OF THIS AND MANY OTHER COURTS, DOES EXTINGUISH CAUSE OF ACTIONS BEFORE THEY THEY ACCRUE.

ISN'T THIS, THE PHRASE I FORGET THAT THE FIFTH DISTRICT USED BUT THEY USED SOME PHRASE AS BIG AS A HOUSE OR SOMETHING.

RIGHT.

SOMETHING, I TAKE IT THAT THOSE WORDS ARE USED TO SAY SOMETHING THAT WAS OBVIOUSLY THERE. FOR ANY COMPETENT PERSON TO READ THIS THING. CERTAINLY THE DECEASED DIDN'T GET TO SEE THIS OR TO KNOW ABOUT IT, SO IT CERTAINLY WAS CONCEALED FROM HER, WAS IT NOT, IN EFFECT?

WELL, IT WAS NOT CONCEALED FROM ANYBODY, IF THE TERM CONCEALMENT CARRIES WITH IT, TWO THINGS, KNOWLEDGE AND INTENT OR AT LEAST KNOWLEDGE, SO ONCE AGAIN, IT IS THE CHOICE OF THE WORD CONCEALMENT IN THE STATUTE. REMEMBER THE LEGISLATURE DID NOT MAKE AN EXCEPTION TO THE FOUR-YEAR STATUTE OF REPOSE IN THE CASE OF NEGLIGENT MISDIAGNOSIS. THE ONLY EXCEPTIONS ARE CONCEALMENT, FRAUD, AND INTENTIONAL MISREPRESENTATION.

LET ME ASK YOU, BY, IF WE ANSWER THE QUESTION THAT NEGLIGENT DIAGNOSIS IS NOT EQUIVALENT TO CONCEALMENT, DOES THE, DO WE HAVE TO DISAPPROVE THE HERNANDEZ CASE, OR DO YOU SEE THE HERNANDEZ CASE OUT OF THE THIRD DISTRICT AS O'CLOCK DIFFERENT? THAT IS THE ONE --

NO.

-- SPONGE, BUT THEY SAID THEY SAID THAT THEY MUST HAVE HAD RECKLESS DISREGARD, WHEN THE SPONGE COUNT WAS CORRECT BUT IT COULDN'T HAVE BEEN.

I THINK THE FACT THAT THE NURSES IN THAT CASE REPRESENTED THAT THEY HAD, IN FACT, CONDUCTED A PAD COUNT, WHEN THEY HAD NOT, BUT REPRESENTED IT TO HAVE BEEN DONE BY SIGNING OFF ON THE PAD COUNT, IS TANTAMOUNT TO THAT SPECIES OF FRAUD WHICH IS RECKLESS MISREPRESENTATION, AS OPPOSED TO INTENTIONAL MISREPRESENTATION.

SO, IF, IN THIS TASTE CASE, IF IT CAME OUT -- IN THIS CASE THAT IT CAME OUT THAT THIS TECHNICIAN JUST HAD NEVER READ IT --

PRECISELY --

WOULD THAT BE A DIFFERENT SITUATION?

IT WOULD CERTAINLY FALL SQUARELY WITHIN THE REASON OF THE HERNANDEZ CASE, AND I CERTAINLY COULDN'T REPRESENT TO THE COURT THAT THERE WOULD BE ANY POLICY REASON WHY CONCEALMENT COULD NOT OR SHOULD NOT ENCOMPASS THAT KIND OF CONDUCT, BUT OF COURSE THAT DID NOT HAPPEN HERE, AND IN FACT, EVERY ONE OF THE CASES CITED BY THE PETITIONERS IN SUPPORT OF THIS PROPOSITION POST NARDONE, CONTAINED AN ELEMENT OF KNOWLEDGE AND, IN SOME CASES, DELIBERATE MISLEADING OF THE PATIENCE ABOUT THE SO-CALLED ADVERSE CONDITION, THE UNDERLYING ADVERSE CONDITION, WHICH WAS THE SUBJECT OF THEIR COMPLAINT.

SO KNOWLEDGE IS THE KEY OR RECKLESS DISREGARD OF THE TRUTH.

