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## Construction Law

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# CONSTRUCTION LAW

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**T**HE following are some of the more important and interesting cases considered during the Survey period. As the cases indicate, this continues to be an area of multiple legal disciplines, involving

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aspects of contract interpretation, trial and appellate procedure, commercial transactions, and litigation.

## I. INDEMNITY

In *Constructors & Associates, Inc. v. Fisk Electric Co.*<sup>1</sup> the Fourteenth Court of Appeals addressed the issue of whether, under an indemnification agreement, an obligation to indemnify a party for attorneys' fees and costs is separate from the obligation to indemnify that party for the consequences of its own negligence. Constructors & Associates, Inc. (Constructors) engaged Fisk Electric Co. (Fisk) as a subcontractor. Under the terms of the subcontract, Fisk indemnified Constructors against claims arising out of Fisk's work. During the course of construction, an employee of Fisk was injured and brought suit against Constructors, the general contractor, alleging Constructors' negligence as the cause of the injuries he sustained.<sup>2</sup> Constructors in turn filed a third party claim against Fisk seeking indemnity under the subcontract.<sup>3</sup> The trial court granted summary judgment in favor of Fisk and severed the third party action<sup>4</sup> on the grounds that the indemnity provision failed to meet the express negligence doctrine<sup>5</sup> set forth in *Ethyl Corp. v. Daniel Construction Co.*<sup>6</sup>

Constructors asserted in its appeal that the express negligence doctrine did not apply because 1) it was not seeking indemnification for its *own* negligence, and 2) that Fisk, as a matter of law, failed to prove that Constructors was negligent.<sup>7</sup> Fisk argued that the express negligence doctrine bars enforcement of an indemnity provision in its entirety when the provision fails to satisfy the express negligence standard. The court, however, cited cases from other courts of appeals to support its holding that any obligation to indemnify for attorneys' fees and costs is separate and distinct from an obligation to indemnify for the indemnitee's own negligence.<sup>8</sup> Essentially, absent a finding of negligence, the issue of whether

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1. 880 S.W.2d 424 (Tex. App.—Houston [14th Dist.]), *rev'd*, 888 S.W.2d 813 (1994).

2. *Id.* at 425.

3. *Id.* The relevant provision provides:

... [Fisk] shall indemnify, hold harmless, and defend [Constructors], ... from and against all claims, damages losses, and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of [Fisk's] work ... provided that any such claim, damage, loss or expense (a) is attributable to bodily or personal injury, sickness, disease or death, or patent infringement, or to injury, ... and (b) is caused in whole or in part by any negligent act or omission or any act or omission resulting in the strict liability of [Fisk] or anyone directly or indirectly employed by it[,] anyone for whose acts it may be liable, or is caused by or arises out of the use of any products, material or equipment furnished by [Fisk]. ...

*Id.*

4. *Id.*

5. *Id.* at 425.

6. 725 S.W.2d 705 (Tex. 1987).

7. *Constructors*, 880 S.W.2d at 425-26.

8. *Id.* at 426 (citing *Construction Invs. and Consultants, Inc. v. Dresser Indus., Inc.*, 776 S.W.2d 790, 792 (Tex. App.—Houston [1st Dist.] 1989, writ denied)); *Continental Steel*

or not the indemnity provision is valid under the express negligence rule is simply not relevant.<sup>9</sup> Because Fisk did not prove that Constructors was negligent, summary judgment based solely on the express negligence doctrine was improper.<sup>10</sup>

Another significant decision in the area of indemnity was issued in *Houston Lighting & Power Co. v. Atchison, Topeka & Santa Fe Co.*<sup>11</sup> In *Houston Lighting & Power*, the court faced the issue of the extension of an indemnification agreement to conduct resulting in the strict liability of the party indemnified. The terms of the indemnity agreement required Houston Lighting & Power to indemnify Santa Fe against claims arising from Houston Lighting & Power's activities with Santa Fe.<sup>12</sup> An employee of Santa Fe was injured during the unloading of a coal train and brought suit against Santa Fe. As part of its defense, Santa Fe asserted the indemnity agreement and joined Houston Lighting & Power as a third-party defendant.

The trial court awarded damages to the injured employee based on Santa Fe's violation of federal safety statutes, and ordered Houston Lighting & Power to indemnify Santa Fe. On appeal, Houston Lighting & Power contended Santa Fe was strictly liable to the injured employee and that the indemnity obligation did not extend to strict liability. The court of appeals, however, affirmed.

