ORAL ARGUMENT — 11/5/97
94-1057
MARITIME OVERSEAS CORP. V. ELLIS

LAWYER: This case presents this court with the issue of the proper standard to be used by CAs when dealing the factual sufficiency of damage evidence that supports a verdict and rest upon medical and scientific testimony.

GONZALEZ: Evidence, which you did not object at trial?

LAWYER: That's correct.

ABBOTT: Are you wanting us to review the factual sufficiency or the legal sufficiency?

LAWYER: No. We are asking that you review the standard that was applied by the CA in reviewing the factual sufficiency of the evidence. And indeed, the factual sufficiency of this evidence has been reviewed under two different standards already: 1) by the initial panel of the CA, which reviewed the factual sufficiency of the evidence according to a proper standard in accordance with the principles that were ultimately announced in Dabuert and adopted by this court in Robinson v. Dupont and Havner v. Merrill Dow.

GONZALEZ: Help me to understand how we can get to that issue if you did not object at trial and the way to preserve is by objection.

LAWYER: The way to preserve error on factual sufficiency is through a motion for new trial according to Rule 324, and according to this court's many opinions, including the Cecil case. And that is indeed what we did. We filed a timely motion for new trial that absolutely laid out our problem, which was we were objecting to the lack of any causative link between Diazinon and delayed neurotoxicity, which is what this jury found in awarding over $8 million in damages. So we clearly met our burden of preserving error and bringing it before this court.

ENOCH: Is it your position that to prove up damages in this case, you have to have not only the expert testimony that there was a _____ deal, but you've got to have evidence in the record that justifies the opinion that gets expressed?

LAWYER: Yes.

ENOCH: And your complaint is that they did not do a review of the evidence underlying the opinion, they just accepted the opinion as the evidence?

LAWYER: No. Both CA's did review the same evidence, but with two different standards in mind. One looked to see whether or not in accordance with the principles this court has now espoused in Havner whether or not there was a reliable scientific basis upon which those experts could express those naked conclusions and reasonable medical probability.

ABBOTT: And in that regard with regard to Havner and with regard to most every other case that discusses that issue, isn't that analysis applied to determine whether or not as you say there is an adequate scientific basis for the admissibility of the evidence? In other words, that goes to what we frame as the gatekeeping function of the courts. But that is separate from what we're dealing with in this case, which is not a gatekeeping because the evidence got past the gate and into the courtroom. And so isn't this analysis that you're asking us to make different from the Havner analysis?

LAWYER: We believe it's very similar to the Havner analysis, since the Havner analysis was a no evidence and it did review the evidence as opposed to determining whether or not it was admissible. We believe that the central inquiry is the same, which is the scientific reliability of scientific testimony that's presented through expert testimony.

ABBOTT: So are you saying that there are two different times periods in which a reviewing court can determine whether or not the evidence was scientifically reliable? First and foremost, before the evidence is ever put on at the witness stand you can engage in that gatekeeping function?

LAWYER: Yes.

ABBOTT: And then, once you get past the gate and into the courtroom and into the jury box on appeal, you can once again review the evidence to determine whether or not it was scientifically reliable?

LAWYER: Yes. And in fact, we believe that Havner recognized that in pointing out that the expert testimony in that case had been partially objected to. Some of the expert testimony had been objected to but there was other expert testimony that came without objection and the petitioners in Havner certainly challenged all of that expert testimony weight of all that testimony of whether or not that was any evidence whatsoever to support a verdict. In fact, this court recognized in both Robinson and in Havner that just because evidence comes in without objection it does not somehow _____ it with some sort of great weight. The weight of the evidence still must be weighed. The Texas Constitution provides that Texas CA's have a duty to weigh the factual sufficiency of the evidence regardless of what...

BAKER: So it's your argument that they did not weigh the evidence?

LAWYER: They did not weigh the evidence according to the proper standard, which has been announced by this court...

GONZALEZ: Who is they?

LAWYER: The 14th CA sitting en banc.

