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Construction and Surety Law

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CONSTRUCTION AND SURETY LAW

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I. INTRODUCTION

DURING late 2005 and throughout 2006, the developments in construction and surety law focused on a wide variety of substantive issues, including the long-awaited decisions by the Texas Supreme Court addressing the ways in which a public entity does and does not waive sovereign immunity in the context of construction projects. The Texas Supreme Court finally decided the issues of waiver by filing suit and of whether city charter language automatically constitutes waiver. Courts of appeals continued to issue opinions on a governmental entity's immunity from suit in the context of a construction dispute.

Courts of appeals also issued decisions regarding the enforceability of arbitration clauses, general construction disputes, mechanic's liens, the statute of limitations, the statute of repose, and insurance coverage in the context of construction disputes.

II. SOVEREIGN IMMUNITY

The issue of sovereign immunity and the waiver of immunity from suit are among the most common subjects for decisions rendered by the Texas courts in the construction context for the last several years. In June 2006, the Supreme Court issued its final decision and ruling on two very important waiver of immunity concepts.

The large number of decisions pending before the supreme court were the result of the large volume of cases addressing immunity from suit following the Texas Supreme Court's decisions during 2001 and 2002. The 2001 opinion in *General Services Commission v. Little-Tex Insulation Company, Inc.*[1] focused on the issue of waiver by conduct and, specifically, the argument by contractors that the state waived immunity by merely accepting the benefits of the contract. In that case, the supreme court concluded that, under the new scheme set forth in Chapter 2260 of the Government Code, "a party simply cannot sue the State for breach of contract absent legislative consent under Chapter 107. Compliance with Chapter 2260, therefore, is a necessary step before a party can petition to sue the State."[2]

The supreme court adopted a consistent approach in 2002 in *Texas Natural Resource Conservation Commission v. IT-Davy*.[3] The issue presented in the case was whether IT-Davy, a general contractor, could sue the Texas Natural Resource Conservation Commission ("TNRCC"), a state agency, for breach of contract, where IT-Davy argued that it had fully performed under its contract, but the TNRCC did not fully pay for services it accepted. The supreme court concluded that merely accepting the benefits of a contract is insufficient to establish waiver.[4] In its conclusion, the supreme court noted its "one route to the courthouse" rule and emphasized Legislative consent.[5] However, the concurring opinion by Justice Hecht, which agrees with the conclusion reached but disagrees with the broad language used by the supreme court, contains perhaps the most significant analysis. Justice Hecht noted that he doubted "whether governmental immunity from suit for breach of contract can be applied so rigidly," but declined to decide any broader issues not presented by the facts of the case.[6]

With these two Texas Supreme Court cases as a backdrop, contractors and public entities continued to focus on arguments that a public entity waives immunity by various types of conduct, and even by the terms of a city charter. The Texas Supreme Court answered all of these questions in 2006.

A. The Supreme Court and Waiver Through Filing Suit

In 2006, the Texas Supreme Court issued its final opinion, following rehearing, in the case of *Reata Construction Corporation v. City of Dallas*.[7] The final decision clarifies Texas law that a public entity does waive immunity from suit by filing its own claims in a court of law, but the scope of that waiver extends only to the monetary sum claimed as damages in

1. 39 S.W.3d 591 (Tex. 2001).
2. *Id.* at 597.
3. 74 S.W.3d 849 (Tex. 2002).
4. *Id.* at 857.
5. *Id.* at 860.
6. *Id.* (Hecht, J., concurring in the judgment).
7. 197 S.W.3d 371 (Tex. 2006).

the public entity's claim.[8]

The claims in *Reata* arose out of a construction accident causing property damage. The City of Dallas issued a license to Dynamic Cable Construction to install fiber-optic cable in a downtown area. Dynamic subcontracted with Reata to drill a conduit. Reata inadvertently drilled into a water main, flooding a residential building. The building owner sued Dynamic and Reata, and Reata filed a third-party claim against the City of Dallas for alleged negligence in misidentifying the location of the water main.[9]

The city filed special exceptions to the Reata claims, asserting that the claims were not within the Texas Tort Claims Act's waiver of immunity. The City also "intervened" to file claims against Dynamic and later amended its plea in intervention to assert claims for damages against Reata. The City then filed a plea to the jurisdiction asserting governmental immunity from suit with respect to Reata's claims. Reata responded to the plea on several grounds, including the contention that governmental immunity did not apply because the City had subjected itself to jurisdiction by intervening in the lawsuit and seeking affirmative relief. The trial court denied the city's plea to jurisdiction, but the court of appeals reversed, holding that the city's intervention in the suit did not waive the city's right to assert subject-matter jurisdiction.[10]

In its first decision, issued in 2004, the Texas Supreme Court affirmed earlier case law regarding waiver of the sovereign-immunity doctrine, as a result of a public entity's decision to invoke the jurisdiction of the courts by filing claims or counterclaims itself. In *Reata Construction Corp. v. City of Dallas*, the Texas Supreme Court concluded that a city waives its governmental immunity from suit by asserting claims for affirmative relief in a lawsuit where it was named as a party.[11] Thus, "the trial court had subject matter jurisdiction over Reata's claims against the City."[12]

The supreme court's holding in the original *Reata* was completely consistent both with the discussion by Justice Hecht in *IT Davy* and with an established line of authority recognizing that where the state invokes the jurisdiction of a court by filing suit, it waives immunity from suit for any claims that are "incident to, connected with, [arise] out of, or [are] germane to the suit or controversy brought by the State."[13]

In its original decision, the Texas Supreme Court properly referred to and followed earlier decisions by itself and other courts in reaching the conclusion regarding waiver, including the decisions in *Anderson, Clayton*

8. *Id.* at 377–78.

9. *Id.* at 373.

10. *Id.* at 373–74.

11. 47 Tex. Sup. Ct. J. 408 (Tex. 2004), *withdrawn*, 197 S.W.3d 371 (Tex. 2006).

12. *Reata*, 47 Tex. Sup. Ct. J. 409.

13. *Id.*; *see* Anderson, Clayton & Co. v. State, 62 S.W.2d 107, 110 (Tex. 1939); State v. Martin, 347 S.W.2d 809, 814 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e).

& Company v. State[14] and *State v. Martin*.[15] In its discussion, the supreme court found no reason to draw a distinction between a governmental entity as plaintiff, and a governmental entity who intervenes to seek affirmative relief. In either case, the supreme court concluded that a governmental entity would subject itself to the jurisdiction of the court and waive immunity.[16]

Following its first opinion in *Reata*, the Texas Supreme Court granted rehearing to the parties. In June 2006, the Texas Supreme Court withdrew its 2004 opinion and issued its new opinion.[17] The new decision essentially follows the original holding, but it clarifies the point that the damages that can be recovered by a contractor in a case where a governmental entity has asserted a claim and waived immunity from suit cannot exceed the amount of the governmental entity's claim against the contractor.[18]

In its decision following rehearing, the Texas Supreme Court devoted much of its discussion to the Texas Legislature's role in establishing both the existence of and any waiver of immunity from suit. The supreme court noted in its decision that it generally deferred to the Texas Legislature to waive immunity because the Legislature is better suited to address the conflicting policy issues involved in both the establishment of immunity and the waiver of immunity.[19] The supreme court also devoted some time in its decision to noting the importance that the Legislature placed upon preserving the management of fiscal matters through the appropriations process, and upon protecting the sovereign from suits for money damages.[20]

Citing its decision from *State v. Humble Oil & Refining Company*[21] and *Kinnear v. Texas Commission on Human Rights*,[22] the supreme court concluded that "no ill [would befall]" a governmental entity by "allowing adverse parties to assert, as an offset, claims germane to, connected with, and properly defensive to [claims] asserted by the governmental entity."[23] Thus, by filing a suit for damages, the City of Dallas left its "sphere of immunity" and became essentially "an ordinary litigant."[24]

With regard to any damages sought by a contractor in excess of the amounts sought by the city, the supreme court held that there was no waiver of immunity, and the trial court did not acquire jurisdiction, unless the Legislature waived immunity in some other way.[25]

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14. 62 S.W.2d 107 (Tex. 1939).
15. 347 S.W.2d 809 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e).
16. *Reata*, 47 Tex. Sup. Ct. J. at 408.
17. *Reata*, 197 S.W.3d at 373.
18. *Id.*
19. *Id.* at 375.
20. *Id.*
21. 169 S.W.2d 707 (Tex. 1943).
22. 14 S.W.3d 299 (Tex. 2000).
23. *Reata*, 197 S.W.3d at 377.
24. *Id.*
25. *Id.* at 377.

This final decision issued in 2006 by the Texas Supreme Court was clearly a limited version of its initial decision, and clearly a reaction to the numerous voices that expressed concern about protecting governmental entities from suits that might result in monetary judgments against the entities. The doctrine announced is more limited than that in the historical cases cited by the Texas Supreme Court, and it clearly was an effort by the supreme court to balance all of the interests before it, rather than to apply the specific waiver doctrine it had articulated in prior cases.

B. The Supreme Court and Waiver Created by City's Counterclaim

In *City of Irving v. Inform Construction, Inc.*,[26] the Texas Supreme Court had the opportunity to apply its holding in the *Reata* decision to a counterclaim filed by a city. Inform Construction sued the City of Irving for breach of contract, and the city filed a counterclaim for breach of the same contract and asserted a plea to the jurisdiction. The trial court denied the City's plea, and the court of appeals affirmed.[27]

The Texas Supreme Court agreed that, based upon *Reata*, the City did not have immunity from suit for claims germane to, connected with, and properly defensive to its counterclaim to the extent Inform's claims acted as an offset against the City's recovery.[28] Although the City argued that the assertion of its compulsory counterclaim should not waive immunity, the supreme court disagreed, holding that there is no difference between a compulsory counterclaim and a permissive counterclaim insofar as immunity from suit is concerned.[29] The supreme court also specified that the City retained "immunity from suit as to Inform's action for monetary damages arising from claims not germane to, connected with, and properly defensive to the City's counterclaim" and "immunity from suit to the extent Inform's damages exceed amounts offsetting the City's monetary recovery, absent legislative waiver of immunity."[30]

This decision makes it clear that it is irrelevant whether a governmental entity sues first or counterclaims. In either instance, the filing of the claim will constitute a waiver of immunity from suit for the types of claims specified.

C. The Supreme Court and No Waiver by Local Government Code

In *Tooke v. City of Mexia*,[31] the Texas Supreme Court resolved the long-standing question of whether the language in a city charter that a city may "sue and be sued" and "plead and be impleaded" unambigu-

26. City of Irving v. Inform Constr., Inc., 201 S.W.3d 693 (Tex. 2006).
27. *Id.* at 693.
28. *Id.* at 694.
29. *Id.*
30. *Id.*
31. Tooke v. City of Mexia, 197 S.W.3d 325 (Tex. 2006).

ously waives immunity from suit.[32] The supreme court adopted the minority view of the various Texas Courts of Appeals, and overruled an earlier Texas Supreme Court case, in concluding that the language itself does not constitute waiver.[33]

The City of Mexia awarded a contract to J.E. Tooke & Sons for a multi-year contract for services. After the first year of the contract, the City discontinued the contract because of lack of funding, and Tooke sued for breach of the contract. The City alleged immunity from suit, and Tooke argued immunity had been waived by the language of Section 51.075 of the Local Government Code, which states that a home-rule municipality "may plead and be impleaded in any court."[34] The court of appeals concluded that such language was ambiguous at best because the fact that such phrase often appeared with the phrase "sue and be sued" in various statutes (and the "sue and be sued" language waives immunity according to *Missouri Pacific Railroad Company v. Brownsville Navigation District*[35]) must mean they have different interpretations or effects.[36]

The Texas Supreme Court began its discussion by noting that scores of Texas statutes contain the language "sue and be sued" and "plead and be impleaded," that the import of such phrases cannot be ascertained apart from the context in which they occur, and that they are therefore not unambiguous.[37]

In reviewing the history and language of section 51.075, the Texas Supreme Court concluded that nothing in the statutory provisions refers to immunity from suit but rather uses language to refer to a capacity to be involved in litigation.[38] The supreme court found that its own holding in *Missouri Pacific* was "inconsistent with the Legislature's more recent limited waiver[s] of immunity from suit," and it overruled *Missouri Pacific*.[39] The supreme court then similarly found that "plead and be impleaded" does not unambiguously waive immunity from suit.[40]

D. The Supreme Court and Waiver by New Statute

The Texas Supreme Court remanded several cases for further proceedings in light of newly enacted legislation impacting the waiver of immunity in the context of a construction contract. In response to the significant number of legal disputes over the issue of waiver of immunity from suit by a public entity in the context of a construction dispute, the legislation was adopted in 2005, clarifying that a public entity that enters

32. *Id.* at 328.
33. *Id.* at 345–46.
34. *Id.* at 329.
35. 453 S.W.2d 812 (Tex. 1970).
36. *Tooke*, 197 S.W.3d at 330–31.
37. *Id.* at 328.
38. *Id.* at 333.
39. *Id.* at 342.
40. *Id.*

into a contract waives immunity from suit with respect to any action relating to the contract.

