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Supreme Court of Texas.
Weeks Marine, Inc.
v.
Maximino Garza.
No. 10-0435.

October 4, 2011.

Appearances:

Frank E. Pérez of Frank E. Pérez & Associates, P.C., for Petitioner.
Edward John 'Jack' O'Neill, Jr. of Pierce & O'Neill, LLP, for Respondent.

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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ORAL ARGUMENT OF FRANK E. PÉREZ ON BEHALF OF THE PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the last cause, 10-0435 Weeks Marine v. Maximino Garza.

MARSHAL: May it please the Court, Mr. Pérez will present argument for the Petitioner and Mr. Knight will present argument for the Amicus. Petitioner has reserved five minutes for rebuttal. Mr. Pérez will open with the first ten minutes and will also present the rebuttal.

ATTORNEY FRANK PÉREZ: May it please the Court, good morning. I'd like to start out with the waiver issue that the Court of Appeals adversely ruled against Weeks Marine. The fundamental fairness concept presents itself with this particular issue and here's why. Texas Rule of Appellate Procedure 38(1)(f) specifically states that and the case law that interprets that particular rule, particularly states that simply stated appellate courts should reach the merits of an appeal whenever reasonably possible. That's the Perry v. Cohen case. Hagberg v. Pasadena specifically states even though the specific point may not be recited with a statement of issues presented, that point is not waved if raised within the body of the brief. Here's why those concepts are extremely important. The entirety of Weeks Marine's brief and the issues presented before this court.

JUSTICE DAVID M. MEDINA: Let's say you're correct there, Mr. Pérez, and that we're supposed to review these briefs liberally so that we can get to the merits of the case. Let's talk about the evidence here. It seems to me that there's just basically a battle of your medical doctors, a battle of the experts, as it were, that examined

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the Plaintiff in this case.

ATTORNEY FRANK PÉREZ: That could be one interpretation of the particular evidence in this case. However, what is clearly evident throughout the trial record in this case and in particular the medical references that we make in the brief is that there is a complete absence of evidence, medical or otherwise, that the failure by Weeks Marine to pay maintenance and cure somehow caused an additional injury over and above that of February 16, 2006. There's no evidence at all, whatsoever that the failure of Weeks Marine to pay for the medical treatment by this gentleman, Mr. Garza, resulted in an aggravation of the injury of February 16, 2006. In fact, the medical rep, evidence that we cited, specifically the MRIs from 2000 and 2006 show the spine absolutely the same.

JUSTICE EVA M. GUZMAN: Well, he testified though that his pain was progressively worse; and surely the jury could have inferred or concluded that had that surgery taken place back in 2006, the pain would, for him, would not have gotten progressively worse.

ATTORNEY FRANK PÉREZ: I disagree, respectfully, and here's why. Mr. Garza went to his doctor, Dr. Fred Pérez, as early as October of 2006. Surgery was performed under that doctor in November of 2007.

JUSTICE EVA M. GUZMAN: When did the injury occur?

ATTORNEY FRANK PÉREZ: I'm sorry?

JUSTICE EVA M. GUZMAN: When did the injury occur?

ATTORNEY FRANK PÉREZ: February 15, 2006.

JUSTICE EVA M. GUZMAN: Okay and from the beginning, he was complaining of pain.

ATTORNEY FRANK PÉREZ: Correct.

JUSTICE EVA M. GUZMAN: Back in 2000 when he was injured -- I mean the jury also considered what happened in 2000, couldn't they have when he was injured? And again they refused the treatment initially and sent him back to work right away. Is that a factor the jury could have considered?

ATTORNEY FRANK PÉREZ: No, Your Honor, not under the evidence of this case, not under the pleadings of this case. Mr. Garza was suing for the injury of February 15, 2006, none other.

JUSTICE DAVID M. MEDINA: No, but you're arguing that that was a pre-existing injury, - essentially.

ATTORNEY FRANK PÉREZ: Not necessarily, no. I'm just arguing what we argued is that the spine has been the same from 2000 to 2006, so the --

JUSTICE DAVID M. MEDINA: So the bang on his head had no effect on his spine.

ATTORNEY FRANK PÉREZ: Correct, correct, it did not. And the fact that an injury, a physical injury, can feel worse with the progression of time is an everyday fact of life and that's why we have doctors and that's why we have conservative care. That's why sometimes conservative care proceeds to more drastic measures, such as surgery, but they don't--

JUSTICE DAVID M. MEDINA: But he was initially sent to and treated by the so-called company doctor.