PHILLIPS: Your complaint here is all an improper factual sufficiency standard. How come the primary relief you ask for in your latest brief is a new trial? I didn't see anything in the brief that points to justification for a new trial?

LAWYER: The justification is the fact that there have been these two contrasting weighings of the evidence already, these two contrasting evaluations of the evidence already according to two separate standards.

PHILLIPS: So it's too hard, let's start over at zero?

LAWYER: Well no. We think certainly the remedy for insufficiency would be a new trial. We understand that you cannot rule on the factual insufficiency of the evidence. However, the original panel of the CA undertook a very extensive factual sufficiency review under a standard that was proper, that was consistent with the principles that ultimately got announced in Daubert and in Robinson and in Havner. Given the fact that that thorough factual sufficiency review has already been undertaken, we certainly think that in the interest of justice, that this court could remand directly to the TC.

PHILLIPS: Can we hold that an en banc decision was a mistake, and reinstate a panel decision in an area over which we have no direct jurisdiction?

LAWYER: Certainly it would be proper for this case to go back to the 14th CA for a redetermination of the issue according to standards announced by this court.

ENOCH: Do you see any other judgment out of this court on the points of error you've raised other than we will simply remand it to the CA for reconsideration?

LAWYER: Certainly. We can see a judgment that would remand to the 14th CA with instructions...

ENOCH: Under no circumstances based on the points you've raised here would this court be free to render a judgment?

LAWYER: No. We do not believe that a judgment can be rendered.

ENOCH: This is simply a remand?

LAWYER: Yes.

ENOCH: In your argument, you're saying, you concede there is some evidence of a causal link?

LAWYER: No, we don't concede that.

ENOCH: But you are not arguing that this is a no evidence point?

LAWYER: The reason that we're not is that there is some evidence of acute injury, short-term injury related to exposure to Diazinon. What we are claiming is that there isn't sufficient evidence, and we don't believe that there is any, but our argument is that there is insufficient evidence to link Diazinon with delay neurotoxicity.

ENOCH: The argument is made that the federal standard is so weak that it doesn't permit of a no evidence review.

LAWYER: The standard under the Jones Act, is that what your honor is referring to?

ENOCH: Assume we have the Jones Act standard, assume we even say it's a featherweight level, would there not still have been a no evidence complaint that could be made in this case?

LAWYER: We believe that that would have been very difficult given the fact that there was evidence of some injury. There was evidence that the employer's negligence played some part in causing some injury. It's the particular injury to which we object, and to which we say that there really was no evidence of any causal link. For this particular injury as opposed to separate acute injuries, the two injuries are two separate things.

ENOCH: I think I understand you're saying they showed he had some injury, but not this injury that was caused by the Diazinon. But you're saying under the record in this case, you could not bring a no evidence complaint?

LAWYER: That's the way we...

ENOCH: And the only issues you have before this court is whether or not the featherweight standard applies to not only the existence of an injury, but to the causal nexus between the agent complained of causing the injury and in fact the injury. You're saying the featherweight standard applies to that as well?

LAWYER: No. We're saying that the featherweight standard applies to the proof of an injury. Proof of some injury that there are causative causation factors involved both in the liability determination as reflected in the special issues that were submitted in this case, a causal component of liability: Did the Maritime Overseas negligence cause injury...it's negligence in any way cause injury? Then there is a separate inquiry, a separate causation inquiry in the damages issue which asked whether or not the jury

finds by a preponderance of the evidence damages caused by the occurrence in question.

ENOCH: And you're saying that's a preponderance of the evidence standard that applies to the damages?

LAWYER: Absolutely.

ENOCH: So we should have two kinds of questions: Do we have was there negligence? Was there a proximate cause of injury? And then was there a proximate cause of a specific injury?

