OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF CANTON, OHIO, Petitioner V. GERALDINE HARRIS, ET AL.

CASE NO: 86-1088

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

CITY OF CANTON, OHIO :

Petitioner :

v. : No. 86-1088

GERALDINE HARRIS, ET AL. :

Washington, D.C.

Tuesday, November 8, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:53 o'clock a.m.

APPEARANCES:

CARTER G. PHILLIPS, ESQ., Washington, D.C.; on behalf of the Petitioner.

DAVID RUDOVSKY, ESQ., Philadelphia, Pa.; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

(10:53 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 86-1088, the City of Canton v. Geraldine Harris.

Mr. Phillips, you may proceed whenever you're ready.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

Canton, Ohio is a relatively small city in the Northeastern part of the State of Ohio whose fame heretofore has been based largely on William McKinley and the professional football hall of fame.

Unfortunately, unfortunately today we have a new reason for fame, you're right, Mr. Chief Justice. It is before this Court because the Sixth Circuit has ordered it to face a new trial under 42 USC Section 1983 for failure to provide adequate medical care to a detainee in the city's jails.

The legal issue in this case, one this Court has confronted somewhat often in recent years, is under what circumstances the city is liable for the Constitution torts committed by its employees?

The case arises out of the arrest of the Respondent, Mrs. Geraldine Harris, on April 26th, 1978. Mrs. Harris was stopped for speeding by a Canton police officer.

There is no question that the stop at that time was a perfectly lawful act by the city. Apparently upset by her sense that others around her were also speeding, she became quite agitated and refused to provide the police officer with information necessary to allow him to fill out his ticket.

Consistent with the standard practice in the State of Ohio and the City of Canton at the time, the officer decided that the best response was to place Mrs. Harris under arrest and to have her transported to the police station in the hopes that she might calm down and provide the officers with the necessary information.

And there's never been any challenge to the lawfulness of the city's action in having Mrs. Harris brought to the police station at that time.

Mrs. Harris became quite agitated, as a consequence of this decision, and apparently became unable to walk without assistance. She was therefore assisted by two police officers into a patrol wagon and taken to the police station.

At the station Mrs. Harris was asked about her

medical condition, whether she had a medical condition, whether she needed any medicine. And her response to that question, as well as all other questions that were provided to Mrs. Harris, was that she wanted to see her son, Ronny, and she wanted to see him immediately.

The reason Mrs. Harris was asked that question is that the City of Canton has a specific written policy which provides that the officer who's assigned as the jailer "shall when a prisoner is found unconscious or semi-conscious or when he or she is unable to explain his or her condition, or who complains of being ill, has such person taken to a hospital for medical treatment, with the permission of a supervisor before admitting a person to the city jail."

Although Mrs. Harris' behavior was extreme under the circumstances, the testimony is undisputed that it was not uncommon for inmates to become hysterical as a consequence of being brought to the police station, especially if they'd never been there previously.

For that reason the decision was made that the best course of action was simply to try to find Mrs. Harris' son and have him brought to the police station as quickly as possible.

Because Mrs. Harris refused to sit in a seat

in the police station at the time, or was unable to -- it's not clear exactly what the circumstances were -- she was placed into a cell until her son was able to arrive within 20 to 30 minutes and to arrange for Mrs. Harris' release.

QUESTION: Is there anything in the record that anybody at any time had the vaguest thought of taking her to a hospital?

MR. PHILLIPS: Yes. There is a direct testimony on a number of instances that the immediate question was, did she require medical assistance and was she ill?

QUESTION: I mean, that they asked her.

MR. PHILLIPS: They asked her that to see whether that, which is one of the things that you're supposed to do under regulations.

QUESTION: What I'm asking is did they -- they could have taken her to the hospital without her consent, couldn't they?

MR. PHILLIPS: Well, they could take her to the hospital. Of course, they could not require her to submit to the medical treatment without her consent.

QUESTION: They could?

MR. PHILLIPS: They could not require her to submit to medical treatment without her consent.

QUESTION: They couldn't take her to the hospital?

MR. PHILLIPS: They could have taken her to the hospital but there was testimony that --

QUESTION: And the hospital might have found out if she was sick.

MR. PHILLIPS: It might have found out that there was a mistake, Justice Marshall--

QUESTION: And that never was thought of?

MR. PHILLIPS: No, it was thought of, Justice Marshall, and there was testimony in the record that --

QUESTION: And they asked her, and they followed her advice.

MR. PHILLIPS: I'm trying to --

QUESTION: Couldn't they have taken her without her consent?

MR. PHILLIPS: They couldn't have taken her without her consent because she was in custody.

But there are two parts to the answer to your question, Justice Marshall. The first part is that their first reaction was to ask her whether she needed medical assistance.

The second part of the answer was that there was testimony from the head jailer that if Mrs. Harris was likely to remain in the jail for much longer he was,

he was at a point in time where he was thinking about sending her to the hospital. But he believed that her son would be coming almost immediately.

So it wasn't even in this case a situation where somebody said, I'm going to completely ignore Mrs. Harris' condition. They took into account the possibility of sending her to the hospital, and decided that under the regulation, and under the circumstances of the case, the better course of action was to allow her to remain there until her son was able to arrive.

QUESTION: Mr. Phillips, in the posture that we have to consider the case, are we concerned only with the liability of the city? And do we take it as a given that the jail supervisor violated this woman's Constitutional rights?

MR. PHILLIPS: Yes. In the posture of this case, we have to assume that there was deliberate indifference by someone.

The testimony that I cited didn't happen to be the supervisor, it happened to be that of the head jailer. There was a supervisor who was not sued in this specific case. But in the posture of the case, you're right.

QUESTION: Well, we, we assume, for purposes of deciding this, that there was some deliberate

indifference and a violation of her Constitutional rights.

MR. PHILLIPS: That's correct. That's accepted for purposes of this argument, Justice O'Connor.

QUESTION: Can a failure on the part of the city to adequately train its personnel ever amount to a violation of the Constitution, Mr. Phillips?

MR. PHILLIPS: Well, I would say it is counter-intuitive, and as the plurality opinion indicated in Oklahoma City, almost difficult to accept as a submission that someone has a policy of inadequate training.

And so I would think it almost inconceivable that a policy of inadequate training exists in a way that would make it --

QUESTION: But here there was a clear policy that the city had adopted, to the effect that if someone in these circumstances needs medical attention they're to take them to the hospital. Right?

MR. PHILLIPS: That's absolutely correct, Justice O'Connor.

