No. 01-23-00704-CV

In the First Court of Appeals

INDUSTRIAL SPECIALISTS, LLC,

Appellants,

v.

BLANCHARD REFINING CO. LLC AND MARATHON PETROLEUM CO. LP,

Appellees.

On Appeal from the 212th Judicial District Court of
Galveston County, Texas
Cause No. 17-CV-1242
The Hon. Patricia Grady, Presiding

BRIEF FOR AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF MANUFACTURERS, AND TEXAS OIL & GAS ASSOCIATION AS AMICI CURIAE SUPPORTING APPELLEES

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INTEREST OF AMICI CURIAE

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing most U.S. refining and petrochemical manufacturing capacity and the midstream companies that move feedstocks and products where they need to go. These companies provide jobs, directly and indirectly, to more than three million Americans, contribute to our economic and national security, and enable the production of thousands of vital products used by families and businesses throughout the nation.

The American Petroleum Institute ("API") represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. API's nearly 600 members produce, process, and distribute the majority of the nation's energy, and participate in API Energy Excellence, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs 13 million men and women, contributes $2.91 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the

leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The Texas Oil & Gas Association is a statewide trade association representing every facet of the Texas oil and natural gas industry including small independents and major producers. Collectively, the membership of TXOGA produces in excess of 80 percent of Texas' crude oil and natural gas, operates over 80 percent of the state's refining capacity, and is responsible for the vast majority of the state's pipelines. In fiscal year 2020, the oil and natural gas industry employed more than 400,000 Texans in direct jobs and paid $13.9 billion in state and local taxes and state royalties, funding our state's schools, roads and first responders.

Texas is the top crude oil and natural gas state in the nation, accounting for 43% of the nation's crude oil production and 27% of its marketed natural gas. U.S. Energy Information Administration, Texas State Energy Profile (July 18, 2024), https://www.eia.gov/state/?sid=TX. Approximately one third of the nation's refining capacity is in Texas, *id.*, and Amici's members include the industry that makes that possible and the many other sectors that depend on that energy. Because of their large presence in Texas, and the complexity of their operations, Amici's members consistently enter into contracts, like the general services agreement at issue in this case, with indemnification provisions governed by Texas law. The ability of sophisticated private parties to negotiate the allocation of risks and potential liability through contract is crucial to the business interests of Amici's members. Amici, therefore,

support the arguments of Blanchard Refining Co. LLC and Marathon Petroleum Co. LP ("the Marathon Plaintiffs"). Amici write separately, in part, to express their concerns that the position taken by Industrial Specialists LLC ("ISI") in this case would massively disrupt reams of private agreements to allocate risks and liability, while making personal injury disputes more difficult to resolve out of court.

SUMMARY OF THE ARGUMENT

Texas law and policy favors the freedom of contract. That includes the freedom of sophisticated parties to negotiate and allocate risks through indemnification. ISI's position attempts to impose limits on contractual indemnification by resorting to inapplicable statutory and common law limits on contribution claims. But those limits do not apply to indemnity agreements between sophisticated private parties.

ISI's express indemnification argument is misplaced. The express indemnification rule requires a party who wants indemnification from its own negligence to say so explicitly in a contract. But that's simply not an issue here, because the Marathon Plaintiffs do not seek indemnification for their own negligence. On the contrary, the contract at hand, like countless other agreements in Texas, expressly limits indemnification to injuries caused by the negligence of a service contractor or third parties while performing work on a facility owner's property. Sophisticated parties enter into contracts like this virtually every day, in part, because they help ensure that service

contractors—whose employees perform maintenance on a facility owner's property but often are shielded from tort claims by their own employees due to workers' compensation laws—remain fully responsible for their own negligence. They do so in full recognition of limitations on contribution and comparative negligence and of the relevant workers' compensation and labor laws.

ISI's position would wreak havoc on contracts across Texas and disincentivize settlements with personal injury plaintiffs. It would encourage indemnitors to refuse to defend any time they believe the indemnitee bears partial responsibility. In turn, indemnitees would refuse to settle with the injured plaintiffs because doing so could eliminate the benefit of their indemnification agreements. As a result, companies would be unable to effectively protect themselves from liability arising out of the acts of a contractor, causing significant disruption in how parties contract with each other. Currently, indemnification provisions allow project owners to shift risk to the contractor, who has the ability to control and manage risk because it employs most of the personnel on site. If owners cannot count on the contractor to protect their interests through an indemnification provision, it will be much more difficult and expensive to enter into contracts. Further, it will likely result in additional litigation due to the need for owners to bring cross actions against contractors.

For these reasons, Amici urge this Court to affirm the trial court's judgment that the indemnity provisions of the agreement between the Marathon Plaintiffs and ISI are enforceable.

ARGUMENT

I. Where Businesses Expressly Agree to Indemnification, Their Agreement Controls Under Fundamental Principles of Contract Law.