LAWYER: No, we are not saying that at all. We're saying that the jury issues as they were submitted to this particular jury absolutely embodied the standards and the burdens of proof that were applied in this case. The first one, which was the negligence issue said: Was Maritime Overseas Corporation negligent on any of the occasions in question, and did such negligence play any part even the slightest in producing injury or illness to Richard Ellis? That was question one. That was the liability question. Of course it does ask about causation in this question. It's a global negligence and causation question right there.

ABBOTT: And you have no problem with that?

LAWYER: Have no problem with that. Question No. 6, because there was some evidence that there were acute injuries as opposed to the delayed permanent secondary injuries was: What sum of money do you find from a preponderance of the evidence would fairly and reasonably compensate Richard Ellis for the injures and/or illnesses resulting from the occurrence in question? Again a causation inquiry to the jury of: Do you find that the negligence that caused an occurrence what were the particular injuries that were caused by this occurrence? And this court in Compugraphic Corp. V. Morgan which this court has recently again cited in the Furrows v. Cry case recognized the two separate causation factors: one in liability and one in the damages inquiry. In that case as the court knows was a default judgment case, the plaintiff who had been exposed to toxic fumes said: "I've got a default judgment on liability, I don't have to prove causation of these particular injuries." The court found that that was absolutely incorrect.

ENOCH: So the only thing you're asking the court to do is just say that the CA needed to do a review based upon a preponderance of the evidence on the damages issue, and they failed to do so and we just need to send it back and tell them to do it that way?

LAWYER: Absolutely.

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RESPONDENT

COOK: I need to take a minute to put this matter in perspective, because in 32 years I've never

seen a case quite like this. And that's why I want this minute to do it. From day one a law student is taught timely objections - specific objections. I am going to look at those objections first of all so that you fully understand the strategy which the defense took. Five expert witnesses on causation, their testimony, 637 pages of testimony, 9 objections; five of the objections were that the testimony was nonresponsive. Three of the objections were that the questions were leading, and one was that the witness was testifying from a document not in evidence. This is the type of objections never once the objections which you would expect to hear. Not once.

Now, did this big, bad, mean trial judge, Judge Harrison, gang up on this defense lawyer and beat him up, and intimidate him? Well of the 9 objections, and remember their nonresponsive leading in a document not in evidence, of those 9 objections Judge Harrison sustained counsel on 6 of them, and ruled against Mr. Ellis. All the lawyer had to do was object.

Let me take you very quickly to the instructed verdict, or directed verdict. I have it right here. He moved for instructed verdict on maintenance and cure. Did he move for instructed verdict on liability, on causation? He did not. The charge, this is the single greatest area in a trial where you have reversible error. And the charge is just so critical. Yet here is the charge for this very important case, and we're talking about 4 pages. Now let's look at this charge. With respect to causation, or liability, whatever the trial counsel's strategy was he didn't object. He said, "I object to liability question No. 1 because it is duplicitous of number 2, and I object to No. 2 because it is duplicitous of No. 1, and that's all he said on causation. On damages - nothing. Whatever strategy they had they carried it through the entire case.

The next step in the trial: Motion for new trial, remittitur, J.N.O.V. Liability and causation. Here we are at a key point in time. What do they say about liability and causation? Nothing. They stand there moot. They've got this multi-page motion, which is really 3 motions in one, and they don't even mention it. What they do say is there is a factual insufficiency on damages, and there is no evidence on damages.

HECHT: Isn't that their argument, that there were some damages here, but not this extensive?

COOK: Oh, they admit there were some damages. Let's take Rule 104a, which is a rule that everyone knows. And this is the preadmissibility rule. And Rule 104a talks about preliminary questions concerning qualification of a witness, existence of privilege, admissibility of evidence shall be determined by the judge. They ignored rule 104a.

Here was the opportunity for them to test their theories, to see if they're valid, and they just totally ignored it. For the court to write otherwise today, we are going to have a problem here with rule 705: Disclosure of facts or data underlying an expert opinion. Because rule 705 says: The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts. Well, you've got to object and they never object. The truth is they have waived it at every step. Their arguments today before you are stated in terms of damages. And that's because that's the only time they

bother to say factual insufficiency.

