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CONSTRUCTION LAW

Robert L. Meyers III*

Michael D. Cuda**

THIS Article covers construction law issues decided between September 1990 and September 1991. During this period, the Texas legislature enacted no significant construction law legislation. Nevertheless, the courts rendered a number of interesting decisions. Two Texas supreme court decisions relating to the Deceptive Trade Practices Act are of particular interest.¹ One case is more interesting, and potentially more significant, due to the court's failure to rule rather than its ruling on the issues.² This Article discusses cases from Texas, from the Fifth Circuit and from out-of-state courts which may impact Texas construction law.

I. DECEPTIVE TRADE PRACTICES

In *Mancorp, Inc. v. Culpepper*³ the court considered whether a jury finding that allowed an offset for defects on a construction contract amounted to a finding of actual damages in a Deceptive Trade Practices Act (DTPA)⁴ claim, thereby allowing an award of attorneys' fees. The court held that well-established construction contract law deems that the cost to remedy defects is a measure of damages for a breach of contract, not an award of DTPA damages.⁵ The party seeking an award of DTPA damages must obtain a jury finding of actual damages under the DTPA in order to be entitled to attorneys' fees⁶. Consequently, the request for attorneys' fees was denied.

The *Culpepper* court also reversed a judgment n.o.v. after a jury finding that John C. Culpepper, Jr. and Culpepper Properties, Inc. were alter egos of one another.⁷ The evidence that the court found determinative included the facts that the construction loan was executed in both the corporation's and the individual's name; the loan was personally guaranteed by the individual; John Culpepper had informed the construction contractor that he was personally behind the project (which was confirmed by the mortgage lender);

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1. See *infra* notes 3 & 6 and accompanying text.

2. See *infra* note 6 and accompanying text.

3. 802 S.W.2d 226 (Tex. 1990) (Hecht, Phillips, J. dissenting).

4. TEX. BUS. & COMM. CODE ANN. § 17.41-.63 (Vernon 1987).

5. *Culpepper*, 802 S.W.2d at 231; *Vance v. My Apartment Steak House of San Antonio, Inc.*, 677 S.W.2d 480 (Tex. 1984).

6. *Culpepper*, 802 S.W.2d at 231.

7. *Id.* at 227.

and strict corporate formalities were not followed in regard to checking accounts and signatures on notes.⁸ Therefore, the case was remanded to the lower court to evaluate the facts in the light most favorable to the jury finding.⁹

Probably the most significant DTPA supreme court decision related to construction law this year is found in *White Budd Van Ness v. Major-Gladys Drive*.¹⁰ This case involved the DTPA's application to architectural negligence. In *White Budd* an architect's plans and specifications required a contractor to install stamped concrete in a new shopping center. The contractor later claimed he could not install the stamped concrete and proposed the installation of "C-Tile." The proposal was reviewed and approved by the project architect. When the C-Tile proved unsuitable after installation, the joint venture sued both the contractor and architect. However, the contractor settled with the joint venture for a nominal amount and signed a "Mary Carter" agreement. The suit against the architect included allegations of DTPA violations and breach of the implied warranty of good and workmanlike performance established in *Melody Home Manufacturing Co. v. Barnes*.¹¹

The jury found against the architect on all claims, including knowing violations of the DTPA, and the *Melody Homes* implied warranty issue.¹² The verdict was based in part on testimony regarding the architectural standard of care from an expert who was not an architect or a licensed engineer, but had a civil engineering degree.¹³ The court of appeals affirmed the jury decision.¹⁴ The architect's Writ of Error to the Texas supreme court was dismissed because counsel would not comply with the 50 page brief limit.¹⁵ Therefore, at least until this issue is considered directly by the supreme court, there is precedent holding that a professional architect may be held liable for failure to provide services in a good and workmanlike manner under the *Melody Homes* doctrine, and that an individual who has a civil engineering degree, but is not a licensed engineer, can testify as an expert on the standard of care for architects.

In *Oxford Finance Companies, Inc. v. Velez*¹⁶ the court considered a case in which the plaintiff contracted to have aluminum siding installed on her home. The contract and mechanics and materialman's lien were subsequently assigned to Oxford Finance Companies, the permanent lender. When it was discovered that the siding was improperly installed, Ms. Velez discontinued payments to Oxford. Oxford subsequently foreclosed on the property and sold it to a third party. The third party attempted to take

8. *Id.* at 229.

9. *Id.* at 231.

10. 798 S.W.805 (Tex. App.—Beaumont 1990), writ *dism'd per curiam*, 811 S.W.2d 541 (Tex. 1991).

11. 741 S.W.2d 349 (Tex. 1987).

12. *White Budd*, 798 S.W.2d at 808-09.

13. *Id.* at 815.

14. *Id.* at 820.

15. 811 S.W.2d 341 (Tex. 1991).

