

IN THE SUPREME COURT OF TEXAS

=====
No. 97-1187
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MELLON MORTGAGE COMPANY, PETITIONER

v.

ANGELA N. HOLDER, F/K/A ANGELA N. HAMILTON, INDIVIDUALLY AND A/N/F FOR
NICHOLAS C. LASKE, RESPONDENT

=====
ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS
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Argued on January 12, 1999

JUSTICE ENOCH concurring.

I join the Court's judgment. I can join neither the plurality opinion nor Justice Baker's writing because I believe those opinions skip a critical step that could lead some to assume the Court has adopted a new common law duty — that a landowner has a general duty to not be negligent. That is not the law in Texas, and is not after today. Because I am concerned that this omission might mislead, I write separately.

This case presents a simple question: Whether a landowner may be held liable for injuries caused to a stranger who was brought to the premises against her will by the criminal attack of another stranger.¹ To begin answering this question, I note that a landowner has no general duty to not be negligent toward those entering the land. The extent of a landowner's liability for injuries caused by a condition existing on the land depends on the status of the injured person. Thus, the

¹ See *Totten v. More Oakland Residential Housing, Inc.*, 134 Cal. Rptr. 29, 32 (Cal. Ct. App. 1976).

scope of a landowner's duty depends on whether, at the time of the injury, the person on the land was an invitee, a licensee, or a trespasser.²

To invitees, the landowner owes a duty to exercise reasonable care to keep the premises in a reasonably safe condition for use by the invitee.³ To licensees, the landowner owes a duty to warn of or to make safe hidden dangers known to the landowner and a duty not to intentionally, wilfully, or through gross negligence cause injury.⁴ And to trespassers, a landowner owes only a duty not to intentionally, wilfully, or through gross negligence cause injury.⁵

While this traditional classification system has been subject to debate, it remains the law in Texas. Thus, I believe it must be applied in this case.

Because this case is strikingly similar to *Nixon v. Mr. Property Management Co.*,⁶ I consider that case instructive. There, ten-year-old R.M.V. was dragged into an apartment complex that she didn't reside in by an unknown assailant and was sexually assaulted. Her next friend sued Mr. Property, the manager of the apartment complex, alleging that it breached a duty of care to R.M.V. The trial court granted summary judgment for Mr. Property. Holding that R.M.V. was a "trespasser," and that Mr. Property's duty was not to injure her wilfully, wantonly, or through gross negligence, the court of appeals affirmed.⁷

² See, e.g., *Carlisle v. J. Weingarten, Inc.*, 152 S.W.2d 1073, 1074 (Tex. 1941); *Galveston Oil Co. v. Morton*, 7 S.W. 756, 757-58 (Tex. 1888).

³ See, e.g., *Carlisle*, 152 S.W.2d at 1075.

⁴ See, e.g., *Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936).

⁵ See, e.g., *State v. Williams*, 940 S.W.2d 583, 584 (Tex. 1996); *Burton Constr. & Shipbuilding Co. v. Broussard*, 273 S.W.2d 598, 603 (Tex. 1954).

⁶ 690 S.W.2d 546 (Tex. 1985).

⁷ See 675 S.W.2d 585, 587 (Tex. App.—Dallas 1984), *rev'd*, 690 S.W.2d 546 (Tex. 1985).

We reversed and remanded on the ground that a Dallas city ordinance requiring property owners to "keep the doors and windows of a vacant structure or vacant portion of a structure securely closed to prevent unauthorized entry" imposed a standard of care on Mr. Property without regard to R.M.V.'s classification. We said:

[T]he question of what duty Mr. Property owed to R.M.V. is answered by the ordinance. This ordinance legislatively imposes a standard of conduct which we adopt to define the conduct of a reasonably prudent person. . . . The unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such a statute or ordinance was designed to prevent injury to the class of persons to which the injured person belongs. . . . A reasonable interpretation of this ordinance is that it was designed to deter criminal activity by reducing the conspicuous opportunities for criminal conduct. . . . ***An ordinance requiring apartment owners to do their part in deterring crime is designed to prevent injury to the general public. R.M.V. falls within this class. Since the ordinance was meant to protect a larger class than invitees and licensees, and since R.M.V. committed no wrong in coming onto the property, these premises liability distinctions are irrelevant to our analysis.***⁸

The facts of this case are virtually indistinguishable from *Nixon* — we have an innocent victim taken against her will into a vacant area and sexually assaulted, followed by tort claims against the landowner for not taking steps to prevent the assault. But unlike the plaintiff in *Nixon*, Holder does not claim in this Court that an ordinance makes the traditional classification system "irrelevant." Thus, we are left with the traditional premises liability classifications to determine Mellon's duty.

