



# BACK TO THE DRAWING BOARD

## Examining CPRC Chapter 95 and *Los Compadres Pescadores v. Valdez*.

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At a recent CLE, I heard a friend (and darn good trial lawyer) lament out loud that “it seems like every time we think we have Chapter 95 [of the Texas Civil Practices & Remedies Code] figured out, the Texas Supreme Court tells us, ‘not so fast,’ and sends us back to the drawing board.” Well, the court’s recent decision in *Los Compadres Pescadores, L.L.C. v. Valdez*<sup>1</sup> is one of those “back-to-the-drawing-board” directives. There’s a good deal in *Los Compadres* that we need to unpack, and even more about its possible impact that merits thoughtful consideration, but the gist is this: in *Los Compadres*, the Texas Supreme Court—for the first time since its 2015 opinion in *INEOS v. Elmgren*<sup>2</sup>—offered new guidance on how to determine whether an independent contractor’s personal injury or property damage arose from the same improvement to real property that the contractor was hired to construct, repair, renovate, or modify, such that Chapter 95 and its heightened standard of proof apply to the contractor’s case.

### The Facts

Named defendant Los Compadres Pescadores, LLC (“Los Compadres”)—translated into English as “The Fishing Buddies”—set out to build on its South Padre Island property a fourplex condominium, which it hoped to lease as residential apartments.<sup>3</sup> South Padre’s sandy soil required that the building be set on concrete pilings buried deep into the ground.<sup>4</sup> Los Compadres hired as a project supervisor and manager Luis Martin Torres, who in turn received a bid from

Luis Paredes Jr., d/b/a Paredes Power Drilling (“Paredes”), to construct the pilings.<sup>5</sup> Based on this bid, Los Compadres contracted with Paredes to build the pilings.

Utility provider AEP Texas Central Company (“AEP”) owned a high-voltage power line that hung about two-and-a-half stories above Los Compadres’ back property line, within a utility easement that AEP owned.<sup>6</sup> Importantly, Paredes knew about the power line before beginning work and further told Los Compadres’ project manager, Torres, “that Torres needed to ‘do something about it’ because it was ‘too close’ to the worksite.”<sup>7</sup> Torres assured Paredes that he would “take care of it,” but when Paredes and his crew arrived at the site to break ground, the power line was still in place, suspended over the property’s back boundary.<sup>8</sup> When Paredes asked why the power line had not been moved, Torres told Paredes to start working at the *front* end of the property because Torres was not yet sure what would be done about the power line.<sup>9</sup>

Following Torres’ instructions, Paredes and his crew began the first day’s work at the front of the property, “warn[ing] his crew to stay at least twenty feet away from the line.”<sup>10</sup> On the second day, Torres informed Paredes that he and his crew should continue to work around the line, which was still energized, prompting Paredes and his crew to continue working at the front of the property.<sup>11</sup> By the third day, Torres had informed Paredes that the power line would remain energized for the duration of the job but that Paredes “needed to continue drilling because the work had to be done.”<sup>12</sup> (Notably, Paredes apparently never warned his two crew members, Juan Valdez and Alfredo Teran, that the line was energized, an omission which prevented Los Compadres from escaping liability on the grounds that the hazard was “open and obvious.”<sup>13</sup>)

On that third day, as Paredes and his two crew members lifted a piece of rebar to insert it into one of the pylon holes—the first that was drilled near the back of the property line—the top end of the rebar apparently contacted the power line, conducting electricity down the rebar, “thr[owing] the men off their feet, briefly knock[ing] them unconscious, and caus[ing] burns to their hands and feet.” As the Supreme Court noted in its recitation of the facts, “[a]lthough the power line carried over seven thousand volts, the lower end of the rebar was in contact with the concrete before the higher end contacted the power line, grounding the circuit and likely saving the men’s lives. After taking a day off, Paredes returned and finished the job.”<sup>14</sup>

### The Lawsuit

Paredes’ two crew members—Valdez and Teran (collectively “plaintiffs”)—sued AEP and Paredes for negligence, and Paredes, in turn, filed a crossclaim against AEP.<sup>15</sup> Finally, AEP joined as a third-party defendant Los Compadres, whom the plaintiffs then sued as well.<sup>16</sup> Ultimately, the jury found that each of the three defendants—Los Compadres, Paredes, and AEP—negligently caused the plaintiffs’ injuries and further found Los Compadres liable under a premises-liability theory because it had exercised or retained some control over the manner in which the injury-causing work was performed.<sup>17</sup> The jury awarded Valdez

\$150,000 and Teran \$83,200 for pain and mental anguish.<sup>18</sup> The 13th Court of Appeals in Corpus Christi affirmed<sup>19</sup> and the Texas Supreme Court granted Los Compadres' petition for discretionary review, which challenged the jury's verdict on the basis that there was legally insufficient evidence to establish, among other things,<sup>20</sup> that Los Compadres had *actual* knowledge (as opposed to mere constructive knowledge) of the dangerous condition that resulted in harm, as required by Chapter 95.

