ORAL ARGUMENT - 12/13/95
95-0897
JOHNSON COUNTY SHERIFF'S POSSE, INC. V. ENDSLEY

STOLLEY: May it please the court. This is a premises liability case which I think presents two main questions for the court. The first question is whether Texas should adopt a new exception to the general rule that a lessor is not liable for harm occurring after commencement of the lease? Secondly, if the court should adopt this new exception is the Sheriff's Posse nevertheless entitled to a summary judgment?

CORNYN: If we adopt §359 of the Restatement of Torts, do you lose?

STOLLEY: No, your honor.

CORNYN: For the second reason?

STOLLEY: For the second reason. But back to the first question about whether the court should adopt. For decades the general rule in Texas has been that the lessor is not liable for harm occurring after commencement of the lease. This arises from Restatement §356 and was cited with approval by the court in 1992 in the Brownsville Navigation District case. Texas case law has for many decades recognized certain exceptions to this general rule. One case that lays these exceptions out fairly readably is the Wallace v. Horn case out of Corpus Christi in 1974. Those exceptions are: when the lessor has a contract to repair the premises; when the lessor fraudulently conceals or fails to disclose hidden defects of which the landlord knows; thirdly, when the landlord maintains control over the premises; and fourth, when there is a nuisance on the premises. Most of these exceptions are set forth in Restatement §§357 - 362. In this case the Waco court adopted the exception in §359, which the Corpus Christi court refused to adopt in Wallace v. Horn.

Section 359 applies when the premises are leased for purposes of admission of the public and has 3 elements: first, the landlord must know or could discover that there is a condition that involves an unreasonable risk of harm; second, the landlord has reason to expect that the tenant will admit the public before that harm is corrected; and thirdly, the landlord fails to exercise reasonable care to discover or remedy the harm.

CORNYN: Especially in the context of a short-term lease, let's say a party room, or whatever picnic grounds, what's wrong with Restatement 359? Why doesn't that just make sense where the lessee perhaps who's in short-term possession is not in the best position to learn about unreasonable risks or harm present on the premises?

STOLLEY: I think there are 2 reasons. First of all is that I think the other exceptions cover the ground. The lessor contracts to repair the premises might be one exception. That would generally apply in the longer-term lease. Secondly, where the landlord conceals some defect. That could clearly apply in a short-term lease. Thirdly, where the landlord retains some control over the premises. And that can occur over part of the premises. The landlord doesn't necessarily have to relinquish control over the entire premises. It could be only over a portion. So over the portion that the landlord retains control, the landlord would still have the duty even in the short-term lease context.

The second reason I think is that §359 is inconsistent with Texas laws emphasis on the right to control being the qualification for determining who has a duty. The cases almost uniformly talk about that the possessor with control of the premises is the one that owes the duty. Section 328e of

the Restatement defines the possessor of the premises in terms of the person who occupies or possesses the premises with intent to control them. So we always come back to the idea of control. And when the landlord relinquishes control the landlord has no further duty.

This court in recent cases has also emphasized the idea of control in Centex Realty v. Siegler, Butcher(?) v. Scott, both of which were decided last term, and Exxon v. Tidwell. And the control of the premises is basically the issue that the court came down to in those cases. So for these two reasons I think it would be unwise and unnecessary for the court to adopt §359. Number 1, the other exceptions control the ground; and number 2, the emphasis on control would be inconsistent with adopting 359.

To focus a little bit more on your question Justice Cornyn, I still think in a short-term lease that the superior right and duty to correct the problems still can lie with the lessee because the lessee is the one who has accepted the premises, has entered the premises, and has invited the public onto the premises. And I think the court needs to consider whether it's wise to let the lessee in that situation off of the duty, because the lessee...

PHILLIPS: It's an either, or duty situation?

STOLLEY: No it wouldn't have to be your honor.

PHILLIPS: Then how come the lessee was not sued here?

