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COURT OF APPEALS

STATE OF NEW YORK

OAKES,

Respondent,

-against-

No. 51

PATEL, et al.,

Appellants.

20 Eagle Street
Albany, New York 12207
February 14, 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

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1 CHIEF JUDGE LIPPMAN: We're going to do
2 number 51, Oakes v. Patel.

3 Counselor, would you like any rebuttal
4 time?

5 MS. FLAHERTY: One minute, please, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: One minute. Go
8 ahead. You're on.

9 MS. FLAHERTY: Amy Flaherty on behalf of
10 the appellant Kaleida Health. It is my intention
11 this morning - - - this afternoon, to address two
12 issues before the court, to primarily focus on the
13 release issue and the additur issue.

14 With respect to the release issue, the
15 court below erred in finding that the releases were
16 null and void which were signed by the plaintiff - -
17 -

18 CHIEF JUDGE LIPPMAN: How long - - - how
19 long after the release did this all come up to the
20 court?

21 MS. FLAHERTY: Your Honor, the release
22 issue came up following the first trial. Kaleida
23 Health obtained copies of the releases following the
24 first trial, and very shortly thereafter made the
25 motion to amend their answer to assert the

1 affirmative defenses of release and of general - - -

2 JUDGE PIGOTT: You don't - - -

3 MS. FLAHERTY: - - - obligation law.

4 JUDGE PIGOTT: - - - you don't disagree

5 that it's a discretionary call by the court?

6 MS. FLAHERTY: In general, I would agree

7 that motions for leave to amend are discretionary

8 decisions. In this particular case, the Fourth

9 Department erred when it found, essentially, that the

10 releases were null and void, so that - - -

11 JUDGE SMITH: Well, even - - - even if they

12 weren't null and void, wasn't there - - - wasn't

13 there a reason not to allow the amend - - - I mean,

14 you could have found those releases sooner.

15 MS. FLAHERTY: Your Honor, what is

16 demonstrated in this record is that as soon as the

17 releases came to the attention of counsel and copies

18 provided to them by the - - -

19 JUDGE SMITH: Well, could they - - -

20 MS. FLAHERTY: - - - liquidator, they were

21 - - -

22 JUDGE SMITH: - - - who - - - couldn't - -

23 - were they unavailable to counsel before that? I

24 mean - - -

25 MS. FLAHERTY: Your Honor - - -

1 JUDGE SMITH: - - - you had, in fact,
2 signed a rather similar document - - -

3 MS. FLAHERTY: But not until 2007, Your
4 Honor. What this record shows is the information
5 that was being provided to both the attorney for
6 Kaleida Health as well as to the client itself,
7 Kaleida Health, was that Kaleida Health had no
8 insurance coverage because it, in fact, had not filed
9 a proof of claim, back - - -

10 JUDGE PIGOTT: But isn't that - - -

11 MS. FLAHERTY: - - - in 2003.

12 JUDGE PIGOTT: - - - isn't that collateral
13 in so many ways? I mean, we've had liquidations in
14 insurance companies before, and usually that's the
15 problem of the defense. And if the defense wants a
16 stay of a proceeding because they don't have any
17 insurance or something like that, it happens.

18 It just struck me that there's an awful lot
19 of issues that are attached to the entire liquidation
20 procedure there that, apparently, the court didn't
21 want to handle that late in the game.

22 MS. FLAHERTY: Your Honor, what the court
23 found, basically - - - the trial court found - - -
24 was that there was no procedural vehicle to allow the
25 amendment - - -

1 CHIEF JUDGE LIPPMAN: Counselor - - -

2 MS. FLAHERTY: - - - which - - -

3 CHIEF JUDGE LIPPMAN: - - - counselor, but
4 didn't - - - by not raising it earlier, didn't you
5 greatly affect the trial, the tactics?

6 MS. FLAHERTY: No, Your Honor.

7 CHIEF JUDGE LIPPMAN: No?

8 MS. FLAHERTY: We did not. No. And let me
9 explain why, if I could?

10 CHIEF JUDGE LIPPMAN: Sure.

11 MS. FLAHERTY: With respect to this
12 particular case where Kaleida Health had a self-
13 insured retention of two million dollars and was
14 controlling the defense; where there were several
15 other physicians involved and liability was contested
16 - - - remember, we're talking about having an excess
17 policy with PHICO - - - there was always going to
18 need to be a liability trial.

19 JUDGE SMITH: Yes, but - - -

20 MS. FLAHERTY: That was always going to
21 happen.

22 JUDGE SMITH: - - - doesn't the - - - what
23 about the - - - wouldn't the strategy of the
24 liability trial change if the plaintiff had known
25 that Kaleida had - - - well, maybe it's sort of half

1 a release, that is, it's a release as to its own acts
2 but not Dent's? Wouldn't the plaintiff have been - -
3 - have been screaming about Dent the whole trial?

4 MS. FLAHERTY: Your Honor, with respect to
5 this, you have to go back and look at our record and
6 the motions that were made before the trial court.
7 And when you look at those, plaintiff has certainly
8 claimed prejudice in terms of the timing of the
9 assertion of the release. But in fact - - - and
10 those papers have not shown prejudice. If you look
11 at each of the arguments that were made - - -

12 JUDGE SMITH: Well, what about - - -

13 MS. FLAHERTY: - - - by the plaintiff, they
14 don't bear - - -

15 JUDGE SMITH: - - - well, what about - - -

16 MS. FLAHERTY: - - - out.

17 JUDGE SMITH: - - - what's the answer to
18 this particular argument? I don't know whether they
19 make it or not, but couldn't they make the argument,
20 we were actually trying - - - although they tried
21 unsuccessfully to get Dent out of the verdict sheet.
22 If we had known that Dent was the only - - - that
23 Dent's liability was the only way to get to your
24 insurance policy, we would not have tried to make
25 Dent a bit player.

1 MS. FLAHERTY: Your Honor, with respect to
2 that, first of all, in terms of the appeal itself,
3 they still could have appealed, from the final
4 judgment, the decision by the trial court to let Dent
5 out of the case - - -

6 JUDGE SMITH: No, my question - - -

7 MS. FLAHERTY: - - - not to pursue.

8 JUDGE SMITH: - - - my question is, I mean,
9 they - - - as I read - - - as I read - - - what I've
10 read of the record, it looks like the plaintiff's
11 strategy was to minimize Dent's responsibility,
12 indeed, to cast doubt on the testimony that
13 implicated Dent. Wouldn't they have done otherwise
14 if they'd realized that there was a release defense
15 that was inapplicable to Dent?

