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Supreme Court of Texas.
COLUMBIA MEDICAL CENTER OF LAS COLINAS, INC. d/b/a LAS COLINAS MEDICAL CENTER,
Petitioner, v. ATHENA HOGUE, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF
ROBERT HOGUE, JR., DECEASED, et al., Respondents.
No. 04-0575.

April 12, 2005

Appearances:
R. Brent Cooper, (argued), Cooper & Scully, P.C., Dallas, TX, for Petitioner.
Eric D. Pearson, (argued), Sayles Werbner, P.C., Dallas, TX, for Respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

CONTENTS
ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF ERIC D. PEARSON ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

CHIEF JUSTICE JEFFERSON: Thank you, be seated. The Court is ready to hear argument in 04-0575, Columbia Medical Center of Las Colinas v. Athena Hogue.

ORAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

SPEAKER: May it please the Court. Mr. Brent Cooper will present the argument for petitioner. The petitioner has reserved five minutes for rebuttal.
MR. COOPER: May it please the Court. This is a medical malpractice case. It presents several issues. The first issue that ironically directs with the Court concerns the manner in which the trial judge submitted the charge in this case.
JUSTICE: Was it intentional?
MR. COOPER: It was intentional, your Honor.
JUSTICE: What was the [inaudible]? It's not clear to me from the briefs what the plaintiff wants.
MR. COOPER: Well, we have in reference, in our brief, where the trial judge referred to phase three of the case sort of as a bill and

the best we can tell, and again, I was -- I was not the trial lawyer who tried this case, was that he went through phase one and he refused to submit to phase one, went through phase one, went to phase two and then --

JUSTICE: The phase two was --

MR. COOPER: phase two was for punitive damages. They got to decide that perhaps we ought to go ahead and give it a due finding with respect to contributory negligence because maybe it should have been submitted but then he decided to go into phase three at that point --

JUSTICE: And was there anymore evidence taken after the verdict in phase two?

MR. COOPER: There was no additional evidence. There was, however, additional closing argument that was allowed by the parties after phase two.

JUSTICE: But he decided -- but the trial judge decided before the first submission of the jury that this is the way it's gonna be submitted?

MR. COOPER: Well, it was -- if you look at the record, I'm not so sure that it was that firm at the time the original submission was done but was, he refused to submit to the contributory negligence question. There was an objection made by the counsel for the hospital at that point in time.

JUSTICE MEDINA: Now, he denied your request of submission before the first jury deliberation phase, correct?

MR. COOPER: That's correct, Justice Medina --

JUSTICE MEDINA: At the bottom of that denial is written request denied until third phase --

MR. COOPER: phase, which indicates he was --

JUSTICE MEDINA: So, it seems that he intended to submit your contributory negligence question but only during the third phase, is that accurate?

MR. COOPER: Correct. That was written on the tendered --

JUSTICE: Okay, now that would make perfect sense if the trial court felt there might not be evidence of contributory negligence. I mean, the way we've crafted the law regarding charges is if you have any doubt whether there is any evidence, carve it out and submit it as a separate question. So, if we look at the evidentiary case in Accelab v. Jackson, the Fourteenth Court of Appeals determined when there is a duty to volunteer information and when there is not. There appears to be a pretty significant factual dispute among the parties as to the conditions in which he presented to the hospital and the information he was requesting to be given. If the trial court felt like there is no duty to volunteer information that you don't think would be relevant and if, in fact, he responded truthfully to the questions asked, no chest pain, if the trial court felt that was the case, then, he would have aired to submit contributory negligence if there was no evidence to support?

MR. COOPER: It set -- I agree -- and I disagree one, with the narrowness of the Accelab holding and as this Court is aware that case is currently before this Court, I also would agree to disagree that there was no evidence but freely, and we've all seen this, if there is a question about whether or not the issue should or should not be submitted, duly, most judges will submit it in the appropriate time --

JUSTICE: Well, but now we've been very careful about charge error now. We've said that if you fail to carve it out and ask it separately, it's gonna result in a new trial as opposed to rendition. So, I'm just saying, it's hard for me to act as though the trial court was just

crazy here when it sounds to me like that's what the trial court was trying to do.

MR. COOPER: This is not a Castile or a Harris County issue because in the issue that was tendered by the defendant in this case, there were separate blanks for the negligence of the hospital and a separate blank for the contributory negligence of the plaintiff. So, there is no Castile problem; there would be no Harris County v. Smith problem if the court had submitted it, as this Court indicated in Lemos v. Montes that it should be submitted and as the patent jury charge that indicates it should be submitted.

JUSTICE: Could you argue contributory negligence during your closing and after the first phase?

MR. COOPER: No, in fact the trial judge specifically refused to allow argument, 24 Reporters Record, pages 32 to 33, "The trial court refused to allow trial counsel for the hospital to argue contributory negligence on the part of the plaintiff in this case."

