ORAL ARGUMENT – 1/4/05
03-1128
SANDY DEW ET AL. V. CROWN DERRICK ERECTORS

LAWYER: Paul Dew fell through an unprotected, open hole during the construction of one of the world's largest off-shore oil derricks. To protect the hole in the rig that it was building, Crown Derrick strung a rope across some handrails instead of placing a cover over the hole or a permanent barrier as was required. Why was that negligent? Because the rope was temporary and because the rope could be moved, and because it was not a cover as required. Crown Derrick's only answer to that negligence is to say that the rope was moved and that moving it was a new and independent cause.

MEDINA: Why was the jury charge an erroneous instruction to the jury?

LAWYER: We don't believe the jury charge was erroneous. The jury charge wasn't erroneous because in two different places it talked about causation involving the very actor that Crown Derrick now says was the new and independent cause. But Crown Derrick's answer that there is a new and independent cause in this case and that it was entitled to a different charge is wrong for at least two reasons. First, it's not legally entitled to a new and independent cause instruction under either current Texas law or under the Third Restatement draft. And secondly, it's not entitled to reversal in any event because the lack of that instruction didn't cause any harm.

The court can ask the same question that it did in 1937 in the new and independent cause case called Young v. Massey. And that is, the question of whether the charge is erroneous turns on the question of whether there is evidence to support it? And under both current Texas law and under the new restatement draft, a new and independent cause just is not presented here.

Proximate cause requires foreseeability. New and independent cause requires a complete lack of foreseeability. And the very tender that Crown Derrick made in this case said that it was an action by a new and independent agency that was not reasonably foreseeable. And it was as a matter of law we submit foreseeable that Crown Derrick's rope that was strung across these handrails (and some of the pictures of this kind of rope are in the oral argument handout behind Tab A) you can see what this looks like. And whether this is the rope that was there on the day of the accident or the rope that it strung, any rope across a hole like this is inviting movement, is demanding that it be moved in an open construction site like this building an oil derrick that's 170 feet tall that people have got to walk around. There's a hole in the platform and a rope barrier is not compliant with any of the standards that govern misconduct. It's not permanent. It doesn't have a top, middle and a tow board railing.

OWEN: How do you walk around the hole? It looks like there are guardrails on either side of it. How do you get around the hole at all? Is there another way around? Do you have to go

all the back around the rig?

LAWYER: There's really not. And that's one of the dangerous things about it. You have to come around the corner and turn left as Paul Dew would have had to have done in this case. You have to come around and turn left around this corner, and the hole is really behind that big girder that you see in the pictures.

OWEN: My point is, there are ropes around it but it's not like in a grocery store and there are cones up and you just walk further to the right and walk around. It looks like that the only way you can get to the other side is to reverse course and go all the way back around something. Is that correct?

LAWYER: I think that's exactly right. You would have had to turn around and go completely around the other side, retrace your steps so to speak probably. And in it's very...

OWEN: You can't just step around it?

LAWYER: It's not really clear how he got around it. But I don't think anybody could really - you can step across the hole. It's only 30 inches or 31 inches wide. So you can step across it if you can get past the ropes, or if you can follow any of the ropes, or if the ropes aren't there. And that's the point, is that the hole is there. In any event no matter how long the ropes stayed, the hole is always there. And there is no reason why one of these pieces of braiding that you see on the 2nd page of the exhibit, couldn't have been taken by Crown Derrick and tacked down over the hole, or why it couldn't have gone to the hardware store and bought some bolts or some other hardware that would have been necessary to do something more than just put a temporary rope barrier that was inviting movement from the very moment that it was strung there.

BRISTER: Of course a gate would invite movement in that sense.

LAWYER: The gate in this case was designed to be moved, but it would have been permanent and it would have precluded people falling through the hole.

HECHT: But not if you left it open.

LAWYER: But it's the kind of a thing, as I appreciate the evidence in the record in this case, although I didn't see the diagram. But it seems to me that what this is is some sort of a hinge that's on a hinged opening and can be closed. And so if it's closed it's closed if you have to walk across it. The point is here it could never be closed.

HECHT: It seems to me that if you have a hole 170 feet high that somebody falls through, it's not going to be very hard to argue that whatever was done was not good enough because he shouldn't have fallen through the hole.

