STATE OF TEXAS
RETAIL COMPENDIUM OF LAW

Michael P. Sharp, Sr. Partner
William M. Toles, Partner
Sabina I. Yushkevich, Associate
Fee, Smith, Sharp & Vitullo, LLP
Three Galleria Tower
13155 Noel Road, Suite 1000
Dallas, Texas 75240
Tel: (972) 980-3255
Email: msharp@feesmith.com
wtoles@feesmith.com
syushkevich@feesmith.com
Website: www.feesmith.com

PREMISES LIABILITY

I. INTRODUCTION

A. Introduction

Premises Liability is a branch of negligence law. It is generally governed by negligence principles, but premises liability law establishes the duties owed by an owner/occupier of land to persons who come on to the land to protect them from injury on account of unreasonably dangerous conditions or activities on the property. The Supreme Court has distinguished claims based upon premises conditions from claims based upon negligent activities in *Keetch v. Kroger Co.,* 845 S.W.2d 262, 264 (Tex. 1992). Recovery on a negligent activity theory requires that the person have been injured by a contemporaneous result of the activity itself rather than by a condition created by the activity. *Id.* In contrast, in a premises liability case, the plaintiff's injury must have been caused by a condition of the premise or a prior activity on the premises which was no longer ongoing. *Id*. A number of states have moved away from traditional doctrine based upon the status of the entrant to a more generalized obligation by the possessor of the land to those who enter it. [See] *Nixon v. Mr. Property Management Co.,* 690 S.W.2d 546, 552-554 (Tex. 1985) (Kilgarlin, J. concurring); *Wal-Mart-Stores, Inc. v. Garza,* 27 S.W.3d 64, 69-71 (Tex. - San Antonio 2000, pet denied) (Hardeberger, J. - concurring). Texas, however, maintains the traditional premises liability doctrine that the duty of the owner or occupier of the land depends upon the legal status of the injured party, i.e., whether the plaintiff was an invitee, a licensee, or a trespasser. *Motel 6, G. P., Inc. v. Lopez,* 929 S.W.2d 1, 3 (Tex. 1996).

Examples of cases found to involve negligent activity include:

- Injury occurred when box was dropped on Plaintiff's head while it was being removed from the shelf. *Wal-Mart Stores, Inc. v. Garza*, 27 S.W.3d 64, 67 (Tex. App.—San Antonio 2000, pet. denied).
- Injury occurred when employee was moving merchandise from one cart to another, *Sibai v. Wal-Mart Stores, Inc.*, 986 S.W.2d 702, 707 (Tex. App.—Dallas 1999 no pet.)

Injuries arising from a condition on land can only be redressed under the theory of premises liability and this cannot be avoided through "adroit phrasing of the pleadings to encompass design defects, *per se* negligence or any other theory of negligence". *Brinker v. Evans*, 370 S.W.3d 416, 421 (Tex. App.—Amarillo 2012, pet. denied).

B. PERSONS OWING A DUTY

1. Owners or Occupiers of Property

An owner or occupier of land generally is obligated by the duties imposed by the premises liability doctrine. [See] *Clayton W. Williams, Jr., Inc. v. Olivo,* 952 S.W.2d 523, 527 (Tex. 1997) ("an owner/occupier of land generally has a use reasonable care to make and to keep the premises safe for business invitees"). An occupier is considered to be the person in control of the premises for the purposes of premises liability. [See] *Butcher v. Scott,* 906 S.W.2d 14, 15 (Tex. 1995) ("in order to be held liable as an owner occupier, the party must be in control of the premises"). In *Butcher,* the Supreme Court distinguished between a party's physical presence on the property from possession of the property. 906 S.W.2d at 15. In fact, control is often the most critical issue. Ownership is not synonymous with control. A property owner who does not have control over the property is generally not liable under the doctrine of premises liability because an owner generally does not have the right to control property which has been leased. *DeLeon v. Creely,* 972 S.W.2d 808, 812 (Tex. App. —Corpus Christi 1998, no pet.).

To recover against the owner or operator of a property, the plaintiff must prove the following elements:

- the owner or operator of the premises had actual or constructive knowledge of a condition on the premises;
- that the condition posed an unreasonable risk of harm;
- that the owner or occupier did not exercise reasonable care to reduce or eliminate the risk; and
- that the owner or occupier's failure to use such care proximately caused the plaintiff's injuries.

Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 296 (Tex. 1983); *Hernandez v. Kroger Co.*, 711 S.W.2d 3, 4 (Tex, 1986) and *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). There is older case dictum that owner or occupier of a premises is considered to have constructive knowledge of unreasonably dangerous conditions when a reasonably careful inspection would have revealed them. *Adam Dante Corp. v. Sharpe,* 483 S.W.2d 452,455 (Tex. 1972); *Corbin, supra* at 295.

CONDITION POSED AN UNREASONABLE RISK:

In *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406 (Tex. 2006), the Supreme Court clarified the duty of a premises owner. In that case, Mary Taylor had sued Brookshire for injuries she sustained to her knee when she slipped and fell on a piece of partially melted ice in front of a self-service soft drink dispenser in the Brookshire Grocery Store. On appeal, the Texas Supreme Court addressed two questions:

- Was the soft drink dispenser unreasonably dangerous itself, or was the ice the unreasonably dangerous condition? and
- If ice was unreasonably dangerous condition, was Brookshire aware of that unreasonably dangerous condition or should it have been?

Evidence established that the soft drink dispenser caused ice to fall to the floor on a daily basis; that users were prone to spill ice from time to time; and that ice on the floor was a hazard to customers that needed to be cleaned daily. Ms. Taylor had slipped on a portion of the floor on a partially melted piece of ice where safety mats were not present. A Brookshire employee admitted that more mats could have been used and warning signs posted of ice being on the floor. Citing *Wal-Mart Stores, Inc. v. Reece,* 81 S.W.3d 812, 814 (Tex. 2002), the Supreme Court declared that Brookshire had a duty to use reasonable care to protect Ms. Taylor, its invitee, from any reasonably dangerous condition of which it had actual constructive knowledge. In rejecting Ms. Taylor's argument that the ice dispenser was the unreasonably dangerous condition, the court pointed out that the ice, not the soft drink dispenser, was the focus of the unreasonably dangerous condition inquiry. Citing, *CMH Homes, Inc. v. Daenen,* 15 S.W.3d 97, 100-101 (Tex. 2001) and *City of San Antonio v. Rodriguez,* 931 S.W.2d 535, 536-537 (Tex. 1996) (per curium) as well as *H.E. Butt Grocery Co. v. Resendez,* 988 S.W.2d 218, 219 (Tex. 1999) (per curium). The court felt that the only unreasonably dangerous condition in the case was ice on the floor. Specifically, the court pointed out that no evidence suggested that the soft drink dispenser was set up such that a store patron would be more prone to slip and fall on ice. Further, the court pointed out that if Ms. Taylor's reasoning was followed to its logical conclusion, then the entire Brookshire store could be unreasonably dangerous since stores are not "foolproof." Finding that the unreasonably dangerous condition was ice in the floor, the court then examined the record as to whether or not Brookshire employees had constructive or actual knowledge of ice on the floor when Ms. Taylor suffered her injuries. Citing, *Wal-Mart Stores, Inc. v. Reece, supra* at 815-816, the court found that the ice had not fully melted or been on the floor long enough to give Brookshire constructive notice, and Brookshire did not have actual knowledge of ice being on the floor at the time Ms. Taylor slipped. Therefore, the Texas Supreme Court reversed and rendered Judgment in Brookshire's favor. In a well reasoned dissent, Justice O'Neill joined by Justice Medina, traced the recent history of premises liability case law and argued that Ms. Taylor presented evidence from which a jury could conclude that the manner in which the soft drink dispenser was arranged frequently caused ice to fall to an exposed tile floor, thereby creating a dangerous condition of which

Brookshire was aware. Reasoning that although Brookshire may not have been able to prevent ice from falling on the floor, it still had a duty to customers to prevent the ice that did fall from causing a dangerous condition, Justice O'Neill would have remanded the case back to trial. This author respectfully recommends that *Brookshire* bears close scrutiny and reading whether a lawyer is prosecuting or defending a premises liability "slip and fall" case.

