THE BASSETT FIRM
WWW.THEBASSETTFIRM.COM

*Passion. Preparation. Persistence.*

***Volume 9, Issue 8***

# THE BASSETT BULLETIN ™

## DUTY OWED TO THIRD PARTIES BY ARCHITECTS IN CONSTRUCTION CASES

The Austin Court of Appeals, on August 5, 2011, reversed itself on a case involving construction defects resulting in the collapse of a balcony and serious injury. The architects who designed and oversaw the project did not a duty to a third party social guest in the finished building. *Black+Vernooy Architects v. Smith*, 346 S.W.3d 877 (Tex. App.—Austin 2011, pet. filed [11-0731, briefs on the merit requested]).

In December 2010, a three judge panel of that same Court of Appeals held that the same architects did have such a duty. The Court of Appeals reconsidered the earlier decision, decided that it was incorrect, and issued this new opinion. Not surprisingly, the losing Plaintiff appealed to the Texas Supreme Court, where it is now pending.

The Court of Appeals held that when architects entered into an agreement with homeowners, (1) they assumed no contractual duty to third-parties (including a homeowner's injured visitor), (2) they did not notice the balcony defects at issue, (3) the contractor had control over the manner of construction, and (4) it would not recognize a new duty in this case.

## FACTS OF THE CASE

Lou Ann Smith, Jimmy Jackson Smith, individually and as next friend of Rachel and Grayson Smith, and Karen Gravely sued Black+Vernooy Architects for negligence in connection with injuries suffered by Lou Ann and Karen when the second-floor balcony of a friend's home collapsed while they were standing on it.

In October 2000, Robert and Kathy Maxfield hired the architects to design a vacation home for them. They signed an agreement based on forms from the American Institute of Architects that required the architects to supervise construction. The architects' design for

the home had a balcony off the master bedroom. The Maxfields hired Nash Builders, Inc. ("Nash") as the general contractor for the project. Nash hired a subcontractor, as it was authorized to do by the contract, to build the balcony. The subcontractor did not build the balcony in compliance with the design drawings in several respects.

Notably, the design drawings required that the metal pipes supporting the balcony be welded to steel plate tabs, which would then be bolted to the balcony. As constructed, however, the metal support pipes were attached to the balcony using thin metal clips. The design drawings also required that a metal support piece be used to reinforce the attachment of each of the balcony joists to the exterior wall of the house. The subcontractor did not use these supports. The balcony handrail was not bolted to the house as the plans required.

Finally, the plan called for the balcony to be attached to the house by bolting it to a heavy joist and wood blocking. Unfortunately, the balcony was just nailed to a one-half-inch piece of plywood.

Karen Gravely and Lou Ann Smith visited the home more than a year after it was built. Shortly after, they stepped out onto the upstairs balcony. The balcony separated from the wall of the home and collapsed, causing the two women to fall approximately twenty feet to the ground. Lou Ann was rendered a paraplegic and Karen suffered minor injuries.

Karen and the Smith family sued the Maxfields, Nash, and the architects for negligence. Nash and the Maxfields settled prior to trial. A jury found that the injury was caused by the negligence of the architects, Nash, and the subcontractor. Based on the jury's findings related to damages and proportionate responsibility, as well as adjustments for medical expenses actually paid, the trial court rendered judgment that the Smith family recover a total of $380,749.19 from the architects, plus prejudgment interest. Karen got nothing.

## THE COURT OF APPEALS' ULTIMATE DECISION

The Court of Appeals noted that the agreement between the Maxfields and the architects required the architects to (1) visit the construction site periodically and report deviations from the design plans to the Maxfields and (2) guard the Maxfields against defects in the construction of the home. However, this did not create a duty to third parties. According to the Court of Appeals, the Smiths were asking it to do something that has never been done in the history of Texas law: to transform and extend the contractual duty owed to the Maxfields into a common law duty owed to the Smiths as visitors to the home. The Court of Appeals refused to create this duty in order to uphold the jury's verdict.

It held that there is *no duty* to protect an individual from a third party (the builder or subcontractor) in the absence of a special relationship between the architect and the third party in question. It was the Maxfields, not the architect, who had the contractual relationship with Nash, and Nash with the subcontractor. There also was *no duty* in the absence of a relationship that imposes a duty on the architect to control the third party's

behavior. While the architect had some duty to the Maxfields to report construction variances, only the Maxfields had a right to order changes in construction. The architects owed no duty at all to the Smiths.

The dissent countered that the Smiths' lack of contractual privity did not preclude them from recovering for their injuries. However, the relevant question in this case was whether the circumstances surrounding the architect's contract with the Maxfields gave rise to a new *common-law* duty to the Plaintiffs. The dissent noted that it did because the architect's conduct created a foreseeable risk of injury to third-party visitors. Specifically, when an architect agrees to provide contract administration services, that architect's failure to notify the owner of observable and dangerous deviations from the architect's own design drawings, particularly when construction in accordance with the design drawings is a critical safety issue, creates a foreseeable risk of injury for visitors to the premises.

## WHAT DOES THIS MEAN?

The Texas Supreme Court will now wrangle with this interesting case. Past rulings suggest that it will agree that in the absence of a specific duty to these Plaintiffs, the Defendants cannot be held liable. Foreseeability of injury to third parties will likely not be enough to support a duty to those third parties in the absence of actual right to control the circumstance giving rise to harm.

The benefit to Defendants in a situation of oversight and reporting duties, but no actual effective control, is clear. Plaintiffs will scramble to try to prove some right of control, if only implied. The defense bar will need to be ready for this.








**The Bassett Firm**

**Two Turtle Creek Village**
**3838 Oak Lawn Avenue**
**Suite 1300**
**Dallas, Texas 75219**
**(214) 219-9900 Telephone**
**(214) 219-9456 Facsimile**
**Toll Free: 1-800-310-9769**
***www.thebassettfirm.com***


## ATTORNEYS

- MIKE H. BASSETT
- JENNIFER R. ASHMORE
- ROBERT L. MCGEE, JR.
- WILLIAM A. NEWMAN
- MICHAEL J. NOORDSY
- J. ANDREW ROBERTSON
- MATHEW SAMUEL


Information regarding *The Bassett Bulletin* [TM] is available from Annie C. ***(acopeland@thebassettfirm.com)*** at (214) 219-9900.



*The Bassett Bulletin* [TM] is published twenty-six times a year, and is a complimentary publication of The Bassett Firm.