

FALL 2017 NEWSLETTER

PREMISES LIABILITY UPDATE

by George L. Lankford

In *United Scaffolding, Inc. v. Levine*, 2017 WL 2839842 (Tex. June 30, 2017,) a 6 to 3 decision, the Supreme Court of Texas took away a \$2 million jury verdict from the Plaintiff during a second trial and held that the case was improperly submitted to the jury on general negligence claims instead of premises liability. Due to the improper submission and Plaintiff's failure to object, the Court rendered a take nothing judgment instead of a remand for another retrial.

Defendant United Scaffolding, Inc (USI) was a contractor for Valero at Valero's Port Arthur facilities. USI constructed the scaffolding for some routine maintenance work that required the installation of two blanks into an exchanger. Considered dangerous work, the scaffolding would be 15 feet above the ground. Plaintiff alleged he slipped on a piece of loose plywood on the scaffold that was not nailed down. He fell through a hole up to his arms, sustaining neck injuries.

The Court determined the case was improperly submitted to the jury because Plaintiff alleged claims of premises liability in his First Amended Petition, but the case was submitted on general negligence principles. This was error because "negligent-activity and premises liability claims 'involve closely related but distinct duty analyses.' In a negligent-activity case, a property owners or occupier must 'do what a person of ordinary prudence in the same or similar circumstances would have...done,' whereas a property owner or occupier in a premises liability case must 'use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about.

In this case, the Plaintiff never alleged any contemporaneous, ongoing, activity that caused him to slip and become injured. Such allegations would be for negligent activity. Instead, Plaintiff alleged "USI "created a dangerous condition by the way it failed to adequately determine a dangerous condition had been created, or to take corrective action, to secure the scaffold in a proper and safe condition. These allegations are for premises liability.

The Court then held that since the case was submitted without the elements of premises as instructions or definitions, the verdict could not support a recovery under premises liability. Additionally, while USA did not raise the issue at the charge conference or during submission, they did raise it in a motion for summary judgment and thereby preserved error.