

**EMPLOYER LIABILITY FOR ACTS OF AN  
INDEPENDENT CONTRACTOR**

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### **Selected Publications**

- *Defining the scope of property improvements in Texas*, Law360, May 9, 2017.
- *Questioning general contractor liability in Texas*, Law360, March 27, 2017.
- *Failing to prevent inadvertent disclosures can be costly*, Law360, March 30, 2017.
- *Digital divorce: asserting Texas Harmful Access by Computer Act claims in intra-spousal data breaches*, Texas Bar Journal, April 2017.
- *Authenticating: Can cellphone text messages stand up in court?* Texas Bar Journal, April 2016.
- *Admissibility and authentication of electronic evidence*, presenter, 2016 State Bar of Texas Annual Meeting, June 17, 2016.

See all Pierre's publications at <http://www.haynesboone.com/people/g/grosdidier-phd-pierre>.

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# EMPLOYER LIABILITY FOR ACTS OF AN INDEPENDENT CONTRACTOR

## I. INTRODUCTION

In the typical construction contractual chain, an owner hires a general contractor, who hires an independent contractor (*i.e.*, a subcontractor) who employs an employee. Sadly, the construction industry is not risk-free. Accidents happen that result in workplace injuries or even fatalities. When this happens, worker's compensation limits an injured employee's ability to recover from his or her employer, the independent contractor. The employee can circumvent this limitation by suing the general contractor, or the owner, or both. The plaintiff hopes that these lawsuits will find deeper pockets with applicable insurance policies. The threshold question in almost all these cases is whether the general contractor or the owner owed the independent contractor employee a duty, either under the common law or under Chapter 95 of the Civil Practice & Remedies Code, the Property Owner's Liability for Acts of Independent Contractors and Amount of Recovery statute ("Chapter 95"). A corollary issue is whether the owner or general contractor exercised control over the independent contractor, because the exercise of control—either by contract or by actual control—creates a duty.

This article reviews the rich case law that has addressed the liability of owners and general contractors toward independent contractor employees. Except when Chapter 95 governs, the case law treats an owner and a general contractor in control of the premises in the same manner, and this article refers to them collectively as "employers."<sup>1</sup>

One of the main findings of this article is that the case law remains unsettled in two areas that are important to parties engaged in the construction industry. First, the opinion and dissent in *Joeris Gen. Contractors, Ltd. v. Cumpian* suggest that some ambiguity remains as to what constitutes actual control by an employer.<sup>2</sup> The case is not over yet. The San Antonio Court of Appeals denied appellee's (plaintiff below) motion for rehearing *en banc*, and on October 5, 2017, Cumpian filed a petition for review in the Texas Supreme Court (hereinafter the "Supreme Court").

Separately, a string of cases show that Texas appellate courts remain split over what constitutes an improvement under Chapter 95, with most courts construing the term broadly and the Fourteenth Court of Appeals doing so narrowly. The Amarillo Court of Appeals recently followed the majority position in *Torres v. Chauncey Mansell & Mueller Supply Co., Inc.*<sup>3</sup> This case is also not over. The court of appeals overruled appellant's (plaintiff below) motion for rehearing, and on June 26, 2017, appellant filed a petition for review in the Supreme Court. Both *Joeris* and *Torres* are discussed in this article and are important cases to watch for construction law practitioners.

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<sup>1</sup> See, e.g., *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997) ("[a] general contractor in control of the premises is charged with the same duty as an owner or occupier.") (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985)).

<sup>2</sup> No. 04-15-00481-CV, 2016 WL 7407634, --- S.W.3d --- (Tex. App.—San Antonio Dec. 21, 2016, pet. filed) (not released for publication).

<sup>3</sup> 518 S.W.3d 481, 489 (Tex. App.—Amarillo, 2017, pet. filed).

## II. EMPLOYER DUTIES AND LIABILITIES UNDER THE COMMON LAW

### A. Duties owed by the employer

An employer owes a duty to use reasonable care to keep the premises under its control in a safe condition, and to warn invitees of concealed hazards that the employer knows or should know about.<sup>4</sup> But the employer does not owe a duty to warn of open and obvious hazards when the invitee is a contractor's employee.<sup>5</sup> "[O]ne who hires an independent contractor generally expects the contractor to take into account any open and obvious premises defects in deciding how the work should be done, what equipment to use in doing it, and whether its workers need any warnings."<sup>6</sup> In *Lopez*, the plaintiff was a contractor employee who fell down stairs on a drilling rig and injured himself.<sup>7</sup> He tripped because of a gap in the stairway's handrail, and sued for "premises liability based on an unreasonably dangerous condition." The Fourteenth Court of Appeals held that Lopez was well aware of the gap, which was open and obvious, and it affirmed the trial court's summary judgments in favor of the defendants.<sup>8</sup>

### B. Causes of action for negligence and premises liability

An employer's duty to invitees gives rise to two types of negligence claims: a claim in ordinary negligence arising from a contemporaneous activity or instrumentality, and a premises liability claim.<sup>9</sup> These two claims are mutually exclusive in the sense that a plaintiff can only prevail on one of them for the same set of underlying facts.<sup>10</sup> Of course, the plaintiff can plead them both in the alternative. Whether a claim is one or the other is a question of law.<sup>11</sup>

There are, furthermore, two possible types of premises liability claims.<sup>12</sup> First, a plaintiff can assert a claim for a hazard that preceded his or her arrival on the premises or that resulted from activities unrelated to his or her own. These claims arise from the employer's duty to inspect the premises and warn of known, or should-be-known, hazards. The hidden well is the old chestnut (*i.e.*, latent defect) in this category. In *Smith v. Henger*, the Supreme Court "held that an open shaft, with inadequate warnings, in existence when contractors entered a property, was such a defect."<sup>13</sup>

Alternatively, a premises hazard can arise from the plaintiff's own activities—usually hazards that result from the independent contractor's own work.<sup>14</sup> For example, in *Olivo*, the plaintiff, a drilling rig contractor employee, was injured when he fell on drill pipe thread

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<sup>4</sup> *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 215 (Tex. 2008); *Lopez v. Ensign U.S. S. Drilling, LLC*, 524 S.W.3d 836, 846 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

<sup>5</sup> *Moritz*, 257 S.W.3d at 215–16; *Lopez*, 524 S.W.3d at 846.

<sup>6</sup> *Moritz*, 257 S.W.3d at 215–16.

<sup>7</sup> *Lopez*, 524 S.W.3d at 840.

<sup>8</sup> *Id.* at 846–48, 850.

<sup>9</sup> *Redinger*, 689 S.W.2d at 417.

<sup>10</sup> *Lopez*, 524 S.W.3d at 840, 845. For a case where the plaintiff alleged ordinary negligence and premises liability claims for related but different facts, see *Exxon Corp. v. Quinn*, 726 S.W.2d 17 (Tex. 1987), discussed below.

<sup>11</sup> *Wood v. Phonoscope, Ltd.*, No. 01-00-01054-CV, 2004 WL 1172900, at \*3 (Tex. App.—Houston [1st Dist.] May 27, 2004, no pet.) (mem. op.) (supplemented by *Wood v. Phonoscope, Ltd.*, No. 01-00-01054-CV, 2004 WL 2476570, Tex. App.—Houston [1st Dist.] Nov. 4, 2004).

<sup>12</sup> *Olivo*, 952 S.W.2d at 527.

<sup>13</sup> *Coastal Marine Serv. of Texas, Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999) (*per curiam*) (superseded on other grounds) (citing *Smith v. Henger*, 226 S.W.2d 425, 431–34 (Tex. 1950)).

<sup>14</sup> *Olivo*, 952 S.W.2d at 527.

protectors left lying on the ground by the previous shift.<sup>15</sup> The Supreme Court held that Olivo's claim for his injuries arose from a premises hazard that the contractor created. The general rule in these premises defect/independent contractor activity cases is that an employer does not have a duty to warn the contractor's employees of these hazards because the employer does not have a duty to ensure that the contractor's employees perform their work safely.<sup>16</sup>

It can sometimes be unclear whether the plaintiff's claim arises under ordinary negligence or premises liability, especially when the latter is of the second kind. In *Saenz v. David & David Constr. Co., Inc.*, a crane lifting a load struck Saenz on the head and knocked him off a roof.<sup>17</sup> Saenz argued that the absence of fall protection systems on the roof amounted to a premises defect. The court of appeals disagreed. The case was a negligent activity case because the work in progress, *i.e.*, the moving of the load, caused the injury.<sup>18</sup>

Even though premises liability is a form of negligence, the two claims are "based on independent theories of recovery." The Supreme Court has held that these claims "are not interchangeable" and that they require "closely related but distinct duty analyses."<sup>19</sup> An ordinary negligence claim arises from the defendant's contemporaneous failure to "do what a person of ordinary prudence in the same or similar circumstances would have . . . done."<sup>20</sup> A premises liability claim arises from the defendant's failure to "use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about."<sup>21</sup> In trying to identify one claim from the other, it is always helpful to ask whether the plaintiff's injury was the result of some contemporaneous act of the defendant. The claim is likely one for ordinary negligence if there is a contemporaneous act, as in a car accident. Otherwise, especially if the injury arises from a preexisting real property condition, the claim is likely one for premises liability, as in a slip and fall because of a prior water spill.

Pleading the wrong cause of action, or submitting the wrong question to the jury, can be fatal to the claim. The Supreme Court has held that "if a claim is properly determined to be one for premises defect, a plaintiff cannot circumvent the true nature of the claim by pleading it as general negligence."<sup>22</sup> For example, in *Olivo*, discussed above, the plaintiff's claim arose from a premises hazard that the contractor created. The Supreme Court held that the trial court erred when it submitted "a single simple negligence question" to the jury instead of the "traditional premises defect elements," including the contractor's right to control the work. The Court rendered judgment that the plaintiff take nothing.<sup>23</sup>

Similarly, in *Levine*, the eponymous plaintiff was a Valero employee who sued the erector of an allegedly defective scaffold.<sup>24</sup> Levine claimed that he slipped on an unfastened

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<sup>15</sup> *Id.* at 526–27.

<sup>16</sup> *Lawrence*, 988 S.W.2d at 225. See Section II.C below for this no-duty rule.

<sup>17</sup> 52 S.W.3d 807, 808–09 (Tex. App.—San Antonio 2001, pet. denied).

<sup>18</sup> *Id.* at 811–12.

<sup>19</sup> *United Scaffolding, Inc. v. Levine*, No. 15-0921, 2017 WL 2839842, --- S.W.3d ---, at \*4 (Tex. June 30, 2017) (not released for publication).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (bracketed language in original).

<sup>22</sup> *Id.* at \*10 (citing *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 389 (Tex. 2016)).

<sup>23</sup> *Olivo*, 952 S.W.2d at 529–30.

<sup>24</sup> *Levine*, 2017 WL 2839842, at \*1.

piece of plywood, fell, and injured his neck. The case was rooted in premises liability, but the jury retired with an ordinary negligence question. The Supreme Court held that “a general-negligence submission cannot support the plaintiff’s recovery in a premises liability case,” and rendered a take-nothing judgment.<sup>25</sup>

Finally, in *E.I. DuPont de Nemours & Co. v. Roye*, the plaintiff suffered severe skin burns when he fell in a pool of scalding water.<sup>26</sup> Roye alleged ordinary negligence and premises liability claims and the trial court submitted a jury charge that contained both theories of liability. The court of appeals held that Roye could only recover under a “premises liability theory of recovery,” and that it was error to include an ordinary negligence claim in the jury charge. The court added that “[a]rtful phrasing of the pleadings to encompass alleged design defects or any other theory of negligence does not affect the application of premises liability law.”<sup>27</sup>

### **C. No duty to ensure that the independent contractor performs safely**

In Texas, the general rule is that “an employer has no duty to ensure that an independent contractor performs its work in a safe manner.”<sup>28</sup> A corollary to this rule is codified in Restatement (Second) of Torts (hereinafter “Restatement”) § 409, which states that “the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants.”<sup>29</sup>

For example, in *Fifth Club* a security guard hired under contract by a night club manhandled an intoxicated would-be patron, fracturing his skull.<sup>30</sup> A jury found that Fifth Club was, *inter alia*, vicariously liable for the guard’s treatment of the plaintiff. The court of appeals affirmed the judgment, but the Supreme Court reversed. The Court held that Fifth Club could not be held liable because the record showed that Fifth Club did not retain control over the security guard and did not give the guard anything other than general directions regarding his work assignment.<sup>31</sup>

The Restatement’s argument for this general no-duty rule is that an employer, such as an owner or a general contractor, should hold no liability for events beyond its control or knowledge.<sup>32</sup> A construction site can harbor scores of subcontractors and the employer cannot be reasonably expected to micromanage them all. The Supreme Court rightly observed that an employer “must have some latitude to tell its independent contractors what to do, in general terms, and may do so without becoming subject to liability.”<sup>33</sup>

Other arguments justify shielding the employer from liability for the injuries of the independent contractor’s employees.<sup>34</sup> First, the contract price presumably included the cost of the employee’s worker’s compensation coverage related to the work. There is no reason, therefore, why the employer should not enjoy the same protection from liability under the

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<sup>25</sup> *Id.*

<sup>26</sup> 447 S.W.3d 48, 55 (Tex. App.—Houston [14th Dist.] 2014, pet. dismiss’d).

