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**Beth Linn v. Basil D. Fossum, M.D.**

THE MARSHAL: PLEASE RISE. LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT. PLEASE BE SEATED.

THE LAST CASE ON THIS MORNING'S DOCKET IS LINN VERSUS FOSSUM.

THANK YOU, CHIEF JUSTICE. GOOD MORNING. MAY IT PLEASE THE COURT, MY NAME IS MAJOR HARDING, AND I REPRESENT BETH AND ANTHONY LINN. MISS LINN WENT TO A DOCTOR AND HAD AN EXPLORATORY PROCEDURE DURING WHICH HE INADVERTENTLY NICKED HER URETER.

LET ME MAKE SURE THAT I UNDERSTAND THE PRECISE QUESTION THAT WE ARE TALKING ABOUT AS FAR AS THE OBJECTION IS CONCERNED, AND THAT IS WHAT I UNDERSTAND IT TO BE IN PART OF THE APPENDIX IS THIS PART OF THE RECORD THAT SAYS IT BEGINS IN THAT REVIEW I ASK YOU TO RENDER SOME QUESTIONS REGARDING STANDARD OF CARE, DID I NOT? ANSWER: CORRECT. AND IN ORDER TO GIVE THOSE OPINIONS ABOUT THE STANDARD OF CARE IN THIS PARTICULAR CASE, WHAT, IF ANYTHING, DID YOU DO TO TRY TO DETERMINE THE APPROPRIATE STANDARD OF CARE? THERE THE OBJECTION WAS RAISED. AND IT WAS RAISED ON THE BASIS OF HEARSAY AND THE USE OF THIS WITNESS AS A CONDUIT, CORRECT?

THAT'S CORRECT.

AND SO WE ARE CONCERNED ABOUT IN THIS CASE WHETHER AN EXPERT CAN TESTIFY AS TO THE MEDICAL STANDARD OF CARE BASED UPON CONVERSATIONS WITH OTHER PHYSICIANS. IS THAT BASICALLY THE GIST OF THIS THING?

BASICALLY THE ISSUE IS, JUSTICE WELLS, WHETHER OR NOT AN EXPERT WITNESS CAN TESTIFY THAT HE OR SHE HAS CONFERED WITH ANOTHER EXPERT IN THE SAME FIELD ON DIRECT EXAMINATION.

ON THE STANDARD OF CARE?

ON THE STANDARD OF CARE.

BUT ALSO AND RELATE WHAT THAT ANSWER WAS? CORRECT? IT IS NOT JUST THAT THEY TALKED WITH THEM. THEY RELAYED IT. DID THIS WITNESS NOT RELATE THAT THOSE PEOPLE AGREED?

THAT'S CORRECT, BUT --.

CHIEF JUSTICE: THAT WAS CORRECT IN THE DEPOSITION, BUT IN THE ACTUAL TRIAL --.

IT WAS NOT BROUGHT OUT UNTIL CROSS.

CHIEF JUSTICE: AFTER THEY OBJECTED SHE SAID, WELL, BASED ON MY REVIEW WHICH INCLUDED TALKING TO ALL OF THESE, I MEAN SHE WENT THROUGH SOME SPECIFICS. SHE TALKED TO FIVE PEOPLE IN MISSOURI.

ON WHAT HAS BEEN CHARACTERIZED AS A CURBSIDE CONSULT THAT LASTED A COUPLE OF MINUTES.

CHIEF JUSTICE: AND THEN THE IDEA THAT WITH THE FOURTH DISTRICT IS THAT THERE IS AN INFERENCE THAT'S DRAWN THAT THE CONSULTATION WITH THE OTHER EXPERT IS THAT THEY ARE THE ONES THAT SUPPLIED THE INFORMATION ON WHICH SHE THEN BASED HER OPINION ON STANDARD OF CARE?

THAT'S RIGHT. AND IN SCHWARZ IN THE FOURTH DISTRICT, THE COURT VERY SPECIFICALLY SAID AN EXPERT CANNOT TESTIFY AS TO MATTERS THAT -- IN A TREATISE THAT AGREES WITH THEM.

BUT YOU WOULD AGREE THAT SCHWARZ IS NOT A MATTER, A QUESTION HAVING TO DO WITH THE STANDARD OF CARE? SCHWARZ IS A QUESTION HAVING TO DO WITH WHETHER A PATHOLOGIST AS TO WHETHER A DEATH IS A HOMICIDE, AND THAT'S AN ENTIRELY DIFFERENT MATTER, IS IT NOT?

WELL, JUSTICE WELLS, THE HOLDING OF SCHWARZ IS VERY PRECISE AND VERY CLEAR. THE PRECISE ISSUE BEFORE US IS NOT WHETHER DR. BURTON COULD TESTIFY THAT OTHER EXPERTS IN HIS FIELD AGREED WITH HIM, AND IT DOES NOT LIMIT IT TO STANDARD OF CARE. IT DOES NOT USE THAT AS AN EXCUSE, IT DOES NOT EXCUSE THAT FROM THE RULE, BUT AND CONTINUING ON, BUT RATHER WHETHER HE COULD TESTIFY THAT HE HAD CONSULTED WITH OTHER EXPERTS IN THE SAME FIELD. IN THE ABSENCE OF ANY PERSUASIVE AUTHORITY TO THE CONTRARY, WE CONCLUDE THAT DR. BURTON SHOULD NOT HAVE BEEN PERMITTED TO DO SO.

THE REASON FOR MY QUESTION ABOUT THAT IS THAT IT SEEMS TO ME THAT UNDER 766.102, WE HAVE A STATUTORY BASIS THAT A MEDICAL MALPRACTICE CASE WHICH SAYS THAT THE PREVAILING PROFESSIONAL STANDARD OF CARE FOR A GIVEN PRACTITIONER SHALL BE THAT STANDARD OF CARE, SKILL AND TREATMENT WHICH IN LIGHT OF ALL RELEVANT CIRCUMSTANCES IS RECOGNIZED AS ACCEPTABLE AND APPROPRIATE BY REASONABLY PRUDENT HEALTH CARE PROVIDERS. AND IT SEEMS TO ME THAT THE POINT THAT JUDGE PANAVANO IS MAKING IN THE FIRST DISTRICT IS HARD TO GET AROUND AND THAT IS IF YOU ARE DEALING WITH THE STANDARD OF CARE, YOU ARE NECESSARILY DEALING WITH A CONSULTATION AND CONVERSATIONS WITH OTHER PHYSICIANS, HOW ELSE WOULD A DOCTOR KNOW WHAT THE STANDARD OF CARE WAS IN THAT COMMUNITY?

AND YOUR QUESTION TO ME IS SHOULD THAT NOT THEN BE PERMITTED TO BE TESTIFIED TO?

ISN'T THAT FAR DIFFERENT THAN TESTIFYING AS TO THE SUBSTANCE OF AN EXPERT'S OPINION AS TO WHETHER SOMETHING IS A HOMICIDE OR NOT?

WITH ALL DUE RESPECT, I WOULD SAY NO AND I THINK SCHWARZ SETS FORTH A VERY CLEAR, CONCISE RULE THAT ANY EXPERT TESTIFYING IN A MALPRACTICE CASE OR IN ANY CASE CANNOT TESTIFY THAT HE OR SHE HAS CONSULTED WITH OTHER EXPERTS IN THE SAME FIELD ON DIRECT EXAMINATION.

