

FALL 2011 NEWSLETTER

PREMISES LIABILITY UPDATE

By Dean Foster

1. *Omaha Healthcare Center, LLC v. Johnson*, 344 S.W. 3rd 392 (Tex. 2011).

In this case, the Texas Supreme Court was considering whether claims against a nursing home regarding a patient's death alleged to have been caused by a brown recluse spider bite are healthcare liability claims that require an expert report to be served. The trial Court and the Court of Appeals held that it was not a healthcare liability claim. The Texas Supreme Court disagreed.

Wilma Johnson, on behalf of the Estate of her deceased sister, filed suit against Omaha Healthcare Center. Johnson alleged that while Reid was being cared for by Omaha, she was bitten by a brown recluse spider and died. Johnson asserted that Omaha had a duty to use ordinary care in maintaining its premises in a safe condition and breached its duty by failing to inspect the premises for spider and insect infestations, properly clean the premises, institute proper pest control policies and procedures, and take the necessary actions to prevent insect and spider infestations. Omaha filed a Motion to Dismiss on the grounds that Johnson's claims were health care liability claims and she did not serve an expert report as required by statute. Johnson responded that her claims were matters of ordinary negligence and did not fall under the statutory definition of health care liability claim. The trial Court denied Omaha's Motion and Omaha filed an Interlocutory Appeal. The Court of Appeals affirmed.

The Texas Supreme Court disagreed and reversed the Judgment of the Court of Appeals and remanded the case to the trial Court with instructions to dismiss the case and consider Omaha's request for attorney's fees and costs. In determining that Plaintiff's claim was a health care liability claim, the Supreme Court noted the duties of a nursing home as set forth in the Texas Administrative Code. A nursing home facility "must provide a safe, functional, sanitary and comfortable environment for residents" and "must maintain an effective pest control program." 40 Tex. Admin. Code § 19.1701, 19.309 (1)(c). In its pest control program, a nursing home must "use the least toxic effective insecticides." Id. at Sec. 19.324.

The Court of Appeals concluded that just because there are regulations requiring pest control in nursing homes does not mean that the regulations are related to health care.

In contrast, the Texas Supreme Court noted that "health care" involves more than acts of physical care and medical diagnosis and treatment. It involves "any act performed or furnished or that should have been performed or furnished, by any healthcare provider for, to, or on behalf of a patient during the patient's confinement." The Supreme Court held that although Johnson pled that Omaha was liable because it failed to exercise ordinary care to conduct the referenced activities, the underlying nature of her claim was that Omaha should have but did not exercise the care required of an ordinarily prudent nursing home to protect and care for the decedent

while she was confined there. The Court concluded that such claims fell within the statutory definition of a healthcare liability claim and the statute required the suit to be dismissed unless Johnson timely filed an expert report. As a result, the Supreme Court reversed the Court of Appeals judgment and remanded the case to the trial Court with instructions to dismiss Johnson's claims and consider Omaha's request for attorney's fees and costs.

2. *Allen Keller Co. v. Foreman*, 343 S.W.3rd 420 (Tex. 2011).

Gillespie County hired Allen Keller Company to work on a number of road construction projects in the County. The projects were intended to address a variety of problems related to flooding. The project at issue in this case required Keller to excavate an embankment and erect a concrete channel next to a one lane bridge across the Pedernales River. The project was designed and engineered by O'Malley Engineers.

The contract between Keller and the County required Keller to adhere to the engineering specifications produced by O'Malley and provided that Keller's obligation to perform and complete the work in accordance with the contract documents was "absolute." The contract further provided that any changes to the contract would be made by the County and O'Malley, not Keller. The contract also specified that representatives of both the County and O'Malley Engineers would periodically visit the site to assess Keller's progress and its adherence to the design, and there was evidence that the County's representative visited the site nearly every day.

The design specifications required Keller to excavate the embankment and pour a concrete pilot channel to drain water from the roadway away from the foundation of the bridge. Prior to the excavation there was a space of approximately 10 feet between the bridge and the embankment which was mostly covered by guardrail connected to the bridge. After Keller excavated a portion of the embankment to erect the pilot channel, the gap between the end of the guardrail and the embankment was widened by at least 10 feet. The contract specifications did not include extending the guardrail.

In June 2003, at the conclusion of Keller's work on the span, and after a representative of O'Malley certified that it was complete according to the specifications, the County accepted Keller's work. Approximately seven months later, Courtney Foreman and two of her friends were traveling towards the one lane span on Old San Antonio Road when tragedy struck. It was night and the road was slick from rain. Although Courtney was the vehicle's registered owner, she was in the front passenger seat while one of her friends drove. The driver lost control of the vehicle as it rounded a curve leading to the bridge and before the driver could regain control, it passed through the gap between the guardrail and the embankment. The vehicle rolled into the Pedernales River. The other occupants of the vehicle were able to escape but they were unable to extract Courtney from the vehicle before it sank into the river and Courtney drowned.

The Foreman's filed a wrongful death action against Gillespie County, O'Malley Engineers, Keller, and the driver of the vehicle. The Foreman's settled with the County, O'Malley and the driver. The Foreman's asserted a premises defect theory of liability against Keller based on the 15 foot gap between the guardrail and the embankment. Keller moved for summary judgment arguing that it owed no duty to Courtney Foreman and that its actions were not the proximate cause of her death. The trial Court granted summary judgment without

specifying which of Keller's motions it was granting. The Court of Appeal reversed the trial Court's summary judgment.

The sole issue presented to the Texas Supreme Court was whether Keller owed a duty of care to subsequent motorists in the area, including Courtney Foreman. The Court of Appeals held that the mere completion of the work according to plan, along with the acceptance of that work by the County, did not relieve Keller of its duty to protect the public from unreasonably dangerous conditions resulting from its work. The Texas Supreme Court held that Keller had no duty to rectify the condition or warn of the dangerous condition because Keller did not own the property and was not in a position to make decisions how about how to make the premises safe or direct permanent signs or other warning devices. Any decision that Keller would have made to rectify the dangerous conditions would have the effect of altering the terms of the contract. Keller was only in control of the property during the construction and it vacated the premises more than 4 months before the accident occurred. As a result, the Court held Keller owed no duty to rectify the site conditions or to warn of them.