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Supreme Court of Texas.
CENTRAL READY MIX CONCRETE COMPANY, INC.
v.
LUCIANO ISLAS.
No. 05-0940.

March 21, 2007

Appearances:
KATIE P. KLEIN, McAllen law firm, McAllen, Texas.
KEVIN M. BEITER, Hornberger Sheehan Fuller & Beiter Incorporated, San Antonio, Texas.

Before:

Chief Justice Wallace B. Jefferson, Justice Nathan L. Hecht, Justice H arriet O'Neill, Justice Dale Wainwright, Justice Scott A. Brister, Justice David Medina, Justice Paul W. Green, Justice Phil Johnson, Justice Don R. Willett.

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CHIEF JUSTICE JEFFERSON: Please be seated. The Court is ready to hear argument in the final cause this morning at 05-0940, Central Ready Mix Concrete Company v. Luciano Islas.

SPEAKER: May it please the Court. Ms. Katie Klein will present argument for the petitioner. Petitioner, you have five minutes rebuttal.

ORAL ARGUMENT OF MS. KATIE P. KLEIN ON BEHALF OF THE PETITIONER

MS. KLEIN: May it please the Court. I'm Katie Klein from McAllen representing Central Ready Mix in this matter before the Supreme Court.

This case concerns an accident that occurred January 14, 2000 when Mr. Islas was working cleaning out a cement mixer drum. Eugene Taylor was the independent contractor who had been retained by Central Ready Mix to perform this function and Mr. Islas was an employee of Eugene Taylor. And while cleaning out the drum, there was a negligence by a coworker who turned on the drum while Mr. Islas was exiting the drum. The activity was such that Taylor had contracted to do it for Central Ready Mix on Taylor's property, with Taylor's employees, with no one from Central Ready Mix present at all. Despite the Court of Appeal's statement to the contrary, the evidence is undisputed. There had never been an accident in cleaning out a cement mixer drum ever and Central

Ready Mix had been doing this almost 50 years.

JUSTICE O'NEILL: What -- what difference does that make?

MS. KLEIN: Well, it makes the difference from the standpoint of foreseeability and from the standpoint of risk.

JUSTICE O'NEILL: But if it's -- if it's inherently dangerous, as he testified it was -- or my understanding is that by -- disputed -- that cleaning out a drum is inherently dangerous, what difference does it make if anyone had been injured before?

MS. KLEIN: He did not testify that it is inherently dangerous. But what he testified to was that it is, yes, a dangerous activity if you do not follow safety procedures such as lock out/tag out. And the point of the matter is, that it's not the drum that's inherently dangerous, it's not the premises that are inherently dangerous, it's the performance of the activity that could create danger. And that's where the court of appeals, in my humble opinion, got it completely wrong because the court of appeals seems to talk about this as a premises defect case. It's not a premises defect case. There was not a defect in the premises. There was no concealed hazard. There was nothing wrong with that drum. It was a negligent activity case because the coworker of Islas, for some reason unknown to anyone, decided to turn on the drum when Mr. Islas was exiting the drum. Now, the odd thing about the court of appeals' opinion is they in no way ever state what the prevailing law is in the state. For some reason, they just came to skip over what the law in this state is. The law in this state is that you have no duty to an independent contractor if you have contracted out the work unless you retained control either by contract or by actually asserting control. They don't even state the principle of law.

JUSTICE: What -- what are they talking about then in each other as a [inaudible]?

MS. KLEIN: Well, in reading the case closely, what -- what they said was that there is a scintilla of evidence that drum cleaning was dangerous, that lock out/tag out safety measures would be required which they were required in the -- the safety measures that were given to them and they said there's a scintilla of evidence that it failed to warn its independent contractor of the hazards. Well, duty to warn arises from a finding that there is an inherently dangerous activity. However, duty to warn cases do not require a duty to ensure that the independent contractor performs the duty safely and that's been the law in this state. The Coastal Marine case talked about how you don't have a duty to go ensure that the person who is performing the contract does so safely.

JUSTICE MEDINA: Is it common in this industry for these men who work in this type of operations to actually get inside a cement truck, to perform work --

MS. KLEIN: I have trouble hearing you. To get inside?

JUSTICE MEDINA: -- is it -- is to get inside and perform whatever duties --

MS. KLEIN: Oh, yes. The -- the custom is that when the drum needs to be cleaned and inspected, they get in there with a jackhammer and they use the jackhammer and they use the jackhammer --

JUSTICE MEDINA: It's a lot?

