DETERMINING "RIGHT OF CONTROL" IN CONSTRUCTION ACCIDENT LITIGATION

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I. Introduction

The purpose of this paper is to outline the tort actions that are typically brought in the construction context. Specifically, the issue of control over the independent contractor as the primary factor in determining the scope of liability of owners and/or general contractors.

II. Independent Contractors vs. Employees

Most construction accident cases deal with an injury to an employee of a subcontractor. Most subcontractors are independent contractors. According to Texas law the subcontractor is protected from suit by the function of his workers' compensation coverage. Therefore, the most targeted source for liability suits is the owner or general contractor in charge of the construction site. The general contractor or owner is generally not liable for the potential negligence of independent contractors and their employees when there is no control of the independent contractors' work. However, Texas does allow for liability of the general contractor in the presence of either: (1) the right to control and/or (2) the actual exercise of control of the work of the independent contractor. This paper seeks to illustrate the factual ramifications of this easily understood but typically difficult concept to apply.

III. Types of Control

An owner or general contractor does not owe a duty to ensure that independent contractors or their employees perform their work in a safe manner. *See Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791 (Tex. 2006); *Shell Oil Co. v. Khan*, 138, S.W.3d 288, 293 (Tex. 2004); *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988, S.W.2d 223, 225-226 (Tex. 1999); *Clayton W. Williams, Jr., Inc. v. Olivio*, 952 S.W.2d 523, 527 (Tex. 1997); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985). However, there are two ways in which a owner or general contractor can demonstrate adequate control to assume the duty to ensure that the independent contractor is performing their work in a safe manner. The Supreme Court has held on several occasions that there are *only* two ways for the plaintiff to establish control on the part of the owner or general contractor:

First, by evidence of a contractual agreement that explicitly assigns the premises owner a right to control;

Second, in the absence of a contractual agreement, by evidence that the premises owner actually exercised control over the manner in which the independent contractor's work was performed.

Dow Chemical Co. v. Bright, 89 S.W.3d 602, 606 (Tex. 2002); *see Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999); *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 208, 804 (Tex. 1999); *Clayton W. Williams Jr., Inc. v. Olivio*, 952 S.W.2d 523, 528-530 (Tex. 1997); *see also Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999); *Ellwood Texas Forge Corp. v. Jones*, S.W.3d 693, 700 (Tex.App.—Houston[14th Dist.] 2007, pet. denied).

Prior to detailing the elements of the control issue, the plaintiff has to demonstrate that his claim falls within two theories of liability:

A. Premises Liability

Generally, a landowner, and by extension general contractor, is liable to employees of an independent contractor only for claims arising from a preexisting defect of the premises rather than negligence on the part of the independent contractor's work. *See Khan*, 138 S.W.3d at 291; *Dow Chem.*, 89 S.W.3d at 606; *Chapa*, 11 S.W.3d at 156; *Redinger*, 689 S.W.2d at 417. "With respect to existing defects, an owner or occupier has a duty to inspect the premises and warn of concealed hazards the owner knows or should have known about." *Khan*, 138 S.W.3d at 295. "This duty to keep the premises in a safe condition may subject the general contractor to direct liability

for negligence in two situations: (1) those arising from a premises defect, (2) those arising from an activity or instrumentality." *Redinger*, 689 S.W.2d at 417.

Recently, the Texas Supreme Court made clear that the plaintiff has to establish more than mere control or knowledge of the defect, but also that the preexisting danger on the premises was concealed and not open and obvious to the independent contractor. *See General Electric Co. v. Moritz*, 257 S.W.3d 211, 215 (Tex. 2008). With respect to open and obvious dangers, the Court held that it is reasonable for an owner to expect an independent contractor "to take into account any open and obvious premises' defects in deciding how the work should be done, what equipment to use in doing it, and whether its workers need any warnings." *Id.* at 215-216. Further the Court held that whether a danger is open and obvious is a legal determination for the reasonable person and it is immaterial whether the actual plaintiff was aware of the danger. *See id.* at 216-217.[1]

B. Negligent Activity

A negligent activity applies when the plaintiff is injured by or as a contemporaneous result of a negligent activity on the premises, rather than where the premises itself is unsafe. *See In re Tex. Dep't of Transp.*, 218 S.W.3d 74, 77 (Tex. 2007); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). Courts treat negligent activity claims as simple negligence claims. Therefore, once the plaintiff establishes the general contractor's control (the foundation of the duty to the plaintiff), the plaintiff must then prove all the other elements of a negligence case: breach of the duty, proximate case and damages. *See Redinger*, 689 S.W.2d at 418. Generally, the plaintiff will try to demonstrate that despite the defendant's control over the work of the plaintiff, the general contractor failed to exercise reasonable care to supervise the subcontractor's activity. *See id.* at 418.

