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Supreme Court of Texas.
Nabors Drilling, U.S.A., Inc., Petitioner,
v.
Francisca Escoto, et al., Respondents.
No. 06-0890.

February 5, 2002

Appearances:
Reagan W. Simpson, King & Spaulding, LLP, Houston, TX, for
Petitioner.
Alex M. Miller, Watts Law Firm, LLP, San Antonio, TX, for
Respondents.

Before:

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

CONTENTS

ORAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF ALEX M. MILLER ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF THE PETITIONER

JUSTICE JEFFERSON: Be seated please. The Court is ready to hear
argument in 06-0890, Nabors Drilling U.S.A., Inc. v. Francisca Escoto.

SPEAKER: May it please the Court, Mr. Simpson will present
argument for the petitioner. Petitioner has reserved five minutes for
rebuttal.

ORAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF THE PETITIONER

MR. SIMPSON: Mr. Chief Justice Jefferson, Justices of the Court,
may it please the Court. An easy answer in this appeal is that the
respondents are relying upon the wrong case. A disavow reliance on Otis
Engineering in their brief is frankly because they can't meet the
elements of Otis. And Otis wasn't submitted in the jury charge below.
Instead, they rely exclusively on Houston Inc. v. Love. But Love has
not been applied in a third party situation. This Court had the
opportunity to do so in Loram Maintenance of Way, which involved a
third party, a police officer, shot by a employee who was strung out on
methamphetamine. The court held a duty, never citing D. Houston Inc. v.
Love, but citing Otis Engineering, because Otis Engineering is a law
this state, in these kinds of circumstances, when a claim is brought by
a third party. And the holding in love was specifically limited to a
duty recognized to an independent contractor for her own injuries. And

the court noted that we did not need to decide whether Otis Engineering applies in such a situation. So two levels of argument on duty on this case are: should the court extend *Houston Inc. v Love* from a first party, if you will, case to a third party case, and whether *Love* should also be extended from intoxication to working a 12-hour night shift. And the answer to both of those questions is no. The court's duty analysis is correct. When the plaintiff is a third party, with whom the defendant has no relationship, it is all together proper to employ the two-step elements in *Otis Engineering*, as opposed to the duty analysis that was applied in *Houston Inc. v. Love*. So in this case, they are simply relying upon a case that does not apply to their class of plaintiffs. The other issue is whether the court should equate intoxication with working a 12-hour nightshift. And the answer again is no. On a very global level, we know that the law does not treat those as the same. If you spend 12 hours at night drinking at a bar and then get in to your car, you can be arrested. If you spend 12 hours working at a nightshift, you can't be arrested just you have done that. The law treats them very differently. And specifically, if you look at the duty factors that this Court has applied in *Greater Houston Transportation* and all of the cases since then, each one of the duty factors argues against recognizing a duty in this case. The first one being foreseeability, in *Jenkins v. Kemlon*, the court noted that there is not as great a degree of foreseeability at injury when you have someone who works long hours, as opposed to someone who is intoxicated. The Supreme Court of Wyoming in the *Kilian* case we cite said, that the foreseeability is not as high when you have someone long hours, but there is provided for as in this case, sleeping quarters that they can go to after work.

JUSTICE WILLET: Then the quarters are designed solely for that purpose, is that the -- the sole purpose behind them, for -- to be able to rest.

MR. SIMPSON: It's described by the witnesses as the employees are told, "This is your home away from home. You treat this as your home. You stay there." And that they are encouraged, that if they are too tired, they stay in those premises. Sometimes of course, they are working the dayshift; sometimes they are working the nightshift.

JUSTICE WILLET: The records show how often they are utilized?

MR. SIMPSON: There's nothing in the record that shows what percentage of the time, and now in the case of *Mr. Ambriz*, he always had stayed in the quarters, because previous jobs had been pretty far from home. When he had this assignment to him to cook, which was about an hour drive from *Raymondville*, this was the first time that he had gone home. But I think the gist of the testimony is that the quarters were available, he enjoyed the quarters, he reported to his parents that they were -- they were well equipped. So for -- this Court also in the *Goodyear* case *v. Mace*, said that mere knowledge of long hours and long commute doesn't equate to driver incompetence or recklessness for negligent entrustment purposes. So there is a difference on the foreseeability angle as far the duty is concerned. Then you turn to the policy considerations, and here there is a vast difference. There is of course no social utility to requiring an exotic dancer getting drunk with customers. In this case, however, there is great social utility in our society, which is a 24-7 society these days to having shift work, to having people working at night. There is a utility to the employer, there is a utility to the employees who want to earn a living, and there's a utility to society. Do you look at the factor of the burden on the defendant, and the burden here would be very great, first of all

