ORAL ARGUMENT – 4/5/00
99-0793
LEE LEWIS CONSTRUCTION V. NORMA HARRISON

O'NEILL: Your client here, didn't they have their own safety program that involved a separate lifeline?

COOPER: No. If you look at E. E to the job site, the work requirements, there was a requirement in that document that there be safety belts employed. There was also requirements that the subcontractor comply with...

O'NEILL: Wasn't there a company policy that required these lifelines for your employees?

COOPER: I don't believe that is the case. I believe it required safety belts to be used in compliance with OSHA. If you got to Ex. E, only job site safety requirements.

O'NEILL: So there was no summary judgment proof of anything beyond OSHA that your client provided for your employees?

COOPER: In the _____ circumstances depending upon what the requirements were, there may be a lifeline required for our own employees. That is correct.

O'NEILL: And there was summary judgment proof to that effect?

COOPER: I believe that is correct for our own employees.

O'NEILL: Well if there was an additional level of safety imposed for your own employees and you are contractually bound to supervise and did supervise the safety of the subcontractors, then why is this situation different from *Mobil v. Owen*?

COOPER: First off, we were contractually bound vis-a-vis the owner. Again, I think that's an important distinction in this case...

O'NEILL: But there was also an agreement with the sub.

COOPER: There was an agreement with the sub again going to Ex. E, that we would make sure they complied with the requirements in the job site safety rules. And none of the job sites safety rules, which is Ex. E to the subcontract dealt with safety lines or lifelines.

HANKINSON: Isn't there evidence in the record as well of actual control over the safety

operations at the job site?

COOPER: There may be. There may not be. But I think it's irrelevant at this point because if you look at the charge - actual exercise of control was not submitted to the jury. Question 1 asked whether or not there was contractual retention of control with respect to safety? And then Question 2 was, whether or not the retention of control was exercised in a negligent fashion.

HANKINSON: Well but there's an instruction on issue 2 though, too. What did the instruction on question 2 say?

COOPER: The instruction on question 2 that was submitted to the jury asked whether or not negligence with regard to the general contractor means the failure to use ordinary care with regard to its retained right of control?

BAKER: By that statement, you would agree then that the contract requires LLC to have control for safety purposes?

COOPER: Again it depends on which contractor you are talking about: vis-a-vis, the owner, with Methodist Hospital...

BAKER: Are you arguing then that this is a *Diaz* situation rather than a straight out contract of control over the safety of all workers on the job site?

COOPER: Actually, I'm arguing its more in the lines of *Mendez* as opposed to *Diaz*. That is, we promulgated, prescribed certain safety regulations and those again were contained in Ex. E, of plaintiff's Ex. 4. And we said, we're going to enforce those. And under *Mendez*, that does create a narrow right of control. And according to this court then, if those safety requirements increase the probability of harm or severity of harm, we have liability. However, there was absolutely no evidence introduced at all that any of the items listed on Ex. E increased the probability or severity of harm to this particular plaintiff.

ENOCH: On the issue of lifelines, did you client have its own employees out there performing functions and requiring them to wear lifelines?

COOPER: Depending on the functions they were performing, there were certain ones with lifelines. There were also certain ones with scaffolding. But as the contract required, the fact that you go to Ex. 1, which is the actual contract between Lee Lewis and Methodist Hospital, it required with respect to work not customarily performed by the contractor shall be performed by subcontractors.

The testimony was, Lee Lewis did not customarily perform glazing work, didn't know how to do it, didn't know the requirements. And by contract, it was required to

subcontract that out. And then also under...

HANKINSON: But it also knew that one of the most serious risks to workers on a construction site was injury or death from falls.

COOPER: Absolutely. There is no question. It was admitted that if you're working, again they were doing inside work as opposed to outside work as far as installing this thermo barriers, it was done from the inside, but there was again this double lanyard system that was being implemented as well as a rail that was there.

ENOCH: Why is your circumstance different than Ellender?

COOPER: I believe that with respect to this case, there was the delegation to the subcontractor of its requirements for safety. Most general contractors don't do skill work. They don't have the skill. They don't have the expertise. And one of the things you do when you contract for a company to install steel, is you're not only buying their expertise as far as doing the work, but you're also buying their expertise as far as safety. And I think the law not only allows but encourages that type of subdelegation to the people who are really in the best position for example to know what safety measures are required to do this type of work. This is a specialized work - doing glazing work on a multi-story building.

