>> THE NEXT CASE UP IS CHIRILLO
MD, VERSUS GRANICZ.
WHENEVER YOU'RE READY.
>> MAY I PROCEED, YOUR HONOR?
>> WHENEVER YOU'RE READY.
>> MAY IS PLEASE THE COURT, I'M
SCOTT COLE, AND REPRESENTING
DR. CHIRILLO.
>> SPEAK CLOSER TO THE
MICROPHONE.
>> IS THAT BETTER.
>> THAT'S BETTER.
>> SHOULD I START OVER?
>> THAT'S FINE.
>> THANK YOU.
THE SECOND DISTRICT COURT OF
APPEAL ERRED IN THIS CASE
BECAUSE IT TRIED TO FIT INTO A
BOX A LEGAL DUTY THAT SIMPLY
DOES NOT FIT INTO A BOX.
THE DUTY OF A PHYSICIAN FOR AN
OUTPATIENT SUICIDE.
WHAT THE SECOND DISTRICT COURT
OF APPEAL DID HERE IN ERRING
BELOW IS IT TOOK A SUICIDE OF AN
OUTPATIENT, WHICH IS A
DELIBERATE INTENTIONAL
INTERVENING ACT, AND SIMPLY
APPLIED THE MEDICAL MALPRACTICE
STATUTE, 766.102 AS WELL AS THE
STANDARD THAT THIS COURT SET
FORTH IN McCAIN AND FOUND THAT
A LEGAL DUTY EXISTED.
THIS WAS ERROR.
IT WAS ERROR FOR SEVERAL
REASONS.
FIRST AND FOREMOST, THE
LONG-STANDING LAW IN THIS STATE
HAS BEEN THAT A PHYSICIAN OR A
HOSPITAL IS NOT LIABLE FOR THE
SUICIDE OF AN OUTPATIENT, EXCUSE
ME OF A PATIENT, UNLESS THAT
PATIENT IS WITHIN THE HOSPITAL'S
CUSTODY OR CONTROL.
IN THAT SITUATION EXISTS, THERE
IS SOMEBODY IN A JAIL OR
SOMEBODY IS IN A HOSPITAL OR
SOMEBODY HAS BEEN INVOLUNTARY
COMMITTED, AND THAT SITUATION
THIS COURT HAS, OTHER COURTS
FOUND IN THE STATE OF FLORIDA,
THAT A PHYSICIAN CAN BE LIABLE
FOR THE SUICIDE OF A PATIENT.
>> LET ME ASK YOU THIS.
IT SEEMS TO ME THAT THE TRIAL

JUDGE, AND CORRECT ME WHEN I GO
OFF HERE, BUT THE TRIAL JUDGE
DECIDED THIS CASE BY SAYING
EXACTLY WHAT YOU JUST SAID.
THERE WAS NO DUTY ON THE PART OF
THE PHYSICIAN OF, TO PREVENT
SUICIDE OF OUTPATIENT.
THAT IS WHAT THE TRIAL JUDGE
SAID, RIGHT?
>> BUT WHEN YOU LOOK AT THE
COMPLAINT THAT WAS FILED HERE,
THAT IS NOT, AS I READ IT, THE
DUTY AND THE BREACH THAT WAS
PLED.
I THOUGHT THE PLEADING SAID
BASICALLY THAT HE BREACHED A
DUTY THAT A PHYSICIAN SHOULD
HAVE UNDER, UNDER THESE
CIRCUMSTANCES.
IT WAS NOT TO PREVENT THE
SUICIDE.
SO, HOW DID THE TRIAL JUDGE GET
TO THAT BEING THE DUTY?
>> JUSTICE QUINCE, YOU ARE
CORRECT IN SETTING FORTH WHAT
OCCURRED HERE.
THAT IS EXACTLY WHAT WAS PLED.
THE TRIAL JUDGE GOT THERE
BECAUSE THE TRIAL JUDGE DID
CORRECT ANALYSIS.
AS THIS COURT SAID IN McCAIN
YOU NEED TO LOOK AT FACTS TO
DETERMINE THE DUTY.
WHAT THE COURT DID, THE TRIAL
JUDGE DID, IS LOOK AT WHAT THE
ULTIMATE FACTS WERE WHAT
EVENTUALLY HAPPENED AND WHAT
THIS COURT DID AND OTHER COURTS
FOUND SUICIDE IS UNIQUE
CIRCUMSTANCE.
YOU NEED TO GO BEYOND THE
SPECIFIC INJURY DELINEAGES
IN McCAIN.
>> I DON'T UNDERSTAND WHY THE
SUICIDE ISN'T A PART OF THE
OTHER ASPECTS OF NEGLIGENCE?
IT SEEMS TO ME, THAT THE DUTY
HERE, AND WAS, THAT THE DUTY ANY
PHYSICIAN WOULD HAVE TO A
PATIENT UNDER THE CIRCUMSTANCES
OF THE PATIENT CALLING IN,
SAYING THAT THE MEDICATION
WASN'T WORKING AND, WHATEVER.
AND THEN YOU GET TO THE SUICIDE
PART OF LATER BUT NOT AT THE

