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COURT OF APPEALS

STATE OF NEW YORK

DEVITO,

Appellant,

-against-

No. 195

FELICIANO,

Respondent.

20 Eagle Street
Albany, New York 12207
October 15, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 195, DeVito v.
2 Feliciano.

3 Counsel?

4 MR. ISAAC: Your Honor, Brian Isaac, I'd
5 like to reserve three minutes for rebuttal, if I can,
6 please?

7 CHIEF JUDGE LIPPMAN: Sure. Go ahead,
8 counsel.

9 MR. ISAAC: Brian Isaac, I represent the
10 plaintiff/appellant. I think, when I saw this case,
11 I was surprised at the Appellate Division's decision,
12 because it seems to me to be a textbook case for the
13 application of the missing witness charge.

14 You have a damages-only trial. Perfect
15 liability, hit in the rear with a passenger, so it's
16 double-perfect liability. You have two witnesses
17 testifying for the plaintiff, both of whom attribute
18 the fractures - - - the nasal fracture and the T12
19 fracture - - - to the accident.

20 You have an elderly plaintiff, but one who
21 was asymptomatic, and clearly she had some arthritic
22 changes, but if you show me a seventy-eight-year-old
23 person who doesn't have some arthritic changes, I'm
24 going to show you an alien, and the defendant has not
25 one, not two, not three, but four doctors. And - - -

1 CHIEF JUDGE LIPPMAN: Could there be - - -
2 counsel, could there be lots of reasons why they
3 didn't call those four doctors - - -

4 MR. ISAAC: Could have been - - -

5 CHIEF JUDGE LIPPMAN: - - - that had
6 nothing to do necessarily with that they were going
7 to be unfavorable to the - - - to the defendant?

8 MR. ISAAC: Could have been a million - - -

9 CHIEF JUDGE LIPPMAN: Like the cost or - -
10 - or they didn't think there was much of a case here.
11 How do you deal with that - - - that kind of sce - -
12 - let's say there were legitimate reasons.

13 MR. ISAAC: Well, I've - - - I've got an
14 answer for you.

15 CHIEF JUDGE LIPPMAN: Sure.

16 MR. ISAAC: And here's my answer, Judge
17 Lippman. There could have been a million reasons,
18 but the defendant didn't articulate any. And if - -
19 -

20 CHIEF JUDGE LIPPMAN: So if he put on the
21 record some kind of good reason, maybe that would
22 have obviated the need - - -

23 MR. ISAAC: That's been - - -

24 CHIEF JUDGE LIPPMAN: - - - for the charge?

25 MR. ISAAC: That's been the law for a

1 hundred years. If he has a good reason for not
2 calling all four doctors, I'd love to hear it,
3 because I've never heard it.

4 JUDGE SMITH: But wasn't - - - wasn't the -
5 - - wasn't the issue in the case, though - - - I
6 mean, as I understand it, then - - - it's pretty much
7 conceded that she broke her nose and she broke a
8 vertebra, and no one really says it's not of
9 traumatic origin. The question is when? Which
10 accident? How can the defense doctors cast any light
11 on that question?

12 MR. ISAAC: It's very simple. They can
13 talk about what they know. They can talk about her
14 age. And the problem here, Judge, is that the
15 question is what did they say in their reports?

16 If you look at your decision in Macana,
17 which is, I think, one of the lead cases, it says
18 here that "the parties seeking the missing witness
19 charge must sustain an initial burden of showing that
20 the opposing parties failed to call a witness who
21 could be expected to have knowledge regarding a
22 material issue in the case, and to provide testimony
23 favorable to the opposing party".

24 Expected. It's very easy how they could do
25 it. I'll tell you how they could do it. The - - -

1 even the other accidents didn't involve facial
2 injuries. And they didn't involve back injuries.

