COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

GRETCHEN VANCE,	§	
Appellant,	§	No. 08-20-00167-CV
v.	§	Appeal from the
HURST JOINT VENTURE LP d/b/a CROSSWATER YACHT CLUB, SUNTEX VENTURES LLC, and SUNTEX MARINA INVESTORS LLC.,	§	419th Judicial District Court
	§	of Travis County, Texas
	§	(TC# D-1-GN-19-002801)
Appellees.	§	

O P I N I O N

In this personal injury case, the trial court granted a summary judgment in favor of the defendant-premises owner based on the open and obvious nature of the risk that caused the injury. The applicable law is well familiar to this court. The context here is unique, only in that the injury to Appellant Gretchen Vance (Gretchen) occurred as she disembarked from a jet ski onto a dock in a marina that was owned and operated by Appellees Hurst Joint Venture, LP, dba Crosswater Yacht Club, Sunset Marina Investments, LLC, and Sunset Ventures LLC (collectively Hurst) on

Lake Travis.[1] For the reasons below, we affirm the trial court's judgment dismissing Gretchen's causes of action.

I. FACTUAL BACKGROUND

A. Aquafly's Hydroflight Operations

At the time of the accident, Gretchen and her husband Bobby Vance (Bobby) were the owners of a business, known as "Aquafly," which operated a marine sport known as "Hydroflight." The Vances began operating Aquafly in 2012 at the Lakeway Marina on Lake Travis, but due to drought conditions, they moved their operations in 2015 to the Crosswater Yacht Club (CYC) marina, which was owned and operated by Hurst. Under an agreement in which Aquafly rented out a small office at the CYC marina, the Vances had a right to install a dock for conducting their Aquafly operations. Although the parties did not have a signed written lease, CYC's general manager, Roland Adams, considered Aquafly as CYC's tenant.

At the dock, an Aquafly instructor placed a board on the feet of a participant, called the "flyer." The instructor then attached a 45-60 foot hose to the board, which was connected to a jet ski operated by the instructor. The propulsion mechanism from the jet ski was reversed, and after placing the flier in the water, the thrust from the jet ski travelled through the hose causing the flyer to move forward, in essence "towing" the jet ski from the dock into open water. Once in open water, the instructor would increase the thrust from the jet ski to lift the flyer out of the water, allowing them to "fly" above the water, typically for 20 to 30 minutes per session.

[1] This case was transferred from our sister court in Austin, and we decide it in accordance with the precedent of that court to the extent required by TEX.R.APP.P. 41.3.

Then the instructor decreased the thrust to return the flyer to the water, and the flyer then "towed" the jet ski back to the dock. During the "towing" phase of the operation, the instructor could not independently navigate the jet ski, and instead followed the flyer's lead back to the dock. The flyers were instructed in advance to turn around as they approached the dock, and the instructor would then "throttle down" so the flyer was in a stationary position with their back to the dock. As explained by Gretchen, the instructor gave the flyer a "little bit of throttle [to] literally raise them up out of the water [so they] land on their -- on their butt on the dock." Significant to this appeal, it was then necessary for the instructor to dismount from the jet ski to meet the flyer on the dock to disconnect the hose and remove the board.

Although there is some dispute over how the spot for Aquafly's operations was selected, Aquafly ultimately agreed to the location. It is also undisputed that the Vances designed the layout of the Aquafly operations, choosing to install the dock next to a pre-existing wave attenuation wall, while placing two jet ski lifts on the opposite side of the dock, as depicted below. At all relevant times, the attenuation wall had visible bolts protruding from it, with no protective caps on them.


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B. Gretchen's Accident

Gretchen was a certified Hydroflight instructor. She had been trained and certified by Bobby, who was "one of the only people in the US that could actually train other instructors." Gretchen had successfully conducted at least 100 flight sessions at the CYC marina without incident over the two-years before her accident.

On the day of the accident, Gretchen had finished a session with a flyer, who was towing her jet ski back to the dock. At her deposition, Gretchen testified that after placing the flyer on the dock, the jet ski came to rest with the bow (front) of the jet ski facing the main body of the water, and the stern (rear) facing the flier. Gretchen testified that as she was attempting to disembark from the jet ski on the side of the dock next to the attenuation wall, she placed her right hand on the attenuation wall to "support" herself while she stood on the jet ski, preparing to swing her right leg onto the dock. According to Gretchen, as she did so a "very large wake" came up which thrust the jet ski five or six feet forward along the attenuation wall. In the process, her left leg was impaled on one of the protruding bolts in the wall. Because of the severity of her wound, Gretchen was transported by ambulance to a nearby hospital for treatment.

