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**Howard Curd v. Mosaic Fertilizer, LLC**

**SC08-1920**

THE LAST CASE ON THE COURT'S  
AGENDA IS CURD VERSUS MOSAIC  
FERTILIZER.

>> MAY I PLEASE THE COURT.

I AM WALLACE POPE FROM  
CLEARWATER FLORIDA, HERE FOR THE  
COMMERCIAL FISHERMAN PETITIONER  
AND MY CO-COUNSEL IS SANDRA  
DREYFUS.

THE FIRST ISSUE IN THIS MATTER  
FOR YOUR CONSIDERATION IS  
WHETHER YOU MEANT WHAT YOU SAID  
IN AMERICAN AVIATION, WHERE YOU  
HELD THAT THE ECONOMIC LAW BARS  
CLAIMS ONLY WHERE THE PARTIES  
ARE IN CONTRACTUAL PRIVITY OR  
THE DEFENDANT IS A MANUFACTURER  
OR DISTRIBUTOR.

>> CAN I ASK A QUESTION, MAYBE A  
FRIENDLY QUESTION.

WHAT DOES THE RULE HAVE TO DO--  
ISN'T THE ISSUE IN THE CASE  
WHETHER YOUR CLIENTS HAD A  
PROPERTY INTEREST OR PROTECTABLE

INTEREST IN THE SEA, FISH,  
UNDERWATER LIFE IN THIS AREA  
WHICH IS, TO ME, NOT AN ECONOMIC  
LAWFUL ANALYSIS TO BEGIN WITH.

>> YOUR SECOND THING YOU SAID IN  
AMERICAN AVIATION WAS THAT, IN  
GENERAL ACTIONABLE CONTACT  
SHOULD NOT GO UNCOMPENSATED  
SOLELY BECAUSE THE HARM IS  
UNACCOMPANIED BY ANY INJURY TO A  
PERSON OR OTHER PROPERTY.

>> THEN THE NEXT LINE, WHICH  
SAID, WHAT ARE WE THEN SAYING,  
CASES ARE BEING JUDGED BY NORMAL  
PRINCIPLES OF NEGLIGENCE, WHICH  
MEANS DUTY AND PROXIMATE CAUSE  
IN DAMAGES, RIGHT?

SO, THAT IS WHAT YOU NEED TO  
FOCUS ON.

HAVE WE EVER EXPLAINED WHERE THE  
PROTECTABLE PROPERTY INTEREST IS  
FOR THE COMMERCIAL FISHERMAN AND  
WHETHER, ABSENT THE STATUTE,  
THERE IS, BASED ON ALL OF THESE  
OTHER CASES FROM OTHER  
JURISDICTIONS, THAT COMMERCIAL  
FISHERMEN APPEAR TO HAVE-- WHEN  
THE GENERAL PUBLIC MIGHT NOT,

AND TO ME THAT IS A WHOLE  
DIFFERENT SPECIES OF CASE IN  
AMERICAN AVIATION.

>> THIS COURT DOES NOT ANSWER  
THE QUESTION AS TO WHETHER THESE  
COMMERCIAL INTERESTS, THESE  
COMMERCIAL FISHERMEN HAVE A  
SUFFICIENT INTEREST IN THESE  
FISH TO MERIT A COMMON LAW  
CAUSE.

>> ISN'T THAT WHAT THE CASE IS  
ABOUT?

A MATTER OF FIRST IMPRESSION.

>> IT IS A MATTER OF FIRST  
IMPRESSION, SO WHAT YOU HAVE  
SAID THOUGH, AND THE CASE WHICH  
YOU DECIDED WAY BACK IN 1938,  
WAS THAT THERE IS A BIG  
DIFFERENCE BETWEEN THE STATE'S  
OWNERSHIP INTEREST IN FISH,  
WHICH IT REALLY HOLDS AS THE  
CUSTODIAN FOR THE PUBLIC,  
ESPECIALLY A LICENSED COMMERCIAL  
FISHERMAN AND THE STATE'S  
OWNERSHIP INTERESTS IN BUILDING  
VEHICLES, WHICH IS AN ENTIRELY  
DIFFERENT MATTER, AND YOU WENT  
ON TO MAKE THAT DISTINCTION.  
HERE, THE FISHERMEN HAVE A STATE

LICENSE RIGHT TO GO OUT AND GET  
TO THESE FISH, AND THEY HAVE  
BEEN DOING THIS FOR YEARS, AND  
THEY EXPECTED TO BE ABLE TO DO  
IT, AND GO OUT AND PULL THE FISH  
ON BOARD, AT WHICH TIME THEY  
BELONG TO THEM.

BEFORE THEY GOT THEM ON BOARD,  
IT WAS AN EXPECTANCY BUT YOU  
HAVE PROTECTED ECONOMIC  
EXPECTANCIES, AND THERE IS A  
WHOLE BODY OF MARITIME LAW,  
WHICH IS AN EXCEPTION TO WHAT  
THEY CALL THE ECONOMIC LAW RULE  
THERE, WHICH IS THE ROBBINS DRY  
DOCK DECISION.

>> BECAUSE THEY HAVE A LICENSE,  
THAT GIVES THEM THE RIGHT.

>> YOUR HONOR, IT GIVES THEM AN  
ECONOMIC EXPECTANCY.

>> I HAVE A LICENSE TO DRIVE.

[INAUDIBLE]

>> TO TELL YOU THE TRUTH, YOUR  
HONOR, IT WOULD DEPEND ON HOW  
YOU ARE HARMED BY IT.

>> IF YOU ARE A TRUCK DRIVER, IF  
YOU ARE A LONG-HAUL TRUCK DRIVER  
AND ALL OF A SUDDEN SOME

INTERSTATE IS CLOSED DOWN--

>> AND THE QUESTION IS?

>> DO THEY HAVE A CAUSE OF  
ACTION?

>> UNDER COMMON LAW?

I AM NOT SURE.

I HAVE NOT THOUGHT ABOUT THAT.

>> WOULD IT BE THE SAME ANALOGY  
AS HERE?

>> I DON'T THINK SO BECAUSE THE  
COMMERCIAL FISHERMAN-- THERE IS  
SUCH A CONNECTION BETWEEN THE  
FISH THAT THE STATE IS HOLDING  
IN CUSTODY FOR THEM AND THEIR  
RIGHT TO EARN A LIVING, THAT  
SEEMS TO ME TO BE A VERY CLOSE  
NEXUS AND IS A LITTLE BIT  
DIFFERENT FROM A TRUCK DRIVER  
WHO HAS TO TAKE A DETOUR OR HAS  
TO STOP BECAUSE THE ROAD HAS  
BEEN POLLUTED.

>> YOU CITED IN YOUR BRIEF  
NUMEROUS CASES FROM OTHER  
JURISDICTIONS THAT SAY,  
INCLUDING, ALTHOUGH THE RIGHT TO  
FISH MAY BE SHARED BY THE  
PUBLIC, FISHERMEN HAVE  
COMMERCIAL INTERESTS IN THE  
WATER AND NOT AS A CONSEQUENCE

THERE ARE SPECIFIC SCENARIOS TO  
BE COVERED.

THERE IS EVERY CASE FROM ALASKA,  
TEXAS TO LOUISIANA ON IT.

ARE THOSE THE CASES THAT YOU ARE  
RELYING ON?

>> ABSOLUTELY.

MY BRIEF IS HALF FULL OF CASES  
FROM OTHER JURISDICTIONS IN  
WHICH COMMERCIAL FISHERMEN ARE  
ALLOWED TO RECOVER UNDER EXACTLY  
THE CIRCUMSTANCES AGAINST  
SOMEONE WHO HAS DESTROYED THEIR  
FISHERY.