QUESTION: So, what do we have left? A custom? I mean, what are we dealing with on the city's liability?

MR. PHILLIPS: Well, the Respondents -- it depends on who you ask and at what point in time, I suspect.

If you ask the Sixth Circuit what we're dealing with here, the Sixth Circuit identifies the policy as delegating discretion to police officers without providing adequate training.

Now Respondents in this Court don't really defend the Sixth Circuit's policy, the policy it recognized, the delegating discretion, I think in large measure because of this Court's decision last term in Praprotnik.

Respondents now are saying that there is a "policy of inadequate training" that has given rise in some respect to the injury in the particular case.

QUESTION: In the sense of a custom, or a practice?

MR. PHILLIPS: They also argue in the alternative that there is a custom at issue in this case.

As we suggest in our brief that it's not clear, frankly, that the issue of custom has been preserved up to this point. The Sixth Circuit certainly did not hold that there was any kind of a custom in this case, and we would submit that there is certainly no

evidence from which one could infer the existence of a custom.

Respondents' only evidence on the issue of custom is a single statement by a single police officer, not a policymaker, that he personally in situations of dealing with emotionally-disturbed would wait until the person appeared to be a threat to herself, him or herself, before he would be obliged to take that person to the hospital.

That is the only evidence. There is no indication in the record of this case of anyone ever being denied medical care, either for emotional or medical or physical injuries.

Indeed, the testimony of the chief of police in office in 1978 when the incident took place was that he had never even been, he had never received even a complaint about a failure to provide medical assistance in this case.

Under those circumstances, I don't think there's any basis frankly for saying that there is such a subtle custom of depriving people of medical care within the community, that it could be regarded as law for the City of Canton.

QUESTION: Going back just one step, is there any evidence in the record from which a tryer of fact

could infer deliberate indifference on the part of the individual officers?

MR. PHILLIPS: Personally, I would have been in a position to argue that a directed, I would have argued that a directed verdict was appropriate in this case, frankly.

But we didn't, we didn't win that, and we didn't preserve it on appeal, and therefore we had to take it as a given that there was deliberate indifference.

But if you ask me for a personal judgment on the record, I'd say no, there is no evidence.

QUESTION: Again backing up just one moment, is there any evidence that the woman was abused? Was she struck or pushed?

MR. PHILLIPS: She testified to the effect that she was struck, pushed, and the jury found against her on all of those claims.

QUESTION: Were there special findings, special verdicts?

MR. PHILLIPS: Yes. So that it's clear that there was, that at least with respect to the assessment of this record in this case, on all elements, save for the provision of medical care, the city has acted perfectly reasonably, and in no way -- I mean the city

and all of its --

QUESTION: Do we infer that just because the officers were found non-liable? Or were there specific findings that the woman was not mistreated?

MR. PHILLIPS: No, that they were found non-liable.

But I take it, at least, it's going to be difficult in a -- I mean, the argument of the defense at trial was that none of those acts were committed. It was not so much that they had a qualified immunity to abuse her.

And, in fact, there were common law tort actions brought, and all of those were rejected, and so there wouldn't have been a qualified immunity for those common law tort actions.

Therefore, I think the inference is inescapable that what the jury found was that this woman was in no way abused as a consequence of her actions, and a consequence of that particular arrest.

At the end of the trial, after Mrs. Harris had sued her arresting officer, the officer who is the backup officer, the person who drove the patrol wagon, the assistant jailer, the head jailer, the chief of police, and the mayor of the city, and including the City of Canton itself, the jury rejected all of the

findings against all of the defendants except for the one against the City of Canton.

And the one against the City of Canton involved exclusively the question of whether the city failed to provide her with adequate medical assistance during the period of her detention. And for that she was awarded $200,000.

Now, that award was set aside by the Sixth Circuit because there was clearly an improper instruction given to the jury with respect to the liability of the city.

The Sixth Circuit, however, went ahead and remanded the case for a new trial on the basis that liability could properly be found in this case "on the fact that the police had an established policy of allowing shift commanders unfettered discretion to make the decision to refer a prisoner to the hospital based on their personal judgment and perception coupled with the fact that these commanders were given no training or guidelines for making this decision."

It is that holding which is at issue in this case, although as I indicated a moment ago Respondents essentially have abandoned defense of that specific holding.

They do not argue that the policy of

conferring the discretion is the "policy" for purposes of liability under Section 1983.

QUESTION: Mr. Phillips, just, the portion of the instruction that the Sixth Circuit felt was proper, not the part that reversed that, who submitted that? Did you agree to that, the city? Or did the city object to that?

MR. PHILLIPS: The city objected to that, Justice Stevens.

QUESTION: They did. I know they submitted a different one. But they also objected to one --

MR. PHILLIPS: And we objected to the instruction as given, as a glorified version of respondeat superior. So I don't think there's any doubt that we preserve the jury instruction issue in this case.

Looking at the holding of the Sixth Circuit, vis-a-vis this Court's decisions in Monell and its progeny interpreting --

QUESTION: Excuse me.

MR. PHILLIPS: 42 USC Section 1983 --

QUESTION: Mr. Phillips, you confuse me with saying that there were two, two bases and they've abandoned the one.

I took, I took them to be two parts of a

single basis for the lower court's assessment of liability. That is to say, the failure to train would not have been a violation unless you are conferring discretion upon the people that you fail to train.

It would be okay not to train the supervisors, if it isn't ultimately their decision, if they have a guidebook that says you do this, this, and this.

MR. PHILLIPS: The basis for my inference about the submission of the Respondents -- obviously I'd be in a better position to clarify that point -- is that if you look at the specific evidence that they identify on the issue of whether there was a policy within the meaning of Monell that could give rise to liability here, they don't say anything about conferring discretion at that point.

The only evidence they turn to was the evidence of the chief of police, although I should note that that was the chief of police in 1980 as opposed to 1978 when the events took place, but his evidence to the effect that they did not have additional training or any specific training with respect to emotional injuries.

I inferred from that they are not really supporting particularly the specific basis of the Court, and I assumed that on the basis of what this Court said in Praprotnik that you cannot identify as an actionable

policy under 1983 the decision to confer discretion upon employees. So they've now gone in search of a new policy, and that policy they style as inadequate training.

Again, I say Respondents are certainly in a position to argue to the contrary. My position here would be, take it as either the conferring of discretion or inadequate training, it doesn't get you any further than the policy of inadequate training in any event, since conferring discretion is a necessary function.