<sup>27</sup> *Id.* at 57–58.

<sup>28</sup> *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791 (Tex. 2006).

<sup>29</sup> *Id.* at 798 (Brister, J. concurring) (citing RESTATEMENT (SECOND) OF TORTS § 409 (1965)).

<sup>30</sup> *Id.* at 790.

<sup>31</sup> *Id.* at 792.

<sup>32</sup> RESTATEMENT (SECOND) OF TORTS § 409, cmt. b (1965).

<sup>33</sup> *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999) (*per curiam*).

<sup>34</sup> *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 795–96 (Tex. 2001) (Hecht, J., concurring).

worker's compensation framework as does the independent contractor. "Simply stated, . . . [the employer is] not an insurer."<sup>35</sup> Second, the employer specifically hired the independent contractor for its special expertise to execute the work, including performing it safely. There is again no reason why the employer's decision to outsource the work to a more qualified party should create greater potential liability than keeping the work in-house. Finally, an employee should not enjoy "greater rights as an employee of an independent contractor than he would have as an employee of the contractor's employer."<sup>36</sup>

The general no-duty rule enunciated in Restatement § 409 assumes that the employer did not retain any control over the work of the independent contractor. Twenty exceptions follow this rule, which are codified in Restatement §§ 410–29. This litany of exceptions led a court to observe that the general "rule is now primarily important as a preamble to the catalog of its exceptions."<sup>37</sup>

### III. COMMON LAW EXCEPTIONS TO THE NO-DUTY RULE

This section of the article reviews the Restatement exceptions to the no-duty rule that Texas courts have adopted. Courts have not addressed, let alone adopted, all the Restatement exceptions.<sup>38</sup> In at least two instances, courts refused to adopt one of them.<sup>39</sup> The most litigated exception by far is the one that deals with control of the independent contractor by the employer (codified in Restatement § 414). This section of the article discusses only those Restatement exceptions for which Texas case law exists.

#### A. Employer liability for negligent selection of contractor; Restatement § 411 (Negligence in selection of contractor)

An employer can be held liable for the harm caused to a third party by an independent contractor if the employer was negligent in selecting the contractor. This exception to the general no-duty rule is codified in Restatement § 411, which the Dallas Court of Civil Appeals adopted in *Webb v. Justice Life Ins. Co.*<sup>40</sup> Restatement § 411 states that

[a]n employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

- (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
- (b) to perform any duty which the employer owes to third persons.<sup>41</sup>

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<sup>35</sup> *Dyall v. Simpson Pasadena Paper Co.*, 152 S.W.3d 688, 697 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (*en banc*)).

<sup>36</sup> *Lee Lewis*, 70 S.W.3d at 796 (Hecht, J., concurring).

<sup>37</sup> *Pac. Fire Ins. Co. v. Kenny Boiler & Mfg. Co.*, 277 N.W. 226, 229 (Minn., 1937)).

<sup>38</sup> *Lee Lewis*, 70 S.W.3d at 792 (Hecht, J., concurring) ("Not all of these exceptions [*i.e.*, Restatement §§ 410–429] have been recognized by Texas courts, but section 414 has.").

<sup>39</sup> *See, e.g., Arlen v. Hearst Corp.*, 4 S.W.3d 326 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) ("no Texas court has ever directly applied section 413. . . . We also decline to adopt section 413.") (citing *Scott Fetzer Co. v. Read*, 945 S.W.2d 854, 862 (Tex. App.—Austin 1997), *aff'd*, 990 S.W.2d 732, (Tex. 1998)).

<sup>40</sup> 563 S.W.2d 347, 349 (Tex. Civ. App.—Dallas 1978, no writ).

<sup>41</sup> RESTATEMENT (SECOND) OF TORTS § 411 (1965). It is worth noting here that negligent hiring is an independent tort based on direct (not vicarious) liability. *Soon Phat, L.P. v. Alvarado*, 396 S.W.3d 78, 101 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

A claim under Restatement § 411, therefore, requires a risk of physical harm or a duty owed to third persons.

A Restatement § 411 claim also requires a nexus between the quality in the contractor that made a hiring employer negligent, and the harm the contractor inflicted on the plaintiff.<sup>42</sup> For example, an employer might incur liability for contracting with a driver with a public drunken driving record if the driver caused an accident while intoxicated, but not if he drove off sober after robbing a bank. In *Webb*, a widow sued two insurance companies for the death of her husband caused by the allegedly negligent driving of their sales representative, an independent contractor.<sup>43</sup> The widow's § 411 negligence claim rested on the insurers' alleged failure to recognize that their representative lacked basic driving skills. The Dallas Court of Appeals affirmed the trial court's summary judgment for the defendants. The court held that the insurers contracted with their representative to sell policies, not to drive a car. The insurers, therefore, "did not have even a general duty to inquire into his competency to drive."<sup>44</sup>

A negligent hiring claim under Restatement § 411 does not include the element of control, which arises in many employer liability claims (as discussed in the rest of this article). In *Wood v. Phonoscope, Ltd.*, Wood, a subcontractor employee, was electrocuted when the cherry picker bucket in which he was working struck a power line.<sup>45</sup> Wood sued multiple parties involved in the accident, including Phonoscope for, *inter alia*, premises defect and negligent hiring of the contractor that hired Wood's employer. Phonoscope, the owner, successfully moved for summary judgment against these claims on the basis of lack of control.<sup>46</sup> But as the court noted, "lack of control is not an element of [a] negligent-hiring claim." That Phonoscope proved lack of control, therefore, did not dispose of Wood's § 411 negligent-hiring claim. Because Phonoscope had failed to move separately for summary judgment on this latter claim, the court reversed the trial court as to this issue and remanded for further proceedings.<sup>47</sup>

## **B. The employer's control gives rise to a duty of care; Restatement § 414 (Negligence in exercising control retained by employer)**

The most frequently litigated exception to the Restatement § 409 no-duty rule occurs when the employer retains some control over the independent contractor's work. This rule is codified in Restatement § 414, which the Supreme Court adopted in *Redinger v. Living, Inc.* and which states that

[o]ne who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.<sup>48</sup>

In *Redinger*, the general contractor, Living, directed a subcontractor to move some dirt lying in the way of incoming concrete trucks. The subcontractor's tractor box blade somehow crushed one of Redinger's fingers. On appeal to the Supreme Court, Living argued that it owed no duty

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<sup>42</sup> RESTATEMENT (SECOND) OF TORTS § 411, cmt. b (1965).

<sup>43</sup> *Webb*, 563 S.W.2d at 348.

<sup>44</sup> *Id.* at 349.

<sup>45</sup> 2004 WL 1172900, at \*\*1, 13–14.

<sup>46</sup> *Id.* at \*\*1, 6.

<sup>47</sup> *Id.* at \*14.

<sup>48</sup> 689 S.W.2d 415, 418 (Tex. 1985); RESTATEMENT (SECOND) OF TORTS § 414 (1965)).

to Redinger, the employee of Living's plumbing subcontractor. The court disagreed. It adopted Restatement § 414 and held that Living "exercised supervisory control" over the dirt work and, therefore, owed Redinger a duty to exercise reasonable care. The court affirmed the trial court's judgment for Redinger because there was evidence that Living negligently exercised this control.<sup>49</sup>

The Texas legislature codified Restatement § 414's common law exception to the no-duty rule for real property owners in 1996 in Chapter 95, which is discussed in Section IV of this article.

### 1. Employer control: general principles

An "employer's duty of reasonable care is commensurate with the control it retains over the independent contractor."<sup>50</sup> At one end, no duty arises from no control. At the other end, an employer that "retains control over the 'operative detail of doing any part of the work'" effectively crafts a master-servant relationship that creates liability for negligence under agency principles.<sup>51</sup> In between these two extremes, where Restatement § 414 applies, "the more detailed the employer's control over the independent contractor's work, the greater is the employer's responsibility for any injuries that result."<sup>52</sup>

Some employer conduct does not amount to control as a matter of law (thankfully so for construction project managers). It is well established that the "general right to order the work to start or stop, to inspect progress or receive reports," does not give rise to a duty.<sup>53</sup> Neither does making nonbinding suggestions and recommendations, or prescribing work alterations and deviations.<sup>54</sup>

Duty-creating control starts when the independent "contractor is not entirely free to do the work in his own way."<sup>55</sup> "For example, a duty may arise if the employer 'retain[s] only the power to direct the order in which the work shall be done, or to forbid its being done in a manner likely to be dangerous to himself or others.'"<sup>56</sup> An employer's knowing approval of a dangerous act is generally an exercise of control.<sup>57</sup> In *Dow Chem. Co. v. Bright*, the Supreme Court "recognized that a general contractor has actually exercised control of a premises when the general contractor knew of a dangerous condition before an injury occurred and approved acts that were dangerous and unsafe."<sup>58</sup>

But control, even when established, does not necessarily create liability. "To trigger

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<sup>49</sup> *Redinger*, 689 S.W.2d at 418.

<sup>50</sup> *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 214 (Tex. 2008); *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 355, 357 (Tex. 1998) (*per curiam*).

<sup>51</sup> *Id.* at 356 (citing RESTATEMENT (SECOND) OF TORTS § 414 cmt. a (1965)).

<sup>52</sup> *Id.*

<sup>53</sup> *Redinger*, 689 S.W.2d at 418 (citing RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965)); *see also* Texas Pattern Jury Charge 66.3 (asking whether employer retained control "other than the right to order the work to start or stop or to inspect progress or receive reports").

<sup>54</sup> *Hoechst-Celanese*, 967 S.W.2d at 356 (citing RESTATEMENT (SECOND) OF TORTS § 414 cmt. c (1965)).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Wood*, 2004 WL 1172900, at \*5 ("[e]ssentially, the evidence must give rise to an inference that the supervising entity specifically approved a dangerous act.") (citations omitted).

<sup>58</sup> 89 S.W.3d 602, 609 (Tex. 2002). The court also noted that it had "never concluded that a general contractor actually exercised control of a premises [when] there was no prior knowledge of a dangerous condition and no specific approval of any dangerous act."

liability, supervisory control must (1) relate to the activity that caused the injury, (2) involve either the power to direct that the work be done in a certain manner or forbid its being done in an unsafe manner, and (3) relate to the injury that the alleged negligence caused.”<sup>59</sup> The case of *Lee Lewis Constr., Inc. v. Harrison* illustrates (but does not expressly discuss) these elements.<sup>60</sup> In *Lee Lewis*, the Supreme Court held a GC liable for the death of a subcontractor’s employee (Harrison) who died on the job. The GC had inspected and approved the subcontractor’s fall protection equipment (element 2), and allowed employees to use a bosun’s chair without a separate lifeline (element 1). Harrison died when, untethered to an independent lifeline, he fell ten stories from a bosun’s chair (element 3).<sup>61</sup> 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.

Additionally, Restatement § 414 incorporates an element of actual or implied knowledge whereby a

principal contractor is subject to liability if he fails to prevent the subcontractors from doing even the details of the work in a way unreasonably dangerous to others, if he knows or by the exercise of reasonable care should know that the subcontractors’ work is being so done, and has the opportunity to prevent it by exercising the power of control which he has retained in himself.<sup>62</sup>

Bona fide absence of knowledge, therefore, might excuse an employer from liability.<sup>63</sup>

A plaintiff can establish an employer’s control by evidencing a contract or actual control.<sup>64</sup> Courts analyze control from either or both angles. For example, in *Abarca v. Scott Morgan Residential, Inc.*, the court considered both contractual and actual control by the defendants in a case of a collapsed scaffold.<sup>65</sup> In *Wood*, because the parties had no contract, the court only analyzed whether the employer exercised actual control.<sup>66</sup> Conversely, in *Johnston v. Oiltanking Houston, L.P.*, the court only analyzed the terms of the parties’ contract because the plaintiff did not allege that Oiltanking exercised actual control.<sup>67</sup> Whether an employer exercised actual control is usually a question of fact, whereas control by contract is a question of law.<sup>68</sup>

Importantly, failure to exercise a contractually-retained right of control will not absolve an employer from liability.<sup>69</sup> “It is the right of control, and not the actual exercise of control, which gives rise to a duty to see that an independent contractor performs work in a safe

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<sup>59</sup> *Wood*, 2004 WL 1172900, at \*5.

