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Ivan Martinez v. Florida Power & Light

CHIEF JUSTICE: GOOD MORNING, EVERYONE. THE FIRST THREE CASES ON THE DOCKET HAVE BEEN CONSOLIDATED, AND I UNDERSTAND THAT COUNSEL IS HAS WORKED OUT THE APPORTIONMENT OF TIME IN ADVANCE. IS THAT CORRECT?

YES, YOUR HONOR.

CHIEF JUSTICE: WE ARE GOING TO HAVE THE COOPERATION OF OUR MARSHAL, WHO WILL TRY TO ASSIST YOU IN REMEMBERING WHAT THAT SCHEDULE IS, BUT IF YOU WILL TRY TO KEEP YOUR EYE ON THE CLOCK, THERE, AT THE SAME TIME. WITH THAT, COUNSEL MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. ELIZABETH RUSSO ON BEHALF OF THE MARTINEZ PETITIONERS. THE ISSUE PRESENTED IN DCA OPINION DEALS WITH THE ISSUE OF PROXIMATE CAUSE.

THE DCA OPINION DOES NOT. I AM REPRESENTING THE CLAIMANTS. THE, THERE WAS NO ISSUE RAISED AS A PROXIMATE CAUSE IN THE TRIAL COURT, ON APPEAL IN FRONT OF THE THIRD DISTRICT. FPL DID RAISE A PROXIMATE CAUSE ARGUMENT AS A BACKUP, I SUPPOSE, ON A RIGHT FOR THE WRONG REASON. IT WAS NOT ADDRESSED BY THE THIRD DISTRICT.

SO YOU ARE DEALING WITH THE THRESHOLD ISSUE, HERE, OF DUTY.

OF DUTY.

ALL RIGHT.

THEY RAISE THE PROXIMATE CAUSE ISSUE HERE AS WELL, BUT I WILL REST ON THE BRIEF FOR THAT, UNLESS THE COURT HAS QUESTIONS ABOUT IT. SO THEY TOOK TO MAINTAIN THE STREETLIGHTS IN THIS PARTICULAR SECTION OF SOUTHWEST MIAMI, AND DID AN INADEQUATE JOB OF IT, ALLOWING SOME OF THE LIGHTS TO BECOME NONFUNCTIONAL AND BURNT OUT IN SOME OF THE AREAS, SO THAT THERE WERE SOME AREAS THAT WERE LIGHT ON THIS STREET AND SOME AREAS THAT WERE DARKENED. THE PETITIONER'S SON, MY CLIENT'S SON WAS KILLED BY A PASSING MOTORIST, BECAUSE THE MOTORIST COULDN'T SEE HIM IN THE DARKENED AREA. WE BROUGHT SUIT, AND THE CASE WAS DISMISSED ON GROUNDS OF NO DUTY, AND THE THIRD DISTRICT AFFIRMED THAT HOLDING, ALSO, THAT THERE WAS NO DUTY ON THE PART OF FLORIDA POWER & LIGHT, SO THE QUESTION HERE IS HOW ARE THE FLORIDA COURTS SUPPOSED TO DETERMINE WHETHER A DUTY EXISTS UNDER THESE CIRCUMSTANCES OR ANY CIRCUMSTANCES FOR TORT LIABILITY.

NOW, THIS WAS A, THE ARRANGEMENT BETWEEN, WITH FLORIDA POWER IN THIS CASE, DOES THE RECORD REFLECT THAT IT SHOWS THAT THEY SPECIFICALLY AGREED TO MAINTAIN THE TRAFFIC LIGHTS, AS OPPOSED TO PROVIDE ELECTRICITY?

THE RECORD REFLECTS THAT THEY SPECIFICALLY UNDERTOOK TO MAINTAIN STREETLIGHTS, AS IN OVERHEAD STREETLIGHTS. MY COMPLAINT WAS DISMISSED. WE ALLEGED THAT THE STREETLIGHTS WERE WHAT THEY HAD UNDERTAKEN TO MAINTAIN AND THAT IS ALL THAT IS INVOLVED IN MY PARTICULAR CASE AND THAT THEY ALLOWED SOME OF THEM TO BECOME BURNT OUT FOR SOME PERIODS OF TIME, WHEN THEY KNEW ABOUT IT AND COULD HAVE

CORRECTED THAT SITUATION. THAT IS WHAT IS INVOLVED IN THE MARTINEZ CASE. IN ANY EVENT, THE QUESTION, THEN, WAS THERE A DUTY. WE SAY THAT THE McCAIN CASE, FROM THIS COURT, ANSWERS THAT QUESTION, BY TELLING COURTS WHAT THE ANALYSIS IS SUPPOSED TO BE IN THIS AND EVERY NEGLIGENCE CASE, WHICH IS YOU DETERMINE WHETHER THE DEFENDANT'S CONDUCT CREATED A FORESEEABLE ZONE OF RISK.

YOUR CASE, IT APPEARS TO BE SUBSTANTIALLY DIFFERENT FROM THAT IN JACKSONVILLE, DOES IT NOT, WITH REGARD TO THE ALLEGATIONS OF THE UNDERLYING CONTRACTUAL RELATIONSHIP, IF THERE WAS ONE, IF THERE WAS NOT ONE. YOURS REALLY DOESN'T HAVE THAT ELEMENT, DOES IT?

IT DOES NOT HAVE IT AT THIS POINT, BECAUSE WE DIDN'T GET THAT FAR. WHAT WE HAVE IS THAT THERE WAS A DUTY UNDER TAKEN. I DON'T THINK IT MAKES A DIFFERENCE IN THE LONG-RUN. IF YOU UNDERTAKE A DUTY, WHETHER YOU DO IT FOR CONTRACTUAL REASONS OR WHETHER YOU JUST UNDERTAKE IT, I THINK THE UNDERTAKING LAW SAYS, ONCE YOU HAVE UNDERTAKEN TO PERFORM ANY ACTIVITY, YOU THEN HAVE A DUTY TO DO IT WITH REASONABLE CARE, AND THE CASE LAW SUPPORTS THAT.

GO BACK TO McCAIN IN FOR A MINUTE AND ADDRESS THE ISSUE IN THE NATURE OF THE QUALITY OF THE POTENTIAL DANGER THAT WAS INVOLVED IN McCAIN, COMPARED TO THE CAUGHT OR -- THE QUALITY OR THE NATURE OF THE POTENTIAL DANGER HERE. TELL ME WHAT THAT IS, WHETHER THAT SHOULD MAKE A DIFFERENCE IN OUR ANALYSIS.

USING THE McCAIN QUESTION OF DID THE DEFENDANT'S CONDUCT CREATE A FORESEEABLE ZONE OF RISK, I LOOK AT WHAT WAS THE DEFENDANT'S CONDUCT HERE. THEY UNDERTOOK TO MAINTAIN STREETLIGHTS FOR THE PURPOSE OF IMPROVING VISIBILITY AT NIGHT FOR PEOPLE WHO WOULD BE USING THE STREETS, AND THEN THEY LET THE LIGHTS GO OUT FOR A LONG PERIOD OF TIME BEFORE THEY CORRECTED AND FOR A LONG PERIOD OF TIME THAT THEIR EMPLOYEES KNEW OR SHOULD HAVE KNOWN ABOUT IT AND THERE WERE DARKENED AREAS THAT, IN FACT, CAUSED A MOTORIST NOT TO BE ABLE TO SEE THE STREET AS HE WAS USING THE STREET TO CROSS IT IN THE DARK.

IN McCAIN, THE GENERAL CONDUCT THAT THE CASE TALKED ABOUT WAS THE PROVISION OF ELECTRICITY AND POWER-VEEN JAT RATE -- AND POWER GENERATING EQUIPMENT, WHICH BY ITS VERY NATURE CREATED A ZONE OF RISK. McCAIN DIDN'T TALK ABOUT THE NATURE OF THE CONDUCT BUT THE CONDUCT THAT THEY TOOK OF POWER GENERATING CREATED A ZONE OF RISK. WHAT ZONE OF RISK IS CREATED BY THE PROVISION OF STREETLIGHTS?

