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Construction law practice tip: Employer liability update

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A recent decision by the San Antonio Court of Appeals, *Arredondo v. Techserv Consulting and Training, Ltd.*, touches on two important issues that frequently arise in employer liability cases.[1] AEP Texas Central Company, an electric utility, hired T&D Solutions, LLC to perform transmission line services. T&D removed a power pole standing on AEP's easement on Arredondo's property and allegedly neglected to fill the hole. Arredondo fell in the hole, injured herself, and sued AEP, T&D, and a third party. The trial court dismissed Arredondo's negligence claims and she appealed.[2]

In its first issue, the court decided whether Arredondo's claim against T&D stood in ordinary negligence, as she alleged, or in premises liability, as T&D argued in its defense. These competing negligence claims are not always easy to distinguish.[3] The court held that the claim stood in ordinary negligence. It reasoned that

> [i]t has long been recognized that ordinary negligence principles apply to an allegation that a party not in possession or control of the premises acted negligently in creating a dangerous property condition.

In this case, T&D created the dangerous condition when it removed the pole and allegedly failed to fill its hole, and had surrendered control of the premises (the easement) when Arredondo fell and injured herself.[4] The court reversed the trial court's summary judgment as to Arredondo's ordinary negligence claim against T&D.[5] The court compared this case to the Texas Supreme Court's *Strakos v. Gehring* decision.[6] In that case, the Supreme Court held liable under negligence a contractor who left a hole unfilled and hidden by vegetation after relocating a fence. Strakos fell in the hole and injured himself after the contractor finished its work and no longer controlled the premises.

On another issue, the court of appeals reversed the trial court's grant of summary judgment for AEP as to Arredondo's negligence, negligence per se, and gross negligence claims.[7] AEP argued, *inter alia*, that it exercised no control over T&D and, therefore, "owed no legal duty to Arredondo."[8] The court disagreed. It held that AEP retained the contractual right to control T&D's work through the following provisions of their agreement:

> Contractor [T&D] shall have an authorized representative at the Site to whom Owner [AEP] may give instructions at all times when Work is being performed.
>
> When work is performed on private property . . . Contractor shall use its best efforts to arrange for the completion of Work to be with the least inconvenience practicable to such owner/tenants. Work performance on private property shall be done as expeditiously as possible and the premises restored immediately.

As the Texas Supreme Court has held elsewhere, it is the right to control the contractor's work that gives rise to a duty on the part of the owner, and the failure to exercise actual control will not exonerate the owner.[9] In this case, AEP controlled T&D's work because it retained the right to be on site to dictate T&D's means and methods, and T&D was not "entirely free" to perform the work in its own way. Moreover, the contract required T&D to restore the premises immediately, which T&D would have failed to do when it allegedly left the hole unfilled. AEP's failure to enforce this provision formed the nexus between its conduct and Arredondo's injury, which is required to impose liability on the controlling party. Concluding that questions of fact remained, the court reversed the trial court's grant of summary judgment in favor of AEP.

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[1] No. 04-17-00609-CV, 2018 WL 4608271, --- S.W.3d --- (Tex. App.—San Antonio Sept. 26, 2018, no pet. h.) (not released for publication), *motion for reh'g filed*. For a comprehensive review of employer liability, *see* Pierre Grosdidier, *Employer Liability for Acts of an Independent Contractor*, Texas Construction Law Journal, Winter 2017, Vol. 14, No. 1, pp. 7–34.
[2] *Id*. at ** 1–2.
[3] *See, e.g., Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529–30 (Tex. 1997) (issuing a take nothing judgment against plaintiff after jury retired with an ordinary negligence charge in a premises liability case); *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 467 (Tex. 2017) (same).
[4] *Id*. at ** 4–5.
[5] The court of appeals affirmed the trial court's dismissal of Arredondo's negligence per se and gross negligence claims.
[6] *Id*. at *4 (citing *Strakos v. Gehring*, 360 S.W.2d 787, 790–94, 803 (Tex. 1962)).
[7] *Id*. at *10.
[8] *Id*. at *7.
[9] *Id*. at *9 (citing *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002)).