<sup>60</sup> 70 S.W.3d at 778.

<sup>61</sup> *Id.* at 784.

<sup>62</sup> RESTATEMENT (SECOND) OF TORTS § 414 cmt. b (1965)).

<sup>63</sup> *See, e.g., Joeris*, 2016 WL 7407634, at \*2 (holding that general contractor had to have actual knowledge of safety violations to create a duty). *Joeris* is discussed in more detail in sub-section 5 below.

<sup>64</sup> *Lee Lewis*, 70 S.W.3d at 783.

<sup>65</sup> 305 S.W.3d 110, 122–25 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (*disapproved on other grounds by Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 563–64 (Tex. 2016); *see also Cardona v. Simmons Estate Homes I, LP*, No. 05-14-00575-CV, 2016 WL 3014792, at \*\*4–6 (Tex. App.—Dallas May 25, 2016, no. pet.) (mem. op.) (analyzing duty arising from both contractual and actual control); *Bright*, 89 S.W.3d at 606–10 (same).

<sup>66</sup> *Wood*, 2004 WL 1172900, at \*5.

<sup>67</sup> 367 S.W.3d 412, 417 (Tex. App.—Houston [14th Dist.] 2012, no. pet.).

<sup>68</sup> *Lee Lewis*, 70 S.W.3d at 783.

<sup>69</sup> *Elliott-Williams Co., Inc. v. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999).

manner.”<sup>70</sup>

## 2. Conduct that does not amount to control

The employer’s presence on a construction site, absent some positive controlling act, does not generally create a duty of care, as the following cases illustrate.

In *Cardona*, an independent contractor employee, Cardona, fell from a roof scaffold at a residential construction project.<sup>71</sup> Cardona and his co-worker had built the scaffold at the direction of their direct employer. A displaced board triggered Cardona’s fall. Cardona sued Simmons (the general contractor), among others, who was four contracts removed from Cardona’s employer. Cardona testified that he did not know anyone at Simmons and that no one other than his direct employer gave him instructions at the work site. Cardona argued that the presence and activities of Simmons’s project manager at the construction site created a fact question as to Simmons’s actual control. The manager was on site daily for up to several hours, spoke with and coordinated the various subcontractors, and made on-site decisions. The court held that this “general supervisory control” did not “relate to the activity causing the injury” and was, therefore, insufficient to create a duty. The court of appeals affirmed the trial court’s summary judgment as to Cardona’s negligence claims against Simmons.<sup>72</sup>

In *Exxon Corp. v. Quinn*, Quinn was electrocuted when his foreman prematurely reenergized a utility pole Quinn had climbed to service a power line.<sup>73</sup> Quinn and his foreman were employees of an independent contractor hired by Exxon, the landowner. Before the accident, Exxon’s on-site representative had inquired whether the utility company should be called to perform a safety “red tag procedure” designed to ensure that power remained disconnected during the service call. Quinn’s foreman declined and stated his intent to perform the procedure himself. Quinn sued Exxon for ordinary negligence and premises liability claims and prevailed at trial.

On appeal to the Supreme Court, Exxon argued that it was not negligent because it did not retain control over the manner in which the electricians performed their work.<sup>74</sup> The Court agreed. It held that Exxon had no contractual control and that Exxon’s participation in the decision not to call the power company to perform the red tag procedure did “not reach the necessary level of ‘control’ required to create liability.” The foreman, not Exxon’s representative, declined to call the power company to perform the red tag safety procedure. Exxon, therefore, was not liable as a matter of law for the events that caused Quinn’s injury. The Court affirmed the trial court’s judgment notwithstanding the verdict in favor of Exxon as to Quinn’s ordinary negligence claim. It remanded to the court of appeals to address Quinn’s premises liability claim against Exxon.<sup>75</sup>

In *Koch Ref. Co. v. Chapa*, an employee of a Koch independent contractor, injured himself when his co-worker lost his balance as they both moved a pipe.<sup>76</sup> A Koch safety

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<sup>70</sup> *Id.* See sub-section 4 below for illustrative cases.

<sup>71</sup> 2016 WL 3014792, at \*1.

<sup>72</sup> *Id.* at \*\*4–6.

<sup>73</sup> 726 S.W.2d at 18–19.

<sup>74</sup> *Id.* at 19.

<sup>75</sup> *Id.* at 21–22.

<sup>76</sup> 11 S.W.3d at 154.

employee stood nearby as Chapa and his employer's supervisor discussed the safety of the maneuver prior to the accident, but did not intervene. Chapa sued Koch and the trial court granted the latter's no-duty motion for summary judgment. The Supreme Court held "that a premises owner, merely by placing a safety employee on the work site, does not incur a duty to an independent contractor's employees to intervene and ensure that they safely perform their work." The Court rendered judgment that Chapa take nothing.<sup>77</sup> *Chapa* is significant in that the Supreme Court issued its opinion after it addressed the duty that an employer incurs for imposing safety measures on an independent contractor, as discussed in the next section.<sup>78</sup>

A general contractor's indemnity obligations toward the owner does not create a duty to control an independent contractor. In *Elliott-Williams v. Diaz*, Elliott-Williams, the general contractor, agreed to be "fully responsible for the actions of all employees and contracted representatives," and to indemnify the owner.<sup>79</sup> An Elliott-Williams subcontractor caused injury to Diaz, a third-party employee. Diaz sued Elliott-Williams for negligence, but the trial court held that Elliott-Williams owed Diaz no duty and it granted the former's summary judgment motion. The court of appeals reversed and remanded for trial. On appeal to the Supreme Court, Diaz argued that the contract between Elliott-Williams and the owner "obligated" Elliott-Williams to control the subcontractor and, therefore, created a duty toward Diaz (Diaz did not argue that Elliott-Williams had a contractual right of control, or exercised actual control over the subcontractor).<sup>80</sup> The Court rejected Diaz's argument and rendered judgment for Elliott-Williams. The contract merely required Elliott-Williams to indemnify the owner for the subcontractor's work. It did "not impose liability on Elliott-Williams for Diaz's injury because it d[id] not require Elliott-Williams to control the means, methods, or details of [the subcontractor's] work."<sup>81</sup>

Finally, in *Coastal Marine Serv. of Texas, Inc. v. Lawrence*, a crane accident killed Lawrence, an employee of a Coastal independent contractor.<sup>82</sup> Coastal had no contractual or actual control of the workplace during the accident. Coastal prevailed at trial but the court of appeals reversed holding that testimony by independent contractor employees created a question of fact regarding Coastal's right to control the crane. The employees had testified in response to hypothetical questions "that they would have complied with any instructions from Coastal about the movement of the crane if Coastal had given such instructions." The Supreme Court disagreed. It held that "an independent contractor's willingness to follow a premises owner's instructions, though no such instructions were given, is legally [in]sufficient evidence of the premises owner's 'right to control' in a premises liability case." Stated differently, a "possibility of control is not evidence of a 'right to control' actually retained or exercised." The Supreme Court reversed the court of appeals' judgment and ordered that Lawrence take nothing.<sup>83</sup>

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<sup>77</sup> *Id.* at 157.

<sup>78</sup> *See Mendez*, 967 S.W.3d at 355–56.

<sup>79</sup> 9 S.W.3d at 802–03.

<sup>80</sup> *Id.* at 803.

<sup>81</sup> *Id.* at 805.

<sup>82</sup> 988 S.W.2d at 224.

<sup>83</sup> *Id.* at 226. *Lawrence* was technically superseded by Chapter 95, but it remains good law as applied to a general contractor and also as to an owner when Chapter 95 does not apply. *See Fisher v. Lee and Chang P'ship*, 16 S.W.3d 198, 201 n.1 (Tex. App.—Houston [1st Dist.] 2003, pet. denied), *overruled by Ineos*, 505 S.W.3d at 567; *see also Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 52 (Tex. 2015) ("independent contractor can recover for

### 3. Conduct that gives rise to a narrow duty of care

General contractors should always be concerned that project requirements they routinely impose on their subcontractors might be construed as exercising contractual control over the subcontractors. The case law singles out imposing several such requirements as exercising narrow control, giving rise to a narrow duty of care. The Supreme Court decided the first of these cases in relation to general contractor-imposed safety requirements.

In *Hoechst-Celanese Corp. v. Mendez*, the chemical company contractually required its independent contractor, Mundy, Mendez's employer, to follow certain safety rules.<sup>84</sup> One of these rules required employees to use A-frame ladders only in their fully-extended "A" position. Mendez decided to use a large metal tool box as a ladder because an extended ladder would not fit in the confined space that was his workplace. Mendez fell from the tool box, injured himself, and sued alleging that "the tool box was a premises defect and that Celanese was negligent in exercising control over the safety practices of Mundy employees."

The Supreme Court rejected the position previously adopted by several Texas courts of appeals that imposing safety practices did not rise to a level of control "sufficient to create a duty." The court held instead that "[a] better view, more consistent with the *Restatement* and this Court's precedents, is that safety requirements give rise to a *narrow* duty of care."<sup>85</sup> The extent of this duty is "commensurate" with the control that the employer retains over the independent contractor. Specifically, the imposition of safety requirements created a qualified duty that they "did not unreasonably increase, rather than decrease, the probability and severity of injury."<sup>86</sup> Moreover, the employer can only be found liable for negligence if there is a nexus between the employer's control and the activity that triggered the injury.

The court held that Mendez adduced no summary judgment evidence that Celanese's A-frame ladder requirements were dangerous or unreasonable. To hold employers liable when they required that tools be used in their intended manner would dissuade employers from imposing "even minimal safety standards." The Supreme Court rendered judgment that Mendez take nothing because Mendez presented no evidence that Celanese exercised unreasonable care in imposing its safety standards.<sup>87</sup>

The Court's holding in *Mendez* is consistent with the holding that a "general contractor or an employer is [not] required to stand idly by while another is injured or killed in order to avoid liability."<sup>88</sup> But, as the Court added elsewhere, this holding implies that

an employer who is aware that its contractor routinely ignores applicable federal guidelines and standard company policies related to safety may owe a

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common law negligence" when Chapter 95 does not apply). Note that it is not clear that Chapter 95 would have applied to the facts in *Lawrence* in light of the holding in *First Texas Bank v. Carpenter*, 491 S.W.3d 729 (Tex. 2016), discussed in Section IV of this article. If the contractor employees were using the crane to "offload skids on Coastal's property," they might not have been constructing, repairing, renovating, or modifying an improvement to real property, unless the offloading was part of a larger construction project. *Lawrence*, 988 S.W.2d at 224.

<sup>84</sup> 967 S.W.3d at 355–56.

<sup>85</sup> *Id.* at 357 (emphasis in original).

<sup>86</sup> *Id.* at 358.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (citing *Welch v. McDougal*, 876 S.W.2d 218, 224 (Tex.App.—Amarillo 1994, writ denied)).

duty to require corrective measures to be taken or to cancel the contract.<sup>89</sup>

Employers who impose safety standards on independent contractors, therefore, may also owe a duty to intervene when faced with known violations of these standards, consistent with Restatement § 414 Comment b.<sup>90</sup> In contrast, an employer who does not impose any such standards might not owe a duty to intervene even when confronted with violations.<sup>91</sup> An employer who does not issue safety standards, therefore, could be, “in a more legally advantageous position” than one who does not,” a result that is “arguably antithetical to public policy.”<sup>92</sup>

Texas Courts have applied *Hoechst-Celanese*’s “narrow duty” standard in other situations. In *Dow Chem. Co. v. Bright*, the Supreme Court applied it to work permits. Bright, a contractor employee, suffered a work-site injury when a pipe fell and trapped his arm.<sup>93</sup> The trial court granted Dow’s no-duty traditional motion for summary judgment, but the court of appeals reversed because of alleged fact issues. In the Supreme Court, Bright argued, *inter alia*, that Dow should have inspected the contractor’s work area before issuing a work permit, per Dow procedures. The court expressly rejected this argument because Dow’s safe work permit procedure “did not unreasonably increase the probability and severity of Bright’s injury.”<sup>94</sup> The court reversed the court of appeals and rendered judgment that Bright take nothing.

