Texas' Assumption of Fifth Circuit Test Requires Jury Findings on Disputed Factors for Borrowed Employee Defense Under Longshore and Harbor Workers' Compensation Act

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W & T Offshore, Inc. v. Fredieu, 2020 WL 3240869 (Tex. June 5, 2020), concerns borrowed employee status under the Longshore and Harbor Workers' Compensation Act (LHWCA).[1] While only assuming the propriety of the *Ruiz* [2] nine factor test for determining that status, the Texas Supreme Court's decision in *Fredieu* probably establishes how such issues will be tried in Texas.[3]

I. *W & T Offshore, Inc. v. Fredieu* Facts

Workers' compensation under the LHWCA is a covered employee's exclusive remedy against an employer when hurt on the job.[4] The Outer Continental Shelf Lands Act (OCSLA) establishes exclusive, federal control over the Outer Continental Shelf (OCS)[5] and makes the LHWCA applicable to persons that are injured while working on fixed platforms there.[6] In *W & T Offshore, Inc. v. Fredieu*, the injured worker, Fredieu, was employed by an independent contractor. However, his injury claims against W & T, the entity who contracted with Fredieu's employer, would nevertheless be relegated to a claim for workers' compensation under the LHWCA if he was found to be W & T's "borrowed employee."[7]

Fredieu was an employee of Wood Group Production Services, Inc.[8] Wood contracted with W & T to provide maintenance and service work, and Wood assigned Fredieu to work on the W & T platform.[9] After working on the W & T platform for over a year, Fredieu was sent to supervise painting and repairing of handrails on another W & T platform.[10] There, he discovered a malfunctioning gas-line regulator and radioed W & T's lead operator on a different platform to ask how to proceed.[11] The lead operator told Fredieu to remove the regulator and bring it to him.[12] The two began the requisite safety analysis, and the supervisor gave Fredieu instructions over the radio about removing the regulator.[13] During the process of removing the regulatory, a pressurized pipe broke, injuring Fredieu.[14]

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1 *W & T Offshore, Inc. v. Fredieu*, 2020 WL 3240869 (Tex. June 5, 2020) at * 9-11 (also addressing a sufficiency of evidence issue on damages).
2 *Ruiz v. Shell Oil Co.*, 413 F2d 310 (5th Cir. 1969).
3 A binding change in the law on the LHWCA would, and, an very persuasive argument might, change matters.
4 *Id*. at *1-2 (citing 33 U.S.C. §§ 904-905).
5 *Id*. at *2 (citing 42 U.S.C. §§ 1331-1356b).
6 *Id*. at *2 (citing 42 U.S.C. §§ 1333(a)(1), b).
7 *Id*. at *1.
8 *Id*.
9 *Id*.
10 *Id*.
11 *Id*.
12 *Id*.
13 *Id*.
14 *Id*. (explaining that the plaintiff's injuries resulted in him having two plates and thirteen screws in his injured arm).

Fredieu sued for negligence-based damages, and W & T asserted the defense that Fredieu was its borrowed employee.[15] At the request of W & T, the trial court submitted a broad-form jury question stating, "[a]t the time of the injury in question, was Wesley Fredieu a borrowed employee of W & T?"[16] The jury question was accompanied by an instruction identifying the following nine *Ruiz* factors as "[f]actors to consider in determining whether Mr. Fredieu was the borrowed employee of W & T".[17] Those *Ruiz* factors "are:

> (1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
>
> (2) Whose work is being performed?
>
> (3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
>
> (4) Did the employee acquiesce in the new work situation?
>
> (5) Did the original employer terminate his relationship with the employee?
>
> (6) Who furnished tools and place for performance?
>
> (7) Was the new employment over a considerable length of time?
>
> (8) Who had the right to discharge the employee?
>
> (9) Who had the obligation to pay the employee?"[18]

The parties did not request a jury finding specifically on any of the individual factors listed above.[19]

The jury answered "no" to the borrowed servant employee question, found W & T negligent, and awarded Fredieu $1.7 million.[20] But in ruling on motions filed by W & T, the trial court disregarded the jury's borrowed employee finding, and ruled that Tex. R. Civ. Proc. 279 allowed the court to make factual findings. The court issued twelve findings on *Ruiz* factors and concluded that Fredieu was a borrowed employee and rendered judgment for W & T.[21] However, the Court of Appeals reversed the trial court and upheld the damages award.[22] W & T sought redress in the Texas Supreme Court.

II. Texas Supreme Court's Analysis

The Texas Supreme Court's opinion first notes that a state court in an admiralty matter "occupies essentially the same position occupied by a federal court sitting in diversity: it must

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15 *Id*. at *2.
16 *Id*.
17 *Id*.
18 *Id*.
19 *Id*.
20 *Id*.
21 *Id*.
22 *Id*. at *3.

apply substantive federal maritime law but follow state procedure."[23] While the parties agreed that federal substantive law and state procedure governed, they "disagree[d] about how the two interact."[24]

The Court acknowledged that "[i]f the jury was asked a question of law, the trial court did not err by disregarding its answer as immaterial."[25] However, the Texas Supreme Court rejected the Court of Appeals' conclusion that borrowed employee status could be a fact question, noting that "all the relevant authority consistently calls borrowed-employee status a legal question."[26]

