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ENJOYING NATURAL ENVIRONMENT INCLUDES RISK OF DANGEROUS INSECTS

As noted by the court in the *Nicholson* case described herein, the majority of cases "have refused to find that a landowner owed an invitee a duty with regard to the acts of wild animals on its premises." In so doing, the court recognized that enjoyment of the natural environment can sometimes result in serious injury, or even death, attributable to incidental contact with indigenous flora and fauna:

> A great deal of Nature is compatible with human happiness and safety. But some is not. Nature is not tamed... and those who seek the outdoors are exposed to its dangers. A good deal of the [natural environment]... stings, sticks or stinks. Any number of insects and animals can hurt, or even kill you.

As illustrated by *Nicholson*, fire ants and other insects would be considered "wild animals" (or *ferae naturae)* for purposes of determining landowner liability.

As noted in *Nicholson*, a limited exception to this general "no duty" rule may arise, however, where the landowner has reduced the animal to possession, or the animal is not indigenous to the locality, but has been introduced onto the premises by the landowner. Under the facts of *Nicholson*, this exception was not applicable because the fire ants were indigenous to the area and had not been reduced to possession, i.e., captured by the landowner. On the contrary, the landowner in *Nicholson* had taken steps to control these pests.

(See also "Insect Sting & Bite Liability: A Limited Duty for Landowners," NRPA Law Review, *Parks & Recreation*, October 1990. As noted in this article, "there is probably no legal duty for landowners to do anything, unless there is a clearly foreseeable risk of injury posed by a known swarm of bees or the existence of a particularly noxious insect on the premises.")

DOCTRINE OF "FERAE NATURAE"

In the case of *Nicholson v. Smith*, No. 04-98-00450-CV (Tex.App. Dist.4, 1999), plaintiff Carlyn Nicholson sued defendants Herman and Mary Smith following an incident which allegedly contributed to the death of her husband, Thomas Nicholson. Thomas Nicholson died after he was attacked by fire ants which were known to inhabit defendants' "Choke Canyon RV Park." The facts of the case were as follows:

> In early to mid-December of 1994, Thomas and Carlyn Nicholson rented a space at Choke Canyon RV Park, a recreational park owned by the Smiths, with the intent to spend the winter months in rural Texas. Nicholson had previously stayed at Choke

> Canyon RV Park throughout the winter months of 1990-91. At least one week after they had set up camp, on December 29, 1994, Thomas Nicholson was stung more than 1,000 times by fire ants while correcting the stabilizer on the underside of his house trailer. He was taken to a local hospital for treatment, and then was transferred to a hospital closer to his Illinois home. Following intermittent periods of hospitalization, Nicholson died on March 26, 1995. Nicholson suffered from leukemia, but there was some evidence that the fire ants were at least a contributing cause of his death.

In response to Nicholson's premises liability claim, the Smiths argued that "they did not owe a duty to Nicholson with respect to the fire ants; that the presence of fire ants did not create an unreasonably dangerous condition; and that the deceased was warned about the fire ants." The trial court granted summary judgment in favor of defendants. Nicholson appealed.

On appeal, the Smiths argued that "the doctrine of *ferae naturae* abrogates any duty to business invitees with regard to fire ants or other indigenous wild animals found upon their land." As described by the appeals court, "[t]he threshold inquiry in a negligence case is duty":

> The question of duty turns on the foreseeability of harmful consequences, which is the underlying basis for negligence. Foreseeability means that a person of ordinary intelligence should have anticipated the dangers that his negligent act created for others. The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question.
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> In determining the question of duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.
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> It is undisputed that Thomas Nicholson was an invitee on the Smiths' land. As a general rule, a landowner must use reasonable care to make the premises safe for the use of business invitees; this duty includes warning invitees of known hidden dangers that present an unreasonable risk of harm.

As noted by the appeals court, the Smiths contended that "the doctrine of animals *ferae naturae* (i.e., from the Latin meaning "animals of a wild nature or disposition") makes the acts of wild animals an exception to the duty of care owed to an invitee." As a general rule, the appeals court acknowledged that "a landowner cannot be held liable for the acts of animals *ferae naturae*, that is, indigenous wild animals, occurring on his or her property, unless the landowner has actually reduced the wild animals to

possession or control, or introduced a non-indigenous animal into the area":

> [I]n general, the law does not require an owner or possessor of land to anticipate the presence of, or guard invitees against the harm from, wild animals unless he or she has reduced them to possession, harbors them, or has introduced onto the premises wild animals which are not indigenous to the locality... [A]rtificial conditions, such as farm ponds, frequently become the abode of poisonous snakes, and stinging insects are common in hunting lodges and summer homes, but no cases have been found where a duty of ordinary care has been imposed on the owner or possessor of such premises...
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> [A]lthough a premises owner who holds his or her land open to business invitees has a duty to exercise reasonable care to protect those invitees from animals coming onto the premises, he or she is under no duty to exercise such care until the landowner knows or has reason to know that dangerous acts by wild animals are occurring or are about to occur... [C]ertain facts may give rise to a duty with regard to wild animals. As we have said, though, the existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question.

