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TEXAS SUPREME COURT RENDERS FEBRUARY 9, 2007, OPINION FAVORING NON-SUBSCRIBERS

In our last several newsletter issues, we have discussed defending a non-subscriber case. Specifically, in Vol. 4 Issue 2, we discussed defending a non-subscriber case by disproving the elements of an employee's negligence claim.

These elements are:

- (1) The employer owed the employee a duty;
- (2) The employer breached the duty; and
- (3) The employer's breach of its duty was the proximate cause of the employee's injuries.

In a February 9, 2007, opinion, the Supreme Court of Texas addressed the first two of these elements in relation to dangers obvious to an employee. Specifically, in the case of *Jack in the Box, Inc. v. Skiles* 50 Tex. Sup. J. 414 (2007), the Supreme Court held that Jack in the Box did not owe, and therefore did not breach, a duty to warn its employee of an obviously dangerous condition.

Sounds too good to be true, so let's examine the facts of the case to find the catch.

Skiles was employed as a tractor trailer delivery driver for Jack in the Box for twenty four years. His job entailed transporting and delivering Jack in the Box's food products to its various stores. The company trailers come equipped with an automatic lift gate to assist the drivers in loading and unloading the food product. Jack in the Box trained their drivers to call the company's independent service center should they encounter a problem with the lift gate. A maintenance person would then be sent to make repairs.

Mr. Skiles encountered such a problem with his lift gate on the date of his accident. He reported the problem to the restaurant manager who responded that he needed the product because it was the lunch-time rush hour. However, rather than report the problem to the company service center, as trained to do, Mr. Skiles decided to use a ladder to climb over the non-functioning lift gate so he could get to the food supplies the restaurant needed. Prior to using the ladder, Mr. Skiles did inform his supervisor of his intent to use the ladder to which the supervisor reportedly responded, "Good."

After climbing over the ladder, Mr. Skiles jumped into the back of the trailer and injured his knees when he landed.

The Supreme Court reiterated its recent holding in *Kroger Co. Elwood*, 197 S.W. 3d 793 (Tex. 2006) in which an employee of the grocery store got his hands smashed in a customer's car door while unloading her groceries. In that case, an employee sued Kroger, a non-subscriber, claiming Kroger had a duty to warn him not to place his hand on a car's door jamb while putting groceries in the car. Not surprisingly, the Supreme Court held that an employer owes no duty to warn of hazards that are commonly known or already appreciated by an employee.

In an attempt to distinguish his case from *Elwood*, Skiles reminded the Court of its holding in *Kroger Co. v. Keng*, 23 S.W. 3d 347 (Tex. 2000) in which it held that an employer has a duty to warn employees of dangerous activities that are not normally a part of their duties. Mr. Skiles argued that having to use a ladder to climb over a lift gate was both dangerous and not normally part of Skiles' duties.

The Supreme Court disagreed, distinguishing its decision in *Keng* by pointing out that in the *Keng* case, the employee, whose job duties were to wait on customers, make sandwiches and sell pastries, was specifically instructed by her supervisor to climb up on a freezer to move boxes when she was injured. Unlike the employee in *Keng*, unloading food product, the activity Mr. Skiles was engaging in at the time he was injured, was part of his regular job duties and it was his decision, not his supervisor's, to find a ladder, jump into the trailer, and unload the food supplies.

THE CATCH

To be sure, the Supreme Court has rendered an opinion from which non-subscribers can benefit. Keep in mind, however, the Court's distinction (1) that when injured by the "obvious danger" the employee should be performing his or her regular job duties and (2) the employer should not be instructing the employee to engage in the obviously dangerous activity.

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