ORAL ARGUMENT – 12/01/05
03-1066
ARKOMA BASIN EXPLORATION V. FMF ASSOCIATES

GUNN: This oil and gas fraud case presents the court with four issues: a wavier issue; the substantive issue behind waiver of damages and the sufficiency of the evidence; a liability question, which split the CA 2-1; and a procedural question about appellate timetables. I intend to address issue 1, the waiver issue; and I will not dwell on the written arguments which I think are well developed by both sides. The court has that. In fact you have had it twice now with the Samedan case that came up a few years ago.

I would like to stress the jurisprudential importance of that issue to the real _____ practice because we are asking for rendition on two alternate grounds. One being damages, the other being liability. And if you choose to rule in our favor, we would ask the court to consider basing that reversal on damages. Dealing with the Samedan problem is quite important to the jurisprudence of the state.

I assure you this result would have been different in Houston where I practice in the CA regularly. It would not have turned out this way. For 15 years I have preserved no evidence points with straight up one sentence assertions of no evidence and have had no trouble. It was not until the Samedan case, and now the Arkoma case that there began to be a problem. And we need uniformity, and we need it as quickly as possible.

BRISTER: Can't we tell what they would have ruled on the legal sufficiency points since they proceeded to say on the remittitur question there was factually sufficient evidence of damages?

GUNN: I think you have some inside in to it. I can't tell for sure.

BRISTER: As a matter or absolute logic if there is factually sufficient evidence there is legally sufficient evidence. It couldn't be one without the other.

GUNN: It's a little more complicated than that in this case. Because there are eight different plaintiffs and they all have different numbers. I'm not certain that that is correct. The trial judge seemed to think he understood it. I'm not certain he did. But I can't tell for certain what the CA would have done. I can tell that the heart of our argument about sort of the Holt Atherton(?) complete calculation saying it doesn't add up. They didn't get there.

BRISTER: I'm interested in the issue, and remittitur issues, the standard. Obviously there was a lot of post - the trial judge was addressing. No question he addressed all this stuff. He wrote a four-page letter about it. And got a lot of letters, including one from the expert about well this is what I meant when I said that, post trial. But on remittiturs at least since Larson, J. Kilgarlin said well we can't pay any attention to that.

Help me understand it. The trial judge says I'm worried that there is no evidence of damages. And the plaintiff says well, we meant this. And then the expert who we are relying on sends a letter saying no, I didn't mean that at all. Does the trial judge have to ignore that? Obviously the trial judge could just grant a new trial saying I can tell from this guy's letter that's not what he meant. We're going to do this over again. As I understand under Larsen, if you say well, we could do it all over again because the expert admits that's not what he said, that's not what he meant. Would you rather have a remittitur? Yes, we would rather have a remittitur. And then when we review the remittitur we pay no attention to any of that because after all it wasn't during the trial. Why does that make sense?

GUNN: Well I'm not sure it makes perfect sense. Our scheme of legal and factual sufficiency, that construct imposes some artificial boundaries. And so when we go through a jnov hearing, we don't get to talk about remittitur at all even though everybody may know that's the big elephant in the room. And when we go to the new trial hearing we've already crossed the bridge of jnov, and so we try to frame it in different terms. So we have this more or less artificial distinction but it's the way things _____ out.

BRISTER: As I understand every other court in the country reviews remittiturs for abuse of discretion. And we did until...

GUNN: And we did. And I have some misgivings about the Larsen regime and the change away from abuse of discretion. Our hope is that if you look at the box of rocks and all the parts in the plaintiff's damage model, at the end of the day this is not really a remittitur case, that you just can't get those rocks to add up to anything. Not just a smaller number than what the jury got, but not to anything. And that's what we're trying to get to. This is a discussion we ought to be having. This is a discussion we should have had in the CA, and we partially had it in the TC after all the dust settles and the trial is over we say, okay, didn't get it right. Has the system produced an accurate result and does this equation work? is there evidence of whatever it is? or else the burden of proof doesn't really mean as much as it's supposed to.