ENOCH: Was *Ellender* wrong? I'm not sure Ellender focused on the specialization of the work. It's just the contractor, the owner, knew that using this cleanup solvent was dangerous, had hired a contractor to do a separate function, and that contractor happened to use the same sort of solvent, but didn't tell them about it.

COOPER: First off, there is no evidence that at the time of this accident that anyone from Lee Lewis knew that this double-lanyard system was not appropriate. In fact, the evidence was that they had been told by the developer of the system, Ken Taylor who was the owner of KK Glass, that the system was safe, that it had been used before. It was OSHA compliance. They had used KK Glass before this instance, and they had used them in other contracts and never had any problem.

HANKINSON: But there was also evidence to the contrary that in fact using that system without an independent lifeline was in fact dangerous. Didn't one of the officers of your company admit that during the course of the trial? So aren't you talking about competing evidence here?

COOPER: I don't believe so.

HANKINSON: Was there evidence though to the contrary that in fact using that lanyard system without an independent lifeline was in fact a danger to the workers?

COOPER: I can recall one hypothetical being given, that if you had the double-lanyard

system and you fell, that you could cause some problems.

HANKINSON: Suffocation or hanging him?

COOPER: Suffocation, hanging, things of that nature. Again though, the question was what we knew at the time. And again, I'm mixing with the gross negligence as far as subjective component and the liability. I'm going to talk about them both at the same time I guess. But the question was, what we knew at the time of the accident. And again, if you look at all the testimony of all of our employees who were out there, I believe you will see that none of them believed that this method was unsafe. In fact, they all believed it was safe. OSHA had been out there two weeks earlier...

O'NEILL: Why did Lee Lewis then require its employees to wear lifelines?

COOPER: Obviously, some of the work that Lee Lewis was doing they were familiar with. They knew the risks and they knew what was the appropriate measures to prevent injury for these risks. Lee Lewis hired KK Glass. They hired their expertise not only to do the work but as far as safety as well.

BAKER: Are you just now saying that because KK was there they had all the safety requirements for their own people and that Lee Lewis had none?

COOPER: No. What I'm saying is, that when Lee Lewis hired KK Glass they did hire their expertise in the job as well as safety. They delegated the safety obligation to KK Glass except for those items that were listed on Ex. E of the subcontract.

O'NEILL: So under that argument, even if Lee Lewis knew that its subcontractors' employees were using no lanyard system or any safety devices, there would be no liability here?

COOPER: Well that's one of the issues which this court touched in in *Diaz*, and which the Amarillo court has addressed in the *McDougal* case and, that is, whether or not if a general contractor sees a subcontractor who's employing _____ dangerous work or practices can stop them. And I think at least what the *McDougal* court said is, Yes they ought to be able to stop them, and by doing that they should not incur liability as far as right of control, because out of humanitarian reasons if we see somebody doing something that's dangerous, you should want to encourage the general contractor to stop the practice and encourage safer practices. If you are going to impose liability because of right of control if they do that, then you're going to defeat public policy.

O'NEILL: I'm not sure I understand your answer. It would be a different case, or it wouldn't be a different case?

COOPER: If we had seen them doing that without a lanyard and believed that that was

a dangerous situation, then I believe that we could have spoken up and stopped the practice.

O'NEILL: There would be liability?

COOPER: I'm sorry, I don't think there would be liability because again if go to *Welch v. McDougal*, it says just because you see something dangerous and you stop it doesn't necessarily mean you subject yourself to the right of control. We want to encourage the contractors...

BAKER: What about the other side: If you see something dangerous and don't do anything when you have a control over safety, the entire safety program for the project as the contract said?

COOPER: Again, I think if it violates one of the provisions that you had prescribed in your safety program, then I think there could be liability.

BAKER: Didn't they also have a requirement that they have a safety person on the job site everyday to look at these things?

COOPER: The contract between Methodist Hospital and Lee Lewis did have a provision under this 10-point something, that we have a safety person out there. And we did have a safety person out there. However, as this court said in the *Chappa* case the mere presence of a safety person out there is not going to be enough to infer right of control so as to establish a legal duty.

PHILLIPS: Respondents say on pages 28-30 of their brief that you assumed the control by your actual conduct on the job site.?