WELL, WHAT IS CREATED IS THE STREETLIGHTS ARE THERE. THEY WERE PLACED THERE TO BEGIN WITH, FOR SAFETY PURPOSES, FOR SAFETY REASONS. THEY ARE NOT THERE FOR DECORATION. THEY ARE THERE FOR SAFETY REASONS, BECAUSE IF YOU HAVE DARKNESS AT NIGHT AND YOU HAVE NOTE MOTORISTS AND WHETHER IT IS CHILDREN OR ANIMALS OR SOMETHING THAT COULD RUN INTO THEM, IT IS TO MAKE THE MOTORISTS ON THE STREETS HAVE MORE VISIBILITY FOR WHATEVER IT IS THAT THEY MAY ENCOUNTER, HENCE PEDESTRIANS.

YOU WOULD AGREE, WOULD YOU NOT, THAT THE DANGER INVOLVED IN McCAIN SEEMS TO BE MUCH MORE PATENT THAN THE DANGER THAT IS INVOLVED HERE, OR WOULD YOU AGREE, AND MORE PATENT, I DON'T KNOW IF THAT IS AN APPROPRIATE PHRASE, BUT FOLLOWING UP ON JUSTICE CANTERO'S QUESTION. THAT IS WHY I ASKED YOU TO TRY TO COMPARE THOSE TWO SITUATIONS AND TELL ME WHETHER THE COMPARISON IS RELEVANT AND THEN WHAT THE COMPARISON YIELDS, IN TERMS OF OUR ANALYSIS.

WELL, IN McCAIN IT WAS THAT THEY KNEW THEY WERE GOING TO BE HAVING POWER LINES THAT THEY WERE WORKING ON, AND THEY WERE SUPPOSED TO BE MARKING THE AREA AROUND IT BECAUSE THEY WERE HAVING WORKERS DIG WHO MIGHT COME INTO CONTACT WITH THE POWER

LINES.

AND THE POWER LINES, REALLY, DANGER, IT IS THE EXPOSURE TO THE POWER LINES AND THE ELECTRICITY THAT GOES THROUGH THOSE POWER LINES THAT IS THE DANGER THAT WAS BEING TALKED ABOUT IN McCAIN, IS THAT CORRECT?

THAT'S CORRECT. THAT'S CORRECT.

NOW, WHAT IS THE DANGER HERE THAT YOU ANALOGIZE OR FILL IN THE BLANK FOR THE McCAIN FORMULA?

PEOPLE GETTING KILLED. PEOPLE GETTING RUN OVER AND KILLED. BECAUSE THE LIGHTING IS INADEQUATE OR BECAUSE THE, BECAUSE THE DARK, IN CONTRAST WITH THE LIGHT, IS IN ADEQUATE. THAT IS WHAT STREETLIGHTS ARE FOR, TO PROVIDE SAFER STREETS AT NIGHT, JUST AS WHAT THEY WERE SUPPOSED TO BE DOING WAS MARK OFF THE AREA IN McCAIN, WHERE THEY WERE GOING TO BE DIGGING, SO THEY COULD TELL THE PEOPLE THAT WERE GOING TO BE DIGGING THE TREFERMINGES WOULD KNOW THE SAFE AREAS WHERE THERE WAS NO POWER LINES FROM THE AREAS WHERE THERE WERE POWER LINES, SO THEY WOULDN'T COME INTO CONTACT WITH THE LINES AND GET KILLED.

MANY OF THESE CASES THAT INVOLVE POWER COMPANIES DO INVOLVE SOME THING THAT IS POWER COMPANIES ARE UNIQUELY INVOLVED WITH, LIKE THE LINES. THIS SEEMS, TO ME, TO BE CLOSER TO WHAT WOULD OCCUR, SAY, IF YOU HAD A DEVELOPMENT, JUST A HOUSING DEVELOPMENT, AND YOU HAD A DEVELOPER WHO IS REQUIRED TO MAINTAIN STREETLIGHTS AND SOMEONE SLIPPED AND FELL BECAUSE IT WAS DARK AND THERE WAS A DUTY TO MAINTAIN THESE LIGHTS. IS THERE A REASON, WHEN IT GETS TO THIS TYPE OF ORDINARY, WHAT I WOULD CONSIDER TO BE AN ORDINARY DUTY, THAT THE POWER COMPANY SHOULD BE TREATED DIFFERENTLY THAN ANY OTHER CORPORATION OR INDIVIDUAL REQUIRED TO MAINTAIN LIGHTS OR LIGHTING?

NO. AND I THINK THAT IS OUR OPPONENT IS THERE REALLY IS NO REASON TO TREAT THEM DIFFERENTLY. THEY WEREN'T REALLY ACTING IN THEIR CAPACITY AS A UTILITY COMPANY HERE. THIS DOESN'T HAVE TO DO WITH FLORIDA POWER & LIGHT AS AN ELECTRIC COMPANY PROVIDING ELECTRIC.

CHIEF JUSTICE: I WANT YOU TO BE AWARE OF THE TIME.

IT HAD TO DO WITH THEIR ACTING IN A CAPACITY AS MAINTAINER AND I WOULD ALSO LIKE TO POINT OUT QUICKLY THAT NOT ONLY DOES McCAIN APPLY HERE BUT THE UNDERTAKER DOCTRINE, CONFIRMED IN THE UNION MEMORIAL, WHICH SAYS THAT WHENEVER ANY PERSON, ANY CORPORATION IN FLORIDA UNDER TAKES TO DO SOMETHING, YOU HAVE THE DUTY OF REASONABLE CARE, SO WE HAVE THE REASONABLE THRESHOLD THERE. THEY UNDERTOOK TO MAINTAIN THE STREETLIGHTS. WHAT HAPPENED AS A PROXIMATE CAUSE DOWN THE ROAD, WE DON'T KNOW, BUT THEY HAD THE DUTY AND THAT IS WHAT WE THINK THE COURT SHOULD HOLD. THANK YOU.

MAY IT PLEASE THE COURT. I AM MARK HICKS. I REPRESENT FLORIDA POWER & LIGHT. THE FIRST THING THAT I WOULD LIKE TO POINT OUT IS THAT, IN THE TRIAL COURT WE DID BRIEF EXTENSIVELY THE PROXIMATE CAUSE OF CAUSATION. IT WAS PRESENTED IN THE APPELLATE COURT. I HAVE THE MEMO RIGHT HERE. THE APPELLATE COURT CHOSE TO GO OFF ON ONE ISSUE AND DIDN'T REACH THE OTHER ISSUE, BUT THEY ARE BOTH PRESENTED HERE FOR THE COURT TO CONSIDER AND TO RULE ON, IF IT FINDS NECESSARY.

COUNSEL, SHOULD UTILITIES BE TREATED DIFFERENTLY, WHEN THEY ARE MAINTAINED OBTAINING LOOK -- WHEN THEY ARE MAINTAINING LIGHTS, AS IN THIS SITUATION?

YOUR HONOR, YES, THEY SHOULD.

OR WHEN THEY ARE FURNISHING ELECTRICITY?

