Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-15-00481-CV

JOERIS GENERAL CONTRACTORS, LTD.,
Appellant

v.

Rolando **CUMPIAN**,
Appellee

From the 45th 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

The Opinion[1] glosses over the egregious facts of this case. Joeris General Contractors retained control over all safety aspects of the jobsite. It also retained control over two specific safety aspects: (1) Armando Gonzalez, a Leal Welding employee, would not be permitted on the jobsite because Joeris admittedly knew he had routinely ignored safety standards in the past,

[1] I refer to Justice Pulliam's concurrence as "the Opinion" and Chief Justice Marion's concurrence as the "Concurring Opinion" based on their respective designations. *See* BLACK'S LAW DICTIONARY 307, 1125 (8th ed. 2004) (defining a "concurrence" as a separate opinion explaining a vote to agree with the judgment in the case "through a different line of reasoning" than another opinion explaining the judgment and "majority opinion" as "[a]n opinion joined in by more than half of the judges considering a given case").

including unsafely operating heavy equipment; and (2) Joeris was responsible for enforcing its company policy that only certified forklift operators would be permitted to use Joeris's forklift. The day Rolando Cumpian was injured, Joeris instructed Leal Welding to complete the installation of a staircase before cement trucks arrived. Joeris gave Leal Welding this on-site order knowing Gonzalez was present, having the contractual authority to remove him from the jobsite, knowing Joeris had not verified that Leal Welding employees were certified forklift operators, and knowing Joeris's forklift was the only machine available to move the staircase for its installation.

Before the incident, Dale Nieder, Joeris's on-site superintendent who was responsible for supervising and disciplining Leal Welding's employees for safety violations, did not instruct Gonzalez to leave the jobsite, ensure Gonzalez was certified to operate the forklift, or supervise Gonzalez to ensure he took proper safety measures when operating the forklift. Instead, there is evidence that Nieder, after instructing Leal Welding to complete the installation of the staircase, walked toward another area of the jobsite and, as a result, did not see the exact manner in which Gonzalez failed to safely operate the forklift. The Opinion and Concurring Opinion do not specifically address Cumpian's argument that Joeris failed to exercise due care after creating a dangerous situation on the jobsite. Instead, the Opinion would hold Joeris owed no duty to Cumpian *because* Joeris failed to supervise Gonzalez and consequently lacked actual knowledge of exactly how Gonzalez's recklessness had manifested itself on that particular day and time. And the Concurring Opinion would hold Joeris owed no duty because there is no evidence that Gonzalez violated a standard company policy.

I would hold the facts of this case fall squarely within the "retained control" exception to the general rule that a general contractor owes no duty to a subcontractor's employees. This case also satisfies the Opinion's "retained control plus actual knowledge" standard Justice Hecht

advocated in his concurring opinion in *Lee Lewis Construction v. Harrison*, 70 S.W.3d 778, 788-800 (Tex. 2001) (Hecht, J., concurring), as well as the Concurring Opinion's "standard company policy" requirement. The evidence at trial clearly explains why the jury found Joeris was not only negligent, but also grossly negligent and awarded $5 million in punitive damages. The judgment sets aside a jury verdict supported by the law and the evidence, awards Cumpian nothing for the loss of his toes due to Joeris's gross negligence, and supports a "perverse rule" that makes accidents more likely to occur in the future. *See id.* at 788, 793 (arguing we should avoid creating a "perverse rule" that increases risk to workers). I therefore respectfully dissent.[2]

THE "RETAINED CONTROL" EXCEPTION TO THE GENERAL "NO DUTY" RULE

A general contractor generally "does not owe any duty to ensure that [a subcontractor] performs his work in a safe manner." *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 356 (Tex. 1998) (per curiam). However, a duty arises when a general contractor retains control over the subcontractor's work. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 414 (1965), as quoted in *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985)). A general contractor may retain control either through a contractual right of control or through actual control,[3] and its duty "is commensurate with the control it retains over the independent contractor." *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803-04 (Tex. 1999); *Mendez*, 967 S.W.2d at 357.

[2] I would overrule Joeris's other "render issue" that chapter 95 precludes liability. *See Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 52 (Tex. 2015) (explaining chapter 95 does not apply to suit against a general contractor).