>> SO, IS YOUR ARGUMENT-- I AM  
TRYING TO FIGURE AND BASICALLY  
WHAT THIS.

YOUR ARGUMENT IS THEN, BECAUSE  
THESE PEOPLE ARE COMMERCIAL  
FISHERMEN AND ARE LICENSED BY  
THE STATE, THAT THEY HAVE SOME  
VESTED EXPECTATION IN THIS FISH  
THAT IS DIFFERENT FROM THIS--

>> ABSOLUTELY, THEY HAVE AN  
ECONOMIC EXPECTANCY THAT THEY  
CAN GO TO THOSE WATERS AND  
REDUCE THOSE FISH TO THEIR  
POSSESSION AND SELL THEM TO MAKE

A LIVING.

FLORIDA HAS TRADITIONALLY BEEN  
VERY PROTECTIVE OF PEOPLE IN THE  
WAY THEY MAKE A LIVING, AND I  
HAVE CITED A NUMBER OF INSTANCES  
IN MY BRIEF.

>> IS THIS A COMMON LAW RIGHT OR  
IS THIS A RIGHT UNDER  
SECTION 376?

>> I WOULD LIKE TO THINK IT IS  
BOTH AND I AM ARGUING FOR BOTH.  
THE SECOND POINT THAT WAS MADE,  
AT LEAST IN MOSAIC'S BRIEF, THAT  
THERE WAS NO DUTY, THAT MOSAIC  
HAD NO DUTY TO THESE FISHERMEN  
TO AVOID THIS HARM TO THEM, SO I  
POINT OUT TO YOU IN OUR BRIEF,  
THE MCCAIN CASE, WHICH YOU  
DECIDED IN 1992, WHICH SAYS A  
LEGAL DUTY WILL ARISE WHATEVER A  
HUMAN ENDEAVOR CREATES A  
GENERALIZED AND FORESEEABLE RISK  
OF HARMING OTHERS.

YOU ALSO HELD IN THE CLAY  
ELECTRIC CASE FOUR DIFFERENENT  
BASES FOR A DUTY TO ARISE.  
ADMINISTRATIVE REGULATIONS, AND  
JUDICIAL INTERPRETATIONS OF  
THOSE, OTHER JUDICIAL PRECEDENTS

AND THE DUTY ARISING FROM THE  
GENERAL FACTS OF THE CASE, SO--  
>> SO WHERE IS THE DUTY HERE?  
>> IS IT REASONABLY FORESEEABLE  
THAT COMMERCIAL FISHERMEN WILL  
BE HARMED BY POLLUTION THAT  
DESTROYS THEIR FISHERY?  
I THINK THAT ANSWERS ITSELF.  
FURTHERMORE, WE HAVE  
SECTION 37630, THE POLLUTION  
ACT, UNDER WHICH WE ALSO  
PERCEIVE-- WHICH IMPOSES STRICT  
LIABILITY ON POLLUTERS WITH A  
WHOLE HOST OF LEGISLATIVE  
FINDINGS ABOUT WHY THIS ECONOMIC  
BURDEN ON POLLUTERS IS  
JUSTIFIED.  
SO, THERE ARE MULTIPLE SOURCES  
OF DUTY TO SUPPORT THE COMMON  
LAW CLAIM AND THE FISHERMAN  
CERTAINLY HAVE, TO WRAP THIS UP  
ON THIS POINT, ENOUGH OF AN  
INTEREST, ENOUGH OF A  
PROPRIETARY EXPECTANCY IN THESE  
FISH TO SUPPORT A CAUSE OF  
ACTION.  
IT DOESN'T SEEM TO ME TO BE A  
HUGE STRETCH TO ALLOW A CAUSE OF

ACTION IN COMMON LAW, AND LET ME  
TURN MY ATTENTION TO--

[INAUDIBLE]

>> WHO TYPICALLY--

I'M NOT SURE I KNOW WHO

TYPICALLY BRINGS--

TTTHE STATE HAS A RIGHT TO DO IT

BUT EACH ONE OF THESE ACTS ALSO

CONTAINS A PRIVATE CAUSE OF

ACTION FOR ANYONE WHO IS INJURED

BY A POLLUTED ACT.

[INAUDIBLE]

THE QUESTION I HAVE THOUGH IS--

[INAUDIBLE]

WHO ELSE CAN BRING THE SUIT ON A

BOAT?

[INAUDIBLE]

DO I GET TO SUE BECAUSE THE

WATER I WANT TO ENJOY-- SCUBA

DIVERS WHO ENJOY THE WATER OR

WHO HAVE SCUBA DIVING CLASSES.

WHERE DOES IT STOP?

>> YOUR HONOR I DON'T KNOW WHERE

IT STOPS BUT IT DOES NOT STOP

WITH A COMMERCIAL FISHERMAN.

>> ALL THE CASES DO SAY WHERE IT

STOPS.

I WAS SURPRISED HOW MUCH LAW

THERE REALLY WAS ON THIS.

THERE HAS BEEN A LOT OF  
POLLUTION OVER THE LAST 50  
YEARS.

COMMERCIAL FISHERMEN WHO HAVE A  
LICENSE TO FISH--

IT HAS NEVER BEEN EXTENDED TO  
BOATERS OR-- THAT IS WHAT THEY  
ESTABLISH, CORRECT?

>> THAT IS ALL I'M ASKING FOR,  
IS COMMERCIAL FISHERMEN SHOULD  
HAVE A RIGHT TO PROCEED.

>> WHEN YOU ANSWER A QUESTION IN  
GOOD FAITH, THE ANSWER TO THAT  
WOULD BE FROM THE CASE LAW AND  
OTHER JURISDICTIONS, IT STOPS  
WITH COMMERCIAL FISHERMEN WHO  
HAVE BEEN GRANTED A LICENSE BY  
THE STATE TO FISH FOR COMMERCIAL  
PURPOSES.

>> EXACTLY.

WHAT I'M ASKING THE COURT TO DO  
IS SAY IT USED TO STOP BEFORE  
THE COMMERCIAL FISHERMEN AND NOW  
INCLUDES THE COMMERCIAL  
FISHERMAN.

>> MR. POPE DOESN'T THE CLASS  
INCLUDE PEOPLE THAT ARE BEYOND A  
COMMERCIAL FISHERMAN?

>> NO YOUR HONOR, THE CLASS AS I RECALL, THE WAY WE DEFINE IT, IS PEOPLE WHO CATCH MARINE LIFE AND SELL IT, RESELL IT.

THAT IS HOW WE DEFINE IT.

WE WERE TRYING TO INCLUDE FISH HOUSES OR PEOPLE FURTHER DOWN THE SUPPLY CHAIN.

>> WOULD THE FISHERMEN AND THOSE PERSONS ENGAGED-- ALL THOSE PEOPLE ARE GOING TO BE LICENSED FISHERMEN?

>> THE LICENSED FISHERMAN WHO ARE ACTUALLY OUT ON THE WATER, PULLING THE FISH INTO THEIR BOAT, TAKING IT TO SOME WHOLESALE BUYER AND BUYING IT. THAT IS OUR CLASS RIGHT THERE.

WE HAVE NO CLASS CERTIFIED BUT THAT WOULD BE OUR CLASS.

>> THE DEPARTMENT OF ENVIRONMENTAL PROTECTION, THEY HAVE THE RIGHT ON BEHALF OF THE PUBLIC TO BRING AN ACTION FOR THE DAMAGES SUSTAINED BY THE POLLUTION?

