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Newsletter

SPECIAL POINTS OF INTEREST:

- Latest opinions of the Texas Supreme Court
- No Horsing Around – liability in equine activities
- Duty of Care of Contractor with strict adherence clause
- Thou Shalt Arbitrate
- Guideline for Effective Disclaimer of Fraudulent Misrepresentations

NO HORSING AROUND

LIABILITY FOR ANY ACTIVITY INVOLVING HORSES IS LIMITED IN TEXAS

The Texas Equine Activity Limitation of Liability Act, TEX. CIV. PRAC & REM CODE, Sections 87.001-.005, was interpreted by the Texas Supreme Court in *Loftin v. Lee* 341 S.W. 3rd 352 (Tex 2011). The Court held that the purpose of the Act was to limit the liability of those who engage in “Equine Activity”.

Facts of Case

Janice Lee sued her friend, Terri Loftin, after she fractured a vertebra when she fell from a horse owned by Terri Loftin. While Ms. Lee had raised horses for years, she had little experience riding horses. Ms. Lee was injured while horseback riding with Terri Loftin. The horse that Ms. Lee was riding was chosen by Ms. Loftin. Terri Loftin also chose the trail for her and Ms. Lee to ride which was on a neighbor's property. As they rode through a wooded and boggy area, a low-lying vine touched the flank of the horse that Ms. Lee was riding causing the horse to bolt. Ms. Lee fell from the horse as the horse bolted.

There is No Liability for Any Injury that Results From an “Inherent Risk” of “Equine Activity”

The threshold analysis in determining whether liability is limited under the Act is whether the claimant's injury resulted from an “Inherent Risk” of engaging in an equine activity. If the injury occurred in an “Inherent Risk” of equine activity then there is no liability unless an exception listed in Section 87.004 of the Act applies. In determining what is an “Inherent Risk” of equine activity, the Court noted that the Act covers “riding, handling, training, driving, assisting in the medical treatment of, being a passenger, or assisting as a

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participant or sponsor” with “a horse, pony, mule, donkey or hinny” (for those who are not familiar with animal husbandry, a hinny is a cross between a male horse and a female donkey while a mule is a cross between a male donkey and a female horse). Section 87.004 provides several exceptions to remove the limitation of liability. In this case Ms. Lee claimed that Ms. Loftin was liable for her injury because the failure of Ms. Loftin to ask specific questions about Ms. Lee's riding ability created liability. Section 87.004 provides that a person is liable in providing a horse to another if the person provided the equine animal and did not make a reasonable and prudent effort to determine the ability of the participant to engage safely in the equine activity. The person who provided the equine animal must also determine the ability of the participant to safely manage the equine animal, taking into account the participant's representations of ability.

The Court found that “...all the causes of Lee's injury—the propensity of her horse to react to trail conditions, the unpredictability of that reaction, the condition themselves and Loftin's choice of trails” were all inherent risks as listed in Section 87.003 of the Equine Act. Therefore, no liability existed unless Ms. Loftin did not make a reasonable inquiry to determine Ms. Lee's ability to ride a horse, including her ability to safely manage a horse.

The Court concluded that Ms. Loftin had made a reasonable inquiry into Ms. Lee's ability to ride a horse to limit her liability under the Equine Act. The Court accepted Ms. Loftin's knowledge of Ms. Lee's riding abilities as adequate under the Act despite the fact that she did not make any specific inquiry to Ms. Lee about her riding abilities. Even though Ms. Lee did not make a specific inquiry to Ms. Lee about her horse riding abilities the Court found that “...she already knew all there was to know about Lee's ability without questioning further—that though Lee had raised horses for years, she rode infrequently.”

Assessment of Opinion

The Court held that the purpose of the Texas Equine Limitation of Liability Act was, as its name implies, to limit the liability of those engaged in equine activity. This opinion is significant in that it found that no inquiry about a person's horseback riding abilities is needed if the person providing the horse has prior knowledge of the claimant's horseback riding background.

