Fourth Court of Appeals
San Antonio, Texas

OPINION

No. 04-15-00481-CV

JOERIS GENERAL CONTRACTORS, LTD.,
Appellant

v.

Rolando **CUMPIAN**,
Appellee

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2013-CI-14392
Honorable Stephani A. Walsh, Judge Presiding

Opinion by: Jason Pulliam, Justice
Concurring Opinion by: Sandee Bryan Marion, Chief Justice
Dissenting Opinion by: Luz Elena D. Chapa, Justice

Sitting: Sandee Bryan Marion, Chief Justice
Luz Elena D. Chapa, Justice
Jason Pulliam, Justice

Delivered and Filed: December 21, 2016

REVERSED AND RENDERED

INTRODUCTION

This appeal arises from an action brought against Joeris General Contractors, Ltd. (Joeris) by Rolando Cumpian, an employee of an independent contractor who was injured on a job site. Cumpian sued Joeris for negligence and gross negligence alleging Joeris failed to reasonably enforce its safety regulations and failed to protect Cumpian by allowing his co-worker, someone

known to have violated safety regulations in the past, on the jobsite. A jury found in favor of Cumpian and awarded actual and exemplary damages.

We conclude, as a matter of law, Joeris did not incur the narrow duty to Cumpian recognized by the Texas Supreme Court in *Hoechst-Celanese Corp. v. Mendez* based upon Joeris's right to control the promulgation and enforcement of safety regulations. Joeris's knowledge of an independent contractor's safety violations in the past did not trigger the exception to the well-established rule that a general contractor has no duty to ensure an independent contractor safely performs its work. In addition, Joeris's limited discussion regarding the priority of work to be completed did not trigger this exception. Because Joeris held no duty as a matter of law, the jury finding that Joeris was negligent was in error. Accordingly, we reverse the trial court's judgment and render a take-nothing judgment in favor of Joeris.

BACKGROUND

Northside Independent School District (NISD) hired Joeris to be the general contractor for construction of Dr. Folks Middle School. Joeris contracted with an independent contractor Leal Welding & Erection (Leal Welding) to conduct steel erection necessary for construction of the project. Plaintiff Cumpian was an employee of Leal Welding.

On May 29, 2012, Cumpian and his co-worker Armando Gonzalez were on the jobsite installing the last of several steel staircase frames. Leal Welding had previously used a crane to move and install the staircase frames; however, on this day, the crane was not on the job site. Instead, Gonzalez used a forklift to install the final staircase frame and attempted to secure the staircase frame to the forklift by using nylon straps. After a failed attempt and strap adjustment, Gonzalez again attempted to lift the staircase frame with the forklift, when it fell from the forklift and landed on Cumpian's foot. Cumpian's foot was crushed and required two surgeries over the

course of a two-week hospitalization. Eventually, Cumpian's injuries necessitated amputation of the toes on his left foot.

Cumpian brought suit against Joeris asserting causes of action for negligence and gross negligence. Cumpian sought exemplary damages. Joeris designated Leal Welding as a responsible third party and moved for a bifurcated trial of any exemplary damages.

In his petition, Cumpian asserted a negligent-activity cause of action. Cumpian lists thirteen acts or omissions of Joeris which he contends support this cause of action. These thirteen acts or omissions fall within two general allegation categories: (1) Joeris failed to keep the jobsite safe by failing to properly ensure all work was performed pursuant to federal and company safety regulations; and (2) Joeris failed to keep the jobsite safe by "hiring and utilizing" Gonzalez when it knew of his previous safety violations on other jobsites but failed to monitor and supervise his actions.

The case proceeded to a nine-day trial. Cumpian plead and presented his negligence allegations under a negligent-activity theory, not a premises-defect theory, and jury questions were submitted to the jury on only a negligent-activity theory. The jury returned a verdict finding Joeris and Leal Welding were negligent, apportioning 80% of fault to Joeris and 20% of fault to Leal Welding. The jury determined Cumpian was not negligent. The jury assessed damages as well as exemplary damages based upon determination that Joeris was grossly negligent.

The trial court denied Joeris's motion for judgment notwithstanding the verdict (JNOV) and motion for new trial. Joeris perfected this appeal.

