

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
=====

Argued on January 12, 1999

JUSTICE O'NEILL, dissenting, joined by CHIEF JUSTICE PHILLIPS and JUSTICE HANKINSON

In three opinions applying three different rationales, a divided Court concludes that Mellon is entitled to summary judgment. These opinions, none of which carries a majority, alternately conclude that (1) the crime victim was not foreseeable, (2) the crime committed was not foreseeable, and (3) Holder was a trespasser toward whom Mellon fulfilled its duty. I cannot agree, in light of the summary judgment evidence, that any of these factors was established as a matter of law. Accordingly, I respectfully dissent.

I

Foreseeability of Plaintiff

Applying the *Timberwalk* factors, the plurality concludes, as I do, that there is some evidence to show that violent criminal conduct in Mellon's garage was foreseeable. *See Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998). They proceed, however, to employ a so-called "second prong" foreseeability analysis that focuses on the class of victim to determine the existence of a duty. Although this approach produces a seemingly desired result, it improperly bootstraps proximate cause foreseeability into the threshold duty question, thereby usurping the

function of the traditional premises liability classifications. Whether or not the foreseeability analysis is the same for both duty and proximate cause purposes, as the plurality posits, the concept of foreseeability in the context of premises liability is embodied in the classifications that have defined a landowner’s duty for over one hundred years.

It is true that in *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546 (Tex. 1985), and in two other cases cited in the plurality opinion, we stated that foreseeability requires “that the injured party should be so situated with relation to the wrongful act that injury to him or to one similarly situated might reasonably have been foreseen.” *Id.* at 551 (Tex. 1985) (quoting *Carey v. Pure Distrib. Corp.*, 124 S.W.2d 847, 849 (Tex. 1939)). But that analysis applied to the determination of proximate cause, which is typically an issue for the jury, not duty, which is typically a question for the court. *Id.* And if the foreseeability analysis is the same, as the plurality reasons, it is difficult to reconcile their conclusion with that reached in *Nixon*. On almost identical facts — a young girl was abducted from another location and sexually assaulted in an abandoned apartment — we held that a fact issue existed on whether the criminal assault was foreseeable to the management company that had left the apartment unlocked:

With a litany of prior crimes . . . and with deposition testimony that vagrants frequented the area, *a material fact question exists on the foreseeability of this crime as it relates to the proximate cause issue.*

Id. (emphasis added). To hold now, on nearly identical facts, that foreseeability is lacking as a matter of law for duty rather than proximate cause purposes defies logic and ignores a primary function of the traditional premises liability classifications. Were we to abandon the traditional classification system and impose upon landowners a generalized duty to exercise reasonable care toward all entrants, as Holder urges, there might be a place for the “foreseeable plaintiff” approach.¹

¹Although disclaiming an intent to supplant the traditional premises liability classifications, the plurality does just that by analyzing the case as one involving a negligent activity, as in *Palsgraf*, rather than a premises defect. Such an approach comes dangerously close to imposing a general negligence duty on landowners for premises defects. Far from

The requirement that injury to the plaintiff's "class" be foreseeable, however, is inherent in the premises liability distinctions between "invitee," "licensee," and "trespasser." Like Justice Enoch, I believe that these classifications govern our analysis. The inquiry should be whether Mellon established as a matter of law that it acted within the scope of any duty that it owed to Holder. The nature of that duty depends upon the status of the person entering the property.

Both Justices Baker and Enoch agree that the second-prong foreseeability analysis is flawed, and decline to join the plurality opinion. Justice Baker applies the *Timberwalk* factors and concludes that, as a matter of law, a sexual assault in Mellon's garage was not foreseeable. Like Justice Enoch and the plurality, I cannot agree that such a conclusion may be drawn from this summary judgment record.

II

Foreseeability of Crime

The summary judgment evidence shows that, from January 1, 1990, through the date of the incident, 190 violent crimes, including murders, rapes, robberies, and aggravated assaults, were reported within a quarter-mile radius of Mellon's garage. This amounted to one reported violent crime every five days, and was enough to support a "High Crime" designation for the area in 1991 and an "Above Average" designation in 1992.