16. 807 S.W.2d 460 (Tex. App.—Austin 1991, writ denied).

possession of the house, and this action was filed for violations of the DTPA and the Home Solicitation Transactions Act (HSTA).¹⁷ Ms. Velez prevailed under both the DTPA and the HSTA claims, thus voiding the deed of trust lien, and foreclosure sale. Ms. Velez was awarded \$7,800.00 in damages and \$25,000.00 in attorneys' fees. Oxford appealed the DTPA violation verdict and claimed the Federal Trade Commission (FTC) notice precluded any affirmative relief, or alternatively, precluded any liability in excess of the total amount of payments made to Oxford by Ms. Velez.¹⁸

Oxford relied on an official comment to the FTC's notice language to argue that affirmative relief was inappropriate.¹⁹ The comment suggests that a consumer will not be allowed to affirmatively recover against an assignee of a contract unless the consumer received little or no value from the seller.²⁰ The court rejected the argument and relied on the clear and unambiguous language of the FTC contractual provision which states that a holder of the contract is subject to all claims and defenses which a debtor may assert against a seller.²¹

The court next considered Oxford's claim that Ms. Velez was not entitled to recover an amount in excess of the payments she made to Oxford under the consumer contract. Here, the court agreed with Oxford's contention, relying on *Home Savings Association v. Guerra*.²² In *Guerra* the supreme court reasoned that if an assignee were held liable for all losses under a contract incurred by the seller, the assignee would become a guarantor of the contract.²³ The court reasoned that this was not intended by Congress when it passed the statute requiring the FTC notice.²⁴ Consequently, the recovery against Oxford was limited to the amount paid under the contract.²⁵ The court also relied on *Guerra* for the proposition that attorneys' fees are properly divisible on a *pro rata* basis between an assignee of a FTC contract and a seller in a breach of contract case.²⁶

The court considered procedural aspects of the DTPA in *Miller v. Kossey*.²⁷ In *Miller* a homeowner brought a DTPA claim against contractors who were hired to construct additions and improvements to her house. The contractors breached the contract in 1984 and the homeowner sent written notice of her complaints, the damages, the expenses, and her anticipated attorneys' fees. Her damages were based on breach of contract, breach of warranty, and violations of the DTPA, but she did not specifically reference which sections of the DTPA had been violated. Under the notice provision of the DTPA in effect at the time the claim arose, the homeowner was re-

17. TEX. REV. CIV. STAT. ANN. arts. 5069-13.01 to -13.07 (Vernon 1987).

18. *Oxford Finance*, 807 S.W.2d at 463.

19. See 16 C.F.R. § 433.2(a) (1990).

20. *Id.*

21. *Oxford Finance*, 807 S.W.2d at 463.

22. 733 S.W.2d 134 (Tex. 1987).

23. *Id.* at 136.

24. *Id.*

25. *Oxford Finance*, 807 S.W.2d at 464.

26. *Id.*

27. 802 S.W.2d 873 (Tex. App.—Amarillo 1991, writ denied).

quired to provide at least 30 days notice of the specific violations prior to filing suit. In this case however, counsel for both parties agreed in open court in September 1988 that the notice given in 1984 under the Act was inadequate. Therefore, the court ordered that new notice be sent to the defendants.²⁸ Additionally, the court order made clear that both parties were required to be ready for trial later that month. After six months, the plaintiff had not sent notice in compliance with the court's order. Consequently, the defendants filed a plea to the jurisdiction and made a motion to dismiss the plaintiff's suit.²⁹

The court began its analysis by noting that proper notice under the Act is a necessary element in a plaintiff's DTPA action.³⁰ In this case, the plaintiff agreed through her counsel in 1988 that the notice provided in 1984 was inadequate. Additionally, the court ordered appropriate notice to be given to the defendant in 1988. The plaintiff failed to comply with that order, and therefore dismissal of the DTPA claims was appropriate. Upon this ruling from the bench, the plaintiff announced that she was not willing to go forward with any of the additional claims at that time. Consequently, the court dismissed the balance of her claims.³¹ The court held that dismissal was appropriate as an exercise of the court's fundamental power to dismiss a claim when a party refuses to prosecute it.³² In this case, the dismissal followed the plaintiff's announcement of ready for trial, the selection of a jury, and refusal to prosecute the actions after her DTPA claims were dismissed.³³ Therefore, the judgment of the trial court for dismissal was affirmed.³⁴

II. ARCHITECTS AND ENGINEERS

Architects and engineers were probably most affected by the cases in construction law this year. While this section contains a limited number of cases, architecture and engineering cases are sprinkled throughout the Article in other sections. This distribution was necessary in that, although architects and engineers were defendants in the cases, the legal principles established may apply to other classes of defendants.

*Jefferson Savings & Loan Ass'n v. Adams*³⁵ involved a dispute between an architectural and engineering firm (A&E Firm) and a savings and loan. In this case, the A&E firm sued Gates Development Corporation (Gates) for failure to pay for services rendered. The judgment was granted in 1987. Subsequently, Jefferson Savings & Loan (S&L) sought to collect on a promissory note executed by Gates, such note being secured by an apartment

28. *Id.* at 875.

29. *Id.*

30. *Cielo Dorado Dev. v. Certainteed Corp.*, 744 S.W.2d 10 (Tex. 1988) (Gonzalez, J., dissenting).

31. *Miller*, 802 S.W.2d at 876.

32. *Id.* at 877.

