

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EXXON COMPANY, U.S.A., ET AL., Petitioners v.
SOFEC, INC., ET AL.

CASE NO: 95-129

PLACE: Washington, D.C.

DATE: Tuesday, March 19, 1996

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 EXXON COMPANY, U.S.A., ET AL., :

4 Petitioners :

5 v. : No. 95-129

6 SOFEC, INC., ET AL. :

7 - - - - -X

8 Washington, D.C.

9 Tuesday, March 19, 1996

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 10:09 a.m.

13 APPEARANCES:

14 SHIRLEY M. HUFSTEDLER, ESQ., Los Angeles, California; on
15 behalf of the Petitioners.

16 GEORGE W. PLAYDON, JR., ESQ., Honolulu, Hawaii; on
17 behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:09 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 first this morning in Number 95-129, Exxon Company v.
5 Sofec, Inc.

6 Ms. Hufstedler.

7 ORAL ARGUMENT OF SHIRLEY M. HUFSTEDLER

8 ON BEHALF OF THE PETITIONERS

9 MRS. HUFSTEDLER: Mr. Chief Justice and may it
10 please the Court:

11 Exxon's tanker would never have stranded but for
12 respondent's torts and breaches of warranty. The question
13 presented is whether these respondents should be totally
14 absolved of all liability because the district court found
15 that the tanker captain's navigation of the stricken
16 vessel was grossly negligent.

17 The answer to that question is no. The lower
18 courts reached the opposite conclusion by failing to apply
19 the comparative fault principles established by this Court
20 in Reliable Transfer and its progeny by misconceiving and
21 misapplying the common-law doctrine of superseding cause.

22 QUESTION: You take the district court to task
23 for having considered causation first and damages second,
24 although it never got to damages. I should have thought
25 it would have been strange to do anything else. You must

1 have causation, mustn't you, before you inquire about
2 damages and, of course, that leads to the next question,
3 do you -- you're not telling us, I take it, that but-for
4 causation suffices?

5 MRS. HUFSTEDLER: Not suffices but, but for that
6 issue, you'd never reach the question whether there's any
7 superseding cause, because superseding cause, if it
8 applies at all in admiralty since Reliable Transfer,
9 necessarily assumes, as the district court concluded, that
10 there had been actual cause, or you'd never reach
11 superseding cause. You don't reach superseding cause,
12 which is a limitation of liability, and it's not causation
13 at all. It's a question of fault.

14 QUESTION: Well, but you must have, before you
15 proceed to the question of damages, that legal cause, that
16 cause which admiralty courts will recognize as sufficient
17 to impose liability on the tortfeasor --

18 MRS. HUFSTEDLER: Of course.

19 QUESTION: And I'm asking how you define that,
20 other than but-for causation, because I take it it's
21 something more.

22 MRS. HUFSTEDLER: In admiralty, as in common
23 law, you have to have but-for causation and legal cause.
24 I do not suggest for a moment that an admiralty claimant
25 need not prove both.

1 The difficulty here is that the foreclosure
2 orders of the district court prevented Exxon from ever
3 proving its liability case-in-chief to prove that there
4 was legal cause as well as but-for cause, and you never
5 got to the issue of damages because you never finished
6 proving liability.

7 All of Exxon's evidence with respect to
8 everything that happened before the equipment failed was
9 foreclosed by the district court. It wasn't a question of
10 order of proof. It was the question of entering judgment
11 before the liability case-in-chief was proved.

12 QUESTION: But Ms. --

13 QUESTION: Well --

14 QUESTION: Well --

15 QUESTION: -- if the district court had found
16 out that some pirates had come, obviously unforeseen
17 cause, I suppose he wouldn't have proceeded to any of
18 those questions either. And he was saying, rightly or
19 wrongly as a matter of fact, but I think correctly as a
20 matter of law, that he was going to first inquire whether
21 or not the negligence of the Captain's tanker was a
22 supervening cause of this extraordinary proportion, and
23 you weren't foreclosed in producing any evidence on that
24 issue, were you?

25 MRS. HUFSTEDLER: Yes, because the Captain was

1 reacting to a series of hazards that were created prior to
2 the time the equipment failed. Exxon was foreclosed from
3 proving anything that happened before that, and even under
4 common-law doctrine, no one can prove there is a
5 superseding cause or that there is not unless there is
6 first proved what the duties are with respect to each of
7 the defendant's acts on the basis of their relationship
8 with each other, and how those breaches of duties created
9 the risks of harm, and until those facts are proved, there
10 is no way in which a court can decide whether there has
11 been superseding cause.

12 QUESTION: Ms. Hufstedler, I don't read your --
13 the questions presented in your petitioner to raise any
14 question about the ordering of the trial.

15 MRS. HUFSTEDLER: Oh, of course not.

16 QUESTION: It raises just questions of law --

17 MRS. HUFSTEDLER: Sure.

18 QUESTION: -- about what governs admiralty.

19 MRS. HUFSTEDLER: That's correct.

20 QUESTION: Ms. Hufstedler, as I understand the
21 district court's findings, the findings were that, at a
22 certain point, I think about 90 minutes after the
23 difficulties began, the tanker reached a point of safety.

24 It was -- according to the district court as I
25 understand it, it was out of whatever danger had been

1 created by the negligent acts of the defendants, and the
2 finding was from that point on the causation for the
3 ultimate grounding and the harm that resulted was entirely
4 attributable to the navigational errors, errors of
5 judgment on the part of the tanker's captain.

6 Do you claim that there is an error of law in
7 what I understand to be the finding that the tanker had
8 reached this zone of safety after which the prior
9 negligence of the defendant simply was not operative?

10 MRS. HUFSTEDLER: Justice Souter, the response
11 is that the Court's conclusions of law cannot be
12 reconciled with its other findings of fact. The other
13 findings --

14 QUESTION: Well, I'm asking just a question
15 of -- well, I asked whether there was an error of law.
16 I'm really asking, I guess, whether you claim that there
17 is such a want of evidentiary basis for the finding about
18 reaching the zone of safety that it was, in fact, a legal
19 error to conclude that.

