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A Cautionary Tale of Pleading and Jury Charge Submissions

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This alert discusses whether a defendant has a duty to object in order to preserve error in cases where a plaintiff improperly submits a general-negligence jury question when the appropriate cause of action falls under a premises liability of recovery.

On June 30, 2017, in *United Scaffolding, Inc. v. Levine*, ---S.W.3d--- (2017), the Texas Supreme Court, delivered an opinion that affirmed two decades of precedent and clarified how to properly preserve error when a plaintiff improperly submits a general-negligence question in a premises liability case. Below is a summary of the case and the takeaways from the decision:

I. BACKGROUND

On December 26, 2005, James Levine ("Levine"), a pipefitter for Valero Energy Corporation, was injured when he fell from a scaffold while on the job at Valero's Port Arthur refinery. The scaffolding at issue was constructed and frequently inspected by United Scaffolding, Inc. ("USI"). Levine filed suit against USI claiming that USI improperly constructed the scaffold and failed to remedy or warn of the dangerous condition.

II. PROCEDURAL HISTORY

In February 2014, the case was tried before a jury.[1] At Levine's request, the trial court submitted a general-negligence question to the jury. Neither Levine nor USI offered a premises liability question to the jury, and USI did not object to the submission of the general-negligence question. The jury allocated 100% of the responsibility to USI and awarded Levine almost $2 million in past and future damages.

USI filed a motion for new trial and a motion for judgment notwithstanding the verdict, arguing that the trial court's submission of a general-negligence question to the jury was improper because Levine's claim sounded in premises liability. The trial court denied both USI's motions and the court of appeals affirmed the judgment in favor of Levine. USI then appealed this matter to the Texas Supreme Court.

III. TEXAS SUPREME COURT'S HOLDING

The Supreme Court took a two-part approach in reaching its decision:

1. **Levine's claim sounds in premises liability, not general negligence.**

Levine attempted to argue that his claim was properly submitted as a general-negligence question because USI did not have control over the scaffolding, and therefore the only claim available to him to assert was general-negligence. Analyzing the character of Levine's claim and the source of Levine's injury, the Supreme Court held that Levine's claim arose from a dangerous physical condition existing on the scaffolding rather than a contemporaneous negligent activity, as required to assert a general-negligence claim. The Supreme Court rejected the court of appeals reliance on the

assumption that USI must have exercised exclusive control in order to be subject to a premises liability claim and found that USI had the requisite control over the scaffolding to support such a claim.[2]

The Supreme Court affirmed its rulings in prior cases that a premises defect case improperly submitted to the jury under a theory of general-negligence without instruction or definition of the elements of premises liability, renders the judgment improper. The Supreme Court held that Levine's claim sounded in premises liability, and therefore, the general-negligence findings could not support the judgment in Levine's favor.

2. USI did not have a duty to object to the omission of the proper theory of recovery or invite error, and USI preserved its submission argument by raising it in its JNOV.

Levine alternatively argued that even if his claim sounded in premises liability, USI waived its argument because it failed to object to the jury charge submission or at the very least, USI invited error when it proposed a general-negligence submission in the first trial.

In considering Levine's waiver argument, the Court held that a defendant has no duty to object to a plaintiff's omission of an independent theory of recovery, noting that requiring a defendant to bear the burden of objecting to a jury charge not supported by the pleadings or the evidence would ultimately force the defendant to forfeit a winning hand.[3] The Supreme Court further held that USI did not invite error by requesting the general-negligence submission in the first jury trial because the motion for new trial effectively wiped the slate clean. Finally, the Supreme Court held that USI preserved its argument by raising the submission issue in its motion for judgment notwithstanding the verdict.

IV. IMPACT OF RULING

The decision in *United Scaffolding, Inc. v. Levine*, ---S.W.3d--- (2017), leaves litigators to consider the following:

(1) A general-negligence submission to a jury cannot support a theory of recovery founded on premises liability.

(2) Creative arguing and pleading does not change the nature of the claim, and plaintiff cannot circumvent the heightened standard required for premises defects by pleading a claim as general negligence nor convert the true nature of his claim by submitting it to the jury under the wrong theory of recovery.

(3) When the wrong theory of recovery is submitted to the jury and the right theory of recovery is omitted from the jury charge in its entirety, Defendant does not waive its right to challenge the judgment by failing to object to the jury charge.

[1] This was actually the second trial of this case. In the first trial, both Levine and USI submitted proposed jury charges with only a general-negligence question. The jury apportioned 51% responsibility to USI and 49% responsibility to Levine and awarded Levine $178,000 in future medical costs. Levine then filed a motion for new trial. After a series of additional appellate steps, the case was ultimately remanded to the trial court for a second trial.

[2] If Levine's claim arose from a contemporaneous negligent activity, the theory of recovery would be submitted to the jury as a general-negligence claim

[3] The Supreme Court noted that it is plaintiff's burden to ensure proper findings support the theory of recovery, and if an entire theory of recovery is omitted from the charge, it would be waived.