In *Belteton v. Desco Erectors and Concrete, Inc.*, the Fourteenth Court of Appeals applied the “narrow duty” standard to insurance requirements.<sup>95</sup> Belteton, a subcontractor’s employee, died from a fall on a construction site. The employee’s estate sued the general contractor, Adrian Industrial Constructors, Inc., among others, for negligence. Adrian prevailed on a traditional motion for summary judgment on the ground that it owed the employee no duty. On appeal, Belteton argued, *inter alia*, that Adrian’s requirement that the subcontractor carry liability insurance evidenced Adrian’s right of control over the subcontractor, which created a duty. Citing *Hoechst-Celanese*’s analysis, the court of appeals noted that “insurance and safety requirements involve similar considerations,” and held that a coverage requirement merely created a duty to ensure that it did “not increase the probability or severity of injury.”<sup>96</sup> Adrian breached no duty because its coverage requirement did not increase the probability of Belteton’s injury. For this and other reasons, the court affirmed the trial court’s judgment.

Finally, in *Johnston v. Oiltanking Houston, L.P.*, the plaintiff, a contractor employee, fell from a height onto concrete and sued Oiltanking.<sup>97</sup> The trial court granted Oiltanking’s no-duty traditional motion for summary judgment. Johnston alleged on appeal that Oiltanking retained contractual control over the “timing and sequence” of Johnston’s work in the master services agreement between Oiltanking and the contractor, Johnston’s employer. The court rejected Johnston’s argument. Citing Restatement § 414, the court held that “the right to schedule the

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<sup>89</sup> *Id.* at 357 (citing *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469, 470 (Tex. 1985) (*per curiam*)).

<sup>90</sup> There is, presumably, a silver lining: intervening to enforce safety regulations might prevent an accident and preempt a lawsuit. Moreover, the intervention itself should not breach a duty if it merely seeks to enforce the regulations.

<sup>91</sup> See the cases in Section III.B.2.

<sup>92</sup> *Dyall*, 152 S.W.3d at 698.

<sup>93</sup> 89 S.W.3d at 605.

<sup>94</sup> *Id.* at 608.

<sup>95</sup> 222 S.W.3d 600, 603 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

<sup>96</sup> *Id.* at 607.

<sup>97</sup> 367 S.W.3d 412, 414 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

timing and sequence of work” fits within a contractor’s general right to manage the project and did not rise to the level of liability-imposing control.<sup>98</sup> Moreover, citing *Hoechst-Celanese*, the court held that “even if Oiltanking’s right to control the timing and sequence of [the contractor’s] work imposed a duty on it,” that duty would merely be that the control “did not increase ‘the probability or severity of the injury.’”<sup>99</sup> The court of appeals affirmed the trial court’s judgment for this and other reasons.

#### 4. Contractual control triggers a duty, irrespective of actual control

As noted above, it is the right of control that gives rise to a duty to see that a subcontractor performs its work safely. Failure to exercise this right will not excuse the employer. The following cases illustrate this principle.

In *Pollard v. Mo. Pac. R.R. Co.*, the railroad prevailed in the trial court on summary judgment over a personal injury claim brought by Pollard.<sup>100</sup> The summary judgment evidence showed that the railroad had not exercised any control over its contractor, Pollard’s employer. The court of appeals affirmed, but the Supreme Court reversed and remanded. The railroad had retained several rights of control in its contract with the contractor, which gave rise to a duty of care, which in turn raised “genuine issue of material fact” regarding the railroad’s negligence.<sup>101</sup>

Likewise, in *Tovar v. Amarillo Oil Co.*, a drilling case, the contract between the employer (the general contractor) and the subcontractor mandated the use of a blowout preventer.<sup>102</sup> The subcontractor configured the blowout preventer in violation of specific written instructions. The employer knew of the deviation, contemplated intervening as was its right under the contract, but in the end did nothing. Tovar suffered severe injury when the equipment failed. The Supreme Court restated its *Redinger* holding that when an employer “exercised some control over a subcontractor’s work, the [employer] may be liable for failure to exercise reasonable care in supervising the subcontractor’s activity.”<sup>103</sup> The Supreme Court reversed the court of appeals, which had held that the employer owed Tovar no duty as a matter of law.

#### 5. A recent development: *Joeris Gen. Contractors, Ltd. v. Cumpian*

The San Antonio Court of Appeals recently held in *Joeris* that a general contractor did not owe a duty of care to a subcontractor’s employee injured by his co-employee even though the general contractor 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.<sup>104</sup> The case is important. It exposes the difficulty, in some cases, of determining whether a general contractor has incurred a duty of care by exercising control over its subcontractor. Then-Chief Justice Phillips noted in 2001 that “[o]ur focus on the degree of the general contractor’s ‘retained control’ has failed to provide either consistent or equitable results,

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<sup>98</sup> *Id.* at 419.

<sup>99</sup> *Id.* at 420.

<sup>100</sup> 759 S.W.2d 670, 670 (Tex. 1988) (*per curiam*).

<sup>101</sup> *Id.*

<sup>102</sup> 692 S.W.2d at 470.

<sup>103</sup> *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 414 (1965)).

<sup>104</sup> 2016 WL 7407634, at \*\*6, 12 (Marion, C.J., concurring).

and I believe that a thorough reconsideration of this area is in order.”<sup>105</sup> *Joeris* and its dissent suggest that “this area” remains unsettled 16 years later.

Joeris 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.<sup>106</sup>

On appeal, Cumpian argued that Joeris’s negligence stemmed from its failure to enforce safety rules and to police Gonzalez’s conduct. The court of appeals held that under *Redinger* and *Hochst-Celanese*, 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.”<sup>107</sup> 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 *Hochst-Celanese*, 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.<sup>108</sup>

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.<sup>109</sup> 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.<sup>110</sup>

Justice Chapa dissented in an argument-rich 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.<sup>111</sup>

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<sup>105</sup> *Lee Lewis Constr. v. Harrison*, 70 S.W.3d 778, 787 (Tex. 2001) (Phillips, C.J., concurring).

<sup>106</sup> *Joeris*, 2016 WL 7407634, at \*2.

<sup>107</sup> *Id.* at \*5 (citing *Redinger*, 689 S.W.2d at 418–19; *Mendez*, 967 S.W.2d at 356–58) (emphases in original).

<sup>108</sup> *Id.* at \*\*6–9.

<sup>109</sup> *Id.* at \*\*9–10.

<sup>110</sup> *Id.* at \*11.

<sup>111</sup> *Id.* at \*12.

The dissenting opinion argued, *inter alia*, 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 in this case 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*.<sup>112</sup>

The dissent also took aim at the majority’s holding that the general contractor 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 general contractor 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.’”<sup>113</sup> Justice Chapa argued that the Supreme Court has not adopted this high standard, which this case met in any event.<sup>114</sup>

Instead, Justice Chapa analogized this case to *Lee Lewis*. Joeris assumed responsibility over the operation of its forklifts at the worksite just as the general contractor 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* knowingly overlooked violations of its safety measures.<sup>115</sup> 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.”<sup>116</sup>

*Joeris* shows that questions remain on the degree of control that an employer must exercise to incur a duty of care toward its contractor under the common law.

### C. The importance of contractual language

As discussed in Section III.B.1, employers can exercise control over a subcontractor by contract or by actual control, and courts typically analyze claims of control either or both ways as required by the alleged facts and claims.

#### 1. Contractual language that protects the employer

Employers who want to resolve the issue of control by contract as a matter of law in a motion for summary judgment need to include clauses in their contracts that unambiguously deny their right to control the independent contractor. In *Shell Oil Co. v. Khan*, Shell leased a

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<sup>112</sup> *Id.* at \*14–15.

<sup>113</sup> *Id.* at \*16 (citing RESTATEMENT (SECOND) OF TORTS § 414 cmt. b (1965)) (emphasis in original).

<sup>114</sup> *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 S.W.3d at 788–800) (Hecht, J. (now Chief Justice), concurring)). Compare with the Texas Property Owner’s Liability for Acts of Independent Contractors and Amount of Recovery statute, 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).

<sup>115</sup> *Joeris*, 2016 WL 7407634, at \*17.

<sup>116</sup> *Id.* at \*13.

gas station to an independent dealer.<sup>117</sup> An assailant shot Khan, the dealer's employee, in the leg one day during Khan's early morning round. Khan sued Shell and others. The trial court granted Shell's summary judgment motion on the ground that it owed Khan no duty. On appeal, Khan argued that Shell controlled several aspects of the gas station's security. The dealer agreement between Shell and the lessee stated that

Dealer is an independent businessperson, and nothing in this Agreement shall be construed as reserving to Shell any right to exercise any control over, or to direct in any respect the conduct or management of, Dealer's business or operations conducted pursuant to this Agreement; but the entire control and direction of such business and operations shall be and remain in Dealer, subject only to Dealer's performance of the obligations of this Agreement.<sup>118</sup>

The court held that this clause indicated that the lessee controlled all gas station operations, "including security-related matters." The court rejected Khan's attempt to portray the last phrase of this clause as "an exception that swallow[ed] the rule" in the sense that it placed Shell in a position to control the lessee's every move. The agreement obligated the dealer to perform, but the dealer's performance did not "diminish its independence, or create liability for Shell." The court also rejected Khan's attempts to turn the dealer's obligations under the agreement to hire and train competent staff into a liability for Shell if it did not. The court upheld the trial court's grant of summary judgment because Khan failed to show that Shell "had a right to control security-related activities at the station."<sup>119</sup>

Employers who hire independent contractors might also consider adopting contractual language that stresses an "intended result." The plaintiff in *Covarrubias v. Diamond Shamrock Ref. Co., LP* worked for a subcontractor to the project's general contractor, which had a contract with Diamond Shamrock.<sup>120</sup> Covarrubias used a scissor lift to inspect carbon steel pipe welds in a refinery unit.<sup>121</sup> The lift inadvertently struck an unrelated small piece of pipe (a one-half inch nipple), which broke off and sprayed Covarrubias with scalding hydrocarbons. Covarrubias sued Diamond Shamrock, but the trial court granted the latter's motion for summary judgment on Chapter 95 grounds.<sup>122</sup>

On appeal, Covarrubias argued, *inter alia*, that Chapter 95 did not apply, but that if it did, Diamond Shamrock was liable because it exercised some control over Covarrubias's work and had actual knowledge of the danger and failed to warn. The contract between Diamond Shamrock and the general contractor stated that

Contractor shall have responsibility for and control over the details and means for performing the Work.... Anything in this Agreement which may appear to give [Diamond Shamrock] the right to direct Contractor as to the details of the performance of the Work or to exercise a measure of control over Contractor, shall mean that Contractor shall follow the desires of [Diamond Shamrock]

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<sup>117</sup> 138 S.W.3d 288, 291 (Tex. 2004).

<sup>118</sup> *Id.* at 292.

<sup>119</sup> *Id.* at 295.

<sup>120</sup> 359 S.W.3d 298, 300 (Tex. App.—San Antonio 2012, no pet.).

<sup>121</sup> *Id.*

<sup>122</sup> See Section IV of this article, discussing Chapter 95.

only as to the intended results of the Work.<sup>123</sup>

The court held that, in the absence of countering evidence, this clause gave Diamond Shamrock no contractual control as a matter of law over the ways Covarrubias’s employer was to perform its work, and it affirmed the trial court’s summary judgment.<sup>124</sup>

## 2. Contractual control and AIA Document A201™

AIA Document A201™, General Conditions of the Contract for Construction (the “General Conditions”), is a form agreement often incorporated into a main contract between an owner and a general contractor.<sup>125</sup> The General Conditions place project control squarely in the hands of the general contractor. In *Saenz*, Saenz appealed the trial court’s take-nothing judgment in favor of David & David after a crane load struck him on the head, precipitating his fall from a roof.<sup>126</sup> Saenz argued, *inter alia*, that the contract between the owner and David & David and the subcontract between the latter and Saenz’s employer gave David & David control as a matter of law. The contract between the owner and the general contractor contained clauses almost identical to those in General Conditions §§ 3.3.1, 5.3, and 10.2.1.<sup>127</sup> The contract provided that

[t]he contractor shall be solely, subject to the terms of Article 4, responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the work under the contract unless contract documents give other specific instructions concerning these matters[;]<sup>128</sup>

and that

[t]he contractor shall take all necessary precautions for safety and shall provide all necessary protection to prevent damage, injury or loss to all persons on the work and other persons who may be affected thereby.<sup>129</sup>

But the contract also required the general contractor to pass its obligations on to its subcontractors via the following clause:

The contractor shall require each subcontractor, to the extent of the work to be performed by the subcontractor, to be bound to the contractor by terms of the contract documents and to assume towards the contractor all obligations and responsibilities which the contractor by the contract documents assumes towards the owner and architect.<sup>130</sup>

The court held that this last “contract clause modified the previous control clauses.” The subcontract gave effect to this last clause with the following clause:

Subcontractor . . . assumes the responsibilities of an employer for performance

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<sup>123</sup> *Id.* at 303 (bracketed terms in original).

