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 WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE O'NEILL, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE GUZMAN joined.

JUSTICE HECHT filed a dissenting opinion, in which JUSTICE JOHNSON joined.

JUSTICE WAINWRIGHT filed a dissenting opinion.

JUSTICE JOHNSON filed a dissenting opinion, in which JUSTICE HECHT joined.

This appeal concerns a bar owner's liability for injuries caused when one patron assaulted another during a closing-time melee involving twenty to forty "very intoxicated" customers. The brawl erupted after ninety minutes of recurrent threats, cursing, and shoving by two rival groups of patrons. The jury heard nine days of conflicting evidence from twenty-one witnesses and found the

owner fifty-one percent liable. The court of appeals affirmed the roughly $1.48 million award: "A reasonable person who knew or should have known of the one-and-a-half hours of ongoing 'heated' verbal altercations and shoving matches between intoxicated bar patrons would reasonably foresee the potential for assaultive conduct to occur and take action to make the condition of the premises reasonably safe."[1] We agree with the court of appeals and affirm its judgment.

I. Background[2]

Bradley Smith was injured when a fight broke out among customers at the Grandstand Bar, part of the Del Lago resort on the shores of Lake Conroe.[3] The 300-acre resort consists of a conference center, hotel, golf course, marina, health spa and fitness center, and other facilities. The Grandstand Bar is located in the conference center.

Del Lago has a security force that includes two off-duty law enforcement officers — John Chancellor, the chief of the Shenandoah, Texas police department, and Lanny Moriarty, a lieutenant in the Montgomery County sheriff's department. Ruben Sanchez, a retired fireman and paramedic, was Del Lago's loss-prevention officer. At times up to six security personnel patrolled the resort. On the evening in issue, Chancellor and Moriarty were patrolling the resort in a golf cart. Sanchez

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[1] 206 S.W.3d 146, 157–58.

[2] Some of the evidence we recite is disputed, but "[i]t is the province of the jury to resolve conflicts in the evidence" and we must "assume that jurors resolved all conflicts in accordance with [the] verdict." *City of Keller v. Wilson*, 168 S.W.3d 802, 820 (Tex. 2005).

[3] Smith sued Petitioners Del Lago Partners, Inc. and Del Lago Partners, L.P., doing business as Del Lago Golf Resort & Conference Center, and Petitioner BMC-The Benchmark Management Company (collectively "Del Lago"). The parties and the courts below have essentially treated Petitioners as a single entity that owned and operated the bar, and the parties do not quarrel with this treatment. The trial-court judgment was entered against all of these entities collectively.

was also on duty.

Smith attended a Sigma Chi fraternity reunion at Del Lago from Friday to Sunday, June 8–10, 2001. On Friday evening he stayed at the bar until it closed. Smith and fellow fraternity member Spencer Forsythe testified that a uniformed officer was on duty in the bar for several hours that evening. The officer removed an unruly and intoxicated fraternity member and made everyone leave the bar at midnight, an hour before the usual closing time.

On Saturday, fraternity members and guests attended a reception and dinner at the conference center. Del Lago provided a cash bar. Around 9:00 p.m., Smith and other fraternity members proceeded to the Grandstand Bar, which was very busy. As many as seven employees were working in the bar that evening. Later that evening, a group of ten to fifteen mostly male members of a wedding party entered the bar. Fraternity member Toby Morgan testified that soon after the wedding party arrived, there was tension in the air, tension that grew as the night went on. Forsythe testified that within ten to fifteen minutes of the wedding party's arrival, verbal confrontations between the wedding party and some of the forty remaining fraternity members began. These heated confrontations involved cursing, name-calling, and hand gestures.

Fraternity member Cesar Lopez testified that the animosity between the two groups arose when one of the fraternity members made an offensive comment to the date of one of the wedding-party members. The comment led to men squaring up to each other, with "veins popping out of people's foreheads." Del Lago waitress Elizabeth Sweet observed the exchanges, describing them as "talking ugly" and consisting of cursing, threats, and heated words. Sweet testified that the participants appeared drunk and that these confrontations recurred throughout a ninety-minute

period. Morgan observed that the bar patrons were "very intoxicated" that night.

The verbal confrontations led to physical altercations. Forsythe testified that the first pushing and shoving match started after about ten minutes of yelling. Smith testified that he saw at least two physical incidents over the course of the evening. He saw a member of the wedding party square up chest to chest with a fraternity member, both pointing at each other and yelling and neither backing down. After three to five "very tense" minutes, the episode ended. Smith also saw a wedding-party member walk up to a group of fraternity members and push them from behind. The man cocked his arm back, but before anything further could happen other wedding-party members dragged him away.