Section 271.151 of the new statute provides the scope of waiver, namely "for the purposes of adjudicating a claim for breach of [a] contract" entered into subject to the statute.[41] Section 271.153 limits the amounts of awards as follows:

> (a) The total amount of money awarded in an adjudication brought against a local governmental entity for breach of a contract subject to this subchapter is limited to the following:
>
> (1) the balance due and owed by the local governmental entity under the contract as it may have been amended, including any amount owed as compensation for the increased cost to perform the work as a direct result of owner-caused delays or acceleration;
>
> (2) the amount owed for change orders or additional work the contractor is directed to perform by a local governmental entity in connection with the contract; and
>
> (3) interest as allowed by law.
>
> (b) Damages awarded in an adjudication brought against a local governmental entity arising under a contract subject to this subchapter may not include:
>
> (1) consequential damages, except as expressly allowed under Subsection (a)(1);
>
> (2) exemplary damages; or
>
> (3) damages for unabsorbed home office overhead.[42]

Section 271.154 provides that adjudication procedures, including requirements to engage in alternative dispute resolution before suit, stated in the contract are enforceable, except to the extent they conflict with the statute.[43] Additional sections of the statute provide that there is no waiver of immunity from suit in federal court or for tort liability.[44] Finally, attorneys' fees incurred by the local governmental entity or any other party in the adjudication of a claim by or against a governmental entity are not awarded unless a written agreement authorizes such an award.[45]

In *Sisk Utilities, Inc. v. City of Greenville*,[46] the Texas Supreme Court addressed the impact that the new provision of the Texas Local Government Code may have on claims of immunity from suit.[47] Sisk Utilities sued the City for breach of contract, as well as negligence and other torts, arising out of a sewer construction project. The trial court sustained the City's plea to the jurisdiction based upon immunity from suit for all claims except breach of contract. The court of appeals reversed, holding

41. TEX. LOC. GOV'T CODE ANN. § 271.152 (Vernon Supp. 2005).
42. § 271.153.
43. § 271.154.
44. §§ 271.156.157.
45. § 271.159.
46. Sisk Utils., Inc. v. City of Greenville, 197 S.W.3d 389 (Tex. 2006).
47. *Id.* at 390.

that immunity was not waived by section 51.075 of the Local Government Code or by the city charter. The supreme court agreed, based upon its holding in *Tooke*, that the city charter did not waive immunity from suit.[48]

The Texas Supreme Court held that, while the case was pending on appeal, the Legislature enacted provisions in the Local Government Code, including sections 271.151-272.160, that waive immunity from suit for certain claims, including municipalities.[49] The supreme court noted that sections 271.152 through 271.154 "apply to a claim that arises under a contract executed before [September 1, 2005] . . . if sovereign immunity has not been waived with respect to the claim before that date."[50] As a result, the Texas Supreme Court concluded that Sisk should have the opportunity to argue in the trial court that the City's immunity was waived by the Local Government Code.[51]

The Texas Supreme Court also concluded that the new statute did not provide any waiver in favor of the claims by the Tooke plaintiffs because they sought recovery of lost profits, which were consequential damages excluded from the scope of the new statute.[52]

Finally, in *Paula Construction, Inc. v. City of Lytle*,[53] the San Antonio Court of Appeals remanded an action to allow the parties to argue the applicability of the newly enacted Local Government Code regarding immunity from suit.[54] Paula Construction entered into a contract with the City of Lytle to remove sludge materials from wastewater treatment ponds. A dispute arose, and Paula Construction filed suit for failure to pay for services it provided. The City of Lytle filed a plea to jurisdiction, arguing it had not waived immunity from suit for the contract in question.

The trial court agreed and dismissed the suit for lack of jurisdiction. Paula Construction appealed, arguing in part that the newly enacted Local Government Code applies retroactively to provide a limited waiver of immunity. Because the contract at issue was entered before September 1, 2005, and because the City did not waive immunity from suit by way of the language in its city charter, the court of appeals concluded that the Local Government Code could apply retroactively.[55] The court of appeals remanded for further proceedings in the trial court so that the parties would have the opportunity to address whether the Code applied.[56]

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48. *See id.* at 389–90.
49. *Id.* at 390.
50. *Id.*
51. *Id.*
52. 197 S.W.3d 325, 346 (Tex. 2006).
53. Paula Constr. Inc. v. City of Lytle, 220 S.W.3d 16 (Tex. App.—San Antonio 2006, no pet.)
54. *Id.* at 18-19.
55. *Id.*
56. *Id.* at 18-19.

E. Derivative Immunity for Contractor

In *GLF Construction Corp. v. LAN/STV*,[57] the Fifth Circuit Court of Appeals, applying Texas law, held that a company performing work on behalf of a public entity was entitled to limited immunity, just as the public entity would have enjoyed.[58] LAN/STV entered into a contract with Dallas Area Rapid Transit ("DART") to prepare plans, drawings, and specifications for the construction of an extension to the light-rail system in Dallas. The engineering contract also required LAN/STV to provide administrative and supervisory services for the project. DART provided the plans to general contractors, who would then submit bids to DART for the contract for construction. The contract was awarded to GLF. By virtue of the contracts, DART was in privity with LAN/STV and GLF, but those two entities were not in privity with one another.[59]

GLF filed suit against LAN/STV for tort claims of professional negligence. Lacking privity with LAN/STV, it could not assert breach of contract actions. LAN/STV filed a motion asserting derivative sovereign immunity. It alleged that, as an independent contractor performing DART's functions, it had the same immunity for tort claims as DART would have.[60]

The Fifth Circuit cited Texas law that when "an independent contractor of [a transportation] entity is performing a function of the entity or of a regional transportation authority, . . . the contractor is liable for damages only to the extent that the entity or authority would be liable if the entity or authority itself were performing the function."[61] GLF did not dispute that the engineering and supervisory services provided by LAN/STV fell within DART's functions as a regional authority. Accordingly, the Fifth Circuit found that LAN/STV would be liable for damages to GLF "only to the extent" that DART would be liable if it had performed the work itself.[62]

The Fifth Circuit then turned its attention to the sovereign immunity principles that would apply to DART in the context of a tort claim, finding that the Texas Tort Claims Act would bar such tort claims.[63] The Fifth Circuit noted that Texas law limits DART's liability both in terms of causes of action for which DART may be held liable and the maximum amount of recovery. Accordingly, the Fifth Circuit concluded that the limitations of the Tort Claims Act would apply to LAN/STV and that it enjoyed immunity from suit to the extent provided in that statute.[64]

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57. GLF Constr. Corp. v. LAN/STV, 414 F.3d 553 (5th Cir. 2005).
58. *Id.* at 557.
59. *See id.* at 555.
60. *Id.*
61. *Id.* at 556 (citing Tex. Rev. Civ. Stat. Ann. art. 6550d (Vernon Supp. 2004–2005)).
62. *GLR Constr.*, 414 F.3d at 556.
63. *Id.*
64. *Id.* at 556–57.

In *Martin K. Eby Construction Co., Inc. v. LAN/STV*,[65] the Dallas Court of Appeals noted two principles not in dispute: governmental immunity protects a government entity from lawsuits absent legislative consent, and the DART is created under chapter 452 of the Texas Transportation Code and enjoys governmental immunity unless waived by the legislature. LAN/STV argued in the case that it "derive[d] governmental immunity from liability from DART pursuant to section 452.056(d) of the Transportation Code and article 6550d of the Revised Civil Statutes."[66]

Section 452.056(d) provides as follows:

> A private operator who contracts with an authority under this chapter is not a public entity for purposes of any law of this state except that an independent contractor of the authority that, on or after June 14, 1898, performs a function of the authority or an entity under Title 112, Revised Statutes, that is created to provide transportation services is liable for damages only to the extent that the authority or entity would be liable if the authority or entity itself were performing the function and only for a cause of action that accrues on or after that date.[67]

The court of appeals looked at the plain, common meaning of the statute's words to determine its meaning. Eby argued that LAN/STV was not immune because the question turned on whether DART would be immune from liability if it performed the same function (preparation of construction plans), not whether DART would be immune from liability for the same type of claim asserted against LAN/STV (negligent misrepresentation). Conversely, LAN/STV argued that Eby ignored the phrase "only to the extent" in the provisions.[68]

The court of appeals concluded that the "determination of whether an independent contractor is entitled to derivative governmental immunity from liability depends upon an analysis of the function performed, not simply the characterization of the claim."[69] The court of appeals interpreted the "phrase 'to the extent' to mean that the damages available against an independent contractor are limited to those damages for which the governmental entity would [also] be liable."[70] Thus, the court of appeals concluded that LAN/STV did not establish that it would be immune from liability.[71]

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65. Martin K. Eby Constr. Co., Inc. v. LAN/STV, 205 S.W.3d 16 (Tex. App.—Dallas 2006, pet. filed).
66. *Id.* at 17–18.
67. TEX. TRANSP. CODE ANN. § 452.056(d) (Vernon 1999).
68. *Eby*, 205 S.W.3d at 19–20.
69. *Id.*
70. *Id.* at 20–21.
71. *Id.* at 21.

III. ALTERNATIVES TO AVOID IMMUNITY: INVERSE CONDEMNATION AND TAKINGS CLAIMS

Texas law is clear that both takings claims asserted under the Texas Constitution and inverse condemnation claims may be asserted against a governmental entity, and immunity is not a relevant inquiry. However, stating a facially valid claim for takings or inverse condemnation is a requirement to avoid dismissal for lack of jurisdiction if the governmental entity files a plea to the jurisdiction. The Eastland Court of Appeals faced both types of claims during 2006.

A. TAKINGS CLAIMS AND IMMUNITY

In *Evatt v. Texas Department of Transportation*,[72] the plaintiffs alleged a takings claim against the State, based upon flooding that occurred to their homes as a result of construction on a Texas Department of Transportation ("TxDOT") project. The homeowners asserted that the property damage was a "taking" without compensation in violation of the Texas Constitution. The trial court granted a plea to the jurisdiction and dismissed the claim, and the Eastland Court of Appeals affirmed.[73]

In order to assert a takings claim when a governmental entity physically damages private property to confer a public benefit, a plaintiff must establish that the governmental entity, "(1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action."[74] Because the homeowners did not allege that TxDOT either knew or was substantially certain that the homes would flood, the homeowners did not sufficiently allege a takings claim, and immunity from suit protected TxDOT.[75]

B. INVERSE CONDEMNATION AND IMMUNITY

In *City of Anson v. Harper*,[76] the Eastland Court of Appeals analyzed the concept of inverse condemnation in the context of a jurisdictional plea. Harper and the other plaintiffs in the case owned mineral estates in a section of land in Jones County. The mineral interest was severed from the surface estate by deed. The plaintiffs executed a mineral lease with Cottonwood in 2003 for a two-year term, with an option for an additional year, which Cottonwood exercised. Cottonwood entered into a surface-use agreement with the surface owner. The surface owner subsequently executed a warranty deed to convey the surface of the land to the City,

72. Evatt v. Tex. Dep't of Transp., 2006 Tex. App. LEXIS 4268, at *1 (Tex. App.—Eastland May 18, 2006, pet. denied) (mem. op.).
73. *Id.* at *1.
74. *Id.* at *10.
75. *Id.* at *13.
76. City of Anson v. Harper, 216 S.W.3d 384, 387-88 (Tex. App.—Eastland 2006, no pet.).

subject to the mineral reservation.[77]

The City acquired the land for the construction of a solid-waste landfill. The City applied for permits and began clearing the land. Plaintiffs filed suit, seeking injunctive relief, a declaratory judgment regarding inverse condemnation, damages, and attorneys' fees. The City filed a plea to jurisdiction, arguing that the claims were barred by sovereign immunity.[78]

The City argued that the "plaintiffs failed to state a claim for inverse condemnation because they did not show that the City acted with the intention [of exercising its] eminent domain power" as contrasted with its rights as a surface owner.[79] Plaintiffs argue they did plead sufficient facts because they alleged that the "City purchased the surface of their tract, undertook actions which precluded . . . their access" to minerals, and destroyed property.[80]

The court of appeals began its discussion with a reference to the Texas Constitution, which provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."[81] The court of appeals also referenced the elements of a takings claim: "(1) the City intentionally performed certain acts (2) that resulted in a taking of property (3) for public use."[82] The court of appeals noted that inverse condemnation can occur in a "total temporary restriction of access, a partial but permanent restriction of access, or a temporary limited restriction of access caused by an illegal activity, a negligent performance of a project, or any unduly delayed project."[83]

Based upon the facts of the case, the court of appeals concluded that the allegations of the plaintiffs were sufficient to establish a potential takings claim because the "City's preparatory dirt work and the plaintiffs' enjoyment of the mineral estate [were] potentially conflicting."[84] More specifically, the court of appeals held that to the extent the City's actual development of the property as a landfill interfered with the plaintiffs' property rights, a takings claim would be alleged.[85] As a result, no immunity applied for that claim.[86]

IV. CLAIMS ON PERFORMANCE BONDS AND PAYMENT BONDS

During 2005 and 2006, Texas courts considered a variety of questions concerning performance bonds and payment bonds, particularly the de-

77. *Id.*
78. *Id.* at 388.
79. *Id.* at 389.
80. *Id.* at 391.
81. *Id.* (citing Tex. Const. art. I, § 17).
82. *Harper*, 216 S.W.3d at 391.
83. *Id.*
84. *Id.* at 393.
85. *Id.*
86. *Id.*

gree to which strict compliance with statutes is required to perfect and enforce a bond claim. The courts of appeals addressing the questions permitted substantial compliance with statutory requirements to be sufficient to perfect claims but strictly enforced the one-year-limitation period for suit on a bond.

