

REVERSE and RENDER and Opinion Filed {Date}



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-22-00709-CV

MONTICELLO ASSET MANAGEMENT, INC., Appellant

V.

**JACKSON WELLS, DEVIN SCHARES, AND ELIZABETH RUSSELL,
INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF
KILEY RUSSELL, DECEASED, AND ON BEHALF OF
K.R. AND Z.R., MINOR CHILDREN, Appellees**

**On Appeal from the 59th Judicial District Court
Grayson County, Texas
Trial Court Cause No. CV-18-0027**

MEMORANDUM OPINION

**Before Justices Partida-Kipness, Reichek, and Miskel
Opinion by Justice Reichek**

Monticello Asset Management, Inc. appeals a judgment following a jury trial awarding personal injury damages to Jackson Wells, Devin Schares, and Elizabeth Russell, individually and as representative of the estate of Kiley Russell, deceased, and on behalf of her minor children, K.R. and Z.R. Because we conclude Monticello owed no duty as a matter of law to Jackson, Devin, and Kiley with respect to the incident at issue, we reverse the trial court's judgment and render judgment that appellees take nothing by their claims.

Background

The facts giving rise to the tragic injuries and death in this case are largely undisputed. Monticello manages approximately thirty apartment complexes, including River Ranch Apartments in Sherman, Texas. In late 2016, Monticello began renovations to the entrance of River Ranch. Ricardo Villalobos, a project manager for Monticello, was involved in the construction process. During the course of the renovations, Villalobos realized that a pre-existing flagpole would block the new entrance to the complex and he decided to move the pole.

The flagpole at issue was thirty-five feet tall and made of metal. Because of the size of the pole and its proximity to overhead power lines, Villalobos enlisted the help of six other men to remove the flagpole and reinstall it in a different place. The men used a skid steer and multiple ropes to hold the pole steady. Villalobos said these precautions were necessary because once the pole was lifted out of the ground, it would be difficult to balance, and they wanted to make sure it did not touch the power lines.

The flagpole was eventually moved to a new location somewhat farther from the power lines, but still close enough that, if it fell, it could come into contact with the lines. The men inserted the pole into a metal sleeve in the ground. Villalobos stated he intended the installation to be permanent even though there was nothing locking the pole into place. After the flagpole was inserted in the ground, Villalobos

stated they had no problems with the pole shifting in the sleeve. Eddy Higgins, a maintenance worker at River Ranch, stated they had no issues with the flagpole.

Several months later, a water valve leak was discovered on River Ranch's property. Higgins testified two different plumbing companies bid on performing the repair work. The first company stated it would require River Ranch to move the flagpole before it began repairing the water valve. The company did not give a reason why it wanted the pole moved.

The second company to submit a bid was Red River Plumbing. Cody Russell, one of the owners of Red River, went to the apartment complex to inspect the site and determine if there were any obstacles to performing the work. Cody stated he saw the flagpole and the power lines and did not think they posed a problem. He also stated he did not believe the flagpole needed to be moved because it was not located where the workers would be digging to fix the valve. No one informed Cody that another company wanted the flagpole moved. Red River was ultimately hired to perform the work.

On May 3, 2017, Jackson, Devin, and Cody's brother, Kiley, arrived at the apartment complex to begin the valve repair work. Red River did not ask for the power lines to be de-energized. Cody stated he was not aware of any possibility that Jackson, Devin, and Kiley would try to move the flagpole because it was not necessary for the work they were hired to do. In addition, Cody stated the pole was "long [and] heavy" and he "couldn't imagine anyone pick[ing] the pole up and

try[ing] to manhandle it.” He agreed that trying to move the flag pole would be both unreasonable and unsafe.

At some point that morning, the men became worried they were going to “mess up” the flagpole while they were working, and they did not want to “get in trouble.” To prevent this, Kiley made the decision to move the flagpole away from the work site. The men did not contact River Ranch or Monticello before endeavoring to move the pole by themselves. As they lifted the pole out of the ground, it tipped over and came into contact with the power lines. All three men were electrocuted. Jackson and Devin sustained severe injuries. Kiley was killed.