Between 1:00 and 1:30 a.m., Forsythe saw some fraternity members and wedding-party members in each others' faces, and "things started getting really heated." The rest of the fraternity members walked over and saw that the confrontation was "getting to the serious point." Fifteen to twenty minutes before the final fight broke out, Smith heard yelling between the two groups.

Witnesses described more than one "pushing" match that evening. At least three witnesses described a particularly heated and intense shoving match that took place a few minutes before the ultimate fracas. The shoving match was followed by shouting and cursing.

Tensions finally came to a head when the bar staff attempted to close the bar. After the crowd refused to leave, the staff went table to table and formed a loose line to funnel the customers toward a single exit and into the conference center lobby. Smith testified that the staff was literally pushing the hostile parties out of the bar through the exit, prompting a free-for-all. He recalled that "it was just a madhouse," with punches, bottles, glasses, and chairs being thrown, and bodies "just

surging." In Forsythe's words, "all heck broke loose" with pushing, shoving, kicking, and punching. He recalled that after the patrons had been "corralled" by the bar staff they were forced out of the bar:

> I only remember one of the wait staff, and it was a female, and she was very close to the door, and she was very obnoxious, very belligerent, and saying, "Y'all get the 'F' out. All of y'all, get the 'F' out of here. Take the F-ing fight out of here. Get out." [And she] just pushed – matter of fact, one of our guys fell down, and she was pushing him while he was on the ground. "Just get the 'F' out. Get the 'F' out."

No one could give an exact number of fight participants, but estimates ranged from twenty to forty men, about equally divided between the wedding party and the fraternity.

Smith was standing against a wall observing the fight when he saw his friend Forsythe shoved to the floor. Smith knew Forsythe had a heart condition and waded into the scrum to remove him. By this time, the fight had moved into the lobby. Before Smith could extricate himself, an unknown person grabbed him and placed him in a headlock. Momentum carried Smith and his attacker into a wall, where Smith's face hit a stud. Smith suffered severe injuries including a skull fracture and brain damage.

Estimates of the fight's duration varied, but most testimony placed it between three and fifteen minutes. Waitress Sweet testified that "it wasn't a quick fight." The fight ended when a woman became caught up in it and was pushed to the ground.

After the fight began, Sweet went to the phone in the bar to call security. Next to the phone was a list of numbers, but none was for security. Sweet called the front desk to get the number. Instead of calling security, the front desk gave the number to Sweet. Instead of immediately calling the number given, Sweet passed it over to a bartender for him to make the call. Once the call was

made, the two security guards on duty, Officers Chancellor and Moriarty, responded swiftly, arriving within two to three minutes. Del Lago's loss-prevention officer, Sanchez, also responded and arrived within fifteen to twenty seconds of receiving the call. By the time he arrived, the fight was over.

Smith brought a premises-liability claim against Del Lago. After a nine-day trial involving twenty-one witnesses, the jury sifted through the conflicting evidence and found Del Lago and Smith both negligent, allocating fault at 51-49 percent in favor of Smith. The trial court reduced the jury's actual-damages award by forty-nine percent, and awarded Smith $1,478,283, together with interest and costs. A divided court of appeals affirmed.[4]

II. Discussion

A. Duty

Del Lago principally argues that it had no duty to protect Smith from being assaulted by another bar customer. In a premises-liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach.[5] Whether a duty exists is a question of law for the court and turns "on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant."[6] In premises-liability cases, the scope of the duty turns on the plaintiff's

[4] 206 S.W.3d at 164.

[5] *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

[6] *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217, 218 (Tex. 2008).

status.[7] Here, 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.[8]

We have not held that a bar proprietor always or routinely has a duty to protect patrons from other patrons, and do not so hold today. Nor have we held that a duty to protect the clientele necessarily arises when a patron becomes inebriated, or when words are exchanged between patrons that lead to a fight, and do not so hold today.

Generally, a premises owner has no duty to protect invitees from criminal acts by third parties.[9] We have recognized an exception when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable.[10] In *Timberwalk Apartments, Partners, Inc. v. Cain*, we addressed the circumstances under which an apartment owner could be held liable for failing to prevent the sexual assault of a tenant. In addressing the element of foreseeability, we stated that

> courts should consider 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.[11]

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[7] *Urena*, 162 S.W.3d at 550.

[8] *Id.*; *see also Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998) (holding that premises liability claim was asserted when plaintiff claimed "defendants' failure to provide adequate security measures created an unreasonable risk of harm that defendants knew or should have known about and yet failed to correct").

[9] *Timberwalk Apartments*, 972 S.W.2d at 756.

[10] *Id.*

[11] *Id.* at 757.

