IN THE SUPREME COURT OF TEXAS

NO. 06-1022

DEL LAGO PARTNERS, INC. AND DEL LAGO PARTNERS, L.P.,
DOING BUSINESS UNDER THE ASSUMED NAME OF
DEL LAGO GOLF RESORT & CONFERENCE CENTER,
AND BMC-THE BENCHMARK MANAGEMENT COMPANY, PETITIONERS,

v.

BRADLEY SMITH, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE TENTH DISTRICT OF TEXAS

Argued December 6, 2007

JUSTICE JOHNSON, joined by JUSTICE HECHT, dissenting.

Justice Hecht articulates what I believe is the correct view of a premises occupier's duty to invitees. I join his dissent.

I also dissent for further reasons, beginning with the Court's starting from an incomplete, and thus improper, premise as to the duty Del Lago owed to Smith. Citing *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005), and *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998), the Court says that "Smith was an invitee, and generally, a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm

created by a premises condition about which the property owner knew or should have known." ___ S.W.3d at ___. The Court's statement of duty is incomplete, is not supported by *Urena*, takes the Court's statement in *Timberwalk* out of context, and is at odds with the unobjected-to jury charge given in this case.

In *Urena*, a child living in an apartment complex was lured into an apartment by an adult resident of the apartments and sexually assaulted. *Urena*, 162 S.W.3d at 549. The resident who assaulted the child fled and could not be found. *Id.* The suit against the apartment complex was based on both ordinary negligence and premises liability theories. *Id.* at 550. The Court noted that premises liability is a special form of negligence, but the difference was not discussed in depth because it was not material to disposition of the case:

> We analyze Urena's negligence and premises-liability claims together. 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. *Premises liability is a special form of negligence where the duty owed to the plaintiff depends upon the status of the plaintiff at the time the incident occurred*. . . .
>
> Negligence and premises liability, therefore, involve closely related but distinct duty analyses. But *we need not delve into this distinction to resolve this case because recovery under either cause of action is foreclosed in the absence of evidence that Front Royale's acts or omissions proximately caused L.U.'s injuries*.

Id. at 550-51 (emphasis added) (citations omitted). The Court referenced the duty owed by a premises occupier to an invitee briefly in the context of proceeding to the causation question on which it decided the case, but the Court did not re-examine the duty owed by a premises occupier to an invitee. *Id.*

In *Timberwalk*, the plaintiff was assaulted in her apartment by an intruder. *Timberwalk*, 972 S.W.2d at 751. The trial court submitted the case on a premises liability charge, and the jury found against the plaintiff. *Id.* at 752. The first issue the Court considered was whether the case was properly submitted as a premises liability case instead of a negligent activity case. *Id.* at 753. In determining that the case was properly submitted, the Court discussed in a brief manner the difference between the two theories of liability as to a premises occupier:

> In *Keetch v. Kroger Co.*, 845 S.W.2d 262 (Tex. 1992), we explained the difference between liability for negligent activity and liability for failing to remedy an unreasonable risk of harm due to the condition of premises. "Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." Negligence in the former context means simply doing or failing to do what a person of ordinary prudence in the same or similar circumstances would have not done or done. Negligence in the latter context means "failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier [of land] knows about or in the exercise of ordinary care should know about."

Id. (citations omitted). The Court determined that the case was properly submitted as a premises liability case, but the defendant had no duty to the plaintiff because the criminal assault was not foreseeable. *Id.* at 758-59. As in *Urena*, the Court was not undertaking to re-examine or re-define the duty owed by a premises occupier to an invitee. That duty had been specifically considered and explicitly addressed in *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam), which issued only two years before *Timberwalk*. There the Court directly considered the proper jury instruction to be used in a premises liability case. *Id.* The State contended that the duty imposed on it was to use ordinary care to either warn of an unreasonably dangerous condition or make it

reasonably safe. *Id.* The Court held that a premises occupier is not liable to an invitee if the occupier either adequately warns of the condition or makes it reasonably safe:

> The State argues that it had a duty to warn or make safe, but not both. In other words, the State argues that it was not negligent unless it *neither* adequately warned Williams *nor* made the condition reasonably safe. Stated differently still, the State argues that it was not negligent unless it *both* failed to adequately warn Williams and failed to make the condition reasonably safe. . . . We agree with the State. . . . In *State Department of Highways & Public Transportation v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992), we held that to establish the liability of a premises owner, a plaintiff must prove that "the owner failed to exercise ordinary care to protect the [licensee or invitee] from danger." The owner can provide the required protection by either warning the plaintiff or making the premises reasonably safe. This statement of the duty eliminates the confusion caused by PJC 66.05.

