Something Lost, Something Gained
in Texas Premises Liability Claims

by Deborah E Lewis

The course has now changed for some slip and fall claims brought against nonsubscriber[1] employers by their employees.

The Texas Supreme Court, in its response to a certified question from the Court of Appeals for the Fifth Circuit concerning conflicting court precedent, has clarified and confirmed various key issues of premises liability law. Texas' highest court has ruled that, subject to two limited exceptions,[2] an employer generally does not have a duty to warn or protect its employees from an unreasonably dangerous premises condition that is open and obvious or known to the employee. *Austin v. Kroger Texas, L.P.,* 2015 WL 3641066 *1 (Tex. June 12, 2015). The Court clarified its prior precedent and confirmed that an employer's premises-liability duty to its employee is the same as a landowner's premises-liability duty to its invitee. *Id* at *4. Because the duties are the same, like a landowner's duty to an invitee, an employer's premises-liability duty to its employee includes only the duty to protect or warn the employee against concealed hazards of which the employer is aware, or reasonably should have been aware, but the employee is not. *Id.* at *3.

In *Austin*, the plaintiff, an employee of Kroger, a nonsubscriber, sustained injury after falling on an oily substance on a restroom floor. The plaintiff contended that a particular product Kroger typically provided to help clean up floor spills (Spill Magic) was not available at the time, but he admitted that he recognized the danger the oily substance presented on the floor. Despite his careful "baby steps" as he mopped the area, the plaintiff slipped on the oily substance, fractured his leg and dislocated his hip. Plaintiff alleged theories of premises liability, negligent activity and negligent failure to provide a "necessary instrumentality".

Under his premises liability theory, the plaintiff disputed the relevance of his awareness of the dangerous condition, and argued that his awareness had no bearing on Kroger's duty to make safe or warn of a dangerous condition. Instead, plaintiff contended, his awareness of the condition should only affect whether he had proportionate responsibility. Arguing further, plaintiff noted that because Kroger was a nonsubscriber employer, Kroger could not raise a proportionate responsibility defense.[3] In essence, the plaintiff argued that Kroger owed him a duty to make safe, or warn against, the dangerous condition and at the same time Kroger should have no viable key defenses because it could not argue that the plaintiff being aware of the situation could have taken measures to protect himself (proportionate responsibility).

The Court rejected plaintiff's argument. While it remains Texas law that the nonsubscriber employer cannot use contributory negligence or assumption of the risk (now proportionate responsibility concepts) as defenses against its employee, the Court concluded and announced that the employee still bears the burden to prove the existence of a duty the nonsubscriber employer owes the employee. *Id.* at *1. The reason, explained the Court, is that a nonsubscriber employer's *liability* may be different because it cannot rely on certain defenses but it has the same *duty* as a landowner to an invitee. *Id.* at *4. Thus, the plaintiff in this case still had to

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[1] A nonsubscriber employer is an employer that has opted out of the state's workers' compensation system.

[2] The Court named the two exceptions as the "criminal-activity" exception and the "necessary-use" exception. Neither exception applied to the *Austin* facts. If one of these exceptions applies to a case, an employer may owe a duty to protect the employee from the unreasonably dangerous condition despite the employee's awareness of the danger. *Austin,* at *16.

[3] The Texas Workers' Compensation Act ("TWCA") provides in part that in an action against a nonsubscribing employer, it is not a defense that: (1) the employee was guilty of contributory negligence; (2) the employee assumed the risk of injury or death; or (3) the injury or death was caused by the negligence of a fellow employee. TEX. LAB. CODE, § 406.033(a).

establish that Kroger owed him a duty in the context of an open and obvious dangerous condition in the restroom.

One take-away from the *Austin* opinion is that for those instances where there is a visible spill on the floor, or an obvious uneven floor, or an employee hops over a high cart or fence or climbs an obviously broken gate, nonsubscriber employers will likely move for summary judgment with greater confidence against claims brought by its employees under such circumstances.

But wait, there is more to consider. While some will view the Court's opinion as a loss for the plaintiffs' bar, the *Austin* opinion did provide an opening for the plaintiffs' bar to assert a different claim. Although the Court of Appeals for the Fifth Circuit did not certify a question about the plaintiff's "necessary-instrumentalities" claim, the Court nonetheless took up, at Kroger's request, the issue concerning the relationship between the instrumentalities claim and the premises-liability claim. Kroger argued that plaintiff's instrumentalities claim should fail because the negligent activity claim[4] already failed (summary judgment had been granted on this theory) and a condition on the premises, rather than Kroger's contemporaneous activities, caused the plaintiff's fall. Thus, Kroger argued, the plaintiff's claims sounded exclusively in premises liability. The Court ruled against this argument pointing out that the additional relationship between an employer and employee may give rise to additional duties such as a duty to provide necessary equipment, training or supervision. *Austin,* at *15. An instrumentalities claim invokes the duty to furnish reasonably safe equipment necessary to perform the job. *Id.* Because contemporaneous negligent activity is not necessary to an instrumentalities claim, the absence of contemporaneous activity does not necessarily exclude an instrumentalities claim. *Id.* To hold otherwise would create different treatment of an employee's instrumentalities claim depending on whether the employer owned or operated the premises where the employee worked. *Id.* at *16.

Based on the Court's conclusion that a necessary-instrumentalities claim is not precluded just because the injury resulted from a premises defect, chances are defense counsel will see more necessary-instrumentalities claims in future actions. Whether these necessary-instrumentalities claims survive summary judgment challenges will likely depend on the case facts. In any event, it is time for both sides of the bar to pay more attention to the necessary-instrumentalities theory.

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[4] "Negligent activity" is a result of a contemporaneous activity, as distinguished from a premises-defect claim which is based on the property itself being unsafe. *Austin,* at *15, *citing State v. Shumake,* 199 S.W.3d 279, 284 (Tex. 2006).