Hammer Time

## Recent Court Rulings

**SCOTUS OKs Landowner Challenge to Clean Water Act**

An owner of property in Minnesota was given the nod in May by the U.S. Supreme Court to challenge the U.S. Army Corps of Engineers over a finding that a property the company wanted to use to mine peat was protected under the U.S. Clean Water Act. In the 8-0 decision, the court said the company, Hawkes, a trucking corporation that hauls peat moss and other goods, could challenge the Corps' findings before going through the lengthy and expensive permitting process. Previously, a landowner could challenge Corps of Engineer determinations only after the permitting process was complete. In the Hawkes case, the Corps said the company needed to obtain a so-called 404 Permit from the federal government to harvest the peat because the property contained waters of the U.S.—dubbed "WOTUS"—which are protected. Hawkes argued the property in question—owned by its affiliated companies—was far from the river in question and had no connection to navigable waters, which the Corps used to claim jurisdiction. The U.S. Environmental Protection Agency updated the law in its Clean Water Rule 2015, expanding the agency's authority over private lands, much to the dismay of construction industry organizations, such as the Associated General Contractors of America and the National Association of Home Builders, which both protested the lack of clarity in the rule about WOTUS and the overreach of the EPA. Twenty-seven states filed challenges to the 2015 rule, and a federal court stayed the new rule until the court can hear arguments and reach a conclusion.

# Lack of Privity Bars Entry of Claims

In the absence of privity, there is no duty of workmanlike performance owed by an independent contractor to a subsequent homeowner.

**BY ANDREW SMITH**

It's everyone's nightmare, right? You purchase a home only to discover substantial structural damage years later that was actually caused by a subcontractor retained by the prior homeowner. The majority of states do not permit subsequent home purchasers to pursue claims against previous subcontractors absent privity of contract. This is also the rule in Ohio.

The 1998 case of *Szabo v. Rosenberg* is instructive on this issue. In 1992, the Rosenbergs contracted with All American to have the company correct a water leakage problem in their basement. A year later, in July of 1993, the Rosenbergs sold the residence to Julius Szabo. The Rosenbergs' property disclosures listed prior water leakage in the basement and represented the condition was repaired by All American.

During a remodeling project in June of 1994, Szabo discovered large washed out areas under the foundation in the northeast corner of the home's basement and alleged All American negligently designed and installed the waterproofing system. Szabo averred a "collapse hazard" developed under both the basement walls and floors and that it was necessary to remove the porch, excavate the foundation walls, and install supports.

Szabo brought suit against both the Rosenbergs and All American. He asserted claims against the Rosenbergs for breach of the express and implied terms of the sales contract and for failure to disclose. He further defined those claims as negligent reconstruction, negligent misrepresentation, and fraud. In addition, he asserted two claims against All American for breach of the implied warranty of workmanlike performance and breach of express warranty.

Szabo and the Rosenbergs settled the main claims for $10,500 and an assignment of all claims the Rosenbergs had against All American. The trial court granted a motion for summary judgment in favor of All American and found, as a matter of law, in the absence of privity, there was no duty of workmanlike performance owed by an independent contractor to a subsequent owner upon which Szabo could recover from All American.

Ultimately, the 9th District Court of Appeals affirmed the trial court's ruling. According to the court of appeals, the lack of contractual privity eliminated the assertion of any claims by a subsequent homebuyer against a subcontractor employed by the former homeowner. This was so regardless of whether the claims alleged breach of contract or negligence because the underlying duty of care resulted from a contractual relationship.

> *Privity of contract is not a necessary element in a negligence action brought by a buyer of real property against the builder-vendor. However, privity of contract is required in order for a subsequent owner to maintain an action for breach of the implied warranty of workmanlike performance against an independent contractor who has performed services for a prior owner. Generally, if a plaintiff initiates an action sounding in tort and bases his claim upon a theory of duty owed by a defendant as a result of a contractual relationship, he or she must either be a party to or privy to the contract.*

**"Generally, if a plaintiff initiates an action sounding in tort and bases his claim upon a theory of duty owed by a defendant as a result of a contractual relationship, he or she must either be a party to or privy to the contract." — 9th District Court of Appeals**

Similarly, in *Weiss v. Thomas & Thomas Dev. Co.* in 1997, the original homeowner hired a plumber to install a gas delivery system from a natural gas well to his house. The subsequent homeowner was unfortunately killed during an explosion caused by a malfunction in the gas delivery system. The subsequent homeowner's estate argued the plumber owed a duty to the subsequent homeowner and that the plumber negligently designed and installed the system. The Ohio Supreme Court found, as a matter of law, the plumber did not owe a duty to the subsequent homeowner that would sustain an action in tort because no privity existed between the plumber and the subsequent homeowner.

Privity of contract can be a game changer regardless of whether suit is filed in contract or tort. In the world of construction law, issues related to contractual privity frequently come into play. While a small minority of states, including Colorado, permit negligence claims to extend to subsequent homebuyers, Ohio does not. Be sure to always review whether a contractual relationship exists between the parties and whether this is detrimental to any claims asserted in a lawsuit. ■

*Andrew Smith is an associate in the Cincinnati, Ohio, office of Smith, Rolfes & Skavdahl. asmith@smithrolfes.com*

## CONSTRUCTION WORKERS SUE OVER UNION ATTACKS

Illinois-based D5 Ironworks and five of its employees are suing a northwest Indiana union, claiming union reps physically beat D5 workers after an argument over a labor agreement. Allegedly, a member of Local 395 Ironworkers, based in Portage, Ind., came to a D5 worksite and spoke with a D5 worker about coming to an agreement with the union but was turned down. That union rep reportedly returned the next day and argued with that D5 employee, shoved him and warned him, "I'm taking this back to old school." That rep and 11 other men returned to the worksite later that day and beat five D5 workers with construction materials, the lawsuit says, breaking one employee's jaw. The union reps have not been charged in the incident, but D5 has requested an injunction against the union, a stay-away order, and at least $3 million in actual damages plus unspecified punitive damages. The case has been moved to U.S. District Court in Hammond, Ind. ■

## QUAKE COVERAGE AVAILABILITY DWINDLING IN MISSOURI

The Missouri Housing Development Commission, which oversees and sponsors affordable housing projects, requires earthquake coverage for the city of St. Louis and the counties of St. Louis, Jefferson, Butler, Cape Girardeau, Carter, Dunklin, Iron, Madison, Mississippi, New Madrid, Pemiscot, Perry, Reynolds, Ripley, St. Francois, St. Genevieve, Scott, Stoddard, Washington and Wayne during construction and after construction for the term of the mortgage loan. But insurers continue to withdraw or restrict earthquake coverage in the state, the third-largest market for quake insurance behind only California and Washington, and premiums continue to rise, according to insurance director John Huff. The six counties that make up the most susceptible areas for earthquake damage along the New Madrid Fault in the state have experienced a 510% increase in premiums since 2000, according to an update to the Missouri Insurance Department's 2015 *Earthquake Report*. The average cost of earthquake coverage in 2000 was $57 a year. In 2015, it was $348. Sixty percent of homes in the New Madrid area were covered for earthquake damage in 2000; that number dropped to less than 18% by 2015. ■