

>> THE SUPREME COURT OF FLORIDA
IS NOW IN SESSION.

THE HONORABLE JUSTICE CANNADY
PRESIDING.

>> GOOD MORNING AND WELCOME TO
THIS SESSION OF THE FLORIDA
SUPREME COURT.

THE FIRST CASE ON THE DOCKET
TODAY IS THE PEOPLE'S GAS SYSTEM
VERSUS POSEN CONSTRUCTION.

COUNSEL, YOU MAY PROCEED.
YOU NEED TO UNMUTE.

>> I HAD PREVIOUSLY UNMUTE BUT
IT PUT ME BACK UNMUTE.
JASON GONZALEZ REPRESENTING THE
APPELLATE PGS.

I RESERVE 5 MINUTES FOR
REBUTTAL.

THE ANSWER TO THE CERTIFIED
QUESTION IS YES.

THE PLAIN AND UNAMBIGUOUS TEXT
OF STATUTE 556-106 ALLOWS PGS TO
RECOVER THE TOTAL SUM OF ITS
LOSSES.

WHATEVER THE FORM OF THOSE
LOSSES MAY BE.

AS LONG AS WE SHOW AN EXCAVATOR
VIOLATED THE STATUTE AND
RUPTURED PGS'S NATURAL GAS LINE
WE ARE ENTITLED TO THE TOTAL SUM
OF THOSE LOSSES, THE STATUTE
PLACES NO RESTRICTION ON THE
TYPE OF LOSS RECOVERABLE WHETHER
THE LOSSES IN A FORM OF PROPERTY
DAMAGE OR LOST REVENUE FOR A
PERSONAL INJURY CLAIM.

IF IT IS A LOSS, THE MEMBER
OPERATOR SUCH AS MY CLIENT, PGS,
CAN RECOVER ALL OF IT FROM THE
EXCAVATOR.

AND I DESCRIBED WHAT HAPPENED
HERE.

POSEN CONSTRUCTION IS A ROGUE
CONTRACTOR AND THEY WERE
PLANNING TO DO CONSTRUCTION.
AND THE LEGISLATURE TAKE UP THE
STATUTE OF 155, FOR PROCEDURES
FOR NOTIFYING UTILITIES WHEN THE
CONTRACTOR PLANS TO DO
EXCAVATION IN AN AREA SO THAT

THE UTILITY CAN BE PUT ON NOTICE AND GO OUT AND MARK WHERE THEIR UNDERGROUND FACILITIES ARE LOCATED SO YOU WILL NOT HAVE AN ACCIDENT SUCH AS WHAT HAPPENED IN THIS CASE.

POSEN CONSTRUCTION FAILED TO DO THAT.

THEY DID NOT PROPERLY IDENTIFY WHERE THEY WOULD BE DOING AN EXCAVATION.

THEIR MANAGER OF POSEN CONSTRUCTION NEW THERE WERE GAS LINES IN THE AREA THAT HAD NOT BEEN MARKED, YET HE DIRECTED HIS EMPLOYEE, MISTER SANTOS, TO START EXCAVATING AND DID NOT TELL HIM THAT HE KNEW THERE WERE GAS LINES IN THE AREA THAT HAD NOT BEEN MARKED.

TRAGICALLY BUT NOT SURPRISINGLY, MISTER SANTOS RUPTURED THE GAS LINE AND WAS ENGULFED IN A FIREBALL.

IT WAS A TERRIBLE ACCIDENT THAT OCCURRED DUE TO THE ACTIONS AND FAILURE TO COMPLY WITH THE STATUTE BY HIS EMPLOYER, POSEN CONSTRUCTION.

>> SORRY TO INTERRUPT.

YOUR CLIENT WAS SUED FOR YOUR CLIENT'S OWN NEGLIGENCE AND SETTLED THAT LAWSUIT AND SEEKING RECOVERY FROM THE EXCAVATOR.

DO YOU AGREE THAT'S A DRAMATIC DEPARTURE FROM WHAT WOULD BE PERMISSIBLE UNDER REGULAR COMMON-LAW STANDARDS?

>> I DISAGREE WE WERE SUED FOR OUR OWN NEGLIGENCE.

>> ISN'T THAT SORT OF -- THE COMPLAINT WAS SUING PGS, THE TWO COMPANIES SUED EACH OTHER, THE WORKERS SUED BOTH COMPANIES BUT THIS PARTICULAR LAWSUIT INVOLVES A LAWSUIT BY SANTOS AGAINST PGS ALLEGING PGS WAS NEGLIGENT FOR NOT RESPONDING AND REMARKING THE WAY IT HAD BEEN ALLEGEDLY WORKING WITH THE FACT IN THE

COMPLAINT BUT ISN'T THAT WHAT HAPPENED?

>> THERE WAS ONE COUNT FOR NEGLIGENCE.

EXACTLY RIGHT ON THAT.

THERE WAS ANOTHER WHERE POZEN -- MISTER SANTOS BROUGHT A COUNT AGAINST MY CLIENT PGS GOING THROUGH ALL THE THINGS IT SAID POZEN CONSTRUCTION DID WRONG, NEGLIGENCE PER SE COUNT SO I DISPUTE THE NOTION WE SETTLED THE CLAIM FOR OUR NEGLIGENCE, WE'VE NEVER BEEN ADJUDICATED NEGLIGENCE, NEGLIGENT, WE NEVER ADMITTED IN ANY SETTLEMENT THAT WE WERE NEGLIGENT AND WE DON'T EVEN AGREE THAT WE WERE SUED FOR A CLAIM OF OUR OWN NEGLIGENCE AND WERE NOT HERE IN THIS CASE IN THIS COMPLAINT IN THE MIDDLE DISTRICT ANYTIME SAYING POZEN CONSTRUCTION IS RESPONSIBLE FOR PAYING DAMAGES BY PGS'S OWN NEGLIGENCE.

