

**RECENT AND EMERGING DEVELOPMENTS  
IMPACTING THE CONSTRUCTION INDUSTRY**

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CONSTRUCTION LAW

INTRODUCTION

This paper is a summary of recent judicial decisions and other developments that have an impact on construction law.<sup>1</sup> As with all such surveys, the classification of “significant” is with the author, and other cases and developments could be included.

I. SOVEREIGN IMMUNITY

Pending before the Supreme Court are twelve cases involving the question of whether legislative or charter language allowing cities and school districts to “sue and be sued” meant that they could, indeed, be sued. (The issue was said to be in doubt because the Court previously had held in *Travis County v. Pelzel*, 775 S.W.3d 246 (Tex. 2002) that somewhat similar language in the “Presentment Statute” did not effect a waiver of counties’ immunity from suit.)<sup>2</sup> The legislature resolved the question—as it did in response to *Pelzel*—by enacting a clear waiver of immunity from suit. Tex. Local Gov’t. Code § 271.151, *et seq.* (Vernon 2005).

The effect of this legislation on the pending immunity cases is less than crystal-clear, but it effectively waives sovereign immunity claims against local governments. **However, claims against the State and its political subdivisions are still subject to sovereign immunity except for the limited administrative remedies of Chapter 2260 of the Government Code. (Builder Beware!)**

II. MECHANICS’ LIENS

A. LEGISLATION

In 2003, the Supreme Court held that a lien affidavit filed more than thirty days after the general contractor was terminated on a project was ineffective to create a lien against the retainage, even though the project was still under construction, with a different contractor. *Page v. Structural Wood Companies, Inc.*, 102 S.W.3d 720 (Tex. 2003).

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<sup>1</sup>Most of this paper is based on a similar paper delivered by Joe F. Canterbury, Jr. and William Allensworth to the 19<sup>th</sup> Annual Construction Law Conference of the State Bar of Texas Construction Law Section on March 3, 2006.

<sup>2</sup>The federal courts do not share this concern. They rejected the sovereign immunity argument in *Webb v. City of Dallas, Tex.*, 314 F.3d 787 (5th Cir. 2002) and Judge Fitzwater recently declined to reopen the issue in *Hensel Phelps Constr. Co. v. Dallas Fort Worth Int’l Airport Bd.*, Mem Op. 2005 WL 1489932 (N.D. Tex.) because he felt that a majority of Texas courts of appeals continue to apply the holdings of *Webb, supra* and the opinion on which it was based, *Missouri Pacific Railroad v. Brownsville Navigation Dist.*, 453 S.W.2d 812 (Tex. 1970).

Subcontractors felt that the decision worked an inequity on them, particularly if their work was done early in the project, and they had no reason to know that the general contractor with whom they had subcontracted was no longer on the project. The legislature, in Tex. H.B. 629, 79th Leg., R.S. (2005) sought to remedy the situation by requiring an owner to provide written notice to subcontractors who have either sent a lien notice or who have requested notification from an owner that the original contract has been either terminated or abandoned.<sup>3</sup> The persons who are entitled to the notice are the ones who ask the owner, in writing, for it or who sent a notice of unpaid account,<sup>4</sup> notice of retainage,<sup>5</sup> or notice of specially fabricated materials.<sup>6</sup>

If the owner does not provide this notice, the lien claimant will have a lien even though it fails to file its lien within 30 days after work is completed, as long as the subcontractor otherwise complies with the chapter (e.g., timely filing of affidavit by the 15th day of the 4th month after accrual of indebtedness, per Tex. Prop. Code § 53.052 Vernon Supp. 2005). A notice sent in compliance with this new statute is prima facie evidence of the date of termination or abandonment if it is sent within ten (10) days of the original contractor's termination or abandonment. This new law does not apply to residential construction projects.<sup>7</sup>

## B. FRAUDULENT LIENS

In 1997, the legislature, in response to "sham" liens filed against Office Holders by "Republic of Texas" activists, enacted Tex. Civ. Prac. & Rem. Code § 12.001 (Vernon 2002), *et seq.*, which made the filing of a "fraudulent lien" an act which could make the filer liable for the greater of \$10,000.00 or actual damages, together with reasonable attorney's fees and exemplary damages. In *Centurion Planning Corp. v. Seabrook Venture II*, 176 S.W.3d 498 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.), a developer successfully used the statute to obtain statutory damages and attorneys' fees from an engineering firm which had improperly liened his property.