ATTORNEY FRANK PÉREZ: I don't like that term; however, yes. When he complained the next day on February 16, 2006 of his injury, he was sent to a doctor that was paid for by the company, yes, and those doctors

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are routinely set up and identified prior to an operation being -- when it's bid on a certain area, doctors are identified.

JUSTICE DAVID M. MEDINA: Then he went to a second visit and complained again to the same doctor.

ATTORNEY FRANK PÉREZ: He did.

JUSTICE DAVID M. MEDINA: And the doctor said, - well you have a bulge or something's wrong with your neck; go back to work and then after that, he saught his own doctor, correct?

ATTORNEY FRANK PÉREZ: I understand, if I recall the medical testimony correctly, that he went to the doctor that was paid for by Weeks Marine twice, and both times, if I recall correctly, it was diagnosed to be a soft tissue injury and he was returned to work. Now--

JUSTICE EVA M. GUZMAN: Well I guess that's my point. He was returned to work in February of 2006, right? Or whatever it was right after that injury occurred, correct?

ATTORNEY FRANK PÉREZ: Correct.

JUSTICE EVA M. GUZMAN: Why can't the aggravation have started immediately after the accident? Because he was hit with a flat steel bar approximately an inch thick and two and a half inches wide. That's a pretty substantial blunt object to be hit with. Why couldn't the injury or the aggravation have started immediately after the accident?

ATTORNEY FRANK PÉREZ: There's no evidence that he did. There's no medical testimony that an aggravated -- whatever happened on February 15, 2006 became worse, was aggravated in any way by any medical testimony or by any testimony.

JUSTICE DAVID M. MEDINA: So we're not --

JUSTICE EVA M. GUZMAN: It obviously became worse because he eventually had surgery for what happened back in February. So it obviously became worse, right?

ATTORNEY FRANK PÉREZ: Not necessarily.

JUSTICE DAVID M. MEDINA: Jury to disregard, are we to disregard his own testimony that he felt worse, that he experienced some pain? Is that no evidence?

ATTORNEY FRANK PÉREZ: I'm not suggesting that the Court disregard any evidence. What I'm suggesting, what I'm--

JUSTICE DAVID M. MEDINA: But some evidence though, right?

ATTORNEY FRANK PÉREZ: I'm sorry?

JUSTICE DAVID M. MEDINA: That's some evidence. That's some evidence as to his -- he is experiencing pain. He's testified that he had pain.

ATTORNEY FRANK PÉREZ: He testified that he had pain. He testified that it got worse over time. But I would respectfully suggest to this Court that the record in every personal injury case that this Court reviews reveals the same progression of pain, especially when you progress to the point of having the surgery. What's important, which I would like to point the court out to, which we did in our brief, is that the condition, the physical

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condition was the same according to the MRIs, okay? There was never any evidence presented of record that there was an aggravation of the initial injury.

JUSTICE EVA M. GUZMAN: At what point did Garza begin to complain about the, the, the pain in, right after going back to work back in February or March or when?

ATTORNEY FRANK PÉREZ: Well, actually, he went -- he had the injury February 15, 2006. The next day, I think that afternoon, he went to rest. The next day he woke up. He told his supervisor that he was in pain. They sent him to the doctor and I believe he rested or went back to light-duty work the rest of the time. However, he was off for the next nine days starting on February 20, 2006. He had been seeing other doctors for other conditions, including knee surgery back in the Valley. So he came back. He complained again. Weeks Marine sent him to the doctor again.

JUSTICE DAVID M. MEDINA: Let's talk about this maintenance and cure issue. Is there any discretion on the employers whether or not they cannot do that, as what appears to be the case here, provide maintenance and care after a seaman's been injured?

