



**In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth**

No. 02-16-00050-CV

RICHARD SEIM AND LINDA SEIM, Appellants

v.

ALLSTATE TEXAS LLOYDS AND LISA SCOTT, Appellees

On Appeal from the 141st District Court
Tarrant County, Texas
Trial Court No. 141-270531-14

Dissenting Memorandum Opinion on Remand and on En Banc Reconsideration
by Chief Justice Sudderth (joined by Justice Pittman)

**DISSENTING MEMORANDUM OPINION ON REMAND
AND ON EN BANC RECONSIDERATION**

I respectfully offer a dissenting viewpoint.

While it is true that from the vantage point of the insurance company and its adjuster, the storms of 2007, 2008, 2012, and 2013 involve separate events, claim numbers, and insurance contracts, the insureds do not necessarily share that view. From the Seims' perspective, they had a leaky roof and their insurance company—from 2007 until 2013—failed to live up to its obligations to cover the damage.

In their original petition, the Seims attributed the roof damage to a storm that occurred “[o]n or around August 13, 2013.” Two months later, without mentioning the August 13, 2013 storm, the Seims amended their petition and claimed roof damage from a storm that occurred “[o]n or around April 13, 2007.” Two months after that, the Seims filed a second amended petition, this time adding storm dates of April 9, 2008, and May 8, 2012, as potential causes for their roof damage, again with no mention of the original August 13, 2013 storm. The Seims' attorney swore that his failing to refer to the August 13, 2013 storm was inadvertent.

The parties conducted discovery in this case for more than a year after the Seims dropped reference to the August 13, 2013 storm from their pleadings. Without objection, discovery related to the August 13, 2013 storm was exchanged during this time. In other words, it would objectively appear that during the discovery process, all parties understood that the August 13, 2013 storm was related to the lawsuit.

Certainly through this discovery process both Allstate and Scott were on fair notice that the August 13, 2013 storm was still at issue in the case.

But on October 5, 2015, Allstate and Scott alerted the Seims to the omission by stating in a footnote in their motion for partial summary judgment that “[a]ll causes of action arising from this August 13, 2013 claim have been dismissed by subsequent amendments.” The Seims responded by filing their third amended petition in which they reasserted their claim for damages resulting from the August 13, 2013 storm. In their third amended petition, the Seims also abandoned their allegations that the 2007, 2008, and 2012 storms caused their roof damage. But unlike the mere omission of the 2013 date that had occurred in the prior amendments, this time, the Seims’ abandonment of allegations was clear and unequivocal:

Previous to August 13, 2013, Plaintiffs had submitted claims to Allstate for damage to the roof. Plaintiffs made the repairs as instructed by Allstate and had no issues of water ingress during the twelve months leading up to the August 13, 2013 storm.

Under these circumstances, I would consider the attorney’s sworn statement that he did not intend to dismiss any claim tied to the 2013 storm plausible, and I would hold that the Seims did not show an intent to nonsuit sufficient to permit the granting of summary judgment on limitations grounds.

/s/ Bonnie Sudderth

Bonnie Sudderth
Chief Justice

Delivered: July 30, 2019