QUESTION: Let me pursue that just a second. Would you say that it would never violate, be a policy of a city conferred discretion to make arrests and interrogate people, do everything the police do on a person who was totally untrained?

MR. PHILLIPS: You mean, can, the conferring of discretion on someone who's not trained?

QUESTION: Can that, could that constitute a policy that would be actionable?

MR. PHILLIPS: Well, I think that the problem with analyzing it that way, Justice Stevens, is that the 1983 isn't concerned with, with who makes decisions, or even how well trained those individuals are.

Section 1983 is concerned with whether there's been a violation of someone's Constitutional rights, and

under what circumstances the city should be responsible.

QUESTION: Well, of course, you have to assume, I mean to take it a step further, that if one calls it a policy, that the policy is one that foreseeably led to the violation of someone's Constitutional rights.

For example, if you took a bunch of ex-convicts and said, we'll make you the police officers from now on, it might be fairly predictable that somebody's rights would be violated.

MR. PHILLIPS: But see, I think the flaw, I mean the problem in that hypothetical is not the conferring of discretion. It is what ultimately is the clear inference that the policy of the city is to act in deliberate disregard of the individual's Constitutional rights.

And so I think to look at what the basis for the decision on training and the conferring of discretion does is take you away from looking at the real issue in the case, and that is has the city's fathers or the policymakers of the city decided that we don't care about the Constitutional rights of individual citizens within our community.

QUESTION: No --

MR. PHILLIPS: Now, it may well be that the action is evidence of that kind of a policy, but the hypothetical you pose is certainly a very extreme one.

QUESTION: Well, what if the policy was to save money, they don't want to spend unnecessary money, and they hire the lowest-paid police officers they could find, who happened also to have no training in areas that police officers are normally trained in? Could that -- and then say they predictably, a Constitutional violation ensues.

Could you say, could you characterize that as a policy of giving discretion to people who are not trained to carry out their duties?

MR. PHILLIPS: I think that's an inappropriate policy to examine.

I think what you say is that that is a policy of manifest indifference, deliberate indifference to the Constitutional rights of the citizens, that the assumption underlying a process by which you decide to put those people out on the streets is that they will in fact violate Constitutional rights.

And when they do in fact violate Constitutional rights that that's really taken pursuant to the authorization inherent in what the, in what the policymakers did.

I think that's a better way to analyze that question than to focus on the issue of whether the policy of inadequate training and policy of conferring discretion are problematic in a particular case.

QUESTION: But the reason you say it would be a violation is because it is so clearly foreseeable that Constitutional violations would result, as I understood your response.

MR. PHILLIPS: Well, I think -- I think that you might find a circumstance where you could infer from that deliberate indifference.

My basic position here is, is that, Justice Stevens, the hypothetical you pose is not a realistic one, for the simple reason that no community is going to go out and seek to find the lowest common denominator person to protect them.

The average citizens of the community are not going to accept that kind of situation. And therefore you're just not going to have the situation where you free up the prisons and make them, police officers --

QUESTION: Well, perhaps my example is an extreme one. But I don't think it's totally implausible to suggest that there are in fact, there have in fact been untrained police officers who've been given such responsibilities.

MR. PHILLIPS: But a specific instance of an untrained police officer being given responsibility seems to me an inappropriate basis for inferring that the city has a policy of deliberate indifference toward Constitutional rights.

And that's why I get back to the point that that's the reason you have to analyze it in terms of the city's policy with respect to the violation of Constitutional rights, because the hypothetical you pose is never going to happen in real life.

And it seems to me inappropriate to focus on inadequate training and conferring of discretion, which are absolutely unquestioned appropriate decisions by policymakers to deal with a one in a billion likelihood that somebody would act in the way that you've described.

It seems to me it's much more sensible to analyze the case across the generality of situations and to focus on the protection of the Constitutional rights themselves, rather than trying to make Section 1983 into a statute designed to provide uniform training for all municipalities and counties throughout the United States, which I think there's no evidence that 1983 was ever intended to be.

QUESTION: Do you agree, Mr. Phillips, that if

the city officials take steps or act in a way that would support an inference of deliberate indifference to people's Constitutional rights, that could be described as a policy under Monell?

MR. PHILLIPS: Yes. I think that that could be described as a policy, Mr. Chief Justice.

QUESTION: Could you infer that policy from failure to act?

MR. PHILLIPS: From failure to act by whom?

QUESTION: By the city.

MR. PHILLIPS: By the city policymakers?

QUESTION: Yes.

MR. PHILLIPS: It's difficult to answer that in the abstract. My assumption is that --

QUESTION: No, but you're giving some abstract question --

MR. PHILLIPS: It wouldn't in a single incident -- I'm sorry, Justice Kennedy.

QUESTION: Please, go ahead.

MR. PHILLIPS: You wouldn't -- I don't think you can find that from a single incident.

For instance in this case, did the city act to provide additional training for medical determinations? No, it didn't. So you could say there's a failure to act.

Does that give rise to an inference of a policy of deliberate indifference to specific medical concerns? I think absolutely not. There's no basis for that.

The only time failure to act can begin to have any significant meaning in this context is in the face of obvious instances of problems. And then you have a failure to act, and the failure to act gives rise to an inference that there's a deliberate indifference to the rights --

QUESTION: Well, what about Justice Stevens' test of what's reasonably foreseeable? Suppose guns are issued and the city for budgetary reasons just doesn't give its officers, new officers training in the use of firearms?

MR. PHILLIPS: I think --

QUESTION: Shows them where the safety is and where the holster is, and that's it.

MR. PHILLIPS: Justice Kennedy, I'm sort of reminded of the old television program, Mayberry R.F.D., or whatever, where the, where you have a single sheriff and he has a gun, and the question is, is the city under all circumstances required to provide a certain minimum amount of 400 hours of training in that kind of a situation, where there's no reason in the world to

believe that the person's ever going to need to use that gun, there has never been any instance where a gun has ever been drawn in the past.

And I don't think that -- I think the problem with looking at this as a training case is that what you're saying is that every community has to face up to this problem and provide a certain amount of training, even when it isn't -- it may be foreseeable in the abstract sense, but it's very unlikely.

QUESTION: Suppose with a particular community, it's reasonably foreseeable that lack of training would lead to serious violations of Constitutional rights?

MR. PHILLIPS: I think that that, that the foreseeability standard is an inappropriate one under Section 1983. You're talking about the policies of the city --

QUESTION: Without reference to what city it is.