Timberwalk recognized that "crime is increasingly random and violent and may possibly occur almost anywhere," and therefore rejected the imposition of a general duty to protect tenants "whenever crime *might* occur," since such a "duty would be universal."[12] *Timberwalk* provides a framework for analyzing how prior criminal conduct influences "what the premises owner knew or should have known" before the criminal act that injured the plaintiff.[13]

The *Timberwalk* factors — proximity, recency, frequency, similarity, and publicity — guide courts in situations where the premises owner has no direct knowledge that criminal conduct is imminent, but the owner may nevertheless have a duty to protect invitees because past criminal conduct made similar conduct in the future foreseeable. The *Timberwalk* factors are not the only reasons that a criminal act might be deemed foreseeable.[14] Although the court of appeals in this case considered prior criminal acts on the Del Lago premises in conducting an analysis of the *Timberwalk* factors,[15] we find those factors inapplicable to today's case.

The nature and character of the premises can be a factor that makes criminal activity more foreseeable.[16] In this case, the fight occurred in a bar at closing time following ninety minutes of

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[12] *Id.* at 756.

[13] *Id.* at 757.

[14] *Id.* at 759 (Spector, J., concurring) (stating that consideration of "other types of evidence" besides "similar incidents in the immediate vicinity" should be allowed in making foreseeability determination); *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 665 (Tex. 1999) (Baker, J., concurring) (stating that "the *Timberwalk* factors are not exclusive"); *id.* at 668 (O'Neill, J., dissenting) (seeing nothing in *Timberwalk* decision "to suggest that these factors are meant to be exclusive").

[15] 206 S.W.3d at 154–55, 158–59.

[16] *Mellon Mortgage*, 5 S.W.3d at 668 n.2 (O'Neill, J., dissenting) (collecting authorities); *Timberwalk Apartments*, 972 S.W.2d at 759–60 (Spector, J., concurring).

heated altercations among intoxicated patrons. As amicus curiae Mothers Against Drunk Driving notes, and as common sense dictates, intoxication is often associated with aggressive behavior.[17] According to the United States Department of Justice, alcohol use accompanies almost forty percent of all violent crimes.[18] Del Lago's security officer, Chancellor, agreed that threatening conversations are serious and that when intoxicated people start arguing, the "[n]ext thing you know," punches are thrown. He further testified that when faced with rowdy, verbally abusive people, he tries to separate them, and that in a bar atmosphere, removal of such patrons is warranted because, obviously, verbal confrontations "can escalate into a fight." That concern might have been the reason Del Lago removed a drunk patron from the bar the previous evening and closed the bar an hour early.

More generally, criminal misconduct is sometimes foreseeable because of immediately preceding conduct. The Second Restatement of Torts explains that since the landowner "is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, *or are about to occur*."[19] If "he should reasonably anticipate . . . criminal conduct on the part of third persons, either generally *or at some particular time*, he may be under a duty to take precautions against it."[20] The Third Restatement of Torts clarifies further: "[I]n certain situations criminal misconduct is sufficiently

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[17] Amicus curiae Pacific Legal Foundation similarly notes: "It cannot be denied that the consumption of alcohol increases the likelihood that people will exercise poor judgment, often leading to altercations."

[18] Lawrence A. Greenfield, U.S. Dep't of Justice, Bureau of Justice Statistics, *Alcohol and Crime: An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime*, at iii, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ac.pdf (last visited March 29, 2010).

[19] RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (emphasis added).

[20] *Id.* (emphasis added).

foreseeable as to require a full negligence analysis of the actor's conduct. Moreover, the actor may have sufficient knowledge of the *immediate circumstances* . . . to foresee that party's misconduct."[21] As we have recognized, when a property owner "by reason of location, mode of doing business, or observation or past experience, should reasonably anticipate criminal conduct on the part of third persons, . . . [the owner] has a duty to take precautions against it."[22] This duty is recognized because "the party with the power of control or expulsion is in the best position to protect against the harm."[23]

In this case, Del Lago observed — but did nothing to reduce — an hour and a half of verbal and physical hostility in the bar. From the moment the wedding party entered, there was palpable and escalating tension. Del Lago continued to serve drunk rivals who were engaged in repeated and aggressive confrontations.

That a fight broke out was no surprise, according to the testimony of three fraternity members. According to Forsythe, everyone could tell serious trouble was brewing. Another fraternity member agreed that the fight was not unexpected but merely "a matter of time." A third characterized the situation as "very, very obvious"; if you did not see it you were "blind or deaf or [didn't] care."

We hold that Del Lago had a duty to protect Smith because Del Lago had actual and direct

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[21] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 19 cmt. f (2010) (emphasis added).

