

For docket see 09-0955

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Supreme Court of Texas.
Allen Keller Company
v.
Barbara Jean Foreman, et al.
No. 09-0955.

December 7, 2010.

Appearances:

Wade Crosnoe of Thompson, Coe, Cousins & Irons, LLP, for petitioner.
Randy Howry of Howry Breen & Herman, LLP, for respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

CONTENTS

ORAL ARGUMENT OF WADE CROSNOE ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF RANDY HOWRY ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF WADE CROSNOE ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09- 0955, Allen Keller Company v. Barbara Jean Foreman.

MARSHAL: May it please the Court. Mr. Crosnoe will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF WADE CROSNOE ON BEHALF OF THE PETITIONER

ATTORNEY WADE CROSNOE: May it please the Court. The issue before this Court is whether a contractor has a tort duty to correct an alleged premises defect by performing work that is not called for by the project engineering plans and when the construction contract requires absolute compliance with those plans. For at least five reasons, there should be no such duty and there is no such duty. First, the starting point for determining when Allen Keller has a tort duty should be the construction contract and what it actually required Allen Keller to do. Here, the construction contract required absolute compliance with the contract documents, which were defined to include the engineering plans and drawings prepared by O'Malley Engineers. And the contract also stated that Allen Keller was not responsible for the negligence of the owner or engineer in

the construction design.

JUSTICE DAVID M. MEDINA: I understand your argument and it's well taken, but it seems to me that's just a simple way for a contractor to escape liability is to have that type of language in any contractual agreement that it has with, in this instance, the state or another situation.

ATTORNEY WADE CROSNOE: Well, there's no suggestion here that this was some sort of fraud.

JUSTICE DAVID M. MEDINA: I understand that, yeah.

ATTORNEY WADE CROSNOE: Or anything of that nature.

JUSTICE DAVID M. MEDINA: I'm not saying that. I'm just, because this will apply to future cases and it seems a way to circumvent liability.

ATTORNEY WADE CROSNOE: Well, there is liability here and the liability is on the people in control of the project, the owner of the premises and the engineer who's responsible for preparing the project plan. So it's not like there is no liability here and there's no avenue of recovery for the Foremans. They sued the project owner. They sued the county in this case and those parties have now been dismissed.

JUSTICE EVA M. GUZMAN: Before you move on through two through five, one more question on this absolute compliance. Does the inquiry hinge on the fact that there may have been absolute compliance, that they had no discretion to deviate and if they had some discretion, is the analysis different?

ATTORNEY WADE CROSNOE: I don't think it hinges on that entirely. It's certainly a very favorable factor for us here, but I also think it's important to look at this, which is that the contract did not require Allen Keller to perform the work that the Foremans' claim would have prevented this accident, which was extending the existing guardrail at the bridge. That was not in our bid. We were not paid to do that work and Allen Keller was not in the business of performing that work at all, but most importantly, it wasn't contemplated by the contract or required by the contract.

JUSTICE DAVID M. MEDINA: Is there ever a duty for a contractor to step up to the plate and say this design is flawed. You should do something else other than this because there's a great risk to the public?

ATTORNEY WADE CROSNOE: There is no duty under the contract to somehow review the entire project plans and critique those plans and, of course, and that leads me to my second point, which is under Texas law, engineers are required to be licensed and this is a point that was made in the amicus brief by AGC. Engineers are required to be licensed, contractors are not, and the governing statute that requires the licensing of engineers says that it is necessary in order to fix responsibility for work done or services or acts performed in the practice of engineering.

JUSTICE DEBRA H. LEHRMANN: Let me ask, but wasn't Keller the one that was in the position to see that the dangerous condition had come about?

ATTORNEY WADE CROSNOE: Well, we don't concede that there was a dangerous condition.

JUSTICE DEBRA H. LEHRMANN: You don't?

ATTORNEY WADE CROSNOE: For the purpose of the motion, we assumed that there was one, but in this case, you have the county, which had an inspector onsite on a daily basis. You had an engineer reviewing the work at the end. So certainly and they're the ones with the control. They're the ones with the duty here so it should have been their duty to install a guardrail if they thought that was necessary.

JUSTICE DEBRA H. LEHRMANN: So you're saying that they were there and they were the ones that witnessed the movement of the embankment?

ATTORNEY WADE CROSNOE: Well, the testimony is that the county had an inspector there on a daily basis and never reported a problem. The testimony was that engineers prepared these plans and that inspected the work upon completion so certainly they were aware that there was a gap in this guardrail and extending a guardrail is a matter of engineering judgment and it is not something, there are regulations that apply to it and it's not something a contractor can just go out and do on its own, particularly when the contractor is not even in the business of performing that kind of work.

JUSTICE DEBRA H. LEHRMANN: Okay, well let me ask, but couldn't the duty be less than that? Couldn't the duty have been to notify the city that this happened, that you had this dangerous condition that had come about?

