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Steven Pollock v. Florida Dep't of Highway Patrol

MR. CHIEF JUSTICE

GOOD MORNING AND WELCOME TO THE ORAL ARGUMENT CALENDAR OF THE FLORIDA SUPREME COURT. I WOULD LIKE TO SAY THAT OUR MARSHAL IS CERTAINLY BACK IN VERY FINE VOICE. LAST MONTH HE HAD A LITTLE LARYNGITIS. I AM GLAD THAT YOU ARE HERE WHEN HE IS RECOVERED. THE FIRST CASE ON THE ORAL ARGUMENT CALENDAR THIS MORNING, OR CONSOLIDATED CASES OF POLLOCK AND LEEDS VERSUS THE DEPARTMENT OF HIGHWAY SAFETY PATROL. I UNDERSTAND THAT COUNSEL ARE GOING TO DIVIDE THE ARGUMENT, AND SO THE MARSHAL IS GOING TO GIVE CONTROL OF THE LIGHTS, SO MR. CYTRYN.

GOOD MORNING, YOUR HONORS. MY NAME IS DAN CYTRYN, AND I REPRESENT STEVEN POLLOCK, PERSONAL REPRESENTATIVE OF THE ESTATE OF ALISA -- -- OF ELISSA POLLOCK. I AM GOING TO PROPOSE A NEW TEST TO ELIMINATE THE TRIANON SITUATION, AND I AM GOING TO APPLY THE FACTS IN THIS CASE TO THE NEW TEST. FIRST OF ALL, THE DISTRICT COURT OF APPEALS DECISION CONFLICTS WITH AT LEAST FIVE DIFFERENT DECISIONS OF EITHER THIS COURT OR OTHER DISTRICT COURTS OF APPEAL. THE FIRST CASE THAT IT CONFLICTS WITH DIRECTLY IS THE TRIANON CASE, WHICH SAYS THAT THE OPERATOR OF ROADWAYS HAS THE SAME DUTY AS THAT IMPOSED UPON PRIVATE CITIZENS. IN THE THIRD DCA CASE, THE, THEY SAID THAT THE, THAT THEY DO NOT HAVE A DUTY OF CARE. THEY ONLY OWE A GENERAL DUTY, EVEN THOUGH THEY ARE OPERATING THIS PARTICULAR ROADWAY, AND TRIANON ALSO STATES THAT, ONCE THE GOVERNMENT TAKES CONTROL OF THE COMMON LAW PROPERTY, IT HAS A DUTY TO MAINTAIN THE PROPERTY. THE THIRD DCA DISAGREES AND SAYS NO. THE DECISION ALSO CONFLICTS WITH THE BAILEY VERSUS STARK DECISION. THIS COURT'S DECISION, WHICH SAID THAT SOMEBODY THAT OWNS PROPERTY OR CONTROLS PROPERTY HAS AN OBLIGATION TO MAINTAIN IT AND THAT IT IS UNDER A DUTY TO MAKE THE STREETS SAFE AND TO REMOVE THE OBSTRUCTION, ONCE IT IS AWARE OF THE CONDITION OR SHOULD BE AWARE OF THE CONDITION. THE THIRD DISTRICT COURT OF APPEALS DECISION, ALSO, CONFLICTS WITH THIS DECISION. IN ADDITION, THE TWO CERTIFIED CONFLICT CASES DIRECTLY AND EXPRESSLY CONFLICT. FOURTHLY, THERE IS A CASE OUT OF THE FIFTH DCA, CALLED HOOVER VERSUS CORRINGTON, WHERE THE FIFTH SAID THAT THE D.O.T., THE DEPARTMENT OF TRANSPORTATION, WAS AWARE OF HAZARDOUS FLOODING ON THE ROADWAY BUT FAILED TO PROVIDE WARNINGS OR MAKE THE CONDITIONS SAFE, THE D.O.T. COULD BE HELD LIABLE AND THERE WAS A DUTY, AND FIFTHLY --

EXCUSE ME JUST A SECOND. ON ALL OF THESE, YOU ARE MAKING AN UNDERLYING ASSUMPTION THAT THE FLORIDA HIGHWAY PATROL IS IN THE SAME STATUS AS THE D.O.T. OR A STATE OR A CITY. IS THAT A PROPER ASSUMPTION TO MAKE, AS WE PROCEED INTO THE ANALYSIS THAT WE MUST MAKE HERE?

IT ABSOLUTELY IS, YOUR HONOR, BECAUSE IN THE STATUTE, I THINK IT IS 321.05, IT SAYS THAT THE HIGHWAY PATROL HAS THE FOLLOWING DUTIES. PART OF THOSE DUTIES ARE TO PATROL AND TO CONTROL THE FLOW OF TRAFFIC WITHIN THE HIGHWAYS. NOBODY ELSE HAS THAT DUTY. THE ONLY ENTITY THAT CAN GO OUT THERE AND, WITH A POLICE CAR, AND HANDLE THE SITUATION, IS THE FLORIDA HIGHWAY PATROL. THE DEPARTMENT OF TRANSPORTATION CANNOT DO IT, AND THAT IS HOW THE SYSTEM WAS SET UP. THIS DUTY IS DIFFERENT THAN THE GENERAL DUTY OF ENFORCEMENT OF THE LAWS. AND SPECIFICALLY, IN 321.05, THEY DIFFERENTIATE BETWEEN THE DUTY TO PATROL AND CONTROL AND LATER ON, TALK ABOUT THE ENFORCEMENT OF THE LAWS.

YOU SAID THAT YOU WERE GOING TO PROPOSE A TEST THAT WOULD DO AWAY WITH THE TRIANON CATEGORIES BUT IF WE WERE TO APPLY THIS IN THE TRIANON CATEGORIES, WHAT, IT IS YOUR POSITION THAT THIS IS A ROAD MAINTENANCE CASE AS OPPOSED TO A PUBLIC SAFETY CASE?

IT IS A CATEGORY THREE. YES, ESSENTIALLY A ROAD SAFETY. IT COULD, ALSO, FALL INTO FOUR. THE PROBLEM WITH TRIANON IS THAT NOBODY CAN TELL THE DIFFERENCE BETWEEN A TWO, THREE AND FOUR. TWO IS SOVEREIGN IMMUNITY. THREE AND FOUR ARE NOT SOVEREIGN IMMUNITY, SO THAT IS THE PROBLEM WITH THE TRIANON TEST. IT HAS BEEN CRITICIZED HEAVILY, CERTAINLY, BY JUSTICE SHAW, IN HIS NUMEROUS DISSENTS ON THESE ISSUES.

YOU WOULD SAY THAT THIS REALLY IS NO DIFFERENT THAN IF THE D.O.T. WAS, WAS CHARGED WITH MAINTENANCE OF THE ROADWAY, BECAUSE YOU SAID THAT THEY WERE THE OPERATOR OF THE ROADWAY, AND THEY ARE NOT THE OPERATOR OF THIS ROADWAY, ARE THEY?