LAWYER: I think certainly more could have done. At a minimum something permanent.

HECHT: Then the question is, is there some end of foreseeability? Because if you make a hole in a walkway like this 170 feet high, it just seems to me it's somewhat foreseeable that somebody is going to fall through that hole. Gates, guards, welding, bolts, ropes, whatever you put around it it's a problem up there.

LAWYER: The brackets that the new restatement would put on that is to ask the question, what was it that made this negligent? It was negligent to use a temporary rope. And did the harm that was caused by that negligence is it within the scope of the kind of thing that made it negligent in the first place? In this event we say yes it was. Clearly to put up a temporary rope, to string it across the handrails when it could be moved and to not put a cover down, is somebody falling through that hole the kind of thing that's within the scope of risk of what made it negligent to use the rope in the first place? And the answer has to be yes. The same question on foreseeability. Is it foreseeable that this would happen? The answer is yes. And it must be unforeseeable for there to be a new and independent cause.

HECHT: I guess my point is, isn't it awfully hard to make it unforeseeable? Isn't it awfully hard to have a hole that is something that you can crawl through to get to a ladder, and not have at least a distinct possibility that somebody is going to fall through it and hurt themselves very badly?

LAWYER: No. Another way to ask that question is, isn't it always going to be hard to get a new and independent cause instruction? Well the answer I think is no, not always. If somebody were standing there and Paul Dew walked up to the edge of the hole and they intentionally pushed him in to the hole and he fell through, I'm not sure that that's foreseeable. The intervening act that would be criminal and intentional of the third party perhaps that is unforeseeable.

OWEN: According to the restatement example it's not. I think it gives the example of someone who digs a hole in the middle of the street and someone intentionally shoves them into it. It says that's foreseeable.

LAWYER: It says that that might raise a fact question in certain instances. That's right. But it would be for this court to say in any event under Texas law whether that's foreseeable or not. And this court said in the Pena case, that those sorts of intervening criminal acts are as a matter of law unforeseeable, and are intervening causes and superseding causes as a matter of law. In the Pena case the court said that. In the case of Union Pump v. Albritton, the court said that on producing cause. The court has not had trouble in saying when it is as a matter of law not foreseeable, or when it is as a matter of law an intervening or superseding cause. The court didn't have any trouble saying that all.

HECHT: Would there have been any harm in giving this instruction? If the judge had given it, the jury answered zero, would you have a valid argument on appeal that the judge shouldn't

have given this instruction?

LAWYER: I believe we would, because our position would be that it's conclusively established that it was foreseeable to do this, and that the instruction would have tilted or nudged the jury in the direction of the defendant's case, and that we weren't given the charge that we were entitled to have. It's certainly not harmful to not have given this charge, because look what you have in the percentage question. And if you look behind Tab B of the handout, you will see the very argument that's being made about what the new and independent cause is. It's all about Rowan, who was the owner of the derrick. Rowan did this, and Rowan did that, and Rowan was the intervening cause. And the 6 factors that are in the second restatement that are cited in the Pena opinion are these 6 factors all discussing the conduct of another party who was submitted in the comparative question. And Rowan's conduct was found by the jury to have caused 47% of the injuries.

For Crown Derrick to say when it was only found 20% that it didn't get to talk about Rowan, or it didn't get to argue the new and independent cause is just not true.

BRISTER: So if the new and independent cause is one of the co-defendants in the case, then it's not error to not submit it, or it's error but harmless error?

LAWYER: We wouldn't take the position that you can't have a new and independent cause instruction when a new and independent cause is alleged to be the party. But what we are saying in this case is that the charge took care of that. Under the new restatement, they...

BRISTER: So it would be error but harmless?

LAWYER: I think we could make the argument either way. Either that it is not error to refuse it or that if it is error legally then it is harmless. We could say it either way.

BRISTER: Did the broad form submission apply to inferential rebuttal instructions?

LAWYER: Sure. Cases submitted on broad form often have inferential rebuttal instructions.

BRISTER: Should there be?

O'NEILL: I think what he means is, can you combine all the inferential rebuttal issues into a broad form inferential rebuttal issue?