20 MRS. HUFSTEDLER: Yes.

21 QUESTION: Okay. How do we know whether you're
22 right or wrong? Tell me what your basis is for saying
23 that there was no evidentiary basis to reach that
24 conclusion?

25 MRS. HUFSTEDLER: I say there's no evidentiary

1 basis because the facts as found by the court on
2 uncontradicted evidence was that the trailing hose caused
3 the crane to collapse after the point at which the vessel
4 was supposed to be safe, that the hose and the collapse of
5 the crane caused the boom of the crane to sweep the decks,
6 which threatened the vessel's life by explosion and
7 threatened the lives of all the deck crew.

8 That was a direct result of the breaking of the
9 chafe chain, of the breakage of the hose, of the lack of
10 any safety equipment on the cargo hose, of the lack of any
11 safety equipment --

12 QUESTION: I think I know the train you're
13 following, but I take it, then, in order to rule your way
14 we would have to find that the -- I guess the second of
15 the conclusions of law is simply unsupportable, and that's
16 the conclusion that such conduct -- that is, of your
17 captain -- was a superseding cause, and the sole proximate
18 cause of the stranding.

19 We would have to reject particularly that
20 finding that it was the sole proximate cause, wouldn't we,
21 in order to hold your way?

22 MRS. HUFSTEDLER: Yes, and I think the Court,
23 unless it is going to retreat from decisions long embedded
24 in the law, would have to say that that's incorrect,
25 because you cannot decide, even under common law, whether

1 there has been a superseding cause unless you have had an
2 opportunity to know whether or not what actually happened
3 was within the risks that were caused by the breaches
4 of --

5 QUESTION: Or you could simply assume that --

6 MRS. HUFSTEDLER: Yes, you --

7 QUESTION: -- and say, on that assumption,
8 nonetheless, superseding cause.

9 QUESTION: Well, on any factual question, Ms. --
10 we have a two-court rule which we usually follow. The
11 district court found against you and the court of appeals
12 affirmed, so that anything that is a factual question I
13 don't think we ordinarily reexamine.

14 MRS. HUFSTEDLER: I don't suggest you reexamine
15 it, Your Honor. What I suggest is that you look at the
16 basis of the doctrine of superseding cause and, as a
17 matter of law, you cannot determine whether there has been
18 a superseding cause unless you have evidence that shows
19 what the duties were that were breached. That's a
20 question of law.

21 QUESTION: Ms. Hufstedler, my problem is this.
22 I didn't think we took this case, even if we're able to --
23 even if the two-court rule does not apply, to make
24 essentially factual determinations and say that, you know,
25 the factual findings of the court below were wrong, or

1 even that the findings of law were wrong, except in one
2 regard.

3 I thought we were going to decide whether the
4 doctrine of supervening cause applies, not whether, if it
5 applies, it was properly imposed by the court here, and
6 you're turning us into an examination of whether that
7 doctrine has been properly applied here. That's not how I
8 read your question presented.

9 MRS. HUFSTEDLER: You only reach the question
10 you have suggested I presented if you get past the first
11 point. I believe that the Eleventh Circuit is entirely
12 right, that after Reliable Transfer, that the superseding
13 cause doctrine as it was applied sometimes in admiralty
14 cases below, is no longer applicable.

15 QUESTION: Ms. Hufstedler, on that point, it was
16 pointed out by the respondent that many States, in fact
17 most, now have comparative negligence systems, and in none
18 of those has the supervening cause doctrine been declared
19 incompatible. Some have not considered it. Some -- a
20 couple have considered it and said they're compatible.

21 My question is, is there any State with a
22 comparative negligence regime that has said, now
23 supervening cause is no longer valid because it conflicts
24 with the notion of comparative negligence?

25 MRS. HUFSTEDLER: I am unaware of any.

1 QUESTION: How could it be that there wouldn't
2 be a supervening cause doctrine? Suppose that the ship
3 had been floating around because of the negligence of the
4 defendant, and it ran into a leftover World War II
5 submarine that torpedoed it? I mean --

6 MRS. HUFSTEDLER: But Justice Breyer --

7 QUESTION: I mean, suppose the most fantastic
8 coincidence, struck by lightning, suppose that -- I mean,
9 we can imagine any bizarre set of circumstance we want.
10 That would cut the causal chain, wouldn't it?

11 I mean, what has comparative negligence to do
12 with that, some amazing coincidence, some odd circumstance
13 that cuts the causal chain and in and of itself is the
14 cause of the accident, the original negligence being
15 simply a but-for condition that happened to place the ship
16 in the particular part of the sea where the enemy
17 submarine was lurking, or the lightning struck?

18 MRS. HUFSTEDLER: Justice Breyer, surely the
19 admiralty defendant would not be responsible for whatever
20 the results were in your illustration --

21 QUESTION: Well, if that's so, how --

22 MRS. HUFSTEDLER: However, there is no reason
23 why the admiralty defendant that has breached a duty and
24 created a risk of some kind of harm should not be
25 responsible for whatever portion of that damage was

1 attributable to the acts before.

2 QUESTION: But then the judge says zero portion,
3 because there was a supervening cause, just like the
4 submarine which would have torpedoed the ship, or the
5 submarine that would have led to evasive action and an
6 eventual stranding of the ship.

7 In this case the ship had come to rest, it was
8 safe, there was no problem, and it was the Captain,
9 himself, who then caused the trouble because of the
10 Captain's failure to keep any chart, because of his
11 failure to let the anchor down, because of his properly --
12 because of failure, et cetera, et cetera, and he's listed
13 about five.