because it's very hard to tell whether somebody is too fatigued to drive home. It's a process of identification and there are so many variables. Some days, I can be sleepy after working six hours, some days, I can work 14 hours and I'm still wide awake, maybe depending on what I did the night before, which is another consideration in this case. And some people require more sleep, some people less sleep. So it would be very hard for an employer to determine whether someone's too sleepy and even if they did, what control does the employer have. The employee is off-duty, is it suggested here that the employer can capture the employee and keep them from leaving. I think that would be absurd and would be beyond what the employer has the power to do. I suppose you would have to then require the employer to pay them for sleeping a certain period of time. Those are just factors that show that the burden would be too great, that there would -- there would be no control. And there would be economic consequences, far reaching economic consequences. Indirectly, the respondents are asking this Court to regulate work hours based upon testimony given by an expert in one single case, when this is a legislative activity. Not denying that can be problems from sleep deprivation and driving while sleepy. But these are these are things that the legislatures can deal with and can deal with in legislation, and it is not proper for the court system to deal. And for all those reasons, the duty analysis stacks up that there should be no duty recognized in this case. The only other argument that they make is duty to train, they cite a number of negligent hiring case, dealing with people who were shot, or raped, or assaulted, and those aren't training cases, you don't have to train people to shoot others, or not to assault others. The only training case that they cite Allen v. AT&T Transportation. And in that case, the employee said you didn't train me how to drive my truck, I didn't know how to drive a truck that has liquid in it, that is going to slosh around and cause my truck to tump over. The court held that there was no duty in that case, and that is a little bit beside the point, but the point is that the argument in that case was that you have to train me about doing my work. There is no authority that says, employers have a duty to train their employees on how they conduct themselves how to work.

JUSTICE JEFFERSON: Is there evidence of a pattern of fatigue-related injuries on the work site or in automobile accidents when employees left in this case?

MR. SIMPSON: If you mean, in this particular case, has there been any study about Nabors Drilling and the activities around the various job sites, I don't believe there is anything on the record on that. They did present Dr. Samuel Shiflett, who had some statistics from various studies, talking about the estimates about how often sleep deprivation --

JUSTICE JEFFERSON: I'm asking but in -- in prior incidents, are there -- is there any evidence in this record that an -- an -- an injury at the workplace or after you know an employee left was causally related to fatigue?

MR. SIMPSON: Well the only other thing that I can think of is McNeil v. Nabors Drilling, which is another case, it dealt with Nabors Drilling, and the -- the court there found that there no duty. There is no authority saying an employer has a duty to train people on how they act outside the workplace. And there is no authority in Texas for training on open, in obvious dangers. It is obvious that you shouldn't drive when you are sleepy. His mother said, I didn't want him to drive when he was too tired. All of the workers there knew the sleeping trailer were there for purposes of sleeping if you needed to. He was

told that morning by Larry Denning, his co-worker, who thought he might be -- that Mr. Ambriz might be more tired than he thinks. You've worked 12 hours, why don't you stay in the trailer, and he didn't do that, this is common knowledge. What they are trying argue is that the employer should educate people about the various studies that are out there and the facts, and -- and information, and theories that underlie this danger. But that's not talking about a new and different danger, that's talking about some studies. And in fact, some of the information is conflicting because part of the study say that your first shift, back of the graveyard is not going to disrupt your circadian rhythm. And that would be a -- then Mr. Ambriz a green light because this was his first night back. So there is conflicting information and it doesn't get to a new and different danger.

JUSTICE WAINWRIGHT: How would your analysis in conclusion change, if at all, if Mr. Ambriz was driving a company truck and going to another company site with a delivery?

