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[00:03:01] **Unidentified** Now imagine the chief justice in that case, Lindsey Graham, saying your silence.

[00:03:10] **Speaker 1** All right. Please be seated. Good morning. The first case today is Neil Vranich versus Teleflex Medical, Inc.. Tape 1454. Can I please have your appearances?

[00:03:35] **Unidentified** I. Uh huh. Um.

[00:03:54] **Speaker 1** All right. Good morning. Thank you.

[00:03:56] **Unidentified** Good morning. I am back. Yeah, well, I don't like.

[00:04:04] **Speaker 1** All right. Good morning. All right. And counsel your parents. All right. Thank you. The line up this morning is 25 minutes, followed by 35 minutes and rebuttal, correct? All right. With that, let's get started.

[00:04:45] **Speaker 2** May it please the court. Good morning again and thank you for allowing me to share with you this morning why the circuit courts summary judgment should be affirmed on behalf of Teleflex Medical, Inc., and why this court should adopt the learned intermediary doctrine. And let me, if I may take up that second issue first. Teleflex requests that this court adopt the learned intermediary doctrine as it is and adopted in the majority of jurisdictions throughout this country. The courts. And it is, as I said, a vast, vast majority of the courts that have adopted the learned intermediary doctrine have generally, while they use different words, cited more reasons for it. One is that it is consistent with the realities of how prescription drugs and prescription medical devices are administered to patients and use by patients. That's number one. It very much tracks. These things are not available other than through a licensed physician or in some cases or other licensed health care providers. Number two, the recognition is, is that the information about medical devices that are implanted into the body, prescription drugs involve complex decisions about risks and benefits. The information that is provided by the companies that sell those products are medically complex, and they take into account a lot of factors that require people who are trained to distill them, to understand them, and to put them into practice with the medical condition of the patient and other therapies that the patient may be receiving. Related to that is the idea that providing that information directly to patients would be overwhelming. And it's in language that they don't understand. And frankly, it may be counter to patient safety and good patient care, because overwhelming those patients with information that they're not really qualified to understand may cause patients not to take therapies, not to use therapies, may cause them not to listen to the physician.

[00:07:23] **Speaker 3** The parts of the arguments that are being made for and against Wisconsin adopting the learned intermediary doctrine seem to ask this court to make a policy decision that, in my mind seems to rest better with the legislature because we aren't policy makers, right? We interpret the law and there really isn't any more out there on this. There are cases where courts around the country, I understand, have routinely and regularly adopted this doctrine, but there are other states where the legislature has adopted or rejected this doctrine. So I find myself in the uncomfortable position of trying to weigh policy choices here. And that's not something that the judiciary is supposed to do. The Constitution also rejects the notion that this court has any authority to alter the common law. That's Article 14, Section 13, of the Constitution. So could you address what legal argument you have? Obviously, the cases are on your side, but what laws on your side?

[00:08:34] **Speaker 2** Well, there's two points that I would submit on that justice. One is and it goes back to the point that you made, which is that overwhelmingly this has been adopted as a common law doctrine, and I think that's significant. You pointed out that there are states that have adopted it as a matter of statute. There's only five of them that have. Two of those, I know for certain Ohio and New Jersey had adopted that as part of the common law prior to them becoming statutory. But there's also a legal test aspect to this, too, which is what you're asking courts below to use as a test that makes sense, that's consistent with reality in failure to warn claims. And so the failure to warn claim when you're asking it to a court below to make a determination about what is the proper scope of duty, what is an adequate warning. Those courts have recognized that in addition to the fact that it fits reality, it fits good health care policy as to that aspect, that it is also a bright line talk test that fits again fits reality and that can be administered by the courts.

[00:09:53] **Speaker 3** Although that but that seems to be all grounded in policy considerations. And of course the counter to your arguments is that the test is arguably a bit anachronistic, isn't it? With the advent of the Internet age, which we've had for some time now, people are perfectly capable, one could argue, of learning even complex material about their medical choices. People go on the Internet all the time. There is a ton of information available. There are, of course, scientific papers that are. Written more for the medical community. But to suggest that people cannot understand something so complex that it's really the doctor's decision seems to not really reflect reality if this court is going to delve into making policy.

[00:10:43] **Speaker 2** Your Honor, there's there's no question that there is more information out there, but it has not been observed by any courts to supplant.

[00:10:53] **Speaker 4** The role.

[00:10:54] **Speaker 2** Of the doctor in prescribing those medications, regardless of what might be out on the Internet. You cannot get the medications or in this case, you can't get an implantable device without the intervention of a physician. And let's take this case because it's a really good example of of why it is the learned intermediary doctrine is so critical. Okay. This is a situation where you have a physician developed procedure that was a vast improvement over what had been available in the past for doing cancer, kidney surgery, for renal cancer surgery, allowing these partial nephrectomy to be done. They're very complex. There's robots involved, there's drugs involved, There's other medical devices involved. The clips are part of this technology that was developed by the physicians. And to say that you would have somebody where you would bring them in and say that they could make meaningful decisions about whether or not, for instance, this surgical technique would be used. That was state of the art in the medical community based on what they read on the Internet. I don't think actually is a realistic paradigm. And because those people know and and only physicians know all the things that can happen when you're implanting something into the body, any time you implant something into the body, there are going to be risks and benefits to it. Okay. And it takes a physician who is trained in those various risks and benefits to impart that to the patient along with all of the other parts of the procedure. So it's it really is essential in terms.

