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Supreme Court of Texas.
RELIANCE STEEL & ALUMINUM CO. and Samuel Alvarado, Petitioners,
v.
Michael SEVCIK and Cathy Loth, Respondents.
No. 06-0422.

December 4, 2007

Appearances:
Thomas C. Wright, Houston, Texas.
Russell H. McMains, Corpus Christi, TX.
David W. Holman, Houston, Texas.

Before:

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

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CHIEF JUSTICE JEFFERSON: Reliance Steel and Aluminum Company v. Michael Sevcik and Cathy Loth.

SPEAKER: May it please the Court. Mr. Wright will present argument for the petitioners. Petitioners have reserved five minutes.

ORAL ARGUMENT OF MR. THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER

MR. WRIGHT: May it please the Court. I'd like to talk about two issues today. What do you do when there's no evidence of the number the jury found for damages and what do you do when a party deliberately introduces prejudicial evidence that this Court and the legislature has cautioned against, what should be the remedy?

First the damages issue, this Court has held in Murdoch, Formosa and other cases including Galow and Freeam that a no evidence challenge can be made to the amount of damages. When there is no evidence to support the amount of damages found but there is some evidence of some damage when a remand is appropriate.

The cases have applied that to a number of different kinds of damages including past medical which was an issue in the Murdoch case. What we have here are three kinds of damages that we are talking about today: past medical, future medical, and lost earning capacity. All of those are pecuniary damages. They are all economic damages as defined by the legislature in Chapter 41 in the Civil Practice & Remedies Code.

They should all be treated as subject to the same kinds of no evidence of tax that this Court has sustained in the cases that I've mentioned.

Now the Corpus Christi Court of Appeals properly held that there was no evidence to support the past medical damage, but then they rendered judgment on a lower amount. A lower amount that was not established as a matter of law by the record and they had no power to do that. They -- you serve the jury's function in doing that rather than remanding for trial at least on that issue.

And the question of course would come to mind, gee, do we have to send the case back for a new trial for a 6,000-dollar error. Well that issue is not gonna be a problem in this case because we don't have just a 6,000-dollar error. We have an error in the future [inaudible]. I know the Court is well aware of the record. The future medicals in this case consist mostly of testimony from a psychologist who happened not coincidentally to run a program in Houston that his program might be a benefit to the plaintiff. Now whether that's evidence of anything is questionable but even if you say, well that's some evidence that this program was medically necessary which in there --

JUSTICE BRISTER: What if we agree with you and all these, their conditional waiver and say, okay, if you agree with them just forget it we'll drop all those.

MR. WRIGHT: -- well, that conditional waiver in attempt to bargain with the court in our view is not effective because of the infection of the whole case by this evidence of wealth and that's you know a point that all develop now if your Honor wishes

JUSTICE HECHT: But before you -- just before you leave the point, how is the rendition of the lower number any different in effect from a remittitur if the judgment creditor then object?

MR. WRIGHT: Well, it's not different in effect but the remedy is not available. Remittitur is available where there is some evidence but factually insufficient evidence to support the award, or there is no evidence to support the number at all. I don't believe our remittitur is appropriate and whether this Court can even do a remittitur is a question that was left open in the -- Oh, the name will come to me but the case about 20 years ago --

JUSTICE HECHT: But doesn't seem to make much sense to have a remittitur to allow a remittitur procedure for factually insufficient evidence but not for legally insufficient evidence.

MR. WRIGHT: Well, the question is, whether if there is no evidence at all to support the number which is easier to see in the pecuniary lost area where there are majors of damage that are available.

JUSTICE WAINWRIGHT: Assume the past medicals area and then answer the question.

MR. WRIGHT: Well, the past medical. If the Court of Appeals had said, well, we will remit this, they cannot do that because they said there's no evidence of it. Had they held and had the fact that there was factually insufficient but legally sufficient evidence of the amount awarded then they could have suggested a remittitur and the other side could have accepted that or not.

So, but the evidence in fact all of these areas and -- let me go to that. This is not the case where some evidence just slipped out or some witness was on the stand and accidentally said something. This is deposition testimony. It's in writing everybody knows what it says and know what the question is, and know what the answer is. And they go up to the judge and the plaintiff say, "Judge, we are entitled to introduce this evidence of gross sales of $1.9 billion last year" for the purpose of showing that the defendant is not a mom and pop

operation. Now what that does mean? Well that means that the defendant has a lot of money and can well afford whatever the jury wants to award.

JUSTICE MEDINA: How's that -- is it any different if we say Reliance, your client, attempted to show that this plaintiff was wealthy or perhaps purchased a Suburban or had a new home? How's that any different?

MR. WRIGHT: Well I would say two things about that. First of all, the trial judge sustained the plaintiff's subjection to the question about the new Suburban.

JUSTICE MEDINA: Let's say he didn't?