Addressing these classifications, I note that no one asserts that Holder was an invitee. At the other end, Holder argues that because she didn't enter Mellon's property for her own purposes, she was not a trespasser. But the court of appeals in the *Nixon* case rightfully explained that the classification of visitors on one's land "does not depend upon . . . volition but upon knowledge and

⁸ *Nixon*, 690 S.W.2d at 549 (emphasis added).

consent of [the landowner].”⁹ And that “[i]n the absence of knowledge and consent [the landowner’s] duty . . . was no greater than not to . . . [be wilful, wanton or grossly negligent].”¹⁰ Thus I agree with Justice O’Neill that for purposes of determining Holder’s status on Mellon’s property, the relevant question is not whether Holder meant to be in the garage, but “whether Mellon expressly or impliedly consented to [Holder’s] entry.”¹¹ Where Justice O’Neill and I part ways is in answering this question.

Justice O’Neill concludes that there is a fact question about whether Mellon, by its conduct, impliedly granted Holder license to come into its garage.¹² I disagree. First, the cases Justice O’Neill cites don’t support this conclusion. Each of these cases demonstrate a nexus between the activity during which the injury occurred and the implied license.¹³ And none hold, as Justice O’Neill would, that a license implied for some is a license implied for all.¹⁴ Evidence that Mellon was aware of vagrants in the garage in no way implies that Mellon opened the garage to vehicular traffic at all hours of the day or night. And while my colleagues struggle to avoid calling Holder a “trespasser,” the summary judgment evidence establishes that that was her status under the nomenclature of the traditional premises liability categories. Rather than struggling with the terminology, the Court could more easily establish another less harsh-sounding term. Regardless,

⁹ *Nixon v. Mr. Property Management Co., Inc.*, 675 S.W.2d 585, 586 (Tex. App. — Dallas 1984).

¹⁰ *Id.*

¹¹ ___ S.W.2d at ___ (O’Neill, J., dissenting).

¹² *See id.* at ___.

¹³ *See id.* at ___ (citing two Texas court of appeals cases that found that boys who swam frequently on property owned by governmental units were “gratuitous licensees” because the governmental units knew that boys were using the property for that purpose and took no steps to prevent it).

¹⁴ *See id.*

and accepting Holder's blamelessness, this does not affect the legal analysis of Mellon's duty.

As part of her argument, Holder cites section 197(1) of the *Restatement (Second) of Torts*.¹⁵ She contends that she had a "privilege" to enter Mellon's property because she was in fear for her safety, and therefore, she was not a "trespasser" for purposes of determining the scope of Mellon's duty. This argument is incomplete. I may agree with Holder that, guided by section 197(1) of the *Restatement*, she was privileged to go on to Mellon's property. But I read that section to mean only that she is relieved of liability to Mellon for having done so. Should this Court adopt section 197(1), Holder could not, as a matter of law, be liable to Mellon for entering Mellon's garage.

But whether Holder had a privilege to be in Mellon's garage has nothing to do with the scope of Mellon's duty to Holder. While section 345(1) of the *Restatement (Second) of Torts* declares that a landowner owes the same duty to a privileged trespasser that the landowner owes a licensee,¹⁶ I would be reluctant to adopt that section. Mellon's duty is determined by Holder's status. And Holder's status is determined by whether Mellon consented to her presence in the garage. Mellon's duty to Holder can't change simply because Holder went on the property involuntarily.

Mellon owned a parking garage in downtown Houston. The garage was not open for public use and was not used at night. Mellon's duty to those who were on the premises without Mellon's consent was only to not intentionally, wilfully, or through gross negligence cause them injury.

Having determined that this was the duty Mellon owed to Holder, the next inquiry would be whether Mellon met its summary judgment burden to conclusively prove that it did not intentionally, wilfully, or through gross negligence injure Holder. Mellon met that burden. Consequently, it was

¹⁵R ESTATEMENT (SECOND) OF TORTS § 197(1) (1965).

¹⁶R ESTATEMENT (SECOND) OF TORTS § 345(1).

up to Holder to present summary judgment evidence that raised a fact issue on consent. The evidence presented by Holder does not. Thus I concur in the Court's judgment.

Craig T. Enoch
Justice

Opinion delivered: September 9, 1999