

>> GOOD MORNING.

MAY IT PLEASE THE COURT.

I'M JOEL EATON.

I REPRESENT CHRISTY AILLS, SHE
WAS A PLAINTIFF IN MALPRACTICE
SUIT AGAINST DR.^BOEMI.

WITH ME IS JEFF GARVIN WHO
REPRESENTED MISS AILLS IN
THE TRIAL COURT.

VERY BRIEFLY, MISS AILLS TRIED
BY CONSENT IN THE TRIAL COURT.

(GAP IN CAPTIONS)

>> IF YOU WOULD ADDRESS, THAT
ISSUE WE APPRECIATE IT.

>> CERTAINLY.

I ANTICIPATE THAT MR.^ENGLAND
WILL ARGUE TO THE COURT IT
DOESN'T HAVE JURISDICTION
BECAUSE THERE IS NO CONFLICT ON
THE FACE OF THIS DECISION.

I'D LIKE TO SPEND A COUPLE
MINUTES ON THAT ISSUE FIRST IN
ANTICIPATION OF HIS ARGUMENT.
WHICH WILL ADDRESS THE MERITS
OF YOUR QUESTION, YOUR HONOR.
THE OBJECTION ON WHICH THIS
REVERSAL WAS BASED, AND I QUOTE
FROM THE FACE OF THE DISTRICT
COURT'S OPINION, WAS THAT THERE
WAS NO PROOF THAT THE
POSTOPERATIVE CARE WAS
NEGLIGENT AND THAT IT WOULD
HAVE MADE A DIFFERENCE.

THAT IS THE OBJECTION THAT THE
DISTRICT COURT BOTTOMED ITS
REVERSAL ON HERE BUT WHAT THE
DISTRICT COURT SAID, IT WAS
REVERSING BECAUSE MR.^GARVIN
HAD MADE DISTURBING AND
INFLAMMATORY ARGUMENT IN
CLOSING ARGUMENT ON AN ISSUE
NOT PLED IN THE COMPLAINT.

THERE IS NOTHING ON THE FACE OF THIS DISTRICT COURT DECISION THAT INDICATES THERE WAS ANY OBJECTION TO THAT ARGUMENT ON THE GROUND THAT IT WAS DISTURBING AND INFLAMMATORY.

>> THE OBJECTION THAT YOU READ TO US FROM THE OPINION, YOU LEFT OUT THE FIRST PART.

OF IT SAYS AT SIDEBAR, DR. ^BOEMI'S COUNSEL EXPLAINED THAT THE REMARK WAS IMPROPER BECAUSE OF ABSENCE OF ANY BASIS IN THE RECORD.

DOESN'T THAT ENCOMPASS THAT THE FACT THAT IT WASN'T PLED.

>> THE WORDS, ABSENCE OF ANY BASIS IN THE RECORD, ARE NOT WITHIN QUOTE MARKS, YOUR HONOR. THOSE ARE THE DISTRICT COURT'S WORDS.

>> EXACTLY.

BUT WE CAN'T GO OUTSIDE THOSE WORDS, CAN WE, UNDER REEVES?

>> NO BASIS IN THE RECORD EVEN ACCEPTING THAT LANGUAGE WHICH IS CONTRADICTED BY THE ACTUAL RECORD WHICH IS ANOTHER POINT I NEED TO MAKE HERE.

NO BASIS IN THE RECORD THAT THE POSTOPERATIVE CARE WAS NEGLIGENT AND IT WOULD HAVE MADE A DIFFERENCE. THAT IS AN OBJECTION TO INSUFFICIENCY OF THE EVIDENCE TO SUBMIT THAT THE THEORY TO THE JURY.

IT IS NOT ON OBJECTION THAT THIS WAS AN ISSUE THAT WAS NEVER PLED IN THE COMPLAINT. THAT CONTENTION WAS RAISED FOR THE FIRST TIME BY APPELLATE COUNSEL IN A MOTION FOR NEW

TRIAL.

THAT CARRIED ALL THE WAY
THROUGH THIS CASE.

IT ENDED UP IN THE DISTRICT
COURT'S OPINION AND THE
DISTRICT COURT ENDED UP
REVERSING THIS TRIAL JUDGE FOR
A RULING THAT HE NEVER MADE.

>> SO RATHER THAN, AND I LOOK
BACK AT YOUR JURISDICTIONAL
BRIEF, RATHER THAN DIRECTLY,
STATING THAT THERE IS EXPRESS
AND DIRECT CONFLICT ON THE TWO
ISSUE RULE, THERE WOULD SEEM TO
ME THAT A STRONG ARGUMENT THAT
YOU'RE MAKING IS THAT THE,
THERE'S A WHOLE LINE OF
APPELLATE CASES AND WE USE THEM
IN DEATH CASES ALL THE TIME,
THAT, THE APPELLATE COURT CAN
NOT REVERSE BASED ON A,
OBJECTION THAT WAS NOT MADE
BELOW.

AND HERE THE OBJECTION WAS NOT
THAT IT WAS AN INFLAMMATORY
ARGUMENT OR THAT IT WAS NOW,
NOT, HAD NOT BEEN PLED BUT
SIMPLY A SUFFICIENCY OF THE
EVIDENCE ARGUMENT.

IS THAT WHAT YOU'RE, IS THAT
ONE ASPECT OF WHERE THERE'S
CONFLICT?

>> THAT IS ONE ASPECT OF THIS
COURT'S CONFLICT JURISDICTION
BUT THERE IS A SECOND ASPECT.
THAT IS, THE DISTRICT'S COURT'S
FAILURE TO APPLY THE TWO-ISSUE
RULE.

PLAINTIFF PROVED A PRIMA FACIE
SHACASE AND WE'RE NOT GOING TO
DISTURB THE JURY'S FINDING OF
LIABILITY BUT WE REFUSE TO

APPLY THE TWO-ISSUE RULE
BECAUSE THIS ISSUE WAS NOT PLED
IN THE COMPLAINT BUT THE
OBJECTION WAS TO INSUFFICIENCY
OF THE EVIDENCE.

AND THIS COURT'S DECISION IN
WHITMAN VERSUS CASTLEWOOD
INTERNATIONAL THE OBJECTION TO
THEIR THEORY OF
LIABILITY PROVED BY
INSUFFICIENT EVIDENCE THAT THE
TWO-ISSUE RULE DOES APPLY.

>> IF THIS CASE, WHAT JUSTICE
LABARGA IS TALKING ABOUT, JUST
THE FOUR CORNERS, TAKE A CASE
WHERE THE COMPLAINT HAS BEEN
TRIED THROUGH NEGLIGENCE AND
ONLY NEGLIGENCE WAS THE ISSUE.
NOW IN CLOSING ARGUMENT FOR
THE FIRST TIME, THERE IS AN
ISSUE AND THEY RAISED AN
INTENTIONAL BATTERY AND THERE
IS NOTHING IN THE PLEADINGS OR
ANYTHING, THERE WERE NO JURY
INSTRUCTIONS ON IT.

DO YOU, IN THAT SITUATION, DO
YOU, DO YOU SEE THAT, AND IF,
SECOND DISTRICT HAD REVERSED
BECAUSE OF THAT, THAT THAT
WOULD BE A MISAPPLICATION OF
THE TWO ISSUE RULE?

