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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Construction Cases To Watch In 2019

By **John Kennedy**

Law360 (January 1, 2019, 12:03 PM EST) -- Johnny Mathis, a Texas hailstorm and the state of Nevada sure sound like three things that go together. After all, the Texas-born singer often performs in Las Vegas. But what links them all here, at the start of 2019, is construction litigation.

This year, storm-damaged Texas homes, a Nevada limit on how much work one contractor is allowed to do and the elderly musician's potential responsibility for a contractor's fall are all important parts of construction cases attorneys plan to keep an eye on as they work their way through court.

Johnny Mathis and the Slippery Roof

Mathis is 83 years old and his lawyers say he hasn't been on the roof of his house for almost a decade, but if the California Supreme Court upholds an appellate decision, he could be found liable for injuries sustained by a window cleaner who fell off the edge. If that happens, it could open the door for more contractors to sue those who hired them, including homeowners, for work-related injuries.

Mathis' one-story Los Angeles home has a flat roof bordered by a 3-foot parapet wall. Luis Gonzalez, the injured man, had been cleaning the skylight in question for about 20 years before his 2012 fall and runs a business that markets itself as specializing in washing hard-to-reach windows and skylights, Mathis said in his Supreme Court petition.

On the day of the fall, Mathis' longtime housekeeper saw water leaking through the skylight, so she asked Gonzalez to make it stop. He climbed onto the roof to talk to his workers, but instead of going inside the parapet wall, he traversed the narrow ledge outside of it. He lost his footing and fell almost nine feet to the ground below and has argued Mathis is responsible because he failed to properly maintain the roof.

Since 1993, California courts have limited the circumstances in which a contractor can successfully sue a homeowner who hired them over a work-related injury. Until the appellate court's decision in the Mathis case, there were two exceptions: when a homeowner has control over a contractor's work and when a homeowner knows about a hazard but doesn't tell the workers.

The trial court followed that path, finding Mathis had no control over the site and that Gonzalez knew about the hazards involved with walking outside of the wall. The appellate court disagreed, finding Mathis was liable for the injury.

The appellate court said there was a third situation in which a hiring party can be held responsible for a contractor's injury: when a worker is exposed to a known hazard that can't be fixed through

reasonable safety measures. It said a jury needs to decide what's reasonable, not a judge, so Mathis' case must go to trial.

Alan H. Packer, a partner at Newmeyer & Dillion LLP, said contractors and their attorneys are waiting to see how the Supreme Court handles the case because it will determine how far responsibility for a contractor's work-related injury actually goes.

"Does it go all the way to Johnny Mathis and his slippery roof?" Packer said. "Or does it stop with the contractor?"

The case is Luis Gonzalez v. John R. Mathis et al., case number S247677, in the Supreme Court of California.

Texas Roofers and the Insurance Industry

In mid-November, the Texas Supreme Court **kicked a class action** over storm-related roof repairs back to Tarrant County District Court, **a case** that attorneys believe could have **a significant effect on the state's roofing industry**.

Named plaintiffs Joe and Stacci Key claim Lon Smith Roofing and Construction violated a state law that bars companies from negotiating property insurance claims on behalf of homeowners. The Keys claim Lon Smith improperly held itself out as a public insurance adjuster as it sought to fix their roof.

More than 10,000 contractors work with insurance companies to fix storm-related damages in the Lone Star State, and trade groups worry that a Lon Smith loss could strain the relationship between homeowners, roofers and insurers.

At risk are contractors that use language similar to what Lon Smith put in the Keys' contract, those that aren't familiar with the state's insurance laws and, of course, those that know the law and deliberately try to get around it, lawyers said.

The law, Texas Insurance Code Chapter 4102, says no one can act as a public insurance adjuster in Texas, or ever claim to be one, unless they've been licensed. Even with a license, one can't handle a property owner's insurance claim and then fix the damage — it's one or the other.

Roofing trade associations have said the Keys' contract did nothing more than recognize Lon Smith's obligation to cooperate with the homeowner's insurance company. But while the case may be a wake-up call to contractors that try to do it all, those working within the law are going to be in the best position if the Keys win, attorneys said.

The case is Joe Key et al. v. Lon Smith & Associates Inc., case number 236-267881-13, in Tarrant County District Court.

Nevada and Contracting Limits

In Nevada, a case focused on the constitutionality of the state's limit on the amount of work one contractor is allowed to do is just getting started but could affect how contractors work in the Silver State, attorneys said.

A little more than a year ago, the Nevada State Contractors Board found Silverwing Development knowingly signed a contract with a contractor that exceeded a statutory limit. Silverwing challenged the decision, saying the law it broke is unconstitutionally vague and that similar

licenses were treated differently.

After Administrative Law Judge Phillip M. Pro sided with the contractors board, the matter went to state district court. There, Washoe County District Judge Elliott A. Sattler said Judge Pro correctly ruled the law isn't too vague because it's clear to people of ordinary intelligence and also provides specific enforcement standards.

But because Judge Sattler remanded the matter to Judge Pro to clarify the method the administrative law judge used to reach part of his initial decision, the ruling isn't yet final. It will likely be appealed when it becomes so, said Philip M. Mannelly, a construction lawyer at McDonald Carano LLP.

The contractors board determines license limits by considering factors including a contractor's financial responsibility, experience and general knowledge of relevant laws. The license limit is intended to prevent less experienced and less solvent contractors from overcommitting on a single contract and potentially stiffing their workers, Judge Sattler said.

"By imposing strict license limits on the work that can be done for a single client, the legislature promotes financially responsible construction and ensures that contractors are able to pay their creditors," the judge said in his decision.

The case is Silverwing Development et al. v. Nevada State Contractors Board, case number CV18-00128, in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe.

--Editing by Pamela Wilkinson and Marygrace Murphy.

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