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Defining the Scope of Property Improvements in Texas

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The Texas Property Owner's Liability for Acts of Independent Contractors statute, Texas Civil Practice & Remedies Code Chapter 95 ("***Chapter 95***"), protects premises owners from negligence liability to a contractor or its employees if the injury arises from work on an improvement to real property.[1] Section 95.003 states that an owner of real property that is used chiefly for commercial or business purposes

> is not liable for personal injury, death, or property damage to a [contractor or its employee] who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a *safe workplace* unless

the owner controlled the work and had actual knowledge of the danger and "failed to adequately warn."[2] The protection from liability applies to negligence claims

> (1) against a property owner . . . and
>
> (2) that arise[] from the condition or use of *an improvement* to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.[3]

Chapter 95 does not define the term "improvement," and Texas courts of appeals have split over its scope. For example, in the case of an employee working on a rooftop HVAC unit, is the improvement just the unit, the roof, or the entire building? Chapter 95 applies if the HVAC unit electrocutes the employee, assuming other statutory provisions are met. But would it more broadly apply if the employee falls through a hidden hole in the roof while walking to and from the unit, or if the employee suffers injury from a falling ceiling lamp while signing service call papers inside the building?

In 2016, the Texas Supreme Court addressed the scope of a Chapter 95 "improvement" in *Ineos USA, LLC v. Elmgren*, but that opinion left unanswered some questions that may need to be resolved in future appeals regarding this important construction law issue.[4]

Texas courts of appeals have split regarding the scope of a Chapter 95 improvement.

The First Court of Appeals has broadly construed the term "improvement" in a long line of cases that began in 2003 with *Fisher v. Lee and Chang P'ship*.[5] Fisher, a contractor employee, fell from a ladder and was injured while servicing a roof-top air conditioner. Fisher tried to circumvent Chapter 95's shield by arguing that the "improvement" was just the air conditioner and not the entire structure or roof. The court found the issue to be one of first impression and analyzed Chapter 95's language and legislative history. Noting that § 95.003 protects a property owner for injuries "arising from the failure to provide a safe workplace," the court held that Chapter 95 did not "require that the defective condition [giving rise to the injury] be the object of the contractor's work." Chapter 95 applied to the case because the ladder was part of the unsafe workplace that caused Fisher's injury.

The court also held that Chapter 95's legislative history supported this broad definition. Legislative records showed that the original bill's sponsors intended the statute to apply in a situation where an employee was injured by a defective scaffold, for example, even if the scaffold was merely used in the project and was not the specific improvement under construction, repair, renovation, or modification. In other words, Chapter 95's protection applied if the injury-causing defect "relate[d] to the contractor's work." Chapter 95 would not apply to an incident unconnected to the employee's work, like an unrelated explosion.

The First Court of Appeals reaffirmed this analysis in 2013 in *Sanchez v. BP Prod. N. Am., Inc*.[6] Sanchez, a

contractor employee, fell from a scaffold at a worksite and suffered injuries. A contractor had built the scaffold to service a refinery unit during a turnaround. Sanchez had merely used the scaffold to reach his work assignment, namely overhead pipes and equipment in the unit. The court followed *Fisher* and held that Chapter 95 applied to his claim.[7]

Before *Ineos*, all but one of the Texas courts of appeals that had considered the issue of the scope of a Chapter 95 improvement had followed *Fisher*. In *Clark v. Ron Bassinger, Inc.*, Clark, a contracted plumber, fell through a hidden tar paper-covered skylight while working on a roof and injured himself.[8] The Amarillo Court of Appeals held that the circumstances of Clarks' injury came within Chapter 95's ambit because the "injury arose from the failure to provide [Clark] a safe workplace." In *Gorman v. Ngo H. Meng*, a convenience store owner hired Gorman, an electrician, to troubleshoot walk-in cooler doors that were shocking customers.[9] Gorman's surviving wife argued that Chapter 95 did not apply because he was electrocuted while servicing the outside condenser, *i.e.*, an improvement other than the one he was hired to repair. The Dallas Court of Appeals rejected this argument and held that Chapter 95 applied because the two pieces of equipment were not separate improvements. In *Clary v. ExxonMobil Corp.*, an electrician who worked outside a building on junction boxes was injured by falling glass while inside the building to obtain work permit signatures.[10] The Beaumont Court of Appeals held that Chapter 95 applied to Clary's claim because the entire building was the improvement, not just the electrical equipment.