LAWYER: You could have a charge as long as you want to have. You could have a charge where the plaintiff said, and don't forget that there were breaks in speed and look out ledge. And for the defendant you could allege well new and independent cause, concurring cause, new intervening cause, superseding cause...

BRISTER: But the reason we did broad form was to avoid reversals and trying cases numerous times because of those sweet little things that people arguably should have put in.

LAWYER: That's right. I think you can have constant remands for new trials if you want. But the question is, is that good policy? And we submit it's really not good policy.

HECHT: Isn't the policy that there has to be some limits on liability. And so we don't want just an academic, endless spectrum. And sure you can keep extending it but at this point we're just going to say for the good of the world life is too short, 5% or whatever number that's it.

LAWYER: And the courts made that judgment in the cases I've cited: _____ Siegler case, Albritton, and Pena.

HECHT: Does the scope of the risk formulation do that?

LAWYER: It does a better job we submit than current Texas law.

HECHT: Why?

LAWYER: Because it focuses back on the core issues of negligence, and what made it negligent in the first place? Something that juries understand better, something that we think judges understand better, and something that gets rid of all of these accretions and barnacles that have been put on to the doctrine of what's negligence and what does ___ liability in the correct places.

HECHT: Even finding the percentages, jurors who are lay people and who don't familiarize themselves with these things, need to be sort of coaxed or told, needs to be suggested for them the answer can be zero, the answer could be 100. Just because there is 5 here, doesn't mean you have to split it up 5 ways. These are questions that lay people ask that the charge needs to speak to it seems to me.

LAWYER: But did the charge fairly do it in a way that gave all the parties the right to have their case submitted? And that's the question of the harmfulness. And clearly it's not harmful if they got to talk about Rowan. And they did. And that's in the charge. And in the new era of comparative responsibility there is just no place for all of these inferential rebuttal submissions, especially not in a broad form world.

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RESPONDENT

YORK: The two issues raised by petitioners in this case have at least one thing in common. They both ask this court to turn its back on established precedent in Texas negligence law.

OWEN: Most of the cases that both of y'all cite deal with the pre-comparative

responsibility rule. And particularly the more recent amendments where you can submit non-party's negligence. It seems to me that maybe there is some overkill here if we continue to put in inferential rebuttal issues and comparative responsibility charges.

YORK: The reason that I think that we are dealing with two different things goes to the very definition of what an inferential rebuttal issue is, which is something that negates a specific and essential element of the plaintiff's cause of action. In this situation a new and independent cause goes to negate the idea of proximate cause, which is subsumed in the first question that is submitted to the jury. The way that this jury was charged was, did the negligence of any of the following parties proximately cause the injuries in question? And so the inferential rebuttal issue of new and independent cause goes directly to negating that element of proximate cause.

But the petitioners are arguing is that we should subsume those inferential rebuttal issues into the comparative question, which is question 2. There are several problems with that, but foremost is that under current Texas law we did not submit to the jury the idea of comparative negligence. We submit to the jury the idea of comparative responsibility. In other words, we ask in question no. 2, of the parties that you have found to be negligent in question no. 1, apportion the responsibility of those parties for the injury in question.

OWEN: It seems like you are getting two bites to the apple already in this charge on causation, because it seems to me you could argue on question 1 that we were negligent, we will concede that we should put something other up than rope. But our negligence did not proximately cause the occurrence because Rowan did all these things afterwards. You can argue that on 1. And then again on 2 you could say, Well even if you find that we were negligent, what we did didn't attribute to any at all to the occurrence in question. Essentially you've got ample opportunity particularly where all the actors who were allegedly negligent are in here to say no. Put it off on Rowan, not on us. And why do you need what might be a nudge and have one more clue to the jury that you can zero out one of these defendants?

LAWYER: I think the problem here is that there were no nudges to the jury. There was no proper charge of the law to the jury. J. Hecht pointed out, that it's a problem if you are asking the jury, for example on this question to say, yes, that Crown Derrick was negligent in question no.1 but answers zero percent as to the apportionment of responsibility. It's counter intuitive to what the jury has just found on question no. 1. Especially if there is no instruction from the court that instructs the jury that they are allowed to find that. Secondly, returning to the first part of that question, which is don't we get to argue that under the first question in terms of well even if were negligent we still weren't the cause. We didn't get to argue that with the strength of a proper charge from the court. In fact, that's what new and independent cause specifically would have allowed Crown Derrick to argue to the jury.

