

>> PLEASE, RISE.

LADIES AND GENTLEMEN, THE  
FLORIDA SUPREME COURT.

PLEASE BE SEATED.

>> MAY IT PLEASE THE COURT, MY  
NAME IS JOEL EATON.

THIS TIME I REPRESENT MR. AND  
MRS. WILLIAM COX IN A MEDICAL  
MALPRACTICE ACTION AGAINST  
ST. JOSEPHS HOSPITAL AND DR.  
ERIC CASTELLUCCI.

MR. COX HAD A STROKE.

HE WAS DELIVERED TO THE  
EMERGENCY ROOM AT THE HOSPITAL  
WITHIN MINUTES OF THE STROKE.

NOBODY AT THE HOSPITAL BOTHERED  
TO FIND OUT THE TIME OF ONSET OF  
THE STROKE ALTHOUGH THERE WERE  
SEVERAL PEOPLE IN THE WAITING  
ROOM THAT KNEW --

>> I HAVE A QUESTION ON THE  
ISSUES IN THIS CASE.

IF -- AND IT HAS TO DO WITH THIS  
ISSUE OF, OR NONISSUE HOWEVER  
YOU LOOK AT IT, THE SUBDURAL  
HEMATOMA.

DOES THE QUESTION OF IF TPA  
SHOULD HAVE BEEN GIVEN IN LIGHT  
OF THE SUBDURAL HEMATOMA HE MAY  
HAVE THAT HE SUSTAINED SEVERAL  
YEARS BEFORE, DOES THAT GO TO  
STANDARD OF CARE OR TO  
CAUSATION?

TO ME, IT SEEMS MORE OF A  
STANDARD OF CARE ISSUE WHICH  
ISN'T BEFORE US.

SO IS THAT SOMETHING YOU'RE  
PREPARED TO DISCUSS, THE ROLE OF  
THE SUBDURAL HEMATOMA, IF ANY,  
IN WHAT THE TRIAL COURT AND THEN  
WHAT THE JURY AND THEN THE

SECOND DISTRICT DECIDED?

>> I DON'T THINK THE ISSUE OF WHETHER THERE HAD BEEN A SUBDURAL HEMATOMA IN THE PAST OR NOT HAS A THING TO DO WITH THE QUESTION THAT WAS DECIDED BY THE DISTRICT COURT.

IT WAS THEIR PRINCIPLE DEFENSE AT THE TRIAL.

IF WE HAD KNOWN ABOUT THE SUBDURAL HEMATOMA -- WHICH WE DIDN'T, BECAUSE THEY NEVER BOTHERED TO ASK ANYBODY -- THEN WE WOULD NEVER HAVE, WE WOULDN'T HAVE ADMINISTERED TPA.

>> OKAY.

SO THAT ISSUE, THEN, REALLY WOULD GO TO STANDARD OF CARE. NOW, ON CAUSATION, THE -- DOES THIS, DOES THE ISSUE OF WHETHER YOU HAVE, YOU ON BEHALF OF THE PLAINTIFF, MET THE STANDARD OF MORE PROBABLE THAN NOT TURN -- AND LET'S NOT TALK ABOUT THE DOCTOR -- BUT ESSENTIALLY TURN ON DR. FUTRELL'S TESTIMONY?

>> YES.

ALTHOUGH MR. BERGES SAID BASED ON THE INFORMATION I HAD AT THE TIME --

>> WELL, IT WAS A LETTER.

I'M CONCERNED ABOUT THAT OPINION AND SEPARATE ISSUES ABOUT THAT.

SO JUST ON FUTRELL, FUTRELL BASES HER TESTIMONY THAT IT WAS A HIGH PROBABILITY THAT HE WOULD HAVE HAD A MINIMAL DEFICIT TO A FULL RECOVERY IF TPA HAD BEEN GIVEN.

SHE BASES THAT ON HER EXAMINATION OF THE CAT SCAN PRIMARILY THAT WAS GIVEN RIGHT

AFTER HE WAS ADMITTED AND THE EXCELLENT CONDITION OF THE NEUROLOGICAL CONDITION OR THE BRAIN STRUCTURE.

THAT, THE SECOND -- THE FACT THE SECOND DISTRICT DOESN'T MENTION ALL OF HER TESTIMONY ABOUT WHY SHE THOUGHT HE'D HAVE SUCH A GOOD CHANCE OF AN EXCELLENT RECOVERY, HOW DO WE DEAL WITH THAT HERE IN A CONFLICT ISSUE? IN OTHER WORDS, IF SHE HADN'T TALKED ABOUT THAT AND JUST SAID IT WAS A HIGH PROBABILITY AND REALLY DIDN'T GIVE ANY REASON, IT'D BE ONE THING.

BUT SHE DID.

AND SO, BUT I'M TRYING TO FIGURE OUT THERE A CONFLICT POINT OF VIEW HOW WE DEAL WITH THAT.

>> WELL, THERE ARE AT LEAST FOUR SEPARATE KINDS OF CONFLICTS HERE, SO TAKE YOUR PICK.

BUT THE ANSWER TO YOUR SPECIFIC QUESTION IS WALE V. BARNES SAYS IF THERE'S EXPERT TESTIMONY, MEDICAL TESTIMONY ON THE ISSUE OF CAUSATION, THAT'S DIRECT EVIDENCE SUFFICIENT TO DEFEAT --

>> BUT DO YOU AGREE, MAYBE YOU DON'T, BUT I'M CONCERNED THAT I WOULDN'T WANT TO COME OUT WITH AN OPINION THAT SAID IF A PLAINTIFF SAYS AFTER, YOU KNOW, ASKING ALL THESE QUESTIONS AND COMPLICATED CASE, AND DO YOU HAVE AN OPINION MORE PROBABLY THAN NOT WHETHER THE PERSON WOULD HAVE SURVIVED, YES, I THINK WITHIN A HIGH PROBABILITY. THEY'VE GOT TO GIVE, GOT TO GIVE FACTUAL BASIS FOR THEIR OPINION

AT SOME POINT.  
THEY MAY NOT HAVE TO GIVE IT ON  
DIRECT EXAMINATION, BUT CAN A  
PLAINTIFF JUST SIMPLY SAY  
THERE'S A HIGH PROBABILITY  
WITHOUT THERE BEING ANY FACTS  
THAT WOULD SUPPORT THAT OPINION?

>> WELL, YOU'RE GETTING WAY  
AHEAD OF MY OUTLINE, BUT SECTION  
90.705 SAYS PRECISELY THAT.

NOW, 50 YEARS AGO IN THE CASE  
THAT THE SECOND DISTRICT RELIED  
ON AN APPELLATE COURT WOULD  
REQUIRE ALL THE UNDERLYING FACTS  
OF AN OPINION.

BUT THEN THE EVIDENCE CODE WAS  
AMENDED A QUARTER CENTURY AGO,  
AND 90.705 NOW SAYS THAT AN  
EXPERT CAN GIVE HIS OPINION  
WITHOUT GIVING THE BASIS FOR --

>> BUT IN THIS CASE SHE DIDN'T  
JUST DO THAT.

BUT THE SECOND DISTRICT OPINION  
MAKES IT SOUND LIKE SHE DID.

>> WELL --

>> WELL, I WOULD THINK, AND IT'S  
A FRIENDLY QUESTION, HER  
FINDINGS ABOUT THE CAT SCAN ARE  
VERY SIGNIFICANT TO WHY SHE  
CONCLUDED THAT HE WOULD HAVE  
BEEN AN EXCELLENT CANDIDATE FOR  
THE TPA.

>> THE SECOND DISTRICT SAID  
WE'RE NOT GOING TO PAY ANY  
ATTENTION TO THIS EXPERT  
TESTIMONY, NOTWITHSTANDING WALE  
V. BARNES FOR TWO REASONS.