John Hilliard, a Mellon employee, testified by deposition that his Jeep was stolen out of the garage in October 1992. Hilliard sent a memo to the garage manager, Curtis Oblinger, among others, expressing his concern about a "drastic increase in crime in the surrounding area" in the previous six months. Hilliard had heard rumors of increased criminal activity from other Mellon employees, including reports of violent crime in the surrounding area. Hilliard proposed a plan for increased garage security, but Oblinger never responded to his memo.

espousing the dissent's position in *Palsgraf*, as the plurality charges, I follow well-established precedent that defines the duty of a landowner in the premises liability context.

Cathleen Hackward, another Mellon employee, sent an e-mail to Oblinger and others to "lodge a formal complaint about the virtually non-existent security for our parking garage." She wrote that "people are free to roam through there, obviously committing crimes," and stated that she was concerned for her personal safety. Hackward testified by deposition that she had Mellon's security guard escort her to her car when she worked late because she did not consider it safe to go to the garage alone.

According to Hilliard, it was obvious that people were sleeping in the garage. There were blankets and newspapers rolled up "like someone was sleeping in the stairwell." Oblinger knew that vagrants were going into the garage, and that they were drinking beer there. He did nothing, however, to prevent their entry.

Reviewing this evidence, Justice Baker concludes that "the risk that someone would be sexually assaulted in Mellon's garage was not foreseeable to Mellon as a matter of law." Such a conclusion drawn from this summary judgment record, in my opinion, blinks reality and strains the *Timberwalk* factors beyond their logical or intended reach.

Justice Baker draws a bright line between property crimes occurring inside Mellon's garage and personal crimes occurring outside. He thus discounts the employee memos identifying property crime within the garage, and dismisses their reference to violent crime in the vicinity as "rumors." It is clear, however, that the employees' memos were written out of concern for their own personal safety, not just the security of their cars. The Hackward memo explicitly states, "not only am I worried about my car, but I fear for my personal safety as well." And Hilliard testified in his deposition that the "drastic increase in crime" in the surrounding area to which his memo referred included reports of violent crimes, including an armed robbery. Hilliard's memo to Oblinger suggested that the garage should be patrolled "to prohibit automobile theft and potential danger to employees." In *Timberwalk* we held that, for a risk to be foreseeable, evidence of criminal activity "either on the landowner's property or closely nearby" may be considered. *See Timberwalk*, 972

S.W.2d at 757. Considering the crime that had occurred in the garage and the abundance of violent crime in the immediate area, it was entirely foreseeable that a sexual assault might occur in Mellon's open and abandoned garage.

Justice Baker also discounts Holder's evidence of prior violent crimes because there is no evidence "that any of the four reported sexual assaults in the area surrounding the garage occurred in either a public or private parking garage or were otherwise similar to Holder's." It is true that neither party presented evidence detailing the circumstances of the sexual assaults or other 190 violent crimes committed in the vicinity. But *Timberwalk* does not require such a heightened degree of similarity for purposes of determining foreseeability. See *Timberwalk*, 972 S.W.2d at 758. As we recognized in *Timberwalk*, it is difficult to compartmentalize criminal activity, and "[p]roperty crimes may expose a dangerous condition that could facilitate personal crimes." *Id.* at 758. See also *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437, 439 (Iowa 1988) (stating "[w]e do not believe, however, that crimes initially directed toward property are without any probative value on the question of foreseeability of injury."); *Aaron v. Havens*, 758 S.W.2d 446, 447-48 (Mo. 1988) (stating "[i]t is not necessary to allege that past crimes involving entry into unauthorized places are of the same general nature as the one which gave rise to the claim. . . . If a burglar may enter, so may a rapist.").

