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Supreme Court of Texas.
Dr. Richard Jackson, Petitioner,
v.
David and Carolyn Axelrad, Respondents.
No. 04-0923.

February 16, 2006

Appearances:
R. Brent Cooper, Cooper & Scully, P.C., Dallas, TX, for petitioner.
Darrin M. Walker, Law Office of Darrin Walker, Kingwood, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David M. Medina, Justice Paul W. Green, Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister

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JUSTICE: 0923 Dr. Richard JACKSON versus David and Carolyn AXELRAD.
COURT ATTENDANT: May it please the Court. Mr. Brent Cooper will present argument for the petitioner. Petitioner reserves five minutes for rebuttal.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: May it please the Court. The first issue which I would like to address today is whether the, the Court of Appeals in this case used the proper standard in measuring the sufficiency of the evidence. This Court going back to Watson versus Brook, Zegifwark versus Zenwith, Osterberg versus Peca, Walmer versus Terges, and most recently in Ramiro versus K.P.H. consolidated has held that in measuring the sufficiency of the evidence, the Court must measure it against the charge that was actually submitted as opposed to serve unknown law if there is no objection to the charge. In this case, the trial Court submitted with respect to the contributory negligence of Dr. Axelrad, the PJC definitions of negligence ordinary care and proximate cost that is what would a reasonable person under the same or certain of circumstances have done. At the charge conference, plaintiff's counsel

was asked whether or not there would any objections to the charge and indicated that volume 6 of reporters record pages 224, there were no objections. So the jury was charge as far as the contributory negligence of Dr. Axelrad, as far as the ordinary care of an ordinary prudent person under the same or similar circumstances. Now, the Court of Appeals in this case however, where they were measuring the sufficiency of the evidence didn't measure against the charge that was actually submitted.

JUSTICE: What they say they were just-- they just looking at whether there's evidence.

MR. COOPER: I'm sorry.

JUSTICE: They say they just looking whether there's evidence and another as I say like fledging, no question stockbroker has duties to your client and they're just say, "but the fact that I didn't tell her-- didn't find out if she was seen in hour or not does not part of that" so the fact that I didn't ask there's not evidence. They say they're not-- it's just a regular citizen; no question a patient has the duty to disclose something to that ...

MR. COOPER: Sure. And the difference between this case and the Fletcher case, in Fletcher if you look there weren't really wasn't as I read the case in it is disputed about the duty. The question was whether or not there were facts that would trigger to do.

JUSTICE: That's to say, why I'm at the same question here?

MR. COOPER: Because in this case, there was a question about what was the duty. In fact in Osterberg versus Pecar-- Peca, this Court said if the trial judge must resolve a legal issue before the jury could properly be perform its fact-finding, the party must lodge an objection in fact with the trial Court to make an appropriate ruling without having to order a new trial. And if this Court recall in the Osterberg case; the question was it was the election case whether or not there must be strict compliance with the statute regarding found the financial disclosures. And if the jury was charge from that and the jury found against the appellant. And on appeal, the appellant said, "well, yeah there was his duty but we believe that was a lesser duty, that is if there was substantial compliance that in order be exact compliance, but if there was substantial compliance, they were okay." In this Court-- in the Osterberg case said, "well, substantial compliance is a lesser duty if you wanted to measure the evidence against that, then you should have objected and you should have requested an issue be submitted on that grounds." It's the same in this case; the argument by Dr. Jackson was that the duty govern the patients was the duty of general ordinary care. Whether a reasonable action have done. Dr. Axelrad on the other hand would say, "no, it's a very limited much more narrow to do." And if that was the position, if they were going to take that position, then we believe that they had an obligation to object at the time when the case being submitted to the charge and to the jury and not wait until there's been an adverse verdict and again for the first time, after the jury has been discharge, the verdict has been receive ...

JUSTICE: But what, but, but what with that, what with that charge look like?

MR. COOPER: Well, that's one of the problem with the, the, the new ...

JUSTICE: It would be very complicated to explain in all details for every case what the patient has to disclosed and how all of that, I mean that's, that's not really, this, this is really a no evidence case and that ...

MR. COOPER: I don't believe so your Honor. I think that first issue thats got to be address is ...

