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SUPREME COURT OF TEXAS FINDS NON-SUBSCRIBERS HAVE NO DUTY TO WARN EMPLOYEE OF OPEN AND OBVIOUS PREMISES DEFECT

Last Friday, in *Austin v. Kroger Texas, L.P.*, 2015 WL 3641066 (Tex. June 12, 2015), the Supreme Court of Texas answered a question certified by the Fifth Circuit finding that under Texas law, an employee injured on the job cannot recover against his employer if he was fully aware of the injury-causing premises defect.

The Fifth Circuit sought guidance on how to proceed in a suit filed by a former employee of Kroger Texas, LP who broke his leg at one of the company's stores in Texas. Kroger does not subscribe to the Texas Workers' Compensation Act. Because it is a non-subscriber to worker's compensation, it can be sued for workplace injuries and is barred under state law from raising the standard negligence defenses of contributory negligence and assumption of risk.

The Court's ruling concluded that an employee generally cannot recover against an employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy. Despite this conclusion, the Court maintained that employers have a duty to maintain their premises in a reasonably safe condition for their employees and warn of concealed dangers. However, there is no liability for "open and obvious dangers."

The Texas court declined Kroger's request to review Plaintiff's necessary instrumentalities claim, which has been remanded back to the trial court. Kroger argued that the premises defect claim should be evaluated under the same standards applied to non-employee slip-and-fall claims. The Court ultimately concluded that an employer owes no duty to warn or maintain a safe workplace in the context of an open or obvious danger and, that because Plaintiff was aware of the dangerous condition at the time of his accident, his premises liability claim fails as a matter of law.

FIFTH CIRCUIT APPLIES DEEPWATER HORIZON ANALYSIS TO COMMON OILFIELD LIABILITY POLICY DISPUTE

A common requirement in contracts between oilfield production companies is an agreement to obtain insurance to cover another company's liabilities. In *Ironshore Specialty Ins. Co. v. Aspen Underwriting, Ltd.*, No. 13-51027, 2015 WL 3621857 (5th Cir. June 10, 2015), a fire at a Texas oil well owned by Endeavor Energy Resources killed two men employed by Basic Energy Services and set the case between the insurers of the involved entities in motion. Endeavor and Basic entered into a contract containing an indemnity provision in which they agreed to cover any liability resulting from claims brought by their own employees, even if the other party was at fault. They each agreed to obtain at least $5 million of insurance that would cover claims asserted by their own employees against the other party. The policies Basic obtained did not expressly limit the coverage for additional insureds like Endeavor to this $5 million.

Endeavor's excess insurer, Ironshore Specialty Insurance Corporation, brought this case against Basic's excess insurers for a declaratory judgment. Ironshore contended that Basic's insurers are obligated to provide coverage up to the full limits of their policies because the policies do not expressly limit the coverage available to an additional insured like Endeavor. Defendants contended that the insurance policies incorporate a $5 million limit because the policies specifically reference the contract.

The Court began with a reference to *Deepwater Horizon* that its analysis: "necessarily begins with the four corners of the policies," not the service contract. *See Deepwater Horizon*, 2015 WL 674744, at *5 (citing *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W.3d 660, 664 (Tex.2008)). The Court recognized that Texas courts "will not hesitate to award coverage beyond that contemplated by a service contract when the "terms of the ... policy itself" do not impose the same limits as the service contract. *See, e.g., ATOFINA*, 256 S.W.3d at 664. Thus finding if there is no limit to the coverage in the policies it is "irrelevant" that the underlying contract contemplated a $5 million limit. The policy at issue made Endeavor an insured only because of contractual obligations (an "insured contract" clause).

Relying on the “insured contract” finding in the *Deepwater Horizon* case, and making an “*Erie* guess” the Court concluded because the provision at issue was almost identical to the one in *Deepwater Horizon* and Basic was only “obliged” to procure $5 Million in insurance, the limit of coverage is therefore $5 million.