

## **WINTER 2012 NEWSLETTER**

### **PREMISES LIABILITY UPDATE**

**By Dean Foster**

**1. *Jensen v. Southwest Rodeo, LP*, 350 S.W. 3<sup>rd</sup> 755 (Tex. App. – Dallas 2011, no pet.).**

Plaintiff, Bob Jensen, appealed the trial court summary judgment in favor of Southwest Rodeo, LP. (“Southwest Rodeo”). The court concluded Southwest Rodeo owed no duty to Jensen and affirmed the trial court’s judgment.

Southwest Rodeo owned an arena and events center located in Mesquite, Texas. On October 21, 2003, Jensen, acting on behalf of the Hella Shrine Temple (“Temple”), signed a lease agreement with Southwest Rodeo to use the arena facilities for a Hella Shrine circus. During one of these circus performances, Jensen tripped and fell on the arena stairs. Jensen filed suit against Southwest Rodeo alleging claims for negligence and premises liability.

Southwest Rodeo filed a motion for summary judgment asserting three grounds to defeat Jensen’s claims. First, Southwest Rodeo argued that as lessor it owed no duty to the Temple or Temple’s invitees for the condition of the leased premises. In the alternative, Southwest Rodeo argued that Jensen’s claims must fail because he was a licensee with knowledge of the alleged dangerous condition. Finally, Southwest Rodeo argued that Jensen could not recover under a separate negligence theory because his injury was alleged to be the result of a premises defect and not any contemporaneous negligent activity.

Jensen only appealed the trial court’s summary judgment as to his premises liability claim. The Court of Appeals noted that it has long been recognized that a lessor generally owes no duty to a tenant or its invitees for dangerous conditions on the leased premises. The tenant takes the property as he finds it and assumes the risk of apparent defects. The court went on to find that it was undisputed that the area where Jensen fell in the arena was part of the premises that was leased to Temple and that Temple was the sole lessee. Jensen attempted to argue that the retained control exemption applied to the area where he fell. However, the Court of Appeals disagreed, finding that the rationale for the retained control exception applies to common areas maintained by the landlord are for the use and benefit of multiple tenants or the public. Accordingly, the common area rationale did not apply to this accident.

Jensen also argued that the evidence showed that Southwest Rodeo maintained sufficient control over the area made the subject of the lease to raise a fact issue on the retained control exception. However, the court noted that the lease agreement between Southwest Rodeo and Temple required Temple to return the facilities in good condition and repair at the end of the lease term. The court found that this contractual requirement placed the responsibility for maintenance, repair, and cleaning on Temple, not Southwest Rodeo, during the term of the lease. The fact that Southwest Rodeo required maintenance to be performed only showed its intent to

protect its interest in the property and not a retention of control over the property during the term of the lease.

Jensen's last argument was that a provision in the lease that permitted the general manager of Southwest Rodeo, or his representative, a right of access to the premises during the lease term amounted to a retention of control. The court disagreed. The court found that a critical issue is who had the right of possession of the premises and not merely a right of access. The court stated that the control necessary to impose a duty of care is physical control of the property or the intention to occupy or possess the property. Jensen presented no evidence that was sufficient to raise a fact issue about Southwest Rodeo's physical control of the premises or its intention to occupy or possess the premises during the lease period. Accordingly, the summary judgment was affirmed.

**2. *Wyckoff v. Fuller Contracting Co. & West*, No. 05-10-00852-CV, 2011 Tex. App. Alexis 9990 (Tex. App. – Dallas, December 20, 2011, no pet. h.).**

This case arises out of a slip and fall at a private residence. Wyckoff attended a party at West's house during which West gave Wyckoff a tour of a wine cellar. During the tour, Wyckoff was injured after falling on the steps leading to the wine cellar. Wyckoff sued both West and Fuller Contracting, the contractor that built the house and sold it to West.

Fuller Contracting filed a combined traditional and no-evidence motion for summary judgment. Fuller sought a traditional summary judgment on grounds that Wyckoff could recover only on a premises liability claim and that his negligence and negligence per se claim should be dismissed as a matter of law and that it did not owe a duty to Wyckoff. Fuller also requested summary judgment on grounds there was no evidence the stairs constituted a dangerous condition or that Fuller had actual or constructive knowledge of a defect, did not owe a duty to Wyckoff, did not breach any duty, and that any alleged breach was not the proximate cause of Wyckoff's injuries.

The Court of Appeals noted that Wyckoff contended that she was injured by defects in the design of the stairway that made it unreasonably dangerous. She did not assert she was injured by any contemporaneous result of an activity by Fuller Contracting at the premises. The court further pointed out that "adroit phrasing" cannot convert her claim into a products liability claim or affect the application of premises liability law. As a result, based on the pleadings and the manner in which the case was presented to the trial court, the Court of Appeals concluded it would analyze Wyckoff's claims strictly as premises liability claims.

Focusing on the duty element, the court noted that Wyckoff had testified that when she entered the stairway, she was aware of the poor lighting and the lack of a handrail. She also testified that she knew the steps were uneven. The court found that Wyckoff had perceived, and thus had actual knowledge of, the alleged dangerous conditions about which she complains. Therefore, as a matter of law, the court finds that neither Fuller Contracting nor West owed a duty to Wyckoff, and the trial court did not err by granting both Defendants no-evidence motions for summary judgment on the ground that they did not owe a duty to the Plaintiff.