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Supreme Court of Texas.
Loram Maintenance of Way, Inc., Petitioner,
v.
David Ianni, Respondent.
No. 04-0666.

November 29, 2005

Appearances:
Mike A. Hatchell, (argued), Locke Liddell & Sapp, LLP, Austin, TX,
for petitioner.
Gordon Stewart, (argued), Calhoun, Vinson & Reaves, L.L.P., El
Paso, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett,
Justice Harriet O'Neill, Justice David Medina, Justice Paul W. Green,
Justice Nathan L. Hecht, Justice Dale Wainwright, Justice Phil
Johnson, Justice Scott A. Brister.

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PROCEEDINGS

JUSTICE: Be seated please. The Court is ready to hear argument in
04- 0666, Loram Maintenance of Way, Inc., versus David Ianni.

COURT ATTENDANT: May it please the Court, Mr. Mike Hatchell will
present argument for the petitioner. The petitioner has reserve five
minutes for rebuttal.

ORAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF THE PETITIONER

MR. HATCHELL: May it please the Court. It's interesting
[inaudible] involving the shooting of the police officer by Loram
[inaudible] employee. And the very important issue here regarding the
extent of liability of an employer for the appellee only that under the
Odes-- the case of Odes Engineering versus Clark. There are two over at
the issues indicated. Did Loram owe a duty to intervene and I
understand that is the principal contingency that Loram should have
intervene to take Mr. Tingle off the job. Did Loram owe a duty to
intervene to do something about Mr. Tingle's drug use which candidly

was known among the employees and perhaps some supervisors.

JUSTICE O'NEILL: If Mr. Tingle had a violent force to fellow employee on the work site, duty or not duty.

MR. HATCHELL: Well, the violence itself would not create duty at least should certainly under Odes Engineering versus Clark%. At least not in the context to talk about the bank conceivably as for, he have during, during work time and ...

JUSTICE: Well, I guess your attorney's tell me what injury whose cover [inaudible] ...

JUSTICE O'NEILL: Well, he attacks, he attacks his fellow worker may I-- I think the expert testimony was not understand your contested the expert testimony but that Matt is particularly bad, drug causes violent erratic behavior. If there was evidence that a police officer knew knew it was taking Matt on the job and that resulted in violence towards a fellow employee were he were injured another employee, duty or no duty?

MR. HATCHELL: Well, probably no duty in that instance because of a camp bar that ...

JUSTICE: Because of what I told you.

MR. HATCHELL: Pardon.

JUSTICE: Because of-- no duty because why it does of a camp bar -

JUSTICE O'NEILL: Other what was count ...

MR. HATCHELL: That, that job. But assuming there was no come. And employer probably has a duty to protect other employees from other unsafe employees, that would be true indeed. Within the contents of the work environment.

JUSTICE: Anything was all the job and placement came in to an investigation and shot that then Mr. Ianni would have a claim?

MR. HATCHELL: I think probably Mr. Ianni would have a claim.

JUSTICE: Does as if it was drunk and run over him he'd have a claim?

MR. HATCHELL: On the premises and within the compounds of the working environment, yes. And your Honor raises a good point is, is to what--what point do we draw the line and this Court has drawn the line and Odes Engineering versus Clark as off-duty conduct his concern. Mr. Justice Brister were not talking about situation for example where we have either created or allowed dangerous employee to essentially not move his danger beyond, beyond the contents of the working environment. This, this incident occurred a couple of hours after this particular employee was, was off-duty. And we do not know what the source of his incapacity was. Odes Engineering ...

JUSTICE: Mr. Hatchell, I will go back to the question Justice O'Neill was asking. You were asked what type of injury in which you ask a question ...

MR. HATCHELL: I don't know that it was to-- to an employee on the premises or whether it was to a member of the public outside and later on after the work exchange.

JUSTICE: Okay. Thank you Mr. Hatchell. Thank you.