JUSTICE: There is one thing you're, you're saying in Osterberg that I may have the need to tell the jury, are you looking for clear and convincing evidence or just let a preponderance of evidence, do you need to tell the jury that.

MR. COOPER: Well, but that was, that was relay ...

JUSTICE: But what if the jury is just, you know, that the patient contributed to this the buckle by not saying where it hurt and then you all on by arguing to the jury whether they did or didn't claim in this charge didn't know?

MR. COOPER: Because if you look at this Court's decision in the others cases or the duty is something other than the duty of ordinary care for example, premises liability cases in negligence and under taking cases where you have a child involve, where you have a higher standard of care; this Court has said, "you got to instruct the jury on what the duty is so the jury can measure the evidence against what the duty is on the part of defendant or the part of plaintiff" and the way to do this is not just to submit a general duty question, and they say, "well, we're going to measure the evidence against some undefined, unsubmitted duty the doctor" that was the argument in Osterberg and that was the argument that was rejected by the Court in the Osterberg case. We believe that this Court has for the last in this 20 to 30 years, and we believe it's a very well-reasoned sound rule require that the party is claiming a duty that is different from the ordinary chair; in a tort case you must request the jury to be instructed on that so that jury will know how to measure the evidence, otherwise the jury is measuring the evidence against something does not before them and likewise when the Court of Appeals is reviewing the evidence certainly, the Court of Appeals utter to review the evidence in lack of what was actually submitted to the jury, then the party is arguing some deviation from that duty based upon a particular facts, particular errie the law, then they have obligations to speak up and not wait until they receive an adverse judgment. Now, in this case even if there have been an objection by Dr. Axelrad, we believe that the new duty that's urge by Dr. Axelrad and adopted by the Court of Appeals is unworkable and conflicts with existing law from this Court. Over 14 years ago, or about 14 years ago, this Court in Elbaor versus Smith held that there is a common law duty, on the part of the patient to cooperate with the doctor in the care and treatment. The exact, of course that involve compliance with instructions which is not what is involved in this case.

JUSTICE: Greater it was a different issue.

MR. COOPER: In Oxford versus Watson the Bulvac Court of Appeals was faced with this particular issue that is whether or not Ms. Watson had given a full and complete history. There was an instruction that was given to the jury on that whether or not she gave a full and complete history unfortunately that days as we pointed out in our brief. The jury answered "no" and so the Court of Appeals never was really confronting with the full extent on the scope of that duty. Now, the majority ...

JUSTICE: The problem, I hate that is cooperating with the doctor is something that I think I understand maybe I know, but a-- atleast I feel like I understand but if you then say and that means volunteering that the pain started on the lower left side see, if I it, it just me but if I were going to the hospital and now where in excruciating pain, it wouldn't occurred me that in matter have started exactly the way

that it moved or any of those things, all I'm thinking about is this courage like the victims and what can be done. And so I wonder if a jury really knows what an ordinary person does in those circumstances without being given some parameters I have to do this month for this much.

MR. COOPER: Well, the problem, your Honor is again I think the situation wherein today is traumatically different in the situation wherein 20 to 30 years ago. If you look at all the cases that recited by the majority, I think all of one will decided in the 80's or the 70's and I think they made them one in 60's. All of them where pretty much 20 to 30 years old and we known that with respect to health care and health care consumers what was true 20 years ago is totally different than is what is true today. 20 years ago you pretty much with the doctor you listen to what here she said and you did. However, now we were in an information age and I, I didn't cite it in their brief but I, I'll give this site, there where study done it is found in P.U. institute to PW was it found www.PUinternet.org and what is says is that in-- there's some 2002 that 80 percent now of all adults who go to seek medical care treatment, do their own research before they go. Ninety-three million young American do this and they say that they go alive becoming for in preparing for equipments and surgeries and the report that 73 percent of them said that the health care services have been improved as a result of them being more on the same level as a doctor or the health care provider this providing this information ...

JUSTICE: That is you plan if the time to do it. Let's do ask the question when you do if you're excruciating pain until you got heard?

JUSTICE #2: Well, what is your duty if any at all?

MR. COOPER: Then the duty is why a person under the same or similar circumstances would have done which is what was argued by the dissent in this case.

