

The Supreme Court Narrows Scope of Chapter 95 Protections for Property Owners

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Chapter 95 of the Texas Civil Practice and Remedies Code provides premises owners protection from liability for negligence claims made by independent contractors performing work on the premises when certain conditions are met. Last month, the Texas Supreme Court issued its opinion in *Los Compadres Pescadores, LLC v. Valdez*, providing new guidance as to the applicability of Chapter 95 and narrowing the scope of cases that fall within its protections. Cause No. 19-0643, 2021 WL 1148228 (Tex. Mar. 26, 2021).

Under Chapter 95, owners are liable for injuries to a contractor's or subcontractor's employees *only* if they: (i) "exercise[] or retain[] some control over the manner in which the work is performed," *and* (ii) have actual knowledge of the danger or condition that injures the employee. Tex. Civ. Prac. & Rem. Code § 95.003. Further, in order for that limitation to apply, however, the employee's injuries must "arise[] from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement." *Id.* at § 95.002. Previously, in *Ineos USA, LLC v. Elmgren*, the Supreme Court held that the employee's injuries must result "from a condition or use of the *same improvement* on which the contractor (or its employee) is working when the injury occurs." 505 S.W.3d 555, 567 (Tex. 2016) (emphasis added).

Building on this prior decision, the Court's opinion in *Los Compadres Pescadores* holds that the employee's injury must arise from a dangerous condition of the *specific improvement* the employee is working on, not just the workplace in general. 2021 WL 1148228, at *7-8. The case involved two employees of a contractor who were injured while constructing pilings for a condominium building on property owned by Los Compadres. *Id.* at *1-2. Although the exact cause of the accident remains unknown, the employees were lifting a twenty-foot piece of rebar to place one end into the concrete when the rebar's other end contacted a live power line. *Id.* at *2. The electrical shock that resulted injured the employees, who filed suit against the premises owner, among others. *Id.*

In its recent decision, the Supreme Court began by explaining its holding in *Ineos*, which involved a petrochemical plant employee who was injured when heated gas burst from a furnace pipe on which the employee was replacing a valve. *Id.* at *6, citing *Ineos*, 505 S.W.3d at 559. The Court held that the evidence satisfied the same improvement requirement of Chapter 95 – that the claim arise from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement – even though the gas leak occurred in a pipe valve near a different but connected furnace over 200 feet away. *Id.* The Court rejected the argument that each of the connected furnaces constitutes a separate "improvement," instead holding they were all part of one single improvement. *Id.*

Based on this reasoning, Los Compadres argued that the power line was a dangerous condition of the "workplace" such that Chapter 95 applied. *Id.* The Court, however, disagreed, explaining that for Chapter 95 to apply, "it is not enough that a dangerous condition existed on the premises on which the claimant was working or created an 'unsafe workplace.'"

Instead, the danger must arise from *the* condition (or use) of 'an improvement' within the workplace on which the claimant was working." *Id.*, citing Tex. Civ. Prac. & Rem. Code § 95.002(2). The Court held that the power line's proximity to the pilings the employees were constructing created a probability of harm to the employees and, consequently, Chapter 95 applied. *Id.* at *8.

In the second part of its opinion, the Court discussed Chapter 95's requirement of evidence establishing actual knowledge on the part of the premises owner. The jury, who found in favor of the employees, determined that Los Compadres "knew or reasonably should have known" about the unreasonably dangerous condition but failed to warn the employees or make the condition reasonably safe. *Id.* at *5. On appeal, Los Compadres contended that this finding was insufficient to support liability because Chapter 95 requires proof that the owner had "actual knowledge" of the condition, not just that it "reasonably should have known" about it. *Id.* at *9. In response, the employees did not dispute the failure to obtain a jury finding on actual knowledge but instead argued that the evidence conclusively established Los Compadres's actual knowledge, and the Court agreed. *Id.*

The Court began its analysis by recognizing that to conclusively establish actual knowledge, "the evidence must leave 'no room for ordinary minds to differ as to the conclusion to be drawn from it.'" *Id.*, citing *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 235 (Tex. 2019) (quoting *Triton Oil & Gas Corp. v. Marine Contractors & Supply, Inc.*, 644 S.W.2d 443, 446 (Tex. 1982)). At trial, Los Compadres's managing owner testified that the company was aware of the power lines at the time it purchased the property but that he did not know whether the supervisor had spoken to anyone about de-energizing them before construction began. *Id.* The subcontractor testified that "weeks" before the accident, he told the supervising contractor that the power lines were too close to the construction. *Id.* The supervisor, however, instructed the subcontractor to begin work from the front of the property and that he would "take care of the line." *Id.* On the third day of work, the subcontractor spoke with the supervisor again, who said that the line would not be de-energized and to "go forward" with the work. *Id.* Based on this evidence, the Court held that there could be no reasonable dispute that the supervisor (whose knowledge was imputed to the owner because he was found to be its agent) had actual knowledge that the power lines were both present and energized, and thus that the "dangerous condition existed at the time of the accident." *Id.*, citing *Ineos*, 505 S.W.3d at 568 (quoting *City of Corsicana v. Stewart*, 249 S.W.3d 412, 414-15 (Tex. 2008) (per curiam)).

Although the Supreme Court's holding recognizes the applicability of Chapter 95, it also imposes important limitations on the statute's scope. Its interpretation of "condition...of an improvement" eliminates claims based on generalized workplace or premises injuries, thereby narrowing the scope of cases that fall within the protections provided by Chapter 95. Moreover, commercial property owners in Texas should be aware that even if Chapter 95 applies to an injury claim, under the recent *Los Compadres Pescadores* holding, an employee's failure to obtain a jury finding on the owner's actual knowledge of the dangerous condition will not, alone, preclude a finding of liability.

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