

## Liability for Negligently Disabling or Failing to Repair a Traffic Signal: Absolute Immunity in the Third District?

by Joel S. Perwin

In a series of decisions beginning with *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984), *review denied*, 464 So. 2d 554 (Fla. 1985), the District Court of Appeal of Florida, Third District, has held that even when a city, county, utility company, or other responsible party was negligent in disabling or in failing to repair a traffic signal, the drivers involved in any subsequent accident were solely responsible for their injuries, even if they were not at all negligent in entering the intersection. These decisions significantly alter the preexisting standard of proximate causation, and with it the incentive of local governments and other responsible parties to take reasonable steps when disabling, or to promptly repair, malfunctioning traffic signals.

The standard of proximate causation in Florida is well established: "The key to proximate cause is foreseeability." *Vining v. Avis Rent-A-Car Systems, Inc.*, 354 So. 2d 54, 56 (Fla. 1977). As the Supreme Court of Florida stated in *Gibson v. Avis Rent-A-Car System, Inc.*, 386 So. 2d 520, 522 (Fla. 1980): "If an intervening cause is foreseeable the original negligent actor may still be held liable. The question of whether an intervening cause is foreseeable is for the trier of fact." Indeed, the Supreme Court has issued "directions to the appellate courts of this state" that issues of proximate causation almost always are for the jury. *Welfare v. Seaboard Coast Line R. Co.*, 373 So. 2d 886, 888 (Fla. 1979).

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The Third District Court's decisions have effectively abolished the cause of action for negligence in the creation of or the failure to repair a traffic control device.

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In proper cases, even intervening conduct which is intentional—even criminal—may be foreseeable, if the defendant should have known that his negligence would create the opportunity for such conduct.<sup>1</sup> Indeed, in cases in which the defendant's negligence is defined by his failure to prevent precisely the type of intervention which took place (*i.e.*, security measures to prevent crime; traffic signals to prevent accidents), it has been held that such intervention must be considered foreseeable as a matter of law.<sup>2</sup> At the other end of the spectrum, an intervening cause was unforeseeable only if it was "highly unusual, extraordinary, or bizarre." *Stahl v. Metropolitan Dade County*, 438 So. 2d 14, 21 (Fla. 3d DCA 1983). *See Palm Beach*

*County Bd. of County Comm'rs v. Salas*, 511 So. 2d 544, 547 (Fla. 1987) ("bizarre, unusual"); *Department of Transp. v. Anglin*, 502 So. 2d 896, 899 (Fla. 1987) ("bizarre"). Thus, as the Supreme Court indicated in *McCain v. Florida Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992), "proximate causation generally must be left to the fact-finder to resolve. . . . [W]here reasonable persons could differ as to whether the facts establish proximate causation—*i.e.*, whether the *specific* injury was genuinely foreseeable or merely an improbable freak—then the resolution of the issue must be left to the fact-finder." In cases too numerous to list, the appellate courts of Florida have held that the intervening negligence of the plaintiff or third parties did not break the chain of causation, relieving the defendant of liability for his preexisting negligence, because a reasonable jury could find that their negligence was foreseeable.<sup>3</sup>

These principles are no different when the original act of negligence is a local government's or utility company's disabling of a traffic signal or its failure to repair a disabled signal of which it had knowledge. The leading decision is *Palm Beach County Bd. of County Comm'rs v. Salas*, 511 So. 2d 544 (Fla. 1987). A county land survey crew working at the intersection had blocked off the left-turn lane with orange traffic cones, "thereby making the vehicle-activated left turn signal a perpetual red light"; it "did not, however, erect any signs prohibiting left turns from the remaining lanes." *Id.*

at 545. An eastbound driver therefore attempted to make a left turn from the open lane, but hit the Salas car coming the other way. The county argued that the eastbound driver's alleged negligence, in asserted violation of a traffic ordinance, relieved the county of liability. Noting that the driver's "alleged violation of a traffic ordinance is merely *evidence* of her negligence," the Supreme Court held that "the county could have easily foreseen that blocking off the turn lane, and deactivating the turn signal and thus leaving motorists with no guidance on if or when they could turn left, personal injury to someone was not a remote possibility. [The other driver's] actions were not so unforeseeable that the county should be relieved, as a matter of law and policy, of all liability." *Id.* at 547. Even if the other driver was negligent, her "confusion at this busy and now more dangerous intersection was not some remote possibility, it was easily foreseeable. The fact that [the other driver] was negligent when she turned left does not render her actions so bizarre, unusual, or outside the realm of the reasonably foreseeable that the county's actions did not also proximately cause the Salases' injuries." *Id.* *Salas* thus is faithful to the general rules of proximate causation and the principle of foreseeability.