14 I mean, once you say there could be some
15 supervening cause, then how do you distinguish your case
16 here?

17 MRS. HUFSTEDLER: Well, as I read your own
18 authorities, both with -- and we're now talking only about
19 the tort claims. It doesn't go to the breach of the
20 warranty claims, but talking only about the tort claims --
21 there must be -- before one can say that a cause has
22 superseded, one must examine what the hazards were that
23 were created in the first place, as Restatement Black
24 Letter 442 states, that the cause is always proximate if
25 what happened was within the risk that was created by the

1 original misconduct and if there was a -- or was also a
2 contributing factor to that.

3 The only time you get a cause broken is in the
4 illustrations that you just gave, where there is conduct
5 of a third person that is either criminal or intentionally
6 tortious. Then the chain of causation is broken.

7 QUESTION: So when you use superseding cause
8 here, and you say it should not be recognized, are you
9 talking about superseding cause as a cause attributed to
10 the plaintiff, as distinct from the third party?

11 We have a terminological problem --

12 MRS. HUFSTEDLER: Yes.

13 QUESTION: -- because 442, which you quote, says
14 superseding cause by definition is only that which is set
15 in play by a third party or a third force, and I take it
16 we don't have that here.

17 MRS. HUFSTEDLER: That's exactly right.

18 QUESTION: Okay.

19 MRS. HUFSTEDLER: That's why the doctrine
20 doesn't apply at all, even if you assume that common-law
21 superseding cause survived the adoption of the --

22 QUESTION: All right. Are we just talking,
23 then, about labels, because let's assume we say,
24 superseding cause is a third party or a third force
25 phenomenon.

1 MRS. HUFSTEDLER: Yes.

2 QUESTION: We don't have that here.

3 MRS. HUFSTEDLER: That's right.

4 QUESTION: However, it is findable in any
5 comparative negligence case, I suppose, that a point is
6 reached at which the defendant's original causation should
7 no longer be recognized by the law, because it has become
8 attenuated and so on, and in place of it the plaintiff's
9 negligence is so overwhelmingly the cause that we should
10 recognize that as proximate cause only.

11 Now, I take it you do not claim that that kind
12 of analysis is somehow precluded by the comparative
13 negligence doctrine.

14 MRS. HUFSTEDLER: It is not that it can never
15 happen where there has been a third person that has
16 intervened.

17 QUESTION: Well, no, let's assume there's no
18 third person, as, indeed --

19 MRS. HUFSTEDLER: Yes.

20 QUESTION: -- is true here, no third party.
21 Isn't it true, consistently with comparative negligence,
22 that if the facts warranted a court or jury could conclude
23 that the defendant's cause was no longer proximate,
24 although the defendant had, in a but-for sense, set things
25 in motion, and that the only proximate cause operative at

1 the time of injury was the cause that the plaintiff had
2 set in motion? That is consistent with comparative
3 negligence. It has to be.

4 MRS. HUFSTEDLER: It is consistent with
5 comparative negligence if --

6 QUESTION: Well --

7 MRS. HUFSTEDLER: -- you assume that -- and I
8 believe the close question does assume -- that the risk
9 that was run by the wrongful conduct did not encompass
10 what happened. Here --

11 QUESTION: In other words, if the defendant had
12 foreseen that the plaintiff was going to do all the stupid
13 things that he says he later did, then that is still
14 within the risk --

15 MRS. HUFSTEDLER: I -- to put --

16 QUESTION: -- and you would still leave the
17 defendant in there. Is that what you're saying?

18 MRS. HUFSTEDLER: To put it differently, the
19 risk that was run was the risk of stranding. It is not
20 material, applying standard tort law that the risk came up
21 -- that what happened came about in a way that --

22 QUESTION: Well, but that just --

23 QUESTION: Not the risk of stranding a couple of
24 hundred miles away on a reef instead of on shore. I mean,
25 that's the issue here, whether the -- you know, the

1 negligence in berthing gives rise to a risk of stranding
2 on some distant reef, and why can't you say -- by the way,
3 I'm not sure I agree that there's no supervening cause.
4 I'm not sure that cause is the negligence.

5 I mean, the immediate cause is the darned reef
6 which is -- which destroys the ship, and can't you say
7 that that cause is a supervening cause, apart from the
8 negligence of the berthing?

9 MRS. HUFSTEDLER: I would say no, because
10 stranding, no matter how it's stranded, was within the
11 exact risks that were created by the respondent's torts.

12 QUESTION: But my problem, Mrs. Hufstedler, is
13 that your answers to Justice Breyer, Justice Souter,
14 Justice Ginsburg, Justice Scalia, all are discussions
15 within the regime of comparative negligence, and I think
16 you concede that there's supervening cause.

17 I don't want to put words in your mouth. I
18 think -- but you've presented this as an admiralty case
19 where the rules somehow should be different. That was, I
20 thought, the gravamen of the question presented, and I
21 don't see why the rule should be different, and it seems
22 to me that you don't, either, because we've been
23 discussing this in the regime of any comparative
24 negligence system, admiralty or not.

25 MRS. HUFSTEDLER: There -- what I'm -- I guess I

1 have to say that while it's possible to take the view that
2 superseding cause, criminal superseding cause survived
3 comparative fault, nevertheless, it should not be applied
4 in admiralty when to apply it violates the admiralty
5 policies which this Court has repeatedly said are going to
6 dominate what kind of law is going to be applied, and the
7 admiralty policies are to place the risk of loss on those
8 persons who are in the best situation to prevent --

9 QUESTION: Well, then we're just talking about
10 what is and what is not an appropriate supervening cause.
11 That's all the case is about.

12 MRS. HUFSTEDLER: It is with respect to -- it is
13 with respect to the negligence charge.

14 If I may, I would like to turn to the breach of
15 warranty charges because, of course, superseding cause
16 does not apply to breaches of warranty which are sounding
17 in contract, not tort. The so-called superseding cause
18 doctrine is not relevant. What you're talking about then
19 is the ability to avoid the consequences of breaches of
20 warranty, and that is an issue that goes to damages, not
21 to liability.