On appeal, the Texas Supreme Court held that a requirement of indemnification for strict liability was improper since the indemnity agreement did not expressly include such acts.<sup>13</sup> The court reasoned that the railroad, under existing case law, is strictly liable under the Employers' Liability Act for violations of the Safety Appliance Act (the statutes involved in the case). The court cited its ruling in *Ethyl Corp. v. Daniel Construction Co.*<sup>14</sup> and concluded that the grounds for its determinations as to the basis of indemnification for one's own negligence were equally compelling for strict liability.<sup>15</sup> In fact, the court went beyond invoking an express strict liability doctrine, and required that the parties' intent to extend the obligation to include comparative indemnity likewise be expressly set forth.<sup>16</sup> As a result of the *Houston Lighting & Power* case, one

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Co. v. H.A. Lott, Inc, 772 S.W.2d 513 (Tex. App.—Dallas 1989, writ denied); M.M. Sundt Const. Co. v. Contractors Equip. Co., 656 S.W.2d 643 (Tex. App.—El Paso 1983, no writ); Copeland Well Service, Inc. v. Shell Oil Co., 528 S.W.2d 317 (Tex. App.—Tyler 1975, writ dismissed).

9. *Constructors*, 880 S.W.2d at 426.

10. *Id.*

11. 890 S.W.2d 455 (Tex. 1994).

12. The activity involved Santa Fe's delivery of coal to Houston Lighting & Power's plant and the off loading of the rail cars into an underground storage pit via a rotary car dumper. The agreement obligated Houston Lighting & Power to indemnify Santa Fe for any claims in connection with rotary dumper and its use or operation.

13. 890 S.W.2d at 459.

14. 725 S.W.2d 705 (Tex. 1987).

15. 890 S.W.2d at 457.

16. *Id.* at 458.

may argue that Texas' express negligence rule is in fact an express intent doctrine.

## II. DECEPTIVE TRADE PRACTICES ACT

After an explosion occurred during expansion of a refinery, refinery owners brought suit against both the contractor and the subcontractor to recover for the resulting damages, alleging, inter alia, DTPA violations, gross negligence, and products liability.<sup>17</sup> The court specifically addressed the issue of which version of the DTPA waiver provision applied to the claims, as there was a question as to whether the relevant reference date was the date when negotiations took place or when the agreement was finally signed.<sup>18</sup> The parties had negotiated for almost three years prior to signing a contract on May 28, 1982. While negotiations were taking place, but prior to execution of the contract, contractor Kellogg provided goods and services which were ultimately included in the final contract. As of the date of the contract, these goods and services amounted to \$15 million. Subcontractor Ingersoll-Rand supplied a "Power Recovery Unit," a type of machinery required for the refinery expansion.<sup>19</sup> On May 3, 1988, approximately eight months after the unit was delivered, it failed and exploded, causing damage to several tons of catalyst, structural I-beams, and a pipe rack.

Valero, the refinery owner, ultimately filed a Fifth Amended Original Petition five years after it first filed suit. In this new Petition, Valero asserted the defenses of duress, fraud, unconscionability, public policy, and unenforceability of the indemnity and waiver provisions.<sup>20</sup> The trial court entered summary judgment against the refinery on its negligence and deceptive trade practices suit.

The court of appeals' opinion focused on the validity of waiver and hold-harmless provisions under the DTPA.<sup>21</sup> The legislature amended section 17.42, effective August 31, 1981, to allow consumers with assets of more than \$25,000,000, which included Valero in this case, to waive the provisions of the DTPA. The prior statute did not allow such a waiver.<sup>22</sup> Valero alleged that DTPA violations occurred during negotiations and that the negotiations occurred prior to the DTPA amendment.<sup>23</sup> The court of appeals rejected this approach and held that the DTPA provision in effect at the time the contract was actually signed.<sup>24</sup> Since the contract was executed May 28, 1982 — a date subsequent to the DTPA's August

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17. *Valero Energy Corp. v. M. W. Kellogg Constr. Co.*, 866 S.W.2d 252 (Tex. App.—Corpus Christi 1993, writ denied).

18. *Id.* at 258-59.

19. *Id.* Valero originally hired Ingersoll-Rand; Ingersoll-Rand later became a Kellogg subcontractor. *Id.*

20. *Id.* As sanctions, the trial court struck all pleadings, exhibits, and affidavits relating to several of these defenses. *Id.*

21. *Id.* at 258 (citing TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1977)).

22. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 17.42 (Vernon 1981)).

23. *Valero*, 866 S.W.2d at 258.

24. *Id.* at 259.

31, 1981 amendment — waiver of DTPA provisions was permissible and effective.<sup>25</sup>

### III. STATUTES OF LIMITATION

In *Bayou Bend Towers Council of Co-Owners v. Manhattan Constr. Co.*, the Fourteenth Court of Appeals upheld a summary judgment on statute of limitations grounds.<sup>26</sup> Bayou Bend, a condominium owners association, brought suit for construction defects against the developer on July 12, 1990. It did not add the general contractor or subcontractors as defendants until April 18, 1991. The allegations included DTPA violations, breach of implied warranties, and negligence.

In 1983, two years after substantial completion of the project, Hurricane Alicia struck. Both before and after the hurricane, it suffered water leaks. Specifically, the leaks occurred in the windows, precast concrete siding, and roof areas. The various defendant subcontractors provided the materials and workmanship for the affected areas. The statutes of limitation for the DTPA and negligence actions was two years; for the breach of implied warranty claims, it was four years.<sup>27</sup> Because Bayou Bend did not file suit until 1990, the defendants moved for summary judgment based on the statute of limitations.

In affirming the trial court's grant of summary judgment, the court of appeals discussed the applicability of the "discovery rule" in determining whether the suit was time-barred.<sup>28</sup> Bayou Bend argued that the statute began to run only once a claimant discovers *both* that an injury has occurred, *and* who and what caused the injury.<sup>29</sup> The court disagreed, holding that "[u]nder Texas law, it is the discovery of the injury, and not the discovery of all of the elements of a cause of action that starts the running of the clock for limitations purposes."<sup>30</sup>

### IV. COMPLETION COSTS AND PREJUDGMENT INTEREST

*Sage Street Associates v. Northdale Construction Co.* involved a construction contract dispute that resulted in an award of prejudgment interest.<sup>31</sup> Sage Street, the property owner, utilized a HUD funding program to build a luxury high-rise condominium in southwest Houston.<sup>32</sup> As part of the project development, Sage Street retained Northdale to provide

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25. *Id.*

26. 866 S.W.2d 740 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

27. *Bayou Bend*, 866 S.W.2d at 742. See TEX. CIV. PRAC & REM. CODE ANN. §§ 16.003(a), 16.004(a) & 16.051 (Vernon 1986); TEX. BUS. & COM. CODE § 17.565 (Vernon 1987).

28. *Bayou Bend*, 866 S.W.2d at 743.

29. *Id.*

30. *Id.*

31. 863 S.W.2d 438 (Tex. 1993). A more detailed examination of the case is provided in last year's Survey article. This discussion is prompted by Justice Hecht's issuance of his dissenting opinion during this year's Survey period.

32. *Id.* at 441 n.4. The court refrained from considering the propriety of using funds intended for low-income housing for this purpose. *Id.*

construction services under a "cost-plus" contract at the "nominal" price of \$13.5 million, the maximum amount of HUD money available for the project. Sage Street assured Northdale a profit of \$760,000, even if its costs exceeded the \$13.5 million. In addition, Sage Street represented that change orders could be submitted after initial HUD approval of the \$13.5 million price.

The original "Construction Agreement" between Sage Street and Northdale reflected the agreed upon \$760,000 fee payable to Northdale, but a second "HUD Contract" executed three weeks later did not. Sage Street informed Northdale that the HUD Contract was "strictly to accommodate HUD."<sup>33</sup> Without any reference to the prior Construction Agreement, the HUD Contract stated that it "constituted the entire agreement between the parties."<sup>34</sup> Inevitably, as the project progressed, disagreements ensued over how payments for extra work and design changes should be handled; ultimately, Northdale walked off the project and was terminated by Sage Street, after receiving \$11 million and completing approximately ninety percent of the work.<sup>35</sup>

