

A Win for Injured Plaintiffs: Chapter 95 Interpretation Narrowed

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Although the Texas Supreme Court has yet to decide a case interpreting the scope of applicability of Texas Civil Practice & Remedies Code Chapter 95, most intermediate appellate courts have interpreted Chapter 95's scope of protection broadly.

When applicable, Chapter 95 abrogates common law negligence claims and is the contractor's exclusive remedy. It imposes heightened proof requirements for liability to attach, including the property owner's right to control the contractor's work, actual knowledge of the dangerous condition and a failure to warn of the danger.

In a rare wins for plaintiffs, two separate decisions narrowed Chapter 95's scope and excluded from its purview common law claims for negligent activity and negligent undertaking.

However, the first win for plaintiffs was short-lived, as the three-judge panel withdrew the opinion for en banc reconsideration. Houston's First Court of Appeals issued *Oncor Electric Delivery Co. v. Murillo* on March 18, excluding negligent activity claims from Chapter 95's purview. But the panel withdrew it on June 5 pending reconsideration by the court en banc.

The Fourteenth Court of Appeals held as a matter of law on March 20 in *Elmgren v. Ineos USA* that Chapter 95 does not apply to negligent activity or negligent undertaking claims.

Oncor involves an appeal from a jury verdict in favor of Marco Murillo, a demolition contractor electrocuted while salvaging electrical cables from a demolition site. According to the First Court's opinion, Oncor was the easement holder and electricity provider to the demolition site. It had exclusive control and responsibility for disconnecting electricity during the demolition process but didn't de-energize the transformer that electrocuted Murillo. Over Oncor's objection, the only question submitted to the jury was for general negligence.

Oncor contended on appeal that Murillo's exclusive remedy was a premises defect claim under Chapter 95 and that Murillo waived his only claim by failing to submit the proper questions and instructions and by failing to obtain findings on the required elements under a Chapter 95 premises defect claim.

The First Court rejected Oncor's Chapter 95 exclusive remedy argument, noting that the Texas Supreme Court recognizes negligent activity and premises defect claims as independent theories of recovery that fall within the scope of negligence; the distinction is that a premises claim is based on the owner's failure to make the property safe, whereas a negligent activity claim is based on affirmative, contemporaneous conduct by the owner that causes injury. After concluding that the facts were sufficient to establish a negligent activity claim distinct and apart from a premises liability claim, the First Court held that a general negligence charge was sufficient and overruled Oncor's challenge to the jury charge.

On March 20—days after the court released the *Oncor* opinion and prior to its withdrawal—the Fourteenth Court cited *Oncor* in *Elmgren v. Ineos USA* in support of its holding that Chapter 95 does not apply to negligent activity and negligent undertaking claims.

Elmgren is an appeal from a summary judgment dismissal of the Elmgrens' claims against Ineos and one of its employees. According to the background facts set forth in the opinion, Joe Elmgren was working as a contract boilermaker hired to replace valves on a furnace at a plant owned by Ineos. He suffered burn injuries when a valve he was replacing released superheated gas. He and his wife sued Ineos and the Ineos furnace maintenance leader who told Elmgren it was "safe to proceed" with his work.

The defendants filed traditional and no-evidence motions for summary judgment, arguing that they qualified for Chapter 95 protection because the Elmgrens could not satisfy the requisite elements necessary to establish liability under Chapter 95: a right of control over Elmgren's work and actual knowledge of the dangerous condition that caused his injuries.

The trial court agreed and granted summary judgment on all of the Elmgrens' claims, including the claims arising from Ineos' and its employee's role in advising Elmgren it was "safe to proceed."

The Fourteenth Court held that Chapter 95 applied to all claims arising from the condition of the gas improvement system on which Elmgren was working when he was injured and concluded that summary judgment was proper on those claims.

However, the court found that the Elmgrens had sufficiently pleaded claims for negligent activity and negligent undertaking and held that those claims were not subject to Chapter 95's protection. In reaching this conclusion, the court cited the *Oncor* decision and the Texas Supreme Court's recognition that premises liability, negligent activity and negligent undertaking are distinct liability theories.

It also considered its prior determination, albeit offered in dicta in a 2004 opinion, *Dyall v. Simpson Pasadena Paper Co.*, that the Legislature did not intend for Chapter 95 to bar all negligence claims against property owners. In doing so it also recognized that Dallas' Fifth Court of Appeals recently declined to follow the Fourteenth Court's dicta in *Dyall*.

Oncor and *Elmgren* represent a distinct departure from what has traditionally been a broad application of Chapter 95 protections in lawsuits brought by injured contractors arising from allegedly unsafe workplaces. It remains to be seen whether the Texas Supreme Court will take up the issue as it has yet to issue any opinions on the scope of Chapter 95's

applicability. Until it does, this area of the law will remain unsettled and inconsistent among the various appellate jurisdictions.

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