

Affirmed in Part, Reversed and Remanded in Part, and Opinion filed June 29, 2000.



In The

Fourteenth Court of Appeals

NO. 14-99-00404 -CV

**JUAN YNCLAN and BRENDA YNCLAN, INDIVIDUALLY
and as REPRESENTATIVES of the ESTATE of JASON YNCLAN, Appellants**

V.

ESTELLA VALDEZ, a/k/a LUS VALDEZ, Appellee

**On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 98-07213**

OPINION

In this wrongful death case, Juan Ynclan and Brenda Ynclan, individually and as Representatives of the Estate of Jason Ynclan (the "Ynclans"), appeal a take-nothing summary judgment granted in favor of Estella Valdez on the ground that the trial court erred in determining that Valdez owed no duty to Jason Ynclan ("Jason"). We affirm in part and reverse and remand in part.

Background

Valdez's adult son, Eulalio Campos, was confined to Valdez's home pursuant to a criminal conviction. Jason went to Valdez's home to return some tire rims he had purchased from a relative of Campos. An argument ensued, and Campos shot Jason. Valdez was home during the shooting. While still alive, Jason was put in the trunk of his car and driven to an apartment complex where his body was found the next day. Campos was convicted of and incarcerated for the murder.

The Ynclans filed suit against Valdez and Campos,¹ alleging negligence, gross negligence, and premises liability. In particular, the Ynclans alleged that Valdez failed to: (a) properly supervise Campos or prevent him from having weapons in her home; (b) notify law enforcement authorities of Campos's having weapons and using drugs in her home; (c) warn Jason that Campos was dangerous; (d) call police when the fight started; (e) intercede on Jason's behalf; or (f) report the shooting to law enforcement authorities or seek medical assistance for Jason. The Ynclans alleged that if Valdez had taken any of these actions, the shooting would not have occurred, or at a minimum, Jason would have survived it. Valdez filed a motion for summary judgment asserting that the facts alleged by the Ynclans gave rise to no duty on her part to prevent the crime committed by Campos. The trial court granted the motion.

Summary Judgment

The Ynclans' only point of error claims that the trial court erred in granting summary judgment based on lack of duty. Acknowledging that a person generally has no legal duty to protect another from the criminal acts of a third person or to control the conduct of another, the Ynclans contend that Valdez nevertheless had a legal duty to Jason because: (1) she controlled the premises at the time of the murder; (2) she knew Campos was dangerous and posed an unreasonable and foreseeable risk of harm to Jason; (3) Jason was an invitee; (4)

¹ After Valdez's summary judgment motion was granted, the court granted Valdez's motion to sever the suit against her from that against Campos.

Valdez had agreed to allow Campos to live in her home and to comply with the conditions of his probation, *i.e.*, to keep the home free of alcohol, drugs, and any “instruments of criminal conduct”; and (5) Valdez was at home and knew of the shooting when it occurred.

Valdez contends that the Ynclans failed to allege a cause of action that is recognized under Texas law because there is no duty to be a “keeper” of another adult, regardless of the relationship between the parties, and because a resident of a home has no duty or responsibility to a social guest for the criminal acts of another resident of the home. Further, Valdez asserts that Jason’s murder was not foreseeable because Campos had never committed any other violent crimes on, or off of, her property.

Standard of Review

A summary judgment may be granted if the summary judgment evidence shows that, except as to the amount of damages, there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law on the issues set forth in the motion or response. *See* TEX. R. CIV. P. 166a(c). A summary judgment for the defendant is proper if the defendant disproves at least one element of each of the plaintiff’s claims or establishes all of the elements of an affirmative defense to each claim. *See American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). When the ground for the trial court’s decision is that the plaintiffs failed to state a cause of action, we must take the allegations in the pleadings as true in determining whether a cause of action exists.² *See Perry v. S.N.*, 973 S.W.2d 301, 303 (Tex. 1998).

Tort liability requires both the existence and violation of a duty. *See Lefmark Management Co. v. Old*, 946 S.W.2d 52, 53 (Tex. 1997). Whether a duty exists is a question

² Generally, before a court may grant summary judgment for failure to plead a cause of action, it must give the parties an adequate opportunity to amend their petition. *See Friesenhahn v. Ryan*, 960 S.W.2d 656, 659 (Tex. 1998). Here, the Ynclans amended their petition after Valdez filed her summary judgment motion and do not complain on appeal of any denial of an opportunity to replead.

