PREMISES LIABILITY LAW IN TEXAS

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I. Premises Liability Law in Texas – Introduction

Over the years, the area of law in Texas to determine the liability for injuries sustained on another's property is knows as "premises liability". The purpose of the paper is to provide a general overview of premise liability in Texas.

A. General Principals

1. A premises liability action is a form of "negligence" based on a premises defect theory. The elements to establish a premises liability claim are different than those of a traditional negligence claim. The claim must arise out of a condition of the premises. "Negligence requires a duty, a breach of that duty, proximate cause and damages. *H. E. Butt Grocery Co. v. Warner*, 845 S.W. 2d 258, 260 (Tex. 1992); *Western Invs., Inc. v. Urena*, 162 S.W. 3d 547, 550 (Tex. 2005).

2. The nature of the duty owed is determined by the status of the injured person. *Nixon v. Mr. Property Mgmt*. 690 S.W.2d 546 (Tex. 1985).

   a. Invitee: An invitee is a person who is on the premises at the express or implied invitation of the possessor of the premises and who has entered thereon either as a member of the public for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor that does or my result in their mutual economic benefit.

   b. licensee: A licensee is a person who is on the premises with the permission of the possessor but without an express or implied invitation. Such person is on the premises only because the possessor has allowed him to enter and not because of any business or contract relationship.

   c. Trespasser: A trespasser is a person who is on the property of another without any right, lawful authority, or express or implied invitation, permission, license, or not in the performance of any duty to the owner or person in charge or on any business of such person but merely for his own purpose, pleasure, convenience, or out of curiosity,

and without enforcement, allurement, inducement, or express or implied assurance of safety from the owner or person in charge.

IV. Initial questions for a premises liability action.

a. Control – was the claimant injured on the premises under the control of your insured?

1. Invitee: The owners or occupiers duty to protect and invitee from a dangerous condition arises from the owner's control over the premises. The owner or occupier is negligent if a) the condition on the premises posed and unreasonable risk of him, and b) the owner or occupier knew or reasonably should have known of the danger, and c) the owner or occupier failed to exercise ordinary care to protect the claimant from the dangers, by failing to adequately warn the claimant of the condition and failing to make that condition reasonably safe.

Example: *Wal-Mart Stores, Inc. v. Reece*, 81 S.W.3d 812 (Tex. 2002), the Plaintiff slipped and fell on a clear liquid near the self service drink and ice machines. Sometime before the fall, a Wal-Mart employee had walked away from the counter, but denied that he saw any liquid. The Court held that there was no evidence that the Defendant had placed the substance on the floor, evidence that the store had time to discover and to rectify a liquid spill on the floor was insufficient to support a finding that the store had actual or constructive notice of the dangerous condition.

2. Licensee: The owner or occupier of the land owns a licensee only the duty to warn him and to make the condition reasonably safe when they have actual knowledge of the condition and to not injure them through willful, wanton or grossly negligent conduct. An owner or occupier is negligent if:

a) The condition on the premises posed an unreasonable risk of harm; and
b) The owner or occupier had actual knowledge of the danger; and
c) The owner or occupier failed to exercise ordinary care to protect the claimant from dangers, by both failing to adequately warn the claimant of the condition and failed to make that condition reasonably safe.

Example: Social guests, uninvited salespersons, persons soliciting for charities, persons crossing from one store to another in a mall. *Wal-Mart Stores, Inc. v. Miller,* 102 S.W.3d 706, 709 (Tex. 2003).

3. Trespasser: There is no duty to inspect, to warn or to make the property safe. The trespasser takes the property as he finds it.

   The owner or occupier of land owes a duty to an adult trespasser not to intentionally and willfully injure him. *Park v. Troy Dodson Constr. Co.*, 761 S.W.2d 98 (Tex. App. – Beaumont 1998, *writ denied*).

   The exception to the rule is if the property owner knows of the trespasser, he must exercise reasonable care for his safety. *Living, Inc. v. Redinger*, 689 S.W.2d 413 (Tex. 1985).

Example: The Plaintiff was cutting across a friend chicken's restaurant's parking lot en route to the drugstore and allegedly slipped on chicken grease and fell. *Weaver v. KFC Mgmt., Inc*., 750 S.W.2d 24, 27 (Tex. App. – Dallas 1988, *writ denied*). Note: Our very own Josh Kutchin represented KFC.

