ORAL ARGUMENT – 04/23/03
02-0557
VOLKSWAGEN V. RAMIREZ

LIBERATO: The issues in this case arise from several errors that began when the TC took away Volkswagen's unanimous verdict. They proceeded then in the second trial whenever the TC allowed in inadmissible evidence that was a videotape and also inadmissible expert testimony. And then concluded whenever the TC signed a judgment that was based on a verdict rendered by a jury that had a disqualifying juror in it.

O'NEILL: To rule your way we would have to overrule some pretty longstanding precedent wouldn't we?

LIBERATO: Yes you would. On the motion for new trial issue. But the time has come quite frankly for Texas to get into step with every other jurisdiction.

PHILLIPS: Wouldn't it better just to do this by rule since we have such precedent whether it's well reasoned or not?

LIBERATO: It could be done by rule, but the basis for the rule if you will as it is right now is that it is judicially created. It is not created by a rule. And in fact, the rules as they stand would be furthered by a holding that it is reviewable when the TC grants a new trial. The reason for that is we have at least three separate rules that concern motions for new trial. Primarily, I think the most significant one being the rule that says that before a trial judge can grant a new trial he or she must state that there must be good cause. Well there's no review of that. And the judge can grant the new trial for no reason or any reason. So it furthers the rules that are already in existence.

O'NEILL: Let's say that we looked at what the judge did here. The motion for new trial did have as a basis that the jury had acted contrary to the evidence. And so if there were evidence in favor of the plaintiffs at the trial how could we say the TC abused its discretion in making that finding? Would we be engaging in an evidentiary review and what would that look like?

LIBERATO: No. And the reason for that is is that if you look at the motion for new trial even though it states the words as you say that it's against the great weight and preponderance. It talks about an evidentiary standard. What the motion really argues is that Volkswagen didn't prove its case. And so the basis on which the new trial motion is filed is a basis that can be determined in this instance as a matter of law.

O'NEILL: But you would have to disregard the evidentiary points?

LIBERATO: Even though they state there is an evidentiary point throughout the entire

motion, if you go through the motion, and it is a lengthy motion, every point is that Volkswagen didn't prove its case. If you just look at the motion, a court would not have to engage in really an evidentiary analysis in looking at the motion, but could take the motion at face value and make the determination that there is a lot of evidence arguably on both sides, but certainly that it's not against the great weight without any review of the evidence. I'm just saying based on what is in the motion itself.

What the plaintiffs do in their motion is to go back and forth in saying here is some evidence that supports Volkswagen's theory that it was driver's error. Here's the evidence that supports our theory that it was a product defect in the car. And then say Volkswagen didn't prove its case.

And so I think there's two reasons. One, the court doesn't have to engage in an evidentiary analysis, the sole basis that's stated in the motion can be determined as a matter of law. And I think the second reason is that in their pleadings and in their briefing the plaintiffs only ask for an affirmance. They don't ask for any other type of review. For example, sending it back to the CA or sending it back to the TC. And so I think those are the two reasons that the court can render on this motion for new trial issue.

O'NEILL: We have continuously to date denied any request to do this. But we should just sort of pick this one?

LIBERATO: I think that's right. Pick this one in the sense that yes the court has denied most recently in a mandamus context. And that's not what we're asking. Obviously we're not here on a mandamus. We made that argument in the past after the first trial and we lost that mandamus is not the appropriate remedy. So now what we're here is after the second trial and we lost the second trial, we're here on appeal, and so our position is and believe that the best way to approach this and consistent generally speaking with the court's other pronouncement is to allow the appeal after the second trial.

JEFFERSON: Can you encapsulate how the evidence was different between the first trial and the second trial? What were the differences in the approach? Is there a way to articulate that? Was the same case tried both times?

LIBERATO: There is a different theory of what the defect was between the first and second trial. I think the other significant difference between the first and the second trial was the length of the trial. The first trial was a 7-week trial. I believe the second trial was like a 7 or 8 day trial. I can't remember for sure. But I know it was significantly shorter period. And so there is a big difference between the first trial and the second trial.

To go back, I think that the time has come for a change. That it is a bad rule. That it conflicts with the other rules of civil procedures, or at least it doesn't further those rules. It interferes with the constitutional right to a jury trial. And I think it's fundamentally unfair that a

party can go through an entire trial and not only have their not be any review in the TC...