MS. KLEIN: -- to chip off the concrete and then they rotate the drum to get the concrete to come out of the drum. And that's -- that's just the way that it's done and has been done so for over 50 years. Interestingly, the court of appeals quotes Shaw v. Con but fails to follow the ruling of Shaw v. Con which is on this subject.

Shaw v. Con says that even if you require the independent

contractor to train according to your standards and even if you require them to know your safety policies but then you turn the safety policies over to the independent contractor, if you don't ensure control, if you don't go control the work, then you don't have liability and the injury-causing activity has to be related to what you retained control over.

JUSTICE BRISTER: The exception to all of that of course is inherently dangerous or peculiar risk.

MS. KLEIN: Well, it is interesting that you mentioned those because obviously they are not the same and I'd like to talk about peculiar risk first and then we'll go back to inherently dangerous if that's okay with you.

Texas has never adopted peculiar risk. Despite the brief to the contrary by my learned colleague here, Mr. Beiter, he only cites the one case which is the Scott Fletcher case. The Scott Fletcher case specifically says, "We decline to accept 413 of the Restatement of Torts." We say that people are adequately protected by 414 of the Restatement of Torts. And that was the 1997 case which was the court of appeals case out of Austin. There are two subsequent cases, the Arlandcase out Houston in 1999 and the case out of Judge Casens Southern District in Laredo in 2000 --

JUSTICE BRISTER: But we have adopted inherently dangerous--

MS. KLEIN: We have not adopted peculiar risk.

JUSTICE BRISTER: Right. But the court of appeals -- and I think even a couple of cases from this Court say they're basically the same. I mean, the restatement says they're basically the same thing.

MS. KLEIN: Well, the duties are different because in peculiar risk, what that would require you to do is to assure that you have proper policies, you have proper procedures, and proper precautions in place. Even if peculiar risk were the law, there's been no assertion that our policies and procedures were inadequate. We told them how to properly -- how to clean this drum and there is no evidence that our policy manual was inadequate. And so we're back to the issue of premises versus activity. There was nothing wrong with the safety manual. There was nothing wrong with the instruction and there's no evidence to claim that there was. What happened was that there was negligent activity and they assert that we have --

JUSTICE BRISTER: So now, okay.

MS. KLEIN: I'm sorry.

JUSTICE BRISTER: Inherently dangerous.

MS. KLEIN: -- inherently dangerous, I'll go back to inherently dangerous. Under inherently dangerous, first of all, there's a problem with inherently dangerous because inherently dangerous protects a third party or protects a member of the public.

JUSTICE BRISTER: Have we ever said so?

MS. KLEIN: Well, no. Amarillo has said so and Dallas has said so. In Gray v. Baker and Agriculture workers v. Evying I think that the closest --

JUSTICE BRISTER: Justice Hecht said so but that was in the concurrence in Lee Lewis.

MS. KLEIN: -- yes, in Lewis.

JUSTICE BRISTER: But did the majority in Lee Lewis reject that?

MS. KLEIN: No. I don't believe that the majority did because in Lewis --

JUSTICE BRISTER: Where if any Texas court that's ever said it does extend to subcontractors' employees? As opposed to --

MS. KLEIN: I have not found a case that says that it does. As a

matter of fact, I think the closest case that I have been able to find, not specifically on that point but out of this Court last fall would be the Fifth Club v. Ramirez, the 2006 case that says -- again inherently dangerous has to be looked up from the nature of the activity not the nature of the manner of performance --

JUSTICE BRISTER: -- what's happening in other state, I mean -- you know, there's no question from the restatement. This is old- fashioned law and everybody recognized this. It appears fairly frequently in the old cases but especially again, citing to Justice Hecht's dissent in Mbank, we've declared lots of things aren't inherently dangerous --

MS. KLEIN: -- yes.

JUSTICE BRISTER: -- and it's hard to find anything especially in the last 50 years that we've declared was inherently dangerous other than --

MS. KLEIN: -- dynamite.

JUSTICE BRISTER: -- other than, well, or MBank or apparently where the repose are --

MS. KLEIN: Yes.

JUSTICE BRISTER: But what -- what has this been taken over by Ochia and statutory regulations which didn't exist of course, by and large, 75 years ago?

