Premises Liability Update and Certificates of Merit

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I. Premises Liability

A. Background

1. Condition of the premises or negligent activity
2. *Keetch v. Kroger*, 845 S.W.2d 262 (Tex. 1992).

B. Status of Plaintiff

1. Invitee
2. Licensee
3. Trespasser

C. Elements of Premises Liability Claim

1. Knowledge of Condition
    a. Actual
    b. Constructive
2. Condition Creates an Unreasonable Risk of Harm
3. Breach of Ordinary Care
    a. Failure to adequately warn plaintiff of the condition
    b. Failure to make the condition reasonably safe
4. Proximate Cause

D. Texas Civil Practice & Remedies Code Chpt. 95

1. Protection for Property Owners
2. Application of the Statute

II. Case Update

A. *Del Lago Partners, Inc. v. Smith*, No. 06-1022, 2010 Tex. LEXIS 284, 53 Tex. Sup. J. 514 (Tex. April 2, 2010).

This case concerned a bar owner's liability for injuries caused when one patron assaulted

another during a closing time melee involving 20-40 "very intoxicated" customers. The brawl erupted after 90 minutes of recurrent threats, cursing and shoving by two rival groups of patrons. Following nine days of conflicting evidence from 21 witnesses, the jury found the bar owner 51% liable and awarded the plaintiff roughly 1,480,000 dollars. The Court of Appeals affirmed the finding that a reasonable person who knew or should have known of the 1½ hours of ongoing heated verbal altercations and shoving matches between intoxicated bar patrons would reasonably foresee the potential for assaultive conduct to occur and take action to make the condition of the premises reasonably safe.

Del Lago principally argued that it had no duty to protect Smith from being assaulted by another bar customer. In a premises liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach. Whether a duty exists is a question of law for the court and turns on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant. Smith was an invitee, and generally a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.

The court noted that it has never held that a bar proprietor always or routinely has a duty to protect patrons from other patrons, and the court did not so hold in this decision either. The court also noted that it has never held that a duty to protect the clientele arises when a patron becomes inebriated, or when words are exchanged between patrons that leads to a fight, and does not so hold now. Generally, a premises owner has no duty to protect invitees from criminal acts by third parties. An exception has been recognized when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable. In analyzing the facts of this case using the elements outlined in *Timberwalk Apartments Partners, Inc. v. Cain* the court found that the circumstances had created a duty on Del Lago to use reasonable care to protect the invitees from imminent assaultive conduct. Del Lago observed, but did nothing to reduce, a 1½ hour verbal and physical hostility in the bar. During all this time, Del Lago continued to serve the drunken rivals who were engaged in repeated and aggressive confrontations. The court held that Del Lago had a duty to protect Smith because Del Lago had actual and direct knowledge that a violent brawl was imminent between drunk and belligerent patrons, and had ample time and means to defuse the situation.

Del Lago also argued that, assuming that it had a duty to Smith, the evidence was legally insufficient on the essential elements of breach of duty and proximate causation. The court held that a reasonable and fair-minded jury could find that Del Lago breached its duty of care to Smith by failing to take reasonable steps to diffuse the dangerous situation at the bar. The jury could have found that Del Lago breached its duty because security failed to monitor and intervene during the extended period when the two groups in the bar were becoming more and more intoxicated and antagonistic. At the time of the fight, the bar was the only place at the resort serving alcohol, and the security office was aware that the bar was crowded, but no witness saw any security in the bar during the 90 minutes of yelling,

threatening, cursing, and shoving between drunken patrons. The bar staff continued to serve drinks and did not call security until after the fight started. As a result, the court held there was legally sufficient evidence for the jury to conclude that Del Lago bar personnel were fully aware of the events transpiring in the bar and nevertheless unreasonably neglected to notify security.

Del Lago also argued that the case should have been submitted to the jury on a negligent activity theory of liability as opposed to premises liability. At the trial court level, Smith believed both theories were applicable to this case, but Del Lago objected to the submission of a negligent activity theory. The court held that Del Lago could not obtain a reversal on appeal on grounds that the jury should have decided the facts under a theory of liability that Del Lago itself persuaded the trial court not to submit to the jury.