A. Proper Notices on a Payment Bond

In *Redland Insurance Co. v. Southwest Stainless, L.P.*,[87] the Fort Worth Court of Appeals concluded that a notice of amount due sent by a subcontractor to a contractor by regular mail, rather than certified mail, constituted substantial compliance with the notice requirements of the McGregor Act and chapter 2253 of the Government Code.[88] In that case, Southwest Stainless was a subcontractor to SAL Saber on a construction project for the City of Fort Worth. Redland Insurance Company issued the payment bond required by chapter 2253 of the Texas Government Code. Stainless provided materials for the project, but Saber did not pay for them and eventually declared bankruptcy. In the interim, Southwest Stainless had timely provided notice of its claim to the surety, with a copy to the general contractor.[89]

The court of appeals noted first that, as the McGregor Act is remedial in nature, "it is to be given the most comprehensive and liberal construction possible," and that the Act's notice requirements are satisfied by substantial performance.[90] Stainless provided testimony that notices of the claim were sent to the contractor by first-class regular mail the same date they were mailed to the surety. Referring to other decisions of the Texas courts, the court of appeals concluded that if substantial compliance with the statutory requisites setting forth the information to be included in the notice is satisfactory, then mailing notice by first-class regular mail, rather than certified mail, was also substantial compliance and sufficient.[91]

B. Time Limitations for Suit on a Bond

In *Fondren Construction, Inc. v. Lumberman*,[92] the Houston Court of Appeals for the First District upheld the one-year-limitation period for filing suit on a bond.[93] In January 1999, Westbrook Construction contracted with Briarcliff Housing Development Associates, Inc. ("BHDA") to provide construction services on apartments. John Deere, as surety, filed a payment bond covering the work at that time. Around the same

87. Redland Ins. Co. v. S.W. Stainless, L.P., 181 S.W.3d 509 (Tex. App.—Fort Worth 2005, no pet.).
88. *Id.* at 511–13.
89. *Id.* at 511.
90. *Id.* at 512.
91. *Id.* at 512–13.
92. Fondren Constr., Inc. v. Lumberman, 196 S.W.3d 210 (Tex. App.—Houston [1st Dist.] 2006, no pet.).
93. *Id.* at 214-15.

time, Westbrook contracted with Lumberman to provide work as owner of Fondren Construction Company. At some point, Westbrook stopped work. Fondren contended that BHDA promised to pay the amounts due under the contracts with Westbrook. In February 2000, Lumberman filed liens for himself and Fondren, and, in October 2000, he sued Westbrook. He later amended in 2003 to sue John Deere rather than Westbrook, specifically relying upon the posted payment bond.[94]

John Deere contended that Fondren could not recover on the payment bond because it failed to bring suit within one year, as stated by the Property Code in section 53.208. In its discussion, the court of appeals referred to section 53.208(a), which provides that if the bond is recorded at the time the lien is filed, the claimant must sue on the bond within one year following perfection of his claim. Because Fondren perfected the bond claim in February 2000, but did not file suit on the bond until 2003, the court of appeals found the claim was barred by limitations.[95]

The court of appeals also rejected an argument by Fondren that it was not required to timely file because John Deere and others conspired to withhold the existence of the bond, despite Fondren's requests for the bond. The court of appeals determined that the bond was on file since 1999, before Fondren filed its liens, and that the filing was proper notice to all persons of the existence of the instrument.[96]

C. Attempted Compliance with Property Code

New AAA Apartment Plumbers, Inc. v. DPMC-Briarcliff, L.P.,[97] reviewed the requirements of section 53.211 and section 53.202 of the Property Code and the attempted compliance with the requirements in a particular bond. The Houston Court of Appeals for the Fourteenth District found that the omission of the language from section 53.202(5), that the bond must be "conditioned on prompt payment . . . not exceeding 15 percent of the contract price," was not fatal, and that the bond substantially complied with the Property Code and protected the property from liens.[98]

D. Perfection and Notice for Government Code

The perfection and notice requirements of the Texas Government Code chapters 2253.041 and 2253.073 were at issue in *Capitol Indemnity Corp. v. Kirby Restaurant Equipment and Chemical Supply Co.*.[99] Kirby provided labor and materials for a public works project for which Capitol

94. *Id.* at 212.
95. *Id.* at 214–15 (citing Tex. Prop. Code Ann. § 53.208(a) (Vernon 1995)).
96. *Fondren Constr.*, 196 S.W.3d at 215.
97. New AAA Apartment Plumbers, Inc. v. DPMC-Briarcliff, L.P., No. 14-05-00485-CV, 2006 Tex. App. LEXIS 8576 (Tex. App.—Houston [14th Dist.] Oct. 5, 2006, no pet.) (mem. op.).
98. *Id.* at *11–13 (discussing Tex. Prop. Code Ann. § 53.202(5) (Vernon 2005)).
99. Capitol Indemnity Corp. v. Kirby Rest. Equip. & Chem. Supply Co., 170 S.W.3d 144 (Tex. App.—San Antonio 2005, pet. denied).

had issued a payment bond under Texas Government Code section 2253.001(a), and, when the bond had not been paid, sought payment.[100] Under cross motions for summary judgment, the trial court ruled in favor of Kirby. On appeal, Capitol challenged only the trial court's finding that Kirby had perfected its claim and provided sufficient notice under sections 2253.041 and 2253.073.[101]

Section 2253.073 requires that a beneficiary under a payment bond properly perfect its claim prior to bringing suit.[102] Perfection requires notice, which, under section 2253.041(a), requires that the beneficiary mail written notice to the primary contractor and the surety. Notice must be "accompanied by a sworn statement of account that states in substance: (1) the amount claimed is just and correct; and (2) all just and lawful offsets, payments, and credits known to the affiant have been allowed."[103] Kirby mailed a letter to Capitol that contained a sworn document entitled Application and Certificate for Payment. The letter stated that it was intended to provide notice of nonpayment, the sworn Application and Certificate for Payment indicated the amount due, that the work had been "completed in accordance with the Contract Document," and "that all amounts [had] been paid by the Contractor for work for which previous Certifications for Payment were issued and payments received from the Owner. . . ."[104]

The San Antonio Court of Appeals held that the sworn document does not have to strictly conform to the specific language of section 2253.041(c).[105] Specifically, the court of appeals found that language indicating that the work was completed in accordance with the contract was sufficient to show that the charges were "just and correct."[106] In addition, the statement in Kirby's sworn document that all other work had been properly paid for by the contractor and that only the present amount was due suggested that "all just and lawful offsets, payments, and credits known to the affiant have been allowed."[107] Therefore, the court of appeals held that the purposes of the statute, "to provide the surety with knowledge of the substance of the claim" and to give those who furnish labor and materials "a simple and direct method of providing notice of their claim," were met with Kirby's letter of notice and sworn Application and Certificate for Payment.[108] The court of appeals affirmed the trial court's judgment for Kirby.[109]

100. *Id.* at 146.
101. *Id.* at 146–47.
102. *Id.* at 147.
103. *Id.*; *see* TEX. GOV'T CODE ANN. § 2253.041(c) (Vernon 2005).
104. *Kirby*, 170 S.W.3d at 147.
105. *Id.* at 148.
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*

V. ARBITRATION CLAUSES AND RIGHTS

A. MANDAMUS PROCEEDINGS ON ARBITRATION CLAUSES

In *In re D. Wilson Construction Co.*,[110] the Texas Supreme Court resolved ongoing confusion in the court of appeals concerning whether those courts have jurisdiction to hear interlocutory appeals based on a denial of a motion to compel arising out of the Texas Arbitration Act ("TAA") when the Federal Arbitration Act ("FAA") is also implicated.[111] In addition, the supreme court found that an arbitration clause incorporated by reference was valid and enforceable against the parties.[112] Finally, the supreme court further explained the scope of waiver of arbitration rights.[113]

As to federal pre-emption, the supreme court found that, unless application of the TAA was contrary to federal law, the courts of appeals retain jurisdiction to hear interlocutory appeals concerning a trial court's denial of a motion to compel arbitration.[114] The court of appeals dismissed the interlocutory appeal based on a lack of jurisdiction, finding that because the contract at issue was "in commerce," the FAA controlled.[115] The FAA does not allow for interlocutory appeals but does allow for mandamus review of a denial of arbitration. The supreme court reiterated a four-factor test to determine whether the TAA would thwart the goals and policies of the FAA. "The FAA only preempts the TAA if: (1) the agreement is in writing; (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses [under state law], and (4) state law affects the enforceability of the agreement."[116] Thus, whether a contract affects interstate commerce is only one factor to consider. The court of appeals had considered it dispositive: "For the FAA to preempt the TAA, state law must refuse to enforce an arbitration agreement that the FAA would enforce, either because (1) the TAA has expressly exempted the agreement from coverage, . . . or (2) the TAA has imposed an enforceability requirement not found in the FAA."[117] Because neither of these conditions were met by the agreement at issue, the supreme court found that the TAA was not preempted, and that therefore the court of appeals retained jurisdiction over the interlocutory appeal.[118]

In *In re Premont Independent School District*,[119] the San Antonio Court of Appeals considered whether the trial court abused its discretion

110. *In re* Wilson Constr. Co., 196 S.W.3d 774 (Tex. 2006).
111. *Id.* at 780.
112. *Id.* at 783.
113. *Id.*
114. *Id.* at 780.
115. *Id.* at 779.
116. *Id.* at 780.
117. *Id.*
118. *Id.*
119. *In re* Premont Indep. Sch. Dist., 225 S.W.3d 329 (Tex. App.—San Antonio 2007, no pet. h.).

by staying proceedings pending arbitration when the parties had deleted section 4.5 of the AIA Document A201 contract. In this case, the school district had contracted with Braselton Construction Company for renovations and additions to the Premont Elementary School, Junior High School, and High School. Finding that the project was not going to be completed on time, the district hired a construction-management company to assist with administration of the project. Ultimately, the district filed suit against both the contractor and the management company.[120] The contractor asserted a contractual right to arbitration, and the trial court granted its motion to compel, ordering all of the parties to arbitrate.[121]

The school district appealed, claiming the trial court abused its discretion in ordering it to arbitrate its claims against the management company because a valid arbitration clause did not exist between them. In particular, the district claimed that, although the parties entered into a contract that incorporated section 4.5 of the AIA Document A201 contract (the arbitration clause), the parties had adopted a supplementary condition striking that section.[122] The management company countered that the supplemental condition was not signed and, therefore, did not operate to cancel the arbitration clause.[123]

The court of appeals found that it had jurisdiction to hear the interlocutory appeal.[124] The court of appeals also held that an unsigned arbitration agreement may be incorporated by reference in the signed contract.[125] No clause in the parties' contract required that supplementary conditions be signed, whereas it did require contract modifications to be signed. Because the supplementary condition unambiguously provided that the arbitration clause was stricken, the court of appeals held that the trial court abused its discretion in ordering the parties to arbitrate because no valid arbitration agreement existed between the parties.[126]

