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Walter Goldberg v. Florida Power & Light Co.

CHIEF JUSTICE: THE LAST CASE ON THE COURT'S DOCKET THIS MORNING IS GOLDBERG VERSUS THE FLORIDA POWER & LIGHT COMPANY , AND THE PARTIES ARE READY TO PROCEED?

YES , WE ARE, YOUR HONOR.

CHIEF JUSTICE: ALL RIGHT.YOU MAY PROCEED.

MAY IT PLEASE THE COURT. MY NAME IS JOEL EATON , AND I REPRESENT WALTER AND ROWSLY GOLDBERG AND AT -- AND ROSA LEE GOLDBERG AND WITH ME AT COUNSEL TABLE IS STEWART GROSSMAN . MRS. GOLDBERG LOST HER LIFE IN ESSENTIALLY A BLIND INTERSECTION , DURING HORRENDOUS WEATHER CONDITIONS .

I THINK WE ARE ALLFAMILIAR WITH THAT.

THE TWO QUESTIONS THAT ARISE TO THIS COURT ARE WHETHER FLORIDA POWER & LIGHT OWED A DUTY OF CARE TO MR . AND MRS. GOLDBERG . JUDGE JUAN RAMIREZ WAS THE TRIAL JUDGE.HE IS NOW ON THE THIRD DISTRICT COURT OF APPEAL.

YOU MADE THE POINT SEVERAL TIMES IN YOUR BRIEF , THAT THIS IS NOT ABOUT THE DUTY TO CONTINUOUSLY PROVIDE ELECTRICITY , AND THEN IT SEEMED THAT THERE WAS ANOTHER PART IN YOUR BRIEFWHERE YOU SAID, BUT, IN LIGHT OF CLAY, IT IS PROBABLY THAT DUTY, TOO , BUT CAN YOU , COULD YOU DIFFERENTIATE THE CASES THAT HAVE BEEN DECIDED , LIKE ARENENDO, FROM THIS CASE.

YES, YOUR HONOR. WHAT HAPPENED WAS THE TRIAL JUDGE APPLIED THE THEORY OF THIS CASE , NOT THAT THERE WAS A DUTY TO AND POLITE TRAFFIC LIGHT. WE ACKNOWLEDGE THAT IN ORDER TO FIX THE ONE WIRE TO THE ONE HOUSE , THE TRAFFIC LIGHHAD TO BE SHUT DOWN. AND BASED ON THE FORESEEABLE RISK TEST AND THIS COURT 'S PALM BEACH COUNTY BOARD OF COMMISSIONERS VERSUS SAL AS , THAT ONCE YOU CREATE A DANGEROUS CONDITION B Y SHUTTING DOWN THE LIGHT AT A DANGEROUS INTERSECTION UNDER HORRIBLE WEATHER CONDITIONS , YOU HAD THE DUTY TO PROTECT THE PUBLIC FROM WHAT YOU HAD DONE . JUDGE RAMIREZ DENIED ON THEGROUND THAT THERE WAS A WARRANT OR DUTY TO PROTECTTHAT WAS BREACHED HERE.

YOU DON'T SEE THE MAJOR PRINCIPLES OF LAW THAT HAVE TO B E ENUNCIATE !!ED IN THIS CASE.

I AM NOT RELYING ON ANYTHING NOVEL TO THE CASE BUT TRADITIONAL PRINCIPLES OF NEGLIGENCE LAW THAT HAVE BEEN RELIED O N B Y THIS COURTIN THE RECENT hSQ'T { _ URI }i , AND SPECIFICALLY BY MEMBERS OF THIS COURT. WHAT HAPPENED WAS THAT THERE WAS A DUTY TO WARRANT O R PROTECT , AND --

THE PROCEDURAL POSTURE. JUSTICE CANTERO .

WHEN WE GET TO PRINCIPLES OF LAW AND WE GET T O THE SUPERSEDING CAUSE ISSUE, IS YOUR ARGUMENT THAT , GIVENTHE EVIDENCE IN THIS CASE ~r }i , AND THE EVIDENCE ABOUT THE NATURE OF THE INTERSECTION, AND THAT THE MOTORISTS DO NOT USE THIS AS A 4-WAY STOP THAT, IN IN THESE CIRCUMSTANCES , THIS WAS NOT A SUPERSEDING CAUSE. IT CAN BE EVIDENCE

OF NEGLIGENCE. OR IS YOUR ARGUMENT THAT, IN ALL KINDS OF TRAFFIC CASES, EVIDENCE OF A TRAFFIC VIOLATION BY MOTORIST, DOES NOT CONSTITUTE A SUPERSEDING CAUSE AND IS SIMPLY EVIDENCE OF NEGLIGENCE. THAT WOULD BE AN INSTANCE WHERE YOU MAY OR MAY NOT BE ASKING US TO ISSUE A BROAD STATEMENT OF LAW.

THIS COURT HAS SETTLED MANY, MANY TIMES, BEGINNING WITH ALLEN VERSUS HOOPER, RIGHT UP THROUGH THE SALAS CASE, THAT THE VIOLATION OF A TRAFFIC REGULATION IS NOT NEGLIGENCE AS A MATTER OF LAW. IT IS SIMPLY EVIDENCE OF NEGLIGENCE, BUT THE JURY DOESN'T HAVE TO FIND NEGLIGENCE, BUT IT MUST CONSIDER ALL THE FACTS AND CIRCUMSTANCES IN THE CASE. THAT INSTRUCTION, WHICH IS A STANDARD INSTRUCTION, WAS GIVEN TO THE JURY IN THIS CASE, AND IT EXONERATED BOTH OF THESE DRIVERS BECAUSE OF THE CONFUSING AND DECEPTIVE CIRCUMSTANCES AND THE HORRIFIC WEATHER CONDITIONS AT THIS INTERSECTION.

ARE YOU SAYING THAT, AGAIN, IN ANSWER TO WHAT JUSTICE CANNON IS ASKING YOU, YOU KNOW, SOMETIMES WE SAY TO LAWYERS, DON'T JUST TELL US ABOUT THIS CASE. LET'S TALK ABOUT BROAD PRINCIPLES OF LAW. I AM SAYING IN REVERSE, IT LOOKS LIKE IT HAS A VERY FACTUALLY DIFFERENT CIRCUMSTANCES FROM MANY OF THESE OTHER CASES, AND CAN'T WE RESOLVE BOTH ISSUES TO SAY THAT, BASED ON THE TRADITIONAL PRINCIPLE OF NEGLIGENCE IN THIS CASE, THAT IN THIS CASE, THERE WAS NO SUPERSEDING CAUSE AS A MATTER OF LAW, BUT THAT DOESN'T MEAN THAT THERE COULDN'T BE ANOTHER CASE WHERE THE CIRCUMSTANCES ARE SUCH WHERE IT WAS CLEAR THAT THE TRAFFIC, YOU KNOW, THAT PEOPLE SHOULD HAVE STOPPED, AND THERE, THAT THERE, THAT IT WAS THE SUPERSEDING CAUSE.

YES, YOUR HONOR. THAT IS BASICALLY HOW I PRESENTED THE PROXIMATE CAUSE ISSUE TO THE COURT, AND I HAVE LAUNCHED A SERIOUS CHALLENGE ON THE THIRD DISTRICT'S LINE OF CASES, BEGINNING WITH COLINA, TRIBBLE, AND OTHER ONES THAT REFUSED TO LOOK AT THE FACTS IN COLLISION CASES AND SAY AS A MATTER OF LAW, ANY COLLISION THAT OCCURS WHEN A TRAFFIC LIGHT SIGNAL IS INVISIBLE OR INOPERABLE, A SUPERSEDING CAUSE OF THE NEGLIGENCE OF THE CONDITION, AS A MATTER OF LAW, AND THAT CAN'T BE THE CASE.

THE COMMERCIAL CARRIER WAS A FAILURE TO MAINTAIN A TRAFFIC LIGHT, AND IT WOULD BE NO WORRY OF THAT DUTY, BECAUSE ONCE THE TRAFFIC LIGHT WASN'T WORKING, THE MUNICIPALITY OR GOVERNMENTAL ENTITY WOULD SHUT OFF, BECAUSE THERE WOULD HAVE BEEN A SUPERSEDING CAUSE.

