

## **SUMMER 2014 NEWSLETTER**

### **AUTOMOBILE / TRUCKING LITIGATION UPDATE**

**By Gerald B. Lotzer**

**1. *Knife River Corporation-South v. Esmeralda Hinojosa*, No. 01-12-00862-CV  
(Tex. App. – Houston [1st Dist.], March 13, 2014)**

This is a wrongful death and survivor suit brought by Esmeralda Hinojosa, Individually and as Representative of the Estate of Andres Hinojosa, Deceased, and as Next Friend on Behalf of Melissa Hinojosa, Vanessa Hinojosa, Andrea Hinojosa, and Andres Hinojosa, Jr. against Knife River Corporation-South. A judgment was rendered against Knife River and in favor of the Plaintiffs and Knife River appealed based on 3 issues. This includes Knife River's assertion that the trial court failed by denying its directed verdict on Plaintiff's negligent-undertaking claim. The Houston Court of Appeals reversed and rendered.

On August 30, 2010, Andres Hinojosa was driving his tractor-trailer, loaded with gravel, on Highway 105 in Washington County, when his vehicle overturned. Hinojosa told emergency personnel at the scene that the accident was precipitated by his driving on the paved shoulder of the road to avoid a head on collision with a vehicle that had crossed over into his lane. Hinojosa was taken to the hospital where he later died from his injuries. A reconstruction of the accident revealed that as Hinojosa drove along the paved shoulder, the right front tire of his vehicle had fallen into the drop off which caused the rear of his vehicle to fall to the right and the front of the vehicle to turn to the left. When the tires regained the pavement, Hinojosa's vehicle was turning sharply to the left resulting in a roll over of the tractor-trailer. The reconstruction of the accident also showed that Hinojosa had been in control of his vehicle until he had reached a location in the highway where there is a concrete box culvert running under the road. The road narrows at that point from 10 feet to 6.3 feet. The ground slopes dramatically at a 45 degree angle, creating a drop off of 1.8 feet to the left and 1.7 feet above the culvert headwall. Tall vegetation grew along the shoulder's edge, camouflaging the slope. The Texas Department of Transportation ("TxDOT") had, at some point before the accident, placed an "object marker" on the side of the road to mark the headwall of the culvert. The object marker was a yellow and black striped sign intended to warn motorists that there is a hazard to the right of the sign and to indicate to motorists that they should drive to the left of the sign to avoid the hazard.

The section of Highway 105 where the accident occurred had last been repaved in 2005. In 2004, TxDOT had hired Knife River Corporation-South to resurface a 4.5 mile section of Highway 105, which included the area where the accident occurred. The plans indicated that the project was "for the construction of the asphalt concrete pavement overlay consisting of one course surface treatments and pavement markings [and] markers". The plans also provided that "no edge drop off exceeding 3:1 shall be left exposed to traffic. Backfilling these areas shall be considered incidental to the various forms of work."

On May 3, 2005, Joe Sustaita, Knife River's asphalt plant manager, made a notation in

the project's work diary that "there are some safety issues on the box culvert sections which really need to be fixed. The shoulder drops right off the edge along these box culverts. The state needs to get a change order to extend the boxes further or put up guard rail on these sections." When Knife River finished the resurfacing project in August 2005, the drop off remained. The TxDOT engineer approved and accepted the work performed by Knife River. The automobile accident occurred 5 years later.

Plaintiffs proceeded to trial before a jury, asserting a theory of negligent undertaking against Knife River based on section 324A of the Restatement (Second) of Torts that Knife River had undertaken certain duties in the construction contract for the benefit of a third person, Andres Hinojosa, which included a duty not to leave a drop off with a greater than 3-to-1 ratio and to send written notification to TxDOT regarding the drop off. The Plaintiff asserted that Knife River had not used reasonable care in performing these undertaken duties.

The charge to the jury asked whether the negligence, if any, of TxDOT or Knife River had caused the death of Hinojosa. The trial court instructed the jury as to section 324A of the Restatement (Second) of Torts. The jury found that TxDOT and Knife River's negligence had caused Hinojosa's death and apportioned responsibility of 5% to Knife River and 95% to TxDOT. The jury answered "no" as to gross negligence and awarded damages totaling \$4,850,895.33.

TxDOT filed a motion to disregard the jury's findings and the trial court granted TxDOT's motion. As a result, the trial court rendered judgment against Knife River in favor of the Plaintiffs with Knife River now being ordered to pay 100% of the damages found by the jury, plus court costs and interest.

Knife River challenged the trial court's judgment asserting (1) the trial court erred by denying Knife River's motion for directed verdict; (2) the trial court erred by granting TxDOT's motion to disregard the jury's findings; and (3) Knife River is entitled to a new trial based on plaintiff's failure to adequately plead its negligent-undertaking claim and based on the trial court's improper exclusion of certain evidence and defenses.

The Court of Appeals reversed the judgment of the trial court and rendered a take nothing judgment against Knife River. The Court determined that to the extent that Knife River undertook to backfill, edge drops was incidental to its overlay work, making safe the preexisting steep drop off above the culvert, into which Hinojosa's tire fell, was outside the scope of that undertaking. No evidence was presented to show otherwise. Because Restatement section 324A imposes a duty to perform without negligence only the task that the actor has undertaken to accomplish, Knife River owed no duty as a matter of law to rectify the drop off or to provide written notice regarding the defect.