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 WAINWRIGHT, dissenting.

Bradley Smith was seriously injured in a bar fight at the Grandstand Bar on the premises of the Del Lago Golf Resort & Conference Center (Del Lago) in Montgomery, Texas. Smith claimed, among other things, that Del Lago had a duty to take steps to preclude a fight or to remedy an unreasonably dangerous situation—the bar fight—once it arose. The trial court submitted the case to the jury on a premises liability charge and declined to submit the proposed negligent activity charge. The jury determined that Del Lago was liable and apportioned 51% of the damages award to it and assessed 49% against Smith. The trial court rendered judgment on the jury's verdict, and the court of appeals affirmed.

We are once again presented with the question of when a premises owner or possessor is liable for the conduct of other persons that cause personal injury to an invitee on the property. Smith's case turns on the alleged contemporaneous acts and omissions of the Del Lago staff and invitees in the Grandstand Bar as he has made no complaint about the "condition of the land." Accordingly, this case presents not a premises liability but a negligent activity case, and the trial court erred by refusing to submit plaintiff's proposed submission on negligent activity. Smith erred, however, by failing to appeal to this Court the trial court's refusal of his negligent activity submission. Smith's claim should not succeed on a premises liability theory because he failed to identify a necessary predicate of a premises liability claim—i.e., a physical defect in the condition of the premises. And Smith's allegation of inadequate security fails as a premises claim because he did not establish an unreasonable risk of serious harm necessary for Del Lago to owe him a duty. Because the Court approves Smith's recovery as a premises liability claim, I respectfully dissent.

I. Smith's Claim Is Not One for Premises Liability

The days of the general demurrer when claims would live or die on the basis of the form of the pleading generally are gone. But the cause of action pled dictates the answers to important questions in a case. The pleading defines the elements of a claim, facts to be proven, potential defenses to recovery, and damages recoverable. A strict liability products claim is different from a negligence claim that seeks the same damages arising from the same product and the same incident. *See Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex. 2004). A simple breach of contract claim arising from a transaction is not a tort claim, artful pleading notwithstanding. *See Sw. Bell Tel. Co. v. DeLanney*, 809 S.W.2d 493, 494–95 (Tex. 1991). Similarly, a cause of action for

premises liability is different from one for negligent activity. In *Keetch v. Kroger Co.* and *Timberwalk Apartments, Partners, Ltd. v. Cain*, we explained the difference between liability for negligent activity and liability for failing to remedy an unreasonable risk of harm arising from the condition of a 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."

Timberwalk Apartments, Partners, Ltd. v. Cain, 972 S.W.2d 749, 753 (Tex. 1998) (quoting *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264, 267 (Tex. 1992)). In short, unlike a negligent activity claim, "a premises defect claim is based on the property itself being unsafe." *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006).

In this case, Smith asserts he was injured when some members of his group of fraternity brothers and some members of a wedding party, all invitees, engaged in a fight at the Grandstand Bar, which had experienced no prior fights causing serious injuries. In this Court, rather than defend his position at the trial court that his cause of action was for negligent activity, Smith defends the trial court judgment on the premises liability claim. But this is not a case for damages caused by a pothole in a road, a slick floor from the misapplication of wax, a grape on a grocery store floor, the lack of adequate lighting in an apartment parking lot, or a trespasser's criminal attack on invited guests at a business. Although a species of negligence, premises liability cases are predicated on a

property possessor's failure to warn or make safe dangerous or defective conditions on property; negligent activity cases arise from contemporaneous actions or omissions in the conduct of people. Smith's case is about the conduct of people at the bar, but the trial court's charge defines negligence "[w]ith respect to the condition of the premises," and instructs the jury that Del Lago was negligent if "the condition posed an unreasonable risk of harm . . . ."[1] Smith did not identify any defective or dangerous physical condition of the premises.