JUSTICE: But for instance, I mean, concern-- my concern is jury been confused, Oh, you should told me that some might told you to get a colonoscopy back in 1994. Well, I mean, the doctor tell everybody over 50 about males who get a colonoscopy. What, what possible grounds for negligence could there be that I forgot to tell Dr. Jackson that, that somebody told me to get a colonoscopy in 1994.

MR. COOPER: Well, the relevance of that possible grounds is the question whether or not there has been a history of bowel disorders and there was a history--

JUSTICE: What is the re-- what is the recommendation to get a colonoscopy?

MR. COOPER: Well, actually, there had been a treatment approx--

JUSTICE: When I do my research on the Internet, they say everybody over 50. They say, I was suppose to have done all of it. Now what, why, why is that, and then that going to confuse the jurors?

MR. COOPER: No. We had expert testimony, your Honor, Justice Brister. Their own expert, Dr. Kenner testified that a recommendation of a colonoscopy would have been useful to know in making a diagnosis of diverticulitise. Dr. Selene ...

JUSTICE: Yeah but, but how does the cause of patient complaint?

MR. COOPER: Well, the cause of patient in this case, first of all ...

JUSTICE: Of course, that he was a Doctor.

MR. COOPER: He was a Doctor, he was an M.D. But no. 2, he was asked by Dr. Jackson, "can you tell me what's happened since your last appointment, what have you done? What has happened to you since the last appointment?" And this again was within two or three years of this

event taking place. I mean, this is a fairly old case in though it says you know, '97 or whatever it was at these events that where the colonoscopy and things like that could place were 1994. So there was a question where Dr. Axelrad was asked what has happened since your last appointment? None of this was revealed. He revealed that to Dr. Dobs, he was a gastroanalogist. He revealed that to Dr. Riodan who was a surgeon, but he didn't reveal it to Dr. Jackson. Dr. Jackson, Dr. Selene and Dr. Kenner all testified that a history of bowel problems would have been important in making your differential diagnosis.

JUSTICE: Is there evidence, I was not clear from your briefs. Is there, is there evidence that not objects and should have asked Dr. Axelrad directly where the pain initiated or whether he had these, this, this history of bowel problems.

MR. COOPER: The only evidence, Justice Hecht, regarding that was Dr. Jackson asked Dr. Axelrad, "tell me what's happening to you."

JUSTICE: That was her-- an expert testimony in the immediate care in this case is to ask directly appoint by ...

MR. COOPER: I don't recall there'd be any expert who said that specific question should have been asked -

JUSTICE: Right

MR. COOPER: - of Dr. Axelrad petition. So that there were, there were two jury questions. "What' happening to you, and what has happened since the last visit that you have here?" Those two questions we believe certainly at a minimum would have elicited that history of bowel problems that had taken place since the last visit. We have three experts testify that if you have a history of bowel problems, that that is significant with respect to the differential diagnosis of diverticulitis in when have moved that up on the differential diagnosis list. So we believe that based on the evidence that was presented even if you adopt the, the more limited rule by the majority board, if you go with the, the general rule by the dissent, we believe that they're truly sufficient evidence to support the jury's finding that contribute to negligence.

JUSTICE: Thank you Counsel. The Court is now ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Darrin Walker for Kingwood respondent.

ORAL ARGUMENT OF DARRIN M. WALKER ON BEHALF OF THE RESPONDENT

MR. WALKER: With the Court's indulgence, I'll take the two issues in reversed beginning in the substantive issue. There was some particularities of the record that I'd like to clear out. First of all, there was no testimony that Dr, Jackson specifically asked Dr. Axelrad what's happened since the last time you were here. Dr. Jackson was to asked, typically when you're seeing a patient, do you asked what happened and Dr. Jackson said, "yes", typically I asked what happens since the last time I saw them. However, in this case, Dr. Jackson was specifically asked and specifically testified on two occasions as to the exact conversation he had with Dr. Axelrad and that question was not, not given. I would submit that when a person testifies to a specific conversation and gives that details of it, it is not reasonable to infer from his testimony that I would typically asked this question that he did when his specific testimony did not recount

that.

JUSTICE: Well, that, your client said, "I told that start in the lower left quadrant."

MR. WALKER: That's true.

JUSTICE: So it really doesn't matter if we infer everything in favor of the jury's judgment, it really didn't matter whether the Dr. Jackson has to or not could your client said, I told it then.