[22] *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993) (quoting *Morris v. Barnette*, 553 S.W.2d 648, 650 (Tex. Civ. App.—Texarkana 1977, writ ref'd n.r.e.)); *see also Garner v. McGinty*, 771 S.W.2d 242, 246 (Tex. App.—Austin 1989, no writ) ("[W]e hold that a business invitor owes a duty to his business invitees to take reasonable steps to protect them from intentional injuries caused by third parties if he knows or has reason to know, from what he has observed or from past experience, that criminal acts are likely to occur, either generally or at some particular time.").

[23] *Tidwell*, 867 S.W.2d at 21 (internal quotation marks omitted).

knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation. Del Lago's duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that very night. When a landowner "has *actual* or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent" to reduce or eliminate that risk.[24]

JUSTICE WAINWRIGHT would hold that the risk of injury was not an *unreasonable* risk. He correctly notes that a property owner's duty to invitees extends only to reduce or eliminate an unreasonable risk of harm created by a premises condition.[25] Under the circumstances of this case, we think Smith faced an unreasonable risk of harm.

The unreasonableness of a risk cannot be completely separated from its foreseeability. It turns on the risk and likelihood of injury to the plaintiff, which for the reasons described above were substantial, as well as the magnitude and consequences of placing a duty on the defendant.[26] We do not see the burden of imposing a duty on Del Lago to take reasonable steps to protect patrons of the Grandstand Bar from potentially serious injury as unwarranted in these circumstances. Del Lago is a huge, multi-use facility covering hundreds of acres that provides entertainment and lodging to scores of guests daily. Like any similar facility, it recognized the need to provide private security

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[24] *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983) (emphasis added).

[25] *See W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

[26] *See Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990) ("In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.").

throughout the resort. It did so through a trained security force.

We do not announce a general rule today. We hold only, on these facts, that during the ninety minutes of recurrent hostilities at the bar, a duty arose on Del Lago's part to use reasonable care to protect the invitees from imminent assaultive conduct. The duty arose because the likelihood and magnitude of the risk to patrons reached the level of an unreasonable risk of harm, the risk was apparent to the property owner, and the risk arose in circumstances where the property owner had readily available opportunities to reduce it.[27]

B. Breach of Duty

Del Lago also contends that, assuming it had a duty to Smith, the evidence was legally insufficient on the essential elements of breach of duty and proximate causation. "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review."[28] We must view the evidence in the light most favorable to the verdict[29] and "must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."[30]

A reasonable and fair-minded jury could find that Del Lago breached its duty of care to Smith by failing to take reasonable steps to defuse the dangerous situation at the bar. Del Lago's duty was

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[27] *See Eastep v. Jack-in-the-Box, Inc.*, 546 S.W.2d 116, 118 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) ("[A] long and continued course of conduct [is not required] to find that the proprietor had knowledge of the violent disposition of the other patron — all that is necessary is that there be a sequence of conduct sufficiently long to enable the proprietor to act for the patron's safety." (quoting *Coca v. Arceo*, 376 P.2d 970, 973 (N.M. 1962))).

[28] *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

[29] *Id.* at 822.

[30] *Id.* at 827.

to "take whatever action [was] reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition."[31] We have alternatively described the duty as requiring the premises owner to "either adequately warn of the dangerous condition or make the condition reasonably safe."[32]

The jury could have found that Del Lago breached its duty because security failed to monitor and intervene during the extended period when the two groups in the bar were becoming more and more intoxicated and antagonistic. Officers Chancellor and Moriarty, the uniformed security personnel on duty that night, testified that they would usually go through the bar five to eight times a night, but they did not have specific recollections of going through the bar that particular evening. At the time of the fight, the bar was the only place at the resort serving alcohol, and the security office was aware that the bar was crowded, but no witness saw any security in the bar during the

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[31] *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 764–65 (Tex. 2009) (quoting *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983)).

[32] *Id.* at 765. JUSTICE JOHNSON's position, as we understand it, is that Del Lago cannot be liable unless *both* its failure to warn and its failure to make the premises safe independently caused Smith's injuries. We do not read Texas law as imposing such a universal requirement. We have recognized that owners must *adequately* warn or make safe, *id.*, and in some circumstances no warning can adequately substitute for taking reasonably prudent steps to make the premises safe. In today's case, a permanent sign warning bar patrons to "drink at your own risk," or a warning the night of the melee 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. Further, as explained below, JUSTICE JOHNSON's view would revive the abandoned doctrine of voluntary assumption of the risk by completely barring recovery in cases where the premises condition was open and obvious, and where, therefore, a failure to warn could not have caused the injury.