ATTORNEY WADE CROSNOE: Well, again, the county was there on a daily basis and it would have been obvious to them that there was this gap and it was inspected by the engineers at the end and if you go back and look at the contract, there's not this duty to review everything and then provide some sort of overall comprehensive safety report and so we did not have an obligation to do that.

JUSTICE DEBRA H. LEHRMANN: So do you think there's an issue that the point that whether or not the resulting situation was obvious rather than lightened, do you think that that's going to be something that would be an important point here?

ATTORNEY WADE CROSNOE: Well, our position is that we would not have had a duty to warn anyone about this. It was an obvious gap and under the contract, we didn't have the duty to warn the county or the engineer about this, but assuming there was a duty, it would have been to the county and to well it would have been the county as the premises owner rather than somehow to the general public. We don't have any ability to somehow warn the general public about anything. So in that sense, I think it is relevant that this was an obvious gap, but more relevant is the fact that they were out there on a daily basis and were obviously well aware of the gap. The engineer was aware of the gap and they're the ones in control. They're the ones who could have done something about it.

JUSTICE EVA M. GUZMAN: Did you have a? Go ahead.

JUSTICE PAUL W. GREEN: This was a bid project?

ATTORNEY WADE CROSNOE: Yes.

JUSTICE PAUL W. GREEN: Do you know whether your, with the Keller Company went out to view the site before bidding on the project?

ATTORNEY WADE CROSNOE: Well, the record does not reflect that. It's a local company so I think you can assume that they were familiar with the location.

JUSTICE PAUL W. GREEN: But in the bid process, if it were the case that the Keller Company and other bidding companies went out there and looked at it and said well, the proposal, the specs that you're giving us to do this project has an unsafe gap in it. We recommend to make changes. Of course, the county is in a position to say well we don't think so. So here's the deal if you want to bid on it or not. That's pretty much the way it was presented? Was that the way it was presented more or less do you know?

ATTORNEY WADE CROSNOE: Well, the contract required absolute compliance and on the bidding process, my understanding was that there was one bid and I

don't think there were any other bids.

JUSTICE DON R. WILLETT: Don't all contracts generally anticipate compliance?

ATTORNEY WADE CROSNOE: Yes, but.

JUSTICE DON R. WILLETT: In an attempt to avoid deviation and surprises?

ATTORNEY WADE CROSNOE: Right and that's true. This one specifically required absolute compliance and that has some relevance under the Strakos decision from this Court.

JUSTICE PHIL JOHNSON: Is it your position that the contract called for the embankment to be moved?

ATTORNEY WADE CROSNOE: Well, the contract required the building of the pilot channel there where it is reflected.

JUSTICE PHIL JOHNSON: Yeah, but my question is did the contract document call for the embankment to be excavated and moved?

ATTORNEY WADE CROSNOE: It required excavation in the area around that pilot channel so, yes, it did.

JUSTICE PHIL JOHNSON: And you have an Exhibit E in your brief, an affidavit of Mr. Keller. I think opposing counsel says that was only submitted shortly before the summary judgment hearing and no order was given procedurally, I'm talking about now, no order was given authorizing authorizing that [inaudible].

ATTORNEY WADE CROSNOE: The same drawing is also in the record as part of their summary judgment at court's record 586, 587, so ultimately I don't think it makes any difference.

JUSTICE PHIL JOHNSON: That is before the court then.

ATTORNEY WADE CROSNOE: And we've cited the Yoonessi and some other case law indicating that when evidence is part of your opponent's summary judgment evidence, it can be considered by the court and you can rely on it as well. So I don't think that should be.

JUSTICE PHIL JOHNSON: And finally, your position is that they're not complaining about the embankment being gone but rather only the guardrail not being extended?

ATTORNEY WADE CROSNOE: Well, if you look at their fourth amended petition, which is in the record in the case and was their live petition, it talks about the guardrail. You didn't extend the guardrail. The guardrail was inadequate.

JUSTICE PHIL JOHNSON: Well let me ask, let me phrase it differently then. Would your position be any different if there is something in their petition or if they are complaining about the embankment having been excavated to leave a gap there?

ATTORNEY WADE CROSNOE: I don't think so because again the contract required that pilot channel to be built there and to build it there, you were going to have to do excavation and move that and move the embankment somewhat.

JUSTICE EVA M. GUZMAN: Do you dispute that this is a dangerous condition?

ATTORNEY WADE CROSNOE: Well, we do dispute that and there is a gap. We don't dispute that, but we do dispute whether it's a dangerous condition or not. We haven't challenged that for the purpose of our summary judgment motion, but I do want to make it clear that we're not conceding that for all purposes.

JUSTICE EVA M. GUZMAN: And you had a duty to refrain from creating dangerous conditions?

ATTORNEY WADE CROSNOE: We had a duty to follow the professional engineering judgment, our duty under the contract was to follow the professional engineering judgment of a licensed engineer, it had been approved by the county and two different federal agencies.

JUSTICE EVA M. GUZMAN: Is as a matter of policy, a contractor never has a duty to hire an engineer to ensure that the condition that they're creating is not a dangerous condition? Is that duty always relegated to the contracting?