THEY ARE, BECAUSE THEY ARE THE ONLY ONES ONES WHO HAVE THE ABILITY TO PATROL AND CONTROL, IS THE WORDING OF THE STATUTE. THIS ROADWAY. AND THAT GOES BACK TO A DISSENT THAT WAS SET FORTH BY JUSTICE WELLS, JOINED BY JUSTICE HARDING IN THE DEPARTMENT OF NATURAL RESOURCES VERSUS GARCIA, THE BEACH CASE, WHERE BOTH JUSTICE WELLS AND JUSTICE HARDING SAID, WELL, LOOK, THEY DIDN'T HAVE THE OBLIGATION TO CONTROL, AND IF THE OBLIGATION TO CONTROL THAT GOVERNS, AND YOU CITED TO THE BOGUS CASE, AND YOU SAID WHOEVER IS IN CONTROL IS THE ONE WHO HAS THE OBLIGATION TO CONTROL AND MAINTAIN THE PREMISES, AND THE ONLY ONE THAT CAN DO THAT IS THE FLORIDA HIGHWAY PATROL. THE FIFTH BASIS FOR OUR CONFLICT IS THE FIRST DCA'S DECISION IN HARTLEY VERSUS FLOYD, AND BASICALLY IT WAS A CASE WHERE SOMEBODY WAS OUT IN THE OCEAN AND THE WIFE CALLED UP AND SAID MY HUSBAND IS OUT IN THE OCEAN. SOMEBODY SAID I AM GOING TO SEND SOMEBODY OUT. SAME THING THAT HAPPENED IN THIS CASE. FLORIDA HIGHWAY PATROL SAID WE ARE GOING TO DISPATCH SOMEBODY. DON'T WORRY ABOUT IT, AND IN THAT CASE, WHICH DIRECTLY CONFLICTS, THE FIRST DCA HELD THAT, IN FACT, THERE WAS A DUTY, AND IT WAS AN OPERATIONAL DUTY.

ON THIS DUTY TO, THE HIGHWAY PATROL HAS THE OBLIGATION TO CONTROL THE HIGHWAY. IF WE ASSUME A SITUATION WHERE IT ISN'T SOMEONE STOPPED ON THE HIGHWAY, AS WE HAVE, BUT, SAY, A HOLE JUST APPEARED IN THE HIGHWAY, AND WAS CAUSING A PROBLEM. WHAT IS THE HIGHWAY, WHAT WOULD YOU CONTEND IS THE HIGHWAY PATROL'S OBLIGATION IN THAT SITUATION?

THAT IS A CLOSER QUESTION. AND THAT COMES INTO A QUANDRY, AS TO WHETHER IT IS, IN FACT, A D.O.T. OR THE FLORIDA HIGHWAY PATROL. IF, IN FACT, IF, IN FACT, IT COMES TO A SITUATION WHERE THERE IS AN ISSUE THAT THEY HAVE NOTICE AND THEY HAVE THE ABILITY TO CONTROL IT, BECAUSE IT IS PART OF THEIR PATROLING OBLIGATION UNDER THE STATUTE, THEN POTENTIALLY THERE CAN BE LIABILITY ON THE PART OF BOTH ENTITIES, AND I BELIEVE THAT WAS SPOKEN TO IN THE BOFIES CASE, WHICH JUSTICE WELLS REFERRED TO IN HIS DESCENT.

WHAT IS THE DIFFERENCE OR THE EXTREMES? WE HAVE A VEHICLE PROCEEDING TOO RAPIDLY. YOU WOULD AGREE THAT IS A LAW ENFORCEMENT SITUATION, WOULD YOU NOT?

IN THIS CASE, NO, SIR. THERE WAS TESTIMONY --

I UNDERSTAND. IF WE ARE ASSUMING WE HAVE DANGER IS A SPEEDING VEHICLE. THAT IS A LAW ENFORCEMENT SITUATION. I WOULD ASSUME THAT YOU WOULD AGREE WITH THAT, AND THEN ON THE OPPOSITE SIDE A VEHICLE PROCEEDING TOO SLOWLY OR AT STOP. WHY IS THAT NOT A LAW ENFORCEMENT SITUATION, AS OPPOSED TO A ROAD MAINTENANCE TYPE SITUATION?

I THINK THAT VERY WELL MAY BE AND THAT IS DIFFERENT FROM THIS SITUATION. THIS IS A SITUATION WHERE THERE IS A VEHICLE STALLED IN THE ROADWAY. THERE IS AN OBSTRUCTION IN THE ROADWAY, AND SOMEBODY HAS TO TAKE SOME ACTION TO REMOVE IT OR TO WARN OF IT, AND WHO BUT, BETTER TO TAKE THE ACTION THAN THE PERSON WHO HAS THE DUTY, UNDER THE STATUTE, TO DO SO? IT KIND OF GOES TO JUDGE AND STEAD -- JUDGE ANSTEAD'S, I THINK IT WAS THE SILVERMAN DECISION, WHERE THIS DISCUSSED OBSTRUCTIONS TO MOTORIST THES, CITING TO THE RE-- TO MOTORISTS, CITING TO THE RESTATEMENT, AND THE D.O.T. IS IN CONTROL OF THE LAND. IT IS OBLIGATED TO OTHERS FOR PHYSICAL HARM CAUSED BY A STRUCTURE ON THE LAND WHICH THE POSES OR REALIZED WOULD CAUSE REASONABLE HARM, BUT REASONABLE CARE IS NOT TAKEN TO MAKE THE CONDITIONS SAFE, AFTER THE POSES OR KNOWS OR SHOULD -- POS IS ESSOR -- AFTER THE POSSESSOR KNOWS OR SHOULD KNOW ABOUT IT.

BUT WITH A DEFINED PROPERTY THAT A PROPERTY OWNER IS IN ABSOLUTE AND COMPLETE CHARGE OF, AND THEREFORE FROM, NOW WE CAN GO BACK, WAY TO THE COMMON LAW, AND TALK ABOUT THE EXISTING OBLIGATIONS OF A PROPERTY OWNER THAT HAVE TRADITIONALLY BEEN FOLLOWED. THAT IS A HUGE LEAP, TO GO FROM THERE AND TALK ABOUT AN EXTENSIVE STATE HIGHWAY SYSTEM, AND THAT THE LAW ENFORCEMENT AGENCY IS THAT CHARGED WITH PATROLING AND ENFORCING THE STATE LAWS, ABOUT THAT, IS NOW THRUST INTO THE POSITION OF THAT PRIVATE PROPERTY OWNER, AND I AM LET ME USE THAT QUESTION AS YOU ARE SPENDING AN AWFUL LOT OF TIME TALKING ABOUT THE POTENTIAL CONFLICT CASES, AND THEN YOU ARE TELLING US, AND CITING DISSENTS, AND THAT YOU ARE GOING TO COUP WITH AN ALTERNATIVE THEORY TO WHAT THE EXISTING LAW IS. I THINK YOU NEED TO FOCUS ON WHAT YOUR BEST SHOT IS HERE, WITH REFERENCE TO THE RULE OF LAW THAT YOU WANT TO COME OUT OF THIS PARTICULAR CASE. WHAT WOULD YOU HAVE US HOLD, AS YOUR BEST SHOT, AS THE LAW TO COME OUT OF THIS SITUATION? IS IT THAT WE ARE GOING TO NATURAL GUISE THIS TO THE PRIVATE PROPERTY OWNER AND MAKE THE -- IS THAT YOUR BEST SHOT?

MY BEST SHOT IS YOUR DECISION NOT YOUR PERSONAL DECISION, BUT THE TRIANON DECISION, WHICH I DISLIKE THE TEST, BUT IN THE TRIANON DECISION, JUSTICE OVERTON, WHO HAS ALWAYS BEEN ON THE SIDE OF SOVEREIGN IMMUNITY, HE, HIMSELF, STATED, WHEN HE WROTE THE OPINION THAT, THE OPERATOR OF ROADWAYS HAS THE SAME DUTY AS THAT IMPOSED UPON PRIVATE CITIZENS. THAT IS MY BEST SHOT. THIS COURT'S OWN DECISION 17 YEARS AGO, THAT SAYS THE EXACT SAME THING THAT I AM ASKING THIS COURT TO HOLD TODAY.

