Karen D'Amario vs Ford Motor Co.

THE FIRST CASE FOR CONSIDERATION BY THE COURT THIS MORNING IS THE CASE OF KAREN D'AMARIO VERSUS FORD MOTOR COMPANY AND GENERAL MOTORS CORPORATION VERSUS BRIAN NASH. I UNDERSTAND THAT THE FORD MOTOR COMPANY CASE WILL GO, FIRST, AND MR. EAT ONE, YOU MAY PROCEED. -- MR. EATON, YOU MAY GO FIRST, AND YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS JOEL EATON. I REPRESENT CLIFFORD HARRISON, WHOSE MOTHER -- CLIFFORD WAS A PASSENGER IN A FORD ESCORT AUTOMOBILE DRIVEN BY A YOUNG TEENAGED DRUNK DRIVER, WITH A BLOOD ALCOHOL CONTENT OF.14. HE MISS THE A CURVE AND HIT A TREE AND HAD AN INITIAL IMPACT.

I DON'T KNOW IF YOU ARE AWARE THAT YOU AND YOUR COLLEAGUES HAVE DIVIDED YOUR TIME. YOU WILL HAVE TEN MINUTES AND MR. LUMISH WILL HAVE TEN MINUTES AND THERE WILL BE 20 MINUTES ALLOTED TO THE OTHER SIDE.

AFTER SEEING A MILLENIUM OF SERVICE, TEN MINUTES SEEMS LIKE AN INORDINATE PERIOD OF TIME IN WHICH TO ARGUE THIS CASE. THE ORTHOPEDIC GIST THAT YOUNG CLIFFORD SUSTAINED, A PERIOD OF TIME EXPIRED, AND OUR CONTENTION IS THAT THE FUEL PUMP DID NOT SHUT OFF, AS IT WAS SUPPOSED TO. FORD HAD INTENDED IT TO SHUT OFF. IT WAS DESIGNED IN SUCH AWAY THAT IT WAS SUPPOSED TO SHUT OFF. IT DID NOT. THE CAR WAS CAUGHT ON FIRE AND ENGULFED IN AN ENORMOUS FIRE, AND CLIFFORD WAS BURNED OVER 80% OF HIS BODY AND LOST THREE LIMBS.

IF YOU WILL GET RIGHT TO THE JUGULAR. WE DO KNOW THE FACTS AND ORDINARILY I WOULDN'T SAY THAT, BUT SINCE YOU HAVE A LIMITED AMOUNT OF TIME, IF YOU WILL GET RIGHT TO THE POINT THAT YOU ARE GOING TO ADDRESS.

THE TRIAL JUDGE GRANTED A NEW TRIAL ON TWO GROUNDS AND THE LOWER COURT REVERSED, HOLDING THAT BOTH THOSE GROUNDS WERE A MATTER OF LAW. IT TURNED OUT, AFTER THE TRIAL, THAT TWO OF THE PROSPECTIVE JURORS MISREPRESENTED THEIR HUSBAND'S PRIOR LITIGATION HISTORY, AND FOLLOWING THIS COURT'S DECISION IN DELLA ROWS, A THE TRIAL -- IN DELLA ROSA, THE TRIAL JUDGE DETERMINED THAT ONE JUROR'S FAMILY OWNED A FLEET OF 25 FORD VEHICLES. HE DETERMINED THAT THAT WAS RELEVANT TO THE JURY SELECTION PROCESS, AND HE GRANTED A NEW TRIAL FOR THAT REASON.

THE CONFLICT THAT YOU ARE HERE ON IS NOT A JURY QUESTION, IS IT? ISN'T IT CONCERNING APPORTIONMENT? ISN'T THAT HOW THIS CASE GOT TO THIS COURT?

THAT IS A MATTER THAT ONLY THE COURT KNOWS, YOUR HONOR. I ARGUED THAT THERE WAS CONFLICT IN THE DISTRICT COURT'S DECISION WITH THE DELLA ROSA CASE AND A THIRD DISTRICT DAYS -- CASE, WHICH HAS HELD THAT PRIOR LITIGATION HISTORY IS MATERIAL AND RELEVANT AND, ALSO, A MATTER OF LAW. I, ALSO, ARGUED THE CONFLICT WITH THE CASE THAT IS GOING TO FOLLOW THIS CASE, SO I DON'T KNOW EXACTLY WHY THE COURT GRANTED --

THE COURT IS INTERESTED IN THE COMPARATIVE FAULT ANALYSIS ISSUE.

I UNDERSTAND THAT.

I REALIZE YOU HAVE THESE OTHER ISSUES.

