

# IN THE SUPREME COURT OF TEXAS

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No. 03-1128

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SANDY DEW, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF PAUL DEW, DECEASED, AND CARL DEW AND DORIS DEW, PETITIONERS,

v.

CROWN DERRICK ERECTORS, INC., RESPONDENT

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE NINTH DISTRICT OF TEXAS

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**Argued January 4, 2005**

JUSTICE MEDINA delivered a plurality opinion, joined by CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, and JUSTICE WAINWRIGHT.

JUSTICE BRISTER filed a concurring opinion, joined by JUSTICE WILLETT.

JUSTICE JOHNSON filed a dissenting opinion, joined by JUSTICE HECHT and JUSTICE GREEN.

The issue in this wrongful death and survival action is whether the trial court erred in refusing to submit an inferential rebuttal instruction on “new and independent cause.” A divided court of appeals reversed and remanded for new trial, concluding that the trial court had erred in failing to submit a new and independent cause instruction because the evidence raised the issue. 117 S.W.3d 526, 537. We do not agree that the evidence in this case required the submission of this additional

instruction, therefore we reverse the court of appeals' judgment and remand for that court to consider the other issues raised in the appeal.<sup>1</sup>

## I

Paul Dew fell to his death through an opening in an oil derrick platform. The derrick was under construction at the time of the accident, and the key dispute at trial concerned who was responsible for the inadequately protected hole left in the platform. The jury concluded that the derrick's owner, Rowan Companies, Inc., its designer, Woolslayer Companies, Inc., and its erector, Crown Derrick Erectors, Inc., were all responsible and apportioned fault among them.

The derrick is known as the Gorilla V, a multi-tiered offshore drilling rig designed by Woolslayer for use in the North Sea. It has working platforms set at varying heights, including a fourble<sup>2</sup> platform set approximately eighty-eight feet up the derrick. Two openings in this platform allow for ladders that are required for such rigs. Woolslayer's design required safety gates to be erected around the ladder openings to prevent a person from falling through the opening.

Rowan hired Crown Derrick to erect the Gorilla V derrick from parts manufactured and supplied by Woolslayer, and construction began in March 1998. While assembling the ladders, Crown Derrick discovered that it did not have some of the necessary parts for installing the safety gates around one of the ladder openings in the fourble platform. Rowan's construction manager was

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<sup>1</sup> Having found error in the court's charge, the court of appeals did not consider Crown Derrick's other issues concerning the sufficiency of the evidence and the computation of the judgment under Chapter 33 of the Civil Practices and Remedies Code.

<sup>2</sup> "A stand of drill pipe consisting of four lengths." WEBSTER'S NEW INTERNATIONAL DICTIONARY 997 (2d ed. unabridged 1954).

told about the missing parts, and he notified Woolslayer.

By August 1998, Crown Derrick had virtually completed assembly of the derrick, but was still missing some parts for one of the safety gates. Crown Derrick left the job site on August 28 without having installed the safety gates around one opening on the fourble platform and the ladder for that opening. Before leaving, Crown Derrick placed two ropes around the otherwise unprotected and obviously dangerous opening. The ropes were tied across the platform's railing as a means to block the walkway and prevent a worker from simply walking into the opening unaware.

On September 22, 1998, Crown Derrick returned to complete its work, but a crane it needed to install the ladder was not working. Crown Derrick also asserts that it still did not have some parts for the safety gates and so nothing was accomplished that day. Apparently, no one with Crown Derrick ascended to the fourble platform to inspect the condition of the double-rope barricade it had left the month before to secure the opening. The next day, Paul Dew, an employee of one of Rowan's associated companies, was working on this platform and fell through the opening to his death.

The double-rope barricade was not maintained while Crown Derrick was away from the work site. At some point, an electrical junction box may have been used to cover the opening, and still later, a single-rope was used to guard the opening. No one actually witnessed the accident, and a dispute exists whether even the single-rope barricade was in place on the day Mr. Dew fell.

After the accident, Paul Dew's wife and parents sued Rowan, Woolslayer, and Crown Derrick. Their wrongful death and survival action was tried to a jury which found that the negligence of all three defendants contributed to cause Mr. Dew's death. The jury also awarded damages, apportioning responsibility as follows:

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|----------------------------|-----------|
| ROWAN COMPANIES, INC.      | 47%       |
| WOOLSLAYER COMPANIES, INC. | 30%       |
| CROWN DERRICK ERECTORS     | 20%       |
| PAUL DEW                   | <u>3%</u> |
| TOTAL                      | 100%      |

The trial court rendered judgment on the verdict.