In its 1984 decision in *Metropolitan Dade County v. Colina*, 456 So. 2d 1233 (Fla. 3d DCA 1984), *review denied*, 464 So. 2d 554 (Fla. 1985), the Third District Court embarked on a journey away from these established principles. And although the *Colina* holding, when limited to its facts, may present some debatable questions even under existing law, its subsequent extension by the district court cannot possibly be reconciled with existing law.

In *Colina*, stormy weather had caused a power outage at the intersection in question; given ample evidence of notice to the county, it did not challenge the jury's finding of negligence both by the county and by the car which hit Ramon Colina's vehicle, killing his wife, nor the

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jury's finding that Mr. Colina was not at all negligent. In addition, the appellate court acknowledged that the plaintiff had proved actual causation: "Application of the traditional 'but for' test results in a conclusion that the county's omission was a cause in fact of Mrs. Colina's death." *Colina*, 456 So. 2d at 1234. The problem for the district court was proximate causation. It noted that Mr. Colina had complied with applicable Florida Statutes in treating the intersection as a four-way stop; he had come to a full stop at the intersection; and then he had ventured forward. Without expressly questioning the jury's unchallenged finding that Mr. Colina had not been at fault, the district court implied that he must have been negligent, and held that his conduct, coupled with the negligence of the other driver, constituted superseding causes of the accident, relieving the county of all responsibility, *id.* at 1235:

Although he realized the intersection presented a danger and that [the other driver] might not stop, Mr. Colina proceeded across the intersection hoping to beat the oncoming vehicles. He would be expected, as a matter of law, to cross the intersection only when it was reasonably safe to do so. . . . [citations omitted]

Any negligence on Dade County's part simply provided the occasion for the actions of [the other driver] and Colina, which together were the proximate cause of Mrs. Colina's death. . . . Both [the other driver] and Colina could see that the traffic light was not functioning and, by complying with statutory re-

quirements, could have avoided the collision. To hold the county liable on these facts would make it an insurer of motorists acting in disregard of their own safety and that of others. Such a responsibility would be an unwarranted social burden. Finding that reasonable persons could not differ on the proximate cause issue, we reverse the trial court's order denying the county's motion for directed verdict.

*Colina* does not hold directly that Mr. Colina was negligent as a matter of law, thus reversing the jury's unchallenged finding on that question. It appears to hold that whether Mr. Colina was negligent or not, his observation of the malfunction at the intersection, his compliance with statutory regulations in stopping at the intersection, and his decision to venture forward, coupled with the other driver's negligence, all were unforeseeable as a matter of law. Given the Supreme Court's pronouncement that an intervening cause is unforeseeable only if it constitutes "an improbable freak," *McCain v. Florida Power Corp.*, 593 So. 2d 500, 504 (Fla. 1992), *Colina* therefore represents the Third District Court's conclusion that a traffic accident at an intersection at which the signal is inoperative is an improbable freak, whether the drivers involved were negligent or not—at least when one of them appreciates that the light is out and stops before proceeding forward. Although this holding itself is inconsistent with the controlling test of foreseeability—numerous decisions hold that even a negligent plaintiff's conscious appreciation of a danger may be foreseeable by the defendant who created it, and thus does not break the chain of causation<sup>4</sup>—at least it is limited to the particular facts of *Colina*.