C. Gretchen's Lawsuit

In a lawsuit seeking compensation for her injuries, Gretchen alleged two primary causes of action against Hurst. First, Gretchen brought a claim for premises liability, contending that the existence of the bolts in the attenuation wall constituted an unreasonable danger, and that Hurst had a duty to either warn her about the danger or to take reasonable steps to protect her from the danger (such as placing protective coverings on the bolts). Second, Gretchen brought a claim for negligence, contending that Hurst and their employees were negligent for either failing to warn her of the dangerous nature of the bolts, or for failing to adequately remedy the situation.

D. Hurst's Motion for Summary Judgment

Hurst filed a traditional motion for summary judgment, arguing that Gretchen's claim for premises liability failed because the danger from the bolts was open and obvious, and that Hurst therefore owed no duty to warn her about the danger or to otherwise protect her from it. Hurst further argued that an exception to the open and obvious doctrine—the necessary use exception—did not apply as Hurst had no reason to anticipate that Gretchen could not avoid the danger posed from the bolts. And finally, Hurst argued that Gretchen could not bring a claim for negligence, as her only valid claim under these circumstances was for premises liability.

In her response, Gretchen acknowledged that the presence of the exposed bolts on the attenuation wall was open and obvious. She argued, however, that the danger she encountered on the day of her accident stemmed not only from the bolts themselves, but from the "combination" of the exposed bolts and the wake action in the area where the dock was located. Relying on both the declaration of her expert witness, Carl Wolf, and the deposition testimony of CYC's manager, Roland Adams, Gretchen pointed out that it is "common knowledge" in the marina industry that attenuation walls are generally built to prevent waves from entering the inner portion of a marina by deflecting and breaking the waves down before they can enter the marina. And because the CYC marina was not built in a cove and was instead located on the "main lake," both Wolf and Adams agreed that it was necessary to build the attenuation wall to protect the boats that were in slips within the inner marina from wake action originating in the lake. As well, they both agreed that this left the exterior portion of the CYC marina, where Aquafly's operations were located, unprotected and subject to wake action, which could be extreme at times. Wolf further opined that the location was "unreasonably dangerous" considering the wake action and the dock's proximity to the unprotected bolts protruding from the attenuation wall.

Gretchen then argued that the unreasonable danger caused by the wake action was concealed from her, primarily relying on her "lack of knowledge of marina operations," and her lack of knowledge that the attenuation wall was constructed to deflect or transmit waves back into the exterior portion of the marina where Aquafly was located, thereby causing an increase in wake action in that area. And she argued that Hurst, with their superior knowledge of such operations, were aware or should have been aware of the dangerous nature of the location, and in turn, should have foreseen the possibility that she might be injured while operating in that location.

As for her negligence claim, Gretchen set forth a new theory not found in her petition. She argued that Hurst was responsible for choosing the location for Aquafly's operations and did so in a negligent manner by "selecting an unsuitable location containing a latent defect," i.e., in an area exposed to "unrepressed waves." And she argued that her negligence claim was distinct from, and broader than, her claim for premises liability. In her view, it was negligent to allow Aquafly to operate in the exterior marina—even in the absence of the protruding bolts on the attenuation wall—as it exposed her to wave activity that could have thrown her "in the water causing her to drown or [thrown] her onto the dock causing impact injuries."

The district court granted Hurst's summary judgment motion and dismissed Gretchen's lawsuit. This appeal followed.

E. Issues on Appeal

On appeal, Gretchen contends that the trial court erred in granting Hurst's motion, contending that there were two questions of fact remaining on her premises liability claim: (1) whether the danger on the premises was open and obvious, and (2) whether the necessary use exception applied to her case. In addition, she contends that a question of fact existed on the issue of whether Hurst was negligent in selecting the location for the Aquafly operations, and that she

should be allowed to go forward with that claim as it is "distinct" from and "broader" than her premises liability claim.

