FALL 2013 NEWSLETTER

PREMISES LIABILITY LITIGATION UPDATE

By Gerald B. Lotzer

1. *Austin v. Kroger,* 2013 U.S.App. LEXIS 19866 (U.S. Ct. of Appeals – 5th Cir.) 9/27/13.

This case arises out of injuries that Plaintiff/Appellant, Randy Austin, sustained while performing his job duties as an employee for Defendant/Appellee, Kroger Texas, L.P. ("Kroger"). The Fifth Circuit Court of Appeals affirmed the District Court's judgment with respect to Austin's gross negligence claim but reversed and remanded his claim with respect to premises liability and ordinary negligence claims.

Randy J. Austin was employed by Kroger and in 2008 he became a "utility clerk" or a "floor clean-up person" at the Mesquite, Texas store. His duties included sweeping, mopping, sacking groceries, consolidating carts, and cleaning the stores restrooms. Kroger Management decided to perform an annual cleaning of the store's condenser units which included power washing the condensers with water and a cleaning solvent for about twenty minutes. Some of the water cleaning solvent leaked into the ventilation ducts that opened into the down stair restrooms. When Mr. Austin came to work he was told about the condenser cleaning and was asked to clean up "whatever mess" it made. Kroger had previously provided Mr. Austin with a safety handbook which included instructions that the store management should "make certain that the Spill Magic Spill Response stations were adequately supplied at all times and available in numerous places throughout the store, however, none were available that day. Austin, therefore, cleaned the spill with a dry mop and bucket. While cleaning the floor, he fell, sustaining a left femur fracture and severely dislocated his hip. He spent nine months in the hospital and underwent six surgeries. His left leg is now two inches shorter than his right.

Kroger, a non-subscriber to the Texas Workers Compensation system was sued in Texas state court by Mr. Austin who asserted negligence, premises liability, and gross negligence claims against Kroger.

Kroger moved for summary judgment and the District Court granted Kroger's motion, based in part on Austin's "subjective awareness of the risk" the spill presented and dismissed his claims with prejudice. Mr. Austin appealed and the Fifth Circuit Court of Appeals who reviewed the District Court's granting of the summary judgment. In the Court's review of the premises liability claim, the Court determined that the Texas Supreme Court has emphasized that an employer's duty to its employees may be identical "in all material respects" to a landlord's duty "to use reasonable care to make his premises reasonably safe for the use of his invitees." They went on to say that the Texas Supreme Court has repeatedly held that an employer owes a continuous, non-delegable duty to provide its employees with a safe work place. There was no genuine dispute that Mr. Austin was aware that the spill posed a risk, therefore, the Court considered the Texas court's treatment of a doctrine called the "no duty rule," and concluded that

the Plaintiff's objective knowledge of the spill did not preclude his recovery as a matter of law. Applying various cases to the facts at issue, the Court determined that Mr. Austin's subjective knowledge of the spill, standing alone, was not enough to support summary judgment in favor of Kroger.

With respect to the gross negligence issue, the Court held that considering the high evidentiary standard that applies to gross negligence claims, they AGREE and AFFIRM the District Court's dismissal of Mr. Austin's gross negligence claim. To recover for gross negligence in Texas, a Plaintiff must satisfy the elements of an ordinary negligence or premises liability claim and demonstrate clear and convincing evidence of "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others." *State v. Shumake*, 199 S.W. 3d 279, 289 (Tex. 2006).

2. *Montoya, Individually and On Behalf of the Estate of Jessica Montoya, Deceased v. Nichirin-Flex*, No. 08-12-00070-CV (Tex. Civ. App. – 8th Dist. El Paso) 2013 Tex. App. LEXIS 9844, Aug. 7, 2013.

This is an appeal from the 128th Judicial District Court of El Paso, County, Texas, by Veronica Montoya, Individually and on Behalf of the Estate of Jessica Montoya, with respect to a summary judgment granted in favor of Nichirin-Flex, USA, Inc. regarding premises liability claims.

Nichirin supplied automotive parts to Japanese automakers in the United States. It has facilities in El Paso, Texas, and Juarez, Mexico. The El Paso facility is a warehouse used for the storage and distribution of automobile parts and consists of three areas, the office, lunch/break room, and warehouse. Prior to August 18, 2010, leaks developed in the building's roof and water began leaking into the warehouse area. At least one of the leaks was significant enough to require Nichirin to place a bucket beneath the leak to catch the water from the air conditioners on the roof. This bucket was used for months at a time. Veronica Montoya's daughter, Jessica Montoya, worked for SPF Foam Roofing and Installation as a helper and performed light duty labor which included buckets and hoses. SPF was hired to apply an elastomeric and foam coating to the roof in an attempt to stop the leaks. As part of Ms. Montoya's duties she was required to use a blower to clean the areas before applying the sealant with a roller or brush. While up on the roof, she began using a blower to clean the area near the parapet in preparation for the coating. She was not using any kind of safety restraints, and she ended up falling through a corroded area of the metal roof onto the warehouse floor some thirty feet below suffering fatal blunt force injuries. Ms. Montoya's employer was not aware at the time of the accident that OSHA regulations required an employee working above skylights over six feet from the ground to use some type of fall restraints. Mr. Montoya filed a premises liability action against Nichirin based on the "dangerous condition" of its premises as well as a negligence action against the employer. Nichirin filed a traditional summary judgment motion based on a defense provided by Chapter 95 of the TEXAS CIVIL PRACTICES & REMEDIES CODE, which was enacted in 1996, with respect to claims against a property owner, contractor, or a subcontractor for personal injury, death, or property damage to an owner, contractor, or a subcontractor or an employee of a subcontractor or subcontractors; and that arises from the condition of the use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates or modifies

