IN THE SUPREME COURT OF TEXAS

NO. 04-0871

GENERAL ELECTRIC COMPANY, PETITIONER,

v.

ARTHUR LEE MORITZ, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

Argued October 17, 2006

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE WAINWRIGHT, JUSTICE MEDINA, and JUSTICE WILLETT joined.

JUSTICE GREEN filed a dissenting opinion, in which CHIEF JUSTICE JEFFERSON and JUSTICE JOHNSON joined.

JUSTICE O'NEILL did not participate in the decision.

Must a landowner warn an independent contractor's employees of obvious hazards they already know about? Four times in the last ten years this Court has said the answer is "No."[1] The

[1] *See Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007) ("In any event, the dangers of rolling an employee about inside a concrete mixer are so obvious they cannot constitute a concealed hazard imposing on Central a duty to warn."); *Wilhelm v. Flores*, 195 S.W.3d 96, 98 (Tex. 2006) ("Nor would Wilhelm, as occupier of the premises where the beehives were kept, have owed an independent contractor's employees a duty to warn them about being stung, since that danger was obvious."); *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 295 (Tex. 2004) ("With respect to existing defects, an owner or occupier has a duty to inspect the premises and warn of concealed hazards the owner knows or should have known about . . . ."); *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999) ("[T]he premises owner has a duty to inspect the premises and warn the independent contractor/invitee of dangerous conditions that are not open and obvious and that the owner knows or should have known exist.").

plaintiff in this case argues that all these cases are wrong because his knowledge of the hazard is simply a factor the jury should consider in assessing comparative negligence. We agree the jury alone can decide whether he was negligent, but disagree that a jury can decide what legal duties landowners owe to independent contractors. We hold the trial court correctly found no duty here, and the court of appeals erred in reversing it.

I. Background

Arthur Lee Moritz worked for an independent contractor that delivered General Electric parts to customers. Every day for 18 months, Moritz drove his pick-up to GE's warehouse, which had a loading dock with two large doors. Both doors were about four-and-a-half feet above the paved driveway, but only one had a concrete ramp extending down to grade level. The ramp was straight, 10 feet wide, 40 feet long, and had six-inch curbs along both edges but no guard rails. Generally, Moritz loaded supplies either by backing his truck up the ramp and into the warehouse itself, or backing up next to the door without a ramp. But on some days, he would load his truck on the ramp or outside in the driveway.

On the day Moritz was injured, both doors were blocked by GE supplies, so he parked his truck up on the ramp. Two GE employees helped him load electrical conduit into the bed of his pickup, after which Moritz alone secured the load with rachet-type straps. He then tried to add a rubber bungee cord, but the cord broke while he was leaning back to stretch it, causing him to fall off the ramp's side and fracture his hip, pelvis, and thumb.

Moritz sued GE and others,[2] alleging that as owners or occupiers of the premises they were liable for negligence regarding activities and premises conditions.[3] The trial court granted summary judgment for the defendants, but the court of appeals found fact questions as to both theories and reversed.[4] We address each theory in turn.

II. The Negligent Activity Theory

Moritz alleged a negligent activity claim solely against GE. Generally, an owner or occupier does not owe a duty to ensure that independent contractors perform their work in a safe manner.[5] But one who retains a right to control the contractor's work may be held liable for negligence in exercising that right.[6] This right to control may be expressed by contract or implied by conduct.[7]

In the summary judgment record here, there was no evidence Moritz's duties were governed by a contract. There was some evidence that in practice GE controlled where Moritz could load his truck, such as when it blocked some of his loading options. But there was no evidence it controlled

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[2] The other defendants were Tarrant County Limited Partnership (the owner of the warehouse) and CB Richard Ellis, Inc. (which managed the warehouse for the owner). Moritz also sued Regal Business Center, Inc., but nonsuited it before the summary judgments at issue here.

[3] *See Khan*, 138 S.W.3d at 291; *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992).

[4] ___ S.W.3d ___.

[5] *Islas*, 228 S.W.3d at 651; *Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 791 (Tex. 2006); *Khan*, 138 S.W.3d at 293; *Coastal Marine Serv. of Tex.*, 988 S.W.2d at 225; *Olivo*, 952 S.W.2d at 527.

[6] *Khan*, 138 S.W.3d at 292; *accord*, *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 607 (Tex. 2002); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001); *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985); RESTATEMENT (SECOND) OF TORTS § 414 (1965).