EVERY BIT OF OUR COMPLAINTS GOES THROUGH EXACTLY THROUGH THIS STATUTE, SECTIONS 2 AND TO BE WHERE WE ARE SAYING POZEN CONSTRUCTION VIOLATED THE STATUTE.

I GO THROUGH THE PRO VERSIONS -- PROVISIONS WORD FOR WORD.

THE ELEVENTH CIRCUIT IS ASKING WHETHER A MEMBER OPERATOR, UNDER STATUTE 556 ONE 62, TO RECOVER DAMAGES AND INDEMNIFICATION FROM AN EXCAVATOR FOR PAYMENTS TO A THIRD PARTY FOR PRIVATE PERSONAL INJURIES RELATED TO EXCAVATORS, ALLEGED VIOLATION OF THE STATUTE, 2 ACES IN THE STATUTE, A PERSON VIOLATES 556, IF A PERSON VIOLATES 105 SUBSECTIONS 106 RELATING TO NOTIFICATION THEY ARE PLANNING TO DO EXCAVATION, TO MARK OUR LINES, IF THEY SUBSEQUENTLY PERFORM THE EXCAVATION WHICH THEY DID KNOWING THERE WERE UNMARKED GAS

LINES IN THE AREA AND THAT DAMAGES A FACILITY OF AN OPERATOR IT IS PRESUMED THE PERSON WAS NEGLIGENT AND THEN IT GOES ON WITH THE SENTENCE, THE PERSON, POSEN CONSTRUCTION IF FOUND LIABLE WE HAVE TO PROVE THIS, ALL THESE THINGS I READ IN THE STATUTE, WE GOT TO THE MIDDLE DISTRICT AND IMPROVE THOSE THINGS AND IF THE PERSON IF FOUND LIABLE THEY ARE LIABLE FOR THE TOTAL SUM OF THE LOSSES TO ALL MEMBER OPERATORS INVOLVED IN COSTS, THE LEGISLATURE WROTE THIS AND THEY DECIDED TO SHIFT THE BURDEN FINANCIALLY FOR THE TOTAL SUM OF THE LOSSES TO AN EXCAVATOR IF WE DEMONSTRATE TO THE FACT FINDER THEY VIOLATED THE STATUTE.

NOTIFYING US OF PLANS TO EXCAVATE IN THIS AREA.

>> ISN'T THE ISSUE.

>> AND THE PLAIN LANGUAGE CASE. AND THE LEGISLATURE IS THE BEST WORD OF THE STATUTE.

WHAT THEY ARE SUGGESTING IS SUCH A DEPARTURE AS A REASONABLE READER THEY WOULD EXPECT WHEN THE TWO PARTIES IN THIS KIND OF RELATIONSHIP, THE RESPONSIBILITY FOR WHAT PGS DOES ON POSEN CONSTRUCTION YOU EXPECT A CLEAR STATEMENT.

IT IS AN ELEPHANT AND A MOUSE ALL TYPE THING.

CAN YOU RESPOND TO THAT?

>> I DON'T AGREE IT IS AMBIGUOUS, TOTAL SUM OF THE LOSSES, MORE IN BIGGEST AND ALL DAMAGES IN THE TRUCKING CASE. TOTAL SUM OF THE LOSSES, I DON'T THINK POSEN CONSTRUCTION EVER SAID THIS WAS AMBIGUOUS. THEY ARE RESPONSIBLE FOR DOING THIS.

IF THEY ARE FOUND LIABLE FOR VIOLATING THE STATUTE, MEETING THE REQUIREMENTS OF THE STATUTE

THEY ARE ON THE HOOK FOR THE TOTAL SUM OF THE LOSSES.

>> YOUR OWN NEGLIGENCE, IS YOUR ARGUMENT THAT POSEN CONSTRUCTION IS RESPONSIBLE FOR YOUR CLIENT'S NEGLIGENCE, NOT UNDERSTANDING WHAT YOU ARE SAYING ON THAT.

>> POSEN CONSTRUCTION IS RESPONSIBLE FOR THE TOTAL SUM OF THE LOSSES.

IF THEY DIDN'T COMPLY WITH THE STATUTE THE LEGISLATURE PUT IN PLACE SAYING YOU GOT TO DO ALL THESE THINGS.

IN THE STATUTE, NOTIFY THE MEMBER OPERATOR, IF YOU VIOLATE THE STATUTE AND RUPTURE AN UNDERGROUND FACILITY, YOU PAY FOR THE TOTAL SUM OF THE LOSSES. IS THIS PAYMENT A LOSS.

>> YOU WERE SUED FOR NEGLIGENCE, IT SOUNDS LIKE THIS IS WHAT YOU WERE DESCRIBING, EACH PARTY, THERE WOULD BE FACT-FINDING, WHO DID WHAT NEGLIGENT, WHO CAUSED WHAT AND EVERYBODY WOULD BE RESPONSIBLE FOR WHAT THEY CAUSED, THAT IS THE NORM.