To the extent Justice Baker bases his "similarity" distinction upon the manner in which Holder was assaulted, *i.e.*, that she was lured into the garage from another location, it is immaterial, for we have long recognized that what must be foreseeable is not the exact sequence of events that produces the criminal conduct, but only the general danger. See *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989). And to the extent his distinction is based upon the differing nature of other crimes in the area, I fail to see it. In the year Holder was assaulted, four sexual assaults, fifty-seven robberies, and twenty-seven aggravated assaults occurred in close proximity to the garage. Any distinction that might be drawn between

Holder's assault and these prior violent crimes is inconsequential at best. Moreover, we stated in *Timberwalk* that "the frequency of previous crimes necessary to show foreseeability lessens as the similarity of the previous crimes to the incident at issue increases." See *Timberwalk*, 972 S.W.2d at 759. Conversely, the similarity of previous crimes necessary to show foreseeability should lessen, to a certain extent, as the frequency of the previous crimes increases. See *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 525 (Del. 1987) (stating "the repetition of criminal activity, regardless of its mix, may be sufficient to place the property owners on notice of the likelihood that personal injury, not merely property loss, will result."). Here, any distinction that might be drawn between Holder's assault and the other violent crimes diminishes in light of their sheer number.

Holder presented additional foreseeability evidence that accounts for the nature and character of the premises in issue, a parking garage, which Justice Baker's opinion altogether disregards. While it is true that our decision in *Timberwalk* articulated similarity, proximity, recency, frequency, and publicity of previous criminal conduct as factors relevant to determine foreseeability, there is nothing to suggest that these factors are meant to be exclusive.² Oblinger admitted in his deposition that he knew parking garages in downtown Houston are inherently susceptible to criminal activity. And the report of Holder's security expert, Horace Loomis, refers to "the inherently dangerous nature of unattended and unprotected parking garages." Justice Baker's opinion gives no consideration to

²Substantial authority supports consideration of the nature and character of the premises as a factor in the foreseeability analysis. See *Kendrick v. Allright Parking*, 846 S.W.2d 453, 458 (Tex. App.—San Antonio 1992, writ denied) (recognizing the distinction between premises that are prone to attract criminal activity and those that are not); *Castillo v. Sears, Roebuck & Co.*, 663 S.W.2d 60, 66 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.) (recognizing that to leave a washateria open and unattended all night may impose a duty on the business to provide some sort of security, a duty that may not apply to a department store in a mall with employees present); see also *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653, 661 (Cal. 1985) (stating that the "nature, condition and location of the defendant's premises" should be considered in the duty analysis); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 33, at 201 (5th ed. 1984) (stating that the defendant has a heightened duty to protect the plaintiff from third party crimes when "an especial temptation and opportunity for criminal misconduct" exists); RESTATEMENT (SECOND) OF TORTS § 344 cmt. f (1965) (stating that "[i]f the place or character of [a] business . . . is such that [the landowner] should reasonably anticipate careless or criminal conduct on the part of third persons," the landowner may have a duty to guard against it); *id.* § 302B, cmt. e, subgmt. G (1965) (noting that, when the defendant's property affords "a peculiar temptation or opportunity for intentional interference likely to cause harm," the defendant is required to guard against the intentional, or even criminal, conduct of others).

the fact that the particular premises at issue may, under certain circumstances, pose a peculiar attraction for criminal misconduct. *See Gomez v. Ticor*, 145 Cal. App. 3d 622, 628 (1983) (stating that “the deserted... nature of these structures, especially at night, makes them likely places for robbers and rapists to lie in wait”).

I agree with my fellow justices that “it was not unforeseeable as a matter of law that a rape might occur in the parking garage,” and therefore cannot join Justice Baker’s opinion. And I agree with Justice Enoch that the plurality’s analysis comes dangerously close to imposing upon landowners a general common law duty not to be negligent. Like Justice Enoch, I believe that the traditional premises liability distinctions govern our analysis. The inquiry should be whether Mellon established as a matter of law that it acted within the scope of any duty that it owed to Holder. The nature of that duty depends upon the status of the person entering the property.