ATTORNEY FRANK PÉREZ: Not -- maintenance and care can basically be viewed as a maritime equivalent -- maybe not equivalent, but the maritime partner to Workers Comp. Okay? If a seaman is injured in the service of the vessel without fault of his own, then he is entitled to maintenance and cure. However, that doesn't mean that the employer, the ship owner has to pay it right away. The ship owner's entitled to do an investigation. Part of that investigation is to look at the medical records and evaluate whether or not he was injured. Whether or not he's taken outside the service of the ship and what type of medical care should be provided. Shortly after this particular incident, there's discrepancy or there's conflict in the testimony, Mr. Garza decided he wasn't going to come back to work. Testified that he had no intention of coming back to work. At that time, the evidence is clear that he had a lawyer and that he was going to go see Dr. Fred Pérez. That's fine. But what the Court has to understand that this man never did not receive medical care from day one, from February 16, 2006. He had any kind of medical care he asked for. When he asked for it from Weeks Marine, he got it. When he went to Dr. Fred Pérez, he got it. Now Dr. Fred Pérez was his chosen doctor. There's no testimony that he missed any medical care whatsoever. He got everything he wanted in the time that his doctor, his own chosen trained doctor dictated. So just because Weeks Marine did not pay the maintenance and cure, somebody did, and somebody paid it timely and he got all the medical care timely. So there's a disconnect between the concept that, well, Weeks Marine you didn't pay maintenance and cure and, well, you didn't get the medical care you needed, that's not what the record shows. What I'm asking the court to do is look at the evidence, understand that this man received every appointment he wanted. Everyone he wanted to go to, this was his chosen doctor. When the time came for his chosen doctor to tell him you need surgery, he got it. Weeks Marine did not control Dr. Fred Pérez, couldn't control Dr. Fred Pérez. So Mr. Garza did not, not receive medical care. He got everything he was entitled to by people other than Weeks Marine. So the whole concept that Weeks Marine's failure to pay maintenance and cure somehow caused an aggravation to his injury, how did that, how does that happen? It's logically in my view, respectfully, impossible. It can't happen.

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Pérez, I see that your time has expired. Are there any additional questions?

ATTORNEY FRANK PÉREZ: I apologize. I wasn't looking at the light.

CHIEF JUSTICE WALLACE B. JEFFERSON: That's all right. Thank you, Counsel. Amicus.

ATTORNEY STEVEN J. KNIGHT: May it please the Court. I'd first like to thank he Court and the parties for permitting King Fisher Marine to appear today as a friend of the Court. The issue presented in Weeks Marine's issue number three calls upon this court to define and decide a unique issue in Texas law and that is the proper parameters of the specific orders doctrine in Jones Act cases. The manner in which this Court defines and

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adopts this rule could have a very serious impact on the contributory negligence defense in these types of cases. Properly framed, the Specific Orders Doctrine applies only when a plaintiff is specifically ordered to perform a task in a specific manner such that the plaintiff has no other alternative way to perform the task available to him. In those instances, any criticism of the plaintiff's conduct is necessarily based on assumption of the risk principles, which are banned in Jones Act cases. So the Specific Orders Doctrine is a test to find out based on the evidence whether the plaintiff had some reasonable alternative. In cases where the plaintiff had a reasonable alternative or a general order is given, then any criticism of the plaintiff's conduct is properly characterized as contributory negligence.

JUSTICE DAVID M. MEDINA: Okay, let's say this was a specific order and so he has the exception on the contributory negligence. What I'm concerned about is double recovery. Can you address that? Is that outside the parameters of your argument?

ATTORNEY STEVEN J. KNIGHT: I believe that's with in the parameters of Mr. Pérez in that as far as King Fisher's concerned, what we're asking the Court to do is to very carefully and decidedly define what a Specific Orders issue is. In this case, there's not a whole lot of guidance. There's two intermediate appellate courts that have contemplated what a Specific Orders concept is. And the body of case law that's out there is primarily federal court cases. Those federal court cases provide very significant guidance to this Court. And what they hold, almost without exception, is that the Specific Orders concept does not apply where a mere general order is given to perform a task. If alternatives are available to the plaintiff and the plaintiff does not utilize those safe alternatives then that is not a Specific Order case and a jury's finding of contributory negligence has to be honored because that does not invoke any impermissible concepts of assumption of the risk. Cases that we've cited in our amicus brief, such as the Fashauer case, Jenkins, Alholm and DuBose, consistently recognize that a jury's finding of contributory negligence cannot be set aside where there is evidence that the plaintiff had available a safe alternative, but didn't utilize the safe alternative. Specific Orders only apply to prevent the reduction of a plaintiff's damages where there is evidence that the plaintiff did not have any other choice, no other alternative way to perform the task where a Specific Order commands the precise manner and method of performing the task. There is--

JUSTICE PAUL W. GREEN: What's an example of a Specific Order?

