

T.A.D.C. Construction Law Newsletter

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**Update on Cases Impacting Construction
Litigation**

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***TIC Energy and Chemical, Inc. v. Kevin
Bradford Martin, 2015 WL 127777 (Tex.
App.-Corpus Christi 2015, pet. granted)***

The Corpus Christi Court of Appeals addressed the applicability of the workers' compensation exclusive remedies provision in the case of "owner-controlled insurance program" ("OCIP") in a recent opinion. The plaintiff Martin was an employee of Union Carbide Corporation, and suffered injuries while attempting to service heavy equipment at Union Carbide's Seadrift facility. Unfortunately, the injuries necessitated the amputation of Martin's leg. Martin made a claim for, and received benefits, under Union Carbide's workers' compensation insurance policy, which was an OCIP. Subsequently, he sued TIC, a subcontractor for the Seadrift facility for negligence and damages related to his personal injuries. TIC filed a traditional motion for summary judgment asserting the exclusive remedies provision of the Texas Workers' Compensation Act. See Texas Labor Code Ann. §408.001. While the trial court denied the motion, the trial court did grant TIC permission to appeal the ruling on the interlocutory basis.

On appeal, the Corpus Christi Court of Appeals focused on the text of §406.123 of the Texas Workers' Compensation Act which allows a general contractor and

subcontractor to agree to a comprehensive insurance program whereby both entities' employees are covered by the same workers' compensation insurance policy. Under those circumstances, the general contractor becomes the employer of the subcontractor and the subcontractor's employees only for purposes of the workers' compensation laws of Texas.

By contrast, §406.122 of the Texas Labor Code provides that a subcontractor and the subcontractor's employees are not employees of the general contractor for purposes of the workers' compensation act if the subcontractor is operating as an independent contractor. The plaintiff/appellee argued on appeal that it could not be the employee of TIC, because §406.122 provides that the employees of independent contractors are not employees of the general contractor. By contrast, TIC argued that §406.123 of labor code specifically contemplates a comprehensive insurance program which provides "deemed employee" status to co-insureds under the comprehensive insurance program. The Corpus Christi Court of Appeals determined that the two sections "irreconcilably conflict." Procedurally, the Court noted that TIC did not present the alleged irreconcilable conflict to the trial court in its motion for summary judgment. Likewise, it noted that TIC's motion did not mention §406.122 at all. Therefore, the Court of Appeals refused to resolve the conflict between the statutes, because it determined that issue was not before the trial court. The Court held that TIC did not meet its summary judgment burden and affirmed the denial of the motion for summary judgment. As discussed below, this issue is now before the Texas Supreme Court.

***Therold Palmer v. Newtron*, No. 09-15-00248-CV (Tex. App. – Beaumont) (February 18, 2016)**

Plaintiff Palmer was employed by Motiva, and was injured in the course and scope of his employment on September 26, 2013. The injury allegedly occurred when a Newtron employee stepped on him while descending on scaffolding. Palmer filed a traditional negligence suit for his personal injuries against Newtron. Newtron filed a traditional motion for summary judgment asserting that Newtron and Motiva entered into a procurement agreement for services under which Motiva provided workers' compensation insurance and employers' liability insurance through a rolling contractor insurance program ("RCIP") which covered Newtron and its employees working in the Motiva plant in Port Arthur, Texas. That same policy provided insurance for all of Motiva's employees, including the plaintiff. Newtron subsequently argued that this RCIP's workers' compensation coverage was the exclusive remedy for Palmer's claims for personal injury.

In its response to the motion for summary judgment, Palmer claimed Newtron was not his employer, and therefore it could not establish it was entitled to the exclusive remedy defense of the Texas Workers' Compensation Act. In fact, Palmer cited *TIC Energy and Chemical Inc. v. Martin*, 2015 WL 127777 (Tex. App. – Corpus Christi, January 8, 2015, petition granted), in which the Corpus Christi Court of Appeals concluded that comprehensive insurance policies for workers' compensation insurance like RCIPs do not create a scenario in which independent contractors, employees or employees are all insured under such policies. Consistent with the *TIC Energy* opinion, Palmer argued that Texas Labor Code § 406.122(a), (b) and §406.123(a), (e) of the Texas Labor Code

irreconcilably conflict. The trial court, in granting summary judgment to Newtron, rejected Palmer's argument.

On appeal, the Beaumont Court of Appeals affirmed. In construing the Texas Labor Code's provisions with respect to workers' compensation, the Beaumont court interpreted §406.122 of the Labor Code, which indicates that independent contractors and their employees are not employees of a general contractor, by construing this section in harmony with §406.123. Specifically, the Court of Appeals ruled that §406.123 permits general contractors and subcontractors to enter into written agreements, pursuant to which the general contractor agrees to provide workers' compensation insurance contractor to the subcontractor and the subcontractor's employees. When this takes place, the general contractor becomes the employer of the subcontractor and the subcontractor's employees. See Texas Labor Code Ann. §406.123(e).

Applying the principles of statutory construction where provisions are to be interpreted in harmony, the Court concluded that §406.122(b) addresses the relationship between a general contractor and subcontractor generally, while §406.123 contemplates a specific circumstance where the general contractor and subcontractor agree to a comprehensive workers' compensation insurance program. Accordingly, Newtron was entitled to the benefit of the exclusive remedy provision of the Texas Workers' Compensation Act and the summary judgment was affirmed. In doing so, the Court noted that the *TIC Energy* petition for review was granted by the Texas Supreme Court on December 18, 2015. Since that time, in February 2016, the case was orally argued and submitted to the Texas Supreme Court. Therefore, any conflicts between the *Palmer* opinion of the

Beaumont Court of Appeals and the *TIC Energy* opinion of the Corpus Christi Court of Appeals are soon to be resolved by the Texas Supreme Court.