O'NEILL: I'm not necessarily disagreeing with those arguments. But they've been made before and rejected. That just seems sort of random that we would pick this case to now say, well something's changed in the interim other than other states don't it.

LIBERATO: Other states don't do it. And why this case? I think it presents the argument very cleanly. We have been through every other part of the procedure where we presented it through a mandamus and now with this. There are rules and there are times where something's not working. And the courts have had the opportunity to deal with them and to say, well what we have done in the past is not going to work for the future.

ENOCH: So what do we do here? Do we say, TC give us your reasons why you granted that new trial and then we assess whether they were good enough reasons, or do we just say no we don't recognize interests of justice and so we just render the judgment that the TC removed? What do we do when we decide the judge should not have granted a new trial in the interest of judgment?

LIBERATO: I think it's one of the most significant questions at least as it relates to this specific case. And that is, what is our remedy? Our remedy is a rendition. And the reason that we think that rendition is the proper remedy is first of all, because what our position is is that if the TC does not specify reason in his order as he did not do here, then the court should rely on the reasons stated in the motion for new trial, the only basis for the motion for new trial was that Volkswagen did not prove its case, which as a matter of law the court can render on.

PHILLIPS: If we were to do that, the plaintiff would still then have a right to appeal that rendered TC judgment on whatever error they think may have been in the first trial.

LIBERATO: I don't think so for two reasons. One, because they didn't ask for that. All they asked for is an affirmance. They don't ask for any lesser relief. And two, because they've already had their chance at an appeal and they should have raised by cross point any issue that would have issued(?) the verdict.

PHILLIPS: We've never allowed something. But in the event we overrule all that precedent, then our cross point is that there was an error in the first trial in letting this witness in.

LIBERATO: That's right. And that is consistent with the j.n.o.v. practice or whenever a party who doesn't have to file an independent appeal. We're not saying that they had to do that. We're just saying that they should have raised cross-points. They had their appeal. Their appeal is this appeal.

ENOCH: But now even this court has jurisprudence on reversing and remanding in the interest of justice and we do so when the law changes and catches the party's potentially not prepared. So if all I've got to do is just make up something to the trial judge because I know that judges doesn't like the outcome in this case and the judge is going to give me a new trial, and we say

that doesn't work anymore. He's got to give a good reason. He can't give it for any reason or no reason at all. He's going to have to give a good reason. Then why wouldn't we remand to the TC in the interest of justice and not base the rendition based on the pleadings because the party had no burden under the pleadings? Wouldn't in the interest of justice we not allow the plaintiff to file a motion demonstrating good cause before we make a decision on whether or not the judge could grant a new trial?

LIBERATO: Well certainly that's within the court's power to do that. And there are examples when the court has done that. Just as there are examples of situations where the court has changed the law but has said that the parties should have anticipated the change in the law.

PHILLIPS: If we were to make this change wouldn't we have to make some other changes? For instance, allow a little more inquiry into jury misconduct. Part of the reason we allow the trial judge this much latitude is sometimes the jury has overwhelming personality who sways the jury their own direction or the judge just hasn't done a good job of keeping order or one of the lawyers is distracted with a personal problem. Wouldn't we at least have to allow jury misconduct to be tried and may be some other things that we now just sweep under this convenient rug of giving judge the discretion?

LIBERATO: I can't answer that in the sense of saying exactly what would have to happen in other rules. I don't think that today with this case that the court would have to make that determination. I do think that is a development in the law that would have to take place if the court rules that there is reviewability.

PHILLIPS: Maybe there was one really bad juror in this case. That's what the trial judge responded to. And yet we don't have any way for the trial judge to even make that record.

LIBERATO: There are other inquiries into the conduct of how juries are selected and that sort of thing, like _____ and hearings. It does seem to me that that then would be a burden on the winning party to do what's necessary to support the trial court's order if he or she states a reason that's not in the motion for new trial. But if it is in the motion for new trial, then certainly it would be the burden of the moving party to provide a record so the court would be able to review that.

HECHT: You say the federal courts allows review of denials under the grants of motions. Do you know whether they allow any greater inquiry into jury misconduct than the state system does?

LIBERATO: I don't know. But what I do know is they do allow an appeal after the second trial, which is what we're asking the rule, we're asking the court to adopt. And when they send it back, at that point the case is over. They reinstate the verdict or the judgment from the first trial.