>> I THINK IT WOULD DEPEND ON
WHETHER THERE WAS AN OBJECTION
TO THE ARGUMENT MADE IN CLOSING
ARGUMENT BECAUSE ONCE COUNSEL
IS PUT ON NOTICE THAT OTHER
COUNSEL HAS INJECTED A
DIFFERENT THEORY OF LIABILITY
THAT HADN'T BEEN PLED, THEN HE
HAS AN OBLIGATION, I THINK, TO
SEPARATE OUT THOSE ISSUES ON A
INTERROGATORY VERDICT FORM OR

BE SUBJECT TO A TWO-ISSUE RULE.
THIS CASE IS NOT CLOSE TO THAT
CASE.

EVEN IF WE ACCEPT THE SECOND
DISTRICT'S OBSERVATION THIS
ISSUE WAS NOT PLED WITHIN THE
COMPLAINT, WITH WHICH WE
DISAGREE, BY THE WAY, THERE WAS
EVIDENCE THAT CAME IN ON THE
ISSUE OF POSTOPERATIVE CARE.

DR.^BOEMI TREATED THIS
YOUNG LADY FOR SEVEN WEEKS
AFTER THIS BOTCHED SURGERY AND
DID NOTHING.

>> REAL THRUST ON THIS ISSUE
THERE WAS NO ATTEMPT ON
POSTOPERATIVE CARE THAT TO SHOW
THIS WAS A BREACH OF THE
STANDARD OF CARE.

IN LOOKING AT EVEN EVERYTHING
THAT YOU'VE BROUGHT TO OUR
ATTENTION, THAT WASN'T THERE.
NOW THE QUESTION OF WHETHER
THAT MADE A DIFFERENCE, AND
AGAIN THERE WAS NO SPECIAL
INTERROGATORY, I TEND TO SEE
YOUR POINT ON THIS, BUT I
THINK IT'S A STRETCH TO SAY
THAT THERE WAS, THAT THE THEORY
THAT HAD BEEN PURSUED PRIMARILY
WAS ONE THAT INCLUDED
NEGLIGENCE IN THE POSTOPERATIVE
CARE.

>> WELL, YOUR HONOR, IN OPENING
STATEMENT MR.^GARVIN OUTLINED
ALL THE THINGS THAT
DR.^BOEMI DID NOT DO AFTER
THIS AFTER THE SURGERY.

>> THIS COMES IN AFTER --
EVERYTHING THAT HAPPENED FROM THE
TIME OF SURGERY ON IS PART OF
WHETHER IT IS INFLAMMATORY OR

NOT, IT IS PART OF WHAT HER DAMAGES ARE.

IT KIND OF COME IN.

>> AGREED.

>> THAT'S WHY I'M HAVING A HARD TIME UNDERSTANDING FRANKLY THE SECOND DISTRICT'S STATEMENT THAT THIS WAS SO INFLAMMATORY IT WOULD INFLUENCE THE JURY.

THE JURY HEARS THIS.

IT'S THE CONSEQUENCE OF MR.^, THE DOCTOR'S ALLEGED NEGLIGENCE.

SO, BUT I'M STILL GOING BACK TO THIS QUESTION THAT YOU SAID, OH, THERE WAS EVIDENCE THAT THEY PRESENTED AND ESTABLISHED ON NEGLIGENCE AND CAUSATION IN POSTOPERATIVE CARE.

I JUST DIDN'T SEE THAT IN THE RECORD.

>> I DIDN'T SAY THAT I DON'T PLAY THOSE KIND OF GAMES IN THE COURT.

I CONCEDED IN THIS BRIEF THERE IS NO EXPERT TESTIMONY SUPPORTING A CAUSATION FINDING ON THE THIRD THEORY OF LIABILITY, BUT TO GET AT YOUR QUESTION A DIFFERENT WAY, ASSUMING THAT IT WASN'T PLED IN THE COMPLAINT AND THAT ALL THIS EVIDENCE CAME IN AS A RESULT, NOT OF A THIRD THEORY OF LIABILITY BUT JUST BECAUSE IT HAPPENED.

DURING CLOSING ARGUMENT, MR.^GARVIN BEGAN TO ARGUE THAT THIRD THEORY OF LIABILITY, AT WHICH POINT DEFENSE COUNSEL JUMPED UP AND OBJECTED, AND SAID THERE'S NO EVIDENCE TO

SUPPORT THIS ARGUMENT.

HE IS ON NOTICE AT THAT POINT THAT THE PLAINTIFF HAS TAKEN THE POSITION THERE THAT THERE'S A THIRD THEORY OF LIABILITY.

AND IT GETS WORSE.

MR. ^GARVIN THEN TELLS THE JURY, IN CLOSING ARGUMENT, BEFORE DEFENSE COUNSEL HAS AN OPPORTUNITY TO MAKE A CLOSING ARGUMENT THERE ARE THREE THEORIES OF LIABILITY YOU'RE GOING TO CONSIDER IN THIS CASE, DESIGN EXECUTION, NEGLIGENT POSTOPERATIVE CARE.

AT THAT POINT DEFENSE COUNSEL IS CLEARLY ON NOTICE WHETHER THERE IS ABSENCE AFTER PLEADING OR NOT THERE ARE THREE THEORIES OF LIABILITY GOING TO THE JURY BECAUSE THE JUDGE ALREADY RULED AGAINST HIM ON THE ISSUE OF INSUFFICIENCY OF THE EVIDENCE.

AT THAT POINT, WE SAY, HE HAS THE NOTICE WHETHER HE GOT IT IN THE PLEADING OR NOT.

HE'S GOT A OBLIGATION TO ASK FOR SPECIAL INTERROGATORY VERDICT FORM.

HE MAKES A TACTICAL DECISION.

HE DOESN'T WANT A SPECIAL INTERROGATORY VERDICT FORM.

HE ASKS FOR A GENERAL VERDICT FORM.

>> YOU ALSO HAVE THE OPTION TO BE ABLE TO SAY, THIS WAS NOT, THIS WAS NOT THE THEORY THIS WENT TO, TO, TRIAL ON, AND, WE ASKED THAT THE, THAT THE COURT AT THIS POINT THAT THERE ARE ONLY TWO THEORIES OF LIABILITY.

>> HE COULD HAVE DONE THAT.

HE SHOULD HAVE MOVED FOR DIRECTED VERDICT ON THIS THIRD THEORY BUT HE DIDN'T.

>> AGAIN, UNDER THE ASSUMPTION THAT, THAT THEY UNDERSTOOD, THAT THERE WAS A THIRD THEORY OF LIABILITY.

I MEAN IF THERE IS NO EXPERT TESTIMONY ON IT, WHAT ARE YOU GOING TO BE, AND THERE IS NO PLEADING ON IT, WHAT ARE YOU GOING TO BE MOVING FOR A DIRECTED VERDICT ON THAT POINT?

SO I SORT OF, I THINK THAT, AGAIN, IN THE ISSUE AS TO HOW SOMEBODY SHOULD HAVE DONE THIS, AND WHETHER THIS IS ACTUALLY SET FORTH IN THE SECOND DISTRICT OPINION ARE TWO DIFFERENT QUESTIONS.

I THINK.

>> THERE ARE LOTS OF THINGS THAT DEFENSE COUNSEL COULD HAVE DONE ONCE HE WAS ON NOTICE FROM THIS ARGUMENT THAT THE JURY WAS GOING TO BE GIVEN THREE THEORIES OF LIABILITY.