>> CHAPTER 376 GIVES THE STATE A NUMBER OF RIGHTS, FAIRLY TO THE RIGHTS TO PROCEED AGAINST

POLLUTERS.

>> SO, THE DEFENDANT-- IT IS ONE  
THING TO SAY THEY SHOULDN'T  
ANSWER TO ANYBODY, BUT THE STATE  
BRINGS THE ACTION ON BEHALF OF  
THE PUBLIC AND THE COMMERCIAL  
FISHERMAN, WOULD THAT  
PRECLUDE THE PRIVATE CAUSE OF  
ACTION?

HERE I AM CONCERNED ABOUT--  
THERE IS UNLIMITED LIABILITY.

>> IT WOULD NOT PRECLUDE THE  
PRIVATE CAUSE OF ACTION AS I  
UNDERSTAND IT, BECAUSE THE STATE  
IS GOING TO BE BRINGING AN  
ACTION FOR HARM TO THE STATE'S  
NATURAL RESOURCES.

THE FISHERMEN ARE GOING TO BE  
BRINGING AN ACTION FOR MONEY OUT  
OF THEIR POCKETS, AND THOSE ARE  
DIFFERENT THINGS.

>> ALL YOU ARE ASKING-- MAYBE  
THAT THE EVIDENCE SHOWS THEY  
NEVER MADE A PROFIT, THEY DON'T  
FISH IN THIS PARTICULAR AREA.

ALL OF THAT WAS THE OTHER BASIS  
TO PRECLUDE THEIR CLAIM?

>> YES, THEY HAVE TO GO THROUGH

THE USUAL METHODS OF PROVING UP  
WHAT THEIR LOSSES ARE.

I MEAN, THEY STILL HAVE THE  
BURDEN.

SO, LET ME TURN MY ATTENTION A  
BIT TO CHAPTER 376, WHICH  
CONTAINS TWO SEPARATE  
INDEPENDENT ACTS.

THEY COVER TO SOME EXTENT THE  
SAME TERRITORY.

BOTH OF THESE LAWS WERE PASSED  
AT THE TIME WHEN FLORIDIANS  
BECAME AWARE THAT THEY WERE  
FOULING-- AND THE FIRST AND WAS  
PASSED IN 1970 AND ORIGINALLY  
CHALLENGED IN THE U.S. SUPREME  
COURT AND WAS HELD  
UNCONSTITUTIONAL.

IT IS NARROWER.

IT COVERS PETROLEUM PRODUCTS,  
PESTICIDES, AMMONIA, CHLORINE  
AND DERIVATIVES PRETTY MUCH  
LIMITED TO THE COASTAL AREAS.

IN 1983, A LAW PASSED 13 YEARS  
LATER IS VERY BROAD, COVERS BOTH  
POLLUTANTS WHICH IS MOSTLY  
PETROLEUM, PESTICIDES, AMMONIA  
ETC.AND ALSO HAZARDOUS  
SUBSTANCES, WHICH IS A LONG

FEDERALLY-CREATED LIST OF  
SUBSTANCES WHICH INCLUDES THE  
MOSAIC DISCHARGE, WHICH IS  
RELATED STUFF.

THIS SECTION PROVIDES THE 1983  
LAW COVERS POLLUTION OF THE  
LANDS AND THE SURFACE AND GROUND  
WATERS OF FLORIDA NOT COVERED BY  
THE 1970 LOSS SO IT COVERS  
EVERYTHING ELSE.

BOTH THE 70 AND 83 LAWS HAVE  
SEPARATE STATEMENTS OF  
LEGISLATIVE INTENT AND SEPARATE  
SECTIONS, BUT THE 1970 LAW, THE  
FIRST ONE PASSED, CONTAINS A  
LIMITING DEFINITION OF DAMAGES  
RECOVERABLE AND IS DEFINED AS  
OBSTRUCTION TO OR LOSS OF REAL  
OR PERSONAL PROPERTY.

WHILE THE 1983 LAW, WHICH IS THE  
LAW UNDER WHICH WE ARE  
PROCEEDING, CONTAINS NO SUCH  
LIMITING DEFINITION AND PROVIDES  
FOR THE RECOVERY OF "ALL  
DAMAGES."

IT DOES NOT TO SAY DAMAGES TO  
THIS.

IT SAYS ALL DAMAGES.

DAMAGES, I SUGGEST, IS NOT  
AMBIGUOUS.

IT IS A TERM OF LEGAL ART.

IN THE ABSENCE OF A STATUTORY  
DEFINITION, COURTS PRESUME THE  
LEGISLATORS USE OF THE TERM IS  
IN ACCORDANCE WITH THE MEANINGS  
THE COURTS HAVE PROVIDED AND I  
CITE THE CRIST CASE, WHICH IS  
YOUR CASE IN 2005.

IN FLORIDA, THE FUNCTIONAL  
DAMAGES IN COURT ACTION IS TO  
RESTORE THE INJURED PARTY TO THE  
POSITION IT WOULD HAVE BEEN IN  
HAD THE WRONG NOT BEEN  
COMMITTED.

THAT IS WHAT THE FOURTH DISTRICT  
SAID IN 19-- IN 2004.

EVERYTHING, THE WHOLE, THERE  
AREN'T ANY EXCLUSIONS.

DAMAGE IS SUFFICIENT TO RESTORE  
THE INJURED PARTIES.

>> THERE YOU ARE NOW ARGUING FOR  
A PRIVATE CAUSE OF ACTION BASED  
ON THE STATUTE.

>> I'M TALKING ABOUT THE  
STATUTORY CAUSE OF ACTION.

WITH THE SET CURRENT DISTRICT IT  
WAS IN A ACKNOWLEDGED YOUR

HOLDING AND THE COMPTECH

INTERNATIONAL CASE.

THE STATUTORY CAUSES OF ACTION

CANNOT BE DEFEATED BY

APPLICATION OF COMMON LAW RULE

SUCH AS ECONOMIC LAW DOCTRINE

AND THEN APPLIES ECONOMIC LAW

DOCTRINE TO MEET THE FISHERMAN'S

CAUSE OF ACTION UNDER THE 1983

LAW.

THE 1983 LAW IS REplete WITH

STATEMENTS OF LEGISLATIVE INTENT

TO PROTECT THE FISHERMEN.

IT IS TO BE LITERALLY CONSTRUED,

THE WATERS OF THE STATE TO BE

HELD IN A PRISTINE CONDITION FOR

THE PROTECTION OF BOTH PUBLIC

AND PRIVATE INTEREST.

POLLUTION POSES A THREAT TO

OTHER INTERESTS, DERIVING

LIVELIHOOD FROM THE STATE AND

THESE INTERESTS OUTWEIGH ANY

ECONOMIC BURDEN IMPOSED ON THE

POLLUTER.

>> YOU ARE WELL INTO YOUR

REBUTTAL.

>> I WILL JUST CONCLUDE BY

SAYING, WHO BETTER THAN THE

FISHERMEN, WHO ARE OUT THERE ON  
THE WATER EVERY DAY, TO POLICE  
THE PURITY OF FLORIDA'S WATER?  
THEY HAVE A METHOD TO DO THAT IN  
THIS PRIVATE CAUSE OF ACTION.

THANK YOU.

>> MAY IT PLEASE THE COURT.

MY NAME IS DAVID WEINSTEIN.

I PRACTICE ALONG WITH THE  
PRESIDENT AND COUNSEL, HERE WITH  
ME TODAY, WHO REPRESENTS THE  
RESPONDENT, MOSAIC.

