By Stephen Gibson
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> **Worker's Compensation Exclusive Remedy:** *An injury is accidental so that a subscribing employer is protected by the exclusive remedy provision unless the employee proves the employer actually knew of the risk of the* particular *means of injury to a* particular *employee.*
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> **Remand in the Interest of Justice:** *Remand rather than rendition of a take-nothing judgment when a case is tried on a legal theory that later proves to be incorrect is* not *appropriate when the losing party was aware from the opponent's proposed jury charge of the possibility the opponent would insist on an evidentiary requirement under existing law.*

Mo-Vac Service Co. v. Escobedo held earlier this year an employee injury is not "intentional" and remains subject to the worker's compensation act's exclusive remedy provision unless the employer knew there was a *definite* risk of a particular injury to a *particular* employee. Under *Mo*-Vac, knowledge that a practice *generally* increased the risk some employee would eventually be injured does not prevent an injury resulting from that risk from being deemed "accidental."

Berkel & Co. Contractors v. Lee reversed a judgment of the court of appeals that approved a definition of intentional injury at odds with *Mo-Vac*. In *Lee*, an employee was injured when a crane being used to drill for pilings collapsed. The collapse occurred during efforts to free a drilling auger. The foreman ordered these efforts halted and directed the drilling of a new piling. The job superintendent overruled him. Crew members thought the ongoing attempts to free the auger created a "death trap" because "something [was] going to break." When the crane later collapsed, an employee was struck by flying debris. As a result, the employee's leg had to be amputated. The employee sued the employer for gross negligence. The employee claimed the injury was not "accidental" and the employer's liability was not shielded under the exclusive remedy provision.

The trial court's jury charge submitted the exclusive remedy question by asking whether the employer "believe[d] that injury was substantially certain to result from his conduct on the date in question?"[1] The court of appeals ruled the affirmative answer to this question required evidence the employer knew the threatened injury was limited to a particular individual or a geographically limited group. When a new evidentiary requirement is added in an appeal, the appellate courts have the option to remand "in the interests of justice" rather than render a take-nothing judgment

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[1] The opinion does not describe the specifics of this objection. If the dispute was over the omission of or an incorrect definition of "substantially certain," more than an objection was necessary to preserve error. "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." Tex. R. Civ. P. 278.

so that the litigants have the benefit of knowing what they have to prove. In this case, the court of appeals deemed the locality aspect of the particularized harm requirement to be new, so it remanded "in the interests of justice."

In a unanimous opinion by Justice Bland, the Supreme Court of Texas disapproved of ruling by the court of appeals that employer knowledge of a threat of injury to employees in a particular area was sufficient to remove a resulting injury from the "accidental" realm. Justice Bland's opinion reiterated *Mo-Vac*'s requirement that the risk must threaten *the* particular injury to a particular employee. Testimony of the awareness of a general risk of injury was not sufficient unless the employer was shown to know both the particular means by which the injury would occur and that an employee was in the danger zone from that event.

To show an employee injury was "substantially certain" so it could not be "accidental," some evidence had to show the superintendent knew his orders to free the stuck auger would "unavoidably" cause the crane's collapse and in turn injure the plaintiff. Plaintiff presented no such evidence. Without it, plaintiff's injury was not "intentional." It may have been the result of gross negligence, but recovery outside the employer's exclusive remedy protection as a worker's compensation subscriber is permitted only when gross negligence results in death. Plaintiff in this case was only injured, albeit grievously.

The opinion then concluded the plaintiff was not entitled to a new trial in the interests of justice for two reasons. First, the employer's proposed charge and arguments notified plaintiff of the risk of not adducing additional evidence necessary to meet the particularized injury test. Moreover, the particularized injury analysis *á la Mo-Vac* did not change existing Texas law or impose a new substantive evidentiary requirement. Accordingly, the court rendered a take-nothing judgment instead of giving the plaintiff a second chance to meet the *Mo-Vac* standard.