THE FACTS OF THIS CASE, THOUGH, ARE SORT OF STRONGER THAN THIS, THAT GENERAL RULE OF LAW, AREN'T THEY? I MEAN, CAN'T WE, IN TERMS OF DISTINGUISHING OTHER SITUATIONS, LOOK TO THE FACT THAT THE HIGHWAY PATROL ACTUALLY WAS PLACED ON NOTICE AND WAS SUPPOSED TO DISPATCH A VEHICLE TO THE SCENE, AND SOMEONE JUST MADE AN ERROR AND FAILED TO EXERCISE REASONABLE CARE IN ENTERING IT INTO THE COMPUTER. WHY DO WE HAVE TO GO, DECIDE WHETHER THEY ARE THE OPERATOR OF THIS ROADWAY OR NOT? NO ONE DISPUTES THAT THEY HAD THE OBLIGATION TO, ONES THE -- ONCE THE CALL WAS MADE, TO AKT ACT IN ACCORDANCE WITH WHAT THEY KNEW -- TO ACT IN ACCORDANCE WITH WHAT THEY KNEW TO BE THE HAZARD, AND ADOPT WE HAVE TO GET AROUND ABOUT THIS SPECIAL DUTY, GENERAL DUTY SITUATION THAT HAS DEVELOPED IN THE CASE LAW, THAT THIS IS REALLY A SITUATION WHERE THE DUTY, THIS IS A FORESEEABLE RISK? ISN'T THAT A BETTER WAY TO ANALYZE THIS CASE? BECAUSE I THINK THE PROBLEM WITH YOUR SAYING THAT THEY ARE THE OPERATOR OF THE ROADWAY IS THAT JUSTICE LEWIS WAS TRYING TO SAY, THIS COULD OPEN UP A WHOLE LOT OF CASES THAT, REALLY, DON'T FIT INTO THIS VERY, VERY NARROW CIRCUMSTANCE. SO CAN YOU HELP ME WITH THAT.

WELL, SURE. THE OTHER ALTERNATIVE IS JUST TO ASK IF THIS ACTIVITY IS, AND THIS IS THE TEST, IS THERE A COMMON LAW OR STATUTORY DUTY OF CARE, AND IF IT IS OPERATIONAL, THEN IT IS, AND OPERATIONAL IS ANY ACT THAT IS MINISTERIAL, DOES NOT REQUIRE PLANNING. THIS IS SIMPLY A MINISTERIAL ACT THAT THE DUTY OFFICER FAILED TO DO. MR. CHIEF JUSTICE

THANK YOU, COUNSEL. I THINK YOUR TIME IS UP.

THANK YOU VERY MUCH. MR. CHIEF JUSTICE

MR. LEVY.

MAY IT PLEASE THE COURT. MY NAME IS JAY LEVY. I REPRESENT THE LEEDS. JUSTICE PARIENTE, I SUBSCRIBE TO THE WAY YOU VIEW THIS CASE, A VERY SIMPLE CASE ON COMPELLING FACTS, AND NOT TO BE LABOR THE POINT BUT THE FACTS ARE TRAGIC IN THIS CASE. THERE WAS A CALL MADE TO THE FHP. THE COMPUTER OPERATOR TOOK THE CALL AND SAID WE WILL SEND SOMEBODY OUT. NEVER ENTERED INTO THE COMPUTER. AS A RESULT, THE OPERATOR NEVER HAD A CALL ON THE SCREEN TO SEND THE TROOPER. 45 MINUTES LATER, MY CLIENT IS DRIVING A VEHICLE WEST ON THE PALMETTO EXPRESSWAY IN DADE COUNTY AND CRASHES INTO THE BACK OF THIS STALLED VEHICLE WHICH COULD NOT BE SEEN BECAUSE IT IS SITTING ON THE DOWN SIDE --

DON'T YOU RUN RIGHT INTO EVERTON?

I DON'T BELIEVE EVERTON IS A PROBLEM, BECAUSE IT IS A JUDGEMENTAL DECISION. IT WAS A NOTICE TO APPEAR AND CHOSE TO DO WHAT HE HAD THE DISCRETION TO DO. IN THIS CASE, WE BELIEVE THAT THIS CASE RUNS SMACK INTO THE, I BELIEVE IT IS THE HARTLEY CASE FROM THE FIRST DISTRICT. IN HARTLEY, WHICH IS VERY, VERY SIMILAR TO THIS CASE, THE LADY CALLED AND SAID MY HUSBAND HASN'T COME HOME. COULD YOU GO DOWN AND CHECK THE BOAT RAMP. THE PERSON ON THE OTHER SIDE HAD NO OBLIGATION TO DO THAT, BUT HE SAID, WE WILL SEND SOMEBODY, IN A VERY, VERY WELL-REASONED DECISION, THE FIRST DISTRICT HELD THAT THEY DIDN'T HAVE A DUTY TO DO ANYTHING, BUT ONCE THEY ASSUME THAT DUTY, IT BECAME AN OPERATIONAL FUNCTION. IT COULD BE LIABLE LIKE EVERYBODY ELSE. WHEN THEY FAILED TO SEND SOMEBODY DOWN TO CHECK IT, THEY WOULD BE LIABLE LIKE THE -- THEY WOULD BE LIABLE LIKE THE STATE, AND THAT IS ALWAYS THE WAY I UNDERSTOOD THE DISTINCTION BETWEEN PLANNING, OPERATIONAL, TO TALK IN THE WORDS OF A COMMERCIAL CARRIER.

BUT, AGAIN, WHEN YOU CARRY THAT OUT, AREN'T YOU GOING TO SAY THAT, WHEN SOMEBODY CALLS NN SAYS THAT THERE IS A DANGEROUS DRIVER ON THE ROAD AND THE PERSON THERE THAT IS ANSWERING THE CALLS, THE DISPATCHER OR WHATEVER, SAYS, ALL RIGHT, WELL, WE WILL SEND SOMEBODY OUT TO INVESTIGATE. IN OTHER WORDS, YOU ARE GOING TO GO ON AND ON WITH REFERENCE TO WHAT THE REPORTS ARE. THERE IS A REPORT THAT SOMEBODY IS BREAKING INTO THE HOME, AND YOU KNOW, ARE YOU NOW GOING TO HOLD THE POLICE DEPARTMENT LIABLE, BECAUSE THEY DIDN'T GET THERE IN TIME TO STOP THE BURGLARY OR WHATEVER, YOU KNOW, TAKES PLACE? IN OTHER WORDS TRADITIONALLY, IT APPEARS THAT UNDER OUR CASE LAW, WE HAVE NOT TREATED THOSE AGENCIES AS BEING LIABLE THAT HAVE THE GENERAL FUNCTION OF RESPONDING TO CALLS LIKE THIS, THIS GENERAL PUBLIC SAFETY REQUIREMENT. SO HOW WOULD YOU DISTINGUISH THE SITUATION OF CALLING THE DANGEROUS THING THERE, BUT CALLING AND SAYING THAT THERE IS A DRUNK DRIVER OUT THERE, WEAVING BACK AND FORTH ON THE HIGHWAY?