22 There is no issue that I have discovered that
23 has suggested otherwise, and this Court's decision in
24 Italia Societa and Weyerhaeuser is quite clear that
25 negligence on the part of the shipowner does not present

1 recovery and/or breach of an admiralty warranty.

2 QUESTION: But there's still a proximate cause
3 requirement. There's still a causation requirement, and I
4 couldn't see where the cases you cited got you away from
5 that. You still have to prove that the damage was caused
6 by the breach of warranty, and I don't see how you're
7 released from the causation by shifting over to contract
8 from tort.

9 MRS. HUFSTEDLER: The question is, is the
10 concept which is built on legal policy of superseding
11 cause one that should be applied to a breach of an
12 admiralty warranty, and my response to that is, no, it
13 should not, because that again is the question of what
14 should be the policy of admiralty, as distinguished from
15 the policy of common law in tort cases.

16 QUESTION: But may I ask this question on that
17 point. How would you measure damages for the breach of
18 contract? Would you -- in an admiralty case. Would you
19 not use the comparative fault approach, and if so, why
20 wouldn't a finding of superseding cause be the equivalent
21 of finding zero negligence, or is there a responsibility,
22 is there a fault?

23 MRS. HUFSTEDLER: Well, I would make the same
24 response, Your Honor, as I would to the question that was
25 raised in Italia Societa. That is to say, it is true that

1 but-for the breakage of the --

2 QUESTION: No, my question is directed at the
3 merits of your suggestion we apply a different test to the
4 contract claim than the tort claim.

5 MRS. HUFSTEDLER: I have not seen a case in
6 which the common-law doctrine of superseding cause has
7 been applied to relieve a defendant in an admiralty case,
8 or, indeed, another, of liability for breach of warranty,
9 although, of course, it does go to the question of how
10 much damages should be allowed.

11 QUESTION: Well, if you're talking about
12 basically a contract action, you've got the idea of
13 contemplated damages that has the same sort of limiting
14 principles, doesn't it, as the idea of supervening cause?

15 MRS. HUFSTEDLER: It does. What -- however, I
16 think the question, Mr. Chief Justice, is -- I would put
17 somewhat differently.

18 That is, in a breach of admiralty warranty case,
19 all I believe that one needs to do is to say, what was
20 within the contemplation, or should have been within the
21 contemplation of these respondents in warranting this --
22 that the berth was safe when they knew very well it was
23 not, and one of the consequences would be that the vessels
24 would strand.

25 QUESTION: Hundreds of miles away?

1 MRS. HUFSTEDLER: It is not that far away, Your
2 Honor, looking at the findings and giving them full
3 credence from the court.

4 QUESTION: Why is -- I mean, not any stranding.
5 Presumably not a stranding caused by evasive action
6 against the submarine. Not any stranding.

7 MRS. HUFSTEDLER: Not any --

8 QUESTION: Not a stranding 15 years later in
9 some foreign place, so why is it that this stranding is
10 within the contemplation, given the enormously negligent,
11 grossly negligent, or however we call it, activity of the
12 Captain. I mean, and that seems to me to boil down to the
13 same question as the other. Why not?

14 MRS. HUFSTEDLER: There's no question whatever
15 that the vessel would have been nowhere near the reef upon
16 which she stranded but for the undisputed fact, as found
17 by the district court, that this vessel was burdened with
18 this enormous cargo hose that continued to be a danger to
19 that vessel until 12 minutes before the turn.

20 QUESTION: But that's a factual -- I mean, I
21 think you may have a good point there, but that goes to
22 the apparent inconsistency between the finding that the
23 negligence had terminated and that finding that the hose,
24 up until half-an-hour before the grounding was still
25 giving difficulty.

1 I agree that those two findings appear
2 incompatible, but I don't see how that has anything to do
3 with the question presented of whether there is or is not
4 a doctrine of supervening cause. That goes to the
5 application of the rule, which is not the reason we took
6 the case.

7 Maybe it's been applied incorrectly, but the
8 question is, does the rule apply?

9 MRS. HUFSTEDLER: And I would, and I do take the
10 position that it should not apply. It should not apply,
11 because to apply it under circumstances in this case means
12 that you reach results that are antithetical with the
13 explicit admiralty policies that this Court has adopted in
14 Reliable Transfer.

15 QUESTION: Let's examine in principle why -- I
16 don't want to use up -- I know you want to reserve some
17 time, but why in principle should shifting to comparative
18 negligence make any difference?

19 Before we shifted to comparative negligence, it
20 was divided 50-50 whenever there was any negligence on
21 either side. Now, why would assessing, instead of 50-50,
22 80-20, or 90-10, why should that in theory have any effect
23 upon the doctrine of supervening cause?

24 MRS. HUFSTEDLER: Because I think it goes to who
25 should bear what kind of risks for what kinds of losses in

1 order to achieve the policies that this Court has said it
2 wishes to achieve in admiralty law.

3 QUESTION: The --

4 QUESTION: If I took the comparative negligence
5 doctrine from the common development, this Court did, took
6 that over as part of admiralty law. Why wouldn't it be
7 natural also to look to the development in the States to
8 develop the comparative law doctrine on the admiralty
9 side?

10 MRS. HUFSTEDLER: The only reason I would
11 respond it is not appropriate, Justice Ginsburg, is that
12 common law, superseding cause included, is made in 50
13 States by multiple courts that do not agree with each
14 other, and this Court has said that one of the very
15 reasons for reaching different conclusions is to strive
16 for uniformity, and there can be none if the law with
17 respect to what will be applied in admiralty is going to
18 be made by multiple courts in 50 States.

19 QUESTION: But you answered before that there is
20 uniformity, at least so far on this point, that there is
21 no State that has said supervening cause is inconsistent,
22 incompatible with comparative negligence.

23 MRS. HUFSTEDLER: What I've said, Justice
24 Ginsburg, is that I'm not aware of such a case, but what
25 that conceals is how differently different courts have

1 perceived how superseding cause applies.

