

HERMES SARGENT BATES

A LIMITED LIABILITY PARTNERSHIP

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Points of Interest:

- A recent decision by the Texas Supreme Court expands the understanding of the “right to control” test, and widens the potential for general contractor liability to the employees of a subcontractor.

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GENERAL CONTRACTORS’ POTENTIAL LIABILITY EXPANDED BY TEXAS SUPREME COURT

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FACTUAL BACKGROUND AND DAMAGE AWARD

A recent opinion by the Texas Supreme Court could mean increased litigation for general contractors in Texas’ construction arena. The case of *Lee Lewis Construction, Inc. v. Harrison* involved a wrongful death action brought by the family of a glass installer employee who fell to his death during an installation project. Prior to the fall, the employee was seen sitting on a bosun’s chair (a wooden board suspended from the roof by a rope) without using an independent lifeline. The family alleged negligence and gross negligence against the glass installer subcontractor who employed the worker, as well as against the general contractor for the construction project. The glass installer subcontractor settled the case before trial. The jury returned a verdict against the general contractor and awarded the plaintiffs \$7.9 million in compensatory damages plus prejudgment interest and \$5 million in punitive damages. The award was upheld on appeal, with the exception of a reduction of \$450,000 for pain and suffering damages that were not sufficiently proven by the plaintiffs.

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The court begins its opinion with the



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recognition of the current standing of Texas law in this area: general contractors typically do not owe a duty to independent contractors (or their employees) to ensure that an independent contractor’s work is performed in a safe manner, unless the general contractor contractually or actually retains control over the manner in which the independent contractor performs the work. The court’s opinion does not address whether the general contractor in this case retained contractual control of the subcontractor’s work, but instead focuses on a finding of actual control retained.

Evidence at trial showed that the general contractor routinely inspected the project site to “see to it that the subcontractor and their employees properly utilized fall protection equipment,” witnessed and approved the fall-protection measures used by the subcontractor, and knew of and did not object to the glass subcontractor’s employees using a bosun’s chair without an independent lifeline. The court found this sufficient evidence that the general contractor retained the

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right to control fall-protection systems on the jobsite, and thus that the general contractor owed a duty of care to the subcontractor's employees. Moreover, the court found that the general contractor knew of, but was consciously indifferent to, the extreme risk to which the subcontractor's employees were exposed, and therefore upheld the finding of gross negligence. The court held that, viewed objectively from the general contractor's standpoint, working nine or ten stories above the ground without using an independent lifeline created an extreme risk of a fatal fall. In addition, the court found that the general contractor subjectively knew of the risk involved in such activity (the general contractor required its own employees to utilize independent lifelines and acknowledged that the fall-protection system used by the subcontractor was inefficient), but consciously chose to do nothing to protect the safety of the subcontractor's employees. Based upon the evidence of the general contractor's retention of actual control over the subcontractor's safety procedures and the general contractor's failure to exercise that control when it actually knew of the subcontractor's unsafe procedures, the court upheld the liability and damages judgments against the general contractor.

Although each of the Texas Supreme Court Justices agreed with the end result of the case (upholding the liability verdict and damages award against the general contractor), several had different reasons for doing so.

Although the rationales of the concurring opinions are not binding law in Texas, their motivations provide insight to potential future decisions of the court. Thus, their concurring opinions bear at least a brief scrutiny here.

CONCURRING OPINION—DUTY OF CARE OWED TO SUBCONTRACTORS' EMPLOYEES [home](#)

A lengthy concurring opinion argues that the policies underlying section 414 of the Restatement of Torts (which provides for a general contractor's liability when the general contractor retains control over the independent contractor's work) support holding a general contractor liable for gross negligence when the general contractor fails to exercise his retained right of control over an independent contractor to prevent the independent contractor from causing the death of its own employee by the independent contractor's own gross negligence. In other words, the two justices who signed the concurring opinion feel it is reasonable to expect the general contractor to take action to prevent a subcontractor's grossly negligent behavior, when the general contractor is actually aware of the contractor's grossly negligent conduct. Addressing "the important public interest of minimizing work-related injuries," the concurring opinion asserts a belief that general contractors should not be allowed to escape liability simply by giving independent contractors "free rein" to complete their work in whatever

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manner they see fit, whether or not the general contractor retains contractual or actual control over job safety.

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A separate concurring opinion argues that the general contractor's liability stemmed from its contractual right to compel compliance with standard safety measures and its tacit approval of the subcontractor's dangerous operations. The opinion disagrees with the majority conclusion that the general contractor's approval of the subcontractor's fall-protection system constituted "actual control" in this case and states that liability must be based on more than mere acquiescence or approval by the general contractor. However, because the general contractor was aware that the subcontractor was violating standard company safety policies, it owed a duty to require the subcontractor to employ corrective safety measures or to cancel the subcontractor's contract.

In sum, the case of *Lee Lewis Construction v. Harrison* arguably makes it easier for injured plaintiffs to prove actual control over a subcontractor's work, thereby making it easier for plaintiff employees of subcontractors to obtain judgments against general contractors for injuries sustained while on a construction project. And, given the unanimous finding of liability by the Supreme Court Justices, albeit for different reasons, plaintiffs now have a variety of

arguments to use in their attempts to persuade courts across the state: actual retained control, contractual retained control, policy arguments of a desire to minimize workplace accidents, and a prohibition on general contractors blindly relying on subcontractors to perform their work safely. Finally, given the large actual and punitive damages awarded in this case, plaintiffs will likely be encouraged to sue the general contractor as well as the subcontractor employer, except where barred by the workers' compensation laws, in each and every personal injury case stemming from a construction accident.

General contractors should thus be cautious in the amount of control they contractually retain and should continue to enforce established safety requirements, not only for their own employees, but now for their subcontractors and subcontractors' employees as well. In addition, although the basic rule that a general contractor does not owe a duty of care to a subcontractor's employees unless the general contractor retains the right to control the details of the subcontractor's work is still valid, the new Supreme Court opinion makes it less likely that a general contractor will be able to prevail on summary judgment when asserting this argument. This unlikelihood should always be taken into account when drafting construction contracts and when supervising a construction project.