

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1217

TITLE CITY OF SPRINGFIELD, MASSACHUSETTS Petitioner V.  
LOIS THURSTON KIBBE, ADMINISTRATRIX OF ESTATE OF  
CLINTON THURSTON

PLACE Washington, D. C.

DATE November 4, 1986

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(202) 628-9300

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x  
3 CITY OF SPRINGFIELD, :

4 MASSACHUSETTS, :

5 Petitioners :

6 v. :

No. 85-1217

7 LOIS THURSTON KIBBE, ADMINISTRA- :

8 TRIX OF ESTATE OF CLINTON :

9 THURSTON :

10 -----x

11 Washington, D.C.

12 Tuesday, November 4, 1986

13 The above-entitled matter came on for oral  
14 argument before the Supreme Court of the United States  
15 at 10:05 a.m.

16 APPEARANCES:

17 EDWARD M. PIKULA, ESQ., Assistant City Solicitor of  
18 Springfield, Springfield, Massachusetts.

19 TERRY SCOTT NAGEL, ESQ., Springfield, Massachusetts.

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1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE REHNQUIST: We will hear  
3 arguments first this morning in the City of Springfield  
4 versus Lois Thurston Kibbe.

5                    You may proceed whenever you're ready, Mr.  
6 Pikula.

7                    ORAL ARGUMENT OF EDWARD M. PIKULA, ESQ.,  
8                    ON BEHALF OF THE PETITIONER

9                    MR. PIKULA: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11                    At issue in this case is the standard for  
12 municipal liability under 42 U.S.C. Section 1983.

13                    The facts center on the fatal shooting of a  
14 fugitive who had abducted a woman, who had avoided  
15 police at two roadblocks during a chase through the  
16 streets of the City of Springfield.

17                    There are three reasons why the First  
18 Circuit's opinion -- decision should be reverse. First,  
19 there is no unconstitutional policy. Second, gross  
20 negligence is an insufficient standard of liability.  
21 And third, the evidence is insufficient to support the  
22 jury verdict against the city.

23                    With regard to the first reason, since Monell  
24 interpreted Section 1983 to impose policy based  
25 municipal liability, an unconstitutional policy has been



1 prevalent in cases where this Court has approve  
2 municipal liability.

3 The First Circuit has expanded municipal  
4 liability beyond the limits of this Court's decision by  
5 imposing liability without the requirement of an  
6 unconstitutional policy.

7 The explicit requirement of an  
8 unconstitutional policy would draw a line which  
9 determines causation. For example, when a municipal  
10 employee acts pursuant to an unconstitutional policy, a  
11 constitutional deprivation results, and the city would  
12 be responsible for that deprivation.

13 QUESTION: Mr. Pikula, is a policy  
14 unconstitutional if it permits but does not explicitly  
15 authorize constitutional violations?

16 MR. PIKULA: I believe a policy is  
17 unconstitutional if it requires the conduct which causes  
18 a constitutional violation, or permits it.

19 QUESTION: No, my question was, if it permits.

20 MR. PIKULA: Or permits the conduct which is  
21 unconstitutional.

22 QUESTION: Did the Court of Appeals, Mr.  
23 Pikula -- excuse me -- say what the unconstitutional  
24 conduct, what the constitutional violation was?

25 MR. PIKULA: I believe a Fourteenth Amendment

1 violation of the Constitution was at issue.

2 QUESTION: Well what -- more specific. I  
3 mean, the Fourteenth Amendment -- again, I'm not asking  
4 you for your opinion. Did the Court of Appeals get any  
5 more specific than that?

6 MR. PIKULA: No, the jury instruction did  
7 charge on a violation of due process, in violation of  
8 the Fourteenth Amendment.

9 The --

10 QUESTION: How far do you go in not taking  
11 necessary steps before you are in effect permitting?  
12 Suppose a municipality is running a jail, and it just  
13 doesn't take any steps to buy food for the jail, so that  
14 the prisoners are not getting any food.

15 Now there's no written policy that says, it's  
16 okay not to feed the prisoners. But anybody would know  
17 that you need food there. Would that be a policy?

18 MR. PIKULA: Well, I think a different  
19 constitutional amendment would be in issue in a prison  
20 case. But in terms of whether the Constitution imposes  
21 affirmative obligations upon a city, I don't believe  
22 that it does.

23 It's our position that the Constitution is a  
24 charter of prohibitions, which -- which states that the  
25 city should not permit its officers, or instruct them,

1 to violate the Constitution, or instruct them in conduct.

2 QUESTION: You said a different constitutional  
3 -- I understood you to say -- provision would be  
4 involved in a prison case?

5 MR. PIKULA: Well, I believe Justice Scalia's  
6 question involved an Eighth Amendment case, where  
7 someone who's in custody. And there may be different  
8 rights at issue.

9 Now, in addition to drawing a line which  
10 indicates causation, an unconstitutional policy  
11 requirement would provide guidance to litigants in  
12 evaluating liability; would prevent liability based on  
13 respondeat superior; and would prevent liability based  
14 solely on the perception of the city as a deep pocket.

15 Now, with regard to the second reason for  
16 reversal in this case, gross negligence --

17 QUESTION: Before you leave the first, I'm not  
18 sure I completely understand your view.

19 Would it, in your view, be constitutionally  
20 permissible for the city to employ totally untrained  
21 people and just said, we need a hundred law enforcement  
22 officers. Here are the guns. You go out and avoid law  
23 and order -- you know, just maintain law and order. And  
24 just did nothing else. But he said, this is -- you are  
25 our policemen. We'll pay you X dollars. Period.

1           Would that be an unconstitutional policy, or  
2 not?

3           MR. PIKULA: I don't believe so, no. It would  
4 certainly be a violation of Massachusetts state law.

5           QUESTION: But it would be -- it would be  
6 unconstitutional if they, in addition to that, said,  
7 everytime you see anybody running away, you just go  
8 ahead and shoot to kill.

9           MR. PIKULA: Yes, sir.

10          QUESTION: Then it would be bad. They have to  
11 give an affirmative instruction to do something wrong?

12          MR. PIKULA: Or an instruction such as was in  
13 issue in Tennessee v. Garner, where that policy  
14 certainly intended that deadly force be used against a  
15 nondangerous felon, even though they didn't go out and  
16 say, shoot every nondangerous fleeing felon, that  
17 conducted was permitted by the statute in that case.

18          QUESTION: Well, what if the municipality  
19 knows that its police are constantly using lethal force?

20          MR. PIKULA: Well, that --

21          QUESTION: You know, there are several people  
22 killed every month. And it's notorious, it's well  
23 known. The city takes no steps to stop it. But it  
24 doesn't have a memorandum that says, good work. It just  
25 doesn't take any step whatever to stop it.