<sup>124</sup> *Id.* at 303–04.

<sup>125</sup> *See, e.g.*, AIA Document A102™ – 2007 § 16.1.2 (Standard Form of Agreement Between Owner and Contractor for Cost Plus with GMP), enumerating AIA Document A201™ – 2007 as part of the contract documents.

<sup>126</sup> 52 S.W.3d at 808–09.

<sup>127</sup> *Id.* at 813.

<sup>128</sup> *Id.* Compare with General Conditions § 3.3.1 (1997 version).

<sup>129</sup> *Id.* Compare with General Conditions § 10.2.1 (1997 version).

<sup>130</sup> *Id.* Compare with General Conditions § 5.3 (1997 version).

of the Work and acts as an employer of one or more employees by paying wages, directing activities, and performing other similar functions. Subject to the right (but not the obligation) of [David & David] to direct Subcontractor or its employees to cease or change unsafe work practices. *Subcontractor is an independent contractor, free to determine the manner in which the Work is performed.* (emphasis added).<sup>131</sup>

The court held that the contracts assigned “the contractor’s responsibility for controlling the construction means, methods, techniques, sequences and procedures” to the subcontractor. The court could not agree, in light of the two contracts, that “David & David’s control of the subcontractor’s work is uncontroverted and thus established as a matter of law.”<sup>132</sup> The court overruled Saenz’s issue on appeal and affirmed the trial court’s take-nothing judgment in favor of David & David. This next case shows what happens when the subcontract does not include a provision that passes project control to the subcontractor for the latter’s scope of work.

In *Maggi v. RAS Dev., Inc.*, the plaintiff, a subcontractor employee, fell from a height on a construction site and died of his injuries.<sup>133</sup> A jury awarded Maggi’s estate \$3.3 million against RAS Development, the general contractor. On appeal, RAS Development argued, *inter alia*, that it should not be held liable for Maggi’s death because it did not control or supervise his work. The subcontract between RAS Development and Maggi’s employer “expressly incorporated” AIA Document A201™, including form language from §§ 3.3.1, 3.3.2, 10.1, 10.2.1, 10.2.3, and 10.2.6, which gave the *contractor* control of the worksite and responsibility for its safety. For example, the General Condition’s § 3.3.1 stated that

[t]he Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract, unless the Contract documents give other specific instructions concerning these matters.<sup>134</sup>

The court of appeals held that these clauses made it “clear that the parties intended RAS Development to be responsible for supervising, directing, and controlling the construction project,” and it affirmed the trial court’s judgment.<sup>135</sup> We can infer that the subcontract did not contain a provision passing control to the subcontractor and making the latter an independent contractor, free to perform its work, as in *Saenz*.<sup>136</sup> RAS Development might have avoided a holding of control-by-contract had such a provision been in place.<sup>137</sup>

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<sup>131</sup> *Id.* (emphasis and parentheses in original).

<sup>132</sup> *Id.* at 814.

<sup>133</sup> 949 N.E.2d 731, 735 (Ill. App. Ct. 2011).

<sup>134</sup> *Id.* at 747.

<sup>135</sup> *Id.* at 747, 755.

<sup>136</sup> *Id.* at 747. The subcontract was titled “Standard Form of Agreement Between Contractor and Subcontractor,” which suggests that it was based on the eponymous AIA Document A401™ 1997 (the accident occurred in 2000). *Id.* The opinion does not discuss whether the language in the latter’s § 4.1.1 (“The Subcontractor shall supervise and direct the Subcontractor’s Work, . . .”) was enough to transfer control to the subcontractor. The same language appears in the 2007 and 2017 versions of A401™ (§§ 4.1.2 and 4.2.2, respectively). Drafters relying on Document A401™ might want to be mindful of this issue.

<sup>137</sup> The court also held that RAS Development exercised actual control of the project. *Id.* at 747–49.

#### D. Others Restatement exceptions to the general no-duty rule

Even though the control exception is the most litigated exception to the general no-duty rule enunciated in Restatement § 409, it is by no means the only one, as the following cases show.

1. Possessor of land duty to those outside of land; Restatement § 414 A (Duty of possessor of land to prevent activities and conditions dangerous to those outside of land)

The general no-duty rule does not shield a possessor of land from liability for harm incurred by someone outside the land because of dangerous activities on the land performed by an independent contractor. Restatement § 414 A states that:

A possessor of land who has employed or permitted an independent contractor to do work on the land, and knows or has reason to know that the activities of the contractor or conditions created by him involve an unreasonable risk of physical harm to those outside of the land, is subject to liability to them for such harm if he fails to exercise reasonable care to protect them against it.<sup>138</sup>

In *Alamo Nat'l Bank v. Kraus*, the bank hired a contractor to demolish an old building that the bank owned and that adjoined a public street in downtown San Antonio.<sup>139</sup> One of the building walls was seen to lean toward the street during demolition. A local television station broadcasted a report. Someone warned the bank vice president responsible for the demolition, who did nothing. The wall collapsed on a passing car, killing a mother and injuring her son. The Supreme Court affirmed the court of appeals, which had held, *inter alia*, that the bank was liable to the plaintiffs for negligence. Citing Restatement §§ 368 and 414 A, the court held that an “owner or occupant of premises abutting a highway has a duty to exercise reasonable care” toward travelers on the highway, and that “[d]elegating this duty to an independent contractor does not relieve the owner or occupant of liability for his own negligence.”<sup>140</sup>

2. Lessor duty to lessee when the lessor undertakes repairs; Restatement § 419 (Repairs which lessor is under a duty to his lessee to make), and § 420 (Repairs gratuitously undertaken by lessor)

Two exceptions to the general no-duty rule arise in the lessor-lessee relationship. A lessor of land is liable for the negligence of a subcontractor hired to perform repairs that the lessor undertook voluntarily or under a duty.<sup>141</sup> In *Damron*, the lessor agreed to replace the deteriorated roof of the building he leased to Anthony, per the lease’s terms. The contractor improperly sealed the portion of the roof that he replaced on the first day and overnight rain damaged store merchandise worth \$15,000. Anthony eventually sued Damron for negligence. Damron responded that any negligence was that of the independent roofing contractor, which insulated her from responsibility. The jury found for Anthony and awarded all his damages.<sup>142</sup>

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<sup>138</sup> RESTATEMENT (SECOND) OF TORTS § 414 A (1965); *see also* RESTATEMENT (SECOND) OF TORTS § 368 (1965) (“Conditions dangerous to travelers on adjacent highway.”).

<sup>139</sup> 616 S.W.2d 908, 909 (Tex. 1981).

<sup>140</sup> *Id.* at 910–11 and n.3.

<sup>141</sup> *Damron v. C. R. Anthony Co.*, 586 S.W.2d 907, 913 (Tex. App.—Amarillo 1979, no writ) (citing RESTATEMENT (SECOND) OF TORTS §§ 419, 420 (1965)).

<sup>142</sup> *Id.* Damron also counterclaimed for breach of the lease and prevailed.

Damron appealed arguing, *inter alia*, that she was not liable as a matter of law for the independent contractor's negligence. Citing Restatement (Second) of Torts §§ 419–420, the court of appeals disagreed. These two sections essentially state that the lessor's duty to repair, when it arises either by contract or by voluntary undertaking, is non-delegable:

§ 419. Repairs which lessor is under a duty to his lessee to make

A lessor of land who employs an independent contractor to perform a duty which the lessor owes to his lessee to maintain the leased land in reasonably safe condition, is subject to liability to the lessee, and to third persons upon the land with the consent of the lessee, for physical harm caused by the contractor's failure to exercise reasonable care to make the land reasonably safe.

§ 420. Repairs gratuitously undertaken by lessor

A lessor of land who employs an independent contractor to make repairs which the lessor is under no duty to make, is subject to the same liability to the lessee, and to others upon the land with the consent of the lessee, for physical harm caused by the contractor's negligence in making or purporting to make the repairs as though the contractor's conduct were that of the lessor.

The court first held that even though these two sections spoke of “physical harm,” it saw “no logical reason” to differentiate between “harm to the lessee's person and property,” and that it would apply these sections to both. It also noted that “Texas has long followed” the principles enumerated in §§ 419–420.<sup>143</sup> In *Dalkowitz*, a case with facts substantially identical to *Damron*'s, the Texas Court of Civil Appeals held that the independent contractor is the landlord's representative from the tenant's perspective and cannot relieve the landlord of responsibility.<sup>144</sup> The *Damron* court reasoned that

[t]he basis of liability in the foregoing cases is the assumption of a duty by the landlord to perform a particular act for the tenant. Whether the duty is assumed gratuitously or by contract, the landlord has primary liability for discharge of the duty and cannot insulate himself from the negligent discharge of the duty by his independent contractor.<sup>145</sup>

Applying these principles to the facts of the case, the court overruled *Damron*'s point of error and affirmed the judgment of the trial court in favor of Anthony, the lessee.

3. Liability to invitees during work on the land; Restatement § 422 (Work on buildings and other structures on land)

Possessors of land, including real property owners, can incur liability when they allow work to proceed on their premises without fully relinquishing possession of the land. This rule is codified in Restatement § 422, which states that

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<sup>143</sup> *Id.* at 913 (citing *Dalkowitz Bros. v. Schreiner*, 110 S.W. 564, 565 (Tex. Civ. App.—San Antonio 1908, no writ) (landlord liable who voluntarily undertook to replace leasehold roof and resulting leaks damaged tenant's goods)).

<sup>144</sup> *Dalkowitz*, 110 S.W. at 565.

<sup>145</sup> *Damron*, 586 S.W.2d at 913.

[a] possessor of land who entrusts to an independent contractor construction, repair, or other work on the land, or on a building or other structure upon it, is subject to the same liability as though he had retained the work in his own hands to others on or outside of the land for physical harm caused to them by the unsafe condition of the structure

(a) while the possessor has retained possession of the land during the progress of the work, or

(b) after he has resumed possession of the land upon its completion.<sup>146</sup>

In *Koko Motel, Inc. v. Mayo*, the motel hired an independent contractor to excavate and repair a sewer line in the hotel lobby.<sup>147</sup> Mayo, a motel guest, slipped on excavation rubble that the contractor had piled outside a motel entrance and injured his foot. The motel receptionist apologized to Mayo after he hobbled into the lobby, and admitted “that she ‘hope[d] we can get maintenance to clean that up, we’ve told them about it.’”<sup>148</sup> A jury awarded Mayo \$1.5 million on his premises liability claim.

Koko Motel argued on appeal that, *inter alia*, the trial court erred in not submitting a jury instruction on whether the motel controlled the contractor. The motel reasoned that a showing of control was necessary to prove its liability because an independent contractor performed the excavation work. The Amarillo Court of Appeals rejected this argument, holding that the right to control was irrelevant “when the conditions exist[ed] on the premises at the time the invitee enter[ed] or were created by someone or something unrelated to the activity of the injured invitee or his employer.”<sup>149</sup> Under these conditions, the possessor of land had a duty to inspect the land and warn of known or should-have-known hazards.

The court also cited Restatement § 422, and held that a possessor of land cannot ignore hazards created by independent contractors when the possessor retains control of the premises and welcomes invitees who are strangers to the hazards, as Koko Motel did with Mayo. Because Mayo was not responsible for the hazard, the motel owed him a duty. The motel’s “right to control [the contractor]’s activities was irrelevant, and the trial court did not err when it omitted such an issue from its jury charge.”<sup>150</sup> The court of appeals rejected Koko Motel’s points of error and affirmed the trial court’s judgment.

Restatement § 422 is inapplicable when the owner of land fully surrenders control of the premises to the independent contractor, as in *Braudrick v. Wal-Mart Stores, Inc.*<sup>151</sup> In that case, the general contractor, Emerson, took control and fenced off areas of adjacent Sam’s Club and Wal-Mart to perform construction work, including repaving a parking lot. The construction contract made Emerson responsible for traffic control, customer safety, and parking lighting. One evening during the construction project, two Sam’s Club patrons, Braudrick and Fierro, tripped on a speed bump, injured themselves, and sued. The jury found for the defendants.<sup>152</sup>

On appeal, the plaintiffs argued that the trial court erred when it allowed the jury to

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<sup>146</sup> RESTATEMENT (SECOND) OF TORTS § 422 (1965).