HE COULD HAVE ASKED THE JUDGE TO TAKE IT OUT OF THE CASE AT THAT POINT.

>> THAT'S WHAT I ASKED YOU WOULDN'T THAT --

>> NO.

>> WOULDN'T THAT BE APPROPRIATE THING TO BE DONE?

>> YES.

BUT HE GOT UP AND ARGUED THE THIRD THEORY OF LIABILITY TO THE JURY.

>> LIKE TO TAKE YOU BACK TO JUSTICE PARIENTE'S DEALING WITH

JURISDICTION AND ERROR
PRESERVATION.

YOU SAID THAT IS BASIS OF
CONFLICT JURISDICTION.

WHERE IN THE DCA OPINION COULD
WE GET THE CONFLICT DEALING
WITH ERROR PRESERVATION?

>> THE CONFLICT, I
SENT A LATE NOTICE OF
SUPPLEMENTAL AUTHORITY UP HERE
WITH JUSTICE ENGLAND'S OPINION
IN FORD MOTOR COMPANY VERSUS
KIKUS.

SAYS YOU CAN FIND CONFLICT
JURISDICTION BASED ON THE LEGAL
DISCUSSION IN THE COURT'S, THE
DCA'S OPINION.

AND MY POSITION HERE IS THAT
THE ONLY OBJECTION IDENTIFIED
IN THIS DECISION

IS THIS OBJECTION THERE IS NO
BASIS IN THE RECORD THAT THE
POSTOPERATIVE CARE WAS
NEGLIGENT AND THAT IT WOULD
HAVE MADE A DIFFERENCE.

THAT IS THE OBJECTION THAT WAS
RECOGNIZED BY THE DISTRICT
COURT.

THE DISTRICT COURT REVERSED ON
A DIFFERENT GROUND.

IT FOUND AN ARGUMENT TO WHICH
NO OBJECTION WAS MADE,
DISTURBING AND INFLAMMATORY ON
AN ISSUE NOT RAISED IN THE
COMPLAINT.

THERE IS NOTHING IN THIS
OPINION THAT SAYS THERE WAS
EVER ANY OBJECTION TO THE
ARGUMENT THAT IT WAS DISTURBING
AND INFLAMMATORY AND IT WAS NOT
PLED IN THE COMPLAINT.

>> TO FIND CONFLICT

JURISDICTION WOULDN'T WE HAVE TO GO INTO THE RECORD WHICH WE CAN NOT DO?

>> NO, YOUR HONOR, I DON'T BELIEVE SO.

IT IS APPARENT ON THE FACE OF THIS OPINION THAT THE OBJECTION THAT IS RECOGNIZED ON THE FACE OF THE OPINION WAS NOT THE OBJECTION ON WHICH IT WAS REVERSED.

THAT IT WAS REVERSED ON A DIFFERENT GROUND THAN THE OBJECTION ON WHICH IT WAS BOTTOMED, THE REVERSAL WAS BOTTOMED.

ONCE YOU RECOGNIZE THAT THERE WAS AN OBJECTION ON GROUND A, AND A REVERSAL ON GROUND B, AND NO SUPPORT IN THE OPINION FOR AN OBJECTION ON GROUND B, THEN ON THE FACE OF THIS OPINION, IT IS, IN CONFLICT, EXPRESS AND DIRECT CONFLICT WITH A LONG LINE OF DECISIONS WHICH SAYS AN APPELLATE COURT CAN'T REVERSE ON A GROUND NOT RAISED BELOW. AND THE REASON FOR THAT IS YOU DON'T HAVE ANY POWERS IN APPELLATE COURT TO REVERSE A TRIAL JUDGE FOR A RULING HE WAS NEVER CALLED UPON TO MAKE AND THAT HE DIDN'T MAKE.

THAT MAY HAVE HAPPENED TO SOME OF THE MEMBERS OF THIS COURT, AND IF I MAY MAKE A PERSONAL OBSERVATION, I HAVE BEEN ARGUING CASES IN THIS COURT FOR NEARLY 35 YEARS.

I READ EVERY WORD IN THE TRANSCRIPT.

I TRY VERY HARD TO STICK TO THE

RECORD.

I HAVE NOTED A DISTRESSING TENDENCY IN THE LAST DECADE ON A PART OF APPELLATE COUNSEL TO REWRITE THE RECORD, TO MAKE UP THEIR OWN OBJECTIONS TO ARGUE THINGS IN APPELLATE COURT THAT WERE NEVER PRESENTED IN THE TRIAL COURT.

NOT INFREQUENTLY THE DISTRICTS COURT OF APPEAL, SWALLOW THAT BAIT AND THEY REVERSE TRIAL JUDGES FOR RULINGS THEY NEVER MADE.

THAT'S WHAT HAPPENED IN THIS CASE.

AND I THINK IT'S WRONG.

IT WAS NOT FAIR TO MISS AILLS.

IT WAS NOT FAIR TO THE TRIAL JUDGE.

>> LET ME TAKE YOU BACK TO THE TWO ISSUE SPECIFICALLY.

>> SORRY ABOUT MY RANT.

IT IS VERY FRUSTRATING.

>> THE DISTRICT COURT SAID WE'RE NOT PREPARED TO EXTEND THE APPLICATION OF TWO-ISSUE RULE, APPLY IT ESSENTIALLY.

WOULD IT REQUIRE AN EXTENSION OF THE TWO-ISSUE RULE TO APPLY IT HERE?

DOESN'T THIS, ISN'T THIS JUST ANOTHER SORT OF CIRCUMSTANCE WHERE THE TWO-ISSUE RULE APPLIES?

BECAUSE WE CAN'T KNOW THERE WAS ANY HARM FROM THIS ALLEGED ERROR WITHOUT THE INTERROGATORY VERDICT.

>> I AGREE WITH YOU, YOUR HONOR.

I THINK THEY CHOSE THE WRONG

WORD WHEN THEY USED THE WORD
EXTENSION.

THE TWO-ISSUE RULE CLEARLY
APPLIED HERE UNLESS THERE WAS
EXCEPTION TO IT.

>> SO WHAT THEY WERE
ESSENTIALLY DOING WAS CARVING
OUT AN EXCEPTION TO THE
TWO-ISSUE RULE?

>> YES, YOUR HONOR.

>> ON THE BASIS OF A RATIONALE,
DUE PROCESS SEEMS TO BE THE
RATIONALE.

THEY SAY IN ADDITION SUCH AN
APPLICATION OF TWO-ISSUE RULE
WOULD VIOLATE THE REQUIREMENTS
OF PROCEDURAL DUE PROCESS.

THE ONLY WAY I CAN UNDERSTAND
THAT, IS THAT THEY'RE SAYING A
PRESERVATION REQUIREMENT, WHICH
IS ESSENTIALLY WHAT THE
TWO-ISSUE RULE IS, VIOLATES
DUE PROCESS.

IS THERE ANY LAW THAT WOULD
SUPPORT THE NOTION THAT
REQUIRING PRESERVATION THROUGH
A SPECIFIC METHOD IS A
VIOLATION OF DUE PROCESS.

>> NOT THAT I'M AWARE OF, YOUR
HONOR.

OTHERWISE THIS COURT COULDN'T
HAVE SAID OVER AND OVER AND
OVER AGAIN YOU CAN'T REVERSE A
LOWER COURT FOR A RULING THAT
IT NEVER MADE.