I DO THINK IT IMPORTANT, HOWEVER, THAT I TOUCH, BRIEFLY, ON THE JUROR MISCONDUCT ISSUE, BECAUSE THIS DECISION IS CONTRARY TO THE DELLA ROSA DECISION, AND IT REPRESENTS AT LEAST TWO OF THE DISTRICT COURTS THE SECOND AND THE THIRD. MS. LUMISH HAS SENT UP A NOTICE, SEVERAL NOTICES OF SUPPLEMENTAL AUTHORITY, IN WHICH THE THIRD DISTRICT HAS BACKED OFF OF THE DELLA ROSA CASE AND HAS STARTED SAYING THAT MISREPRESENTATIONS OF PRIOR LITIGATION HISTORY ARE NOT PARTICULARLY MATERIAL, IF THEY ARE REMOTE IN TIME. IN ESSENCE, TWO OF THE DISTRICT COURTS HAVE SIMPLY BALKED AT THE STRINGENT NATURE OF THIS COURT'S DELLA ROSA DECISION AND HAVE REPRISED THE DECISION THAT WAS DISAPPEAR PROVED, AND I THINK THE COURT NEEDS TO TAKE A LOOK AT THAT. WHETHER YOU WANT TO BACK OFF OF DELLA ROSA BECAUSE THE DISTRICT COURTS ARE HAVING DIFFICULTY APPLYING IT, OR WHETHER YOU WANT TO APPLY IT STRINGENTLY IS UP TO YOU, BUT I THINK WHAT NEEDS TO BE KEPT IN MIND HERE ARE THESE DETERMINATIONS OF RELEVANT MATERIALALITY AND CONCEALMENT AND THE LIKE ARE RELEVANT FOR THE TRIAL COURT TO DETERMINE IN ITS DISCORRECTION. THE TRIAL COURT IS THE ONLY JUDICIAL OFFICER IN THE ENTIRE PROCESS THAT WAS ACTUALLY THERE AND CAN MAKE THOSE KINDS OF DETERMINATIONS, AND A NEW TRIAL BASED ON JUROR MISCONDUCT OUGHT TO BE REVIEWED FOR DISCRETION. THE DISTRICT COURT, AS A MATTER OF LAW, MADE ITS OWN JUDGMENTS AND NEVER MENTIONED THE STANDARD OF REVIEW. WE BELIEVE THE DECISION WAS WRONG FOR THAT REASON AS WELL. THE SECOND GROUND IN THE NEW TRIAL ORDER, THE JUDGE DETERMINED THAT HE SHOULD NOT HAVE ADMITTED EVIDENCE OF THE INTOXICATION OF THE DRIVER. THE DISTRICT COURT DETERMINED THAT THE APPORTIONMENT ISSUE HAD BEEN PROPERLY INJECTED INTO THE CASE, AND THAT THE EVIDENCE OF THE DRUNK DRIVER WAS ADMISSIBLE, AND OP ORTIONABLE WITH FORD'S BLAME, AND IT RE-- AND APPORTIONABLE WITH FORD'S BLAME, AND IT REVERSED FOR THOSE REASONS. ACCORDINGLY THE DISTRICT COURT ERRED IN REACHING THAT CONCLUSION. THE THIRD DISTRICT, INCIDENTALLY HAS REACHED THE OPPOSITE CONCLUSION IN THE CASE THAT WILL FOLLOW THIS, WHICH IS, MORE LIKELY THAN NOT, THE REASON THE COURT GRANTED REVIEW. I DON'T BELIEVE YOU NEED TO REACH THE ISSUE, IN MY CASE. THERE WAS NO PLEADING, ALLEGING, AS AFFIRMATIVE DEFENSE, A FABRE DEFENSE, NAMING MR. LEBEMARL WITH SPECIFICITY AND THE TRIAL JUDGE AMENDED -- ALLOWED AMENDMENT TO THE PLEADINGS ON THE FOURTH DAY OF TRIAL, WHICH IS FLATLY CONTRARY TO THIS COURT'S HOLDING IN NASH VERSUS WELLS FARGO, THAT YOU HAVE GOT TO GIVE THAT AMENDMENT, INTO THE PROCEEDING, BEFORE TRIAL, AND THE OBVIOUS REASON IS, IF THE ISSUE OF THE INTOXICATED DRIVER IS GOING TO BE AN ISSUE IN THE CASE, COUNSEL IS ENTITLED TO EXPLORE THAT ISSUE WITH THE JURY ON VOIR DIRE AND ENTITLED TO ADDRESS IT ON OPENING STATEMENT. NONE OF THAT HAPPENED IN THIS CASE. ON THE FOURTH DAY OF TRIAL THIS BECAME AN ISSUE, SO NOW WE HAVE GOT A JURY PANEL THAT NOBODY HAS BEEN ABLE TO QUESTION ON HOW THEY FEEL ABOUT TEENAGED DRUNK DRIVERS AND HOW IT WOULD IMPACT THEIR ABILITY TO VIEW THE TAX FACTS AGAINST FORD -- THE FACTS AGAINST FORD MOTOR COMPANY, AND I BELIEVE THAT WAS WRONG AND IT CAN BE REVERSED FOR THAT SINGLE MOST IMPORTANT ISSUE. IF THE ISSUE IS REACHED, IT IS IMPORTANT THAT THE COURT UNDERSTAND THAT WE DID NOT SEE MR. LEIBERMARL NOR FORD FOR THE INITIAL INJURES CAUSED IN THE IMPACT. THE ONLY THING THAT WAS SUED FOR WERE THE HORRIBLE BURNS THAT MR. DELIVERED SUSTAINED IN THE SECOND, THE POST-ACCIDENT, FUEL-FED FIRE.

