



By PARTH S. GEJJI

# Retained Control Over Independent Contractors Still Raising Important Questions

The Texas Supreme Court has issued opinions since the mid-1980s regarding the duty a premises owner or general contractor owes with respect to work performed by an independent contractor.<sup>1</sup> As a general rule, one who retains an independent contractor has no duty to ensure that the contractor performs its work safely.<sup>2</sup> But an exception exists “when the employer retains some control over the manner in which the contractor performs the work that causes the damage.” Plaintiffs can prove that the employer retained control by showing actual control over the manner in which the independent contractor performed work or a contractual right to do so. But the control has to relate to the condition or activity that caused the injury.

This duty analysis regarding retained control was adopted by the Texas Supreme Court from § 414 of the Restatement (Second) of Torts,<sup>3</sup> which states:

One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

That rule is now stated in § 56 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, which states:

When an actor entrusts work to an independent contractor but retains control over any part of the work, the actor has a duty of reasonable care as to the exercise of the retained control.

## Recent *En Banc* Case from the First Court of Appeals

A recent *en banc* opinion from the First Court of Appeals, *Torres v. Pasadena Refining Systems, Inc.*,<sup>4</sup> illustrates that important questions are still being litigated regarding this duty analysis. The *en banc* opinion produced a dissenting opinion.<sup>5</sup>



The panel opinion was a split decision and featured a vigorous dissent, as well.<sup>6</sup> These various opinions are a fascinating read for any serious students of the Restatement of Torts and tort law.

A personal injury claimant, Michael Torres, sued Pasadena Refining Systems, Inc. (“PRSI”) and National Plant Services, LLC (“NPS”).<sup>7</sup> PRSI retained 3-J Ryan, Inc. (“Ryan”) as an independent contractor to perform turn-around work at its refinery. In turn, Ryan hired NPS to build the scaffold needed for the work.

Torres was an employee of Ryan. In other words, neither PRSI nor NPS owed Torres any duties under the employer-employee relationship. Rather, Torres’ employer was PRSI’s independent contractor, which had hired another company to build the scaffold needed for

the work. Torres slipped and fell while he was on the scaffold attempting to latch his safety lanyard. Torres alleged that, among other things, the scaffold was dangerous because of the placement of the access gate and a tarp impeding access to the scaffold platform, and because of the lack of proper fall protection—either a self-retracting lifeline or a ladder cage. The trial court granted summary judgment to both PRSI and NPS on the basis that there was no duty owed to Torres.

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As a general rule, one who retains an independent contractor has no duty to ensure that the contractor performs its work safely.”

The panel issued a split decision, with the panel majority reversing summary judgment as to both PRSI and NPS.<sup>8</sup> The *en banc* majority affirmed summary judgment in favor of PRSI, but reversed summary judgment in favor of NPS.<sup>9</sup> The *en banc* opinion contains a comprehen-



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sive summary of the current state of the law regarding the duty owed by a premises owner or general contractor when a dangerous condition arises from the work of an independent contractor.

As to PRSI, the *en banc* court held that there was no evidence of contractual or actual control. Examining the contract between PRSI and Ryan, the *en banc* court found that none of the provisions allowed the kind of control that would give rise to a duty on behalf of PRSI to Ryan's employee, i.e., Torres. The provisions at issue were contained in an exhibit to the contract between PRSI and Ryan, and concerned health, safety, and environmental requirements. Among other things, the provisions stated:

PRSI shall have *the right, but not the obligation*, to inspect the worksite and associated work records and to interview personnel to ascertain that [Ryan] is complying with the expectations and requirements of this attachment.

Should [Ryan] fail to observe the requirements of this attachment, PRSI shall have *the right* to stop the work performed by [Ryan] at the worksite and to take the action necessary to resolve the condition with all related costs of such action for [Ryan's] account.

...

Stop Work or Suspension. The PRSI has *the right* to stop or suspend the work of [Ryan] for any reason, including, but not limited to, [Ryan's] failure to comply with any of the safety and health requirements either set forth in this Contract or incorporated by reference.

#### **Correction of Deficiencies.**

***When the PRSI notifies [Ryan], either verbally or in writing, that [Ryan] is not complying with a safety and health requirement either set forth in this Contract or incorporated by reference, [Ryan] shall correct the deficiency immediately.***

Torres asserted that the provision regarding "Correction of Deficiencies" established that there was a contractual right of control. The *en banc* court rejected this argument, and held that, as a whole, the contract simply gave PRSI a right to inspect the worksite and the right to stop work. This was not enough to establish control: "It is well established that reserving a general right to order the work stopped or to inspect its progress is not evidence of retained control."

Turning to actual control, the *en banc* court found no evidence of control being exercised on the worksite by PRSI. Because Torres "did not present evidence that PRSI knew of a dangerous condition and yet specifically approved a dangerous act," the *en banc* court concluded there was no evidence regarding actual control.