Subsequent Third District decisions, however, have not confined *Colina* to its facts. In *Ruiz v. Taracomo Townhomes Condominium Ass'n, Inc.*, 525 So. 2d 445 (Fla. 3d DCA 1988), the district court was willing to assume that the condominium association was negligent in designing the driveway out of which a "phantom" vehicle emerged and hit the plaintiff. *Id.* at 446. Nevertheless, citing *Colina*, the court upheld a

summary judgment for the condominium association, on the ground that "the record conclusively demonstrates that the sole proximate cause of the traffic accident sued upon was the negligence of the 'phantom' vehicle in failing to yield the right-of-way, in pulling into the path of the plaintiff Daniel Ruiz, in forcing the plaintiff Ruiz off the road causing serious injuries to Ruiz." *Id.* at 446. Unlike *Colina*, here there was no evidence that either driver consciously appreciated the danger, or stopped his car, thus assertedly breaking the chain of causation, and then negligently or nonnegligently ventured forward. In *Ruiz*, there was only an intervening act of simple negligence by the other driver, which is unforeseeable (under existing law) only if it is "highly unusual, extraordinary or bizarre," *Stahl v. Metropolitan Dade County*, 438 So. 2d 14, 21 (Fla. 3d DCA 1983)—"an improbable freak." *McCain v. Florida Power Corp.*, 593 So. 2d at 504. Thus, *Ruiz* holds that the negligent designer of a driveway could not foresee that an accident might occur there.

*Ruiz* was followed by *Derrer v. Georgia Electric Co.*, 537 So. 2d 593 (Fla. 3d DCA 1988), *review denied*, 545 So. 2d 1366 (Fla. 1989), in which the district court acknowledged both the power company's "negligence in causing the traffic light to become inoperable," and "that the subject negligence was a cause-in-fact of the aforesaid collision because arguably the female plaintiff would have seen the traffic control signal in question had it been operating, would have realized that she was approaching an intersection, and, consequently, might have avoided hitting the automobile which entered the intersection from her left." *Id.* at 594. Again, therefore, negligence and actual causation were not at issue. The perceived failure of proof was proximate causation, informed here by the jury's assignment of 30 percent comparative fault to the plaintiff:

We conclude, however, that her oblivious behavior in not realizing she was entering an intersection was not a reasonably foreseeable consequence of the defendant's negligence in causing the

traffic light to become inoperable. Surely, inoperable intersectional traffic lights do not, in the range of ordinary human experience, cause automobile drivers to miss seeing the entire intersection where the light is located; such a bizarre occurrence is, in our view, beyond the scope of any fair assessment of the danger created by the inoperable traffic light. This being so, the trial court correctly concluded that the defendants' negligence herein was not a proximate cause of the plaintiffs' injuries.

*Derrer*, 537 So. 2d at 594.

The district court cited *Colina*. It held that notwithstanding that the very purpose of a traffic light is to prevent accidents caused either by negligent or nonnegligent conduct at an intersection, the 30 percent negligence of a plaintiff in entering the intersection without stopping was "such a bizarre occurrence" that no reasonable person could be expected to foresee it. *Id.* It was, in *McCain*'s language, "an improbable freak." *McCain*, 593 So. 2d at 504. And here, too, the facts reach well beyond *Colina*. In *Derrer*, there was no conscious appreciation of the danger, leading the plaintiff to stop at the intersection, thus assertedly breaking the chain of causation, and then to venture forward. Further, in *Derrer* there was simple negligence in failing to appreciate the danger negligently created by the defendant. According to the Third District, that intervening negligence was the sole proximate cause of the injury.

In *Wright v. Metropolitan Dade County*, 547 So. 2d 304 (Fla. 3d DCA), *review dismissed*, 553 So. 2d 1168 (Fla. 1989), the traffic light malfunctioned, displaying either a

continuous red signal or a flashing red signal. The plaintiffs halted, attempted to cross the intersection, and were struck by an oncoming motorist with the right-of-way. Citing *Colina*, the district court affirmed a summary judgment for the county. In *Metropolitan Dade County v. Tribble*, 616 So. 2d 59 (Fla. 3d DCA), *review denied*, 626 So. 2d 210 (Fla. 1993), the car carrying the plaintiff's decedent was hit by a taxicab, whose driver admitted that he knew the red lightbulb on the signal was out, but had proceeded forward because his light was green. He collided with a crossing driver who also had a green light, killing a child. Without disturbing the jury's finding that the county was negligent in failing to repair the light, the district court noted