MR. HATCHELL: Demonstrating as supposed that I've been at this business a long time. Odes Engineering versus Clark was sentence in a bombshell when it was decided in, in 1984 and Justice Calderon hand the thread of the needle through a number of doctor and is that since you already hands the result in that case. Particularly one that overwriting doctrine that employees and employers are not liable to control the, the conduct of their off-duty employees. So it's very important in this case to stick exactly to what Justice Calderon have said. He said, "No one." He said, "When we call us an employee

incapacity," an employer exercises control over the employee. The employee has the duty to take such action and has a reasonably prudent person under the Simmers and on the circuit on which it would take, there are two readings of the Court of grievance in that. One is there has to be an incapacity and going to quote: There has to be knowledge on behalf of the employer that the employee is incapacitated and there has to be an affirmative act not just simply non [inaudible]. There has to be an affirmative act of control. This doctrine in our judgment is constricted within those guidelines and it just essentially a particular act or in-- of the rest of the doctrine and that we simply don't well, fit in-- into this paragraph. The incapacity of this employee on the day in question did not originate on the premises itself and so far as his being out of control. It is true that during that day he was probably on drugs and he was testified to being someone stuporous in nature and vagrant. But he was not bad, he was not violent when he was delivered back to the motel. It was-- there is no actual or knowledge or our awareness did Mr. Tingle was out of control and nothing it emanate out of the work environment. So and there was no actual affirmative conduct by which Loram attempted to take control in response to a non-incapacity. And as simple this is may seem one would, one would should probably asked, where did the Court of Appeals go wrong. Were I think the Court Appeals went wrong is-- and analyzing the question of control looking at that issue more as if we are looking at the question of control to determine, let's say for example a criminal contract his liability for the conduct of the employees uncertainty. Simply merely the exercise of some control which then blockage the contract or with the duty. That's not the way Odes Engineering versus Clark% works in my idea. Odes Engineering versus Clark% is what I recall an epizootic case. The duty is impose in relation to an episode which occur whether it's drinking which was usually is the basis or whether is any other kind of incapacity to control as the exercise in relation to that but the control and the liability and the duty ceased when the episode itself abates and I think what the Court of Appeals do was to say do we have some evidence of what we consider killing had then consider.

JUSTICE: Is that is how you distinguished love on that basis, [inaudible] ...

MR. HATCHELL: Well, yeah in, in, in a way yes of course love is completely a different situation in the sense that-- and I think this Court rightly held-- that the independent contractor was essentially was part of her job to get drunk and if an employee imposes a cause which encourages and, and, and keep quite handled in this case induce the intoxication and I see no problem with the liability. Not related Loram had not required his employees ...

JUSTICE O'NEILL: Well, but now that-- there could be a fact issue with that, that apparently there was testimony that supervisors were using drugs. I am great that it was contested but then it was given time off to knowingly go buy drugs because it benefited the company on his long shifts to have it's employees using drugs to stay awake, there is testimony to that affect in the record. If there is fact issue on whether the employees felt they needed to use drugs to keep their jobs so they could stay awake, why would be fit within the love construct.

MR. HATCHELL: Well, for of all there was no-- well, I'm going to have answer that facts later, I'm going to answer completely. It is true that there's evidence that supervisors knew of the drug used. In my judgment there is no evidence that they were given time off to go bad drugs. That testimony which unfortunately it is over hype again and

the otherwise excellent brief of those of the counsel. Comes from the testimony of Roger Tingle in which he said, "I was given two days off to go to Barstow, California." He was not given two days off and support any evidence shows to go back drugs could occur.

JUSTICE O'NEILL: Well, okay. Hypothetically he had been, is that-- with that fall underlying ...

MR. HATCHELL: I don't think that an episode of one employee that you would have in my judgment, in love it was a policy of the company [inaudible] ...

JUSTICE O'NEILL: Unwritten, unspoken, it was ...

MR. HATCHELL: Well, and there was plenty of testimony.

JUSTICE: Here is the truth-- I mean is it, is it true that not true but is there evidence that a supervisor are actually supply Tingle with med.

MR. HATCHELL: No, no. There is no evidence that he-- there-- that Tingle was supplied with met by supervisors. There is evidence just the opposite.

