

**Dissenting Opinion Filed January 23, 2024.**



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

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**No. 05-22-00709-CV**

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**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**

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

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**DISSENTING OPINION**

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

The jury charge instructed the jury to find Monticello Asset Management, Inc. (Monticello) negligent with respect to the condition of the premises if (1) the condition posed an unreasonable risk of harm, (2) Monticello knew or reasonably should have known of the danger, and (3) Monticello failed to exercise ordinary care to protect Kiley Russell, Jackson Wells, and Devin Schares by both failing to adequately warn them of the condition and failing to make that condition reasonably safe. The jury found Monticello negligent and fifty percent responsible for the

incident. The jury attributed the remaining responsibility to Schares, Wells, Russell, and Red River Plumbing. My colleagues in the majority, however, disregard the jury's findings and conclude Monticello's responsibility should be zero because it had no control over the work activities of Schares, Wells, and Russell, those activities alone created the hazard that caused the injuries, and, as a result, Monticello owed the men no duty to protect them from the hazards. Because the majority mischaracterizes the dangerous condition and, as a result, overturns a jury verdict supported by legally and factually sufficient evidence, I respectfully dissent.

The crux of my disagreement with the majority opinion is how it characterizes the dangerous condition. Monticello maintains the alleged premises defects were the presence of power lines and their proximity to the flagpole, both of which were purportedly open and obvious. Monticello further argues appellees' decision to allow three men to move the flagpole was the only negligent conduct displayed and "[t]he flagpole became unreasonably dangerous only when the crew decided to move it without any safety precautions." According to Monticello, it owed no duty to foresee the crew's negligence and "can hardly be blamed for not predicting the workers would decide to move the pole [or . . .] for the workers' failure to appreciate an open and obvious danger and failure to use safety measures once they decided to move the pole." The majority agreed, adopted Monticello's narrow characterization of the premises defect, and concluded appellees' decision to move the flagpole alone created a dangerous condition on the property. Because Monticello retained no right

of control over appellees' work, the majority holds Monticello cannot be held liable for the hazards created by appellees.

I believe Monticello's description of the premises defect is too narrow and led the majority to an incorrect analysis and result. Appellees characterize the dangerous condition as "the weight and instability of the flagpole," and more particularly Monticello's knowledge "that the flagpole would need to be moved, that the flagpole was deceptively heavy and difficult to move, and that it required extensive manpower and heavy machinery, which Red River did not have and was not told to provide." I would adopt appellees' characterization of the dangerous condition on the property and conclude the danger of moving the flagpole was not open and obvious as a matter of law.

As the Texas Supreme Court explained in *Los Compadres Pescadores, L.L.C. v. Valdez*, although the presence of a power line is an open and obvious condition, that presence does not mean a dangerous condition created by the power lines was an open and obvious condition. 622 S.W.3d 771, 790 (Tex. 2021) (holding the fact the line was energized and, therefore, created a dangerous condition was not open and obvious). Rather, the location of the power lines is only one component in the open and obvious test. *See id.*; *see also Sun Oil Co. v. Masset*, 594 S.W.2d 125, 128 (Tex. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.) ("Under the circumstances, the hazard posed by the live power lines was not obvious despite their visibility, since the location of the lines was only one component of the danger, the other being

that they were charged with electricity.”). The second component courts must consider is whether the power line poses a risk for the activity being conducted such that the danger is “so open and obvious that as a matter of law [the plaintiff] will be charged with knowledge and appreciation thereof.” *Los Compadres Pescadores*, 622 S.W.3d at 788 (quoting *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 516 (Tex. 1978)); see also *Sun Oil*, 594 S.W.2d at 128.

Here, I would conclude although the power lines were visible, the danger posed by the power lines and their proximity to the flagpole was not obvious because appellees were not working on the power lines and could not anticipate the danger in moving the flagpole. Further, I would conclude appellees’ decision to move the flagpole did not create the dangerous condition. The danger lay with the flagpole itself; more particularly, the location, weight, and unwieldy nature of the flagpole. Monticello knew the flagpole was not a standard flagpole that could be easily moved. On the contrary, Monticello knew from experience it took six people, three ropes, and a skid steer to move the flagpole because the flagpole was heavy, unwieldy, and unsecured. Further, based on a prior bid for the job from Pruitt Plumbing, Monticello knew the plumbing work could require the flagpole to be moved. In the prior bid, Pruitt told Monticello they would not do the job unless Monticello removed the flagpole. Red River Plumbing, appellees’ employer, provided Monticello a less expensive bid and did not mention the flagpole or require Monticello to move it. Yet, Monticello did not warn appellees of either the potential need to move the pole or

the safety precautions necessary to move the pole safely. Instead, Monticello accepted the cheaper bid and stayed silent regarding the hidden danger posed by the flagpole.

Appellees maintain the danger was created by Monticello's placement of the flagpole and silence concerning the safety procedures necessary to move the flagpole. The jury accepted appellees' characterization of the dangerous condition and proportioned responsibility accordingly. The majority reverses that finding and the judgment by concluding no premises defect existed at all and places 100% responsibility on appellees for moving the flagpole. I would conclude the jury's findings were supported by legally and factually sufficient evidence, Monticello owed appellees a duty to warn as a matter of law, and I would affirm the judgment. Because the majority does not, I respectfully dissent.

/Robbie Partida-Kipness/  
ROBBIE PARTIDA-KIPNESS  
JUSTICE

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