

Cooper & Scully, P.C.
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Construction Symposium

Construction Accident
Claims

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Topics

- Contractor control over subcontractors and employees
- Property owner control over the premises and work
- Nonsubscriber claims
- Construction injury damage models

General Contractor Control: What does “Control” Involve?

- Construction-jobsite worker files a personal injury lawsuit against the General Contractor for negligence and/or premises liability.
 - Common Examples: Sub-Contractor’s employee slips and falls on a construction site; a Sub-Contractor’s employee is injured due to improper use of equipment (i.e., a nail-gun); or a Sub-Contractor’s employee is injured due to a newly-constructed structure failing or falling onto the employee.
- Specifically, Control is a measure used in lawsuits to hold General Contractors liable for injuries sustained on the jobsite by subcontractors and/or employees of subcontractors.

Traditional Approach to General Contractor Liability

- General Rule for Negligence in the Construction Sphere: A General Contractor has no duty to ensure that the independent contractor (or its employee(s)) safely performs its work.
- However, there is an exception that gives rise to such a duty being owed by the General Contractor:
 - General Contractor retains some “control” over the manner in which the independent contractor (or its employee(s)) performs the work that causes the damage/injury.
- Generally, “Control” can mean one of two things:
 - 1. Actual Control; or
 - 2. Contractual Right to Control.

Actual Control Before 2021

- Prior to the Texas Supreme Court case, *JLB Builders, LLC v. Hernandez*, Actual Control was clarified and narrowed by the following:
 - General contractors must have some latitude to tell subcontractors what to do in general without becoming subject to liability. *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999);
 - General right to order work started and stopped or the right to direct when and where work is done ≠ creation of a Duty of Care. *AEP Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 295 (Tex. 2020);
 - Exercise of control over the “timing or sequence” of particular injury-causing work = duty of care. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 609 (Tex. 2002);

Actual Control Before 2021

- General contractor's Duty arises ONLY = firsthand observation of safety risk (+) direct ordering of injured subcontractor's employee to perform task (+) injury caused when performing task due to same safety hazard. *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985);
- Promulgated safety requirements/procedures = ONLY a narrow duty arises for general contractor to ensure the probability and severity of injury is not unreasonably increased. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 358 (Tex. 1998).

Texas Supreme Court's Clarification of Actual "Control" in 2021

JLB Builders, LLC v. Hernandez, 622 S.W.3d 860 (2021)

- The GC hired a subcontractor to erect a concrete tower. The plaintiff, an employee of the subcontractor, suffered injuries when the concrete tower detached and fell on his legs.
- Employee filed a lawsuit against the general contractor alleging negligence and gross negligence, arguing that the defendant had contractual and actual control over the subcontractor's work and thus owed a duty of care.
- Plaintiff's Lawyers: GC's daily safety inspections, supervisors on site, awareness of risks of the work, and control over a daily schedule of the work to be completed.
- Texas Supreme Court: NOT enough

JLB Builders, LLC v. Hernandez

- 1. The General Contractor's control MUST be over the performance of the specific work that CAUSED the injury. (Expands on *Bright* and *Chapa* rules):
 - A mere supervisory role over the day-to-day process is not enough.
 - “Appearance” of direction provided by supervisor is not evidence of actual control.
- 2. Safety measures and the implementation of such is encouraged, not liability-creating and/or exposing for general contractors. (Expands on *Chapa* rules):
 - Narrow duty imposed; to find liability would dissuade general contractors from implementing safety measures.

JLB Builders, LLC v. Hernandez

- 3. Duty arises when the general contractor:
 - (1) knows of unsafe condition on the job site,
 - (2) and specifically approves or requires performance of work to be completed despite that specific unsafe condition.
 - Mere awareness of potential risks does not give rise to a duty.
 - “Could’ve watched” ≠ firsthand observance of safety hazard.
- 4. Contractual Control – duty arises to ensure safe performance if general contractor retains the right to such control.
 - Provisions must be clear.
 - Requiring compliance with safety procedures ≠ duty, so long as procedures do not unreasonably make an injury more probable and more severe for workers.
 - General supervisor authority over scheduling ≠ control.

Property Owner Liability Under CPRC Ch. 95

A property owner is not liable 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, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:

- (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
- (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Property Owner Liability

- Ch. 95 only applies to a claim:
 - (1) 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; **and**
 - (2) That arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.
- “Property Owner” means a person or entity that owns real property primarily used for commercial or business purposes.
 - NOT property owner’s employees or agents

Property Owner Liability

- Chapter 95 applies to “all negligence claims that arise from either a premises defect [a condition] or the negligent activity [a use] of a property owner or its employees . . .”
 - *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42 (Tex. 2015)
- When Ch. 95 applies, it grants property owner additional protection by requiring P to prove the owner had actual knowledge of the danger or condition, so the owner is not liable based merely on what it reasonably should have known.
- If Ch. 95 applies, it is P’s sole means of recovery:
 - If requirements cannot be met, common law applies
 - If requirements are met, burden shifts to P to establish control, actual knowledge, and inadequate warning

Nonsubscriber Employer Liability

- Texas remains one of the only states that permits employers to opt out of the workers' compensation system.
- In exchange for avoiding the cost and regulatory burdens of workers' compensation coverage, these employers expose themselves to significantly increased liability in the event of a workplace injury.
- Most notably, nonsubscribing employers forfeit several common-law defenses, including contributory negligence, assumption of the risk, and the negligence of fellow employees.
- The exclusive remedy provision of the Workers' Compensation Act shields subscribing employers from civil lawsuits by injured employees.
- Consequently, injured employees may file direct negligence lawsuits against nonsubscriber employers, a remedy otherwise barred if the employer carried workers' comp insurance.