DUTY PART OF IT.
WHY ISN'T THAT MORE TO ME, AN EFFICIENT WAY OF DOING THIS CASE, INSTEAD OF JUMPING RIGHT TO THE SUICIDE?
>> IT WOULD BE, JUSTICE QUINCE, I AGREE IT WOULD BE MORE EFFICIENT IN A STANDARD NEGLIGENCE CASE SUCH AS THE McCAIN CASE WE'RE ALL FAMILIAR WITH THE FACTS BUT NOT EFFICIENT IN A CASE SUCH AS THIS AS YOU SIDE IS UNIQUE.
IT'S A DELIBERATE INTENTIONAL ACT THAT INTERVENES IN THE DUTY THAT A PHYSICIAN MAY OR MAY NOT HAVE.
COURTS HAVE RECOGNIZED THAT.
THE REASON FOR THAT BEING IS THE END RESULT.
>> SO BECAUSE OF A PATIENT THAT COMMITS SUICIDE, WHICH DON'T EVER LOOK AT WHETHER THE GENERAL DUTY AND WHETHER THERE WAS A BREACH OF THAT DUTY?
WE JUST LOOK AT THE FACT THERE WAS A SUICIDE AND THAT'S THE END OF THE INQUIRY?
>> NO, IT'S A NOT.
WHAT YOU LOOK AT FIRST OF ALL IS THE PATIENT WITHIN THE CUSTODY OR CONTROL OF THE PHYSICIAN.
THAT'S WHAT THE COURTS HAVE FOUND.
THAT THAT IS AN ACCEPTABLE DUTY IF A PATIENT COMMITS SUICIDE IN CUSTODY AND CONTROL--
>> LET'S LOOK AT OTHER CIRCUMSTANCES THAT WOULD NOT INVOLVE A SUICIDE.
THE SAME TELEPHONE CALL IS MADE, BUT THE PATIENT ADVISES, I'M BLEEDING FROM MY NOSE, FROM MY EARS AND FROM MY MOUTH.
AND THE DOCTOR GIVES WRONG INFORMATION AND PATIENT CALLS BACK.
THE DOCTOR SAYS, OH, IT WILL STOP.
THE PATIENT DIES.
IS THERE A DUTY UNDER THOSE CIRCUMSTANCES TO DO ANYTHING.
>> IT WOULD BE ASSUMING THERE IS EXPERT TESTIMONY.
>> OTHER STUFF.

WOULD BE DUTY ON CALL-IN.
NOT NECESSARILY BEING IN THE PRESENCE OF A PHYSICIAN AND THAT THE INJURY IS, IS SOMETHING THAT IS OUT OF THE PRESENCE OF MEDICAL HELP.
SO WE DO RECOGNIZE THAT.
SO WHAT YOU'RE SAYING IS THAT SUICIDE IS NOT BECAUSE IT'S WITHIN THE PRESENCE OR NOT, IT IS JUST THAT IS NOT SOMETHING THAT IS EVER FORESEEABLE IS SEEMS LIKE WHAT YOU'RE SAYING?
>> THAT IS EXACTLY WHAT I'M SAYING.
>> BUT HAVEN'T WE OVER TIME COME TO UNDERSTAND MORE AND MORE ABOUT THE HUMAN MIND AND, GENERALLY ONE WOULD THINK THAT THERE IS, THE HUMAN, HUMAN RESPONSE TO SURVIVE, TO LIVE, BUT FOR SOME REASON, SUICIDE OVERWHELMS THAT WHATEVER IT IS, AND INDIVIDUALS TAKE STEPS THAT WOULD, I DON'T KNOW WHAT NORMAL IS ANYMORE BUT THAT WOULD BE NOT NORMAL?
A SUICIDE WOULD NOT BE NORMAL, YOU WOULD AGREE WITH THAT?
>> OF COURSE I WOULD.
>> WHY IS IT THAT IS SUCH RESERVED AREA?
I REALIZE IT IS INTENTIONAL BUT I REALIZE, I MEAN, A LOT OF THINGS, WE LOOK AT WE'RE UNDERSTANDING MORE AND MORE AS TIME GOES BY.
AND WHAT IS THE POLICY?
I MEAN IF, IF I CALL MY PHYSICIAN AND SAY I'M GOING TO KILL MYSELF BECAUSE I'M NOT GETTING BETTER, AND PHYSICIAN SAYS, TAKE A COUPLE ASPIRIN. CALL ME AFTER IT IS OVER, NO DUTY?
>> NO, JUSTICE LEWIS.
I WOULD STATE THAT IN THAT CASE THERE WOULD BE A DUTY FOR A COUPLE OF REASONS OF THE FIRST, THAT WE, WE SUBMIT TO THE COURT THAT THE DUTY SHOULD BE UNLESS THE PATIENT IS IN CUSTODY AND CONTROL.
>> YOU AGREED THAT IS THE NOT CASE BECAUSE--

>> HOW?
>> BECAUSE YOU CAN HAVE DUTY
WITHOUT BEING CUSTODY OR
CONTROL.
>> A MEDICAL DUTY.
THIS IS FAILURE TO ACT DUTY, NOT
A MEDICAL NEGLIGENCE DUTY.
AND WHAT--
>> WHAT IS THE DIFFERENCE?
>> WELL THE DIFFERENCE IS
MISFEASANCE VERSUS NON-FEASANCE.
>> IT IS MEDICAL NEGLIGENCE
WHETHER IT IS MIS, OR NON?
>> I WOULD NOT FOR SEVERAL
REASONS.
SUICIDE IS NOT FORESEEABLE.
>> THAT DOESN'T GO TO
MISFEASANCE OR NON-FEASANCE.
IT MEANS I DO SOMETHING OR I DO
NOT ACT.
-- FEASANCE.
THERE IS NOT DUTY TO ACT, NO
DUTY TO AFFIRMATIVELY ACT IN
THOSE SITUATION.
>> WHAT STATEMENT?
>> 315.
>> THIRD RESTATEMENT.
>> RESTATEMENT OF SECOND.
I DON'T BELIEVE THEY ADOPTED IT
YET IN THE THIRD.
>> HERE IS, AS I AM LISTENING TO
THIS, WE HAVE DUTY,
FORSEEABILITY,
INTERVENING CAUSE.
I COULD SEE, IF THIS CASE GOES
DOWN, EVEN IF HE TOLD HER, JUST
GO TO THE FACTS, COME ON IN.
I'M NOT GOING TO PRESCRIBE
LEXAPRO BEFORE I SEE YOU.
SHE COMMITS SUICIDE THE NEXT
DAY, THAT THAT IS, NO THE MARE
WHAT SOMEBODY DID IN THE
EXERCISE OF ALL CARE, HOW, YOU
KNOW, YOU MAY HAVE A SITUATION
WHERE THERE IS NO
FORESEEABILITY, YOU HAVE DONE
EVERYTHING YOU CAN.
-- FORESEEABILITY.
IF YOU TOOK THE SITUATION WHERE
THEY PRESCRIBED LEXAPRO AND A
MONTH LATER, SHE COMMITS SUICIDE
AND, ACCORDING TO THEIR EXPERTS,
LEXAPRO OR COMING OFF OF EFFEXOR
QUICKLY ARE ALL CONTRIBUTING
CAUSES TO SOMEONE COMMITTING

