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FIRST VALLEY BANK OF LOS FRESNOS V. MARTIN

GONZALES: ...initiates or procures with malice and without probable cause, the prosecution of an innocent person. This court has declared in numerous opinions, particular Browning Ferris v. Lieck, that the tort of malicious prosecution involves a delicate balance between society's interest and the efficient enforcement of criminal law, and an individual's interest and freedom from oppressive and unjustifiable criminal prosecution. This court has declared that strict proof of each element is required and even a small departure from the exact prerequisites for liability threatens this delicate balance.

Implicit in all of the court's writings on malicious prosecution is that the burden is on law enforcement officials to know the elements of a crime and to ask the right questions. The burden is not on private citizens to know what information to give law enforcement officials. The only burden plays on a private citizen is to report truthful information to law enforcement officials.

There is also a presumption that the private citizen in reporting suspected criminal activity acts reasonably and in good faith. In Browning Ferris v. Lieck, in King v. Graham and Wal-Mart v. Rodriguez this court declared that the tort of malicious prosecution is different from other torts. This court has stated that general tort principles regarding causation do not apply to the tort of malicious prosecution.

O'NEILL: What about if there is an intentional failure to report exculpatory information. Would that be enough?

GONZALES: No. This court has declared that when the decision to prosecute is left to the discretion of another, there must be proof that the complainant knowingly furnished false information to law enforcement officials. And that is not the only requirement. There's an additional requirement that there must be proof that the false information caused the criminal prosecution.

O'NEILL: But can't information be false if the person reporting has a key piece of evidence that they are hiding, and they report it. Why would that not be enough? Isn't that false information?

GONZALES: The court has declared in Browning-Ferris v. Lieck that failure to make full and fair disclosure...

O'NEILL: But isn't that different - failure to make full and fair disclosure - from intentionally hiding relevant exculpatory evidence?

GONZALES: We don't believe that it is. This court because of the delicate balance of the competing interest intention has looked at the restatement and the restatement had defined procurement in such a manner that requires failure to give false information, that the complaining witness must give false information and that false information must have caused the indictment. That is the only basis for liability.

O'NEILL: So you're saying it's only false if there's an affirmative statement. It can never be false from omission?

GONZALES: That is correct. That is our position. The investigator who investigated this case has testified in this court that every piece of information that the bank gave was truthful information.

SCHNEIDER: Do you agree that Mr. Villanueva's statement was misleading?

GONZALES: No. The investigator testified that based on his investigation every piece of information that the bank official gave to the investigator was true. This is what the court has declared.

PHILLIPS: But that's not established as a matter of law. And there is some evidence that the bank didn't advise the investigator about the whereabouts of at least 42 cows, or the existence of an essential pay out agreement, or an alternative agreement. These may be controverted facts but aren't they there in the record and don't we...

GONZALES: They are controverted facts, but this is the way this case happened. When the bank was concerned about its collateral on a defaulted note from a customer who vowed never to be seen again, the bank called an investigator. The investigator came, the bank gave a statement to the investigator. And it is important to look at the statement that the investigator took from the bank employee. The bank did not accuse Martin of a crime. The bank did not seek to have Martin prosecuted. The bank did not seek to have Martin arrested. The bank did not testify before the grand jury. The bank gave truthful information. All the bank did was, as any private citizen has a legal right to do, is report suspected criminal activity. The parties stipulated here that the discretion to prosecute or not if the facts fit the crime was placed in the DA and the grand jury. This court has declared in Browning-Ferris v. Lieck and in King v. Graham that if those are the facts, if no false information is given and the false information did not cause the indictment, there is no basis for liability.

PHILLIPS: When does a prosecutor not have the discretion whether to prosecute or not? What kind of facts would there be where the false lie would be a tort? You speak of the dichotomy but I don't see a case where the prosecutor doesn't maintain that decision as a matter of constitutional setup.

GONZALES: The restatement speaks to that and it speaks to that in terms of initiation.