AND ONCE THE DEFENSE COUNSEL
WAS ON NOTICE IN THIS CASE AND
HE CLEARLY WAS ON THE FACE OF
THIS OPINION, WHICH RECITES
MR.^GARVIN'S ARGUMENT THERE ARE
THREE THEORIES OF LIABILITY
GOING TO THE JURY.

ONCE HE IS ON NOTICE OF THAT HE HAS GOT TO PROTECT HIMSELF AND HE DIDN'T.

I NEED TO RESERVE REMAINDER OF MY TIME, THANK YOU.

>> MR.^ENGLAND.

>> MAY IT PLEASE THE COURT, MY NAME IS ARTHUR ENGLAND. I'M HERE ON BEHALF OF DR.^BOEMI AND HIS PROFESSIONAL ASSOCIATION.

YOUR HONORS, THE SECOND DISTRICT COURT OF APPEAL AWARDED DR.^BOEMI A NEW TRIAL AFTER A CAREFUL DETERMINATION FROM THE TRIAL COURT RECORD THAT MRS.^AILLS DID NOT PLEAD AND NEVER TRIED THE ISSUE OF POSTOPERATIVE NEGLIGENCE.

>> I'M GOING TO GET YOU TO EXPLAIN FOR ME SOME OF THE FACTS THAT I HAVE NOT READ, EVERY PAGE OF THIS RECORD YET. SEEMS THERE WERE ALLEGATIONS OF NEGLIGENCE OF THE BREAST SURGERY, CERTAINLY HOW IT WAS PERFORMED BUT THE PARTICULAR PROBLEM SEEMS TO BECOMING THROUGH THE PAGES ALTHOUGH NOT CLEARLY STATED THERE WAS A PROBLEM WITH BLOOD SUPPLY, OR WAS IT, AN INFECTION THAT REALLY CAUSED THIS?

IS THAT THIS DISPUTE?

WHAT WAS THE DOCTOR'S DEFENSE, I DID RIGHT BUT THIS WAS INFECTION WHICH IS PART OF ACCEPTABLE RISK?

HOW DOES THAT FIT TOGETHER.

I NEED TO UNDERSTAND BECAUSE I THINK IT IS IMPORTANT HERE.

>> THIS IS NOT AN INFECTION CASE.

THE CONCERN WAS ABOUT BLOOD FLOW,
WHICH THROWS, THROWS THIS CASE
OUT OF CONCERN, FOR MISS AILLS
COMES FROM HER SECOND AMENDED
COMPLAINT.

IT IS EXACTLY, --

>> I'M NOT ASKING ABOUT THE
COMPLAINT.

I READ THE COMPLAINT.

>> BUT I HAVE --

>> WHAT I'M TRYING TO
UNDERSTAND, JUST PLEASE
DESCRIBE FOR ME WHAT IT IS
ABOUT HER CONDITION, WAS IT
THAT THE BLOOD SUPPLY, WAS
INSUFFICIENT OR NOT
APPROPRIATELY PLACED AND
THEREFORE IT CAUSED THIS?

>> YES, YOUR HONOR.

THAT'S IT.

THE BLOOD SUPPLY WAS
INSUFFICIENT DURING SURGERY,
DURING SURGERY, NOT AFTER IT,
DURING SURGERY.

>> HOW WOULD, YOU MEAN THAT THE
THEORY WAS THAT DURING THE
SURGICAL PROCEDURE ITSELF --

>> THE DOCTOR DID NOT INSURE
THAT THE BLOOD SUPPLY CONTINUED
TO THE NIPPLE.

>> AND THIS DIDN'T CONTINUE
AFTERWARDS?

>> THEY DIDN'T PLEAD IT
CONTINUE AFTERWARDS.

>> I'M TRYING TO ASK A
QUESTION.

THE BLOOD SUPPLY THAT WE'RE
TALKING ABOUT, IS IT SOMETHING
THAT IS SUPPOSED TO CONTINUE
FLOWING SO THAT THE TISSUE --

>> YES.

>> OKAY, SEEMS TO ME, WHAT MY

CONCERN IS, IS THAT HOW DO WE DISCUSS THIS CASE WITHOUT LOOKING AT THE CIRCUMSTANCES OF THIS PATIENT POST-SURGERY? IF THE BLOOD SUPPLY RETURNED WE DON'T HAVE AN ISSUE BUT YOU HAVE TO LOOK AT IT.

>> JUDGE PARIENTE POINTED IT OUT.

THERE WAS A LOT OF DISCUSSION ABOUT IT.

THE EVIDENCE CAME IN ABOUT POST-SURGERY BUT HAD TO DO WITH DAMAGES.

THEY WERE SEEKING PUNITIVE DAMAGES AND NON-ECONOMIC DAMAGES.

IT HAD NOTHING TO DO WITH THE PROCEDURES THAT DR. ^BOEMI MIGHT OR MIGHT NOT HAVE, OR ANYBODY DECLARED HE DID, AFTER THE SURGICAL PROCEDURE.

>> BUT ON THIS, ON THAT ISSUE, AND I UNDERSTAND WHAT THE EXPERTS DID OR DIDN'T SAY, AND I KNOW WE'RE GOING BEYOND THE FOUR CORNERS IN ASKING THIS QUESTION.

>> WE ARE, YOUR HONOR.

>> IN OPENING STATEMENT THE COUNSEL FOR THE PLAINTIFF SAID IT MAY WELL HAVE BEEN POSSIBLE TO DETECT THAT THE BLOOD SUPPLY HAD BEEN IMPAIRED AND THEN SOMETHING COULD HAVE BEEN DONE TO FIX THE PROBLEM, RELEASING THE PRESSURE OR ALLOWING THE VENOUS SUPPLIES TO WORK.

HE GOES OVER ALL THE POSTOPERATIVE VISITS WHERE NOTHING HAPPENED.

HERE IS A WOMAN, NOT LIKE HER
NIPPLES FELL OFF RIGHT AFTER
THE SURGERY.

SHE IS GOING BACK TO THIS
DOCTOR ON NUMEROUS OCCASIONS
AND HE'S SAYING, OH, IT'S
NOTHING OR IT'S AN INFECTION.
I BETTER SEND YOU SOMEPLACE.
SO IT BECOMES, AND PART AND
PARCEL OF BOTH THE LIABILITY
AND THE DAMAGES.

>> I DISAGREE, YOUR HONOR.
AND --

>> BUT, DO YOU DISAGREE THAT'S
WHAT THE COUNSEL ARGUED IN
OPENING?

>> OF COURSE NOT.

I DISAGREE WITH THE CONCLUSION
THAT IT BECOMES PART AND
PARCEL.

>> IT WASN'T AS IF IT IS A
STRANGER TO THIS CASE.
IT ISN'T AS IF THIS CAME OUT,
NOT ONLY LEFT FIELD BUT IT WAS
PART OF ALL THE TESTIMONY IN
THE CASE, POSTOPERATIVE CARE.

>> I HAVE TO START, I HAVE TO
GIVE YOU A FOUR-PART ANSWER TO
THAT BECAUSE I'M GETTING OFF
FROM WHAT THIS CASE IS ABOUT
AND WHY IT'S IN FRONT OF YOU.

>> YOU HAVE TO UNDERSTAND WHAT
THE CASE ARE ABOUT AND THOSE
ARE THE FACTS OF THE CASE.