Appellees brought this suit generally alleging that Monticello was negligent in (1) placing the flagpole too close to the power lines, (2) failing to permanently secure the flagpole, (3) failing to make safe a condition on the premises that it knew or should have known created an unreasonable risk of harm, and (4) failing to warn Red River’s employees of the dangerous condition on the property. Monticello moved for summary judgment contending it owed no duty as a matter of law because the proximity of the power lines to the flag pole was open and obvious. The trial court denied the motion.

At trial, Jackson and Devin acknowledged that pictures of the accident site showed nothing that would have obscured their view of the power lines or the proximity of the lines to the flagpole. They also acknowledged it was clear the pole was taller than the height of the lines. Both men stated they understood that working

around power lines could be hazardous and, although they knew it was dangerous for something to come into contact with energized power lines, they made no attempt to have the lines de-energized before trying to move the flagpole. Jackson, Devin, and Cody all testified the repair work was controlled solely by Red River, and Monticello gave no instructions regarding how the work was to be done.

Monticello moved for a directed verdict arguing, again, that the alleged dangerous condition on the property was open and obvious. Additionally, it argued appellees failed to provide any evidence that the placement of the flagpole near the power lines was, by itself, an unreasonably dangerous condition. Monticello contended the danger was created by the workers' attempt to move the pole rather than its location or the manner in which it was installed. The trial court denied the motion.

The jury returned a verdict finding Monticello 50% responsible for the incident, Devin and Jackson each 2% responsible, Kiley 25% responsible, and Red River 21% responsible. Damages in varying amounts were awarded to appellees. Monticello brought this appeal.

Analysis¹

When a plaintiff alleges injury resulting from a physical condition or defect on the defendant's premises, premises liability principles apply. *United Scaffolding*,

¹ Although Monticello brings six issues, the arguments in support of each issue are largely intertwined. Because of this, we address all the issues as a whole.

Inc. v. Levine, 537 S.W.3d 463, 472 (Tex. 2017). The threshold question in a premises liability case is whether a duty is owed to the injured person. *Hillis v. McCall*, 602 S.W.3d 436, 440 (Tex. 2020). “The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question.” *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

The duty a premises owner or occupier owes to the plaintiff depends on the plaintiff’s status at the time of the incident. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). An employee of an independent contractor is an invitee. *Coastal Marine Serv. of Tex., Inc. v. Lawrence*, 988 S.W.2d 223, 224–25 (Tex. 1999) (per curiam). When the invitee is an independent contractor’s employee, there are two types of premises defects that may give rise to liability: (1) defects existing on the premises when the employee entered, and (2) defects created by the independent contractor’s work activity. *Id.* at 225. The first type of defect includes “[o]nly concealed hazards—dangerous in their own right and independent of action by another.” *Id.* With respect to the second type of defect—a condition arising as a result of the independent contractor’s work activity—the premises occupier normally owes no duty to the independent contractor’s employees because it generally has no duty to ensure that an independent contractor performs its work in a safe manner. *Id.* A limited exception has been recognized where the premises occupier retains control over the “operative details” of the independent contractor’s

work. *Torres v. Pasadena Refin. Sys., Inc.*, No. 01-18-00638-CV, 2022 WL 17684333, at *7 (Tex. App.—Houston [1st Dist.] Dec. 15, 2022, no pet.).

The evidence in this case shows, and appellees concede in their brief on appeal, that “[a]s long as the flagpole remained in its sleeve in the ground, [a]ppellees were in no danger from the power lines.” Accordingly, the proximity of the flagpole to the power lines, by itself, did not constitute a premises defect. *See McCaughtry v. Barwood Homes Ass’n*, 981 S.W.2d 325, 333 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (proximity of high voltage power lines to light standard not premises defect); *Bryant v. Gulf Oil Corp.*, 694 S.W.2d 443, 446 (Tex. App.—Amarillo 1985, writ ref’d n.r.e.) (power line not dangerous until invitee caused pole to come into contact with it). It was only when the Red River employees decided to move the pole that it became a hazard.