16 MS. FLAHERTY: No, Your Honor. I think
17 what would happen in those circumstances, if there
18 was, in fact, a disclaimer with respect to Dent, but
19 there was not in this case - - -

20 CHIEF JUDGE LIPPMAN: You don't think this
21 affected the apportionment and what went on here? I
22 mean - - -

23 MS. FLAHERTY: No, Your Honor. Again - - -

24 CHIEF JUDGE LIPPMAN: - - - how could it
25 not? How could it not?

1 MS. FLAHERTY: Because there always was
2 going to be a liability trial. And in fact,
3 plaintiff would not have changed their strategy,
4 because, basically, the most insurance coverage, the
5 most - - - the deepest pocket was always going to be
6 Kaleida Health.

7 JUDGE GRAFFEO: Explain - - -

8 JUDGE READ: Could you talk about the
9 additur a little bit before you - - -

10 MS. FLAHERTY: Yes, Your Honor. I would -
11 - -

12 JUDGE READ: - - - run out of time?

13 MS. FLAHERTY: - - - very much like to.

14 JUDGE GRAFFEO: Just before you go into the
15 additur, I just have one more question on this. What
16 are you saying our standard of review is, then?
17 Aren't we still limited to whether there was an abuse
18 of discretion by the trial court determination?

19 MS. FLAHERTY: Your Honor, I would refer
20 this court to their decision in Edenwald. And in
21 that particular case, this court looked at the
22 prejudice argument which was asserted by the
23 plaintiff, and found as a matter of law that there
24 was no prejudice and that the amendment could have
25 been - - - should have been permitted.

1 So under the circumstances of this case,
2 this court can do the same. It can also look at the
3 prejudice argument - - -

4 JUDGE GRAFFEO: You want us to say the
5 plaintiff wasn't prejudiced - - -

6 MS. FLAHERTY: As a matter of law, Your
7 Honor.

8 JUDGE GRAFFEO: - - - by this proposed
9 amendment?

10 MS. FLAHERTY: Yes.

11 JUDGE GRAFFEO: As a matter of law.

12 MS. FLAHERTY: As a matter of law - - -

13 JUDGE GRAFFEO: Okay.

14 MS. FLAHERTY: - - - given the arguments
15 that were - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel, go to
17 additur.

18 JUDGE GRAFFEO: Go to additur.

19 MS. FLAHERTY: With respect to the additur,
20 the Fourth Department, of course, held in this
21 particular case that the appellant - - - well, that
22 the defendants had failed to preserve the additur
23 argument.

24 I want to direct, first and foremost,
25 because I think it's very important, this court back

1 in time, to when the initial motion was made by the
2 plaintiff. Because the Fourth Department found that
3 there was not preservation at the level of the trial
4 court. So if we put ourselves back, that means that
5 the plaintiff has a verdict in his favor.

6 The plaintiff then moves to - - -

7 CHIEF JUDGE LIPPMAN: But aren't you kind
8 of taking it - - -

9 MS. FLAHERTY: - - - set aside - - -

10 CHIEF JUDGE LIPPMAN: Isn't your strategy -
11 - - were you sort of taking an all-or-nothing
12 approach?

13 MS. FLAHERTY: No, Your Honor.

14 CHIEF JUDGE LIPPMAN: One is good, one's
15 not good - - -

16 MS. FLAHERTY: No.

17 CHIEF JUDGE LIPPMAN: - - - period; that's
18 the end of the story?

19 MS. FLAHERTY: No, Your Honor, and if I
20 could - - -

21 CHIEF JUDGE LIPPMAN: Why - - -

22 MS. FLAHERTY: - - - if I could elaborate
23 in terms of this preservation issue, because I think
24 it's important - - -

25 CHIEF JUDGE LIPPMAN: Yes.

1 MS. FLAHERTY: - - - and then address your
2 issue as well.

3 CHIEF JUDGE LIPPMAN: Yes.

4 MS. FLAHERTY: With respect to that, going
5 back in time to when the motion was initially made,
6 this Fourth Department decision requires defendants -
7 - - us, in this particular case - - - in order to
8 preserve the issue, to have opposed the motion to set
9 aside as well as to offer an alternative argument
10 that should this court direct additur, it should be
11 to a particular sum.

12 Again, back in time when the court has not
13 yet heard that motion, has not yet decided the motion
14 to set aside the verdict, essentially we have to - -
15 -

16 JUDGE SMITH: Assume you're - - -

17 MS. FLAHERTY: - - - anticipate - - -

18 JUDGE SMITH: - - - assume you're right - -
19 -

20 MS. FLAHERTY: Um-hum.

21 JUDGE SMITH: - - - assume you're right
22 about that. Isn't there still something troublesome?
23 Assume you're right on the preservation point, or
24 Justice Peradotto is right on the preservation point,
25 isn't there something troublesome about your coming

1 up after the second trial, when you know how the
2 second trial comes out, and say, okay, now give me
3 the choice I should have had after the first trial?

4 MS. FLAHERTY: No, Your Honor. The
5 standard for preservation is - - -

6 JUDGE SMITH: I'm not asking a preservation
7 question.

8 JUDGE GRAFFEO: Why didn't you - - -

9 MS. FLAHERTY: In terms of - - - I believe
10 it answers your question.

11 JUDGE GRAFFEO: - - - why didn't you appeal
12 initially, after the first trial?

13 MS. FLAHERTY: We did appeal, Your Honor.
14 We appealed; we filed a notice of appeal. This trial
15 judge - - -

16 JUDGE SMITH: You did not - - -

17 MS. FLAHERTY: - - - then scheduled trial -
18 - -

19 JUDGE SMITH: - - - you did not get a stay.

20 MS. FLAHERTY: - - - in March. We did not
21 get a stay. There was not sufficient time to perfect
22 that appeal.

23 JUDGE PIGOTT: Why - - - the same thing had
24 struck me. You can get a stay. I mean, if the trial
25 judge doesn't give one, you can go get one at the

1 Appellate Division.

2 MS. FLAHERTY: We did try, as well - - -

3 JUDGE PIGOTT: Because it's bonded.

4 MS. FLAHERTY: - - - to move for a stay.

5 And to be forthright, it was on the grounds so we
6 could pursue the appeal from the amendment. But it
7 was vigorously opposed, both at the trial court - - -

8 JUDGE SMITH: Did you - - -

9 MS. FLAHERTY: - - - and at the Fourth
10 Department by that. There was not time to have this
11 particular appeal heard and decided.