IF YOUR CLIENT HAD BEEN THE DRUNK DRIVER AND WAS SUING FOR THE PRODUCT LIABILITY, DO WE HAVE TO -- IF WE DECIDE THAT IT IS APPROPRIATE TO HAVE THAT AS A COMPARATIVE NEGLIGENCE DEFENSE, DOES IT FOLLOW THAT IT IS, ALSO, PROPER, THAT THEY BE A JOINT TORTFEASOR FOR FABRE CONSIDERATIONS? IN OTHER WORDS DOES ONE HAVE TO FOLLOW THE SNORE.

I DON'T BELIEVE THAT MY ARGUMENT WOULD CHANGE, IF CLIFFORD HAD BEEN THE DRIVER OF THIS VEHICLE.

YOU WOULD SAY THAT HIS COMPARATIVE NEGLIGENCE IN CAUSING THE ACCIDENT OR TO WHAT EXTENT THE JURY FOUND CAUSED THE INJURES COULD NOT COME IN AS A DEFENSE?

IF THIS WERE A SINGLE INDIVISIBLE INJURY, AND THE PARTIES WERE IN CAPABLE OF SEPARATING THE TWO SETS OF INJURES THAT OCCURRED IN THESE TWO SEPARATE TORTS, IN MY JUDGMENT, THEN I THINK, AS AT MATTER OF LOGIC OR AT LEAST POLICY, YOU WOULD PROBABLY HAVE TO APPORTION, BECAUSE THERE IS NO OTHER WAY TO DIVIDE UP THOSE DAMAGES, BUT IN OUR CASE THERE IS ABSOLUTELY NO DISPUTE THAT FORD CAUSED THE BURNS, NOT MR. LIEBERMARL.

YOU HAVE ASKED US TO LOOK AT THIS AS A MALPRACTICE CASE.

ONE HOLDS IMPACT TO THE CONDITION WHICH GIVES RISE TO THE SUBSEQUENT TORTFEASOR AND THE INJURY, AND THE SUCCESSIVE TORTS, THE FIRST TORTFEASOR MAY BE RESPONSIBLE FOR THE WHOLE, BUT THE SECOND TORTFEASOR IS ONLY RESPONSIBLE FOR THE DAMAGES THAT HE CAUSED, AND THEY ARE NOT JOINT TORTFEASORS. IF YOU REACH THE CONCLUSION THAT THEY ARE NOT JOINT TORTFEASORS IN THIS CASE, STEWART APPLIES APPORTIONMENT WHERE THERE WOULD HAVE BEEN JOINT AND SEVERAL LIABILITY, UNDER THE COMMON LAW, STEWART HOLDS YOU TO REQUIRE THAT THESE PEOPLE ARE NOT JOINT TORTFEASORS, AND I WOULD, FINALLY, SUBMIT THAT, AS A MATTER OF LOGIC, IT MAKES NO SENSE TO SAY THAT FORD HAS A DUTY TO DESIGN A CRASHWORTHY VEHICLE, BUT IF YOU BREACH THAT DUTY, YOU ARE ONLY GOING TO BE RESPONSIBLE FOR 5, 10, 15, 20% OF THE DAMAGES, BECAUSE THE GUY THAT CAUSED THE ACCIDENT IS GOING TO BE RESPONSIBLE FOR MOST OF IT, EVEN THOUGH YOUR DUTY WAS TO PROTECT AGAINST THE VERY THING THAT HAPPENED IN THIS CASE WHICH IS FORESEEABLE, AND THE LANGUAGE OF THIS COURT, IN THE MERRILL CROSSINGS CASE, IT SEEMS TO ME TO BE PERFECTLY APPROPRIATE IN THE CRASHWORTHY CRASHWORTHYNESS SITUATION, WHERE THE DAMAGES ARE READILY DIVIDESIBLE INTO THEIR SEPARATE PARTS. THE COURT RULED THAT IT WOULD BE IRRATIONAL TO ALLOW A NEGATIVE PARTY WHO FAILS TO PROVIDE REASONABLE SECURITY MEASURES TO REDUCE ITS LIABILITY BECAUSE THERE IS AN INTERVENING INTENTIONAL TORT, WHERE THE INTERVENING INTENTIONAL TORT IS EXACTLY WHAT THE SECURITY MEASURES ARE SUPPOSED TO PREVENT AGAINST. IF YOU APPLY THE DUTY TO APPLY CRASHWORTHYNESS AND THE DUTY TO PROTECT IN THIS CASE, YOU HAVE TO REACH THE MERRILL CROSSINGS CONCLUSION. I HAVE USED UP MOST OF MY TIME. THANK YOU.

