>> OUR NEXT CASES NUMBER 22068,
LAURIE CARMODY.
>> MAY IT PLEASE THE COURT.
CHRISTINE DAVIS, ON BEHALF OF
THE PETITIONER'S.
THE ISSUE BEFORE THIS COURT IS
WHETHER FLORIDA'S DISTRICT COURT
OF APPEAL HAVE TERTIARY
JURISDICTION TO REVIEW A TRIAL
COURT ORDER DENYING MOTION TO
EXIST, A DEFENDANT'S MOTION TO
DISMISS, WHEN THE PLAINTIFF HAS
FAILED TO CAR OPERATE HIS
MEDICAL MALPRACTICE CLAIM FOR
THE STATUTORILY QUALIFIED
EXPERT.
IT IS IMPORTANT TO NOTE AT THE
OUTSET THE CASE IS NOT ABOUT THE
JURISDICTIONAL IRREPARABLE HARM
TO CERTIORARI REVIEW.
THAT HAS BEEN ESTABLISHED BY
DECADES OF PRECEDENT IN THIS
COURT.
IT WASN'T IMPACTED BY THE
COURT'S DECISION IN WILLIAMS
WHERE THE PARTIES IN THIS CASE.
THAT BECAUSE THE LEGISLATURE SET
OUT A CLEAR AND UNAMBIGUOUS
PROCESS THAT MALPRACTICE
LITIGANTS ARE TO FOLLOW IN
BRINGING MEDICAL MALPRACTICE
CLAIMS.
THE LEGISLATURE MADE CLEAR THAT
IN THE ACT, THE INVESTIGATION OF
MEDICAL MALPRACTICE CLAIMS
APPLIES TO ALL SUCH CLAIMS,
THESE INVESTIGATION REQUIREMENTS
ARE THE HALLMARK TO THE
STATUTORY FRAMEWORK.
THE LEGISLATURE ENFORCES THESE
PROCEDURES THROUGH SEVERAL
STATUTES.
FIRST, NO ACTION SHALL BE FILED,
THIS INVOLVES A CORROBORATING
AFFIDAVIT FROM A QUALIFIED
EXPERT UNDER THE STATUTE.
WHEN THE COMPLAINT IS FILED BUT
IT IS NOT COMPLIED WITH
MANDATORY REQUIREMENTS THE
STATUTE ESPECIALLY SAYS THE
CLAIM SHALL BE DISMISSED.
>> IN DETERMINING WHETHER OR NOT
THIS HAPPENED, IT SEEMS LIKE

WHILE THE STRIKE SECTION 14 USE
THE LIMIT ON ITS FACE THE TRIAL
THE PILE COURT FOR EXPERT
WITNESS ON GROUNDS OTHER THAN
QUALIFICATIONS IT DOES SEEM WHAT
IS RETAINED IS THE COURT'S
ABILITY TO STRIKE AN EXPERT ON
THE BASIS OF QUALIFICATION,
WHETHER THE EXPERT IS OF THE
SAME SPECIALTY.
MY QUESTION IS, DO YOU AGREE THE
DETERMINATION, WHETHER THE
POSITION, MEDICAL PRACTITIONERS
ARE THE SAME SPECIALTY, A
DETERMINATION OF FACT, A
QUESTION THE COURT WOULD TAKE
EVIDENCE ON ONE WAY OR ANOTHER.
AND ITS CONCLUSION ON THAT FRONT
WHETHER SOMEONE IS OR IS NOT IN
THE SAME SPECIALTY, WOULD
THEREFORE, WHATEVER IT IS, IF IT
IS SUPPORTED BY EVIDENCE ON
THAT, NOT BE IN CLEAR VIOLATION
OF THE LAW, THE ESSENTIAL
REQUIREMENTS OF THE LAW, IF IT
IS THE KIND OF QUESTION THAT'S
AMENABLE TO TAKING EVIDENCE, AN
UPHILL CHARGE SAYING IT IS
APPROPRIATE.
>> I DON'T UNDER THESE
CIRCUMSTANCES.
STARTING WITH WHETHER IT IS A
FACT-FINDING, THIS COURT MADE
CLEAR, YOU LOOK AT THE EVIDENCE
OF THE PERSON EXPERTS
QUALIFICATION THAT CAN BE
AFFIDAVIT, DEPOSITION TESTIMONY
AND YOU COMPARE IT TO THE
STATUTORY REQUIREMENTS AND SEE
IF THEY ONLINE.
WHEN YOU GET INTO SAYING
ESPECIALLY IN MEDICAL
MALPRACTICE, FACT FINDING AND NO
CERTIORARI PETITION SHOULD BE
GRANTED WITH FACT-FINDING, THAT
IS NOT SO IN A MEDICAL
MALPRACTICE CASE BECAUSE THE
STATUTE HAS CLEAR MANDATES,
766-ONE HUNDRED 2, A CLEAR
MANDATE THAT MUST BE FOLLOWED
FOR THE EXPERT TO BE QUALIFIED
SO THERE IS NO WAVE OF EVIDENCE,
NO DISCRETION OF THE TRIAL COURT
ANYMORE, THE ANALYSIS IS SIMPLY