COOPER: If you will look at what they say we assumed, this is what they say. That we assume control by scheduling KK's work, by inspecting KK's work, by requiring corrections or changes to KK's work, and by requiring compliance with contract specifications. And I would encourage the court to read comment C to section 414, the restatement, each one of those things the restatement says is not sufficient to confer a right of control on the part...

HANKINSON: Your position is, is that there is no evidence that they retained control over the aspect of the job that's at issue in this case, correct?

COOPER: We did retain a limited right of control with respect to the safety regulations that was contained in Ex. E. We concede that. Beyond that, it's our position we did not retain any other right of control.

HANKINSON: Then how do you deal with the testimony of LLC's President that the CA recites in its opinion, that he first testified that LLC "wanted responsibility of safety on the job site?" Then he conceded that LLC retained the right to control safety on that job site "even in terms of

making sure that the subcontractors did their work safely." Furthermore, the work which LLC intended to "make sure" was done safely included that work performed by KK and all other subcontractors, that the subcontract did not affect LLC's ability to "make sure that they, the subcontractors, did their work in a safe manner" was also conceded. Do you disagree that the CA has correctly cited the record?

COOPER: The CA has correctly cited portions of the record. However, I think you need to look at all of the testimony in context. Lee Lewis also said that when they contracted with KK Glass they expected KK Glass to have their safety program in place as well.

HANKINSON: I understand that, but we're reviewing this to determine - you're taking the position that there is no evidence to support this judgment?

COOPER: There's no evidence to support a contractual retention of control. That is correct.

HANKINSON: How can we conclude that there is no evidence in light of that testimony from the president of the company?

COOPER: Well, again, we believe that we did have the limited right of control, as in *Mendez*, with respect to Ex. E. However, our position is that none of these increased the risk or the probability...

PHILLIPS: She's asking actual and you're answering contractual. Actual exercise of control.

COOPER: Again, if you look at Lee Lewis's testimony, and I would refer you to 5.171 that KK was responsible for the design and implementation of the fall protection system. They took their direction only from Todd Taylor. That Todd Taylor trained the KK employees on the safety systems at KK Glass warehouse. They had regular safety meetings. And in fact, they had a safety meeting on the morning of the accident on how to hook-up on the double lanyard.

HANKINSON: I understand that, but that does not remove the pieces from the record that the CA recited. And isn't a no evidence review properly done?

COOPER: Y'all had this discussion earlier this morning as far as the inferences and things like...

HANKINSON: But this isn't inferences. This is direct evidence. And you agree that the CA has correctly cited it. And my question is, how - I don't understand how we get where you want us to go in deciding that there is no evidence when this kind of evidence is in the record. I agree that there may be other evidence that does something different, but that's not the test that we use for no

evidence.

COOPER: You still have the issue of whether or not the control - let's assume that actual exercise of control was submitted, which if you look at the charge it was not. Let's assume it was submitted. You still have the issue, I believe it was in *Mendez* that this court said that where we are exercising control was the cause of the accident. And here, I think there are general discussions about exercise of control, but if you go through the record you will also see with respect to fall protection, that KK Glass was the only one who developed and trained and who implemented that system for their employees.

HANKINSON: But this language is much broader than that that says LLC says they are responsible for all safety aspects for making sure that the subs do their work in a safe manner. It's very broad language. Again, you keep pointing to me to other evidence that may contradict and that the jury could have chosen to believe, but I can't figure out in a no evidence review what we are supposed to do with this.

COOPER: If you look at Lee Lewis's testimony, numerous times he says this and he keeps asking and gives the same testimony. He says, Yes vis-a-vis the owner, we have the right of control. Vis-a-vis Methodist as far as safety, we are the ones that Methodist looks at. But then he goes on to say, vis-a-vis- the subcontractors, we delegated out that right of control. If you look through the record excerpts in fact that were handed out this morning you will see numerous times that Lee Lewis says, vis-a-vis the Methodist contract that's true, but that's not true vis-a-vis the subcontract that we had with KK Glass.

HANKINSON: What about the subcontract, the contract with the sub in which LLC agreed to initiate, supervise and maintain all safety precautions and programs, and take all reasonable safety precautions for the safety of all employees and persons. How does that language get dealt with?

COOPER: There was evidence in the general contract.

PHILLIPS: You talk a lot about the lanyard system. But couldn't the jury have believed that he wasn't using that at all, he was using the bosun's chair only?