12 JUDGE SMITH: Did the Appellate Division
13 deny a stay?

14 MS. FLAHERTY: As well. Yes. But with
15 respect to - - -

16 CHIEF JUDGE LIPPMAN: Okay - - -

17 MS. FLAHERTY: - - - that's going back to
18 what the relevant issue was in front of the Fourth
19 Department. The Fourth Department, in looking at
20 this appeal, always had to decide what the minimum
21 amount that the plaintiff was entitled to - - -

22 CHIEF JUDGE LIPPMAN: Okay, counselor.

23 MS. FLAHERTY: - - - receive.

24 CHIEF JUDGE LIPPMAN: Counsel, okay.

25 You'll have your - - -

1 MS. FLAHERTY: Thank you, Your Honor.

2 CHIEF JUDGE LIPPMAN: - - - rebuttal.

3 Thank you.

4 Counselor, would you like any of your four
5 minutes for rebuttal?

6 MR. MILLER: No, thank you, Your Honor.

7 CHIEF JUDGE LIPPMAN: Good, go.

8 MR. MILLER: Your Honor, Gregory Miller on
9 behalf of the defendant-appellant, Satish Mongia. I
10 would like to use my four minutes to discuss an issue
11 that is derivative, I think, of the additur issue and
12 essentially flows downhill, and that is the
13 preclusion of certain evidence at the second damages-
14 only trial.

15 JUDGE SMITH: This is your - - - the expert
16 that you had disclosed?

17 MR. MILLER: That's correct.

18 CHIEF JUDGE LIPPMAN: What do you hope to
19 show with the expert?

20 MR. MILLER: What did I hope to show - - -

21 CHIEF JUDGE LIPPMAN: Yes.

22 MR. MILLER: - - - with the expert?

23 CHIEF JUDGE LIPPMAN: Yes.

24 MR. MILLER: What we hoped to show, not
25 only with the expert, but through any proof at - - -

1 during the course of the trial, was that there was a
2 certain amount of damages that would have been
3 sustained by the plaintiff anyway, even without - - -

4 CHIEF JUDGE LIPPMAN: You want to mitigate
5 - - -

6 MR. MILLER: - - - the defendant's
7 agencies.

8 CHIEF JUDGE LIPPMAN: - - - yes, you want -
9 - -

10 MR. MILLER: Correct.

11 CHIEF JUDGE LIPPMAN: - - - to mitigate
12 your damages.

13 MR. MILLER: That's correct, Your Honor.

14 JUDGE SMITH: Did the expert disclosure say
15 that?

16 MR. MILLER: The expert disclosure
17 specifically stated that the testimony would be given
18 only to the extent that those conditions could have
19 been - - - that his injuries could have been avoided
20 or ameliorated with an earlier diagnosis.

21 JUDGE SMITH: I guess I didn't really see
22 that in the expert disclosure. I think the expert
23 disclosure sounded like it was a general - - - you
24 know, it covered everything, including the standard
25 of care. I just didn't see you - - - I mean, I

1 understand your point that causation is a damages
2 issue if you say only part of the injury was caused
3 by causation - - - by this negligence. I just didn't
4 see it in the disclosure.

5 MR. MILLER: The import of the disclosure
6 was simply to elucidate for this jury and actually -
7 - - and to be fair, the preclusion of the expert is
8 only one piece of the puzzle of the preclusion at the
9 trial.

10 JUDGE SMITH: Okay. So you say there was a
11 broader preclusion of what should have been proper
12 damages proof?

13 MR. MILLER: That's correct, Judge.

14 JUDGE SMITH: What other rulings do you
15 complain of other than that one based on the motion
16 to preclude that expert?

17 MR. MILLER: Other than the motion in
18 limine, I would direct Your Honors' attention to
19 pages 13,371 of the record with respect to the
20 testimony of the physiatrist, Dr. Janet Kent. And
21 actually, I apologize. The record is 13,368 to
22 13,384. During the course of Dr. Kent's testimony on
23 direct, Mr. Letro had asked a number of questions
24 regarding an aneurism that developed in the
25 plaintiff's groin as a result of a catheterization

1 attempt that was made to discover and actually
2 diagnose the aneurism.

3 JUDGE PIGOTT: Was this addressed at the
4 appellate level?

5 MR. MILLER: It was briefed at the
6 appellate level, but not discussed by the court.

7 JUDGE PIGOTT: Are you asking us to
8 overrule an evidentiary ruling by the Supreme Court?

9 MR. MILLER: No, Your Honor. What I'm
10 asking you to do - - - I'm simply saying that this is
11 another aspect of - - - not only is it an aspect of -
12 - -

13 JUDGE SMITH: What do you mean "no"? You
14 are - - -

15 MR. MILLER: Excuse me?

16 JUDGE SMITH: - - - aren't you? You say
17 the Supreme Court erred and you want us to reverse.
18 The Supreme Court erred, the Appellate Division erred
19 in affirming, and you want us to reverse. I thought
20 that's what an appeal was?

21 MR. MILLER: That's correct. Maybe I
22 misunderstood Judge Pigott's - - -

23 JUDGE PIGOTT: Oh, I think you understood
24 it. I guess Judge Smith is asking it in a different
25 way.

1 JUDGE SMITH: Maybe I didn't.

2 JUDGE PIGOTT: You're saying he made a
3 ruling that you think was wrong?

4 MR. MILLER: In preclusion of the evidence,
5 not only the expert proof on the motion in limine,
6 but also - - -

7 JUDGE PIGOTT: With respect to the - - -

8 MR. MILLER: - - - the proof - - - with
9 respect to the proof that was allowed to be brought
10 out on cross-examination during the course of the
11 trial.

12 JUDGE PIGOTT: Yes. I'm wondering how we
13 get there. I mean, generally, we don't deal with
14 evidentiary rulings by the trial court.

15 MR. MILLER: Understood. But that is just
16 - - - I only bring it up - - -

17 JUDGE PIGOTT: Fuel for the fire.

18 MR. MILLER: Fuel to the fire, exactly.

19 I believe that the overall preclusion of
20 the proof related to the amount of damages that would
21 have been sustained had it not been for the
22 defendant's alleged negligence or proven negligence.

23 JUDGE PIGOTT: Are you tying that to the
24 preclusion on the expert? In other words, are you
25 saying you didn't get your expert and then this

1 testimony came in, and but for that, your expert
2 would have - - - would have been more germane?

3 MR. MILLER: Correct.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.

5 Thanks.

6 MR. MILLER: Thank you.

7 CHIEF JUDGE LIPPMAN: Counselor?

8 MS. CAMPBELL: May it please the court, Ann
9 Campbell on behalf of Rajnikant Patel, M.D. With
10 respect to the issue of the - - - I believe some of
11 the questioning as to the preclusion - - -

12 CHIEF JUDGE LIPPMAN: Yes.

13 MS. CAMPBELL: - - - addressed the offer of
14 proof. And I would submit that the colloquy that
15 occurred among counsel and the court established that
16 the court was well aware of what the purpose of the
17 expert proof - - -

18 JUDGE SMITH: And I see that. But still,
19 if it's not in the disclosure - - - I mean, it may be
20 that in the discussion that counsel was having with
21 the court, that counsel was right and the court was
22 wrong. But still, if it's not - - - if the
23 disclosure that he precluded doesn't really say this,
24 can we reverse him?

