ORAL ARGUMENT – 04/07/04
03-0655
Dillard v. Texas Elec. Corp.

LAWYER: The lower court opinion that is under review here is essentially ill conceived and poorly reasoned. Left to stand it will turn East Texas into Alice's Wonderland, a place where trial by imagination rules, and where there are no standards of proof for conduct or proximate cause.

The opinion is a disaster for ranchers and other animal owners, because it assumes a new duty to enclose livestock. Contrary to statute. But worse...

PHILLIPS: But it doesn't say there is any liability for that duty.

LAWYER: No it doesn't. But if you can presume my conduct, then it's not part of presume my negligence especially if a presumption of conduct carries with it the certain knowledge that if cattle get out they might get to a road.

O'NEILL: But conduct doesn't have anything to do with the sole proximate cause.

LAWYER: Yes. It does. If you read this instruction it says the _____ admission of a person.

O'NEILL: It doesn't say failure to act reasonably. It doesn't qualify that. It doesn't say it has to be reasonable.

LAWYER: That's correct. Proximate cause in and of itself, the definition of proximate cause implies that what an ordinary person - a person of ordinary prudence could foresee. And if you can foresee an injury and you're a person of ordinary prudence, then that's almost the same as negligence. But I'm not arguing that negligence is required for a sole proximate cause instruction. But an act or omission is required for sole proximate cause by the very definition of it.

The instruction inquires about a person's act or omission that proximately caused an accident. And the definition of proximately caused is what could a reasonable prudent person foresee.

This opinion proceeds on the assumption that that conduct existed contrary to this court's prior announcements. It says that the mere presence of cows on a road leads to a presumption of conduct, act or omission. Admittedly not of negligence. But certainly a presumption of some conduct. And that's contrary to what I think that the cases have always said in Texas about proving conduct.

The Tyler court in recent years declared a new common law duty to enclosed livestock. But in 1999 this court reversed that in Gibbs v. Jackson. In spite of that, however, this opinion still operates on the assumption of a duty on the part of livestock owners to fence them in, to enclose them, to keep them off of the highway.

O'NEILL: Not a duty. It doesn't matter whether they had a duty to.

LAWYER: I don't think we need to go there to argue this case. But if you say omission, an omission by definition is the failure to do something that a person has a duty to do. Granted, the CA's, although I can't find a case where this court has ever said it, don't require negligence. But if you say that an omission to be a sole proximate cause can be anything I imagine, each of us is sitting here omitting to do several things as we speak. Many of which can cause injury to other people. If there's no duty then why isn't it the sole proximate cause of this accident that the state didn't build a 30 ft wall between these two lanes of traffic, so that when Ms. Brown hit the cow she hit the wall instead of hitting Mr. Dillard. What about the ___ truck that came through the scene and was _____ Bumstead after he hit the dead cow? He didn't stop to warn. He had no duty to do so. Would his failure to stop to warn be a potential sole proximate cause of these injuries?

PHILLIPS: Assume that there's some third party that did have a duty and they failed to comply with that duty, and that may have been a part of this accident. When and when not in your opinion should a trial judge give a sole proximate cause instruction, and when is it error to guess the wrong way?

LAWYER: Well it's error to give it if you don't have some evidence of a person who committed an act or omission, but more importantly some evidence of foreseeability. There are several reasons why this instruction would have been error to give. First, all of the reasoning in the CA's opinion starts with the cows on the road. But you must start with the particular conduct that we're assuming occurred that had to have happened before the cows got there. There must be foreseeability to that owner from some particular conduct, even if not negligent, that the cows could escape.

HECHT: That's pretty easy to foresee that the cows could escape.

LAWYER: Well it is easy to foresee in the abstract just like it's easy to foresee death, taxes and a lot of other things in life. But not the type of foreseeability that this court has routinely required for proximate cause. You can foresee it in the abstract but let's say your cow is inside a fence, inside your pasture. And in order for that cow to get out it must traverse 5 fences, or break down three gates.

HECHT: Coming to the Chief's question. If the owner had just been standing there and decided well he needed to move the cattle from one side to the other side, now is as good a time as any and so he opened the gate and was sending them across the road. Would that be a time to give a sole proximate cause instruction?