JUSTICE O'NEILL: If, if a supervisor had allowed him time off to go to California knowing he was going to purchase drugs-- I, I understand your saying does not this case. I am just trying to figure out what case would fit your love and the supervisors knows he's going to go buy drugs to give to the other employees so they can stay awake as well on a remote a work site. Would that fit within the love construct?

MR. HATCHELL: No not to me unless it rises to the level of a policy within the company and policies as I understand it have to be set by, vice principal of the company. In love it was set by the company itself and not by the individual employees at the lower level. It could be very mad if we are going beyond the Odes Engineering versus Clark into basically just a general duty and it-- and that general duty is, is your Honors saying hypothetically is being affirmed, concerns a policy of the company which-- in, in my judgment it cannot become a policy of other company unless it is done that-- by vice principal and this, this supervisor were not vice principal but I really would like to dispel the notion that, that what happened in this case because Robert Tingle specifically testified.

JUSTICE: How do you know that your supervisors knew what he had to know? Why?

MR. HATCHELL: Well, I don't know I can't remember any conversation we had but he used some other drugs when we got back. Oh, okay and Barstow was the only place I ever went to bad drugs so he had absolutely no recollection of that fact, I mean, it cannot give any testimony that was done and it's, it's just a very unfortunate that, that's allowed verbally around that but I think if you Honor, it just an excellent question and I've done simply I think it must rise to the level of policies is being in the love and that policy must come from the corporation itself otherwise it there would be ...

JUSTICE: Well, let's take a-- addressed that general version of the other side of the argument. Explain why on a remote work site where there is evidence that three fourths of the employees are using methamphetamine and there's evidence that benefits the company and assume evidence or knowledge that methamphetamine produces certain results in takers of that drug that are known. And the company allows that to continue on a contin-- on extended basis all the work of that remote sites and as soon that there's evidence of the supervisors know. So the company can allow that situation to continue three fourths of the workers using methamphetamine, supervisors know. They leave the

work site that day-- say Nino Ellimo come back the next day and maybe their thinking hopefully with the drugs so they can continue to work hard and work long. Explain that what's your best argument to where Nino Ellimo works in that situation.

MR. HATCHELL: Well, Nino Ellimo works -

JUSTICE: Finding the facts of the best like for your opponent.

MR. HATCHELL: - Nino Ellimo works because-- and I'm assuming of course in your affidavit you also have your off-duty in jury that appears hours after-- and are-- arguably as related to drugs. Nino Ellimo works -

JUSTICE: - put to the side, put to the side for now to see the ability of the gun and -

MR. HATCHELL: Right.

JUSTICE: - criminal act let's just sees a civil.

MR. HATCHELL: Right. Nino Ellimo works in that case because once you begin to extend duties beyond the workforce-- workplace you have your, your own a very, very slippery slope. Everyone of the factors in your hypothetical has been dealt with in one case or another. The beer party that describe in the drinking benefits the company and the employees so it subject the, the employers who drink on the premises on a regular basis and violation of the company policy. The providing of places to sleep all abstract concepts but consider before he go when you ranked it down the facts of this case, supposed you have an employee that has bipolar disorder and that-- and you know that employee because of low salary and because of hard work on the job, cannot take his naps and then leaves the premises and an episode occurs on the state of depression, employee allow or in allowable? You can extend that answer to nearsightedness? You can any potential incapacity that would manifest itself outside the premises that could result if you have not a job and could resolved and that's to me is the genius both and the stopping point of Odes Engineering versus Clark is the affirmative act of taking actual control under the court which did not occur in this case.

JUSTICE: Thank you Mr. Hatchell. The Court is ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Mr. Gordon Stewart represent argument for the respondent.

ORAL ARGUMENT OF GORDON STEWART ON BEHALF OF THE RESPONDENT

MR. STEWART: May it please the Court. A unanimous jury of twelve people and two unanimous Court of Appeal's palace consisting of four justices. Found by lower house negligence liability exercise through a rich employee Tingle and that approximately cause [inaudible]. At first in my own opinion that not even the as far as I can tell then criticize by any other court in the state. It is not resolved it in any significant new law being establish by any other courts in the state because it didn't try to establish a new law it simply applied well establish [inaudible] law that already existed.