1 MR. PIKULA: In that situation, we certainly  
2 have some sort of pattered of misconduct --

3 QUESTION: By the officers, but not by the  
4 city.

5 MR. PIKULA: No, but you may be able to infer  
6 some sort of conscious decision by policymakers in not  
7 responding to that prior pattern, which might give them  
8 some knowledge that there was something wrong.

9 But, for instance, in a case like this, we  
10 have only a single incident where --

11 QUESTION: But isn't that gross negligence  
12 you're talking about? You're saying that anybody who  
13 saw that and took no step to stop it would be so grossly  
14 negligent that you can attribute almost willful  
15 permission from it?

16 MR. PIKULA: Well, in any case, before  
17 anything could be attributed to a policymaker, some  
18 conscious decision on the part of a policymaker needs to  
19 be shown.

20 Without that, it would just be liability based  
21 on respondeat superior.

22 QUESTION: What if the only decision was not  
23 to fire any of these officers? A, not to fire them; and  
24 B, not to give them any more training?

25 MR. PIKULA: Again --

1           QUESTION: If they're on notice that they're  
2 very poorly trained, and they're very hazardous to the  
3 general public.

4           MR. PIKULA: If there is some notice that they  
5 are some hazard to the general public --

6           QUESTION: Well, what if the notice takes the  
7 form that we don't think you have an adequate training  
8 program for your police. Because there have been a lot  
9 of mistakes bad. And then they still don't train.

10           Would that failure to train be an  
11 unconstitutional policy?

12           MR. PIKULA: I don't believe so. If there was  
13 a prior pattern of misconduct -- if this Court does not  
14 choose to impose a standard of requiring an  
15 unconstitutional policy, if there's a prior pattern of  
16 misconduct, at least you could infer some knowledge on  
17 the part of policymakers in that they had an  
18 opportunity to respond and prevent some future action.

19           In this case, we have simply a single incident  
20 which occurred very -- during a very short period of  
21 time; it did not provide any opportunity for  
22 policymakers to respond or prevent.

23           QUESTION: Well, that goes to whether the  
24 negligence is gross or not. It doesn't go to the  
25 principle of whether gross negligence alone is enough to

1 establish the kind of intent you need.

2 You're just saying, look, if nobody has been  
3 dying out there, the city is not necessarily aware of  
4 the problem. But once that's been happening, it's very  
5 much aware, and it becomes gross negligence.

6 MR. PIKULA: Well, gross negligence is an  
7 insufficient standard for liability, because it does not  
8 involve any cognitive element which is necessary to show  
9 any state of mind on the part of policymakers.

10 QUESTION: Well, I'm not sure I agree with  
11 you. It seems to me that's precisely what gross  
12 negligence is, negligence that approaches such a point  
13 that you almost have to intend the result in order not  
14 to have done something to stop it.

15 MR. PIKULA: The violation of the due process  
16 clause has historically involved deliberate or conscious  
17 decisions rather than a lack of due care. A lack of due  
18 care has not historically been the type of conduct which  
19 is implicated in the Fourteenth Amendment. It's not the  
20 sort of abuse of government conduct which the Fourteenth  
21 Amendment was designed to prevent.

22 On the other hand, decisions which are  
23 conscious, or deliberate, are precisely which the  
24 Fourteenth Amendment is designed to prohibit.

25 QUESTION: Well, Mr. Pikula, if the city

1 policymakers adopt an inadequate policy with regard to a  
2 specific matter, and if they know that it is inadequate,  
3 is that enough for the determination of a policy?

4 MR. PIKULA: I don't believe inadequate  
5 training, in itself, is enough for a constitutional  
6 violation.

7 QUESTION: If they adopt a policy for police  
8 training which is in fact inadequate, and if they know  
9 it is inadequate, is that enough?

10 MR. PIKULA: Only if that training policy  
11 intends conduct which violates the Constitution, or  
12 permits conduct which violates the Constitution?

13 QUESTION: Well, by definition, if it's  
14 inadequate, it's going to permit conduct which would  
15 violate the Constitution.

16 MR. PIKULA: Not necessarily.

17 QUESTION: Doesn't it go to fault rather than  
18 to the existence of a policy? I find your argument  
19 difficult to follow.

20 MR. PIKULA: I believe that the issue of fault  
21 on the part of the city is shown when you show that  
22 policymakers have made some sort of conscious decision,  
23 or acted deliberately, rather than inferring that they  
24 have done something without any evidence to show  
25 policymakers have acted at all. Then liability is based



1 solely --

2 QUESTION: You don't take into consideration  
3 failure to act? You do not take into consideration  
4 failure to act on the part of the city? Do you?

5 MR. PIKULA: I think historically failure to  
6 act has not been the basis of constitutional violations.

7 QUESTION: Failure to instruct the police on  
8 the proper methods of protecting people's rights is not  
9 required?

10 MR. PIKULA: Again, it would be a violation of  
11 state law in Massachusetts. And certainly, there may be  
12 a duty to do so in ordinary tort law.

13 But to distinguish a constitutional violation  
14 from an ordinary tort --

15 QUESTION: Well, for a city to hire a man,  
16 give him a gun, tell him he's entitled to kill somebody  
17 and turn him loose, that's --

18 MR. PIKULA: No, certainly not.

19 QUESTION: -- and nothing else, that wouldn't  
20 be a violation of the law?

21 MR. PIKULA: That certainly would be, telling  
22 somebody they're entitled to shoot.

23 QUESTION: That's what I'm talking about,  
24 nonaction. You agree that that's bad. You have to tell  
25 him something, don't you?

1 MR. PIKULA: Yes.

2 QUESTION: Well, how much do you have to tell  
3 him?

4 MR. PIKULA: No, under the Constitution, as I  
5 said, I don't believe there is an affirmative duty to  
6 train.

7 QUESTION: (Inaudible) tell him, don't take  
8 this gun that I give you and unwillingly kill somebody?

9 MR. PIKULA: The Constitution -- or I don't  
10 think there's any evidence in this case or in any other  
11 case which shows that just giving someone a gun is more  
12 likely than not -- likely to result in constitutional  
13 violations.

14 It's when you condone, or tolerate, behavior  
15 which violates the Constitution, which is --

16 QUESTION: Well, now you're going to use the  
17 dog bite rule. One shot's okay, but don't do it twice.

18 MR. PIKULA: No. It's certainly -- if one  
19 shot was fired pursuant to an unconstitutional policy,  
20 that would be sufficient to impose liability.