[00:12:48] **Speaker 3** Of your argument feels really patronizing to me. It it you you are putting physicians. It feels like you are you are elevating them to this level of knowing all. And you are I feel like you are putting the rest of us in a category that there's no way in hell we could figure this stuff out. This is a guy who had who had clips inserted in his body and the the clips migrated and he had some terrible, terrible results because of that. I can understand that. I could explain that to my kids. If you were going to go in front of a jury, you could explain that to 12 people who have had no idea about that these clips ever existed. Right. So I just I am having a hard time I have a hard time with that argument. And I think it's your fourth point that you didn't get to, but I think is that it would be a burden on the pharmaceutical companies if they had to. Well, you started off by giving us the four reasons why you didn't get to number four. And in reading your brief, I think number is that number four, in fact.

[00:13:53] **Speaker 2** Well, number four is is that. Let me take that first, then I'll. Yeah.

[00:13:57] **Speaker 3** Aren't you sorry You're here.

[00:13:58] **Speaker 2** To ask.

[00:13:59] **Speaker 3** Too many questions.

[00:14:03] **Speaker 2** There on the fourth. It's the practical reality of warning people in this kind of situation, because these are put into the stream of commerce. The the labeling is written for physicians. And so there are practical realities have been understood.

[00:14:19] **Speaker 3** Which. Which goes into my question. It's it's written for physicians. There's no way the rest of us could understand it. I'm just I'm just I'm not buying. I just am really having a hard time with that argument.

[00:14:28] **Speaker 2** Well, I think it's important when you're looking at this to justice. First of all, I want to make sure I am getting in the microphone here. I think it's important when you when you're looking at this, what you're looking at this is retrospectively what we're saying is, is these decisions have to be made prospectively, that the at the time that the decision is being made as to whether or not this surgery here is going to be done, then there are a lot of things that could go wrong. There are a lot of things that that are in play. And so it does take we submit a physician in those circumstances to sort through all of that on the front end because of the concern that if you tell somebody here is everything that could go wrong with you and this procedure. The concern is, is that people will not undergo the.

[00:15:31] **Speaker 4** Surgeries.

[00:15:32] **Speaker 2** Or the or whatever the therapy.

[00:15:34] **Speaker 3** And that's where I think this feels really paternalistic. We're only going to tell you some things because we want you to have this surgery because we're going to decide what's best for you. I have a hard time with that.

[00:15:46] **Speaker 2** Well, I think the it's not deciding what's best in this situation. It's deciding how the procedure should be done. And so what happened here, of course, is you have doctor labels who is using a procedure that was developed by physicians. This is state of the art as to how you close up the kidney. And so the issue here is going on the front end and trying to explain everything that possibly could go wrong and have a patient micro-manage surgical technique, micro-manage exactly how you're going to use the state of the art technique. It seems to me there's a real concern there that you could be depriving people of a procedure that is really important to them.

[00:16:41] **Speaker 5** The matter that's before us, isn't that all a bit of speculation here? Unless I misunderstand the record. Teleflex did not give a warning to the physician who performed the surgery. Right.

[00:16:53] **Speaker 2** Well, they did not.

[00:16:56] **Speaker 5** That's a yes or no.

[00:16:58] **Speaker 2** They did not warn about migration. They did as to the use of this product for ligation of vessels. They told surgeons exactly how to apply it.

[00:17:09] **Speaker 5** But they knew about migration, didn't they?

[00:17:11] **Speaker 2** There there had been reports that they had, but.

[00:17:14] **Speaker 5** That's not what they warned the physician about. Right.

[00:17:18] **Speaker 2** They did not have the word migration in there. They did warn physicians in litigating vessels how to properly apply it and how to make sure it didn't go off.

[00:17:27] **Speaker 5** Here were clips that move throughout a man's body and caused him, in some cases, severe pain in other places, really significant health care problems because of migration. Right.

[00:17:39] **Speaker 2** Well, Your Honor, that's a matter of dispute. But it was not part of our our motion. So medical causation was not what our motion was directed to. We don't agree with that. But we didn't address it because we were looking at legal causation issues in our motion.

[00:17:58] **Speaker 5** Okay. Well, and how does your motion fit with 890 5047i don't recall your arguing that either. And that's a statute that gives manufacturers the obligation to warn consumers.

[00:18:11] **Speaker 2** Right. So the it fits with a 9.047 in the sense that causation is a required element of a claim.

[00:18:21] **Speaker 5** The learning will have to give the warning. You're wanting to step over the first part of the statute. I don't want you to do that. I want you to tell me how what you did fits within it.

[00:18:31] **Speaker 2** Well, Your Honor, I as to that point, I would say, although it was not the subject of our motion, because our motion was based on causation, that we did warn as to like 18 vessels how it is you kept them on the vessel and that is you clamp them, you left a cuff, a sufficient cuff that you'll see in the infuse, which is intended to leave it in place and not have a situation here. Of course, they were put on vessels, they were put on sutures in this position.

[00:19:02] **Speaker 3** But again, you're you're stepping.

[00:19:04] **Speaker 5** Over my question because there was no warning about migration given from the manufacturer to the patient or to the physician. Correct.