MR. WALKER: Well, except that I don't believe the standard of review would permit the Court to draw conflicting inferences that would give conflicting that

JUSTICE: I saw that, I saw that but that doesn't make sense. Let me give, give you a hypothetical. Wife says, "Honey, did you send that package I asked you to send?" Husband, long pause. "Sure I did." Now, could a jury infer from that, that husband is long ...

MR. WALKER: Oh certainly. after the ...

JUSTICE: Could a, could a jury also infer that the husband is telling the, the lie because the husband knew he was suppose to mail.

MR. WALKER: Certainly.

JUSTICE: So there's one thing, why isn't is the same as that if the jury could infer that the Axelrad was lying when he said I told him that it was left lower quadrant pain when he, we talked on the phone. Couldn't the jury infer from that that means Axelrad also knew he was suppose to do that.

MR. WALKER: Well, when I said that the court, the standard of review does not permit conflicting inferences as well, and that was this. The jury could have believe on of two facts occur. Either Dr. Axelrad said he had left lower quadrant pain or he didn't. And if the jury believes that he actually told Dr. Jacskon I have left lower quadrant pain that cannot be is it they're tell him that not be a basis that can contrieve by. So the jury had to-- in order for that to been the basis for the jurisdiction ...

JUSTICE: No, no, no. What I'm saying is though if he says at the trial, couldn't the jury decide no. 1, we don't believe you, you didn't tell him back then, and no. 2, the reason you're saying that at trail is because you now acknowledge you should have said it back there.

MR. WALKER: Well, I would argue that the reasonable inference would be that he learned, Dr. Axelrad learned during trial or in preparation for the trial that it was important for, if Dr. Jackson had know that there was left lower quadrant pain, Dr. Jackson was negligent and everyone, all the experts basically said that that was a classic some. So the inference and in fact in the closing argument that's exactly what defendant argue was, he, he didn't tell Dr. Jackson this at that time. He admitted in his deposition he didn't tell them, but now, he's talk to Dr. Kenner he's expert, and Dr. Kenner has told him that, Boy that's really important if you told him that. So now he has change his story. So I want to argue that the, because of the direction of the inference, that the, the only reasonable inference from the change in testimony is that Dr. Axelrad didn't learn until sometime as he was referring between his deposition in trial, that, that was an important fact. Now ...

JUSTICE: Does it makes reference to did he imposed from doctors by the opinion written by the majority. Can you comment on that please.

MR. WALKER: If there are no duties on the doctor. The doctor only has a duty to exercise reasonable prudence to ask whatever questions are reasonable prudent doctor would asked. The question that the, the majority decided was what is the patient's duty to give information to the doctor. So for example if there was situation where recently

prudent doctor would not answer about a particular fact, but the patient had no reason to know what it's important either, then neither party would be negligent, the doctor exercise the reasonable prudence, so that the patients, the problem was that this case just still be the crux there's a bad result but nobody is negligence, no one's negligent.

JUSTICE: Well, what, what's the, was the submission proper or not?

MR. WALKER: Well, I believe it was and, and here's why. The submission was not erroneous. The submission did not tell the jury something that was wrong like in Osterberg versus Peca and so forth, it didn't say the burden of proof is clear and convincing when it shouldn't been proponderance, it didn't give the wrong definition of malice, it was simply broad so under that broad submission, this Court can review the evidence to say, "is there any evidence to support the negligence finding" and if the only evidence in the record, demonstrates omissions that the plaintiff had no duty to act, then there was no evidence of a breach of any duty that the plaintiff owed, I can not distinguish this case from Fletcher I just-- I think this case is, is virtually identical to Fletcher, and the-- now if the charge had said, "a patient has a duty to take care of himself before he get sick and if the patient doesn't take good care of his health, that's contributory-negligence" if the charge's said that, well, we know that's not the law, but if the charge's said that and we hadn't objected, then evidence of that could support the finding but the charge didn't say that. The charge wasn't wrong, it was just broad. In which case--

JUSTICE: But if the only duty is narrow; that's the only, then is there a problem with the charge, that you can raise by no evidence.

