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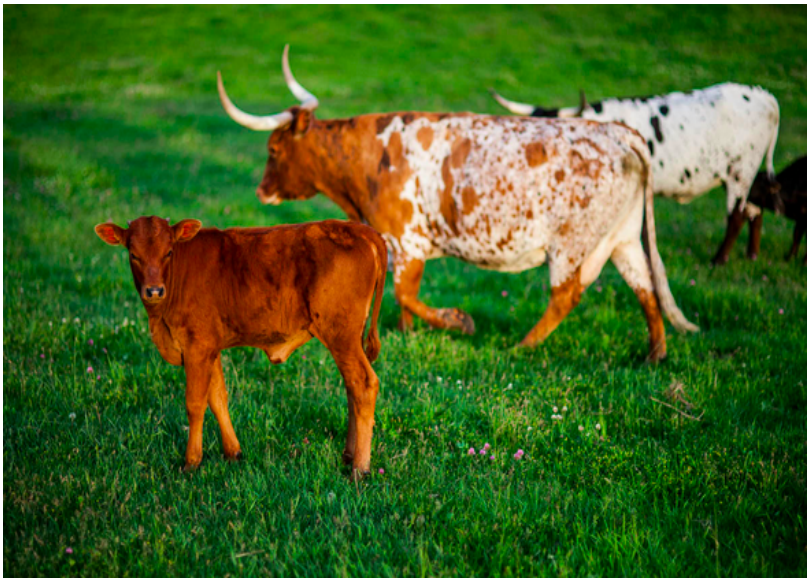
Keeping Liability Outside the Fence

Landowners in Texas today face a myriad of threats concerning liability to third parties on their property. The sheer expanse of the Rio Grande Border makes Texas landowners susceptible to illegal immigration and narcotics activities on their property. With over eighty percent of Texas privately-owned, landowners are well-advised to know the law and understand their obligations to those on their property. This guide provides a basic overview of Texas law on landowner liability.

Landowner Liability Concerns

Statutory Protections

The primary questions underlying landowner liability are: 1) does the landowner owe a duty to the person on their property; and 2) if so, what is that duty? In Texas there are three primary categories of persons to whom a landowner may owe a duty: trespasser, licensee, and invitee. A trespasser enters property without permission. In the case of a trespasser, a landowner only owes a duty to avoid injuring a trespasser willfully, wantonly, or through gross negligence. Another category of person in landowner liability is a licensee. Licensees enter property for their own benefit. The property may not be open to the general public but a licensee is allowed to enter the property. In this case, a landowner owes a duty to a licensee to avoid intentionally injuring the licensee. Further a landowner must make a licensee aware of or make safe dangerous conditions known to the landowner that would not be known to the licensee. A third category of person in landowner liability is an invitee. An invitee enters property for the mutual benefit with the landowner. An invitee is "invited" onto the land by the owner either as a member of the general public or for some business dealing with the landowner. Landowners owe invitees a duty to avoid intentionally injuring invitees. Further landowners must make invitees aware of or make safe dangerous conditions both known to the landowner or that the landowner *could have known* with a reasonable inspection.



Today in Texas, landowners can look to statutory protections that address the liability of owners, lessees and occupants in certain situations. Many of these statutes specifically apply to agricultural land and address all types of visitors on property from invitees and licensees to trespassers.

Law Enforcement, Peace Officers and Firefighters

Increasingly, Texas landowners are facing risks that may involve law enforcement on private property. Texas law now provides unique liability protection to landowners due to the presence of law enforcement or firefighters on the property. Chapter 75 of the Texas Civil Practice and Remedies Code addresses situations when liability may be caused by certain actions of law enforcement or firefighters on property. Specifically, the statute addresses three situations: 1) damages arising from escaped livestock as a result of law enforcement or firefighter presence on the land; 2) damages arising from law enforcement or peace officers entering the property; and 3) damages arising from other individuals entering the property as a result of law enforcement activity.

Under section 75.006, a landowner is not liable for damages arising from injury caused by livestock of the landowner due to an act or omission by a firefighter or peace officer who entered the property with or without permission. This limitation of liability applies whether the damage occurs on the landowner's property or not. The statute goes further to limit liability for the owner, lessee, or occupant of agricultural land, providing that such persons are not liable for damage to any person or property that arises from the actions of a peace officer or federal law enforcement officer when the officer enters or causes another to enter the agricultural land with or without permission. This limitation of liability for agricultural land also extends to actions of an individual, who because of the actions of a peace officer or federal law enforcement officer, enters or causes someone else to enter agricultural land without the permission of the owner, lessee, or occupant. In these cases, the landowners, lessees, or occupants are only liable for damage that arises by the gross negligence or wilful or wanton conduct of the owner, lessee, or occupant.

