DECEPTIVE TRADE PRACTICES AND WARRANTIES

SUBSEQUENT PURCHASER CANNOT SUE ORIGINAL BUILDER

Todd v. Perry Homes, 156 S.W.3d 919 (Tex. App.—Dallas 2005).

FACTS: The Todds were subsequent purchasers of the house at issue. In 1995, the Smiths purchased the house from defendant builder Perry Homes. The Todds purchased the house from the Smiths in 2001. Shortly thereafter, the Todds discovered drainage defects which resulted in accumulation of standing water in their garage and crawlspace. To remedy the defects, the Todds claimed they had to replace the driveway and correct drainage slopes around the house. They alleged negligence, a "construction defect" under the Texas Property Code, breach of the implied warranties of good workmanship and habitability, and violations of the Texas Deceptive Trade Practices Act ("DTPA").

Perry Homes asserted that the Todds had not met their burden to present sufficient evidence that the house was uninhabitable. They moved for a traditional and no-evidence summary judgment on all the claims. The trial court granted the no-evidence summary judgment on the claims for breach of implied warranty of habitability and unconscionable conduct under the DTPA. The remaining claims were decided by a jury trial. The Todds appealed the granting of the no-evidence summary judgment.

HOLDING: Affirmed

REASONING: To maintain an action for breach of the implied warranty of habitability, the plaintiff must show the property was unsuitable for its intended use as a home and unfit for human habitation. The court agreed with Perry Homes that the Todds had not raised a genuine issue of material fact regarding habitability. The Todds presented evidence that the drainage problems created a risk for future problems, such as mold or termites. The general rule is that evidence of a risk of future problems does not create a fact issue regarding the home's current habitability. Furthermore, the implied warranty of habitability extends only to latent defects. The drainage problems were a visible defect to the Todds, and there was no evidence of any hidden or latent defects. Therefore, the court found there was no breach of the implied warranty of habitability.

The Todds also claimed that Perry Homes acted unconscionably under the DTPA. The purpose of the DTPA is to "protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty and to provide efficient and economical procedures to secure such protection." Tex. Bus. & Com. Code Ann. § 17.44 (Vernon 2002). However, to be actionable under the DTPA, the defendant's deceptive conduct "must occur in connection with a consumer transaction." *Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 649-50 (Tex. 1996). Absent contractual privity, a connection can still be demonstrated by a representation that reaches the consumer or by a benefit from the subsequent transaction to the initial seller. *Marshall v. Kusch*, 84 S.W.3d 781, 786 (Tex. App.—Dallas 2002). However, the record shows the Todds purchased the home from the Smiths in 2001 without relying on any representation from Perry Homes. Furthermore, there was no evidence that Perry Homes was connected to the subsequent purchase or that they benefited from it. Since the Todds have shown no material fact issue regarding implied warranty of habitability and have failed to show there was either representation or benefit was conferred to Perry Homes, they cannot sue the defendant builder under the DTPA.

FRAUD REQUIRES RELIANCE

Watts v. Green, ____S.W.3d____ (Tex. App.—Amarillo 2005).

FACTS: Dennis Watts was the owner of Senior Benefits Plans ("SBP"). SBP was an insurance business that sells health insurance, life insurance and annuities. Nathan Grimes was an agent of SBP. Susan Green was an insured of SBP and Grimes managed Susan Green's savings through investments. Green agreed after a presentation by Grimes to invest her money in a telephone investment program. Green later learned that the telephone investment company was in bankruptcy. Green brought suit asserting claims for negligence, fraud, violation of the Deceptive Trade Practices Act, breach of fiduciary duty and negligent representation. She alleged that Watts was liable for Grimes' conduct under theories of agency, conspiracy and joint enterprise.

HOLDING: Affirmed in part and reversed in part

REASONING: The court agreed with Watts that the evidence presented at trial was "legally insufficient to support the jury's finding he committed fraud, and [the court] sustained his point of error." The jury instructions stated that "[f]raud occurs when a party makes a material misrepresentation; the misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion; the misrepresentation is made with the intention that it should be cited on by the other party; and the other party acts in reliance on the misrepresentation and thereby suffers injury." (*see Green Int'l, Inc. V. Solis*, 951 S.W.2d 384, 390 (Tex. 1997). The court reasoned that the jury instructions "required the jury to find that Watts made a material misrepresentation on which Green relied."

The court found that, "the evidence reflect[ed] no direct communication between Watts and Green concerning her investment in pay phones until after her she had made her investment." The court further reasoned that there was insufficient evidence to support the jury's finding of fraud because, "[a]lthough Watts added language to a flyer before […] agent [Grimes] showed [it] to [Green] and flyer claimed investment would return 14.1% on capital with no market risk, the flyer did not refer to the phones or any other particular investment. It was, "only by receiving addition information, which agent [Grimes] provided to the insured, could a reader of the flyer learn of the particular opportunity it touted." The court held that the jury instructions stated that reliance was a required element of fraud and there was, "no evidence Green acted in reliance of the flyer [or direct statements by Watts thus the finding of fraud was reversed]."