[7] *Khan*, 138 S.W.3d at 293; *Dow Chem.*, 89 S.W.3d at 606; *Coastal Marine*, 988 S.W.2d at 226; *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155 (Tex. 1999).

how or where Moritz secured his load for delivery — the truck, straps, and rubber cords he used for that purpose were entirely his own.

Citing our opinion in *Lee Lewis Construction, Inc. v. Harrison*,[8] the court of appeals held that a fact question was created if "GE retained the right to control *any aspect* of Moritz's activities."[9] What we actually said in *Lee Lewis* (citing the Restatement of Torts and numerous opinions) was that a defendant's duty "*is commensurate with the control it retains* over the independent contractor's work."[10] Thus, it is not enough to show that the defendant controlled one aspect of Moritz's activities if his injury arose from another.[11]

Here, GE's control of where Moritz could load supplies did not dictate where he could secure that load. While some loads undoubtedly must be secured before they are moved an inch, that was not the case here; Moritz admitted at his deposition that he could have driven off the ramp before securing this load. As an independent contractor, Moritz was free to choose whatever vehicle he wanted for deliveries, and when, where, and how he would secure his load. Thus, none of the defendants had contractual or actual control of Moritz's decision to carry loads in the back of a pick-up truck or secure them with rubber cords requiring him to use his body weight to pull them taut.

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[8] 70 S.W.3d 778 (Tex. 2001).

[9] ___ S.W.3d at ___ (emphasis added).

[10] 70 S.W.3d at 783 (emphasis added) (citing *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999); *Hoechst-Celanese Corp. v. Mendez*, 967 S.W.2d 354, 355 (Tex. 1998); *Redinger*, 689 S.W.2d at 418; RESTATEMENT (SECOND) OF TORTS § 414 (1965)).

[11] *See Khan*, 138 S.W.3d at 294 ("[I]t is not enough to show that an oil company controlled some security activities if the ones it controlled had nothing to do with the criminal act that ultimately occurred.").

Accordingly, the court of appeals erred in finding a fact question on his negligent activity theory.

III. The Premises Condition Theory

Moritz alleged a premises-condition claim against all the defendants. Generally, a landowner is liable to employees of an independent contractor only for claims arising from a pre-existing defect rather than from the contractor's work,[12] and then only if the pre-existing defect was concealed: "With respect to existing defects, an owner or occupier has a duty to inspect the premises and warn of *concealed* hazards the owner knows or should have known about."[13] Moritz's claimed defect — the absence of rails on the loading ramp — was obviously a pre-existing condition and obviously not a concealed hazard.

Limiting premises liability to concealed hazards is not unique to cases involving independent contractors. A lessor who relinquishes possession or occupancy of premises also has no duty to warn of defects except those that are concealed.[14] In both cases, the landowner's duty is limited because control is being turned over to someone else in a way that is not true of shoppers, sightseers, or other business invitees.

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[12] *Id*. at 291; *Dow Chem*., 89 S.W.3d at 606; *Koch Ref.*, 11 S.W.3d at 156 n.3*; Redinger*, 689 S.W.2d at 417.

[13] *Khan*, 138 S.W.3d at 295 (emphasis added); *accord*, *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *Wilhelm v. Flores*, 195 S.W.3d 96, 98 (Tex. 2006); *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999); *Shell Chem. Co. v. Lamb*, 493 S.W.2d 742, 746 (Tex. 1973); *Bryant v. Gulf Oil Corp*., 694 S.W.2d 443, 446 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).

[14] *Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 285 (Tex. 1996); *Brownsville Navigation Dist. v. Izaguirre*, 829 S.W.2d 159, 161 (Tex. 1992); *Flynn v. Pan Am. Hotel Co.*, 183 S.W.2d 446, 448 (Tex. 1944); RESTATEMENT (SECOND) OF TORTS § 358 (1965).

An independent contractor owes its own employees a nondelegable duty to provide them a safe place to work, safe equipment to work with, and warn them of potential hazards;[15] it also controls the details and methods of its own work, including the labor and equipment employed.[16] Thus, one who hires an independent contractor generally expects the contractor to take into account any open and obvious premises defects in deciding how the work should be done, what equipment to use in doing it, and whether its workers need any warnings. Placing the duty on an independent contractor to warn its own employees or make safe open and obvious defects ensures that the party with the duty is the one with the ability to carry it out.

