

The following is a real-time transcript taken as closed captioning during the oral argument proceedings, and as such, may contain errors. This service is provided solely for the purpose of assisting those with disabilities and should be used for no other purpose. These are not legal documents, and may not be used as legal authority. This transcript is not an official document of the Florida Supreme Court.

United States of America v. Maureen Stevens

SC07-1074

>> ALL RISE.

HEAR YE HEAR YE, SUPREME COURT
OF FLORIDA IS NOW IN SESSION.
ALL THOSE HAVING BUSINESS BEFORE
THIS COURT, DRAW NIGH, GIVE
ATTENTION AND YE SHALL BE HEARD.
GOD SAVE THE UNITED STATES, THE
GREAT STATE OF FLORIDA, AND THIS
HONORABLE COURT.

>> GOOD MORNING.

>> LADIES AND GENTLEMEN, FLORIDA
SUPREME COURT.

PLEASE BE SEATED.

>> GOOD MORNING.

WELCOME TO THE FLORIDA SUPREME
COURT.

ORAL ARGUMENT CALENDAR FOR
MONDAY, MAY 5th.

FIRST CASE IS UNITED STATES OF
AMERICA VERSUS STEVENS.

READY TO PROCEED?

>> GOOD MORNING, YOUR HONOR,
MATE PLEASE THE COURT --

>> MOVE THE MICROPHONE UP AND
MAKE IT EASIER FOR YOU, THERE
YOU GO.

>> THANK YOU, THAT'S BETTER.

GOOD MORNING, YOUR HONOR.
FROM THE U.S. DEPARTMENT OF
JUSTICE, FOR THE UNITED STATES.
I'LL BE PUTTING -- SPLITTING MY
TIME WITH CO-COUNSEL.

AND THIS CASE PRESENTS THE BASIC
QUESTION OF WHETHER THIS COURT
SHOULD RETAIN IN ANY FORM TO ANY
EXTENT THE TRADITIONAL COMMON
LAW REQUIREMENT EMBODIED IN THE
RESTATEMENT AND REAFFIRMED IN
THE COURT CASES AND A LEGION OF
CASES FROM THE LOWER COURT THAT
IN THE CONTEXT OF THIRD-PARTY
CRIMINAL ATTACKS THERE IS NO
DUTY ABSENT A RELATIONSHIP OF
SOME KIND.

>> WHY SHOULDN'T BE THERE AN

EXCEPTION WHEN THERE IS A
SUBSTANCE THAT IS SO DANGEROUS
IT VIRTUALLY GUARANTEED SHOULD
IT BE RELEASE -- VIRTUALLY
GUARANTEED SHOULD IT BE RELEASED
OUTSIDE OF THE SAFEGUARDS THAT
ARE THERE IT IS GOING TO HURT

PEOPLE?

AND IT IS GOING TO INJURE PEOPLE
AND IN OTHER WORDS, IF THE
GOVERNMENT OR PRIVATE
INDIVIDUALS ARE GOING TO DEAL
WITH A SUBSTANCE LIKE THIS, THEN
WHY SHOULDN'T MEMBERS OF THE
INNOCENT PUBLIC, THAT ARE ALMOST
GUARANTEED IF THERE HAS BEEN A
BREACH OF SECURITY, TO BE HARMED
BY THIS, UNDER ANY THEORY,
WHETHER YOU ARE TALKING ABOUT A
TRADITIONAL FOR THE THEORY, OR
TALKING ABOUT A HERE TO THEY
JUST SAYS WHY SHOULD THE
INNOCENT PERSON THAT IS -- THAT
IS KILLED OR WHATEVER HAPPENS
HERE, SUFFER THE COMPLETE BURDEN
OF THAT, WHEN YOU HAVE A
SUBSTANCE -- WHEN YOU HAVE A
SUBSTANCE THAT IS AS DANGEROUS
AS THIS SUBSTANCE IS.

>> I DON'T THINK IT IS POSSIBLE
TO FASHION A RULE THAT WOULD
APPLY ONLY TO A SUBSTANCE LIKE
ANTHRAX --

>> WHY NOT?

>> BECAUSE ANTHRAX IS NOT THE
ONLY SUBSTANCE THAT IS DANGEROUS
ANTHRAX LIKE A LOT OF OTHER
SUBSTANCES HAS SOCIALLY
BENEFICIAL USES AND ANTHRAX IS
STUDIED BY THE FEDERAL
GOVERNMENT AND DEPARTMENT OF
AGRICULTURE FOR AGRICULTURAL
INDUSTRY STUDIED FOR THE
IMPORTANT USE OF DEVELOPING
COUNTER MEASURES TO PROTECT OUR
CITIZENS.

AND IN THE EVENT TERRORISTS OR
ENEMIES MIGHT OBTAIN ANTHRAX.
LOTS OF SUBSTANCES ARE DANGEROUS
AND ANTHRAX ACTUALLY IS MUCH
LESS DANGEROUS THAN A LOT OF
SUBSTANCES STUDIED ALL OVER THE

PLACE AND THE INFLUENZA --
>> WHAT CONSTRUCTIVE POSITIVE
USES WERE BEING MADE OF THE
SUBSTANCE IN THIS INSTANCE.
>> YOUR HONOR, THE RECORD
DOESN'T DISCLOSE EXACTLY WHAT
THE USES THAT THE FOUR TEACHERS

FACILITIES THE PLAINTIFF SAYS
THE ANTHRAX CAME FROM WERE USING
BUT I THINK ONE THING IS CLEAR
IS THAT THE UNITED STATES DOES
NOT HAVE, HAS NOT FOR DECADES
HAD ANY KIND OF BIOLOGICAL
WEAPONS PROGRAM, THE ONLY USES
WERE DEFENSIVE RESEARCH USES FOR
MEDICAL PURPOSES FOR THE
PROTECTION OF OUR CITIZENS AND
FEDERAL LAW STATUTES CITED IN
THE 1969 STATUTE, SPECIFICALLY
CONTEMPLATES THAT LOTS OF
ENTITIES ACROSS THE COUNTRY
SHOULD HAVE ACCESS TO ANTHRAX
AND A LOT OF OTHER ALSO
DANGEROUS SUBSTANCES IN ORDER TO
PERFORM BASIC SCIENTIFIC
RESEARCH AND TO PERFORM RESEARCH
SPECIFICALLY TO DEVELOP COUNTER
MEASURES --

>> WHY SHOULD THE INNOCENT PARTY
BE THE ONLY ONE TO CARRY THE
BURDEN?

>> THE ONLY REASON EXCUSE E ME,
YOUR HONOR, THE ONLY REASON

THERE IS A VICTIM IN THIS CASE,
IN THE FALL OF '01 IS BECAUSE OF
A THIRD-PARTY CRIMINAL AND IS
NOT THE CASE WORKING WITH
ANTHRAX IS ITSELF SO INHERENTLY
OBVIOUSLY DANGEROUS THAT PEOPLE
ARE GOING TO DIE.

FIVE PEOPLE WERE KILLED,
TRAGICALLY IN THE FALL OF 2001.
FOR ANTHRAX AND IN THE TIME WE
ARE STANDING HERE THIS MORNING,
FIVE PEOPLE WILL BE KILLED BY
GUNS IN THE COUNTRY.

YET ACCORDING TO THE STATE --
>> YES, HASN'T FLORIDA AND THE
COMMON LAW RECOGNIZED THE
DISTINCTION WITH REGARD TO ULTRA
HAZARDOUS MATERIALS AND ARE
THOSE TO BE DEALT WITH

DIFFERENTLY BECAUSE A GUN IN
FLORIDA IS NOT ULTRA HAZARDOUS
AND IS CONSIDERED TO BE
INHERENTLY DANGEROUS BUT A
DIFFERENT CATEGORY.
DOES THAT NOT COME INTO OUR
DISCUSSION SOMEWHERE THE STORIES

OF ULTRA HAZARDOUS MATERIALS?
FLORIDA HAS STATUTES, I MEAN,,
NUMEROUS, DOES THAT --
>> THE COMPLAINT ALLEGES ANTHRAX
IS ULTRA HAZARDOUS AND WE DON'T
DISPUTE THAT IT IS HAZARDOUS BUT
ULTRA HAZARDOUS IS A TERM OF ART
IN FOR THE LAW USUALLY REFERRING
TO A STRICT LIABILITY CLAIM AND
THERE IS NO STRICT LIABILITY
CLAIM IN THIS CASE AND AGAIN BE
ONE AGAINST THE U.S. BECAUSE
THERE IS NO WAY WE'RE A
COMMUNITY.

>> CAN YOU ADDRESS SECTION 521
OF THE RESTATEMENT OF TORTS,
UNDERSTANDING THERE IS AN
EXCLUSION FROM STRICT LIABILITY,
THAT -- WE STILL ARE DEALING
THEN WITH A HIGHLY DANGEROUS
SUBSTANCE.

AND THAT IS THE COMMENT THAT IS
CITED IN THE APPELLEE'S BRIEF
AND TALKS ABOUT THE PUBLIC
OFFICIAL WILL NOT BE LIABLE
UNLESS HE IS NEGLIGENT IN THE

CUSTODY OF THE EXPLOSIVES AND I
UNDERSTAND YOU CAN'T BE LIABLE,
STRICTLY, BUT, TO ME, IT'S
BECAUSE IT IS SO HIGHLY
DANGEROUS WHY WOULDN'T IT UNDER
McCAIN --

THERE HAS TO BE A DUTY OF
REASONABLE CARE AND MAYBE THE
GOVERNMENT EXERCISES --
EXERCISED REASONABLE CARE, WE
DON'T KNOW.

WE ARE ASKED -- IS THAT CORRECT,
RIGHT?

WE ARE SEEING COULD THERE BE A
DUTY, A QUESTION OF WHETHER THE
GOVERNMENT WAS CAREFUL OR
CARELESS IS NOT FOR US TO
DECIDE.

>> THE QUESTION BEFORE THE COURT

IS ONLY THE LEGAL QUESTION,
THRESHOLD QUESTION OF A
NEGLIGENCE CLAIM, ISN'T THERE A
DUTY --

>> YOU CAN'T BE LIABLE -- BUT
THE EXCEPTION SAYS THEY CAN BE
LIABLE IN NEGLIGENCE FOR NOT

EXERCISING REASONABLE CARE,
COMMENSURATE WITH THE RISK IN
THE STORAGE AND CUSTODY OF AN
ULTRA DANGEROUS SUBSTANCE.
JUSTICE PARIENTE, DANGER OF
CONDUCT RELATES TO THE STANDARD
OF CARE, THINGS -- OTHER THINGS
BEING EQUAL, GREATER PRECAUTIONS
ARE NECESSARY ARE REASONABLE,
NEGLIGENCE REQUIRES
REASONABLENESS, NOT STRICT
LIABILITY AND GREATER --
REPERCUSSIONS, EVERYTHING BEING
EQUAL THE MORE DANGEROUS CONDUCT
IS AND THE HAZARDOUS NATURE IS
RELEVANT TO A NEGLIGENCE CLAIM
BUT UNDER McCAIN, THAT YOU
REFERENCED IT APPLIES IN THE
NORMAL CONTEXT OF WHETHER A DUTY
EXISTS ON A DEFENDANT.
BUT McCAIN DOESN'T APPLY, NEVER
HAS BEEN APPLIED BY THIS COURT
OR LOWER COURTS OF THE STATE TO
THE SPECIFIC CONTEXT OF A
THIRD-PARTY CRIMINAL ATTACK,
BEFORE McCAIN THE COURT

DISTINGUISHED IT IN CRANDON PARK
AND EVERTON --

>> IS THE ISSUE HERE WHETHER WE
ARE GOING TO RECOGNIZE A
SUPERSEDING INTERVENING CAUSE.

>> IT'S NOT AN INTERVENING CAUSE
ISSUE, YOUR HONOR IT IS A
QUESTION OF DUTY AND IN THIS
COURT, IN CASES LIKE
SOUTHEASTERN AGAINST GROSS AND
VAN THE COURT HELD THERE WAS NO
DUTY IN THE CONTEXT OF A
THIRD-PARTY CRIMINAL -- FOUND
THE DUTY BOUGHT ONLY BECAUSE OF
A SPECIAL RELATIONSHIP AND THE
COURT SAID THE SPECIAL
RELATIONSHIP HAS DUTIES BETWEEN
PARTIES THAT WOULDN'T EXIST BUT
FOR THE RELATIONSHIP AND McCAIN

--

>> LET ME ASK YOU ON THE QUESTION OF DUTY, AT THE TIME OF THIS ATTACKS WHAT WAS THE HISTORY OF ANTHRAX ATTACKS IN THE COUNTRY?

>> THERE HAD NEVER BEEN, BEFORE

THE FALL OF 2001.

A TERRORIST ATTACK LIKE THIS USING ANTHRAX AS A WEAPON THROUGH THE MAIL.

IT NEVER HAPPENED IN THE HISTORY.

