

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

ANDREW J. HAIN,

Respondent,

-against-

NO. 201

ANGELA J. JAMISON, et al.,

Appellants.

20 Eagle Street
Albany, New York
November 16, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

JAMES P. O'BRIEN, ESQ.
COUGHLIN & GERHART, LLP
Attorneys for Defendants-Appellants
99 Corporate Drive
P.O. Box 2039
Binghamton, NY 13904

ELLEN B. STURM, ESQ.
CELLINO & BARNES, P.C
Attorneys for Respondent Hain
16 West Main Street, 6th Floor
Rochester, New York 14614

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DEREK J. ROLLER, ESQ.
BRIAN P. FITZGERALD, P.C.
Attorneys for Respondent Drumm Family Farm
509 Liberty Building
424 Main Street
Buffalo, NY 14202

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 201, Hain v. Jamison.

3 Counsel?

4 MR. O'BRIEN: Good afternoon, Your Honors. My
5 name is James O'Brien. I represent the appellants Ha - - -
6 Jamison. And I would like to reserve two minutes for
7 rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. O'BRIEN: I'd like to start out by indicating
10 that Drumm's negligence in failing to adequately confine
11 its calf due to a disrepair of its fence and then allowing
12 that calf to meander onto an adjacent, dark, unlit, narrow,
13 country, fifty-five-mile-an-hour road - - -

14 JUDGE ABDUS-SALAAM: Counsel, do we know why the
15 motorist stopped to help that calf? Or did - - - did she
16 hit the calf or what happened there?

17 MR. O'BRIEN: The reasonable inference, Your
18 Honor, is that the calf was in the road, and that she
19 stopped because she could not get past it. This is not
20 Western Avenue here in Albany where you have two lanes on
21 either side and you have bright lights. This is a very
22 narrow, unlit, dark country road, that has not out - - - no
23 fog lines, no center line; it's very narrow. Someone
24 coming around that corner, a jury could find, is reasonably
25 foreseeable that she had to stop because of the - - - the

1 calf was in her lane or in the road.

2 JUDGE STEIN: Does - - - does the record reflect
3 what side of the road was it - - - the farm was on? The -
4 - - the north side or the south side?

5 MR. O'BRIEN: Yes, Judge. The - - - it would be
6 on the side - - - on the same side where the accident
7 occurred, which I believe was the north side.

8 JUDGE RIVERA: But - - - but does that explain
9 her actually going into the middle of the road? You could
10 stop and wait for the cow to move.

11 MR. O'BRIEN: Judge, that's an inter - - - that's
12 - - - that's why I - - - I - - - I started with what the
13 road looked like. Again, it's not Western Avenue. This is
14 a very small road. If that - - - if that cow - - - calf -
15 - - is in the road, it's in the road. I mean, there's no
16 way around it. If it's on the side of the road, it'd be
17 very hard to go around it. If it's in the middle of the
18 road, it's very hard to go around it. You just don't know.

19 And - - - and historically, and in common - - -
20 the common law has indicated also that calves have a ten -
21 - - cows have a tendency to wander. They don't just stop;
22 they wander. So I think it's reasonable for a jury to
23 infer that this calf was wandering around this little bitty
24 - - - little road, a narrow, unlit, dark, unlined road, and
25 that she had to stop. She was fic - - - forced.

1 JUDGE RIVERA: So is - - - is there any way to
2 determine, based on the nature of this accident, where on
3 either of these lanes or if across both lanes, or if it's
4 on - - - perpendicular or diagonally? Is there going to be
5 any evidence or would there be any evidence that would help
6 the trier of fact figure that out?

7 MR. O'BRIEN: Yes, Judge. I - - - I think it's
8 generally agreed, and the court found that it was agreed
9 amongst the - - - the parties - - - that the calf - - - the
10 calf was in the northbound lane, the - - - the one that
11 Jamison was traveling at the time, at least - - - at least
12 the time it was hit. When the time that Ms. Hain and the -
13 - - and the calf was hit, it was in that lane, if you will.
14 And - - -

15 JUDGE PIGOTT: The Fourth Department, they - - -
16 they said it just furnished the occasion for - - - for what
17 occurred and it was not negligence in itself. How do you
18 distinguish or how do you - - - how do you answer that
19 particular part of their decision?