HECHT: I don't understand why. You say you can't argue with the strength of the charge from the court. But there is going to be a general instruction about cause and you can get up there and say we couldn't proceed _____.

LAWYER: Except that the inferential rebuttal issue again goes to say - to _____ situation where Crown Derrick can say, even if you find that we were negligent there still was no proximate cause. We could not have been the proximate cause because of this new and independent cause.

O'NEILL: Are you saying that even if it's foreseeable, there can be a new and independent cause?

LAWYER: No. We concede that current Texas case law requires that for new and independent cause to be applicable it cannot be something that was foreseeable. For example in your opinion on Pena, this court addressed the 6 factors that would be looked at for foreseeability. In other cases such as Bell v. Campbell this court has also dealt with the foreseeability question dealing with injuries in kind and foreseeability issues such as that.

I want to point the court's attention to a specific opinion from the Dallas court...

OWEN: But the charge does specifically say, in order to be a proximate cause the act or omission complained of must be...it takes foreseeability into account doesn't it?

LAWYER: It takes foreseeability but it does not include the idea that there could be a causative break.

OWEN: It said would have foreseen.

LAWYER: Yes.

OWEN: And so you are free to argue that, Look, we never foresaw that Rowan would untie these ropes. You can argue that to the jury. Why do you need another instruction that emphasizes that?

LAWYER: We're not arguing on foreseeability, because we agree that again under current Texas law in order for us to be entitled to a new and independent cause it must be something that was not foreseeable. Our argument is that new and independent cause goes to negate the causation element. It's a causal break instruction. It instructs the jury that even if you find that Crown Derrick was negligent in the actions that it took up till August 28 when it tied the ropes up to barricade this hole that was in the platform, you can still find according to the instructions of the court that that was not the cause of the injury that was suffered by Mr. Dew.

O'NEILL: I cannot get my mind around that argument. How would you be negligent by putting a rope up, but for it being foreseeable that it could be removed? What's the negligence factor at all?

LAWYER: I would concede that when you put a rope barrier up, it is certainly possible

that someone could potentially come and take that rope down. But as the Dallas CA in Coleman held, what's not foreseeable is that when you leave a barrier such as that, when you leave a condition, and you advise someone who is responsible and in charge of the work site of the dangerous condition, what is not foreseeable is that if the condition becomes dangerous that they will take no action to correct it.

OWEN: That applies to you too. You had an obligation to make this safe, which you admit. You say you did so by putting up the rope. And the evidence appears to be that the space could be spanned by stepping over it, and that you can't just simply walk around it. So doesn't it seem foreseeable that average workmen up there who want to get to the other side in a hurry are going to take this rope down and try to step over it and might fall through?

LAWYER: Actually what the evidence supports in this record is that the rope barrier that was erected by Crown Derrick is significantly different from the pictures that have been provided to you.

OWEN: But even with the rope barrier you put up isn't it foreseeable that someone, a workman, would untie it and try to span the gap by walking across it?

LAWYER: Potentially so. But again we return to the idea of how foreseeability in a situation just as this has been addressed by the Dallas CA. And in fact it's specifically addressed in the Restatement Third of Torts that petitioners are arguing should be applied here. Even in the Third of Torts it is acknowledged that when a condition exist on a premises that has been safeguarded and then something happens afterward to make it unsafe, and the person who is responsible...

OWEN: But see you're arguing that you safeguarded it. And that goes to negligence not proximate cause. That is, I think, is what J. O'Neill and I are asking about. If the negligence is that the rope barrier you erected in the first place was not adequate, then you have not adequately safeguarded it. It's a question of negligence.

LAWYER: That goes to the whole heart of the necessity for the new and independent cause. Because we did have the opportunity to argue at trial that by erecting the double rope barrier that the evidence supports would have prevented anyone from walking in to the hole as Mr. Dew did. We were able to argue to the jury that there was no negligence on Crown Derrick's part. What we were prevented from arguing is that even if the TC found that those actions were negligent, it couldn't have been the causal effect of the injury because of all the activities that occurred subsequent to that.