21 On the other hand, if all we have is one shot  
22 that's fired, it's really uncertain whether or not that  
23 shot was fired pursuant to any policy to violate the  
24 Constitution, rather than just the conduct of -- or  
25 misconduct of an employee.

1           And I believe that would go beynd -- or cross  
2 over into respondeat superior liability, basing  
3 liability solely on misconduct.

4           QUESTION: I still get the feeling that your  
5 position is, the only way the city can be liable is if  
6 the city says, specifically, you don't need to follow  
7 the Constitution; do what you please. That's the only  
8 way the city's liable.

9           MR. PIKULA: No, certainly not.

10          QUESTION: Well, how else?

11          MR. PIKULA: Well, for example, in Tennessee  
12 v. Garner, if a city adopted a policy which permitted  
13 deadly force to be used against a nondangerous fleeing  
14 felon, that would violate the Constitution under  
15 Tennessee v. Garner, and would be an unconstitutional  
16 policy, although not unconstitutional on face. The fact  
17 that it permitted the unconstitutional conduct would be  
18 --

19          QUESTION: Let me phrase the question just a  
20 little different. I'll phrase it affirmatively.

21          Supposing city fired all their police  
22 officers, we need a clean sweep of our police force. We  
23 hire a brand new bunch of officers. They all have to be  
24 military veterans. They all have to be trained in how  
25 to handle weapons. They all have to be trained in the

1 martial arts, and how to wear uniforms neatly, and how  
2 to march. That's all they're trained.

3 And then they just turn them loose in the  
4 city. Don't tell them how to serve search warrants, how  
5 to arrest people, how to stop vehicles, or anything.  
6 They just train them to the extent I described. And  
7 then there are a lot of mistakes made thereafter.

8 Would there be a constitutional violation or  
9 not?

10 MR. PIKULA: I don't believe so.

11 QUESTION: (Inaudible) I'm not sure what you  
12 can say about it except that it happened. The  
13 instruction at trial specifically said that the jury  
14 could find liability if the city had failed to train,  
15 supervise or discipline, and if that failure is reckless  
16 or grossly negligent.

17 And the city did not object to that. In fact,  
18 the city itself asked for an instruction which included  
19 the statement that the plaintiff has the burden of  
20 proving the city was not merely negligent in its  
21 training, but grossly negligent in failing to train its  
22 police officers.

23 And now you're arguing before us, although you  
24 asked for that instruction, that that is not enough.  
25 Now why should we hear this at this point?



1 MR. PIKULA: I certainly wouldn't ask for that  
2 instruction again.

3 QUESTION: I know that.

4 (Laughter.)

5 MR. PIKULA: It may have been inartfully  
6 drafted on my part. However, I believe the issue is  
7 preserved with regards to our motion for directed  
8 verdict, and our motion for judgment notwithstanding the  
9 verdict.

10 QUESTION: Well, then, the Court of Appeals  
11 didn't foreclose review on the basis that you didn't  
12 object. They just reached the merits and moved against  
13 you?

14 MR. PIKULA: That's correct. They -- that was  
15 not brought up by the First Circuit at all.

16 QUESTION: What was not brought up?

17 QUESTION: The failure to object.

18 MR. PIKULA: The failure to object. They did  
19 reach a jury instruction in question -- a jury  
20 instruction question, and did discuss it in their  
21 opinion.

22 QUESTION: Rule on it, they ruled on it and  
23 approved it. They approved it.

24 MR. PIKULA: They approved the instruction,  
25 although they noted, it could have certainly been more

1 detailed. They felt --

2 QUESTION: But that was the instruction on  
3 proximate cause, not the instruction Justice Scalia is  
4 talking about.

5 QUESTION: Did you challenge this point before  
6 the Court of Appeals, the grossly -- did you make the  
7 argument before the Court of Appeals that gross  
8 negligence alone would not suffice?

9 MR. PIKULA: As I said, I believe our motion  
10 for a directed verdict did. One of the points was that  
11 even grossly negligent training wouldn't be enough.

12 QUESTION: And what about at the Court of  
13 Appeals?

14 MR. PIKULA: At the Court of Appeals, it was  
15 not specifically laid out in our brief that way,  
16 although we did ask for some higher standard of  
17 culpability. And we were searching for a standard. And  
18 as I said, we were kind of unsure what the standard  
19 should be.

20 And then I think this decision in -- the  
21 Court's decision in Tuttle clarified that.

22 Now --

23 QUESTION: May I ask this before you proceed?  
24 What evidence was there of gross negligence?

25 MR. PIKULA: None whatsoever. There was no

1 showing that the city's training violated any recognized  
2 standards.

3 QUESTION: If there was no evidence, why was  
4 the instruction not objected to?

5 MR. PIKULA: Well, again, once the trial judge  
6 had denied my motion for a directed verdict, some jury  
7 instruction did have to be put forward, and therefore --

8 QUESTION: That's one you wish you had  
9 objected to?

10 MR. PIKULA: One I wish I had objected to, yes.

11 QUESTION: (Inaudible) what Justice Scalia  
12 read you was the instruction that you requested, wasn't  
13 it?

14 MR. PIKULA: That's correct, Justice.

15 QUESTION: And then -- how would you object to  
16 it after you requested it and your request was granted?

17 MR. PIKULA: I --

18 QUESTION: How did your motion for a directed  
19 verdict put it in issue.

20 MR. PIKULA: The first point -- our first  
21 point -- our first point in our motion for a directed  
22 verdict was that there was no proof of an  
23 unconstitutional policy.

24 Our second point had to do with, there's no  
25 evidence of negligent training.

1           And our third point was, there was no evidence  
2       -- or even grossly negligent of a single officer would  
3       be insufficient. Something of that nature. I believe  
4       that's specifically what it was.

5           QUESTION: Well, you never retracted the  
6       request for the gross negligence instruction, did you?

7           MR. PIKULA: No, I did not. But I should  
8       point out, I believe last term in Tuttle, the same  
9       argument was made about the failure to object to jury  
10      instructions.

11          And the Court noted, it was not brought up in  
12      the opposition to the petition for cert. I believe the  
13      same issue is also --

14          QUESTION: Yes, and we had something to say  
15      about that situation in the opinion in the Tuttle case,  
16      did we not, that where the respondent fails at the  
17      certiorari stage to bring out the reasons why the court  
18      might not be able to reach a point made in the petition  
19      for certiorari, that unless it's a jurisdictional point,  
20      the court will consider it waived?

21          MR. PIKULA: That's correct.

22          QUESTION: Of course, they did bring it out in  
23      the brief in opposition, though, didn't they? They did  
24      point out the instruction.