MR. PHILLIPS: Without reference to what city it is. I think you have to have a different causal link between the policy of the city that you identify and the injury that ultimately arises out of that.

The Court said in Praprotnik last term that you cannot use simple proximate cause standards when

you're dealing with Section 1983. There's got to be something more.

You have to find that it is pursuant to, that it is the moving force, that it an affirmative link. And I don't think that foreseeability is a sufficient standard to satisfy all of those, to satisfy any of those descriptions of what causation is required under Section 1983.

QUESTION: Well, maybe you shouldn't have bought on to gross indifference then. I don't know how you can measure gross indifference without measuring the foreseeability.

I mean, whenever you say you're grossly indifferent it depends upon how certain it is that something will happen if you don't do something else.

MR. PHILLIPS: But I -- Justice --

QUESTION: It seems to me you cannot embrace gross indifference as a standard and at the same time reject foreseeability --

MR. PHILLIPS: I think that you can reject mere foreseeability as tantamount to gross indifference.

If it is unforeseeable it clearly isn't grossly indifferent. But I don't think it follows that simply because something is foreseeable and you don't

take action in response to that, that you act with gross indifference.

I'll go back to my hypothetical involving a small community that has a single sheriff. In that situation it certainly may be foreseeable that some incident will arise in a local high school where the police officer suddenly pulls out his gun and starts to shoot. That may happen.

But what I submit to you is that 400 hours of training and the refusal to provide that to that police officer is not a gross indifference to the Constitutional rights of those high school students. No one anticipated that that would happen.

QUESTION: Mr. Phillips, my question earlier was deliberate indifference.

Now, maybe there's, it's fine shades of nuance between gross indifference and deliberate indifference. Deliberate always to me has connoted an element of recklessness, that comes closer to intent than what might be -- I've never heard the term "gross indifference" used up till now.

MR. PHILLIPS: Well, I was merely going along with Justice Scalia on that.

QUESTION: You have no choice.

MR. PHILLIPS: My preference frankly --

QUESTION: Whatever.

MR. PHILLIPS: Can I just finish? My preference, frankly, is deliberate indifference, because I think it even connotes more than simply recklessness.

I think what it connotes is some kind of volition, and I think that's terrible important in situations where you're trying to hold the city liable.

Prosser and Keaton, in their analysis of gross negligence and reckless indifference and deliberate indifference, say that gross negligence and recklessness all tend to shade toward the negligence side based on conduct.

Deliberate indifference is a standard that tends to provide a certain amount of volition, which I think is again a central element of what should be required as part of the policy prong under Monell.

If there are no further questions, I think I'll reserve the balance of my time.

QUESTION: Thank you, Mr. Phillips. Mr. Rudovsky, we'll hear now from you.

ORAL ARGUMENT OF DAVID RUDOVSKY

ON BEHALF OF THE RESPONDENTS

MR. RUDOVSKY: Mr. Chief Justice, and may it please the Court:

As a threshold matter, I wish to call this

Court's attention to the fact that the issue that the city says is properly before this Court, as they say, a failure to train can never amount to a policy, as that term is defined in Monell, is not properly before this Court.

Not only did the city not appeal from the underlying judgment that there was a 14th amendment violation here in the sense that Mrs. Harris was denied a right to necessary medical care, and the record does support that judgment, but at trial, this case was tried on a simple negligence theory because the city pre-trial, in its pre-trial brief, and I've cited it at page nine of our brief, on the merits, conceded that if the Plaintiff proved that the actions of the city as the result of misfeasance and nonfeasance by failing to adequately train, supervise, or discipline members of the police offices, proximally caused the injury in this case, the city could be held properly liable.

QUESTION: Mr. Rudovsky, did you make this point in your brief in opposition to certiorari?

MR. RUDOVSKY: I personally was not on the case at that point, but in the opposition to certiorari, and I will get to that point, even at the stage of opposition of certiorari, the city's submission on the certiorari petition was not that training can never

amount to a policy under Monell.

This question submitted, on which this Court granted cert, was whether or not Monell liability could be found where violations of Constitutional rights might foreseeably result from inadequate training.

That is, in this petition for certiorari itself, the city reaffirmed the position it took in the trial court that negligence alone could be a basis for finding that a failure to train amounts to a policy under Monell.

Not only did the city make that position clear pre-trial, and therefore this case was tried, and the evidence was produced, on a theory of simple negligence, but in the Court of Appeals, in its petition for rehearing before the Court of Appeals, the city stated, and we quoted the page 11 of our brief, in its petition for rehearing, the city says, the majority opinion of the Court of Appeals "quite correctly, in our view, states that grossly inadequate training may be a basis for a city's liability under 42 Section U.S. 1983."

So that the position of the city consistently, pre-trial, on appeal in the Court of Appeals, in it's petition for certiorari to this Court, which is why we didn't make the response that would normally be called for under Tuttle, to point out to this Court that the

issue is not properly before it, the city's consistent position is diametrically opposed to what it suggests to this Court today.

Now, the two reasons this Court has traditionally given for not deciding issues which are not properly preserved below, both strongly counsel against this Court deciding this case on the submission of the city.

Number one, you have the possibility -- and we're not certainly accusing the city of doing it here -- of preserving an issue for appeal by suggesting an erroneous legal standard at trial.

They say at trial mere inevidence is sufficient, and now they say both the trial court and the Court of Appeals were wrong for adopting that position. Well, they can't have it, when they themselves suggested that position.

QUESTION: Did you say this in your opposition to the petition for cert?

MR. RUDOVSKY: As I said to Justice White, the opposition, which I did not file, I did not become part of this case until the brief on the merits, that point was not made in the opposition brief, but it was not made, as in Kibbe, the same reason, because the brief for certiorari, the petition for certiorari, itself

expressed this issue in terms of inadequate training, which was the same position as taken by the court below.

Secondly, the city now says that we didn't adduce sufficient proof to meet the standard they suggest of, as best I can tell its intentionality, its, we don't state a claim under Monell unless we show that the failure to train was done with the intent to violate citizens' rights.

The city now says that we haven't adduced enough proof, if that's the proper standard. Well, of course we haven't. We think the proof could meet that standard, but this case was tried under a simple negligence theory.

There was no burden on the Plaintiff at trial, given the very position of the city, to adduce proof that would meet deliberate indifference or intentionality.

And so both issues that are supposedly before this Court, number one, the question of what standard applies under a failure to train, and the question, the underlying question -- because a new trial has already been granted in this case, the city will have another chance.