ABSOLUTELY, YOUR HONOR, ONCE YOU DETERMINE AS YOU DID IN COMMERCIAL CARRIER THAT THE MUNICIPALITY OR THE COUNTY, IN THIS CASE, HAD A DUTY TO MAINTAIN ITS TRAFFIC SIGNALS IN OPERABLE CONDITION, IT SEEMS TO ME THAT YOU HAVE GOT FACTUAL CIRCUMSTANCES FROM WHICH A JURY COULD FIND THAT THIS PARTICULAR ACCIDENT WAS FORESEEABLE, INCLUDING THE ARGUMENT OF THE NEGLIGENCE OF THE DRIVERS BEING FORESEEABLE, THAT A JURY QUESTION IS BEING PRESENTED ON PROXIMATE CAUSE. NOW, I HAVE CONCEDED IN MY BRIEF AND I WILL CONCEDE IT HERE AGAIN, THAT ON A BLUE SKY DAY AT U.S. 1, WHERE THE INTERSECTION IS OBVIOUS AND THERE ARE NO WEATHER HAZARDS, AND A DRIVER SEES THAT THE LIGHT IS OUT AND STUMBLES INTO THE INTERSECTION AND HAS A COLLISION, PERHAPS THE COURT COULD SAY ON FACTS LIKE THAT, THAT IS A MATTER OF LAW. THAT IS A SUPERSEDING CAUSE, BUT THAT IS NOT THIS CASE. THIS CASE IS THE EXACT OPPOSITE OF THAT CASE.

BUT THE FACT OF THE WEIGHT OF - - THE FACT OF THE WEATHER CONDITIONS DOES NOT OBTVIATE THE TRAFFIC ORDINANCE, CORRECT, AS TO WHAT TO DO AT THIS INTERSECTION, REGARDING RIGHT-OF-WAYS. THERE IS EVIDENCE IN THIS RECORD ANOTHER JURY WAS PROPERLY HEARD THE EVIDENCE THAT THERE WAS A LAW THAT SAID, IF YOU DETECTED THAT THE STOP LIGHT IS OUT, YOU ARE TO TREAT THE INTERSECTION AS A FOUR-WAY STOP. D-

4AQ!eet THAT STATUTE.

NOW, THEY COULD HAVE FOUND BOTH DRIVER AND WAS THE OTHER DRIVER, THE DRIVER OF THIS VEHICLE , MRS. GOLDBERG , WAS SHE , WAS THERE A CLAIM AGAINST HER? IN OTHER WORDS WHOSE NEGLIGENCE WAS BEING COMPARED?

MRS. GOLDBERG WAS DRIVING NORTH. MRS. --

WHO , ON THE VERDICT WAS THERE A PLACE TO REDUCE THE NEGLIGENCE BECAUSE OF HER DRIVING?

YES, IT WAS, AND THERE WAS A PLACE FOR A FINDING OF NEGLIGENCE ON THE PART OF MRS. SALE , WHO PULLED OUT AND COULDN'T SEE. THERE IS A WALL HERE AND IT BLOCKS HER VISION AND { _ SHE HAS GOT A TINY VIEW OF A CRACK ABOUT 50 FEET DOWN. SHE PULLS OUT AND TAPS MRS. GOLDBERG'S VEHICLE , AND BECAUSE THE ROAD WAS WET , THE CAR YAWED AND SLID INTO THE ONCOMING LANE AND { _ A VEHICLE HIT HER VEHICLE AND KILLED HER DAUGHTER. IT DOESN'T MEAN THAT BECAUSE OF THIS TRAFFIC VIOLATION , THE TWO DRIVERS ARE NEGLIGENT.

GOING BACK TO THIS POINT , WE CAN DECIDE THIS CASE ON THE }i ISSUE THAT { _ , GIVEN THE FACTS OF THIS CASE , THERE WAS OR IS A COMMON LAW DUTY TO EXERCISE REASONABLE CARE IN PERFORMING NANT MEN'S WORK, AND THAT THERE WAS EVIDENCE IN THIS RECORD FROM WHICH THE JURY COULD FIND THAT THEY DID NOT EXERCISE REASONABLE CARE IN PERFORMING THEIR MAINTENANCE WORK. WITHOUT HAVING, I GUESS, WITHOUT HAVING TO GO TO THE CONTRACTUAL ISSUE THAT IS REALLY NOT IN CONFLICT WITH ANYTHING. IN OTHER WORDS , JUST WHEN YOU SEE A STRONGER CASE HAVING BEEN THE CONTRACTUAL ISSUE.

MY NOTES SAY DON'T ARGUE EW THE ASSUMED DUTY. THERE IS NOT ENOUGH TIME. WE PROVED EVERY ELEMENT OF SECTION 324-A IN THIS CASE , AND THERE IS A CONFLICT , BECAUSE JUDGE SCHWARTZ WROTE THAT THERE IS NO CONTRACTUAL DUTY , AND AS THE COURT IS AWARE, A GRATUITOUS DUTY IS UNDER 34-.

IS THE JUDGE CORRECT IN THE DESCENT , BOTH IN SAYING THAT THIS WAS NOT AN ENTIRE EVENING CAUSE AND IN SAYING THAT THE FINDING OF FPL'S 100 PERCENT NEGLIGENCE , WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE , SHOULDN'T THE JURY DECIDE AT LEAST SOME PERCENTAGE, N O MATTER HOW SMALL , OF NEGLIGENCE TO THE DRIVERS, WHO DID ADMITTEDLY VIOLATE THE TRAFFIC LAWS?

YOUR HONOR , NO. BECAUSE MRS. GOLDBERG COULD NOT SEE THE LITTLE BIT OF THIS LIGHT THAT WAS OUT THAT WASN'T OBSCURED BY A TREE . THEY WALKED BACK AND LOOKED AT IT , THAT YOU COULD NOT SEE. HOW COULD SHE?

SHE IS FROM THE COMMUNITY, CORRECT?

YES.

SHE HAD DRIVEN TWELVE YEARS , REMIND ME OF THE FACT OF THIS ROAD AND HER AWARENESS .

IT WAS IN HER NEIGHBORHOOD AND SHE HAD DRIVEN THIS ROAD BEFORE.

AND SO SHE WOULD HAVE KNOWN THAT THERE WAS A LIGHT THERE. I MEAN, IS THERE ANY DISPUTE, IS THERE ANY WAY --

SHE SAID SHE DID NOT SEE }i IT AND THE POLICE OFFICER SAID YOU COULD NOT SEE IT.

HELP ME OUT. I WENT TO PENSACOLA TWO WEEKS AGO. EVERY TRAFFIC LIGHT WAS OUT. I HAVE

GREEN UP THERE. BUT -- I HAVE GROWN UP THERE, BUT EVERY TRAFFIC LIGHT WAS OUT AND I KNEW WHERE THE TRAFFIC LIGHTS WERE, SO I KNEW TO STOP , AND JUST HELP, NOT ME PERSONALLY , BUT THAT SITUATION , AND WHAT FACTSWERE THERE THAT SHE COULD NOT OR SHOULD NOT HAVE KNOWN THAT THERE WAS A TRAFFIC LIGHT THERE.

IF YOU GO DOWN TO LOOK AT THIS INTERSECTION , YOURHONOR, IT IS AN IN A RESIDENTIAL AREA, WHICH IS THE SAME ALL THE WAY FROM U.S. 1 DOWN TO 160-SOME-ODD ~r STREET. IT IS HOUSE , HOUSE , HOUSE , BUSH , BUSH , BUSH , TREE , TREE , TREE. IT IS HARD TO THESE STREETS.SHE WAS IN A LINE OF TRAFFIC AT RUSH HOUR, FOLLOWING A CAR IN ~r FRONT OF HER. NONE OF THIS LINE OF TRAFFIC WAS STOPPING AT THE LIGHT. SHE FOLLOWED THE CAR IN FRONT OF HER , UNAWARE, UNABLE TO SEE THIS INOPERABLE TRAFFIC LIGHT IN THE RAIN WITH THE WINDSHIELD WIPERS ON.

HOW ABOUT THE OTHER LADY?

THE OTHER LADY HAD N O VICEIBILITY, NO VICE IBILITY -- NO VISIBILITY ACROSS THIS CORNER THERE. IS A HOMEOWNERS WALL, A BIG BOX, A POLE. THE TESTIMONY WAS THAT SHE COULD SEE THROUGH A CRACK FROM WHERE SHE WAS LEGALLY STOPPED.ONLY FROM ABOUT 50 FEET DOWNTHE ROAD ON WHICH MS. GOLDBERG WAS APPROACHING, AND THAT WAS NOT ENOUGH TIMETO AVOID AN ACCIDENT. SHE THOUGHT SHE DETECT ADD BREAK IN THE TRAFFIC. SHE PULLED OUT TO SEE IF SHEHAD A BREAK. SHE DIDN'T PULL OUT FAST. SHE JUST TAPPED THE BACK OF THIS VEHICLE.

