

2013 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2013: PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

***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.

***Austin v. Kroger*, 2013 U.S.App. LEXIS 19866 (U.S. Ct. of Appeals – 5th Cir.) 9/27/13.**

This case arises out of injuries that Plaintiff/Appellant, Randy Austin, sustained while performing his job duties as an employee for Defendant/Appellee, Kroger Texas, L.P. ("Kroger"). The Fifth Circuit Court of Appeals affirmed the District Court's judgment with respect to Austin's gross negligence claim but reversed and remanded his claim with respect to premises liability and ordinary negligence claims.

Randy J. Austin was employed by Kroger and in 2008 he became a "utility clerk" or a "floor clean-up person" at the Mesquite, Texas store. His duties included sweeping, mopping, sacking groceries, consolidating carts, and cleaning the stores restrooms. Kroger Management decided to perform an annual cleaning of the store's condenser units which included power washing the condensers with water and a cleaning solvent for about twenty minutes. Some of the water cleaning solvent leaked into the ventilation ducts that opened into the down stair restrooms. When Mr. Austin came to work he was told about the condenser cleaning and was asked to clean up "whatever mess" it made. Kroger had previously provided Mr. Austin with a safety handbook which included instructions that the store management should "make certain that the Spill Magic Spill Response stations were adequately supplied at all times and available in numerous places throughout the store, however, none were available that day. Austin, therefore, cleaned the spill with a dry mop and bucket. While cleaning the floor, he fell, sustaining a left femur fracture and severely dislocated his hip. He spent nine months in the hospital and underwent six surgeries. His left leg is now two inches shorter than his right.

Kroger, a non-subscriber to the Texas Workers Compensation system was sued in Texas state court by Mr. Austin who asserted negligence, premises liability, and gross negligence claims against Kroger.

Kroger moved for summary judgment and the District Court granted Kroger's motion, based in part on Austin's "subjective awareness of the risk" the spill presented and dismissed his claims with prejudice. Mr. Austin appealed and the Fifth Circuit Court of Appeals who reviewed the District Court's granting of the summary judgment. In the Court's review of the premises liability claim, the Court determined that the Texas Supreme Court has emphasized that an employer's duty to its employees may be identical "in all material respects" to a landlord's duty "to use reasonable care to make his premises reasonably safe for the use of his invitees." They went on to say that the Texas Supreme Court has repeatedly held that an employer owes a continuous, non-delegable duty to provide its employees with a safe work place. There was no genuine dispute that Mr. Austin was aware that the spill posed a risk, therefore, the Court considered the Texas court's treatment of a doctrine called the "no duty rule," and concluded that the Plaintiff's objective knowledge of the spill did not preclude his recovery as a matter of law. Applying various cases to the facts at issue, the Court determined that Mr. Austin's subjective

knowledge of the spill, standing alone, was not enough to support summary judgment in favor of Kroger.

With respect to the gross negligence issue, the Court held that considering the high evidentiary standard that applies to gross negligence claims, they AGREE and AFFIRM the District Court's dismissal of Mr. Austin's gross negligence claim. To recover for gross negligence in Texas, a Plaintiff must satisfy the elements of an ordinary negligence or premises liability claim and demonstrate clear and convincing evidence of "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others." *State v. Shumake*, 199 S.W. 3d 279, 289 (Tex. 2006).