In *Taylor Electrical Services, Inc. v. Armstrong Electrical Supply Co.*, 167 S.W.3d 522 (Tex. App.—Fort Worth, 2005, no pet.), a general contractor successfully used the statute against a materials supplier who had liened one of the contractor's projects. There, the supplier furnished materials, but the contractor deducted \$6,000.00 for its "liquidated damages" allegedly due to the supplier's late deliveries. The supplier filed a lien affidavit for \$12,452.04, which did not reflect a \$7,700.00 payment in the form of a check which the supplier had received, but not cashed. When the case was

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<sup>3</sup> The detailed requirements of the notice of termination are set forth at TEX. PROP. CODE § 53.107(b) (Vernon 2005).

<sup>4</sup> TEX. PROP. CODE § 53.056 (Vernon 1995 & Supp. 2005).

<sup>5</sup> TEX. PROP. CODE § 53.057 (Vernon 1995 & Supp. 2005).

<sup>6</sup> TEX. PROP. CODE § 53.058 (Vernon 1995 & Supp. 2005).

<sup>7</sup> TEX. PROP. CODE § 53.107 (Vernon Supp. 2005).

tried, the jury found that the lien filing was fraudulent, and the court therefore awarded an additional \$10,000.00 penalty against the materials supplier under the statute.

The primary question on the appeal of the award was whether the contractor could fit within the definition of persons authorized to recover damages under Tex. Civ. Prac. & Rem. Code Ann. § 12.003, stated as follows:

- (a) The following persons may bring an action to enjoin violation of this chapter to recover damages under this chapter:
  - (8) in the case of a fraudulent lien or claim against real or personal property or an interest in real or personal property, the obligor or debtor, or a person who owns an interest in the real or personal property.

Tex. Civ. Prac. & Rem. Code Ann. § 12.003(a)(8). Unlike the developer in *Centurion*, *supra*, the contractor was not an owner, but the court found that he nevertheless was an “obligor or debtor” because, under his contract with the owner, he had agreed to indemnify the owner from any claims or liens filed against the project.

*Taylor*, like *Centurion*, is a demonstration that any lien affidavit which the jury or court finds to be incorrect can form the basis for invoking this statute.

### C. SUBSTANTIAL COMPLIANCE

In *Redland v. Southwest Stainless*, 2005 WL 3244323 (Tex. App.—Fort Worth, no pet.), a contractor purchased materials from a supplier but never paid for them. The supplier sent its notice to the payment bond surety via certified mail, but only used regular mail to copy in the contractor, despite the requirement in Tex. Gov’t Code Ann. § 2253.048(a) (Vernon 2000) that the notices be sent by certified or registered mail.

After a bench trial, the trial court entered judgment against the surety, which appealed. In affirming the trial court’s decision, the Fort Worth court held that substantial compliance with the statutory requisites was sufficient, particularly since the notices were timely and were apparently received by the contractor, who in the meantime had gone bankrupt. However, the substantial compliance doctrine does not stretch far enough to cover many errors in lien notice and filing requirements as illustrated by *Wesco Distributing, Inc. v. Westport Group, Inc.*, 150 S.W.3d 553 (Tex. App.—Austin 2004, no pet.) where a notice returned for insufficient postage causing it to be late was not rescued by the doctrine. **Lawyer Beware!**

### III. TRUST FUNDS

#### A. INDIVIDUAL LIABILITY FOR TRUST FUNDS

The Texas Construction Trust Fund Act<sup>8</sup> creates, by operation of law, a trust fund upon “. . . payment of funds under a construction contract to a contractor, subcontractor or supplier. The general contractor or other party receiving such payments, and having control or direction over such payments, is deemed a trustee over the funds it has received.”<sup>9</sup> Section 162.002 of the Act provides the following:

A contractor, subcontractor, or owner or an officer, director or agent of a contractor, subcontractor or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds.

The Act provides for civil and criminal penalties for the misapplication of those funds.

In *C & G, Inc. v. Jones*, 165 S.W.3d 450 (Tex. App.—Dallas 2005, no pet. h.), a trade creditor sued two officers of a general contractor for misapplying trust funds. The officers’ defense was that their company was a wholly-owned subsidiary of another company, and that the parent company dictated to whom the trust funds should be paid. The officers contended that they did not “independently” decide upon the misallocation, that neither of them personally received any of the funds, and that they therefore had no “control or direction” over the trust funds.