When the complainant puts pressure on the DA, and that pressure caused the indictment, in that situation the complaining witness initiated a complaint and we over the hurdle.

PHILLIPS: Your vision of how the average case would work, you would subpoena everybody who was or is in the DA's office who dealt with this and ask them subjectively how they felt about the complainants desire to have a prosecution?

GONZALES: This court has declared in Richey v. Brookshire that if the objective elements of the crime are satisfied there cannot be lack of probable cause as a matter of law. In this case, we had the objective elements of the crime that _____ secured credit.

O'NEILL: What if the note had been fully paid and the bank hadn't said the note has been fully paid?

GONZALES: There is no basis to file a complaint. But here the bank did not file a complaint in any way, shape or form.

O'NEILL: But if they had reported to the prosecutor, We think that our collateral has been stolen or is missing." Even though the note had been paid in full and they intended to do that, they just didn't like him and they reported that the cattle were missing, but they didn't report the note had been paid in full. Could that be a basis for malicious prosecution?

GONZALES: It may be, but that is not our case.

O'NEILL: If those were the facts, could that be the basis of malicious prosecution?

GONZALES: If the court wants to go in that direction, the court is going to have to change Browning-Ferris v. Lieck. The court is going to have to overrule King v. Graham. And the courts going to have to overrule Wal-Mart v. Rodriguez.

O'NEILL: So your answer then is even then no malicious prosecution?

GONZALES: Because the court has already declared what the standards are for malicious prosecution. The court has required that for civil liability for the tort of malicious prosecution dealing with the causation element, the court has stated that the requirement is that the complaining witness gave false information knowingly and that the false information caused the indictment.

O'NEILL: Would that be false information? That would be giving false information, my scenario, of not revealing that the note was paid.

GONZALES: I do not know. You are going to have to tell us. Under the current state of the law, there is no basis for liability in this case.

JEFFERSON: We're dealing with the charge that says unless the person fails to fully and fairly disclose all material and information known to him. And that's how it was submitted to the jury. If it was submitted that way shouldn't we be bound by the law as given to the charge? What was the objection on the record to that instruction?

GONZALES: In Browning-Ferris v. Lieck, the bank requested verbatim the definition of procurement that the court mandated in Browning-Ferris v. Lieck. The court was so concerned that there be confusion in this matter, the court stated this is the definition that should be given in future cases. That's the instruction that we requested and we cited Browning-Ferris v. Lieck as a source of our instruction. The court refused to give this instruction. The court modified the instruction. And extended liability to include failure to make full and fair disclosure, which is in direct conflict with Browning-Ferris v. Lieck, and King v. Graham.

JEFFERSON: I pulled the record to see if there was an objection on the record to that instruction, and it's not there. So how did you preserve this? Do you preserve in a trial an objection to an instruction when the court substantially modifies it and no objection is lodged to that modification?

GONZALES: This court has held in State Dept. of Public Highways v. Payne that what is required to preserve error when you give an instruction that this court says must be given, there must be a complaint, it must be timely, and we must obtain a ruling. We complied with every respect as the CA found. The CA found that there was no error.

PHILLIPS: Payne said the jest of it is does the TC know you are dissatisfied with the charge. And you have an opportunity to get it right. What on the record shows us that the TC - the TC was apparently trying to split the bacon here. And how did the TC know that you were unhappy with the compromise that he/she wrote in?

GONZALES: Because the court refused to give the instruction that we told the court should be given based on what this court declared in Browning-Ferris v. Leick, and the court modified and substantially modified what this court said should not be done.

PHILLIPS: Essentially any time you give a piece of writing to the judge, and that's not in the final charge, error is preserved under Payne. Is that your position?

GONZALES: No.

PHILLIPS: Short of you saying well thanks for what you gave us but it's still wrong, where is the line then?

GONZALES: Rule 276 provides that a properly endorsed or modified instruction shall constitute a bill of exception and it shall be conclusively presumed that all requirements of the law have been observed. As long as the record indicates in some way the TC ruled on the objection either

expressly or implicitly through its actions error is preserved.