STOLLEY: In this case the lessees were two individuals who had an oral lease with the Sheriff's Posse. I can only speculate as to why there were not sued.

BAKER: Judgment proof?

STOLLEY: That would be a good guess. I don't know. The second question that I think this court can answer in this case is if §359 does apply, if you decide to adopt it, the Posse is still entitled to summary judgment. Section 359 as I said has 3 elements. To be granted summary judgment a defendant has to defeat only 1 element of a plaintiff's claim. In this case element A is that the lessor knows or could discover that there's an unreasonable risk of harm. The alleged risk of harm in this case is a rock in the dirt floor of the arena. That is not an unreasonable risk of harm. In the Brownsville Navigation District case this court addressed the situation where the trailer was sitting on dirt and because of wet weather, the ground shifted and the trailer fell over. The court said that plain dirt which becomes soft and muddy when wet is not dangerous.

PHILLIPS: And part of your summary judgment is based on that theory?

STOLLEY: Yes your honor, that there is no unreasonable risk of harm in this case. Because a rock in dirt is something you are going to have. And I think there's some evidence from one of the lessees, or maybe it's from the manager of the facility, but you are going to find rock in any dirt in any arena you go to because rock is in dirt.

Element B of §359 is that the lessor has reason to expect that the lessee will admit the public before the land is put in the safe condition. The evidence in this case is that the lessor and the lessee agreed that it was the lessee's obligation and duty to fix the arena premises, that is the floor of the arena specifically the way they wanted it. This is a multi-purpose arena used for many types of events and each organization for each different event likes to have the floor done a different way. It needs to be a different way for a rodeo verses barrel riding verses a dog show verses a livestock show or whatever the

event might be. So the lessee is responsible for preparing the surface. The Sheriff's Posse even provides a tractor and tools for the purpose of the lessee to prepare the surface the way they want it to be prepared.

So here the expectation was that the lessees would fix any conditions, any unsafe conditions before the public was admitted to the arena.

ENOCH: Can the contractual arrangement between a lessor and a lessee affect liability of the lessor to someone who gets injured on the property? I mean the control factor can that control factor be reallocated among the contracting parties such as affects an injured person's claim?

STOLLEY: I think it can your honor because in many cases that has occurred: Exxon v. Tidwell was a security case and who had right to control the security - the landlord or the tenant? Centex Realty v. Siegler was the same thing.

CORNYN: Does it make any difference those weren't premises liability cases? I mean those were criminal activities on protecting someone from criminal activities.

STOLLEY: But again the issue was who had the right to control the premises. In this case it's who has the right to control the physical condition of the premise. In your situation your honor it's who has the right to control the activity of third parties on the premises? But nevertheless we still come down to right to control.

The CA in this case held that disregarding subsection (a) and (b) of §359, there is a fact issue on subsection (c). Because there is a fact issue on subsection (c) the summary judgment was improper. But as I said earlier a defendant is entitled to summary judgment when that defendant defeats just one element of the plaintiff's claim. The Posse has defeated elements A and B and it doesn't matter that they have not defeated element C.

BAKER: Is it and A and B and C, or A or B or C?

STOLLEY: It's conjunctive. It's A and B and C. So by defeating one of those elements, the Posse defeats the claim under §359. The CA's logic would be you can do a negligence case where there's a fact issue on damages but no fact issue on duty or breach of duty. And the court said: Just because there's a fact issue on damages we are going to let it be tried. But there's no fact issue on the other elements. So that's a proper summary judgment case, and so is this one, and that's a big hole in the CA's opinion as I see it.

In conclusion we ask that the court not adopt §359, but if you do we ask that the court recognize that summary judgment is proper for the Sheriff's Posse.

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RESPONDENT

HOLLEN: Generally speaking with respect to the argument regarding the summary judgment evidence itself is whether or not there was sufficient evidence to create a fact question. The court of civil appeals believed so. The argument right now I believe if I understand it correctly is we, the petitioner, demonstrated to the TC that control of the dirt was absolutely within the lessee's, therefore we win.

