

Another Look at Texas Civil Practice and Remedies Code Chapter 95

BY COLLYN A. PEDDIE AND BENNY AGOSTO, JR.

Illustration by Gilberto Saucedo

EDITOR'S NOTE: An article in the February issue offered one perspective on Chapter 95 of the Texas Civil Practice and Remedies Code. This article provides a different perspective.

In reading “Texas Civil Practice and Remedies Code Chapter 95: A Review for Practitioners” by Brett J. Young (February, p. 100), we were overwhelmed with a sense of *déjà vu*. It did not take us long to realize why. The article is a nicely illustrated version of every defendant’s brief in every Chapter 95 case we have ever faced (only with better footnotes). It is much less “a review for practitioners” than a strategy memo for defense counsel. Because we represent

injured workers in such cases, we want to provide practitioners and judges with a fuller discussion of Chapter 95 and the untenable, unsettled state of the law surrounding it.

As it stands today, the judicial interpretation of Chapter 95 bears little resemblance to the plain wording of the statutes themselves, which provide property owners with only limited immunity from claims arising from the acts of independent contractors.¹ This is because, 10

years ago, a distinguished jurist made an unfortunate choice of words in a Chapter 95 opinion.² Until just a year ago, his brethren on the courts of appeals had so inexorably, but unwittingly, magnified this language that the only circumstance under which Chapter 95 did *not* apply to bar an injured workers’ claims was alien abduction at work.³

Worse, no court would openly acknowledge this disconnect so the Legislature could repair the damage done.



Instead, the courts repeatedly assured losing plaintiffs that Chapter 95 did not automatically apply in every case, but they could never actually identify a circumstance in which it did not apply. And, despite many opportunities to do so, the Texas Supreme Court refused to address, let alone remedy, this situation.

For these reasons, simply to recount the existing case law from the intermediate appellate courts, as Mr. Young did in his article, only reinforces and supports

the original mistake. It does nothing to illuminate the substantial problem those decisions reflect or to supply the means to solve it. This article attempts to do both.

What's in a Name?

By its express terms, Chapter 95's statutes permit plaintiffs to pursue claims arising from a property owner's *own* negligence. In Section 95.002, "Applicability," it states that the chapter applies "*only* to a claim:

- (1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and
- (2) that arises from the condition or use of an *improvement* to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the *improvement*."⁴



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As a result, Chapter 95, titled *Property Owners' Liability for Acts of Independent Contractors and Amount of Recovery*, is not woefully misnamed, as Mr. Young suggests.⁵ Instead, the Texas Legislature apparently meant exactly what it said. During the hearings on what would ultimately become Chapter 95, its chief sponsor, Justice Robert A. Junell, then a state representative, was asked a series of questions regarding the scope of the statute. He was given a hypothetical situation concerning a plant explosion and asked whether the bill would “modify or increase the burden of proof or limit any recovery” by a contractor injured in the explosion:

Junell: *If there is an incident that is not related to the work being done by the contractor and the subcontractor, then this chapter does not apply to that.* So, if you have an explosion that's not related to anything that

the contractor and the subcontractors are doing for their purpose of being on there, then this chapter would not apply.

Eiland: So the plant owner, or the *premise owner would still be responsible for their* —

Junell: That's correct.

Eiland: — *personal negligence.*⁶

A court may not embellish, rewrite, or truncate a statute at will. Instead, it must focus “on the literal text of the statute in question and attempt to discern the fair, objective meaning of that text at the time of its enactment.”⁷ All of a statute's plain language must be considered; none may simply be read out. In fact, “it is presumed that ... the entire statute is intended to be effective.”⁸

Moreover, “it is recognized that if a statute ... deprives a person of a common law right, the statute will be strictly

construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview.”⁹ Thus, under Texas law, a statute that takes away or hinders substantive rights, as Chapter 95 does, must be read narrowly. In fact, the Texas Supreme Court has counseled against adopting overly broad interpretations of tort-reform statutes.¹⁰

Finally, there is the long-standing statutory construction rule that the more specific statute controls over the more general.¹¹ Section 95.002 clearly provides the more specific description of the claims to which Chapter 95 applies.