As to NPS, both the *en banc* and panel majority agreed that there was a duty based on actual control.<sup>10</sup> NPS built and maintained the scaffold, inspected the scaffold daily, and would assign the appropriate safety tag for the scaffold indicating whether it could be used.

The dissenting opinion to the *en banc* majority argued that PRSI had a contractual right of control based on the "Correction of Deficiencies" provision.<sup>11</sup> The dissent argued that the provision was unambiguous, and "reserve[s] to PRSI the right to require [Ryan] to 'correct' an unsafe work practice. [Ryan] is thus not free to do the work entirely in the manner it sees fit."

#### **Continuing Debate Due to the Restatement of Torts**

*Torres* is an important case because it demonstrates that there are continuing debates regarding the duty analysis involving an independent contractor's

work. The case as to NPS (the scaffold builder) was straightforward: NPS built, maintained, and inspected the scaffold, so it owed a duty with respect to the dangerous condition of the scaffold. But the case as to PRSI (the premises owner) was complicated by the contractual language, including the right to correct safety deficiencies.

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**Torres alleged that, among other things, the scaffold was dangerous because of the placement of the access gate and a tarp impeding access to the scaffold platform, and because of the lack of proper fall protection—either a self-retracting lifeline or a ladder cage.”**

Relying on Texas Supreme Court authority, *Torres* holds that the right to stop the work due to safety concerns does not impose a duty on the premises owner or general contractor.<sup>12</sup>


But the debate articulated by the *Torres* opinions is not specific to Texas. Rather, that debate has been playing out since § 414 was published by the Restatement (Second) of Torts. As § 56 of the Restatement (Third) of Torts explains, there were two conflicting comments to § 414, and they have resulted in a "a recurring question on which courts have divided: whether sufficient retained control exists

when the hirer retains the power to forbid or stop the work of a contractor if the hirer believes the work is unsafe."<sup>13</sup>

Section 56 of the Restatement (Third) of Torts seemingly sides with those courts that have held that the ability to forbid dangerous work is not enough to impose a duty. Indeed, the two conflicting comments have now been revised, and the Restatement's latest position seems clear: "the control necessary to trigger a duty...requires more than merely the general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations that need not necessarily be followed, or to prescribe alterations and deviations."<sup>14</sup> But the Restatement then backpedals and declares: "But the 'general right' to order the work stopped or resumed is different from a more spe-



cific right to stop the work if the hirer believes that it is being performed dangerously.”<sup>15</sup> In other words, the “more specific right” may need to be analyzed differently than the “general right.”

In short, the Restatement continues to invite debate about the duty a premises owner or general contractor owes with respect to the work of an independent contractor, and *Torres* represents another important holding on this issue. 

- 2022 WL 17684333, reconsideration en banc denied, 2023 WL 1974740.
- 7. *Torres*, 2022 WL 17684333, at \*1.
- 8. *Torres*, 2022 WL 1467374, at \*1.
- 9. *Torres*, 2022 WL 17684333, at \*18.
- 10. *Id.* at \*15-18; *Torres*, 2022 WL 1467374, at \*12-15.
- 11. *Torres*, 2023 WL 1974740, at \*2.
- 12. *Torres*, 2022 WL 17684333, at \*9 (citing *inter alia* *Dow Chem.*, 89 S.W.3d at 606-08 and *Koch Ref.*, 11 S.W.3d at 155).
- 13. Restatement (Third) of Torts: Physical & Emotional Harm § 56 reporter’s note c.
- 14. *Id.* § 56 cmt. c.
- 15. *Id.* § 56 reporter’s note c.



**Parth S. Gejji** is an associate in Beck Redden's appellate section. Parth focuses his practice on civil appeals and complex civil litigation.

**Endnotes**

1. See, e.g., *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985); *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 155-56 (Tex. 1999); *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 783 (Tex. 2001); *Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 605-06 (Tex. 2002); *AEP Tex. Central Co. v. Arredondo*, 612 S.W.3d 289, 295 (Tex. 2020); *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864-65 (Tex. 2021).
2. *JLB Builders*, 622 S.W.3d at 864-65.
3. *Redinger*, 689 S.W.2d at 418.
4. *Torres v. Pasadena Ref. Sys., Inc.*, No. 01-18-00638-CV, 2022 WL 17684333 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, no pet. h.) (en banc).
5. *Torres v. Pasadena Ref. Sys., Inc.*, No. 01-18-00638-CV, 2023 WL 1974740 (Tex. App.—Houston [1st Dist.] Feb. 12, 2023, no pet.).
6. See *Torres v. Pasadena Ref. Sys., Inc.*, No. 01-18-00638-CV, 2022 WL 1467374 (Tex. App.—Houston [1st Dist.] May 10, 2022), withdrawn and superseded on reconsideration en banc,

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