B. Waiver of Arbitration Clause

In *Grand Homes 96, L.P. v. Loudermilk*,[127] the Fort Worth Court of Appeals determined that the trial court did not abuse its discretion by ordering all parties to binding arbitration even though the party requesting arbitration had not done so as to claims against Grand Homes 96.[128] Two of the defendants in this case requested that the owners' claims

120. *Id.* at 331.
121. *Id.*
122. *Id.* at 331 n.2, 333-34.
123. *Id.* at 334.
124. *Id.* at 335-36.
125. *Id.* at 334.
126. *Id.* at 333-36.
127. Grand Homes 96, L.P. v. Loudermilk, 208 S.W.3d 696 (Tex. App.—Fort Worth 2006, pet. filed).
128. *Id.* at 702.

against them be referred to binding arbitration as per the agreement between them. The owners, during the hearing on the motion to compel, pointed out to the trial court that Grand Homes 96 was also a party to the warranty agreement at issue and that the owners' claims against it should be referred to binding arbitration.[129] The trial court agreed and ordered all parties to arbitration.[130] Grand Homes 96 previously filed a petition for mandamus which was denied by the court of appeals. The arbitration resulted in the arbitrator ordering that the contract between Grand Homes 96 and the owner be rescinded and that Grand Homes 96 purchase the owners' home for $292,000.[131] The trial court affirmed the award.[132]

On appeal, Grand Homes 96 contended that the trial court erred by compelling arbitration of the owners' claims against it when the owners had not filed a motion to compel those claims (instead, the other defendants had).[133] In addition, Grand Homes 96 complained that the owners did not file a motion to compel, depriving it of the ability to present defenses to arbitration and to object to the court's appointment of an arbitrator.[134] The court of appeals held that the trial court had jurisdiction to order the parties to arbitration, notwithstanding that the owners had not requested the arbitration in a motion to compel, citing to Texas Civil Practice & Remedies Code section 171.021(a), which requires only that a motion to compel be filed by "a party."[135]

The court of appeals went on to consider Grand Homes 96's argument that it was deprived of the opportunity to raise defenses to arbitration because it had no notice that those claims were on the table for arbitration when the trial court issued its order compelling all parties to arbitrate. In particular, Grand Homes 96 argued it was unable to present its defense of waiver to the trial court.[136] Following United States Supreme Court precedent, the court of appeals held that Grand Homes 96 had the opportunity to raise its waiver defense to the arbitrator, and therefore Grand Homes 96 was not harmed by its unpreparedness to raise the defense to the trial court.[137]

The court of appeals reviewed the issue of waiver *de novo*.[138] The court of appeals held that the owners did not waive their right to arbitrate their claims against Grand Homes 96, pointing out the strong presumption against waiver, "courts will not find that a party has waived its right to enforce an arbitration clause by merely taking part in litigation unless it has substantially invoked the judicial process to its opponent's detri-

129. *Id.* at 700.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 701.
134. *Id.*
135. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.021(a) (Vernon 2005)).
136. *Loudermilk*, 208 S.W.3d at 702–03.
137. *Id.* at 703.
138. *Id.*

ment."[139] The only action the owners took was to request that the trial court compel arbitration once the other defendants were successful in compelling arbitration of the owners' claims. In addition, because the case was only eight-months old and very little discovery had taken place, Grand Homes 96 could not meet its burden to show that it was prejudiced by the owners' actions.[140] Significantly, the court of appeals rejected Grand Homes 96's request that the court adopt the holding of the Austin Court of Appeals in *Vireo P.L.L.C. v. Cates*,[141] which held "after a plaintiff files suit, if the defendant does not insist upon arbitration, the contracting parties have mutually repudiated the arbitration covenant as a matter of law and waived any right thereunder."[142] The court of appeals held that this holding was inappropriate for a multi-defendant lawsuit, where the plaintiff could be forced to litigate and arbitrate, depending on the choices of the defendants.[143]

C. Review and Enforcement of Arbitration Award

The defendant in *Grand Homes 96, L.P. v. Loudermilk* also challenged the appointment of the arbitrator by the trial court, claiming that it had the contractual right to select the arbitrator or to have one appointed by the American Arbitration Association.[144] After the order to compel was entered, the owners filed a motion to set aside the trial court's first choice of an arbitrator. The motion was served on Grand Homes 96, but Grand Homes 96 did not respond to the motion or file its own. The court of appeals held that Grand Homes 96 waived its right to challenge the appointment by waiting until after they had fully participated in the arbitration and had an adverse award against it.[145]

Grand Homes 96 also argued that the arbitrator exceeded her authority by granting remedies outside of the warranty's scope, disregarding limitations, and miscalculating the rescission damages. The owners countered that, because of the lack of a record of the proceedings, deference had to be shown to the arbitrator's award.[146]

The court of appeals began by stating that, in Texas, review of an arbitration award is extraordinarily narrow and that a "mere mistake of law or fact" does not allow a court of appeals to set aside the award.[147] The court of appeals also agreed with the owners that, absent a transcript of the proceedings, the court must presume that the arbitrator's reasoning and the evidence were adequate to support the award.[148] But an appel-

139. *Id.* at 704.
140. *Id.*
141. 953 S.W.2d 489 (Tex. App.—Austin 1997, pet. denied).
142. *Loudermilk*, 208 S.W.3d at 704 (citing *Virco P.L.L.C.*, 953 S.W.2d at 491).
143. *Loudermilk*, 208 S.W.3d at 704.
144. *Id.* at 705.
145. *Id.*
146. *Id.* at 705.
147. *Id.*
148. *Id.*

late court can vacate an arbitration award if there is a statutory or common-law ground to do so.[149] One of the statutory grounds is that the arbitrator exceeded its power, which is derived from the arbitration agreement and is limited to a decision of the express or implied matters submitted therein.[150] Unfortunately for Grand Homes 96, because the owners' pleadings prayed for rescission and the damages awarded by the arbitrator, Grand Homes 96's argument that the arbitrator exceeded her authority was without merit.[151]

In *Holcim (Texas) Limited Partnership v. Humboldt Wedag, Inc.*,[152] Holcim, the owner of a cement production line, brought an arbitration claim against its contractor under an arbitration clause in a turnkey agreement.[153] Watkins, the contractor, brought a third-party claim against Humboldt, a subcontractor in the arbitration. Holcim objected to the joinder of Humboldt, claiming that Humbolt was not a necessary party and that there was no arbitration between Holcim and Humboldt. Humboldt cross-claimed against Holcim for trapped funds and asked the arbitration panel to order Holcim to pay whatever it owed Watkins directly to Humboldt.[154] The arbitration panel entered an order bifurcating the proceedings and, after the first proceeding, found that Watkins did not substantially complete the project. Holcim was therefore entitled to damages of almost $5 million.[155] But the panel also found that Watkins's breach was not material and that Watkins was entitled to recover $7.5 million from Holcim, leaving a balance due to Watkins of about $2.6 million. Holcim then complained that there was no arbitration agreement between it and Humboldt and that it should not have to pay Humboldt directly. The panel disagreed, imposing a constructive trust on the $2.6 million. Humboldt moved for the district court to confirm the award, which it did promptly, leading Holcim to file an interlocutory appeal.[156]

The first issue the court of appeals confronted was whether an interlocutory appeal was the correct procedural device. In this case, the Federal Arbitration Act controlled the proceedings. Citing Texas Civil Practices and Remedies Code section 171.098(a), the court of appeals determined that a party seeking review of an arbitration award confirmation may do so by an interlocutory appeal, regardless of whether the arbitration occurred under the Federal Arbitration Act or the Texas Arbitration Act.[157]

In a second issue, the court of appeals determined that Holcim's petition to vacate the arbitration award was timely because it was brought within three months of the arbitration award being mailed to the parties,

149. *Id.*
150. *Id.* at 705–06.
151. *Id.* at 706.
152. Holcim (Texas) Ltd. P'ship v. Humboldt Wedag, Inc., 211 S.W.3d 796 (Tex. App.—Waco 2006, no pet.).
153. *Id.* at 798.
154. *Id.*
155. *Id.* at 800.
156. *Id.*
157. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 171.098 (a) (Vernon 2005)).

as required by the section 12 of the Federal Arbitration Act.[158]

Humboldt contended that Holcim could not dispute the existence of an arbitration agreement because Holcim had not sought a stay of the arbitration proceedings. The court of appeals found that there was no requirement that a party file a motion to stay before it filed a motion to vacate an arbitration award.[159] Humboldt relied on Texas Civil Practices and Remedies Code sections 171.023 and 171.088, but the court of appeals did not find that a party must file a motion to stay in order to challenge an arbitration award by filing a motion to vacate.[160] Holcim had complained to the trial court that Humboldt was not a necessary party and that there was no arbitration agreement. This was sufficient for Holcim to preserve its ability to challenge the award.[161]

Humboldt further argued that Holcim was estopped from denying that Humboldt's claims were within the scope of the arbitration clause between Holcim and Watkins because Holcim sought affirmative relief against Humboldt in the arbitration proceedings.[162] But the court of appeals found that Holcim had objected to consideration of Humboldt's claims, stating "where a party objects to arbitrability but nevertheless voluntarily participates in the arbitration proceedings, waiver of the challenge to arbitral jurisdiction will not be inferred."[163] Because Holcim had objected to the arbitrability of Humboldt's claims before participating in the arbitration proceedings, Holcim was not estopped from denying that Humboldt's claims were within the arbitration clause between Holcim and Watkins.[164]

D. Nonsignatories Can Be Bound by Arbitration Provisions

In *Associated Glass, Ltd. v. Eye Ten Oaks Investments, Ltd.*,[165] the San Antonio Court of Appeals conditionally granted mandamus relief compelling arbitration to two subcontractors being sued by developer Eye Ten Oaks in a construction and design defects dispute.[166] The subcontractors did not have contracts directly with the developer, but their contracts with the general contractor contained identical arbitration provisions. The court of appeals thus framed the issue as whether Eye Ten Oaks was attempting to assert claims that relied on the contracts between the subcontractors and the general contractor. If the developer was relying on the underlying contracts, it could be bound to the arbitration provision.[167]

158. *Holcrim*, 211 S.W.3d at 801–02.
159. *Id.* at 803.
160. *Id.* at 802.
161. *Id.* at 803.
162. *Id.*
163. *Id.*
164. *Id.*
165. Associated Glass, Ltd. v. Eye Ten Oaks Inv., Ltd., 147 S.W.3d 507 (Tex. App.—San Antonio 2005, no pet.).
166. *Id.* at 514.
167. *Id.* at 512.

By examining the factual allegations, rather than the legal causes of action asserted, the court of appeals sought to determine if the claims were "so interwoven with the contract that [they] cannot stand alone."[168] If so, then the claim would fall within the scope of the underlying agreement to arbitrate.[169] If the claims were "completely independent" of the contracts between the subcontractors and the general contractor and "could be maintained without reference to the contract," then the nonsignatory would not be bound to the arbitration agreements between the subcontractors and the general contractor.[170]

The court of appeals found that each specific allegation asserted by Eye Ten arose out of or related to the duties and obligations created by the subcontracts.[171] Because "a party may not avoid broad language in an arbitration clause by attempting to cast complaints in tort rather than contract," the court of appeals held that Eye Ten was bound by the arbitration provisions of the subcontracts and that all of Eye Ten's factual allegations fell within the scope of the arbitration provision.[172]

Similarly, in *Cappadonna Electrical Management v. Cameron County*,[173] the Corpus Christi Court of Appeals had to determine if mandamus was warranted, compelling Cameron County, Texas, to arbitrate a dispute with two subcontractors arising out of the construction of a new prison facility.[174] Claiming negligence, negligence per se, breach of express warranty, and breach of fiduciary duty, the County sued both the general contractor and the subcontractor. The trial court denied the subcontractors motion to compel arbitration, granted the contractor's motion to compel arbitration, and severed the claims against the subcontractors from those against the contractor.[175]

The subcontractors filed both a request for mandamus and an interlocutory appeal.[176] They offered two theories, incorporation by reference and equitable estoppel, for why the County should be bound to the arbitration provisions of the subcontracts, to which the County was not a party.[177] Ultimately the court denied relief to the subcontractors under

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168. *Id.* at 513.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Cappadonna Elec. Mgmt. v. Cameron County, 180 S.W.3d 364 (Tex. App.—Corpus Christi 2005, no pet.).

174. *Id.* at 368–69.

175. *Id.* at 371.