MOSAIC IS SIMILARLY SITUATED AND  
AS A RESULT LET THERE BE NO  
MISTAKE ABOUT IT, MOSAIC IS  
RESPONSIBLE TO THE NATURAL  
RESOURCE TRUSTEES OF THE STATE  
FEDERAL AND LOCAL GOVERNMENTS  
WITH A LOSS OF NATURAL RESOURCES  
THAT HAVE OCCURRED DURING THE  
HURRICANE FRANCES EVENT IN  
SEPTEMBER 2004.

>> LET'S GET RIGHT TO IT.

I WANT TO GET TO THE STATUTORY  
PROVISION THAT MR. POPE WAS JUST  
TALKING ABOUT.

UNDER 376.313, IT SAYS NOTHING  
CONTAINED IN SECTION 376.30  
THROUGH 376.317 PROHIBITS ANY

PERSON FROM BRINGING AN ACTION,  
AND GOES ON TO TALK ABOUT  
PROVING NEGLIGENCE AND THAT KIND  
OF THING, SO WHY DOESN'T THAT  
GIVE THE COMMERCIAL FISHERMAN  
HERE BECAUSE OF ACTION FOR YOUR  
CLIENTS POLLUTION OF THE WATER?

>> BECAUSE AS JUSTICE CANTERO'S  
OPINION OF THIS COURT IN THE  
AIRMARK CASE MAKES CLEAR, IN  
ORDER TO DEPART FROM THE COMMON  
LAW, IN ORDER TO READ THE  
STATUTE, IT IS TAKING A COMPLETE  
RIGHT TURN FROM THE COMMON LAW.

>> DID WE SAY THAT 376.313 DID  
CREATE A CAUSE OF ACTION?

>> YOU CERTAINLY DID.

>> THE MY QUESTION IS THEN WHY  
CAN'T THESE FISHERMEN TAKE A  
BANDAGE OF THIS CAUSE OF ACTION  
HAD THAT WE HAVE ALREADY SAID IS  
CREATED?

>> I WILL EXPLAIN WHY.

IN THIS COURT'S OPINION, IN  
AIRMARK, THEY CAREFULLY  
DECONSTRUCTED THE STATUTE AND  
FOUND SIX SEPARATE INSTANCES  
WITHIN THE STATUTE AND WHAT THE

LANGUAGE OF THE STATUTE WAS CLEARLY INCONSISTENT WITH THE COMMON LAW, AND FROM THE SIX SEPARATE INSTANCES, THIS COURT CONCLUDED THAT THE LEGISLATIVE INTENT TO DEPART-- AND THEREFORE THE HOLDING WAS CONSTANT WITH A HOLDING IN CARLISLE, WHICH SAYS THE LEGISLATIVE INTENT MUST BE EXPRESSED.

IN THIS CASE, JUSTICES, THERE IS NO LANGUAGE IN THE STATUTE WHATSOEVER THAT INDICATES ANYTHING OTHER THAN DAMAGES WHICH EXISTED, AND IN COMMON-LAW THE DAMAGES THE PETITIONERS REQUEST DO NOT EXIST.

>> OF THE CASES IN MR. POPE'S BRIEF, AND I FRANKLY WAS NOT FAMILIAR WITH BECAUSE THEY DON'T COME FROM THIS COURT-- THEY COME FROM COURTS IN TEXAS AND LOUISIANA AND NEW YORK AND ALASKA.

THEY TAKE A CAUSE OF ACTION FOR COMMERCIAL FISHERMEN WHO ARE DAMAGED AS A RESULT OF POLLUTION, OIL SPILLS AND THE LIKE.

THOSE WERE NOT BECAUSE IN THOSE  
STATES HAVE STATUTES THAT ALLOW  
RECOVERY.

AREN'T ALL THOSE COURSES OF  
ACTION BROUGHT TO COMMON LAW,  
THAT THERE IS A DUTY TO  
DAMAGES--

[INAUDIBLE]

THE QUESTION IS, DOES THAT DO  
THE EXTENT TO THOSE WHO FISH IN  
THE WATER WHO ARE LICENSED BY  
THE STATE TO RECOVER A LOSS OF  
THEIR ABILITY TO FISH IN THOSE  
WATERS?

SO THIS WAS NOT IN A COMMON LAW  
ISSUE.

>> THE COURT IS QUITE RIGHT, IT  
IS A COMMON LAW ISSUE AND PLEASE  
ALLOW ME TO PUT THE COMMERCIAL  
FISHERMEN PERSPECTIVE IN ITS  
PROPER PERSPECTIVE.

IN VERY LIMITED CIRCUMSTANCES,  
THEY CLEARLY DON'T APPLY HERE  
AND LET ME START WITH THE RECENT  
CASES, INCLUDING THE FIRST  
DISTRICT'S DECISION IN ST. JOE  
IN WHICH JUSTICE-- CONCUR.  
FROM FIVE DIFFERENT COURTS, TWO

DIFFERENT FEDERAL DISTRICTS,  
FOUR STATES AND COURTS IN TWO  
DIFFERENT STATES, COURTS HAVE  
LOOKED AT EXACTLY THE SAME  
ARGUMENTS HIS BOSS BY THE  
PETITIONERS TODAY.  
IN ALL SIX CASES, THE COURTS  
ROUTINELY, UNIFORMLY REJECTED  
THESE ARGUMENTS AND FOUND THAT  
ONE WHO SUFFERS NO PROPERTY  
DAMAGE OR PERSONAL-INJURY CANNOT  
RECOVER FROM AN EVENT OF  
POLLUTION.

>> ARE WE BACK THEN, WHEN YOU  
SAY PROPERTY DAMAGE OR  
PERIPHERAL INJURY, ARE BACK TO  
THE ECONOMIC LAW?

>> NO YOUR HONOR, WE ARE CLEARLY  
NOT.

JUSTICE PARIENTE HAD IT RIGHT IN  
THE BEGINNING.

IN PREPARING FOR THE CASE, I  
PULLED OUT OUR ORIGINAL MOTION  
TO DISMISS.

WE MADE IT CLEAR TO THE TRIAL  
COURTS ALONE THAT THIS IS NOT AN  
ECONOMIC LAW CASE AND INSTEAD  
MUST BE DECIDED IN COURT.

ON THE NEGLIGENCE SIDE OF THE

SPECTRUM HERE, THERE IS SIMPLY  
NO DUTY, WHICH IS WHAT ALL SIX  
COURTS FOUND AND WITH THE FIRST  
DISTRICT FOUND IN ST. JOSEPH,  
WHEN IT HELPS THAT ABSENT THE  
CLASS REPRESENTATIVES' ABILITY  
TO PROVE THAT THEIR PROPERTY WAS  
ACTUALLY IMPACTED, THEY COULD  
NOT RECOVER AND--

>> LET'S GO BACK TO THE FISH.  
THEY BELONG TO THE PUBLIC AT  
LARGE.

IT IS THE STATE THAT HAS SAID  
THAT CERTAIN INDIVIDUALS HAVE A  
RIGHT TO NOT ONLY FISH, AND THEN  
USE THEIR FISH AND SELL THEM,  
AND SO IN TERMS OF THIS  
PREDICTABLE PROPERTY INSURANCE,  
IT IS NOT THEIR FISH SO THEY CAN  
RECOVER THE LOSS OF THEIR FISH.  
THERE ARE THE CASES THAT ARE  
STILL HELD, SO YOU ARE SAYING IT  
IS A MORE RECENT TREND OF CASES,  
THAT THEY HAD OVERTURNED THE  
NINTH CIRCUIT CASE AND THE FIFTH  
CIRCUIT CASE AND THE 11TH  
CIRCUIT CASE, TO SAY THAT NOBODY  
HAS A RIGHT TO RECOVER WHEN A

POLLUTER KILLS ALL THE FISH,  
OTHER THAN THE STATE'S BRINGING  
IT ON BEHALF OF THE PUBLIC?