3 One is - - -

4 JUDGE GRAFFEO: Well, I was just going to
5 ask you. Once - - - once the plaintiff's own
6 witnesses indicated they weren't aware of those other
7 hospital records, that kind of undercut some of her
8 case, didn't it? So did the defense then still have
9 to produce - - -

10 MR. ISAAC: Absolutely, that - - -

11 JUDGE GRAFFEO: - - - all of its - - - all
12 of its physicians?

13 MR. ISAAC: I'm sorry, Judge Graffeo.
14 Absolutely. That's the point. You see, the purpose
15 of the missing witness charge - - - and I think I,
16 kind of, actually figured it out driving up here this
17 morning, is to say, facts don't stop becoming facts
18 merely because a case might go bad, or an attorney is
19 bad, or an attorney is great.

20 If you read my adversary's brief, and you
21 read the amicus brief from the Defenders Association,
22 they talk about what a phenomenal job the defense
23 lawyer did. Inconsistencies, problems with memory,
24 not a real good witness.

25 JUDGE SMITH: Let me - - - let me - - - let

1 me simplify the case. Take a - - - yeah. Suppose
2 the - - - you know, she had accident on - - - on
3 Monday and she had an accident on Wednesday. And she
4 says these injuries occurred in the Wednesday
5 accident, and the defense says they occurred in the
6 Monday accident. How is a doctor, who examined her
7 two or three years later, going to have the slightest
8 idea which accident?

9 MR. ISAAC: I can't answer your
10 hypothetical, but that's not this case.

11 JUDGE SMITH: What's the difference?

12 MR. ISAAC: In this case, what you have is
13 you have a prior accident involving a fall, involving
14 a broken wrist. That's their position. Nothing to
15 do with the back. Nothing to do with nose. And then
16 there's a subsequent accident, also, involving a
17 fall. No evidence whatsoever that involved any of
18 these injuries. So I have to deal with my record. I
19 can't deal with other records, because I don't know
20 what's going on - - -

21 JUDGE SMITH: But then what is - - - and
22 how the defense - - - what is a defense doctor going
23 to say?

24 MR. ISAAC: It's simple. You have a
25 asymptomatic plaintiff, under your decision in Tobin

1 v. Steisel, even if you have someone who's
2 predisposed toward a condition, if an event occurs
3 which causes that person to seem - - -

4 JUDGE SMITH: My - - - my question is
5 what's the defense doctor going to say?

6 MR. ISAAC: The defense doctor could say it
7 was not caused by the accident, it was caused by age;
8 it was caused by - - - I don't know what he would
9 say.

10 JUDGE SMITH: Well, well, wait. The
11 defense - - - I don't think the defense is saying
12 that these were degenerative changes. They're saying
13 it was caused by a different traumatic event. How
14 can the defense doctor testify to that?

15 MR. ISAAC: Because the defense doctor
16 would have to say I looked at this record, I looked
17 at that record. In my opinion, the trauma that was
18 caused by this fall, or the trauma that was caused by
19 that fall, could have resulted in that injury. You
20 can't not call - - -

21 JUDGE SMITH: Okay. But is that - - - but
22 is that really a disputed point? I mean, isn't - - -
23 isn't the question really just her credibility? I
24 mean, I - - - I assumed, when I was reading the
25 record, there was nothing impossible about what she

1 said. It just wasn't true, because she - - - because
2 it didn't match the - - - the objective evidence.

3 MR. ISAAC: What - - - but that's the
4 point. Once you - - -

5 JUDGE SMITH: I - - - what I'm saying,
6 their defense was not a medical defense; their
7 defense was a credibility defense.

8 MR. ISAAC: Oh, Judge, of course, it was a
9 medical defense. Just read - - - read the summation.

10 JUDGE SMITH: I did.

11 MR. ISAAC: They talked about the fact that
12 the doctors weren't credible; they talked about the
13 fact the plaintiff wasn't credible. They talked
14 about the fact that she was symptomatic with
15 arthritis. That was the whole defense. The whole
16 defense was that we didn't establish a prima facie
17 case, and that's the purpose of the charge.