[00:19:15] **Speaker 2** There was not a warning that migration would occur.

[00:19:18] **Speaker 5** Good record. Thank you.

[00:19:21] **Speaker 6** Counsel. There are a lot of different claims in this case. The trial court, I think, dismissed basically all of them, you know, and in sort of assuming that, you know, we might adopt learned intermediary doctrine, assuming that we agreed with your argument that we can and we should. I still don't understand how that reaches all of the different claims, particularly again in this piggybacking off of justice. Robin Sax question. You know, we've got a statute that the legislature drafted that governs strict liability. There's obviously claims for false advertising under 100.18. There's all kinds of different you know, there's a manufacturing defect claim and design defect claim. Typically, warnings may or may not be involved in that analysis. I'm trying to understand how it is that even even if even if like the main thrust of the briefing, an argument here is, you know, we can and we should adopt this for negligence type arguments in terms of the scope of what a manufacturer. I should warn you. To whom it should warn. I don't understand how that affects the rest of these claims and what we're supposed to do. What we're supposed to do with them. Could you help help out on that in particularly those claims that are governed by statute? Because they're really, to be frank, was very little argument about the statutory language in how we're supposed to interpret the statutory language. Obviously, the common law is one thing, but when the legislature steps in, we read the statute. That's what we did. We filed with the statute says we don't go off and do our own thing.

[00:20:55] **Speaker 2** Okay. Thank you for that. So what happened here is I'm going to go back and I won't repeat everything that's in the brief in terms of Dr. Whaples, what his testimony was that there is no replacement for work clubs. This is a game changer. This is how you do the procedure. This is how everybody does something. So after his deposition, after he gave that testimony and by the way, that he would not he had no replacement. He would he wouldn't use anything else but work clips in this procedure. After that, we went to the court and we said to the court through this motion for summary judgment that all of these claims, all of these claims are barred as by causation. By causation. Causation is an element of every single one of the claims, whether it's negligence, strict liability, the the misrepresentation claim under 100.18. The horror to be which frankly this I'm not aware of any Wisconsin authority that's adopted that and I don't think it's part of the statute. So we said in this situation they cannot prove causation on any of those claims. And what happened is and they've never disputed that they have to prove causation. And it's their burden that with Dr. Ables giving that testimony, they weren't going to be able to make showing what happened in their response as they came back and they said, oh, wait a minute, we we have a defective manufacturing defect or designed claim. And we said, well, few things. First of all, and let me go back on the 100.18, that whole representation claim that that they might make under the statute. Dr. Wakefield was the one that was the decision maker here. This was his idea. Wasn't people buying it at Aurora Health or anything like that. He said, look, this is how you do this procedure. I want wet clips. And he made it very clear that he didn't rely upon anything from Teleflex. He never heard anything from Teleflex upon about that, that he made that decision. And that was part and parcel of this procedure. It comes packaged together. You can't separate the two. There's no replacement. That's what the big boys do. This is what all the natural guys do. So in terms of any mission.

[00:23:27] **Speaker 3** Women do it, too as well, right?

[00:23:28] **Speaker 2** Hey.

[00:23:29] **Speaker 3** There might be women surgeons as well who might do it. Big boys and big girls perhaps.

[00:23:34] **Speaker 2** Yeah, I'm quoting him, but fair enough. And I take I take your correction. So that takes care of anything and misrepresentations, anything that are statements, whether they're statutory based, common law base, whether it's negligence or whether it's a failure to warn he wasn't going to change, he was going to do it that way. Now, on the defective design and manufacture, they the plaintiffs came back and said, Oh, we've got a defective design and manufacture claim, which frankly, as we said in our reply, we thought was quite diversionary given how the case had been developed, the claims that they made and all that. But we pointed out that, look, our motion is based on the fact that you can't prove causation on any of your claims if you are now saying that, yes, we've got a defective design that allows us to get past summary judgment or a defective manufacture, we said, Well, you have not shown any evidence that a defective design caused the clips to migrate or a manufacturing defect caused clips to migrate. Our motion was based on lack of causation. If you were going to come and say that there is causation, then you need to come forward with evidence and expert evidence. And they've never disputed that to show that the migration occurred. They didn't do it. They never asked for time to do it. They didn't do it. They never said to the court, We need more time to do it.

[00:25:16] **Speaker 5** Was there some reason why you moved for summary judgment when Discovery was still open?

[00:25:23] **Speaker 2** Yes. Yeah. After Dr. Wake. Will's testimony that was unequivocal about how he would use those clips. And this was the only way to do it. And there was no replacement for them. We did not think there was any issue whatsoever that that in the case that we had this targeted motion on causation. We filed it on December 9th. We had a conference with the court the following day, explained what we were doing.

[00:25:54] **Speaker 5** Was there an order in effect that required at that time the prior listing of all experts?

[00:26:02] **Speaker 2** There was not.

[00:26:04] **Speaker 5** Wouldn't you have expected there would be such an order in a case like this that's based on technological development?

[00:26:11] **Speaker 2** Not necessarily.

[00:26:13] **Speaker 5** Really?

[00:26:13] **Speaker 2** Okay. Yeah. I mean, not an order in place. I think it was incumbent upon the plaintiffs to come forward with that evidence or to make it clear why they couldn't. Neither one of those things happened.