ATTORNEY WADE CROSNOE: I suppose you could agree to that in your contract. It seems unnecessary here and I think you'll end up adding unnecessarily to the cost of public construction projects if you effectively require engineers to retain engineers if they don't and they're not required to have engineers on staff. If you're required to retain an engineer to review plans --

JUSTICE EVA M. GUZMAN: Well, I guess how else would you determine that this is a dangerous condition, but for an engineer coming in and evaluating?

ATTORNEY WADE CROSNOE: Well, I think that would be necessary and so you would have this double level of engineer review. You've got the engineer who prepares the contract. It gets approved by the county here by two different federal agencies and then the contractor's going to have to come in and hire an engineer to review all that again and then do you require that of all the subcontractors.

JUSTICE EVA M. GUZMAN: I guess that's what I'm getting at. Does that make sense then to have the contract define the parameters of the inquiries as they relate to the conditions of the premises?

ATTORNEY WADE CROSNOE: It's appropriate for the contract to define it this way, which is that the engineer is responsible for the engineering design and then as here, it says we're not, the contractor is not responsible for the engineering design.

JUSTICE EVA M. GUZMAN: Let me ask, would --

JUSTICE DALE WAINWRIGHT: What if the contract called for creation of a or construction of a five-foot iron spike pointed at the road in place of that channel? What would your client's obligation have been in that case?

ATTORNEY WADE CROSNOE: We certainly don't have that extreme situation here, but to answer the Court's question, ultimately the contractor is entitled to rely on the professional engineering judgment of a licensed engineer and as particularly here, when it's been approved by two different federal agencies and, again, this is a situation where the Foremans do have a remedy against the county and against the engineer and they pursued that remedy.

JUSTICE DALE WAINWRIGHT: [Inaudible] and they settled with them.

ATTORNEY WADE CROSNOE: And then can I add one other thing, Your Honor? This is not a situation where you can look at it like that and say this is this obvious and extreme risk of danger.

JUSTICE DALE WAINWRIGHT: Well, that's my question.

ATTORNEY WADE CROSNOE: Okay.

JUSTICE DALE WAINWRIGHT: If it were that obvious and Respondent may argue it is that obvious, we'll see, but if the danger were that obvious, would

there be a duty on your client to do something?

ATTORNEY WADE CROSNOE: I think my answer is still the same, but I want to point out here that you can look at this extending the guardrail across where this pilot channel is and think of reasons that the engineer might not have wanted to do that. If you extend out the guardrail with vertical posts, those are going to cross over where this pilot channel drains into the water there and could potentially get debris and caught up there, which would defeat the purpose of the water draining out. So there are reasons they might not have wanted to do that and there are also reasons the engineer may have thought it was unlikely the car was going to pass through this gap and at least do so under circumstances where the car was going sufficiently slow that a guardrail would have made a difference because a guardrail is not going to make a difference if the car is going at a significant speed and hits it straight on.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions?

JUSTICE DEBRA H. LEHRMANN: Can I just get a little bit of clarification? Let's say though that the contract had called that the bridge, a bridge be built so many feet and as it turned out to this whatever kind of circumstances came up, that didn't go all the way to the other side of the river. Then that's, I would say, an obvious situation. So were you saying is something would be more obvious, would your conclusion be different?

ATTORNEY WADE CROSNOE: In terms of the duty, no, because the duty should be on the engineer and the premises owner. Now certainly that's something that would typically get called to somebody's attention and resolved in that extreme obvious of the situation, but there wouldn't be a duty.

JUSTICE DEBRA H. LEHRMANN: And do you think that that issue and you may have just answered, the issue of whether or not it is dangerous or not would have had a bearing on whether or not there's a fact issue and its relation to the summary judgment?

ATTORNEY WADE CROSNOE: No, I don't think so because we're talking about whether you have a duty to do anything about it.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, counsel. The Court is ready to hear argument from the respondents.

MARSHAL: May it please the Court, Mr. Howry will present argument for the respondent.

ORAL ARGUMENT OF RANDY HOWRY ON BEHALF OF THE RESPONDENT

ATTORNEY RANDY HOWRY: May it please this honorable Court. The issue on appeal is whether this Court should overturn 50 years of jurisprudence in this state and the majority rule across the United States and hold that a contractor who had actual notice, actual knowledge, it was creating a dangerous condition cannot be held liable for damages. In other words, should Texas go back to the accepted work doctrine? The respondent's position in this case is that this Court should not return to the accepted work doctrine.

CHIEF JUSTICE WALLACE B. JEFFERSON: Can I ask you this? On any major construction contract, the subcontractor is going to come in and its very purpose in coming in is to create a dangerous condition at least for a short time. It's going to dig a hole or it's going to have exposed electrical wires or what have you and you would assume it's going to rely on

the general contractor to come in later with the next crew that's going to cover it up. So there are going to be times when that's the very purpose. You create this. You're doing exactly what you were told to do and then you leave. Why would that person who leaves that site be responsible if it has done exactly what the contract requires it to do?