ATTORNEY STEVEN J. KNIGHT: A Specific Order is, an example is go and perform a particular task.

JUSTICE PAUL W. GREEN: What task?

ATTORNEY STEVEN J. KNIGHT: Using this way. Let's say, take a wrench and walk across the floor and go in a straight path even though there's a pile of nails there, that's the way you have to walk to get to that task. If the plaintiff does what he's told to do and then sues the employer and says I got hurt based on this task, then the employer says well you were contributorily negligent. You took a very silly path. He had to. The Specific Order commanded the exact manner of performance. He could not have gone around those nails because the order prevented him from doing so. The one case that throws a wrench into this nearly uniform body of law is the Simeonoff case. And this Court in commenting on what a Specific Order is in addressing Weeks's issues should reject Simeonoff outright. Simeonoff is the only case that has held that the reduction -- or that has set aside a contributory negligence finding, even though it was undisputed in the case, that that plaintiff had available a safer alternative and chose not to use it. In that case, banned assumption of the risks concepts were not at play, and the court had no principled reason to set aside a contributory negligence finding. So I want to thank the Court. I think that this is a very unique opportunity for the Court to explain Texas law in the wake of a nearly uniformed body of federal law with the exception of what I believe Simeonoff to be and that is an aberration. It misapplies the law and this Court ought not follow it. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court is ready to hear argument from the Respondent.

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MARSHAL: May it please the Court Mr. O'Neill will present argument for the Respondent.

ORAL ARGUMENT OF EDWARD JOHN "JACK" O'NEILL, JR., ON BEHALF OF THE RESPONDENT

ATTORNEY EDWARD JOHN O'NEILL, JR.: Good morning, and may it please the Court, I'm Jack O'Neill for the Respondent. Let me begin by going directly to the point raised by Justice Medina and discussed by him and by Justice Guzman, and that is the evidence to support the jury's answer to question 13. Question 13 was the damages issue. Question 13 asked what evidence, it asked about the injury sustained by Mr. Garza. You have question 12 and you have question 13. Question 12 is the liability question that predicatory to question 13. And question 12, the questions that Justice Medina raised don't really relate to question 12. They relate to question 13, which is the damages finding. And question 13 asked what amount would compensate Mr. Garza for the injuries that he sustained as a result of Weeks's failure to pay maintenance and cure? And as I understood Justice Medina's question. that's what he was asking about, what evidence is there in this record that Mr. Garza sustained separate injuries as a result of Weeks's failure to pay maintenance and cure? So let me spend a few minutes talking about that. I think at the outset, we need to put that question in its proper framework. And I think the proper framework has to begin with the realization that it is undisputed in this case that there was no legal sufficiency challenge mounted by the Petitioner to the $2,500,000 number that was rendered by the jury or found by the jury in response to question 13. So let me start out, I think that's very important, let me start out by saying that, that this is not a question of the amount. It's not a question of sticker shock looking at the $2,500,000 that the jury awarded in question number 13. That's not at issue here because it is undisputed that there was no legal sufficiency challenge that was made below to the amount that was found.

JUSTICE DALE WAINWRIGHT: That does tend to get your attention though - doesn't it, Counsel?

ATTORNEY EDWARD JOHN O'NEILL, JR.: I'm sorry, Your Honor, I'm hard of hearing.

JUSTICE DALE WAINWRIGHT: The distinction in the numbers does tend to get one's attention. The actual damages from the jury were about a million two; the aggravation damages from that injury were double that 2.5 million. That tends to get your attention though doesn't it, Counsel?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Yep. There are - there were two damages questions submitted. You are correct. One of them was question seven, one of them was question 13. Question seven was the damages attributable to the incident itself, the negligence. And question number 13 was did this man incur separate injuries as the result of the failure to pay maintenance and cure. The only point I'm making here is that in analyzing this issue and the evidence to support issue 13, which was raised by Justice Medina, the first thing we have to realize is, we might as well be analyzing that as if the jury had found $5,000 worth of damages. The amount is not an issue. The second thing I think we have to realize is the type of injuries that the law says will suffice as injuries for -- that can be sustained by a person for failure to pay maintenance and cure and these are set forth on page 31 of our brief with appropriate authorities. And it's very important to the analysis to realize what type of injuries will suffice as a matter of law. And what those cases there say on page 31 of our brief, there a couple of federal court cases. One of them is a Ninth Circuit case one of them is an 11th Circuit case, excuse me one's a Fifth Circuit case and one's an 11th Circuit case and what they say is that the type of injury that will suffice, that a person can sustain for the failure to pay maintenance and cure are things like additional pain, aggravation of pain and very importantly, a delay in the time of recovery, a delay in the time of the person's recovery. So now that we have kind of set the stage by considering that the amount is not an issue, that the real question is whether this man sustained any damages as a result of Weeks's failure to pay maintenance and cure. And now that we have, number two, seen what type of damages suffice, an aggravation of pain, a prolongation of pain, a prolongation of the recovery period, then all we have to do is look at the record and see whether or not there is more than a scintilla of evidence to support that this man sustained those types of injuries as a result of the failure to pay maintenance and cure.