>> NO, YOUR HONORS.

>> THE FACTS OF CASE ARE WHAT
THE CASE IS ABOUT AND THAT'S
WHAT WE NEED TO UNDERSTAND AS A
FUNDAMENTAL PREMISE AS TO
WHAT'S GOING ON HERE.

WHAT'S IN DISPUTE.

>> WITH ALL RESPECT, YOUR

HONOR, THE FIRST THING YOU HAVE TO UNDERSTAND IS WHAT THE FOUR CORNERS OF THE DISTRICT COURT DECISION.

>> NOT TO UNDERSTAND THE CASE. IF YOU WANT TO ARGUE ONLY JURISDICTION THAT MAY BE A QUESTION.

I'M ASKING ABOUT THE CASE. THAT'S ALL I'M ASKING ABOUT.

>> OF COURSE THERE WAS DISCUSSION ABOUT WHAT HAPPENED AFTERWARD.

BUT YOU CALL DR, BRUECK, DR.^BOEMI TOOK PERSONAL RESPONSIBILITY IN THE TESTIMONY FOR POST-SURGICAL CARE. HE WAS ASKED SPECIFICALLY BY MR.^GARVIN AND HE SAID, I WAS RESPONSIBLE FOR POSTOPERATIVE CARE.

THAT'S WHY THERE WAS NO TRIAL ON THAT ISSUE, YOUR HONOR.

I WANT TO BE CLEAR THAT IT WASN'T PLED, IN CASE THERE IS ANY DOUBT.

I DON'T HAVE TO GET INTO THE WORDING HOW IT WAS THREE PARAGRAPHS ABOUT FAILURE TO INSURE WAS PART OF THE PERFORMANCE.

START WITH THE, MISS AILLS INITIAL BRIEF, PAGE 1, THEY COULD NOT AVOID WHAT I'M TRYING TO TELL YOU.

THEY SAID ON PAGE 1, HER SECOND AMENDED COMPLAINT ALLEGED THAT WHAT WAS PERFORMED WAS SUPPOSED TO BE A BREASTLESS AUGMENTATION.

ON APRIL 26th, PARDON ME, APRIL 16th, 2003, ONE DAY DURING

WHICH TISSUE WAS REMOVED
COMPROMISING THE BLOOD SUPPLY.
THEY HAVE SAID ON THE VERY
FIRST PAGE, IT WAS DURING THE
SURGERY, NOT AFTERWARDS.
THE DISTRICT COURT HAD A LOT OF
TROUBLE FINDING SOMETHING
LIABLE FOR --

>> ASSUMING THAT THERE WASN'T,
THAT THERE WAS AN ERROR, HOW
CAN WE KNOW, THAT THIS ERROR
WAS HARMFUL IN LIGHT OF THE
FAILURE OF THE DEFENSE LAWYER
TO REQUEST AN INTERROGATORY
VERDICT, WHICH WOULD LIST THE
DIFFERENT NEGLIGENCE THEORIES?

>> VERY SIMPLY, YOUR HONOR, THE
VERDICT WAS SELECTED BEFORE
CLOSING ARGUMENT.

IT WAS AGREED TO BY COUNSEL
BEFORE CLOSING ARGUMENT.

THAT'S WHY THIS WAS SANDBAG,
YOUR HONOR.

NO PLEADING, --

>> DID COUNSEL REQUEST AN
INTERROGATORY VERDICT?

>> THERE WAS NO REASON TO, YOUR
HONOR. THIS WAS NOT PLED.

>> WELL, IF THE TWO-ISSUE RULE
APPLIES THERE CERTAINLY WOULD
BE A REASON TO ASK FOR THE
INTERROGATORY VERDICT BECAUSE
IF THE JURY, IF THE JURY HAD
RETURNED A VERDICT BASED ON THE
THEORY OF NEGLIGENCE AND
EXECUTION OF THE SURGERY, THIS
ERROR IS BESIDE THE POINT,
ISN'T IT?

>> I'M HAVING TROUBLE
UNDERSTANDING HOW COUNSEL GOING
THROUGH WITH TRIAL WITH
SOMETHING THAT WAS NEVER PLED,

TRIED, AS TO WHICH THERE WAS NO STANDARD OF PROOF, AND AS TO WHICH THE JURY INSTRUCTIONS WERE NEVER GIVEN, HOW COUNSEL WHEN HE HEARS IN CLOSING ARGUMENT, I GOT ANOTHER THEORY OF LIABILITY, HE IS SUPPOSED TO PROTECT HIMSELF?

YOUR HONOR, FREID SAYS, AND I COULDN'T BE MORE CLEAR, FROM THIS COURT, QUOTE, LITIGANTS AT THE OUTSET OF A SUIT MUST BE COMPELLED TO STATE THEIR PLEADINGS WITH SUFFICIENT PARTICULARITY FOR A DEFENSE TO BE PREPARED.

NOT TO AFTERWARDS.

>> HE COULD HAVE PROTECTED THE RECORD FIRST BY MAKING THE SPECIFIC OBJECTION.

WHAT HE SAID WAS ON THE, WITHIN THE FOUR CORNERS OF THIS SECOND DISTRICT OPINION, IS THAT THE ARGUMENTS ABOUT THE POSTOPERATIVE PERIOD AND ANY APPROPRIATE CARE WAS IMPROPER BECAUSE THERE WAS NO BASIS IN THE RECORD THAT THE POSTOPERATIVE CARE WAS NEGLIGENT AND IT WOULD HAVE MADE A DIFFERENCE.

IS THAT, ISN'T THAT WHAT THE OBJECTION WAS?

>> YOUR HONOR, THE LONG ANSWER TO YOUR QUESTION --

>> CAN YOU, HOW ABOUT THE SHORT ANSWER? ISN'T THAT IN THE FOUR CORNERS OF THE COMPLAINT WHAT THE OBJECTION WAS BY COUNSEL?

>> CAN I GIVE YOU THE LONG ANSWER, YOUR HONOR?

>> YOU KNOW, YOU'RE, WHATEVER

YOU WANT.

>> I HAVE TO BECAUSE YOU'VE HEARD PART OF MY ANSWER ALREADY FROM ONE OF YOUR COLLEAGUES.

FIRST OF ALL, THIS WAS AN OBJECTION IN CLOSING ARGUMENT ON THE 5th DAY OF A TRIAL AND ANY TRIAL JUDGE WILL TELL YOU THAT IS NOT THE IDEAL PLACE TO GET SPECIFICITY OR CLARITY. YOU'VE GOT TO GET THE GIST OF WHAT IS GOING ON.

>> WASN'T THERE A SIDEBAR, THIS IS AT SIDEBAR?

>> SIDEBAR, EXACTLY.

>> SO, YOUR HONOR, THIS WAS NEVER PLED, I'M SURPRISED I'VE BEEN SANDBAGGED.

YOU'VE GOT TO INSTRUCT THE PLAINTIFF'S COUNSEL NOT TO ARGUE A THEORY THAT WASN'T PLED.

THEN I GUESS MR. ^GARVIN WOULD HAVE GONE ON TALKED ABOUT HOW HORRIBLE THIS POST-OPERATIVE PERIOD WAS.

THAT'S HOW WE ENFORCE THESE THINGS.

