T.A.D.C. Construction Law Newsletter – Fall 2011

Update on Cases Impacting Construction Defect Litigation

Editor: *David V. Wilson II*
Hays, McConn, Rice & Pickering, P.C.
Houston, Texas

Co-author: *Jared Byrd, J.D.*
Hays, McConn, Rice & Pickering, P.C.
Houston, Texas

Winton v. Tex. Bd. of Architectural Examiners (In re Rogers), 2011 Tex. App. LEXIS 6110 (Tex. App. Austin Aug. 3, 2011).

Recently, the Third Court of Appeals in Austin delivered an opinion that could have wide implications on the use of engineers as expert witnesses.

In *Winton v. Tex. Bd. Of Architectural Examiners*, the court analyzed the conflicts between the different regulatory acts that govern the practices of Architecture and Engineering in Texas. *Id*. The case arose from a series of cease and desist letters which were issued by the Texas Board of Architectural Examiners to a group of licensed engineers. *Id*. at 1. The Architectural Board alleged that the engineers were conducting the unauthorized practice of architecture by preparing plans for various public works projects. *Id.* at 2-3. Specifically, the Architectural Board argued that the engineers' conduct violated *Tex. Occ. Code § 1051.703(a)*, which states that the certification of alterations to a state or publicly owned building are to be performed *only by an architect*. *Winton*, 2011 Tex. App. LEXIS 6110 at 3-4.

The engineers responded by arguing that licensed engineers are wholly exempted from regulation under the Architectural Practice Act (*Tex. Occ. Code §§ 1051.001-.801*). *Winton*, 2011 Tex. App. LEXIS 6110 at 6. The engineers citied *§ 1051.601(a)* of the *Tex. Occ. Code*, which provides "[t]his chapter and any rule adopted under this chapter do not limit the right of an engineer licensed under Chapter 1001 [the Engineering Practice Act] to perform an act, service, or work within the scope of the practice of engineering as defined by that chapter." *Id.* Further, the engineers pointed out that *§ 1051.703(b)* of the Architecture Practice Act allows property owners to use either an architect or an engineer as the prime design professional for a construction project. *Id.* The Architecture Board responded that the "only by an architect" language of *§ 1051.703(a)* trumped any supposed exemption from regulation. *Id.* at 7.

After cross motions for summary judgment in front of an administrative law judge (ALJ), the Architecture Board rejected the ALJ's findings of fact and conclusions of law and instead substituted its conclusion that the engineers were indeed engaged in the unauthorized practice of architecture. *Id.* at 12. The engineers then sought judicial review, first in the district court, who remanded the case back to the Architecture Board, then subsequently on appeal to the Third Circuit. *Id.* at 12-13.

The court of appeals ultimately disagreed with the arguments of both parties and affirmed the district courts' remand of the case to the Architectural Board. *Id.* at 34. The court found that the question was "not whether the engineers were practicing *architecture*, but

whether they were practicing *engineering*." Id. at 2 (emphasis added). The court disagreed with the engineers' argument and held that *§ 1051.601(a)* did not categorically bar all regulation of engineers under the Architecture Practice Act. *Id*. at 23. But the court also rejected the Architectural Board's reliance upon the "only by an architect" language of *§ 1051.703(a)*, stating that the Architecture Practice Act does not categorically preclude licensed engineers from preparing building plans for public works projects. *Id*. at 18-19. The court affirmed the remand back to the Board of Architectural Examiners for further development of the record; to answer the question of whether the engineers' actions were within the scope and practice of *engineering* as defined by the Engineering Practice Act. *Id.* at 34. Thus, the Board of Architectural Examiners presumably does have the power to regulate the actions of licensed engineers, but only when viewed through the lens the Engineering Practice Act. Counsel may well want to read this case before deposing engineering experts in cases where the design implicates the Architecture Practice Act.

Martin K. Eby Constr. Co. v. LAN/STV, 2011 Tex. App. LEXIS 6910 (Tex. App Dallas Aug. 29, 2011)

In this case, the appellate court addressed the implications of the economic loss rule upon the relationship between contractors and design professionals. Martin K. Eby Construction Co. (Eby) was a contractor who was awarded an extensive contract by the DART rail line in Dallas. *Martin K. Eny Constr. Co. v. LAN/STV*, 2011 Tex. App. LEXIS 6910 at 2 During the course of the project Eby began experiencing several delays, which in turn vastly increased the costs which Eby had to absorb. *Id.* at 2-3. Eventually, Eby sued DART for breach of contract and misrepresentation claims. *Id.* at 2. After settling with DART out of court, Eby then sued LAN/STV who was the party primarily responsible for preparing the plans for the documents used in the bid documents. *Id.* Eby made clams of negligence and misrepresentation against LAN/STV, which resulted in a jury verdict in Eby's favor. *Id.* at 3. At trial, the terms of the settlement between DART and Eby were presented, which led to the trial court reducing the awarded amount to 45% of the verdict the jury had rendered. *Id.* Both parties cross-appealed to the Fifth District Court in Dallas. *Id*. at 1.