176. *Id.* at 369. Mandamus is the proper remedy for a denial of a motion to compel arbitration arising out of the Federal Arbitration Act, whereas an interlocutory appeal is the proper course for a denial under the Texas Arbitration Act. The Texas Supreme Court has instructed courts of appeals to consolidate such proceedings and render a decision that disposes of both simultaneously. *Id.*; *see In re* Valero Energy Corp., 968 S.W.2d 916, 916–17 (Tex. 1998).

177. *Cappadonna*, 180 S.W.3d at 370. There are six theories recognized by the Texas Supreme Court for binding a nonsignatory to an arbitration provision: (1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6)

incorporation by reference, but granted mandamus under equitable estoppel.

The trial court found that the subcontract was not part of the prime contract between the County and the general contractor, which contained the arbitration provision at issue.[178] The court of appeals agreed, finding that the intent of the parties to the general contract was to specifically disclaim any contractual relationship between the County and the subcontractors.[179] Thus, the court of appeals found that a nonsignatory third party cannot be compelled to arbitrate through incorporation by reference where the party neither signed the agreement nor incorporated it into a contract that it did sign.[180] In other words, a party cannot unilaterally bind a third party to an agreement through the doctrine of incorporation by reference.[181]

The subcontractors fared better under the theory of equitable estoppel. The court of appeals recognized two circumstances under which a nonsignatory can compel a signatory to arbitrate claims between them: "(1) when the signatory has raised allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract; or (2) when the nature of the signatory's claims against the nonsignatory requires reliance on the agreement containing an arbitration provision."[182] That is, if the nonsignatory is attempting to directly benefit from the contract by seeking to enforce the terms of the contract against one of the signatories, then the nonsignatory is bound to arbitrate if the contract contains an arbitration provision.[183]

The question of whether a nonsignatory has attempted to derive a direct benefit from enforcement of the contract is a highly fact-specific inquiry. A party attempts to derive a direct benefit from the contract when it seeks to exploit not just the relationship between the signatories, but the rights and duties of the contract itself.[184] Or, as the Texas Supreme Court said, "when a nonparty consistently and knowingly insists that others treat it as a party, it cannot later turn its back on the portions of the contract, such as an arbitration clause, that it finds distasteful. A nonparty cannot both have its contract and defeat it too."[185]

VI. MECHANICS' AND MATERIALMEN'S LIENS

The Fort Worth and Austin Courts of Appeals briefly addressed certain issues of mechanics' liens during the Survey period. The Forth Worth

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third-party beneficiary. *Id.* at 370–71; *see In re* Kellogg, Brown & Root, 166 S.W.3d 732, 739 (Tex. 2005).

178. *Cappadonna*, 180 S.W.3d at 371.

179. *Id.* at 372.

180. *Id.* at 373.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (internal citations omitted) (citing *In re* Weekley Homes, 180 S.W.3d 127, 135 (Tex. 2005)).

Court of Appeals reiterated the priority of liens, while the Austin Court of Appeals emphasized the specific requirements in a lien affidavit.

A. Priority of Liens

In *Northside Marketplace W.D. '97, Ltd. v. David Christopher, Inc.*,[186] David Christopher, Inc. ("DCI"), a materialman, challenged the trial court's grant of a motion for partial summary judgment invalidating its materialmen's lien. The contractor argued that the issue was moot because the property had been foreclosed upon and was no longer owned by Northside. The contractor asked the Fort Worth Court of Appeals to take judicial notice of a certified copy of the trustee's deed, which showed that foreclosure had occurred and that the property was owned by a third party. But because the materialmen's lien was superior to the deed of trust, the court of appeals held that the issue of the validity of the lien was not moot.[187] Nevertheless, the court of appeals held that there was no live controversy because the jury in the underlying proceeding had awarded DCI judgment and damages, which included funds that were identified as unpaid in the materialmen's lien affidavit and notice of claim.[188] DCI's appeal was therefore dismissed as moot.[189]

B. Affidavits Must State Months of Work to Perfect the Lien

Milner v. Balcke-Durr, Inc.,[190] reviewed various requirements of the Property Code to perfect a mechanic's lien. American National Power entered into a contract with Balcke-Durr to act as a general contractor for the construction of a power plant. Balcke-Durr contracted with AC Construction which contracted with Milner to supply steel. Milner furnished materials and labor under its contract but was not paid by AC Construction. Milner attempted to secure payment by perfecting a mechanic's lien against the property. Balcke-Durr filed a bond to indemnify against the lien through its surety, Lumbermens.

Milner sued AC Construction for breach of contract and sued Balcke-Durr and Lumbermens on the bond. All parties filed summary-judgment motions. The district court granted the motion of Balcke-Durr and Lumbermens, which argued that Milner failed to perfect his lien in the first instance.

In its de novo review of the issues, the Austin Court of Appeals began its discussion with the requirements of the Property Code, in Chapter 53, for perfecting a lien, focusing on the requirements of the contents and

186. No. 2-03-276-CV, 2005 Tex. App. LEXIS 9830 at *1–2 (Tex. App.—Fort Worth, Nov. 23, 2005, no pet.).
187. *Id.* at *14.
188. *Id.* at *15.
189. *Id.* at *16.
190. No. 03-05-00547-CV, 2006 Tex. App. LEXIS 6935 at *1 (Tex. App.—Austin Aug. 4, 2006, no pet.).

timing of the affidavit. The court of appeals did not address the issue of whether a lien affidavit may be filed on the first business day that falls after the fifteenth day of the month (referenced in Section 53.052 of the Property Code) but concluded that the lien affidavit did not perfect Milner's rights because it failed to specify the months during which the work at issue was performed.[191] The court of appeals noted that it was a strict requirement of Section 53.054(a)(3) to state each month during which work was performed and that summary judgment against Milner was proper for the failure to include that information.[192]

VII. CONSTRUCTION DISPUTES

The Texas Courts of Appeals faced several interesting construction issues during late 2005 and throughout 2006, including whether a construction dispute sounds in contract or tort, what the proper measure of damages is in a construction dispute, and whether a construction defect may be a DTPA violation.

A. CONTRACT V. TORT CLAIMS

In *Hooker v. Nguyen*,[193] the Houston Court of Appeals analyzed whether causes of action founded in a construction relationship sounded in contract or tort. Hooker and his partner entered into a contract with Nguyen's company, CPN Construction, for Nguyen to perform construction build-out work in a salon. The original contract did not include a completion date.[194] Hooker became anxious when, in mid-October, he noted that Nguyen was failing to make progress on the build-out. Hooker sent a letter to Nguyen dated November 30, 2000, in which Hooker claimed that the original due date was December 1, because this was the date that Hooker was to begin paying rent on the space.[195] By January 18, 2001, the salon was still not complete. The parties met and signed a document that listed outstanding tasks to be completed by Nguyen by February 4, 2001. This date passed, and on February 11, 2001, Hooker notified Nguyen that he was terminating their contract, and on February 12, 2001, Hooker's lawyer sent Nguyen a letter claiming that he was "in substantial breach" of the agreement and providing a list of alleged deficiencies.[196] Nguyen and Hooker later went over the "punch-list" document and revised the list. In March 2001, Nguyen sent Hooker a letter stating that he had finished the punch list work and that he was owed the remainder of the contract funds. Nguyen claimed that the amount he was owed was more than ten percent of the contract price.

191. *Id.* at *8.
192. *Id.* at *9.
193. No. 14-04-00238-CV, 2005 Tex. App. LEXIS 8753 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied) (mem. op.).
194. *Id.* at *3.
195. *Id.* at *3–4.
196. *Id.* at *5.

Hooker's attorney responded, stating that lien waivers from all subcontractors were required before any funds would be paid. Nguyen obtained lien waivers for all subs, but he was still not paid.[197]

Aside from the delays in progress, Hooker claimed that Nguyen improperly installed sheetrock, improperly completed painting, installed the wrong water heaters and air conditioner units, and performed poor plumbing work. Nguyen filed suit in county court against Hooker and his partner in 2002 to recover the outstanding contract funds of $44,159.20.[198] Nguyen alleged breach of contract, fraud, and failure to make prompt payment under the Texas Property Code. Hooker counterclaimed for breach of contract and violations of the DTPA. The DTPA counterclaim was dismissed based on the statute of limitations, and Nguyen never answered the breach-of-contract counterclaim.[199]

At trial, the jury found that Hooker failed to comply with the agreement with Nguyen, that Hooker's failure was not excused, that Hooker committed fraud, that harm resulted to Nguyen from Hooker's fraud, that Hooker made misrepresentations upon which Nguyen relied, that Hooker failed to make prompt payment to Nguyen, and that the failure to make prompt payment was not excused.[200] The jury awarded $44,159.20 to Nguyen for failure of Hooker to comply with the agreement, $101,666.67 for Hooker's fraud, $44,159.20 for loss of value, $101,666.67 for misrepresentation, $72,672.56 for attorney's fees, and $100,000 exemplary damages for Hooker's fraud.[201]

Contradictorily, the jury found that Nguyen failed to comply with the agreement, that the failure to comply with the agreement was a producing cause of damage to Hooker, that Nguyen did not substantially perform his obligations under the contract, and that $58,949.00 would compensate Hooker for his damages.[202] The jury also awarded Hooker attorneys' fees in the amount of $34,599.43.

Hooker appealed the findings of fraud and misrepresentation, and damages associated therewith, on the basis that the only remedy available to Nguyen was his breach of contract claim. The court of appeals agreed, examining both *Southwestern Bell Telephone v. DeLanney*[203] and *Formosa Plastics Corp. USA v. Presidio Engineers and Contractors, Inc.*,[204] and held that in order to determine whether claims sound in tort or in contract, under Texas Supreme Court precedent, a court should first look to the source of the duty to act.[205] In this case, Hooker's duty arose solely under the agreement with Nguyen, and Nguyen provided very little

197. *Id.* at *6.
198. *Id.* at *6–7.
199. *Id.* at *7.
200. *Id.* at *7–8.
201. *Id.* at *8.
202. *Id.* at *8–9.
203. 809 S.W.2d 493, 494 (Tex. 1991).
204. 960 S.W.2d 41, 47 (Tex. 1998).
205. *Hooker*, 2005 Tex. App. LEXIS 8753, at *13.

evidence of damages other than those for breach of contract and attorneys' fees.

The court of appeals held that tort damages are available if the claimant produces evidence of fraudulent inducement.[206] Such damages are not available for common-law fraud. A claim for fraudulent inducement requires proof that the other party made representations with the intent to deceive and with no intention of performing as represented.[207] Because Nguyen could only provide evidence of fraud occurring after the contract had already been formed, a fraudulent-inducement claim was not available.

Finally, as to the breach-of-contract claims, Hooker argued that because he had proved conclusively that Nguyen failed to comply with the contract before Hooker refused to make final payment, the jury findings on Hooker's breach of contract should have been disregarded as immaterial. The court of appeals agreed, holding that Nguyen could only recover for breach of contract if he proved that he substantially performed.[208] The court of appeals applied the Restatement (Second) of Contracts § 241 factors to the record evidence and determined that Nguyen had failed to substantially perform.[209] Thus, the court of appeals reversed and rendered judgment for Hooker on his breach-of-contract claims against Nguyen.[210]

B. Construction Defects as DTPA Violations

In *Main Place Custom Homes, Inc. v. Honaker*,[211] the builder challenged the judgment of the trial court awarding damages to the owners of a residence for the builder's violation of the DTPA, fraud in a real estate transaction, breach of warranty, negligent misrepresentation, and negligence. The property on which the house sat had a very steep grade in the back. When questioned about the stability of the soil and the foundation of the house, the builder had responded that the property was stable and that there would be no problems with the property falling away. The builder further represented that he built solid homes. The owners relied on these statements in deciding to buy the house.[212] The builder, obligated to provide engineering reports before closing, provided two letters

206. *Id.* at *18.
207. *Id.* at *21–22.
208. *Id.* at *24.
209. *Id.* at *24–26. The factors are: "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." Restatement (Second) of Contracts § 241 (1981).
210. *Id.* at *25.
211. 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied).
212. *Id.* at 610.

opining that a retaining wall was strong enough to withstand pressure from the foundation and built-up soil.[213] About two years after closing, the soil began to slide, and the foundation began cracking and pulling away from the house. The culprit was an incorrectly installed sprinkler system that allowed water to seep into the soil below the house, causing it to slide and bringing the foundation with it. All claims were settled except for the claims against the builder. The trial court found in favor of the homeowners.[214]