>> I GUESS THE ANSWER IS, AS I THINK JUSTICE LABARGA WAS SUGGESTING, IF THE ALLEGATION OF THE AMENDED COMPLAINT, FAILURE TO INSURE PROPER BLOOD SUPPLY, WAS, QUOTE, BROAD ENOUGH, UNQUOTE, TO INCLUDE NEGLIGENCE AFTER SURGERY AS SUGGESTED BY MISS AILLS ON PAGE 7 MUCH HER BRIEF, THEN I GUESS THE ARGUMENT IN CLOSING ON QUOTE, THIS LINE OF ARGUMENT, UNQUOTE, AND, THERE BEING AN

ABSENCE OF, QUOTE, A BASIS IN
THE RECORD, UNQUOTE, FOR,
POSTOPERATIVE NEGLIGENCE WAS
BROAD ENOUGH TO INCLUDE A CLAIM
OF, THERE WAS NO CLAIM PLED FOR
POSTOPERATIVE NEGLIGENCE.

LET ME ANSWER YOUR QUESTION
SPECIFICALLY.

THE ANSWER IS NO.

THE ANSWER IS NO, YOUR HONOR.

>> WHAT YOU JUST DID IN ANSWERS
YOU SAID YOU FOUND WHAT THEY
SAID DISINGENUOUS. THAT IT WAS
BROAD ENOUGH IN THE COMPLAINT.
YOU FIND THAT IS DISINGENUOUS,
THEN THIS IS BROAD TOO.

>> THAT'S NOT WHAT I SAID, YOUR
HONOR.

>> THEN YOU'RE TOO CLEVER --

>> THE INTERPRETATION THAT CAN
BE GIVEN TO THIS THAT WAS BROAD
ENOUGH.

I THINK I WANT TO SAY TO YOU,
THE ANSWER TO YOUR SPECIFIC
QUESTION, TO BE CANDID, WAS NO,
THERE WAS NO, EXPRESS DIRECT
REFERENCE TO DOCTOR, BY
DR.^BOEMI'S COUNSEL THAT THERE
WAS A FAILURE TO PLEAD.

JUST, YOUR HONOR, AS THERE IS
NO EXPRESS AND DIRECT REFERENCE
IN THE DISTRICT COURT'S OPINION
TO ANY REQUIREMENT FOR
SPECIFICITY IN ON PROJECTS
BEFORE A VERDICT -- OBJECTION
TO THE JURISDICTIONAL ISSUES
THAT IT HAS TO BE TROUBLESOME.

>> THAT'S WHAT I WANT TO ASK
YOU SPECIFICALLY, AND I ASKED
YOUR OPEN POSING COUNSEL ABOUT
ERROR AND PRESERVATION ISSUE
AND I'M INTERESTED IN THAT

ISSUE.

THE DCA RULED ON THE BASIS OF AN OBJECTION THAT HAD TO DO WITH THE THEORY OF A THEORY OF MEDICAL NEGLIGENCE NOT PLED OR TRIED, CORRECT?

>> CORRECT. THEY THOUGHT THERE WAS --

>> THEY SAID AN OBJECTION WAS MADE, BUT YET IN THE OPINION ITSELF THEY TALK ABOUT THE OBJECTION HAVING TO DO WITH SUFFICIENCY OF THE EVIDENCE.

>> THEY QUOTE THAT PART.

>> AND OPPOSING COUNSEL SAID, AS I UNDERSTAND, THAT'S TWO SEPARATE THINGS.

YOU HAVE A RULING ON A LEGAL THEORY BUT THE OBJECTION MADE HAD TO DO WITH SUFFICIENCY SO THOSE OBJECTIONS, THE RULING AND THE OBJECTION ARE TWO DIFFERENT THINGS.

THEREFORE, THERE IS A CONFLICT JURISDICTION, BECAUSE THERE'S, YOU HAVE TO RULE ON WHAT'S PRESENTED TO THE TRIAL COURT, AS I UNDERSTAND THEIR ARGUMENT.

>> WELL, THAT IS THEIR ARGUMENT BUT I ALWAYS THOUGHT, NOT ALWAYS, SINCE 1980, THOUGHT IT HAD TO BE EXPRESS AND DIRECT AND I DON'T BELIEVE ANYBODY READING THIS OPINION WILL COME TO THE CONCLUSION THERE WAS OBJECTION OR DISCUSSION, SIDEBAR WHICH DID OR DIDN'T DEAL WITH THE PLEADING.

>> CAN I ASK YOU A QUESTION ON THE FACE OF IT AND IN THE BRIEFS.

DON'T TOUCH UPON THE ISSUE

ABOUT INFLAMMATORY ARGUMENTS.

IT APPEARS TO ME THAT THE
SECOND DISTRICT SAID THIS IS AN
INFLAMMATORY ARGUMENT.

>> THEY DID.

>> AND, I DON'T FIND YOU ALL
QUOTING AN OBJECTION IN YOUR
BRIEFS.

IS THERE ONE SOMEWHERE ELSE IN
THE RECORD?

>> NO.

>> SO THE DEFENDANT DID NOT
MAKE THAT OBJECTION THIS IS
INFLAMMATORY THEN?

>> THE DISTRICT COURT SAID THAT
ON ITS OWN, HAVING PERUSED THE
RECORD.

>> AFTER LOOKING AT, STATING
WHAT THE OBJECTION WAS AND THEN
REVERSING ON THE BASIS OF THE
ONE, THAT'S OTHER THAN WHAT
THAT OBJECTION IS, IS THAT WHAT
YOU'RE SAYING?

>> YES, YOUR HONOR.

THE DISTRICT COURT OF APPEAL,
INTERESTINGLY, ALLOTTED USUAL
15, 20 MINUTES FOR AN ARGUMENT
AND HAD AN ARGUMENT OVER AN
HOUR ON THIS CASE.

THEY THEN WENT BACK AND WROTE
THIS OPINION WHICH IS AN
EXTRAORDINARY PIECE OF
CRAFTSMANSHIP IN TERMS OF WHAT
THE RECORD SAYS BECAUSE IT IS
ACCURATE ON THAT, IN TERMS OF
WHAT THE LAW IS, BECAUSE IT IS
ACCURATE ON THAT.

WHAT THE LAW IS NOT AND THEY
SAID, THIS IS A VIOLATION OF
DUE PROCESS, TO TRY A CASE --

>> THAT MAY BE AN OPINION
BECAUSE I DON'T AGREE THIS IS A

MASTERFUL OPINION

AT ALL.

THAT IS NOT SOMETHING WRITTEN
IN STONE THAT THIS COURT HAS TO
FOLLOW.

I UNDERSTAND THEY DISCUSSED
THESE THINGS, BUT I SEE VERY
MANY PROBLEMS WITH THAT
OPINION.

>> CAN YOU FIND, YOUR HONOR,
WITHOUT READING THE RECORD,
COULD YOU HAVE FOUND --

>> ON FACE OF IT, YEAH.

>> PARDON ME?

>> ON THE FACE OF IT, YEAH,
ABSOLUTELY, STATING WHAT THE
OBJECTION IS AND THEN RULING ON
A DIFFERENT BASIS FOR REVERSAL.
SO THAT ON ITS FACE SCREAMS
OUT, HOW DO YOU REVERSE FOR AN
INFLAMMATORY ARGUMENT WHEN THE
OBJECTION THEY SAY IN THE
OPINION IS SOMETHING TOTALLY
DIFFERENT?

