>> THE NEXT CASE.
WHENEVER YOU'RE READY.
LET'S JUST WAIT A COUPLE OF MINUTES.
THERE'S A LOT OF PEOPLE WALKING OUT, AND LET'S LET THE DUST SETTLE.
>> OKAY.
I THINK WE HAVE GOT IT QUIET.
WHENEVER YOU'RE READY.
AND JUST SO YOU KNOW, JUSTICE LEWIS HAD--
[INAUDIBLE]
AND HE'D RATHER SIT IN THE BACK, AND HE'S BACK THERE LISTENING TO THE ARGUMENTS.
SO HE'D RATHER COUGH BACK THERE.
>> FAIR ENOUGH.
GOOD MORNING.
MAY IT PLEASE THE COURT, MY NAME IS ANDREW MANKO, AND IT'S MY PRIVILEGE TO REPRESENT THE PETITIONER, CRYSTAL SELLS.
I'D LIKE TO RESERVE FIVE MINUTES FOR REBUTTAL.
MS. SELLS BROUGHT THIS ACTION PURSUANT TO DUTIES OWED UNDER THE FEDERAL EMPLOYERS LIABILITY ACT, OTHERWISE KNOWN AS FELA, AFTER HER HUSBAND SUFFERED A CARDIAC ARREST WHILE WORKING FOR CSX OUT AT A REMOTE WORKSITE AND DIED PENDING THE LATE ARRIVAL OF THE EMTs SOME 35 MINUTES LATER.
AT ISSUE IN THIS APPEAL IS THE PROPER RECOGNITION OF THE COURT'S LIMITED ROLE IN DETERMINING THE THRESHOLD INQUIRY OF WHETHER A DUTY OF CARE EXISTS AND THE PRESERVATION OF THE JURY'S IMPORTANT ROLE IN DECIDING WHETHER CSX'S CONDUCT WAS REASONABLE AND WHETHER IT CAUSED THE DAMAGES IN THE CASE.
THE DECISION BELOW BLURRED THE LINES BETWEEN THOSE TWO CRITICAL AND DISTINCT ROLES CONTRARY TO PRECEDENT FROM THIS COURT, FROM THE U.S. SUPREME COURT AND FROM

SEVERAL STATE AND FEDERAL
COURTS.
>> I JUST WANT TO BE CLEAR, YOU
SAID IT WAS BROUGHT UNDER THE
FELA, BUT AS THE FIRST DISTRICT
ENUNCIATED, THE LAW GENERALLY,
THE DUTY ARISES FROM THE COMMON
LAW.
IS THAT CORRECT OR NOT?
>> THAT'S ACTUALLY NOT CORRECT,
AND AN ADDITIONAL BASIS FOR
JURISDICTION WHICH WE INCLUDED
IN OUR REPLY BRIEF IN RESPONSE
TO THE ARGUMENTS THAT CSX MADE
ABOUT JURISDICTION, THAT'S
ACTUALLY INCORRECT.
THIS COURT IN FOREMAN AND THE
FIFTH DCA IN ROBINSON BOTH
CLEARLY HELD THAT THE DUTY IN A
FELA CASE ARISES FROM A FEDERAL
STATUTE, A FEDERAL LAW, NOT THE
COMMON LAW.
>> SO THEN WHY-- SO, THEREFORE,
THEN THE QUESTION IS WHERE'S THE
CONFLICT?
BECAUSE LAMONES TALKS ABOUT THE
COMMON LAW, AND McCAIN TALKS
ABOUT THE COMMON LAW.
SO IF IT'S AN ISSUE OF ARISING
FROM A DUTY UNDER THE FELA, THEN
WE DON'T-- WHAT CASE IS THAT IN
CONFLICT WITH?
>> SO, FIRST AND FOREMOST, I
THINK CONFLICT EXISTS FOR THE
REASON I JUST SAID.
AND ONCE THE COURT HAS
JURISDICTION, IT CAN DECIDE ANY
ISSUE IN THE CASE.
SO THAT'S THE FIRST RESPONSE TO
THAT--
>> WAIT, I DON'T UNDERSTAND.
THE CONFLICT EXISTS BECAUSE OF
OTHER CASES THAT WERE NOT ARGUED
AS A BASIS FOR CONFLICT WHEN YOU
FIRST FILED YOUR JURISDICTIONAL
BRIEF?
>> I'M NOT AWARE OF ANY
REQUIREMENT THAT--
>> NO, I'M JUST ASKING A
QUESTION.

>> RIGHT.
NO, NO, I'M NOT AWARE OF A REQUIREMENT THAT THE BASES THAT ARE RAISED IN THE JURISDICTIONAL BRIEF ARE THE ONLY BASES THAT CAN BE RAISED ON THE MERITS, BECAUSE THE COURT CAN ALWAYS EXERCISE ITS DISCRETION ONCE IT GRANTS REVIEW TO RECONSIDER THAT ISSUE.
AND, OF COURSE--
>> BUT THE QUESTION IS IF DUTY IS NOT A COMMON LAW ISSUE, THEN-- AND YOU'VE SAID IT'S NOT UNDER FELA-- THEN HOW DO WE HAVE CONFLICT JURISDICTION WITH THE ONLY CASES YOU CITED WERE COMMON LAW DUTY CASES?
>> THIS IS THE WAY I THINK ABOUT IT--
>> THAT'S THE QUESTION.
>> THE WAY I THINK ABOUT IT IS YOU HAVE TO PUT ASIDE THE SOURCE OF THE DUTY IN A PARTICULAR CASE.
IN THIS CASE, THE SOURCE IS A FEDERAL STATUTE.
IN LAMONES, THE SOURCE WAS THE COMMON LAW.
IF YOU PUT ASIDE THE SOURCE OF THE DUTY, THE PRONOUNCEMENT THAT IS IN CONFLICT--
>> THE QUESTION, THE QUESTION IN THIS CASE AND IN THE OTHER CASES WERE WHETHER THERE WAS A DUTY.
>> WELL, THE PRONOUNCEMENT IN LAMONES, I THINK, IS WHAT IS THE-- AND IT'S REALLY MORE OF A PROCEDURAL ISSUE, I THINK--
WHAT IS THE ROLE OF THE COURT AND WHAT'S THE ROLE OF THE JURY.
ONCE YOU DETERMINE THE SOURCE OF THE DUTY AND THE EXTENT OF THE DUTY, THEN IT'S FOR THE JURY IN THE NEGLIGENCE ACTION TO DETERMINE WHETHER AND TO WHAT EXTENT THE CONDUCT WAS UNREASONABLE.
AND THAT'S REALLY THE CONFLICT ISSUE.