GOOD MORNING. MAY IT PLEASE THE COURT. WENDY LUMISH FROM CARLTON FIELDS ON BEHALF OF FORD MOTOR COMPANY, WHO OBTAINED A VERDICT NIKT THEIR FAVOR IN THE TRIAL COURT BELOW. LET ME JUST BRIEFLY ADDRESS THE JURY ISSUES, SINCE PLAINTIFF'S COUNSEL HAS RAISED THIS. BASICALLY IT IS OUR POSITION ON THAT, THAT THE DECISION OF THE SECOND DCA SHOULD BE APPROVED, BECAUSE IT REINFORCES THE SANCTITY OF THE JURY DELIBERATION PROCESS. BY LOOKING AT THE FACTS OF EACH CASE, IT REINFORCES AND FOCUSES ON THE PURPOSE OF THE RULE, WHICH WAS TO DETERMINE WHETHER THERE WAS RELEVANT AND MATERIAL INFORMATION THAT THE LAWYER NEEDED TO KNOW IN MAKING HIS DECISION ABOUT THE JURY SELECTION PROCESS. THAT IS PRECISELY WHAT DELLA ROSA SAID. IT WAS NOT A PER SE RULE. IT LOOKED ON IT AS A CASE-BY-CASE BASIS, AND IT WAS --

BUT ISN'T THE CASE BY CASE ANALYSIS, UNDER DELLA ROSA, IN OUR WHOLE UNDERSTANDING OF MOTIONS FOR NEW TRIAL, UPON THING THAT IS HAPPEN UNIQUELY IN THE COURTROOM, IN A GIVEN CASE, CENTERED UPON THE DISCRETION OF THE TRIAL JUDGE?

YES, IT IS, BUT IN THIS CASE, THE JUDGE, IF YOU LOOK AT THE ORDER, THE COURT FELT COMPELLED BY DELLA ROSA TO FIND THAT ANY NONDISCLOSURE, ASSUMING A NONDISCLOSURE, THAT NONDISCLOSURE AUTOMATICALLY MEANT THAT THE JUROR, THAT YOU GET A NEW TRIAL, AND THAT SIMPLY IS NOT WHAT DELLA ROSA SAID N FACT, IF THAT WAS WHAT DELLA ROSA SAID OR MEANT, THERE WOULD BE NO MATERIALITY REQUIREMENT ON TOP OF THE REQUIREMENT THAT THERE BE A NONDISCLOSURE. SO THERE NEEDS TO BE THAT ANALYSIS, AND THE PROBLEM

IN THIS CASE WAS THE TRIAL JUDGE DIDN'T GO TO THAT STEP, BECAUSE HE FOUND THAT THE MISSTATEMENTS, EVEN IF THEY WERE MINOR MISSTATEMENTS, REQUIRED THE NEW TRIAL, AND SO THE COURT ERRED IN ITS INTERPRETATION OF DELLA ROSA AND THE DISTRICT COURT CORRECTED THAT, APPLIED THE RULE PROPERLY, AND WHAT THEY DID WAS CONSISTENT WITH WHAT THE THIRD DISTRICT HAS NOW, SAID, IS PREVENT ANY MINOR MISSTATEMENT BY JUROR FROM TURNING INTO A FREE RIDE, IN A WAY, TO GET A NEW TRIAL. WE BELIEVE THAT THE DECISION OF THE DCA WAS ENTIRELY CONSISTENT WITH DELLA ROSA, AND WE WOULD ASK THAT THE COURT APPROVE THE SECOND DISTRICT COURT OF APPEAL DECISION ON THAT BASIS.