25          MR. PIKULA: Not in the brief in opposition to



1 cert, but in the brief on the merits.

2 QUESTION: Well, in the brief in opposition to  
3 cert, they raised the question about the instructions  
4 too, didn't they? Didn't they also point out the  
5 instruction was proper?

6 MR. PIKULA: Well, I don't believe they raised  
7 the 51(a) objection.

8 Now, there are three reasons why this jury  
9 verdict against the city is not supported by sufficient  
10 evidence.

11 As I noted, this case involved only a single  
12 incident, which would not provide any opportunity for  
13 policymakers to respond to the situation or have any  
14 knowledge that there was anything wrong.

15 QUESTION: Let me go back to the instruction  
16 problem. Is it not correct that in your petition for  
17 certiorari, you did not challenge any instruction?

18 MR. PIKULA: We challenged -- no, that's  
19 correct. We challenged the old standard for inadequate  
20 training.

21 Additionally, the jury verdict is not  
22 supported by sufficient evidence because it does not  
23 involve -- there was no evidence of any conscious  
24 decision by a policymaker.

25 And as I also noticed, the jury's verdict is

1 not supported by sufficient evidence in that there was  
2 no evidence that the city violated any recognized  
3 training standards.

4 The verdict is based on nothing more than  
5 speculation. And if the decision is allowed to stand,  
6 it will allow the imposition of municipal liability and  
7 a standard of proof which is, in essence, respondeat  
8 superior.

9 With the Court's permission, I reserve the  
10 remainder of my time.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Pikula.

13 We'll hear now from you, Mr. Nagel.

14 ORAL ARGUMENT OF TERRY SCOTT NAGEL, ESQ.,

15 ON BEHALF OF THE RESPONDENT

16 MR. NAGEL: Mr. Chief Justice, and may it  
17 please the Court:

18 In this case the City of Springfield is asking  
19 the Court to reverse a modest jury verdict in favor of  
20 Clinton Thurston who was shot, beaten, and then denied  
21 medical care, and died in Springfield.

22 The scope of this review is necessarily  
23 somewhat limited narrowly by the Seventh Amendment and  
24 Rule 51, and I'd like to clarify a few of the points  
25 that you brought up in the questions to Mr. Pikula

1 regarding exactly what was preserved for review in this  
2 case.

3 Regarding gross negligence in particular, that  
4 issue, in our view, is completely waived in this case.  
5 There was no objection to the instruction regarding  
6 gross negligence.

7 QUESTION: Well, Mr. Nagel, in your opposition  
8 to petition for writ of certiorari, the orange, did you  
9 bring to our attention the reasons that you now adduce  
10 for not reaching the points?

11 MR. NAGEL: No, Your Honor, that would have  
12 been impossible, because my brother, Mr. Pikula, didn't  
13 put it in his petition for certiorari. There's not a  
14 mention of gross negligence in the petition for  
15 certiorari.

16 On page 15, the word is used once with  
17 apparent approval, saying that we failed to meet the  
18 burden of proof. But in fact, in the Court of Appeals,  
19 the city litigated on the theory that gross negligence  
20 was a proper standard.

21 If I can just read you one sentence from their  
22 brief from the Court of Appeals, it says: To sustain an  
23 action under Section 1983 on the theory of negligent  
24 training, training must be nonexistent, or reckless, or  
25 gross, palpably or culpable negligent before liability

1 will attach.

2 It says: Monell has been interpreted to hold  
3 that a municipal policy of authorizing or condoning  
4 police misconduct can be inferred where the municipality  
5 has been gross negligent in the supervision or training  
6 of its police force.

7 That's reproduced at page 13 of our brief.  
8 And that's from their brief in the Court of Appeals.

9 QUESTION: Well, then, what you're saying is  
10 not that we can't reach the points that they raised in  
11 their petition for certiorari, which we granted, or  
12 anything fairly subsumed under it, but that the  
13 instruction point that they're making is outside the  
14 scope of even those points?

15 MR. NAGEL: Yes. They didn't object to the  
16 instruction, and now they're arguing that -- on appeal,  
17 on a motion for j.n.o.v, under which, of course, we're  
18 entitled to have the evidence construed in our favor,  
19 they also want a standard which they argued against --  
20 which the requested against at trial. Because they  
21 requested a gross negligence standard.

22 This is not only a matter of wavering --

23 QUESTION: What did the Court of Appeals  
24 decide?

25 MR. NAGEL: About that issue?



1 QUESTION: No, about -- didn't they say that  
2 -- didn't they say that -- talk about the standard for  
3 determining when there is a policy about --

4 MR. NAGEL: They agreed with the gross  
5 negligence standard, but it wasn't litigated in the  
6 First Circuit, because both sides agreed at the First  
7 Circuit.

8 It wasn't before -- it wasn't anything we were  
9 on notice of until we received the City's brief in this  
10 case.

11 QUESTION: Well, do you say then -- but I  
12 suppose the issue is fairly here with respect to whether  
13 the evidence shows that there was gross negligence?

14 MR. NAGEL: Well, certainly. There was a  
15 motion for j.n.o.v.

16 QUESTION: Yes.

17 MR. NAGEL: And I don't quarrel with that.  
18 What I quarrel with is the idea that this case is  
19 presented to the Court with a cert-worthy case in which  
20 the review the standard of negligence and whether  
21 training can ever be a claim, which is also something  
22 that was not litigated below.

23 Now, it may be that the Court wishes to reach  
24 that question, and I'm prepared to address that  
25 question. But I want you to be aware that as far as the

1 gross negligence question in particular, there was  
2 nothing below to indicate that this was going to be an  
3 issue in the case, and nothing to put us on notice when  
4 we filed our opposition to cert.

5 QUESTION: Well, the petition for cert said --  
6 says the following, among other things: The Court in  
7 Tuttle expressed doubts as to whether inadequate  
8 training can ever be a policy or custom under Monell.  
9 However, a trend in the lower courts permits municipal  
10 liability based on inadequate training. This trend  
11 undermines the standard of liability established by  
12 Monell and its progeny.

13 Without further definition of this standard,  
14 lower courts will continue blah-blah-blah-blah.

15 MR. NAGEL: It's true. And as far as  
16 inadequate training, I think we're on a different  
17 footing than the gross negligence question. Because  
18 just the question presented in bold face type on their  
19 petition says, can failure to train ever be a claim?  
20 And we're happy to talk about that.

21 QUESTION: I see.

22 MR. NAGEL: But the gross negligence question  
23 simply, as far as I can tell, isn't properly --

24 Now, there are two issues, and I'd like to  
25 clarify also. There was question, I believe, from

1 Justice Rehnquist regarding what the Court of Appeals  
2 found. Mr. Chief Justice, I believe you asked that  
3 question on the basis of liability.