IV. Initial Questions for a premises liability action.

a. Control: was the premise under the control of your insured? For purposes of premises liability, the party must be in control of the premises in order to be held liable as an owner or occupier. *Butcher v. Scott*, 906 S.W.2d 14, 15 (Tex. 1995). "Power of control or expulsion" does not always equate to control, therefore, a property owner who doe not have control over the premises is not liable under the premises liability doctrine. *De Leon v. Creely*, 972 S.W.2d 808, 812 (Tex. App. – Corpus Christi 1998, *no pet*).

b. Status: Why was the claimant on the premises? The duty owed depends on the claimants status as an invitee, licensee or as a trespasser. The claimant's status depends on his or her purpose in coming onto the property. *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996).

c. Type: What was the mechanism or factors that caused the injury? Slip and fall, trip and fall, premises defect, or negligent activity? If the injury is a result of the condition of the premises, then premises liability will apply, however if it's a result of an activity, then traditional negligence principals will apply. To recover under a negligent activity theory, a person must have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity. *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992).
   Example: A box containing a TV was dropped on a claimant's head while being removed from a shelf by an employee of the store. The moving of the TV and dropping it on the claimant's head was a

contemporaneous result of the activity itself rather than by a condition created by the activity and would be a "negligent activity" and not a premises liability case. *Wal-Mart Stores, Inc. vs. Garza*, 275 S.W.3d, 64, 67 (Tex. App. – San Antonio 2000, *pet denied*).

d. Causation: were the claimant's injuries/damages caused by the alleged negligence of your insured? The mere creation of a condition does not establish knowledge as a matter of law. The claimant has the burden to prove that the existence of an unreasonably dangerous condition caused the accident and injuries. Evidence of other persons having fallen under the same or similar circumstances will be generally admissible. *Motel G.P., Inc. v. Lopez,* 929 S.W.2d 1 (Tex. 1996) (hotel guest slipped and fell in shower however, the Hotel had no actual or constructive knowledge of the "dangerous condition" in the shower and therefore could not be held liable)

V. ELEMENTS TO BE ESTABLISHED:

a. Actual knowledge: as a general rule, actual knowledge is the most difficult element to establish. When there is no prior notice of a similar incident, the Court will find that there is no actual knowledge that the condition was unreasonably dangerous unless there is some other proof the Defendant was actually aware that the condition was dangerous or the Defendant created the dangerous condition. *Univ. of Tex. – Pan Am v. Aguilar*, 251 S.W.2d 511, 514 (Tex. 2008) (*per curian*). The fact that the Defendant created the condition merely creates an inference of knowledge. *Keetch v. Kroger*, 845 S.W.2d 262, 264 (Tex. 1992).

b. Constructive Knowledge: the claimant invitee may establish constructive knowledge (should have known) by showing that the condition existed long enough that the Defendant should have known of the alleged dangerous condition. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998). Thirty minutes or less has been held to be legally insufficient evidence to show constructive knowledge. *Brookshire Food Stores, L.L.C. v. Allen*, 93 S.W.3d 897, 901 (Tex. App. – Texarkana, 2002, *pet denied*). *Kimbell, Inc. v. Roberson*, 570 S.W.2d 587, 590 (Tex. Civ. App. – Tyler, 1978, *no writ*).

c. "Unreasonable" risk of harm. The claimant must also prove that the condition complained of posed a "unreasonable" risk of harm in which there is a "sufficient probability" of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event happening. *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 537 (Tex. 1975). The determination of whether a particular condition poses an unreasonable risk of harm is generally fact specific and viewed from the standpoint of a "reasonably prudent person". *Hall v. Sonic Drive-In of*

Angelton, Inc., 177 S.W.2d 635, 645 (Tex. App. – Houston [1st Dist.] 2005, pet denied).

d. "Reasonable" care is reducing the risk of harm. If the condition is known and presents an "unreasonable risk of harm," then the owner or the occupier must take reasonable care to reduce or to eliminate the risk. *Corbin v. Safeway Stores, Inc*., 648 S.W.2d 292 (Tex. 1983). "Reasonable" care or "ordinary" care has been defined to mean that degree of care which would be used by an owner or occupier of ordinary prudence under the same or similar circumstances. *Keetch v. Kroger*, 845 S.W.2d 262, 267 (Tex. 1992).

e. Proximate Cause. The standard for proximate cause is 1) cause in fact and 2) foreseeability. *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992). The test for cause in fact is whether the negligent act or omission was a substantial factor in bringing about the injury and without which the injury would not have occurred. Within a reasonable probability, the injury would not have occurred but for the Defendant's negligence. To prove foreseeability, the claimant must establish that a person of ordinary intelligence should have anticipated the danger crated by the negligent act or omission of the Defendant. *Nixon v. Mr. Property Management Co*., 690 S.W.2d 546 (Tex. 1985).

B. TYPES OF PREMISES LIABILITY CASES:

1. Slip and Fall: Claimant slips and falls on something on the floor. *Motel 6, G.P., Inc. v. Lopez,* 929 S.W.2d 1 (Tex. 1996) (Claimant/hotel guess slipped and fell in shower. Hotel had no actual knowledge nor any constructive knowledge of the "dangerous condition" in the shower and therefore could not be held liable).

2. Premises Defect: 77 year old woman falls and breaks her ankle when she tripped over a ridge in a concrete ramp leading from the parking lot to the side walk. Wal-Mart, the occupier of the land, had added the ramp and therefore had actual knowledge of the ridge and one of their employees had previously tripped over it, however Wal-Mart took no corrective action. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d (Tex. 1993).