WAINWRIGHT: The precedent that's been stated from this court for the proposition that motion for new trial that are granted cannot be reviewed as Cummins, which is a procurement from

this court in 1984, on how many other occasions has this court stated that rule?

LIBERATO: There have been several. And certainly there are many CA's. And I think it's an important point to make that we don't really know how many times this comes up because at a certain point people say well this is what the ruling is of the court, and they live with it and they don't pursue it or they settle their cases because they know the problems that are inherent in them.

JEFFERSON: Do you agree that once we - if we were to do that and allow review of an order granting a motion for new trial, that the dockets of the appellate courts would expand exponentially every time one is granted and that might have been one of the reasons the legislature converted from allowing some form of review to insulating those orders from appellate reach.

LIBERATO: I don't agree at all, and the reason for that is that it just will be another issue presented after a second trial. The only way that it's going to arise is that a party like Volkswagen wins the first trial and loses the second trial. And just like we've brought up several other points before this court and before the CA, there will still be an appeal. So I would think that in virtually no case would it mean that there is an appeal only on that issue and therefore without that issue there is no appeal it's just going to be another point of several points.

I understand. Of course it is a very important issue in what we're asking the court to do. Anytime we ask this court to change its precedence it is a big deal. But we also have three other independent bases...

PHILLIPS: Is the videotape in the record?

LIBERATO: It is in the record. And I think the fact that it is in the record is one of the things that takes that point out of the traditional situation where a great deal of deference properly is giving to the trial judge, because this court or an intermediate court or anyone here can look at this video and not have any more or less incite into the specific demeanor of the witness and that sort of thing than the trial judge did.

SCHNEIDER: Is your strongest argument that it was like in response to a question or is it that they just didn't lay the proper predicate for it?

LIBERATO: As far as the video?

SCHNEIDER: Yes.

LIBERATO: Our strongest point on the video is that it is a witness who had his back to the camera, who was never identified, who we never had the opportunity to...

SCHNEIDER: Well that's all under the rule. Why is this not an excited utterance?

LIBERATO: One, he had no personal knowledge and there is no showing that he had personal knowledge. So there has to be a showing of personal knowledge. And in fact he even uses the word "apparently" the wheel exploded. "Apparently" which indicates a lack of personal knowledge about the critical aspect of it. But I think second, and to get directly to the excited utterance point, that is that there are two things that are required for there to be an excited utterance. And that is, that it must be close to the time of the event and caused by the excitement. And in almost every case, I think every case the plaintiff cited the actual witness, the person uttering the excited utterance is a victim or greatly involved. He or she is not a bystander. They are involved in the case and that's what gives the indicia of reliability to the witness for a proper use of excited utterance. In this case you have a guy who obviously wasn't - you know it's been a long time, to the time he talks to the reporter, he is calm enough to say that he won't give his name and that he won't turn his back. And so I think that this is about as far away as you can get and still make a credible argument that this was an excited utterance.

O'NEILL: How do you address the harmless error argument because the tire in fact was intact and so the fact that he said the tire exploded sort of undermines his credibility at the very beginning, and it doesn't relate to the theory of product liability that's alleged?

LIBERATO: There's two ways. And I think the first and it's really important to look at what the plaintiffs themselves said. I mean from the very beginning to the very end of the case they said, this is a critical piece of evidence. And there's quote after quote that the plaintiff's lawyers used. And what they knew, and this really goes - this is number two, but really I think more directly answers your question, it is the only evidence in the case that it was a defect which is the plaintiff's theory that it was a defect that caused the accident. That whether that defect was a tire blown or the wheel bearing is sort of a subpart of it. But the plaintiffs used that throughout. And as a matter of fact they say that something went wrong with this tire and that's exactly what our expert said.

So it is the only eyewitness testimony that bolsters the expert's, which we say is unreliable expert testimony, and that's why it's so important, and that's why there is harm.

* * * * * * * * * *

RESPONDENT

WAINWRIGHT: With regard to the juror who was convicted of a felony. In your brief you've argued that the question asked on the jury's card was unclear. I've got a copy of the jury card. The question is, have you ever been and accused, and there's some punctuation, complainant or witness in a criminal case? Answer: No. Do you think Mr. Saucedo was confused by that question? Is there any evidence of that in the record other than your assertion in your brief?

DUBOSE: There's no direct testimony from him. My looking at his juror card shows there's no punctuation between the word accused and complainant.