THIS COURT IN LAMONES--
>> BUT ISN'T THE ISSUE HERE ENTIRELY A MATTER OF FEDERAL LAW?
NOW, THAT INCLUDES THIS BODY OF LAW THAT HAS DEVELOPED UNDER FELA AND ALL OF THAT.
THIS HAS TO BE CONSIDERED.
BUT IT IS PURELY A MATTER OF FEDERAL LAW.
AND I'M JUST, I'M STILL STRUGGLING TO UNDERSTAND THE THEORY BY WHICH OUR PRONOUNCEMENTS ON STATE LAW ARE IN EXPRESS AND DIRECT CONFLICT WITH THE PRONOUNCEMENT ABOUT FEDERAL LAW.
HELP ME UNDERSTAND THAT.
>> WELL, THE SOURCE OF THE DUTY IS A FEDERAL LAW, BUT THE U.S. SUPREME COURT HAS MADE CLEAR THAT THIS CASE IS GUIDED BY COMMON LAW PRINCIPLES, PARTICULARLY--
>> NOT NECESSARILY FLORIDA COMMON LAW.
>> NOT FLORIDA COMMON LAW, BUT WHERE FLORIDA COMMON LAW AND FEDERAL COMMON LAW ARE IDENTICAL, IT IS A RELEVANT CONSIDERATION.
AND HERE BOTH THE U.S. SUPREME COURT CASES AND THIS COURT'S CASES MAKE CLEAR THAT IN A NEGLIGENCE ACTION-- WHICH THIS IS A NEGLIGENCE ACTION-- ONCE YOU DETERMINE WHAT THE DUTY IS, IT'S THE COURT'S ROLE TO DETERMINE WHETHER AND TO WHAT EXTENT THAT DUTY--
>> IS THE DUTY UNDER FELA DIFFERENT THAN THE DUTY IN FLORIDA COMMON LAW?
>> IN TERMS OF THE EMPLOYER TO AN EMPLOYEE?
>> YES.
>> IT IS, IT'S BROADER.
IT'S BROADER.
IF ANYTHING, IT'S A BROADER DUTY THAN UNDER FLORIDA LAW.

>> SO FELA HASN'T-- SO IT'S
DIFFERENT THAN FLORIDA LAW.
>> IT IS-- YES.
IT IS A DIFFERENT DUTY.
I'M TRYING TO, MAYBE I'M NOT
ARTICULATING IT VERY WELL.
I'M TRYING TO SAY THAT THIS
COURT HAS ACCEPTED JURISDICTION
IN OTHER CASES IN WHICH THE
DUTIES WERE DIFFERENT, TOTALLY
DIFFERENT.
IN LAMONES THEY BOTH WERE UNDER
FLORIDA LAW, BUT THAT WAS A DUTY
OWED TO A STUDENT FROM A SCHOOL.
A VERY DIFFERENT DUTY THAN THE
McCAIN CASE WHICH WAS A POWER
COMPANY AT LARGE.
SO THAT'S ONE EXAMPLE.
JUST BECAUSE THE DUTIES MAY BE
DIFFERENT DOESN'T MEAN THAT
THERE'S NO CONFLICT.
>> WHAT YOU'RE REALLY-- I MEAN,
THERE'S A HIGHER DUTY.
I MEAN, THE ONLY REASON THAT
THERE'S A DUTY IS BECAUSE, AS
LIKE THE SCHOOL IN LAMONES, IS
BECAUSE THIS IS AN
EMPLOYER-EMPLOYEE RELATIONSHIP
WHICH OTHERWISE WOULD BE
GOVERNED BY WORKER'S COMP.
BUT GOING BACK TO SO THAT WE
DON'T GET OUR, YOU KNOW, I'M
SURE YOU DON'T WANT TO TALK
YOURSELF OUT OF JURISDICTION--
>> I'D PREFER NOT TO, SURE.
[LAUGHTER]
>> IT'S SORT OF SOUNDING LIKE
THE QUESTION IS IF THE DUTY IS
BROADER THEN AND THEY USE
LAMONES TO MAKE IT NARROWER,
THEY DISTINGUISHED IT AND RELIED
ON L.A. FITNESS.
IS THAT WHAT THE FIRST DISTRICT
DID?
>> YES, I THINK THE FIRST--
>> I MEAN, THAT'S THE PROBLEM.
DIDN'T THEY-- LAMONES, THEY
RELIED IT AND SAID, NO, THIS IS
DIFFERENT, THIS IS MORE LIKE
L.A. FITNESS.

>> THAT IS, YES, ONE OF THE PROBLEMS.
>> THAT'S A MAJOR PROBLEM.
>> IT IS A MAJOR PROBLEM IN PART BECAUSE OF THE DUTIES ARE SO DIFFERENT BETWEEN BUSINESS OWNERS AND EMPLOYERS.
AND PARTICULARLY FELA EMPLOYERS.
WHEN YOU CONSIDER L.A. FITNESS, I WENT BACK AND WAS LOOKING AT THIS CLOSELY BEFORE COMING HERE TODAY.
AND L.A. FITNESS, LIKE ALL OF THE OTHER BUSINESS OWNER CASES THAT ARE CITED BY CSX IN THEIR BRIEF, THE ISSUE OF THE DUTY WAS ONE OF FIRST IMPRESSION.
I THINK THE FOURTH DCA MADE THAT CLEAR IN ITS DECISION.
THIS, THE DUTY OF A HEALTH CLUB OWED TO A PATRON HAD NEVER BEEN DECIDED BY A COURT BEFORE.
AND SO, OF COURSE, THEY HAD TO GO THROUGH THE PROCESS OF DETERMINING WHETHER A DUTY OF CARE EXISTED AND ALSO TRYING TO FIGURE OUT WHAT THE SCOPE OF THAT DUTY WAS.
HERE THERE WAS NO NEED FOR THAT.
THIS DUTY IS WELL ESTABLISHED AND WELL SETTLED.
UNDER FELA, RAILROADS OWE A DUTY TO EXERCISE REASONABLE CARE TO BOTH PROVIDE A SAFE WORKPLACE AND AS PART AND PARCEL OF THAT DUTY, THEY HAVE A DUTY TO EXERCISE REASONABLE CARE TO PROVIDE PROMPT AND ADEQUATE MEDICAL CARE IN A MEDICAL EMERGENCY.
>> LET ME ASK YOU THIS, IT'S RELATED TO THAT LARGER POINT, BUT IT'S A QUESTION ABOUT THE FEDERAL RAILROAD SAFETY ACT.
NOW, DOES THE FEDERAL RAILROAD SAFETY ACT PREEMPT AN ARGUMENT HERE THAT MR. WELLS, WHO WAS THE COWORKER AND IS AN ENGINEER, SHOULD HAVE BEEN TRAINED IN CPR?
>> YES.