25 MS. CAMPBELL: Well, Your Honor, I - - -

1 because the judge - - - the trial judge did distill
2 it and he understood it perfectly when he said, "The
3 issue is you want to show that regardless of a timely
4 intervention, the plaintiff still would have had
5 deficits," that's exactly - - -

6 JUDGE PIGOTT: Where are you in - - -

7 MS. CAMPBELL: That is 12,277 of the record
8 and 12,281 of the record. So that the trial judge
9 understood perfectly what the purpose was for the
10 expert disclosures for the experts - - -

11 JUDGE SMITH: You're saying failings in the
12 disclosure were really remedied in the colloquy?

13 MS. CAMPBELL: Yes. Yes, Your Honor.

14 And getting back to the additur issue, we
15 ask the court to look at the case - - - this court's
16 case of Geraci v. Probst. That's a 2010 case. And
17 there the standard for preservation was, was the
18 Appellate Division alerted to the relevant question
19 and given an opportunity to correct the error?

20 And we submit that yes, that was the case.
21 When the Appellate Division looked - - - the
22 Appellate Division looked at that first - - -

23 JUDGE READ: Well, let's assume it's - - -

24 MS. CAMPBELL: - - - verdict - - -

25 JUDGE READ: - - - preserved; what should

1 they have done?

2 MS. CAMPBELL: They should have - - - they
3 should have then evaluated what was the minimum - - -
4 they all agreed that 5.1 million dollars was not
5 adequate. So there was some discussion, obviously,
6 among the court about that was not an appropriate
7 number. What we understand ordinarily happens when
8 an Appellate Division looks at the - - -

9 CHIEF JUDGE LIPPMAN: After the second case
10 is finished, this is what ordinarily happens?

11 MS. CAMPBELL: Well, Your Honor, we were -
12 - - as Ms. Flaherty alluded to, we - - -

13 JUDGE READ: You had no choice.

14 MS. CAMPBELL: - - - there was just simply
15 not enough time.

16 JUDGE READ: There was no choice.

17 JUDGE PIGOTT: You're - - - I know your
18 time is up, but can you explain to me you didn't have
19 any choice? Because I just find - - - I would think
20 that you'd be running around trying to find every
21 judge you could to say we cannot try this case again.
22 There's too many issues, there's too many things that
23 we've got to take up to Rochester. And, you know,
24 we'll post a bond; we'll do - - - you know, I mean -
25 - -

1 MS. CAMPBELL: Well, there was an effort to
2 put in - - - to - - -

3 JUDGE PIGOTT: I guess you went to both.

4 MS. CAMPBELL: - - - enter an interlocutory
5 order - - - judgment, rather. And that was denied.
6 And then there was an attempt to - - - we did sit
7 with one of the Appellate Division judges and - - -

8 JUDGE GRAFFEO: Did - - -

9 MS. CAMPBELL: - - - attempted to get a
10 stay.

11 JUDGE SMITH: So you went only to one
12 judge? You didn't get a ruling from the full court?

13 MS. CAMPBELL: That's correct.

14 JUDGE GRAFFEO: Did you make a motion - - -

15 MS. CAMPBELL: If I recall.

16 JUDGE GRAFFEO: - - - did you make a motion
17 to set aside the verdict, claiming - - - at the trial
18 court level, claiming that the - - -

19 MS. CAMPBELL: We - - -

20 JUDGE GRAFFEO: - - - proposed additur was
21 beyond the minimum that the jury could have found
22 reasonable?

23 MS. CAMPBELL: At the trial court level,
24 Your Honor?

25 JUDGE GRAFFEO: Yes.

1 MS. CAMPBELL: I guess the question I would
2 have is what was the - - - what would be the
3 mechanism for doing that?

4 JUDGE SMITH: You - - -

5 MS. CAMPBELL: We appealed.

6 JUDGE SMITH: - - - so did you - - - did
7 you object to the - - - I guess the point is, did you
8 - - - after the trial court - - - you obviously - - -
9 you've moved to set aside the verdict, because you
10 did set it aside.

11 MS. CAMPBELL: We did not move to set aside
12 the verdict.

13 JUDGE PIGOTT: You wanted it?

14 MS. CAMPBELL: We - - - we were - - - we
15 were okay with - - -

16 JUDGE SMITH: I'm sorry, the plaintiffs - -
17 - the plaintiffs moved to set aside the verdict. You
18 said the verdict's fine.

19 MS. CAMPBELL: Yes.

20 JUDGE SMITH: On damages?

21 MS. CAMPBELL: On damage - - - well, and
22 apportionment.

23 JUDGE SMITH: Yes. And the judge said no,
24 it's not fine, it's got to be X dollars higher. And
25 you never said no, it should be X minus Y dollars

1 higher?

2 MS. CAMPBELL: Well, Your Honor, because
3 what was the mechanism for us to do that?

4 JUDGE SMITH: You say there's no - - -

5 MS. CAMPBELL: We appealed.

6 JUDGE SMITH: - - - point in doing that.

7 MS. CAMPBELL: We filed a notice of appeal.

8 I - - -

9 JUDGE PIGOTT: I'm sorry. But there's no -
10 - - there's no - - - I mean, let's assume for a
11 minute that the five-million-dollar judgment had been
12 entered. You still could have appealed that, right?
13 I mean, it wasn't like you were so satisfied with it
14 that you were going to write a check at the
15 courthouse steps?

16 MS. CAMPBELL: The dreaded hypothetical.

17 JUDGE PIGOTT: It's all right. I think I
18 understand.

19 CHIEF JUDGE LIPPMAN: Good.

20 MS. CAMPBELL: I want to make sure I answer
21 your question - - -

22 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

23 MS. CAMPBELL: - - - Your Honor. I guess
24 I'm just not quite understanding what you're asking
25 of me.

1 JUDGE PIGOTT: Well, what we were talking
2 is if you were satisfied with the five-point - - -
3 five-million-dollar verdict. And what I'm suggesting
4 is maybe, maybe not. I mean, it's over, and then
5 there's a judgment filed. And I would think within
6 thirty days there might be another paper filed rather
7 than a check being written. But I guess we'll never
8 know.

9 JUDGE SMITH: Well, but you - - - but you
10 weren't - - - assuming you were stuck on liability,
11 you weren't complaining about what the first jury did
12 on damages?

13 MS. CAMPBELL: Dr. Patel did not. We urged
14 the court to affirm the jury's verdict.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.
16 Thanks.

17 MS. CAMPBELL: Thank you, Your Honor.

18 CHIEF JUDGE LIPPMAN: Counselor?

19 MR. WRIGHT: Thank you. If it pleases the
20 court, I'm Ronald Wright. I'm here with Francis M.
21 Letro on behalf of the respondents, Oakes.