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JUSTICE EVA M. GUZMAN: How do you respond to--

CHIEF JUSTICE WALLACE B. JEFFERSON: What if you--go ahead.

JUSTICE EVA M. GUZMAN: No, Chief Justice, please.

CHIEF JUSTICE WALLACE B. JEFFERSON: What if the only injury, the only pain that we're talking about in this latter instance was connected with the pre-existing condition and had nothing to do with the injury in February of '06? Then you would lose on maintenance and cure, correct?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Your Honor--

CHIEF JUSTICE WALLACE B. JEFFERSON: And that's what they're saying. There's no medical evidence to the contrary.

ATTORNEY EDWARD JOHN O'NEILL, JR.: Well, Your Honor, I disagree that there's no evidence to the contrary. To answer the Court's question I think we're walking a very fine line here. When somebody is hurt -- and I'll get into the evidence here in just a minute and I think the court will see as a result of the evidence I'm about to set forth that, yes, he did suffer head and neck injuries as a result of this incident on February 15, 2006; there's no question about that. The question is whether or not after Weeks stopped paying -- you have to look at this chronologically. After Weeks stopped paying maintenance and cure, did this man suffer or incur the types of injuries that the law says suffice as legally cognizable injuries incurred by a person for failure to pay maintenance and cure? And, look, what happened here is this man was -- it comes through in the record and it goes without saying that this man is kind of the employee that all of us would like to employ. I mean this is a man who worked for 28 years on this dredge. He worked the first 20 years for another company. Then Weeks Marine purchased the company that he had worked for. He worked for eight years on this dredge. He had missed virtually no work. On February 15th there is a piece of metal about this big that's two and a half inches thick - wide and an inch thick that's under friction that this man's supervisor has pulled back and it's torque loaded and this man is given an order to go get some tools. There's a --

JUSTICE PAUL W. GREEN: Well, we understand all of that. I guess the question I have then is where -- don't you need some medical testimony rather than just the plaintiff himself to say this happened to me and as a consequence, medically there is a causation element here that's connected. And your opponent says there's no evidence of that. Do you disagree?

ATTORNEY EDWARD JOHN O'NEILL, JR.: I disagree and here's why. He suffered head and neck injuries on February 15th. He went to a company doctor on February 16, 2006 that was paid for by Weeks. He returned to work and finished his hitch, which ended on February 20th. He returned to the company doctor on March 8, 2006 complaining of a burning in his neck. The following week, he had an MRI and at that point, Weeks stopped paying for his cure, for his medical expenses and they terminated him on May 17th. So the question is did this man suffer legally cognizable injuries after the failure to pay, after paying of maintenance and cure stopped and here's the answer to your question, Justice Green. After that there's testimony that his condition worsened. On April 26, 2006, he saw another doctor, who prescribed surgery and diagnosed that his condition had worsened and it had become symptomatic. On May 17, 2006, Weeks refused to pay and fired him. All this time, this man was suffering complications from the original injury. The doctor that he saw, that Weeks refused to pay for, recommended surgery. This is in the record. This man suffered an aggravation of his initial condition to the point where his initial pain and condition had become symptomatic requiring surgery. That surgery did not occur until October of 2007. And so how much evidence do you need that's more than--I'm sorry.

JUSTICE PAUL W. GREEN: So there's evidence in the record then from the doctor, the second treating doctor, that the injury that he was suffering post, after he was terminated was an aggravation or a continuation of the in-

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jury that he suffered on the incident in question. There's -- the doctor said so?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Your Honor, I think that they're on a timeline looked at chronologically, I think there are two pieces to the timeline. The evidence that Weeks wants to discuss is what the company doctor did. The company doctor's --

JUSTICE PAUL W. GREEN: Well, my question is very simple. I'm just asking if there's medical evidence that the injury, that the surgery and so forth was a consequence of the accident complained about?