<sup>147</sup> 91 S.W.3d 41, 44 (Tex. App.—Amarillo 2002, pet. denied).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 46.

<sup>150</sup> *Id.* at 47.

<sup>151</sup> 250 S.W.3d 471, 479 (Tex. App.—El Paso 2008, no pet.).

<sup>152</sup> *Id.* at 474–75.

consider whether Sam’s Club controlled the parking lot paving work—the first charge question, which the jury answered in the negative. The El Paso Court of Appeals rejected this argument. The court distinguished this case from *Koko Motel* on the ground that Restatement § 422 was now inapplicable. The owner in this case retained no contractual control of the work, unlike *Koko Motel*. To the contrary, the construction contract specifically provided that “Emerson would have control over the portion of the premises in which repairs were being made,” and that Wal-Mart would re-take possession of the work area after completion of the work.<sup>153</sup> For these reasons, the jury charge’s threshold control question was not error.<sup>154</sup> The court of appeals overruled the plaintiffs’ points of error and affirmed the judgment of the trial court.

#### 4. Restatement § 424 (Precautions required by statute or regulation)

This section of the Restatement (Second) of Torts creates a non-delegable duty that applies “whenever a statute or an administrative regulation imposes a duty upon one doing particular work to provide safeguards or precautions for the safety of others.”<sup>155</sup> Restatement § 424 states that

[o]ne who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.<sup>156</sup>

In *Mbank El Paso, NA v. Sanchez*, the bank hired an independent contractor to repossess Sanchez’s car.<sup>157</sup> The repossessioners towed the car at high speed with a resisting Sanchez locked inside, and then left the car with Sanchez still inside in a padlocked repossession yard patrolled by a loose Doberman pinscher. Sanchez sued MBank, which argued that it was not responsible for the breach of the peace because the repossessioners were independent contractors. The court of appeals and the Supreme Court disagreed, holding that § 9.503 of the Texas Business & Commerce Code imposed on MBank a duty of peaceful repossession, which Restatement § 424 barred the bank from delegating.<sup>158</sup>

#### 5. Restatement § 425 (Repair of chattel supplied or land held open to public as place of business)

An employer who retains an independent contractor to effect repairs on premises open to the public retains liability for harm caused by the contractor, as stated in Restatement § 425:

One who employs an independent contractor to maintain in safe condition land which he holds open to the entry of the public as his place of business, or a chattel which he supplies for others to use for his business purposes or which he leases for immediate use, is subject to the same liability for physical harm caused by the contractor’s negligent failure to maintain the land or chattel in reasonably safe condition, as though he had retained its maintenance

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<sup>153</sup> *Id.* at 479.

<sup>154</sup> *Id.* at 480.

<sup>155</sup> RESTATEMENT (SECOND) OF TORTS § 424 cmt. a (1965).

<sup>156</sup> RESTATEMENT (SECOND) OF TORTS § 424 (1965).

<sup>157</sup> 836 S.W.2d 151, 152 (Tex. 1992).

<sup>158</sup> *Id.* at 152–54 (citing Tex. Bus. & Comm. Code § 9-503 (granting right to repossess collateral “without judicial process if this can be done without breach of the peace.”) (emphasis in original)).

in his own hands.<sup>159</sup>

For example, a building owner retains liability for invitee injuries caused by a defective elevator serviced by an independent contractor.<sup>160</sup> In *Bond v. Otis Elevator Co.*, a free-falling elevator injured Bond, a passenger, who sued the building owner and the elevator maintenance company.<sup>161</sup> Citing Restatement § 425, the Supreme Court held that the building owner could not delegate its duty to maintain the elevator in proper order to an independent contractor, so as to relieve itself of responsibility in case of an accident.<sup>162</sup>

6. Restatement § 429 (Negligence in doing work which is accepted in reliance on the employer's doing the work himself)

An employer can be held liable for the work of a contractor when someone accepts the employer's services in reliance on the employer doing the work himself. This rule is codified in Restatement § 429, which states that

[o]ne who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.<sup>163</sup>

This situation typically arises when, unbeknownst to the employer, an independent contractor hires a subcontractor to perform the work. Significantly, the rule applies even when the injured person is a third-party who believes that the independent contractor performed the work.<sup>164</sup> For example, consider the case of a general contractor who hires a plumber, who in turn covertly outsources the work to another plumber. The first plumber remains liable for the negligence of the second plumber toward the general contractor and toward a third-party (*e.g.*, another independent contractor on the construction site) who believes the first plumber performed the work.

In *Byrd v. Skyline Equip. Co., Inc.*, a poorly wired hotel washing machine shocked and injured Byrd, a hotel employee.<sup>165</sup> Byrd sued Skyline, the contractor responsible for the machines. Skyline moved for summary judgment on the basis that Muniz, an independent contractor, maintained and serviced the machines. The trial court granted the motion but the court of appeals reversed and remanded. Citing Restatement § 429, the court held, *inter alia*, that the summary-judgment record did not “establish, as a matter of law, that the hotel did not believe Muniz was an employee,” nor “that any such belief was unreasonable.”<sup>166</sup> The court also noted that Comment *a* stated that it did not matter that the hotel, not Byrd, accepted the services:

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<sup>159</sup> RESTATEMENT (SECOND) OF TORTS § 425 (1965).

<sup>160</sup> *Id.* cmt. a, Illustration 1.

<sup>161</sup> 388 S.W.2d 681, 682 (Tex. 1965).

<sup>162</sup> *Id.* at 685–86 (*see also* *Moeller v. Fort Worth Capital Corp.*, 610 S.W.2d 857, 861 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (same)).

<sup>163</sup> RESTATEMENT (SECOND) OF TORTS § 429 (1965).

<sup>164</sup> *Id.* cmt. a.

<sup>165</sup> 792 S.W.2d 195, 196 (Tex. App.—Austin 1990, writ denied with *per curiam* opinion, *Skyline Equip. Co., Inc. v. Byrd*, 808 S.W.2d 463 (Tex. 1991)).

<sup>166</sup> *Id.* at 198.

the test was the hotel's reasonable belief that Skyline's servant performed the services.

#### **IV. EMPLOYER LIABILITY UNDER TEXAS CIVIL PRACTICE & REMEDIES CODE CHAPTER 95**

The Texas legislature codified Restatement § 409 in 1996 in Texas Civil Practice and Remedies Code Chapter 95, the Property Owner's Liability for Acts of Independent Contractors and Amount of Recovery statute. The codification was part of that year's "sweeping tort-reform package."<sup>167</sup> In enacting Chapter 95, the legislature recognized that real property owners often want to rely on third-party specialists or experts to perform certain work, including potentially dangerous work.<sup>168</sup> Chapter 95's premise is that an owner is not responsible for injuries sustained by these independent third-parties unless the owner exercised control and had actual knowledge of the underlying danger and failed to adequately warn.

##### **A. Statutory language**

Chapter 95's two key provisions, for the purpose of this article, are §§ 95.002 and 95.003, reproduced here for convenience. The statute applies only to owners of "real property primarily used for commercial or business purposes," and to claims for "damages caused by negligence."<sup>169</sup> Chapter 95, therefore, does not apply to residential property owners.

SEC. 95.002. APPLICABILITY. This chapter applies only to a claim:

- (1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and
- (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.<sup>170</sup>

SEC. 95.003. LIABILITY FOR ACTS OF INDEPENDENT CONTRACTORS. A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor 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:

- (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
- (2) 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.<sup>171</sup>

When Chapter 95 applies, it is the plaintiff's only means of recovery.<sup>172</sup> This last statement means that when § 95.002 applies, then the plaintiff must satisfy the conditions in

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<sup>167</sup> *Dyall*, 152 S.W.3d at 699; *see also Fisher*, 16 S.W.3d at 201–02 (reviewing statute's history).

<sup>168</sup> *Dyall*, 152 S.W.3d at 699.

<sup>169</sup> Tex. Civ. Prac. & Rem. Code § 95.001(1), (3).

<sup>170</sup> *Id.* § 95.002.

<sup>171</sup> *Id.* § 95.003.

<sup>172</sup> *Abutahoun*, 463 S.W.3d at 51.

§ 95.003 to recover.<sup>173</sup>

## B. Procedural aspects

Chapter 95 is not an affirmative defense, and a defendant does not waive its applicability by failing to plead it.<sup>174</sup> A defendant must merely establish Chapter 95’s applicability, which it can do at any time, including after trial.<sup>175</sup> The defendant does so by adducing evidence that conclusively establishes that it satisfies all of the § 95.002 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.”<sup>176</sup> 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.<sup>177</sup> The plaintiff must prove both control (§ 95.003(1)) and actual knowledge and failure to warn (§ 95.003(2)) “before liability will be imposed upon the property owner.”<sup>178</sup>

A Chapter 95 defendant’s motion for summary judgment typically combines a traditional motion to establish the § 95.002 elements, and either a traditional or no-evidence motion to disprove the § 95.003 elements.<sup>179</sup>

## C. Applicability

### 1. Chapter 95 also applies to claims based on the owner’s negligence

The Supreme Court rejected a plaintiff’s attempt to circumscribe Chapter 95 to claims based on the plaintiff’s negligence. In *Abutahoun v. Dow Chem. Co.*, the original plaintiff, Henderson, a contractor employee, installed asbestos-containing insulation on pipes in a Dow plant in the late 1960s.<sup>180</sup> Contemporaneously, Dow employees also worked nearby with insulation on the same pipe system and exposed Henderson to *their* asbestos dust. Henderson developed mesothelioma and died. He and his wife sued Dow, *inter alia*, for his exposure to the dust created by Dow’s employees under an ordinary negligence theory and secured a \$2.64 million judgment.<sup>181</sup>

Dow appealed, reiterating its trial-court argument that Chapter 95 applied to bar the

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<sup>173</sup> *Id.* at 51–52.

<sup>174</sup> *Gorman v. Ngo H. Meng*, 335 S.W.3d 797, 802–03 (Tex. App.—Dallas 2011, no pet.); *disagreed with on other grounds by First Texas Bank v. Carpenter*, 491 S.W.3d 729 (Tex. 2016); *see also Sanchez v. BP Prod. N. Am., Inc.*, No. 01-12-00054-CV, 2013 WL 3233218, at \*4 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.) (mem. op.) (“Sanchez’s first issue erroneously characterizes chapter 95 as an affirmative defense that BP carries the burden to prove.”).

<sup>175</sup> *Gorman*, 335 S.W.3d at 803 (“Whether chapter 95 applied to appellants’ claims against [defendant] could be raised at any time, including after trial.”).

<sup>176</sup> *Lopez*, 524 S.W.3d at 842–43.

<sup>177</sup> Tex. Civ. Prac. & Rem. Code § 95.003; *Sanchez*, 2013 WL 3233218 at \*4.

<sup>178</sup> *Dyall*, 152 S.W.3d at 699 n.15 (quoting *Kelly v. LIN Television of Tex., L.P.*, 27 S.W.3d 564, 567 (Tex. App.—Eastland 2000, pet. denied)).

<sup>179</sup> *See, e.g., Cox v. Air Liquide America, LP*, 498 S.W.3d 686, 689 and n.2 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (noting that a party “may not obtain a no-evidence summary judgment on an issue for which it bears the burden of proof” and construing Air Liquide’s § 95.002 motion as a traditional motion even though it was labeled as a no-evidence motion for summary judgment).

<sup>180</sup> 463 S.W.3d at 44.

<sup>181</sup> *Id.* at 45.

Hendersons' claims.<sup>182</sup> The Hendersons argued that Chapter 95 did not apply "because their claims against Dow were 'based solely upon the negligent activities of Dow employees, and not from injury arising from the condition or use of an improvement of real property by [Robert] Henderson.'"<sup>183</sup> Stated differently, the Hendersons argued that Chapter 95 only protected owners from claims that arose from an independent contractor's work.

The Supreme Court rejected the Henderson's argument and it affirmed the court of appeals' take-nothing judgment for Dow. The Supreme Court rested its analysis, *inter alia*, on the fact that the statute applied to negligence claims without distinguishing whose negligence caused the injury. The Court held that "[t]he Legislature did not distinguish between negligence claims based on contemporaneous activity or otherwise, and neither shall we."<sup>184</sup> This last language also makes clear that Chapter 95 applies to claims that arise from ordinary negligence and not just premises liability.