[T]he cab driver had to treat the intersection as though it were regulated by a four-way stop sign. Thus, the jury's finding places the cab driver in the position of having disobeyed the traffic signals in derogation of his own personal safety and that of the motoring public. Consequently, his actions constituted a separate and unusual action rendering it a superseding and intervening cause of the accident.<sup>5</sup>

The latest decision takes *Colina* slightly outside the traffic signal context. *Clark v. L. & A. Contracting Co.*, 1998 WL 870843 (Fla. 3d DCA Dec. 9, 1998). The district court cited *Colina* in affirming a summary judgment for the contracting company effecting repairs on I-95, over a dissent by Judge Shevin which invoked the preexisting principles of proximate causation in Florida. The

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contracting company had replaced the normal entrance ramp to I-95 with a temporary on-ramp which ended abruptly at its intersection with the expressway. There was no room to merge into I-95, and no sign, other than an ordinary yield sign, which warned of the abrupt entry. Several accidents already had taken place at the intersection, but neither the county nor the contractor had done anything about them. The accident occurred “when a car driven by Mr. Bermudez rear-ended a car on the on-ramp causing that car to careen across the road and collide with the van in which Mr. Clark was a passenger.” *Id.* at \*1 (Shevin, J., dissenting). In opposition to the defendants’ motions for summary judgment, “Mr. Clark submitted expert testimony that in the absence of an acceleration lane rear-end collisions on the on-ramp were a foreseeable result of the improper ramp configuration and the lack of proper warning signs.” *Id.* Judge Shevin disagreed that *Colina* governed these facts, *id.*:

Unlike *Colina*, the record in this case does not demonstrate as a matter of law that the drivers were acting in disregard of their own safety and that of others. The plaintiff-driver in *Colina* observed the nonfunctioning traffic light, appreciated the danger, and stopped his car. That action broke the chain of causation. After stopping, he proceeded to attempt to cross the intersection when it was not reasonably safe to do so. In the case before us, there were no adequate warning signs which would alert a driver to the hazardous condition attending the ramp traffic. In the absence of a DOT-mandated warning sign or a no-acceleration lane warning sign, Mr. Bermudez did not appreciate the danger caused by the ramp configuration: the cars on the ramp would come to a complete stop. Because there is no other event here which would break the chain of causation, L & A is not relieved of liability as a matter of law.

\* \* \*

As the record before the court reveals disputed issues of fact as to proximate causation and the foreseeability of Mr. Bermudez’ asserted intervening negligence, summary judgment is inappropriate.

Notwithstanding that a jury in *Clark* could find that the plaintiff had no conscious appreciation of the danger, did not stop at the intersec-

tion in light of that danger, and was not comparatively negligent, the district court applied *Colina* in holding that his conduct was the sole proximate cause of the accident.<sup>6</sup>

In each of these decisions, the intervening accident, involving drivers who either were not negligent at all or were comparatively negligent, was held not to be a foreseeable result of the very condition which caused the accident. It might be appropriate to compare these decisions with *Palm Beach County Bd. of County Comm’rs v. Salas*, 511 So. 2d 544 (Fla. 1987), discussed at the outset of this article. The county’s survey crew in that case had blocked off the left-turn lane without informing oncoming drivers that left-hand turns from the other lanes were prohibited. The plaintiff consciously appreciated that the left-turn lane was blocked off, but she made a left turn from the other lane anyway, and was hit by an oncoming driver who may have violated applicable traffic regulations, which is evidence of negligence. Nevertheless, “[u]ntil [the other driver] approached

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the intersection she had no notice that a dangerous situation existed.” “Planning on turning left and having no direction from the county as to whether she could do so, [the other driver] became confused and turned when the only operable traffic light turned green.” This “confusion at this busy and now more dangerous intersection was not some remote possibility, it was easily foreseeable.”<sup>7</sup> Thus,

[t]he fact that [the other driver] was negligent when she turned left does not render her actions so bizarre, unusual or outside the realm of the reasonably foreseeable that the county’s actions did not also proximately cause the Salases’ injuries. The county created this danger and confusion and failed to warn the motoring public. It thus breached the duty it owed to the drivers, like the Salases who might be injured. In short, the county’s conduct combined with [the other driver’s] negligence to cause the Salases’ injuries.