C. Elements of Control

A plaintiff's burden of proof to establish control on the part of an owner or occupier is no different under either a premises theory of liability or a negligent activity theory. Therefore, in the absence of express contractual agreement retaining control, the owner or occupier has to actually exercise control over the manner in which the plaintiff's work was performed. *Dow Chemical Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002); *see Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999); *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 208, 804 (Tex. 1999); *Clayton W. Williams Jr., Inc. v. Olivio*, 952 S.W.2d 523, 528-530 (Tex. 1997); *see also Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999). It would not be enough to suggest or even demonstrate that the owner or occupier *could* have exercised some right to control absent express contractual language.

Most importantly, the exercised control on the part of the owner or occupier has to relate to the activity or defect that caused the injury. *See Moritz*, 257 S.W.3d at 214 (citing *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 294 (Tex. 2004). In fact, the courts have held that "a nexus must be shown between the general contractor's retained control and the condition or activity that caused the injury." *Belteton v. Desco Steel Erectors and Concrete, Inc.*, 222 S.W.3d 600, 605 (Tex.App.—Houston[14th Dist.] 2007, no pet.); *see Lee Lewis Contr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001). That is, a defendant's duty "is commensurate with the control it retains over the independent contractor's work." *Harrison*, 70 S.W.3d at 783 (citing *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999); *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 355 (Tex. 1998)); *Redinger*, 689 S.W.2d at 418.

[1] In *Moritz*, the plaintiff was an independent contractor who delivered GE parts. He was injured when he fell off of a ramp while picking up parts at a GE warehouse. *Moritz* had backed his truck up on a ramp that had no guard rails. He was attempting to secure the parts to the back of his truck with a bungee cord when the cord broke while he was leaning back to stretch it and he fell and injured himself.

1. *Factual Examples of Inadequate Control for Liability*

In order to fully illustrate the legal application of the above principles the following are examples of owner or occupier conduct that did not meet the threshold of actual exercise of control or contractual control as discussed above.

1. Retention of or exercise of the right to stop or start work. *Fifth Club, Inc. v. Ramierez*, 196 S.W.3d 788, 791(Tex. 2006);

2. Retention of or exercise of the right to inspect or receive reports about the work of an independent contractor. *See id.*;

3. Retention of or exercise of the right to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. *See id.*;

4. placing a safety employee on the work site to observe the work of the independent contractors. *Chapa*, 11 S.W.3d at 157;

5. placing a safety representative on the work site who could have stopped the plaintiff from working had the representative know of the safety hazard on its premises. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 608 (Tex. 2002);

6. creating a safe work permit system, giving the owner the general right to preclude independent contractor's work from beginning in the first place. *See id.*;

7. exercising general control over "safety matters" on the work site, where the safety regulations or procedures do not actually cause or contribute to the plaintiff's injury. *See id.*;

8. exercising the general right to order the work stopped or resumed, inspect the premises or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. *See Mendez*, 967 S.W.2d at 356;

9. maintaining the right to forbid work unless the contractor complies with safety regulations. *See Ellwood*, 214 S.W.3d at 701-702;

10. providing training materials to an independent contractor who fails to use them. *See Khan*, 138 S.W.3d at 295.[2]

Generally, the courts have held that either the retained or exercised actual control has to be "such a retention of the right of supervision that the contractor is not entirely free to do the work in his own way." *Chapa*, 11 S.W.3d at 157. In *Moritz* the Texas Supreme Court held that the control must extend to the "operative details" of the work of the independent contractor. *Moritz*, 257 S.W. 3d at 214. The Houston Court of Appeals held that the control must be "over the manner in which the work is performed." *Dyall v. Simpson*, 152 S.W.3d 688, 699 (Tex.App.—Houston[14th Dist.] 2004, pet. denied). Therefore, the control cannot be over the general

[2] In dicta the Court suggested that there could be a potential cause of action if the general contractor was aware that the instruction provided were not being followed and approved of the independent contractors' failure to follow the prescribed safety instructions. However, again the plaintiff would have to demonstrate the it was the failure to follow the reasonable safety instructions caused the injury.

work site, such as the ability to shut down facilities, or control entry and exit. *See id*. Rather, the control required goes to direction and regulation over the very manner and nature of the independent contractor's work. *See id.*

2. *Retained Contractual Control*

In the presence of contractual language regarding the performance of the independent contractor's work, the Courts are more apt to try to find the elements of control. If within the contract, the owner occupier retains specific control over the safety and security of the premises, rather than the general right to control over operations, the Court has alluded to the potential for the owner to have assumed the duty to take reasonable care to protect the independent contractor from foreseeable safety hazards. *See Mendez*, 967 S.W.2d at 357.