CHIEF JUSTICE: JUST IN THIS CASE, THIS DOCTOR, THIS IS SORT OF AN UNUSUAL THING. THIS IS A MALPRACTICE CASE IN FLORIDA. THE DOCTOR WAS FROM WHERE?

TENNESSEE. COLORADO.

CHIEF JUSTICE: COLORADO. AND SHE ENDS UP SAYING THAT SHE CONSULTS WITH DOCTORS IN -- AT THE UNIVERSITY OF MISSOURI AND OTHER PRIVATE PRACTICE UROLOGISTS TO COME UP WITH THE STANDARD OF CARE. NOW, THE MOTION IN LIMINE THAT WAS FILED IN THIS CASE HAD TO DO WITH HER REALLY INSTEAD OF THE DOCTORS THAT MAY HAVE KNOWN THE STANDARD OF CARE IS ESSENTIALLY THEY WERE SAYING SHE WAS BEING USED AS A CONDUIT FOR THESE PEOPLE THAT WEREN'T IDENTIFIED OR WEREN'T EVEN -- THERE WAS NO REPORT FROM THEM?

THAT'S CORRECT. THEY DID NOT EXAMINE THE RECORDS. THE ONLY INFORMATION THAT THEY HAD THAT WE AND WE DON'T KNOW WHAT THAT INFORMATION WAS, BUT WHAT WAS CHARACTERIZED AS A FEW MINUTE CONSULT.

CHIEF JUSTICE: WAS THE ARGUMENT MADE THAT THE MALPRACTICE STATUTE, WHICH I GUESS I ALWAYS THOUGHT WAS NARROWING REALLY WHO COULD TESTIFY RATHER THAN EXPANDING IT, THAT THERE WAS SOME DIFFERENT RULE THAT SHOULD APPLY BECAUSE OF THE MALPRACTICE SCHEME? I DON'T RECALL SEEING THAT.

NO, I DON'T, EITHER. THE MOTION IN LIMINE WAS FILED AFTER THE DEPOSITION AND WAS SUGGESTING THAT TO ALLOW THIS BASED UPON SCHWARZ TO ALLOW THIS WITNESS TO TESTIFY ON DIRECT EXAMINATION THAT HE -- THAT SHE HAD CONSULTED WITH OTHER AND OF COURSE THIS CASE IS UNUSUAL BECAUSE SHE TESTIFIED THAT FROM HER OWN EXAMINATION OF THE RECORDS AND HER OWN EXAMINATION OF THE DEPOSITION, SHE WOULD HAVE FOLLOWED A DIFFERENT STANDARD OF CARE, AND THAT IS SHE WOULD HAVE SENT IT, THIS URETER AND DRAINED THE ABDOMINAL CAVITY.

FIRST IS THE STANDARD OBJECTIVE OR SUBJECTIVE? THE STANDARD OF CARE?

THE STANDARD OF CARE IS THE OPINION OF THE WITNESS AS TO THE STANDARD OF CARE IN THE COMMUNITY.

BUT IT IS WHAT A REASONABLE PERSON WOULD DO UNDER THE CIRCUMSTANCES?

RIGHT.

NOT WHAT AN INDIVIDUAL WOULD DO?

CORRECT.

SECONDLY, WHEN YOU GO BACK TO SCHWARZ AND IT IS CONSISTENT WITH WHAT AIRHART SAYS TO APPLY A 403 BALANCING TEST AND NOT TO ADOPT AN ARBITRARY RULE AND IN SCHWARZ THEY ARE DEALING WITH A 403 BALANCING. HERE IN THIS CASE THE ONLY OBJECTION WAS TO HEARSAY AND WHAT HEARSAY EVIDENCE WAS ADMITTED IN THE DIRECT TESTIMONY OF THIS WITNESS?

THE HEARSAY TESTIMONY WAS ADMITTED BY THE INFERENCE THAT THESE EXPERTS ESTABLISHED THE STANDARD OF CARE AND SHE AGREES.

LET ME ASK YOU WHAT OUT OF COURT STATEMENT WAS OFFERED TO PROVE THE TRUTH, WHAT OUT OF COURT STATEMENT?

SHE DID NOT ACTUALLY TESTIFY AS TO WHAT ANYONE SPECIFICALLY SAID, OTHER THAN THE FACT THAT THEY AGREED THAT DR. FOSSUM HAD ESTABLISHED, MADE THE --

WHERE DID SHE SAY THAT?

IN THE RECORD, THE SPECIFIC REFERENCE WAS THAT SHE HAD -- I CAN --

BUT ON DIRECT EXAM, DIDN'T SHE JUST SAY THAT IN DETERMINING WHAT THE STANDARD OF CARE WAS SHE CONSULTED WITH OTHER PHYSICIANS?

SHE DID.

SHE DIDN'T AT THAT POINT SAY THAT HE COMPLIED WITH THAT STANDARD OF CARE AS SET FORTH BY THEM ON DIRECT, DID SHE?

NO.

SO IN THIS CASE, IS YOUR ARGUMENT THE SAME? YOU WOULD AGREE THAT SHE MADE NO STATEMENTS THAT ANY OTHER PHYSICIAN SAID TO HER, CORRECT?

SHE MADE -- YES.

SHE MADE NO STATEMENTS?

SHE INDICATED THAT SHE HAD CONSULTED WITH OTHER EXPERTS.

SO DOES IT MAKE ANY DIFFERENCE WHETHER OR NOT SHE ACTUALLY SAYS SOMETHING THAT ANOTHER DOCTOR TOLD HER VERSUS SIMPLY SAYING THAT SHE CONSULTED WITH SOME OTHER DOCTORS? I MEAN, MY QUESTION HERE REALLY IS IS THE IMPLICATION THE SAME? DO YOU STILL -- WOULD A REASONABLE JUROR INTERPRET THAT AS BEING A STATEMENT THAT THESE OTHER PEOPLE AGREED WITH WHAT I AM SAYING?

ACCORDING TO SCHWARZ, YES. THE HOLDING IN SCHWARZ SAYS ACCORDINGLY, WHILE THERE IS NOTHING IMPROPER ABOUT DR.^BURTON CONSULTING WITH OTHER EXPERTS IN HIS FIELD, HE SHOULD NOT HAVE BEEN ALLOWED TO TESTIFY THAT HE DID SO ON DIRECT EXAMINATION.

AND THAT'S BECAUSE OF --

AND THAT'S BECAUSE OF THE INFERENCE. IT SAYS THERE IS TOO MUCH OF A POSSIBILITY OF AN INFERENCE BEING DRAWN THAT THESE EXPERTS AGREED WITH DR.^BURTON, AND ANY PROBATIVE VALUE WOULD BE SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE, CONFUSION OF ISSUES AND MISLEADING TO THE JURY.

I GUESS IT ALL GOES BACK TO THE QUESTION THAT SOMEONE ASKED EARLIER IS THAT WHAT DOES A DOCTOR, WHAT CAN A DOCTOR SAY AND USE TO DEMONSTRATE THE STANDARD OF CARE IN A COMMUNITY IF YOU AGREE THAT THIS IS AN OBJECTIVE STANDARD AND NOT ONE THAT MERELY IS THE WITNESS' SUBJECTIVE VIEW OF WHAT THE STANDARD OF CARE IS?