MR. WRIGHT: Well, you know then you'd have to ask, well which came first, I mean you know, to some extent the defense lawyer has to have a right to try to fight back when the judge has done this. So I don't think they are off-setting in any regard. Nobody was asking for money to be awarded against the plaintiff and there was the necessity of having some evidence about her earnings because she is making a claim for lost earning capacity which normally is proved by a history of earnings. But in this case -- yeah.

JUSTICE WILLETT: -- set a stage in the context of how this information got elicited and known to the jury. I'm sort of confused on that.

MR. WRIGHT: All right. Well of course the corporate rep deposition had been taken prior to trial. The question was asked, how big of a company is Reliance Steel? And he said, "well we had 1.9 billion in sales last year," gross sales.

And so I believe there was motion in limine granted at any event the parties knew enough to go to the bench and have a bench conference about whether this evidence ought to come in. So outside the presence of the jury, our side makes the objection but this is irrelevant and they're not even seeking punitive damages. And the judge says you're not even seeking punitive damages doesn't quite make this less relevant and the plaintiff says, well, we are entitled to show that they are not mom and pop operation which nobody had argued. It had already come out that they had offices in different places and so forth. And so they want to put this in for the specific prohibited purpose of showing that the defendant is a big company and if you look at the order of proof in the case they start by putting Mr. Sevcik on the stand to say how the accident happened and to talk about his injuries which fortunately were not that severe then they put two doctors on to talk about the severity of the plaintiff's injury, of the other plaintiff Ms. Loth, and then they put on this evidence and by the way the defendant is loaded. You know, that information was not lost on this jury.

JUSTICE MEDINA: You say if the judge did this and later on during the course of the trial for whatever reason realize that he or she may have aired with an instruction to the jury to disregard that evidence cure this problem?

MR. WRIGHT: I doubt it, you know. It is not as socially offensive as making a racial comment or religious comment but it has a similar effect. You cannot unring the bell. You can't tell the jury, "oh you heard that evidence before, please disregard it."

JUSTICE MEDINA: Sure you can. Otherwise, the distraction wouldn't be allowed for a trial court to give to disregard that.

MR. WRIGHT: I'm not saying the trial court can't do it. I'm just saying in this circumstance, in this evidence. You see in the Moriel case this Court specifically identified evidence of wealth as being pernicious?

JUSTICE MEDINA: I understand that.

MR. WRIGHT: Okay.

JUSTICE MEDINA: Don't you have to consider the totality of the statement and the totality of the trial to determine whether or not there is harm if any?

MR. WRIGHT: Well I think, when somebody deliberately violates what this Court said, what the legislature has said about wealth evidence goes up and intentionally ask the court to put it in for the purpose of showing how big the defendant is. There are to be presumed harm. I mean, there's not that many kinds of evidence that could be this incendiary in a trial to say how wealthy the defendant is.

JUSTICE WILLETT: But the sum total of what was introduced, was that single deposition sentence?

MR. WRIGHT: Yes. And our position is, you don't need to repeat 1.9 billion in order for the jury to get it. In fact, every time you ask jurors after a trial and those of you being trial judges know this. One of the complaints you would get is, why did they repeat so much, we got it the first time. Well they got this the first time.

CHIEF JUSTICE JEFFERSON: If instead of the monetary amount, the question was you know, how many drivers do you have, how many buildings, what's your payload on a typical day, and that sort of thing that gave the clear impression that this was a very large company. Would that had been prejudicial as well?

MR. WRIGHT: Well, it wouldn't be nearly as prejudicial because it would be more difficult for the jury to tie that to any particular number. Yes, maybe they have a lot of drivers but companies can have a lot of employees and still be losing money.

CHIEF JUSTICE JEFFERSON: And so my question is, isn't this is the form of vicarious liability had been stipulated because I understand that that's evidence in hand. Correct?

MR. WRIGHT: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: Are there other ways for them to have established that it's not a mom and pop operation?

MR. WRIGHT: Well, yes they could have. They could have said you have offices in other states and you know -- and so forth. And they did put in some of that kind of evidence. So --

JUSTICE BRISTER: Did the defendant done anything to the jury, in front of the jury to suggest it was a mom and pop operation?

MR. WRIGHT: No, your Honor. There's not a thing in the record where the jury had suggested that. The defense had suggested that. He was talking about, of course mostly talking about his driver and so forth, but you know there was no suggestion that the company was not -- you know -- able to take care of whatever happen but frankly --

JUSTICE WILLETT: How can --

MR. WRIGHT: Yes?

JUSTICE WILLETT: -- how can we sort of define or conclude with confidence that the jury's verdicts turned on what you say was this improper reference.

MR. WRIGHT: Well, first I think that you could make the rule that says it's presumed, when it's under these circumstances, when it's deliberate, when it's evidenced, this evidence is not even admissible had [inaudible] impunitive damages.

JUSTICE WILLETT: If we don't presume harm?

