

THE INTERPRETATION OF CHAPTER 95



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Chapter 95 CPRC

- Property Owner's Liability for Acts of Independent Contractors & Amount of Recovery
- Application & Interpretation by Texas Courts

95.002 Applicability

- Applies only to a claim:
 - (1) Against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; **and**
 - (2) That arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

95.001 Definitions

- “Claim” means a claim for damages caused by negligence, including a counterclaim, cross-claim, or third party claim
- “Claimant” means a party making a claim subject to Ch. 95
- “Property Owner” means a person or entity that owns real property primarily used for commercial or business purposes.

Liability for Acts of Independent Contractors

- CPRC 95.003 provides:
- A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:

Liability for Acts of Independent Contractors

- (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; **and**
- (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Ineos USA, LLC v. Elmgren (Tex. 2016)

- Does Chapter 95 apply to non-premises liability claims like those based on negligent activity or negligent undertaking?
- Does Chapter 95 protect the employee or agent of the property owner from liability?

Ineos USA, LLC. V. Elmgren (Tex. 2016)

- Under the Common Law, an IC or its EE can recover against a property owner for premises liability or negligence if the owner exercised some control over the relevant work and either knew or reasonably should have known of the risk of danger.
 - *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985)
 - *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97 (Tex. 2000)

***Ineos USA, LLC v. Elmgren* (Tex. 2016)**

- When Ch. 95 applies, it grants property owner additional protection by requiring P to prove the owner had actual knowledge of the danger or condition, so the owner is not liable based merely on what it reasonably should have known.
- If Ch. 95 applies, it is P's sole means of recovery.
 - *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42 (Tex. 2015)

***Ineos USA, LLC v. Elmgren* (Tex. 2016)**

- Chapter 95 applies to “all negligence claims that arise from either a premises defect [a condition] or the negligent activity [a use] of a property owner or its employees”
 - *Abutahoun*, 453 S.W.3d at 50.

Ineos USA, LLC v. Elmgren (Tex. 2016)

- Does Ch. 95 apply to claims against employees or agents of property owners?
 - Plain meaning of “property owner” does not refer to an employee or agent among those against whom a claim might be asserted
 - Definition does not include an owner’s employees or agents who do not own the property at issue

Ineos USA, LLC v. Elmgren (Tex. 2016)

- “Property Owner” does not include corporate owner’s employees.
 - Chapter 95 protects property owner even against claims asserting vicarious liability for conduct of property owner’s employees based on respondeat superior
 - Definition of “claim” does not limit Chapter 95’s application to claims for damages caused by the property owner’s negligence

Ineos USA, LLC v. Elmgren (Tex. 2016)

- “Chapter 95 only applies when the injury results from a condition or use of the same improvement on which the contractor (or its employee) is working when the injury occurs.”

First Texas Bank v. Carpenter (Tex. 2015)

- Must “Contractor” have written agreement or contract for Ch. 95 to apply?
- Ch. 95’s applicability turns on the kind of work being done, not on whether an agreement for the work is written, formal, or detailed.
- “Contractor” is someone who makes improvements to real property.

Abutahoun v. Dow Chem. Co. (Tex. 2015)

- Chapter 95 applies to a claim against a property owner for an independent contractor's personal injury, death, or property damage caused by negligence.
 - No distinction by Legislature between negligence claims based on contemporaneous activity or otherwise

Abutahoun v. Dow Chem. Co. (Tex. 2015)

- Section 95.002(2) limits to claim “that arises from the condition or use of an improvement to real property”
 - “Arises from” intends, at minimum, to capture causation
 - Thus, applies to negligence claim that is caused by the condition or use of an improvement to real property where the contractor or sub modifies the improvement

Abutahoun v. Dow Chem. Co. (Tex. 2015)

- If Chapter 95 applies, it is the sole remedy.
 - If 95.002 cannot be met, common law applies
 - Ch. 95 does not abrogate common law negligence claims against property owners

Abutahoun v. Dow Chem. Co. (Tex. 2015)

- Negligent activity encompasses malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury
- Premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe

Burdens

- Property Owner has burden of establishing Ch. 95's application to P's claims
 - *Rawson v. Oxea Corp.* (Houston 1st & 14th)
- Once Property Owner satisfies application of Ch. 95, burden shifts to P to establish control, actual knowledge, and inadequate warning (exceptions to liability protections)
 - *Ineos*
- Ch. 95 Not an Affirmative Defense
 - *Gorman v. Meng* (5th)

Improvement

- Ch. 95 does not define “improvement” but Supreme Court holds it be broadly construed to include “all additions to the freehold except for trade fixtures that can be removed without injury to the property.”
 - *Ineos*
- Everything attached to a structure may not be regarded as a single improvement
 - *Cox v. Air Liquide America, LP* (14th)
- Construction of oil well was construction of improvement
 - *Painter v. Momentum Energy* (8th)

Repairs

- Chapter 95 does not define the term “repairs.” However, one court, adopting a dictionary definition, has defined repair, for Chapter 95 purposes, to mean “to restore to a good or sound condition after decay or damage; mend; ... to restore or renew by any process of making good, strengthening, etc. ...”

– *Montoya v. Nichirin–Flex U.S.A., Inc.* (8th)

Actual Knowledge

- Actual Knowledge requires knowledge that the dangerous condition existed at the time of the accident.
 - What a person actually knows, and not constructive or imputed knowledge or what a reasonably prudent person should have known or foreseen
 - Circumstantial evidence establishes actual knowledge only when it either directly or by reasonable inference supports that conclusion

Actual Knowledge

- Knowledge of a possibility or potential danger or condition is not enough
 - *Ineos*
 - *Oiltanking Houston, LP v. Delgado*
- Knowledge of potential danger or condition equates with “should have known” standard for constructive knowledge

Actual Knowledge

- Examining circumstances: actual knowledge requires more than knowledge of a need for elaborate safety precautions due to “the mere presence of flammable or explosive gasses at a petrochemical plant.”
– *Ineos, Oiltanking v. Delgado*

Failure to Provide Safe Workplace

- *Kelly v. LIN TV* (Eastland 2000)
 - P must prove that property owner exercised or retained some control over the manner in which the work was performed and that the property owner had actual knowledge of the danger or condition resulting in the personal injury or death and failed to adequately warn of that danger. Both conditions must be proved before liability is imposed.

Exercises or Retains Some Control

- Party can prove control through evidence of agreement that explicitly assigns the premises owner a right to control or by evidence that owner actually exercised control over the manner in which work was performed
- If party retains right but does not exercise right, failure to do so does not absolve potential liability

The End