MR. SIMPSON: Well, if he was in the course and scope of employment, that would be a different thing because then the employer can exercise control. Now, you still have the issue of whether you have to train people about normal incidents at their job. And in fact, I think in the Mathern case, I think that was just a settlements and you -- there's no duty to train people how to drive around and obey the normal rules of the road, if there is nothing complex or -- or unusually dangerous about it. But it's a difference if he is on duty, then there would be some control in light and be respond -- he had superior, so you really wouldn't have this issue come up. It would really be an impossible burden for employers to come up with every fact. Now that might be relevant to some known danger, and in fact this Court, in a case I don't think anyone cited, *American Tobacco v. Grinnell* 951 Southwest 2nd, page 420, the court, addiction to cigarettes is something new and different from having some disease, lung cancer or whatever from tobacco, and so maybe that's something you need to warn separately about. But here, we're not talking about some separate danger, we may be talking about the nature and extent of the danger, some aspects of the danger, but it is open and obvious. This Court's decision in *Caterpillar v. Shears* wouldn't had -- wouldn't have been any different, if there had been any evidence in there of how often rollover accidents happen or that people don't realize big, heavy equipment can roll over. *Wilhelm v. Flores* wouldn't have been any different if there had been evidence that show many are allergic to bee stings or how many people don't know that they could be allergic to bee stings. The court simply said there is no duty because of an obvious endangerment. And there is no causation here; this is a 19-year-old boy, young man who had promised his girlfriend he was going to drive her to school.

JUSTICE: I'm sorry, what?

MR. SIMPSON: Drive her to school. Larry Denning, this is volume four, pages 103 to 105, Larry Denning said, you ought to stay at the trailer, and he wasn't going to stay at the trailer. He said you've been working all night, stay at the trailer. So nothing was going to keep him, no educational programs, no public service announcements were going to dissuade him. And in fact, the other side's expert agreed that the study show that young men are usually not going to follow this kind of advice, they are going to go ahead and decide if they can drive whether they are sleepy or not, and that is pretty much a known fact. So there is also no causation from the theory of failure to train, a theory that doesn't apply. So in short, there is no basis for an

employer warning about an open and obvious risk, that is encountered outside the workplace, when it's probably not going to do any good anyway. And so there is nothing wrong with telling people that. There is nothing wrong with Mr. [inaudible] for instance saying, you ought to be careful going home, but to make that a court duty is beyond any justification under Texas law. There are other issues that we briefed concerning the expert in the case, and why his testimony should not be admitted, and there are issues that I think are fully briefed on the damages. I believe this is a no-duty case, I don't think this is an expert admissibility case, although I think that he reasoned backwards not having enough information in Mr. - Dr. Shiflett did to come up with a theory that this was caused by sleep -- sleepiness, but I think that this is a no-duty case for the court. We ask this Court to provide guidance on these issues the Corpus Christi Court of Appeals reached a holding that is at contrary to its own precedent, as well as the precedent of virtually every case, if not every case that has addressed analogous facts. And for those reasons, the judgment notwithstanding the verdict should be reinstated.

JUSTICE JEFFERSON: Thank you, Counsel. The Court is now ready to hear argument from the respondents.

SPEAKER: May it please the Court. Mr. Miller will present argument for the respondent.

ORAL ARGUMENT OF ALEX M. MILLER ON BEHALF OF THE RESPONDENT

MR. MILLER: May it please the Court. I want to focus on this duty issue with basically two steps. First step is to talk about what the case is not, being the Otis case. And the second step to talk about, why fatigue is something you create in your employment conditions, you can't have a duty for that. With regard to the -- the Otis issue, which also they're -- they're making a - - in -- in oral argument now, a statement with regard to the Loram v. EONI case and saying that that's like Love. Let me explain what the distinctions of the cases are and this is a major distinction in the case, and it's a major distinction in understanding why courts have come to the decisions they have in some of these other cases. In Otis, the employer did not cause the employee to be impaired. In EONI, the court -- the employer did not cause the employee to be impaired, one was drugs, the other was alcohol.

JUSTICE GREEN: That's-- that's not entirely so because there's the -- the record in EONI showed that the methamphetamines were supplied by some people within the company. So that -- isn't that accurate?

MR. MILLER: That -- that is accurate but the company as a work condition did not cause the impairment of the employee. It may have had something --

JUSTICE GREEN: Well there's -- there's no testimony in that case where that's so. That they want -- that these workers to stay awake longer so they -- they encourage them to take these drugs.

MR. MILLER: If -- okay -- well let's -- we can -- we can with that -- with that fact but I don't think that the ultimate holding in that was the same because what the court came to was that you didn't have to have the knowledge of employment because you were looking at an Otis Engineering type situation.