ANALYSIS

Joeris appeals the trial court's judgment arguing: (1) the record does not support liability based upon a general negligence theory because the undisputed evidence shows Joeris did not control Leal Welding's work, and Joeris was not aware of Cumpian or Gonzalez's injury-causing

activity, and therefore, Joeris owed no duty to Cumpian; (2) the evidence conclusively shows Cumpian and Gonzalez were the only negligent parties who caused the injury; (3) Cumpian's only viable cause of action was a premise-defect theory, not the submitted negligent-activity theory, and therefore, Cumpian waived the premises-defect claim by failing to plead and present it; (4) alternatively, *Casteel* error in the submission of two jury questions mandates reversal; (5) Chapter 95 of the Texas Civil Practice and Remedies Code precludes liability; (6) the individual and cumulative effect of the trial court's harmful evidentiary errors mandates new trial; (7) the trial court erred by awarding exemplary damages; and (8) the trial court erred by allowing unsupported and inaccurate jury argument on Joeris's net worth.

We begin our analysis with the first argument, i.e. whether Joeris held a duty as a matter of law, because it is a dispositive issue.[1]

Whether Joeris held a duty as a matter of law

Applicable Law

To prevail on a general negligence cause of action based in any theory of liability, a plaintiff must prove three essential elements: the existence of a legal duty, breach of that duty, and damages proximately caused by the breach. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). The threshold inquiry is the existence of a duty, which

[1] The parties presented on appeal in-depth briefing and argument on the issue whether this is a negligent-activity or premises-defect case under the premises liability umbrella because only the negligent-activity cause of action was plead and presented to the jury. In situations such as this, when a general contractor is sued by an independent contractor's employee, analysis to determine the existence and/or the scope of the independent contractor's duty is the same whether the cause of action asserted is one of negligent activity or premises defect. *See Kalinchuk v. JP Sanchez Constr. Co.*, 04-15-00537-CV, 2016 WL 4376628, at *3 (Tex. App.—San Antonio Aug. 17, 2016, no. pet. h.) (mem. op.); *compare Del Lago Partners Inc.*, 307 S.W.3d at 767 (applying risk-utility balancing factors to determine question of duty in premise defect case) *with Gonzales v. O'Brien*, 305 S.W.3d 186, 189 (Tex. App.—San Antonio 2009, no pet.) (applied risk-utility balancing test in negligent-activity case). Consequently, determination of the primary contested appellate issue whether this is a negligent-activity or premises-defect cause of action is not necessary to determine whether Joeris held a legally cognizable duty or the scope of any duty. Because the duty issue is dispositive, we do not address the parties' dispute whether this is a negligent-activity or premises-defect case, and this court's conclusion on the duty issue is not affected by and has no bearing on the issue whether these facts support a negligent-activity or a premises-defect cause of action.

is a question of law for the courts to decide from the essential, undisputed facts surrounding the occurrence in question. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009); *see also Sanders v. Herold*, 217 S.W.3d 11, 15 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The existence of duty is also a question of law when the evidence conclusively establishes the pertinent facts or when reasonable inferences can be drawn from those facts, as in this case. *See Bennett v. Span Indus., Inc.*, 628 S.W.2d 470, 474 (Tex. App.—Texarkana, writ ref'd n.r.e.); *City of Alton v. Sharyland Water Supply Corp.*, 402 S.W.3d 867, 875 (Tex. App.—Corpus Christi 2013, pet. denied). In such instances, appellate courts review *de novo* a determination regarding whether a legal duty is owed. *Nabors Drilling*, 288 S.W.3d at 404; *Alcoa, Inc. v. Behringer*, 235 S.W.3d 456, 459 (Tex. App.—Dallas 2007, pet. denied).

In a suit brought under the premises-liability umbrella of negligence (either negligent-activity or premises-defect), ordinarily, a general contractor holds no duty to prevent harm to others absent certain special relationships or circumstances. *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 837 (Tex. 2000). One of these "special relationships or circumstances" is between a general contractor and any invitee, which includes the employee of an independent contractor. *See Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985); *Kalinchuk*, 2016 WL 4376628, at *2. In this context, the well-established rule is: a general contractor must use reasonable care to make and keep the premises safe; however, a general contractor has no duty to ensure an independent contractor safely performs its work. *Redinger*, 689 S.W.2d at 418; *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 356 (Tex. 1998); *Arias v. MHI P'ship, Ltd.*, 978 S.W.2d 660, 662 (Tex. App.—Corpus Christi 1998, pet. denied).

In *Redinger v. Living, Inc.*, the Texas Supreme Court evaluated this no-duty general rule and established an exception in a situation in which the general contractor exercises "'some control over the manner in which the independent contractor's work is performed.'" *Redinger*, 689

S.W.2d at 418. The *Redinger* court held that if the general contractor exercises control over the means or manner of the independent contractor's general operations, then an exception to the no-duty general rule arises. *Id*. Under this exception, the general contractor must exercise reasonable care in its supervision of the subcontractor's activity "so as to prevent the work which he has ordered to be done from causing injury to others." *Id*.

