Construction Law Practice Tip: Two Employer Liability Cases to Watch

September 18, 2017

PRACTICES Construction Litigation

Owners and general contractors in control of the premises (together, "Employers") are generally not liable for injuries suffered by independent contractors' employees.[1] These employees are presumed to be in control of their own safety, assuming that the Employer provided a safe workplace and disclosed hidden dangers.[2] A well-known exception to this no-duty rule exists under the common law when the Employer exercises control over the independent contractor's work.[3] A Texas statutory exception ("Chapter 95") also shields premises owners from liability if the injury "arises from the condition or use of an improvement to real property," and "from the failure to provide a safe workplace," unless the owner controlled the work and had actual knowledge of the danger and "failed to adequately warn."[4] Two cases testing these exceptions are making their way to the Texas Supreme Court.

In *Joeris Gen. Contractors, Ltd. v. Cumpian*, the San Antonio Court of Appeals held 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.[5] The plaintiff prevailed at trial but the court of appeals reversed and rendered a take-nothing judgment—but with a strong dissent from one of the justices. The decision and dissent suggest that some ambiguity remains as to what constitutes control by an employer. The court 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.

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. 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?[6] In *Clary v. ExxonMobil Corp*., the Beaumont Court of Appeals held that an entire building was the improvement even though the plaintiff worked only on outside junction boxes.[7] Conversely, in *Hernandez v. Brinker Int'l, Inc*., the plaintiff was a rooftop air conditioner serviceman injured when the roof collapsed under his feet.[8] The Fourteenth Court of Appeals held that Chapter 95 did not apply because the serviceman was to repair the air conditioner and his claim arose "from the condition of the roof." The roof and the air conditioner were "separate improvements to real property."

The Amarillo Court of Appeals recently followed the majority position in *Torres v. Chauncey Mansell & Mueller Supply Co., Inc*. Torres was electrocuted when the 16-foot-long handle of the bull float he was using to finish a concrete parking lot struck an overhead power line. The trial court granted defendant's Chapter 95 motion for summary judgment. The court of appeals agreed, holding, *inter alia*, that the scope of the improvement included the power line because the injury arose from the failure to provide a "safe workplace."[9] But this case is also not over. The court of appeals overruled

Torres's motion for rehearing and, on June 26, 2017, Torres filed a petition for review in the Supreme Court. Appellee's response is due by October 5, 2017.

Both *Joeris* and *Torres* are important cases to watch for construction law practitioners.

---

[1] For background discussions regarding this article, *see* Grosdidier, Pierre, *Questioning General Contractor Liability in Texas*, originally published in *Law360*, March 27, 2017, and *Defining The Scope Of Property Improvements in Texas*, originally published in *Law360*, May 19, 2017.

[2] For more thorough discussions of the rationale for this rule, *see* RESTATEMENT (SECOND) OF TORTS § 409, cmt. b (1965); *Dyall v. Simpson Pasadena Paper Co*., 152 S.W.3d 688, 698-99 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (*en banc*)).

[3] *Redinger v. Living, Inc*., 689 S.W.2d 415, 418 (Tex. 1985) (adopting RESTATEMENT (SECOND) OF TORTS § 414 (1965)).

[4] Tex. Civ. Prac. & Rem. Code Chap. 95.

[5] No. 04–15–00481–CV, 2016 WL 7407634, --- S.W.3d --- (Tex. App.—San Antonio Dec. 21, 2016, no pet. h.) (not released for publication). The factual recitation relies, in part, on that in Chief Justice Marion's concurring opinion.

[6] *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.").

[7] 410 S.W.3d 558, 559–61 (Tex. App.—Beaumont 2013, no pet.).

[8] 285 S.W.3d at 164-65.

[9] 518 S.W.3d 481, 489–90 (Tex. App.—Amarillo, 2017, pet. filed) (holding that "we could not but factor the concept of 'a safe workplace' into the nature of the improvement.").