II. STANDARD OF REVIEW

The movant in a traditional motion for summary judgment under TEX.R.CIV.P. 166a must demonstrate the absence of a genuine issue of material fact such that the party is entitled to judgment as a matter of law. *Eagle Oil & Gas Co. v. TRO-X, L.P.*, 619 S.W.3d 699, 705 (Tex. 2021), *citing* TEX.R.CIV.P. 166a(c). A defendant moving for traditional summary judgment must state the specific grounds for the motion and must negate at least one essential element of the plaintiff's cause of action. *See Stierwalt v. FFE Transp. Services, Inc.*, 499 S.W.3d 181, 194 (Tex.App.--El Paso 2016, no pet.), *citing KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). In responding to the motion, the nonmoving party need not marshal all its proofs, but it must present evidence that raises a genuine fact issue on the challenged elements. *Stierwalt*, 499 S.W.3d at 194.

We review a trial court's grant of summary judgment de novo. *See Eagle Oil & Gas Co.*, 619 S.W.3d at 705. In determining whether a trial court properly granted summary judgment, we review the summary judgment record in the light most favorable to the nonmovant, indulging every reasonable inference in the nonmovant's favor and resolving any doubts against the motion. *Id.* at 705, *citing Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007). And when, as here, the trial court's order does not specify the grounds for its summary judgment, we must affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Provident Life & Acc. Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

III. THE PREMISES LIABILITY CLAIM

In Issue One, Gretchen contends that the trial court erred in granting summary judgment on her premises liability claim, contending that a question of fact remained on the issue of whether Hurst owed her a duty to either warn her of the risk of a dangerous condition on the premises, or to remedy the danger. For the reasons set forth below, we disagree.

A. Applicable Law

Premises liability is a special form of negligence. *See W. Investments, Inc. v. Urena*, 162 S.W.3d 547, 550-51 (Tex. 2005). "The threshold question in a premises liability case, as with any cause of action based on negligence, is the existence of and violation of a duty." *Chappell v. Allen*, 414 S.W.3d 316, 323 (Tex.App.--El Paso 2013, no pet.). In general, the existence of a legal duty is a question of law for the court to decide, and the court's determination must be made "from the facts surrounding the occurrence in question." *Tri v. J.T.T.*, 162 S.W.3d 552, 563 (Tex. 2005), *quoting Bird v. W.C.W.*, 868 S.W.2d 767, 769 (Tex. 1994); *see also Black ± Vernooy Architects v. Smith*, 346 S.W.3d 877, 882-83 (Tex.App.--Austin 2011, pet. denied) (same).

In a premises liability case, a premises owner's duty is determined by the complaining party's status at the time and place of injury. *See Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 412 (Tex. 2010); *Urena*, 162 S.W.3d 547, 550. Here, the parties agree that Gretchen, as CYC's tenant, was an invitee on the premises, as she was on the property at the time of the accident with Hurst's knowledge and for their mutual benefit—for a "shared business or economic interest." *See Catholic Diocese of El Paso v. Porter*, 622 S.W.3d 824, 829 (Tex. 2021) (recognizing that the requisite "mutual benefit" to an invitee and an owner or occupier of property is a shared business or economic interest); *see also Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 768 (Tex. 2010) (treating tenant of apartment complex as an invitee). A premises owner owes an invitee a duty

"to exercise reasonable care to protect against danger from a condition on the land that creates an unreasonable risk of harm of which the owner or occupier knew or by the exercise of reasonable care would discover." *Fair*, 310 S.W.3d at 412, *quoting CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000).

However, when the danger on the premises is open and obvious, the property owner generally need not warn an invitee of the danger or make the premises safe. *See SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 563 (Tex. 2022) (recognizing that, as a matter of law, a landowner does not have an obligation to warn a business invitee of a dangerous condition on the premises if the dangerous condition is undisputedly open and obvious); *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 788 (Tex. 2021) (same); *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 201 (Tex. 2015) (a premises owner has no duty to protect an invitee from a dangerous condition that is open and obvious or known to the invitee). Stated otherwise, the Texas Supreme Court has "typically characterized the landowner's duty as a duty to make safe or warn of unreasonably dangerous conditions that are not open and obvious or otherwise known to the invitee." *Austin*, 465 S.W.3d at 203 (collecting cases).