YES, THEY SHOULD, AND HERE IS THE REASON WHY. McCAIN HAS NOT CHANGED THE LEGAL LANDSCAPE. MANY CASES HAVE SAID THAT. THE WORD "ZONE OF RISK" IN McCAIN DEALT WITH MAPPING OUT A CIRCLE ON THE GROUND AND SAID DILG THERE AND THE MAN DOUG THERE AND -- AND THE MAN DUG THERE AND HE WAS ELECTROCUTED. AND THE QUERY IS ALWAYS WHETHER THE PUNITIVE WRONGDOER HAS LAUNCHED A FORCE OR ADMINISTERED HARM WHERE THE REFUSAL HAS BECOME AN INSTRUMENT FOR GOOD. THAT IS EXACTLY WHAT McCAIN IS TALKING ABOUT, DID WE LAUNCH A FORCE OF HARM. HERE WE HAVE IN THE UNITED STATES, TENS OF THOUSANDS, MAYBE HUNDREDS OF THOUSANDS OF MILES OF ROADS THAT HAVE NO STREETLIGHTS. NOW YOU COME ALONG AND THEY HAVE ALLEGED THAT WE ONLY MAINTAIN THEY WILL BUT WE ERECT THEM AND LET'S SEE S SAY IN REALITY WHAT YOU HAVE IN THIS COUNTRY IS CERTAIN UTILITIES, PROBABLY IN FLORIDA, OWN STREETLIGHTS, ERECT STREETLIGHTS, TAKE CARE OF MUNICIPALITY STREETLIGHTS. THERE IS ALL FORMS OF STREETLIGHT ACTIVITY. HOWEVER, WHAT YOU END UP WITH IS THAT YOU CANNOT HOLD A UTILITY LIABLE, WITHOUT ANY KIND OF DIRECT PRIVITY, AND I DON'T MEAN PRIVITY. YOU NEED A CONTRACTUAL PRIVITY, IN ORDER FOR A UTILITY TO AGREE TO BE LIABLE TO IN THE PUBLIC UNDERNEATH THOSE STREETLIGHTS, BECAUSE OTHERWISE YOU OPEN UP THE UTILITY TO UNLIMITED TORT LIABILITY, AND I KNOW PART OF THIS IS DRIVEN BY PUBLIC POLICY AND THE RULES FROM MOCK FORWARD ARE DRIVEN BY PUBLIC POLICY, BUT I THINK IT HAS TO BE, BECAUSE LOOK WHERE THIS IS GOING TO GO FROM HERE. EVERYBODY WHO NOW SLIPS UNDER A LIGHT THAT IS OFF OR DIMED OR LET'S SAY THE BUSH IS IN THE WAY OF THE LIGHT, SO IT NOW CASTS A SHADOW AND A THIEF IS ALLOWED TO COME AND ROB YOU. LET'S SAY THAT THE TREES CAST A SHADOW, AND NOW YOU SLIP AND FALL IN A PUDDLE AT NIGHT. YOU KNOW, THE DANGERS OF NIGHTTIME IS WHAT WE ARE TALKING ABOUT HERE. WE HAVE A DANGER AT NIGHT. AT NIGHT MEANS WHEN YOU SEE A HEADLIGHT OF A CAR, THE CAR IS SUPPOSED TO SEE YOU. YOU ARE SUPPOSED TO SEE THE CAR, AND YOU ARE SUPPOSED TO NOT WALK IN FRONT OF THE CAR. THAT DANGER, WE DIDN'T MAKE ANY WORSE BY ADDING STREETLIGHTS.

THAT IS A PROXIMATE CAUSE ISSUE. IT MAY VERY WELL BE THAT THIS CASE, THAT IT IS MAYBE A SUMMARY JUDGMENT OR IT MAY BE A DIRECTED VERDICT, OR IT MAY BE A DEFENSE VERDICT, ABOUT I AM HAVING TROUBLE UNDERSTANDING, IN TERMS OF WHAT WE HAVE RIGHT NOW BEFORE US IN THIS CASE, WHY WOULD WE TREAT, IN ANSWER TO JUSTICE SHAW'S QUESTION, THE UTILITY WHO IS, WHO HAS UNDERTAKEN TO EITHER MAINTAIN OR ERECT AND MAINTAIN STREETLIGHTS DIFFERENTLY THAN WE WOULD, IF THIS OCCURRED, SAY, IN A PARKING LOT AT, YOU KNOW, WAL-MART, OUTSIDE WALL MART, WHERE THE LIGHTS WERE DOWN AND SOMETHING OCCURRED. THERE WOULD BE AN ORDINARY LAWSUIT, AND THOSE ISSUES WOULD BE ASSORTED OUT, WITHIN THE CONTEXT OF THE LAWSUIT, RATHER THAN SAYING THERE IS NO DUTY TO THE PERSON.

WELL, FOR 75 YEARS, THE COURTS HAVE HELD THAT THERE IS NO DUTY. IF THIS COURT WANTS TO RECONSIDER WHETHER THERE SHOULD BE A DUTY, THINK ABOUT THIS.

BUT WHEN YOU ARE SAYING FOR 75 YEARS. I MEAN, JUSTICE CARDOZO'S CASE, AND I HAVEN'T GONE BACK TO COMPARE IT, BUT IT HAD TO DO WITH NOT HAVING WATER PRESSURE IN A FIRE, AND THERE MAY BE OTHER ISSUES ABOUT FORESEEABILITY THERE, THAT I THINK MIGHT --

NOT NECESSARILY, YOUR HONOR, BECAUSE IN THIS CASE IT WAS DECIDED AS A MATTER OF DUTY THAT, ONCE A UTILITY AGREES TO PROVIDE, LET'S SAY, A CITY WITH WATER, THAT IS AS FAR AS IT GOES. THEY ARE NOT AGREEING TO PROVIDE EVERYONE ELSE WITH ABSOLUTE PRO STEX -- PROTECTION DENTION P AGAINST FIRE. YOUR HONOR, IN THE SUPREME COURT CASE OF ARANODO, DISTINGUISHED TWO CASES, MOVIE AND WOODWARD ON THAT GROUND. YOU LOOK

AT THE CONTRACT AND IN THOSE CASES IT SAYS THESE CONTRACTS ARE FOR THE PROTECTION OF THE PUBLIC, BUT THEN YOU LOOK AT THE MOVIE CASE AND SAY THERE IS NO -- THE MOODY CASE AND SAY THERE IS NO DUTY. IT ALL DEPENDS UPON WHAT THE UTILITY AGREED TO DO.

WHAT YOU ARE DOING, MR. HICKS, MAKING A PUBLIC POLICY ARGUMENT, SORT OF ANALOGOUS TO THE SITUATION WHERE THE POLICE STOPS THE DRUNK, AND THE DRUNK, AND LET'S THE DRUNK GO, AND LATER THE DRUNK IS INVOLVED WITH A CAR.

THIS IS WAY TOO REMOTE OF A SITUATION, YOUR HONOR. THINK ABOUT THIS. ONCE YOU CREATE A DUTY, IT IS NOT JUST A PROXIMATE CAUSE ISSUE, BUT IF YOU WANT TO TALK ABOUT OUR CASE --

HOW DOES THIS DIFFER FROM THE SITUATION WHERE A MUNICIPALITY PUTS UP A STOP SIGN? AND THEN HAS --

YOUR HONOR, WHEN THE MUNICIPALITY PUTS UP A STOP SIGN, THIS COURT HAS HELD THERE IS A DUTY TO MAINTAIN IT. HOWEVER, WHEN A MUNICIPALITY HIRES ANY OUTSIDE VENDER TO DO -- VENDOR TO DO SOMETHING FOR IT, THE PUBLIC HAS A NONDELEGABLE DUTY. THE VENDOR WHO COMES TO THE MUNICIPALITY TO DO THE WORK IS LIMITED BY HIS CONTRACT. IF THE CONTRACT SAYS TO CHANGE THE LIGHT BULBS ONCE A MONTH, NO MATTER THEIR CONDITION AND I DO THAT, THE LIGHT BULB DOESN'T FLOW THROUGH ME. IT STOPS AT THE CAUSE OF ACTION. THERE MAY BE A DUTY.

FOR THE UTILITY SERVICE, BE IT WATER OR ELECTRICITY, IS A DIFFERENT BALLGAME THAN MAINTENANCE, AND IT MAY BE THAT IT IS DETERMINED BY THE CONTRACTUAL ARRANGEMENT, BUT AREN'T THEY DIFFERENT, THE PROVISION THAT UTILITY PROVIDES WATER OR A CERTAIN PRESSURE OF WATER OR ELECTRICITY. ISN'T THAT A DIFFERENT ANIMAL THAT WE ARE DEALING WITH THAN THE MAINTENANCE CONCEPT, BECAUSE IT MAY BE THAT YOUR CONTRACT WITH DADE COUNTY WAS THAT YOU WILL REPLACE BULBS ONCE A YEAR AND THAT IS IT. IT MAY DEFINE WHAT --

YOUR HONOR, I THINK THE PLAINTIFFS WOULD LIKE TO SAY FOR PURPOSES OF THIS CASE LET'S JUST LOCK INTO THE WORD MAINTENANCE AND MAKE IT A TINY LITTLE THING, SO YOU ARE NOT EXPANDING THE LAW. LET'S JUST SAY THAT FPL, WITH OVER HALF A MILLION LIGHT BULBS ALONE, HAS TO BE ON THEM EVERYDAY TO MAKE SURE THEY ARE NOT OUT, EVERY NEIGHBORHOOD IN ALL OF FLORIDA WHERE IT HAS ITS TERRITORY. OF COURSE, THE UTILITY, THE COUNTY IS NOT GOING TO PAY FOR. THAT THE CITIES AREN'T GOING TO PAY FOR THAT. THAT IS BECAUSE A RULE OF LAW COMING DOWN FROM YOU ALL SAYS GET IN YOUR CAR AND BE AWARE ABOUT THOSE HALF MILLION LIGHT BULBS PLUS. NOW, IF WE MAKE THAT RULE -- I AM SORRY.