JUSTICE: So do you agree in-- that it's, it's, it's a general duty concept rather than restricted concept [inaudible] that orders?

MR. STEWART: I see now, I try to understand the question?

JUSTICE: Well, do you that, that, that the Ianni situation case comes out of Court of Appeals sets that a general duty, own by

employers rather than restricted duties that landed a notice.

MR. STEWART: No I think the court of appeal applied-- improperly applied Odes Engineering versus Clark but I do think there are two duty involved here. There is the general duty of employer to control it's employees and one negligent manner and there is -

JUSTICE: What, what, what ...

MR. STEWART: - a Odes versus Engineering versus Clark it's simply a special case so that duty in my view.

JUSTICE: When their at home?

MR. STEWART: No what I'm say-- what do you explain-- what I'm saying is you have to look at the circumstances of the case there is a duty and this is the second really particular duty all I'm referring to. There is a duty not to negligently retain or higher dangerous employees that's a long serious occasion including the Reed versus Scott Fletcher case which was applied that duty extended it to a franchise org.

JUSTICE: Well, that what your jury here. Discussed shots somebody shots police officers before?

MR. STEWART: He was known to be dangerous.

JUSTICE: Had he-- let's try that one more time-- had he shot-- how many police officer had he shot before?

MR. STEWART: He'd not shot a police officer, he attack first ...

JUSTICE: So, so the fact-- so if you ever attack the person an employer cannot hire them or they will be hire-- liable for all assaults no matter where or what time it occurs?

MR. STEWART: No but that's not about his case either.

JUSTICE: Well, I know but that's, that-- this case has nothing to do with negligence harm, how does this case have to do with negligence harms ...

MR. STEWART: No it, it's-- is actually better for the employer and the less honor is duty, duty negligence challenge case, negligence challenge is require investigation. This a negligence retention of unknown dangerous employee known to be dangerous that's just days before this shooting occur. That is why I say that this is not, this is not even an honor is the duty has been applied in numerous other cases, a franchise are and a Reed case has to go out and require franchise that need to investigate. In this case you have an employer knowing that there are dangerous employee they tried to knifed someone that merely-- he thought was interfering between himself and the wife a matter of two or three days before indeeming the Mexico at first it known to be dangerous. You have co-workers telling his supervisors-- the superintendent in-charge that is entire clearly charges a machine telling in this portion is altered.

JUSTICE: Let me ask you this thing, if an employer has an employee who does something dangerous at the job and then two days later at home shoots his or her spouse, what difference does it make whether the employer fired them or retain them in the, in the-- in between?

MR. STEWART: The difference is, is the same difference as Odes Engineering versus Clark, in that, the employer is in control of the situation, in this case the employer by ...

JUSTICE: What if the employer-- if the employee shoots somebody at home? What has the employer done different if they fire them or haven't fire them that affects that outcome? You're just-- you just establishing a rule as-- you going to fire everybody or you're liable for everything they do they're after it?

MR. STEWART: No that's not correct. I establish a rule on a very extents of facts those case extensively set forth two far on those

things and in our brief. There are numerous facts that make the employer liable on this particular case and I establishing any kind of special general rule but in this particular case as employer aiding and abetting this employee to get drunk ...

JUSTICE: Let me ask you, let me ask you this under the duty scenario that you articulated today if the employer here had terminated Tingle before this incidental phrase, before, you know, he said, "You're fired, leave." and then the shooting occur, would the employer be liable?

MR. STEWART: No just as in Odes Engineering versus Clark have the employer simply said your terminated.

JUSTICE: Why should the employer do more than this if he has knowledge that this is a dangerous person why should he take the next step and call the authorities to have this person investigated or arrested because he imposes a threat to public society have the duty of an employer as well?

