CAUSE NO. 2003-30139

Elsa Nunez Suarez, et al.	§	**IN THE DISTRICT COURT OF**
	§	
v.	§	**HARRIS COUNTY, T E X A S**
	§	
H and M Construction Co., Inc., et al.	§	**157th JUDICIAL DISTRICT**

Order

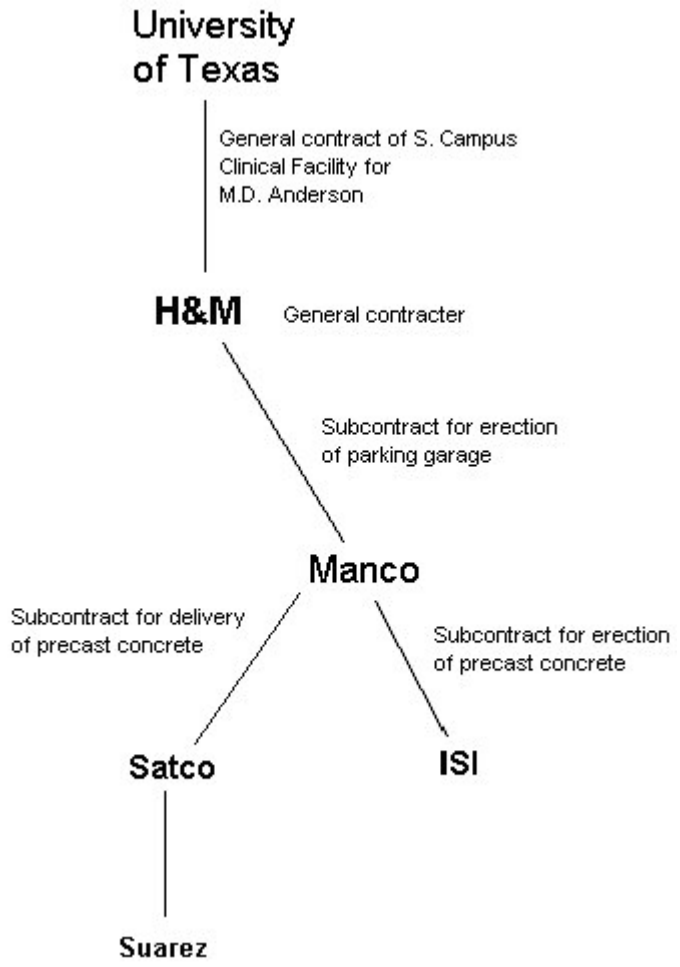
Defendants H and M Construction Co. ("H&M") and International Structures, Inc. ("ISI") have moved for summary judgment on three grounds: (1) H&M owed no duty to plaintiff Suarez; (2) There is no evidence to support a finding of negligence against ISI; and (3) There is no evidence to support a gross negligence finding against either H&M or ISI. For the reasons stated herein, the first motion is granted, the second motion is denied, and the third motion is denied as to defendant ISI and moot as to defendant H&M.

Background Facts

This court is very familiar with the facts of this case. This court conducted a four week trial in this matter in May 2006. The same grounds as were alleged in this motion were urged in support of defendants' motions for directed verdict. This court denied the directed verdicts, stating that the merits of the motions would be considered during possible JNOV motions, should that prove necessary. Unfortunately, the first trial resulted in a mistrial when the jury deadlocked. Defendants H&M and ISI now re-urge the same grounds in this motion for summary judgment.

The relationship of the parties can be summarized as follows. The University of Texas contracted with H&M to construct the South Texas Clinical Facility, including a parking garage, at M.D. Anderson in Houston. H&M subcontracted with defendant Manco to construct the

parking garage. Manco, in turn, contracted with defendant ISI to erect pre-cast concrete delivered to the site and with defendant SATCO to deliver the pre-cast concrete from San Antonio to the job site in Houston. Plaintiff Suarez was employed by SATCO as a driver who was tragically killed when a pre-cast stair weighing approximately 9,000 pounds fell from a truck, crushing plaintiff.



The prime contract between University of Texas and H&M required H&M to enter into separate contracts with subcontractors and further provided that H&M's relationship with subcontractors would "be that of a general contractor to its subcontractors unless otherwise approved in advance in writing by Owner [University of Texas]."[1] The contract further provided that H&M was "solely responsible for all safety precautions and programs in connection with the Work. [H&M] shall review the safety programs developed by each of the Subcontractors and prepare and submit to Owner a comprehensive safety program which complies with all applicable requirements of the Occupational Safety and Health Act of 1970 and all other applicable state, local, or federal laws or regulations. . . ."[2]

[1] University of Texas and H&M contract, Ex. 1 to motion for summary judgment, article 2.01(q).
[2] *Id*. article 6.02.