The bottom of the waiver issue is really just a policy judgment. Let's get it right.

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JUNG: The jury in this case sent out a note which said in part we cannot locate evidence, exhibits, which reflect the actual value of the property at the time the contract was made, and the value that the property would have possessed had the representation been true, if any.

I stand before this court today with that same question in our minds. We know from Sharbenow(?) and Pope v. Tenneco that there are three recognized methods of property valuation. What was attempted here was clearly not the comparable sales approach or the replacement cost approach. It most closely resembled the income approach. The plaintiff's expert

testified to what he called lost reserves, that is reserves that were allegedly represented to be there less the reserves that in his opinion were actually there.

But when you think about it gas reserves being in the ground are actually an income stream or more accurately the prospect of an income stream.

O'NEILL: Do we reach this broad decision and calculation of damages under Virginia law if we decide the points not waived, or do we remand that to the CA? Because there will be a factual sufficiency determination at that level. Right?

JUNG: You decided at this level as a straight-up legal sufficiency question. It is our position that there is no evidence of damages. And that is a question of Texas law because it's a question of the sufficiency of the evidence. Everyone agrees on the Virginia law measure of damages. The jury was instructed on that. There is no issue about that on appeal.

O'NEILL: But why would we sort through all of these issues of Virginia law instead of remand it to the CA to let them do that?

JUNG: Because the issue of damages is not an issue of Virginia law. It is an issue of Texas law. How you prove damages in a Texas court is an issue of Texas law even if the measure of damages is defined by Virginia law. So this is a Texas law.

BRISTER: How would we find that there is no evidence when the expert said in my opinion the value of these lost reserves is X millions dollars?

JUNG: The answer is that this court said in Coastal and Havener, going way back in Dallas RR v. Gossett, that an expert's fair opinion like that is standing alone no evidence.

BRISTER: In Helton we said that as well. But in Helton there was a long cross examination that pointed out that the expert was just ignoring. He said they are the same when he admitted in effect on cross examination he had no basis for that. I'm looking at our rule - 705(b), which says what the evidence of damages or anything else is proved. In (a), the expert may testify in terms of opinion or inference and give the reasons therefore without prior disclosure of the underlying facts or data unless the court requires otherwise. Wouldn't it be your client's duty if they wanted how those damages were calculated more specifically to have asked those questions?

JUNG: Absolutely not. The rule deals with admissibility. And so it was admissible for him to say in my opinion the damages are X. If he had stopped there, this court's precedence say that is no evidence of damages.

BRISTER: Which one says that?

JUNG: Coastal...

BRISTER: Wait a second. Coastal is not - the guy just said this is grossly negligent.

JUNG: Right.

BRISTER: Well we don't need any help on that. We can look at the record and figure out from what happened and who did what, and what they knew whether there is gross negligence or not. Damages is different. Damages takes some calculations. Have we ever said that somebody couldn't just say the value of my house is $150,000?

JUNG: I'm not aware of a precedent applying those general rules about expert testimony to damages. But what this court has said time and time again is the conclusory expert opinion is no evidence. The court said in Burrow that it is...

BRISTER: Of course we've also been criticized that what we're doing is helping lazy defense lawyers who sit there on their hands and say nothing, and then when the trial is over and the experts have all gone home, the jury is discharged, then they come up and say hey they should have been more specific. The ones that I joined with, I disagree with that on. But on this one, I mean how much detail to go into the damages? Why shouldn't we put the burden on the defense lawyer to say how did you calculate that?

JUNG: First of all because the burden rests with the plaintiff as a matter of overriding burden of proof. Secondly, this court has said the fact that an expert thinks something standing by itself does not make that fact more probable or less probable and does not aid the jury in reaching a decision until it hears the basis for that opinion. And it is the basis for that opinion that gives the ultimate Birchfield opinion on the ultimate issue probative value.