>> OKAY.
SO THAT'S, THAT'S UNDISPUTED.
>> RIGHT.
>> THAT IS PREEMPTED.
>> THAT IS OFF THE TABLE.
>> OKAY.
THAT'S OUT OF THE CASE.
OKAY.
LET ME ASK YOU ANOTHER QUESTION
ABOUT THE LOCOMOTIVE INSPECTION
ACT.
WE'VE GOT THIS OTHER FEDERAL
LAW.
[LAUGHTER]
DOES THE LOCOMOTIVE INSPECTION
ACT PRECLUDE IMPOSING LIABILITY
FOR FAILING TO INSTALL THESE
AEDs ONBOARD LOCOMOTIVES?
>> IT PREEMPTS THAT AS WELL.
THAT IS ALSO OUT OF CASE, AND WE
CONCEDED THAT PART.
>> THOSE ARE--
>> WE KNOW--
>> WHATEVER DUTY IS HERE, IT
CANNOT INCLUDE THOSE THINGS.
>> LIABILITY CANNOT BE BASED ON
THOSE TWO THINGS, THAT'S
CORRECT.
AND I DON'T THINK THERE'S A
DISAGREEMENT ABOUT THAT.
WE CONCEDED THOSE THINGS--
>> I DIDN'T THINK THERE WAS
EITHER, BUT I JUST WANTED TO
CLARIFY THAT.
I THINK THAT'S QUITE SIGNIFICANT
WHEN WE'RE LOOKING AT THE
BROADER ISSUE AND THE WAY YOU'RE
TRYING TO KIND OF GET AROUND
THOSE THINGS--
>> WELL, I THINK WHAT'S
IMPORTANT TO STEP BACK FROM THAT
BECAUSE CSX'S BRIEF TALKED ABOUT
THOSE TWO THINGS.
>> QUITE REASONABLY, I WOULD
THINK.
>> QUITE REASONABLY, ALTHOUGH
THEY WEREN'T SOMETHING WE ARGUED
IN THE FIRST DCA.
EVERYBODY AGREED THOSE TWO
ARGUMENTS WERE OFF THE TABLE

BECAUSE OF THE PREEMPTION
ISSUES.
BUT WHAT THAT LEFT WAS SEVERAL
OTHER ALLEGATIONS OF BREACH.
ONE, THEY CONDUCTED NO
ASSESSMENT WHATSOEVER ABOUT HOW
TO ADDRESS THE RISK OF HAVING A
MEDICAL EMERGENCY, A FORESEEABLE
MEDICAL EMERGENCY IN A REMOTE
AREA.
NO RISK ASSESSMENT WHATSOEVER.
>> LET'S MAKE SURE ON THAT,
BECAUSE WE LOOKED FOR DUTY TO
STATUTES AS WELL AS REGULATIONS,
THE OSHA REGULATION THAT
REQUIRES WHEN EMPLOYEES WORK IN
A LOCATION WITHOUT A CLINIC,
INFIRMARY OR HOSPITAL WITHIN
PROXIMITY, THAT THE EMPLOYER
SHALL HAVE A PERSON ADEQUATELY
TRAINED IN FIRST AID.
>> ABSOLUTELY.
>> JUST-- AND I KNOW YOU WANT
TO TALK ABOUT SOME OF THE OTHER
WAYS YOU ARGUE THIS, BUT I'M
CURIOUS AND WE MUST HAVE IN THE
RECORD THE JURY INSTRUCTIONS.
HOW DID THE JURY INSTRUCTIONS
DEFINE WHAT THE NEGLIGENCE WAS
OF THE CSX?
>> I'M GLAD YOU ASKED THAT,
BECAUSE I WENT AND LOOKED AT
THEM AGAIN LAST NIGHT BECAUSE I
WAS CURIOUS ABOUT THAT VERY
ISSUE.
AND IN TERMS OF THE FIRST DCA'S
DECISION SAYING THERE'S NO DUTY
TO ANTICIPATE, EVEN REASONABLY
ANTICIPATE--
>> I'M ASKING JUST ABOUT
NEGLIGENCE.
WAS NEGLIGENCE DEFINED
DIFFERENTLY THAN IN THE STANDARD
JURY INSTRUCTIONS.
>> I DON'T BELIEVE IT WAS
DEFINED DIFFERENTLY EXCEPT FOR
IT WAS SORT OF BASED ON AND
TAILORED TO FELA AND THE DUTY TO
PROVIDED PROMPT CARE AND HOW
REASONABLENESS IS DECIDED.

AND IN THE JURY INSTRUCTION-- I
JUST WANT TO LOOK FOR IT REALLY
QUICK SO I CAN GET THE LANGUAGE
CORRECTLY-- THAT IT
SPECIFICALLY INCLUDED LANGUAGE
THAT REASONABLENESS, WHICH IS
INSTRUCTIVE TO THE JURY ABOUT
WHAT THEY'RE SUPPOSED TO
CONSIDER, INCLUDES WHAT COULD
REASONABLY BE ANTICIPATED FROM
THE SET OF CIRCUMSTANCES.
SO THE JURY INSTRUCTION TOLD THE
JURY THAT WHEN YOU'RE
CONSIDERING WHETHER THE CONDUCT
IS UNREASONABLE, YOU DO NEED TO
LOOK AT REASONABLE
FORESEEABILITY, AND YOU DO NEED
TO LOOK AT WHAT COULD BE
REASONABLY ANTICIPATED.
BUT JUST TO GO BACK TO SOME OF
THE OTHER ALLEGATIONS OF BREACH
THAT WERE PROPER IN THIS CASE,
NOT ONLY DID THEY NOT CONDUCT
ANY RISK ASSESSMENT, THEY HAD A
POLICY THAT REQUIRED
MR. WELLS-- THE WORKER WHO WAS
WITH HIM-- TO GO, TO CONTACT
THE DISPATCH.
AND THAT THE DISPATCH THEN WOULD
BE THE SOLE MEANS OF
COMMUNICATION WITH THE EMTs.
AND THAT WAS PROBLEMATIC HERE
FOR TWO REASONS.
ONE, IT CAUSED ALMOST 20 MINUTES
IN DELAYS IN GETTING THE EMTs
THERE BECAUSE THEY WAITED 14
MINUTES BEFORE THEY EVEN PICKED
UP THE PHONE TO CALL THE EMTs.
AND IT TOOK THEM ANOTHER FIVE
MINUTES TO ASCERTAIN THE
LOCATION FOR WHERE THEY WERE.
SO ALMOST 20 MINUTES OF DELAYS
WERE CAUSED BY THAT POLICY.
AND BY NOT REQUIRING MR. WELLS
TO CALL 911 DIRECTLY, IT HAD A
FURTHER PROBLEM WHICH WAS THE
911 OPERATORS WERE TRAINED IN
CPR.
IT COST NOTHING, IT REQUIRED NO
PRE-TRAINING, AND THEY COULD

HAVE COACHED HIM IN IT PENDING
THE LATE ARRIVAL OF THE EMTs.
SO THERE COULD HAVE BEEN SOME
INTERVENTION OF WHAT WAS
FORESEEABLY A LATE ARRIVAL.
>> WHAT WAS THE TESTIMONY ABOUT
THE AED?
BECAUSE WE, AS JUSTICE CANADY
SAID, THE ENGINEER WOULD NOT BE
SOMEONE THAT WOULD BE REQUIRED
TO BE TRAINED IN CPR.
BUT LAMONES HAD THE ISSUE OF THE
AED, AND WE CAUTIONED THAT THAT
ISSUE ABOUT WHERE IT SHOULD BE,
THOSE ARE MORE FACTUAL DISPUTES.
WHAT EVIDENCE DID YOU PRESENT
ABOUT WHETHER THERE SHOULD HAVE
BEEN AN AED, WHERE IT WOULD HAVE
BEEN AND COULD THEN THE ENGINEER
WHO WAS NOT ON DUTY-- I MEAN,
HE WAS NOT, THE TRAIN WAS NOT
GOING-- COULD HAVE, WOULD HAVE
BEEN PROHIBITED FROM USING THE
AED?
>> NO.
THE PREEMPTIVE CLAIM WAS JUST
TRAINING HIM IN CPR.
IT HAD NOTHING TO DO WITH THE
USE OF DEFIBRILLATOR, AND THE
EVIDENCE PRESENTED BELOW WAS,
ONE, YOU COULD USE THE
DEFIBRILLATOR WITHOUT ANY
TRAINING WHATSOEVER.
AND THIS WAS UNDISPUTED.
CSX PRESENTED NO EVIDENCE
BELOW--
>> BUT WE KNOW THAT THE CLAIM
THAT THERE HAD TO BE A
DEFIBRILLATOR-- AN AED--
>> IT'S EASIER.
[LAUGHTER]
>> AN AED ON THE LOCOMOTIVE IS
OUT.
>> AFFIXED TO THE LOCOMOTIVE.
IT'S AN IMPORTANT DISTINCTION, I
MEAN, FOR TWO REASONS.
I'M NOT TRYING TO MAKE LIGHT OF
THE SITUATION, BUT THE
LOCOMOTIVE INSPECTION ACT
SPECIFICALLY LISTS THE TYPES OF