The common law has recognized for a long time that the basis of a premises liability claim is a physical defect or condition on property. *See Kallum v. Wheeler,* 101 S.W.2d 225, 229 (Tex. 1937) (Where a building's decayed wooden floor gave way injuring a guest, the Court held "it appears to be settled in this state that one in possession of premises is under a duty to exercise

---

[1] The full text of the jury question follows:

> Did the negligence, if any, of those named below proximately cause the occurrence in question?
> 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.
> "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.

This is the Pattern Jury Charge submission for premises liability claims in which plaintiff is an invitee. STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 66.4, at 137 (2006).

ordinary care to make them safe" for invitees.). Relying on section 343 of the Restatement (Second) of Torts, we held that "[a] possessor of land is subject to liability for physical harm caused to his invitees *by a condition on the land*." *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 454 (Tex. 1972) (Pope, J.) (emphasis added); *see also McKee v. Patterson*, 271 S.W.2d 391, 395 (Tex. 1954) (involving an allegedly slick floor as a dangerous condition on the premises), *abrogated on other grounds by Parker v. Highland Park*, 565 S.W.2d 512, 517–18 (Tex. 1978). Comments to section 343 discuss the "physical condition" of the land, the "actual condition of the premises and [duty] to make reasonably safe by repair or to give warning," and potential dangerous qualities "of the place itself and the appliances provided therein . . . ." RESTATEMENT (SECOND) OF TORTS § 343 cmts. b, d, f (1965). The Restatement also distinguishes between "Activities Dangerous to Invitees" addressed in section 341A and the section 343 topic of "Dangerous Conditions Known to or Discoverable by Possessor." *Id.* §§ 341A, 343. The First Restatement recognized a similar dichotomy. RESTATEMENT (FIRST) OF TORTS §§ 341, 343 (1939). Although the Restatement (Third) of Torts collapses the differing duties, based on the status of the injured party, into a unitary standard, it continues to recognize the distinction between "conduct by the land possessor" and artificial or natural "conditions" on the land. *See* RESTATEMENT (THIRD) OF TORTS § 51 (Tentative Draft No. 6, 2009).

Opinions of this Court consistently illustrate that premises liability claims arise from physical conditions or defects on property, including:

- A pothole in a dirt road allegedly causing a driver's neck injury, *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 764–65 (Tex. 2009);

- Ice from a soft drink dispenser making a grocery store floor slippery, *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 407, 409 (Tex. 2006);
- An unstable metal and wood platform accessing a storage shed, *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 98–99 (Tex. 2000);
- Leaking water making a basketball court slippery, *City of San Antonio v. Rodriguez*, 931 S.W.2d 535, 536–37 (Tex. 1996);
- Store abduction occasioned by premises owner's disconnection of existing security alarm devices, poor external lighting, and failure to have two clerks on a late night shift, *Havner v. E-Z Mart Stores, Inc.*, 825 S.W.2d 456, 457, 459 (Tex. 1992).
- Plant spray making a floor slick, *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992);
- Grapes from a self-service grape bin falling on the floor and making a grocery store floor slippery, *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 297 (Tex. 1983);
- An unlit apartment stairwell where there was no other exit route, *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 513–14 (Tex. 1978);
- Misapplication of wax making a floor dangerously slick, *State v. Tennison*, 509 S.W.2d 560, 561 (Tex. 1974);
- Soapy foam making a spa floor slippery, *Adam Dante Corp. v. Sharpe,* 483 S.W.2d 452, 453–54 (Tex. 1972);
- Showroom rug alleged to be a tripping hazard, *Seideneck v. Cal Bayreuther Assocs.*, 451 S.W.2d 752, 753 (Tex. 1970); and

- A decayed wooden floor in a building through which a guest fell, *Kallum v. Wheeler*, 101 S.W.2d 225, 226–27 (Tex. Com. 1937).

In contrast to physical conditions, we have recognized that negligent activity claims arise from:

- Failure to warn taxi drivers not to carry guns, *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 524–25 (Tex. 1990);
- Independent contractor's operation of a mechanical pump on property, *Abalos v. Oil Dev. Co. of Tex.*, 544 S.W.2d 627, 628, 631 (Tex. 1976); and
- Failure to remove "rowdy" patrons before one such patron allegedly threw a bottle injuring another patron in a theater, *E. Tex. Theatres, Inc. v. Rutledge*, 453 S.W.2d 466, 467–68 (Tex. 1970).