A primary dispute in this case pertains to the *Redinger* exception to this no-duty general rule. In this case, Cumpian specifically asserts liability based upon Joeris's failure to enforce, or otherwise ensure compliance with, safety regulations and based upon Joeris's failure to monitor Gonzalez's activity to ensure his compliance with the safety regulations. Unlike *Redinger*, in which the plaintiff alleged liability arose from the general contractor's control over the independent contractor's *general operations*, Cumpian's negligence allegations in this case focus on Joeris's *promulgation and enforcement of safety regulations*. Thereby, following *Redinger*, disposition of this issue whether Joeris held a duty to Cumpian under the theory presented in this case is clearly guided by the Texas Supreme Court's decision in *Hoechst-Celanese Corp. v. Mendez* and the cases that follow.

In *Hoechst-Celanese Corp. v. Mendez*, the Texas Supreme Court specifically addressed the question: "What is a [general contractor's] duty to an independent contractor's employees when the [general contractor] requires the contractor to observe general workplace safety guidelines?" *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 355. The court began by noting the no-duty general rule, as well as the equally well-established *Redinger* exception to this no-duty general rule which may arise when the general contractor exercises "'some control over the manner in which the independent contractor's work is performed.'" *See id*. at 356. The court then recognized numerous appellate decisions which strictly followed the no-duty rule when the negligence allegations focus on a general contractor's enforcement of safety regulations. All of

the cited cases held a general contractor does not incur a duty of care by requiring its independent contractor to comply with the general contractor's standard safety practices and applicable laws. *Id.* at 357 (citing *Davis v. R. Sanders & Associates Custom Builders, Inc.*, 891 S.W.2d 779, 782 (Tex. App.—Texarkana 1995, no writ); *Campbell v. Adventist Health System/Sunbelt, Inc.*, 946 S.W.2d 617, 623 (Tex. App.—Fort Worth 1997, no writ); *Welch v. McDougal*, 876 S.W.2d 218, 223 (Tex. App.—Amarillo 1994, writ denied); *Good v. Dow Chem. Co.*, 945 S.W.2d 877, 882 (Tex. App.—Houston [1st Dist.] 1997, no writ)).

Contrary to these cited opinions, however, the Texas Supreme Court concluded the "better view" is to analyze a general contractor's specific actions of promulgating and enforcing safety regulations within the same general framework as that established in *Redinger*. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357. Under this framework, a court must focus its duty analysis on the nexus between the general contractor's control and the condition or activity that caused the injury, such that the scope of a general contractor's duty to an independent contractor is commensurate with the control it holds. *Id*. at 355-57. The more detailed the general contractor's control over the independent contractor's work, the greater is the responsibility for any injuries that occur as a result of this control. *Id*. In the context of the promulgation and enforcement of safety regulations, "the court's inquiry must focus on who had specific control over the safety and security of the premises, rather than the more general right of control over operations." *Id*. at 357. Specifically, the "supervisory control must relate to the condition or activity that caused the injury." *Id*.

Therefore, in *Hoechst-Celanese v. Mendez,* the Texas Supreme Court opened the door to a possible exception to the strictly-construed, no-duty general rule in the circumstance in which a general contractor holds the right to control the promulgation and enforcement of safety regulations. The court held that, in itself, a general contractor's right to control jobsite safety or

to require an independent contractor's compliance with safety regulations does not impose an unqualified duty of care to ensure the independent contractor's employees "do nothing unsafe." *Id.* at 357-58; *see also Hanna v. Vastar Res., Inc.*, 84 S.W.3d 372, 377 (Tex. App.—Beaumont 2002, no pet.). However, a general contractor which promulgates safety rules and maintains control to enforce these safety requirements might assume a *narrow* duty of care commensurate with the extent of the control it maintains. *Id.* at 357 (emphasis in original). Thereby, the court followed the analysis framework as established in *Redinger*, in which it is alleged a general contractor controls the independent contractor's general operations, and held a general contractor that promulgates and enforces safety regulations assumes a narrow duty to ensure that its rules and regulations are reasonably safe and do not increase the probability or severity of injury. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58.

