NONSUBSCRIBERS’ CLAIMS OF “NO DUTY” AGAINST EMPLOYEE’S WORKPLACE INJURIES

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I. INTRODUCTION

In Texas, the negligence of a defendant-landowner turns on the status of the plaintiff as he or she entered upon the land.1 The plaintiff’s status as a trespasser, a licensee, or an invitee thus establishes the landowner’s duty.2 Invitees enter the land with the express consent of the landowner and for the mutual benefit of the landowner and themselves.3 Under this definition, employees are considered invitees when they enter upon their employer’s premises.4 A landowner’s duty to an invitee is that of reasonable care, which may include a duty to warn and a duty to make the premises reasonably safe.5 However, a landowner generally has “no duty” to warn invitees of dangers that are open and obvious.6 This Note focuses

2. Mellon Mortg. Co. v. Holder, 5 S.W.3d 654, 655 (Tex. 1999) (“For most premises liability cases, the foreseeability analysis will be shaped by determining whether the plaintiff was an invitee, a licensee, or a trespasser.”); see also Del Lago, 307 S.W.3d at 767.
4. See RESTATEMENT (SECOND) OF TORTS § 332 cmts. a, j (1965).
5. See City of Beaumont v. Graham, 441 S.W.2d 829, 834 (Tex. 1969) (“Stated generally, these duties require elimination, or warning to the invitee, of hidden conditions which are unreasonably dangerous and which are known to the owner or occupier but are unknown to the invitee.”).
6. See Sears, Roebuck & Co. v. Robinson, 280 S.W.2d 238, 240 (Tex. 1955); see also RESTATEMENT (SECOND) OF TORTS § 343A(1) (1965) (“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.” (emphasis added)).
exclusively on the duty owed by employer-landowner to his or her employee-invitees under Texas premises liability law.

The Texas Workmen’s Compensation Act (TWCA) abrogates nonsubscribing employers’ common-law defenses in premises liability actions brought by their employees. As such, complications arise when an employee, suing as an invitee, is injured by an open and obvious condition on the premises. Texas courts have struggled to answer a difficult question: does the open and obvious nature of a condition completely eliminate the duty an employer owes to an employee-invitee, or should the employee-invitee’s subjective appreciation of the risk constitute a defense to liability? Under the first view, nonsubscribing employers can evade liability arguing that the employee-invitee failed—as a matter of law—to state a valid claim of negligence (i.e. because the employee failed to show the employer owed a duty). Under the second view, nonsubscribers are barred from claiming that the employee assumed the risk—a common-law defense unavailable to nonsubscribers after the enactment of the TWCA. Recently, in the case of Austin v. Kroger Texas L.P., the Fifth Circuit asked the Supreme Court of Texas to address this issue by certified question.

Part II of this Note will discuss the facts and procedural posture of Austin v. Kroger Texas L.P. Part III will present a short history of Texas master–servant liability. Part IV will highlight an important distinction concerning an employer’s duty in premises liability actions versus negligent-activity actions. Part V will conclude by examining the Supreme Court’s likely disposition of Austin v. Kroger Texas L.P.

II. THE FACTS & PROCEDURAL POSTURE OF AUSTIN V. KROGER L.P.

Austin began working for Kroger in 1997. In 2008, Austin started working as “utility clerk” or “floor-clean-up person” at a Kroger location in Mesquite, Texas. On July 27, 2009, Kroger performed a cleaning of the store’s condenser units located on the mezzanine level of the facility. As a