33. *Id.* at 875.

34. *Id.* at 877.

35. 802 S.W.2d 811 (Tex. App.—San Antonio 1990, writ denied).

complex. In conjunction with that effort, the S&L obtained a temporary injunction that prevented the A&E firm from executing on the apartments to satisfy their judgment. The terms of the injunction required all rents, profits and revenues from the apartment complex to be paid into a third party bank account. The A&E firm then filed a garnishment action against the bank. The trial court ruled in favor of the A&E firm relying in part on the fact that Texas is a mortgage lien theory state and therefore, the owner of the property (Gates) is the owner of the rents.³⁶ The trial decision was reversed because the garnishment action was an attempted collateral attack on a temporary injunction.³⁷ The court reasoned that a collateral attack on a judgment may only be maintained if the judgment is absolutely void.³⁸ Therefore, the S&L was allowed to retain possession of the funds.

III. MUNICIPALITIES

Another garnishment issue was raised in *City of Victoria v. Hoffman*.³⁹ In this case, a subcontractor (Hoffman) sought to enforce a judgment against a general contractor for services performed on a municipal contract. Hoffman was unable to locate any assets to satisfy the judgment, other than a potential receivable owed to the contractor from the City of Victoria. The City's initial response to the garnishment stated that it did not owe the contractor any funds. The City subsequently entered into an agreed judgment to pay the contractor a total of \$10,000, paid the funds to the contractor, and then amended its answer to the garnishment and claimed statutory sovereign immunity from garnishment.⁴⁰ The trial court found that the City's failure to amend the response to the garnishment prior to paying the contractor served as a waiver of sovereign immunity.⁴¹

The appellate court initially commented that waiver is an intentional relinquishment of a known right.⁴² In this case, the Texas Rules of Civil Procedure determine whether or not the City waived its defense. Rule 94 requires that an affirmative defense be pleaded, and a failure to plead the defense results in a waiver.⁴³ Nevertheless, the court reasoned that rule 94 must be read in conjunction with rule 63, which allows amendment of pleadings until seven days before trial.⁴⁴ Here, although the City paid the contractor the funds before amending the pleadings, the pleadings were amended more than seven days before trial. Therefore, the affirmative defense of sovereign immunity was not waived and the City prevailed in the action.⁴⁵

36. *Id.* at 812.

37. *Id.* at 814.

38. *Id.*

39. 809 S.W.2d 603 (Tex. App.—Corpus Christi 1991, writ denied).

40. See TEX. LOC. GOV'T CODE ANN. § 101.023 (Vernon 1988).

41. *City of Victoria*, 809 S.W.2d at 604.

42. *Id.* at 605.

43. *Id.* (citing *Bracton Corp. v. Evans Construction Co.*, 784 S.W.2d 708, 710 (Tex. App.—Houston [14th Dist.] 1990, no writ).

44. *City of Victoria*, 809 S.W.2d at 605.

45. *Id.*

Another municipality faced similar problems in *Corpus Christi v. Heldenfels Brothers*.⁴⁶ In this case, a subcontractor (Heldenfels) sued the City for recovery under theories of quantum meruit, unjust enrichment, and negligent failure of the City to require the contractor to provide a proper payment bond under the McGregor Act.⁴⁷ The City contracted with La-Mann Constructors Inc., as general contractor to make improvements to park land and a recreation center. Before completion the contractor abandoned the project without paying Heldenfels and it was discovered that the performance and payment bonds were fraudulent documents involving a nonexistent bonding company. Heldenfels sued the City for \$26,000, which represented the cost of the T-beams supporting the roof to the recreation center. The jury's verdict favored the subcontractor on all issues.

The court of appeals reversed the jury's decision. The court disposed of the quantum meruit finding on a factual insufficiency point by focusing on the required element that the contractor notify the party to be charged that they expect payment for services performed from that party.⁴⁸ The only testimony regarding Heldenfels' notification of the City adduced at trial came from their attorney and from the party who prepared their price and cost estimate on the project. Their attorney testified that "he would be greatly surprised" if the City was not aware that Heldenfels expected payment from it.⁴⁹ The party who prepared Heldenfels' cost and price estimate stated that because the City had used and enjoyed the T-beams in question, "under such circumstances as Heldenfels Brothers reasonably notified the City that they expected the City to pay for that work."⁵⁰ The court found this evidence so weak that it did not amount to more than a scintilla of evidence.⁵¹ Therefore, the City's factual insufficiency point on quantum meruit was sustained.⁵²

The court next disposed of Heldenfels' unjust enrichment claim. While it agreed that the City gained at least incidental benefits from the provision of the T-beams, the Court held that the City was under no contractual obligation to make payment to a subcontractor who was not a party to the separate general contract.⁵³ Therefore, recovery under this theory was improper.

Finally, the court disposed of the claim for negligent failure to require a general contractor to provide a proper payment bond. The version of the McGregor Act in effect when the action arose⁵⁴ did not impose liability for breach of the responsibility to require a valid payment bond by a contractor. Although the Act was subsequently amended specifically to provide liability against a governmental entity for failure to secure a proper payment bond on

46. 802 S.W.2d 35 (Tex. App.—Corpus Christi 1990, writ granted).