Finally, the *Hoechst-Celanese v. Mendez* court recognized two situations in which the exception to the no-duty rule may arise, and a general contractor which promulgates and enforces safety rules may incur a duty beyond that of just ensuring that its rules and regulations are reasonably safe and do not increase the probability or severity of injury. *Id*. The court defined these situations and the duty incurred in each situation, stating: (1) if the general contractor is aware an independent contractor routinely ignores applicable safety guidelines or company regulations, then it "may owe a duty to require corrective measures to be taken or cancel the contract"; or (2) if the general contractor gives on-site orders or directs the manner of performance in the injury-causing activity that is contrary to the safety regulations, the general contractor must otherwise protect workers from hazards associated with the act. *Id.* at 357.

In sum, under *Hoechst-Celanese Corp. v. Mendez*, a general contractor which promulgates safety rules and maintains control to enforce these safety requirements may assume a *narrow* duty of care but that duty is commensurate with the control it holds over the independent contractor and

"'its supervisory control must relate to the condition or activity that caused the injury.'" *Id.* (quoting *Williams v. Olivo*, 952 S.W.2d 523 (Tex. 1997)). Accordingly, following *Redinger* and *Hoechst-Celanese v. Mendez,* to prove exception to the no-duty general rule arises in the event a plaintiff asserts negligence based upon a general contractor's failure to enforce safety regulations, a plaintiff must prove: (1) the general contractor held the right to control the safety regulations related to the specific injury-causing activity; **and** (2) the general contractor committed an act or omission that was not in accord with the *scope* of any such duty incurred through this control. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 356-58; *Redinger*, 689 S.W.2d at 418-19.

Prong One: *Whether the general contractor held the right to control the safety regulations related to the specific injury-causing activity*

In the parties' appellate argument pertaining to the issue whether Joeris held a duty, the parties dispute whether Joeris possessed control over the means or manner of Leal Welding's general operation. However, Cumpian's asserted basis of liability is not that Joeris was negligent in controlling the general operations of Leal Welding's work to which this argument is relevant. Instead, Cumpian's asserted basis of liability is Joeris's omission in failing to enforce and ensure compliance with safety regulations or to otherwise monitor Gonzalez's behavior, contending such enforcement would have prevented Gonzalez and Cumpian from committing the injury-causing act.

The court in *Hoechst-Celanese v. Mendez* directed that in the situation in which the alleged liability arises from a general contractor's promulgation of safety regulations, the relevant inquiry does not focus on the general contractor's general right of control over the independent contractor's operations, as in *Redinger*. *Hoechst-Celanese v. Mendez*, 967 S.W.2d at 357. Rather, inquiry must focus, first, on the issue whether the general contractor held the right to control the promulgation and enforcement of safety regulations. *Id*. Therefore, based upon the theory in which this case

was presented, the parties' dispute whether Joeris held a broader control over all of Leal Welding's work is not relevant to the salient issue created by the specific basis of Cumpian's assertion of liability. *See id.* (citing *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex. 1993)).

"A party can prove right to control in two ways: first, by evidence of a contractual agreement; and second, by evidence that the general contractor actually exercised control over the manner in which the independent contractor's work was performed." *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 605 (Tex. 2002); *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999). However, this court need not review whether Joeris held the requisite control as established in a contract or by its exercise of actual control because it is undisputed that Joeris possessed the right of control to promulgate, enforce and ensure compliance with safety regulations.

Thus, determination whether Joeris held a duty turns on the second requisite prong: whether Joeris committed an act or omission that was not in accord with the scope of any such duty incurred through this control. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 356-57.

Prong Two: Scope of Duty

Cumpian's allegations of Joeris's negligent acts or omissions in his petition and appellate brief fall within the situations described in *Hoechst-Celanese v. Mendez* in which a general contractor may incur a duty beyond just ensuring its safety rules and requirements unreasonably increased the probability and severity of injury.[2] Specifically, Cumpian contends Joeris incurred a legal duty to (1) take corrective measures to ensure Gonzalez worked in a safe manner based upon its knowledge of Gonzalez's past violations; (2) to ensure Gonzalez and Cumpian complied

[2] Cumpian never asserted at any time during the trial court proceedings argument that Joeris's promulgated safety requirements and procedures unreasonably increased the probability and severity of injury to Cumpian. Therefore, it was not necessary for Joeris to negate this allegation. *See Dow Chem. Co.*, 89 S.W.3d at 611.

with OSHA and Joeris's safety regulations; and (3) to protect Cumpian from work hazards created by Dale Nieder's instruction to another of Leal Welding's employees, Victor Rapalo.

a. Contention One: Joeris failed to take corrective measures to ensure Gonzalez worked in a safe manner based upon its knowledge of Gonzalez's past violations

Cumpian asserted at trial and on appeal that Joeris held a duty to ensure his safety because its employees knew Gonzalez was a safety risk, yet Joeris allowed Gonzalez to work on this jobsite without the supervision of a safety monitor. Cumpian alleges Joeris knew Gonzalez was a safety risk because Gonzalez had previously failed to follow its safety protocol on other job sites, and consequently, Joeris had previously removed him from a job site. Cumpian contends Joeris had the authority to assign a full-time safety monitor to Gonzalez, and had done so on a previous job; however, Joeris contracted with Leal Welding to work on this project without imposing any requirement that it assign a safety monitor to Gonzalez. Based upon this knowledge of previous violations of safety regulations, Cumpian contends Joeris held a duty to take corrective measure, as recognized in *Hoechst-Celanese v. Mendez*.