>> I'M AFRAID, YOUR HONOR, I
DIDN'T, CAN I TALK TO YOUR
COLLEAGUES THEN, BECAUSE I HAVE
TROUBLE SEEING THE EXPRESS AND
DIRECT --

>> TALKING ABOUT SUBSTANCE, I
UNDERSTAND YOU MAY HAVE
PROBLEMS WITH THE SUBSTANCE OF
THE CASE BUT THERE IS MORE TO
IT THAN JURISDICTION.

IF WE HAVE JURISDICTION WE HAVE
TO ADDRESS THE SUBSTANCE.

IF YOU PREFER NOT TO ADDRESS
THE SUBSTANCE THAT'S CERTAINLY
YOUR PREROGATIVE.

>> NO, IF YOU'RE GOING TO
ACCEPT JURISDICTION I WANT YOU
TO ADDRESS THE SUBSTANCE.

>> WE HAVE INITIALLY.

>> OF WHY WE DIDN'T GET
DIRECTED VERDICT ON LIABILITY.

I DON'T WANT TO REARGUE THAT,
BUT I DO WANT TO MAKE THE
POINT, THE ALLEGATION THERE HAD
TO BE MAGIC WORDS IS NONSENSE.
THE STANDARD OF WHAT'S AN
ACCEPTABLE AND PROPER IN A
COMMUNITY IS VERY IMPORTANT TO
A JURY TO UNDERSTAND ON WHAT
THEY'RE MEASURING SOMEBODY'S
NEGLIGENCE TO IMPOSE MILLIONS
OF DOLLARS. THAT'S WHAT --

>> BUT ON THE MERITS, HERE,
EVEN IF THERE SHOULD HAVE, SAY,
THE POSTOPERATIVE CARE SHOULD
HAVE BEEN EITHER A DIRECTED
VERDICT OR BEEN TOLD IT WAS NOT
AN ISSUE.

AS JUSTICE CANADY HAS ASKED YOU
SEVERAL TIMES, IN TERMS OF THE,
THERE'S NO ARGUMENT IN THE, IN
THE APPELLATE OPINION THAT THE,
THEY REJECTED YOUR ARGUMENT
THAT THERE WASN'T SUFFICIENT
EVIDENCE ON THE OTHER CLAIMS.
SO, THEY FOUND THAT THOSE TWO,
TWO ASPECTS OF NEGLIGENCE WERE
PLED AND, PROVEN.

AND SO, ARE YOU NOW REARGUING
THAT THAT IN FACT WAS ERRONEOUS
ON THE DISTRICT COURT'S PART?

>> SURE, SURE, ON THE ABSENCE
OF, WE DID ARGUE THAT AT
LENGTH.

>> AND I'M SURE THEY WOULD LOVE
TO ARGUE THAT IT WAS RIDICULOUS
FOR THE TRIAL JUDGE TO ENTER
REMIT REMITTER ON.

>> THAT COULD BE AVAILABLE DOWN
THE ROAD BUT PROBABLY NOT.

YOUR HONOR, JUSTICE CANADY, I
TO TAKE UP YOUR POINT ABOUT,
WAS IT TWO RULE, I THINK YOU
HINTED ON THAT JUSTICE
PARIENTE.

IS THIS EXCEPTION CARVED BY THE
COURT BUT DON'T PLEA OR TRY AND
ISSUE BUT CAN BE FOUND LIABLE
ON IT.

WHY ISN'T THAT IN TWO-ISSUE
RULE?

THIS ISN'T PRESERVATION ISSUE.
THIS IS DUE PROCESS.

THAT IS WHAT YOU HELD IN
ARKY-FREID AND WHOLE OTHER
DECISIONS.

YOU HAVE TO TELL A PERSON WHAT
THEY'RE BEING CHARGED LIABILITY
FOR.

YOU HAVE TO INDUCE PROOF OF IT.
>> BUT THE HARM COMES TO THEM
IF THEY'RE HELD LIABLE FOR
SOMETHING THEY WERE NOT CHARGED
WITH LIABILITY FOR.

I UNDERSTAND THAT, THAT IS VERY
CLEAR PRINCIPLE.

THE POINT HERE HOW CAN WE KNOW
THEY WERE HELD LIABLE FOR
ARGUABLY THEY WERE NOT CHARGED
LIABILITY FOR?

THAT IS WHERE THE TWO-ISSUE
RULES COMES IN.

THAT IS WAY OF ESTABLISHING A
BASIS FOR KNOWING THAT THE
ERROR WAS HARMFUL.

>> DOES NOT THAT GO BACK TO A
QUESTION EARLIER?

YOU ASKED THE QUESTION OF
NEGLIGENCE, THIS WAS A
NEGLIGENCE CASE, AND, THERE
WERE SOME OTHER FORM OF CAUSE
OF ACTION IN IT THAT POPPED UP.

WITH THE TWO-ISSUE RULE BECAUSE
OF THE GENERAL VERDICT SAY, OH
YOU CAN BE FOUND LIABLE NOT FOR
MEDICAL MALPRACTICE BUT FOR
BATTERY WHICH WE DIDN'T TELL
YOU ABOUT.

AFTER ALL WE DID PROVE
NEGLIGENCE?

THAT CAN NOT BE DUE PROCESS OF
LAW, YOUR HONOR.

THAT CAN NOT BE WHAT THE
TWO-ISSUE RULE IS ABOUT.

THIS COURT, I'M SORRY, JUSTICE
LEWIS YOU DIDN'T LIKE THE
OPINION AS MUCH AS I DID.

I THOUGHT IT WAS ARTICULATION
OF WHAT DISTRICTS COURT ARE --

>> HELP ME OUT WITH
UNDERSTANDING HOW THE OBJECTION
BY DR. BOEMI WAS SUFFICIENT.
HOW WAS HIS OBJECTION
SUFFICIENT TO PRESERVE THE
ERROR THAT IT WAS NOT PLED OR
TRIED?

>> BECAUSE IN THE CONTEXT OF A
CLOSING ARGUMENT, ON A FIFTH
DAY OF TRIAL, ON A SIDEBAR, ON
A MATTER SPRUNG ON COUNSEL, HE
MAY NOT HAVE USED THE WORDS
THAT WERE NECESSARY TO CONVEY
TO THE JUDGE BUT THERE WAS NO
QUESTION THE TRIAL JUDGE KNEW
THIS HAD TO DO WITH THIS
ARGUMENT.

THIS LINE EVER ARGUMENTS.

>> BUT THE RULES OF EVIDENCE
DON'T CHANGE DEPENDING UPON
WHAT DAY OF TRIAL YOU'RE ON.
THEY HAVE TO BE DONE WITH
SPECIFICITY.

SO THE TRIAL JUDGE CAN PROPERLY
RULE ON AN OBJECTION.

>> I GUESS, YOUR HONOR, THE IS THAT I DON'T SEE ANYTHING IN THE OPINION ABOUT A RULE OF SPECIFICITY THAT DIRECTLY AND EXPRESSLY CONFLICTS SO I DON'T KNOW HOW YOU GET THERE.

>> NORMALLY JUDGES, APPELLATE COURTS, WE DO THIS IN DEATH CASES ALL THE TIME WHERE SOMEONE'S LIFE IS ON THE LINE.

>> AND YOU DON'T HAVE A CONSTITUTIONAL --

>> ASK LAWYERS TO OBJECT WITH SPECIFICITY.