20 MR. O'BRIEN: Because when you come - - - it - -
21 - it was foreseeable that someone coming upon the road
22 would stop to move this calf. It's a - - - it's a
23 foreseeability issue, because you have a calf that's
24 wandering in this road - - -

25 JUDGE PIGOTT: Well, let's assume for a minute

1 that instead of a calf, the - - - the - - - the farmer had
2 - - - had a - - - his tractor and a wagon and a - - - and a
3 bale of hay fell off, and - - - and, you know, it's dark.
4 It's all - - - it's everything that you - - - you
5 described, and there's a bale of hay in the middle of the
6 road.

7 MR. O'BRIEN: That's a good distinction, because
8 a bale of hay, like the ball in the Lee case, is an
9 inanimate, nonmoveable - - - hay, it's an object. It's in
10 the road. It just stops. You can go around it. It's not
11 going to move. It's not go - - - it's not going to all of
12 a sudden move when it hears a car. It's not going to - - -
13 it's - - - it's not meandering around a wa - - - a road.
14 It is actually stopped in the road and it - - - and the - -
15 - the negligence has concluded.

16 Here, because of this calf is wandering back and
17 forth presumably, because that's what cows - - - cows and
18 calves do - - - it was move - - - it kept moving and cause
19 - - - and the - - -

20 JUDGE RIVERA: But - - - but if that's so, how is
21 it foreseeable that someone would risk at night getting out
22 if this calf is moving back and forth? You can be out in
23 the middle of the road while there's an animal just going
24 back and forth. That seems very high risk behavior that
25 one might not foresee?

1 MR. O'BRIEN: Maybe not - - -

2 JUDGE RIVERA: As - - - as a response - - -

3 MR. O'BRIEN: Right.

4 JUDGE RIVERA: - - - to having a calf in - - - in
5 your lane, as you say.

6 MR. O'BRIEN: I - - - because how do you get past
7 the calf? You have to go past it presumably. A jury could
8 find that the - - - that she was forced off the road and
9 had to move the co - - - the calf to get back on the road.
10 What we're - - -

11 JUDGE PIGOTT: Because you're suggesting there's
12 an element of com - - - perhaps comparative negligence - -
13 -

14 MR. O'BRIEN: Exactly.

15 JUDGE PIGOTT: - - - not - - - not - - -

16 MR. O'BRIEN: Exactly, because - - -

17 JUDGE STEIN: What - - - what if - - - what if
18 she had gotten the calf safely back to the farm and - - -
19 and then she was walking back to her car and - - - and got
20 hit at that point. Would you still say that there was
21 proximate cause in that situation?

22 MR. O'BRIEN: Arguably not.

23 JUDGE STEIN: What was it - - -

24 MR. O'BRIEN: Because that's more of a Barnes - - -
25 - Barnes-case-type thing, where at that point, the - - -

1 the danger of the cow being in the road has concluded. The
2 cow is now off the road. The danger has ended. The
3 continuous nature of the Drumm's negligence in allowing the
4 calf has - - has concluded. So arguably, now she's walking
5 back and now she gets hit by a car, that would be more
6 attuned to her own negligence in not seeing the car
7 approaching her.

8 JUDGE FAHEY: You know - - - you know, one of the
9 things with a - - - I've always kind of struggled with the
10 concept of furnishing the occasion and - - - and
11 intellectually comparing it to a substantial factor. I
12 think it's - - - sometimes it's hard to tell which is
13 which. And the standard - - - do you say that the standard
14 is that the intervening act of moving of cow must be both -
15 - - it's when it's unforeseen and an extraordinary act. Is
16 that what it has to be to meet the burden? Does it have to
17 be an unforeseeable and an extraordinary act on - - - or is
18 it a matter of context, whether or not you moved the cow or
19 not? You know, I - - - it's - - - in other words, in a
20 country lane, moving a - - - a cow off the road seems to be
21 a normal act of neighborliness. It's kind of a normal act.

22 MR. O'BRIEN: Correct.

23 JUDGE FAHEY: And - - - and so, under that
24 standard, this - - - this actually would constitute a - - -
25 a case of "no good deed goes unpunished" but in - - - in

1 another situation, driving around a bus who is stopped to
2 pick up a passenger, that's seems to be the kind of thing
3 you expect on a city street, and - - - and that intervening
4 act would not constitute some - - - would not constitute a
5 - - - a foreseeable act that - - - and it could be
6 furnishing the occasion for an accident.