4 There were two theories of liability in this  
5 case. This is not the Tuttle case. There were two  
6 theories.

7 One was that there was an explicit  
8 unconstitutional policy of the city. And the other was  
9 that there was failure to train amounting to gross  
10 negligence.

11 QUESTION: And what was the unconstitutional  
12 policy in this hypothesis?

13 MR. NAGEL: Both courts below -- Chief Judge  
14 Frank Freedman of the Massachusetts District, and the  
15 Court of Appeals -- found that there was evidence  
16 sufficient to warrant a finding that it was a policy of  
17 the Springfield police force to allow the use of deadly  
18 force at the first moment at the first moment at which  
19 it was technically -- appeared technically permissible  
20 to do so under the rules.

21 The judge made a memorandum finding with  
22 regard to a motion for a new trial on the part of --

23 QUESTION: And what was the view below, what  
24 was it that was unconstitutional about that policy?

25 MR. NAGEL: Well, there was evidence at trial

1 which indicated that the police had operated under a  
2 rule which allowed them to create a danger, or create  
3 the appearance of an attack, and then use deadly force.

4 The shooting -- and I must stress, there are  
5 three shootings, and two beatings in this case -- but  
6 the last shooting in particular in this case, when the  
7 man had a bullet through his head at a distance closer  
8 than I am to --

9 QUESTION: And what was he doing at that  
10 point? What was the --

11 MR. NAGEL: He was driving down the street in  
12 his car, with a woman in the seat --

13 QUESTION: But there were a few more facts  
14 attending it than that, weren't there?

15 MR. NAGEL: Well, it depends. We are here on a  
16 motion for j.n.o.v. And there was plenty of evidence  
17 from which you could have found -- or with the jury, I  
18 should say, because that is who we're concerned with --  
19 the jury could have found that Mr. Thurston was driving  
20 along at a legal speed straight down the road, and the  
21 motorcycle came up next to him and shot him in the head  
22 because he wouldn't stop.

23 And there's a police rule which appears on its  
24 face to allow that, a rule that is completely at odds  
25 with Garner, which would be rule 2813, which says that



1 when you're in a motor vehicle and you fire a gun, you  
2 can shoot a dangerous felon fleeing, or a felon; you can  
3 shoot a nondangerous fleeing felon on the face of this  
4 rule.

5 QUESTION: And your claim is that your client,  
6 or your client's predecessor, was not a -- was a  
7 nondangerous fleeing felon?

8 MR. NAGEL: Certainly the jury could have  
9 found that. There was testimony from which they could  
10 have found, he never swerved his car at the motorcycle.  
11 Everyone testified he was driving at speeds from 35, 25  
12 to 45 miles an hour. There just --

13 QUESTION: He also went through a roadblock,  
14 didn't he?

15 MR. NAGEL: He went through a roadblock that  
16 was set up over a crest of a hill where he had two  
17 seconds when he came over the hill. And as he came over  
18 the hill, there was a policeman standing in the road in  
19 front of him he drew his gun and fired. And that was  
20 another example of this triggering rule, you can create  
21 a colorable attack. "I'll stand on the road over the  
22 crest of the hill and then shoot."

23 And he drove past that at -- I think he  
24 approached at, they said, at 35 to 40 miles an hour.

25 QUESTION: And so you say, that part of your

1 hypothesis, the unconstitutional conduct is based on our  
2 decision in Tennessee v. Garner?

3 MR. NAGEL: Which part, you mean the rule?

4 QUESTION: Well, the -- yes.

5 MR. NAGEL: Well, actually at the time it  
6 would have been based on Commonwealth v. Klein, which  
7 tracks Garner almost exactly. But it was the  
8 Massachusetts case which, I believe, the instructions to  
9 the jury were based on. Which track the elements in  
10 Garner precisely.

11 And the jury heard that instruction. They're  
12 presumed to have followed it. And then they have the  
13 rule book. And they look at a rule that says, you can  
14 shoot a felon or a dangerous fleeing felon.

15 They could have concluded that there was a de  
16 jure policy that was unconstitutional.

17 And besides that, there's a second theory,  
18 which is, of course, failure to train, which I think may  
19 be what got us here today. And --

20 QUESTION: Well, failure to train doesn't deal  
21 with whether or not there was a 1980 -- there was a  
22 violation of a constitutional right. That's your Monell  
23 aspect of the case, isn't it?

24 MR. NAGEL: Yes.

25 QUESTION: I mean, you could have a failure to

1 train, and if no constitutional right was violated as a  
2 result of that failure to train, it doesn't make a bit  
3 of difference.

4 MR. NAGEL: That's true. And there is  
5 testimony in this case that the officers were not  
6 trained at all with regard to shooting at fleeing  
7 vehicles.

8 There's testimony directly on that point,  
9 which takes us right outside of Tuttle. I mean, Tuttle  
10 -- the only thing in Tuttle, because of the defective  
11 instruction, and I emphasize, and it's reproduced in the  
12 addendum to our brief, there was not a Tuttle  
13 instruction in this case.

14 The -- if I again can read you just one  
15 sentence. The -- Judge Freedman instruction: An  
16 incident of excessive force on the part of police  
17 officers, standing by itself, is insufficient to find  
18 the City of Springfield liable under Section 1983.

19 Now, they're presumed to have heard and  
20 understood and followed that instruction. So they had  
21 all of the things that went on on this day, and they had  
22 testimony directly on point from a number of police  
23 officers that they had received no training: no  
24 training with regard to shooting at fleeing vehicles; no  
25 training with regard to shooting from vehicles; no

1 training about roadblocks beyond, stand on the road and  
2 put your hand up.

3 And given the instruction, which is sufficient  
4 under Tuttle, and that testimony -- that is what we were  
5 litigating in the First Circuit, frankly. We went up to  
6 the First Circuit on a Tuttle issue.

7 And when the City wrote its brief in the First  
8 Circuit, Tuttle was still pending here. It came down.  
9 We had a reply brief, which also didn't talk about gross  
10 negligence, or the necessity of an underlying  
11 unconstitutional policy, or some of the other issues  
12 we're talking about here today.

13 But we're right outside of Tuttle on that  
14 issue. But I would assume the Court wants to consider  
15 the training question, whether training can ever be a  
16 claim.

17 And I would just like to invite your  
18 attention, the fact that there's really no reason to  
19 assume that there's a need for an unconstitutional  
20 underlying policy.

21 There were a lot of questions about that.  
22 Originally, as I understood this case to be formulating,  
23 we were talking about whether training would ever be a  
24 claim.

