Reversed and Rendered and Majority and Dissenting Opinions filed May 28, 2020.

In The

Fourteenth Court of Appeals

NO. 14-18-00849-CV

HNMC, INC., Appellant

V.

FRANCIS S. CHAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LENY REY CHAN, JONATHAN CHAN, AND JUSTIN CHAN, Appellees

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On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 2015-18367

DISSENTING OPINION

I dissent to the majority's opinion sustaining Houston Northwest Medical Center's (HNMC) second issue, reversing the trial court's judgment, and rendering a take nothing judgment against HNMC.

"It is well established that an appellate court cannot merely substitute its judgment for that of a jury, because the court cannot exercise its constitutional

authority to the detriment of the right of trial by jury, which is of equal constitutional stature." *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 651 (Tex. 1988). The burden to show the jury's verdict is erroneous is on the appealing party; we presume sufficient evidence was introduced to support the jury's findings. *See Murray v. Devco, Ltd.,* 731 S.W.2d 555, 557 (Tex. 1987). In general, reasonableness determinations are highly fact intensive and involve issues well suited for a jury. *See Reliable Consultants, Inc. v. Jaquez,* 25 S.W.3d 336, 342 (Tex. App.—Austin 2000, pet. denied); *see also Knox v. Fiesta Mart, Inc.*, No. 01-09-01060-CV, 2011 WL 1587362 (Tex. App.—Houston [1st Dist.] Apr. 21, 2011, no pet.). The determination of whether a particular condition poses an unreasonable risk of harm is generally fact specific. *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 646 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

In the case at issue, based on the evidence presented, the jury found that all of the parties were negligent in causing the death of Leny Rey Chan on March 17, 2015, assessing twenty percent of the responsibility to HNMC.

The majority acknowledges that Chan and other pedestrians must cross Cali Drive to reach HNMC's parking lot. The hazard in this case was not just the roadway, nor the fact that Chan and other pedestrians had to cross the roadway. The dangerous condition was the design of pedestrian routes and access points on HNMC's property in combination with the design of HNMC's east parking lot.

Chan's car was parked in the east surface parking lot owned by HNMC. In order to reach the HNMC east parking lot from HNMC's northeast entrance, Chan, an employee of HNMC, had to cross Cali Drive. It is undisputed that Cali Drive is a public roadway, controlled and maintained by Harris County. Chan exited the building from the northeast door of HNMC with two of her colleagues, walked down a set of stairs that almost directly lined up with the only vehicle entrance and exit to

the east parking lot, crossed a concrete pad leading to a crosswalk, entered the crosswalk with her co-workers, and halfway to the east parking lot, was struck and killed by a vehicle attempting to exit the parking lot by turning left on Cali Drive.

The east parking lot is a quarter mile long with two pedestrian gates at each end of the lot, and a single operative vehicle entrance/exit at a mid-block location. At the time of the incident, there appeared to be a pedestrian crosswalk with faded markings across Cali Drive at mid-block which align with concrete pads on both sides of HNMC property. The majority maintains that there was no "marked" crosswalk at that location, and therefore the crosswalk that had once been there was abandoned. The evidence refutes this assumption. The concrete pads installed on HNMC's property extending into Harris County's right of way, in combination with the location of the stairs at HNMC's northeast exit, and the existing crosswalk markings, indicated that the crosswalk was not abandoned.

Deputy Bedingfield, in documenting the incident, stated in his report that the crosswalk had deteriorating paint stripes, but unlike other crosswalks "in the vicinity of the hospital" there were no crosswalk signs. However, the photographs introduced into evidence show that the markings on the pavement were visible, despite the fact that the paint had deteriorated. Employees of HNMC testified they believed there was a crosswalk outside the northeast door of HNMC. Testimony from a long-time employee of HNMC, Lynne Jones, supports the conclusion that employees using the crosswalk outside the northeast door believed it was a crosswalk:

> Q: All right. And when you told Mr. Guerrero that back on May 15th -- May 19th, 2015, that was your best recollection, that you really believed you were in that crosswalk?
> A: I was in the crosswalk.

Jones, who was walking across the street with Chan when Chan was killed, testified that she considered the concrete pads on each side of the road part of the path to the parking lot: "I know that we were in the crosswalk because we were walking toward the concrete on the other side of the road, straight in front of us." Jones testified that no one had ever made employees aware that there was no crosswalk outside the northeast door. The CEO of HNMC, Timothy Puthoff, testified by deposition at trial, confirming incidents of "misses and scares" on Cali Drive prior to March 17, 2015, when cars exited the east parking lot, as well as a specific incident of an HNMC employee being hit by a car, which was exiting the east end parking lot and turning left. Puthoff also acknowledged that he was not aware of anything the hospital did to warn pedestrians, employees, workers, or visitors that they were not supposed to use the crosswalk, or to notify drivers by signage or otherwise to be aware of pedestrians on Cali Drive. He further stated no one informed the employees of HNMC that the crosswalk had become a "non-designated" crosswalk, and there was no signage indicating such. Expert testimony from Andrew Kwasniak, a civil engineer who specializes in traffic engineering, provided expert opinion testimony that the concrete pads, in conjunction with the crosswalk, encouraged pedestrians to cross in the crosswalk, and further stated that Harris County documented that the number of pedestrians crossing Cali Drive at locations not designated as crosswalks was almost as high as the number of pedestrians crossing in designated crosswalks—forty pedestrian crossings at the location of the Chan incident in an hour, or the equivalent of one pedestrian crossing midblock every 1.4 minutes.