Recreational Use

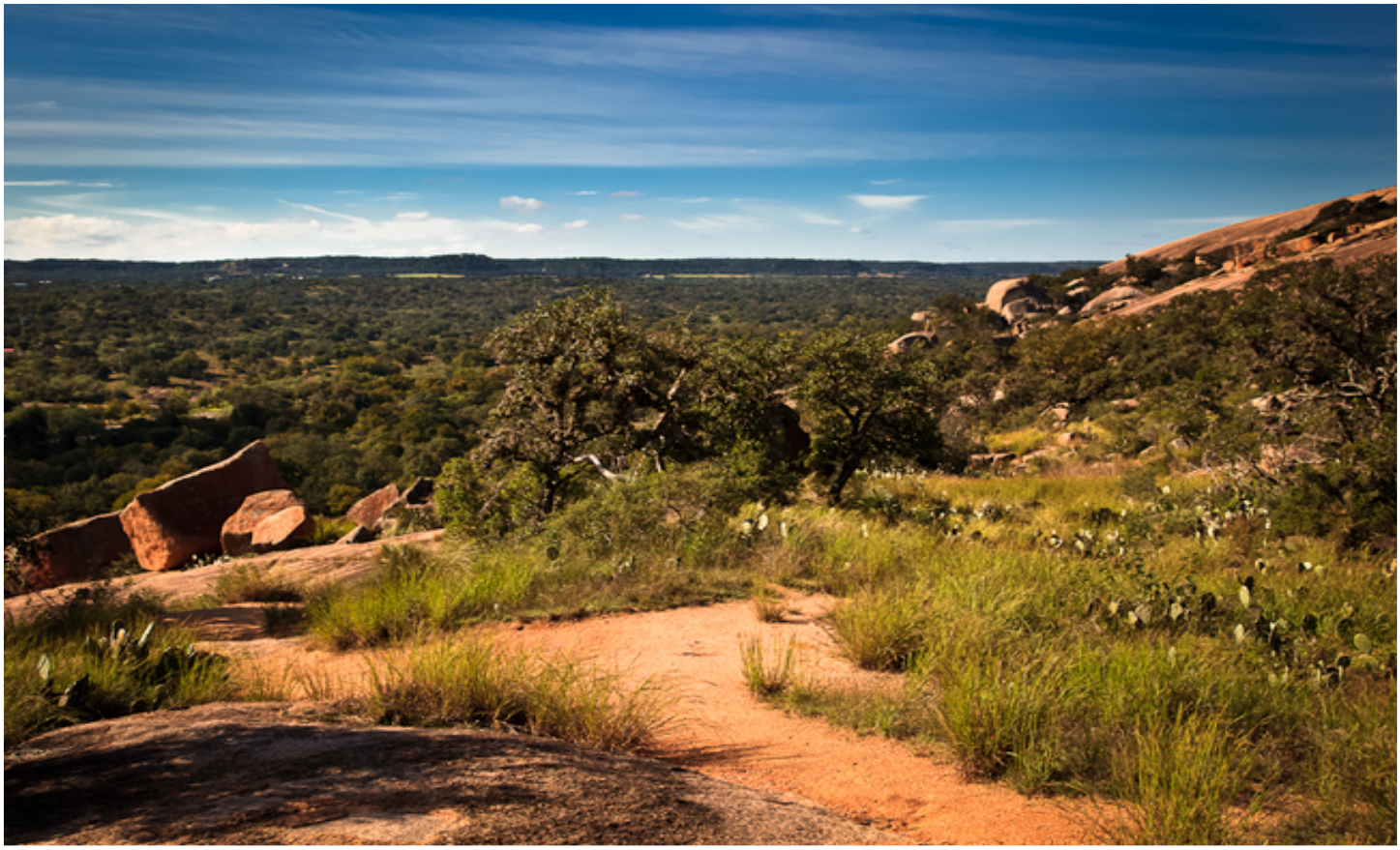
Another specific limitation of liability concerns owners of agricultural land that is used by individuals for certain recreational purposes. Chapter 75 of the Texas Civil Practice and Remedies Code also houses the Recreational Use Statute. This law provides a lower level of responsibility for landowners who let people use their land for recreational purposes. In these cases, a landowner is liable only for intentional acts or gross negligence if three major requirements are met: 1) the land at issue is agricultural land as defined by the statute; 2) the user enters the land for recreational purposes as defined by the statute; and 3) one of three monetary requirements are met (landowner did not charge fee, fee charged did not exceed 20 times the amount of landowner's ad valorem taxes paid during last calendar year, or landowner maintains adequate insurance (at least $500,000 for each person, $1 million for each occurrence, and $100,000 for each occurrence of property damage). If these requirements are met, landowner liability is significantly limited both in terms of trespassers and invitees.