The question of whether a danger is open and obvious is a question of law determined under an objective test. *Los Compadres Pescadores*, 622 S.W.3d at 788. The question is whether the danger is "so open and obvious that as a matter of law [the plaintiff] will be charged with knowledge and appreciation thereof." *Id.* Under the objective standard, "the question is not what the plaintiff subjectively or actually knew but what a reasonably prudent person would have known under similar circumstances." *Id., citing Texas Dep't of Human Servs. v. Okoli*, 440 S.W.3d 611, 614 (Tex. 2014). To properly apply an objective test, we must consider the totality of the particular circumstances the plaintiff faced. *Id.* at 788-89, *citing State v. One (1) 2004 Lincoln*

Navigator, 494 S.W.3d 690, 706 (Tex. 2016) ("[A]n objective determination . . . requires an examination of the totality of the circumstances.").

And finally, even if a danger is open and obvious, a landowner may still have a duty to make the premises safe under the so-called "necessary use exception," which applies "when, despite an awareness of the risks, it is necessary that the invitee use the dangerous premises and the landowner should have anticipated that the invitee is unable to take measures to avoid the risk." *Austin*, 465 S.W.3d at 207-08, *citing Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520-21 (Tex. 1978) (imposing duty when persons leaving apartment had no choice but to use unlit stairwell); *see also Barfield*, 642 S.W.3d at 568-69 (assuming without deciding exception applies to independent contractors performing work on owner's land).

B. Analysis

1. The danger was open and obvious

As she did in the trial court, Gretchen concedes that the presence of the protruding bolts on the attenuation wall was open and obvious to her. But she renews her argument that the danger from the "combination" of the protruding bolts and the wake action in the exterior portion of the marina was not. In particular, she contends that Hurst failed "to come forth with summary judgment evidence to show that the danger of being involuntarily propelled onto a bolt from a distance [from the wake action] was something open and obvious to [her]."

Hurst first counters that we should not consider the danger posed from the wake action, as it was not a condition on the property, but was instead a danger from a naturally-occurring event that came to the property. And as they point out, courts have held that naturally occurring or accumulating conditions, such as rain, mud, and ice, which, in essence, come to the property, are generally beyond a landowners' control and therefore cannot be the basis for a premises liability

claim. *See, e.g.*, *Walker v. UME, Inc.*, No. 03-15-00271-CV, 2016 WL 3136878, at *3-4 (Tex.App.--Austin June 3, 2016, pet. denied) (mem. op.) (injuries sustained by campers when campground flooded due to heavy rain that caused a nearby river to swell did not result from an unreasonable danger on the premises, and were instead caused by a danger that "came to the property"); *Fair*, 310 S.W.3d at 412-14 (holding that naturally occurring ice that accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim.). Thus, in general, courts distinguish between natural and unnatural conditions on a defendant's property and allow for liability for dangerous conditions caused in unnatural ways. *See generally Fair*, 310 S.W.3d at 415 n.5, *citing Furr's, Inc. v. Logan*, 893 S.W.2d 187, 189, 191-92 (Tex.App.--El Paso 1995, no writ.) (unnatural ice accumulation caused by leaking vending machine could support a premises liability action); *Brookshire Grocery Co. v. Taylor*, 222 S.W.3d 406, 409 (Tex. 2006) (ice on the floor from a soft drink dispenser was not naturally occurring and could be an unreasonably dangerous condition).

At least a portion of Gretchen's premises liability claim centers on the naturally-occurring wake action in the exterior marina. However, liberally construing her pleadings, the claim is also based, at least in part, on unnatural conditions in that portion of the marina. That is, the increased wake action caused by the construction of the wave attenuation wall, which deflected or redirected the waves toward the Aquafly dock, and the design and construction of the wall itself, with its protruding and unprotected bolts are claimed to have contributed to the accident. Assuming, without deciding that we can consider both the increased wake action and the protruding bolts as part of Gretchen's premises liability claim, we conclude that both "conditions" were open and obvious to Gretchen as a matter of law.

First, Gretchen admitted at her deposition that she knew about the protruding bolts and the danger that they posed when Aquafly first started operating at the CYC marina two years before her accident. In fact, she testified that she expressed concern to Bobby about the fact that the bolts faced out to the water, and she also acknowledged that she and Bobby discussed this concern with one of Hurst's employees, inquiring why the bolts were threaded that way. And she also testified that she and the other Aquafly instructors routinely warned their customers to avoid contact with the wall when returning to the dock, acknowledging that it was "common sense" to keep the customers away from the wall's protruding bolts. In addition, she explained that if it appeared the customer was heading in the direction of the wall, the instructor would cut the throttle to stop their approach.