MR. WRIGHT: If you don't presume harm, you look at what happen and if you look at the damage awards where this lady had worked for a week, or who knows how long she couldn't say. Making $630 a week, 10 years before the trial and that turns into a $750,000 worth for lost earning

capacity with no visible means of support. And you look at the medical, the future medical, that's more than twice the number that they proved on their best day, you know the numbers are inflated.

CHIEF JUSTICE JEFFERSON: So you're pretty confident that with the new trial that the damages the jury finds would be significantly less?

MR. WRIGHT: I'm confident of this. The new trial would be tried on the merge of the case. If this Court says that this evidence should not be and should not have been admitted. And if this Court does not say that, if this Court says this is harmless error, this kind of evidence is gonna come in every trial because the plaintiff is gonna say, well I can argue harmless error and try to settle this on appeal for some fraction of the inflated judgment and verdict that I get. So, that's the dilemma this Court faces.

These -- so back to these damages for a minute, you know, this Court has said in the MacGyver case 50 years ago, that yes, you don't need to -- you know, prove to the dollar every bit of lost earning capacity. But when you are trying to collect money on lost earning capacity from a specialized business or profession a higher level of proof is required. That's the case both of us rely on.

Well, this plaintiff was attempting to get lost earning capacity from their sewing business. She did not make any kind of level of proof about how the business would go, what kind of profits you would make and so forth. Or criticize for talking about lost profits but that's exactly what we believe they were trying to do. Now, you can't say that you know in every case of infants and so forth that there's got to be a past earning history but you could say and in fact the MacGyver case does say when a person has been working --

CHIEF JUSTICE JEFFERSON: But the jury instructed that Reliance would pay any damages set against its driver.

MR. WRIGHT: I don't believe the jury was instructed that, they just --

CHIEF JUSTICE JEFFERSON: Let us get at Justice Willett's question again. How can we assume that this reference with the 1.9 billion enters the jury's deliberation with reflective question that has been of not against as to Reliance but only as to Sam Alvarado, I think his name was.

MR. WRIGHT: Well, the jury was told he was an employee of the company. I think the jury is going to assume that the company is gonna take care of it.

JUSTICE BRISTER: The company's name is on the top of the chart profit, right?

MR. WRIGHT: Well, ah yes, the company's name is in the style of the case and I heard a lot about it before that stipulation was entered into. So you know I don't think they had any question about who is gonna pay. They knew that if it is up to Mr. Alvarado they wouldn't, he wouldn't had been able to have a lawyer there probably so --

JUSTICE MEDINA: And how do you know that? How did you jump to that conclusion?

MR. WRIGHT: The driver? I don't think the truck driver is gonna racked up enough assets in his own --

JUSTICE MEDINA: How do you know that? I mean, you just assuming things. Why can't the jury assume that your company has 500,000 or 500 billion worth of assets?

MR. WRIGHT: They can assume what they like. But the problem is, are you gonna let the plaintiff lawyer go in and prove that and prove it with improper evidence that doesn't even show net worth but to try to inflate an idea of wealth. If these cases are gonna be tried on

who's got the most money, they could be trialed a lot quicker because you could prove that right away. But, you know, yes I was assuming they would figured that, maybe that's a false assumption but I think the jury didn't have any confusion about Reliance Steel being Mr. Alvarado's employer and they didn't have any confusion about Reliance Steel being a big company because of this evidence that was erroneously let in.

CHIEF JUSTICE JEFFERSON: Further questions? Thank you Mr. Wright. The Court is ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Holman will present argument for the respondents.

JUSTICE MEDINA: Mr. Holman how's the admissibility of the things net worth any different from allowing an insurance issue coming to the case?

ORAL ARGUMENT OF MR. DAVID W. HOLMAN ON BEHALF OF THE RESPONDENT

MR. HOLMAN: It was quite different in this situation. The Court as you know, has an abuse of discretion on standard of review. And the question is, whether the admission of evidence was an abuse of discretion, it's the first question. The second question is whether the admission of the whole case turned upon that admission of evidence nor to be reversible. In this case, the Reliance Steel was still a party and the question was why did they drive their driver so hard, Mr. Alvarado. This was on a Friday afternoon at three o'clock, he's driving back to San Antonio on a dead end run after having driven 61 hours that week.

JUSTICE MEDINA: They were required to work 60 and a 40-hour a week?

MR. HOLMAN: Correct. And the plaintiff attorney wanted to show that this was a big enough company that had the resources to provide more drivers and not to have to work the driver so hard.

JUSTICE BRISTER: Explain that to me. That's -- so the argument is bigger companies can afford to be less productive than smaller companies?

MR. HOLMAN: I think the argument is that, if you have a small company and you only have one driver, you only have two drivers then they have to do all the work. In this case --

JUSTICE WAINWRIGHT: So a small company can commit negligence that a big company cannot?

MR. HOLMAN: No, I think --

JUSTICE WAINWRIGHT: It sounds like this where you're headed?