MS. KLEIN: Well, it would seem that federal regulation has eliminated a lot of these cases in the common law and there is one other case that I failed to mention but that is the Alma Lambert case out of Corpus Christi, a 1988 case. And interestingly enough Alma Lambert says, and this was the case that was the exploding tire and if you recall that case that the -- they would always tell them, if the tire had been driven flat, and on this occasion, they just forgot to advise that this car had been driven flat for 75 miles to 100 miles. So poor little Mr. Peña goes to fix the tire and it explodes and he gets injured.

But they said in that case, even if you find an inherently dangerous activity that the negligent activity has to be contemporaneous. In other words, that has to be the moment that it happens and that you have only a duty to exercise due care and that's the Lloyd exception. But even if it's inherently dangerous, even if there is a duty, then your duty is reasonable care. Your duty is not to be an insurer. And there is no evidence from the record that anything that Central Ready Mix did or did not do because they weren't even there. It wasn't even their premises. All they did was hand over the work, gave him an instruction manual and, you know, the -- the respondent argues in the brief that we made no effort to inquire if Mr. Taylor was confident which is kind of a negligent hiring argument although not specifically stated. However, the undisputed evidence is that Mr. Taylor had already done this, I think, 17 times without incident. I mean, there was no indication that, why would a person conclude that you are not confident if you've known this person for years, he is a friend of yours, and you know the kind of work that he does, and he's been doing this for you for several years and never had an incident.

So, the court of appeals imposed, I think, a five- pronged duty that this Court has never imposed. And the five-pronged duty that the court of appeals that wants this Court to accept is, number one, let's make every independent contractor, we have to be an insurer of their welfare. That's what they asked us to do. To make you be an insurer, to give you a duty to warn, to give you a duty to avoid increasing risk, to a duty to train, and a duty to supervise.

Well, if this Court were to accept the court of appeals' standards for what it requires, they would no longer be an independent contractor relationship. Because if the person contracting has a duty to protect and warn and avoid increasing risk, and train, and supervise, you've created a master-servant relationship. So that if this Court affirms the court of appeals' decision, you have just thrown out independent contractor law in its entirety because --

JUSTICE HECHT: Well, if there is, if it is an inherently dangerous activity, you know, in most cases, it involves, all the more reason it comes up is because you have an independent contractor relationship, right? I mean the contractor is not there. It's a contemporaneous activity. And so, for a contractor who's not there, he's hired somebody else to do the work and what we've said is, if there is inherent dangerous activity, you can't delegate that duty away.

MS. KLEIN: Okay. That's two questions. One is, very often the independent contractor is there and that's why there's that line of cases about if you have a safety employee there, if you actually have somebody on site, it still doesn't create liability. Unless the safety employee actually comes over there and exerts some control. But the second question is having to do with nondelegable duties and when you deal with nondelegable duties, nondelegable duties of course assume that you have an inherently dangerous activity. But in this particular situation, there is no basis for believing that the activity of actually using the jackhammer to knock off the cement is inherently dangerous. It is, it could potentially be dangerous if you don't follow the proper procedures, and that's what the testimony was at trial.

JUSTICE MEDINA: Once the -- and once the manual is turned over to the independent contractor, your duty is fulfilled? That's...

MS. KLEIN: Yes. That would be my position and that's based on the cases that say that unless, there's one exception to that, if you prepare safety manuals and it is determined that you've increased the risk of the probability or severity of harm. And the cases say so, that even if your safety manual or especially if your safety manual increases the probability or severity of injury, then you have a nondelegable duty and you cannot unabsolve yourself from it. But in fact, the evidence in this case, everybody testified that the safety manual would be likely to decrease the probability of injury and severity.

Now, the fact that Mr. Taylor didn't train his employees, if he did or he didn't. Mr. Islas said he wasn't trained. That is not the responsibility under the prevailing law of the person who writes the safety manual and turns it over to the independent contractor. And when you go back and look at this five-point responsibility, in Downe Chemicals, the case specifically referring to the point that you brought up, if you promulgate safety guidelines, it does not establish control of the premises, and the Coke v. Trapa case, is the one that says even if you have a safety employee out there, it does not establish liability.

So, if you look at that five-point prong that the court of appeals wants you to adopt, it flies in the phase of Redinger, in Hopes v. Selenese that says there has to be a nexus between control and the injury. It is undisputed. There was no control by Central Ready Mix of these premises. And Dahl v. Bright, it says you have to have actual control. Coastal Marine is the case out of this that says you do not have a duty to ensure that the performance is done safely. And again, I would take you back to these two kinds of premises defect. One of them focuses on the premises. The other one focuses on the performance.