2 QUESTION: Ms. Hufstedler, if we accepted your
3 rationale, which I guess is the ultimate admiralty policy
4 should be to place the responsibility where -- damage
5 responsibility on the party with the best chance of
6 avoiding the harm, I suppose we wouldn't even have a
7 comparative fault rule at all. We'd simply decide which
8 of the parties was in the best position to avoid the harm,
9 and we would attribute all of the damage to that party.

10 MRS. HUFSTEDLER: I would suggest, Justice
11 Souter, that that would not be your conclusion.

12 I would suggest that you would actually compare
13 the degrees of fault, as this Court taught in Reliable
14 Transfer, and in doing so, in comparing those degrees of
15 fault, when you discover that one party, or in this case
16 several parties, were tremendously at fault and the
17 shipowner was slightly at fault -- you can't decide
18 whether somebody is grossly negligent unless you're
19 comparing it with something.

20 Here, there is no comparison possible, because
21 the court excluded all of the evidence of what --

22 QUESTION: May I ask one question on that point?
23 Conclusion of Law 44 --

24 MRS. HUFSTEDLER: Yes.

25 QUESTION: -- contains the statement that the

1 negligence of the Captain was the sole proximate cause of
2 the stranding.

3 MRS. HUFSTEDLER: Mm-hmm.

4 QUESTION: And do you accept that? Should we
5 accept that for purposes of a decision, or do you contend
6 that because it's a conclusion of law we should review it?

7 MRS. HUFSTEDLER: I contend, Justice Stevens,
8 that it is a conclusion of law. It is not a finding of
9 fact, and it could not be a finding of fact that would
10 make sense because it is already admitted that one of the
11 causes --

12 QUESTION: Let me push you one step further,
13 then. If it is a conclusion of law, must we disagree with
14 it to accept your position on the doctrine of superseding
15 cause?

16 MRS. HUFSTEDLER: Yes.

17 QUESTION: But you say that's not a finding of
18 fact, so we may do that.

19 MRS. HUFSTEDLER: That's exactly right.
20 If I may, I will save my remaining time.

21 QUESTION: Very well, Ms. Hufstedler.

22 Mr. Playdon.

23 ORAL ARGUMENT OF GEORGE W. PLAYDON, JR.

24 ON BEHALF OF THE RESPONDENT

25 MR. PLAYDON: Mr. Chief Justice, and may it

1 please the Court:

2 The facts of this case are as found by the
3 courts below. They are unchallenged by Exxon. They are
4 binding, and they clearly support the judgment below. We
5 simply cannot read the decision of Reliable Transfer --

6 QUESTION: Which ones are correct? I mean, the
7 ones that favor you, or the ones that don't favor you?

8 MR. PLAYDON: Oh, I think they all favor me,
9 Justice Scalia.

10 QUESTION: They tend to contradict each other is
11 the problem.

12 MR. PLAYDON: Well, I think you -- Justice
13 Scalia, you tried -- you focused in on the presence of
14 this hose that remained aboard the vessel until a few --
15 12 minutes before that final fatal turn occurred. Let me
16 offer an answer to your, perhaps question, and justify how
17 Judge Fong actually said that some hour and 17 minutes
18 earlier before that hose had gone off, it had reached a
19 point of safety.

20 At that time, at 1830, about 1 hour and 2
21 minutes after the breakaway, that vessel had traversed the
22 leeward coast, it had gotten itself into fair water, and
23 only at that point of time, when the Captain made an
24 unforced decision to linger and remain, did that hose
25 become a problem.

1 And the hose, Justice Scalia, was under the
2 control of the assist vessel NENE, and if it presented a
3 problem, it was a problem to the maneuverability of the
4 vessel, not to the navigation of the vessel, and it was
5 the navigation of the vessel subsequent to this time, the
6 navigation subsequent to this 1830, that resulted in the
7 stranding of the vessel an hour and 39 minutes later.

8 QUESTION: But the Captain had this loose boom
9 that was swinging across the deck, causing risk of injury
10 to seamen and also causing a risk of explosion, as I
11 understand it, isn't that right?

12 MR. PLAYDON: Whatever risk it was, Justice
13 Scalia, he had --

14 QUESTION: And you wanted him to sit down calmly
15 at his maps and chart at what point in the ocean he was at
16 this time.

17 MR. PLAYDON: If not he, then someone else on
18 his bridge that should have been there to do so. The
19 vessel needed to be navigated. The Captain was there to
20 navigate the vessel, not to micromanage what was going on
21 on the deck, and what was going on on the deck was a
22 hazard to the vessel only because of the unforced
23 decisions that were made by the Captain an hour and 17
24 minutes earlier.

25 QUESTION: Well, I think the two findings are

1 hard to reconcile, but -- all right.

2 MR. PLAYDON: I would differ with the Justice,
3 but I will accept that's your opinion.

4 The doctrine of superseding cause has been part
5 and parcel of the law of admiralty for literally
6 generations.

7 QUESTION: Well, let me ask you this, is it
8 possible to have a so-called superseding cause if it's not
9 caused by a third party?

10 MR. PLAYDON: Yes.

11 QUESTION: If it's caused by the plaintiff
12 itself?

13 MR. PLAYDON: Certainly. I see nothing --

14 QUESTION: I don't see why that wouldn't be just
15 a matter of comparable negligence rather than superseding
16 cause.

17 MR. PLAYDON: Well, certainly --

18 QUESTION: What is -- under the Restatement,
19 does it contemplate a third party?

20 MR. PLAYDON: The key part of the Restatement,
21 section 442, actually contemplates an intervention to
22 bring about a harm different in kind than that which would
23 otherwise have resulted.

24 QUESTION: But it's a third party intervention,
25 isn't it? I mean, I think Justice O'Connor and I are both

1 bothered by a question of terminology. Under 442 there's
2 got to be a third party or a third force. It's not
3 plaintiff's negligence, right?

4 MR. PLAYDON: I disagree. I believe it can be
5 any act that occurs after the initial act.

6 QUESTION: Well, let me just read from 442(b).
7 I mean, it's saying that the defendant doesn't get off the
8 hook. I'm reading from page -- where it's set out on page
9 30 of the blue brief.