The court of appeals disagreed, noting that both of the officers were, indeed, officers of the contractor and that both of them had signatory authority over the checking accounts into which the trust funds were deposited, and wrote the checks from it. The court, therefore, reversed the trial court’s judgment and held both of the officers individually liable to the supplier for the misappropriated funds.

#### B. FACTORING COMPANY NOT A “TRUSTEE”

*Park Environmental Equipment, Ltd. v. Texas Capital Funding, Inc.*, 102 S.W.3d 243 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2003, pet. den. 12/19/03) denied Texas Construction Trust Fund Act applicability to funds obtained by a factoring company for value to the detriment of an unpaid supplier. In this case, a subcontractor purchased goods from the plaintiff and then assigned its accounts receivable to the defendant factoring company, which was then sued by the unpaid supplier. The supplier contended

<sup>8</sup> TEX.PROP.CODE ANN. § 162.001-162.007 (Vernon Supp. 2005).

<sup>9</sup> Wilshusen, Texas Construction Trust Fund act and Bankruptcy Preferences, Construction Law Journal Vol. 1, No. 2, at 43-44 (2003); TEX.PROP.CODE ANN. § 162.002 (Vernon Supp. 2005).

that the funds in the hands of the factoring company were trust funds for suppliers. The factoring company agreed that the supplier was an intended beneficiary under the Act (TEX. PROP. CODE § 162), but that it did not apply to funds in its hands. The Houston Court of Appeals agreed, strictly construing the Act and analogized the parties' positions as follows:

If a construction company uses project payments to buy cars for its officers instead of paying subcontractors, there is no question that the company has misappropriated trust funds under the Act. But it does not follow that the car dealership who received the funds is a party to the fiduciary breach.

102 S.W. 3d at 245

#### IV. INSURANCE

##### CGL INSURANCE COVERAGE

In *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 335 F.Supp.2d 754 (W.D. Tex. 2004), a homebuilder sought coverage under his CGL policy against a homeowner's claim that he had failed to construct the foundation of the home in a good and workmanlike fashion. Although the petition contained allegations of negligence, Judge Yeakel applied the economic loss rule to determine that the homeowners' allegations necessarily should be read as a "contractual breach for construction defects requiring repair or replacement instead of negligence resulting in property damage, [and therefore] the resulting damage for economic loss does not fall within the coverage of the insurance policy." 335 F.Supp.2d at 759. This decision was appealed to the Fifth Circuit, which certified the question of coverage for defective work to the Supreme Court.

In *Archon v. Great American Lloyds Ins. Co.*, 174 SW 3d 334 (Tex. App.—Houston [1st Dist.] 2005, pet. filed), the same Houston court which previously had decided *Hartrick v. Great American Lloyds Ins. Co.*, 62 S.W.3d 270 (Tex. App.—Houston [1st Dist.] 2001, no pet.) held that an allegation that a builder was liable for his subcontractor's negligent work was sufficient to trigger a duty to defend under a CGL policy, expressly declining to follow *Lamar Homes, supra* and its economic loss rule analysis. It left open, however, the question of whether subcontractor negligence would necessarily invoke a duty to indemnify.

While the petition in *Archon* was pending review by the Supreme Court, the Fifth Circuit, to which *Lamar* had been appealed, certified the following questions to the Texas Supreme Court:

1.

When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege an “accident” or “occurrence” sufficient to trigger the duty to defend or indemnify under a CGL policy?

2.

When a homebuyer sues his general contractor for construction defects and alleges only damage to or loss of use of the home itself, do such allegations allege “property damage” sufficient to trigger the duty to defend or indemnify under a CGL policy?

3.

If the answers to certified questions 1 and 2 are answered in the affirmative, does Article 21.55 of the Texas Insurance Code apply to CGL insurer’s breach of the duty to defend?

The case was argued before the Supreme Court on February 14, 2006.

Another important coverage case is *Lennar Corp. v. Great American Ins. Co.*, 2005 WL 1324833 (Tex. App.—Houston [14<sup>th</sup> Dist.]). Lennar Corporation’s subsidiary construction companies built more than 400 homes with synthetic stucco (“EIFS”). Lennar contended that EIFS trapped water which did not drain, causing mold, wood rot, and related problems. Lennar then replaced the EIFS with traditional stucco, repaired resulting water damage, and sought coverage from its insurance carriers. The carriers denied coverage alleging there was no “occurrence” or “accident” involved. After adverse summary judgment rulings denying its declaratory judgment action seeking coverage, Lennar appealed. The Houston Court of Appeals made a thorough analysis of the typical insurance company contention that defective construction and its resulting damages are not covered. The court sided with Lennar holding that defective construction resulting in damage to the insured’s own work can constitute an occurrence as long as the resulting damage was unintended and unexpected.