As previously stated, in *Hoechst-Celanese v. Mendez*, the Texas Supreme Court concluded a general contractor "who is aware that its contractor routinely ignores [safety regulations] may owe a duty to require corrective measures to be taken. . . ." *Hoechst-Celanese v. Mendez*, 967 S.W.2d at 357. In this situation, "[w]here an injury is caused by a subcontractor's routine disregard of safety guidelines and policies, a *Mendez* duty of care arises if the general contractor exercised control over the safety procedures related to the injury." *Perez v. Embree Const. Group, Inc.*, 228 S.W.3d 875, 881 (Tex. App.—Austin 2007, pet. denied). Following *Hoechst-Celanese v. Mendez* when a party asserts a duty arises based upon a general contractor's knowledge of an independent contractor's routine failure to follow safety regulations, to cross the threshold into the exception to the no-duty general rule, the general contractor must be aware of the independent contractor's

violation of safety regulations on the jobsite and must be aware of the specific injury-causing activity before the injury occurred. *See, e.g., Dow Chem. Co.*, 89 S.W.3d at 609 (holding that the presence of general contractor's safety representatives on job site was insufficient to establish control where representatives did not specifically approve or have knowledge of any dangerous act by subcontractor); *Perez*, 228 S.W.3d at 881; *Gomez v. Charter Builders, Ltd.*, 10-10-00415-CV, 2012 WL 662321, at *5 (Tex. App.—Waco Feb. 29, 2012, pet. denied) (mem. op.) (holding plaintiff must establish defendant was aware that a co-worker routinely ignored safety standards which lead to plaintiff's death.); *Victoria Elec. Co-op., Inc. v. Williams*, 100 S.W.3d 323, 330 (Tex. App.—San Antonio 2002, pet. denied) (holding plaintiff did not demonstrate Victoria Electric was aware that Urban "routinely ignored" safety guidelines related to the injury-causing activity and, consequently, had the duty to "require corrective measures be taken.").

The court in *Dow Chemicals* stated, the Texas Supreme Court "ha[s] never concluded that a general contractor actually exercised control . . . where . . . there was no prior knowledge of a dangerous condition and no specific approval of any dangerous act." *Dow Chem. Co.*, 89 S.W.3d at 609; *see also Gomez v. Charter Builders, Ltd.*, 2012 WL 662321, at *5. Therefore, to fall within the exception to the no-duty general rule, a general contractor must have actual knowledge, not constructive knowledge, of an independent contractor's safety violations. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58; *see also Dow Chem. Co.*, 89 S.W.3d at 609; *Victoria Elec. Co-op., Inc.*, 100 S.W.3d at 330. In addition, any safety violation of which the general contractor has actual knowledge must pertain specifically to the activity that caused the injury. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58; *see also Dow Chem. Co.*, 89 S.W.3d at 609; *Victoria Elec. Co-op., Inc.*, 100 S.W.3d at 330.

Because the existence of a legal duty is a question of law to be determined from the facts surrounding the occurrence in question, this court must examine the facts surrounding the accident

that caused Cumpian's injuries and, specifically, Joeris's control over the safety regulations particular to that incident. *Nabors Drilling*, 288 S.W.3d at 404.

Here, the parties do not dispute, and the testimony of Joeris employees does show, that employees of Joeris did have knowledge of Gonzalez's previous safety violations on other jobsites. The Joeris employees who testified stated they did not want Gonzalez on this job due to his previous safety violations. However, the testimony of these employees, of Cumpian himself and of Cumpian's witnesses does not address whether Joeris had knowledge of *any* safety violations while Gonzalez was on *this* job or that any employee of Joeris knew Gonzalez and Cumpian were attempting to secure the staircase to the forklift using only nylon straps. In fact, the undisputed testimony, and Cumpian's testimony, conclusively established Joeris did not have knowledge of Gonzalez and Cumpian's specific injury-causing activity.

