

ORAL ARGUMENT — 2-9-99
97-0900
PHAN SON VAN V. PENA

SHANK: I represent P-One Food store. P-One seeks reversal of the decision of the CA because there was no general issue in this case as to either cause and fact of foreseeability arising out of the negligence alleged against P-One Food.

The questions to be answered by this court today are as follows: Does the superceding criminal act of an off-site capital murder negate the proximate cause element of a negligence claim against a convenient store owner under dram shop liability theories? No. 2: Is a capital murder an injury of such a general character as to be anticipated when selling beer to individuals either 17 or 18 or legibly to be intoxicated? No 3: Is evidence of a superceding cause involving a criminal act such as capital murder, which involves an elevated men's _____ an aggravated intentional conduct such as to be sentenced to death by lethal injection sufficient to negate proximate cause? No. 4 and relatedly: What is the definitional coverage of superceding cause in connection with a capital murder, such that once it negates proximate cause, is it then the burden of the respondent to a motion for summary judgment to come forward with some evidence of foreseeability? Next, and on a different tack an issue that was not addressed by the CA: Was the alleged negligent conduct in question a substantial factor in bringing about the capital murders in question at a distant location hours after the alleged sale of the beer? Second, can the negligence in question be the cause and fact where there was - and the record is very clear about this and even the CA found that there was a chance encountered by the victim with their assailants, does that in that circumstance rebut a but for analysis?

Now the court has to address an issue here that has some public policy overtones. As the court will recognize, a limits of proximate cause analysis necessarily mandates weighing the public policy considerations of when one party can be responsible for the conduct of another party?

ENOCH: Does the court have to conclude as a matter of law that the commission of a crime is a superseding cause to get to the point that you say that the plaintiff had - the burden shifted to the plaintiff on summary judgment to bring forth evidence that raises fact issue on it?

SHANK: I don't believe it has to, although it is certainly a basis upon which to make this decision.

ENOCH: The plaintiff argues that the posture of this case is essentially you're saying that's what we must do because all of you introduced summary judgment was that there was a crime that occurred?

SHANK: I think that's belied by the record when you look at - even the CA found that

there was chance and counter that occurred in _____ locations, that it was not on the premises of P-1 Food store. There was substantial evidence to show...

HANKINSON: But the only proof that you offered in support of your summary judgment motion were the indictments and the conviction?

SHANK: That's not correct. The criminal transcript was also in the record.

HANKINSON: But everything that was associated with the criminal proceeding, you didn't put on proof of anything else?

SHANK: No, we did not.

HANKINSON: And the CA's decision in fact turned on a question of summary judgment procedure under the old rules before the no evidence rule, correct?

SHANK: Yes.

HANKINSON: And they decided that you did not meet your burden under the old summary judgment rule to establish the absence of proximate cause as a matter of law?

SHANK: No. What they found was that we didn't meet our burden to negate foreseeability, which is an element of proximate cause. If you go back to the *Leer Segler* and the *Doe* cases and *Alberton v. Union _____*, you still have to show that the acting question was a substantial factor in bringing about the negligence.

HANKINSON: But the plaintiff were the respondent to a summary judgment motion under the old procedure before the no evidence procedure was adopted had no burden whatsoever under a summary judgment until you met your burden to negate the element as a matter of law?

SHANK: I agree, but I also think the definitional coverage of superseding cause - if the court will go back and look at the definition of superseding cause in the restatement of torts §440, and what that says is: Superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which antecedent negligence is a substantial factor in bringing about. So what it assumes is cause and fact and proximate cause. And what it says is, it's in the nature of an affirmative defense which we demonstrated as a matter of law that there was no general issue of material fact but that a capital murder had occurred. And all we're saying is that in this context that they then had to come back and offer some evidence of foreseeability in order to go to trial and not have the case dismissed on summary judgment.

HANKINSON: Didn't you have to negate foreseeability as a matter of law before the burden shifted to the plaintiff to raise a fact issue on that element?

SHANK: Yes. And by proving superceding cause by definition as defined in §440, the Restatement of Torts, I believe we did that.

GONZALEZ: Would your answer be different if the crime had been say a DWI, where the intervening criminal activity was foreseeable?

SHANK: Yes.

GONZALEZ: The sale of alcoholic beverages?

SHANK: Yes. And I think you need to draw a distinction between the zone of danger, which arises out of the alleged negligence. In this context, and I think if the court will go back and look at the 5th circuits decision in the *Skipper* case, they drew that very distinction. The *Skipper* case dealt with a premeditated murder that occurred on-site. And it was alleged that the individual was sold beer or alcohol or whatever repeatedly after he was already intoxicated. And the 5th circuit held as a matter of law, that the premeditated murder was a superceding cause and distinguished that case from an involuntary manslaughter case