The trial court found for Northdale on its wrongful termination claim, awarding damages for work performed, overhead, and profit. The court of appeals affirmed. The supreme court also affirmed, but remanded for a determination of the sufficiency of the evidence to support damages.<sup>36</sup> Justice Hecht issued a dissent in which he stated of the majority opinion, "With all due respect, this is nonsense."<sup>37</sup> Justice Hecht disagreed with the majority's holding that Northdale (the contractor) was not required to prove the cost of completion. The court conceded that if the contract had involved a fixed-price, Northwood would have the burden of proving the cost of completion as an essential element of its calculation of damages. Justice Hecht took issue with the majority's conclusion that the contract, being more in the nature of a cost-plus than a fixed-price agreement, results in Sage Street (the owner) acquiring the burden of proving the cost to complete.<sup>38</sup> The dissent reasoned that there is no need for *any* party to establish cost to complete *if* the contract is cost-plus and only damages for work performed are claimed; however, in this case there was a maximum price, with the dispute being whether the \$760,000 was included in or in addition to the maximum price. The dissent concluded that the contract at issue was a maximum price contract, and that damages could not be calculated without knowing whether Northdale could have completed construction within the maximum price, increased by any other expenses or fees it might be entitled to. Given the need to prove

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33. *Id.* at 441.

34. *Id.* at 442.

35. *Id.*

36. *Id.* at 446-47.

37. 863 S.W.2d at 448 (Hecht, J., dissenting).

38. *Id.*

the cost to complete, Justice Hecht argued that "there is no basis in law or logic for shifting this burden to the defendant."<sup>39</sup>

## V. DELAY DAMAGES

In *Beaumont v. Excavators & Constructors, Inc.*, the Beaumont Court of Appeals considered the validity of a "no damage for delay" clause in a contract between Excavators and the City.<sup>40</sup> Under a contract signed April 8, 1986, Excavators was to provide various improvements, including street widening, for the City of Beaumont.<sup>41</sup> The contract included a provision that the improvements be completed within 220 working days, with final completion to occur within 240 working days. In addition, the contract contained a "no damage for delay" clause.<sup>42</sup> Excavators finished its work within the contract period, but sought to collect delay damages because of delays allegedly caused by Southwestern Bell, who was not a party to the contract between Excavators and the City. The trial court awarded damages to Excavators.<sup>43</sup>

The court of appeals reversed and rendered and set forth several specific reasons. First, the court found that Excavators completed its work within the number of days allotted in the contract.<sup>44</sup> Second, during the course of performance Excavators elected to do previously subcontracted work itself, increasing costs and damages without mitigating them.<sup>45</sup> Third, the no damage clause was valid and precluded recovery.<sup>46</sup> Fourth, there was no privity of contract between Excavators and Bell.<sup>47</sup> Fifth, Excavators did not prove a nexus between the delays and Excavators' alleged damages.<sup>48</sup> Because of these factors, Excavators was not entitled to any damages. The court did not, however, preclude an award of damages for delays that occur during performance of a contract merely because the work is ultimately concluded on time. Rather, the court stated that in this particular case, the contractor did not prove that the delays alleged caused it any damages.<sup>49</sup>

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39. *Id.*

40. 870 S.W.2d 123 (Tex. App.—Beaumont 1993, writ denied).

41. 870 S.W.2d at 126.

42. *Id.* at 128.

43. *Id.* at 126.

44. *Id.* The dissenting opinion argued that delay which causes damages during performance is actionable, even if ultimate performance is completed within the period specified in the contract (citing *Shintech, Inc. v. Group Constructors, Inc.*, 688 S.W.2d 144, 148 (Tex. App.—Houston [14th Dist.] 1985, no writ); *City of Houston v. R.F. Ball Constr. Co.*, 570 S.W.2d 75, 77 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.)).

45. *Id.* at 127.

46. *Id.* at 128.

47. *Id.* at 129.

48. 870 S.W.2d at 131.

49. *Id.* at 132.



## VI. MCGREGOR ACT

The Dallas Court of Appeals discussed McGregor Act requirements in *S.A. Maxwell Co. v. R.C. Small & Associates*.<sup>50</sup> Small, the general contractor, contracted with the Richardson Independent School District to renovate four elementary schools and to provide all materials and labor for the project. As required by the version of the McGregor Act in effect in 1989, Small obtained a surety bond from Great American.<sup>51</sup> Subcontractor Glen Barrett Paint was hired to handle the drywall work. To perform its work, Barrett ordered materials from S.A. Maxwell. Maxwell shipped materials to its Dallas warehouse on May 27, 1990; Barrett made pick-ups on May 31 and June 4. After receiving two separate invoices totalling almost \$67,000, Barrett left an outstanding balance of \$52,000. On July 26, 1990, Maxwell mailed a notice of nonpayment as required by the McGregor Act. Receiving no payment, Maxwell sent its second notice on August 15, 1990. Because Maxwell was still awaiting payment, it filed suit on February 27, 1991 against Small and Great American to recover.

