NEXT CASE ON THE COURT'S CALENDAR IS FLORIDA POWER VERSUS WEBSTER. MR. FLEMING, YOU ARE HERE WITHOUT ANY OPPOSITION. MR. SHEA DID CALL THE CLERK AND INDICATED THAT HE WOULD RELY ON HIS BRIEFS. FOR HIS POSITION. BUT YOU HAVE THE OPPORTUNITY TO ADDRESS THE COURT.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS DAN FLEMING. I REPRESENT FLORIDA POWER CORPORATION. A DEFENDANT BELOW AND THE PETITIONER HERE, REQUESTING THAT THIS COURT REVERSE THE FIFTH DISTRICT'S DECISION. THAT DECISION, IN TURN, HAD REVERSED THE TRIAL COURT'S GRANTING OF A SUMMARY JUDGMENT. THAT WAS BASED UPON THE STANDING TRAIN DOCTRINE. THE FIFTH DISTRICT DECISION CONFLICTS WITH THIS COURT'S DECISION IN BROWN VERSUS LOFTON. IT CONFLICTS WITH THE SECOND DISTRICT COURT OF APPEALS DECISION IN MASSEY VERSUS SEABOARD. IT IS A DECISION THAT IS NOT SUPPORTED, CONTRARY TO THE FIFTH DISTRICT'S RULING BE, BY -- IS IT YOUR VIEW THAT THE STANDING TRAIN DOCTRINE GOES TO THE ISSUE OF NEGLIGENCE, OR DOES IT GO TO THE ISSUE OF COMPARATIVE NEGLIGENCE?

I THINK IT ACTUALLY GOES TO THE ISSUE OF DUTY.

IT GOES TO THE ISSUE OF NEGLIGENCE.

YES, SIR. THAT'S CORRECT.

SO YOUR THEORY IS THAT, WHEN A TRAIN IS STANDING THERE, REGARDLESS OF THE CIRCUMSTANCES, THAT IT HAS NO DUTY TOY PROVIDE ANY WARNING. -- NO DUTY TO PROVIDE ANY WARNING.

THAT'S CORRECT. I CAN'T SAY THAT THE WAY YOU PHRASE IT, STANDING THERE, OBVIOUSLY THERE HAS BEEN SOME EVOLUTION IN THE STANDING TRAIN DOCTRINE. THE CASES TALK ABOUT, NOW, THE ACTUAL MOVEMENT OF THE TRAIN BE AN ESSENTIAL NOTEIES THAT A TRAIN AT A CROSSING GIVES, SO THAT IS SOMETHING THAT, ALSO, HAS BEEN ADDRESSED BY THE LEGISLATURE RECENTLY.

WOULD THE SAME BE TRUE OF A TRUCK, THEN, THAT WAS STRETCHED ACROSS THE ROAD?

NO. I THINK, CERTAINLY, THE SIZE AND, AGAIN, THE MOVEMENT, I THINK, BECOMES A PART OF IT AS WELL. THE SIZE OF A TRAIN. THE CASE IN THE DECISION IN BROWN LOOKED AT IT WOULD NOT BE -- THE ANSWER TO YOUR QUESTION IS NO. A TRUCK WOULD NOT SUFFICE.

BUT YOU HAVE GOT TO ADMIT THAT BROWN WAS IN A DIFFERENT SORT OF ERA OF OF OUR NEGLIGENCE LAW.

THERE IS NO QUESTION.

BEFORE HOFFMAN.

BEFORE HOFFMAN. COMPARATIVE NEGLIGENCE IS, OBVIOUSLY, CHANGED THE LAW AND MADE THIS SOMETHING THAT IS, I THINK, IT WARRANTS MORE SCRUTINY, ANGI THINK THE STANDING -- AND I THINK THE STANDING TRAIN DOCTRINE HAS SURVIVED THAT SCRUTINY, NOT ONLY HERE IN FLORIDA BUT THROUGHOUT THE COUNTRY, AND AS RECENTLY AS 1993, THE STANDING TRAIN DOCTRINE IS STILL THE LAW IN THE MAJORITY OF STATES IN THIS COUNTRY, AND THAT IS WITH