7 So that distinction between substantial factor
8 and what test to apply, I think, is what I struggle with.
9 And I'm asking you, I guess, how do you see it - - - how
10 would you characterize it?

11 MR. O'BRIEN: I think it's a foreseeability
12 issue.

13 JUDGE FAHEY: Um-hum.

14 MR. O'BRIEN: Is it foreseeable that if someone
15 was approaching a cow on a dark, unlit road that they would
16 stop, as oppose - - - you mentioned a bus. It's not
17 foreseeable that someone would run into a back of a bus
18 that stopped in its proper location. So I - - - and I
19 think the superseding - - - when you're looking at
20 superseding causes, here the risk that was to be - - - the
21 risk that was to be seen or foreseen or guarded against was
22 exactly the cow getting in the road. Why is it a problem
23 of a cow getting into a road because - - -

24 JUDGE FAHEY: No, I'm - - - I'm - - - by my
25 question, I'm assuming negligence on the - - - on the Drumm

1 Farm, that - - - that the cow is wandering. Let's just
2 assume - - -

3 MR. O'BRIEN: Yes.

4 JUDGE FAHEY: - - - for the purpose of the
5 question, it's negligent.

6 MR. O'BRIEN: Yes.

7 JUDGE FAHEY: Yeah.

8 JUDGE RIVERA: Well, it seems that it's
9 foreseeable again, getting back to my other question that
10 the car was stopped. It's whether or not she's going to
11 get out and get in the middle of the road at night.

12 MR. O'BRIEN: Well - - -

13 JUDGE RIVERA: She could just wait for a while.
14 This seems to have moved very quickly - - -

15 MR. O'BRIEN: Right.

16 JUDGE RIVERA: - - - right? So she comes upon
17 the calf, gets out, and gets hit, as opposed to waiting and
18 seeing - - - as you say, the cow was moving around.

19 MR. O'BRIEN: The cow is moving around. Another
20 car comes upon the scene; she gets rear-ended. As the - -
21 - as the dissent found below, even if - - - no matter if
22 they - - - if she came around that curve and stopped her
23 car, another car could have come around and hit her - - -
24 see the cow and then hit her, and hit her and then the cow,
25 or - - - or visa versa.

1 JUDGE STEIN: Do we know how long she was there
2 before the accident happened?

3 MR. O'BRIEN: No, we do not know how - - -

4 JUDGE STEIN: There's nothing in the record about
5 that?

6 MR. O'BRIEN: No. No. Under the Noseworthy
7 Rule, though, you - - - our bur - - - the plaintiff's
8 burden would be lessened, because she is - - - she is
9 deceased. She never - - - she was - - - you know, she died
10 on impact, our position - - -

11 JUDGE RIVERA: Well, how much time elapsed
12 between the time that the neighbor saw the cow and went to
13 - - - to tell the - - - Mr. Drumm - - -

14 MR. O'BRIEN: Right.

15 JUDGE RIVERA: - - - and when - - - when he hears
16 the accident. I thought he also heard the accident.

17 MR. O'BRIEN: That was probably within about five
18 or ten minutes. That exact amount of time is not known.
19 But what we do know is that the neighbor stopped, called
20 another neighbor and said what should I do, and he said,
21 well, just go right to the Drumm Farm and tell them. So we
22 can - - - I would assume, it's not in the record, but it
23 was a matter of minutes, not a half hour or - - - we know
24 it was about a - - - another half hour or forty-five
25 minutes before the accident occurred.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 Counsel?

3 MS. STURM: Good afternoon, Your Honors. May it
4 please the court, my name is Ellen Sturm. I represent the
5 estate of Holly Hain, the decedent in this matter. I
6 request no time for rebuttal.

7 I have a preliminary argument that I would like
8 to make that although plaintiff did not seek leave to
9 appeal the Fourth Department's order, the plaintiff
10 certainly has been aggrieved by it, contrary to the Drumm
11 defendant's contention.

12 JUDGE STEIN: But isn't it pretty well settled
13 that we can't grant affirmative relief, like reinstating
14 the complaint?

15 MS. STURM: Well, two cases that the Drumm
16 defendants cited, *Mixon* as well as *Hecht*, both involved not
17 appealing from the Appellate Division. Here, this is - - -
18 this was not an automatic leave to appeal. We only had
19 presiding Justice Whelan dissenting, and it was, you know,
20 leave to appeal, but granted by permission. The - - - the
21 other two cases, I think, are distinguishable because they
22 do involve appeals at the Appellate Division where you have
23 an appeal as of - - - as of right.