The *Lennar* case is also interesting on the damages allowed. Despite the conclusion that defective construction constitutes an occurrence, the court held that all of Lennar's repair and replacement accosts were not "damages because of . . . property damage." The court rejected the characterization of overhead costs, inspection costs, personnel costs, and attorney's fees as "damages because of . . . property damage." The insuring agreements provided that the carriers would pay those sums that Lennar becomes "legally obligated to pay" to mean an obligation imposed by law.

The court distinguished between three categories of damages:

- (1) the costs to repair water damage to the homes;
- (2) the costs to remove and replace EIFS as a preventative measure; and
- (3) overhead costs, inspection costs, personnel costs, and attorney's fees.

The court concluded that neither the costs to remove and replace EIFS as a preventative measure constituted "damages because of . . . property damage." As to replacing the EIFS, the court held that despite the fact that Lennar made a good business decision in removing and replacing the EIFS to prevent further damage, there was no evidence that the removal and replacement of the EIFS was necessary; therefore, the costs incurred by Lennar to remove and replace EIFS as a preventative measure were not "damages because of . . . property damage." The court further stated that Lennar must apportion the EIFS-related damages between its costs to remove and replace the EIFS as preventative measure and its cost to repair water damage to homes.

## V. ARBITRATION

### A. PARTIES BOUND BY ARBITRATION CLAUSES

Chief Justice Jefferson, in *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732 (Tex. 2005) did much to clarify the circumstances in which a non-signatory to an arbitration agreement can nevertheless be forced to arbitrate.

There, the general contractor had an arbitration agreement with its subcontractor, but the subcontractor did not have an arbitration clause in its agreement with a second-tier subcontractor. When the general contract was terminated, the contractor and the subcontractor arbitrated their dispute, but the second-tier subcontractor filed suit against the subcontractor for breach of contract, and against the general contractor under a quantum meruit theory.

The contractor moved to either abate the second-tier subcontractor's suit, or to compel it to join the arbitration, even though it had not signed an arbitration agreement.

The court of appeals required the subcontractor to do so, *In re MacGregor (FIN) Oy*, 126 S.W.3d 176 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2003), but the Supreme Court vacated the order, holding that even though a “direct benefits estoppel” would prevent a non-signatory plaintiff seeking the benefits of a contract from simultaneously attempting to avoid the contract’s burdens, such as the agreement to arbitrate, that doctrine did not apply because the second-tier subcontractor’s claims were not on the contract, but rather for quantum meruit. Justice Jefferson concluded that

...Although a non-signatory’s claim may relate to a contract containing an arbitration provision, that relationship does not, in itself, bind the non-signatory to the arbitration provision. Instead, a non-signatory should be compelled to arbitrate a claim only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision.

166 S.W.3d at 741.

One recent case, *Olshan Foundation Repair Co. v. Ayala*, 180 S.W.3d 212, (Tex. App.—San Antonio, pet. filed) has bucked the trend toward enforcement of arbitration agreements. There, a homeowner sued Olshan for the alleged breach of a \$22,650.00 foundation repair contract. Olshan moved to compel arbitration, citing the contractual agreement to arbitrate under the AAA rules, and the trial court granted the motion.

The homeowners then contacted the AAA, which appointed a panel of three engineers to arbitrate the dispute, and sent the parties an invoice for \$63,670.00, of which \$33,150.00 was immediately due from the homeowners [on top of the \$4,130.00 filing fee they already had paid]. They went back to court, which ruled that the cost of the arbitration rendered the agreement unconscionable, and therefore it put the case back on the docket.

Olshan appealed, but a divided San Antonio court of appeals ruled that “the fees to be charged for arbitration of [the homeowners’] claim are, by any definition, shocking.” It therefore held that the trial court did not abuse its discretion when it refused to enforce the arbitration agreement.

This is a significant decision which, if it stands, will affect the arbitrability of many disputes, particularly those involving consumer complaints. The court focused on the amount of the fees in relation to the amount of the contract, rather than the amount in controversy. Since AAA filing fees and the number of arbitrators and, therefore, the cost of arbitration are a function of the claimant’s demand, this decision enables any claimant to allege that the fees are high in relation to the contract price simply by filing an inflated demand.