THE ADVENT OF COMPARATIVE NEGLIGENCE IN MOST OF THOSE STATES. WHAT THE DIFFERENCE, REALLY, IS, AND I THINK IT DOES BOIL DOWN TO COMMON SENSE. SOME OF THE CASES CITED IN THE LATTER PART OF OUR REPLY BRIEF DISCUSS HOW OBVIOUS A TRAIN IS, COMPARED TO, SAY, A TRUCK, COMPARED TO, SAY, OTHER THINGS IN LAW THAT ENJOY THE SAME SORT OF PRESUMPTION, IN OTHER WORDS UNEVEN FLOORS IN A HOME. YOU LOOK AT A TRAIN, PARTICULARLY A MOVING TRAIN GOING THROUGH A CROSSING, THE NOISE AND THE VIBRATION PARTICULARLY THE SIZE OF THE TRAIN, WHICH, I THINK, WAS IMPORTANT IN BROWN. I THINK IT IS EQUALLY IMPORTANT NOW, AND WHEN YOU APPLY THOSE CONDITIONS AND FACTS AND LOOK AT THE FACTS IN THIS CASE, IT VERY CLEARLY FALSE WITHIN THAT SOUND RULING.

WHY WOULDN'T THE SAME BE TRUE FOR A DOUBLE TANDEM TRAILER, TRACTOR-TRAILER?

IT IS, AGAIN, I THINK, IT IS A MATTER OF A RELATIVE TERM. A DOUBLE TRACTOR-TRAILER DOES NOT, IN ANY WAY, AND APPROXIMATE THE NOISE, THE SOUND OR THE TIME THAT YOU ARE TALKING ABOUT WHEN A TRAIN THROWS GOES THROUGH A CROSSING, AND AGAIN I THINK IT -- WHEN A TRAIN GOES THROUGH A CROSSING, AND AGAIN, I THINK IT IS IMPORTANT TO CONSIDER THE TIME COMPARISON. YOU SAID A DOUBLE TANDEM TRAILER, AGAIN --.

TRUCK TRAILER.

THE DIFFERENCE IS BETWEEN THE SIZE OF A TRAIN CAR, SINGULAR, IN THAT DOUBLE-ENDED TRAILER, WHICH MAY BE COMPABLE, WHICH IS, MAYBE, WHY I THINK YOU RAISED IT, AND THAT TRAIN WITH BROWN, REQUIRED TO BE IN EXCESS OF 30 TRAIN CARS, AND THERE YOU SEE THE DIFFERENCES IN THE DISTINCTION BETWEEN THE TWO. 30 CARS AND IN FACT THE CASES AFTERWARDS, MASSEY TALKS ABOUT A TRAIN IN EXCESS OF 100 CARS IN THE SYSTEM.

LET ME ASK YOU A QUESTION. NO ONE DISPUTES THE IDEA THAT, IN THIS CASE, SOMEONE, MAYBE, PLAINTIFFS MAY BE 100% AT FAULT. THAT IS BASED ON THESE CIRCUMSTANCES, THAT NO REASONABLE PERSON COULD HAVE NOT SEEN THIS VEHICLE. THIS TRAIN. THIS 100-CAR TRAIN. BUT WHY -- WHAT I AM HAVING TROUBLE WITH, I AM TRYING TO THINK IN TORT LAW AND WHERE WE HAVE COME FROM AND WHERE WE ARE TODAY, WHY SHOULD -- WE NOW HAVE A DOCTRINE, THE STANDING TRAIN DOCTRINE, THAT, I GUESS, IS NOW ONLY APPLIED TO MOVING TRAINS, AS A STEADFAST RULE, AND WHY ISN'T IT A BETTER RULE OF LAW, CONSISTENT WITH ALMOST EVERY OTHER AREA OF TORT LAW, THAT THE COURTS EVALUATE THIS UNDER THE CIRCUMSTANCES, AND THAT THIS MAY BE A CASE THAT IS A MATTER OF SUMMARY JUDGMENT LAW, THAT THE PLAINTIFF IS 100% AT FAULT, THAT THAT SHOULD BE LOCKED -- LOOKED AT ON A CASE BY CASE BASIS, RATHER THAN AS A STEADFAST, UNMOVING DOCTRINE?

THE ANSWER TO YOUR QUESTION, I DON'T THINK IT IS, STILL, AS STRICT OR AS STEADFASTLY APPLIED RULE AS IT WAS. I THINK IT HAS, AND I THINK WHAT HUTTON ACTUALLY DOES IS, IT DOES CREATE A CONDITIONAL EXCEPTION. THERE ARE, NOW, CIRCUMSTANCES ON THE BOOKS IN FLORIDA, WHERE THE CIRCUMSTANCES SURROUNDING A PARTICULAR CROSSING OR A PARTICULAR ACCIDENT COULD TAKE YOU OUT OF THE REALM OF THE STANDING TRAIN DOCTRINE. FOR INSTANCE YOU COULD STILL HAVE, I THINK, UNDER THE READING OF THE CASE LAW IN THIS STATE, A SITUATION WHERE THE CROSSING, THE MAKEUP OF THE CROSSING, ITSELF, THE APPROACH, WAS SUCH THAT IT WOULD TAKE YOU OUT OF THE REALM OF THE STANDING TRAIN DOCTRINE, AND IN FACT IN HUTTON, I CAN IMAGINE THE CASES THAT WOULD ACTUALLY WARRANT THE APPLICATION OF LUT ONE -- HUTTON TO THE FACTS IN THIS CASE, BUT HERE WE ARE NOT IN THAT SITUATION.