There is no dispute the power lines were clearly visible, and Jackson testified no one attempted to have the lines de-energized before they tried to move the pole. *See Shell Oil Co. v. Songer*, 710 S.W.2d 615, 620 (Tex. App.—Houston [1st Dist.] 1986, writ ref’d n.r.e.) (premises owner not required to anticipate methods of contractor’s work and de-activate power lines). Both Jackson and Devin stated they understood the danger associated with coming into contact with energized power lines. Although Jackson testified they had no real awareness of the proximity of the power lines as they were trying to move the flagpole, “the fact that [they] were not paying attention did not change the presence of the highline from a reasonably

apparent condition into a dangerous condition about which the occupier of the premises had a duty to warn.” *Corpus v. K-J Oil Co.*, 720 S.W.2d 672, 675 (Tex. App.—Austin 1986, writ ref’d n.r.e.); *see also Martin v. Gehan Homes Ltd.*, No. 03-06-00584-CV, 2008 WL 2309265, at *2 (Tex. App.—Austin June 4, 2008, no pet.) (mem. op.) (whether condition is open and obvious not controlled by whether invitee had personal, subjective knowledge or awareness of it).²

Because there was no dangerous condition on the property existing independent of the actions of the Red River employees, Monticello did not owe a duty to the men unless it retained some right of control over the work they performed. *See Coastal Marine*, 988 S.W.2d at 225–26; *see also Martin v. ECO Servs. Operations, LLC*, No. 01-17-00293-CV, 2018 WL 1003384, at *3 (Tex. App.—Houston [1st Dist.] Feb. 22, 2018, no pet.) (mem. op.) (where work activity was indispensable to injury claim, no duty absent evidence of control). Appellees did not allege, and presented no evidence to show, that Monticello exercised any level of control over the repair work. It was undisputed that Red River retained full control over how the work was to be performed.

Appellees argue Monticello owed a duty to either move the flagpole or warn the Red River employees that the flagpole “needed to be moved to access the water

² Relying on *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771 (Tex. 2021) and *Sun Oil Co. v. Massey*, 594 S.W.2d 125 (Tex. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.), the dissent concludes the “danger of moving the flagpole was not open and obvious as a matter of law.” In both *Los Compadres* and *Sun Oil*, the plaintiffs believed the power lines had been de-energized, a critical circumstance lacking in this case.

main.” First, there are no facts in evidence to support the assertion that the flagpole needed to be moved to access the water main. Appellees point only to Higgins’s testimony that the first plumbing company to bid on the repair job stated it would require Monticello to move the flagpole before work began. Higgins further testified, however, that the first company gave no reason why it wanted the pole moved.

Cody Russell testified “the flagpole was never to be moved,” and moving the pole was not necessary for Red River to do the job it was hired to do. For this reason, moving the pole was not a factor in Red River’s bid to do the repair work.³ Jackson testified Kiley decided to move the pole because it was close to where they were digging and they were concerned the pole would be damaged. No one testified the pole was an obstruction. In short, there is nothing in the record to indicate that moving the pole was necessary for the plumbing repair work to be accomplished.

Even if we were to conclude the evidence showed Monticello was aware of the possibility that the flagpole might need to be moved at some point in the repair process, there is no evidence to suggest Monticello should have anticipated that Red River’s employees would attempt to perform this task themselves, or that it knew or should have known the pole could not be moved safely. The record, in fact, shows the opposite. Only a few months before the accident occurred, the pole was moved

³ This evidence disproves the dissent’s premise that Monticello “knew the plumbing work could require the flagpole to be moved.”

without incident by River Ranch's employees. This shows the pole could be moved safely with the proper precautions. Where the evidence shows that a task can be performed safely, and the invitee could have taken measures to avoid the risk that caused the injury, a premises owner owes no duty. *See Martin*, 2018 WL 1003384, at *3. This is because an owner or occupier of a premises may assume that an independent contractor will take proper care and precautions to have his employees perform in a safe and workmanlike manner. *Corpus*, 720 S.W.2d at 674.