YOU SAY THE STATUTE DEPARTS FROM THAT AND THE QUESTION IS WHY SHOULD WE READ INTO THE STATUTE SUCH A DRAMATIC DEPARTURE FROM THE NORM WHEN YOU COMPARE THE OTHER STATUTES, BOTH PARTIES CITED AND VERY DIFFERENT IN TERMS OF THE CLARITY WITH WHICH THE LEGISLATURE SPOKE AND THE QUESTION IS WHY SHOULD WE NOT EXPECT THE SAME KIND OF CLARITY WHEN YOU HAVE AS DRAMATIC A DEPARTURE.

>> THERE IS CLARITY.

IT SAYS WHAT IT SAYS WAS MAYBE THEY DON'T LIKE THAT THERE IS NO STATUTORY EXCEPTION THAT SAYS THIS TYPE OF LOSS IS NOT EXPECTED BUT WE ARE GOING TO GO TO THE MIDDLE DISTRICT IF WE GET OUR DAY IN COURT.

THIS IS SOMETHING THAT THEY ARE

RELIABLE.

IF YOU THINK IT IS A DRAMATIC DEPARTURE FROM THE NORM THE LEGISLATURE CAN DO THAT. THEY SPENT 20 PAGES OF ARGUMENT, NOT ONCE DID A QUOTE FROM YOU. WITH THE EXCEPTION THE TOTAL SUM OF THEIR LOSSES?

IS ALL THE MONEY WE PAID TO MISTER SANTOS NOT A LOSS? BY ANY ORDINARY DICTIONARY DEFINITION OF COURSE IT IS A LOSS.

MY CLIENT DIDN'T FEEL THEY GAINED ANYTHING WHEN THEY PAID A BUNCH OF MONEY TO THEIR EMPLOYEE FURTHER VIOLATIONS OF THE STATUTE THAT SEVERELY INJURED HIM.

WE WOULD HAVE MARKED THE LINE IF THEY COMPLIED WITH THE STATUTE. 20 PAGES OF ARGUMENT BY POSEN CONSTRUCTION THEY NEED TO BE ASKED PLEASE QUOTE FOR US THE EXCEPTION TO THE TOTAL SUM OF THE LOSSES.

INSTEAD EIGHT TIMES THEY ARE ARGUING TO YOU THE LEGISLATURE REALLY INTENDED SOMETHING DIFFERENT.

HERE IS THREE EXAMPLES OF LEGISLATIVE HISTORY, TO DEPART FROM PLAIN AND UNAMBIGUOUS TEXT OF THE LAW.

WE ARE ENTITLED UNDER 2 A OR 2 BE, WE FIT IN BOTH OF THE STATUTES AND HAVE NOT ONCE QUOTED AN EXCEPTION TO TOTAL SUM OF THE LOSSES, JUST LIKE PLAIN AND ORDINARY, PLAIN AND UNAMBIGUOUS TEXT.

>> SUPPOSE PGS HAD NOT BEEN SUED, TRY TO WORK THROUGH THE CONSEQUENCES OF THE HOLDING YOU ARE ADVOCATING.

ARE YOU SAYING THE LEGISLATURE ACTED TO EXTINGUISH A POTENTIAL CAUSE OF ACTION AGAINST PGS FOR CONSTANT -- AFTER-THE-FACT. THE PLAINTIFF HERE CHOSE ONLY TO

SUE POSEN CONSTRUCTION AND ONLY LATER CAME TO PGS, WOULD PGS HAVE AN AFFIRMATIVE DEFENSE TO LIABILITY ON THE BASIS OF THIS SECTION?

>> GOOD QUESTION.

I DO WANT TO SAY WE ARE GETTING BEYOND THE QUESTION CERTIFIED BY THE ELEVENTH CIRCUIT AND I DON'T KNOW, I DON'T THINK THEY WOULD BRING AN ACTION FOR CONTRIBUTION GIVEN THE FACTS OF THIS CASE, IF THEY ATTEMPTED TO DO IT THEY WILL HAVE THEIR DAY IN COURT. IF YOU ANSWER THIS QUESTION IN THE AFFIRMATIVE WE HAVE OUR DAY IN COURT AND THEY WILL HAVE THEIR DAY IN COURT, THEY GO TO THE MIDDLE DISTRICT AND SO WE DIDN'T VIOLATE THE STATUTE, AND WHERE THE GAS LINE WAS. AND THEY HAVE A CHANCE TO BRING THAT.

WE HAVE TO BRING THOSE THINGS THE FACT FINDER WILL HAVE A QUESTION AND THEY HAVE TO ANSWER AND FIND -- IT IS A GOOD QUESTION BUT IT IS BEYOND THE SCOPE OF THE CERTIFIED QUESTION BUT IS AMELIORATED BY THEY HAVE DEFENSES THEY RAISE.

>> WHAT I AM TRYING TO DO IS UNDERSTAND IF THIS IS CAUSE OF ACTION.

I AGREE THE LANGUAGE CLEARLY SETS IT UP AND THE CONSEQUENCE OF AGREEING TO THAT IS THE CAUSE OF ACTION I'M TALKING ABOUT, THE CONSEQUENCE OF THE WE ARE ADVOCATING IS CLEAR.