COOPER: That gets back to the reasonable inferences that y'all discussed, the first case. In this case, there was direct testimony from the employee who was up there working with him that he wasn't in the bosun's chair, that he had the double lanyard system...

PHILLIPS: But there is testimony both ways, is there not?

COOPER: No. There was testimony that when they found him on the ground, he had the double lanyard system. There was no bosun's chair on the bottom. There was no bosun's chair at the top. There were people who said they thought they saw him at other times use a bosun's chair.

But I think the evidence using reasonable inferences, which is where I think the court is entitled to look at all the evidence to determine whether or not an inference is reasonable or not, I think the only evidence is and the only reasonable inference is, he had the double lanyard system because when they found him on the ground, that's what he was hooked up with on his belt - was the double lanyard system. There wasn't a bosun's chair on the ground. There wasn't a bosun's chair up at the top of the building. So there was testimony from employees that on other occasions he may have used the bosun's chair; however, I don't think it's reasonable to infer in light of the totality of the testimony that he was using a bosun's chair at the time of this accident. And I don't think inference would be reasonable.

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RESPONDENT

CROW: This is a classic *Reddinger v. Living* and *Williams v. Olivo*, 414 Restatement of Torts Second...

ABBOTT: Let me ask you about that paradigm. Let me ask you about perhaps reevaluating the paradigm established in those cases and the restatement as it concerns the real world today in which construction takes place. Here is a statement that I think you will agree with. Based upon the contract that LLC had, LLC is responsible for all safety aspects concerning this construction. Do you agree with that?

CROW: Yes, I do.

ABBOTT: I'm going to guess that the contract that LLC had in this particular case with regard to the responsibility placed upon it by the owner of the property, by the party that wanted the construction to be done - I guess it was Methodist Hospital, this is fairly common with regard to the way that major commercial construction projects are conducted. The property owner expects the general contractor to be in charge of everything, including being in charge of safety. In turn what properly happens most frequently in major commercial construction projects, is you have a second contract like we have here about the responsibilities vis-a-vis the general and the sub. My point is this, if we continue with the current paradigm, the reality of it is that general contractors are going to be subject to liability in every single case whenever any employee of a subcontractor is injured on a work site. Because they are responsible in general to ensure safety on the premises. So why is that we should not shift from the paradigm that was established in the cases you cited and the restatement?

CROW: To be very blunt, I don't think there is a need to shift in any way. Comment B clearly states the general circumstance when you have a general contractor who signs an AIA contract like we have in this case and who accepts all those responsibilities, and the fact is that in that circumstance they retain the right to control a lot of things. I presented a bench book to the court and part of the contract is in there. And in this case, the contractors specifically engaged itself to be

responsible and agreed to be responsible to supervise and direct the work. And that included to be solely responsible for all construction means, methods, techniques, sequences and procedures. They also agreed to be responsible for safety. Now this court has reviewed a number of cases since *Clayton Williams* in which this court found that there was not sufficient contractual retention for the right of control to impose *Reddinger v. Living* obligations on the general contractor. But in this case, there is a matter of law. I'm not saying that every general contractor in every single case would have these obligations. This court in its decisions has so determined. But in this case with this general contract signed by Lee Lewis, they assumed those obligations in order to have the opportunity to occupy that premise and do that work that included the work that Jimmy Harrison was doing at the time of his death.

ENOCH: Are you talking about the contract with the sub or the contract with the owner?

CROW: I'm talking about the contract with the owner.

ENOCH: Is there any indication in the contract of the owner that the employees of a sub were the third-party beneficiaries of that contract?

CROW: The only indication in here is that on §5.3.1, that Lee Lewis understood when they signed this that this contract and the general conditions which follow that contract and are incorporated therein will bind the subcontractors to the same terms that I just read to this court meaning that the subcontractor and their employees are bound to the fact when they come on the job site and sign their own contract, that Lee Lewis is the one who is going to direct and supervise the work. They are the ones who are going to be solely responsible for means, methods, techniques and procedures. And they are also the one who is going to take the initiative in safety.

Something that has been overlooked here significantly so, I think, is the fact that the subcontract and in the bench exhibits that I have provided the court on Tab 3, the very first language of the subcontract says that the contract documents for this subcontract consists of this agreement and any exhibits attached hereto. The agreement between the owner and the contractor dated 4/4/90, the conditions of the contract between the owner and contractor, general supplemental and other conditions thereby incorporating the very general conditions to this contract that place the obligations on Lee Lewis as I've just told the court and as reflected in the record to be responsible to supervise and direct the work, to be solely responsible for means, methods, techniques, sequences and procedures and that take the initiative and safety. It's all bound together...