10 Except where the harm is intentionally caused by
11 a third person and is not within the scope of the risk
12 created by the actor's conduct.

13 I mean, isn't that pretty clearly a third person
14 rule? The text writers, some of them at least, use it --
15 use superseding to refer to plaintiff's conduct, but 442
16 talks about a third party, doesn't it?

17 MR. PLAYDON: Well, third -- yes, it does,
18 Justice --

19 QUESTION: Okay, so if we're going to take the
20 Restatement view, we're going to look for a third party
21 and we don't have one here, right?

22 MR. PLAYDON: I believe the acts of the Captain
23 are the third party, but --

24 QUESTION: I thought the Captain was working for
25 Exxon.

1 MR. PLAYDON: Well, he was with his acts, and
2 the gross negligence of the operation of the vessel
3 subsequent were in fact found by Judge Fong to be that
4 supervening --

5 QUESTION: Well, but maybe he was just engaging
6 in a terminological mistake. He wasn't saying that the
7 Captain had ceased to be the agent of the ship and had
8 somehow gone beyond the scope of his employment. He was
9 simply doing his job in a grossly negligent fashion, and
10 in normal terminology, that still makes him identical with
11 Exxon for this purpose, doesn't it?

12 MR. PLAYDON: Yes. His employment --

13 QUESTION: Okay.

14 MR. PLAYDON: I think it was specifically found
15 by the --

16 QUESTION: All right. Now --

17 QUESTION: Of course, it wouldn't make very much
18 sense to have a doctrine of supervening -- I mean, maybe
19 you want to give it a different name, but it wouldn't make
20 any sense to say that the defendant gets off the hook if
21 some third party caused the injury that the plaintiff is
22 suing for, but the defendant does not get off the hook if
23 the plaintiff himself caused the injury that the plaintiff
24 is suing for. That wouldn't make any sense at all.

25 MR. PLAYDON: It wouldn't make any --

1 QUESTION: So don't use the Restatement.

2 MR. PLAYDON: No, but --

3 QUESTION: Why don't you use these other
4 commentators instead?

5 QUESTION: But it's just a question of
6 terminology. I'm trying to understand what you're saying,
7 and when you use superseding cause, I take it you are
8 using it not in the Restatement sense but in the broader
9 sense that plaintiff's acts can be superseding cause.

10 MR. PLAYDON: Yes, Justice.

11 QUESTION: Okay.

12 MR. PLAYDON: Yes.

13 QUESTION: Is it true, I don't know -- I didn't
14 notice this in the brief particularly, but is it true in
15 the case of a corporate defendant where there are many
16 different individuals involved and they're all the
17 plaintiffs, sorry, corporate plaintiff, the third person
18 in the Restatement was not meant to refer to employees of
19 the same plaintiff? Do you know that? I mean, I don't
20 know. the answer to me is not obvious.

21 MR. PLAYDON: It's --

22 QUESTION: I did notice now that, since it's
23 pointed out --

24 MR. PLAYDON: Yes.

25 QUESTION: -- that it does say third person, and

1 I don't know how that was meant to apply in the -- nobody
2 seems to argue that it might. Maybe they did, but --

3 MR. PLAYDON: I don't believe anybody did.

4 QUESTION: -- do we know how that word, third
5 person, was meant by the Restatement drafters to apply --

6 MR. PLAYDON: I don't.

7 QUESTION: -- in the case of the corporate
8 plaintiff with many employees?

9 MR. PLAYDON: Justice Breyer, I don't know. It
10 would seem to make no logical sense to have it apply in
11 any other sense than in the context in which it is being
12 presented in this particular action.

13 Clearly, a superseding cause should be one that
14 occurs after an initial event, and surely superseding
15 cause should be used to terminate a liability at some
16 point of time short of eternity, just as --

17 QUESTION: May --

18 MR. PLAYDON: -- you have suggested there may
19 come a logical time at some point when, in fact, an act
20 ceases to act, and in this particular --

21 QUESTION: Well, what I'm actually thinking is
22 that if the employee, if the plaintiff company happens
23 also to employ my submarine captain, it would make no
24 sense not to apply the doctrine of supervening cause, but
25 if the employee happens to be the person who himself,

1 let's say, was physically injured in a tort case, then it
2 would seem more likely and reasonable to apply the
3 comparative negligence. At least that's an initial
4 reaction. I haven't thought it through, and that's why
5 I'm puzzled as to how this third party doctrine does
6 apply.

7 MR. PLAYDON: I wouldn't be as quite concerned
8 with the semantics as when we're looking at the doctrine.
9 We're looking at the doctrine of when does the act of
10 someone else, whether it is the captain or the employee,
11 or submarine captain, or something, operate to block any
12 prior fault, so that that prior fault just simply no
13 longer is active in the scenario.

14 QUESTION: Well, could Exxon say, did it ever
15 say here that the tort was concluded when the ship parted
16 from the mooring? That was the tort. That's the tortious
17 conduct here. Everything else is simply a question of
18 mitigating damages, or avoidable consequences.

19 MR. PLAYDON: Well, I think Judge Fong --

20 QUESTION: Because I don't see some independent
21 tort coming from what the Captain did.

22 MR. PLAYDON: Justice Kennedy, I would
23 respectfully disagree, because I think what you found and
24 what you saw here in the application by Judge Fong was, in
25 fact, independent fault in the faulty navigation of the

1 vessel of making a wrong turn without knowing where he
2 was, violating the Louisiana --

3 QUESTION: May I interrupt --

4 QUESTION: But in the usual case we think about
5 an independent tort, a third person, the submarine captain
6 or something, creating a tort.

7 I don't see a second tort here. I see an initial
8 tort, arguably the parting of the chain, followed by a
9 failure to mitigate, or a failure to take avoidable
10 consequences of damages which might get you where you want
11 to go, but I'm not sure that it's superseding or
12 supervening cause.