Clearly, this was a performance case. It was a negligent activity case because it was the negligence of the co-worker that caused the problem.

JUSTICE MEDINA: Is there any -- is there any evidence in the trial court that the manual was wrong or could have been --

MS. KLEIN: -- none.

JUSTICE: -- issued differently?

MS. KLEIN: None. There was no defect in the manual. And there was no evidence that the manual was defective or in any way increased the risk of injury. I have not addressed the cross point but I'll do that in my rebuttal.

CHIEF JUSTICE JEFFERSON: Thank you, Ms. Klein. The Court is now ready to hear argument from the respondent.

SPEAKER: May it please the court, Mr. Kevin Beiter will present argument for the respondent.

ORAL ARGUMENT OF MR. KEVIN M. BEITER ON BEHALF OF THE RESPONDENT

MR. BEITER: May it please the Court. We're here on a reversal of judgment NOV that didn't specify specifically what grounds were being reversed. In the trial court, Mr. Islas got favorable findings on three issues. One was that the task in issue, the cleaning out of the interior of a cement concrete mixing truck, was inherently dangerous. The jury found that it was. The second was that, the cleaning of the interior of the truck created a peculiar risk. Again, the jury found that it was. And the third was that --

JUSTICE BRISTER: We're not -- we're not here on a right of control case?

MR. BEITER: -- no. Not here on a right of control. Your Honor --

JUSTICE BRISTER: Certainly, the CA is wrong that this is a premises liability case -- turning the truck on or off has nothing to do with the premises.

MR. BEITER: Well, your Honor, there was evidence in the court below that the very premises itself, there were a number of existing dangers that were testified to by Ochia representative and by an expert that were not dependent upon the truck being turned on and off.

JUSTICE BRISTER: But the thing that hurt this guy -- the thing that hurt your client was the truck got turned on?

MR. BEITER: Well it did. But also one of the static conditions that was testified to as being a risk was entering and exiting the truck drum through the clean out port.

JUSTICE BRISTER: But that's again entering and exiting as an activity, not a condition of the premises.

MR. BEITER: Your Honor, I think that's where you get to some pretty fine hair splitting, whether the exit, the entrance, and why you have to enter and exit because of the way the premises are configured --

JUSTICE BRISTER: Yeah.

MR. BEITER: Well, that's a premise issue or whether that's an --

JUSTICE BRISTER: Trying to make sure that my focus is right if in a hypothetical world, this is not the case but if Texas didn't recognize nondelegable duties for peculiar risk and inherently dangerous, then what the [inaudible] did was right, if that was if we didn't recognize or either one of those.

MR. BEITER: Your Honor, I think that's right. I'm not sure that I

would agree --

JUSTICE BRISTER: I'm not --

MR. BEITER: -- that the inverse --

JUSTICE BRISTER: That's -- that's -- I don't know. I want to get your your views on peculiar risk but if we clearly do recognize or have recognized inherently dangerous.

MR. BEITER: Your Honor, let me go right to peculiar risk because that's really the most comfortable fit for these facts. And to do that, I need to take you to the Scott Fletcher v. Reid case. And your Honor, the contention that the court of appeals here in Austin didn't rely on section 413, the peculiar risk stand, is simply wrong. If you read the opinion in that case, there is an extended discussion of the basic law having to do with nondelegable duties as being an exception to the general rule of nonliability for contractors.

The court looked at 414, they looked at 413, and even made reference to some others, 414 being the standard for some retention of actual control and 413 being the peculiar risk issue. The court went through an extended discussion of that and then ended in this way. It said, summarizing the duty issue, we hold that Kirby was under a duty but take reasonable precautions to prevent the assault on Reid because of the peculiar risk inherent in permitting in-home sales to be conducted by persons with histories of crime, violence, or sexually-deviant behavior.

In other words, the court, in coming to the duty issue, it ruled under the facts of that case, the 413 was satisfied and that was a ground for liability. Now the court also went on to analyze the case under 414 which is the general retention of control standard and also found that there was enough -- there was sufficient retention of control that had also constituted a basis for liability.

Now in that court went up to the supreme -- that case went up to the supreme court, this Court. This Court has decided it only on 414 issues, did not discuss, didn't criticize, didn't withdraw, didn't make any reference whatsoever other than, I believe, Justice Hecht in his dissent noted that there may have been some amalgamation of the extent of duties that the court may have considered sufficient in that case. One might be more consistent with peculiar risk than an inherently dangerous or an actual retention of control.

