Fourth Court of Appeals
San Antonio, Texas

CONCURRING 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

I write separately because I disagree with some of the analysis in the majority opinion; however, I agree we are constrained to hold there is no exception here to the general rule that a contractor does not owe a duty to ensure that a subcontractor performs his work in a safe manner. The facts in this case fit within the general logical construct of the Texas Supreme Court's decisions discussing an exception to the general rule; however, to hold an exception applies here would require this court to go a step further than the analysis in those decisions. We would have to equate a general contractor's decision to not allow a subcontractor's employee to work on a job

site to a "standard company policy" related to safety. Without further clarification from the Texas Supreme Court, I am unable to take that step.

In *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 357 (Tex. 1998), the Texas Supreme Court cited *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469 (Tex. 1985), to support its assertion that "an employer who is aware that a 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 *Tovar*, the standard company policy, and the contract between the parties, prohibited the subcontractor from using a kill line for a fill line on an oil well blowout preventer because it was an unsafe design. 692 S.W.2d at 470. The general contractor was aware the subcontractor used the kill line for the fill line in violation of this policy. *Id*. Nevertheless, the general contractor did not order the shutdown of operations despite its knowledge of the specific danger that could result. *Id*. Tragically, the use of the kill line for the fill line allowed pressure to build up in the hole and caused the bit breaker and drilling mud to spew out of the mouth of the hole severely injuring Henry Tovar's chest, ribs, shoulder, legs, and back. *Id*. Because the general contractor was aware the subcontractor ignored a standard company policy related to safety and failed to take corrective measures, the Texas Supreme Court held the general contractor owed a duty to Tovar. *Id*.

Similarly, in *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 783-84 (Tex. 2001), the issue presented was whether the general contractor retained control over the fall-protection system used by a subcontractor's employee. Under the facts in that case, the standard company policy required the proper utilization of fall-protection equipment for safety purposes, and the general contractor's job superintendent was assigned the responsibility to ensure that the subcontractor's employees complied with this policy. *Id*. at 784. However, "[t]estimony indicated that [the job

superintendent] personally witnessed and approved" the use of faulty fall-protection equipment. *Id*. Because the general contractor was aware the subcontractor was in violation of its standard company policy regarding the proper utilization of the fall-protection equipment, the Texas Supreme Court held the general contractor owed the subcontractor's employee a duty to require corrective measures to be taken. *Id*.

In the instant case, Joeris's safety director testified he reached a verbal agreement with the owner of Leal Welding, one of the subcontractors, that Armando Gonzalez, a Leal employee, would not be allowed to work on the project in question because he did not take safety seriously on prior jobs. The evidence also established that Joeris's job superintendent knew about this decision and also knew Gonzalez was working on the project despite the verbal agreement. Finally, the evidence established that Rolando Cumpian was injured when Gonzalez used a forklift in an unsafe manner.

In order to hold Joeris had a duty under these facts, we would have to conclude that Joeris's safety director's decision not to allow Gonzalez to work on the project is equivalent to a "standard company policy" related to safety. This would require us to extend the analysis in *Tovar* and *Lee Lewis Const., Inc.* in which standard company policies regarding specific safety measures were violated. Absent further guidance from the Texas Supreme Court, I do not believe we can extend the law that far. Therefore, I must concur in the majority's conclusion that Joeris did not owe Mr. Cumpian a duty under the facts in this case.

Sandee Bryan Marion, Chief Justice