Federal courts have followed this jurisprudence. In *Petri v. Kestrel Oil & Gas Props., L.P.*, a United States District Court followed the majority of Texas appellate courts and held that Chapter 95 applied to the claims of a worker swept out by heavy seas while he attempted to repair an emergency shutoff device ("ESD") on an offshore oil rig platform on the outer continental shelf.[11] The court rejected plaintiffs' argument that the ESD alone was the improvement.

Only the Fourteenth Court of Appeals in Houston rejected this analysis. In *Hernandez v. Brinker Int'l, Inc.*, the plaintiff acknowledged the courts' propensity to broadly construe the scope of Chapter 95 improvements but argued that they had gone too far:

> Although the Texas courts maintain the fiction that there exist claims to which Chapter 95 does not apply, since *Fisher*, they have never identified a single one. Instead, they have moved steadily to a situation in which a premises owner can effectively booby-trap his own property yet escape liability for his actions under Chapter 95.[12]

Hernandez was an employee of a contractor hired to service a rooftop air conditioner. Hernandez was injured when the roof collapsed under his feet. He sued Brinker, the owner, but the trial court granted the latter's Chapter 95 motion for summary judgment. On appeal, Hernandez argued that the improvement was just the air conditioner, the subject of his work, while Brinker argued that it was the entire building and that the air conditioner was merely a fixture. In its plurality opinion, the court relied on prior case law to hold that what Brinker argued would be fixtures were, in fact, improvements, and that the roof and the air conditioner were "separate improvements to real property." The court also pointed out that § 95.002(2) applied "only to a claim 'that arises from the condition or use of *an* improvement to real property where the contractor [repairs or modifies] *the* improvement.'"[13] Chapter 95 only applied, therefore, when the improvement that caused the injury was the same one the contractor was servicing. On this basis, the court of appeals reversed the trial court's summary judgment. The Fourteenth Court of Appeals also rejected its sister Houston court's reliance on legislative history in *Fisher*. It stated that a court should not rely on legislative history to override "unambiguous statutory language," and suggested that the First Court of Appeals "overly extended Chapter 95's reach."[14]

The *Hernandez* dissent noted that ambiguous statutory language, as encountered here with the use of term "improvement," authorized reliance on legislative history. Using arguments similar to those made in *Fisher*, the dissent concluded that the injury-work nexus was sufficiently strong to justify applying Chapter 95. Other Texas appellate courts that have considered *Hernandez* have all declined to follow it.[15]

Some courts consider § 95.003's "safe workplace" element in defining an improvement.

A Chapter 95 defendant bears the burden of proving Chapter 95's applicability. The defendant does so by adducing evidence that conclusively establishes that he or she satisfies all of § 95.002's elements, including the requirement that the negligence claim is asserted against a property owner for personal injury to a contractor employee that arises "from the condition or use of an improvement to real property."[16] Having done so, the burden shifts to the plaintiff to prove the elements of § 95.003, namely that the owner exercised some control over the work and had actual knowledge of the danger and did not adequately warn.[17] But § 95.003 also applies to claims that arise "from the failure to provide a safe workplace."

In *Fisher*, the court read §§ 95.002 and 95.003 "together to effectuate their purposes and examine them as a whole, rather than by isolated portions taken out of context."[18] The court considered both sections to hold that Chapter 95 applied because the ladder was an unsafe part of Fisher's workplace.[19] This approach was consistent with the rule of statutory construction that requires courts to "always consider a statute as a whole and attempt to harmonize its various provisions."[20] Under this logic, the threshold issue one should consider in a Chapter 95 case, namely whether the defendant meets all the § 95.002 elements, also implicates the language of § 95.003. The Amarillo Court of Appeals recently agreed. This court held in *Torres v. Chauncey Mansell & Mueller Supply Co., Inc.* that it "could not but factor the concept of 'a safe workplace' into the nature of the improvement."[21]

The Supreme Court construed a Chapter 95 "improvement" broadly.