JEFFERSON: You say you were prevented from arguing on proximate cause. How did the absence of this instruction prevent you from making that argument?

LAWYER: We certainly did the best that we could with the bad hand that was dealt to us and tried to argue around this issue as much as possible. What we were actually deprived of was the

court's charge that properly charged the jury as to the law applicable to the facts of this case. And as this court held in Crown Life v. Casteel, it is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law. That statement is supported once again in Harris County v...

O'NEILL: I'm struggling here. Tell me what you would have argued to the jury was the new and independent cause? Was it someone taking the rope down, or was it the fact that if someone took the rope down, that someone else wouldn't have had a backup there?

LAWYER: It was a series of events. And I do need to make one factual distinction. The evidence in the record does support that there is at least one activity that occurred that no one is clear who did it. And that was the first act of taking the ropes down that Crown Derrick had erected. There is nothing in the record that says that Rowan did that. So to the extent that there is an issue whether the actor that's in the new and independent cause is a party to the action or not, there is certainly evidence to support that someone other than a party to this case took the ropes down.

BRISTER: But y'all blamed in on Rowan.

LAWYER: We certainly blamed a lot of things on Rowan.

BRISTER: Your closing argument says it's 90% Rowans fault if you find there's not a rope there, because Rowan let it be taken down.

LAWYER: That's certainly true.

BRISTER: And Rowan wasn't there in closing argument. Right?

LAWYER: That's correct. They had already settled.

BRISTER: So nobody for Rowan says, No, that's not true. So how were you prevented from arguing it's not our fault when you say it's Rowan's fault if you find there was no rope there and nobody from Rowan says otherwise?

LAWYER: We return to the idea that it's fundamental error as this court has found. We have a fundamental right to ____ jury properly charged.

OWEN: You said that at the beginning. The problem with this is it doesn't nudge the jury. And that's my question. Are you entitled to a nudge particularly under comparative responsibility where you've got all the people that could possibly have been at fault in the charge? The jury is asked, did the negligence proximately cause? If so, how much of their negligence proximately caused? It seems like you've already gotten two bites at the apple. Why do you need a nudge?

LAWYER: Again, we're talking about two very different apples. One is the liability question; one is the comparative responsibility question. But we're not asking for a nudge or asking as this court has consistently held is only what we are entitled to, which is to receive a verdict from a jury that has been properly charged on the law as presented by the facts of that case.

O'NEILL: I'm unsure what you claim the new and independent cause is. If it's someone removing the rope, isn't that the very basis of the negligence claim that you put up something that could be so easily removed and that's why OSHA requires a higher standard. That someone took the rope down seems irrelevant to me.

LAWYER: There is disputed evidence in the record whether the ropes that were tied by Crown Derrick did in fact meet the OSHA standard. And we offered testimony that they did. But again, we're not talking about just the ropes having been taken down. There is a series of events that occurred. The ropes are taken down, an electrical junction box is placed over the hole, it's removed, and then a single rope barrier is tied across the hole that is a ___ rope barrier. And then there is even evidence that by the time of Mr. Dew's fall, he fell. Now the more important evidence that is also included in the record...

O'NEILL: But all because you're alleged not to have properly secured it in the first instance.

LAWYER: No. I don't agree with that. Because the evidence in the record is that we did properly secure it. Could we perceive that maybe someone would have taken it down? But I think that misstates the foreseeability question here, because the other evidence in the record is that only 1 week before Mr. Dew's accident, Robert Rimlinger who was Rowan's supervisor on the rig, was up on the rig. This was after a time that Crown Derrick's ropes had been removed, that the other changes had happened to the hole, and that now there was a single slack rope barrier that was slung across the hole. And the evidence was that Mr. Rimlinger saw that condition of the hole and did absolutely nothing to properly barricade the hole, and further did nothing to warn the workers who were going to be present up there. And under the Coleman case from the Dallas CA and under the Restatement Third, if that's the direction that this court chooses to take, that is not foreseeable. It is not foreseeable that once Crown Derrick turned control of the rig over to Rowan, and told Rowan specifically, we do not have the hardware necessary to hang the safety gates that would protect this ladder opening. This is not an opening that normally would be one that would be intended to be stepped around. This was a planned opening in the platform intended for a ladder to come up through it. So it was always intended...