So if Mr. Harper had said I've run the numbers and the damages are X, Y and Z. Thank you. I quit. That would have been no evidence of damages. It should not be incumbent on the defendant to say do you really know what you're talking about about that or not? The expert has to explain, the plaintiff has to prove that the expert knew what he was talking about and what the basis for that conclusion was.

BRISTER: What if he proved that well I took $1.60 and multiplied it times the reserves and $1.92 and multiplied it by the reserves.

JUNG: That was perfectly adequate as far as it went. But then the question is, where did the $1.60 and the $1.92 come from?

BRISTER: At what point does the defendant need to ask that question?

JUNG: Once the expert has said here is where the$1.60 and the $1.92 came from, and the places that it came from are the places that the law requires it to have come from. Under Maritime v. Ellis, and Coastal, the issue becomes is this a relevancy objection or is it a reliability

objection? And if the expert has proved what he needs to prove, and I say but it's unreliable, then indeed it is my burden at least to object. But if the expert has proved what he needs to prove by more than just a say so...

O'NEILL: Well what if he does not prove what he needs to prove because of a flaw in his methodology or the factors he uses?

JUNG: The word methodology is a tricky word. If it means that he has not done his work in a way that is peer reviewed or that has an acceptable error rate...

O'NEILL: Well isn't that just the claim here, that you've used this method of valuation but it's not an accepted methodology. It's unreliable and, therefore, you have to challenge it at that level.

JUNG: No. It is not the legally, appropriate methodology. In a medical malpractice case, the expert says in my opinion the doctor was negligent. Well what is the basis for that opinion, sir? Well I went and I looked at all the dental manuals and I thought about what a reasonable dentist would do. And in my opinion this was not what a reasonable dentist would do. There is no evidence there of medical doctor negligence. Because what the expert has demonstrated is that the basis for his conclusory opinion does not meet the legal standards that it is required to meet what a reasonable doctor would do under the same or similar circumstances.

O'NEILL: And you say Texas law controls those legal standards?

JUNG: Texas law controls how you prove damages in a Texas court. Virginia law controls the measure of damages. But Texas law controls the sufficiency of the evidence of proof of a fact in a Texas court.

O'NEILL: So if Virginia law did not require for example proof of a capitalization rate, we would have to take that into account.

JUNG: That is right.

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RESPONDENT

HOLLINGSWORTH: This is really not a no evidence case. This is not a situation where the testimony of the amount of damages is conclusory on its face.

BRISTER: The judge certainly knew the complaint was that there was no evidence of damages. He wrote a four page letter to that effect.

HOLLINGSWORTH: I don't believe that letter reflects that the judge ever understood what

the complaints were. There were variations...

BRISTER: He understood the complaint was that the damages had not been proved very specifically or where the numbers came from. I mean that's what the letter is about.

HOLLINGSWORTH: The letter is about the calculation of damages. But I don't think it's that there was no evidence of the damages. Here there was evidence...

BRISTER: Well then why did he grant a remittitur of several million dollars?

HOLLINGSWORTH: It's puzzling to me on the remittitur. I've read the letter and I still don't understand if the...

BRISTER: He didn't think it was discounted to present value did he?

HOLLINGSWORTH: I'm not sure, but it appears that that was what the basis of the letter that you are referencing.

BRISTER: And can we take into account in reviewing it, should the CA have taken into account the expert's letter submitted to the court on the post-judgment motions saying oh yes, I did because what investors do apparently is take 8 years of value and that's how they value reserves.

HOLLINGSWORTH: I think the court should take it into account in determining whether there was sufficient reliability of the expert. Here the expert was challenged because he had reviewed data by third persons, which had not been previously...

BRISTER: But you're not arguing it on appeal.