I THINK SCHWARZ WOULD INDICATE THAT THERE IS NOTHING WRONG WITH THIS DOCTOR CONSULTING WITH OTHERS, BUT WHEN SHE OR HE IS TESTIFYING AS TO THE STANDARD OF CARE, IT WOULD BE ON THE BASIS OF THAT WITNESS' TRAINING AND EXPERIENCE AND COMMON SENSE.

YOU WOULD SAY THAT 703 IS TOTALLY OUT THE WINDOW AS FAR AS FLORIDA APPLICATION TO EXPERT TESTIMONY?

NO, I SAY THAT 703, LIKE SCHWARZ, IS TEMPERED BY 403 AND THEY HAVE HELD --

BUT THIS WASN'T A 403 OBJECTION IN HERE? I MEAN WE ARE NOT DEALING WITH THIS ON THE BASIS OF 403. WE'RE DEALING WITH THIS ON THE BASIS OF WHETHER, UNDER -- IT IS HEARSAY.

JUSTICE WELLS, ON PAGE 4 OF THE MOTION IN LIMINE, PERMITTING AN EXPERT TO REPEAT HEARSAY TESTIMONY UNFAIRLY PREJUDICES. IT CITES SCHWARZ, AND IT WOULD BE UNFAIRLY PREJUDICIAL TO PERMIT DR.^WEAVER-OSTERHOLTZ TO RELAY THE PURPORTED OPINION OF FOUR WITNESSES ON PAGE 7. IT IS PATENTLY UNFAIR AND SO THE OBJECTION WAS THAT THIS WAS AN UNDULY PREJUDICIAL ADMISSION OF EVIDENCE.

CHIEF JUSTICE: I ALWAYS THOUGHT, AND HAVING, YOU KNOW, DONE TRIAL LITIGATION WITH EXPERTS, IS THAT THE REASON FOR THE IDEA THAT THERE COULD BE HEARSAY WOULD BE THAT, AGAIN, IF YOU TOOK A DOCTOR, THERE MIGHT BE MEDICAL RECORDS AND THERE IS, YOU KNOW,

A CAT SCAN IN THERE, AND THERE IS SOMETHING THAT SHOWS THE RESULTS OF A CAT SCAN AND SO YOU ARE NOT GOING TO BRING IN THAT DOCTOR, THAT THAT'S THE TYPE OF THING IN THAT CASE THAT A DOCTOR WOULD REASONABLY RELY ON. I HAVE NEVER, UNTIL THIS CASE, EVER EVEN HEARD ANYONE SUGGEST THAT A DOCTOR, ESPECIALLY IN A MALPRACTICE CASE WHERE THE LEGISLATURE WENT OUT OF ITS WAY TO SAY WHO COULD TESTIFY AS AN EXPERT WITNESS, WOULD SAY THAT YOU WOULD FIND THE STANDARD OF CARE BY DOING SOME KIND OF A POLL OF DOCTORS IN AND AROUND THE COUNTRY OR THE WORLD. I MEAN, IS THAT -- IS THAT WHERE WE WOULD BE GOING WITH THIS?

I THINK IF YOU APPROVE THE DISTRICT -- FIRST DISTRICT'S OPINION, YES.

WAS THE FIRST DISTRICT'S OPINION, THOUGH, BASED UPON YOUR POSITION, AND I'M READING YOUR REPLY BRIEF, IT SAYS IT WAS THE SOLE BASIS BEING THE OTHER PHYSICIAN'S STATEMENTS TO THIS DOCTOR, IT WAS THE SOLE BASIS FOR HER TESTIMONY, AND THE FIRST DCA REJECTS THAT ALLEGATION, SO DOES YOUR ARGUMENT HINGE ON THE FACT THAT OF US FINDING IT WAS THE SOLE BASIS OF HER --

NO, IT DOES NOT, AND I THINK THAT SCHWARZ IS AUTHORITY TO THE EFFECT THAT WHETHER IT IS -- WHETHER IT IS A TREATISE OR A CONDUIT, WHETHER IT IS THE SOLE BASIS OR WHETHER IT IS COMMENTING ON THE CREDIBILITY OF ANOTHER EXPERT, WHETHER IT IS BOLSTERING.

ONE OTHER QUESTION: WAS YOUR MOTION TO PRECLUDE HER TESTIMONY OR THE MOTION IN LIMINE WAS IT TO PRECLUDE HER FROM SAYING THAT SHE HAD CONSULTED WITH OTHER EXPERTS?

THE MOTION WAS TO DETERMINE THAT SHE COULD NOT TESTIFY IN THE TRIAL.

SO WHY WASN'T THERE A MORE DISCRETE MOTION TO SAY PRECLUDE THIS WITNESS FROM SAYING SHE CONSULTED ALL OF THESE OTHER PHYSICIANS?

SHE HAD ALREADY TESTIFIED IN THE DEPOSITION.

CHIEF JUSTICE: IS THE MOTION IN LIMINE, WHERE IS IT IN THE RECORD SO WE HAVE THE -- MAKE SURE WE KNOW EXACTLY WHAT WAS --

I CAN -- WE CAN FIND THAT FOR YOU.

YOU HAD INDICATED IN THE ANSWER TO JUSTICE PARIENTE THAT THIS WAS, I MEAN THIS HAD NEVER BEEN HEARD OF BEFORE, BUT THAT THIS NEVER, I MEAN THIS ISSUE HAS NEVER BEEN HEARD OF BEFORE, BUT I DO NOTE THAT YOUR OPPONENT CITED IN THE BRIEF A 1985 OREGON SUPREME COURT CASE WHICH SPECIFICALLY HELD THAT THIS WAS A PERMISSIBLE TYPE OF INQUIRY BY REASON OF THE FACT THAT YOU -- IT WOULD BE NONSENSICAL TO REQUIRE YOU TO BRING IN MANY OB-GYN PEOPLE IN ORDER TO ESTABLISH THE STANDARD OF CARE. I MEAN, THAT'S BEEN THE STATE OF THE LAW IN OREGON FOR SOME TIME, HAS IT NOT?

WE RECOGNIZE THAT THERE ARE A LOT OF APPELLATE OPINIONS THAT HAVE MADE BROAD STATEMENTS THAT HAVE THEIR IMPLICATION AS FAR AS THIS CASE IS CONCERNED. IN MANY OF THOSE CASES, THOUGH, THEY ARE -- LET ME SEE IF I'VE GOT THAT ONE. I DON'T HAVE THAT ONE RIGHT IN FRONT OF ME, BUT IN MANY OF THOSE CASES THEY WERE CONSULTING WITH PEOPLE IN OTHER FIELDS, OTHER THAN THE FIELD IN WHICH THE EXPERT WAS TESTIFYING, AND WE RECOGNIZE THAT THEY ARE BROAD STATEMENTS AND WE SUGGEST THAT THE BETTER RULE IN FLORIDA IS THAT SCHWARZ SAYS THAT YOU CANNOT TESTIFY THAT YOU HAVE CONSULTED ANOTHER EXPERT IN THE SAME FIELD ON DIRECT EXAMINATION, AND I WOULD SUGGEST --

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CHIEF JUSTICE: I WANT TO REMIND YOU YOU ARE IN YOUR REBUTTAL.