ANTHRAX HAD CAUSED ILLNESS AND DEATH THROUGHOUT HUMAN HISTORY BECAUSE IT IS A NATURALLY OCCURRING BACTERIUM AND PEOPLE WHO WORK IN BARNES AND CERTAIN KINDS OF ANIMALS HAVE BEEN IN CONTACT FOR MILLENNIA AND FIVE PEOPLE DIED TOTAL IN HISTORY, TRAGICALLY BUT ONLY FIVE DIED AS A WEAPON IN THIS KIND OF ATTACK AND IF THE COURT IS GOING TO TAKE THE HAZARD -- EXTENDS OF THE HAZARD INTO ACCOUNT IN FASHIONING THE RULES IMPOSING A DUTY WHERE THERE OTHERWISE WOULDN'T BE IN A CRIMINAL CONDUCT CAN TEXT THE COURT -- CAN'T DO THAT AND APPLY IT ONLY TO ANTHRAX, DOWN THE STREET IN FLORIDA STATE THE MAGNETIC LAB

THEIR RESEARCHING INFLUENZA, ALL AROUND THE COUNTRY LABS ARE RESEARCHING THINGS THAT ARE AS OR MORE HAZARDOUS THAN ANTHRAX. YOU CAN'T FASHION A RULE THAT APPLIES ONLY TO ANTHRAX AND ANTHRAX IS UNFORTUNATELY NOT THE ONLY HAZARDOUS --

>> BUT THE LAB AT FSU WAS NOT CAREFUL, IN THE WAY THEY STORED A VIRUS AND IT INADVERTENTLY GOT OUT OR WAS TAKEN OUT, ARE YOU SAYING THE LAB WOULD BE IMMUNE FROM EXISTENCE OF A DUTY AND MAYBE WE ARE DEALING WITH SUPERSEDING CAUSE.

MAYBE WE ARE DEALING AS JUSTICE CANTERA IS SAYING, IT WASN'T FORESEEABLE IN THE WAY IT

HAPPENED AND WE GET THE QUESTIONS FROM THE 11th CIRCUIT AND THEY ASKED A VERY NARROW QUESTION AND I DON'T UNDERSTAND YOU SAYING THAT BECAUSE THERE MIGHT BE MORE ULTRA HAZARDOUS THINGS GOING ON, WE'D SAY, NO

NONE WILL EVER BE LIABLE.

>> I'M CERTAINLY NOT SUGGESTING THERE SHOULD NEVER BE ANY LIABILITY AND WHETHER THERE WOULD BE LIABILITY IN THE CASE OF RELEASE OF SOMETHING LIKE INFLUENZA OR ANTHRAX OR ANY OTHER SUBSTANCE, IF IT IS INADVERTENT AND THERE IS NO THIRD-PARTY CRIMINAL ATTACK, McCAIN GOVERNS AND DUTIES HINGE ONLY ON THE FORESEEABLE ZONE OF RISK.

>> BUT THERE HAD BEEN PREVIOUS ANTHRAX PROBLEMS -- WOULD YOUR ANXIOUS BE -- WOULD THIS LAB THEN HAVE TO DO SOMETHING EXTRA AS A PRECAUTION TO THE PUBLIC, BECAUSE THIS KIND OF INCIDENT HAD IN FACT HAPPENED BEFORE.

>> YOUR HONOR I THINK IT IS IMPORTANT TO DISTINGUISH THE ELEMENTS OF A NEGLIGENCE CLAIM AND FIRST IS DUTY AND QUESTION OF LAW AND IF THERE IS A DUTY, THE NEXT QUESTION IS WAS THE

CONDUCT REASONABLE OR NEGLIGENT AND THE EXISTENCE OF A HISTORY GOES TO FORESEE ABILITY OF CERTAIN CONDUCT AND THERE HAS BEEN A BLACK LETTER RULE IN THIS COUNTRY AND IN THIS STATE, THAT THIRD-PARTY CRIMINAL CONDUCT, CRIMINAL ATTACKS, WHETHER FORESEEABLE OR NOT IS A FACTUAL MATTER, AND IF THERE IS A DUTY, THEN OF COURSE THE EXTENT OF THE HISTORY OF A CERTAIN KIND OF CONDUCT GOES TO FORESEE ABILITY AND THE STANDARD OF CARE IF IT IS REASONABLE.

>> TAKING THAT, YOU COULD HAVE EITHER THE SPECIAL RELATIONSHIP OR THE FACT THESE KINDS OF INCIDENTS HAVE HAPPENED THERE

BEFORE AND EITHER/OR, DOESN'T HAVE TO BE BOTH.

>> THAT IS NOT HOW THE COURT ANALYZED THE ISSUE, THE COURT DEALT WITH A CASE, A CONVICTED MURDERER ESCAPED AND MURDERED AGAIN AND IT WAS FORESEEABLE

PRISONERS WOULD TRY TO ESCAPE AND THEY DO ALL THE TIME, UNFORTUNATELY AND IT WAS CERTAINLY FORESEEABLE IF A CONVICTED MURDERER ESCAPED HE MURDERS AGAIN AND HAPPENS ALL THE TIME, UNFORTUNATELY.

>> WHAT ABOUT THE ITEM NUMBER ONE IN THE MANUAL FOR ENSURING THE INTEGRITY AND PROTECTION OF THE ANTHRAX IN THIS -- IN THIS PARTICULAR LAB OR WHATEVER, SAID IT IS WIDELY KNOWN THAT TERRORISTS AND OTHER CRIMINALS WILL USE THIS SUBSTANCE THIS IT -- IF IT IS OUT OF THE LAB AND FALLS INTO THE WRONG HANDS AND SO THIS HAS TO HAVE ABSOLUTE TOP SECURITY AS A RESULT OF THAT BEING WELL-KNOWN.

AND THEN IT GOES ONTO LIST THE OTHER CONCERNS.

LET'S ASSUME THE NUMBER ONE THING, THE MANUAL, WOULD THAT CHANGE THE CIRCUMSTANCES, THAT IS A HYPOTHETICAL, OKAY?

-- WOULD THAT CHANGE THE CIRCUMSTANCES OF THIS CASE.

>> I APPRECIATE THAT -- THE HYPOTHETICAL, I DON'T THINK IT WOULD CHANGE THE LEGAL ANALYSIS ANY MORE THAN HOW FORESEEABLE IT MIGHT BE A PRISONER WOULD TRY TO ESCAPE AND IF THE PRISONER WAS A CONVICTED MURDERER MIGHT HURT SOMEONE ELSE ANY MORE THAN IT IS RELEVANT TO THE LEGAL QUESTION OF WHETHER THERE IS A DUTY IN ADVANCE.

>> WE DIDN'T CREATE THE CRIMINAL.

I GUESS YOU ARE THE ONE CREATING THE DANGEROUS SUBSTANCE. AND IT SEEMS TO ME THAT THAT MAKES IT -- AND YOU ARE SAYING

THAT IT HAS SOME BENIGN USES BUT I'M ASSUMING THAT YOU MEAN THAT THERE WERE -- THEY WERE LOOKING AT A, IN THE EVENTS OF A TERRORIST ATTACK HOW WOULD YOU PREVENT DEATH AS PEOPLE WERE EXPOSED TO IT.

IS THAT CORRECT.

>> THAT IS ONE OF USES, THE FEDERAL LAW RECOGNIZES IS APPROPRIATE AND NECESSARY, OF SUBSTANCES LIKE ANTHRAX, THAT'S RIGHT.

>> THIS IS VERY DIFFERENT THAN THE FERTILIZER CASE FOR THE OKLAHOMA CITY BOMBING, WHERE FERTILIZER IS SOLD FOR BENIGN PURPOSES TO FERTILIZE FARMS AND ALL OF THAT.

HERE, AND AGAIN, WE ARE DEALING WITH A VERY NARROW QUESTION. WHICH IS, WHETHER, IF A -- IF THEY PASS MATERIALS DO THEY OWE A DUTY OF REASONABLE CARE TO MEMBERS OF THE PUBLIC TO AVOID AN UNAUTHORIZED INTERCEPTION AND ALL SEEMS LIKE A BASIC THING, EVERY MEMBER OF THIS PUBLIC WOULD SAY, WE SURE HOPE THEY ARE TAKING STEPS TO EXERCISE REASONABLE CARE TO AVOID IT. AND CERTAINLY YOU ARE NOT SAYING THE GOVERNMENT -- WHAT --

WOULDN'T EXERCISE THAT REASONABLE CARE.

>> OF COURSE NOT, YOUR HONOR, I POINTED -- MY POINT IS SIMPLY TRADITIONAL FOR THE -- THIS COURT AND OTHER COURTS OF THE STATE HAVE APPLIED IT DISTINGUISHED BETWEEN THE DUTY OF CARE OWED IN THE CONTEXT OF A RELATIONSHIP, WHERE THERE IS YOU A THIRD-PARTY CRIMINAL ATTACK, WHERE THE BASIS FOR THE DUTY UNDER BLACK LETTER COURT PRINCIPLES, WELL ESTABLISHED IN THE STATE IS THIS RELATIONSHIP

--

>> BUT, I WANT TO ASK YOU ONE QUESTION, I'D LIKE TO GO BACK TO JUSTICE WELLS' QUESTION AND

YOU BRUSHED THAT RIGHT OFF.
AND I WOULD LIKE TO GIVE YOU
ANOTHER CHANCE TO RESPOND TO
THAT ONE, BECAUSE, IN FLORIDA
FOR THE LAW, HAS SEPARATED DUTY
FROM THE INTERVENING ACT THAT IS
EXACTLY WHAT HE IS ASKING ABOUT

AND THOSE ARE TWO DIFFERENT
THINGS, AND SO, LET ME GIVE YOU
ANOTHER SHOT TO TRY AND EXPLAIN
IT AWAY, BECAUSE I'M HAVING
TROUBLE WITH YOUR EXPLANATION,
TO JUSTICE WELLS IN THIS
CONDITIONALLY.

-- QUESTION.

WE HAVE A CRIMINAL ACT.

WE UNDERSTAND THAT.

SO, IT IS MY UNDERSTANDING SINCE
I WENT TO LAW SCHOOL AND THAT IS
A LONG TIME AGO AND HAS BEEN
CONSISTENT, THAT THE REAL ISSUE
IS, IS WHETHER IT'S FORESEEABLE.
THAT THAT CRIMINAL ACT, IS IT A
INTERVENE, SUPERVENING CAUSE?
AND WE HAVE DEALT WITH THAT FOR
YEARS.

>> YOUR HONOR I APPRECIATE THE
OPPORTUNITY TO ANSWER THE
QUESTION, THAT IS NOT THE
ANALYSIS THIS COURT ENGAGED IN

--

>> I'M ASKING -- SOUTHEASTERN
THERE WAS A STUDENT THERE AS I

RECALL THE CASE AND PUT HIM INTO
A DANGEROUS NEIGHBORHOOD.
THAT IS WHAT HAPPENED HERE AND
HERE I WANTED TO YOU RESPOND TO
THE CRIMINAL INTERVENING --
INTERVENING, CRIMINAL
SUPERSEDING EVENT AND WHY AN
ORGANIZATION, MAYBE A GOVERNMENT
IS DIFFERENT A IS A SOVEREIGN
IMMUNITY ISSUE BUT ALL THINGS
BEING EQUAL WHY WE AREN'T
LOOKING AT JUSTICE WELLS'
QUESTION.

>> YOUR HONOR, WE BELIEVE THAT
THE CRIMINAL ATTACK IN THE FALL
OF 2001 WAS SUPERSEDING
INTERVENING CAUSE AND I DON'T
WANT TO SUGGEST WE DISAGREE WITH
THAT NOTION BUT THAT ISN'T THE

ARGUMENT WE ARE MAKING TODAY.
THE ARGUMENT WE ARE MAKING TODAY
GOES TO A DIFFERENT ELEMENT OF
THE NEGLIGENCE CLAIM AND THE
DUTY ELEMENT WHICH IS A SEPARATE
ELEMENT THE COURT TREATED ALWAYS
AS BEING A SEPARATE ELEMENT FROM

THE ELEMENT OF PROXIMATE
CAUSATION AND SO THE FACT THAT
THE ISSUE COULD BE RELEVANT TO
BOTH ELEMENTS DOESN'T MEAN THAT
IT ISN'T RELEVANT TO THE DUTY
ELEMENT --

>> AND AGAIN MY CONCERN IS YOU
ARE DEFINING THE DUTY BY THE
CRIMINAL ELEMENT AND FLORIDA
DOESN'T ALWAYS DO THAT, IT SEEMS
TO ME.