WHAT PRINCIPAL OF -- WHAT PRINCIPLE OF LAW DO YOU GATHER COMES OUT OF McCAIN. WHAT IS THE PRINCIPLE OF LAW?

THE PRINCIPLE OF LAW THAT COMES OUT OF McCAIN IS, IF YOU CREATE, CREATE IS THE UNDERSCORED WORD, IF YOU CREATE A RISK, A DANGEROUS CONDITION, THAT IS WITHIN THE ZONE OF RISK. HERE, DARK HAPPENS EVERYDAY AROUND THE COUNTRY. HUNDREDS OF THOUSANDS, TENS OF THOUSANDS OF MILES OF ROADS ARE NOT LIT. BECAUSE SOME CITIES, SOME AREAS --

YOU CREATED A RISK WHEN YOU SAID I AM GOING TO LIGHT THE ROAD, AND THE PUBLIC --

NO WORSE THAN DARK.

-- AND THE PUBLIC, THEN, RELIES UPON THIS BEING A LIGHTED SECTION OF THE ROAD AND THEN YOU NEGLIGENTLY FAIL TO LIGHT IT.

YOUR HONOR, IT IS NOT REALLY A RELIANCE CONCEPT IN OUR VIEW, BECAUSE IT IS SO SELF-EVIDENT. IF YOU ARE DRIVING ON ONE STREET AND THE NEXT STREET OVER HAS GOT STREETLIGHTS AND THE NEXT STREET OVER DOESN'T, YOU ARE OBSERVING YOUR SURROUNDINGS AT NIGHT. YOU CAN'T COUNT ON LIGHTS BEING ON EVERYWHERE, YOURSELF. THERE IS NO RULE OF LAW FOR THAT.

IN THIS CASE, IF IT WAS THE MUNICIPALITY THAT THEY WERE ALLEGEING MAINTAINED THE LIGHTS, HAD ERECTED THEM AND MAINTAINED THEM, GOING BACK TO JUSTICE WELLS'S QUESTION, WOULD THERE BE AN ISSUE, SUBJECT, OF COURSE, SOVEREIGN IMMUNITY LIMITATIONS, THAT THERE WOULD BE, THAT THE DUTY TO MAINTAIN, ONCE THEY WERE ERECTED, WOULD ARISE?

I DON'T THINK ANY CASE HAS SO FAR HELD A MUNICIPALITY IS GOING TO BE LIABLE FOR STREETLIGHTS. YOU SEE, THERE IS A LOT OF CONSIDERATIONS. FOR ONE THING, ONCE YOU SAY THERE IS A DUTY EITHER ON THE MUNICIPALITY, EITHER ON FLORIDA POWER & LIGHT OR SOME OTHER COMPANY, LET'S TALK ABOUT DUTY FOR A MINUTE, THE DUTY TO DO WHAT? HOW BIG IS THE WORD MAINTENANCE? THEY USE THE WORD "ERECT".

SO MUNICIPALITY WOULDN'T BE LIABLE, EITHER, UNDER YOUR THEREY?

THE STREETLIGHT. THEY WOULDN'T BE.

IF THIS WAS WAL-MART AND THE PARKING LOTS WERE DOWN.

THAT IS A WHOLE DIFFERENT RULE, AN INVITEE RULE FOR LANDOWNERS. YOU ARE INVITING PEOPLE TO COME TO YOUR PLACE OF BUSINESS FOR MONEY, FOR COMPENSATION. YOU HAVE GOT TO GO THE EXTRA MILE. CITIES AREN'T REQUIRED TO PUT UP STREETLIGHTS, AND WHEN YOU DO YOU GO OUT AND A FEW OF THEM ARE ON AND A FEW OF THEM ARE OFF. ALL YOU DO IS YOU ARE DRIVING AT NIGHT BASICALLY. YOU ARE NOT GOING TO PAY TO GO ON THE PREMISES, JUST AS IF DRIVE IN YOUR NEIGHBOR'S BEYOND A REASONABLE DOUBT, YOU DON'T HAVE TO HAVE A LIGHT.

DOES IT MAKE ANY DIFFERENCE IF THE CITY IS ON NOTICE, IF THEY HAVE BEEN CALLED SEVERAL TIMES THAT THIS IS OUT. WE ARE HAVING A PROBLEM HERE ON THIS STREET?

IT SHOULDN'T, IF THERE IS NO DUTY. I MEAN, LET'S, TRY TO UNDERSTAND WHERE I AM COMING FROM. THE DANGER HERE, I AM SORRY.

YOU CAN JUST ERECT THESE AND NEVER HAVE TO WORRY ABOUT IT.

THE ONLY TIME YOU WOULD HAVE TO WORRY ABOUT IT IS FOR EXAMPLE, IF ONE OF OUR STREETLIGHTS CAME DOWN AND WAS FACING TRAFFIC INTO SOMEBODY'S EYES. THAT CREATES DANGER. IF YOU ARE TALKING ABOUT JUST HAVING STREETLIGHTS, BECAUSE LET ME SAY WHERE THIS IS GOING. YOU ARE GOING TO END UP WHERE UTILITY POLES ARE TOO FAR APART. YOU ARE GOING TO END UP WITH WHY ARE THERE STREETLIGHTS ON THIS SIDE OF THE STREET AND NOT ON THE OTHER STREET, FLORIDA POWER & LIGHT. WHY DON'T YOU ERECT OTHER POLES? THEY ARE NOT ILLUMINATED ENOUGH. WE NEED HUGE, BRIGHT SPOTLIGHTS.

CHIEF JUSTICE: YOU HAVE TO END ON THAT THOUGHT. YOU ARE OUT OF TIME. THANK YOU VERY MUCH.

I HAVE ONE MINUTE LEFT. I WANT TO SAY THAT I THINK THE MAINTENANCE OF IMPROVEMENTS IS WHAT WE ARE TALKING ABOUT AS BEING DIFFERENT, AS OPPOSEED TO JUST SUPPLYING ELECTRICITY OR WATER AND UNQUESTIONABLY A CITY OR MUNICIPALITY WOULD HAVE LIABILITY FOR MAINTENANCE. UNDER COMMERCIAL CARRIERS, WHICH WAS THE STOPLIGHTS, IT

SAYS ONCE THE IMPROVEMENT HAS BEEN MADE, THERE IS A DUTY TO MAINTAIN IT PROPERLY, ONCE YOU UNDERTAKE THAT UNDERTAKING, AND THE CITY OF MIAMI VERSUS SLEFERP WAS THE OTHER ONE WHERE I CITE THIS COURT'S DECISION, WHERE THERE IS NO DUTY TO PREVENT FLOODING IN VENNIAL, BUT -- IN GENERAL, BUT ONCE THEY PUT IN A SYSTEM TO MAINTAIN FLOODING, THEY HAD A DUTY TO MAINTAIN IT PROPERLY. SO SHOULD THE UTILITY COMPANIES. THANK YOU.

CHIEF JUSTICE: ALL RIGHT. WHO IS UP NEXT? OKAY.