But that aside, there was no reference in the opinion that created any question about the applicability of 413 which is the peculiar risk standard that was relied upon as the basis for the Court's holding. Your Honor, there's not been any case in this state that we've been able to find other than Justice Caison's [inaudible]bound opinion in the federal court in [inaudible] simply saying he found no basis in Texas law for application of 413. We don't know what was briefed to him.

And Justice Cowen's in the, I believe, is the first court of appeals' decision in the Arland case saying, I think somewhat gratuitously, that the court had declined to follow Section 413. In fact, he referred to the right page where the court said basically, we've been asked to adapt 413 as law of the state. We don't feel we need to do that. Then it launched into this analysis, relied on 413 at the end of the analysis but whether it didn't feel that needed to adapt 413 because it considered already to be a part of the jurisprudence of this state or whether it wasn't adapting 413 for some other reason because it didn't feel like it was bound to do that under the facts. That hasn't been answered. But the fact is, Scott Fletcher opinion remains on the books. It's been affirmed by this Court without

criticism of its reliance on 413 as grounds for liability. And your Honor, peculiar risk is not an uncomfortable [inaudible] so, I think you just heard that in fact that imposes an obligation on the part of the contractor to exercise some level of control over the aspects of the work of an independent contractor when there is a peculiar risk of harm to somebody.

JUSTICE MEDINA: What's? What's? --

JUSTICE O'NEILL: Why it -- passing along the safety manual saying, here's how you do it, sufficient to meet that duty.

MR. BEITER: Your Honor, the problem with passing along the safety manual is, one, it was in conflict whether it was actually received, used. It was pretty clear that it was not used.

JUSTICE O'NEILL: I thought he signed it.

JUSTICE BRISTER: He did sign it.

MR. BEITER: He did, he did sign it, your Honor but there was, if you read the testimony, there was some question about whether --

JUSTICE BRISTER: What can -- what can a contractor do? Here, take this, read it, and sign it, and he does. How can you be sure that he actually did read it rather than daydreamed?

MR. BEITER: Your Honor, I think that's where the issue of a peculiar risk comes into effect. I think if you know you got a danger that arises out of the work you're delegating and you're delegating it to your buddy because you've decided after an OSCON investigation that it's too risky for you to do. You want to delegate it to someone else so you send it to your buddy and you have him do it. There ought to be a policy and I think 413 recognizes the policy that you have the most control over the details or the work at that point --

JUSTICE BRISTER: Well, in fact you're required to exercise control, this, as a support of my concurrence in Fifth Club. When you say a nondelegable duty, basically, you've got a court telling contractors you can't have an independent contractor do this. You must do it yourself and where do we have the expertise to decide which jobs should use independent contractors and which jobs should must be done by whoever the general is.

MR. BEITER: And your Honor, I think that's a matter of trial. As -- is clearly a fact question, this is going to have to be determined through a trial.

JUSTICE BRISTER: No, I mean, if it's a nondelegable duty we don't--we're not going to leave that up to a jury, are we?

MR. BEITER: Well, your Honor, I think that the facts that give rise to whether it is or not nondelegable are issues of fact that are jury questions. I mean, there are certain kinds of things that by their very nature are dangerous. Now, there are things that this Court has already recognized as being inherently dangerous. That's not a fact question that's going to be determined on the case by case basis --

JUSTICE BRISTER: What -- what were those?

MR. BEITER: Your Honor, explosives, the MBank case that you made reference to. There are small cases. There is a pipeloading case that's been subject to some criticism but not overruled --

JUSTICE BRISTER: Is it -- I was trying to find a definition of inherently dangerous and best -- closest I found was from a 1953 case Ruth and Jenicoff that said dangers in its normal or nondefective state --

MR. BEITER: Yes --

JUSTICE BRISTER: -- like explosives or poisons--

MR. BEITER: Right.

JUSTICE BRISTER: So in other words even if you do it right,

explosives are dangerous.

MR. BEITER: And Your Honor, here's the --

JUSTICE BRISTER: But that --

MR. BEITER: -- [inaudible] --

JUSTICE BRISTER: If that's the right definition that didn't cover your case because if you do this right, the truck never gets turned on and you never get mushed.

MR. BEITER: Your Honor, I think the distinction has to be that, what is the normal nondefective state of a cement mixer, a concrete mixing truck. It's not to have people walking around in the back of it --

JUSTICE BRISTER: But, but how do you get the concrete out of it without that?