WHO DECIDES WHETHER IT IS MINOR OR NOT AND WHAT IS THE STANDARD?

THE STANDARD ON THAT IS THE STANDARD THAT HAS BEEN STATED IN THE CASES, INCLUDING MITCHELL. THE ISSUE IS WHETHER OR NOT THE LAWYER WOULD HAVE DISCHARGED THAT JUROR, HAD HE KNOWN OF THE STATEMENT, AND IN FACT, IN THIS CASE, WITH REGARD TO JUROR WARWICK, THERE WAS NOT EVEN AN AFFIDAVIT MAKING A STATEMENT LIKE THAT, BECAUSE IN FACT, THERE COULD BE NO SUCH ASSERTION THAT THE MISSTATEMENT THAT WAS MADE ABOUT LAWSUITS, A LAWSUIT THAT OCCURRED IN 1985, INVOLVING THE JUROR'S HUSBAND NOT INVOLVING THE JUROR, AND THREE WORKERS' COMP CLAIMS, THERE SIMPLY COULD BE NO ARGUMENT THAT THAT WAS SOMETHING THAT WOULD HAVE BEEN MATERIAL, FOR PURPOSES OF DETERMINING WHETHER THE JUROR SHOULD HAVE BEEN SEATED OR NOT, AND UNFORTUNATELY, THE TRIAL JUDGE, IN THIS CASE, SIMPLY DIDN'T GO THROUGH THAT ANALYSIS. NUMEROUS CASES SINCE THEN, INCLUDING THE CASES OUT OF THE THIRD DISTRICT, HAVE GONE THROUGH JUST THAT ANALYSIS, LOOKED AT IT, AND DETERMINED THAT THERE WAS NO MISSTATEMENT THAT WAS MATERIAL. IF I CAN TURN TO THE ISSUE OF APPORTIONMENT.

WHY WOULDN'T THE PROPER RESULT, UNDER DELLA ROSA, RATHER THAN FOR THE DISTRICT COURT TO REVERSE AND REIN STATEMENT THE VERDICT -- TO REVERSE AND REINSTATE THE VERDICT, REVERSE ON THE IMPROPER ALLOCATION OF DELLA ROSA?

I THINK AT THIS POINT IT IS APPROPRIATE THAT THIS COURT CAN LOOK AT THE STANDARD OF MATERIALITY AND MAKE THE VERY SAME DETERMINATION. THERE IS NO ISSUE, AS THERE MIGHT BE IN A CASE OF GREATER WEIGHT OF THE EVIDENCE, WHERE YOU ARE LOOKING AT DEMEANOR OF WITNESSES OR ANYTHING OF THAT NATURE. THIS COURT CAN LOOK AT THE ISSUE AS WELL AS THE TRIAL COURT DID AT THIS POINT, TO MAKE A DETERMINATION THAT, AS A MATTER OF LAW, THE MISSTATEMENTS THAT WERE MADE WERE SIMPLY NOT MATERIAL. IN ADDITION --

YOU ARE, REALLY, SAYING THAT MATERIALITY IS NOT GOING TO BE QUESTIONS OF FACT. IT IS A QUESTION OF LAW THAT WE SHOULD COME UP WITH, IF IT IS THIS MANY YEARS BEFORE, IT IS OR ISN'T?

NO. I THINK THAT, IN THIS CASE, UNDER THE FACTS OF THIS CASE, THE TRIAL JUDGE DIDN'T DO THE ANALYSIS. THERE IS NOTHING DIFFERENT THAT WOULD HAPPEN IF IT WENT BACK. IN FACT, IN SEVERAL OF THE INSTANCES OF MISCONDUCT, THERE IS, ALSO, A LACK OF DUE DILIGENCE. THAT DOESN'T CHANGE BY GOING BACK AND LOOKING AT IT. EITHER COUNSEL ACTED WITH DUE DILIGENCE IN INQUIRING ON THE SUBJECT OR COUNSEL DIDN'T ACT WITH DUE DILIGENCE. THESE ARE ALL ISSUES THAT CAN'T BE DETERMINED, WITHOUT GOING BACK TO THE TRIAL COURT AT THIS POINT, TO MAKE THE DETERMINATION. THE PROBLEM THAT OCCURRED IN THIS CASE, AND THE PROBLEM THAT WAS CORRECTED BY THE SECOND DCA, WAS SIMPLY THAT THE COURT NEVER WENT THROUGH AND ANALYZED IT, AS WAS PROPER UNDER DELLA ROSA. THE COURT SINCE THAT TIME, THE THIRD DCA, IN A NUMBER OF CASES THAT WE HAVE PRESENTED TO THE COURT, HAVE, ALL, GONE THROUGH THE ANALYSIS AT THEIR LEVEL, AND DETERMINED THAT SIMPLY NO ONE COULD SAY THAT A TEN-YEAR-OLD LAWSUIT HAS ANY BEARING WHATSOEVER, AND UNDER THE FACTS OF OUR CASE, WE ARE NOT ASKING TO MAKE A HARD AND FAST RULE, BUT UNDER THE FACTS OF OUR CASE, THE DISTRICT CORRECTLY ANALYZED AND MADE A