EQUIPMENT THAT HAS TO BE ON THE LOCOMOTIVE.
SAFETY THINGS.
>> YOUR THEORY IS THEY COULD HAVE REQUIRED THAT HE CARRY IT ON HIS BODY.
>> THAT WAS, UNDISPUTED EVIDENCE WAS PRESENTED THAT THEY'RE LIGHTWEIGHT, THEY COULD FIT IN A BACKPACK, AND THEY COULD TAKE THEM LIKE ANY OTHER EQUIPMENT.
WHEN THEY GO THROUGH A TUNNEL, THEY TAKE THESE HEAVY PIECES OF EQUIPMENT WITH THEM.
SEPARATE AND APART FROM THAT, THEY COULD HAVE HAD DEFIBRILLATORS AT DEPOTS THAT COULD HAVE BEEN BROUGHT TO THE REMOTE AREA WAY FASTER THAN EMTs COULD HAVE BEEN GOTTEN THERE.
AND THAT WAS UNDISPUTED EVIDENCE ABOUT WHERE THE AED COULD HAVE BEEN WHICH IS SEPARATE AND APART FROM THE LOCOMOTIVE, AFFIXING IT, WHICH IS PREEMPTED, OR BRINGS IT WITH THEM.
THAT WAS UNDISPUTED.
THERE WAS ALSO UNDISPUTED EVIDENCE THAT IT WAS NOT HORRIBLY EXPENSIVE, THAT IT WAS EASY TO USE.
>> LET ME ASK, WHO ELSE DOES FELA APPLY TO?
DOES IT APPLY TO OTHER COMMON CARRIERS?
>> IT APPLIES TO ALL COMMON CARRIERS.
RAILROADS ARE GOVERNED BY THAT.
>> [INAUDIBLE]
>> I'M NOT ENTIRELY SURE AS TO WHETHER IT APPLIES TO BUSES.
I WANT TO SAY NO.
I KNOW MR. TAGER'S SHAKING HIS HEAD, SO I'LL TAKE HIS WORD FOR THAT.
WE KNOW IT APPLIES TO RAILROADS.
THE JONES ACT, WHICH IS NEARLY IDENTICAL TO THE FEDERAL EMPLOYERS LIABILITY ACT, APPLIES

TO--
>> WE'RE TALKING ABOUT
NON WORK-RELATED MEDICAL
EMERGENCY, CORRECT?
>> WE ARE TALKING ABOUT A
NON WORK-RELATED MEDICAL
EMERGENCY, A FORESEEABLE MEDICAL
EMERGENCY--
>> OKAY.
>> AND WE KNOW THAT FELA CREATES
A WELL-ESTABLISHED DUTY TO
PROVIDE PROMPT AND ADEQUATE
MEDICAL CARE IN AN EMERGENCY,
WORK-RELATED OR NOT.
>> WE'RE TALKING ABOUT WHETHER
THERE'S A DUTY TO ANTICIPATE A
NON WORK-RELATED MEDICAL
EMERGENCY.
>> AND I THINK FELA ABSOLUTELY
SAYS THAT YOU HAVE A DUTY TO
REASONABLY ANTICIPATE
FORESEEABLE RISKS TO YOUR
EMPLOYEES IN EXERCISING A DUTY
OF CARE.
AND HERE--
>> SO THAT WOULD INCLUDE STROKE?
>> IT COULD.
>> ANAPHYLACTIC SHOCK?
>> IT COULD.
>> I MEAN, ANYTHING ELSE THAT AN
AMBULANCE IS EQUIPPED TO TREAT
IS A NON WORK-RELATED
EMERGENCY--
>> IT ABSOLUTELY COULD, AND I
THINK FELA WAS DRAFTED IN A WAY
THAT IS AS BROAD AS COULD BE
FRAMED--
>> WHY DO YOU THINK DUTY IS
GENERALLY A QUESTION OF LAW?
>> WELL, I THINK THIS COURT IN
LAMONES SAID IT'S A THRESHOLD
INQUIRY TO ESTABLISH WHAT THE
DUTY OF CARE IS OWED FROM A
PARTICULAR DEFENDANT TO A
PARTICULAR PLAINTIFF.
>> BUT, I MEAN, DOES IT EVEN
MAKE SENSE THAT WHEN WE'RE
TALKING ABOUT WHETHER THERE'S A
DUTY TO ANTICIPATE A
NON WORK-RELATED MEDICAL

EMERGENCY THAT THE LAW IS SET
SUCH THAT AN EMPLOYER OR
ANYBODY, WE'LL NEVER KNOW THE
ANSWER TO THAT QUESTION UNTIL
HINDSIGHT ALLOWS YOU TO LOOK ON
A FACT-BASED INQUIRY AND DECIDE,
WELL, GOODNESS.
WE SHOULD HAVE HAD SOMETHING TO
TREAT A STROKE OR ANAPHYLACTIC
SHOCK OR-- BECAUSE ANY
NON WORK-RELATED MEDICAL
EMERGENCY IS--
>> I THINK FELA IS DIFFERENT
THAN SOME OTHER SCENARIOS
BECAUSE OF THE BREADTH WITH
WHICH THIS STATUTE, THIS LAW IS
DRAFTED.
AND THE JURY DETERMINATION OF
WHAT'S REASONABLE ON A GIVEN SET
OF CIRCUMSTANCES IS PART OF THE
REMEDY.
THAT'S WHAT THE U.S. SUPREME
COURT HAS SAID.
>> THERE IS NO WAY AN EMPLOYER
COULD EVER KNOW UNLESS THEY SENT
AN AMBULANCE TO FOLLOW ANYBODY
GOING INTO A REMOTE AREA THAT
THEY COULD-- BECAUSE THEY WON'T
KNOW UNTIL AFTER THE FACT THAT
WHETHER THIS IS MEDICAL
EMERGENCY IS SOMETHING THEY
SHOULD HAVE ANTICIPATED AND WHAT
EQUIPMENT OR WHAT THEY WOULD
HAVE NEEDED--
>> I THINK THE IMPORTANT-- AND
I REALIZE I'M WELL INTO MY
REBUTTAL, BUT I THINK THE
IMPORTANT THING TO KEEP IN MIND
HERE IS THAT WHAT IS REASONABLE
IS DEPENDENT ON THE
CIRCUMSTANCES.
AND IT'S DEPENDENT ON FACTS OF
EACH INDIVIDUAL CASE.
AND THAT'S WHY WE ALLOW JURIES
TO RESOLVE, BASED ON THE
CIRCUMSTANCES, WHAT IS
REASONABLE.
WE KNOW THE EVIDENCE WAS
UNDISPUTED THAT MEDICAL
EMERGENCIES, INCLUDING CARDIAC