YES. I THINK SO. NOW, YOU KNOW, WE BELIEVE CERTAINLY, AT A MINIMUM, KNOWLEDGE IS AN ABSOLUTE PREREQUISITE AND NOT CONSTRUCTIVE KNOWLEDGE NOW. NOW YOU ARE GETTING INTO WHAT YOU SHOULD HAVE KNOWN AND WHAT YOU SHOULD HAVE KNOWN, IS TRADITIONALLY A NEGLIGENCE STANDARD. WHAT YOU ACTUALLY KNEW BUT FAILED TO DISCLOSE TO THE PATIENT. AND REMEMBER, IN EVERY CASE CITED BY THE PETITIONERS EXCEPT ONE POST-NARDONE, YOU HAD A SITUATION WHERE THERE WAS AN ACT OF MEDICAL MALPRACTICE, WHICH EITHER CAME TO LIGHT TO THE TREATER, OR WAS SIMPLY IGNORED, RECKLESSLY IGNORED, AS IN THE CASE OF HERNANDEZ.

WHAT IS THE DIFFERENCE BETWEEN WHAT YOU ARE TALKING ABOUT THERE AND DISTINGUISHING THOSE CASES? AND A TECHNICIAN OR A PATHOLOGIST, IF A PATHOLOGIST HAD BEEN INVOLVED, SAYING THERE IS NO MALIK NANCY -- MALIGNANCY THERE OR NO IRREGULAR FINDINGS HERE, THERE IS NO TUMORS, THERE IS NO, AND YET THERE IS A TUMOR AS BIG AS A WATERMELON OR AS BIG AS A HOUSE AS THE FIFTH DISTRICT SAID, AND THEY ARE AFFIRMATIVELY SAYING THERE IS NO NOTHING WILL. WHAT IS THE -- THERE IS NOTHING THERE. WHAT IS THE DIFFERENCE BETWEEN THAT AND THE CASES THAT YOU SAY WE SHOULD DISTINGUISH LIKE THE SPONGE?

WELL, FIRST OF ALL, I TAKE ISSUE WITH THE NOTION THAT THE RECORD ESTABLISHES CONCLUSIVELY THAT THERE WAS ANYTHING THAT, THERE WAS MALIGNANCY ON THIS SLIDE. WHAT THE FIFTH DISTRICT QUOTED WAS A STATEMENT MADE BY THE PETITIONER'S EXPERT WITNESS, DR. ROSEN THAT WILL, I LEAVE HER NAME WAS -- DR. ROSENTHAT, I BELIEVE HER NAME WAS, HOWEVER THERE WAS NO CONCLUSION BY THE DEFENSE EXPERTS IN THAT CASE. BUT NONETHELESS, THE PAP SMEAR AS WE KNOW IS A SCREENING DEVICE. IT IS DONE BY CITE-TECHNICIANS. THE -- BY CYTO TECHNICIANS. IT IS SHOWN TO REDUCE BY 70 PERCENT THE MORTALITY FROM CERVICAL CANCER BUT NOT 100 PERCENT. COTO TECHNICIANS ARE TRAINED TO LOOK AT PALP SMEARS. THERE IS A NONREDUCEABLE FALSE NEGATIVE OF 5-TO-10 PERCENT IN THE LABORATORIES. A CASE IS OCCASIONALLY GOING TO SLIP THROUGH, AND FROM MY EXPERIENCE, IT IS DIFFERENTLY AN ART NOT A SCIENCE, AND THERE IS ALL KINDS OF LITERATURE ABOUT HOW A REASONABLE PATHOLOGIST CAN DIFFER AS TO WHAT IS DISCLOSE ODD A GIVEN SLIDE, SO I WOULD RESPECTFULLY SUBMIT THAT IT IS DEFINITELY NOT BLACK AND WHITE. THERE ARE DIFFERING OPINIONS AND A CYTOTECH CAN MISS IT ON A SLIDE. DEFINITELY. IT HAS HAPPENED.

ON 911, WE TALK ABOUT TWO YEARS FROM THE TIME THE INCIDENT GIVING RISE TO THE ACTION OCCURRED OR WITHIN TWO YEARS FROM THE TIME THE INCIDENT IS DISCOVERED, AND IN THIS CASE, WE ARE USING THE INCIDENT AS WHEN SHE WAS ACTUALLY DIAGNOSED WITH CANCER. CORRECT?