The issue on summary judgment and on appeal was whether the notices were timely under the McGregor Act.<sup>52</sup> The Act requires that the first notice be sent on or before the fifteenth of the second month following the delivery of materials.<sup>53</sup> The court of appeals ultimately determined that delivery for McGregor Act purposes occurred each time materials were picked up, or on May 27 and again on June 4.<sup>54</sup> Therefore, the McGregor Act notice period was different for each delivery.<sup>55</sup> Using that timetable, the July 26 notice was only timely for the June materials and the claim regarding the May 27th materials was not properly perfected.<sup>56</sup>

In another school construction case, the Austin Court of Appeals affirmed a trial court judgment against a surety in *Commercial Union Insurance Co. v. Spaw-Glass Corp.*<sup>57</sup> The school under construction was Judson High School in San Antonio. Spaw-Glass contracted with the school district to build the high school; Kleck Plumbing was a subcontractor who defaulted on its obligations, and Kleck's surety was Commercial Union. Pursuant to an agreement with the school district, Spaw-Glass released part of the retainage it was withholding against the Kleck subcontract to other performing subcontractors. Commercial Union, Kleck's surety, expected to recoup its project expenditures from Spaw Glass's retainage; however, it recovered \$100,000 less than what it had funded.<sup>58</sup>

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50. 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied).

51. *Id.* at 450. The version of the McGregor Act relevant to this case, TEX. REV. CIV. STAT. art. 5160, was repealed effective September 1, 1993, and was recodified in TEX. GOV'T CODE ANN. § 2253 *et seq.* (Vernon Pamph. 1994).

52. 873 S.W.2d at 451-57.

53. *Id.* (citing TEX. REV. CIV. STAT. ANN. art. 5160).

54. 873 S.W.2d at 453.

55. *Id.*

56. *Id.*

57. 877 S.W.2d 538 (Tex. App.—Austin 1994, writ denied).

58. *Id.*

Commercial Union, as a third-party beneficiary of Spaw-Glass's subcontract with Kleck, sued Spaw-Glass for the retainage sums.<sup>59</sup>

On appeal, Commercial Union attacked the trial court's ruling that the McGregor Act governed the case.<sup>60</sup> While not disputing the application of the McGregor Act to claims asserted against a prime contractor and its surety, Commercial Union argued that the McGregor Act does not govern claims of a subcontractor's surety (such as itself) against the contractor. The court concluded that the trial court had *not* held that Commercial Union's claim was governed by the McGregor Act.<sup>61</sup> The trial court had rather held that Kleck's *suppliers* were required to give notice to Spaw-Glass of non-payment. The court stated that one of the requirements of the McGregor Act is that a claimant give written notice to the contractor.<sup>62</sup> None of the suppliers gave notice pursuant to the statute to Spaw-Glass; consequently, Spaw-Glass had no liability to the unpaid suppliers. Were the contractor (Spaw-Glass) required to reimburse Kleck's surety (Commercial Union) for amounts paid by the surety, Spaw-Glass would in effect be required to pay claims that had not been perfected.<sup>63</sup> The court affirmed judgment for Spaw-Glass, holding it had no duty to reimburse Commercial Union for paying claims for which Spaw-Glass had received no notice.<sup>64</sup>

## VII. ARBITRATION

Both parties appealed a decision in *Monday v. Cox* in which the trial court refused to enforce an arbitrator's award of attorneys' fees.<sup>65</sup> Cox alleged a sprinkler system that came with a house built by Monday did not function correctly. The contract between the parties provided for binding arbitration, which ensued. The arbitrator denied both Cox's claim and Monday's claim for extras; in addition, the arbitrator awarded attorneys' fees to Monday.

The court of appeals held that the trial court erred in not enforcing the attorneys' fees award.<sup>66</sup> The court noted that the Arbitration Act<sup>67</sup> provides for the award of attorneys' fees when the parties' agreement so specifies or the state's law would allow attorneys' fees from a court and that Texas courts favor arbitration of disputes.<sup>68</sup> The plaintiff had sought DTPA recovery, and the defendant had disputed that the work was defective and had pleaded for attorneys' fees. The court concluded that even

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59. *Id.* at 539.

60. *Id.* at 540. As was the case in *S.A. Maxwell*, the court considered the McGregor Act as it existed before September 1, 1993.

61. *Id.* at 540.