ARRESTS, ARE REASONABLY
FORESEEABLE.
AND WHEN YOU SEND YOUR WORKERS
TO A PLACE THAT YOU KNOW IS TOO
FAR FROM EMTs AND YOU DON'T DO
ANYTHING TO MAKE SURE OR EVEN
TRY TO MAKE SURE THAT YOU CAN
PROVIDE PROMPT CARE WHICH YOU
HAVE A DUTY TO DO, IT'S
TANTAMOUNT TO SAYING YOU HAVE NO
DUTY AT ALL.
AND THAT'S THE IMPORTANT
DISTINCTION.
>> [INAUDIBLE]
>> JONES ACT-- NO CASE HAS EVER
NARROWED THE SCOPE THAT I'M
AWARE OF WHEN IT COMES TO THE
DUTY TO PROVIDE CARE OF
NARROWING IT THE WAY THE FIRST
DISTRICT DID HERE, OF TAKING
SPECIFIC EQUIPMENT AND SAYING
YOU'RE NOT REQUIRED TO HAVE
THAT, YOU'RE NOT REQUIRED TO
HAVE THIS.
AND, IN FACT, THE TWO MAIN CASES
WE CITE, POWERS AND MONHEIM,
BOTH FELA CASES, BOTH SAY THAT
LIABILITY CAN FLOW UNDER FELA
FOR FAILURE TO HAVE LIFE SAVING
EQUIPMENT AND TRAINED PERSONNEL.
SO WE KNOW BACK FROM THE '50s
THAT THIS DUTY CAN INCLUDE THE
FAILURE TO HAVE THOSE THINGS,
AND THAT'S WHY THE FIRST
DISTRICT ERRED.
I'LL RESERVE 46 SECONDS FOR
REBUTTAL.
THANK YOU.
>> THANK YOU, YOUR HONOR.
EVAN TAGER FOR CSX.
FOR THIS COURT TO HAVE
JURISDICTION, IN ESSENCE, YOU
HAVE TO TOLD THAT LAMONES IS
CONTROLLING OF THIS CASE.
IF LAMONES ISN'T CONTROLLING,
THEN THERE CAN BE NO EXPRESS AND
DIRECT CONFLICT.
>> YOU WOULD AGREE THAT IN
LAMONES THAT WE CITED
McCAIN--

>> CORRECT.
>>-- FOR THE BASIS FOR
CONFLICT.
NOW, THERE WAS A DISSENT TO
THAT.
BUT I GUESS HERE THE ISSUE OF,
THAT THEY USED L.A. FITNESS
RATHER THAN LAMONES TO SAY THAT
THERE WAS NO DUTY, THAT'S--
WOULD YOU AGREE THAT THAT, USING
L.A. FITNESS IS COMPLETELY NOT
ON POINT TO WHAT CSX NEEDED TO
DO AND WHAT DUTIES IT HAD IN
THIS SITUATION?
>> YOUR HONOR, THAT WAS A
SECONDARY PART OF THE DECISION.
THE COURT DID EXACTLY WHAT IT
WAS SUPPOSED TO DO.
IT CONSULTED FELA CASES AND
JONES ACT CASES.
THE JONES ACT CASE, THE DECISION
BY THE U.S. SUPREME COURT SAID
STRAIGHT OUT VESSEL OWNERS HAVE
NO OBLIGATION TO ANTICIPATE AN
EMERGENCY BY PUTTING A DOCTOR
ONBOARD.
IF THERE IS ONE, THEY'VE GOT TO
TAKE YOU TO A DOCTOR AT WHATEVER
EXPENSE THAT MAY COST THEM, BUT
THEY DON'T HAVE TO ANTICIPATE
THE DUTY BY PUTTING THE DOCTOR
ONBOARD.
SO WE HAD A JONES ACT CASE WHICH
IS BASICALLY THE SISTER STATUTE
TO FELA.
AND THE DCA RELIED ON THAT CASE.
AND THE DCA ALSO RELIED ON THE
WILLKIE CASE WHICH IS A VERY
EARLY FELA CASE WHICH FLAT OUT
SAID THERE'S NO DUTY TO
ANTICIPATE AN EMERGENCY.
SO WITH RESPECT TO L.A. FITNESS,
ALL IT WAS DOING WAS SAYING,
OKAY, WE'VE ALREADY LOOKED AT
THE FELA CASES.
THIS REINFORCES OUR DECISION
BECAUSE THE ONLY CASE IN THE
STATE THAT DEALS WITH AN AED
SAYS THAT A PREMISES OWNER HAS
NO OBLIGATION TO PROVIDE ONE.

SO IT WAS MERELY REASONING BY
ANALOGY--
>> LET ME ASK YOU THAT ABOUT,
OKAY, SO L.A. FITNESS DOESN'T
ANSWER THE QUESTION.
YOU WOULD AGREE WITH THAT.
>> IT REINFORCES OUR POSITION
THOUGH BECAUSE LIKE EVERY OTHER
CASE THROUGHOUT THE COUNTRY, IT
HELD THAT A PREMISES OWNER DOES
NOT HAVE A DUTY TO PROVIDE ONE.
IT, LIKE ALL THE OTHER CASES,
ANALYZED IT AS A MATTER OF
DUTY--
>> ALL RIGHT.
SO AED, LET'S JUST SAY THAT AED
WOULD BE OUT.
NOW, I UNDERSTAND THIS WAS A
GENERAL VERDICT AND THERE WAS
MORE THAN A THEORY-- I MEAN,
AGAIN, LET'S JUST ASSUME.
THERE WAS A GENERAL VERDICT, SO
THEY DIDN'T SAY WAS THERE
FAILURE TO EXERCISE REASONABLE
CARE IN NOT PROVIDING A PORTABLE
AED.
THE OTHER PART WHICH, WOULD YOU
AGREE, THE OSHA REGULATION DOES
NOT PROVIDE SOME SOURCE FOR
DECIDING WHAT'S REASONABLE UNDER
THE CIRCUMSTANCE?
>> YOUR HONOR, PLAINTIFFS--
OSHA DOES NOT APPLY TO THE
RAILROAD, AND PLAINTIFF'S EXPERT
ADMITTED THAT.
>> OKAY.
SO THERE WAS NO-- SO THE ISSUE
OF WHETHER OSHA PROVIDES ANY
GUIDANCE, YOU WOULD SAY THE
ANSWER'S NO.
IS THAT CORRECT?
IN OTHER WORDS, BECAUSE WHAT I'M
ASKING HERE--
>> IT'S NOT--
>> WHEN YOU'RE IN A REMOTE
LOCATION WHERE THEY HAVE THIS
PROCEDURE WHERE THE PERSON WHO
HAS A CELL PHONE ISN'T ALLOWED
TO USE IT, INSTEAD HE'S SUPPOSED
TO CALL INTO JACKSONVILLE CSX