MR. BEITER: Well, the way you get it out is by the very dangerous practice of putting people inside it --

JUSTICE BRISTER: Which is not dangerous at all as long as it's not turned on.

MR. BEITER: Well that's not entirely true, your Honor.

JUSTICE BRISTER: If, if you take it off the truck, there is no longer a motor on it and you do exactly what these guys did, it's not dangerous at all.

MR. BEITER: But that's, that's not the condition --

JUSTICE BRISTER: That's not dangerous at all there?

MR. BEITER: Under the testimony or trial, that is not true. Now, it wouldn't be dangerous for its respect to the specific, dangerous --

JUSTICE BRISTER: [inaudible] you got.

MR. BEITER: -- in this case but there was testimony that there are protrusions and sharp concrete. There's low clearance. There is a blade that impairs mobility. There's the difficulty of getting down in the position to exit through the very small escape clean out hatch. There are a number of other dangers that make it dangerous to put a person in that condition --

JUSTICE MEDINA: But ultimately we have to go to the cause of the injury though.

MR. BEITER: Ultimately, they all --

JUSTICE MEDINA: -- and none of those were the cause of the injury.

MR. BEITER: Not singularly, your Honor. Not singularly but the cause of the injury was that he was in the back of the truck which is not its -- it's not the normal, nondefective use of that.

JUSTICE BRISTER: Come back to a [inaudible] that the jury is going to say that, I'm uncomfortable about judges saying which things you can't hire somebody to do. Nobody in Texas can hire somebody to do this. I'm even more uncomfortable about a jury deciding, well, in this county you can't hire somebody to do that but in the next county you can hire somebody to do that. Isn't that --

MR. BEITER: Well --

JUSTICE BRISTER: Isn't that kind of, this kind of regulation, hasn't that been taken over by Ochia and those kind of people like, who in this case told him to hire somebody else to do it?

MR. BEITER: Your Honor -- and had some level of care been used in hiring someone to do that.

JUSTICE BRISTER: Well, we don't, we don't have a negligent hiring question for the jury.

MR. BEITER: No. No, your Honor. But --

JUSTICE BRISTER: -- I wouldn't try what that theory was --

MR. BEITER: But peculiar risk --

JUSTICE BRISTER: Just answer that question.

MR. BEITER: That's correct, your Honor. We don't. The peculiar risk subsumes that, I mean, what it says is that if you're going to take a task that you know has a peculiar risk that it creates an excess risk of injury to somebody and you are going to delegate that to someone else to do that work you have to make sure and exercise some care as to those things that Texas law has always recognized. Some person is going to be in a better condition to know of the risk and manage the risk than someone else. That's the reason it's inherently dangerous. Liability relays -- remains with the contractor.

JUSTICE BRISTER: But how can that really be so if you may recognize a risk but you hire people that are experts to know how to deal with.

MR. BEITER: And your Honor that's why, again that's subsumed in the peculiar risk responsibility that you have to make sure you've accurately communicated the risk. You've taken steps to minimize the risk of danger to someone else and your attempt to delegate that duty. And if you don't do that --

JUSTICE BRISTER: No, when I --

MR. BEITER: -- you don't get to delegate.

JUSTICE BRISTER: -- so, when I hire somebody to mow my yard, I've got to get them all together and say, "Now look, don't stick your hand or your foot down under the mower because otherwise you're going be hurt."

MR. BEITER: Again, your Honor, I think it's going to relate to the nature of the task that you had them do. If it's --

JUSTICE BRISTER: Surely that's dangerous.

MR. BEITER: I think there's no question that in some cases a lawn mower is dangerous but, your Honor, the question is going to be one effect of whether relative to the specific risks that are involved in the duty that's being delegated. They are peculiar and they have an elevated risk of injury such that there ought to be an obligation on the part of the person who knows and perceives those risks and has an ability to control them to take some effort to mitigate the risk.

JUSTICE HECHT: But what role should the inability of that person to make the thing safe play in deciding whether there's a duty or not? Or maybe that the owner of the premises or the operator has hired an independent contractor because he realizes he doesn't know about to minimize the risks and if he doesn't get somebody that does, someone could be hurt.

MR. BEITER: Your Honor, that's conceivable but that's not our case.

JUSTICE HECHT: If it were the case, would you say that's not a nondelegable duty?