OWEN: I want you to explain that for the record, because it was unclear to me. I couldn't tell that once the thing finally finished, there would be a ladder beneath it and you would open a gate. How would this look if it had been finished out like it was supposed to be?

LAWYER: My understanding is that there was never intended to be a latch that would raise up from the floor. What was intended that you would come up the ladder into the hole and

there would be gates on either side of the hole as you came up. One of those gates would open. So that as you climbed the ladder you would open the gate and step on to the platform.

OWEN: What if you just want to walk down the ramp and you don't want to go up the ladder. What do you walk on in this space with the ladder there?

LAWYER: There are two ladder openings on this platform. So it would access all the way around the platform depending on which ladder you took up and which way the access gate was.

HECHT: You were never supposed to walk through it?

LAWYER: No.

OWEN: That's my question. Is this just like a thing that normally you would loop around the ladder just off to your right and you walk by it, or is supposed to be a permanent barrier where you don't go beyond that barrier unless you are going up and down the ladder?

LAWYER: My understanding is it was never intended to be something that was stepped around. It was intended to be a ladder opening into the platform. And design wise it would make sense that was why there were two of these on this top platform to allow full access to the platform.

I don't want the foreseeability issue to be misstated. Because it's not foreseeable that given the fact that Mr. Rimlinger was on the platform less than 1 week before this accident, and knowing that this was a danger unlike anything that Crown Derrick had left when it left the job site, that he took absolutely no actions to protect this.

OWEN: Is your position that it doesn't matter how good or bad your original barrier was, you were entitled to a new cause because of the egregiousness of the subsequent actions?

LAWYER: That is correct. We believe it goes to two separate issues.

OWEN: So whether you were negligent or not in tying the original barrier has no bearing in your view on whether you were entitled to this instruction?

LAWYER: That's absolutely correct. Because the nature of a new and independent cause would allow us to say to the jury with the court's specific instruction: The court has instructed you that even if you find that we were negligent in someway up to August 28 in leaving these rope barriers, let's assume negligence, we still have no liability in this case because there is no proximate cause. Because as proximate cause would be defined, if in fact a new and independent cause was submitted, proximate cause would say, proximate cause is a cause unbroken by any new and independent cause. And the new and independent cause would be a separately defined term for the jury. The fact of the matter is, Texas case law is clear on at least one point, and that is, as even conceded by the petitioners, if the evidence in the case supports the submission of the inferential

rebuttal issue of new and independent cause, and if the TC refuses to give that definition, then a party has been deprived of its right to have the jury properly charged on the law. And that is specifically important under this court's line of cases, such as Casteel and such as Harris County v. Smith. Because in this case this court and no other appellate court has the opportunity to review the jury's verdict in such a way as to determine that the jury's negligence finding was based upon a valid theory. Because if the evidence supports new and independent cause, and if new and independent cause was not submitted such the jury understood that there could be a causal break, then its finding of a yes as to the negligence of Crown Derrick may be based on an invalid theory.

JEFFERSON: So what is it that is not foreseeable? That the supervisor would see the problem and not correct it, that's what's not foreseeable?

LAWYER: I think that certainly is the primary foreseeability argument. And the problem with this as J. Hecht pointed out, was that we're talking about a hole that was designed to be in the platform. In petitioner's argument they said, well they didn't do anything to permanently cover this hole. This hole was never intended to be permanently covered.

OWEN: But it was never intended to be walked over either. That's what we're trying to figure out here. What was it intended to be?

LAWYER: And the evidence in the record is that the rope barrier that was left by Crown Derrick would have prevented anyone from walking across the hole.

OWEN: But you just got through saying that doesn't matter to your argument.

LAWYER: Correct. I was just trying to respond to your inquiry.

O'NEILL: So you wouldn't have had to have done anything?

LAWYER: Taken to its logical extreme...

O'NEILL: Even though you agreed to protect the hole and all of that, you would have no liability if you had done nothing?

LAWYER: That is the very definition of new and independent cause, that our negligence had come to a rest or that it did nothing more than furnish the condition that led to the possibility of plaintiff's actions. That's how this court has time and time again defined the idea of new and independent cause. So taking your factual scenario, you are absolutely correct. It's taking it to an extreme and it certainly would make Crown Derrick look a lot worse in this case. But if in fact there was a causal break, if in fact there were actions that were taken by another party subsequent to the time that Crown Derrick had left the job site that operated to prevent the...

