

FALL 2018 NEWSLETTER

PREMISES LIABILITY/NEGLIGENCE

By George L. Lankford

Nichols v. McKinney, 2018 WL 1321533 (Tex.App.-Waco) March 14, 2018.)

Melody Nichols died from bee stings when she parked her riding lawnmower on her property between her residence and her neighbor McKinney's garage. The heirs sued McKinney for negligence and various other causes of action. The Court granted summary judgment to McKinney.

In Texas, a landowner cannot be held liable for the acts of indigenous wild animals occurring on his property unless the landowner has possession or control or introduced the animal into the area. Courts have followed this logic to negate the existence of a duty in premises liability where the acts of the wild animal occurred on the defendant's property. However, premises liability is a special form of negligence where the duty that is owed depends on the plaintiff's status to the property. The duties in negligence and premises liability are related, but different.

There is no common law duty owed by a landowner to protect a plaintiff from the acts of wild indigenous animals which originate on the defendant's property, but cause injury elsewhere. Before liability can be imposed, there must be sufficient evidence that the defendant knew or should have known the harm that might befall the Plaintiff. However, foreseeability, alone, is not sufficient. It is too high a burden to require landowners to constantly survey their land for wild animals in order to protect someone "in another location" in case the wild animals roamed from the property. In this case, McKinney did not negligently release the bees. Summary judgment was properly granted against all theories that relied on a common law duty, like negligence or premises liability.

The heirs' claims for negligence *per se* also failed. It was based on the claim that allowing a condition to exist on defendant's property constituted a breeding ground for the bees in violation of a city ordinance. The defendant agreed the bees were getting behind the garage exterior wall panel to build a hive. The Court ruled that such facts do not constitute a "condition" or describe what "constituted a breeding place." Summary judgment was properly granted against negligence *per se*.

Ana Aranda v. Hovnanian Homes-DFW, 2018 WL 3017307 (Tex.App.-Dallas, June 18, 2018.)

Victor Arana died after falling from a rafter at a construction site. He worked for a second tier framing subcontractor. He was not wearing a helmet or safety harness. The heirs sued. The court granted Hovnanian's motion for summary judgment.

The threshold question is whether the defendant owed a legal duty to the plaintiff. The court recognized a premises owners or general contractor does not owe any duty to ensure that an independent contractor performs its work in a safe manner. A limited duty arises if a general contractor or premises owners retains control over a subcontractor's methods of work or operative details to the point that "the subcontractor is not entirely free to do the work in his own way." The general contractor's or premises owner's "duty of reasonable care is commensurate with the control it retains' over the subcontractor.

However, "general supervisory control" that does not relate to the specific activity causing injury does not create a duty. The specific act in this matter was Victor Arana standing on open ceiling rafters without safety equipment to fix some damaged insulation. Those facts do not raise a fact issue on a duty to control. Additionally, there was evidence that Antonio Arana exercised control over his workers, not the defendant. Antonio Arana directed the framing crew where to work and when to begin work, and Victor Arana told the crew when to stop work. Consequently, there was insufficient control to create a duty of care.

The plaintiffs argue that defendant created a dangerous condition that should make it liable under premises liability law. The court disagreed, and found there was no evidence that the defendant created the condition of "walking on the open ceiling rafters on the premises without fall protection.