PHILLIPS: There's no question if we are just talking about a simple garden variety automobile intersection case. You don't have to object to factual insufficiency until after the trial? In fact, you can't get a judgment. All you can get is a new trial. You bring that up at the time for a motion of new trial and that's the first time you need mention it. You're saying here that something more needed to be mentioned because this is a more complicated area; is that right?

COOK: Yes. I'm saying they've waived it. And I am saying the only part of...

PHILLIPS: They have waived it because of the complexity of the issues here, or is there something in the rule that says you really can't wait till after the trial is over to bring up insufficiency?

COOK: One of the things that causes me to think that they have waived it is this is the Jones Act case. The standard is featherweight. And Havner, I think is creating additional burdens. And when we talk about it we are going under federal substantive law. And I think that Havner is creating problems that are infringing and creating additional burdens on Mr. Ellis. I think Havner also as you know GE v. Joiner is going to be heard by the US SC addressing the question of: Is there an overlapping now between methodology and conclusions. And I think that's one of the problems with Havener that the two are merging there. But I think that Havner creates burdens under the Jones act for Mr. Ellis that federal law will not allow.

HECHT: Why is that?

COOK: I think that federal law will not allow the person to ignore each stage of the trial and wait until the very end and attempt to lay behind the law.

HECHT: Is there a case on that?

COOK: We will see about finding one. One of the things that counsel pointed out in her argument...

PHILLIPS: Let me try to clarify this. Are you saying that in any Jones Act case, I have to make a motion about insufficiency of the evidence prior to the time of new trial, or are you saying in a Jones Act case that involves scientific evidence?

COOK: Scientific. We are in a totally new area. The quality of the evidence, I would like to address that for just a second. You know when they ignored 702 type hearing, the 702 type hearing that this court has pointed out in that hearing you get witness qualification, you get reliability, and you get relevance of the _____ bearer fit. They ignored that. All they are up here on today is on damages. And we were always taught that there are 4 elements in a tort: duty; violation of duty; damages; and

proximate cause. And they are only up here on damages. All the rest of it is through.

GONZALEZ: Their argument is causation. As the Powell decision noted, as to each expert, none of them testified to this particular toxic substance caused the delayed toxicity reaction of his injury.

COOK: You're right as far as it goes. But I would like to address that if I could for a minute. We're talking about Diazinon. This person was in Diazinon in a level that was 100-200 times the normal strength. They've admitted his short term damages. They just don't want to admit the larger term. Diazinon is an organophosphate. Their logic is, Well the body has organophosphates in it. Diazinon is an organophosphate insecticide. It was designed to kill whether it is used on rats, on roaches, on animals or on human beings. But if you realize that it is an insecticide, not just an organophosphate, and you look at what the experts did say. There were epi studies, and the epi studies covered parathion, which is probably the most dangerous of the organophosphate insecticides. There is no way you are ever going to get the studies on Diazinon, because you're not going to get a base from which to do these studies. But since we know that when you have Diazinon, which is an organophosphate insecticide it attacks the central nervous system the same way as the other organophosphate insecticides, I believe it is reasonable to say, to draw on the other epi studies to say that we can take the characteristics of these other insecticides, we can analogize them to this, and we can draw conclusions.

Now again, the objective conclusions of the expert is different than his methodology. But you're never going to have epi studies when you're dealing with an insecticide like this.

HECHT: One problem though, Havner is a no evidence case. And one of the witnesses in this case, there were several as you know, but Dr. Johnson for example he testified in a number of other cases, and there are ½ dozen reported decisions, one of which we cited in Havner that refused to give weight to his testimony. Does that play any part in our no evidence analysis or evidentiary analysis?

COOK: On the issue of causation in this case nothing has been preserved on that for you to consider. I don't think you can consider Dr. Johnson's what you just referred to, because they haven't preserved it. And I do not agree with them when they said that you have causation factors in liability and you have causation factors in damages. I think they are totally separate.