24 So I think that this - - - the - - - I'm - - -
25 I'm requesting that the court look at this a little more

1 carefully than to just simply say that - - - that the
2 complaint cannot be reinstated in this case. I think a
3 distinction needs to be made where you have an automatic
4 right to appeal versus where you have to literally seek
5 leave.

6 But in any event, plaintiff, certainly - - - she
7 falls under the second prong of the definition of
8 aggrievement, under - - - that - - - that this court
9 formulated in *Mixon*. "A person is aggrieved when someone
10 asks for relief against her, which the person opposes, and
11 the relief is granted in whole or in part." And that's
12 certainly true for Drumm's appeal of the denial of its
13 summary judgment motion at the Fourth Department.

14 Plaintiff vigorously opposed that. And as - - -
15 as I said, then the - - - th - - - everything else
16 unfolded. As soon as I learned that the court had granted
17 leave to - - - to Mr. O'Brien's client, I then contacted
18 the clerk of the - - - the clerk at the court and asked
19 what I could do, and that's how this - - - my - - - my
20 respondent's brief got filed.

21 One thing that - - - that I think is - - - is
22 critical is that unlike the posture in *Mixon*, the Drumm
23 defendants never filed a motion to strike my responding
24 brief in this appeal. So again, I - - - I respectfully
25 request that Your Honors do reinstate the - - - the

1 complaint, and really for the following two reasons.

2 Holly Hain's actions of leaving her vehicle and
3 entering the roadway, our contention is, were a normal and
4 foreseeable consequence of Drumm's failure to confine and
5 retrieve its cow. At a minimum, there's a question of fact
6 on this point. What is foreseeable and what is normal may
7 be subject to varying inferences, especially in this case,
8 where we have a deceased plaintiff, and thus generally it
9 should be left for the factfinder to resolve.

10 JUDGE ABDUS-SALAAM: So could I - - - counsel,
11 excuse me, could I ask you the same question that - - -
12 that Judge Fahey asked Mr. O'Brien? How do you distinguish
13 between furnishing the occasion and foreseeability? And I
14 - - - I think the hypothetical may have gotten changed a
15 little bit when Mr. O'Brien answered, but in - - - this is
16 a farm country problem, but in the city, buses double park;
17 people double park all the time. And if somebody tries to
18 pull out around them, then, you know, we've said that
19 furnishes the occasion.

20 So what - - - what is the distinction here?

21 MS. STURM: I think the distinction is that you
22 have - - -

23 JUDGE ABDUS-SALAAM: Is it foreseeable that
24 someone would come out - - -

25 MS. STURM: I think if it - - -

1 JUDGE ABDUS-SALAAM: - - - from behind a bus - -
2 -

3 MS. STURM: I think the distinction is - - -

4 JUDGE ABDUS-SALAAM: - - - that's double parked?

5 MS. STURM: - - - is that you - - - I mean, if
6 you cost-benefit analysis in this case, the cost of
7 repairing your fence and keeping your animals corralled
8 versus a lady getting killed on a dark country road, I - -
9 - I think there's - - - there's, you know - - - the co - -
10 - cost-benefit analysis of that is that the burden on Drumm
11 or the duty of Drumm was very minimal compared to the harm
12 to the plaintiff.

13 But this is a - - - this is a live animal. And I
14 think that Mr. O'Brien did an excellent job of describing
15 that it's - - - you know, it's moving around. It's dark.
16 I mean, she may have not even known it - - - what it was.
17 Maybe - - - you know, I don't know what a calf looks like
18 exactly, but I mean, it's a - - - I - - - I don't - - -
19 there are - - - there are a lot of open questions.

20 I don't think that it was the plaintiff's burden
21 necessarily on a motion that the defendant brought to - - -
22 to show - - - to demonstrate that this calf was in her lane
23 of travel. It was almost like the Fourth Department, the
24 majority, said, well, if you can't show that, like too bad,
25 so sad. But, you know, under Noseworthy, we have a less

1 evidentiary burden at trial.

2 And - - - so why on a motion that the defendant
3 brings for summary judgment is the plaintiff so burdened
4 with an evidentiary standard that really, I think really is
5 - - - is not the law of this state. And those were really
6 my two points. Proximate cause is a question here that is
7 subject to inferences, so it should not be decided as a
8 matter of law. And with that, I thank you very much your
9 time.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 Counsel?