MR. HOLMAN: It's degrees of negligence your Honor and --

JUSTICE BRISTER: And why is it -- if you're driving him too far? Why is it any more negligent for a big company to do that than a small company?

MR. HOLMAN: I don't think it is but I think the question is --

JUSTICE BRISTER: It looks to me like the argument is exactly that big companies can afford to be less productive which of course we know they can't being in the long run, they'll go out of business if they do that but that makes the argument just the big companies can afford big verdicts.

MR. HOLMAN: No I think, it means that they probably have more resources in order to prevent being negligent.

JUSTICE BRISTER: Well, but that's the point there. You're just -- the argument is to tell the jury that they have more resources.

MR. HOLMAN: Well, and this is the question that you all asked. Was there evidence about how big the company was? And there was. It is part of this presentation unobjected to. Question is, how many drivers do you have? We have 3000 drivers. Mr. Wright admitted that there's evidence in the record that they had offices in other places.

JUSTICE BRISTER: So there was no need to show the jury that this is not a mom and pop operation?

MR. HOLMAN: It was all part of the presentation. It was all part of the submission that was submitted.

JUSTICE BRISTER: Well, this is special part. How rich the defendant is. This is special part like how rich the plaintiff is, is special part. And so we didn't need that part to show this was not a mom and pop operation.

MR. HOLMAN: And your Honor, where I judge I might not have admitted this evidence. It might have been error for me to do that.

JUSTICE BRISTER: Right.

MR. HOLMAN: But it's an abuse of discretion standard. Did the judge have discretion to decide whether this evidence was relevant or not relevant?

JUSTICE BRISTER: And of course they don't give judges that discretion on insurance of we know. What will happen if you tell the jury there is an insurance.

MR. HOLMAN: And that's a good example, your Honor, because the admission of evidence of insured is not always reversible error.

JUSTICE BRISTER: Right.

MR. HOLMAN: There's no presumed harm in Texas Law with regard to these sort of things.

JUSTICE BRISTER: But we don't look forward that you mentioned insurance. We don't treat it like admission of a hearsay statement. We don't look around to say that you emphasized insurance. I mean, we look pretty much, we look at the verdict to say that the verdict show that the jury knew there was an insurance.

MR. HOLMAN: Well, the question here is in the admission of evidence is, did the whole judgment turn on this evidence that was admitted? And here we know that it wasn't. That the whole judgment didn't return --

JUSTICE BRISTER: Did they ever said on insurance, we look and just did the whole judgment turn on insurance. I mean surely, the judgment turns on the evidence at least a little even when they found out there's insurance.

MR. HOLMAN: But that's why it's so hard to reverse the case on the admission or exclusion of evidence because you have to show that the evidence was so important that an improper judgment was caused because of that admission or exclusion. We don't look for error-free trials. There is going to be things in the heat of the moment that the judge admits that probably shouldn't be admitted. There's gonna be things that the judge excludes that probably shouldn't be excluded. The way we sift that out is to determine whether that error was so significant that it should result in the reversal of the whole judgment. The way we do that, was we look at the entire record. When we looked at the entire record here this one sentence about annual sales of this company was never referred to by anybody again.

JUSTICE BRISTER: What if the one sentence was to the defendant's rights?

MR. HOLMAN: Well of course, that's I mean, this Court -- there are

certain things that are incurable error.

JUSTICE BRISTER: Right.

MR. HOLMAN: That is.

JUSTICE BRISTER: So that's our question. The question presented precisely by this case. Should how rich one of the party is to be one of those questions like race that we just not gonna allow.

MR. HOLMAN: Never has been and they haven't set a single case in the history of Texas jurisprudence where it has been. In every case in order to --

JUSTICE BRISTER: That's was pretty close.

MR. HOLMAN: -- well, in order to determine even with insurance, in order to determine whether it is reversible error, the Court looks to whether it's evidence of the whole case tried upon.

JUSTICE BRISTER: Everybody pretty much knows if the throw in that the defendant insured, there's gonna be a problem affirming that case.

MR. HOLMAN: Well, the only way you --

JUSTICE BRISTER: Even if you thrown in just a little.

MR. HOLMAN: -- well, the only way you get there is to disregard the harmless error.

JUSTICE MEDINA: It seems to me --

MR. HOLMAN: I think that's a good case to reaffirm the harmless error rule.

JUSTICE MEDINA: -- it seems to me most people are aware that there's an insurance involved in some schemes and the state requires every driver to have insurance and so forth so perhaps the better review is the use of discretion.

MR. HOLMAN: Yes. We have in this case with this other evidence that they had 3,000 employees and they had other evidence that makes this cumulative error so that would be harmless as well but there's other reasons.