Second, Gretchen acknowledges that she was aware of the wake activity around the Aquafly dock. Yet she nevertheless contends that there is no evidence in the record that she knew how a wave attenuation wall functions, or that they are meant to deflect waves into the exterior portion of the marina. She therefore contends the dynamic of the attenuation wall led to increased wake activity in that area. That Gretchen may not have been aware of the cause of the wake activity in the exterior portion of the marina, however, does not alter the fact that she was admittedly aware that there was in fact wake activity there. At her deposition, Gretchen pointed out that there were "very large boats" on the lake, including cigarette boats and small yachts, that will "move across the main channel of the lake, and . . . disperse a great deal of water," leading to wake action in the outer marina. And she testified that it was "one of those very big swells" that pushed her into the wall on the day of her accident.[2] In addition, Gretchen was aware of the

[2] Bobby Vance also testified at his deposition that he knew that there could be "significant waves" in the outer marina area where Aquafly operated due to the design of the marina, and that there was "no way to predict" when they might occur.

potentially violent nature of the wake activity in that area, as she admitted that the Aquafly dock had been "repeatedly ripped from the marina" due to wake action during the two years that Aquafly operated at the marina before her accident.

Gretchen, however, argues that because the wave action was "intermittent," and because the wave that propelled her into the attenuation wall arose suddenly, the danger was not open and obvious to her, seeking to analogize her case to the Texas Supreme Court's holding in *County of Cameron v. Brown*, 80 S.W.3d 549 (Tex. 2002). In that case, a motorist had entered a lighted causeway, but had encountered "sudden darkness created by . . . failed lighting" at the accident scene, which allegedly contributed to the motorist's fatal accident. *Id*. at 558. The motorist's survivors filed a wrongful death case against the County, which maintained the causeway, alleging that the failed lighting constituted a dangerous condition. *Id*. at 552-53. In response, the County filed a plea to the jurisdiction, contending, among other things, that the condition was open and obvious, as the dangerous condition was "nothing but 'darkness at night,' which is so open and obvious that knowledge of the condition must be imputed to causeway users." *Id*. at 558. The court, however, disagreed, concluding that the "dangerous condition alleged [was] not merely 'darkness' but a failed block of artificial lighting that caused a sudden, unexpected and significant transition from light to darkness." *Id.* The court therefore could not "say that sudden darkness created by the failed lighting at the accident scene was a danger open and obvious to motorists entering the illuminated causeway so that knowledge of the condition should be imputed to them as a matter of law." *Id.* at 558. Nor did the court find any jurisdictional evidence to suggest that the motorist had actual knowledge of the failed lighting in the causeway. *Id.* at 558-59.

Unlike the situation in *Brown*, however, the danger from the attenuation wall and the associated wave action in the exterior marina was not a new or intermittent danger that occurred

on the day of Gretchen's accident due to some malfeasance on the part of Hurst. Instead, the danger was ongoing, which existed from the time that Aquafly started its operations at the marina two years before Gretchen's accident. And as set forth above, Gretchen was aware of both the fact that there could be wake action in the exterior marina, as well as the danger posed by the protruding bolts on the attenuation wall and the need to avoid them. Yet, as Gretchen herself acknowledged at her deposition, she repeatedly disembarked from her jet ski onto the dock next to the attenuation wall and would use the wall to hoist herself up onto the dock. Accordingly, while Gretchen may have been surprised by the *particular* swell of water that propelled her into the wall that day, under the objective test that we must apply in this situation, a "reasonably prudent person" would have realized the danger that disembarking onto the dock next to the attenuation wall would have posed under these circumstances. *See Valdez*, 622 S.W.3d at 788 (applying objective test to determine whether a danger was open and obvious); *see also State v. Shumake*, 199 S.W.3d 279, 288 (Tex. 2006) (a landowner "may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake").

And finally, although Gretchen repeatedly argues that Hurst should have foreseen the dangers in the exterior marina and the possibility that she could have been hurt while operating there, the fact that she was the one who routinely conducted operations in that location for two years placed her in a better position than Hurst to appreciate that danger. *See M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 676 (Tex. 2004) (recognizing that invitees are typically at least as aware as landowners of the existence of a danger on the premises, such as visible mud that has accumulated naturally outdoors, and "will often be in a better position to take immediate precautions against injury."); *Austin*, 465 S.W.3d at 203 ("When the condition is open and obvious

or known to the invitee . . . the landowner is not in a better position to discover it."). We therefore conclude that the dangerous nature of this location was, as a matter of law, open and obvious to Gretchen.

