2015 YEAR IN REVIEW

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.

3. *Edith Suarez, Individually and as Surviving Parent of A.S. and S.S., Deceased, and as Surviving Spouse of Hector Suarez, Deceased v. The City of Texas City, Texas* (Tex. Sup. Ct., No. 13-0947, opinion delivered June 19, 2015).

This is an interlocutory appeal to the City of Texas City, Texas' plea to the jurisdiction in a premises-liability case arising from the drowning deaths of three family members at a man-made beach. The surviving spouse and mother of the decedents alleges that the drowning deaths resulted from a peculiar risk of harm created by a confluence of artificial and natural conditions at the beach and that the municipality was "grossly negligent" in failing to warn or protect the public against those dangers. The trial court denied the jurisdictional plea, but the court of appeals reversed and dismissed the claims for want of jurisdiction. *See*, No. 01-12-00848-CV, 2013 WL 867428, at *1 (Tex.App. – Houston [1st Dist.] March 7, 2013). At issue is whether there is some evidence of the municipality's liability to invoke the Texas Tort Claims Act's waiver of governmental immunity, as limited by the recreational use statute. *See*, TEX. CIV. PRAC. & REM. CODE §§ 75.003(e)-(g), 101.021-.022, .025.

The Texas Tort Claims Act generally waives governmental immunity in premises liability cases when a governmental unit breaches the duty of care that a private party would owe to a licensee. *Id.* at §75.003, 101.021-.022, .025. If a premise is open to the public for recreational activities, however, the recreational use statute elevates the burden of proof required to invoke the Tort Claims Act's immunity waiver by classifying recreational users as trespassers and requiring proof of gross negligence, malicious intents, or bad faith. *Id.* at § 75.002; *State v.*

Shumake, 199 S.W.3d 279, 281 (Tex. 2006). In previous cases applying these statutes, the court has held that landowners owe a duty to warn or protect recreational users when "artificial conditions create dangerous conditions that are not open and obvious, but have no duty to warn or protect against conditions that are open or inherent, and thus obvious, regardless of whether such conditions are naturally or artificially created." *Id.* at 281-82 (man-made culvert created dangerous, hidden undertow) and compared with *City of Waco v. Kirwan*, 298 S.W.3d 618, 626 (Tex. 2009) (edge of cliff is inherently dangerous); and to *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 660 (Tex. 2007)(artificial condition was visible and known to recreational cyclist).

The allegation in this case was that artificial conditions interacted with natural conditions to exacerbate and increase inherent risks well beyond what a reasonable recreational user might reasonably anticipate. In other words, a convergence of natural and artificial conditions as well as open, inherent, and latent dangers.

Regardless of whether a duty existed, however, when gross negligence is alleged, immunity is waived only if the governmental entity (1) knew about a condition of the property giving rise to an extreme degree of risk and (2) proceeded with conscious indifference to the rights, safety, or welfare of others. *Shumake*, 199 S.W.3d at 287; and TEX. CIV. PRAC. & REM. CODE § 41.001(11). The court construed the record in the light most favorable to the Petitioner, and found that there was no evidence that the municipality had knowledge of a concealed condition at the beach creating an extreme risk of harm and therefore affirmed the court of appeals judgment with regards to the cause of action for gross negligence.

The remaining issues on appeal were limited to the existence of evidence to support Texas City's liability under the recreational use statute as it pertains to the Texas Tort Claims Act's waiver of immunity.

After construing the evidence and every reasonable inference in Suarez's favor, the court concluded that there was no evidence from which a reasonable factfinder could conclude that Texas City possessed actual, subjective awareness that the combined effect of the Dike's size and location, along with the deposition of fine-grained sediment, altered the natural conditions in the water at the beach. Likewise, they found that there was no evidence that Texas City knew about or appreciated the gravity of any danger created by the combined effect of man-made and natural conditions in the water at the beach. Because the evidence failed to raise a general and material fact issue concerning gross negligence, Texas City retained immunity from suit and the trial court lacked jurisdiction over Suarez's claim. Suarez failed to produce evidence sufficient to invoke the Texas Tort Claims Act's waiver of immunity from suit and they affirm the court of appeals judgment dismissing the petitioner's claims for want of jurisdiction.

4. ***Magdalena Adrienna Abutahoun, Individually and as Personal Representative of the Heirs and Estate of Robert Wayne Henderson, Deceased, and Tanya Elaine Henderson, Individually in her own right and as next friend of Z.Z.H., a Minor v. The Dow Chemical Company*** **(Tex. Sup. Ct., No. 13-0175, opinion delivered May 8, 2015).**

The Dow Chemical Company contracted with Win-Way Industries to install insulation on

a system of pipelines at Dow's facility in Freeport, Texas. Robert Henderson was a Win-Way employee and assisted with insulation work at the facility from 1967 to 1968. The insulation materials contained asbestos. Mr. Henderson was allegedly exposed to asbestos dust by Dow employees who were installing, sawing, and removing asbestos insulation nearby. Prior to his death, Mr. Henderson testified that he was doing the same kind of work as Dow employees and that he was frequently, regularly, and proximately exposed to asbestos-based insulation as a bystander to Dow's employees performing similar insulation work nearby. Eventually, he was diagnosed with mesothelioma. The case was originally filed in the 160th Judicial District Court of Dallas County but was transferred to the asbestos multi-district litigation ("MDL") pretrial court in Harris County for pretrial proceedings. *See*, TEX.GOV'T CODE § 74.162.

Dow moved for summary judgment arguing that Chapter 95 of the TEXAS CIVIL PRACTICES & REMEDIES CODE applied to the Hendersons' negligence claims against Dow and precluded any recovery. The court, in a case of first impression, interpreted Chapter 95 of the TEX. CIV. PRAC. & REM. CODE which relates to limitations on a property owner's liability for injury, death, or property damage as an independent contractor.

The Court of Appeals correctly held that Chapter 95 applies to independent contractors' claims against property owners for damages caused by negligence when those claims arise from the condition or use of an improvement to real property whether the independent contractor constructs, repairs, renovates, or modifies the improvement. Chapter 95 limits property owner liability on claims for personal injury, death, or property damage caused by negligence, including claims concerning a property owner's own contemporaneous negligent activity.

After analyzing the facts specific to this case, the court held that Chapter 95 applies to all independent contractor claims for damages caused by a property owner's negligence when the requirements of § 95.002(2) of the TEX. CIV. PRAC. & REM. CODE are satisfied. They affirmed the court of appeals judgment that "[t]he plain meaning of the text of Chapter 95 does not preclude its applicability where a claim is based upon the negligent actions of the premises owner." In sum, the court held that the Hendersons failed to challenge the court of appeals' conclusion that: (1) their specific claims against Dow, as pleaded and applied, fell within Chapter 95, and (2) their claims were barred by Chapter 95 because the Hendersons did not establish Dow's liability under § 95.003. This alleviated the need to address remaining issues Dow raised on appeal.