ATTORNEY EDWARD JOHN O'NEILL, JR.: There is, Your Honor. It is a consequence of the worsening of this man's neck condition.

JUSTICE PAUL W. GREEN: My question is, -is there medical testimony to that effect?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Your Honor, in the record there was a woman who took the stand. She was an assistant risk manager. I think her name was Teresa -- I'm sorry, I forget her last name. And in the examination of Teresa Torio, I believe was her name. And what you have in that testimony is the recognition and this evidence was introduced that there were four instances recorded in Weeks's file of subsequent diagnoses of this man needing surgery as a result of an aggravation of a -- his existing injury and as a result of his injury having worsened and become symptomatic. Now when you look at the types of injuries that will suffice: a prolongation of the pain, a prolongation of the recovery period and then you combine that with the fact that because of the failure to pay, this man did not have surgery for over a year later, I respectfully suggest that there's more than a scintilla of evidence present in this record that this man sustained the types of legally cognizable injuries that the law says suffice for the failure to pay maintenance and cure.

JUSTICE PHIL JOHNSON: Mr. O'Neill, I have maybe a simple question; it seems like it may be simple. Opposing Counsel said there's no evidence. There's no evidence that Mr. Garza sought any type of treatment that he did not get because of Weeks's failure to pay. Is that, do you agree with that statement or do you disagree with that statement?

ATTORNEY EDWARD JOHN O'NEILL, JR.: I disagree with it and I don't think it's relevant to the analysis.

JUSTICE PHIL JOHNSON: Well, but if you disagree with it, what evidence is there in the record that he did try to get treatment or see a physician or something of that nature that he did not get because Weeks refused to pay?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Well, I think that was virtually admitted by Mr. Pérez when Mr. Pérez just told the court that Mr. Garza received all--

JUSTICE PHIL JOHNSON: Well, but let me go back to my -- let me go back to my question. Would you tell us what evidence there is in the record of the plaintiff attempting to get treatment and not being able to receive that treatment because Weeks refused to pay. Would you tell us what evidence you believe is in the record of that.

ATTORNEY EDWARD JOHN O'NEILL, JR.: There came a point in time, Justice Johnson, where Weeks refused to pay. That's admitted.

JUSTICE PHIL JOHNSON: Right.

ATTORNEY EDWARD JOHN O'NEILL, JR.: After that Mr. Garza saw, and this is in the record, two, three or maybe four, I forget, doctors. Those doctors diagnosed Mr. Garza with an aggravation of his condition with the diagnosis that his condition had worsened and it had become symptomatic.

JUSTICE PHIL JOHNSON: Okay, did he try to see any doctor, that he was -- is there evidence that he tried to

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see a doctor that refused to see him because Weeks would not pay?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Well, Weeks stopped paying --

JUSTICE PHIL JOHNSON: I understand that.

ATTORNEY EDWARD JOHN O'NEILL, JR.: -- after that Mr. Pérez is right that he saw doctors and that those doctors were paid. The man had no money to pay a doctor.

JUSTICE PHIL JOHNSON: I understand that, but I'm asking you is there any evidence that he tried to see a doctor that he could not see because Weeks refused to pay?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Your Honor, I think it's obvious from the record. If you worked for me, and I stopped --

JUSTICE PHIL JOHNSON: Okay. Let me go to another question. Did he try to get surgery at any time that someone refused to do the surgery because Weeks refused to pay?

ATTORNEY EDWARD JOHN O'NEILL, JR.: It was not an issue of Weeks's refusal to pay because, by that time, Weeks had fired him and was refusing to pay any further medical expenses. So he had to turn someplace else to get his medical expenses paid for. He did have surgery to correct what had been diagnosed, and this is in the record, as an aggravated condition that had become symptomatic requiring surgery after Weeks refused to pay for anymore doctor visits for the man.

JUSTICE PHIL JOHNSON: So is there evidence that he tried to get treatment at any time that he did not receive it?

ATTORNEY EDWARD JOHN O'NEILL, JR.: There is no evidence that this man was ever denied treatment for his condition.