Well-established principles of contract law require courts to enforce mutually agreed upon, unambiguous contract terms as written. "Texas strongly favors parties' freedom of contract." *Gym-N-I Playgrounds, Inc. v. Snider,* 220 S.W.3d 905, 912 (Tex. 2007). This includes indemnification, which allows parties "to bargain for mutually agreeable terms and allocate risks as they see fit." *Id*. The freedom of contract is particularly strong where the contracting parties are two sophisticated entities that negotiate at arm's length. *See, e.g., Sundown Energy LP v. HJSA No. 3, Ltd. P'ship*, 622 S.W.3d 884, 889 (Tex. 2021) (*"*The principle of freedom of contract requires us to recognize that sophisticated parties have broad latitude in defining the terms of their business relationship and courts are obliged to enforce the parties' bargain according to its terms." (cleaned up)); *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471, 484 (Tex. 2019).

In fact, indemnification is one of the most common and accepted vehicles for apportioning liability risks in commercial contracts. With few exceptions

specifically identified by the Legislature,[1] Texas courts honor indemnification agreements where they are conspicuous and agreed upon by both parties after fair notice. *See, e.g.*, *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993); *see also Gulf. Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000) (Texas courts construe indemnity agreements under normal rules of contract construction).

Although not at issue here, contracting parties are even free to agree to have one party indemnify the other for the indemnified party's own negligence if they do so expressly. *Ethyl Corp. v. Daniel Const. Co.*, 725 S.W.2d 705, 708 (Tex. 1987). This "express negligence doctrine" protects indemnitors from inadvertently covering another party's negligence due to ambiguous terms or concealed intentions, but it does not prohibit any form of indemnity. *Id.* And it is consistent with Texas's overarching policy favoring the freedom to contract: where two sophisticated parties agree to unambiguous terms, those terms will be honored.

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[1] For example, the Texas Insurance Code expressly bars certain types of indemnification agreements for certain types of construction contracts. Tex. Ins. Code Ann. § 151.102. Similarly, the Texas Oilfield Anti-Indemnity Act voids certain indemnity provisions in contracts relating to oil, gas, and water wells and mines that would indemnify a party against liability caused by the indemnitee's sole or concurrent negligence. Tex. Civ. Prac. & Rem. Code § 127.003. The Legislature knows how to limit indemnification when it wants to, and it has not done so here.

These principles are particularly important to Amici's members. Oil and gas operations, including refineries, and manufacturing facilities involve complicated and expensive equipment that must be safely maintained. Maintenance and repair work often includes risk of injury and business disruption. Contractors regularly supply the labor for this work, which often occurs on Amici's members' property. Because those contractors generally cannot be sued by their own employees injured on the job due to Texas workers' compensation law that provides the exclusive remedy against the employer, *see* Tex. Labor Code Ann. § 408.001, contractor employees will name the operators in lawsuits. Indemnification agreements allow operators and their service contractors to allocate risks between each other and to make sure proper incentives and procedures are in place to manage those risks pursuant to the parties' mutually agreed upon responsibilities.

II. ISI's Position Would Disrupt Countless Contracts, Prevent Many Settlements, and Bog Down the Courts.

ISI's argument relies on inapposite limitations on statutory and common law contribution and comparative fault claims to assert that the Marathon Plaintiffs have no right to enforce the parties' indemnification agreement that ISI negotiated and agreed to. But those contribution limitations do not apply to contractually agreed upon indemnification. ISI's position would ignore established Texas law and disrupt countless contracts between sophisticated parties who have full knowledge of the relevant limitations on

contribution. This, in turn, would severely disincentivize settlements between indemnitees and personal injury plaintiffs.

A. *Beech AirCraft v. Jinkins* governs statutory and common law contribution claims, not contractually agreed upon risk allocation.

ISI mistakenly asks the Court to extend *Beech AirCraft v. Jinkins*, 739 S.W.2d 19 (Tex. 1987)—which addressed statutory and common law contribution claims—to private parties' contractual indemnification agreements. Appellants' Br. at 31-39. *Jinkins* is inapposite. In *Jinkins*, a pilot and a passenger who were injured in a private airplane crash sued Beech Aircraft ("Beech") and other defendants alleging negligence and products liability claims. 739 S.W.2d at 20. Beech settled with the passenger, who had not sued the pilot for his alleged negligence, in an agreement that purported to release Beech and the pilot and to preserve Beech's right to contribution against the pilot. *Id.* Beech counterclaimed against the pilot for contribution, who moved for summary judgment contending that Beech's settlement with the passenger extinguished any right to contribution.