Now how more plain can it be when we asked the court to give the instruction or the definition of procurement that this court mandated in Browning-Ferris v. Leick. The court refuses and modifies and marks it modified as follows and then expands...

PHILLIPS: The judge didn't exactly write on this charge all the words that are in rule 276. The judge doesn't put the and exceptional out, that is part of that language. And so I'm trying to understand where after Payne the line comes between just handing the judge something and making a formal set of objections.

GONZALES: This court has already ruled on that matter in Dallas Market Center Development Co. v. Liendecker. In citing appellate procedure 33.1(a)(2), this court stated that a TC's endorsement of refused is not required as long as the record indicates in some way that the TC rule on the objection either expressly or implicitly. By implication when we request a charge that this court says should be given, and the court refuses to give that charge and says as modified, and expands the basis of liability to include failure to fully disclose, by implication the court denied our requested charge, and nothing more is required.

SCHNEIDER: What about the harmless error. Doesn't that apply to that?

GONZALES: No. This court has stated in Browning-Ferris v. Leick when you do not give the instruction that this court mandates it is error. That was the issue in Browning-Ferris. And nothing more is required. The harmless error rule does not come into play.

SCHNEIDER: Are you arguing that we have commingling here of a valid and invalid theory?

GONZALES: That's our fallback position - Casteel. Our main argument here is even if the correct charge had been given, there is no basis of liability in this case because there's no clear and convincing evidence of malice. There is no evidence that the bank procured the charge or initiated the charge.

SCHNEIDER: Let's assume that this statement was made - "the bank can't find any of the cattle," when the bank knew of these other cattle in existence is that a true or false statement?

GONZALES: The bank gave to the investigator the file. The file included a check for cattle that had been purchased by Dr. Anderson, and another purchase to _____. So anything that the bank had was given. So that information about the cattle that had been sold by Martin without permission from the bank was in the file. It was turned over to the investigator.

WAINWRIGHT: Assume it's true that a failure to disclose can never be a sufficient basis for malicious prosecution. Assume J. O'Neill's hypothetical where all the facts in this case are the same except that the bank's note was fully paid. The bank never told the investigator that or the DA that.

What is the rationale then for your approach that an omission can never constitute or be sufficient to support malicious prosecution? What is the rationale underlying the decision? You've cited Lieck. You've cited Richey.

GONZALES: I would invite the court to reread Browning-Ferris v. Lieck, because the rationale is in Browning-Ferris v. Lieck.

WAINWRIGHT: Assume Lieck was never written. Assume Richy was never written. What's the rationale, the underlying compelling reason for saying an omission can never constitute a sufficient basis for malicious prosecution?

GONZALES: The rationale is that the burden is on law enforcement to know the elements of the crime that they are investigating. The burden is not on private citizens to know what information they need to give. That is the rationale.

WAINWRIGHT: So then if a private citizen makes an intentionally false statement, then under your rationale that private citizen would still not be liable because the burden is on law enforcement officials to fully investigate and know the elements?

GONZALES: No. If a complainant gives knowingly false information, and that false information caused the indictment, under the current state of the law there is basis for liability for malicious prosecution.

O'NEILL: But you're just saying it can never be knowingly false by omission?

GONZALES: The court declared in Browning-Ferris and in King v. Graham that it required a knowingly false statement. So that bridge has been crossed by this court. In Browning-Ferris and King and in Wal-Mart v. Rodriguez.

WAINWRIGHT: We don't have to go as far as finding that an omission can never be sufficient for malicious prosecution in order to find in favor of your client do we?

GONZALES: No. Here, we have the investigator who investigated this case and he said every piece of information that came from the bank was true. And even if the alleged statements are false, there is no evidence that any alleged false statements caused the indictment. So that's the missing link here. It's a two-prong. So Martin had the burden of proving that the action or conduct by the bank caused the indictment, and there is no evidence here. And, therefore, this is why the court should render judgment in this case that the bank take nothing, and that the bank should recover the $50,000 the jury found was owed by Martin.