SUICIDE.
TO PUT SOMEBODY ON AN ANTIDEPRESSANT AND THEN THEY COME OFF IT AND THEN RECOMMEND ANOTHER ONE, AND TELL THEM TO TAKE IT WITHOUT SEEING THEM, HOW DO YOU SAY-- THE SIDE-EFFECTS CAN BE YOU SIDE.
SO-- SUICIDE.
HOW CAN THAT THE NO BE GENERAL DUTY OF CARE WHEN A GENERAL PHYSICIAN IS PRESCRIBING ANTIDEPRESSANTS WITH KNOWN SIDE-EFFECTS?
AGAIN I'M AGREEING ON ONE HAND THERE MAY BE A SITUATION WHERE THE, THE NEXT DAY, NO MATTER WHAT SOMEONE DID SUICIDE WAS STILL GOING TO OCCUR BUT I'M NOT BUYING YOUR ARGUMENT THAT SUICIDE WOULD ALWAYS BE A INDEPENDENT INTERVENING CAUSE THAT WOULD TAKE, WOULD BREAK ANY DUTY OR THAT IT IS NOT FORESEEABLE.
SO CAN YOU, SEE IF YOU CAN MAYBE AGAIN WITH THAT PARADIGM TELL ME WHY, WHETHER IT IS THIS CASE THAT FITS INTO, THAT THERE IS NO DUTY?
IT IS NOT FORESEEABLE?
OR THAT, IT HAPPENED THE DAY AFTER SO IT WOULDN'T HAVE MATTERED WHAT THE DOCTOR DID?
>> JUSTICE PARIENTE I WOULD AGREE TO YOU.
I THINK FIRST AND FOREMOST, I DON'T WANT TO REPEAT MYSELF BECAUSE I WANT TO GET CLEAR THE COURT BECAUSE I DON'T THINK I ANSWERED JUSTICE LEWIS'S QUESTION.
IT HAS ALWAYS BEEN UNLESS THERE IS CUSTODY THERE IS NO DUTY TO PREVENT A SUICIDE HOWEVER THERE IS EXCEPTION TO THAT SOME OF THE COURTS FOUND, THE RAFERMAN COURT AND KELLY COURT IN THE THIRD DISTRICT UNLESS SOMEONE SHOWS SUICIDAL TENDENCIES THAT IS THE EXCEPTION.
TO ANSWER YOUR QUESTION, JUSTICE LEWIS AND I BELIEVE YOURS, JUSTICE PARIENTE, IF SOMEONE SHOWED SUICIDE TENDENCIES WE

AGREE A DUTY MAY ATTACH HERE.
THERE WAS NEVER AN INDICATION
NOT ONLY IN CASE, NOT ONE POINT
IN THIS TIME OF THIS LADY'S
TREATMENT, MRS. GRANICZ THERE
WAS NEVER SUICIDAL TENDENCIES.
NEVER WAS IN MY CLIENT UP UNTIL
2005 SHE WAS TAKING PROZAC AND
NEVER WAS THREE YEARS PLY CLIENT
WAS TREATING HER, AND NEVER IN
CRITICAL TWO OR THREE DAYS PRIOR
TO HER SUICIDE.
THAT IS SIGNIFICANT BECAUSE
THERE WAS NEVER AN INDICATION
THAT THIS PATIENT HAD ANYTHING
OTHER THAN DISTRESS AND SUM
ISSUES.
NOW-- STOMACH ISSUES.
GETTING BACK TO YOUR QUESTION,
JUSTICE LEWIS, I HAVE STOMACH
ISSUES, DOCTOR SAYS, TAKE TWO
ASPIRINS, HAVE A NICE DAY, AND
PATIENT DIES OF ULCER I WOULD
AGREE THAT IS MEDICAL
NEGLIGENCE.
OF THE IT IS NOT MEDICAL
NEGLIGENCE IN THIS SITUATION
WHERE THERE IS INTERVENING ACT
OF SUICIDE.
>> IN THIS CASE THE PHONE CALL
WAS MADE.
THE DOCTOR THEN PRESCRIBED A
MEDICATION THAT I THOUGHT THE
RECORD INDICATES ONE OF THE
SIDE-EFFECTS MIGHT HAVE BEEN
SUICIDE.
AND SO WHY ISN'T IT, UNDER THE
CIRCUMSTANCES OF THIS CASE, WHY
SHOULDN'T THE DOCTOR HAVE
BROUGHT HER IN BEFORE HAVING
PRESCRIBED SUCH A MEDICATION, TO
SOMEONE WHO IS ALREADY INDICATED
ON THE PHONE THEY WERE HAVING
PROBLEMS WITH THE OTHER
MEDICATION?
>> WELL, JUSTICE QUINCE, HERE'S
WHAT WAS, I THINK IT IS CRUCIAL
TO UNDERSTAND THE FACTS OF WHAT
OCCURRED HERE.
SHE SAID SHE STOPPED TAKING THE
OTHER MEDICATION BECAUSE SHE
THOUGHT IT WAS AFFECTING HER.
>> EXACTLY.
>> SHE DIDN'T SAY IT WAS
AFFECTING HER MIND.