I BELIEVE IT IS THE NATURE OF WHAT THEY WERE CALLED ON TO DO IN THIS CASE. THEY WERE CALLED TO DEAL WITH A STATIC CONDITION AND OBSTRUCTION. THEY WERE NOT CALLED TO DEAL WITH WHAT I WOULD CONSIDER TO BE AN ACTIVELY, ONGOING POLICE FUNCTION, A BURGLARY, A CHASE. WE KNOW, UNDER THE ELMER CASE, THAT THOSE KINDS OF THINGS WHICH INVOLVE ALLOCATION OF PAN POWER, DECISIONS ON HOW TO DO THINGS, DISCRETIONARY CALLS ARE TRADITIONALLY POLICE FUNCTIONS AND I DON'T QUESTION THAT HERE, BUT HERE, AND, AGAIN, I DON'T WANT TO BELABOR THE EVIDENCE, BUT THERE WERE EIGHT OR NINE TROOPERS WHO COULD HAVE MADE IT HERE. NO PROBLEM. TO PUT THEIR LIGHT ON AND SIT ON TOP OF THE BRIDGE AND WARN PEOPLE, BECAUSE THAT IS EXACTLY WHAT THE DADE COUNTY

PEOPLE DID, WHEN THEY FIRST SHOWED OCCUPY THE SCENE. TO ANSWER IT THIS WAY, I NEED TO GO BACK TO JUSTICE QUINCE'S QUESTION. YOFBL THIS IS A DUTY TO MAIN -- I DON'T FEEL THIS IS A DUTY TO MAINTAIN CASE. I AM NOT HERE ON THAT. THIS IS A DUTY TO WARN CASE. THAT IS THE WAY I SEE IT, AND UNDER THE DUTY TO WARN, ONLY THE FHP COULD SERVE THAT AND DO THAT DUTY. THERE FOR I DON'T WANT TO GIVE YOU THE ANALOGY BUT I WILL ANYHOW. IN THE BAILEY CASE WE DEALT WITH JOINED THINGS. THAT WAS THE STATUS. IN A COMPELLING SITUATION HERE, THIS IS A ONE INSTRUCTION. THIS IS SOMETHING THEY HAD KNOWLEDGE OF. THIS IS SOMETHING THAT WASN'T CHANGING. IT WAS NOT A FLUID SITUATION. THERE WAS A DUTY --

EXCHANGING THE PARTICULAR SITUATION, THERE ARE CASES WHERE WE SEEMED TO APPROVE, IF THE POLICE SHOW UP AND NOW TAKE OVER THE SITUATION, AND FOR INSTANCE HERE, IF THEY HAD ARRIVED AT THE SCENE AND ATTEMPTED TO SET UP PROPER WARNINGS OR WHATEVER, BUT WERE UNSUCCESSFUL, THAT IS THAT THEY WERE NEGLIGENT IN A WAY THAT THEY DID THAT, SO THAT THEY PLAYED SOME ROLE, THEN, IN THE HAPPENING OF THE ACCIDENT, ISN'T THE IMPLICATION, THOUGH, FROM THOSE HOLDINGS, THAT THERE HAS TO BE THAT DIRECT ASSUMPTION OF RESPONSIBILITY, BEFORE WE WILL EXTEND THE DUTY TO THEM? AND COULD YOU RESPOND TO THAT.

WELL, WHAT THIS COURT'S CASES HOLD, AS I UNDERSTAND THEM, JUSTICE ANSTEAD, GO DOWN TO A SPECIAL DUTY ON GEICO ON THE MILE, THAT WHEN YOU ARE DEALING WITH DISCRETIONARY FUNCTIONS, WHICH IS THE WAY YOU ARE PUTTING IT TO ME, ONCE YOU DEAL WITH A DISCRETION AREA FUNCTION, THERE HAS -- A DISCRETIONARY FUNCTION THERE, HAS TO BE A SPECIAL RELATIONSHIP, AND I READ THAT THAT IS WHEN THE TROOPER TAKES ONE TROLL OF THE SCENE. THEY HAVE THE CASES WHERE THERE ARE PEOPLE ON THE SIDE OF THE ROAD AND SOMEBODY COMES ALONG AND CRASHERS AND THEY DIDN'T -- CRASHES AND THEY DIDN'T SECURE THE AREA PROPERLY AND THEY ARE HELD LIABLE. IN THIS CASE, THE HOOVER CASE, THE HARTLEY CASE, THE LAT CAN I SKIES -- THE LATKY CASE, THE COOK CASE, I AM SORRY, NOT THE LATKY CASE, ALL ARE GIVEN KNOWLEDGE TO WARN OF A CONDITION AND SOMETIMES THE KNOWLEDGE AND DISTINCTION IS WHEN THEY FALL WITHIN AN ALLOCATION OF SCARS RESOURCES, AND WHEN THEY MAKE -- ALLOCATION OF SCARCE RESOURCES, AND WHEN THEY MAKE A DISCRETIONARY DECISION, I SUBMIT THERE COULD BE NO LIABILITY, BUT HERE THE DISTRICT COURT FOUND AND THE EVIDENCE WAS CLEAR THAT THERE WAS MORE THAN AMPLE POLICE MORE THAN AMPLE TROOPERS AVAILABLE TO TAKE THIS CALL, AND AS SUCH, WE AS SCRIBE TO THE THEORY CONTAINED IN HARTLEY THAT ONCE THEY AGREED TO SEND THE PERSON. THEY DIDN'T HAVE TO DO THAT. HE COULD HAVE SAID, YOU KNOW, WE ARE PACKED. WE WILL DO IT AS QUICKLY AS WE CAN. THAT WOULD BE ONE THING, AND THEN I WOULD SAY IT IS A DIVERSION OF SCARCE RESOURCES AND THEY ARE ENTITLED TO MAKE THOSE CALLS -- MR. CHIEF JUSTICE

YOU ARE GOING TO USE UP ALL 6 YOUR REBUTTAL TIME.

ALL RIGHT. THANK YOU, YOUR HONOR.

MAY IT PLEASE THE COURT. SHERRY WEISSENBORN, AND ALSO MR. POPY, MY PARTNER, WHO WILL SPEAK AND I WILL SPEAK WITH REGARD TO THE DUTY KARING UNIT. MR. CHIEF JUSTICE

HEAVE PLEASE BE AWARE OF YOUR TIME.

WITH REGARD TO THE DUTY, THERE IS A CALL THAT CAME IN AND IT IS A CANISTER OF ANTHRAX AND SITTING ON A STATE HIGHWAY AND IT IS IN AN EXACT LOCATION WHERE A SCHOOL BUS IS GOING TO HIT THE CANISTER. IS IT THE SAME DUTY WE ARE TALKING ABOUT HERE AND IF NOT, WHY SO? OR IS THAT A DIFFERENT SITUATION?

I SAY IF WE LOOK AT THE TRADITIONAL NEGLIGENCE LAW AND WE LOOK AT DUTY, WHICH IS

WHERE WE HAVE TO GO, AND LET'S FORGET WE ARE DEALING WITH THE SOVEREIGN IN THIS INSTANCE, BUT BECAUSE WE ARE DEALING WITH THE SOVEREIGN, WE GET INTO THE CATEGORY OF TWO POLICE POWERS, BUT WHAT YOU ARE ASKING IS, IF IT HAD BEEN A NORMAL POLICE FORCE, WAS THERE AN OBLIGATION TO GO OUT TO THAT SCENE, AT THAT POINT IN TIME, FOR THE PROTECTION OF THE PUBLIC AT LARGE.

I AM ASKING WHETHER THERE IS A CIVIL DUTY ARISING FROM THAT, BECAUSE THIS IS EXAGGERATED CIRCUMSTANCES.

