CONSTRUCTION LAW – SUPPLEMENT

Since the Construction Law paper has gone to print, the Texas Supreme Court has issued a trio of opinions relating to our subject that merit their inclusion.

1. 59 Sup Ct J 1143 – **First Texas Bank v Carpenter**– – In this case, the Texas Supreme Court answers the question of when a person or company is a "contractor" for purposes of the landowners' limitations of liability under Chapter 95 Tex Civ Prac & Rem Code.

2. 59 Sup Ctr J 1174 – **Centerpoint Builders GP, LLC. Et al vs Trussway, Ltd** – Texas Supreme Court outlines the considerations used to decide when a builder is also a seller of the goods it uses in construction of the building for the owner as that determines the application of Chapter 82, Civ Pac & Rem Code and the rules that require a "manufacturer" to indemnify a "seller" fo various products liability claims.

3. 589 Sup Ct L 1278 – **Ineos USA et al v Elmgren et al** – Texas Supreme Court outlines several new rules for Texas respecting Chapter 95, Civ Prac & Rem Code which protects owners against liability to contractors, subcontractors and their employees under certain circumstances.

First Texas Bank v. Carpenter, 59 Sp Ct J. 1143 (June, 2016)No. 15-0172. (Opinion of Court of Appeals not yet reported.)

In this case the Supreme Court answers the question of when a person or company is a "contractor" for purposes of the landowner's limitation of liability in Tex. Civ. Prac. & Rem Code Chapter 95, and what types of work limit the owner's liability under the statute.

Chris Carpenter was a roofing repair contractor who had done repair work in the past for First Texas Bancorp d/b/a First Texas Bank. After a hailstorm, the Bank asked him to investigate a leak. He found hail damage, and the Bank then asked him to show the hail damage to an insurance adjuster. Although there was no written contract between the Bank and Mr. Carpenter at the time, they had agreed to negotiate the terms of a contract based upon what the insurance would provide. While showing the insurance adjuster the damage, Mr. Carpenter fell, allegedly because of a defective ladder provided by the Bank. Mr. Carpenter then brought this negligence action against the Bank.

The Bank filed motions for traditional and no-evidence summary judgment on the grounds that Mr. Carpenter was their "contractor" under Chapter 95, Tex. Civ. Prac. & Rem. Code, which operates to limit a property owner's liability for the acts of independent contractors. Mr. Carpenter responded that he was merely a business invitee at the time of the accident, not a "contractor" under the statute, as he and the Bank had no written or binding contract at the time.

The trial court granted the Bank's motions for summary judgment. On Mr. Carpenter's appeal, the Court of Appeals said: ". . . [T]he parties had not entered into a contract and, it follows, Carpenter could not be a party to that non-existent contract and, therefore, he was not a 'contractor' as the term is ordinarily used." The Court of Appeals reversed the trial court's summary judgment in favor of the Bank and remanded Mr. Carpenter's claims for further proceedings.

The Supreme Court says: "Chapter 95 does not define 'contractor', so we give the word its ordinary meaning unless a more precise meaning is apparent from the context of the statute. * * * Chapter 95 is not a statute regulating contracting in general but one prescribing the conditions under which an owner is liable to someone working on improvements to real property. Its applicability turns on the kind of work being done, not on whether an agreement for the work to be done is written, or formal, or detailed."

The Supreme Court continues: "As used in Chapter 95, a 'contractor' is someone who makes improvements to real property. Carpenter was, by his own admission, the Bank's roofing contractor. As a matter of law, he was a 'contractor' under Chapter 95. The court of appeals erred in concluding
that Chapter 95 was, for that reason, inapplicable."

The Supreme Court then says, however: "[The Court of Appeals] did not reach Carpenter's argument that Chapter 95 is also inapplicable because he was not injured while performing any of the work described in the statute. * * * . . . Chapter 95 does not cover everyone injured while working on real property; it

expressly covers only contractors, subcontractors, and their employees 'who construct[], repair[], renovate[], or modif[y] an improvement to real property". The statute does not apply to one injured apart from such work."

The Supreme Court continues: "Had the Bank hired Carpenter to fix the roof, and a necessary first step was demonstrating hail damage to the adjuster and obtaining insurance proceeds, then he would have been engaged in repairing or modifying the roof, an improvement to real property. But the evidence does not come close to establishing those things. Rather, the evidence fairly shows that the Bank had never fully decided what, if any, repairs to make to the roof before Carpenter was injured. Had the insurance claim been denied, the Bank might have decided not to make any roof repairs."