Further, lack of any factual dispute on the issue whether Joeris had actual knowledge of Gonzalez's violations of safety regulations while on the Dr. Folks Middle School jobsite is demonstrated through the testimony of: Dale Nieder, Joeris's Project Manager; Mark Bakeman, Joeris's safety representative; Cumpian and; Victor Rapalo, another employee of Leal Welding. This testimony conclusively establishes as a matter of law that Joeris did not possess the requisite actual knowledge to incur a duty to take corrective measures.

Nieder testified that use of a forklift was an acceptable method to move and install the staircase frame; however, a specific boom attachment should be used to do so safely. Nieder testified he did not know Gonzalez and Cumpian were working during the lunch hour and did not know they were attempting to fasten the staircase frame to the forklift with nylon straps. Nieder testified he did not "witness any part of all of the events that led to Mr. Cumpian getting hurt." Nieder did not testify that he had knowledge of any safety violations committed by Gonzalez on

this jobsite, nor that he was aware that Gonzalez violated any safety regulations at the time of the accident.

Bakeman testified that he had removed Gonzalez from a previous jobsite, and he did not want Gonzalez on this jobsite due to Gonzalez's neglect of safety regulations. Bakeman further testified he was not aware that Gonzalez was on this jobsite, and that due to his other duties, he was not at the jobsite on a daily basis. Therefore, Bakeman did not testify that he had knowledge of any safety violations committed by Gonzalez on this jobsite, nor that he was aware that Gonzalez violated any safety regulations at the time of the accident.

Cumpian testified that he took his instruction and direction from Gonzalez. Specifically, Cumpian testified that Nieder was in the vicinity, but no one from Joeris was at the scene directing he and Gonzalez in securing and moving the staircase frame. Cumpian testified Gonzalez made the decision to attempt to fasten the staircase frame to the forklift using the nylon straps, and Gonzalez placed the straps around the staircase frame. Cumpian testified he and Gonzalez moved the staircase frame during the lunch break. Cumpian did not testify regarding Joeris's knowledge of any safety violations committed by Gonzalez on this jobsite, nor to Joeris's awareness that Gonzalez and Cumpian violated any safety regulations at the time of the accident.

Rapalo testified that the forklift used was Joeris's, but Rapalo did not testify that anyone from Joeris knew of or approved of Gonzalez and Cumpian's attempt to fasten the staircase frame with nylon straps. While Rapalo did testify that Joeris employees were on the jobsite and in the vicinity of the accident, he also testified that "[t]he Joeris guys started showing up" after the accident happened. Rapalo did not testify that these Joeris employees knew of the injury-causing activity. Rapalo further testified that he considered Gonzalez to be a risk taker and that Gonzalez had been removed from other jobsites for this reason. However, Rapalo did not testify regarding

any safety violations committed by Gonzalez on this jobsite, nor to Joeris's awareness that Gonzalez violated any safety regulations at the time of the accident.

Thus, the undisputed testimony demonstrates only that Joeris was aware Gonzalez had violated safety regulations on other jobs, to such a degree to require his removal; however, the testimony does not address the issue whether Joeris was aware that Gonzalez routinely ignored safety guidelines on this job or committed any violations or unsafe conduct specific to the injury-causing activity. The undisputed testimony demonstrates no one from Joeris was at the scene of the accident and no one from Joeris was aware that Gonzalez and Cumpian were attempting to fasten the staircase frame to the forklift using nylon straps.

Because the undisputed facts and testimony conclusively demonstrate Joeris was not aware that Gonzalez routinely ignored safety guidelines on this job and was not aware that Gonzalez and Cumpian were engaging in unsafe behavior, as a matter of law, Joeris did not have a duty to "require corrective measures be taken" as established in *Hoechst-Celanese v. Mendez*. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58; *see also Dow Chem. Co.*, 89 S.W.3d at 609; *Perez*, 228 S.W.3d at 881; *Victoria Elec. Co-op., Inc.*, 100 S.W.3d at 330; *Gomez*, 2012 WL 662321, at *5. Therefore, Cumpian's argument that Joeris incurred a duty based upon its knowledge of Gonzalez's past safety violations must fail.