47. TEX. REV. CIV. STAT. ANN. art. 5160 (Vernon 1987 & Supp. 1992).

48. *Heldenfels*, 802 S.W.2d at 39.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 41.

54. Act of June 16, 1977, 65th Leg., R.S., ch. 809, 1977 Tex. Gen. Laws 2027, amended by Act of June 18, 1989, 71st Leg., R.S., ch. 1138, § 38, 1989 Tex. Gen. Laws 4703, 4704.

a contract, the statute in effect at the time the action arose did not impose liability on the municipality. Therefore, the jury's decision on this issue was reversed as a matter of law.⁵⁵ Nevertheless, writ has been granted by the supreme court⁵⁶ and while any one of these reversals may be changed, the supreme court is likely to correct the court of appeals' rendition of the quantum meruit factual insufficiency point of error. Remand is the appropriate disposition of a factual insufficiency point.⁵⁷

IV. EXPRESS NEGLIGENCE

Municipalities and the application of the express negligence rule were considered by the court in at least two recent decisions. In *City of Houston v. Goings*⁵⁸ Snead Site Preparation was hired to demolish a hybrid suspension bridge. Although the bridge appeared to be supported by the piers below it, most of its weight was supported by a series of basketwork trusses. Snead did not have any previous experience dismantling bridges. The trusses supporting the center section were removed without incident because the bridge was counterbalanced. However, when the trusses in the south section of the bridge were cut, the steel began "ripping like paper" and the plaintiff was injured.⁵⁹ The jury ruled in favor of the plaintiff on all issues, and found the City 100% negligent. Among the City's issues on appeal was a claim that the contract specifically indemnified the City for its own negligence in accord with *Ethyl Corp. v. Daniel Construction*.⁶⁰

The court of appeals reviewed the pertinent contractual clauses to determine whether the City had been indemnified for its own negligence.⁶¹ While there were a number of clauses assigning the risk of loss to the contractor, all the clauses were specifically referable to the contractor's own negligence. Because the contractor's employee was found non-negligent by the jury, no damages could be assessed against the contractor.⁶² The court also held that the City was not entitled to comparative indemnity because it did not meet the requirements of the express negligence test.⁶³

Another case involving municipalities analyzed the procedural issue of which party has the burden of proof in a motion for summary judgment when the express negligence doctrine for indemnification agreements is involved. In *R. L. Jones Co. v. San Antonio*⁶⁴ Jones and the City of San Antonio were sued by a party who was injured when she drove her car into a trench dug by Jones for the purpose of lowering a gas pipeline. The contract between Jones and the City had an indemnification clause, but it did not

55. *Heldenfels*, 802 S.W.2d at 41.

56. *Heldenfels Brothers v. Corpus Christi*, 34 Tex. Sup. Ct. J. 515 (April 10, 1991).

57. See TEX. R. APP. P. 81(c).

58. 795 S.W.2d 829 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

59. *Id.* at 832.

60. 725 S.W.2d 705 (Tex. 1987).

61. *Going*, 795 S.W.2d at 835.

62. *Id.*

63. *Id.*

64. 809 S.W.2d 565 (Tex. App.—San Antonio 1991, no writ).

contain express language indemnifying the City for its own negligence as required by *Ethyl Corp. v. Daniel Construction Co.*⁶⁵ Therefore, the City of San Antonio would be liable under the contract for its own negligence. In this case, Jones severed the suit against the City from the original action by the plaintiff. The plaintiff received a take-nothing judgment against Jones based on a jury finding that the plaintiff was 80% negligent and Jones was 20% negligent. Subsequently, the City settled with the plaintiff for \$2,000 and sought to recover the funds plus attorneys' fees and expenses from Jones pursuant to the indemnification clause. Both parties moved for summary judgment.

The court of appeals determined that an indemnitee (the City) that makes a motion for summary judgment under an indemnification clause that does not comply with *Ethyl* must prove as a matter of law that it was not negligent.⁶⁶ In this case, the court reviewed the motions for summary judgment and found that the City did not conclusively show that it was not negligent.⁶⁷ Additionally, it found that because Jones did not expressly plead in its motion that the City was negligent, summary judgment was not proper in Jones' favor.⁶⁸ Therefore, the denial of Jones' summary judgment was affirmed, and the summary judgment in favor of the City was reversed and remanded.⁶⁹

Another application of the express negligence rule to the burden of proof in pleading appeared in *R. B. Tractors, Inc. v. Mann*.⁷⁰ Mann leased a tractor and signed a contract in which he assumed liability for all losses and damage to the equipment. The tractor was hitched to Mann's trailer by the lessor and during transportation, the tractor fell off the trailer and suffered damage. R. B. Tractors sued for breach of contract to recover repair expenses. The jury found that Mann was not negligent. Therefore, the trial court entered a take-nothing judgment in favor of Mann.⁷¹

The court of appeals reversed the decision on the ground that although the indemnification clause did not comply with the *Ethyl* express negligence requirement, Mann was still required to plead, prove, and obtain a jury instruction on the indemnitee's negligence because contributory negligence is an affirmative defense.⁷² Mann did not obtain a jury instruction on the issue and therefore, he was required to pay for the tractor damage.