LAWYER: Not in this case.

PHILLIPS: We're not asking about this case. It's a whole other case. It's a busy state highway. Try to follow our law in those few cases where there's a majority opinion. The judge's question is: if you open the highway and just let some cattle out, then is it error - but for some reason you're not brought into the case, you're judgment proof, or a friend of the plaintiff or whatever, is it error for the trial judge not to give a sole proximate cause instruction?

LAWYER: If there's conduct it's not. If there's foreseeability from that conduct that the cows would arrive at the highway, and if we presume that _____ rebuttal instructions are appropriate, then I suppose so.

BRISTER: If you do give an unavoidable accident instruction that says it may be an unavoidable accident if it's caused by an event not proximately caused by the negligence of any party to it, couldn't a jury - I mean yes unavoidable accident in our cases says it's nonhuman events. But nothing in this instruction says nonhuman events. Right?

LAWYER: It sure doesn't.

BRISTER: So why would a jury be misled by this unavoidable accident if they couldn't consider the possibility that somebody negligently let the cattle out?

LAWYER: Notice. I didn't say reversible error. I think your prior decisions given those facts would require the giving of the instruction. But when you give the unavoidable accident instruction and it says these could be events not proximately caused by party's negligence, that means exactly the same thing as saying somebody else caused it. There's a CA opinion I cited to that says an unavoidable accident instruction about human conduct has the same effect as the sole proximate cause instruction.

The basis of our argument in this case hasn't been that since there was an unavoidable accident instruction he wasn't entitled to sole proximate cause. I think that's contrary to your prior decisions. I think if the facts called for it, he would be entitled to it. But where we are is the trial judge said the facts don't call for it. He didn't disclose it. He didn't offer any proof of it. I'm not going to give it. So the question is, was that an abuse of discretion on the trial judge's authority? Even if you assume some evidence, or if the court decides to change the law and create a presumption of conduct from the mere presence of animals on a roadway, they are still not reversible error because there's not any real difference in the meaning to a jury. Juries don't know that this court said let's only give unavoidable accident when there's nonhuman conduct or a child, or maybe the court has said an incompetent person. Juries don't know that. They are just reading it. The question is answered yes or no. It says negligence, if any. And the instruction went further to say this could have been an accident caused, an event not caused by party's negligence.

A sole proximate cause instruction would not have added anything to this

jury's understanding in this case. And certainly given the overwhelming evidence in this case would not have resulted in a different judgment.

OWEN: In a couple of your footnotes in your reply brief you talk about what occurred during the charge conference. And that the defendant said we're only talking about the cows on the road, not Mrs. Brown. Was that recorded _____ because your cite is not to the record?

LAWYER: It's not recorded and that's a bystander's bill that I referenced that's attached to our CA's brief. The charge conference was not recorded, but you don't have to go there. Here's what he said in his opening statement about Mae Brown. "I think that once you've considered the evidence you're going to see that the individuals involved in this accident were just flat all in the wrong place at the wrong time, and none of them were at fault in causing this accident. Because the cows for some reason were out on the road." Not because of anything the owner did, but for some reason. And he had already named Mae Brown as one of the parties involved. And then in his closing argument he says this. "And you know what? I don't think Mr. Dillard, I don't think Mae Joyce Brown, and I don't think that Stephen Bumstead or TEC was at fault in causing this accident. They were all in the wrong place at the wrong time."

What caused this accident? Cows out on the road, not an owner herding his cows out on the road, not an owner was negligent in his enclosure like they pled. But the cows were on the road. The only evidence in this case of conduct is cow conduct. We know the cows walked onto the road. That's it. We know nothing about anything that an owner did or did not do whatsoever. And cow conduct is sure nonhuman conduct and it is a stretch to say that the trial judge abused his discretion when he gave the unavoidable accident instruction.

WAINWRIGHT: Logically why is it error for a trial judge not to submit a sole proximate cause charge instruction if there is some evidence of more than one party being involved, or causing the accident? I'm questioning the fundamental and possibly questioning some of our prior precedence. Why should a trial judge if asked have to give a sole proximate cause instruction if there's some evidence that more than one person may have caused the accident?