I pointed out to the TC and to the CCA, and they apparently read it real well. The testimony of Tom Frank Jones as found in the deposition of Mr. Jones at pages 223-226 in my brief, I specifically asked Mr. Jones the question: "Can the lessee's of the building bring their own dirt?" His

response was: "No, of course not. We supply the dirt. We also supply them a tractor and a harrow to prepare the dirt with, and a water truck that they sometimes use." Now in questioning Teressa McClendon in her deposition, which is set out here, she stated: "Arenas are prepared differently for different events that we use. Barrel racers would prefer the arena dirt be plowed deeper than team ropers, or calf ropers."

CORNYN: If the presence of rock in the dirt in the arena doesn't present an unreasonable risk of harm do you lose?

HOLLEN: I probably might. I presented the affidavit of who I would consider the foremost expert in this area, Mr. Clem McSpadden to the TC. Mr. McSpadden's affidavit sets out that the presence...he concludes: "The presence of rocks of any size in any rodeo arena is unreasonable. It presents an unreasonable risk of harm to not only the contestants, their animals, but to the spectators."

BAKER: Is it clear that it was a rock and not clod?

HOLLEN: If it's not clear that was my client's assertion. There's been no summary judgment proof one way or the other. That would be a fact question.

BAKER: But the actual whatever it was that caused the injury is not in evidence itself?

HOLLEN: It's not in evidence at this time. My client contends it was a rock. In his deposition he gave some lengthy explanation of why he thought it was a rock. Nobody else thought it was anything else.

Mr. McSpadden his qualifications are set out in his affidavit which was attached to the summary judgment. Mr. McSpadden went to school right here at UT. But he is from Oklahoma. He has been a rodeo announcer, he was the originator of the national finals rodeo along with Lex Conley. He managed the national finals rodeo for years. He managed the all Indian national finals. He still manages the Lazy E arena for the Gaylord family in Oklahoma City. He was a state senator; a US Congressman; an unsuccessful candidate for Governor of Oklahoma; and a graduate of UT law school.

GONZALEZ: What particular job or endeavor that he has in his impressive resume qualifies him as the renowned expert you claim him to be that a rock would be an unreasonable harm, risk or harm?

HOLLEN: He has managed the arenas for the national finals and has as he stated over the years determined that the presence of rocks in the arena could be propelled out of the arena to a spectator, could injure the animals especially horses by forcing it up into their foot...

HECHT: We are speculating here that it was a rock?

HOLLEN: And my client testified in his deposition it was a rock.

ENOCH: Assuming that it's a rock how far can a horse throw a rock?

HOLLEN: In a barrel race I suppose he could hit the back wall with one.

ENOCH: Would it depend on the size of the rock? A smaller rock would go farther, a larger rock would go not as far?

HOLLEN: Well I think a small rock may not go very far. From physics there is a size of rock that would go farther than others. A little bitty one's not going to go very far. A great big one he's not going

to have the force to move it.

ENOCH: To evaluate an unreasonable risk of harm wouldn't you have to have somebody who would demonstrate that a certain size of rock with a certain horse hitting...somebody should know that a horse of a certain size running a certain speed would pick up a certain size rock and throw it out of the arena? I mean if we are going to talk about an unreasonable risk of harm if that's the evaluation, simply saying it poses a risk because the animal could throw it, does that get you there?

HOLLEN: I would think under summary judgment proof. I prepared the affidavit from a man who is admittedly at least some sort of an expert who says: "the presence of rock of any size in a rodeo arena presents an unreasonable risk of harm to the animals, the spectators, and the participants."

SPECTOR: Was your client a spectator?

HOLLEN: Yes, ma'am.

SPECTOR: And sitting in the stands?

HOLLEN: Sitting in the grandstand. And what happened: a barrel racer came out, made the first turn around the barrel; as she was turning the horse in heading for the next barrel he was talking to someone at the time, he looked back up and he said his eye turned black, he heard a thud behind him like the sound of rocks hitting the back wall. He couldn't see out of that eye.