Next, the Court observed that the Fifth Circuit has held that a single, broad-form question on borrowed employee status "is not 'feasible' because the balancing of the *Ruiz* factors and the ultimate determination of borrowed-employee status is a question of law."[27] According to the Fifth Circuit, the jury submission of individual *Ruiz* factors may be needed "if resolution of fact issues related to one or more factors would be material to the court's determination of the ultimate legal question."[28] While agreeing that, "in LHWCA cases, the question of borrowed-employee status is a question of law for the district court to determine",[29] the Court merely assumed that *Ruiz* was correct, noting that it was not bound by Fifth Circuit decisions and that *Ruiz* was not universally followed.[30] But, the Court would be "reluctant to depart from the Fifth Circuit approach to the LHWCA" as that would permit forum-shopping "merely by choosing a court system."[31]

The Court then noted that W & T had the burden of proof on the borrowed employee defense with the obligation to obtain all necessary jury findings to prevail.[32] However, W & T requested no jury findings on any *Ruiz* factor, thereby waiving its right to do so.[33] Without favorable fact findings, W & T could only "have a Ruiz factor weighed in its favor if: (1) there is no genuine, material dispute that the factor weighs in its favor, or (2) the evidence conclusively establishes that the factor weighs in its favor."[34]

The Court analyzed each *Ruiz* factor and began by observing that control (factor 1) is "the central factor," but is "not determinative."[35] After noting that both parties offered evidence

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[23] *Id*.
[24] *Id*.
[25] *Id.*
[26] *Id*. at *4.
[27] *Id*. Indeed, the Fifth Circuit says that no factor, "or any combination of them, is decisive, and no fixed test is used to determine the existence of a borrowed-servant relationship." *Id*. at *6.
[28] *Id.* at *4.
[29] *Id.*
[30] *Id.*, n.1 & *5 & n.4 (citing *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 150 (4th Cir.2000)).
[31] *Id*. at *4, n.1.
[32] *Id*. at *5.
[33] I*d*.
[34] *Id*. The trial court's findings were irrelevant as no appeal was taken from the Court of Appeals' holding that there was no authority to make them. *Id*. at *5, n. 2. The Court said that "[t]he court of appeals held that the trial court did not have authority to make its own findings under rule 279, which governs omission of elements of grounds of recovery and defenses, not factors weighed by courts in determination of legal questions." *Id*.
[35] *Id*. at *6.

relating to the control issue, the Court concluded that an issue of material fact regarding control existed and should have been submitted to the jury.[36] The Court found that the supervisor's instructions to Fredieu at the time of injury were "a function of safety protocol… not the kind of day-to-day control that is crucial" in the borrowed employee determination, and that the "testimony by W & T's Vice President that W & T did not control Fredieu …at least created a material fact issue."[37]

The Court found that factors 2 (whose work is being performed), 4 (employee's acquiescence in new work situation), 7 (length of time of new employment), and 8 (right to discharge employee) were undisputed.[38] Because the contract between Wood and W & T stated both that Wood's employees were not employees of W & T and that W & T would secure workers compensation coverage for Wood's employees—a fact that the Court noted gave "considerable support for W & T's position"—the Court concluded that an unresolved fact question remained regarding factor 3 (whether there was an agreement between the original and the borrowing employer.[39] Factor 6 (who furnished the tools and place of performance) favored W & T but "makes little difference…when weighed against the other factors."[40] Finally, factor 9 (obligation to pay employee) favored Fredieu as, "from his perspective," Wood was obligated to pay him.[41]

The Court considered de novo the legal question of borrowed employee status, with the "obligation to weigh the *Ruiz* factors in light of how they were resolved—or in this case not resolved—by the fact-finder."[42] Its discussion focused on "control" and a recounting of some of the evidence, including W & T's vice president's testimony that Fredieu controlled his own work, and again stated that W & T did not "conclusively establish its control of Fredieu."[43] It also distinguished cases cited by W & T as not "involv[ing] evidence of independence as strong as Fredieu's, including testimony from a W & T vice-president confirming Fredieu's claim to control his own work on the platform."[44] The Court rejected the "primary evidence" proffered by W & T to show control—directions on non-routine activities and instructions on job safety immediately before the accident—as "insufficient to demonstrate… the level of "power to control and direct another in the performance of his work" necessary to convert Fredieu" into a borrowed employee."[45] Even if the Court assumed that Fredieu's control of his day-to-day work was irrelevant, it found that W & T still failed to "conclusively establish that it did control" the plaintiff.[46]

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[36] *Id*. at *6-7.
[37] *Id*. at *7
[38] *Id*. at *7-8.
[39] *Id*. at *7.
[40] *Id*. at *8.
[41] *Id*. (noting there was "no evidence" that Wood was not obligated to pay until it was paid by W & T).
[42] *Id*.
[43] *Id*. at 8-9.
[44] *Id*. at *9.
[45] *Id*.
[46] *Id*.

After considering all the *Ruiz* factors, the Court concluded that W & T failed to establish that Fredieu was a borrowed employee.[47]

III. Conclusion

The Texas Supreme Court held that: (1) "borrowed-employee status is a legal question to be answered by the courts, subject to subsidiary fact-findings that may be necessary," and (2) "based on the disputed evidence and the absence of fact-findings in W & T's favor, W & T failed to prove its borrowed-employee defense."[48] Absent a change in the law, *Fredieu* will lead to defense counsel in Texas state court cases seeking jury questions on any disputed *Ruiz* factor when asserting a borrowed employee defense under the LHWCA.

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[47] *Id*.
[48] *Id*. at *11.