LAWYER: I think the rationale that the courts have given is is that perhaps a jury won't understand that they can say no. Perhaps we need to draw their attention to this other party who the evidence has raised.

WAINWRIGHT: I think that would make sense if the wording of the instruction said that. But I don't think it says anything close to that. In this case was Maxwell sued?

LAWYER: No. And he was not involved. The reason nobody talks about him, he didn't hit anything until after Kenneth Dillard had already been hit and killed. He was behind Mr. Dillard and after Ms. Brown hit Mr. Dillard, Mr. Maxwell then ran into Mrs. Brown. And she's not a party to the lawsuit. And that's why it just doesn't come up anywhere in the briefs in this matter.

WAINWRIGHT: And you said Mae Brown was a plaintiff?

LAWYER: May Brown was a plaintiff and settled.

WAINWRIGHT: Before trial?

LAWYER: Yes.

WAINWRIGHT: And she sued TEC and Bumstead or did the defendants bring her in?

LAWYER: She sued TEC and Bumstead.

PHILLIPS: And you did not sue her?

LAWYER: No.

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RESPONDENT

DICKENSON: With regard to the charge conference, and the kind of statements that were made, and he referenced an appendix to an appellate's brief, and that needs some clarification from this court, because that's one not in the record, and disputed. They did attempt to create a bystander's bill in the CA as he referenced. What he failed to mention was we disagreed with that, filed a motion with the court to permit us to either 1) file a controverting affidavit disputing it entirely; or 2) to strike it. And the CA struck the affidavit that he is now relying upon in this court.

O'NEILL: But you would agree with the substance. No testimony came in at trial as to anything about who owned the cows or what they may or may not have done.

DICKENSON: I will agree that there was no direct evidence at all, at trial about who the owner was. The only evidence on that issue was the fact that they were owned by someone. They had generic ____ tags indicating ownership from the cattle...

O'NEILL: That came into the testimony at trial before the jury?

DICKENSON: Yes.

O'NEILL: Unavoidable accident instruction - in my mind means nobody's fault. Sole proximate cause means somebody's fault.

DICKENSON: I think that's a fair basic distinction between the two.

O'NEILL: So if it's nobody's fault then what difference does it matter if it's somebody's

else's fault?

DICKENSON: A party to the accident to the suit is what I believe - this court has - if the court is saying today or says in this case that there is no difference of consequence that sole proximate cause is somehow subsumed within the definition of unavoidable accident...

O'NEILL: I don't understand why it's not in this case. Because your argument is premised on the notion that unavoidable accident has to relate to nonhuman conduct. Right?

DICKENSON: That is generally what it is considered to be.

O'NEILL: But if it relates to arguably human conduct, if that's the case, then isn't sole proximate cause superfluous?

DICKENSON: No. We don't believe so especially in the context of this case in the way they presented their theory of the case to the jury. It is somewhat convoluted in the facts. They have taken alternative positions that there was either one accident or two accidents. Were we negligent in striking the cow, or failing to miss the cow, and then were we later negligent in failing to warn? And there's numerous references to these two separate accidents. So to that extent an unavoidable accident would apply to this first accident. However with regard to the second one, the second accident, then which is actually the facts of this case are, he struck a cow, pulled off to where he could...

O'NEILL: But your sole proximate cause instruction only relates to the first piece.

DICKENSON: No.

O'NEILL: Who else's fault could it be that he didn't properly warn?

DICKENSON: Mae Brown.

BRISTER: She kept him in the truck? Don't you get out of that truck and clean up the mess you made!

DICKENSON: No. And that's not the position we're taking. But what they have said and there was evidence to this effect that unlike the circumstances that were presented to him, she was coming from the opposite direction. There was testimony that he left his lights on...

OWEN: You say she was negligent. Is that your position?

DICKENSON: I'm saying that she couldn't have been considered to be negligent or just her conduct in striking a cow in the road.

OWEN: If your position is she was negligent you're required to do comparative responsibility aren't you? Even if she's not - you are required to submit that to the jury.

DICKENSON: I don't believe I am required to. I don't think...

BRISTER: You're not entitled to a sole proximate cause instead of submitting Sam _____ name are you?