22 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

23 MR. WRIGHT: Responding to the question of
24 the additur, I just want to bring out the questions
25 regarding the stay and the issue of the stay. When

1 they sought the stay between the first and the second
2 trial, they were only seeking a stay to appeal the
3 issues with respect to the release issue. They did
4 not at all mention anything to do with settings. In
5 fact, they said we are not going to deal with any
6 issues with respect to the apportionment - - -

7 CHIEF JUDGE LIPPMAN: What was their
8 strategy that they were saying that?

9 MR. WRIGHT: Well, they said they could do
10 that quickly and - - -

11 JUDGE PIGOTT: Was that in the record - - -

12 MR. WRIGHT: - - - it would be a limited
13 issue.

14 JUDGE PIGOTT: - - - I mean - - -

15 MR. WRIGHT: Yes. The motions for stay are
16 in the record.

17 JUDGE PIGOTT: That's all right, I can find
18 it.

19 MR. WRIGHT: I probably - - - but, yes - -
20 -

21 JUDGE SMITH: Can you give - - -

22 MR. WRIGHT: - - - I think they're part of
23 the supplemental record, as a matter of - - -

24 JUDGE PIGOTT: Okay.

25 JUDGE SMITH: Don't do it now, but give - -

1 - can you give it to us in some form, because it's
2 kind of a big record.

3 MR. WRIGHT: Just a little bit. Just a
4 little bit. Absolutely. Yes, I do believe that was
5 part of the supplemental record, however. So I think
6 that does address some of the issues that even when
7 they had the opportunity, they never once said hey,
8 listen, we want to appeal this large additur, we
9 think it's too high, give us a chance. Because, as
10 we, you know, argue on our papers, once you hit the
11 second trial, that radically changes the nature of
12 the relief form.

13 JUDGE PIGOTT: But Judge Peradotto thought
14 it was preserved.

15 MR. WRIGHT: Well, she did. She argued
16 that was preserved. Of course, the majority did not.
17 And I would argue they took the position all along
18 that the first verdict was correct. There should be
19 no additur whatsoever.

20 JUDGE SMITH: So did they have to suggest
21 in the alternative a number that they thought would -
22 - - was - - - would have been adequate?

23 MR. WRIGHT: At the very least, they had to
24 indicate a willingness to take an additur anything -
25 - - of any amount - - -

1 JUDGE SMITH: They would have taken a
2 dollar. You knew that.

3 MR. WRIGHT: Well, at least based on the
4 representations throughout the proceedings, they said
5 they would. Now, obviously, you know, no, a dollar -
6 - -

7 JUDGE SMITH: No, I mean, at some point - -
8 - at some point it's ridiculous. Obviously, an
9 additur of a dollar or a hundred dollars is a - - -
10 it's a joke. Of course they'd take it.

11 MR. WRIGHT: Right. I acknowledge that.
12 Sure, of course.

13 JUDGE SMITH: I mean, they - - - what did
14 they have to do? Did they have to come up with some
15 number that was not a joke that they would take?

16 MR. WRIGHT: Well, I would suggest, again,
17 I mean, whether they needed to come back with a
18 number, that would have been, I think, an intelligent
19 thing to do.

20 JUDGE SMITH: Isn't that a settlement
21 discussion rather than a motion?

22 MR. WRIGHT: Well, that's why I think that
23 the proper - - - the relief, of course, is that they
24 refused the additur. That's - - -

25 JUDGE READ: Well, isn't it - - - isn't it

1 kind of inherent in objecting and saying that the
2 five million - - - I mean, aren't they kind of saying
3 that's minimally adequate, if they're saying that's
4 adequate?

5 MR. WRIGHT: That's what their position
6 was. And I'd say - - - I mean, it's just there's a
7 logical - - - just a natural logical inconsistency in
8 saying we refuse any additur - - -

9 JUDGE READ: Because we think - - -

10 MR. WRIGHT: - - - while at the same time
11 saying we'll accept some additur. It's one or the
12 other. Or at least argue in the alternative. They
13 certainly have that availability. They never made
14 that representation.

15 JUDGE PIGOTT: I still get stuck on, I
16 guess, just the concept. If this had been a
17 remittitur - - - let's assume that you hit for five
18 and the judge said I think that's too high; if you
19 don't take three, you're going to trial next week. I
20 would think that because your experts are all
21 scattered and everything else, you'd say I can't do
22 it next week and would ask for and, I would think,
23 obtain a stay. But you didn't. I mean, it didn't
24 happen here. I'm not blaming anyone. Then there's
25 another trial. Why would we go back?

1 MR. WRIGHT: Well, that's - - - that's one
2 of my - - - I mean, the whole point - - - I mean, you
3 know, I cite the O'Connor case - - - additur, this
4 issue doesn't come up to the - - -

5 JUDGE SMITH: So even - - - you mean you
6 have the alternative argument, I guess is what Judge
7 Pigott and I are both suggesting - - - even if it was
8 preserved, you have the alternative argument that it
9 essentially fell out of the case once the second jury
10 came in and - - -

11 MR. WRIGHT: Oh - - -

12 JUDGE SMITH: - - - that their remedy was
13 to try to get it decided before then, which they
14 didn't do.

15 MR. WRIGHT: I think that's absolutely the
16 case. I must - - - they also had the opportunity to
17 brief it to the Appellate Division, which they - - -
18 what they didn't do. And then - - - but once you had
19 - - - the whole purpose of an additur or a
20 remittitur, it applies equally, is to save, you know,
21 judicial economy and efficiency of saving the need to
22 go through the second trial.

23 JUDGE PIGOTT: Yes. And you can see the
24 colorable argument that when the judge says five
25 million for here - - - I mean, it wasn't like he was

1 sitting there with a green eyeshade saying, I think
2 that the - - - you know, the cost of future custodial
3 care is a little bit high or low. I mean, he hit on
4 the nonpecuniary, right, and with what some people
5 would consider boxcar numbers - - - which doesn't
6 sound like a deliberative body making a determination
7 based on a verdict.

8 MR. WRIGHT: Well, I would point out that
9 the court's - - - the amount that actually the court
10 came up with its additur, was eerily similar to the
11 exact numbers that came out at the second trial. So
12 to say that it's unreasonable or was pulled out of
13 the hat or something like that, I just don't think
14 stands up.

15 JUDGE SMITH: What was it - - -

16 MR. WRIGHT: He offered a very detailed
17 account - - -

18 JUDGE SMITH: - - - what was it supposed to
19 be? What's an additur supposed to be? Is it
20 supposed to be the lowest number that would not
21 deviate from reasonable compensation, or can it be
22 any number within the range of reasonable
23 compensation?