7. Texas’ Worker’s Compensation scheme is elective in nature. As such, the terms “nonsubscribing” and “nonsubscriber” are used in Texas, and throughout this Note, to describe employers and businesses that do not subscribe to Texas’ Worker’s Compensation Scheme.
8. See generally TEX. LAB. CODE ANN. § 406.033(a) (West Supp. 2014) (precluding nonsubscribers from claiming that an injured employee was contributory negligent or assumed the risk); see also Robinson, 280 S.W.2d at 239 (“It was with the law in Texas in this attitude that the Legislature passed the Workmen’s Compensation Act and abolished the defense of assumption of risk.” (emphasis added)).
9. See Robinson, 280 S.W.2d at 239.
10. See id.
11. See Austin v. Kroger Tex. L.P., 746 F.3d 191, 204 (5th Cir. 2014) (per curiam).
12. Id. at 195.
13. Id. (internal quotation marks omitted).
14. Id.
result of the cleaning, a dirty brown liquid leaked through the ventilation ducts on to the floor of the restrooms below. Austin was tasked with cleaning up “whatever mess” was made by the condenser cleaning. Upon inspection, Austin discovered the oily, dirty brown liquid on the floor in both restrooms. Unable to locate floor cleaner on the premises that day, Austin was given a dry mop to remedy the spill. Austin placed wet floor signs inside and outside of the restroom, took “baby steps,” and changed the mop numerous times during the cleaning. Nevertheless, after some time cleaning the spill, Austin slipped, fell, and sustained injuries.

Austin asserted three theories of recovery: ordinary negligence, gross negligence, and premises liability. Kroger—a nonsubscriber under the TWCA—moved for summary judgment arguing that Austin was barred from recovery because he subjectively appreciated the risk. The federal district court granted Kroger’s summary judgment. Austin timely appealed.

On appeal, the Fifth Circuit found Austin was precluded from asserting both negligent-activity and premises liability claims based on the same injury. Because Austin’s injuries arose from a defect on the premises and not an activity or omission, only his premises liability claim was considered. Moreover, because Austin’s premises liability claim implicated “arguably unsettled [Texas] law” regarding a nonsubscribing employer’s duty to employee-invitees, the Fifth Circuit certified the following questions to the Supreme Court:

“Pursuant to Texas law, including § 406.033(a)(1)-(3) of the Texas Labor Code, can an employee recover against a [non]subscribing employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy? Put differently, does the employee’s awareness of

15. Id.
16. Id. (internal quotation marks omitted).
17. Id.
18. Id. According to Kroger’s Safety Handbook, store management was to “‘make certain that Spill Magic Spill Response Stations [were] adequately supplied at all times.’” Id. (alteration in original). According to Kroger’s Safety Handbook, Spill Magic allows a liquid spill to be cleaned with a broom and a dustpan and effectively reduces slip-and-falls by 25%. Id.
19. Id. (internal quotation marks omitted).
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id. at 196.
26. Id. at 196–97.
27. Id. at 194.
the defect eliminate the employer’s duty to maintain a safe workplace?28

III. A SHORT HISTORY OF TEXAS MASTER–SERVANT LIABILITY

In 1894, the Texas Supreme Court examined an employer’s duty to warn employees of the dangers associated with stacking railroad ties.29 Recognizing that the employee’s work involved “no exercise of peculiar skill” and “no [use of] dangerous machinery,” the court found the employer had no duty to warn employees of such dangers.30 A close reading of Echols reveals the employer’s claim of no duty did not operate as a defense, but rather, as an outright bar to recovery by negating the employee’s ability to establish a standard of care that could be breached.31 Thus, under Echols, employers could briskly evade liability by asserting that they have no duty to warn employees of common dangers associated with their work.

The Texas Legislature recognized this inherent unfairness and enacted the Employers’ Liability Act of 1913, an early predecessor to the TWCA.32 The Texas Supreme Court has since articulated the dual-pronged legislative intent behind the TWCA: (1) to eliminate nonsubscribers’ assumption of the risk defense against employees injured by open and obvious conditions in the workplace; and (2) to allow recovery from nonsubscribing employers who “created or failed to correct an unsafe condition of the premises.”33 Thus, although employers are not required to subscribe, a failure to do imposes significant limitations on their ability to defend against employees’ premises liability claims.

In 1934, the Texas Supreme Court recognized four specific duties owed by an employer to his or her employees.34 Texas employers owe “absolute or nondelegable duties” to their employees, including: (1) the duty to provide rules and regulations and the duty to warn of certain hazardous conditions of employment; (2) the duty to “furnish reasonably safe machinery or instrumentalities” for the employee’s work; (3) the duty to make the workplace reasonably safe; and (4) the duty to exercise

28. Id. at 204.
30. See id. at 62.
31. See id. (“There was no evidence in this case of negligence on the part of the railroad company . . . .”).
ordinary care in selecting competent co-employees.\footnote{Id. at 401–02.} Thus, employers owe four ongoing and indispensable duties to their employees under Texas law.