18 If you read your decision in Savinon, you
19 talk about the fact - - - and I'm quoting here, "The
20 missing witness instruction allows a jury to draw an
21 unfavorable inference based on a party's failure to
22 call a witness who would normally be expected to
23 support that party's version of the events. As we
24 stated in People against Gonzalez, the instruction
25 rests on 'the common sense notion that the

1 nonproduction of evidence that would naturally have
2 been produced by an honest, and therefore fearless
3 claimant, permits the inference that its tenor is
4 unfavorable to the party's cause'".

5 JUDGE GRAFFEO: So all - - -

6 JUDGE RIVERA: Other than requesting the
7 charge, is there any foundation you had to lay to
8 justify getting the charge?

9 MR. ISAAC: Absolutely none. I showed - -
10 - I showed - - - I showed - - - I did. I showed all
11 three elements. One, control. They never contested
12 control; they don't contest it in their brief. Two,
13 materiality of issue. Medical testimony was the only
14 thing that was at trial in this damages-only trial.
15 And three, that this witness was expected to give
16 testimony that could be favorable to that party. As
17 a matter of fact, and I - - -

18 JUDGE GRAFFEO: So all IME doctors are
19 going to have to testify?

20 MR. ISAAC: If there's a - - -

21 JUDGE GRAFFEO: All defense IME doctors are
22 going to have to testify - - -

23 MR. ISAAC: No, if they - - - absolutely
24 not.

25 JUDGE GRAFFEO: - - - unless they argue

1 that it's cumulative - - -

2 MR. ISAAC: If - - -

3 JUDGE GRAFFEO: - - - for some reason.

4 MR. ISAAC: Yes, if they argue it's
5 cumulative - - - that's one of the arguments they
6 made. I can't quite understand the cumulative
7 argument.

8 JUDGE SMITH: Well, yeah, your point is - -
9 -

10 MR. ISAAC: How could - - - how could - - -
11 how could a it - - -

12 JUDGE SMITH: - - - it may be cumulative,
13 but their witness is not yours.

14 MR. ISAAC: Right, right.

15 JUDGE SMITH: Yeah, if it's cumulative with
16 your witness, you want to see it.

17 MR. ISAAC: That's correct.

18 JUDGE SMITH: Yeah.

19 MR. ISAAC: But - - - but here - - - but
20 here's the rule. I mean, I know that this is the
21 Court of Appeals; I know you're always asking for the
22 actual rule that you should apply. I'm going to give
23 it to you. I'm going to give it to you word for
24 word.

25 Here's the rule I want you to apply: "When

1 a doctor who examines the plaintiff on defendant's
2 behalf does not testify at trial, an inference
3 generally arises that the testimony of such witness
4 would be unfavorable to the defendant unless he" - -
5 - that's the defendant - - - "demonstrates that the
6 testimony would be merely cumulative" - - - one - - -
7 "the witness was unavailable and not under his
8 control, or that the witness would address matters
9 not in dispute".

10 Those are the - - - that's not me. The
11 Appellate Division is much smarter than I am. I'm
12 quoting them word for word. That's what you should
13 hold.

14 JUDGE PIGOTT: But they - - -

15 MR. ISAAC: I don't - - -

16 JUDGE PIGOTT: What do you do, Mr. Isaac,
17 when your - - - one of your doctors - - - I can't
18 pronounce it, Naiditch, is it? He said that he could
19 have predated it. He said that - - - that the
20 fracture could have predated the accident. And then
21 Kaecker - - - if I'm pronouncing that right - - -
22 said that at the time of the examination immediately
23 following the accident, there was no pain on
24 palpation.

25 So most juries, and I suspect some defense

1 lawyers are saying, you know, that's - - - that's
2 good enough for me. I'm just - - - you know. So I -
3 - - I think we're done.

4 MR. ISAAC: You don't get to make that
5 choice. That would be my response. You can do that,
6 and the way to do it is to tell the jury, look, I had
7 doctors. I chose not to call them, because the
8 plaintiff didn't establish a prima facie case. You
9 don't get to not call the ex - - - not call the
10 witness, and you don't get to change facts by dint of
11 your opponent's problem.