Smith fails to implicate any premises condition at the Grandstand Bar in causing his injury.

Texas law also recognizes a duty of premises owners to take reasonable measures to prevent injury occasioned by the criminal conduct of trespassers, or third parties, if the type of harm is unreasonable and foreseeable. *Timberwalk*, 972 S.W.2d at 756. We have analyzed these claims as premises liability claims. Assuming the existence of an unreasonable risk of harm, property owners have a duty to act within reason to prevent the harm if evidence of the *Timberwalk* factors establish foreseeability.[2] *See e.g.*, *Trammell Crow Cent. Tex., Ltd. v. Gutierrez*, 267 S.W.3d 9, 15 (Tex. 2008); *Timberwalk*, 972 S.W.2d at 757.

---

[2] The *Timberwalk* factors are "whether any criminal conduct previously occurred on or near the 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 that the landowner knew or should have known about them." *Timberwalk*, 972 S.W.2d at 757.

In *Timberwalk*, we held that an apartment complex did not have a duty to protect a tenant from sexual assault by a stranger because that type of serious crime was not foreseeable. The injuries and criminal violations in the past had not made that type of crime one the premises owner knew or should have known was likely to occur, thereby prompting a legal duty to take reasonable precautions to prevent it. 972 S.W.2d at 758–59. The Court approved the plaintiff's pleading of the dispute as a premises liability case allegedly brought about by the defendants' failure to provide adequate security measures and the absence of allegations that she was "injured by or as a contemporaneous result of any activity of defendants." *Id*. at 753 (quoting *Keetch*, 845 S.W.2d at 264). The Court, significantly, noted that the alleged inadequate security measures included defective physical security-related components—missing "charley" bars or pin locks for sliding glass doors, inoperative alarm systems in the apartments, inadequate lighting, inoperative access gates to the complex and the absence of security guards. *Id.* at 751.

In *Trammell Crow*, we again analyzed a dispute as a premises liability claim where plaintiff alleged negligently inadequate security to prevent a third party from shooting an invitee who was leaving a movie theater on the premises. 267 S.W.3d at 11–12. We held there was no duty to prevent the shooting because any prior criminal activity at the mall was not sufficiently similar and frequent to give rise to a duty to prevent the death. *Id.* at 17.[3]

[3] *Mellon Mortgage Co. v. Holder* is a difficult case to categorize. 5 S.W.3d 654 (Tex. 1999). In *Mellon*, an on-duty police officer stopped Holder, took possession of her drivers license, and instructed her to follow him. *Id.* at 654. He led her to Mellon Mortgage's parking garage and assaulted her in his squad car. *Id.* Plaintiff sued Mellon Mortgage. *Id.* The Court was sharply divided in the case as there was only a plurality opinion. *See generally id.* No invitees were injured by third parties who came onto the property, and there was no contemporaneous activity that the

All of these cases raising premises liability claims for third party injury to persons legally on the premises concern, to some degree, the alleged failure of defendants to employ adequate security measures. These security measures could be inadequate lighting, disconnected existing alarm systems, broken pin locks for sliding glass doors, inoperative security gates, an unrepaired opening in a security fence, or the absence of guards for business parking lots. *See Timberwalk*, 972 S.W.2d at 751; *Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 55 (Tex. 1997). These types of premises liability cases have in common the existence of defective physical conditions of the premises that allegedly allowed the criminal conduct to occur. The plaintiffs showed a nexus between their injuries and some physical defect or inadequacy in the property. Here, Smith implicates no physical condition of the property in his complaints.