GONZALEZ: Is this case analogous to fans who are injured at sporting events like professional baseball that are hit by a foul ball?

HOLLEN: I would say not because in baseball the spectator who comes to the arena knows that a ball can be hit out of there.

GONZALEZ: You're saying that somebody who goes to a rodeo is not...

HOLLEN: I would assume. I spent many years rodeoing professionally - 12 to 13 years. I did it for a living while I was in law school. I had no other job. One year in law school I went to 87 rodeos across the US from right here from this law school.

GONZALEZ: You were not aware that you could be hit b a clod or some dirt?

HOLLEN: A dirt clod. Sure. And I guarantee you I never worried about it. But I never thought that there would be rocks in an indoor rodeo arena or for that matter an outdoor rodeo arena. But I never saw rocks in Ft. Worth, anywhere. I mean I've been to ever indoor arena that existed 20 years ago.

HECHT: The CA focused on control. And it only mentions unreasonable risk in the next to the last paragraph. Although it is a point of error in the application and you do address it briefly in your response your view is that whether there was an unreasonable risk here is an issue...

HOLLEN: It's a fact issue.

HECHT: ...that would have to be resolved?

HOLLEN: It would have to be resolved. And I think that would be fair.

HIGHTOWER: Is the only evidence that it was a rock is your client's testimony that he was hit by a rock?

HOLLEN: That is correct.

HIGHTOWER: But he didn't see it coming and all of a sudden he is hit and then he couldn't see. How did he know it was a rock?

HOLLEN: His testimony was that he was hit by an object in the eye. He said I have been hit by a clod before and it didn't feel like a clod. There was no dirt in my eye. I also heard something hit the tin wall 10-12 feet behind me which sounded like either the rock that hit me or another rock. He said I know the difference between a clod and a rock hitting a wall. That was his testimony. And there was no controverted testimony at all.

With respect to the adoption of §359 by the CCA, or at least their reference to it and their statement it should be adopted, in my brief and in my original pleadings to the court, I have requested that the court hold that a party may not make available property to the public for a specific purpose knowing that the property is unsafe for that purpose, and escape liability by merely stating that the lessee knew it was unsafe.

BAKER: Is there any knowledge that the rodeo people, the Posse, knew there was a rock in this dirt?

HOLLEN: Yes. In the testimony of Tom Frank Jones set out, which I've made reference to in my brief, Tom Frank Jones said: Yes, I'm sure there were rocks in the arena.

OWEN: As a matter of curiosity how do you insure that there aren't any rocks in the dirt?

HOLLEN: You shift the sand.

OWEN: Through what?

HOLLEN: Through a large, a thing about the size of this table, that would go over the back of a dump truck, that has wire mesh in it. I mean it is actually done that way.

GONZALEZ: How deep do you go: one foot, 6 inches? It's a lot of dirt we are talking about.

HOLLEN: Most arenas have a cement floor indoors. The exterior arenas, the outdoor arenas _____.

GONZALEZ: How about this one?

HOLLEN: This was an indoor arena. I do not know though and there was no testimony of whether it had a cement floor or not. You would put 12-14 inches. You sift it and you can buy sifted sand. That's fairly common. The rocks are a real problem.

ENOCH: A rock in the sand poses an unreasonable risk to animals that are running across that sand. But in terms of the likelihood of the animal picking up the rock and heaving the rock a distance necessary to catch a spectator someplace else is not the same type of risk that an animal faces when it runs across rocky ground is it?

HOLLEN: Probably the greater propensity would be for the animal to harm itself on that same rock. If you have a barrel race and there are any rocks in the sand around that barrel it will be every time that horse turns that corner and starts out and kicks back with his hind feet if there happens to be a rock in that pile of dirt into the walls, the rock will be picked up every time. Every rock that is there that comes underneath a horses foot that's turning it is going to be picked up and propelled some distance.

