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 HECHT, joined by JUSTICE JOHNSON, dissenting.

The rule in Texas is that a possessor of land discharges his duty to protect an entrant from a condition that poses an unreasonable risk of harm by giving an adequate warning.[1] Now the Court tells us that "in some circumstances" no warning can be adequate. Which ones, exactly, the Court does not specify, saying only that Bradley Smith's full appreciation of the risk of injury from a bar fight "hardly seems" adequate.[2] So the rule has become that an adequate warning discharges a land

[1] *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam).

[2] *Ante* at ___ n.34.

possessor's duty except in circumstances when any warning hardly seems adequate. In other words, there is no rule, as the Court admits: "We do not announce a general rule today."[3] The land possessor who simply wants to be sure to avoid any exposure to liability is left without guidance.

The Court's application of its non-rule in this case portends a misguided change in the law. It is quite *possible* that Smith would not have been injured in a fight at the Grandstand Bar if the Del Lago Resort had provided better security. But it is quite *certain* he would not have been injured if he had left the Bar by either of its exits at any time during the 90 minutes he thought a fight was obvious, as he was completely free to do. The Court's holding in this case is that a possessor of land must protect an entrant from a potentially dangerous condition that any reasonable person could clearly see, fully appreciate, and easily avoid. This has never been the law of Texas. It is not the law in most states, and for good reason. It exposes a possessor of land to liability for harm that any reasonable person could have avoided.

The rule in section 343A(1) of the *Restatement (Second) of Torts* is to the contrary:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.[4]

Based on this rule, I would reverse and render judgment for Del Lago. Accordingly, I respectfully dissent.

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[3] *Ante* at ___.

[4] RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965).

I

Bradley Smith, 29, and a large crowd of his Sigma Chi fraternity brothers had been in the Del Lago Resort's Grandstand Bar for several hours celebrating their fraternity's 40th reunion when around midnight, in came a wedding party. Everyone had been drinking, and within a few minutes, a man in the wedding party apparently took umbrage at advances being made upon women in his party by the fraternity brothers. Recurrent shouting and shoving ensued for some 90 minutes, escalating in frequency and intensity with the approach of closing time. From the tension in the room, Smith — who recalled having had only one beer all night and could therefore clearly appreciate what was happening — thought it obvious to all there would be a fight. As one of the brothers testified at trial: "I mean, if you didn't know that this was going on, then you're either blind or deaf or don't care."

Security officers were on duty at the Resort, and had they been called to the Bar at the first sign of trouble, the fight that erupted in the doorway, just as the wait staff was insisting that everyone leave, might have been prevented. Smith was not part of that fight, but his friend Spencer Forsythe was. At trial, Forsythe recounted:

> Q [T]here were about forty Sigma Chi guys there, right?
>
> A I would say so.
>
> Q Ten or fifteen in the wedding party, right?
>
> A Right.

* * *

Q And some of the Sigma Chi fellows down at one end of the bar are having some words with the people in the wedding party, right?

A Right.

* * *

Q So you were concerned when you saw this verbal altercation go on between your Sigma Chi friends and these wedding party friends that this thing could develop into a bar fight?

A Sure.

* * *

Q Then what happens is . . . that a group of your friends — people you knew, right? Sigma Chi fellows? — moved, kind of, down towards the door? Not at the door, but towards the door, right?

A Right.

Q And we have some chest-thumping, that type of thing, right?

A Right.

Q And you chose to go to that fight, right?

A Yes. I — yes, I did.

Q Were you sitting or standing at the bar?

A I was actually — I was leaning on the bar.

Q Okay. You were leaning on the bar, and you looked down at the other part of the bar over here and you see some of your friends, and they're kind of doing the whole chest thing, the whole "I'm a tough guy" thing, right?

A Right.

* * *

Q You walked right over here to it, didn't you.

A Okay. Yes. Yes.

Q You came —

A Yes.

Q You came over here to support your friends in the Sigma Chi, didn't you?

A Right.

Q You wanted to show some force and show that you were here for them?

A Right. Yes.

Q You made that decision?

A I made that decision.

* * *

Q And then once you interjected yourself into that situation, now you're there, and now you're in the fight, right?

A After a few minutes. Yes.

Smith had not taken part in any of the evening's altercations and had stayed in another area of the Bar. He entered the fray at closing solely to rescue Forsythe. He testified at trial:

Q Were you in any way in the middle of this? Involved in the conflict?

A No, ma'am. I was actually up against — my right side was against this wall.