MR. BEITER: Well, first of all, I'll draw this distinction. I'm not sure that I would say a peculiar risk is necessarily nondelegable under all circumstances. It's probably delegable with certain conditions attached that are intermediate to no duty and a duty that's completely nondelegable because it is inherently dangerous.

JUSTICE HECHT: So, you think whether it's a peculiar risk, hence, not only on the activity and the risk associated with it but the, what, the sophistication or the skill of various people.

MR. BEITER: And the degree of the risk. The extent to which it's likely to happen and on that, you fall back to the general standard that is discussed in a hundred Texas cases of what is the tradeoff between the exemption from liability for someone who contracts as an independent contractor. The tradeoff is that you get protection from the wrongs that are done by your independent contractor but you've got

to do certain things. One is, for instance, you got to get somebody. Initially, you got to choose somebody who's marginally competent to do the job. Secondly, you've got to, if it's an inherently dangerous activity, you've got to retain some control because you're not going to get rid of liability entirely. If you're going to retain any level of control, you're going to be liable to the extent you exercise control to the extent of the peculiar risk if there's something that you know of and you're in the best position to know of the danger and appreciate it and to protect the people against that peculiar risk through the exercise of the duties by the contractor. What peculiar risk doctrine says is that you have an obligation to exercise some level of care, taking into account the nature of the risk, the extent of the risk, the likelihood --

JUSTICE BRISTER: Have we, have we ever applied peculiar risk or inherently dangerous to the independent contractor's employee as opposed to third party?

MR. BEITER: This court has no, your Honor.

JUSTICE BRISTER: Why? Why should we?

JUSTICE O'NEILL: Did we not do that in Lee Lewis? Wasn't the decedent there an employee of the subcontractor?

MR. BEITER: I'll take that back. You're right.

JUSTICE BRISTER: Well, but the majority in Lee Lewis, didn't they not, they decided on right on the control.

MR. BEITER: That's right. It was on right of control. It was 414 but -- and I'm sorry, your Honor, I've lost your question --

JUSTICE BRISTER: The question is surely if its, you know, dangerous things like explosives where people could get hurt or worse could fall and stuff and third party is innocent walking by, seems like there's a much stronger case for saying you can't delegate or waive that responsibility if you're the one saying I want something blown up as opposed to, if you hire an independent contractor who is supposed to know how to do it or, you know, they have their own workers comp and all that and their employee seems like that's a weaker case for saying, that can't be delegated.

MR. BEITER: I think that's probably right, your Honor. But I would say if there's oppose for trial case for not going to that extreme, this is it. If you have the ability and aware with all and the knowledge and the experience to do something about it and in fact, you know you're delegating a dangerous task --

JUSTICE BRISTER: Well, this theory says it's not that hard. Seems to me, I've never been inside a concrete truck but it seemed like to me I would know, I wouldn't want it turned on when I am inside.

MR. BEITER: Right.

JUSTICE BRISTER: And I don't -- I haven't had any special training and nobody made me sign anything. Wouldn't any fool know that the dangerous thing about this is don't turn it on whether halfway in and halfway out.

MR. BEITER: Your Honor, obviously, that's a pretty dangerous thing that to have happened but again this is not the only significant danger that people are being exposed to. And again, I would take you back to the fact that it's the nature of the task that it's being done and it is not merely with relation to the drum turning. It's with relation to other conditions affecting the workplace that are peculiar to that particular task that created the risk.

Now, in this case, the particular risk that is also one of the peculiar risks of this activity is the fact that no one restrained the drum. You'll see in the evidence that the usual practice was to block

and chain the drum so it couldn't move. Something that Taylor was never instructed to do and didn't do. And that was in part what caused this to happen. Now, the fact is though, of all of the people involved in this, the one who had the most degree of knowledge and the degree of ability to control the circumstances and to assure that some level of control was implemented to mitigate the risk to the employee, it was the company that delegated it to avoid exposing its own employees to that risk and that's Central Ready Mix.

JUSTICE O'NEILL: What is Lockout and Tag Program?

MR. BEITER: A Lockout and Tag is the program that -- that -- it was the paper program that involved taking the key out of the ignition before entering, putting the key in your pocket, and making sure that nobody can get into it so there's no possibility of the engine being turned on. Again, a policy that Taylor, if it intended to implement, never did apparently.

CHIEF JUSTICE JEFFERSON: Further questions? Thank you very much.

MR. BEITER: Thank you your Honor.