The question of whether there was sufficient proof to meet whatever standard this Court would

announce controls the question of failure to train, the Plaintiff didn't have a proper opportunity to provide that proof, because we tried it under the theory that the city made.

In Tuttle, as Justice White's question suggests, this Court said, properly so. The Respondent ought to point out to this Court where an issue has not been properly preserved.

I've explained why we didn't do that. This is the fourth time in as many years that this Court has taken a case concerning municipal liability on a city's petition where there have been substantial questions over whether the issue was properly preserved in the lower courts.

Tuttle, Praprotnik, Kibbe, and now this case, and indeed Newport, the City of Newport case, had the same problem as well. It's one thing to say to the Respondent, you should point it out. Here we didn't because it wasn't properly posed.

We think as a corollary to the Tuttle rule a petitioner as an officer of this Court ought to at least in its petition for certiorari point out what might be arguable grounds, and here they were abundant, as to why the issue was not properly preserved.

QUESTION: Do you agree, Mr. Rudovsky, that

the questions actually presented and worded in the petition are properly before the Court?

MR. RUDOVSKY: As worded, they are. But, as worded, as I read it, and it's a little unclear to me exactly what the point was, it seems to repeat this simple negligence question.

That is, the city says, in this question presented, is negligence, which is the foreseeability standard that's suggested here, and inadequate training sufficient to state municipal liability under Monell.

Well, we think the answer to that is yes, simple negligence is that. But that is not the argument they are currently making.

They are now trying to ratchet up the culpability requirement all the way up to intentionality when throughout this case they have said simple negligence, or at one point under a motion for directed verdict they used the term gross negligence, would be sufficient.

QUESTION: But do you think at least the questions presented in the, as worded in the petition -- I know that the wording is somewhat different in the brief -- are properly before the Court?

Because, your motion, your brief in opposition did not raise any question about it.

MR. RUDOVSKY: I certainly concede that, and the brief in opposition didn't, I think, for the reason that it appeared that the city was taking the same position in its petition for certiorari that it took in the lower court, that is whether simple negligence would be sufficient.

That issue is before the Court, and there's certainly abundant evidence, as I will get to in a moment, to support the judgment of the Court of Appeals remanding for a new trial on a theory that negligence in terms of training, which foreseeably would raise a risk of a violation of Constitutional rights, and would raise a risk of danger to the public, would be sufficient.

Now, this Court has debated the underlying issue in several opinions. But as presented to this Court, all the city properly preserved was that lower threshold issue.

And we think because the facts were not fully developed --

QUESTION: Haven't they, haven't they at least preserved the question of whether inadequate training can ever be a policy or a custom for purposes of Monell? Haven't they raised that?

MR. RUDOVSKY: Not in those terms, because they have conceded --

QUESTION: Well, the question on cert is whether inadequate training can be found to be a policy or a custom within the meaning of Monell.

MR. RUDOVSKY: That's true. But given their position in the court below, where they expressly conceded, indeed at a petition for rehearing in the Court of Appeals, they expressly conceded that issue. We are --

QUESTION: Well, but it seems to me they raised it here and that we can answer that question. Can't we?

QUESTION: You, you should have raised that in your motion in opposition.

MR. RUDOVSKY: We raised it as they did in Kibbe, at the first opportunity where it became clear to us that they are now changing their position.

Kibbe was the same situation. In Kibbe the argument by the Respondent that cert was improperly granted was raised for the first time on the merits brief, because that's the first time it became clear to the Respondent that the petition was changing grounds, and a majority of this Court dismissed cert as improperly granted in Kibbe.

This is even stronger than Kibbe, because at least in Kibbe the city had by motion for directed

verdict preserved, or attempted to preserve that issue in the lower court.

And remember, in Kibbe, when this Court dismissed cert, it meant the city was held liable. There wasn't a new trial situation in Kibbe. That meant the judgment of damages was affirmed.

Here there's going to be a new trial under any circumstances. And we think that you don't have a full record on which to decide, in this case, because of what the city did, this very important question, which has pretty broad ramifications in terms of municipal liability.

If I may, I will turn, however, assuming this Court reaches the merits of this case --

QUESTION: We should dismiss as improperly granted?

MR. RUDOVSKY: That's correct, Your Honor. For the same reason that the Court did in Kibbe, we think it's --

QUESTION: And other cases.

MR. RUDOVSKY: And obviously it's discretionary. Sometimes you have dismissed, sometimes you haven't.

But we think of the five cases in the past seven years that have raised this issue, this is the

strongest case of the clearest change in position by a petitioner from the trial court to this Court. And there's no basis on which to hear this particular issue.

QUESTION: But the rule you're talking about, is it just a rule of the court that we normally don't hear cases that -- hear issues that weren't presented below?

MR. RUDOVSKY: It's certainly discretionary in this Court.

But the factors the Court has pointed to in deciding whether we hear it or whether we don't, Tuttle v. Kibbe for example, Tuttle you heard it, Kibbe you didn't, when you look at those factors they counsel most strongly against hearing this particular case. And that's our basic submission on that point.

But I do want to move to the merits, because the Court certainly can address the merits, and we differ quite sharply with opposing counsel, both on the facts in this case and on the submission we make with respect to the proper legal principle that controls.

Two significant facts that have to be kept in mind, because we are arguing both a custom of denying medical care to a certain class of prisoners, and a failure to train police that led to this particular

violation.

We're arguing both and we will submit in conclusion that the confluence of those doctrines clearly established municipal liability here. But as a predicate, there are two significant facts that we produced at trial which are quite important.

Number one, with respect to our submission that there is a practice and custom in the City of Canton of withholding medical care for persons who the police think are emotionally disturbed, as opposed to suffering from physical ailments, the custom was established not by a series of incidents that we proved but by testimony of a police officer, not that he withheld care in these cases, but Officer Norsia, as we cite in our brief, testified that he was trained not to provide medical care to persons who the officer believed was suffering from emotional distress unless that person became seriously dangerous to herself.

QUESTION: Well, is that by itself supposed to be a violation of the equal protection clause?

MR. RUDOVSKY: I don't think it's an equal protection matter. I think when the city --

QUESTION: Treating mentally disturbed people differently than physically --

MR. RUDOVSKY: No, no. We don't make an equal

protection argument. We say that someone who is mentally disturbed, as Mrs. Harris, was, and in fact was, as the jury finding mandates in this case, was denied necessary medical attention.