Using its plain language, legislative history, and ordinary rules of statutory construction, Chapter 95 applies only to claims arising from injuries caused by the same improvement on which the worker worked, not to the failure of the premises owner to provide a safe workplace generally. Moreover, by its express terms, Chapter 95 applies only where the claim in question “arises from the condition or use of an improvement to real property *where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.*”¹² It, therefore, arguably does not apply where there is evidence that the property owner either “constructs, repairs, renovates, or modifies the improvement” or simply leaves it to deteriorate without saying a word. As a result, whether Chapter 95 applies is a fact issue to be determined on a case-by-case basis.¹³ It does not apply automatically. Yet, you would never know it from the case law interpreting Chapter 95.

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The Wheels Come Off

Prior to 2000, the question of whether Chapter 95 applied to bar a given claim had not loomed large. In *Fisher v. Lee & Chang Partnership*, 16 S.W.3d 198 (Tex. App. — Houston [1st Dist.] 2000, pet. denied), that changed. In *Fisher*, the court was faced with the question of whether Chapter 95 applied to bar a claim by a worker injured when he fell from a defective ladder. In an opinion by then-Justice Murry B. Cohen, the court found that it did



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because the claim allegedly arose from the property owner's general failure to provide a safe workplace, a phrase derived from Tex. Civ. Prac. & Rem. Code §95.003, not 95.002, which governs when Chapter 95 applies. The court nevertheless explained:

Sec. 95.003 provides that a property owner is not liable for "... injury ... arising from the failure to provide a safe workplace" The ladder was an unsafe part of appellant's workplace, and his injury arose from the failure to provide a safe workplace. *The statute does not require that the defective condition be the object of the contractor's work.* Therefore, by affording the statute its common meaning, secs. 95.002 and 95.003 are consistent and may both be read to provide protection from liability *if the injury arose from the contractor's work on an improvement to real property.* Here, it did. Appellant used the lad-

der to reach the roof to perform his job, the repair of air conditioning units.¹⁴

In making this statement, the court held that there needed to be a connection between the work done and the defect. On the next page, it reaffirmed that "Junell stated that *the injury-producing defect must relate to the contractor's work for Chapter 95's protections to apply.*"¹⁵

Fisher, therefore, holds that, so long as there exists a relationship between the defect and the contractors' work described by Junell, it does not matter that the particular defect in question was not the very one on which the contractor worked.

Unfortunately, the court in *Fisher* provided no analytical tools with which future courts could identify such relationships, particularly in a summary judgment context where all facts and inferences, including whether there is a relationship between the work in question and the injury-producing defect, militate favor of the non-movant plaintiff.

Without such analytical moorings, the Texas intermediate appellate courts since *Fisher* have read only the statement that Chapter 95 "does not require that the defective condition be the object of the contractor's work" while ignoring the limitation Justice Cohen acknowledged in citing Junell's comments.¹⁶ In so doing, the courts virtually eliminated an injured worker's right to sue a premises owner for the premise owner's *own* negligence by holding that Chapter 95 applies in virtually every case in which the issue has been raised, as Mr. Young recounts.¹⁷ As the court in *Hernandez v. Brinker Int'l, Inc.*, 285 S.W.3d 152, 159 (Tex. App. — Houston [14th] 2009, no pet.) acknowledged, the courts had "moved steadily to a situation in which a premises owner [could] effectively booby-trap his own property yet escape liability for his actions under Chapter 95."¹⁸

Not surprisingly, *Fisher* has been criticized. In *Spears v. Crown Cent. Petroleum Corp.*, 133 Fed. Appx. 129, 131 (5th Cir. 2005), the Fifth Circuit panel observed that, "at first blush, Spears's argument

[that his injury did not arise out of his work] is persuasive." It continues, "although Crown Central points to an abundance of Texas cases concluding that any injury relating to the work done on the premises is covered under Chapter 95, relating to is a much broader proposition than is arising from the condition or use of the improvement," the specific language in Section 95.002. *Id.* Nevertheless, because it was bound by Texas decisions, it had to follow *Fisher*.