What is "agricultural land" under the statute? The statute defines "agricultural land" as Texas land that meets at least one of three criteria: 1) land used in production of plants and fruits grown for consumption (human or animal) or plants grown for production of fibers, floriculture, viticulture, horticulture, or planting seed; 2) land used for forestry or growing trees for lumber, fiber, or for industrial, commercial, or personal consumption; or 3) land used for domestic or native farm or ranch animals kept for use or for profit. The statute broadly defines "recreation" to include hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving (including off-road driving, motorcycling, or use of all-terrain vehicles), nature study, cave exploration, waterskiing and water sports, bicycling and mountain biking, disc golf, on-leash and off-leash walking of dogs, radio control flying, and any other activity associated with enjoying the outdoors. "Recreation" includes bird-watching and swinging on a swingset, among other activities. Courts, however, have declined to find some activities "recreation" despite their connection with the outdoors. For example, an outdoor wedding is not considered to be "recreation" for purposes of the statute.

In addition to limiting the liability of certain landowners, the statute explains that a landowner who invites or gives permission for others to use agricultural land for recreation does not assure that the premises are safe for that purpose and does not owe a greater duty than that owed to a trespasser under the Act. Landowners do not owe a duty of care to trespassers under the statute and are not liable to injury to trespassers except for wilful or wanton acts or gross negligence by the owner, lessee or occupant of the land. Therefore, a landowner invoking the Recreational Use statute generally limits his liability to acts of gross negligence or wilful or wanton conduct. Further, for landowners who maintain liability insurance in the denominations noted herein, the statute limits the amount of damages that can be assessed against such landowner for acts or omissions of the landowner that damages a person on the premises to the maximum amount of $500,000 for each person and $1 million for each single occurrence of bodily injury or death and $100,000 for each single occurrence of injury to or destruction of property.

Finally, landowners should be cautious concerning children on their property. The Recreational Use statute allows for greater liability where children are concerned. Specifically, an owner, lessee, or occupant of land may be liable for injury to a child caused by a highly dangerous artificial condition when the place where the condition exists is a place where the owner, lessee, or occupant knew or reasonably should have known children were likely to trespass. Further liability may attach if: 1) the artificial condition is one that the

owner, lessee, or occupant knew or should have known existed and knew or should have realized involved a reasonable risk of death or serious injury to children; 2) the injured child, because of the child's youth did not discover the dangerous condition or understand the risk involved; 3) the use of the condition and the burden of eliminating the danger were slight in comparison with the risk to the children involved; and 4) the owner, lessee, or occupant failed to exercise reasonable care to either eliminate the danger or protect the child.



Agritourism

As a further limitation of liability for owners of agricultural land, Chapter 75A of the Texas Civil Practice and Remedies Code is home to the Texas Agritourism Act, which limits liability when certain warnings and signs are present or when a signed agreement is in place releasing the landowner. Agritourism activity is defined under the statute as "an activity on agricultural land for recreational or educational purposes of participants, without regard to compensation." Under the statute, an "agritourism entity" is not liable to an "agritourism participant" for injury or damages if: 1) required signage is posted; or 2) there is a signed, written agreement containing required language. The required language for a posted sign is: "WARNING: UNDER TEXAS LAW (CHAPTER 75A, CIVIL PRACTICE AND REMEDIES CODE), AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY TO OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AN AGRITOURISM ACTIVITY." The required release language for the signed written agreement is: "AGREEMENT AND WARNING: I UNDERSTAND AND ACKNOWLEDGE THAT AN AGRITOURISM ENTITY IS NOT LIABLE FOR ANY INJURY OR DEATH OF AN AGRITOURISM PARTICIPANT RESULTING FROM AGRITOURISM ACTIVITIES. I UNDERSTAND THAT I HAVE ACCEPTED ALL RISK OF INJURY, DEATH, PROPERTY DAMAGE, AND OTHER LOSS THAT MAY RESULT FROM AGRITOURISM ACTIVITIES." The agreement must be in at least 10-point bold type and signed *before* the activity, by the participant or guardian of the participant, and must be separate from any other agreement.