ONE, DR. FUTRELL'S OPINION WHICH  
CLEARLY SATISFIED BOTH GOODING  
AND WALE V. BARNES, WE'RE NOT  
GOING TO PAY ANY ATTENTION TO IT  
BECAUSE HER OPINION IS

CONSTRAINED BY STATISTICS.  
THEY TOOK THIS DECADE-OLD TEST,  
STUDY OF A RANDOM SAMPLE OF  
STROKE PATIENTS TO DETERMINE  
THAT LESS THAN 50% OF THEM  
GAINED ANY BENEFIT FROM TPA.  
AND, THEREFORE, THEY WEREN'T  
GOING TO ACCEPT DR. FUTRELL'S  
OPINION THAT THIS INDIVIDUAL  
WOULD HAVE HAD A BENEFICIAL  
EFFECT FROM THE DRUG.

>> NOW, ON THE  
CROSS-EXAMINATION, THOUGH,  
SHE -- THE SUMMARY, THE STUDY  
WAS NEVER INTRODUCED INTO  
EVIDENCE, CORRECT?

THIS NINDS STUDY?

>> IT WAS NEVER IN EVIDENCE.

>> IT'S NOT IN EVIDENCE.

SHE TALKS ABOUT THAT.

SHE ACKNOWLEDGES THAT THE STUDY  
COULD BE, THAT 20% OF THE  
PATIENTS MADE A COMPLETE  
RECOVERY.

BUT THEN SHE SAYS, BUT THAT'S A  
DISTORTION OF WHAT THE RESULTS  
WERE.

AND SHE STARTS AND TALKS ABOUT  
THAT THE WORST NUMBER WAS A 36%  
IMPROVEMENT.

SO, AGAIN, IF -- LET ME ASK YOU  
THIS WAY.

IF SHE HAD, IN FACT, SAID I FIND  
THE STUDY AUTHORITATIVE AND THAT  
I AGREE THAT THAT'S THE NUMBER  
AND STOPPED THERE, WOULD THERE  
BE A PROBLEM FOR THE PLAINTIFF  
AT THAT POINT?

>> IF SHE HAD GIVEN AN OPINION  
THAT MR. COX'S CHANCES OF A GOOD  
RECOVERY WITH TPA TREATMENT WERE  
LESS THAN 50% --

>> NO.

IF SHE ACKNOWLEDGED, YES, THAT'S THE CASE BUT NEVER EXPLAINS WHY THAT STUDY DOESN'T HAVE -- EXPLAIN ANY PROBLEMS WITH THOSE NUMBERS, I GUESS THAT'S THE -- SEEMS TO ME ONCE YOU'VE SAID THAT SHE ACKNOWLEDGES THE STUDY, THAT DOESN'T SHE HAVE TO FURTHER EXPLAIN WHY THOSE NUMBERS ARE NOT WHAT THE 20% AND THEN THE 31%?

>> YOUR HONOR, THE STUDY WAS OF A RANDOM SAMPLE OF STROKE PATIENTS DONE DURING A DRUG TRIAL FOR FDA APPROVAL.

IT WAS TEN YEARS OLD.

THE STUDY THAT THEY WERE READING TO HER WAS A DIFFERENT STUDY.

SHE SAID IT DISTORTED THE FIGURES IN THE NINDS STUDY.

>> THAT'S WHAT I'M ASKING.

SO SHE DID GO ON, THAT'S WHAT I'M SAYING --

>> YES.

>> DID SHE EXPLAIN SOME PROBLEMS WITH THOSE NUMBERS THAT WOULD, THEREFORE, NOT BE THAT SHE'S CONSTRAINED BY STATISTICAL EVIDENCE?

>> SHE ALSO SAID THERE'S AN ADDITIONAL STUDY OUT OF CANADA WHICH -- AND THERE WAS AN OBJECTION.

THEY SAY, OH, WE GET TO RELY ON THE NEW STUDY, BUT YOU CAN'T RELY ON THE LITERATURE THAT SUPPORTS YOUR POSITION.

I DON'T SEE THAT THEY CAN HAVE IT BOTH WAYS.

BUT THE IMPORTANT POINT IS THAT THE STUDY DOESN'T CONTROL

MR. COX.

MR. COX WAS AN APPROPRIATE CANDIDATE AND WOULD HAVE BENEFITED FROM THIS THERAPY BASED ON ALL THE TESTS THAT THE EMERGENCY ROOM DOCTOR RAN FOR THE BENEFIT OF THE ON-CALL NEUROLOGIST WHO WOULD USE THESE TESTS, PARTICULARLY THE CT SCAN, TO DETERMINE WHETHER MR. COX WAS AN APPROPRIATE CANDIDATE FOR THERAPY.

>> BUT LET ME ASK YOU THIS WAY, WHEN YOU'RE TALKING ABOUT A DRUG, YOU KNOW, A LOT OF TIMES THIS MIGHT BE IN A CANCER CASE, AND A ONCOLOGIST DOESN'T FIND THE CANCER, YOU KNOW, SAY FIVE MONTHS OR SIX MONTHS EARLIER, AND THEN THE ISSUE IS WOULD IT HAVE MADE A DIFFERENCE. AND THE ONCOLOGIST IS, THEY'RE CONSTRAINED BY THE ONLY THING THEY CAN DO IS GIVE DRUGS, TREATMENTS, YOU KNOW, RADIATION. SO THEY GO, WELL, IF THEY HAD BEEN GIVEN THIS DRUG SEVERAL MONTHS BEFORE, IT WOULD HAVE MADE A DIFFERENCE. BUT ALL THE STUDIES ON THE DRUG SHOW THAT SOMETHING ELSE. DOES IT -- IN A SITUATION WHERE THEY'RE TALKING ABOUT WHETHER A DRUG WOULD HAVE MADE A DIFFERENCE AS OPPOSED TO YOU KNOW, THE FOUR STEPS, DELIVERY AND WHETHER THAT WAS WALES, IS THERE SOMETHING ELSE YOU ARE CONSTRAINED BY AS A MEDICAL EXPERT? BECAUSE YOU ARE ONLY AS GOOD AS WHAT YOU UNDERSTAND THE STUDIES

TO SAY, YOU KNOW, WHETHER TO GIVE A DRUG OR NOT TO GIVE A DRUG.

IT'S NOT LIKE SOMETHING YOU CAN JUST EXPERIMENT WITH AND SAY, I THINK I'LL TRY THIS DRUG OR THAT DRUG.

YOU'VE GOT TO RELY ON THE STUDIES.

>> IT --

>> AND I'M CONCERNED ABOUT THAT, I GUESS.

>> I THINK IT'S CONSIDERABLY MORE COMPLICATED THAN THAT BECAUSE EACH PATIENT IS DIFFERENT, AND A DRUG CAN HELP SOME PEOPLE AND HURT OTHER PEOPLE.

IN THIS PARTICULAR CASE, THIS DRUG CAN HELP SOME PEOPLE AND HURT OTHER PEOPLE AND DOESN'T WORK ON A MIDDLE GROUP, AND YOU'VE GOT TO DO IT WITHIN THE FIRST THREE HOURS.

>> ULTIMATELY, THERE'S AN ELEMENT HERE OF EXPERIENCE.

>> EXPERIENCE AND TRAINING.

>> AND WITH THE USE OF THE DRUG AND THE EXPERIENCE AND TRAINING OF THE PHYSICIAN THAT WOULD BE CALLED ON TO CONSIDER ADMINISTERING IT OR THE EXPERIENCE AND TRAINING OF THE EXPERT PHYSICIAN WHO'S RENDERING OPINION ABOUT WHETHER IT SHOULD HAVE BEEN GIVEN OR NOT GIVEN AND WHAT DIFFERENCE IT WOULD HAVE MADE IF IT HAD BEEN GIVEN, RIGHT?

>> YES, YOUR HONOR.

>> IT'S A MATTER OF EXPERIENCE AND TRAINING OF THE EXPERT.