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RESPONDENT

LAWYER: First, just as a matter of record. This record shows that the bank made knowingly false statements. They told investigator Vasquez: 1) they couldn't find any of the collateral; they had already sold off 20 head, they had authorized their bank director, Gus Guerrera, to take another 15 head...

BRISTER: The Chairman of the Board was there when the cattle were transferred. Right?

LAWYER: That's to the 1995 sales...

BRISTER: The chairman of the board was there, and the chairman of the board did not talk to the police officer.

LAWYER: That's true.

BRISTER: So what we're doing here is imputing everybody in the bank's knowledge, to everybody else in the bank to find either negligence or intention. Right?

LAWYER: No. There's direct evidence that the bank authorized the Guerrera to take that 15 head.

BRISTER: The bank. Who?

LAWYER: Marcos Villanueva, the vice president.

BRISTER: There was evidence that the ones that were sold when the chairman was there, what's the evidence that Villanueva knew that?

LAWYER: We don't have direct evidence of that.

BRISTER: The fact of the matter is your guy didn't pay the loan. And if those 20 were not waived, then your guy did - I mean your case that more than 75 disappeared and the bank knew about it and waived them, depends on those 20 as well as the rest.

LAWYER: It doesn't depend on just the 20.

BRISTER: Twenty plus 58 is 78, that's how you get past the 75.

LAWYER: No. I think we're confusing different sales. The sale in 1995 was of 58 head. At that time the testimony was that Sam Martin had over 200 head of cattle. And there's independent evidence that he had over 100, maybe 150 head after that. Now of that 140-150 head, which was more than the 75, before investigator Vasquez came to the bank, the bank had the evidence shows - sold 20 head at 50 cents on the dollar to the bank director and his brother. They had authorized the bank director to take other cattle. And in fact, the evidence shows that the

Guerrera took another 15 head off of Bud Parker's ranch, cows that were never accounted for on the loan. Sam Martin was never given credit for those cattle. There's also evidence from the man that was hired by the bank to so call find the cattle, that there was another 7 head that they had found and claimed that that was all they could find. So there's 42 head at that time that the bank already knew about and the evidence shows at the time they are telling the investigator that there is no collateral, they can't find any. When in fact they had already found...

BRISTER: When you say the bank, is there evidence that Villanueva, the only one who talked to the police, knew each and every one of those things?

LAWYER: Yes. He authorized it.

BRISTER: Every one of those? The 7, the 15, everything?

LAWYER: Yes. There is also Denny who was the loan collector for the bank. He knew about the 7. In fact the bank told a man they hired that that seven were the only seven they could find.

BRISTER: So does your case turn on that? If one member of the bank knows of a waiver, and the only member of the bank that talks to the police doesn't, is it a malicious prosecution?

LAWYER: I think we're mixing oranges and apples.

BRISTER: Before you avoid the question answer that one.

LAWYER: On the issue of knowing false statement it is irrelevant what happened in 1995.

BRISTER: I'm not talking about your case. This is a hypothetical case. One member of the bank knows the loan has been paid. The person at the bank that talks to the police officer does not. Is that a malicious prosecution?

LAWYER: Yes. The bank is - that's knowledge to the bank. Corporations act through their agents, and corporations get pretty big. And if you say that one agent's knowledge cannot be imputed to another one, then corporations will almost always have no liability except for a direct tort.

And we're not saying that at the time Gus Guerrera was an actual agent of the bank in terms of say liability. But his knowledge could be imputed to the bank for the reasons y'all stated in Holloway. But that goes to probable cause and...

HECHT: Do you think the word "any" - we've focused a little bit on the word any you've mentioned here is that relative to the context do you think of the bank? If a bank had found one cow and they had a lien on 10,000 surely that wouldn't make any difference that they said any.

LAWYER: Well maybe not. I don't know.