Did H&M Owe a Duty to Plaintiff?

H&M argues that it owed no duty to plaintiff either by virtue of any contract or as a matter of fact by exercise of any control. For the reasons stated in defendants' motion for summary judgment at pages 1-23, this portion of the motion is granted.

The duty analysis begins with *Redinger v. Living, Inc*., 689 S.W.2d 415, 418 (Tex. 1985). There, the Supreme Court held:

> An owner or occupier of land has a duty to use reasonable care to keep the premises under his control in a safe condition. *Smith v. Henger,* 148 Tex. 456, 226 S.W.2d 425 (1950). A general contractor on a construction site, who is in control of the premises, is charged with the same duty as an owner or occupier. *Id.* 226 S.W.2d, at 431. This duty to keep the premises in a safe condition may subject the general contractor to direct liability for negligence in two situations: (1) those arising from a premises defect, (2) those arising from an activity or instrumentality. *J.A. Robinson Sons, Inc. v. Ellis,* 412 S.W.2d 728 (Tex.Civ.App.--Amarillo 1967, writ ref'd n.r.e.); *Moore v. Texas Company,* 299 S.W.2d 401 (Tex.Civ.App.--El Paso 1956, writ ref'd n.r.e.).

Redinger, 689 S.W.2d at 417; see RESTATEMENT (SECOND) OF TORTS § 414 (1965). Here, plaintiffs have dropped any claim of premises defect.

A general contractor normally does not have a duty to ensure that an independent contractor performs work safely. *Elliott-Williams Co. v. Diaz,* 9 S.W.3d 801, 803 (Tex.1999). However, a duty may arise when a general contractor retains some control over the manner in which the independent contractor's work is performed. *Id.* This duty is commensurate with the amount of control retained over the independent contractor's work. *Id.; Lee Lewis Constr., Inc. v. Harrison,* 70 S.W.3d 778, 783 (Tex.2001). Control may be proven in two ways: (1) by contractual agreement that explicitly assigns a right to control or (2) by exercise of actual control. *Dow Chem. Co. v. Bright,* 89 S.W.3d 602, 606 (Tex.2002); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001); *Ashabranner v. Hydrochem Indus. Servs., Inc.,* 2004

WL 613026, at *2 (Tex.App.-Houston [14th Dist.] Mar. 30, 2004, no pet.). A right of control is contingent on the ability to control the means, methods, or details of the independent contractor's work. *Dow Chem Co.,* 89 S.W.3d at 606. Plaintiffs argue both contractual and actual control.

Plaintiffs argue that the contract between H&M and UT imposes a contractual duty of H&M to plaintiff. The cases, however, foreclose this argument. Whether there is a contractual right of control is generally a question of law for the court. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002); *Deleon v. DSD Development, Inc*., 2006 WL 2506743 (Tex. App.—Houston [1st Dist.] 2006, no writ), *citing Elliott-Williams Co. v. Diaz,* 9 S.W.3d 801, 803 (Tex.1999). Here, as was the situation in *Deleon*, the contract between H&M and UT envisioned separate contracts with subcontractors,[3] and provided that the contract was solely between UT and H&M and that UT was relying solely on H&M to perform the work.[4] Read as a whole the contract was meant to allocate risks and responsibilities as between UT and H&M, and not with respect to third parties. *See Legros v. Lone Star Striping and Paving, L.L.C.*, 2005 WL 3359740 (Tex. App.—Houston [14th Dist.] 2005, no writ).

Plaintiffs next argue that H&M exercised actual control sufficient to impose a duty to plaintiff Suarez. Plaintiffs point to the testimony of Bill Murphy, H&M safety coordinator, who had an office on site and testified that his job was to dictate safety rules to the subcontractors. Again, the cases do not support plaintiffs' argument.