JUSTICE MEDINA: Well in Otis, the employer took an informative stance to place the employee in the vehicle therefore --

MR. MILLER: Exactly.

JUSTICE MEDINA: -- creating -- creating the duty.

MR. MILLER: Exactly, and in those cases, what was happening was the -- in -- in Otis, what the employer did was, it didn't create the impairment, but it created a duty when it took that step of putting the employee, taking control of the employee that it knew was impaired, and then putting that employee on the roadway.

JUSTICE O'NEILL: So what would you -- what would you require to discharge that duty, that because I guess you'd be on constructive notice that after working the graveyard shift, your employees are going to be tired. Would an employer then have to mandate that they stay on the premises and sleep a certain number of hours before they go on the road. Or would you require an actual knowledge that someone was falling asleep. How would you -- how would you impose this duty on -- on an employer?

MR. MILLER: Your Honor, the way the duty was imposed and what was talked about in this case, on the facts, based on the experts in the industry, is that what would be required would be to have a place to sleep, which they had, and essentially training of the employees so that they would understand and make an informed decision about what they were doing, that they would understand the fatigue on them. This is --

JUSTICE BRISTER: Why did -- why did this guy not know that driving while you're tired and falling asleep behind the wheel is dangerous. Surely he knew that.

MR. MILLER: Your Honor, actually, we don't know exactly what he knew because unfortunately, he died. But can -- can we all say, oh well sure, we know you shouldn't drive while you're sleepy. But the training goes to more than that, what the training goes to is teaching people how to understand why they're in the condition, to understand that that fatigue is equal to alcohol intoxication, which most people don't know and this 19-year-old probably didn't know. His father stated during trial that he didn't know that.

CHIEF JUSTICE JEFFERSON: Is this -- is this duty -- is it restricted to certain employers or all employers. I mean we, sometimes have our clerks working overtime, and do we have a duty then to bring someone here to train them about fatigue?

MR. MILLER: If -- if --

JUSTICE JEFFERSON: Is it a universal duty?

MR. MILLER: I -- I think that it depends on how we define duties, in this case, we're talking about a particularized duty on this employer who decided to work graveyard shifts of manual labor.

JUSTICE BRISTER: But if it works -- but if it works for you, why wouldn't it work for everybody.

MR. MILLER: Oh.

JUSTICE BRISTER: We can't write a rule that just says drilling companies have to warn people about when the employees are tired and get off and drive home.

MR. MILLER: Not just drilling companies, your Honor, but you -- you can make -- temporize duties with regard to the foreseeability of certain work situations. If you have continual work situations where you've decided to create the conditions that will put fatigue in your employees, based on the conditions of the working employment as it's set forth.

JUSTICE GREEN: So -- so -- so a law firm who requires one of its

lawyers to work all night to get ready for an oral argument before the Supreme Court, that would be a situation wouldn't it. Where the fatigue would be a factor in perhaps you're going home after working all night and you've -- you're in an accident. Does the law firm have a duty to the public, in that instance, to warn you or train you about, you know, you -- you work all night, you're going to be tire, you -- maybe you should stay in the office.

MR. MILLER: Well, that -- you may have a different duty in that situation. If it's an emergency situation, maybe the responsibility of the employer is to provide transportation. I'll reimburse you to take a taxi home. It's -- if -- if you are creating a dangerous situation, then you have a responsibility to take reasonable steps to prevent the danger that arises in that situation.

JUSTICE BRISTER: Would it be that the dangerous situation, the guy could have slept there on site. So didn't he create the dangerous situation by taking off on an hour drive?

MR. MILLER: The dangerous situation was created when he was in the course and scope of his employment. He -- he -- he was fatigued while he was in the course and scope of his employment.

JUSTICE BRISTER: Well that does sound like you're doing what opposing counsel said, you're asking jurors to set what working hours can be for any business.

MR. MILLER: No, your Honor, I'm -- I'm not, because the duty that you're placing upon the employer is not to take absolute control of the employees. It's not to say that everything the employee does outside the course and scope of his employment is causing you to be held liable. What we're saying is, you have a responsibility to take reasonable steps. What they're saying are there -- all the steps are unreasonable. We can't -- it's just an impossible burden because there is nothing we can do, therefore, we should never be held responsible for fatigue because fatigue is something we can't do anything about. So we have no burden, no duty in that case. Under their explanation, if they work somebody for 48 straight hours, they would have no duty, but their own conduct shows that they think they do have a duty, because one thing they are providing is places to sleep. There -- I mean that is one thing they are providing.

