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***Premises Liability*: Duty to Prevent Criminal Acts Is a Separate Inquiry From Foreseeability That Focuses on Whether the Likelihood and Consequences of Harm Outweigh the Burden of Prevention; Proof of an Unreasonable Risk Is Necessary to Establish Duty.**

***Rendition v. Remand*: Arguments by Opposing Counsel Can Provide Notice of the Need to Adduce Evidence on an Issue Even If the Court Has Not Previously Clarified That the Issue Is Independent of Other Considerations.**

UDR Texas Properties, L.P. v. Petrie is a premises liability case arising out of a criminal assault on a tenant's guest in the parking lot of an apartment complex. Premises owners only have a duty to prevent harm from a third party's criminal conduct on the premises the owner controls if the owner knew or should have known of an unreasonable and foreseeable risk of harm to the invitee. In *Timberwalk Apartment Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), the court specified the following factors germane to establishing a landlord's liability for criminal acts of third parties: 1) proximity, 2) recency, 3) frequency, 4) similarity and 5) publicity or notoriety of the earlier crimes.

After a two-day evidentiary pre-trial conference under Rule 166, the trial court in *Petrie* ruled that the landlord owed no duty to prevent the assault. The court of appeals ruled that all the *Timberwalk* factors bore on both foreseeability and reasonableness of the landlord's actions so that the plaintiff could have presented sufficient evidence of duty through proof of the *Timberwalk* factors alone. The Texas Supreme Court reversed, holding that the *Timberwalk* factors only addressed the question of foreseeability and that such evidence, standing alone, did not suffice to prove that the risk of harm from failure to prevent was unreasonable. To prove that the risk was unreasonable, the claimant is obliged to adduce evidence that the foreseeable risk was greater than the burden on the premises owner and society at large by the measures necessary to prevent the assault.

The court ruled that the plaintiff was on notice that he needed to adduce evidence on the issue of unreasonable risk even though it had not disposed of a post-*Timberwalk* case on unreasonableness grounds. The court found such notice in the landlord's arguments about the necessity of such proof and which the plaintiff had the opportunity but failed to ever address. Accordingly, the court rendered judgment that the plaintiff take nothing.

Justice Boyd joined Justice Willett in a concurring opinion expressing without solution the concern that the duty determination usurps the jury's right to decide reasonableness and foreseeability. In this writer's opinion, the trial court in *Petrie* was only deciding what the law imposed as a duty on the property owner and whether there was any legally sufficient evidence from which the trier of fact could find a breach of that duty. If not, there would be no reason to submit any liability question at all. Deciding whether the plaintiff could possibly establish a breach of duty in no way interferes with the jury's witness credibility assessment or making the value judgments that broad form

[1] The opinions expressed are solely those of the author. They do not necessarily represent the views of Munsch, Hardt Kopf & Harr, P.C. or its clients.

submission inherently allows. The "broad form" question is, after all, just a more focused version of a general verdict. Both, to some degree, ask the jury to apply the law to the facts when answering.

***Appellate Review and Error Preservation*: The Acceptance of Benefits Doctrine Bars an Appeal Only If the Appellant Voluntarily Accepts a Judgment Benefit to the Opponent's Prejudice.**

In *Kramer v. Kastleman*, the court revisits the acceptance-of-benefits (AOB) doctrine under which a party is equitably precluded from challenging a judgment on appeal if its benefits have been voluntarily accepted. Over its history the appellate courts have applied the AOB doctrine as a bright-line, hard and fast rule when its application is more nuanced. The takeaway for the practitioner is that the rule is equitable and subject to the interest-balancing necessary when any equitable right is being evaluated. The AOB doctrine does not apply unless action of the putative appellant is truly involuntary and prejudices the opponent's rights.

The AOB problem frequently arises in divorce disputes because the trial court will often divide control over community property before rendering the final judgment of divorce. In *Kramer*, the parties entered a settlement agreement a year before the final decree. The wife accepted the real property, business interests and assets that had been the husband's separate property, received about $20,000 monthly from income generated by community property, complied with orders directing that she finance loans on community property and requested personal property awarded to her under the settlement. The court of appeals deemed this to be a sufficient to foreclose the wife's appeal under the AOB doctrine.

In a unanimous opinion by Justice Lehrmann, the court remanded the case to the court of appeals because it deemed the wife's dominion over marital property was not sufficient to establish *both* clear intention to acquiesce in the validity of the judgment *and* that the wife's conduct prejudiced the husband's rights. The court found no prejudice because, even if the appeal resulted in a different allocation, the evidence showed that the appellant would have been able to restore any benefits that accrued from any "acceptance."