JUSTICE: Was there argument on contributory negligence before the third phase of jury deliberation?

MR. COOPER: We were not allowed to argue contributory negligence until the third phase of this case.

JUSTICE: But you argued Mr. Hogue's failure to reveal his medical condition as a causation element in the first phase?

MR. COOPER: The trial -- the trial judge, and again, if you look in pages 32 and 33, did allow us to go into the facts. The fact what the doctor was operating with, what knowledge, what knowledge the hospital was offering. That was allowed to be addressed in the closing argument. That is correct.

JUSTICE: Counsel, can you give us your strongest arguments for how the timing of the submission of the contributory negligence harmed your client? Why is it not harmless error?

MR. COOPER: First off, there is a case that we brought to the Court's attention, General Electric v. Schmal, that says when you're looking at the right of a defendant to submit in the form of a defense, that right must be determined not at looking outside at how the jury answered issues in the charge, but looking at how the evidence was at the time the case should've been submitted. Secondly, this Court, in accordance with General Motors, says, "If the trial judge gives an instruction of a law, a correct instruction of the law, that that is harmful error in a hotly and closely contested case." So, even if the trial court gives in the appropriate phasing case a correct instruction of the law, this Court has said, "That is harmful error." What do we have in this case? We had first phase one where trial counsel for the hospital was precluded from arguing for contributory negligence, the jury found the defendant was negligent --

JUSTICE: But the question ultimately you -- you could argue with insult. What I'm trying to understand is how did that impact the case as a whole, the timing of the submission of this?

MR. COOPER: This -- this way, your Honor. By the time the jury was afforded the opportunity to address the contributory negligence, they had gone through phase one and found the defendant was negligent and grossly negligent, awarded over $9 million in damages. They had gone to phase two and awarded over $21 million in punitive damages. They finally get to phase three. Trial counsel in phase three is allowed to argue that the jury should consider the work that it has already done in answering this question. That is, the jury is to consider the answers that they've already rendered in answering this important question.

JUSTICE: How long was the jury out from the phase three question?

MR. COOPER: There is a very short time, your Honor. I don't have the exact time with me now, but it was not very long.

JUSTICE: And the first phase, how long were they out?

MR. COOPER: I'm sorry I have to -- I don't have that in my notes here. I apologize.

JUSTICE WAINWRIGHT: Was there an issue raised that directed verdict stage on contributory negligence?

MR. COOPER: There was and --

JUSTICE WAINWRIGHT: So, the plaintiffs moved for directed verdict on contributory negligence?

MR. COOPER: There were two issues, Justice Wainwright, regarding contributory negligence. One had to do with the failure of Mr. Hogue. He was told back in 1996 that he had a heart murmur. He was told by his pc -- permanent care physician to go see a doctor, a cardiologist, and get a chest x-ray which he did, and an EKG. He did not do that. The trial judge said that is not contributory negligence. Evidence of that was not allowed to come in and that was not argued. There was discussions regarding the second issue of contributory negligence and that is the failure to give an accurate history upon admission. There was discussions regarding directed verdict and apparently the trial judge, you know, at one point in time, it looks like he might grant it then he comes back and decides to go ahead and submit it in phase three of the case and so, the best we can tell is that he decided, if it was granted that it was ungranted by the submission in this particular case.

JUSTICE WAINWRIGHT: And if it was granted, it was ungranted. Is it unclear how that ruling at directed verdict came out?

MR. COOPER: Well, at one point in time, as I recall Justice Wainwright indicated that he was going to grant it, then later on the record, as I recall, he indicated that he was going to go ahead and submit in this phase three.

JUSTICE: The Medical Center's brief says, "Hogue denied any cardiac symptoms or history," and Hogue's brief said, "At no time did anybody ask Hogue if he'd previously been diagnosed with heart problems." Those seem conflicting.

MR. COOPER: Let me -- let me show the Court the record. There was an admission sheet, a T-sheet which is in the record. Defendant's exhibit, page 16 which was filled out by Dr. Blomquist, upon admission, and one section here is past history, one issue is heart disease. Dr. Blomquist testified on Volume 16, in Reporters Record pages 236 to 241 that he went over with Mr. Hogue about his heart history and past history of heart disease and he indicated, "No, there wasn't." We go to -- this is Dr. Blomquist again --

JUSTICE: Who was filling out for him?

MR. COOPER: The emergency room physician.

JUSTICE: And he asked if Mr. Hogue is experiencing chest pain?

MR. COOPER: He did.

JUSTICE: And he responded to that?

MR. COOPER: That is true.

JUSTICE: Where is it in the record that he asked him, "Have you had a prior heart condition?"