[00:26:27] **Speaker 5** So the plaintiffs could still name an expert because there wasn't was no order in place that gave them a date certain that had already passed, correct?

[00:26:36] **Speaker 2** There was not. Correct? Correct. They had. They had approximately five months between the time that we filed our motion on December 9th. And when they filed their response on April 27. And the case had been going on for, I think, a couple of years at that point, and they didn't present an expert.

[00:26:59] **Speaker 1** I'm trying to think if there's anything procedurally that bars either party from seeking summary judgment or filing a motion during the time that there's discovery or a case is being worked up. I, I guess I've seen that on a number of occasions. And if there are still issues that need to be explored, often you hear the response that, well, we haven't deposed our expert yet or we haven't even named experts where there might be an answer to that, asking the judge for more time before the issue is finally disposed of. Was any such request asked for here?

[00:27:43] **Speaker 2** No. No. The only request was for the depositions of the Aurora health people and then three of our sales representatives, none of whom talked with Dr. Staples, only talked with Aurora. And we're not even sure talked with Aurora healthy, frankly. But but it would and those were the that was the discovery that was requested. So we told the court, as I said, what we were doing, you know, filed the motion, said, here's what we've got in mind. Discovery was requested by the plaintiff and and allowed that discovery did not occur either for Aurora Health or our salespeople. The the reason is, is by the time we were dealing with people that were out of state who were not subject to the subpoena power, we were dealing with a former employee. It took a while to get those people together. By the time we started to get things set up on that COVID hit and we were in a situation and this was right in the throes of COVID, if you remember, the country's shut down about March 16th, 2020. We were talking about doing these depositions in April. They did not occur. Plaintiff did not ask for more time on that. But those depositions did not have anything to do with design or manufacturing defects. They were on the 102.18 issue, which again, is Dr. Whaples really as the person driving that in terms of any allegation of a representation might also add in terms of the design defect. Not only did they not come forward with expert evidence, but it's also true two things. One on the design is, is that Dr. Wakefield said he wouldn't use another design, he wouldn't do anything online until that was the national consensus he had. He had looked at other things and and said, that's that's not what people do. This is what everybody does. I'm sticking with the work clips. That's number one. Number two, and this is something we pointed out, but we we relied on causation. Is is is that the whole issue of manufacturing defect? I see. My time is up.

[00:30:01] **Speaker 1** You may finish your finish.

[00:30:02] **Speaker 2** Thank you. I'm sorry to interrupt you.

[00:30:06] **Speaker 1** You may finish your sentence, but not a paragraph.

[00:30:12] **Speaker 4** Understood.

[00:30:12] **Speaker 2** Thank you. Mr. Grieve is the one who elicited testimony from Dr. Wei Falls that all the clips properly closed like they should.

[00:30:23] **Speaker 4** All right. Thank you. Martin justices and may have pleased the court. Again, my name is Jim Cramer. I'm a senior shareholder with the Cavs Dorf law firm in Milwaukee. I have the privilege of representing Dr. Neal Resnick in a very serious product liability personal injury matter. Dr. Resnick commenced this lawsuit against defendant Teleflex due to the permanent injuries he sustained and pecuniary losses that he sustained in his private solo medical practice. The claims pled in the complaint are one of the record. In this case are four claims. There is a common law negligence claim. There is a separate statutory strict liability products claim. There is a strict liability misrepresentation claim number three and there is for the pecuniary loss statutory pecuniary damages claim based on deceptive advertising. As has been commented in court today, at least by questions. There is no law, no law in Wisconsin that applies the physician concentric causation test that the defendant is seeking to apply for his claim of absence of causation to any of these common law claims. It simply is not the law in this state. Wisconsin is a substantial factor state. That is our causation test. It does not analyze injury and damage causation from the perspective of a physician and a physician alone. That is done in some states that have adopted and strictly apply a very strict version of the learned intermediary doctrine. That is not the law in Wisconsin. It has never been the law of causation in this state.

[00:32:50] **Speaker 3** So are you are you arguing against us adopting the learned intermediary doctrine? Pardon me? Are you. Are you. I didn't get this from your brief. And so my question is, Mr. Peck, in the filings, they give us all the reasons that we should adopt the learned intermediary doctrine. And I didn't read your filings to say, please don't do that. I don't know if that's what you're arguing today or not, but I'm interested in what your position is.

[00:33:20] **Speaker 4** I believe that there is potentially with legislative guidance or on the court's own direction and opportunity in some facts and some cases to craft an appropriate specie of learned intermediary doctrine. What I suggest is this is not the case to do it with the facts that are unique to this case, that are uncontested in the record. The essence of the learned intermediary doctrine calls on a manufacturer of a medical device to share its knowledge of dangerous injury causing potential in its product with the learned intermediary doctrine. Doctor. That is the essence of learned intermediary doctrine. In this case, it is an uncontested fact that although this defendant had actual knowledge that its hemo lock clip product on a recurrent basis was migrating and causing patient complication injuries in some patients, not all patients, but in some patients on a recurrent basis and it concealed that risk. It did not share it with the medical community. It didn't tell Dr. Renick, the surgeons who insert and surgically implant the products. It didn't tell the hospitals that by its products, and it certainly never told Dr. Renick, the patient who received 28 to 32 of these put into his that his surgically his into his body without any advance knowledge that this product had that potential to injure.