12 JUDGE SMITH: Well, you're - - - you're not
13 saying they have to call a witness. You're saying
14 they have to endure a missing witness instruction,
15 because they don't - - -

16 MR. ISAAC: That's it. That's exactly
17 right. That's their choice.

18 JUDGE PIGOTT: What's the difference
19 between that and as happened in this case, where the
20 plaintiff's lawyer could make hay about the fact that
21 they didn't bring him.

22 MR. ISAAC: My argument would be if the
23 argument was that the plaintiff's - - - that the
24 summation of the plaintiff's lawyer pointing out the
25 fact that a defendant's doctor didn't testify,

1 obviated the charge, you never have the charge. You
2 just throw it right out for cause.

3 CHIEF JUDGE LIPPMAN: Okay, counsel.
4 Thanks, counsel.

5 MR. ISAAC: Thanks.

6 CHIEF JUDGE LIPPMAN: You'll have your
7 rebuttal.

8 Counsel?

9 MR. GOTTLIEB: Good afternoon, my name is
10 Michael Gottlieb. I'm for the defendant/respondent.

11 CHIEF JUDGE LIPPMAN: Why shouldn't there
12 be a miss - - - missing witness charge here? And
13 what - - - what possible rationale do you have for
14 not calling any of the doctors? And if you don't
15 want to call them, don't call them. Why don't you
16 get a missing witness charge?

17 MR. GOTTLIEB: Well, preliminarily, there
18 are three preconditions that a movant for the missing
19 witness charge - - -

20 CHIEF JUDGE LIPPMAN: Sure, go ahead.

21 MR. GOTTLIEB: - - - has to make. And in
22 this instance, even though the trial court Judge
23 Stinson offered them - - - the trial lawyer the
24 opportunity to make those pre - - - make out those
25 preconditions, he absolutely refused. By doing that,

1 he then prevented respondent's attorney, that's - - -

2 JUDGE SMITH: Tell us what preconditions he
3 didn't make out.

4 MR. GOTTLIEB: He didn't make out the ident
5 - - - the identity of the witness and what the
6 knowledge of that witness would be.

7 JUDGE PIGOTT: Well, everybody knew that.
8 I mean, you had - - - you had the reports.

9 MR. GOTTLIEB: He - - - he didn't mark
10 those reports for identification.

11 JUDGE PIGOTT: No, but I mean, I - - -

12 JUDGE SMITH: Is that - - - is that the
13 problem, that he didn't mark the reports for
14 identification?

15 MR. GOTTLIEB: Well, we don't know what
16 those reports would say, Your Honor.

17 JUDGE PIGOTT: They're your doctors.

18 MR. GOTTLIEB: I underst - - - just because
19 they're my doctors, doesn't mean they're giving
20 testimony - - - they would give testimony favorable
21 to me. They prepared reports.

22 CHIEF JUDGE LIPPMAN: Your - - - they're
23 your witnesses, and you don't know what they're going
24 to testify to?

25 MR. GOTTLIEB: Your Honor, of course, I - -

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JUDGE PIGOTT: If they weren't favorable -
- - if they weren't favorable to you, then that's why
you need the missing witness charge.

MR. GOTTLIEB: The que - - - but we don't
know that - - - the preliminary examination, I think,
is that we do not know what those reports said. Why?
Because plaintiff's counsel did not put them forward.

JUDGE PIGOTT: Are you trying to dodge the
issue by saying they didn't preserve it because they
didn't go one, two, three, in the - - -

MR. GOTTLIEB: Well, that's a preliminary
point. I think - - -

JUDGE PIGOTT: I don't mean to say "dodge",
by the way.

MR. GOTTLIEB: Yeah, no, I understand.
Thank you, though. That's a preliminary point. I
think there's additional points that can be made.

JUDGE SMITH: But isn't - - - isn't it
always true - - - isn't the nature of a missing
witness case that you don't know what the missing
witness would say because you control - - - that is,
the other side doesn't know because you control him,
and he doesn't.