GONZALEZ: I don't have plaintiff's pleadings before me. If I was to look at those pleadings what would your allegations be with regards to what caused the damage? Would it say that there was a rock or small clump of dirt? Is that what your pleading would show?

HOLLEN: I think I said rock only. But I could have said rock or clod. I don't recall right now.

GONZALEZ: If it said small clump of dirt would it make a difference to your argument?

HOLLEN: If I thought it was a small clump of dirt I would never have filed a lawsuit. At page 5 of my brief I set out briefly what my pleadings stated, that appellant furnished the rodeo arena with a dirt floor containing rocks, that this condition was known to the appellee that the presence of rocks is unsafe and presents an unreasonable risk that appellee warranted that the arena was suitable for its intended purpose, that in fact it was not, that appellee controlled the composition of the arena dirt, that appellant was injured as a result of a rock being thrown, that the arena was leased for commercial _____, and that appellee could have removed rocks as it had in the past, which was the testimony of their president that at one time they sifted that sand, those rocks when it was brought in.

HECHT: At one point you were going to tell us why 359 is a good rule?

HOLLEN: What I had indicated as I said the holding should be and I think the Bruton case out of Washington is where I really came up with this, and I think that's cited in some case here or something I read this morning. In that case you had the leasing of a Elk's hall for a wedding reception. And at that reception, which was going to be for 2 hours, a lady was injured by falling down some stairs that were known to be dangerous by the landlord. The landlord in that case said: Hey, I leased it to these people they should be liable. They are the ones in control of it. They should have repaired it. The Washington court said: That's ridiculous, completely unreasonable to expect people in that condition to do this.

PHILLIPS: But that's not really the facts here where different types of groups with different needs rent this same arena. It was for more than 2 hours.

HOLLEN: These people rented the arena for 1-2 hours. That was the testimony, that for a very short period, for one event, one night. That was it. They didn't have a long term lease on the building. They would lease it about 3-4 times a year they said for one night. And the Sheriff's Posse provided that same arena to other parties. But they would lease it out to these people for a very short period of time. And I think it's extremely analogous.

CORNYN: Did I hear you say it's not necessary for us to adopt Restatement Second of Torts §359 outright because you're arguing for a narrower rule?

HOLLEN: I would think a narrower or maybe I'm arguing for a more expanded version of it.

CORNYN: I thought you said that Tom Frank Jones said that they knew there were rocks?

HOLLEN: That's correct.

CORNYN: And so you're saying that the Posse leased it to the rodeo knowing there were rocks there?

HOLLEN: That is correct.

CORNYN: And that's your theory of liability?

HOLLEN: They knew there were rocks there. And they wished to escape liability by saying: So did the lessee and the lessees could have removed the rocks with that harrow and tractor we provided. As the court knows I'm sure what a harrow is. It's not going to remove any rocks.

GONZALEZ: Could they have brought other equipment to make the field suitable for their needs?

HOLLEN: Realistically, no.

GONZALEZ: Practically. Could they go out and lease whatever equipment they need?

HOLLEN: They could have gone out and sifted that dirt probably at a cost of about $1,000-1,500.

GONZALEZ: There was nothing preventing them from doing that?

HOLLEN: Time. It would take 2-3 days. They leased it for a one night affair a day before they did it, maybe 2 days before they did it. Sure you know all of that could be said. This court has said in the past I believe in the Davidow case it's unreasonable in this time to believe that the lessee is going to, when you have really short-term leases to make all the repairs. Those repairs should be imposed on the landlord. But especially...

GONZALEZ: So we ought to have a rule that whoever has these types of arenas should not lease, cannot lease, cannot enter into contracts of this nature unless they take it upon themselves to insure that there would be no rocks or any unreasonable risks of any kind?