REBUTTAL ARGUMENT OF MS. KATIE P. KLEIN ON BEHALF OF THE PETITIONER

MS. KLEIN: Without intending to be disagreeable, I'd like to read a statement to you from Scott Fletcher that says, "Reid asks us to adopt the particular version of the peculiar risk exception embodied in Section 413. We need not formally adopt 413 because we believe a balancing of the factors present in this case under traditional Texas notions of duty is sufficient to impose on Kirby, a duty to take reasonable precautionary measures."

They specifically declined to adopt 413 and said under this case that the fact that the person was going into the home selling Kirby vacuums it was foreseeable that a person who had criminal propensities would pose a duty to people.

So again, I had to say that Scott Fletcher does not adopt 413 but the most interesting thing to me is the Fifth -- and we're talking about the Fifth Club opinion because both Justice Green's majority opinion and Justice Brister's concurring opinion make reference to the fact that danger in these cases stems from the activity itself not from the manner of performance. And so that if you have the issue -- if the injury comes from the manner of performance, that only if it's the activity itself came responsibility for creating the danger not be shifted to the contractor.

Well, what is dangerous about taking a jackhammer and jackhammering a piece of concrete? I mean, there are hundreds of thousands of people doing that on city streets everyday. There's never been a court of opinion -- court of appeals, or supreme court opinion in any state that has ever said that taking a jackhammer to a piece of concrete is an inherently dangerous activity. The injury, in this case, came from the fact that a co-worker turned on the drum. So, that if the focus has to be on the performance, not on the activity itself, obviously, the performance here was messed up. I mean, the man had a co-worker who turned on the truck.

JUSTICE MEDINA: What about all of these other dangerous conditions that are alleged?

MS. KLEIN: Specifically, what are you making reference to?

JUSTICE MEDINA: Well, your opposing counsel's argument that there

were other dangerous conditions, I guess, on the truck itself, perhaps on the premises realizing that --

MS. KLEIN: Well, there's no evidence in the trial court of any other dangerous conditions. Now, there was an expert who said that various things could happen but he didn't testify that those were inherently dangerous activities either.

JUSTICE MEDINA: What about the failure of the Tag and Lockout System?

MS. KLEIN: Well, that's all part of the one danger which is that if the drum moves or the truck is turned on, that activity can be dangerous and that was addressed in the safety manual that you should use lockout/tagout procedures and that you should use blocks to keep the drum from rotating ever so slightly when you're in the drum. The fact that the independent contractor elected not to respect the safety manual does not create liability on the person who contracts with the independent contractor.

The other thing that's interesting about this peculiar risk argument, besides the fact that, I don't think that Texas has adopted it, is the fact that there is no suggestion in the briefing by the appellee that what could have been done to address the peculiar risk. He says there should be a proper policies, procedures, and precautions in place or there's no evidence that -- that work. There's no evidence that the safety manual was defective --

JUSTICE MEDINA: That takes me to a question that I have here, under what scenario would your client ever be responsible in this type of situation and particularly hands off the procedures, manual and --

MS. KLEIN: I would say only if the facts were changed. If he did not provide the safety manual, if he knew that Mr. Taylor had hired some people that for whatever reason, you know, were incompetent people, blind people or, I mean, if there was obvious that there was a person out there who could not function in that job --

JUSTICE MEDINA: But blind people what if they are illiterate and don't read English or whatever language these documents are published?

MS. KLEIN: If they're what Sir?

JUSTICE MEDINA: You said "blind people," which indicates that handicap, what if the individual who the manual was given to is illiterate and not able to read the manual --

MS. KLEIN: Well that's the independent contractor's responsibility to train his own employees. And that's the duty that no court has imposed upon a person contracting with an independent contractor is that you have the duty to go and train them. In fact, the converse is through that even if you train them that unless you are asserting control at the time of the injury, and that your control of those safety procedures is related to the cause of the injury even that will not subject you to liability. So, the court of appeals is asking this Court to just throw independent contractor law completely out the window and to impose the duty to warn and a duty to train and a duty to supervise in all cases where you intend to contract with an independent contractor over an activity that has not been determined to be inherently dangerous. So we would request that the court of appeals decision be reversed and that the judgment of the trial court be reinstated.

CHIEF JUSTICE JEFFERSON: Thank you, Miss Klein. The cause is submitted and that concludes the argument for this morning. The marshal will adjourn the Court.

SPEAKER: All rise.

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