* * *

Q Now what was the extent of your involvement in this fight? If you could, tell the jury.

A The only involvement I had was going back in to get Spencer out.

Forsythe testified that he could have left at any time before the fight, and could have used the Bar's other exit, but chose not to:

Q [T]here are a couple of exits out of The Grandstand, right?

A Yes.

* * *

Q And you can use either one of those exits as long as it's during the hours of the club, correct?

A Yes.

* * *

Q Did you, at that time, choose to leave the bar —

A No.

Q — through either exit?

A No. I did not.

Q Did, at that time, you say, "Look, let's go out to our cottages, and let's just hang out there; these guys are too much of a hassle"?

A No. No. I did not.

* * *

Q You could've invited several of the Sigma Chi fellows, say, "Let's go out to the cottage," or "Let's go back to the lobby," "Let's get away from the situation which now I'm concerned about", right?

A Right.

Q And you chose not to do that?

A Right.

* * *

Q If you had chosen to take one of the two exits and go back to your cottage or go to some other part of the resort, you wouldn't have been involved in that fight, right?

A Right.

Presumably, Smith had the same options. Forsythe acknowledged that he could have asked for security to be called:

Q Or if you'd chosen — since you said you were concerned about it — if you'd chosen to advise the wait staff to go get security, that fight wouldn't have happened, right?

A Right.

* * *

Q If it was so obvious to you, Mr. Forsythe, that this verbal incident was going to break into a fight over here — if it was so obvious to you — why didn't you stop one of the wait staff and say, "I assume somebody's on the way; have you guys got somebody on the way?" Why didn't you do that?

A I don't — why was it my responsibility?

There is no reason to think Smith could not have done the same. And Forsythe admitted that even inside the bar, he could have stayed completely out of the fight:

Q Okay. Now, if you'd been sitting back over here, leaning up against the bar like you were before, you wouldn't have been in that fight, right?

A Most likely. Right.

Smith, in fact, had stayed out of the fight until he ventured back to rescue Forsythe.

Another fraternity brother, Cesar Lopez, stayed out of the fight altogether because, as he testified: "I'm not a fighter. I had to go to work Monday morning. I didn't want to go to work with a black eye from some fight." He added:

> Q As soon as you saw that blows were happening, you said you backed away, you didn't want to get in a fight?
>
> A Right.
>
> Q Well, where did you go?
>
> A Back towards the bar.
>
> Q Okay. You played it safe?
>
> A Yes.
>
> Q You decided to play it safe and backed away?
>
> A Right.
>
> Q And you were not injured?
>
> A No.

Smith, like Lopez, could have played it safe.

II

Smith's only claim, based on premises liability, is that Del Lago is liable for failing to protect him from an unreasonably dangerous condition in the Grandstand Bar, viz, the tension among the patrons that led to a fight. The settled rule in Texas is that a possessor of land "must either adequately warn" an entrant onto the property of an unreasonably dangerous condition "or make the

condition reasonably safe";[5] he need not do both.[6] There is no question that Smith was fully aware that a fight was brewing, not because of any sign displayed by the Bar, but because of events unfolding before his very eyes for 90 minutes, and that he had a ready means of avoiding all injury.

While an adequate warning discharges a land possessor's duty, as the Court says, "in some circumstances, no warning can adequately substitute for taking reasonably prudent steps to make the premises safe."[7] Those circumstances are to be found in *Parker v. Highland Park, Inc.*[8] Parker, a widow in her late 60s, tripped and fell at night in an unlit stairwell while descending from an apartment belonging to her sister and brother-in-law, the Masseys. It was obvious that the stairwell was dark and therefore dangerous, but there was no better way to leave. The Masseys escorted Parker down the stairs, Justice Massey leading the way while his wife held a flashlight to illuminate the steps, but Parker still stumbled and fell. We concluded that Parker was not precluded from recovery merely because the danger due to the darkness was obvious. No warning of tripping in the dark would have kept her from falling. She could see the danger for herself, and so could the Masseys. They used the only exit reasonably available and took every precaution.

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[5] *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 765 (Tex. 2009); *accord State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam); *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992); *see Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983); *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 454-455 (Tex. 1972) (overruled on other grounds, as noted in *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517-518 (Tex. 1978), by *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975)); *see also* RESTATEMENT (SECOND) OF TORTS § 343 (1965).

[6] *Williams*, 940 S.W.2d at 584 ("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.").

[7] *Ante* at ___ n.34; *see ante* at ___.

[8] 565 S.W.2d 512 (Tex. 1978).

