WINTER 2015 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

1. *Texas Department of Public Safety v. Raquel Guzman,* (Tex. Civ. App. – 13th Dist., Nov. 14, 2014).

This lawsuit arises out of a premises liability case in which the Plaintiff alleges that she slipped and fell while entering a Department of Public Safety ("DPS") office. This is an interlocutory appeal to challenge the trial court's order denying the DPS' plea to jurisdiction and motion to dismiss on the basis that:

1. The trial court erred because the DPS did not have actual knowledge of the alleged water on the floor; and

2. the trial court abused its discretion when it overruled the DPS' objections to Guzman's affidavit.

The Plaintiff Raquel Guzman alleges that she entered a DPS office in Palmview, Texas, to obtain a receipt of her Texas Drivers License renewal. As she was entering the DPS office, she allegedly slipped and fell on the floor injuring herself. After she fell, she noticed that there was water on the floor and that a DPS employee, identified as Armando Hilbrands, was mopping the floor nearby.

The DPS argued that even if Ms. Guzman was an "invitee", the DPS exercised reasonable care prior to Ms. Guzman's slip and fall. Guzman, however, had acknowledged in her brief on appeal that she was a "licensee", therefore the Court did not need to address the DPS' issue pertaining to the duty to an "invitee". The DPS also filed a plea to the jurisdiction and a motion to dismiss arguing that Guzman failed to plead facts sufficient to establish a waiver of governmental immunity under the Texas Tort Claims Act. In support of its plea, the DPS offered an affidavit by Armando Hilbrands that he did not see any water on the floor and that he had not yet mopped the entrance to the lobby where Guzman fell.

The Court on appeal held that a government entity has sovereign immunity from suit, however, the Texas legislature has provided a limited waiver of a city's immunity from suit for certain tort claims under the Act. See, Tex. Civ. Prac. & Rem. Code Ann. §101.025 (West, Westlaw through 2013 3d. C.S.); *State v. Shumake*, 199 S.W.3d 279, 283 (Tex. 2006). The Act includes, among other things, a limited waiver of the city's immunity from suits for "personal injury and death so caused by a condition or use of ... real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law." *Id.* §101.021(2). The act recognized premises claims, and the proof required to establish a breach of the duties owed for such a claim. Regarding a premises defect, the State owes a person the same duty a private landowner owes a licensee. *Id.* at §101.022(a); *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974). That duty requires that a landowner not injure a licensee by "willful, wanton or

grossly negligent conduct", and that the owner "use ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not." See, *Tennison*, at 562. The elements of a licensee's premises liability claim are:

(1) a condition of the premises created an unreasonable risk of harm to the licensee;

(2) the owner actually knew of the condition;

(3) the licensee did not actually know of the condition;

(4) the owner filed to exercise ordinary care to protect the licensee from danger either by not adequately warning the licensee of the condition or by not making the condition reasonably safe; and

(5) the owner's failure was a proximate cause of injury to the licensee.

See, *State Dep't of Highways & Pub. Trasnp. v. Payne*, 838 S.W.2d at 235, 237 (Tex. 1992).

The Court held that the DPS accident report and Guzman's affidavit creates a reasonable inference of Hilbrands' actual knowledge of the dangerous condition that suffices to establish the governmental unit's actual knowledge of the alleged premises' defect. The trial court did not err in denying the DPS' plea to the jurisdiction and motion to dismiss. The Court went on to hold that Guzman's statement was not conclusory that she "slipped on a recently mopped floor" since it is supported by her factual observations. Whether her conclusion is correct or not, is a question for the jury to decide. The trial court did not abuse its discretion in overruling the DPS' objections and the Court of Appeals affirmed the holdings of the trial court.

2. *QuikTrip Corporation v. Glenn Goodwin, Individually and on Behalf of the Estate of Melanie Therese Goodwin, and Peggy Goodwin, Individually and on Behalf of the Estate of Melanie Therese Goodwin* (Tex. Civ. App. – 2nd Dist., Nov. 13, 2014).

This lawsuit arises from the Texas Court of Appeals, Second District on appeal from the 393rd Judicial District Court of Denton County, Texas. The case is very fact specific. The case was tried before a jury which found Melanie Therese Goodwin 1% responsible and Ernest Reyes 71% responsible with QuikTrip being 28%, and awarded damages in excess of $2,246,250.00. QuikTrip appealed based on no foreseeability, no duty, and no liability. The Court, after reviewing the evidence, sustained Appellant's first issue, reversing the trial court's judgment, and rendered a take-nothing judgment.