MR. COOPER: If you go to pages 238, Volume 16, Reporters Record and 239. On 239 for example, the first part I'm searching him on is the history. I specifically asked him as you can see by this T-sheet, this is Dr. Blomquist this time. By this test pinpointed out specific cardiac problems. The man could not read. I asked him do you have chest

pain? Do you have a family history? Do you have risk factors wherein you could have heart disease which includes smoking, family history? Do you have a history of high blood pressure, high cholesterol? None of those. And how did that affect your search for potential heart problems given the fact that he denied having any types of symptoms or history? His answer was, to my mind, it moved the heart problem lower on the differential diagnosis list. We go on to page 241. "I asked whether or not he'd been told about the heart history problem, would it affect his treatment of Mr. Hogue, in this case. It certainly wouldn't cause me to look more deep." Dr. Blomquist also testified in the record that he talked to Mrs. Hogue. That's page 121 of Volume 16 of Reporters Record. She said, and this is her testimony, that he had a heart problem, a history of heart problems, and I heard what she said, "I told him no, that he didn't."

JUSTICE: So, you're lying there and something is seriously wrong. You're not always thinking clearly enough to being said, "Oh well, yeah, there was this time."

MR. COOPER: I agree but this was less than 18 months early, your Honor. And the issue here, though, is that is an argument but we're applying the standard of review for whether or not an issue is to be submitted.

JUSTICE: But it was submitted, right? It just wouldn't submit it when you wanted it submitted.

MR. COOPER: It was submitted in phase three, that's correct. But applying the standard of review indulging in all inferences in favor of the party submitting the issue, we believe clearly this would be sufficient to raise a fact issue on the issue of whether or not he had a heart history or murmur. We knew, according to Dr. Blomquist, that he was asked, according to the T-sheet and we knew, that according to Dr. Blomquist, Dr. Schroeder, that it wasn't revealed. Now, why wasn't it revealed? That's an argument that they may have regarding he was too ill, etcetera, etcetera. But from the applicable standard review on whether or not this issue should have been submitted in phase one, we believe it clearly creates a fact issue which would require the trial --

JUSTICE: Your -- your rule is that everybody whose negligence is alleged and as to whom there is some evidence, they've gotta all be in one question?

MR. COOPER: I -- we believe that Rule 277 and this Court's pronouncement in Lemos v. Montes is that all the issues -- defensive issues should be submitted in the primary placement case unless good cause exists --

JUSTICE: Can you think of any reason why -- why you would have a second negligence question as to one party plaintiff or defense?

MR. COOPER: Cannot and in fact --

JUSTICE: Unless there is no evidence to support it?

MR. COOPER: Well, that's not -- respectfully your Honor, I don't believe that that would be reason to put it in a separate phase because if there is no evidence, regardless of what the jury may answer in the primary phase, the Court can always disregard it.

JUSTICE: One might argue -- Are we speculating on what the jury did in its deliberation? I mean, we usually presume the jury, read the instruction, read the question, listened to the evidence and then came up with the verdict based on the evidence involved as given by the trial court and my question here is, you're saying well because of the timing, you know the jury had already answered this and so it's predisposed to answer adverse to one, and so in deciding exactly, how,

you know, what is the precise link to show a harmful error?

MR. COOPER: Well, you look at, first, the question is, was this a fair submission of the issues in this case which this Court has said "that's the test for" --

JUSTICE: So, let's assume it was not fair submission that we -- that the Court would agree unanimously that it should've been in phase one, if we're gonna call these phases. The question I have is, how have you demonstrated that there is harmful error? How do we know that the jury didn't look precisely at the questions submitted to evaluate arguments of counsel, you know, and determine, you know --

MR. COOPER: If we go back to Accord v. General Motors and that is -- it is a hotly contested case. Any construction which tilts or nudges the jury, in favor of one party or the other, is going to be deemed and presumed to be in harmful error by this Court.

CHIEF JUSTICE JEFFERSON: Okay. Further questions?

JUSTICE: Chief Justice, I have one.

CHIEF JUSTICE JEFFERSON: Yes.

JUSTICE: In Accord was there an objection to the manner of submission on the basis that it was somehow a comment on the weight of the evidence or [audible].

MR. COOPER: In the court case?

JUSTICE: Yes, Sir.

MR. COOPER: In the court case, there was an objection. There was an instruction that was given in that case on the law, a correct instruction.

JUSTICE: But did -- but did the opposing counsel, counsel of the plaintiff make an objection to the manner of submission as nudging the jury or commenting on what is the evidence?

MR. COOPER: My recollection in the Accord and again, it's been a while since I read it, was that it was an improper instruction to be going to the jury. I don't believe there was an objection in the court case that it tilted or led the jury. I believe that language came from this Court's opinion in the court case.

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

SPEAKER: May it please the Court. Mr. Eric Pearson will present argument for the respondent.