The burden of proof in a contractual indemnification clause was also raised in *Champlin Petroleum Co. v. Goldston Corp.*⁷³ Champlin executed a facility maintenance contract with Goldston that contained an indemnification clause in Champlin's favor. A Goldston employee was injured on the

65. 725 S.W.2d 705 (Tex. 1987).

66. *R.L. Jones*, 809 S.W.2d at 568 (citing, *Sira & Payne, Inc. v. Wallace & Riddle*, 484 S.W.2d 559 (Tex. 1972)).

67. *R.L. Jones*, 809 S.W.2d at 569.

68. *Id.*

69. *Id.*

70. 800 S.W.2d 955 (Tex. App.—San Antonio 1990, no writ).

71. *Id.*

72. *Id.* at 957-58.

73. 797 S.W.2d 165 (Tex. App.—Corpus Christi 1990, writ denied).

job. Champlin settled with the employee and sought indemnity from Goldston. Goldston claimed that because the clause did not meet the express negligence requirements, indemnification was improper.

Champlin did not argue that the clause met the express negligence rule, but rather that the rule was inapplicable in this case. The express negligence rule is used to determine whether a negligent party will be indemnified for its own negligence.⁷⁴ In this case, Champlin was never found to be negligent and the stipulated facts did not establish or support a negligence finding against Champlin.⁷⁵ Because Goldston did not meet its burden of proof as a matter of law, the trial court decision was reversed and rendered.⁷⁶

In *Olson v. Central Power and Light*⁷⁷ the court discussed whether the express negligence rule applies to statutory as opposed to contractual indemnity. Kermit Olson, d/b/a Olson Plastering Company, was hired to aid in the construction of an office building. While working on the building, one of Olson's employees, Smith, came in contact with a power line and was injured. Because Olson carried Workers' Compensation Insurance, it claimed to be indemnified from any and all liability.⁷⁸ While it is clear under the Workers' Compensation Act that Smith could not sue Olson, the initial issue in this case was whether Central Power and Light could sue Olson for indemnification for Smith's injuries under the Texas Public Utilities Act.⁷⁹

The court began by stating that whether one statute takes priority over another is an issue to be decided by the court as a matter of law.⁸⁰ The court then noted statutory construction rules dictate that when statutes are in irreconcilable conflict, the more specific statute or the later enacted statute is deemed to control.⁸¹ In this case, the Texas Utilities Act met both tests. The court then turned to the express negligence rule. According to the court, the rule was developed "to defeat crafty scribes who create ambiguous indemnity contracts in an effort to deceive the indemnitor."⁸² This concern does not exist in statutory indemnification cases.⁸³ Based on these findings, Central Power and Light was indemnified from any liability to Smith for his injuries.

Another indemnification case involved an architect's attempt to enforce an indemnity agreement against a contractor to recover the cost of defending a suit filed by a property owner against both the contractor and the architect. In this case, the contractor and a third party were found to be negligent, but not the architect. In *Foster, Henry, Henry & Thorpe, Inc. v. J. T.*

74. See *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987).

75. *Champlin Petroleum*, 797 S.W.2d at 166.

76. *Id.* at 167.

77. 803 S.W.2d 808 (Tex. App.—Corpus Christi 1991, writ denied).

78. Act of March 28, 1917, 35th Leg., R.S., ch. 103, 1917 Tex. Gen. Laws 269, *repealed* by Act of Nov. 14, 1989, 71st Leg., 2nd C.S., ch. 1, § 16.01(7)-(9), 1989 Tex. Gen. Laws.

79. TEX. REV. CIV. STAT. ANN. art. 1436c, § 7(b) (Vernon 1980) (repealed 1989) (current version at TEX. HEALTH & SAFETY CODE § 752.008 (Vernon Pamph. 1991)).

80. *Olsen*, 803 S.W.2d at 811.

81. *Id.*

82. *Id.* at 812.

83. *Id.*

Construction Co.,⁸⁴ an architectural firm entered into a contract to provide plans and specifications for the construction of the El Paso Rehabilitation Center. The arrangement with the contractor included an indemnification clause that stated that the owner of the property and the architect and their agents and employees were indemnified from any claims, expenses including attorneys' fees, and losses for any claim "attributable to . . . injury to or destruction of tangible property" that "is caused in whole or in part by a negligent act or omission of the Contractor."⁸⁵ The negligent acts considered in this case caused damage to property adjacent to the construction site when a substantial rainfall caused flooding, allegedly due to the contractor's failure to protect the site. The trial court directed a verdict that the architects take nothing on their indemnification claim.