The Texas Supreme Court first opined on the scope of a Chapter 95 improvement in 2015 in *Abutahoun v. Dow Chem. Co*.[22] The original plaintiff in that case, Henderson, a contractor employee, installed asbestos-containing insulation on pipes in a Dow plant in the late 1960s. At the same time, Dow employees who worked nearby with insulation on the same pipe system exposed Henderson to *their* asbestos dust. Henderson developed mesothelioma and died.[23] The court "read Chapter 95 to be unambiguous," and it rejected the plaintiff's call to rely on extrinsic aids to interpret the statutory language.[24]

The Supreme Court recently elaborated on the scope of a Chapter 95 improvement in *Ineos*.[25] Elmgren, a contractor employee, suffered burns from a gas explosion while replacing a furnace header valve. The part of the header on which Elmgren worked was supposed to be isolated from the rest of the gas supply network connecting the furnace headers to prevent such accidents. Elmgren alleged that a leak in another valve a couple hundred feet away in the network, near another furnace, caused the explosion. He argued that Chapter 95 did not apply because his injuries did not arise from the same improvement upon which he had worked. The Supreme Court agreed with the Fourteenth Court of Appeals, which had refused to partition the header and gas supply network into "discrete improvements." Noting that "[t]he valves and furnaces, though perhaps 'separate' in a most technical sense, were all part of a *single processing system within a single plant* on Ineos' [sic] property," the court held that "the evidence conclusively establishe[d] that the entire system was a single 'improvement' under Chapter 95."[26]

The Supreme Court acknowledged in *Ineos* that Chapter 95 did not define "improvement," but noted that it had previously "broadly defined an 'improvement' to include 'all additions to the freehold except for trade fixtures [that] can be removed without injury to the property.'"[27] The court's use of the singular to characterize *an* improvement as including *all* additions to the freehold might be construed as endorsing a broad construction of the term "improvement" reminiscent of that adopted in *Clary*, where the court held that the entire building was the improvement. But elsewhere in a parenthetical, the Supreme Court cited approvingly to *Hernandez* for the proposition that "Chapter 95 did not apply because the injury arose from a different improvement than the one the plaintiff was repairing." Consistent with this parenthetical, the Supreme Court also held that "Chapter 95 only applies when the injury results from a condition or use of the same improvement on which the contractor (or its employee) is working when the injury occurs."[28] This language, referring as it does to *Hernandez*, suggests that an improvement's scope is not unlimited. This language appears to reject the premise of *Fisher*, which held that

Chapter 95 applies if the injury-causing defect *relates* to the contractor's work.

After *Ineos*, the boundary of a Chapter 95 improvement arguably remains as elusive as ever. The Supreme Court broadly defined an "improvement," but its "single processing system" language suggested that there must be *some* nexus between the various parts of the improvement, as in *Ineos*'s gas supply network or *Abutahoun*'s network of pipes. Under this logic, an inside cooler and its outside condenser might be one improvement, as in *Gorman*, because they are linked and work together. But an HVAC unit and a roof might be separate improvements and Chapter 95 would not apply when a serviceman falls through a hidden hole in the roof. The same analysis might apply in the case of a worker who falls from a defective scaffold that gives the worker access to his workplace but that is not the object of his work.[29] These last two outcomes favoring the plaintiff seem inconsistent with a statute that seeks to shield owners from their failure to provide a *safe workplace* absent control and actual knowledge, an aspect of the issue that the Supreme Court and the courts of appeals did not address in *Abutahoun* and *Ineos*. But not factoring § 95.003's "safe workplace" provision into the scope of an improvement seems inconsistent with the rule that courts must always consider and try to harmonize a statute's four corners. If a roof is not an HVAC serviceman's workplace, for example, what is? And why shouldn't Chapter 95 shield an owner from liability because of a defective scaffold erected by a third-party, as the legislative history explains it should?

The appellate-level split endures after *Ineos*.