III

Holder’s Status

At the outset, Holder urges us to abolish the traditional premises liability classifications applied by Texas courts for well over a century to determine a landowner’s duty to persons coming onto the property. That duty is defined by the entrant’s status as an invitee, licensee, or trespasser to the premises. *See Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975); *Carlisle v. J. Weingarten, Inc.*, 152 S.W.2d 1073, 1074-75 (Tex. 1941); *Galveston Oil Co. v. Morton*, 7 S.W. 756, 757-58 (1888). According to Holder, we should follow the lead of those jurisdictions that have abrogated the traditional classification scheme, and define Mellon’s duty under ordinary negligence principles.

It is true that some jurisdictions have abolished the traditional classification scheme, regarding it as “unjust, unworkable and unpredictable.”³ *See, e.g., Michael Sears, Abrogation of the*

³In 1968, the Supreme Court of California abolished the traditional classifications and declared the ordinary negligence principles of foreseeable risk and reasonable care to be the standard for premises liability in California. *See*

Traditional Common Law of Premises Liability, 44 U. KAN. L. REV. 175, 184 (1995). Those courts now define a landowner's duty not in terms of the plaintiff's status, but in terms of foreseeable risk and reasonable care. *See id.* The California Supreme Court first articulated the rationale for doing so:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values. The common law rules obscure rather than illuminate the proper considerations which should govern determination of the question of duty.

Rowland, 443 P.2d at 568. Thus, the traditional classifications have been criticized as occasioning inequitable results.

It has been noted, however, that while the movement to abolish the traditional scheme gathered momentum through the mid-1970s, it has since come to "a screeching halt." PROSSER & KEETON ON THE LAW OF TORTS § 62, at 433. In the last decade, only Nevada has abolished all entrant classifications. *See Moody v. Manny's Auto Repair*, 871 P.2d 935, 942-43 (Nev. 1994). Most other jurisdictions have decided to retain the traditional classifications in some form, recognizing that their abrogation in favor of what has been criticized as "a standard with no contours" would create corresponding problems. *Younce v. Ferguson*, 724 P.2d 991, 995 (Wash.

Rowland v. Christian, 443 P.2d 561 (Cal. 1968), *superseded in part by statute as explained in Calvillo-Silva v. Home Grocery*, 968 P.2d 65, 71-72 (Cal. 1998). Courts in a number of jurisdictions later followed California in abandoning all classifications, including that of trespasser. *See, e.g., Webb v. City and Borough of Sitka*, 561 P.2d 731, 732-33 (Alaska 1977), *superseded in part by statute as explained in Alaska v. Shanti*, 835 P.2d 1225, 1227 (Alaska 1992); *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 311-15 (Colo. 1971), *superseded by statute as explained in Lakeview Assoc., Ltd v. Maes*, 907 P.2d 580, 582-83 (Colo. 1995); *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Pickard v. City & County of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Keller v. Mols*, 472 N.E.2d 161, 163 (Ill. 1984) (abolishing distinctions only with regard to child entrants); *Cates v. Beauregard Elec. Coop., Inc.*, 328 So.2d 367, 370-71 (La. 1976), *cert. denied*, 429 U.S. 833 (1976); *Limberhand v. Big Ditch Co.*, 706 P.2d 491, 496 (Mont. 1985) (construing statute to require duty of ordinary care to all); *Moody v. Manny's Auto Repair*, 871 P.2d 935, 942-43 (Nev. 1994); *Ouellette v. Blanchard*, 364 A.2d 631, 633-34 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868, 871-72 (N.Y. 1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 130-33 (R.I. 1975) (*but see Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056, 1062 (R.I. 1994) (restoring trespasser status)).

1986).