JUSTICE EVA M. GUZMAN: Is it a requirement though that you provide proper medical care and is that failure to provide--

ATTORNEY EDWARD JOHN O'NEILL, JR.: I'm sorry.

JUSTICE EVA M. GUZMAN: Is there a requirement that you provide proper medical care versus just any medical care and is the failure to provide proper medical care back in February of 2006 evidence of their failure to provide proper care because proper care would have meant surgery?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Proper care would have obviously meant surgery shortly before the time they terminated him and especially after they terminated him. This man was in a position after being, he had been told by a company doctor. Look, Weeks spent $1200 for this man's medical expenses for a company doctor to tell him to get back to work. Then they terminated him. The evidence is in the record that his condition worsened, it aggravated to the point where his neck condition had become symptomatic and he required surgery. Weeks refused to pay, point blank refused to pay any further medical expenses of this man who was suffering a worsened condition to the point where it needed surgery. Eventually, he had surgery.

JUSTICE DAVID M. MEDINA: Mr. O'Neill before you're out of time her, can you discuss the direct order issue and the issue of perhaps double recovery?

ATTORNEY EDWARD JOHN O'NEILL, JR.: The specific order issue?

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JUSTICE DAVID M. MEDINA: Yes, sir.

ATTORNEY EDWARD JOHN O'NEILL, JR.: You're talking about the order.

JUSTICE DAVID M. MEDINA: Raised by --

ATTORNEY EDWARD JOHN O'NEILL, JR.: The amicus issue, and --

JUSTICE DAVID M. MEDINA: Right.

ATTORNEY EDWARD JOHN O'NEILL, JR.: Yeah, I'd like to discuss that. Let me just begin by saying with respect to the amicus position here, maybe it's just me, but I don't understand the amicus position in this case. I mean, the amicus position in this case on a bottom- line basis and just look at the amicus brief; it's at the end of the brief. They are asking this Court to do one thing and they are asking this Court to rule that the Simeonoff case, a case rendered in 2001 by the Ninth Circuit Federal Court of Appeals, was incorrectly decided on the specific order exception. That's the reason the amicus has filed the brief. Let me talk about the specific order exception for a minute and how it relates to this case. The jury found that at the time of this incident, Mr. Garza was operating under specific orders that had been given to him. There is something called the Specific Orders Exception to Comparative Negligence. If Mr. Garza was operating under specific orders at the time of this incident, then the 20% negligence, apportioned to Mr. Garza, does not apply and his damages are not reduced by 20%. That's what this specific order issue is all about.

JUSTICE DAVID M. MEDINA: I got that. Was this a specific order or not?

ATTORNEY EDWARD JOHN O'NEILL, JR.: This incident occurred as the result -- most incidents occur from physical things. This incident occurred as the result of two physical things. Physical thing number one, a man pulling back on a friction lever and letting it go. Physical event number two, and this is undisputed, Mr. Garza being at a place where the friction lever, once it let go, hit him. It's undisputed that Mr. Garza's supervisor, shortly before this incident occurred, told him, go get some tools. Undisputed. It's also undisputed that there was only one path for him to follow to get the tools. So getting back again to why this incident occurred, it was the pulling back of a friction lever and the negligent release of it combined with Mr. Garza being in exactly the wrong place at the wrong time. And the reason why he was in the wrong place at the wrong time, and this is undisputed, is that he had been told go get some tools and there was only one path the man could walk to get the tools. In short, this incident would not have occurred but for the order given to Mr. Garza to go get tools. Because if that order had not been given, this man could have released this friction lever all day long and it wouldn't have hit anybody. And as a result, I respectfully suggest that the man was operating under specific orders at the time of the incident. The specific order given to him to get his tools directly contributed to this incident. It's why this incident occurred and it is, to me, his damages should not be reduced by 20% because the specific order exception, he was operating under specific orders at the time of this incident. I see that my time is up. I'll be happy to answer questions, any further questions anyone might have.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any additional questions?

ATTORNEY EDWARD JOHN O'NEILL, JR.: Thank you.

REBUTTAL ARGUMENT OF FRANK E. PÉREZ ON BEHALF OF PETITIONER

JUSTICE EVA M. GUZMAN: Mr. Pérez, I have a few questions on the maintenance and cure.

ATTORNEY FRANK PÉREZ: Yes.

