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Update on Cases Impacting Construction Litigation

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TIC Energy and Chemical, Inc. v. Kevin Bradford Martin, No. 15-0143 (June 3, 2016)

The Texas Supreme Court addressed the applicability of the workers' compensation exclusive remedies provision in the case of "owner-controlled insurance programs" ("OCIP") or "contractor controlled insurance programs ("CCIP") in its recent opinion styled *TIC Energy & Chem., Inc. v. Martin,* No. 15-0143 (June 3, 2016). In the case below, *TIC Energy and Chemical, Inc. v. Kevin Bradford Martin*, 2015 WL 127777 (Tex. App.-Corpus Christi 2015, pet. granted), 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. 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 enrolled in the OCIP for negligence and damages related to his injuries. TIC filed a traditional motion for summary judgment asserting the "exclusive remedies" defense 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 an interlocutory basis.

On appeal, the Corpus Christi Court of Appeals focused on the text of §406.123 of the Texas Labor Code, 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. TIC argued that §406.123 of the 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.

The Texas Supreme Court granted Petition for Review, and reversed. In reversing the Corpus Christi Court, the Texas Supreme Court found no irreconcilable conflict in the Texas Labor Code. The Supreme Court noted that TIC produced evidence of a written agreement that extended workers' compensation insurance coverage under the OCIP to TIC and its employees. TIC alleged that 406.123(a) of the Labor Code provides a permissive exception to 406.122 of the Labor Code, and results in "comprehensive coverage of workers at a single site in pursuit of a common objective, and therefore extends the Workers' Compensation Act's benefits and protections both vertically and horizontally among multiple tiers of contractors that may be working side-by-side at a job site." The Texas Supreme Court analyzed the applicability of Sections 406.122 and 406.123 of the Labor Code, and stated that "406.123 in turn provides for an election by which a general contractor may become a statutory employer by agreeing, in writing, to provide workers' compensation insurance to the subcontractor." The Texas Supreme Court ultimately agreed with TIC and held that "TIC is entitled to rely on the Workers' Compensation Act's exclusive-remedy defense as Martin's co-employee," and reversed and rendered in favor of TIC on its affirmative defense under section 408.001 of the Workers' Compensation Act.

***Centerpoint Builders G.P., L.L.C., et al. v. Trussway, Ltd.,* No. 14-0650 (June 17, 2016)**

Ever since the *Fresh Coat v. K2* decision a few years ago, which held that EIFS subcontractors are entitled to statutory indemnity from manufacturers in products liability claims, many Texas lawyers assumed that the same rights would apply to general contractors. 318 S.W.3d 893 (Tex. 2010). The key issue is whether a contractor qualifies as a "seller" in the products liability context under the Texas Product Liability Act, or Ch. 82 of the Civil Practice and Remedies Code. In a decision released June 17, 2016, the Texas Supreme Court determined that despite its holding in *Fresh Coat,* general contractors sell services, not products. Accordingly, the broad statutory right to indemnity is not available to them. Oklahoma has an identical statute, so this opinion may have implications there.

This case arose when an individual named Merced Fernandez, working for the installer of wooden roof trusses on apartment project, was injured when a truss broke, causing him to fall 8-10 feet. Fernandez sued the truss installer, the truss manufacturer (Trussway), the sheetrock installer, and the general contractor on the project, Centerpoint. Plaintiff alleged various negligence and premises liability theories, as well as products theories relating to the trusses themselves. Fernandez settled with each defendant. Centerpoint filed a cross-action against Trussway for statutory indemnity under Chapter 82 of the Texas Civil Practice and Remedies Code. Centerpoint moved for summary judgment on its indemnity claim and prevailed at the trial court. The trial court held that as a matter of law, Centerpoint was a "seller" under Chapter 82. On appeal, the Beaumont Court of Appeals reversed, holding that Centerpoint did not fit the statutory definition of a seller and was not eligible to seek indemnity. The Texas Supreme Court granted Centerpoint's petition for review. After briefing and argument, the Texas Supreme Court affirmed the appellate ruling which reversed the trial court's summary judgment. In doing so, the Supreme Court acknowledged that Chapter 82 has a broad statutory grant of indemnity from a

manufacturer to a seller in a products liability action. However, the Supreme Court emphasized that to be eligible for this broad indemnity, one must qualify as a "seller." The Act defines a "seller" as a "person who is engaged in the business of distributing and otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption, a product or any component part thereof."

In analyzing the status of general contractor, the Texas Supreme Court was persuaded by Trussway's argument that general contractors sell construction services, not building materials. The Texas Supreme Court distinguished its previous holding in *Fresh Coat* which provided that the subcontracting installer of synthetic stucco on a construction project is a "seller" under Chapter 82. A distinction – according to the Court – is that there was testimony in that case that the installer was in the business of selling the product in addition to installing it. Moreover, the testimony in *Fresh Coat* was uncontroverted that the installation was in accordance with the manufacturer's instructions.