>> WE INVITED - IN THE STATE COURT ACTION BY MISTER SANTOS, WE NOTIFIED THEM OF THE MEDIATION DUE TO WORKER'S COMP. WE INVITED THEM TO THE MEDIATION, WE WERE CLEAR FROM THE BEGINNING THEY ARE TO COME TO THE MEDIATION AND TAKE RESPONSIBILITY FOR WHAT THEY DID.

AND COMING AFTER YOU FOR EVERY PENNY OF WHAT YOU DID HERE IF YOU HAVE TO PAY ANYTHING TO RESOLVE THE CLAIM OF THE EMPLOYEE WHO WAS INJURED.

>> HOW DOES THIS WORK MECHANICALLY.

IF YOU ARE SAYING EVERYTHING DONE TO THE TOTAL SUM OF LOSSES, YOUR CLIENT SET THIS CASE FOR WHAT THEY FELT LIKE SETTLING IT FOR AND THEN BUILD TO POSEN CONSTRUCTION?

>> THAT IS KIND OF THE QUESTION, WHAT IF WE ENGAGED IN AN EXTRAORDINARILY HIGH SETTLEMENT THAT WOULD BE A MATTER OF PROOF IN THE TRIAL COURT BUT IF POSEN CONSTRUCTION THINKS GOSH, HERE IS A DRAMATICALLY UNFAIR WAY THIS COULD BE APPLIED, IF THEY DON'T LIKE THAT TAKE UP WITH THE LEGISLATURE AND LIMIT IT. THEY REFUSED TO COME TO THE MEDIATION, TAKE CARE OF THEIR RESPONSIBILITY.

>> CAN'T WAIT TO SEE SOME SORT OF LIMITATIONS. HAVE TO BE REASONABLE ETC. ETC.. YOU TALK ABOUT INVITING THEM TO THE MEDIATION, WEIGHT INTENSIFICATION NORMALLY WOULD WORK IF YOU GET PEOPLE NOTICE ON THE FRONT END OF THE LAWSUIT. ONCE YOU START READING LIMITATIONS AND WHAT YOU ARE HEARSUALLY -- ESSENTIALLY SAYING THIS IS GOVERNED BY COMMON-LAW PRINCIPLES AND WHEN THE PARTING BY THAT YOU EXPECT TO SEE SOME SORT OF CLEAR STATEMENT AND IT IS NOT ENOUGH TO KEEP REPEATING THE TOTAL SUM OF DAMAGES WHEN THAT HAS TO BE READ IN THE CONTEXT WHEN LEGISLATURE IS FROM THE STATUTE.

>> ALL THOSE THINGS, DOES NOT SET FORTH. YOU THEY DID NOTIFY THEM OF THE MEDIATION AND OPPORTUNITY TO

STEP IN.

AND NOT JUST MYOPICALLY FOCUSING
JUST ON THAT PHRASE, THIS IS --
EVERYTHING THE STATUTE, THE
LEGISLATURE SAID WHAT YOU DO.

>> YOU ARE NOW A MINUTE INDIA
REBUTTAL TIME.

YOU COULD CONTINUE IF YOU LIKE
BUT YOU ARE CONSUMING A REBUTTAL
TIME.

>> I RESERVE THE REST OF MY TIME
FOR REBUTTAL.

>> YOU MAY PROCEED.

>> GOOD MORNING.

HINDA KLEIN HERE ON BEHALF OF
POSEN CONSTRUCTION.

WE BELIEVE THE DISTRICT COURT
GOT IT RIGHT IN THIS CASE AND
THERE IS NO STATUTORY INDEMNITY
CAUSE OF ACTION BROUGHT BY A
MEMBER OPERATOR AGAINST AN
EXCAVATOR LIKE POSEN
CONSTRUCTION.

WE ALSO BELIEVE THE STATUTE IS
NOT IN BIG US INSOFAR --
AMBIGUOUS IN TERMS THAT IT DOES
NOT USE THE TERM INDEMNITY OR
ANY KIND OF LANGUAGE THAT WOULD
IMPLY A RIGHT TO INDEMNITY.
THE COURT'S INTERPRETATION VERY
WELL STOP THERE.

THE MEMBER OPERATOR HERE, PGS,
IS IMPLYING THE STATUTE DOESN'T
DEFINE THE TERM LOSSES, THAT
NECESSARILY MEANS THEY CAN SUE
US FOR ANYTHING AND EVERYTHING.
THERE ISN'T A CASE IN THE UNITED
STATES THAT SUPPORTS THAT
CONTENTION.

ALLOCATIONS WE HAVE CITED.
FROM OTHER JURISDICTIONS THAT
ADDRESS THIS ISSUE HAVE VERY
SPECIFIC LANGUAGE DISCUSSING
INDEMNITY OR LANGUAGE THAT
SPECIFICALLY SAYS AN EXCAVATOR
CAN BE LIABLE FOR DAMAGES TO
THIRD PARTIES INCURRED.