[00:35:23] **Speaker 3** I think your friends on the other group, please. Okay. I have one question. Okay. Sure. I think. Well, I don't know. See? Okay. Don't hold me to it. This is my question. I think what your friends on the other side would say is, even if the doctor had received the warnings, he still was going to use the clips in this procedure.

[00:35:45] **Speaker 4** So that's the interesting question, because what perhaps you didn't finish your question.

[00:35:50] **Speaker 3** No, And that's my no, I'm being held to one question and I'm I'm sticking with it. I got I got four I got five colleagues holding me accountable.

[00:36:00] **Speaker 4** This doctor, after hours of depositions about what he knew and did not know about this specific product and why he uses it and how he uses it, gave a very candid deposition testimony. And in this testimony and it's in the record, he said in answering defense question, you know, perhaps this is something that I should disclose that is his sworn testimony in this record that is in the opposition record on summary judgment. This doctor, by his own testimony, has questioned whether, based on what he knows now about these clips, whether this is. Something that should be shared with patients. The patient in this case is himself a licensed physician in Wisconsin. If there is somebody that is capable of understanding the arguments and receiving the warning and making a rational, informed consent surgical decision to proceed or not proceed, it is my client, Dr. Rennick. He was deprived of his opportunity to exercise informed consent to this operation, placing 28 to 32 of these never tested in human being clips into his body because Teleflex didn't tell his doctor. These clips can migrate. They have a recurrent problem in this regard. And he didn't supply Teleflex didn't supply to his doctor. The safety instructions as to how you recognize, diagnose and timely and properly treat the patients that have these foreseeable complications caused by migration. Why did Teleflex choose to conceal and hold this information to itself instead of sharing it with the medical community that purchases and uses its products?

[00:38:26] **Speaker 3** Counsel and I ask this question seriously. Are you finished answering the question? Just as corrupt skiers going into new areas. Sounded like you were going into a new area.

[00:38:40] **Speaker 4** I think it finished.

[00:38:42] **Speaker 3** I think so. So I'm going to follow up on Justice Carrasco's question. And she asked you, were you arguing against. In part, she asked, Are you arguing against adopting this doctrine? And you responded with. It's not. It wasn't Yes or no, it was.

[00:39:06] **Speaker 1** I don't know. But not here.

[00:39:07] **Speaker 3** That's right. That's exactly it. Maybe it was just. I do know, but not here. And that's kind of what I heard, I think. And all the lawyers here will know that you talk about limitations of duty in common law. You start with what case. You start with Paul's draft case. Right. And and so that's where I start when I look at this doctrine of limiting the duty here.

[00:39:36] **Speaker 4** Um.

[00:39:37] **Speaker 3** The doctrine holds the manufacture of a prescription drug or medical device fulfills its duty to warn of the product's risks by informing the prescribing physician of those risks. So there is a limitation on duty. And pulse graph. Of course, Wisconsin, which has been repeated, repeated and repeated in our jurisprudence, adopts the minority approach in Paul's scrap Andrews approach. Judge Andrews, not Cardozo, is majority opinion, and I think arguably that the adoption of this doctrine, maybe other jurisdictions have done it. I don't know where those other jurisdictions fall on how they see negligence. We clearly fall the dissent on Andrews and I think under Andrews we can't ducked this. The quintessential difference, a quintessential difference between the majority and the dissent is the timing. Cardozo would limit it at the very beginning. Motion to dismiss Motion to Suppress the court decides whether or not you're going to go forward with it. And that is I see. Andrews and I might be wrong. It is on causation. It's it's it's different. It allows the jury in fact, an explanation would be thus that under the Andrews theory, the jury first determines the elements of negligence, including causation. And the verdict is subject to review for possible judicial limitations unless the jury itself finds a lack of prerequisite causation, proximate cause. So let's take, for purposes of argument, that adoption of this doctrine is antithetical to the dissent. In Paul's graph. Hmm. Should that be a consideration? And if you haven't thought about it, that's okay, too.

[00:42:05] **Speaker 4** In Wisconsin.

[00:42:06] **Speaker 3** In Wisconsin, you know, we're in Wisconsin. We're different here.

[00:42:09] **Speaker 4** Every person.

[00:42:12] **Speaker 3** All right. That way.

[00:42:14] **Speaker 4** Every other person duty to exercise reasonable care.

[00:42:17] **Speaker 3** And you probably got an A because that's exactly the words of Andrews. You'd order you. We have the duty to the world, everyone.

[00:42:26] **Speaker 4** Correct. And applying that duty to the world, in this case, this defendant had a duty to my client to tell them about a risk that it knows about inherent in its product. And it did not do so, nor did it tell the physician to qualify as a duty exception under any variant of learned intermediary. It failed in both regards. It didn't tell my client the end user patient. It didn't tell the physician who is the learned intermediary surgeon who installs it.

[00:43:07] **Speaker 3** Are you able to answer this question yes or no? And maybe not. Not every question falls into that category. Is your position here today? That in certain circumstances the doctrine should be adopted by this court. I think that is your position consistent with Wisconsin's view of negligence set forth in the dissent and postscript.