MR. GOTTLIEB: But you do know because you

1 have to put forward - - - there has to be - - -

2 JUDGE PIGOTT: What was the basis of the
3 court's ruling?

4 MR. GOTTLIEB: The lower - - - the trial
5 judge's ruling? Was that it was cumulative.

6 JUDGE PIGOTT: All right. How can it be
7 cumulative when - - - when you raise these issues
8 about whether or not the - - - the fracture of the
9 nose predated the - - - the injury? You - - - that
10 was raised on your cross-examination.

11 MR. GOTTLIEB: Right.

12 JUDGE PIGOTT: And the same thing with the
13 - - - I think the radiologist who - - - or who said
14 there was no pain on palpation.

15 MR. GOTTLIEB: But contrary to my learned
16 counsel, I think the record is clear that those
17 doctors backed off their initial statement. The - -
18 -

19 JUDGE PIGOTT: Which doctors? The ones
20 that testified?

21 MR. GOTTLIEB: The ones that testified
22 initially said there was causation. We then had - -
23 - there were two doctors that testified. We had Dr.
24 Naiditch then testifying that it was possible that it
25 occurred before the motor vehicle accident. But what

1 - - -

2 JUDGE SMITH: Okay, you - - - you did a lot
3 of damage to the plaintiff's case. You had a lot of
4 good arguments and you would still have had them if
5 there had been a missing witness instruction. But
6 why should there - - - why should you not either have
7 called your witnesses or taken your chances with a
8 missing witness instruction?

9 MR. GOTTLIEB: Simply put is what I said
10 before, we - - - I did not have an opportunity to
11 respond to the transfer of the burden to me - - -

12 JUDGE PIGOTT: But doesn't that - - -
13 doesn't that then say to the jury, you - - - you - -
14 - these doctors have nothing to say. That the IME
15 doctors - - - that they're - - - if they're
16 cumulative, that means they would have testified the
17 same way as the doc - - - as the doctors have
18 testified already.

19 MR. GOTTLIEB: But in fact, Your Honor, I
20 never even - - - throughout the record, there's no
21 indication by myself that I was going to call these
22 doctors. The only one that ever mentioned these
23 doctors was the plaintiff's attorney. Not once
24 during the record - - -

25 JUDGE PIGOTT: Then why did you have

1 defense - - - defense examinations? What - - -

2 MR. GOTTLIEB: As a matter of course,
3 there's a defensive examination which - - - after the
4 plaintiff testifies she gets - - -

5 JUDGE PIGOTT: And so - - - and why
6 wouldn't you call them? I mean, if you get - - - if
7 these doctors - - - if you - - - if you, as a
8 defendant, say I want these doctors to examine this
9 plaintiff. And they do. And then you don't call
10 them. Shouldn't - - - shouldn't the presumption be
11 that you're not calling them because they're not
12 going to help your case?

13 MR. GOTTLIEB: But in fact, that burden
14 didn't - - - that means that the burden has now
15 shifted to the defendant.

16 JUDGE PIGOTT: Yeah, you're under - - -

17 MR. GOTTLIEB: It was my view - - -

18 JUDGE PIGOTT: - - - you're on the defense.

19 MR. GOTTLIEB: But - - - but it was my
20 view, Your Honor, that the plaintiff's testimony and
21 evidence on its own defeated their argument.

22 JUDGE PIGOTT: But didn't you make that
23 argument? I mean, you must have made a sufficiency
24 argument, which was denied.

25 MR. GOTTLIEB: There was no sufficiency

1 argument. The - - -

2 JUDGE SMITH: Any - - - any - - - any
3 missing witness argument shifts the burden in the
4 sense that it suggests that you would - - - if you
5 had good evidence, you would - - - you would produce
6 it. That's what a missing witness argument is.

7 MR. GOTTLIEB: I understand, but - - -

8 JUDGE SMITH: Or a missing witness
9 instruction.

10 MR. GOTTLIEB: But because plaintiff did
11 not meet - - - reach that first three preconditional
12 argument - - -

13 CHIEF JUDGE LIPPMAN: Counsel, what's - - -
14 what's the rule here? What - - - your adversary gave
15 us the rule he wants. What's the rule you want in
16 this case?