THAT IS, YES, THAT IS WITHIN THE 1993 STATUTE. CORRECT.

IS THERE ANY ROOM IN THIS CASE FOR THE INCIDENT THAT WE ARE REFERRING TO BEING THE INCIDENT OF WHEN THE PETITIONER ACTUALLY DISCOVERED THE MISREADING OF THE SLIDE, AS OPPOSED TO WHEN THE PATIENT WAS DIAGNOSED WITH CANCER?

WELL, IF WE WERE GOING TO TAKE CONCEALMENT OUT OF THE EQUATION, THEN WHAT YOU SAY IS CERTAINLY TRUE, BUT WHAT YOU WOULD BE DOING WOULD BE RELEGATING THE STATUTE OF REPOSE TO A STATUTE OF LIMITATIONS. THE CAUSE OF ACTION IN WHICH DOES NOT EVEN ACCRUE UNTIL THE PLAINTIFF KNEW OR SHOULD HAVE KNOWN, BY REASONABLE CARE, ABOUT THE CAUSE OF HER UNDERLYING --

IN THIS KIND OF CASE, WHEN THE PLAINTIFF HAD NO REASON TO SUSPECT ANYTHING BUT THE SLIDE, WOULDN'T THAT BE A MORE EQUITABLE WAY TO DEAL WITH THIS?

IT MIGHT BE VIEWED MORE EQUITYBLY AS A MORE EQUITABLE WAY, BUT IT WOULD RUN, IT

WOULD RUN CONTRARY TO THE KUSH VERSUS LLOYD OPINION FROM THIS COURT, IN WHICH THE COURT OBSERVED THAT THE PURPOSE OF THE STATUTE OF REPOSE IS TO DEFINE A TIME LIMIT BEYOND WHICH A MEDICAL MALPRACTICE SUIT SIMPLY MAY NOT BE INSTITUTED, AND I THINK THAT IS THE DIFFERENCE. THE ACCRUAL OF THE CAUSE OF ACTION FOR A STATUTE OF LIMITATIONS WILL NOT OCCUR, UNTIL THE PATIENT KNEW OR SHOULD HAVE KNOWN ABOUT THE UNDERLYING MEDICAL MacMALL PRACTICE, BUT THAT IS NOT -- MEDICAL MALPRACTICE, BUT THAT IS NOT THE CASE FOR THE STATUTE OF REPOSE, AND SOME PEOPLE SAY IT HAS SOME HARSH IMPLICATIONS, AND NONETHELESS THE LEGISLATURE, BECAUSE OF THE MEDICAL MALPRACTICE CRISIS, HAS EXPRESSED THE WILL OF THE PEOPLE THAT FOUR YEARS SHOULD BE IT EXCEPT IN THE THREE VERY NARROW EXCEPTIONS THAT ARE SET FORTH IN THE STATUTE.

NOW, DO YOU AGREE WITH YOUR OPPOSING COUNSEL'S RESPONSE TO JUSTICE PARIENTE, ABOUT THE PEP PAP SMEAR SUBSEQUENT -- ABOUT THE PAP SMEAR SUBSEQUENT TO THIS TIME FRAME? GENERALLY PALP SMEARS ARE DONE ANNUALLY.

THAT'S CORRECT. GENERALLY.

AND THE STATUTE READS NOT ONLY ABOUT THE CONCEALMENT BUT ALSO PREVENTING DISCOVERY. WAS A RECORD EVER DEVELOPED ABOUT WHETHER THERE WERE OTHER PALP SMEARS DONE BETWEEN '94 AND '97?

IT WAS NOT SO DEVELOPED, YOUR HONOR.

CHIEF JUSTICE: THE MARSHAL ADVISED ME THAT YOU USED 12 MINUTES.

IF THERE ARE NO OTHER QUESTIONS FROM THE PANEL, I WOULD LIKE TO DEFER TO MR. HURT. THANK YOU VERY MUCH.