CHAPTER 33 DOES NOT APPLY TO UCC IMPLIED WARRANTY

JCW Electronics, Inc. v. Garza, 176 S.W.3d 618 (Tex.App.—Corpus Christi 2005).

FACTS: In 1998, the City of Port Isabel contracted with JCW Electronics, Inc (JCW) to provide telephone service for the Port Isabel City Jail. As a part of its contractual agreement with the city, JCW installed telephones in each jail cell. The following year nineteen year old Rolando Domingo Montez (Montez) was arrested and placed in a Port Isabel City Jail cell. Montez placed a number of collect calls from the jail cell phone to Pearl Iriz Garza (Garza).

Two days later Garza arrived at the city jail to retrieve Montez. While Garza waited for Montez to be released, Montez hung himself with the cord of the telephone installed in his cell. Garza filed suit against JCW on behalf of the Estate of Rolando Domingo Montez and Belinda Leigh Camacho and as "next friend" of Rolando Kadric Montez, a minor child. The suit alleged breach of express and implied warranties, strict liability, misrepresentation, and negligence. The trial court found in favor of Garza on the issues of misrepresentation, negligence, and implied warranty of fitness. The trial court also awarded damages and attorney's fees. JCW appealed.

HOLDING: Affirmed with modification.

REASONING: The court held that the Proportionate Responsibility Statute (Chapter 33), which precluded recovery in tort by a plaintiff if he was found to be more than 50% responsible for his injury, did not apply to a judgment for breach of implied warranty of fitness for particular purpose. It pointed out that the UCC was created to be a complete framework of rights and remedies with the express purpose of governing the sale of products. The court opined that because the UCC was a complete and integrated legal framework governing the sale of products, the court must be careful not to interpret any statute to modify its rules on recovery without an express designation of that statute's power to do so. The court emphasized that although Chapter 33 designated that it applied to tort and Deceptive Trade Practices Act claims, the statute did not address how it applied to UCC cases. Therefore, because the statute did not expressly designate that it affected recovery under the UCC, the court could not extend Chapter 33's proportionate responsibility scheme to cover UCC article two claims.

The UCC was created to be a complete framework of rights and remedies with the express purpose of governing the sale of products.

INSURANCE

AN INSURED'S CLAIM FOR DEFENSE COSTS IS NOT A "FIRST PARTY CLAIM"

Serv. Lloyd's Ins. Co. v. J.C. Wink, Inc., ____S.W.3d____ (Tex. App.—San Antonio 2005).

FACTS: J.C. Wink ("Wink") was sued in a class action suit for allegedly violating the Texas Motor Vehicle Installment Sales Act ("TMVISA"). Wink was insured by Serv. Lloyd's Ins. Co. ("SLIC"). Wink's policy covered negligent errors and omissions. There was some dispute as to whether or not Wink's violation of TMVISA was intentional or negligent, and as a result, SLIC refused to defend Wink. Wink sued SLIC under Article 21.55 of the Texas Insurance Code ("TIC"). TIC requires insurers to pay claims by their insured in a prompt manner, or notify the insured if more time is needed to investigate the claim.

Wink moved for declaratory judgement and the trial court granted the motion and awarded Wink attorney's fees and damages under TIC. SLIC sought review of the declaratory judgment. The appellate court found that Article 21.55 only applies to first party claims or claims by the actual insured, and does not apply to claims against the insured by third parties.

HOLDING: Affirmed in part and Reversed in part.

REASONING: The appellate court reversed the award of attorney's fees and damages and entered a take nothing judgement on these claims based on *TIG Ins. Co. v. Dallas Basketball, Ltd.*, 129 S.W.3d 232 (Tex. App.--Dallas 2004, pet. denied). In *Dallas*, the court found that a demand for defense is not a claim within the meaning of TIC. The TIC statute is entitled "Prompt Payment of Claims," and a demand for defense is not a claim for a definite sum of money for a tangible loss, which is what Article 21.55 was intended to cover. Because there was not a definitive loss, SLIC was not required to promptly provide money for Wink's defense.

Wink additionally asserted that once it had incurred expenses in its own defense, those expenses became an insurable loss. The court found that the expense incurred by Wink in defending itself gave rise to a breach of contract claim but not to a prompt payment claim under TIC.

A $21 MILLION PUNITIVE AWARD IN BAD FAITH CASE WITH $900,000 IN COMPENSATORY DAMAGES IS UNCONSTITUTUIONAL

Goddard v. Farmers Ins. Co. of Oregon, 202 Or.App. 79 (Or. Ct. App. 2005).

FACTS: Plaintiff, Margie A. Goddard, as personal representative for the estate of Marc E. Goddard, deceased, brought an unfair claims settlement action against defendant (insurer) for damages from unsatisfied excess judgment she obtained against the insured (John Munson) in a wrongful death action. On October 29, 1987, plaintiff's son, Marc Goddard, was killed in a collision with a pickup truck driven by Munson. Munson had an auto insurance policy issued by defendant with a policy limit of $100,000. Defendant defended Munson in the wrongful death action. In May 1990, plaintiff, as Munson's assignee, filed this action, asserting that defendant had acted in bad faith in defending the wrongful death claim and seeking compensatory damages in the