## B. PROCEDURAL VS. SUBSTANTIVE ARBITRABILITY

In *In re Global Construction Co., LLC*, 166 S.W.3d 795 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2005, no pet. h.), a contractor and the owner had a dispute over the contractor's failure to perform warranty work and alleged extra work. The dispute was submitted to the architect for his decision, and he found against the contractor.

The owner—which had already paid the contractor for some of the extra work—filed suit against the contractor and sought a declaratory judgment, stating that the architect's decision was binding and requested a refund of the money paid for the extra work and the costs of the warranty work the contractor refused to perform. The contractor filed a motion to compel arbitration. The trial court denied the motion, finding that the contractor had waived its right to arbitrate by failing to demand arbitration within the thirty days specified in the general conditions. (§ 4.4.6 of A-201).

The contractor sought mandamus, which the Houston court granted, holding:

The Supreme Court has held that questions of arbitrability fall into one of two categories: issues involving procedural impediments to arbitration, and those involving substantive impediments to arbitration. Issues of notice, time limits, laches, and estoppel—generally any issue requiring the adjudicator to decide if a party has satisfied the prerequisites to compelling arbitration—involve procedural arbitrability. Procedural arbitrability is the province of the arbitrator. Substantive arbitrability, on the other hand, requires the adjudicator to determine whether parties have agreed to arbitrate a given dispute. Substantive arbitrability is the province of the trial judge.

166 S.W.3d at 798.

Because any contractual time limit on a request for arbitration was held to be procedural, the court held that it was for the arbitrator to decide, and granted the mandamus. The court held that whether the procedural issue was waiver or a condition precedent to arbitration made no difference.

## C. SCOPE OF ARBITRATION CLAUSE

The Supreme Court again reiterated its admonition that a court should not deny arbitration “unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue.” *In Re Dillard Department Stores, Inc.*, No. 05-0250 (per curiam, January 27, 2006). The case involved a discharged employee's defamation action. The company and employee had signed an agreement providing for arbitration of claims including personal injuries

arising from termination of employment. Although the clause did not mention “defamation”, the Supreme Court held that defamation claims were “personal injuries”; therefore, compelled arbitration of the claim.<sup>10</sup>

#### D. ARBITRATOR DISCLOSURES

The use of incomplete arbitrator’s disclosures continues as grounds for setting aside an arbitration award. The lengths to which an arbitrator must go in making disclosure seems stretched to the limits by the Fifth Circuit’s opinion in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495 (5<sup>th</sup> Cir. 2006). After receiving a losing award, the attorneys for Positive Software Solutions searched the internet for connections between the arbitrator and counsel for New Century and found that they had both represented Intel in a case seven years ago. On those grounds, the award was set aside by the federal district judge and the Fifth Circuit refused to reverse. Relying on the evident impartiality standard, the court held that the arbitrator should have disclosed the co-counsel relationship seven years earlier.

#### E. AIA FORMS TO DROP MANDATORY ARBITRATION UNDER AAA

The American Institute of Architects (“AIA”) is abandoning mandatory arbitration pursuant to the Construction Industry Rules of the American Arbitration Association (“AAA”), as it revises its forms. The 2007 edition of A-201 will provide the option of arbitration, or litigation, with litigation as the default if neither is checked.<sup>11</sup> The current Design-Build form (A-141, 2004 Ed.) permits selection of any ADR provider the parties may select. It also provides three check type options of “Arbitration, Litigation and Other” in § 6.2 of the contract form. Although AAA arbitration is set forth in § A.4.4.1 of the Terms and Conditions, AAA is easily replaced with another ADR provider in § 6.2.

These changes will result in parties to AIA documents finding themselves in litigation. To avoid this result, unless intended, attorneys must educate their clients on the impacts of the AIA document revisions.

#### F. SANCTIONS FOR FRIVOLOUS APPEAL OF ARBITRATION AWARDS

Sanctions have been imposed for frivolous attempts to set aside an arbitration award. The Seventh Circuit upheld such sanctions in *Cuna Mut. Ins. Society v. Office and Professional Employees Int’l. Union 39*, 2006 WL 647717 (7<sup>th</sup> Cir. 3/16/06) after finding that the “employer’s claims were meritless and unlikely to succeed.”

<sup>10</sup> Citing *Prudential Sec. Inc. v. Marshall*, 909 S.W.2d 896, 899 (Tex. 1995) (quoting *Neal v. Hardee's Food Sys., Inc.*, 918 F.2d 34, 37 (5<sup>th</sup> Cir. 1990)) and *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d at 737.