12 MR. ROLLER: May it please the court, my name is
13 Derek Roller. I represent the defendant-respondent Drumm
14 Family Farm. And I think the question here today is
15 proximate cause, which exists to place manageable limits on
16 the liability that can flow from negligent acts. And I
17 think to address Judge - - -

18 JUDGE PIGOTT: Suppose - - - suppose instead of
19 this lady being killed, she got out of her car, did
20 whatever she thought she was going to be doing, and the
21 calf ran away. She get - - - she continues on and the calf
22 comes back and a - - - and another car confronts the same
23 thing. Is it - - - is this - - - is it - - - is it that
24 the negligence, which was the, I guess, maintaining the
25 fence, is such that even then the Drumm Farm would not be

1 liable?

2 MR. ROLLER: Well, I think we have to analyze
3 this case in terms of what the negligence caused. And part
4 of doing that in - - - in the cases that we cited, and what
5 the Fourth Department did in this case, was to look at
6 whether the negligence was an act of force upon the person
7 - - -

8 JUDGE PIGOTT: No, but I - - - I - - - the - - -
9 the argument's being made that, you know, unlike my bale of
10 hay, a cow moves around; a calf moves around it. And so
11 that made me think that - - - that if - - - if the scenario
12 I just gave you occurred under the Fourth Department,
13 you're - - - that calf can wander around for the rest of
14 the night and cause two or three accidents, and all of them
15 would not be your fault, because all you did was con - - -
16 you know, create the occasion and you have no liability
17 whatsoever for having your calf out there.

18 MR. ROLLER: Well, unlike the Hastings case, for
19 example, that was decided by this court, this does not
20 involve a motor vehicle-farm animal accident. There was no
21 injury caused by the calf in this case.

22 JUDGE PIGOTT: Well, I think there - - -

23 MR. ROLLER: And that's - - -

24 JUDGE PIGOTT: - - - I think there might be some
25 disagreement on that, I mean, the lady's dead.

1 MR. ROLLER: Well, the allegation in the
2 complaint was that she died solely as a result of being
3 struck by Leah - - - Leah Jamison's vehicle.

4 JUDGE PIGOTT: Right, but, I mean, well - - -
5 right, but I mean, the - - - the competent producing cause
6 of that besides them, of course, is the calf. That's the
7 whole - - - that's the whole nub of this, right?

8 MR. ROLLER: Yes, and I believe that assuming
9 Drumm Farm's alleged negligence caused this calf to escape
10 and wander on or near the roadway, you have to then look at
11 what happened when the plaintiff - - - the plaintiff's
12 decedent, Holly Hain, came upon this calf - - -

13 JUDGE STEIN: So you're saying that based - - -

14 MR. ROLLER: - - - and the only question of facts
15 - - -

16 JUDGE STEIN: - - - on Hastings, the only - - -
17 the only way that there would be proximate cause here is if
18 the motorist actually hit - - - hit the cow - - - hit the
19 calf?

20 MR. ROLLER: Well, no, the farm animal could
21 cause injury itself if it has - - -

22 JUDGE STEIN: Well - - -

23 MR. ROLLER: - - - escaped property to, say,
24 attacking someone or something of that nature.

25 JUDGE STEIN: What if decedent and the Jamison

1 vehicle were passing each other, and one of them swerved to
2 get around the calf and they had an accident, would there
3 be proximate cause there?

4 MR. ROLLER: There certainly could be, but that's
5 also certainly a different case than what happened here.

6 JUDGE STEIN: Well, how is that different?

7 MR. ROLLER: Well, in this case, Holly Hain
8 encountered the calf, either on or near the roadway; we
9 don't know where it was. What we do know and what's agreed
10 upon is she pulled her vehicle over to the southbound side
11 of the road. At that time, she's remaining in her vehicle.
12 She's not in danger, and she's not injured.

13 JUDGE STEIN: So she's supposed to sit there if
14 the calf is wandering back and forth across the road for -
15 - - for an hour. She just supposed to sit there. It's not
16 foreseeable that she would - - - it's - - - it's so
17 extraordinary to think that - - - that she would actually
18 get out her car and try to get the calf over so she could
19 go by, and - - - and so another vehicle might not hit the -
20 - - hit the calf and - - - and have injuries. That's - - -
21 is that - - -

22 MR. ROLLER: Well, I - - - I think under the - -
23 - the case law that the Fourth Department decided this
24 under, it's - - - it's almost a different analysis. That's
25 because at this time when she is stopped on the southbound

1 side of the road and not injured or endangered, the
2 negligence of Drumm Family Farm stops being an active force
3 upon her. In the situation that was then created and the
4 risk that was then created of her being struck by a vehicle
5 in the roadway was the one that she created by her own
6 actions.