NOW , THESE WERE ALL , WENTTO THE JURY, IT IN TERMS OF ARGUING HOW MUCH NEGLIGENCE SHOULD BE FOUND ON EITHER THE DRIVER OF THE ONE VEHICLE OR ON THE GOLDBERG VEHICLE.

THE TONIGHT'S YOUR QUESTION, AND JUSTICE CANTERO 'S QUESTION, IS THAT THAT ISSUE , THE ISSUE OF NEGLIGENCE OF THOSE TWO DRIVERS WAS SUBMITTED TO THEJURY, WITH APPROPRIATE INSTRUCTION THAT IS NOBODY HAS CHALLENGED THIS THIS CASE, AND THE JURY CHOSE TO BLAME , PUT ALL THE BLAME ON FLORIDA AND EXONERATE AND EXCUSE THESE TWO DRIVERS, FOR THEIR VIOLATION OF THE FOUR-WAY STOP PROVISION , AND JUDGE RAMIREZ SAID, AND IT IS A DISCRETIONARY RULING , THAT THAT WAS NOT AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

YOU ARE NOT CHALLENGINGTHE REDUCTION OF THE VERDICT TO \$10 MILLION AND I DIDN'T REALLY GET THAT THE OTHER , FP&L WAS CHALLENGING THE MIDDLE GROUND WOULD BE TO LET IT GO BACK TO HAVE THE JURY REEVALUATE --

THAT HAS NOT BEEN PRESENTED AS ISSUE TO THIS COURT.THERE ARE TWO ISSUES.

YOU HAVE POSTED THAT THERE MAY BE AN EXAMPLE, AND YOU USED U.S. 1 }i ON A CLEAR~r DAY}i }~ { _ AND { _ , }i { _ ALSO xD }i , YOU SEEM TO NOT BE CHALLENGING THE POWER OUTAGE CASES THAT ARE OUT THERE ALREADY , AND JUSTICEBELL HAS POSTED TO YOU, YOUKNOW , SORT OF A}i HYPOTHETICAL ABOUT THE SITUATION IN PENSACOLA , AFTER A HURRICANE, ~r OR ANYWHERE ELSE { _ IN FLORIDA , FOR THAT MATTER , AFTER , WHETHER IT CAUSE POWER OUTAGES OR WHATEVER , BUT HOW CAN THE RULING ON THIS CASE }i NOT AFFECT THE DISPOSITION }i OF THOSE CASES? IN OTHER WORDS, IF WE APPROVE THIS BEING SUBMITTED TO A JURY UNDER YOUR THEORY , WHY WON'T THAT M EAN THAT THE U.S.{ _ 1 CASE AND THE POWER OUTAGE CASES, IN OTHER WORDS , THAT THERE WILL NOW ALWAYS BE AN ISSUE A S TO WHETHER OR NOT , IN PENSACOLA , OR MIAMI , OR WEST PALM BEACH , OR WHEREVER , THAT THE POWER COMPANY DID NOT RESPOND, YOU KNOW , QUICKLY ENOUGH , YOU KNOW , TO THE SITUATION , AND MEAN , NOW , THAT ALL OF THOSECASES , AT LEAST GET T O A JURY UNDER THOSE CIRCUMSTANCES.

THE ANSWER TO THAT QERXYOUR HONOR , IS -- T O THAT QUESTION, YOUR HONOR , I S IN A LONG

LINE OF AUTHORITY FROM THIS COURT, { _ WHICH SAYS PROXIMATE CAUSATIONxD I S))T pORDINARILY AN ISSUE FOR THE JURY AND QUESTION OF FACT IS NORMALLY PRESENTED ON THEISSUE OF CAUSATION , UNLESS REASONABLE PERSONS CANNOT DIFFER IN THEIR DETERMINATION OF THAT ISSUE, AND THIS COURT HAS SAID , ON THESE FACTS , THE HURRICANE , LIGHTNING STRIKE, WHATEVER , EQUIPMENT FAILURE REASONABLE , VERSUS CANNOT DIFFER ON THE PROXIMATE CAUSATION ISSUEAND THEREFORE N O PROXIMATE CAUSE IS A MATTER OF LAW , BUT WHEREVER REASONABLE PERSONS CAN DIFFER ON AN ISSUE , A JURY QUESTION IS PRESENTED ON THAT ISSUE.

I THOUGHT THE QUESTION WAS ON THE DUTY.

I THOUGHT HE WAS TALKING ABOUT PROXIMATE CAUSATION. I APOLOGIZE.

DOES THAT INCLUDE, THEN , THE FACT THAT, IN THIS SITUATION, YOU THROW IN THE OTHER ELEMENT OF THE ELECTRICAL COMPANIES HAVING ACTUALLY DONE SOMETHING AFFIRMATIVE.THIS ISN'T LIKE A NATURAL DISASTER THAT --

OF COURSE NOT.

-- THERE IS A HURRICANEAS WE TALKED B WE HAVE SOMEONE GOING IN AND ~r DELIBERATELY CUTTING THE WIRES , EVEN THOUGH THEY DIDN'T KNOW , AT LEAST THEY SAY THEY DIDN'T KNOW THEY WERE CUTTING THE WIRES TO THE TRAFFIC LIGHT. ANOTHER JURY GOT THEM ON THAT ISSUE. THERE ARE SEVEN LINEMEN AND SIX TRUCKS PARKED .

THE QUESTION.

THE QUESTION , NOW , AND JUSTICE ANSTEAD CAN FOLLOW-UP WITH THIS , IS THE DIFFERENCE IN THE CASES OF THE HURRICANES , IS THAT THE POWER { _ COMPANY DOESN'T CAUSE THE HURRICANE, SO HERE YOU ARE ARGUING, I UNDERSTAND , FROM A NARROW DUTY ARISES FROM DOING MAINTENANCE WORK THAT THEY WERE DOING , THAT A DUTY ARISES TO EXERCISE REASONABLE CARE.

YES. #99 YOU --

IT IS NOT THE SAME AS THESE CASES THAT ARE ABOUT WIDESPREAD POWER OUTAGES.

THAT IS MY POSITION , ALTHOUGH I MUST TELL THE COURT THAT, IN VIEW OF CLAY ELECTRIC, WHICH SAYS THAT ONCE YOU UNDERTAKE TO PROVIDE ELECTRICITY T O THESE SIGNALS , YOU HAVE THE DUTY TO PROVIDE IT WITH REASONABLE CARE.

THAT IS WHY YOU CAN ARGUE YOUR ANSWER TO BE THAT THOSE CASES WILL PROBABLY GO TO A JURY. THAT IS THAT , WHETHER OR NOT , AFT HURRICANE, IF THE POWER COMPANY SHOULD HAVE GOT THE POWER COMPANY BACK O N , ITWILL AND FACTUAL ISSUE, ANDYOU CAN HAVE AN UTILITIES EXPERT THAT SAYS, IN THIS SMALL TOWN , WITH THE ABILITYTHAT THE UTILITY COMPANY HAD , THEY SHOULD HAVE HAD THE POWER BACK ON , AND SIX HOURS , BUT THEY DIDN'T HAVE IT BACK ON UNTIL --

MY CASE ON BOTH ISSUES , DUTY AND PROXIMATE CAUSATION , RESTS SQUARELY ON THIS COURT'S DECISION IN PALM BEACH COUNTY BOARD OF COUNTY COMMISSIONERS VERSUS SALAS , IN WHICH A COUNTY WORK CREW DEACTIVATED A LIGHT. A WOMAN TURNED LEFT , KNOWING THAT THE LIGHT WAS OUT , AND YET HAD AN ACCIDENT , THAN COURT SAID, ONCE THE COUNTY CREATED THIS DANGEROUS SITUATION , CREATED THESITUATION , THAT IS THE DISTINCTION BETWEEN THIS CASE AND ALL THOSE OTHERCASES , IT HAD A DUTY TO WARN OR PROTECT. IN THIS CASE , THERE WERE SEVEN LINEMEN , SIX TRUCKS. A POLICEMAN OFFERED TO HELP AND THEY SENT HIM AWAY.

