Texas Supreme Court Update

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QUESTIONS?

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Chapter 95, Civil Practice & Remedies Code

Los Compadres v. Valdez

- Jobsite accident at condos being built on S. Padre Island, owned by Los Compadres
- Workers building concrete pilings to support building; power line owned by AEP ran across back of property
- Subcontractor (Sub) and general contractor (GC) told workers to "work around" power line; but, while workers were inserting a 25-foot piece of rebar, rebar contacted the power line and injured the workers
- Jury held Los Compadres, AEP, and Sub caused accident

- On appeal, owner raised several Ch. 95 issues but one involved the disconnect between injured employees' work and the cause of the injuries
- Ch. 95 applies when injury arises from the condition or use of an "improvement" that the contractor or subcontractor "constructs, repairs, renovates, or modifies."
- First issue: how broadly to define "improvement"
- "Improvement" cannot include the entire workplace (location where improvement being built)
- "Condition" is an "intentional or inadvertent state of being"

- TSC framed issue: If a dangerous "condition," by reason of its proximity to an "improvement," creates a probability of harm to one who "constructs, repairs, renovates, or modifies" the improvement in an ordinary manner, it constitutes a "condition" of the improvement itself
- Thus, because the power line was in close proximity to the improvement on which plaintiffs were working (pilings), the power line created a dangerous condition of the improvement itself
- Ch. 95 applied, and Plaintiffs had to prove owner had actual knowledge of the dangerous condition
- TSC held evidence conclusive on actual knowledge

- Another issue – whether Los Compadres relieved of duty to warn because power line "condition" was open and obvious as matter of law
- TSC held the presence of the power line was open and obvious, and there is inherent danger working around electricity
- But, based on evidence, fact that power line was energized and, thus, dangerous, was not open and obvious as a matter of law to workers
- Neither worker knew line was energized, and Sub's owner told them power was "cut off"
- Thus, Los Compadres still liable for failing to warn

BARFIELD V. SANDRIDGE ENERGY

- Chapter 95 opinion from El Paso Court of Appeals in Mar. 2020 – Texas Supreme Court has granted review (issued before *Los Compadres*)
- Oral argument – Jan. 11, 2022
- Electrical company, OTI, installing power lines to support wells drilled on SandRidge's property.
- Barfield, while working on lines as an OTI employee, suffered electric shock and severe injuries, leading to amputations
- Sued SandRidge and project supervisor, Saenz

- Asserted claim under Chapter 95, and parties agreed SandRidge owned the relevant property on which improvements being built
- Under Chapter 95, to impose liability on property owner for failing to provide a safe workplace, plaintiff must prove owner exercised some control over the work and had actual knowledge of the dangerous condition but failed to warn
- Trial court granted summary judgment to SandRidge and Saenz; Barfield challenged only SandRidge ruling on appeal
- El Paso CA held Barfield's evidence raised a fact issue as to "some control"

- However, more interesting issue for TSC may be whether Barfield's knowledge that the line was energized negated SandRidge's duty to warn him of a dangerous condition – open and obvious rule
- CPRC 95.003 says owner not liable unless: "owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn."
- Under common law, premises owner does not have a duty to warn an invitee of danger that is open and obvious
- Rule extended to employees by TSC in *Austin v. Kroger*

- El Paso CA held the plain language of 95.003:
  - Does not address employee's knowledge of dangerous condition and
  - Does not abrogate an owner's duty to warn of a dangerous condition even if the employee already has knowledge of it
- Even though training materials and safety policies required certain meetings, procedures, and equipment when doing "hot work," Saenz did not give any warnings or require compliance
- Held, fact question existed as to whether SandRidge gave Barfield adequate warning
- Dissenting opinion – would hold no duty to warn if danger open and obvious

Arbitration Agreements

AEROTEK, INC. V. BOYD

- Contractors sued staffing company, Aerotek, alleging discrimination and retaliation after job dismissal
- Aerotek sought to enforce mutual arbitration agreement (MAA)
- Contractors argued they never electronically signed the MAA during the application process – but only evidence was their declarations
- Trial court denied motion to compel arbitration and Court of Appeals affirmed – insufficient evidence to show that electronic application process was "failsafe"
- TSC held: mere denial of signing MAA does not suffice to avoid agreement enforcement – party contesting agreement has burden to show how electronic signature appeared on form