of law for the court to decide under the facts surrounding the occurrence in question.³ *See Thapar v. Zezulka*, 994 S.W.2d 635, 637 (Tex. 1999). As a general rule, a landowner or one who is otherwise in control of premises must use reasonable care to make the premises safe for the use of invitees.⁴ *See Lefmark*, 946 S.W.2d at 53. Ordinarily, this duty does not include the obligation to prevent criminal acts of third parties who are not subject to the premises occupier's control. *See id.* However, a landowner does have a duty to use ordinary care to protect invitees from criminal acts of third parties if he knows or has reason to know of an unreasonable and foreseeable risk of harm to the invitees.⁵ *See id.*

In addition, one who voluntarily enters an affirmative course of action affecting the interests of another is regarded as assuming a duty to act and must do so with reasonable care. *See Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). Otherwise, a person is generally under no common law negligence duty to come to the aid of another in distress, but only to avoid any affirmative act which might worsen the situation. *See Perry*, 973 S.W.2d at 306; *Otis*, 668 S.W.2d at 309.

In this case, appellant has cited and we have found no authority which would impose civil or criminal liability for Valdez's alleged failure to intercede in the altercation, report the crime to law enforcement authorities, or seek or provide medical assistance for Jason.⁶

³ In determining whether a duty should be imposed, we weigh several factors, including 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. *See Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 544 (Tex. 1998).

⁴ An invitee is one who enters on another's land with the owner's knowledge and for the mutual benefit of both. *See Allright San Antonio Parking Inc. v. Kendrick*, 981 S.W.2d 250, 252 (Tex. App.–San Antonio 1998, no pet.). Although Valdez refers to Jason as a social guest, his status as such was not a basis on which summary judgment was sought and thus is not at issue in this appeal.

⁵ Even one not in control of property at the time of an injury may owe a duty to make the premises safe if he has agreed to make safe a known dangerous condition of the property or is the person who created the dangerous condition. *See Lefmark*, 946 S.W.2d at 54.

⁶ *See* RESTATEMENT (SECOND) OF TORTS §§ 314, 315 (1965) (“the fact that an actor realizes or should realize that action on his part is necessary for another’s aid or protection does not in itself

Therefore, we overrule the portion of appellants' point of error contending that Valdez had a common law duty to provide assistance to Jason once the altercation began.

With regard to any duty to warn Jason or take other action to prevent the incident, Valdez's motion for summary judgment was not based on the factual considerations that can negate either a duty under premises liability law or assumption of a negligence duty. Instead, it essentially asserted that no such duty could arise from the Ynclans' allegations regardless of the underlying circumstances:

There is no duty at law to be a "keeper" for the fault of another adult. That is true no matter what the relationship is between the parties.

There is no scenario wherein one resident of a home has a duty and responsibility for the criminal acts of another resident of the home as it relates to a social guest. One cannot be vicariously liable for a condition giving rise to a criminal act absent control over that aspect of an operation. See, Exxon v. Tidwell, 867 S.W. 2d 19 (Tex. 1993); Timberwalk v. Cain, 972 S.W.2d 749 (Tex. 1998). There are not cases which have ever found liability on a party for somehow failing to control and thereby prevent a crime committed by someone known to that party.

Absent sufficient authority for doing so, we are not prepared to adopt so broad a holding.⁷ Instead, we believe that the existence of a duty in this situation would depend on such factors as Valdez's knowledge, or reason to know, of an unreasonable risk of harm to invitees and whether she assumed any responsibility for or control over Campos's conduct, such as under the terms of his home incarceration.⁸ Because Valdez's motion for summary judgment was not based on facts or evidence that would negate a duty under the premises liability or

impose a duty to act" nor is there any duty, absent a special relationship, to control the conduct of a third person to prevent him from causing physical harm to another).

⁷ See generally *Cain v. Cain*, 870 S.W.2d 676, 680-81 (Tex. App.–Houston [1st Dist.] 1994, writ denied) (concluding that a homeowner had breached a duty, under general negligence principles, to prevent sexual molestation by a known convicted sex offender living in his home).

⁸ Although Valdez contends on appeal that she lacked any knowledge of the danger posed by Campos or the terms of his home incarceration, her motion for summary judgment was not based on the lack of any knowledge but instead essentially asserted that no duty would exist regardless of such knowledge.

negligence theories alleged, we sustain the Ynclans' point of error to that extent. Accordingly, we: (1) affirm the portion of the summary judgment pertaining to the Ynclans' claim for negligence in failing to act once the altercation between Campos and Jason began; and (2) reverse and remand the portion of the summary judgment pertaining to the claim for premises liability and negligence in failing to take action to prevent the murder.

Richard H. Edelman
Justice

Judgment rendered and Opinion filed June 29, 2000.

Panel consists of Justices Fowler, Edelman, and Sondock.⁹

Do not publish — TEX. R. APP. P. 47.3(b).

⁹ Senior Justice Ruby Kless Sondock sitting by assignment.