>> BUT THE POINT IS THAT THIS STUDY DOESN'T SAY NEVER GIVE THIS DRUG TO ANYBODY. IT SAYS THIS DRUG CAN BE VERY HELPFUL TO 31% OF THE PEOPLE WHO ARE THE RIGHT CANDIDATES FOR IT. MR. COX WAS THE RIGHT CANDIDATE FOR THIS DRUG.

AND CURIOUSLY, THE DEFENSE EXPERTS DIDN'T TESTIFY THAT THE DRUG WOULDN'T HAVE HELPED HIM. THEIR TESTIMONY WAS IT'S IMPOSSIBLE TO KNOW.

>> WELL, THERE'S NO SUGGESTION THAT THE, FROM THE STUDY OR ELSEWHERE THAT THE EFFECTIVENESS OF THE DRUG IS RANDOM, IS THERE?

>> NO, YOUR HONOR.

IT DEPENDS ON THE CONDITION OF THE BRAIN AND THE VASCULAR SYSTEM AND WHERE THE CLOT IS AND PRIOR HISTORY, AND THAT'S WHY YOU HAVE TO HAVE AN EXPERT TO ANALYZE THESE THINGS.

BECAUSE I CERTAINLY COULDN'T TELL YOU WHETHER THIS PATIENT WAS AN APPROPRIATE CANDIDATE AND WHETHER HE WOULD BENEFIT FROM IT, AND NEITHER CAN ANY OF YOU, AND NEITHER COULD THE THREE JUDGES THAT HEARD THIS CASE BELOW AND DECIDED THAT THIS WOMAN WHO IS AN INTERNATIONALLY-RECOGNIZED STROKE EXPERT DIDN'T KNOW WHAT SHE WAS TALKING ABOUT. THAT'S WHY I'M UP HERE COMPLAINING.

WALES V. BARNES SAYS HER TESTIMONY WAS DIRECT EVIDENCE ON THE ISSUE OF CAUSATION WHICH PREVENTED A DIRECTED VERDICT.

AND YOU CAN'T SAY, BUT HER TESTIMONY IS CONSTRAINED BY STATISTICS AND BECAUSE THE RANDOM SAMPLE SHOWS THAT LESS THAN 50% ARE GOING TO BENEFIT, NOBODY CAN WIN.

THAT'S --

>> BUT ISN'T SHE, WASN'T HER TESTIMONY THAT FOR THIS CATEGORY OF THE, OF A PATIENT THAT IT WOULD BE HIGH -- IT WOULD NOT BE THE 30%, HE WOULD BE ABOVE 50% ON THIS BECAUSE THE STUDY WAS SHOWING PEOPLE THAT ALSO HAD OTHER PROBLEMS.

I MEAN, I GUESS I THOUGHT THAT WAS HOW SHE WAS REALLY DISTINGUISHING THE STUDY.

>> CORRECT, YOUR HONOR.

NOW, YOU CAN'T TAKE A SET OF STATISTICS AND CONSTRAIN AN EXPERT'S TESTIMONY AND SAY BECAUSE THE STUDY SHOWS LESS THAN 50%, THIS EXPERT'S OPINION OF GREATER THAN 50% WE HAVE TO DISCOUNT.

>> WELL, IS IT IMPORTANT THAT SHE DOESN'T REALLY ACKNOWLEDGE THE NINDS STUDY AS BEING AUTHORITATIVE?

IN OTHER WORDS, IT SEEMS TO ME THAT THERE IS, THAT THE BASIC PREMISE THAT SHE ACKNOWLEDGED THE STUDY AND THAT IT WAS BINDING DOESN'T REALLY, DOESN'T COME FROM WHAT HER ACTUAL TESTIMONY.

>> I DON'T THINK SHE ACKNOWLEDGES IT WAS AUTHORITATIVE AT ALL.

SHE SAID THE STUDY YOU'RE READING FROM IS A DISTORTION OF

THE NINDS STUDY IS WHAT SHE SAID.

>> DO WE KNOW WHAT STUDY THEY WERE READING FROM?

IT'S SORT OF HARD TO FOLLOW IN THE RECORD.

>> IT'S NOT IN EVIDENCE EITHER, AND I DON'T KNOW THE ANSWER TO THAT.

AND, OF COURSE, WHEN DR. FUTRELL TRIED TO SAY THERE WAS AN ADDITIONAL STUDY THAT I RELY ON, THEY OBJECTED, AND THE OBJECTION WAS SUSTAINED, AND THEY SAY WE CAN RELY ON ONE STUDY, BUT YOU CAN'T RELY ON ANOTHER STUDY.

THE WHOLE THING DOESN'T MAKE AN AWFUL LOT OF SENSE TO ME.

BY THE LOGIC OF THE DISTRICT COURT, THE FACT THAT THIS COURT TAKES LESS THAN 5%, 10%, I DON'T KNOW WHAT THE NUMBER OF THE CASES YOU TAKE ON DISCRETIONARY REVIEW ARE, THAT COULD DISCOURAGE ME FROM EVER TRYING TO COME UP HERE.

BY THE DISTRICT COURT'S LOGIC, I WILL ALWAYS LOSE.

BUT I'M HERE.

MR. COX --

>> WELL, THAT'S NOT -- I MEAN, MAYBE --

>> THAT'S, THAT'S THE LOGIC.

>> YOU ACTUALLY HAVE A BETTER CHANCE OF WINNING IF YOU'RE COMING UP HERE AS THE PETITIONER BECAUSE WE'VE DECIDED TO ACCEPT THE CASE.

BUT WHAT THE SECOND DISTRICT IS SAYING THAT SHE DIDN'T ADEQUATELY EXPLAIN WHY HE WOULD BE IN THIS 31% OR 21%.

THAT'S -- ISN'T THAT WHAT THEY ENDED UP, THAT'S WHAT THEIR OPINION SAYS.

>> WELL, THEY HAD TWO BASES. THE FIRST ONE WAS HER OPINION -- ALL THESE CASES THAT FOLLOW WALE V. BARNES WERE NOT CONSTRAINED BY STATISTICS AND, THEREFORE, WE DON'T HAVE TO FOLLOW WALE V. BARNES.

THEY MISAPPREHENDED AND MISAPPLIED THE GOODING CASE, THAT'S FAIRLY OBVIOUS.

THEN THE SECOND GROUNDS, HER OPINIONS WERE SPECULATIVE AS UNSUPPORTED BY SUFFICIENT FACTS. NOW, THEY DIDN'T SAY WHAT FACTS SHE DIDN'T SUPPLY, WHAT SHE SHOULD HAVE SUPPLIED.

WHAT SHE DID WAS EXAMINE THE VERY TESTS THAT THE EMERGENCY ROOM DID TO DETERMINE WHETHER THEY SHOULD APPLY, SUPPLY TPA THERAPY TO MR. COX.

THOSE TESTS WERE THE DECISION MAKERS FOR THE NEUROLOGIST. SHE LOOKED AT THEM --

>> MR. EATON, YOU'RE NOW IN YOUR REBUTTAL TIME.

>> I'M ALWAYS IN MY REBUTTAL TIME.

[LAUGHTER]

>> WE HELP YOU DO THAT, I UNDERSTAND.

>> AND SAID, THIS MAN IS AN APPROPRIATE CANDIDATE, AND HE WOULD HAVE BENEFITED FROM IT. WHAT ELSE COULD SHE HAVE DONE? AND BESIDES, AS I MENTIONED EARLIER, 90.705 SAYS HER OPINION COULD COME IN WITHOUT ANY FACTS AT ALL, AND THIS COURT SAID THAT

IN JACKSON V. STATE IN 1994,  
THERE IS NO REQUIREMENT THAT THE  
FACTS OR DATA UNDERLYING AN  
EXPERT OPINION BE BE ADMITTED  
INTO --

>> SINCE YOU BROUGHT THAT UP  
AGAIN, I'VE READ 90.705, AND IT  
SAYS THERE, "ON  
CROSS-EXAMINATION THE EXPERT  
SHALL BE REQUIRED TO SPECIFY THE  
FACTS OR DATA."