## 2. Chapter 95 does not apply to owner's employees

Chapter 95 does not protect the owner's employees.<sup>185</sup> In *Ineos USA, LLC v. Elmgren*, Elmgren, an independent contractor employee, suffered burns when gas leaked through a valve and exploded in a furnace header he was servicing in an Ineos plant. He sued Ineos and its employee Pavlovsky under various tort theories and, in the latter's case, on the basis that he was Ineos's "furnace maintenance team leader," and in control of the header and valves. The trial court granted Pavlovsky's motion for summary judgment based on a Chapter 95 defense but the Fourteenth Court of Appeals reversed, holding that nothing in Chapter 95 indicated that it applied to a property owner's employees.<sup>186</sup>

The Supreme Court agreed with the court of appeals that "Section 95.003 protects a 'property owner,' which section 95.001 defines as 'a person or entity that owns real property primarily used for commercial or business purposes.'" This language protected Ineos because it owned the plant, but not its employees like Pavlovsky because they did not. Additionally, Section 95.002 expressly lists employees as potential plaintiffs, but not as potential defendants.<sup>187</sup> The legislature's use of such distinguishing language implied that it intended different meanings, from which one can conclude that Chapter 95 did not apply to owners' employees.

The Supreme Court also rejected Pavlovsky's argument that Chapter 95 had to protect employees because otherwise employers could be held liable for their employees' conduct under the doctrine of *respondet superior*. According to Pavlovsky, a plaintiff could sue the property-owner employer for vicarious liability and circumvent the "actual knowledge" requirement. But, the Court held, Chapter 95's protection extended to "all claims for 'damages caused by negligence,' not just claims for 'damages caused by *the property owner's* negligence.'"<sup>188</sup>

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<sup>182</sup> *Id.* at 44–45.

<sup>183</sup> *Id.* at 45 (citing *Dow Chem. Co. v. Abutahoun*, 395 S.W.3d 335, 342 (Tex. App.—Dallas 2013)).

<sup>184</sup> *Id.* at 48, 53.

<sup>185</sup> *Ineos*, 505 S.W.3d at 564–66.

<sup>186</sup> *Id.* at 560.

<sup>187</sup> *Id.* at 563–64; Tex. Civ. Prac. & Rem. Code. § 95.002(1) (Chapter 95 applies to claims "against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or *an employee* of a contractor or subcontractor.") (emphasis added).

<sup>188</sup> *Ineos*, 505 S.W.3d at 565–66 (citing Tex. Civ. Prac. & Rem. Code § 95.001(1)) (emphasis in original).

Chapter 95’s protection, therefore, extended to vicarious liability claims that arose from an employee’s negligence—but not to claims against the employee.

Texas legislators introduced a bill in January 2017, to amend Chapter 95 to extend its protection to property owners’ employees.<sup>189</sup> The bill would have expanded the definition of a “Property Owner” in Chapter 95’s Section 95.001(3) to include “an employee of a person or entity described by this subdivision.”<sup>190</sup> The bill never left the House Committee before the end of the regular 2017 legislative session. *Ineos*, therefore, remains the rule for now regarding this important construction law issue.

#### **D. Who is a contractor and what work qualifies under Chapter 95**

Despite its apparent breadth, in light of *Abutahoun*’s holding, Chapter 95 does not protect business owners from liability for all the acts of independent contractors. It protects owners from claims “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.”<sup>191</sup> In *First Texas Bank v. Carpenter*, the Supreme Court held that Chapter 95 did not protect an owner from a contractor who merely inspected the improvement.<sup>192</sup>

*Carpenter*, First Texas Bank’s roof repair “go-to guy,” climbed on the bank’s roof with the bank’s ladder, fell, and crushed two vertebrae. His task was to show hail damage to an adjuster. The bank had not yet hired anyone for the actual repairs, even though *Carpenter* expected to get the work. *Carpenter* alleged that the ladder was defective and sued the bank, which invoked Chapter 95.<sup>193</sup>

The Supreme Court first rejected the Austin Court of Appeals’ holding that Chapter 95 did not apply because *Carpenter* was not a contractor absent an “‘actual’ contract to perform specific work for stated compensation.” The court gave the term “contractor” its ordinary meaning and held that “a contractor is simply someone who works on an improvement to real property.” The term’s linchpin is “the kind of work being done, not . . . whether an agreement for the work to be done is written, or formal, or detailed.” Moreover, Chapter 95 covers contractors’ “employees, subcontractors, and their subcontractors’ employees, none of whom would ordinarily have a contract with the owner.” *Carpenter*, therefore, was a contractor under Chapter 95 as a matter of law.<sup>194</sup>

But the court also rejected the bank’s claim that Chapter 95 applied, holding that Chapter 95 does not cover everyone injured while working on real property; it expressly covers only contractors, subcontractors, and their employees “who construct[ ], repair[ ], renovate[ ], or modif[y] an improvement to real property”. The statute does not apply to one injured apart from such work.<sup>195</sup>

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<sup>189</sup> See H.B. No. 1315 and S.B. No. 621 in Legislative Session 85(R) – 2017.

<sup>190</sup> *Id.* (“Section 95.001(3), Civil Practice and Remedies Code, is amended to read as follows: ‘Property owner’ means a person or entity that owns real property primarily used for commercial or business purposes. The term includes an employee of a person or entity described by this subdivision.”).

<sup>191</sup> Tex. Civ. Prac. & Rem. Code § 95.002(2) (emphases added); see also *id.* § 95.003 (similar language).

<sup>192</sup> 491 S.W.3d 729, 730, 733 (Tex. 2016).

<sup>193</sup> *Id.* at 730–31.

<sup>194</sup> *Id.* at 732.

<sup>195</sup> *Id.* (brackets in original; citation omitted).

The record did not show that the bank had retained Carpenter for the actual roof repairs. The inspection, therefore, was not the first step in an overall repair process, and the record did not show that Carpenter satisfied the aforementioned conditions. Had the bank retained Carpenter for the repairs, then the roof visit with the adjuster could have been the first step in repairing or modifying the roof, and Chapter 95 would have applied. For these reasons, the Supreme Court affirmed the court of appeals' decision that the trial court erred in granting summary judgment for the bank, and it remanded for further proceedings. Owners can expect to benefit from Chapter 95's protection, therefore, only when they hire contractors to construct, repair, renovate, or modify real property improvements. A mere inspection in possible preparation for these activities, as in *Carpenter*, does not qualify.

## **E. The scope of an improvement**

Chapter 95 applies to negligence claims that arise “from the failure to provide a *safe workplace*” and “from the condition or use of an *improvement* to real property.”<sup>196</sup> 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 (including the unit), or the entire building?<sup>197</sup> Chapter 95 applies if the HVAC unit electrocutes the employee, assuming other statutory provisions are met. But does it more broadly apply if the employee falls through the roof while walking around the unit, or if the employee suffers injury from a falling ceiling lamp while signing service call papers inside the building? And how should Chapter 95's “safe workplace” requirement factor in the scope of an improvement, if at all?

In analyzing the appellate court split, it is helpful to consider separately the cases that preceded and followed *Ineos*, which addressed the scope of a Chapter 95 “improvement.”<sup>198</sup> But as the following discussion shows, *Ineos* left unanswered important questions that will hopefully be resolved by cases that are pending appeal.

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

The First Court of Appeals first broadly construed the term “improvement” in *Fisher v. Lee and Chang P'ship*.<sup>199</sup> Fisher, a contractor employee, fell from a ladder and injured himself 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.”<sup>200</sup> Chapter 95 applied to the case because the ladder was part of the unsafe workplace that caused Fisher's

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<sup>196</sup> Tex. Civ. Prac. & Rem. Code §§ 95.003, 95.002(2) (emphases added).

<sup>197</sup> See, e.g., *Hernandez v. Brinker Int'l, Inc.*, 285 S.W.3d 152, 164–65 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (plurality op.) (Yates, J., dissenting) (“it is unclear whether the improvement contemplated [in Chapter 95] is the overall structure, part of the structure, or both.”).

<sup>198</sup> *Ineos*, 505 S.W.3d at 568 (“we have ‘broadly defined an ‘improvement’ to include ‘all additions to the freehold except for trade fixtures [that] can be removed without injury to the property.’”).

<sup>199</sup> 16 S.W.3d 198, 201 (Tex. App.—Houston [1st Dist.] 2003, pet. denied), *overruled by Ineos*, 505 S.W.3d at 567.

<sup>200</sup> *Id.*; but see *Ineos*, 505 S.W.3d at 567 (“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.”).

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.”<sup>201</sup> 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.*<sup>202</sup> 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.<sup>203</sup>

All but one of the Texas appellate courts that have considered the issue of the scope of a Chapter 95 improvement have 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.<sup>204</sup> The Amarillo Court of Appeals held that the circumstances of Clark’s injury came within Chapter 95’s ambit because the “injury arose from the failure to provide [Clark] a safe workplace.”<sup>205</sup> In *Gorman v. Ngo H. Meng*, a convenience store owner hired Gorman, an alleged electrician, to troubleshoot walk-in cooler doors that were shocking customers.<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup> 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.<sup>209</sup>

Significantly, in both *Fisher* and *Clark*, the courts expressly considered Chapter 95’s “safe workplace” requirement in their decisions. 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

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<sup>201</sup> *Id.* at 202.

<sup>202</sup> No. 01-12-00054-CV, 2013 WL 3233218, at \*5 (Tex. App.—Houston [1st Dist.] June 25, 2013, no pet.) (mem. op.).

<sup>203</sup> *Id.* at \*1; *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.”).

<sup>204</sup> No. 07-03-0291-CV, 2006 WL 229901, at \*\*1-2 (Tex. App.—Amarillo Jan. 31, 2006, no pet.) (mem. op.).

<sup>205</sup> *Id.* at \*2.

<sup>206</sup> 335 S.W.3d at 800-01; *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* because the “diagnosis the decedent was asked to make *could* have been the first step of the repair process, as one might easily expect, but it need not have been.”).

<sup>207</sup> *Id.* at 806.

<sup>208</sup> 410 S.W.3d 558, 559 (Tex. App.—Beaumont 2013, no pet.).

<sup>209</sup> *Id.* at 561.

portions taken out of context.”<sup>210</sup> The court considered both sections to hold that Chapter 95 applied because the ladder was an unsafe part of Fisher’s workplace.<sup>211</sup> The court in *Fisher* followed the rule of statutory construction that requires courts to “always consider a statute as a whole and attempt to harmonize its various provisions.”<sup>212</sup> 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 “safe workplace” language of § 95.003. The Amarillo Court of Appeals recently agreed. This court held in *Torres* that it “could not but factor the concept of ‘a safe workplace’ into the nature of the improvement.”<sup>213</sup>

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.<sup>214</sup> The court rejected plaintiffs’ argument that the ESD alone was the improvement.

Only the Fourteenth Court of Appeals in Houston rejected the *Fisher* line of cases.<sup>215</sup> In *Hernandez*, 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.<sup>216</sup>

Hernandez was an employee of a contractor hired to service a rooftop air conditioner who 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.”<sup>217</sup> Chapter 95 only applied, therefore, when the improvement that caused the injury was the same one the contractor was servicing. Chapter 95 did not apply in this case because Hernandez’s claim arose “from the condition of the roof,”

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<sup>210</sup> *Fisher*, 16 S.W.3d at 201 (citing *Hammond v. City of Dallas*, 712 S.W.2d 496, 498 (Tex. 1986)).

<sup>211</sup> 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 . . .”).

<sup>212</sup> *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”).

<sup>213</sup> 518 S.W.3d at 490.

<sup>214</sup> 878 F. Supp. 2d 744, 768–71 and n.20 (S.D. Tex. 2012) (“Mineral wells like the 969 platform are ‘improvements’ to real property as a matter of law. . . . Activities facilitating a well’s performance qualify as construction, renovation or modification under Chapter 95.”).

<sup>215</sup> *Hernandez*, 285 S.W.3d at 159.

<sup>216</sup> *Id.* at 160.

<sup>217</sup> *Id.* at 157 (emphases in original).

but he was there to repair the air conditioner, not the roof. 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."<sup>218</sup>

The *Hernandez* dissent noted that ambiguous statutory language, as encountered here with the use of term "improvement," authorized reliance on legislative history.<sup>219</sup> 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.<sup>220</sup>

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

The Supreme Court first opined on Chapter 95's term "improvement" in 2015 in *Abutahoun*.<sup>221</sup> 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.<sup>222</sup>

The Supreme Court recently elaborated on the scope of a Chapter 95 improvement in *Ineos*.<sup>223</sup> As noted above, a gas explosion burned Elmgren, the plaintiff, as he replaced 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.<sup>224</sup> 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' property," the court held that "the evidence conclusively establishe[d] that the entire system was a single 'improvement' under Chapter 95."<sup>225</sup>

The Supreme Court acknowledged in *Ineos* that Chapter 95 did not define the term "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.'"<sup>226</sup> 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 reminiscent of that adopted in *Clary*, where the court held that the entire building was the improvement.<sup>227</sup> 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

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<sup>218</sup> *Id.* at 159.

