

SUMMER 2012 NEWSLETTER

PREMISES LIABILITY UPDATE

By Dean Foster

1. *Saeco Electric & Utility, Ltd. v. Gonzales*, No. 04-11-00305-CV (Tex. App. – San Antonio, April 18, 2012, no pet.), 2012 Tex. App. Lexus 2985.

On June 16, 2009, Gonzales was involved in a multi-vehicle accident in San Antonio, Texas. Gonzales was uninjured, but his vehicle was damaged as a result of the collision. Following the accident, Gonzales moved his vehicle off the roadway and into a parking lot at a shopping center overlooking the intersection. He did return to the accident scene to provide his information to the police officer. Gonzales was directed by one of the police officers to move off the roadway and to wait on the section of land located at the northwest corner of the intersection. Gonzales stood in this area and spoke with an EMS technician while waiting. Shortly thereafter, the ground underneath Gonzales suddenly caved in, causing his left leg to enter the hole created in the ground. A metal rod in the hole entered Gonzales' body at the back of his left leg and transected his body over his penis to his right abdominal cavity. At least 12 inches of the metal rod penetrated his body.

It was later discovered that the 18 inch diameter, 7 foot deep hole was created when an old wooden traffic signal pole had been removed from the intersection. However, the 5/8 inch diameter, 7 foot long metal grounding rod associated with the wooden pole had not been removed from the hole when the pole was pulled.

Prior to Gonzales' injury, construction work was being performed on the traffic signals and turn lanes at the intersection by a general contractor, Ram Building Services, LLC, and its subcontractor, Saeco. Saeco was specifically hired to remove the old wooden pole, install a new aluminum traffic pole, and install pedestrian crossing push buttons at the northwest corner of the intersection. As part of the project, Saeco was supposed to remove the metal grounding rod following the removal of the wooden pole or cut the rod off below ground level. Saeco was then supposed to backfill the hole.

On June 1, 2009, Saeco removed the wooden pole and backfilled the hole. Gonzales' injury occurred about two weeks later. Saeco returned to the same location on August 4, 2009 to finish its project and install the signs on the new pole. At that time, Saeco's employees discovered the hole with the old metal grounding rod still inside. Saeco then removed the metal grounding rod and properly backfilled the hole.

Gonzales filed suit against Saeco, Ram, and the City, asserting violations of the TEXAS TORT CLAIMS ACT and negligence claims. Gonzales claimed he was an invitee on the premises. After settling with the City and Ram, a jury trial against Saeco returned a verdict in favor of Gonzales, awarding actual damages in the amount of over \$5 million. The trial court signed the Final Judgment, overruling Saeco's Motion for Judgment Notwithstanding the Verdict. Saeco

filed a Second Motion for Judgment Notwithstanding the Verdict and a Motion for New Trial, both of which the trial court denied, and Saeco appealed.

Saeco argued that the trial court erred in denying its Motions for Judgment Notwithstanding the Verdict because Gonzales failed to request and obtain findings from the jury on the essential elements of his only viable claim, a premises defect action. Saeco claimed that the broad form negligence question that was submitted to the jury was immaterial and not a controlling issue.

On appeal, Saeco contended that Gonzales' only viable claim for recovery was one for premises defect, as opposed to negligent activity, because Gonzales' pleadings and evidence alleged injury from a dangerous condition on the property and not as a contemporaneous result of someone's negligence or some negligent activity. Gonzales argued that a negligent activity charge was sufficient to support liability in Saeco because a premises defect claim can only be asserted against a possessor, owner, or occupier of land, of which Saeco was none of these. However, the court noted that while it is ordinarily the possessor of a premises that has the duty to use reasonable care to keep the premises safe for invitees, liability may extend to one who is not the owner or the occupier, but one who is in control of the premises. A premises defect claim can be asserted against a contractor who is a non-owner or non-occupier of the premises if the contractor had the right to control the condition that caused the injury.

The Court of Appeals disagreed with Gonzales' position that a general negligence theory of liability as was submitted in the jury charge was sufficient. In fact, Gonzales had not tendered a liability question to the trial court at all, but simply chose to accept the general negligence liability question submitted by Saeco without objection. As a result, the Court of Appeals concluded that no basis existed on which Gonzales could recover under the general negligence theory presented to the jury. There was no evidence to support the jury's findings on liability because no instructions or questions were asked concerning Saeco's right to control or Saeco's actual or constructive knowledge of the dangerous condition it created.

The next question the Court of Appeals addressed was whether to reverse and render or reverse and remand. The court noted that because the distinction between premises liability claims and negligent activity claims are well established, rendition, and not remand, is normally the appropriate disposition. However, the court noted that remand is appropriate when the interest of justice requires it, and as long as there is a probability that a case has, for any reason, not been fully developed, an appellate court has discretion to remand for new trial rather than render a decision. The court noted that Saeco submitted its proposed charge with the general negligence question in order to submit to the jury the negligence of Ram. One week after the jury's verdict, Saeco argued the wrong theory of liability was submitted to the jury, and as a result, Saeco is entitled to judgment notwithstanding the verdict. At the hearing on Saeco's Motion for Judgment Notwithstanding the Verdict, the court stated, "You know, that's real interesting because it was Saeco's proposed charge that I used in order to prepare the charge of the court. Are you saying that was abandoned because now you want to claim premise defect?" Because the trial court had relied on Saeco's proposed negligence question in preparing the court's charge, the Court of Appeals concluded that remanding the case to the trial court, rather than rendering judgment, was in the interest of justice because the case was ultimately tried on an incorrect theory of liability.