But suppose Parker could have avoided all danger by using an identical, well-lit stairwell adjacent to the dark one. Would the landowner have been liable for letting the light go out in one stairwell when any reasonable person would be expected to take the other one? Surely the answer is no. The *Parker* case illustrates the situation in which no warning is adequate: when heeding it cannot prevent harm. Parker and Smith were both fully aware of the risk of danger. The crucial difference between Parker's situation and Smith's is that Parker had no realistic way of avoiding the risk of descending the darkened stairs, while Smith could easily have avoided being hurt in a fight by leaving early or through another exit. The risk of danger to Parker was unavoidable; Smith need not have run any risk at all.

A landowner may be liable for an unreasonably dangerous condition, even if it is open and obvious, but not if a reasonable person would avert harm. That is the rule of section 343A(1) of the *Restatement (Second) of Torts*, which states:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.[9]

It is also the rule in most states.[10]

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[9] RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965). Contrary to the Court's suggestion, the proposed *Restatement (Third)* does not abandon section 343A(1). RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 51, cmt. k (Tentative Draft No. 6, 2009) ("Section 343A(1) of the Restatement Second of Torts requires possessors to take reasonable precautions for known or obvious dangers when the possessor 'should anticipate the harm despite such knowledge or obviousness.' The duty imposed in this Section, as amplified in this Comment, is consistent with § 343A . . . .").

[10] *See Dolgencorp, Inc. v. Taylor*, No. 1070900, 2009 Ala. LEXIS 150, at *10-12, 2009 WL 1643347, at *3-4 (Ala. June 12, 2009) (adopting invitor's argument that it, by establishing its affirmative defense that the condition was open and obvious, negated its duty to invitee, and defeated invitee's injury claim without the operation of affirmative defenses like contributory negligence or assumption of the risk); *Kuykendall v. Newgent*, 504 S.W.2d 344, 345 (Ark.

1974) ("The duties of owners and occupiers of land to business invitees usually end when the danger is either known or obvious to the invitee. However, most authorities . . . recognize that under some circumstances a possessor of land may owe a duty to the business invitee despite the knowledge of the latter."); *Shanley v. Am. Olive Co.*, 197 P. 793, 794 (Cal. 1921) ("[O]wner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger."); *Fleming v. Garnett*, 646 A.2d 1308, 1312-1313 (Conn. 1994) (landowner has no duty to warn invitee of dangerous condition of which invitee was or should have been aware of); *Ashcroft v. Calder Race Course, Inc.*, 492 So. 2d 1309, 1311-1312 (Fla. 1986) ("A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness." (quoting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965))); *LaFever v. Kemlite Co.*, 706 N.E.2d 441, 447-448 (Ill. 1998) (same); *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 618 (Iowa 1990) (same); *Bonn v. Sears, Roebuck & Co.*, 440 S.W.2d 526, 528-529 (Ky. 1969) (landowner owes no duty to warn of "dangers that are known to the visitor or so obvious to him that he may be expected to discover them"); *Isaacson v. Husson Coll.*, 297 A.2d 98, 105 (Me. 1972) (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)); *Lloyd v. Bowles*, 273 A.2d 193, 196 (Md. 1971) ("If the injured person knew or should have known of the dangerous condition, there is no right to recovery . . . the reason for the latter ruling being that the [landowner's] liability is based on a presumption that he has greater knowledge concerning the dangerous condition than the invitee."); *O'Sullivan v. Shaw*, 726 N.E.2d 951, 954-955 (Mass. 2000) ("Landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards."); *Riddle v. McLouth Steel Prods. Corp.*, 485 N.W.2d 676, 680-681 (Mich. 1992) ("[W]here the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee."); *Richardson v. Corvallis Pub. Sch. Dist. No. 1*, 950 P.2d 748, 755-756 (Mont. 1997) (landowner owes no duty to warn "persons foreseeably upon the premises for physical harm caused to them by any activity or condition on the premises whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness"); *Tichenor v. Lohaus*, 322 N.W.2d 629, 632-633 (Neb. 1982) (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)); *Tagle v. Jakob*, 763 N.E.2d 107, 109-110 (N.Y. 2001) ("We have long held that a landowner has no duty to warn of an open and obvious danger."); *Wrenn v. Hillcrest Convalescent Home, Inc.*, 154 S.E.2d 483, 484 (N.C. 1967) (per curiam) ("However, defendant was under no duty to warn plaintiff, as an invitee, of an obvious condition or of a condition of which the plaintiff had equal or superior knowledge."); *Johanson v. Nash Finch Co.*, 216 N.W.2d 271, 276-278 (N.D. 1974) (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)); *Armstrong v. Best Buy Co.*, 788 N.E.2d 1088, 1091 (Ohio 2003) ("Where a danger is open and obvious, a landowner owes no duty of care to individuals lawfully on the premises."); *Nicholson v. Tacker*, 512 P.2d 156, 158 (Okla. 1973) ("It can be stated with equal force that the invitor has no duty to protect the invitee from dangers which are so apparent and readily observable that one would reasonably expect them to be discovered."); *Carrender v. Fitterer*, 469 A.2d 120, 123-124 (Pa. 1983) (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)); *Coln v. City of Savannah*, 966 S.W.2d 34, 41-44 (Tenn. 1998) (same), *overruled on other grounds by Cross v. City of Memphis*, 20 S.W.3d 642 (Tenn. 2000); *Hale v. Beckstead*, 116 P.3d 263, 265-270 (Utah 2005) (same); *Tazewell Supply Co. v. Turner*, 189 S.E.2d 347, 349-350 (Va. 1972) (landowner owes no duty to warn "if the alleged dangerous condition was open and obvious to a person exercising reasonable care for his own safety"); *Monk v. Virgin Islands Water & Power Auth.*, 53 F.3d 1381, 1384-1388 (3d Cir. 1995) (applying Virgin Islands law) (concluding RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965) is consistent with Virgin Islands' adoption of comparative fault); *Tincani v. Inland Empire Zoological Soc'y*, 875 P.2d 621, 630-631 (Wash. 1994) (adopting RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965)).