The premises liability classifications reflect policy judgments carefully developed over time to balance the landowner's interest in the free use and enjoyment of his land against the interests of persons injured by the land's condition. The categories and their corresponding duties place rational limits on the liability of landowners, assuring that property owners do not become absolute insurers against all risk of injuries that others might sustain on their property. These distinctions afford a degree of certainty to what would otherwise be an amorphous standard of liability, and provide relatively predictable rules by which landowners and entrants may assess the propriety of their conduct. As recently stated by the Supreme Court of Missouri in deciding to retain the traditional categories: "To abandon the careful work of generations for an amorphous 'reasonable care under the circumstances' standard seems — to put it kindly — improvident." *Carter v. Kinney*, 896 S.W.2d 926, 930 (Mo. 1995).

It is not surprising, then, that most jurisdictions continue to apply the traditional premises liability classifications.⁴ And several jurisdictions have attempted to reach a middle ground by abolishing the distinction between licensees and invitees, but retaining limited duty rules toward trespassers.⁵ While I agree that this middle road is far more compelling than the wholesale

⁴By 1996, twenty-three jurisdictions had abolished some or all of the premises liability categories. *See Heins v. Webster County*, 552 N.W.2d 51, 54-55 (Neb. 1996) (providing comprehensive analysis of how other jurisdictions have dealt with question of whether to abrogate traditional classifications). However, fourteen jurisdictions had expressly retained the categories, and another fourteen had continued to apply the common-law classifications without specifically addressing their continued validity. *See id.* at 55.

⁵At least fifteen jurisdictions have repudiated the licensee-invitee distinction while maintaining the limited-duty rule for trespassers. *See Nelson v. Freeland*, 507 S.E.2d 882, 666-87 (N.C. 1998) (abolishing licensee-invitee distinction but maintaining categories and citing the following cases as doing the same: *Wood v. Camp*, 284 So.2d 691 (Fla. 1973); *Jones v. Hansen*, 867 P.2d 303 (Kan. 1994); *Poulin v. Colby College*, 402 A.2d 846 (Me. 1979); *Baltimore Gas & Elec. Co. v. Flippo*, 705 A.2d 1144 (Md. 1998); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639 (Minn. 1972); *Heins*, 552 N.W.2d 51; *Ford v. Bd. of County Comm'rs*, 879 P.2d 766 (N.M. 1994); *O'Leary v. Coenen*, 251 N.W.2d 746 (N.D. 1977); *Ragnone v. Portland Sch. Dist. No. 1J*, 633 P.2d 1287 (Or. 1981); *Tantimonico v. Allendale Mut. Ins. Co.*, 637 A.2d 1056 (R.I. 1994); *Hudson v. Gaitan*, 675 S.W.2d 699 (Tenn. 1984); *Antoniewicz v. Reszcynski*, 236 N.W.2d 1 (Wis. 1975); *Clarke v. Beckwith*, 858 P.2d 293 (Wyo. 1993)). Six others have modified the common-law categories without abolishing them outright. Missouri and Kentucky, for example, recognize a duty of care to all entrants equal to that owed to invitees once the landowner is aware of the entrant's presence. *See Heins*, 552 N.W.2d at 54-55. Connecticut passed legislation modifying the common law status of a social guest from licensee to invitee. *Id.* at 55. Illinois eliminated the classifications by statute in 1984. *Id.* at 55. Indiana and Maine

abandonment of the traditional classifications, we are not faced with that issue in this case. Because the traditional classifications are supported by many years of carefully developed law and public policy and afford relative certainty to an otherwise nebulous premises liability standard, I would decline to abandon them now. Far from “mak[ing] all property owners insurers of the general public,” as Justice Baker charges, I rely on well-established precedent in defining the duty owed to Holder by determining her status as an invitee, a licensee, or a trespasser to Mellon’s garage.

An invitee enters onto another’s land with the owner’s knowledge and for the mutual benefit of both parties. *See Rosas*, 518 S.W.2d at 536. The owner owes an invitee a duty of reasonable care to protect her from foreseeable injuries. *Id.* It is undisputed that Holder was not an invitee; her presence in the garage was neither for Mellon’s benefit nor with its knowledge.