[3] The supreme court has held that in the absence of actual control, a general contractor may owe a duty to a subcontractor's employees based on contractual control. *Diaz*, 9 S.W.3d at 803-04. If a court holds a general contractor owes a duty based on actual control, it need not address whether the general contractor owes a duty based on contractual control. *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001). The Opinion concludes Joeris retained actual control, but the scope of its actual control did not give rise to a duty. Under *Diaz* and *Lee Lewis Construction*, the Opinion should have addressed the parties' arguments regarding Joeris's contractual control, which is an alternative basis for Joeris's duty that would support the judgment. *See* TEX. R. APP. P. 47.1 (requiring our opinions to "address[] every issue raised and necessary to final disposition of the appeal"); *see also Lee Lewis Constr.*, 70 S.W.3d at 800 (Jefferson, J., concurring) (noting, "If . . . liability cannot be based on actual control, we must determine whether there is some other basis for imposing liability," and arguing "the question of [the general contractor's] contractual right to control must be addressed").

In *Mendez*, the Supreme Court of Texas explained a general contractor may owe a duty under the "retained control" exception:

1) When the general contractor "is aware that its contractor routinely ignores applicable federal guidelines and standard company policies related to safety," 967 S.W.2d at 357 (citing *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469, 470 (Tex. 1985) (per curiam));

2) When the general contractor gives an independent contractor an "on-site order," *id.* (citing *Redinger*, 689 S.W.2d at 418);

3) When the general contractor "provides detailed instructions on the means or methods to carry out a work order," *id.* (citing *Enserch Corp. v. Parker*, 794 S.W.2d 2, 6 (Tex. 1990)); or

4) When the general contractor imposes safety requirements and procedures, the requirements and procedures must not unreasonably increase the probability and severity of injury. *Id.*

And in *Lee Lewis Construction*, the supreme court held the "retained control" exception is satisfied when a general contractor controls a safety aspect of the subcontractor's work and is aware of a safety violation. *See* 70 S.W.3d at 783.

A. This case is (1) analogous to *Tovar* because Joeris knowingly approved a deviation from an agreed-to safety measure and (2) satisfies *Tovar*'s broader principle that a general contractor owes a duty when it is aware a subcontractor routinely violates safety standards.

In *Tovar*, the supreme court recognized a general contractor has a duty to take contractually authorized corrective measures when a general contractor has actual knowledge that an independent contractor has deviated from an agreed-to safety measure. 692 S.W.2d at 470. In that case, the general contractor and subcontractor agreed that, in drilling a well, "the kill line [w]ould not be used for a fill line on the blowout preventer." *Id.* The subcontractor deviated from the agreement by "us[ing] the kill line for a fill line, and [the general contractor] was aware of that deviation." *Id.* The general contractor retained the authority under the contract to "discontinue drilling in the event of [the subcontractor's] carelessness, inattention, or incompetency." *Id.* The

general contractor did not exercise this right, and the subcontractor's employee was injured as a result of the deviation from the general contractor and subcontractor's agreement. *Id.* The supreme court held the general contractor owed a duty to take corrective measures or cancel the contract. *Id.*

Here, Joeris requested and Leal Welding agreed that Gonzalez would "not work on the project." Joeris made this request because it was aware of Gonzalez's "repetitive safety behavior issues." At previous jobsites, Joeris had reprimanded Gonzalez multiple times for violating safety standards. Joeris was concerned Gonzalez's presence at this jobsite would increase the risk of a serious accident resulting in injury or death. Leal Welding deviated from this agreement by assigning Gonzalez to work on the jobsite, and Joeris's on-site manager Nieder was aware Gonzalez was working on the jobsite in deviation from this agreement.[4] In Joeris's contract with Leal Welding, Joeris retained "the authority to remove any employee" due to safety concerns. Furthermore, Joeris had previously stopped Gonzalez's work and removed him from other jobs and here, immediately after the accident, "made sure [Gonzalez] got off the job." Because Joeris had actual knowledge that Leal Welding was deviating from an agreed-to safety measure by allowing Gonzalez to work on the jobsite, retained contractual control to remove Gonzalez from the jobsite, and exercised actual control to stop Gonzalez's work and remove him from the jobsite, Joeris owed Cumpian a duty to take corrective measures under *Tovar*. *See id.*

