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Questioning General Contractor Liability in Texas

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In a decision that drew an argument-rich dissent, the San Antonio Court of Appeals held that a general contractor ("GC") did not owe a duty of care to a subcontractor's employee injured by his co-employee even though the GC knew of the co-employee's past safety violations on other projects, had barred the co-employee from the project at hand, and knew that the employee was nonetheless working on the project. *Joeris Gen. Contractors, Ltd. v. Cumpian*, No. 04–15–00481–CV, 2016 WL 7407634, --- S.W.3d --- (Tex. App.—San Antonio Dec. 21, 2016, no pet. h.) (not released for publication).[1] The case is important. It exposes the difficulty of determining whether a GC has incurred a duty of care by exercising control over its subcontractors. Then-Chief Justice Phillips noted over 16 years ago that "[o]ur focus on the degree of the general contractor's 'retained control' has failed to provide either consistent or equitable results, and I believe that a thorough reconsideration of this area is in order."[2] *Joeris* and its dissent suggest that "this area" remains unsettled.

Joeris, a GC, hired Leal Welding & Erection ("Leal") as a steel work subcontractor. Cumpian and co-employee Gonzalez both worked for Leal. Cumpian suffered injury when Gonzalez tried to move a steel staircase into place using a forklift owned by Joeris. The improperly strapped staircase fell and crushed Cumpian's foot, whose toes required amputation. Cumpian sued Joeris and obtained a jury verdict for actual and exemplary damages. Joeris appealed, arguing, *inter alia*, that it did not owe Cumpian a duty of care because it did not control Leal's work. The court of appeals agreed and reversed the judgment. Cumpian filed a motion for rehearing *en banc* after the court of appeals denied his motion for rehearing. The court requested a response, which Joeris filed on May 1, 2017. The case seems slated for Texas Supreme Court review.

The basic principles applied in *Joeris* are well-established. A GC must use reasonable care to ensure that its work space is safe, but otherwise has no duty to ensure that independent contractors perform their work safely.[3] Under these conditions, a GC incurs no liability for the harm that results from the acts or omissions of its independent contractors.[4] A well-known exception arises when the GC retains or exercises some control over the subcontractor's work.[5] In that case, the GC must exercise reasonable care in its control to protect interested parties from injury. The measure of the GC's duty is commensurate with the extent of its control.[6]

In *Tovar v. Amarillo Oil Co.*, for example, the contract between the GC and the subcontractor mandated the use of a blowout preventer.[7] The subcontractor configured the blowout preventer in violation of specific written instructions. The GC knew of the deviation, contemplated intervening as was its right under the contract, but did nothing. Tovar suffered severe injury when the equipment failed. The Texas Supreme Court held that when the GC "exercised some control over a subcontractor's work, the [GC] may be liable for failure to exercise reasonable care in supervising the subcontractor's activity."[8] The Supreme Court reversed the court of appeals, which had held that the GC owed Tovar no duty. Likewise, in *Lee Lewis*, the Supreme Court held a GC liable for the death of a subcontractor's employee (Harrison) who, untethered to an independent lifeline, fell 10 stories from a bosun's chair.[9] The GC had inspected and approved the subcontractor's fall protection equipment, but did not object when some employees used a bosun's chair without a separate lifeline. The court held that the GC "retained the right to control fall-protection systems on the jobsite" and, therefore, owed Harrison a duty of care.

A GC who promulgates and enforces safety rules on its worksite does not assume an unqualified duty of care to ensure that its subcontractors' employees work safely.[10] Instead, the GC "assumes a narrow duty of care" that its rules "are reasonably safe and do not increase the probability or severity of injury."[11] Under this reasoning, the Supreme Court held, a GC who knows its subcontractor routinely violates safety policies might owe a duty to intervene or cancel the contract. In any event, for the duty to arise, the control must relate to injury-causing activity.

In *Joeris*, Cumpian argued that Joeris's negligence stemmed from its failure to enforce safety rules and police Gonzalez's conduct. Under *Mendez*, to prove that Joeris owed a duty of care for failure to enforce safety rules, Cumpian had to prove that "(1) [Joeris] held the right to control the safety regulations related to the specific injury-causing activity; and (2) [Joeris] committed an act or omission that was not in accord with the scope of any such duty incurred through this control."[12] Because neither party disputed Joeris's right to control worksite safety, the controlling issue was whether Joeris fell short of its obligations. Cumpian argued that Joeris did so in two different ways.

Invoking *Mendez*, Cumpian first claimed that Joeris failed to police Gonzalez despite knowing he presented a safety risk. Gonzalez had failed to comply with safety measures on other projects and Joeris had previously removed him from one of its other job sites for this reason. But the court held that to trigger the exception to the no-duty rule, Joeris had to have *actual knowledge* of safety violations on *this project*, *i.e.*, not merely constructive knowledge. Because the testimony did not support this finding, Joeris had no duty to impose remedial safety measures.