Accordingly, Smith appropriately offered a negligent activity charge in the trial court, and the trial court erred in refusing it. *See Keetch*, 845 S.W.2d at 264. He claims that the acts and omissions of the Grandstand Bar staff during the evening were negligent. However, Smith erred in failing to appeal the trial court's improper submission of this case to the jury as a premises liability claim. Because the Court approves the award in this case on a premises liability charge (with respect to the "condition of the premises"), it opens almost any negligence dispute involving contemporaneous activities to being tried as a premises case. The Court's opinion is untethered to

---

premises owner knew or should have known about. *Id.* This case does not fit neatly under the typical premises liability or negligent activity rubric. Without determining whether Holder was an invitee, licensee, or trespasser, the Court resolved the case by concluding no duty arose in any event because foreseeability principles limited the scope of the defendant's duty. *Id.* at 658.

our long line of precedents drawing a distinction between negligent activity and premises liability causes of action.

II. Smith Fails to Show That the Risk of Harm Was Unreasonable

Smith also fails to establish that Del Lago owed a duty to prevent the type of injury he suffered. Premises owners are not obligated to insure the safety of invitees on their premises. However, a premises owner has a duty to protect invitees if he knows or has reason to know of an "unreasonable and foreseeable risk of harm to the invitee." *Timberwalk*, 972 S.W.2d at 756 (quoting *Lefmark*, 946 S.W.2d at 53); *see also TXI Operations*, 278 S.W.3d at 764–65; *Trammell Crow*, 267 S.W.3d at 12; *CMH Homes*, 15 S.W.3d at 101; *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993). The common law imposes this duty on premises owners based on the rationale that, as between an invitee and a premises owner, the premises owner is in the better position to know of and take precautions against the risk of such harm. *Tidwell*, 867 S.W.2d at 21.

Although foreseeability has received the lion's share of the attention of Texas courts considering this duty, for premises owners to have a duty to protect invitees, the risk of harm must also be unreasonable. *TXI Operations*, 278 S.W.3d at 764; *Lefmark*, 946 S.W.2d at 53. The question is not whether the harm itself is unreasonable, but whether the risk of that type of harm occurring is unreasonable. A great harm may not, but a small harm may, be unreasonable, depending on the risk of it occurring.

To determine whether the risk of this type of harm was unreasonable, courts must weigh the type of risk involved, the likelihood of injury and its magnitude—including the nature, condition, and location of the defendant's premises—and the harm to be avoided by imposing a duty, against

the consequences of placing the burden on the defendant. *See Trammell Crow*, 267 S.W.3d at 18 (Jefferson, C.J., concurring); *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 218 (Tex. 2008); *Timberwalk*, 972 S.W.2d at 759 (Spector, J., concurring); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990); *see also Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 212 n.5 (Cal. 1993) (explaining that courts weigh foreseeability of the harm against other factors, including the burden imposed on the premises owner); *McClung v. Delta Square L.P.*, 937 S.W.2d 891, 902 (Tenn. 1996) (holding that duty is determined by balancing the likelihood and gravity of harm against the burden imposed on the premises owner to prevent the harm). For example, if a premises owner could easily prevent a certain type of harm, it may be unreasonable for the premises owner not to exercise ordinary care to address the risk. On the other hand, if the burden of preventing the harm is unacceptably high, the risk of the harm is not unreasonable. *See Ann M.*, 863 P.2d at 215.

In determining whether Del Lago had a duty to protect against this type of crime, we consider whether Del Lago knew or should have known of the likelihood of this type of crime before Smith's accident. The evidence shows only one crime and approximately four undocumented incidents per year in the Grandstand Bar, only one of which involved several people. Most of the incidents that had occurred at the Grandstand Bar, as the evidence shows, were relatively minor alcohol-induced physical and verbal altercations that quickly resolved without intervention, or minimal intervention, by Del Lago security. The likelihood of a fight at the bar involving several people was very low; nothing similar in size or scale had occurred in the past. *See Trammell Crow*, 267 S.W.3d at 17

(protecting premises owners from liability for "crimes that are so random, extraordinary, or otherwise disconnected") (footnotes omitted).