The closer question is whether Holder was a licensee or a trespasser. A trespasser enters another’s property without express or implied permission. *See Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936); *Weaver v. KFC Management, Inc.*, 750 S.W.2d 24, 26 (Tex. App.— Dallas 1988, writ denied). A licensee, by comparison, is a person who is privileged to enter on land only by virtue of the owner’s consent and “under such circumstances that he is not a trespasser.” *Rowland v. City of Corpus Christi*, 620 S.W.2d 930, 933 (Tex. Civ. App. — Corpus Christi 1981, writ ref’d n.r.e.); *see also Dominguez v. Garcia*, 746 S.W.2d 865, 866-67 (Tex. App. — San Antonio 1988, writ denied); RESTATEMENT (SECOND) OF TORTS § 330 (1965). Licensees have been found to include:

those taking short cuts across the property . . .; loafers, loiterers and people who come in only to get out of the weather; those in search of their children; servants or other third persons; spectators and sightseers not in any way invited to come; those who enter for social visits or personal business dealings with employees of the possessor of the land; tourists visiting a plant at their own request; those who come to borrow tools or to pick up and remove refuse or chattels for their own benefit; salesmen calling at the door of private homes, and those soliciting money for charity; and a stranger entering an office building to post a letter in a mail-box provided for the use

judicially altered the status of social guest from licensee to invitee. *Id.*

of tenants only.

PROSSER AND KEETON ON THE LAW OF TORTS § 60, at 413 (citations omitted).

For purposes of distinguishing an invitee from a licensee, courts have often looked to the entrant's purpose in coming onto the property. Thus, it has been said that a licensee's presence on the premises is "for his own purposes, benefits, convenience or pleasure." *Rowland*, 620 S.W.2d at 933; *Smith v. Andrews*, 832 S.W.2d 395, 397 (Tex. App. — Fort Worth 1992, writ denied). However, the traditional premises liability classifications have also been retained, in large part, to afford owners an element of certainty regarding their duty to entrants upon the property. In the present case, where it cannot be said that Holder entered the garage "for her own purposes, benefits, convenience or pleasure," the more appropriate inquiry is whether Mellon expressly or impliedly consented to the entry. *See Webster*, 91 S.W.2d at 306; *Rowland*, 620 S.W.2d at 933; *see also* RESTATEMENT (SECOND) OF TORTS § 330 (1965).

It is undisputed that Holder did not have Mellon's express consent to enter the garage. But consent to enter property may be manifested by the owner's conduct or by the condition of the land itself. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 60, at 413. Situations clearly exist "where a trespass has been tolerated for such a sufficient period of time that the public believes it has the 'permission' of the possessor to use the property." *Murphy v. Lower Neches Valley Auth.*, 529 S.W.2d 816, 820 (Tex. Civ. App.—Beaumont 1975), *rev'd on other grounds*, 536 S.W.2d 561 (Tex. 1976); *see also Boydston v. Norfolk S. Corp.*, 598 N.E.2d 171 (Ohio Ct. App. 1991)(stating that "[consent] can be implied from acquiescence to continued use of the property by the public").

In *Murphy v. Lower Neches Valley Authority*, for example, a teenage swimmer was injured when he jumped into a canal and struck his head on a lump of clay. 529 S.W.2d at 817. The summary judgment evidence showed that boys swam in the canal every day, the defendant knew that

boys swam in the canal yet never asked them to leave, and no signs prohibited their activity. *Id.* at 820. The court concluded that the defendant did not prove, as a matter of law, that the injured boy was a trespasser and not a licensee. *Id.*

Likewise, in *City of El Paso v. Zarate*, the plaintiff sued the City of El Paso after her two sons drowned in a muddy city pond. 917 S.W.2d 326, 329 (Tex. App.— El Paso 1996, no writ). The City claimed that the evidence was legally and factually insufficient to support the jury’s finding that the boys were licensees and not trespassers. *Id.* at 330. The court of appeals disagreed, holding that the City gave its implied permission to use the premises because it failed to fence the area, put up barricades, or post warning signs, even though it knew people often entered the area to remove dirt and knew that four years earlier a child almost drowned in the pond. *Id.* at 331. Conversely, in *Smither v. Texas Utilities Electric Company*, the court classified the injured party as a trespasser, rather than a licensee, when the evidence showed that efforts were made to prevent access to the premises. 824 S.W.2d 693, 694-95 (Tex. App.— El Paso 1992, writ dism’d by agt.).