UNDER THE CURRENT LAW, I BELIEVE HAS BEEN THE LAW FROM TIME IMMEMORIAL, THE ANSWER IS, NO, THERE IS NO SPECIFIC DUTY, BECAUSE THAT IS THE DUTY THAT IS OWED TO THE PUBLIC AT LARGE AND NOT TO A SPECIFIC INDIVIDUAL. NOW, YOU GET INTO OTHER EMERGENCY SITUATIONS, AND THAT BECOMES A DEPLOYMENT, BECAUSE ISN'T THE POLICE DEPARTMENT ENTITLED TO DECIDE HOW IT IS GOING TO DEPLOY. THIS COURT HAS TRADITIONALLY HELD THAT. THAT IS BECAUSE, AGAIN, WE GO BACK TO THE COMMON LAW, AND IF THERE IS NO COMMON LAW DUTY, THEN YOU HAVE TO LOOK TO STATUTORY DUTY. IS THERE A STATUTORY DUTY? THERE IS NO STATUTORY DUTY TO THE POLICEMAN.

YOU SAY THE LAW FROM TIME IMMEMORIAL, BUT COMMERCIAL CARRIER CASE EXPRESSLY REFUTES THE POSITION THAT YOU ARE SAYING AND SAYS THAT THAT BECOMES ABSURD, BECAUSE IF YOU SAY A DUTY TO ALL IS A DUTY TO NONE, THEN THERE IS NO DUTY OF CARE.

THERE IS A SPECIFIED DUTY IN THE COMMERCIAL CARRIER CASE. IT IS NOT A STATUTORY DUTY. IT IS NOT A DUTY THAT IS A COMMON LAW PER SE, IF WE JUST SAID THIS IS AN INDIVIDUAL SOVEREIGN. WHAT WE HAVE IN A COMMERCIAL CARRIER, IS IT IS A PRIVATE, IT IS AN UNDERTAKING, A VOLUNTARY UNDERTAKING. HAD THEY NEVER PUT ANY SIGNS UP OR ROAD SIGNS OR TRAFFIC OBSTRUCTIONS UP, THERE WOULD HAVE BEEN NO DUTY, BUT THE STATE UNDERTOOK, IN COMMERCIAL CARRIER A DUTY OF PLACEMENT, AND ONCE IT TOOK THAT DUTY TO PLACE, IT NOW BECAME RESPONSIBLE, IF IT NEGATIVE ENTERED INTO THAT UNDERTAKING.

WHAT IF THERE ARE, WE HAVE OBSTRUCTIONS ON OUR ROADWAYS. TREES FALL AND THERE IS A TREE THAT HAS FALLEN AND IT IS THERE FOR SEVERAL DAYS. IS THERE ANYBODY THAT HAS GOT THE OBLIGATION TO REMOVE THE TREE THAT IS FALL SOMETHING.

MAINTENANCE IS DOT BASED ON STATUTE, AND THE OWNER OF THE PROPERTY, BASED ON STATUTE AND THE MAINTENANCE IS DOT. FHP'S DUTY BY STATUTE, AND I WOULD NOTE THAT THE STATUTE SAYS WE WILL TREAT FHP LIKE OTHER POLICE ENFORCEMENT OFFICERS.

SO DID THE 9/11, WHEN THEY DISPATCHED, WHEN THEY GOT THE CALL AND THEY SENT IT TO THE FLORIDA HIGHWAY PATROL, DID THEY SEND IT TO THE WRONG AGENCY? SHOULD THEY HAVE SENT IT TO THE D.O.T.?

NO. THERE IS NO DOUBT THE CORRECT AGENCY. TO PATROL A HIGHWAY, OBVIOUSLY, THE TRAFFIC OBSTRUCTION IS PART OF THE PATROLING. THE DEPARTMENT HAS THE RIGHT TO DECIDE HOW TO DEPLOY ITSELF. YES. 911 CONTACTED FHP. WE CANNOT DENY THAT FHP'S DISPATCHER DID NOT CONTACT A TROOPER. BUT THEN WE HAVE TO CARRY, FURTHER, GO BEYOND, IF WE WANT TO GO THAT DIRECTION, WE HAVE TO NOW GO TO THE PROBABLE CAUSE, BECAUSE, REMEMBER, IN NEGLIGENCE THERE IS THREE ELEMENTS. ONE, ANYONE THAT IS MISSING, IS FATAL. AND, IF YOU GO TO PROBABLE CAUSE ASSUMING THERE IS THE DUTY, THE PROBABLE CAUSE IS MISSING, BECAUSE YOUR ASS YOU MEANING THAT --

YOU DON'T MEAN PROBABLE --

PROBABLE CAUSE. PROXIMATE CAUSE. SORRY. PROXIMATE CAUSE. IF YOU GET TO THAT ISSUE, THE -- HAD, ASSUME THAT THE TROOPER HAD BEEN NOTIFIED. IF THAT TROOPER, ON HIS WAY TO

THAT SCENE, HAD SEEN A DRUNK DRIVER GOING BACK AND FORTH BETWEEN TWO LANES OF TRAFFIC, CROSSING OVER THE MEDIAN, HE WOULD HAVE BEEN OFF THAT OBLIGATION, POSSIBLY, BECAUSE AGAIN THAT BECOMES A DEPLOYMENT ISSUE, AND HE WOULD HAVE STOPPED THE DRUNK DRIVER. THEY NEVER WOULD HAVE GOTTEN TO THE SCENE AND THE ACCIDENT STILL WOULD HAVE OCCURRED, AND YOU GET TO THIS ISSUE, THESE GIRLS TOOK NO EVASIVE ACTION WHATSOEVER, YET THERE WERE OTHER CARS OUT THERE THAT DID, THAT MISSED THE ACCIDENT ALL TOGETHER, AND THEY RAN OVER THE TRIANGLES THAT WERE OUT THERE.

NOW YOU ARE ARGUING FACTS, ARE YOU NOW? TRADITIONALLY, WE HAVE LEFT WHETHER IT WAS ACTUALLY CAUSED BY THE, SO, I MEAN, I AM NOT SURE WHETHER, ARE YOU CONCEDING DUTY NOW, THEN?

NO. I AM SAYING ASSUMING THERE WAS A DUTY. I AM NOT CONCEDING DUTY WHATSOEVER. THERE WAS NO DUTY. THIS IS A DUTY OWED TO THE PUBLIC AT LARGE. IT WAS NOT SPECIFIC, AND IF WE LOOK AT EVERY CASE THAT THIS COURT HAS CARVED OUT AN EXCEPTION IN SOVEREIGN IMMUNITY, BECAUSE IT HAS GOT TO DECIDE WHAT SOVEREIGN IMMUNITY MEANS, WE WILL FIND THAT THERE HAS BEEN EITHER, A SPECIFIC STATUTORY DUTY THAT SAYS YOU MUST DO A, B AND C, AND THERE IS A PARTICULAR PERSON WHO IS INTENDING TO RELY UPON THAT, OR WE HAVE A VOLUNTARY UNDERTAKING, SUCH AS YOUR --.

NOW WE ARE COMING BACK TO MR. CYTRYN'S STATEMENT ABOUT PERHAPS A RESTATEMENT OF THE WAIVER OF SOVEREIGN IMMUNITY, BECAUSE, LET'S FACE IT, DON'T WE END UP WITH THE LEGISLATURE'S BROAD DEFINITION, THEN, AS IN COMMERCIAL CARRIER, REALLY, BEING TOSSED OUT UNDER THIS KIND -- TOSSED OUT UNDER THIS KIND OF CONSTRUCTION, WITH THE UNDERSTANDING THAT, YES THERE, IS A DUTY, BUT IT IS SOMEHOW THIS UNDEFINABLE DUTY TO ALL, BUT THAT REALLY MEANS THAT NOBODY IS PROTECTED UNDER THAT DUTY, AND SO WE REALLY END UP WITH NO WAIVER AT ALL IN THE BROADEST CATEGORY OF CASES AND THE MOST OBVIOUS OBLIGATIONS TO DO SOMETHING OUT THERE.