>> IF SHE WAS CROSS-EXAMINED ON  
THEM.

SHE WAS CROSS-EXAMINED ON THE  
NINDS STUDY.

>> I'M TALKING ABOUT HOW THAT  
INTERACTS WITH THIS PARTICULAR  
CASE IS ONE QUESTION.

BUT THE NOTION THAT AN EXPERT  
CAN JUST COME UP THERE AND GIVE  
AN IPSE DIXIT AND IF CHALLENGED  
ON IT CAN SAY, WELL, THAT'S WHAT  
I THINK AND THAT'S IT, I THINK  
IS VERY QUESTIONABLE --

>> I'M NOT SUGGESTING THAT AT  
ALL, YOUR HONOR.

THEY'RE ENTITLED TO  
CROSS-EXAMINE HER ON THE BASIS  
OF HER OPINION, BUT SHE GAVE IT  
ON DIRECT EXAMINATION.

TWO QUICK ITEMS.

ATKINS V. HUMES SAYS LAYPERSONS  
AND JUDGES DON'T HAVE THE  
MEDICAL EXPERTISE TO MAKE  
DECISIONS LIKE THIS ON STANDARD  
OF CARE FOR EACH CAUSATION.  
YOU'VE GOT TO HAVE EXPERT  
TESTIMONY.

BUT THREE JUDGES WITH NO MEDICAL  
TRAINING AT ALL BELOW SAID WE  
DON'T, WE DON'T BUY THIS  
EXPERT'S TESTIMONY, THE

DEFENDANT WINS, AND THAT'S JUST NOT CORRECT.

THERE'S ALSO A LINE OF CASES THAT SAY THE SUFFICIENCY OF THE FACTS IS FOR THE EXPERT TO DECIDE, NOT FOR THE JUDICIARY, BUT WE DON'T HAVE ANY MEDICAL EXPERTISE.

THIS WOMAN'S OPINION IS, PLAINLY, ENOUGH TO SUPPORT A JURY FINDING OF LIABILITY AND CAUSATION IN THIS CASE, AND THE DISTRICT COURT IS SIMPLY WRONG, AND WE RESPECTFULLY REQUEST THAT IT BE REVERSED.

THANK YOU.

>> MAY IT PLEASE THE COURT, MY NAME IS KIMBERLY ASHBY.

I REPRESENT ST. JOSEPHS, AND WE RESERVE OUR TIME TODAY IN HALF, SO I'LL HAVE TEN MINUTES.

THE SECOND DISTRICT DID NOT CREATE A CONFLICT FOR JURISDICTION IN THIS COURT WHEN IT ISSUED THE OPINION IN THIS CASE.

THE TPA THERAPY IS, IT IS A CLOT-BUSTING THERAPY FOR STROKE VICTIMS THAT IS MANUFACTURED BY GENENTECH.

GENENTECH AND THE FDA HAVE ISSUED A REPORT THAT SHOWS THAT THERE IS A 31% CHANCE THAT THE TPA THERAPY IS GOING TO HAVE A BENEFICIAL EFFECT ON PEOPLE GETTING IT WITH SOMEWHERE IN THE NEIGHBORHOOD OF 20% OF THAT POPULATION --

>> THE STUDY DIDN'T COME INTO EVIDENCE.

>> CORRECT.

>> WOULD YOU, WOULD YOU SUGGEST

THAT THIS COURT IS ABLE TO GO ON THE INTERNET, AND SHOULD WE SEPARATELY LOOK AT THE STUDY?

>> I WOULD HAVE ABSOLUTELY NO OBJECTION TO THAT.

>> WELL, I MEAN, IS THAT SOMETHING THAT AN APPELLATE COURT SHOULD BE DOING?

>> I THINK SOME OF THE OTHER COURTS THAT I CITED

--

>> I MEAN, I WILL SAY, I LOOKED, TRY TO LOOK AT THESE THINGS ON THE INTERNET. WITH THAT EXPERT'S EXPLAINING IT I DON'T KNOW HOW I CAN, I DON'T THINK AT ALL, SOMEBODY IS CAPABLE OF LOOKING AT.

DID YOUR EXPERTS, EVERYBODY FOCUSES ON FUTRELL'S TESTIMONY IN CROSS WHERE I DON'T THINK SHE ADMITS AUTHORITATIVENESS OR NUMBERS THAT YOU'RE TALKING ABOUT.

I DIDN'T SEE ANY CITATIONS IN THE BRIEF, THIS WAS A VERY LENGTHY TRIAL, THERE WERE A LOT OF EXPERTS, TO TESTIMONY FROM YOUR DEFENDANT'S CLEARLY EXPLAIN WHY HE WOULDN'T BE, WHY THE 20% OR THE 31%, IS THAT IN THIS RECORD AND DID YOU CITE TO IT IN YOUR BRIEF?

>> WE DID NOT CITE TO THE TESTIMONY OF THE DEFENSE EXPERTS BECAUSE THIS, THE QUESTION THAT WAS BEFORE THE SECOND DCA, WHAT WAS FOUND IN THE OPINION IS WHETHER THE DIRECTED VERDICT WAS APPROPRIATE.

>> OKAY. SO ALL WE --

>> THAT'S RIGHT.

>> IF WE DON'T AGREE LOOKING AT WHAT DR. ^FUTRELL SAID, SHE ACKNOWLEDGED THE STUDY AS AUTHORITATIVE OR AGREED TO THE NUMBERS AS BEING APPLICABLE TO HIM, THEN THERE IS NO BASIS FOR THE SECOND DISTRICT'S STATEMENT THAT THEY'RE CONSTRAINED AND SHE WAS CONSTRAINED BY STATISTICS. THAT'S WHERE I'M HAVING MY PROBLEM.

>> UNDERSTOOD.

IF I CAN ADDRESS THAT.

I THINK THAT WHAT THE SECOND DISTRICT SAID YOU CAN'T JUST SAY SOMETHING AND MAKE IT SO AND WHAT SHE SAID IN ORDER TO SAY, I'VE TAKEN THE 31% AND I'M BENDING THAT NUMBER, SHE DID RECOGNIZE IT AS THE STUDY NUMBER AND WHETHER YOU WANT TO GO TO THE EXTREME OF SAYING SHE RECOGNIZED IT AS AUTHORITATIVE OR NOT, SHE DOES MAKE REFERENCE TO IT AS THE STUDY.

AND THEN SHE SAYS SHE'S CAPABLE OF PICKING OUT SOMEWHERE ON THE ORDER OF 100% OF THE PEOPLE THAT ARE GOING TO FALL IN THAT 31% CATEGORY WHICH REALLY PUTS STATISTICS ON ITS HEAD WHEN YOU DO THAT.

THE REASON --

>> I DON'T QUITE UNDERSTAND THAT BECAUSE I CAN UNDERSTAND THE STATISTICS BUT I DON'T UNDERSTAND THAT THOSE STATISTICS INDICATE THAT THE EFFECTIVENESS OF THE DRUG IS GOING TO BE RANDOM AND IT SEEMS

TO ME THAT IT MAKES A PERFECT SENSE THAT, SOMEONE WHO IS EXPERIENCED THIS THE USE OF MIGHT BE ABLE TO LOOK AT THE PARTICULAR CIRCUMSTANCES INVOLVED, THE PARTICULAR CHARACTERISTICS OF THE PATIENT AND WHATEVER ELSE WOULD BE RELEVANT TO THE EFFECTIVENESS AND MAKE A JUDGMENT.

