

T.A.D.C. Construction Law Newsletter

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Update on Cases Impacting Construction Litigation

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***Centerpoint Builders GP, LLC v. Trussway Ltd.*, 436 S.W.3d 882 (Tex. App.-Beaumont 2014, pet. granted)**

The Texas Supreme Court recently granted a petition for review to analyze whether an apartment building contractor qualifies as a “seller” of a building truss for purposes of analyzing Chapter 82 of the Texas Civil Practices and Remedies Code. Specifically, the builder argues that Trussway Ltd. owes a duty to defend and indemnify it in a personal injury claim arising from an injury to the employee of a subcontractor. In July 2014, the Ninth Court of Appeals had determined that the builder did not qualify as a “seller” under Chapter 82 of the Civil Practices and Remedies Code, which governs indemnity in products liability matters. Accordingly, the Court of Appeals reversed the trial court that had concluded Centerpoint, the builder, was eligible to seek indemnity.

The case began as a personal injury action filed by Merced Fernandez against Centerpoint, Trussway and other defendants for injuries Fernandez sustained while installing drywall in an apartment complex construction project. Centerpoint was a general contractor and Fernandez was an independent subcontractor. The mechanism of the injury was that Fernandez was injured by stepping on a truss that broke and collapsed. It was important to the Court of Appeals’ analysis that the truss had not yet

been installed. In the lawsuit brought by Fernandez, Trussway and Centerpoint filed crossclaims against each other and both moved for summary judgment claiming they were entitled to indemnity. The trial court agreed with Centerpoint and disagreed with Trussway.

On appeal, the Court of Appeals determined that neither Trussway nor Centerpoint was entitled to indemnity under Chapter 82. Significantly for construction lawyers, the court distinguished the *Fresh Coat v. K-2* case from the Texas Supreme Court. 318 S.W.2d 893 (Tex. 2010). There, the Court noted that “builders may be held liable as product sellers when they sell prefabricated homes or other cookie-cutter homes as part of a large development.” In addition, Centerpoint argued that *Fresh Coat* held that an installer of a building product can be a “seller” under Chapter 82. The Court of Appeals distinguished both holdings in *Fresh Coat* by determining that Centerpoint was not acting as the seller, in large part because the truss in this case had not yet been installed. The Court of Appeals specifically declined to address the issue of whether Ch. 82 can ever apply to a general contractor at a construction site. On petition for review, in Case No. 14-0650, the Texas Supreme Court granted the petition and agreed to hear arguments from both sides. The petition was granted on September 8, 2015.

***Magdalena Abutahoun, et al. v. Dow Chemical Co.*, Case No. 13-0175 (Tex. Sup. Ct., May 8, 2015)**

The Texas Supreme Court recently interpreted Chapter 95 of the Texas Civil Practices and Remedies Code addressing a property owner’s liability for injury, death or property damage to an independent contractor. The case began when a pipeline insulation worker contracted mesothelioma

and sued Dow Chemical Company. He alleged he was exposed to asbestos while working as an independent contractor at the chemical company's facility. At issue at the appeal was whether Chapter 95 applies to an independent contractor's negligence claim against a property owner when the claims arise out of injuries for "negligent activities" and not the independent contractor's work on the premises.

More specifically, the plaintiffs' decedent worked installing insulation on pipelines at Dow's Facility in Freeport, Texas during the late 1960s. Allegedly, the asbestos dust was generated by Dow employees performing similar insulation work nearby. In the wrongful death suit, which was filed after the plaintiff's death, Dow moved for summary judgment arguing that Chapter 95 applied to both negligent activity claims and premises liabilities claims. The MDL Trial Court denied the motion for summary judgment as to negligent activity claims in those claims preceded to the jury. The jury returned a verdict which Dow appealed. When the case reached the Texas Supreme Court, the Texas Supreme Court determined that the plain meaning of the statute was unambiguous. Since the statute makes no distinction between negligent activity and premises liability claims, the court stated "the legislature did not distinguish between negligence claims based on contemporaneous activity or otherwise, and neither shall we."