The builder challenged the trial court's proportionate-responsibility finding with respect to the DTPA violations. In particular, the builder argued that the evidence was insufficient to find that it was sixty-percent responsible when the leaking sprinkler system, which the builder did not install, caused the water seepage that led to the landslide.[215] In order to recover under the DTPA, a claimant must prove that the defendant's misrepresentations were the producing cause of the claimant's injuries.[216] "A producing cause is an efficient, exciting, or contributing cause, which in the natural sequence of events produces injuries or damages."[217] The homeowners introduced engineering reports that had been prepared for the developer and given to the builder before construction began. Those reports showed that the soil conditions were much less stable than the builder had represented, that there was not positive drainage around the property, that the slope of the property was too steep, and that debris fill did not satisfy recommendations.[218] The builder did not share the reports with the owners and told the owners that further reports were unnecessary. The Fort Worth Court of Appeals found that there were several different causes of damage to the property but that the DTPA claims were based on the causal connection between the builder's misrepresentations and the owners' damages.[219] The owners had relied on the builder's representations and the evidence supported the conclusion that but for the builder's misrepresentations, the owners would not have incurred damages in connection with the property.[220]

The builder also challenged the legal and factual sufficiency of the evidence of violations of the DTPA laundry list. In particular, the builder argued that there was no evidence of producing cause and that its representations had been mere opinion.[221] The court of appeals articulated three factors to consider in determining whether a statement is an opinion or an actionable misrepresentation: "the specificity versus vagueness of the statement; the comparative knowledge of the buyer and seller; and whether the representation relates to a past or current event or condition

213. *Id.* at 611.
214. *Id.* at 611–12.
215. *Id.* at 615–16.
216. *Id.* at 616.
217. *Id.*
218. *Id.* at 617–19.
219. *Id.* at 619–20.
220. *Id.* at 620.
221. *Id.* at 624.

versus a future event or condition."[222] The court of appeals found that the builder's statements had been specific as to the stability of the soil and the home, that the builder was in a better position to know about the condition of the property, and that the statements applied equally to the present and future condition of the home and property.[223] Thus, the evidence was sufficient to support the trial court's finding that the builder's misrepresentations violated at least one item on the DTPA laundry list.[224]

Finally, the builder challenged the trial court's finding that the builder had committed a knowing violation of the DTPA. In order to find that a violation was committed knowingly, the evidence must show that the misrepresentation was made with actual awareness, at the time of the act.[225] "Actual awareness," however, "does not mean merely that the person is aware of what they are doing; it means that a person knows that what he is doing is false, deceptive, or unfair. In other words, a person must think to himself at some point, 'Yes, I know this is false, deceptive, or unfair to him, but I'm going to do it anyway.'"[226] The court of appeals found that there was no evidence to support a knowing violation of the DTPA because no one "other than an engineer would have been alerted to the stability problems simply by reading both reports,"[227] and the builder was not an engineer. The court of appeals reversed the award of treble damages.[228]

C. Measure of Damages

The propriety of prejudgment interest for breach-of-contract damages was at issue in *Landmark Organization, L.P. v. Delphini Construction Co.*[229] Landmark, the general contractor, subcontracted with Delphini for roofing materials, labor, and equipment. Landmark was dissatisfied with Delphini's performance and terminated the contract. Delphini sued for breach of contract and quantum meruit. A jury found for Delphini on all issues, and the trial court awarded prejudgment interest on Delphini's damages at a rate of twelve percent.[230]

On appeal, Landmark challenged the award of prejudgment interest. The Corpus Christi Court of Appeals held that prejudgment interest was available for breach-of-contract damages.[231] Because there is no enabling statute for prejudgment interest on breach-of-contract damages, the rate of interest is governed by general principles of equity.[232]

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222. *Id.* at 624.
223. *Id.* at 625.
224. *Id.*
225. *Id.*
226. *Id.* at 625–26.
227. *Id.* at 626.
228. *Id.*
229. No. 13-04-371-CV, 2005 Tex. App. LEXIS 8414 (Tex. App.—Corpus Christi Oct. 13, 2005, pet. denied) (mem. op.).
230. *Id.* at *2–3.
231. *Id.* at *6.
232. *Id.* at *7.

The trial court calculated the rate of prejudgment interest based on the contractual rate of interest that Landmark was entitled to under its contract with Delphini. Although Delphini was not entitled to interest by the terms of the contract, because Landmark had set the rate for itself in the contract, the court of appeals held that using that rate for Delphini was not an abuse of discretion.[233]

Landmark also challenged the date from which prejudgment interest was to be calculated. In particular, Landmark argued that its "pay when paid" agreement with Delphini prevented the imposition of interest until it received payment in full from the owner because that is when Delphini was entitled to payment from Landmark.[234] But the evidence showed that Landmark had abandoned the "pay when paid" clause by paying Delphini throughout the course of construction without receiving payment from the owner.[235] The trial court could have considered this a waiver of the clause without abusing its discretion.[236]

Finally, Landmark argued that section 28.003 of the Texas Property Code tolled the accrual of prejudgment interest for "good faith disputes" related to a construction contract.[237] The court of appeals disagreed, finding that "while section 28.003 allows a party to withhold prompt payment in the event of a good faith dispute, it does not exempt this withheld amount from accruing interest if the withholding party is ultimately found to be at fault for the breach."[238] Thus, the trial court did not err by calculating prejudgment interest from the earlier of the date the lawsuit was filed or the date that Delphini submitted invoices, as allowed by the Texas Prompt Payment Act.[239]

VIII. QUANTUM MERUIT

Over the last year, the Houston and Dallas Courts of Appeals addressed claims of quantum meruit as a means of recovery in a construction dispute. In *Pepi Corp. v. Galliford*,[240] Galliford, a subcontractor, sued Pepi Corp., the owner of a restaurant, for quantum meruit. Galliford provided electrical work on the building and submitted invoices to the contractor but did not receive payment. Galliford contacted Pepi and spoke to the president of the company, who allegedly said, "I'll make sure you get paid."[241] The trial court entered judgment for Galliford on his quantum meruit claim.[242]

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233. *Id.* at *11, 14.
234. *Id.* at *13.
235. *Id.*
236. *Id.*
237. *Id.* at *13–14.
238. *Id.* at *14.
239. *Id.* at *14–15.
240. Pepi Corp. v. Galliford, No. 01-05-00788-CV, 2007 Tex. App. LEXIS 1018 (Tex. App.—Houston [1st Dist.] Feb. 8, 2007, no pet.).
241. *Id.* at *2.
242. *Id.* at *1.

On appeal, Pepi argued that judgment was improper because quantum meruit is not available when a contract exists governing the subject matter of the claim. Quantum meruit recovery can be had, said the Houston Court of Appeals for the First District, when the plaintiff proves the following:

> (1) that valuable services were rendered or materials were furnished, (2) for the person sought to be charged, (3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him, (4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff, in performing such services, was expecting to be paid by the person sought to be charged.[243]

But absent a recognized exception, a quantum meruit claim is not available when an express contract exists that governs the party's performance.[244] The two issues on appeal were whether the fourth element was met and whether an express contract existed that barred recovery in quantum meruit.

The court of appeals first noted that the fact that an express contract does not exist between the plaintiff and the party sought to be charged is not dispositive because any express contract governing performance will preclude recovery in quantum meruit. "This rule not only applies when a plaintiff is seeking to recover in quantum meruit from the party with whom he expressly contracted, but also when a plaintiff is seeking to recover from a third party foreign to the original but who benefited from its performance."[245] The determinative consideration is whether a contract covers the materials and services at issue.[246] Here, there was a contract between Galliford and the general contractor covering the materials Galliford provided on the project. Unless an exception to the general rule applied, Galliford's quantum meruit claim should have been dismissed.

In *Gentry v. Squires Construction, Inc.*,[247] the construction company sued the Gentrys, claiming breach of contract and quantum meruit damages resulting from a residential construction contract entered into by the parties. The Gentrys refused to pay Squires' final draw request, claiming numerous construction defects, including the fact that the house had been built with eight-foot ceilings, whereas the plans and contract called for ten-foot ceilings.[248] The trial court entered judgment for Squires for its reasonable costs of labor and materials under a quantum meruit theory.[249] In addition, the trial court found that the Gentrys' counterclaims were preempted by the Texas Residential Construction Liability Act

243. *Id.* at *4.
244. *Id.* at *10.
245. *Id.* at *10–11.
246. *Id.* at *11.
247. Gentry v. Squires Constr., Inc., 188 S.W.3d 396 (Tex. App.—Dallas 2006, no pet.).
248. *Id.* at 401–02.
249. *Id.* at 401.

("RCLA"). On appeal, the Gentrys challenged both rulings.[250]

The Dallas Court of Appeals determined that the trial court had not erred in finding that Squires could collect the reasonable value of its labor and materials under quantum meruit.[251] There are three ways in which a contractor can collect the reasonable value of labor and materials: (1) if the services rendered and accepted are not covered by the contract; (2) if the contractor partially performed under the contract, but was prohibited from completing the contract because of the owner's breach; and (3) if the contractor breached but the owner accepted and retained the benefits of the contractor's partial performance.[252] The Gentrys argued that none of the three ways was available to Squires because Squires did not substantially comply with the contract. The court of appeals disagreed, holding that, unlike substantial performance, which will bar recovery in quantum meruit, the fact that a contractor does not substantially comply with a contract does not preclude recovery in quantum meruit.[253] Here, there was evidence that Squires partially performed, but did not substantially perform, the contract and that the Gentrys accepted and retained the benefits of that partial performance. Thus, the trial court did not err in allowing recovery for Squires under quantum meruit.[254]

IX. THE SUBSTANTIAL-PERFORMANCE DOCTRINE

The appellate courts addressed several cases on the doctrine of substantial performance, and its relationship to a party's ability to sue for breach of contract, during the Survey period. The cases illustrate how important the concept of substantial completion is in the construction context as a means to support a claim for breach, to attempt to excuse the breach of a condition, and to recover damages.

A. Final Payment

In *TA Operating Corp. v. Solar Applications Engineering, Inc.*,[255] the San Antonio Court of Appeals was faced with an issue of first impression in Texas: whether the doctrine of substantial performance excuses a contractor's nonperformance of an express condition precedent to final payment of a contract. The trial court answered in the affirmative, but the court of appeals disagreed.[256] In this case, the express condition precedent was an all-bills-paid affidavit intended to foreclose the possibility that TA, the owner, would have to pay twice on the construction of a

250. *Id.*
251. *Id.*
252. *Gentry*, 188 S.W.3d at 403.
253. *Id.* at 404.
254. *Id.* at 411.
255. TA Operating Corp. v. Solar Applications Eng'g, Inc., 191 S.W.3d 173 (Tex. App.—San Antonio 2005, pet. granted).
256. *Id.* at 178.

truck stop.[257]

TA did not dispute that Solar had substantially performed under the contract. Instead, it relied on an express condition in the contract that stated, "The final Application for Payment shall be accompanied by: . . . iii) complete and legally effective releases or waivers (satisfactory to OWNER) of all Lien rights arising out of or Liens filed in connection with the Work."[258] At the time that Solar filed suit for final payment, it had not secured such waivers or releases, and the evidence showed that liens totaling almost $250,000 existed against the property.[259] The court of appeals acknowledged that the doctrine of substantial performance was intended to modify the general common-law rule of strict compliance with the terms of a contract.[260] The court of appeals distinguished between "constructive conditions precedent" and "express conditions precedent."[261] A constructive condition precedent is one which, though nowhere to be found in a contract, obligates the other party to perform once the constructive condition precedent is met, whereas the all-bills-paid affidavit was an express condition precedent set out in writing in the contract.[262] The court of appeals held that the doctrine of substantial performance applies only to constructive conditions precedent, not to express conditions precedent.[263] In so holding, the court of appeals rendered judgment that Solar take nothing on its breach-of-contract claim.[264]

B. Substantial Performance, Material Breach, and Excused Performance

In *Hooker v. Nguyen*,[265] the Houston Court of Appeals for the Fourteenth District found that Hooker, a salon developer, was excused from paying Nguyen, the contractor, because Nguyen failed to substantially perform the contract.[266] Hooker contracted with Nguyen to provide build-out construction work in a salon. The original contract did not include a completion date.[267] As previously discussed, target completion dates were missed. On February 11, 2001, Hooker notified Nguyen that he was terminating their contract, and on February 12, 2001, Hooker's lawyer sent Nguyen a letter claiming that he was in substantial breach of the agreement. Hooker refused to pay the outstanding balance of $44,159.20 on the contract.[268]

257. *Id.* at 180.
258. *Id.* at 177.
259. *Id.*
260. *Id.* at 179.
261. *Id.* at 180 (citing 15 Williston on Contracts § 44:53 (4th ed. 2000)).
262. *Id.* at 177, 180–81.
263. *Id.* at 180.
264. *Id.* at 181.
265. No. 14-04-00238-CV, 2005 Tex. App. LEXIS 8753 (Tex. App.—Houston [14th Dist.] Oct. 20, 2005, pet. denied) (mem. op.).
266. Hooker, 2005 Tex. App. LEXIS 8753, at *23.
267. *Id.* at *3.
268. *Id.* at *6.