- For MAAs to be valid, contractors must have consented to them
- Contractors admitted they completed the electronic application process – only denied they electronically signed the MAA
- Aerotek provided undisputed tangible and testimonial evidence that forms could be signed by the applicant only during application process, with no ability to alter forms after submission
- Each form must be signed in a specific order before proceeding to the next form and prior to final application submission
- Each applicant creates own unique identifier, user ID, password, and security questions, all unknown to Aerotek; system timestamps all activities

- Contractors complained: if MAAs enforced, it would establish irrebuttable presumption of validity of electronic signatures on corporate records. TSC said not true – contractors were free to discredit Aerotek's evidence
- Contractors had burden to present evidence showing they did not place electronic signatures on MAAs – mere denial does not meet burden
- TSC held: reasonable people could conclude hiring applications could not have been completed without contractors themselves signing the MAAs
- Denial of arbitration reversed
- Dissent: contractors' sworn testimony was enough to prove they did not sign to justify trial court's factual findings, which TSC should accept

Premises Liability

Catholic Diocese of El Paso v. Porter

- Church festival volunteers working third-party booth injured when booth caught fire
- Families of teenaged volunteers brought premises liability action against diocese
- Jury verdict in favor of diocese and propane company (jury found volunteers = licensees)
- Ct. App. reversed with respect to diocese
- Issue: were volunteers working in a third-party booth at church festival invitees of the church or licensees?
- TSC held volunteers were licensees

- Invitee – duty to exercise reasonable care to protect against danger from condition on land that creates unreasonable risk of harm of which owner/occupier knew or would have discovered by exercising reasonable care
- Licensee – owner/occupier must use ordinary care either to warn of dangerous condition or make condition reasonably safe when owner is aware of condition and licensee is not
- El Paso 4-H Leaders Assoc. rented booth at festival to sell funnel cakes, snow cones, etc.
- All equipment owned by 4-H, including propane tank that started the fire
- 4-H paid church to rent the booth, but church received none of 4-H's sales

- Invitee – enters property with owner's knowledge and for mutual benefit of both
- "Mutual benefit" means shared business or economic interest – must be at least potential pecuniary profit to the owner
- Licensee – enters property by permission, express or implied, and not by express or implied invitation
- TSC held: volunteers' presence in 4-H booth did not provide church with any benefit, only 4-H for sales
- Church had no business or economic interest shared with 4-H's booth
- 4-H volunteers injured inside booth, which was off limits to festival-goers (who were invitees of church)

- TSC: volunteers were licensees as matter of law
- Absent unusual circumstances, a person performing volunteer work for a third party benefits the third party rather than the property owner, and, therefore, is not the owner's invitee
- When a visitor does not economically benefit the landowner, law imposes on the owner the lesser duty owed to licensees – trial court correct
- Even if church had controlled 4-H booth, church had no knowledge of any danger posed by propane tank
- Without knowledge, families could not recover from church under premises liability theory

Certified Questions from Fifth Circuit

Certified Questions

- Rule 58 of the Texas Rules of Appellate Procedure governs:
- "The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent."
- TSC recently accepted two cases with certified questions from the Fifth Circuit

Maxim Crane v. Zurich Am. Ins. Co.

- Maxim leased crane to subcontractor (Berkel); subcontractor's employee, while operating crane, caused boom to fall, crushing GC's project supervisor's leg. Maxim sued for declaratory judgment to recover as additional insured under sub's CGL policy, after Maxim reimbursed Zurich for judgment and legal costs paid in suit brought by general contractor's project supervisor.
- Appeal turns on single question of statutory interpretation—whether employee exception under Texas Anti-Indemnity Act (TAIA) precludes Maxim from coverage as an additional insured.

- TAIA generally voids indemnity coverage in construction contracts, with certain exceptions.
- Same anti-indemnity provisions apply to additional insured coverage.
- Maxim claims it falls within a TAIA exception concerning employees. Exception states the bar against indemnity coverage does not apply:
  - To a contract provision that requires a person to indemnify … against a claim for the bodily injury or death of an *employee* of the indemnitor, its agent, or its subcontractor of any tier.
- "Simply put, additional insured coverage is enforceable, and not void, if the claim runs against the policyholder's employee."