Chapter 95 of the Texas Civil Practices and Remedies Code generally provides that a premises owner is not liable for injuries to an independent contractor working on improvements unless the owner exercised control over the work, or if the owner had actual knowledge of a hidden, dangerous condition and failed to warn the contractor. The Supreme Court pointed out

that at trial and at the Court of Appeals, the Hendersons never sought to establish Dow's liability in the event that Chapter 95 did, in fact, apply to their claims. Accordingly, the Texas Supreme Court affirmed the Court of Appeal's prior judgment reversing the judgment on the jury verdict, and rendered a take nothing judgement for Dow Chemical.

***D.R. Horton-Texas, Ltd. v. Bernhard*, 423 S.W.3d 532 (Tex. App.- Houston [14th Dist.] 2014)**

The plaintiff homeowners sued D.R. Horton-Texas, Ltd. for damages resulting from a construction defect in a home purchased from D.R. Horton. Included within the sales contract for the sale of the home was an arbitration clause. Before a single arbitrator, both sides presented evidence, and the arbitrator awarded the Bernhards a total of \$114,477.45 in damages, including \$31,027.93 in attorneys' fees as "economic damages" under the Residential Construction Liability Act.

However, the arbitration paragraph for the sales contract set forth that each party would bear its own fees and expenses and any other costs and expenses incurred for the benefit of such party.

At the trial court level, D.R. Horton moved to vacate the arbitrator's award of attorney's fees, but the trial court not only signed a final judgment in accordance with the arbitration award it further awarded an additional \$18,500 for an appeal from the trial court's judgment.

D.R. Horton appealed to the Fourteenth Court of Appeals in Houston, contending that the trial court erred by entering a judgment based on the arbitrator's award of attorneys' fees, and further challenging the award of appellate attorneys' fees.

On appeal, D.R. Horton argued that the arbitrator exceeded his authority as established by the arbitration clause in the sales contract. It cited Tex. Civ. Prac. & Rem. Code Ch. 171 which provides that a court must vacate an award if an arbitrator exceeds his powers. The appellate court noted a long line of authority which states that an arbitrator exceeds his authority when he disregards the contracts and dispenses his own idea of justice. The appropriate inquiry is not whether the arbitrator decided an issue correctly, but instead whether he or she had the authority to decide the issue at all. Here, the Court of Appeals noted that D.R. Horton did not ask the trial court to except from arbitration the issue of attorneys' fees when D.R. Horton asked the trial court to compel arbitration.

The Court of Appeals also noted that the Texas Arbitration Act specifically identifies when an arbitrator must award attorneys' fees. Specifically, the arbitrator shall award attorneys' fees as additional sums required to be paid under the award only if the fees are provided for: (1) in the agreement to arbitrate; or (2) by law for a recovery in a civil action in the district court on a cause of action on which any part of the award is based. See Tex. Civ. Prac. & Rem. Code § 171.048(c). Furthermore, the Residential Construction Liability Act authorizes an award of attorneys' fees for homeowners as economic damages should they prevail in the trial court. The Court of Appeals noted the arbitrator relied on a contractual provision stating that the contract was subject to the Residential Construction Liability Act, and the arbitrator determined that the RCLA's enumeration of attorneys' fees as economic damages was controlling over the provision of the contract. Accordingly, D.R. Horton's first issue was overruled.

However, on the second issue, the court noted that the arbitrator had not awarded appellate attorneys' fees. The Court of Appeals found there was no basis for modifying the arbitrator's award with additional attorneys' fees for appeals. The plaintiffs fail to identify either at the trial court or in the briefing of the Court of Appeals any basis to modify the award to include appellate attorneys' fees. As such, D.R. Horton's second issue was sustained and the trial court's judgment was modified as a result.