WHAT DO WE HAVE THAT SAYS ON THE QUALIFICATIONS OF THIS EXPERT, AND DO THEY ALIGN WITH STATUTORY REQUIREMENTS AND THAT IS WHAT THIS COURT SAID.
THIS WAS AN APPEAL FROM A FINAL JUDGMENT BUT THE ANALYSIS IS THE SAME.
>> LET ME PRESS YOU WILL LITTLE BIT ON THIS.
IS IT FAIR TO SAY THEY ARE RUNNING OUT THERE IN THE STATE, THERE ARE MATTERS OF WHICH TWO CARDIOLOGISTS OR TWO CRITICAL-CARE PHYSICIANS ARE IN THE SAME SPECIALTY, ISN'T THAT BEING LITIGATED RIGHT NOW OR IS THAT JUST NOT LITIGATED?
>> IT CAN BE LITIGATED IF A PLAINTIFF FILES A CLAIM AND CORROBORATES THEIR CLAIM WITH AN AFFIDAVIT FROM A CARDIOLOGIST AND THE DEFENDANT IS A CARDIOLOGIST, THEN THAT WOULD BE SAME SPECIALTY SO THAT DOESN'T MEAN A DEFENDANT DOESN'T CHALLENGE IT BECAUSE THEY HAVE THE GROUNDS FOR BELIEVING THE STATUTORY REQUIREMENTS HAVEN'T BEEN COMPLIED WITH BECAUSE THEY ARE NOT THE ONLY ONES, BUT IT IS LITIGATED AND THE PURPOSE OF THE IRREPARABLE HARM THAT'S CLEARLY ESTABLISHED IN OUR LAW IS THE DEFENDANT IS NOT SUPPOSED TO HAVE TO LITIGATE.
>> I'M NOT TALKING ABOUT THAT. LET'S LEAVE TO THE SIDE THE FACT THAT WE AGREE THE STATUTE ON SPACE SEEMS DESIGNED IN NEXT TEXTUAL CONTENT AVOIDS IRREPARABLE HARM HAVING TO DEAL WITH THE CLAIM.
I'M FOCUSED ON THE ESSENTIAL REQUIREMENTS OF LAW IN THE ANALYSIS.
WHAT I CAN'T SEEM TO GET MY HEAD AROUND IS I AM CERTAIN THAT TWO ICU PHYSICIANS, TWO CRITICAL-CARE SPECIALIST WILL HAVE SLIGHTLY DIFFERENT RESUME, MAYBE THEY ARE HOSPITALISTS AS WELL, MAYBE THEY ARE INTERNAL MEDICINE HEAVY ICU DOCTORS, OR A

PULMONOLOGIST.
FOLKS ARE GOING TO LITIGATE
WHETHER THERE IS A MISSING
SPECIALTY AND I HAVE A HARD TIME
UNDERSTANDING HOW THE DECISION
YOU DON'T LIKE OR THAT YOU DO
LIKE THAT HAPPENS WITHIN THAT
CONTEXT THE PARTS FROM THE
ESSENTIAL REQUIREMENTS OF LAW
SUCH THAT CERTAIN RELIEF IS
APPROPRIATE?
>> THIS COURT HAS MADE CLEAR IN
THE DEPARTMENT OF HIGHWAY SAFETY
WHAT IS THE DEPARTURE FROM
ESSENTIAL REQUIREMENTS OF LAW,
WHAT ARE CLEARLY ESTABLISHED
PRINCIPLES OF LAW AND A STATUTE
IS CLEARLY ESTABLISHED LAW AND
VIOLATION OF A STATUTE IS
DEPARTURE FROM ESSENTIAL
REQUIREMENTS OF LAW SO WHEN THE
STATUTE REQUIRES THAT YOU SHALL
COMPLY WITH STATUTORY CRITERIA
OR ELSE YOUR CLAIM SHOULD BE
DISMISSED, FAILING TO DO SO IS A
DEPARTURE FROM THE ESSENTIAL
REQUIREMENTS OF LAW.
>> THAT BASICALLY COLLAPSES INTO
A DETERMINATION TO THE EXTENT
THAT THE WHOLE REQUIREMENTS OF
LAW AND CLEARLY ESTABLISHED LAW
TO THE EXTENT THAT IT'S TRYING
TO NARROW AND MAKE IT DIFFERENT,
DID THE JUDGE GET IT RIGHT OR
WRONG AND IT SEEMS YOU ARE
COLLAPSING THAT?
>> IN A TYPICAL CASE, YOU WOULD
HAVE THE EXPERT QUALIFICATIONS
AND IN THIS CASE, FOR EXAMPLE, A
NEUROSURGEON WHO COMPLETED THE
PROCEDURE AND BROUGHT A CLAIM
AGAINST THE NEUROSURGICAL ARV,
THEY CORROBORATED THAT CLAIM
WITH INTERNAL MEDICINE OPERATION
DOCTOR WHO HAD NOT BEEN
PRACTICING IN THE HOSPITAL
WITHIN THREE YEARS AND THROUGH
HIS TESTIMONY WHICH WAS PLAYED
OUT IN THIS BRIEF HAD ABSOLUTELY
NO EXPERIENCE WITH THE CLINICAL
PRACTICE OF NEUROSURGICAL --
NEVER SUPERVISED ONE, HAD NEVER
DEALT WITH -- HE COULD IDENTIFY
A WOUND ABSCESS BUT COULDN'T

