

LAWRENCE AND PAULA C.,)	IN THE DISTRICT COURT
et al.)	
)	
Plaintiffs,)	HARRIS COUNTY, TEXAS
)	
v.)	
)	
TAU KAPPA EPSILON FRATERNITY,)	
et al.)	
)	
Defendants.)	55 th JUDICIAL DISTRICT

PLAINTIFFS RESPONSE TO DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Lawrence and Paula C., et al., through undersigned counsel, file this Response to Defendants’ Motion for Summary Judgment pursuant to Rule **** of the Texas Rules of Civil Procedure and hereby state as follows:

I. FACTUAL BACKGROUND

II. ARGUMENT

The three elements of actionable negligence are: (1) a legal duty owed by one person to another; (2) a breach of that duty; and (3) damage proximately resulting from such breach. Cameron County v. Velasquez, 668 S.W.2d 776, 779 (Tex. App. 1984). In the instant case, the TKE Defendants owed several different duties to Plaintiffs: [a common law duty, a duty based on the rules and regulation of Texas A&M, and a duty based on the police warning to the TKE Defendants on the night before the fatal crash.] The TKE Defendants’ breach of these duties

proximately caused the deaths of Tricia C., Erica Lanham, Emily Hollister, Tripp Wostal, and Michael Flores. Each of the TKE Defendants' duties is discussed below.

A. [Common Law Argument]

“Ordinarily, a person who does not own, occupy, or otherwise control real property cannot be held liable for dangerous conditions thereon.” Guereque v. Thompson, 953 S.W.2d 458, 466 (Tex. App. 1997). “It is possession and control which generally must be shown to establish liability.” Id. However, “Texas courts have recognized four closely related ‘assumed duty’ exceptions to the general rule that there is no duty to prevent accidents on adjacent property that a person neither owns nor occupies.” Id. One of those exceptions is that “a person who has created a dangerous condition may be liable even though not in control of the premises at the time of the injury.” Id. at 467; City of Denton v. Page, 701 S.W.2d 831, 835 (Tex. 1986). Another exception is that “a lessee who assumes actual control over a portion of adjacent property also assumes legal responsibility for that adjacent portion, even though none of the adjacent property is included in the lease.” Guereque, supra; Wal-Mart Stores, Inc. v. Alexander, 868 S.W.2d 322, 324 (Tex. 1993). In the instant case, both of these exceptions apply because the TKE Defendants created the dangerous condition which caused the crash and they assumed control over the highway should in order to accommodate their guests’ parking needs.

1. The TKE Defendants Caused the Dangerous Condition Which Led to the Fatal Crash

One exception to the rule that there is no duty to prevent accidents on adjacent property that a person neither owns nor occupies is that a person who has created a dangerous condition may be liable even though not in control of the premises at the time of the injury. Guereque,

953 S.W.2d at 466-67. Texas case law provides that “an owner or occupier of premises abutting a highway has a duty to exercise reasonable care to avoid endangering the safety of persons using the highway as a means of travel, and is liable for any injury that proximately results from his negligence.” Dixon v. Houston Raceway Park, Inc., 874 S.W.2d 760, 763 (Tex. App. 1994); see also Alamo Nat'l Bank v. Kraus, 616 S.W.2d 908, 910 (Tex. 1981). This duty “has been limited to cases where an owner negligently releases upon the highway an agency that becomes dangerous by its very nature once upon the highway.” Dixon, supra at 763 (internal quotes omitted).

Examples of “agencies” that becomes dangerous once upon the highway include: a building wall being demolished and falling onto the street, Alamo Nat'l Bank, 616 S.W.2d at 910; smoke from a grass fire that drifts across an adjacent road, Atchison v. Texas Pac. Ry., 186 S.W.2d 228, 229 (Tex. 1945); a windowpane that falls from a building onto an adjacent sidewalk, Beaumont Iron Works Co. v. Martin, 190 S.W.2d 491, 495 (Tex. Civ. App. 1945); and water blown from a cooling tower that creates a slippery spot on an oil-surfaced highway, Skelly Oil Co. v. Johnston, 151 S.W. 2d 863, 865 (Tex. Civ. App. 1941). In each of these cases, the “agent of catastrophe” is an inanimate object. This need not always be the case, however.

Some agents of catastrophe are under direct human control. For example, in Golden Villa Nursing Home, Inc. v. Smith, 674 S.W.2d 343, 350 (Tex. App. 1984), the court held that a nursing home was liable when a patient with a known tendency to wander onto the highway darted onto the highway and knocked down a motorcyclist.

Naumann v. Windsor Gypsum, 749 S.W.2d 189, 191 (Tex. App. 1988).

A line of cases exists where the “agency” released

“In determining whether the defendant was under a duty, the court will consider several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed 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 *Id.* at 309. Of all these factors, foreseeability of the risk is “the foremost and dominant consideration.” *El Chico*, 732 S.W.2d at 311.”

Excerpt from: 801 S.W.2d 523, *525
Greater Houston Transp. Co. v. Phillips, 801 S.W.2d 523, 525 (Tex.1990).

[any parked car cases, or crowds, animals attracted to property??]

2. The TKEs Assumed Control Over the Highway Shoulder in Order to Accommodate the Parking Needs of Their Guests

A second exception to the general rule that owners and occupiers of land are not responsible for injuries that occur off the property is that “a lessee who assumes actual control over a portion of adjacent property also assumes legal responsibility for that adjacent portion, even though none of the adjacent property is included in the lease.” Guereque, 953 S.W.2d at 466; Wal-Mart Stores, Inc., 868 S.W.2d at 324.

Restatement (Second) of Torts § 328E (1965) (possessor of land includes a person "in occupation of land with intent to control it" regardless of whether the occupation is rightful between the possessor and some third person).

Excerpt from: 868 S.W.2d 322, *324

Walmart

B. [Duty Arising from A&M]

C. [Duty From Police Warning]

III. NEGLIGENCE PER SE

IV. CONCLUSION

For the foregoing reasons, the TKE Defendants should be compelled to answer the deposition questions which were certified and produce the documents which have been wrongfully withheld.

Respectfully submitted,

LAW OFFICES OF BARRY G. FLYNN

SHERMAN, MEEHAN, CURTIN &
AIN, P.C.

By: _____
Barry G. Flynn
State Bar No. 07196560
1300 Post Oak Blvd., #750
Houston, Texas 77056

By: _____
Douglas E. Fierberg
DC Bar No. 418632
1900 M Street, NW
Suite 600

(713) 840-7474 Telephone
(713) 840-0311 Facsimile

Washington, D.C. 20036
(202) 530-3300 Telephone
(202) 530-4411 Facsimile

Certificate of Service

I hereby certify that a true and exact copy of the foregoing Motion has been served this ___ day of *****, 2000 by facsimile and first-class mail, postage prepaid, to:

William J. Baine, Esquire
Plunkett & Gibson, Inc.
Financial Center, N.W., 6th Floor
6243 1H-10 West
P.O. Box BH002
San Antonio, TX 78201

Wayne D. Adams, Esquire
Law Offices of M. Joseph Meynier, IV
2050 Lyric Centre Building
440 Louisiana
Houston, Texas 77002

and

Sam D. Sparks, Esquire
Webb, Stokes & Sparks, LLP
P.O. Box 1271
San Angelo, TX 76902

Barry Flynn

g:\data\clients\11133\MEM-PA0228-jdzubow-01.doc