Texas courts have determined there are some conditions which, as a matter of law, do not pose an unreasonable risk of harm:

- An entrance ramp at a car dealership without handrails was not unreasonably dangerous. *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161 (Tex. 2007).
- Stairs were not an unreasonably dangerous condition even though the premises underneath the stairs would eventually become unstable with use. *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97 (Tex. 2000).
- A self-service display of loose grates with no warning cones was not an unreasonably dangerous condition. *H.E. Butte Grocery Co. v. Resendez*, 988 S.W.2d 218 (Tex. 1999).
- Icy bridge during cold, rainy weather. *State Dept. of Highways and Public Transportation v. Kitchen*, 867 S.W.2d 784, 786 (Tex. 1993) per curiam.
- Mud that accumulates naturally on outdoor concrete slab. *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 675 (Tex. 2004).
- Naturally occurring ice which accumulates without assistance or involvement of unnatural contact *Scott & White Mem'l. Hosp. v. Fair,* 310 S.W.3d 411, 414 Sup. Ct. Tex. 2010; *Callahan v. Vitesse Aviation Servcs., LLC,* 213 Tex. App. Lexis 4095 at *22-23 (Tex. App.—Dallas March 29, 2013, no pet. h.).
- Dirt in its natural state. *See, Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 287 (Tex. 1996).

2. Former Owners

Normally, prior owners of property owe no duty to keep a property safe after transfer. *Kelly v. Lin Television of Texas, L.P.*, 27 S.W.3d 564, 571 (Tex. App. —Eastland 2000 pet. denied); [See] *Lefmark Management Co. v. Old*, 946 S.W.2d 52,54 (Tex. 1997). Some courts of appeals have adopted the view stated in Restatement (Second) of Torts §353. *See, First Financial Dev. Corp. v. Hughston*, 797 S.W.2d 286, 290 - 291 (Tex. App.—Corpus Christi 1990, writ denied); *Davis v. Esperado Mining Co.*, 750 S.W.2d 887, 888 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Moeller v. Ft. Worth Capital Corp.*, 610 S.W.2d 857, 861 (Tex. Civ. App.—Ft. Worth 1988, writ ref'd. n.r.e.). The restatement view provides an exception to the general rule when the transferor of real property fails to disclose or actively conceals a dangerous condition that may cause injury. The exception, however, will not come into play where the new owner discovers or should have discovered the dangerous condition and has had a reasonable opportunity to take precautions. *Hughston*, 797 S.W.2d at 291. In *Lefmark*, the Supreme Court specifically noted that it had never adopted a §353. The court of appeals in *Lefmark* had used §353 to find a former property manager shopping center liable for injury caused by criminal activity at a shopping center. The Supreme Court held that §353 did not apply to the circumstances in *Lefmark* and left open the question of whether it would adopt §353. Although the Supreme Court refused to rule on this issue, it may be noteworthy that it declined to review most of the cases in which courts of appeals cited and relied upon §353. *See, Lefmark*, 946 S.W.2d at 54.

3. Persons in Control

A person who is not an owner or an occupier but who exercises control over the premises has the duty to keep the premises in a safe condition. *Wal Mart Stores, Inc. v. Alexander*, 868 S.W.2nd 322, 324 (Tex. 1993). Lessee was liable to a person who slipped on ramp in front of defendant's store, which was

not part of the lease premises, because the defendant built and exercised control over the ramp. The control that the defendant exercised over the premises must relate to the condition or activity that caused the injury for the defendant to be liable. *See, Exxon Corp. v. Tidwell,* 867 S.W.2d 19, 23 (Tex. 1993) (the focus of inquiry should be on the power to control the alleged security defects rather than control over general operations). A defendant's duty, however, does not extend beyond the limits of its control of the premises. *LaFleur v. Astrodome - Astro Hall Stadium,* 751 S.W.2d 563, 565 - 566 (Tex. App.—Houston [1st Dist.] 1988, no writ).

4. Persons Who Create Dangerous Conditions

Under some circumstances, one who creates a dangerous condition may owe a duty even though he or she is not in control of the premises when the injury occurs. *Science Spectrum, Inc. v. Martinez,* 941 S.W.2d 910, 912 (Tex. 1997); *City of Denton v. Page,* 701 S.W.2d 831, 835 (Tex. 1986); *Strakos v. Gehring,* 360 S.W.2d 787, 790 (Tex. 1962).

5. The Persons Who Agree to Fix the Dangerous Condition

One who agrees to make safe a known dangerous condition of real property owes a duty of due care. *Lefmark,* 946 S.W.2d at 54; *Page,* 701 S.W.2d at 835

6. Special Situations

a. Landlords and Tenants

Generally, landlords are not liable for injuries occurring on lease premises within the control of their tenants. *Johnson County Sheriff's Posse, Inc. v. Endsley,* 926 S.W.2d 284, 285 (Tex. 1996). This rule stems from the notion that a lessor relinquishes possession of the premises to the lessee. *Id.* Therefore, the tenant will normally be responsible for the lease premises while in control of it. However, there are several exceptions to the general rule. The lessor who makes repairs may be liable for injuries resulting from the lessor's negligence in making the repairs. *Endsley,* 926 S.W.2d at 285; *Flynn v. Pan Am. Hotel Co.,* 143 Tex. 219, 183 S.W.2d 446, 448 (1944). Lessor who conceals defects on lease premises of which the lessor is aware may also be liable. *Endsley,* 926 S.W.2d at 285. Finally, a lessor may be liable for injuries caused by defect on a portion of the premises that remain under the lessor's control. *Id.*; *Renfro Drug Co. v. Lewis,* 149 Tex 507, 235 S.W.2d 609, 618-619 (1950).

b. Independent Contractors

An owner or occupier generally has no duty to see that an independent contractor performs its work in a safe manner. *Redinger v. Living, Inc.,* 689 S.W.2d 415, 418 (Tex. 1985). A general contractor in charge of the premises is charged with the same duties as an owner or occupier. *Olivo,* 952 S.W.2d at 527. The owner or general contractor may be liable under two sub-categories of premises defects theory: (1) defects existing on the premises when the independent contractor/invitee entered; and (2) defects the independent contractor created in its work activity. *Coastal Marine Service of Texas v. Lawrence,* 988 S.W.2d 223, 225 (Tex. 1999); *Olivo,* 952 S.W.2d at 527. Under the first category, the premises owner or general contractor has a duty to inspect the premises and warn the independent contractors/invitees of dangerous conditions that are not open and obvious and that the owner knows or should have known exist. *Lawrence,* 988 S.W.2d at 225. A general contractor has a duty to inspect the premises and warn the independent contractor or invitee of dangerous conditions of which the general contractor knows or should know. *Olivo,* 952 S.W.2d at 527. Only concealed hazards, dangerous in their own right that are in existence when the independent contractor arrives on the premises fall into this sub-category of premises defects. *Lawrence,* 988 S.W.2d at 223.

The second sub-category is those defects that the independent contractor, including an injured employee, created by its work activity. *Lawrence,* 988 at 225; *Olivo,* 952 S.W.2d at 527. Normally, the premises owner/general contractor owes no duty to the independent contractor or its employee because the owner/general contractor or its employee has no duty to insure that an independent contractor performs its work in a safe manner. *Lawrence,* 988 S.W.2d at 225; *Olivo,* 952 S.W.2d at 527. However, a

premises owner or general contractor may be liable when the owner or general contractor retains the right of supervisory control over the work on the premises. The right to control must be more than a general right to order a work stop and start or to inspect progress. The supervisory control must relate to the activity that actually caused the injury and grant the owner/general contractor at least the power to direct the order in which the work is being done or the power to forbid it to be done in an unsafe manner. *Lawrence,* 988 S.W.2d at 225-226*; Olivo,* 952 at 528.

The duty of the owner/general contractor is commensurate with the control it retains over the contractor's work. *Elliott-Williams Co. v. Diaz,* 9 S.W.3d 801, 803 (Tex. 1999). If an owner/general contractor has no control over the independent contractor's work, then a legal duty does not arise. *Id.*

Chapter 95 of the Texas Civil Practice and Remedies Code should also be read and analyzed in prosecuting or defending this type of claim, especially construction cases. Section 95.003 declares that a property owner cannot be held liable for personal injuries, death or property damage to a subcontractor, contractor, or employee of either the contractor or subcontractor for failure to provide a safe workplace unless:

- the property owner exercises or retains some control over the manner in which work is performed other than the right to order the work to start or stop or to inspect progress, or receive reports; and
- the property owner had actual knowledge of the danger or condition resulting in the personal injury, death or property damage it failed to adequately warn.

