FLETCHER | FARLEY
CONFLICT RESOLVED

Fletcher Farley Newsletter

May 2021

"Do not withhold good from those to whom it is due, when it is in your power to act."

Proverbs 3:27

Greetings from Craig Reese

Welcome to May! Summer is just around the corner and soon kids will be out of school (whether virtual or actually wandering the halls).

Looks like there may be a light at the end of the tunnel regarding Covid. More and more people are getting vaccinated. Numbers are going down across the country. Of course, we still recognize how serious Covid is and remains. But, things are looking up. Broadway is going to open back up in October and more and more of us are going on vacation.

Our firm continues to be blessed by our relationships with all our clients. We are working hard to make sure your cases are being handled in an efficient manner with our focus being on obtaining excellent results.

Let us know if there is anything we can do to assist you.

The Supreme Court Expands the Scope of Chapter 95

by Richard Harwell

The Supreme Court of Texas recently issued an opinion in *Los Compadres Pescadores, LLC v. Valdez* which expands the scope of Chapter 95. Chapter 95 protects

Welcome Richard Harwell, Jason Jacob and Georgette Oden

We welcome Richard Harwell to the firms' Dallas office. He concentrates on appellate practice and insurance and defense coverage.

property owners from liability when construction is being performed on their property. Pursuant to Chapter 95, owners are liable for injuries to a contractor's or subcontractor's employee only if they: (1) exercise or retain some control over the manner in which the work is performed and (2) have actual knowledge of the danger or condition that injures the employee. Tex. Civ. Prac. & Rem. Code Ann. § 95.003. However, the protections of Chapter 95 only apply if the injuries arise from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement. *Id*. § 95.002.

The facts of the *Valdez* case involved two employees of a contractor who were placing concrete pilings in the foundation of a condominium on South Padre Island. There were powerlines overhead which the contractor had advised the owner were dangerous, but the owner insisted the work proceed. While placing 20-foot rebar into the concrete, the rebar came into contact with the powerlines and electrocuted the two workers (but did not kill them due to the lower end of the rebar being grounded in the concrete). At trial, the jury found the owner liable under a premises liability theory because it had retained some control over the manner in which the work was performed. The owner appealed the verdict.

In *Valdez*, the Supreme Court determined that an improvement under the statute may include a dangerous condition that is in close proximity to the improvement. The Supreme Court stated that an improvement is "any addition to real property, other than fixtures, that can be removed without causing injury to the real property." [There is no explanation for why fixtures would not be considered an improvement under the statute]. The Court rejected the owner's argument that the entire workplace was the "improvement," as all workplace conditions would then be within the scope of Chapter 95, and a workplace cannot be an "improvement" since it is "not an addition to real property."

Nevertheless, the Court interpreted "improvement" under the statute broadly. The Court noted that an improvement could be the pilings that were part of the foundation or the entire foundation itself, including the pilings, depending on the nature of the work being performed. In this case, the contractor was hired to

We welcome Jason Jacob as he joins us in the Dallas office where he focuses his practice on insurance defense and construction claims.

We welcome Georgette Oden to the firms' Austin office. She has extensive first-chair pretrial, trial and appellate experience and focuses on insurance defense, premises liability and catastrophic accidents.

SAVE THE DATE

THE TEXAS LAW★UPDATE

We are excited to

construct only the pilings, not the foundation itself. However, the Court determined that proximity of the alleged dangerous condition was the key to whether the condition was part of the improvement sufficient to invoke the protections of Chapter 95. Had the powerlines been located hundreds of yards away, the Court reasoned, then they would not be considered part of the improvement, even if they were a dangerous condition on the premises. Because the powerlines were located in close proximity to the location of the improvement at issue, creating a probability of harm to one who constructs, repairs, renovates, or modifies the improvement, the energized powerlines created a dangerous condition of the piling itself, and Chapter 95 applied.

The meaning of "proximity" will likely be argued in most cases, as the Court was ambiguous as to what constitutes "proximity," only giving a range from 20 feet as being in proximity to 200 yards as not being in proximity to the improvement. However, if it is determined that a condition creates a probability of harm due to its proximity of the improvement, then it is a condition of the improvement and Chapter 95 applies. After *Valdez*, in cases involving construction, it will be necessary to determine what the dangerous condition is and whether it is in proximity to the location of the improvement. If so, then Chapter 95 will apply and require the plaintiff to prove both actual knowledge and control over the work being performed to establish liability of the premises owner.

Conflicts Resolved

Fletcher Farley Obtains Summary Judgment

Julia Sinor recently obtained a summary judgment in a tortious interference with a contract case which involved a variety of contract issues. Plaintiff claimed our client induced a customer to breach its contract with Plaintiff, then hired our client to provide the same services. Julia argued that there was no enforceable contract between Plaintiff and the customer after a change in ownership, and alternatively, that the customer terminated the contract before seeking our client's services. She further argued that Plaintiff had no evidence that our client committed any tortious act, nor that our client caused Plaintiff's damages. Rather, the Plaintiff's own poor performance caused Plaintiff to lose the business. Plaintiff's attorney tried several legal theories to show a valid contract, including express and implied assignment, express assumption, assumption by conduct, ineffective termination, and even that the

announce that our Annual Texas Law Update is back and in-person.

Save the date for the 2021 Texas Law Update **in Dallas on Friday, October 29th.**

More information coming soon!

Community Events

DCA Golf Classic Charity Tournament

We are proud to be a sponsor at the 37th Annual Dallas Claims Association (DCA) Golf Classic Charity Tournament on Friday, May 14th, in Carrollton, Texas. To learn more, please click here.

Subscribe to our Newsletter!

If you want more information or have questions, please contact:

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contract obligations were tied to land ownership. Despite the Plaintiff's attorney's earnest efforts to muddy the waters, the Court granted summary judgment on all Plaintiff's claims against our client.

Fletcher Farley Shipman & Salinas LLP

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