13 MR. PLAYDON: Let me then perhaps argue from a
14 different perspective, Justice Kennedy. The harm that was
15 envisioned by the breakout from the mooring at 28 minutes
16 past 5 in the evening would be that that vessel would
17 somehow, before it regained control of itself, find itself
18 aground in the vicinity of the mooring. That was the harm
19 that was envisioned if, in fact, the breakout was a cause.

20 But what we have here is, we have a passage of
21 almost 3 hours where a fully manned, fully staffed, fully
22 functional tanker managed to --

23 QUESTION: Yes, but Mr. Playdon, let me
24 interrupt you with a question. So you're asking -- you're
25 saying the entire cause of the accident was the

1 navigational errors of the Captain.

2 MR. PLAYDON: Yes.

3 QUESTION: Now, supposing the trial judge said
4 well, why did he make these navigational errors? One
5 reason, presumably -- he might have made a finding, one
6 reason was that he was still concerned about the hose that
7 was trailing along the vessel. That distracted him, and
8 that caused him to only give 90 percent attention to
9 navigation where he should have given 100 percent
10 attention.

11 If that was one of the facts that caused him to
12 navigate improperly, why would that not have been
13 inconsistent with the view that his -- that one side is
14 entirely responsible for the accident?

15 MR. PLAYDON: Well, now, Justice Stevens, what
16 you're doing is you're going in and we're sort of changing
17 the fact pattern a bit.

18 QUESTION: I'm just assuming if there had been
19 such a finding.

20 MR. PLAYDON: Absolutely. If there had been
21 such a factfinding that the --

22 QUESTION: And instead we're saying he was just
23 dumb. It's 100 percent the answer. Or he was
24 incompetent.

25 MR. PLAYDON: I think both of those things,

1 Justice Stevens.

2 QUESTION: And it's inconceivable that the
3 condition of the ship with the trailing on it had any
4 bearing on his navigational errors.

5 MR. PLAYDON: Well, it wasn't found by the court
6 below.

7 QUESTION: I understand.

8 MR. PLAYDON: It certainly wasn't. Now, if we
9 are to assume --

10 QUESTION: But isn't the conclusion of law based
11 on an assumption that such a finding could not have been
12 made?

13 MR. PLAYDON: That's correct. That's correct,
14 and --

15 QUESTION: Could not have been made, or was not
16 made?

17 MR. PLAYDON: Probably both.

18 QUESTION: Could not have been made? So if I
19 think that such a finding could have been made, that on
20 the evidence here you could have made a finding that he
21 was distracted by the hose you, think I should find
22 against you?

23 MR. PLAYDON: No, I don't believe so.

24 QUESTION: I didn't think you meant that. Then
25 what did you mean?

1 MR. PLAYDON: I meant that given the facts as
2 they are below, and they are not challenged in this Court,
3 that such a finding --

4 QUESTION: Given the facts as they are below, or
5 given the findings below?

6 MR. PLAYDON: Well, remember that Judge Fong, he
7 sort of gave us a safety valve when he said look, if I've
8 made findings of fact that are really conclusions, they
9 should be held to be conclusions, and if I made
10 conclusions that are really findings, then they should be
11 deemed by findings, and that's what we're saying.

12 The finding of causation, of proximate cause, is
13 a factual finding. It's --

14 QUESTION: And you're saying we should treat
15 Conclusion of Law 44 as a finding of fact?

16 MR. PLAYDON: Certainly.

17 QUESTION: Yes.

18 QUESTION: Well, isn't proximate cause a mixed
19 question? I mean, it involves the application of facts as
20 found to a concept of limited causation, which is a legal
21 concept.

22 MR. PLAYDON: Absolutely.

23 QUESTION: It's mixed.

24 MR. PLAYDON: Yes, Justice Souter, it is, and
25 insofar as it contains the factual determination that in

1 fact Captain Coyne was the sole proximate cause, that is a
2 factfinding that this Court, I think under the two-court
3 rule referred to by Justice -- Chief Justice Rehnquist is
4 one that they're bound to adhere to.

5 QUESTION: It may be a mixed question, but it is
6 the kind of question if you had a judge-jury you would
7 give it to a jury.

8 MR. PLAYDON: Absolutely, Justice Ginsburg, and
9 in this particular case Judge Fong was both the judge and
10 the jury in this case.

11 QUESTION: But going back to Justice Stevens'
12 question, doesn't that underscore the impropriety of
13 splitting this trial? That is, in order to determine if
14 there really was a break in this negligence on the part of
15 the defendants, one would have to have the whole scene
16 played out.

17 MR. PLAYDON: I would respectfully disagree,
18 Justice Ginsburg. Let me indicate that perhaps we might
19 take some note of the Union Oil v. SAN JACINTO case, where
20 3 years before Reliable Transfer this Court took that case
21 thinking, my, this may be the case to deal with divided
22 damages.

23 And then the Court took a look at it and said,
24 you know, and the orderly disposition of issues requires
25 addressing the issue of liability before we address the

1 question of damage, and when it went through the analysis
2 it found that there really wasn't two causes of this
3 particular incident on the Columbia River, that really
4 there was only one person at fault, and that was the tug
5 coming out of a fog bank at right angles and striking the
6 SAN JAC -- excuse me, the SANTA MARIA as it was proceeding
7 up past Portland.

8 And that certainly would say that the inquiry
9 done by Judge Fong is not only appropriate but an
10 essential part, and it's clearly within his mandate of
11 Rule 42(b), which gives the trial court sound discretion
12 to be able to structure a case so that it can be
13 conserving of its time and resources, recalling that this
14 particular case took 3 weeks of the court's time, bench
15 time, just to try the issue of causation.

16 So surely that tort of examination would
17 indicate that Exxon over those 3 weeks had an abundant
18 opportunity to be heard on all of the issues and to
19 present all of the proof that it could on the issue of
20 causation. They simply failed to be able to prove to the
21 Court that the events set in motion by the breakout
22 proceeded in a causal manner to result in the stranding
23 that occurred some 3 hours later.