ATTORNEY RANDY HOWRY: Certainly, in the situation where a dangerous condition is created during the project, that contractor has responsibility for that dangerous condition. When that contractor leaves the job site, the contractor is also obligated to make sure that he leaves that premise in a safe condition and in this case, what we know is that this contractor had actual knowledge of a dangerous condition and that contractor left the scene without doing anything.

JUSTICE PHIL JOHNSON: And what exactly is the dangerous condition?

ATTORNEY RANDY HOWRY: The dangerous condition in this situation, Your Honor, was to create this gap that one passerby called the boat ramp and to leave this property in that condition created a dangerous condition.

JUSTICE PHIL JOHNSON: That's with the embankment moved and no guardrail or is it no guardrail or exactly what is your position that the dangerous condition is?

ATTORNEY RANDY HOWRY: The dangerous condition is that there is a gap that now exists between the guardrail and the embankment and when this contractor arrived on this job site, that gap did not exist. That embankment extended over to the guardrail and the contractor created the gap. The contractor was warned about this gap during the construction process. The passerby that I referred to, Judge Johnson --

JUSTICE NATHAN L. HECHT: But if the engineer says we don't think it is dangerous, build it the way we told you, then what?

ATTORNEY RANDY HOWRY: I don't think that the contractor can stop there and I don't think that's what the state of the law is in Texas or in most of the jurisdictions across this United States.

JUSTICE NATHAN L. HECHT: So he says no, I'm not going to do it.

ATTORNEY RANDY HOWRY: I'm not going to leave this condition as dangerous. [Inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, let me ask you this. There are buildings being constructed all over Austin right now that have no walls because the floor is just put in and there's no wires, no walls or what have you. Is that, is the subcontractor who built that supposed to what, do they have to build a temporary wall? I mean there are always dangerous conditions in construction areas that are designed to be that way so that the next phase can happen.

ATTORNEY RANDY HOWRY: I understand, Judge, and certainly we can look at extremes of this condition and understand that the premise of our argument in this case and the issue before this Court is whether a contractor can leave a job site and leave that condition in a dangerous condition.

JUSTICE EVA M. GUZMAN: Do they have a duty to do more than warn though? I mean, what are they supposed to do? If they performed according to the contract, so do they have just simply a duty to let the county know we think this is really unsafe. You need us to hire us or hire someone else to take care of it?

ATTORNEY RANDY HOWRY: Justice Guzman, I think so. I think they have at least that obligation. Whether they go further, I'm not sure, but at least

they have the obligation to call somebody --

JUSTICE EVA M. GUZMAN: And unless --

ATTORNEY RANDY HOWRY: To call the - I'm sorry.

JUSTICE EVA M. GUZMAN: No, no. You go ahead.

ATTORNEY RANDY HOWRY: To call the engineer and say look, we finished this job. There's a gap out here.

JUSTICE PHIL JOHNSON: But under your position, didn't everybody know that? Didn't the county have someone onsite? It seems like you say that there were people that came by and said this is a dangerous condition here and didn't the county know that?

ATTORNEY RANDY HOWRY: I'm not sure that there is any summary judgment evidence, Your Honor, that indicates whether the county knew or didn't know [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Well there's a picture right there.

ATTORNEY RANDY HOWRY: Right. They certainly. There were folks in a better position to know that this was a dangerous condition.

CHIEF JUSTICE WALLACE B. JEFFERSON: So if there's a duty to notify, it was satisfied by the obviousness of the condition?

ATTORNEY RANDY HOWRY: I'm not sure that the engineer fulfilled its obligations to notify anybody because the summary judgment evidence is there's a total lack of effort on the part of this contractor to tell anybody.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well what is the duty? If the duty is to notify and the condition is plain and it's obvious, then the condition is satisfied even without an express statement of that gap.

ATTORNEY RANDY HOWRY: Well, I still think you have to evaluate the evidence about what did the contractor did who was in control of this job.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay but what I'm asking is let's assume that Keller notified everybody concerned that there's a gap and then they leave. Would they have satisfied the duty that you say they owed?

ATTORNEY RANDY HOWRY: Potentially, potentially they've done that. Potentially by giving notice to everyone that they report to, everyone that's inspecting this, perhaps the fulfilled their obligation.

JUSTICE PAUL W. GREEN: Well how does that satisfy duty to the public?

ATTORNEY RANDY HOWRY: It doesn't, Your Honor, that's the point. They may satisfy that obligation, but they didn't satisfy that obligation to my client.

JUSTICE PAUL W. GREEN: [Inaudible]. So they still get sued?

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes, so what more are they required to do then?

ATTORNEY RANDY HOWRY: To give notice to someone and then to have their conduct evaluated whether that was adequate or enough.

CHIEF JUSTICE WALLACE B. JEFFERSON: Exactly what more. I mean?