DETERMINATION ON THAT ISSUE. IF I CAN TURN TO APPORTIONMENT, WE BELIEVE THAT THERE IS ONLY ONE QUESTION THAT THIS COURT HAS TO ANSWER, IN RESOLVING WHAT MR. EATON PRESENTS AS COMPLEX ISSUE, AND THAT IS WAS THE DRIVER THE CAUSE OF THE INJURES FLOWING FROM HIS ACCIDENT. I THINK THERE CAN BE NO DOUBT --

HOW ABOUT SPEAKING DIRECTLY TO MR. EATON'S POINT ARGUMENT AND THE SECOND DISTRICT, IF THE LOGIC THAT THE TORT, FOR WHICH THE MANUFACTURER STANDS LIABLE, IS THE FAILURE TO PROTECT THE VEHICLE, IN CASE OF ACCIDENT, HOW CAN MAKE LOGICAL SENSE THAT THESE PEOPLE ARE JOINT TORTFEASORS?

THE LOGIC OF IT IS THAT THE INITIAL TORTFEASOR IS THE ONE WHO CAUSED ALL OF THE INJURES THAT OCCURRED. FORD MOTOR COMPANY IS RESPONSIBLE, IF AT ALL, FOR THE INJURES THAT WERE ENHANCED, AND THOSE ARE THE ONLY INJURES THAT WE ARE TALKING ABOUT THIS THIS CASE, WHICH ARE THE FIRE INJURES. THE MERRILL CROSSING CASE TALKED ABOUT AN INSTANCE WHERE THE NEGLIGENCE GAVE RISE TO THE PARTICULAR TORT THAT WAS INVOLVED THERE. FORD MOTOR COMPANY AND ALL MANUFACTURERS HAVE A DUTY TO PROVIDE SAFE VEHICLES. THAT DOES NOT, IN ANY MANNER, ELIMINATE THE DRIVER'S RESPONSIBILITY IN OPERATING THE VEHICLE IN A SAFE MANNER. AND IF YOU THINK ABOUT IT FROM A VERY LOGICAL, BASIC PERSPECTIVE, IF THE PLAINTIFF HAD SUED THE DRIVER OF THE VEHICLE ALONE, THERE IS NO QUESTION THAT THE DRIVER WOULD HAVE BEEN RESPONSIBLE FOR THE FIRE INJURES AND AS MR. EAT ONE CONCEDED IN HIS ARGUMENT, HE SAYS HAD IT BEEN A SINGLE AND DIVIDESIBLE INJURY, THEN THERE WOULD BE NO QUESTION THAT YOU COULD APPORTION. THAT IS WHAT WE HAVE HERE, THE SINGLE INDIVISIBLE INJURY FOR WHICH THE PLAINTIFF HAS SUED IS THE INJURY RESULTING FROM THE FIRE.

LET ME ASK YOU, AGAIN, TO USE THE MEDICAL MALPRACTICE ANALOGY. IF YOU SUED THE DRIVER AND THERE HAD BEEN SUBSEQUENT MALPRACTICE, THE DRIVER WOULD BE RESPONSIBLE FOR ALL THE INJURES, INCLUDING ANY FORESEEABLE MALPRACTICE. CORRECT?

THAT'S CORRECT.

ALL RIGHT. NOW, IF THE PLAINTIFF SUED THE DOCTOR, COULD THE DOCTOR BRING IN THE ORIGINAL TORTFEASOR?

LET ME BACK UP BY SAYING THAT FIRST OF ALL, IN THAT SITUATION, THE INITIAL TORTFEASOR IS THE ONE RESPONSIBLE FOR ALL OF IT, AND THAT IS PRECISELY WHAT WE ARE TALKING ABOUT HERE.

HERE IS THE LAWSUIT AGAINST THE MANUFACTURER, NOT AGAINST THE TORTFEASOR. IF YOU SUED THE DOCTOR, COULD -- AND THE TORTFEASOR, AGAIN, ON THE SAME THING COULD BE RESPONSIBLE FOR ALL OF THE INJURES, COULD YOU, UNDER FABRE, APPORTION DAMAGE TO THE TORTFEASOR?