JUSTICE BRISTER: We should fault them because they took that extra step.

MR. MILLER: No, your Honor, you shouldn't fault them. They -- they took part of the step. The part they didn't take was them to explain to their employees why they need to be staying or having --

JUSTICE BRISTER: Tell -- tell me -- tell me what this training course would've been like, to -- we're going to train our employees that you shouldn't drive home a long way when you're tired, you might fall asleep at the wheel. What -- what's that going to be?

MR. MILLER: Your Honor, there is actually training materials put out by NTSA that are part of the record. They do exist and what they train on is --

JUSTICE BRISTER: In like the driver's training things where we show smashed up cars.

MR. MILLER: I -- I -- I am not sure that it -- it does like a driver's education course. But it does talk about -- it teaches about circadian rhythms and how you understand your circadian rhythms. Something that was stated in court today is a misunderstanding of that issue. They're claiming well if he would've under -- he -- he would've said, my circadian rhythms haven't been disturbed, so I must be okay to drive at six in the morning. But the truth of the matter is, your

circadian rhythms have you asleep at the time he was driving. That's one thing that wasn't understood in this Court today. That's one thing that the training would show, that at certain times of the day, you want to be asleep. And those are dangerous times to drive if you are sleep impaired, if it happens.

JUSTICE BRISTER: But I'm wondering -- I'm wondering -- the program, well in driver's ed program, of course we do these things primarily to try to get teenage boys to slow down. And we know how that works, since they're the most expensive drivers to insure. So why do we think this is going to change? Teenage -- 19-year-old young man's behavior, if we set him down in a class and make him watch this movie about circadian rhythms, do we really -- is -- is this just stuff that -- a hoop we need to jump over so the lawyers won't bother us, or do we really think that's going to do any good?

MR. MILLER: Your Honor, I really hope it does good. There's a 100,000 accidents every year because of fatigue drivers. Shift workers make out 20% percent of the drivers and make up 50% percent of those accidents. Every year 1500 of those accidents have fatalities. This accident alone had five fatalities.

JUSTICE BRISTER: I - I -- I -- I agree there's a lot -- I mean there's no -- nothing more dangerous you can do in America than drive in a car. But the problem is, American's want to drive in cars, and if we tell them they can't because we want you to be safe, they're going to throw us all out of office because it's a free country and they want to drive cars and that kind of stuff. And so we pass laws saying, okay you can't drive drunk, to try to stop, try to make them stop. But you're basically saying we're going to have to tell these folks, they work you 12 hours, that's fine and then you can't go home, we're going to make you stay here. Because, while you're just saying well they just have to have a training program, and the next case will just say well they have to have a better training program.

MR. MILLER: Your Honor, I mean --

JUSTICE BRISTER: I mean where are we -- where are we going to stop short of telling them, you must keep your employees imprisoned after they work and not let them go anywhere.

MR. MILLER: Nobody in this case ever said anything like that.

JUSTICE BRISTER: Of course not.

MR. MILLER: That was not the NTSA expert said.

JUSTICE BRISTER: But I'm -- but we're going to -- if we make that rule, how can we stop anywhere short --

MR. MILLER: Well you can -- you -- you can make the rule based on the duty of this case and the facts of the case, which are that if they had provided a training program which talks about more than the circadian rhythms, it also talks about counter measures, and how you cannot be fatigued when you come into shift work. This is an important issue societally when we talk about some of the duty issues. This is an important issue, it really is and I take to say oh well, training makes no differences, I mean, then why would we training and other things.

JUSTICE BRISTER: It's like -- it's like the Seagram case, I mean, drinking alcohol excessively is a very important issue. Thousands of people die in the country every year from it. But we said in Seagram's that doesn't mean distillers have to put on the bottle, drinking can be bad for your health, because basically, any fool knows that. And isn't -- doesn't anybody know, you've worked all night, drive the next morning for an hour, your -- there's a severe danger of --

MR. MILLER: Your Honor, I don't think people know that.

JUSTICE BRISTER: They don't --

MR. MILLER: I don't think that they understand fatigue puts the same type of impairments on you that alcohol does. I don't think they understand that there are certain times that it -- it's worse at certain times of the day.