JUSTICE PAUL W. GREEN: If you put a sawhorse out there and left the scene.

ATTORNEY RANDY HOWRY: They could have done that. They didn't do that. They could have put up a warning sign. They didn't do that.

JUSTICE EVA M. GUZMAN: Can you do anything else to a project that's outside the scope of what you were contracted to do? They're almost trespassing if they come back and try to remedy something that they have no authority to remedy. How do you, practically speaking, do that?

ATTORNEY RANDY HOWRY: Practically speaking, I think what a contractor does and has to do in this situation when they have actual knowledge of a dan-

gerous condition, they have an obligation to let somebody know about that problem. They have an obligation to call the county, to call the engineer and say we've got a problem out here. Can we fix this?

JUSTICE EVA M. GUZMAN: Let's assume that that was done. Does that end it for the contractor or what else are they supposed to do to make sure the public is somehow on notice?

ATTORNEY RANDY HOWRY: Well I think that in this case that's at least what they should have done. Should they have done more? I think that's a question for the jury ultimately to decide in this case, but the point is--

JUSTICE EVA M. GUZMAN: What was their duty though? I mean--

ATTORNEY RANDY HOWRY: The duty is to warn third parties of a dangerous condition. That's the duty.

JUSTICE PHIL JOHNSON: You mean your client?

ATTORNEY RANDY HOWRY: Well, they have an obligation to notify those that they report to so that that condition is not left dangerous.

JUSTICE PHIL JOHNSON: When you say third party, you're talking about the person they're contracted with?

ATTORNEY RANDY HOWRY: That's right. That's right.

JUSTICE PHIL JOHNSON: Okay. They didn't have a duty to your client to warn your client?

ATTORNEY RANDY HOWRY: No, because as I've stated, this was certainly not an open and obvious condition for my clients on the night of this accident. It was a dark night. It was a rainy night and this condition that was allowed to exist--

JUSTICE PHIL JOHNSON: If I can go back to what Justice Guzman was asking, then if the county, the contracting parties knew about this condition, then is it your position that the contractor should have done something else such as extending the barrier or reinstall the embankment or do anything else to the site itself?

ATTORNEY RANDY HOWRY: Your Honor, I don't think we have to go further than an evaluation of the duty to warn of this condition and I don't think there is any evidence in this case, certainly not summary judgment evidence that the contractor fulfilled that duty to warn of a dangerous condition.

JUSTICE PHIL JOHNSON: Okay, well but let me go back to the question though. If that is done, do you have a position at all on whether the contractor has a duty to do more at the site to make it safe than simply warn the person that the contractor has contracted with?

ATTORNEY RANDY HOWRY: No I don't, Your Honor, I don't.

JUSTICE EVA M. GUZMAN: Do they have a duty not to create a dangerous condition in the first place. This is somewhat troubling that you go out and create the dangerous condition pursuant to a contract. Did you have a duty to refrain from that or what are the implications of that [inaudible]?

ATTORNEY RANDY HOWRY: Absolutely, Your Honor, that's the problem here and fundamentally that's been the question this Court faced in the Strakos case in 1962 and if you go back to 1916 when Justice Cardozo or Judge Cardozo at the time before he became a Supreme Court Justice dealt with this issue and in that situation, Judge Cardozo in a case styled McPherson v. Buick, addressed this issue. Can the contractor hide behind the contract? And Justice Cardozo said we're going to do away with this privity rule. This rule that if you comply with the contract, you get off the hook and what Justice Cardozo said in overruling the privity rule he said this, "we have put aside the notion that the duty to safeguard life and limb when

the consequences of negligence may be foreseen grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put the source in the law." And our position--

JUSTICE EVA M. GUZMAN: How did you raise a fact issue on that in your summary judgment evidence? This came up on a summary judgment and at some point I suppose the contractor, if the facts bear that out, may have recognized that there was something not appropriate about this condition. How was that raised in the summary judgment evidence as to this question?

ATTORNEY RANDY HOWRY: Right, the question of what did the contractor do?

JUSTICE EVA M. GUZMAN: The duty to refrain. In other words, they knew they were creating a dangerous condition and they went ahead and did it anyways. How did that come in the SJ context?

ATTORNEY RANDY HOWRY: Well it came up in two contexts. First, we have the testimony of Larry Casbeer, the gentleman who lived about 175 yards away who drove Old San Antonio Road every day, who stopped frequently and had conversations with the folks working for Allen Keller, commented that it looked like they were building a boat ramp. Commented that repeatedly asked if they were going to put up a guardrail and indicated to him that he thought they were creating a dangerous condition. We also had at the summary judgment level the testimony of Kory Keller, who was and is the vice-president and co-owner of Allen Keller Company, the Petitioner in this case, and Mr. Keller testified in deposition that the condition at the time of the accident was unsafe. He admitted that it was unsafe at the time of the accident and he also admitted that it was his company that created this gap by moving this embankment so that was our summary judgment evidence at the time we presented this case.