TREAT IT, HE REFERRED THOSE OUT.
THIS IS THE TYPICAL CASE OF
THESE TWO EXPERTS, THIS EXPERT
DOES NOT SATISFY THAT
REQUIREMENT AND SO THEN GOING
BACK TO MORRIS WHICH I THINK IS
CRITICAL, YOU JUST CONSIDER
WHETHER THEY ONLINE.
IT'S UNIQUE IN MEDICAL
MALPRACTICE CASES BECAUSE OF THE
WAY THE STATUTORY SCHEME HAS
BEEN SET UP.
>> THERE ARE ALWAYS GOING TO BE
-- ONE THING THAT STRIKES ME
ABOUT THIS BODY OF CASE LAW, SO
MUCH TIME SPENT ARGUING ABOUT
WHETHER CERTAIN REQUIREMENTS ARE
MET AND ALL THAT, SEEMS TO ME
YOUR ARGUMENT ABOUT LEGISLATIVE
SCHEME AND WHAT THE LEGISLATURE
IS TRYING TO ACCOMPLISH POINTS
TO THE CONCLUSION THAT THERE
OUGHT TO BE A RIGHT OF INTERLOCK
YOU STORY APPEAL, THEN WE CUT TO
THE CHASE.
WE CUT TO WHETHER THE STATUTE IS
ACTUALLY BEING FOLLOWED BY THE
TRIAL COURT AND MOST OF THE TIME
THEY WILL BUT SOMETIMES TRIAL
COURTS MAKE MISTAKES LIKE
APPELLATE COURTS MAKE MISTAKES.
THAT WOULD BE THE CLEAREST, MOST
DIRECT MEANS OF FOCUSING ON WHAT
THE LEGISLATURE IS TRYING TO
ACCOMPLISH.
WHAT I'M I MISSING WHEN I SAY
THAT?
>> YOU ARE NOT MISSING ANYTHING.
WE WERE AMENDED TO ALLOW AN
INTERLOCK USSURI APPEAL FROM
THESE DECISIONS THAT WOULD MAKE
SENSE BUT THAT DOESN'T HELP US
IN THIS CASE OR ALL THE CASES
THAT HAPPENED BEFORE THAT ARE
COMING DOWN THE PIKE NOW.
WHEN YOU GET INTO THE
REQUIREMENTS OF CERTIORARI,
THERE IS IRREPARABLE HARM AND
JURISDICTION AND REQUIRING A
PARTY TO GO THROUGH THE TRIAL
WHEN THEY ARE NOT SUPPOSED TO
HAVE TO GO THROUGH THE TRIAL
BECAUSE THE STATUTORY
REQUIREMENTS HAVE NOT BEEN

FOLLOWED THAT IS IRREPARABLE HARM.
THEN YOU GET TO ESSENTIAL REQUIREMENTS OF LAW AND WITHOUT HAVING IMMEDIATE REVIEW OF AN ORDER THAT SAYS, DENIES MOTION TO DISMISS BECAUSE THE COURT THINKS THE EXPERTS ARE QUALIFIED, WITHOUT IMMEDIATE REVIEW, YOU'RE GETTING THAT PORTION, YOU'RE GETTING THE ENTIRE ACT BECAUSE ANY QUALIFICATION THAT HAS NOT BEEN SATISFIED CAN'T BE REMEDIED ON POSTJUDGMENT APPEAL.
>>
>> THE ARGUMENT BETWEEN THE TWO SIDES COMES DOWN TO WHETHER IT MAKES SENSE TO HAVE A PROPHYLACTIC RULE BECAUSE IN THE SENSE OF NOT ALLOWING IT, YOU POSIT THE SORT OF WORST-CASE SCENARIO WHERE IT IS OBVIOUSLY WRONG IN WHICH CASE YOU WOULD HOPE THE TRIAL COURTS WOULD GET IT RIGHT MOST OF THE TIME, THAT IT WOULD BE AN OUTLIER, YOU GET PEOPLE WITH CATEGORICALLY DIFFERENT SPECIALTIES AND THEN IN THE CASE WHERE IT IS KIND OF DEBATABLE AND MAYBE YOU THINK THAT LOOKING AT IT THEY WOULD HAVE APPLIED THE STATUTORY CRITERIA DIFFERENTLY, THEN YOU ARE REALLY DEPRIVING DEPARTURE FROM ESSENTIAL REQUIREMENTS OF LAW, OF HAVING ANY FORCE.
YOU BASICALLY JUST, YOU ARE EITHER GOING TO HAVE IT HAVE THE DISTRICT COURT CONSISTENTLY SAYING MAYBE IT IS WRONG BUT NOT REALLY WRONG OR OBVIOUSLY WRONG OR MISCARRIAGE OF JUSTICE AND SO WHAT IS THE POINT?
>> THAT IS WHERE YOU ARE GETTING INTO WHERE COURT START TALKING ABOUT MERE LEGAL ERROR AND NOT SIMPLY AND I DON'T THINK THAT APPLIES IN THIS CONTEXT BECAUSE IT CAN'T BE A SIMPLE LEGAL ERROR OR NOT SERIOUS ERROR IF YOUR EXPERT IS NOT QUALIFIED.
IF YOU HAVEN'T CORROBORATED YOUR CLAIM WITH A QUALIFIED PRE-SUIT

EXPERT, YOU HAVEN'T COMPLIED WITH THE PROVISIONS OF THE ACT, THAT REQUIRES THE ESPECIALLY WAS OF THE STATUTE, THAT THE CASE SHALL BE DISMISSED AND IT IS ESTABLISHED THAT IT CANNOT BE REMEDIED ON JUDGMENT APPEAL.
>> CLEARLY ESTABLISHED, THAT WOULD HAVE TO RELATE NOT JUST TO THE WORD IN THE STATUTE BUT TO THE APPLICATION AND IT WILL BE RARE THAT THERE'S GOING TO BE PRECEDENT THAT DIRECTLY ADDRESSES A DISPUTE OVER PARTICULAR EXPERT THAT IS SO MUCH LIKE A CLEARLY ESTABLISHED CASE OF THAT, YOU KNOW WHAT I AM SAYING?
IT SEEMS THAT YOU'RE ESSENTIALLY TURNING IT INTO, YOU ARE LETTING THE IRREPARABLE HARM PIECE WHERE YOUR ARGUMENT IS STRONG, IT'S OBVIOUS IF THE WHOLE POINT IS TO GIVE PEOPLE THE ABILITY TO DO THE EXAMINATION AND NOT BE SUBJECT TO THIS -- IT IS OBVIOUS THERE IS IRREPARABLE HARM BUT IF YOU LOOK THE OTHER PRONG IF IT'S GOING TO HAVE ANY MEANING AT ALL, WHAT YOU ARE ARGUING IS STRAIGHT UP REVIEW BY THE APPEALS COURT.
>> LET ME GIVE YOU SOME EXAMPLES WHY THAT WOULD NOT BE TRUE.
AND THE CIRCUMSTANCES OF HAVING A QUALIFIED EXPERT IT IS TRUE BECAUSE THAT IS THE LAW, THE STATUTE IS CLEARLY ESTABLISHED.
>> I JUST -- I REALIZE WE ARE OPERATING UNDER THE AMENDMENT STATUTE AND THERE IS GREATER CLARITY AND LIMITED SCOPE BUT THERE ARE STILL CIRCUMSTANCES UNDER THE STATUTE WHERE DETERMINATION HAS TO BE MADE CONCERNING WHETHER THE EXPERT HAS BEEN ENGAGED IN THE ACTIVE CHEMICAL PRACTICE OF OR CONSULTING WITH RESPECT TO THE SAME OR SIMILAR HEALTH PROVISION AS A HEALTH PROVIDER ON WHOSE BEHALF THE HAVE TESTIMONIES OFFERED, THEY'RE ALL KIND OF -- THERE ARE KIND OF -- HOW WOULD