17 MR. GOTTLIEB: The rule should be that what
18 Caveat 2 says in the PJI, which is "in order to
19 permit effective judicial review, all discussions
20 regarding the charge must be clearly put into the
21 record, so that each party's position can be easily
22 discerned." The trial court attempted to do that.
23 Specifically asked the trial lawyer, what is your
24 argument? And he refused to make - - -

25 JUDGE SMITH: Well, well, we know - - - we

1 do - - - what he's saying - - - we - - - I thought it
2 was pretty clear that he said, hey, they got some
3 doctors, and if their doctors support those ca - - -
4 their case, they ought to call them. What more did
5 he have to say?

6 MR. GOTTLIEB: He needed to put forth what
7 those doctors said. And he needed to show - - -

8 JUDGE SMITH: Well - - - now, I thought the
9 whole point of a missing witness instruction was that
10 he does not have to do that. That that's - - - that
11 that's the very - - - that's the essence of the
12 missing witness instruction, is it's not for the - -
13 - the guy asking for the instruction doesn't have to
14 say what the witnesses would say. Haven't we said
15 that in a few cases?

16 MR. GOTTLIEB: You have, Your Honor, but in
17 this particular case, there's the plaintiff's
18 attorney fail - - - failure to do that - - -

19 JUDGE PIGOTT: Wouldn't it - - - wouldn't
20 it make - - -

21 MR. GOTTLIEB: - - - did not a - - -

22 JUDGE PIGOTT: Go ahead; I'm sorry.

23 MR. GOTTLIEB: No, no, it's so - - -

24 JUDGE PIGOTT: I keep interrupting.

25 MR. GOTTLIEB: That's okay. You have

1 questions.

2 JUDGE PIGOTT: Mr. Isaac's arguing that his
3 - - - that the judge allowing him to make the
4 argument that these doctors weren't called and - - -
5 and therefore you can assume they were going to
6 testify favorably or not unfavorably to the
7 defendant, should have done it.

8 Wouldn't it have been just as fair if the
9 judge had said, I'm going to give the missing witness
10 charge and you, Mr. Defense Lawyer, can make the
11 argument that the reason you didn't call them was too
12 expensive; they're out of town; I thought that what
13 these doctors said - - - and I'll - - - and I'll
14 summarize it for you, is sufficient that I don't have
15 to call my doctors. And in that way, cover your
16 bases.

17 MR. GOTTLIEB: Well, that would have been
18 reasonable, but again, I think, the trial judge did
19 not get to that point, because the three pre - - -
20 preconditions weren't made.

21 JUDGE PIGOTT: What was left out? What - -
22 - what - - - you mentioned the three - - - the same
23 preconditions that Mr. Isaac talked about?

24 MR. GOTTLIEB: I think so, yeah.

25 JUDGE PIGOTT: So which one was missing?

1 MR. GOTTLIEB: Well, I - - - I actually
2 think all three of them.

3 JUDGE PIGOTT: Give them - - - give them to
4 me again.

5 MR. GOTTLIEB: Well, I - - - I know Judge
6 Smith is - - - is - - - has pointed out that I'm
7 incorrect about one of them, but the three of them
8 are the identity of the witness believed to be
9 knowledgeable about a material issue pending in the
10 case.

11 JUDGE PIGOTT: And we knew that. We knew
12 they were your doctors.

13 MR. GOTTLIEB: But they didn't give the
14 identity of them, but just knew that they were
15 doctors; you're right. Demonstrate - - - witness can
16 be expected to testify favorably and it's not
17 cumulative. And third, that the party that did not
18 call the witness has the witness available.

19 Again, because - - -

20 JUDGE GRAFFEO: And you're saying that's
21 the plaintiff's burden to - - -

22 MR. GOTTLIEB: Correct, in the first
23 instance.

24 MR. GOTTLIEB: - - - to unveil those three
25 conditions - - -

1 MR. GOTTLIEB: In the first instance.

2 JUDGE GRAFFEO: - - - and not - - - and
3 none of those are your responsibility?

4 MR. GOTTLIEB: Well, in the first instance,
5 if the plaintiff puts that forward, then the
6 defendant has to contest those. And - - -

7 JUDGE PIGOTT: How does he say it? The - -
8 - in other words, you want him to say to the judge:
9 Judge, those witnesses are available to the defense.
10 And unless and until he says that, the judge does not
11 have to consider availability?