BUT DOESN'T THAT INDICATE THAT THE DOCTRINE, REALLY, NO LONGER HAS ANY VIABILITY ITSELF. THAT IS THAT THE FACTS AND CIRCUMSTANCES OF A PARTICULAR CASE, FOR INSTANCE, MIGHT CONTROL OR DEMAND A PARTICULAR OUTCOME. THAT IS PERHAPS THAT THERE IS NO NEGLIGENCE ON THE PART OF THE RAILROAD OR THAT THERE IS ALL NEGLIGENCE ON THE PART

OF THE DRIVER OF THE VEHICLE THAT STRIKES, YOU KNOW, A RAILROAD CAR OR WHATEVER. BUT AS YOU WERE ENUMERATING ALL THESE VARIOUS CIRCUMSTANCES AND SAYING, WELL, IT WOULDN'T APPLY TO A DOUBLE TANDEM TRUCK, PAW IT DOESN'T MAKE AS MUCH AS NOISE AND IT IS NOT AS VISIBLE OR DOESN'T SHAKE THE GROUND AS MUCH AND ALL OF THAT KIND OF THING. AREN'T YOU, REALLY, INDICATING THAT ALL OF THESE CIRCUMSTANCES HAVE TO BE CONSIDERED? ISN'T IT TRUE THAT TRAINS CONFIGURATIONS AND NOISE AND VISIBILITY AND ALL OF THOSE THINGS ARE, ALSO, ALL VARIED ON TODAY'S MARKET? I MEAN, CAN'T YOU HAVE A RELATIVELY QUIET TRAIN OUT IN THE COUNTRYSIDE, THAT HAS ALL FLAT CARS AND THAT YOU CAN LOOK ACROSS THAT TRAIN, AND ALL YOU SEE IS THE OPEN COUNTRYSIDE ON THE OTHER SIDE OF IT, AND, PERHAPS, NEVER EVEN SEE, YOU KNOW, THE EDGE OF THE FLAT CARS THAT THERE ARE, THAT BLENDS IN WITH THE HIGHWAY, AND THAT IS MAKING NO NOISE OR WHATEVER, BUT IF YOU JUST APPLY A STRICT DOCTRINE, WHAT YOU ARE DOING IS ALL YOU ARE DOING IS SAYING, IF IT IS A TRAIN, AND NOW IT HAS GONE FROM BEING A STANDING TRAIN DOCTRINE, AS WE HAVE SAID, IF IT IS A TRAIN AND IF IT IS MOVING, THERE CAN BE NO LIABILITY, AND AS YOU SAY, NOW, WE HAVE MADE SOME EXCEPTIONS, BUT WHY WOULDN'T THE BETTER RULE BE, AS WE HAVE DONE WITH MOST OTHER DOCTRINES, WHEN WE HAD A MILLION OF THEM, TO SAY ISN'T THAT ALL CONSUMED IN OUR COMPARATIVE NEGLIGENCE LAW NOW, AND IF THERE ARE UNDISPUTED FACTS THAT INDICATE THE RAILROAD IS NOT RESPONSIBLE, THEN SURELY THAT IS WHAT A JUDGE, YOU KNOW, SHOULD DECIDE. ON THE OTHER HAND, IF THERE ARE CONTROVERTED FACTS IN WHICH A REASONABLE JURY COULD DETERMINE THAT THERE WAS SOME FAULT OR NEGLIGENCE, THEN THAT OUGHT TO GO TO A JURY. WHY WOULDN'T THAT BE A BETTER RULE?

THE REASON IT WOULDN'T AND BETTER RULE, AND YOU ASKED A COUPLE OF QUESTIONS AND I WOULD LIKE TO ADDRESS THE FIRST ONE YOU ASKED.

SURE.