*Id.* at 547.

It would be difficult, if not impossible, to reconcile this holding with the Third District Court’s decisions discussed above. Nevertheless, the Third District Court has applied *Colina* to preclude recovery in at least three analogous contexts. In *Colina* itself, and in *Wright*, the plaintiff consciously appreciated that the traffic signal was inoperative, stopped his car, and proceeded forward anyway. He may have been negligent or nonnegligent in doing so. In *Metropolitan Dade County v. Tribble*, the codefendant knew that the traffic signal was inoperative, but proceeded directly through the intersection anyway, without stopping. In *Ruiz, Derrer, and Clark*, in the light most favorable to the plaintiff, the plaintiff had no conscious appreciation of the danger at the intersection, did not stop at the intersection, and either negligently or nonnegligently proceeded forward. In all three scenarios, the district court applied *Colina*, assigning 100 percent of the fault to the plaintiff and the other drivers, on the ground that the defendant, whose admitted negligence also was admittedly a cause-in-fact of the injury, could not reasonably have foreseen the accident which ensued. Even in those

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cases in which the plaintiff and the other drivers were not negligent at all, the district court has held that the defendant who created the very danger which was a cause-in-fact of their collision could not have anticipated that it would take place.

Given these holdings, it is difficult to conceive of a scenario in which a defendant who negligently created or failed to correct an inoperable traffic signal could be held liable for such negligence in the Third District. Whether the plaintiff knows of the danger or not, whether the plaintiff stops at the intersection or not, whether the plaintiff is negligent or not, his conduct, coupled with that of other drivers (who themselves may not be negligent), is the sole proximate cause of the accident. Perhaps there will come a case in which the accident takes place on a dark, stormy night in which the disabled traffic light is totally invisible, or in which the defendant not only has disabled the light but has utterly obscured it, so that no one could possibly see it, in which the district court will permit the assignment of some responsibility to the defendant. In the vast majority of cases, however, the Third District Court's decisions have effectively abolished the cause of action for negligence in the creation of or the failure to repair a traffic control device. In the process, they have removed the incentive for local governments, utilities, and others to take care in their creation of or their failure to repair deadly conditions on our roadways. □

<sup>1</sup> See *Nicholas v. Miami Burglar Alarm Co.*, 339 So. 2d 175, 177 (Fla. 1976); *Holley v. Mt. Zion Terrace Apartments, Inc.*, 382 So. 2d 98, 100 (Fla. 3d D.C.A. 1980); *Werndli v. Greyhound Corp.*, 365 So. 2d 177 (Fla. 2d D.C.A. 1978); *Rosier v. Gainesville Ins. Associates, Inc.*, 347 So. 2d 1100 (Fla. 1st D.C.A. 1977); *Rotbart v. Jordan Marsh Co.*, 305 So. 2d 255 (Fla. 3d D.C.A. 1974).

<sup>2</sup> As the Third District Court itself put it in an earlier regime: "It is well-established that if the reasonable possibility of the intervention, criminal or otherwise, of a third party is the avoidable risk of harm which itself causes one to be deemed negligent, the occurrence of that very conduct cannot be a superseding cause of a subsequent misadventure." *Holley v. Mt. Zion Terrace Apart-*

## The court has held that the defendant who created the very danger which was a cause-in-fact of their collision could not have anticipated that it would take place.

*ments, Inc.*, 382 So. 2d 98, 101 (Fla. 3d D.C.A. 1980). *Accord Werndli v. Greyhound Corp.*, 365 So. 2d 177 (Fla. 2d D.C.A. 1978); *Rosier v. Gainesville Ins. Associates*, 347 So. 2d 1100 (Fla. 1st D.C.A. 1977). See generally W. Keeton, *Prosser and Keeton on the Law of Torts* §43, at 282, §44, at 303-04 (5th ed. 1984); *Restatement (Second) of Torts* §449 & comt. b (1965).