YOU DESCRIBE IT?
THERE'S GOING TO BE -- PEOPLE
WILL REASONABLY DISAGREE ABOUT
SOME OF THOSE THINGS.
RIGHT?
I DON'T KNOW HOW YOU CAN SAY A
CLEAR-CUT PRINCIPLE OF LAW THAT
WE -- IT WILL BE AMENABLE TO THE
KIND OF TREATMENT YOU ARE
TALKING ABOUT.
>> THE COURT IS THE ONE WHO HAS
TO MAKE THE DETERMINATION
WHETHER REQUIREMENTS HAVE BEEN
SATISFIED, IT IS NOT A JURY
QUESTION.
THE COURT HAS TO MAKE A
DETERMINATION SO WHEN IT DOES
THAT IT LOOKS -- I KEEP GOING
BACK TO MORRIS VERSUS LOUISE
BECAUSE THAT'S THE MOST HELPFUL
WAY TO DESCRIBE IT, THE COURT
HAS TO BE ABLE TO DECIDE.
HAVE THEY PRACTICED IN 3 YEARS
PRECEDING THIS INCIDENT?
IN THIS CASE NO.
THIS TESTIMONY DOESN'T MAKE
CLEAR HE DID NOT.
AND DO THEY PRACTICE IN THE SAME
-- AN ACTIVE CLINICAL PRACTICE?
THE EVIDENCE HERE IS HE HASN'T.
WHAT YOU ARE TAKING IS THE
EVIDENCE AND COMPARING IT TO THE
STATUTORY CRITERIA WHICH YOU
HAVE DO.
OTHERWISE, YOU WOULD BE
PROCEEDING WITH PRE-SUIT BECAUSE
YOU WOULD HAVE NO IMMEDIATE
REVIEW WHEN YOU HAVEN'T COMPLIED
WITH THE STATUTE.
ONE THING I NOTE AS FAR AS A
PROPHYLACTIC RULE, THERE ARE
CIRCUMSTANCES WHERE THE COURT
HAS HELD THAT IT WOULDN'T BE A
DEPARTURE FROM THE ESSENTIAL
REQUIREMENTS OF LAW WHEN IT IS
NOT CLEARLY ESTABLISHED.
THE THIRD DISTRICT CASE, THE
ISSUE WAS WHETHER A COURT WAS
REQUIRED TO HOLD THE HEARING,
THE LAW IS NOT CLEARLY
ESTABLISHED IN THE MEDICAL
MALPRACTICE ACT AS TO WHETHER IT
IS REQUIRED, IT ESTABLISHED WHAT
WAS DENIED.

THEY MADE AN ARGUMENT THAT ONE PARTICULAR DEFENDANT WASN'T NOTICED PROPERLY AND THE LAW WAS NOT CLEARLY ESTABLISHED AS TO WHETHER THIS PARTICULAR DEFENDANT NEEDED THOSE, THAT WASN'T SUFFICIENT BECAUSE THE LAW WASN'T CLEARLY ESTABLISHED.
IN THIS CASE YOU HAVE CLEAR STATUTORY REQUIREMENT THAT AN EXPERT HAS TO BE QUALIFIED BUT EXPERT IS NOT QUALIFIED, YOU SHOULDN'T HAVE TO PROCEED WITH THE ACT AND SO IT IS UNIQUE IN A MEDICAL MALPRACTICE SCHEME, UNDER ANY SUBSECTION OF 5 ON ABC OR SECTION 6, THAT YOU TAKE THE QUALIFICATIONS AND COMPARE THEM AND YOU HAVE TO HAVE IMMEDIATE REVIEW OF THAT.
>> THANK YOU.
ADAM RICHARDSON ON BEHALF OF THE RESPONDENT.
THE POSITIONS HAVE BEEN CLEARLY STATED IN THE BRIEF SO LET ME RUN THROUGH A QUICK SUMMARY BECAUSE I THINK ONE OF THEM HASN'T RECEIVED ATTENTION SO FAR.
THE FIRST ARGUMENT IS THE COURT SHOULD APPROVE THE RESULT OF THE FIRST DISTRICT'S DECISION.
WE ALL RECOGNIZE JURISDICTION TO REVIEW THESE ISSUES.
THE QUESTION IS ABOUT THE DEPARTURE FROM REQUIREMENTS.
ADDITIONALLY, THE SECOND ARGUMENT IS THE 2013 AMENDMENTS WHICH LEAD SPECIALISTS AND THE SUBSECTION 14 THAT THE JUSTICE MIGHT HAVE MENTIONED DO NOT UNDERMINE THE BILLIONS THAT WAS BASED ON GENERAL SURF PRINCIPLES WHICH THE FIRST YOU SEE A RECOGNIZED.
>> I'M GLAD YOU BROUGHT UP WILLIAMS BECAUSE I HAVE QUESTIONS ABOUT THAT.
IN THIS CASE, UNLIKE WILLIAMS AM I RIGHT THAT THERE HAS BEEN AN EVIDENTIARY AIR REHEARING?
>> YES, THAT IS CORRECT.
I'M NOT SURE IF IT WAS CLEAR IN THIS COURT -- THERE WERE TWO