3. Criminal acts of third parties. When the risk of crime is foreseeable, the owner or occupier has a duty to protect invitees from criminal acts of third parties. *Trammel Crow Central Texas, Ltd. v. Guitierrez*, 267 S.W.3d 9, 12 (Tex. 2008); *Mellon Mortg. Co. v. Holden*, 5, S.W.3d 654, 655 (Tex. 1999). *Timberwalk Apartment Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998). The Texas Supreme Court has set forth several factors the Court should consider in determining whether criminal conduct was foreseeable: 1) whether any criminal conduct previously occurred on or near the property; 2) how

recently it occurred; 3) how often it occurred; 4) how similar the conduct was to the conduct in this case; 5) what probability was given the occurrences to indicate the owner knew or should have known about them. *Timberwalk Apartment Partners, Inc. v. Cain*, 927 S.W.2d at 759 (Tex. 1998).

4. Negligence per se. Negligence per se involves a "breach of a statutory duty. Unlike a breach of ordinary care a jury must decide whether the statute applies, if it was violated and whether that violation was the proximate cause of the injury. *Skillern & Sons, Inc. v. Paxton*, 293 S.W.2d 521 (Tex. Civ. App. – Eastland 1956, *writ ref'd n.r.e.*) (94 year old woman injured when she was attempting to exit the building using revolving door while another patron was exiting at a higher rate of speed. The door was not defective however the local ordinance provided for a "regular swinging door", therefore the revolving door violated local building ordinances.)

5. Doctrine of Attractive Nuisance. The doctrine of attractive nuisance applied to children of a tender age that come upon the premises by virtue of their unusual attractiveness. The legal effect is that a child is not regarded as a trespasser, but being rightfully on the premises because of an implied invitation to do so. *Texas Utilities Electric Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997) (Child climbed on utility pole). The owner or occupier of land owes the child the same duty as an invitee when the attractive nuisance doctrine applies. *Id*. at 193. The claimant must show: 1) that the place where the condition is maintained is one upon which the possessor knows or should have known that children are likely to trespass; 2) the condition is one of which the possessor knows or should have known and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children; 3) the children, because of their youth, do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it; 4) the utility of the possessor of maintaining the condition is slight as compared to the risk to young children involved therein; and 5) the owner/controller failed to eliminate the danger or otherwise protect children. The doctrine usually does not apply to children over 14 years of age since they are presumed to have the capacity to appreciate danger. *Massie v. Copeland*, 233 S.W.2d 449, 451, 452 (Tex. 1950). Where a creek is a naturally occurring condition the attractive nuisance doctrine does not apply. *Woolridge v. East Texas Baptist University*, 154, S.W.3d 257, 260 (Tex. App. – Texarkana 2005, *no pet*).

VI. CONSTRUCTION SITES:

Chapter 95 of Texas Civil Practice & Remedies Code provides that a property owner is not liable for personal injury, death, or property damage to a contactor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property…unless the property owner exercises or retains control over the manner in which the work is performed, other than the right to order the work to start on stop or to inspect the progress or receive reports; and the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

1. Defenses.

a. Comparative responsibility/comparative negligence: Chapter 33 and 34 of the Texas Civil Practice & Remedies Code provides for the comparative responsibility of the parties. Generally, if a claimant is more than 51% at fault, he or she cannot recover any damages. If however, the claimant is less than 50% at fault, he or she can recover the proportionate amount of responsibility for the Defendant or Defendants.

b. New and independent cause. The defense of new and independent cause is raised when the injury or damages claimed by a Plaintiff arose through no fault of the Defendant. There are two types: dependent and independent. A dependent intervening cause is set in motion by the Defendant's own conduct and will not relieve the Defendant of liability unless fault of the Defendant and release a Defendant of liability unless it was foreseeable by the Defendant. The most common intervening causes are natural forces and negligent human conduct.

c. Sole cause. The defense of sole cause is raised by the evidence that the cause of he accident and injury originates from the act and/or omissions of an independent third party or an extraneous event.

d. Notice or no knowledge. The defense of no knowledge includes actual and/or constructive knowledge as discussed previously.

e. Act of God. The defense of Act of God is appropriate if the act (1) was caused directly and exclusively by the violence of nature; 2) was without human intervention or cause; and 3) could not have been prevented by reasonable foresight or care. *Haney v. Jerry's GM, Ltd*., _____ S.W.2d _____, 2009 WL 383, 761 (Tex. App. – El Paso 2009, no pet). (Slip and fall at car dealership in naturally forming ice. Naturally forming ice is not a unreasonably dangerous condition).

f. Statute of Limitations: Texas Civil Practice & Remedies Code, Chapter 16, provides for a 2 year statute of limitations for claims based on a "tort".

II. CONCLUSION:

The success or failure of a premises liability claim depends on the class to which the claimant belongs; whether the owner or occupier of the land has actual or constructive knowledge of the condition; whether the condition is an "unreasonably dangerous" condition; and if the alleged injuries and damages were a proximate cause of such a condition. Thus in most cases the facts should be carefully explored with an eye towards requiring the claimant to prove each element.