**Motion for En Banc Reconsideration Granted, Affirmed, and En Banc Majority, Concurring, and Dissenting Opinions filed December 30, 2021.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-18-00849-CV**

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**HNMC, INC., Appellant**

**V.**

**FRANCIS S. CHAN, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LENY REY CHAN, JONATHAN CHAN, AND JUSTIN CHAN, Appellees**

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**On Appeal from the 133rd District Court**
**Harris County, Texas**
**Trial Court Cause No. 2015-18367**

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## E N B A N C D I S S E N T I N G O P I N I O N

The panel opinion in this case issued on May 28, 2020, which was over a year ago. The court granted en banc reconsideration in a case that will have no practical extension beyond its own particular set of facts. In doing so, the majority violated Rule 41.2(c) of the Texas Rules of Appellate Procedure.

Our court is designed to work in panels of three justices. When we use our precious resources to turn every case into an en banc one, we delay resolution of the en banc case and all other cases on our docket.

Even if the majority opinion is correct that there was a duty in this case, the duty lies in premises liability. Both the majority opinion and Justice Jewell's dissenting opinion make that clear. Appellees pled the case as a premises case yet submitted a general negligence issue to the court for its submission of HNMC's negligence to the jury. Even after counsel for Siemens asked for a premises liability issue, the appellees did not agree.[1]

A second issue in this case is whether or not this is really invited error and should the result be an affirm. The majority discusses the invited error doctrine, but the majority focuses more on *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762 (Tex. 2010), than on *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463 (Tex. 2017), which recognized that a defendant is under no obligation to object to a plaintiff's incorrect submission. *Id*. at 481.

On the one hand, at every stage of the case—pretrial, during trial, and post-trial—HNMC claimed that it owed no duty to the appellees, because the accident did not happen on its premises. On the other side of the ledger, HNMC did file a proposed jury charge with the court under a general negligence "landowner" standard. Siemens filed a proposed jury charge with a traditional premises standard for HNMC and Harris County. Appellees filed a proposed general negligence charge as to HNMC.

[1] Perhaps fearing that the court would not find invited error, the appellees assert repeatedly in their brief that general negligence is the correct standard while at the same time, they discuss the design of the stairs, the design of the entrance to the parking garage, and the presence of a concrete pad and signs on the premises blocking a driver's view—all traditional premises issues.

During the charge conference, counsel for Siemens stated, "I would agree with [plaintiffs' counsel] that I would prefer to submit the hospital and Harris County under a negligent activity claim as it is in the charge here and as he has proposed. I just don't think . . . that it's proper." According to the reporter's record, counsel then submitted a standard premises instruction for HNMC under Pattern Jury Charge Section 66.4. Counsel for HNMC stated, "I think that the jury charge as a broad form negligence is appropriate, your honor." Counsel for appellees stated, "Plaintiffs join." The judge stated, "And your proposed instruction is refused."

Is this then invited error under *Del Lago*? Is the statement of HNMC's counsel—in response to a co-defendant's request—invited error?

What we know from reading the majority opinion is that the majority concluded that HNMC had a duty of some sort as the owner of a premises abutting a public roadway because HNMC either created the dangerous condition (by its design of the exit stairs, the parking lot, and its installation of a concrete pad to assist in crossing at an abandoned crosswalk) and/or that it knew about, but failed to warn of, an obscured danger on land directly appurtenant to the premises. (I am unclear from the majority opinion exactly what the obscured danger was in crossing a public street near a parking lot exit where a person could clearly see cars exiting the lot.) This is not a general negligence duty and the trial court erred in finding such a duty.

No one has suggested that HNMC has waived its argument that there was no duty at all, even if HNMC invited the jury charge error. Yet the result here is an affirm despite the fact that the duty was improperly submitted. Perhaps a better result would be a remand for a new trial.

I join in Justice Jewell's dissent with these thoughts.

/s/ Tracy Christopher
Chief Justice

En banc court consists of Chief Justice Christopher and Justices Wise, Jewell, Bourliot, Zimmerer, Spain, Hassan, Poissant, and Wilson. Justice Poissant authored an En Banc Majority Opinion, which was joined by Justices Bourliot, Zimmerer, Spain, and Hassan. Justice Hassan authored an En Banc Concurring Opinion, which was joined by Justices Bourliot and Spain. Chief Justice Christopher authored an En Banc Dissenting Opinion, which was joined by Justice Wilson. Justice Jewell authored an En Banc Dissenting Opinion, which was joined by Chief Justice Christopher and Justices Wise and Wilson.