SHE DIDN'T SAY SHE HAD SUICIDAL
IDEATIONS OR SHE HAD
DEPRESSION OR DEPRESSION WAS
INCREASING.
SHE SAID I HAVE PAIN IN MY
ESOPHAGUS.
SHE SAID SHE WAS HAVING TROUBLE
SLEEPING AND GETTING WEEPY.
THAT IS WHAT SHE SAID TO HER
DAUGHTER TWO DAYS BEFORE THE
SUICIDE.
>> SHE SAID MORE THAN THAT SHE
SAID SHE WASN'T FEELING, FIRST
OF ALL THE RECOGNITION SHE JUST
WENT OFF OF EFFEXOR JUST COLD
TURKEY AND THEN THE ASSISTANT,
SHE TOLD THE ASSISTANT, SHE
HADN'T FELT RIGHT.
SHE WAS UNDER MENTAL STRAIN AND
CRYING EASILY.
SHE WAS NOT SLEEPING WELL AND
TAKING MORE SLEEPING PILLS.
AND SO, THAT DOES NOT, INDICATE
SOME STOMACH PAINS.
THOSE ARE SOME, THEN HE LOOKS AT
THIS.
INSTEAD OF SAYING GET HER IN
RIGHT AWAY, I CAN'T BELIEVE SHE
JUST COLD-TURKEYED OFF OF
EFFEXOR, GOES, HAVE HER COME AND
GET SOME SAMPLES OF LEXAPRO.
>> AND THE, THAT IS, THAT IS
CORRECT BUT THE PROBLEM HERE IS
THAT YOU'RE DEALING WITH WHAT
THE COURTS HAVE FOUND IS A
PENULTIMATE GRAY AREA, THE HUMAN
MIND.
THERE IS NO-- IN FACT THEIR OWN
EXPERT SAID THERE IS NO
FORESEEABILITY THAT SHE WOULD
HAVE COMMITTED SUICIDE.
YOU'RE DEALING WITH NOW
INFERENCE UPON INFERENCE UPON
INFERENCE UPON INFERENCE.
WHAT YOU HAVE HERE, WELL, YOU HE
SHOULD HAVE BROUGHT HER IN.
AND THEN LET'S ASSUME--
>> BUT THE ISSUE WE HAVE HERE IS
THE ISSUE OF DUTY.
>> YES, SIR.
>> ISN'T THAT CORRECT?
>> YES, JUSTICE.
>> AND THE CONNECTION, THESE
OTHER THINGS, THIS CAN ALL, THIS
HAS GOT A LIFE BEYOND THIS,

OKAY?
AND SOME OF THE POINTS YOU'RE MAKING MAY HAVE SOME FORCE IN A DIFFERENT CONTEXT THAT THEY, EVEN IF THEY'RE NOT SUCCESSFUL HERE.
BUT LET ME ASK YOU ABOUT THIS. WHAT ABOUT SECTION 766.102 OF THE FLORIDA STATUTES?
NOW WHEN IT TALKS ABOUT THE PREVAILING PROFESSIONAL STANDARD OF CARE FOR A PARTICULAR HEALTH CARE PROVIDER, ISN'T IT TALKING ABOUT THE DUTY OF THE HEALTH CARE PROVIDER?
>> IT IS, YES, SIR.
>> SO WHY ISN'T THIS, THIS STATUTE, A PROBLEM FOR THE POSITION YOU'RE TAKING?
I MEAN, AND, I THAT BUT LET ME ELABORATE ON IT.
AREN'T YOU ESSENTIALLY ASKING US TO KIND OF CARVE OUT AN EXCEPTION TO WHAT THE LEGISLATURE HAS SAID HERE IN THIS STATUTE?
NOW YOU MAY HAVE GOOD ARGUMENTS FOR THAT AND, MIGHT EVEN BE ARGUMENT I FIND QUITE PERSUASIVE BUT THIS IS A DIFFERENT QUESTION OF WHETHER, AS A MATTER OF THE POLICY IS ONE QUESTION BUT WHETHER WE SHOULD, OURSELVES, TAKE IT UPON OURSELVES TO CARVE OUT EXCEPTION TO WHAT THE LEGISLATURE HAS SAID HERE IS A DIFFERENT QUESTION.
SO ADDRESS THAT, IF YOU WOULD.
>> THANK YOU, JUSTICE CANADY.
THE LEGISLATURE SAID THAT A PHYSICIAN SHOULD ACT IN ACCORDANCE WITH THE PREVAILING PROFESSIONAL STANDARDS AND THE PREVAILING PROFESSIONAL STANDARDS IN MEDICAL NEGLIGENCE CASES LIKE JUSTICE LEWIS POINTED OUT ARE WELL-SETTLED AND I WOULD AGREE WITH JUSTICE LEWIS THAT'S A SITUATION WHERE A DOCTOR SHOULD DO MORE.
IN THIS SITUATION YOU'RE TALKING ABOUT THE HUMAN MIND WHICH, AS THE COURTS HAVE FOUND THROUGHOUT THE UNITED STATES THAT IS SOMETHING THAT CAN NOT BE