Insofar as JUSTICE JOHNSON believes the jury charge required the jury to find that both a failure to warn and a failure to make the premises safe caused the injuries, Del Lago does not make this argument, and we do not so read the charge. The charge does not require separate proximate cause findings on failure to warn and failure to make safe to impose liability. It states that Del Lago's negligence could consist of the failure to use ordinary care "by both failing to adequately warn Bradley Smith of the condition and failing to make that condition reasonably safe." The jury could have and apparently did find that no warning would have been adequate under the circumstances, and that Del Lago was negligent in failing to use ordinary care to make the premises safe. Ordinary care as defined in the charge "means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances." The jury could have construed the charge to mean, and could have made the factual finding, that ordinary care under the circumstances required something other than a warning.

ninety minutes of yelling, threatening, cursing, and shoving between drunk patrons. Waitress Sweet specifically testified that she did not see security throughout the ninety minutes preceding the fight. The bar staff continued to serve drinks and did not call security until after the fight started. In contrast, security was on duty for hours in the bar the previous night and had ejected a drunk and unruly fraternity member.

There was legally sufficient evidence for the jury to conclude that Del Lago bar personnel were fully aware of the events transpiring in the bar and nevertheless unreasonably neglected to notify security. Forsythe testified that while the repeated confrontations were occurring, the wait staff and bartenders were watching and did nothing. Del Lago's security expert agreed at trial that he would "certainly" want the bar staff to call security after ninety minutes of serious verbal confrontations and at least one shoving match, if the staff did not feel the situation was under control. In his deposition, referred to at trial, he "absolutely" agreed that if his wife was in a bar that had experienced an hour and a half of verbal confrontations, he would want the bar staff to call security. Instead of calling security, asking patrons to leave, or otherwise bringing the situation under control, the bar staff continued to serve drinks.

The jury also could have found negligence on Del Lago's part by finding that bar personnel were not provided with the training and information needed to immediately notify security of an emergency; that the front desk failed to immediately notify security of the fight when the front desk was informed of the crisis, and instead gave the number for security back to a bar waitress to make the call; that the bar personnel should not have allowed the bar to stay open until 1:30 a.m. — a half-hour past the usual closing time — under the circumstances and should have asked unruly customers

to leave earlier; and that Del Lago acted unreasonably in failing to provide a security presence at closing time instead of forcibly funneling the warring factions through a single exit.

JUSTICE JOHNSON would reverse because Smith was equally aware of the events transpiring at the bar and could have walked away, but instead chose to stay and enter the fray. The jury found Smith contributorily negligent, and Smith, who says he entered the scrum to rescue a friend, does not argue otherwise here. JUSTICE JOHNSON's view would effectively revive the doctrine of voluntary assumption of the risk as a complete bar to recovery, but the Texas proportionate responsibility statute makes clear that a plaintiff's negligence bars recovery only "if his percentage of responsibility is greater than 50 percent."[33] Here, the jury found that Del Lago's negligence (fifty-one percent) exceeded Smith's (forty-nine percent). We abandoned the assumption-of-the-risk doctrine as a complete defense to tort liability thirty-five years ago,[34] holding that the Legislature's adoption of comparative negligence "evidenced its clear intention to apportion negligence rather than completely bar recovery."[35] A plaintiff's own risky conduct is now absorbed into the allocation of damages through comparative responsibility. We no longer compartmentalize negligence into rigid categories: "we have discarded categories like imminent-peril, last-clear-chance, and assumption-of-

[33] TEX. CIV. PRAC. & REM. CODE § 33.001.

[34] *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) (abolishing implied assumption of the risk but retaining affirmative defense of express assumption of the risk, when a plaintiff, before undertaking risky conduct, explicitly consents to take personal responsibility for potential injury-causing risks).

[35] *Id.*

the-risk in favor of a general submission of comparative negligence."[36] A plaintiff's appreciation of and voluntary exposure to a dangerous on-premises risk is something the jury can weigh when apportioning responsibility, as was done in this case.

Further, we have expressly abolished a "no-duty" doctrine previously applicable to open and obvious dangers known to the invitee. Instead, a plaintiff's knowledge of a dangerous condition is relevant to determining his comparative negligence but does not operate as a complete bar to recovery as a matter of law by relieving the defendant of its duty to reduce or eliminate the unreasonable risk of harm.[37] "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."[38] While presented in terms of a no-negligence or no-causation analysis, JUSTICE JOHNSON's view would in effect revive the no-duty rule rejected by statute and caselaw, and hold as a matter of law that an invitee's decision not to remove himself from a known and dangerous premises condition bars any recovery against the landowner.