NOW STATUTE AND NO COURT HAS
SAID THAT WHERE THE TERM LOSSES
OR SIMILAR TERM LIKE DAMAGES IS

UNDEFINED, THAT NECESSARILY
MEANS THERE'S CAUSE OF ACTION
FOR STATUTORY INDEMNITY WITHOUT
REGARD TO FAULT,
IN THE EVENT THIS COURT BELIEVE
THE STATUTE IS AMBIGUOUS AND I
CERTAINLY AGREE THE LANGUAGE
USED IS LESS THAN ARTFUL.
>> WITHOUT REGARD TO FAULT, THE
ARGUMENT ON THE OTHER SIDE IS
YOUR CLIENT COULD ONLY BE HELD
LIABLE FOR LOSSES.
AND FOR THE LOSSES THEY CAUSE.
THE QUESTION IS PHRASED.
CONVEY GET A COST, A LOSS AND GO
INTO COURT AND REIMBURSED FOR
THAT.
AND INCORPORATE INDEMNITY
DAMAGES.
THEIR ARGUMENT THAT THEY ARE
ONLY SUING US --
>> ON THE OTHER SIDE COUNSEL
ASKED WHERE'S THE EXCEPTION FOR
INDEMNITY TO THE PHRASE TOTAL
SUM OF THE LOSSES TO ALL
PARTIES.
>> WHY IS IT A TOTAL LOSSES, A
PLAIN LANGUAGE ITEM TO COVER
INDEMNITY.
THAT WOULD BE ONE KIND OF LOSS.
>> A COUPLE REASONS.
THE FIRST IS THE COMMON-LAW IN
THE STATE IS CONTRARY TO THE
CONCEPT OF STATUTORY INDEMNITY.
THERE IS ONLY ONE STATUTE WE
HAVE FOUND THAT ADDRESSES
STATUTORY INDEMNITY.
THE COMMON-LAW IN THIS STATE IS
COMPARATIVE THOUGHT.
AS JUSTICE MUNOZ NOTED THEIR
INTERPRETATION IS CONTRARY TO
THE COMMON-LAW.
AND UNDER THE HARDY COUNTY CASE
WE CITED IN OUR BRIEFS, WHERE
THE INTERPRETATION OF THE
STATUTE IS CONTRARY TO THE
COMMON-LAW, IT MUST BE NARROWLY
CONSTRUED.
I DON'T THINK IT APPROPRIATE
COUNSEL KIND OF SHIFTS THE

BURDEN TO US TO SHOW THAT
STATUTORY INDEMNITY IS ACCEPTED
FROM THE STATUTE.

I THINK IT MORE APPROPRIATE THAT
PGS SHOW THAT IT IS PART OF THE
STATUTE.

>> IN WHAT RESPECTS BASED ON
YOUR UNDERSTANDING OF THE
STATUTE IN WHAT RESPECTS DOES
THE STATUTE ALTER COMMON-LAW?

>> IT WOULD ALTER COMMON-LAW BY
REQUIRING US TO INDEMNIFY PGS
WHEN WE HAVE NO, QUOTE, SPECIAL
RELATIONSHIP WHEREBY PGS --

>> I AM NOT SURE WHAT YOU ARE
SAYING.

I AM ASKING BASED ON YOUR
UNDERSTANDING OF THE STATUTE,
HOW DOES THE STATUTE ALTER THE
COMMON --

>> WE DON'T BELIEVE THE STATUTE
ALTERS THE COMMON --

>> ALL OF THIS ALTERS THE
COMMON-LAW IN NO RESPECT?
IS THAT YOUR POSITION?

>> TO THE EXTENT WE ARE TALKING
ABOUT ECONOMIC DAMAGES, DAMAGE
TO A FACILITY CAUSED BY AN
EXCAVATION.

>> THE ONLY WAY IT ALTERS
COMMON-LAW IS BY LIMITATION ON
LIABILITY.

THIS IS A COMPLICATED SCHEME BUT
SEEMS A LITTLE ODD TO ME THAT
THERE IS SO MUCH TALK ABOUT
LIABILITY, THAT'S JUST A
RECAPITULATION OF THE
COMMON-LAW.

AND ON WAY TO GO ABOUT IT.
FOR WHAT THAT IS WORTH.

>> IF THE STATUTE.

>> WE CAN'T HEAR IT.

>> THERE'S ALSO THE FACT IN 2 A
IT CREATES THIS REBUTTABLE
PRESUMPTION OF NEGLIGENCE
LANGUAGE.

CLEARLY THE COMMON-LAW, IT IS
BEING MORE SPECIFIC ABOUT WHAT
THE DUTIES ARE THAN IF IT WAS
PURE NEGLIGENCE.

IT IS AN OVERLAY ON COMMON-LAW.

>> I TOTALLY AGREE.

TO THE EXTENT THAT IT GIVES RIDES TO REBUTTAL PRESUMPTION OF NEGLIGENCE AND TO THE EXTENT IT DOES TALK IN TERMS OF EACH PARTY'S LIABILITY FOR ECONOMIC DAMAGES CAUSED TO MEMBER OPERATORS FACILITIES.

TO THAT EXTENT IT WOULD ALTER THE COMMON-LAW.

WHAT NEEDS TO BE REMEMBERED HERE IS THE FACT THAT THIS CASE THROUGHOUT ALL OF THE PERMUTATIONS ALLEGED IN PRIOR COMPLAINTS AND PRIOR LAWSUITS IS NOT JUST ABOUT A VIOLATION OF THE STATUTE.

MISTER SANTOS IN HIS CLAIMS AGAINST PGS LISTED NEGLIGENT ACTS ON THE PART OF THE FACILITY THAT HAVE NOTHING TO DO WITH THE STATUTE AND THAT IS PAGE 43 OF THE RECORD IN THIS CASE.

>> ISN'T THAT A MATTER OF DEFENSE?

