ORAL ARGUMENT - 04/23/97
97-1270
HAMMERLY OAKS, INC V. EDWARDS

MOORE: The issue we are addressing here today in this case generally stated is what quantum of evidence is required to sustain a gross negligence finding an exemplary damage award against a corporation? Specifically in our case _____ legally sufficient evidence to support the jury's finding of gross negligence here based on the conduct of Marilyn Montgomery, Hammerly Oaks as a policing agent who was found by the CA to be a vice principal. We seek a clarification from this court of the amount and quality of evidence required to show sufficient responsibility for someone to be characterized as a vice principal.

To address this issue I think we need to look to the roots of what the vice principal concept is as stated by this court in Ft. Worth Elementary v. Russell and its progeny. The fundamental underpinning of that case was that in order to recover exemplary damages against a corporation of the grossly negligent act must be the very act of the corporation itself. Acts of ordinary employees, ordinary servants will not suffice to bind a company to exemplary damages.

Also the type of employees whose actions are considered to be the actions of the company of the corporate entity are a limited group of people. Traditionally they have included people such as corporate officers, those with the authority to employ, direct or discharge employees, those in whom the business have confided, the management of the whole company or the _____ division of business, or those engaged in nondelegable duties. Only two of those are really at issue in this case.

With that said what are the problems we have here with the CA's opinion in this case? I think primarily there are three-fold, first of which is the CA's opinion impermissibly expands the vice principal concept to include employees that were not originally intended to bind a company to punitive damages under this court's jurisprudence.

HECHT: Was Brittain the vice principal?

MOORE: Yes.

HECHT: It was not Montgomery?

MOORE: Correct.

HECHT: And what about Smotech?

MOORE: Smotech was not a vice principal because he was for starters an independent contractor. In this case he was not employed of Hammerly Oaks. The only way that he could be a vice principal is if he was performing a nondelegable duty. But that issue has been waived and it's not before this court.

OWEN: You say it's waived. I thought they said in a reply point that the CA's judgment should be upheld because Smotech was performing a nondelegable duty as a matter of law?

MOORE: I think that the existence of what constitutes a nondelegable duty would be a question of law. However, whether Smotech was actually performing a nondelegable duty in this instance is not a question of law. And there was in fact I believe the record will show conclusively that he was not engaged in the performance of a nondelegable duty because his duties did not involve securing the apartments as testified to by Montgomery and Brittain.

I think the CA's opinion is correct as it discusses that issue in footnote 4 about why the issue is not one of law in this case, and why Edwards was required to object to the charge in this case, that being the definition of "vice principal", or at a minimum submit an appropriately worded instruction or definition and he did not do that. And has thus waived that issue in the CA. And has also not challenged the CA's conclusion in this court by perfecting his own appeal.

OWEN: Does the jury's finding that he was not in the course and scope; does that have any bearing on this issue of nondelegable duty?

MOORE: That question about the course and scope on its face is limited to whether or not the jury finds that Smotech actually participated in the assault. I'm not sure that that encompasses whether or not he was performing a nondelegable duty in terms of security in apartments.

We believes that the CA's conclusion that Montgomery qualifies as a vice principal indicates a need for clarification from this court on the level of responsibility required to establish someone as a vice principal not only to assist the CAs but more importantly to guide the TCs in their preparation and submitting of the charge. Because this issue frequently comes up during the charge conference.

What evidence is enough evidence to satisfy someone as a vice principal? I first suggest that a title designation by itself is not enough. Just because someone is a manager or called a manager by a corporation does not necessarily mean that they should be a vice principal. The term manager means different things to different companies. By the same token, just because someone is not designated as a manager does not necessarily preclude them from being a vice principal as well.

I believe authority of this court in Purvis v. Pratco supports such a proposition where the court focused upon the scope of authority granted to the employee rather than a title designation as determinative of the managerial capacity.

We would also suggest that mere authority or hiring and firing decisions by themselves are not enough to meet the vice principal standard, or exercising on the part of the employee of small amounts of discretionary tasks and things of that nature.

We believe that what we are talking about here is an identifiable concrete type of authority granted to the employee showing responsibility for the overall affairs of the company; someone with the general power to control the company's business.

BAKER: There's a definition or instruction by the court as a charge; is that right on what a vice principal means?

MOORE: That's correct.

BAKER: Didn't your client object to that in the TC?

MOORE: I think that the instruction as it was submitted was the instruction submitted by us at the TC.