YOU DO DISTINGUISH , BECAUSE YOUR ORIGINAL ANSWER TO M Y QUESTION SEEMED TO BE CONTRARY TO THAT --

I THOUGHT YOU WERE TALKING ABOUT PROXIMATE CAUSATION.I AM SORRY. I MISUNDERSTOOD THEQUESTION. YES. AND IN SALAS THIS COURT SAID THAT THE WOMAN MAY HAVE BEEN NEGLIGENT TURNING IN FRONTOF THIS CAR AND HAVING AN INTERSECTION ACCIDENT , DOESN'T MEAN THAT THE COUNTY 'S SURVEY }i CREWS'S NEGLIGENCE WAS NOT THE PROXIMATE CAUSEAS MATTER OF LAW. BOTH OF THOSE ISSUES WERE RESOLVED AGAINST FLORIDAPOWER & LIGHT IN THIS CASE. THEY ARE GOING TO STAND UP HERE AND SAY OPEN A PANDORA'S BOX , ONEROUS BURDEN, ALL OF THOSE KINDSO F THINGS.

CHIEF JUSTICE: DO YOU WANT TO WAIT AND HEAR WHAT THEY ARE GOING TO SAY? YOU ARE IN REBUTTAL.

I WOULD SAY THE BURDEN THEN THIS CASE WAS TO PICK UP THE RADIO AND SAY TELL THE DISPATCHER TO FIND SOMEONE TO DIRECT TRAFFIC , AND IF THEY CAN'T DO IT, THEY IT WILL FIND SOMEONE OURSELVES.

BUT THEY WERE TLOOCHLT THEY WERE THERE AND FLORIDAPOWER & LIGHT SENT THEM AWAY .

CHIEF JUSTICE: THANK YOUVERY MUCH.

MAY IT PLEASE THE COURT. MY NAME I S GARY SASSO , AND I REPRESENT FLORIDA POWER & LIGHT .

CAN YOU START WHERE MR. EATON LEFT OFF , WHICH IS HOW DO YOU DISTINGUISH THIS CASE FROM S ALAA S?

SALAS , WITH ALL DUERESPECT , HAS NOTHING TO DO WITH THIS CASE. TO BEGIN WITH , SALAS WASAGAINST A LOCAL GOVERNMENT, A CRITICAL DISTINCTION WHICH I WILL EXPAND ON IN AMOMENT. LOCAL GOVERNMENTS , AS PLAINTIFFS CONCEDE, HAVE OPERATIONAL RESPONSIBILITY FOR MAINTAINING INTERSECTION SAFETY AND TRAFFIC LIGHT SAFETY. THAT IS THEIR JOB. IT IS NOT THE JOB OF PUBLIC UTILITIES .

LET'S TALK A LITTLE BIT ABOUT THE FACTS IN THIS CASE.

YES, YOUR HONOR.

IT APPEARS TO MAE THAT A LINE IS DOWN, AND F -- IT APPEARS TO ME THAT A LINE IS DOWN, AND FPL RESPONDS. THEY ARE THERE. THE POLICE ARE ON THE SCENE BY TWO O'CLOCK , AND THE POWER COMPANY RIVERS. THE LIGHT IS ON AND THE POWER IS ONTO THIS LIGHT, CORRECT?

YES, YOUR HONOR. HIM.

AND FPL SENDS THE POLICE AWAY FROM THE SCENE.

YES.

AND THEN THEY PROCEED TO HAVE SIX TRUCKS AND SEVEN PEOPLE, ACCORDING TO WHAT I READ , THEY PROCEED TO TURN OFF THE POWER TO THIS LIGHT. NOT ONLY WERE THERE TWO BOXES CLEARLY DEMONSTRATING THAT THIS CONTROLLED THAT LIGHT , WITHIN 100 FEET OF IT THAT LIGHT.

YES, SIR.

SO YOU ARE TAKING THE POSITION THAT ANYONE THAT COMES AND ENGAGES INACTIVITY THAT WOULD DELIBERATELY CUTOFF THE POWER TO A PARTICULAR LIGHT OR PARTICULAR SITUATION , AN IRON LUNG , THAT THEY ARE FREE FROM RESPONSIBILITY AND THEY HAVE NO DUTIES WHATSOEVER TO, WHEN THEY ARE ENGAGED IN THIS , SOMETHING THAT IS WITHIN THE LINE OF SIGHT, TO TAKE ANY ACTION TO PROTECT.

YOUR HONOR , THAT IS NOT THIS CASE , AND LET ME PAUSE FOR A -- LET ME PAUSE FOR A MOMENT TO ADDRESS THAT CONCERN.

TELL ME WHAT IS WRONG WITH THE FACTS OF THAT CASE , SIR.

TO BEGIN WITH, YOUR HONOR, THIS IS NOT A CASE WHERE THE COMPANY KNOWINGLY TERMINATED POWER TO A TRAFFIC LIGHT.

LET'S PROBE THAT A LITTLE BIT. WAS IT WITHIN 100 FEET?

IT WAS WITHIN 100 FEET.

DID THE POLE HAVE ON IT TWO BOXES, INDICATING THAT IT CONTROLLED THE TRAFFIC LIGHT?

THE POLE HAD ON IT TWO BOXES.

AND ISN'T IT THE STANDARD IN DADE COUNTY THAT THE POLES THAT CONTROL THE LIGHTS ARE WHERE THESE BOXES ARE LOCATED?

YOUR HONOR , THAT IS DADE COUNTY 'S EQUIPMENT, AND DADE COUNTY'S WITNESS TESTIFIED THAT IT IS THE COUNTY 'S PRACTICE TO INSPECT POLES AND UNDERSTAND THE CONNECTION TO THESE TRAFFIC SIGNALS. THERE WAS TESTIMONY THAT THE POWER AND LIGHT COMPANY SHOULD HAVE INSPECTED THE POLE AND LOOKED FOR INDICATIONS OF TRAFFIC SIGNALS , AND WE CAN SEE THEM IN OUR BRIEF AND -- WE CONCEDE IN OUR BRIEF AND WE CONCEDE HERE THAT , IF THERE WERE A DUTY TO INSPECT THE POLE , THAT A LINEMAN ON THE SCENE WOULD HAVE BEEN ABLE TO DETECT THAT THIS POLE WAS CONNECTED TO A TRAFFIC LIGHT. WE CONCEDE THAT . IT IS AVAILABLE TO THESE MEN .

WHEN A POWER COMPANY DEENERGIZES ALONG A ROAD WAY OR AT A HOME , THEY ARE UNDER NO OBLIGATION TO CHECK ANYTHING AT ALL?

YOUR HONOR , THEY ARE UNDER AN OBLIGATION TO DO THEIR JOB, WHICH IS TO GET THE POWER BACK UP FOR THE PUBLIC HEALTH , SAFETY AND WELFARE FOR ALL PEOPLE, TO DO SO IN A WAY THAT CONTAINS THE RISK OF ELECTROCUTION , AS THEY DID IN THIS CASE , FROM DOWNED POWER LINES .

WAIT A MINUTE. THE DOWNED POWER LINE WAS BEHIND THE HOME. THE HOME HAD BEEN EVACUATED.

THERE WAS A RESIDENCE AT THE HOME , WHO MADE CONTACT WITH MR . WOODARD AND SAID I AM ABOUT TO LEAVE. PLEASE STAY HERE ON THE PREMISE. FOR ALL WE KNOW , THERE WERE NO OTHER OCCUPANTS IN THE HOME. A ZOO ON THERE WAS NO DANGER OF ELECTROCUTION.

WE DON'T KNOW THAT , YOUR HONOR. EACH WITNESS WHO WAS ASKED THAT FROM THE POWER COMPANY SAID THEY WERE CONFRONTED WITH THE FACTS. THERE WAS A HEDGE AROUND THE PROPERTY. WE CAN'T ASSUME THAT PEOPLE DON'T WALK THROUGH THIS LAWN.

I THINK MR. EATON CONSIDERED THAT YOU TOOK , IN DEENERGIZING THE LINE, THAT THAT WAS REASONABLE, SO, REALLY, NOW WE ARE TALKING ABOUT , WHICH YOU HAVE NOW SAID, WHICH ,

AND I HAVE TO SAY I AM STARTLED BY IT , MAYBE BECAUSE THE FACTS OF THIS CASE SEEM SO CLOSE TO BEING EGREGIOUS , YOU KNOW , I COULD TAKE, MAYBE , ONE STEP MORE , WHERE THE GUY IS NOT ON THE POWER -- THE GUY IS ON THE POWER POLE AND HE LOOKS OVER AND SEES THAT INTERSECTION IS BUSY.IT IS RAINING , AND HE JUST SAYS I HAVE GOT TO FLIP IT OFF , AND HE FLIPS OFF , AND THEN THERE IS A COLLISION, BECAUSE IT JUST HAPPENED. IS FLORIDA POWER & LIGHT ACTUALLY, DO THEY INSTRUCT THEIR EMPLOYEES NOT TO WORRYABOUT WHERE THEY ARE TURNINGTHE POWER OFF WHEN THEY ARE TURNING THE POWER OFF?