12 MR. GOTTLIEB: Well, this is a perfect
13 example of it, Your Honor. I was the one that was
14 the trial lawyer.

15 JUDGE PIGOTT: Right.

16 MR. GOTTLIEB: I was the one that was doing
17 all the calling - - - my staff was calling - - - for
18 those doctors. I knew their availability. I knew
19 that in reality, which is not part of the record - -
20 - why? Because the plaintiff didn't make it part of
21 the record. I know that those doctors weren't
22 available that day. In fact - - -

23 JUDGE GRAFFEO: Well, what was the
24 plaintiff's lawyer supposed to say about
25 availability? Just give me an example. What - - -

1 MR. GOTTLIEB: Simply put, that these are
2 his doctors, and therefore, we have no information
3 that they're not available - - -

4 CHIEF JUDGE LIPPMAN: Counsel, isn't that
5 almost a truism? That they're your witnesses, for
6 God's sake.

7 MR. GOTTLIEB: But, I - - -

8 CHIEF JUDGE LIPPMAN: I mean, isn't your
9 burden? I mean, I don't - - - let's take some common
10 sense here. What more does he really need to say?

11 MR. GOTTLIEB: Well, I would suggest he
12 needs to - - -

13 CHIEF JUDGE LIPPMAN: I know what you're
14 saying, but isn't that saying things that are so
15 obvious to everybody?

16 MR. GOTTLIEB: But - - -

17 CHIEF JUDGE LIPPMAN: Your witnesses, you
18 control them.

19 MR. GOTTLIEB: But that's suggesting, Your
20 Honor, that there's a per se rule that every time a -
21 - - a defendant does not call an IME doctor, in every
22 case, then a missing witness charge should apply.

23 JUDGE PIGOTT: Well, how - - - how many
24 times - - - how many times have you said to a judge,
25 I can't - - - I can't try this case; my doctors

1 aren't available. Or Judge, you know, I know - - - I
2 know that we're going to have to take a break, you
3 know, from Wednesday to Monday, and I know that you
4 crucify lawyers for that, but my doctors aren't
5 available.

6 MR. GOTTLIEB: Right. The point is, I
7 never had the opportunity to do that, because the
8 discussion did not go that far. And why didn't it go
9 that far? It didn't go that far because of the
10 plaintiff's - - -

11 JUDGE PIGOTT: No, it didn't go that far,
12 because you never had a problem. You didn't say, my
13 doctors are out of town. You didn't say, you know,
14 the trial ended faster on the plaintiff's side than I
15 expected, so I don't - - - I can't have my doctors
16 here until Friday. There was - - - there was nothing
17 in the record to indicate that you did not have
18 control, I guess.

19 MR. GOTTLIEB: But - - - but Your Honor, if
20 you look at the record, you - - - the court can see
21 that there was no colloquy that went back and forth
22 on this very is - - -

23 JUDGE GRAFFEO: I thought - - -

24 MR. GOTTLIEB: - - - on this very issue.

25 JUDGE GRAFFEO: - - - the plaintiff asked

1 for the missing witness charge.

2 MR. GOTTLIEB: The plaintiff did.

3 JUDGE GRAFFEO: And the judge denied it.

4 MR. GOTTLIEB: That's correct.

5 JUDGE GRAFFEO: So if he asked for the
6 missing witness charge, why wouldn't you stand up and
7 say, Your Honor, I don't think it's necessary to have
8 the missing witness charge - - -

9 MR. GOTTLIEB: Be - - -

10 JUDGE GRAFFEO: - - - because my doctors
11 aren't going to add anything to this. The pla - - -
12 I - - - I discredited the plaintiff's positions, or
13 they're not available. I mean, why wouldn't you
14 answer the request for the missing witness charge?