VERY NARROW ISSUE IN THIS CASE FROM THE ELEVENTH CIRCUIT COURT OF APPEALS, IT SEEMS THERE ARE DEFENSES DOWN THE ROAD COMPARED TO NEGLIGENCE HAS BEEN TALKED ABOUT A LOT, WORKERS COMPENSATION ISSUES, THERE COULD BE OTHER DEFENSES RAISED PROCEDURALLY LATER BUT THE NARROW QUESTION IS WHETHER IT STATE A CAUSE OF ACTION. ISN'T THAT RIGHT?

>> THAT IS CORRECT.

WE KNOW FROM THE PRIOR LITIGATION PGS'S CLAIM AGAINST POSEN CONSTRUCTION IS EXCLUSIVE A CLAIM FOR DAMAGES TO THEIR FACILITIES.

THAT HAS ALREADY BEEN DETERMINED IN PRIOR LITIGATION.

THE ONLY DAMAGES THEY ARE SEEKING IN THIS CASE IS THE MONEYS THEY PAID TO MISTER SANTOS IN SATISFACTION FOR HIS

PERSONAL INJURY CLAIM AND THERE'S NOTHING IN THIS STATUTORY SCHEME WHICH COULD CONCEIVABLY IMPLY THAT THEY ARE ENTITLED TO STATUTORY INDEMNITY FOR THOSE SUMS.

>> LET'S TALK ABOUT MORE DIRECTLY THE LOSS, IS IT YOUR POSITION THAT YOUR CLIENT IS NOT LIABLE UNDER THE STATUTE FOR PERSONAL INJURY CAUSED BY YOUR CLIENT'S VIOLATION OF THE STATUTE.

>> WE WERE SUED FOR PERSONAL INJURY, WE DO NOT GET OUT BECAUSE THE STATUTE DOES NOT ADDRESS THAT.

THAT'S NOT WHAT WE ARE ARGUING AT ALL.

CERTAINLY IF POSEN CONSTRUCTION HAD CAUSED PERSONAL INJURY TO MISTER SANTOS OR ANY PLAINTIFFS THEY ARE UNDER THE COMMON-LAW IT IS CLEAR THEY COULD BE HELD LIABLE.

>> IT IS CLEAR THEY COULD BE HELD LIABLE BECAUSE THAT WOULD BE PART OF THE TOTAL SUM OF LOSSES ATTRIBUTED TO THEIR VIOLATION OF THE STATUTE, RIGHT?

>> WE BELIEVE THEY ARE HELD LIABLE, SUBSECTION C, THE STATUTE IS NOT THE SOLE REMEDY, IT DOES NOT EXCLUDE THE EXCAVATOR FOR LIABILITY FOR ANY DAMAGE OR INJURY RESULTING FROM EXCAVATION OR DEMOLITION.

WE NEVER ARGUED THAT SOMEHOW WE ARE IMMUNE FROM ANY AND ALL LIABILITY IF WE VIOLATE THE STATUTE, WHAT THEY ARE ARGUING IN THIS CASE IS THE COURT SHOULD FOCUS ON THE STATUTE AND 106, WITHOUT THE STATUTORY PURPOSE, VERY EXPLICITLY SET FORTH IN SUBSECTION 101 WHICH SETS FORTH IN GREAT DETAIL THE LEGISLATIVE INTENT AND WITHOUT CONSIDERING LEGISLATIVE HISTORY OF THE STATUTE.

WHEN EVERYTHING IS READ IT IS CLEAR THE LEGISLATURE WAS NOT CONCERNED WITH PERSONAL INJURY DAMAGES, IT IS CONCERNED WITH ECONOMIC DAMAGES FOR VIOLATION OF THIS STATUTE BY THE EXCAVATOR, THE MEMBER OPERATOR, MUNICIPALITY BY THE SYSTEM. THAT IS ALL THE STATUTE ADDRESSES.

THEIR ARGUMENT THAT BECAUSE THE STATUTE DOESN'T DEFINE THE TERM LOSSES, IT NECESSARILY IS WIDE OPEN SUCH THAT IT CAN BE INTERPRETED TO BROADEN THE COMMON-LAW OR CONTRARY TO COMMON-LAW BY REQUIRING US TO INDEMNIFY PGS REGARDLESS OF PGS'S FAULT, REGARDLESS OF THE FACT THAT THEY ARE NOT SERIOUSLY LIABLE FOR ANY ALLEGED NEGLIGENCE.

>> IT DOES SAY TOTAL SUM. WHY WOULD WE EXCLUDE DIFFERENT TYPES OF DAMAGES THAT MAY BE APPLICABLE HERE.

I DON'T SEE THAT IN THE STATUTE.
>> THE STATUTE HAS TO BE BECAUSE IT WOULD BE CONTRARY TO COMMON-LAW HAS TO BE NARROWLY CONSTRUED AND WHEN IT IS LOOKS AT AS A WHOLE AGAINST THE BACKDROP OF LEGISLATIVE INTENT

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>> LET ME STOP YOU BECAUSE THIS IS AN IMPORTANT POINT OF LAW. OF THE STATUTE'S PLAIN AND UNAMBIGUOUS WHERE IS THE CASE THAT WE NARROWLY CONSTRUE IT?

>> IF IT IS CLEAR AND UNAMBIGUOUS IT CAN BE NARROWLY CONSTRUED IF IT IS CONTRARY TO COMMON-LAW.

>> WHAT IS YOUR AUTHORITY FOR THAT IS THE PRINCIPLE OF STATUTORY INTERPRETATION?

>> THE HARDY COUNTY CASE 221 SOUTHERN THIRD 1162.