MAY IT PLEASE THE COURT. MY NAME IS BILL STONE, AND I REPRESENT CLAY ELECTRIC COOPERATIVE IN THE NEXT TWO CONSOLIDATED CASES HERE TODAY. OUR ACCIDENT AROSE ON SEPTEMBER 4, 1997. IT WAS BEFORE SUNRISE. DAUNTE JOHNSON WAS WALKING ALONG THE WHITE FOG LINE ALONG THE ROAD IN JACKSONVILLE. IT IS A TWO-LANE ROAD IN THE SOUTHWEST PART OF TOWN. HE WAS HIT BY A TRUCK DRIVEN BY MR. GAINES. IT WAS A LIGHT TRUCK. MR. GAINES MAINTAINED THAT HE DIDN'T SEE DAUNT I BECAUSE IT WAS IN A DARK AREA. THE TRIAL JUDGE REVERSED AND THE FIRST DISTRICT COURT OF APPEALS, THE TRIAL JUDGE DID CITE AND RELY UPON THE McCAIN CASE, AND WITH THE LIMITED TIME THAT I HAVE TODAY, I WOULD LIKE TO FOCUS ON McCAIN, AND I THINK THAT IN MANY RESPECTS, McCAIN WAS A BACK TO BASICS-TYPE OF DECISION OF THIS COURT AND THE COURT DESCRIBED IT AS SUCH RECENTLY IN THE WHITT CASE, AS AN ATTEMPT TO CLARIFY THE ROLE THAT FORESEEABILITY PLAYS IN EVALUATING DUTY, AND McCAIN SAYS THAT REASONABLE GENERAL FORESIGHT IS THE CORE OF THE DUTY ELEMENT, AND REASONABLE FORESIGHT IS NOT PERFECT FORESIGHT AND CERTAINLY IT IS NOT 20/20 HINDSIGHT. OTHERWISE, I THINK MY OPPOSITION IN THIS CASE IS TAKING A POSITION THAT ANY INCREASE IN RISK, HOWEVER SLIGHT, GIVES RISE TO A DUTY. THE PROBLEM WITH THAT IS, IF THAT WERE THE CASE, IF THAT IS WHAT THIS COURT INTENDED IN McCAIN, THEN DUTY WOULD BE A FOR GONE CONCLUSION IN VIRTUALLY EVERY CASE, AND WE MIGHT AS WELL READ DUTY OUT AS AN ELEMENT OF A NEGLIGENCE CASE.

CAN YOU ADDRESS THE QUESTION THAT MS. RUSSO RAISED IN THE IMMEDIATELY-PRECEDING CASE, AND THAT IS FORGET THAT THIS IS A UTILITY FOR A MOMENT. LET'S JUST TALK ABOUT THIS, IN TERMS OF MAINTENANCE. SOMEBODY DOES NOT HAVE AN OBLIGATION, WILL CONCEDE TO PUT UP A STREETLIGHT. LET'S SAY THERE HAS TO BE NO STREETLIGHTS IN JACKSONVILLE AT ALL. HOWEVER, ONCE YOU PUT UP THE STREETLIGHTS, ACCORDING TO SOME CASES IN OTHER CONTEXTS, YOU HAVE GOT A RESPONSIBILITY TO MAINTAIN THE STREETLIGHTS. WHY SHOULDN'T WE ANALYZE IT UNDER THAT THEORY?

I DON'T DISAGREE THAT THE UTILITY IS NOT ACTING IN THE TRADITIONAL SENSE OF PROVIDING ELECTRICITY, WHEN THEY AGREE WITH THE CITY OF JACKSONVILLE TO MAINTAIN A STREETLIGHT, AND I AGREE THAT, IF THE UTILITY HAS AGREED AS WE DID, TO MAINTAIN THE STREETLIGHT ON COLLINS ROAD THAT, AS TO THE CITY OF JACKSONVILLE, WE HAVE TO, WE SHOULD MAINTAIN THAT STREETLIGHT, BUT THE QUESTION IS WHETHER THE DUTY IS OWED TO A PEDESTRIAN WHO IS WALKING ON THE ROADWAY. THAT IS THE QUESTION OF WHETHER THE DUTY IS OWED TO THE PEDESTRIAN, NOT THE CITY OF JACKSONVILLE, AND I THINK THAT IS AN IMPORTANT DISTINCTION.

SO THE PLAINTIFF WOULD HAVE TO SUE THE CITY AND THE CITY WOULD HAVE TO THIRD PARTY YOU IN?

WELL, I THINK THE CITY MAY HAVE THE SAME, THE IS CITY WOULD BE ENTITLED TO THE SAME DEFENSE UNDER McCAIN THAT WE ARE ASSERTING IN THIS CASE. CONCEIVABLY THEY COULD SUE THE CITY, BUT THE CITY WOULD HAVE THE SAME McCAIN DEFENSE, AND THAT IS THE POINT. IF YOU LOOK AT McCAIN, IF YOU LOOK AT THE FACTS OF McCAIN AND YOU LOOK AT THE CASES THAT THIS COURT HAS HANDED DOWN SINCE McCAIN, THAT EMPLOYEE THE McCAIN ANALYSIS, AND I AM TALKING ABOUT UNION PARK, WHITT --

I AM NOT SURE WHETHER YOU HAVE REALLY ANSWERED JUSTICE CANTERO'S QUESTION, THOUGH, YOU KNOW, BY SAYING BECAUSE YOU ARE A CONTRACTOR WITH THE CITY, THAT YOU ARE NOT, LET'S TAKE IT IF YOU WERE THE CITY NOW, AND YOU WENT AHEAD AND DID THIS, AND WE HAVE THIS LINE OF CASES, AS JUST NIECE CANTERO SAYS, THAT -- AS JUSTICE CANTERO SAYS, THAT IN THIS LINE OF CONTEXT WHERE WE HAVE PUT SOMETHING UP NOW, AND NOW WE ARE TALKING ABOUT MAINTAINING THOSE THINGS, ONCE THEY ARE PUT UP. WOULD THE CITY BE LIABLE FOR NOT MAINTAINING THOSE LIGHTS?

NOT UNDER McCAIN ANALYSIS.

AND, WELL, WHY NOT?

BECAUSE IF WE HAVE THOSE --

THAT LINE MUCH CASES THAT SAY, WELL, NOW THAT YOU HAVE DONE IT, NOW IT IS AN ISSUE OF MAINTENANCE.

YES, YOUR HONOR, AND YOU ARE TALKING ABOUT THE COMMERCIAL LINE OF CARRIER CASES.

RIGHT.

IN THE COMMERCIAL LINE OF CARRIER CASES, YOU ARE TALKING ABOUT TRAFFIC CONTROL DEVICES, STOP SIGNS, TRAFFIC SIGNALS AT INTERSECTIONS WHICH WE KNOW ACTUALLY CONTROLS THE WAY A PERSON DRIVES AN AUTOMOBILE F YOU COME TO AN INTERSECTION WITH A STOP SIGN, YOU STOP. IF WE WERE TO KNOCK DOWN ALL OF THE STOP SIGNS IN THE STATE OF FLORIDA AT THIS MINT, WE WOULD PROBABLY HAVE HUNDREDS OF ACCIDENTS WITHIN AN HOUR.

IS IT THE QUALITY OF THE DANGER THAT IS CREATED IN THAT SITUATION?

YES, SIR. YES, SIR. YES, SIR.

AND IS THAT WHAT YOU BELIEVE CHANGES THIS CASE?

YES, SIR.

WHO ARE THE STREETLIGHTS FOR?

I THINK WE WOULDN'T ARGUE THAT THE STREETLIGHTS ARE THERE TO LIGHT THE ROADWAY.

FOR WHOM?

PEOPLE ON THE ROADWAY, MOTORISTS, PEDESTRIANS, WHATEVER. I DON'T DISAGREE WITH THAT CONCEPT BUT IT IS A QUALITATIVE ANALYSIS.

WHEN YOU ARE ANALYZING, YOU GET A CALL AS THE BUSINESS, YOU KNOW, STREETLIGHTS NEED TO BE MAINTAINED TODAY BUT THERE IS FIVE OTHER THINGS TO DO, HOW DOES THE BUSINESS DECIDE ORDER OF IMPORTANCE, WHETHER IT IS SOMETHING THEY SHOULD GO OUT AND DO? WELL, IT IS REALLY NOT A BIG DEAL, BECAUSE EVEN THOUGH THEY ARE THERE TO LIGHT THE ROADWAYS, IF THEY ARE NOT LIT, NOTHING IS REALLY GOING TO GO WRONG TODAY ON THE ROAD.