In the course of resolving the case, the court identified the following "non-exclusive factors to be considered before the AOB doctrine applies:

1) whether acceptance of benefits was voluntary or was the product of financial duress – e.g., choosing between the appeal and groceries;
2) whether the benefit accepted or sought to be enforced exists only because of the judgment;
3) whether the benefit if wasted, dissipated or converted could be restored if the judgment were to be changed on appeal;
4) whether the appealing party is entitled to the benefit as a matter of right or by the non-appealing party's concession;
5) whether the appeal, if successful, could only result in a more favorable judgment;
6) if the judgment could be less favorable, is there any chance the appellant could receive less than the value of the assets dissipated, wasted, or converted;
7) whether the issue on appeal is severable so that accepted benefits could not be affected; and
8) whether the non-appealing party will be incurably prejudiced.

These factors recognize several important limits on the AOB doctrine. First, the doctrine does not apply when the appeal, regardless of merit, cannot affect the right to the benefit allegedly accepted. Second, if the appeal might affect the right to the accepted benefit, the AOB doctrine cannot be invoked if the benefit could be restored. As long as the estate is sufficient, cash and other fungible assets are restorable by definition and will not justify the denial of the right to appeal. Third, the acceptance must be truly voluntary. Acceptance due to financial duress –e.g., choosing between groceries and other essentials or prosecuting the appeal – is not voluntary and does not estop the would-be appellant from pursuing the appeal.

According to the court, the factors itemized in the opinion and the particular limitations the opinion emphasized aligned the AOB doctrine with recent efforts to mitigate the voluntary payment rule. Those efforts include recognition that payment of a judgment does not moot an appeal if the payment is made with the expressed intent that it is not intended as an acceptance of the judgment. Indeed, the court suggests that voluntary payment cannot

render an appeal moot unless the opposing party is misled. Extreme caution is recommended, however, before relying on the opinion's incidental observations about the effects of any voluntary payment of a judgment.

***Property Insurance*: A Fence Attached to a Dwelling Is a "Structure" That Becomes Part of the "Residence Premises" Under a Form A Texas Homeowner's Policy.**

In a *per curiam* opinion, the court in *Nassar v. Liberty Mutual Fire Insurance Co*. addressed whether a fence attached to house was part of "dwelling" or was an "other structure." The fence was destroyed in a hurricane. Its status as part of the "dwelling" versus an "other structure" affected the amount the insurer was required to pay due to the difference in policy limits for the two classes of insured property:

1. the dwelling on the residence premises … including structures attached to the dwelling[; and]

2. other structures on the residence premises set apart from the dwelling by clear space [including] structures connected to the dwelling by only a fence, utility line or similar connection.

The court concluded that these provisions were unambiguous and that the fence, which was attached to the dwelling at four points, including the foundation, was part of the "dwelling." It was unpersuaded by the insurer's argument that the policy could not have intended for a fence to be part of the dwelling because a fence could form a connection between the main dwelling and any other structure that would permit the other structure to be considered part of the dwelling.

Nassar presages the renewed emphasis the court is giving to context to inform its statutory and contractual interpretations. *See, e.g.*, *El Paso Healthcare System v. Murphy*. This contextual approach allows the courts to looking at more than the dictionary definitions of isolated words used in a particular provision by considering its apparent purpose or function.

***Defamation*: Liability Must Be Based on Actual Knowledge of Falsity When the Publication Is Mainly About a Matter of Public Concern.**

In *Brady v. Klentzman*, the minor son of the Fort Bend Chief Deputy Sheriff sued a local newspaper and its reporter for libel and libel *per se* after the paper published an article about the son's being charged with possession of alcohol. The article also reported that the father was in continual contact with the officers involved in the incident and suggested that this contact was intended to "intimidate." The article also referred to a prior incident where the son was reported as unruly and intoxicated during a different encounter with a DPS Trooper. It also recounted that the Chief Deputy had gotten involved in the follow-up on the reported theft of the son's mobile phone.

- *Charge Error – When the Publication is About a Public Concern, Actual Damages Liability Requires Falsity; Punitive Damages Require "Actual Malice."*

When the statements made in an article that "wholly embraces matters of public concern," the First Amendment requires proof that the statements were false for the recovery of *any* damages and proof that the publisher acted with actual malice – i.e., knew of the falsity or published them with reckless disregard of whether they were false.