In this case, they say -- well this is, we know that this is error because the verdict was inflated. This verdict wasn't inflated. The jury gave far less than was requested of them. In fact, with Michael Sevcik they only gave him $100,000, with Cathy Loth they gave her less than what's requested in every element damages except for medical and that in this case this is an odd case because this is a very narrow issue presented to this Court. There is no challenge to liability here. The driver admitted he was negligent on the stand. There is no challenge to the fact that she is permanently brain-injured. She has a traumatic brain injury. Doctors got up on the stand and testified to that, that is a permanent injury she will never recover from. There's no dispute in the evidence that she can never work again. They didn't even present any experts to trial. Okay. There's no evidence that's inflated.

JUSTICE GREEN: That seems to me the highlight of the problem here. The fact your opponent was saying a moment ago that if we allow this type of evidence to come in on a case like this and we are arguing about well, whether there's an abuse of discretion or not and you don't have case of gross negligence. It's a lot easier to sustain damages whether or not punitive damages, these are those who are get overturned frequently. So the easy way to do this is you just convince the Judge on some pretext argument that they should allow this type of inflated worth of evidence to come in and never mention it again. Then, you can argue as you're doing here; well, it was never argued and it can't be shown to be a harmful error or not, but it's out there in attempt to inflate the damages. There can be no other explanation for it, it seems to me. So how is this not? If we were to say that there is no showing

abuse of discretion here, why isn't this just a template for future plaintiffs to try to do this?

MR. HOLMAN: Well then, all evidence will be subject to the harmless error rule and in other cases in Texas jurisprudence, we've cited where people have tried to get in evidence of wealth and that sort of thing. They've applied the harmless error rule and in some cases it's reversible because they relied upon an argument, they relied upon another things. Just this, the mere statement, that they had 1.9 billion in sales doesn't mean the jury is as Justice Brister said in the [inaudible] case doesn't mean that the jury's cattled that would be stampeded to an improper verdict. I think that when you look at this verdict, you can see the jury --

JUSTICE BRISTER: The thing I'm troubled about in this case it was the word billion. 190 thousand, I think I'd probably agree with you, maybe even 800 thousand but when you say billion -- I mean that's -- I mean -- this is Waller County, I mean, how many billionaires are there probably? How many businesses maybe bloomed now, but, I don't know if they sell a billion dollars worth of ice cream, but that's big numbers in Waller County, any -- no matter what word goes in front of it, billion is big.

MR. HOLMAN: And I understood that. The Waller County is a bunch of conservative Germans and I think that's the reason that they didn't give the plaintiff everything that the plaintiff was asking for. But, you know, you have -- in order to get there, where you wanna get, that they, somehow because of their knowledge about Reliance, you have to assume this assumption that Mr. Wright asked you to assume, that they knew that Reliance was gonna be paying this judgment. Reliance wasn't even mentioning in the jury charge as far as who is responsible for paying these damages with sum of money paid now in cash with Samuel Alvarado responsible for paying not Reliance Steel. So there's a lot of hurdles you'd have to get to. You have to get to this presumed form. You have to get to an assumption that the jury knew about Reliance Steel wasn't part of the charge and Reliance Steel was not even mentioned.

JUSTICE HECHT: The harmless error rule is always hard because we're trying to look back, second guess, and you know, when you listen to the appellant explanations about what was harmful and what wouldn't it, it's not always convincing. But I'm wondering, a part of that is because the explanation tries to be objective. Trying to look at, well, what happened in the trial and how much we've argued? I'm wondering, what's your review on a situation like this where a council leader knows or should know that this evidence is probably not messing with it. I mean, there's a very strong argument at why it should not be admitted. And he tries anyway, not just in the heat of the moment, but in a conference outside in the presence of the jury, everybody is sitting there. The Judges got time to think about it. It seems that counsel, the pro-counsel must have been thinking, this is gonna help me, if I get this in. To what extent should we take that into account in looking at the harmless error rule, however many years later it has been since the case was trialed.

MR. HOLMAN: I think that's a lot of sub position too, and the reason, the reason I feel that, is that because there's nothing in the evidence that supports that and if he believed that helped him so much, you would think that he would maybe even included it at some point in this argument. And he didn't do that, and I think that's why the harmless error rule is done. If you ask me --

JUSTICE JOHNSON: Yeah, of course.

MR. HOLMAN: -- I would -- I'm sorry.

JUSTICE JOHNSON: You got the best of all worlds, you got it in, like you say, like Justice Brister said, when you say billion to most jurors, there is -- it's just gonna break up so -- in fairness to the argument, this is a little different. Good Lord, you're [inaudible].

MR. HOLMAN: It works the other way as well, Justice Hecht asked me what I would do in that situation and if I were in the situation of Mr. Wright's client, representing Mr. Wright's client, and I've been in that situation, I'll try to make sure that the Court, this Court, this Appellate Court knows the harm. If I think that this is gonna be a significant harm, I'm talking about this harm at every stage I can with this judge. I'm moving from mistrial. I'm requesting limiting instruction. I'm doing something. All they did here is make the objection and go on. Nobody ever mentioned this piece of evidence ever again, not the defense, not the plaintiffs, not the judge. This evidence was never referred to again and we would have to overrule the harmless error rule in order to adopt their argument.