That is not to say that every tolerance of an intrusion will imply an owner’s consent to enter the land. Instead, courts have articulated sound principles to determine the conditions under which consent may be inferred from the owner’s tolerance of continued trespass. First, consent to enter is not implied unless the owner has actual knowledge that people have been entering the land. *Cf. Hall v. Holton*, 330 So. 2d 81, 83 (Fla. Dist. Ct. App. 1976); *Gonzalez v. Broussard*, 274 S.W.2d 737, 738 (Tex. App.— San Antonio 1954, writ ref’d n.r.e.). And implied consent may only be found when an owner with actual knowledge fails to take reasonable steps to prevent or discourage those persons from entering the land. *Compare Zarate*, 917 S.W.2d at 331-32 (upholding trial court’s finding that plaintiff was a licensee and not a trespasser when defendant knew people used land but made no attempt to keep them out) *with Longbottom v. Sim-Kar Lighting Fixture Co.*, 651 A.2d 621, 622-23 (Pa. Commw. Ct. 1994) (holding that defendant school conclusively proved it did not consent to people climbing on roof when evidence showed school undertook various measures to prevent

access). Finally, an owner need not take steps to evict known trespassers when doing so would be unduly burdensome or futile. *See Boydston*, 598 N.E.2d at 174 (quoting PROSSER AND KEETON ON THE LAW OF TORTS § 60, at 414: "[T]he mere toleration of continued intrusion where objection or interference would be burdensome or likely to be futile . . . is not in itself and without more a manifestation of consent").

In the present case, the summary judgment evidence shows that Mellon knew people were using the garage on nights and weekends for drinking alcohol and sleeping, yet took no action to keep them away. There is some evidence that Mellon impliedly consented to public entry by failing to make any attempt to impede access to the garage or post no trespassing signs when it knew the public was in fact entering the garage and sleeping there. Mellon presented nothing to indicate that it would have been unduly burdensome or futile to attempt to keep the public from the garage, but rather stated only that the problem "wasn't noteworthy of any corrective action being taken." Based on this summary judgment record, I cannot conclude as a matter of law that Holder was a trespasser, rather than a licensee, on Mellon's premises. *See Wiley v. National Garages, Inc.*, 488 N.E.2d 915, 923 (Ohio Ct. App. 1984) (conferring licensee status on plaintiff who was assaulted after parking in defendant's parking garage on Sunday during "off hours" with owner's implied permission). Nor do I find any support for Justice Enoch's position that a license for the public to enter the garage on foot does not imply a license to enter by car.

When the plaintiff is a licensee, the owner is negligent with respect to the condition of the premises if

- a. the condition posed an unreasonable risk of harm;
- b. defendant had actual knowledge of the danger;
- c. plaintiff did not have actual knowledge of the danger; and
- d. defendant failed to exercise ordinary care to protect plaintiff from danger, by both failing to adequately warn plaintiff of the condition and failing to make that condition reasonably safe.

State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996) (per curiam opinion denying application for writ of error). Mellon's motion for summary judgment did not address its potential liability if Holder were found to be a licensee, nor do we.

In sum, after properly placing the summary judgment burden on Mellon and resolving all inferences from the facts in Holder's favor, I conclude that fact issues exist as to the foreseeability of the risk of criminal conduct in the garage and Mellon's actual knowledge of that risk. Because the Court concludes otherwise, I respectfully dissent.

Harriet O'Neill
Justice

OPINION DELIVERED: September 9, 1999.