JUSTICE BRISTER: And it -- do you have -- do you have any evidence to support that, any study to show that or is that what [inaudible]

MR. MILLER: That is -- there are studies and that's part of the -- it's with the experts.

JUSTICE BRISTER: That people -- that people don't know -- your expert thought people don't know that they could fall asleep after they worked all night.

MR. MILLER: Well I -- I don't think it says that, your Honor. I -- I think that there are studies that show that -- that people aren't completely aware of what fatigue is. And there's reasons and we have the training programs just to try to make people aware of things they are not currently aware of. But also, to talk about this duty issue, you -- you mentioned the alcohol but it -- when this Court held on El Chico that you could have a duty with regard to alcohol. They didn't say, don't allow the patron to drive off if they've -- if they're intoxicated. The duty was, don't serve them anymore. So --

JUSTICE WILLET: What is your response to the Chief's earlier question about, any evidence in the record empirically about prior fatigue related accidents, either on the job site or as people are leaving the job site going home.

MR. MILLER: There was no evidence I know off, there was evidence that they actually check for fatigue before somebody goes on duty, to try to prevent fatigue related accidents that happened during the course and scope of employment.

JUSTICE WILLET: Do you know how long Nabors Drilling has had shift work on its plant site there.

MR. MILLER: I -- I'm not sure, your Honor, and I'm also not sure when they switched to 12-hour shifts [inaudible]

JUSTICE WILLET: Well your unaware -- aside from this though, you're unaware of any other fatigue related accident, even on the job site much less off the job site.

MR. MILLER: Your Honor, I'm kind of like this Court, I'm kind of limited to the record and I didn't try to go do extra research on something that would be outside the record. So I -- I am, your Honor --

JUSTICE WILLET: But the record shows -- but the record shows no other.

MR. MILLER: It -- it -- it -- not that I know of, your Honor, I -- I -- I didn't try to do anything in addition to that.

PHIL JOHNSON: Counsel, if in fact we go with your theory that -- no training, and if we assume this young man made it home and assume he picked his girlfriend to drive her to school the next day, and they stopped off and had breakfast and then drove on a little further and they had a wreck. Is Nabors still responsible for that? In -- in your view. Where do we -- where do we stop, where do we stop --

MR. MILLER: I think that you could --

JUSTICE JOHNSON: -- responsibility under circumstances like this.

MR. MILLER: -- I think in superseding and intervening issues which are actually raised in almost all the other cases that are Otis fatigue cases, they all had these hours of delay between, sometimes there actually -- went and started drinking alcohol and stopped off and shot pool for a couple of hours and drank beer. The court's were finding well there's no duty but I -- I think that it's -- it's probably makes just as much sense to say at a certain point, we are an not on the

direct route out if you've had enough time and you've done something else, but you've had a break in that chain and you wouldn't have responsibility for that.

JUSTICE JOHNSON: But the fatigue -- but the fatigue you are talking about and his knowledge of the fatigue, you want us to impose a duty to train about is going to continue unabated until he rests, it seems like.

MR. MILLER: He -- his fatigue will continue, yes, your Honor.

JUSTICE JOHNSON: So how -- where -- where do we stop that then. You -- you say once he's -- goes and stops at his first stop, if he stops at home after an hour, changes clothes and then goes on down the road, we stop at once he gets and changes clothes and he -- and Nabors is not responsible for anything after that.

MR. MILLER: Well we think that that would be a natural progression that it has to be related to fatigue that's actually from the work site. If you've been doing stuff for another hour or hour and a half and then is -- it gets -- the fatigue from the -- that happened on the work site is not --

JUSTICE JOHNSON: [inaudible] home, change his clothes, washes his face and goes to pick up his girlfriend, still down the road, still tired, doesn't sleep still -- he -- he stops for 15 minutes and does it quick because he wants to see his girlfriend, picks up his girlfriend, they eat breakfast, he's not -- still not sleeping, he's still got this fatigue, it's building and building and building, and they have a wreck at that point on the way to school. Nabors is still responsible for that or where and there -- we never -- where do we cut it off once we start making them responsible?

MR. MILLER: I think that -- well I guess I think that there's natural lines and I -- I think that once he gets where he's --

JUSTICE JOHNSON: Where is it in that case -- where is it in that case, when he gets home and changes.