In 1955, the Texas Supreme Court eliminated nonsubscribing employers’ claims of no duty to dodge liability in premises liability actions brought by their employees.\footnote{See Robinson, 280 S.W.2d at 240.} As a threshold matter, the court determined that the employer’s claims of no duty because of the open and obvious nature of a premises condition operated as a defense (i.e., assumption of the risk) and not a limitation on the employer’s duty.\footnote{See id. at 240. This holding appears to be at odds with the court’s holding sixty years earlier in \textit{Echols} which held that “there was no evidence . . . of negligence on the part of the railroad company” because the employee subjectively appreciated the risks of the work. \textit{Tex. & N.O. Ry. v. Echols}, 27 S.W. 60, 62 (Tex. 1894). However, for reasons described in Part IV, infra, this apparent contradiction is reconcilable.} Finding that the assumption of the risk defense was made unavailable to nonsubscribers following the TWCA’s enactment, the court affirmed a judgment by the lower court against the employer.\footnote{See Robinson, 280 S.W.2d at 240–41.}

Thirty-three years after \textit{Robinson}, the court extended its recognition of claims of no duty as an assumption of the risk defense in all premises liability cases brought by invitees, even outside the employment context.\footnote{See \textit{Parker v. Highland Park, Inc.}, 565 S.W.2d 512, 513, 518–19 (Tex. 1978).} In the court’s view, an invitee’s conduct with regard to an open and obvious condition “is a matter which bears upon his own contributory negligence” and should be properly raised as a defense.\footnote{Id. at 520.} Accordingly, \textit{Parker} merely reaffirms \textit{Robinson}, resolving the confusion in Texas jurisprudence as to how a claim of no duty by defendant-landowners should be raised and properly analyzed. However, because \textit{Parker} did not involve an employer–employee relationship, the TWCA’s restrictions on nonsubscribers were not considered.

In 2010, the court analyzed the application of the no duty concept in a premises liability action brought by an invitee against the owners of a bar.\footnote{See Del Lago Partners, Inc. v. Smith, 307 S.W.3d 762, 764, 767 (Tex. 2010).} The plaintiff there was injured when he intervened in a fight between patrons at the bar.\footnote{Id. at 766. The plaintiff alleged that the resort owners were liable for his injuries because they were aware of a dangerous condition on the premises and did nothing to prevent it from causing his injury. \textit{Id.} at 769. The dangerous condition was the volatile and escalating tension between patrons, which was exacerbated by the bar’s continuing to serve alcoholic beverages and its failure to call security. \textit{Id.}} Because his claim was brought against a nonemployer, the TWCA had no application and was not discussed by the court.\footnote{Unlike \textit{Robinson}, the case did not analyze claims brought by an employee against a nonsubscribing employer. Nevertheless, his status was that of an invitee for the purposes of establishing the bar owner’s duty. \textit{Id.} at 767.}
Moreover, the employer duties outlined in Russell found no application in this case brought by a customer against the resort owners. Relying on its holding in Parker, the court affirmed a finding that the resort breached its duty to the plaintiff, despite a finding of contributory negligence by the jury at trial.\textsuperscript{44}

IV. THE DUTIES OF AN EMPLOYER VARY DEPENDING ON THE THEORY OF RECOVERY

A. The “Nonsubscriber Trilogy”: Kroger Co. v. Elwood, Jack in the Box v. Skiles, and Brookshire Grocery Co. v. Goss

In the instant matter, the Fifth Circuit “perceive[d] some tension” regarding three cases that predate the Del Lago opinion but which Kroger argues breathe new life into the no duty concept abandoned by the Court in Parker.\textsuperscript{45} Unlike the employee–employer cases described above,\textsuperscript{46} the employees in these three cases sued their respective nonsubscribing employers alleging negligent activity and not premises liability theories.\textsuperscript{47} While claims of premises liability rely on the existence of an injury-causing condition on the premises, negligent activity claims result from an affirmative act or omission by the employer.\textsuperscript{48} In each of these cases, the court found that an employer owes no duty to warn its employees about the dangers of activities undertaken by employees during work when such activities presented a “danger known to all.”\textsuperscript{49} As such, the court has held that an employer has no duty to warn an employee of the following dangerous activities:

- an employer’s failure to train or advise its employees about the risks of placing one’s hand in a customer’s car door jamb when unloading groceries;\textsuperscript{50}
- an employer’s failure to warn an employee about the dangers of using a ladder to mount the broken lift gate of a truck;\textsuperscript{51}

\textsuperscript{44} Id. at 772–73.
\textsuperscript{45} Austin v. Kroger Tex. L.P., 746 F.3d 191, 200, 203 (5th Cir. 2014).
\textsuperscript{46} See discussion supra Part III.
\textsuperscript{47} See Austin, 746 F.3d at 202.
\textsuperscript{48} See id. at 202 n.8 (“Although negligent activity and premises defect are branches of the same tree, they are conceptually distinct claims: ‘negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner’s failure to take measures to make the property safe.’” (quoting Del Lago, 307 S.W.3d at 776)).
\textsuperscript{49} Kroger Co. v. Elwood, 197 S.W.3d 793, 795 (Tex. 2006) (per curiam); see infra notes 50–52.
\textsuperscript{50} Kroger Co., 197 S.W.3d at 793, 795 (“Kroger had no duty to warn Elwood of a danger known to all . . . .).
• an employer’s failure to warn an employee of the dangers associated with entering and navigating through a confined space where a lowboy cart is present.\textsuperscript{52}

B. The Distinction Between Negligent-Activity and Premises Liability

The distinction between negligent activity and premises liability theories will ultimately be determinative in the case of \textit{Austin v. Kroger Texas L.P.} That distinction lies on the face of the complaint and factually depends on whether the employee is suing as an employee versus when the employee is suing as an invitee.\textsuperscript{53} Furthermore, an employer’s duty to his or her employees varies significantly depending on whether negligent activity or premises liability is alleged.\textsuperscript{54}

When the employee alleges negligent activity, the employer’s duty is measured by the four duties recognized by the court in \textit{Russell}: (1) the duty to provide rules and regulations and to warn of certain hazardous conditions of employment; (2) the duty to furnish reasonably safe machinery or instrumentalities for the employee’s work; (3) the duty to make the workplace reasonably safe; and (4) the duty to exercise ordinary care in selecting competent co-workers.\textsuperscript{55} However, when the employee sues an as invitee, the employer owes an additional, heightened duty of care. Under a premises liability theory, an employer’s duties to his employees include the four duties outlined in \textit{Russell} in addition to the duty of reasonable care, the duty to warn, and the duty to make safe—duties owed to all invitees regardless of employment status.\textsuperscript{56} Therefore, nonsubscribers are vulnerable to premises liability claims by employees because (1) they owe a heightened duty of care based on the condition of the premises, and (2) because they are unable to assert an assumption of the risk under the precedent of \textit{Robinson}.

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\textsuperscript{51} Jack in the Box, Inc. v. Skiles, 221 S.W.3d 566, 566, 569 (Tex. 2007) (per curiam) ("The dangers associated with the use of a ladder to climb over a lift gate are common and obvious to anyone.").

\textsuperscript{52} Brookshire Grocery Co. v. Goss, 262 S.W.3d 793, 795 (Tex. 2008) (per curiam) (We conclude that Brookshire owed no duty to warn Goss of a risk commonly known and appreciated . . .).\textsuperscript{53} See \textit{Odom v. Kroger Tex., L.P.}, Civil Action No. 3:13-CV-0579-D, 2014 WL 585329, at *6 (N.D. Tex. Feb. 14, 2014) ("When an employee sues \textit{qua} invitee, because he was injured by a condition that was not directly caused by the negligent activity of his employer and his employer did nothing else to cause the injury, he must satisfy the elements of premises liability. But when an employee sues \textit{qua} employee, because his employer has violated one of its continuous, non-delegable duties to the employee, he must satisfy the elements of ordinary negligence.").\textsuperscript{54} See \textit{id.}

\textsuperscript{55} Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 401–02 (1934), \textit{overruled on other grounds}, Wright v. Gifford-Hill & Co., 725 S.W.2d 712 (Tex. 1987); \textit{see also Odom}, 2014 WL 585329, at *5.