Id.; *see also Harris County v. Eaton*, 573 S.W.2d 177, 180 (Tex. 1978) (noting duty of the County as to a special defect was to "warn as in the case of the duty one owes to an invitee").

The differences between general negligence cases and suits against premises occupiers based on conditions of the premises are important. *See Urena*, 162 S.W.3d at 550. A premises occupier has specific duties of care. When a claim against the occupier is based on a condition of the premises, the jury is instructed on the specific elements of the occupier's duty and what must be proved before the plaintiff may prevail. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997).[1] In this case, Smith pleaded that his injury was caused by both Del Lago's negligent activity and a dangerous condition on the premises. He requested jury questions on both theories, but the trial court charged the jury only on the dangerous condition theory. Smith does not assert that the trial court erred by refusing to submit a jury question on negligent activity, nor does

[1] Premises occupiers may be liable for injuries to invitees when the injuries are caused by (1) negligent activities of the occupier or (2) unreasonably dangerous conditions on the premises. *See Timberwalk*, 972 S.W.2d at 753.

he complain of the jury instructions. Del Lago does not assert charge error. Thus, the parties' contentions and the evidence should be measured by the charge given. *See St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 530 (Tex. 2002).

Question 1 of the jury charge asked whose negligence, if any, proximately caused Smith's injuries. As relevant to Question 1 and the issue before us, the charge contained the following instructions and definitions:

> "Proximate Cause" means that cause which, in a natural and continuous sequence, unbroken by any new and independent cause, produces an event, *and without which cause such event would not have occurred*. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event, but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an occurrence, then no act or omission of any other person could have been a proximate cause.
>
> With respect to the condition of the premises, **Del Lago** was negligent if-
> (a) the condition posed an unreasonable risk of harm, and
> (b) Del Lago knew or reasonably should have known of the danger, and
> (c) Del Lago failed to exercise ordinary care to protect Bradley Smith from the danger, *by both failing to adequately warn Bradley Smith of the condition and failing to make that condition reasonably safe*.[2]
>
> "Ordinary Care," when used with respect to the conduct of **Del Lago** as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances. (emphasis added).

Under the jury charge, Smith's burden was to prove Del Lago negligent by proving it failed in two regards: (1) it failed to use ordinary care to adequately warn of the condition posing an unreasonable

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[2] *See Williams*, 940 S.W.2d at 584; *see also* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 66.4 (2006).

risk of harm and (2) it failed to use ordinary care to make the condition reasonably safe. Because Del Lago could have been negligent only if it failed to act with ordinary care in regard to both, it is not liable unless that negligence, including both components, proximately caused Smith's injury.

The Court's statement of Del Lago's duty and its analysis of the case focuses only on Del Lago's duty to make a dangerous condition reasonably safe. In doing so, the Court neglects part of Smith's burden of proof: that Del Lago failed to use ordinary care to adequately warn him of the condition about which he complains.

I would hold that under these facts, Del Lago did not violate a duty of ordinary care to warn Smith of a condition that he did not need to be warned about. I would also hold there is no evidence that even if Del Lago breached a duty of care, the breach proximately caused Smith's injuries.

To review the essence of the case, Smith and his fraternity friends were in Del Lago's Grandstand Bar Friday night until it closed at midnight, then returned on Saturday evening. Smith suffered injuries at approximately 1:30 a.m. on Sunday morning while he and other late-staying patrons of the bar were being ushered out of the bar at closing time. He complains that Del Lago failed to protect him from a condition he had known of for approximately an hour and a half, but his complaint is bottomed on the injury he suffered at the hands of an unknown assailant in a bar fight he was not initially involved in, yet chose to subject himself to. No one could identify who started the fight, why it started, or who injured Smith. Smith could not sue the unknown person who injured him, but he could and did sue Del Lago and recovered a judgment for over $1,400,000.

Smith complains that ongoing interaction between members of his fraternity and the wedding party was an unreasonably dangerous condition,[3] Del Lago knew of the condition or should have known of it, and Del Lago failed to provide proper security to protect patrons from injury in the event of a fight. Del Lago essentially asserts that there was no unreasonably dangerous condition on the premises that it knew of or should have known of, so it did not owe a duty to provide more security or take other action to protect patrons such as Smith. It also asserts that even if it did owe Smith a duty, the evidence is legally insufficient to support the findings that it breached the duty or that the breach proximately caused Smith's injury.