On an early morning in September 2007, Ernesto Reyes saw Melanie Therese Goodwin at a QuikTrip store and briefly spoke with her, entered her car, and then brutally raped and murdered her away from the store. The split jury found Appellant QuikTrip liable for Melanie's tragic death and awarded damages to Appellees, Glenn Goodwin and Peggy Goodwin, each appearing individually and on behalf of Melanie's Estate. Melanie Goodwin had stopped at a QuikTrip store to buy food for her boyfriend. Prior to her arriving at the store, Ernesto Reyes had gone to the same store and the store manager allowed him to use the store's cordless phone

to try to get his ex-girlfriend to pick him up. After his girlfriend refused to pick him up, Mr. Reyes began talking to the QuikTrip's Assistant Manager, Chinedu Anyadike ("Chin"), telling Chin that he did not have a car, his mother had kicked him out of the house after he'd beaten up his brother, and asked if he could sleep at the store overnight. Chin told Reyes that he could not stay at the store. During the conversation, a male customer walked in and Reyes appeared to unsuccessfully ask him for a ride. At least five women, other than Ms. Goodwin, entered the store and made purchases, however, Reyes did not interact with the majority of them. Chin allowed Mr. Reyes, who said that he did not have any money, to get a fountain drink. Mr. Reyes again called his girlfriend saying that he had no place to go, that he had no friends, and that his girlfriend had broken the relationship off the day before because Reyes had broken his girlfriend's brother's nose. Reyes also told Chin that he had pending arrest warrants but did not disclose what crime the warrants concerned. Reyes said that he planned on remaining at the store until someone kicked him out. Chin even pled with Reyes' girlfriend by phone to come and get him, and Chin was told by the girlfriend that Reyes had stolen her car, whereas Reyes said that he'd only borrowed it. Reyes said that he was hungry and Chin gave him some food that Chin had brought from home. Chin again urged Reyes to call a friend for help and Reyes made more unavailing phone calls. Reyes eventually left the store but returned again asking to use the phone. Before Reyes could persuade anybody to pick him up he left again where he paced on the pavement outside the store's front windows. Apparently, Reyes got into Ms. Goodwin's car. After leaving QuikTrip's property, Reyes raped and brutally murdered Ms. Goodwin by blunt force and strangulation. Reyes fled to Mexico and after being extradited to the United States was subsequently arrested and convicted of murdering Ms. Goodwin. He was sentenced to life in prison.

In the Goodwins' Original Petition they asserted that QuikTrip was negligent because, among other acts or omissions, they had failed to provide a safe environment for Ms. Goodwin, an invitee, and had failed to warn her about the danger that Mr. Reyes posed. The Goodwins amended their Petition several times and, at the time of trial, sought wrongful death and survival damages based only on a premises liability claim. Specifically, that QuikTrip was liable because it failed to enforce its safety policies, had failed to provide a safe environment, and had failed to warn Melanie Goodwin of Reyes' dangerousness. The parties disputed whether the evidence provided an "occurrence" on QuikTrip's property to support a premises liability claim. The Court did not reach that question finding that QuikTrip did not owe a legal duty to the Plaintiff on the basis of foreseeability.

Premises liability is a special form of negligence in which the duty owed to the plaintiff, if any, depends on the status of the plaintiff, i.e. whether the plaintiff is an invitee, licensee, or trespasser. The Texas Supreme Court has repeatedly emphasized that, generally, Defendant has no legal duty to protect another from the criminal acts of a third person. *Graham Cent. Station, Inc. v. Pena*, No. 13-0450, 2014 WL 2790578 at 2 (Tex. June 20, 2014); *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 767 (Tex. 2010); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998). A defendant who controls premises has a duty to use ordinary care to protect [an invitee] from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitee. *Del Lago* at 767. The foreseeability requirement "protects the owners and controllers of land from liability for crimes that are so random, extraordinary, or otherwise connected from them that they could not

reasonably be expected to foresee or prevent the crimes." *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 17 (Tex. 2008). The Supreme Court has created two frameworks under which lower courts should analyze whether property owners have a duty to protect against third parties' criminal acts against invitees. First, where past criminal conduct has occurred at or near the premises, courts should examine the proximity, recency, frequency, similarity, and publicity of that conduct to determine whether similar future conduct was reasonably foreseeable. See, *Del Lago*, 307 S.W.3d at 767-68. The evidence shows that this QwikTrip store opened soon before the incident and that no emergent situations had occurred on the premises before Ms. Goodwin's death. The Court went on to find that the acts that Mr. Reyes reported to Chin were not as extensive in frequency or severity to suggest that instances of "domestic violence" between residents would result in a violent and sexual crime against Ms. Goodwin. After considering all of the facts that Chin knew or should have known before Mr. Reyes' rape and murder of Ms. Goodwin, the Court concluded as a matter of law that Ms. Goodwin's abduction, rape, and murder specifically, or even a violent and sexual crime against a stranger generally, was not foreseeable and that this event or similar events would result as a natural and probable consequence. Thus, they held that QuikTrip had no duty to protect Ms. Goodwin from that harm. Because that sustained QuikTrip's first issue, they were required to reverse the Trial Court's judgment and render a Take Nothing Judgment for QuikTrip. The Court declined to address QuikTrip's second through fifth issues in which QuikTrip contends the judgment should be reversed because the trial court committed error in the jury charge and because there was no evidence to prove proximate cause that an "occurrence" happened on QuikTrip's premises or the jury's allocation of fault.