BAKER: So the jury finds whether they are a vice principal or not based on your submitted instruction?

MOORE: That's correct.

BAKER: It seems to me like what you're arguing for today is considerably narrower than what you submitted on your own in the case? Didn't you say just a minute ago that to hire and discharge or direct employees is not enough?

MOORE: I said that.

BAKER: That's what you submitted?

MOORE: Hiring and firing alone should not be enough.

BAKER: So it takes "and direct employees?"

MOORE: I think it takes a substantial decision-making ability.

BAKER: But you didn't say that in that instruction?

MOORE: It does not say that in the instruction, that's correct.

BAKER: So aren't you struck with it?

MOORE: We would be stuck with it.

BAKER: Well how can you argue differently?

MOORE: I think that's one of the reasons we are requesting a clarification from the court.

BAKER: How can we clarify what you've already said you think the law is when you've tried the case?

MOORE: I agree with you. We will live and die by what is contained in the charge.

BAKER: So do we have to have a policy reason why we want to agree with your assessment of what the definition ought to be today for different purposes and different reasons? So then what is the policy reason?

MOORE: I don't think that's necessarily dispositive of the issues before us today. Fortunately I don't think it matters because Montgomery did not have the authority to hire and fire anybody.

BAKER: Even under this definition?

MOORE: That's correct.

BAKER: Is this the right case to try to make your policy point?

MOORE: She did not have the authority to do that. It's undisputed. To hire and fire her whereas Brittain did.

BAKER: Well was Brittain grossly negligent?

MOORE: Absolutely not.

BAKER: But Montgomery was?

MOORE: Well I don't believe Montgomery was either.

BAKER: So even if she was a principal, if she wasn't grossly negligent your argument is still good, it's just you're not filing?

MOORE: That's correct. Even assuming she is a vice principal, which she cannot be, in order to find her grossly negligent her conduct would have had to have passed the Moriel test both the objective and subjective prongs, and it does not in this case. Subjectively there is no evidence in the record that Montgomery actually understood what the risk of harm was to Edwards when Gonzalez communicated his statement to her. I think that when someone communicates or says something like Gonzales did to her just out of the blue in everyday practice, people don't tend to make good on threats like that. And she does not understand when he says such a thing that he really means to do it. And most importantly there is no evidence in the record that indicates from prior instances or circumstances that Gonzales was likely to do this. To Montgomery's knowledge, Gonzalez was a good worker. He had no prior complaints or conflicts with other tenants. She had no reason to be on notice that this might come to be.

BAKER: When he said that to her had he already been fired because he didn't have a machine?

MOORE: I think he communicated to her that he would not be able to clean the carpets anymore because he didn't have a machine. I don't think it was a question of whether or not he had been fired or not.

My point is, I think for the vice principal conduct what we're talking about is a person that has substantial decision-making ability along the lines of policy formulation or choosing the direction of the company generally, or the authority to act on behalf of the company without prior approval from superiors. And I think what we're suggesting is consistent with the current state of tort reform in this state, including recent clarifications of this court with regard to necessary proof of gross negligence. For instance, I direct the court to the new venue statute, which makes a distinction or draws off the type of distinction we're after here when determining when a corporation is subject to venue in a _____ county. Venue is only proper to a corporation if they have a principal office, that is an office where policy-making type decisions are made for the company beyond just the mere day-to-day operations of a corporate agent. And I think that's the distinction that we are looking for here and the distinction that was intended by this court in Ft. Worth Elevators v. Russell.

SPECTOR: If Mr. Gonzalez had come to the leasing office looking for a tenant who he did not know the tenant's name or where their apartment was, and no one had been in the leasing office, and so he just goes and looks through the files and identifies who he is looking for and goes to that apartment, would there be any proof of gross negligence?

MOORE: If he just enters the leasing office without permission?

SPECTOR: And it's empty; no one's there; it's unlocked.

MOORE: Well if it's unlocked I'm not sure...

SPECTOR: What I am trying to understand is what is the purpose of there being a vice principal who makes the corporation responsible, or there not being any one there at all?

MOORE: Well a corporation has to act for the people. A corporation is just an entity and it has to act through persons. One of the ways in which a corporation can be responsible for punitive damages when an employee who is a vice principal acts within the scope of his or her employment. And I think that must be a step to take to recover punitive damages when we're talking about a particular act of an employee. I have trouble doing it with the facts of our case because it's clearly not what happened here. Of course Gonzalez was not an employee himself of the company, and his intentional conduct, probably criminal conduct in what he was doing in going into the leasing office and rifling through the files I don't think should expose Hammerly Oaks to exemplary damages at all because of his intentional conduct.