AND THAT IS A FACT. BECAUSE THAT IS WHAT EXPERIENCE TEACHES US. I MEAN, THAT IS WHAT IS SO DIFFERENT ABOUT McCAIN P AND THESE OTHER CASES. IN McCAIN, YOU COULD EASILY SAY THAT REASONABLE FORSYTH SHOULD HAVE TOLD THE DEFENDANT THAT, IF HE MARKS THE AREA ON THE GROUND AS SAFE, THAT MR. McCAIN IS GOING TO DIG THERE AND BE ELECTROCUTED. IN

UNION PARK, WHEN YOU HAVE A FUNERAL PROCESSION AND THE FUNERAL DIRECTOR IS SUPPOSED TO MONITOR TRAFFIC AND PROVIDE SOME SAFEGUARDS, AND YOU HAVE THE FOLKS IN THE FUNERAL DRIVING RIGHT THROUGH A RED LIGHT AT A BUSY INTERSECTION, IT IS NOT HARD TO APPRECIATE THE FACT THAT YOU HAVE CREATED A SIGNIFICANT DANGER. EVEN IN THE WHITT CASE. WHITT VERSUS SILVERMAN, WHERE THE DEFENDANT AMOCO STATION ON COLLINS AVENUE IN MIAMI BEACH, BASICALLY BLINDFOLDS THEIR CUSS TOMORROWER -- THEIR CUSTOMER AS HE LEAVES THE SERVICE STATION. IT IS NOT HARD TO PREDICT THAT THERE IS GOING TO BE AN ACCIDENT AND SOMEONE IS GOING TO GET HURT AS HE LEAVES THE SERVICE STATION. AND THE FPL VERSUS PERRIER CASE, WHERE YOU HAVE GOT A LIGHT OVER A BICYCLE PATH. AGAIN, IT IS AN ACCIDENT WAITING TO HAPPEN. AGAIN THE ONLY GIVERENCE WAS IT WAS A PERSON -- THE ONLY DIFFERENCE WAS IT WAS A PERSON ON A MOTORCYCLE RATHER THAN A BICYCLE, BUT THE COMMON THREAD IN THE McCAIN CASE THAT WE DON'T HAVE HERE IS THAT YOU HAVE A PLAINTIFF WHO IS PLACED IN AN UNUSUAL, CLEARLY UNSAFE, PRECARIOUS POSITION BY THE DEFENDANT'S CONDUCT, AND USUALLY IN THOSE CASES THERE IS SOME ELEMENT OF RELIANCE. NOW, HERE THERE IS NOTHING UNUSUAL ABOUT A ROAD WAY OR A HIGHWAY WITHOUT LIGHTS. THESE ARE ENCOUNTERED EVERYDAY, BY DRIVERS AND PEDESTRIANS EVERY NIGHT, I SHOULD SAY, THROUGHOUT THE STATE.

BUT ISN'T THAT, DOESN'T THAT, REALLY, GO TO PROXIMATE CAUSE? IN OTHER WORDS THAT IS A GOOD ARGUMENT THAT THE CAUSE OF WHAT HAPPENED HERE WAS EITHER THE YOUNG MAN'S OWN NEGLIGENCE AND WHERE HE WAS WALKING, OR THAT THE MOTORIST SHOULD HAVE REALLY, SENSE IT WAS DARK, YOU KNOW, HAD AN OBLIGATION TO GO, THAT THAT IS REALLY AN ISSUE AS TO WHETHER FACT-SPECIFIC, AS TO IN THIS CASE WHERE THERE WERE INTERVENING, SUPERSEDING CAUSES OF THIS ACCIDENT. BUT I AM STILL HAVING TROUBLE IN UNDERSTANDING HOW THE IDEA THAT THERE, THAT STREETLIGHTS AND THE DUTY TO MAINTAIN STREETLIGHTS ARE GOING TO BE PLACED IN A DIFFERENT POSITION THAN, SAY, A STOP SIGN, WHERE THE IDEA IS THAT YOU MIGHT NOT PUT A STOP SIGN UP AT A GIVEN INTERSECTION, BUT ONCE YOU PUT IT UP, YOU ARE CHARGED WITH MAINTAINING IT.

I THINK IT DOES GO TO PROXIMATE CAUSE, ALSO. BUT WE ARE LOOKING AT THE FORESEEABILITY OF HARM, AND WHAT IS A REASONABLE FORESEEABILITY, AND IT IS AN ENTIRELY DIFFERENT CASE, WHEN YOU NEGLIGENTLY DON'T REPLACE A STOP SIGN, WHEN A PERSON IS GOING TO GO THROUGH AN INTERSECTION WITH TRAFFIC COMING THE OTHER WAY VERSUS A STREETLIGHT, WHEN WE HAVE ROADS AND PEOPLE NAVIGATING ROADS AND PEDESTRIANS NAVIGATING ROADS ALL THE TIME WITHOUT LIGHTS.

CHIEF JUSTICE: I HAVE TO REMIND YOU THAT YOU HAVE USED YOUR TIME. THANK YOU VERY MUCH. COUNSEL. 6.

IF IT PLEASE THE COURT, I AM STEVE PASSAGE IB ONn BEHALF OF -- I AM STEVE PAJCIC ON BEHALF OF THE PLAINTIFFS JOHNSON, AND THE FOCUS HERE IS SHOULD THE UTILITY COMPANY BE TREATED DIFFERENTLY IN THIS SETTING, AND I THINK THE QUESTION IS RAISED ABOUT THE QUALITY OF DANGER AND ABOUT THE ZONE OF RISK. I WOULD LIKE TO ADDRESS THOSE FOR JUST A MINUTE.

HOW ABOUT STATING SUCCINCTLY, MR. PAJCIC, WHAT THE BASIS OF YOUR CAUSE OF ACTION IS.

YES.

WHAT IS YOUR CAUSE OF ACTION, AS TO THIS UTILITY?

AS TO THIS UTILITY, OUR CAUSE OF ACTION IS A CASE OF NEGLIGENCE AGAINST THE UTILITY COMPANY, BECAUSE THERE WERE TWO STREETLIGHTS, ONE OR TWO STREETLIGHTS THAT WERE LIGHTING ONE SIDE OF THE ROAD ON WHICH MY CLIENT WAS WALKING, WERE SUPPOSED TO LIGHT ONE SIDE OF THE ROAD ALONG WITH OTHER LIGHTS, AND THOSE LIGHTS WERE OUT AND

HAD BEEN OUT FOR YEARS, AND BECAUSE OF THAT, THE TESTIMONY FROM, IN FACT, DAVID CARTER HERE IS ON BEHALF OF LANCE, INC. AND MOST OF THE TESTIMONY MOST DAMAGING TO THE UTILITY COMPANY COMES FROM THE DRIVER DEFENDANT, WHO WAS DRIVING A PEANUT TRUCK TO WORK, AND HE SAID THAT HE COULDN'T SEE, AND HIS EXPERT SAID THAT HE COULD NOT SEE THE PLAINTIFF SOON ENOUGH, BECAUSE THE LIGHTS WERE BURNT OUT.

IS THE ISSUE, THEN, IN THIS CASE, WHETHER THE UTILITY OWES A DUTY IN GENERAL, AS TO THE MAINTENANCE OF THE LIGHTS, OR IS IT AN ISSUE OF, REALLY, WHAT I WOULD SAY WAS THE CAUSE OF ACTION ELEMENT WITHIN DUTY, AND THAT BEING WHO DOES THE, WHO IS THE DUTY OWED TO? IS THAT THE ISSUE HERE?

I AM NOT QUITE SURE WHAT THE REASONING BEHIND NOT ALLOWING THE DUTY TO BE OWED, WHAT IT COULD BE BASED ON, BECAUSE IT IS CLEAR THAT OTHER DEFENDANTS WHO, OR OTHER COMPANIES OR GOVERNMENTAL ENTITIES, WHO HAVE UNDERTAKEN AN OBLIGATION TO PROVIDE LIGHTING OR TO PROVIDE TRAFFIC ZUING ANALYSIS, THEY HAVE THE DUTY TO THE PUBLIC AT LARGE, TO MAINTAIN THAT LIGHTING AND THOSE TRAFFIC ZUING ANALYSIS IN A REASONABLE WAY, IN A -- TRAFFIC SIGNALS IN A REASONABLE WAY, IN AN AND McCAIN SAYS THAT.