HECHT: This is an AIA standard form agreement. So your argument would apply anytime it was used?

CROW: Anytime that the contract is sufficient to clearly state that the general contractor is obligated to retain control, yes, that is our position.

HECHT: When could a general contractor operate very well if he didn't have the right to control the basic project?

CROW: That would be very difficult for him to do.

HECHT: So he's going to get stuck basically?

CROW: In my view the issue is, if the general contractor desires to sign a contract that specifies he retains the right to control on a job site, then he's going to have to exercise that retained right of control with ordinary care. It doesn't mean he is an insurer. But it certainly means that he has to exercise ordinary care.

ENOCH: Or, it just means he gets worker's compensation. The general contractor will be required to carry worker's compensation insurance for the employee because that's the only way to assure that the proper coverage, the proper activities occur. The only reason the employee here for KK is suing the general is because he's going after what he perceives to be a third-party to his injury. And if the general under AIA takes it, the general should always put itself in the position of being the employer of any of the employees of the subs.

CROW: That was not the evidence in this case, that is, that Lee Lewis necessarily actually exercised control over the details of KK Glass's work. I don't think the *Reddinger v. Living* cases or *Clayton Williams v. Olivo* require the general contractor to take out comp. All it requires is that if there is evidence, either contractually or by actual exercise of the retention of the right to control, then that general contractor has an obligation to exercise ordinary care. It's not that they ensure the result.

HECHT: Do you disagree with the petitioner's position that the only issue here is the legal right to control as opposed to actual control?

CROW: Not at all. There was evidence of actual control as well.

PHILLIPS: His question is about the charge.

HECHT: My question is about question 1 of the charge. Do you agree with the petitioner's position that the only issue here is the legal right to control, not actual control?

CROW: The way the charge was worded I believe is did Lee Lewis retain the right to control safety on this job site? It doesn't say: Did they retain that right by contract? It said: Did they retain the right to control safety on the job site?

HECHT: How else can you get a right?

CROW: According to this court's decisions in the cases that I have read, you can prove a right of control either by contract, which would demonstrate that that right of control was retained as a matter of law, whether or not it was exercised; or 2) that control was actually exercised in lieu of a contract.

HECHT: We've said that whether you are liable for control may depend on whether either you have it legally or you actually exercise it. But the petitioner's position in this case is that the only issue submitted to the jury was the legal right, but you disagree with that?

CROW: I do, because the word 'contract' is not in the special issue No. 1: Did Lee Lewis retain the right to control safety on the job site? And I hope I've answered your question.

HANKINSON: Is your answer then the use of the word 'retain' the right to control means legally by contract, or via actual exercise as opposed to retain the right to control only references legally via contract?

CROW: That's correct. Furthermore, as I've said a moment ago, there is ample evidence that control was exercised.

HANKINSON: If you are incorrect in that interpretation of what retain the right to control meant in the charge, then must we disregard all the evidence? For example, some of the evidence I quoted to Mr. Cooper about the testimony about the company's perspective on what was happening. Does all of that evidence then become immaterial to our no evidence review?

CROW: Absolutely not. Because there is ample evidence of actual exercise of control.

HANKINSON: I understand that. But in follow-up to Justice Hecht's question, if your interpretation of the charge is not correct and retain the right to control only means legal right to control via contract according to the case law in Texas, then does that make the actual testimony of the LLC employees and officers as to what they did and how they approached the job immaterial because it goes to actual control rather than legally retained control?

CROW: If the court determines that the term "retained right to control" means only legal control by contract, and also concludes that special issue No. 2, which includes the issue of control retained by Lee Lewis, if any, on this job site, then that may be the case.

O'NEILL: How was the case argued to the jury?

CROW: It was argued that there was an absolute right of control in this case by contract.

O'NEILL: Contract and by actual exercise?

CROW: And by exercise.

O'NEILL: Was there any objection to the exercise argument that it was outside the scope of the question?

CROW: Absolutely not.

ABBOTT: So KK did not have the right to control the safety of its own employees?

CROW: They did. Whenever a general contractor subcontracts out the work, which is what they did in this case and generally do, they have a right to do that. The contract says that they have a right to do that.