THE MEDICAL CASES AS SET FORTH IN STEWART, SET FORTH THEIR OWN BODY OF LAW AND ANALYSIS THAT, REALLY, IS DISTINCT UNTO ITSELF.

WHAT IS -- WHAT IS DISTINCT ABOUT IT, SUBSEQUENT TO FABRE? WHY?

IT IS OUR POSITION THAT ACTUALLY SUBSEQUENT TO FABRE, YOU SHOULD, IN FACT, TREAT THE MEDICAL MALPRACTICE CASES EXACTLY IN THE SAME MANNER THAT YOU HAVE TREATED THESE CRASHWORTHYNESS CASES AND ALL OTHER CASES UNDER PROXIMATE CAUSE.

SO YOU WOULD HAVE, IN THE CASE OF A MALPRACTICE CASE AGAINST A DOCTOR, YOU WOULD HAVE THE DRIVER OF THE VEHICLE ON THE VERDICT FORM.

I THINK THAT THAT IS CLEARLY APPROPRIATE, UNDER FABRE, BUT THIS COURT NEED NOT DECIDE THAT ISSUE IN ORDER TO COME TO A CONCLUSION TODAY, AND ONE OF THE THINGS ABOUT THE CONTEXT OF THIS IS THE CRASHWORTHYNESS OF THIS VEHICLE, AS SPECIFICALLY FOUND BY THIS COURT, IS THAT THE MANUFACTURER AND THE DRIVER COMBINED, CONCURRENTLY, TO CAUSE THE ACCIDENT, AND IN THIS CASE IT IS VERY IMPORTANT TO RECOGNIZE THE PLAINTIFF REQUESTED A CONCURRENT CAUSE INSTRUCTION, SO TO, NOW, MAKE AN ARGUMENT THAT SOMEHOW THESE THINGS ARE SEPARATED IS COMPLETELY ILLOGICAL, NOT ONLY UNDER THE LAW --

HOW WOULD A JURY, UNDER YOUR THEORY, GO ABOUT APPORTIONING RESPONSIBILITY FOR THE DAMAGES? AND LET ME GIVE YOU A HYPOTHETICAL TO HELP ME WORK THROUGH THIS OR HELP US WORK THROUGH THIS. YOU SAY THAT, UNDER THE LAW, THAT THE ORIGINAL TORTFEASOR IS RESPONSIBLE FOR ALL THE DAMAGES, AND CLEARLY THAT HAS BEEN THE LAW THAT WE HAVE HAD IN THE PAST. SO IF THE MOTORIST THAT CAUSED THE ORIGINAL INJURY IS 100% RESPONSIBLE FOR ALL OF THE DAMAGES, EVEN THOUGH THERE MAY AND MANUFACTURER THAT MANUFACTURED A DEFECTIVE SEAT BELT CHRAF P, THE ORIGINAL -- C ELEMENT ASP, THE ORIGINAL -- CLASP, THE ORIGINAL TORTFEASOR IS GOING TO BE RESPONSIBLE FOR THAT, SO WE HAVE AN ADMITTED DEFECTIVE LOCK ON THE SEAT BELT, AND WHAT HAD HAPPENED IS THAT THERE WAS A RECALL, AND FOR SOME REASON THE NOTICE DIDN'T GET OUT TO THE RIGHT PEOPLE, AND EVERYBODY AGREES THAT THERE WAS A DEFECTIVE CLASP, THAT IF IT HAD BEEN A PROPER CLASP, THAT THE PERSON WOULD HAVE STAYED IN THE SEAT AND NOT BEEN SUBJECT TO HAVEING BEEN THROWN OUT OF THE VEHICLE OR WHATEVER. TELL ME HOW A JUDGE WOULD INSTRUCT A JURY THAT, IN OTHER WORDS, THAT THE ORIGINAL COLLISION DIDN'T CAUSE THOSE ADDITIONAL DAMAGES, AFTER THEY WERE THROWN OUT, BUT NEVERTHELESS, AS YOU SAY, UNDER OUR LAW, THAT ORIGINAL TORTFEASOR IS LIABLE, HOW WOULD A JUDGE INSTRUCT A JURY TO APPORTION THOSE DAMAGES THAT WERE CAUSED BY THE DRIVER OR THE PASSENGER BEING EJECTED FROM THE VEHICLE?

I SEE THAT I AM PAST MY TIME, BUT IF I MAY ANSWER THE QUESTION. IT IS THE SAME AS THE APPORTIONMENT IN ALL OTHER CIRCUMSTANCES. THE JURY WOULD BE TOLD THAT THE DRIVER IS RESPONSIBLE FOR ALL INJURES THAT WERE CAUSED BY THE ACCIDENT, WHICH IS THE WHOLE. THE MANUFACTURER IS LIABLE FOR THE ENHANCED INJURES, AND IT IS AN INJURY QUESTION -- A JURY QUESTION HOW THEY APPORTION THE FAULT BETWEEN THE TWO. THAT IS PRECISELY WHAT THE FUNCTION OF THE JURY IS.