JUSTICE: And what --

JUSTICE WAINWRIGHT: What is the -- excuse me, Justice. What is the argument that 1.9 billion in gross sales is relevant at all?

MR. HOLMAN: Well, the argument is in our brief. They are --

JUSTICE WAINWRIGHT: Sales doesn't tell you anything about net worth.

MR. HOLMAN: No. It --

JUSTICE WAINWRIGHT: -- entirely different animals --

MR.HOLMAN: And the question --

JUSTICE WAINWRIGHT: -- the company could have 1.9 billion in gross sales and 2 billion in cost and be worthless, or it could be very valuable. Gross sales tells you absolutely nothing in this context about the entity. Why? I mean, what's the argument that it's relevant in this type of a case?

MR. HOLMAN: Yeah. I think the question was asked. And this is the question and answer. How big is your company? And the guy says, I think we did 1.9 billion in annual sales last year or in 2002. And so, it's like I agree with you. I don't think that that really tells you anything about the net worth of the company, but it certainly tells you something about the resources that they have available to him. How big the company is or --

JUSTICE WAINWRIGHT: Perhaps, but I mean, you could have sales that are based on passive income, contractor relationships, and investment income. It doesn't tell you -- now say, 3000 employees may tell you something, or offices in 20 states and you still have to wonder about the relevance there but telling a billions of dollars of sales seems to me they have very little of any connection to relevance. I mean, if that's the case or like this.

MR. HOLMAN: In relevance is, where the evidence has any tendency to make a fact more or less probable. And in this situation, the fact that they were trying to make more probable is that they have plenty of resources and therefore, they shouldn't have done this. And that was what he was trying to establish, the plaintiff attorney was trying to establish. As I say, if I were the judge, I may have said that doesn't come in. You can get the stuff in about the driver's, but I don't have anything to do with financial information. But that's a discretionary judgment call and the way we measure that discretion is by, you know, looking at the, whether there's any relevance and if we find that there's error, whether it's reversible error.

JUSTICE WAINWRIGHT: Well, as said that's a discretionary judgment

call. I guess the argument was that this company had the resources to have additional drivers so that they wouldn't be fatigued and cause this type of accident.

MR. HOLMAN: That's how I understand it.

JUSTICE WAINWRIGHT: So, doesn't that suggest the different negligence standard for a small trucking company versus a large trucking company. The small trucking company doesn't have the resources to have any more than one driver. In the argument then that was proposed at trial to the judge that the negligence standard will be different because a driver in a big company is held to a higher standard than a driver in a little company.

MR. HOLMAN: I think that's true as a fact, I mean, I think that's what reality is. And you're looking at what a reasonable person in the situation of this company would do. And so you have to see what the situation of that company in order to determine what negligence is.

JUSTICE WAINWRIGHT: We may be missing each other a little bit. A driver on a truck on a highway has a standard of care to satisfy regardless of whether they come from --

MR. HOLMAN: I --

JUSTICE WAINWRIGHT: -- a big company or little company.

MR. HOLMAN: I agree with that Justice Wainwright.

JUSTICE WAINWRIGHT: And whether there's somebody else back in the office to expel them after a day or two or not, doesn't change that standard of care on the highway when that guy is behind the wheel.

MR. HOLMAN: No question about it.

JUSTICE WAINWRIGHT: If it does, I'm gonna start looking at company labels when I'm driving and changing lanes.

MR. HOLMAN: No question about it. I agree with you.

JUSTICE WAINWRIGHT: So the argument that additional resources as well as drivers place into the standard of care, again I'm finding it hard to see how that's even a defensible statement, as to the standard of care for that driver on the highway.

MR. HOLMAN: And you may find your Honor, that -- that it was error to admit that evidence. But I think --

JUSTICE WAINWRIGHT: But you state like -- harmless --

MR. HOLMAN: -- we're beyond that because what Mr. Wright's client wants you to do is to overrule the harmless error rule and you can't do that in this instance because this is an instance where --

JUSTICE BRISTER: Assume, we don't want to reverse every case where there's a mistake. So just, let's assume we're gonna do it. But there are some things like race that we want a message to be clear to everybody. Never. Never. And the way we do that is by saying, we're not going to look at harmless error for this. If you do that, you're doing it over. We don't want to do that on all the hearsay rules and everything else in the rules of evidence but this we don't want a system where people say, forget about who did anything wrong. These people have money and my client is brain damaged and she needs it. Now, how do we tell people don't do that and make sure that they don't.