WAINWRIGHT: If the original's available, I would like to get a clean copy of the original. But

if there's punctuation there it undermines the argument that this was confusing I would say. But it's your position that it was confusing?

DUBOSE: Right. And also that question was never asked in voir dire. Even though one of the juror information cards reflected that someone was convicted of a felony. Another juror information card, the juror left that question blank.

WAINWRIGHT: Attorneys cannot ask that question in voir dire can they? Our rule 230 of the Texas Rules of Civil Procedure preclude asking a question, the answer of which might disclose that the person has been convicted. And it doesn't seem to matter whether you ask that publically or at the bench. It seems to preclude asking that question at all in civil trials unlike criminal trials. So he couldn't even ask him that question. They had to rely on his answer that no, he was not disqualified. He had never been accused of a crime. Didn't they?

DUBOSE: They didn't have to completely rely on his answers. They could have done investigation during the trial to determine whether he had been convicted of a crime just as they did an investigation after the trial. There is no evidence in the record there was anything preventing that. And the prior opinions of this court say that that complaint must be raised before the jury verdict is rendered. And that's precedent that's never been overruled. There's the Palmer Well Service case that Volkswagen relies on, which was a case where something that came up after the verdict was used to reverse. But the argument of waiver was never made in that case. But in this court's opinion in Herring v. Peterson, 1948 writ ref case cited in our brief. It says the juror qualification issue must be challenged before the verdict. That's not just our view. In the 2001 Edition of McCormack & Carlson that text says that a member of the panel who's disqualified as a juror must be challenged promptly. The voir dire examination does not include questions reasonably calculated to uncover the disqualification. The challenge must be presented promptly after the facts are discovered and in any event before verdict.

WAINWRIGHT: Well the conditions you just read kind of flies in the face of our Rule 230 that precludes them from asking that question. But it's your position that at sometime during the trial the parties, whichever side has a suggestion or even no suggestion of a problem, should investigate all of the jurors and raise that before the end of trial?

DUBOSE: Just as they did after the verdict. They can do it during the verdict. There are only 12 people they have to investigate. It's not that difficult.

WAINWRIGHT: Which cases either from this court or the Texas CCA have addressed the Texas constitutionality of art. 42.12(20) and whether that improperly violates the governor's province to issue pardons and commutes sentences?

DUBOSE: It was directly addressed by this court in Baker v. State in 1913. There have been other cases since then...

WAINWRIGHT: Underwood in 1927. Any that have addressed this version of the statute?

DUBOSE: Not that I'm aware of that have directly addressed the constitutionality.

WAINWRIGHT: So even the Texas CCA cases that you cite just address the statute as a matter of statutory interpretation and have not considered the constitutionality _____?

DUBOSE: That's true. With regard to the res gestae statement Volkswagen has mentioned in oral argument that the videotape is in the record. And that's the first time that they've ever invited this court to look at it. I join in that invitation. Look at the videotape and see what you think. The rule under res gestae is that the statement must be made under the stress of excitement caused by a startling event or condition. That is a decision that's left to the TC's discretion. And this court has traditionally granted the TC considerable discretion or latitudiness discretion in making that judgment.

If you look at that videotape you will see that it has not been a long time since the exciting event. The exciting event is still going on.

HECHT: What seems troublesome to me is that is's a nautilus(?) I mean it's one thing to have a known person's res gestae statement offered into evidence. But it seems a little harder when you don't even know who it was. It could have been just a put up. You have no idea who it was. The rule doesn't seem to take that into account. But why isn't that more troublesome because it's a nautilus(?)

DUBOSE: As you say the rule does not mention that the speaker has to be identified. And I think the rule presumes that if it's made under excited circumstances that gives the statement more trustworthiness and reliability regardless of whether the person reveals their name.

ENOCH: It seems to me the threshold of an excited utterance is that it's spontaneous, it happens at a time that they are under excitement, and so it creates liability. It seems to me it's inconsistent with the notion of being spontaneous, excited, under the excitement of the event if a reporter shows up on the scene and says, Bill Smith, I see you've been watching all this. Can I ask you what happened and tell me a little bit about all this? It looks more like a Q & A process that's going on rather than someone just so excited about the event. Wow! They were going so fast. The notion of the excited utterance seems to me pale the moment it becomes more in response to a series of questions upon someone who's coming there to investigate what's happened at the scene and EMS is already there and they are already working on it and some time has passed and this is a witness who is just answering questions.