7 JUDGE FAHEY: Well - - -

8 JUDGE STEIN: So if she had left her car in - - -
9 in the street - - - in the middle of the street, and gotten
10 out, that - - - that would not have attenuated the - - -
11 the negligence - - - the cause?

12 MR. ROLLER: I don't believe that would have
13 changed the Fourth Department's analysis and the analysis
14 under whether it furnishes the occasion or not.

15 JUDGE PIGOTT: Well, they said, "Importantly, the
16 plaintiff does not contend and did not submit any evidence
17 that would establish that the calf's presence in the road
18 blocked the decedent's ability to travel in the southbound
19 lane or otherwise forced the decedent to stop her vehicle."
20 How do they reach that conclusion?

21 MR. ROLLER: That conclusion is reached because
22 she's pulled over on the southbound side of the road, and
23 plaintiff's counsel admitted at oral argument in the
24 Supreme Court that there was no damage to the vehicle and
25 there's no damage to show - - -

1 JUDGE PIGOTT: No, but to do that, are - - - are
2 they saying that - - - that she should not have gotten out
3 of her car? She should not have tried to, let's assume,
4 either assist this - - - this calf or - - - or do a
5 Samaritan-type act of getting the thing out of the way so
6 the next car doesn't hit it. I - - - I was just wondered
7 how they - - - how they reached that conclusion that - - -

8 MR. ROLLER: Well, they - - -

9 JUDGE PIGOTT: - - - she should have stayed in
10 her car, should have driven around the calf and left it
11 there.

12 MR. ROLLER: There were certainly other
13 reasonable options for her to take, but the option that she
14 did take, the Drumm Family Farm's negligence didn't cause
15 her to do that.

16 JUDGE RIVERA: Well, you're assuming the car - -
17 -

18 JUDGE FAHEY: Well, how about - - - how it - - -

19 JUDGE RIVERA: - - - what's the other reasonable
20 option - - - what - - - on the side that she's on, is there
21 some place that she can go at night by herself?

22 MR. ROLLER: I don't know that she would've
23 needed - - - needed to do something like that. I think the
24 only two - - - well, possibly two or three legally
25 significant facts here are that she pulled over on the side

1 of road and was not injured, and was not injured until she
2 exited her vehicle to go to stand in the northbound lane.
3 And this is exactly analogous to the Ely and Schiff cases
4 that we have cited and the Hurlburt case that the Fourth
5 Department cited and in fact the others as well.

6 JUDGE FAHEY: Well, do you understand my question
7 from before. I'm having a hard time analytically
8 separating the ideal of "substantial factor" from
9 "furnishing the occasion". I - - - I think Judge Abdus-
10 Salaam referred to something that clearly is furnishing the
11 occasion, the - - - the but - - - stopped busses on - - -
12 on the side street. But here, all right, first you've got
13 the problem: the calf's in the middle of the road.

14 Now, you'd agree - - - let - - - let's assume
15 negligence on the Drumm Family Farm for letting the calf
16 get out. Let's just assume that for our purposes here.
17 You'd agree if she was driving down the road and she ran
18 into the calf that Drumm Family - - - if she just ran into
19 it with her car, and something - - - there was either
20 damage or she was hurt, there'd be no question, right?

21 MR. ROLLER: Yes, that's the Hastings case.

22 JUDGE FAHEY: That's - - - that's an in - - -
23 that's an easy one. All right. So - - - so here the on -
24 - - the only - - - the only time that I - - - I would - - -
25 I think you can say that the moving of the cow would have

1 to be from the middle of a country road at night - - -
2 would have to be an act that we would have to consider it
3 unforeseeable and extraordinary to say that - - - that - -
4 - that this intervening act could break the causal chain.
5 Wouldn't we have to say that? Isn't that what the standard
6 is?

7 MR. ROLLER: I think that before you get to that
8 point - - -

9 JUDGE FAHEY: Well, I'm just quoting from the
10 case law, that's why I'm asking you if you agree that
11 that's the standard.