The court of appeals reversed and remanded the lower court decision, first noting that the indemnification agreement did not seek to indemnify the architects for their negligence.⁸⁶ In fact, the jury found that the architects were not negligent.⁸⁷ The court next considered the contractor's argument that recent statutory changes⁸⁸ making indemnity clauses in favor of architects void and unenforceable applied in this case. Here, the court held that the statutory changes were expressly referable to indemnification for an architect's negligence.⁸⁹ Although the court ruled in favor of the architects, the case was remanded because the trial court excluded the architectural firm's evidence of expenses and attorneys' fees associated with the litigation.⁹⁰

An interesting decision was reached in a California case involving the construction and applicability of its anti-indemnity statute. In *Markborough California, Inc. v. Superior Court*⁹¹ Markborough, a developer, entered into a contract with an engineering firm (Glenn) that specialized in man-made lake design. The contract included a clause, one of thirty-three paragraphs in fine print on the reverse side of the contract, that limited Glenn's liability to Markborough for negligent acts to the greater of \$50,000 or the engineering services fee. When the lake liner failed, Markborough incurred over \$5 million in expenses to repair the problem. Glenn asserted the limitation of liability clause to cap its exposure on the project at \$67,640.

The California anti-indemnification statute provides that a construction contract agreement that attempts to indemnify a party for loss due to its negligence or wilful misconduct is void as against public policy.⁹² The statute, however, provides that parties may negotiate and expressly agree to reduce or limit their liability between themselves.⁹³ The court ruled that the

84. 808 S.W.2d 139 (Tex. App.—El Paso 1991, writ denied).

85. *Id.* at 140.

86. *Id.* at 141.

87. *Id.*

88. TEX. CIV. PRAC. & REM. CODE ANN. § 130.002 (Vernon 1991).

89. *Foster*, 808 S.W.2d at 141.

90. *Id.*

91. 277 Cal. Rptr. 919, 227 Cal. App. 3d 705 (1991).

92. CAL. CIV. CODE § 2782 (West 1974).

93. *Id.* § 2782.5.

agreement between Markborough and Glenn fell outside the anti-indemnification clause.⁹⁴ According to the court, negotiating merely requires "a fair opportunity to accept, reject or modify a liability limitation provision"⁹⁵ and the agreement only operated to limit liability between the parties.⁹⁶ Therefore, Markborough was left with virtually no recourse against Glenn except recovery of the \$67,640 fee.

V. CONTRACT CONSTRUCTION

Amazingly, the courts had the opportunity to review an unambiguous construction contract this year. In *Sage Street Ass'n v. Northdale Construction Co.*⁹⁷ the court addressed a breach of contract issue between an owner and general contractor. In this case, an unambiguous construction contract provided for installment payments to the contractor as the project progressed, payment of the contractor's utility bills on the project, and payment for change orders. When the owner refused to pay change order expenses and utility costs, the contractor walked off the project when it was 80% complete.

The court first noted that both sides agreed that the contract was unambiguous.⁹⁸ Therefore, the issues were decided as a matter of law.⁹⁹ The court then found that the contract provided for progress installment payments that included both utility expenses and change orders.¹⁰⁰ The owner failed to make those payments in accordance with the terms of the contract. Therefore, the owner breached the contract and the contractor was excused from performance.¹⁰¹ The contractor was also entitled to recover damages that would place him in the same position as if there had been no contractual breach because the owner breached the contract.¹⁰² Damages may include profits that a contractor would have made if permitted to fully perform the contract.¹⁰³ Additionally, because the owner breached the contract and the performance bond provided by the contractor contained express language linking its obligation to pay under the bond to the owner's proper payment under the contract, the bonding company was not required to make any payments under the performance bond.¹⁰⁴ Therefore, the trial court decision awarding the contractor in excess of \$2.5 million plus prejudgment interest was affirmed. The only change to the verdict was an adjustment to the interest rate from 6% that was awarded at trial, to the 10% statutory

94. *Markborough*, 277 Cal. Rptr. at 924.

95. *Id.* at 925.

96. *Id.* at 927.

97. 809 S.W.2d 775 (Tex. App.—Houston [14th Dist.] 1991, writ granted).

98. *Id.* at 777.

99. *Id.*

100. *Id.*

101. See *Fischer v. Richard Gill Co.*, 253 S.W.2d 915, 917-18 (Tex.Civ.App.—San Antonio 1952, writ ref'd).

102. *Sage Street*, 809 S.W.2d at 777.

103. *Id.*

104. *Id.* at 778.

level.¹⁰⁵

VI. ERRATICA

This year, there were a number of cases within the State, in the Fifth Circuit, and from out of state that were of interest, but were not easily classified into one particular section of this article. The result is Erratica.

An interesting product liability issue was considered in *Barham v. Turner Construction Co.*¹⁰⁶ Mr. Barham was the foreman of a subcontractor's crew hired by Turner Construction to erect steel columns on a project. While erecting a forty-foot steel column, a steel erection plate that was wired to the top of the column fell and struck Barham, who was wearing a hardhat, on the head. Barham sued Turner Construction and the steel column fabricator for negligence and strict product liability. After a verdict against the steel fabricator, Barham appealed the trial court's refusal to submit the product liability theory of recovery against Turner to the jury.