PREDICTED.
A PHYSICIAN COULD HAVE SEEN THIS, AND YOU'RE ALSO TALKING ABOUT THE LIMITATIONS OF PSYCHOLOGICAL TREATMENT AND PSYCHIATRIC TREATMENT ON AN OUTPATIENT BASIS.
THEY DON'T HAVE THE OPPORTUNITY TO SEE THE PATIENT AROUND THE CLOCK.
THEY DON'T HAVE THE OPPORTUNITY TO THE MONITOR THE PATIENT.
THAT PATIENT COULD BE NO MORE HAVING STOMACH ISSUES THAT COULD BE SOLVED BY LEXAPRO THAN A VISIT TO GASTROENTEROLOGIST.
>> WHETHER YOU COUCH IT IN TERMS OF A STATUTE OR COMMON LAW STRAIGHT, STRAIGHT UP COMMON LAW DUTY, SEEMS TO ME OVER HISTORY, WHAT PHYSICIANS OR MEDICINE, MEDICINE MAY HAVE KNOWN IN THE 1920s IS CERTAINLY NOT WHAT MEDICINE HAS COME TO KNOW NOW IN THE 21st CENTURY.
AND WE LEAVE IT, DO WE NOT LEAVE IT TO THE PROFESSIONALS TO DEFINE WHAT THAT PROFESSIONAL PREVAILING PROFESSIONAL STANDARD IS?
THE COURT DOESN'T SET THAT WITHOUT REFERENCE TO EVIDENCE FROM AN EXPERT, RIGHT?
I MEAN, THAT IS WHERE IT COMES FROM.
>> YES, IT DOES.
>> AND IF THE EXPERT SAYS, WELL WE DIDN'T EVEN KNOW ABOUT, YOU KNOW, THIS DEPRESSIVE CONDITION BACK IN THE 1920s.
WE DIDN'T KNOW ABOUT MEDICATIONS.
HOW GIVING IT, WITHDRAWING IT MAKES A DIFFERENCE.
WHY, ARE WE STUCK WITH THAT HARD AND FAST PRINCIPLE THAT I RECOGNIZE WE'VE BEEN DEALING WITH WHY ARE WE ABSOLUTELY WEDDED OR COMMITTED TO THAT WHEN KNOWLEDGE IN THE WORLD CHANGES WITH REGARD TO HUMAN EXPERIENCE?
>> I AGREE WITH YOU, JUSTICE LEWIS, THE WORLD DOES CHANGE AND THE SIGNIFICANCE HERE IS THAT IN THIS PARTICULAR CASE THIS WAS A

SUICIDE.
THIS WASN'T A STANDARD MEDICAL NEGLIGENCE CASE.
UNDER THE McCAIN STANDARD IT WAS VERY EASY TO PREDICT WHAT THE ZONE OF RISK WOULD BE.
IT WAS--
>> I'M SAYING, ARE WE SAYING THAT SCIENTIFICALLY WE HAVE NOT ADVANCED FROM THE 1920s UNTIL THE 21st CENTURY IN PREDICTING OR UNDERSTANDING THE PRECIPITATING EVENTS TO A SUICIDE?
>> WE ABSOLUTELY HAVE ADVANCED. THAT WAS SET FORTH IN THE PADDOCK CASE BUT WE HAVE NOT ADVANCED TO EXTENT NECESSARY TO IMPOSE DUTY WHEN NOT FORESEEABLE.
>> OKAY.
>> WHAT THE PLAINTIFF OR RESPONDENT IS ASKING THIS COURT TO DO TO FIND FORESEEABILITY EXISTS IN THE McCAIN ZONE OF RISK FOR FORESEEABILITY FOR SOMETHING THAT IS SIMPLY NOT FORESEEABLE.
IT IS EASY IN A CASE LIKE McCAIN OR ITS PROGENY TO SAY THAT IS A FORESEEABLE ZONE OF RISK.
UNDER SUICIDE SITUATION YOU ABSOLUTELY CAN NOT SAY THAT BECAUSE IT IS NOT FORESEEABLE ESPECIALLY IN CASE LIKE THIS WHERE NOT ONE TIME IN THIS LADY'S LIFETIME HAD SHE EVER INDICATED SHE WAS GOING TO COMMIT SUICIDE.
NEVER ONCE DID SHE EXPRESS THAT.
YOU'RE PUTTING INCREDIBLE BURDEN ON OUTPATIENT PSYCHIATRIC AND MENTAL HEALTH TREATMENT IF YOU STATE AND YOU HOLD THIS CASE TO THE SAME STANDARDS AS McCAIN OR AS SIMPLE AS I MENTIONED WHEN I FIRST STARTED PUTTING IT IN A BOX.
HERE IS MEDICAL NEGLIGENCE, HERE IS THE ALLEGATIONS OF THE COMPLAINT.
HERE IS 766.
HERE IS McCAIN OF THE THAT'S THE END OF IT.