MR. STEWART: Well, I think morally the employer should I, I just don't think the law of Texas go that far morally I don't think the employer probably should but in this case you have an employer does not even just a office employer. This what the employer bringing this people from town to town and making this employee more dangerous everyday because he going to the job 14 hours a day that is making it more dangerous.

JUSTICE: If there's no liability and hypothetically I give you the-- and I think I'm, I'm asking the same question as Justice Brister was asking what about the inclined of relationship was the proximate cause of the injuries to Mr. Ianni.

MR. STEWART: The employment relationship here is, is employer is a certain control is why is-- why was Odes Engineering versus Clark comes in. It's hard to control over not just one instance but over a number of days and months-- weeks. A certain control making this employer more-- actually more dangerous bringing this employee from town to town does employee will not even then allow counsel . The employment is making it more dangerous. I respectfully disagree what told in Counsel. This employee was mumbling the day of this incident, mumbling on the job, "I'm going to kill her," referring to the what, I'm going to kill her. The co-worker tells the supervisor this employee is out of control. The supervisor had previously and again disagree respectfully what told in Counsel. This supervisor had given the employee methamphetamine when he was addict, this supervisor had allowed Roger Tingle time-off to keep methamphetamine so it could function.

JUSTICE: Was there any evidence that-- after the end of work before the police officer was shot that he took additional drugs?

MR. STEWART: No because he already get struck out on the job I mean ...

JUSTICE: So this is my question is what difference would it made to fire?

MR. STEWART: What difference would it made in a ...

JUSTICE: He still, he still would have gone back to the hotel, he still would have got an argument with his wife, he'd still would have shot the police officer?

MR. STEWART: I do not think that's correct that's all speculations because if I knows is only knowing respect we know what they didn't argue this thing always can get a respect. You could speculate the same thing what had happened if I had acquit the person that caught. You can always speculate in this situation it would have happened anyway but in this case he will not he would not have work ...

JUSTICE: We can tell a difference between putting a drunk person in the car and they hit somebody on the way home versus [inaudible] taxi give, would you tell that to-- but your saying they should have struck his name from the books but, what would have happened differently?

MR. STEWART: What had happened differently is knowing [inaudible] on the first place but remember how does ...

JUSTICE: He's there now they fire him because as you say that day he's acting strange. So they fire him because back in the hotel and everything else happens.

MR. STEWART: Well, there we-- I would have been there but the, the, the more essential point is we don't know what will happened. It may have brought into the senses enough he may have gotten ill anything could have happen we know what did happened.

JUSTICE: Let me ask you this, Mr. Hatchell says, "The difference is his gone home his been home, his been home for a worthwhile this is not like Odes% where your own the way home." Has-- is there any case we've held an employer liable for something that happens several hours later you go home you take a nap you drink another beer again and that we've held that the employer is liable I'm concern about how long after the working time this is?

JUSTICE: Well, I say Reed versus Scott Fletcher that happened long ...

JUSTICE: But he is on the job and Scott Fletcher.

MR. STEWART: This fellow is not on the job I'm concern that if my briefing attorney goes home today gets in an argument with the spouse and shoots him or the police officer comes to rescue the spouse if Judge Brister who's liable because I've put them under sex stress. Now by stressing out the officer. And I charge you to people out there,

JUSTICE: Did comes that-- they've gone home and I'm not there caressing them. Why am I liable for what they do at home?

MR GORDON: Well, I respectfully disagree the discussion ...

JUSTICE: I can't even go into their home, why am I left for it?

MR. STEWART: I'm respectfully is grand Scott Fletcher and somebody in the other cases the dangerous people are found the job, their not but to go back to your question the fact is that I think your not-- and with respect stating the facts as they actually are in the sense that; first, Loram creates the entire situation to start with we won't even get there if I act-- if they fair to try to control properly. When-- if supervisor is notify that this person is try on drugs and dangerous shows [inaudible] the attack me that came off his machine that's indeeming. What the supervisor tells him is moderate your methamphetamine used, you've got not worsen Odes Engineering and what if ...

JUSTICE: My, my, my question-- let me go back to my question-- my question is, "This Court ever held somebody who's several hours after being at home does something the employer is left?"