HECHT: For example: It's been alluded from Judge Gonzalez's comment that the moon is made of green cheese; testimony that the moon is made of green cheese is no evidence that it is. It's just not. Why isn't a sort of multi-court rejection of a witness testimony not just in one place but across the country, why isn't that sort of like a moon is made of green cheese testimony?

COOK: I will answer your question, and I would also point out that in Havner, Justice Owen said: You know that unobjected to testimony does not necessarily make it reliable. But at some point, some place in the trial somebody has to preserve for review by this court something. And that was not done in

this particular case.

I don't think you can bootstrap the no evidence insufficiency on damages over to causation and liability. I just don't think you can do that.

Let me point out in Havner, too. In Havner there were more objections than a person would ever believe possible. They fought them on motion for summary judgment, they had a 702 hearing, they had numerous other hearings all throughout the case, they preserved error with their objections, motion for new trial. Every place Havner preserved it. Here, it has not been preserved anywhere. And I do not agree that there what they did do regarding question 6 on their motion for jnov, and motion for new trial, I do not concur that that will allow anyone to bootstrap.

The psychology that they used again and again in this case, I simply believe that they are not entitled. They don't have the right to ask to be bootstrapped up and to be helped. Cross-examination according to Wigmore is the greatest engine in searching for truth there is. They abandoned cross-examination. They abandoned every right and remedy, and now they want the court to save their apples. And I just don't think they can do it.

ENOCH: The issue here is not that there was some injury. The issue is that some witnesses got up there to testify some additional injuries and they are saying there is no evidence for that. But from the Jones Act case there's not a featherweight of evidence on this other injury. It seems to me it would be like: the expert who is testifying about the cost of repairs to an automobile that's in a car wreck and it collapsed the front-end of the car and I get the cost repair of the car wreck, and well they also repaired the back-end. Yes, I repaired the back-end and here's the cost of the back-end, and there's no dispute that there was a wreck, and there's no dispute that it caused some damages to the car. When I come up and after the jury awards 100% of the cost to repair this automobile, I want to object to the TC: Wait a minute, there's no factually sufficient evidence to establish that the back-end of the car repairs were required because of this accident. Couldn't I do that without objecting to the repair company's testimony? Couldn't I call the court's attention, that wait a minute, I didn't object to him talking about the cost of repairs and all this, but I do object after the testimony comes in and when the jury awards 100% of the cost of repairs, that the evidence doesn't support that all of the damages was the result of this one accident. Couldn't I do that without objecting?

COOK: I understand your point. What I am saying is that I think in a federal substantive case like this involving a featherweight burden of proof to come in and set all these standards, that what you are doing is you are increasing Mr. Ellis' burden of proof under the Jones act from a featherweight to a burden of proof that is far more significant.

ENOCH: Under a featherweight wouldn't he have to tie in the repairs to this accident?

COOK: On causation they haven't preserved anything. They are trying to bootstrap damages into a discussion causation. And I don't think you can do that. I don't think even liberally interpreting the rules we will get to the point where their objections are anymore than objections as to damages.

BAKER: The question about the featherweight burden is also one of their points of error. And they point out that question number 6 is based upon proving by a preponderance of the evidence as opposed to how question no.1 on causation was in fact a featherweight burden. Can an appellate court look at that question under some other standard other than what was submitted to the jury to decide, that is preponderance of the evidence?

COOK: I'm not sure if I fully understand your question.

BAKER: I seem to recall a line of cases that says if you submit a question to the jury, then you look at the evidence from the standpoint of the question the jury was answering from a preponderance of the evidence rather than saying at a later time: Oh, no, you should look at it as a featherweight burden. That's what I'm getting at. Are you stuck with what you submit to the jury?

COOK: I think you are stuck, but if I can read to you the liability of causation issues were submitted twice. Here is the way question 1: Was Maritime Overseas Corp. negligent on any part of the occasions in question and did such negligence play any part even the slightest in producing the injury or illness to Richard Ellis?