MR. WALKER: There is, we can not complain that charge error, okay, because it the charge was submitting was not objected to, however they-- the evidence is still trying to support the findings, now, let me give you-- there was consequence your failure to object, and here's was it was, I've personally believe that the reason the jury and Dr. Axelrad negligence is because didn't take care himself in the 10 years before, this, this event occurred, that was the main thrust of the argument, now if we have requested a, a limited instruction then the jury might answer that question known you wouldn't be here be, but because that there broad-form submission our burden is to show that there is no evidences to support a breach of duty other any theory and so we have to show not only that there's no evidence that will support a breach of duty on failure to reveal the product by costaty but we also have to show that there's no evidence that support a breach of duty for failure to show the a failure diagnose the left lower quadrant pain, if the Court-- if the chargers have been more narrowly constructed or more detailed perhaps the theory will advance to some of us question know and we would have to fight that back.

JUSTICE: Let me attest this, this for a second. If, at the time charge conference you believe there's no evidence in any brief patient duty whatsoever then shouldn't have been objection to submission at all compared?

MR. WALKER: I don't believe that the rule of procedure required objections to the charge to raising no evidence point and in fact often times in a more traditional scenes often times I think you know- if the jury finds against the-- I think we can probably reverses it but go ahead let them submit it because if the jury answers in our favor then having easier appellate burden and the rules specifically saying we don't have object the charge ...

JUSTICE: I heard it, but if, if you didn't show me your rights on,

on no evidence point and you convinced the Trial Court at the time to turn on your right, let says what you know in the Trial it, it submitted only the defendants in that question we would be here.

MR. WALKER: That's true I mean I'm not saying that there is not a negative consequences to the failure to, to putting instructions limiting the duty or, or what not all I'm saying is that under the rules of procedure we can't raise in no evidence point, and part of the evidence that is required is evidence that Dr. Axelrad brief some duty that he oath and this Court can look at the evidence and, and ask itself does any of this evidence support a breach of any legal duty just like in Fletcher

JUSTICE: Is there a curiosity? if the answer is no what the Court of Appeals thought, why aren't you entitled to win this issue?

MR. WALKER: Well, because the jury didn't reach the damages question and so we are, are we don't have damages finding so I can't ask the Court render judgment for me I have to retry the case.

JUSTICE: Because it's condition that way?

MR. WALKER: Right.

JUSTICE: And so why would there-- why didn't you object to the conditioning?

MR. WALKER: Well, I anticipated you to ask this question and so my intern it was not a conscious decision, may strategically in light of this whole body of law, we didn't object where which is why we raise a no evidence rather than charge error we have consequences from our failure to object one which is we can go condition. Another which we have to deal with all the possible theory's negligence but the fact in the matter remains that there no evidence from which theory even if the that have been charge properly a jury can not have the answer the question, yes, under this record, there just simply is it any evidence that Dr. Axelrad had any appreciation that this two things work important, the-- Dr. Jackson points out. Oh I want-- I'm sorry I wanted to answer Justice Hecht's question about whether there was any evidence that Dr. Jackson should have asked the specific question. Dr. Jackson's expert a Dr. Selene at volume 4, page 15 was talking about, how a doctor learns about a calanoscopy about diagnosing. And he was asked, what if the patient con-- insist they have an abdominal pain? Dr. Selene said, well, then I want to know some more things. I want to know, x, y, z, and he specifically said, "I want to know more details including does the pain move from one part to another?" So Dr. Jackson's own expert said that if a patient came in and said, "I have an abdominal pain", he would asked, "is this pain moving around?" There's no evidence and that's it for before record page 15. So there was an evidence that a reasonable prudent position would have asked about whether the pain was moving around. The, the reliance on Dr. Axelrad's medical training is a little bit over blown because Dr. Axelrad didn't testify at one point that he had work in E.R.'s for about five years in the 70's. That was in the context of-- he was being questioned about his own mistake and belief that he had a rebound when he first called Dr. Jackson. And he was asked now, "laying on hands in not really something you do as a psychiatrist and so that's why." And, and he was asked, "in fact, that's really not something you done since you got out on medical school." And she said, "oh no, that's not really true. For 5 years right after I got out on medical school, I worked in, in so I have examined abdomens." That is not, that is not any of the evidence relating to any knowledge about diverticulitis or, or specifically the importance of left lower quadrant pain unset of diverticulitis. To infer from that, that Dr. Axelrad knew or should