That does not end the analysis, however. In determining the likelihood of injury, case law focuses on the nature, condition, and location of the defendant's premises to determine if Del Lago's Grandstand Bar was a dangerous place or a relatively safe facility. *Timberwalk*, 972 S.W.2d at 759 (Spector, J., concurring). In this case, nothing about the premises indicates that this type of serious injury was imminent, as it never had occurred at Del Lago before. *See Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring). The Grandstand Bar was part of an upscale resort. It did not border an area or particular establishment that posed a threat to Del Lago's invitees, have a conspicuous lack of security that would encourage criminal behavior, or otherwise attract or indicate impending criminal activity. The lack of such evidence here weighs against imposing a duty on Del Lago.

The likelihood of Smith incurring this type of serious injury was relatively low. Again, we examine the harm to be avoided from Del Lago's perspective before the fight that injured Smith. The typical harm resulting from the incidents at the Grandstand Bar that previously occurred and were most likely to occur again—alcohol-induced scuffles—resulted in only minor injuries, such as bruises and scrapes. Even a larger-scale scuffle would typically involve only those same types of minor injuries, but perhaps to more than one person. *See Trammell Crow*, 267 S.W.3d at 19 (Jefferson, C.J., concurring) ("Because the relatively few incidents of violent crime at the Quarry Market during the two-year period before Gutierrez's death did not pose an unreasonable risk of

harm, and in light of the tremendous burden that would be required to prevent such brazen attacks, I would hold that Trammell Crow owed Gutierrez no duty to prevent this crime.”).

Weighing the above considerations against the burden to be imposed on a premises owner, the law considers not the burden of preventing crime on the premises of Del Lago in general, but the imposition of a further duty to prevent this particular type of serious crime from occurring in the Grandstand Bar itself. Smith also argues that Del Lago had a duty to post a security guard in the bar. The security personnel at Del Lago were experienced and well-trained. They consisted of two off-duty police officers, Shenandoah Chief of Police John Chancellor and Lieutenant Lanny Moriarty of the Montgomery County Sheriff’s Office, who had a combined fifty years of police experience, as well as Director of Security and Safety Ruben Sanchez, a twenty-year veteran fireman and paramedic, and the Manager-on-Duty Ken Jeffrion. Smith did not dispute at trial that the size of the security staff was adequate. On the night in question, Chancellor and Moriarty were patrolling together in a golf cart on the grounds of Del Lago, which included the golf course, a group of cottages, and a hotel. Del Lago had a substantial security force.[4] Reallocating the security guards

---

[4] If I were considering foreseeability, applying the *Timberwalk* factors to the claim that there was a duty to place security guards in the bar would result in the conclusion that, based on past experience, it was not foreseeable that a serious injury would occur. The evidence showed twelve prior crimes on the 300-acre Del Lago resort property in the three years preceding Smith’s assault. Four of the twelve crimes were assaults in or near the Grandstand Bar, and eight were assaults in other portions of the resort. Officer Chancellor, employed by Del Lago, testified that he was called to the Grandstand Bar approximately five times per year for incidents that received no documentation. Officer Sanchez estimated he is called to the Grandstand Bar every two to three months to intercede in an argument. None of the incidents was of a magnitude to cause serious injury to the persons involved. Hence, there was no duty to provide security guards in the bar or additional security at Del Lago.

from patrol could leave the rest of the premises understaffed, especially when most of the documented crimes—and arguably the more serious incidents—occurring on the resort premises did not occur at the Grandstand Bar, but instead on other parts of the 300 acres.