NO. THAT IS NOT WHAT THE RECORD SHOWS, YOUR HONOR. THE RECORD SHOWS THAT THE COMPANY, AS BUSINESS PRACTICE, DOES TRY TO PROVIDE NOTICE , WHEN PRACTICABLE , WHERE THEY ARE DEALING WITH PLANNED , SCHEDULED OUTAGES AND EMERGENCY RESTORATIONS. THEY DEAL WITH I T O N AN AD HOC SITUATION. IN THIS CASE --

WE KNOW YOU ARE ARGUING THIS WASN'T PLANNED, AND WE ALREADY NOT GOING TO GET INTO WHETHER THIS WAS THE CONTRACTUAL SITUATION , BUT IT WAS AN INTENTIONAL DEACTIVATION OF POWER , NOT AN ACT OF GOD.

IT WAS AN INTENTIONAL DEACTIVATION OF POWER AT THE POLE. THE LINEMEN WERE NOT AWARE THAT IT WAS CONNECTED TO A TRAFFIC LIGHT .

HAS FLORIDA POWER & LIGHT TOLD THEIR EMPLOYEES THAT THEY DON'T HAVE TO BE AWARE , WHEN THEY ARE DOING MAINTENANCE WORK , THAT THEY DON'T HAVE TO WORRY WHAT POWER IS BEING CUT OFF , AS A RESULT OF DEACTIVATING THE POWER LINE?

THAT QUESTION WAS NOTASKED AND ANSWERED IN THIS TRIAL.

BUT YOU ARE REALLY ARGUING FOR US TO SAY, AS A MATTER OF LAW, THAT WE WANT TO MAKE SURE THAT POWER AND LIGHT NEVER HAS TO WORRY ABOUT THIS AGAIN , AND THATTHEY HAVE NO DUTY ~r .

WHAT WE ARE ARGUING , YOUR HONOR, IS THAT TO IMPOSE UPON THE POWER COMPANY A DUTY TO INSPECT AND TO SECURE INTERSECTION THAT IS MAY BE AFFECTED BY LIGHTS TAKEN OUT OF SERVICE AND WIRES TAKEN OUT OF SERVICE, WOULD B E A N UNTENABLE BURDEN. WHAT THE RECORD SAYS I N THIS CASE IS OUTAGE S .

WE ARE SAYING THE DIFFERENCE BETWEEN OUTAGES AND ESSENTIALLY TURNING OFFER , YOU ARE STLAING SHOULD BE NO DISTINCTION - - YOU ARE SAYING THERE SHOULD BE NO DISTINCTION BETWEEN THOSE TWO CIRCUMSTANCES.

IT IS IMPORTANT TO UNDERSTAND HOW THIS CIRCUMSTANCE CAME ABOUT, YOUR HONOR. THIS RISK WAS CREATED BY AN ACT OF GOD. LIGHTNING STRUCK DOWN ONE O F THESE LINES T COULD VERY EASILY STRUCK DOWN BOTH LINES.

HOW LONG DID THEY DECIDE , THAT BECAUSE OF THIS HIGHLY DANGEROUS CIRCUMSTANCE , THAT THEY HAD TO ACT IMMEDIATELY. WAS IT TWO HOURS?

THE MEN WERE ON THE SCENE. IT TOOK THEM A COUPLE OF HOURS BEFORE THEY WERE ABLE TO IMPLEMENT THEIR COURSE OF ACTION IN TAKING THIS OUT. EVERY JOB HAS A PLAN.IT IS NOT A PREPLANNED SCHEDULED OUTAGE , HOWEVER , A VERY DIFFERENT PHENOMENON. THE COMPANY IN THIS INSTANCE,MIGHT HAVE BEEN ABLE TO DETERMINE , ARGUABLY COULD HAVE AND SHOULD HAVE BEEN ABLE TO DETERMINE, IF IT WAS THEIR DUTY TO DO SO, THAT THIS PARTICULAR POLE WAS CONNECTED TO A TRAFFIC SIGNAL , BUT THE RECORD SHOWS THAT THE COMPANY DEALS WITH OUTAGES ON A REGULAR BASIS , ON A DAILY BASIS. SOMETIMES THEY HAVE TO PUT LINES DOWN. SOMETIMES THOSE LINES AFFECT A NUMBER OF TRAFFIC SIGNALS. WE DON'T KNOW IF THIS ONE D THE ONLY THING IN THE RECORD IS WE KNOW, WITH THE BENEFIT OF

HINDSIGHT . THAT ONE TRAFFIC SIGNAL WAS AFFECTED AND THERE WAS A TRAFFIC ACCIDENT THERE. TO IMPOSE A DUTY ON ACCOMPANY TO INSPECT IN EACH AND EVERY INSTANCE , IS AN UNTENABLE POSITION.

DO THESE POLES LOOK DIFFERENT THAN OTHER POLES? THEY HAVE GOT A CABLE GOING UP AND THEN AS JUSTICE LEWIS MENTIONED , THEY HAVE GOT A SIGN THAT SAYS "TRAFFIC LIGHT" ON THE SIGN?

THE EVIDENCE AT TRIAL WAS UNDISPUTED IN THIS SENSE, THAT THE LINEMAN TESTIFIED , THE ONLY PERSON THERE TESTIFIED THAT THE POLE WAS COVERED WITH FOLIAGE , THERE WERE LEAVES ON THE PLATE THAT HAD THIS SIGNAL .

DO WE HAVE ANYTHING IN THE RECORD?

THERE WAS A PICTURE IN THE RECORD THAT WAS ALLOWED INTO EVIDENCE WITH A LIMITING INSTRUCTION THAT IT COULD NOT BE TAKEN AS AN INDICATION OF THE SCENE AT THE DATE OF THE ACCIDENT IT COULD BE TAKEN ONLY AS EVIDENCE OF THE EQUIPMENT THAT WAS THERE . THE PLAINTIFF ATTACKED THE VERACITY --

I THOUGHT THAT WAS, WHEN YOUR PEOPLE WENT OUT THE NEXT DAY, THEY HAPPENED NOT TO TAKE PHOTOGRAPHS OF THIS LINE.

THERE ARE NO PHOTOGRAPHS TAKEN AT OR AROUND THE TIME OF THE ACCIDENT , YOUR HONOR THAT IS CORRECT.

COULD THE JURY HAVE CONCLUDED FROM THIS EVIDENCE, THAT THE LINEMAN 'S TESTIMONY THAT, EVEN THOUGH THE TRAFFIC LIGHT WAS 100 FEET AWAY , THAT HE NEVER NOTICED THE TRAFFIC LIGHT WAS NOT CREDIBLE, AND THAT IN FACT , HE DID NOTICE THE TRAFFIC LIGHT?

NO, YOUR HONOR. FOR THIS REASON. THAT THEORY WAS NEVER ARGUED AT TRIAL. I UNDERSTAND THAT , ON THIS REVIEW, PETITIONER'S COUNSEL ARGUES THAT PLAINTIFFS ARGUED IN THE ALTERNATIVE AT TRIAL , THAT EITHER MR . WOODARD KNEW HE WAS TAKING A TRAFFIC SIGNAL OUT OF SERVICE OR HE SHOULD HAVE KNOWN , BUT IN FACT THAT WAS NOT WHAT PLAINTIFFS ARGUED AT TRIAL. I INVITE THE COURT TO REVIEW OPENING STATEMENT AND CLOSING ARGUMENT , TO SATISFY ITSELF WHO IS CORRECT ON THIS POINT. THE CONSISTENT THEORY AT TRIAL IS THAT MR . WOODARD JUST DIDN'T LOOK. HE DIDN'T INSPECT THE POLE. HE CARED ONLY ABOUT THE --

IT SEEMS TO ME THAT , FROM THIS RECORD , THAT ANYONE APPROACHING THAT POLE, WOULD HAVE SEEN , WASN'T IT WRITTEN AT THE BOTTOM OF IT, THAT THIS , THAT THERE WAS A TRAFFIC SIGNAL , AND THEN ON A BOX , I AM HAVING A HARD TIME, YOU SEEM TO BE SUGGESTING THAT THERE WAS SUCH AN ONEROUS DUTY ON THE PART OF THESE FLORIDA POWER & LIGHT PEOPLE TO HAVE DETERMINED THAT THERE WAS A TRAFFIC SIGNAL ATTACHED HERE, WHERE IT SEEMS TO ME THAT IT WAS PRETTY OBVIOUS ANYONE WHO WAS THERE AT THAT POLE, WOULD HAVE BEEN ABLE TO SEE THAT THERE WAS , IN FACT, A TRAFFIC SIGNAL ATTACHED.