Within this context, the appeals court determined that fire ants are considered *ferae naturae*, i.e. wild animals, as defined by the Restatement (Second) of Torts:

> The Restatement (Second) of Torts section 506 defines "wild animals" as "an animal that is not by custom devoted to the service of mankind at the time and in the place in which it is kept." Restatement (Second) of Torts § 506 (1977). In comment a, the Restatement explains that "[t]he word animal is used . . . in a broad sense to include not only animals strictly so-called, but also birds, fish, reptiles and insects. Thus rattlesnakes, alligators, ostriches or tsetse flies are wild animals in the sense here used." §506 cmt. a.

EXPECTED NORMAL BEHAVIOR?

Applying these principles to the facts of the case, the appeals court found no evidence which would support the imposition of a legal duty requiring the Smiths to protect Nicholson against the fire ants:

> Nicholson was attacked by indigenous wild animals in their natural habitat, in the normal course of their existence. The Smiths did nothing to cause the fire ants to act outside of their expected and normal behavior. Nicholson was not injured while in an artificial structure, nor was he injured where fire ants would not normally be found, nor was the

> presence of the fire ants due to any affirmative or negligent act of the Smiths bringing them upon the property or drawing them to the area where Nicholson was parked. In fact, Smith testified that he regularly attempted to kill or drive away the fire ants...
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> Presumably Nicholson chose to stay at the Choke Canyon RV park, as opposed to a hotel, in rural South Texas because he wanted to enjoy the natural environment. His injury, although tragic, was incident to his enjoyment of the natural land...
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> We do not say a landowner can never be negligent with regard to the indigenous wild animals found on its property. A premises owner could be negligent with regard to wild animals found in artificial structures or places where they are not normally found; that is, stores, hotels, apartment houses, or billboards, if the landowner knows or should know of the unreasonable risk of harm posed by an animal on its premises, and cannot expect patrons to realize the danger or guard against it...

In so doing, the appeals court found further that "Nicholson had both actual and constructive knowledge of the presence of and danger posed by fire ants." Specifically, the appeals court found "Nicholson and Smith were aware of this natural, but pernicious, insect." Moreover, the appeals court found "Smith took reasonable steps to control the pests, but, unfortunately, fire ants are simply an undesirable part of the South Texas landscape."

> Smith routinely warned invitees of the presence of fire ants... [H]e discouraged customers from parking their trailers where fire ant mounds were found... Dan Head [former manager of the RV park] specifically warned Nicholson about the presence of fire ants, to which Nicholson responded, "I know. I was here before."...
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> Smith applied fire ant poison to the property every three or four weeks. Smith also testified that he applied poison to ant hills when and where he found them as he was mowing the grass or walking on the property. There is no evidence that the Choke Canyon RV Park was experiencing a greater incidence of fire ants than the surrounding areas at the time Nicholson rented the space.
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> Under ordinary circumstances, Texas landowners do not have a duty to warn their guests about the presence and behavior patterns of every species of indigenous wild animals and plants which pose a potential threat to a person's safety, as well as the extent of that threat. If a landowner was required to affirmatively disclose all risks caused by plants, animals, and insects on his or her property, the burden on the landowner would be enormous and would border on establishing an absolute liability.

> We do not say that there never can be such a case. But this case fits within the rule, not the exception.

Accordingly, the appeals court held that "Fire ants, by legal definition, are indigenous wild animals, and, without more, they do not pose an unreasonable risk of harm in their natural habitat."

> Nicholson was not injured while in an artificial structure, nor was he injured where fire ants would not normally be found. The presence of the fire ants was not caused by any affirmative or negligent act of the Smiths. Indeed, Smith tried to control them, and there was uncontroverted evidence that Nicholson was aware of their presence.

Having found that "[t]he doctrine of *ferae naturae* defeats Nicholson's premises liability claim as a matter of law," the appeals court affirmed the summary judgment of the trial court dismissing Nicholson's claims.