ABBOTT: My point is, what right did KK have to say: We are in charge of ensuring the safety of our own employees and this is what we're going to do?

CROW: Under this contract, KK would have been expected to exercise its own employer obligations to its own people. But there is nothing in the general contract between the owner and Lee Lewis, nothing in the general conditions attached and incorporated in that contract, and nothing in the subcontract which specifically supports the petitioner's argument that there was a delegation of those duties and responsibilities to KK Glass. Those words 'delegate' or 'delegation' are not included. Never have been. I would simply submit to this court that that argument isn't consistent with these contracts and is not supported by the record.

PHILLIPS: How is this case different from *Universal v. Ung* in terms of respondent's objective knowledge that the failure to use every precaution in the world may lead to very serious consequences.

CROW: This case is completely different than *Ung*. In this case, Lee Lewis's own people, and there is a Tab 8 to the bench exhibits that I provided to the court, testified they were well aware that falls were the top hazard on a construction project like this.

PHILLIPS: And don't you suppose getting hit is the top hazard for road workers?

CROW: I don't know exactly what the record showed in *Ung*. But they went on to explain that they knew that these men would be working on the edge of the building on the 9th and 10th floors. They also explained that they knew that without proper fall protection, there was a risk of them falling to their deaths. And that therefore, the proper fall protection techniques would be essential to protect them from that type of injury or fatal injury in this case because of the height.

OWEN: So you're basically saying this is an alter hazardous activity? In other words, if any time you are involved in a multi-story building, you've got potential for a gross negligence damages?

CROW: No, that's not what I'm saying. What I'm saying is that Lee Lewis was well aware that fall hazards were the primary problem in this type of multi-story construction. And that they were well aware that not only would they end up causing an injury, but from the 9th and 10th floors it would be fatal.

OWEN: But that's true in every tall building case.

CROW: It's true in an elevated construction site, which means that without adequate fall protection, without the supervision to make sure that the men were using proper fall protection, the risk becomes astronomical.

ABBOTT: So what distinguishes gross negligence here from just negligence?

CROW: To direct the court's attention back to Tab 8 in terms of the testimony of C.L. Lewis, who was the superintendent on this job site. He gave testimony in this case that you don't find in *Ung*. And the only case where I see it come close is *Mobile v. Ellender*. And that is that in spite of the knowledge of what Lee Lewis had about the potential for an extreme risk to the employees of the subcontractor, C.L. Lewis said that he did not and would not even meet with the subcontractors to talk to them about their fall protection systems that they intended to utilize. And furthermore, that he did not and would not even consider it, and that he did not intend to, and did not attempt to supervise or inspect their systems to see if they were adequate to prevent them from falling.

ABBOTT: Doesn't that cut both ways though, because had he testified to the exact contrary that evidence would have been used by you in support of the argument that look they had exercised control over the safety here and, therefore, they should be negligent. And now you're using the converse to say, Well because they didn't exercise control, they are grossly negligent.

CROW: I don't think that I needed C.L. Lewis's testimony in this case to show control. The contract documents show it in my view as a matter of law. But secondly, there was much other evidence of exercise other than just C.L. Lewis's admissions that I just explained to the court. What that testimony showed in my view is as close to a confession of the mental state of somebody as you are likely to ever see in real life litigation...

OWEN: But you're saying in a tall building case that if the contractor doesn't meet with every sub and talk to them about and ensure that they use proper equipment, that they are liable for gross negligence basically. There is no way a general contractor under what I'm hearing you say can avoid liability for gross negligence unless they just take charge of the whole - I mean they have to take charge of the whole job? And then they are still liable because they control. How do you as a general contractor delegate that to your sub and say, You deal with your own employees?

CROW: As I said a moment ago, there is not the word 'delegation' in these contracts.

They can delegate the work, but Lee Lewis never had the right pursuant to these documents to delegate away the responsibilities they assumed that are so specifically stated.

What I am saying is that that _____ statement by C.L. Lewis that he knew about the danger and it was an extreme risk but, nevertheless, decided that he intentionally was not going to do anything to try to protect those subcontractor employees from that danger makes this case even stronger than anything I saw in the record as reflected in the...

OWEN: Why isn't that the subcontractor's responsibility?

