

RECENT DEVELOPMENTS

DECEPTIVE TRADE PRACTICES AND WARRANTIES

TRIAL COURT ERRED IN DISMISSING DTPA CLAIMS AND CONSPIRACY TO VIOLATE THE DTPA CLAIMS

Four Brothers Boat Works, Inc. v. Tesoro Petroleum Cos, Inc., 217 S.W.3d 653 (Tex. App.—Houston [14th Dist.] 2006).

FACTS: In 1975, the Galveston Yacht Basin, Inc leased a tract of land on the Galveston Ship Channel to Joe Grasso & Son, Inc. (“master lease”). The primary term of the master lease began in 1977 and was to end in 1987, with two ten-year options that would be exercised automatically, unless the tenant gave at least six months notice to the landlord that the tenant did not wish to exercise the option. Grasso entered into a sublease with Wallace Trochesset for a portion of the land. In 1980, Trochesset assigned the sublease to Four Brothers Boat Works, Inc. The sublease gave Four Brothers the option of renewing the lease for additional 10

year terms in 1987 and 1997. In 1987, Grasso entered into a sublease with Columbia Star, Inc. for another portion of the land under the master lease. The sublease gave Columbia an option to renew the lease in 1997. In 1991, Galveston Yacht Basin and Grasso amended the master lease to terminate

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in 1997 and to eliminate any right that Grasso had to extend the lease beyond 1997. Tesoro acquired the master lease from Grasso’s successor and, in 1998, ordered Four Brothers and Columbia Star (“Appellants”) to vacate the premises.

Appellants filed a declaratory judgment action against Tesoro asking the trial court to determine the “current owners” of the leasehold interests in dispute. The trial court found as a matter of law that Four Brothers did not have a vested right of occupancy or a current leasehold interest in the sublet land. The First Circuit Court of Appeals affirmed. Four Brothers then sued Tesoro for violations of the Deceptive Trade Practices Act (“DTPA”) and conspiracy to violate the DTPA. The trial court granted summary judgment for Tesoro on both claims. Four Brothers appealed the judgment of the trial court.

HOLDING: Reversed.

REASONING: The court held that Tesoro violated the DTPA. First, the court determined that Tesoro breached the implied warranty of quiet enjoyment under the DTPA. Tesoro argued that the breach of warranty claims were merely claims for breach of contract and were derived from Tesoro’s failure to perform under the sublease. The court rejected Tesoro’s arguments and reasoned that a breach of warranty of quiet enjoyment claim is separate from a breach of contract because implied warranties are grounded more in tort than in contract. *La Sara Grain Co. v. First Nat’l Bank*, 673 S.W.2d 558, 565 (Tex. 1984). Additionally, the court stated that a breach of warranty claim does not have to be coupled with a claim for false, misleading, or deceptive act. *Continental Dredging, Inc. v. De-Kaizerred,*

Inc., 120 S.W.3d 380, 391 (Tex. App.—Texarkana 2003).

Second, the court held that Tesoro conspired with the Galveston Yacht Club to violate the DTPA. Tesoro’s only defense to the conspiracy claim was the law of the case doctrine. The law of the case doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages. *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). It applies only to questions of law, not questions of fact. The court determined that the law of the case doctrine did not apply. Tesoro raised no other grounds in support of its motion for summary judgment on the conspiracy to violate the DTPA. Therefore, the trial court erred in granting summary judgment. The law of the case doctrine did not apply to the previous holding of the First Circuit Court of Appeals because that holding concerned the right of possession between the parties and not the issue of damages.

BY PURCHASING A RESIDENCE “AS IS” A BUYER AGREES TO UNDERTAKE HIS OWN EVALUATION OF THE BARGAIN AND ACCEPT THE RISK THAT HIS EVALUATION MIGHT BE WRONG

AS IS DEFENSE MAY NOT BE RAISED BY THIRD PARTY

Haire v. Nathan Watson Co. ____ S.W.3d ____ (Tex. App.—Fort Worth 2007).

FACTS: In 2001, the Haires purchased a home from Prudential Relocation in the Hunter Pointe subdivision of Arlington, Texas. Sovereign Homes Corporation built the residence and Nathan Watson Co. (“NWC”) was the developer of the subdivision. Fugro was the geotechnical firm hired to perform soil analysis of the Hunter Pointe subdivision, including the Haires’ residence, in the initial development stages of the subdivision. Fugro’s professional analysis served as a basis for the foundation design of the homes within the subdivision. The Haires alleged that in early March 2002, they began having structural problems with their home, including cracks in the walls, uneven floors, and doors that would not close properly. Subsequent investigations revealed excessive swelling of the soils beneath the home and that the home was not designed and constructed in a manner that would accommodate this excessive swelling. The Haires sued both Fugro and NWC. They claimed that because of these design and construction failures, their home sustained major and irreparable damages to its foundation.