The general rule is that a property owner has no duty to ensure the safety of a person who leaves the owner's property and suffers injury on an adjacent public roadway, or to ensure a person's safety against the dangerous acts of a third party.

See Hirabayashi v. N. Main Bar-B-Q, Inc., 977 S.W.2d 704, 706 (Tex. App.—Fort Worth 1998, pet. denied); *Dixon v. Houston Raceway Park, Inc.*, 874 S.W.2d 760, 762-63 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Gonzales v. Trinity Indus., Inc.*, 7 S.W.3d 303, 307 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). The general rule is subject to certain exceptions. As discussed in the majority's opinion, a premises owner assumes a duty of care if it: (1) agrees or contracts, either expressly or impliedly, to make safe a known, dangerous condition of real property, *see Lefmark Mgmt. Co. v. Old*, 946 S.W.2d 52, 54 (Tex. 1997); (2) creates the dangerous condition, *see Buchanan v. Rose*, 159 S.W.2d 109, 110 (Tex. 1942); (3) assumes actual control over the adjacent property, *see Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 324 (Tex. 1993); or (4) knows about, but fails to warn of, an obscured danger on land directly appurtenant to the premises owner's land, *see Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 615 (Tex. 1950). The jury reasonably could have made its finding of HNMC's percentage of negligence based on two of the exceptions: 1) that HNMC created the dangerous condition and 2) that HNMC knew about, but failed to warn of, an obscured danger on land directly appurtenant to the premises.

The facts in this case are distinct from the facts in the cases cited in the majority opinion. In *Hirabayashi*, the plaintiff parked in a lot "not owned or used by the restaurant" and sought to hold the restaurant liable for locating its business on a busy road and/failing to provide adequate parking for the restaurant. *Hirabayashi*, 977 S.W.2d at 706-07. *Cabrera v. Spring Ho Festival, Inc.*, is inapplicable because there were no facts alleged that the design or layout of the festival led to the injury, or that the Spring Ho Festival used or operated the parking lot at issue. *See No.* 03-09-00384-CV, 2010 WL 3271729, at *1 (Tex. App.—Austin Aug. 20, 2010, no pet.) (mem. op., not designated for publication). The majority

does not cite to any cases that hold a premises owner has no duty when the landowner's premises created or contributed to the hazard. There are, however, cases that hold a premises owner has such a duty. *See Hamrick v. Kansas City S. Ry Co*., 718 S.W.2d 916, 918 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.) (a duty exists when a visual obstruction created on property owned or controlled by the landowner obscures a traveler's view on the road); *see also Zapata v. Kariyaparambil*, No. 14-96-00901-CV, 1997 WL 566222, at *3 (Tex. App.—Houston [14th Dist.] Sept. 11, 1997, no pet.) (mem. op., not designated for publication) (landowner whose overgrown vegetation obscured a driver's visibility of a stop sign, thereby causing an accident, had a duty).

Here, HNMC owned and operated the hospital where Chan worked. It is undisputed that HNMC owned and operated the parking lot where Chan parked her car. Although Cali Drive is a public roadway, it is also part of the hospital complex used daily by employees and visitors to HNMC. HNMC does not dispute that it was able control its premises, including the design of the east parking lot, and the pedestrian areas on its premises. The driver of the vehicle that struck Chan had just exited the east parking lot. The design of HNMC's premises placed vehicles exiting and entering HNMC's east parking lot in the same area as pedestrians using the crosswalk from the northeast entrance of HNMC, which the majority acknowledges employees, including Chan, used for thirty years.

The majority declines to impose a duty that requires "a premises owner to align its doors with marked crosswalks." However, a premises owner has a duty to make its premises safe for invitees. *See, e.g., CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 99 (Tex. 2000) ("premises owners and occupiers owe a duty to keep their premises safe for invitees against known conditions that pose unreasonable risk of harm"). It is immaterial that the injury to Chan occurred on a public street.

HNMC's duty arises from the design of its premises that encouraged and allowed pedestrians to cross a roadway in a crosswalk knowing the crosswalk was not a safe path from HNMC's building exit to HNMC's parking lot. There was sufficient evidence for the jury to find HNMC was negligent.