CROW: The safety is the responsibility of the subcontractor as well. But as Frank _____, the only expert that was listed that testified in this case for Lee Lewis said, You know there's a joint responsibility here, and even though the work is delegated, even though there is the anticipation that the subcontractor will be required to be responsible for its own employer safety, that's the overall responsibility and the joint responsibility never leaves Lee Lewis. If there had been a contract provision that provided for delegation, then that might be the case.

I would like to touch on proximate cause. And that is simply this. There were three scenarios advanced. One was that he simply unhooked from the window seal, and yet the custom and habit evidence was that this man worked extremely safely. Even taught others how to do so and looked out after others.

O'NEILL: Isn't that issue sort of a red herring though? It seems to me that that's the whole point, that the purpose of a separate lifeline is presuming a fall and regardless of how they occur.

CROW: The central fact of the matter is that if you have a separate independent lifeline as we saw and we see this man using on the scaffold, which our experts testified is the only safe way you can have men or women working on the outside of a building 9 or 10 stories above the floor, it doesn't matter if it's his fault, their fault, or nobody's fault. If something happens to the work platform that man or woman is standing on, the lifeline allows the fall to continue no more than 2-3 feet in a _____ fall. The focus by the petitioner has been, we must look at what initiated the fall. But that is not what fall protection equipment is designed to do. It doesn't stop the fall from beginning. But what it does do is stop it within the 2 or 3 feet before it turns into a fatal injury to the person involved. That's the reason our experts testified and many of the legalists contractor management personnel also testified as you will see in our tab on proximate cause, that it is unequivocally the case that if this man had been provided with the kind of fall protection equipment he should have been provided with - a lifeline, independent rope grab, that his life would have been saved. So in that sense, it does not matter whether he was in the bosun's chair or not - his life would have been saved.

ABBOTT: When Mr. Cooper gets up for his rebuttal, I'm going to ask him a question and

I don't know what his answer is going to be, but maybe you do and I want to see if you can try to rebut it. Here is the question I am going to ask him. I'm going to say that it is your assertion that there was no delegation of safety responsibility by LLC to KK. And I'm going to ask him if that was true. I don't know what his answer is going to be, and you may or may not know what his answer is going to be, but I'm going to give you a chance to rebut whatever you think his answer is going to be.

CROW: I'm here to tell you what his answer is going to be. It's going to be yes. And yet they say that without being able to point...

ABBOTT: You say his answer is going to be yes, there was no delegation?

CROW: I'm sorry. Maybe I misunderstood the question.

ABBOTT: Here's the question. The questions is that Mr. Cooper says that there was no delegation of safety responsibility by LLC to KK. Is that true? And he's going to say, No, it's not true, that there was delegation for whatever reason. And I wanted to give you a chance now to rebut whatever he is going to say.

CROW: And my rebuttal is similar to what I've already told the court with one distinction. And that is, that the contract between the owner and the general does not provide for delegation. The general conditions do not provide for delegation of those responsibilities as specifically enumerated. The subcontract incorporates those provisions. In 5.3.1, which we cited in our brief of the general conditions, it says that the subcontractor is bound by the terms of the general contract and the general conditions. That's the reason it's in the subcontract. And my only question to Mr. Cooper would be, what is it about bound that we do not understand?

O'NEILL: Isn't it that clause that separates this from *Elliott Williams*?

CROW: In *Elliott Williams* that was a case where this court as a matter of fact...

O'NEILL: I know what we did. But doesn't that clause incorporating agreement with the owner into the subcontract distinguish this case for *Elliott Williams*?

CROW: I think *Elliott Williams* had a completely different contract that simply said responsible in terms of financial responsibility for what Lingel was going to do. And this contract is completely different than that. And what this court did then was examine the contract between the owner and the general contractor to see if there was a retained right to control so as to have a duty towards Diaz. They found no retained right to control. But this contract is considerably different.

O'NEILL: What I am saying is the fact that it was incorporated specifically and that the subcontract takes it out of *Elliott Williams* doesn't it?

CROW: That takes it out of *Elliott Williams* . But as I read the *Elliott Williams* case, the very detailed provisions of these contracts take it out of *Elliott Williams* as well.

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REBUTTAL

HANKINSON: Mr. Cooper, why don't you start right away and respond to the argument why Mr. Crow's reference to the language in the subcontract that the contract between the sub and LLC incorporating the general contractor's contract with the owner does not defeat your legal control arguments.

