

Cooper & Scully, P.C. 17th Annual Construction Symposium



GENERAL CONTRACTORS AND UPDATES TO THE ART OF “CONTROL” FOR CONSTRUCTION-JOBSITE INJURIES

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What does “Control” Involve?



- Construction-jobsite injuries to workers, where those workers file a civil suit 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 falling onto him/her.
- Specifically, Control is a measure used in law suits / litigation in order to hold General Contractors liable for injuries sustained on the jobsite by independent contractors and/or employees of said independent contractors.

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.

“Control” Generally



- Generally speaking, “Control” can mean one of two things:
 - 1. Actual Control; or
 - 2. Contractual Right to Control.
- The “control” must extend to the “means, methods, or details of a subcontractor’s employee’s work” in order for a negligence claim to be successful.

Actual Control Up and Until May of 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 Up and Until May of 2021, Cont.



- 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); and
- 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 May of 2021



- Plaintiff's Lawyers are always finding new ways to claim actual control was retained by the General Contractor.
- JLB Builders, LLC v. Hernandez, 622 S.W.3d 860 (2021): A slip and fall claim by a subcontractor's employee for injuries suffered against the General Contractor.
 - Plaintiff's Lawyers: General Contractor'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, Continued



- Supreme Court's Clarification of Actual "Control" Liability:
- 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, Continued



- 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.
 - Rule in *Redinger*: 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.
 - "Could've watched" ≠ firsthand observance of safety hazard.
 - ✦ Expands on *Bright* and *Redinger* rules.

JLB Builders, LLC v. Hernandez, Continued



- 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 \neq duty, so long as procedures do not unreasonably make an injury more probable and more severe for workers.
 - General supervisor authority over scheduling \neq control.

Conclusion



- No added hoops, and no shortcuts provided.
- Thus, General Contractors can breathe a little bit easier and conduct their work with a little more confidence here in Texas.
- Thank you,
- Zachry Toups