In the wake of *Ineos*, Texas appellate courts have decided four cases dealing with the scope of a Chapter 95 improvement. In *Cox v. Air Liquide America*, LP, Cox, a contractor employee servicing an industrial boiler, injured himself while jumping away from a shifting grate at the workplace.[30] The Fourteenth Court of Appeals noted that the "Supreme Court cited approvingly to *Hernandez*" in *Ineos*, and it held that Chapter 95 did not apply as a matter of law because Air Liquide had not presented evidence that the grate was part of the improvement Cox was hired to service. In *Lopez v. Ensign U.S. S. Drilling, LLC*, Lopez fell down stairs on a drilling rig and injured himself.[31] Lopez worked as a mud logger in a trailer for an independent contractor, and ventured onto the rig to collect drill cuttings. Again citing *Ineos*, the Fourteenth Court of Appeals held that the well and the rig were different improvements and declined to apply Chapter 95. In *Rawson v. Oxea Corp.*, the plaintiff, a contracted electrician, was electrocuted in a transformer substation.[32] Rawson entered the substation to replace damaged insulators, which isolated powered equipment from the ground. The accident happened because misconfigured switches located 1000 feet away re-energized the substation. Citing *Ineos*'s broad improvement definition, the First Court of Appeals held that the improvement was the entire substation and lines, not just the insulators as Rawson argued. The holdings in *Cox*, *Lopez*, and *Rawson* all conform with the Supreme Court's "single processing system" criterion. The pieces of equipment in *Cox* and *Lopez* were sufficiently separate to justify not applying Chapter 95, unlike the substation in *Rawson*. None of these cases, however,discuss the relevance of § 95.003's "safe workplace" language to the scope of an improvement.

But in *Torres*, the Amarillo Court of Appeals did just that in a case that did not satisfy the "single processing system" criterion.[33] The plaintiff was a subcontractor employee tasked with surfacing concrete in a parking lot. Torres was electrocuted when the 16-foot-long handle of his bull float struck a power line hanging over the parking lot.[34] On appeal, Torres argued that Chapter 95 was inapplicable to his claims because the power line that injured him was not the improvement upon which he had been working. The court construed *Ineos* as a directive to consider an improvement broadly, in consideration of its physical and geographic environments, *i.e.*, a "single processing system ***within a single plant***" on the defendant's property.[35] This approach, the court thought, comported itself with § 95.003's "safe workplace" language. Because a statute's terms must be considered *in toto*, the court held, the "nature of the workplace," and its safety, "must be factored" into the scope of a Chapter 95 improvement. Moreover, Chapter 95 applies to claims "that arise from the ***condition*** . . . of an improvement," which again implies that this condition should be "factored into the improvement."[36] In this case, overhanging power line was a dangerous condition of the workplace, *i.e.*, the parking lot, which was also the improvement. Torres's injuries, therefore, arose "from a condition of the improvement on which he worked," and

Chapter 95 applied.

The court downplayed the significance of the Supreme Court's *Hernandez* citation in *Ineos*. The court acknowledged (and agreed with) the Supreme Court's holding that Chapter 95 required that the improvement that caused injury must be the same as the one worked on. But it added that *Ineos* did not suggest that the Supreme Court approved how the *Hernandez* court had applied this principle to the facts of its case, and it questioned whether it was possible to disassociate the air conditioner from the roof that supported it. The air conditioner needed a supporting foundation, and to say that this foundation

> is not a part of the air conditioner is to ignore the interrelationship between the air conditioner and its physical and geographic surroundings. And, that is what *Ineos* and *Abutahoun* warned against.[37]

But in a footnote the court indicated that this interrelationship had limits, perhaps implying that Chapter 95 might not apply when the roof failed some distance away from the air conditioner.

Torres construed a Chapter 95 improvement more broadly than did *Cox*, *Lopez*, and even *Rawson*. These four post-*Ineos* cases demonstrate that the exact meaning of a Chapter 95 improvement remains disputed among the Texas courts of appeals.