JEFFERSON: And the action taken by the party is non action?

LAWYER: That's correct. And to the Restatement Third and the Dallas CA that I cited, both specifically say that it does not necessarily have to be an action by a third party. It can be an omission.

O'NEILL: So if only Rowan was in there, would they be entitled to new and independent cause for your failure to put the gates up?

LAWYER: Yes. I don't think that there is anything in Texas law that would support the idea that once a party is named to a lawsuit as a defendant, that they lose the right to any causal break instruction. That's really what petitioners have argued here. New and independent cause is very different for example sole proximate cause, which by definition applies only to actions of a party who is not a party to the lawsuit. New and independent cause has never been so defined in Texas.

OWEN: But would Woolslayer be entitled two? One saying that you can look at what Crown Derrick did, and you can look at what Rowan did as new and independent causes.

LAWYER: No. Because new and independent cause is not so narrowly defined. New and independent cause is defined in general terms. And specifically the instruction that was requested, defined a new and independent cause as it means the act or omission of a separate and independent agency not reasonably foreseeable that destroys the causal connection if any between the act or omission inquired about in the occurrence in question and, thereby, becomes the immediate cause of such occurrence. So there would be no need for specificity of two new and independent causes. But under this court's precedential law guaranteeing parties a fundamental right to receive a verdict based upon a jury's proper charging with the law...

O'NEILL: You're talking about but for causation, which is concurring cause. You're saying but for Rowan's failing to do something, this wouldn't have happened.

LAWYER: The definition of ____ from the PJC refers to is something that destroys the causal connection.

OWEN: But the jury could have interpreted that to apply to you, to Woolslayer and to Rowan. Is that correct?

LAWYER: That's potentially correct. It's not specifically defined as to the party.

OWEN: So it wasn't limited to just your or to Woolslayer. They could have decided that Rowan too, there was some independent cause as to Rowan as well.

LAWYER: That's correct. The jury was charged with one charge and this...

OWEN: I'm talking about requested instruction.

LAWYER: That's correct. Woolslayer actually requested the instruction as well, and I believe that they preserved their objection. They are not obviously a party to this appeal. But both Woolslayer and Crown Derrick had requested and submitted this instruction on new and independent cause.

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REBUTTAL

POWERS: I would like to discuss three issues, three which have been addressed in many of the questions. The first is, what will trigger even under the current PJC, the new and independent cause? And we've heard a number of things. Mainly it was so egregious by Rowan and things of that sort. What the current instruction says is that foreseeability is what triggers a new and independent cause instruction. Just under the current PJC. Look at why they are negligent. They are negligent because it was temporary and could be taken down and not put back up. That's why Crown Derrick was negligent. If that negligence was to prevent some other kind of a foreseeability event of something happening, we don't know what they are. That's exactly what happened: was why the jury found that they were negligent , that it was temporary and it could be moved. And it is in my view impossible to think of any other kind of reason for it to be negligent.

So why they were negligent is exactly what happened. Under the new restatement that's the approach. Under current nomenclature, under foreseeability and proximate cause that's the approach. Foreseeability is the standard there. And the jury was asked that question, not just in the breach issue. The jury was asked that question in the proximate cause issue. Was this a foreseeability result? It asked the exact same question as the new and independent cause question. So it is redundant. And these little incrustations ought to be, and the new restatement says they ought to be reevaluated and taken out of the law. They are asking the same question.

MEDINA: When would it be proper to submit a new and independent cause instruction?

POWERS: Under the restatement and in my view both for reasons of not incrusting the charge with repetitive questions. It can be confusing because the jury thinks when then asked about foreseeability and proximate cause were being asked something else, we're supposed to be doing something different here. And it's the same question.

In the old days it would be given when the evidence raised the question that somebody was negligent. For example, rear ending a car. The person whose car is rear ended gets out, goes to a telephone to call in for a mechanic and gets murdered. Now that series of events is not the foreseeable kind of thing we think is going to happen because somebody gets rear-ended. And that's an unforeseeable consequence of that rear-end accident. He happened to involve an intervening cause. And under the current PJC that would be the kind of case that would be a new and independent cause.

