

TEXAS SUPREME COURT NO. 08-0970

IN THE
SUPREME COURT OF TEXAS

SCOTT AND WHITE MEMORIAL HOSPITAL AND
SCOTT, SHERWOOD AND BRINDLEY FOUNDATION

PETITIONER

GARY FAIR AND LINDA FAIR

RESPONDENTS

On Appeal from the Court of Appeals
from the Third Appellate District in Austin, Texas

RESPONDENTS' MOTION FOR REHEARING

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TO THE HONORABLE COURT OF APPEALS:

COMES NOW **GARY** and **LINDA FAIR**, (hereinafter referred to as the "Respondents") and hereby files their MOTION FOR REHEARING and in support thereof would respectfully show unto the Court as follows:

In this Motion for Rehearing, Respondent requests that this Court focus on two of the four necessary elements of Respondent's cause of action based upon the icy condition of the premises: (1) whether the icy condition of the premises posed an unreasonable risk of harm to Respondent, an invitee, and (2) whether the landowner, Petitioner, exercised reasonable care to reduce or eliminate the risk.

In its opinion, this Court focused on the first of these two elements, whether the icy condition posed an unreasonable risk of harm. This Court, in at least two cases thus far, has embarked upon an analysis of whether certain conditions do not pose an unreasonable risk of harm as a matter of law. First, in *M. O. Dental Lab v. Rape*, this Court held that natural accumulations of mud do not pose an unreasonable risk of harm as a matter of law. 139 S.W.3d 672, 676 (Tex. 2004). Now, in the present case, this court has held that natural accumulations of ice do not as a matter of law pose an unreasonable risk of harm. One can only wonder what other conditions that this Court will find, as a matter of law, do not pose an unreasonable risk of harm. To find that ice does not pose an unreasonable risk of harm defies common sense. It is hard to imagine a condition which poses a greater risk of harm. The breadth and inflexibility of this Court's holding in this case is obvious. Based upon this Court's holding, there is no conceivable set of facts which would allow a plaintiff the right to have a jury decide whether or not natural accumulations of ice pose an unreasonable risk of harm. Yet, there are numerous conceivable fact situations where such a rule of law would result in serious injustice.

The second element upon which this Court should focus is whether the landowner failed to exercise reasonable care to reduce or eliminate the unreasonable risk of harm. Even Scott & White admits in its brief that a rule of law that discourages a landowner from taking steps to make its premises safe is undesirable. Petitioner's Brief at p. 9. Nonetheless, the result of this Court's ruling is to insulate from liability landowners who choose to do nothing when it comes to ice. Rather than allowing a jury to decide, based upon the unique facts of the case, this Court has concluded that whether a landowner has taken reasonable steps to

reduce or eliminate a risk is irrelevant. This is bad policy. Further, this Court has chosen to align itself with a diminishing minority of courts in the United States which follow this rule of law.

In the present case, Petitioner is a large hospital that treats people whose condition suggests a level of impairment that may make it more difficult to negotiate ice, with a written ice response policy in effect, with control over and knowledge of the condition of the premises, with personnel who are charged with maintaining the hospital premises and with equipment and materials on hand to combat ice. Yet this Court has found that in balancing the burden placed upon the hospital if required to take steps to reduce or eliminate the risk of ice, against the burden placed upon its invitees, the entire burden should be placed upon the invitees. We respectfully suggest that the better approach is to allow local juries to analyze matters of this nature.

We respectfully suggest that what this Court has really held is that a landowner owes no duty to an invitee to make its premises safe insofar as ice is concerned. Until the holding in this case, the well established law in Texas was that a landowner owes to an invitee a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known. *Western Investments, Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). This Court has created an exception to this rule by effectively holding that no such duty exists insofar as naturally occurring ice is concerned. Such a holding is contrary to previous decisions of this court. For example, in *Parker v. Highland Park, Inc.*, this Court abolished the no-duty rule in negligence actions with respect to open and obvious dangers of which an invitee is aware

and held that one who is contributorily negligent is still entitled to have his negligence compared with that of the landowner. 565 S.W.2d 512, 517 (Tex. 1978). Other more recent Supreme Court cases have followed this rule. *See State Dep't. of Highways & Public Transp.*, 828 S.W.2d 235 (Tex. 1992); *Schley v. Structural Metals, Inc.*, 595 S.W.2d 572 (Tex. 1979). This Court apparently distrusts a jury's capacity to weigh comparative responsibility, backtracks against decades of jurisprudence development in premises liability cases, and instead creates a no-duty, safe harbor that allows businesses to treat its customer invitees as trespassers on days that naturally occurring ice is present.

Respondents request that this Court grant this Motion for Rehearing, withdraw its prior opinion and judgment, and issue an opinion and judgment granting the relief sought in Respondents' Response to Petitioner's Petition for Review and Respondents' Response to Brief of Petitioner, and for such other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This certifies that the undersigned served this RESPONDENTS' MOTION FOR REHEARING by sending it to the following individuals by facsimile, electronic mail, first class mail, hand delivery and/or certified mail, return receipt requested on this 20th day of May, 2010.

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