>> THAT IS WHAT THE COURT HAS
DONE IN NOVA SOUTHEASTERN AND
THE REASON I MENTION THE CASE IS
THAT CASE THE DEFENDANT COULD
HAVE ARGUED I SUPPOSE THE
CRIMINAL ATTACK ON MS. GROSS WAS
AN INTERVENING CAUSE BUT THAT IS
NOTE WAY IT WAS FRAMED BY THIS
COURT, THE ARGUMENT WAS, THE
FACT THIS WAS A THIRD-PARTY
CRIMINAL ATTACK THE ONLY BASIS
FOR A DUTY IS THE SPECIAL
RELATIONSHIP AND THE COURT'S
OPINION SAYS THE SPECIAL
RELATIONSHIP IMPOSES A DUTY

BETWEEN PARTIES THAT WOULDN'T
OTHERWISE EXIST AND WASN'T ABOUT
PROBLEMS MANAGEMENT CAUSE, WHICH
WOULD BE A DUTY LATER IN THE
CASE AND THE ISSUES OF DUTY AND
PROBLEMS MALT CAUSATION ARE
SEPARATE AND THE ISSUE WE ARE
HERE BEFORE YOUR HONORS TODAY ON
IS WHETHER THERE IS A DUTY IN
THE FIRST PLACE AND I HAVE TAKEN

--

>> I APPRECIATE YOU HAVE GONE
AHEAD OF TOMB -- GONE OVER TIME
TO PRESENT YOUR CASE.

>> I APPRECIATE YOUR HONOR'S
INDULGENCE, THANK YOU.

>> GOOD MORNING, YOUR HONOR,
TAMI AZORSKY REPRESENTING
BATTELLE. THERE IS A DIFFERENCE

BETWEEN SUPERSEDING CAUSE AND --
>> BEFORE YOU GET INTO THAT I
REALIZE WE DON'T HAVE A LOT OF
FACT HERE BUT IT SEEMS TO ME
YOUR LAB IS IN A VERY DIFFERENT
SITUATION THAN THE GOVERNMENT'S
LAB.

THERE IS NO -- NOTHING ALLEGED
ABOUT THERE BEING A HISTORY OF
THE DANGEROUS MATERIALS HAVING
GONE MISSING, OR STOLEN.
IS IT AN EITHER/OR THEY ARE
ALLEGING EITHER THE ANTHRAX CAME
FROM YOUR LAB OR THE
GOVERNMENT'S LAB AND ARE YOU IN
THE SAME -- I MEAN, THE QUESTION
IS BEING ASKED EQUALLY ABOUT
BARTEL AS THE GOVERNMENT BUT --
BATTELLE AS IT IS THE GOVERNMENT
BUT IF THERE IS ANYTHING IN THE
GOVERNMENT -- BUT ENLIGHTEN US
ON WHERE BATTELLE IS.

>> ANTHRAX IS A NATURALLY
OCCURRING BACTERIA AND WE ARE
DEALING WITH AN ISSUE OF WHAT IS
IN THE COMPLAINT AND WHAT ISN'T
BECAUSE WE RAISED THE ISSUE AS A
MOTION FOR JUDGMENT ON THE
PLEADINGS BUT THERE ARE COMMON
FACTS KNOWN, WHICH IS ANTHRAX IS
A NATURALLY OCCURRING BACTERIA.
THE PLAINTIFF EVEN HAS MADE
STATEMENTS IN PLEADINGS AND

BRIEFS THAT THERE WERE AT LEAST
12 DIFFERENT LABORATORIES THAT
HAD IT.

FROM 1900 TO 1976 THERE WERE 18
DEATHS FROM ANTHRAX, ALMOST ALL
OF THEM WERE IN TANNERY WORKERS
OR GOAT-HAIR WORKERS OR WOOL
WORKERS.

>> I'M MORE INTERESTED WHAT WAS
YOUR LAB DOING WITH THE ANTHRAX.

>> OUR LAB USES ANTHRAX FOR,
AMONG OTHER THINGS, VACCINE
EFFICACY TESTING AND DO ANIMAL
CHALLENGES TO DEVELOP VACCINES
TO PREVENT PEOPLE EXPOSED FROM
ANTHRAX TO GETTING SICK AN
ANTIDOTES TO HELP PEOPLE IF THEY
ARE EXPOSED TO ANTHRAX AND IT IS
NOT ONLY ANTHRAX, IF IT IS USED

AS A TERRORIST WEAPON BUT THOSE
PEOPLE WHO WORK IN INDUSTRIES
WHERE THEY MAY BE EXPOSED TO A
SUBSTANCE, SO, THERE IS A
SOCIALY BENEFICIAL USE AND
SOMETHING THAT SHOULDN'T BE
CHILLED IN TERMS OF LABORATORIES

DOING THAT.

YES, THEY SHOULD BE CAREFUL IN
HANDLING THE MATERIALS, AND
THOSE MATERIALS ARE ONLY HANDLED
HANDLED IN LABS THAT ARE CALLED
BIOLOGICAL LEVEL-3 LABS.

OR HIGHER.

SO, THERE ARE CONSTRAINTS AND
THINGS THAT THE ENTITIES HAVE TO
DO.

>> SO YOU WOULD AGREE YOUR LAB
WOULD THEN HAVE A DUTY TO
EXERCISE REASONABLE CARE AND ONE
OF THE THINGS, CERTAINLY, SINCE
YOU ARE HIGHLY DANGEROUS, TO
AVOID UNAUTHORIZED DISSEMINATION
OF SUCH A HIGHLY DANGEROUS
SUBSTANCE.

I MEAN, YOU MAY HAVE -- AND THE
THING, WHILE WE'RE HERE IN THIS
LITTLE -- ANSWER ME ONE
QUESTION.

MAYBE YOU WERE VERY CAREFUL.
MAYBE THERE IS NO LEGAL CAUSE,
BECAUSE I DON'T -- YOU KNOW, HOW
THEY ESTABLISH, IF YOUR ANTHRAX

KILLED..., YOU KNOW, MAYBE,
MAYBE, MAYBE.

BUT HOW DO YOU GET AROUND SAYING
THAT YOU HAVE NO DUTY OF
REASONABLE CARE?

>> THE DUTY ISSUE ARISES BECAUSE
DUTY IS THE CONCEPT, THRESHOLD
LEGAL INQUIRY OF WHO CAN BE HELD
IN THE COURT AND I'VE GONE
THROUGH THAT ANTHRAX IS
AVAILABLE IN OTHER PLACES.
AND SO, THE QUESTION IS, IF THEY
ARE BEING -- IF THEY ARE A
VICTIM OF A CRIME COMMITTED WITH
ANTHRAX, CAN YOU BRING A
DEFENDANT INTO COURT THAT IS
DISTANTLY LOCATED WHERE THERE IS
NO ALLEGATION OF LOST OR MISSING
SAMPLES, NO ALLEGATION OF A

HISTORY OF PROBLEMS AT THE FACILITY, THERE IS NO ALLEGATION THAT IT IS THAT FACILITY'S ANTHRAX, ALL THERE IS IN THE COMPLAINT ARE GENERALIZED STATEMENTS --
>> THAT IS NOT WHAT WE'RE HERE

ABOUT.

>> GO AHEAD.

>> IT SEEMS TO ME THAT WE ARE KIND OF FORCING THIS INTO A STRUCTURE WHICH I FOR ONE AM UNCOMFORTABLE WITH. AND THIS IS, IN SEPARATING THE CONCEPT OF WHETHER THE LAB, THE GOVERNMENT OWES REASONABLE CARE AS OPPOSED TO WHO THEY OWE IT TO.

WHO -- I MEAN, WHAT GIVES RISE TO ACTIONABLE NEGLIGENCE? WHICH IS THE -- WHAT HAS BEEN STRUGGLED WITH IN SOVEREIGN IMMUNITY CASES, EVERTON VERSUS WILLARD AND THE KAISER CASE, AND HENDERSON VERSUS BOWTON, ALL OF THESE CASE START OFF WITH A PREMISE THAT THERE IS A DUTY IN TERMS OF EXERCISING REASONABLE CARE BUT DON'T NECESSARILY END UP WITH THERE BEING ACTIONABLE NEGLIGENCE BY REASON OF THE FACT THAT THERE IS NO RELATIONSHIP BETWEEN THE DEFENDANT AND THE

PERSON WHO IS INJURED. HOW DOES THAT FIT HERE.

>> WELL, I THINK THE WAY IT FITS IS THAT Mc-- IN McCAIN THE COURT SAID THERE IS A FORESEE ABILITY THAT ARISES BECAUSE OF PURPOSES OF DUTY AND FOR SEE ABILITY THAT IS ANALYZED FOR PURPOSES OF PROXIMATE CAUSE.

AND HERE WE ARE FOCUSED ON THE FORMER.

AND THE QUESTION IS, CAN AN ENTITY OWE A DUTY TO THE ENTIRE WORLD?

IN McCAIN, IT WAS NOT THAT DIFFERENT ANALYSIS BECAUSE THE POWER COMPANY PUT EQUIPMENT SOMEWHERE, THEY PUT SIGNS THAT SAID IT WAS SAFE, SOMEONE CAME

INTO THAT LOCATION.

THERE ARE OTHER CASES, THE
FERRARE CASE --

>> BUT ISN'T THIS A CASE IN
WHICH THE ANALYSIS IS BETTER
SUITED TO TRYING TO DETERMINE
WHETHER THIS IS AN ACTIONABLE

TYPE OF NEGLIGENCE BY SOMEONE
THAT IS IN FLORIDA, WHEN IT IS
BEING STORED, IN MARYLAND,
WHETHER THIS IS A NEGLIGENCE IN
THE AIR SO TO SPEAK, AS PROSSER
WOULD HAVE TALKED ABOUT.

>> WELL, THE ISSUE IS -- THE
NEGLIGENCE INN IS A GOOD WAY TO
THINK OF IT.

THE ISSUE.

>> EVEN IF THE -- BATTELLE WERE
NEGLIGENT IN SUPERVISING AND
HIRING ITS EMPLOYEES BUT THE
ANTHRAX USED IN THE ANTHRAX
THROUGH THE MAIL ATTACKS CAME
FROM SOME OTHER LOCATION FROM
SOME OTHER FACILITY BUT THAT IS
THE PROBLEM --

>> THAT THIS IS PROBLEM.

AS I SAID WE ARE NOT LIMITED IN
WHAT WE ANSWER, FIRST OF ALL,
YOU SAID IT CAME FROM JUDGMENT
ON THE PLEADINGS.

IT SOUNDS TO ME LIKE YOU HAVE A
VERY GOOD CASE THAT -- OF NO
LEGAL CAUSE OF THE LACK OF

PROXIMATE CAUSATION OR SOME OF
THESE OTHER ISSUES THAT YOU ARE
BRINGING UP ABOUT THE HISTORY OF
HOW ANTHRAX IS USED.

MAYBE THIS IS SUMMARY JUDGMENT
MATERIAL BUT IT CAME UP ON
JUDGMENT ON THE PLEADINGS, AND,
YOU KNOW, AS I LOVE THAT 11th
CIRCUIT BUT THEY KEEP ON GIVING
US THESE VERY, YOU KNOW, NARROW
QUESTION AND WITHOUT REGARD TO
ALL OF THESE OTHER THINGS THAT
JUSTICE WELLS IS RAISING AND
SOME VERY GOOD FACTS THAT YOU
ARE RAISING.

SO WE WRITE AN OPINION, MAYBE,
BUT, YOU'VE GOT TO LOOK AT ALL
OF THESE OTHER THINGS.

>> THIS COURT HAS SAID THAT DUTY

IS A THRESHOLD LEGAL ISSUE AND
IN DEFINING THAT WHAT THE RULE
OF FORESEE ABILITY IS, DEFINES
THAT THRESHOLD -- LEGAL ISSUE
THERE HAS TO BE UNDERSTANDABLE
RULES THAT ARE OUT THERE.
THE SPECIAL RELATIONSHIP RULE IS

ONE SUCH RULE.

IT SAYS THAT IN THE CASE OF
THIRD-PARTY MIS CONDUCT,
THIRD-PARTY CRIMINAL CONDUCT,
YOU HAVE TO HAVE A SPECIAL
RELATIONSHIP.

THAT IS UNDERSTANDABLE, IT TELLS
DEFENDANTS TO WHOM THEY OWE A
DUTY.

AND IN WHAT CIRCUMSTANCES THEY
OWE A DUTY.

THERE ARE -- ANOTHER SITUATION
IN WHICH FORESEE ABILITY
REQUIRED FOR ESTABLISHING A DUTY
MAY BE REQUIRED, IF THERE IS
ACTUAL KNOWLEDGE.
OF THE CRIMINAL CODE.

>> LET ME ASK YOU, IF THE -- THE
PERSON DISSEMINATED THIS
ANTHRAX, ACTUALLY WORKED FOR
YOUR LAB, THEN WOULD WE HAVE A
DIFFERENT -- WOULD THAT
ESTABLISH THAT THE SPECIAL
RELATIONSHIP SO THAT YOU WOULD
HAVE A DUTY AND POSSIBLY BE --
>> EMPLOYER/EMPLOYEE IS COVERED

BY THE SPECIAL RELATIONSHIP,
YES.