Although Del Lago could have taken extraordinary measures to prevent this type of bar altercation, the law does not require premises owners to take draconian measures to prevent all unlikely but theoretically conceivable types of crime. *Timberwalk*, 972 S.W.2d at 756; *see also Boren v. Worthen Nat'l Bank of Ark.*, 921 S.W.2d 934, 941–42 (Ark. 1996). It is neither feasible nor desirable to impose such a requirement because of both the additional cost and the chilling effect it could have on the activities of invitees. While there may have been a risk of alcohol-induced altercations in the Grandstand Bar, the frequency, recency, and severity of prior incidents do not indicate that the risk of harm of this magnitude was unreasonable. Del Lago may have had a duty to act reasonably to prevent the typical scuffle from occurring at the Grandstand Bar, but that duty is less onerous than the one Smith demands and would not impose an inordinate burden on Del Lago. However, to require Del Lago to take further security measures—including, for example, the added cost of increased security training for all personnel and adding at least one stationary guard in the Grandstand Bar—would impose unreasonably large costs in order to prevent a type of crime that had never before occurred at the resort and may never occur again. *See Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 768 (La. 1999) ("The economic and social impact of requiring businesses to provide security on their premises is an important factor.").

The analysis of whether the risk of crime is unreasonable must always be determined based on what the premises owner knew or should have known before the criminal act occurred. Del Lago

took many, considerable steps to avoid risks of reasonable harm. The security at the Del Lago resort that evening was very experienced and well-trained, and the adequacy of the number of guards on duty that night was not questioned. In this case, I would hold that the burden on the defendant outweighs the likelihood, magnitude, and risk of harm to be avoided, taking into account the visible presence of security guards and their quick response time,[5] the added cost and inconvenience of having additional personnel, allocating existing personnel differently, or requiring additional training—all designed to prevent an unprecedented, albeit dangerous, fight. Because there was not an unreasonable risk of a barroom fight occurring and a serious injury resulting therefrom, Del Lago had no duty to protect against the risk of serious harm.

The Court argues that the jury's verdict should supercede our determination of the duty issue. That approach places the cart before the horse because the existence of a duty is a predicate to liability in tort. *Moritz*, 257 S.W.3d at 217; *see also Palsgraf v. Long Island R.R.*, 162 N.E. 99, 101 (1928) ("The question of liability is always anterior to the question of the measure of the consequences that go with liability."). In the landmark case of *Palsgraf*, the court held, with Chief Judge Benjamin Cardozo writing, that whether action is required to prevent harm is a question of duty. *Palsgraf*, 162 N.E. at 101. Disagreeing with the court, dissenting Justice Andrews asserted that predicating negligence on the existence of a legal duty to take care is "too narrow a concept." *Id.* at 102 (Andrews, J., dissenting). He believed that "[w]here there is the unreasonable act, and some right that may be affected there is negligence . . . ." *Id.* "Everyone," he wrote, "owes to the

[5] The first officer was on the scene of the fight about twenty seconds after being called. Two others arrived within two or three minutes of being called.

world at large the duty of refraining from those acts that may unreasonably threaten the safety of others." *Id.* at 103. Texas law does not define duty so expansively or, as the *Palsgraf* dissent, restrict limitations on duty only to the role of proximate cause. *Id.* Similarly, a duty arises from risks of harm that are both foreseeable and not unreasonable for premises owners to prevent.

Finally, the Court's description of the evening suggests that there was both a foreseeable and unreasonable risk of serious harm. First, there is no evidence that a serious injury ever occurred previously at the Grandstand Bar, described by the parties as an upscale bar. Establishing foreseeability or an unreasonable risk of serious harm in this case is a difficult climb. Second, the evidence does not portray a caldron of escalating events leading inevitably to a huge brawl. The testimony presented at trial paints a somewhat different picture of the events of the evening. No doubt the atmosphere in the Grandstand Bar was not calm and peaceful all evening. Members of the two groups exchanged heated words that night, and the physical confrontations in the bar happened "off and on" over the course of the evening. Smith and fraternity brothers Toby Morgan, Spencer Forsythe, and Michael Brooks testified that they witnessed shoving between some group members before the fight, but those situations diffused on their own. These incidents resolved themselves without staff intervention. Both Arlene Duncan and Elizabeth Sweet, the bartender and cocktail waitress on-duty that night, testified that they certainly would have called security had they seen assertive physical behavior that would have led to a fight. "Tensions" between bar patrons alone do not constitute an unreasonably dangerous situation. Although there were people in the bar not part of either the fraternity reunion or the wedding party, Smith presented no evidence that even one bar patron complained about the behavior of the fraternity or wedding party members, called security,

requested that security be called, left the bar to escape the situation, or otherwise expressed concern for his physical safety, either in word or deed.