SO I WOULD SUGGEST THAT IF A TRIAL JUDGE WAS CONFRONTED WITH THIS ISSUE AND DETERMINED WHAT SHOULD I DO, AND YOU HANDED THIS TRIAL JUDGE SCHWARZ AND YOU HANDED THIS TRIAL JUDGE LINN, IF YOU WERE IN THE FIRST DISTRICT YOU WOULD HAVE TO FOLLOW LINN. IF YOU WERE IN THE FOURTH DISTRICT YOU WOULD HAVE TO FOLLOW SCHWARZ, IF YOU WERE IN THE OTHER THREE DISTRICTS YOU WOULD -- IT WOULD BE A TOSS-UP AND WE JUST THINK THAT THIS ADDS STABILITY TO THE LAW. IT ADDS CERTAINTY TO THE LAW AND IT PROVIDES A MEANS IN WHICH WE CAN PROGRESS WITHOUT HAVING A BUNCH OF APPEALS IN THIS CASE. SO WITH THAT, I WILL SAVE THE REMAINDER OF MY TIME FOR REBUTTAL. THANK YOU. I DO HAVE, EXCUSE ME, I DO HAVE THAT CITE. VOLUME 3, PAGE 397 FOR THE MOTION IN LIMINE.

CHIEF JUSTICE: THANK YOU.

MAY IT PLEASE THE COURT, I'M MARK HICKS, I REPRESENT DR.^FOSSUM. WITH ME TODAY IS BILL FULLER.

WILL YOU PICK UP ON THAT LAST POINT THAT MR.^HARDING MADE AS TO WHETHER SCHWARZ AND THIS CASE CAN LIVE SIDE BY SIDE IN THE LAW IN FLORIDA?

I THINK THEY CAN LIVE SIDE BY SIDE, ALTHOUGH I THINK SCHWARZ IS WRONG AND HERE'S HOW IT DOES LIVE SIDE BY SIDE. IN THIS CASE, IF YOU LOOK AT THE DISSENT, THEY NEVER ONCE CITE 766.102 WHICH IS CRUCIAL. IF YOU LOOK AT THE BRIEF OF MY OPPONENT AND YOU IF YOU LOOK AT THE REPLY BRIEF OF MY OPPONENT 766 IS NOT MENTIONED AT LEAST WHEN I LOOK THROUGH THE TABLE OF THE INDEX IT WAS NEVER MENTIONED. THAT'S THE KEY TO THIS CASE. THIS IS A MEDICAL MALPRACTICE CASE. MY OPPONENT SAYS SCHWARZ REQUIRES THAT YOU NOT CONSULT SOMEONE IN YOUR FIELD OR THAT THE JURY KNOW ABOUT IT. EVEN THE FACT OF CONSULTATION IN AND OF ITSELF COULD PREJUDICE THE JURY. WELL, THE PROBLEM WITH THAT IS THAT THE STATUTE AND THE JURY INSTRUCTION BOTH REQUIRE BY ITS VERY LANGUAGE THAT YOU CONSULT SIMILAR HEALTH CARE PROVIDERS, BECAUSE NO LONGER COMMUNITY STANDARD --.

CHIEF JUSTICE: SO I WANT TO MAKE SURE THAT THIS WOULD WORK FOR THE GOOSE AND THE GANDER, BOTH SIDES. THE LEGISLATURE WHEN THEY SPECIFICALLY IN 766.102 TALKED ABOUT WHO COULD GIVE THE EXPERT TESTIMONY AND WENT THROUGH THOSE THAT HAVE TO BE IN THE SAME SPECIALTY, HAVE TO HAVE DEVOTED PROFESSIONAL TIME TO THE THREE YEARS PRECEDING, HAVE TO GIVE AFFIDAVIT THAT WE WOULD SANCTION AS LONG AS SOMEONE IS IN THE SAME HEALTH CARE FIELD IF THEY BASE THEIR OPINION ON DOING A POLL OF DOCTORS IN THIS COUNTRY, AROUND THE WORLD THAT THAT'S WHAT WAS CONTEMPLATED BY 766.102?

NO, YOUR HONOR, THAT'S NOT WHAT I AM SAYING.

CHIEF JUSTICE: I WOULD THINK THAT THE LEGISLATURE WOULD THINK QUITE THE OPPOSITE BECAUSE WHAT THEY WERE TRYING TO DO WAS MAKE SURE THAT PLAINTIFF'S LAWYERS DID NOT USE THESE EXPERTS THAT WERE KIND OF JUST GENERALISTS TO COME IN AND GIVE A STANDARD OF CARE AND NOW YOU WOULD BE SAYING THAT THEY COULD FIND SOMEBODY WHO IS, YOU KNOW, PRACTICING IN THIS FIELD BUT COULD JUST GO FIND, YOU KNOW, TEN PEOPLE AND SAY I TALKED TO THOSE TEN PEOPLE AND THAT'S HOW I CAME UP WITH MY OPINION ON THE STANDARD OF CARE?

NO, YOUR HONOR.

THAT'S NOT WHAT HAPPENED IN THIS CASE, IS IT? IS THAT WHAT HAPPENED IN THIS CASE? I THOUGHT THE EXPERT SAID THAT WAS ONE OF THE BASES FOR HER OPINION AND THERE WERE OTHER BASES.

WHAT YOU DO IN THIS CASE, YOUR HONOR, IS WE ARE NOT SAYING THAT THE EXPERT CAN TURN AROUND AND FIND OUT FROM AN EXPERT WHAT THE ULTIMATE OPINION IS IN THE CASE AND NOT APPLY THEIR OWN KNOWLEDGE, READING, DEPOSITION READING, READING OF THE MEDICAL RECORDS, BUT IT IS LIMITED TO STANDARD OF CARE.

RIGHT. SO THEREFORE ON STANDARD OF CARE THAT'S EXACTLY WHAT SHE DID, BECAUSE THE QUESTION WAS IN ORDER TO GIVE THOSE OPINIONS ABOUT THE STANDARD OF CARE IN THIS PARTICULAR CASE, WHAT, IF ANYTHING, DID YOU DO TO TRY TO DETERMINE THE APPROPRIATE STANDARD OF CARE FOR THIS CASE, AND THEN THE OBJECTION IS MADE. YOU UNDERSTAND THE QUESTION. YES, WHAT I DID WAS PRESENTED THE CASE IN SEVERAL AND A COUPLE OF DIFFERENT FORUMS, ONE IS THE FIVE PRIVATE PRACTICE UROLOGISTS WHO VARY FROM HAVING EXPERIENCE THREE YEARS TO 25 AND THEN I PRESENTED TO THE UNIVERSITY OF MISSOURI THAT HAS FIVE STAFF AND THEIR EXPERIENCE AREAS AND BASED UPON THAT DETERMINATION OF WHAT THE APPROPRIATE STANDARD OF CARE IS FOR THE CASE, DID YOU COME TO AN OPINION? YES, SHE MEETS THE STANDARD SO SHE MAY HAVE REVIEWED DEPOSITIONS BUT THE QUESTION FROM MR. FULLER, I MEAN IT SEEMS LIKE HE WAS SPECIFICALLY THAT YOU WERE BASING YOUR STANDARD OF CARE ON TALKING TO OTHER PEOPLE.