>> PLAIN AND UNAMBIGUOUS IS A MEANINGLESS CONCEPT OUTSIDE THE

IDEA WHAT CONTENT, CAN YOU EXPECT THE LEGISLATURE TO WRITE COMMON-LAW BACKGROUND OF LAW IN THE STATE OF FLORIDA YOU CAN'T EXPECT THEM TO WRITE EVERY POSSIBLE WE DON'T MEAN THIS BUT DON'T MEAN THAT, WITHIN THE COMMUNITY TO WHICH IT IS ADDRESSED IS A CERTAIN SET OF BACKGROUND ASSUMPTIONS AGAINST WHICH LEGISLATURE LEGISLATES. I DON'T KNOW IF IT IS A MATTER OF STRICTLY CONSTRUING BUT GIVING IT A FEAR IN PROPER CONTEXT.

>> YOU HAVE TO CONSIDER COMMON-LAW IN CONJUNCTION WITH THIS WAS THE LEGISLATURE MEANT FOR US TO DO SO BY EMPHASIZING IN SUBSECTION 1062 SEE, AND EXCAVATOR REGARDLESS OF EVERYTHING ELSE IN A PRUDENT MANNER BASED ON ENGINEERING AND CONSTRUCTION PRACTICES AND WHETHER IT COMPLIES WITH THE STATUTE THEY ARE NOT EXCUSED FROM LIABILITY FOR DAMAGE OR INJURY RESULTING FROM NEGLIGENT EXCAVATION.

I THE STATUTE CAN CLEARLY BE HARMONIZED WITH COMMON-LAW BUT I THINK OPPOSING COUNSEL'S ARGUMENT THAT JUST BECAUSE THE TERM LOSSES IS UNDEFINED IN THE STATUTE THEY CAN RECOVER ANYTHING AND EVERYTHING THEY CAN DREAM UP IS SIMPLY NOT SUPPORTED BY STATUTORY LANGUAGE BY THE LEGISLATIVE INTENT.

AS I MENTIONED AT THE BEGINNING NO COURT IN THIS COUNTRY THAT HAS ADDRESSED A SIMILAR STATUTE AND MANY STATES HAVE SIMILAR STATUTES, WITHOUT THE STATUTE ACTUALLY SAYING SO EITHER BY USING THE TERM INDEMNITY OR SAYING YOU COULD BE LIABLE TO A MEMBER OPERATOR FOR ANY DAMAGES PAID TO THIRD PARTIES AS A RESULT OF FAULTY EXCAVATION.

>> LET ME ASK YOU THIS.
THE PHRASE AS THOSE COSTS ARE
NORMALLY COMPUTED AS IT APPEARS
IN SUBSECTION THEM TO A AND 2
BE, IT SUPPORTS THE ARGUMENT,
TOTALLY CONCERNED WITH THE TYPE
OF ECONOMIC DAMAGE, THE MEMBER
OPERATORS UTILITY.
INDEMNITY CLAIMS ARE NOT
NORMALLY AS THOSE DAMAGES ARE
NORMALLY COMPUTED.
INTERESTINGLY ENOUGH,
AND DEALING WITH MEMBER OPERATOR
LIABILITY TO A THIRD PERSON FOR
INJURY OR ANY PERSON OR DAMAGE
TO EQUIPMENT.
IT IS THE ONLY SECTION THAT
EXCUSE THAT LANGUAGE AS NORMALLY
COMPUTED AND INCLUDES LANGUAGE
ADDRESSING INJURY TO A PERSON.
THAT IS A FURTHER INDICATION TO
US THAT THE STATUTE DOES NOT
PROVIDE A RIGHT TO INDEMNITY
WITH RESPECT TO PERSONAL INJURY
DAMAGES WHICH CAN'T POSSIBLY BE
AS THOSE DAMAGES ARE NORMALLY
COMPUTED.
IN CONCLUSION WE BELIEVE ABSENT
REFERENCE TO STATUTORY INDEMNITY
OR REFERENCE FOR THE OBLIGATION
TO INDEMNIFY A PARTY FOR ITS
PAYMENT FOR PERSONAL INJURY
DAMAGES, IT CANNOT BE
INTERPRETED TO REQUIRE STATUTORY
INDEMNITY OR AUTHORIZE STATUTORY
CAUSE OF ACTION.
WE WOULD REQUEST THIS COURT FIND
THE DISTRICT COURT'S DISMISSAL
OF THIS CASE WAS ABSOLUTELY
CORRECT UNDER THE LAW.
THANK YOU.

>>

>> THEY CALL IT INDEMNITY IN
EVERY INSTANCE, STATUTORY
INDEMNITY, YOU CAN CALL IT
DAMAGES WHICH WAS THE
ALTERNATIVE IN THE CERTIFIED
QUESTION.
I WOULD CALL IT A 556106 ACTION
FOR LOSSES.