I agree with the Court that occurrences on and around the Del Lago premises *outside* the bar before the night of the incident are dissimilar from and do not support a finding that Del Lago should have foreseen the general risk that patrons of the Grandstand Bar would be assaulted in a brawl *inside* the bar. *See Timberwalk*, 972 S.W.2d at 758. The bar was not the type of secluded or out-of-the-way area where a robbery, sexual assault, or other similar crime might typically, and possibly foreseeably, take place. The bar was lighted and occupied by patrons and bar personnel up until closing time when Smith was injured. Nor does the evidence establish sufficient prior occurrences inside or specifically related to the bar and similar to the events on the evening of Smith's injury so that Del Lago had a general duty to provide unusual amounts of security to protect patrons from assaults by other patrons. *See id.* The bar was not the scene of frequent fights, much less fights involving multiple participants.

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[3] Justice Wainwright argues persuasively that the activities in the bar were not conditions of the premises insofar as duties owed by Del Lago to invitees. Although I do not necessarily disagree with his analysis, the parties address the activities as being a premises condition, and the Court addresses them as such; thus I will do so.

On the other hand, there is no reason to relieve Del Lago of a duty of ordinary care to its bar patrons if a specific, unreasonably dangerous condition developed on its premises. *See, e.g., Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 754 (Tex. 1970); RESTATEMENT (SECOND) OF TORTS § 343 cmt. b (1965) ("To the invitee the possessor owes . . . [the] duty to exercise reasonable affirmative care . . . at least to ascertain the condition of the land, and to give such warning that the visitor may decide intelligently whether or not to accept the invitation . . . ."). Here, the jury found, under the charge as given, that an unreasonably dangerous condition arose. That finding had evidentiary support in testimony by Smith and other persons that persons were drinking, loudly cursing, challenging each other, making hand gestures toward each other, and even occasionally physically pushing each other. Witnesses, including a police officer Del Lago employed during his off-duty hours as a security officer, testified that such behavior in a bar setting is the way a lot of fights happen.[4] The evidence is legally sufficient to support the jury finding that conditions in the bar developed to the point that an unreasonable risk of harm was posed to bar patrons.

As Justice Hecht explains, Smith also fully knew of and was charged with knowledge of the condition at a time and under conditions giving him the choice of remaining in the bar and encountering the condition, or avoiding the conditions by leaving or taking other action—such as staying away from any fights that broke out. That should end the matter, but because it does not, the jury charge and burden of proof issues must be examined. Addressing those, I would hold that for

[4] Smith also urges that the lack of sufficient security was part of the condition. But the alleged insufficient security was not part of the condition posing a risk of harm; it was a component of Del Lago's action in meeting the duty Del Lago had to its invitees. Smith's argument that insufficient security was part of a premises condition conflates the condition alleged—the ongoing aggressive behavior of bar patrons—with the question of whether Del Lago exercised ordinary care to protect him from the condition.

two reasons, Del Lago is not liable for Smith's damages. First, Smith does not deny knowing full well about the condition he complains of. His knowledge of the condition, when he knew of it, and his ability to either encounter or avoid the condition should be balanced against Del Lago's duty to adequately warn him of the condition. I would hold that under the circumstances, Del Lago was not negligent because it did not breach a duty of *ordinary care* to warn Smith as a matter of law. Next, even assuming Del Lago was negligent, there is no evidence its negligence was a proximate cause of Smith's injury.

In *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 521 (Tex. 1978), this Court held that an invitee's knowledge of a dangerous condition does not relieve the premises occupier of its duty to the invitee.[5] In those situations in which the invitee's knowledge does not relieve the premises occupier of its duty, however, the invitee still must prove that the premises occupier failed to