AFFIDAVITS.
>> AND WILLIAMS, THE COURT CONCLUDES NO SIR BUT REMANDS AND SAYS HOLD THIS EVIDENTIARY AIR REHEARING.
HERE, WE ARE, IF YOU WILL, NET OF THAT EVIDENTIARY AIR REHEARING ALREADY.
DOES THAT LIMIT THE APPLICABILITY OF WILLIAMS TO OUR CASE?
FROM YOUR PERSPECTIVE?
>> LIMITED IN WHAT WAY?
>> I THINK THERE'S AN ARGUMENT TO BE MADE THAT WILLIAMS, AN ARGUMENT FAVORABLE TO YOUR CLIENT THAT WILLIAMS CONSTRAINS US IN THIS CASE AND A COUNTER ARGUMENT THAT WILLIAMS IS QUITE DISTINGUISHABLE, DIFFERENT FACT PATTERN.
MY BOTTOM LINE QUESTION, IS WILLIAMS MUCH HELP TO YOU TODAY OR NOT AND IF SO, HOW?
>> I THINK IT IS HELPFUL BECAUSE IF YOU HAVE AN EVIDENTIARY AIR HEARING AND STANDARDS OF REVIEW PARTICULAR TO CERTAIN CASES.
ONE OF THE PROBLEMS WITH THE INSTRUCTION IN WILLIAMS, THE DCA DON'T HAVE THE ABILITY TO ISSUE INSTRUCTIONS, THEY DON'T -- JURISDICTIONS ARE NOT TRANSFERABLE TO DCA.
THAT'S PART OF THE COURT DECISION BUT I'M NOT SURE HOW HELPFUL IT IS IN SAYING WHETHER WILLIAMS APPLIES TO OUR CASE BUT WILLIAMS HAD A MUCH BROADER POINT THAN WHETHER OR NOT IT WAS PRIOR AND IF NOT, THE IMPLICATIONS OF THAT.
WILLIAMS, WILLIAMS INVOLVED GENERAL PRINCIPLES.
AS I SAID EARLIER, WHICH IS CLEARLY ESTABLISHED DEPARTURE FROM REQUIREMENTS OF LAW WHICH THIS COURT HAS DEFINED OVER THE DECADES AS VIOLATION OF CLEARLY ESTABLISHED PRINCIPLE OF LAW RESULTING IN A MISCARRIAGE OF JUSTICE.
THAT'S WHAT YOU NEED TO LOOK AT THEIR INSTEAD OF PARTICULAR

PROCEDURALS.
>> I AM WONDERING IF WE NEED TO RETHINK HOW WE DO THIS IN THE CONTEXT OF WHERE IT IS COMING FROM A TRIAL COURT OR A DECISION ON THIS ISSUE TO A DCA.
BASED ON READING EVERYTHING HERE.
IT SEEMS THE ESSENTIAL REQUIREMENTS OF LAW TEST WHICH IS VERY DUE PROCESS FOCUSED, MISCARRIAGE OF JUSTICE ET CETERA.
IT ERODES IN THE CONTEXT OF A SECOND APPEAL WHERE YOU HAD COUNTY COURT DOING SOMETHING, CIRCUIT COURT DOES AN APPELLATE REVIEW.
IS IT SO BAD THAT WE SHOULD GIVE SOMEONE AN APPELLATE APPLE AND IN THAT CONTEXT, THAT'S WHERE THE TEST MIGHT MAKE SENSE, BUT HERE, SEEMS LIKE THE FOCUS IS THIS WHOLE ERA FOR HARM CONCEPT IS DOING MOST OF THE WORK, THEN WE GET INTO THESE WEIRD DISCUSSIONS IN CASES ABOUT THE DIFFERENCE BETWEEN SOMETHING THAT'S A LONG VERSUS OBVIOUSLY WRONG ETC.
AND I'M NOT SURE WHETHER WE ARE DOWN THE RIGHT PATH ON THAT OR IF THE QUESTION SHOULDN'T BE MORE TIED TO THE VALUE ADD OF THIS KIND OF INTERMEDIATE REVIEW, IN WHICH CASE IT SEEMS THAT TEST IN THIS CASE WHERE THERE'S A LOT OF DISPUTES HOW TO APPLY THE TEST AND EVERYTHING, ARGUABLY THERE'S JUST NOT MUCH VALUE ADDED BY INTERRUPTING THE PROCEEDING TO HAVE THIS REVIEW.
ANY THOUGHTS ON THAT?
>> THE DISTINCTION BETWEEN FIRST YEAR REVIEW AND SECOND-TIER REVIEW IS SOMETHING I THOUGHT MIGHT COME UP TODAY, SOMETHING I THOUGHT ABOUT A LOT.
FROM CAREFUL DECISIONS OF THIS COURT, THIS COURT, I UNDERSTAND YOU ARE INCLINED TO REVISIT THAT, HAS NOT DISTINGUISHED BETWEEN THE TWO WHEN IT COMES TO THE STANDARD OF REVIEW OR