Tex. Civ. Prac. & Rem. Code §95.003. Generally, exercise or retaining some control is an important element of proof which a plaintiff bears and results in the failure of a plaintiff to prevail. See, *Phillips v. The Dow Chemical Co.,* 186 S.W.3d 121 (Tex. App.—Houston [1st Dist.] 2005)(holding the owner of a chemical plant not liable for the death of a construction worker that resulted from a fall of scaffolding despite the owners safety regulations and rules.) *Clark v. Ron Bassinger, Inc.,*2006 WL 229901 (Tex. App.—Amarillo, 2006 not reported) (holding the general contractor on a housing construction project not liable when an independent plumbing contractor employee sustained injuries from falling through a skylight opening in the roof. Moreover, whether there is a contractual right of a property owner to control acts of independent contractors is normally a question of law for the court. *(Chi Energy, Inc. v. Uris,* 156 S.W.3d 873 (Tex. App.—El Paso 2005; rehearing overruled).

c. Tex. Civ. Prac. & Rem. Code 95.003

Tex. Civ. Prac. & Rem. Code 95.003 relieves duties that an owner, contractor or subcontractor owes. The owner, contractor or subcontractor must retain control and have actual knowledge of the dangerous condition. *Id.* at §95.003(1)(2). The control must be actual or contractual. *Elwood Tex. Forge Corp. v. Jones,* 214 S.W.3d 693, 698 (Tex. App. —Houston [14th Dist.] 2007, pet denied).

d. Tex. Civ. Prac. & Rem. Code §97.002

This statute limits the liability of a subcontractor to TxDOT. A contractor is not liable if it follows TxDOT's plans and specifications. This statute is strictly followed and held to require a contractor no duty to warn a motorist. See, *Allen Keller Co. v. Foreman,* 343 S.W. 3d 420 (Tex. 2011).

e. Governmental Entities

The State and most of its governmental subdivisions are protected from suit by sovereign immunity. (The scope of sovereign immunity and its waiver are beyond the scope of this article). The Texas Tort Claims Act provides a limited waiver of sovereign immunity. Tex. Civ. Prac. & Rem. Code Ann. §101.001, et seq. That waiver includes claims involving personal injury and death caused by a condition or use of tangible personal or real property if the governmental unit, were it a private person, would be liable to the claimant according to Texas law. Tex. Civ. Prac. & Rem. Code Ann. §101.021 [Note that liability of municipality is separately defined. Tex. Civ. Prac. & Rem. Code §101.0215. Also

school and junior college districts are excluded from the premises liability waiver. Tex. Civ. Prac. & Rem. Code §101.051]. The Tort Claims Act contains a number of exclusions and exceptions including an exemption for the exercise or non-exercise of discretionary powers. Tex. Civ. Prac. & Rem. Code Ann. §101.022(a). This limitation, however, does not apply to the duty to warn of special defects such as excavations or obstructions on highways, roads or streets, or the duty to warn of the absence, condition or malfunction of traffic signs, signals, or warning devices that may be required under another section of the code.

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RECENT DECISIONS

In *City of Dallas v. Thompson*, 210 S.W.3d 601 (Tex. 2006), Thompson sued the City of Dallas, alleging that while walking through the lobby of Dallas Love Field airport she tripped on the lip of an improperly secured metal expansion-joint coverplate protruding up from the floor and fell, fracturing her shoulder. The trial court sustained the City's plea to the jurisdiction based on governmental immunity, concluding that there was no evidence the City actually knew of the alleged protruding coverplate. The court of appeals reversed at 167 S.W.3d 571 (Tex. App.—Dallas 2005). The Texas Supreme Court reversed the court of appeals' decision and affirmed the judgment of the trial court stating that under Tex. Civ. Prac. & Rem. Code §101.021 the City is immune from suit unless there is evidence that it actually knew of the alleged protruding coverplate. The City knew that the coverplate could become loose and raise suddenly, or raise over time with ordinary wear and tear, and when it did, City employees would tighten it. After Thompson fell, the City added a screw to the end of the coverplate where it was protruding. But the fact that materials deteriorate over time and may become dangerous does not itself create a dangerous condition. The actual knowledge required for liability is of the dangerous condition at the time of the accident, not merely of the possibility that a dangerous condition can develop over time. Additionally, without evidence showing how long the alleged protrusion had existed, the proximity of the City employees to the plate is no evidence of actual knowledge.

Further, in *State of Texas v. Shumake*, 199 S.W.3d 279 (Tex. 2006), the Plaintiffs'daughter, Kayla, drowned while swimming in the Blanco River, at the Blanco State Park. Kayla was allegedly sucked underwater by a powerful undertow and trapped in a man-made culvert that diverted the water under a nearby park road. Days before Kayla's death, three other park patrons had encountered the same undertow and nearly drowned due to the same conditions. These events were communicated to the Parks Department. The Shumakes sued for the wrongful death of Kayla.

The trial court denied Parks Department's plea to the jurisdiction, and the Park Department took an interlocutory appeal. The court of appeals affirmed the trial court's denial of the plea to the jurisdiction. The Texas Supreme Court affirmed the court of appeals decision stating that the Shumakes' pleadings were sufficient to state a premises liability claim under the recreational use statute, Tex. Civ. Prac. &

Rem. Code §§75.001-004. The recreational use statute raises the burden of proof by classifying the recreational user of state-owned property as a trespasser, and by requiring proof of gross negligence, malicious intent, or bad faith, it does not reinstate sovereign immunity. Rather, it immunizes the state only to the extent of the elevated standard.

In *Texas Dept. Of Transportation v. Pate,* 170 S.W.3d 840 (Tex. App. - Texarkana 2005, rehearing overruled), three young people were killed after their pickup either stopped or slowed to a crawl at a stop sign before they proceeded slowly onto the highway and into the path of a tractor-trailer truck traveling about 60 miles per hour. The driver, Haley's, view of oncoming traffic was obscured by overgrown vegetation. The jury found defendant, Texas Department of Transportation 60% liable and Haley 40% liable, and the trial court rendered judgment on the verdict. The Texarkana court of appeals affirmed the trial court's verdict stating sovereign immunity did bar recovery and evidence supported the verdict.

In *City of Bellmead v. Torres,* 89 S.W.3d 611 (Tex.2002), Torres had been playing in a softball tournament at the Bellmead Softball Complex. On a break, she was injured when the swing she was sitting on broke. She sued the City of Bellmead, the owner of the complex, for premises defect. Torres did not allege that the City's actions were willful, wanton, or grossly negligent. The trial court entered summary judgment for the City under the Recreational Use Statute. Tex. Civ. Prac. & Rem. Code §§75.001- .004, which absolves property owners of liability for injuries to others using the property for recreation, so long as the property owner does not engage in grossly negligent conduct or act with malicious intent or in bad faith. The court of appeals reversed and remanded. 40 S.W.3d 662. The Texas Supreme Court reversed and remanded for the City. Because sitting on a swing is recreation, as contemplated by the Recreational Use Statute, the City owed Torres only the duty not to injure her through willful, wanton, or grossly negligent conduct. Even if softball is not recreational, Torres's intent upon entering the Softball Complex is not controlling. It is what she was doing when she was injured that controls.

C. CLAIMS OF INVITEES

1. Definition of Invitee

An invitee is a person who enters a premises with the possessor's express or implied knowledge and for the mutual benefit. *Rosas v. Buddies Food Store,* 518 S.W.2d 534, 536 (Tex. 1975).

2. Duty of Owner

A land owner owed invitees a duty to exercise care to protect them not only from those risks of which the owner is actually aware, but also those risks of which the owner should be aware after reasonable inspection. *Motel 6,* 929 S.W.2d at 3. The owner is considered to have constructive knowledge of any premises defects or other dangerous conditions that a reasonable careful inspection would reveal. *Corbin v. Safeway Stores, Inc.,* 648 S.W.2d 292, 295 (Tex. 1983).

3. Elements of Invitee's Claims

To prevail in a premises liability case an invitee must prove that:

- The defendant had actual or constructive knowledge of a condition on his premises;
- The condition imposed an unreasonable risk of harm;
- The defendant failed to exercise reasonable care to reduce or eliminate the risk; and
- Such failure proximately caused injury to the plaintiff.

Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 935, 936 (Tex. 1998); See, *Dallas Market Center Development Co. v. Liedeker,* 958 S.W.2d 382, 385 (Tex.1977).

There are three ways in which the defendant's knowledge may be proved:

- Proof that its employees caused the harmful condition;
- Proof that the employees saw or were told of the harmful condition prior to plaintiff's injury therefrom; or
- Proof that the harmful condition was present for so long that it should have been discovered in the exercise of reasonable care.

Wright v. Wal-Mart Stores, Inc., 73 S.W.3d 552 (Tex. App - Houston [1st Dist.] 2002, no pet. h.).