THERE WAS A 17-FOOT FIGUS HEDGE ADJACENT TO THIS POLE, AND THE LINEMAN'S TESTIMONY -- DID IT OBSTRUCT?

YES. IT COVERED --

I AM ASKING YOU SPECIFICALLY IT OBSTRUCTED THE WORDING DOWN AT THE BOTTOM THAT SAID "TRAFFIC SIGNAL " ?

THE TESTIMONY IS THAT FOLIAGE AND LEAVES COVERED THAT PLATE.

AREN'T YOU ARGUING THE FACTS OF THIS CASE? YOU ARE NOW SAYING THERE WAS LEAVES THAT OBSTRUCTED IT AND THEREFORE THE JURY SHOULD HAVE FOUND THAT HE DIDN'T SEE IT. WHATEVER.

NO, YOUR HONOR. WE CONCEDE THAT , IF THERE WERE A DUTY TO INSPECT THAT POLE THAT , THE LINEMAN COULD HAVE FOUND THAT EQUIPMENT. WE DON'T DENY THAT.

IF YOU WERE CUTTING OFF POWER , ISN'T THERE A DUTY TO KNOW WHAT YOU'RE DOING? THAT IS A SIMPLE -- TO KNOW WHAT YOU ARE DOING? THAT IS A SIMPLE , YOU KNOW, IF WE HAVE A HOSPITAL OVER HERE AND ALL OF US KNOW OR HOPE THAT THERE ARE BACK UP GENERATORS , KIND OF THING, BUT YOU ARE WORKING , ON THE POWER THING THERE, THAT SERVES THE HOSPITAL , AND YOU KNOW THAT THE HOSPITAL IS BEING OPERATED ON AT THAT TIME , AND I THINK THAT COMMON SENSE WOULD TELL US THAT YOU HAD A DUTY TO KNOW WHETHER OR NOT THE POWER THAT YOU CUT OFF SERVED THE OPERATING ROOM OF THAT HOSPITAL, IF THAT IS WHAT YOU WERE DOING. NOW , HELP ME WITH , I AM JUST HAVING DIFFICULTY WITH YOU SAYING THERE IS ABSOLUTELY NO DUTY . YOU PHRASE IT IN TERMS OF INSPECTION, OKAY , I AM PHRASING IT IN TERMS OF OBVIOUSLY THIS LINEMAN CUT OFF THE POWER TO THAT TRAFFIC LIGHT. IS THAT CORRECT?

YES, SIR.

HOW IS THAT ANY DIFFERENT , IF HE WAS THERE TRYING TO REPAIR SOMETHING AT THE HOSPITAL AND HE NEGLIGENTLY CUT OFF THE POWER TO AN OPERATING ROOM THAT DIDN'T HAVE A BACKUP AND SOME TERRIBLE ACCIDENT HAPPENED?

WELL , THAT PARTICULAR EXAMPLE MIGHT NOT BE A GOOD ONE , YOUR HONOR , BECAUSE MY UNDERSTANDING, AND THIS IS OUTSIDE THE RECORD , THAT THERE ARE SPECIAL PROVISIONS BY NOTICE TO HOSPITAL COMPANIES , THAT REQUIRE SPECIAL ATTENTION. THERE MAY BE SPECIAL ISSUES INVOLVED THERE, BUT NO COURT , NO COURT HAS IMPOSED ON POWER COMPANIES, A DUTY TO KNOW THE CONSEQUENCES TO NONCUSTOMERS, ARISING FROM , ESPECIALLY AS HERE , A NONNEGLIGENT INTERRUPTION OF SERVICE TO A CUSTOMER . NO COURT HAS DONE THAT. THAT THE PLAINTIFFS ARE ASKING THIS COURT TO MAKE A FUNDAMENTAL CHANGE OF THE LAW.

HAS ANY COURT EVER HELD THAT A POWER COMPANY HAS ABSOLUTELY NO DUTY TO NONNEGLIGENTLY PERFORM THEIR ACTIVITY , WHEN THEY CREATE A ZONE OF RISK THAT IS AS CLOSE TO US AS THE BACK OF THAT COURTROOM?

I WOULD SAY YES, YOUR HONOR, IN THIS SENSE. THE COURTS HAVE BEEN VERY CAREFUL TO DEFINE WHAT IS THE ZONE OF THE UTILITY 'S RESPONSIBILITY, AND THEIR RESPONSIBILITY IS NOT THE SAME AS THE LOCAL GOVERNMENT'S RESPONSIBILITY, AND THE LEGISLATURE HAS WEIGHED IN ON THIS ISSUE IN THIS STATE. THE LEGISLATURE , AS JUDGE NAISBITT SAID ON THE ADOPTION ISSUE , AND SAYS LOCAL MUNICIPALITIES HAVE THE RESPONSIBILITY FOR LOCAL SAFETY AND TRAFFIC LIGHTS , AND THE SIGNIFICANCE OF THAT IS ALL OVER THIS RECORD.

ISN'T THE SIGNIFICANCE OF THAT IS WHAT ARE FACTS IN THIS RECORD, THAT THEY SENT THE POLICE AWAY?

YOUR HONOR, THEY SENT THE POLICE AWAY BECAUSE THE EMERGENCY ON THEIR MINDS WAS THE EMERGENCY OF THE LINE THAT WAS DOWN. IT HAD BURNED A THICK TRENCH ON THE LAWN FROM THE FIRE.

IT SEEMS TO BE TROUBLING ME THAT , DO YOU AGREE THAT THERE IS A COMMON LAW DUTY TO

EXERCISE REASONABLE CARE IN THE PERFORMANCE OF MAINTENANCE WORK. DO YOU AGREE WITH THAT?

YES, YOUR HONOR , WITH THE IMPORTANT QUALIFICATION THAT WE ALWAYS HAVE TO CONSIDER THE SCOPE OF THE MAINTENANCE WORK. IT IS NOT THE POWER COMPANY'S RESPONSIBILITY TO MAINTAIN INTERSECTIONS - -

THEY DON'T HAVE TO MAINTAIN, IT BUT THEY DON'T HAVE TO CREATE A WORSE HAZARD. I MEAN, IN OTHER WORDS , EVALUATING WHAT THEY ARE DOING , YOU WERE ASKING US TO SAY THAT THER THEY HAVE NO -- THAT THEY HAVE NO CONCERNABOUT WHAT THE WEATHER IS LIKE, WHAT THE RISK MIGHT BE TO WEIGH WHAT NORMAL PEOPLE DO WHEN THEY ARE DECIDING TO DO MAINTENANCE WORK, WHICH IS THAT THERE ARE OTHER RISKS INVOLVED, AND I GUESS , YOU KNOW, THIS IDEA THAT THERE WOULD BE TOTAL IMMUNITY FOR THAT , IS UNDER THE FACTS OF THIS CASE. YOU KNOW , SOMETIMES BAD FACTS MAKE BAD LAW , BUT I CAN'T IMAGINE A MORE COMPELLING FACTUAL SITUATION THAT YOU ARE FACED WITH HAVING TO, THEN , SAY NO , THEY SHOULDN'T HAVE HAD TO DO SOMETHING THAT SEEMS TO BASIC.

WITH THE POSSIBLE EXCEPTION OF THIS COURT'S DECISION IN POLLACK , WHERE THE COURT DREW THE LINE ON DUTY, WHERE THE FLORIDA HIGHWAY PATROL WAS INVOLVED.

BUT THEY WERE TALK ABOUT GOVERNMENTAL IMMUNITY. THIS IS NOT --

TO DO THAT. LAST TIME I LOOKED , FLORIDAPOWER & LIGHT WAS NOT A GOVERNMENTAL ENTITY.