HOLLINGSWORTH: And we're not arguing about that on appeal. That was the only challenge to this expert's testimony. The expert had in fact prepared reports which were not allowed at trial because they had not been timely filed. Nonetheless the expert relied on that in coming to his conclusion. He could have testified in great detail at trial about those exhibits that the court considered in remittitur if he had been cross examined. He was not cross examined at trial. There was no objection to his testimony. The only objection was that this expert had relied on data which is not an issue in this appeal.

JEFFERSON: Let me ask you this. You have a jury verdict. And you have a judgment that's based on that verdict. And the losing party comes in and says each finding that supports the verdict, no evidence to support question number 1. No evidence to support question number 2. That is how they intend to preserve error. Does that preserve legal sufficiency complaint or not, and if it doesn't, then what sort of details must a party go to preserve that error?

HOLLINGSWORTH: Generally an objection would preserve a no evidence point. But here

the point I'm trying to get across is this is not really a no evidence point. In that there was evidence to support the jury finding.

JEFFERSON: So the answer to my question. Just on a technical preservation point is if you've got no evidence objections to each of those findings that preserves a legal sufficiency complaint. Is that right?

HOLLINGSWORTH: I don't think so without qualifying it. And the point is here they are coming in and challenging under - well yes, it would preserve it. And I guess my point is this isn't really a no evidence point. They are coming in trying to based on this court's decision in Coastal no doubt trying to come in the backdoor and challenge the methodology and technique and calculations that the expert used to arrive at his opinion, which covers about 3 volumes of testimony by saying this is a no evidence point. And it's taken many forms and fashion throughout these proceedings as to what the no evidence was. But even if you look at the briefs in the CAs, and even if you look in the briefs in this case and read what the complaint is, the complaint is this. Well this really isn't evidence of the value, or this isn't a correct measure of the value, or this is not good testimony...

MEDINA: Is cross examine necessary when the expert's opinion doesn't meet the legal standard?

HOLLINGSWORTH: I think there are cases that hold you do not have to cross examine an expert if there is absolutely no testimony or no evidence. If it's completely conclusory.

MEDINA: It's an obviously a risk the lawyer takes.

HOLLINGSWORTH: It's a risk the lawyer takes...

MEDINA: Which he or she can cover by making the type of objection that was made post trial. Right? The no evidence.

HOLLINGSWORTH: If the objection is that this is not evidence of the benefit of the bargain damages perhaps. But here the objection is that the methodology that was used to arrive at the expert's opinion, that objection had to be made at trial. That goes back to the reason for Robinson on the one hand for the court, a gatekeeper to keep out unreliable testimony. But more importantly, this court has held that if your challenge is to the methodology you've got to object at trial.

WAINWRIGHT: In Havener there was no objection during trial.

HOLLINGSWORTH: But in Havener there was cross examination. And in Havener that was a case where the expert testimony did not prove or was not probative of the fact that it was offered.

JOHNSON: I'm reading the motions under Tab 5, the defendant's motion for jnov and to disregard. There is for example here a statement:

There is no evidence of damages other than speculative damages which are not recoverable as a matter of law. That's (d). (E) There is no evidence of the actual value at the time of the purchase on which to base damages for benefit of the _____.

Now, do you agree that that preserves error for us to review the no evidence points on damages?

HOLLINGSWORTH: Yes. I agree that you can consider those points but you've got to go further and see if the points are really that there is no evidence or that the methodology...

JOHNSON: I understand that, the preservation of error. Had that objection or the nov point being simply there is no evidence to support the damages finding would that in your opinion preserve error for us to review the damages no evidence point?

HOLLINGSWORTH: If it were truly a no evidence point as opposed to a challenge to the methodology and the underlying basis for the expert's opinion...

HECHT: And to clarify that. The CA said the objections raised in the motions must be specific enough to call the TC's attention to the precise lack of sufficiency asserted on appeal. And you would disagree with that if as you say it were really a no evidence point?

HOLLINGSWORTH: Right.

HECHT: But you think it's broader here because it gets in to the no man's land between no evidence and whether the opinion is just conclusory or unreliable.