YOU ARE CONFUSING THE ULTIMATE OPINION OF THE EXPERT WITH WHAT THE STANDARD OF CARE IS. I AGREE WITH YOU THAT THE OPINION OF THE EXPERT, THE ULTIMATE OPINION HE GIVES HE CANNOT TURN AROUND AND ASK ANOTHER EXPERT WHAT THAT OPINION SHOULD BE AND JUST RELAY IT TO THE JURY. WHAT WE ARE TALKING ABOUT HERE IS ONLY WHAT IS THE STANDARD OF CARE AND LOOK AT WHAT THE STATUTE SAYS. IT SAYS THAT YOU HAVE TO DETERMINE THAT LEVEL OF CARE, SKILL AND TREATMENT, RECOGNIZED AS ACCEPTABLE AND APPROPRIATE BY REASONABLY PRUDENT, SIMILAR HEALTH CARE PROVIDERS. AND THE FIRST DISTRICT SAID, A DOCTOR WOULD HAVE TO COMMUNICATE IN SOME WAY WITH OTHER HEALTH CARE PROFESSIONALS TO KNOW WHAT THEY REGARD AS ACCEPTABLE AND APPROPRIATE.

WOULD YOU DESCRIBE, I MEAN IS THIS LIMITLESS, I MEAN ON BOTH SIDES, BOTH CLAIMANTS AND DEFENDANTS, EXPERTS CAN SAY, WELL, I TALKED WITH THE HEAD OF THE DEPARTMENT AT THE UNIVERSITY OF MIAMI, AND I TALKED WITH THE UNIVERSITY OF FLORIDA, I TALKED WITH FLORIDA STATE AND I WENT TO ALL OF THESE DEPARTMENTS, AND ALTHOUGH MY OPINION MAY BE A LITTLE DIFFERENT, THIS IS THE STANDARD OF CARE AND BRING IN BY INFERENCE ALL OF THOSE? I MEAN CAN YOU JUST GO ON AND ON? IS THERE NO LIMIT AT ALL?

NO, THERE IS A LIMIT. AND THE LIMIT IS YOU CANNOT GIVE THE ULTIMATE OPINION ABOUT ANY OTHER PHYSICIANS ABOUT THE FACTS OF THIS CASE, BUT YOU CAN CONSULT AND TELL THE JURY WHAT THE STANDARD OF CARE IS. SO LET'S SAY THE STANDARD, A REAL-LIFE EXAMPLE LET'S SAY THE STANDARD OF CARE IN A BRAIN DIAGNOSIS CASE, BRAIN CANCER CASE IS WITHIN THE FIRST MONTH YOU DO TEST A AND THEN THE SECOND MONTH DO TEST B AND MAYBE TEST C. THAT'S THE STANDARD OF CARE. NOW, OUR EXPERT GOES AROUND AND ASKS EIGHT TO TEN OTHER EXPERTS AND NINE OUT OF TEN SAY THAT IS THE STANDARD OF CARE. HE SAYS TO HIMSELF, YOU KNOW, I'M MORE CONSERVATIVE THAN THAT. I THROW IN AN EXTRA TEST BUT HERE IS WHAT I AM GOING TO DO BECAUSE MOST OF THE PEOPLE SAY THAT IT IS NOT REQUIRED TO THROW IN THAT FOURTH TEST, OKAY, NOW I KNOW WHAT STANDARD OF CARE IS AND I'M GOING TO GO BACK AND APPLY ALL OF THE FACTS AND MEDICAL RECORDS NUMBER ONE TO FIND OUT IF THEY MET THAT STANDARD BY DOING ALL OF THE TESTS. NUMBER TWO, WHERE THE TESTS PERFORMED ACCURATELY, PROPERLY AND TIMELY, AND WHAT ARE THE RESULTS? NOW, HE CAN'T COME IN AND SAY, THAT THESE OTHER EXPERTS OUT HERE I CONSULTED ONLY ON WHAT IS THE DEFINITION OF STANDARD OF CARE UNDER THESE FACTS MEANING DIAGNOSIS OF A BRAIN TUMOR, THAT'S THE ONLY THING HE IS ASKING WHAT IS THE STANDARD OF CARE. HE CAN'T TURN AROUND AND THEN APPLY WHAT THEY SAY AND THE OPINION THEY MIGHT GIVE BASED UPON A REVIEW OF MEDICAL RECORDS AND GIVE THE ULTIMATE OPINION.

WELL, DOES THE STATUTE REALLY CONTEMPLATE THAT KIND OF AD HOC DETERMINATION ON A STANDARD OF CARE AS EACH CASE COMES UP AND A PHYSICIAN EXPERT IS PREPARED TO TESTIFY? I GUESS I'M CONCERNED, I THOUGHT THAT THE STATUTE CONTEMPLATED THAT, TO GIVE A SIMPLE EXAMPLE, THAT WE'VE GOT A COMMUNITY OF JACKSONVILLE OR WHEREVER, AND YOU'VE GOT 50 OBSTETRICIANS THAT PRACTICE IN JACKSONVILLE, AND THEY HAVE BEEN, YOU KNOW, THEY HAVE BEEN PRACTICING, YOU KNOW, FOR A LONG, LONG TIME, AND SO IF WE'VE GOT AN ISSUE ABOUT WHETHER OR NOT A PARTICULAR PHYSICIAN HAS BEEN NEGLIGENT OR WHATEVER, THAT YOU BRING IN ONE OF THOSE OBSTETRICIANS AND THEY SAY I'VE BEEN PRACTICING OBSTETRICS FOR 30 YEARS AND I'VE SEEN ALL OF THESE PATIENTS, AND I'VE, YOU KNOW, HAD COLLEAGUES, I'VE BEEN IN INDIVIDUAL PRACTICE IN A HOSPITAL PRACTICE AND, YOU KNOW, THE WHOLE WORKS OR WHATEVER, AND THEY RENDER THEN AN OPINION ABOUT THE STANDARD OF CARE AS OPPOSED TO WHAT I SEE AS SORT OF AN AD HOC PRACTICE THAT APPARENTLY IS GOING ON WHERE NOW YOU HIRE A PHYSICIAN AND THE PHYSICIAN SAYS, WELL, I WENT OUT TO THE CLEVELAND CLINIC WHERE THEY HAVE THE SIX FINEST OBSTETRICIANS IN THE WORLD, OKAY, AND I ASKED THEM WHAT THE STANDARD OF CARE WAS, AND NOW OF COURSE I'VE LOOKED AT THE RECORDS AND EVERYTHING LIKE THAT, TOO, BUT I'M REALLY INCLUDING WHAT THEY TOLD ME IN TERMS OF THIS THING. SO WE'RE REALLY NOW HAVING ON SORT OF AN AD HOC BASIS A DETERMINATION, YOU KNOW, THAT APPEARS TO BE AT LEAST SUBSTANTIALLY INFLUENCED BY THESE SIX PEOPLE THAT ARE AT THE CLEVELAND CLINIC, YOU KNOW, THAT ARE ALL WORLD CLASS PEOPLE ON AN AD HOC BASIS. NOW, HELP ME WITH HOW WE GOT THE LEAP FROM AN OBSTETRICIAN THAT'S BEEN PRACTICING IN A COMMUNITY AND BECAUSE OF THAT PRACTICE IS FAMILIAR WITH THE STANDARD OF CARE ABOUT IF YOU HAVE A PATIENT THAT IS PRESENTING WITH THESE KINDS OF SYMPTOMS AND, YOU KNOW, THAT THIS IS WHAT YOU DO, AND AS YOU GO ALONG, YOU KNOW, BASED ON THEIR ACTUAL PRACTICE AS OPPOSED TO GOING OUT TO THE CLEVELAND CLINIC AND CONSULTING WITH THESE SIX WORLD-CLASS EXPERTS AND NOW COMING BACK AND TELLING WHAT THE STANDARD OF CARE IS BASED ON THAT. ISN'T A PROBLEM THERE?