ORAL ARGUMENT OF ERIC D. PEARSON ON BEHALF OF THE RESPONDENT

MR. PEARSON: May it please the Court. There were several questions by the justices, including Justice Wainwright and Justice Hecht, about what the trial court was thinking when it decided to submit the issues in a manner which it did, and I'd like to try to clarify the record on that point, if I may. In Volume 24 of the Reporters Record, pages 31 to 32, the Court very clearly granted the plaintiff's directed verdict on contributory negligence theory. The Court stated that Court is going to grant the plaintiff's motion in full on the directed verdict as to both branches of the defendant's Section 33 [inaudible]. And the branches are, the one branch was Mr. Hogue's alleged failure to follow up on his advice of his cardiologist two years prior, and the other is alleged failure to inform the doctors of his heart murmur.

JUSTICE: Of course, they can't complain about that anymore now, can they?

MR. PEARSON: No, they can't, your Honor.

JUSTICE: Because if the trial judge, at the last minute, gives what the trial judge calls the last question?

MR. PEARSON: Exactly, your Honor and it's very clear from -- from reading the transcript that the court granted the directed verdict and he says I'm also granting as to causation. In referring to the second prong, this argument about Mr. Hogue not being forthright with his doctors, the court said, "We haven't heard any evidence on how it would have made a difference if he had told them." And so, in that charge -- and then in the charge conference before the third phase, the court said, "Are there any objections other than what I've already sustained," which is your objection that it'd be submitted and I've already sustained that. He's talking to Mr. Werber , the trial counsel for the plaintiff. Hence, we're doing it in the trifurcated way and he --

JUSTICE: Why?

MR. PEARSON: Why, your Honor? I believe it was --

JUSTICE: I mean it granted a directed verdict, why give the issue?

MR. PEARSON: I believe it was done out of the abundance of caution --

JUSTICE: Well, then why not give it in phase one?

MR. PEARSON: Because the court didn't feel like the evidence mandated its submission.

JUSTICE: So your rule is we give the -- in one question, the defendants, the judge thinks, did do it and in a separate question, we give the names of the people the judge thinks aren't liable because, of course, the judge really wants to jury to get the first ones.

MR. PEARSON: No, your Honor, I'm not suggesting that this is the way that it ought to be done. I mean, there are many case where the Court says it would have more ideal to phrase the question in a certain way. But there was no harm here in the way the question was --

JUSTICE: Could, could --

JUSTICE: Go ahead.

JUSTICE: If there were evidence of contributory negligence, if there, should the question be submitted this way? Can you think of a situation where it should be submitted this way?

MR. PEARSON: Ideally, it should be submitted in one question. I think it was submitted this way because the Court was convinced that there was not evidence to submit - -

JUSTICE: If there were. Surely this is reversible error.

MR. PEARSON: I disagree, your Honor, with all due respect. There is an argument to be made that it was an abuse of discretion to -- to split these questions if there was evidence to justify its submission and I contend there was not. However, clearly, there has to be the harmful error in absence.

JUSTICE: But if there was evidence, you just take another case and other issues, limitation issues, other kinds of defensive issues. It seems to me that it would be -- the -- very difficult for the defendant to argue with a straight face after the jury has already decided the liability and punitive damages, that it should go free.

MR. PEARSON: Well, I don't know that their argument was to go free. They were arguing if Mr. Hogue was contributory negligent and then there should be some percentage of blame placed upon Mr. Hogue which is the same thing they would have argued had it been at first phase.

JUSTICE: But you wouldn't feel disadvantaged if you were the defendant arguing phase three to the jury had just decided that you owe

$30 million to the other side?

MR. PEARSON: No, your Honor. In fact, they were given a separate closing argument before the third phase in which the only issue they had to focus on, and could it could've devote all their time and attention to, is Mr. Hogue's alleged contributory negligence.

JUSTICE: Would you -- would you feel disadvantaged if the only defendant with money was defendant two out of three? And the trial judge submitted only defendants one and three in the first question, the first phase. The jury comes back says they are liable then we do exemplary damages, and then as an afterthought, the judge says, "By the way, do you think defendant two was liable. You would object to that, would you not? The one who you really want to recover from being saved to an afterthought third phase.

MR. PEARSON: I would like to object to that, but I think again that the issue before this Court would be whether there was harmful error. And I disagree with --

JUSTICE: Can you tell us how long the jury was out on phase one v. phase three?

MR. PEARSON: I believe they were out slightly longer on phase one than in phase three.

JUSTICE: Slightly longer to return $30 million in damages?

MR. PEARSON: I don't know the exact length of how -- how we call on the jury --

JUSTICE: Well, the fact of the matter is, the third -- the second time the jury comes back with the answer and saying, "Ladies and gentlemen, you're still not done. We got some more questions for you." At this point, one might reasonably assume a reasonable juror's patience is being tried, where they -- unless they were told we are going to have at least three phases of coming in and going out to the jury room.