<sup>3</sup> See, e.g., *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *McDonald v. Florida Dep't of Transp.*, 655 So. 2d 1164, 1168 (Fla. 4th D.C.A. 1995); *State Dep't of Transp. v. Brown*, 497 So. 2d 678, 680 (Fla. 4th D.C.A. 1986), review denied, 504 So. 2d 766 (Fla. 1987); *Machin v. Royale Green Condominium Ass'n*, 507 So. 2d 646 (Fla. 3d D.C.A. 1987); *Leahy v. School Bd. of Hernando County*, 450 So. 2d 883 (Fla. 5th D.C.A. 1984); *Loranger v. State Dep't of Transp.*, 448 So. 2d 1036 (Fla. 4th D.C.A. 1983); *Stahl v. Metropolitan Dade County*, 438 So. 2d 14, 22-24 (Fla. 3d D.C.A. 1983); *Crislip v. Holland*, 401 So. 2d 1115, 1117 (Fla. 4th D.C.A.), review denied, 411 So. 2d 380 (Fla. 1981); *McCabe v. Watson*, 225 So. 2d 346 (Fla. 3d D.C.A. 1969), cert. dismissed, 232 So. 2d 739 (Fla. 1970).

<sup>4</sup> "[U]nder the doctrine of comparative negligence, the plaintiff's knowledge of a dangerous condition will not normally bar recovery." *Regency Lake Apartments Associates, Ltd. v. French*, 590 So. 2d 970 (Fla. 1st D.C.A. 1991). *Accord Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Hancock v. Department of Corrections*, 585 So. 2d 1068 (Fla. 1st D.C.A. 1991), review denied, 598 So. 2d 75 (Fla. 1992); *Warren v. State Dep't of Transp.*, 559 So. 2d 387 (Fla. 3d D.C.A. 1990); *Metropolitan Dade County v. Yelvington*, 392 So. 2d 911, 912-13 (Fla. 3d D.C.A.), review denied, 389 So. 2d 1113 (Fla. 1980); *Ferber v. Orange Blossom Center, Inc.*, 388 So. 2d 1074, 1075 (Fla. 5th D.C.A. 1980); *Zambito v. Southland Recreation Enterprises, Inc.*, 383 So. 2d 989, 991 (Fla. 2d D.C.A. 1980).

<sup>5</sup> The irony of the district court's language in *Tribble* should not escape notice. Perhaps the district court is correct that the cab driver should have known that absent a working signal the intersection should be treated as a four-way stop, and thus that the cab driver was at fault. But the district court neglected to mention that the county also knows the same thing. Indeed, it was the county which put a traffic signal at this intersection instead of a four-way stop, which necessarily means that the county thought that the intersection was too busy—too dangerous—to accommodate a four-way stop. The county had *actual knowledge*—not just constructive knowledge—that accidents would likely occur at a four-way stop at that intersection. And yet the district court held that such accidents were not foreseeable by the county, as a matter of law.

It is also ironic that events which the district court thought were unforeseeable in 1984, when *Colina* was decided, were still held to be unforeseeable 10 years later in *Tribble*, even though they have happened over and over again in the interim. Given all of the identical fact scenarios in which traffic accidents have occurred, one would think that the Third District Court at some point would acknowledge what common experience tells all the rest of us—that traffic accidents happen when traffic lights are out. And yet, in case after case, as if ruling in a vacuum, the court continues to hold that events like these simply cannot be foreseen.

<sup>6</sup> In a companion case, *Clark v. Metric Engineering, Inc.*, 1999 WL 247742 (Fla. 3d D.C.A. Apr. 28, 1999), the court affirmed a summary judgment for another defendant, over a dissent by Judge Green, adopting Judge Shevin's earlier dissent.

<sup>7</sup> Note that the foreseeability of the intervening driver's negligence, in the Supreme Court's view, was about as far away from "an improbable freak" (*McCain*) as possible. It was not merely foreseeable; it was "easily foreseeable." *Salas*, 511 So. 2d at 547.

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This column is submitted on behalf of the Appellate Practice and Advocacy Section, Lucinda Ann Hofmann, chair, and Jacqueline E. Shapiro, chair.



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