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Supreme Court of Texas.
Venkateswarlu Thota, M.D., North Texas Cardiology Center, Petitioners
v.
Margaret Young, Individually and as Representative of the Estate of William R. Young, Respondents.
No. 09-0079.

November 10, 2011.

Appearances:

Diana L. Faust, Cooper & Scully, P.C., Dallas, TX, for the Petitioners.

J. Mark Perrin, The Perrin Law, Dallas, TX, for the Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the first cause 09-0079 Thota v. Young.

MARSHAL: May it please the Court, Ms. Faust will present oral argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF DIANA L. FAUST ON BEHALF OF THE PETITIONER

ATTORNEY DIANA L. FAUST: May it please the Court, Counsel, the first issue I'd like to address this morning for the Court is the question of whether the failure to follow doctor's orders during recovery, post surgical recovery thereby aggravating or in creating a new injury constitutes contributory negligence? Here the trial court found it was. The jury found it was, but the court of appeals disagreed and relying on precedent from this Court indicated and held that it was actually mitigation of damages and reversed the case. Now, the court of appeals relied on, as I said, a pre-1995 precedent from this Court, Elbaor v. Smith and Kerby v. Abilene Christian College. These cases, for example, like Kerby were decided concerning mitigation pre 1995 when, before the Legislature changed Chapter 33 of the Texas Civil Practice and Remedies Code. Now here, the jury was asked the question of whether the negligence of the parties, that is Dr. Thota, the defendant, and Mr. Young, the plaintiff, proximally caused the injury in question. That submission, that question was proper under Chapter 33 Section 33.003a, which provides that the trier of fact shall determine the percentage of responsibility with respect to each person.

JUSTICE DON R. WILLETT: Ms. Faust, tell me how Mr. Young's conduct caused the injury here?

ATTORNEY DIANA L. FAUST: Mr. Young's conduct, Your Honor, caused the injury, which was the extensive retroperitoneal bleeding that occurred. The evidence that the court--

JUSTICE DON R. WILLETT: They're saying the bleeding was the injury and not the arterial tear itself?

ATTORNEY DIANA L. FAUST: That is correct, Your Honor.

JUSTICE DON R. WILLETT: So when somebody gets shot, the injury is the bleeding and not the gunshot wound.

ATTORNEY DIANA L. FAUST: The wound can be the injury, but the gunshot, the wound and the subsequent treatment and all the delay, yes, that's the injury, but we have two. We have the analysis that requires, we have to consider occurrence-causing injury. We have to consider the injury itself. Now here, the question is what was the evidence that supported submission of contributory negligence, well--

JUSTICE DEBRA H. LEHRMANN: Let me just follow up on that a little bit. It seems that to separate the two, -that is, whether the injury is the puncture or whether it's the bleeding. I mean isn't that just a matter of semantics. Isn't the reality that if it were not for the puncture, the bleeding would have never occurred? And so how can you separate those and say that those are two distinct occurrences? Isn't that just one ball of wax?

ATTORNEY DIANA L. FAUST: Well, Your Honor, here we have evidence that was conflicting as to whether there was a breach of the standard of care that caused that bleeding. Here we have a puncture that is determined even by the Respondent's own experts to have been, that had full hemostasis at the time of discharge. We had conflicting evidence that the jury heard and from which the jury could infer that Dr. Thota did not negligently perform the catheterization, that he did not negligently perform that puncture in the wrong location.

JUSTICE DEBRA H. LEHRMANN: Well, I understand that, but that is a different issue I believe then what we're getting at, isn't it?

ATTORNEY DIANA L. FAUST: I'm sorry. I may have misunderstood the Court's question.

JUSTICE DEBRA H. LEHRMANN: Well, I'm just trying to understand how the two can be distinct.

ATTORNEY DIANA L. FAUST: The--

JUSTICE DEBRA H. LEHRMANN: In other words, the argument that the injury was the bleeding and the in jury was not the puncture and how do you separate the two?