<sup>11</sup> Howard Goldberg will provide a preview of the 2007 edition of A-201 this afternoon.

## G. AAA TO ADOPT OPTIONAL APPELLATE RULES

AAA is currently considering adopting optional rules for limited appeal of an arbitration award. AAA's National Construction Disputes Resolution Committee ("NCDRC") will review and probably recommend adoption of the optional rules for appeal of cases involving awards in excess of \$500,000. The current draft requires a notice of appeal within seven (7) days of receipt of an award to either a single or three member appellate arbitrator(s).

The rules, when adopted, will be entirely optional and will not apply unless adopted in the contract or in a separate submission agreement prior to the start of the proceedings. The process will be prompt (currently anticipated to be completed with full briefing by all parties in 89 days) and expensive (anticipated \$10,000 deposit per appellate arbitrator plus a filing fee).

AAA already has optional rules for emergency situations in its Commercial Rules (Rules 0-1 to 0-8, "Optional Rules for Emergency Measures of Protection"), which can be adopted for construction projects.

## VI. JOB SITE SAFETY

### A. VICARIOUS LIABILITY

Texas courts continue to use the rubric of premises liability to determine the extent of the duty owed by general contractors to employees of their subcontractors; more specifically, they equate owners with general contractors and hold that neither owes a duty to an independent contractor's [subcontractor's] employee to ensure that the employee safely performs his work, unless the owner [contractor] retains or actually exercises control over the means, methods or details of the [subcontractor's] work. *McClure v. Denham*, 162 S.W.3d 346, 351 (Tex. App.—Fort Worth 2005, no pet.).

In *McClure*, a subcontractor's employee was knocked off a beam by a crane operated by a fellow employee. He collected worker's compensation from his employer, then sued the general contractor on the theory that the general contractor had contractually retained control over fall protection [in its subcontract] under a theory which apparently was belied by the contract. He also alleged that the contractor had retained control by actually exercising it, through scheduling, quality control, and job site safety meetings. The court held that because the general contractor's control was general and supervisory, rather than over the actual activity that caused the employee's injury [the manner in which the subcontractor hoisted and handled the material], the control was insufficient to create a duty to the employee. *McClure*, 162 S.W.3d at 352; see *Koch Ref. Co. v. Chapa*, 11 S.W.3d 153, 156 (Tex. 1999).

The *McClure* court also discussed the extent to which OSHA applies to safety litigation in Texas. OSHA regulations impose a nondelegable duty on contractors to provide for safety at the work site:

The prime contractor and any subcontractors may make their own arrangements with respect to obligations which might be more appropriately treated on a jobsite basis rather than individually. Thus, for example, the prime contractor and his subcontractors will provide all required first-aid or toilet facilities, thus relieving the subcontractors from the actual, but not any legal, responsibility (or, as the case may be, relieving the other subcontractors from this responsibility). In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

*McClure*, 162 S.W.3d at 353; 29 C.F.R. § 1926.16(a) (2000). Nevertheless, *McClure*, citing Texas and Federal precedents and OSHA,<sup>12</sup> held that the violation of this statute neither created an implied cause of action nor established negligence *per se* because “Texas courts have held that the common law duties imposed by state law are not expanded by OSHA regulations.” *McClure*, 162 S.W.3d at 353.

## B. OSHCN

Although not a new development, many contractors and attorneys are unaware of the Occupational Safety and Health Consultation Program (“OSHCN”) which is administered by the Health and Safety Division of the Texas Department of Insurance. This program is a source of free safety help and “fine free” safety inspections. A safety consultant inspects the work site and provides a list of problems found with correction advice. An agreed abatement period is established and the contractor only needs to post the list of serious hazards found for three (3) days or until the hazards are abated. No report is made to OSHA, unless an employer fails to correct serious violations within the agreed time period. (If serious hazards are not corrected, they must be reported to OSHA.) The program is available to all Texas employers with less than 500 employees.

Attorneys should advise their clients, particularly smaller companies, of this program. Information is available online at [OSHCN@tdi.state.tx.us](mailto:OSHCN@tdi.state.tx.us) or at 1-800-687-7080.

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<sup>12</sup> Nothing in this chapter shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities, of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment. 29 U.S.C.A. § 653(b)(4) (1999).