YOUR OPPONENT SAYS THE DUTY IS TO THE ENTITY WITH WHOM THEY CONTRACTED, AND YOUR POSITION, I KNOW, IS THAT THE DUTY IS OWED TO PEOPLE WALKING ALONG THE ROAD. WELL, HOW FAR DOES THAT DUTY, WOULD THAT DUTY EXTEND, THOUGH? IS IT, DOES IT EXTEND TO THE HOUSE OWNER, WHO FALLS IN THEIR BACKYARD BECAUSE THE LIGHT DOESN'T GET THERE, OR WHAT I AM CONCERNED ABOUT IS WHERE ARE WE, WHERE IS THIS ZONE EXTEND TO?

RIGHT. I THINK WE DO HAVE TO LOOK AT WHAT IS THE PURPOSE OF THE STREETLIGHTS, AND THE PURPOSE OF THE STREETLIGHTS IS TO ILLUMINATE THE STREET, TO MAKE IT SAFER FOR PEDESTRIANS, TO MAKE IT SAFER FOR DRIVERS. IN FACT, IN OUR CASE, IT IS VERY LIKELY THAT THE PLAINTIFF WAS WALKING ON THIS SIDE OF THE STREET WHICH HAD LIGHTS, AS OPPOSED TO THE OTHER SIDE OF THE STREET. IN ORDER TO TAKE ADVANTAGE OF THE LIGHTING. BUT WHEN HE GOT TO THIS PARTICULAR PART OF THE STREET, THE LIGHTS WERE OUT. AND THEY HAD BEEN OUT FOR YEARS.

YOU SAID THAT YOU WERE GOING TO ADDRESS THAT THE QUALITY OF DANGER OR ZONE OF DANGER ISSUE, FOR INSTANCE YOUR OPPONENT HERE HAS SAID THAT McCAIN, TRAFFIC CONTROL ZUING ANALYSIS, STOP SIGNS -- TRAFFIC CONTROL SIGNALS, STOP SIGNS, THAT THESE ALL PRESENT DIFFERENT QUALITIES OF DANGER THAT ARE MUCH MORE APPARENT THAN THE DANGER THAT IS INVOLVED HERE. WOULD YOU ADDRESS THAT.

YES. NOW, THE QUALITY OF DANGER IS, PERHAPS, NOT AS FEAR SOME AS ELECTROCUTION, BUT IT CAN BE JUST AS FATAL. THE QUALITY OF DANGER IN McCAIN IS PERHAPS MORE UNIQUE TO UTILITY COMPANIES. THE QUALITY OF DANGER HERE IS NOT UNIQUE TO UTILITY COMPANIES. IT IS MORE LIKE THE LACK OF VISIBILITY ISSUE RAISED IN THE WHITT CASE AND SIMILAR TO THE WHITT CASE IN THAT REGARD.

COUNSEL, YOUR OPPOSING COUNSEL SAYS THIS LACK OF VISIBILITY IS ENCOUNTERED EVERY NIGHT IN FLORIDA AND IN THE UNITED STATES H THERE ARE MANY ROADS, EVEN WITHIN CITIES THAT ARE NOT LIGHTED. DOES THE UTILITY, THEN, HAVE A DUTY TO LIGHT EVERY SINGLE STREET, AND IF A LIGHT IS PRESENT AT EACH CORNER BUT THERE IS DARKNESS IN THE MIDDLE OF THE STREET AND SOMEBODY GETS INJURED, IS THE UTILITY, THEN, LIABLE BECAUSE THERE IS NO LIGHT IN THE MIDDLE OF THE STREET?

NO. THIS CASE ISN'T ABOUT A DUTY TO PROVIDE LIGHTING. IT IS ABOUT A DUTY TO MAINTAIN THE LIGHTING, ONCE IT HAS BEEN PROVIDED AND ONCE YOU HAVE CONTRACTED WITH ANOTHER

PARTY TO PROVIDE IT AND BEING PAID FOR IT. IN THIS CASE CLAY COOPERATIVE WAS BEING PAID FOR YEARS, FOR PROVIDING LIGHTING FOR THESE KIDS WALKING TO A BUS STOP, AND YET THEY WERE NOT, THE LIGHT HAD BEEN BURNT OUT AND FOR YEARS.

SO IN YOUR CASE, WHERE THE PLAINTIFF WAS WALKING ACROSS THE STREET FROM A LIGHTED PART OF THE STREET TO A DARKENED PART OF THE STREET AND THOSE LIGHTS HAD BEEN OUT FOR YEARS, IF IT WERE THE CASE THAT THERE HAD BEEN NO LIGHT EVER ERECTED ON THAT SIDE OF THE STREET, YOU WOULD SAY THERE IS NO DUTY TO PUT UP A LIGHT AND THERE IS NO DUTY TO HAVE A STRONG-ENOUGH LIGHT THAT IT LIGHTS BOTH SIDES OF THE STREET?

ABSOLUTELY NO LIABILITY FOR NOT PUTTING UP LIGHTS. I HAVE NO QUESTION ABOUT THAT, AND BY THE WAY IN MY CASE, HE HAD CROSSED TO THE OTHER SIDE OF THE STREET EARLIER AND WAS WALKING ALONG THE SIDE OF THE STREET THAT HAD THE LIGHTING AT THE TIME THAT HE WAS HIT. HE WAS NOT CROSSING THE STREET WHEN HE WAS HIT. HE WAS WALKING ALONG THE SIDE OF THE STREET.

SO IF WE ACCEPT YOUR POSITION AND THAT STATEMENT THAT THERE IS NO LIABILITY, NO DUTY TO ERECT LIGHTS, IF WE ACCEPT THE PLAINTIFF'S POSITION IN THIS CASE, DON'T WE RUN THE RISK THAT UTILITIES WILL REFUSE TO PUT UP LIGHTS IN DARKENED AREAS OF TOWN BECAUSE THEY DON'T WANT TO CREATE FOR THEMSELVES, A DUTY THAT DOESN'T ALREADY EXIST?

NO. UTILITIES WILL HAVE OBLIGATIONS UNDER THEIR FRANCHISE AGREEMENTS AND UNDER, AND IN RESPONSE TO GENERAL REGULATORY QUESTIONS ABOUT WHERE THE LIGHT SHOULD BE PUT UP, AND THEY WILL BE REQUIRED, BY CERTAIN CITIES, PIE CERTAIN STATES, BY CERTAIN COMMISSIONS, BY CERTAIN CONTRACTS, BY CERTAIN FRANCHISE AGREEMENTS TO PUT UP LIGHTS, BECAUSE THERE IS A CONCERN THAT THIS IS AN AREA THAT NEEDS TO BE LIGHTED, AND WHEN THAT HAPPENS, THEY HAVE THE DUTY TO MAINTAIN IT.

WHO MADE THE DECISION IN THIS CASE TO HAVE STREETLIGHTS? WAS IT THE CITY OF JACKSONVILLE, OR WAS IT THE UTILITY THAT CONTRACTED TO PUT THEM UP AND MAIN OBTAIN THEM?

IT -- AND MAINTAIN THEM?

IT WAS THE CITY AND THIS ILLUSTRATES THE PROBLEM. WE ARE TRYING TO RELY TOO MUCH ON THE CONTRACT HERE, BECAUSE THE UTILITY COMPANY AND THE CITY CANNOT PRODUCE THE CONTRACT, BUT THEY AGREE THAT THERE WAS AT LEAST AT VERBAL AGREEMENT THAT CLAY COOPERATIVE WOULD MAINTAIN THE LIGHTS WHICH WERE PUT UP BY OR THE DECISION MADE TO PUT THEM UP WAS MADE BY EITHER THE JACKSONVILLE ELECTRIC AUTHORITY OR THE CITY OF JACKSONVILLE. THE EVIDENCE IS UNCLEAR ON THAT POINT, TOO, SINCE IT WAS SO FAR IN THE PAST.