DICKENSON: I am actually unaware of anything which requires me if I'm just saying, as they took the position in this case, that her conduct caused the accident. Whether it was negligent or not.

OWEN: It seems to me you've got to decide whether you're going to say she was negligent or not. If you're saying she is negligent it seems to me you've got to submit that comparative responsibility. If you're saying her conduct caused it, as sole proximate cause it was not negligent, then it seems to me the unavoidable accident squarely addressed that. It says an event not proximately caused by the negligence of any party to it, which would include Mrs. Brown. So it seems to me you're covered if your position is Mrs. Brown was not negligent but it was her conduct that caused the second accident.

DICKENSON: I respectfully disagree. I do believe that her conduct, assuming it's not negligence, which is what they argue, for taking the police officer's report of faulty action on her part, her failure to see a cow traveling at 35-40 mph on level land that, that conduct, not negligent, but conduct could have been a sole proximate cause.

BRISTER: Did you argue that at closing argument?

DICKENSON: I was appellate counsel only. Yes. Contrary to what they were saying, there were references in the closing arguments to conduct on the part of Mrs. Brown.

BRISTER: But you could only be harmed by the judge didn't give us an instruction. If you try to make the argument and the other side objects, there's no basis for that in the charge, and the judge sustains it. Nothing that like happened.

DICKENSON: They didn't object to it. But we can still be harmed by failing to receive the sole proximate cause in our opinion.

BRISTER: Isn't what your saying, saying okay if it's sole proximate cause that means caused by another person. Unavoidable accident that's caused by another nonperson. Act of God that's caused by God. And why do we care whether the cows got on the road because of another person, or another nonperson, or God let them out? Why do we want the jury spending any time figuring that out? None of those people are liable.

DICKENSON: In the context of the sole proximate cause...

BRISTER: You should have given this one rather than that one. What your argument is, is we want the jury to decide whether these cows got out because of the weather or because somebody let them out. And my question is who cares? Why do we want a jury to decide that?

DICKENSON: Because in the context of a sole proximate cause instruction, which unlike the unavoidable accident instruction and pursuant to the prior pronouncements of this court, the purpose of the sole proximate cause instruction is to focus the jury's attention that actions or conduct of some other human may destroy the causal connection or may be the cause of this accident.

WAINWRIGHT: What one person was the sole proximate cause of this accident? 100% responsible. Pick one. You're saying you are harmed by failure to give a sole proximate cause instruction. What one person was the sole proximate cause of the accident? The sole proximate cause instruction says an act or omission of a person not a party to the lawsuit is the sole proximate cause of the occurrence.

DICKENSON: I say that is the owner of the cattle.

WAINWRIGHT: And Mae Brown's conduct was not responsible at all?

DICKENSON: I think that a jury could have found that depending upon what version of the facts they decided to accept. A jury could have disagreed with me and concluded that Mae Brown was in fact the sole cause of this second accident.

WAINWRIGHT: So now you've told me there are two persons that are responsible. Mae Brown and the cows' owner. I don't understand how you say you're harmed by failure to submit a sole proximate cause instruction when you acknowledge that there is more than one person responsible for this accident. Maybe that's the problem with the instruction rather than your position or maybe both. But I have a fundamental question about that.

DICKENSON: This court has previously ruled in Shoemacher v. Holcomb, that a party is entitled to advance inconsistent and alternative theories. And in fact in that case approved the submission of sole proximate cause and unavoidable accident. And expressly rejected - in fact the CA said were both sole proximate cause and unavoidable accident are raised by the same pleadings and evidence, you get to submit one but not both. And this court said we disagree with that.

WAINWRIGHT: If in a trial the evidence hashes out such that there are three defendants and each is 1/3 responsible, is a sole proximate cause instruction required to be given by the judge if requested?

DICKENSON: I think under the instruction as it is worded at the present time in the pattern jury charge, and as this court has discussed it for instance in the Yarborough case, no. You will not be entitled to it. It must be someone who is not a party to the lawsuit.

O'NEILL: And Mrs. Brown was a party you say?

DICKENSON: Not at the time of trial.