THE FIRST ONE YOU ASKED IS ISN'T THERE A TRAIN, AND THE ANSWER IS NO. THERE CAN'T BE A TRAIN QUIET, AS YOU TALKED ABOUT. OUT IN THE COUNTRY --

IN OTHER WORDS YOU COULDN'T HAVE A DRIVER OUT IN THE COUNTRYSIDE WHERE THERE IS NOTHING AROUND FOR MILES AND THE AIR CONDITIONING IS ON IN THE CAR AND THEY ARE LISTENING TO THE RADIO, AND THEY COME UP TO A TRAIN INTERSECTION THAT HAS FLASHING LIGHTS ORDINARILY, AND THE FLASHING LIGHTS AREN'T ON, AND THE TRAIN IS ALL FLAT CARS, AND THE DRIVER OF THAT CAR LITERALLY, BECAUSE THERE IS SIX PASSENGERS IN THE CAR THAT, ALSO, TESTIFIED, WE DID NOT SEE. WE DID NOT HEAR THAT TRAIN, BEFORE OUR DRIVER, WHO WAS COMPLETELY SOBER AND COMPLETELY FOCUSING ON WHAT HE WAS DOING, DIDN'T SEE THAT TRAIN AND RAN INTO IT, AND ONE OF OUR COLLEAGUES WAS KILLED, AND WE WERE ALL SOBER, AND CONSCIOUS, AND ALERT, AND YOU KNOW, WE ARE ALL GENERALS IN THE AIR FORCE OR SOMETHING, AND THAT IS WHAT WE ARE TAUGHT TO DO. IN OTHER WORDS AN ACCIDENT LIKE THAT COULDN'T HAPPEN, YOU ARE SAYING?

WELL, THE JUSTICE HAS ADDED A NUMBER OF FACTS. WHAT I WAS ANSWERING NO TO, IS COULD A TRAIN COME TO ACROSSING IN A QUIET MANNER, AND MY ANSWER TO THAT IS NO. A TRAIN, IN AND OF ITSELF, MAKES A CERTAIN AMOUNT OF NOISE, AND REMEMBER IT IS NOT JUST TRAIN. THE PRESENCE OF A TRAIN CROSSING IN FLORIDA DOES NOT TRIGGER THIS DOCTRINE. IT HAS GOT TO BE THERE ARE QUALIFICATIONS AND STANDARDS, SO IN ANSWER TO YOUR BIGGER QUESTION, I DON'T THINK THIS IS THE SORT OF STRICT DOCTRINE THAT YOU SAY SHOULD BE STRUCK DOWN BECAUSE OF THE ADVENT OF COMPARATIVE NEGLIGENCE. THIS IS SOMETHING DIFFERENT, AND THERE ARE CRITERIA THAT HAVE TO BE MET BEFORE THE DOCTRINE IS APPLIED.

TELL ME WHAT THOSE CRITERIA ARE THAT WOULD BAR AN ACTION.

MAYBE YOU ARE MISUNDERSTANDING ME. I AM TALKING ABOUT THERE ARE CRITERIA, FOR INSTANCE, SET FORTH IN BROWN. FOR INSTANCE THE TRAIN HAS TO BE IN EXCESS OF 30 CARS. ALSO IMPLICIT, AND IT IS OBVIOUS --

SO IF IT WAS 29 CARS, THEN THE DOCTRINE WOULDN'T APPLY.

ARGUABLY YOU COULD SAY NO.

IF IT WAS 31 CARS, IT WOULD. NOW, DOES THAT MAKE A LOT OF SENSE?

NO, IT DOESN'T. I UNDERSTAND YOUR HONOR'S OR THE JUSTICE'S RELUCTANCE TO SEE THAT SORT OF STANDARD BEING APPLIED, BUT THAT IS WHAT THE LAW SAID. BROWN SAID 30 CARS. I THINK THE IMPORTANT POINT IS, AND I DON'T THINK THE 29 CARS WOULD RESTRICT THE COURT FROM FINDING THAT IT DID APPLY. ALL I AM SAYING IS THAT BROWN TALKS ABOUT 30 CARS, AND THE REASON 30, AND I THINK THAT CRITERIA, I THINK, IS IMPORTANT, BECAUSE IT DOES TALK ABOUT THE SIZE OF THE WHOLE TRAIN. IN ANOTHER POINT THAT I THINK I NEED TO MAKE --

DOES THE VISIBILITY OF THE TRAIN HAVE ANYTHING TO DO WITH IT? IN OTHER WORDS WHETHER THEY ARE FLAT CARS THAT HAVE ANYTHING ON THEM OR WHETHER THEY ARE SQUARE CARS THAT ARE PAINTED RED, WHITE, BLUE AND WHITE AND YELL SNOW.