12 MR. ROLLER: I don't necessarily agree that
13 that's the standard. I think before - - -

14 JUDGE FAHEY: Okay, what would you say it is,
15 then?

16 MR. ROLLER: Before you get to that point, you
17 can analyze whether an act that a defendant did was an act
18 of force or harm up until the time that the plaintiff was
19 injured, or whether it was not, and other forces acted upon
20 it, for which the defendant did not set in motion and were
21 not responsible for it. So - - -

22 JUDGE FAHEY: Okay, but I - - - I still want to
23 go back to what - - - what do you think the standard is,
24 then, if it isn't the way I stated it?

25 MR. ROLLER: I think that - - - that the standard

1 is that that was applied in Ely and Schiff and the Fourth
2 Department's - - -

3 JUDGE FAHEY: Give me the phrase. Wha - - - what
4 are they saying? I can't bring it up off the top of my
5 head; tell me, if you - - - if you - - - if you can
6 remember. If you can't, it's not a test. I don't mean to
7 be that way about it, but - - -

8 MR. ROLLER: That the - - -

9 JUDGE FAHEY: - - - the - - - the way I
10 understand it is that that's the test. And - - - and if
11 that's the test, that's what I'm having a hard time for.
12 So really then it comes down to distinguishing the
13 intellectual concept of furnishing the occasion from - - -
14 from the substantial factor analysis and that's why I'm
15 having a difficult time here with this.

16 MR. ROLLER: I think all I can say is point to
17 the facts in the cases that rely on that - - -

18 JUDGE FAHEY: Yeah.

19 MR. ROLLER: - - - "furnishing the occasion"
20 standard.

21 JUDGE STEIN: Are you familiar with our Gralton
22 case?

23 MR. ROLLER: Yes.

24 JUDGE STEIN: Okay. And - - - and doesn't that
25 suggest that if the - - - the - - - the instrument of the

1 harm, if you will, is still, you know, ongoing, involved,
2 then - - - then it hasn't broken the causation chain. Do
3 you - - -

4 MR. ROLLER: Yes, that is part of the analysis.

5 JUDGE STEIN: - - - do you agree with that?

6 Okay. And here, apparently, the calf was still in the
7 road, so doesn't that mean that the chain was not broken?

8 MR. ROLLER: Well, the calf's present in a - - -
9 presence in the road didn't cause an injury to her. It
10 gave her the op - - -

11 JUDGE STEIN: Well, but that's the question here.

12 Isn't that the question, is whether - - -

13 MR. ROLLER: No, I don't - - - I don't believe
14 so. I don't believe it's - - - it's in question of whether
15 the calf caused an injury. If a calf - - -

16 JUDGE PIGOTT: Well, if a car - - - if a car - -
17 - let's say, make it a tractor - - - pulled out on - - - in
18 front of the car in the road, but the car didn't hit it,
19 but swerved and somebody was hurt, you could safely say the
20 tractor did not cause the injury. That does not mean that
21 there wasn't negligence that caused the injury.

22 MR. ROLLER: Well, the - - - the tractor in that
23 situation was a force that acted upon the person that
24 swerved. The person had to swerve to avoid getting
25 injured.

1 JUDGE PIGOTT: Like the calf, might.

2 MR. ROLLER: Well, in this case, the person
3 pulled over to the side of the road and - - - and at that
4 time, no one was injured or endangered.

5 JUDGE PIGOTT: That's - - - that's your - - -
6 that's your key right there. There was somehow a break in
7 the time.

8 MR. ROLLER: Oh, absolutely.

9 JUDGE STEIN: What - - - what - - -

10 MR. ROLLER: She pulled over and was not injured
11 or in danger and she was not at risk of being struck by a
12 motor vehicle while standing in that northbound lane until
13 she exited her vehicle and went there herself.

14 JUDGE RIVERA: So then if - - - if the calf had
15 not been in the road, just still on the side, right, on the
16 side of where the farm is on, but not in the road, and she
17 comes up, and as counsel was suggesting perhaps it's not
18 that obvious that it's a calf and she's startled and she
19 hits a tree and gets killed that way. Is there any
20 negligence?

21 MR. ROLLER: In her vehicle?

22 JUDGE RIVERA: Correct.

23 MR. ROLLER: I would have to say no. You know, a
24 calf being on the side of the road - - -

25 JUDGE RIVERA: But if the calf was in the middle

1 of the road.