have known that it was important where the pain began versus where it was a the time he presented would be a kin to the argument that was made in Broadus versus Hayes that well this person is a doctor, they've been to medical school and so they could testify about medical things in this Courts that didn't know. There has to be some evidence that they know what they're talking about with respect to the specific issue. And there's nothing in the record that indicate that at that time, Dr. Axelrad knew anything about the importance of left lower quadrant pain. At one point he was asked. Now you aware, at least I hope you're aware by now. that left lower quadrant pain is a classic symptom of diverticulitis and Dr. Axelrad said, "yes because by this time, Dr. Axelrad had been through this terrible experience that talked to all these doctors that talked to his expert." He gained an education in preparing for this case. And a lot of his testimony that was sort of, touching upon certain topics that were medical in nature, was testimony given at trial with the benefit of the experience, of prepared for trial. But there is not testimony that Dr. Axelrad knew anything about the importance of, of left lower quadrant pain at that time that he presented to Dr. Jackson.

JUSTICE: Let me ask you, apart from the presolation issues that you talk about. If you think that one thing the jury thought was that he's failure to take a proper care of himself over an extended period. All of this really ascribable doing this responsibility for one hand. Doesn't that argue for a more detailed description of the duty in charge? and if you think so what should it be?

MR. WALKER: Well, I-- certainly, in a case such as-- in a case where there is some evidence of both a valid theory and an invalid theory. There should be something in the charge. Otherwise, the, the ch-- without objection, the charge will be, the, the verdict will be sustained if there is evidence to support the jury finding on any here. And, and that's-- we, we've taken all in that burden in this case. We've attacked every theory they raised and show that there is no evidence that the jury could have found under any theory. But yes, if there had been evidence for example that Dr. Axelrad knew at that time that it very important that he deal left lower quadrant and he didn't. Then we would be suffering from the fact that we do not instructs the jury, "Don't consider his, his prior course of, of treating and taking care of himself as negligence," because the jury could have actually answer yes this based on that. Jury could have believe, "Well, yeah, even though he moves in Court, he was in so much pain," that, that that really wasn't negligent. But we would still have to defend assuming the jury had found on the valid theory. So yes, it would be proven in a case where the evidence was support a, a, a valid and an invalid theory to instruct the jury.

JUSTICE: About what?

MR. WALKER: Well, about that it is not a patience, but that they cannot be consider contributory negligence that the patient fail to take care of himself prior to presenting to the doctor. And first of all, in a case by case, you would have to draft such instructions depending upon what the evidence was in the case. But in this case, there's simply is no evidence that would support the finding on any theory in the record and, and that's why the failure to object does not prohibit the score from affirming what the Court of Appeals did. Or show that the Court of Appeals was wrong. Very briefly on the issue of proximate cause. The Dr. Jackson's brief paraphrases what the testimony was. We would encourage the Court to actually go to the record where the Dr, Jackson cites and read what the actual testimony was and here's

why. Dr. Jackson says in his brief that there was testimony that, "if we knew about this long standing bowel problems we may have diagnose but, but they've keep you lies." But that the j-- it was undisputed that Dr, Jackson was told by Mrs. Axelrad before he prescribe the enema that he had, that Dr. Axelrad had weird bowel habits. It wasn't the failure to, to explain his unusual bowel habits that was the problem. The, the alleged negligence was the failure to, to talk about the prior proctoscope. And there was no testimony in the record that if I had known about the prior proctoscope I'd probably would not have prescribed the enema. And in fact, what, what the evidence showed, and there are several places where Dr. Jackson said, "If I knew then what I know now I would have done differently. If I knew he had diverticulitis I would have done it differently." But he never said, " If I knew he had that prior proctoscope, I would have done this," and that would have prevented the injury. "Or if I knew that he's pain has started in the left lower quadrant, I would have done this." And, and then his result would have been different. There was never any specific testimony with respect to these two pieces of information where Dr. Jackson said, "knowing that probably would have change the result." By contrast, Dr. Jackson testified several times with respect to several different pieces of information that if I had known that, I would then prescribe the enema. At page 29 of volume 6, he said, If I had known he had rebound I would not have ordered an enema. At page 279 through 80 of volume 3, he said, if I had known he had an elevated white blood cell count, and abdominal pain, I would probably not have given an enema. But he never said anything like that-- If I apologies, may I finish?