THE JUSTICE'S CONCERN, I THINK, HAS BEEN ADDRESSED BY THE LEGISLATURE, BECAUSE THE SCENARIO THAT YOU ARE TALKING ABOUT, WHEN YOU ADD ALL OF THOSE FACTS, WHEN YOU ARE IN ESSENCE TALKING ABOUT WHAT IS AN INVISIBLE TRAIN, AND THAT OCCURRENCE HAS BEEN ADDRESSED IN REAL LIFE IN THE LEGISLATURE, 51.03 PAREN 5-A, THAT PARTICULAR STATUTE HAS ADDRESSED WHEN IT CAN OCCUR. IN OTHER WORDS AT NIGHT, WHEN A PARTICULAR TRAIN IS STOPPED AT A CROSSING, BECAUSE THEN YOU CAN GET WHERE A TRAIN CAR DOES BLEND IN WITH THE BACKGROUND. IT IS COMPLETELY STATIONARY, AND THERE IS NOTHING THERE THAT WOULD ALERT A DRIVER TO HAVING SOMETHING MOVING. IN OTHER WORDS MOVEMENT PLACE A KEY THERE -- MOVEMENT PLAYS A KEY THERE. THAT ACTUALLY PROTECTS THE SCENARIO THAT YOU ARE TALKING ABOUT, TO THE EXTENT THAT IT COULD ACTUALLY HAPPEN, BUT ONE THING I WANT TO POINT OUT, WHEN WE BROUGHT UP THE QUESTION ABOUT DOES IT APPLY TO A TRUCK OR TRAILER, AND ANOTHER SIGNIFICANT DISTINCTION, WHICH ALL OF US KNOW, WHEN THEY THINK ABOUT IT BUT WHICH IS NOT OBVIOUS WHEN YOU START LOOKING AT ALL OF THESE LEGAL PRINCIPLES AND WHAT IS DIFFERENT IS, AGAIN, A TRAIN CAN'T TURN. THERE IS NOBODY STEERING THE TRAIN. THE TRAIN IS ON THE TRACKS. IT IS GOING DOWN THE TRACKS. IT IS NOT AN ABILTY OF A DRIVER, ONE, TO STEER IT, AND, TWO, TO STOP IT IN ANY REASONABLE MANNER THAT WOULD PREVENT AN ACCIDENT LIKE THE ONES WE ADDRESSED. THE OTHER CRITERIA IN BROWN THAT I HADN'T REACHED YET IS THE FACT THAT THIS DOCTRINE IS NOT APPLIED, IF YOU ARE DEALING WITH A SITUATION WHERE THE TRAIN AND THE CAR ARE APPROACHING THE CROSSING AT THE SAME TIME. IN OTHER WORDS THERE ARE A NUMBER OF CASES THAT THE LAW, AS IT SITS RIGHT NOW, HAS TO TALK ABOUT HOW FAR BACK THE CAR ACTUALLY HITS THE TRAIN. IN OTHER WORDS IT IS IMPERATIVE TO KNOW HOW LONG THE ACTUAL MOVING TRAIN HAS BEEN OCCUPYING THE CROSSING, AND, AGAIN, THE FACTS IN THE INSTANT CASE, WHEN YOU LOOK AT THE VERY SOLID PRECEDENT THAT IS OUT THERE, BOTH FROM THIS COURT AND THE SECOND DISTRICT COURT OF APPEAL, IT IS RIGHT IN LINE WITH IT.

ARE TRAINS REQUIRED IN FLORIDA? TO BLOW A WHISTLE OR WHATEVER, WHEN THEY APPROACH AN INTERSECTION?

THAT WAS MY NEXT POINT THAT, IT IS ANOTHER CRUCIAL ELEMENT TO, ACTUALLY, WHY A MOVING TRAIN IS SO MUCH MORE IMPORTANT THAN A STOP OR A SWITCHING TRAIN, WHICH, REALLY, IMPLIES THAT IT STOPPED AS WELL, AND THAT IS WHAT THE LEGISLATURE DEALT WITH IN 351. THERE WE ARE TALKING ABOUT, LOOK, THERE ARE INSTANCES WHERE WE KNOW THAT

TRAINS ARE GOING TO BE STOPPED AT -- STOPPED AT A CROSSING, AND IMPLICIT IN THAT IS THAT THERE ARE NOT GOING TO BE HORNS AND BELLS BLOWING AND NOT GOING TO BE THAT ADDED WARNING TO A MOTORIST THE, AND IN THOSE INSTANCES, THE RAILROAD HAS SPECIFICALLY REQUIRED THE RAILROAD TO PUT OUT FLARES OR LIGHTS ON THE SIDE.

YOUR CLIENT IS CHARGED WITH MAINTAINING THIS CROSSING?

NO. MY CLIENT, FLORIDA POWER CORPORATION, ACTUALLY PROVIDES ELECTRICITY.