THERE IS MORE LIKELY THAN NOT TO WORK FOR THIS PATIENT, AND THEY'RE NOT CONSTRAINED BY A STUDY WHICH, AGAIN, UNLESS THE SCIENTIFIC INDICATION WAS THAT WE DON'T KNOW WHEN IT WORKS. IT IS JUST RANDOM BUT THERE IS NOTHING IN THE RECORD THAT INDICATES, THAT THE EFFECTIVENESS OF THIS DRUG IS RANDOM, IS THERE?

>> WELL, NO.

THERE ISN'T AT FINDING ONE WAY OR THE OTHER WHETHER EFFECTS ARE RANDOM BUT MORE TO YOUR POINT, WHAT DR. ^FUTRELL SAID, I CAN PICK PATIENTS SUCH AS MR. ^COX OUT AND TESTIFY THAT HE IS IN A PARTICULAR GOOD STEAD WITH THIS THERAPY WHEN THEY ARE CLINICAL, THE REST OF THE BACKGROUND, THE UNDERPINNING AND BASIS FOR HER TO BEING ABLE TO SAY THAT IS NOT THERE.

THAT IS --

>> WHAT MORE DOES SHE NEED IF SHE WERE THE TREATING PHYSICIAN AT THE SITE, HAVING ALLED STUDIES AND HAVING THE INFORMATION THAT IN HER OPINION, THAT'S WHAT EXPERTS DO, THAT MORE LIKELY THAN NOT,

AND I HAVEN'T SEEN MANY EXPERTS  
VOICE IT A VERY HIGH  
PROBABILITY.

MOST OF THEM ARE WITHIN A  
REASONABLE MEDICAL PROBABILITY  
BUT THIS WAS EXPRESSED VERY  
HIGHLY THAT HE WOULD HAVE,  
WHATEVER, THAT HIS CHANCES OR,  
WHAT WAS GOING TO HAPPEN TO HIM  
WAS GOING TO BE A BENEFICIAL  
RESULT.

I THOUGHT THAT'S WHAT SHE SAID?

>> JUSTICE LEWIS WHICH IS, IF  
YOU LOOK WHAT SHE CLAIMS, I  
HAVE ALL THE RESPECT IN THE  
WORLD FOR DR. ^FUTRELL,  
I'M NOT TRYING TO MAKE THIS A  
PERSONAL THING.

IF YOU LOOK AT HER CLINICAL  
EXPERIENCE, OTHER THAN THAT SHE  
IS RELYING ON THE MEDICAL  
LITERATURE AND --

>> IF YOU'RE SAYING LOOK AT  
CLINICAL EXPERIENCE THAT SHE IS  
NOT A QUALIFIED EXPERT?

>> NO, I'M NOT SAYING THAT.  
SHE HAS EXPERTISE IN STROKES  
THEN SITTING IN THE WITNESS  
CHAIR, IS SHE, GENERALLY  
SPEAKING QUALIFIED TO TALK  
ABOUT STROKE ISSUES.

THAT MAY BE YES OR THAT MAY BE  
NO. IF SHE --

>> I DIDN'T UNDERSTAND THIS, I  
DIDN'T UNDERSTAND THIS CASE  
BEING ONE SHE WAS NOT QUALIFIED  
TO EXPRESS AN OPINION.

>> I'M NOT SUGGESTING THAT IT  
IS.

>> THAT'S WHAT YOU'RE SAYING TO  
ME.

>> I'M REALLY FOCUSING ON THE

OPINION ITSELF, NOT THE OPINION  
GIVER AND HER QUALIFICATIONS TO  
GIVE OPINIONS GENERALLY  
SPEAKING.

BUT IF YOU LOOK AT WHAT SHE  
USES AS HER CLINICAL EXPERIENCE  
TO SUPPORT THIS OPINION, SHE,  
HAD 40, 50 PATIENTS.

WE DON'T KNOW WHAT HAPPENED TO  
THEM.

WE DON'T KNOW WHETHER HAD ANY  
OF THE DEMOGRAPHICS AT ALL THAT  
MATCH UP WITH WHAT MR.^COX HAD.  
WHEN SHE TALKS ABOUT, JUSTICE  
PARIENTE IS CONCERNED ABOUT  
HER.

SHE LOOKED AT THE CT SCANS.

THIS IS AFTER THE STROKE.

SHE FINDS FOR A MAN HIS AGE HIS  
BRAIN LOOKS RELATIVELY YOUNG.

WE EXPECT TO SEE MORE  
SHRINKAGE, FINE.

WHERE IS THE EVIDENCE THAT  
SHOWS I HAVE CLINICAL  
EXPERIENCE WITH YOUNGER THAN  
EXPECTED BRAINS AND HERE'S WHAT  
MY STATUS IS ON THAT.

>> EVERY EXPERT WILL NEED TO  
COME IN, IN ANY TYPE OF  
SITUATION WHERE THE EXPERT'S  
TESTIFYING BASED UPON TRAINING,  
EXPERIENCE, WORK IN THE FIELD  
AND EXPLAIN EVERYONE OF THEIR  
PATIENTS OR EVERYONE OF THE  
BUILDINGS THAT THEY HAVE DONE  
OR EVERY PROFESSIONAL ACTION  
THAT THEY HAVE TAKEN TO SUPPORT  
THEIR OPINION.

IS THAT WHAT YOU'RE SUGGESTING?

>> NOT ENTIRELY BUT --

>> BUT SOMETHING LIKE THAT?

>> IF THEY HAVE NO BASIS

THOUGH --

>> EASY TO SAY NO BASIS, I MEAN THAT SEEMS TO ME TO GO INTO THE QUALIFICATIONS, IF YOU FELT THAT HER 40 TO 50 WAS NOT SUFFICIENT, THEN, SOMEBODY NEEDS TO CHALLENGE THAT.

>> THAT'S WHAT WAS DONE.

>> I DON'T AGREE, --

>> IT WAS DONE AS A, AS A CALIBRATION OF WHETHER WE HAVE SUFFICIENT COMPETENT EVIDENCE TO GO TO THE JURY ON CAUSATION IN THIS CASE.

>> IF IT IS NOT QUALIFICATION, WHY WOULDN'T IT AT LEAST BE A CREDIBILITY ISSUE WHICH EXPERT YOU CHOOSE TO BELIEVE AND THEREFORE BE A JURY ISSUE? ISN'T THAT UP TO THE JURY TO DECIDE WHICH EXPERT IS MORE CREDIBLE AND ONE ONES THEY BELIEVE?

>> IF THIS WAS JUST YOUR EXPERT SAYS X AND MY EXPERT SAYS Y, I WOULD AGREE WITH YOU.

THAT DOESN'T PLY HERE BECAUSE OF NATURE OF THIS DRUG.

AS JUSTICE PARIENTE POINTS OUT THIS IS NOT A PROCEDURE OR I USED THE FORCEPS WRONG.

THIS IS A DRUG THAT HAS BEEN TESTED AND THIS EXPERT RECOGNIZED THAT TEST AND SAID BUT HERE'S WHY I CAN PICK THE BETTER POPULATION OUT OF THAT 31% IN ORDER TO PUT ME OVER THE BAR ON THE 50% OR MORE, MORE LIKELY THAN NOT.

>> BUT YOU'RE USING, LET ME GO BACK TO THE PERCENTAGES.

SHE ON DIRECT SAID WHY SHE

THOUGHT HE HAD A HIGH  
PROBABILITY OF MAKING AN  
EXCELLENT RECOVERY AND BASED ON  
THE CAT SCAN AND EVERYTHING SHE  
HAS AND THIS IS AGAIN, NOT ONLY  
AN EXPERT WHOSE QUALIFICATIONS  
WEREN'T CHALLENGED BUT A VERY,  
VERY, NOT I MEAN, 40 TO 50  
PATIENTS TPA, SHE HAS REVIEWED  
HUNDREDS OF CAT SCANS AND WHAT  
SHE SAYS ON THE  
CROSS-EXAMINATION THAT YOU RELY  
ON AND THAT THE SECOND DISTRICT  
RELIES ON IS THAT, FIRST SHE  
SAYS SUBSEQUENT PAPER WAS A  
DISTORTION OF THE NINDS STUDY.  
THE COMPETENT IS IT IS NOT A  
DISTORTION.