## VII. WORKER'S COMPENSATION

The Supreme Court held, in *Wingfoot Enterprises v. Alvarado*, 114 S.W.3d 134 (Tex. 2003), that an employee of a temporary employment agency who is injured while working under the direct supervision of a client company should be able to pursue worker's compensation benefits from either the temporary employment agency or the client company, but not from both.

The decision in *Wingfoot* was premised upon the fact that both the client company and the temporary leasing company had worker's compensation insurance, which barred common law actions against either. In *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473 (Tex. 2005), an injured employee sought and recovered comp benefits through the temporary employment agency, and then brought a negligence action against the client employer, who contended that since under its contract with the temporary employment agency it paid a "mark up" to purchase worker's compensation insurance, and that the agency had indeed purchased such insurance, the worker's comp bar would protect it from liability. Justice Owen—who drafted the opinion in *Wingfoot*, as well—disagreed, holding that the client company would not be covered under the temporary agency's policy unless there was an explicit agreement by the worker's comp provider to do so. Her rationale was that the comp premiums are based upon the client company's experience, rather than that of the temporary employer, and so if the client company wanted to avail itself of worker's comp, it should pay for it, based on its own rating, rather than that of the employment agency.

Accord, *Florez v. No. American Tech Group, Inc.*, 176 S.W.3d 442 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.) (comp a bar to the client company's employee who already had recovered comp benefits from the temporary agency, and because the client company apparently had worker's comp insurance).

The import of this decision is that a contractor may not rely upon a subcontractor's purchase of worker's comp insurance to protect it from negligence claims by the subcontractor's employees—even if it pays for the insurance—unless there is an explicit agreement on the part of the comp carrier to cover the contractor, as well. This is consistent with the court's policy of encouraging the collective purchase of comp insurance by the general contractor. See, cf. *Etie v. Walsh & Albert Co., Ltd.*, 135 S.W.3d 764 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

## VIII. RESPONSIBILITY FOR ADEQUACY OF PLANS AND SPECIFICATIONS

After the Texas Supreme Court answered the certified question on "pass through claims" in *Interstate Contracting Corp. v. City of Dallas*, 135 S.W.3d 605 (Tex. 2004), the case went back to the Fifth Circuit which, in a fact-specific, 29-page opinion, held, in *Interstate Contracting Corp. v. City of Dallas, Texas*, 407 F.3d 703 (5th Cir. 2005), that

“...the Texas Supreme Court would require contractual language indicating an intent to shift the burden of risk to the owner in order to find an owner breached a contract by providing defective plans”, *Interstate Contracting supra* at 720.

The court relied on the holding of *Loneragan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907) [no implied warranty from owner on efficacy of plans] and did not even mention *U.S. v. Spearin*, 248 U.S. 132 (1918) [owner warrants plans and specifications].

The court analyzed the case on both contract and warranty principles. Under its contract analysis, the court held that

In order for an owner to breach a contract by supplying inadequate plans to a contractor, *Loneragan* and its progeny require that the contract evidence an intent to shift the burden of risk of inadequate plans to the owner.

The court reviewed those portions of the contract which it found not to have shifted this risk, and indeed said that the provisions showed that the parties intended to place the burden of risk for inadequate plans on Interstate. The clauses that the court identified, however, appear to be remarkably similar to those rejected by Justice Cardozo in his *Spearin* analysis as being the “usual clauses requiring builders to visit the site, check the plans, and inform themselves of the requirements of the work.” *Spearin, supra*, at 136.

The court also analyzed whether the drawings and specifications constituted a warranty on which the contractor justifiably relied [as the jury so found]. Reversing the trial court, the Fifth Circuit held that the disclaimers in the contract regarding the contractor’s obligation to visit the site, examine local conditions and inform himself by independent research of all the circumstances affecting the cost of doing the work meant that, as a matter of law, Interstate was not justified in relying on any warranty of the drawings, and that without reliance, it could not prevail on its differing site condition claim. (Builder Beware!)

A careful review of the case reveals that implied warranty theories were not the basis of the decision. The court simply construed tough, unambiguous language placing the risk of defective or incomplete contract documents on the contractor who accepted the risk. The case also makes the AIA documents more appealing to contractors. For example, A-201 (1997 ed.) provides:

2.2.3 . . . The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner . . .

3.2.2 . . . The Contractor is not required to ascertain that the Contract Documents are in accordance with applicable laws, statutes, ordinances, building codes . . .

3.3.1 . . . The Contractor shall carefully study and compare the various Drawings and other Contract Documents . . . These obligations are not for the purpose of discovering errors, omissions, or inconsistencies in the Contract Documents . . .

