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Cross Currents at the Supreme Court, as Justices Split Over Worksite, Power Line Injury

By David R. Kinzer **July 22, 2024**

Facts

El-Jamaly was brought by an employee of a concrete subcontractor who was using a "bull float," which is a long-handed tool used to smooth fresh concrete. Plaintiff's bull float, which was 23.5 feet long, came into contact with a power line, and Plaintiff was electrocuted, suffering a traumatic brain injury and double-amputation.

Plaintiff filed suit against Kirco (the general contractor) and DTE (the owner and operator of the power lines). Discovery showed that prior to Plaintiff's injury, Kirco requested DTE take greater safety precautions on the worksite, such as having DTE raise, de-energize, relocate or bury the high voltage lines, none of which was done. The preceding April, an employee of a different subcontractor accidentally severed the power lines with a crane, but no one was injured. In response, Kirco required extra discussion prior to work near the power lines and ordered more caution signage, though the sign was no longer visible by the time of Plaintiff's injury.

Kirco and DTE filed motions for summary disposition, which the trial court denied. However, the Court of Appeals reversed, finding in favor of both Kirco and DTE. El-Jamaly v Kirco Manix Constr, LLC, unpublished per curium opinion of the Court of Appeals, issued September 1, 2022 (Docket Nos. 355402, 355703, 355932, and 356542). Plaintiff sought leave to appeal to the Supreme Court, which reversed again.

SECREST WARDLE NOTES

On July 18, 2024, the Michigan Supreme Court announced another of the term's major cases, *El-Jamaly v Kirco Manix Construction, LLC*, __ Mich __; __ NW3d __ (2024) (Docket No. 164902–164904), this one concerning construction liability. Unlike other recent decisions, *El-Jamaly* declined to explicitly overrule past precedent or increase businesses' duty to employees or contractors.[1] Nevertheless, the case provides plaintiffs' bar with sharper tools to defeat motions for summary disposition and force more cases to trial.

[1] Whether the decision implicitly did so is another matter, as the dissent insists the majority has vastly expanded the common work area doctrine and incentivized workers to disregard their own safety. *El-Jamaly*, slip op, at 19, 24 n 38, 25-26 (Zahra, J., dissenting).

Application of Common Work Area Doctrine to the General Contractor, Kirco

Writing for the majority, Justice Welch began by noting an important factual dispute overlooked by the Court of Appeals. According to DTE, the power lines were at least 23 feet tall, but other evidence said they were 20 feet with a "belly" or "sag" of three feet, so they may have been just 16 or 17 feet tall at their lowest, which is below safety standards. Hence, the Court of Appeals erred at the outset by improperly presuming the lines themselves were safe.

As for Kirco, general contractors are not ordinarily liable for their subcontractors' negligence. However, there is an exception, the "common work area doctrine," which recognizes situations in which general contractors are best positioned to coordinate work and ensure safety. To use the common work area doctrine, a plaintiff must establish four elements: "(1) the defendant, either the property owner or general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area." *Ormsby v Capital Welding, Inc*, 471 Mich 45 (2004).

Turning to the first two elements in this case, the majority found a question of material fact as to whether Kirco took "reasonable steps" to guard against observable and avoidable danger. Kirco pointed to three such steps taken: 1) distributing a safety manual, 2) having regular safety meetings, and 3) posting a warning sign near the lines, but none of these were dispositive on the issue, and a jury needed to decide whether these steps were substantive enough to be reasonable. Furthermore, the Court found specific weaknesses with each: there was no evidence that the manual addressed power lines; Plaintiff never attended a safety meeting, and even the sign was gone by the time of Plaintiff's injury.