The Haires purchased the house “as is.” The sales contract and the “rider” to the sales contract both contained “as is” language. The Haires also received the original homeowner’s disclosure, which detailed foundation concerns in the neighborhood and a copy of a report by a structural engineer noting previous foundation movement and resulting damage to the house. The Haires also retained their own inspector, who examined the foundation and offered his assessment regarding the foundation and the maintenance that would be required. The trial court granted Fugro summary judgment on the basis that (1) the “as is” language of the sales contract precluded recovery by the Haires, (2) there is no implied warranty for professional services under Texas

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law, (3) the DTPA claims are barred by the professional services exemption, and (4) Furgo has no duty to the Haires, thus barring their negligence action. The trial court granted NWC summary judgment because the “as is” language precluded recovery by the Haires. The Haires appealed the trial court’s ruling.

HOLDING: Reversed and remanded.

REASONING: Furgo and NWC relied on *Larsen v. Carlene Langford & Assocs., Inc.*, 41 S.W.3d 245 (Tex. App.—Waco 2001) to support their assertions that the “as is” provision governs their cases. In *Larsen*, the plaintiffs explicitly agreed to perform their own inspection of the property and to accept the property in its present condition without requiring any repairs by the seller. Because courts assume that parties intended every contractual provision to have some meaning, the court held that the plaintiffs were not relying on any statement by the defendant regarding the condition of the property. The court agreed with Furgo and NWC that the Haires were bound by their agreement, but the sales contract was between the Haires and the seller of the home. Therefore, Furgo and NWC were not privy to the contract. The court also found that Furgo and NWC were not third party beneficiaries of the contract. The court held that the “as is” provision was not an available defense for either NWC or Furgo.

IMPLIED WARRANTY OF GOOD AND WORKMANLIKE MANNER WAS NOT BREACHED DUE TO THE BUYER’S KNOWLEDGE PRIOR TO PURCHASE

Haire v. Nathan Watson Co., ____ S.W.3d ____ (Tex. App.—Fort Worth 2007).

FACTS: In October 2001, the Haires purchased a home “as is” from Prudential Relocation. The home was built by Sovereign Homes Corporation and the subdivision was developed by Nathan Watson Construction (“NWC”). The sales contract included the original homeowner’s disclosure, which detailed foundation concerns, and a copy of the report on the foundation by a structural engineer specifically noting the previous foundation movements. Prior to closing on the home, the Haires retained their own inspector who examined the foundation and offered an assessment of maintenance that would be required. In late February and early March 2002, the Haires began having structural problems with their home including cracks in the wall, uneven floors, and doors that would not close. Subsequent investigations revealed that there was excessive swelling of the soil beneath the home, which the home was not designed and constructed to accommodate.

In September 2003, the Haires filed suit against NWC and Furgo, the geotechnical engineering firm that performed the soil analysis in the initial development stages of the subdivision. The Haires then filed their second amended original petition alleging that NWC and Furgo were negligent and breached implied warranties under the Texas Deceptive Trade Practices Act (“DTPA”). Furgo filed a motion for summary judgment on the grounds that: (1) the “as is” language of the sales contract precludes recovery, (2) there is no implied warranty for professional services under Texas law, (3) the DTPA claims are barred by the professional services exemption, and (4) Furgo has no duty to the Haires thus barring a negligence action. NWC also filed a motion for summary judgment arguing that the “as is” language precluded recovery by the Haires. The trial court granted Furgo and NWC

summary judgment and the Haires appealed contending that the trial court erred by granting Furgo’s motion for summary judgment for the implied warranty claims under the DTPA.

HOLDING: Affirmed as to Furgo, reversed and remanded as to NWC.

REASONING: The Texas Supreme Court has defined good and workmanlike as “that quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work.” The court noted that one of the purposes behind the implied warranty is the protection of the “helpless consumer who takes what he gets because he does not know enough technically to test or judge what is before him.” Thus, the implied warranty of good and workmanlike

performance is not breached when the consumer is advised as to the need of certain repairs and the consequences of failing to make them. In *DiMiceli v. Affordable Pool Maint., Inc.*, the defendant, APM, advised DiMiceli about the necessity of having APM perform repairs and the consequences of

APM not performing repairs. The court held that DiMiceli could not recover for his breach of warranty claim. The same general principle is equally applicable to the Haires’ situation.

The Haires had knowledge of the need for certain repairs and the consequences of failing to make them. The Haires’ pre-purchase knowledge barred them from surviving summary judgment on the breach of implied warranty. The evidence showed that prior to purchase the Haires were aware of the potential foundation problems in the subdivision as well as in the house they purchased. This awareness was demonstrated by the existence of an independent appraisal, the original homeowner’s disclosure, which included detailed foundation concerns for the subdivision, and a copy of the report noting previous foundation movement. Therefore, the court held that the implied warranty of good and workmanlike performance was not breached due to the Haires’ knowledge prior to purchasing the house.

AIRPLANE MAY BE CONSUMER PRODUCT COVERED BY MAGNUSON MOSS

Waypoint Aviation Servs., Inc. v. Sandel Avionics, Inc., 469 F.3d 1071 (7th Cir. 2006).

FACTS: Waypoint Aviation purchased a Bravo M20M Airplane from Mooney Aircraft. The airplane contained parts separately warranted by Sandel Avionics and Honeywell. Waypoint complained, under the Magnuson-Moss Warranty Act (“MMWA”), that the plane was unsafe and Mooney was unable or unwilling to fix it yet refused to take the plane off Waypoint’s hands and refund the purchase price. MMWA applies only to

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consumer products, a term that means “tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes.”