NO , YOUR HONOR , THE ANALYSIS WITH ALL RESPECT IN THAT CASE , WAS WE START OUR ANALYSIS BY DETERMINING WHETHER THERE WOULD AND DUTY ANYTIME PRIVATE SECTOR. THAT IS THE GOVERNMENT IMMUNITY ANALYSIS.

THERE WAS NO DUTY BECAUSE THE DEPARTMENT OF TRANSPORTATION DID NOT CREATE HAZARD AND THEDEPARTMENT OF TRANSPORTATION DID NOT MAINTAIN THE ROADWAY.

YOUR HONOR, WITH ALL DUE RESPECT , THIS HAZARD WAS ORIGINALLY CREATED, AGAIN, BY AN ACT O F GOD , BITE LIGHTNING .

I REALLY HIM TERRIBLY CONCERNED BY , YOU -- I REALLY , I AM TERRIBLY CONCERNED THAT YOU ARESAYING THE TURNING OFF THE POWER IS THE SAME THING THAT LIGHTNING STRUCK pTIS AN ACT OF GOD? THAT IS WHAT YOU SAID.

NO, YOUR HONOR, THAT CONTRIBUTED TO A CHAIN OF EFFECTS OF WHAT HAPPENED HERE, BUT THESE OUTAGES ARE PREVALENT, AND IN THIS CASE AS JUSTICE PARIENTE WAS SUGGESTING, BAD FACTS MAY MAKE BAD LAW N THIS CASE IT MAY HAVE BEEN NULLABLE THAT A PARTICULAR -- {_ IT MAY HAVE BEEN KNOWABLE THAT A PARTICULAR INTERSECTION WOULD HAVE BEEN AFFECTED. SOMETIMES A FEEDER HAS TO DROP 20 LINES THEY . CAN'TMONITOR THE END USES O F THEIR MANY CUSTOMERS. THEY MONITOR THE END USER, THE CUSTOMERS.

UNDER McCAIN, HOW WOULD YOU DEFINE THE DUTY OF THE POWER COMPANY , UNDER THESEFACTS?

YOUR HONOR, McCAIN WAS ESSENTIALLY AN UNDERTAKINGCASE , WHERE A TRENCH DIGGER CAME TO THE POWER COMPANYAND SAID WHERE CAN I DIG SAFELY, AND THE POWER COMPANY DELINEATED AN AREA AND SAID YOU CAN DIG SAFELY HERE.

BUT I T WENT ON TO A ZONE OF RISK HERE , AND WHAT WOULD BE YOUR POSITION AS TO WHERE THE ZONE O F RISK WAS THAT THE POWER COMPANY HAD A DUTY TO PROTECT IT?

I WOULD RELY ON THE NEW YORK CASES THAT WE CITED IN OUR BRIEF, WHERE THEY HAVE DECLINED TO IMPOSE A DUTY THAT FLOWS TO NONCUSTOMERS , BASED SIMPLY ON THE FORESEEABLE ITY OF RISK. YES , YOUR HONOR , JUSTICE LEWIS , WHEN THE POWER COMPANY CUT THIS POWER, IT CREATED RISK AND EXTENDED A RISK TO THIS INTERSECTION , BUT THE COURTS IN NEW YORK SAID THAT IS ALWAYS THE CASE , WHEN POWER COMPANIES ARE RESPONSIBLE FOR A N INTERRUPTION OF SERVICE THAT CAUSE BAD THINGS TO HAPPEN TO NONCUSTOMERS. THEY SAID A FORESEEABLE ZONE OF RISK CANNOT ALONE BE THETEST. YOU HAVE TO HAVE FORESEE ABILITY AND RELATIONSHIP , AND THE COURT IN NEW YORK DREW THE LINE AT CUSTOMERS VERSUS NONCUSTOMERS. THE DUTY TO NONCUSTOMERS --

YOU TALK ABOUT FALL AS. IT -- YOU TALK ABOUT FALLACE, AND WHY ISN'T THAT THE CASE HERE THAT , FLORIDA POWER & LIGHT SHOULD HAVE KNOWN OR KNEW OF THE HAZARD THAT IT CREAATED?

THE CREATION WOULD BE IF IT WERE A DUTY. THE OTHER ANSWER WOULD BE IT WAS NOT SUBJECTIVE LY KNOWN. THE OTHER ANSWER WOULD BE A FALLACE OF DUTY.

YOUR WHOLE POSITION IS THAT THERE IS NO DUTY.

I DISPUTE THAT THEY KNEW. I CONCEDE THAT THEY SHOULD HAVE KNOWN, IF THERE WERE A DUTY TO KNOW. IF THERE WERE A DUTY TO INSPECT , THEN THEY SHOULD HAVE KNOWN, BECAUSE THEY WOULD HAVE BEEN ABLE T O ASCERTAIN THE CONNECTION WITH THE TRAFFIC SIGNALS FROM THE POLE . ANOTHER THING ABOUT SALAS , YOUR HONOR --

COULDN'T THE EVIDENCE, ALSO , BE REVIEWED , TO SHOW THAT , WHETHER HE SHOULD HAVE KNOWN OR NOT , HE KNEW , BECAUSE IT WAS 100 FEET FROM THE TRAFFIC LIGHT.

NO , YOUR HONOR. AGAIN , IF THAT WERE LEGALLY SIGNIFICANT ON THIS APPEAL, IF THE COURT BELIEVED THAT IT IS IMPORTANT WHETHER THE POWER COMPANY EMPLOYEES KNEW THAT THEY WERE PUTTING OUT A TRAFFIC SIGNAL TO IMPOSE LIABILITY, T HEN ONE THAT HADTO BE ARGUED A S A THERE I HAVE THE CASE , AND, TWOS , THE JURY HAD TO BE CHARGED WITH THAT THEORY. FOR EXAMPLE I N A CRIMINAL CASE, YOU HAVE TO PROVE A DEFENDANT ACTED KNOWINGLY , YOU HAVE TO GIVE THE JURY A PROPER INSTRUCTION. YOU CAN'T ASSUME THE DEFENDANT KNEW OR SHOULD HAVE KNOWN .

THAT GOES TO THE D.O.T. I , AND THE -- TO THE DUTY , AND THE JURY FOUND THAT THE LINEMAN KNEW ABOUT THE POWER OUTAGE AT THE SIGNAL , THEN THE JURY COULD FIND THATTHERE WAS A DUTY.

YOUR HONOR, THERE IS NO INDICATION THIS JURY FOUNDTHAT THE LINEMAN KNEW N CLOSING , PLANS WERE VERY SPECIFIC IN SAYING THIS IS AN ISSUE OF NEGLIGENCE. HE SHOULD -- IN CLOSING , PASS SAID THIS IS AN ISSUE OF NEGLIGENCE.HE KNEW OR SHOULD HAVE KNOWN. WHICH IS IT, MR . WOODARD? DID YOU KNOW OR DIDN'T YOU? IF HE KNEW , AND THE TRUTH IS HE DIDN'T LOOK. IF HE HAD LOOKED, HE WOULD HAVE FOUND AN INDICATION THAT THERE WAS A TRAFFIC SIGNAL HERE , AND HE SAID I F HE WOULD HAVE KNOWN, HEWOULD HAVE DONE SOMETHINGABOUT IT, AND THE JURY WAS CHARGED WITH A JURY INSTRUCTION WHICH FOUNDNEGLIGENCE AS FAILURE T O USE REASONABLE CARE , ANDPLAINTIFF ARGUED THAT TO THEJURY, SO THEY DIDN'T USE REASONABLE CARE , YOU HEARD THEM, THEY DIDN'T INSPECTTHE POLE, THEY DIDN'T LOOK. NEVER ARGUED THAT THEY DIDN'T LOOK.THE JURY COULD NOT HAVE FOUND THAT I N THE CASE. THEY WEREN'T PRESENTED THAT. IT WAS NOT AN ISSUE I N THE DECISION. THE ISSUE A S INSTRUCTED BY THE COURT IS THE ISSUE FOR YOUR DETERMINATION IS WHETHER FP&L WAS NEGLIGENT IN SHUTTING DOWN POWER TO THE INTERSECTION. THIS IS ALL ABOUT AN INTERRUPTION OF SERVICE , NONNEGLIGENCE.IT WAS CONCEDED IN DETERMINING THAT THIS POW TORT CUSTOMER , IT IS DETERMINATIVE TO A DUTY TO A NONCUSTOMER : THEY SHOULD HAVE KNOWN .