Only Crown Derrick appealed, complaining among other things that the trial court had erred in refusing to submit a jury instruction on new and independent cause. Agreeing that this instruction was necessary and its omission harmful, the court of appeals reversed the judgment against Crown Derrick and remanded the Dews’ claims against it for a new trial. The court concluded that an instruction was needed because a fact question existed as to “whether any intervening act occurred, and was an unforeseeable new and independent cause.” 117 S.W.3d at 537. One justice dissented, questioning whether there was any evidence upon which a reasonable jury could conclude that the intervening acts were unforeseeable, but also questioning whether any subsequent forces intervened to alter the consequences of Crown Derrick’s original negligence. *See* 117 S.W.3d at 537 (Burgess, J. dissenting).

## II

A new and independent cause is one that intervenes between the original wrong and the final injury such that the injury is attributed to the new cause rather than the first and more remote cause. *Robert R. Walker, Inc. v. Burgdorf*, 244 S.W.2d 506, 509 (Tex. 1951); *Phoenix Ref. Co. v. Tips*, 81 S.W.2d 60, 61 (Tex. 1935). An intervening cause thus supersedes the defendant’s negligence by

destroying the causal connection between that negligence and the plaintiff's injury thereby relieving that defendant of liability. *See generally* 1 JAMES B. SALES AND J. HADLEY EDGAR, TEXAS TORTS AND REMEDIES § 1.04[4] (2005). It is one of a number of inferential rebuttal defenses that “operates to rebut an essential element of the plaintiff’s case by proof of other facts.” *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429, 430 (Tex. 2005); *see also* COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES--GENERAL NEGLIGENCE & INTENTIONAL PERSONAL TORTS PJC 3.1-3.5 (2003) (inferential rebuttal instructions). The instruction’s purpose is “to advise the jurors, in the appropriate case, that they do not have to place blame on a [particular defendant] to the suit” if the true cause for the accident lies elsewhere. *Dillard*, 157 S.W.3d at 432 (citing *Reinhart v. Young*, 906 S.W.2d 471, 472 (Tex. 1995)). The instruction is necessary when the evidence in the case raises a fact issue on new and independent cause. *Dallas Ry. & Terminal Co. v. Bailey*, 250 S.W.2d 379, 384 (Tex. 1952); *Young v. Massey*, 101 S.W.2d 809, 810 (Tex. 1937).

As in the court below, the parties here generally disagree about whether evidence supports the submission of this inferential rebuttal instruction. Specifically, they disagree about whether Rowan’s or someone else’s act in altering or removing the ropes was foreseeable and an intervening act that should supersede Crown Derrick’s own negligence.

“Generally speaking, if the intervening force was foreseeable at the time of the defendant’s negligence, the force is considered to be a ‘concurring cause’ of the plaintiff’s injuries,” and “the defendant remains liable for the original negligence.” SALES AND EDGAR § 1.04[4][b] at 1-55; *see also J. Wigglesworth Co. v. Peeples*, 985 S.W.2d 659, 665 (Tex. App.-Fort Worth 1999, pet. denied) (“if an intervening cause was reasonably foreseeable by the defendant in the exercise of ordinary care,

it cannot be considered a new and independent cause”). If, on the other hand, “the intervening act is extraordinary under the circumstances, not foreseeable in the normal course of events, or independent of or far removed from the defendant's conduct, it may well be a superseding act.” *Derdiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670; 434 N.Y.S.2d 166, 169 (1980). What generally distinguishes a superseding cause from one that merely concurs in the injury is that the intervening force was not only unforeseeable, but its consequences also unexpected:

[A] superseding cause is one that alters the natural sequence of events and produces results that would not otherwise have occurred. Or one that is “of such an extraordinary nature or so attenuates defendant’s negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant.” An intervening force will not break a causal connection if that force was itself probable or foreseeable by the original wrongdoer. It must be one not brought into operation by the original wrongful act and must operate entirely independently of such original act.

1 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 4:7 at 4-14 - 4-15 (2d ed. 2002) (footnotes and citations omitted).

We have relied on the Restatement in the past to aid us in determining when an intervening force rises to the level of a new and independent or superseding cause. *See Phan Son Van v. Pena*, 990 S.W.2d 751,754 (Tex. 1999); *Humble Oil & Ref. Co. v. Whitten*, 427 S.W.2d 313, 315 (Tex. 1968). The Restatement, which itemizes six factors as useful when making this determination,<sup>3</sup>

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<sup>3</sup> The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

(a) the fact that [the intervening force] brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that [the intervening force's] operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of [the force's] operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

generally parses the core principles already discussed – that a superseding cause ordinarily involves the intervention of an unforeseen, independent force from a third party, causing injury different from that which might have been expected at the time of the original negligent act. *See* RESTATEMENT (SECOND) OF TORTS § 442 (a)-(d) (1965). The Restatement also lists considerations that are not relevant to our present circumstances, such as whether the intervening act was intentional or criminal. *See id.* § 442(e)-(f). But as our case law and the Restatement make clear, the threshold, and often controlling, inquiry when distinguishing between a concurring and a superseding cause remains “whether the intervening cause and its probable consequences were such as could reasonably have been anticipated by the original wrongdoer.” *Bell v. Campbell*, 434 S.W.2d 117, 120 (Tex. 1968).