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[5] The rule in most states is to the contrary: the premises occupier has no duty to warn of open and obvious conditions when the danger can be fully appreciated and averted by a reasonable person. *See TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 771-72 n.18 (Tex. 2009) (Hecht, J., dissenting) (listing jurisdictions holding that a landowner has no duty to warn of a condition of which the invitee is aware, or should be aware of). The rationale underlying this doctrine is that "'the open and obvious nature of the hazard itself serves as a warning. Thus, the owner or occupier may reasonably expect that persons entering the premises will discover those dangers and take appropriate measures to protect themselves.'" *See Armstrong v. Best Buy Co.*, 788 N.E.2d 1088, 1089 (Ohio 2003) (quoting *Simmers v. Bentley Constr. Co.*, 597 N.E.2d 504, 506 (Ohio 1992)). This is also the rule of the Restatement (Second) of Torts, and in many other contexts, is the law in Texas. RESTATEMENT (SECOND) OF TORTS § 343 (1965); *see, e.g.*, *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 218 (Tex. 2008) (premises owner owes no duty to warn an independent contractor's employees of an open and obvious danger); *Stephen F. Austin State Univ. v. Flynn*, 228 S.W.3d 653, 660 (Tex. 2007) (explaining that the recreational use statute does not obligate a landowner to warn of known conditions); *Jack in the Box, Inc. v. Skiles*, 221 S.W.3d 566, 568 (Tex. 2007) (per curiam) (noting that an employer owes no duty to warn of hazards that are commonly known or already appreciated by the employee); *Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 184 (Tex. 2004) (holding that product seller owes no duty to warn of commonly known risks of the product's use); *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 387-88 (Tex. 1991) (holding there is no duty to warn of risks associated with prolonged and excessive alcohol consumption because such risks are common knowledge).

Jurisdictions retaining the open-and-obvious risk doctrine have also logically concluded that a landowner has no duty to an invitee to warn or make safe known and obvious conditions when the invitee has assisted in creating the conditions; under such circumstances, a landowner should anticipate the invitee will avoid harm from the known condition and warning is unnecessary. *See, e.g., Baber v. Dill*, 531 N.W.2d 493, 496 (Minn. 1995) ("To hold a landowner has a duty to warn an invitee of danger created, in part, by that individual is untenable.").

exercise ordinary care by failing to both adequately warn the invitee of the condition and take action to make the condition reasonably safe. In *Williams*, the Court specifically approved the format of the jury question and instructions given in this case. *Williams*, 940 S.W.2d at 584-85.

The Court says that there are some conditions for which no warning could possibly be adequate. Assuming that is so, for the sake of argument, it cannot be the case here because several of Smith's witnesses testified that the possibility of a fight was evident for a long period of time and one of Smith's witnesses, a fellow fraternity brother, testified that he did not enter the fight when it started because he did not want to go to work with a black eye. Clearly the "condition" was one for which an adequate warning could have been given if one were needed. By diminishing the importance of the duty to warn that invitees must prove premises occupiers breached in order to prove liability, the Court moves premises liability law close to that of simple ordinary negligence.

In its third issue, Del Lago argues that there is no evidence it breached its duty to Smith. Smith argues that there is evidence Del Lago knew of an escalating situation but took no action to defuse it or call security to protect bar patrons. Del Lago focuses on the credibility of the witnesses. It urges that Smith and his witnesses were not believable as to what took place during the evening while the believable evidence—that to which Del Lago's witnesses testified—is conclusive on the question of whether security was sufficient for the conditions. I disagree with Del Lago as to its credibility assertion. The record supports the jury's determination that at least some of Smith's testimony was credible. Nevertheless, I would hold that Del Lago did not breach its duty to Smith and was not negligent.

The purpose of requiring premises occupiers to warn invitees of unreasonably dangerous conditions is to provide the invitee with a choice at a time and place where the invitee can decide (1) whether to come onto or remain on the premises, accept the risk of harm posed by the condition, and take action to avoid or protect himself from the risk or (2) refuse to accept the risk by either not coming onto the premises or by leaving. *See* RESTATEMENT (SECOND) OF TORTS § 343 cmt. b (1965) (stating that the possessor owes the duty "to give such warning that the [invitee] may decide intelligently whether or not to accept the invitation, or may protect himself against the danger if he does accept it"); *see also Bill's Dollar Store, Inc. v. Bean*, 77 S.W.3d 367, 370 (Tex. App.—Houston [14th Dist.] 2002, pet. denied). As to Smith, a warning by Del Lago would have been similar to a passenger telling a driver who was consciously exceeding the speed limit that exceeding the speed limit could result in a ticket for speeding. Such a statement is not a warning, it is a superfluous reminder of what the driver already knows.