Some exceptions to the Agritourism limitation of liability exist and include the following: 1) employees of an agritourism entity are not covered; 2) injury caused by an entity's negligence evidencing a disregard for the safety of an agritourism participant is not covered; 3) injury caused by a dangerous condition that was either known or should have been known to a landowner is not covered; 4) injury caused by the dangerous propensity of an animal used in the activity that was not disclosed to the participant if the entity knew or should have known of the propensity is not covered; 5) injury caused by an entity's failure to adequately train an employee is not covered, and 6) intentional injuries are not covered. In these cases, an agritourism entity can be held liable notwithstanding the statute.

Fence Law in Texas

In general, there are two approaches to fence law: open range or closed range. In the open range approach, a landowner has no duty to fence animals or prevent them from running loose on a roadway. In the closed range approach, a landowner has the obligation not to permit animals to run at large. Texas is an open range state. Notwithstanding this fact, there are a few significant exceptions. First, on U.S. or State Highways, the policy is closed range. A landowner cannot knowingly permit animals to run at large in these areas. Additionally, local stock laws can make portions or all of some counties closed range. Landowners are well-advised to check the law of their county to determine whether it is closed or open range.

Landowner Liability After *Boerjan v. Rodriguez*

In the recent case of *Boerjan v. Rodriguez*, the issue of landowner liability to trespassers in Texas came before the Texas Supreme Court. The statutory protections previously discussed were not applicable in the *Boerjan* case because the case predated the effective date of the statutes, but it gave the Court an opportunity to consider the important issue of landowner liability in twenty-first century Texas. In *Boerjan*, a family of illegal immigrants from Mexico hired a "coyote" to transport them from the border into the United States. The coyote illegally transported the family across the Jones Ranch. An employee of the ranch stopped the coyote to inquire why he was on the property. The coyote took off with the ranch employee in pursuit. Driving at a high rate of speed, the coyote ultimately wrecked his truck, killing several immigrants. The family of the immigrants who were killed brought a wrongful death lawsuit against the ranch and its employee. The case posed an important question of what duty, if any, the landowner owed the immigrant family who were trespassers and illegally on the property. In the case of a trespasser, a landowner only owes a duty to avoid injuring a trespasser willfully, wantonly, or through gross negligence. This standard was reaffirmed and upheld in *Boerjan* when the Texas Supreme Court affrimed a trial court's summary judgment in favor of landowners.

This case was critical to landowners in South Texas and border areas but became very political when the Government of Mexico and human rights organizations filed briefs seeking to broaden a landowner's duty. A collection of Agriculture and Property Rights associations submitted an amicus brief to the Texas Supreme Court laying out the significant burdens and risks to landowners caused by immigration and smuggling activities and urged the Court to reject any broader standard of liability and make clear the limited duty owed to smugglers and trespassers. In its opinion the Court stated "the 'only duty the premises owner or occupier owes a trespasser is not to injure him wilfully, wantonly, or through gross negligence.' The court of appeals' foreseeability analysis ignored this well-established rule, under which the Ranch Petitioners owed the decedents only a duty to avoid injuring them wilfully or wantonly, or through gross negligence. By its plain language, this duty does not support a simple negligence claim." (internal citations omitted) A landowner's duty to a trespasser, therefore, remains limited. Now, in addition to the precedent of the *Boerjan* case, landowners can rely on statutory protections as well as the common law when addressing liability to trespassers.

Best Practices

What does this mean for landowners? Certain best practices can help reduce or limit landowner liability.

- For trespassers, landowners have a right to stop, photograph, or follow (not chase) a trespasser on their property. There should be no confrontation or threats.
- Post "No Trespassing" signs in English and Spanish.
- Develop protocol for employees and post it.
- Call authorities upon discovery of trespasser.
- Post-event, have employee prepare exact description of events and times.
- If there are extreme dangers on roads, consider repair.
- Post warning and caution signs as needed.
- Be sure to post appropriate signage if agritourism entity.
- Use extreme caution with weapons.
- Obtain liability insurance coverage in the recommended amounts under the Recreational Use statute.
- Documentation and protocol are key.