IF I AM UNDERSTANDING YOUR QUESTION CORRECTLY, SIR, I THINK WHAT YOU ARE OVERLOOKING IS THAT THE STATUTE SAYS THAT THE DUTY OR THE INDIVIDUAL, MEANING THE STATE, SHALL BE HELD RESPONSIBLE LIKE A PRIVATE INDIVIDUAL. THERE ARE NO DUTIES ON A PRIVATE INDIVIDUAL WHO GO OUT TO THE HIGHWAY.

IF I CONTRACTED FOR SOMEBODY TO GO OUT TO THE HIGHWAY AND I TOLD THEM THIS THING WAS DANGEROUS, AND IF IT WASN'T REMOVED, IN THE NEXT 20 MINUTES, SO THAT PEOPLE WOULD BE KILLED OUT ON THE HIGHWAY, AND THEY CONTRACTED WITH ME TO DO THAT, AND THEY AGREED TO DO IT, AND THEN THEY WENT AND, TO THE BAR AND STARTED DRINKING AND FORGOT THAT THEY WERE SUPPOSED TO BE, AND PEOPLE WERE KILLED OUT THERE THOSE PEOPLE WOULD BE HELD DIRECTLY LIABLE FOR THAT, WOULD THEY NOT? BECAUSE CLEARLY IF THEY HAD REMOVED IT WHEN THEY SAID THEY WOULD DO IT AND ALL THAT, IT WOULD HAVE BEEN TAKEN CARE OF. WHY SHOULD A GOVERNMENT AGENCY THAT, WHERE EVERYBODY CONCEDES COMPLETELY FOULED UP AND THEY GOT THE CALL AND THERE IS THIS TERRIBLY DANGEROUS THING OUT THERE ON THE HIGHWAY AND THEY DIDN'T GO OUT AND TAKE CARE OF THAT, WHY SHOULDN'T THEY BE HELD LIABLE, JUST LIKE THE PRIVATE ENTITY THAT HAD BEEN CONTRACTED TO DO THAT?

BECAUSE THE PRIVATE ENTITY DIDN'T OWN THE HIGHWAY. IS NOT A GOVERNMENTAL AGENCY, AND IT IS NOT SOMETHING THAT IS PART OF GOVERNING. YOU HAVE GOT, REMEMBER WE ARE STILL TALKING ABOUT TRADITIONALLY, THE WAIVER DIDN'T INTEND TO CREATE A NEW DUTY.

I TAKE IT THAT THIS 911 SITUATION IS ALL A FRAUD. IT IS ALL A FRAUD ON THE PUBLIC, THAT WE REALLY HAVE SOMETHING LIKE THAT THAT MEANS SOMETHING.

IT IS A MATTER OF CONVENIENCE TO TRY AND LET THE PUBLIC HAVE ONE PLACE, AND, AGAIN,

LET'S NOT GET HUNG UP, IT IS NOT A 911 ISSUE. THE ISSUE GOES TO WHAT WAS THE DUTY, ASSUMING THEY GOT AND DID WHAT THEY WERE SUPPOSED TO DO. MR. CHIEF JUSTICE

IF YOU ARE GOING TO ALLOW MR. POPY, BUT JUSTICE SHAW?

I HAVE ONE QUESTION. WOULD A DUTY ARISE, IF THE DISPATCHER SAYS YES, WE WILL DO SOMETHING ABOUT THIS HAZARD IN THE ROAD, AND THERE IS A HIGHWAY PATROL PROTOCOL THAT SAYS, ONCE YOU GET THIS TYPE OF CALL, THIS IS WHAT YOU DO. WOULD THAT LEAD TO A DUTY?

YOU ARE ASKING WHETHER OR NOT SIMPLY THE INTERNAL POLICIES AND PROCEDURES OF THE DEPARTMENT, THEMSELVES, WOULD CREATE THE DUTY?

NO. NOT JUST PROTOCOL, THE PROTOCOL PLUS THE AFFIRMATIVE ANSWER THAT WE ARE GOING TO DO SOMETHING.

I THINK, UNDER THE TRADITIONAL, IN THE HARTLEY CASE AS DISTINGUISHABLE, HAD THE PROMISE BEEN MADE TO THE GIRLS, THEN THERE WAS A SPECIAL RELATIONSHIP CREATED BETWEEN THE GIRLS AND THE DEPARTMENT. THIS WAS SIMPLY FINE, WE WILL TAKE CARE OF IT. IT IS NOT THE PROMISE THAT HAPPENED IN HARTLEY, WHERE MRS. HARTLEY DETRIMENTALLY RELIED THAT THE POLICE WOULD GO OUT AND DO SOMETHING AND THEY DIDN'T, SO SHE STOPPED AND HER HUSBAND --

IS THAT AN AFFIRMATIVE ANSWER YES, A DUTY WOULD ARISE?

NO. IT HAS TO BE STATUTORILY, IT HAS TO BE COMMON LAW, OR THERE HAS TO BE SOME SPECIAL RELATIONSHIP. NONE OF THOSE ENTERED INTO THE PICTURE IN THIS IN SFANS.

THANK YOU. -- IN THIS INSTANCE.

THANK YOU. MR. CHIEF JUSTICE

MR. POPY.

MAY IT PLEASE THE COURT. MY NAME IS CHARLIE POPY. I HAVE DONE A LOT OF WORK IN REPRESENTING THE FLORIDA HIGHWAY PATROL AND DOT FROM TIME TO TIME AND THERE IS A BIG DIFFERENCE BETWEEN THE TWO. DOT, OF COURSE, HAS A DUTY TO MAINTAIN THE HIGHWAYS, ET CETERA. THE FLORIDA HIGHWAY PATROL DOESN'T HAVE THAT DUTY TO MAINTAIN THE HIGHWAYS. THE FLORIDA HIGHWAY PATROL IS A POLICE AGENCY. AND THE SITUATION WE HAVE HERE, IF YOU GO BACK TO THE CASE THAT WAS CITED BY THE PLAINTIFFS, ORIGINALLY, TALKING ABOUT THE BOAT INCIDENT AND THE SHERIFF, AND THAT INSTANCE, THE WIFE CALLED THE SHERIFF AND SAID MY FAMILY HASN'T COME BACK. THEY LEFT THEIR BOAT THERE. THEY WENT OUT TO SEA. WOULD YOU GO CHECK THE BOAT RAMP. AND THEY COME BACK AND SAY, WELL WE CHECKED THE BOAT RAMP. THE CAR ISN'T THERE. WHEN, IN FACT, THEY NEVER DID GO OUT THERE, AND SHE RELIED UPON THAT AND THEREFORE NO SEARCH WAS STARTED, AND THEREFORE THE COURT SAID, AND I THINK WISELY SO, YOU CREATED A SPECIAL RELATIONSHIP WITH HER. THERE WAS NO SPECIAL RELATIONSHIP CREATED HERE BETWEEN THE GIRLS THAT DIED AND THE FLORIDA HIGHWAY PATROL. IF YOU ARE GOING TO FOLLOW THEIR SUGGESTION, THEN YOU HAVE GOT TO REVERSE YOUR LINE OF CASES, WHERE YOU HAVE SOMEONE NEGLIGENTLY ALLOWING A MAN WHO IS UNDER ARREST AND IS IN JAIL TO ESCAPE. WE HAVE HAD THEM WHERE THEY FORGOT TO LOCK THE DOOR AND THE MAN WALKS OUT AND HE MURDERS SOMEONE THREE BLOCKS AWAY. WE HAD THAT CASE. AND YOU SAID WAIT A MINUTE! THERE IS NO SPECIAL DUTY TO THE MAN THAT WAS MURDERED. BUT THERE CERTAINLY WAS A DUTY TO KEEP THAT MAN INCARCERATED. AND WE FAILED TO DO IT. YOU ARE GETTING READY TO PUT, WHAT THEY WANT YOU TO DO IS PUT A BIG BURDEN ON THE STATE THAT THE STATE

PRESENTLY DOESN'T HAVE.