>> HOW ABOUT SOMEBODY WALKING
DOWN THE SIDEWALK?
FROM THE FACILITY AND ESCAPES
FROM THE FACILITY?

>> THAT IS ANOTHER GOOD EXAMPLE,
FORESEE ABILITY IS DEFINED BY
GEOGRAPHIC SCOPE AND TIME AND IF
WE WERE DEALING WITH THE CASE
WHERE SOMEONE HAD WALKED OUT OF
THE FACILITY WITH ANTHRAX ON
THEIR SHOES, AND SOMEONE HAD
FALLEN ON IT ON THE SIDEWALK THE
FORESEE ABILITY ANALYSIS FOR
PURPOSE OF DUTY WOULD BE
DIFFERENT, BUT WHAT THE WE ARE
DEALING WITH HERE IS A FACILITY
THAT HAD ANTHRAX THAT IS NOT

CLOSE BY, NO ALLEGATIONS THAT IT IS THEIR ANTHRAX, NO ALLEGATIONS OF HISTORICAL LOSSES.

>> IS THAT THE PLEADING DEFECT YOU ARE CLAIM HERE AND THAT IS THAT IT IS ESSENTIAL THAT THEY ALLEGE THAT IT WAS YOUR ANTHRAX

THAT WAS SENT BY THE CRIMINAL AGENCY IN THIS CASE AND THAT THAT THIS IS DEFECT YOU ARE FOCUSING ON.

>> THAT MIGHT BE ONE SUCH ALLEGATION OR ACTUAL --

>> I'M ASKING THAT, IN CONTEXT OF THIS VERY BROAD QUESTION, YOU KNOW, THAT IF IN -- HAS BEEN CERTIFIED TO US, BECAUSE THE -- REALLY, WHAT HAS BEEN CERTIFIED WAS -- A MUCH, MUCH BROADER QUESTION THAN JUST THE RESOLUTION OF THIS INDIVIDUAL CASE.

AND ITS INDIVIDUAL CIRCUMSTANCES INCLUDING THIS FACTOR OF WHETHER OR NOT, YOU KNOW, IT IS THE PARTICULAR.

AND SO I'M -- HOW DO YOU PERCEIVE WHAT THE CIRCUIT COURT FEELS IS ASKING US TO DO?

>> WELL, I GUESS I THINK THAT WHAT THE CIRCUIT COURT IS ASKING YOU TO DO IS TO LINE-DROP, TO SAY WE HAVE ALREADY SAID THAT

FORESEEABILITY -- FORESEEABILITY DEFINING DUTY FOR THE -- AND COURT IN FLORIDA HAVE SET THE RELATIONSHIP TEST AS ONE TEST THAT SAYS, IF YOU HAVE A SESSION RELATIONSHIP, THEN THIS RISK IS FORESEEABLE.

>> YOU ARE NARROWING THOUGH IN THIS PARTICULAR INSTANCE ONE OF THE OTHER WAYS THAT THIS FORESEEABILITY IS APPROACHED IS BY SORT OF A RISK ANALYSIS, AND THAT IS THAT THE HIGHER THE RISK, YOU KNOW, THE GREATER THE DUTY.

THAT IS OUT THERE.

AT LEAST WHAT IS BEING ATTEMPTED HERE, THEY ARE ATTEMPTING TO SAY, LOOK, THIS IS AS HIGH RISK

AS YOU CAN GET -- AS YOU CAN GET
AND THEREFORE THE DUTY SHOULD
COME ALMOST CLOSE TO BEING
ABSOLUTE.

AT LEAST THAT IS HOW I PERCEIVE
AS WHAT IS STARTING OFF HERE AND
WHAT ABOUT THAT, AS YOU SAW FROM

MY INITIAL QUESTIONS ABOUT THE
FACT, YOU KNOW, IF YOU ARE GOING
TO DEAL WITH THIS AND -- YOU ALL
I'M SURE -- EVERYBODY AGREES
THAT THE PERSON THAT DIED HERE
WAS A TOTALLY IN INTENT PARTY.

-- INNOCENT PARTY, TOTAL
INNOCENT PARTY AND SO WE HAVE A
-- AN EXTREMELY DANGEROUS
SUBSTANCE WHERE THE ALLEGATION
IS THIS IS THE HIGHEST POSSIBLE
RISK AND, THEREFORE, SURELY
THERE MUST BE A DUTY IN TERMS OF
THOSE THAT ARE HANDLING THE
SUBSTANCE, THERE BY CREATING THE
RISK.

SO, TELL ME HOW IN A GENERAL WAY
YOU RESPOND TO THAT.

THEY ARE JUST SEEKING US TO SAY,
WELL, JUST TAKE McCAIN FOR
EXAMPLE.

AND SAY THIS IS SUCH A HIGHER
RISK, THAT WE OUGHT TO -- IMPOSE
ALMOST AN ABSOLUTE DUTY.
IF IT GETS OUT.

>> IF IT WERE A LEAK FROM THE

FACILITY, IF IT WERE SOMEONE WHO
WERE IN THE CLOSE VICINITY TO
THE FACILITY, THEN THAT DUTY TO
PROTECT THOSE IN THAT VICINITY
--ED.

>> WHY NOT, WHY NOT SOMEBODY
THAT LET'S SAY THAT I'M SURE
FROM TIME-TO-TIME THE SUBSTANCE
HAS TO BE MOVED FROM
PLACE-TO-PLACE.

YOU KNOW AND SO -- LET'S SAY
THAT THERE WAS A HIJACKING, YOU
KNOW, OF A SUBSTANCE AND THEN
THE CRIMINALS THAT DID THE
HIJACKING, OKAY, SEIZE THE
MATERIAL AND THEN SOME INNOCENT
CITIZEN INTERVENED TO TRY TO
PREVENT THE HIJACKING AND THEY
GOT THIS THROWN IN THEIR FACE.

AND, YOU KNOW, WE'VE GOT
CRIMINAL AGENCY CLEARLY, THE
CRIMINAL HIJACKING BUT THE
DEMONSTRATION WAS THAT CRIMINAL
HIJACKING SHOULD HAVE BEEN
ANTICIPATED.
AND THE SECURITY WASN'T, YOU

KNOW, TIGHT ENOUGH.
IS THAT AN ANALOGY TO A
SITUATION LIKE THIS.

>> THAT WOULD ACTUALLY BE A MUCH
MORE COMPLICATED SCENARIO
BECAUSE THERE ARE REGULATIONS
THAT APPLY TO EXACTLY HOW
ANTHRAX CAN BE TRANSPORTED.
AND WHAT SHOULD BE DONE WHEN IT
TRAINS SENATOR THERE -- THERE
MAY BE STANDARDS THERE IN A --
ARTIFICIAL IN A WAY, CREATED BUY
GOVERNMENT.

RIGHT.

>> ONE THING I WOULD LIKE THE
COURT TO THINK ABOUT, IN
ANSWERING THESE QUESTIONS, IS
THAT WE TALKED ABOUT IT IN THE
CONTEXT OF ANTHRAX AND WHETHER,
BECAUSE ANTHRAX IS SO DANGEROUS
THERE IS A HEIGHTENED DUTY BUT
IT WOULDN'T APPLY JUST TO
ANTHRAX AND TAKE JUST ONE
EXAMPLE.

OKAY?

TAKE NUCLEAR FACILITIES.

NUCLEAR FACILITIES HAVE NUCLEAR
MATERIAL THAT CAN CAUSE HARM AND
THERE IS OBVIOUSLY A DUTY TO
PREVENT A RELEASE OR AN
EXPLOSION.

BUT, ASSUME FOR A MOMENT THAT
SOME PERSON GUESSES A HOLD OF
NUCLEAR MATERIALS AND PUTS IT IN
AN ENEMY'S SANDWICH, OKAY?
THAT PERSON WHO ATE THE SANDWICH
IS COMPLETELY INNOCENT.
THEY DIDN'T DO ANYTHING, DOES
EVERY OPERATOR OF EVERY NUCLEAR
FACILITY IN THE COUNTRY OWE A
DUTY TO THAT PERSON TO PREVENT
THAT FROM HAPPENING.

>> I WOULD THINK THAT THE ANSWER
WOULD BE THAT I WOULD HOPE, IF
WE LOOKED AT THE SITUATION,

SOMEONE THAT WAS RUNNING A NUCLEAR FACILITY, TOOK EVERY STEP POSSIBLE TO SAY, NO, THIS TYPE -- IN THIS DAY AND AGE, THE RISK OF TERRORISM IS SO HIGH THAT THEY HAVE THE DUTY TO -- TO TAKE EVERY STEP TO PREVENT ITS

INTERCEPTION.

AND MAYBE EVERY STEP WAS TAKEN BUT I DON'T KNOW HOW WE'D SAY NO WE WOULDN'T JUST BECAUSE, YOU KNOW, IT COULD HARM -- I MEAN, HARM IS -- IN A WAY THAT YOU DON'T INTEND IS THE -- IT IS THE NATURE OF THE SUBSTANCE IT IS GOING TO BE USED FOR CRIMINAL ACTIVITY.

AND THAT IS THE --

>> THAT'S THE PROBLEM.

WHY DUTY HAS TO BE DEFINED BY EITHER SPECIAL RELATIONSHIP ARE ACTUAL KNOWLEDGE OF MISCONDUCT. BECAUSE OTHERWISE, IN THAT SITUATION, EVERY, SINGLE OPERATOR IN THE COUNTRY COULD BE HAILED INTO COURT AND BE REQUIRED TO EXPLAIN AND JUSTIFY EVERY HIRING PROCEDURE, EVERY MAINTENANCE PROCEDURE, AND THAT IS WHAT THE LEGAL THRESHOLD CONCEPT OF DUTY IS INTENDED TO PREVENT.

IT IS INTENDED TO PREVENT AN

ENTITY FROM BEING HAILED INTO COURT WITHOUT SOME RULE OR INDICATION THAT THAT SPECIFIC ENTITY COULD HAVE PREVENTED WHAT HAPPENED.

>> LET ME ASK YOU A QUESTION.

WE ALL KNOW THAT THE INDUSTRY IS TREMENDOUSLY REGULATED AND SO THERE ARE DUTIES THAT ARE WELL ESTABLISHED.

ARE THERE SIMILAR REGULATIONS FOR ANTHRAX?

WE KNOW AS FAR AS FOR MAILING OR FOR DISTRIBUTING.

>> AS TO THE SPECIFIC SUBSTANCE, IT'S NOT DIRECTED TOWARD ANTHRAX.

THERE ARE LABORATORIES, KNOWN AS BIOLOGICAL LEVEL 3 LABORATORIES,

BIOLOGICAL LEVEL 4 LABORATORIES,
AND THERE ARE REQUIREMENTS FOR
THOSE LABORATORIES AND
REQUIREMENTS FOR WHAT THEY CAN
AND CANNOT POSSESS IN THOSE
LABORATORIES, AND, YOU KNOW, I'M
NOT -- TO -- TO GO THROUGH THE

REGULATIONS --

>> ALLEGED TO HAVE BEEN BREACHED
IN THIS CASE.

>> NO, THEY ARE SENATE HOW DO
YOU KNOW THAT, IT SAYS THERE IS
NEGLIGENCE IN THE STORAGE
SPECIFICALLY ALLEGED IN THERE.

>> OKAY, LET ME RESTATE WHAT I
SAID.

YOUR HONOR, IT IS -- THE PROBLEM
I HAVE WITH THE ALLEGATIONS OF
NEGLIGENCE IN THE CASE AGAINST
BATTELLE IS THERE ARE NOT ANY
FACTS THAT SUPPORT THOSE
GENERALIZED STATEMENTS --

>> THEN THAT WILL COME -- THERE
MAY NOT BE FACTS TO SUPPORT IT
BACK TO WHAT JUSTICE PARIENTE
SAID YOU MAY WIN THE CASE, WE
ARE -- WE'RE TALKING ABOUT, DOES
THE OWNER AND OPERATOR OR
POSSESSES SOURCE OF WHATEVER YOU
WANT TO CALL IT, SOMETHING THAT
IS PRETTY BAD HAVE A DUTY OF
REASONABLE CARE IN ITS STORAGE
AND TRANSPORTATION, AND THE WAY

THAT IT IS LOCKED UP, WHO HAS
ACCESS TO IT.

THOSE KINDS OF THINGS.

THIS IS NOT A STATUTORY ACTION,
SO WHATEVER STATUTE SAYS HAS
NOTHING DO WITH IT.

IT IS IN RELATION TO THE GENERAL
NEGLIGENCE, SO, I HAVE A HARD
TIME UNDERSTANDING YOUR RESPONSE
TO THAT QUESTION, NOT ALLEGED --
I LOOKED LAST NIGHT AT THE
COMPLAINT SPECIFICALLY TO SEE
WHAT WAS THERE, BECAUSE I HAD
CONCERNS AND IT DOES SAY THAT,
DOES IT NOT.

>> IT ALLEGES THOSE NEGLIGENT
HIRING, NEGLIGENT SUPERVISION,
THAT -- AND I MADE MY POINT ON
THAT.