The policy -- not the policy, the practice and custom of denying medical care to people in that situation, until they became literally dangerous to themselves, which she wasn't, she wasn't trying to commit suicide, she wasn't trying to hurt herself, means that in a class of cases persons who are in need of medical attention will not be given that medical attention.

And we don't seek to support the verdict on a single incident theory. If this was just a single incident, this was the one time it happened, we would agree --

QUESTION: What Constitutional right do you say was violated by --

MR. RUDOVSKY: Her right, ultimately her right under the 14th amendment to necessary medical care as a person in custody, pre-trial custody.

The violation under Monell is that the custom of the city, the practice of the city which ultimately caused this officer to withhold medical care, as he said, the reason we withheld medical care is that we

were trained, don't seek medical care to someone in Mrs. Harris' condition. That's the basic testimony. And his testimony was not that --

QUESTION: If that was the custom, I suppose it was based on a notion that people who are just emotionally, sort of emotionally disturbed, they don't need medical care.

MR. RUDOVSKY: Well, you have to remember, though, the facts in this case. This is --

QUESTION: Well, isn't that -- that must have been the opinion.

MR. RUDOVSKY: It, it may have been the opinion. But when you apply it to the facts of this case, where Mrs. Harris, when she gets to the police station, is disoriented, she's incoherent, she's hyperventilating, and she literally cannot even sit on a chair. She continues to fall to the floor, faints at one point, in fact.

Someone in that condition, and I'll get to this point, number one, may not be just emotionally disturbed, they could be suffering a heart attack. But if the officer makes the judgment, well, this is just a nervous arrestee, that person will never receive medical care in the City of Canton, until as in this case her son has to come to the police station -- this question

of who provided medical care, Justice Marshall -- her son comes and says to the officer, my mother is lying on this dirty cell, she's hyperventilating, she's hysterical, would you call a doctor?

And they said no. You call the doctor. He calls a doctor, the doctor comes or the ambulance comes, they put her on a stretcher, they're taking her out in this condition, and what do the police do? They delay her transportation to the hospital because they say we have to fingerprint her.

This was a callous disregard of this woman's rights to medical care. And it was caused, which is a critical question here, was it caused by the city? Remember language of 1983, subjects or causes to be subjected to un-Constitutional deprivations.

QUESTION: In your view, is there a difference in a custom and a policy?

MR. RUDOVSKY: There is. And I will get to the policy in one moment.

The custom, though, which this Court as a legal matter has clearly recognized in Monell and Adickes, is established by the officer's testimony, not that I do it but that this is the way the police department is trained.

QUESTION: Well, why is that any different

than a policy?

MR. RUDOVSKY: In effect, Justice Kennedy, this custom and practice becomes the policy. This written regulation that we have now has been superseded, at least in cases with respect to emotionally disturbed persons.

QUESTION: So in this case it is a policy?

MR. RUDOVSKY: I think it amounts to a policy, although this Court, and the reason I hesitate to say blanketly it's a policy, is that this Court has used the terminology "practice and custom" where you have a written regulation which is supposedly the policy, and then over time officers by lack of training or supervision adopt a different practice.

And that's why I use the term "custom and practice," and I will get to the policy of lack of training.

QUESTION: What do you have besides this one officer's testimony?

MR. RUDOVSKY: That is the testimony. But the important --

QUESTION: What else do you have?

MR. RUDOVSKY: Oh, the other factor I want to mention in terms of the other piece of evidence is the testimony of the chief of police, who at least at the

time he testified was the chief of police, who testified that we give no training -- we're not talking about inadequate training -- we give no training to police to help them distinguish between symptoms that may just be symptoms of an emotional disturbance, as opposed to physical problems.

No training with respect to symptoms of someone in emotional distress, no training with respect to symptoms of someone who may be having a heart attack, no training with respect to symptoms of someone who has respiratory problems.

Now, that fits into the lack of training policy prong of our argument. Not only do you have this underlying custom, which has now become un-Constitutional, but it gets aggravated by the fact that the police are not even trained to distinguish properly between emotionally disturbed people and those suffering physical ailments.

That is, in this case it may have turned out to be a physical ailment. But if this case was a heart attack, if this case was a heart attack, which it well could have been, given her symptoms, the officer for two reasons would have been caused not to act by the city's policy, one, he's made a determination that it's a mental instability and therefore we won't get training,

and two, he's made that decision incorrectly because he hasn't even been given the rudimentary training that's necessary for a police officer in that situation.

And we're not talking about 400 hours of training in this case. We're not talking about the most sophisticated medical training. We're not talking about a doctor in the station.

All we're saying is that when you give police officials in the station decisions that could be in some circumstances life or death, you have to give them at least some basis upon which to make those decisions.

It's the point I think that Justice Stevens made in his question to opposing counsel. If you give a police officer a gun, you've got some responsibility under this Court's decision in Garner to tell that police officer, you can't use that weapon to stop every fleeing felon.

QUESTION: Do you think every hotel in the country has the duty to give that training to hotel desk clerks?

MR. RUDOVSKY: They may under state law.

QUESTION: I --

MR. RUDOVSKY: But they certainly don't under the Constitution.

QUESTION: Do you think they're negligent

under state law if they don't do that?

MR. RUDOVSKY: In some states the failure to provide training to security guards -- is that the question?

QUESTION: No. Hotel desk clerks.

MR. RUDOVSKY: No. A hotel desk clerk, I don't think so, nor would I say, Justice Kennedy, that you would have to train an officer --

QUESTION: You think police officers, in addition to all their law enforcement duties, have to have more training than hotel desk clerks so far as admitting people for a half-hour booking, hour booking?

MR. RUDOVSKY: Well, in this case it amounts to two hours, and it could have been more. But --

QUESTION: I thought it was 40 minutes.

MR. RUDOVSKY: No. The testimony in this case, I think that's just a misstatement of the facts.

There was testimony where the jury could have found that she was in custody for two hours. Her son, Ronny Harris, said he got to the station around 10:00 o'clock, which was two hours after she was arrested.

And we certainly are entitled to that inference, given that we were the verdict winner in the trial court.

I am not suggesting that every officer has to

be trained in this regard. The jailer has to be trained. The person who makes that decision has to be trained, in the same way the jailer doesn't necessarily have to be trained about hostage-taking situations.

The jailer's not going to find himself in that kind of a situation probably. If there's a hostage unit in a city, well those are the people you train with respect to taking hostages.

But any police officer who in his normal course, or her normal course, exercises powers of arrest, exercises powers sometimes of lethal force, at a minimum consistent with this Court's opinions, have to know when to use it and when not.