ATTORNEY DIANA L. FAUST: Well, I think how we separate it under this evidence, Your Honor, is that at the time of discharge there is no injury. There's full hemostasis. The patient goes home. The experts agreed there's a 99% chance that there was no bleeding at all at the time he went home. The bleeding under the expert testimony here is that it, the bleeding didn't start until 6 PM when the Plaintiff suffered extreme pain. And that could have been caused under the evidence by either that blood clot that had formed at the puncture site coming lose or by a tear. The evidence was disputed on that issue. That blood clot coming lose would not have necessarily been with a result of Dr. Thota's negligence and the jury heard conflicting evidence about that. So in this case at 6:00 when Mr. Young does not follow his doctor's orders to return to the hospital with that pain, to return to the hospital with what he was experiencing at that time, that gives rise to this injury and that is this extensive bleeding and the subsequent care and treatment that he had to undergo.

JUSTICE PAUL W. GREEN: You have, as you say the evidence related to one injury or the other whether it was the puncture, whether it was the bleeding. I'm having a hard time understanding why it makes a difference here because whatever it was, the jury heard all of this, one side was pointing to one injury, one was pointing to the other and they said, there was, whatever the injury might have been, the doctor got a no-negligence finding. So why doesn't that settle it?

ATTORNEY DIANA L. FAUST: Your Honor, we believe that it should settle it, but we still have under the court of appeals' analysis to look at the no answer with respect to Dr. Thota in the context of whether this submission of the new and independent cause instruction was proper.

JUSTICE PAUL W. GREEN: Well, unless there's a Casteel issue here, there's some question about that, you go to a traditional harm analysis.

ATTORNEY DIANA L. FAUST: That is correct. And under the traditional harm analysis, then the court would have, as the dissent pointed out, looked at the entire record. The jury could have under these conflicting facts that we've talked about, the jury could have reasonably inferred that Dr. Thota did not breach the standard of care. They don't even get to causation at that point. And--

JUSTICE PHIL JOHNSON: The court of appeals did not determine harm based on looking at the entire record though, as I recall its opinion.

ATTORNEY DIANA L. FAUST: They did not, Your Honor. That's right. The dissent did.

JUSTICE PHIL JOHNSON: Used the presumed harm of Casteel.

ATTORNEY DIANA L. FAUST: That is correct. And we believe that's an error and we agree with the dissent's analysis and that is because we can't have Casteel co-mingling here under this circumstance where we have two separate answers, one with respect to Dr. Thota and one with respect to Mr. Young under those two separate theories of liability that are submitted. So you don't have the co-mingling issue that arises with Casteel where you have a valid theory and an invalid theory not supported by legally sufficient evidence with one answer blank. Here we know what the jury decided with respect to each one of those theories.

JUSTICE PAUL W. GREEN: Do you believe that the Casteel question was preserved at the trial court level?

ATTORNEY DIANA L. FAUST: Your Honor, we've argued that it has not been preserved. I think that the, if, giving it a very, very liberal interpretation as the court of appeals did, perhaps, but we think that it required more. We think that at least the court, trial court should have been on notice of a problem with respect to the co-mingling issues that arise by submitting an invalid legal theory. And the trial court at that point should have the opportunity to correct it and at least address that issue. That never occurred here. The objection was made that the submission of contributory negligence was incorrect, hat Mr. Young should not be submitted because there was no evidence of contributory negligence because of the differing legal opinions.

JUSTICE PAUL W. GREEN: And if it was --yeah, but I mean, it seems to me if contributory negligence is incorrectly submitted, then you just ignore it, wouldn't you?

ATTORNEY DIANA L. FAUST: You would ignore it, Your Honor, under the traditional analysis because once you look at the no answer with respect to Dr. Thota, even the yes answer coming back with respect to Dr. Young won't alter the outcome. And so it doesn't matter what the jury says, with respect to Mr. Young. We know what --

JUSTICE EVA M. GUZMAN: Well, but if it was incorrectly submitted, it should not have been submitted, it could, is there not some confusion then that the jury could have been confused and we do, would move to a pre-

sumed harm analysis because how do we know that the jury was not confused and misled by the incorrect submission?