HOLLINGSWORTH: Right. And I'm not sure the CA - I think the CA got it right. I'm not sure that it should have cited _____ or that the CA reasoning was exactly right. But here this point is not preserved for appeal because it's a point that needed to be made at the TC level and was not made until later.

JOHNSON: What is your understanding of the appellate bar's thinking in regard to this: a generic, no evidence point on a jnov would preserve for appellate review the no evidence contention?

HOLLINGSWORTH: I don't know that I can speak for the entire appellate bar. But I think when you want to challenge an expert, you need to either have a Robinson hearing, you need to object...

JOHNSON: Just the no evidence? I'm not asking you to speak for the appellate bar. I was just asking for your understanding of what the general thinking is. Is a generic, no evidence claim in a jnov enough to preserve the no evidence issue for review on appeal? There is no evidence of damages.

HOLLINGSWORTH: If it's a true no evidence...

BRISTER: The plaintiff in a personal injury case puts the doctor on the stand. Future medical expenses are going to be $500,000. Nothing more. No objection. Nobody says anything. Post trial no evidence. We can see the plaintiff. We know what the problem is. But he doesn't break it down into operation by operation and how much etc. Is that enough or what can we review on appeal?

HOLLINGSWORTH: That might be enough. It's similar to the situation discussed in the Maritime - no not really. In the Maritime dissent maybe it was a little bit stronger. But that's not the situation that we have here. We have volumes of testimony regarding what he relied, the theory...

BRISTER: You say that. In my review of the briefs, I only saw pages 105-108 of Harper's testimony being the only thing anybody cited in their briefs has been where he explained what the damages were.

HOLLINGSWORTH: That may be the only cite we have in this court. But first of all _____ testified as to the methodology to be used in evaluating the quantity of the reserves.

BRISTER: But Harper was the only one that said this is the amount of money.

HOLLINGSWORTH: Right. And I believe that testimony, and I can provide a...

BRISTER: All I could find in the briefs was these four pages, and without x-ray glasses I can't...

HOLLINGSWORTH: Some of the testimony from Harper is direct about his methodology. Some of it is implicit. And it was not our duty to use the magic words "capitalization rate" or how the methodology...

BRISTER: So how do we draw the line when the doctor gets on the stand and says $500,000 future medical bills? Is that conclusory? Does the plaintiff have to say more than that?

HOLLINGSWORTH: Maybe not in that case.

BRISTER: We've never written on this. What is the line on damages between conclusory and no evidence and methodology? What would you suggest?

HOLLINGSWORTH: The court's written on it a little bit in the dissent in Maritime. And I think that when the - you have to look at the basis for the opinion and that's what R.C. v. Burrows says, and several other cases, including Havener. And I think that you look at whether there is any basis in the facts and the supporting record to support what would otherwise be a conclusory opinion. Because it's the basis for the expert's opinion that gives its probative value.

BRISTER: So when he says there is going to have to be a future surgery, it's going to cost $75,000. We have to ask him how many hospitals did you survey? how many...

BRISTER: You're going to keep adding another procedure to this.

BRISTER: I'm concerned. For years in personal injury doctors have done nothing more than that. They've gotten on the stand and said future medical is $100,000, because after all it's the future. It's a little hard to present the bills. And if that's not enough we've got to tell people...

HOLLINGSWORTH: I think you have to evaluate the case on a case-by-case method. I think you've got to be able to tell practitioners that their experts can give opinions, that they've got to be based on the facts in the record or facts that they've stated that they have reviewed. They've got to have some scientific reliability. It's got to be based on fact in order for it to be reliable. And I think that's going to vary from case to case on what the data the expert has to rely on, what factors he had to consider. And I don't think it's ever going to be implicit that in cases where the expert has got to use magic words such as "capitalization rate" or "discount". Different experts would calculate the value of reserves differently.