The dissent argues that it "makes no sense" to allocate duty in this manner because Moritz had no "control over the workplace conditions." GE may have controlled Moritz's loading options, but not where he chose to secure his load. Accordingly, it had a duty only to warn him of concealed defects he might encounter in doing his own work. The absence of handrails here was clearly not a concealed defect. If owners and occupiers have no duty to warn an independent contractor of open and obvious defects, the defendants had no duty to warn Moritz that the ramp he had been using for more than a year had no handrails.

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[15] *See Islas*, 228 S.W.3d at 652 n.10 (noting employers' nondelegable duties to provide safe workplace, hire competent co-employees, and provide safety regulations); *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (noting employers' duties to warn employees of hazards of employment and provide needed safety equipment or assistance); *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 754 (Tex. 1975) ("It is well established that an employer has certain nondelegable and continuous duties to his employees. Among these are the duty to warn employees as to the hazards of their employment and to supervise their activities, the duty to furnish a reasonably safe place in which to labor and the duty to furnish reasonably safe instrumentalities with which employees are to work.").

[16] *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002).

IV. The Duty to Independent Contractors and *Parker*

The court of appeals held the defendants still owed Moritz a duty to warn or make the ramp safe because this Court abolished all no-duty arguments in 1976 in *Parker v. Highland Park*.[17] But *Parker* does not go that far, as we explained more than 20 years ago in *Dixon v. Van Waters and Rogers*.[18]

In *Parker*, a landlord mis-set a timing device that turned on the lights in an enclosed stairway of an apartment building, darkening the tenants' only way down.[19] In upholding a jury verdict in a visitor's favor, we "expressly abolish[ed] the so-called no-duty concept in this case" and ordered that "[t]he reasonableness of an actor's conduct under the circumstances will be determined under principles of contributory negligence."[20]

But *Parker* abolished a certain kind of no-duty defense, not all duty questions whatsoever. The question in *Parker* was not whether the defendant owed the plaintiff a duty; the landlord unquestionably had a duty to provide second-floor renters some way down besides jumping. The question instead, as we explained in 1984 in *Dixon*, was whether the plaintiff had to prove she had no knowledge of the stairway's darkness as part of her case-in-chief:

> The term "no-duty," as used in *Parker*, referred to the oddity that had uniquely developed in Texas to confuse negligence law. It meant that a plaintiff had the burden to negate his own knowledge and his own appreciation of a danger. The rule

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[17] 565 S.W.2d 512, 517 (Tex. 1978).

[18] 682 S.W.2d 533, 533-34 (Tex. 1984).

[19] 565 S.W.2d at 514.

[20] *Id*. at 517.

> that the plaintiff does not have the burden to obtain findings that disprove his own fault does not, however, mean that a plaintiff is excused from proving the defendant had a duty and breached it. *A plaintiff does not have the burden to prove and obtain findings that he lacked knowledge and appreciation of a danger; he must, however, prove the defendant had a duty and breached it*.[21]

Like any other negligence action, a defendant in a premises case is liable only to the extent it owes the plaintiff a legal duty.[22] Whether such a duty exists is a question of law for the court;[23] it is not for the jury to decide under comparative negligence or anything else. If (for example) a defendant neither owns nor occupies the premises, a jury cannot impose a duty anyway on the theory that *Parker* abolished all no-duty defenses. Every court that has analyzed *Parker* and *Dixon* together has come to this same conclusion — including courts of appeals for the First,[24] Seventh,[25] Eighth,[26] and Fourteenth Districts,[27] and the federal Fifth Circuit.[28]

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[21] *Dixon*, 682 S.W.2d at 533-34 (emphasis added) (citations omitted); *cf. Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 455 (Tex. 1972) (predating *Parker* and requiring plaintiff "to prove that she did not possess actual knowledge of the danger, that she did not fully appreciate the nature and extent of the danger, and that the danger complained of was not so open and obvious as to charge her, as a matter of law, with such knowledge and appreciation").

[22] *See Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 782 (Tex. 2001) ("The plaintiff must produce evidence of a legal duty owed by the defendant to the plaintiff, a breach of that duty, and damages proximately caused by that breach."); *Abalos v. Oil Dev. Co. of Tex.*, 544 S.W.2d 627, 631 (Tex. 1976) ("[A]ny plaintiff must prove the existence and violation of a legal duty owed to him by the defendant to establish tort liability.").

[23] *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 663 (Tex. 1999); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998).

[24] *Joachimi v. City of Houston*, 712 S.W.2d 861, 863 n.1 (Tex. App.—Houston [1st Dist.] 1986, no pet.).