COOPER: Three points. One is, it's our position that that provision which is contained in Art. 1.1, requires the subcontractor to assume toward us the obligations that we assumed to toward the owner. So with respect to the safety obligations for the work that the sub is doing, they are required to assume those obligations toward us. I think it supports delegation.

HANKINSON: Say that again.

ABBOTT: And when you say it again would you be specific about which language you're talking about here in 1.1.

COOPER: Section 1.1 says, subcontractor agrees to be bound to contractor by all the terms of the agreement between contractor and owner in contract documents and to assume toward contractor all the obligations and responsibilities that the contractor by those instruments assumes toward the owner. So for example with respect to the safety obligations that we assume towards the owner KK Glass under this provision was required to assume toward us. Second, under 11.3 of the subcontract, there was specific assumption regarding safety obligations.

ENOCH: You've talked about delegating. But, in fact, the tort duty if you have one is nondelegable. You can't delegate your tort duty to somebody else. You have either a duty toward this gentleman who was injured, or you don't. And the question is, have you incurred a duty? And that question depends on whether or not by contract you retained control, or whether or not you fall into that narrow category that you've talked about, which is that the control you exercised with regard to safety was only as to that safety exhibit manual policy on exhibit E, and had you not exercised elsewhere, the only question on safety is did you increase the likelihood of danger? It seems to me that's the issue.

COOPER: The general law that this court has said as far as tort duty is, that absent these other circumstances a general contractor owes no tort duty with regard to safety to the employees of a subcontractor. That's the premise we all start out with, but then you have the two exceptions: contractual retention of control; or actual exercise of control. And those are the sources of some type of tort duty that creates a duty. And I agree with the court, the question here is, we believe, is

whether or not there was a contractual retention of the right of control. We believe that the only contention again, a retention was a narrow retention as far as the job site safety requirements and the issue is whether or not these increased the severity and probability of an injury to Mr. Harrison in this case. And we don't believe there is any evidence.

HANKINSON: Mr. Crow says that in the jury charge, the references to retain right to control means that you can retain it legally by contract or retain it via actual exercise. Why is that argument not correct?

COOPER: Because if you read this court's decision in *Chapa*, this court says, A premises owner can be liable under this section if it either contractually retains or actually exercises control. The same language is in the *Olivo* case. You don't retain control...

HANKINSON: But in this particular case, the charge makes no reference to contract.

COOPER: It talks about retention of control, which again, the only way you retain...

HANKINSON: But the jury argument apparently was legally and via actual control with no objection.

COOPER: I don't recall what the jury arguments were. But the question is whether or not there is any evidence to support the jury's finding that was made in response to questions that were actually submitted by the judge.

HANKINSON: But if the jury was never instructed that retaining control means via contract, and the jury is not going to know about these cases and know what that means, why couldn't the jury consider all the evidence presented and give a common meaning to that term?

COOPER: Again, I believe, as with certain definitions they do have specific legal consequences. And I think retention of control in all this court's decisions that I have read - *Olivo*, *Mendez*, *Chapa*, *Diaz* - all of them talk about retention of control being by contract not by going out there and actually exercising control.

O'NEILL: Did you offer instruction to that _____?

COOPER: The only instruction that we offered was in connection with question 1, as to whether or not the right to control the safety regarding the bosun's chair or the lanyard system was the only instruction we offered. We tried to focus the jury in on the injury producing event.

O'NEILL: So you did not offer an instruction?

COOPER: We did not.

HANKINSON: At what point in time did this issue come up in the case since the CA makes no mention of it? Is this the first time it's come up in this court?

COOPER: I argued it - I've got my notes from the CA - and it was one of the arguments that was made in the CA that is, that it was not part of the instructions that was given to the jury...

HANKINSON: Is it part of your brief in the CA?

COOPER: I believe it was.

HANKINSON: Was it ever brought to the TC's attention?

COOPER: I do not recall that.

ABBOTT: Mr. Crow claims there is no delegation of safety responsibility to KK, and your answer is?

COOPER: Yes there was under art. 1.1, under art. 11.3, and under Exhibit E of the job site safety requirements.

OWEN: You mentioned 11.3, is that the correct - I can't find it in either files.

COOPER: It's 11.2 or 11.3 where it says that the subcontractor will basically take all reasonable safety measures for its employees, etc., etc.

OWEN: There's a stamped page on the subcontract. Can you tell us what page you're looking at?

COOPER: Again, the copy I had is 222. Mine is fuzzy there at the top.