MR. PEARSON: I believe they were told before they went out to assess the amount of the punitive damages that there would be no assessment.

JUSTICE: Counsel, assuming that you're the plaintiff in a case. The trial judge says we're gonna split this case to the jury in two phases. The first phase is going to be only affirmative defenses. None of your claims for affirmative relief would be submitted in this phase. Would you feel that that's a problem and fairly, being able to fairly present your case to the jury and have them deliberate fairly on the facts? Only affirmative defenses first, knowing your claims for affirmative relief will come later after the jury's determination on the affirmative defenses.

MR. PEARSON: I would argue that that was unfair in that it is more sensible to, to establish a liability before an affirmative defense. It really -- all the time, there are --

JUSTICE: Well, it's more sensible to determine liability before determining damages too but that didn't happen in this case.

MR. PEARSON: Well, --

JUSTICE: Well, complete, not complete liability.

MR. PEARSON: Yes, your Honor. That is correct. And, again --

JUSTICE: So, again, affirmative defense is submitted first, then your claims for affirmative relief submitted after the jury comes back and that's put into phase two. Does that cause you problem as a plaintiff?

MR. PEARSON: I think there was essentially change the burden of proof in that the plaintiff is supposed to be allowed to present their theory of liability and then the defendant can raise defenses. That

would spin that around to change the verdict. Here the verdicts were not changed.

JUSTICE: I am not sure if that was true or not. Let's put that to the side. I am just asking about your belief on whether the jury can fairly and accurately reach a verdict on a case, and they are presented with the case after the trial, and they are presented within the jury charge where there is only affirmative defenses for them to consider. They fail to know if anything else is coming or not.

MR. PEARSON: I think that in order for this Court to reverse, there would have to be some evidence of -- that -- that error was reasonably calculated the leading cause, did cause rendition [inaudible].

JUSTICE: Let's suppose this defense --

JUSTICE: And one final question on this point. Assume the judge also, in submitting only the affirmative defenses in phase one, says, "You cannot argue your claims for recovery during this first phase." Does that cause you a problem when I add that additional fact?

MR. PEARSON: Again, I thank the Court. We have to look at the particular facts and circumstances, the way the questions were phrased to determine whether any errors are harmful.

JUSTICE: Let us assume all of the things you just posited were done perfectly. Only thing that I am asking about is not being able to argue your claims for affirmative relief and have the jury only consider affirmative defenses under phase one. Everything else in the trial is done perfectly. Will you feel like you've been treated fairly in that case?

MR. PEARSON: I don't think that harmful error could be shown so long as my liability claims were presented to the same jury and you properly worded question as was done here.

JUSTICE: And in a phase two.

MR. PEARSON: In a phase two.

JUSTICE: And you think that is okay, two --

MR. PEARSON: I think that there is no harmful error as there were no harmful error here. And I --

JUSTICE: What if this becomes a template? The way this case was tried for all personnel cases, clients cases, leadmouth, carrot cases and in each case, there is some evidence whether there is evidence of contributory negligence. How would we reverse that? How would we stop that trend without showing harmful error?

MR. PEARSON: Well, I think first of all, that's not likely to happen, in that this was the case very clearly where the Court granted a directed verdict and really, if there was any error, it was an error --.

JUSTICE: The Court, obviously, reversed itself on that and decided it's not harmful for me to just stick this on in phase three. Let's say, complainants think this is a good thing. And we're gonna ask all the trial courts henceforth, to try these cases. Well, haven't you ever shown verbal error before?

MR. PEARSON: I think you would have to show, you have to have some evidence of harm --

JUSTICE: And what would that be? Tell me what that would amount to in your [inaudible] --

MR. PEARSON: I think you would have to show that the question was not fairly presented, that the words of the question --

JUSTICE: Let's assume that it was a properly worded question. We're only talking about timing. How would -- what in your mind would tip the scales in favor saying, "Yeah, this was harmful"--

MR. PEARSON: I can't think of anything, but what I think, the question is fairly presented to the jury and they have an --

JUSTICE: So, it's okay if trial courts start trying cases like this?

MR. PEARSON: I don't think -- I don't think that's the ideal way to do it and I think the Court here was troubled with the issue. It granted the directed verdict. It felt that there was no evidence that specifically caused the issue. And now, I would ask the Court to look very hard at the issue of whether this question should have been submitted at all. But I don't think that this is going to be the way the Court's generically start to submit this issue. This was an issue where the Court had numerous charge conferences where there were discussions about this issue --

JUSTICE: But what would we do in the classic case where the plaintiff's case is weak on liability but strong on damages. It has always been the position and has been the position of Texas law since Olley v. Hughes. You can't separate those. Even though logically, terrible damages has absolutely no effect on strong or weak liability. But the fact of the matter we all know if the jury considers all of it together, they may have some effects bleed over. So, are you here arguing the position that trial judge could, in fact, try liability and damages in two phases, where the first phase we don't tell anybody what happened to your client or how sympathetic the family or how bad the injury. We only decide whether anything was done wrong and if the jury says no to that, we never even get to it.