ATTORNEY DIANA L. FAUST: The incorrect submission of contributory negligence?

JUSTICE EVA M. GUZMAN: Yes.

ATTORNEY DIANA L. FAUST: Well, in, under Casteel, we wouldn't have that co-mingling problem because, again, we have the ability to look at if you're just looking at the contributory negligence of Mr. Young and Dr. Thota, you've got separate blanks. You don't have one blank so you have no idea what the jury determined. You know, that the jury determined and failed to find that Dr. Thota's negligence proximately caused the injury here and that's all we need to know. We have the ability, and that's what's important under Casteel, does the court have the ability to know how the jury answered the question? Here we do because we have two blanks; one for each answer

CHIEF JUSTICE WALLACE B. JEFFERSON: If the torn artery was the injury, was the new, if you, assume that we hold that is the new and independent cause instruction proper or not?

ATTORNEY DIANA L. FAUST: Your Honor, we believe it was proper because it was raised by the pleading and it was raised by the evidence. Here the evidence is the failure of Mrs. Young to essentially follow those discharge instructions. Now the court of appeals held that Mrs. Young could not be submitted as the theory under new independent cause because she's a party; she's a party plaintiff. But you have an issue in this context where we cannot submit this party plaintiff on her derivative claim because we have other Texas law determining that she owes no duty to her husband under these circumstances and without a duty, no contributory negligence questions could be submitted with regard to her conduct.

CHIEF JUSTICE WALLACE B. JEFFERSON: But new and independent cause talks about causation and destroying the casual causation, but if the tear was the injury, why wouldn't her delay in getting him to the hospital not be the proper submission for new and independent cause and go rather to mitigation of damages?

ATTORNEY DIANA L. FAUST: If the, Your Honor, if the tear is the injury, then I believe that analysis, which is the conclusion of the court of appeals, may be correct. We disagree with it. We don't believe that that is the injury here. We, then the jury here wasn't asked about what was the accident, what was the occurrence. The occurrence here is the tear because we know that when Mr. Young went home at 2:00 in the afternoon, he had full hemostasis there at that puncture site. We don't know whether again it's a clot that formed and came loose, that the clot had that formed had come loose or whether it's a tear as a result of negligence. There's conflicting evidence.

JUSTICE NATHAN L. HECHT: With respect to harm, the Respondents argue, at page 16 in their brief, that it's likely because of the instruction and the question and now I'm quoting, "that the jury believed they could find petitioners negligent only if the jury found them responsible for the entire cascade of events stemming from the tear in the external iliac artery." That was certainly the import of the rest of the question and instructions given. What's your response to that?

ATTORNEY DIANA L. FAUST: Well, the jury is presumed to follow the instructions and the new independent cause instruction only went to causation with respect to Dr. Thota. So in answering the question about Mr. Young's negligence, the jury would not be considering the issue of new and independent cause under those circumstances.

JUSTICE NATHAN L. HECHT: Well, but the argument is that the jury may have thought that they couldn't only find Dr. Thota negligent if they thought he was responsible for everything else that happened after the tear, the bleeding and then all of the problems that he had after that before he died. So what's the response to that?