62. 877 S.W.2d at 540.

63. *Id.* at 540.

64. *Id.* at 541.

65. 881 S.W.2d 381 (Tex. App.—San Antonio 1994, writ denied).

66. *Id.*

67. TEX. REV. CIV. STAT. ANN. arts. 224, 238 (Vernon 1973 & Supp. 1994)(Texas General Arbitration Act).

68. 877 S.W.2d at 384.

though the defendant had not specifically pleaded section 17.50(c) of the DTPA — which entitles a defendant to recover attorneys' fees if the plaintiff's claim is groundless and brought in bad faith, or brought for the purposes of harassment — the defendant had sought attorneys' fees and that the pleadings were sufficient to give notice thereof.<sup>69</sup> Moreover, Cox never objected to the alleged lack of specificity of Monday's pleadings until after the arbitrator's award.<sup>70</sup>

### VIII. STATUTORY CONSTRUCTION

A case arising out of facts and events in Galveston presented an interesting approach to the interpretation of property zoning in a dispute over whether or not a particular type of project could be constructed. The issue in *Seawall East Townhomes Associates, Inc. v. Galveston* was whether a proposed go-cart track was a permitted use within its zoning district.<sup>71</sup> The subject property was zoned "RES-RESORT."<sup>72</sup> That classification included "AMUSEMENT, COMMERCIAL (OUTDOOR)" and allowed certain specified uses as well as uses requiring a special use permit.<sup>73</sup> Go-cart tracks were not specifically listed in either category. In concluding that a go-cart track is a permitted use, the court of appeals found persuasive evidence in the record of testimony from the Director of the Galveston Planning and Transportation department that go-carts were a form of general amusement covered by the zoning definition.<sup>74</sup>

### IX. INVERSE CONDEMNATION

*Harris County v. Felts* reminds potential homeowners to consider all possible prospective uses of the surrounding property.<sup>75</sup> In the late 1970s, the Felts' purchased a half-acre lot in Cypress, Texas, on which they built a home a year later.<sup>76</sup> Through the years they made various improvements to their home and to their backyard, which they used frequently. When Harris County decided to build North Eldridge Parkway in 1987, the original plan called for acquiring one square foot of land from the Felts. Based on a recommendation from the Right-of-Way department, Harris County did not make an offer on the Felts property, but instead moved the Parkway a few inches off the property. The Felts then decided to try to sell the property for \$165,000, but ultimately were only able to obtain \$119,500. Subsequently, the Felts filed an inverse condemnation action, resulting in a jury award of \$15,645 in damages.

The court of appeals reversed and rendered. First, the court set forth the test for recovery under an inverse condemnation theory: "the prop-

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69. *Id.*

70. *Id.*

71. 879 S.W.2d 363 (Tex. App.—Houston [14th Dist.] 1994, n.w.h.).

72. *Id.* at 365.

73. *Id.*

74. *Id.*

75. 881 S.W.2d 866 (Tex. App.—Houston [14th Dist.] 1994, writ granted).

76. *Id.* at 867.

erty owner must establish that: 1) the governmental entity intentionally performed certain acts; 2) that resulted in a taking of property; 3) for public use."<sup>77</sup> The court focused on whether a "taking" occurred and concluded that building the Parkway close to the residence resulting in noise, debris and a decline in property value was not a "taking".<sup>78</sup> Under Texas law, "taking" requires "(1) actual physical appropriation or invasion of the property, or (2) unreasonable interference with the land owner's right to use and enjoy his property."<sup>79</sup>

## X. CONCLUSION

While the cases presented address a variety of issues, the nature of the indemnity obligation and the requirements that must be satisfied for its extension to strict liability and comparative indemnity as well as the negligence of the indemnitee are of particular importance. The practitioner must be mindful of developments in this area to insure that the interest of the parties, and the interests of the client, are reflected and enforceable.

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77. *Id.* at 869 (citing *Waddy v. City of Houston*, 834 S.W.2d 97, 102 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *City of Abilene v. Smithwick*, 721 S.W.2d 949, 951 (Tex. App.—Eastland 1986, writ ref'd n.r.e.)).

78. 881 S.W.2d at 869.

79. *Id.* (quoting *Allen v. City of Texas City*, 775 S.W.2d 863, 865 (Tex. App.—Houston [1st Dist.] 1989, writ denied)). The court also noted that "Not a single reported decision has permitted recovery for construction activities such as dirt, dust and noise." *Id.* at 870.