WHAT IS THE ALLEGATION? THAT THERE WERE SUPPOSED TO BE GATES DOWN AND THEY WEREN'T? WHAT WAS --

THE ALLEGATION IN THIS PARTICULAR CASE, IN ADDITION TO THE -- JUST BASICALLY ARGUING ABOUT WHETHER THE STANDING TRAIN DOCTRINE SHOULD APPLY IS THAT THE MOTORIST, ON APPROACHING THE CROSS O'CLOCK, PERCEIVED LIGHT FUNCTIONING, AND THEN --

I AM SORRY. WERE THERE GATES AT THIS CROSSING?

NO. THIS WAS -- NO. THERE WERE NOT GATES. THIS IS A INSTANCE WHERE IT HAD FLASHING LIGHTS. THE FLASHING LIGHTS WERE OPERATING ACCORDING TO THE PLAINTIFFS THINKING THEIR ALONGITION AS -- ALLEGATION RESPECT TRUE, AS WE SEE FROM THE ADJUSTMENT. THEY SEE THE FLASHING LIGHTS OPERATING AND THEN, ACCORDING TO THE PLAINTIFF'S TESTIMONY, THE LIGHTS STOPPED, INDICATING THAT THE TRAIN PASSED THROUGH.

THE MALFUNCTIONING OF FLASHING LIGHTS.

THAT IS THE ALLEGATION.

IF WE TAKE A STANDING TRAIN DOCTRINE, WHICH IS REALLY A MOVING TRAIN DOCTRINE. IT IS NOT A STANDING TRAIN DOCTRINE ANYMORE, WHAT WE WOULD, REALLY, BE SAYING IS THAT, IN FLORIDA, GATES, ONCE A TRAIN STARTS THROUGH AN INTERSECTION, THE GATES CAN COME UP. THE BELLS AND WHISTLES IN THE INTERSECTION THAT CAN STOP, BECAUSE EVERY MOTORIST, ONCE THEY SEE THE TRAIN, WILL KNOW THE TRAIN IS THERE, SO WE DON'T REALLY NEED TO KEEP THE GATES DOWN WHILE THE TRAIN IS GOING THROUGH THE INTERSECTION. IS THAT THE LOGICAL COROLLARY OF THIS, ISN'T IT?

YES, IN GENERAL, BUT I THINK WHAT THE DANGER OF GOING DOWN THAT ROAD AND MAKING THAT ANALYSIS PART OF WHETHER OR NOT THE STANDING TRAIN DOCTRINE IS GOOD LAW IS YOU ARE DEALING WITH AN AREA OF FEDERAL PREEMPTION, WHEN YOU GET INTO WHAT SIGNALS ARE PRESENT AT THE CROSSING. WHAT THE STANDING TRAIN DOCTRINE DOES IS IT FOCUSES ON THE TRAIN, ITSELF, AS REQUISITE AND SUFFICIENT NOTICE TO THE MOTORIST THE OF THE TRAIN BEING THERE, IN THE CIRCUMSTANCES AND UNDER THE CRITERIA WE DISCUSSED.

SO IT IS BASICALLY SAYING THAT, AS A MATTER OF LAW, A TRAIN GOING THROUGH A CROSSING IS WARNING THAT EVERY MOTORIST, REASONABLE OR UNREASONABLE, WOULD HAVE TO SEE, AND THEREFORE AS A MATTER OF LAW, THERE WOULD BE NO NEED FOR ANY OTHER WARNING. IS THAT WHAT THE DOCTRINE IS?

I THINK THAT IS A FAIR RENDITION.

AND IT WAS BORN OUT OF A TIME, WOULD YOU AGREE, WHEN THE INTEREST OF THOSE LEGISLATURES AND THE COURTS WERE TO PROTECT A FLEDGLING TRANSPORTATION INDUSTRY?

THAT I AM UNCLEAR ABOUT, IN TERMS OF FLEDGLING --

I DON'T SEE, BASED ON WHAT YOU HAVE SAID, WHY THIS WOULDN'T AND PERFECTLY TERRIFIC JURY ARGUMENT THAT NO JURY IN THEIR RIGHT MIND WOULD EVER FAULT SOMEBODY FOR NOT HAVING LIGHTS FLASHING WHEN A BIG OLD TRAIN IS COMING THROUGH.

