



KELLY, DURHAM & PITTARD, L.L.P.

Liability for the Acts of Others

Peter M. Kelly

pkelly@texasappeals.com

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New Orleans, Louisiana

Dallas: P.O. Box 224626, Dallas, Texas 75222 [Mailing Address]
601 Haines Ave., Dallas, Texas 75208
(214) 946-8000 | (214) 946-8433 (fax)

Houston: 1005 Heights Blvd., Houston, Texas 77008
(713) 529-0048 | (713) 529-2498 (fax)

Rule 91a Essay

- ❖ *Emerging Issues in Texas Dismissal Practice: Pleading Standards and Important Miscellany*, 6 HOUSTON L. REV. (Online Ed.) 123 (2015) (final version available for free at SSRN or Houston Law Review website).
- ❖ Will the courts allow 91a to become just a fee-shifting summary judgment or plea to the jurisdiction?

PJC 66.3 Premises Liability Based on Negligent Activity or Premises Defect—Right to Control

- ❖ PJC 66.3 Premises Liability Based on Negligent Activity or
- ❖ Premises Defect—Right to Control
- ❖ QUESTION _____
- ❖ Did [*the general contractor*] [*the property owner*] exercise or retain some
- ❖ control over the manner in which [*the injury-causing activity*] [*the defect producing*
- ❖ *work*] was performed, other than the right to order the work to start
- ❖ or stop or to inspect progress or receive reports?
- ❖ Answer “Yes” or “No.”
- ❖ Answer: _____

Matter of law?

exercise or retain
some
control

Scope of work

- ❖ Define during discovery
- ❖ Keep as broad as possible
- ❖ Documents!

First question--retain

- ❖ Did the negligence, if any, of Brazos Contractors Development, Inc. proximately cause the injuries sustained by Henry Jefferson?
- ❖
- ❖ For the purposes of this question only, you are instructed that the court has ruled that Brazos Contractors Development, Inc. retained some control over the erection of the steel frame, other than the right to order the work to start or stop or to inspect progress or receive reports.

Second question--exercise

- ❖
- ❖ Did Brazos Contractors Development, Inc. exercise some control over for the manner in which the erection of the steel frame was performed as of the time of the injury to of Henry Jefferson, other than the right to order the work to start or stop or to inspect progress or receive reports?

Painter

- ❖ . PJC 10.06 is as follows:
- ❖ On the occasion in question, was J.C. Burchett acting in the scope of his employment?
- ❖ An employee is acting in the scope of his employment if he is acting in the furtherance of the business of his employer.

PJC Comment

- ❖ **When to instruct on scope of authority.** Generally, vicarious liability is imposed only for authorized action in the furtherance of an employer's business. The element of general authority, however, is not included in PJC 10.6 because it is usually undisputed. If it is disputed, the phrase "and within the scope of the general authority given him by his employer" should be added at the end of the definition. *See Broaddus v. Long*, 138 S.W.2d 1057 (Tex. 1940).

Deviation

- ❖ An employee is not acting within the scope of his employment if he departs from the furtherance of the employer's business for a purpose of his own not connected with his employment and has not returned to the place of departure or to a place he is required to be in the performance of his duties.
- ❖ PJC 10.07.

Right To Control

- ❖ “the master *can exercise* control.” *St. Joseph Hosp.*, 94 S.W.3d at 541 (quoting Restatement (Second) of Agency § 219, cmt. a (emphasis added))
- ❖ Master *could have exercised* control

Don't go to far

- ❖ Beware the borrowed servant trap

Proving the opposite

- ❖ Derivative sovereign immunity
- ❖ *Olivares v. Brown & Gay*

Two requirements

- ❖ Unforeseen expenditures
- ❖ Independent discretion

Not “no discretion”

- ❖ “Some discretion”
- ❖ Any exercise of independent judgment

Get past the papers

- ❖ Jury question
- ❖ Proportionate responsibility
- ❖ Blended liability and jurisdictional facts