24 QUESTION: I take it -- I just noticed out of
25 interest that in one of your -- the red briefs they've

1 cited cases from Scotland, Australia, Canada, England, and
2 I guess a number of other places. In any of those other
3 places in the world have they shed light on either the
4 third party doctrine, the third party part or the
5 supervening cause part? Were those cases actually --

6 MR. PLAYDON: No, I can't -- one doesn't come to
7 mind, Justice Breyer. You know, the one that comes to
8 mind is perhaps the most illustrative of a foreign
9 jurisdiction.

10 It was cited in the corespondent's brief, and
11 that's the PALUDINA case which occurred in 1927, in a case
12 where they had an initial breakout, then hit another
13 vessel that hit a third vessel, and then the vessels were
14 separated for a period of time, and then the SARA struck
15 another vessel and they tried to bring in the original
16 vessel, the PALUDINA.

17 And basically the English court said, now, wait
18 a minute, whatever was started by the PALUDINA had long
19 since passed before the ultimate harm.

20 QUESTION: I'm not sure that you need a doctrine
21 of supervening cause. Isn't the doctrine of supervening
22 cause anything other than Pfalzgraf? I mean --

23 MR. PLAYDON: Well --

24 QUESTION: -- when you say, you know, that the
25 negligence, the causality, they had long since terminated.

1 Once you say you're out of the scope of the risk, what do
2 you need a doctrine of supervening cause for? And isn't
3 that basically your case?

4 MR. PLAYDON: I smiled. I never envisioned 30
5 years ago --

6 QUESTION: Yes.

7 MR. PLAYDON: -- that I would have the
8 opportunity of standing before you --

9 QUESTION: Of arguing Pfalzgraf, right.

10 MR. PLAYDON: -- of arguing Pfalzgraf.

11 (Laughter.)

12 MR. PLAYDON: Obviously, Pfalzgraf is a
13 foreseeability doctrine, just like Hadley v. Baxendale is
14 a foreseeability problem.

15 I think that the supervening cause gives us a
16 set of sort of workable parameters within which we can
17 work this doctrine as opposed to having it exist as merely
18 a name, or a title.

19 You know, one of the -- as the commentators have
20 commented on, that sometimes it becomes difficult to apply
21 this, and perhaps the Restatement gives us some sort of
22 guidelines.

23 QUESTION: But I mean, I could say that
24 whenever it's beyond the scope of the risk under Pfalzgraf
25 I could say, no, you were not the cause of it. There was

1 this other cause, because basically it was beyond the
2 scope of the risk that you created.

3 MR. PLAYDON: Sure.

4 QUESTION: And I can call that other cause, if I
5 want, a supervening cause, and I guess that makes
6 everything sound nicer, but I don't know that it's any
7 different.

8 MR. PLAYDON: It probably may not. It may be a
9 distinction without a difference, Justice Scalia.

10 I think what happened, you know, in practicality
11 is that when the trial court, when Judge Fong was
12 presented with just the facts, or the basic facts of what
13 was occurring, that the grounding -- excuse me, the
14 stranding that occurs 3 hours later at a remote distance
15 around Barbers Point, that that just in and of itself
16 cried out for a proceeding that examined causation. And
17 when he examined that causation, it was clearly that the
18 operative events of the breakout simply had no bearing on
19 the ultimate harm.

20 QUESTION: Mr. Playdon, can you tell me one fact
21 that really puzzles me? Why was it going to take the
22 Coast Guard 2 hours to get vessels out there? It just
23 puzzled me.

24 MR. PLAYDON: I guess we'd have to ask the Coast
25 Guard. I mean, they had buoy tenders, and they had some

1 cutters that were tied up in Honolulu Harbor, I guess in
2 order to turn the O-N, the O-F-F switch and get that
3 vessel moving and get it out of the harbor and over to the
4 berth would have taken the period of time. That's the
5 only explanation I have.

6 Actually, in point of fact, Justice Stevens,
7 there was a -- we found out later and during the course of
8 the trial that there was a Navy salvage vessel that was
9 within about 30 or 40 minutes of the HOUSTON but was never
10 called, never asked for, but in fact was one of the
11 responding vessels that ultimately helped to pull the
12 vessel off the reef.

13 Members of the Court, we believe that the
14 decision of the Ninth Circuit --

15 QUESTION: If you've got a minute or two extra,
16 let me ask one other question.

17 MR. PLAYDON: Oh, absolutely, Justice -- I was
18 looking out at a --

19 QUESTION: Yes. Is there a -- there's a
20 description in the facts here about negligence which
21 occurred before 1830. Is that relevant, the failure to
22 let the anchor down all the way and so forth?

23 MR. PLAYDON: I don't really think so. You
24 know, the attempt to anchor was within about 12 minutes of
25 the breakaway. The Captain felt that, you know, he might

1 be pulling the anchor, and maybe he didn't think to pull
2 it up more sharp to hold the vessel.

3 But thereafter he then, at about 1803 the little
4 assist vessel NENE -- by the way, it was about 65 feet,
5 and 75 tons, and 800 horsepower -- had that hose under
6 control, and they backed across the face of the south
7 coast of Oahu, cleared Barbers Point, and that's that 1830
8 position, Justice Stevens.

9 QUESTION: Right.

10 MR. PLAYDON: In summation, we just believe that
11 there is no causal nexus to any of the breakout, and I
12 want to thank the Court.

13 CHIEF JUSTICE REHNQUIST: Very well.

14 Ms. Hufstedler, your time has expired. The red
15 light went on just as you were sitting down.

16 The case is submitted.

17 (Whereupon, at 11:00 a.m., the case in the
18 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

EXXON COMPANY, U.S.A., ET AL., Petitioners v. SOFEC, INC., ET AL.

CASE NO: 95-129

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY *Ann Marie Federico*

(REPORTER)