SECOND-TIER CONTEXTS, VIOLATION
OF DUE PROCESS AND DEPARTURE
FROM PARTS OF THE LAW BUT THE
LANGUAGE IS THE SAME ON THE
STANDARD REVIEW AND THAT'S WHY
THE MEANING SHOULD HAVE THE SAME
AND WHETHER THE COURT WANTS TO
REVISIT THAT, IT'S NOT AN
APPROPRIATE CASE FOR THAT.
HASN'T BEEN BRIEFED.
I DON'T KNOW IF THIS IS
SOMETHING THE COURT DOES BUT
THAT IS SOMETHING WE WANT TO
THINK ABOUT AND IT WOULD BE
APPROPRIATE.
>> WHAT MAKES THE WILLIAMS CASE
KIND OF STRANGE IS, THE WAY I
READ IT, THEY ESSENTIALLY THEY
DREW THIS DISTINCTION BETWEEN
THE PROCEDURAL PART AND THE
SUBSTANTIVE PART WHICH I'M NOT
SURE I WOULDN'T PUT WHETHER THE
EXPERT IS QUALIFIED, THAT COULD
BE A PROCEDURAL THING, TO HAVE A
QUALIFIED EXPERT OR YOU DON'T
AND THEY ESSENTIALLY SAY EVEN IF
THERE WAS A DEPARTURE FROM THE
ESSENTIAL REQUIREMENTS OF LAW,
IF IT'S IN THE SUBSTANTIVE
BASKET YOU CAN'T REVIEW THAT AND
THAT IS THE SENSE THAT I WOULD
DESCRIBE THE PROPHYLACTIC RULE
SAYING WE ARE NOT EVEN GOING TO
LET THE DCA GO DOWN THAT PATH IF
THE DISPUTE IS OVER SUBSTANCE
VERSUS JUST CHECKING THE BOXES
OF DID YOU FOLLOW THIS DEADLINE
AND IS THERE AN AFFIDAVIT?
SO IT SEEMS LIKE WILLIAMS ISN'T
REALLY TRYING TO APPLY THE TEST
FAITHFULLY EITHER BECAUSE YOU
WOULD THINK WHAT THEY WOULD HAVE
SAID IS THERE MAY BE SOME
DECISIONS THAT ARE SO
EGREGIOUSLY CRAZY, THE
CARDIOLOGIST CLAIMING TO BE AN
EXPERT ON WHATEVER, THAT'S A
DEPARTURE FROM CLEARLY
ESTABLISHED LAW BUT FOR THE
RUN-OF-THE-MILL THING WHERE
REASONABLE MINDS CAN DISAGREE
YOU WILL NEVER MEET THAT
CATEGORY.
>> I HAVE TWO POINTS ON THAT,

THE FIRST IS WHEN WE TALK ABOUT WILLIAMS, WHICH IMPLICATES THE RULE STANDARD.
>> THAT'S DEBATABLE.
>> OKAY.
SO THAN MY MORE SUBSTANTIVE RESPONSE IS THAT WE ACTUALLY SAID THAT IN OUR ANSWER BRIEF, THERE'S A POSSIBILITY WILLIAMS MIGHT NOT BE COMPLETELY ACCURATE AND PERHAPS THE COURT WILL CLARIFY IT.
THE RUN-OF-THE-MILL CASES, IT MIGHT NOT BE APPROPRIATE BECAUSE OF THE VOLUME NATION DOVES CLEARLY ESTABLISHED ETC.
BUT THERE ARE ERRORS THAT ARE SO SIGNIFICANT THAT WOULD RESULT IN A MISCARRIAGE OF JUSTICE AND IN THOSE INSTANCES WHICH I THINK WOULD BE FEW AND FAR BETWEEN IT WOULD BE APPROPRIATE FOR DCA TO INTERVENE AS THEY TALK ABOUT.
>> SO LET'S APPLY THAT TO THIS CASE.
YOUR PROFIT EXPERT DOES WHAT?
>> AT THIS POINT THE PROFFERED EXPERT IS MORE OF INTERNIST.
IS NOT A HOSPITALIST.
>> THE DOCTOR TEAM, WHAT DO THEY DO?
>> THE DOCTOR UNDER WHOM THE ARNP WORKS WAS A NEUROSURGEON.
>> YOU WOULD STIPULATE, WOULDN'T YOU, THEY ARE NOT THE SAME SPECIALTY.
>> YES.
THAT IS NOT THE PROVISION IMPLICATED BY THIS CASE.
>> I WANT TO MAKE SURE, WE CAN HAVE AND HAVE HAD VERY EDIFYING DISCUSSION ABOUT THE STATUTE AND THAT IS ALL GREAT BUT AT THE END OF THE DAY WE HAVE A CASE WE NEED TO RESOLVE.
THIS CASE INVOLVES A VERY CLEAR SITUATION IN WHICH THE PROFFERED EXPERT DOESN'T MEET STATUTORY COMMAND, JUST DOESN'T.
WHATEVER WE HOLD IN THIS CASE WE ARE SPEAKING, WE ARE NOT SPEAKING TO A CLOSE CALL, WE ARE NOT SPEAKING TO AN EDGE CASE.
SO SINCE ALL WE REALLY HAVE TO

DO IS SPEAK TO THIS CASE, WHY
SHOULD WE DO ANYTHING MORE THAN
ADDRESS THE FACT THAT THIS IS
NOT EVEN CLOSE SITUATION WHERE
YOU STIPULATE THE PROFFERED
EXPERT IS NOT THE SAME
SPECIALTY, THAT ON ITS FACE, MAY
BE THE RARE CASE WHERE IT IS
REQUIRED, IT IS BETTER TO DEAL
WITH THIS ON INTERLOCUTOR
APPEAL, WHY ISN'T THAT THE RIGHT
OUTCOME TO THIS CASE?
>> I HAVE A COUPLE RESPONSES TO
THAT.
>> I FIGURED YOU WOULD.
THE PETITIONERS BRIEFING, ALL OF
THE PROCESS, WHAT THEY DID IS
ASKED THE COURT TO ADDRESS THIS
TOP LINE ISSUE AND SEND THE CASE
BACK TO DCA TO MAKE THE SPECIFIC
DETERMINATION IN THIS CASE.
>> YOU STIPULATED THEY ARE NOT
THE SAME SPECIALTY.
>> THAT'S TRUE BUT THAT IS NOT
THE PROVISION THAT APPLIES HERE.
THE CIRCUIT COURT, 5C.
>> THE NURSE PRACTITIONER THAT
WORKS FOR A NEUROSURGEON.
IN FOR A PENNY, IN FOR A POUND.
IF YOU'RE YOUR INTERNIST IS NOT
A NEUROSURGEON, NOT IN NEITHER
CASE WITH THE INTERNIST WOULD
OVERSEE HOUSE -- NURSE
PRACTITIONER IN THE NEUROSURGERY
FIELD.
>> THERE ARE STATUTORY
REQUIREMENTS.
IF YOU WANT TO CARRY DOWN THE
LEGISLATURE --
>> THAT'S WHAT WE ARE GOING TO
DO.
>> THE STATUTE HERE THAT APPLIES
IS THE 5C AND I UNDERSTAND YOU
ARE TRYING TO HOLD US TO
COLLATION AGAINST US.
>> I'M NOT TRYING TO HOLD THIS
TO BE ELATION AGAINST YOU BUT
TRYING TO GET THE FACTS TO THE
STIPULATION YOU MADE.
WHAT'S THE CONSEQUENCE OF THE
STIPULATION?
>> THE STIPULATIONS THEY MADE
WHICH IS NOT THE SAME SPECIALTY
PROVISION BUT IS 5C.