24 MR. WRIGHT: Well, I certainly think it can
25 - - - there's no set formula. And in fact, in the

1 O'Connor case, which the court - - - was a Court of
2 Appeals case, they actually, in that case, said it
3 should be set at the highest level, otherwise you're
4 depriving the nonmoving - - - the moving party, the
5 party that doesn't have the chance to accept or
6 reject the additur, you're depriving them of their
7 right to a trial. Because after all, this was - - -

8 JUDGE SMITH: Well, they already got a
9 trial, and a jury gave them less than they - - - less
10 than they thought was right.

11 MR. WRIGHT: Exactly. And then the court
12 found that was an improper measure of damages, and so
13 set it aside. It became a nullity, at that point.
14 And both sides were entitled to a fresh trial on the
15 nature of the damages; a fresh start with that
16 respect and to offer proof. At that point, where - -
17 -

18 JUDGE GRAFFEO: Hasn't - - - hasn't kind of
19 the general rule, I guess, to make it as simple as
20 possible, been if it's an additur, it's the minimum
21 amount that was reasonable for the jury to find, and
22 if it's a remittal, it's the maximum amount?

23 MR. WRIGHT: Well, there's certainly case
24 law, I mean, that's cited, that says that. But as I
25 point out, there's also some findings to the contrary

1 on that. So I don't know that that is a hard and
2 fast rule. And as I argued - - -

3 JUDGE SMITH: It is true, isn't it, that
4 the Appellate Division - - - I don't know whether
5 it's a question of law or a question of fact or
6 discretion or whatever - - - the Appellate Division
7 would have - - - assuming the issue was adequately
8 preserved, and assuming the second trial hasn't
9 happened, the Appellate Division could review the
10 amount of the additur?

11 MR. WRIGHT: Well, certainly before the
12 second trial, that happens on a regular basis. As we
13 point out in the papers, we haven't been able to find
14 a single instance where after a second trial, any
15 court, anywhere - - -

16 CHIEF JUDGE LIPPMAN: Logically, why - - -
17 why do you think that is?

18 MR. WRIGHT: Well, I think the logical
19 reason, once again, goes back to the - - - I think
20 it's twofold. One is the purpose of additurs and
21 remittiturs, to conserve judicial economy. Once
22 you've gone through the process and expense of the
23 second trial, it's no longer serve its purpose to go
24 back and - - -

25 JUDGE PIGOTT: Would the - - -

1 MR. WRIGHT: - - - revisit it.

2 JUDGE PIGOTT: - - - I should have asked
3 Ms. Flaherty this. But the - - - if the issue is the
4 amount of the additur, that's a different question
5 than if there should be an additur at all. I mean it
6 - - -

7 MR. WRIGHT: Oh - - -

8 JUDGE PIGOTT: - - - if it - - -

9 MR. WRIGHT: - - - that's correct.

10 JUDGE PIGOTT: - - - if the amount of the
11 additur is even as - - - a dollar, so they say we're
12 not paying you another dollar, and you go to trial
13 and you get seventeen, you're going to get your
14 seventeen, I would assume, even though they said the
15 additur's going to be - - - you know, if they said
16 you've either got to take seven million or a new
17 trial, and they say we're not paying the seven, and
18 you have a new trial and you're hit for seventeen,
19 you still get seventeen, you don't get seven.

20 MR. WRIGHT: Right. Because the second
21 verdict supersedes the - - -

22 JUDGE PIGOTT: Right.

23 MR. WRIGHT: - - - I mean, it no longer
24 exists. Once they've rejected it - - - and that was
25 the second point - - - once they've rejected it,

1 which is their remedy, they have accepted the
2 consequences of the second trial. You have a first
3 trial. Is it set aside or is not properly set aside?
4 You make that decision. Again, this is discretionary
5 with the court, anyway. He could have simply have
6 ordered the second trial without going through the
7 additur process at all. Well, why does the granting
8 of - - -

9 JUDGE GRAFFEO: Is there any - - -

10 JUDGE SMITH: Yeah, I was wondering about
11 that. Is that clearly established that when there's
12 a - - - when the damages are either insufficient or
13 inadequate does the court have the discretion to just
14 set aside the verdict without offering additur or
15 remittitur?

16 MR. WRIGHT: I think that's certainly true.
17 There are multiple cases and we cite several - - -

18 JUDGE PIGOTT: Well, there are interests of
19 justice in terms of - - - I've seen it in liability;
20 I'm not sure I've seen it in - - -

21 MR. WRIGHT: Well, we cite several cases,
22 and in fact, most - - - when the dissent cited cases
23 for the proposition that we have to be able to review
24 the additur, she cited three cases. One of them was
25 Sherry v. North Colonie School District. And in that

1 case, there was no additur whatsoever and the court
2 didn't look askance at it whatsoever when it was
3 reviewed. They simply said was it properly set
4 aside? Yes or no?

5 JUDGE SMITH: It works - - - presumably it
6 should work both ways. So you would say that if the
7 - - - if the damages had been excessive and the judge
8 had said these damages are excessive, new trial on
9 damages, he doesn't have to say new trial on damages
10 or take this number?

11 MR. WRIGHT: That's correct. It's
12 discretionary with the trial court.

13 JUDGE SMITH: Do they ever do that?

14 MR. WRIGHT: I believe they do. And in - -
15 - once again, the case of O'Connor - - - which I know
16 is an older case, but it is probably the most lengthy
17 treatment by the Court of Appeals on this issue - - -
18 quite clearly said that this is a discretionary
19 remedy. You can do it or you don't have to do it.

20 JUDGE GRAFFEO: Did you change your proof
21 of damages at the second trial?

22 MR. WRIGHT: We did not change the proof of
23 damages. It was the same level; we claimed the same
24 injuries. We did bring in different experts to
25 discuss various elements of those damages. But we

1 didn't, in any way, claim damages at the second trial
2 that were not claimed and proven at the first trial.

3 JUDGE SMITH: Doesn't - - - don't, I guess,
4 Mr. Miller and Ms. Campbell have a point that they -
5 - - that causation can be a damages defense as well
6 as a liability defense?

7 MR. WRIGHT: You know, it's our position
8 that causation and damages are separate issues. Now,
9 of course, causation affects - - -

10 JUDGE SMITH: Well, suppose - - - suppose
11 you say half my damages were caused by the negligence
12 and half weren't? That goes to damages, doesn't it?

13 MR. WRIGHT: Causation necessarily can have
14 some effect on damages. However, in this case, we
15 had a trial the first time where - - -

16 JUDGE SMITH: Yes, and that first - - -

17 MR. WRIGHT: - - - it was proven all - - -

18 JUDGE SMITH: - - - that first trial heard
19 - - - the first jury heard experts who were not - - -
20 where you weren't worrying about whether the expert
21 was talking about liability or damages, because it
22 was a nonbifurcated trial. And that jury came up
23 with a low number. Maybe the second jury should have
24 heard the same experts?