MR. MILLER: I would -- I would say when he got home, and that case that would be --

JUSTICE JOHNSON: Why?

MR. MILLER: Because I think that at that point it would be just -- a -- a -- a causation issue of a -- of a decision.

JUSTICE JOHNSON: Because he chose not to stay there and go to sleep, but he chose on his own volition to go somewhere else. What other reason could be there be?

MR. MILLER: I guess that would essentially be the reason that he -- he at that point had other, other things that came to it. And I think most of it would be a timing issue that as long as he hadn't been at the work site for a certain amount of time, which in that case I -- I -- am -- maybe I misunderstood the hypothetical on that, then that would be a proper term.

JUSTICE WILLET: Did I hear you say a minute or so ago that employers ought to be on the hook only for job related, or job created, or job induced fatigue?

MR. MILLER: Yes, your Honor.

JUSTICE WILLET: So if they came to the worksite, they had been up all night playing poker or heaven knows what, they've been up all night, they arrive worn out and fatigue, work 12 hours. There would be no duty by the employer?

MR. MILLER: There would be no duty because it wasn't caused by the employment. The and -- and -- that's not what we have in this case by the way and evidences in this case that he woke up between 10 or 11 in the morning before the shift, left about four.

JUSTICE BRISTER: Oh, no -- you would -- you would say you're still at duty, you would just say there's no causation.

MR. MILLER: It depends on how we define --

JUSTICE BRISTER: If your -- if your argument is you've got a duty to tell your people about fatigue, that's a duty that applies before and after they get hurt.

MR. MILLER: And -- and --

JUSTICE BRISTER: Whether they show up in good shape or not.

MR. MILLER: Let me rephrase. If -- if it were the situation in Nabors, then that would actually be true because the duty would arise because of the work conditions themselves. That you -- you have foreseeable knowledge that the -- because of the working conditions that you place your employees under, that they will be fatigued at the end because of -- because of being in that [inaudible]

JUSTICE BRISTER: [inaudible] it's going to be foreseeable that some of your employees don't take care of themselves, or didn't have a good night's sleep, I mean that is always foreseeable.

MR. MILLER: And in cases sometimes we have to leave certain things to the juries to decide foreseeability and causation of cases. I don't think that we should run away from ever finding that anybody ever has a duty because it might be in some cases that there would be a foreseeability issue.

JUSTICE BRISTER: Any court ever said there's this duty regarding sleep. I didn't see one in the Court of Appeals opinion.

MR. MILLER: And there's -- there's -- in -- in Texas there is no case that's -- that's held on this.

JUSTICE BRISTER: Any -- any case anywhere?

MR. MILLER: There are cases that have held on duties with regard to fatigue, one of them is the Lamastra case out of West Virginia, and there is a case called Thaver out of Oregon, those are all cited in the brief.

JUSTICE GREEN: But this would be a new duty in Texas.

MR. MILLER: It would be, with regard to the fatigue part, it would be new in Texas. It would be recognizing the same duty as the court recognized in the Love case.

JUSTICE GREEN: Right, but --

MR. MILLER: Which is if you create the condition that you have the duty to take responsibility to per -- take reasonable steps to prevent the action.

JUSTICE GREEN: Out of the employers out there, this would be a big surprise to them to find out that they have a duty to protect against fatigue. I mean the -- the -- you think of the law enforcement industry -- sector, medical providers, all these people work long shifts, and many at night their employers would have this duty.

MR. MILLER: We might -- you might be surprised how many already trained their employees in that respect especially the police officers but I believe that --

JUSTICE GREEN: Especially the police officers but they -- but they have this duty.

MR. MILLER: -- I -- I think that it's -- they may not think of it that way as a legal obligation. I don't know that it would definitely be that astounding to people to realize that they have an obligation if they make somebody stay up -- if -- in the hypothetical of somebody working all night, that if I said that I'm too tired and I need a taxi ride home, that they are going to reimburse that person. I don't think that would be something they -- they currently think would be out of the realm of ordinary. Do they think of it as being a legal duty. I am

not sure exactly how businesses think but they may not, but again I don't know that the nightclub in the Love case really thought that they had a legal duty with regard to the intoxication of the independent contractor for the -- so I mean the fact that we have to have the duties because certain people have a better ability to be responsible for preventing the accident and --

JUSTICE GREEN: But -- but you don't see this as any way like the Otis duty or the EONI context where the employer is -- is not exercising the control of the employee off the premises.