The dissent formulates its conclusion based upon Cumpian's assertion that Joeris created a dangerous condition by allowing Gonzalez on the jobsite. We do not ignore this assertion, but instead, conclude it is subsumed within Cumpian's argument that Joeris failed to take proper and reasonable corrective measures. Thereby, this argument fails for the same reason: Joeris did not incur a heightened duty beyond that enumerated in *Hoechst-Celanese v. Mendez*. That is, Joeris did not incur a duty to ensure Leal Welding's employees performed their work in a safe manner based upon its knowledge of Gonzalez's safety violations on other jobs.

b. Contention Two: Joeris failed to ensure Gonzalez and Cumpian complied with safety regulations

Cumpian asserted at trial and on appeal that Joeris held a duty to ensure his safety because Joeris knew Gonzalez and Cumpian were violating safety regulations pertaining to installation of the staircase frames, yet failed to correct the action, or that Joeris tacitly approved of the conduct by failing to take action. Again, Cumpian asserts that because Joeris was aware of, or should have been aware of, the safety-regulation violation, it incurred a duty to ensure Cumpian's safety or to protect him from hazards associated with the act.

As in the previous discussion, for a general contractor to incur the narrow duty recognized in *Hoechst-Celanese v. Mendez*, it must be aware of the specific activity in violation of the safety regulations that caused the injury. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58; *see also Dow Chem. Co.*, 89 S.W.3d at 609; *Victoria Elec. Co-op., Inc.*, 100 S.W.3d at 330. A general contractor's promulgation of safety regulations, alone, is insufficient to incur a duty. *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58. The general contractor must be aware of the specific act that caused the injury, but failed to stop it. *See id*.; *Arias*, 978 S.W.3d at 663.

Thus, as previously discussed, the undisputed facts and testimony that pertain to the question of law whether Joeris held a duty demonstrates only that Joeris was aware Gonzalez had violated safety regulations on other jobs; however, the testimony does not address the issue whether Joeris knew that Gonzalez was engaging in any violations or unsafe conduct at the time of the injury or specific to the injury-causing activity. Instead, the undisputed testimony demonstrates no one from Joeris was at the scene of the accident and no one from Joeris was aware that Gonzalez and Cumpian were attempting to fasten the staircase frame to the forklift using nylon straps.

Because the undisputed facts and testimony conclusively demonstrate Joeris was not aware that Gonzalez and Cumpian were engaging in unsafe behavior, as a matter of law, Joeris did not have a duty to protect Cumpian from hazards associated with the act, as established in *Hoechst-Celanese v. Mendez*. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58; *Arias*, 978 S.W.3d at 663; *Gomez*, 2012 WL 662321, at *5. Therefore, Cumpian's argument that Joeris incurred a duty to ensure his safety based upon its knowledge or constructive knowledge of Gonzalez and Cumpian's dangerous activity must fail.

c. Contention Three: Joeris directed and controlled the situation in which Cumpian was injured

Cumpian asserted at trial and on appeal that Joeris held a duty to ensure his safety because Nieder knew Gonzalez and Rapolo had installed the first staircase using the forklift, but ordered Rapolo to finish the welding on the first staircase, thereby leaving no one but Cumpian to help Gonzalez move the second staircase. Cumpian contends this direction established sufficient control over the injury-causing activity to impose a duty on Joeris to keep Cumpian safe.

Rapolo testified that immediately following a mandatory safety meeting, Nieder asked Rapalo if the welding on the first staircase installed earlier that morning was complete. When Rapalo responded "No", Nieder asked him, "[c]ould you please get it done? Because I'm having cement trucks coming in and they're going to pour the main staircases, so I would like to get that poured."

Cumpian testified Joeris did not exercise control over the manner in which he and Gonzalez chose to install the staircase, stating instead that Gonzalez instructed him what to do and how to help in moving the staircase with the forklift. Cumpian stated no one from Joeris was on the scene "telling [me] or Armando how to secure the stairs onto the forklift."

In *Lee Lewis Construction*, the Texas Supreme Court established the control necessary for a general contractor to incur the duty enumerated in *Hoechst-Celanese Corp. v. Mendez* based upon its "on-site orders" or "detailed instructions on the means and methods to carry out a work order." *See Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001). In *Lee Lewis Construction*, the testimony established the general contractor personally witnessed and approved of the specific injury-causing activity. *Id*. at 784. The testimony also indicated the general contractor knew of and did not object to the independent contractor's act that was contrary to its safety regulations. *Id*. Based upon this specific control, the court held the general contractor incurred a duty to keep the independent contractor's employees safe from the hazards created by its direction or tacitly approved-of activity. *Id*.