A few jurisdictions have held that the openness and obviousness of the condition is relevant to whether the landowner breached a duty to the invitee, but not to the threshold matter of whether the landowner owed a duty to warn of the condition. *See Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 367-368 (Ariz. 1985) (abrogated in part by statute);

The Court argues that under *Parker*, the obviousness of a risk never relieves a possessor of land from the duty to protect an entrant; in every case both parties' fault must be determined and responsibility allocated between them. This is incorrect for at least three reasons. First, the Court went out of its way to reject this broad reading of *Parker* shortly after that case was decided. In *Dixon v. Van Waters and Rogers*, we denied the application for writ of error but wrote to correct the same misinterpretation of *Parker* that the Court now espouses:

> The term "no-duty," as used in *Parker*, referred to the oddity that had uniquely developed in Texas to confuse negligence law. It meant that a plaintiff had the burden to negate his own knowledge and his own appreciation of a danger. The rule that the plaintiff does not have the burden to obtain findings that disprove his own fault does not, however, mean that a plaintiff is excused from proving the defendant had a duty and breached it. A plaintiff does not have the burden to prove and obtain findings that he lacked knowledge and appreciation of a danger; he must, however, prove the defendant had a duty and breached it.[11]

Second, *Parker* did not purport to address the situation in which an entrant to property was not only fully aware of a risk of harm but fully capable of avoiding it. The Court cites this passage in *Parker*:

Smith v. Baxter, 796 N.E.2d 242, 243-245 (Ind. 2003); *Harris v. Niehaus*, 857 S.W.2d 222, 225-226 (Mo. 1993).

Some other jurisdictions have concluded that this rule is inconsistent with their comparative fault statutes, *see Koutoufaris v. Dick*, 604 A.2d 390, 395-398 (Del. 1992); *Harrison v. Taylor*, 768 P.2d 1321, 1323-1329 (Idaho 1989); *Tharp v. Bunge Corp.*, 641 So. 2d 20, 23-25 (Miss. 1994); *Woolston v. Wells*, 687 P.2d 44, 147-150 (Ore. 1984), or another state statute, *see Vigil v. Franklin*, 103 P.3d 322, 323, 328-332 (Colo. 2004) (holding that COLO. REV. STAT. ANN. § 13-21-115 preempted the "open and obvious danger" doctrine).

Lastly, some courts hold that whether a danger is open and obvious is merely one factor to be considered. *See, e.g.*, *Pitre v. La. Tech Univ.*, 673 So. 2d 585, 590-591 (La. 1996); *Klopp v. Wackenhut Corp.*, 824 P.2d 293, 297-298 (N.M. 1992); *Rockweit by Donohue v. Senecal*, 541 N.W.2d 742, 748-749 (Wis. 1995).

[11] *Dixon v. Van Waters & Rogers*, 682 S.W.2d 533, 533-534 (Tex. 1984) (per curiam noting writ ref'd, n.r.e.) (citation omitted).