JUSTICE HECHT's dissent posits a variant of JUSTICE JOHNSON's view. JUSTICE HECHT favors a rule drawn from section 343A(1) of the Second Restatement of Torts that says landowners cannot be liable for dangerous conditions that are "known or obvious" (though he would permit liability for

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[36] *Jackson v. Axelrad*, 221 S.W.3d 650, 654 (Tex. 2007) (citing *French v. Grigsby*, 571 S.W.2d 867, 867 (Tex. 1978) (disapproving of last-clear-chance doctrine); *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977) (same regarding imminent peril); *Farley*, 529 S.W.2d at 758 (same regarding assumption of the risk)).

[37] *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 516–17 (Tex. 1978). We recently distinguished *Parker* where the plaintiff was an employee of an independent contractor, but made clear that *Parker* remains the law applicable to invitees. *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008).

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

unavoidable risks). On this record, we cannot embrace a principle that embodies something akin to assumption of the risk. As comment (e) to section 343A explains, if the invitee "knows the actual conditions," the landowner "may reasonably assume that he will protect himself by the exercise of ordinary care, or that he will *voluntarily assume the risk* of harm if he does not succeed in doing so."[39]

The Second Restatement itself indicates that section 343A(1) is rooted in a doctrine that Texas, most other jurisdictions, and the Third Restatement of Torts have abandoned.[40] Professor Powers, Co-Reporter of the Third Restatement, explains that "[a]fter the advent of comparative responsibility . . . most courts abandoned the doctrine,"[41] and "[i]n light of these developments, the new Restatement rejects all forms of implied assumption of risk."[42]

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[39] RESTATEMENT (SECOND) OF TORTS § 343A cmt. e (1965) (emphasis added).

[40] The Delaware Supreme Court has observed that "an overwhelming majority of courts" have recognized that sections 343 and 343A "'are too heavily laden with the prohibited defenses of assumption of the risk and contributory negligence to be followed rigidly . . . .'" *Koutoufaris v. Dick*, 604 A.2d 390, 396 (Del. 1992) (quoting *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334, 347 (1st Cir. 1980)). Further, "[o]f those state courts which have addressed the issue of whether the principles espoused by § 343A survive the adoption of comparative negligence, only one appears to have answered in the affirmative." *Id.* Still further, "an even greater number of courts, while not addressing the precise issue presented here, have held that the rule articulated by § 343A does not limit a landowner's duty to latent dangers, but recognize that a landowner can be liable even for injuries resulting from obvious hazards thus posing a fact question for the jury," consistent with our holding today. *Id.* at 397.

JUSTICE HECHT advocated section 343A(1) in a recent dissent, *TXI Operations, L.P. v. Perry*, 278 S.W.3d 763, 771–72 n.18 (Tex. 2009) (Hecht, J., dissenting), but since the creation of Texas' comparative-negligence scheme, the Court has yet to adopt section 343A(1) as Texas law. Further, *TXI Operations*, as a procedural matter, turned solely on whether a premises owner gave an adequate warning. The dissent in that case contended that the warning was adequate to meet the landowner's duty as a matter of law. *Id.* at 769–70. Today's case poses a separate question, whether "in some circumstances no warning can adequately substitute for taking reasonably prudent steps to make the premises safe." __ S.W.3d at __ n.32. The issue here — whether a landowner is always absolved of all liability if the invitee knows about the dangerous condition — is different from the narrower issue presented in *TXI Operations*.

[41] William Powers, Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771, 772 (1999).

[42] *Id.* at 775.

More to the point, JUSTICE HECHT's reliance on section 343A(1) gives short shrift to the section's last twelve words, which anticipate today's uncommon facts. Though section 343A(1) bars liability when an invitee is aware of the dangerous condition, that absolution comes with an exception: "unless the possessor should anticipate the harm despite such knowledge or obviousness." That is, if Del Lago had reason to expect harm notwithstanding Smith's awareness of the risk, it may still be liable. That caveat seems to capture today's narrow and fact-specific holding. We do not hold today that a landowner can never avoid liability as a matter of law in cases of open and obvious dangers. We merely hold that Smith's refusal to walk away does not completely bar recovery, given the jury's decision to apportion liability, and given Del Lago's actual and direct knowledge that a violent brawl was brewing notwithstanding Smith's awareness of the surroundings. In some circumstances, no warning can suffice as reasonably prudent action to reduce or remove an unreasonable risk. Indeed, the reason Del Lago "should anticipate the harm despite such knowledge or obviousness" is because Del Lago's own conduct that night did nothing to decrease the danger and much to promote it.

Ultimately, JUSTICE HECHT makes a compelling argument that Smith was negligent. We agree. So do Smith, Del Lago, JUSTICE JOHNSON, the court of appeals, the trial court, and the jury. Our only disagreement is whether Smith's negligence is a complete bar to recovery. On this record, it is not.