>> THAT IS NOT WHAT I'M SAYING.

FORGIVE ME IF I DID NOT DO THIS  
AS PRECISELY AS I SHOULD HAVE.

[INAUDIBLE]

SIX RECENT DECISIONS ALL GO  
AGAINST THE PLAINTIFFS  
RECOVERING ECONOMIC DAMAGES.  
THREE OF THOSE CASES AND OF  
COMMERCIAL FISHERMEN AND IN ALL  
THREE CASES THE COMMERCIAL  
FISHERMAN IS CAREFULLY  
CONSIDERED BY THE TRIAL COURT  
AND REJECTED FOR REASONS I WILL  
EXPLAIN.

THERE ARE FIVE SEPARATE REASONS  
WHY THE COMMERCIAL FISHERMEN  
EXCEPTION DOES NOT APPLY IN THIS  
CASE.

FIRST, THE CONTEXT OF THE  
COMMERCIAL FISHERMAN EXCEPTION  
IS THAT IT IS APPLIED IN  
MARITIME CASES, AND THERE IS A  
TWO-PART TEST THAT HAS TO BE  
SATISFIED.

THE LOCUS TEST AND THE NEXUS  
TEST.

THE LOCUS TEST SAYS THE COURT HAS TO-- AND THE DECISIONS WE CITED OF THE THREE TRIAL COURSE THAT HAVE CONSIDERED THIS, THIS ACTIVITY, THE RELEASE OCCURRED ON LAND SO THE LOCUS TEST IS VIOLATED.

>> LET ME ASK ONE QUESTION.

THE SOURCE MUST BE FROM WITHIN THE NAVIGABLE WATERS, THAT IS THE ELEMENT AS YOU SEE IT?

>> THE NEGLIGENCE HERE MUST OCCUR--

>> IT CANNOT ORIGINATE OUTSIDE OF NAVIGABLE WATERS.

>> INTERESTINGLY ENOUGH, THE VERY RECENT CASE OUT OF LOUISIANA IS OUR FACTS.

INSTEAD OF HURRICANE FRANCES IT WAS HURRICANE KATRINA.

THE RELEASE OCCURRED ON A LAND BASE FACILITY AND CONTAMINATED ADJACENT WATERS AND REPORTEDLY HURT WILDLIFE.

COURTS WENT TO EXACTLY THE SAME ANALYSIS.

IT DID NOT OCCUR ON THE WATER AND VERY IMPORTANTLY, ALL OF

THESE CASES FOR THE MARITIME  
EXCEPTION TO APPLY THE COURT HAS  
TO OCCUR IN THE PURSUIT OF  
ACTIVITIES THAT ARE  
TRADITIONALLY MARITIME  
ACTIVITIES.

THAT DOES NOT APPLY.

THE THIRD STRIKE IS THAT THE  
GREAT BODY OF CASE LAW IN WHICH  
COMMERCIAL FISHERMEN RECOGNIZE  
IN THE CONTEXT OF OIL SPILLS.

THE FOURTH STRIKE IS THAT-- IF  
YOU LOOK AT TESTBANK WHICH SAYS  
IMPORTANTLY, THE AREAS AFFECTED  
WERE CLOSED TO COMMERCIAL  
FISHERMAN.

MOST OF THESE CASES DISCUSSED  
THE FACT THAT THE COAST GUARD  
DISCLOSE THE AREA AND THAT GIVES  
THE BOUNDARIES THAT WOULD  
PREVENT THIS FROM BEING  
LIMITLESSLY EXPANSIVE TORT LAW  
AS YOUR HONOR HAD ASKED ABOUT  
EARLIER BUT THE QUESTION ABOUT  
SCUBA AND YOUR QUESTION ABOUT  
VOTING.

THE FACT THAT THE COMMERCIAL  
FISHERMAN EXCEPTION IT IS ONLY  
MARITIME, IT ONLY APPLIES TO

NEGLIGENCE AND WOULD NOT APPLY  
TO STRICT LIABILITY.  
IT ONLY APPLIES UNDER THESE  
CIRCUMSTANCES THAT I JUST  
ARTICULATED, GIVES THE COURT  
COMFORT THAT WE WOULD HAVE A  
DOCTRINE, AN EXCEPTION OF THE  
BOUNDARIES AND WHEN THE  
PLAINTIFFS ARE ABDICATING, WHAT  
PETITIONERS ARE ABDICATING HAVE  
NO BOUNDARIES AT ALL.

>> LET ME ASK YOU, THIS IS WHAT  
CONCERNS ME.

LET'S SAY I OWN THE HILTON  
SOMEWHERE IN SOUTH FLORIDA.

[INAUDIBLE]

BECAUSE OF THAT I LOSE FIVE OR  
SIX MONTHS' WORTH OF BUSINESS.

LET'S SAY THE STATE AGENCY IS  
RESPONSIBLE FOR ABOUT.

UNDER YOUR THEORY, I HAVE NO  
RECOURSE.

I COULD NOT BE COMPENSATED FOR  
THE DAMAGES.

>> THE ANSWER IS, RESPECTFULLY,  
THAT YOU CAN, AND IT DEPENDS ON  
WHETHER YOU HAVE SOME  
PROPRIETARY INTEREST IN THE

BEACH.

>>

[INAUDIBLE]

>> THERE IS PROPERTY DAMAGE.

>> WAIT A MINUTE, THE ANSWER IS  
THE PRIVATE OWNERS DON'T OWN THE  
BEACH IN FLORIDA, SO LET'S START  
THERE.

LET'S TAKE HIS-- IN THE PROPERTY  
OWNERS FOUND AND IN FACT IN SOME  
SITUATIONS RIPARIAN RIGHTS DON'T  
CARRY THE RIGHT TO TOUCH THE  
WATER, SO SAM-- THAT IS  
REASONABLE.

>> TO RESPOND TO THAT, IF WE  
HAVE TAKEN AND ERASE PROPERTY  
RIGHTS, ERASE PROPRIETARY  
RIGHTS, THEN UNDER THE THEORY  
THAT THE PLAINTIFF HAS PLEDGED  
THERE WOULD BE NO CAUSE OF  
ACTION.

WHETHER THERE WOULD BE A CAUSE  
OF ACTION UNDER THE OIL  
POLLUTION ACT, THAT IS NOT  
BROUGHT IN THIS CASE IS BEYOND  
THE SCOPE HERE.