>> WHAT THE POINT, WHAT THE EFFECT OF THAT, SO WHAT?
>> THEY ARE COMPLETELY DIFFERENT STATUTORY REQUIREMENTS.
>> WALK ME THROUGH WHAT THE STATUTORY REQUIREMENT DOES GIVEN AN INTERNIST DOES NOT SUPERVISE NURSE PRACTITIONERS IN THE FIELD OF NEUROSURGERY AND THE PEOPLE YOU HAVE SUED ARE NEUROSURGEON AND NURSE PRACTITIONER AND NEUROSURGERY, DEAL WITH YOUR STATUTORY PROVISION.
HOW DO YOU IN THIS CASE GIVEN THAT?
>> IS IT UNDERSEA ONE, 2 OR 3?
>> IT IS UNDERSEA ONE.
>> HERE IT IS NOT AS NARROW AS THE SAME SPECIALTY AND LOOKING AT THE BREADTH OF SUBSECTION 1, IT DOES SAY ACTIVE PRACTICE OF BUT THERE'S ALSO THE CLAUSE FOR CONSULTING WITH RESPECT TO THE PROFESSION AND I THINK REASONABLE MOVEMENT COULD DISAGREE ON WHETHER THIS PARTICULAR EXPERT IN OUR CASE DOES OR DOES NOT SATISFY THAT.
>> WITH THEIR EVIDENCE IN THE RECORD YOUR EXPERT SUPERVISED NEUROSURGERY, NURSE PRACTITIONERS AT ANY POINT IN HIS CAREER?
>> NO, BUT THAT IS NOT EVEN HINTED AT IN THE STATUTE.
THERE IS NO REQUIREMENT OF SUPERVISION WHICH I UNDERSTAND THAT'S THE ARGUMENT THE PETITIONERS HAVE MADE.
CONSULTING WITH RESPECT TO --
>> HAS YOUR PROFIT EXPERT EVER CONSULTED WITH RESPECT TO A NEUROSURGERY NURSE PRACTITIONER?
>> NOT NEUROSURGERY NURSE PRACTITIONER.
>> THE MORE FACTS WE GET THE WORST THIS GETS FOR YOU, NO?
>> NO, I DIDN'T THINK IT WAS THAT BAD.
THE DEPOSITION TESTIMONY AND THE TESTIMONY OF THE EVIDENTIARY AIRY HEARING, THIS WOULD BE MORE OF A BORDERLINE CASE THAN CLEAR STATUTORY LANGUAGE IN 5 AND.

AND I ALSO WOULD WANT TO POINT OUT WE GO BACK TO THE CERT STANDARD WHICH IS CLEARLY, UNDER THE STANDARD THE COURT HAS BEEN VERY CLEAR, AS OF DCAs THE MISAPPLICATION OF LAW IS INSUFFICIENT SO I THINK WHEN WE ARE TALKING ABOUT -- WE ARE REALLY TALKING ABOUT MISAPPLICATION OF LAW.
>> TO UNDERSTAND THIS FACTUALLY, THE PHRASE IS THE SAME OR SIMILAR HEALTH PROVISION AS THE HEALTHCARE PROVIDER.
SO HOW ARE YOU DEFINING -- YOU ARE CONCEDING IT IS NOT THE SAME, CORRECT?
SO WHAT IS IT, WHAT IS THE SYMBOL?
>> THAT'S DIFFICULT BECAUSE -- IN 2013, THEY DID PRIOR ITERATIONS OF THE STATUTE AND THEN THEY TOOK THAT OUT AND NOW WE ARE JUST LEFT WITH A SIMILAR, WITHOUT EVEN PREVIOUS ITERATIONS THEY HAD ON SOMETHING LIKE INVOLVING -- SORRY, THE DIAGNOSIS OF THE PARTICULAR CASE SO I DON'T KNOW HOW FAR IT GETS ME, I WILL BE HONEST.
>> I DON'T THINK IT GETS YOU FAR AT ALL.
IF THAT WERE THE POINT BASED ON MY UNDERSTANDING OF THE FACTS, THAT WOULD UNDERCUT YOUR POSITION, WOULDN'T IT?
>> I DON'T THINK SO BECAUSE THE PARTICULAR TREATMENT --
>> WHAT DID YOU MEAN WHEN YOU SAY YOU DON'T KNOW HOW FAR THAT GETS YOU?
>> BECAUSE OF IT BEING A PRIOR VERSION OF THE STATUTE THAT WAS TAKEN OUT BY THE LEGISLATURE, HOW FAR WE CAN RELY ON IT BUT IF WE WERE TO DO THAT, IT IS TALKING ABOUT THE CARE THAT WAS RENDERED.
I UNDERSTAND THAT SHE WAS IN THE HOSPITAL FOR NEUROSURGICAL PROCEDURE BUT THE ACTUAL CARE WAS POSTOPERATIVE CARE AND THEN OUR EXPERT WOULD HAVE BEEN QUALIFIED UNDER THE STATUTE