WAINWRIGHT: So if you have a defendant who was involved in the accident and is at trial, and then two persons who were involved in the accident but are not at trial, and there is some evidence that all three of these persons - one a defendant, two not parties, had some involvement with the accident, is a sole proximate cause instruction required?

DICKENSON: Yes. There were two persons who were involved in the accident and their conduct - there were allegations that their conduct may have contributed to it. Yes. I think the jury should be entitled to determine under the current state of Texas law whether the actions of one of the other two people, actions or conduct, was the sole proximate cause of the accident.

WAINWRIGHT: Does that make sense to you?

DICKENSON: Yes.

OWEN: What evidence is there that the owner of the cattle was negligent. You're only entitled to the instruction if it's raised by the pleadings and the evidence. What evidence is there that the owner of these cattle was negligent?

DICKENSON: There is no direct evidence in the record of any conduct on the part of the cattle owner because we could not locate him.

PHILLIPS: So you're saying if I own cattle, and they are on a road, that's kind of res ipsa loquitur of my negligence?

DICKENSON: No. I am saying there is a presumption of human conduct or should be a presumption or an inference of human conduct...

PHILLIPS: And that would be enough to get to the jury if that's all you had? The cattle are mine, but they are on the road. If you introduce those two facts and rest, do you get a jury trial?

DICKENSON: Under the court's question no.

PHILLIPS: What else did you have here?

DICKENSON: We had something showing these cattle were owned, that there were fences around the area where this happened, that the weather was good at the time. Under those circumstances showing that the cattle were owned by somebody, the jury was told by plaintiff's counsel we wanted to find them because we want to find out what happened, how their cattle got there.

OWEN: But cattle can get on the road without the owner doing anything.

DICKENSON: Under that same scenario, I think that there could be an inference that if your cattle can walk through the fence, then you did something wrong in not making sure that you had a better fence. And I realize that can be taken to a number of levels. But we just believe that if in fact cattle are on a US highway, such as this, in that area, as reflected in the pictures and the evidence, that there is an inference that the conduct on the part of a human being permitted the cattle to be there.

PHILLIPS: How are these instructions - unavoidable accident, act of God, and sole proximate cause different from the comments on the evidence that we disapproved in GM v. Accord? And what does this add to the jury trial since they are free already under the basic instructions and questions they have to find no negligence on any of the parties in the case?

DICKENSON: Since the GM v. Accord case, I do believe that this court has specifically addressed...

PHILLIPS: Oh well we have. But I just didn't understand their opinions. Maybe you can make it clearer what the basis for the court's rationale.

DICKENSON: I think the basis for the court's rationale is that every party is entitled to submission of the specific issues. I think the rationale for it being that it is something that has been used. It permits a party to not only can you find that these two people involved in this accident are at fault, but you can find that the actions or conduct of some other party was involved. I believe some of the rationale for it may be reflected in J. Hecht's dissenting opinion in Rinehart in which he discussed the history of these different types of instructions and how with the development of time they have been retained by the courts, especially in a broad form submission where you can tell the jury just because we're going to give you broad form there are these other considerations. And that is a party's defensive theory that they are entitled to consider that.

BRISTER: I would like to know how you were harmed by the absence of a sole proximate cause instruction given the unavoidable accident instruction that said it may have been noone's fault. That a party in effect. Couldn't a jury just looked at that unavoidable accident instruction the same way they would have considered a sole proximate cause instruction?

DICKENSON: I don't believe so under the rationale of this court's prior opinions in discussing the significant differences between unavoidable accident...

BRISTER: It's the kind of differences that we don't tell the jury anyway. Right? It's the kind of significant differences that we don't instruct the jury on anyway. The human verses nonhuman conduct. There's none of that in the instruction in unavoidable accident for example. Just as a practical matter how are you harmed by the absence of an instruction on sole proximate cause given the jury was _____ the unavoidable accident?

DICKENSON: Because we do not believe that the unavoidable accident instruction in and of itself as written is sufficient to submit a defendant's primary or predominant defensive theory to the jury of saying you may consider the actions of someone not a party to the lawsuit in determining specifically between cause. Because I believe the unavoidable accident instruction says an accident may be unavoidable, that is not proximately caused by the negligence of any party to it. But the sole proximate cause instruction on the other hand doesn't reference negligence. It talks about conduct. A key distinction between the two is that sole proximate cause informs the jury that nonnegligence, just conduct on the part of a party, can be the sole cause of an accident.