YOU CAN'T PUT THE LID ON THE BOX
IN THIS TYPE OF A CASE.
IT IS UNIQUE.
THERE IS POLICY CONSIDERATIONS.
THERE IS ECONOMIC CONSIDERATIONS
AND THERE IS SOCIAL
CONSIDERATIONS.
AND THAT'S WHY--
>> YOU'RE INTO REBUTTAL.
>> THANK YOU, CHIEF JUSTICE.
I HAVE WILL SIT DOWN.
THANK YOU.
>> MAY IT PLEASE THE COURT.
JIM TILGHMAN WITH ME.
GARY FOX REPRESENTING ROBERT
GRANICZ.
I'D LIKE TO DITCH MY ORDER A
LITTLE BIT AND PICK UP ON THE
POINTS THAT JUSTICE CANADY AND
LEWIS WERE MAKING, KIND OF
PRACTICAL, EQUITABLE SIDE OF
THIS THING BEFORE WE GO BACK TO
THE LAW WHICH TO ME IS VERY
CLEAR BUT, THERE ARE A COUPLE OF
THINGS GOING ON HERE.
AND ONE PROGRESS OF TIME THAT
HAS BEEN MENTIONED HERE.
WHEN THE COURTS FIRST STARTED
DEALING WITH SUICIDE, IT WAS A
DIFFERENT MEDICAL BALL GAME THAN
IT IS NOW.
FRANKLY ALTHOUGH I LOVED JUSTICE
JORGE BEGAN SIN FROM THE THIRD
DISTRICT, I GET A LITTLE TIRED
OF READING HIS DISSENT FROM 40
YEARS AGO HOW COURTS CAN'T DEAL
WITH SUICIDE.
IT IS ALMOST EMBARRASSING WE'RE
OPERATING IN THAT OLD SPECTRUM.
SO, BUT BIGGER POINT IS WHO IS
TO TELL US IT IS UNPREDICTABLE
OR TOO VAGUE FOR A COURT TO DEAL
WITH?
IT IS NOT ME.
IT IS NOT MR. COLE.
IT IS THE DOCTORS.
ONLY THEY CAN TELL US HOW FAR
MEDICINE HAS COME, WHAT IS A
REASONABLE STANDARD, WHAT DOES
IT MEAN THAT SHE DIDN'T MENTION
THAT SHE HAD SUICIDAL IDEATION.
IS THAT IMPORTANT?
HOW IMPORTANT WAS IT?
WAS THERE ANY CHANCE IF
DR. CHIRILLO DONE WHAT HE HAD

SUPPOSED TO IT WOULD HAVE MADE A
DIFFERENCE?
WAS IT MORE LIKELY THAN NOT
COULD HAVE SAVED HER?
THAT IS WHAT THE CASE IS ABOUT
LATER AND THAT'S ALL MEDICAL
JUDGMENTS, WE, NONE OF US HERE
ARE QUALIFIED TO MAKE.
SO I THINK THAT'S A HUGE
CONFUSION GOING ON HERE, WHICH
SEGUES US INTO, WE'RE ALLOWING
US TO CONFUSE HOW THE LEGAL
SYSTEM WORKS.
ALL THOSE THINGS ARE GOING TO
HAPPEN IN THIS CASE, EVERYONE OF
THEM.
>> LET ME ASK YOU.
THIS CASE WAS DECIDED ON MOTION
FOR SUMMARY JUDGMENT, RIGHT?
>> YES.
>> STANDARD IN A MOTION FOR
SUMMARY JUDGMENT IS THAT THERE
ARE NO DISPUTED FACTS AND THAT
DISPUTED FACTS HERE WOULD SHOW
THERE IS NO DUTY, RIGHT?
>> YES.
>> SO, BUT, THE QUESTION THEN
BECOMES, WHAT IS THE DUTY WE'RE
TALKING ABOUT?
>> YEAH.
>> SEEMS TO ME YOUR OPPONENT IS
SAYING THERE IS NO DUTY TO
PREVENT SUICIDE.
I MIGHT AGREE WITH THAT BUT WHAT
IS THE DUTY--
>> I MIGHT TOO.
>> THE DUTY ALLEGED HERE AND
THAT THERE IS A DISPUTED FACT
ABOUT?
>> WHEN THEY MOVED FOR SUMMARY
JUDGMENT, THEY MOVED ON THE DUTY
ISSUE.
WHICH IS A FAVORITE THING FOR
SUMMARY JUDGMENT BECAUSE YOU
DECIDE THAT AS A MATTER OF LAW,
NOT AS A MATTER OF DISPUTE.
BUT, THEY MOVED FOR SUMMARY
JUDGMENT ON DUTY BASED ON A LACK
OF FORESEEABILITY AND STARTED
CITING DEPOSITIONS.
SO THE FACTS ABOUT
FORESEEABILITY SEEPED IN.
WE FILED OUR EXPERT'S
DEPOSITION.
SO YOU HAD THAT MIX THERE.

BUT YOU HAVE TO SEPARATE THE
TWO.
WHAT IS THE DUTY?
WHICH IS WHAT THE SECOND
DISTRICT WENT OFF ON.
THE DUTY-- LOOK, AS THIS COURT
SAID IN McCAIN, DUTY CAN COME
FROM FOUR DIFFERENT PLACES.
IT CAN COME FROM YOUR STATUS,
FROM A STATUTE, FROM CASE LAW,
OR FROM THE HARDCORE TORT
ANALYSIS WHICH IS WHAT THE COURT
REITERATED, WENT OVER IN
McCAIN.
WELL THE FIRST THREE ARE
DESIGNED FOR SITUATIONS THAT
RECUR A LOT.
A STATUTE THAT COVERS NUMBER OF
CASES AND LORD KNOWS,
DOCTOR-PATIENT RELATIONSHIPS
HAPPEN ALL THE TIME.
WE HAVE A STATUTE THAT SAYS
THERE IS DUTY TO TREAT ACCORDING
TO THE STANDARD OF CARE.
WE HAVE A RASH OF CASE LAW THAT
SAYING DOCTORS HAVE A DUTY TO
TREAT THEIR PATIENTS ACCORDING
TO STANDARD OF CARE.
IF THEY DIDN'T HAVE ANY OF THAT
AND STARTED FROM SCRATCH WITH
THE McCAIN ANALYSIS WE WOULD
END UP THE EXACT SAME PLACE
BECAUSE IT IS CERTAINLY
FORESEEABLE THAT THE DOCTOR'S
FAILURE TO DO WHAT HE IS
SUPPOSED TO DO WITH HIS PATIENT
CREATE AS GENERAL RISK ZONE OF
HARM.
THERE IS NO MAGIC THERE.
SAME THING IS TRUE IF YOU'RE
TREATING DEPRESSION.
DOES A DOCTOR KNOW ONE OF THE
RISKS THAT, BROAD ZONE OF RISK
BEING CREATED IS SUICIDE?
YEAH.
YOU HAVE TO BE IN A CLOSET NOT
TO KNOW THAT.
DR. CHIRILLO DIDN'T DISPUTE THAT
NO MATTER HOW YOU LOOK AT IT,
HOW YOU COME AT IT, THERE IS A
DUTY.
WE DON'T GET TO THE NEXT STEP
UNTIL TRIAL.
EVEN THOUGH THE SECOND DISTRICT
TALKED ABOUT IT AND WE ALL DID

