SPRING 2014 NEWSLETTER

AUTOMOBILE / TRUCKING LITIGATION UPDATE

By Gerald B. Lotzer

1. *Rodriguez v. Sandhill Cattle Co.*, No. 07-13-00043-CV (Tex.Civ.App. – Amarillo) (March 10, 2014, no pet.)

Pilar Rodriguez, the Plaintiff, brought suit against Sandhill Cattle Co., L.P., Defendant, for damages arising as a result of a collision with cattle owned by Sandhill that has been pastured at a location several miles from the accident scene. The accident occurred after midnight. The pasture was surrounded by a functioning "hot-wire" fence, however, it was discovered later that the "hot-wire" had been broken and a portion of the cattle had escaped from the pasture and were roaming the area.

At trial, and after Rodriguez rested, Sandhill moved for a directed verdict contending that Plaintiff, Rodriguez, had failed to prove a violation of the local stock law. The trial court agreed, granting the directed verdict and entered judgment for Sandhill. Rodriguez subsequently appealed on two points. First, that the trial court applied an incorrect legal standard in granting the directed verdict and second, some evidence of negligence appeared of record precluding entry of the directed verdict.

The Court's analysis began by pointing out that "no one questions that in Texas there exists no common law duty to restrain cattle within fences." *Gibbs v. Jackson,* 990 S.W.2d 745, 747 – 48 (Tex.1999). Texans have no common law duty to fence their domestic animals such as cows and horses. A duty is created, however, by statute that arises under Subsection 143.074 of the Texas Agricultural Code which provides that "a person may not permit" livestock "to run at large in the county or area in which" a local stock law was adopted by popular vote. Tex. Agric.Code.Ann. § 143.074(a)(West 2004). Castro County, where the accident occurred, had adopted the statute and Sandhill pastured its cattle in that county. The Court went on to determine that since the duty was created by a statute, its scope was defined by the statute creating it. They then focused on the words "permit" livestock "to run at large" for that is what the legislature said a person could not do. They relied on a decision from the Beaumont Court of Appeals which reviewed what was meant by the word "permit". *Rose v. Hebert Heirs,* 305 S.W.3d 874 (Tex.App. – Beaumont 2010, no pet.) In that case, Rose struck a bull that escaped its enclosure. Rose sued the landowners contending that they were negligent in permitting the bull to roam at large. Given the lack of any statutory definition of the word "permit" the *Rose* court turned to authority requiring it to assign the word its common or plain meaning. *Id.*, at 881; Tex Gov't Code Ann. § 311.011(a)(West 2013). "Permit" means to "consent to expressly or formally" or "to give leave". Applying that definition, the Court in *Rose* held that the Plaintiffs "failed to meet their burden of producing evidence to show that the landowners breached Section 143.074." *Id.* at 881-82. The Court further focused on the word "knowingly" in the statute before the use of the word "permit" and reached the conclusion that there was no evidence that Sandhill "knowingly" permitted its cattle to run at large. The Court also looked at

whether or not a single strand of 14 gauge electrified wire, like in this case, was sufficient or insufficient to generally hold cattle like those being pastured. There is no evidence in the record indicating that a single strand of hot-wire was no less sufficient than three, four, or five strand barbed wire fence. The Court also found that evidence that the cattle were not trained to stay within the confines of a hot-wire fence is also missing from the record, as is evidence that the cattle in question had previously escaped from a hot-wire fence, that Sandhill knew the hot-wire fence was inoperative before leaving the cattle, that Sandhill failed to inspect the hot-wire fence to determine if it was operative, that Sandhill failed to periodically inspect the wire once the cattle were left, that Sandhill knew the cattle escaped and did nothing, that Sandhill left or allowed anyone to leave an opening in the hot-wire fence, or that there were too many head of cattle on the 60 acres. The Court found no evidence from anyone familiar with cattle or their pasturing that could be read as criticizing the pasturing technique here and accordingly affirmed the trial court's judgment.

The Amarillo Court of Appeals affirmed the judgment finding that nothing of record supports a reasonable inference that Sandhill breached Subsection 143.074 of the Texas Agricultural Code and permitted its cattle to run at large. Consequently, the trial court did not err in granting the directed verdict. The judgment was affirmed.

2. *Fraire v. Budget Rent-A-Car of El Paso, Inc.*, No. 08-12-00280-CV (Tex.App. – El Paso) (March 28, 2014, no pet.)