WHO THEN CALLS THE EMT?
WAS THAT THE EVIDENCE IN THE CASE?
>> THAT'S THE EVIDENCE THAT THEY PRESENTED.
BUT I NEED TO BRING THIS BACK, BECAUSE YOU DON'T HAVE JURISDICTION.
AND WE CAN'T GET TO THE MERITS OF THIS UNTIL I CAN EXPLAIN THAT POINT.
LAMONES IS NOT A FELA CASE.
IT CAN'T POSSIBLY CONTROL THIS CASE.
IT WAS DECIDED AS A MATTER OF FLORIDA LAW.
IT DIDN'T PURPORT TO ARTICULATE THE METHODOLOGY FOR FELA.
THE CASE THAT DOES DO THAT IS THE U.S. SUPREME COURT'S DECISION IN CONRAIL V. GOTTSCHALK.
AND I URGE YOU TO READ THAT CASE.
BUT ALSO LET ME SUMMARIZE FOR YOU AND QUOTE FOR YOU SOME OF THE RELEVANT PASSAGES THAT SHOW THAT LAMONES CANNOT POSSIBLY CONTROL THIS DECISION.
BECAUSE AFTER ALL, LAMONES HOLDS AS A MATTER OF FLORIDA LAW THAT DUTY CAN'T BE DISAGGREGATED.
ONCE YOU HAVE A GENERAL DUTY, EVERYTHING ELSE IS FOR THE JURY.
THE SUPREME COURT SAYS IN GOTTSCHALK THAT, FIRST OF ALL, YOU LOOK TO THE STATUTE TO DECIDE WHETHER THE STATUTE ADDRESSES, WHETHER THERE IS A DUTY.
AND THEN, FAILING THAT, YOU LOOK TO THE COMMON LAW AT THE TIME.
AND THE COURT MAKES IT CLEAR IN GOTTSCHALK, THE ISSUE WAS WHETHER EMOTIONAL STRESS CAUSED BY THE STRESSES OF THE WORKPLACE IS COMPENSABLE.
AND THE SUPREME COURT SAID THAT THAT ISSUE IS A MATTER OF DUTY TO BE DECIDED BY THE COURT.

THAT'S ON PAGE 546.
512 U.S. 546.
AND THEN IF YOU MOVE TO 550, THIS IS, I THINK, CRITICAL TO EXPLAINING HOW THIS DIFFERS FROM LAMONES.
WE THEREFORE HOLD THAT AS A PART OF ITS DUTY TO USE REASONABLE CARE IN FURNISHING ITS EMPLOYEES WITH A SAFE WORKPLACE, THAT'S THE ONLY DUTY THAT THE PETITIONER SAYS IS RELEVANT HERE, RIGHT?
EVERYTHING ELSE IS BREACH ACCORDING TO THE PETITIONER.
THEY SAY AS PART OF THAT DUTY, A RAILROAD HAS A DUTY UNDER FELA TO AVOID SUBJECTING ITS WORKERS TO NEGLIGENTLY INFLECTED EMOTIONAL INJURY.
SO THEY'VE NOW SUBDIVIDED IT ONE LEVEL MORE.
BUT BEYOND THAT, THEY GO ON TO SAY THIS LATTER DUTY, HOWEVER, IS NOT SELF-DEFINING.
SO THEN THEY CONTINUE ON PAGE 554.
NOW THEY'RE TALKING ABOUT--
THERE WERE TWO DIFFERENT EMPLOYEES IN THAT CASE.
THE SECOND EMPLOYEE CLAIMED THAT HE SUFFERED EMOTIONAL STRESS BECAUSE THEY WORKED HIM TOO HARD, AND HIS JOB WAS TOO STRESSFUL.
THE SUPREME COURT SAYS WE FIND NO SUPPORT IN THE COMMON LAW FOR THIS UNPRECEDENTED HOLDING WHICH WOULD IMPOSE A DUTY TO AVOID CREATING A STRESSFUL WORK ENVIRONMENT AND THEREBY DRAMATICALLY EXPAND EMPLOYERS' FELA LIABILITY.
SO THERE THEY'VE APPLIED THEIR INTERPRETIVE METHODOLOGY.
FIRST, THEY LOOKED AT THE STATUTE, THEN THEY LOOKED AT THE COMMON LAW INVOLVING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, AND THEN THEY HELD AS

A MATTER OF POLICY-- AND THAT'S
WHERE, THAT'S WHY DUTY IS A
MATTER OF LAW, BECAUSE IT'S A
POLICY QUESTION FOR THE COURT.
AS A MATTER OF POLICY, THEY ARE
GOING TO REFUSE TO RECOGNIZE A
DUTY ON RAILROADS TO PREVENT
WORK-RELATED EMOTIONAL DISTRESS.
OR THAT IS TO SAY EMOTIONAL--
TO PREVENT THE STRESS OF THE
WORKPLACE FROM CAUSING AN
EMPLOYEE TO SUFFER EMOTIONAL
DISTRESS.
THEY TAKE THAT OFF THE TABLE,
AND THEY--
>> WELL, WE WOULD, I MEAN,
AGAIN, I DON'T THINK THEY SAID
IN THEIR PLEADINGS OR BEFORE
THIS COURT OR BEFORE THE JURY OR
THE FIRST DISTRICT THAT THE CSX
CAUSED THIS PLAINTIFF TO HAVE A
HEART ATTACK.
AND, IN FACT, ONE OF THE
ARGUMENTS IS THERE SHOULDN'T
HAVE BEEN A 45% FINDING OF
COMPARATIVE NEGLIGENCE BECAUSE
HE DIDN'T DISCLOSE HIS HEART
ATTACK.
SO WOULD YOU AGREE THAT THIS
CASE IS NOT ABOUT CSX HAVING
DONE ANYTHING TO CAUSE MR. SELLS
TO HAVE A HEART ATTACK?
>> IT'S UNDISPUTED THAT CSX DID
NOTHING TO CAUSE HIS CARDIAC
ARREST--
>> WELL, BUT YOU'RE CITING A
CASE THAT TALKS ABOUT INFLICTION
OF EMOTIONAL DISTRESS.
>> WHAT I'M--
>> THIS IS NOT THIS CASE.
>> NO.
WHAT I'M TRYING TO ESTABLISH IS
THAT THE SUPREME COURT DOES NOT
SAY ONCE WE'VE ESTABLISHED THAT
THE DUTY IS TO PROVIDE A
REASONABLY SAFE WORKPLACE,
EVERYTHING ELSE IS FOR A JURY.
THE COURT SUBDIVIDES THAT AND
LOOKS ALMOST SPECIFICALLY AT
SUBCATEGORIES OF DUTY AND SAYS