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RESPONDENT

LAWYER: What we are here today to decide I believe is whether or not the standard applied by the CA was a proper standard of Moriel is one question. And another question is whether or not, and I think it's really the only question that has been seriously challenged, is whether or not Mrs. Montgomery Griffin is a vice principal?

First, I would like to say that yes Mrs. Montgomery Griffin is a vice principal of this corporate entity. The reasons I would submit to you are the following: There are those that are listed in the opinion of the CA, which I think when Justice Dunn, Wilson & O'Connor found those issues they cited some examples. They are however not the only examples of evidence that was presented in trial and to the CA.

I would point out that they cited that the individual Mrs.Griffin worked closely with the acknowledged general manager, Mrs. Brittain. However, in addition to that she was in charge of the office and worked in the office alone. Now we know that for a couple of reasons. We know that because when she spoke with Mr. Gonzalez, she indicated that they were alone; she was receiving this information and that there was no one else in charge, but her. But in addition to that we know that that was what she said when she talked to Officer Wolfe. And I don't think you will see Officer Wolff's name mentioned, but it is discussed at the CA level.

OWEN: What is the significance of the fact that she was alone?

LAWYER: She was in charge. She was the one that was handling of the decisions that were being made at the time. They had delegated to her the authority to handle issues and...

HECHT: Even when a business goes to lunch and they leave the receptionist to answer the phone, she's a vice principal?

LAWYER: The example I would give, and the answer is no. But what I would say to that is that when the person who is left behind is the person who actually interacts for example with the police when an aggravated assault has been committed on the premises, because that has not been previously discussed here.

HECHT: If there's nobody there by the janitor and the police come running in and say: What's going on? open this door, do this, do that, doesn't he have to do it?

LAWYER: To some degree he would have to follow the orders of the police. But he doesn't have the knowledge and ability and authority to do the things she did. She accessed personnel files for example on both of the Gonzalez' and provided that information, including the personnel files to Officer Wolfe. She told Officer Wolfe that she had had these discussions with these individuals and discussed what they had said. By the way at trial she was caught being somewhat inconsistent in her testimony. The jury had good reason not to believe hardly anything she or Rose Brittain, or Frank Snoteck had to say.

I would point out to you that what we're examining here today is a no evidence question. It's not weighing for example Mrs. Montgomery's statements that what her jobs were or Mrs. Brittains statements verses somebody elses. It is deciding whether or not there is some evidence in the record that says that Mrs. Montgomery Griffin, acted on that occasion with the proper authority to be a vice principal. And the answer to that question I believe was found in several places. In Officer Wolfe's testimony he on numerous occasions described her as the manager of the complex. He said that I went and spoke to two people: Mr. Smoteck and the manager. And the manager that he's talking about is Marilyn Montgomery Griffin. He acknowledges he never met or spoke to Rose Brittain at all. He indicated that while in the management office he was given access to personnel files by Mrs. Griffin. While in the management office she was the person that appeared to be in charge. This kind of information is all contained within the testimony of an unbiased witness, and that being the police officer investigating the assault.

Now the importance of that is is that it was apparent to him that she had that authority. She was acting in such a manner as to exhibit that authority. Not under commands or orders from him, such as in the case of the janitor that you described Justice Hecht, but because she was in the office as the management personnel.

OWEN: Do you think that's equivalent to authority to manage the entire corporation, or department, or division of its business? Do you think simply having access to personnel files is the equivalent of authority to manage the department or division?

LAWYER: No it is not. And I don't have to prove that she had the authority to manage the entire

corporation. And that is a disjunctive form of a list of items.

OWEN: Strike the entire corporation. What evidence is there that she had authority to manage a department or division of the business?

LAWYER: I believe that there is evidence that she was managing subcontractor corporate employees, the exact assailants in this crime by the way, that she had the ability to assign where they did their job, which apartments they went to, that this was discussed, and that's what she did. She had the ability to manage their personnel files, to interact with them in seeing that the work was performed and completed. There is no requirement that she hire or fire. There's no requirement that she write checks in order to be for purposes of this law operating as a vice principal. The question was at the time when issues of this importance were involved was she acting in such a manner and with such authority? And I would submit to you combined with the way she presented herself to the officer such that he believed she is the manager, and the way that she presented herself in the conduct that she engaged in, that she was operating in that manner. So I do believe that there is evidence and that's the point. We are not weighing. What we are saying is there some evidence. And there certainly is the evidence of the officer's testimony, her own admissions, and then the actual evaluation of what was she doing. And I believe that that does support a finding of her being a vice president. And it would support the court belows finding in that regard.