JUSTICE NATHAN L. HECHT: Let me ask you this, please. In your brief on the merits on page 13 and in your response to motion for rehearing on page 7, both places you say to this effect thus, even if Allen Keller's, I just did what I was told to do defense might have merit under Texas law under other fact and circumstances does not have any merit under the facts and circumstances presented here. What other facts and circumstances?

ATTORNEY RANDY HOWRY: Facts and other circumstances are that in this case, Allen Keller had actual notice of the dangerous condition. That's what makes it different and that's what the Court--

JUSTICE NATHAN L. HECHT: You say in your brief, I just did what I was told to do. So if you're doing what you told to do you know that you're doing it.

ATTORNEY RANDY HOWRY: Right.

JUSTICE NATHAN L. HECHT: You have actual notice that you're doing it because you're doing it and so you say you might not be liable under those circumstances, right?

ATTORNEY RANDY HOWRY: Right.

JUSTICE NATHAN L. HECHT: But not in this case and I'm wondering why not this case.

ATTORNEY RANDY HOWRY: Why not in this case is because as I've indicated is because of the actual notice that this contractor had. The contractor knew what he was doing clearly and it followed the plans and specifications apparently, but if the contractor didn't realize that this was a dangerous condition, it should have because of Mr. Casbeer driving by and stopping to warn him about it and that's the distinction we're trying to make. You

can't just say I'm following the rules and stick your head in the sand and stand by and try to hide behind the contract.

JUSTICE PAUL W. GREEN: We have a very careful and conscientious Allen Keller Company here that bids on this project, wins the bid, goes out there and starts working on it and begins to, comes to realize well wait a minute, there's a problem here. If we could complete it as specified, then there's going to be a problem. Goes to the county and says we can't finish it this way because of the danger it's created. Says well, we're not going to change it so they want a change order to fix something here. We want to add this, so you're not authorized to do that. Well, what is he supposed to do at that point? What would be the duty of the contractor at that point? Abandon the job and be sued for breach of contract?

ATTORNEY RANDY HOWRY: I think that the contractor would have a much better argument in the lawsuit that we filed against them if they had done what you have suggested, which based on the evidence we have at this case they didn't do. They never went to anybody in the county.

JUSTICE PAUL W. GREEN: Well, but they still had actual knowledge. They still didn't fix it.

ATTORNEY RANDY HOWRY: Right.

JUSTICE PAUL W. GREEN: And you say that there's still a breach of duty because they left the site.

ATTORNEY RANDY HOWRY: I think the judgment--

JUSTICE PAUL W. GREEN: Why would they be better off?

ATTORNEY RANDY HOWRY: Well I think that ultimately this turns on this idea, I think the approach from the Petitioner's presenting is a binary approach. It's an either/or approach. It could only be the engineer because the engineer is the one who designed the plan and our position is it's not a binary approach. The courts across this state and certainly our Civil Practices and Remedies Code as amended a few years ago recognizes that there's a comparative negligence standard that applies and all parties who have any role in the process of creating a problem that leads to injury, their conduct gets evaluated. Why should this case be any different? If Justice Green, that's what this contractor had done then that would be evidence that contractor could present, but what we--

JUSTICE DALE WAINWRIGHT: What can the contractor do to ensure itself that it won't be liable in this case?

ATTORNEY RANDY HOWRY: What can a contractor do to be sure?

JUSTICE DALE WAINWRIGHT: What should this contractor have done to be sure?

ATTORNEY RANDY HOWRY: Not, not.

JUSTICE DALE WAINWRIGHT: If it's your company. You own this contractor company and you're building the next bridge. What will you do to ensure that you're not going to be liable and to avoid having a fact question go to a jury because you'd rather spend your money on making money than paying yourself as a lawyer? That's the question, some of the questions I hear.

ATTORNEY RANDY HOWRY: If it were my company and I had been hired, contracted to do this job, first of all, I wouldn't leave it in this condition and if I saw that this dangerous condition was being created and someone stopped on the roadway and said hey, contractor, you're creating a dangerous condition, then I might look at it and say, maybe I am and maybe I need to say something to the guy that I contracted with or maybe the

owner of the project.

JUSTICE DALE WAINWRIGHT: So you do and they say finish it as specified.

What do you do to ensure?

ATTORNEY RANDY HOWRY: I think that's what you do. I think that's what you do. That's all you could do at that point in time is to finish it. There are extremes.

JUSTICE DALE WAINWRIGHT: And then let the jury decide.

ATTORNEY RANDY HOWRY: Ultimately that becomes the question, but in this case, what's happened to these folks is they never even had the chance to let the jury decide this issue because the court, the Gillespie County Court went against the accepted work doctrine, which stands for this very proposition that you cannot create a dangerous condition and leave the scene. You have a duty to warn.

JUSTICE DALE WAINWRIGHT: I think I understand your answer there and, Counsel, your case is very important to us, but as you recognize from all the hypotheticals you're being asked, you have to be cognizant of what message or deciding this case in certain ways it's going to send to all the thousands of contracts and projects as the Chief pointed out going on now so we're looking at the forest, not just the trees.