The Supreme Court continues: "The record does not establish that the Bank had retained Carpenter to perform work covered by Chapter 95 at the time he was injured. Whether Chapter 95 applies remains in dispute, and the trial court erred in granting summary judgment for the Bank." The Supreme Court concludes: ". . . [T]he case must be remanded to the trial court for further proceedings. The judgment of the court of appeals is therefore *Affirmed*."

Tex. Civ. Prac. & Rem. Code § 95.001

Sec. 95.001. Definitions.

In this chapter:

(1) "Claim" means a claim for damages caused by negligence, including a counterclaim, cross-claim, or third party claim.

(2) "Claimant" means a party making a claim subject to this chapter.

(3) "Property owner" means a person or entity that owns real property primarily used for commercial or business purposes.

Sec. 95.002. Applicability.

This chapter applies only to a claim:

(1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and

(2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

Sec. 95.003. Liability for Acts of Independent Contractors.

A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:

(1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
(2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Centerpoint Builders GP, LLC et al. v. Trussway, Ltd, No. 14-0650 (Opinion of Court of Appeals, 436 S.W.3d 882.) Opinion at page 1295.

In this products liability case the Supreme Court announces new rules for Texas regarding how to determine who is a "manufacturer," and who is a "seller," for purposes of applying the products liability indemnity provisions in Chapter 82 of the Texas. Civ. Prac. & Rem. Code.

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Merced Fernandez was working as an independent contractor, on an apartment construction project, when he stepped on an uninstalled wooden truss, lying on its side, above the future second floor of the building. The truss broke, and he suffered a fall. Mr. Fernandez was rendered paraplegic by the accident, and this suit resulted, wherein he sought damages from several parties, including Trussway, the manufacturer of the truss, and Centerpoint Builders GP. LLC et al. (Centerpoint) the general contractor on the apartment project. All the defendants settled with Mr. Fernandez. Trussway then brought claims against Centerpoint and Centerpoint brought claims against Trussway. Both parties sought indemnity from the other party, pursuant to Chapter 82 of Tx. Civ. Prac. & Rem. Code, which defines what constitutes a "seller" and a "manufacturer" of a product, and the duty of the manufacturer to indemnify the seller for various products liability claims. Both parties moved for partial summary judgments on the issue of indemnity, and which party was a seller or manufacturer.

The trial court held Centerpoint is a "seller" and is eligible to seek indemnity under Chapter 82; denied Centerpoint's motion for partial summary judgment with respect to Centerpoint's entitlement to indemnity; denied Trussway's motion for summary judgment; and granted Centerpoint's motion for summary judgment as to Trussway's crossclaim for indemnity. Both parties joined in an interlocutory appeal.

On that appeal, the Court of Appeals said: "Under the common law, a manufacturer was not required to indemnify a seller of its products unless the manufacturer had been judicially determined to have been negligent. . . . By enacting Chapter 82, the Legislature supplemented the common law and provided a means for an innocent seller to seek indemnification from the manufacturer of an allegedly defective product."

The Court of Appeals reviewed Chapter 82 and said: ". . . [W]e hold that Centerpoint does not fit the statutory definition of a seller; therefore, Centerpoint is not entitled to indemnity from Trussway." The Court of Appeals concluded: "We affirm the trial court's granting of summary judgment in favor of Centerpoint as to Trussway's cross-claim against Centerpoint for indemnity. We remand the cause to the trial court for further proceedings consistent with this opinion."

The Supreme Court says: "Like the court of appeals, our inquiry is limited to Centerpoint's seller status. * * * Whether a general contractor may seek statutory indemnity as a seller of materials used in a building's construction is an issue of first impression in this Court."

The Supreme Court continues: "Centerpoint contends that . . . it is both a product seller and a service provider. It argues that the contract and truss purchase order show that Centerpoint was 'in the business of placing the trusses, for a commercial purpose (fulfilling its contract to build the apartment building), into the stream of commerce for use or consumption.' Trussway responds that Centerpoint, like most builders, 'is 'engaged in the business' of selling construction services,' not building materials."

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The Supreme Court says: ". . . [W]e hold that a general contractor who is neither a retailer nor a wholesale distributor of any particular product is not necessarily a 'seller' of every material

incorporated into its construction projects for statutory-indemnity purposes. Whether a person or entity is 'engaged in the business of' selling a service, selling a product, or doing both . . . regardless of the person's classification as a general contractor or subcontractor—depends upon the specific facts at issue."