AND --

>> THE WELL, THOUGH, IS --
>> ISN'T THE ISSUE, THOUGH, THE
FEDERAL GOVERNMENT WHO IS
OVERSEEING I WOULD ASSUME WHO IS
EXPERIMENTING WITH ANTHRAX AND
FOR WHAT PURPOSES HAS THE

ABILITY, AS THEY HAVE DONE IN
MANY SITUATIONS, TO REALLY
PREEMPT THIS AREA AND SAY, YOU
KNOW, THERE SHALL BE NO
LAWSUITS, THERE, YOU KNOW, YOU
WILL IMMUNIZE YOU ALSO AS LONG
AS YOU POLICY THESE STEPS, IT
SEEMS -- YOU ARE ASKING -- BUT
THOSE ARE GREATER POLICY ISSUES
THAN THIS COURT IS GOING TO
ANSWER BY THE VERY NARROW
QUESTION THAT HAS BEEN CERTIFIED
TO US, SO I HAVE A HARD TIME
WHEN YOU TALK ABOUT THE NUCLEAR
FACILITIES AND WHETHER THEY
SHOULD BE LIABLE TO THE PUBLIC,
I MEAN, LET'S SEE -- LET'S SEE
THE CASE AND AS WE SEE WHAT IS
GOING ON WITH THIS.

BUT, HERE, I THINK YOUR
STRONGEST ARGUMENT IS THAT YOU
MAY HAVE AGAIN A GOOD SUMMARY
JUDGMENT BECAUSE YOU CAN'T BE
HELD LIABLE BECAUSE YOU -- CAN
BE HELD LIABLE BECAUSE YOU
MANUFACTURE A DANGEROUS

SUBSTANCE AND SO NEGLIGENCE --
AND THERE HAS TO BE A CAUSATION
AND YOUR SUBSTANCE HAS A --
CAUSED THE ULTIMATE DEATH BUT
YOU AGREE WE ARE NOT HERE TO
ANSWER THOSE QUESTIONS.

>> WE ARE NOT ANSWERING THOSE
QUESTIONS.

THE QUESTIONS WERE ANSWERING
TODAY IS WHICH ENTITIES CAN BE
BROUGHT INTO COURT AT -- FROM
THE OUTSET.

WHICH ENTITIES CAN BE FORCED TO
DEFEND THEIR CONDUCT TO THAT
EXTENT SO THEY CAN GET THE
SUMMARY JUDGMENT.

SHOULDN'T THERE BE -- AND THERE
ARE RULES, FLORIDA HAS
ESTABLISHED RULES, ESTABLISHED

THE SPECIAL RELATIONSHIP RULE,
WE KNOW THERE ARE SPECIAL
RELATIONSHIPS AND YOU CAN BE
HAILED INTO COURT CASES LIKE
HUGH IT AND SHERMAN ESTABLISH
THE ACTUAL KNOWLEDGE RULE, IF
YOU HAVE ACTUAL KNOWLEDGE THE

MISCONDUCT IS GOING ON, YOU HAVE
A DUTY TO DO SOMETHING ABOUT IT.
BUT, BEYOND THAT, MY SUGGESTION
IS, THIS COURT SHOULDN'T GO, IF
THERE IS SOMETHING ELSE THAT
SHOULD BE DONE, PERHAPS A
DIRECTIONS OR OPINION TO SUGGEST
THE LEGISLATURE DO SOMETHING,
BUT THERE ARE RULES THAT ALREADY
EXIST BEING THE SPECIAL
RELATIONSHIP RULES, THE ACTUAL
KNOWLEDGE RULES, AND TO GO
BEYOND THAT I THINK OPENS UP,
YOU KNOW, A WHOLE HOST OF NEW
KINDS OF CASES THAT PEOPLE WILL
BE COMING INTO THE COURT SYSTEM
BRINGING SAYING THAT SOMEONE WHO
POSSESSED SOMETHING THAT CAN BE
MISUSED WILL BE BROUGHT INTO
COURT AND THERE WILL BE ALL KIND
OF ATTENUATING LAWSUITS WITH
ATTENUATING ALLEGATIONS.

>> THANK YOU WITH THAT YOU HAVE
GONE OVER 10 MINUTES BEYOND YOUR
TIME BUT WE WANTED TO HEAR WHAT
YOU HAVE TO SAY ON THE CASE.

RESPONSE?

>> MAY IT PLEASE THE COURT, I'M
HERE ON BEHALF OF MAUREEN
STEVENS AND WITH ME ARE TRIAL
COUNSEL RICHARD SCHUELLER AND
JASON WISER, ONE THING I NEED TO
CLARIFY E ABOUT THE ALLEGATIONS,
THE SUGGESTION OF ANTHRAX
GENERICALLY BEING THE CAUSE AND
THAT WE JUST -- THE LABORATORY
SUCH AS BATTELLE IS NOT CORRECT
WITH THE ALLEGATIONS OF THE
COMPLAINT.

WHAT WE ALLEGE IN THE COMPLAINT
AGAINST THE GOVERNMENT IS THAT
THIS PARTICULAR STRAIN OF
ANTHRAX IS THE ONE WE ARE
FOCUSING ON.
THIS PARTICULAR STRAIN OF

ANTHRAX IS ONE THAT HAS BEEN GENETICALLY TRACED BACK TO FORT DETRICK.

NOT ONE THAT OCCURRED IN NATURE.
>> BUT YOU ARE NOT ALLEGING HERE -- OR MAINTAINING THAT BECAUSE THIS IS ANTHRAX OF WHATEVER

STRAIN, THAT THERE IS ABSOLUTE LIABILITY.

>> NO, WE ARE NOT.

>> YOU ARE NOT ARGUING THAT THIS IS STRICT LIABILITY.

>> NO, WE'RE NOT.

>> AND AS A MATTER OF FACT THE GOVERNMENT IS CORRECT UNDER THE TERRITORIAL CLAIMS ACT, ACTION HAS TO BE BASED ON NEGLIGENCE, NOT ON STRICT LIABILITY.

>> CORRECT.

CORRECT.

>> SO THE ISSUE IN -- THAT WE'RE HERE ON IS WHETHER THERE IS A DUTY TO THE GENERAL PUBLIC, WHETHER WE SEPARATE BY REASON OF THE FACT THAT THIS IS A ULTRA HAZARDOUS ACTIVITY OR ULTRA HAZARDOUS SUBSTANCE, WHETHER THERE CAN BE A BASIS FOR ACTIONABLE NEGLIGENCE, TO THE GENERAL PUBLIC, AS OPPOSED TO SOMEONE THAT WAS IN SOME TYPE OF SPECIAL RELATIONSHIP WITH THE -- THIS LAB AND VIS-A-VIS THE

GOVERNMENT, CORRECT.

>> CORRECT AND THEY RELY ON THE SPECIAL RELATIONSHIP RULE AND HAVE CONTINUOUSLY IGNORED EXCEPTIONS THAT ARE RECOGNIZED IN THE RESTATEMENT AND IN CASES IN FLORIDA.

THEY RELY ON SECTION 315 OF THE RESTATEMENT, WHICH HAS AN EXPRESS EXCEPTION FOR WHEN THE DEFENDANT HAS ACTUAL OR CONSTRUCTIVE CONTROL OF THE INSTRUMENTALITY.

THE ANTHRAX IN THIS CASE WOULD -- WAS CLEARLY IN THE ACTUAL CONTROL OF THE GOVERNMENT.

>> BUT UNDER THAT RESTATEMENT SECTION, IS IT THAT YOU ARE GOING TO -- IF YOU HAVE

SOMETHING THAT IS A DANGEROUS SUBSTANCE AND IT GETS OUT, THAT YOU ARE LIABLE TO ANYBODY, I MEAN, THAT IT DOESN'T HAVE TO BE SOMEONE THAT WAS WITHIN THE CONTEMPLATION THAT IT WOULD COME IN CONTACT WITH, BUT YOU ARE

LIABLE TO -- THAT THIS WAS, IT WAS BEING HELD IN MARYLAND, IT GOT SOMEHOW TO FLORIDA, AND SO JUST YOU ARE LIABLE TO ANYBODY.

>> YOU HAVE A DUTY, THE RISKS TO BE PERCEIVED, DEFINES THE DUTY TO BE OBEYED -- DEFINES THE DUTY TO BE OBEYED.

THE RISK OF A MICROSCOPIC PATHOGEN OF THIS NATURE, WHICH NOT ONLY IS EASILY TRANSPORTED BECAUSE OF ITS SIZE BUT REGENERATES AND CAUSES PROBLEMS, I WAS THINKING --

CAUSES EPIDEMICS AND EVERYTHING ELSE, IS SOMETHING THE GOVERNMENT HAD KNOWLEDGE, IN FACT SUPERIOR -- SUPERIOR KNOWLEDGE OF -- OVER ANYBODY AND HAD TO KNOW --.

>> IT SEEMS TO ME YOU HAVE A HARD TIME DIFFERENTIATING THAT THEORY FROM THE STRICT LIABILITY.

>> WELL, BECAUSE IF YOU LOOK IN THE RESTATEMENT 521 WHICH DEALS

WITH HAZARDOUS ACTIVITIES IT SAYS WHILE NORMALLY ULTRA HAZARDOUS ACTIVITIES GENERATE STRICT LIABILITY WHICH IS 5 19, 521 SPECIFICALLY SAYS IF THE WORK IS DONE IN FURTHERANCE OF A PUBLIC DUTY IT IS GOVERNED BY NEGLIGENCE AND SO THAT IS WHY WE HAVE A SITUATION WHERE EVEN THOUGH WE ARE TALKING IN TERMS OF ALL -- ALL OF US WOULD NORMALLY ASSOCIATE WITH STRICT LIABILITY, WITH RESPECT TO THE GOVERNMENT THAT IS NOT THE CASE.

>> DO YOU AGREE OR DISAGREE WE NEED TO TAKE THE ALLEGATIONS, AND REVIEW THE CASES IN A CONTEXT OF CASES THAT IMPOSE LIABILITY FOR THIRD PARTY

CRIMINAL CONDUCT.

>> NO.

>> ISN'T THAT WHAT IS HERE,
THIRD-PARTY CRIMINAL CONDUCT.

>> THAT IS A QUESTION OF
CAUSATION BECAUSE YOU ARE
TALKING ABOUT -- TALKING ABOUT

THE FORESEEABILITY OF HOW THE
INJURY OCCURRED AND THE
THIRD-PARTY TOOK IT UPON
THEMSELVES.

>> I'M TALK ABOUT THE CASES
IMPOSING A DUTY ON THE OWNER OF
A SHOPPING CENTER TO PROVIDE
SECURITY FOR THE PARKING LOT
WHERE THERE IS A HISTORY OF
CRIMINAL ACTIVITY AND ROBBERY IN
THAT PARKING LOT.

AND THE CASES FIND THAT BECAUSE
OF THAT HISTORY OF CRIMINAL
ACTIVITY, THE OWNER HAD A DUTY
TO PROTECTED PATRONS FROM THAT
CRIMINAL CONDUCT.

AND THEREFORE, IN ANALOGIZING IT
TO THAT SITUATION DON'T WE HAVE
TO HAVE AT LEAST ONE PRIOR
ANTHRAX ATTACK BEFORE WE IMPOSE
A DUTY TO PROTECT AGAINST
ANTHRAX ATTACKS.

>> NO, BECAUSE DIFFERENT -- THE
DIFFERENCE IS THE LANDLORD IN
THAT CASE DID NOT CREATE THE
RISK.

HERE, THE RISK IS CREATED BY THE
NATURE OF THE SUBSTANCE, NOT
ONLY THE FACT THAT IT IS DEADLY,
BUT BECAUSE THE STORAGE HANDLING
AND TRANSPORT OF IT REQUIRES
SUCH SOPHISTICATION AND
PROTECTION TO ENSURE THAT IT IS
NOT A--

>> THIS ISN'T A CASE OF WHERE
YOU ALLEGE THAT BECAUSE OF THE
NEGLECTED TRANSPORTATION THAT
ANTHRAX SPILLED ON THE HIGHWAY
AND SOMEBODY WAS KILLED BY
INHALING IT.

YOU ARE SAYING THAT SOMEBODY
AFFIRMATIVELY TOOK THE ANTHRAX
AND AFFIRMATIVELY SENT IT WITH
EVIL INTENT TO SOMEBODY TO HARM
THAT PERSON AND SEEMS TO ME, A

DIFFERENT KIND OF SITUATION THAN SAYING YOU NEGLIGENTLY STORED IT AND THEREFORE IT SPILLED AND SOMEBODY GOT INJURED.

>> WE HAVE NOT ALLEGED SPECIFICALLY THE CRIMINAL NATURE OF THE CONDUCT.

