2014 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2014:
PREMISES LIABILITY LITIGATION

By Gerald B. Lotzer

***In Re Whataburger Restaurants LP*, No. 11-0037-CV, (Tex. Sup. Ct., February 25, 2014)**

This is a *per curiam* opinion on a petition for writ of mandamus after the trial court granted plaintiffs' motion for new trial based on a juror's failure to disclose information during voir dire, even though there was no evidence that the non-disclosure probably caused injury. The defendant, Relator Whataburger Restaurants LP, filed a petition for writ of mandamus in the court of appeals, and the court of appeals denied the petition. Whataburger then sought a mandamus review before the Texas Supreme Court and the Court conditionally granted the petition and ordered the trial court to withdraw its new trial order and render judgment on the jury's verdict.

The case arises from a premises liability suit filed by Jose Acuna and others (collectively "Acuna") filed against Whataburger for injuries sustained in a fight outside one of its restaurants in El Paso, Texas. The jury selection process included a written questionnaire that inquired whether the potential jurors had "ever been a party to a lawsuit", and four of the seventy-five potential jurors disclosed that they had previously been defendants in a lawsuit. The Acuna's attorney did not ask any of the four jurors questions about their prior lawsuits and did not challenge or exercise peremptory strikes against them. Whataburger exercised strikes against two of them. Of the remaining two, Albert Villalva was seated on the jury. Neither party questioned, challenged or struck him even though he had disclosed he had been a defendant in a prior lawsuit.

"To warrant a new trial for jury misconduct, the movant must establish: (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury." See, *Golden Eagle Archery v. Jackson,* 24 S.W.3d 362, 372 (Tex. 2000); Tex. R. Civ. P. 327(a). "The complaining party has the burden to prove all three elements before a new trial can be granted." See, *Redinger v. Living, Inc.,* 689 S.W.2d 415, 419 (Tex. 1985)(citing *Fountain v. Ferguson,* 441 S.W.2d 506 (Tex. 1969)). Whether misconduct occurred and caused injury is a question of fact. See, *Golden Eagle Archery*, 24 S.W.3d at 372 (citing *Pharo v. Chambers Cnty.*, 922 S.W.2d 945, 948 (Tex. 1996)). The Court, upon reviewing the evidence, determined there is no evidence that such conduct resulted in probable injury. There is no evidence that Ms. Chavez's failure to disclose that she was a defendant in prior lawsuits caused Acuna injury. Although Acuna's attorney testified that if Ms. Chavez had disclosed that she had been a defendant in prior lawsuits, he would have questioned her about those suits and would have struck her as a juror. Generally, such testimony about what a person "would have" done or what "would have" happened under different circumstances is speculative and conclusory in the absence of some

evidentiary support. See, *In re Ethyl Corp*., 975 S.W.2d 606, 618-19 (Tex. 1998). Although four prospective jurors disclosed that they had been defendant in a prior lawsuit, Acuna's attorney did not question, challenge or strike any of them. One of them was seated on the jury and joined in a majority verdict. Acuna provided no evidence to suggest that Ms. Chavez or her prior experience as a defendant in a lawsuit was in some way meaningfully different than the other prospective jurors' experiences and Acuna's attorney's failure to question or to strike those jurors contradicts his conclusory claim that he "would have" questioned or struck Ms. Chavez. Because they hold that the trial court abused its discretion in granting a new trial, they conditionally granted relief and ordered the court to withdraw its order and render judgment on the verdict.

Christopher Henkel and Lisa Henkel v. Christopher Norman, **No. 13-0712, (Tex. Sup. Ct., August 22, 2014)**

At issue in this premises liability case is whether a homeowner's "don't slip" statement to a mail carrier was adequate as a matter of law to warn him of an icy sidewalk. The trial court determined that it was and granted summary judgment to the homeowner defendants. The court of appeals reversed and the Texas Supreme Court, agreeing with the trial court, reversed the court of appeals' judgment and remanded to the court of appeals for its consideration of the issues it did not reach.

The parties agreed that Norman was an invitee and therefore the Henkels owed him a legal duty as such. The Supreme Court held that the property owners' warning to an invitee of an unreasonably dangerous condition was adequate if, given the totality of the surrounding circumstances, the warning identifies and communicates the existence of a condition in a manner that a reasonable person would have perceived and understood. Here, temperatures had been and were well below freezing and there is no evidence that any other circumstance that a reasonable person might have contemplated would have precipitated Lisa's "don't slip" warning. Norman agreed that he heard her statement and the court held that it was adequate in light of the totality of the circumstances to alert a reasonable person in his person that there were slippery conditions caused the by freezing temperatures. Assuming, without deciding, that the ice on the Henkels' sidewalk created an unreasonably dangerous condition, Lisa adequately warned Norman. Accordingly, they reversed the judgment of the court of appeals and remanded the case to that court for its consideration of Norman's additional issues. (Note: It is interesting that prior decisions by the court that ice is a normally occurring condition when water freezes was not raised in this case.)