2. The Necessary Use Exception is inapplicable

We also reject Gretchen's claim that the necessary use exception to the open and obvious doctrine applies to her case. The Texas Supreme Court has explained that the "necessary use" exception applies only when no means of performing an activity exists other than to use the dangerously defective condition, regardless of how obvious the danger of doing so may be. *See Austin*, 465 S.W.3d at 213; *see also Kennedy v. Wal-Mart Stores Texas, LLC*, No. 03-19-00587-CV, 2020 WL 1943357, at *3 (Tex.App.--Austin Apr. 23, 2020, no pet.) (mem. op.) (concluding that the "necessary use" exception did not apply where store customer admittedly had other options to retrieve a bottle of wine that would have avoided the obvious danger of the bottle falling on her foot). The necessary use doctrine requires the invitee to establish that it was (1) necessary that the invitee use the unreasonably dangerous premises, and (2) the landowner should have anticipated that the invitee would be unable to avoid the unreasonable risk of danger despite the invitee's awareness of it. *See Austin*, 465 S.W.3d at 207; *see also Barfield*, 642 S.W.3d at 568. In their motion for summary judgment, Hurst did not address the first element of the necessary use exception, and instead focused on the second element, arguing that they had no reason to anticipate that Gretchen would be unable to take measures to avoid the risk of danger. As an exception to the open and obvious doctrine, Gretchen carried the burden of presenting some evidence of its application. *See Barfield*, 642 S.W.3d at 568-69 (noting plaintiff did not meet burden of showing doctrine's application in summary judgment proceeding). We assume without deciding that she has presented some evidence of the first element but conclude Hurst has disproven the second

element. Stated otherwise, Hurst had no reason to anticipate that Gretchen could not have avoided the risk of danger posed by the attenuation wall.

Gretchen argued below and in this Court that Hurst knew (1) the attenuation wall contained protruding bolts, and (2) of the extreme wake action in the exterior marina. She points out that CYC's manager, Roland Adams, testified at his deposition that he knew that the Aquafly dock had broken lose on several occasions due in part to wake activity in the area. She therefore argues that Hurst cannot make a "credible claim that the dangers and risks associated with conducting marine operation on Lake Travis without protection from wake action were not foreseeable to [them]." Appellant's Brief at p. 33. Yet the question of whether Hurst could have foreseen that Gretchen—or anyone else—could have been injured during Aquafly's operations is not the question for whether the necessary use exception applies. Instead, the question is whether Hurst should have anticipated that Gretchen would have been "unable to take measures to avoid the risk." *Austin*, 465 S.W.3d at 208. And we conclude that the record lacks evidence to support such a finding, and instead establishes the opposite.

First, CYC's manager, Roland Adams, testified at his deposition that Bobby Vance — who he knew to be one of the foremost experts in Hydroflight operations in the world—assured him that his Aquafly instructors could safely conduct their operations at the location, and that the attenuation wall was not an "issue" as he believed the instructors could safely avoid the wall during their sessions. In addition, Adams testified that the Vances never reported any concerns about the location to him—even after Gretchen's injury. And Gretchen was a certified Hydroflight instructor, who had been trained by Bobby, and she had safely conducted approximately 100 Hydroflight sessions at the CYC marina over a two-year period before her injury. Bobby further

testified at his deposition that in total, Aquafly had safely conducted approximately 200 to 300 sessions at the marina before Gretchen's accident, all without incident.

In an analogous situation, the Texas Supreme Court recently held that the necessary use exception did not apply to an experienced lineman who was injured while working on energized overhead lines on the defendant's property. *Barfield*, 642 S.W.3d at 563. In particular, the court found it significant that the lineman had worked near the energized supply line—which constituted an open and obvious danger—for at least six months prior to his injury and had performed the task that led to his injury hundreds of times before, using specialized tools for the task that were designed to avoid the risk. *Id*. at 569. As well, the court noted that the defendant landowner could expect that the lineman's employer "would take the energized lines into account in instructing and equipping [the plaintiff] to avoid the risk." *Id.* The court therefore held that the defendant-landowner had no reason to anticipate that the lineman could not have avoided the risk of injury on the day of his injury, and so the necessary use exception did not apply to his case. *Id*.