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[1] Tex. Civ. Prac. & Rem. Code §§ 95.001–003, the Property Owner's Liability for Acts of Independent Contractors and Amount of Recovery.
[2] *Id*. §§ 95.001, 95.003 (emphasis added).
[3] *Id*. §§ 95.001–002 (emphasis added).
[4] 505 S.W.3d 555 (Tex. 2016).
[5] 16 S.W.3d 198, 200 (Tex. App.—Houston [1st Dist.] 2003, pet. denied), *overruled by Ineos*, 505 S.W.3d at 567.
[6] No. 01-12-00054-CV, 2013 WL 3233218 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.) (mem. op.).
[7] *See also Phillips v. Dow Chem. Co.*, 186 S.W.3d 121, 132 (Tex. App.—Houston [1st Dist.] 2005, no pet.) ("scaffolding from which [victim] fell was sufficiently related to [her] injuries to bring Dow within the protections of chapter 95.").
[8] No. 07–03–0291–CV, 2006 WL 229901, at **1–2 (Tex. App.—Amarillo Jan. 31, 2006, no pet.) (mem. op.).
[9] 335 S.W.3d 797, 800–01 (Tex. App.—Dallas 2011, no pet.), *but see First Texas Bank v. Carpenter*, 491 S.W.3d 729 (Tex. 2016) (disagreeing on whether Chapter 95 applies to the facts in *Gorman*).
[10] 410 S.W.3d 558, 559 (Tex. App.—Beaumont 2013, no pet.).
[11] 878 F. Supp. 2d 744, 768–71 and n.20 (S.D. Tex. 2012).
[12] 285 S.W.3d 152, 160 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (plurality op.).
[13] *Id.*, 285 S.W.3d at 157 (emphasis in original).
[14] *Id*. at 159.
[15] *See*, *e.g.*, *Gorman*, 335 S.W.3d at 805–06 (noting that "*Hernandez* appears to be a departure from the existing case law of other intermediate courts of appeals.").
[16] *Lopez v. Ensign U.S. S. Drilling, LLC*, No. 14-15-00872-CV, 2017 WL 1086518, --- S.W.3d ---, at *3 (Tex. App.—Houston [14th Dist.] Mar. 21, 2017, no pet. h.) (not released for publication).
[17] Tex. Civ. Prac. & Rem. Code § 95.003; *Sanchez*, 2013 WL 3233218 at *4.
[18] *Fisher*, 16 S.W.3d at 201 (*citing Hammond v. City of Dallas*, 712 S.W.2d 496, 498 (Tex. 1986)).
[19] *See* Tex. Civ. Prac. & Rem. Code § 95.003 ("A property owner is not liable for . . . [claims] . . . arising from the failure to provide a safe workplace unless . . .").
[20] *Marcus Cable Assocs., L.P. v. Krohn*, 90 S.W.3d 697, 706 (Tex. 2002); *see also* Tex. Gov't Code § 311.021(2) ("In enacting a statute, it is presumed that . . . (2) the entire statute is intended to be effective").
[21] No. 07-16-00016-CV, 2017 WL 877335, --- S.W.3d ---, at *6 (Tex. App.—Amarillo Mar. 03, 2017, no pet. h.) (not released for publication) (motion for rehearing pending) (the case was heard on transfer from the Third Court of Appeals).
[22] 463 S.W.3d 42, 49 (Tex. 2015).
[23] In the opinion's sole issue, the Supreme Court held that Chapter 95 also applied to the negligence of the *owner* (*i.e.*, Dow) if all other statutory conditions were met. The Court rested its analysis, *inter alia*, on the fact that the statute applied to negligence claims without distinguishing whose negligence caused the injury. The Dallas Court of Appeals had held that Henderson and the Dow employees had worked on the same improvement because they worked on the same system of pipes, but this issue was not before the Supreme Court. *See Dow Chem. Co. v. Abutahoun*, 395 S.W.3d 335, 346 (Tex. App.—Dallas 2013).
[24] *Abutahoun*, 463 S.W.3d at 47 and n.4.
[25] 505 S.W.3d 555, 567–69 (Tex. 2016).
[26] *Id*. at 568 (emphasis added).

[27] *Id*. The Supreme Court had also restated this definition in *Abutahoun*, 463 S.W.3d at 49.
[28] *Citing Hernandez*, 285 S.W.3d at 157–58.
[29] The legislative history contemplates precisely this possibility. *Fisher*, 16 S.W.3d at 201–02.
[30] 498 S.W.3d 686 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
[31] No. 14-15-00872-CV, 2017 WL 1086518, --- S.W.3d --- (Tex. App.—Houston [14th Dist.] Mar. 21, 2017, no pet. h.) (not released for publication).
[32] No. 01-15-01005-CV, 2016 WL 7671375 (Tex. App.—Houston [1st Dist.] Dec. 22, 2016, no pet. h.) (mem. op.) (motion for rehearing *en banc* pending).
[33] *Torres*, 2017 WL 877335, at *6.
[34] A bull float is a T-shape device used to finish fresh (*i.e.*, smooth) cement surfaces.
[35] *Torres*, 2017 WL 877335, at **3–4 (emphasis in original).
[36] *Id*. at *6 (emphasis in original).
[37] *Id*. at *5 (footnote omitted).