20% MAKE THAT KIND OF RECOVERY  
WITHOUT ANY MEDICATION.

THE NUMBER GOES UP TO 31%,  
THAT'S WHAT IT SAID.

IT SAID THAT? YES.

AND YOU KNOW IF YOU DO THE  
MATHEMATICAL CALCULATION THAT  
MEANS YOU'VE GOT TO GIVE THIS  
MEDICATION TO EIGHT PEOPLE TO  
GET ONE THAT MAKES THE KIND OF  
RECOVERY YOU SAY MR.^COX IS  
GOING TO GET.

THAT IS NOT TRUE.

WHY ISN'T THAT TRUE?

THE CATEGORIES, MR.^COX WOULD  
GO EITHER OF THE TWO AND SHE  
GOES ON AND THEN SHE SAYS THE  
WORST NUMBER IN THE NINDS  
STUDY, THERE WAS 30%,  
IMPROVEMENT OR 36% WITH PEOPLE  
WITH ALL PROBLEMS.

YOU'RE QUOTING A PAPER THAT  
LATER LOOKED AT THE DATA AND  
SAID IT WASN'T THAT GOOD.

MY FIRST PROBLEM WITH WHAT THE SECOND DISTRICT DID, IT SEEMS THAT IT MISTATE STATED WHAT SHE SAYS ABOUT THE NINDS STUDY. SINCE WE DON'T HAVE THE NINDS STUDY IN EVIDENCE AND WE DON'T HAVE ANYTHING ELSE SAYING IT IS AUTHORITATIVE AND I'M NOT SURE HOW WE GO OUT AND LOOK AT A STUDY AND MAKE SOME CONCLUSORY STATEMENTS I THINK THAT IS WHERE THE PROBLEM IS. SO PLEASE HELP ME WITH THAT, WHETHER WE JUST GO DO WHAT THE SECOND DISTRICT SAYS, THEY JUST ACCEPTED THIS 20% AND 31% FIGURE WHEN SHE DIDN'T ACKNOWLEDGE THAT IS AN ACCURATE STATEMENT AS TO ALL PEOPLE LIKE MR.^COX?

>> I THINK --

>> YOU'RE NOW IN CO-COUNSEL'S TIME.

>> ONE MINUTE QUESTION.

>> I WILL GIVE Y'ALL A LITTLE MORE TIME BUT YOU NEED TO WRAP IT UP.

>> SO I'M CONCERNED ABOUT THE CROSS-EXAMINATION AND THAT FIGURE.

>> AND YOUR HONOR, THE EXPERT, DR.^FUTRELL, USED THE STUDY AS HER PLATFORM. SHE COULD HAVE JETTISONED IT, THE STUDY IS OLD. I DON'T RELY ON IT. IT HAS NO PURPOSE HERE. SHE SAID, HERE'S WHY I CAN PICK THE POPULATION OUT OF THAT GROUP. AND THAT'S WHAT MAKES HER OPINION UNFOUNDED IN ANY, ANY

OTHER CLINICAL OR LEGITIMATE EXPERIENCE THAT'S FOUND IN THE EVIDENCE CODE AND THAT'S GETTING TO HER SAYING MAKING IT SO.

WE DID ASK THE COURT TO, I DID BRING UP THE OTHER ISSUES THAT WE HAD RAISED WITH THE SECOND DISTRICT THAT WERE NOT ADDRESSED IN THE OPINION AND I WOULD BE REMISS IF I DIDN'T POINT OUT THAT WE STILL CONSIDER THOSE TO BE UNRESOLVED AT THIS TIME.

THANK YOU VERY MUCH.

>> MAY IT PLEASE THE COURT, IRENE PORTER ON BEHALF OF DR.^CASTELLUCCI.

I'D LIKE TO ADDRESS THE CROSS-EXAMINATION OF FUTRELL. SHE WAS ASKED, IS THE NINDS STUDY THE ONE THAT ESTABLISHED THE EFFICACY OF DRUG AND SHE AGREED WITH THAT AND SHE AGREED WITH THE STATISTICS.

WHAT SHE THEN WENT ON TO TALK ABOUT IS A SECOND STUDY AND WHETHER THAT MEANT ONE IN EIGHT WOULD WORK.

THAT'S WHAT SHE SAID WAS A DISTORTION.

THAT WAS A SUBSEQUENT ANALYSIS.

SHE DID NEVER EVER, EVER, DISPUTED THE NINDS STUDY.

THE OTHER PROBLEM THAT WE HAVE AND --

>> AGAIN, THE NINDS STUDY, CORRECT ME IF I'M WRONG, IT DOES NOT ESTABLISH THE EFFECTIVENESS OF THE DRUG IS RANDOM, DOES IT?

>> I BELIEVE THAT IT DOES.

THE TESTIMONY, I WROTE BACK, I WENT WHILE YOU WERE TALKING LOOKED WHAT ELSE WE HAVE IN THE RECORD.

THE DEFENSE EXPERT, BERNSTEIN, TESTIFIED IN 1831 AND TO 1833 OF THE TRIAL TRANSCRIPT ABOUT THE NINDS STUDY.

MY UNDERSTANDING OF THAT TESTIMONY IT IS JUST AN OVERALL RANDOM EFFECTIVE RATE, 20% IMPROVED GETTING A PLACEBO. 31% IMPROVED GETTING THE DRUG.

>> WELL, BUT IT'S ONE THING, I MEAN I GUESS I DON'T FOLLOW THAT BECAUSE IT'S ONE THING TO SAY, HERE, WE GAVE THIS DRUG TO THIS POPULATION AND WE DID THE CONTROL, AND HERE ARE THE RESULTS.

IT'S ANOTHER THING TO SAY, THAT, NOBODY CAN FIGURE OUT WHY IT WORKED WITH SOME PEOPLE AND NOT WITH OTHER PEOPLE. WHY IT WAS MORE EFFECTIVE WITH SOME THAN WITH OTHERS. THAT'S AN ENTIRELY DIFFERENT QUESTION.

>> I UNDERSTAND THAT QUESTION AND THE PROBLEM WITH THE THIS PARTICULAR CASE IS WE DIDN'T EVEN GET THERE AND WE DON'T NEED TO GET THERE BECAUSE MR.^COX UNDISPUTEDLY HAVE A PRIOR SUBDURAL. WHETHER THIS DRUG CAN EVER WORK IN HIS CASE HAS NEVER EVER, BEEN TESTED. EVERYBODY CONCEDES THAT. AND DR.^FUTRELL HAS NEVER GIVEN THE DRUG ON THAT TYPE OF

PATIENT.

THIS IS EXACTLY LIKE THE CANCER  
THING.

I'VE GOT CANCER, DOCTOR, WHAT  
CAN YOU DO FOR ME?

WE'VE GOT A CLINICAL STUDY.

I THINK YOU'LL BENEFIT.

I CAN'T REALLY TELL YOU BECAUSE  
I NEVER STUDIED IT.

>> MY PROBLEM WITH THIS IS THAT  
WHEN I LOOK AT THE SECOND  
DISTRICT OPINION INSTEAD OF THE  
SECOND DISTRICT, IN MY OPINION,  
LOOKING AT THE, WHETHER OR NOT  
A DIRECTED VERDICT SHOULD HAVE  
BEEN GRANTED OR NOT, THEY  
SEEMED TO BE PUTTING THEMSELVES  
IN THE POSITION OF THE JURY  
HERE AND DISCOUNTING OR  
ACCEPTING SOME PORTIONS OF THE  
EVIDENCE AND NOT ACCEPTING  
OTHER PORTIONS OF THE EVIDENCE.  
AND SO THAT'S WHAT MY REAL  
PROBLEM IS HERE.