The specific issue considered by the court in *Barham* related to whether Turner, as contractor, was a seller "engaged in the business of selling" the product (steel beams) for purposes of strict product liability.¹⁰⁷ The court initially noted that strict product liability does not necessarily require the defendant to sell the product; however, the defendant "need only be engaged in the business of introducing the product into channels of commerce."¹⁰⁸ The court then reviewed the evidence and found that the steel fabricator sold the columns used by Turner.¹⁰⁹ Turner was merely a general contractor in the business of selling services, not steel columns. Because Turner did not introduce the columns into commerce, the trial court decision refusing to submit the strict liability theory against Turner to the jury was upheld.¹¹⁰

In *Sur v. Otts, Inc.*¹¹¹ the court considered a procedural issue relating to a suit on sworn account to recover the cost of labor, materials and services incurred renovating apartments damaged by Hurricane Alicia. The defendant failed to deny the claim under oath as required by the rules of procedure¹¹² and consequently, the court ruled as a matter of law that the plaintiff was entitled to judgment.

The defendant filed a timely motion for new trial that was overruled. The defendant then had ninety days from the date the judgment was signed to file a cost bond and perfect an appeal in accordance with the rules of appellate procedure.¹¹³ The defendant failed either to timely file the cost bond or to request an extension of time to file the bond. However, the defendant claimed that notice of the judgment was not received and knowledge of the

105. *Id.*

106. 803 S.W.2d 731 (Tex. App.—Dallas 1990, writ denied).

107. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

108. *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 375 (Tex. 1978).

109. *Barham*, 803 S.W.2d at 738.

110. *Id.*

111. 800 S.W.2d 647 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

112. TEX. R. CIV. P. 185.

113. TEX. R. APP. P. 41(a)(1).

judgment was not acquired within twenty days of the date it was signed, as required by the Rules. Hence, the defendant filed a motion¹¹⁴ in the trial court after the initial appeal was dismissed in order to show that notice had not been timely received. The appellate court dismissed her second appeal because the lack of notice did not prevent her from filing a motion for new trial, and therefore, her cost bond should have been timely filed.¹¹⁵

In *Criton Corp. v. Highlands Insurance Co.*¹¹⁶ a dispute arose between a bridge contractor (Layton) and a subcontractor (Criton) that was to provide pedestrian and automobile railing for the bridge. The dispute revolved around which party was at fault when the bolting anchors and the guardrail bolt holes did not match. Criton used an acetylene torch to cut additional holes into the railing in an attempt to make the rails fit. The facts were in conflict regarding whether Layton granted Criton the opportunity to make repairs or whether Criton refused to acknowledge the problem. However, it was undisputed that the Harris County inspector refused to certify the work because of the burned holes.

Criton was ordered off the job because of the problem, and Layton removed and replaced the existing guardrails. By performing the work itself, Layton was able to complete the job for \$5,800 less than the contract amount. The savings were pled into the registry of the court. Layton claimed the \$5,800 was the only amount due on the contract. Criton filed suit alleging breach of the subcontract and alternatively, an action in quantum meruit. Layton claimed that Criton had breached the subcontract and also requested an award of attorneys' fees under section 38.001 of the Texas Civil Practice and Remedies Code (the Code). All issues were found in favor of Layton and Criton appealed, claiming that Layton was not entitled to attorneys' fees.

Criton's complaint revolved around which party was the prevailing party in the action as well as the procedural requirements to satisfy in order to be awarded attorneys' fees under the Code. The court first noted that the prevailing party is the party who "successfully prosecutes the action or successfully defends against it."¹¹⁷ The court then observed that when "a general contractor recovers the amount necessary to complete a contract less the amount that the general contractor retains, the general contractor is the prevailing party entitled to attorney's fees."¹¹⁸ Therefore, Layton was entitled to attorneys' fees.

The court also considered the procedural notice requirements of Texas Civil Practice and Remedies Code section 38.002, and determined that Layton presented the claim to Criton prior to filing suit, even though the presen-

114. See TEX. R. APP. P. 5(b)(4).

115. *Sur*, 800 S.W.2d at 648.

116. 809 S.W.2d 355 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

117. *Id.* at 357 (citing BLACK'S LAW DICTIONARY 1352 (4th ed.)).

118. *Criton*, 809 S.W. at 357 (citing *Davis Masonry, Inc. v. B-F-W Const. Co., Inc.*, 622 S.W.2d 144 (Tex.Civ.App.—Waco 1981), writ *ref'd n.r.e. per curiam*, 639 S.W.2d 448 (Tex. 1982)).

tation was made orally.¹¹⁹ Therefore, the decision of the trial court was affirmed.

In *Daniel International Corp. v. Fischbach & Moore, Inc.*¹²⁰ the court considered whether a liquidated damages clause, that entitled the contractor to cost plus a 10% profit if a subcontractor was not able to complete the project in a timely manner, was a contractual penalty provision. The dispute arose over a contract to build a prison in Texas. Because the project was court ordered, the completion date was inflexible and the subcontract made very few provisions for delay. The contractor was allowed to step in and complete the project in the event that a subcontractor was not performing in a timely manner. The contractor was ultimately required to step in, and the subcontractor was charged for the cost to complete the project as well as liquidated damages amounting to an additional 10% of the cost. The district court determined that the liquidated damages clause was a penalty provision and therefore refused to enforce it.¹²¹

The court of appeals reviewed the criteria for determining whether a liquidated damages clause operates as a penalty provision.¹²² The court must determine first whether at the time the contract was let, the parties believed that proof of loss would be difficult; and second, whether the amount fixed as a liquidated damage is reasonable.¹²³ In this case, the court determined that because it would be difficult to prove actual loss of profit suffered by the contractor due to contingencies such as foregone profits, fixing a loss at the time the contract was entered would be difficult.¹²⁴ The court then relied on other Fifth Circuit precedent indicating that a 10% profit was reasonable and customary in contract work.¹²⁵ Therefore, the liquidated damages clause was not a penalty provision and was enforced.