At some point, the ordinary care standard must mean something. I would hold that it means something here. The question is, would reasonable persons exercising ordinary care in Del Lago's position have gone around the room telling Smith and other adult members of the groups who were in the bar after midnight and into the wee hours of the morning about what was occurring and that there was potential for a fight? I think not. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. I (Proposed Final Draft No. 1, 2005) ("Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care . . . . In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. . . . [T]hese cases

merely reflect the one-sidedness of the facts bearing on negligence . . . ."). Such actions would not have added to Smith's knowledge, and to require them imposes a requirement of meaningless ritual. And more to the point, should tort liability attach because Del Lago's personnel did not do so? Smith's knowledge under these facts gave him the same knowledge and opportunity to avoid potential harm from the condition as if he did not know of the escalating conditions in the first place and Del Lago had given him an adequate warning of the conditions and the ultimate fight. His knowledge, considering when he obtained it and the adequacy of the choices that were available to him, must be weighed when determining whether Del Lago failed to act with ordinary care to warn him. The greater Smith's knowledge of the condition, the less an ordinary person would believe Smith needed warning. Once his knowledge reached the level of what an adequate warning would have conveyed, as it did that evening and early morning, Del Lago's duty of ordinary care to warn should be deemed fulfilled as a matter of law. I would hold, as a matter of law, that under these facts Del Lago did not breach its duty of ordinary care to warn Smith.

The purpose of the law is not to make the premises occupier an insurer of its invitee's safety and thus insulate an invitee from all risk of injury, but rather to afford the invitee sufficient knowledge and reasonably available choices to make an informed decision about whether to encounter or avoid a condition. It is contrary to both common sense and logic to impose liability on Del Lago because its employees did not warn Smith during the evening that "members of Sigma Chi and a wedding party are drinking, acting belligerently toward and threatening each other," or take similar action when, according to Smith's own testimony, he knew as much as the warning would have conveyed. Parties should be held liable in tort because they did or failed to do something

substantive that caused injury to another, not because they performed or failed to perform meaningless acts. If it is otherwise, premises occupiers can be held liable for failing to perform a meaningless act, as is being done to Del Lago here.

Further, even assuming Del Lago was negligent, I would hold that there is no evidence its negligence was a proximate cause of Smith's injury. One reason is there is no evidence the absence of the warning was a cause-in-fact of the injury. A second reason is there is no evidence that even if security had been present earlier and at the time of the fight, or if Del Lago personnel had taken actions such as escorting rowdy patrons out of the bar, the person or persons who started the fight and the person who injured Smith would not have been present at the time of the fight.

As to the first reason, proof of cause-in-fact ("but-for" causation) requires evidence that the negligent act or omission was a substantial factor in bringing about the injury and that absent the act or omission, the harm would not have occurred. *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). Thus, Smith was required to prove that the absence of a warning by Del Lago was a substantial cause of his injury and that his injury would not have occurred but for the absence of the warning. *See id.* Including both the warning and "making safe" elements in one instruction did not lessen Smith's burden to prove that both elements proximately caused his injury. *See Williams*, 940 S.W.2d at 584 ("The State argues that it had a duty to warn or make safe, but not both. . . . We agree . . . .").

Under some circumstances, when a defendant has the duty to give a warning, the plaintiff is aided by a rebuttable presumption that a warning would have been heeded if it had been given. *See, e.g.*, *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357-59 (Tex. 1993); *Tex. Dep't of Transp. v.*

Fontenot, 151 S.W.3d 753, 765 (Tex. App.—Beaumont 2004, pet. denied); *see also Barron v. Tex. Dep't of Transp.*, 880 S.W.2d 300, 304 (Tex. App.—Waco 1994, writ denied). But even when such a presumption applies, it is rebutted by evidence from which an inference can be drawn that the plaintiff would not have reacted differently if a warning had been given. *See Saenz*, 873 S.W.2d at 358-59. For example, the presumption is rebutted by evidence suggesting that the plaintiff knew the information a warning would have provided but nevertheless knowingly and voluntarily chose to face the risk. *See Guzman v. Synthes (USA)*, 20 S.W.3d 717, 720-21 (Tex. App.—San Antonio 1999, pet. denied); *see also Stewart v. Transit Mix Concrete & Materials Co.*, 988 S.W.2d 252, 256-57 (Tex. App.—Texarkana 1998, pet. denied). Once the presumption is rebutted, it ceases to play any part in determining causation. *See Saenz*, 873 S.W.2d at 359.

As noted above, and also by the Court and Justice Hecht, Smith knew all the information an adequate warning by Del Lago would have conveyed. He testified that he was aware of the tension between the groups, he witnessed episodes he described as "severe escalation," and at least an hour before the fight he saw men yelling, "squaring up chest to chest, kind of in a standoff," and "taunting back and forth." He also testified that when the fight finally broke out, he knew of the fight because he saw it even though he was not part of it. As Smith put it in his brief to this Court:

> Smith was not fighting and was standing against the wall until he saw his friend Spencer Forsythe go down. Forsythe was thrown against a wall and shoved to the floor. He was being kicked in the head, legs, and stomach when Smith leaned over and grabbed him by the shirt to pull him up and move him out of the bar.