25 But if the inquiry is whether the underlying



1 training policy itself has to be unconstitutional, I  
2 would submit to the Court that in that direction lies  
3 even more confusion than we need to engage in.

4 There's been a problem in the Monell area that  
5 the temptation really is to develop a jurisprudence  
6 that's specific to police cases. I don't think there's  
7 any reason to do that.

8 And what Mr. Pikula said regarding the  
9 question -- I believe it was from Mr. Marshall, from Mr.  
10 Justice Marshall, and Justice Stevens also asked,  
11 regarding the effect of no training. And his answer was  
12 to the effect that the inquiry seems to collapse into  
13 one of causation.

14 In other words, if there's no training at all,  
15 and it causes a constitutional violation, then why do we  
16 need to bifurcate the inquiry into whether the policy  
17 itself is unconstitutional or the resulting activity of  
18 the police is unconstitutional, when the statute itself,  
19 as interpreted by Monell, says that if A causes B to  
20 inflict a tort on C, then B's tort becomes A's tort.

21 I mean, that language is right in Monell, and  
22 it comes right from the statute, which says that any  
23 person who causes -- who subjects or causes to be  
24 subjected to a constitutional violation.

25 QUESTION: Well, wouldn't that allow the

1 finding of liability just on the basis of respondeat  
2 superior, so far as the city is concerned?

3 MR. NAGEL: No, I don't believe it would. I  
4 think that a better traditional category of tort law to  
5 look to is agency law, which --

6 QUESTION: Well, that's where the idea of  
7 respondeat superior comes from, I thought, is agency  
8 law.

9 MR. NAGEL: It may come from the great body of  
10 agency law. But there's no reason when respondeat  
11 superior law doesn't apply that all of agency law has to  
12 be thrown out, as the Vincent case mentions.

13 And if you take that part of the restatement  
14 of agency -- or general agency law that holds that a  
15 principal is responsible for the torts that occur due to  
16 his negligent training, supervision or selection of  
17 agents, then you're back to the language of the statute  
18 again directly.

19 Because that is talking about causation. That  
20 is something the principal has done. And that's  
21 something the city has done in this case. Its negligent  
22 training of their agents.

23 And I just mention in passing that one of the  
24 things that was alleged in the complaint four years ago  
25 in this case is that the police were the servants, the

1 agents, and the employees of the City of Springfield.  
2 That was admitted in this case.

3 There's no reason to treat them as anything  
4 else. Now that, unfortunately that part of the answers  
5 appears to have been omitted from the Joint Appendix.  
6 But I'm sure the original answer is here on file.

7 As to the question of gross negligence, while  
8 we're on the subject of the language of the statute and  
9 Monell, I would also just invite your attention to the  
10 fact that if you should choose to reach the question of  
11 what level of culpability, what the mental state has to  
12 be under Section 1983, there's no reason to go beyond  
13 simple negligence, Davidson and Daniels notwithstanding.

14 Those cases weren't dealing with municipal  
15 liability. Those were dealing with the simple  
16 negligence of public officials or government officials  
17 dealing directly with the person injured.

18 But the language of Section 6 is worth another  
19 look. That is the language, of course, which in Justice  
20 Brennan's opinion in Monell was central, it was the  
21 lynchpin to the argument about respondeat superior.

22 And footnote 57 of that case says: We look to  
23 the language of Section 6 to find the contours of  
24 municipal liability.

25 Well, the language of Section 6 --

1 QUESTION: (Inaudible) someone is hurt by --  
2 as a result of negligence by a city official at a  
3 supervisory level, there's a claim for constitutional  
4 violation?

5 MR. NAGEL: At a supervisory level, if we're  
6 understanding that word to mean the same thing. In  
7 other words, if the chief of police is given the power  
8 to train -- has delegated the power to train all the  
9 police officers, and he gives them guns and says, go out  
10 and catch bad guys, and doesn't give them any other  
11 instruction than that, I would say yes, that liability  
12 would attach to the supervisory official.

13 Now, there would be inquiries about whether he  
14 was asking on his own, or whether he was authorized to  
15 do that for the municipality. But there's no reason to  
16 go beyond that level of negligence --

17 QUESTION: What about negligent construction  
18 of a building, of a city building, under the supervision  
19 --

20 MR. NAGEL: Under 1983?

21 QUESTION: Yes, under the supervision of a  
22 city manager?

23 MR. NAGEL: Well, I --

24 QUESTION: And a piece of the building falls  
25 off and kills somebody, depriving him of life.



1 MR. NAGEL: Of course that has so little to do  
2 with the police conduct area, where you know you're  
3 dealing with a dangerous instrumentality, firearms, so  
4 forth, that you're unleashing on the populace, and that  
5 if the people aren't trained, the constitutional  
6 violations are not only foreseeable, they're almost  
7 inevitable.

8 QUESTION: Is there any constitutional  
9 violation in Justice Scalia's hypothesis?

10 MR. NAGEL: Is there -- is there deprivation,  
11 you mean?

12 QUESTION: Well, is there any -- I mean, is  
13 there any constitutional violation if the city building  
14 instructor has negligently supervised the construction  
15 of a building, and the building collapses on somebody?

16 MR. NAGEL: I doubt it.

17 QUESTION: Well, I would hope you would doubt  
18 it.

19 MR. NAGEL: Yes, because we would be --

20 QUESTION: Why is that, when you've urged a  
21 negligence theory? You have negligence, and you have a  
22 deprivation of life, without due process of law, I  
23 presume.

24 MR. NAGEL: I think it's because, in the area  
25 of police brutality, which is a central governmental

1 function -- or police -- the police are a central  
2 governmental function, one hopes -- you have a different  
3 standard of --

4 QUESTION: I don't see anything in there about  
5 police. I don't see how you can read police in. What  
6 you may be able to read in is the necessity of  
7 intentionally depriving somebody of life. That's what  
8 makes it a constitutional violation. If you  
9 intentionally do it, and then you may argue, well, it's  
10 almost the same as intentionally doing it to do it with  
11 gross negligence. Because there's very little  
12 difference between that and intent.

13 And there you have a theory that separates  
14 constitutional violations from ordinary torts. But when  
15 you argue before us that only a negligence standard is  
16 necessary, I don't know how you distinguish the  
17 negligent construction of a building from negligent  
18 action by a police officer.