ATTORNEY DIANA L. FAUST: Your Honor, really that, that, that assumption is not borne out by the record here. We don't have, for example, we don't have any argument in closing even referring to that instruction, new and independent cause. We don't know whether the jury considered it at all. And that is just an improper assumption I think that the Respondent has to make here. In this case, Your Honors, we believe that the contributory negligence submission was proper and even if it was not proper, it did not constitute presumed harm requiring reversal of the case. Additionally, we believe that and we would urge that the new and independent cause instruction was proper under the circumstances where the contributory negligence of the spouse could not be submitted where she owed no legal duty. But the evidence borne out if the injury was the bleed, the evidence did support the submission of that instruction. So therefore, there would be no error in the submission on the instruction. There would be no presumed harm as this Court has stated in the Urista case when you have a proper liability issue with an improper inferential rebuttal defense, there is no presumed harm. You must conduct a tradition harm analysis and under that traditional harm analysis, this Court should conclude that there was no reversible error based on the arguments that we previously asserted. If the Court has no further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Ms. Faust. The Court is now ready to hear argument from the Respondents.

MARSHAL: May it please the Court, Mr. Perrin will present argument for the Respondent.

ORAL ARGUMENT OF J. MARK PERRIN ON BEHALF OF THE RESPONDENT

ATTORNEY J. MARK PERRIN: May it please the Court, Ronny and Margaret Young filed this lawsuit years ago to get the answer to one question and that question was did Dr. Thota negligently cause a tear in Ronny Young's right external iliac artery while performing a cardiac catheterization on March 4, 2002. Here we are nine and a half years later and we still don't have an answer to that question. There's no way the Court can look at the charge that was given in this case and this Court, the court of appeals, any of the parties and be able to say that the jury has answered that question yet.

JUSTICE DEBRA H. LEHRMANN: Let me ask you something. If whenever the patient was at home and let's say the situation was that blood was gushing from him, it was, would that change your argument? Would that, would it then not go just to mitigation?

ATTORNEY J. MARK PERRIN: I don't think so Your Honor, and there are a couple reasons for that. Maybe the most significant, I think, in this circumstance, which is certainly interesting as post catheterization, post what we allege to be the negligence, Ronny Young spent five months with hospitalization, three months with hospitalization another two months in rehab. Over the course of those three months seemingly every week, every month there's something knew coming up. He's got renal failure. He's got a splenectomy. He has his gallbladder removed because it was gangrenous. He loses vision in one eye. He has blood clots. He has thrombocytosis and all these things are happening along the way. All of those things can't be the injury. If all of those things are the injury, I mean logical extension of Petitioner's argument is at any point in those three months and those four months and those five months of the follow-up care if Ron Young at any point didn't follow a doctor's instruction, take this medicine to avoid clots and he misses one dose, if at any point along the way Margaret Young doesn't do something that the doctor told her to do then under Petitioner's argument that would be contributory negligence. Maybe it happened three months down the road and it's contributory negligence again.

JUSTICE DEBRA H. LEHRMANN: What's your response to the argument that when he left the hospital, everything was okay and that there was evidence that substantiates that?

ATTORNEY J. MARK PERRIN: I will certainly admit that there was conflicting evidence on that. I mean that's why it went to a jury. We're not here asking for the Court to find as a matter of law that we could win at the trail court, but there was conflicting evidence. Plaintiff's expert, the Petitioners love to cite this testimony

about 99%. I think if the Court will look at the record, the context of that testimony was all of the objective evidence that was available at that time was that good hemostasis had been achieved. We never sued saying that the discharge was negligent, but there was also evidence from Plaintiff's expert that bleeding into the retroperitoneal cavity, which is what occurred here, only occurs if the stick is too high from the external iliac artery as opposed to the femoral artery and that it will go undetected for 12 to 24 hours, particularly if it's a slow leak, bleeding in the, there's a lot of room in there, the blood builds and builds and builds and it takes a while for it to get to a point where there are actual physical signs and symptoms associated with the bleed. There are learned treatises to that effect, a learned treatise that Dr. Thota acknowledged as a learned treatise. Undisputed that wherever the bleed was, it was the site of the puncture and so we would certainly contend that the record as a whole reflects that there were significantly disputed factors as to whether or not there was good hemostasis achieved at the time Ronny Young was discharged.

JUSTICE DALE WAINWRIGHT: And the jury heard all of that?

ATTORNEY J. MARK PERRIN: Yes, Your Honor.