ON THE OTHER HAND, THE BRASSES  
CASE IS VERY INSTRUCTIVE ON THIS  
POINT BECAUSE IT EXAMINES THREE

DIFFERENT TYPES PLAME-- AND IT SAYS THAT THE PLAINTIFFS THAT HAVE PROPERTY RIGHTS, THEIR MOTION TO DISMISS DOES NOT. EVEN THE PLAINTIFFS THAT CAN SHOW A PROPRIETARY INTEREST IN THE OYSTER BEDS, A SUBCLASS OF OYSTER FISHERMEN AND THEY HAVE SOME KIND OF-- IF YOU CAN TIE YOUR-- GO BEYOND A MERE EXPECTATION AND TIE IT TO SOME PROPRIETARY INTERESTS, WE WILL ALLOW THAT CASE TO GO FORWARD. BUT THE PETITIONERS WHO HAD MERELY AN EXPECTATION OF PROPERTY DID NOT HAVE THE RIGHT TO RECOVER AND THAT MAKES COMPLETE SENSE AND IT IS A CONCERT WITH PRAYER DECISIONS FROM OTHER COURTS ALL AROUND THE COUNTRY ABOUT A COMMERCIAL FISHERMAN. SO, WHAT YOU HAVE HERE IS THREE CAUSES OF ACTION. YOU HAVE A COMMON-LAW LIABILITY CAUSE OF ACTION AND THE STATE HAS ADOPTED SECTION 519 OF THE RESTATEMENT, AND THAT CLEARLY

REQUIRES BY ITS TERMS DAMAGE TO  
PERSONS OR DAMAGE TO PROPERTY SO  
THERE IS NO WAY THAT--

SECOND, YOU HAVE BEEN NEGLIGENCE  
CAUSE OF ACTION AND NEGLIGENCE  
CAUSE OF ACTION CANNOT STAND  
BECAUSE AS JUDGE ALTENBERND  
WROTE, THERE IS NO DUTY HERE  
UNDER A TRADITIONAL NEGLIGENCE  
PRINCIPLE.

THERE IS NO DUTY IN THIS COURT  
SHOULD NOT EXPAND IT AND THE  
ONLY COURSE THAT HAVE EXPANDED  
IT--

>> NO DUTY BECAUSE OF WHAT?

>> IT IS TOO ATTENUATED TO AN  
INJURY HERE.

>> AGAIN-- NET.

>> THE DAMAGES MAY BE A  
DIFFERENT THING.

WHETHER THEY CAN ACTUALLY  
DEMONSTRATE THAT THEY HAVE CAUSE  
LESS FISH BECAUSE OF THIS  
POLLUTION.

YOU COULD HAVE HAD OTHER FACTORS  
THAT WOULD COME INTO PLAY IF  
THEY COST LESS FISH OR  
SOMETHING, SO ISN'T THE DAMAGE  
REALLY A DIFFERENT ISSUE FROM

WHETHER NOT THERE WAS A DUTY  
OWED HERE?

>> NOT EVEN IF THE DAMAGES PART  
OF THIS.

ALTHOUGH I WOULD BE HAPPY TO  
AGREE WITH THE COURT TO SAY WE  
HAVE GREAT DIFFICULTY  
ESTABLISHING DAMAGES HERE BUT  
LET ME GO TREACLY TO THE HEART  
OF THE ISSUE, WHICH IS DUTY.

THERE ARE THESE NINE REASONS WHY  
THIS COURT SHOULD NOT EXPAND THE  
CONCEPT OF DUTY TO INCLUDE THE  
PLAINTIFFS IN THIS CASE.

FIRST, IT IS CONTRARY TO DECADES  
OF PRESIDENTS.

THE DUTY DOES NOT EXPAND TO  
THESE PURELY ECONOMIC  
EXPECTATIONS.

>> BUT WE HAVE A STATUTE.

THE LEGISLATURE SAYS, DOES NOT  
PROHIBIT ANY PERSON FROM  
BRINGING CAUSE OF ACTION.

>> IF I MAY, I WOULD STRESS  
FIRST AND NEGLIGENCE AND IN THE  
STATUTE IF THAT WOULD PLEASE THE  
COURT PROGRESS TO EXTENDING THE  
DUTY, THE SIX WEEKS IN DECISIONS

WE CITED TO YOU ALL UNIFORMLY  
WHOLE SIX DIFFERENT COURTS  
HOOKING HEART OF THIS ISSUE  
INCLUDING THE FIRST INTEREST TO  
SAY NO.

>> QUITE FRANKLY IT IS VERY  
IMPORTANT TO ME BECAUSE THESE  
ARE A CLASS OF PEOPLE WHO HAVE  
GONE TO THE STATE AND PAID MONEY  
AND GOT A LICENSE, AND THE STATE  
HAS SAID, YOU NOW HAVE AN  
INTEREST IN GOING INTO THESE  
WATERS AND HARVESTING MARINE  
LIFE, AND SO TO ME THEY HAVE AN  
INTEREST FROM MY ARE YOUR  
PERSONAL INTEREST WHY WOULD KNOB  
THAT TRANSLATE INTO A DUTY THAT  
IT CERTAINLY SEEMS FORESEEABLE  
TO ME THAT SOMEONE WOULD BE  
POLLUTING THE AIR WOULD HAVE A  
DUTY TO THESE PEOPLE BECAUSE  
THEY HAVE SOME KIND OF INTEREST  
AND THEY HAVE PAID FOR ITS  
PURPOSE BE WHAT THE CASE IS  
ESSENTIALLY SAYING IS WITH ALL  
DUE RESPECT TO THE PETITIONERS,  
AND I WANT TO SPEAK ABOUT THE  
CLASS FOR SECOND, BUT WITH ALL  
DUE RESPECT, THE FISH ARE A

COMMON RESOURCE OF THE PEOPLE OF  
THE STATE OF FLORIDA AND I HAVE  
AS MUCH RIGHT TO GO OUT AND  
SCUBA DIVE OR ANYBODY ELSE DOES,  
TO SCUBA DIVE AND TAKE THESE  
FISH FROM A BOAT.

ALL OF THE CASES SAY UNTIL THE  
RESOURCES ACTUALLY HARVEST FISH,  
IT BELONGS TO EVERYONE AND IF  
THE COURT HAS ANY CONCERNS  
WHATSOEVER ABOUT THE REEVES, WE  
ARE HEARING A MOTION THAT THERE  
IS NO FACTUAL RECORD BUT THAT  
THE COURT HAS ANY CONCERNS ABOUT  
WHERE THE ENVIRONMENTAL CASE IS  
HERE, IT IS NOT HERE.

THIS IS A LOST PROPERTY CASE.

THE ENVIRONMENTAL CASE THE COURT  
CAN FIND ON THE WEB SITE, WHERE  
THERE IS A COMPLETE WEB PAGE .

I WILL FILE THOSE BUT WHAT THAT  
WILL SHOW THE COURT IS THAT  
MOSAIC HAS BEEN WORKING  
COOPERATIVELY WITH THE TRUSTEES  
FROM THESE RESOURCES.

THESE FISH WILL BE ADDRESSED.

>> THAT IS ALL WELL AND GOOD,  
BUT I STILL WANT YOU TO TELL ME

WHY THERE IS NO DUTY HERE.

>> THE ISSUE WILL EXPAND THE

CONCEPT OF DUTY TO THE BREAKING

POINT, AND LET ME TAKE THE

FEBRUARY 2009 CASE AND TAKE

JUDGE DOUGHERTY'S, VERY WELL

WRITTEN OPINION AND HER OPINION

AND THE FEDERAL DISTRICT PACE.

IS A CASE WHERE YOU HAVE AN

INTERSTATE HIGHWAY AND SOME

UNKNOWINGLY PUT AN OIL WELL

WITHIN 100 YARDS OF THAT

HIGHWAY.

THE OIL WELL BLOWOUT, CUT THE

HIGHWAY AND HALF AND YOU HAVE A

CLASS CONSISTING OF DIFFERENT,

SEVEN DIFFERENT SUBSETS OF TRUCK

STOPS, SIT-DOWN RESTAURANTS,

TOWING COMPANIES, A GROCERY

STORES AND ON AND ON.