WOULD YOU ADDRESS THE QUESTION THAT MR. HICKS DIDN'T GET TO FINISH THAT HE WAS INTERRUPTED ON, THAT THE UTILITY DECISIONS ACROSS THIS COUNTRY, THAT DO NOT ALLOW LIABILITY OR RESPONSIBILITY IN THESE CIRCUMSTANCES, TEND TO BE THOSE WHICH ARE CONNECTED WITH THE PROVISION OF SERVICES, THE ACTUAL ELECTRIC SERVICE, THE PRESSURE OF WATER, AND HOW IS THIS, WITHIN THAT CONCEPT OR HOW IS IT DIFFERENT IN YOUR EYES, BECAUSE IT SEEMS AS THOUGH THEY TREAT THE CASES DIFFERENTLY.

YES. I THINK THOSE CASES THAT DEAL WITH THE PROVISION OF POWER OR ELECTRICITY OR WATER, THEY ARE CONCERNED ABOUT, YOU KNOW, LIKE THE GREAT FIRE OF JACKSONVILLE WHICH OCCURRED IN 1901, ABOUT THE TIME THAT, MAYBE A LITTLE BIT BEFORE Mac WAS DONE AND THERE IS UNLIMIT THE -- BEFORE MACH WAS DONE, AND THERE IS UNLIMITED LIABILITY. THOSE BENEFITS OF COSTS AND WEIGHING WHAT SHOULD BE DONE. THAT WAS NOT THIS KIND OF CASE. THIS IS THE KIND OF CASE WHERE WE ARE DEALING WITH THE MAINTENANCE OF

STREETLIGHTS AT A LIMITED GEOGRAPHICAL LOCATION.

YOU HAVE A POINT OF TRYING TO DETERMINE WHAT THE CONTRACTUAL UNDERTAKING WAS, BECAUSE IT MAY BE DIFFERENT IN DIFFERENT MUNICIPALITIES AND DIFFERENT REGIONS, AND AS YOU HAVE INDICATED THERE MAY BE DIFFERENT DUTIES AND IT IS NOT JUST A BLANKET DUTY. HOW DO YOU ADDRESS THAT?

I DON'T KNOW THAT WE NEED TO GET INTO THE DETAILS OF THE WRITTEN CONTRACT, AND IF WE DO, IT SHOULD BE THE OBLIGATION OF THE DEFENDANT TO PRODUCE THE CONTRACT AND TO SHOW THE LIMITATIONS ON IT. WHEN THERE HAS BEEN AN AGREEMENT TO PROVIDE THE STREETLIGHTING AND THE LIGHTS IN THIS AREA, AND TO COME BACK TO YOUR EARLIER QUESTION, THE CASES LIKE MACH AND LIKE WHITE AND VAUGHAN OUT-OF-STATE, WHEN THEY BALANCE THESE BENEFITS THAT, IS A TOTALLY DIFFERENT APPROACH THAN THE McCAIN APPROACH. THEY ARE ALMOST CONTRADICTORY.

CHIEF JUSTICE: JUSTICE SHAW HAS A QUESTION.

YES.

WHEN YOU HAVE A CONTRACT, AND I ASSUME THAT YOU DO HAVE SOME TYPE OF ORAL CONTRACT HERE, BETWEEN CLAY ELECTRIC AND JACKSONVILLE, AT LEAST THERE WAS A BILLING FOR SOMETHING SO I ASSUME THAT THERE WAS A CONTRACT OF SOME NATURE, IS THE DUTY LIMITED BY THE CONTRACT, OR IS THERE A DUTY, STILL, TO THE PUBLIC, OVER AND ABOVE THE CONTRACT?

I THINK THAT IS A INTERESTING QUESTION, THAT IS NOT REALLY RAISED BY THIS CASE. I THINK IT IS POSSIBLE THAT A UTILITY COMPANY COULD COME IN AND SAY THAT, HERE ARE THE TERMS OF MY CONTRACT. THIS IS WHAT LILTS MY DUTIES, LIMITS AND SO -- LIMITS MY DUTIES, LIMITS AND SO ON. IT COULD HAVE A DUTY TO MAINTAIN OR WHATEVER.

THE CONTRACT TO MAINTAIN THE LIGHTING OR PUT IN NEW BULBS EVERY YEAR, BUT THE BULBS GO OUT EVERY THREE MONTHS AND YOU KNOW THAT, AND THERE ARE ACCIDENTS.

RIGHT. I DO BELIEVE THAT THERE ARE, MY OWN APPROACH TO IT WOULDY IS THAT THAT WOULD BE A POINT THAT WOULD BE RAISED AFTER WE GET BEYOND THIS INITIAL DUTY QUESTION AND ALMOST IN THE WAY AFTER AFFIRMATIVE DEFENSE OR A RESPONSE FROM THE DEFENDANTS, TO SAY HERE ARE THE LIMITATIONS ON THAT DUTY BY CONTRACT, OR BY AGREEMENT THAT THEY WOULD COME FORWARD WITH.

CHIEF JUSTICE: I AM GOING TO HAVE TO ASK YOU TO CLOSE ON THAT NOTE. I BELIEVE YOU HAVE TWO MINUTES LEFT.

MAY IT PLEASE THE COURT. WE ARE NOT ASKING FOR SPECIAL TREATMENT IN THIS CASE. WE ARE ASKING FOR THIS COURT TO DRAW THE LINE AT SOME REASONABLE POINT OF HOW FAR WE ARE GOING TO EXTEND THIS ZONE OF RISK THEORY IN THE McCAIN CASE, AND I THINK IF WE COMPARE THIS CASE TO THESE CONSOLIDATED CASES AND THE PATEENT DANGER THAT WE SEE IN THE OTHER CASES, THE OBVIOUS DANGER THAT WE SEE IN THE OTHER CASES, I THINK THE LINE HAS TO BE DRAWN SOMEWHERE. IF IT IS NOT, WE ARE JUST READING DUTY, PAYING LIP SERVICE TO THE NOTION THAT DUTY SAY THRESHOLD QUESTION OF LAW FOR THE COURTS.

DO YOU AGREE, THOUGH, THAT AGAIN, WHEN THE UTILITY IS MAINTAINING STREETLIGHTS, VERSUS PROVIDING ELECTRICITY OR OTHER TYPES OF TRADITIONAL SERVICES, THAT THE ANALYSIS SHOULD BE DIFFERENT, OR YOU DO NOT AGREE WITH THAT?

I AM SAYING, I AM NOT SAYING THE ANALYSIS SHOULD BE DIFFERENT. I AM AGREEING WITH

YOUR POINT ON THAT, I BELIEVE.

THAT YOU THINK THE ANALYSIS SHOULD BE THE SAME?

I THINK THAT THE UTILITY HAS, IF THEY AGREE TO MAINTAIN THE LIGHTS, THEY SHOULD MAINTAIN THE LIGHTS FOR THE CITY OF JACKSONVILLE.

SO ISN'T THE ISSUE HERE, REALLY, LIKE IF WE TOOK THE STOP SIGN SITUATION, JUST LET'S ASSUME WE THINK IT IS A GOOD IDEA IF THE STREETLIGHTS ARE GOING TO BE THERE, THEY SHOULD BE ON, BECAUSE THAT IS, AND THAT IF SOMEONE IS INJURED BECAUSE OF THAT, BUT THE QUESTION HERE IS WHETHER, IF YOU HAVE A STOP SIGN THAT WAS DOWN, THE CITY IS RESPONSIBLE FOR THAT. MAYBE THEY CONTRACTED WITH ANOTHER ENTITY TO MAINTAIN THE STOP SIGN, BUT THAT IS NOT THE DIRECT, THE SUIT IS AGAINST THE CITY OR MUNICIPALITY, BUT I DON'T GET THAT THAT HAS BEEN THE ARGUMENT, REALLY, THAT HAS BEEN RAISED BY THE POWER COMPANY HERE. YOU ARE JUST SAYING NO ONE SHOULD HAVE THE DUTY.

I AM SAYING THERE IS A SIGNIFICANT QUALITATIVE DIFFERENCE BETWEEN A DOWNED STOP SIGN AND AN INOPERABLE STREETLIGHT, THAT IS BASED UPON OUR HUMAN EXPERIENCE AND OUR KNOWLEDGE OF ALL OF THE ROADS AND HIGHWAYS WITHOUT LIGHTING.

CHIEF JUSTICE: WE HAVE TO CLOSE ON THAT NOTE. WE THANK YOU ALL VERY MUCH.

THANK YOU.