MR. STEWART: Well, again PB for example in essentially the same situation on employer situation was essentially the same control situation occurs and goes to another city. The fact is that I don't-- to give back to direct answer your question what Loram did was they took the employee, the supervisor drove him to this hotel-- motel Loram was hire they paid for it, they drove him there an hour and a half before this whole thing happened when he was mumbling that he wanted to kill his wife they delivered him directly to his wife, what was his wife doing there all day. His wife that whole day was desperately going to the night supervisor, the highest Loram employee at the motel

saying, "I'm terrified I got to get out of here, what do I do? My husband is dangerous." The night supervisor tell it's hurt, the wife to wait in her motel room and pacify the employee when he gets home. Then the su-- the have the reigning the superintend in-charge of this whole thing he delivers his dangerous individual he's been wound about directly to the very person they know he is going to attack with danger to bystanders because Charles Supernoli told him he attack her.

JUSTICE: So, so in my instance I should basically arrest my briefing attorney and keep him at the office cause I don't want in danger his spouse.

MR. STEWART: Again, I think, I think the distinction if between the employer that merely is employing a person and that person maybe dangerous on the office and making an employee dangerous more and more dangers bringing at the city, city and then delivering them to the very person you are having wait for. There is a distinction there.

JUSTICE: So would it make any difference to your case that the angry conduct have been due to personality disorder or stress or something other than drugs I take it long.

MR. STEWART: Well, I think the illegal drug making a specially bad and ...

JUSTICE: The [inaudible] but I wonder if ...

MR. STEWART: But I do think the case wouldstill be viable case depending again [inaudible]. I think the exact facts matter in this case.

JUSTICE: Yeah, but then these exact facts would be extended to other circumstances. What, what happens to situation where you have an employer that has an employee that-- maybe has a drug problem. And then the employer has a great human resources department and they set up medical treatment, they set up appropriate treatment for this individual. Enclose all those medical records are subject to review by the employer. It's all confidential. So the employers doing everything right, morally right, professionally right to take care of it's employee and then there's an offsite killing because the employee doesn't get along with the supervisor. In your situation, you would-- I think say that the employer still responsible.

MR. STEWART: No. I say that's absolutely incorrect. I would say the employer is not responsible. That's why I'm emphasizing the exact facts. The fact is not because their hiring a dangerous employee or the employee is dangerous. That's not the problem but the employee taking drug is not the problem. The problem is that the supervisor is helping this employee to become more, more dangerous not sending him to drug program. The evidence is that the wife even call their drug program and got no results. The point is that they are making this employee more and more dangerous setting up this situation that occurred, what occurred is actually what they should expected occur, to occur and what the supervisor and almost been warned would occur. And that is why these particular facts are important. We are not saying that the employer has to intervene just because of person is on drugs. We are saying and going back to the earlier question, if an employee had shown himself to be dangerous. If there-- if your taking employee from town to town and you don't even know anything if taking drugs. In this case to survive and knows he's taking drugs. He's taking drugs with it-- on occasion. But supervisor wasn't really on drugs is clearly wanted the drugs will occur more to keep them working and because he, he had that bigger dependency in himself.

JUSTICE: What control was Loram exerting at the time of the shooting, over the incident?

MR. STEWART: Again, the PB case establishes that that's not the point. The point is what controls did Loram exercise when he had control and it that result in the shoot. That is the question.

JUSTICE: But again. Well, but on the job that's the employer do need to provide a safe place to work that employee doesn't have the duty to provide a safe place after work. I mean some-- again concern with won't everybody, everybody that every domestic disturbance could be blame on stress from the office or the workplace. What we make all employers liable to all spouses and all crime victims.

MR. STEWART: Now because this is a very exact facts is in the case. Again ...

JUSTICE: Wait. What's, what's going to make your case different from all the others?

MR. STEWART: Because we are not saying that the employer just play-- what a purpose was, you know, your respectfully despite what opposing counsel say--we're not saying there no obligation to intervene. We are saying that Loram exercise his control, his employee to make him dangerous. To create every element that it assure to end the delivering right there when they knew the shooting -

JUSTICE: What -

MR.: - would likely to occur.