\textsuperscript{56} \textit{See Odom}, 2014 WL 585329, at *5.
Like the “Nonsubscriber Trilogy,” Echols analyzed an employer’s duty under a claim of negligent activity. Indeed, Echols resolved whether an employer had a duty to warn his employees of dangers associated with stacking railroad ties, a claim wholly unrelated to the condition of the premises. In negligent activity actions then, an employer may validly claim that it had no duty whatsoever to warn its employees of activities whose danger is known to all. This makes good sense because—in the absence of a premises liability claim—the employer’s duties do not include a duty of reasonable care, a duty to warn, or to make the premises safe for the invitee. Quite simply, the condition of the premises is not a concern when mere negligent-activity is alleged. Thus, in light of the in the “Nonsubscriber Trilogy,” Echols is still good law when the employee sues on a negligent-activity theory.

Robinson is the controlling precedent in this premises liability case. In Robinson, the invitee was an experienced employee. On the day of the accident, he noticed a pool of oily liquid on the floor of the warehouse. He admitted to knowing that oil was slippery yet proceeded to work. As he helped others move a car engine, he slipped, fell, and sustained injuries. Although the condition was open and obvious to him, his employer was a nonsubscriber and was thus unable to assert assumption of the risk as a defense. The court roundly rejected the employer’s argument that it had no duty whatsoever to warn its employee of the danger. Robinson was decided in 1955, remains good law in Texas, and is analogous to Austin v. Kroger Texas L.P.

Despite Kroger’s urging, the court is unlikely to extend its recognition of the no duty concept from the premises liability field to the master–servant field. Such a holding would thwart the legislative intent behind the TWCA. If the court allows an extension in this case, employers would simply self-insure under a less expensive policy, claim no duty against all employee premises claims, and have all such cases disposed of on summary

58. See Kroger Co. v. Elwood, 197 S.W.3d 793, 795 (Tex. 2006) (per curiam).
60. See id.
61. See id.
62. See id.
63. See id. passim.
64. Id. at 239–40.
65. See id. at 240.
66. See id. (“The two fields of law (landowner-invitee and master-servant), are entirely separate, and they should be kept so.”).
67. See id. (“Certainly the concept should not be so extended when its extension would serve to defeat and nullify the obvious and clearly expressed intention of the Legislature . . . .”).
judgment. Such as result is antithetical to the intent of the TWCA and places the costs of employers’ negligence entirely on employees.

V. CONCLUSION

In the case of Austin v. Kroger Texas L.P., Austin sued his employer as an invitee under a premises liability theory.\textsuperscript{68} Austin’s injuries resulted from an open and obvious dangerous condition of the slippery floor, which Austin subjectively appreciated.\textsuperscript{69} As such, Kroger—a nonsubscriber under the TWCA—is barred from claiming that it owed Austin no duty with regard to the open and obvious condition.

In Texas premises liability law, no duty claims are properly analyzed as an assumption of the risk defense. Because the TWCA eliminates nonsubscribers’ ability to assert assumption of the risk as a defense, Kroger’s contention that it owed Austin no duty is of no avail. Whether Kroger violated one or more of the duties it owed to Austin is not analyzed by this Note.

Accordingly, the Texas Supreme Court should answer the Fifth Circuit’s certified questions as follows:

1. “Pursuant to Texas law, including § 406.033(a)(1)-(3) of the Texas Labor Code, can an employee recover against a non-subscribing employer for an injury caused by a premises defect of which he was fully aware but that his job duties required him to remedy? Yes.

2. Put differently, does the employee’s awareness of the defect eliminate the employer’s duty to maintain a safe workplace?” No.

Stephen L. Pasta

\textsuperscript{68} See supra Part II.

\textsuperscript{69} See supra Part II.