This Court affirmed the trial court's grant of summary judgment for the pilot. The Court held that Beech lacked a claim under Texas's contribution statute, Tex. Civ. Prac. & Rem. Code Ann. § 32.001, because the statute only created claims for "judgment debtors"—"a person against whom a judgment is rendered," *Jinkins*, 739 S.W.2d at 20. (quoting Tex. Civ. Prac. & Rem. Code Ann. § 32.001). Further, the comparative negligence statute, Tex. Civ.

Prac. & Rem. Code Ann. § 33.001, did not create contribution claims against non-settling defendants. *Id.* at 21. While the statute specifically addressed a joint tortfeasor's right to contribution against a party who settled with a plaintiff, it said nothing about a joint tortfeasor's right to contribution against a non-settling party. *Id.* at 22. Thus, the Supreme Court determined that the "legislature did not see fit to create a contribution right in favor of a settling party." *Id.* at 21.

As for Beech's common law contribution claim, the Supreme Court explained that a settling party ordinarily cannot create a common law contribution claim. That is because a party may bring a common law contribution action only if he is held jointly liable for an amount disproportionate to his own liability. And because a party can settle only that portion of the liability for which he is responsible, a settlement that does not include all defendants does not create a common law contribution claim. *Id*. at 21-22.

The Supreme Court specifically explained that its holding under these statutes and common law contribution principles represented an "exception to [the] general rule" that "a cause of action for damages for personal injuries may be sold or assigned." *Id.* And the Supreme Court has since clarified that the Legislature has replaced the common law contribution schemes with statutory schemes. *Sky View at Las Palmas, LLC v. Mendez*, 555 S.W. 3d 101, 107 n.7 (Tex. 2018); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 5 (Tex. 1991), *holding modified on other grounds by Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006).

Jinkins therefore has no bearing on contractual claims for indemnification like the claim at issue here. Texas courts have correctly refused to extend *Jinkins* outside the realm of contribution and comparative negligence claims. *Bennett Truck Transp., LLC v. Williams Bros. Const*., 256 S.W.3d 730, 735 (Tex. App.—Houston [14th Dist.] 2008, no pet.). The *Jinkins* rule, for example, does not apply to an action against a joint tortfeasor for a debt under a contract. *See Peterson v. Dean Witter Reynolds, Inc.*, 805 S.W.2d 541, 553 (Tex. App.—Dallas 1991, no writ). Nor does the *Jinkins* rule apply to assignment of a claim for breach of an insurance contract. *Am. Indem. Co. v. McFarland Ins. Agency, Inc*., No. 05-95-00939-CV, 1996 WL 601706, at *3 (Tex. App.—Dallas Oct. 16, 1996, writ denied) (citing *Hartford Casualty Ins. Co. v. Walker County Agency, Inc.*, 808 S.W.2d 681, 686-87 (Tex. App.— Corpus Christi 1991, no pet)).

For these reasons, the lack of a statutory or common law contribution claim cannot prevent private parties to a contract from enforcing an indemnification clause. Contractual indemnification claims, including claims for proportionate indemnity, are actions to enforce contractual terms that allocate risks and liability. Sophisticated parties often agree to indemnification knowing that they may more favorably allocate risks via contract than by pursuing contribution. And, as the Marathon Plaintiffs note, "[t]he Texas Supreme Court has long recognized that defendants often settle more than their own proportionate fault, making a calculated decision to settle their *risk* of *potential* liability and avoid the hassle, expense, and uncertainty of trial." Appellees' Br. at 40 (citing *Fireman's Fund Ins. Co. v. Com. Std. Inc. Co.*, 490

S.W.2d 818, 824 (Tex. 1972), *overruled on other grounds by Ethyl Corp. v. Daniel Constr. Co.,* 725 S.W.2d 704 (Tex. 1987)).

B. The express negligence doctrine is inapplicable.

ISI argues that the express negligence rule bars indemnification in instances of joint or concurrent negligence. *See* Appellees' Br. at 18-22. The express negligence rule recognizes that indemnifying a party for its own negligence is an extraordinary shifting of risk that warrants express and conspicuous terms in a contract. *Ayers Welding Co. Inc. v. Conoco, Inc.*, 243 S.W.3d. 177, 181 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). "Parties seeking to indemnify the indemnitee from the consequence of its *own* negligence must express that intent in specific terms." *Ethyl Corp. v. Danial Constr. Co.*, 725 S.W.2d 705, 708 (Tex. 1987) (emphasis added).

Here, both parties agree that the contract expressly does *not* indemnify the Marathon Plaintiffs for the Marathon Plaintiffs' own negligence. Rather ISI indemnified the Marathon Plaintiffs, "except to the extent [liability is] caused by or attributable to" Marathon's own negligence. Appellees' Br. at 19. And the Marathon Plaintiffs are not seeking any indemnification for their own negligence. *Id.* at 20.

Accordingly, the express negligence doctrine does not apply. And as the Marathon Plaintiffs note, the Supreme Court came to the same conclusion in a dispute involving nearly identical contract terms. *Id.* at 17-19 (discussing *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 905 (Tex. 2007)).