> **Remand in the Interest of Justice:** *Remand for retrial rather than rendition of a take-nothing judgment when a case is tried on a legal theory that later proves* is appropriate *when the losing party relies on a previous decision in a previous interlocutory appeal in the same case when the court of appeals overturns that decision in a later appeal from the final judgment.*

The propriety of a remand in the interest of justice instead of rendition of judgment was also the issue in *Carowest Land, Ltd. v. City of New Braunfels, et al.* *Carowest*'s plaintiff alternatively sought declaratory and injunctive relief against the City for alleged violations of the Open Meetings Act and the contract-bidding provisions of Local Government Code Chapter 252. In an interlocutory appeal, the court of appeals ruled the City enjoyed no sovereign immunity from suit for declaratory relief. At trial, plaintiff prevailed on its declaratory relief claims, but in the appeal from the trial court's final judgment, the court of appeals overturned its earlier decision and apparently rendered a judgment dismissing the declaratory judgment claim.

In a *per curiam* opinion, the court considered whether the plaintiff was entitled to remand in the interest of justice so that the case could be tried as to the injunctive relief remedy. Generally, statutory waivers of immunity are limited to the particular remedy permitted by statute. Last year, the court remanded a similarly situated case for trial on the claim for injunctive relief after it determined that Open Meetings Act did not waive immunity from declaratory relief. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 554–55 (Tex. 2019). Relying on *Swanson*, the court held that *Carowest* was also entitled to a remand in the interest of justice so that it could have the opportunity to urge its claims for injunctive relief.

The opinion confined its holding to those circumstances where the losing party relies on precedent that is later overruled, including resolution of a "conflicting line of cases." However, the opinion emphasizes reliance on a rogue outlier does not warrant an interest-of-justice remand. The *Carowest* plaintiff, however, relied on a decision in the *same* case but later had the rug pulled out from under it. Under these circumstances, the interests of justice required that the plaintiff be given the opportunity to present its alternative claim for injunctive relief.

> **Sovereign Immunity:** *Unless the plaintiff can make a prima facie case of impermissible age discrimination, the Texas Commission on Human Rights Act does not waive the sovereign immunity of a state university.*

Age Discrimination Prohibited by the TCHRA: *A circumstantial evidence case of prohibited discrimination requires a plaintiff to show that the person or persons by whom the plaintiff was replaced individually or collectively were called upon to perform substantially similar job responsibilities.*

Legally Insufficient Circumstantial Evidence: *Replacement by a younger person is not a circumstance sufficient to establish "replacement" by a younger person if the job responsibilities are not substantially similar.*

In *Texas Tech Univ. Health Sciences Center - El Paso v. Flores*, after a Texas Tech medical school was reorganized, a fifty-something employee that had worked as a director for the medical school's erstwhile dean was reassigned to a different, less lucrative position. The change was because the incoming university president felt he needed administrative assistance more than someone with the employee's director skills. The new president eliminated the director's position after a few months and expressed doubts about the quality of the employee's work and ability to lead office staff. The president created an administrative assistant's position which he filled with someone twenty years younger than the former director. In the staffing reassignments, the former director was the only staffer who received a pay cut.

The former director sued alleging the university's "reassignment" was primarily motivated because of her age in violation of the Texas Commission on Human Rights Act ("TCHRA"). Texas Labor Code §21.051. The TCHRA waives the university's sovereign immunity if, but only if, the plaintiff presents evidence sufficient to raise a fact issue of age discrimination. When the plaintiff must, as usual, rely on circumstantial evidence, that evidence must show the plaintiff was (1) age 40 or more, (2) qualified for the position (3) but subjected to a final, adverse employment action, and (4) either (a) replaced by someone significantly younger or (b) treated less favorably than others similarly situated younger than 40. The dispute in *Flores* focused on the last element: whether plaintiff was "replaced" or treated less favorably than a younger person.

A unanimous opinion by Justice Boyd ruled the plaintiff could not meet the "replacement" requirement because the duties of the new "assistant's" position in the president's office were materially different than those she had performed before the reorganization as a "director" to the medical school dean. The opinion acknowledges a change in title or salary alone does not make a position materially different. The former and current positions are not substantially similar if the former duties are partially or temporarily assigned to another employee or those duties are distributed among several existing employees.