Cumpian also claimed that Joeris exercised control over Leal's work, and incurred a duty to its employees, when Joeris asked another Leal employee to finish a welding job on another staircase the morning of the incident. The court rejected this argument as well because there was no nexus between Joeris's supervisory instruction to finish a weld on one staircase and the unsupervised incident with the staircase that injured Cumpian. Joeris did not exercise control over Cumpian's work by requesting the weld.

For these reasons, the court held that Joeris owed no duty as a matter of law. The court reversed the trial court and rendered judgment for Joeris.

Justice Elena Chapa dissented in a lengthy opinion, writing at the outset that the majority's opinion "glosse[d] over the egregious facts of this case." These facts included, *inter alia*, Gonzalez's unauthorized and overlooked presence on the worksite, and Joeris's restrictions on the use of its forklifts. Gonzalez had routinely disregarded safety rules in the past and had unsafely operated heavy equipment. Yet, Joeris failed to demand Gonzalez's departure, failed to ensure that he was qualified to operate the forklift, and failed to ensure that he did so safely.

The dissent argued that Joeris had a *Tovar* duty to remove Gonzalez from the project. Joeris and Leal had agreed that Gonzalez would not work on the project. Joeris was aware of Gonzalez's safety violations and had reprimanded him "multiple times" on other projects. Joeris had the contractual authority to remove Gonzalez based on safety considerations—and had done so on prior projects. But Joeris did nothing. By failing to remove Gonzalez from the project, Joeris knowingly deviated from an agreed-to safety measure and failed to respond to a subcontractor's known and repeated safety violations, as in *Tovar*.

The dissent also took aim at the majority's holding that the GC had to have "actual knowledge, not constructive knowledge" of a subcontractor's safety transgressions to trigger a duty of care. The dissent found this high standard inconsistent with the Restatement (Second) of Tort's position that a GC is subject to liability "'if he knows ***or by the exercise of reasonable care should know*** that the subcontractors' work is being' completed 'in a way unreasonably dangerous to others.'"[13] Justice Chapa argued that the Supreme Court has not adopted this high standard, which *Joeris* met in any event.[14]

Instead, Justice Chapa analogized this case to *Lee Lewis*. Joeris assumed responsibility over the operation of its forklifts at the worksite just as the GC in *Lee Lewis* retained control over safety. Moreover, Joeris knew that Leal employees used the forklifts and never verified their certification, just as the GC in *Lee Lewis* ignored violations of its safety measures. For these reasons, among others, the dissent would have held that "the facts of this case fall squarely within the 'retained control' exception to the general rule that a general contractor owes no duty to a subcontractor's employees."

Questions remain, therefore, on the degree of control that a GC must exercise to incur a duty of care toward its subcontractors. The Texas Supreme Court might soon have an opportunity to answer them in *Joeris*.

[1] The factual recitation relies, in part, on that in Chief Justice Marion's concurring opinion.
[2] *Lee Lewis Constr. v. Harrison*, 70 SW3d 778, 787 (Tex. 2001) (Phillips, C.J., concurring).
[3] *Arias v. MHI P'ship, Ltd.*, 978 S.W.2d 660, 662 (Tex. App.—Corpus Christi, 1998, pet. denied); *Lee Lewis Constr.*, 70 SW3d at 783.
[4] *Fifth Club, Inc. v. Ramirez*, 196 SW3d 788, 798 (Tex. 2006) (Brister, J., concurring) (citing Restatement (Second) of Torts § 409).
[5] *Lee Lewis Constr.*, 70 SW3d at 783.
[6] *Id*.
[7] 692 S.W.2d 469, 470 (Tex. 1985).
[8] *Id*. (*citing* Restatement (Second) of Torts § 414).
[9] 70 SW3d at 784.
[10] *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354 (Tex. 1998) (per curiam).
[11] *Joeris Gen. Contractors, Ltd.*, 2016 WL 7407634, at *4 (*citing Mendez*, 967 S.W.2d at 357–58).
[12] *Id*. at *5.
[13] *Id*. at *16 (*citing* Restatement (Second) of Torts § 414 cmt. b) (emphasis in original).
[14] *Id*. (arguing that the majority opinion applied Justice Hecht's recommended but unadopted "heightened 'retained control plus actual knowledge' standard" to trigger duty) (*citing Lee Lewis Constr.*, 70 SW3d at 788–800) (Hecht, J. (now Chief Justice), concurring). Compare with the Texas Property Owner's Liability Act, which requires that "the property owner had *actual knowledge* of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn" for liability to attach. Tex. Civ. Prac. & Rem. Code § 95.003(2) (emphasis added).