

## **SPRING 2018 NEWSLETTER**

### **PREMISES LIABILITY UPDATE**

**by George L. Lankford**

*Martin v. ECO Services Operations, LLC*, No. 01-17-00293-CV (Tex. App.-Houston [1<sup>st</sup> Dist.] Feb. 22, 2018)

Employee of independent contractor was injured while unloading sulfuric acid from a truck at a connection point at a chemical plant. He using a heavy hose to unload the chemical, but the hose snagged on a metal plate or grate. When the hose released, the hose pushed against the employee's arm and caused a shoulder injury. The employee of the independent contractor sued the plant owner on the basis that the plant owner had a right of control over the plaintiff's work activity in using the hose. The trial court granted the plant owner's motion for summary judgment. On appeal, the court of appeals affirmed the summary judgment.

A premises owner owes a business invitee a duty "to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not." However, when the invitee is an employee of an independent contractor, the injury causing defect must be analyzed as either (1) existing on the premises when the employee entered the location, or (2) was created by the employee's work activity. If category (1), then only concealed hazards – dangerous in their own right and independent of anyone's actions – are deemed premises defects for which a premises owner may be liable. If category (2), then the defect poses no danger until the independent contractor's employee activates its dangerous by commencing work with it, and the premises owner is only liable if the exercise control over the contractor's work and fails to use reasonable care.

In the instant matter, plaintiff alleged the defects arose as a result of his work activity, i.e. category (2.) The steel plates and pipe on the ground allegedly caused the hose to snag. Such danger did not exist on the premises independently of plaintiff's work activity, i.e. category (2.) The undisputed evidence was that ECO did not exercise control over plaintiff's work: a.) ECO employees did not assist or supervise plaintiff's unloading process of maneuvering the hoses, b.) plaintiff's employer had access to the unloading spot at all times; and c.) on the two occasions an ECO employee spoke to plaintiff while he was unloading, the conversation did not involve instructing plaintiff how to do the task.

Plaintiff argues the "necessary use" exception ... ECO owned the hose and thereby ECO "controlled the only way for plaintiff to attach the hose and unload the cargo." However, his limited exception only applies when there are no other means of doing the task than bu using the dangerously defective condition. In this matter, the dangerous condition was the metal plates and grate on the ground. They're use was "not necessary" to plaintiff's work, thus the snagging of the hose was "not unavoidable."