JUSTICE: - what would happen if they, if the supervisor had said, you know, "You are wake down on drugs, we don't want you here at the office. Go home."

MR. STEWART: Right.

JUSTICE: And, or, or let me change that. It was-- he's shifts over and he gets in his car and goes home. They know the shifts over he says, I'm going to home I know he's getting in his car and he has a wreck and kills someone. Do they cause there were orders, order there wouldn't be, right?

MR. STEWART: Well, that's orders in the immigration expects, always in the immigration expect says, if you just tell somebody to go home and don't-- to do more than that then that doesn't create liability and we, were saying that this case does not extend that.

JUSTICE: But I noticed that the employer was providing the alcohol, right? And so therefore arguably making him more dangerous.

MR. STEWART: Yes and no. Yes the-- in a certain situation the employer maybe buying the alcohol making him more dangerous but the alcohol is a illegal drug and ...

JUSTICE: So it really is the illegality of the drug or you're drawing the line?

MR. STEWART: No. It's the illegality of the drug and the knowledge that this particular employee is in fact dangerous and helping him become more dangerous.

JUSTICE: How do they help him become more dangerous?

MR. STEWART: They gave him time off to get the drugs. They gave him drugs when he was out.

JUSTICE: I thought you said, drugs is not the issue just a minute ago. It was making this employee more dangerous.

MR. STEWART: What? What drug if illegality of the drugs I'm saying it's not totally the issue. Let's say if your giving a person alcohol on a regular basis knowing that what's make him dangerous with respect. I don't think your decision with this board required that we know liability.

JUSTICE: So you're contention is that the company is making him more dangerous by providing drugs or allowing him to get unused drugs.

MR. STEWART: Well, I'm saying that, that is one element why they

should be liable. There is also the elements that they are bringing a person is becoming more and more dangerous and they know he is. The supervisor warned about it from town to town and the job is making him more dangerous. Loram is more [inaudible].

JUSTICE: The one question I have is-- typically when you satisfy a duty under negligence you are lessening the danger to a third party. But you're saying here is satisfy, if the employer satisfy this duty by terminating him. It would have no impact on what occur afterwards. Do they -

MR. STEWART: No.

JUSTICE: - fired him, they wouldn't be liable. Much say they didn't fire him, they are liable. So if they set fire of duty doesn't make the difference, they don't doesn't make a difference.

MR. STEWART: No. I'm not saying that. I'm saying is speculation is were they terminated him whether that would have prevent the incident or not. I think there's a strong a [inaudible], it would have.

JUSTICE: But it would have, would have prevented the employer from being liable.

MR. STEWART: Again, I-- the only reason I say that-- I am not-- again morally, I think the employer should do more than simply terminate that you should notify somebody to have refer to question earlier. But the problem is Odes engineering versus Clark. The case said-- can I had feel sort of [inaudible] we don't know what the case said. The case said, if they terminate the employee if they just, if they just not putting in a car, if they just had go home that, that would have not created liability. Well, I think it's more likely, in fact much more likely, almost intimately more likely that the accident would have occur anyway an Odes vers-- Engineering versus Clark. Then in our case where the person whose getting more and more dangerous from day to day and if he had been fired indemnity he would endear if he had been sent home to his, to a more stable place where he was known like Alabama or where he came from he would be more likely to get help. They are making more dangerous day by day and this case is less onerous. Less onerous ...

JUSTICE: Clarify this point. Are you saying that Loram was on the hook or off the hook? If I fired him on that final day before they took him back to the hotel.

MR. STEWART: Well, in fact-- in this particular fact situation. I think they would be on the hook because they have, they've already negligence they exercise control on a number day right before them and shouldn't been mean that in counsel. I'm saying it-- in isolation, if all they have is a dangerous employee on a single day like Odes Engineering versus Clark. In isolation if they fired him Odes Engineering versus Clark is saying, well that's okay. You have to do more than that. When, this case they did more than that. They negligently exercise control aided and defended illegal drug use over which.