***Dallas Drain Company, Inc., et al. v. Kevin Welsh, et al.*, No. 05-14-00831-CV (Tex. App. – Dallas) (July 8, 2015)**

The Dallas Court of Appeals recently addressed two issues which frequently are litigated in construction defect claims. First, the Court addressed the issue of whether home owners can pursue direct claims against a subcontractor, with no contractual relationship, despite the economic loss rule. Additionally, the Court addressed whether home owners can bring breach of implied warranty claims against a subcontractor with no contractual relationship.

The original plaintiffs were owners of a residence in Highland Park, Texas. They sued the original home builder and its subcontractor, Dallas Drain, for claims arising from original construction in the year 2000. The plaintiffs bought the residence from subsequent owners of the residence in 2013. Shortly after purchasing the home, the underlying plaintiffs learned the sanitary sewer line to the residents had settled and sagged causing the sewer line to backup. A plumber hired to rectify this issue discovered the sump pump was improperly connected to the sewer line, instead of properly connected to the storm water drainage line. This allegedly violated a Highland Park city ordinance. The plaintiff's damages model was for the cost of repairs to connect the sump pump directly to the storm water drainage system.

After filing suit, and after Dallas Drain failed to respond to certain requests for admissions, the plaintiffs below moved for summary judgment on their affirmative claims, and that motion was granted. Dallas

Drain appealed, asserting several procedural and substantive issues. The Dallas Court of Appeals reversed the summary judgment in favor of the plaintiffs, specifically analyzing whether plaintiffs had a viable negligence claim and a viable claim for breach of implied warranties against Dallas Drain.

Turning to the first issue, the Dallas Court of Appeals noted that the economic loss doctrine applies to negligence claims. It noted that the economic loss rule generally precludes recovery in tort for economic losses arising from a party's failure to perform under a contract when harm consists only of the economic loss of a contractual expectancy. It was important in the analysis of the Court of Appeals that there was no personal injury or property damage alleged, other than repairing the sump pump to the condition it should have been under the original contract. Absent physical property damage or personal injury, the Court determined that the plaintiffs were not entitled to judgment as a matter of law in the negligence claim, and further stated that the negligence cause of action against Dallas Drain was barred by the economic loss doctrine.

On the second issue, the Court noted that there was no evidence that the home was not habitable, and also noted that the plaintiffs were not the original home owners. Moreover, the plaintiffs below had not contract with Dallas Drain. For each of these reasons, the Court resolved the implied warranty of habitability claim in favor of Dallas Drain. With respect to the implied warranty of good and workman-like performance, the Dallas Court of Appeals noted that many intermediate appellate courts had previously held that a property owner may not recover from a subcontractor with whom the owner has no direct relationship under a theory of implied warranty. The Dallas Court of Appeals did

not address the fact that the Texas Supreme Court has never addressed that issue directly. Nonetheless, relying on its sister appellate courts, the Dallas Court of Appeals reversed the trial court's summary judgment for the underlying plaintiffs, and remanded the case for further proceedings.

***Zbranek Custom Homes Ltd v. Joe Allbaugh*, 03-14-00131-CV (Tex. App. – Austin) (December 23, 2015)**

In this case, the original home builder was sued by its clients' tenants after a fire caused by a defective fireplace damaged personal property of the tenants. After a jury trial, the jury found that the original home builder was negligent and awarded damages of \$651,396 for the actual value of their personal property and \$73,603.74 for reasonable costs of repair to their personal property. The trial court rendered a judgment in favor of the tenants and against the original home builder, based upon the jury verdict. The home builder appealed.

On appeal, Zbranek, the home builder argued that Texas law does not impose a duty on home builders to third party tenants like the plaintiffs. Specifically, the builder cited *Black + Vernooy v. Smith*, 336 S.W. 3rd. 877, 882 (Tex. App. – Austin 2011, petition denied). The *Black + Vernooy* case held that an architect's contractual duty to a home owner did not extend to third parties. The Court of Appeals looked instead to a recent Texas Supreme Court case, *Chapman Custom Homes, Inc. v. Dallas Plumbing Company*, 445 S.W. 3rd 716, 718-719 (Tex. 2014) where the Supreme Court held that negligent performance of a contract which proximately injures a non-contracting party's property or person is a viable negligence claim. This is because there is a common law duty to perform a contract with

care and skill. The Court then analyzed whether there is sufficient evidence that Zbranek exercised control over the construction of the fireplace so as owe a duty of reasonable care to the tenants.

The testimony introduced at trial indicated that the owner of the company made the decision to install an Isokern firebox rather than the metal-insert type called for in the original construction plans. He also admitted that he did so without consulting the original architect. The builder further testified that his company supplied all the raw materials and framing supplies for the home construction, which would have included the motor required to complete installation of the fireplace after the Isokern unit was delivered and assembled. The owner also testified he was aware that combustible materials were within eight inches of the fireplace opening, and that he specifically inspected the area above firebox at the time of construction because he knew how important it was to avoid gaps through which hot flue gasses could escape other than through the intended chimney. There is also evidence that Zbranek was informed on two separate occasions by the fireplace manufacturer of the importance of following the recommended framing instructions, and that Zbranek did not provide these instructions to the individuals who reframed the fireplace.

In light of the evidence that Zbranek exercised control over the construction of the fireplace, the Court of Appeals concluded that the trial Court did not air concluding that the home builder owed a legal duty to the tenant plaintiffs in this case. The judgment in favor of the plaintiffs was affirmed.