IF YOU AGREE THAT THE ORIGINAL TORTFEASOR, THEN, IS GOING TO BE RESPONSIBLE FOR ALL OF THE DAMAGES.

ABSOLUTELY.

SO THEY ARE GOING TO PUT 100% BY THE ORIGINAL TORTFEASOR.

NO. BECAUSE THE ORIGINAL TORTFEASOR IS RESPONSIBLE FOR ALL OF THE DAMAGES, BUT IF THE JURY FINDS THAT THE MANUFACTURER IS, ALSO, RESPONSIBLE, AND IN YOUR SCENARIO THEY HAVE ADMITTED THAT THERE IS A DEFECT THAT, IS A STRAIGHT ISSUE OF APPORTIONMENT FOR THE JURY TO DECIDE HOW TO ALLOCATE FAULT BETWEEN THE TWO.

BUT THE ORIGINAL TORTFEASOR IS NOT RESPONSIBLE --

NO. IT IS FOR THE JURY TO MAKE THE DETERMINATION OF THE ALLOCATION FOR THE AT ALL TIMES FAULT BETWEEN THE TWO. THEY ARE BOTH PROXIMATE CAUSE. THE JURY SAYS WHO DO I BLAME FOR THE ORIGINAL FAULT CONCEPT.

THE ORIGINAL TORTFEASOR IS NOT RESPONSIBLE FOR ALL OF THE DAMAGES. IS THAT CORRECT?

THE JURY IS GOING TO MAKE THAT DETERMINATION, AND THEY CAN DETERMINE IT IN WHATEVER PERCENTAGES THEY WOULD SELECT. I APPRECIATE THE EXTRA TIME, AND WE WOULD ASK THAT THE COURT APPROVE THE SECOND DISTRICT COURT OF APPEAL DECISION IN ITS ENTIRETY. THANK YOU VERY MUCH.

MR. EATON.

THERE IS A KEY SENTENCE IN STEWART VERSUS HERTZ, WHICH ANSWERS THE QUESTIONS THAT ARE COMING FROM THE BENCH. IN THE SITUATION THAT JUSTICE PARIENTE AND JUSTICE ANSTEAD HAS OUTLINED, THIS COURT HAS HELD, IN STEWART, IT THAT THE PARTIES CAUSING PLAINTIFF'S INJURES WERE NOT JOINT TORTFEASORS BUT DISTINCT AND INDEPENDENT TORTFEASORS, AND IF THAT IS STILL THE LAW, AND IF 768.81 ONLY APPLIES IN SITUATIONS WHERE THERE IS JOINT AND SEVERAL LIABILITY, THEN YOU DO NOT APPORTION IN A CASE LIKE THIS. FORD IS ASKING YOU TO SAY THAT 768.81 OVERRULES STEWART VERSUS HERTZ. ON THE NEW TRIAL ISSUE, VERY BRIEFLY, THE TRIAL COURT DID DECIDE MATERIALITY. PLEAS -- PLEASE DON'T DECIDE THIS ISSUE ON THE FACTS THAT ARE DECIDED IN THE DISTRICT COURT'S OPINION. IT PAINS ME TO SAY THIS, BUT THE DISTRICT COURT CHANGED THE FACTS OVERLOOKED SOME OF THE FACTS AND UTILIZED A FACT THAT CAME IN AFTER THE NEW TRIAL ORDER WAS ENTERED, TO REVERSE THE TRIAL COURT FOR A RULING THAT IT NEVER MADE, AND THAT FACT WAS NEVER PROVEN WITH COMPETENT PROOF. THE MARRIAGE OF THE LESLIES SUPPOSEDLY OCCURRED AFTER THIS ACCIDENT THAT SHE DID NOT DISCLOSE, WAS NEVER PROVEN TO THE TRIAL JUDGE BEFORE HE ENTERED THIS NEW TRIAL ORDER. IT CAME IN, IN THE FORM OF A HEARSAY, UNAUTHENTICATED, UNSWORN LETTER, AND IT IS SIMPLY WRONG FOR THE JUDICIARY TO REVERSE A TRIAL COURT ON THE BASIS OF AN UNSWORN HEARSAY THAT WAS NOT AVAILABLE TO IT AT THE TIME OF THE RULING. THANK YOU.

THANK YOU, MR. EATON.