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PREMISES LIABILITY UPDATE

by Dean Foster

***Cooper v. Lewis*, No. 01-10-00292-CV, 2011 Tex. App. Lexis 813 (Tex. App. – Houston [1st Dist.] February 3, 2011, no pet. h.).**

In May of 2008, Plaintiff Cooper entered a Food Town grocery store in Pearland, Texas. Cooper saw a metal, collapsible, multi-use cart that she wanted to buy. The cart was on top of an open air shelving cooler. The top of the cooler was about 6½ feet above the floor. A metal panel ran along the front edge of the cooler forming a small barrier such that the cart would have to be lifted over the barrier before it could be taken down. Three signs were affixed to the panel, two yellow price signs and a white sign with black text that read, "Please ask store personnel for assistance for all items on top of coolers."

Cooper testified that she noticed the yellow signs listing the cart's price, but she did not notice the white sign and it did not occur to her to ask for assistance. Cooper, who is 5 feet, 3 inches tall, stood on her tiptoes and extended her arms up, putting her hands on one of the carts. Two or three carts fell on top of her causing alleged injuries to her head, neck, shoulders, and left thumb.

Cooper sued Food Town asserting a premises liability claim. Food Town filed a motion for summary judgment on the grounds that there was no evidence that (1) a condition posing an unreasonable risk of harm existed on its premises prior to the incident in question, (2) it had actual or constructive knowledge of the condition, (3) it failed to exercise reasonable care to reduce or eliminate the risk of harm posed by the condition, or (4) its failure to exercise such care proximately caused Cooper's injuries and damages. The trial court granted summary judgment in favor of Food Town without stating on which ground or grounds it based its ruling.

On appeal, Cooper argued that the trial court erred in granting summary judgment because the summary judgment evidence raised issues of material fact. She argued that Food Town had knowledge of the dangerous condition because it created the display, that Food Town had breached its duty of care because the white sign was inadequate and the cart was not secured, and that the breach proximately caused her injuries.

The Court of Appeals noted that Food Town had asserted that there was no evidence that the cart display posed an unreasonable risk of harm. In response at the trial court level and again on appeal, Cooper failed to identify any evidence that the cart display posed an unreasonable risk of harm. Cooper suggested that the white sign requesting customers to ask for assistance was evidence that the cart display was unreasonably dangerous. However, the court noted that Plaintiff had also stated in her brief that the white signs were a generic notice placed on all coolers on which items were placed atop, regardless of whether the items were heavy metal carts or light Styrofoam

cups. The Court of Appeals concluded that the signs requesting that customers ask for assistance were not evidence that the cart display was unreasonably dangerous.

Cooper also suggested that the customer might not realize that the front panel on the top edge of the cooler was there and required the customer to lift the cart up over the lip and could cause the cart or carts to tumble over when moving them. However, out of the near accident, Cooper presented no evidence to support this argument, either as to the likelihood that consumers would not notice this barrier or that this would cause the carts to fall. Cooper also suggested that that display of unsecured carts would tempt a customer to try to take one down, but she failed to present any evidence to support this assertion other than her own accident.

Because Cooper failed to produce any evidence of an unreasonable risk of harm that would result from the cart display, and failed to produce any evidence indicating that anyone else had been injured, and Food Town presented evidence that their were no other reports of similar incidents in the past 13 years, the Court of Appeals held that the trial court had properly granted summary judgment in favor of Defendant Food Town.

***Gorman v. Ngo and Hayden*, No. 05-09-01189-CV (Tex. App. – Dallas, March 1, 2011, no pet. h.).**

Ngo was the owner of a convenience store and hired Hayden to install a walk-in cooler, along with a condenser unit. Hayden placed the condenser unit outside the convenience store on a pallet and wired it to the walk-in cooler. Hayden used existing circuits at the store and did not install either an electrical disconnect or a ground on the condenser. Ngo did not assist Hayden during the installation of the walk-in cooler or the condenser.

Shortly after the walk-in cooler was installed, customers in the store began complaining they were being shocked when they touched the doors to the walk-in cooler. In addition, the lessee of the store was knocked to the floor when he was shocked while mopping the floor next to the cooler. The lessee complained to Ngo at least three times that the walk-in cooler was shocking people. Each time the lessee complained, Ngo asked Hayden to investigate the problem. Hayden visited the store on three occasions, but the doors to the walk-in cooler did not shock him or show any signs of being energized. After his third trip to the store, Hayden testified he cut the power to the walk-in cooler and the condenser, placed tape over the breakers, placed tags in the breaker box instructing that the power not be turned on, and told the employees of the store not to touch the breakers or turn on the power to the walk-on cooler or the condenser. Hayden then suggested that Ngo hire a licensed electrician to investigate the problem.

Ngo contacted Gorman, who had installed 20 to 30 walk-in coolers at other locations. Ngo testified that Gorman represented he was a licensed electrician, but appellants denied Gorman ever represented that he was an electrician.

Gorman and his brother, Gary, went to the convenience store to investigate the problem. Using an ohm meter, Gorman determined that the cooler doors were energized. Gorman then turned off the breakers to the walk-in cooler and again checked the cooler doors. The cooler doors were no longer energized. Gary did not know whether Gorman turned off the breakers to the condenser outside. According to Gary, they then went outside to check the condenser. Gary testified there was standing mortar around the condenser. Gorman asked Gary to hand him a tool so Gorman could open the condenser cover. As Gary started to open the cover, Gorman picked up a control box that was connected to the condenser. The box was energized, and Gorman was electrocuted.

An investigation following the incident revealed that the walk-in cooler and condenser installation violated the electrical code because neither the cooler nor the condenser was properly grounded. The investigation revealed that Gorman would not have been electrocuted if the breaker was off.

During closing arguments, the trial court questioned Plaintiff's counsel about whether he had established Ngo's liability under Chapter 95 of the TEXAS CIVIL PRACTICE & REMEDIES CODE relating to a property owner's liability for the acts of an independent contractor. Plaintiffs filed a post-trial brief arguing that the condenser was not an improvement or fixture, that Chapter 95 was an affirmative defense not pled by Ngo, and that there was a fact question as to Ngo's control and knowledge of the dangerous condition. The trial court entered a take nothing judgment in favor of the Defendant.

On appeal, the defense argued Chapter 95 should not have been applied to their claims against Ngo because Gorman did not construct, repair, renovate, or modify the condenser. Instead, Plaintiffs argued Gorman only attempted to inspect the unit, which would be an activity not encompassed by Chapter 95. However, based on the trial court's findings, the Court of Appeals concluded Gorman was on the property for the purpose of determining what was causing the electrical shock to customers of the store coming into contact with the walk-in cooler, the first step of the repair process.

In addition, Plaintiffs argued that the trial court erred in entering a take nothing judgment because Ngo was liable under common law. Common law imposes a duty on a premises owner to "inspect the premises and warn the independent contractor/invitee of dangerous conditions that are not open and obvious and that the owner knows or should have known exist." However, the Court of Appeals stated that the statutory "actual knowledge" standard in Chapter 95 replaces the pre-Chapter 95 standard of constructive knowledge. The Court of Appeals noted that it had already concluded the trial court did not err by applying Chapter 95 to Plaintiff's claims against Ngo, and accordingly Chapter 95 was Plaintiff's exclusive remedy against Ngo and Ngo could not be held liable to Plaintiffs under common law.