MAY IT PLEASE THE COURT. LADIES AND GENTLEMEN, MY NAME IS BUCKY HURT FROM ORLANDO. I REPRESENT DR. WILLIAM SCHULTZ, WHO WAS AN INDIVIDUAL IN THIS CASE. DR. SCHUTZ WAS ONE OF THE PATHOLOGIST EMPLOYED BY PREMIER MEDICAL LABORATORIES AT THE TIME, AND AT ALL PERTINENT TIMES IN 1994 AND 1995, WHEN THE EVENTS THAT GIVE RISE TO THIS ACTION TOOK PLACE, DR. SCHUTZ WAS ON MEDICAL LEAVE IN THE STATE OF TEXAS, UNDERGOING PERSONAL MEDICAL CARE, THAN IS AN UNDISPUTED FACT. IT IS ALSO UNDISPUTED THAT DR. SCHUTZ WOULD NOT HAVE BEEN VICARIOUSLY LIABLE FOR THE ALLEGED NEGLIGENCE OF CYTO TECHNOLOGIST LANDON, BECAUSE SHE WAS EMPLOYED BY PREMIER, AND DR. SCHUTZ DID NOT HAVE ANY CONNECTION TO THE CYTO TECHNICIAN LANDON. IT WAS NOT PHYSICALLY POSSIBLE FOR HIM TO OVERSEE THE WORK.

YOU ARE SAYING THERE SHOULDN'T BE A CAUSE OF ACTION, EVEN IF THERE WAS NOT A STATUTE OF REPOSE ISSUE.

THAT'S CORRECT, YOUR HONOR.

IS THE POLICY OF THE LAB THAT THE PATHOLOGISTS ONLY READ THE SLIDES THAT ARE SCREENED FOR THEM BY TECHNICIANS? IS THAT HOW IT WORKS?

LET ME EXPLAIN HOW IT WORKS NOT ONLY IN THIS LAB BUT IN THE COUNTRY, AND THE EXPERT OF THE PLAINTIFF READS THE SAME WAY. ALL ARE READ BY CYTO TECHNOLOGIST, AND TEN PERCENT OF THOSE READ AS NORMAL ARE RESCREENED FOR QUALITY CONTROL PURPOSES BY A PATHOLOGIST. THIS PARTICULAR SLIDE OF MRS. NEHME WAS NOT RESCREENED. HER SLIDE WAS NOT ONE OF THAT RANDOM 10% THAENT IS RESCREENED, THAN IS THE STANDARD OF CARE IN THIS COUNTRY. THAT IS NOT CONTROVERTED BY THE PLAINTIFF IN THIS CASE. INDEED THE PLAINTIFF'S OWN EXPERT SAID THAT IS THE STANDARD OF CARE, SO THERE WOULD HAVE BEEN NO OPPORTUNITY FOR DR. SCHUTZ, EVEN HAD HE NOT BEEN IN TEXAS ON PERSONAL MEDICAL

LEAVE, TO REREAD THIS SLIDE, AND HE SHOULD NEVER HAVE BEEN A PARTY TO BEGIN WITH.

THERE IS NO ALLEGATION IN THIS CASE THAT, IN EVERY CASE A PATHOLOGIST MUST READ THE SLIDE?

THAT'S CORRECT. EVEN THE PLAINTIFF'S OWN EXPERT CONCEDES THAT THAT IS NOT ECONOMICALLY FEASIBLE TO HAVE EVERY PAP SMEAR SLIDE IN THIS COUNTRY READ BY PATHOLOGIST. THEY ARE ALL READ BY A CYTO TECHNOLOGIST, AND THEN THE ABNORMAL ONES WILL GO TO A PATHOLOGIST, AND THEN 10 PERCENT OF THE NORMAL ONES AS READ BY A CYTO TECHNOLOGIST, GO TO THE PATHOLOGIST FOR THE A RESCREENING, THAT IS DONE BY EVERY LAB IN THE COUNTRY?

WHAT ABOUT THE RATE OF MISDIAGNOSIS FOR THOSE ORIGINALLY SCREENED AS NORMAL?