MR. MILLER: I don't see it as that kind of duty. It's -- it's -- it's not although I do see it is -- the one way that Otis is analogous is that I'd see it as a very particularized duty in this case. We're talking about other facts of this case, whether Nabors Drilling had a duty in this case. My time is essentially up so unless there are further questions.

JUSTICE JEFFERSON: Any further question. Thank you, Mr. Miller.

MR. MILLER: Thank you.

REBUTTAL ARGUMENT OF REAGAN W. SIMPSON ON BEHALF OF THE PETITIONER

MR. SIMPSON: There is of course nothing wrong with having a training program, there is nothing wrong with telling people, reminding them, about what they already know. Just like there is everything wrong in Loram when the employer encourage his employees to use methamphetamine to meet the grueling hours. But neither should be a basis for civil liability for many of the reasons that have prompted the questions from this Court. No way to draw lines, there's no way to cabin this duty. There are cases already that were filed where duty was rejected that didn't deal with drilling companies. Moore v. Dallas Times Herald was a computer specialist, the computer malfunctioned and he had to come in late. National Convenience Stores v. Matherne, somebody who was working long hours, I think they were shorthanded at the convenience store. So there's no way of stopping this duty and when you boil it down what they're arguing for is training. Because otherwise, Texas law doesn't fit into their duty analysis and there simply is no duty to train about what we already know.

JUSTICE WAINWRIGHT: Counsel, I meant -- I recall that the trial judge granted a post-trial motion setting aside the verdict because he determined there was no duty. Does question number one in the charge essentially give the inquiry as to whether there was a duty to the jury. I mean if you look at the question, it's a standard negligence question. Did the negligence of any of those named below approximately caused the current in question. Typical negligence question but then the instructions seem to track duty question.

MR. SIMPSON: Yes, in fact the first time we learned that we needed to submit sometimes duty questions; I believe it was Justice O'Neill's opinion on Torrington where the court said, sometimes you have to ask predicate questions to the jury. There may be factual predicates to decide duty. Now one of the things we argue at question one, it doesn't have the right duty prongs in there, it doesn't have actual knowledge -- the incapacity, which is what was required by Otis, and that was one of the objections that was made at trial. But it does in effect ask some predicate questions relevant to duty.

JUSTICE WAINWRIGHT: But it doesn't ask for answers to the

predicate questions, it asks for an answer to the negligence approximately caused the occurrence question.

MR. SIMPSON: That's correct.

JUSTICE WAINWRIGHT: And -- and so you don't know what the jury's answers were to the predicate questions which are instructions here.

MR. SIMPSON: That's correct.

JUSTICE WAINWRIGHT: And I -- I guess the trial judge recognized that was a legal, the question of duty is a legal issue, not for the jury because he ruled as he did posttrial. I would -- wouldn't you normally expect this duty question to be determined by the judge at pre-trial?

MR. SIMPSON: Well, in fact Judge Murray, he is now retired -- stated in probably in his letter to counsel saying he was going to grant a judgment, notwithstanding the verdict, that he realized sometime during trial that there, I'm remembering this correctly, sometime during trial, that this -- they weren't going to be able to make their case, but he decided to go ahead and let the case go to the jury and then after verdict, decided to grant the judgment notwithstanding the verdict. And I think here, there can be predicate questions to duty. Here there was no evidence supporting, I think the only cause of action that this Court has recognized in third party cases, there's absolutely no evidence anybody had knowledge of his incapacity. There was no evidence that any control was exercised after that knowledge was gained. And I disagree on this creation of danger. There was no danger created by the job, he didn't run over anybody or change lanes during the job. It's afterwards, after he left the work. And the creation of duty in Otis Engineering was taking control of someone you know is incapacitated and say it's time for you to go home, I'm going to walk you to your car and you go on home. So there is a creation of duty in the Otis facts. The Otis law is what should apply here and the facts simply do not support a duty in this case. And for those reasons, Judge Murray's judgment notwithstanding the verdict should be reinstated.

JUSTICE JEFFERSON: Any questions. Thank you, Counsel. The cause is submitted and that concludes arguments for this morning. The Marshall will adjourn this Court.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas now stands adjourned.