Nonsubscriber Employer Liability

- What defenses **are** available to a nonsubscriber?
- Sole proximate cause
 - While the defense of contributory negligence is unavailable to a nonsubscriber, the employer can assert that the employee was solely responsible for his/her injuries.
- Pre-injury waiver agreements
- Superseding cause
- Lack of duty for open and obvious or known hazards
- Responsible Third Parties
 - *In re East Texas Medical Center Athens*, 712 S.W.3d 88 (Tex. 2025)
 - Can a nonsubscriber employer avail itself of the RTP procedure under CPRC Ch. 33?
 - Employee of East Texas Medical Center Athens (ETMC) brought a negligence lawsuit against the hospital, a nonsubscriber
 - ETMC attempted to designate an EMT as a RTP
 - SC stated that claims against nonsubscribers are not claims for benefits, but common law tort claims subject to standard principles
 - Held that ETMC may use RTP procedure to assign fault to 3rd parties

Construction Injury Damage Models

Letters of Protection / Deferred Payment Agreements

- Plaintiffs' attorneys sometimes provide "letters of protection" to their clients' healthcare providers, in lieu of any immediate payment, to assure future payment from the proceeds of any recovery from the third party who allegedly caused the injuries.

Life Care Plans

- "The Life Care Plan is a dynamic document based upon published standards of practice, comprehensive assessment, data analysis and research, which provides an organized, concise plan for current and future needs with associated cost for individuals who have experienced catastrophic injury or have chronic health care needs. "
 - The International Academy of Life Care Planners

Letters of Protection

- Gives healthcare provider a financial stake in the outcome
- Frequently results in inflated medical billing in an effort to build a large enough damage model to reimburse provider while still compensating plaintiff and his/her attorney
- Lays the foundation for a material, adverse interest with the attorney's personal injury client

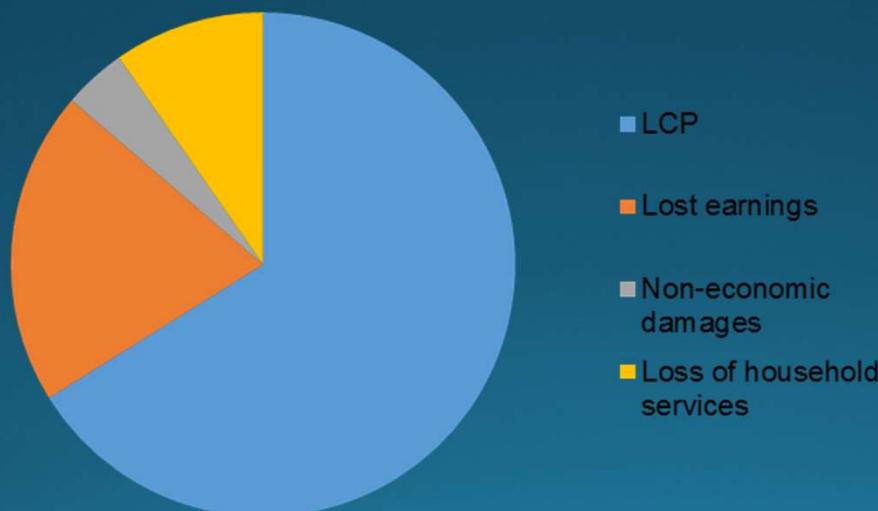
Letters of Protection

Defense strategy

- Discover and attack the amounts billed for the medical treatment in all contexts
 - *In re K & L Auto Crushers, LLC*, 627 S.W.3d 239, 254 (Tex. 2021)
 - Use of LOP providers opens the door to discovery of provider's rates
 - Any weight the providers' non-party status may have on the burden issue is substantially offset by the fact that the "letters of protection" give the providers a direct financial stake in the resolution of [plaintiff's] claims. Unlike most non-parties, the providers who treated [plaintiff] pursuant to letters of protection invested themselves in the outcome of this case and the amount of damages recovered, and because of that, they forfeit a degree of the protection our rules afford disinterested third parties who are subjected to third-party discovery
- Attack the credibility of providers by establishing their financial interest in the litigation
- Retain experts to assess the necessity of care and alternative treatment options

Life Care Plans

- A life care plan (“LCP”) is a standard tool in cases involving a plaintiff with catastrophic injuries
- It serves an important role in establishing a plaintiff’s economic damages
- In many cases, the value of the LCP makes up the majority of the plaintiff’s damage model



Life Care Plans

Defense strategy:

- Retain a physician expert to drive the value of the life care plan down through an analysis of:
 - Necessity of care
 - Cost
 - Actual care and treatment history
 - Alternative treatment options
 - Utilization of free services
 - Life Expectancy

Life Care Plans

- Use written discovery to identify current treaters and obtain medical and billing records
- Use depositions to examine the plaintiff(s) and family members to understand:
 - Plaintiff's condition
 - Plaintiff's limitations
 - Plaintiff's capabilities
 - LCP components being used
 - LCP components that are needed
 - LCP components that have been rejected by plaintiff
 - LCP components that will be of limited to no value.
- Use depositions to examine the plaintiff's treating physician regarding the plaintiff's condition, limitations, prognosis and needs

Life Care Plans

- Analyze the medical, counseling and therapy records to determine:
 - Plaintiff's condition,
 - Plaintiff's limitations
 - Plaintiff's prognosis
 - Pre-existing or subsequent injuries or conditions that require LCP components
 - LCP components being used (current physicians, medications, treatments, etc).
 - LCP components that are needed or recommended
 - LCP components that have been deemed to be unnecessary or recognized as ineffective
 - Which providers, if any, have communicated with Plaintiff's life care planner and/or reviewed the plan
- Analyze the medical bills to understand frequency and pricing

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