Even though the court held this ground for reversal was waived by Del Lago, it still addressed the issue of whether the case should have been submitted on a negligent activity theory of liability. The court noted that it has repeatedly treated cases involving claims of inadequate security as premises liability cases. The court noted that this case was largely based on Del Lago's failure to properly use its security resources, and therefore did not warrant different treatment. Error in not allowing Smith to pursue a separate negligent activity claim, if any, was at Del Lago's behest. Even as to the allegation "that we herded them out the door," Del Lago argued at the charge conference that the evidence did not support a negligent activity claim because there was no direct correlation between Del Lago's conduct in trying to push the patrons out the door once the fight erupted and Smith's injury.

B. *Hernandez v. Brinker Int'l., Inc.*, 285 S.W.3d 152 (Tex.App.—Houston [14th Dist.] 2009, no pet.).

An air conditioning contractor fell through the roof of a restaurant while working on the air conditioning unit. The contractor sued the property owner for negligence in maintaining the roof. The property owner moved for summary judgment, contending that Chapter 95 of the Texas Civil Practice & Remedies Code precluded the plaintiff from recovering because the property owner never exerted control over the plaintiff's work on the air conditioning unit.

The Court of Appeals held that Texas Civil Practice & Remedies Code §95.002 was inapplicable because the contractor was working on the air conditioning unit, not the roof, at the time of his injury. The plain language of Section 95 states that it only applies to a claim "that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement." Because the air conditioning and the roof are separate improvements to real property, and the Plaintiff's claim arose from the condition of the roof, which he was not repairing or modifying, Chapter 95 did not apply.

C. *TXI Operations, L.P. v. Perry*, 278 S.W.3rd 763 (Tex. 2009).

A truck driver invitee sued a property owner for injuries sustained when his truck hit a pothole, throwing him into the roof of the cab of the truck. The property owner had posted a 15 M.P.H. speed limit sign, and therefore argued that the duty to warn was satisfied.

The Texas Supreme Court held that the speed limit sign had not discharged the property owner's duty to warn the truck driver of the dangerous condition created by the pothole as a matter of law, especially in light of the evidence that the driver was traveling at the posted speed limit when his truck hit the pothole and caused the driver's resulting injuries.

D. *City of Waco v. Debra Kirwan, Individually and as Representative of The Estate of Brad McGehee*, 53 Tex. Supp. J. 140 (Nov. 20, 2009)

In this case, the Supreme Court was considering whether a landowner owes a duty, under the Recreational Use statute, to recreational users to warn or protect them against the danger of a naturally occurring condition or otherwise refrain from gross negligence with respect to the condition. The court found that a landowner owes no such duty.

On April 24, 2004, Brad McGehee was watching boat races in Cameron Park, a municipal park in the City of Waco. McGehee was sitting on top of a cliff in an area known as Circle Point, when the plaintiffs alleged a solid rock ground collapsed underneath McGehee, causing him to fall approximately 60 feet to his death.

The Municipal Services Director for the City of Waco swore in an affidavit that the cliff was a naturally occurring cliff consisting of loose rock and natural cracks, that it was not created by the City of Waco nor had the City altered, modified, or excavated the limestone cliff beyond the stone wall in front of the cliff.

Plaintiff filed a premises liability suit against the City of Waco, alleging that McGehee's death was proximately caused by the gross negligence of the City, thus waiving the City's immunity against suit and liability under the Texas Tort Claims Act. While the original lawsuit was pending, the Texas Supreme Court issued its decision in *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006). *Shumake* was another case which addressed the Recreational Use statute and defined gross negligence as "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others." As evidence of the City of Waco's subjective awareness of the cliff's alleged extreme degree of risk, Kirwan relied on a student report which had been submitted to the City and had warned of falling rocks in Cameron Park and had recommended the use of warning signs. As evidence of the City's alleged conscious indifference to these risks, Kirwan cited the lack of any signs specifically warning of the risk of fatality resulting from the condition of the Cameron Park premises and evidence showing that despite the fact that other park patrons had died or had been seriously injured by the condition, the City continued to allow park patrons into the area with the unstable rock.