JUSTICE DALE WAINWRIGHT: And decided that Dr. Thota, or failed to find that Dr. Thota was negligent, but found that Young was?

ATTORNEY J. MARK PERRIN: The jury certainly answered no as to Dr. Thota and answered yes as to Mr. Young. I would suggest, Your Honor, that, in fact, the yes answer as to Ronny Young is maybe more instructive than the no answer to Dr. Thota in terms of how this charge misled and confused the jury. When the jury is, when the injury, as we contend, is properly understood as the tear in the right external iliac artery, then there is no way that Ronny Young could have been contributorily negligent in causing that injury and there's literally not a shred of evidence anywhere in the record. No one testified that he did anything to cause the tear. It goes back to my earlier comment, the tear was wherever Dr. Thota made his puncture. And so the fact that the jury answered yes as to Ronny Young, we believe is instructive to the fact that the jury when they were answering those questions was thinking about everything that happened, the whole cascade from the time that Ronny Young went home through his hospitalization and we're believing that those questions were inquiring as to everything that happened, not as to the specific question that Margaret and Ronny Young want an answer to, did the negligence of Dr. Thota negligently cause a tear in his right external iliac artery.

JUSTICE DALE WAINWRIGHT: How did you suggest that the liability question be structured then? Are you suggesting going back to specific issues? You said, you had never gotten the answer to the question that you started out seeking nine years ago. Do you want to, did the tear, do you want to ask the jury is the tear the injury, is the bleeding the injury, who caused the tear? Are you saying we should go back to that?

ATTORNEY J. MARK PERRIN: I certainly hope not, Your Honor. That's not my intent.

JUSTICE DALE WAINWRIGHT: Me too.

ATTORNEY J. MARK PERRIN: I believe that if the contributory negligence question was simply removed from the charge, if the new and independent cause instructions removed from the charge and I would submit that there should have been given how the court viewed the case and some of the evidence came out at trial, probably should have been an instruction on mitigation of damages. My recollection is that the Defendants didn't even ask for a mitigation instruction at trial, that they were married to their contributory negligence question.

JUSTICE NATHAN L. HECHT: If the new and independent cause instruction was error to give, but the question about Young's negligence had not been included, then do you agree that under Urista, you'd have to show harm?

ATTORNEY J. MARK PERRIN: Yes, Your Honor.

JUSTICE NATHAN L. HECHT: And your harm analysis would be the same. It indicated that he had to find the doctor liable for everything that happened.

ATTORNEY J. MARK PERRIN: Yes, Your Honor. I mean it's interesting because the harm analysis as we see it really does line up with what Casteel was talking about I think. I mean whether, this obviously is not on all four squares with Casteel. I mean we don't have multiple liability theories and one blank and we acknowledge that. That said, the harm that was caused, I mean the rationale underlying Casteel and the cases that came after it and quite frankly the cases that came before is the that this charge, in particular, was so confusing to the jury, so misled the jury as indicated by their answer of yes to the negligence of Ronny Young, that there's just no way we can possibly say on what basis they found the way they found.

JUSTICE NATHAN L. HECHT: But the presumption of harm is invoked only because the question of Young's negligence was included. If it had been omitted, you'd have to show harm.

ATTORNEY J. MARK PERRIN: Certainly, Your Honor. Under Urista, I think the Court has made it clear that merely erroneous instruction with a proper, an erroneous instruction with a proper question is, not subject to the Casteel presumed harm standard.

JUSTICE PHIL JOHNSON: What if you'd submitted one question as to Dr. Thota, question number one and question number two as to Young? Would it be your position that there's still a Casteel problem?

ATTORNEY J. MARK PERRIN: Yes, Your Honor, it would be.

JUSTICE PHIL JOHNSON: Okay. And let me go into the preservation. Casteel says, there has to be a specific objection telling the trial court, look, here's the problem with this charge. If we have these findings, no one's going to be able to appeal it. Was that objection made to the trial court in regard to this charge?