IN THE TRIAL TOO BECAUSE
EVERYBODY THREW THEIR EVIDENCE
IN BUT THE VERY NEXT LEVEL, AS
THIS COURT DISCUSSED IT ON THE
VERY NEXT LEVEL WELL, THE
STATUTE SAYS, THE DUTY OF A
DOCTOR IS DEFINED BY THE
PREVAILING STANDARD OF CARE.
IT SAYS IT BETTER THAN THAT BUT
THAT WHAT'S IT IS SAYING.
THIS COURT IN PATE, WELL WE'RE
RECOGNIZE DUTY IF THE DOCTORS
SAYS THE GENERAL DUTY, THE
DOCTOR HAD DUTY TO DO THIS
SPECIFIC THING IN THIS SCENARIO.
BOTTOM LINE, VERY NEXT STEP YOU
LOOK TO THE DOCTORS WHAT IS THE
DUTY OF DUE CARE IN THIS
SITUATION?
WHAT IS THE PREVAILING STANDARD
OF CARE?
IF WE WERE BEING 100%
ACCURATE--
>> WAS THAT DISPUTED FACTS ABOUT
WHAT IS THAT PREVAILING STANDARD
OF CARE?
>> THAT'S RIGHT.
AND WHEN YOU CROSS THAT LINE
THAT I JUST CROSSED SAYING OKAY,
WE HAVE TO ASK THE DOCTORS WHAT
THIS GENERAL DUTY MEANS IN THIS
SITUATION, TAKE WHAT HE LIKES.
WHAT DOES IT MEAN THAT SHE
DIDN'T HAVE TENDENCIES.
>> IS THAT A QUESTION OF LAW OR
A QUESTION OF FACT IN THIS
CONTEXT?
>> WHICH ONE, I'M SORRY?
>> WELL, THE DUTY QUESTION?
>> THE BASE DUTY TO TREAT IN
ACCORDANCE WITH THE PREVAILING
STANDARD OF CARE IS A QUESTION
OF LAW.
>> OKAY.
NOW HERE'S WHERE DEFENSE SAYS,
IN THE CONTEXT OF A NONCUSTODIAL
PATIENT, UNDER CIRCUMSTANCES OF
AN ULTIMATE SUICIDE, THE BASIC
LAW GENERAL LAW, NOT WHAT
DOCTORS SAY IT IS OR NOT BUT THE
GENERAL LAW IS, THERE IS NO DUTY
TO PROTECT FROM SUICIDE.
THAT IS HOW HE STARTED OFF.
THAT IS HOW HE SAT DOWN.
>> OKAY.

SO--
>> IT'S A DIFFERENT, HE IS SAYING THIS ASK A DIFFERENT CATEGORY.
IT HAS BEEN RECOGNIZED BY THE LAW FOR, I MEAN LONGER THAN WE'VE BEEN DOING THIS.
>> HE IS LOOKING AT A DIFFERENT KIND OF SUICIDE CASE THAN WE HAVE HERE.
>> OKAY.
>> THAT'S WHAT'S GOING ON.
IF YOU CROSS FROM THE QUESTION OF, DID THE DOCTOR HAVE A DUTY TO TREAT JACQUELINE GRANICZ ACCORDING TO THE STANDARD OF CARE INTO THE REALM OF, DID HE HAVE TO COMMIT HER OR DID HE HAVE TO INSTITUTIONALIZE HER OR TAKE HER INTO CUSTODY OR HAVE HER HUSBAND TAKE HER INTO CUSTODY OR CONTROL OR SUPERVISION, YOU JUST CROSSED A THRESHOLD FROM MISFEASANCE TO NONFEASANCE.
>> BUT IT IS STILL A DUTY.
>> BUT THEN HE GETS TO BE RIGHT BECAUSE AT THAT POINT THE LAW SAYS TO HAVE THAT DUTY YOU NEED A SPECIAL RELATIONSHIP, AND YOU NEED VARIOUS OTHER THINGS.
IT IS A HARDER, AND YOU GET TO LOOK AT SPECIFIC FORESEEABILITY FOR THE SUICIDE.
THAT IS WHERE, HE DECIDES GETTING CONCEPTS OF PUTTING THEM IN THERE.
SO, YES, THOSE CASES EXIST AND, THIS CASE DOESN'T CHANGE THAT.
THIS IS A, YOU'VE GOT TO TREAT YOUR PATIENT ACCORDING TO STANDARD OF CARE.
NOT, THAT YOU HAVE TO BAKER ACT THEM OR GOT TO DO ANY OF THAT.
THAT CASE LAW IS OUT THERE AND THIS CASE DOESN'T CHANGE THAT.
AND IN FACT, THE THREE FAVORITE CASES THEY LIKE ON THAT, PADDOCK, GARCIA AND LAWLOR, ALL ACTUALLY SUPPORT US IN THIS SENSE.
THEY END UP BEING DECIDED ON THE NONFEASANCE KIND OF DUTY THAT YOU HAVE TO LOCK THEM UP OR COMMIT THEM OR WHATEVER.

