WINTER2013 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

1. *St. Luke's Episcopal Hospital v. Irving W. Marks*, No. 07-0783, 177 S.W. 3rd 255, 260 (Tex. App. – Houston [1st Dist.] 2005), vacated, 193 S.W. 3rd 575 (Tex. 2006).

This case centers on Irving Marks, who fell and injured himself during his recuperation from back surgery at Houston's St. Luke's Episcopal Hospital in 2000. The fall allegedly occurred when Mr. Marks was sitting on his hospital bed, attempting to use the bed's foot board to push himself up to a standing position. As he was doing so, the foot board came loose which resulted in Mr. Marks' fall. Mr. Marks sued St. Luke's Hospital alleging various acts of negligence, including failing to train and supervise the nursing staff properly; failing to provide him with the assistance he required for daily activities; failing to provide him with a safe environment in which to recover; and providing the hospital bed that had been negligently assembled and maintained by the hospital employees. Mr. Marks' suit was for unspecified damages with a so-called "premises liability" claim. The hospital argued that Mr. Marks' incident involved medical care and should fall under the Texas Medical Liability and Insurance Improvement Act, which requires a timely expert report and caps damages for pain and suffering at $250,000.00.

The trial court concluded that the hospital bed claim was a healthcare liability claim, and dismissed the claim because of Mr. Marks' failure to file a timely expert report. The trial court also denied his request for an additional grace period. The Court of Appeals initially disagreed with the trial court, concluding that the patient's claim was not a healthcare liability claim. Following a remand of the case, the Court affirmed the trial court's judgment. One Justice dissented, arguing that the hospital bed claim was in the nature of a premises liability claim rather than a healthcare liability claim. The Medical Liability and Insurance Improvement Act, Tex. Rev. Civ. Stat. art. 4590i subsection 1.03(a)(4) requires that healthcare liability claims be substantiated by timely filing an expert report. *Id*, subsection 13.01(d). Because Mr. Marks failed to file a timely expert report, the trial court granted the hospital's Motion to Dismiss. The Court of Appeals initially reversed, concluding that Mr. Marks' allegations concerned "an unsafe condition created by an item by furniture" and thus related to "premises liability, not healthcare liability". The hospital appealed, filing its Motion for Review a few days before the Texas Supreme Court had decided *Diversicare General Partner, Inc. v. Rubio*, 185 S.W. 3rd 842 (Tex. 2005) in which they held that the patient's claims against a nursing home for inadequate supervision in nursing services were healthcare liability claims.

On August 27, 2010, in a 5-4 decision, the Court reversed its 2009 opinion that Marks' claims did not fall under medical malpractice law because the bed was not integral to his medical care but determined that he was disqualified for damages because he did not get a timely expert report, required in the medical malpractice case on the broken bed.

2. *Cherilyn Gatten v. Windell McCarley and Tammy McCarley,* No. 05-11-01138-CV, 2013, Tex. App. – Lexis 838 (Tex. App. – Dallas, Jan. 30, 2013).

The McCarleys invited Mr. Gatten to a house-warming party. As the Gattens were leaving the party, one of Mr. Gatten's co-workers approached them from behind and struck Mrs. Gatten in the head. Mr. Gatten ended up fighting with the co-worker. The McCarleys ordered the co-worker to leave the premise. Mrs. Gatten subsequently brought a negligence action against the McCarleys based on a premises liability theory. The trial court granted the McCarleys' special exceptions and dismissed the complaint for failure to state a cause of action. On appeal, the Court of Appeals held that Texas courts have declined to impose a duty on social guests to control their guests and prevent them from inflicting injury on other guests. Further, the pleadings did not indicate that the McCarleys knew of the co-worker's threat to provoke a fight with the husband prior to inviting the husband to the party and, even after the co-worker had earlier attempted to provoke a fight, the husband and wife remained at the party for another two hours, apparently without incident. There is nothing in the pleadings to suggest that the McCarleys could have foreseen that the co-worker would make a second attempt to provoke a fight.

To prevail on a negligence cause of action, Plaintiff is required to prove: the Defendant owed a legal duty to the Plaintiff; the Defendant breached that duty; and the breach proximately caused the Plaintiff's injury. Whether a duty exists is the threshold inquiry and a question of law. Liability cannot be imposed if no duty exists. As a general rule, a person has no legal duty to protect another from the criminal acts of a third person or control the conduct of another. There are limited exceptions where the existence of a special relationship may impose a duty to control a third-party's conduct. Examples of relationships that are recognized as giving rise to a duty to control include employer/employee, parent/child, and independent contractor/contractee. The scope of the duty is commensurate with the right of control and the extent of the danger. A social guest is generally classified as a licensee, not an invitee. A property owner has a duty not to injure a licensee by willful, wanton, or grossly negligent conduct and, in cases in which the property owner had actual knowledge of a dangerous condition unknown to the licensee, to either warn the licensee of the condition or to make the condition reasonably safe. With regard to the criminal acts of third parties, the Court considers not only whether the danger was foreseeable, but also whether it was foreseeable if the danger would harm a particular plaintiff or one similarly situated. The Texas courts have currently declined to impose a duty on social hosts to control their guests and prevent them from inflicting injury on other guests.

3. *Kevin D. Spruell and Darcy Spruell, Individually and As Next Friend of Camryn Spruell, Minor v. USA Gardens at Vail Leasco, L.L.C., et al* , No. 02-12-00056-CV, 2013 Tex. App. Lexis 942 (Tex.App. – Ft. Worth, Jan. 31, 2013).

Camryn Spruell was injured when she fell from an open window in her third-story apartment. On appeal, the Court held that the trial court properly granted the apartment complex owners' No-Evidence Motion for Summary Judgment on the parents' claims for breach of implied warranty of good and workmanlike repair because there was no evidence that the owners' repair of the window, which was not improperly performed, was completed in accordance with the maintenance request by the parents, enabled the window to work properly

after the repair, satisfied the parents, and was not in violation of any code or standard, breached the implied warranty of good and workmanlike repair. Furthermore, the owner's failure to install safety locks, window guard, or other child-proof devices on the windows did not constitute a breach of the implied warranty to perform repairs in a good and workmanlike manner, because there was no evidence that the owner fell within either of the two exceptions plead by the parents to the general no-duty rule.

An implied warranty exists that a service provider will perform repairs in a good and workmanlike manner. A good and workmanlike manner means that the quality of the work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work. The implied warranty focuses on a service provider's conduct by defining a level of performance expected when the parties fail to make an express provision in their contract for such performance. Generally, the premises owner has no duty to tenants or their invitees for dangerous conditions on the lease premises. This rule stems from the notion that a lessor relinquishes possession of the premise to the lessee. The Texas courts, however, recognize several exceptions to this general no-duty rule in which a lessor may be liable for injuries arising from: the lessor's negligent repairs; concealed defects of which the lessor was aware when the premises were leased; and a defect on a portion of the premises that remained under a lessor's control.

In this case, the maintenance request was submitted February 20, 2007 and repairs were completed on March 21, 2007. On May 19, 2007, Darcy Spruell (the mother) opened one of the windows three-fourths to one hundred percent of its capacity and left it open to provide fresh air. On that day while Darcy was cooking in the apartment Camryn fell from the third-story apartment through the living room window and sustained serious and permanent injuries. Because no evidence existed that either of the exceptions plead by the parents to the general no-duty rule applied, the trial court properly granted the Owner's No-Evidence Motion for Summary Judgment on the parents' claims for premises liability.