DOESN'T IT LOOK LIKE THE SECOND  
DISTRICT IS ACTUALLY ACTING AS  
A JURY IN THIS CASE?

>> I THINK THAT THE OPINION MAY  
BE CONFUSING.

IT TALKS ABOUT THE FACT IF HE  
HAD A PRIOR SUBDURAL AND THEN  
IT GOES ON AND ON AND THEN  
TALKS ABOUT STUDY.

I THINK THE BOTTOM LINE THOUGH  
THE RESULT IS ABSOLUTELY  
CORRECT FOR TWO REASONS.

ONE THEY DIDN'T EVEN REACH THAT  
HE COULDN'T HAVE EVER GOTTEN  
THE DRUG OR WOULD NOT HAVE IN  
THIS CASE BUT IF WE LOOK AT THE  
SUBDURAL --

>> WAS THAT ISSUE ACTUALLY --

>> THAT WAS BRIEFED AND THAT WAS ARGUED AND --

>> BUT THEY DIDN'T DISCUSS THE SUBDURAL HEMATOMA.

>> OH I'M SORRY, THE SUBDURAL. YEAH, THE SUBDURAL BEING THERE THE ONLY THING DR.^FUTRELL SAID WAS I DON'T THINK IT WAS REALLY SIGNIFICANT BECAUSE HE DIDN'T HAVE ANY RESULTING BRAIN DAMAGE.

SHE NEVER DENIED IT EXISTED.

I ASKED YOU TO GO OUT AND GET ME THE SCANS, PLAINTIFF'S ATTORNEY. THEY DON'T EXIST.

ALL RIGHT, I'M GOING WITH THE RECORD.

>> SHE TOOK A NEUROLOGIST WHO HAS EXPERIENCE, USING THEIR CLINICAL JUDGMENT AND SHE SAID GIVING TPA WOULD NOT BE AN ABSOLUTE CONTRAINDICATION BECAUSE WHATEVER THERE WAS, RESOLVED WITHIN A SHORT TIME AND SHE, CAT SCAN ON THAT MORNING WAS A PERFECTLY NORMAL CAT SCAN WITH NO EVIDENCE OF ANY, NOT JUST ANY BRAIN DAMAGE, OF ANY PRIOR SUBDURAL HEMATOMA.

>> WELL, OR ANY CURRENT INTRACRANIAL HEMORRAGE. THAT IS ANOTHER CONTRAINDICATION. SHE DIDN'T SAY A SUBDURAL THAT WAS RESOLVED WOULD SHOW ON A CT SCAN.

WE HAD TESTIMONY FROM DR.^BERGES AND DR.^CRISP THE CANADIAN DOCTOR RHUMATOLOGIST. THAT THEY WEAKEN THE BLOOD VESSELS.

THAT DOESN'T SHOW UP ON A CT SCAN.

BUT THE CT SCAN GOES TO ONE THING, CAN YOU HAVE THE DRUG? IF YOU HAVE ACTIVE BLEEDING NO WAY.

SHE EVEN AGREED WITH THAT.

SHE SAYS I DON'T THINK A PRIOR, I DON'T THINK IT IS THAT BAD.

YOU CAN STILL GET IT.

OTHER EXPERTS SAID, ABSOLUTELY NOT.

DR.^BERGES SAID ABSOLUTELY NOT AND DR.^FUTRELL AND PLAINTIFF'S OTHER EXPERT ADMITTED IF YOU WANT TO FOLLOW THE GUIDELINES AND NOT GIVE IT, THAT IS PERFECTLY APPROPRIATE AND WITHIN THE STANDARD OF CARE.

>> WE'RE NOT HERE ON STANDARD OF CARE CASE.

>> STANDARD OF CARE COMES IN ON THE ISSUE THE SECOND DISTRICT DIDN'T REACH ON CAUSATION ARGUMENT.

WHAT WE SHOULD HAVE DONE THEY SAY IS FIND OUT WHAT THE ONSET OF THE STROKE WAS.

THEREFORE I WOULD HAVE GOTTEN A DRUG AND THEREFORE I WOULD HAVE GOTTEN BETTER.

POINT ONE I WOULD HAVE GOTTEN THE DRUG.

HOW DO YOU PROVE YOU WOULD HAVE GOT THE DRUG?

THE NEUROLOGIST WHO WAS ON CALL WOULD HAVE HAD TO GIVE IT TO YOU.

THAT'S WHY THEY WENT OUT AND GOT A LETTER WITHOUT GIVING HIM ALL THE FACTS TO TRY AND PROVE THAT.

THAT ENDED UP NOT BASED ON THE FACTS.

HE SAYS I WOULD NOT GIVE IT.  
I CONSIDER IT CONTRA  
INDICATIONS ABSOLUTE.  
I WOULDN'T EVEN THINK ABOUT IT.  
SO THIS --

>> SO THE NEUROLOGIST WHO WAS  
NEVER CALLED IN UNTIL AFTER,  
WHO NEVER INQUIRED ABOUT ANY  
HISTORY OF SUBDURAL HEMATOMA,  
AND SAID THAT HE COULDN'T BE  
GIVEN TPA BECAUSE IT WAS AFTER  
THE, AFTER THE WINDOW, AND THAT  
EXPERT, THAT DOCTOR HAS SENSE  
BEEN SUED AND WAS UNSTAFFED,  
YOU'RE SAYING BECAUSE THAT  
DOCTOR WAS SAYING I WOULDN'T  
HAVE GIVEN TO THE PATIENT THAT  
THAT, THAT GOES TO WHAT?

>> GOES TO CAUSATION.

THE ONLY REASON STANDARD OF  
CARE COMES INTO IT IF I MAY  
EXPLAIN WE RELIED ON EWING  
VERSUS SALINGER, THAT IF YOUR  
THEORY IS DR.^A WAS NEGLIGENT  
BECAUSE HAD THEY DONE  
SOMETHING, SOMEBODY ELSE WOULD  
HAVE DONE SOMETHING DIFFERENT.  
IF YOU GET DR.^B, SUBSEQUENT  
TREATMENT, TO SAY, NO, I WOULDN'T  
HAVE CHANGED MY COURSE OF  
TREATMENT, THERE IS NO  
CAUSATION.

THE ONLY --

>> YOU'RE SAYING THAT EVEN  
THOUGH THE EXPERT CAN'T SUPPLY  
THAT, YES, REASONABLE DOCTOR,  
LOOKING AT IT WOULD HAVE GIVEN  
IT BECAUSE A SUBSEQUENT DOCTOR  
SAYS --

>> NO.

THE REASON STANDARD OF CARE AND  
REASONABLENESS --

>> I'M NOT FINISHED.

YOU'RE SAYING AN EXPERT CAN'T  
SUPPLY THAT TESTIMONY ON  
STANDARD OF CARE?

>> EXPERTS CAN SUPPLY THE  
TESTIMONY ON STANDARD OF CARE  
BUT WHEN YOU HAVE THE ON CALL  
DOCTOR WHAT HE WOULD HAVE DONE,  
IT HAS TO BE TAKEN AS TRUE  
UNLESS THERE IS EVIDENCE THAT  
THAT DOCTOR WOULD HAVE BEEN  
NEGLIGENT IN SAYING HE WOULDN'T  
GIVE IT.

THAT'S THE ONLY REASON STANDARD  
OF CARE COMES INTO IT.

AND THAT'S --

>> THIS IS COMPLICATED BECAUSE  
WE HAVE DIFFERENT STANDARDS OF  
CARE HERE.

THE STANDARD OF CARE THAT THE  
DEFENDANTS HERE WERE ACCUSED OF  
BREACHING IS THE STANDARD OF  
CARE RELATED TO MAKING A PROPER  
INQUIRY ABOUT THE ON SET OF THE  
STROKE.