Here too, Hurst could expect that Aquafly would have ensured that its instructors, who were trained and certified to conduct Hydroflight experiences, were well-versed and equipped to avoid the risk of danger posed by the attenuation wall in performing their operations. And because Aquafly had safely performed its operations at the same location at the marina for two years, with no injuries or complaints, Hurst had no reason to anticipate that Gretchen could not have taken appropriate measures to avoid the risk of injury on the day of her accident.[3] We therefore conclude that the necessary use exception does not apply to save Gretchen's premises liability claim, and that the trial court properly granted summary judgment on that claim.

[3] Both Gretchen and Bobby testified that there were other methods for disembarking from the jet ski that would allow an instructor to avoid the attenuation wall, such as by cutting the throttle at a distance from the dock and swimming to the dock, which Gretchen occasionally did. Arguably, these other methods would have avoided the risk that led to Gretchen's injury.

Gretchen's Issue One is overruled.

IV. GRETCHEN'S NEGLIGENCE CLAIM

In Issue Two, Gretchen contends that even if her premises liability claim fails, she has a separate claim for negligence, contending that Hurst was negligent in "selecting" the location for the Aquafly operations and "mandating" that the Vances operate their business in an "unsafe" or "unsuitable" location. For the reasons below, we disagree.

A. Applicable Law

In general, a person injured on another's property may have either an ordinary negligence claim or a premises-liability claim against the property owner depending on the circumstances. *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016), *citing Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992). When the injury results from a contemporaneous, negligent activity on the property, ordinary negligence principles apply. *Id*. However, when the injury results from the property's condition rather than an activity, premises liability principles apply. *Id.*; s*ee also United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017) (recognizing that negligent-activity and premises liability claims "involve closely related but distinct duty analyses"). Stated otherwise, a "negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *Levine*, 537 S.W.3d at 471, *citing Del Lago*, 307 S.W.3d at 776.

As Gretchen points out, however, the Texas Supreme Court has recognized that an injury can have more than one proximate cause. *See Austin*, 465 S.W.3d at 216. Thus, the fact that a plaintiff has alleged that a condition of the premises proximately caused his injury does not preclude the plaintiff from also alleging that the defendant-landowner may have owed other duties,

the breach of which caused injury. *Id*. at 215-16 (recognizing that a plaintiff-employee who was injured on the job may assert both a premises-liability claim and a "necessary instrumentality" claim if the injuries resulted from both a dangerous condition on the premises and the defendant's failure to provide necessary instrumentalities to safely perform a job).

B. Analysis

Gretchen does not contend that Hurst was engaged in any contemporaneous activities on the property at the time of her accident or that there was any malfeasance taking place on the premises that caused her injuries. Consequently, she effectively concedes that she does not have a valid claim against Hurst for negligent activity.

She does, however, claim to assert a valid and distinct claim against Hurst for either "negligent undertaking" or simply "ordinary negligence," arguing that her injuries were caused by Hurst's alleged selection of the unsafe and "unsuitable location" for their operations. In particular, she contends that after Hurst rejected the Vances' request to operate in a "safe" location within the inner portion of the CYC marina, they "assumed" or "undertook" the duty to find the Vances a "better location," and "bungled" that duty when they selected the location in the exterior portion of the marina with its dangerous wake activity. And she argues that being in the exterior marina posed dangers aside from being injured by the retaining wall, arguing for example, that a wave could have thrown "her in the water causing her to drown." She therefore contends that this claim is "broader" and "distinct" from her premises liability claim.

Yet the record does not show that Hurst "mandated" that the Vances use that particular location for their operations. Instead, the record reflects that the parties negotiated with each other, each proposing locations at the marina, which the other rejected. In particular, the Vances sought a location in the inner marina, which Hurst rejected for various business reasons. Among

other proposals, Hurst offered the Vances the option of locating the Aquafly operations on an anchored platform away from the marina, using a pontoon boat to taxi customers to and from the platform to start their rides, which the Vances rejected. And the undisputed evidence reflects that although it was not their preferred location, the Vances nevertheless agreed to the location in the exterior marina, as they were anxious to relocate their business to the CYC marina. Thereafter, they never asked to be moved to another location during the three years that they operated there. And because the Vances never signed a lease, they were free to leave at any time.