FROM PURELY ECONOMIC DAMAGES,

JUST LIKE THE PETITIONERS DO AND

JUDGE DOUGHERTY IN HER OPINION

THE CONSTRUCTED THIS AND SAID

THAT, AND THE COURTS-- FORGIVE

ME SECOND, SHE SAID THAT TO

EXPAND THE CONCEPT OF NEGLIGENCE

TO THIS LEVEL WOULD RESULT IN A

LIABILITY AND AN INDETERMINATE

AMOUNT FOR AN INDETERMINATE TIME  
FOR AN INDETERMINATE CLASS.  
THAT THEORY, THAT RIPPLES  
THROUGH.

>> I THINK THIS IS GOING TO BE  
VERY INTERESTING CASE, BUT HOW  
MANY, DO WE KNOW HOW MANY FISH  
WERE IN THIS AREA THAT WERE  
ACTUALLY KILLED?

I MEAN, IS THERE A FINE LINE  
NUMBER?

>> IF THE COURT WERE TO LOOK AT  
THE NOAA WEB SITE.

>> THAT IS NOT IN OUR RECORD.  
WE ARE NOT TALKING ABOUT AN OIL  
SPILL 20 MILES AWAY, SAYING THAT  
THEY ARE NOT ABLE TO BREATHE AS  
WELL.

WE ARE TALKING ABOUT WHETHER  
PEOPLE THAT IF FISH THESE WATER  
AND CAN ESTABLISH AND MAKE MONEY  
FROM FISHING CAN RECOVER FOR  
LOSS OF THE ABILITY TO FISH IN  
THOSE WATERS.

SO, I DON'T KNOW IN TERMS OF  
OPENING THE DOOR, IT MAY BE  
THERE SHOULD NOT BE A COMMERCIAL  
FISHERMAN EXCEPTION IN THE STATE

AND THE LEGISLATURE DID NOT INTEND IT, BUT WHEN YOU TALK ABOUT ISSUES OF WHAT MIGHT HAPPEN IF THERE WAS A HIGHWAY OIL SPILL-- PEOPLE THAT ARE NOT FORESEEABLE PLAINTIFFS BUT ISN'T UNDER, THOSE KINDS OF THINGS, IS THAT FORESEEABLE, AND THIS GOES BACK TO WHAT JUSTICE QUINCE WAS SAYING, WHEN SOMEBODY POLLUTES AN AREA WHERE THERE IS FISHING, THOSE THAT FISH THOSE WATERS WILL SUFFER DAMAGE.

ISN'T THAT FORESEEABLE?

>> IT IS NO MORE FORSEEABLE THEN-- IF THERE IS IRAQ ON AN INTERSTATE AND AN OIL TRUCK AND IT SPILLED OIL ON THAT INTERSTATE ISN'T FORESEEABLE THE BUSINESSES THAT ARE DOWN--

>> YOU ARE GOING BACK TO FIRST-YEAR LAW SCHOOL CASES, THERE IS A FIRE IN THE FIRE DEPARTMENT DOES NOT PUT IT OUT AND HOW FAR DOES IT GO?

A THING JUSTICE PARIENTE, JUSTICE QUINCE AND JUSTICE OF LOMBARDI HAVE ASKED VERY SPECIFIC QUESTIONS.

WHAT I THINK IS AN IMPORTANT  
POINT, TALKING ABOUT A PROPERTY  
OWNER WHO DOES NOT HAVE A  
PROPRIETARY INTEREST.

WHAT KIND OF DUTY GOES TO THAT  
PERSON THAT IS RIGHT BY HIM?

>> LET ME ADDRESS TWO POINTS.

FIRST WITH RESPECT TO THE CLASS.

I RESPECTIVELY DISAGREE.

CLASS IS ALL PERSONS ENGAGED IN  
THE COMMERCIAL CATCH AND SALE OF  
FISH.

>> ARE YOU NOT GOING TO ANSWER  
THE DO THE QUESTION?

>> WHAT IS BEING CONTEMPLATED  
HERE WOULD BE COMPLETELY  
UNPRECEDENTED JURISPRUDENCE.

IF YOU GO BACK AND READ ALL OF  
THOSE CASES FROM ALL OF THOSE  
JURISDICTIONS, NOT ONE OF THEM  
GOES NEARLY AS FAR AS  
PETITIONERS WOULD SUGGEST.

YOU WOULD BE EXPANDING, AND WHAT  
IS GOING TO HAPPEN IS THIS WITH  
ALL DUE RESPECT.

FIRST IT IS GOING TO BE THE  
COMMERCIAL FISHERMAN.

THE NEXT PEOPLE BEFORE THE COURT

IS SAYING THAT FARMERS-- THEN

IT WILL BE CITRUS GROWERS.

THEN IT IS GOING TO BE THE

TIMBER INDUSTRY.

ONE OF THE THINGS JUSTICE

ALTENBERND SAID THE LOW WAS ONE

OF THE REASONS FOR CONSTRAINT IN

THE COURT SYSTEM IS THERE ARE

COMMON-LAW COURTS THAT SHOULD BE

RESERVED FOR COURT CLAIMS AND

YOU ARE INVITING A CASE BY CASE

BASIS.

>> IN 376, THE LEGISLATION TO ME

SEEMS TO HAVE MADE A CLEAR

STATEMENT THAT WHEN PEOPLE ARE

INJURED BY THIS POLLUTION, THAT

THOSE INJURIES TAKE PRECEDENT

OVER THE POLLUTERS ECONOMIC

INTEREST.

THAT SEEMS TO BE ONE OF THE

FINDINGS THAT THEY MAKE IN THE

STATUTE.

>> RESPECTIVELY THE EFFECT OF A

COURT DECISION AS THE

PETITIONERS REQUEST WILL HAVE

ADVERSE UNINTENDED ECONOMIC

ENVIRONMENTAL IMPACT AND I WILL

TELL YOU WHY.

>> YOU HAVE A TO THE QUESTION

AND YOU ARE WAY OVER YOUR TIME  
BUT IF YOU COULD JUST FOCUS ON  
THAT TO THE QUESTION.

>> THE TO THE QUESTION IS AS  
FOLLOWS.

THEY ARE ASKING YOU TO ESTABLISH  
A DUTY THAT IS SO FAR BEYOND THE  
DUTY THAT HAS BEEN RECOGNIZED IN  
COMMON LAW FOR HUNDREDS OF YEARS  
AND HAS BEEN RECOGNIZED BY SIX  
OTHER COURTS RECENTLY THAT HAVE  
LOOKED AT THIS.

THE REASON THAT THE COMMERCIAL  
FISHERMAN EXISTS UNDER SUCH  
NARROW MARITIME CIRCUMSTANCES IS  
TO AVOID THE HARM THAT JUSTICE  
ALTENBERND CONTEMPLATES BELOW BY  
HAVING ALL OF THESE DETAINEE  
WOULD DECLAIMS MAKE A RUN AT OUR  
COURTS AND WITH RESPECT TO THE  
CORE ENVIRONMENTAL ISSUE LET ME  
TELL YOU WHY, WHAT THEY ARE  
ASKING FOR IS GOING TO HURT THE  
ENVIRONMENT.

