

Construction Law Practice Tip: The Texas Property Owner's Liability Statute Still Does Not Protect Owner's Employees

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The Property Owner's Liability for Acts of Independent Contractors and Amount of Recovery statute (Tex. Civ. Prac. & Rem. Code Chapter 95) protects a real property owner from liability

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, . . . unless:

the owner controlled the work and had actual knowledge of the danger and failed to warn.¹ But Chapter 95 does not protect the owner's employees.² *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 564?66 (Tex. 2016). Texas legislators introduced a bill in January 2017, to amend Chapter 95 to extend its protection to property owners' employees. The bill never left the House Committee before the end of the regular 2017 legislative session. *Ineos*, therefore, remains the law for now regarding this important construction law issue.

In *Ineos*, 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.

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.³ 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 respondeat 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.'"⁴ Chapter 95's protection, therefore, extended to vicarious liability claims that arose from an employee's negligence—but not to claims against the employee.

¹ Tex. Civ. Prac. & Rem. Code § 95.003.

² See H.B. No. 1315 and S.B. No. 621 in Legislative Session 85(R) – 2017. 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.”

³ *Id.* § 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).

⁴ *Ineos*, 505 S.W.3d at 565-66 (*citing* Tex. Civ. Prac. & Rem. Code § 95.001(1)) (emphasis in original).