HECHT: Do you think it would?

LAWYER: But this is more than 50%.

HECHT: Do you think any is in context?

LAWYER: I think this context is clear.

HECHT: I'm just asking you do you think it is? I know you think it's clear. Do you think the statement "any" has to be read in some context? That's all I'm asking.

LAWYER: I think in the context of this case the bank wanted to leave the impression in the context that they couldn't find any cattle. That all this collateral was gone and that the collateral he had had been sold off to Dr. Anderson, 2 years before. And they couldn't find anything else. And that's in investigator Vasquez's report. That's what they told him, and that was the basis of his report. That's what this charge is all about. There were no other cattle. That is what they told investigator Vasquez.

HECHT: Why isn't the impression that we can't find enough to get paid communication that's being made?

LAWYER: That's not what they said.

HECHT: How is that different from we can't find any?

LAWYER: The impression they left with investigator Vasquez was that in fact Sam Martin didn't have any cattle. He sold it all off 2 years ago, and he's been defrauding them because in fact he didn't have any. When in fact they knew he had cattle out there. They have been picking up that cattle. And in fact the evidence showed that at the time of trial they only could count for, Sam Martin and his son, for 40 head. And before the bank started picking them up they had 140 or more than that.

O'NEILL: Should the standard be any different for a false imprisonment claim?

LAWYER: Y'all held in Rodriguez that this same standard applied.

O'NEILL: We said there that failing to make full and fair disclosure is not enough.

LAWYER: If that discretion triggers it. The holding in Lieck is that in fact you can have a lesser standard to know it. That is the actual holding of Lieck.

O'NEILL: But we have said failure to make full and fair disclosure is not enough. It does not equal knowingly providing false information. And under that standard isn't this clearly an erroneous jury charge?

LAWYER: No.

O'NEILL: Why?

LAWYER: The actual holding of Lieck was that the TC did not err in refusing to give a charge on knowing. That's the actual holding of Lieck.

O'NEILL: But it did say it is improper - I agree and that's kind of weird. But it does say failure to fully and fairly disclose is not enough.

LAWYER: If the complainant's conduct was not a determining factor. It's not the discretion, and frankly I think that's where there's a little confusion in Lieck, and why the instruction needs to be tinkered with a little bit. Here's the problem I see and I wrote about it in the brief. It's not the existence of discretion, because that discretion always exists in the criminal law. It is a hallmark of our criminal justice system that prosecutors have discretion and grand juries have independence. That's even built into our bill of rights.

O'NEILL: But that's on the causative end.

LAWYER: But that goes to procurement, and what triggers the standard. Because y'all said that if the complainant's conduct, even if that discretion exist, if that complainant's conduct is a determining factor because of pressure of any kind. And the restatement example, you know is just requesting a charge be brought, is that kind of pressure. Then that triggers a lesser standard. And that's why you held in Lieck that in fact the full and fair disclosure in Lieck was a factor. You said it might have been important in terms of winning that prosecution. And so on that basis you held the knowing instruction in Lieck error. Or to put it the opposite way, the TC did not err in not giving that charge. It's not the existence of discretion. It's the exercise of that discretion. Because that discretion exists in every case. It has to. It's a hallmark of our criminal justice system. No person can force a DA to present a case to a grand jury, and no person can force that grand jury to bring an indictment.

WAINWRIGHT: Why isn't the very discretion you're talking about a compelling reason why the standard of fully and fairly disclose all material information placing that burden on a private citizen is too high? What private citizen is going to know all material information involved in a criminal prosecution or criminal charge?

LAWYER: That's true. If they know about material information and don't disclose it, and that was a determining factor...

WAINWRIGHT: Well that's different if they know about material information. Some material information they may know about. But failure to fully and fairly disclose all material information what does that mean, and how can we enforce that with private citizens? Lieck wasn't written, and Richey wasn't written, hypothetically as of now, what's the rationale for placing that high burden on private citizens?