4. Protection Against Third Parties' Criminal Acts

Generally, a person has no legal duty to protect another from the criminal acts of a third person. *Greater Houston Transportation Co. v. Phillips,* 801 S.W.2d 524, 525 (Tex. 1990); *Walker v. Harris,* 924 S.W.2d 375, 377 (Tex. 1996). Similarly, a landowner has no duty to prevent criminal acts of third parties who are not under the landowner's supervision or control. *Walker v. Harris,* 924 S.W.2d 375, 377 (Tex. 1996). This rule,
however, is not absolute. One who controls the premises does have a duty to use ordinary care to protect invitees 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.

Lefmark, 946 S.W.2d at 53; *Centeq Realty, Inc. v. Siegler,* 899 S.W.2d 195, 197 (Tex. 1995). This duty is commensurate with the right of control over property. *Exxon Corp. v. Tidwell,* 867 S.W.2d 19, 21 (Tex. 1993). That duty does not arise in the absence of a foreseeable risk of harm. *Walker,* 924 S.W.2d at 377. Foreseeability requires only that the general danger, not the exact sequence of events that produce the harm, be foreseeable. *Id.* Thus, the foreseeability of an unreasonable risk of criminal conduct is a prerequisite to imposing a duty of care on a person who owns and controls property to protect others on the property from the risk. Once this prerequisite is met, the perimeters of the duty must still be determined. *Timberwalk Apartment Partners, Inc. v. Cain,* 972 S.W.2d 749, 756 (Tex. 1998). A landowner does not have the duty to protect people on his property from criminal conduct whenever crime might occur. *Id.* The duty exists only when the risk of criminal conduct is so great that it is both unreasonable and foreseeable. Whether such risk was foreseeable must be determined not in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred. *Timberwalk,* 972 S.W.2d at 757. In determining whether the occurrence of certain conduct on a landowner's property should have been foreseen, the court should consider:

- whether any criminal conduct previously occurred on any other property;
- how recently it occurred;
- how often it occurred;
- how similar the conduct was to the conduct on the property; and
- what publicity was given the occurrences to indicate the landowner knew or should have known about them.

These factors - proximity, recency, frequency, similarity, and publicity - must be considered together in determining whether criminal conduct was foreseeable. *Id.* at 759. A complaint that a landowner failed to provide adequate security against criminal conduct is ordinarily a premises liability claim. *Id.* at 753.

General Allegations as to the nature of the risk posed, the foreseeability of the result, and the likelihood of the injury will not suffice. *Gatten v. McCarley,* 2013 Tex. App.—LEXIS 838, *12-14 (Tex. App.—Dallas 2013).

RECENT CASES

Maurer v. 8539, Inc., No. 01-09-00709-CV (Tx. App.—Houston [1st Dist.], Dec. 30, 2010). There, Mary Maurer was a bartender and cocktail waitress at 8539, Inc. d/b/a Barney's Billiards Saloon.

On the date of the incident, she arrived at work at approximately 10:30 a.m. and began to clean the bar area in preparation for her shift. The cleaning crew was leaving as she arrived, and when they left, they failed to lock the front door. Maurer did not check the lock but instead continued to prepare for her shift. Shortly before 11:00 a.m., a man walked into the bar through the front door. Maurer testified in her deposition she was afraid of the man and did not tell him that the bar was still closed. The man first went to the restroom and then sat down at the bar. Maurer discreetly called her boyfriend from her mobile phone and hung up repeatedly hoping he would realize something was wrong. She also attempted to stall the man. Maurer testified in her deposition she was "trying to think of things to do without going to the back and getting the money" because she was afraid the man was going to rob her. Maurer estimates she talked to the man for approximately 30 - 45 minutes, at which time he pulled a gun out of his pocket, pointed the gun at her face and told her he was robbing her. Although Maurer's boyfriend arrived at the bar shortly thereafter, the man had Maurer remove all money from the safe and he later left the bar. As a result of the incident, Maurer received counseling and would later be diagnosed with post-traumatic stress disorder.

Maurer sued Barney's for negligence alleging that it failed to maintain the premises in a safe condition, to warn her of a dangerous condition on the property, and gross negligence alleging that through acts and omissions it recklessly or consciously disregarded a known risk. Barney's filed both traditional and non-evidence motions for summary judgment on both claims arguing (1) that it did not owe a duty to Maurer to protect her from the criminal acts of a third-party because such acts were not foreseeable; (2) that Maurer had not produced evidence of the similarity, proximity, frequency, recency, or publicity of prior criminal activity and (3) that Maurer had presented no evidence to support her gross negligence claim. In Maurer's summary judgment response, she argued that (1) Barney's was not entitled to summary judgment because of her deposition, (2) the Houston Police Department call logs, and (3) medical records raised questions of material fact as to her negligence claim. The response did not argue that any of the attached evidence supported Maurer's gross negligence claim and Maurer did not challenge the judgment as it related to her gross negligence claim. The trial court granted summary judgment in favor of Barney's and the 1st District (Houston) Court of Appeals affirmed the judgment of the trial court. It was the opinion of the Court of Appeals that the evidence showed neither Barney's nor Maurer was aware of any violent crime occurring on or near the relevant premises prior to the incident. Thus, the risk that Maurer would be the victim of an armed robbery while at work was not foreseeable to Barney's and Maurer's evidence was insufficient to establish that Barney's had a duty to protect her from the unforeseen criminal conduct of a third-party.

Recency And Frequency

Trammel Crow Central, Ltd. v. Gutierrez, 267 S.W.3d 9 (Tex. 2008). This incident took place at the Quarry Market, a 53 acre mall in San Antonio. Luis Gutierrez and his wife Karol Ferman were walking towards their car after watching a movie. Shortly after exiting the building, Karol heard a gunshot. She turned in the direction of the sound and saw a person dressed in black, wearing a ski mask and pointing a gun towards her and Luis. The gunman fired again, hitting Luis in the shoulder and causing him to fall to the ground. Karol was able to crawl under a nearby car, yet Luis suffered four gunshot wounds: one in the shoulder, two in the back and one in the back of the head. An off-duty policeman, working as a security guard at the Quarry Market, had been patrolling the parking lot in an unmarked car, yet wearing his police uniform. He was approximately 200 feet away from the theater when the shots were fired, and drove to where Luis was wounded.

The trial court returned a verdict in favor of Luis' mother, wife, and children for over $5 million in damages. The Court of Appeals (En Banc) affirmed the trial court's ruling holding that Trammel Crow owed a duty to Luis as a matter of law and the evidence was sufficient to support the jury's finding that Trammel Crow breached its duty in a way that proximately caused Luis' death. The Supreme Court reversed the Court of Appeals' judgment rendering a judgment that respondents take nothing. In an

opinion authored by Justice Willett, the Supreme Court found that because the attack on Luis was so extraordinarily unlike any crime previously committed at the Quarry Market, we conclude that Trammel Crow could not have reasonably foreseen or prevented the crime and thus owed no duty in this case. Therefore, without reaching the issue of causation, we reverse the Court of Appeals judgment and render a judgment that respondents take nothing.

In *Western Investments, Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005), Maria Urena and her ten-year old son, L. U., lived in the Front Royale Apartments. L.U. had the mental capacity of a four-year old. One day, Urena left L.U. under the care of his aunt, who also lived in the complex. L.U. left his aunt's apartment, unsupervised, to retrieve some toys from his home. On the way back, another Front Royale resident, Zuniga, lured L.U. into his apartment and sexually assaulted him. L.U.'s aunt discovered the assault immediately, confronted Zuniga, and called the police. Zuniga fled and has never been apprehended. Urena, individually and on behalf of L.U., sued Front Royale. Urena contended she presented evidence that Front Royale proximately caused L.U.'s injuries by failing to employ a security company to patrol the complex, provide appropriate security personnel and security measures, by failing to obtain police reports of calls related to criminal activity in the area, and by failing to conduct a background check on all tenants. The Texas Supreme Court reversed and remanded in favor of the defendant holding that in order to prevail on her negligence cause of action, Urena must establish the existence of a duty, a breach of that duty, and damages proximately caused by the breach. Urena presented no evidence that L.U.'s sexual assault could have been prevented if Front Royale had done the three things the plaintiff claims it should have done. Nothing transpired that reasonably would have alerted security guards had they been present. Police reports about criminal activity in the area would have done nothing to alert management that Zuniga was a pedophile, or to suggest that an attack by a pedophile tenant was likely to occur. A background check on Zuniga revealed only driving infractions, nothing that would have alerted a reasonable landlord to the possibility that he posed a danger to others. Even assuming Front Royale's acts or omissions constituted breach of a duty owe to the Urenas, as they allege, the Urenas presented no evidence that such acts or omissions were a substantial factor in causing L.U.'s injury.