[4] Although the Opinion states Bakeman testified he did not know Gonzalez was on the jobsite, the evidence established Joeris (through Nieder) did have actual knowledge Gonzalez was working on the jobsite. Victor Rapalo, a Leal Welding employee, testified Nieder approached him, Gonzalez, and Cumpian and asked whether they were done with the staircase, and then instructed them to complete the staircase. Nieder testified (as did Cumpian) that Gonzalez was at the safety meeting earlier that morning. Nieder also testified he saw Leal Welding install staircases before this incident, and Cumpian testified it was Gonzalez who had installed the staircases before this incident. Finally, Cumpian testified Gonzalez was working on the jobsite the entire time Cumpian was there, and Nieder testified he and his assistant superintendent generally supervised the Leal Welding employees.

Although *Tovar* concerned a known deviation from a site-specific safety agreement rather than knowledge of numerous prior safety violations, the Supreme Court of Texas in *Mendez* stated the "retained control" exception would apply when the general contractor is "aware that its contractor routinely ignores applicable federal guidelines and standard company policies related to safety." *Mendez*, 967 S.W.2d at 357 (citing *Tovar*, 692 S.W.2d at 470). Here, it is undisputed Joeris was aware Leal Welding, specifically Gonzalez, had—according to Joeris's safety director Mark Bakeman—"repetitive safety behavior issues." The "repetitive safety behavior issues" to which Bakeman referred included conduct at several prior jobsites at which Joeris took corrective measures regarding Gonzalez.

- Bakeman testified about an incident on a prior jobsite when Gonzalez was improperly using a scissor lift to hoist heavy equipment.

- Bakeman testified there was an incident at Trinity University when Gonzalez was not using fall protection. He stated "it was discussed with [Gonzalez], and within minutes later, he was found to be not wearing fall protection again after being talked to previously about it." Victor Rapalo, who had worked for Leal Welding, testified he was there when Bakeman came to the site and "tossed [Gonzalez] off the job." He stated Joeris later decided to allow Gonzalez back on the jobsite and hired a safety representative to monitor Gonzalez.

- Rapalo testified he and Gonzalez worked on another Joeris project at "Hidden Cove." He testified Gonzalez instructed him and other Leal Welding employees how to use a crane to lift a beam. The beam "slammed into the other beam and it caused that beam to come down." According to Rapalo, Bakeman "showed up . . . because of the situation."

- Rapalo testified there was another incident while working on "a school on Judson." He testified Gonzalez wanted him and another worker "to get on top of these cement beams, tie off and pick up the joists[5] and walk them and set them into place one by one." Rapalo called Bakeman because he "knew it was dangerous"; the joists were too heavy and it was "not safe at all" to walk across cement beams with the joists. According to Rapalo, Bakeman arrived and "was able to stop that process." Rapalo testified, "Everyone that knows Mr. Gonzalez, it's either his way or the highway."

[5] Rapalo testified a joist is a long piece of steel "that holds roofing [or] decking together."

I would hold this case is directly analogous to *Tovar*[6] and this case falls squarely under the supreme court's explanation in *Mendez* of what satisfies the "retained control" exception.

B. Joeris owed a duty under *Redinger* because it gave Leal Welding an "on-site order."

Under *Redinger*, a general contractor has a duty to exercise reasonable care in supervising when the general contractor gives an independent contractor an "on-site order." *Mendez*, 967 S.W.2d at 357; *Redinger*, 689 S.W.2d at 418. In *Redinger*, a general contractor's superintendent "was preparing the site for a subcontractor to pour concrete." 689 S.W.2d at 417. When the concrete trucks arrived, several piles of dirt blocked their access to the work area. *Id.* The superintendent ordered a dirt-hauling subcontractor to move the dirt. *Id.* The dirt-hauling subcontractor used a tractor to move the dirt and the tractor injured another subcontractor's employee. *Id.* The supreme court held the general contractor owed the subcontractor's employee a duty because the general contractor retained control by directing a subcontractor to immediately move the dirt when other workers were only few feet away. *Id.* at 417-18. The dirt-hauling subcontractor's ability to move the dirt by safer means or to warn the other workers did not preclude the general contractor's duty to exercise reasonable care. *See id.*