[00:43:44] **Speaker 4** I will try to answer that question this way. I will say Wisconsin absolutely not should accept and adopt a learned intermediary doctrine in any case, for any medical product in which the manufacturer has not warned of a known danger, which is the uncontested facts in this case. So should this case be a basis to adopt learned intermediary doctrine in the state of Wisconsin? I will answer that firmly. No. Might there be some other case, some other day, some other time with a manufacturer who made a much better effort to comply with and follow its duty of disclosure of injury warnings and instructions? Perhaps. But that is not this case.

[00:44:39] **Speaker 3** Why? Why are you hinging it on the warning? Because in my reading of Zimmer, the Seventh Circuit case, my understanding of the facts of that case, there was also no warning in that case. Correct. And so why that why is that what the tipping point for you?

[00:44:57] **Speaker 4** Actually, there was a warning in that case. There was a warning about cement. There was an instruction to use cement. It was a more applicable case for potential application for learned intermediary, because the debate was how much cement should the product use. That's so different, Your Honor.

[00:45:20] **Speaker 3** Hold on. Let me let me back up. I misstated. And I should state it right that what the court upheld in Zimmer was that if properly warned the doctor, it had to do with whether or not the doctor would would alter his or her behavior. Correct. And in this case, my understanding is that even if warned, the doctor was not going to alter his behavior, he still was going to use the clips. So I'm just trying to understand why that's the tipping.

[00:45:51] **Speaker 4** Point for you. This doctor has suggested or at least raised a jury inference from which a reasonable jury can take competing inferences. When he testifies, perhaps this is something I should discuss.

[00:46:07] **Speaker 3** Okay. So you're not accepting and I understand why you're not accepting as a fact in this case. You're saying that that that would go to the jury as to whether or not the doctor.

[00:46:15] **Speaker 4** Exactly. I do not accept the fact that they have proven with certainty justifying summary judgment the absence of causation and that he would not alter his behavior.

[00:46:28] **Speaker 3** Okay. So now help me connect that that to what Justice. And was Bradley just asked you? Which I think is a 30,000 foot view of the plane by misstating, I mean how she will. Yeah. And I'll never be able to see it as articulately as she could. Is the 30,000 foot view of how does this case fit or how does it not fit into the allied?

[00:46:56] **Speaker 4** Into into the polygraph exception, minority rule. Polygraph exception, the Wisconsin rule that everyone owes a duty of conduct to everyone in the world supports my client's common law negligence claim. It supports my clients product liability, statutory claim, and it supports its misrepresentation claim.

[00:47:25] **Speaker 3** But, I mean, there are limitations. I don't mean to suggest there aren't limitations. Everyone owes a duty. And then, you know, flip. That would be horrible, wouldn't it? I mean, there are limitations. Causation, Proving causation is.

[00:47:39] **Speaker 4** There are causation and there are the causation limitations inherent in every tort case, every negligence case. And I would go to the record that my client put into the record. There is substantial evidence, substantial evidence that Teleflex acts. Omissions are a significant factor cause of my client's injuries and damages that satisfies the Wisconsin standard tort standard. It will satisfy the duty to everyone in the world of reasonable standard. My client has for causes of action, grounded, well-grounded in Wisconsin, causes of action which should go forward and present jury questions.

[00:48:28] **Speaker 1** Can you talk to me a little bit about the facts? Because it summary judgment, material issues of fact are important from the one perspective. They introduce evidence that even if there's a duty, even if there is a breach, even if there's harm, there's isn't that middle part, that causation? That's important because I think they say that the doctor said regardless of a warning, I already knew these things migrated. I knew this could happen and I was going to use them anyway. What is in the record from your side to say, no, that's a contested fact. We need to go to trial on that. And there's a material issue of fact.

[00:49:23] **Speaker 4** The plaintiff's opposition brief has extensive argument and it's built around the contents and the substance of Dr. Neil Reddick's own affidavit that effectively walks action by action through what happened to him and connects the causation. What he would what happened to him and what he would do differently had he been told and warned. It satisfies the causation warning test for negligence in this state and it creates jury issues of fact. I like I like to turn, if I can if if I've answered your question sufficiently, the suggestion that the plaintiff on this motion had a burden to come forward with expert testimony to substantiate the design defect claim and the other aspects of the strict liability claim, that is, it's nonsense. A scheduling order requiring disclosure of the plaintiff's experts. Liability experts had never been issued in this case.

[00:50:37] **Speaker 1** All right. So your response would be presumably, hey, Judge, we don't even have a scheduling order. We need more time to work up this case. There are genuine issues of material fact. I could even submit some affidavits in that regard. But let us work up the case first before you decide the summary judgment motion.

[00:50:53] **Speaker 4** Right. Those arguments were made, Your Honor, and I suggest looking at I can't pull them by memory, but there are citations to the records of my comments to the trial court stating exactly that.

[00:51:06] **Speaker 1** So you have to.

[00:51:07] **Speaker 4** Haven't even closed fact discovery, much less touched on expert discovery.

[00:51:12] **Speaker 1** I understand that. But summary judgment motions happen before cases are concluded because they are intended to perhaps abbreviate all of the expense and things that go on in trials and eliminate cases that aren't properly before a court and allow cases that are to go forward and trying to figure out. I mean, it's not as if you can't bring a summary judgment motion. I Brett, you brought summary judgment motions before discovery is completely done or expert witness lists are submitted. Right. There's no time limit. But then you say to the judge, because the judge wants all the facts. So, you know, you're deciding it correctly. You say, hey, we haven't properly worked this case up. Did you do that?