I WAS A TRIAL LAWYER.

I DIDN'T LIKE THAT RULE.

I THOUGHT, WHAT ARE APPELLATE COURTS DOING MAKING ME HAVE TO STATE MY OBJECTION BECAUSE I KNEW RIGORS OF TRIAL.

BUT THAT IS NOT APPELLATE CASES HAVE GONE.

THEY REQUIRE THAT THE REVERSAL BE ON A BASIS THAT WAS OBJECTED TO BELOW.

>> RIGHT. YOUR HONOR, I'M NOT DISAGREEING

WITH THAT POSITION IN THE CAPITAL CASE THIS CAME ON EXPRESS OR DIRECT CONFLICT OR NOT.

>> I'M TELLING YOU THAT THE GENERAL RULE.

>> OF COURSE IT IS.

>> JUSTICE POLSTON WAS ASKING YOU FOR DOESN'T DEPEND ON WEIGHTYNESS OF THE CASE OR WHEN THE OBJECTION IS MADE DURING TRIAL.

>> I FOUND IT INTERESTING, YOUR HONOR, ONE OF THE PANELISTS IN THIS CASE WAS A SARASOTA COUNTY

CIRCUIT COURT JUDGE, WILLIAMS AND HE HAD NO TROUBLE REACHING A CONCLUSION THAT DUE PROCESS WAS VIOLATED BY A POSSIBILITY OF THE JURY FINDING DR. BOEMI LIABLE FOR \$8 MILLION ON THE BASIS OF SOMETHING HE NEVER KNEW HE WAS BEING TRIED FOR. I THINK THAT'S VERY TELLING THAT A TRIAL JUDGE UNDERSTOOD THAT IN CLOSING, IN THE CONTEXT, THE MAGIC WORDS, NOTHING WAS PLED, MAY NOT HAVE BEEN SAID BUT THE MESSAGE WAS LOUD AND CLEAR.

I HAVE TO CONCLUDE, BECAUSE I AM INTERESTED IN THE JURISDICTION OF THE COURT. I THINK IT'S TERRIBLY IMPORTANT.

>> AND YOU NEED TO CONCLUDE VERY SHORTLY BECAUSE YOU'VE ALREADY USED MORE THAN YOUR TIME.

>> I'LL CONCLUDE THIS WAY.

30 YEARS AGO, VOTERS OF FLORIDA TOLD THIS COURT TO STOP BEING A SECOND LEVEL ERROR-CORRECTING TRIBUNAL.

STOP TREATING DISTRICT COURTS OF APPEAL AS WAYSTATIONS AND EVERY CASE IS NOT ONE WAY FOUR JUSTICE ON THE COURT COULD DELVE INTO THE RECORD AND FIND THAT THEY PERCEIVED AN IMPROPER OUTCOME.

YOUR HONORS, I HAVE BEEN ON BOTH SIDES OF THE HEADY DAYS WHEN THE COURTS USED, WHEN THIS COURT USED RECORD PROPER TO JUSTIFY ITS REVIEW OF DISTRICT COURT DECISIONS WHICH DID NOT

EXPRESSLY SAY ANYTHING IN
CONFLICT WITH OTHERS.

I URGE YOU NOT TO RETURN TO
THOSE THRILLING DAYS OF
YESTERYEAR.

>> WITH THAT, THANK YOU VERY
MUCH, MR.^ENGLAND.

REBUTTAL?

>> MAY IT PLEASE THE COURT.

>> MR.^ENGLAND I DESCRIBED YOUR
JURISDICTIONAL ARGUMENT
CORRECTLY.

>> YOU DESCRIBED HALF OF IT.
THE OTHER HALF THE COURT SHOULD
HAVE APPLIED TWO-ISSUE RULE.

>> I UNDERSTAND.

AS TO ERROR PRESERVATION AM I
UNDERSTANDING CORRECTLY?

>> OBJECTION IS ON THE
RECORD.

THAT IS GROUND, THEY REVERSED ON
BUT THE GROUND THEY REVERSED ON
IS OBJECTION B.

>> THE ISSUE OF ERROR
PRESERVATION, OR THE
SUFFICIENCY OF EVIDENCE IS WHAT
THE OBJECTION WAS BY THE TRIAL
COURT AND WHAT THE TRIAL COURT
RULED ON WAS THAT ISSUE WAS NOT
PLED AND TRIED, CORRECT?

>> YES, YOUR HONOR.

>> FOR TWO SEPARATE THINGS,
THAT'S YOUR ARGUMENT?

>> THERE IS NO OBJECTION ON
THIS RECORD AND MR.^ENGLAND HAS
NOT BROUGHT THE COURT'S
ATTENTION TO ANY OBJECTION MADE
BELOW THAT THIS ISSUE WAS
NEITHER TRIED, NEITHER PLED NOR
TRIED BECAUSE TRIAL COUNSEL
UNDERSTOOD IT HAD BEEN PLED AND
TRIED.

THAT'S WHY HE DIDN'T OBJECT ON THAT GROUND.

HIS OBJECTION IS NOT, IS LONGER THAN THE LITTLE SNIPPET OF IT THAT THE DISTRICT COURT PUT IN ITS OPINION.

>> WHERE IS THE, WHEN DID THE ISSUE WHETHER THIS WAS INFLAMMATORY ARGUMENT FIRST COME UP IN THE, IN THE, IN THE BRIEFS IN THIS CASE OR, --

>> THAT ISSUE WAS RAISED BY APPELLATE COUNSEL, NOT IN THE MOTION FOR NEW TRIAL BUT IN A MEMORANDUM ACCOMPANYING THE MOTION FOR NEW TRIAL.

FIRST TIME ANYBODY EVER SAID ANYTHING ABOUT THAT ARGUMENT IN THIS CASE WAS IN A MEMORANDUM IN A MOTION FOR NEW TRIAL.

NOW, THE OBJECTION THAT WAS MADE, THERE IS NO EXPERT TESTIMONY ON THE ISSUE OF PROXIMATE CAUSATION ON THIS THIRD THEORY OF LIABILITY.

IT IS RIGHT THERE IN BLACK AND WHITE.

WHAT MR. ENGLAND HAS ASKED THIS COURT TO DO IS ALLOW THIS YOUNG LADY'S RIGHTS TO BE COMPENSATED FOR THE DISASTROUS SURGERY THAT WAS PERFORMED ON HER REST ON A FALSEHOOD.

NOW THIS COURT'S JURISDICTION IS SOMETIMES NARROW AND SOMETIMES BROAD.

I DON'T PERCEIVE THAT IT HAS BEEN ABSOLVED ALL TOGETHER OF ITS ERROR-CORRECTING FUNCTION OR ITS SUPERVISORY ROLE.

WHEN A DISTRICT COURT BOTTOMS A REVERSAL OF A PERFECTLY

LEGITIMATE JURY VERDICT ON A FALSEHOOD, AND WE CAN DEMONSTRATE A CONFLICT ON THE FACE OF THIS COURT'S, DISTRICT COURT'S OPINION, THEN THIS COURT HAS AN OBLIGATION TO CORRECT IT AND I RESPECTFULLY SUGGEST THIS DECISION SHOULD BE QUASHED THANK YOU.

>> THANK YOU BOTH FOR YOUR ARGUMENTS.

THE COURT WILL NOW TAKE ITS MORNING RECESS FOR 10 MINUTES.