Here, on the day of Cumpian's injury, Leal Welding's employees were required to attend an on-site safety meeting in the morning. After the meeting, Joeris's on-site manager approached Leal Welding's foreman, asked if "you guys" were done with the staircase, and informed him that

[6] The primary difference between this case and *Tovar* is that in *Tovar* the general contractor and subcontractor agreed not to use a piece of equipment for a particular purpose and, here, the general contractor and subcontractor agreed not to use a particular worker on the jobsite. This distinction is legally insignificant because (1) both factual situations present a reasonably foreseeable risk of harm, and such foreseeability is "the foremost and dominant consideration" in a duty analysis, *Greater Hous. Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); and (2) in torts, a duty may arise when entrusting a person known to be reckless with heavy machinery, *see Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987). Cumpian's cause of action is not for the negligent hiring of Leal Welding as a subcontractor, but for Joeris's actual control, jointly with Leal Welding, over Gonzalez's access to the worksite. *Cf. Tavary v. Channel Terminal Corp.*, No. 01-97-00571-CV, 1998 WL 417945, at *3 (Tex. App.—Houston [1st Dist.] July 23, 1998, no pet.) (mem. op.) (holding general contractor who imposes access restrictions for safety concerns assumes "actual control").

cement trucks were on their way. According to the foreman, Cumpian was standing to his left and Gonzalez was "a few feet" to Cumpian's left. Joeris asked them to complete the installation of the staircase so that cement could be poured on all of the staircases that day. At Joeris's direction, Leal Welding started working to complete the installation of the staircase and Cumpian was injured while attempting to complete that task. Joeris gave Leal Welding an "on-site order" similar to the one given in *Redinger*. *See id.* The *Redinger* exception therefore applies.

The Opinion rejects the *Redinger* exception in this case, reasoning that "Cumpian specifically asserts liability based upon Joeris's failure to enforce . . . safety regulations." This misstates Cumpian's position; he does not assert liability based solely on Joeris's authority to promulgate and enforce safety regulations. Out of the thirteen different allegations of negligence in Cumpian's live pleading, only three were related to safety policies. Cumpian also alleged Joeris was negligent by failing to supervise on-site work involving dangerous machinery, which is a breach of the duty recognized under the facts of *Redinger*.

C. Joeris also owed a duty under *Lee Lewis Construction* because Joeris retained control over all operations involving the use of Joeris's forklift.

The Opinion states, "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.'" The Opinion would hold the element of duty in this context depends on the general contractor's "actual knowledge, not constructive knowledge, of an independent contractor's safety violations." This holding directly conflicts with the Restatement's explanation that a general contractor may be subject to liability "if he knows ***or by the exercise of reasonable care should know*** that the subcontractors' work is being" completed "in a way unreasonably dangerous to others." *See* RESTATEMENT (SECOND) OF TORTS § 414 cmt. b (emphasis added);

BLACK'S LAW DICTIONARY 2004 (8th ed.), at 888 (defining "constructive knowledge" as "Knowledge that one using reasonable care . . . should have."). Furthermore, I disagree with the Opinion's suggestion that *Lee Lewis Construction* impliedly overruled *Redinger* (which required due care in supervising the execution of an on-site order with no mention of actual or constructive knowledge) and heightened the standard for *Redinger*'s "on-site orders" exception. *Lee Lewis Construction* did not address the "on-site orders" exception in any manner, directly or indirectly. *See* 70 S.W.3d at 782-84. Instead, the supreme court in *Lee Lewis Construction* applied the "retained control" exception to a different set of facts. *See id.*

The Opinion appears to apply the heightened "retained control plus actual knowledge" standard Justice Hecht recommended in his concurring opinion in *Lee Lewis Construction*. *Id.* at 788-800 (Hecht, J., concurring). Chief Justice Phillips concurred in that case, noting the majority in *Lee Lewis Construction* "accurately articulate[d] and applie[d] current Texas common law," Justice Hecht's "views clearly constitute a change in Texas law," and his "position seems to have been adopted by only a small minority of American jurisdictions." *Id.* at 787 (Phillips, C.J., concurring). The Opinion in this case applies the same standard advocated by Justice Hecht, one which the supreme court has not adopted. *See id.* at 788-800 (Hecht, J., concurring).