SOME ARE ON THE TABLE AND SOME
ARE OFF THE TABLE.
AND THAT IS EXACTLY WHAT ALL OF
THESE EARLIER FELA CASES, JONES
ACT CASES THAT WE'VE CITED AND
COMMON LAW CASES, THE CASE WE
SUBMITTED LAST WEEK WAS A COMMON
LAW CASE FROM ALABAMA FROM 1906
WHICH SAID WE HAVE A STATUTORY
DUTY ON MINING COMPANIES TO
PROVIDE THESE KINDS OF EQUIPMENT
FOR RESPONDING TO AN EMERGENCY.
BUT FOR THE STATUTE, THERE WOULD
BE NO COMMON LAW DUTY.
SO GOING BACK TO THE DAYS BEFORE
FELA, THERE WERE-- IT WAS WELL
ESTABLISHED THAT A EMPLOYER HAD
NO DUTY TO PROVIDE, TO
ANTICIPATE AN EMERGENCY AND
PROVIDE PROTECTIVE OR EMERGENCY
EQUIPMENT TO RESPOND TO THE
EMERGENCY.
SO THEN THE COURTS HAVE SAID,
WELL, WHAT IS THE DUTY?
THE DUTY IS ONCE THE, ONCE THE
EMPLOYEE IS IN A POSITION OF
PERIL, YOU'VE GOT TO GET HIM
EMERGENCY ATTENTION, YOU'VE GOT
TO BRING HIM TO A DOCTOR, CALL
911, WHATEVER.
SO THAT IS THE DUTY.
NOW, THAT'S SOMETHING THEY'VE
ALLEGED HERE.
THAT'S WHAT YOU WERE REFERRING
TO.
BUT YOU WOULDN'T HAVE
JURISDICTION TO REACH THAT
BECAUSE THE ONLY QUESTION IS
WHETHER THE DECISION BELOW
CONFLICTS WITH LAMONES ON
WHETHER YOU CAN DIVIDE THE DUTY
AND TAKE OFF THE TABLE THE
DUTIES THAT THE DCA TOOK OFF THE
TABLE.
IT DIDN'T DECIDE THE DELAY
QUESTION AS A MATTER OF DUTY, IT
DECIDED IT AS A MATTER OF
PROXIMATE CAUSE-- OR CAUSATION,
NOT PROXIMATE CAUSE.
SO YOU WOULDN'T HAVE

JURISDICTION OVER THAT QUESTION
INDEPENDENTLY, BECAUSE NOBODY'S
SAYING THAT THE SORT OF
FACT-BASED DECISION ON CAUSATION
CONFLICTS WITH ANYTHING.
IT'S ONLY THE DECISION THAT
THERE IS IN DUTY TO ANTICIPATE
AN EMERGENCY THAT IS ALLEGED TO
CONFLICT WITH LAMONES.
>> LET'S JUST, LET ME GO OVER
ABOUT THE DUTY THING.
THE ISSUE AS FAR AS GIVING,
RENDERING FIRST AID OR CALLING
FOR 911 HELP REQUIRES A SPECIAL
RELATIONSHIP, RIGHT?
IF THERE'S SOMEBODY, WE GO
OUTSIDE TODAY AND THERE'S
SOMEBODY HAVING SOME, IS IN
DISTRESS ON THE STREET, THERE'S
NO DUTY THAT WE HAVE TO RENDER,
TO DO ANYTHING, CORRECT?
IT HAS TO BE A SPECIAL
RELATIONSHIP.
>> IT-- THAT'S ABSOLUTELY
RIGHT.
>> OKAY.
SO LAMONES, THERE WAS A SPECIAL
RELATIONSHIP BECAUSE IT WAS A
STUDENT.
HERE YOU WOULD AGREE THAT IF
ANYTHING ELSE WHETHER IT'S UNDER
THE COMMON LAW OR UNDER FELA AS
A HEIGHTENED DUTY, THERE'S A
SPECIAL RELATIONSHIP BETWEEN THE
EMPLOYER AND THE EMPLOYEE,
CORRECT?
>> YES.
BUT THERE IS NO--
>> LET ME FINISH.
AND THIS WAS, OTHER THAN FELA
AND WORKMAN'S COMP WOULD HAVE
COME IN, THERE WOULD HAVE
BEEN-- IT WASN'T CAUSED BY
WORK, BUT IT OCCURRED AT WORK.
WOULD THERE HAVE BEEN WORKER'S
COMPENSATION AVAILABLE TO THIS
EMPLOYEE?
THAT HE WAS ON THE JOB SUFFERING
A HEART ATTACK?
>> WELL, I THINK FELA

SUBSTITUTES FOR WORKER'S COMP.
IF HE HAD BEEN IN ANOTHER
INDUSTRY, THAT'S CORRECT.
HE WOULD RECEIVE--
>> OKAY.
SO HE WOULD HAVE RECEIVED--
>> BECAUSE THAT'S NO FAULT.
>> RIGHT.
OKAY.
SO NOW WE GO BACK TO THE DUTY
WAS TO PROVIDE A REASONABLY SAFE
WORKPLACE.
WE WOULD DISPUTE, YOU AND I
MIGHT SAY WHETHER THE AED,
HAVING A PORTABLE ONE, IS THAT
PART OF WHETHER THE DUTY EXISTS
INITIALLY OR A PART OF WHETHER
THERE WAS REASONABLE CARE
EXERCISED BY CSX AND WHAT IT DID
OR DIDN'T DO?
>> IT REQUIRES THE ANTICIPATION
OF AN EMERGENCY.
IT REQUIRES THE COMPANY TO
PURCHASE, MAINTAIN, TRAIN,
LOCATE THE AEDs.
THAT IS THE THING THAT ALL OF
THESE CASES WE CITED-- WILLKIE,
XABO, DASON, THE OTHER JONES ACT
CASES THAT FOLLOWED SAY YOU
DON'T HAVE TO DO THINGS IN
ADVANCE OF EMERGENCY.
YOUR OBLIGATION ARISES WHEN THE
EMERGENCY ARISES, AND IT ENDS
WHEN IT ENDS.
>> BUT IS CSX, THEY HAVE-- THIS
IS A REMOTE LOCATION.
DO THEY HAVE, IF TOMORROW
ANOTHER PERSON WAS TO HAVE A
HEART ATTACK AND THEY STILL
DIDN'T HAVE A PORTABLE AED, THEY
STILL DIDN'T HAVE A BETTER
SYSTEM FOR GETTING EMERGENCY
TREATMENT THERE, DOES IT-- THEY
STILL HAVE NO DUTY?
I MEAN, ARE YOU SAYING THAT THE
IDEA THAT THEY'RE LETTING THEIR
WORKERS WORK IN THIS REMOTE
LOCATION WHERE ANYTHING COULD
HAPPEN, I MEAN, YOU KNOW, THEY
WERE SWITCHING, RIGHT?