And it certainly is not counter-intuitive to suggest that one who is not properly trained, who receives no instructions that you cannot use lethal force against a fleeing pickpocket, is not as readily going to cause or commit a violation of Constitutional rights than the very policy in Garner, which this Court condemned, which just permitted the use of deadly force in that kind of situation.

Either one can as readily cause the underlying Constitutional violation as the other. And that's why we suggest that the proper standard, the proper standard in determining whether or not failure to train amounts

to a violation of Section 1983 is best determined on a theory of gross negligence.

That theory would require the Plaintiff to prove, and it's ultimately the burden of proof of the Plaintiff, to demonstrate that the failure to train in a particular situation --

QUESTION: You, you pick gross negligence from our cases, or from the statute, or just because you think it would be a good idea?

MR. RUDOVSKY: No. I think that gross negligence has a basis both in some of the opinions of this Court, and certainly some of the opinions of the lower court. But more important, we think it satisfies what Monell requires.

QUESTION: Justice O'Connor and I were given a case in law school, which -- that defined gross negligence as the absence of even that care which careless people exercise. That always struck me as a rather unsatisfactory concept.

MR. RUDOVSKY: I have some law students who I teach in the courtroom and, they've been unsatisfied with some of my definitions, as we go along the continuum of culpability.

I'm not going to stand before this Court and say, I can give a precise formulation as to when

negligence folds into gross negligence, when gross negligence folds into deliberate indifference, when deliberate indifference folds into intentionality.

But gross negligence as understood, and certainly in terms of agency principles, which are well-established, it is not unfair to say to a city that if you adopt a policy, and this is a deliberate choice, you either train or you don't train, that's certainly a choice made by a city official, that creates a high-risk and a high degree of foreseeability, which is gross negligence, to the citizens of the community in that particular area where you don't train, and in fact a Constitutional violation occurs, a jury can find, a jury can find both causation and we also have fault.

I'm not suggesting a no-fault standard here. Monell says we need causation, and we need fault. Gross negligence meets the fault standard, and indeed when you think about the notion of causation, you can have causation whether or not you have fault.

Whether in fact an officer doesn't get trained under Garner deliberately, or the city just forgets to train that officer, the result can be the same, the person gets shot regardless of the question of fault.

But we recognize that fault is a component of Monell, and indeed as Justice O'Connor noted in her

opinion in dissent, in the Kibbe case, she would require some higher level of culpability to ensure that there was in fact causation, that a jury's not speculating.

I think where I disagree somewhat with that analysis is to the level of culpability you require. Remember, to the degree it was suggested in that dissenting opinion, that we don't know whether the officer acted because of lack of training or because of predisposition or because of some kind of malice toward the Plaintiff, we're concerned about a jury speculating on, on, on causation, and then we get into the respondeat superior situation.

QUESTION: I'm also concerned about a jury speculating about what is gross negligence.

Why shouldn't we adopt a much higher standard, to the extent, to the extent we miss something as a policy, which you think should have been considered a bad policy, you get the city under a practice anyway.

If indeed they've adopted a policy of not training people, it is very bad, because it's absolutely foreseeable that these officers are not, are going to be making mistakes. They will make mistakes, and you will have a practice of providing inadequate medical care, which will enable the city to be held liable.

MR. RUDOVSKY: You might in some cases. Now,

I think where we differ --

QUESTION: Why wouldn't you inevitably, if it's as foreseeable as you say it is?

MR. RUDOVSKY: Well, but I think that's the definition of gross negligence.

Gross negligence suggests a high degree of foreseeability and a high degree of risk in terms of danger. Once you get --

QUESTION: Yes, but I'm a little worried about having the jury guess about that, whereas a practice you can look out there and say, here are ten instances of adequate, inadequate medical care.

MR. RUDOVSKY: I think the response to that, Justice Scalia, in part is that to the degree you're worried that the jury may be deciding on some other basis, and maybe the officer acted not because of lack of training but because of predisposition, say, and how do we know?

Well, the city can call that officer at trial. They city can call the officer and say, officer, in this case, did you not provide medical care because of lack of training, or was it some other predisposition?

This officer might have said, look, I wasn't trained properly. We had a custom of denying medical

care. But that's not the reason I didn't send her to the hospital. I knew she needed medical attention. I didn't send her because she gave my fellow officer a hard time out on the street.

Well, if the jury accepts that testimony, and it can be produced by the city, then there's a question on causation.

QUESTION: That's a realistic hypothetic you're giving us?

MR. RUDOVSKY: Not only is it realistic --

QUESTION: The realistic hypothetical is going to be what happens here, that the officer gets off and the deep pockets, the city, gets held liable. That's the realistic --

MR. RUDOVSKY: I have seen it happen in the qualified immunity context, where the officer in fact says, I acted the way I acted because I wasn't properly trained.

And in these cases, remember, municipalities are different defendants from the individual, and sometimes they have different lawyers, and sometimes they're at odds.

All I'm suggesting is that to the degree you're worried that the failure to train didn't cause the violation, that it may have been something else,

that's a matter, that's a matter for evidence.

When you look at principles of agency -- now we're not dealing with respondeat superior -- a basic principle of agency which was established in 1871 when this act was passed, and which is now codified in the restatement, is that a principle, the employer, is generally responsible for failure to control, supervise, and discipline employees, a simple negligence standard which we're not suggesting here.

The courts have not had trouble adjudicating that principle. They haven't had trouble deciding when in fact the employer's failure to control was the causation factor for the ultimate violation.

These are settled principles that common law courts have applied for decades without much difficulty, and we don't think that a Federal court in a civil rights action properly charged, a jury that's properly charged, will have difficulty.

Nor do we think that error is a one-way street, that is that a jury will always find causation when causation didn't occur, as opposed to the other problem.

There will be situations where, under the standard, a jury perhaps will find, even under gross negligence, will not find causation, where maybe in fact

it existed.

Causation obviously is a very elusive concept. But we're stuck with it as a matter of tort principle, and certainly as a matter in this Court's jurisprudence on Section 1983, the statute itself talks about, subjects, or causes to be subjected.

If you look for the most analogous principle in common law tort, and certainly this Court time and again has said, we look to common law tort principles on occasion in fleshing out 1983, the agency principle of an employer controlling an employee certainly has sufficient bite, has sufficient experience, and has sufficient general acceptance in the jurisprudence of this country for it to be the standard here.

QUESTION: Mr. Rudovsky --

MR. RUDOVSKY: Yes.

