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Contractor Liability

Safety mishaps occur on almost every construction site, but what happens when a company is liable for their subcontractor's safety negligence? A recent decision issued by the Texas Court of Appeals interpreted when control exercised by a general contractor on a job site is sufficient to subject it to liability for a subcontractor's negligence. Authors Greg Dillard and Emily Rochy from Katten Muchin Rosenman LLP examine where a company's liability for a subcontractor lies under Texas law and how a now pending motion for rehearing to the court could have far-reaching implications beyond the case at hand.

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Texas Court: When Are You Liable for a Subcontractor's Safety Negligence?

BY GREG DILLARD AND EMILY ROCHY

A recent decision issued by the Texas Court of Appeals in San Antonio interpreted when the control exercised by a general contractor on a job site is sufficient to subject it to liability for the negligent acts of a subcontractor's employee (*Joeris General Contractors, Ltd. v. Cumpian*, Tex. App., 12/21/16, no pet. h). But a now-pending motion for rehearing to the court, as

well as a vigorous dissenting opinion by Justice Luz Elena D. Chapa, shows that this issue is all but settled.

Joeris, a general contractor hired to construct a middle school, subcontracted the steel work to Leal Welding & Erection. Joeris had previously engaged Leal on other jobs. On this job, two Leal workers, Rolando Cumpian and Armando Gonzalez, were installing the last of several steel staircase frames. Although they had used a crane to move and install the staircase frames, the crane was not on the job site that day. Gonzalez, therefore, used a forklift to install the final staircase, attempting to secure the staircase frame to the forklift by using nylon straps. This unsecure method failed, causing the staircase frame to fall and land on Cumpian's foot, crushing it and eventually requiring amputation of all of the toes on that foot. At trial, and again on appeal, Cumpian alleged that Joeris was liable for Leal's and Gonzalez's negligence. A jury assessed against Joeris compensatory and punitive damages exceeding \$5 million.

Notably, this was *not* Gonzalez's first safety mishap while working at Leal, nor his first on a Joeris job site. He was previously removed from job sites by Joeris for failing to abide by Joeris's safety protocols. And on this particular job, Joeris's safety director had verbally agreed with Leal's owner that Leal would not hire Gon-

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zalez to perform any work. Gonzalez, nevertheless, was hired by Leal and allowed to work by Joeris's job superintendent.

Narrow Exceptions Under Texas law, general contractors are required to keep the premises safe, but otherwise have no duty to ensure that an independent contractor safely performs its work (*Redinger v. Living, Inc.*, Tex., 689 S.W. 2d 415, 418, 1985). Requiring a subcontractor to follow its safety rules also creates no duty for a general contractor, beyond ensuring that these rules are reasonably safe. There are narrow exceptions to the no-duty rule, however, that may arise in two situations: (1) if the general contractor is aware an independent contractor routinely ignores applicable safety guidelines or company regulations; or (2) if the general contractor gives on-site orders or directs the manner of performance in the injury-causing activity that is contrary to the safety regulations. At the heart of both of these exceptions is the question of whether the general contractor retains control over the subcontractor.

Cumpian's primary arguments to the court of appeals were that: (1) Joeris was aware that Gonzalez routinely ignored safety guidelines, but it did nothing to correct the "hazard" (e.g., monitoring Gonzalez or removing him from the site); and (2) Joeris gave on-site orders relating to installation of the staircase that created a duty to Cumpian. The court of appeals held that the evidence did not support applying either narrow exception to the no-duty rule.

First, the court held that Texas law requires *actual* knowledge of an independent contractor's safety violations on the current job, and those safety violations must be related to the specific injury-causing activity. Here, Joeris's knowledge that Gonzalez had previously disregarded safety policies on other job sites amounted merely to constructive knowledge. Indeed, there was no evidence that Joeris had knowledge of "any safety violations while Gonzalez was on *this* job or that any employee of Joeris knew Gonzalez and Cumpian were attempting to secure the staircase to the forklift using only nylon straps."

As to Cumpian's second argument, he argued that a Joeris employee instructed another Leal employee to finish a different staircase, leaving Gonzalez and Cumpian to work alone. These instructions, Cumpian argued, conferred a duty on Joeris. Again, the court rejected Cumpian's argument, noting that to create a duty, Joeris had to have directed an action that caused the injury. General or supervisory control was not enough: "Every general contractor has to 'tell' the subcontractor what to do, in general terms, and may do so without subjecting itself to liability." Here, the appellate court held, Joeris did not instruct Cumpian and Gonzalez how to move or secure the staircase frame to the

forklift or otherwise direct Cumpian's activity in this situation.

Contractor Liability In a strong dissent, Justice Chapa took issue with the majority's opinion. Among her positions, she urged that Joeris created a duty when it had actual knowledge that Leal deviated from an agreed-to "safety measure": barring Gonzalez from working on the job site. Justice Chapa further argued that Joeris retained contractual and actual control over this safety measure in that it could remove Gonzalez. The dissent views the decision to bar Gonzalez from the job site as a safety rule or company regulation. The majority rejected this interpretation, noting that the decision to bar Gonzalez was instead a possible corrective measure to a safety hazard. Likewise, the concurring opinion rejected Justice Chapa's interpretation, noting that it would not expand the Texas Supreme Court's decisions so far as to consider a safety director's decision not to allow Gonzalez to work on a project as equivalent to a "standard company policy" related to safety.

But Justice Chapa's opinion includes an even greater effort to expand contractor liability. Rebutting the majority's dicta that mere general or supervisory control is not enough, she opined that Joeris retained control over all safety aspects of Leal's work on-site by assigning safety supervisors to monitor safety on-site and by retaining contractual control to remove Leal employees who fail to comply with safety policies. This interpretation would undoubtedly expand the duty on general contractors to those situations in which the general contractor provides mere safety-related oversight.

Cumpian has since requested the court of appeals rehear the appeal *en banc*. It is unclear whether the court of appeals will rehear these issues or if, ultimately, the Texas Supreme Court could decide to consider this case. A decision by either court, however, could have far-reaching implications for contractors in Texas, deciding between either (1) maintaining some control over work-site safety on the one hand, which could be construed as actual knowledge of all kinds of safety violations, and (2) passing off safety responsibility completely to a subcontractor.

Should either court side with Justice Chapa, the safety-conscious practice of providing general safety supervision would open up a contracting party to liability, even where the specific hazards posed by a subcontractor's actions were unknown. This scenario could apply in various contracting relationships extending beyond construction. Indeed, there are similar contracting relationships in numerous industries, from manufacturing to chemical plants and terminals to upstream oil and gas.

Texas law may be reaching a tipping point between choosing safety or avoiding liability. Where the chips will fall remains to be seen.