25 MR. WRIGHT: Well, the trial court, you

1 know, wrote a decision. It was supervising the
2 trial, heard the nature of the proof. And we - - -
3 as we cite in - - - to the record, the only proof on
4 causation and the attribution of the damages came via
5 Dr. Jacobs, the plaintiff's expert. And he was quite
6 clear that the damages that resulted in all his
7 catastrophic injuries were because of the second
8 rebleed.

9 JUDGE SMITH: Yes, well, that's - - -
10 you're talking about the plaintiff's proof.

11 MR. WRIGHT: They offered no proof on this
12 issue. They disclosed Dr. Grand on this issue and
13 not - - - and that's what we said, he offered almost
14 the exact same disclosure at the second trial. For
15 whatever reason, this discretion, obviously, and
16 prerogative of the defense - - -

17 JUDGE SMITH: So but you - - - well - - -

18 MR. WRIGHT: - - - they didn't offer that
19 proof.

20 JUDGE SMITH: - - - it does - - - it does
21 look to me - - - I mean, we agree that it in general,
22 at a damages trial with no liability at stake, the
23 defense is allowed to say, hey, only half the damages
24 were caused by the negligence. That's just common
25 sense, right?

1 MR. WRIGHT: Where it hasn't been tried
2 before.

3 JUDGE SMITH: Yes.

4 MR. WRIGHT: Correct.

5 JUDGE SMITH: What do you mean hadn't been
6 tried before? Whether it's been tried before or not,
7 you're trying only damages. And if you want to say
8 only half the damages were caused by the negligence,
9 you've got a right to show that to the jury.

10 MR. WRIGHT: Yes. I'm agreeing with that.

11 JUDGE SMITH: And it did seem to me that in
12 the colloquy that they keep talking about, the judge
13 was missing that point.

14 MR. WRIGHT: Well, I - - - I guess I differ
15 on that point, obviously, because in this case, all
16 those - - - those issues had been fully tried and
17 vetted during the first trial. He was making a
18 ruling. I did not set that finding aside.

19 JUDGE SMITH: Maybe they were and maybe - -
20 - but we don't know what the jury did with them.
21 Maybe they on - - - maybe that's why the verdict was
22 so low. Maybe they only did give you half the
23 damages.

24 MR. WRIGHT: The defendants made that
25 argument both to the trial court and to the Appellate

1 Division, and that was rejected. On the - - -

2 JUDGE SMITH: Well, that's why we're here.

3 MR. WRIGHT: I appreciate that. And - - -

4 but the reason is because you have to look at what
5 the proof was. Again, the proof on causation came
6 only through Dr. Jacobs, who, as the plaintiff's
7 expert, did not say any of it was apportioned to the
8 underlying condition of the - - -

9 JUDGE SMITH: Well, but isn't the question
10 whether defense proof on causation was kept out at
11 the second trial?

12 MR. WRIGHT: I don't think you can view the
13 second trial in isolation from the first trial. The
14 whole point - - -

15 JUDGE SMITH: As to damages, it was.

16 MR. WRIGHT: But this again - - - is this
17 an issue of damages - - -

18 JUDGE GRAFFEO: It's separate from the
19 jury's - - -

20 MR. WRIGHT: - - - or causation?

21 JUDGE GRAFFEO: - - - viewpoint, isn't it?
22 It's separate from the jury's viewpoint, from the
23 first trial.

24 MR. WRIGHT: But the nature of the proof
25 that came in via the first trial was that causation

1 was entirely decided at that point. It did not need
2 to be revisited.

3 JUDGE PIGOTT: Well, you said yourself, you
4 brought in different testimony, different proof on
5 the second trial. Why couldn't they?

6 MR. WRIGHT: Well, they did, actually. I
7 mean, it wasn't on causation, because that was a
8 settled issue. But with respect to damages, they
9 brought in their own physiatrist.

10 CHIEF JUDGE LIPPMAN: Aren't the two issues
11 intertwined, though?

12 MR. WRIGHT: They're not intertwined,
13 because again - - -

14 CHIEF JUDGE LIPPMAN: Why not?

15 MR. WRIGHT: They're not intertwined. And
16 this - - - and it has to look at the specific facts
17 of this case, because again, this trial - - - this
18 issue was fully tried and vetted during the first
19 proceeding. Dr. Jacobs, our expert, gave the only
20 testimony on - - -

21 JUDGE SMITH: You keep saying that of
22 course it was. But the - - - but the first
23 proceeding was set aside as to damages. To the
24 extent it was relevant to damages, didn't the issue
25 have to be fully tried and vetted again?

1 MR. WRIGHT: No. Not - - - no, no.
2 Because causation still - - - well, in the cases that
3 the defense cites where they talk about damages - - -
4 causation impacting damages, it's still a separate
5 issue. Causation is a distinct issue from damages,
6 which is - - -

7 JUDGE PIGOTT: Well, then you're
8 disagreeing with Judge Smith's first question.
9 Because he says, can't causation be an issue in
10 damages? And you disagree?

11 MR. WRIGHT: It can be. But in this
12 particular case there was already a trial where it
13 was found that it wasn't. And the judge - - - based
14 on the proof - - - again, there was no proof
15 whatsoever offered at the first trial that - - -

16 JUDGE SMITH: You - - -

17 MR. WRIGHT: - - - any of this was - - -

18 JUDGE SMITH: - - - you're saying that the
19 law of the case by the time you got to the second
20 trial was that this was all or nothing?

21 MR. WRIGHT: That's right. Just as
22 liability should - - -

23 JUDGE SMITH: That if it caused one dollar
24 of damages, it caused them all?

25 MR. WRIGHT: That is - - - that is what

1 we're - - -

2 CHIEF JUDGE LIPPMAN: Is that fair? Does
3 that strike you as - - -

4 MR. WRIGHT: No, not at all. I mean, just
5 as liability - - -

6 CHIEF JUDGE LIPPMAN: Not fair, or that it
7 is fair?

8 MR. WRIGHT: It is fair to happen, just as
9 liability can affect damages, or if you want to
10 apportion proof - - - say that had the Oakes are
11 contributorily at fault, that will obviously affect
12 the measure of damages, too.

13 CHIEF JUDGE LIPPMAN: Yes, but you should
14 be able to put in evidence that limits damages to
15 your negligence, no?

16 MR. WRIGHT: And they had that opportunity
17 at the first trial.

18 CHIEF JUDGE LIPPMAN: And after that,
19 foreclosed?

20 MR. WRIGHT: Absolutely, because that
21 wasn't set aside. It wasn't set aside.

22 JUDGE GRAFFEO: Before your red light goes
23 on, do you want to tell us what the relevance of the
24 releases - - - what you view as the purpose of the
25 releases?