The district court dismissed Waypoint’s complaint against Mooney, Sandel, and Honeywell concluding that an airplane cannot be a consumer product, even if its principal use is personal transportation or recreation. Waypoint appealed, but due to Mooney entering bankruptcy, the appeal was put on hold. Eventually, Waypoint dismissed claims against Mooney, and appellate proceedings resumed.

HOLDING: Vacated and remanded.

REASONING: The court described the district judge’s conclusion that an airplane cannot be a consumer product as “problematic.” “Airplanes,” explained the court, is too large a category for analysis. Analysis must be more fine-grained, and

on a motion to dismiss the complaint a court must indulge every factual assumption in the plaintiff’s favor. To the question of whether the electronics that Sandel and Honeywell supplied and warranted directly to the purchaser are consumer products, the court had two responses. If the principal use of such equipment is in military jets and large commercial planes, the court responded then they are not “consumer products.” If the products are normally used directly by consumers (perhaps in automobiles or boats) they could be “consumer products” even if all airplanes are outside the statute. The appeals court vacated the lower court’s opinion and remanded the case with instructions to dismiss Waypoint’s claims against Sandel and Honeywell, with prejudice, for failure to present any factual or legal arguments concerning these parties.

INSURANCE

IF AN INSURANCE CONTRACT IS SO WORDED THAT IT CAN BE GIVEN A DEFINITE OR CERTAIN LEGAL MEANING, IT IS NOT AMBIGUOUS

Bexar County Hosp. Dist. v. Factory Mut. Ins. Co., 475 F.3d 274 (5th Cir. 2007).

FACTS: Plaintiff-Appellant Bexar County Hospital District (“UHS”) discovered that its water system was leaking. UHS rented temporary cooling towers for its air conditioning system to allow the hospital to continue functioning while it located the source of the leak. Over a period of some 90 days, UHS spent \$557,134 to repair the leak and \$1,001,093 to rent the temporary water chillers. At the time the damage occurred, UHS had in place Factory Mutual’s Global Advantage Policy (“policy”), an “all risks” property insurance policy covering both physical damage and “time element” loss. Time element loss referred to business interruption loss. Factory Mutual paid all of UHS’s property damages less a \$25,000 deductible and all of UHS’s time element losses minus a deductible equal to the value of one day’s worth of UHS’s total projected operating revenue. UHS complained that the appropriate deductible would have been the value of UHS’s actual time element loss. UHS further claimed that there was no actual time element loss because the water chillers prevented the occurrence of any business interruption. Factory Mutual disagreed.

UHS filed suit in Texas state court for declaratory judgment and breach of contract. Factory Mutual removed to federal court, and both parties filed summary judgment motions. Each party argued for its own method of calculating the Time Element loss deductible. The district court granted Factory Mutual’s motion, denied UHS’s motion, and dismissed the case.

HOLDING: Affirmed.

REASONING: The court explained that if the language of a policy or contract is subject to two or more reasonable interpretations, it is ambiguous. If, however, a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. In its determination of whether ambiguity existed within the deductibility provisions of the policy, the court observed that the policy only made reference to the term “time

element”, in two sections. In the reporting provisions, Factory Mutual required UHS to provide it with values anticipated for the term of the policy as well as the actual time element values for the previous twelve-month period. Because of the way the term time element was situated within these two sections of the policy, the court concluded that Factory Mutual’s interpretation of the proper calculation of the policy deductible was the only reasonable interpretation. Specifically, the court concluded that Factory Mutual’s reading of the policy’s deductible provisions (1) comports directly with the plain meaning and common usage of policy terms, (2) preserves the internal consistency of the policy and (3) gives meaning to all policy provisions. In contrast, UHS’s proffered interpretation required a “strained reading” of the policy’s plain language and would render meaningless the time element portion of the policy’s value reporting provisions.

UIM INSURANCE COVERS PREJUDGMENT INTEREST THAT THE UNDERINSURED MOTORIST WOULD OWE THE INSURED

UNDER CHAPTER 38, A CLAIM FOR UIM BENEFITS IS NOT PRESENTED UNTIL THE TRIAL COURT SIGNS A JUDGMENT ESTABLISHING THE NEGLIGENCE AND UNDERINSURED STATUS OF THE OTHER MOTORIST

Brainard v. Trinity Universal Ins. Co., 216 S.W.3d 809 (Tex. 2006).

FACTS: Edward H. Brainard II was killed in a head-on collision with a rig owned by Premier Well Service. His widow, Lilith Brainard, and their five children sought uninsured/underinsured motorist (“UIM”) benefits from Trinity Universal Insurance Company. Trinity paid \$5,000 under the personal injury protection (“PIP”) provision of the policy but requested more information supporting the UIM claim. Brainard alleged she submitted the information and performed all conditions precedent to receiving the benefits, but Trinity never paid. Brainard brought action against Trinity alleging breach of contract, breach of the common law duty of good faith, violations of the Deceptive Trade