The City responded by filing a Second Amended Plea to the Jurisdiction arguing that Kirwan's pleadings affirmatively negated the court's jurisdiction. More specifically, the City relied on *Shumake* to argue that as a matter of law a landowner may not be grossly negligent for failing to warn of the inherent dangers of nature. The trial court agreed and signed an order dismissing the case against the City.

The Court of Appeals reversed the trial court's judgment and remanded, reasoning that *Shumake* did not suggest that all natural conditions are per se open and obvious or that a natural condition may never serve as a basis of premises defect claim. Instead, the Court of Appeals held that the Recreational Use statute permits premises defect claims based on natural conditions as long as the condition is not open and obvious and the plaintiff furnishes evidence of the defendant's alleged gross negligence. The Court of Appeals concluded that Kirwan's pleadings and evidence raised fact issues as to the City's alleged gross negligence.

While noting that the Recreational Use statute was enacted to encourage government and private parties to open their land to the public, the Texas Supreme Court stated it is generally unreasonable and unduly burdensome to ask a landowner to seek out every naturally occurring condition that might be dangerous and then warn of the condition or make it safe. In most circumstances, the court noted, the magnitude of the burden in requiring a landowner to make perfectly safe, or post signs warning of, every potentially dangerous naturally occurring condition on his property would be immense. As a result, the court determined that, with some exceptions that did not apply in this case, a landowner generally owes no duty under the Recreational Use statute to warn or protect against the dangers of natural conditions, and the City did not owe McGehee a duty in this case. The judgment of the Court of Appeals was therefore reversed and the case was dismissed with prejudice.

E. *Haney v. Jerry's GM, Inc.*, No. 08-07-00183-CV (Tex.App.—El Paso, Feb. 12, 2009), 2009 Tex. App. Lexis 1056.

This was appeal from a summary judgment dismissing plaintiff's premises liability and negligent activities suit. Plaintiff slipped on ice located in the parking lot of a car dealership where he was making a vehicle exchange. The Court of Appeals affirmed the trial court's dismissal.

Plaintiff was employed by a company transporting dealer trade vehicles. On December 9, 2005, Mr. Haney was told a trade had been completed, and that he would need to drive to Weatherford, Texas to exchange a Chevrolet Silverado. Mr. Haney knew there had been an ice storm in Weatherford three days before his trip. He first encountered ice upon arriving at the dealership. He saw the ice, and found a spot to park in front of the showroom where the ice had already melted. As Mr. Haney was getting ready to unlock the truck he was to transport, he slipped on a patch of ice he did not see. Mr. Haney knew that there was ice present on the lot, but did not think there was any where he was trying to get into the truck.

Upon his return to Kerrville, Texas, Plaintiff went to the emergency room and was treated and released. A few days later, Plaintiff went to see an Orthopedist and was diagnosed with

a broken fibula and L-2 compression fracture of his spine. Mr. Haney then filed suit under premises defect and negligent activity theories of recovery.

Plaintiff tried to distinguish his case from other cases where courts have held that a landowner is not responsible for a naturally occurring condition by arguing that a sales lot of a dealership is its retail area and is therefore distinguishable from the other cases. The Court of Appeals disagreed and found that it was still just a parking lot. The court therefore ruled consistently with the other Courts of Appeals that have addressed similar issues and held that naturally forming ice is not an unreasonably dangerous condition that would impose liability on a premises owner/operator.

F. *Tex. Dept. of Transportation v. Gutierrez*, 52 Tex. Sup. J. 780, 2099 Tex. Lexis 300 (Tex. 2009).

This appeal posed the question whether loose gravel on a road is a "special defect" under Texas Civil Practice and Remedies Code sec. 101.022(b).

Stephanie Gutierrez was commuting to work on FM 624 in Wells County. TxDOT had repaired a portion of the road the previous night, but some excess gravel was left on the road. Gutierrez lost control of her vehicle on the gravel and pulled to the side of the road to inspect her car for damage. While standing near her vehicle, Gutierrez was struck by a second driver that lost control of his vehicle on the same loose gravel.