3.2.3 . . . If the Contractor believes that additional cost or time is involved because of the clarifications or instructions issued by the Architect . . .

3.12.10 . . . The Contractor shall not be responsible for the adequacy of the performance or design criteria required by the Contract Documents.

Had these clauses been used, Interstate would have prevailed.

## IX. CONSTRUCTION LITIGATION

### B. SETTLEMENT CREDITS

The Austin Court of Appeals recently handed down a decision, *CTTI Priesmeyer, Inc. v. K&O, L.P.*, 164 S.W.3d 675 (Tex. App.—Austin, 2005, no pet.), involving settlement credits and the “one satisfaction rule” in the construction context. There, the owner sued the general contractor, the architect, and others for cracking in the slab of its building. Prior to trial, everyone but the architect and the general contractor settled. The jury found the general contractor liable for breach of contract and found the architect liable for negligence. The general contractor appealed, arguing that it should have received a credit against its judgment for the settlements entered into by the other defendants.

The evidence indicated that there were multiple factors that contributed to the cracking, including design issues (improper spacing of control joints and insufficient designated concrete strength) and construction defects (misplacement of rebar and use of material other than those called for in the specs).

The general contractor contended that it was entitled to a settlement credit under the “one satisfaction rule,” arguing that because the conduct of both the general contractor and the settling defendants caused a single, indivisible injury of a defective slab, it was entitled to credits against its judgment for all undisputed settlements. The Austin court, rejecting opinions by the Texarkana and Houston (1st Dist.) courts, held

that the one satisfaction rule only applies to damages caused by joint tortfeasors. Since the general contractor breached the contract, it was not a “joint tortfeasor,” and the Austin court upheld the trial court’s denial of any settlement credits.

## B. EXPERT TESTIMONY

An interesting—but unreported—case dealing with the admissibility of expert testimony is *State Farm Lloyds v. Blacklock*, No. 10-04-00018-CV, 2005 WL 2155635 (Tex. App.—Waco, no pet. h.) (mem. op.), a homeowner insurance case brought by the plaintiffs against their homeowner’s insurance carrier for damages to their house that they claimed were caused by a plumbing leak. The insurer had concluded that a portion of the foundation had been damaged by the leak, but that the damage to the rest of the house was outside the “area of influence” of the leak. The insurer therefore offered to pay for the damage in the “area of influence,” but not for the rest of the house.

The homeowners filed suit and hired engineer Jeffrey Lineburger to investigate the conditions. He concluded that the entire area of the home had been affected by the leaks and opined that the only way to fix the problem was to place concrete piers underneath the foundation of the house, effectively changing the slab-on-grade foundation to a structural slab. The court noted that he had recommended similar repairs in each of the 200 other foundation cases in which he had testified, but nevertheless held that the opinion did not violate the “analytical gap test” from *Gammil v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex. 1998) because the expert indeed had some experience in the area, and because he did not base his opinions on unsupported speculation or subjective belief. Consequently, even though the insurer’s experts came to different conclusions as to the cause of the damage, the analysis the expert used to reach those conclusions was, in the opinion of the court of appeals, sufficiently reliable to pass the *Gammil* test.

That did not, however, end the inquiry. The court, citing *E.I. DuPont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549 (Tex. 1995), further considered the additional *Robinson* factor of whether the opinion was formed solely for the purposes of litigation. Although that would not have automatically rendered the opinion unreliable, *Robinson* had held that “when an expert prepares reports and findings before being hired as a witness, that record will limit the degree to which he can tailor his testimony to serve a party’s interest. *Robinson*, 923 S.W.2d at 559.

The homeowner’s expert testimony failed under this standard. The plaintiffs had listed him as an expert before they retained him, gave him authority that he relied upon in giving his opinions, and in a response to a Request for Disclosure written more than a month before he visited the home and three weeks before he was hired, disclosed that he had already concluded the foundation damage was caused by plumbing leaks and that the house would need to be “fully pierced.” Finally, in a deposition taken before trial, he

testified that if a plaintiff's lawyer requests "full piercing," he recommends it, adding that "basically what it amounts to is if they request that I recommend full piercing, I recommend it if the foundation and superstructure are damaged. If they don't recommend it, then I don't." *Blacklock*, No. 10-04-00018-CV, 2005 WL 2155635 at \*8.

The court concluded that his testimony was unreliable and, because there was no other evidence of causation, reversed the judgment of the trial court and rendered judgment that the insureds take nothing.