Gretchen failed to plead the requisite elements of a negligent undertaking claim, raising it only in her response to the motion for summary judgment.[4] But in any event, the record would not support that she can meet all the elements for that claim. The requisite elements of a claim for negligent undertaking are that: "(1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection; (2) the defendant failed to exercise reasonable care in performing those services; and either (a) the plaintiff relied upon the defendant's performance, or (b) the defendant's performance increased the plaintiff's risk of harm." *Nall v. Plunkett*, 404 S.W.3d 552, 555-56 (Tex. 2013). The critical inquiry in a negligent-undertaking theory is whether the defendant undertook to protect another individual, which

[4] "[I]f the nonmovant raises a new theory for the first time in its response to a motion for summary judgment, and does not amend its pleadings to include this additional theory of recovery, the new theory of recovery is not considered at issue before the trial court when the trial court rules on the motion for summary judgment." *Luna v. Gunter Honey, Inc.*, No. 09–05–207–CV, 2005 WL 3490126, at *1 (Tex.App.--Beaumont Dec. 22, 2005, pet. denied) (mem. op.). This is because a "defendant need not . . . show that the plaintiff cannot succeed on any theory *conceivable* in order to obtain summary judgment; he is only 'required to meet the plaintiff's case as pleaded.'" *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995) *quoting Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751, 759 (Tex. 1976); *see also Jones v. Wal-Mart Stores, Inc.*, 893 S.W.2d 144, 147 (Tex.App.--Houston [1st Dist.] 1995, no pet.) (unpleaded cause of action could not be raised to defeat summary judgment motion that was directed at the claim that plaintiff asserted in her petition); *Bliss v. Bank of Am. N.A.*, No. 05-18-00476-CV, 2019 WL 2353445, at *5 (Tex.App.--Dallas June 4, 2019, pet. denied) (mem. op.) ("Although the [movants] bore the burden to prove their right to judgment as a matter of law, they were not required to disprove theories that [the nonmovant] did not raise in her pleadings or in her summary judgment response."). But rather than decide the case on this unbriefed procedural issue, we reach the merits.

"requires the imposition of a duty where one otherwise would not exist." *Id.* at 555, *citing Osuna v. S. Pac. R.R.*, 641 S.W.2d 229, 230 (Tex. 1982) ("Having undertaken to place a flashing light at the crossing for the purpose of warning travelers, the railroad was under a duty to keep the signal in good repair, even though the signal was not legally required.").

Here, there is no evidence that Hurst engaged in any conduct or made any representations to the Vances suggesting that they were undertaking a duty to provide them with any "services" for their protection when they entered into their rental agreement with the Vances. Instead, as set forth above, the undisputed record reflects that the parties agreed on where to locate the Aquafly business—even if neither party was fully satisfied with the location—and both parties did so, knowing that it was in the exterior portion of the marina. In short, the record reflects that the parties were simply in a landowner-invitee relationship and owed Gretchen the duty to either make safe or warn her about concealed dangers on the premises of which the landowner was, or should have been, aware. *Wallace v. ArcelorMittal Vinton, Inc.*, 536 S.W.3d 19, 23-25 (Tex.App.--El Paso 2016, pet. denied) (discussing the limited nature of a landowner's duty to an invitee). As the Texas Supreme Court has repeatedly recognized, a landowner's duty to an invitee is "not absolute," and the landowner "is not an insurer of [a] visitor's safety." *Austin*, 465 S.W.3d at 203, *citing Del Lago Partners*, 307 S.W.3d at 769.

We also note that the cases cited by Gretchen for her contention that she has a claim for "ordinary negligence" against Hurst involve situations in which a defendant provided design or construction services to a party, but did so in a negligent manner. *See, e.g.*, *Barzoukas v. Found. Design, Ltd.*, 363 S.W.3d 829, 838 (Tex.App.--Houston [14th Dist.] 2012, pet. denied) (finding question of fact on ordinary negligence claim based on defendant's allegedly improper foundation design); *J.D. Abrams, Inc. v. McIver*, 966 S.W.2d 87, 93-95 (Tex.App.--Houston [1st Dist.] 1998,

pet. denied) (holding that contractor owed general negligence duty to third-party for dangerous condition it created on road). As explained above, however, Hurst did not undertake to perform any services for Gretchen—whether for her protection or not—and therefore, these cases are inapplicable to her situation.

We thus conclude that Gretchen does not have a separate claim for negligence against Hurst and that her sole claim against them sounds in premises liability—a claim that we have already found fails as matter of law.

Gretchen's Issue Two is overruled.

V. CONCLUSION

We affirm the trial court's order granting summary judgment for Hurst.

JEFF ALLEY, Justice

August 11, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.