[00:51:53] **Speaker 4** And that's why I made oral. An oral motion in front of the judge under the state statute that permits you, permits a party to request additional discovery and additional time to oppose that was made in this case.

[00:52:11] **Speaker 1** So that it's the judge's error to have denied that.

[00:52:15] **Speaker 4** The judge never ruled on that. Okay. The judge never ruled on that. Initially, initially, he granted certain depositions, fact witnesses that would would really address more the misrepresentation causes of action, the issue of no expert testimony on the product defect that was never raised in the defendants motion. The motion says Teleflex is entitled to judgment on all of plaintiff's claims because plaintiff cannot allege, cannot establish that any alleged act or omission by Teleflex caused his alleged injuries. That's the sole basis on which they moved. That's the exact basis that my client, in his summary judgment, opposition submissions, presented affidavits, evidence showing alternative reasonable design, at least to the extent we had it at that time, and presented causation issues of fact as to how their product and their conduct, including the failure of warnings, contributed to his injury. As the Court of Appeals expressly ruled in this case, they found material disputes of fact and issues of fact on all those points based on our opposition submission. That is the correct resolution of this case, essentially to follow the guidance of the Court of Appeals that this is not a summary judgment case due to material disputed issues of fact liability causation and all issues and all causes of action. That's what they decided. And they said specifically the facts of this case do not fit the learned intermediary doctrine. That was my case. That was my argument to the trial court. That was my argument to the Court of appeals that because no warnings were provided by this manufacturer to the doctor or to the plaintiff himself. It doesn't fit the traditional understanding of learn it intermediary counsel.

[00:54:47] **Speaker 6** What you describe in your brief and just now about the nature of how the learned intermediary doctrine is applied nationwide? I don't think is correct. I think the opposing counsel is correct about about the way it operates in practice and about the way courts that have adopted it play it out, not an affirmative defense. When you're looking at causation, you look at what the doctor would do. I have some real concern that and obviously some of my colleagues have expressed expressed some skepticism about what we should do or can do under these circumstances. But I'm trying to think about what a rule is that comes out of this case that would give any guidance here, because the the idea that, you know, any time anybody might get a surgery, that if warnings weren't given to the physician about the way, you know, laparoscopic tools work or the anesthesia that might be used or those sorts of things that those warnings need to be given to, you know, the patient. And if those warnings aren't given, then they then they can be liable if something goes wrong. It seems that there is a potential dramatic expansion of liability. There's an open question about what the law is in this area, but how you prove causation. I don't think it's enough to say maybe we don't go go this way or go that way. I don't know what the I don't know what the rule is. I don't even know what the rule is you're advocating for. Because what you're advocating for, at least as I read it, is totally inconsistent with the way courts around the country applied. At least almost all of them know in that that that's not the way the learned intermediary doctrine works. It goes to the scope of duty in cases that might be non-answers to send cases or potentially towards the nature of how you proofs prove causation in maybe to send cases or adopt by the legislature. So could you help us out here because some rules are going to come out of this. And I have some real concern that we might mess things up here and make the law less clear for courts and for juries. I'm trying to think of how judges are supposed to instruct juries in some of these questions because those things are all affected by how injuries are caused and what the legal analysis is in this area.

[00:57:19] **Speaker 4** I think my time is up.

[00:57:20] **Speaker 1** No, it's not. You've got some where within five.

[00:57:23] **Speaker 6** It's just a yellow light. You're all good. Yeah.

[00:57:29] **Speaker 4** One of my arguments in my prepared outline that I haven't got to today was to suggest that this may be a case that calls for a reasoned exercise of judicial discretion to not apply learn of intermediary doctrine under the facts of this case, because they are so inapplicable where the manufacturer has made no effort to warn anyone. Not the doctor, not the hospital, or not the patient. It's just bad facts make bad law. But again.

[00:58:08] **Speaker 6** That adage, I'm sorry, I just want to jump in. That's how the learned intermediary doctrine works around the country. If there is no third to warn, it doesn't mean you're liable. It goes to how you prove causation. At the end of the day, who do you look at? So you can't just say, I think there was no warning given to anybody. Ergo, we throw it out the door and the warning needs to be given to the patient. That's precisely where these questions come in.

[00:58:32] **Speaker 4** Justice Sykes and her seventh Circuit decision, which has been cited by Teleflex, cited by the trial court, expressly states, and I quoted the quote verbatim in my brief, I don't have it in memory, but the essence of what Justice Sykes decided or what she wrote is that the learned intermediary doctrine applies where the manufacturer provides an adequate warning of the known danger to the prescribing medical professional. That is the quote from her decision. That is an apt summary of.

[00:59:13] **Speaker 3** What she goes on to say. But the failure to warn must also establish causation by showing that if properly warned, he or she would have altered behavior and avoided injury. That's just a couple paragraphs below. I think you're site is paragraph 751 and this is at 754. Page 754.

[00:59:34] **Speaker 4** Yes.

[00:59:34] **Speaker 3** So it gets back to the causation question that I'm hearing Justice Hagedorn asking.