In addition, the Court claims that the fight was a "closing-time melee involving twenty to forty 'very intoxicated' customers." The evidence shows that a number of people were in the *area* of the fight but only two to four people were involved in the actual fight. The length of the fight is also characterized as lasting fifteen minutes. Only one of the testifying witnesses stated that the fight lasted fifteen minutes. The other witnesses stated that the fight lasted between ten seconds and five minutes. This time frame is corroborated by the fact that when the first security officer arrived (within twenty seconds of being called), the fight was over. Though the Court disclaims creating a universal duty of these premises owners to prevent serious harm in these situations, its opinion paves a road in that direction.

III. If a Duty Arose to Act During the Fight, the Standard of Conduct to Which Del Lago Is Held Is Very High

The case was submitted to the jury on a premises liability charge, and the Court confirms liability against Del Lago on a negligent activity analysis. If the case had been submitted as a negligent activity claim, then the jury would properly have considered whether Del Lago breached its duty to use ordinary care to make the premises reasonably safe once the altercation broke out. *See E. Tex. Theatres, Inc. v. Rutledge*, 453 S.W.2d 466, 469–70 (Tex. 1970). Smith argues that the Bar staff should have taken timely steps to stop the altercation. On the issue of breach of that duty,

the evidence shows that the security personnel's response times that evening were exemplary,[6] and the liability finding in spite of the security response would be concerning, but for some evidence of delay in calling security sufficient that the jury could conclude that Del Lago breached this duty, as the facts show.

Once the fight began, the bartender and one of the waitresses took action. Duncan immediately attempted to break up the fight, while Sweet called security. Sweet testified that she was in shock when the fight arose, such that she could not immediately find the number. A sticker on the phone itself instructed "Dial 0 for Emergency," which directly connected to Del Lago's security when dialed. Instead, the waitress dialed the front desk, obtained the number for security, and then quickly gave it to another bar employee to alert security. Smith does not argue that the delay by the waitress in calling the front desk rather than security directly was a breach of Del Lago's duty. That is the only delay in this sequence of events that occurred that could constitute a breach. Del Lago's security force responded promptly to the calls. Sanchez, the first officer on the scene, arrived at the bar fifteen to twenty seconds after being called, and the fight was over when he got there. The other two officers arrived after Sanchez, within two to three minutes of being called. None of these facts is disputed. These are the response times we want in security personnel. I am persuaded not to conclude that Del Lago did not breach its duty in this regard only because of the one piece of evidence that is barely sufficient but on which the jury could conclude there was a breach—i.e., the waitress's testimony that it took her about three to four minutes to get the proper

---

[6] The security personnel at Del Lago that evening included three officers with some seventy years of combined law enforcement and paramedic experience.

telephone number and give it to another employee to make the call to security. I would be concerned if the message from the Court is to hold premises owners to a standard of perfection, instead of a standard of reasonable care.

IV. Conclusion

Because I believe the case was improperly submitted as a claim that it is not, I respectfully dissent. This dispute is either a premises liability case for alleged inadequate security (Smith's only allegation that raises a premises liability claim) or a negligent activity claim based on the contemporaneous acts or omissions of the Del Lago personnel and invitees, or it may be both if plaintiff articulates different facts in support of both claims. The charge for a negligent activity claim should not instruct the jury to find a dangerous "condition of the premises" as that finding addresses premises liability. I agree with the Pattern Jury Charge comment on this point that because the elements of these two theories are different, "it is important to submit the questions, instructions, and definitions that are applicable to the particular theory." COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES–MALPRACTICE, PREMISES, PRODUCTS PJC 65.1 (Comment), at 121 (2006). Submission of a premises liability charge for a negligent activity claim muddles the duties and undermines clarity in the law.

____

Dale Wainwright
Justice

OPINION DELIVERED: April 2, 2010