CONTRACTOR DUTY OF CARE

ROAD CONTRACTOR WITH STRICT ADHERENCE TO ENGINEERING SPECIFICATIONS DOES NOT HAVE A DUTY OF CARE TO MOTORISTS

The Texas Supreme Court in *Allen Keller Company v. Barbara Jean Foreman*, 343 SW3d 420 (Tex.2011), was called upon to decide whether a general contractor owed a duty to a motorist who was



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killed as a result of an allegedly dangerous condition created by the contractor's work. Allen Keller Company was working under a contract that required strict adherence to the contract and had no discretion to vary from its terms. The Court concluded that it had no duty to rectify the condition. In addition, because the premises were not under the control of Allen Keller Company at the time of the accident, it had no duty to warn either the public or the property owner.

Facts of Case

Gillespie County (County) hired Allen Keller Company (Keller) to work on a number of road construction projects due to flooding. The project in this case was to excavate an embankment and erect a concrete channel next to a one-lane bridge spanning the Pedernales River. The project was designed and engineered by O'Malley Engineers (Engineers).

The contract between Keller and the County contained provisions that required Keller to strictly adhere to the engineering specifications produced by the Engineers. Keller's obligation to perform and complete the work in accordance with the contract documents was absolute.

Prior to excavation, there was a space of ten feet between the bridge and the embankment, most of which was spanned by a guardrail that was connected to the bridge. The gap between the end of the guardrail and the embankment was widened by at least ten feet. The contract specifications did not include extending the guard rail.

After Keller's work on the span, the Engineers certified that it was complete according to specifications. The County accepted Keller's work.

Seven months later a tragic accident occurred when Courtney Foreman and two of her friends were traveling towards the one-lane span. Although the vehicle was Courtney's, she sat in the middle seat. The driver lost control after the vehicle passed through the gap. The vehicle plunged into the Pedernales River killing Courtney.

A Contractor Does Not Have the Duty to Correct A Dangerous Condition That Was Required By the Contract

In determining the existence of a duty in this case, the Court assumed that it was Keller's work that created an unreasonably dangerous condition at the site, namely, the gap. In this case, any decision that Keller would have made to rectify the dangerous condition would have had the effect of altering the terms of the contract. Moreover, because Keller did not own the property, it was not in a position to make decisions about how to make the premises safe. The Court held that under these facts Keller owed no duty to the general public for causing and failing to rectify the dangerous condition.



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A Contractor Does Not Have a Duty to Warn Of a Dangerous Condition Once the Construction is Completed

The next issue addressed by the Court was the duty to warn. As long as a contractor controlled the premises, the contractor could be subject to a duty to warn because it was charged with the same duty as an owner or occupier.

While Keller was in control of the property during construction, at the time of the accident, Keller neither owned, occupied nor controlled the premises. It had no right, obligation or duty to erect permanent signs or other devices to warn the public of the gap.

Assessment of Opinion

This opinion was a victory for limiting the liability of contractors after completion of the job, but only when the construction contract contains a provision requiring "strict adherence" to the plans and specifications. However, liability exposure to the contractor for failure to warn may still exist while the contractor is in control of the premises to perform the construction.

T H O U S H A L T A R B I T R A T E

2011 TEXAS SUPREME COURT OPINION REAFFIRMED THE COURT'S COMMITMENT TO THE ARBITRATION PROCESS

In *In Re Rubiola, et al.*, 334 S.W. 3d 220 (Tex. 2011), Realtors sought to compel arbitration under an arbitration agreement they did not sign. The Texas Supreme Court concluded that an arbitration agreement may grant non-signatories the right to compel arbitration and the Relators were granted that right.

Facts of Case

Brian and Christina Salmon (the Salmons) bought a home from Greg and Catherine Rubiola. The listing broker was J.C. Rubiola (J.C.), Greg's brother, who handled the transaction. The Salmons and the Rubiolas signed a standard form Texas real estate contract containing no arbitration provision.

The Rubiola brothers operated a number of real estate related businesses including Rubiola Mortgage Company. The Salmons used J.C. as their mortgage broker and loan officer. As part of the loan process the Salmons executed an arbitration agreement with the mortgage company. J.C. signed on behalf of Rubiola Mortgage Company; the Salmons signed a form acknowledging J.C.'s dual role as real estate agent and mortgage broker.