[00:59:39] **Speaker 4** It's back to the causation question. On the issue of where do we use and apply, this physician can separate causation. And the only place that it reasonably would be applied if, if, if it's to be applied in Wisconsin is on the issue of failure to warn liability. The issue doesn't exist for the rest of the course of actions pled in this case of negligence of product defect of of strict product misrepresentation. The essence of plaintiffs first pled cause of action. Common law negligence is seeking liability because Teleflex sold and marketed an unsafe product, never tested in human beings, and then mis advertised the safety, the reliability and the performance of this product. That's the essence of what the negligence claim has been built around.

[01:00:47] **Speaker 3** So are you saying in response to Justice Hagedorn's question just to cut to the quick here, that in a situation where there has not been a warning, the lady should not come into play?

[01:00:59] **Speaker 4** Yes. Okay. Yes, that's exactly what I'm saying. How are you going to merge the decades of Wisconsin tort law?

[01:01:08] **Speaker 1** You to get a sentence? Not, apparently.

[01:01:11] **Speaker 4** I'll withdraw it. Thank you, Your Honor. All right.

[01:01:14] **Speaker 1** Thank you.

[01:01:32] **Speaker 2** I like to start with the question posed by just hanging on. How do you come out of this with a test.

[01:01:41] **Speaker 4** For trial.

[01:01:42] **Speaker 2** Courts? And the test is, is that in a situation where prescription medical products and medical devices are involved, the duty to warn is to the physician, to health care provider bright line test. That's what the learned intermediary doctrine is all about. It is about and that is what was articulated by Justice Sykes or excuse me, Judge Sykes, when she said, we're going to join everybody else, which is, as you pointed out, Justice Hagedorn. That's the rule of law and that is what we are advocating here. If any plaintiff can prove that the warning was inadequate, whether absence or inadequate, and we cited cases. And so as the amicus showing, there's no differentiation on that in terms of the application learning intermediary doctrine and the plaintiff can prove causation, then the plaintiff can prevail in its action.

[01:02:41] **Speaker 3** Mr. Peck, is there any distinction that we should think about trying between devices that are implanted in someone and and drugs? Because it seems to me that every time I go to the pharmacy or pick up something for a member of my family, there's lots and lots of information that is know in the package from Walgreens. In this case, obviously is about something that a medical implant. And are you asking us just to loop it all together? Or should we think about parsing it out?

[01:03:14] **Speaker 2** The courts have not distinguish, and I don't think as long it is something that is prescribed by a physician. Justice I believe that the learning intermediary doctrine should apply to both sets of products.

[01:03:28] **Speaker 6** We probably wouldn't need to decide that in order to decide this case though. How are correct there? If there are, there might be times or places where there are exceptions or some jurisdictions have some exceptions. I think what you're asking us to do is to adopt it for the purposes of this particular product as in as used in this particular case.

[01:03:51] **Speaker 2** That is correct. Just hagedorn it, if the decision was made that there was going to only be in this case, that would be inappropriate resolve from Teleflex standpoint, but it has been adopted with respect to prescription drugs as well. I did want to address a question that Justice Bradley posed about the whole issue of Paul's scrap, the influence here and how that is. And I have two thoughts on that. One is, number one, New York has adopted the learned intermediary doctrine where Paul's graph came out. And what it recognized is, is that even in situations with the duty is owed to the public at large, there are limitations. As I believe Justice Ziegler identified and and I believe Justice Bradley, you did as well. And that is something that this Court pointed out in Hocking, saying that the while Wisconsin follows the minority view from Paul's grasp, the duty owed to the world is not unlimited, but rather is restricted to what is reasonable under the circumstances. This represents a situation where the duty going to the physician is reasonable under the circumstances and applies well.

[01:05:18] **Speaker 3** Reasonable under the circumstances. Just another way of saying a usual word is like limiting liability under public policy because it's to causation is too remote. Is that a fancy way of saying well. I can limit causation because it's too remote. In essence, it's reasonable under the circumstances. Are you using those terms synonymous?

[01:05:51] **Speaker 2** I Oh, I'm sorry. Were you finished? I'm not using it to limit liability in any sense. What I'm using it is to define to whom the duty is owed. If the plaintiff can prove that the duty was not discharged, that the warning was not adequate and there was causation can still recover. It's not a limitation of of any liability. Instead, it is a direction of to whom the duty is owed as opposed to the public.

[01:06:16] **Speaker 3** And the duty under your argument is the duty to warn is owed to the physician.

[01:06:24] **Speaker 2** Correct.

[01:06:25] **Speaker 3** And not to the public at large?

[01:06:29] **Speaker 2** Correct? Right. I'd like to.

[01:06:33] **Speaker 4** Oh.

[01:06:34] **Speaker 2** I see. My time is up.

[01:06:36] **Speaker 1** I can't even a sentence this time. All right. Thank you for oral arguments. This is very interesting. The court will adjourn. Are properly positioned for that.

[01:06:54] **Speaker 3** This program is a production of Wisconsin Eye, an independent, nonpartisan, nonprofit media network with a mission to inform, educate and engage the citizens of Wisconsin. Wisconsin is the nation's first and only independently funded state civics broadcast network, providing gavel to gavel access to government proceedings and events at the state capitol.