19 MR. NAGEL: Well, I don't think it would be a  
20 deprivation under color of state law. I don't think  
21 that the supervisor is in the same relationship to the  
22 person who has a building fall on them as a police  
23 officer who shoots a fleeing felon. It's --

24 QUESTION: Mr. Nagel, haven't a good many  
25 lower courts applied a deliberate indifference standard?

1 MR. NAGEL: The courts have been inconsistent,  
2 you're right. There are some cases --

3 QUESTION: Well, certainly, there are a good  
4 many cases out there in these situations that have  
5 applied a deliberate indifference standard. And doesn't  
6 that standard come a lot closer to what the Court was  
7 talking about in Davidson and Cannon.

8 MR. NAGEL: Well, Davidson and Cannon, as I  
9 understood it, was ruling out simple negligence as to  
10 officials.

11 It's true that Leite v. City of Providence  
12 used the words, gross negligence amounting to deliberate  
13 indifference. And that language has been adopted in  
14 many cases. Some cases don't, though. Some say, gross  
15 negligence. Some say, recklessness. Some cases have  
16 avoided the question altogether.

17 The fact is that every circuit that has  
18 considered the question has found that failure to train  
19 is a basis of claim. And the majority of them have  
20 found gross negligence to be a sufficient basis.

21 But to get back to the language of the statute  
22 if I may just for a moment, Section 6 is -- of the  
23 statute, which is now 42 U.S.C. 1986, is written now in  
24 the language of simple negligence.

25 That's the statute which imposes liability on

1 anyone having power to prevent constitutional  
2 deprivations, who neglects or refuses to do so. And the  
3 measure of damages there is the damages which reasonable  
4 diligence could have prevented.

5 Now that seems to be the language of simple  
6 negligence. If the Court is going to impose gross  
7 negligence, I think it will have to do it outside that  
8 part of the statutory history.

9 The -- there is also statutory history in the  
10 Congressional Globe, which is cited in the brief of one  
11 of the amicus curiae, regarding the fact that this  
12 statute will impose liability for the defaults of the  
13 municipality. Again, language of simple negligence.

14 So there's really no reason to go beyond a  
15 gross negligence standard.

16 Finally, I would just like to come back again  
17 to the Tuttle issue, or the Tuttle nonissue in this  
18 case. The basis of the decision in Tuttle seemed to be  
19 that the single incident of outrageous brutality on the  
20 part of the police officers was not a logical basis on  
21 which an inference of failure to train could be drawn,  
22 that single thing -- that single shooting, because you  
23 could just as easily infer that the man who did the  
24 shooting was deranged. "One bad apple," was the phrase.

25 In this case, you have three shcotings in



1 three separate places, the third one being presumably  
2 the fatal bullet, followed by a beating inside the man's  
3 car, which was justified again on the basis that he had  
4 failed to surrender.

5 He was unconscious and therefore he had failed  
6 to surrender, and there's an officer who testifies to  
7 that. Another beating when he was pulled from the  
8 car. And then man is transported to the hospital. And  
9 whoever fired the fatal shot withholds the information  
10 that the man has been shot.

11 And we know that Theodore Perry has shot him  
12 from eight feet away -- and ballistics shows that it's  
13 his bullet -- couldn't have not known that.

14 The inference that arises from that kind of a  
15 broad sampling is different, by far, than one bad apple  
16 kind of analysis. We're talking about a whole  
17 collection of people who've engaged in this conduct.

18 And on top of that, we have testimony that  
19 these men have not been trained.

20 Now, there were some questions about, whether  
21 no training at all can be a basis for liability.  
22 Obviously, the unleashing of the police officers on the  
23 city, having them be armed, with no training at all, and  
24 with rules that tell them they can shoot nondangerous  
25 fleeing felons, is foreseeably going to cause this kind

1 of harm.

2 And for that reason, the motion for judgment  
3 notwithstanding the verdict, should remain denied. We  
4 should affirm the Court of Appeals and the court -- the  
5 trial court.

6 There is simply no basis for reversing it.

7 I feel that at this point I've covered almost  
8 everything that the city has talked about --

9 QUESTION: Could I ask, do you believe that if  
10 some member of the community or some organization  
11 interested in law enforcement thought that the city had  
12 an inadequate training program or one that evidenced  
13 deliberate indifference or gross negligence could just  
14 bring a suit and say -- a 1983 suit and say, you've got  
15 a bad program, and we want an injunction for you to  
16 measure up?

17 MR. NAGEL: You mean without the occurrence of  
18 harm?

19 QUESTION: Yes.

20 MR. NAGEL: No, not under Section 1983.

21 QUESTION: So the inadequacy in the program  
22 does have to be the cause of some injury?

23 MR. NAGEL: By the language of the statute.

24 QUESTION: Yes, all right.

25 MR. NAGEL: I mean, the statute gives a cause

1 of action if someone causes a constitutional deprivation.

2 QUESTION: And so, in this case, certainly one  
3 of the issues here, even if you're right on the  
4 standard, does the evidence -- does the case -- was  
5 there an injury that demonstrated gross negligence?

6 MR. NAGEL: Well, you know --

7 QUESTION: Or whatever the standard was that  
8 was approved.

9 MR. NAGEL: The officer who fired the shot --

10 QUESTION: Well, see, there is an issue of  
11 that in this case.

12 MR. NAGEL: Well, yes, there's no issue, or no  
13 question --

14 QUESTION: As to causation.

15 MR. NAGEL: -- that constitutional deprivation  
16 occurred. Officer Perry -- there was a judgment of \$1  
17 against the man who pulled the trigger in this case, and  
18 \$500 for punitive damages.

19 QUESTION: Well, it wasn't a constitutional  
20 violation unless there was a -- as the Court of Appeals  
21 said -- a grossly negligent training program, and that  
22 training program was responsible for the injury.

23 MR. NAGEL: In other words, as I understand  
24 your question, the fact that the constitutional  
25 violation occurred does not necessarily mean that it was

1 caused by the city?

2 QUESTION: Well, that's right. But what  
3 constitutional violation was there?

4 MR. NAGEL: There was a deprivation of life  
5 without due process of law, a summary execution.

6 QUESTION: Well, I know, but that is not --  
7 well, without due process of law. I thought that meant  
8 that there had to be -- in this case, that it had to be  
9 a grossly -- it had to be caused by a grossly negligent  
10 training program before there was a constitutional  
11 violation.k

12 MR. NAGEL: In the case that is here on  
13 appeal, that is true. I don't think you can separate --

14 QUESTION: Well, don't say then it's clear  
15 that there was a constitutional violation here.

16 MR. NAGEL: By the city?

17 QUESTION: Yes.

18 MR. NAGEL: Well, I think it's clear on the  
19 evidence. Because there's testimony that these guys  
20 were not trained.