DUBOSE: It's not like a calm interview in the TV studio. The excited event is still going on, which you will see if you see the videotape. The jaws of life machine is trying to remove someone from the car. You can hear moaning. There's a great deal of confusion and excitement. And you can tell from the voice of both the reporter and the witness that they are both quite excited.

That the witness states that he had gotten down out of his truck to help render first aid and the person he was going to render first aid to had just died. There's another driver who is still in the car who is trying to be extracted. You can hear that moaning. That excited event is still going on. And the standard is whether the person is under the stress of excitement caused by a startling event or condition. And that's what's going on. And the trial judge gets to make that call within their discretion. And unless there's a reason why it's an abuse of discretion that call should not be reversed.

O'NEILL: If during trial you've made the argument repeatedly that this was very important evidence, how can we find it was harmless?

DUBOSE: Two reasons. First, there was other evidence to support the jury's finding that there was a defective product.

O'NEILL: But it was the only eyewitness testimony. So it was the only bolstering testimony.

DUBOSE: Actually it was not the only eyewitness testimony. There were two other people who testified at trial who witnessed the accident.

O'NEILL: Did they testify about the tire blowing?

DUBOSE: They didn't testify about the tire blowing up. They testified about seeing the car cross the medium and hit the other car.

O'NEILL: So it was the only bolstering testimony as to some tire theory whether it blew or the wheel assembly caused it to fall apart. So if it's emphasized by counsel throughout trial and in argument how important this is how can we hold that it's harmless?

DUBOSE: Because again there is two experts who testified at some length about how this happened and their testimony supports the jury's causation finding with out without this witness. The other reason it's cumulative is that the same evidence came in by other means other than the videotape because the reporter testified and there was a transcript of the interview that was admitted into evidence. With regard to the reporter's testimony, there was a discussion prior to trial about the videotape and the reporter. And counsel for Volkswagen said with regard to the reporter that she could testify about what she did and what she asked and he is saying. And the judge says, do you want a running objection. And he said we will deal with this as we go along. And as they were going along, she was asked a question and Volkswagen objected on the grounds that she couldn't interpret what he was saying and what he meant. And after that objection the question was asked what did he tell you? And there was no objection. And so the reporter's testimony comes in without objection. In addition the transcript of that interview comes in without objection. So the same evidence comes in later without objection.

O'NEILL: The transcript of the interview came in without objection and the running objection didn't apply to that?

DUBOSE: The running objection could conceivably have applied to that. But at the time that it came in Volkswagen's attorney was helping them put it on and telling them what to read , and who to read and that sort of thing. But certainly the testimony of the reporter comes in without any objection and that's covered in pre-trial. So that's the other reason why it would be harmless because it's cumulative(?)

HECHT: Let me ask you about Mr. Walker's testimony. I suppose you would agree that under the current state of the law a witness couldn't just say there are tests, A, B, C, D, E, I've reviewed them all, and now my position, my opinion is X. And that would not be enough to establish reliability or admit the evidence? And so there has to be some bridge between that review and what those tests showed to hook up to what the opinion is. And it's unclear from the briefs whether that happened and how it happened. Can you illuminate that.

DUBOSE: Mr. Walker not only testified that he performed tests with Dr. _____. Volkswagen says he did not. He actually did. He also testifies about those tests in the record at vol. 3, pages 127, 169, 171 and 174. Those tests are worked into his testimony. So he testifies about tests. I also don't think there's an absolute rule that you have to perform tests in order to have valid testimony as a reconstruction expert. He did perform tests. One of the cases that's relied upon by Volkswagen in their brief is the Warring v. Womack case from the Austin CA in which an accident reconstruction expert was allowed to testify over objection. The CA affirmed that decision. And his testimony was based on tests, on physical evidence from the scene and on the laws of physics. And that's exactly what this witness testified to.

In addition, even if Mr. Walker's testimony were excluded there is extensive testimony from Dr. Cox, the metallurgist, about causation, which by itself is some evidence to support this jury's finding about causation. So for that reason and in addition the testimony of Mr. Walker even if it were error would be harmless error.