C. ISI's position incentivizes and rewards breach and will make it more difficult to settle personal injury claims.

Texas law and policy favor voluntary settlements and orderly dispute resolution. *E.g., Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997). ISI's mistaken reading of the law would incentivize indemnitors to refuse indemnification, thereby discouraging settlement. This is perhaps best demonstrated by ISI's actions in this case.

After the injured ISI employees sued the Marathon Plaintiffs, ISI and its insurer rejected the Marathon Plaintiffs' indemnification demand under the agreement. *See* Appellees' Br. at 4. ISI intervened in the suit to assert its workers' compensation lien and was designated a responsible third party. *Id*. at 3-4. The Marathon Plaintiffs and the injured ISI employees engaged in settlement discussions, in which ISI refused to participate, resulting in a settlement between the Marathon Plaintiffs and ISI's injured employees. *Id.* at 5. ISI then renewed its refusal to honor the bargained-for indemnification agreement on the basis that the settlement had forfeited the Marathon Plaintiffs' contractual right. *Id.* at 5-6; *cf.* Appellants' Br. at 32.

If ISI's position were correct, all indemnitors would take this position, refuse to defend, and wait on the sidelines, particularly since indemnitors like ISI are immune from suit by their employees. If the litigating parties settle and there is anything less than a full judgment allocating liability to responsible third parties, indemnitors like ISI have no obligations. Consequently, indemnitees would have a significantly reduced incentive to settle

with the personal injury plaintiffs. Doing so would forfeit their right to obtain indemnification from the indemnitor.

This is contrary to well-established Texas law and policy favoring settlement, and it unnecessarily wastes judicial resources. Sophisticated entities enter into thousands of contracts with indemnification agreements in Texas each year. There are countless settlements that implicate these agreements. ISI's position would grind to a halt the out-of-court resolution of underlying claims implicating indemnification agreements, forcing indemnitees to refuse settlement due to the resulting inability to pursue indemnification absent the indemnitor's participation in a settlement.

ISI's claim that enforcement of indemnity agreements will prove unworkable and spawn "satellite litigation," Appellants' Br. at 39, is nonsensical and belies decades of experience. *See, e.g.*, *Energy Serv. Co. v. Super. Snubbing Servs., Inc.*, 236 S.W.3d 190, 196-97 (Tex. 2007) (recognizing "the significant policy and practical considerations favoring the use of [mutual indemnification] agreements"); *Enserch Corp. v. Parker*, 794 S.W.2d 2, 9 (Tex. 1990) (enforcing contractor's agreement to indemnify owner for injuries to contractor's employees). Initially, the only reason for the "satellite litigation" in this case is ISI's own refusal to honor its contractual indemnity obligation to Marathon. And the trial court saw no difficulty in "cut[ting] through the ambiguity" of the parties' indemnity agreement, *id.* at 21; it correctly held that the agreement "was unambiguous and thus subject to construction as a matter of law," *id.* at 4, and the court was able to apportion responsibility

through a trial. As for ISI's complaint that it should not have to "reimburse Marathon for its tactical decision to limit its risk and avoid trial," Appellants' Br. at 34, that is contrary to ISI's contractual agreement, and it only underscores the perverse incentives created by ISI's position. Nothing prevented ISI from honoring its indemnity agreement and participating in settlement negotiations, and nothing in Marathon's position suggests that it "would still be entitled to a trial to reallocate responsibility" had ISI entered into a settlement. *See* Appellants' Br at 37. It is ISI's position—not Marathon's—that encourages "satellite litigation" by incentivizing indemnitors to shirk their obligations, leaving their indemnitees no choice but to seek redress in court, and ultimately harming business interests across the State.

The best way to protect business interests is to make clear that indemnity contracts will be enforced, consistent with Texas Supreme Court precedent and Texas public policy. Consistent and predictable enforcement of contractual indemnification agreements will provide certainty, allowing parties to allocate risk and manage potential liability in advance, preventing unnecessary litigation, and facilitating resolution of disputes out of court.

PRAYER

The Court should hold that the indemnity provisions of the agreement between the Marathon Plaintiffs and ISI are enforceable and affirm the judgment of the trial court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

As required by Texas Rule of Appellate Procedure 9.4(i)(3), I certify that this brief complies with the typeface and word count requirements set forth in the Rules of Appellate Procedure. This Brief has been prepared using Microsoft Word, in 14-point Palatino Linotype font. This Brief contains 3,323 words, as determined by the word count feature of Microsoft Word, excluding those portions of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

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I hereby certify that a true and correct copy of this document was served on all counsel of record in this case, identified below, on December 4, 2024, electronically through the electronic filing manager in compliance with the Texas Rules of Appellate Procedure:

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