MR. PEARSON: No, your Honor. And I believe that Olley v. Hughes and the other cases cited by the petitioner all involved literal separate trials with literal different jurors.

JUSTICE: But what is the difference in phase three versus [inaudible]? What is about in phase three that would differentiate separating questions from separate evidence? Couldn't the trial judge if you are gonna do phase three just said, "No evidence of contrib until phase three"?

MR. PEARSON: Well, that, I think, would certainly present a stronger argument for reversible error, but in this case, during the case in chief, the defendant was able to put on all the evidence they wanted about the alleged --

JUSTICE: So, so the argument is, it would be wrong to break up the evidence into phases but as long as you're sending the jury back in forth to the jury room in phases, that's okay. Now, why would you want to do that? I mean we do that with exemplary damages because they are supposed to be some evidence that doesn't come in on the first phase that does on the second. That's not the case with contrib.

MR. PEARSON: I agree, your Honor. And this is not -- I am not saying this is the ideal way to do it or a template. This was a situation in which the court believes there was no evidence of causation, that the issue should not be submitted, and then, for some reason, he said -- he says, "I still agree with the plaintiffs but I'm submitting at this point because I can't see any harm." He was saying, "I'm gonna go ahead and submit it because that way, well know, for sure, if I had erred or not." This is not the usual case, and this is not a template for the best way to do it.

JUSTICE: But I think Justice O'Neill is correct though. It certainly could be argued if we were to rule the way you'd like this Court to rule, that the Columbia case now stands for the proposition that it didn't matter what or if you submit the question, as long as they're ultimately submitted.

MR. PEARSON: Well, I don't think that argument would be adopted by the trial courts. Again, this is a very unusual situation which the Court felt that there were no evidence to submit the question, and out of the bunch of caution, submitted it in a final phase. It is interesting to note that Columbia has not appealed the directed verdict. There is nothing on the record where the Court indicated, I am overruling my prior ruling on --

JUSTICE: Yeah, but you can't -- a trial judge can't have it both ways. You can't, say, "Well, I've directed verdict and I'm submitting to the jury." You either did one or the other.

MR. PEARSON: Well, he did submit it to the jury, so --

JUSTICE: Right.

MR. PEARSON: -- I don't know.

JUSTICE: So you can't say, "Well, I am granting the summary judgment but I also am gonna let the jury find the verdict," and which ever one I get upheld on appeal will stand." I mean if you send it to trial, you send it to trial. Trial merges everything that goes before it.

MR. PEARSON: Yes, your Honor, and the question was submitted and -- I disagree one thing Mr. Cooper said which is, citing to the Small case, that you can't look at what happened after the fact. This Court in the Island Recreational case made very clear that to determine whether an error is reversible, the Court needs to consider the charge in its entirety, and the charge in its entireties submitted the exact question that Columbia wanted submitted, "Was Mr. Hogue negligent?" And the answer was no.

JUSTICE: But other than this case and punitive damages where the legislature requires it, are you aware of any other case where judges send the jury back and forth with additional questions.

MR. PEARSON: There are cases that we cite in our brief where the issues were broken up, for example, the Roselle case where the Court submitted questions about the bus company's negligence for their own driver separately from the question that had all the other defendants in the question, the court found no harmful error there. Also, the Miller v WalMart case where there was [inaudible] question as to whether WalMart was negligent by selling ammunition to a minor that was separate and apart from question about generically WalMart and other defendants did the court found no harmful error. Thought v. Boswell , a car wreck case where both the plaintiff and defendant were blaming the other. The Court submitted --

JUSTICE: Perhaps I should have been more specific.

MR. PEARSON: I'm sorry?

JUSTICE: Where this Court has ever said to do that?

MR. PEARSON: No, your Honor, but this Court has said that the issue is this harmful error, and here, I think the Court looks at the record carefully. In fact, even the portion that Mr. Cooper read to the Court the questions that were asked of Mr. Hogue raised specific questions about smoking, family history, chest pain, in fact, curiously throughout Columbia's brief, they talked about if there had been evidence of chest pain. The fact is, Mr. Hogue was not experiencing chest pain. There is no evidence to the contrary. He honestly and accurately had answered every question up there. This was not a situation like in the Ellmore v. Smith case --

JUSTICE: But we are not saying, they have a strong case. I am not concerned with those questions. I read this record enough shocked than somebody just constantly being. Will get back to you in hours until the guy does. Our question is how is tried not whether you should have won

or not. So, when, I mean, it does look like this question was an afterthought.

JUSTICE: Counsel let me ask a question, before going to that. Was there in fact an argument about the plaintiff during the third phase that the jury should and could consider what it had already done?