C. Causation

The evidence of proximate cause was also legally sufficient. There may be more than one

proximate cause of an event,[43] and indeed the jury found that both Del Lago and Smith contributed to Smith's injury. Proximate cause comprises two elements: cause in fact and foreseeability.[44] The ninety minutes of alcohol-fueled verbal and physical exchanges between the two groups in the bar, directly observed by Del Lago personnel, provide the element of foreseeability, as discussed above. "The 'foreseeability' analysis is the same for both duty and proximate cause."[45]

As to causation in fact, generally the test for this element is whether the defendant's act or omission was a substantial factor in causing the injury and without which the injury would not have occurred.[46] The jury could have found, on the lay and expert testimony presented, that a security presence and response in the bar at some point during the ninety minutes that the two antagonistic groups were confronting each other would have defused the situation and prevented the violent brawl at closing time. Security could have removed particularly unruly patrons prior to the fight. The jury heard evidence that the mere presence of uniformed security personnel can defuse barroom tensions. Bartender Arlene Duncan, for example, testified that uniformed officers can usually deter problems in the bar. She also believed that any failure of staff to report serious confrontations at the bar not only was a violation of Del Lago policy, but put "people in a situation that easily could've been avoided." Officer Chancellor testified that a uniformed presence can chill dangerous or criminal activity. He agreed that his ability to defuse hostile behavior might explain why he had never

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[43] *Lee Lewis Constr., Inc. v. Harrison*, 70 S.W.3d 778, 784 (Tex. 2001).

[44] *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005).

[45] *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 659 (Tex. 1999) (plurality opinion).

[46] *Urena*, 162 S.W.3d at 551.

witnessed a physical fight at Del Lago. Smith's security expert, Gerald Brandt, testified that Del Lago employees had ample opportunity to notify security of the hostile situation in the bar and that a security presence would have prevented the fight and Smith's injuries.

The jury also could have reasonably determined that Del Lago's bar and front-desk personnel moved too slowly to notify security after the fight broke out, and that this delay was a proximate cause of Smith's injuries. Although the evidence was conflicting as to the length of the fight, the jury heard evidence that security arrived in a matter of seconds after being notified.

In concluding that the evidence of causation was legally insufficient, JUSTICE JOHNSON relies on *East Texas Theatres, Inc. v. Rutledge*.[47] In that case, we held that the causation evidence was legally insufficient where a movie theater patron was injured by a bottle thrown by another patron. We held the evidence insufficient to establish that removing unruly patrons or a security presence would have prevented the incident. The Court noted that efforts to remove "rowdy persons" might not have succeeded in removing the unknown bottle thrower.[48] *Rutledge* is factually distinguishable. The combatants in today's case were not sitting in a hushed and darkened theater but in a raucous and lighted bar; security could have identified them more easily and removed them. Today's case is further distinguishable: (1) the melee was preceded by ninety minutes of repeated belligerence between obviously intoxicated patrons; (2) expert testimony was offered that a security presence could have prevented the fight; (3) one of Del Lago's bartenders testified that the situation that night "easily could've been avoided;" (4) a Del Lago security officer likewise opined that his mere

[47] 453 S.W.2d 466 (Tex. 1970).

[48] *Id.* at 469.

presence could defuse hostile behavior; and (5) on the previous night a rowdy customer had been removed from the bar and the bar had closed early, with the result that no confrontations occurred. Legally sufficient evidence of causation was presented on this record.

D. Premises Liability v. Negligent Activity

JUSTICE WAINWRIGHT would reverse because the case should have been submitted to the jury under a negligent-activity theory. For several reasons, we disagree.

As to landowners, we have recognized negligent-activity and premises-liability theories of liability.[49] Smith believed both theories were applicable to his case, but Del Lago objected to the submission of a negligent-activity theory. The trial court agreed and only submitted a premises-liability question. Del Lago cannot now obtain a reversal on grounds that the jury should have decided the facts under a theory of liability that Del Lago itself persuaded the trial court not to submit to the jury.[50]

Even if Del Lago had preserved this ground for reversal in the trial court, neither Del Lago's petition nor briefs to us mention it, and we should not stretch for a reason to reverse that was not raised.[51] This ground for reversal was waived.

Ignoring preservation of error problems, the case was properly submitted on a premises-liability theory. We have repeatedly treated cases involving claims of inadequate security as

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[49] *E.g.*, *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998).

[50] *See Osterberg v. Peca*, 12 S.W.3d 31, 55 (Tex. 2000) (citing TEX. R. CIV. P. 272, 274, 278, 279).