In *Nacol v. McNutt*¹²⁶ the court considered whether a trustee acting on behalf of the beneficiaries of the trust was personally liable on a construction contract that was executed without a reservation of rights clause. In particular, the trustee complained that the jury issues placed the burden of proof on the trustee to show that she had disclosed that she was acting in her capacity as trustee, as opposed to putting the burden on the contractor to show that she had concealed the fact that she was acting as the trustee. The court found that it is well-settled law that a trustee bears personal liability for contracts that she executes on behalf of the trust beneficiaries unless she expressly stipulates to the contrary.¹²⁷ Therefore, the decision of the lower court was affirmed.

119. *Criton*, 809 S.W.2d at 358.

120. 916 F.2d 1061 (5th Cir. 1990).

121. *Id.* at 1062.

122. *Id.* at 1066.

123. *Id.* at 1016 (citing *Farmers Export Co. v. M/V Georgis Prois*, 799 F.2d 159 (5th Cir. 1986)).

124. *Daniel Int'l*, 916 F.2d at 1066.

125. *Id.* at 1067.

126. 797 S.W.2d 153 (Tex. App.—Houston [14th Dist.] 1990, writ denied).

127. *Id.* at 155.

In *Texas-Capital Contractors, Inc. v. Abdnor*¹²⁸ the court reviewed an administrative law judge's determination that a contractor did not fit within the Small Business Administration's (SBA) definition of a small business in that it was affiliated with a number of other corporations held under common ownership and common management. The dispute in this case arose when the Army Corps of Engineers awarded a small business set-aside to the low bidder. The next lowest bidder challenged the award on the basis that Michael McCarty, the sole stockholder, officer, and director of Texas-Capital Construction, Inc. (TCCI) was affiliated with a number of other companies. Due to the affiliation, the combined average annual receipts of all the businesses exceeded the \$17 million revenue limit placed on small businesses. The corporations with which Michael McCarty was allegedly affiliated were all owned or influenced by members of his family.

The SBA regional office initially determined that Michael was not affiliated with the companies. The SBA reasoned that Michael did not own stock and was not a director of the other companies, and the family association did not create an affiliation within the meaning of the SBA limitation. This decision was subsequently reviewed and it was determined that the corporations all had an "identity of interest" and hence, were affiliated organizations. This determination was challenged by Michael McCarty as arbitrary, capricious, and not supported by the substantial evidence.

The court reviewed the identity of interest rule as it applies to family members.¹²⁹ Under the rule, an identity of interest among family members is presumed in the absence of certain factors such as remoteness of family ties, estrangement, or lack of close involvement in the business matters.¹³⁰ The court then reviewed the specifics of the corporate relationships.

The court found that all of the corporations were initially established as the McCarty Group by William McCarty.¹³¹ William was Michael's father. William McCarty set up a series of trusts, all of which were related to the construction business, for the benefit of his children. There was evidence that the only reason Michael resigned his position in the McCarty Group and sold his stock was to avoid a determination of affiliation by the SBA. There was also evidence, however, that each of the corporations in the McCarty Group functioned as separate entities in that, although they were located in the same building, each corporation was responsible for its own expenses. While the court agreed that not one of these factors was determinative of whether TCCI controlled or was controlled by the McCarty Group, there was evidence of a business relationship between the father and the son.¹³² Based on these facts, the court would not overrule the administrative law judge's decision.¹³³ Therefore, the determination that TCCI did not fall within the category of a small business was upheld.

128. 933 F.2d 261 (5th Cir. 1990).

129. *Id.* at 266.

130. *Id.* at 266 (citing *Size Appeal of Golden Bear Arborists, Inc.*, No. 1899 (1984)).

131. *Texas-Capital*, 933 F.2d at 267.

132. *Id.*

133. *Id.* at 269-70.

VII. CONCLUSION

Legislative and judicial action during this past twelve months has not brought any dramatic changes in the law affecting the construction industry, except possibly some federal legislation such as the Americans With Disabilities Act, which is beyond the purview of this article. What this year did bring was a steady infiltration of the law applicable to particular aspects of life into the world of construction. In addition, the year's activities highlight the breadth of the field known as construction law. Indeed, to confidently furnish the full range of legal services for the construction industry one must be a truly "complete lawyer." Virtually every case reviewed for this construction law update could have been and probably will be included in articles relating to a broad range of industry specialization areas as well as the more traditional, academically-defined legal specialties. So now more than ever before, "you people be careful out there."