Hernandez Bucks the Trend

In *Hernandez*, Justice Jeff Brown finally acknowledged that "the *Fisher* court's analysis overly extended Chapter 95's reach." A contractor's employee was asked to repair the air conditioning unit on the roof of a restaurant. In doing so, he stepped on a weakened area of the roof, one about which the owner had long known, fell through, and was seriously injured. No contractor or subcontractor had worked on the roof.¹⁹

Distinguishing *Fisher* and its progeny, Justice Brown held simply that Chapter 95 did not apply because "Hernandez's claim arises from the condition of the roof, but Hernandez did not repair or modify the roof. Hernandez repaired the air-conditioning system. Thus, under the plain language of Section 95.002(2), Chapter 95 does not apply to Hernandez's claims."

Justice Anderson, concurring, found that the defendant did not conclusively show it was a property owner under Chapter 95. *Id.* at 162. Justice Leslie B. Yates, in dissent, would have followed the *Fisher* line of cases to find Hernandez's work related to the defect in the roof despite the plain language of Section 95.002(2) and the defendant's admission that it was not. *Id.* at 164.

Can the Courts Fix Fisher?

The defendants in *Hernandez* did not file a petition for review of the court's plurality decision. As a result, the Supreme Court had no opportunity to review that case. Hopefully the court will have another chance to resolve the discrepancy between what Chapter 95 says

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and what courts say it says. This time, however, the court should take that opportunity.

In the meantime, courageous judges need to exercise the options they have to read the statute as it is. They can first factually distinguish the conflicting cases as Justice Brown did in *Hernandez*. Second, despite the strength of *stare decisis* in the area of statutory construction, there are cases in which a court may decline to follow a previous construction of the same statute. As with any issue, the court may overrule or disapprove a line of cases containing one particular interpretation if it concludes, on the basis of the statutory language, that the legislative intent behind the statute was something other than that on which the earlier construction was based.²⁰

Here, the legislative intent in giving the statute a title that limited Chapter 95's protections to acts of independent contractors, Junell's remarks, and the enactment of Section 95.002, which is unnecessary verbiage under *Fisher's* interpretation of the statute, all indicate clear legislative intent to preserve some claims against property owners while eliminating others.

In addition, a court may also decline to follow a previous construction of the same statute when the previous construction is antiquated and/or inequitable, and the Legislature has remained inactive on the issue.²¹ Despite its relatively short lifespan, Chapter 95 has clearly grown inequitable as its interpretation has effectively eliminated any claims against premises owners and reduced the duties a premises owner owes to those who work on his property to fewer than those he owes to a common trespasser.

Finally, courts of appeals are free to disagree with the decisions of courts in sister districts.²²

If the courts of Texas will not follow the *Hernandez's* court's lead and fix the *Fisher* problem, the Texas Legislature should do so by clarifying when Chapter 95 actually applies and, more important, when it does not. Only then can the Legislature restore the rights it reserved for injured workers when it first enacted

Chapter 95 and ensure that it no longer provides "generalized tort immunity for premises owners" or "the ideal result for defendants."²³

Notes

1. See, e.g., Tex. Civ. Prac. & Rem. Code §95.003. *Liability for Acts of Independent Contractors*, which provides:
A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:
(1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
(2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.
2. *Fisher v. Lee & Chang Partnership*, 16 S.W.3d 198 (Tex. App. — Houston [1st Dist.] 2000, pet. denied) (Cohen, J.).
3. Brett J. Young, *Texas Civil Practices and Remedies Code Chapter 95, A Review for Practitioners*, Texas Bar Journal 100 (Feb. 2010). As Mr. Young described it, "Until very recently, the scope of Chapter 95 had found essentially no limits." *Id.* at 106.
4. Tex. Civ. Prac. & Rem. Code §95.002 (1997) (emphasis added).
5. See Young, *supra* note 5, at 101.
6. See Transcript of Senate Hearing Regarding Bill 28 — Joint and Several Liability, at 157–158] (quoted in *Dyall v. Simpson Pasadena Paper Co.*, 152 S.W.3d 688, 708 (Tex. App. — Houston [14th Dist.] 2006, pet. denied) (en banc) (emphasis added).
7. *Ex parte Spann*, 132 S.W.3d 390, 393 (Tex. Crim. App. 2004) (quoting *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991)).
8. Tex. Gov't Code. §311.021 (Vernon 2004).
9. *Smith v. Sewell*, 858 S.W.2d 350, 354 (Tex. 1993) (emphasis supplied); *Dutcher v. Owens*, 647 S.W.2d 948, 951 (Tex. 1983); *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969).
10. See, e.g., *Diversicare General Partner, Inc. v. Rubio*, 185 S.W.3d 842, 862 (Tex. 2005).
11. See, e.g., *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 901 (Tex. 2000) (applying principle in tort-reform context).
12. Tex. Civ. Prac. & Rem. Code Ann. §95.002(1)–(2) (emphasis added).
13. See *Dyall* 152 S.W.3d at 708.
14. *Fisher*, 16 S.W.3d at 200.
15. *Id.* at 201.
16. For example, *Fisher* has been followed without question or discussion by two reported panels