JUSTICE EVA M. GUZMAN: Is it your contention that on this record there was never a refusal by Weeks to

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pay maintenance and cure?

ATTORNEY FRANK PÉREZ: No. No, in fact when --

JUSTICE EVA M. GUZMAN: I mean that is your contention.

ATTORNEY FRANK PÉREZ: That there was never a refusal to pay maintenance and cure? Not when he asked it of us, when he was still employed by us. He left, the testimony is very clear that he left. He left; when he got a doctor, when he got a lawyer, he never intended to come back to work for Weeks Marine. That's undisputed.

JUSTICE DAVID M. MEDINA: There's nothing wrong with getting a lawyer, right?

ATTORNEY FRANK PÉREZ: No.

JUSTICE DAVID M. MEDINA: Well, you make it sound like it's a bad act here.

ATTORNEY FRANK PÉREZ: I want people to come to me. It's a good thing. It's a good thing. However, when we started getting bills, I saw we, when Weeks Marine starting getting bills from the other doctor, yes, they were not paying those bills. However, even Mr. Garza's briefs specifically state these bills were paid by other sources and I made that point very, very clear.

JUSTICE EVA M. GUZMAN: So there was a refusal at some point to give him the medical care that he ultimately needed, correct?

ATTORNEY FRANK PÉREZ: Well needed was disputed. We had out experts dispute that --

JUSTICE EVA M. GUZMAN: Well, but ultimately it was deemed appropriate by a treating physician and believed by the jury.

ATTORNEY FRANK PÉREZ: Apparently so, yes.

JUSTICE EVA M. GUZMAN: Now under the maintenance and cure provision, the discussions, at least in U.S. Supreme Court jurisprudence are about adequate medical care or proper medical care. Do you meet your obligation to provide maintenance and cure by providing any medical care or substandard medical care or sending people to your company physicians that don't treat them properly?

ATTORNEY FRANK PÉREZ: No. No, and we're not taking that position, but there's no evidence in this record at all that any of the medical care that Weeks Marine paid for was inadequate. It just wasn't.
JUSTICE EVA M. GUZMAN: Well it's certainly sending him back to work shortly after that accident when ultimately the injury was aggravated. Was that adequate medical care?

ATTORNEY FRANK PÉREZ: I dispute your, the Court's characterization that the injury was aggravated because I think what the court of appeals and Mr. Garza are confusing here, and it is confusing the argument as a whole is that injury versus damages. Pain and suffering, whether it's increased, decreased, continued, is the Court's, the law's characterization of a type of element of damage that he would be entitled to if and only if he has an injury. Under the aggravation theory, you still have to have a separate and distinct injury over and above the injury that was sustained on February 15, 2006. Once you establish that additional injury, okay? Whether it be a worsened medical condition that can be verifiable by medicine, then you might, if you can prove damages, get those damages. And it is true, we didn't object or we didn't assign as error the amount of money in question 13. We're saying you never get to question 13 because you never proved another injury. Dr. Fred Pérez, his chosen physician, and Dr. Gary Freeman, the doctor that we hired, an orthopedic surgeon that we hired to review the films both agreed that the MRIs of 2000, 2004 and 2006 show no change in the cervical spine.

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JUSTICE DALE WAINWRIGHT: Okay. In that connection, as I understand the record, Dr. Pérez testified that the surgery was "necessary to relieve his pain", Garza's pain, "and increase his function." And he testified that the accident in question, February 2006, made the surgery necessary as indicated by the MRI. Do you have a problem with any of that, the statement of what the record shows from what I just said?

ATTORNEY FRANK PÉREZ: That's what the record shows. We do dispute, we did dispute the accuracy of Dr. Pérez's no relation, his assessment. But still even Dr. Pérez when he says that, he refers the injury and his so-called need for surgery to the injury of February 15, 2006. He doesn't say, oh by the way, you know what? Weeks Marine's failure to pay maintenance and cure, failure to pay my bill aggravated his injury because there's no evidence from Dr. Pérez or otherwise that Weeks Marine, that he didn't get the medical care he needed and that's what's key here. The court of appeals in their first footnote says I didn't object to the damages. No, that's right I didn't, why? There's evidence he had pain and suffering, he had mental anguish for either of the damage issues. The problem is they're both the same because there's no defining injury after February 15, 2006 to indicate another injury. I would be happy to answer any questions of the Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: It appears there are no additional questions; therefore, the cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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