NO, YOUR HONOR, AND THE REASON IS THAT IF ONE PRACTITIONER, LET'S SAY IS THREE YEARS DOWN THE ROAD. LET'S SAY HE IS TEN YEARS DOWN THE ROAD. IF HE TESTIFIES ABOUT WHAT HE THINKS THE STANDARD OF CARE IS IN HIS PRACTICE, THAT'S NOT PROPER UNDER THE STATUTE AND UNDER YOUR JURY INSTRUCTION WHICH THE JURY INSTRUCTION AND THE STATUTE MIRROR EACH OTHER AND SAY IT HAS TO BE SIMILAR HEALTH CARE PROVIDERS PLURAL. NOW, WHERE HE GETS HIS TESTIMONY FROM IS HE TALKS TO OTHER DOCTORS AND HE GOES TO THE HOSPITAL, HE HAS A GENERAL UNDERSTANDING OF WHAT THE STANDARD OF CARE IS. HE DOES THE VERY SAME THING WE'RE TALKING ABOUT.

BUT DOES HE DO THAT FOR THE PARTICULAR CASE OR HAS HE BEEN DOING THAT? THAT IS, AS PART OF HIS PRACTICE AND HIS QUALIFICATIONS TO BE ABLE TO RENDER AN OPINION? I DIDN'T KNOW THAT WE WERE TO THE POINT NOW WHERE YOU COULD JUST GRAB ANYBODY AND THEY COULD SAY, WELL, I HAVE LOOKED THROUGH THE RECORDS AND EVERYTHING LIKE THAT AND NOW I'VE GONE AND CONSULTED WITH OTHER DOCTORS IN THE COMMUNITY NOW AND THAT EQUIPPES ME TO BE ABLE TO TELL YOU WHAT THE STANDARD OF CARE IS IN A COMMUNITY SINCE I HAVE GONE AND ASKED THESE OTHER DOCTORS AS OPPOSED TO THAT PERSON THEMSELVES BY REASON OF EXPERIENCE AND PRACTICE AND EVERYTHING BEING ABLE TO TESTIFY AS AN EXPERT, AND THAT'S WHAT I THOUGHT THE STATUTE CONTEMPLATED WAS NOT THAT YOU COULD GO AND QUALIFY YOURSELF BY CHECKING WITH THESE PEOPLE AT THE CLEVELAND CLINIC, BUT THAT YOU HAD TO BE THIS PERSON THAT ALREADY WAS FAMILIAR WITH THE STANDARD OF CARE BY REASON OF YOUR EXPERIENCE AND PRACTICE AND PRACTICING WITH OTHER DOCTORS AND EVERYTHING SO IT IS SORT OF A HISTORICAL ACCUMULATION AS OPPOSED TO AN AD HOC BASIS OF GOING OUT AND SAYING, WELL, ANYBODY NOW, YOU KNOW, THAT HAS A MEDICAL LICENSE CAN BECOME AN IMMEDIATE EXPERT.

THAT'S NOT TRUE, YOUR HONOR. YOU'VE GOT ONE SET OF CIRCUMSTANCES WHERE YOU'VE GOT

TO QUALIFY AS THE EXPERT AND IN THIS CASE THEY DID NOT OBJECT TO OUR EXPERT AS A QUALIFIED EXPERT. ALLOWED THE EXPERT TO COME IN.

WHY DOES SHE NEED TO GO TALK TO THE OTHER DOCTORS?

BECAUSE SHE IS MORE CONSERVATIVE, BECAUSE SHE HAS HUNDREDS OF CASES OF URINARY AND URETER PROBLEMS IN WHICH HER CONSERVATIVE APPROACH SHE CONCEDES BECAUSE OF ALL OF THESE --

IF SHE HAD GONE AND CONSULTED WITH ANOTHER GROUP OF CONSERVATIVE DOCTORS THAT HER OPINION WOULD HAVE ENDED UP BEING DIFFERENT?

THAT COULD HAPPEN IN ANY EVENT. IT COULD HAPPEN AND THAT'S WHY YOU DO CROSS EXAMINATION. THAT'S WHY 703 SAYS TO THE EXTENT THESE DOCTORS RELY ON HEARSAY STATEMENTS WHICH THEY ARE ALLOWED TO RELY ON, STATEMENTS AND DISCUSSIONS WITH OTHER DOCTORS, YOU CAN CROSS-EXAMINE ON THAT.

WHAT ABOUT YOU SAID SHE COULD GO OUT AND TALK TO TEN PHYSICIANS OR SAY, AND SUPPOSE THAT IN THAT TEN, FIVE OF THEM SAID THIS IS THE STANDARD OF CARE, FIVE OF THEM SAID SOMETHING DIFFERENT ABOUT THE STANDARD OF CARE. SHE COMES IN AND SAYS, YOU KNOW, I TALKED WITH THESE TEN PEOPLE AND THIS IS THE STANDARD OF CARE. DON'T YOU THINK THAT A JURY WOULD REASONABLY INFER FROM HER TESTIMONY THAT THESE PEOPLE ALL AGREE THAT THIS IS THE STANDARD OF CARE AND ISN'T THAT REALLY BOOSTING, BOLSTERING HER TESTIMONY ABOUT WHAT THE STANDARD OF CARE IS? IT JUST SEEMS TO ME THERE IS A REAL PROBLEM WHEN COW IN AND TALK ABOUT EVEN THOUGH YOU MAY NOT SAY WHAT THEY SAID, BUT TELL THE JURY, YES, I TALKED TO THESE OTHER PEOPLE AND THIS IS THE STANDARD OF CARE?

WELL, YOUR HONOR, YOU ARE GOING TO GET CROSS-EXAMINED ANYWAY, THE EXPERT IS, ON HOW THEY KNOW THE STANDARD OF CARE IN ANY EVENT AND WHAT THEY ARE GOING TO SAY IS, WELL, I PRACTICED IN THE HOSPITAL AND I HAVE OBSERVED OTHER UROLOGISTS IN THE OPERATING ROOM AND I KNOW THE TESTS -- I'VE DISCUSSED IT WITH THEM AT LUNCH AND YOU'RE GOING TO GET THE SAME SORT OF TESTIMONY.

CHIEF JUSTICE: BUT YOU SAID AND I THOUGHT I HEARD YOU SAY THAT THEY WOULD HAVE TO TAKE A POLL. HOW DOES A PLAINTIFF OR A DEFENDANT EVEN CROSS-EXAMINE ABOUT THESE, AGAIN, CONVERSATIONS NOT IN THE COURSE OF IT WAS ABOUT THE CASE AS IT WAS ONGOING THAT THERE MIGHT BE CONSULTATIONS BUT AFTER THE FACT WHEN THERE IS TWO MINUTES OF DISCUSSION WITH THESE PEOPLE IN MISSOURI OR WHATEVER AND SHE IS FROM COLORADO AND THE CASE IS IN FLORIDA, THAT HAS THE EVEN A MODICOM OF RELIABILITY AND I GUESS THAT'S WHY I GO BACK TO SORT OF THIS QUESTION WHICH IS YOU SEEM TO BE JUSTIFYING IT UNDER 766.102, DID YOU RAISE THAT BELOW AS THE REASON THAT THIS EVEN THOUGH SCHWARZ HAD SAID OTHERWISE THAT IN THIS CASE THAT 766.102 REALLY MANDATED THAT THIS KIND OF POLLING TAKE PLACE? WAS THAT RAISED BELOW?