I quite frankly in all candor _____ of the court. I wish they would have given me more of these details that I'm giving you in their opinions so that you could see that there was more than merely some statement that she was acting in close concert with the manager, or that she interacted with the carpet cleaners, because the evidence was greater than that. They didn't even mention for example Officer Wolfe, which I think is a very important witness in that regard.

It's also important I think to note that she did not seek authority from someone else. She had apparent authority. She did not ask permission to obtain personnel files. She did not go to someone else to make a judgment decision. What is the fundamental aspect of being a vice principal or managing? It's when you exert your judgment in important issues when you're given the ability to do so. And Rose Brittain acknowledged that this woman had the authority to exercise her judgment and evaluation. Obviously it was very bad judgment.

The conduct, and I would emphasize to you in Officer Wolfe's testimony, it's not once but on many different occasions that he refers to her as management, manager, management office, and the only person he spoke to was her other than Mr. Smoteck.

Since she held herself out in that manner and had that apparent authority, I believe it is reasonable that the jury could follow that and that's the evidence they could look for. And that's the evidence the jury had in front of them that they could have relied on. I think it's the kind of evidence the CA and that this court can rely on in that regard.

We have a case of a brutal assault where a person is told by an angry individual, and by the way she deviated back and forth on the use of the word "agitated," "aggravated", "angry", "upset", but ultimately the testimony was that angry, aggravated, upset individual who's lost his livelihood, who can't work, who can't make a living, who has a person he thinks is to blame is wrong, but he thought he had the right person to blame, and says: I want to beat it out of him. I am looking for him. I am going to try to find her. Then she takes no efforts to prevent him from being on the premises. He's allowed to just roam around the premises which is acknowledged by Mr. Smoteck who sees him roaming around the premises, and speaks to him. Quite frankly I believe the evidence will suggest Mr. Smoteck was complicit, gave them the ability to get into the apartment and of the assault. The coincidence of the vacant apartment being immediately next door to my client's apartment is more than a mere coincidence.

I guess the point we're making here is and it gets worse. They talk about the Moriel standard. Can anybody honestly say that when someone says I'm looking for your client to beat him up, because I've lost my livelihood, that that is not something to put you with subjective awareness of a risk of serious injury?

PHILLIPS: What were the exact words?

LAWYER: That was debated. Officer Wolfe again said that when I talked to her she said that they indicated they were looking for him to attack him, beat him up and they were going to try to find him. She at her deposition and she changed her words between the deposition and the trial, which we cross examined her about that, tried...she said stronger way the first time. And then at trial said that well all he really said was that I would like to find him and beat it out of him. Implying that it was just a wish list. He says that however that she acknowledges while angry, aggravated, aggitated, upset, and without livelihood.

The clear import of the statement was that if I find this guy I am going to beat him up, and he did exactly what he said accept he also stabbed him multiple times _____ the crime in a secluded area where they could ambush him behind closed doors. Provided by the fact this company has not one single policy regarding following a city ordinance that says you lock the door. Not an oral policy, not a written policy on a vacant apartment. There's a law that says they do just like the same ordinance in Nixon v. Mr. Property, same exact ordinance or virtually the same ordinance applies in Houston, and they had no procedure to implement that. Nothing in place according at least wise by Mrs. Britain and Mrs. Montgomery.

The fact is that they set up the opportunity for the crime to be committed in such a manner.

OWEN: Do you have a jury finding on the failure to secure the door?

LAWYER: What we have is a jury finding on negligence and gross negligence. But we believe that as a matter of law under the evidence that was presented is they did not controvert that there was no

procedure policy written or otherwise training or anything that dealt with complying with the city ordinance and as a matter of law they were in violation of that and I believe that therefore we didn't have to ever prove that the issue of vice principal actually becomes surplusage in that gross negligence question in that regard.

They didn't deny that they didn't have those polices and procedures. And I believe that that alone and that goes beyond by the way I would suggest beyond just the ordinance. It also goes to Rose Brittain acknowledging that in an apartment complex of 520 units that she had no policy or training procedure about security. What to do if someone comes or you receive knowledge of a threat against a tenant? There was no procedure. They didn't even have so much as something that says call 911.