21 QUESTION: Well, I know you do. But that's  
22 one of the issues.

23 MR. NAGEL: Yes.

24 QUESTION: Yes, but everybody agrees, don't  
25 they, that there was a constitutional violation caused



1 by the police officer acting under color of law.

2 MR. NAGEL: That's correct.

3 QUESTION: That's not in dispute, is it?

4 MR. NAGEL: And I don't think anybody would  
5 argue that it was negligent. He testified that he --

6 QUESTION: The only question is whether the  
7 city itself committed a constitutional violation?

8 MR. NAGEL: Right. And that is a causation  
9 inquiry. And that --

10 QUESTION: (Inaudible) constitutional  
11 violation of the city, necessarily.

12 MR. NAGEL: Well, not merely by the fact that  
13 the officer committed one. That would be respondeat  
14 superior. And we're not arguing for that. There may be  
15 good reasons why you'd want to consider that. But that  
16 wasn't how we litigated this case below, and it's not  
17 how we're litigating it here.

18 But the jury looked at all of this evidence.  
19 The jury are the people under the Seventh Amendment, and  
20 under the rules of construction that have always applied  
21 in the review of the motion j.n.o.v, which I submit is  
22 all that's really here. They thought there was plenty  
23 of evidence.

24 And the Court of Appeals, noting that  
25 defendant -- or rather, the plaintiff in a police

1 brutality case is always going to be in a position that  
2 he's going to be accused of being this kind of felon, or  
3 being that kind of felon. Of having done various  
4 dangerous things, and as trial counsel said, of having  
5 garbage heaped upon his grave.

6 The Court of Appeals said, nonetheless, if  
7 they find someone who's that unsympathetic a plaintiff,  
8 and they find for him, and they find the defendants  
9 liable, we do not lightly contemplate reversal.

10 Now this is a Springfield jury that drives  
11 down the Springfield streets and pays the taxes that's  
12 going to pay the Springfield judgment.

13 QUESTION: Suppose the police officer is  
14 merely negligent. That's bad conduct, I must say,  
15 especially if he took somebody's life. But say he's  
16 merely negligent.

17 MR. NAGEL: Under Daniels and Davidson,  
18 there'd be no claim against the police officer.

19 QUESTION: All right. But then, what if it is  
20 proved that the city had a grossly negligent training  
21 program, and that this officer hadn't been properly  
22 trained?

23 MR. NAGEL: And that that training amounted to  
24 gross negligence and caused his negligence?

25 QUESTION: Well --

1           MR. NAGEL: I think now -- I think that's the  
2 kind of can of worms that we're opening up if we try to  
3 have special rules of culpability for each defendant in  
4 a 1983 case.

5           Why not just use the ordinary --

6           QUESTION: How was the -- was the officer here  
7 negligent, or just -- grossly negligent?

8           MR. NAGEL: He said he meant to do it. This  
9 is intentional. There's no question about that. He  
10 said, I dropped back. I said, I'm going to pull up. If  
11 he swerves again, I'm going to shoot him. Not exactly  
12 in those words, but that's --

13           QUESTION: That doesn't necessarily mean that  
14 he knew he was breaking the law or anything else. He  
15 was just -- he made a mistake of judgment.

16           MR. NAGEL: Well, he'd also been trained that  
17 he was able to do this. And that was what the rules  
18 allowed him to do. I don't think there was any question  
19 that he was acting -- and again, in the answer to the  
20 complaint, the city said at all times --

21           QUESTION: That's right. He was doing what he  
22 was supposed to do?

23           MR. NAGEL: Right.

24           QUESTION: Mr. Nagel, can I ask you one more  
25 question about what you would agree is before us?

1 I undertand it's your position, is, that  
2 issues relating to the standard of care and the  
3 instruction are definitely not here, but you do agree  
4 that the first question presented by the cert petition,  
5 whether the inadequate training is a viable theory of  
6 municipal liability, that that is here.

7 MR. NAGEL: I'm not sure about that one, to be  
8 frank with you. We have not -- we did not raise rule 51  
9 in our opposition to cert on that question; but did not  
10 realize that we were going to be arguing about something  
11 that the city had asked for an instruction about, and,  
12 beyond the rule 51 question, there is the issue of  
13 invited error, because this was also an instruction that  
14 they asked for. It's a standard they incorporated in  
15 their motion for j.n.o.v and their motion for a directed  
16 verdict.

17 In the middle of trial, they filed a motion --

18 QUESTION: Your short answer, you do not  
19 accept that that's necessarily before us?

20 MR. NAGEL: Not necessarily, no.

21 Thank you.

22 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
23 Nagel.

24 Mr. Pikula, do you have anything further? You  
25 have eight minutes.



1 REBUTTAL ARGUMENT OF EDWARD M. PIKULA, ESQ.,

2 ON BEHALF OF THE PETITIONER

3 MR. PIKULA: Just one point I would like to  
4 make. And that is, the First Circuit found that  
5 Respondent's theory that the Springfield -- the City of  
6 Springfield had a policy to permit the use of deadly  
7 force whenever technically permitted by the rules was  
8 not sufficiently proven or sufficiently linked to the  
9 harm to impose liability.

10 QUESTION: Mr. Pikula, can I ask you a  
11 question that goes to the last point just made?

12 Your first question presented in your petition  
13 does read, whether inadequate training of police  
14 officers is a viable theory of municipal liability under  
15 42 U.S.C. 1983.

16 Does the petition contend -- I didn't read it  
17 as contending -- that under no circumstances, training  
18 can be a theory of municipal liability?

19 In other words, I'm not sure that the text  
20 lives up to the billing. It says, whether it can be a  
21 viable theory. But does your petition assert that you  
22 were going to argue that training can never, under no  
23 circumstances, be a theory of liability?

24 MR. PIKULA: No, I don't think we're urging  
25 the Court to adopt that broad a rule. If training

1 intends or permits unconstitutional acts, then that  
2 would violate the Constitution.

3 QUESTION: So then I don't really know what  
4 the question presented means, whether it is a viable  
5 theory -- I don't like "viable" anyway. I don't  
6 understand what it means here. What did you mean by it?

7 MR. PIKULA: Basically, whether a general  
8 allegation that the city just didn't train its officers  
9 well enough to prevent this incident is a basis of  
10 liability.

11 We argue that it is not.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
13 Pikula.

14 The case is submitted.

15 (Whereupon, at 10:59 a.m., the case in the  
16 above-entitled matter was submitted.)  
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CERTIFICATION

Anderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

85-1217 - CITY OF SPRINGFIELD, MASSACHUSETTS Petitioner V. LOIS THURSTON

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IBBE, ADMINISTRATRIC OF ESTATE OF CLINTON THURSTON

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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