ATTORNEY J. MARK PERRIN: If I could, I maybe have two points in response to that. My first point would be and I think it's interesting, the Petitioners never really contended that we didn't properly preserve error. I mean sort of did we make the court aware of what the objection was. There was no real argument about that until the motion for rehearing before this Court. It certainly wasn't presented to the court of appeals. The court of appeals didn't address it. So I think at the very least, it's interesting that this preservation of error argument maybe hasn't been preserved. But in response to your question, I think it was clear in the record during the charge conference that everyone understood that the Plaintiff's objection to the charge was, look, our question on Thota's negligence is supposed to be focused on the conduct during the catheterization and the injury caused by the catheterization which we contend is the tear in the right external iliac artery. Their contributory negligence question, their new and independent cause instruction are focused on post catheterization, what we allege to be post negligence conduct or activity and this is going to confuse the jury because they have one question that's supposed to be about one thing and they have another question of instructions about--

JUSTICE PHIL JOHNSON: Confusing the jury I think is different than in the Casteel problem where you have a question was the defendant or the plaintiff, either one, was one party negligent in A, B, C or D and then answer yes or no. And then we don't know whether they found A, B, C or D. It seems that whether the jury's confused is different than that Casteel problem where we can't tell what the jury's answer really was. And that's what I'm wondering and did you tell the court of appeals that we can't tell from this charge what the jury found.

ATTORNEY J. MARK PERRIN: Certainly. I think without question, we told the court of appeals. Now, admittedly, in the dissent in the opinion from the Fourth Court of Appeals pointed this out, we didn't specifically sight Casteel in our briefing to the court of appeals, but we told the court of appeals.

JUSTICE PHIL JOHNSON: Let me ask this, did either party cite Casteel in the court of appeals or the trial court? It seems like did anybody mention that to the trial court because it seems like under this charge, both parties would be in the same boat if they found Dr. Thota negligent and Young not negligent, Dr. Thota's going to have to appeal also and so I'm wondering did either party say to the trial court judge, this is going to be a problem on appeal?

ATTORNEY J. MARK PERRIN: To the best of my recollection nobody talked about Casteel in the trial court.

JUSTICE PHIL JOHNSON: Or in the court of appeals, either party to your recollection?

ATTORNEY J. MARK PERRIN: To the best of my recollection, nobody talked about Casteel in the court of appeals until after the Court of Appeals' opinions when the now Petitioners filed their motion for rehearing or en banc hearing from the Fourth Court of Appeals. So probably from that point forward is when Casteel itself was specifically cited and talked about.

CHIEF JUSTICE WALLACE B. JEFFERSON: So as I understand your argument, what you want in a new trial would be a submission that says, did the negligence of Dr. Thota proximately cause the injury to Mr. Young.

ATTORNEY J. MARK PERRIN: That's correct.

CHIEF JUSTICE WALLACE B. JEFFERSON: Without a contributory negligence and without a new and independent cause submission at all and then that to the extent Dr. Thota thinks the injuries were exacerbated by the failure to seek medical care promptly that that would be submitted in the mitigation damages instruction.

ATTORNEY J. MARK PERRIN: That's our position, Your Honor. Even Kerby, which everyone has cited hundreds of times in all the briefing, Kerby v. Abilene Christian College. I mean the direct quote from the court is negligence that increases or contributes to the extent of an injury. I mean they use the word injury, is not contributory negligence and mitigation of damages and that's the situation we have here. I mean the negligence, if any, of Ronny Young didn't cause the injury. It didn't cause the tear in the right external iliac artery. It contributed to the extent of them. It maybe exacerbated them and the jury being charged on that, if the evidence came out the exact same way, I can't imagine we'd have any objection to a mitigation instruction and we would argue it to the jury the best we could.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what would your argument be if the jury returned a verdict of zero damages?