The Plaintiff, Sergio Fraire, appeals the trial court's take-nothing grant, hybrid summary judgment, in favor of his former employer, Defendant Budget Rent-A-Car of El Paso, Inc. Budget was a non-subscriber of the Texas Workers Compensation Act and Plaintiff Fraire brought a negligence cause of action contending that Budget breached its duty to warn or instruct the Plaintiff about the risk inherent in repairing a broken lift gate on the back of a large truck. Plaintiff maintains that Budget breached a non-delegable general duty to provide adequate equipment which precluded a summary judgment. Fraire was injured in September 2009 while repairing a 24 foot rental truck with a broken roll-up door designed to secure the truck's rear cargo area. Fraire had been employed with Budget for fifteen years, first serving as a mechanic for three years before being promoted to service manager. As service manager the Plaintiff supervised between 10 and 12 people, including mechanics, rental agents and employees responsible for cleaning and preparing rental cars. This also included helping with the cleaning of cars, taking inventory, handling paperwork from Budget's El Paso office and its administrative headquarters near the airport. The Plaintiff was <u>not</u> assigned to perform any mechanical duties as a service manager.

Several of Budget's rental trucks were in need of repair and Budget's regular mechanic had not shown up for work for several days. Budget's General Manager, Neal Remz, the Plaintiff's direct supervisor, asked the Plaintiff why there was a backlog of trucks and told the Plaintiff that the trucks "needed to get out." Because sending the trucks to a dealership for repairs would cause even longer delay and increase Budget's backlog, the Plaintiff decided to repair the trucks himself. He stated in his deposition that he had fixed a roll-up cargo door once before and that prior to joining Budget, he had worked as a mechanic for several years. He also stated that "the company never trained any employees to work on trucks."

Another supervisor and a service agent who were not mechanics, assisted the Plaintiff with the repair job. The General Manager Remz testified that the service agent's job consisted of washing, vacuuming, gasing the cars and turning them around and getting them ready for re-rental.

When attempting to repair the roll-up cargo door, the Plaintiff used equipment to hold it there with "clamps, vise grips and stuff like that." In order to reach the door mechanism and replace the spring inside, the Plaintiff retrieved a plastic milk crate from inside the shop and placed it inside the truck's cargo area where he stood on it to reach the spring. The Plaintiff contended that Budget was negligent because it did not have any "mini stepladders" or other similar equipment he could have used in making the repair. Budget did have five or six foot stepladders but did not possess any smaller step-stool type ladders. Apparently, one of the employees, Carlos Hernandez, testified that employees had found "a small, six-inch step stool left in one of the rental cars" but that Budget had not purchased that stool and he was unsure if the stool was available at the time Plaintiff sought to repair the truck.

The Plaintiff suffered torn tendons and ligaments requiring surgery takes medication for chronic pain, and currently cannot lift his arm above his head. His employment was terminated several months after his injuries.

Because Budget is a non-subscriber to the Texas Workers Compensation Insurance Coverage Team, the Plaintiff must prove that Budget was negligent to recover damages. TEX. LAB.CODE ANN.§ 406.033(d)(West Supp. 2013). "A negligence cause of action has three elements: 1) a legal duty; 2) breach of that duty; and 3) damages proximately resulting from the breach." *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex.1998).

Reviewing the record, the Court held that the Plaintiff undertook the repairs voluntarily in order to expedite the rental process and that the dangers of mounting an A-frame ladder from an elevation would be commonly known to a reasonable person. Further, although making mechanical repairs fell outside the scope of his job description at the time, no duty arose because the Plaintiff had been a mechanic for a number of years before Budget hired him. Plaintiff's claim of a duty to warn was therefore without merit.

The second issue of whether Budget had a duty to furnish adequate equipment, the Court held that there was a fact issue on proximate cause. The Court analyzed that a person of ordinary intelligence would have anticipated that Remz's instruction that the trucks needed to "get out" and the strain on business created by the regular mechanic's absence would lead to the Plaintiff or another employee attempting to make the truck repairs themselves, thereby triggering the duty to furnish safe equipment. Whether the Plaintiff's injuries were proximately caused by his failure to use an alternative safer repair method or whether his decision to move laterally between surfaces and an elevation because Budget did not furnish appropriate equipment caused his injuries is a proper jury question. Budget failed to establish that Fraire, the Plaintiff, was the sole proximate cause of his own injuries is a matter of law.

The Court affirmed the trial court's summary ruling on the issue to warn or issue safety

instructions and reversed the trial court's summary judgment on the issue of Budget's duty to furnish adequate equipment and remand for further proceedings consistent with that opinion.