LAN/STV argued (along with several other points of error) that the economic loss rule barred any recovery by Eby. The court reiterated the general rule that "if a plaintiff asserts a negligent misrepresentation clam, but seeks only benefit of the bargain damages, as opposed to the permissible out of pocket damages, the plaintiff cannot establish an independent injury and economic loss rule bars recovery." *Id*. at 26. Pointing to Texas Supreme Court precedent, the court held that the economic loss rule bars recovery in tort for economic loss resulting from a defendant failing to perform under a contract. *Id.* However, the court held that in this case Eby succeeded in substantiating out of pocket expenses that were in addition to the costs incurred due to delays, modifications and reworking; therefore the Eby had proved the required damages and was not barred by the economic loss rule. *Id*. at 29.

Moreover, while analyzing the economic loss rule, the court rejected LAN/STV's argument that "no Texas case holds that a contractor can maintain a tort action against a design professional with whom it has no privity of contract purely for economic loss." *Id.* at 29-30. LAN/STV's argument relied upon *Bernard Johnson, Inc. v. Continental Constructors, Inc.*, where the Austin appellate court held that a contractor was not owed a duty by the architect to properly perform administrative duties provided for in the contract between a defendant and a third party. 630 S.W2d 365 (Tex. App. Austin 1982). However, in this case, the Dallas appellate court quickly pointed out that Eby's negligent misrepresentation claims did not relate to any administrative duties that LAN/STV might have owed to DART. . *Eby Constr. Co.*, 2011 Tex. App. LEXIS 6910 at 30. The court ultimately affirmed the decision of the lower court, stating that the economic loss rule placed no bar to recovery on Eby and found that the trial court had properly rendered judgment by reducing Eby's recovery. *Id.* at 36-37.

Black + Vernooy Architects v. Smith, 2011 Tex. App. Lexis 6118 (Tex. App. Austin, Aug. 5, 2011)

In this case, the defendant architects challenged a jury verdict holding them liable for personal injuries suffered by the plaintiffs. In October of 2000 the Maxfield family hired Black + Vernooy Architects to design a vacation home. *Id*. at 2. Soon after the Maxfields hired Nash Construction, Inc. to handle the construction of the home. *Id*. Nash Construction in turn hired a subcontractor to complete construction of a deck that was to be connected to the back of the home. *Id*. at 3-4. About a year after the home was completed, the Maxfields home was visited by Lou Ann Smith. *Id.* at 4. While at the Maxfields' home, Lou Ann stepped out on to the back deck, which suddenly collapsed causing Lou Ann to fall approximately 20 feet to the ground. *Id*. Lou Ann suffered severe injuries, which rendered her as a paraplegic. *Id*.

Lou Ann then brought suit against the Maxfield's, Black + Vernooy, Nash Construction and the subcontractor. *Id*. Lou Ann subsequently settled with all parties except for Black + Vernooy Architects, and a jury trial was held to determine the architects' liability. *Id*. It was apparently undisputed at trial that the construction failed to comply with the design of the balcony, but Lou Ann's experts contended the architects could have and should have discovered these defects as part of its role in contract administration. *Id.* The jury found the architects to be proportionately responsible for 10% of the injuries suffered. *Id*. at 4-5. The architects then appealed the jury's finding. *Id*. at 5.

The appellate court reversed the trial court's judgment and agreed with the argument that the architects owed no duty to third parties such as Lou Ann. *Id*. at 11.The court rejected Lou Ann's claims that the architect's had a duty to protect the Maxfields (as owners of the home) from faulty construction methods and by implication that duty therefore extended to intended third party beneficiaries such as Lou Ann. *Id*. at 13. The court cited several provisions of the contract between the architects and the Maxfields, as evidence that no contractual duty was owed by the

architects to any party other than the Maxfields. *Id*. at 14-17. Further, and most importantly, the court also firmly refused to impose any common law duty between the architects and Lou Ann, holding "this court simply cannot create a new common law duty in order to uphold the relief that [Lou Ann] sought against the architects." *Id*. at 8.