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NEGLIGENT ACTIVITY VS. PREMISES LIABILITY

In a recent decision, the Texas Court of Appeals (Texarkana) upheld the trial court's granting of a Defendant's Motion for Summary Judgment on a Plaintiff's premises liability and negligent activity claim. In doing so, the Court of Appeals provided some insight on the difference between these two theories of recovery and what elements are needed for Plaintiff to prove his/her claim. *Brooks v. PRH Investments Inc.*, 06-09-00080- CV (Tex. App. – Texarkana, Jan. 25, 2010).

FACTS OF THE CASE

On May 23, 2007, Brooks was a customer at a Whataburger restaurant owned and operated by PRH. As she was leaving the restroom, she slipped and fell in the restroom which had been recently mopped by a PRH employee.

The PRH employee, who mopped the floor, testified that before she commenced mopping the floor, she put out a wet floor sign in the restroom and that she had just about finished mopping the restroom floor when Brooks entered the restroom. The employee, Jayne Summers, testified that she told Brooks "to be careful" and "the floor was wet" because she had "just mopped in there."

Brooks testified that when she entered the restroom the floor was dry. While she was in the bathroom stall, a lady came and mopped the restroom floor. Brooks testified that when Summers was leaving the restroom, she told Brooks to "be careful, the floor may be a little damp." After Summers left, and Brooks attempted to leave the restroom, Brooks slipped and fell, injuring herself.

Brooks sued PRH and Whataburger of East Texas (collectively, PRH), the owners and operators of the restaurant. Brooks' suit alleged negligently activity and/or premises liability.

After discovery, PRH filed a Motion for Summary Judgment on both traditional and no-evidence grounds, and the trial court granted the Summary Judgment on both the negligent activity and premise liability claims.

Brooks appealed this case, stating that she (1) adequately alleged and supported her claims for negligent activity and that there were material facts in dispute as to this issue and (2) she adequately alleged support of her claims for premises liability and there were material facts in dispute.

THE COURT OF APPEALS' DECISION

The Texarkana Court of Appeals sustained Brooks' points of error regarding the granting of the No-Evidence Summary Judgment as to the premises liability claim; however, they affirmed the trial court's judgment because (1) Brooks' fall was not contemporaneous to the action of mopping the floor and (2) PRH provided Brooks with adequate cautionary warnings concerning the wet floor.

Negligent Activity

Brooks argued that the trial court erred in granting PRH's Summary Judgment and No-Evidence Summary Judgment on the negligent activity claims.

However, the Court of Appeals stated that a trial court should not submit a negligent activity claim to the trier of fact, unless the evidence shows that the injury was caused by, or was a contemporaneous result of, a negligent activity itself, rather than a condition created by the negligent activity. *Keetch v. Kroger Co.*, 845 S.W. 2d 262 264 (Tex. 1992). The Court went on to say that the negligent activity theory of liability is only applicable where the evidence shows that the injuries were directly related to the activity itself. If the injury was caused by a condition created by the activity, rather than the activity itself, a Plaintiff is limited to a premises defect theory of liability.

The Court of Appeals cited various cases where a Plaintiff was injured, not by the activity itself, but by a condition that was created by the activity.

Since the evidence showed that Summers testified that (1) she had finished mopping the restroom and verbally warned Brooks about the floor as Brooks entered the restroom, and (2) that Brooks testified that she fell several minutes after Summers ceased mopping the floor, there was no evidence that the negligent activity itself caused Brooks' injuries or that her fall was contemporaneous with Summers' mopping.

Thus, the Court of Appeals affirmed the Trial Court's granting of the Summary Judgment and No-Evidence Summary Judgment as to Brooks' negligent activity claims.

Premises Liability

Brooks also contended that the trial court erred by granting the Summary Judgment and No-Evidence Summary Judgment as to her premise liability claims.

The Court of Appeals stated that the No-Evidence Summary Judgment was improperly granted, but the traditional Motion for Summary Judgment was correctly granted.

To succeed in a premise liability suit, an invitee Plaintiff must prove (1) that the Defendant had actual or constructive knowledge of some condition on the premises, (2) that the condition posed an unreasonable risk of harm, (3) that the Defendant failed to exercise reasonable care to eliminate or reduce the risk of that harm, and (4) that the Defendant's failure to use such care proximately caused the invitee's injury. *Wal-Mart Stores, Inc., v. Gonzales*, 968 S.W. 2d 934, 936, (Tex. 1998).

In the instant case, the Court of Appeals stated that the material facts were not in dispute. Brooks slipped and fell 3-5 minutes after the restroom floor was mopped. In reviewing the evidence in the light most favorable to Brooks, she saw the floor being mopped, saw the wet floor warning sign, and was verbally warned "to be careful" because the "floor may be a little damp."

Under the circumstances, whether the warning was given prior to or after Brooks entered the restroom, the warning was adequate as a matter of law to discharge the property owner's duty to warn Brooks about the possible danger posed by the condition of the floor.

Thus, the Court of Appeals stated that the traditional Motion for Summary Judgment granted by the Trial Court was correct and affirmed the ruling.

WHAT DOES THIS MEAN?

It is clear from this case and the other cases cited that if a Plaintiff brings forth a negligent activity cause of action, the injury *must* have been caused by a contemporaneous result of the negligent activity itself. For example, in this particular case, the Plaintiff would have a valid negligent activity cause of action if the employee was mopping and the Plaintiff injured herself as a result of the mopping. Many times, Plaintiffs bring claims because of the condition and not the activity although they may allege it. Thus, evaluate the case and determine if an activity was going on when the Plaintiff injured herself. If not, the best thing to do is file a Motion for Summary Judgment on this issue.

As for premises liability claims, in this particular case, the Court focused on the Defendant's actions in exercising reasonable care to eliminate or reduce a risk of harm. If you have a condition such as a spill, a wet floor, or some other defect, take appropriate action such as putting up warning signs, informing clients and customers of any potential danger. If you have evidence this was done, file a Motion for Summary Judgment to see if you can get an early dismissal of the case.



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