

## **Wilson Elser's Appellate Practice Group Makes Law on the Issue of Partial Contractual Indemnification at the New York Court of Appeals**

In *Brooks v. Judlau Contracting*, Richard E. Lerner (Partner-New York) and Melissa Murphy-Petros (Of Counsel-Chicago) represented the appellant general contractor before the New York Court of Appeals, the state's highest court. The case was briefed by Rich and Melissa, and then argued by Melissa.

The court held as a matter of first impression that New York General Obligations Law § 5-322.1 allows a partially negligent general contractor to enforce a partial contractual indemnification provision against its subcontractor for that portion of damages attributable to the negligence of the subcontractor.

In *Brooks*, plaintiff Stephen Brooks, an ironworker, sued general contractor Judlau Contracting for injuries he sustained from a fall while employed by the company's subcontractor, Thunderbird Constructors. The accident happened during the renovation and restoration of a highway overpass. Judlau filed a third-party action against Thunderbird for contractual indemnification.

In support of its third-party action, Judlau asserted that Thunderbird contributed to the plaintiff's injury because it had control of the workplace and failed to provide him with the safety equipment necessary to prevent his fall.

Summary judgment was granted to the plaintiff on liability pursuant to Labor Law §240(1). The matter then proceeded to a bifurcated jury trial. The liability phase tried the apportionment of fault between Judlau and Thunderbird in the third-party action, and the damages phase tried plaintiffs' damages in the direct action. At the close of all evidence in the liability phase, the trial court granted Thunderbird's motion for a directed verdict on Judlau's contractual indemnification claim on the grounds that Judlau was partially negligent and that G.O.L. §5-322.1 prohibited the enforcement of partial contractual indemnification provisions. The Appellate Division, Second Department affirmed. Judlau and the plaintiff ultimately settled the main action for \$3 million.

The Court of Appeals reversed the dismissal of Judlau's third-party action against Thunderbird. The court remanded the case for a new trial between Judlau and Thunderbird on the apportionment of liability.

By finding that partial contractual indemnification provisions are permissible under G.O.L. §5-322.1, Brooks provides general contractors with a previously unavailable remedy in two frequently recurring scenarios. The first scenario is where the partially negligent subcontractor is plaintiff's employer and the general contractor is prohibited from filing a common law contribution claim against it because plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law §11. The second scenario is where the partially negligent general contractor settles the main action with the injury plaintiff. A common-law contribution claim will not survive the settlement of the main action (G.O.L. §15-108(c)), but a contractual indemnification claim will.

In the trial of apportionment of fault, our client will now be able to seek recovery from Thunderbird based upon Thunderbird's share of fault, notwithstanding that the case against Judlau has been settled.