

## Pierre Grosdidier for Law360: Questioning General Contractor Liability In Texas

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In a decision that drew an argument-rich dissent, the San Antonio Court of Appeals held that a general contractor (GC) did not owe a duty of care to a subcontractor's employee injured by his co-employee even though the GC 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. *Joeris General Contractors Ltd. v. Cumpian*. The case is important. It exposes the difficulty of determining whether a GC has incurred a duty of care by exercising control over its subcontractors. Then-Chief Justice Thomas Phillips noted over 16 years ago that "[o]ur focus on the degree of the general contractor's 'retained control' has failed to provide either consistent or equitable results, and I believe that a thorough reconsideration of this area is in order." *Joeris* and its dissent suggest that "this area" remains unsettled.

*Joeris*, a GC, 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. The court of appeals agreed and reversed the judgment. Cumpian recently filed a motion for rehearing en banc after the court of appeals denied his motion for rehearing. The case seems slated for Texas Supreme Court review.

The basic principles applied in *Joeris* are well-established. A GC must use reasonable care to ensure that its work space is safe, but otherwise has no duty to ensure that independent contractors perform their work safely. Under these conditions, a GC incurs no liability for the harm that results from the acts or omissions of its independent contractors. A well-known exception arises when the GC retains or exercises some control over the subcontractor's work. In that case, the GC must exercise reasonable care in its control to protect interested parties from injury. The measure of the GC's duty is commensurate with the extent of its control.

In *Tovar v. Amarillo Oil Co.*, for example, the contract between the GC and the subcontractor mandated the use of a blowout preventer. The subcontractor configured the blowout preventer in violation of specific written instructions. The GC knew of the deviation, contemplated intervening as was its right under the contract, but did nothing. *Tovar* suffered severe injury when the equipment failed. The Texas Supreme Court held that when the GC "exercised some control over a subcontractor's work, the [GC] may be liable for failure to exercise reasonable care in supervising the subcontractor's activity." The Supreme Court reversed the court of appeals, which had held that the GC owed *Tovar* no duty. Likewise, in *Lee Lewis*, the Supreme Court held a GC liable for the death of a subcontractor's employee (Harrison) who, untethered to an independent lifeline, fell 10 stories from a bosun's chair. The GC had inspected and approved the subcontractor's fall protection equipment, but did not object when some employees used a bosun's chair without a separate lifeline. 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.

A GC who promulgates and enforces safety rules on its worksite does not assume an unqualified duty of care to ensure that its subcontractors' employees work safely. Instead, the GC "assumes a narrow duty of care" that its rules "are reasonably safe and do not increase the probability or severity of injury." Under this reasoning, the Supreme Court held, a GC who knows its subcontractor routinely violates safety policies might owe a duty to intervene or cancel the contract. In any event, for the duty to arise, the control must relate to injury-causing activity.

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