MR. HOLMAN: Well, I think if you want to create a fundamental error in Texas or incurable error, you can do that. You are the Supreme Court, you can do that but I'm telling you that --

JUSTICE BRISTER: Right --

MR. HOLMAN: -- the incurable error --

JUSTICE BRISTER: Mr. Wright says all we need to do is presume there. That if this is clear enough, defense attorneys, plaintiff attorneys, whoever knows they shouldn't do this, and if they walk into it deliberately, then they're gonna have, rather than the other side

haven't proved something went wrong, they're gonna have to prove to us why didn't make -- couldn't have made any difference in their case.

MR. HOLMAN: As your Honor knows, the incurable error doctrine at a solid history in Texas jurisprudence. It is --

JUSTICE BRISTER: I agree with this.

MR. HOLMAN: What is incurable for one person may even not be incurable for others.

JUSTICE BRISTER: I agree with it.

MR. HOLMAN: And so, you know, you would be going down the wrong road if you wanted to create some kind of category because you could never make it precise enough, so that it would apply in every instance. You know, you have a situation where the discretion of the Court is at play and should be a play.

JUSTICE JOHNSON: Counsel, all damages just a moment. We require pretty stringed of proof of past damages, property damage, medical damage, and things of that nature. What about future medical? How can -- isn't there -- shouldn't we at least look for something solid other than just allowing the jury to say, well, I think it ought to be about $200,000. Aren't those completely different standards and should they be?

MR. HOLMAN: Yes, your Honor. I've seen my time is almost done. May I have a moment to respond?

JUSTICE JOHNSON: Tell it to the Chief.

MR. HOLMAN: May I have moment to respond.

CHIEF JUSTICE JEFFERSON: Please respond.

MR. HOLMAN: The Reliance Steel has argued that these damages were liquidated in the future. Future damages are never liquidated. They are always uncertain. They are uncertain because we don't know what arising costs of medical care are. We don't know what inflation is gonna do. We don't know what new treatments are gonna be available. That's why the jury is not bound by expert testimony with regards to future medical, with regard to future loss of earning capacity. We are only talking about the capacity that is lost. How do you measure that in the future? We don't know if the person will ever get a job because they will never get a job.

JUSTICE JOHNSON: Which --

MR. HOLMAN: -- they're impaired. They can never work again.

JUSTICE JOHNSON: And I agree. I agree with him. So, do we just allow a jury to fill in a blank.

MR. HOLMAN: No. MacGyver v. Gloria is the case. You need to look at it because that's the case that set the standard. And it says that each case is judged in its own facts and that damages are proved to the extent they are susceptible of extermination within this case. We don't manufacture evidence this early. You use what evidence you have to try and establish what the loss of earning capacity was, and what the loss medical was.

JUSTICE JOHNSON: And then we just let the jury fill in the blank.

MR. HOLMAN: And then we -- and you know, when there's a complex injury like in the case of a brain injury, when there's complex injury, I believe that the jury should have more discretion because I can't imagine any more complex injury than brain damage and therefore, I think that we are in the realm of letting the jury decide whether proper evidence or damages are provided, and that they are provided with some evidence to support some measure of damages and they don't just pick a number out of thin air.

CHIEF JUSTICE JEFFERSON: Other questions?

JUSTICE WAINWRIGHT: One other question, Chief, if I may. As to

past medicals, the Court of Appeals said that there was legally, factually, sufficient evidence of $33,985.23 of past medicals. The jury came back with $40,000 for past medicals. Is the amount of past medicals in this record established as a matter of law?

MR. HOLMAN: I believe it is and here's why.

JUSTICE WAINWRIGHT: At $33,985.23?

Mr. HOLMAN: -- 982 -- There was no evidence in contrary, number one. But number two, on their argument in the Court of Appeals, Reliance Steel's argument in the Court of Appeals was, they proved only $33,982. They didn't prove $40,000. They proved only $33,982. And therefore, you should reverse and remand because they presented some evidence but they didn't present the evidence of $40,000. We argued --

JUSTICE WAINWRIGHT: If that was only the issue in the case. What remedy would you be asking?

MR. HOLMAN: Well, the Court of Appeals did the right thing by -- if they believed that we didn't provide evidence which is worth $40,000 we argued that it should, but if they believed that the evidence was only about $33,982, then the Court of Appeals did the proper thing by reforming the judgment down to what the evidence was and was proved as stated by them in their briefs.

JUSTICE WAINWRIGHT: And proven by as a matter of law.

MR. HOLMAN: And that as they said, it's legally sufficient evidence and factually sufficient evidence. The Court has discretion under Rule 43 to reduce the amount of damages to the amount that is proven by the evidence.

CHIEF JUSTICE JEFFERSON: Further questions. Thank you, Mr. Holman.

MR. HOLMAN: Thank you.

SPEAKER: May it please the Court. Mr. McMains will present the rebuttal for the petitioners.

REBUTTAL ARGUMENT OF MR. RUSSELL H. MCMAINS ON BEHALF OF THE PETITIONER

MR. MCMAINS: May it please the Court.