ATTORNEY J. MARK PERRIN: Then I guess the Defendant would have met their burden of proving to the jury that he didn't mitigate any of his damages. I don't think that would be possible because even the Defendant's counsel at trial in his closing arguments to the jury said, Ronny Young should have come back to the hospital at 6:00 when he first felt the pain. And if he'd come back at 6:00, all that would have had to have been done is Dr. Walker, the vascular surgeon who ultimately repaired it, would have had to repair the tear in the right external iliac artery. There was some damage caused and that damage was at the very least the repair to the right external iliac artery. Obviously, we contend that the cascade is at least to some degree the responsibility of Dr. Thota's negligence. There's some harm for sure.

JUSTICE PAUL W. GREEN: A lot of attention is being placed on the term, injury here and of course, some submissions, occurrence, incident, accident, do we make too much of that distinction in terms of whether the jury is confused or not? I mean they know what's going on, don't they?

ATTORNEY J. MARK PERRIN: I certainly think so Your Honor? I've searched high and low for anything from this Court that has drawn any real distinction between the use of those two words and a jury charge and have struggled to find anything. The Petitioners have cited a lot to the comments from the PJC. And this is a

case that I don't think is cited anywhere. I found it yesterday when I was thinking about what we were going to talk about here today and I would suggest to the Court that Block v. Mora and the cite is 314 S.W.3d 440. That's a 2009 case from the Amarillo Court of Appeals, really has a lot of similar issues to what we're talking about here. It was a car wreck case and I don't want to spend too much time on the facts, but it was a jury charge to use the word injury. There was a contributory negligence question submitted. The Fourth Court of Appeals found that that question was incorrect. They said we, don't care what the PJC says, just because the jury charge used the word injury doesn't mean you get a contributory negligence question. The evidence has to support it. You get contrib when the evidence supports it. And ultimately decided that it was a Casteel problem because there was a valid theory of liability submitted, the negligence of the defendant with an invalid theory of liability submitted, the alleged contributory negligence of the plaintiff and found that Casteel applied presumed harm and sent it back to the trial court. I think the petition was dismissed by agreement of the parties sometime in 2009 and I apologize for that not being in the briefs, but I found it and I think it might be helpful to the Court.

JUSTICE DALE WAINWRIGHT: The Petitioner's claimed that Elbaor v. Smith really causes you a problem with your case. Do you agree with the court of appeals' attempt to distinguish it or do you have a different argument?

ATTORNEY J. MARK PERRIN: No, I think the court of appeals, the focus has to be when you're talking about the difference between contributory negligence and mitigation, really I think boiled down to its core is the timing of the negligence. I mean was the negligence concurrent with or precede the actual injury of which you're complaining thereby contributing to or causing it or was it post negligence? In this case, all the evidence about the standard of care dealt with where the stick was located. All the evidence about the injury was where the stick was located. And so if all we're doing is post negligence, post injury contributing to, then, obviously, it's mitigation as opposed to contrib. I think I said, it in some brief somewhere, but this case would only be like Elbaor if in Elbaor, the doctor had actually broken the ankle doing the surgery and then the infection happens later and the allegation is the infection occurred because the patient didn't follow instructions in taking the antibiotics. In that case the patient went to see Dr. Elbaor specifically related to post broken ankle. The injury complained of was the infection in the ankle and because the patient didn't follow instructions in taking antibiotics and other things, then it was her negligence that contributed to that injury, the infection. In this case, any negligence brought on Young was post injury, post tear in the right external iliac artery and as such, should have, if anything, been properly charged as mitigation not contrib. I appreciate the time. We're glad to be here and we're proud to represent these folks and we would just like an opportunity to have the question answered.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Perrin. It appears no further questions and the Court will hear rebuttal.