Appellees also suggest the fact that the flag pole was unsecured in the sleeve in the ground gave the impression it could be moved safely by "three strong adults." Again, there is no evidence in the record to support this argument. The only testimony concerning the actual or apparent difficulty in moving the flagpole came from Monticello's project manager, Villalobos, and Cody Russell. Villalobos testified that, due to the size of the pole, he knew it would not be possible to balance it once it was pulled out of the ground without the use of ropes and a skid steer. Cody testified he believed it was unreasonable and unsafe for Red River's employees to try to lift the pole out of the ground. He further testified it was obvious to him that it would be dangerous for the men to try to move the flagpole by themselves because the pole was too long and heavy. The fact that Red River's employees misjudged their ability to handle a thirty-five foot tall metal pole does not transform the flagpole into an inherently dangerous hazard about which Monticello had a duty to warn. *See id.* at 675; *see also Greene v. Watkins*, No. 12-21-00119-CV, 2022 WL

2182228, at *4 (Tex. App.—Tyler June 16, 2022, no pet.) (mem. op.) (no duty to warn invitee of obvious risk of lifting fence post with concrete attached); *Durbin v. Culberson Cnty.*, 132 S.W.3d 650, 660–61 (Tex. App.—El Paso 2004, no pet.) (light pole not inherently dangerous independent of work activity).⁴

The record affirmatively shows that Red River’s employees did not inform anyone at River Ranch or Monticello that they were going to move the flagpole before they attempted to do so. Appellees’ theory of liability would require premises owners and occupiers to anticipate the methods and procedures by which an independent contractor will perform work and to furnish the contractor’s employees with appropriate safety equipment to guard against hazards arising from that work. *Jenkins v. Fritzler Dev. Corp.*, 580 S.W.2d 63, 65 (Tex. App.—Houston [1st Dist.] 1979, writ ref’d n.r.e.). Appellees would further impose a duty on premises owners and occupiers to supervise and police the contractor’s employees to ensure that safety precautions were taken. *See id.* Absent evidence of control over the work being done, the imposition of such duties has been repeatedly rejected. *Id.*; *see also McCaughtry*, 981 S.W.2d at 333–34.

⁴ The dissent claims, “Monticello knew the flagpole was not a standard flagpole that could be easily moved.” Nothing in the record suggests the flagpole at issue was not “standard” or that movement of the pole presented challenges beyond those inherent in moving a thirty-five foot tall metal pole. Cody Russell testified he independently recognized, as Villalobos did, the danger of moving the flagpole without proper precautions. There is no evidence that Monticello possessed any specialized knowledge regarding the nature of the pole.

The families in this case suffered horrible losses. But Texas law strictly proscribes the liability of premises owners and occupiers for hazards created by the work activity of an independent contractor's employees over which they had no control. *Coastal Marine*, 988 S.W.2d at 225–26. Based on the foregoing, we reverse the trial court's judgment and render judgment that appellees take nothing by their claims.

/Amanda L. Reichek/

AMANDA L. REICHEK
JUSTICE

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**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

MONTICELLO ASSET
MANAGEMENT, INC., Appellant

No. 05-22-00709-CV V.

JACKSON WELLS, DEVIN
SCHARES, AND ELIZABETH
RUSSELL, INDIVIDUALLY AND
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ESTATE OF KILEY RUSSELL,
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OF K.R. AND Z.R., MINOR
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On Appeal from the 59th Judicial
District Court, Grayson County,
Texas

Trial Court Cause No. CV-18-0027.

Opinion delivered by Justice
Reichek. Justices Partida-Kipness
and Miskel participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that:

JACKSON WELLS, DEVIN SCHARES, AND ELIZABETH RUSSELL INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF KILEY RUSSELL, DECEASED, AND ON BEHALF OF K.R. AND Z.R., MINOR CHILDREN, take nothing by their claims against MONTICELLO ASSET MANAGEMENT, INC.

It is **ORDERED** that appellant MONTICELLO ASSET MANAGEMENT, INC. recover its costs of this appeal from appellees JACKSON WELLS, DEVIN SCHARES, AND ELIZABETH RUSSELL, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF KILEY RUSSELL, DECEASED, AND ON BEHALF OF K.R. AND Z.R., MINOR CHILDREN.

Judgment entered January 23, 2024