BAKER: But that was your issue, which is a featherweight burden under the Jones Act.

COOK: Yes.

BAKER: But your number 6 question is by preponderance of the evidence. Do you agree they are not the same?

COOK: Yes.

BAKER: So now are you stuck with what you submitted when you look at their claims of excessive damages by preponderance of the evidence?

COOK: No.

BAKER: Why not?

COOK: I think that question No. 6 has its burden of proof. But I don't think you can do anything that goes back and change no. 1.

BAKER: That's not my question. I understand what you're saying there. But when we look at their point of error, which is that $8 million plus is excessive. They say the CA looked at it and used the wrong standard. And they're asking this court to send it back to look at it under what they say is the correct standard, whatever they may say it is.

COOK: I don't agree that on question no. 6 there is any causation to tie back to. I think question no. 6 is simply the money amount of the damages.

BAKER: That's exactly what it says. We can't disagree with that. I understand your argument to be that they're attempting to use a causation argument to overturn excessive damages?

COOK: Yes.

BAKER: You say they can't do it because they didn't preserve the causation issue; is that right?

COOK: Yes.

BAKER: And that's the bottom line.

COOK: They didn't preserve it.

PHILLIPS: What about the Compu Graphic case?

COOK: Compu Graphic is an interesting case, but it's a default judgment case and I don't think it stands for what they cite it for. It is a default judgment case, which is a totally different fact situation. They've admitted that we have damages. They've admitted it here. They've admitted it in their briefs. I think this admission is fatal. I think the proper disposition of the case is improvident grant and deny. Never have I seen a case where people ask the court to go to this link to save their _____.

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REBUTTAL

LAWYER: I would like to start with reading a portion of the motion for new trial that Maritime filed timely with the TC very clearly pointing out to the TC in accordance with the State Department of Highways v. Paine, the basis for our error being that there was a lack of a causative element. This is a page 44 of the transcript. And I want to read section 1 that says: The award is based on speculative evidence. Defendant does not dispute and has never disputed the fact that plaintiff was exposed to Diazinon on board the Overseas Alaska and suffered some immediate or acute effects of the exposure. Plaintiff's recovery of actual damages as set forth in all of the subparts of question 6 must be predicated upon a determination by the jury that plaintiff was permanently and totally disabled from the exposure to Diazinon. Plaintiff

produced testimony from a toxicologist and a number of health care providers to the plaintiff, all of whom testified that plaintiffs suffered from chronic neurotoxicity as a result of the exposure, which neurotoxicity caused permanent physiological damage to the nervous system and secondary psychological symptoms. All of the medial experts testified that plaintiff would experience temporary effects from the exposure to Diazinon, which would resolve as the _____ colon _____ raised levels and the body return to normal. Defendant concedes that plaintiff is entitled to damages consistent with exposure in short term effects. Defendant would assert however, that there is insufficient evidence upon which the jury could make the determination of permanent disability or permanent injury and that such determination would be against the great weight and preponderance of the evidence.

BAKER: Isn't that a causation assertion?

LAWYER: It absolutely it is of the causation portion of damages.

PHILLIPS: If it was this clear to you that they had a great lay down case on short term damages but no case on long term, why didn't you ask for two separate damage entries?

LAWYER: Because there was evidence. There is not a lay down case as I said. It's an insufficiency review we believe here. But the damage issue was submitted by the plaintiffs in this way.

PHILLIPS: Why didn't you object...in Cavanar v. Quality Control opposing counsel didn't object to not laying out the damages - they lost it all?

LAWYER: We certainly did believe that there was some evidence of some damages. Just not these damages.

PHILLIPS: But if they're clearly simple...I mean there's a short term, you get well, and then there is long term damages, why didn't you ask for two damage _____ and do you run into some preservation problems in not doing that?

LAWYER: I don't think so. Primarily because of the fact that the way the two issues are worded, the question No. 1 being: Did it cause some injury? Which is yes. Question 6 being: What were the injuries that actually resulted from that exposure? We believe the evidence supported some damage but not years and years and years of...