[25] *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 445 (Tex. App.—Amarillo 1985, writ ref'd n.r.e.).

[26] *Delgado v. Houghston*, No. 08-99-00044-CV, 2000 WL 678774, at *5 n.2 (Tex. App.—El Paso May 25, 2000, no pet.).

[27] *Bill's Dollar Store, Inc. v. Bean*, 77 S.W.3d 367, 370 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). *But cf. Wilson v. Braeburn Presbyterian Church*, 244 S.W.3d 469, 472 (Tex. App.—Houston [14 Dist.] 2007, pet. filed) (Yates, J., concurring) ("Admittedly, it may seem awkward to require an invitor who has not made a condition safe to

We do not, as the overwrought dissent suggests, overrule *Parker,* comparative negligence, or principles of premises liability law "that govern virtually all other jurisdictions." We acknowledge that GE had a duty to exercise care with respect to matters over which it exercised control, but it did not control where or how Moritz chose to secure his load. Unlike other invitees, independent contractors are hired for special projects that often entail special expertise,[29] and can be expected to use whatever equipment or precautions are necessary so long as a hazard is not concealed. If Moritz wanted to use bungee cords and lean over backwards, that was his business; but he could not require GE to keep him safe no matter how he chose to do his own work.

Nor has it been "settled in our state for more than thirty years" that someone besides Moritz's employer must owe him a duty here. We expressly rejected any such duty forty years ago. Before then, we had held in the 1920s in *Galveston-Houston Elec. Ry. Co. v. Reinle* that a premises owner had to warn employees of an independent contractor of a hazard even if the employee already knew about it.[30] But in 1967, Chief Justice Calvert writing for this Court expressly overruled that decision:

> *Reinle* must either be followed or overruled. With due respect for the rule of stare decisis, we are convinced that the rule of *Reinle* imposes an unfair and, indeed, an intolerable burden on an owner or occupier of land who employs an independent contractor to do work or to perform services on the premises. While an owner owes a duty to employees of an independent contractor to take reasonable precautions to protect them from hidden dangers on the premises or to warn them thereof, an adequate warning to or full knowledge by the independent contractor of the dangers

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warn an invitee of that danger even if the invitee is already aware. However, that result is dictated by *Parker* . . . .").

[28] *See Thomas v. Internorth, Inc*., 790 F.2d 1253, 1256 (5th Cir. 1986).

[29] *See Anchor Cas. Co. v. Hartsfield*, 390 S.W.2d 469, 471 (Tex. 1965); *Pitchfork Land & Cattle Co. v. King*, 346 S.W.2d 598, 603 (Tex. 1961).

[30] 258 S.W. 803, 806 (Tex. 1924).

> should and will be held to discharge the landowner's alternative duty to warn the employees.[31]

This rule, repeated frequently and as recently as 2007, has never been abrogated — impliedly or otherwise — as the dissent asserts.

Nor is analysis of a defendant's duty "no different" from analysis of a plaintiff's negligence. It is true that when a hazard is obvious, the plaintiff will usually know about it. But that does not mean the plaintiff is negligent, as some like Ms. Parker must encounter a hazard because they have no other choice.[32] By contrast, duty depends on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant.[33] Those factors are not necessarily the same for shoppers, deliverymen, or independent contractors who perform their own work with their own equipment in their own way. It was because of those factors that we adopted the rule limiting landowner liability to independent contractors in 1967; the dissent addresses none of them in urging that we change that duty today, instead simply pointing to *Parker*, a case that did not involve independent contractors at all. The distinctions drawn in the law may not always be easy, but we decline the dissent's suggestion that we simplify them by mashing them all together.

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[31] *Delhi-Taylor Oil Corp. v. Henry*, 416 S.W.2d 390, 394 (Tex. 1967).

[32] *See Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 336 (Tex. 1998) ("Similarly, this Court has indicated that the fact that a danger is open and obvious (and thus need not be warned against) does not preclude a finding of product defect when a safer, reasonable alternative design exists."); *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520 (Tex. 1978).

[33] *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 544 (Tex. 1998).

When a defendant hires an independent contractor to come on premises and perform work as it sees fit, the defendant may reasonably expect the contractor to instruct its own employees on the safe means and manner of doing so. Regardless of whether Moritz acted prudently, the defendants had no duty to warn him that the ramp he used daily had no handrails. Accordingly, we reverse the court of appeals' judgment and render a take-nothing judgment in favor of the defendants.

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Scott Brister
Justice

OPINION DELIVERED: June 13, 2008