THEY WERE SWITCHING-- A PIECE
OF EQUIPMENT COULD HAVE FALLEN
ON THEM--
>> WELL, THEN THEY'D HAVE A
DIFFERENT--
>> THEY HAVE NO DUTY TO THEIR
WORKERS?
>> LET ME DISAGGREGATE THAT.
THEY DO HAVE A DUTY TO CALL 911
AND GET EMERGENCY ATTENTION AS
QUICKLY AS POSSIBLE.
>> ALL RIGHT.
SO IF THEY HAVE THAT DUTY--
>> YES.
>> OKAY.
THEN THE BREACH OF THE DUTY,
DIDN'T THEY PRESENT EVIDENCE
THAT THEIR SYSTEM WHICH WAS YOU
COULDN'T USE YOUR OWN CELL
PHONE, YOU HAD TO CALL THE CSX
PLACE IN JACKSONVILLE, THAT ALL
OF THAT WOULD BE A JURY QUESTION
THAT THE JURY HEARD?
>> WE DID NOT CONTEST THE
SUFFICIENCY OF EVIDENCE OF
NEGLIGENCE WITH RESPECT TO THE
DELAY.
WE WON THAT ISSUE IN TWO COURTS
NOW ON THE BASIS OF THE ABSENCE
OF ANY EVIDENCE THAT HE COULD
HAVE BEEN STILL ALIVE AFTER 18
MINUTES.
THERE WERE 18 MINUTES THAT
PASSED BETWEEN THE TIME THAT HE
COLLAPSED AND THE EARLIEST TIME
THAT THE EMERGENCY RESPONDERS
COULD HAVE GOTTEN THERE.
AND ALL OF THE DOCTORS AGREED
THAT HE WOULD HAVE BEEN BRAIN
DEAD BY THEN.
SO WE DIDN'T-- THAT WASN'T A
QUESTION OF WHETHER THERE WAS A
DUTY TO GET THEM THERE MORE
QUICKLY OR WHETHER WE BREACHED
THE DUTY, IT WAS JUST A
CAUSATION ISSUE.
AND AS I SAID BEFORE, IF I'M
RIGHT THAT THERE'S NO CONFLICT
WITH RESPECT TO WHETHER, WHETHER
THE DCA COULD HOLD THAT THERE

WAS NO DUTY TO ANTICIPATE, IF I'M RIGHT ABOUT THAT, THE OTHER ISSUES IN THE CASE, THERE'S NO JURISDICTION OVER THEM.
IF THERE'S NO JURISDICTION OVER THE FIRST ISSUE, YOU CAN'T REACH THE OTHER ISSUES.
SO THAT'S WHY IT'S SO IMPORTANT TO DISCUSS WHY THERE'S NO CONFLICT WITH LAMONES AND WHY GOTTSCHALK MAKES THAT CLEAR THAT THE SUPREME COURT HAS HELD TIME AND TIME AGAIN THAT CERTAIN DUTIES CAN'T BE RECOGNIZED.
SO LAMONES IS, IF THAT'S WHAT FLORIDA LAW IS FOR ALL CAUSES OF ACTION, FINE.
BUT THAT'S JUST NOT FEDERAL COMMON LAW.
THAT'S NOT WHAT APPLIES IN A FELA CASE.
I ALSO, IF THERE'S NO FURTHER QUESTIONS ON THAT POINT, I'D LIKE TO SWING BACK TO FORESEEABILITY.
THERE WAS A REFERENCE, I THINK IN MR. MANKO'S ARGUMENT, FORESEEABILITY IS REALLY THE BE ALL AND END ALL.
SO LONG AS IT'S FORESEEABLE, THE JURY CAN HOLD THE RAILROAD LIABLE.
AND GOTTSCHALK AGAIN ADDRESSES THAT POINT, IF I CAN FIND IT.
THE SUPREME COURT SAYS ON PAGE 553 IF ONE TAKES A BROAD ENOUGH VIEW, ALL CONSEQUENCES OF A NEGLIGENCE ACT NO MATTER HOW FAR REMOVED IN TIME OR SPACE MAY BE FORESEEN.
CONDITIONING LIABILITY ON FORESEEABILITY, THEREFORE, IS HARDLY A CONDITION AT ALL.
THAT'S THE U.S. SUPREME COURT.
THAT'S A FELA CASE.
SO, AGAIN, IF THIS COURT WANTS TO HOLD AS A MATTER OF FLORIDA LAW, THEN IN ALL COMMON LAW TORT CASES GOVERNED BY FLORIDA LAW IF THERE'S A GENERAL DUTY, THEN

EVERYTHING ELSE IS FOR THE JURY
AND THE JURY JUST DECIDES IF
IT'S REASONABLY FORESEEABLE,
THAT IS THIS COURT'S PREROGATIVE
AS A MATTER OF FLORIDA LAW.
BUT THE COURT DID NOT PURPORT TO
BE SPEAKING MORE BROADLY THAN
FLORIDA LAW IN LAMONES AND
CERTAINLY WASN'T CONSIDERING
FEDERAL COMMON LAW THE WAY THE
DCA WAS WHEN IT CITED THE
WILLKIE CASE.
WHICH, AGAIN, I THINK IS A, YOU
KNOW, THAT'S CASE NUMBER TWO I
WOULD ENCOURAGE YOU TO READ
AFTER GOTTSCHALK IS THE WILLKIE
CASE WHICH IS A 1930s ERA CASE
FROM THE MINNESOTA SUPREME COURT
THAT FLAT OUT SAID THE RAILROAD
HAD NO DUTY TO ANTICIPATE THAT
ITS EMPLOYEE WOULD SUDDENLY BE
STRICKEN.
SO THAT IS ONE OF THE FEW CASES
THAT ACTUALLY USES THE WORDS
"DUTY TO ANTICIPATE."
SO UNLESS THERE ARE FURTHER
QUESTIONS, THANK YOU.
>> I'LL TALK VERY QUICKLY.
FIRST OF ALL, POWERS AND MONHEIM
ARE THE CASES THIS COURT SHOULD
READ.
LIABILITY FLOWS WHEN A RAILROAD
FAILS TO HAVE LIFE SAVING
EQUIPMENT OR TRAINED PERSONNEL.
THAT REQUIRES A DUTY TO
ANTICIPATE.
HOW CAN YOU HAVE, PLAN AHEAD--
HOW CAN YOU HAVE NO REQUIREMENT
TO PLAN AHEAD AND BE LIABLE FOR
NOT HAVING PLANNED AHEAD AND--
>> HOW DO YOU DEAL WITH THE
ARGUMENT ABOUT, IS IT GOTTSCHALK
AND THE WAY THE U.S. SUPREME
COURT APPROACHES THE DEFINITION
OF THE SCOPE OF DUTY IN THAT
CASE?
HOW DO YOU RESPOND TO THAT?
>> I THINK THE PRIMARY
DIFFERENCE IS IN THAT CASE AND
OTHERS DECIDED IN THE BRIEF

WHERE THE COURT IS TRYING TO DETERMINE WHETHER A NEW THEORY OF LIABILITY OR NEW CLAIM SHOULD BE ANALYZED, AND THAT WAS AN EMOTIONAL DISTRESS CLAIM, YOU HAVE TO TALK ABOUT THE SCOPE OF THE DUTY BECAUSE IT'S BRAND NEW. IN THIS CASE IT IS NOT BRAND NEW.
THE LAW IS SETTLED, HAS BEEN SETTLED FOR A HUNDRED YEARS. THERE'S A DUTY TO PROVIDE PROMPT MEDICAL CARE, AND IF YOU DON'T HAVE A DUTY TO EVEN ANTICIPATE WHAT COMPLICATIONS MAY ARISE WHEN YOU SEND A WORKER TO REMOTE AREAS, IT'S TANTAMOUNT TO NO DUTY AT ALL.
I'LL RESERVE TO MY BRIEFS ON ALL THE OTHER ISSUES, AND THANK YOU VERY MUCH.
>> THANK YOU.
THANK YOU FOR YOUR ARGUMENTS.
WE'RE IN RECESS FOR TEN MINUTES.