THE TRIAL JUDGE RULED IN OUR FAVOR TO THE ADMISSIBILITY OF THIS.

BUT NEVER ON THE BASIS THAT THIS WAS A --.

WE WON THE ISSUE. I MEAN WE WON THE ISSUE.

CHIEF JUSTICE: BUT THEY DID CITE SCHWARZ, RIGHT? THEY RELIED ON SCHWARZ?

YES.

CHIEF JUSTICE: AND YOU DIDN'T SAY, WELL, 766.102 --

LET'S PUT SCHWARZ INTO PERSPECTIVE.

CHIEF JUSTICE: BUT SCHWARZ WAS WHAT WAS PRESENTED AS BEING THE REASON THAT THIS TESTIMONY SHOULD NOT COME IN?

WELL, THE HEARSAY PART OF SCHWARZ. SCHWARZ IS REALLY A BOLSTERING CASE. THEY USED IT AS A CONDUIT FOR HEARSAY CASE AND WE DON'T HAVE A CONDUIT FOR HEARSAY. IN THIS CASE, BECAUSE EVEN THE DISSENT LIMITS ITS DECISION ON WHETHER WE WERE A CONDUIT FOR HEARSAY MEANING THAT WE HAD NO OTHER FACTS, CIRCUMSTANCES OR ANYTHING ELSE WHICH OUR EXPERT BROUGHT TO BEAR ON THE OPINION. THE MAJORITY GOES THROUGH ON THE DETAIL ON HOW OUR EXPERT HAD ALL OF THOSE OTHER FACTS, REVIEWS THE RECORDS AND EVERYTHING ELSE THAT BROUGHT TO BEAR ON HER ULTIMATE OPINION BASED UPON THE STANDARD OF CARE THAT WAS LESS CONSERVATIVE THAN HERS.

WOULD YOU GET BACK TO AND COULD YOU RESPOND TO THE PARAMETER OF THE RULE? THE RULE THAT YOU ARE URGING US TO ADOPT OR TO APPROVE, I GOT INTERRUPTED IN THE MIDDLE SO WHAT ARE THE PARAMETERS?

THE PARAMETERS ARE CURRENTLY AS THE CURRENT LAW STANDS YOU ARE ALLOWED TO CROSS-EXAMINE AN EXPERT WITNESS ON WHAT HEARSAY STATEMENTS WERE MADE, OKAY? IF OUR EXPERT WANTS TO GET OUT AND SAY, OR A PLAINTIFF'S EXPERT WANTS TO GET UP AND SAY I'M NOT SURE OF THE STANDARD OF CARE BECAUSE I'M CONSERVATIVE BUT I HAVE DISCUSSED IT WITH ALL OF MY COLLEAGUES AND THREE OF MY COLLEAGUES THINK IT IS THIS SO I'M GOING TO ADOPT THAT THE FIRST THING THAT HAPPENS IS IT COMES OUT IN CROSS EXAMINATION THAT THIS ENTIRE GUY'S TESTIMONY IS RELIED UPON BY THREE OF HIS COLLEAGUES. HE IS GOING TO LOSE THE CASE. THAT'S WHAT CROSS EXAMINATION IS ALL ABOUT. YOU'RE ALLOWED TO CROSS-EXAMINE THE BASIS OF THE OPINION SO THIS IS ALL GOING TO WORK ITSELF OUT. YOU MEAN TO SAY, SIR, THAT YOU CALLED TEN PEOPLE AND FIVE OF THEM SAID NO, FIVE OF THEM SAID YES, HOW CAN YOU HAVE ANY KIND OF AN OPINION IN THIS CASE?

CHIEF JUSTICE: THERE ARE NO PARAMETERS.

THE ONLY THING I'M TALKING ABOUT IS A MEDICAL MALPRACTICE CASE WHICH HAS THIS STATUTE AND YOUR JURY INSTRUCTION WHICH MIRRORS THE STATUTE WHICH SAYS PRECISELY THAT YOU MUST, YOU MUST RELY ON SIMILAR HEALTH CARE PROVIDERS, PLURAL, WHICH YOU ARE PROPOSING YOUR HONOR IS THE BEST WAY TO FIX THE PROBLEM IS JUST TO SAY THIS AREA WE ARE NOT GOING TO TELL THE JURY HOW YOU FOUND OUT ABOUT THE STANDARD OF CARE, BUT YOU HAVE TO LET THE JURY WEIGH HOW YOU FOUND OUT ABOUT THE STATUTE, STANDARD OF CARE TO DETERMINE WHETHER YOUR OPINION IS ANY GOOD OR NOT.

SO WOULD YOU SAY THAT THEN LIKE FOR EXAMPLE, MY EXPERT CONSULTS WITH SAY THERE ARE 20 PEOPLE THAT WROTE LEARNED TREATISES AND I SAY THAT I CONSULTED WITH ALL 20 OF THOSE PEOPLE THAT WROTE LEARNED TREATISES. I COULD IDENTIFY WHO THE PEOPLE WERE THAT I CONSULTED WITH AND SAY THAT THEY WROTE LEARNED TREATISES.

WELL, THE LEARNED TREATISE, WE ARE GETTING INTO ANOTHER AREA.

I CONSULTED WITH THE PEOPLE THAT WROTE THE LEARNED TREATISE.

I CONSULTED WITH EXPERTS IN THE FIELD OF UROLOGY.

CHIEF JUSTICE: WOULD I NAME THEM?

I DON'T SEE ANYTHING WRONG WITH THAT. JONES FROM THE UNIVERSITY OF MIAMI, SMITH FROM THE UNIVERSITY OF GEORGIA.

CHIEF JUSTICE: AND I FOUND THEM BECAUSE I REVIEWED THE LITERATURE AND I REVIEWED IT WITH PEOPLE ONLY THAT WERE PUBLISHED OR HAD WRITTEN TREATISES IN THIS AREA. I GUESS THAT'S WHERE THIS ISSUE ABOUT NO PARAMETERS, SO THAT'S JUST CROSS EXAMINATION AND THEN THE PLAINTIFF OR THE DEFENSE HAS TO ACTUALLY DO IT EFFECTIVELY WHICH NEEDS TO GET THE NAMES OF EACH OF THOSE PEOPLE AND GO --

NOT REALLY.

CHIEF JUSTICE: I MEAN I WOULD.

THINK ABOUT WHAT THEIR TESTIMONY IS. STANDARD OF CARE. NOT WHAT THE ULTIMATE OPINION IS IN THE CASE WHETHER SOMEONE COMMITTED MALPRACTICE, BUT THE TESTIMONY IS A UROLOGIST WHEN UNDER THESE CIRCUMSTANCES WOULD DO TEST A, TEST B AND TEST C, AND IF THEY DID THOSE CORRECTLY THEY WOULD MEET THE STANDARD OF CARE.

WHAT I AM -- WHERE I AM HAVING DIFFICULTY WITH IS HOW THIS IS NOT COVERED BY 704 IN THAT IF IT IS A MATTER, THE PARAMETERS OF IT, WHY AREN'T THE PARAMETERS OF IT WHAT THE EXPERT, WHOEVER IT IS, REGULARLY USES IN THE PRACTICE OF THAT EXPERT'S PROFESSION? I MEAN, ISN'T THAT REALLY THE TEST THAT WE ARE DEALING WITH?