OWEN: There is evidence of negligence, or at least conduct of more than one person that could have caused this. And your theory of the case was just that. It could have been this confluence. If you had targeted and said no. It's one person. It's that person's conduct - nonnegligent conduct that caused this. I might see where you would have a strong argument that yes, I want to focus the jury on this wholly intervene sole cause. But here you were saying well, it's this, this and this. And you've got the unavoidable accident instruction that says it could be an event not proximately caused by the negligence of any party to it. So that seems to me to cover your position in this case because you didn't take the position that no, it's this sole cause to the exclusion of my client's negligence.

DICKENSON: It's my understanding from trial counsel that the case progressed between a - was there one accident or was there two accidents. They did take the position...

OWEN: Looking solely at the second accident, it seems to me that throughout the trial the defendant took the position that there was at least a confluence of events that wasn't anybody's fault. But they didn't focus in on this sole proximate cause.

DICKENSON: I think he took alternative positions. For instance in closing statements, he made comments about in discussing the conduct of Mrs. Brown, over and above what was referenced by counsel 1) what the conduct of Mrs. Brown; did she hit a second cow? Because there was issue between one or two dead cows on the road. And that what logic in there is that he should have avoided it, but she shouldn't have with regard to the second accident. And the quote was - they tell you, the plaintiff's counsel, "she's not at fault but Bumstead is." Where is the logic in that? He was making the argument that with regard to that second accident to the extent it was two separate accidents, that it was her conduct.

OWEN: Is there anywhere in the record that shows you argued at the TC - I thought you told us awhile ago that you were contending it was the owner of the cattle's fault, not Browns. Again, you're saying it's either Brown or...

DICKENSON: What I was saying earlier in response to a question was if I was forced to pick one. But a jury may be forced to pick one, or they may pick none. If I had to pick one, yes, I would use the cow owner's conduct. However, if the jury believed that there were two separate accidents a jury is entitled to say with regard to that circumstance, we believe that it was Mae Brown's

conduct.

OWEN: It seems that unavoidable accident covers Mae Brown. If it doesn't you should have asked for a comparative fault question.

WAINWRIGHT: Did you ask that Mae Brown be submitted in the charge?

DICKENSON: No.

WAINWRIGHT: Did you ask that the owner of the cow be submitted in the charge?

DICKENSON: That I do not recall.

WAINWRIGHT: What about Maxwell, the driver behind Dillard. Did you ask that he be sued?

DICKENSON: No. There was no contention that at trial from either party that Mr. Maxwell's fault/conduct - the intoxication, contributed to Mr. Dillard's injuries as opposed to injuries suffered by Mrs. Brown.

WAINWRIGHT: So at the trial the defense was the empty chair defense? Maybe one or two empty chairs were responsible?

DICKENSON: Essentially yes.

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REBUTTAL

LAWYER: At trial the theory was nobody was at fault. Ever at trial was any argument made that Mae Brown was at fault. The argument counsel referenced was, I'm in the same boat with poor Mrs. Brown. She wasn't at fault, and I'm not at fault. None of us could see these dark cows. The problem of that argument was, she had one dead cow laying on the road. He had a herd of cows he saw from 1,700 feet away. Big difference. But that was the pitch. The pitch was never that Mae Brown was at fault. He told the jury at the beginning and at the end of the trial she wasn't at fault, and nobody was at fault. It was the cows that caused the accident. And if that's your theory _____ is your instruction. Never, not one time cited in the brief, in the CA's opinion or anywhere was any mention of the cow's owner or anything he or she or it did or did not do. Ever. The first time there was a theory that well maybe it was him, and maybe it was her was on this appeal. The trial theory was the cows caused this. We, me and poor ole Mrs. Brown and poor ole Mr. Dillard couldn't avoid what these cows did.

O'NEILL: What argument did they use at the TC to support the sole proximate cause instruction? They did rely on the owner.