>> CORRECT.

>> THEN WE HAVE A DIFFERENT  
STANDARD OF CARE THAT APPLIES  
TO WHEN THE DRUG WOULD BE  
ADMINISTERED OR NOT.

>> CORRECT. AND THAT COMES  
IN WITH THE CAUSATION.

I DIDN'T MEAN TO COMPLICATE IT  
BUT THE REASON IT BECOMES  
IMPORTANT WE RELY ON EWING  
VERSUS SALINGER, SAYS IF THE ON  
CALL PHYSICIAN SAYS I WOULDN'T  
HAVE DONE WHAT YOU SAID WOULD  
HAVE HAPPENED, END OF STORY, NO  
CAUSATION.

THE THIRD DISTRICT AND THE 5th  
COME BACK AND SAY WE DON'T

AGREE WITH THAT IF IT MEANS THE  
SUBSEQUENT TREATER WOULD HAVE  
ALSO BEEN NEGLIGENT AND YOU  
CAN'T HAVE CAUSATION.

THAT IS WERE I'M DISCUSSING  
STANDARD OF CARE.

DR.^BERGES SAID I WOULD HAVE  
NEVER GIVEN IT.

DR.^FUTRELL SAID THAT A  
REASONABLE, NOT BELOW THE  
STANDARD OF CARE FOR DR.^BERGES  
WOULD DO.

>> YOU'RE INTO YOUR TIME.

I WILL GIVE YOU ANOTHER 60  
SECONDS.

>> IN CONCLUSION, WE THINK, WE  
SHOULD WIN AND, ON DIRECTED  
VERDICT ON TWO GROUND.

ONE HE WOULD HAVE NOT EVER  
GOTTEN THE DRUG WHICH THE  
SECOND DISTRICT DIDN'T REACH  
BUT YOU CAN REACH.

AND TWO, WE BELIEVE IT IS  
UTTERLY SPECULATIVE TO RELY ON  
STUDIES THAT DON'T INCLUDE A  
PATIENT WITH THIS  
CONTRAINCATION YOU CAN NOT  
PROVE A DANGEROUS DRUG WOULD  
IMPROVE SOMEONE WHEN IT HAS  
NEVER BEEN STUDIED THANK YOU.

>> THANK YOU.

>> NO OBJECTION TO  
DR.^FUTRELL'S TESTIMONY OR  
QUALIFICATIONS AND IN POINT OF  
FACT, THE DEFENDANTS NEVER  
MOVED FOR DIRECTED VERDICT ON  
THE GROUND THAT THE DISTRICT  
COURT SAID THEY WERE ENTITLED  
TO A DIRECTED VERDICT.

THIS THERAPY IS GIVEN TO  
PATIENTS.

THE DRUG IS EFFECTIVE IN SOME

PATIENTS.

IT IS A QUESTION OF MEDICAL JUDGEMENT WHICH PATIENTS GET THIS DRUG AND WHICH PATIENTS DON'T.

AND THIS INTERNATIONALLY RECOGNIZED STROKE EXPERT SAID THIS WAS AN APPROPRIATE PATIENT FOR TREATMENT.

>> WHAT ABOUT THIS ISSUE ON THIS EWING VERSUS SALINGER?

>> THAT I WILL ADDRESS.

EWING HAS BEEN DISAVOWED BY ONE MEMBER OF THE PANEL THAT WROTE IT, THAT PARTICIPATED IN IT.

THAT CASE IS CITED IN THE BRIEF.

IT HAS BEEN DISAGREED WITH BY THE THIRD DISTRICT IN A WONDERFUL, BEAUTIFUL, OPINION BY JUDGE SCHWARTZ IN THE MUNOZ VERSUS SOUTH MIAMI HOSPITAL CASE.

THE SECOND ONE, STATEWIDE INDUSTRIES CASE.

FIFTH DISTRICT DISAGREED WITH EWING VERSUS SALINGER AND GOOLSBY CASE AND ANOTHER CASE.

I DISCUSS THOSE IN MY REPLY BRIEF.

EWING IS NO LONGER CONSIDERED GOOD LAW ANYWHERE IN THIS STATE EXCEPT PERHAPS IN THE FOURTH DISTRICT.

BUT I DON'T THINK YOU'RE GOING TO NEED TO GET TO THAT BECAUSE THIS PRIOR SUBDURAL HEMATOMA THING IS A RED HERRING.

IT WAS THEIR DEFENSE.

IT DEPENDED ON WHAT I HAVE CALLED THE THREE IFS AND A MAYBE DEFENSE.

DEPENDENT ON THE JURY ASSUMING  
WHAT MIGHT HAVE HAPPENED IF  
THREE DIFFERENT THINGS THAT  
DIDN'T HAPPEN WOULD HAVE  
HAPPENED.

THE JURY REJECTED IT.

DR. ^FUTRELL SAID THERE IS NO  
EVIDENCE THAT THIS MAN EVER HAD  
A PRIOR SUBDURAL HEMATOMA AND  
FROM HIS CT SCAN, IT MADE NO  
DIFFERENCE TO MY OPINION IN  
THIS CASE.

>> WHAT ABOUT HER POINT THAT HE  
NEVER WOULD HAVE GOTTEN THE  
DRUG?

>> THEIR ARGUMENT WAS BECAUSE  
WE DISCOVERED DURING THE COURSE  
OF THIS LITIGATION SOMETHING  
THAT WE NEVER ASKED ANYBODY  
ABOUT AT THE TIME, THAT THIS  
PATIENT MAY HAVE HAD A PRIOR  
SUBDURAL HEMATOMA, THAT'S AN  
ABSOLUTE CONTRAINDICATION FOR  
GIVING THIS DRUG AND THEREFORE  
DR. BERGES WHO RECANTED  
HIS FORMER OPINION SAID I WOULD  
NEVER GIVEN IT BECAUSE HE HAD A  
PRIOR SUBDURAL HEMATOMA.  
THE EVIDENCE WAS THIS WAS NOT  
AN ABSOLUTE CONTRAINDICATION.  
THAT THIS WAS MERELY A  
GUIDELINE THAT CAME FROM THEIR  
OWN EXPERTS.

THAT IN FACT, THERE WAS NO  
SUBDURAL HEMATOMA ON A PRIOR  
OCCASION.

THERE WERE TWO MRIs, ONE OF  
WHICH, REPORTS OF MRIs, ONE  
WHICH SHOWED A HEMATOMA AND ONE  
WHICH DID NOT TAKEN SIX WEEKS  
LATER.

THERE WAS ALL KIND OF EVIDENCE

THAT REFUTED THEIR SUBDURAL  
HEMATOMA THEORY.  
AND THE JURY BOUGHT OUR VERSION  
OF THE FACTS, NOT THEIR VERSION  
OF THE FACTS AND WHAT'S BEEN  
ARGUED HERE TODAY AND IN THE  
BRIEFS IS A JURY ARGUMENT ON  
THEIR DEFENSE THAT THE JURY  
REJECTED.  
AND, I WILL CLOSE BY REMINDING  
EVERYBODY HERE ONCE AGAIN THAT  
NONE OF US KNOW A THING ABOUT  
THE MEDICINE IN THIS CASE.  
THAT'S WHY WE HAVE EXPERTS.  
AND IT BOGGLES MY MIND THAT  
THREE JUDGES, AS WONDERFUL AS  
THEY ARE AND AS BRIGHT AS THEY  
ARE AND AS GOOD LAWYERS AS THEY  
ARE, CAN SAY WE DON'T ACCEPT  
THE MEDICAL TESTIMONY IN THIS  
CASE BECAUSE WE KNOW BETTER.  
THAT CAN'T BE THE LAW.  
THANK YOU VERY MUCH.  
>> THANK YOU VERY MUCH.