### III

The Dews argue that, given the insubstantial nature of Crown Derrick’s rope barricade, it was inevitable that it would be altered. They submit that Crown Derrick should have protected the opening with a fixed, static barrier instead that could not so easily be altered or removed. Crown Derrick’s failure to do this, the Dews submit, was negligence that combined with others’ foreseeable negligence to cause this accident. Thus, because the accident was a foreseeable consequence of the creation of a dangerous hole which Crown Derrick failed adequately to safeguard, the Dews conclude

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(d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

RESTATEMENT (SECOND) OF TORTS § 442 (1965).

that the intervening acts cannot be considered new and independent.<sup>4</sup>

Crown Derrick, on the other hand, maintains that it was entitled to an instruction on new and independent cause because the possibility that someone would alter or remove its barricade was not foreseeable, and the barricade was a safety precaution that Crown Derrick suggests was completely adequate to protect others from the dangerous opening. Crown Derrick thus views the alteration or removal of its rope barrier, without an adequate replacement, as an extraordinary and unexpected occurrence, and therefore some evidence of a new and independent cause.

Crown Derrick's argument, however, is premised on an erroneous assumption – that its double rope barricade was an adequate safeguard.<sup>5</sup> Were this true, Crown Derrick would not have needed an instruction on new and independent cause because it would not have been negligent in the first place. The jury obviously did not view the double-rope barricade as an adequate precaution

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<sup>4</sup> The Dews further argue that, even though they should prevail under a traditional proximate cause analysis, Texas jurisprudence would be better served by replacing that analysis with the “scope-of-liability” principles espoused by the American Law Institute in the tentative draft of the Third Restatement of Torts. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29 (Tentative Draft No. 3, 2003) (“An actor is not liable for harm different from the harms whose risks made the actor’s conduct tortious.”). This tentative draft suggests that the term “proximate cause” has proven a poor choice for describing the limits of liability because it “implies that there is but one cause – the cause nearest in time or geography to the plaintiff’s harm – and that factual causation bears on the issue of scope of liability.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) § 29, cmt. b (Tentative Draft No. 3, 2003). Because neither implication is correct, the draft suggests that the term “proximate cause” and the accompanying instructions typically used to define the term be abandoned; that its component elements of cause in fact and foreseeability be considered separately; and that legal cause hereafter be defined in terms of the “scope of liability” which is meant to convey “the idea that an actor should be held liable only for harm that was among the potential harms – the risks – that made the actor’s conduct tortious.” *Id.* cmt. b & d. While we applaud any effort to bring greater clarity to this difficult area of the law, we must decline the invitation to abandon decades of case law, not to mention the Restatement (Second) of Torts, before even the American Law Institute has done so.

<sup>5</sup> Crown Derrick argues that it was entitled to an instruction on new and independent cause because “the evidence raises the question of whether Paul Dew’s accident was caused by the *properly barricaded* ladder opening left by Crown Derrick, or by the *improperly barricaded* ladder opening that came into being as the result of intentional actions by other parties after Crown Derrick left the worksite.” (emphasis added).

against the hazard left by Crown Derrick, probably because the ropes could so easily be altered or removed. Its verdict indicates that Crown Derrick breached its duty of ordinary care by leaving an open hole in the platform without adequate safeguards.

Any intervening acts which exploited this inadequacy did not fundamentally alter the foreseeable consequences of Crown Derrick's original negligence. *See Tex-Jersey Oil Corp. v. Beck*, 305 S.W.2d 162, 166 (Tex. 1957) (bolt of lightning that ignited vapors defendant negligently permitted to escape from tank not new and independent cause). As one authority has observed:

Obviously the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which the defendant has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence. The courts are quite generally agreed that intervening causes which fall fairly in this category will not supersede the defendant's responsibility.

KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 44, at 303 (5th ed. 1984). Where the intervening act's risk is the very same risk that renders the original actor negligent, the intervening act cannot serve as a superseding cause. *See Tex-Jersey Oil Corp.*, 305 S.W.2d at 166; *Derdiarian*, 414 N.E.2d at 671; RESTATEMENT (SECOND) OF TORTS § 442 B (Intervening Force Causing Same Harm as That Risked by Actor's Conduct).<sup>6</sup> Because these are our present circumstances, Crown Derrick was not entitled to an instruction on new and independent cause.

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<sup>6</sup> "Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct."

The court of appeals' judgment is reversed and the cause is remanded for consideration of other issues raised, but not considered, in that court.

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David M. Medina  
Justice

Opinion delivered: June 30, 2006