LAWYER: Because when people make that report as the restatement says, it's causing that prosecution. Now we're not going to hold liable just for starting that process assuming the DA has total discretion on this and exercise it without any pressure from any kind. But when they cause that prosecution there is a certain level, a standard, that they have to be held liable. And if they know material information, like in a shoplifting case, take Richey for example. Let's say that that store manager had seen that customer actually pay for the cigarettes that he is accused of stealing, but he didn't tell the police. He told them everything: He walked out of that store with that package of cigarettes, but he doesn't tell the police that the guy paid for them.

WAINWRIGHT: Because the police are going to ask - did he pay for them?

LAWYER: Maybe they do. Maybe they don't.

OWEN: Well the implication is, he walked out without paying for them. Counsel for the other side got questions about the note being paid. Well when you go to the authorities and say my collateral isn't here, and I've got a note outstanding. Implicit in that is that there is a note outstanding that's unpaid. And you don't have collateral if the note's been paid. So that seems to be sort of a redherring.

LAWYER: There are times when an omission does rise to the level of a false statement. You held that in the context of fraud.

HECHT: But tell us when that it is?

LAWYER: For example here. The bank we know had taken 42 head. But they tell the investigator, and let's say that 42 head is enough to pay off this loan, they can't find any collateral. Sam Martin has defrauded them.

SCHNEIDER: But that's an affirmative statement isn't it?

LAWYER: Well that's what they said in this case.

SCHNEIDER: That's not just pleading something out. That's an affirmative statement.

LAWYER: Well that's what they said. This is investigator Vasquez's testimony.

Q: Who is complaining about hindering a secured creditor? You or the bank?

A: The bank
Q: Was that on July 3, 1997?
A: Yes.
Q: So they called you to complain about a criminal charge, not you calling them. Am I correct?
A: Yes.
Q: You came there because somebody was complaining about a criminal activity. Am I correct.
A: Yes.

And Vasquez testified he didn't even know what hindering a secured creditor was. He had to ask.

SCHNEIDER: The other side says that in your mental anguish at most that you've proved is worry, anxiety, shame, vexation. Do yo have anything additional or can you point to any place in the record where it rises to a level higher than what I just said?

LAWYER: The record shows this man cried on the stand. As a proud man; 58 years old; two time candidate for sheriff; almost one once; proud rancher; a proud father; former law enforcement officer.

SCHNEIDER: Is there evidence of injury, mental anguish that caused him injury over a period of time?

LAWYER: He testified it was traumatic, he was humiliated, couldn't sleep. He didn't go to a therapist or anything. This man is a rancher.

SCHNEIDER: What about reputation damages. Did you show at the trial what his reputation was before the incident, and did you show what it was after?

LAWYER: Not in that form. But before he was a respected member of the community, his father-in-law was sheriff of Cameron county for 30 years. And then afterwards they made jokes about him. He was ashamed. He wouldn't even file applications because he would have to put down that in fact he had been charged and indicted before.

PHILLIPS: Was the only evidence of that Martin's testimony himself?

LAWYER: His son testified to that also. His son testified to the trauma that he suffered and their standing in the community, and that sort of thing.

O'NEILL: Are you claiming that the prosecutor was pressured in this case?

LAWYER: Through the investigator the bank requested these charges be brought.

O'NEILL: The argument has been made that really what the evidence is going to show was that the bank did no more than turnover its file. And you seem to have indicated there may be some sort of continuum involved if there's pressure brought to bear. If you are claiming pressure brought to be bear, specifically what are you relying on?

LAWYER: Yes. The restatement in Lieck talked about either through direction, request or pressure of any kind. An example they use is just requesting the charge was an example of pressure of any kind in the restatement. And that's certainly what the bank did here. People don't have contact with DA's about their case and their complaint. They talk to investigating officers who then file reports and then DA use those reports in the grand juries. And that's what the stipulation says here, that this report was the basis of the grand jury indictment.