JUSTICE: Are there any questions? Thank you very much.

MR. WALKER: Thank you.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF PETITIONER

MR. COOPER: Three points I'd like to make. First is regarding their objection to the charge in how sufficiency of the evidence is to be reviewed. As I understand counsel's statement is, a litigant can make no objections regarding what is the proper legal duty what the charge be submitted in any federal fashion and then would it comes bound for review the sufficiency of the evidence. They said, "we're going to discard the charge rather or look at what the actual duties are." If that is the case. First of all, why are we instructing the juries as far as duties any way to begin with ...

JUSTICE: Well, because I mean, the broad form, I mean you know, we did, we got tired of instructing the jury, you know, a defendant fails to use ordinary care that help keep a proper look out, fell the road way, well to this, fell to that, that was the other thing you just say well, they felt act like a ordinary prison, an ordinary good prison like all the argument. And so why isn't this find for that same purpose. We get a very complicated thing about all the possible things that patients might do wrong. But didn't that easier just to say that the patient act like an ordinary person that let you alert.

MR. COOPER: Well, then why is as this Court on numerous occasion said where the jury had something other than a acquitted person. You'll instruct the jury on what the duty is, and the question in Osterberg versus Peca. This Court said, it is the Court's charge. Not some other

unidentified law that measures the sufficiency of the evidence when the opposing party fails to object to the charge. So this Court has said five years ago, six years ago that it is the Court's charge. That governs sufficiency not some other unidentified law that governs the measure of the sufficiency of the evidence where there has been no objections ...

JUSTICE: But I thought his argument was if there's no evidence in the record of any omissions which there is did to act, then what difference does it make, how broadly the duties to find in the charge?

MR. COOPER: Well, there again he's trying to, to identify with the Fletcher case. In Fletcher I don't believe there was a dispute as to what the duty was in this case. As in Osterberg there was a dispute as to what the duty was as to act. We took position, it was a broad duty over required act, they took position, it was very narrow. And I believe what Osterberg says that where there is a duty, where there's a dispute, a legal dispute as to the duty, then the trial Court must resolve a legal issue before they jury could proper the former spot County and a party must lodge in objection in time for the trial Court to make the appropriate ruling without having order a new trial. That's on page no. 55 of Osterberg versus Peca. And so we believe this case falls greater than that. Number two, standard of review. We want and hear their arguments is like well, you know, this was really what the jury met or this is really what they were fighting. That is consistent with the standard review. If there is a reasonable inference, it must be indulge in our favors. So for example, when Dr. Jackson said, "my routine practice was to ask what is change since the last appointment." And that's the way, I think the way have normally conduct myself under the standard of review. All the reasonable inferences must be indulge in the jury's favor. And applying the appropriate standard review then, this Court and the Court of Appeals should have done it, should have indulge, well, that's his routine, then we would like to assume that that's what was asked of Dr. Axelrad, what has change since last time, and then he did not disclose all the medical history that had encourage since then which was undisputed and that therefore, he felt to respond to a specific inquire. Also, with respect to the, the lower left quadrant pain. As counsel said, there was testimony of volume 3, page 133 by Dr. Axelrad that he knew lower left pain was a classic symptom of diverticulitis. Now grabbing in the record, there is no indication about when that knowledge was obtained or was acquired. That is true. We don't know what it was at the trial, suing before the trial, or opinion ten years before trial. It is simply as the get on the standard review, all witnesses must be indulge in favor of Dr. Jackson we believe with the sufficient evidence to support the jury's question.

JUSTICE: Can I ask one question?

MR. COOPER: Yes, your Honor.

JUSTICE: Would you address briefly counsel statement that there is no evidence of causation.

MR. COOPER: We believe there clearly is evidence of caution.

JUSTICE: Will you stand on the record references on that, is that or is there anything beyond that?

MR. COOPER: The record references -

JUSTICE: In your brief.

MR. COOPER: - in our brief that I can give?

JUSTICE: There's no e-- if you'll just standing you'll know.

MR. COOPER: We would stand on those; we believe there is a thirty evidence of causation.

JUSTICE: Thank you. The case is submitted and the Court will now

take a brief recess.
COURT ATTENDANT: All rise.

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