the improvement. Under Section 95.003 the property owner is not liable for personal injury, death, or property damage to a contractor or an employee of a contractor ... (1) where the damage arises from the failure to provide a safe work place unless the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports and (2) the property owner had actual knowledge of the danger or condition resulting in personal injury, death, or property damage and failed to adequately warn.

The Court held that the property owner has the burden to establish that Chapter 95 applies to the Plaintiff's claim. Once the property owner has shown that Chapter 95 applies, the Plaintiff then has the burden to establish both prongs of Section 95.003. The Court determined that the Legislature, when enacting Chapter 95, did not define the terms "constructs, repairs, renovates, or modifies" and, consequently, the words must be given their ordinary meaning. After analyzing the type of work that was being performed, the Court held that Chapter 95 did apply and held that Nichirin conclusively established a Chapter 95 defense and the trial court did not err by granting summary judgment in their favor.

3. *Sedita v. Royal Sweeping and Paving,* No. 01-12-00702-CV, (Tex.Civ.App., Houston [1st Dist.] 2013, Tex. App.) LEXIS 8327, July 9, 2013.

This is an appeal from the 157th Judicial District Court of Harris County, and is a Memorandum Opinion by a panel consisting of Justices Jennings, Brown, and Huddle. Ellen Sedita challenged the trial court's rendition of summary judgment in favor of Royal Sweeping and Paving, LLC, for negligence, negligent activity, and premises liability.

In Plaintiff's Second Amended Petition she alleged that she was injured on the morning of March 8, 2010 in a parking garage when she "slipped on loose gravel and debris and fell on the ground." The property management company had hired a parking company to manage the premises and, in turn, the parking company, Merit Parking Company, hired Royal Sweeping to sweep and to vacuum the garage twice a month. Royal Sweeping had swept and vacuumed the garage the day before the Plaintiff's alleged accident.

The Plaintiff sued the owners of the building, the parking company, and Royal Sweeping for negligence, negligent activity, and premises liability. In her petition, Ms. Sedita alleged that she was a business invitee and that she had entered the garage with the Defendant's consent and had slipped and fallen on loose gravel and debris which posed an unreasonable risk of harm. She went on to allege that the Defendants knew or should have known about the dangerous condition and owed a duty to exercise reasonable care in maintaining the premises, breached the duty of ordinary care to her and, as a result, she was injured.

Royal Sweeping filed a No-Evidence Motion for Summary Judgment on each of the Plaintiff's claims. The trial court granted Royal Sweeping's No-Evidence Motion. Ms. Sedita did not appeal the trial court's rendition of Summary Judgment in favor of Royal as to her negligent activity claim, but appealed based on her claims for negligence and premises liability.

The Court held that premises liability is a special form of negligence in which the duty

owed to the Plaintiff depends on the Plaintiff's status on the premises at the time the incident occurred. The parties do not dispute that Ms. Sedita was a business invitee or that she was on the premises with the owner's knowledge and for the mutual benefit of both. Premises owners and operators owe a duty to keep premises safe for invitees against conditions on the property that pose an unreasonable risk of harm. The duty, however, does not make the premises' owner or operator a "warrantor" or "insurer" to the invitee's safety. *Wal-Mart Stores, Inc. v. Gonzalez*, 968 S.W.2d 934, 936 (Tex. 1998.) The Court held that Ms. Sedita presented no evidence that Royal Sweeping placed the debris on the floor of the garage or had "actual or constructive knowledge" of the debris. The Court relied on Chris Figg, the Facility Manager for Merit's, testimony that he had earlier walked by the area, which is near his office, and he did not see the debris on which the Plaintiff claims to have fallen. Thus, the Court reasoned that even the Property Management Company on site that morning was unaware of any dangerous condition. The Court further determined that approximately fourteen to sixteen hours had passed from the time that Royal Sweeping swept the garage to the time of the alleged fall and, therefore, the Plaintiff did not meet her burden of presenting evidence to raise a genuine issue of material fact on the challenged element of actual or constructive knowledge of the condition on the premises and accordingly held that the trial court did not err in granting Royal Sweeping's No-Evidence summary judgment motion on the Plaintiff's claim as to premises liability.