I WOULD RESPECTFULLY DISAGREE, BECAUSE I THINK, AND THAT IS WHY WE PUT SOME OF THOSE OTHER CASES IN THERE. THERE ARE A NUMBER OF PRESUMESS, UNDER FLORIDA LAW, THAT, I THINK, PROVIDE FAR LESS NOTICE TO A PARTICULAR PERSON THAT THERE IS A DEFECTOR A POTENTIAL PROBLEM AHEAD, AND WE FIND, THROUGHOUT FLORIDA LAW THAT, THOSE ARE NOT THINGS THAT YOU CAN CLAIM WITH SOMEBODY ELSE AS RESPONSIBLE TO WARN US. SOMETHING AS BENIGN OR LATENT AS A MISS LEVEL OR A SPLIT LEVEL FLOOR IN FLORIDA IS CLEARLY SOMETHING YOU CAN'T CLAIM SOMEONE SHOULD HAVE GIVEN YOU NOTICE OF. COMPARE THAT TO A TRAIN IN EXCESS OF 30 CARS GOING THROUGH A CROSSING, BLOWING ITS HORN AND RINGING BELLS, I THINK, IS REALLY THE CONTEXT YOU SHOULD LOOK AT IS WHETHER OR NOT THE STANDING TRAIN DOCTRINE, TO THE EXTENT THAT IT HAS BEEN QUALIFIED, AND THANK IS IMPORTANT, I MEAN, GETTING BACK TO JUSTICE ANSTEAD'S QUESTIONING, THIS IS REALLY NOT A STRICT DOCTRINE IN THE MODE OF WHAT THE COURT SHOULD BE CONCERNED ABOUT, BECAUSE THERE REALLY HAVE BEEN NOT ONLY CRITERIA THAT I THINK THE CASE LAW DISCUSSED BUT THE LEGISLATURE HAS SPECIFICALLY ADDRESSED, WHEN THEY PUT THE QUALIFICATIONS ON IT. THAT IF YOU ARE AT NIGHT, IF YOU ARE STOPPED OR IN THE PROCESS OF DOING A SWITCHING MODE, THEN YOU HAVE GOT A SITUATION WHERE THERE ARE ADDITIONAL RESPONSIBILITIES PUT UPON THE RAILROAD OR WHOEVER'S JOB IT IS TO ACTUALLY NOTIFY THAT PARTICULAR TRAIN, SO THOSE ARE CONCERNS I DON'T THINK ARE PRESENT. GETTING TO THE ACTUAL --

BUT AREN'T YOU REALLY ADVOCATING A STRICT DOCTRINE, WHEN IT COMES TO A MOVING TRAIN? I MEAN AS I UNDERSTAND YOUR ARGUMENT, WHAT YOU ARE SAYING IS, BECAUSE THIS TRAIN WAS MOVING, AND WE HAVE THE PLAINTIFF, HERE, ARGUING THAT, OR AT LEAST ALLEGING THAT IT WAS NIGHT. IT WAS RAINING. IT WASING FORY. ALL OF THESE OTHER -- FOGGY. ALL OF THESE OTHER FACTORS. SO WHAT YOU ARE REALLY A -- ADVOCATING IS THOSE FACTORS DON'T MAKE A DIFFERENCE, WHEN THE TRAIN IS MOVING. STRICT DOCTRINE.

THAT IS CORRECT, BUT I DON'T WANT TO MISLEAD YOU. WHEN I SAY MOVING, MOVING IS NOT ENOUGH. THERE ARE OTHER FACTORS THAT ARE REQUIRED --

BUT IF THIS SAME TRAIN WERE STOPPED, WE WOULD, IN FACT, CONSIDER THE FACT THAT IT WAS FOGGY AND RAINING AND WHATEVER ELSE THAT THE PLAINTIFF ALLEGED. CORRECT?

I DON'T THINK SO. AND I THINK THE REASON BEING IS THAT THE LEGISLATURE, AGAIN, THIS WAS AT NIGHT AS WELL. I MEAN THE FACT IF IT WERE IN DAY AND OCCUPYING THE CROSSING, AGAIN, IT CHANGES AGAIN.

BUT THE ONLY THING THAT CHANGES HERE IS NOW THE TRAIN IS MOVING.