IT IS POINTED HER TEMPERAMENT  
BECAUSE YOU ARE GOING TO ALLOW  
PEOPLE TO SUE THOSE WHO CAUSE  
POLLUTION FOR PURELY ECONOMIC

DAMAGES AND THEY ARE GOING TO  
GET TO THE COURTHOUSE FIRST.  
THE REASON THEY ARE GOING TO GET  
TO THE COURTHOUSE FIRST IS THAT  
THE ENVIRONMENTAL PROCESS IN  
THIS COUNTRY REQUIRES A VERY  
CAREFUL CONTAMINATION ASSESSMENT  
WHICH HAS TO BE APPROVED BEFORE  
1 DOLLAR--

>> YOU WOULD AGREE, AND YOU ARE  
COMPLETELY OVER HERE TIME-- IF  
THERE WAS A COMMON-LAW CAUSE OF  
ACTION, EITHER THE FEDERAL  
GOVERNMENT CAN PREEMPT THE WHOLE  
FIELD, OR IF IT IS WITHIN THEIR  
JURISDICTION, NOT NAVIGABLE  
WATERS AND THEY MAY NOT HAVE  
JURISDICTION PART OF THE STATE  
CAN LIKEWISE SAY, WE DON'T WANT  
IN OUR BALANCE, WE ARE GOING TO  
BE THE ENFORCERS, NOT  
INDIVIDUALS.

THEY COULD DO THAT AND THEN THEY  
CAN'T, THEY CAN ALTER THE  
COMMON-LAW.

WOULD YOU AGREE WITH THAT?

>> I WOULD AND IF THAT IS WHAT  
THE LEGISLATURE INTENDS  
RESPECTFULLY JUSTICES THAT IS

WHAT THEY SHOULD DO.

NOT IN AN AMORPHOUS STATEMENT

BUT I WILL AGREE WITH WHAT JUDGE

ALTENBERND SAID BELOW, IF THE

LEGISLATURE HAD INTENDED TO

CREATE SUCH AN EXPANSIVE

LIABILITY SCHEME FROM PEOPLE

ONLY INDIRECTLY AFFECTED, IT

WOULD HAVE DONE SO DIRECTLY AND

EXPLICITLY AND IF THAT IS WHAT

THE LEGISLATURE INTENDS, THAT IS

WHAT SHOULD DO.

THAT PRONOUNCEMENT SHOULD COME

FROM THE LEGISLATURE NOT THE

COURT.

THANK YOU FOR YOUR INDULGENCE.

>> HOW MUCH TIME IS REMAINING?

>> IT SAYS THREE MINUTES.

>> MAY IT PLEASE THE COURT.

ON THE QUESTION OF DUTY, SEEMS

TO ME CHAPTER 376 IS A

LEGISLATIVE IMPOSITION OF DUTY

ON EVERY SINGLE PERSON IN EVERY

SINGLE BUSINESS IN THE STATE,

NOT TO POLLUTE AND IF YOU DO,

YOU HAVE TO PAY FOR IT.

>> HE IS SAYING, UNLESS THE

STATUTE, UNLESS YOU HAVE A

COMMON-LAW OBLIGATION TO BEGIN WITH, THAT THAT STATUTE WILL NOT OPERATE TO CREATE A PRIVATE CAUSE OF ACTION FOR THOSE WHO DID NOT HAVE ONE IN COMMON LAW. THAT IS HIS ARGUMENT.

>> I DON'T BELIEVE THAT HE CITED A CASE THAT HOLDS THAT.

>> YEAH HE DID.

HE REFERRED TO A CASE FROM THIS COURT, THAT HE SAID THAT.

>> I DON'T REMEMBER WHICH CASE IT WAS, BUT I CAN'T RECALL THIS COURT HAS EVER HELD THAT THE LEGISLATURE CAN'T PASS A BRAND NEW CAUSE OF ACTION THAT HAS NOTHING TO DO WITH THE COMMON LAW.

TO ME THAT DOES NOT COMPUTE.

AND THEY HAVE THE LEGISLATURE--

WE ARE IMPOSING ECONOMIC BURDENS ON POLLUTERS.

>> WHERE DOES IT STOP, THE ARGUMENT IN THIS CASE?

[INAUDIBLE]

[INAUDIBLE]

>> IF YOU HOLD THAT THESE COMMERCIAL FISHERMEN HAVE A CAUSE OF ACTION FOR THE

DISRUPTION OF THEIR ABILITY TO  
TAKE FISH AND MAKE A LIVING OUT  
OF IT, THAT IS WHERE IT STOPS,  
WITH THIS CASE.

YOU MAY HAVE ANOTHER CASE-- THE  
BEAUTY OF THE SYSTEM AS IT  
PROVIDES FOR STABILITY AND  
CHANGE AT THE SAME TIME.

YOU HOLD THE COMMERCIAL  
FISHERMAN HAVE THIS RIGHT.

THAT DOES NOT MEAN THE TRUCK  
DRIVER HAS THE RIGHT.

THE TRUCK DRIVER MAY GIVE IT A  
SHOT AND YOU MAY SAY NO.

BUT IT DEPENDS ON WHAT YOU SAY.

THEY MAY GET INTO THE CIRCUIT  
COURT AND GO OUT ON THE MOTION.

>> THERE HAS TO BE A PRINCIPLE  
BASIS MR. POPE AND ALL OF THE  
DEFERENCE FOR TAKING SOMETHING  
TRADITIONALLY.

SOMEONE HAS EITHER PROPERTY  
INTERESTS OR SOME OTHER KIND OF  
PERSONAL INTEREST AND THERE HAS  
TO BE DAMAGE TO THE PROPERTY.

HERE, THE ISSUE REALLY IS  
WHETHER THE DUTY EXTENDS TO  
THOSE THAT DO NOT HAVE A

PROPERTY INTEREST, AND WE WOULD  
HAVE TO UNDERSTAND THE FACT THAT  
ALL OF THESE CASES CAUSE  
EXCEPTIONS FOR COMMERCIAL  
FISHERMAN AND PLACED THEM IN A  
DIFFERENT POSITION.

WOULD YOU AGREE THAT IS HOW WE  
HAVE TO GET THERE?

>> YES YOUR HONOR AND MY  
CONCLUDING REMARK IS SIMPLY  
THAT, BEFORE YOU MAKE YOUR  
CONCLUDING REMARK, ONE OF THE  
THINGS THAT STRUCK ME ABOUT YOUR  
OPPONENT'S ARGUMENT IS THAT HE  
SAID-- HE MAKES THE ARGUMENT  
THAT ALL OF THESE CASES THAT YOU  
CITE THAT RECOGNIZE THE  
FISHERMEN ARE CASES INVOLVING  
THE POLLUTION ACTUALLY TAKING  
PLACE ON THE NAVIGABLE WATERS,  
AND I WANT YOU TO ADDRESS  
WHETHER OR NOT THAT IS IN FACT  
THE CASE.

>> THAT WAS NOT AN ISSUE IN THE  
PLEADINGS OR THE DEFENSE BELOW.  
THIS IS THE FIRST TIME I HAVE  
HEARD THAT STATEMENT IS IN THIS  
COURTROOM TODAY, BUT I WILL TELL  
YOU THAT AS A MATTER OF FACT,

THIS POND IS RIGHT NEXT TO A  
NAVIGABLE CREEK AND WHEN THE DAM  
BROKE IT WENT RIGHT INTO THE  
CREEK, WHICH FLOWED RIGHT INTO  
TAMPA BAY, SO THERE IS AN ISSUE  
THERE THAT IS SIMPLY NOT  
DEVELOPED IN THIS RECORD.

>> SO IF WE HELD IF THAT WAS  
PART OF IT, THAT HAS NOT BEEN  
LITIGATED.

>> THAT IS NOT BEEN LITIGATED  
AND THERE IS NO PLEAD AGAINST  
YOU, NO FACTS TO CLAIM OR  
ANYTHING LIKE THAT IN THE  
SUPREME COURT.

SO, YOUR HONOR, I THINK I  
PROBABLY HAVE HAD MY FINAL SAY  
ON THIS THING.

>> THANK YOU VERY MUCH.  
THE COURT IS NOW IN RECESS.

>> PLEASE RISE.