1 MR. WRIGHT: Well, again, our position on
2 the releases is that they just waited too long after
3 the trial. All the discussion about the trial
4 strategy, I think, was absolutely spot on during the
5 first argument. Obviously, if we knew about the
6 releases and knew that they were going to be
7 asserted, we would have an interest in talking about
8 Dent more, because we would have an avenue of
9 recovery for all that percentage that was related to
10 Dent. And we tried very hard - - -

11 CHIEF JUDGE LIPPMAN: So from a tactical
12 perspective, it was very telling?

13 MR. WRIGHT: And that's just one element of
14 it. I mean, we also released defendants post-trial
15 before this motion was made.

16 JUDGE RIVERA: Is there any way that the
17 court could have addressed that concern?

18 MR. WRIGHT: I don't see how it could have
19 happened after the fact. I mean, you would have to
20 go back and retry everything over again. And that's
21 the hallmark of prejudice, after all the time,
22 effort, and expense.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.

24 Thanks.

25 Rebuttal, counselor?

1 MS. FLAHERTY: Just briefly. With respect
2 to the - - - the preclusion issue, I think it's just
3 important to remember that the defendant - - - excuse
4 me, the plaintiff, at the first trial, had the burden
5 to establish which damages stemmed from the
6 negligence that was proven. That continued with
7 respect to the second trial. And the preclusion of
8 the defendant's expert then precluded the defendant's
9 ability - - -

10 JUDGE SMITH: Is there - - - I'm still - -
11 -

12 MS. FLAHERTY: - - - to challenge that.

13 JUDGE SMITH: - - - I'm still a little
14 confused about whether this issue extends to more
15 than the preclusion of the one expert.

16 MS. FLAHERTY: Yes, Your Honor.

17 JUDGE SMITH: There are other - - - are
18 there other rulings or offers of proof or anything
19 that you can point to that you say was error,
20 independent of that preclusion order?

21 MS. FLAHERTY: In terms of the second
22 trial?

23 JUDGE SMITH: Yes.

24 MS. FLAHERTY: Well, to an - - - one thing
25 that does come to mind is with respect to the judge's

1 ruling, he also precluded any of the defendants from
2 cross-examining any of the witnesses at the trial
3 with respect to any additional - - -

4 JUDGE SMITH: Any causation issue - - -

5 MS. FLAHERTY: - - - any causation - - -

6 JUDGE SMITH: - - - and those are - - -

7 MS. FLAHERTY: - - - any - - -

8 JUDGE SMITH: - - - and Mr. Miller gave me
9 some pages. And I'd be happy if after the argument
10 anybody wants to give me more where that occurred. I
11 would - - - I'd like to know that.

12 MS. FLAHERTY: Just briefly with respect to
13 the additur argument. What is important to
14 appreciate is because the Kaleida Health and the
15 other defendants did not have an opportunity - - -
16 did not, simply, have enough time to perfect that
17 order from the denial of the motion, you're creating
18 a situation where there are disparate appellate
19 rights.

20 JUDGE SMITH: Your adversary says that you
21 never really tried to get review of the additur
22 before trial. That the review you were looking for
23 was review of the release. Is that correct?

24 MS. FLAHERTY: We also did, though, seek an
25 interlocutory judgment. We also - - - remember, we

1 have ongoing proceedings in front of this trial judge
2 where it was very clear that this trial judge was
3 going to set the next trial; did, in fact, set the
4 next trial - - -

5 JUDGE SMITH: Okay. But I guess - - -

6 MS. FLAHERTY: - - - for a short period - -
7 -

8 JUDGE SMITH: - - - I guess what I'm saying
9 is - - -

10 MS. FLAHERTY: - - - of time - - -

11 JUDGE SMITH: - - - I guess what I'm
12 suggesting is - - -

13 MS. FLAHERTY: - - - when it could be
14 perfected - - -

15 JUDGE SMITH: - - - wasn't your remedy to -
16 - - so we wouldn't be in the position where we're
17 talking about a first trial additur after the second
18 trial, wasn't your remedy to try to get the issue
19 resolved in the Appellate Division before the second
20 trial took place? And maybe you tried to get a stay
21 and failed, or maybe you couldn't, maybe you never
22 tried. But either way, why shouldn't you be out of
23 luck? Now we've had the second trial. He says the
24 point is judicial economy. What are you economizing?

25 MS. FLAHERTY: A couple of things. You

1 know, in terms of judicial economy, it is the reason
2 why it's so important to have this appellate court
3 review the issue that, in fact, was before them: the
4 relevant question in terms of the minimum amount of
5 damages that this gentleman was entitled to.

6 JUDGE PIGOTT: In the global aspect of
7 this, though, if the second jury had come back at six
8 million, do all the arguments go away? I mean, you
9 won't - - - you won't say, well, wait a minute, we
10 want to set that aside too, because we still want to
11 talk about - - -

12 MS. FLAHERTY: Your Honor, then at that
13 point in time, the final judgment would have been
14 entered, and there would have been a determination
15 whether or not to perfect an appeal - - - take an
16 appeal and perfect an appeal from a final judgment.

17 JUDGE PIGOTT: Which - - -

18 MS. FLAHERTY: Whether or not that would
19 have been done or not, I think, depends upon a lot of
20 things, including what - - - you know, what happened
21 at the second trial.

22 JUDGE PIGOTT: Well, true. But what I'm
23 saying is that if you'd gotten a four-million-dollar
24 verdict then, I mean, you wouldn't be appealing?

25 MS. FLAHERTY: In terms of following the

1 second trial?

2 JUDGE PIGOTT: Right.

3 JUDGE SMITH: You wouldn't be appealing on
4 damages.

5 MS. FLAHERTY: I don't think there would
6 have been a need to appeal the additur issue at that
7 point in time, to perfect the appeal and include - -
8 -

9 JUDGE PIGOTT: Right. So you wouldn't be
10 going back - - -

11 MS. FLAHERTY: - - - those arguments we had
12 in our brief.

13 JUDGE PIGOTT: - - - saying our rights were
14 impaired when we were forced on to trial without
15 being able to argue the additur, because of course,
16 it was satisfied, because the jury came back with a
17 verdict that we can live with.

18 MS. FLAHERTY: I think there was definitely
19 a compilation of errors which led - - -

20 JUDGE PIGOTT: Yes.

21 MS. FLAHERTY: - - - I think, as we - - -

22 CHIEF JUDGE LIPPMAN: Okay, counselor.

23 MS. FLAHERTY: - - - discussed, to the
24 second verdict.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

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Thanks counselor. Thank you all.

MS. FLAHERTY: Thank you.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of Oakes v. Patel, et al., No. 51 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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