Even if this court decides to overturn a century of precedent and hold that a new trial should be reviewable, if it decides that the best time to review a new trial order is after the second trial, if it decides the best body to make that decision is not the legislature or this court in its rulemaking authority, but in this court's _____ adjudicating this case, and if it decides that the TC must state reasons in the new trial order and that the test is an abuse of discretion, if you go with Volkswagen on all of those points, this still is not a case that should be reviewed or reversed because of an abuse of discretion. Because in this case it is clear from the record why the court granted the motion for new trial. As J. O'Neill pointed out there was motion for new trial that stated factual sufficiency ground and the court said in its order after considering that motion and the arguments of counsel and all the evidence at trial it is granting a new trial in the interest of justice. And I think just because you add that phrase at the end that doesn't invalidate an otherwise valid order.

Volkswagen's only argument is that that motion for new trial was wrong as a matter of law because it only argued that Volkswagen did not meet its burden of proof. And that is just simply wrong. And I encourage you to look at the motion for new trial which is in the clerk's record at pages 175-191. In our brief at pages 20-21 we set forth 9 bullet points that just provide some examples from the motion for new trial where the Ramirez family argued that the evidence demonstrated that our theory of the case was correct, and the jury's failure to find a defect was against the great weight and preponderance of the evidence.

HECHT: For the CA to make that kind of a decision we require that they summarize the whole record. Was that done in the motion or was it just the evidence that supported the plaintiff's position?

DUBOSE: I haven't really looked at it with that question in mind. But my recollection is that it sets out both sides.

HECHT: If the CA made that determination without setting out both sides, we would say they didn't do the analysis properly. And here the trial judge didn't do anything. He just signed an order. But if you say, well maybe in these cases the analysis is whatever is in the motion, you're not sure whether the motion would meet that standard or not.

DUBOSE: I'm not sure whether it would meet the standard that's required at the CA. I'm not sure that we've ever required a motion for new trial to set forth all the evidence in the case. It may be that we want to change that standard. But I think if we want to make a change the best way to make that change is through a policymaking body like the legislature amending the interlocutory appeal statute, or this court sitting in its rule making capacity. And the legislature has considered the question. The legislature did change the rule in the 1920's and two years later repealed that statute. The legislature has said that new trial orders are reviewable in criminal cases since 1986. But has not made that decision with regard to civil cases.

WAINWRIGHT: If you were to disaffiliate yourself from this case and it's long gone would it be your position having significant amount of experience in the appellate area that granting of motions for new trial should be reviewed? Again put to the side how that change, if it happens, should occur. Would that be your position if this case were long gone?

DUBOSE: My position would be that this court should do the same thing in this context that it did in Moriel and the death penalty sanctions case, and in Blackmon v. Chrysler. Blackmon v. Chrysler was death penalty sanctions, and Moriel was punitive damages context. The court said it would be helpful for the TC's to provide reasons in their order, but we're not going to require that they do so in every case. And I think that might be the best rule because there are a lot of cases where it would be easy for the TC to state the reason in the new trial order. But the few cases where they don't want to do so are where this rule is needed the most. J. Phillips talked awhile ago about some of the examples where a problem may come up that the trial judge knows about but it's not something that appears in the record. Whether it's because of jury misconduct, if the judge finds out

that the jury considered things that they shouldn't have considered, rendered the decision based on the wrong reason, our current rules 327 in the Rules of Civ. Proc. and rule 606 of the Rules of Evid. say that you can't take testimony from jurors about why they made their decision. So that reason would never be...

JEFFERSON: What if one of the reasons the TC grants a new trial in the interest of justice is because the court believes it made an error in sustaining an objection on the evidence and permitting the juror to serve or something like that. And that's the reason but he won't declare it. But as a matter of law that reason is no good. And the CA could look at it and determine right off the bat that that is an erroneous reason and if that's their only reason then the new trial should not have been granted. And no one knows. That's kind of the problem with these. We don't know what the basis of the reasons. We don't even know what the interest of justice means in this context. And so isn't that a problem with granting a new trial in the interest of justice when the parties are not permitted to engage the court and the reason for it?

DUBOSE: I'm not sure I understand what you mean by how that would not be proper reason. If the TC decided that a prior ruling that they made...

JEFFERSON: Let's say the TC determined that a ruling that he or she made was wrong and it affected the whole case and for that reason a new trial had been granted. Now if you and I knew and could hear what the TC was thinking, we could say as a matter of law the ruling that you made new trial was exactly appropriate. It would have been an abuse of discretion to do anything else. And yet the TC believed otherwise and grants a new trial because of his erroneous interpretation of what the law was. Well that's a legal thing that the CA could consider. We can consider and most people might even agree that that's not a basis for granting a new trial. So why shouldn't we ask the courts to tell us so that we can at least look at that and parties can make determinations to look at that.