<sup>219</sup> *Id.* at 165 (Yates, J., dissenting).

<sup>220</sup> *See, e.g., Gorman*, 335 S.W.3d at 805 (noting that "*Hernandez* appears to be a departure from the existing case law of other intermediate courts of appeals.").

<sup>221</sup> 463 S.W.3d at 47 and n.4.

<sup>222</sup> *Id.*

<sup>223</sup> 505 S.W.3d at 567–69.

<sup>224</sup> *Id.* at 560.

<sup>225</sup> *Id.* at 568 (emphasis added).

<sup>226</sup> *Id.*; *see also Abutahoun*, 463 S.W.3d at 49 (same).

<sup>227</sup> *See Clary*, 410 S.W.3d at 561.

different improvement than the one the plaintiff was repairing.”<sup>228</sup> 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.”<sup>229</sup> This language, referring as it does to *Hernandez*, suggests that an improvement’s scope is not unlimited. This language also expressly rejects *Fisher*’s holding that the defective, injury-causing condition could be other than (albeit related to) the object of the contractor’s work.<sup>230</sup>

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 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.<sup>231</sup> 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*. Moreover, 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.<sup>232</sup> Ignoring the “safe workplace” issue leads to odd results. For example, if a roof is not an HVAC serviceman’s workplace, 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?<sup>233</sup>

### 3. 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.<sup>234</sup> 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.<sup>235</sup> In *Lopez*, Lopez fell down stairs on a drilling rig and injured himself.<sup>236</sup> 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

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<sup>228</sup> *Ineos*, 505 S.W.3d at 567.

<sup>229</sup> *Fisher*, 16 S.W.3d at 201–02.

<sup>230</sup> *Id.*

<sup>231</sup> The legislative history contemplates precisely this possibility. *Fisher*, 16 S.W.3d at 201–02.

<sup>232</sup> See footnote 208.

<sup>233</sup> *Fisher*, 16 S.W.3d at 201–02.

<sup>234</sup> 498 S.W.3d 686, 687–88 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

<sup>235</sup> *Id.* at 690–91.

<sup>236</sup> 524 S.W.3d at 840.

well and the rig were different improvements and declined to apply Chapter 95.<sup>237</sup> In *Rawson v. Oxea Corp.*, the plaintiff, a contracted electrician, was electrocuted in a transformer substation.<sup>238</sup> 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.<sup>239</sup> 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 arguably 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 recently did just that.<sup>240</sup> 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.<sup>241</sup> The trial court granted defendants' Chapter 95 motion for summary judgment. 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.<sup>242</sup> This approach, the court thought, comported itself with § 95.003's "safe workplace" language. Because a statute's terms must be considered "in harmony if possible," the court held, the "nature of the workplace," and its safety, "must be factored" into the scope of a Chapter 95 improvement.<sup>243</sup> 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."<sup>244</sup> In this case, the overhead 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.<sup>245</sup>

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.<sup>246</sup> 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

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<sup>237</sup> *Id.* at \*5,

<sup>238</sup> No. 01-15-01005-CV, 2016 WL 7671375, at \*3 (Tex. App.—Houston [1st Dist.] Dec. 22, 2016, pet. filed) (mem. op.).

<sup>239</sup> *Id.* at \*8.

<sup>240</sup> *Torres*, 518 S.W.3d at 490.

<sup>241</sup> *Id.* at 484. A bull float is a T-shape device with a long handle used to finish (*i.e.*, smooth) fresh cement surfaces.

<sup>242</sup> *Id.* at 487 (emphasis in original).

<sup>243</sup> *Id.* at 490.

<sup>244</sup> *Id.* at 489–90 (emphasis in original).

<sup>245</sup> *Id.* at 491.

<sup>246</sup> *Id.* at 488–89.

air conditioner and its physical and geographic surroundings. And, that is what *Ineos* and *Abutahoun* warned against.<sup>247</sup>

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.<sup>248</sup>

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

## F. Actual knowledge under Chapter 95

Chapter 95 sets a higher “knowledge” bar than does the common law by requiring the defendant to have actual knowledge of a danger, as opposed to knowledge or constructive knowledge.<sup>249</sup> The law is clear that “knowledge that an activity is potentially dangerous” is insufficient to satisfy Chapter 95’s knowledge requirement.<sup>250</sup> In *Ineos*, Elmgren alleged that a fact question prevented summary judgment for Ineos on the issue of actual knowledge.<sup>251</sup> Elmgren argued that the presence of explosive gases in the plant and a prior explosive incident gave Ineos “actual knowledge that the entire plant was explosive.” In rejecting Elmgren’s argument, the Supreme Court reiterated that

[a]ctual knowledge requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge[,] which can be established by facts or inferences that a dangerous condition could develop over time. Circumstantial evidence establishes actual knowledge only when it ‘either directly or by reasonable inference’ supports that conclusion.<sup>252</sup>

The Court held that the leak was the dangerous condition, not the presence of combustible gases in the plant, and the record showed no evidence that Ineos had knowledge of that danger.<sup>253</sup>

In an eerily similar case, *Delgado*, an independent contractor employee, was killed when leaking hydrocarbon vapors exploded as he welded a 24-inch pipe in Oiltanking’s tank farm.<sup>254</sup> A jury awarded *Delgado*’s estate \$21 million. During closing arguments, *Delgado*’s counsel argued that Oiltanking had actual knowledge of the danger because it had “just moved 72,000 barrels of product through” the pipe where the explosion occurred.<sup>255</sup> *Delgado* reiterated this argument on appeal but the court was unmoved. As in *Ineos*, knowledge of oil movements in the tank farm and of the required measures to do so safely was, at most, “knowledge of a potential danger” and not actual knowledge of the danger.<sup>256</sup> “To hold otherwise impermissibly would dilute the actual knowledge requirement by making it indistinguishable from the ‘should have

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<sup>247</sup> *Id.* at 489 (footnote omitted).

<sup>248</sup> *Id.* n.1.

<sup>249</sup> Tex. Civ. Prac. & Rem. Code § 95.003(2).

<sup>250</sup> *Oiltanking Houston, L.P. v. Delgado*, 502 S.W.3d 202, 212 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (citing *Dyall*, 152 S.W.3d at 709 n.18).

<sup>251</sup> *Ineos*, 505 S.W.3d at 568.

<sup>252</sup> *Id.* (citing *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414–15 (Tex.2008) (*per curiam*)).

<sup>253</sup> *Id.* at 569.

<sup>254</sup> *Delgado*, 502 S.W.3d at 205.

<sup>255</sup> *Id.* at 215.

<sup>256</sup> *Id.* at 217.

known' standard for constructive knowledge."<sup>257</sup> Citing the recently released Supreme Court *Ineos* decision, the Fourteenth Court of Appeals held that the "supreme court's rejection of actual knowledge of a generalized hazard foreclose[d]" Delgado's claims against Oiltanking and it rendered a take-nothing judgment.<sup>258</sup>

The Fourteenth Court of Appeals held that the defendant had actual knowledge of a danger in *Pasadena Ref. Sys. Inc. v. McCraven*.<sup>259</sup> McCraven suffered second and third degree burns when he fell in boiling hot waste water in a refinery coker unit. The water was being drained from the coker drum vessel via its evacuation channel or sluiceway. The sluiceway was uncovered at the time of the accident because it was to be hydroblasted for cleaning. The sluiceway was also overflowing because of pump problems, which caused the refinery to evacuate the area. McCraven prevailed at trial and the refinery appealed arguing, *inter alia*, that the evidence was insufficient to show that it had actual knowledge of the danger under Chapter 95. The court of appeals disagreed.<sup>260</sup> It reasoned that the refinery's employees admitted they knew about the uncovered sluiceway, knew that the water was scalding hot, and knew that the sluiceway overflowed because "the pumps were not keeping up."<sup>261</sup> A refinery employee had given permission to McCraven to remove a truck from the flooded area, which led to the accident. The court concluded "that the evidence [wa]s legally and factually sufficient to support the jury's finding that [the refinery] had actual knowledge of the danger or condition resulting in resulting in [(sic)] McCraven's injury," and it overruled the refinery's issue.<sup>262</sup>

## V. JURY CHARGES AND RELATED ISSUES

As noted in Section II-B, allowing the jury to retire with the wrong charge can ultimately be fatal to the plaintiff's case. The elements of a premises liability negligence claim are not the same as those of ordinary negligence. The ordinary negligence pattern jury charge asks whether "the negligence, if any, of those named below proximately cause the [injury] [occurrence] in question?"<sup>263</sup> Negligence grounded in premises liability requires "the elements of premises liability as instructions or definitions," the absence of which "causes the rendition of an improper judgment."<sup>264</sup> Elements of a claim not submitted to the jury are waived.<sup>265</sup>

The Supreme Court held in *Corbin v. Safeway Stores, Inc.* that a premises liability plaintiff must prove:

- (1) that [the defendant] had actual or constructive knowledge of some condition on the premises;
- (2) that the condition posed an unreasonable risk of harm to [the plaintiff];
- (3) that [the defendant] did not exercise reasonable care to reduce or to

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<sup>257</sup> *Id.* (citing *Elmgren v. Ineos USA, LLC*, 431 S.W.3d 657, 665–66 (Tex. App.—Houston [14th Dist.] 2014), *aff'd* in part and *rev'd* in part, 505 S.W.3d 555, 564–66 (Tex. 2016)).

<sup>258</sup> *Id.* at 217–18.

<sup>259</sup> Nos. 14–10–00837–CV, 14–10–00860–CV, 2012 WL 1693697, at \*\*6–7 (Tex. App.—Houston [14th Dist.] May 15, 2012, *pet. dism'd*) (mem. op.).

<sup>260</sup> *Id.* at \*6.

<sup>261</sup> *Id.* at \*7.

<sup>262</sup> *Id.*

<sup>263</sup> Tex. PJC 4.1 (2016). The definitions of "negligence" and "proximate cause," *inter alia*, accompany the negligence question. Tex. PJC 2.1, 2.4 (2016).

<sup>264</sup> *Levine*, 2017 WL 2839842, at \*3.

<sup>265</sup> *Id.* at \*11.

eliminate the risk; and  
(4) that [the defendant's] failure to use such care proximately caused [the plaintiff's] personal injuries.<sup>266</sup>

These “*Corbin* factors” must accompany the negligence question in the jury charge in a premises liability claim either as instructions or definitions.<sup>267</sup> A jury question that does include these factors “cannot support a recovery in a premises defect case.”<sup>268</sup> These factors are embedded in Pattern Jury Charge 66.4 (2016) (“Premises Liability—Plaintiff Is Invitee”). Note that a control question (PJC 66.3 (2016)) must precede the premises liability question if control is a question of fact.<sup>269</sup> Pattern Jury Charge 66.14 (2016) applies to premises liability claims under Chapter 95.

Importantly, a defendant need not object to the charge when the jury retires. The plaintiff bears the burden of ensuring the correctness of the jury charge, and the defendant has no duty to object to a charge that omits an independent theory of recovery.<sup>270</sup> The plaintiff waives a claim not expressed in the jury charge. Requiring the defendant to object before the jury retires would be tantamount to forcing it to abandon “a winning hand.” A defendant, therefore, has no obligation to fix the plaintiff’s error if that error works to the defendant’s advantage. The correct time for the defendant to raise an objection under these circumstances is in a motion for judgment notwithstanding the verdict.<sup>271</sup> Of course, the defendant may not invite the jury charge error and then argue the error on appeal.<sup>272</sup>

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<sup>266</sup> *Id.* at \*\*4–5 (citing *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983)).

<sup>267</sup> See PJC 66.4 (2016) (“Premises Liability—Plaintiff Is Invitee”).

<sup>268</sup> *Levine*, 2017 WL 2839842, at \*5 (citing *Olivo*, 952 S.W.2d at 529).

<sup>269</sup> *Olivo*, 952 S.W.2d at 529 (“To recover against a general contractor for a premises defect, the injured plaintiff must establish both the general contractor’s right to control the defect-producing work and a breach of that duty according to the traditional premises defect elements.”).

<sup>270</sup> *Levine*, 2017 WL 2839842, at \*11.

<sup>271</sup> *Id.* at \*12.

<sup>272</sup> *Id.*