WHAT WE HAVE ALLEGED IS, IS THAT THE SUBSTANCE WAS ONLY AT -- FOR DIETRICH AND ALSO SENT TO THE PRIVATE LAB AND SOMEHOW IT CAME OUT OF THEIR CUSTODY DESPITE THEIR AWARENESS OF THE DANGER AND WE'D ALSO -- HAVE ATTACH TO THE COMPLAINT AS EXHIBIT F A MEMORANDUM AT FORT DETRICK THAT IDENTIFIES AN INCREDIBLE LIST OF THESE PATHOGENS THAT ARE MISSING, THEY ARE CONCERNED ABOUT THEM, IT INCLUDES THE EBOLA VIRUS AND INCLUDES --

>> LET ME JUST GO BACK TO SOMETHING TROUBLING ME, I ASSUME YOU GET SOME OF US TO BUY THE FACT THAT THERE HAS TO BE A DUTY ON THE PART OF LABS TO PREVENT THEIR UNAUTHORIZED DISSEMINATION AND IF THEY TOOK, SAY LEFT THE DOORS OPEN DAY AND NIGHT, A MOST EXTREME EXAMPLE, OBVIOUSLY THAT -- YOU WOULDN'T WANT THAT TO HAPPEN, BUT HOW ARE YOU, YOU KNOW, LET'S SAY THAT

YOU ESTABLISH SOMETHING THAT THEY PREACHED THE -- I MEAN, THERE WERE -- THEY WERE NEGLIGENT IN THE WAY THEY KEPT THE SUBSTANCES, HOW ARE YOU GOING TO ESTABLISH THAT THE ANTHRAX WAS IN FACT STOLEN FROM ONE LAB OR THE OTHER AND IS THE ANTHRAX THAT THEN CAUSED THE HARM TO THE GENTLEMAN IN BOCA RATON, WHERE WILL THAT COME FROM?

YOU CAN'T JUST HAVE A DUTY. THERE HAS GOT TO BE A LEGAL CAUSATION.

>> WELL, WE -- AS I INDICATED THIS IS A PARTICULAR STRAIN THAT WAS CREATED SOLELY FOR DETRICK AND ONLY WENT TO A FEW OTHER

LOCATIONS.

THE -- WE HAVE NOT BEEN ABLE TO
ENGAGE IN ANY DISCOVERY OF --
>> BUT YOU AGREE IT COULD BE A
PROBLEM FOR YOU.
YOU CAN'T -- MS. AZORSKY
YESTERDAY, YOU CAN'T HOLD THEM

LIABLE BECAUSE THEY HAPPEN TO BE
WORK WITH ANTHRAX, YOU HAVE TO
ESTABLISH SOMETHING THEY DID
CAUSED THAT ANTHRAX TO BE STOLEN
FROM THEIR LABS.
CORRECT.

>> WHETHER IT WAS STOLEN OR GOT
OUT NEGLIGENTLY AND THEN YOU --
>> YOU'VE GOT SHOW ONE OR THE
OTHER HAPPENED IF THEY SAY NO.
WE HAVE NO -- WE HAVE ALL OF OUR
RECORDS AND THERE IS EXACTLY THE
SAME AMOUNT OF ANTHRAX EACH DAY,
WE CHECKED AND WE HAVE THE SAME
-- AT THAT POINT, YOU KNOW,
THERE IS SUMMARY JUDGMENT
AGAINST YOU.

>> WE CERTAINLY HAVE A BURDEN OF
PROVING THE NEGLIGENCE.

>> AND LEGAL CAUSE.

>> EXCUSE ME?

>> AND LEGAL CAUSE.

THERE IS NO EVIDENCE THAT
ANYTHING THEY DID CAUSED THIS
ANTHRAX TO, YOU KNOW, BE
INTERCEPTED THAT IS THE END OF

THIS CASE.

>> BUT, I MEAN, FOR EXAMPLE,
EVEN WITHOUT HAVING BEEN ABLE TO
ENGAGE IN ANY DISCOVERY WE HAVE
THE MEMO WHICH IS EXHIBIT F TO
THE COMPLAINT WHICH SHOWS
MISSING ANTHRAX OF AT LEAST TWO
SAMPLES, THERE IS AMPLE OTHER
EVIDENCE OF WHICH, AGAIN,
DISCOVERY WILL BE ONGOING.
OF THE PROBLEMS AND SECURITY AND
-- AT FORT DETRICK AND THERE IS
ALSO AN ONGOING CRIMINAL
INVESTIGATION WHICH IS A MATTER
OF RECORD AND I'M NOT GOING
OUTSIDE THE RECORD, THE
GOVERNMENT WASN'T -- WAS ABLE TO
GET A SIX-MONTH STAY, AND THEY
ARE PURSUING THIS.

AND SO THE SOURCES OF INFORMATION FOR HOW THIS HAPPENED, IS NOT LIMITED TO OUR ABILITY, WHICH IS GOING TO BE NO QUESTION...

>> BUT, HOW --

>> JUSTICE WELLS' QUESTION --

>> SORRY.

.
>> COMING BACK TO WHERE WE HAVE BEEN ON THESE QUESTIONS, HAVING TO DO WITH LAW ENFORCEMENT AND EVER TON CASE AND THE ANALYSIS FOLLOWING THE KAISER CASE, AND THEN INTO HENDERSON IN WHICH WE HAVE SAID THE VICTIM OF CRIMINAL OFFENSE WHICH MIGHT HAVE BEEN PREVENTED DULUTH THROUGH REASONABLE LAW ENFORCEMENT ACTION DOES NOT ESTABLISH A COMMON LAW DUTY TO THE INDIVIDUAL CITIZEN AND RESULTING FOR THE LIABILITY ABSENT THE SPECIAL DUTY TO THE VICTIM.

>> THOSE OF OUR -- THOSE ARE CASES WHERE THE DEFENDANT WHO WAS BEING SUED DID NOT CREATE THE RISK.

THE GOVERNMENT DID NOT CREATE THE CRIMINAL.

THE GOVERNMENT AND IT IS CLEARLY UNREASONABLE TO IMPOSE ON THE GOVERNMENT A DUTY TO PROTECT

EVERY MEMBER OF THE PUBLIC FROM ANY CRIMINAL ACT.

WE ARE TALKING ABOUT A ULTRA HAZARD DOES -- HAZARDOUS SUBSTANCE THEY CREATED AN MONITORED.

>> YOU HAVE TO CONCEDE THEY WERE NOT NEGLIGENT IN CREATING ANTHRAX.

>> NO, BUT ONCE THEY CREATED IT WITH THEIR KNOWLEDGE OF ITS -- THE EXTREMELY DANGEROUS NATURE OF IT, THEIR KNOWLEDGE AS TO THE DIFFICULTY --

>> SO WHAT WE ARE GETTING TO IS WHETHER THEY WERE NEGLIGENT IN RESPECT TO THE CRIMINAL OFFENSE, CORRECT?

>> NO --

>> THEY WERE NEGLIGENT IN NOT PROVIDING SECURITY WHICH WOULD PREVENT SOMEONE FROM STEALING NIGHT WE DON'T EVEN KNOW IF IT WAS STOLEN FROM THE FACILITY.
>> GETTING OUT OF THE FACILITY.
>> YES, WHETHER THEY -- WHETHER

IT WAS TAKEN OUT FOR INADVERTENT OR MAYBE FOR SOMEONE WHO THOUGHT THEY WERE GOING TO DO THEIR -- WE DO NOT KNOW WHAT HAPPENED WITH RESPECT TO HOW IT GOT OUT OF THEIR CUSTODY.

>> I'M HAVING A LOT OF DIFFICULTY WITH THE -- WHAT I PERCEIVE TO BE SORT OF A MOVING TARGET CONCEPT OF -- OF NEGLIGENCE HERE.

IT SEEMS THAT THERE CLEARLY IS A REALIZATION THAT THERE IS AN OBLIGATION UNDER THE FEDERAL ACT, FOR THE CLAIMS ACT, TO ESTABLISH NEGLIGENCE.

AND SO, THIS IS WHY THE CIRCUIT COURT IS COMING BACK TO US AND SAYING IN THIS PARTICULAR CIRCUMSTANCE WHAT IS THE NEGLIGENT STANDARD THAT IS OUT THERE BUT YOU SEEM TO BE MOVING BACK AND FORTH OR AROUND FROM THE CONCEPTS OF NEGLIGENCE, FOR INSTANCE, THAT WE WOULD ASSOCIATE WITH IF THE LAB HAD

BEEN NEGLECTFUL IN THE WAY THEY STORED THIS MATERIAL.

OR IF THEY HAD BEEN NEGLECTFUL IN THE WAY THAT THEY TRANSPORTED THE MATERIAL.

AND YET, WHAT WE'RE ENDING UP WITH HERE, IS THE CONCEPT OF NEGLIGENCE IN TERMS OF ANTICIPATING THAT THE SUBSTANCE WOULD END UP IN THE HANDS OF A CRIMINAL ACTOR WHO THEN WOULD ACT AGAINST A MEMBER OF THE PUBLIC AT LARGE SUCH AS THE VICTIM HERE.

SO I'M -- HOW ABOUT FOCUSING ON -- ARE YOU TALKING ABOUT ONE BROAD CONCEPT OF NEGLIGENCE? OR ARE YOU TALKING ABOUT THE MANY ASPECTS OF IT?

WHAT IS THE CORE FEATURE -- AND YOU CAN SORT OF GIVE US A FORMULA, IF YOU WILL, WHAT WOULD YOU LIKE US TO TELL THE CIRCUIT COURT OF APPEALS THAT THE FORMULA IS, THAT THE STANDARD IN FLORIDA UNDER THESE

CIRCUMSTANCES IS, THUS AND SO? ARTICULATE THAT FOR US HERE, SO THAT WE STOP FOR A MINUTE AND TRY TO APPLY, THEN, TO THE EXTENT POSSIBLE THE ALLEGATIONS THAT YOU HAVE SET OUT TO THAT FORMULA.

SO WHAT IS THE FORMULA.

>> WHAT IS -- WHAT WOULD YOU LIKE US TO TELL THE CIRCUIT COURT OF APPEALS THAT THE NEGLIGENCE CONCEPT TO BE APPLIED IN THIS CASE IS THUS AND SO IF.

>> THE NEGLIGENCE CONCEPT TO BE APPLIED TO THIS CASE IS ZONE OF RISK WHICH WE HAVE CONSISTENTLY ASSERTED THROUGHOUT THIS CASE. PART OF THAT AND EVEN IN THE RESTATEMENT 302, IT TALKS ABOUT PART OF THAT IS DEPENDING UPON THE NATURE OF THE RISK YOU CREATE, FORESEE ABILITY OF -- FORESEEABILITY OF MISCONDUCT, INTENTIONAL OR OTHERWISE BY THIRD PARTIES AND THAT YOU CAN BE IN A SITUATION WHERE YOU HAVE

TO REASONABLY ANTICIPATE THAT. WHEN ARE DEALING WITH BIOLOGICAL WARFARE, MATERIEL IT'S NOT UNREASONABLE IN THIS DAY AND AGE TO EXPECT THE GOVERNMENT TO REASONABLY ANTICIPATE THAT OR A PRIVATE LAB AND THE WAY --

>> BUT, BEFORE --

>> THE ANTICIPATION OF THAT COMES SOLELY FROM THE NATURE OF THE SUBSTANCE.

AS OPPOSED, FOR INSTANCE, IN JUSTICE CANTERO'S EXAMPLE THAT HE GAVE -- CANTERO'S EXAMPLE THAT HE GAVE TO YOU, THE SHOPPING CENTER OWNER AND --

>> KNOWING OR NOT KNOWING ABOUT CRIMINAL ACTIVITIES IN THE PARKING LOT.

BUT IT COMES SOLELY FROM THE NATURE OF THE SUBSTANCE, IS THAT

--

>> FROM THE NAME OF THE SUBSTANCE AND THE PROBLEMS INHERENT IN THE STORAGE, TRANSPORT, ALL OF THOSE THINGS

--

>> IT ALL THEN COMES FROM THE NATURE OF THE SUBSTANCE?

>> YES.

AND IT'S NOT A MOVING TARGET. IT IS JUST, BECAUSE WE DON'T KNOW EVERYTHING THAT HAPPENED TO THIS SUBSTANCE, OTHER THAN WE KNOW IT WAS STORED.

WE KNOW IT WAS TRANSPORTED.

WE KNOW THEY HAD PROBLEMS AND THE --

>> YOU HAVE TO KNOW SOMETHING, DO YOU NOT, BEFORE YOU CAN BRING A LAWSUIT.

>> YES.

AND WE HAVE ATTACHED TO OUR COMPLAINT, EVIDENCE THAT THE GOVERNMENT WAS ON NOTICE IN 1992 AND THERE IS LATEST OF ABOUT 20 DIFFERENT EBOLA ANTHRAX, A LIST OF THESE THINGS.