of the 1st Court of Appeals. See *Phillips v. The Dow Chemical*, 186 S.W.3d 121 (Tex. App. — Houston [1st Dist.] 2005, no pet.); *Rueda v. Paschal*, 178 S.W.3d 107 (Tex. App. — Houston [1st Dist.] 2005, no pet.). Only one reported case actually discusses its holding with regard to Section 95.002 and then does not question its assumptions. See *Francis v. Coastal Oil & Gas Corp.*, 130 S.W.3d 76, 83 (Tex. App. — Houston [1st Dist.] 2003, no pet.). Two panels of the Houston courts have also cited *Fisher* but not discussed Section 95.002 or Chapter 95's applicability specifically. See *Bishop v. Nabisco, Inc.*, 2004 Tex. App. Lexis 3486 (Tex. App. — Houston [14th Dist.] April 20, 2004, no pet.); *Ashabanner v. Hydrochem Indus. Servs.*, 2004 Tex. App. Lexis 2782 (Tex. App. — Houston [14th Dist.] March 30, 2004, no pet.). The Court, in *Dyall v. Simpson Pasadena Paper Co.*, 152 S.W.3d 688, 707–08 (Tex. App. — Houston [14th Dist.] 2004, pet. denied) (en banc), reaffirmed the notion that there exist cases involving injured contractors to which Chapter 95 does not apply and it is the relationship to the work to be done and not location alone that governs.

17. See Young, *supra* note 5, at 102.
18. *Hernandez v. Brinker Int'l, Inc.*, 285 S.W.3d 152, 159 (Tex. App. — Houston [14th] 2009, no pet.) at 160.
19. Compare *Clark v. Ron Bassinger, Inc.*, 2006 Tex. App. Lexis 795 *4–5 (Tex. App. — Amarillo, Jan. 31, 2006, no pet.) (plumbing contractor fell through skylight on which other contractor was working).
20. See, e.g., *National Surety Corp. v. Friendswood Ind. School Dist.*, 12 Tex. Sup. Ct. J. 76, 433 S.W.2d 690, 693–694 (Tex. 1968) (disapproving former construction given statute regarding liability of school district trustees on policy grounds, and reversing court of civil appeals decision that followed construction).
21. See, e.g., *Sanchez v. Schindler*, 26 Tex. Sup. Ct. J. 353, 651 S.W.2d 249, 251 (Tex. 1983) (Supreme Court discarded a judicial construction of the Texas Wrongful Death Act).
22. See, e.g., *Luquis v. State*, 72 S.W.3d 355, 366 (Tex. Crim. App. 2002).
23. *Hernandez*, 285 S.W.3d at 106.

COLLYN A. PEDDIE

is a sole practitioner in Houston. She was counsel to the plaintiff on appeal in *Hernandez v. Brinker Int'l, Inc.*, the only case in which an appellate court has reversed a summary judgment in favor of a property owner.

BENNY AGOSTO, JR.

is a partner in Abraham, Watkins, Sorrels, Agosto & Friend in Houston. He is certified in personal injury trial law by the Texas Board of Legal Specialization and is a former chair of the Texas Bar Journal Board of Editors.