ABBOTT: So you agree that there was some evidence to support the answer to question 6?

LAWYER: There certainly would be evidence to support two days worth of loss of work, medical, care for the acute effect...

ABBOTT: So the bottom line is there is some evidence to support the answer to question 6, but your contention is there is not enough evidence or maybe there's no evidence to support what appears to be the full scope of the award that was given?

LAWYER: Insufficient evidence to support...

ABBOTT: If you didn't object to that, how can we deal with it here?

LAWYER: But we did object to that. We objected to question No. 6 and asked for remittitur as well.

ABBOTT: What was your objection to 6?

LAWYER: Not an objection to the charge. We made no charge error on that basis. Our objection timely brought before this court was on a motion for new trial saying that the evidence supporting the answer to question no. 6 was insufficient.

PHILLIPS: Let me try this one more time. You have a case and you submit lost wages. Defendant concedes there is evidence of past lost wages, but doesn't think there is any evidence of new lost wages. Do you have some obligation to object to that question in the form that it is and ask for two _____. Or can your argument that well if they gave us so much down they must have given some future lost wages and there is no evidence of that and can that buy you a new trial?

LAWYER: I think that that probably would not be able to under the case law that you've cited. However, this I believe is very distinguishable given the fact that there is some evidence of each and every element that was submitted on the individual...In our case there was evidence of lost wages. There was some evidence of medical expenses. There was some evidence of injury due to the short term effect.

I wanted to read a quote from the court's opinion in Compu Graphics, which I think is absolutely relevant to this case.

BAKER: Didn't you preserve a no evidence point for appeal?

LAWYER: No, I do not believe. We did file a motion for new trial and for j.n.o.v. However, I don't believe that we objected to...

BAKER: All your points of error are based on your motion for new trial?

LAWYER: Absolutely.

BAKER: And that's all?

LAWYER: Yes.

BAKER: And you did not preserve a no evidence point in your motion for new trial?

LAWYER: Let me take a look again.

BAKER: I recall everyone of them say the damages are excessive?

LAWYER: Yes.

BAKER: And there is factually insufficient evidence to support the $8 million in damages?

LAWYER: Yes. Our motion for judgment...

BAKER: Is it correct, your whole argument is about causation?

LAWYER: Causation of damages.

BAKER: So you just think they're too much, and you argue there's no causation; is that right?

LAWYER: Well it's not simply that there is just too much. It's the fact that the amount of the damages is...

BAKER: But that's the only point you make, they are excessive is what you said in your motion for new trial.

LAWYER: Yes, they are excessive.

BAKER: And we want a remittitur?

LAWYER: It says more than that.

BAKER And you want a new trial?

LAWYER: The portion that I read to the court talks about the lack of causative link between Diazinon and the kinds of damages that...

BAKER: Based upon evidence admitted without objection?

LAWYER: Yes.

ABBOTT: Are you familiar with the US SC case _____ v. InterCarribean Shipping Corp.?

LAWYER: Yes.

ABBOTT: Does that case pose a problem for you all?

LAWYER: No, I really don't think it does especially in light of the recent US SC opinion in Metro North Computer Railroad Co. v. Buckley, which was cited to the court in our most recent supplemental brief: 117 SC 2113. In that case, the court looked to state common law in deciding not to allow a cause of action for negligent infliction of emotional distress without evidence of particular physical manifestation rather than psychological. It was a FELA case. And as the court knows FELA and the Jones Act uses the exact same standards. In that case, the court held that courts like this court in the absence of some sort of the statutory provisions in the Jones Act or FELA excluding inquiry, that this court should look to common law to determine what the standards are going to be. Neither the Jones Act or FELA have any dictation of the standard for appellate review of damage awards or on the burden of proof of proving damages. In that case, this court must look to the common law, which we've asked this court to do in Daubert and in accordance with Daubert and Havner.