FLETCHER | FARLEY
CONFLICT RESOLVED

FOR THE DEFENSE

August 2017

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

Proverbs 2:27

Greetings from Craig Reese

It is almost time for a big change around many of our households. Summer vacation for the kids is coming to an end and it is time for back to school activities like shopping, registration, and kids complaining that they have to go back. If they only knew what most of us now know - school was so much better than work. Just a sign that things are always changing. We hope that the process goes smoothly. For those of us without kids, just get prepared for those school zones and put that cell phone down. Somethings never change for us at the firm - we appreciate our clients and our relationships with them and we will always strive to give you the very best legal representation. Have a great rest of the summer and let's all look forward to some cooler weather and football.

Once Again, The Multi-Employer Worksite Doctrine Does Not Fare Well in the Fifth Circuit

Craig Reese

The Department of Labor has adopted the multi-employer worksite doctrine, which basically provides that a general contractor or premises owner who does not have its own employees exposed to a risk and did not create the violative condition is responsible nonetheless as an employer where the general contractor/premises owner could reasonably be expected to prevent, detect, or abate the violation. As of 1999, OHSA's manual now has four multi-employer doctrines/policies: exposing employer; correcting employer; creating employer; and controlling employer.

Irrespective of its treatment by other courts and the Occupational Safety and Health Review Commission, the Fifth Circuit has expressly rejected the doctrine. In *Melerine v. Avondale Shipyards*, the court noted that the only class of employees protected under OSHA regulations was an employer's own employees.

In This Issue

Welcome to the latest edition of Fletcher Farley's Newsletter, which we hope you find interesting and helpful.

If you have any comments, questions or would like more information from us, please contact Doug or Joanna.

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Welcome Ryan Curry

Plaintiffs have not done any better in Texas courts in attempts to utilize the doctrine to prove evidence of negligence on the part of a contractor or owner who does not directly employ the persons exposed to the condition or risk.

A case was recently decided by the Occupational Safety and Health Review Commission that once again confirms that the multi-employer worksite doctrine simply will not afford OSHA any leg to stand on in the Fifth Circuit. In *Secretary of Labor v. Hensel Phelps Constr. Co.*, OSHA inspected a Hensel Phelps Construction Company jobsite in Austin, Texas. As a result of the inspection, OSHA issued a citation to Hensel Phelps, in the capacity as the general contractor on the jobsite for the new Austin Central Public Library. The complaint alleged that employees of a subcontractor were working in hazardous conditions. OSHA cited Hensel Phelps under its controlling employer enforcement policy. The parties stipulated that Hensel Phelps had overall construction management authority on the project and supervised the library work through various on-site management personnel. They also stipulated to the facts necessary to establish all the prima facie elements of a violation. The only dispute was whether Hensel Phelps was liable for the violation as a controlling employer.

The Commission recognized that under the Eighth Circuit's *Summit Contractors*, the citation should be affirmed. However, because the case was subject to the geographical jurisdiction of the Fifth Circuit, and given the holding in *Avondale Shipyards, Inc.*, the citation could not be upheld and was vacated.

Conflicts Resolved

Fletcher Farley Convinces Federal Court to Toss Out $480 Million Dollar Judgment

On July 20, 2017, U.S. Federal Judge Fitzwater (Northern District of Texas) entered an order vacating the $480,000,000 Judgment the Court had entered in May of this year. The Court's Judgment had been entered prior to Fletcher Farley's involvement in the case, and the law firm was retained, post-judgment, to move to set it aside. The Motion to Vacate the Judgment, as well as the flurry of related briefings prior to the vacatur, were briefed by Lane Farley and Lorin Subar. The underlying lawsuit was based on a claim of trademark infringement under the Federal Lanham Act. The Plaintiff alleged that the firm's client, a California nonprofit corporation, had created a reading awareness program with a name similar to that being used by the Plaintiff, a for-profit Texas company. The Judgment was entered when the Defendant failed to respond to the lawsuit, choosing instead to have its corporate counsel address the lawsuit rather than putting its insurer on notice of the lawsuit. The carrier was not notified until after the Court had entered its judgment. In addition to the Motion to Vacate, Fletcher Farley also fended off multiple post-judgment collection activities by the Plaintiff prior to the Court vacating the Judgment. Fletcher Farley has now filed a Motion to Dismiss or Transfer to California, which is pending before the Court. The Court's decision as well as the history of the litigation can be located at *Springboards to Education v. Families In Schools* now pending before the U.S. Federal Court of the Northern District of Texas, Dallas Division.

Fletcher Farley Obtains Full Defense Verdict

Senior Associate Alex Bell recently obtained a full defense

We welcome Ryan Curry to the firm's Dallas office. Ryan focuses his practice in complex and commercial litigation. As a former criminal defense attorney, he has handled nearly 1000 cases, serving as first chair for over 30 jury trials and well over 100 bench trials. Ryan brings to the firm the same abilities to defend clients throughout the state.

Honoring 25 Years with 25 Acts of Kindness

Back to School Backpacks benefiting Dallas CASA

We are continuing the firm's 25th anniversary celebration with 25 backpacks and school supplies donated to benefit the children served by Dallas CASA.

TADC Magazine Article: The Shifting Sands Regarding Burdens of Proof in Coverage Cases

This article authored by Craig Reese was published in the

verdict from a jury in Dallas County, Texas on a breach of contract case brought against a popular local concert venue by a disgruntled promoter. The jury rejected claims that the concert venue breached its contract to provide its concert space for the promoter's show. Not only that, the jury also found in favor of the concert venue's counter-claims for the promoter's failure to pay its bills and awarded all of the damages sought by the venue. The Court further awarded over $50,000 in attorney's fees to the venue for pursuing the counter-claim.

Texas Association of Defense Counsel magazine in the Spring/Summer 2017 edition.

It is important to understand the rules regarding burdens of proof on insurance coverage, regardless of whether you are a coverage geek or defense counsel.
READ MORE

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