I DON'T KNOW THE ANSWER TO THAT, YOUR HONOR. I EXPECT IT IS A VERY SMALL PERCENTAGE, BUT I DON'T KNOW, AND THERE IS NO RECORD EVIDENCE IN THIS CASE OF THAT STATISTIC.

CHIEF JUSTICE: LET ME STOP FOR A MINUTE HERE, BECAUSE YOU ALL HAVE AGREED ON A DIVISION OF TIME.

I HAVE GOT FOUR MINUTES.

HOW FAR ALONG ARE WE IN THE 20 MINUTES? ALL RIGHT. JUSTICE QUINCE HAS A QUESTION FOR THAT ONE MINUTE.

SO IF A CITE-TECHNOLOGIST HAD READ ANY NUMBER OF, SAY, TEN OR TWELVE OF THESE SLIDES AND SAID THEY WERE ALL NORMAL AND YET THEY WERE ALL ABNORMAL, THERE WOULD BE NOTHING YOU COULD DO? THERE WOULD BE NO CAUSE OF ACTION.

THAT'S CORRECT.

UNTIL ONCE THE CANCER IS DIAGNOSZED BUT YOU HAVE NO IDEA THAT IT IS THE MISREADING OF THE SCREENER?

BEARING IN MIND THAT IN 1995, THE STATUTE OF REPOSE WAS CREATED IN RESPONSE TO THE MEDICAL MALPRACTICE CRISIS THAT EXISTED AT THAT TIME AND TODAY, PERHAPS, EXISTS STILL, AND THERE ARE GOING TO BE UNFAIR RESULTS OCCASIONALLY, AS RECS ONNIZED BY THIS COURT IN THE CURB CASE AND THERE IS NOTHING -- IN THE CUS SH. H CASE,-KNOW THE CUSH CASE, AND THE KEY HERE IS CONCEALMENT. I THINK I AM GOOD B TO RUN OUT OF TIME.

I THINK THAT YOU ALL HAVE RUN OUT OF TIME AND YOU ALL HAVE FILED EXTENSIVE BRIEFING THAT WE ARE ALREADY AWARE OF. NOT TIME FOR REBUTTAL YET. OKAY. YOU HAVE SOME TIME LEFT, TOO. ALL RIGHT. GOOD MORNING.

GOOD MORNING, YOUR HONORS. ARTHUR ENGLAND. I WILL BE BRIEF, AND I THINK, PERHAPS I CAN JUST SUMMARIZE BY ANSWER AGO QUESTION, MR. CHIEF JUSTICE THAT, YOU ASKED TO START , CAN WHICH IS, ISN'T IT UNFAIR IN THIS FACT SITUATION, WHERE THE CAUSE OF ACTION REALLY ISN'T DISCLOSED? LET ME POSTURE IT THIS WAY. THE ALLEN CASE, THE ALMONGORA CASE, THE HERNANDEZ CASE, THE HERMAN, THE PROCTOR, THE MANDONE CASE, EVERY CASE THAT WE HAVE TALKED ABOUT IN THIS CASE, IS A SITUATION IN WHICH THE HEALTHCARE PROVIDER KNEW SOMETHING THAT MAY HAVE BEEN DONE WRONGLY AND DIDN'T TELL THE PATIENT WHAT MIGHT HAVE CAUSED THAT WRONG. KNEW OF IT, PERHAPS, OR AT LEAST KNEW OF THE PROCEDURE AND DIDN'T SAY ANYTHING. THIS CASE IS THE OPPOSITE. IN THIS CASE, IT IS THE PATIENT WHO, WITHIN THE FOUR-YEAR STATUTE OF REPOSE, KNEW SOMETHING MAY HAVE BEEN DONE WRONG. WRONG IS THE WORD THAT MR. NEHME USED, AND THAT IT MAY NOT HAVE

BEEN THE DOCTOR, AS HE SAID. AND IT WAS THE PATIENT WHO DID NOT ASK FOR THE INFORMATION ABOUT WHAT MIGHT HAVE GONE WRONG! HAVING CONSULTED A PHYSICIAN AND AN ATTORNEY, AND DURING THAT PERIOD OF TIME WHEN THAT INFORMATION WAS KNOWN, SOMETHING IS DRAMATICALLY WRONG, AND HAD BOTH THE PHYSICIAN AND AN ATTORNEY, THERE REMAINED 18 MONTHS LEFT IN THE STATUTE OF REPOSE.