The Texas Supreme Court in interpreting an oil company contact held that an oil company had contractually retained control to protect an independent contractor employee when it failed to suspend operations. *See Tovar v. Amarillo Oid Co.*, 692 S.W.2d 469, 470 (Tex. 1985). The oil company was aware that the drilling contractor was violating specific safety provisions in the drilling contract. *See id.* As a result of the contractual language the Court held that the oil company was under a duty to suspend operations because it had retained that level of control within the contract. *See id.* Note here that the contract provision specifically mentioned the safety provision and that the company specifically retained the right to suspend operations. The Court then drew the conclusion that since the right to suspend was within the contract and the safety provision was in the contract, the oil company had assumed the duty to enforce the contracted safety provisions, if it knew those provisions were not being followed.

Further, even in the absence of a contract if "an employer who gives on-site orders or provides detailed instructions on the means or methods to carry out a work order owes the independent contractor employee a duty of reasonable care to protect him from work related hazards." *See Mendez*, 967 S.W.3d at 357. Additionally, the Texas Supreme Court has held that a *mere possibility* of control (in the absence of a contractual agreement) is not enough to create a duty on the part of the contractor or owner. *See Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 224-225, 226 (Tex. 1999). Specifically the Court held:

> "Here, no contractual agreement assigning control rights existed between Coastal and Campbell, and no Coastal employees were directing work on the job site when the accident occurred or at any other time. Instead, the Lawrences showed only that Campbell employees would have taken directions from Coastal if any and been offered. A **possibility of control is not evidence of a 'right to control'** actually retained or exercised."

Id. at 226 (emphasis added).

IV. Chapter 95: Heightened Test for the Defense of Property Owners

Chapter 95 is an express protection for property owners excluding liability from the injuries of independent contractors and their employees while working on improvements to the premises. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 90.001-.004 (Vernon 2005). Specifically, the statute provides that a property owner is not liable for the personal injury, death, or property damage to a contractor or his employees who construct, repair, renovate, or modify an improvement to real property, unless (1) the property owner exercises or retains some control over the manner in which the work is performed, and (2) the property owner had *actual knowledge* of the danger or condition resulting in the injury and failed to adequately warn. *See id.* at § 95.003 (emphasis added); *Dyall*, 152 S.W.3d at 699.

Under Section 95.003 the plaintiff bears the burden of proof to show (1) control, (2) actual knowledge of the danger, and (3) failure to warn of the danger. *See Dyall v. Simpson*, 152 S.W.3d 688, 699 (Tex. App.—Houston[14th

Dist.] 2004, pet. denied). These are necessary and independent conditions to the imposition of liability. *See id.* The court in *Dyall* held that the control must be "control over the manner in which the work is performed." *Id.* at 701 (quoting §95.003). Therefore, the control cannot be over the general work site, such as the ability to shut down facilities, or control entry and exit. *See id*. Rather, the control required goes to direction and regulation over the very manner and nature of the independent contractor's work. *See id.* Even the presence of safety regulations imposed by the owner does not establish the actual control over an independent contractor necessary for imposing liability under the statute. *See id.* at 702.

Section 95.001(3) defines property owner as "a person or entity that owns real property primarily used for commercial or business purposes." Although the courts have not directly addressed the applicability of whether the statute applies to owners acting as their own general contractors, a couple of cases tend to demonstrate that it would apply. *See Lopez v. Homebuilding Co.*, No.01-04-00095-CV, 2005 WL 1606544, at *2 & n.3 (Tex.App.—Houston[1st Dist.] July 7, 2005, no pet.) (memo. opinion) (stating in dicta that 95 would have applied if it had been raised by the parties). Outside of the construction law context one court held that a plaintiff in a DTPA claim was not a consumer because they were in the business of constructing and selling of homes. *See Ratliff v. Trenholm*, 596 S.W.2d 645, 649 (Tex.App.—Tyler 1980, writ ref'd n.r.e.). In the *Ratliff* case the court held that the plaintiff would not be considered a consumer but rather a merchant, thereby disallowing any DTPA claims. *See id.* In the construction law context the duel role of owner and general contractor is prevalent. Therefore, one could argue that the general contractor status of the owner should not deprive the owner of the additional statutory protection.

The burden on the plaintiff to establish control on the part of the owner is no greater under the statute than under the common law discussed above. Therefore, the only element not already addressed is the knowledge of the owner. Section 95.003(2) places a greater burden on the plaintiff to show *actual knowledge* on the part of the owner rather than the common law test of *should have known* of the condition causing the injury. *See Phillips v. Dow Chem Co.*, 186 S.W.3d 121, 133, 135 (Tex.App.—Houston[1st Dist.] 2005, no pet.); *Dyall*, 152 S.W.3d at 699. Therefore, the owner can not merely be aware of the potential for a danger or even a negligent failure to inspect. *See Phillips*, 186 S.W.3d at 135; *Dyall*, 152 S.W.3d at 709.

Chapter 95 places the enhanced burden on the Plaintiff to demonstrate actual knowledge of the danger that caused the injury. Although the plaintiff has to demonstrate actual control either through retained contract or exercised control, this requirement is no different than outside the Chapter 95 context.