THAT IS WHAT THE STATUTE PROVIDES FOR.
POSEN CONSTRUCTION SAYING -- CONSTRUE THIS TO MEAN WE CAN RECOVER ANYTHING AND EVERYTHING. IF IT IS A LOSS, DETERMINED TO BE A LOSS, FACTFINDER FINDS THEY VIOLATED THE STATUTE, EVERYTHING WOULD BE INCLUDED.
UNDER THE TEXT OF THE STATUTE THEY MAY NOT LIKE THAT.
>> WOULD THIS BE A REPLAY OF THE ORIGINAL LAWSUIT BETWEEN POSEN CONSTRUCTION AND PGS OVER THE ACCIDENT, WHO DID WHAT AND WHO VIOLATED WHAT DUTY?
>> I DO THINK -- I DON'T THINK IT WOULD BE A REPLAY. IT IS NOT IDENTICAL BUT THIS STATUTE SETS FORTH A COUPLE THINGS PGS WILL HAVE TO DEMONSTRATE AND SHOW SOME EVIDENCE, WE HAVE TO GET A FACT FINDER, POSEN CONSTRUCTION VIOLATED THE STATUTE. THE FACT I GOING TO BE RELEVANT. THIS IS NOT AN AUTOMATIC -
>> YOUR CLIENT'S POTENTIAL NEGLIGENCE GOING TO BE RELEVANT IN THAT LAWSUIT, DID POSEN CONSTRUCTION VIOLATE THE STATUTE ON THE ONE HAND OR DID PGS PAY OUT A SETTLEMENT, IF THE ANSWER IS YES TO BOTH OF THOSE THAT IS THE END OF IT.
>> IF THE FACTFINDER DETERMINES VIOLATED THE STATUTE AND IS LIABLE IN ANY WAY, THE LEGISLATURE HAS SHIFTED THE BURDEN OF THE LOSSES TO THE EXCAVATOR, THE LEGISLATURE DETERMINED THE EXCAVATOR IS IN THE BEST POSITION TO PREVENT THESE LOSSES. THEY SET ON A DETAILED PROCEDURE TO COMPLY WITHIN 556105 AND IF THEY DON'T COMPLY WITH THOSE THINGS ALL THE LOSSES SHIFT TO THEM.
THERE ARE GOING TO BE SOME

FACTFINDERS BY A JURY.
THEY HAVE USED SEVERAL OF THOSE
CANNONS OF STATUTORY
CONSTRUCTION OR INTERPRETED
METHODS THAT ARE NOT
APPROPRIATE.
THEY SAID IN 1984 YOU DON'T USE

--

>> SUBSECTION 3 RELATES TO YOUR
ARGUMENT.

IF THE MEMBER OPERATOR FAILS TO
DISCHARGE A DUTY, THE MEMBER
OPERATOR RESPONSIBLE FOR THE
LOSS CAUSED BY INJURY TO ANOTHER
PERSON.

>> THE LAST SENTENCE RECOGNIZES
THEY ARE NOT EXCUSED, IT
RECOGNIZES, ACKNOWLEDGES EARLIER
PERSONAL INJURY CONTEMPLATED BY
THIS VERY SUBSECTION.

THERE IS NOT -- IF WE SHOW THEY
HAD NOT VIOLATED THE STATUTE
UNDER TO A OR TO BE, ALL OF OUR
LOSSES ARE SHIFTED, IF THEY
VIOLATED THE STATUTE AND
EXCAVATED AND I'M VERY CONFIDENT

--

>> IS IT POSSIBLE BOTH PARTIES
VIOLATED THE STATUTE?

>> IT IS POSSIBLE --

>> SUBSECTION 3, HOW CAN YOU
READ SHIFTING EVERYTHING TO THE
EXCAVATOR WHEN SUBSECTION 3 SAYS
IF THE MEMBER OPERATOR VIOLATES
THE STATUTE AS WELL BUT MEMBER
OPERATORS RESPONSIBLE FOR
PERSONAL INJURY.

>> THE MEMBER OPERATOR.
SUBSECTION -- I WAS REFERRING TO
SUBSECTION 2 SEE, 3 DOES NOT SAY
IF WE VIOLATED THE STATUTE
COMPLETELY EXCUSED, THIS ACTION
AND WHAT WE ALLEGED IS WHETHER
WE HAVE A CAUSE OF ACTION AND WE
CAN PRESENT THE EVIDENCE THEY
VIOLATED THE STATUTE, I'M NOT
SAYING THEY WERE FORECLOSED FOR
MANY DEFENSES THEY HAVE, THE
ANSWER TO THE CERTIFIED QUESTION
IS YES.

>> YOU ARE – WE ARE OVER TIME
HERE BUT ONE DEFENSE THEY WOULD
NOT BE ABLE TO RAISE IS YOUR
CLIENT WAS NEGLIGENT.
>> IF THEY DID PRESENT SOME
COMPARATIVE NEGLIGENCE.
THE LOSS HAS BEEN SHIFTED TO
THEM, THEY VIOLATED THE STATUTE,
SO THEY CAUSED THE EXPLOSION
THEY WENT AND EXCAVATED.
THE EVIDENCE WILL BE
OVERWHELMING AND NOT SAYING THEY
ARE FOR CLOTHES FOR MANY
DEFENSE.
THEY MAY NOT LIKE THE
LEGISLATURE HAS SHIFTED ALL OF
THE BURDEN OF THE LOSSES TO
THEM.
BUT THAT WAS DONE IN THE STATUTE
AND THEY TAKE IT UP WITH
LEGISLATURE THEY WANT AN
EXCEPTION TO THAT.
>> YOU ARE INTO OVERTIME.
YOU WANT TO SUM UP?
>> ANSWER THE AFFIRMATIVE, THE
CERTIFIED QUESTION IN THE
AFFIRMATIVE, THANK YOU, YOUR
HONORS.
>> THANK YOU BOTH FOR YOUR
ARGUMENTS.