SO WHAT DO YOU CONTEMPLATE THAT THE PETITIONER SHOULD HAVE DONE, ONCE THE DIAGNOSIS WAS MADE?

HAD THE PHYSICIAN OR THE ATTORNEY SIMPLY ASKED FOR THE SLIDE. THEY CLAIM THAT IS THE THING THAT WAS CONCEALED. BUT IT WAS NEVER CONCEALED. IT WASN'T ASKED FOR.

IS THAT THE BASIS UPON WHICH THIS CASE WAS DECIDED?

NO. IT WAS NOT.

THAT THE --

THIS CASE WAS DECIDED ON THE WRONG STATUTE OF LIMITATIONS.

YOU ARE POINTING THAT OUT ON THE FAIRNESS ISSUE. IS THAT --

IN RESPONSE TO YOUR QUESTION ABOUT FAIRNESS.

THAT IS NOT THE BASIS, THAT IS NOT THE LEGAL ISSUE THAT WE HAVE BEFORE US TODAY, IS IT?

NO, IT IS NOT, AND THAT IS WHY I RESPECTFULLY SUGGEST THAT, AS THE COURT FREQUENTLY DOES, I SUGGEST THAT YOU RESTATE THE CERTIFIED QUESTION. I THINK THE QUESTION IN THIS CASE, BECAUSE THE DISTRICT COURT CITED THE WRONG STATUTE OF REPOSE. THEY CITED THE 2000 VERSION AND NOT THE ONE WHICH HAS THE "WITHIN THE FOUR-YEAR LIMITATION." I THINK THE QUESTION THAT SHOULD BE ASKED IN THIS CASE IS SOMETHING LIKE THIS, DOES THE CONCEALMENT EXCEPTION TO THE PRE-1996 MEDICAL MALPRACTICE STATUTE OF REPOSE, COME INTO PLAY AT ALL, WHEN AN INJURY MANIFESTS ITSELF DURING THE PERIOD OF REPOSE ACTION AND THE INJURED PARTY HAS ADEQUATE TIME WITHIN THE REMAINDER OF THE REPOSE PERIOD, AND THE OPPORTUNITY INDIVIDUALLY, THROUGH A PHYSICIAN AND THROUGH AN ATTORNEY, TO OBTAIN THE MEDICAL INFORMATION WHICH WOULD SUPPORT A CAUSE OF ACTION.

CHIEF JUSTICE: YOU WILL HAVE TO CLOSE ON THAT.

THANK YOU.

CHIEF JUSTICE: HOW MUCH TIME DOES COUNSEL HAVE ON REBUTTAL?

CHIEF JUSTICE: ALL RIGHT.

MR. BURLINGTON, CAN YOU ADDRESS THAT LAST ISSUE, AND THAT IS DOES THE STATUTE IMPOSE A DUE DILIGENCE REQUIREMENT ON THOSE WHO HAVE DISCOVERED THE POSSIBILITY THAT SOMETHING MAY HAVE, QUOTE, GONE WRONG?

THE STATUTE DOES, GENERALLY WITH THE STATUTE OF LIMITATIONS. IT DOES NOT, WITH THE STATUTE OF REPOSE AND IN IT, IT PROVIDES TWO YEARS FROM THE DATE THAT THEY KNEW OR SHOULD HAVE KNOWN OF THE INJURY, AND AGAIN WHAT THEY ARE TRYING TO BLUR HERE IS WHAT MY CLIENT'S CONCERN WAS WITHIN THE PERIOD, THE ONLY EVIDENCE OF WHAT MY CLIENT'S CONCERN WAS NOT THE INITIAL ONSET. THAT INJURY WAS NEVER ASSOCIATED, AND THEY HAVE NEVER SUGGESTED ANY FACTUAL BASIS FOR THE ASSOCIATION OF THAT INJURY

WITH ANY MEDICAL MALPRACTICE PROBABILITY. BUT WHAT THEY ARE TALKING ABOUT IS TESTIMONY THAT HER CONDITION WAS INITIALLY DIAGNOSED STAGE ONE AND THEN IN A MONTH IT WAS STAGE FOUR AND HE THOUGHT THAT DETERIORATION WAS NOT CONSISTENT WITH HOW CANCERS DEVELOP OVER THAT SHORT PERIOD OF TIME, SO WE THINK IT IS A DIFFERENT INJURY. THERE IS A REASONABLE REQUIREMENT.