The sale closed, the Salmons moved in and the trouble began. The Salmons sued the Rubiolas and others and alleged, among other claims, that J.C., as listing agent and a principal involved in unsatisfactory repairs to the home, had made misrepresentations that induced the Salmons to buy the home.



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The Rubiolas moved to compel arbitration pursuant to the agreement signed incident to securing the mortgage. The trial court denied the motion, the court of appeals refused to grant mandamus relief, and the Rubiolas sought relief from the Texas Supreme Court.

A Non-Signator to an Arbitration Agreement May Compel Arbitration

The arbitration agreement provided:

Arbitrable disputes include any and all controversies or claims between the parties of whatsoever type or manner, including without limitation, all past, present and/or future credit facilities and/or agreements involving the parties. This arbitration agreement shall survive any termination, amendment, or expiration of the agreement in which this agreement is contained, unless all of the parties expressly agree in writing.

The agreement defined “parties” to include:

Rubiola Mortgage Company, and each and all persons and entities signing this agreement or any other agreements between or among any of the parties as part of this transaction. “The parties” shall also include individual partners, affiliates, officers, directors, employees, agents and/or representatives of any party to such documents, and shall include any other owner or holder of this agreement.

In examining the issue the court discussed whether the Rubiolas, as non-signators to the agreement, had the authority to compel arbitration and, if so, did the arbitration clause cover the Salmon's claims? The court determined that the arbitration agreement's broad definition of parties, at a minimum, made J.C. and Greg Rubiola parties to the agreement.

Plaintiffs' Claims Were Subject to the Arbitration Agreement

The court then turned to the issue of whether the agreement, made incident to securing a mortgage for the property, covered the allegations made in the suit against J.C. as real estate agent. The Salmons argued that the real estate contract itself stated that it constituted the entire agreement between the parties and provided that the parties could enforce it in court. The Court, however, focused on the provision which stated that the real estate contract could be amended by a later writing. The arbitration agreement was executed a month later as part of the process of obtaining financing. The Court tacitly determined that the arbitration agreement constituted such an amendment. The Court then held that signatories to an arbitration agreement may identify other parties in their agreement who may enforce arbitration as though they had signed the agreement themselves. Mandamus relief was conditionally granted.

Thus, a non-signator to an arbitration agreement, may, if the definition of the “parties” is sufficiently broad, compel arbitration. Further, an arbitration agreement signed subsequent to an original agreement may constitute an amendment to that original agreement, even if signed only as part of a second agreement.



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Assessment of Opinion

The case reaffirms that if there is any possible way in which the Texas Supreme Court can rule in favor of mandatory arbitration it will do so.

C O N T R A C T S U P D A T E

CONTRACTS/MERGER CLAUSE/IMPLIED WARRANTY: A GUIDELINE FOR EFFECTIVE DISCLAIMER OF FRAUDULENT MISREPRESENTATIONS

In *Italian Cowboy Partners, Ltd., et al. v. The Prudential Insurance Company, et al.*, 341 S.W. 3d 323 (Tex. 2011), the Texas Supreme Court issued an opinion determining whether disclaimer of representations language within a lease contract amounted to a standard merger clause, or also disclaimed reliance on misrepresentations. The Court held that the contract language in the case did not disclaim reliance or bar a claim based upon fraudulent inducement. The Court rendered judgment in favor of the lessee on its claim for rescission premised on breach of the implied warranty of suitability.

Facts of Case

The Secchis determined to open a restaurant called the Italian Cowboy. They looked for a space to lease. Keystone Park, a Dallas shopping center owned by Prudential and managed by Prizm Partners, housed three successful restaurants and had a space available. The Secchis began negotiating a lease with Fran Powell of Prizm. Powell made representations regarding the perfect nature of the building and the space which the Secchis sought to lease. The Secchis signed the lease and began to build out the space. During this time they first heard that a severe odor had plagued the previous tenant, also a restaurant. Concerned, the Secchis contacted Powell, who denied that there had ever been such a problem.

Well, there had been and it continued. The persistent strong odor manifested a week before the restaurant's opening. The Secchis notified Powell and multiple efforts were made to locate and quell the odor, all of which were unsuccessful. The business suffered greatly and, at one time, was shut down by the health department after a customer complaint.

