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GENERAL CONTRACTOR'S EMPLOYEES VERSUS SUBCONTRACTOR'S EMPLOYEES: WORKERS' COMPENSATION EXCLUSIVE REMEDY DEFENSE APPLIES!

In *Garza v. Zachry Construction Corp.*, the Fourth Court of Appeals affirmed a take-nothing summary judgment rendered in favor of Zachry Construction Corp. in an interesting work-related injury.

Background Facts

Appellant, Hector Garza, worked for DuPont as an operator at DuPont's plant in Ingleside, Texas. Zachry Construction Corp. ("Zachry") was a subcontractor performing various services at the plant. Gilbert Morales and Anthony Rodriguez were Zachry employees that also worked at this plant.

On November 25, 2007, Garza operated a railcar mover pulling four tanker railcars. Morales and Rodriguez assisted him. Three of the cars came loose and collided with the railcar mover. Garza was injured and received workers' compensation benefits through a policy provided for him by his employer, DuPont. Garza later sued Zachry, Morales, and Rodriguez alleging the negligence of Morales and Rodriguez caused the accident. Garza sued Zachry under the doctrine of *respondeat superior*.

The Defendants moved for a traditional summary judgment on the ground that Garza's common-law claims were barred by Labor Code section 408.001 because his exclusive remedy was the recovery of workers' compensation benefits. The trial court rendered a take-nothing summary judgment in favor of the defendants and prompted Garza's appeal.

Workers' Compensation Bar

The court noted that recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance against the employer or an employee of the employer for a work-related injury sustained by the employee. TEX. LAB. CODE. ANN. §408.0001(a)(West 2006). Further, this exclusive remedy defense provided to subscribing employers is also afforded to a general contractor if, pursuant to an agreement, the general contractor provides workers' compensation insurance coverage to the subcontractor and its

employees. Id. § 406.123(a). Also, a premises owner, such as DuPont, can be a "general contractor" under section 406.123. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 438 (Tex. 2009).

In this case, a subcontractor's employee did not sue a general contractor or the employee of another subcontractor. The court noted that under those circumstances, section 408.001 would bar the subcontractor's employee's claims and limit his recovery to workers' compensation benefits. Instead, the court noted that this case involved the premises owner/general contractor's employee suing the subcontractor and two of the subcontractor's employees.

The court indicated that DuPont, under its contract with Zachry, agreed to provide workers' compensation insurance to Zachry, thereby creating the legal fiction of DuPont as the "deemed employer" and Zachry and its employees as "deemed employees." The court also noted that its interpretation of the contract as a whole was not inconsistent with the parties' intent that DuPont provide its "deemed employees" with the statutory benefits of workers' compensation coverage, but not provide the same "deemed employees" with other more traditional employee benefits enjoyed by DuPont's actual employees.

The court was comfortable that its interpretation was consistent with Labor Code section 406.123, which states an agreement such as the one entered into between DuPont and Zachry makes DuPont "the employer of" Zachry and Zachry's employees "only for purposes of the workers' compensation laws of the state." TEX. LAB. CODE. § 406.123(e).

The court also noted that section 406.123 indicated the Legislature's intent to extend the exclusive remedy bar contained in section 408.001 to general contractors that, pursuant to a written agreement, provide workers' compensation insurance coverage to the subcontractor and its employees. TEX. LAB. CODE. § 406.123(a).

The court did not agree with Garza that the contract evidenced an agreement that Zachry employees were not considered deemed employees of DuPont for purposes of workers' compensation law. Accordingly, Morales and Rodriguez were entitled to assert the exclusive remedy bar.

Texas Open Courts

In his second issue, Garza asserted that if the court determined his common-law tort claims were barred against Zachry and its employees, then Labor Code sections 406.123 and 408.001 were unconstitutional as applied to him because they violate the Texas Constitution's open court's guarantee.

Specifically, Garza argued (1) a subcontractor who itself did not provide any workers' compensation insurance may not rely on exclusive remedy bar to prohibit claims by the general contractor's employee who is not covered by the same workers' compensation policy as that provided to the subcontractor and (2) if such a bar applies, it violates the open court's guarantee. The court noted that his second issue was "one of first impression regarding the interpretation of a statute."

The Texas Constitution's open court's guarantee provides that "all courts shall be open, and every person for an injury done to him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I,§ 13. This provision assures that a person bringing a well-established common-law cause of action will not suffer unreasonable or arbitrary denial of access to the courts. *Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996).

The court noted that a statute has the effect of denying access to the courts if it unreasonably abridges a plaintiff's right to obtain redress for injuries caused by the wrongful acts of another. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 783 (Tex. 2007). The court also noted that proof of an open court's violation requires two elements: (1) a cognizable, common-law claim that is statutorily restricted and (2) the restriction is unreasonable or arbitrary when balanced against the statute's purpose and basis. *Id*.

The court held that where a general contractor had purchased workers' compensation insurance to cover its own employees and its deemed employees, whether by virtue of a single policy or separate policies, the general

contractor had immunized itself from liability for workplace negligence, at the price of paying insurance premiums to benefit all employees injured at its worksite, regardless of whose negligence caused the injury and regardless of whether it was its own employee or a deemed employee.

Thus, in exchange, all employees covered by workers' compensation insurance supplied by the general contractor forfeit their right to bring common-law claims against the employer (deemed or otherwise) and against co-employees (deemed or otherwise).

The court determined that Garza's benefit or "quid" was two-fold: He may claim workers' compensation benefits from DuPont without proof of negligence and is shielded from common-law claims that may be brought against him by the employees of a subcontractor. Likewise, his "quo" is two-fold: He forfeits his right to bring common-law tort claims against DuPont and he forfeits his right to bring common-law tort claims against his co-employees (deemed or otherwise).

The court concluded that the restriction on Garza's right to bring common-law tort claims against Zachry and its employees was not unreasonable or arbitrary because the workers' benefits he received from his employer, which also provided those same benefits to its subcontractors, was an adequate substitute for his right to bring his tort claims against those subcontractors. Accordingly, his rights under the Texas Constitution's open courts provisions were not violated.

WHAT DOES THIS MEAN MOVING FORWARD FOR SUBCONTRACTORS AND THEIR EMPLOYEES?

This ruling clearly benefits subcontractors and their employees. If the subcontractor is smart enough to negotiate having the contractor provide workers' compensation insurance for the subcontractor and its employees; thereby, creating the legal fiction of the general contractor as the "deemed employer" and the subcontractor and its employees as "deemed employees," the subcontractor (and its employees) will likely be shielded by the workers' compensation exclusive remedy defense should one of the general contractor's employees be injured as a result of the negligence of the subcontractor's employee's actions, and that injured party is also covered under a workers' compensation policy from the general contractor.

Thus, careful drafting of general contractor and subcontractor agreements, and agreements on applicable workers' compensation coverage, can effectively shield the subcontractor and its employees from the time and expense associated with prolonged litigation.








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