SO YOU ARE INTERPRETING THAT STATEMENT AS SAYING THAT THE DOCTORS IN THIS LAST MONTH OR TWO HAVE DONE SOMETHING WRONG, IF SHE HAS PROGRESSED SO FAR IN THAT SHORT OF A TIME PERIOD?

CORRECT. THERE WAS A QUESTION ABOUT THE NATURE OF THE TREATMENT SHE WAS BEING GIVEN AND THE STAGE ONE DIAGNOSIS AT THE OUT SET, AND HE WAS SIMPLY CONFUSED ABOUT THAT, BUT NOTHING ABOUT THE ONSET, TO ASSOCIATE IT WITH THE PRIOR ACT.

THE RECORD DOESN'T REVEAL, THEN, WHEN SOMEBODY HAS DECIDED, WELL, WHEN WAS THE LAST TIME YOU HAD A PAP SMEAR, AND IT WAS 1994?

CORRECT.

MAYBE, AGAIN, IS THE RECORD SILENT AS TO WHETHER YEARLY PALP SMEARS ARE WHAT MOST WOMEN UNDERSTAND THEY SHOULD RECEIVE.

YES.

DID SHE HAVE PALP SMEARS IN '95 AND '96?

I DON'T THINK THE RECORD SHOWS, ONE WAY OR THE OTHER. HER DEPOSITION WAS NOT TAKEN. THERE WAS A DEPOSITION OF MY CLIENT, AND I BELIEVE, OF --

YOU WOULD HAVE GOTTEN MEDICAL RECORDS, IF THERE WERE PALP SMEARS FROM '94 --

THEY ARE NOT YET, BECAUSE THIS WAS DONE ON SUMMARY JUDGMENT, ASSUMING WE HAD A FULL TRIAL, WE WOULD KNOW ONE WAY OR THE OTHER. ONE THING I DID WANT TO TOUCH ON WAS THE DISCUSSION, THERE WAS A COMMENT MADE THAT, UNDER CUSH THERE WAS A STATUTE OF REPOSE THAT WOULD PROVIDE A FIXED PERIOD, AND THIS STATUTE OF REPOSE DOES THAT, WITHIN SEVEN YEARS, AND WE ARE NOT WITHIN THAT PROBLEM, SO TO SPEAK. IT DOES GIVE THE OPPORTUNITY FOR A CLIENT SUCH AS MINE, IN A SITUATION WHERE SOMETHING HAS BEEN CONCEALED, TO HAVE AN ADDITIONAL PERIOD OF TIME, TWO YEARS FROM THE DISCOVERY OF THAT INJURY, WHICH WE KNOW NECESSARILY REQUIRES SOME PROBABILITY OF MEDICAL NEGLIGENCE ASSOCIATED WITH AN INJURY.

HAVE YOU EVER, HAVE YOU MADE ANY CLAIM THAT BECAUSE IN THIS CASE, ACTUALLY, NO DOCTOR DID ANYTHING, THIS WAS A TECHNICIAN, THAT SOMEHOW THE MEDICAL MALPRACTICE STATUTE IS NOT IN PLAY, OR IS THAT NOT --

NO. IT HAS ALWAYS, THE LAB HAS ALWAYS BEEN TREATED AS A HEALTHCARE PROVIDER, SO WE HAVE NOT TAKEN THAT POSITION. WE PURSUED IT AS WE WOULD ANY OTHER CASE. ABSENT FURTHER QUESTIONS, THANK YOU.

CHIEF JUSTICE: THANK YOU VERY MUCH. THE COURT IS GOING TO TAKE A BRIEF RECESS OF ABOUT 5 MINUTES, BEFORE WE HEAR THE NEXT CASE. WE WILL STAND IN RECESS.

MARSHAL: PLEASE RISE.