SPECTOR: Was there evidence that after the assault they did nothing to assist the clean-up?

LAWYER: It's worse than that. After the assault Mr. Smoteck was concealing and destroying evidence. He was actually cleaning up blood off of the walk way where my client had drizzled blood from the vacant apartment where he was attacked trying to get home. He was hiding it, concealing it. He did not call the police. They did not call the police. Furthermore, they offered no medical assistance. Now there came some dispute over some of that. But I thought it was interesting what Officer Wolfe said when he described and Officer Toungey also describing Mr. Smoteck and Mrs. Griffin that they both were nonchalant That was his word that they were nonchalant about the whole thing. They just didn't really care that this man...they didn't know that _____ was injured. He had been stabbed multiple times; his nose was broke; he was beaten brutally, and terrorized for an extended period of time; and they didn't care. They didn't do anything, and they didn't care.

SPECTOR: After the assault they did not go to his...where did he go?

LAWYER: He went back to his apartment. First he called a friend then he called 911. The police came on his call. They did at some point, and I do not recall in all candor the details of why or how they did it, but at some point Mrs. Brittain testifies that she did go to his apartment with another person and they knocked on the door. I do not remember what drew her attention to go to that apartment. I don't know if it was because the police were there or if Mr. Smoteck said something. In all candor I wasn't looking for that in my review of the record. It could have been Mr. Smoteck went to them and told them. I don't remember. But they didn't take any affirmative action on his behalf.

If you ever want an example of conscious indifference I think you've got it. If you want a corporate entity that doesn't seem to care about the 520 apartments and the people that live in those apartments, you've got it.

BAKER: Is it your position that by not adhering to the ordinance that that's gross negligence?

LAWYER: Yes sir. In fact I would say that not adhering to the ordinance when the ordinance is designed for the specific purpose of the safety and welfare of the tenants of apartment complexes and for the public at large also in order to secure vacant apartments, and then they consciously disregard that ordinance, they don't even have any procedure to comply with the ordinance; don't have anybody that they claim at least was supposed to comply with the ordinance. Now I disagree with the testimony. I think at some point it became apparent that Mr. Smoteck was supposed to check doors on his rounds, although they seem to deny that in the form of the testimony of Mrs. Brittain. So if that's true, then they're claiming that knowledge not only do they not follow the ordinance, but they don't even intend to follow the ordinance.

BAKER: Does the testimony you're talking about about they're nonchalants, indifferent after the fact of the assault are you asserting that that's grossly negligent conduct?

LAWYER: No sir it's after the fact. But it is some evidence of what their candor or what their circumstances may have been before the fact. When after you've not warned a tenant that he's about to be assaulted when someone's threatening you have not asked the security guard or anyone else to secure the area, you have not kept them off the premises, you have not insured that the door is locked, you have not called the police, there's a whole list of things you can say that they omitted to do - acts or omissions. Their acts and their omissions both speak _____. But when they've done all of that and then because of all of that, their contract labor, their contract cleaners beat this man senseless and then they are nonchalant about it. I think that is relevant evidence to interpret their pre-act conduct. And that's the relevance of it. It is not in and of itself I agree with court prove gross negligence. It is evidence to help you interpret and I believe help the jury interpret what they've done before then.

The other things I would like to address to the court is the nondelegable duty question. I don't believe and I think Judge Owen brought this out the court addressed the issue of waiver because we did not object to the jury charge. We didn't need to have a charge that included that question at all because of it being proved as a matter of law.

OWEN: You said it's proved as a matter of law. But I thought you just got through saying that the evidence was conflicting on whether it was Smotech's duty to lock doors?

LAWYER: It was proved as a matter of law that they had absolutely, according to their testimony, no procedure about what to do in regards to complying with the city ordinance and insuring that doors were locked. And Rose Brittain as the acknowledged manager said that she had no procedure in place and no policy in that regard. So by that admission I believe that it is prudent.

The nondelegable duty we would have waived if the issue required us to change the jury charge. But that isn't the issue. We are not objecting to the jury charge. I would admit to you that the vice principal language becomes surplusage in that regard and those instances, but it's not something that we

need or have to object to and therefore have not waived that issue on appeal.