>> TELL US -- TELL US WHERE, AGAIN, AND PERHAPS, IT IS IN ONE OF THE RESTATEMENT CONCEPTS, OR WHATEVER, WHAT IS THE BEST

ARTICULATION THAT IN DEALING WITH THE SUBSTANCE LIKE THIS, THAT THERE IS A DUTY TO ANTICIPATE THE CRIMINAL INTERVENTION OR ACTIVITIES OF THE THIRD PARTY AND ARTICULATE THAT FOR ME AS CLEARLY AS YOU CAN.

>> IT IS IN SECTION 302, WHICH DEFINES ESSENTIALLY THE STANDARD OF -- CONTAINED ON ZONE OF RISK AND IF YOU LOOK AT 302-A IT SPECIFICALLY ADDRESSES RISK OF NEGLIGENCE OR RECKLESSNESS OF OTHERS THAT ACTS IN CONJUNCTION WITH THE AFFIRMATIVE ACTS OF THE DEFENDANT THAT CREATED THE INITIAL RISK.

>> THE DIFFICULTY I'M HAVING

WITH THIS CONCEPT HERE OF YOU SAYING THAT ESSENTIALLY ALL THAT IS IS A RYE STATEMENT OF McCAIN

--

RESTATEMENT OF McCAIN IS IT SEEMS TO ME IN EXAMINING THIS LITANY OF CASE THAT'S WE HAVE

HELD THAT THERE IS A DUTY, UNDER THE McCAIN ANALYSIS, THAT VIRTUALLY EVERY ONE OF THEM INVOLVES SOME DIRECT CONNECTION THEN EITHER WITH THE ANTICIPATED VICTIM OR THE DEFENDANT, YOU KNOW, HAVING SPECIAL KNOWLEDGE HERE OF THE RISK THAT WOULD INCORPORATE OR INCLUDE A DEFENDANT.

THAT IS THERE -- THAT BECAUSE THE RISK IS SO HIGH, THAT YOU ANTICIPATE.

EVEN WITH THE CRIMINAL ACTIVITY, YOU KNOW, OF SOMEBODY, LIKE THE KMART CASE.

YOU KNOW, WHERE THERE IS' PERSON THAT COMES IN AND I FORGET WHETHER THEY WERE INTOXICATED OR DOING WHATEVER, BUT.

>> INTOXICATED.

>> BUT THERE, YOU KNOW, WE ARE PRESENTED WITH CIRCUMSTANCES THAT WOULD ALERT AT LEAST WE SAID SO, THAT WOULD ALERT A REASONABLE STORE OWNER THAT

DEALS IN FIREARMS.

TO THAT RISK.

NOW, I'M HAVING DIFFICULTY -- WHERE IT SEEMS-LIKE LIKE THERE IS A BIG GAP, IN THIS CASE, WHERE HAVE YOU ALLEGED THAT THAT GAP HAS BEEN FILLED HERE?

>> WE ARE -- WHAT I AM SAYING IS THAT 302 ITSELF IS THE RESTATEMENT THAT FOLLOWS McCAIN. 302-A ON -B DEAL WITH THE SITUATIONS OF WHEN THE CONDUCT OF THE THIRD-PARTY IN THE RANGE OF CONDUCT FROM NEGLIGENCE TO CRIMINAL -- NEGLIGENT TO CRIMINAL, THAT CAN TIE IN TO THE ACT OF THE DEFENDANT THAT CREATED THE INITIAL RISK. AND BECOMES PART OF THE ZONE OF

RISK FOR WHICH A DUTY CAN BE IMPOSED.

>> BEFORE OCTOBER OF 2001, OVER HERE, HAD ANYONE DIED FROM A -- ANTHRAX FROM HAVING RECEIVED IT IN THE MAIL?

>> WE ARE NOT AWARE OF THAT EVER HAPPENING.

>> OKAY, HOW IS THIS SOMETHING THAT COULD BE ANTICIPATED EVEN FROM THE NEGLIGENT STORAGE OVER ANTHRAX.

>> BECAUSE THE VARIOUS VIRUSES THAT WERE MISSING FROM THE LAB IN 1992 HAD NO OTHER FUNCTION OTHER THAN TO KILL PEOPLE. THAT IS WHY THEY WERE DEVELOPED. THAT IS WHY THE GOVERNMENT --

>> BUT NONE OF THESE VIRUSES, EBOLA OR OTHER ONES YOU REFERRED TO, HAVE THEY EVER BEEN SENT OVER THE MAIL TO ATTACK SOMEBODY AND HARM THEM?

>> WE DO NOT KNOW.

I AM NOT AWARE OF ANY --

>> SO EVEN AFTER ANY OF THESE VIRUSES THAT WERE IN THE POSSESSION OF THE UNITED STATES, HOW COULD THEY ANTICIPATE THAT THE NEGLIGENT STORAGE OF THESE VIRUSES COULD RESULT IN SOMEBODY EITHER NEGLIGENTLY OR DELIBERATELY SENDING IT OVER THE MAIL TO SOMEBODY TO ATTEMPT TO HARM THEM?

>> YOUR HONOR, THAT DEALS WITH FORESEEABILITY IN THE CONTEXT OF CAUSATION.

>> ISN'T THERE FORESEE --

>> YES, THERE IS, RISK WHICH IS --

>> BUT YOUR ZONE OF RISK IS THE ENTIRE WORLD.

>> IT'S THE ENTIRE WORLD THAT COULD BE AFFECTED BY THIS PARTICULAR PATHOGEN, YES. WE WOULD STILL HAVE TO PROVE NEGLIGENCE.

BUT WHAT YOU'RE TALKING ABOUT IS THE FORESEEABILITY OF THIS DEATH OCCURRING IN A PARTICULAR MANNER.

>> I'M TALKING ABOUT THE FORESEEABILITY OF ANY DEATH OCCURRING BY SENDING ANYTHING OVER THE MAIL WHEN IT HASN'T EVER HAPPENED.

>> BUT IT WOULDN'T MATTER IF THEY PUT IT IN SOMEBODY'S SANDWICH --

>> BUT THAT HASN'T HAPPENED EITHER.

THE ONLY DEATHS WE KNOW ABOUT CONCERNING ANTHRAX WERE RELATED TO PEOPLE WORKING WITH THE ANTHRAX OR AROUND THE ANTHRAX, NOT ANYBODY WHO WAS TOTALLY REMOVED FROM WHERE THE ANTHRAX WAS AND RECEIVED IT SOMEHOW.

>> BUT THEN YOU WOULD BE LIMITING EVERY ENTITY THAT DEALS WITH ULTRA HAZARDOUS MATERIALS. SOMEBODY HAS TO DIE FIRST.

>> WELL, MAYBE IN 2001 YOU WOULD HAVE BEEN CORRECT.

MAYBE THERE HAD ALREADY BEEN ONE INCIDENT, AND SOMEBODY, EVERYBODY, ALL THE LABORATORIES HAVE NOW BEEN ALERTED THAT ANTHRAX COULD BE USED BY SENDING IT OVER THE MAIL.

THAT WASN'T THE CASE IN OCTOBER OF 2001.

>> WE WOULD NOT KNOW ACCIDENTS THAT OCCURRED WITH ANTHRAX THAT THE GOVERNMENT MAY KNOW OF IN THEIR TESTING IN THE HISTORY OF WARFARE, AND ALL OF THAT --

>> CAN I ASK, LET ME JUST ASK -- AND MAYBE THIS WOULD HELP CLARIFY AT LEAST FOR ME WHY THERE WOULDN'T HAVE TO BE A DEATH BEFORE THERE WOULD BE A DUTY.

AGAIN, UNLIKE FERTILIZER OR SOMETHING ELSE, IF I'M UNDERSTANDING WHAT YOU'VE ALLEGED AND WHAT YOU WOULD INTEND TO PROVE IS THAT THE ANTHRAX, THE FEAR THAT THE FEDERAL GOVERNMENT HAD IS THAT AGENTS LIKE ANTHRAX WERE GOING TO BE USED BY FOREIGN COUNTRIES AS AGENTS OF BIOLOGICAL WARFARE, AND THAT, I ASSUME, WAS NOT INTENDED THAT THEY WERE GOING TO

USE IT ON THEIR OWN PEOPLE.
BUT THE IDEA OF IT WAS THAT THEY
WERE LOOKING AT IT BECAUSE OF
THE FEAR THAT TERRORISTS COULD
GET A HOLD OF THIS AND CAUSE
MASSIVE HARM TO OUR COUNTRY.
IS THAT CORRECT?

>> CORRECT, OR IT COULD RESULT
FROM NEGLIGENCE, OR --

>> WAS IT THE TERRORISTS OR
FOREIGN COUNTRIES?

THERE'S A DISTINCTION THERE.
IN 2001 WERE WE WORRIED ABOUT
TERRORISTS SENDING IT, OR WERE
WE WORRIED ABOUT FOREIGN POWERS
SENDING IT IN WARFARE?

>> THAT WOULD BE SOMETHING THE
FEDERAL GOVERNMENT WOULD HAVE IN
THEIR KNOWLEDGE.

WE'VE SEEN RADIOACTIVE MATERIALS
TO ASSASSINATE PEOPLE.

WE DON'T KNOW IF IT'S HAPPENED
BEFORE IN THE GOVERNMENT --

>> WELL, WHAT DO YOU KNOW ENOUGH
OF THAT YOU CAN ACTUALLY MAKE
ALLEGATIONS IN A COMPLAINT
THAT'LL WITHSTAND A MOTION TO
DISMISS?

>> OUR CLAIM IS --

>> YOU KNOW ENOUGH, AND I'M
HAVING TROUBLE WITH YOU GOING
BACK AND FORTH, IT SEEMS TO ME,
BETWEEN THE CONCEPTS OF
NEGLIGENCE, PERHAPS, AND JUST
THE NEGLIGENCE AND NEGLIGENTLY
PROVIDING SECURITY THAT
SOMETHING DOESN'T GET OUT.

AND THEN WITH THE BROADER
CONCEPT WHICH MAY BE WORKED IN
WITH EITHER NEGLIGENCE OR
PROXIMATE CAUSE OF HOW THAT
LEADS TO THE INJURY, YOU KNOW,
TO YOUR CLIENT.

ARE YOU SAYING IN THIS CASE ALL
THE ONLY EVIDENCE YOU HAVE IN
TERMS OF PROVING NEGLIGENCE OR
ESTABLISHING NEGLIGENCE IS JUST
THAT THEY SOMEHOW DIDN'T HAVE
SUFFICIENT STANDARDS --

>> NO.

>> TO PREVENT THIS THING?

>> NO, WE ARE NOT.

>> WHAT ARE THE ELEMENTS,
THEN -- [INAUDIBLE] WHAT IS A

JURY GOING TO BE TOLD?

>> YOU SEE, THE PROBLEM WE HAVE HERE IS YOU ARE TRYING TO IMPOSE UPON MY CLIENT A DUTY SHE CAN NEVER OVERCOME.

WE DON'T KNOW THE GOVERNMENT'S KNOWLEDGE OF THE RISKS, THE SPECIFIC USES IN THE PAST OF THIS, HOW THEY DEVELOPED IT, HOW IT COULD BE PROTECTED.

>> YOU NEED TO KNOW ENOUGH --

>> WE KNOW ENOUGH TO SAY IT WAS ULTRA HAZARDOUS, IT WAS DESIGNED TO KILL PEOPLE.

THEY KNEW IT HAD GOTTEN OUT OF THEIR LAB.

>> DOES THE SAME THING HAPPEN IF, FOR INSTANCE, A MILITARY DEPOT IS STORING CLAYMORE MINES AND -- [INAUDIBLE] MINE, YOU KNOW, COMES UP MISSING AND, YOU KNOW, AND LATER 5,000 MILES AWAY THE CLAYMORE MINE IS USED TO KILL SOMEBODY?

>> THERE IS AN EXAMPLE IN SECTION 521 OF THE RESTATEMENT DEALING WITH THE GOVERNMENT'S DUTY IN ULTRA HAZARDOUS MAINTENANCE OF MUNITION DUMPS WHICH, I BELIEVE, WILL ADDRESS THAT.

BUT THE POINT IS THIS, DUTY IS DEFINED BY THE NATURE OF THE RISK CREATED, THE GENERAL NATURE.

THE LANGUAGE IS WHETHER THE CONDUCT FORESEEABLY CREATED A BROADER ZONE OF RISK.

YOU'RE ASKING US TO PROVE CAUSATION SAYING COULD THEY ANTICIPATE THIS PARTICULAR MANNER OF KILLING SOMEBODY WHEN WE HAVE NOT BEEN ALLOWED ANY DISCOVERY.

WE DON'T KNOW WHAT THE GOVERNMENT KNEW, WE DON'T KNOW WHAT THEY DEVELOPED, WE DON'T KNOW IF IT HAS HAPPENED UNDER SIMILAR SITUATIONS BEFORE.

MAYBE NOT THE MAIL, MAYBE SIMPLY --

>> WELL, WHAT ABOUT THE LAB IN THIS CASE?

