SUMMER 2013 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

1. *Nall, et al v. Plunkett,* No. 12-0627, Supreme Court of Texas, 213 Tex. LEXIS 518; 56 Tex. Sup.J. 818.

On June 28, 2013, the Court delivered a *per curiam* opinion in the above-referenced matter. John Plunkett sued Justin Nall, Robert Nall, Olga Nall, and Justin Kowrach for personal injuries suffered at a New Year's Eve party at the Nalls' residence. Plunkett attended Justin Nall's New Year's Eve party at a home that is owned by his parents, Robert and Olga Nall. Plunkett alleged that the Nalls hosted the party and knowing that alcohol would be consumed at the house and required all attendees who remained at the house after midnight to spend the night. The Plaintiff contends that the Nalls failed to confiscate car keys of those who remained after midnight or to take any actions to keep the attendees from leaving. The Petition states that Robert and Olga went to bed after midnight but before 2:00 a.m. without insuring that those still in attendance would remain until they were safe to drive. Shortly after 2:00 a.m., Justin Kowrach and a friend attempted to leave in the friend's vehicle. Plunkett alleges that he attempted to convince Kowrach not to leave. As Plunkett stood on the running board of the vehicle and attempted to pull the keys from the ignition, Kowrach pressed the accelerator, increased his speed, and then hit the brakes. The sudden breaking and Plunkett's momentum propelled him headfirst into the ground, lodging his head under a parked car. Plunkett claimed traumatic brain damage as a result of his injuries that will require medical care for the rest of his life.

Plunkett sued Olga Nalls and Mr. Kowrach alleging that the Nalls were liable for "common law negligence", failing to exercise due care in their undertaking to protect guests, and for premises liability. The Nalls moved for Summary Judgment arguing they owed no duty to Plunkett and the trial court granted the Motion as to all claims except for the premises liability claim which Plunkett eventually nonsuited. The trial court severed Plunkett's claims against the Nalls from his claim against Kowrach and Plunkett appealed.

The only issue briefed by Plunkett on Appeal was whether the trial court erred by granting Summary Judgment as Nalls' motion only addressed social host liability and not the negligent-undertaking theory. The Court of Appeals agreed and reversed the Summary Judgment.

On Appeal, the Supreme Court held that Nalls' Summary Judgment Motion specifically addressed the negligent-undertaking claim by arguing that the Court's decision in *Graff v. Beard*, 858 S.W.2d 918, 921 (Tex. 1993) forecloses the assumption of any duty by a social host under the facts of this case. Because Plunkett did not argue that Summary Judgment was improper on the merits, the Court did not reach any substantive issues related to the Summary Judgment. Accordingly, they reversed the Court of Appeals' judgment and reinstated the Trial Court's

judgment.

2. *Wilson v CBL/Parkdale Mall, et al,* No. 09-12-00566-CV (Tex App. 9th Dist. Beaumont) 2013 Tex. App. LEXIS 5641.

The Plaintiff, Theresa Wilson, brought suit against Defendants CBL/Parkdale Mall GP; LLC A/K/A CBL/Parkdale Mall, LT; CBL Parkdale Crossing, GP; CBL Parkdale Crossing; and CBL & Associates, LLP alleging that she and her daughter were walking inside the Parkdale Mall when she slipped in a "red substance" on the floor and fell on her left side. Wilson alleges that she had been looking straight ahead and never saw the substance before the accident, but that she probably would have seen the substance had she been looking down. Her daughter, Smith, testified that she saw a "nice size puddle" and stepped over it and that the substance was "out in the open" and probably came from a "spilled drink". When Wilson brought this to the attention of a custodian and asked why she had not cleaned the substance the custodian replied "but this is not my area". Smith, Wilson's daughter, did not believe that Wilson could have done anything different to avoid the accident and acknowledged that she could have warned Wilson about the liquid.

In discovery, Parkdale admitted that there were no warning signs in the area at the time of Wilson's fall and that they had no notice of the substance on the floor until after the accident. Parkdale had contracted with a third party janitorial and security service to clean substances from the floor when they occurred. Parkdale said that their employees continuously patrol the mall for spills and hazardous conditions and if any such spill or condition is observed or brought to the employees' attention, the area is secured with a warning sign while the spill or condition is remedied. Parkdale filed a no-evidence motion for summary judgment on the basis that they had no actual or constructive knowledge. Actual knowledge requires that the owner or the operator of the premises actually knows about the condition prior to the accident. Constructive knowledge can be ascertained from conspicuity and longevity of the condition.

The threshold question was whether Parkdale had actual or constructive knowledge of the dangerous condition on the premises. The court held that the conversation with the janitorial person following the accident that "that's not my area" was legally insufficient evidence to support actual knowledge on the part of Parkdale. The Court further held that there was insufficient evidence for the Court to perform an analysis as to constructive knowledge so that it could conclude that there was some evidence of constructive knowledge on the part of the Defendant.

Viewing the evidence in the light most favorable to the Plaintiff, they concluded that the Plaintiff did not produce Summary Judgment evidence raising a genuine issue of material fact to support the knowledge element of her premises liability claim. Accordingly, they held that the top court properly granted Parkdale's No-Evidence Motion for Summary Judgment disposing of the Wilson's claim against Parkdale.