### The Texas Supreme Court's Holding

On appeal, the Texas Supreme Court agreed with Los Compadres that Chapter 95 applied to the case, though the court ultimately affirmed the jury verdict anyway, finding that there was legally sufficient evidence to support the verdict, even under Chapter 95's heightened standards of proof.<sup>21</sup>

The Texas Supreme Court began by summarizing that:

Chapter 95 applies to a claim, counterclaim, cross-claim, or third-party claim (1) for damages caused by negligence resulting in personal injury, death, or property damage, (2) asserted against a person or entity that owns real property primarily used for commercial or business purposes (a property owner), (3) asserted by an owner, contractor, or subcontractor or an employee of a contractor or subcontractor, and (4) "that arises from the condition or use of an improvement or an employee of a contractor or subcontractor," and (5) "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."<sup>22</sup>

The parties in *Los Compadres* "agree[d] that the claims asserted [in the case] satisfi[ed] the first three requirements, but they dispute[d] whether the claims ar[ose] from the condition or use of an improvement that Paredes [and his crew members,] Valdez and Teran, were constructing, repairing, renovating, or modifying when the injuries occurred."<sup>23</sup>

The Texas Supreme Court reaffirmed its holding in *Ineos v. Elmgren* that "a claim satisfies the fourth requirement only when the injury results 'from a condition or use of the *same* improvement on which the contractor (or its employee) is working when the injury occurs."<sup>24</sup> Los Compadres argued that this fourth element was satisfied "because the power line was a dangerous condition of the 'workplace' on which Valdez and Teran were working when they were injured."<sup>25</sup> The Texas Supreme Court disagreed, reasoning that Chapter 95's plain language does not allow for the fourth requirement to be satisfied "whenever the injury arises from a dangerous condition of the claimant's 'workplace.'"<sup>26</sup>

Instead, "to constitute a condition of the improvement on which Valdez and Teran were working when they were injured, the power lines had to affect the 'state of being' of the pilings they were hired to construct."<sup>27</sup> And, "[w]hether the power line constituted a dangerous condition of the piling necessarily depends on the piling's proximity to the power line."<sup>28</sup> So, "[i]f a dangerous condition, by reason of its proximity to an improvement, creates a probability of harm to

one who 'constructs, repairs, renovates, or modifies' the improvement in an ordinary manner, it constitutes a condition of the improvement," such that Chapter 95 applies.<sup>29</sup> "Under these facts," the Texas Supreme Court wrote—"in which the plaintiffs were directly exposed to the dangerous condition because of its close proximity to the improvement on which they were working—we conclude that the energized power line created a dangerous condition of the piling itself."<sup>30</sup>

### Conclusion

The Texas Supreme Court's recent holding in *Los Compadres* highlights the difficulty in determining whether Chapter 95 applies in scenarios where the injury-producing hazard is a disconnected condition of the improvement. *Los Compadres* now teaches us that spatial proximity is key—something that both the plaintiff's and defense bar ought to keep in mind as they litigate these complex cases. **TBJ**

### NOTES

1. 622 S.W.3d 771 (Tex. 2021).
2. 505 S.W.3d 555 (Tex. 2016).
3. 622 S.W.3d at 777 & n.1.
4. *Id.* at 777.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 778.
12. *Id.*
13. *Id.* at 789.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 779.
19. *Id.* (citing *Los Compadres Pescadores, L.L.C. v. Valdez*, 608 S.W.3d 829, 833 (Tex. App.—Corpus Christi 2019, pet. granted)).
20. We are concerned only with *Los Compadres*' discussion of Chapter 95's applicability, but the court also considered whether there was legally sufficient evidence that Torres, Los Compadres' project manager, acted as Los Compadres' employee or agent such that Los Compadres could be vicariously liable for Torres' acts or omissions. *Id.* at 779. The Texas Supreme Court ultimately concluded that Los Compadres had waived this argument on appeal, and that even if it hadn't, there was legally sufficient evidence that Torres was Los Compadres' agent for purposes of *respondereat superior*. *Id.* at 779–80.
21. *Supra* note 3 at 782.
22. *Id.* (quoting Tex. Civ. Prac. & Rem. Code §§ 95.001, .002).
23. *Id.*
24. *Id.* & n. 8 (citing *Ineos*, 505 S.W.3d at 567).
25. *Id.* at 783.
26. *Id.*
27. *Id.* at 785.
28. *Id.*
29. *Id.*
30. *Id.*



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