WHAT THE EXPERT REGULARLY USES, IN OTHER WORDS ASK THE EXPERT DO THEY REGULARLY CONSULT WITH OTHER DOCTORS TO DETERMINE STANDARD OF CARE?

WELL, HOW --

THIS WOULD BE ONLY THE THIRD TIME I THINK THIS EXPERT WAS EVER AN EXPERT.

BUT I THINK THE QUESTION THAT I WOULD UNDERSTAND TO BE WOULD BE HOW IS, AS THIS EXPERT WAS ASKED, HOW IS THE STANDARD OF CARE DEVELOPED AND HOW DID YOU COME TO YOUR OPINION IN YOUR PRACTICE AS TO WHAT STANDARD OF CARE SHOULD BE USED?

THAT WOULD BE THE CROSS EXAMINATION QUESTION IF THE PLAINTIFF OR DEFENSE WANTS OF THE OTHER SIDE'S EXPERT JUST LIKE IF YOU RELY ON A TEST PERFORMED BY SOME DOCTOR WHO IS NOT THERE, YOU CAN STILL CROSS-EXAMINE ABOUT THE FACT THAT HE IS NOT THERE. YOU CAN CROSS-EXAMINE ABOUT THE TEST, YOU CAN POINT OUT WE NEVER BROUGHT HIM TO COURT, BUT THE COURT ALLOWS IT. THAT'S -- YOU ALLOW, YOU HAVE ALLOWED AND THE FLORIDA RULES ALLOW EXPERTS TO TESTIFY ABOUT MATTERS THAT ARE HEARSAY, SO LONG AS IT IS NOT JUST A CONDUIT, AND HERE WE SAID NOTHING TO THE JURY ABOUT RESULTS OR ANYTHING ELSE. WE JUST TOLD THE JURY THAT WE CONSULTED EXPERTS ONLY ABOUT STANDARD OF CARE.

AND IT IS YOUR VIEW THAT THE INFERENCE CREATED BY THAT CAN NEVER SATISFY THEN THIS CONDUIT PROHIBITION?

NO, NOT IF YOU SAY -- IF YOU ASK WHAT IS THE STANDARD OF CARE AND THE EXPERT SAYS, WELL, MINE IS VERY CONSERVATIVE BUT I HAVE CONSULTED OTHERS, AND THEY SAY THAT TESTS A, B AND C IS ALL YOU NEED TO DO TO SATISFY THE STANDARD OF CARE AND I WENT BACK WITH THAT AND I LOOKED AT THE FACTS AND THAT'S BEEN MET IN THIS CASE, AND THOSE TESTS WERE DONE APPROPRIATELY. THAT'S NOT A CONDUIT WHEN YOU DO THAT. THE CASES ALL SO HOLD.

CHIEF JUSTICE: MR.^HICKS, WITH OUR HELP YOU'VE USED UP YOUR TIME. THANK YOU.  
MR.^HARDING, REBUTTAL?

MAY IT PLEASE THE COURT, HISTORICALLY THE WAY EXPERTS' TESTIMONY HAS BEEN GIVEN IN THE COURTS OF THIS STATE IS THAT IT IS BASED UPON THE EXPERTS' EDUCATION, TRAINING AND EXPERIENCE.

LET ME ASK YOU THIS: LET'S SAY THE EXPERT TESTIFIES ABOUT WHAT THE STANDARD OF CARE IS AND COUNSEL ASKS THEM HOW DID YOU GET THAT STANDARD OF CARE AND THE EXPERT SAYS, WELL, I WENT TO THIS SYMPOSIUM TWO YEARS AGO AND THERE WAS AN EXPERT IN THE FIELD THERE AND SAID THIS IS EXACTLY WHAT YOU DO AND IN THIS PARTICULAR SITUATION THIS IS WHAT YOU SHOULD DO AND THAT WAS DONE IN THIS CASE. IS THAT ADMISSIBLE?

WE ARE TALKING ABOUT ON DIRECT EXAMINATION.

CORRECT, ON DIRECT EXAMINATION AND THE SYMPOSIUM WAS DONE LONG BEFORE THIS CASE EXISTED.

ACCORDING TO SCHWARZ YOU CANNOT CONSULT WITH ANY OTHER EXPERTS IN THE FIELD AND TESTIFY TO THAT.

BUT THIS WAS NOT A CONSULTATION. THIS WAS GOING TO A SYMPOSIUM AND AN EXPERT GOES UP THERE AND SAYS ACCORDING TO MY STUDIES THIS IS WHAT SHOULD BE DONE IN THIS PARTICULAR SITUATION?

AND THAT IS A PART OF THE EXPERT'S EDUCATION, TRAINING AND EXPERIENCE?

YES.

SO THE QUESTION WOULD -- EXCUSE ME, GO AHEAD. I'M SORRY.

YES.

AND THEN THAT IS THE SUBJECT TO CROSS EXAMINATION, AND --

SO THAT WOULD BE ADMISSIBLE?

I WOULD THINK THAT DEPENDING ON THE TESTIMONY YOU WOULD HAVE TO DETERMINE WHETHER OR NOT IT WAS UNFAIR PREJUDICE, AND AS 704 MENTIONED BY JUSTICE WELLS IS TEMPERED BY 403, THE --

SO HOW DO YOU GET AN EXPERT TO TESTIFY ABOUT WHAT THE STANDARD OF CARE IN THE COMMUNITY IS IF IT IS ALWAYS UNFAIR PREJUDICE TO SAY WHAT OTHER EXPERTS IN THE FIELD BELIEVE?

IT IS ON DIRECT EXAMINATION WHEN THIS WITNESS IS BEING QUALIFIED TO GIVE AN OPINION, IT IS ON DIRECT EXAMINATION THAT THE PROHIBITION OF SCHWARZ APPLIES. AND AS COUNSEL HAS INDICATED, IT WOULD BE UP TO THE OTHER SIDE TO DETERMINE WHETHER THEY WANTED TO EXPLORE THAT.

CHIEF JUSTICE: JUSTICE WELLS HAS A QUESTION. I KNOW YOU ARE OUT OF TIME.

MY QUESTION WAS: WOULD IT BE PERMISSIBLE, YOU SAY THAT THE HISTORIC QUESTION HAS BEEN BASED UPON YOUR BACKGROUND, TRAINING AND EXPERIENCE THAT -- AND KNOWLEDGE OF THE PREVAILING PRACTICES OF UROLOGISTS? COULDN'T THAT BE A QUESTION, YOUR KNOWLEDGE?

TO FOLLOW HIS EXAMPLE, JUSTICE WELLS, IT COULD BE THAT THAT WOULD BE A PART OF HIS

TRAINING OF THE EXPERT'S TRAINING, BUT YOU MUST UNDERSTAND, SCHWARZ DOES NOT SAY THAT IT IS I AM PERMISSIBLE FOR THIS EXPERT TO CONSULT WITH OTHER EXPERTS. IT IS SAYING THAT IT IS IMPERMISSIBLE ON DIRECT EXAMINATION AND FOR ALL OF THE REASONS OF THE INFERENCES OF BOLSTERING AND CONDUIT AND TESTIFYING AS TO THE CREDIBILITY, THOSE INFERENCES ARE UNFAIRLY PREJUDICE.

CHIEF JUSTICE: THANK YOU. WITH OUR HELP YOU HAVE USED UP YOUR TIME. THE COURT WILL BE IN RECESS UNTIL 9:00 TOMORROW MORNING.

THE MARSHAL: PLEASE RISE.