Throughout all of this time Powell continued to deny any prior knowledge of an odor in the space. However, the Secchis heard from a number of people that the odor had plagued the previous tenant, and that Powell herself had been on the premises during the previous tenancy and experienced the odor personally on numerous occasions.

Upon receiving this information the Secchis closed the restaurant, ceased paying on the lease and sued Prudential and Prizm, alleging fraud in the inducement, fraud based upon misrepresentations, negligent



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misrepresentations, breach of the implied warranty of suitability and constructive eviction and sought rescission of the lease. The trial court found for the Secchis on all claims. The Secchis opted for rescission of the lease and the recovery of damages. Actual and exemplary damages were awarded. Prudential took nothing on its counterclaim for breach of contract.

The court of appeals reversed and rendered a take nothing judgment and rendered judgment in favor of Prudential. The Texas Supreme Court granted review.

The Lease Did Not Effectively Disclaim Reliance UPON Representations Made by Defendants

The lease in question contained the following provisions:

14.18 Representations. Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.

14.21 Entire Agreement. **[the merger clause]** This lease constitutes the entire agreement between the parties hereto with respect to the subject matter hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party. . .

The Court examined whether the lease contract effectively disclaimed reliance on representations made by Prudential, negating an element of Plaintiffs' fraud claim. It determined that the contract provisions did not disclaim reliance by clear and unequivocal language. It reiterated that it has been the law for more than 50 years that a contract is subject to avoidance on the ground of fraudulent inducement. An exception was recognized in 1997 in *Schlumberger Technology Corp. v. Swanson*, 959 S.W. 2d 171, in which the Court held that when sophisticated parties represented by counsel disclaimed reliance on representation about a specific matter in dispute, such a disclaimer may be binding.

The Court stated that the question of whether an adequate disclaimer of reliance exists is a matter of law. Pure merger clauses, without an expressed, clear and unequivocal intent to disclaim reliance or waive claims for fraudulent inducement have never had the effect of precluding claims for fraudulent inducement. The contract in *Schlumberger* provided "[N]one of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying upon his or her own judgment. . ." In that case, and others cited by the Court, the intent to disclaim reliance on others' representations was evident from the language itself. The Court also stated that a lease agreement, which is the initiation of a business relationship, should be all the more clear and unequivocal in effectively disclaiming reliance and precluding a claim for fraudulent inducement, "lest we forgive intentional lies regardless of context."



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The Court then examined the evidence supporting the Secchis claims of fraud and found that Powell's misstatements were actionable material misrepresentations as a matter of law.

Breach of Implied Warranty of Suitability

In a commercial lease there is an implied warranty of suitability for the intended commercial purposes. Specifically, the lessor impliedly warrants that at the inception of the lease, no latent defects exist that are vital to the use of the premises for their intended commercial purposes.

To establish breach of the warranty, the lessee must show that a latent defect in the facilities existed at the inception of the lease, that the facilities were vital to the use of the premises for the intended purpose and that the lessor failed to repair the defect. The issues for the Court were the identity of the defect and whether the lease allocated responsibility to the Secchis to repair that defect. The Court analyzed the root cause of the odor, as such would constitute the defect. It agreed with the trial court's determination of the root cause and held that the evidence was legally sufficient to support that finding. To determine responsibility for repair as between landlord and tenant, the Court went back to the lease document. After lengthy discussions and analysis of definitions in the document of "repair" versus "alteration" the Court held that the necessary "fix" for the problem constituted an alteration and thus was the responsibility of the lessor.

After an exhaustive discussion of damages, the Court reversed the court of appeals' judgment and rendered judgment in favor of the Secchis for rescission of the contract premised on Defendants' breach of the implied warranty of suitability. The case was remanded to the court of appeals for further consideration consistent with the Court's opinion.

Assessment of Opinion

Those who would fraudulently induce another into a contract must be very specific in the disclaimers made in the contract document in order to avoid liability. A standard merger clause is insufficient. Additionally, the Court continues to recognize the implied warranty of suitability when the premises leased is known to be intended for a specific purpose.



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