There is no question about what Smith would have done if he had the knowledge a warning would have conveyed about the condition: he had the knowledge, yet he stayed in the bar with his

friends until closing time and then moved from a place of safety into the fight after he knew it was occurring. Smith did not testify that a warning by Del Lago was necessary for him to know what was happening or that a warning would have affected his conduct or prevented his injury, and there is no other evidence that if he had been warned by Del Lago employees about the ongoing aggressive behavior and confrontations during the evening, the alleged lack of sufficient security, or even the fight itself, the warning would have made a difference to him. In short, there is no proof that but for Del Lago's failure to warn Smith of the condition, or even the fight itself, his injury would not have occurred. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 18 cmt. c (Tentative Draft No. 1, 2001) ("To justify liability in a negligent failure-to-warn case, there must be a finding of causation—a finding that the warning, if given, would have prevented the harm that resulted . . . .").

Next, there is no evidence that the presence of security or the removing of rowdy persons from the bar would have prevented Smith's injury; in other words, that they were a cause-in-fact of his injury. In regard to the causation analysis, the facts in this case are similar to those in *East Texas Theatres, Inc. v. Rutledge*, 453 S.W.2d 466 (Tex. 1970). There the Court considered whether a theatre owner's failure to provide security proximately caused injury to a patron. The plaintiff was on the ground floor of the theatre when she was hit in the head by a bottle thrown from the balcony. *Id.* at 467. The plaintiff claimed, and the jury found, that persons in the balcony were acting in a rowdy manner during the movie, the theatre and its employees negligently failed to remove the rowdy persons, and the theatre's negligence proximately caused the plaintiff's injuries. *Id.* During the movie, there was "hollering" from patrons in the almost-full balcony and on the ground floor and

paper and cups were falling or being thrown from the balcony. *Id.* at 467-68. After the movie ended, the plaintiff was leaving the theatre when she was hit in the head by a bottle thrown from the balcony. *Id.* at 467. No particular person in the balcony was identified during trial as having been rowdy, nor was the person who threw the bottle identified. *Id.* at 468. The Court assumed, without deciding, that the finding of negligence was supported by evidence, but held there was no evidence the negligence proximately caused the plaintiff's injuries. *Id.* at 468-69. The Court rejected two contentions of the plaintiff that are substantively the same as those made by Smith in this case: rowdy patrons could and should have been removed and the balcony should have been supervised more closely. *Id.* at 469. As to the first contention, the Court held there was no evidence the bottle-thrower was one of the rowdy persons, so even if the rowdies had been removed, there was no evidence the bottle-thrower would have been removed. *Id.* As to the second contention, the Court held that it was speculative to say supervision would have prevented the bottle-thrower from injuring the plaintiff because no one knew who did the throwing. *Id.*

In reaching its conclusion that Del Lago's failure to provide adequate security was a proximate cause of Smith's injuries, the majority relies on lay and expert testimony that a security presence in the bar during the ninety minutes that the two groups were confronting each other would have defused the situation and prevented the brawl at closing time. However, no one knew who or what started the fight as the patrons were leaving the bar. The testimony was that there was a press of bodies going out the door when all of a sudden "all heck broke loose." There was no evidence that only fraternity members and wedding guests were exiting the bar or that a member of one of the groups started the melee. There was no evidence about why the fight started, that is, for example,

whether one of the fraternity or wedding group members started it because of earlier friction, or whether someone unrelated to either group took offense at a remark or insensitive touch or rub and threw a punch, or whether someone tripped and fell into another person who pushed back, thus starting a chain reaction of pushing and fighting. Nor was there testimony that a member of either the fraternity or wedding groups was the person who injured Smith or that the person who injured Smith was intoxicated or involved in the earlier jousting between the groups. Just as in *East Texas Theatres*, there is no evidence that if security had escorted rowdy patrons out of the bar earlier, the person or persons who started the fight would not have been present at closing time, the cause of the fight would have been eliminated, or the person who injured Smith by holding him in a headlock and hitting his head against the wall would not have been in the fight. *Id.* (stating that, unless the identity of the bottle-thrower was known, it was impossible to determine the effectiveness of the suggested control measures).

I would reverse the judgment of the court of appeals and render judgment that Smith take nothing.

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Phil Johnson
Justice

OPINION DELIVERED: April 2, 2010