JUSTICE: Thank you Counsel. Are there any further questions?

MR. STEWART: Thank you, your Honor.

REBUTTAL ARGUMENT OF MIKE A. HATCHELL ON BEHALF OF PETITIONER

JUSTICE: Mr. Hatchell, I think everyone yourself included with not one employers to-- I mean that, saying those what happened here. I

understand you contested. But would not one employers to look the other way while employers abusing drugs that benefit the company by keeping them away for long shifts. What avenues of relief are there from employer, for against employers or what to turn is there against employers who engage in that sort of behavior?

MR. HATCHELL: It seems to me your Honor, that were would any would be enough to the ruling back those in counsel.

JUSTICE: I know, I'm saying if there were no such rule. Presuming there's not such rule.

MR. HATCHELL: I think were, I think were, were heading in discouraging employees with doing anything because in this case ...

JUSTICE: No. That's not my question. Presuming there is no duty. This Court were to hold there is no duty. What, what sort of-- what relief would there be or what, what determine there would be to employers not to engage in the sort of activity?

MR. HATCHELL: What my answer were there's a, I was giving the same answer in, in mirror image, the, the encouragement is that an employee can become proactive in, in an employer can become proactive. An employee in work environment to deal with the sort of things. As you well know, we have within the bar program set up to assist attorneys and substance abuse and the mental problems. In this case, Loram have number one, a policy restricted forbidding both drug use and carrying a gun particularly in an established program for the employees to call anonymously and without over signed that a employer -

JUSTICE: But there's any -

MR. HATCHELL: - to deal with this.

JUSTICE: - is there any sort of mechanism to take an employer to tasked who has policies on the books they don't enforced. Who, I mean, let's just say you have a bad employer out there. What means of redress against those employers? Well, that they do not know if there were no common law that he presuming there's not. Is there-- can an employee report them to law enforcement was sort of thought to add there ...

MR. HATCHELL: Well, and that was attempted in this case and of course nothing, nothing happened and, I mean, his potential part is there was attempted report to the attorney general. Well, I think that the answer to that question may depend in industry to industry. And, and in a number of regulating industries, let say the trucking industry are-- at least once was a regulated and other industries which served another interest and have to meet certain licensing requirement. Certainly that-- those are happenings by which I think can be address, the other happenings is, is which was number one, to encourage a police and I think that the decision that you were to hold with our position in this case would actually encouraged that because the other holding discourages employers from taking control because they fear liability for that. So I think that being able to become proactive in the light of employees without incurring liability is very important.

JUSTICE: Why shouldn't the court craft a narrowly tailored opinion specifically the facts of this case involving an employer who knowingly enables a dangerous person to continue to take drugs and reach a benefit of those drugs because it get longer and much more productivity from those employees. Why should I also bear the consequences, the bad conduct of those employees?

MR. HATCHELL: I think your Honor, that this Court is not an error correction for this court to establishes policy as a state. And I will say that going down the slippery slope that respondent asks you to is, is bad policy because you have to look at where it's going to end. Mr. Justice Hecht made a comment and say, "Well, this sounds good" and does

sound bad. And, and Justice O'Neill not-- everybody is frustrating by the the fact that nobody did anything in this case. His wife didn't do anything in this case, his fellow employees didn't do anything in this case, the supervisors didn't do anything in this case, the attorney-general didn't do anything in this case. But Mr. Justice Medina if you-- they say will these facts are reason enough. Where do you draw the line? As I understand opposing counsel's argument here would be aiding and a betting? Well, that means that a tough work environment which causes people to be tired at the end of the day. Now, you have essentially bought the farm you can turn a lose at the end of the day without giving them a place to sleep and refresh themselves. And once you start allowing all of these conditions to be distant that occur outside the work environment but it can-- can some sort of brief, source in the work environment. There's hardly any place that you stop and becomes that the twin insurance that is between great buyout rather than negligent liability.

JUSTICE: Thank you, Mr. Hatchell. The cause is submitted and the Court will take up a brief recess.

COURT ATTENDANT: All rise.

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