ATTORNEY RANDY HOWRY: I understand.

JUSTICE DALE WAINWRIGHT: So let me ask you another hypothetical. What if instead of that pilot channel being left there, there was a big oak tree. Under the facts of this case, your client's car still would have crashed into that oak tree and caused significant damage and the contractor left it there. The same neighbor came by and said that oak tree might get hit. Somebody might hit it. It's a problem. Contractor says well if there's a gap, it might be a problem. If there's a tree there, it might be a problem. If there's a dirt embankment there, they could still hit that. At what point does a contractor overrule the engineering experts and the owner and say, I'm going to do differently, fire me and sue me or not.

ATTORNEY RANDY HOWRY: If that oak tree were in the middle of the boat ramp and they want a guardrail there to protect it, I think the contractor ought to say something about that as well. I don't think that [inaudible]-

JUSTICE DAVID M. MEDINA: Excuse me, what's on the other side of this bridge? Does it look like similar to the far side or is it what's on the other side?

ATTORNEY RANDY HOWRY: It doesn't have a guardrail type situation like this, just on the other side.

JUSTICE DAVID M. MEDINA: So does the contractor have a duty to say hey, you need a guardrail on the other side and you need to do something about the far side? Where does his duty stop?

ATTORNEY RANDY HOWRY: I understand the concern and I understand that we're looking at the forest and not the trees here and I don't know--

JUSTICE DALE WAINWRIGHT: We're trying to look at both actually.

ATTORNEY RANDY HOWRY: What's that?

JUSTICE DALE WAINWRIGHT: We're trying to look at both actually.

ATTORNEY RANDY HOWRY: And I appreciate that. The reality of it here, Judge, is that I think that in a situation like this, you have to apply the facts of the particular case and in the facts of this particular case, this contractor had notice of a dangerous condition. It is a dangerous condition. The contractor has admitted it.

JUSTICE DAVID M. MEDINA: Well maybe only under certain circumstances, not a dangerous condition when that picture was taken because you can see it. And in unusual circumstance when there's a flood or you can't see, maybe the risk is a little bit different. Maybe you shouldn't be driving under those conditions.

ATTORNEY RANDY HOWRY: Well, there may be a lot of factors to be considered and certainly in this case, I haven't talked about the facts, but this was a very low-speed operation of a vehicle. These kids were not speeding. These kids were not drinking. They were driving appropriately on that particular night and this is the condition that faced them on this particular night so--

JUSTICE NATHAN L. HECHT: Is this a one-lane bridge?

ATTORNEY RANDY HOWRY: It is, yeah.

JUSTICE DEBRA H. LEHRMANN: Whenever these parties originally entered into the agreement from my review of the record, it looked like this wasn't something that could necessarily be anticipated. In other words, there was a five-foot gap that a car probably couldn't have gone through an embankment and then due to the excavation that they thought that they needed to do to comply strictly comply it with the contract, then due to forces of nature that embankment went back and so my question is does the fact that that wasn't foreseeable necessarily at that point have an effect upon your position in this case?

ATTORNEY RANDY HOWRY: I'm not sure it does, Judge. I think that a lot of times on these jobs and this contract, and the Court has a copy of it--, is not specific. It's a nonspecific contract about exactly how this job is to be done and in this particular case, the contractor went out there knowing that their obligation was to build a five-foot pilot channel and when they got out there, they had to do the excavation work to be able to do that and so whether it was trees that they moved, whether it was dirt that they moved, this is what they created and in a situation where they create that dangerous condition and they have actual notice of the dangerous condition, that contractor should have and does have according to the law in this state and almost 40 states across this country that if you create a dangerous condition, you have an obligation to warn of that dangerous condition and that's our position here today is that, and I've repeated this before, but it's the obligation of this contractor under these facts to have said something about it. It's consistent with what Justice Cardozo talked about in 1916. It's consistent with what this Court had did in the Strakos opinion. It's consistent with what just three years ago the Washington Supreme Court did in a full evaluation of all these issues, an evaluation of cases on both sides, an evaluation of this privity of contract concept, an evaluation of the restatement proceeding or process and that court agreed with Texas and 36 other states that the accepted work doctrine has been rejected and it's been rejected for good reason because if we allow contractors or anyone else for that matter to go out and say well I did what I was told, stick their head in the sand and go away and a dangerous condition like this happens, that's not appropriate. Public policy is another issue, I think, that weighs in here, particularly in road situations. Public road projects like this where contractors contract to do safety-related work on roads or work that impacts the safety of road conditions, then public policy weighs in the favor of those contractors

making sure they don't leave things in an unsafe condition. That's what this contractor did here. That's the reason they accepted work doctrine has been rejected in Texas and across the nation at this point in time. So, I think that in summary the three reasons why I believe that this Court should continue its rejection of the accepted work doctrine are threefold. First, if you create a dangerous condition, you have a duty to warn. Second, a liability as Justice Cardozo talked about it is grounded in tort not contract. You can't hide behind the terms of the contract if you create a dangerous condition. You have a duty to warn. And third, the public policy indicates that contractors on public projects are liable when they fail to warn of dangerous conditions they create. I see I've exceeded my time and I apologize for that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Howry.