Proximity

Texas Real Estate Holdings, Inc. v. Quach, 95 S.W.3d 395 (Tex. App. - Houston [1st Dist.] 2002), is a premises liability case arising out of a carjacking incident that took place at an apartment complex. Plaintiffs the Quach family, were the victims of a violent carjacking in the parking lot of an apartment they rented from the defendants who were the owners and managers. Mrs. Quach was shot in the face and suffered permanent neurological damage and disfigurement, and she required multiple surgeries. After a jury trial, plaintiffs were awarded $1.1 million. The Texas Supreme Court reversed and rendered in favor of defendants stating that the carjacking was unforeseeable. The court of appeals resolved conflicting expert testimony in favor of defendants, finding census tract information concerning the crime history of the area more reliable than police beat statistics, because a census tract covers a much smaller area that included the apartment complex.

Mellon Mortgage - Was the Victim Foreseeable?

In *Mellon Mortgage* the Texas Supreme Court addressed the following question: What role does foreseeability play when someone other than an invitee sues a premises owner for liability based upon a third party's criminal conduct? In that case, a police officer stopped a woman, Holder, at night for a traffic violation and instructed her to follow him to a parking garage where he raped her. *Mellon Mortgage v. Holder*, 5 S.W.3d 654 (Tex. 1999). Holder sued the owner of the parking garage; the trial court granted summary judgment in favor of the parking garage owner and the court of appeals reversed. *Id.* In a plurality opinion joined by three justices, the supreme court rendered a judgment that Holder take nothing from the parking garage owner; two other justices wrote concurring opinions and three justices joined in

the dissent. *ld.*

Citing the *Timberwalk* case, the supreme court noted that in this case the focus would be on the "foreseeability" of the risk. *Id.* at 655. The supreme court stated that "[f]or most premises liability cases, the foreseeability analysis will be shaped by determining whether the plaintiff was an invitee, a licensee, or a trespasser." *Id.* Holder's status at the time of the crime was the subject of much debate. In his concurring opinion, Justice Enoch concluded that Holder was a trespasser. *ld.* at 661-62 (Enoch, J., concurring). The dissenters concluded that she was a licensee. *ld.* at 673 (O'Neill, J., dissenting). The plurality opinion written by Justice Abbott and a concurring opinion by Justice Baker addressed liability without determining Holder's status. *ld.* at 655 (plurality opinion); see also *Id.* at 662 (Baker, J. concurring). The plurality noted that because the plaintiff was an "unforeseeable victim regardless of her status," it was not necessary to determine into which category she fell. *Id.* In a footnote, the supreme court stated that this "analysis is complementary, not contradictory, to the traditional premises liability categories." *ld.* fn. 3.

The plurality opinion applied a threshold foreseeability analysis divided into two prongs: the foreseeability of the crime and the foreseeability of the victim. *Id.* at 655. The court applied the *Timberwalk* factors to determine the first prong, and determined that "it was not unforeseeable as a matter of law that a rape might occur in the parking garage." *ld.* at 657. The court then considered whether Holder was situated such that the garage owner could foresee that she would be the victim of this third-party criminal act. *Id.* Given the fact that the plaintiff was pulled over several blocks away and led to the garage, the supreme court held that she was not a foreseeable victim. *Id.* at 658.

D. THE *DEL LAGO* OPINION

In *Del Lago Partners* v. *Smith,* 307 S.W.3d 762, 766 (Tex. 2010), the plaintiff was injured when a fight erupted in the bar at the Del Lago resort between members of a fraternity reunion group and a wedding party. As soon as the members of the wedding party entered the bar, there were confrontations between the two groups. *Id.* at 765. Bar employees testified that the men were very intoxicated and that several confrontations between the two groups occurred, including shoving, cursing and yelling. *Id.* at 765-66. These altercations continued for nearly 90 minutes, at which time a brawl erupted when the bar employees attempted to close down the bar. *!d.* at 766. The bar employees attempted to "funnel" the men towards a single exit when "all heck broke loose". *ld.* The plaintiff was injured when he was thrown up against the wall. *ld.* The plaintiff brought suit alleging premises liability and negligent activity, but the trial court only submitted the premises question to the jury. *Id.* at 775. The jury found in favor of the plaintiff. *ld.* at 767.

The supreme court went out of its way to attempt to limit the *Del Lago* holding to its facts: "We do not announce a general rule today." *ld.* at 770. The Court cited *Timberwalk* but noted that the *Timberwalk* factors should be used where the premises owner has no direct knowledge that criminal conduct is imminent. *ld.* at 768. The Court held that because the defendant and its employees were aware of the unreasonable risk of harm to its patrons that night, they had actual knowledge of imminent criminal acts and, therefore, had a duty to reduce or eliminate the risk. *Id.* at 769.

Despite the Court's attempt to limit the application of the *Del Lago* holding, at least one court has cited the case as standing for the following: "a property owner with actual and direct knowledge that violence is imminent has a duty to protect an invitee from imminent assaultive conduct by a fellow patron." *West v. SMG,* 318 S.W.3d 430, 439-42 (Tex. App.— Houston [1st Dist.] 2010, no pet.) (holding that the crime was not foreseeable under *Timberwalk* and Defendant was not liable under *Del Lago* because there was no evidence that Defendant had actual knowledge that assault was imminent).

The current state of the law appears to be that generally, a premises owner has no duty to protect

another person from the criminal acts of a third party. *Timberbwalk*, 972 s.w.2d at 756. When a premises owner has actual and direct knowledge that a crime is imminent, based upon immediately preceding conduct, the premises owner has a duty to reduce or eliminate the risk. *Del Lago*, 307 s.w.3D AT 769. When the premises owner has no direct knowledge of imminent criminal conduct, the unreasonableness of the risk arising from the conduct will be judged by the *Timberwalk* factors. *Timberwalk*, 972 S.W.2d at 757. In circumstances similar to the *Mellon Mortgage* case, where the victim is not an invitee of the defendant, it appears that the foreseeability of the victim is also considered, as well as the foreseeability of the crime. *Mellon Mortgage, 5* S.W.3d at 657.

E. *DEL LAGO* AFTERMATH

1. *Austin v. Kroger Texas, L.P.*

In *Austin*, Plaintiff fell while mopping a restroom at the Kroger store where he worked. *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193 (Tex.2015). An oily liquid leaked through the store's ventilation ducts after another employee power-washed the condenser units, creating spills in the store's restrooms. According to the safety handbook, spills should have been cleaned using a "spill magic" system that involves a powdery absorbent product, a broom, and a dustpan. *Id.* at 198. On the date of the incident, however, the system was not available and Plaintiff thus attempted to clean the liquid with a mop. *Id.* Prior to his fall, Plaintiff successfully cleaned 30% to 40% of the brownish liquid that covered approximately 80% of the bathroom floor.

He sued his employer, Kroger (a workers' compensation non-subscriber) under both premises-liability and negligence theories. Under the premises liability theory, he alleged that Kroger breached its duty to provide him a safe workplace, despite the fact that the spill was open and obvious, and despite his own actual awareness of the risk. Under the negligence theory of liability, he alleged Kroger had an independent duty to provide him with the Spill Magic system according to company policy and breached that duty for failing to have same on the date of the accident.

Importantly, the Court revived the previously abolished rule that a landowner owes no duty to warn of open and obvious dangers, or dangers the invitee knew about, on its premises. Now, landowners in Texas owe their invitees the "duty to make safe or warn against any *concealed*, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware *but the invitee is not*." Accordingly, in order to impose a duty on a landowner, the plaintiff must prove the following:

- There is an unreasonably dangerous condition on the premises
- The landowner knew, or should have known, about the dangerous condition
- The condition is concealed (i.e. not "open and obvious")
- The plaintiff was not aware of the danger

The Court also adopted two exceptions to the general duty rule—the criminal-activity exception and the necessary-use exception.

The criminal-activity exception covers cases where an invitee and premises owner are both aware of risks posed by potential criminal activity of third parties. In such cases, a landowner is not absolved of its duty to make the premises safe if it should have anticipated that harm would occur despite the plaintiff's knowledge of the risk.

The necessary-use exception covers cases where a plaintiff has no other choice but to use an unsafe premise. In such cases, despite the plaintiff's knowledge of the risk, a landowner is not relieved of its duty to make the premises safe if (1) it is necessary that the invitee use the dangerous premises, and (2) the landowner should have anticipated that the invitee is unable to take measures to avoid the risk.