2 MR. ROLLER: And she had to swerve to avoid it?

3 JUDGE RIVERA: Yes.

4 MR. ROLLER: And in the process of doing that,
5 that caused an act of force or harm upon her - - -

6 JUDGE RIVERA: She hits a tree and she gets
7 killed.

8 MR. ROLLER: - - - that - - - that would be a
9 direct cause.

10 JUDGE RIVERA: Yes, but being startled by the
11 calf, you say, is not enough? The surprise of seeing
12 something, even though not on the road, but on the side,
13 gets your peripheral vision, you say, that's not enough?

14 MR. ROLLER: No, that wouldn't be enough. I
15 think drivers have a duty to be aware of their surroundings
16 and be prepared for things like that, but if this - - -

17 CHIEF JUDGE DIFIORE: Thank you, Mr. Roller.

18 MR. ROLLER: Thank you.

19 CHIEF JUDGE DIFIORE: Counsel?

20 MR. O'BRIEN: I would disagree. It's a
21 continuous force that - - - that the negligence here
22 continued right up until the time of the accident. And if
23 it had - - - had - - - somebody was forced off the road,
24 the - - - the negligence would continue. When a - - - when
25 a bus is stopped in its - - - in its lo - - - in its

1 correct location, and somebody hits it, the bus is stopped;
2 it's not moving. It's - - - it's - - - and its cause - - -
3 it may cause the acc - - - it may occasion the accident,
4 but it didn't cause the accident.

5 JUDGE FAHEY: Well, you know the way I - - - I
6 understand it, and it may be different than - - - than
7 yours, but busses stopping is highly an unforeseen or
8 extraordinary act. That's - - - that's how I would - - -

9 MR. O'BRIEN: That's correct.

10 JUDGE FAHEY: - - - categorize it. Yeah.

11 MR. O'BRIEN: That's what I think. And so is
12 finding - - - someone stopping on a road because they can't
13 get past a - - - a moving animal in the road. It's an
14 intervening act, but it's a - - - a - - - it's a - - - it's
15 a foreseeable intervening act, so it's not a superseding
16 intervening act.

17 JUDGE FAHEY: So - - - so what it comes down to,
18 I suppose, is moving the calf out of the road. It's six
19 hours old, kind of an extraordinary act that are
20 unforeseeable. Yeah.

21 MR. O'BRIEN: It's not an extraordinary act.

22 JUDGE FAHEY: Yeah.

23 MR. O'BRIEN: It's not something that - - - that
24 would, you know, shock the conscience of a jury.

25 JUDGE RIVERA: And there's no signage, like one

1 of those signs that shows animal crossings, right - - -

2 MR. O'BRIEN: No, no.

3 JUDGE RIVERA: - - - farm animal crossings?

4 MR. O'BRIEN: This is dark, rural - - -

5 JUDGE RIVERA: Yeah.

6 MR. O'BRIEN: - - - rural country road.

7 But talking about the majority - - - what the
8 majority found that - - - the majority found that there was
9 no evidence that the - - - the - - - the cow blocked the -
10 - - the roadway or otherwise forced her off.

11 Well, who made that decision? The court made
12 that decision. Isn't that a decision that the jury should
13 be making? The fact finder. That's the one who's been
14 making this. The re - - - the inference was rule - - -
15 used against the nonmoving party in favor of the moving
16 party, exactly the opposite of the way it's supposed to
17 work. All facts are - - - and inferences are to be assumed
18 as true on behalf of the nonmoving party. The court
19 flipped that below.

20 In Hastings, the court found that there was a - -
21 - a danger, and the danger is these cows in the road.
22 There - - - there's a - - - the - - - the pla - - - the
23 Drumm Family wants to restrict - - - they want to restrict
24 that to a car and an animal only. That's an unnatural
25 restriction. And - - - and also that's against public

1 policy because it would - - - it disincentivizes cow owners
2 to keep their - - - their fences up and keep their cows in,
3 exactly what Hastings found was a problem.

4 CHIEF JUDGE DIFIORE: Thank you, Mr. O'Brien.

5 MR. O'BRIEN: Thank you.

6 (Court is adjourned)

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

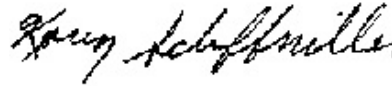
24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Hain v. Jamison, No. 201 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite 607
New York, NY 10040

Date: November 23, 2016