So here, yes, there is pressure. The bank requested these charges be filed. In fact attached to the bank's brief is the report of investigator Vasquez. And it says violations hindering secured credit reported by Marcus V. Nueva, July 3, 1997. Which by the way that day Marcos V. Nueva testified before this jury that in fact he didn't think Sam Martin was guilty of any crime at the time he made that statement and on this date.

And then on the case report it shows the victim, Marcos V. Nueva

Q: Will victim file charges?
A: Yes.

This report went to the DA. There's a blank there for no. But that's not what this says. This says yes. I mean that tells the DA that these people are requesting charges be brought. And this in a normal case, and this was handled like any other case, that's what this stipulation was about. Almost all cases this is what happens. And this is all DA's go by to decide whether to indict.

PHILLIPS: You make much of the fact that Guerrero was chairman of the board. Doesn't Texas law require that that knowledge had been gained while he was acting within the scope of his authority or he had some duty within the scope of his authority to request it, or are you saying the chairman of the board anything they know is imputed to their bank?

LAWYER: If it's adverse to the corporation that they are the director of, because they had a fiduciary to the corporation. And if they learn outside their scope of authority, and in fact in Holloway you said their imputed knowledge doesn't just exist at official meetings. Which by the way most of the time directors, their official duties consists of mostly meetings. They don't have official duties other than that. But if they learn something adverse to a corporation on their own they have a fiduciary duty to report that to the corporation, to protect that corporation that they are a director of. That's part of their job. Otherwise they could learn like in Enron, a director could learn about all of that fraud on their own, but it would not mean anything to the - you would be able to impute that to the corporation, which that director they learned about all that fraud would have a duty

to do something about that.

SCHNEIDER: Is there any testimony in the record about the size of the bank, and the size of the community, and what people knew about how many cattle in certain ranches?

LAWYER: Yes. There was testimony that - basically the ranchers knew who worked that area knew where cattle were generally. And in fact they do annual sort of roundups. And there is independent testimony that Martin had well over 100 head after he sold the cattle to Dr. Anderson. There is testimony from Martin, his son, Raul Mendez, there's testimony from Joe Serata who was actually hired by the bank to find the cattle. Also Bud Parker, the rancher, he testified to that also.

SCHNEIDER: How do you connect that dot between the director and a bank? Is there any testimony in the record showing that?

LAWYER: The director approved this loan. The evidence is clear that he knew about this loan at the time that he helped Martin sell the cattle. If he thought that act was adverse to the corporation, he had a duty to report that. And under Holloway his knowledge was imputed to the corporation. If the corporation is now claiming that's an adverse act, which they obviously were, then they certainly had a duty. And you have to look at it from Sam Martin's perspective. Here he is the director of the bank, is helping him with this sale of cattle. He testified that he thought that given that and normal procedure, which ranchers pay off their loans by selling cattle, then he thought there wasn't any problem with this particularly when the bank director who knew of the loan and approved that loan.

SCHNEIDER: Was there any testimony that the directors were involved in the day to day business of the bank?

LAWYER: There is evidence that the director was very involved in the collection of the collateral in this case.

BRISTER: Of course if he had thought the bank had been paid off when they set off part of his checking account, he could have mentioned that instead of saying you will never see from or hear me again. Right?

LAWYER: There's no question that Sam Martin lost his cool. But that didn't give the bank the right to take his cattle without reimbursing him, and then seek criminal charges against him when in fact those investigators came to the bank and asked the bank, Did y'all take that cattle? Because they were investigating a castle rustling charge. And they wanted to know if the bank had taken it, and the bank says no. Sam Martin never had it. They deflected the criminal investigation from themselves to Sam Martin. That's what happened in this case.

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REBUTTAL

RHODES: Our view of the record in this case makes one thing unmistakably clear. And that is that this case was tried on a failure to disclose theory. You have to look no farther than counsel's own closing argument to the jury where in speaking about the procurement instruction, he told the jury that the procurement instruction allows you to find procurement for a failure to disclose. He speaks about the fact that there was evidence, and there was evidence, we have to admit that, that the bank did not tell Vasquez...