REBUTTAL ARGUMENT OF DIANA L. FAUST ON BEHALF OF PETITIONER

ATTORNEY DIANA L. FAUST: Thank you, Your Honors. Just a couple of points. Why isn't there a mitigation instruction in the charge? According to the PJC comments at 4.1 and 8.9 when the question is, submitted as injury in question, approximately caused the injury in question such as it was here, then contributory negligence is properly submitted by the trial court and mitigation of damages is not included in the damages question and that's exactly what occurred here. Contrib was submitted in that form entering questions so there was no mitigation of damages instruction that I recall even being requested.

JUSTICE PAUL W. GREEN: So you think there is a distinction between using the term, injury versus occurrence?

ATTORNEY DIANA L. FAUST: Yes, Your Honor. It goes back really to this change we saw in 1995, I think, to Chapter 33 because now our juries are by statute required to consider each person as submitted, the claimant or the defendant or responsible third party. Their causing or contributing to cause in any way the harm for which damages are sought in any way. That would include aggravating or increasing the harm even under Ker-

by. We--

JUSTICE PAUL W. GREEN: I guess my question is, do you think that that's a distinction that a jury's recognized by and large or would that be lost on them?

ATTORNEY DIANA L. FAUST: Well, I think that the jury is going to, as the law says, follow the instructions and that mitigation of damages instruction, I believe the jury would follow, Your Honor, if it is properly given. It's not given here in this context when the jury is actually determining whether the defendant was contributorily negligent. So they're going to be considering the issue as whether the plaintiff is contributing to cause of the actual injury itself rather than just did the plaintiff take all precautions not to increase the damages that somebody else caused and he had no hand in it.

JUSTICE PAUL W. GREEN: So if you had looked at this case as well this is not an injury case, this is an occurrence case, you would have submitted it differently?

ATTORNEY DIANA L. FAUST: It should have been submitted differently as an occurrence case. You know, there was never any question raised about defining injury in question under this charge. It wasn't defined and the jury was told to anything that's not defined was given its common ordinary meaning. The issue on whether or not the jury was then going to follow and give it its own meaning, injury in question, the parties were arguing and the jury heard differing theories and the jury made the decision on which theory to accept and which theory to reject. I haven't read, but I recall the Block v. Mora case, I apologize to the Court. But again I would think in that instance where it appears that this Court of Appeals is rejecting the comment and the patterns are recharged that you will not include the mitigation of damages and instruction when you use the injury question or you don't. You won't put the contributory negligence in an injury question. I think then really the resolution has to be it's very important for this Court to look at how Chapter 33 operates here. And if the PJC is wrong, then this Court should take care of that problem and either announce that Block v. Mora has been decided correctly or that under Chapter 33, we're going to submit that plaintiff for the harm so long as the jury is going to decide whether that person caused or contributed to cause in anyway including aggravating or exacerbating those injuries that someone else may have caused that occurred later. With that, Your Honors, we would ask that the Court reverse the decision.

JUSTICE PHIL JOHNSON: Before you sit down let me ask you a question. In the dissenting opinion on the court of appeals, Justice Gardner says that, she disagrees with the majority sua sponte application of the presumed harm analysis adopted in Crown Life. Opposing counsel said, Casteel to his recollection was not mentioned to the trial court by either party nor was it in the briefs of the court of appeals. Do you recall it being argued in the court of appeals?

ATTORNEY DIANA L. FAUST: Your Honor, I did not see it argued in the charge conference in the trial court. In the court of appeals, according to the briefs, I believe that the Respondents argued Wal-Mart v. Johnson or cited Wal-Mart v. Johnson, which I think is what the court of appeals held citation to that case would have preserved the Casteel error on the presumed harm. But where the issue really became apparent was when the court of appeals did on its own apply the Casteel argument of presumed harm, then at that point in time there was a motion for rehearing filed that and one of the grounds was that the court of appeals reversed based on unassigned error because nobody had ever brought that error to the attention of the trial court. So at that point in time then, everything had been raised and brought forward on the issue of whether or not as the dissent pointed out, it was raised to sua sponte by the court of appeals' majority.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel, the cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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