When these exceptions apply, the invitee's knowledge does not absolve the landowner of its duty to make the premises safe, but it may be used to show that the invitee's own negligence contributed to his injuries.

2. *QuikTrip Corp. v. Goodwin*

In *QuikTrip*, a criminal third party who had been loitering at a Denton convenience store abducted, raped, and murdered a female customer. *QuickTrip Corp. v. Goodwin*, 463 S.W.3d (Tex. Civ. App.—2nd Dist., Nov. 13, 2014). A Denton County jury apportioned 71% of the responsibility to the criminal third party and 28% to the defendant convenience store. *Id.*, 469 S.W.3d at 670. On appeal, the Fort Worth Court of Appeals reversed and rendered the trial court's judgment on the jury verdict, on the grounds that the criminal third party's actions were not foreseeable to the defendant, in terms of their character and severity, such that the *Del Lago* standard precluded liability. *Id.* In arriving at its decision, the court distinguished the facts in *Del Lago* from the facts before them:

…the harm caused to the plaintiff in *Del Lago* was a natural and predictable progression from the conduct that preceded it. As the supreme court explained, after more than an hour of verbal and physical hostilities inside the bar, that a fight broke out outside the bar was "no surprise" and was merely a "matter of time." In other words, the brawl that occurred outside the bar had the same character, with only greater severity, as the foretelling verbal and physical confrontations inside the bar. But here, even if Ernesto's illicit activity had occurred in Chin's presence or had immediately preceded Ernesto's entrance into the store, the illicit activity, comprising comparatively minor assault and property crimes that Ernesto disclosed without significant context of the events that preceded them, is not nearly of the same character as abduction, rape, and murder…. And Ernesto's conduct within the store was no more predictive; he did not, for example, make inappropriate sexual remarks or acts to women, physically accost any of the several women who entered the store before Melanie, or express present thoughts about violence.

Id., 469 S.W.3d at 673-674 (citations omitted). Considering all the facts that the defendant's employee knew or should have known about the criminal third party prior to the criminal incident in question—including, specifically, comments that the criminal third party made about his own prior criminal activity—the court concluded, as a matter of law, that the criminal incident in question was not foreseeable to the defendant, such that the defendant had no legal duty to protect the victim from the criminal acts. *Id.*, 469 S.W.3d at 677.

3. *McDaniel v. Trio Holdings, LLC*

In McDaniel, the plaintiff was assaulted and badly beaten by other customers at the defendant's wireless communications store in Odessa. McDaniel v. Trio Holdings, LLC, 2012 WL 3799666, *2 (Tex.App.—Eastland, no pet.). The Ector County trial court granted summary judgment to the defendant. Id., at *1. Noting that the criminal third parties had used rude and profane language to the defendant's store employee and threatened the victim before the assault, the Eastland Court of Appeals

nevertheless affirmed and upheld the summary judgment: "Trio owed no duty to protect McDaniel from the assault because the assault that occurred in this case was not foreseeable under the parameters of either Timberwalk or Del Lago. The trial court did not err in granting Trio's motion for summary judgment." Id., at *2-3. The court therefore affirmed and upheld the summary judgment granted by the trial court in favor of the defendant. Id., at *3.

4. *West v. SMG*

In *West*, the plaintiff alleged that she was struck in the head by a water bottle thrown by a band member during a rock concert at Reliant Arena. *West v. SMG*, 318 S.W.3d 430, 434 (Tex.App.—Houston [1st Dist.] 2010, no pet.). The Harris County trial court granted summary judgment to the defendant, which was the operator of the arena. *Id.* Houston's First District Court of Appeals concluded that, as a matter of law, the plaintiff failed to provide evidence of the foreseeability of the band's criminal actions. *Id.*, 318 S.W.3d at 440. The court also found that there was no evidence that the defendant "had actual and direct knowledge" that a violent assault on the concert-goers by the band was imminent, as required to hold the defendant liable for the violent acts of third parties. *Id.*, 318 S.W.3d at 442. The court therefore affirmed and upheld the summary judgment granted in favor of the defendant. *Id.*, 318 S.W.3d at 442-443.

VII. CONCLUSION

A premises liability case is a negligence action brought by someone who claims to have been injured by some condition on property. Premises liability shares the elements of duty, breach of duty and proximate cause with negligence but has its own particular requirements that make these cases harder to prove. Therefore, the first question that must be asked is whether the case can be brought under a negligent activity theory. If not, then the status of the injured person will control the duty owed absent a statute or doctrine. If the plaintiff is an independent contractor (or his employee), then Chapter 95 of the Texas Civil Practices & Remedies Code must be consulted. In cases involving licensees, the Recreational Use Statute will downgrade the licensee to a trespasser if the statute applies. The attractive-nuisance doctrine may be relevant in cases dealing with trespassing children. The status of the owner of the property must also be determined; control of the property is the determinative factor. If the allegations involve criminal activity by a third person, the foreseeability of the risk will be the issue and the Texas Supreme Court's opinions in *Timberwalk, Mellon Mortage* and *Del Lago* will be key.

D. Liability to Licensees

1. General Duty

Generally, the landowner owes a licensee a duty not to injure the licensee through willful, wanton or grossly negligent conduct. In addition, if the landowner has knowledge of a dangerous condition and a licensee does not, the landowner had a duty either to warn the licensee or to make the condition reasonably safe. *City of Grapevine v. Roberts,* 946 S.W.2d 841, 843 (Tex. 1997).

2. Definition of Licensee

The Supreme Court has stated that a licensee generally speaking is a person who goes on the premises of another merely by permission, express or implied and not by any express or implied invitation. *Texas-Louisiana Power Co. v. Webster,* 127 Tex. 126, 91 S.W.2d 302, 306 (1936). Court of appeals have more recently attempted to clarify the definition by stating that a licensee is one who enters the land of another with permission of the landowner, but does so for his own convenience or on business

for someone other than the owner. *Smith v. Andrews,* 832 S.W.2d 395, 397 (Tex. App. - Ft. Worth 1992, writ denied); *Weaver v. KFC Management, Inc.,* 750 S.W.2d 24, 26 (Tex. App. - Dallas 1988, writ denied).

The difference between a licensee and an invitee is that an invitee is present for the mutual benefit of himself and the owner, while a licensee is on the premises only for his own purposes, not because of any business dealings with the owner. *Peerenboom v. HSP Foods, Inc.*, 910 S.W.2d 156, 163 (Tex. App. - Waco 1995, no writ). Social guests are considered a licensee rather than an invitee, even though the guest is "invited" in a layperson's understanding of the word. *Dominguez v. Garcia,* 746 S.W.2d 865, 867 (Tex. App. - San Antonio 1988, writ denied).

Public servants entering premises to perform their duties are considered licensees. *Campus Management, Inc. v. Kimball,* 991 S.W.2d 948, 950 (Tex. App. - Ft Worth 1999, pet. denied); see also, *Juhl v. Airington,* 936 S.W.2d 640 645, 646 (Tex. 1996) (Gonzales, J., concurring).

A volunteer rescuer who enters another's property without invitation in an attempt to rescue persons in danger or to reduce the risk of the property and the public in general are considered licensees. *Pifer v. Muse,* 984 S.W.2d 739, 742 (Tex. App. - Texarkana 1998, no pet.).

There are other uncertain situations in which a person enters onto another's property without the owners' knowledge may be considered to have implied consent and, therefore, be a licensee rather than a trespasser. See, *Mellon Mortgage Co. v. Holder,* 5 S.W.3d 654 (Tex. 1999) (O'Neill, J., dissenting); *Weaver,* 750 S.W.2d at 25.

3. Duty of Owner

With respect to the condition of the premises when the plaintiff is a licensee, the owner is negligent if:

- the condition posed an unreasonable risk of harm;
- the defendant had actual knowledge of the danger;
- the plaintiff did not have knowledge of the danger; and
- the defendant failed to exercise ordinary care to protect plaintiff from danger by both failing to adequately warn plaintiff of the condition and failing to make the condition reasonably safe.

State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996). In addition, the duty requires that a landowner not injure a licensee by willful, wanton or grossly negligent conduct. *State Department of Highways v. Payne,* 838 S.W.2d 235, 237 (Tex. 1992). There are two differences between the elements required by an invitee to prove viability of the owner vs. the elements required of a licensee to prove liability. First, the licensee must have that the premises owner actually knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known. Second, a licensee must prove that he did not know of the dangerous condition, while an invitee need not do so. *Payne,* 838 S.W.2d at 237.

E. LIABILITY OF TRESPASSER

1. General Duty

An owner or occupier owes the duty to trespassers to not injure them willfully, wantonly, or through gross negligence. *Payne,* 838 S.W.2d at 237.