The jury found for Nguyen on the breach of contract issue and that Hooker was not excused from performing. Contradictorily, the jury also found that Nguyen had breached the agreement and that he failed to substantially perform.[269] The court of appeals applied the Restatement (Second) of Contracts § 241, which contains five factors to determine whether a failure to perform is material.[270] In addition, the court of appeals noted that section 242 of the Restatement provides "significant circumstances that aid in a determination of whether a party's duties are discharged under a contract due to the other party's material breach."[271] Those circumstances are when the failure to perform causes a delay that prevents the party from making alternative arrangements and whether the contract has a firm due date that, under the circumstances, indicates that the date is important.[272]

In sum, Nguyen failed to complete the project on time and neglected to cure his failure to perform, Nguyen's delays prevented Hooker from making alternative-construction arrangements, and the jury found that Nguyen failed to substantially perform. Thus, the court of appeals found that Nguyen's failure to perform was a material breach excusing Hooker's performance under the contract.[273] The court of appeals reversed judgment against Hooker and rendered judgment that Nguyen take nothing.[274]

C. Substantial Performance and Damages

The dispute in *RAJ Partners, Ltd. v. Darco Construction Corp.*[275] arose from the construction of a Holiday Inn Express in Lubbock, Texas. RAJ owned the franchise to build the hotel and contracted with Darco to build it. RAJ withheld the eleventh and twelfth pay applications because it believed that Darco had failed to perform as required under the contract. Darco perfected its mechanic's liens and filed suit. The trial court found for Darco on its breach of contract claim, awarding prejudgment interest, attorneys' fees, and foreclosure of the mechanic's lien.[276] RAJ appealed, arguing that Darco did not substantially perform.

RAJ's theory for Darco's failure to substantially perform was based on the fact that the cost to fix Darco's construction exceeded the cost of mere remediation and that Darco failed to meet the difference-in-value measure of damages. The Amarillo Court of Appeals began its analysis by stating the general rule that substantial performance is an equitable doctrine that allows breaching parties to recover on a contract so long as

269. *Id.* at *8.
270. Hooker, 2005 Tex. App. LEXIS 8753, at *24–26.
271. *Id.* at *25.
272. *Id.* at *25–26.
273. *Id.* at *26–31.
274. *Id.* at *33.
275. RAJ Partners, Ltd. v. Darco Constr. Corp., 217 S.W.3d 638 (Tex. App.—Amarillo Dec. 8, 2006, no pet. h.).
276. *Id.* at 642–43.

the breaching party substantially completed its obligations.[277] RAJ argued that the brickwork done by Darco had to be torn down and reconstructed. But the trial court's finding of fact was that the defects in the brickwork were merely aesthetic and not in need of remedy.[278] Because the brickwork was not in need of remedy, Darco did not have to prove the remedial cost of the work.[279]

RAJ next argued that substantial performance was legally impossible because the reconstruction cost exceeded mere remediation. The trial found that the defects were aesthetic in nature and did not impair the structure as a whole. Thus, the defects did not render substantial performance legally impossible.[280] Because the court found Darco had substantially performed, the difference-in-value measure was inapplicable.[281] Thus, RAJ's appeal was overruled, and the trial court's judgment was upheld, as modified by the court of appeals.[282]

X. BREACH AND WAIVER OF WARRANTY

In *Welwood v. Cypress Creek Estates, Inc.*,[283] the Welwoods sued Cypress Creek for damages to the Welwoods' home when the slope behind the house failed. Cypress Creek, doing business as Legacy Lakes, sold five lots to a custom-home firm owned in part by Curt Welwood. Legacy Lakes agreed to develop the lots in a good-and-workmanlike manner in accordance with the City of Frisco's standards but disclaimed any express or implied warranties regarding the physical condition of the lots.[284] Welwood's firm agreed to rely on its own inspection and agreed to accept the lots in "as-is" condition, with all faults and without warranty of merchantability or fitness for a particular purpose. Welwood asserted that Legacy Lakes' engineer recommended a slope-stability analysis, which Legacy did not perform during development of the lot. This failure, Welwood argued, was negligence and a breach of an implied warranty of workmanlike-development services. The trial court granted Legacy Lakes' motion for summary judgment.[285]

The Dallas Court of Appeals considered whether Legacy Lakes' disclaimer of warranties barred the Welwoods' claims. Relying on *Luker v. Arnold*[286] for the proposition that Texas law implies a warranty of good and workmanlike development, Welwood argued that the implied warranty of development services cannot be waived or disclaimed. The court of appeals noted that the Texas Supreme Court has not recognized such a

277. *Id.* at 643.
278. *Id.* at 644.
279. *Id.* at 645.
280. *Id.*
281. *Id.*
282. *Id.* at 645, 653.
283. Welwood v. Cypress Creek Estates, Inc., 205 S.W.3d 722 (Tex. App.—Dallas 2006, no pet.).
284. *Id.* at 725.
285. *Id.*
286. 843 S.W.2d 108, 116 (Tex. App.—Fort Worth 1992, no writ).

duty.[287] In addition, the warranty urged by Welwood resembled the warranty of good workmanship, which the Texas Supreme Court held was disclaimable in *Centex Homes v. Buecher*.[288] In that case, the supreme court held that the implied warranty of good workmanship is a gap-filler warranty used when the parties do not themselves prescribe the quality of the construction work being performed.[289] Because the parties had agreed that the property was being sold "as-is," there was no need to imply a warranty, and the court of appeals affirmed the trial court's judgment.[290]

XI. CONSTRUCTION DEFECTS AND INSURANCE COVERAGE

In the context of the commercial-liability policy, the question of whether an alleged construction defect can ever qualify as an "occurrence" and trigger an insurer's duty to defend or duty to indemnify in favor of an insured contractor continues to be a subject of discussion by the Texas courts. The decisions in 2005 and 2006, especially compared with those in earlier years, make it clear that this question will be determined on a case-by-case basis and may be dependent upon a particular court's views about the allegations presented. While the decisions have indicated that state courts have been reluctant to expand coverage to include damages for defective work performed by the insured contractor itself, there continues to be an emphasis on analyzing concepts such as the definition of "occurrence" and the meaning of "property damage."

A. What Constitutes an "Occurrence"

In *Grimes Construction, Inc. v. Great American Lloyds Insurance Co.*,[291] the Fort Worth Court of Appeals had to determine whether a contractor's own negligent construction could constitute an "occurrence" under a commercial-general-liability ("CGL") insurance policy. The homeowners had claimed against Grimes for faulty construction and failure to construct the residence in a good and workmanlike manner. This underlying litigation settled in favor of the owners for $52,653.51.[292] Grimes claimed that Great American owed both a duty to defend and a duty to indemnify, which Great American denied. The trial court entered summary judgment in favor of Great American, and Grimes appealed.[293]

As to the duty to defend, the court of appeals applied the "eight-corners" rule to the underlying litigation, finding that an "occurrence" had not been alleged because the only "property damage" claimed was the

287. *Welwood*, 205 S.W.3d at 730.
288. 95 S.W.3d 266, 274–75 (Tex. 2002).
289. *Id.*
290. *Welwood*, 205 S.W.3d at 731.
291. Grimes Constr., Inc. v. Great Am. Lloyds, Ins. Co., 188 S.W.3d 805 (Tex. App.—Fort Worth 2006, pet. filed).
292. *Id.* at 808.
293. *Id.*

result of the builder's own conduct.[294] In particular, the court of appeals noted that, in order to constitute an "occurrence," an "accident" must be alleged.[295] By definition, an accident includes, "negligent acts of the insured causing damage which is undesigned and unexpected."[296] There are two factors to be considered in determining whether an act constitutes an accident: "(1) whether the actor intended to cause damage to others and (2) the reasonably foreseeable effect of the actor's intended conduct."[297] The court of appeals noted that unintended effects are accidental but that intentional conduct is generally not accidental.[298]

The court of appeals went on to note that allegations of negligence may not assert an "occurrence" if the allegations are based on breach of contract or breach of implied warranties.[299] Although other Texas courts of appeals have found that recasting allegations is an inappropriate evaluation of the merits of the claims, and forbidden by the eight-corners rule, the court of appeals in this case did just that: "Even though we construe such allegations in favor of the insured, we hold that the Coxes' negligence allegation is simply a recharacterization of their basic breach of contract and warranty claims."[300] Because the owners' claims all appeared "from the face of the demand for arbitration" to stem from contractual and warranty obligations, there was no alleged "occurrence" as required under the policy.[301]

The court of appeals further held that the foreseeable result of noncompliance with the construction contract is construction defects.[302] The court of appeals also held that the foreseeable result of failing to properly supervise a subcontractor is construction defects.[303] Thus, the court of appeals concluded that the owners' claims for negligent misrepresentation, fraud, and breaches of warranty were not an "occurrence."[304]

In *Summit Custom Homes, Inc. v. Great American Lloyds Insurance Co.*,[305] the Dallas Court of Appeals had to determine whether application of a synthetic stucco ("EIFS") could constitute a covered "occurrence" or "property damage" under a CGL policy. The owners of a residence brought negligence, breach-of-warranty, and breach-of-contract claims against the builder, Summit, who then filed a claim with Great American and Mid-Continent Insurance Company, respectively, its prior and cur-

294. *Id.* at 813.
295. *Id.* at 810.
296. *Id.* (citing Mid-Century Ins. Co. of Tex. v. Lindsey, 997 S.W.2d 153, 155 (Tex. 1999)).
297. *Grimes Constr.*, 188 S.W.3d at 810.
298. *Id.*
299. *Id.* at 811.
300. *Id.* at 812.
301. *Id.*
302. *Id.* at 813.
303. *Id.* at 815.
304. *Id.* at 817.
305. Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co., 202 S.W.3d 823 (Tex. App.—Dallas 2006, pet. filed).

rent, CGL carriers, seeking defense and indemnity.[306] Both carriers denied Summit's claim on the basis that application of the EIFS was not an occurrence triggering coverage and did not constitute property damage as defined by the respective policies. The trial court granted the carriers' joint motion for summary judgment.[307]

The Dallas Court of Appeals first noted that the duty to defend arises when a third party has asserted claims that state a cause of action under the policy.[308] The pleadings are construed strictly against the insurer, and doubts are resolved in favor of coverage.[309] But the terms of the policy still dictate whether a duty to defend has arisen, and the policies at issue only covered property damage that manifested during the policy period: "If such damages are not manifested during the policy period, then there is no 'occurrence' during the policy period."[310]

The court of appeals then turned to analyze whether the underlying claims alleged property damage manifested during the policy period of either of the policies. The Great American policy was in effect from 1996 to 2000, so if the homeowners' property damage manifested during that period, then Great American could potentially owe Summit a duty to defend. The only property damage alleged in the owners' petition was that "since the house was constructed [in 1996], damages have occurred."[311] The court of appeals held this was insufficient to determine when the damage manifested.[312] Still, the court of appeals held that summary judgment for Great American was inappropriate because it was Great American's burden to establish as a matter of law that the property damage did not manifest during the policy period.[313]

Because the homeowners had sufficiently pleaded property damage, the court of appeals then turned to whether their property damage constituted an "occurrence" under the policy. "'Occurrence' means 'an accident, including continuous or repeated exposure to substantially the same general harmful conditions.'"[314] Great American argued that the "business-risk" doctrine should apply to bar coverage for property damage that was the result of the builder's own negligence.