Here, the very thing that they are claiming is a new and independent cause is

the very reason this was foreseeable negligence in the first place.

OWEN: Well the restatement example, the excavation in the street that someone creates and then a woman pushes the guy in there purposefully. And under the restatement example the person who created the hole would be liable. Now how do you square that - why wouldn't you be entitled to a new and independent cause instruction, or as a matter of law new and independent cause under Texas law?

POWERS: Well if they are intentionally pushed in - it's similar if I spill some gasoline on the ground. That somebody might inadvertently throw a match into it is part of the foreseeable risk that is part of the scope of liability, that an arsonist would come up and use that occasion to purposefully...

OWEN: But the restatement seems to say the opposite. And y'all are saying we've got the restatement and the restatement seems to say that even if you intentionally push someone in the hole the person that created the hole was liable.

POWERS: No. I think the example says it would be - it might be a fact question.

OWEN: Why would it be a fact question?

POWERS: Because sometimes you create risks where it might be foreseeable that there are criminals around and would do intentional acts. If it were under circumstances where it was no reasonable act could differ as to whether it was an arsonist...

OWEN: What if there had been horseplay on the ramp that day and a fellow worker had thrown him down the hole. What would be the circumstances - how does that all work out here?

POWERS: I think that would raise a proximate cause question. I still would not submit new and independent cause because it's duplicate of the proximate cause question.

JEFFERSON: Well you would never submit new and independent cause...

POWERS: I think we would win this case either way. I think for the reasons J. Brister is pointing out and the reasons that were not post comparative, I think the new and independent is a confusing barnacle on the law. It ought to be cleaned up and that's what the restatement...

OWEN: Would you suggest to us that the way that we should deal with my example. Let's suppose everybody had done exactly what had happened here except that for reasons that were not clear, the hole was opened and a worker intentionally pushed Mr. Dew through it. Now would you handle that in this court say as a matter of law that's a new and independent cause based on its evidence, or take it away from the jury, or would you just submit it to - how would you handle that?

POWERS: If there was no evidence of criminal behavior by people around the derrick, then I think just like this court did in Lear Siegler and Union Pump, that as a matter of law I would say that that's no proximate cause. But you don't need a new and independent cause submission...

OWEN: That's my question. Are you suggesting the court handle those situations where either there is clear evidence of independent cause or not. And if there is, is it so clear as a matter of law, otherwise let the jury just decide it?

POWERS: Correct. And here it is so clear the proximate cause as a matter of law. But in any event, you can do all of that as the court did in Lear Siegler, as the court did in Union Pump. There was producing cause rather than proximate cause. We can do all that within the proximate cause instruction and fact finding. You don't need a new and independent cause instruction.

WAINWRIGHT: What were your other two points?

POWERS: I would like to pick up on the reason the restatement in §34 Comments C & D characterizes new and independent or superseding causes as a holdover from the pre-comparative negligence days. When there was joint and several liability on every single actor who was at all involved, and there was contributory negligence in the absolute part, was an all or nothing approach, and it was important to have doctrines that pointed to the really culpable people as opposed to the more tangential culpable people, once we've gone to comparative negligence the comparative instructions and comparative findings can do that. And we don't have joint and several liability. So the historical source of this idea of superseding causes and new and independent causes goes back to that all or nothing approach. And there is no need for it.

There are two cases we can provide you with cites on them. A case out of the 5th circuit, Campbell written by J. Jones; and a 7th circuit case, the Justice case, and we will provide the court with cites to those, written by J. Possner, who say exactly the same thing. That in post-comparative there is no need for a new and independent or superseding or special doctrine that the regular proximate cause instructions along with the comparative finding.

O'NEILL: Has any other courts, any other states adopted the scope of liability concept under the restatement?

POWERS: The nomenclature. Not that I know of. Although it is pretty new.

HECHT: So new it hasn't even been adopted.

POWERS: It's been adopted by the membership. It hasn't come out of a final draft. The nomenclature part is to get around this idea of leaks in the chain of causation, breaks in the chain of causation, incurring causes, new and independent causes. Those terms are just conclusions and they don't provide the jury with any help at all.