2. Definition of Trespasser

A trespasser is a person who enters a property of another without right, lawful authority, or express or implied invitation, permission, not in performance of any duty to the owner or person in charge, but

merely for his own purposes, pleasure or convenience, or out of curiosity and without any enticement, inducement, or implied assurance of safety from the owner or person in charge. *Texas - Louisiana Power Co.*, 91 S.W.2d at 306; *Weaver*, 750 S.W.2d at 26. A person may be an invitee or a licensee to certain parts of the premises but not as to others. *Burton Construction and Shipbuilding*

Co. v. Broussard, 273 S.W.2d 598, 602 (Tex. 1954). An invitee or licensee becomes a trespasser if he or she goes beyond area of the invitation or permission and goes to another part of the premises. *Id.; Peerenboom* 910 S.W.2d at 161-163.

3. Attractive Nuisance

When children of tender years come on premises by virtue of their unusual attractiveness, the legal affect is that of an implied invitation to do so. Such children are regarded as trespassers but as being rightfully on the premises. *Texas Utilities Electric Co. v. Timmons*, 947 S.W.2d 191, 193 (Tex. 1997), *quoting Banker v. McLaughlin*, 146 Tex. 434, 208 S.W.2d 843, 847 (1948). When the attractive nuisance doctrine applies, the owner occupier of the premises owes the trespassing child the same duty as an invitee; 947 S.W.2d at 193; See also, *Eaton v. R. B. George Investments*, 152 Tex. 523, 260 S.W.2d 587 591 (1953). To establish that the attractive nuisance doctrine applies, a plaintiff must establish the following:

- the place where the condition exists is one upon which the possessor knows or has reason to know the children are likely to trespass;
- the condition is one which the possessor knows or is easy to know and which he or she realizes or should realize involve an unreasonable risk of death or serious bodily harm to such children;
- the children because of their youth do not discover the condition or realize the risk involved in inter-meddling with it or in coming within the area made dangerous by it;
- the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared to the risk to the children involved; and
- the possessor fails to exercise reasonable care to eliminate the danger or otherwise protect the children.

Despite the name of the doctrine, the plaintiff does not have to show that the structure involved was unusually attractive to children. Instead the crucial issue is a foreseeability of children's presence at or on the premises. *Eaton*, 260 S.W.2d at 591, 592.

The attractive nuisance exception generally does not apply to children over fourteen because they are presumed to have the capacity to appreciate danger. *Massie v. Copeland*, 149 Tex. 319, 233 S.W.2d 449, 451-452 (1950). Children under seven are presumed not to have the capacity to appreciate danger. The capacity to appreciate risk of danger are children between seven and fourteen is usually a question of fact. *City of Lampasas v. Roberts*, 398 S.W.2d 612, 617 (Tex. Civ. - App. Austin 1966, writ ref'd n.r.e.). The doctrine may be extended to children older than fourteen who are lacking in mental development. See, *Soledad v. Lara*, 762 S.W.2d 212, 214 (Tex. App. - El Paso 1988, no writ). The doctrine does not have absolute age limitations. Instead the test is whether "the child is still too young to appreciate the danger." *Timmons*, 947 S.W.2d at 916. Significantly, it is not necessary that the child appreciate the specific danger that may cause the injury so long as the child appreciates the general danger. *Timmons*, 947 S.W.2d at 194-196.

In *Timmons*, a drunken 14 year-old climbed a 90 ft. utility tower. At the top was an electric transmission line. The electric company had erected a barricade around the tower 12-1/2 ft. off the ground and had a sign on the tower warning "Keep Away - Danger - Wires Heavily Electrified." When the boy's friends realized he was gone, they went outside looking for him and heard him yelling from the top

of the tower. His friends and relatives previously and repeatedly warned him not to climb the tower because it carried high voltage electric lines and that he could be electrocuted. On that evening, a cousin and another boy repeatedly shouted to him to come down. He acknowledged the warnings but remained at the top of the tower. Later on when he started to descend there was a bright flash and he fell to the ground. It was subsequently determined that the boy was killed not as a result of actually touching the electric lines but from approaching closely enough for the electricity to arc into him. The Court held that, even though the boy may not have known that electricity could arc from the wiring into a nearby object that was not touching the line, he was not too young or immature to appreciate the danger of climbing the 90 ft. tower. The Court, therefore, held that the doctrine did not apply to him. 947 S.W.2d at 194-196.

4. **CPRC 75.001 et. seq - Recreational Use Statute**

Chapter 75 of the Texas Civil Practice & Remedies Code provides protection to owners of agricultural land or "other real property" from liability to social guests and licensees who are permitted on the land for recreational purposes. TEX CIV. PRAC. & REM. CODE § 75.002. Courts have held that the defendant must be in possession (ie. control) of the land at the time of the injury. *See Guadalupe-Blanco River Auth. V. Pitonyak,* 84 S.W.3d 326, 340 (Tex. App. - Corpus Christi 2002, no pet.) (if Defendant had control over the bayou where injury occurred, then Defendant had right to grant or deny access and the statute would apply to limit Defendant's liability). However, in *Stephen F. Austin University v. Flynn,* 228 S.W.3d 653, 658 (Tex. App. - Tex. 2007), the supreme court decided that even though the injury occurred on an easement that the University had given for use as a recreational trail, it retained ownership, and as the owner it was protected by the statute.

The statute provides that an owner of real property is entitled to the statute's protection when it gives "permission to another to enter for recreation". TEX CIV. PRAC. & REM. CODE § 75.002(c). Permission may be implied from a landowner's knowledge of, and acquiescence in, the public's use of its land for recreational purposes. *Flynn,* 228 S.W.3d at 658.

The statute covers agricultural land used for recreational use and all types of "real property other than agricultural land" used for recreational purposes. The statute does not define the types of property that are included in "real property other than agricultural land". However, whether the incident occurred on "agricultural land" or on "real property other than agricultural land" will have an impact on the application of the statute as follows:

- Agricultural land - statute applies to those given permission (licensees) to enter the premises and those invited (social guests) to enter the premises for recreation.
- Real property other than agricultural land statute applies only to those given permission (licensee) to enter the premises for recreation.

TEX CIV. PRAC. & REM. CODE § 75.002(b), (c). The statute does not apply to social guests invited onto "real property other than agricultural land" for recreation. *McMillan v. Parker,* 910 S.W.2d 616, 619 (Tex. App. - Austin 1995, writ denied). The statutory limitation was meant as an inducement for owners of certain types of private land to allow members of the general public to use land for recreation. *Id.* at 618.

The term "recreation" is defined very broadly to essentially include any activity related to enjoying nature and the outdoors. TEX CIV. PRAC. & REM. CODE § 75.001(3). The statutory list is not exclusive. *Kopplin v. City of Garland,* 869 S.W.2d 422 (Tex. App.—Dallas 1993, writ denied). The supreme court has held that it is not the landowner's or the injured party's intent for the land that matters but what the injured party was doing at the time of the injury that controls. *City of Bellmead v. Torres,* 89

S.W.3d 611, 614 (Tex. 2002). While recreation is defined broadly, it does not encompass the following:

- An outdoor wedding. *Sullivan v. City of Fort Worth,* 2011 Tex. App. LEXIS 3866 (Tex. App. Fort Worth, 2011, pet. denied);
- Spectating an outdoor soccer game. *University of Texas at Arlington v. Williams,* 2013 Tex. App. LEXIS 3985, at *8-9 (Tex. App. - Fort Worth, March 28, 2013, no pet. h.); *contra Sam Houston State University* v. *Anderson,* 2008 Tex. App. LEXIS 8614, at *8-9 (Tex. App. Waco, Nov. 12, 2008, no. pet.) (held that plaintiff sitting on outdoor bleachers watching a baseball game was recreation pursuant to the statute).

The statute distinguishes between private and governmental landowners. Whether the statute applies to a private landowner is governed by three tests:

- Did the private landowner charge for entry? If no, then statute applies;
- If the private landowner charged a limited amount for entry, then statute applies only if total charges collected in previous calendar year for all recreational use of the entire premises are not more than 20 times the total amount of ad valorem taxes imposed on the premises for previous calendar year (the "financial-ratio test"); or,
- In the case of agricultural land, did the private landowner have adequate liability insurance as described in section 75.004(a)?

TEX CIV. PRAC. & REM. CODE § 75.003(c). The purpose of the "financial ratio" test is to prevent landowners from taking advantage of the statute by engaging in commercial recreation for profit. *McMillan,* 910 S.W.2d at 619. If the defendant is a governmental landowner, the statute applies regardless of whether the plaintiff is charged a fee to enter the premises, and regardless of whether the governmental landowner has liability insurance. *Id; See also* TEX CIV. PRAC. & REM. CODE § 75.004(d).