Plaintiff's former position was not filled, and her alleged replacement was assigned less than all her former job responsibilities. Plaintiff's testimony that all such responsibilities had been assigned to her ostensible replacement was deemed conclusory and without probative value because the plaintiff admitted she didn't know *how* her former duties had been reassigned. All she knew was that she was no longer performing them. Other evidence showed the president's new assistant performed some of plaintiff's former job responsibilities, but the evidence showed that there were many others performed by the person holding the newly created assistant's position. The fact that the president approved a salary increase for the assistant to approximately the same level as the compensation plaintiff received in her former position was not evidence from which the trier of fact could infer the positions were substantially similar. This was especially true when the evidence showed that plaintiff had performed more duties as a director than the person who allegedly replaced her.

The court also held Plaintiff failed to adduce any probative evidence she was treated less favorably than a similarly situated person who was under 40. To show "similar[] situat[ions]" obliges the plaintiff to adduce some evidence the job responsibilities were substantially similar. Because there was no probative evidence that they were, there was nothing showing plaintiff had received disparate treatment. Differing job responsibilities was also proffered as justification for treating plaintiff's testimony the president generally preferred to work with "younger" people as lacking probative value. When the job responsibilities were dissimilar, the inference that the president preferred working with younger persons was not the only reasonable inference that could be drawn from the fact that other positions had been filled with younger hires.

The opinion also rebuffed plaintiff's suggestion that the president's comment that referred to her retirement was evidence of discriminatory intent. The president told plaintiff that he did not want her to "retire" as a result of the changes in her job responsibilities. The court explained that the mere reference to "retirement" in the context of a statement that it was desired that plaintiff would *continue* working was no evidence of discriminatory motive. "Neutral comments about the employee's eligibility for retirement also fail to demonstrate discriminatory intent or pretext."

Because the plaintiff failed to meet her *prima facie* burden, sovereign immunity was held not to have been waived. Plaintiff's suit was dismissed for want of jurisdiction.

> **Default Judgments:** *Substituted Service invalid due to variance in alleged residence and location for substituted service.*

In *Spanton v. Bellah*, plaintiff's original petition, the citation, the process server's return of substitute service, and Plaintiff's certificate of last known address filed with the default judgment motion all identified street for the Defendants' residence where they could be served as "Heather Hill*s*." But plaintiff's motion for substituted service, the process server's affidavits supporting that motion, and the trial court's order authorizing substitute service said the street was "Heather*s* Hill," not "Heather Hill*s*." Substituted service was attempted by certified mail to the "Heathers Hill" address. The certified mail was returned unclaimed with a notice the forwarding order had expired. The forwarding address stated on the returned envelope stated an address that differed by number, name and city. The substituted service order also authorized service by leaving the citation at the gate at the "Heathers Hill" address. The trial court rendered default judgment and mailed abstracts of the judgement to the Heather Hills address alleged in the petition.

The defendants did not file a timely new trial motion but instead challenged the default judgment by restricted appeal approximately three months after the default judgment was signed. The court of appeals upheld the default, reasoning that the variance between the address alleged in the petition and the address at which substituted service had been authorized was sufficiently slight that it still satisfied the "strict compliance" standard for manner of service. According to the court of appeals, strict compliance did not require "obeisance to the minutest detail" of the substituted service order.

In a *per curiam* opinion, the court rejected the lower court's "slight" variance exception to the rule requiring strict compliance with service procedures. The opinion highlights that strict compliance is a result of indulging no presumption – i.e., anything not shown in the clerk's record – that a citation was validly issued and served. If the record does not show strict compliance, the service is invalid, and the court never acquired personal jurisdiction over the defendant. The opinion distinguished situations where service was upheld despite slight errors in the address by pointing out that the result was based on the fact that the defendant was shown to have been personally served and the substituted service order authorized service on the defendant wherever found, not solely by delivery to the address specified.