WITH REGARD TO THE NEWYORK CASES, HE SAYS THAT THERE ARE GOING TO B E TIMESWHEN YOU ARE GOING TO HAVE TO TURN THE POWER OFF ANDTHERE IS NO DUTY , AS I UNDERSTAND THE ARGUMENT, ON THE POWER COMPANY, T O TRACE WHERE ALL OF THIS POWER I S RUNNING, AND WE ARE GOING TO BE IMPOSING THE DUTY ALL OF THE WAY FROM 120th STREET OR ALL THE WAY OUT TO U.S. 1. ANOTHER NEW YORK CASES INVOLVED THOSE MEETING A POWER FAILURES , AFFECTINGTENS OF MILLIONS OF PEOPLE , AND OF COURSE IT IS A MATTER OF PUBLIC POLICY WE NORTHGOING TO LET EVERYBODY THAT GOT HURT BY THIS POWER FAILURE THAT SHUT DOWN THE WHOLE CITY, TO COME INTO THE APPELLATE, TO THE TRIAL COURTS OF THIS STATE. THAT IS WHAT THOSE THREE CASES INVOLVED. THEY DO NOT INVOLVE ONE MAN , ONE DOWNED LINE, ONE HOUSE WITHOUT POWER , ONE TRAFFIC LIGHT .

BUT AS FAR AS OUR DECISION --

AND THE DEATH OF A TWELVE-YEAR-OLD GIRL.

HOW FAR DOES THE DUTY EXTEND, WHEN ONE IS SHUTTING OFF THE POWER THAT MAY AFFECT AN INTERSECTION , AS JUSTICE LEWIS SAYS , DOES THE DUTY EXTEND TO DRIVING AROUND THE NEIGHBORHOOD, TO SEE IF THERE ARE OTHER TRAFFIC LIGHTS OUT ? OR DOES IT JUST EXTEND TO LOOKING AROUND THE INTERSECTION THAT YOU CAN SEE AND DETERMINING WHETHER THAT TRAFFIC LIGHT IS SNOUT.

YOU HAVE TO KNOW OR SHOULD KNOW THE DANGER , THE SCOPE OF THE DANGER THAT YOU ARE CREATING. IF IT IS UNNOTICEABLE , WHAT HAPPENED -- IF IT IS UNKNOWABLE WHAT HAPPENED DOWN THE ROAD 50 BLOCKS AWAY, THEN HOW COULD THERE BE ADUTY? ALL THOUGH THERE IS A WAY OF KNOWING. YOU PICK UP THE PHONE AND CALL THE COUNTY AND SAY HOW MANY TRAFFIC LIGHTS DO I SHUT DOWN? THEY HAVE A COMPUTER THAT CAN TELL YOU. OR YOU CAUGHT POLICE DEPARTMENT AND SAY WE ARE GOING TO SHUT DOWN AT LEAST ONE LIGHT.YOU ARE GOING TO HAVE TO CHECK TO --

LET'S SAY IN A RESIDENTIAL NEIGHBORHOOD. YOU ARE SHUTTING DOWN ONE LIGHT IN A RESIDENTIAL NEIGHBORHOOD AND YOU KNOW THAT PEOPLE ARE SUPPOSED TO STOP WHERE THERE IS A KNOWN DANGER. WE DON'T HAVE A SITUATIONWHERE THERE IS RAIN AND DUST AND WHATEVER.

YOUR HONOR , THERE IS A LIGHT THAT IS TWO BLOCKS FROM MY HOUSE THAT FP&L COMES OUT TO WORK ON EVERY TWO WEEKS, AND THEY ALWAYS HAVE A POLICEMAN IN THE INTERSECTION. IT CAN BE DONE.IT IS VERY SIMPLE, AND THEREIS NO BURDEN HERE.

THE KEY POSITION IS THAT A PERSON A T THREE O'CLOCK IN THE AFTERNOON , BRIGHT LIGHT , SINGLE LANE , RESIDENCE , ONE LITTLE LIGHT , THAT THE PERSON SHOULD STOP AND DO A {_ FOUR-WAY STOP , THAT THEY HAVE A N AFFIRMATIVE DUTY TO GO OUT AND MONITOR THE INTERSECTION.

THEY HAVE A DUTY TO EXERCISE REASONABLE KARNDALL THE CIRCUMSTANCES.

BECAUSE ARE SAYING IS THEY HAVE TO GO AND MONITOR THE INTERSECTION.

NO. WHAT I AM SAYING IS WHAT THEIR SENIOR SAFETY SPECIALIST SAID AND THIS IS THE IRONY IN THE FP&L POSITION HERE , IS THAT WHEN WE SHUT DOWN THE LIGHT, IT IS OUR COMMON SENSE OBLIGATION TO CALL POLICE AND GET THE POLICE THERE OR PUT OUT TRAFFIC CONES AT LIGHTS AND HAVE ONE OF OUR MEN DIRECTING TRAFFIC.

YOU ARE NOT ASKING FOR A RULE OF LAW THAT SAYS THAT EVERY TIME THERE IS WORK BEING DONE THAT , FP&L HAS TO FOLLOW THESE TEN STEPS. THE ISSUE IS WHETHER, UNDER THESE

CIRCUMSTANCES , THERE WAS A DUTY TO EXERCISE REASONABLE CARE UNDER THESE CIRCUMSTANCES.

THAT'S CORRECT , YOURHONOR , AND FINALLY, WITH RESPECT TO THE POLLACK DECISION , WHICH COUNSEL SAYS IS THIS CASE , THERE IS A PARAGRAPH IN HERE IN WHICH THEY DISTINGUISHED POLLACK FROM OUR CASE, WHICH SAYS A SPECIAL TORT DUTY DOES ARISE WHEN LAW ENFORCEMENT OFFICERS BECOME DIRECTLY INVOLVED IN CIRCUMSTANCES WHICH PLACE PEOPLE WITHIN A ZONE OF RISK BY CREATING OR PERMITTING DANGERS ~r TO EXIST , AND THAT IS THIS CASE. --00CIEATED A KNOWN DANGER. ONCE YOU DO THAT , YOU HAVE A DUTY TO PROTECT , AS I HAVE DETAILED IN MY STATEMENT OF FACTS, IT FULLY SUPPORTS THE JURY'S CONCLUSION THAT WE DID ARGUE FOR OVER AND OVER, THAT MR . WOODARD KNEW EXACTLY WHAT HE WAS DOING AND SIMPLX"DID NOT CARE. HE LEFT THESE DRIVERS TO FEND FOR THEMSELVES, AND THAT IS BAD PUBLIC POLICY FOR THE THIRD DISTRICT TO SAY YOU DON'T EVEN HAVE A COMMONSENSE OBLIGATION WHICH YOU, YOURSELF , }i RECOGNIZE.

DID YOU ARGUE THAT THE LINEMEN KNEW THAT THE TRAFFIC LIGHT WAS OUT?

OF COURSE WE DID. READ MR . GROSSMAN 'S ARGUMENT. I QUOTED IN MY REPLY BRIEF. WE ARGUED ALTERNATIVELY, IF YOU DON'T BELIEVE THIS xD FOLIAGE STORY , IT IS NOT CREDIBLE, IF YOU DO , AT THE VERYLETES, THE MAN SHOULD HAVE INSPECTED THE POLE.

I THINK WHAT MR . SASSER'S ~r ARGUMENT IS }i THAT , BECAUSE THE JURY INSTRUCTION ONLY TALKS ABOUT NEGLIGENCE , WE ~ jDTQ) ..(*jj\$QQ(R"E THIS CASE. IT SAYS WHEN FP&L KNOWS IT HAS TURNED OVERPOWER TO AN INTERSECTION, THEN THIS HAPPENS , BECAUSE WE DON'T REALLY KNOW WHETHER THE JURY DECIDED THAT, BASED ON IT , HE KNEW OR }i SHOULD HAVE KNOWN.

WELL , EXCEPT FOR THE TWO-ISSUE RULE, YOUR HONOR, WHICH OPENS UP ANOTHER 2 0 MINUTES' WORTH OF xD --

CHIEF JUSTICE: AND WITH THAT, WELL , I THINK YOU HAVE HAD , ANY, NO { _ OTHER QUESTIONS , THE COURT BE , THANK YOU VERY MUCH FOR YOUR TIME , AND BOTH OF YOU BEING RESPONSIVE TO OUR QUESTIONS. THE COURT WILL BE IN RECESS UNTIL NINE O'CLOCK TOMORROW MORNING.

MARSHAL: PLEASE RISE.