JUSTICE MEDINA: Was it invasive that wealth is such a concern to anybody, maybe it skunks the box like insurance does, why don't we just eliminate all corporate defendants from the pleadings and put the employee up there so that the jury will be totally unaware that there is a corporation behind the negligence acts of its employees?

MR. MCMAINS: Well, I mean, there was never any effort obviously to do that. We're not contending that there's no evidence of a corporation or plenty of poor corporations in the country.

JUSTICE MEDINA: There are plenty mom and pop stores like Sam Wal-Mart and his family.

MR. MCMAINS: Right. But it was -- of course the scope was stipulated in this case. There was not even a pleading of negligence on the part of the company with regards to driving the drivers too long. The only pleading is of negligence with regards to the negligent conduct of the driver himself, not of the company. That's the only cause of action that's even asserted. There are allegations that were found basically on appeal about causation that are buried in the pleadings, but they aren't the basis of any negligence claim against Reliance. The company knows that they represent Reliance. They've known it from the time that there was voir dire. They knew it from not only the caption in the case. Probably knew that on the basis of the

argument and the fact that that's what the evidence says.

JUSTICE MEDINA: The jury -- you said the company, you mean the jury knows.

MR. MCMAINS: Jury knows, yeah sure.

JUSTICE MEDINA: Right. Then why there is a harmless error for this one statement to come in. If it's already known that there's --

MR. MCMAINS: Once again because it's wealth evidence and because it's wealth evidence that this Court initially in Transport v. Moriel took posture of saying that the reason we have a bifurcated proceeding --

JUSTICE MEDINA: I understand that, in your case --

MR. MCMAINS: -- is precisely to avoid this wealth evidence.

JUSTICE MEDINA: Your case is where insurance is invoked in the trial court. And those cases aren't always reversed.

MR. MCMAINS: Correct. But they also -- weren't always embodied by statute which is true in this case.

JUSTICE WILLETT: What about Mr. Holman's point that the admission at trial, if it were such a big deal then you would've made it a bigger deal. You would've asked for a limiting instruction --

MR. MCMAINS: Fact of the matter we did --

JUSTICE WILLETT: -- or mistrial.

MR. MCMAINS: In the first place, when you have an objection overruled, you have no requirement to go any further in order to preserve any complaint. There is no preservation issue there are makeable. Secondly, to continue to request relief before the jury does nothing but emphasize the problem and that doesn't help you in the least, but the point is that there is no kind of requirement that you have to have a request for an instruction.

Once you have had an objection overruled, you only may go further with regards to request for instructions and there is even basically authority that you never have to ask for a mistrial as being a pre-requisite for reversible error. But even with regards to that, I've always operated under the assumption on my old school evidence and procedure that it blankly told me that you keep going until the Court denies you to relief and you can stop there. If he has denied you the relief, you preserve it and that's exactly what happened in this case because the objection was overruled. Once it's overruled, it's in the record, in the case, for the jury to consider it for whatever purposes they want to and we think they've considered it for illicit purposes. There's no other explanation.

The argument about the fact that the suggestion, that Ms. Loth has permanent injury, she didn't seek medical attention for 2 1/2 years, number one, with regards to this idea that the medical, or past medical is established as a matter of what, 2 1/2 years after the accident before he knew that medical is incurred incident. Secondly, the neurologist that testified in that case said that he couldn't say that any of her condition was permanent. Third, it was competing psychological testimony that she had done average on other psychological test and there was no problems. The need for medication shows she only needs, she had headaches once or twice a month and with regards to the need to take medication. There are evidence that they tried to put up on the board and that they were trying to get the worth is $37,000. She got $15,000 in past loss earnings for 3 1/2 years. For 23 years, if you take the long side of their argument and their expert, she got $750,000 in future loss earning capacity.

JUSTIC GREEN: Mr. McMains, how do we draw --

MR. MCMAINS: -- 500% more.

JUSTICE GREEN: How do we draw a line here? If 1.9 billion is too much, where do we say, it's [inaudible]?

MR. MCMAINS: It's not that, your Honor. My belief is, and I believe that it is not a question of overruling the harmless error. It is the fact that when this Court, initially in Moriel and the legislature subsequently in Chapter 41 says, this evidence is so pernicious, it should not be admitted in the liability phase of the trial. At the election of the defendant, should not be admitted at all when you have a statutory directive to that effect that is violated for the precise reason of showing wealth when there is no claim of gross ever going to be made and no claim of primary liability that would justify the admission of the evidence --

JUSTICE GREEN: Its a matter of --

MR. MCMAINS: -- we take that sufficient.

JUSTICE GREEN: It's a matter of intent.

MR. MCMAINS: Well, it's a matter of intent coupled with a fact that it is a legislatively prescribed that we think it supplies a legitimate basis for suggesting that there are greater harm in this case.

CHIEF JUSTICE JEFFERSON: Any further questions?

MR. MCMAINS: Thank you, your Honor.

CHIEF JUSTICE JEFFERSON: Case on the file is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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