BRISTER: But this would also affect then we've had for 100 years: the owner of the house or land can say the value of my property is $100,000. For 100 years we've said that's enough evidence. I'm gathering from this case is now after Daubert in fact that's not enough evidence. That owner is going to have to say why $100,000 is their valuation.

HOLLINGSWORTH: I don't think so. I think owners have always been treated differently. Owners of property than experts who were strangers to the situation...

BRISTER: So owners can give conclusory opinions but experts can't? That's what you just said I think.

HOLLINGSWORTH: Yes. It's their opinion based on what the value is to them, so it's not a conclusion. They are saying that I believe...

BRISTER: Experts saying an opinion, too.

HOLLINGSWORTH: I just see it differently.

O'NEILL: Here's what obviously we're struggling with is how you determine what speculative and conclusory on its face verses methodology that underlies the opinion is unreliable. So for example if you have an expert who says okay, here is my damage figure and I arrived at that by doing a series of coin flips to determine various measures. Now is that going to be conclusive(?) speculative on its face, or do you have to challenge the methodology because flipping coins is not reliable?

HOLLINGSWORTH: I would challenge it in the TC and at a minimum cross examine. The defendants here chose not to do either one.

MEDINA: Why does it have to be challenged if the burden is on you?

HOLLINGSWORTH: To show that was the value. I guess in that situation the point would be that's absolutely no evidence because it's based on a coin flip.

O'NEILL: But the coin flip goes to the reliability of the methodology that was used. Or can we just determine that on our own that that methodology was invalid?

HOLLINGSWORTH: I think some times it is just going to be a common sense approach that that's not a valid statistical way to evaluate a situation. And I'm not sure that a coin toss ever would be unless you're talking about the odds of heads or tails in a particular case.

O'NEILL: So if that's the case, then if we say that not determining a capitalization rate makes it speculative, then why wouldn't that fit under the same scenario just like a coin toss?

HOLLINGSWORTH: This is a different situation. This is a detailed analysis of quantifying, and qualifying in the amount of reserves, and then putting a dollar figure on it. First of all there is evidence in the record that talks about risk and would be evidence of capitalization and also discounting. I don't won't to leave the impression that there is not. But when you take into account the capitalization rate different experts might do it different ways. But the point is he came to an opinion as to the value of the property, the misrepresented value of the property, and the actual value of the property, discounted the difference in that by 25%, which the jury could have inferred that that included the capitalization rate.

In answer to your question, the capitalization rate is an element or part of the technique that the expert came to arrive at a number. And it is part of his methodology. It's not that the expert evaluated the Barnett Shell fields up near Dallas/Ft.Worth as opposed to the Arkoma Basin in Oklahoma and said based on this evidence of the Barnett Shell and what I project based on how many wells have been drilled and how many - all of this, there is this much reserves and it was worth this in California sometime. That might be the kind of thing you could say there was no evidence of. But here on its face the evidence is probative. You can look at the evidence in the record and the jury could have based its finding on that. And because of that, the opposing party should have either objected, taken the witness on voir dire, let the TC know some how that there was on objection to this testimony as being no evidence in order to preserve the right to complain to the CA's about the evidence.

HECHT: In some of our cases we have been concerned that if there is no contemporaneous objection, the other side doesn't have a chance to fix it - a fair chance to fit it. Is that involved here?

HOLLINGSWORTH: I think it's definitely involved here. This was a conscious decision because Harper was also a witness who detailed the extensive fraud that was involved in this case...

BRISTER: He was on the stand for a long time.

HOLLINGSWORTH: Yes. And a lot of it was him talking about how the reserves that Arkoma had used had been falsified. I think there was a conscious decision not to cross examine him any further. Furthermore, there was data, which J. Brister referred to earlier and reports that he relied on, that he could have testified specifically yes, I relied on these reports, which the TC later reviewed, to determine the reliability of the testimony. So if there had been a proper objection raised in the TC, not only could the TC have corrected the error, but if it had happened contemporaneously as you're suggesting, much more detail could have been gone in to regarding his methodology, what was the basis, the specifics.