In *State* v. *Shumake,* 199 S.W.3d 279, 281 (Tex. 2006), the supreme court held that the recreational use statute does not reinstate immunity for premises liability claims but only raises the burden of proof by classifying a recreational user of government owned property as trespassers.

The statute protects covered owners in two distinct ways. First, the statute defines the applicable standard of care owed to recreational users of the property as essentially the same standard of care that is owed to a trespasser; that is, the plaintiff must establish that defendant breached its duty by showing the defendant acted with gross negligence. TEX CIV. PRAC. & REM. CODE § 75.002(b), (c). This standard applies both to agricultural land and "real property other than agricultural land" used for recreational purposes. *Id.* Section 75.002(d) provides that the statute will not protect owners who have been grossly negligent or acted with malicious intent, or bad faith. TEX CIV. PRAC. & REM. CODE § 75.002(d). The Texas Supreme Court recognized in *Shumake* that although the recreational use statute references a trespasser standard, it actually creates a specialized standard of care which dictates that landowners must refrain from gross negligence, or from acting with malicious intent or in bad faith. *Shumake,* 199 S.W.3d at 286-87.

The other protection that the statute provides is a cap for damages that the recreational user can recover for injuries occurring on agricultural land used for recreational purposes that are covered under an insurance contract. TEX CIV. PRAC. & REM. CODE § 75.004(a). However, the statute does not place a cap on damages for injuries

occurring on real property, other than agricultural land, used for recreation.

The supreme court has distinguished between injuries cause by natural conditions and those caused by man-made conditions. In *Shumake,* the supreme court stated that a landowner has no duty to warn or protect a trespasser from obvious defects and dangers such as a cliff, a rushing river or a hidden rattlesnake. *Shumake,* 199 S.W.3d at 288. Then, in *City of Waco v. Kirwan,* 298 S.W.3d 618 (Tex. 2009), the supreme court dealt with the death of a college student caused by falling off a cliff. *Id.* at 620. To get to the cliff's edge, the student climbed over a low rock wall constructed by the City which had a sign warning against going beyond the wall. *Id* The court held that landowners under· the statute generally do not owe a duty to protect or warn against dangers of natural conditions on the land and, therefore, may not ordinarily be held to have been grossly negligent for failing to have done so. *Id.* at 626. The supreme court made it clear that its holding was fact-specific, and that it was not holding that a party may never be liable for gross negligence related to a natural condition. *Id.* at 627.

Lastly, the statute limits the applicability of the attractive-nuisance doctrine, stating that no trespasser over the age of 16 can bring an attractive nuisance lawsuit for injuries arising on agricultural land used for recreation. TEX CIV. PRAC. & REM. CODE § 75.003(b). There is no similar provision for "real property other than agricultural land".

NUISANCE

A. In General

A nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons or ordinary sensibilities to use and enjoy it. *Reproducers v. McFarland,* 476 S.W.2d 406, 410 (Tex. App. - Dallas 1972, writ ref'd, n.r.e.). A "nuisance per se" is a nuisance at all times and locations. *City of Sundown v. Shewmake,* 691 S.W.2d 57, 59 (Tex. App - Amarillo 1985, no writ). A "nuisance in fact" is a condition that is a nuisance because of its particular surroundings. *Id.*

Dram Shop Liability

A. Dram Shop

In Texas, the statutory causes of action available under Texas Alcoholic Beverage Code §2.02, known as the Dram Shop Act, provide for two causes of actions for plaintiff's injuries resulting from the provision of an alcoholic beverage by (1) a commercial provider to an obviously intoxicated adult, or (2) any adult not authorized by §2.02©(1) to a minor under the age of eighteen. TEX. ALCO. BEV. CODE §2.02(b),(c). The Act preempts common-law claims against commercial sellers of alcohol arising from the seller's provision of alcohol. *D. Houston, Inc. v. Love*, 92 S.W.3d 450 (Tex.2002).

1. Providing Alcohol to Intoxicated Adults

To establish a cause of action for providing alcohol to an intoxicated adult, the plaintiff must prove the following elements: (1) the defendant was a provider (licensed or unlicensed) and sold or served an alcoholic beverage to an adult recipient; (2) when the defendant served the alcoholic beverage, it was apparent o the defendant that the recipient was obviously intoxicated; and (3) the recipient's intoxication proximately caused the plaintiff's injury. TEX. ALCO. BEV. CODE §2.01, 2.02(b); *20801, Inc. v. Parker*, 249 S.W.3d 392 (Tex. 2008).

The defendant must be a provider—a person who sells or serves alcoholic beverages. TEX. ALCO. BEV. CODE §2.01, 2.03; Schmidt v. Centex Bev., Inc., 825 S.W.2d 791 (Tex. App.—Austin 1992, no writ). A social host who serves alcoholic beverages to adult guests is not a provider if it does not charge for the drinks. *Smith v. Merritt,* 940 S.W.2d 602 (Tex. 1997). Similarly, an employer who provides alcoholic drinks at a party for its employees is not a provider if the alcoholic drinks were free.

Of note, one court has suggested that a bartender may be personally liable for providing an alcoholic beverage to an adult recipient. See *Grand Aerie Fraternal Order of Eagles v. Haygood,* 402 S.W2. 3d 766 (Tex. App.—Eastland, no pet.). However, there are no reported cases where a bartender was individually named as a defendant, and as such, it is unclear how such a lawsuit would proceed under the Act.

As stated above, the plaintiff must prove it was apparent to the defendant when the alcohol was served that the recipient was obviously intoxicate and presented a clear danger to himself and others. TEX. ALCO. BEV. CODE §2.02(b)(1). For the conduct to be apparent, it must be visible, evident, and easily observable. *Bruce v. K.K.B., Inc.*, 52 S.W. 3d 250 (Tex. App.—Corpus Christi 2001, pet. denied). In other words, the Act does not require that defendant or its employees actually witnessed the intoxicated behavior; it requires only that recipient showed obvious signs of same. *Id.* at 256. Proof of obvious intoxication can be established by direct evidence, including the following: amount of alcohol served to recipient; disorientation, impaired balance, slurred speech; changes in behavior or emotions; and witness' testimony that recipient's intoxicated condition was obvious to everyone. Notably, plaintiff can prove the recipient's obvious intoxication by circumstantial evidence such as a police officer's testimony that the recipient was obviously intoxicated based on the elevated blood-alcohol level. Id. at 255; Cianci v. M.Till, Inc., 42 S.W.3d 327 (Tex. App.—Eastland 2000, no pet.). The jury may infer that intoxication was apparent from testimony about the effects of the high blood-alcohol level, even if witnesses testify that the recipient did not show signs of intoxication. *Bruce*, 52 S.W.3d at 255. Evidence that the defendant often provided intoxicated customers with alcoholic beverages may also be used to show the recipients obvious intoxication. TEX. R. EVID. 406; Pena v. Neal, Inc., 901 S.W.2d 663 (Tex. App. — San Antonio 1995, writ denied).

Defendant can assert that the plaintiff's own acts or omissions contributed or caused his injury. If defendant pleads and proves plaintiff's fault, then defendant is entitled to a jury submission on the issue of proportionate responsibility. *Borneman v. Steak & Ale,* 22 S.W.3d 411 (Tex. 2000). An employer of the person who served the plaintiff can assert the "trainer-server" (or "safe harbor") defense to bar a dram-shop action. *20801, Inc.* 249 S.W.3d at 395-6-96. To assert this defense, Defendant must prove that the employee was trained as required by Texas Alcoholic Beverage Code §106.14(a)(1)-(2). *Id.* This shifts the burden back on Plaintiff; Plaintiff must prove that defendant directly or indirectly encouraged its employees to violate the law. *Id.*

2. Providing Alcohol to a Minor

Texas Alcoholic Beverage Code §2.02(c) permits recovery of damages from an adult who knowingly provides alcoholic beverages to a minor under the age of 18 who, as a result of the intoxication, injures another person. To recover, plaintiff must establish defendant was at least 21 years old and not the minor's parent, guardian, spouse, or custodian. TEX. ALCO. BEV. CODE §2.02(c). Importantly, Plaintiff must prove that the alcoholic beverage provided to the minor contributed to the minor's intoxication. *Id.*

By comparison, a plaintiff is not required to prove that the alcohol defendant provided contributed to an adult's intoxication in order to establish the cause of action for providing alcohol to an intoxicated adult.