MR. PEARSON: There was a remark by counsel to that effect which was not objected to --

JUSTICE: Okay, assuming he is not objected to, does that not then demonstrate one of the problems here, seems like, excuse me, in that argument does submitting the case this way reveals upon itself and does in fact almost induced that type of argument and that type of trial? Look what you did back there, you have already found things -- do we not start down that road once we separate these issues as was done here?

MR. PEARSON: I don't think so because if the Court knows there could be more than one proximate cause of event. It wasn't an I and/or not either or situation --

JUSTICE: But was that a proper argument?

MR. PEARSON: Well, if it wasn't any error was waiting --

JUSTICE: My question is, was it the proper argument as you stand here today was that it already heard in the trial and that it was part of the proceedings. Was it or was it not a proper argument?

MR. PEARSON: I don't think there's anything improper about it. It was offhand remark, it was not exporting --

JUSTICE: So even we had an objection to that and we start trying these cases this way, then your position would be it is proper to submit it piecemeal and then to argue to the jury based upon what has already happened in the decisions. We've already had a peak, so to speak, of this jury thought processes and we can nudge them a little further by arguments --

JUSTICE: You decide. Plaintiff or defendant, whichever way it goes?

MR. PEARSON: Again, I am not saying that because in this case it was an off-hand mark. There was no attempt in the third phase for the plaintiff and there is nothing in the record to support any type of allegations like this when the plaintiff said, "Look you already found the hospital negligent" therefore, Mr. Hogue is not negligent, I mean, there is no specific --

JUSTICE: That's what I am asking -- that's the logical extension in the argument. You can't consider what's already gone in the case, is it not? Would that be a proper argument if it's, in fact, going on? You're not going outside the record, you've got the time. Would that not be a proper way to argue the case? Either side, the deal was making off of interest.

MR. PEARSON: Well, obviously I think, on the issue of the compared responsibility of Mr. Hogue and the hospital, if they were to find him negligent, you can refer to the conduct of the hospital that had the led the jury find the hospital negligent where you are arguing about the percentage causation and there is nothing wrong with that, and that's, I mean, this question was submitted the exact way of what it would have been as Columbia won it, except in two phases, and there's been no explanation of any harm in that this -- the cases that had been cited to are cases in which the jury was tilted or nudged and those all involved cases where the very instruction was intended to nudge the jury like a school agent instruction or in the Accord case that Mr. Cooper cited. This was a situation where it had to deal with a manufacturer who is not an insurer of its product. I mean, those are

cases in which you are trying to nudge the jury. This was the exact question they wanted: just put it the two phases And again, I will urged the Court that if its inclined the whole that the manner which this question was submitted was an abuse of discretion and should not be condoned for some fear that it become a template that the Court should hold, and in this case, it was not harmful error because there was no factual evidence to support the submission and most importantly --

JUSTICE: Let me ask you this. But why it was, to what instruction did the jury says did the negligence of the hospital proximately causing the occurrence in question? The answer was yes, and what was originally in the question was the typical compared responsibility. And a portion between yes or no as between these two, and if you answered "yes," it's about their portion. So, it was structured differently. Wasn't that in itself a nudge?

MR. PEARSON: No, your Honor, the question was, was Mr. Hogue -- did his negligence, if any, proximately cause --

JUSTICE: But what was the original question, was, did the negligence, if any of those named below, proximately caused occurrence of the question. And then he had A, the hospital says C. I think it should have been B, Mr. Hogue. So, the jury, they've gone side by side the same question whereas different questions was -- and this would actually be the negligence that the hospital proximately caused the occurrence of question.

MR. PEARSON: Yes, your Honor, and --

JUSTICE: And I didn't -- they weren't considering at the same time.

MR. PEARSON: They were but they did in the third phase and they found --

JUSTICE: But not side by side like they were -- you would have been asking the traditional paired responsibility.

MR. PEARSON: Not side by side, but again, if the question is, did it affect their determination of whether Mr. Hogue was negligent. You can have a mountain of new evidence that the hospital was negligent and that doesn't negate a possible negligence by Mr. Hogue. It wasn't an either or situation. So, the jury, there really is no conflict in them saying yes in the first phase and no on the third, and again, there was no -- this question did not even be submitted because there was no evidence proximate cause and I will ask the Court to look carefully that --

JUSTICE: Counsel, as we know that Judge excluded Mr. Hogue from the first question in the first phase. In the second question in the first phase, the judge submitted the instructions, "So not reduce the amounts of any in your answers because of the negligence, if any, of Robert Hogue, Jr. Why was that instruction needed in question two when Mr. Hogue was not submitting question one?

MR. PEARSON: Well, I think that actually goes to show that the jury had been given evidence. The defendant was --

JUSTICE: I'm sorry, goes to show that the jury had been given evidence of what?

