IN THE SUPREME COURT OF TEXAS

NO. 03-1128

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

v.

CROWN DERRICK ERECTORS, INC., RESPONDENT

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

Argued January 4, 2005

JUSTICE BRISTER, joined by JUSTICE WILLETT, concurring.

Only last year, we rejected the tradition of reversing jury verdicts based on inferential-rebuttal instructions that could have made no difference to a jury. Because that rule applies here, I concur in the Court's judgment.

The Court splits today over whether the evidence establishes a superseding or merely intervening cause, applying the broad and rather amorphous factors of section 442 of the Restatement of Torts. But section 442 is not about jury instructions; it is about the much more philosophical question of what constitutes "legal cause." *See* RESTATEMENT (SECOND) TORTS § 441.

The question here is much simpler: did omission of an inferential-rebuttal instruction probably cause an improper judgment? *See* TEX. R. APP. P. 61.1(a). As we held last year in *Dillard*

v. Texas Electric Co-operative, the purpose of such instructions is to advise jurors "that they do not have to place blame on a party to the suit." 157 S.W.3d 429, 432 (Tex. 2005). As we noted then, it is hard to see any harm in instructing jurors that a broad-form question asking *whose* negligence caused an occurrence is not meant to imply that *someone's* must have. *Id.* at 433; *see also Louisiana-Pacific Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998) (per curiam) ("If an instruction *might* aid the jury in answering the issues presented to them, or if there is any support in the evidence for an instruction, the instruction is proper.") (emphasis added).

But if the right inferential-rebuttal instruction is refused, *Dillard* rejected a rule of automatic reversal. That was what the court of appeals did after concluding that a cow in the road was some evidence that a nonparty caused the accident. *See* 171 S.W.3d 196 (Tex. App.—Tyler 2003). This Court unanimously took a broader view, noting that while the charge's unavoidable-accident instruction was technically incorrect, it still allowed jurors to blame the cow. As we stated then, "rather than focus on whether or not there was evidence to support each of [the] proposed inferential rebuttal defenses, we think it more appropriate to examine the adequacy of the charge that was given." *Dillard*, 157 S.W.3d at 432.[1]

Here, Crown Derrick's theory—that the accident was someone else's fault—was adequately presented in the comparative negligence portion of the charge. In closing argument, Crown Derrick's attorney argued that "Rowan took down our rope" and "How can we be the proximate cause when the controllers of this area [Rowan] made a conscious decision not to do anything about

[1] As a result, *Dillard* made clear (as adopting appellate rule 61.1 should have done) that failure to give the instruction is no longer automatic reversible error regardless of harm.

a hazard they knew about?" Moreover, this argument was largely effective, as the jury assessed 80% of the fault for the accident to someone other than Crown Derrick. Other than omitting Crown Derrick from the charge entirely (an issue not before us), it is hard to see how a new-and-independent-cause instruction would have made it any easier for jurors to blame someone else.

Of course, there are some cases in which failing to give an inferential-rebuttal instruction will be reversible error. For example, if a nonparty intentionally jams an electric switch (thereby defeating designed safety features), it is reversible error to submit a charge that instructs jurors to consider only the negligence of the parties. *See Bel-Ton Elec. Serv., Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996) (per curiam). Similarly, if a nonparty refuses to provide masks or respirators for employees, it is reversible error to submit a charge that instructs jurors to consider only the negligence of the silica suppliers. *See Dresser Indus., Inc. v. Lee*, 880 S.W.2d 750, 754-55 (Tex. 1993).

But trial judges should not have to guess whether an analysis of the Restatement's factors means they should submit one inferential-rebuttal instruction rather than another. In this case, the jury was instructed to consider whether the accident occurred because Rowan negligently took down the rope barrier or allowed someone else to do so, or because Paul Dew negligently ducked under it. As the Court's split today adequately illustrates, a new-and-independent-cause instruction would not have made the application of law to these facts any clearer. Accordingly, the court of appeals erred in reversing the jury's verdict on that basis.

Scott Brister
Justice

OPINION DELIVERED**:** June 30, 2006