I would hold this case is directly analogous to *Lee Lewis Construction* and even satisfies the heightened standard recommended by Justice Hecht.[7] In that case, a subcontractor's worker fell ten stories to his death and, in a wrongful death and survival action against the general contractor, a jury awarded $7.9 million in compensatory damages and $5 million in punitive damages. *Id.* at 781-82 (majority opinion). The supreme court majority held there was sufficient

[7] The facts of this case also satisfy the *Tovar*-based "contractual control plus actual knowledge" standard Justice Jefferson articulated in his concurring opinion. *Lee Lewis Constr., Inc.*, 70 S.W.3d at 800-01 (Jefferson, J., concurring) (characterizing *Tovar* as a "contractual control" case).

evidence of actual control over a particular safety aspect of the subcontractor's work because the general contractor assumed the responsibility to ensure the subcontractors' employees properly utilized fall protection equipment; approved of some fall protection equipment; and knew of and did not object to the workers' failure to use other fall protection equipment that would have prevented Harrison's fall. *Id.* at 784. It was undisputed the general contractor did not observe exactly how Harrison fell or know what safety measures he failed to take other than not using an independent lifeline. *Id.* at 782.

Cumpian argues Joeris controlled a specific safety aspect of Leal Welding's work involving forklift operations. The Opinion does not directly address this argument other than to generally hold Joeris owed no duty because Joeris did not supervise Gonzalez's use of the forklift. It is undisputed that Joeris assumed the responsibility over forklift operations on the site. Nieder testified anyone who wanted to use Joeris's forklift was required to be a certified forklift operator, complete a form, and ask Joeris for the key. It is also undisputed that Joeris knew Leal Welding employees occasionally used Joeris's forklift, and Joeris never ensured whether any of the Leal Welding employees were certified forklift operators. There is evidence the forklift Gonzalez used that day belonged to Joeris, and some evidence from which a jury could have reasonably inferred Gonzalez was not certified to operate a forklift.[8] Thus, the *Lee Lewis Construction* exception applies because Joeris retained control over all forklift operations, including Leal Welding's use of the forklifts, by establishing a procedure to control who could use a forklift on the jobsite and assuming responsibility for enforcing that procedure. *See id.* at 783. Because Joeris had actual knowledge of this specific safety violation, and this safety violation was a proximate cause of

[8] Although this evidence was disputed, we must ignore contradicting evidence. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 234 (Tex. 2004).

Cumpian's injury, the evidence in this case also satisfies Justice Hecht's heightened standard for a general contractor to owe a duty of care. *See id.* at 784 ("More than one act may be the proximate cause of the same injury.").

D. It is undisputed Joeris and Leal Welding jointly retained control over all safety aspects of Leal Welding's work on the jobsite.

If a general contractor retains control, its duty of care is commensurate with the control it retains over the subcontractor's work. *Lee Lewis Constr.*, 70 S.W.3d at 783; *Mendez*, 967 S.W.2d at 357. "[I]t is not enough that the [defendant] has merely a general right to order the work stopped." *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 607-08 (Tex. 2002). And unless there is a contractual provision giving the general contractor "the right to take action" in the event of a safety violation, merely having an on-site safety employee is insufficient to give rise to a general contractor's duty. *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156-57 (Tex. 1999) (per curiam); *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 226 (Tex. 1999) (per curiam). "The rule . . . is usually, though not exclusively, applicable when a principal contractor entrusts part of the work to subcontractors, ***but himself or through a foreman superintends the entire job***." RESTATEMENT (SECOND) OF TORTS § 414 cmt. b. (emphasis added).

