

DELAWARE STRENGTHENS THE EMPLOYER'S DEFENSES IN CONSTRUCTION ACCIDENT CASES**BY: JOHN D. BALAGUER AND TIMOTHY S. MARTIN**

The Delaware Superior Court's recent decision in *Giery v. K&S Drywall, Inc. et al. v. Custom Cabinet Shop, Inc., et al.*, clarifies two issues in construction injury cases. First, Delaware's Workers' Compensation Exclusivity Doctrine precludes third-party claims against an injured worker's employer for contribution and, second, absent a contractual or special relationship, an injured worker's employer has no duty to indemnify a third-party tortfeasor.

In *Giery*, the plaintiff was injured during a construction project. He filed suit against the general contractor and K&S Drywall, which was a subcontractor. K&S Drywall filed a third-party complaint against the plaintiff's employer, Custom Cabinet Shop, for contribution and indemnification. Custom Cabinet filed a Motion to Dismiss based upon the Workers' Compensation Exclusivity Doctrine.

Delaware's Workers' Compensation Act (the Act) provides that the payment of benefits to an injured employee under the Act is the exclusive remedy against the employer; thus, the employer cannot be liable to the employee as a tortfeasor. Under Delaware's Joint Tortfeasor's Act, to maintain a claim for contribution, joint tortfeasors must be liable to the same person asserting the claim. Because Custom Cabinet could not be considered a tortfeasor with respect to its injured employee, the Court held that K&S Drywall's contribution claim was precluded.

Additionally, K&S Drywall argued that an exception to the Workers' Compensation Exclusivity Doctrine permitted their claim for indemnification. K&S Drywall relied on the Delaware Supreme Court's opinion in *Diamond State Telephone v. University of Delaware*, 269 A.2d 52 (Del. 1970) which held that the duty to indemnify could result from an express or implied contractual agreement, where the contract requires the contractor to perform in a workmanlike manner and the contract contemplates a duty to indemnify. In *Diamond State* the Supreme Court held that the duty to perform in a workmanlike manner may be implied from a contractual relationship.

K&S Drywall conceded that there was no contractual relationship between it and Custom Cabinet, but nevertheless asked the Superior Court to expand the exception announced in *Diamond State*. In the absence of any contractual relationship, K&S Drywall asked the court to find an implied obligation between it and Custom Cabinet, which required Custom Cabinet to indemnify K&S Drywall for Custom Cabinet's alleged negligence.

The Court in *Giery* dismissed K&S Drywall's third-party complaint, holding that in order for its third-party claim for indemnification against Custom Cabinet to stand, there had to be a contractual or "special relationship" between Custom Cabinet and K&S Drywall. A "special relationship" typically involves a bailment, which was not at issue in *Giery*. The Court found no prior Delaware cases holding that an implied duty to indemnify existed in the absence of an express or implied contractual relationship. Without any controlling case law in support of K&S Drywall's position, the Court was "unwilling to extend the exception to the exclusivity doctrine beyond its present bounds."

In dismissing the third-party complaint, the Court held that "any claim for indemnity must be based upon a contract, express or implied." Furthermore, the *Giery* court concluded that it is "clear that the [Supreme Court in] *Diamond State* was not endorsing the concept of some undefined 'equitable obligation' to indemnify."

Thus, the *Giery* decision can be relied upon by employers of injured parties in construction accident cases to preclude claims of contribution and indemnification against them, as long as no contractual relationship, express or implied, exists between the employer and the party seeking the third-party claims.

The attorneys of White and Williams LLP's Wilmington, Delaware office stand ready to answer any questions you may have about the *Giery* decision and all construction law related matters.

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