WHY THIS PARTICULAR LAB, WHY NOT

ALL --

>> BECAUSE THIS PARTICULAR STRAIN WAS SENT TO THIS PARTICULAR LAB.

>> ALONE?

>> WELL, THERE WAS ONE OTHER ONE, AND THEY ARE NOT A PARTY TO THIS SUIT.

I CAN'T COMMENT, OBVIOUSLY, ON THAT.

>> I GUESS MY CONCERN IS AT LEAST ON THE ALLEGATION OF THE COMPLAINT, YOU'VE MADE NO ALLEGATION TYING THE GOVERNMENT TO THIS LAB TO THIS INCIDENT OTHER THAN IT MAY BE THE SAME STRAIN.

>> IT'S THE SAME STRAIN THAT WAS CREATED SOLELY AT FORT DIETRICH AND SENT TO PARTICULAR LABS. THIS WAS ONE OF THEM.

>> OVER A HOW MANY YEAR PERIOD?

>> WELL, I DON'T KNOW THAT WE HAVE ALL OF THIS INFORMATION.

THIS IS NOT -- THIS IS NOT INFORMATION WE CAN GET.

AND WHEN YOU TRY TO IMPOSE A BURDEN ON US TO GIVE YOU DETAILS OF FORESEEABILITY THAT RELATE TO CAUSATION, THAT IS WHAT WE ARE ABLE TO GET IN DISCOVERY.

WE CANNOT DO THAT --

>> SO WHAT YOU'RE SAYING IN ORDER TO HAIL ANY OF THE 12 LABS INTO COURT TO ANSWER TO YOUR COMPLAINT, THIS IS ALL YOU HAVE TO ALLEGE?

>> IF THEY HAD THIS PARTICULAR STRAIN OF ANTHRAX AND WE KNOW THAT THAT IS THE ONE THAT CAUSED THE DAMAGE --

>> AND YOU GOT THAT KNOWLEDGE FROM THE PUBLIC RECORDS OF THE CRIMINAL INVESTIGATION OF THE --

>> WELL, WE HAVEN'T GOTTEN ANYTHING FROM THE CRIMINAL INVESTIGATION AS OF YET, BUT WE HAVE GOTTEN IT FROM CERTAIN SOURCES, AND I HONESTLY COULDN'T TELL YOU BECAUSE [INAUDIBLE] BUT WE DO HAVE SOME INFORMATION, YES.

BUT IT IS UNFAIR TO IMPOSE ON US

A DUTY OF SPECIFICITY REGARDING THE RISK WHEN THE PARTY WITH SUPERIOR KNOWLEDGE, THE PARTY THAT HAD EXCLUSIVE CONTROL, THE PARTY THAT DEVELOPED ALL THIS IS THE ONE THAT HAS HAD NO OBLIGATION TO PROVIDE IT TO US YET BECAUSE WE'VE HAD ABSOLUTELY NO DISCOVERY.

THEY CLEARLY CREATED A BROADER ZONE OF RISK THAT CAUSED A GENERAL THREAT OF HARM, AND MY DECEDENT FELL WITHIN THAT, HONESTLY.

>> IF YOU'LL BRING YOUR ARGUMENT TO A CONCLUSION.

>> I JUST WANT TO SAY ONE OTHER THING, AND THAT IS THE CONCERN ABOUT OPENING THE FLOODGATES OF LITIGATION AND EXTENSIVE LIABILITY WHICH EVERY DEFENDANT RAISES, HAS TO BE CONSIDERED IN -- TO MAKE THE GOVERNMENT LIABLE TO THE SAME EXTENT AS A PRIVATE ENTITY WAS A DECISION MADE BY CONGRESS.

THIS COURT SHOULD NOT BE CONCERNED WITH WHETHER A PRIVATE INDIVIDUAL'S LIABILITY IMPOSED ON THE GOVERNMENT CREATES CONCERNS ABOUT THE SCOPE OF IT. THAT IS FOR THE GOVERNMENT TO DEAL WITH LEGISLATIVELY AS THEY DID IN THE FEDERAL TORT CLAIMS ACT, AND WE ARE SIMPLY TRYING TO SEEK JUSTICE FOR OUR CLIENT IN WHAT WE BELIEVE WE HAVE PROVED IN EXISTENCE OF A DUTY.

>> YOU'VE EXHAUSTED YOUR TIME, BUT I'M GOING TO GIVE YOU TWO MINUTES IN REBUTTAL. TWO MINUTES, PLEASE.

>> THANK YOU VERY MUCH, YOUR HONOR --

>> JUST THAT LAST STATEMENT IN THE CERTIFIED QUESTION, IT DOESN'T LOOK LIKE WE ARE BEING ASKED TO TREAT THIS AS A SOVEREIGN IMMUNITY CASE, AND WOULD YOU AGREE AS WE LOOK AT THIS OTHER THAN THIS QUESTION OF STRICT LIABILITY THAT WE SHOULD LOOK AT THIS AS A NEGLIGENCE

CASE AND NOT MAKE SPECIAL RULES
BECAUSE IT'S THE GOVERNMENT?
THAT IS NOT BEFORE US?
>> THAT'S TRUE, YOUR HONOR.
THE QUESTION BEFORE THE COURT IS
WHETHER A PRIVATE PARTY UNDER
FLORIDA LAW WOULD HAVE A DUTY
UNDER THE CIRCUMSTANCES ALLEGED
HERE.

ACTUALLY, I'D LIKE TO ADDRESS
THE SCOPE OF THE CERTIFIED
QUESTION AND HOW THIS COURT
SHOULD TRY TO ANSWER IT.
THERE HAVE BEEN A NUMBER OF
QUESTIONS ABOUT MISSING FACTS IN
THE QUESTION OR BREADTH OR
NARROWNESS OF THE QUESTION, AND
I'D LIKE TO TRY TO SUGGEST HOW
THIS COURT COULD APPROACH THAT
GIVEN THE ISSUES WITH THE
CERTIFIED QUESTION ITSELF.
THERE ARE A FEW THINGS THAT THIS
COURT CAN SIMPLIFY IN ANSWERING
THIS QUESTION.

IN THIS CASE THERE IS NO
RELATIONSHIP OF ANY KIND ALLEGED
BETWEEN EITHER OF THE DEFENDANTS
AND EITHER THE UNKNOWN THIRD
PARTY, CRIMINAL ATTACKER, OR
MR. STEVENS.

SO ALL OF THE CASES FROM THE
LOWER COURTS OF THE CASE AND
FROM THIS COURT THAT ANALYZE
VARIOUS SCENARIOS TO DECIDE IF
THEY QUALIFY AS SPECIAL, NONE OF
THAT IS RELEVANT.

THERE'S NO RELATIONSHIP -- SO
THE COURT DOESN'T HAVE TO SAY
ANYTHING.

>> DO YOU SEE THAT
MR. BURLINGTON'S DISTINCTION IN
ALL THOSE OTHER CASES INVOLVING
CRIMINAL ACTIVITY, THE PERSON
DOESN'T CREATE THE
INSTRUMENTALITY SUCH AS HERE
WITH THE ANTHRAX, THAT IN OTHER
WORDS IF THERE'S CRIMINAL
ACTIVITY IN A PARKING LOT OR IN
AN AREA, THAT'S NOT CREATED BY
THE PERSON.

AND SO THE AIR WE'RE TALKING
ABOUT, SIMPLY THE FAILURE TO
PROVIDE SECURITY HERE IF YOU
MANUFACTURE ANYTHING, ANY

DANGEROUS SUBSTANCE, YOU'VE GOT DUTIES TO MAKE SURE -- DON'T YOU HAVE DUTIES, THEN, THAT ARE DIFFERENT THAN JUST IF THEY WERE, YOU KNOW, A LANDLORD?

>> I DON'T THINK THAT THAT HELPS THE PLAINTIFF, YOUR HONOR, BECAUSE THE SAME THING COULD BE SAID OF GUNS, MOTOR VEHICLES, AND THE CASES IN THIS STATE ARE CLEAR THAT JUST BECAUSE SOMETHING CAN BE USED AS A WEAPON DOESN'T MEAN THAT A PARTY HAS A DUTY TO PREVENT --

>> LET ME TRY IT THIS WAY, WE HAVE NUCLEAR-POWERED, NUCLEAR-FUELED POWER FACILITIES IN THE STATE OF FLORIDA, SO YOU WOULD ASK US TO HOLD THAT EVEN THOUGH ONE OF THOSE OPERATORS LEFT ALL THE DOORS OPEN, DID NOT STORE PROPERLY, WHATEVER THE STANDARDS ARE ACCORDING TO THAT KIND OF MATERIAL, AND SOMEONE WALKS IN AND REMOVES RADIOACTIVE MATERIAL AND TAKES IT OUT INTO THE COMMUNITY, THERE WAS NO DUTY ON THE PART OF THE OPERATOR OF THAT POWER PLANT TO REASONABLY PROTECT WHATEVER THE STANDARDS ARE, AND THAT'S FAIR TO THEM, HAD NO DUTY WHATSOEVER TO SOMEONE THAT'S INJURED BY THAT RADIOACTIVE MATERIAL EVEN THOUGH WE KNOW THAT IT'S DANGEROUS, AND WE ASSUME FOR THE PURPOSES OF THE COMPLAINT BECAUSE IT'S ALLEGED THAT THERE'S IMPROPER STORAGE, ACCESS, THOSE KINDS OF THINGS.

AT THE TOP OF THE THIRD PAGE IS WHERE THOSE ARE ALL CONTAINED ON THE COMPLAINT, SO THERE'S NO DUTY IN FLORIDA?

>> YOUR HONOR, I DON'T KNOW IF THERE ARE STATUTES --

>> JUST COMMON LAW DUTY.

>> THE TRADITIONAL COMMON LAW RULE IS THERE IS -- JUSTICE WELLS' QUESTION OF WHO THE DUTY IS OWED TO.

IN YOUR HYPOTHETICAL I DON'T KNOW WHETHER THE PERSON WHO TOOK THE MATERIAL OUT OF THE FACILITY

HAD SOME RELATIONSHIP --

>> DOES THAT MAKE A DIFFERENCE?

>> IT DOES UNDER THE TRADITIONAL ANALYSIS --

>> IF HE TAKES IT?

>> I'M SORRY, YOUR HONOR?

>> IF THE FACILITY IS JUST TOTALLY NEGLIGENT, IT MAKES A DIFFERENT --

>> THE FACILITY HAS A RELATIONSHIP WITH THE PEOPLE THAT WORK FOR IT.

IT HAS THE ABILITY AND RESPONSIBILITY TO CONTROL THEIR CONDUCT.

BUT, AGAIN, THERE'S NO RELATIONSHIP OF ANY KIND ALLEGED BETWEEN EITHER OF THE DEFENDANTS AND EITHER THE PERPETRATOR OR THE VICTIM, SO THAT RAISES THE QUESTION JUSTICE WELLS ASKED OF WHO IS THE DUTY OWED TO?

THERE'S NO WAY AROUND THE CONCLUSION, THE DUTY IS OWED TO THE ENTIRE WORLD.

THERE'S NO PRECEDENT FOR HOLDING A DUTY OWED TO THE ENTIRE WORLD IN A CONTEXT OF THIRD-PARTY CRIMINAL CONDUCT.

>> THANK YOU VERY MUCH.

>> YOUR HONOR, THERE ARE TWO FACTUAL ISSUES I'D LIKE TO CORRECT THE RECORD ON VERY BRIEFLY.

THANK YOU VERY MUCH.

THE FIRST IS THE SUGGESTION THAT THE MATERIALS AT FORT DIETRICH WERE PART OF SOME KIND OF --

>> THAT'S BEYOND WHERE WE ARE.

>> I JUST WOULDN'T WANT YOUR HONORS -- [INAUDIBLE]

>> WE'RE LOOKING AT FOUNDATIONAL LAW, NOT ALL THE FACTS OF THE CASE.

SO WE DON'T REALLY NEED TO GO THERE.

WE WON'T GO INTO THOSE.

>> OKAY, THANK YOU.

THE SECOND FACT THAT THE PLAINTIFF DOES THINK, IF I MAY VERY BRIEFLY ADDRESS THIS MEMO ATTACHED TO THE COMPLAINT FROM 1992 THAT SAYS FROM SOMEONE AT FORT DIETRICH THAT SAYS THEY'RE

MISSING EM BLOCKS.

EM BLOCKS ARE ELECTRON

MICROSCOPE SLIDES --

>> HAS THIS ALL BEEN DEVELOPED
IN THE RECORD?

>> NO, BUT THE PLAINTIFF PUT
THAT MEMO IN THE RECORD.

>> THANK YOU VERY MUCH.

>> THAT'S WHAT EM BLOCKS ARE.

>> THANK YOU VERY MUCH.

WE'LL TAKE THIS CASE UNDER
ADVISEMENT, WE THANK BOTH
PARTIES FOR WELL-ARTICULATED
POSITIONS, AND WE'LL TAKE THE
CASE UNDER ADVISEMENT.