[51] *See* Tex. R. App. P. 53.2(f), 55.2(f).

premises-liability cases.[52] Today's case, largely based on Del Lago's failure to properly use its security resources, does not warrant different treatment. We have recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury,[53] while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe.[54] This case was properly tried and submitted as a premises-liability case, as Smith primarily complained of Del Lago's nonfeasance — its failure to remedy an unreasonably dangerous condition for ninety minutes and failure to react promptly once the fight started.

The lines between negligent activity and premises liability are sometimes unclear, since "almost every artificial condition can be said to have been created by an activity."[55] Smith complained of some conduct that might be cognizable as a negligent-activity claim, such as Del Lago's decision to move the patrons through a single exit immediately before the fight erupted, but

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[52] *See Timberwalk Apartments*, 972 S.W.2d at 753 (holding, in inadequate security case, that jury was properly charged under premises-liability theory rather than negligent-activity theory); *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 655 & n.3 (Tex. 1999) (plurality opinion) (discussing, in inadequate security case, prior "premises liability cases" and noting that Court's analysis "is complementary, not contradictory, to the traditional premises liability categories"); *id.* at 661 (Enoch, J., concurring) ("Thus, we are left with the traditional premises liability classifications to determine Mellon's duty."). We also note that in *Trammell Crow Central Texas, Ltd. v. Gutierrez*, 267 S.W.3d 9 (Tex. 2008), another inadequate security case, we did not expressly address the issue of whether premises liability versus negligent activity applied, but we decided the case by closely following the rules set out in *Timberwalk Apartments*, which in turn expressly rejected the argument that an inadequate security case should be tried under a negligent-activity theory instead of a premises-liability theory.

[53] *See Timberwalk Apartments*, 972 S.W.2d at 753 ("'Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself . . . .'") (quoting *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)).

[54] *Id.* (describing premises liability as "failing to remedy an unreasonable risk of harm due to the condition of premises").

[55] *Keetch*, 845 S.W.2d at 264.

Del Lago persuaded the trial court not to give Smith an alternative negligent-activity question. The error in not allowing Smith to pursue a separate negligent-activity claim, if any, occurred at Del Lago's behest. Even as to the allegation "that we herded them out the door," Del Lago argued at the charge conference that this evidence did *not* support a negligent-activity claim because "[t]here is no direct relation between Del Lago's conduct and Brad's injury."

Further, the evidence regarding the bar staff's affirmative conduct was relevant to issues of negligence and causation under the premises-liability claim, since Smith could and did properly contend under this theory that instead of using due care to make the premises safe by calling security or closing early, Del Lago made the unreasonably dangerous condition worse by continuing to serve drinks and funneling the hostile factions into closer physical contact. In any event, Del Lago makes no argument that the trial court improperly admitted evidence.

Finally, JUSTICE WAINWRIGHT does not explain what elements of a negligent-activity claim were not presented in the jury charge. To impose liability, the jury was required under the charge to find that Del Lago "failed to exercise ordinary care" to make an unreasonably dangerous condition safe, that "ordinary care" means the "degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances," and that this failure to use due care proximately caused Smith's injury. The trial court was concerned about giving Smith two bites at a negligence verdict in the charge, and we think it correctly noted that under the single question presented, Smith would "be able to argue exactly what [he has] argued in support of negligent activity."

III. Conclusion

One need not believe that Del Lago has a universal duty to insure patrons' safety against all third-party crimes, or that prior criminal activity at Del Lago imposed a duty to post security guards in the bar at all times, in order to accept that on *this* record *this* sequence of conduct on *this* night in *this* bar could foretell *this* brawl. "Tort law does not provide a remedy for every harm,"[56] nor must a bar call 911 for every blowhard drunk, but the record in this case documents that for an hour and a half Del Lago knowingly served rowdy and drunk rivals who were engaged in repeated and aggressive verbal and physical confrontations. Tension at the bar turned into cursing, cursing led to threats, threats grew into pushing, and all of the above culminated in a full-scale brawl. Del Lago observed — but did nothing to reduce — this persistent hostility, and while the antagonism may have ebbed and flowed over those ninety minutes, the liquor simply flowed. Given this evidence, the jury was free to find Del Lago's response not just unalert but unreasonable, and we do not disturb that finding.

In summary, the jury heard nine days of sharply disputed evidence, chose what testimony to believe and which witnesses to credit, and carefully apportioned liability 51-49 percent against Del Lago, finding it breached its duty to remedy an unreasonably dangerous condition by doing nothing until after the free-for-all melee that injured Bradley Smith erupted. Accordingly, we affirm the court of appeals' judgment.

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[56] James R. Adams, *From Babel to Reason: An Examination of the Duty Issue*, 31 MCGEORGE L. REV. 25, 53 (1999).

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Don R. Willett
Justice

OPINION DELIVERED: April 2, 2010