15 MR. GOTTLIEB: Because the - - - as the
16 record reflects, Your Honor, when the plaintiff's
17 counsel asked for the missing witness charge, the
18 court then gave the plaintiff the opportunity to make
19 out the three preconditions. And the plaintiff's
20 counsel specifically refused to do that. Once this
21 plaintiff's counsel refused to do that, the court
22 said - - - without hearing from me, the court said,
23 then I'm not - - - I'm denying your request. So that
24 we did not have the opportunity to have a full
25 colloquy and argue - - -

1 JUDGE GRAFFEO: Since you won on that
2 point, that was - - - that was - - -

3 MR. GOTTLIEB: The court had made a
4 decision. And the court made the decision after
5 offering an opportunity to plaintiff's counsel,
6 please, tell me why I should give a missing witness
7 charge? And he said, no. I mean, not in those
8 words. But he essentially said, I'm not going to
9 bother.

10 JUDGE PIGOTT: Well, the judge was - - -
11 the judge had already made the decision, I guess,
12 that it was cumulative. Regardless of what the other
13 two were, he said it's cumulative.

14 MR. GOTTLIEB: She - - - she had made a
15 decision, and - - - but af - - - offered him the
16 opportunity to argue the decision. I mean, she gave
17 him the opportunity. And the record is clear that he
18 specifically refused to.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.
20 Thanks, counsel.

21 MR. GOTTLIEB: Thank you very much.

22 CHIEF JUDGE LIPPMAN: Let's have rebuttal.
23 Counsel?

24 MR. ISAAC: I'm going to be brief. Just if
25 I can give you some page references.

1 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

2 MR. ISAAC: I know that you were a little
3 concerned with some of the testimony of - - - of my
4 doctors, and quite frankly, I'm a little concerned
5 about it too. But if you - - - if you take a look at
6 page 406 to 408, and 480 - - - 480 to 482. On
7 recross-examination, the doctors did specifically
8 adhere to their position. And you decided a case in
9 1921 called Woods v. Ochs, which says, answers
10 elicited on cross-examination do not amount to a
11 retraction of - - -

12 JUDGE PIGOTT: Either way, how does - - -
13 what does a defense do when they - - - they - - -
14 it's not - - - it's a cold record, so we don't know,
15 but it looks like they beat up these doctors pretty
16 well. And so, you know, he talks to his client, and
17 says, you know, I - - - I think we're fine. Let's -
18 - - you know, let's wrap this thing up before the
19 weekend or whatever the strategy is. And why isn't
20 that enough?

21 MR. ISAAC: I'll tell you why. Let's - - -
22 let me give you my hypothetical. Let's say Clarence
23 Darrow comes down from heaven a thousand times
24 smarter than when he was here.

25 JUDGE PIGOTT: We have you, Mr. Isaac.

1 MR. ISAAC: Not me - - - I - - - you have
2 him, but not me. But he comes down, and he has a - -
3 - and he has a perfect defense case that he destroys,
4 but he's got four witnesses in his pocket lined up to
5 say that his great cross-examination was nonsense.
6 He's got two choices. He can put them on the stand,
7 and risk havoc with his cross-examination, or take
8 the missing witness charge. And I told you exactly
9 how to do it.

10 He says, you didn't prove a prima facie
11 case. The judge is going to instruct you on burden
12 of proof. We asked you to follow the law; I want to
13 follow the law. I didn't call him because I didn't
14 have to. That's how you do it. It's that simple.

15 And finally, Judge Smith - - -

16 JUDGE SMITH: But you're - - - you're
17 saying that - - - that Mr. Darrow has to live with a
18 missing witness charge in that case?

19 MR. ISAAC: He does. He does win. He's
20 got four witnesses.

21 And just one other point. When he told you
22 about what you have to say, okay, he says I have to
23 make the showing. I don't. You decided that in
24 People against Kitching. If you read 78 NY2d at 537
25 to 538, the exact argument my adversary made about

1 the plaintiff having to give the specifics, was
2 specifically repudiated by this court, pre-Macana.

3 I have nothing further; I'm done.

4 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
5 you. Thank you both. Appreciate it.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of DeVito v. Feliciano, No. 195 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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