MR. POPY, WITH REGARD TO THE WARNING CASES THAT HAVE BEEN ARGUED BY THE OPPOSITION.

YES.

CERTAINLY WE KNOW THAT THERE ARE CASES LIKE THE NEILSON CASE, WHERE THE LAW SEEMS TO BE THAT, IF THE STATE, IN DESIGNING AND CONSTRUCTING A ROAD WAY, CREATES A DANGEROUS CONDITION, THERE APPEARS TO BE A DUTY TO WARN, MAYBE NOT THE FHP, BUT AN UNDERLYING DUTY TO WARN. WOULD YOU AGREE THAT THAT IS THE BASIC STATUS?

BASICALLY BUT IT IS NOT QUITE AS SIMPLE AS IT WAS PUT, JUDGE.

ARE THERE CASES IN YOUR EXPERIENCE WITH DEALING WITH DOT WHICH WE HAVE ENCOUNTERED, HAZARDS CREATED AND THIS WARNING ISSUE AND IF THERE IS A DUTY, WHO THAT DUTY FALLS ON?

YES. THE DUTY FALLS UPON DOT, NUMBER ONE, IF THEY HAVE NOTICE, AND IF THEY HAVE A NOTICE SUFFICIENTLY, A LENGTH OF TIME IN WHICH TO CORRECT THE SITUATION, ET CETERA. BUT IF IT IS A DESIGN DEFECT, THEN YOU HAVE SAID THAT THERE IS NO LIABILITY ON BEHALF OF DOT. WHICH THERE IS NO LAWSUIT AGAINST THEM.

I THOUGHT IF YOU CREATE A TRAP ---.

IF YOU CREATE A TRAP, THAT IS A ENTIRELY DIFFERENT SITUATION, YES, AND WE ARE RESPONSIBLE FOR THAT, BUT HERE WE HAVE A SITUATION WHERE THEY WANT TO MAKE THE FLORIDA HIGHWAY PATROL RESPONSIBLE FOR ACCIDENTS THAT OCCUR BECAUSE THEY DID NOT GET THERE IN TIME ENOUGH TO PREVENT IT. FRANKLY PROXIMATE CAUSE DOES HAVE SOMETHING TO DO WITH THIS, BECAUSE THERE WAS NO TESTIMONY ANY TIME THAT, IF WE GOT THERE, WE COULD HAVE MOVED THE TRUCK. WE DON'T MOVE TRUCKS. WE HAVE NO WAY OF REMOVING THAT OBSTACLE. SURE, WE HAVE BLUE LIGHTS AND SIRENS THAT WE CAN HAVE GOING, BUT WE HAVE TROOPERS RUN OVER IN THE STREET, OUR OWN CARS ARE HIT WHILE WE ARE AT THESCENE OF AN ACCIDENT WITH VERY KIND OF LIGHT RUNNING.

IF THE FACTS WERE THAT THE FLORIDA HIGHWAY PATROL HAD GOTTEN TO THE SCENE AND THEN, IN THE WAY THAT THEY DIRECTED TRAFFIC, THEY SAY THEY HAD FLARES BUT THEY DIDN'T HAVE PUT THEM UP IN -- BUT THEY DIDN'T PUT THEM UP IN THE RIGHT PLACE, WOULD THERE BE LIABILITY IN THAT SITUATION, ONCE THEY GOT TO THE SCENE, IF THEY HANDLED IT NEGLIGENTLY?

I DON'T THINK SO, BECAUSE I THINK THOSE ARE ALL JUDGMENT CALLS, WHEN YOU GET TO THE SCENE AS TO WHAT YOU NEED TO DO FIRST, AND WHAT YOU HAVE TO DO AT THE SCENE, BECAUSE, FIRST, YOU ARE THERE TO TAKE CARE OF THE INJURED, IF THERE ARE INJURED.

SO THE REASON, I AM TRYING TO SEPARATE THE DIFFERENT REASONS, SO IN THAT SITUATION, WHAT YOU ARE SAYING IS THAT THERE WOULD BE, STILL, A PLANNING LEVEL DECISION AT THE SCENE, ABOUT HOW TO REDIRECT TRAFFIC?

WELL, THERE MIGHT VERY WELL BE, BECAUSE THE TROOPER MIGHT BE ALL ALONE AND HE MIGHT HAVE OTHER DUTIES THERE. THE OTHER PROBLEM YOU HAVE HERE IS BECAUSE THIS IS FOUR O'CLOCK IN THE MORNING.

LET ME, I AM --

THERE IS NO SHOWING THAT WE COULD HAVE GOTTEN A TROOPER THERE IN THAT LENGTH OF

TIME ANYWAY.

SO, AGAIN, THAT GOES BACK TO THE PROXIMATE CAUSE ISSUE.

YES.

WHAT IS IN THE SAME SITUATION INSTEAD OF IT BEING A THIRD PERSON THAT HAD CALLED THE FLORIDA, OR CALLED 911, IT WAS THE OWNER OF THAT DISABLED VEHICLE THAT HAD MADE THE CALL AND SAID I HAVE GOT, YOU KNOW, MY DAUGHTER IS IN THIS VEHICLE, AND IT IS STALLED. I CAN'T GET AAA. PLEASE SEND SOMEONE, AND, AGAIN, THE SAME THING. 911 HAD CALLED THE FLORIDA HIGHWAY PATROL AND SOMEONE JUST NEGLECTED TO PUT THE CALL IN. UNDER OUR LAW, YOU ARE SAYING THAT IN THAT SITUATION, IT IS A SPECIAL DUTY CREATED AND THERE WOULD BE LIABILITY?