The record is sufficient to support a finding that HNMC was aware of the danger to invitees and employees posed by the design of the access to HNMC's parking lot prior to and at the time of the March 17, 2015 incident. The majority opinion details correspondence to and from HNMC acknowledging prior incidents, during the five years before Chan was fatally injured, including an incident during which another nurse was struck by a vehicle while crossing Cali Drive in the same crosswalk. HNMC also acknowledged "other scares" and characterized the issue as "too serious to ignore for the protection of our patients, visitors, staff and physicians." In 2010, another hospital employee was hit by a car as she crossed Cali Drive. Prior to the Chan incident, HNMC wrote Harris County requesting a meeting to review options, which resulted in a study and recommendations made by Harris County. While this correspondence does not constitute an agreement by HNMC to correct the condition, it does show knowledge on the part of HNMC of the dangerous condition. The prior incidents and the correspondence also support that the danger to pedestrians was not open and obvious to pedestrians.

The testimony at trial reveals that HNMC's employees did not know of the hazard posed by walking from HNMC in the area where the incident occurred. The majority points out that the danger of the roadway was open and obvious, and that there was no obstruction preventing visibility outside the northeast exit. The witnesses who were walking with Chan when she was struck testified that they checked the roadway and the parking lot before entering the crosswalk. An employee who was struck by a vehicle in a prior incident testified that he did not see

any vehicles before entering the roadway. There were prior incidents and "scares" at the same location. The jury could have reasonably concluded that the danger to Chan and other pedestrians was obscured. The correspondence exchanged internally by HNMC, and between HNMC and Harris County, demonstrates that HNMC knew of the danger and yet failed to warn pedestrians. Testimony by long-time HNMC employees and HNMC's CEO confirm that no warnings were given or posted at the location.

HNMC took no action to correct a situation it acknowledges was "too dangerous to ignore." The jury had a reasonable basis to find HNMC was liable based on a duty to warn of the danger posed by the crosswalk and pathway between HNMC and its east parking lot. *See Buchanan*, 159 S.W.2d at 110 ("One who in the exercise of a lawful right, and without negligence on his part, makes an excavation across a street or sidewalk or on his premises in close proximity to a public way, or parks a vehicle in a road, or otherwise obstructs the road with a foreign substance, is bound to give warning of the danger created thereby."). There is sufficient evidence to support the jury's verdict finding HNMC negligent.

The factors cited by the majority in weighing whether to recognize a common-law negligence duty weigh in favor of the jury's verdict. In weighing the risk, foreseeability, and likelihood of injury 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, and considering whether one party had superior knowledge of the risk or a right to control the actor who caused the harm, the scales tip in favor of holding HNMC liable, in part, for the death of Chan. As HNMC was well aware, there was a dangerous condition that would, in all likelihood, cause serious injury, based on prior documented incidences; HNMC could have removed the steps from the eastside door, permanently barred the door,

fenced off the crosswalk access, or removed the deteriorated paint and concrete pads, or followed the recommendations of Harris County in removing or relocating parking lot access points to align with the three remaining crossings, removed the mid-block flasher and installed Texas Manual on Uniform Traffic Control Devices approved warning beacons with advance signs; all of which was not of great magnitude in guarding against dangers "too serious to ignore" and what became a fatal injury; the consequences of placing this burden on HNMC would have been minimal, as it would have protected HNMC from liability as well as pedestrians from injury, as evidenced by the number of incidents, scares and near misses, which HNMC characterized as "too serious to ignore for the protection of our patients, visitors, staff and physicians." Given the knowledge of multiple and serious incidents in the same crosswalk as the Chan incident, the letters and emails to Harris County of the known dangers and serious incidents, and the testimony acknowledging that no warnings were given to employees or pedestrians of the dangerous condition, HNMC had superior knowledge of the risk; and given that the harm could have been controlled by HNMC, it is apparent that HNMC had a common-law negligence duty.

Vasilenko v. Grace Family Church, 404 P.3d 1196, 1198 (Cal. 2018), cited by the majority, is not persuasive. In *Vasilenko*, the plaintiff sought to hold the defendant church liable for maintaining an overflow parking lot requiring invitees to cross the street. In affirming summary judgment in favor of the church, the California Supreme Court held a landowner had no duty to assist invitees in crossing a public street to access the overflow parking lot, but qualified its holding by stating "so long as the street's dangers are not obscured by or magnified by some condition of the landowner's premises. . .", which is precisely what HNMC's liability rests on here.

In reversing the jury’s verdict against HNMC, the majority substitutes its own judgment for that of the jury and fails to properly assess the factors recognizing a common-law negligence duty. The jury verdict against HNMC is supported by the evidence. I would affirm the judgment.

/s/ Margaret 'Meg' Poissant
Margaret ‘Meg’ Poissant
Justice

Panel consists of Justices Jewell, Wise, and Poissant. (Jewell, J., majority).