QUESTION: Your time's almost up. And when you raised your point about this, the main issue that we're now discussing not having been raised, I tended to agree with you on the manner in which the question was presented in the statement of question presented.

But I've been looking through the petition itself, and there are a number of statements which it seems to me do raise the question, including the statement that the fundamental issue in Kibbe is

identical to the issue presented here.

And in your reply to the petition, you didn't deny that, by saying, oh no, this was all acknowledged below. You distinguish Kibbe in a quite different way, that Kibbe involves un-Constitutional conduct arising out of gross negligent failing, as opposed to a regulation coupled with inadequate training.

You just completely failed to make the point you're making.

MR. RUDOVSKY: Counsel who filed that did not respond to that. But recall, this petition for certiorari was filed when Kibbe was pending. Kibbe had not yet been decided. And remember, in Kibbe you found that that issue was not properly preserved either.

QUESTION: But it's clear what issue was being referred to in the brief.

MR. RUDOVSKY: I won't quarrel with you on that. I think, in retrospect, if I had written that opposition, I probably would have pointed that out.

But given this almost right-hand turn the city has now taken from the trial court here, you're left with a totally imperfect record. We're sandbagged because we couldn't even present the evidence that would have met the standard they now say should be the standard that controls decision in this case.

This matter has already been remanded for a new trial by the Sixth Circuit. The case can be retried under a proper standard, with both parties allowed to present the evidence that would support each side's theory, we think that the Court of Appeals' judgment in that regard.

QUESTION: If the Court of Appeals had the wrong standard in mind, the case will be retried on the wrong standard.

MR. RUDOVSKY: Not necessarily. A lot of water has gone over the dam since the Court of Appeals spoke.

And it seems to us, first of all, the Court of Appeals standard was right. The gross negligence standard that they articulated was right. And that's presumably --

QUESTION: Well, what if it was wrong? That's part of the issue.

MR. RUDOVSKY: It's certainly a problem in terms of this tension between a record that is not properly preserved and an issue you want to decide, and we agree, ought to be decided at some point.

But an issue of this importance, and this Court has done this before when -- negligence, it took you three times finally to decide that, in terms of

whether negligence states a cause of action in 1983, we don't think it, it should not be decided.

We think on this record it's difficult, particularly given the fact that there's a separate grounds for affirmance, there's a custom and practice here, that regardless of lack of training the custom and practice prong is certainly satisfied.

There's no legal problem with that. It was properly made. And that custom and practice --

QUESTION: Well, I think that that certainly is open to question, because the testimony of the one police officer may well not suffice to meet that standard.

MR. RUDOVSKY: Justice O'Connor, just in quick response, I think unrebutted testimony of the police officer, when the city could have presented a witness to rebut that testimony, I think under evidentiary rules, should be sufficient to establish --

QUESTION: Well, there's going to be a new trial in this case no matter what we decide. And the question is on what rules of law is it going to be retried.

MR. RUDOVSKY: That's correct, Your Honor.

QUESTION: Thank you, Mr. Rudovsky. Mr. Phillips, you have six minutes remaining.

REBUTTAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONER

MR. PHILLIPS: Thank you, Mr. Chief Justice. Justice White, I'd like to, I'd like to respond to the last statement that you made to counsel.

If this Court concludes that there is no evidence from which a policy as a basis for liability under 1983 exists, there is no reason for a new trial in this case.

At a minimum, one of the things this Court is obliged to do at this stage is to decide whether or not the standards employed by the Sixth Circuit are an appropriate basis for a new trial, and we say that's clearly wrong, and I don't still hear Respondents' counsel to defend the standards employed by the Sixth Circuit in this case.

QUESTION: Respondent says it's not fair to him. He might have produced additional evidence, had he known that the standard that you're now contending before us is the standard he was going to be held to.

He produced lesser, or evidence to satisfy a lesser standard because you conceded the lesser standard in the trial.

MR. PHILLIPS: Justice Scalia, the truth is that the evidence in this case doesn't meet any standard

with respect to the city.

You can use simple negligence, and there's not enough evidence to go to the jury.

QUESTION: That's the evidence that was put in. But he's saying I might have put in more if I --

MR. PHILLIPS: But even, even in the worst of circumstances, he knew he was obliged to put in enough evidence to demonstrate that the city was negligent. And he hasn't even done that.

So he's hardly in a position to say here that we've sandbagged him with respect to the evidence he wants to put in on the issue of a policy in this case.

QUESTION: Both of you, I take it, think that the Court of Appeals was wrong on its standard.

MR. PHILLIPS: Yes. And we believe -- but the standard the Court of Appeals --

QUESTION: And so the question is, if we just dismiss as improperly granted an admittedly wrong decision, the Court of Appeals is going to govern in a new trial?

MR. PHILLIPS: Yes. That's absolutely correct. The District Court's not in any position to do anything different other than say that it thinks that the standard of the Sixth Circuit --

QUESTION: But you just said that you haven't

heard your opponent defend the --

MR. PHILLIPS: That's correct. I still don't think I've heard him defend that standard, and all I'm saying is that under any standard there's no basis for going back for a trial in this case.

Because if you examine the custom, or excuse me, the policy issue in this case, there's one, no issue that any policymaker ever, ever made a decision with respect to the adequacy of training in this case.

The chief of police that he cites was the chief of police in 1980, not in 1978 when the events took place.

Second of all, there's no deliberate choice among alternatives in this case, because there's no evidence whatsoever of what alternative levels of training could possibly have been adequate in this case.

And finally, there is no evidence on the issue of causation. There's not a single expert testify as to what level of training would have been satisfactory to stop Mrs. Harris from suffering the injuries she suffered, and I submit to you that a physician in this particular case could well have made exactly the same mistake that the officers made.

One last point on the issue of custom.

Counsel cites the testimony of Mr. Norsia and says it was uncontradicted.

The testimony he cites from the captain, the ship's commander on the issue, was, what things are done with a very emotional hysterical type person, Captain Maxson stated, they generally cool off on their own, but if the situation persists we take them to the hospital.

I submit there's no evidence in this case of a custom of violating Constitutional rights, and therefore the judgment below should be set aside. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Phillips. We'll hear argument now on No. 87-6325, Donald Ray Perry v. William D. Leeke.

(Whereupon, 11:47 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson 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:

No. 86-1088 - CITY OF CANTON, OHIO, Petitioner V. GERALDINE HARRIS, ET AL.

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

BY Judy Freilicher

(REPORTER)