MR. PEARSON: That the defendant had been able to put on evidence of the alleged contributory negligence of Mr. Hogue, and the Court had already decided that in the third phase, they will be able to determine whether that constituted negligence, and so, the jury was required in answering the damage question, as they are, in all damage questions as set forth in the panel jury charge do not reduce the damages because of any of alleged negligence by Mr. Hogue, and again, they were given free

range to put on all the evidence in the case per chief had wanted on that. Even during their closing argument on the first phase. They were permitted to argue the facts. In other words, the reason we didn't diagnose him sooner was because he didn't tell us, they just couldn't argue specifically right, you know, contributory negligence, but they were able to articulate all the facts.

JUSTICE: So those instructions are not needed unless the jury had heard some evidence that might lead them to reduce damages based on Mr. Hogue negligence, is that what you're saying?

MR. PEARSON: I don't think -- I think that comes from the panel jury charge and it's submitted that way --

JUSTICE: But the instructions are not needed if there's absolutely nothing to suggest that Mr. Hogue may have contributed to his injuries right?

MR. PEARSON: That would be correct, your Honor, so I --

JUSTICE: So it's there for a purpose, right?

MR. PEARSON: Yes, your Honor.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF R. BRENT COOPER ON BEHALF OF THE PETITIONER

MR. COOPER: Couple of issues I'd like to address. First, with respect to Justice Brister, about he used and how [inaudible] are interconnected that you can remand for separate trials, this Court, in 1989 in the case called Otis Elevator v. [inaudible] whose face were a remand and I believe, [inaudible] San Antonio Court of Appeals for they were only going to remand the issue about the defendant's negligence. And this Court said, "No, you cannot do that." You've got to remand, not only the defendants negligence, but you have to remand the plaintiff's contributory negligence, as well, because they are interconnected, they are intertwined and you can't have a trial just on one.

JUSTICE: My understanding is the echo that was officially done did detect heart murmur.

MR. COOPER: There was a leakage in one of the valves when the echocardiogram was done. That is correct Your Honor.

JUSTICE: So what's the evidence of causation that anything would have been done differently if that revealed the heart murmur.

MR. COOPER: Page 239, Volume 16, the Reporters Record. Dr. [inaudible] The first part of searching my mind is the history. He said he went through the T-sheet which I showed the Court, but there's a unit for --

JUSTICE: No, I understand that -- I understand he said that he would have put that higher on his differential, but that was in an early point of time before the echo. Once the echo indicated a heart problem, what harm was caused by the failure to reveal it when he was first admitted?

MR. COOPER: Well, the problem was in the delay. They will work -- they called a pulmonologist originally, Dr. [inaudible] because they thought it was a lung problem and they spent hours going through the test for his pulmonary problems when the problem was not in the lungs but was rather in the heart and they didn't finally get to the heart diagnosis until later that evening at which time they transferred him

to Baylor Hospital early because it was too late. On the causation, I would like to challenge from Mr. Pearson who thinks 241, Volume 16, he was asked about the -- his opinion by Dr. Marcus. Would the opinion had been affected Sir? If in fact he received different information from Mr. Hogue or his family that it had a physician advised him that he had a heart murmur and he says it certainly would have called me to look more deeply. He also testified that he would have called in a different consult and that he probably would have transferred him to the hospital they were earlier on and he had known about the fact that there was heart problem, further on.

Last thing, I would like to point to the Court is Sandra Bar case dealing with medical malpractice, a contributory negligence, it's not from this Court its -- from the entire court. But that court said, in a medical malpractice case, evidence of contributory negligence of the plaintiff, of the patient, is simultaneous in cooperating with the alleged fault of the defendant. It must have entered into the creation of the cause of action and must have been an element in the transaction which create it. Basically, what the court is saying is, they are inextricably intertwined with the ridiculous notes. And I believe as far as harmful error, again, first off, I'd resort to dunking but the fact that the Court didn't submit it to the third phase is a comment by the judge to this jury of what he thinks about the contributory negligence. That in itself, I believe, is a comment on the way to the evidence --

JUSTICE: Why is that if you didn't get to argue it, why would the jury think that it is a comment, that --

MR. COOPER: There is --

JUSTICE: Excluding Mr. Hogue from the charge is a comment on the evidence.

MR. COOPER: Why would the jury be deciding the negligence of Columbia, the gross, assessing all these, and then finally almost as an afterthought, we finally get to the last phase, didn't go ahead and address Mr. Hogue's negligence.

JUSTICE: So, you think it was a comment in phase three?

MR. COOPER: The fact that it was delayed until phase three, I believe that it was a comment. If there were no more questions, we request that the case be reversed [inaudible].

JUSTICE: Counsel, the cause is submitted. That concludes all argument for today and the Marshall will now adjourn the Court.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas now stands adjourned.

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