DUBOSE: I think that's one of those situations where it would be clear from the record whether the court's reason was erroneous or not.

JEFFERSON: No. Because without respect to what the motion for new trial has, we said that the court can grant a new trial in the interest of justice on its own initiative. And I'm just saying what if the court's initiative is based on a fallacious legal interpretation of the rule.

DUBOSE: I meant that if the court stated that reason in the record it would be clear from the record whether that was a correct ruling. But it's more troubling in cases where the concern that the TC has is something that doesn't appear from the record, whether it's an inattentive juror, or a mentally challenged juror or a juror misconduct in the jury room.

JEFFERSON: If the TC determines that the reason to grant the new trial is irreconcilable conflict, that's reviewable, and the court states that. Let's assume the court doesn't state that but that's the ruling that the court is basing its new trial on. But the order just says in the interest of

justice. Well there's no way to take a look at it is what I'm saying. There's no way to review that even though we've declared that's something that ought to be reviewable and we can reverse the court.

DUBOSE: If we are going to assume that trial judges are going to evade the law...

JEFFERSON: Just make mistakes is what I'm saying.

DUBOSE: If that was the reason but rather than stating that reason he just said in the interest of justice rather than stating the real reason, even we required them to state reasons and we eliminate in the interest of justice as a reason, there will still be things that they can find that are not reflected in the record if corrupt judges are absolutely determined to evade the law requiring them to state a reason will not change that. There will still be reasons to do that.

JEFFERSON: I guess my point it, if it's not a corrupt judge, but a judge that makes a mistake, which happens from time to time

DUBOSE: And if the judge makes a mistake then they can state their reason on the record.

JEFFERSON: Why shouldn't we require that?

DUBOSE: Because there are certain cases where the reason will not be reflected in the record. And if we only require them to state a reason but the record doesn't reflect that, then that won't be meaningful review which is the whole reason for making the change.

* * * * * * * * * *

REBUTTAL

PHILLIPS: Can't hear.

LIBERATO: If the court determines that the motion indeed was one on great weight and preponderance, then I agree that the case assuming that you ruled against us on all the other grounds and that's the only issue, then I agree that the case would have to go back to the CA, but that would also assume that the court made the determination that there wasn't any waiver by the plaintiffs that by failing to ask for that relief that they didn't waive it. It would also mean...

PHILLIPS: We really don't want people to have to come up with motions on something that hasn't been a good law for 100 years do we?

LIBERATO: Well we asked for it. I understand your point. But in our briefing we have always asked for rendition based on this point and that seems reasonable enough to put them on notice to at least make some sort of request short of an affirmance if the court reverses. And so it seems reasonable to me anyway that they should have to do that.

WAINWRIGHT: If there are other cases out there pending where opposing counsel has not been so kind to put the other side on notice they are just out of luck?

LIBERATO: I think they should have to ask for alternative relief. It is not unusual for a party to ask. And it seems very common to me for either party to ask for alternative relief. If they don't get everything they want they can ask for something less. And so the general concept before any court is that before you can get something you should ask for it even if it is an alternative request for relief.

But going back to your question J. Phillips. I think you also have to make the determination that you can't decide this motion as a matter of law. And I know that you said if we look at this and find it's a great weight and preponderance. So I think those are - I guess the bottom line is, I agree that putting everything else aside that this court can't make a decision about great weight and preponderance. But I also think that even assuming the court makes that determination that before it can finally rule on the case it's got to next go to our challenge to the expert because that's a rendition point for us. And then if it fails to hold for us on that point then probably the next logical place to go is on the excited utterance issue because even though that requires a new trial it will give direction in the new trial if there is a trial and then finally the disqualified juror.

O'NEILL: Did the reporter testify as to what the witness had said without objection?

LIBERATO: Our objection is that, we cite to it in a lengthy footnote, we object to the tape and any references to it. And we had a running objection to that. And she described the tape. We didn't waive that. We were doing everything we could do to object to that and to keep that out. And I think it's fair to say to refer to it specifically that when objection is to the tape and any references to it that that covers the reporter.

WAINWRIGHT: Did the judge acknowledge the running objection?

LIBERATO: Yes. The judge acknowledged and allowed it and so there's no issue