SCHNEIDER: What about the statement we can't find any cattle. That's not just a leaving something out. That's an affirmative statement isn't it?

RHODES: The statement needs to be taken in the context of what they were talking about. And the context is they were talking about the bank needed 75 head of cattle still to satisfy the amount that Martin owed on this loan at that particular time. That's undisputed evidence. The fact that the bank had found 20 cattle before is really irrelevant to the fact they still needed 75 head of cattle, which is what Villanueva's report is complaining about - that we need 75 head of cattle.

The security agreement gave the bank a security interest in all cattle owned by Martin, including, but not limited to, 75 head. The idea was that 75 head would cover the amount of the loan. But subsequently Martin added a car note to that, and so obviously we may need more cattle if that's the secured interest that we have. But we have a security interest in all of his cattle, not just 75 head. And so the fact that we said we couldn't find it. We said any of the livestock put up as collateral. That's what the actual statement was from the record - any of the livestock put up as collateral. And we were looking for at that point in time 75 head of cattle. So I do not believe that that's a false statement.

SCHNEIDER: So they didn't make the statement that we can't find any of the cattle?

RHODES: The statement was any of the livestock that had been put up as collateral. That was the statement that was made.

But in closing argument to the jury, this is Martin's closing argument. He refers to the fact that 20 cattle is 20 cattle that were sold in May to the bank director's brother. He says that wasn't provided. That wasn't told to the investigator. And he says it's not there. It's not in the report. So that means Bill Lavae didn't tell Vasquez lies, but he kept all of the information. He failed to disclose the information. **(SIDE 1 ENDS)**

...told me that I may not have had an indictment. Now this is her own closing argument. So the argument we brought up earlier about harmless error, the argument that this failure to disclose theory can be harmless error is really a red herring here when their own closing argument did not identify for the jury one allegedly false statement. The false statements that have been presented to the court were developed on appeal. They were never argued to the jury that these are false statements. And this is somewhat important in that investigator Vasquez would not testify that he had been given any false statements. Martin tried, and tried and tried to get Vasquez to testify that

you've been given a false statement. And Vasquez kept saying No, I wasn't given a false statement. I just wasn't told everything.

Now the reason that's important is since Vasquez when he testified that he had given a false statement, there is no evidence that correlates or that ties up any alleged false statement to the decision to prosecute. And if you go back to this court's per curium opinion that was just recently issued in King v. Graham, this court said that the plaintiff has to present evidence showing that the alleged false statement caused the prosecution. That just can't be inferred unless all the information the bank gave was false. And here there is plenty of undisputed information that the bank gave to Vasquez that was true. There is no dispute about it. Martin was a debtor under a security agreement. He did not have the right to sell cattle, and he did sell cattle subject to the security agreement without the written consent of the bank. And that undisputed evidence was enough to cause a prosecution.

O'NEILL: I thought all of that was disputed. I thought it was disputed the number of cattle that the thought he could sell that wasn't the subject of the agreement. He thought he could sell anything over 75. And there was disputed evidence as to how many head there were, whether that agreement was part of the original loan agreement. There was a lot of disputed evidence here.

LAWYER: The security agreements are clear: it's all cattle, including, but not limited to, 75 head. There was one document signed in 1992. It was a notice form that went to the local auction house that said 75 cattle. But even if that created an ambiguity there were 12 other subsequent security agreements signed, including adding a car loan. So those 1992 documents were not part of the loan that was defaulted on. The loan that was defaulted on had the security agreement - all cattle, including, but not limited to, the 75 head, plus a car. So that was a different security agreement. As a matter of law it's clear that we had a security interest in all of the cattle.

With respect to his argument that he thought he could sell, that was brought up that this is a calf/cow operation, and that's how you pay. You could sell calves but you weren't supposed to sell bulls and mother cows, because that's how you make more cattle.

O'NEILL: Where does it say that?

LAWYER: It's in the security agreement.