AND THEY SAY NO.
I HAVE NO ARGUMENT WITH THAT.
ALONG THE WAY EVERYONE EVER
THOSE CASE, THERE WAS EMBEDDED
MALPRACTICE CLAIM, MEANING A
CLAIM LIKE WE'RE MAKING THAT THE
DOCTOR DOESN'T DO IT RIGHT IN
THE FIRST PLACE.
IN EACH OF THOSE CASES, THE
COURTS DISPOSED OF THOSE CLAIMS
ON THE FACTS.
THEY DIDN'T DISPOSE OF THEN BY
SAYING THERE IS NO SUCH DUTY.
WE DON'T HAVE TO LOOK AT THAT
THERE IS NO DUTY.
THEY SAY, WELL, EVEN IF WHAT YOU
SAY IS TRUE WOULDN'T MATTER HERE
BECAUSE, THEY DECIDE THEM ON
CAUSATION.
SO IMPLICIT, EXACTLY WHAT WE'RE
SAYING.
THERE ARE PARALLEL DUTIES HERE.
WE'RE NOT TRYING TO END THE LAW
THAT SAYS YOU DON'T HAVE TO
BAKER ACT SOMEBODY.
YOU CAN'T, THAT'S THE CASE LAW
AND THAT'S WHAT PROTECTS THE
DOCTORS FROM THIS BURDEN THAT WE
KEEP HEARING ABOUT AND QUOTES.
>> LET ME ASK YOU, THIS LEGAL
CAUSE.
MAYBE THAT'S WHERE I WAS-- THE
ISSUE AS TO WHETHER, YES THEY
HAVE THE DUTY AND THE DUTY,
YOU'RE TREATING SOMEBODY FOR
DEPRESSION AND THE CALL COMES IN
IS NOT, WELL, I COULDN'T IMAGINE
SOMEBODY WITH DEPRESSION--
SUICIDES IS AN INDEPENDENT ACT,
WE GET BY THAT BUT THE ISSUE OF
LEGAL CAUSE HERE, WAS THAT
ARGUED AS PART OF THE SUMMARY
JUDGMENT THAT LOOK, IF SHE GOT
OFF THE PHONE AND SHE SHOT
HERSELF THE NEXT MOMENT, YOU
KNOW, THERE IS, NOTHING COULD
HAVE HAPPENED.
HERE IT IS THE NEXT DAY?
IS LEGAL CAUSE, IS THAT A PART
OF THE SUMMARY JUDGMENT?
IS THAT GOING TO BE AN ISSUE FOR
THE JURY?
>> TO ANSWER THE FIRST PART OF
THE QUESTION, NO, IT WAS NOT
SUMMARY JUDGMENT ISSUE.

THE ANSWER TO THE SECOND
QUESTION IS, YOU BET.
I MEAN THAT IS GOING TO BE PART
OF THE--
>> SEEMS TO ME THAT WILL BE YOUR
BIGGEST HURDLE.
>> ABSOLUTELY.
>> IN THIS CASE BECAUSE--
>> THAT AND LACK OF SUICIDAL
IDEATIONS.
WE'LL HEAR ALL THAT.
>> ONE OF ISSUES, THAT THE
DOCTOR SHOULD HAVE TOLD HER THAT
LEXAPRO CAN CAUSE SUICIDAL
IDEATION AS WELL.
EVEN IF SHE CAME IN AND PICKED
UP THE MEDICATION, IT IS NOT
GOING TO CAUSE SOMEBODY THE NEXT
DAY TO LEAP OFF OF A BUILDING.
SO--
>> ALL THOSE THINGS WILL BE
ISSUES.
AND, AS THEY SHOULD BE BUT
THAT'S HOW THE SYSTEM IS
SUPPOSED TO WORK.
NOT, THERE IS NO DUTY TO TREAT
THE PATIENT CORRECTLY.
I'VE COVERED WHAT I WANT TO
COVER ON THE ISSUES I THINK THAT
EVERYBODY IS INTERESTED IN.
IS THERE A QUESTION, I'M HAPPY
TO GO, THANK YOU.
>> THE FORESEEABILITY ANALYSIS
IS DEPENDENT ON THE FACTS OF THE
CASE AND THE FORESEEABILITY
ANALYSIS AS IT GOES TO DUTY
DEPENDS ON THE FACTS OF CASE AND
IN THIS CASE THEIR OWN EXPERT
STATED THIS SUICIDE WAS NOT
FORESEEABLE.
THEREFORE UNFORESEEABLE ZONE
OF RISK FOR McCAIN NO DUTY
SHOULD HAVE BEEN CREATED HERE.
IN ADDITION WHEN YOU HAVE
PHYSICIANS SUCH AS THIS IN A
SITUATION SUCH AS SUICIDE,
WHICH, JUSTICE LEWIS, IN THE
TUTEN CASE, WHICH IS 2012 CASE
TO ADDRESS YOUR CONCERNS THEY
SAY PSYCHIATRY HAS GONE A LONG
WAY, HAS COME A LONG WAY, BUT
STILL NOT COME LONG ENOUGH TO
GET INTO INNER-WORKINGS OF THE
HUMAN MIND.
WHEN YOU HAVE A CASE LIKE THIS,

YOU ENTER INTO SOCIAL ISSUES,
ECONOMIC ISSUES AND OTHER ISSUES
WHICH WE REQUEST THIS COURT
ADDRESS AS WELL.
THANK YOU.
>> THANK YOU FOR YOUR ARGUMENTS.
THE COURT WILL BE IN RECESS TEN
MINUTES.