As to Rose Brittain, I would also argue, and the CA only picked one example for you, that being that of Marilyn Griffin and said she is a vice principal and she engaged in this conduct. They didn't give you all the facts about it, which I am hoping now you can see there was much more, that proved her being a vice principal including her acceptance of authority and actions and conduct. But they didn't say whether Rose Brittain was or was not. They didn't say whether Rose Brittain's conduct was or were not grossly negligent. And quite frankly I think they could have added more emphasis to their ruling by point out to you that Rose Brittain is the admitted general manager. Rose Brittain admitted not following the law, not having policies, not having procedures, not doing anything to insure locks, not doing anything to insure that these people weren't on the premises even though she admitted they had no reason to be there. She acknowledged that. This is an apartment complex that has gates, computer codes, it's supposed to be a safe and secure environment. She however admitted they took no effort whatsoever to do that.

BAKER: To do what?

LAWYER: To keep these people off the premises that had no business being there.

BAKER: They are there to clean the carpet?

LAWYER: She acknowledged that at one point that she knew they no longer had some equipment therefore they no longer had any work to do. And she said they had no reason to be there after that _____ and should not have been on the premises. She admitted that. And by that admission she's also now admitting....we asked her: Did you do anything to prevent it? And she admitted that she had not.

OWEN: Did she at the time that that happened did she have any knowledge of the threat that had been made?

LAWYER: She denies knowledge of the threat. However, I would submit to you that we only look at the evidence that supports the verdict rather than evidence that would be conflicting. That would certainly be evidence of conflict, but that's not...we're not doing a weighing here.

OWEN: I'm just trying to get at what evidence Rose Brittain had in front of her that would lead her to be grossly negligent as opposed to negligent?

LAWYER: First off I think she's grossly negligent when she does not comply with city ordinance. When you don't have a procedure to enforce the city ordinance policies of having locked and secured doors, I think you're grossly negligent already. But beyond that I think there is a reasonable inference that she did know of the threat because she acknowledged that she knew that the equipment had been stolen or allegedly stolen, she knew that these people could not work, she knew that these things were going on.

And it stretches the imagination to believe that her co-worker Mrs. Griffin has been told that by the way they think that our tenant did this, but that's not communicated to her and or that there is a threat made against that tenant.

OWEN: There's no evidence of that you're just saying that that's a reasonable inference?

LAWYER: I believe it's a reasonable inference. And again we are allowed to rely not only on the...first off only the affirmative evidence, none of the conflicting evidence, but also reasonable inferences from that evidence.

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REBUTTAL

MOORE: Counsel just spoke quite a bit of Montgomery's acceptance of a great deal of authority. I do not believe that is born out of the record. There was no evidence of the scope of Montgomery's authority when Brittain was absent from the premises. It's undisputed that Brittain was the one who could write checks, and perform all the other or had all the other managerial authority vested in her. When she wasn't there there is no indication from the record that Montgomery could magically go and write checks for the company and bind and hire and fire people who do all those things. She did not stand in the shoes of Brittain when Brittain wasn't there.

I think that any attempt to characterize Montgomery as a vice principal solely because of the nature of the tasks that she was performing as counsel has attempted to do, I believe to a certain extent the CA attempted to do, conflicts somewhat with this court's opinion in Ramos v. Frito Lay, where the court emphasized that the managerial capacity inquiry is based more on the actual scope authority rather than whether someone is performing managerial type tasks verses nonmanagerial type tasks.

I would also like to add briefly the language quoted by the CA in their opinion regarding Montgomery's testimony about how she worked closely with Brittain, etc. was testimony enlisted by defense counsel and objected to by the plaintiff's attorney; and the TC sustained that objection. And the grounds for his objections were that this testimony Montgomery gave is nonresponsive and narrative, the TC sustained those objections. That evidence cited by the CA is not properly in the record any way. That evidence cannot be considered by the CA because it could not have been considered by the jury because they were instructed not to consider matters not represented by evidence.

I also challenge the contention that anything Brittain did after the incident in question could somehow implicate or satisfy the gross negligence test in this case. She clearly did not have any knowledge whatsoever about this threat. It was not communicated to her. She was not present on the premise when that statement was made.

I just don't see how there is any evidence there even circumstantially can give rise to subject an awareness on her part and I don't think what she did after the incident has any bearing whatsoever on what her state of mind was before the incident in question.

OWEN: Is there any evidence that someone at Hammerly Oaks knew that the plaintiff was injured before the police arrived?

MOORE: Not to my knowledge. As I recall Brittain testified that she called the ambulance as soon as she found out there was an incident. If there is anything I would like the court to remember about the argument today I really want to impress upon them that they should _____ the judgment and affirm the TC's judgment.