AGAINST THAT BECAUSE HE DOES
HAVE EXPERIENCE WITH
POSTOPERATIVE CARE.
>> TO BRING THIS BACK TO THE
ISSUE, THE DCA FELT THEY DIDN'T
HAVE THE AUTHORITY BECAUSE OF
WILLIAMS TO GO IN DOUBT.
THIS DEBATE IS ABOUT HOW
OBVIOUSLY WRONG WAS THIS
DECISION, THE DCA THOUGHT
BECAUSE OF WILLIAMS IT DIDN'T
EVEN HAVE THE DISCRETION TO EVEN
LOOK AT THE ISSUE, RIGHT?
SO ONE POSSIBLE RESOLUTION OF
THIS IS TO CHANGE, INTERPRET
WILLIAMS A CERTAIN WAY AND SAY
WILLIAM SORT OF TOOK THE
DEPARTURE FROM ESSENTIAL
REQUIREMENTS OFF THE TABLE FOR
THIS KIND OF QUESTION OR PUTTING
IT BACK ON THE TABLE.
DCA, SHOULD APPLY THE TEST.
>> THAT GETS BACK TO WHAT YOU
SAID EARLIER ABOUT WHETHER
WILLIAMS FAITHFULLY APPLIES
BECAUSE AS THE COURT MADE CLEAR
OVER THE DECADES, VERY
CONSISTENT ABOUT THIS, IT IS A
DISCRETIONARY REMEDY.
I WILL NOT NECESSARILY PLAY
DEVILS ADVOCATE BUT WILLIAMS
DECISION CREATED THE RULE THAT
IS COMPLETELY REMOVED, THE
ABILITY OF THE COURT TO ADDRESS
THIS ISSUE AND PERHAPS THAT'S
WRONG BECAUSE OF THE APPLICATION
OF THE COURT'S CERT BUT EVEN IF
THE COURT WERE TO RESTORE THAT
DISCRETION AND SEND IT BACK TO
THE DCA, AS I SAID BEFORE, IN
MOST CASES THE RESULT WOULD BE
THE SAME BECAUSE OF THE REVIEW
OF THE MERITS AND OUTLIER CASES.
FOR EXAMPLE, THERE WOULD BE A
CERTAIN RELIEF.
IF THERE ARE ANY MORE QUESTIONS.
>> THANK YOU VERY MUCH.
>> I WOULD LIKE TO MAKE TWO
POINTS.
FIRST, TO SAY THAT THE COURT
APPLIES THE CORRECT LAW DOESN'T
HELP US IN THIS SITUATION AND WE
SET THAT OUT IN OUR BRIEF
BECAUSE OF THE COURT APPLIES THE

CORRECT LAW, THAT MEANS THE
COURT SAYS OKAY, WE LOOK AT
766-102, 506 AND DECIDE WHETHER
IT APPLIES AND THAT LAW IS
APPLIED BUT YOU CAN HAVE AGAIN A
NEUROSURGEON AND A PODIATRIST
AND THE CORRECT LAW HAS BEEN
APPLIED BECAUSE THE PROCEDURE
HAS BEEN FOLLOWED AND THAT
CLEARLY CAN'T BE THE LAW IN THIS
COUNTRY TO THE STATUTE.
AS FAR AS WILLIAMS I WOULD LIKE
TO SUGGEST REASONS THAT IT IS
INCORRECT.
WE DID MAKE AN ARGUMENT THAT THE
STATUTE AND CHANGED, WILLIAMS
WAS BASED ON TWO PRIMARY
REASONS.
BEFORE I GET INTO THOSE, IT DID
NOT CITE OR GIVE ANY KIND OF
ATTENTION TO THE MULTITUDE OF
CASE LAW THAT EXISTED PRIOR TO
WILLIAMS THAT FOUND A DEPARTURE
FROM ESSENTIAL REQUIREMENTS OF
LAW WHEN AN EXPERT IS NOT
QUALIFIED SO THE COURT IN
WILLIAMS KIND OF GRABBED ONTO
THE PUNITIVE DAMAGES AND ANALOGY
TO SAY IN A PUNITIVE DAMAGES
CASE YOU HAVE TO DETERMINE
WHETHER THERE'S BEEN AN
EVIDENTIARY AIRY PROPER TO SHOW
A REASONABLE BASIS TO ASSERT
PUNITIVE DAMAGES.
THAT'S NOT THE SAME, THAT'S
COMPLETELY DIFFERENT IN MEDICAL
MALPRACTICE CASES WHERE YOU HAVE
STATUTORY CRITERIA, NOT THIS
FLEXIBLE, IS THE EVIDENCE
SUFFICIENT TO ALLOW THIS CLAIM
TO GO FORWARD AND WHETHER THE
IRREPARABLE HARM WAS A FINANCIAL
WORK DISCOVERY, HERE, YOU HAVE
EXPRESS LANGUAGE THAT YOU HAVE
TO QUALIFY UNDER THIS ACT OR
ELSE YOUR CLAIM HAS TO BE
DISMISSIVE, THAT WAS INCORRECT
REASONING AND THE COURT RELIED
ON THE ST.
MARY'S CASE WHICH WAS NOT
OPPOSITE TO THE ISSUE BEFORE THE
COURT.
IN ST.
MARY'S, THE ISSUE WAS WHETHER

THE PLAINTIFF HAD EVER BEEN A
PATIENT OF THE HOSPITAL SO THAT
WAS THE DISPUTED MERIT ISSUE OF
WHETHER THE PATIENT HAD EVER
BEEN ADMITTED TO THE HOSPITAL
NOT RELATED TO IT.
THE TWO MAIN REASONS THE COURT
IN WILLIAMS MADE THIS RULE THE
FIRST DISTRICT FELT IT HAD TO
FOLLOW HERE DOESN'T LINE UP WITH
THE ACT AND BASICALLY EVISCERATE
THE PURSUIT REQUIREMENTS.
>> THANK YOU.
I WANT TO SAY THE BRIEFING IN
THIS CASE WAS GREAT ON BOTH
SIDES.
UNUSUALLY GOOD.
THANKS.