It is not enough that the general contractor may dictate the results of the work or has a general right to order the work stopped or resumed, to inspect progress or receive reports, to make suggestions that need not necessarily be followed, or to prescribe alterations and deviations. The general contractor must retain enough right of supervision over the manner of

[3] *Id*. art. 4.02; art. 2.01(q).
[4] *Id*. art. 3.02.

the work that the subcontractor is not entirely free to do the work in his own way. *Davis v. R. Sanders & Associates Custom Builders, Inc*., 891 S.W.2d 779 (Tex. App.—Texarkana 1995). For a general contractor to be liable for its independent contractor's acts, it must have the right to control the means, methods, or details of the independent contractor's work. Further, the control must relate to the injury the negligence causes. *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). Merely exercising or retaining a general right to recommend a safe manner for the independent contractor's employees to perform their work is not enough. *Id*. at 607. If a premises owner or contractor exercises control by requiring a subcontractor to comply with its safety regulations, the premises owner owes the subcontractor's employees a narrow duty of care that its safety requirements and procedures do not unreasonably increase the probability and severity of injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354 (Tex. 1998). Mere right to stop the subcontractor's work is insufficient. *Id*. at 358. To hold otherwise would deter general contractors from setting even minimal safety standards. *Id*. Mere presence of a safety employee and the possibility that he might intervene and forbid dangerous work is insufficient to impose liability. *Koch Refining Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999).

The Supreme Court has recognized that a general contractor has actually exercised control of a premises when the general contractor knew of a dangerous condition before an injury occurred and approved acts that were dangerous and unsafe. *Dow Chem. Co. v. Bright*, 89 S.W.3d at 609. *See Lee Lewis Constr*., 70 S.W.3d at 784 ("testimony indicated that [general contractor] personally witnessed and approved of the specific fall protection systems [sub-contractor] used"). See also *Hoechst-Celanese*, 967 S.W.2d at 358 ("am employer who is aware that its contractor routinely ignores applicable federal guidelines and standard company policies

related to safety may owe a duty to require corrective measures to be taken or to cancel the contract"). In *Dow*, the Court stated:

> Had the Dow safety representative actually approved how the pipe in question was secured or instructed Bright to perform his work knowing of the dangerous condition, we could have a fact scenario mirroring Lee Lewis. However, we have never concluded that a general contractor actually exercised control of a premises where, as here, there was no prior knowledge of a dangerous condition and no specific approval of any dangerous act.

Dow Chem. Co. v. Bright, 89 S.W.3d at 609. H&M's motion for summary judgment is granted and H&M is dismissed with prejudice.

ISI's Motion for Summary Judgment

At the summary judgment hearing, this Court orally denied the ISI motion. For the reasons stated in Plaintiffs' Response to the Motion for Summary Judgment at pages 4-5, the motion is denied.

Gross Negligence or Malice

H&M[5] and ISI argue that there is no evidence of gross negligence or malice to support punitive damages. Gross negligence includes two elements: (1) viewed objectively from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others. *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 2994). Evidence of simple negligence is insufficient. *Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 641 (Tex. 1995). Under the first element, "extreme risk" is not a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. *Ellender*,

[5] In light of the ruling on H&M's motion for summary judgment, the punitive damage portion of this order will be limited to ISI.

968 S.W.2d at 921; *Ung*, 904 S.W.2d 641. Under the second element, actual awareness means that the defendant knew about the peril, but its acts or omissions demonstrated that it did not care. *Ellender*, 968 S.W.2d at 921. Circumstantial evidence is sufficient to prove either element. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 326 (Tex. 1993).

Here, there is evidence from the ISI crane operator, Brian Ulery, that he knew that the location where Suarez parked his truck was not the safest place to be located.[6] ISI determined where Suarez would park.[7] Ulery knew Suarez was parked too close to the crane, but did nothing to stop or move him.[8] Troy Crabtree, the ISI job superintendent, testified that he saw the load sway, and was "alarmed" that he was parked in a rut and thus the trailer was leaning.[9] While not overwhelming, this evidence is sufficient to get to the jury and satisfy the subjective or second prong to prove gross negligence. The motion for summary judgment with regard to punitive damages against ISI is denied. The punitive damage motion as to defendant H&M is moot.

Signed December 18, 2007.

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Hon. Randy Wilson

[6] Ulery deposition, Plaintiffs' Response to Motion for Summary Judgment, Ex. I, p. 42, line 23.
[7] *Id.*; Crabtree deposition, Plaintiffs' Response to Motion for Summary Judgment, Ex. J, p. 51, line 10.
[8] Ulery deposition, Plaintiffs' Response to Motion for Summary Judgment, Ex. I, p. 43, line 5.
[9] Crabtree deposition, Plaintiffs' Response to Motion for Summary Judgment, Ex. J, p. 94.