Applying this standard, this court held a general contractor owed a duty in *Lawson-Avila Construction, Inc. v. Stoutamire*, 791 S.W.2d 584, 589-91 (Tex. App.—San Antonio 1990, writ denied). In *Stoutamire*, just as in this case, the general contractor had been hired to a build a school; the subcontractor was in charge of welding; and the subcontractor's employees were injured by the use of heavy equipment. *Id.* at 589. This court considered evidence that the general contractor (1) had two on-site safety employees who were acting in a management or supervisory capacity; (2) had the authority to give on-site orders to subcontractors; (3) had the authority to stop work if the general contractor's superintendent observed a safety violation; (4) shared the "ultimate[]

responsibility" for safety on the jobsite with the subcontractors; and (5) had "the overall responsibility" for compliance with the requirements of the work. *Id.* at 589-91.

Here, there is evidence Joeris retained contractual control and exercised actual control over all safety aspects of the jobsite. Under the master contract between Joeris and Leal Welding, Joeris retained the contractual right to "remove any employee . . . of [Leal Welding] from the project" if Leal Welding "fail[e]d to comply with [safety] policies and procedures." The master contract between Joeris and Leal Welding also provided Leal Welding's employees were required to attend safety meetings, which Joeris held on a weekly basis.

Joeris assigned at least three safety employees to the jobsite to monitor Leal Welding's conduct: Joeris's on-site manager and superintendent Nieder, his assistant superintendent, and Joeris's safety director Bakeman. Nieder testified he "was the senior on-site safety supervisor"; the subcontractors' foremen "answered to" him; the chain of command on the jobsite was important to maintain safety; and if he saw them "doing something unsafe, I'm going to stop them working right there and get their foreman." Bakeman testified his job duties as safety director included "enforc[ing] the safety rules and the safety regulations for a particular [jobsite]." Wesley Johnson, Joeris's director of training and risk management, testified "Bakeman's job as safety director in part was to observe the [jobsite], including the conduct of . . . the employees of sub[contractor]s, to make sure those employees . . . were performing their job in a safe manner dictated by the safety policies on the job." Joeris's Vice President of Operations John Casstevens testified Joeris and Bakeman, specifically, "shared responsibility [for overall jobsite safety] with everybody involved."

Joeris exercised actual supervisory control over all safety aspects on the jobsite by enforcing its safety policies and procedures through a disciplinary reprimand program. Bakeman

testified if he observed subcontractors have repeated safety violations, he would warn them verbally, "[a]ction must be taken" for repetitive violations, and a written reprimand would be placed "in their file." Nieder testified he and his assistant wrote up three reprimands pertaining to Leal Welding employees "on this job." Johnson testified "written reprimands" were issued when there were either frequent or severe violations of safety policies and procedures. The safety citations advised the cited Leal Welding employee, "Please be advised that company policy prohibits tolerance of the aforementioned, and we are giving you this citation so that you may correct and not repeat the situation. Safety violations are subject to discipline depending on the severity of the violation."

In this case, there is evidence Joeris did more than simply have an on-site safety employee and the "general right" to order the work stopped. *Cf. Dow Chem. Co.*, 89 S.W.3d at 607-08; *Koch Ref.*, 11 S.W.3d at 156-57; *Coastal Marine Serv.*, 988 S.W.2d at 226. Joeris had the specific "right to take action" in the event of a safety violation. *See Koch Ref.*, 11 S.W.3d at 156-57 (suggesting a duty would be found in such a case). Not only did Joeris retain that authority and control, it exercised its authority and control on this particular jobsite on numerous occasions. Viewing the evidence in a light most favorable to Cumpian and drawing all reasonable inferences in his favor, Joeris retained control over all safety aspects on the jobsite. Joeris owed Cumpian a duty that is commensurate with the control it retained over Leal Welding's work, which included Gonzalez's safety violations when completing the installation of the staircase. *See Lee Lewis Constr.*, 70 S.W.3d at 783; *Mendez*, 967 S.W.2d at 357.

E. The Opinion supports a dangerous jobsite-safety precedent for subcontractors that is inconsistent with fundamental tort principles.

The Opinion excuses Joeris's conduct because Joeris did not have actual knowledge of the precise manner in which Gonzalez's known reckless conduct would manifest itself on the

particular day and time when Cumpian was injured. But "[i]n determining whether the defendant was under a duty . . . foreseeability of the risk is the foremost and dominant consideration." *Greater Hous. Transp.*, 801 S.W.2d at 525 (internal quotes and citation omitted). "Foreseeability ***does not require that a person anticipate the precise manner in which injury will occur*** once he has created a dangerous situation through his negligence." *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992) (emphasis added). Such a requirement would encourage general contractors who have knowingly created dangerous situations on the jobsite to turn a blind eye to avoid actual knowledge of the precise manner in which workers' injuries occur. This is a "perverse rule" that makes serious accidents resulting in injury and death more likely to occur in the future. *See Lee Lewis Constr.*, 70 S.W.3d at 788, 793 (Hecht, J., concurring).