Gutierrez sued TxDOT asserting that the loose gravel constituted a special defect. The jury returned a verdict for Gutierrez. TxDOT filed a post-trial plea to the jurisdiction, which was denied. TxDOT then filed an interlocutory appeal, but a divided court of appeals held the loose gravel was a special defect and the jury had concluded TxDOT had failed to give an adequate warning of the condition.

The Texas Supreme Court first noted the Tort Claims Act does not define "special defect" but likens it to "excavations and obstructions." The central inquiry then is whether the condition is of the same type or class as excavations and obstructions. Because loose gravel does not physically block the road and does not impair a car's ability to travel on the road in the same manner as an excavation or obstruction, it falls outside the special defect class as a matter of law. As a result, the judgment in favor of Gutierrez was reversed and the case dismissed.

***G. Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 483 (Tex. 2009).**

Entergy contracted with IMC to assist in the performance of certain maintenance, repair and other technical services at its various facilities. The parties agreed that Entergy would provide, at its own cost, workers' compensation insurance for IMC's employees through an owner provided insurance program, or OPIP, in exchange for IMC's lower contract price.

John Summers, an IMC employee, was injured while working at Entergy's Sabine Station plant. He applied for, and received, benefits under the workers' compensation policy purchased by Entergy. He then sued Entergy for negligence. Entergy moved for summary judgment on the ground that it was a statutory employer immune from common-law tort suits. *See TEX. LAB. CODE § 408.001(a)*. The trial court agreed and granted judgment for Entergy. The court of appeals reversed.

The question for the Texas Supreme Court was then whether a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to that contract, is entitled to the benefit of the exclusive remedy defense generally afforded only to employers by the Texas Workers' Compensation Act. While the Act specifically confers statutory employer status on general contractors who qualify by providing workers' compensation insurance for their subcontractors' employees, it says nothing about whether premises owners who act as their own general contractor are also entitled to employer status, and thus the exclusive remedy defense.

The Supreme Court held that the exclusive remedy defense for qualifying general contractors is, likewise, available to premises owners who meet the Act's definition of "general contractor," and who also provide workers' compensation insurance to lower-tier subcontractors' employees. Because Entergy Gulf States, Inc. met the definition of "general contractor" under the Act, and because Entergy otherwise qualified under the Act as having provided workers' compensation insurance under its written agreement with International Maintenance Corporation (IMC), it was entitled to the exclusive remedy defense against the negligence claims brought by IMC's employee, John Summers. The court of appeals' judgment was reversed and judgment rendered for Entergy.

H. *Denton County v. Beynon*, 283 S.W.3d 329 (Tex. 2009).

At issue in this case was whether a floodgate arm next to a rural roadway constituted a special defect under the Texas Tort Claims Act (TTCA). The court held that the floodgate arm did not meet the narrow definition of a special defect under the TTCA. The TTCA does not define "special defect" but likens it to "excavations or obstructions" that exist "on" the roadway surface. The court held the floodgate arm was not of the same kind or class as an excavation or obstruction, nor did it pose a threat to "ordinary users" in the manner that an excavation or obstruction blocking the road does. As a result, the Texas Supreme Court reversed the court of appeals' judgment and dismissed the case.

I. *Scott & White Mem'l Hosp. v. Fair*, 2008 WL 2388018 (Tex. App. – Austin 2008), pet granted, 52 Tex. Sup. Ct. J. 1140 (August 21, 2009).

The issue in this case was whether Texas should adopt the "Massachusetts Rule" that accumulated ice in its natural condition does not present an unreasonable risk of harm. The trial court granted Scott & White's summary judgment and the court of appeals reversed.

The Texas Supreme Court stated that while a natural accumulation of ice or mud does pose a risk, as a matter of law it does not present an unreasonable risk of harm. As a result, the judgment of the court of appeals was reversed and judgment was rendered that the plaintiffs take nothing.