REBUTTAL ARGUMENT OF WADE CROSNOE ON BEHALF OF PETITIONER

JUSTICE DAVID M. MEDINA: How does this accepted work doctrine apply here if it applies at all?

ATTORNEY WADE CROSNOE: Well, Your Honor, we are not trying to revive the accepted work doctrine here. There are significant differences between the Strakos case and this one and first and foremost, the Strakos decision talked about how distinguished situations where the contract requires strict compliance which is exactly what we have here. So and the contract also says not responsible for design error and doesn't require the work that supposedly would have prevented this accident.

JUSTICE EVA M. GUZMAN: Isn't that just an indemnity issue between you and the landowner? How does that affect your duty to the public?

ATTORNEY WADE CROSNOE: Well I think it informs what our role here was and what our responsibility was. The role was not to be somehow review the overall project safety, make recommendations, tell them what to fix and not to fix. The engineer exercised professional judgment, designed the plans and we executed the plans and that was the role here.

JUSTICE EVA M. GUZMAN: The notion that a contractor can contract to build something that's unsafe and obviously unsafe and escape liability as to the public at large because you comply with a contract is troubling. Can you reconcile that?

ATTORNEY WADE CROSNOE: Well, again, we don't believe that it was a situation where this was obviously unsafe and this is a situation where the law says that liability should follow control and the people with the control over the engineering plans were the county and the engineer and those plans gave us no control over this guardrail and I think that's an important point that needs to be made here.

JUSTICE EVA M. GUZMAN: As between you and the county, but how does that impact your duty to the public?

ATTORNEY WADE CROSNOE: Well we can't have a duty to go breach our contract and the duty here is going to flow from the engineer and from the county and that is a sufficient remedy. You can't give us a conflicting remedy and say you're not responsible for design error, but oh at the same time, then you have some sort of duty to go through and retain an engineer, review these plans and make all these different suggestions, which may or may not get accepted.

CHIEF JUSTICE WALLACE B. JEFFERSON: If you knew you were the last contractor on the project and when you left that was going to be it. It was going to be open to the public and your contract required excavating a huge hole right before the bridge, so that anyone trying to cross is going to crash into that hole. Do you get to walk away without warning anybody? Have you satisfied any duty you have by simply complying with the contract?

ATTORNEY WADE CROSNOE: Again, that's an extreme situation, but we are entitled to rely on the engineering.

CHIEF JUSTICE WALLACE B. JEFFERSON: So your answer would be then you would have no duty to the public in that instance even though you knew that the next thing that's going to happen is the car is going to crash into that hole?

ATTORNEY WADE CROSNOE: How are we going to, this has gone back and forth as to what the specific duty is and whom it's supposedly owed to, but how are we going to warn the public? Are we going to erect a sign on our own that--?

CHIEF JUSTICE WALLACE B. JEFFERSON: You're not going to leave the site if you know you're the last one because this is clearly a dangerous condition and people are going to die.

ATTORNEY WADE CROSNOE: Your example is an extreme situation, but again in sorting out the liability, that should be on the engineer and as distinguished from whether that kind of extreme situation is going to get pointed out and corrected.

JUSTICE DALE WAINWRIGHT: Does it make a difference in this case that the contract at issue is with a governmental entity? Does that play any role in the analysis or change it at all?

ATTORNEY WADE CROSNOE: I don't know that it does. We do have the additional factor here of these plans being approved by two different federal agencies which certainly would have given an indication to the contractor that it had been approved by multiple entities and also there was testimony in this record that if we had not complied with the plans that that could have jeopardized federal funding for this project and that would have been a problem.

JUSTICE PHIL JOHNSON: One question really quick and I haven't fully reviewed the summary judgment record. Was part of your summary judgment motion did it include whether the anyone supervising or the contracting parties knew that this was allegedly a dangerous condition? Did you go to that warning?

ATTORNEY WADE CROSNOE: The motion itself didn't address that. There was evidence in the record referenced by counsel for Mr. Casbeer who was a local resident and he said that he talked to workers out at this site or at least people who were out at the site. It's important to keep in mind though, he testified that he didn't know if he was talking to county people, Keller people and his testimony about that is that--

JUSTICE PHIL JOHNSON: But your motion did not address the fact that you had warned the county?

ATTORNEY WADE CROSNOE: No.

JUSTICE PHIL JOHNSON: That was not one of the basis for your motion?

ATTORNEY WADE CROSNOE: No, it was not. And the testimony of Mr. Casbeer I was talking about was a page 504 of the Clerk's Record.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you,



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Counsel. The cause is submitted and that concludes the arguments for this morning. The Marshal will adjourn the Court.
MARSHAL: All rise.

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