AND IMPLICIT IN THAT, WHILE THE JUSTICE HAS POINTED OUT THAT THE ONLY DIFFERENCE IS MOVING THAT, IS NOT THE ONLY DIFFERENCE. AS I POINTED OUT BEFORE, MOVING OR NOT MOVING IS ONLY ONE ASPECT OF THE NOTICE. WHEN YOU CONFINE THOSE WORDS, ALL YOU ARE TALKING ABOUT IS YOU ARE TAKING HEARING OUT OF PLAY AND ALL OF THOSE THINGS OUT OF PLAY AND YOU JUST SAY MOVING ARE ON NOT MOVING. MOVING OR NOT MOVING MAKES A DIFFERENCE, WHEN YOU TALK ABOUT WHETHER OR NOT THE TRAIN ACTUALLY GIVES NOTICE TO THE MOTORIST. IF IT IS STOPPED, IT IS NOT ONLY STOPPED BUT QUIET. IT IS NOT ONLY QUIET, BUT I I AM TALKING ABOUT QUIET IN TERMS OF VIBRATION OF NOISE IN THE TRAIN MOVING THROUGH THE CROSSING, BUT IN TERMS OF NOT ONLY VIBRATION MOVING THROUGH THE CROSSING BUT QUIET IN TERMS OF IT NOT EMITTING A NOISE OR A HORN WHEN IT GOES THROUGH THE CROSSING.

BUT GETTING BACK TO JUSTICE ANSTEAD, COULDN'T THE MOTORIST HAVE THE RADIO ON AND

ALL OF THOSE OTHER FACTORS, SO WHAT REAL POLICY ARE WE ADVANCING HERE, IF WE CONTINUE TO HAVE THE STANDING TRAIN POLICY FOR A MOVING TRAIN?

I THINK THAT THE POLICY THAT YOU ARE ACTUALLY ADVANCING IS THE VERY POLICY THAT ANY MOTORIST HAS TO WATCH OUT FOR WHAT THEY ARE DOING WHEN THEY ARE DRIVING. THE POLICY IN FLORIDA OF DRIVING WITHIN YOUR HEADLIGHTS, AS WE HAVE INCLUDED THOSE WITHIN OUR CASES IN THE BRIEF AS WELL. THIS IS A SITUATION, AND, AGAIN, THERE ARE SITUATIONS THAT NOT ONLY ARE REQUIRED BUT THERE ARE, ALSO, OTHER SITUATIONS THAT THIS -- THAT ARE ON THE BOOKS, AND, AGAIN, YOU LOOK AT THE HUTTON CASE. FOR INSTANCE, IF THIS WERE A SITUATION WHERE THERE WAS A DIP IN THE ROAD, IN HUTTON THERE WAS A DISPUTED FACT, BUT IN HUTTON THERE WAS A DIP IN THE ROAD, AND THE DIP IN THE ROAD NOT ONLY WOULD INHIBIT THE DRIVER'S ABILITY TO SEE THE TRAIN MOVING THROUGH THE CROSSING AND ALL THAT IT ENTAILS, BUT IT WOULD, ALSO, INHIBIT THE NOISE, BECAUSE OF THE DIFFERENT ASPECTS OF HOW NOISE TRAVELS AND EMITS FROM THE ACTUAL TRAIN, ITSELF. IN THIS CASE NONE OF THAT IS PRESENT, SO THERE ARE OTHER FACTORS AND OTHER THINGS WITHIN THE PRECEDENCE THAT THE FIFTH DISTRICT HAD TO LOOK AT THAT WOULD HANDLE THE PARTICULAR CONCERNS THAT THE COURT HAS REGARDING THIS DOCTRINE. I THINK IT DOES ADVANCE THE POLICIES OF HOW A MOTORIST SHOULD OPERATE THEIR VEHICLE, WHEN THEY APPROACH A RAILROAD CROSSING OR ANY OTHER INTERSECTION. TO ALLOW PEOPLE TO DRAF INTO THE SIDE OF A TRAIN, WHEN A TRAIN IS IN TURN, AND IN FACT IF YOU LOOK AT THE LANGUAGE OF THE FIFTH DISTRICT'S DECISION, IT IS IN FACT VERY CLEAR THAT THIS COURT DID NOT LIKE THE STANDING TRAIN DOCTRINE AND MOST IMPORTANTLY DIDN'T MAKE THE FACTUAL ANALYSIS AND LOOK AT THE CASE LAW ON THE BOOKS AND SAY DOES OUR CASE FIT UNDER THE SUPREME COURT'S HOLDING IN BROWN OR MASSEY OR DO THE FACTS IN WEBSTER FIT UNDER THE LOADING IN HUTTON? THEY DIDN'T DO THAT. THEY VERY CLEARLY DIDN'T. WHAT THEY DID WAS THEY LOOKED AT ONE AND SAID THIS IS THE ONE WE LIKE, AND WE ARE GOING TO TAKE THE FACTS IN OUR CASE, AND IT IS A CLASSIC ATTEMPT TO TAKE A SQUARE PEG AND FIT IT INTO A ROUND HOLE, BECAUSE WHEN YOU LOOK AT THE FACTS --

YOUR TIME HAS CONCLUDED. WE THANK YOU VERY MUCH.

THANK YOU VERY MUCH.