LAWYER: I gave you the bystander's bill. They told the judge it's cow conduct that we think we're entitled to. And we read it and said judge it says a person. And the judge says I'm not going to give you that. You don't have to believe my bystander's bill that they objected to though. That's what he told them in the opening statement, and that's what he told the judge in closing argument.

OWEN: We really shouldn't be looking at closing argument should we because you didn't get the instruction. I wouldn't argue sole proximate cause if I didn't get the instruction.

LAWYER: But if you had an argument that Mae Brown caused anything, it still fit under unavoidable accident. He was free as a bird to say, you know Mae Brown is not a party and if you think she caused this, this was an unavoidable - he argued unavoidable accident directly, but he only argued it about the cows, not the cow owner, not Mae Brown. He had every reason in the world to argue that Mae Brown was at fault if that's what he thought. That wasn't the way this lawsuit was tried. I felt like I had woken up in Wonderland when I read the appellate brief. This lawsuit was tried about these cows were in the way and they caused this whole thing. And we've got an appeal going on about whether Mae Brown or an unknown mystery cow owner committed some mystery conduct that caused this accident.

HECHT: If there had been evidence of the owner's conduct, would a sole proximate cause instruction have been appropriate?

LAWYER: Is it proper to give an inferential rebuttal instruction or when would it be? Let me just say this. I can imagine if you're ever going to have them that it would be in a case where there was strong evidence of an outside party involved in the deal, and some reason that the trial judge felt like there was potential confusion and that that instruction was necessary. Maybe a person who was not a party but was arguably an agent or was somebody that the jury might confusingly lump in with the defendant. And the court felt like it was necessary to quote a very learned justice's statement in the dissent in Hill v. Winn Dixie "if what the trial judge did here constituted an abuse of discretion, then that discretion is very small indeed. Fashioning a jury charge cannot be so tightly circumscribed, not only as a matter of law but as a matter of sure practicality."

Is there ever a situation when a trial judge ought to give a sole proximate cause instruction or act of God, or unavoidable accident? I'm not prepared to stand here and I surely don't feel I need to to win this appeal and say never. But maybe we could avoid a lot of confusion if you just write out beside yes or not, put one of those red circles with a slash through it and wrote just say no, to be sure they understand that. Because that's really all that any of those instructions do is say you don't have to find that he caused this accident - the defendant. But it sure outside the realm reason it seems to be to say that prejudicial error would have changed the outcome of this lawsuit under this record when the only witness they called lied about everything he said except he admitted he saw the cows from the top of the hill, 1,700 feet away.

To say that this is reversible error with that unavoidable accident instruction

when their only argument throughout the trial was the cows were the cause. None of us people. Just the cows.

The sole proximate cause focus in this appeal is purely an animal of appeal and not an animal that occurred during this trial. We've not mentioned the fact that sole proximate cause was never disclosed at anytime. There was not a factual mention of a basis for a sole proximate cause defense in disclosures. This is a creature of appeal because we lost the lawsuit. And because we're hoping that on appeal a court will ___ on to sole proximate cause as an advantageous instruction for me because I lost this lawsuit, and not because that's the way this case was tried. There is more evidence about the number of elves that Santa Clause employed in 1977 in this record, or as much as there is about this cow owner, or any conduct, or any foreseeability from that particular conduct even that got the cows to the highway.

SCHNEIDER: What were the responses to your discovery about what the cause was?

LAWYER: It was just we didn't do it. Unavoidable accident was not disclosed either, but I wasn't about to object to it because it was kind of raised by these facts.

SCHNEIDER: Did you ask what their theory was?

LAWYER: I sent a request for disclosure that says explain your defensive claims of theory, and the factual basis therefore. And the answer never mentioned a cow owner, and never mentioned sole proximate cause, and never mentioned unavoidable accident. So we let that go because there was kind of an argument that the cows caused the first accident. There's a clear argument that the cows couldn't have anything to do with the second accident. Bellvue Campbell and Union Pump, and a number of this court's decisions make it clear as a bell that proximate cause does not go forever. Proximate cause is a tough concept. This court has said there is a limit to proximate cause to foreseeability and cause and fact. And that limit stops before a second accident.