The court of appeals began its analysis by stating that "Texas law is unsettled on whether defective construction constitutes an 'occurrence.'"[315] But unlike the court in *Grimes Construction*,[316] the court of appeals held that "negligently created, or inadvertent, defective construction resulting in damage to the insured's own work which is unintended

306. *Id.* at 826.
307. *Id.*
308. *Id.* at 827.
309. *Id.*
310. *Id.*
311. *Id.* at 828.
312. *Id.*
313. *Id.*
314. *Id.* at 829.
315. *Id.*
316. *See supra*, note 283.

and unexpected can constitute an 'occurrence.'"[317] The court of appeals further explained that an intentional act negligently performed results in unexpected and undesigned consequences that can constitute an "occurrence."[318]

In addition, the "your-work" exclusion did not bar coverage. "The 'your work' exclusion prevents coverage for 'property damage' to the insured's own work arising after a construction project is finished and in the owner's possession."[319] The court of appeals found that the "your-work" exclusion itself contained an exception for work performed on the insured's behalf by a subcontractor.[320] Because the EIFS was prepared and applied by subcontractors, the "your-work" exclusion did not bar coverage.[321] Because the pleadings asserted an "occurrence" within the meaning of the policy, the court of appeals held that the trial court erred in granting Great American's motion for summary judgment.[322] The case was remanded back to the trial court for determination of whether the alleged property damage manifested during the Great American policy period.[323]

The court of appeals also addressed Great American's duty to indemnify. The trial court had granted Great American's motion for summary judgment based on its finding that Summit was not owed a duty to defend. Because the court of appeals held that there was a genuine issue as to whether Great American owed Summit a duty to defend, the duty to indemnify was not ruled out and summary judgment was inappropriately granted.[324]

Finally, the court of appeals addressed Summit's argument that it was owed summary judgment on its claims for the statutory penalty embodied in Article 21.55 of the Texas Insurance Code for Great American's wrongful refusal and delay in paying its defense costs.[325] Although the courts of appeals in Texas are conflicted as to whether the penalty applies to claims for defense costs, the court of appeals here adhered to its prior holding that defense costs are not within the purview of Article 21.55, and held that the trial court did not err in denying Summit's motion for summary judgment on this point.[326]

317. *Id.*
318. *Id.* at 830.
319. *Id.*
320. *Id.*
321. *Id.* at 830-31.
322. *Id.*
323. *Id.* at 830–31. The court went on to hold that the Mid-Continent policies contained a specific EIFS exclusion that barred Summit's claims. *Id.* at 831.
324. *Id.* at 832.
325. *Id.*
326. *Id.* at 833.

XII. STATUTE OF LIMITATIONS AND REPOSE

A. LIMITATIONS AND THE DISCOVERY RULE

In *Royce Homes, L.P. v. Dyck*,[327] the central issue was whether untinted windows were inherently undiscoverable such that the statute of limitations was tolled for breach of a construction contract specifying tinted windows. The owners brought their breach-of-contract and fraud claims more than four years after they closed on and conducted a walk through of the residence. After trial, the jury found for the owners.[328]

The Beaumont Court of Appeals determined that untinted windows are not inherently undiscoverable. "An injury is inherently undiscoverable if it is the type of injury that is unlikely to be discovered within the prescribed limitations period, despite due diligence."[329] Although there was some evidence that it is difficult to determine whether a window is tinted, Mrs. Dyck's testimony showed that she could tell which windows were tinted and which were not.[330] Thus, the discovery rule did not toll the statute of limitations, which was four years for both breach of contract and fraud.[331]

The Dycks' claim for fraudulent concealment was likewise unavailing because, under Texas law, a seller of residential real estate does not have a duty to disclose that which a reasonable investigation would reveal.[332] The court of appeals found that the Dycks' failed to show that a reasonable investigation would not have disclosed that the windows were untinted.[333] Thus, Royce was not under a duty to disclose the untinted nature of the windows. Based on this holding and the holding that the discovery rule did not operate to toll the Dycks' claims, the court of appeals reversed and rendered judgment for Royce.[334]

B. LIMITATIONS AND THE STATUTE OF REPOSE

In *Brent v. Daneshjou*,[335] the Austin Court of Appeals considered the interplay of statutes of limitation and repose in the construction and repair of a house that Daneshjou built in 1990. Brent purchased the house in 1992 and noticed water leaks soon after. Brent contacted Daneshjou about the leaks, and Daneshjou completed repair efforts in January, 1993. Again in 1995, Brent noticed that the water leaks were recurring and that there were new leaks in other parts of the house. Daneshjou again undertook repair efforts and suggested that Brent replace the roof, which he

327. Royce Homes, L.P. v. Dyck, No. 09-06-034-CV, 2006 Tex. App. LEXIS 9484 (Tex. App.—Beaumont Nov. 2, 2006, no pet.).
328. *Id.* at *1–2.
329. *Id.* at *8.
330. *Id.* at *12–13.
331. *Id.* at *14.
332. *Id.* at *18.
333. *Id.*
334. *Id.*
335. Brent v. Daneshjou, No. 03-04-00225-CV, 2005 Tex. App. LEXIS 9249 (Tex. App.—Austin Nov. 4, 2005, no pet.).

did. Brent continued to experience problems with the house in the fall of 1998, when the 1992 leak resurfaced. This time Brent did not contact Daneshjou, and, in December 2001, Brent began extensive mold remediation. Brent sued Daneshjou on November 22, 2002, complaining that the original construction was defective and that repairs made by Daneshjou in 1993 and 1995 were insufficient to correct the water-incursion problems plaguing the house.[336]

Daneshjou filed motions for summary judgment, arguing that the statutes of limitation and repose had expired on all of Brent's claims and, alternatively, that Brent offered no evidence on his breach-of-contract, breach-of-warranty, fraud, and DTPA causes of action. The trial court granted summary judgment in favor of Daneshjou on all claims. The court of appeals affirmed.[337] The statute of repose at issue is found in Texas Civil Practice and Remedy Code sections 16.008-009 and provides that, absent several exceptions, the builder of a house is free from liability ten years after completion of the building for "an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement."[338] Thus, absent tolling, the statute of repose expired in 2000.[339]

Although there was evidence that Daneshjou "cut corners" during the initial construction of the house, the court of appeals found that there was no evidence that Daneshjou did so knowing that the house would be dangerous or deficient as a result.[340] In addition, the court of appeals found no evidence that Daneshjou deliberately concealed the deficiencies in construction that led to Brent's leaks and mold problems while Daneshjou was endeavoring to repair the leaks.[341] Thus, the statute of repose was not tolled on the original construction of the house and all of Brent's claims concerning the construction of the house were barred.[342]

The statute of limitations also ran on most of Brent's other claims against Daneshjou. The 1993 repairs were barred because Brent discovered that the repairs had been insufficient in 1995, more than four years before he filed suit. Likewise, absent tolling, claims on the 1995 repairs would be barred by a four-year statute of limitations expiring in 1999. The recurrence of the window leak in 1998 ended tolling from the discovery rule.[343] But because rediscovery of the leak had been alleged to occur in the "fall" of 1998, a fact question remained as to whether the leak had been rediscovered before or after November 22, 1998.[344] Other repairs made in 1995, specifically to the stucco exterior of the house, were

336. *Id.* at *2–4.
337. *Id.* at *1.
338. *Id.* at *11 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(a) (West 2002)).
339. *Id.* at *10.
340. *Id.* at *18–19.
341. *Id.* at *19–20.
342. *Id.* at *20.
343. *Id.* at *24.
344. *Id.* at *24–25.

not time barred because Daneshjou had not conclusively shown that Brent should have discovered the defects before 2001, when Brent engaged in mold remediation.[345]

Unfortunately for Brent, those claims that Daneshjou had not shown were time barred did not survive Daneshjou's no-evidence motion for summary judgment. Specifically, Daneshjou argued, and the court of appeals agreed, that Brent produced no evidence of a contract between them for repair services, no evidence that Daneshjou breached a warranty under the DTPA, no evidence of fraud, and no evidence of proximate causation on any of Brent's other causes of action.[346] Because Daneshjou had undertaken the repair services for free, any potential contract failed for lack of consideration.[347] Because Brent had not paid for the services, he was not a consumer under the DTPA and therefore had no standing to assert DTPA violations.[348] Finally, the court of appeals agreed with Daneshjou that Brent produced no evidence of proximate cause on any alleged negligence or breach of warranty with respect to Daneshjou's repair work.[349]

XIII. RESIDENTIAL CONSTRUCTION LIABILITY ACT

In *Gentry v. Squires Construction, Inc.*,[350] the Dallas Court of Appeals had to determine whether the trial court erred in finding that the Gentrys' DTPA counterclaims were preempted by the Texas Residential Construction Liability Act ("RCLA"). The court of appeals first noted that the RCLA does not create a cause of action because it does not "provide a complete structure for liability" or "contain a description of what conduct will result in liability or an express statement of the elements of a cause of action."[351] The RCLA modifies certain causes of action concerning residential construction defects. The court of appeals held that the RCLA does not preempt the DTPA even though the DTPA is mentioned as a cause of action in the RCLA.[352] The court of appeals also held that the RCLA "clearly authorizes suits for breach of contract or breach of warranty after" certain presuit requirements are met.[353] Accordingly, the court of appeals concluded that the trial court erred in dismissing the Gentrys' DTPA claims; the judgment was reversed and remanded back to the trial court on those claims.[354]

In *Hernandez v. Lautensack*,[355] the owner sued Hernandez for breach

345. *Id.* at *25
346. *Id.* at *28–32.
347. *Id.* at *28.
348. *Id.* at *29–30.
349. *Id.* at *32.
350. Gentry v. Squires Constr., Inc., 188 S.W.3d 396 (Tex. App.—Dallas 2006, no pet.).
351. *Id.* at 404.
352. *Id.* at 405.
353. *Id.*
354. *Id.* at 406, 411.
355. Hernandez v. Lautensack, 201 S.W.3d 771 (Tex. App.—Fort Worth 2006, pet. denied).

of contract, misrepresentation, fraud and deceptive trade practices in connection with a roof that Hernandez had installed on Lautensack's home. The new roof suffered from leaks that Hernandez was unable to remedy. Hernandez told Lautensack that Hernandez could replace the roof for $9,100 in labor if Lautensack provided all new slate tiles at a cost of $25,000. Unhappy with Hernandez's original and repair work, Lautensack hired another contractor to replace the roof. On February 12, 2003, Lautensack sent, by certified and regular mail, a claim notice to Hernandez describing the problems with the roof and threatening litigation unless Hernandez paid Lautensack $41,880. The certified letter was returned unclaimed, and the regular letter was not returned.[356] Thereafter, Lautensack filed suit on April 17, 2003. Hernandez responded with a plea in abatement, claiming that Lautensack's presuit notice was insufficient under the RCLA. The case was tried to a jury that found for Lautensack on all causes of action and awarded damages of $24,750 plus attorneys' fees of $10,680. The jury also found that Lautensack's notice was untimely because it did not allow Hernandez the opportunity to inspect the alleged defects and offer to repair them. The trial court disregarded these findings and entered judgment on the verdict.[357]

On appeal Hernandez raised three points. First, Hernandez claimed that the trial court should not have disregarded the jury findings and should have dismissed Lautensack's lawsuit. The Fort Worth Court of Appeals noted that the RCLA requires a claimant seeking damages resulting from construction defects to give the contractor sixty-days written notice before filing suit.[358] The contractor then has thirty-five days after receiving notice to inspect the property, and forty-five days to make a written offer of settlement.[359] The RCLA was amended in 2003 to provide that failure of timely notice results in dismissal of the suit. But this case arose under the prior version of the RCLA, which provided only for abatement during the presuit notice period.[360]

Hernandez argued that, by replacing the roof before sending notice, Lautensack deprived Hernandez of the opportunity to inspect the roof and offer to repair the defects. The court of appeals rejected Hernandez's argument that judgment should have been entered for him, finding that "the practical effect of Hernandez's argument is to engraft the dismissal provision of the current RCLA onto the prior version that controls this case."[361] The court of appeals also held that the intent of the RCLA to provide the contractor with a reasonable opportunity to inspect and offer settlement was effected in this case because Hernandez inspected the roof and made an offer of settlement when he attempted to

356. *Id.* at 774.
357. *Id.* at 775.
358. *Id.* (citing TEX. PROP. CODE ANN. § 27.004(a) (Vernon Supp. 2005)).
359. *Id.* (citing TEX. PROP. CODE ANN. § 27.004(a)–(b)).
360. *Id.*
361. *Id.* at 776.

repair leaks and submitted a bid to Lautensack to replace the roof.[362]

Hernandez further argued that there was no evidence that Lautensack's claimed cost of repair was reasonable. "A party seeking recovery for the cost of repair must prove their reasonable value."[363] Lautensack introduced expert testimony of the contractor who replaced his roof. The contractor testified to Hernandez's original construction defects and that the roof needed to be replaced. The contractor's bid of $32,330 to replace the roof was paid in full by Lautensack. In addition, evidence showed that Hernandez himself had charged $20,000 for the original roof installation, and offered to replace the roof for $9,100 plus $25,000 in materials. Based on this evidence, the court of appeals concluded that there was some evidence supporting the jury's damage award.[364]

362. *Id.*
363. *Id.*
364. *Id.* at 777.