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REBUTTAL

GUNN: Value is a subjective judgment. The law establishes certain means by which that subjective judgment can be arrived at: the various approaches to the ascertainment of value. An owner is permitted, is presumed to have a basis for an opinion as to value, as an overriding legal presumption...

BRISTER: Have we said so since Havener?

GUNN: I don't believe you have.

BRISTER: We used to think that about experts in general until it just got out of hand.

GUNN: Prior to Havener the owner at least was presumed and maybe is still presumed today to have a basis. But an expert is not presumed to have a basis. If this were an imminent domain case and the evidence was I'm an expert, I've looked at this and the value of the property is $1 million, pass the witness. That would be no evidence of value.

BRISTER: Do we have to amend the expert witness rule that says you can do just that?

GUNN: No. It's not a question of admissibility. That evidence is admissible because it it is a predicate to the explanation of the basis that then gives it probative value. If we had stood up and objected, said Mr. Harper cannot say what his value is until he has given his basis, that would have been not a good objection under the rule and under Birchfield. But we waited for the basis to come. And the evidence that Mr. Harper put in was admissible evidence. He took 8 years worth of cash flow and valued the reserves based on that.

BRISTER: But again. 705(a) says the expert may in any event disclose on direct exam

or be required to disclose on cross exam the underlying facts. If in fact the expert must disclose underlying facts, we need to amend rule 705(a).

GUNN: I would submit that the TX Rules of Evidence deal with admissibility not with sufficiency.

BRISTER: But they mislead people if they say well you can do it but you don't have to.

GUNN: That's arguably so but I think if you recognize that there are admissibility rules...

BRISTER: How about when the doctor says this surgery is going to be $50,000?

GUNN: The question then becomes, is the rest of his testimony such that it is clear that he is basing that on the treatment that in reasonable medical probability will be required. If that's so, then he's given an adequate basis.

BRISTER: So all the doctor has to say is $50,000.

GUNN: Right. But if you just put the doctor on the stand and say have you studied the plaintiff, you know what his future medical is? Yes. It's $50,000. Pass the witness. I don't think that's enough. I think if he's testified to his examination and his understanding of the patient's condition, then it may be enough.

BRISTER: I love this point of whether a order of remittitur extends the appellate deadlines.

GUNN: This court has said in a number of cases that the deadlines are controlled by signed, written orders of the TC.

BRISTER: Anything that changes the judgment.

GUNN: Anything that changes the judgment.

BRISTER: An order of remittitur doesn't technically change the judgment.

GUNN: It does not change the judgment.

BRISTER: But we know for a fact the judgment will change.

GUNN: No we don't.

BRISTER: You have two options on a suggestion of remittitur. Right? One is a new trial,

and one is to cut the judgment.

GUNN: That's what the judge is saying at the time he signs that order. But what if he orders a remittitur, the plaintiff doesn't file it, and he never gets around to signing an order granting a new trial.

BRISTER: So you're asking what if the judge lied when he said these are your two options?

GUNN: Not if what if he lied. What if he forgot. What if I failed to exercise due diligence...

BRISTER: Assume with me that the judge meant what they said, you have two options: we're going to try the case over; or you can take a smaller judgment. We know for a fact the judgment is going to change.

GUNN: No. Technically it's not. Technically the judgment today is as big as it ever was. The plaintiff has merely filed an instrument that precludes him from enforcing the judgment to the extent of that excess. The judgment today is for $4.7 million. There is merely an instrument that prevents $1.8 million or now that the CA has dealt with it, $300,000 from being collected.

BRISTER: What harm would there be to saying that they do extend the judgment, the time for post-judgment motion?

GUNN: There is seldom any harm in saying here are the rules, now go follow them. And if that were in the rules that would be okay. But what the rules and what this court's opinions have said is, only when the judgment is changed does the clock start over.