NO. I THINK THE SPECIAL DUTY IS ONLY CREATED UNDER OUR PRESENT LAW. ONCE THE PATROL ARRIVES AT THE SCENE AND THEN HAS A RELATIONSHIP WITH THAT PERSON, JUST LIKE WE HAVE HAD PEOPLE IN OUR CUSTODY INJURED FROM TIME TO TIME. YOU HAVE ALWAYS HELD US LIABLE FOR THAT AND SHOULD BE. WE HAVE THIS, ONE OF THE FAMOUS CASES THAT CAME UP HERE THAT I ARGUED HERE, 25 YEARS AGO, OR 30 YEARS AGO IN THIS COURT, WAS WHERE THE CITY OF FT. LAUDERDALE GOT A CALL FROM A JEWELRY STORE THAT THEY WERE BEING ARMED ROBBED AT THE TIME. THEY SENT ONE CAR THERE. BOTH OF THE POLICE OFFICERS HAD THEIR GUNS REMOVED AND THEY, BURGLARS TIED THEM UP AND LEFT THEM THERE, AND EIGHT HOURS LATER, THEY WENT BACK TO THE JEWELRY STORE, BECAUSE THEY HAD NEVER HEARD FROM THE POLICE OFFICERS. THEY HAD SENT THEM THERE EIGHT HOURS BEFORE. IN THE MEANTIME, THAT JEWELRY COMPANY LOST \$5.5 MILLION IN JEWELS, FOR WHICH IT SUED THE CITY OF FT. LAUDERDALE, AND THEY SAID WAIT A MINUTE. THERE IS NO SPECIAL DUTY OWED TO THEM ANYMORE THAN TO ANYONE ELSE THERE AND FOR, MR. JEWELRY STORE OWNER, YOU CAN'T COLLECT, BECAUSE THIS IS A POLICE DUTY, AND WE CAN'T TELL THEM EXACTLY HOW TO FUNCTION, AND I THINK THAT IS WHAT THE SITUATION IS HERE. WE DON'T HAVE A SPECIAL DUTY, AND THEY WANT YOU TO CHANGE THE LAW, AND, OF COURSE, THAT IS YOUR PRIVILEGE TO CHANGE THE LAW BUT IF YOU CHANGE THE LAW HERE, YOU ARE MAKING ONE TREMENDOUS ECONOMIC IMPACT UPON THE STATE OF FLORIDA. IF YOU ARE GOING TO MAKE US RESPONSIBLE FOR EVERYTHING THAT HAPPENS OUT THERE ON THESE HIGHWAYS, WE HAVE NOT, WE CAN'T POLICE THEM THAT WELL. AND I DON'T SEE WHERE THERE IS A DUTY HERE, AND I THINK THAT IS WHAT WE HAVE TO STICK TO. NLTS THERE IS A -- UNLESS THERE IS A SPECIAL DUTY CREATED, WE CAN'T HOLD A POLICE OFFICER RESPONSIBLE FOR WHAT THE END RESULT WAS, JUST LIKE WE CAN'T HOLD HIM RESPONSIBLE FOR NOT ARRESTING THE MAN THAT, AN HOUR LATER, IS BACK IN ANOTHER AUTOMOBILE AND RUNS OVER SOMEONE ELSE OR THE MAN THAT, THE LADY COMES IN AND SAYS MY HUSBAND WANTS TO KILL ME, AND THE POLICE OFFICER SAYS, WELL, YOU KNOW, WHAT HAS HE DONE TO YOU, AND THEN THE POLICE OFFICER DECIDES NOT TO DO ANYTHING, AND TWO HOURS LATER SHE IS DECIDED DEAD! -- SHE IS DEAD! THESE THINGS DO OCCUR. I THINK IT IS TOO MUCH RESPONSIBILITY TO PUT UPON THE HIGHWAY PATROL.

JUSTICE PARIENTE'S SITUATION THAT SHE JUST GAVE, WITH A TRUCK DRIVER CALLING AND SAYING MY TRUCK IS INCAPACITATED, MY DAUGHTER IS IN THE BACK, AND SHE CALLS, HE CALLS THIS IN TO THE DISPATCHER. THE DISPATCHER SAYS DON'T WORRY ABOUT IT. I WILL SEND SOMEBODY OUT THERE. WITH THAT ASSURANCE, THE TRUCK DRIVER DOESN'T CALL DOT AND HE DOESN'T DO SOME OF THE THINGS HE MIGHT HAVE DONE, HAD THE DISPATCHER TOLD HIM YOU CALLED THE WRONG PERSON. YOU NEED TO CALL SOMEBODY ELSE. YOU NEED TO GET A WRECKER. WITH THAT ASSURANCE THAT SOMETHING IS GOING TO BE DONE, HE FAILS TO DO ANYTHING. HAS ANY DUTY A RIZED?

WE HAVE TO SHOW THAT, IF HE WOULD HAVE DONE SOMETHING, THAT THE INCIDENT WOULDN'T HAVE OCCURRED, AND THAT YOU CAN'T DO. THERE HAS BEEN NO TESTIMONY, NO EXPERT

TESTIFIED ABOUT ANY OF THAT.

WELL, THAT WOULD GET INTO THE FACTS.

WELL, YOU KNOW, SOMEHOW YOU CAN'T DISTINGUISH EVERYTHING IN THIS CASE.

-- DUTY AT THIS POINT.

THIS CASE WAS A MISCARRIAGE OF JUSTICE, AS FAR AS OUR PRESENT LAWS ARE CONCERNED.

WELL, MY QUESTION IS WOULD A DUTY ARISE IN THAT HYPOTHETICAL?

I DON'T THINK THE DUTY WOULD ARRIVE, UNTIL THE POLICE OFFICER ARRIVED ON THE SCENE. BECAUSE I THINK THAT WOULD CREATE A SPECIAL DUTY. NOW, IF HE NEVER DID ANYTHING ELSE ABOUT HIS DAUGHTER BEING IN THE TRUCK AND HOURS WENT BY, LIKE IT DID IN THE BOAT INCIDENT WHEN THE SHERIFF TOLD THEM THAT THE BOAT HAD LEFT THE RAMP OR THAT THE TRUCK HAD LEFT THE RAMP HOURS BEFORE, AND IT WAS THE NEXT DAY BEFORE IT WAS DISCOVERED THAT IT HAD NOT LEFT THE RAMP, THEN YOU HAD A GREAT NUMBER OF HOURS WENT BY. THAT IS WHEN YOU DECIDED THAT THERE WAS A SPECIAL DUTY OWED. MR. CHIEF JUSTICE

THANK YOU, MR. PAPY. YOUR TIME IS UP. THANK YOU, COUNSEL. REBUTTAL?

THANK YOU.

THANK YOU, YOUR HONOR. IF I COULD MAKE FOUR QUICK POINTS. ONE IN RESPONSE TO JUSTICE PARIENTE'S QUESTION. I BELIEVE THAT YOUR QUESTION AS TO THE FLARES AND HOW THEY DID THINGS AND NEGLIGENCE IS CONTROLLED BY THIS COURT'S DECISION IN HALL, WHICH PRETTY MUCH SAYS THAT ONCE YOU GET TO THE SCENE AND YOU TAKE CONTROL, THEN YOU CAN BE LIABLE, LIKE ANYBODY ELSE. I THINK THAT IS THE ISSUE HERE, CONTRARY TO WHAT MR. PAPY SAYS. SECONDLY, MR. PAPY READS THE HARTLEY CASE, NOT SQUARE ON WHAT HE TOLD YOU BUT SQUARELY ON THE FACT THAT THEY SAID THEY WERE GOING TO SEND SOMEBODY OUT BUT THEY DIDN'T SEND ANYBODY. IT IS A SPECIAL DUTY AND THAT BELIES THAT CONTENTION. A SPECIAL DUTY OF LAW IS NOT APPLICABLE TO THE FACTS OF THIS CASE. WE ARE NOT STANDING ANY DUTY AND IT WAS AS TO HER REQUEST. ONCE ASSUMING THE DUTY, THE OFFICE HAD TO DO IT. I THOUGHT THE JURY TERMED A VERDICT THAT WAS NEVER SET ASIDE THAT HELD THE HIGHWAY PATROL 50 PERCENT AT FAULT. PROXIMATE CAUSE IS AN ISSUE AND WE ARE BEYOND THAT HERE. FOURTH -- MR. CHIEF JUSTICE

MR. LEVY, YOUR TIME IS UP.

THANK, YOUR HONORS. MR. CHIEF JUSTICE

THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.