In a similar case, *Hagins v. EZ Mart*, the Texarkana Court of Appeals analyzed *Lee Lewis Construction* and the control necessary for a general contractor to incur a duty when it controls compliance with safety regulations. *Hagins v. EZ Mart*, 128 S.W.3d 383, 391 (Tex. App.—Texarkana 2004, no pet.). In *Hagins*, before the accident in question, the general contractor directed the independent contractor's employee to weld a bracket on a gas pipe and asked another to hang a door. After the accident, the general contractor instructed that rails be installed on the platform where the accident occurred and asked an employee to come down from the top of a ladder. *Id*. at 390-91. Although these facts presented some direct control by the general contractor, the court held the direction given was insufficient to establish the requisite control necessary for the independent contractor to incur the narrow duty enumerated in *Hoechst-Celanese Corp. v. Mendez*. *Id*. at 391. The *Hagins* court concluded the direction given was also not specific to the injury-causing activity. *Id*. at 391.

Therefore, for Joeris to have incurred any duty of care under the circumstances in this case, Joeris must have exercised control beyond mere general or supervisory control, extending its

influence over Gonzalez and Cumpian's work such that a Joeris employee directed the action that caused the injury or that a Joeris employee was aware of the injury-causing activity to such a degree that Joeris tacitly approved. *See Lee Lewis Constr*., 70 S.W.3d at 784; *Hagins*, 128 S.W.3d at 391. Similar to *Hagins*, the testimony presented conclusively established that Joeris was not exercising control over Cumpian or Gonzalez's work at the time of the accident, and Joeris was not aware of Cumpian or Gonzalez's actions in order to tacitly approve of the unsafe conduct. *See Hagins*, 128 S.W.3d at 391.

In addition, any alleged retention of control must relate to the specific activity that led to the accident. There must be a nexus between a general contractor's retained supervisory control and the condition or activity that caused the injury. *See Lee Lewis Constr*., 70 S.W.3d at 784; *Hagins*, 128 S.W.3d at 390-91; *see also Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357 (citing *Williams v. Olivo*, 952 S.W.2d 523 (Tex. 1997)). The courts' analyses in both the *Hagins* and *Lee Lewis Construction* cases require that the general contractor's control directly affect, cause, or relate to the complained-of injuries. *Lee Lewis Constr*., 70 S.W.3d at 784; *Hagins*, 128 S.W.3d at 390-91.

Here, Nieder directed only that Rapalo finish the welding on another staircase installed that morning. Nieder's instruction for *Rapalo* to finish the welding is not evidence that Nieder exercised control over *Cumpian's* work. The instruction does not indicate that Nieder or Joeris controlled how the work was to be completed nor did the instruction provide specific direction. The testimony only refers to instruction to Rapalo, but does not refer to any instruction to Gonzalez or Cumpian directly regarding the specific manner or means in which they were to complete any task, specifically the action that caused Cumpian's injury. "Every general contractor has to 'tell' the subcontractor what to do, in general terms, and may do so without subjecting itself to liability."

Redinger, 689 S.W.2d at 418. "Such right does not create a duty, nor expand the scope of the duty beyond that as expressed in *Hoechst-Celanese.*" *Arias*, 978 S.W.2d at 663.

Because the undisputed facts and testimony conclusively demonstrate Joeris did not direct or control the manner in which Gonzalez and Cumpian attempted to secure the staircase frame to the forklift, nor did Joeris specifically direct Cumpian's activity in this situation, Joeris did not have a duty to protect Cumpian from hazards associated with the act, as established in *Hoechst-Celanese v. Mendez*. *See Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d at 357-58; *Arias*, 978 S.W.3d at 663; *Gomez*, 2012 WL 662321, at *5. Therefore, Cumpian's argument that Joeris incurred a duty to ensure his safety based upon its direction of Rapalo must fail.

CONCLUSION

Review of the record reveals Joeris held a right to promulgate and enforce safety regulations. However, Cumpian did not demonstrate or create a fact issue requiring jury determination whether Joeris was aware of the specific injury-causing violation but failed to take corrective action, or whether Joeris specifically directed or tacitly approved of the injury-causing safety violation. Thus, as a matter of law, the undisputed facts do not demonstrate that Joeris held a duty to take corrective measures or to otherwise protect Cumpian from work hazards created by his dangerous activity. Conversely, the undisputed facts demonstrate, as a matter of law, that Joeris did not hold a duty to Cumpian arising from Joeris's right to control the promulgation and enforcement of safety regulations. *See Hoechst-Celanese v. Mendez*, 967 S.W.2d at 357.

For these reasons, we sustain Joeris's argument that Joeris held no duty as a matter of law. This conclusion requires that we reverse the trial court's judgment and render judgment in favor of Joeris. Because there are no other issues that are necessary for final disposition of this appeal, we do not reach the remaining issues presented on appeal. *See* TEX. R. APP. P. 47.1.

Jason Pulliam, Justice