III. Certificate of Merit – Texas Civil Practice & Remedies Code Chpt. 150

A. Legislative History

1. 2005 Amendments
    a. Interlocutory appeal
    b. Application to registered professional land surveyors
    c. Application to arbitration proceedings
    d. Application to rendition of professional services as opposed to only allegations of professional negligence

2. 2009 Amendments
    a. Application to landscape architects
    b. Reducing affiant's qualification to "knowledgeable" in the same area as defendant
    c. Expansion of affidavit requirement to set forth the negligence behind each theory of recovery

B. Application to Claims other than Negligence

1. *Landreth v. Las Brisas Council of Co-Owners*, Inc., 285 S.W.3d 492 (Tex. App. – Corpus Christi 2009, no pet.).

    Las Brisas retained Cotton Landreth to provide architectural services in conjunction with the renovation work performed by F&G. Landreth did not provide architectural services as Las Brisas expected and suit was filed complaining of breach of agency, breach of fiduciary duty, negligence, negligent misrepresentation, and breach of contract. In holding that plaintiff's case should be dismissed for failure to provide an affidavit from an expert that practices in the same area as the defendant, the court commented that the certificate of merit requirement applies to all causes of action arising from the provision of professional services. This was in contradiction to prior rulings of the San Antonio Court of Appeals that any non-negligence cause of action was not subject to the Chapter 150 requirements. The court of appeals therefore reversed and remanded for the trial court to make a determination as to which of the causes of action were for professional services.

2. *Ashkar Eng'g Corp. v. Gulf Chem. & Metallurgical Corp.*, No. 01-09-00855-CV, 2010 Tex. App. Lexis 769 (Tex. App. - Houston [1st Dist.] Feb. 4, 2010, no pet.).

This was an interlocutory appeal in an industrial construction design defect suit. Ashkar appealed from the trial court's order denying its motion to dismiss the suit brought my GCMC. Ashkar contended that the suit was a claim against a professional engineering firm and that GCMC failed to file a certificate of merit pursuant to Tex. Civ. Prac. & Rem. Code 150.002.

The court agreed that GCMC failed to file the required certificate of merit and in analyzing GCMC's claims noted that despite the title of the claims for breach of contract and breach of warranty, the claims were really negligence claims because the acts or omissions complained of amount to a claimed departure from accepted standards of practice for engineers. As such, the court held that GCMC failed to timely comply with section 150.002 and the trial court was required, on Ashkar's motion, to dismiss the suit.

3. UOP, L.L.C. f/k/a Universal Oil Products v. Kozak, No. 01-08-00896-CV, 2010 Tex. App. Lexis 3876 (Tex. App. – Houston [1st. Dist.] May 20, 2010, no pet.).

   UOP designed a Sun Oil refinery in Duncan, Oklahoma and afterwards acted as general contractor for the construction. Plaintiff worked at the facility and later died of mesothelioma, a cancer which is usually linked to asbestos exposure.

   The sole claim that survived UOP's motion to dismiss for plaintiff's failure to file the certificate of merit was the claim for failure to warn of the hazards of working around asbestos products. As a result, the sole issue for the court of appeals was to determine whether a claim against an engineering firm for failure to warn is a claim for negligent acts, errors, or omissions arising out of the provision of professional services. Ultimately, the court held that the failure to warn claim, whether against UOP in its capacity as a designer or general contractor, was one for negligent acts arising out of the provision of professional services and therefore should have been dismissed along with the other claims.

4. Curtis & Windham Architects, Inc. v. Williams, 315 S.W.3d 102 (Tex. App. – Houston [1st Dist.] 2010, no pet.).

   Claims against an architectural firm for systematic and pervasive over-billing did not implicate the architect's "education, training, and experience" in applying "special knowledge or judgment." Therefore, the court held it did not make any sense to require the filing of a certificate of merit with an affidavit from a professional architect when plaintiff's claims do not concern any alleged act of negligence.

C. Claims against out of state professionals

1. *DLB Architects, P.C. v. Weaver*, 305 S.W.3d 407 (Tex. App. – Dallas 2010, no pet.).

   The trial court concluded an affidavit in support of the certificate of merit was not

required for a claim against architects not registered in Texas. The court of appeals reversed, holing that by the plain language of Chapter 150, the term "licensed architect" is not limited to those architects registered in Texas. The court noted that its interpretation is supported by the requirement that the architect submitting the affidavit in compliance with Chapter 150 is to be "licensed in this state." Accordingly, the trial court's decision was reversed.