As to the third element, "a high degree of risk to a significant number of workmen," the Court of Appeals found that only one or two employees were exposed to the risk of having "high-reaching conductive tools" cross active power lines. *Id*, slip op at 16. However, other workers traveled beneath the power lines with equipment like cranes and lifts. The lower court also "explained away" the April incident, when a contractor accidentally severed a power line, saying it occurred seven months before Plaintiff's accident, and the worker was not injured. The Supreme Court said this "added two new requirements to the common work area doctrine—a temporal limitation and a prior injury requirement," which it rejected. *Id*., slip op at 20.

The fourth element is that the injury occurred in a common work area, defined as an area "where employees of two or more subcontractors *will eventually work*." *Id*., slip op at 22 n 9, emphasis in original. Here, multiple workers from multiple contractors had to pass under the power lines in order to perform work, rendering the area a potential common work area.

Negligence and DTE

Special duty rules apply to utility companies regarding the safe maintenance of their power lines. "The test to determine whether a duty was owed is not whether the company should have anticipated the particular act from which the injury resulted, but whether it should have foreseen the probability that injury might result from any reasonable activity done on the premises for business, work, or pleasure." *Schultz v Consumers Power Co*, 443 Mich 445, 452-53 (1993). In practice, these cases often hinge on whether the power lines in question were defective, such that injury to the plaintiff was "reasonably foreseeable." *Id*. at 454.

In this case, the Supreme Court found a question fact as to whether the power lines met or exceeded the required height of 18 feet and 7 inches. Regardless, it was well-documented that DTE knew about the risks associated with work near the active power lines and prevented Kirco from taking further safety measures, such as paying to cover them.

The Dissent

The common work area holding as to Kirco was decided 4-3, making it a closer question than whether DTE owed Plaintiff a duty, which was decided 5-2. Chief Justice Clement split her vote.

Justice Zahra authored a dissenting opinion joined by Justice Viviano, which would affirm the Court of Appeals in all respects. As to Kirco, Justice Zahra emphasized that other workers did not use the same "high-reaching conductive equipment" as Plaintiff. He distinguished other incidents in which workers were near the power lines, like when DTE de-energized the power lines for electrical workers, since de-energized power lines were a lesser risk. With so few workers in danger, liability should not be placed on the general contractor, as risk was better addressed as needed by individual subcontractors. As for DTE, the dissent believed that it did not owe plaintiff any duty since it was not foreseeable that an experienced construction worker would carry such a tall conductive tool vertically and cross the power lines.

The Impact

The Court disagreed about the importance of *El-Jamaly*. According to the dissent, the majority "flies in the face" of 50 years of caselaw. *Id*., slip op, at 19 (Zahra, J., dissenting). "Now, general contractors will be liable for injuries that occur on the work site even when no other person was exposed to the hazard." *Id*. On its own terms, however, the majority reflects a difference of opinion as to how narrowly one understands the risks of this specific worksite. (For instance, was Plaintiff exposed to the same risk while using a bull float near the active power line that an electrical worker was exposed to while using a crane near the de-energized power line?)

The implications for utility companies may be even more dramatic, with the dissent claiming that the majority "silently overrule[d]" decades of precedent despite "framing itself as a logical and natural extension of caselaw." *Id*., slip op, at 25. As with other recent cases, an important fault line running through the Court concerns the importance placed on a plaintiff's own poor decisions. Here, that divide meant that instead of "focusing on plaintiff and his experience, knowledge, and reasons for being near the power lines, to determine whether it was foreseeable to the power company that he would be near the power lines…the majority opinion focuse[d] exclusively on DTE." *Id*.

General contractors should be aware that, regardless of whether *El-Jamaly* literally overturned precedent, the case may in practice expand the common work area doctrine by generalizing the risk different subcontractors must face, making it easier for judges to find the six or more workers required to invoke the doctrine. The case grants pro-plaintiff judges greater justification for denying motions for summary disposition, and even judges inclined toward defendants will find it more difficult to dismiss meritless cases, and their dismissals will be more vulnerable on appeal. With *El-Jamaly*, the Court has once again raised the bar for motions for summary disposition, making skilled and resourceful defense counsel more important than ever.

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