The Supreme Court continues: "In this case, evidence that the general contractor agreed to undertake construction of the entire building and to be reimbursed for the cost of the materials (including the trusses) indicates that Centerpoint was selling construction services rather than trusses or other building materials. While some contractors may engage in the business of selling both products and services, the record is devoid of evidence that Centerpoint was doing so here. Instead, the record shows that any sale of the trusses by Centerpoint 'was incidental to its contract to provide the services necessary to construct a building.' . . . . [Thus], Centerpoint is not a 'seller' under the Products Liability Act."

The Supreme Court concludes: "The Products Liability Act defines 'seller' not simply as 'a person who sells' or 'a person who places a product in the stream of commerce,' but as a person 'engaged in the business of' commercially distributing products. We may not ignore the Legislature's prudently selected words, lest we stray from the statute's plain language. Centerpoint has not shown that it is "engaged in the business of" commercially distributing or placing trusses in the stream of commerce. Accordingly, Centerpoint is not a 'seller' entitled to seek indemnity under chapter 82. We affirm the court of appeals' judgment.

Ineos USA et al. v. Elmgren et al., No. 14-0507. (Opinion of Court of Appeals not yet reported.) Opinion TX Sp Ct J Vol 59, at page 1278.

In this case, the Supreme Court announces several new rules for Texas respecting Chapter 95 of the Texas Civil Practice and Remedies Code, which protects property owners against liability to contractors, subcontractors, and their employees under certain circumstances.

Johannes "Joe" Elmgren was employed by Zachry Industrial, Inc. Zachry had contracted with Ineos Olefins & Polymers USA, [Ineos] to perform maintenance services at Ineos' plant. Mr. Elmgren alleges that an Ineos employee, Jonathan Pavlovsky, told him that a certain pipe was clear of explosive gasses, but when he accessed the pipe there was an explosion, and he was severely burned. This suit by Mr. Elmgren et al. [the Elmgrens] resulted, wherein they seek actual damages plus exemplary damages.

Mr. Pavlovsky and Ineos moved for summary judgment pursuant to Chapter 95 Tex. Civ. Prac. & Rem. Code, which applies to certain claims involving property owners, contractors and subcontractors working on improvements to real property. The trial court granted summary judgment favoring Ineos and Mr. Pavlovsky.

On appeal, the Court of Appeals distinguished premises liability claims from other negligence claims and said: "[We] must determine whether chapter 95 applies to automatically bar all such negligence claims. In other words, whether chapter 95 as a matter of law provides the Elmgrens' exclusive remedy against Ineos here. We conclude that it does not." The Court of Appeals continued: ". . . [W]e conclude that chapter 95 defeats a premises-liability claim if the statutory requisites are satisfied but does not as a matter of law reach distinct claims for negligent activity and negligent undertaking.* * * . . . [W]e affirm in part and reverse and remand in part the trial court's summary judgment."

The Supreme Court says: "Chapter 95's definition of 'property owner' contains no language including agents who act on behalf of or hold themselves out as the property owner. . . . In the absence of such language, we must conclude that Chapter 95 does not protect a property owner's agents, and we disapprove of those decisions holding otherwise."

The Supreme Court continues: "Based on Chapter 95's language, we conclude that it does not protect employees, but does protect property owner employers against all claims based on negligence, including respondeat- superior claims based on the negligence of the owner's employees."

The Supreme Court reviews Chapter 95 and says: "We conclude that Vol. 59 THE TEXAS SUPREME COURT JOURNAL 1171 Chapter 95 of the Texas Civil Practice & Remedies Code applies to all categories of negligence claims, including those based on respondeat superior, but Chapter 95 does not apply to claims against an employee or agent of a property owner. We further conclude that the Elmgrens failed to present any evidence to trigger an exception to the protection Chapter 95 provides to Ineos. We therefore (1) affirm the part of the court of appeals' judgment affirming the trial court's summary judgment on the Elmgrens' premises-liability claims against Ineos, (2) reverse the part of the court of appeals' judgment reversing the trial court's summary judgment on the Elmgrens' negligent-activity and negligent- undertaking claims against Ineos and render judgment in favor of Ineos on those claims, and (3) affirm the part of the court of appeals' judgment reversing the trial court's summary judgment on the claims against Pavlovsky and remanding those claims to the trial court."