In *Spanton*, nothing showed the defendant actually received the citation. Because the record did not show the defendant was served in the manner specified in the order authorizing substituted service, it was necessary to vacate the default judgment. The takeaway for the practitioner is to assure the service allegations in the petition, any motion for substituted service, any order allowing substituted service, and the officer's return must be sufficient to satisfy the rules concerning proper service and *must mirror* one another.

> **Liability for Independent Contractor's Negligence** requires an contractual right or or exercise of actual control or an inherently dangerous activity for which the duty of care is non-delegable. Contract rights consistent with directing the work objective but not the manner and means for perming that work does not make one liable for the independent contractor's negligence in performing that work.

In *AEP Texas Central Co. et al. v. Arredondo*, the plaintiff alleged she was injured by stepping into a concealed depression left by a disused power pole that had been removed from a utility easement on her property. Among others, she sued the electrical utility, AEP, and its independent contractor who removed the pole under an as-needed

maintenance contract. The trial court rendered summary judgment for both the contractor and the utility. In a unanimous opinion by Justice Lehrmann, the Supreme Court of Texas held the summary judgment for the contractor was erroneous because the evidentiary dispute presented a fact issue. The summary judgment for the utility, however, was upheld because the utility did not have a right of control and did not exercise actual control over how the independent contractor performed the work.

The contractor did not conclusively negate failure to exercise reasonable care in filling hole when plaintiff adduced evidence that she later fell in a similar hole in the same location.

With respect to the contractor who removed the pole, the summary judgment issue was whether the contractor was negligent in creating the two-and-a- half-foot hole when it removed the utility pole. The contractor adduced deposition testimony it filled the hole after the pole was removed, compacted the soil and left an additional six inches of soil on top of the hole. The plaintiff, however, presented summary judgment evidence that she fell in a hole that was where the utility pole had been removed and that the hole was the same size as the hole left after the utility pole had been removed. This conflict was enough to present a fact issue whether plaintiff fell in a hole created by the contractor's failure to exercise reasonable care in removing the utility pole.

The utility did not have a contractual right to control details of the work necessary to make it liable for the contractor's negligence.

Generally, the employer of an independent contractor is not liable for the contractor's negligence unless it exercises actual control over the details of work that is not inherently dangerous or has the right to exercise such control. The utility's take-nothing summary judgment for vicarious liability for any contractor negligence depended first on whether it conclusively established that it did not control the details of the utility pole removal

There was no dispute the utility did not actually control the operation. The plaintiff instead urged that the utility had vicarious liability because its contract with the contractor gave it the *right* to control it by virtue of two contractual provisions: (1) the contractor's obligation to have someone at the work site to receive the utility's instructions while the work was being performed and (2) the contractor's obligation to complete work on private property with the least practicable inconvenience to the owner. Requiring the contractor have a person on site to receive instructions did not necessarily mean the utility had the right to control the details of the work. The contract provided that the contractor was an independent contractor and the right to give instructions did not necessarily mean the utility had the right to control the details of how the work was performed. The provision was consistent with the utility's right to control the objective of the work, not *how* that work was performed. Likewise, the court concluded that the contractual requirement to finish work on private property "expeditiously" and restore the property immediately was a direction about the desired result, not control over the details of the work itself.

The work was not inherently dangerous so that the utility had a nondelegable duty.

Those who retain independent contractors are also liable for an independent contractor's negligence if the work performed is inherently dangerous. The utility pole that had been removed had been disconnected from any electrical lines before the work began. The court held the removal of an unused utility pole was not itself "inherently dangerous" so the utility could be liable on that basis.

The final issue addressed was one of summary judgment procedure. The plaintiff alleged generally the utility was liable for negligence *per se*, but at no point did the plaintiff ever identify the statute allegedly violated. That failure foreclosed plaintiff's ability to question summary judgment that she take nothing on her negligence *per se* ground of recovery.

The utility had established that there was no triable issue with respect to duty as to any of the plaintiff's claims. Accordingly, the court unanimously reversed and rendered judgment that plaintiff take nothing from the utility.