Moreover, the Court analyzed earlier cases of strict products liability in which it held that general contractors could not be liable under a products theory in strict liability. Given that the Texas Legislature used the same definition of "seller" in Chapter 82 as the Texas Supreme Court has used in its products liability jurisprudence, the Court found these cases persuasive. Similarly, the Court noted that Centerpoint's contract with the owner described the work as "the construction and services required by the contract documents." While the "work" under the project included materials, the Court determined those materials were ancillary to the services being provided. Accordingly, Centerpoint was not eligible for Chapter 82 indemnity.

The Court left open the possibility that other contractors may be eligible for such indemnity by writing that "some contractors may engage in the business of selling both products and services, [but] the record is devoid of evidence that Centerpoint was doing so here." Therefore, in future litigation, lawyers for general contractors should take a look at the contract language to determine if there is an argument that the sale of materials was on equal footing with the sale of construction services. Otherwise, it would appear that there is little hope for products liability indemnity to general contractors under Chapter 82.

***Ineos USA, Inc., v. Elmgren,* No. 14-0507 (June 17, 2016)**

In the latest of what has been a series of opinions interpreting Chapter 95 of the Texas Civil Practice and Remedies Code, the Texas Supreme Court both broadened and narrowed the scope of the protection of the statute. The case arose in June 2010 when the individual plaintiff, Mr. Elmgren, was injured while working for Zachary Industrial, an independent contractor providing maintenance services at Ineos USA's petrochemical plant in Alvin, Texas. After being advised that a "sniff test" indicated that no gas was present in the section on which he was working, Mr. Elmgren and a co-worker removed first one, then two, valves. Upon removal of the second valve, a burst of gas exploded out of the pipe, burning Mr. Elmgren's torso, neck and face. Mr. Elmgren and his wife filed suit against Ineos and Jonathan Pavlovsky, an Ineos employee alleged to be the "furnace maintenance team leader." The theory of the case was that a leaky pipe valve several hundred feet away from the valve on which Elmgren was working

caused gas to enter the pipes, resulting in the explosion. Significantly, the Elmgrens alleged premises liability theories, active negligence theories, negligent failure to warn, and that the defendants acted with reckless disregard for the dangers on the premises.

At the trial court, both Ineos and Pavlovsky filed motions for summary judgment asserting that Chapter 95 of the Texas Civil Practice and Remedies Code protected them from liability from all of the Elmgrens' claims. In response, the Elmgrens argued that the summary judgment evidence precluded the application of Chapter 95 and further argued that Chapter 95 did not apply to those claims not arising from premises liability, and that Chapter 95 did not protect Pavlovsky because he did not qualify as a property owner, as an employee of Ineos. The trial court granted defendants' motions on all claims and the Elmgrens appealed. The intermediate Court of Appeals affirmed the non-premises claims as to the summary judgment, but reversed the judgment as to the non-premises negligence claims. Additionally, the court reversed the summary judgment on all claims against Pavlovsky, holding that Pavlovsky failed to establish that Chapter 95 protected him as the property owner's employee.

The Texas Supreme Court granted both Ineos' and Pavlovsky's petitions for review. In its final opinion, the Supreme Court determined that Chapter 95 protects the property owner from liability and damages against all claims, unless the owner retained some control over the work and had actual knowledge of the danger or condition resulting in the injury. Therefore, the Court of Appeals' reversal of the summary judgment on the non-premises claims was reversed and the trial court's original summary judgment affirmed as to Ineos. In doing so, the Supreme Court ruled that Chapter 95 should be and has been construed broadly and not limited to premises claims.

With respect to the claims against Pavlovsky, the Supreme Court opined that Pavlovsky did not quality for protection of Chapter 95 because he did not qualify as a "property owner" under the definition of the statute. The Supreme Court acknowledged that many intermediate appellate courts and federal district courts had reached the opposite conclusion and applied Chapter 95 to the employees of premises owners. However, the Supreme Court correctly noted that all those opinions cited the *Fisher v. Lee and Chang Partnership* case, 16 S.W.3d 198, 202-03 (Tex.App.-Houston [1st. Dist.] 2000, pet. den.), which was merely an intermediate appellate court opinion. The Supreme Court noted that the *Fisher* court did not analyze the statute of Chapter 95 and determined that it had come to the incorrect conclusion. It should be noted that the Supreme Court rejected Pavlovsky's argument that he should be the beneficiary of summary judgment because a contrary result would result in Ineos being liable under *respondeat superior,* despite the application of Chapter 95. The Supreme Court rejected that contention, holding that employees could be held liable, despite Chapter 95, and their employers would not be liable under a *respondeat superior* theory because Chapter 95 would protect the employers even against such claims. Therefore, the claims against Pavlovsky were remanded to the trial court for further proceedings.