F. None of the leading cases applying the "retained control" exception require a violation of a standard company policy; the evidence also establishes Gonzalez violated Joeris's standard company policy regarding use of its forklift.

I respectfully disagree with the Concurring Opinion's position that the "retained control" exception requires a violation of a standard company policy related to safety, rather than a site-specific safety agreement. In *Lee Lewis Construction*, *Tovar*, and *Redinger*, the supreme court held a general contractor owed a subcontractor's employee a duty without a violation of a standard company policy. *Id.* at 784 (majority opinion) (general contractor observed and expressly approved use of unsafe fall-protection equipment); *Tovar*, 692 S.W.2d at 470 (general contractor was aware subcontractor violated safety agreement contained in the drilling contract); *Redinger*, 689 S.W.2d at 418 (general contractor retained control by giving a subcontractor's employee an oral on-site order). The "standard company policies" language is from *dicta* in *Mendez* describing just one plausible application of *Tovar*. *See Mendez*, 967 S.W.2d at 357 (citing *Tovar* with a "see e.g."

cite). *Mendez* does not hold the "retained control" exception requires a violation of a standard company policy, as opposed to a site-specific safety agreement as in *Tovar*. *See id.*

Even if the "retained control" exception does require a violation of a standard company policy, the evidence establishes Gonzalez violated Joeris's company policy regarding who may use Joeris's forklift. Specifically, Nieder testified:

> Q. If a sub's employee is using the Joeris or the -- or the -- the orange Skytrak that Joeris rented for this job, they're doing it without the OSHA certification, forklift certification, they're violating Joeris' policy because Joeris' policy is no one's to get on that forklift unless they're forklift certified, correct?
>
> A. Yes, sir.

There is evidence that Gonzalez was using Joeris's forklift and the Leal Welding employees' forklift certifications had expired. Thus, there is evidence of a violation of a standard company policy.

CONCLUSION

The proper application of the "retained control" exception deeply divides this court today, as it has in the past. Today, the proper application of this exception has spawned three separate opinions, and the judgment is inconsistent with a prior decision of this court in a case in which the general contractor retained the same level of supervisory control over the subcontractor as Joeris retained over Leal Welding. *See Stoutamire*, 791 S.W.2d at 589-91. In *Victoria Electric Cooperative, Inc. v. Williams*, this court sitting en banc reheard an appeal involving the "retained control" exception and decided the merits in a 4-3 decision. 100 S.W.3d 323, 325 (Tex. App.—San Antonio 2002, pet. denied) (en banc op. on reh'g). And in *Traylor Brothers, Inc. v. Garcia*, the supreme court appointed two visiting judges to assist this court in resolving a disagreement regarding the proper application of this exception. 49 S.W.3d 430, 432 (Tex. App.—San Antonio 2001, pet. denied) (en banc). *Traylor Brothers* was finally resolved in a 5-4 decision. *See id.*; *see*

also Laurel v. Herschap, 5 S.W.3d 799, 800 (Tex. App.—San Antonio 1999, no pet.) (op. on reh'g) (rehearing issue regarding "retained control" exception).

In *Lee Lewis Construction*, Justice Hecht recommended that the supreme court "clarify the issue" regarding the "retained control" exception to the general "no duty" rule. 70 S.W.3d at 788-800 (Hecht, J., concurring). Chief Justice Phillips also expressed his "substantial misgivings about [the supreme court's] approach in suits against general contractors for injuries to a subcontractor's employees [because the court's] focus on the degree of the general contractor's 'retained control' has failed to provide either consistent or equitable results." *Id.* at 788 (Phillips, C.J., concurring). Based on the foregoing, I respectfully dissent and ask the Supreme Court of Texas to provide clarity in this area.

Luz Elena D. Chapa, Justice