> A plaintiff's knowledge, whether it is derived from a warning or from the facts, even if the facts display the danger openly and obviously, is a matter that bears upon his own negligence; it should not affect the defendant's duty.[12]

That was true in the context in which it was written, but a plaintiff's awareness of a risk of harm, when coupled with a safe alternative for proceeding, is relevant in determining whether a reasonable person would ever incur the risk, and therefore whether the land possessor should be obliged to protect against it. And third, we have continued to analyze the duty owed by a possessor of land in different circumstances.[13] The obviousness of risk is but one factor among others, repeatedly considered by this Court, in determining the nature of a land possessor's duty.

The Court protests that to hold that Del Lago owed Smith no duty is tantamount to reviving the long-rejected absolute defense of voluntary assumption of the risk, but this is not true. We rejected the defense because it placed undue weight on the subjective intent of the plaintiff in a negligence action governed by an objective reasonable-person test.[14] The rule stated in section 343A(1) of the *Restatement (Second)* is an objective rule. Under that rule, the issue is not, subjectively, whether the plaintiff voluntarily chose to risk harm, but objectively, whether a

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[12] *Parker*, 565 S.W.2d at 521.

[13] *See*, *e.g.*, *Trammell Crow Cent. Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9, 17 (Tex. 2008) ("[W]e conclude that [the landowner] could not have reasonably foreseen or prevented the crime and thus owed no duty in this case."); *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 213 (Tex. 2008) ("We agree the jury alone can decide [negligence], but disagree that a jury can decide what legal duties landowners owe to independent contractors.").

[14] *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (rejecting voluntary assumption of the risk as an issue in negligence cases based on the legislative adoption of comparative negligence and the "cogent and compelling reasons" stated in *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 538-539 (Tex. 1975) ("The heart of the matter is that the *volenti* doctrines represent an attempt to impose the analysis of subjective intent on a behavioral tort rather than resolve liability or not on the basis of fault under traditional concepts of negligence. Put more simply, negligence is a measure of a party's conduct and the test is generally objective, whereas *volenti* is a subjective inquiry into a party's actual, conscious knowledge. The standards are different.") (Justice Steakley, joined on this point by two justices)).

reasonable person could have avoided harm. Thus, the defense would have barred Parker's recovery, but section 343A(1) would not. An entrant is not denied recovery because he subjectively consented to assume the risk but because any reasonable person would have avoided it. Defining Del Lago's duty does not reintroduce the defense through a back door.

The Court says that a warning to Smith that a fight was imminent "hardly seems an adequate substitute for calling security or taking other reasonable steps during the course of the evening to prevent the fight."[15] Calling security *could* have helped — the jury found it would have — but it would not have guaranteed Smith's safety. The presence of officers might have brought reason to a bar full of men who had been drinking and cursing each other all night. Or if not, perhaps the officers could have arrested them all and carted them off before one slugged another. But whatever quieting influence security officers could have had, one absolutely sure way for Smith, who had drunk only one beer all night, to avoid injury was to walk out one of the exits before things escalated. If Smith had had no warning and no sure means of protecting himself, then I would agree that Del Lago was obliged to protect him. But he did.

If Smith's full appreciation of the risk and ample opportunity to avoid it hardly seemed an adequate substitute for calling security, the Court never says why. Nor does it attempt to explain how its notions about adequate substitutes provide a workable rule of law. The Court's job is not

[15] *Ante* at ___ n.34.

to offer its musings on the case but to state a clear rule of law, which it acknowledges it does not do: "We do not announce a general rule today",[16] only a "narrow and fact-specific holding."[17]

Legal duties should be determined categorically rather than ad hoc, should be based on sound policy, and should be as clear as possible. Section 343A(1) does all that. It applies an objective standard in all circumstances. It recognizes that as a policy matter, a possessor of land is entitled to know, before injury has occurred, what the law requires and whether he has complied with it. It embodies the policy that obedience is better than the sacrifices made in the time and expense of a lawsuit.

* * *

Any reasonable person who saw a bar fight brewing and was concerned for his safety should be expected to avoid it if he could. Smith, Forsythe, and Morgan could easily have avoided the fight in the Grandstand Bar, and Morgan did. As he said, he "played it safe". Smith and Forsythe did not. Under the rule in section 343A(1), Del Lago's duty to Smith was fully discharged. I would therefore reverse and render judgment for Del Lago. Because the Court disagrees, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: April 2, 2010

[16] *Ante* at ___.

[17] *Ante* at ___.