HOLLEN: Or at the Elks lodge ensure that there's no problem with their place or the Sheraton hotel when the Bar Association leases for its annual function and somebody trips on the carpet. The people who are the public coming in there are the ones who are being told: Look you don't have any redress here. Number 1, the Bar Association is a state agency and they were in control and they leased it. You don't have any redress because the UIL leased the place and they are a state agency. And so what. You're the guy who had no idea that you were going to get hurt when you went in there. You Mr. Public are being told that's tough.

If the lessee has a liability - fine. But the landlord should also have a liability because it's not practical for these lessees to correct that property in that short time frame.

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REBUTTAL

PHILLIPS: I thought you said in answer to one of my questions that your summary judgment evidence establish that there were no unreasonable risks of harm here. So even if the court were to adopt 359 you would prevail?

STOLLEY: Well I think that's true your honor.

PHILLIPS: That's contrary to what your brief says though. Doesn't it make a concession that there's a...at least it says on page 12: For summary judgment purposes you concede there was a dangerous condition and that's brought under a discussion about 359.

STOLLEY: I'm sorry your honor I had forgotten about that. That's one of the arguments that Ms. Vrielink made in a point that this court did not grant the writ of error on. Contrary to what she wrote in the brief I think just the pleadings themselves show that there was not an unreasonable risk of harm.

PHILLIPS: Their pleadings prompted this affidavit that Mr. McSpadden filed?

STOLLEY: Yes your honor I believe they do. They are touting Mr. McSpadden as an expert. Former President Reagan claims to be a horseman. I don't care if it was him who was out here testifying as an expert witness, there is nobody who can add to the jury's knowledge in this case. An expert can testify only when he can add specialized knowledge that's beyond the jury's providence. I think it's entirely within the jury's providence to determine whether rocks in the dirt floor of an arena is an unreasonable risk of harm.

PHILLIPS: If that's within the jury's providence how do you establish it as a matter of law?

STOLLEY: Because this court has done so in the Brownsville case. It said: that the dirt was not as a matter of law was not an unreasonable risk of harm.

SPECTOR: I don't see the connection.

STOLLEY: The dirt in that case, the allegation was that you didn't warn us that this dirt when it gets wet can cause the trailer to tip over. And there was as far as I can tell from reading the case, there was no expert testimony about such things as: what are the affects of different types of cargo or weight of cargo? what is the load bearing capacity of the soil? what is the capacity at different levels of moisture? There was no evidence like that that I can tell from reading the case. And this court decided as a matter of law that was not an unreasonable risk of harm.

OWEN: Do you have a point of error in this court saying that as a matter of law that was not an unreasonable risk of harm?

STOLLEY: I can't remember that we do your honor. Probably not.

PHILLIPS: So to win in this court if you don't have a point of error on it or alternatively if we don't adopt the view that we can disregard the affidavit as a matter of law, wouldn't you have to win by showing that we should not adopt 359?

STOLLEY: No we could still win on subpart (b) your honor, that under 359 that the expectation was that the lessee would prepare the arena floor and make it safe before the public was admitted to the arena.

PHILLIPS: Does the summary judgment evidence show long this oral lease was for?

STOLLEY: The oral lease was for 1 day, but it was made 2 days before. And the evidence is that the lessee had that 2 days to observe the condition of the arena.

CORNYN: It was a couple of hundred bucks?

STOLLEY: Two hundred dollars.

CORNYN: Do you know how much it would cost to eliminate all the rocks from the floor of the arena? I think counsel indicated it may be substantially more than that?

STOLLEY: I have absolutely no idea your honor. It's not in the record. Another point I would like to make is early in his argument Mr. Hollen mentioned what he believes the record states that the lessee cannot bring dirt into the arena. Whether the lessee can bring dirt into the arena is not the issue. The issue is could the lessee remove the rocks? And the answer to that question is yes. The testimony of the manager of the arena Mr. Jones was: Who maintains the arena in terms of preparing the dirt in the indoor arena? Ever who we lease the arena to. They prepare it like they want it.