- Key to resolving issue is meaning of "employee."
- In underlying suit between Lee and sub (Berkel), TSC held Lee and Berkel were "co-employees" for purposes of Tex. Worker's Comp Act.
- But TAIA does not define "employee."
- No Texas cases construing TAIA or employee exception.
- Maxim argues similar analysis to TWCA should apply to TAIA and that, if Berkel and Lee were co-employees, the employee exception would apply and Maxim could claim additional insured coverage.

- Zurich argues, under traditional definition of employee, an employee of GC cannot also be employee of sub. Thus, employee exception does not apply.
- District Court sided with Zurich.
- Fifth Circuit certified this question to TSC:
  - Whether the employee exception to the TAIA allows additional insured coverage when an injured worker brings a personal injury claim against the additional insured (indemnitee), and the worker and the indemnitee are deemed "co-employees" of the indemnitor for purposes of the TWCA.
- TSC accepted the certification; oral argument on Dec. 2, 2021.

POLL:

- Which team wins the NFL's AFC Championship in 2022?
- A. Tennessee Titans
- B. Cincinnati Bengals
- C. Kansas City Chiefs
- D. Buffalo Bills

BITCO GEN'L INS. CO. V. MONROE GUAR. INS. CO.

- Question certified to Texas Supreme Court: whether "*Northfield* exception" to eight-corners rule (adopted only by Fifth Circuit) applies in Texas to allow consideration of extrinsic evidence when:
  - it is initially impossible to discern whether coverage is potentially implicated, and
  - the extrinsic evidence goes solely to a fundamental issue of coverage which does not overlap with the merits of or engage the truth or falsity of any facts alleged in the underlying case.
- Question accepted, TSC heard oral argument Sept. 2021

- TSC recognized a limited exception to eight-corners rule in *Loya Ins. v. Avalos* in 2020, but only for:
  - conclusive evidence that groundless, false, or fraudulent claims against the insured have been manipulated by the insured's own hands, to secure a defense/coverage that would not otherwise exist.
- Monroe wants the full-blown *Northfield* exception to apply, as it claims undisputed evidence shows the date of the incident (well blowout) occurred before its policy incepted.

Section 18.001 Affidavits

In re Allstate Indemnity Co.

- Insured brought action against Allstate to recover UIM benefits
- TC struck counteraffidavit of nurse challenging reasonableness of medical charges – Ct. App. denied petition for writ of mandamus
- Issue: did counteraffidavit comply with CPRC 18.001?
- TSC: nurse's counteraffidavit satisfied requirements of section 18.001 – abuse of discretion to hold otherwise and prevent Allstate from presenting proof regarding reasonableness
- 18.001 allows for affidavits concerning cost and necessity of services

- 18.001(f): counteraffidavit must be made by qualified person to testify in contravention of all or part of matters contained in initial affidavit – affidavit must also give reasonable notice of basis on which party intends at trial to controvert claim
- Counteraffidavit provided reasonable notice because it itemized each charge controverted as unreasonable and bases for challenge explained in detail
- TC: nurse not qualified to controvert reasonableness because not in same field of medicine as the medical providers
- TSC: nurse had 21 years experience in health care, 12 years reviewing medical bills, and extensive knowledge of medical documentation and billing practices

- *Gunn v. McCoy* – TSC held medical providers are in best position to determine necessity of expenses, but testimony about necessity is not limited to medical providers (court held a subrogation agent who relied on databases of medical expenses could testify to medical expense reasonableness and necessity)
- Nurse likewise qualified based on her extensive experience with medical billing
- 18.001(f) does not require that opinion expressed in counteraffidavit meet admissibility standards for expert testimony (*Daubert* standards)
- TC erred by striking counteraffidavit and excluding Allstate's evidence of unreasonableness of medical expenses

- 18.001(b): unless controverting affidavit served, affidavit that amount charged for service was reasonable is sufficient evidence to support finding of reasonableness
- 18.001(b) does not suggest uncontroverted affidavit is *conclusive* evidence on reasonableness (simply *sufficient* evidence to go to the jury)
- Decision to file initial affidavits *may* relieve party of burden to adduce expert trial testimony as to reasonableness and necessity; but, failure to serve compliant counteraffidavit has *no* impact on defense ability to challenge reasonableness at trial
- 18.001 does not suggest that party's failure to comply with 18.001(f) means party lacked intent to controvert initial affidavit, nor is it a waiver of intent to controvert

The End – Thank You!