In a 5:4 decision by Justice Devine, the court ruled that it was only necessary for the "general subject of the publication" to reflect a matter of public concern, not that every item do so. The court further ruled that law enforcement and the conduct of public office were matters of public concern which were affected by the chief deputy's actions to intervene on his son's behalf. The error in the charge, the court noted, was preserved because the media defendants objected to the charge on precisely on these grounds.

- *Remand v. Rendition – Proof of Damages?*

The next issue – and the one most hotly disputed among the Justices – was whether the case should be remanded for a new trial, which in turn depended on whether the plaintiff adduced some evidence that would support a damage award. Proof of defamation damages is not required if the statement is defamatory *per se*. In that instance, the plaintiff is entitled at the very least to *nominal* damages. The plaintiff here, however, only asserted that he sustained

actual damages in the form of reputational harm. The majority held that there was sufficient evidence of reputational harm through plaintiff's testimony that he was asked by his employer to quit after the publication. The evidence showed that the employer contracted with the county to install decals on sheriff department vehicles. According to that testimony, the owner became concerned about continuation of the contract after the article was published. Because it deemed this testimony some evidence of damage to the son's reputation, the majority remanded for a new trial.

- *The Dissenters Would Have Rendered a Take-Nothing Judgment for Lack of Damages Evidence.*

The dissent, authored by Chief Justice Hecht and joined by Justices Green, Willett and Brown, would have rendered a take-nothing judgment. In their view, the testimony about reputational harm – which they clearly considered razor-thin at best – at most showed that any reputational harm occurred *after* the publication of the article but failed to show that any such harm was *because of* the article. As Chief Justice Hecht put it, "*Post hoc* is not *propter hoc*." The dissenters were equally unpersuaded by testimony that the plaintiff was more withdrawn after the publication because there was no testimony whatsoever that the alleged mental anguish disrupted the plaintiff's daily routine as required. The dissenters were especially concerned that the majority overlooked this paucity in the evidence not merely to impose civil liability, but to do so in a case involving the exercise of free speech rights.

***Sovereign Immunity & Ultra Vires Conduct*: A Mistake of Law Other Than One Directly Involving the Scope of Delegated Authority Does Not Mean the Official's Action Was *Ultra Vires*.**

In *Hall v. McRaven*, a UT system regent, Hall, raised concerns that VIPs were exercising undo influence over the UT President, who in turn influenced deviations from usual admissions standards for certain "must-have" students. Hall filed suit against the UT Chancellor to obtain undisclosed supporting documents for a public report about the external investigation about the allegations. The Chancellor declined to disclose these documents on the ground they excluded confidential information about the students and was protected by the Federal Educational Rights & Privacy Act (FERPA). The Board of Regents authorized the disclosure of redacted records, but Hall refused the offer. Hall sued for declaratory judgment and writ of mandamus against the Chancellor to obtain access to the unredacted records. Hall asserted that the Chancellor was acting *ultra vires* in refusing his records request because the Chancellor had no authority to incorrectly apply FERPA.

While the suit was pending, the Board of Regents approved the Chancellor's proposal for determining whether and what to disclose to Hall. Rejecting the assertion the Chancellor was acting beyond the scope of his authority – i.e., *ultra vires* – the lower courts dismissed the case for sovereign immunity. They reasoned that the Chancellor acted within his authority because the Chancellor serves at the pleasure of the Board of Regents and it was the majority of the Board of Regents, not the Chancellor, that denied disclosure authority.

In a decision penned by Justice Devine, the court explained that it was possible for the Chancellor to act beyond his authority concerning the interpretation of FERPA concerning the information that could be disclosed, but that the Chancellor was constrained by the Board of Regent's resolution that limited Hall's alleged right to unfettered access to the underlying records. The Board of Regents set "concrete limits on Hall's claimed right to complete access" and that McRaven had no discretion but to comply with those directives. The "board instructed [the Chancellor] to redact information he determined protected ... and he did just that."

The majority declined to hold that the Chancellor exceeded his authority even if he misinterpreted or misapplied FERPA. The court explained that an error of law in the interpretation of a statute is not *ultra vires* unless law that was misinterpreted was the very law that defined the scope of the official's authority to act in the first place. It was the board's resolution, not FERPA, that defined the Chancellor's authority. Misinterpretation of a "collateral" law that did not itself define the scope of authority was not one that exceeded the official's authority, but was simply an erroneous exercise of the official's discretion. Consequently, the Chancellor's conduct remained protected by sovereign immunity.

Justices Willett, Lehrmann, Guzman, and Brown filed concurring opinions fully endorsing the majority result. Each concurring Justice, however, added their observations about various aspects of the case, including the importance of transparency concerning the admissions process and the necessity of protecting student privacy.