



ALERT  
AUGUST 2017



## General Contractors' Workers' Compensation Plan Bars Personal Injury Claims Against Subcontractor

On July 13, 2017, Houston's Fourteenth Court of Appeals in *Berkel & Company Contractors, Inc. v. Lee*, 2017 WL 2986856, reversed a \$43.5 million jury verdict for a superintendent who lost a leg after a crane collapsed at a construction site. The court held that the Texas Workers' Compensation Act barred the plaintiff's recovery of common law damages and that the intentional conduct exception did not apply because there was insufficient evidence of intent.

The court first found that the workers' compensation bar applied to the plaintiff, who was employed by the general contractor, even though the defendant was a subcontractor, because the general contractor provided workers' compensation insurance for its subcontractors through a contractor-controlled insurance program, creating a deemed employee-employer relationship. The court then examined the standards for establishing intent through knowledge with substantial certainty. The court held that "an actor must have known that his conduct was substantially certain to result in specific consequences—i.e., in injury to a particular victim, or to someone in a small class of potential victims within a localized area."

Although the court found evidence that the defendant knew the crane's collapse was substantially certain and could have foreseen that the plaintiff might be nearby, that was not enough. The court held there was insufficient evidence of intent because there was no evidence the defendant knew the *plaintiff's* specific location or that the defendant knew the exact fall path of the equipment.

### Importance of the Decision

The court's interpretation underscores the importance of closely examining owner- or contractor-controlled insurance programs anytime there is workplace injury or death, including where the employee may work for a subcontractor. Also, owners, subcontractors, and general contractors should closely examine these programs and the potential protections afforded at the contracting stage.

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## CONTACTS



Nicole M. Perry  
Houston



J. Laurens Wilkes  
Houston



Jane W. Walker  
Houston

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