IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TEXARKANA DIVISION

GLORIA J. LANGE and DON R. LANGE, Individually and as Husband and Wife Plaintiff,	§	
vs.	§	**No. 507CV045 JURY**
TEXAS ROADHOUSE OF TEXARKANA, LTD., Defendants.	§	**JUDGE CRAVEN**

DEFENDANT, TEXAS ROADHOUSE OF TEXARKANA, LTD.'S MOTION FOR SUMMARY JUDGMENT, STATEMENT OF MATERIAL FACTS, AND BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, Texas Roadhouse of Texarkana, Ltd., (herein after referred to as "Texas Roadhouse") and files this Motion for Summary Judgment, and would respectfully show unto the Court the following:

I.

MOTION FOR SUMMARY JUDGMENT

Texas Roadhouse moves the Court to enter a Summary Judgment in favor of Defendant. This Motion is based upon Defendant's Statement of Material Facts, Defendant's Brief in Support of Motion for Summary Judgment, and the attached supporting summary judgment evidence. These documents show that there is no genuine issue of material fact, and that Defendant, Texas Roadhouse, pursuant to Fed. Rule of Civ. Proc. 56, is entitled to judgment as a matter of law.

II.

STATEMENT OF UNDISPUTED MATERIAL FACTS

As required by Local Rule 56, Defendant contends, for purposes of this Motion for Summary Judgment, that there is no genuine issue as to the following material facts:

(1) No peanut shells were present in the area where Plaintiff allegedly fell at the time of the incident in question. *See* Deposition of Linda Jones, attached hereto as Exhibit "E," Page 12, Lines 18-21, Page 24, Line 25, and Page 25, Line 1. *See also* Deposition of Ronnie Howell, attached hereto as Exhibit "G," Page 11, Lines 21-25.

(2) Peanut shells did not cause the Plaintiff to fall. *See* Deposition of Linda Jones, attached hereto as Exhibit "E," Page 12, Lines 9-11 and Page 13, Lines 6-8. *See also* Deposition of Ronnie Howell, attached hereto as Exhibit "G," Page 13, Lines 6-9.

(3) Mrs. Lange was aware that peanut shells are present on the floor of Texas Roadhouse due to prior visits to the restaurant. *See* Plaintiff, Gloria Lange's, deposition, attached hereto as Exhibit "A," Page 45, Lines 9-24 and Page 58, Lines 7-17.

(4) Mrs. Lange was an invitee of Texas Roadhouse of Texarkana, Ltd. at the time of the incident in question.

III.

STATEMENT OF ISSUES TO BE DECIDED BY THE COURT

Whether Defendant, Texas Roadhouse, was negligent by acts or omissions and whether said alleged acts or omissions were the direct and proximate cause of Plaintiff, Gloria Lange's injuries.

IV.

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant asks the Court to render final summary judgment against Plaintiff because there is no genuine issue of material fact, and Defendant is entitled to judgment as a matter of law.

A. Introduction

On or about March 26, 2007, Gloria Lange and her husband, Don Lange, brought suit against Texas Roadhouse of Texarkana, Ltd. for negligence. On or about May 10, 2007, Defendant filed its Original Answer denying Plaintiffs' claims, and on or about January 8, 2008, Defendant filed its First Amended Answer. Defendant has affirmatively asserted that Plaintiff, Gloria Lange, had prior and/or subsequent physical or mental infirmities, or conditions not caused by the alleged occurrence made the basis of this lawsuit which are the sole cause, or in the alternative, a cause of Plaintiff's alleged damages.

Defendant now files this Motion for Summary Judgment because the evidence in this case conclusively shows there is no genuine issue as to any material fact, and Defendant is entitled to judgment as a matter of law.

B. Standard of Review

Summary Judgment is proper in any case where there is no genuine issue of material fact. Fed.R.Civ.P. 56(c); *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A Defendant that seeks summary judgment on Plaintiff's cause of action must demonstrate the absence of a genuine issue of material fact either by (1) submitting summary judgment evidence that negates the existence of a material element of Plaintiff's claim or (2) showing there is no evidence to support an essential element of Plaintiff's claim. Celotex Corp.,477 U.S. at 322-25, 106 S.Ct. at 2552-2554;

J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1251 (1st Cir. 1996). The burden of proof in a summary judgment proceeding is on the same party who would bear the burden of proof at trial. Celotex Corp., 477 U.S. at 324, 106 S.Ct. at 2553. After adequate time for discovery has passed, the court may grant summary judgment against a party who cannot establish an element essential to that party's case and on which that party will bear the burden of proof at trial. *Id.* at 322-23, 106 S.Ct. at 2552; Baton Rouge Oil & Chem. Workers Un. v. ExxonMobil Corp., 289 F.3d. 373, 375 (5th Cir. 2002); *see* FRCP 56(c). When the movant has carried its burden under FRCP 56(c), the nonmovant must demonstrate that there is a genuine issue of material fact and not merely allege that there is a factual dispute. Scott v. Harris, 127 S.Ct. 1769, 1776 (2007). When there are two opposing versions of the facts, if one is blatantly contradicted by the record, the court cannot adopt that version for summary judgment purposes. *E.g.,* Scott, 127 S.Ct. at 1776 (court declined to adopt nonmovant's version of facts because they were so contradicted by videotape that no reasonable jury could have believed them).

C. Argument and Authorities

Plaintiffs have sued Defendant, Texas Roadhouse, alleging it was negligent in (a) failing to maintain the premises in a safe and reasonable manner; (b) failing to monitor premises for potentially dangerous/hazardous conditions existing on the premises; (c) failing to properly train and supervise employees to recognize and correct potentially dangerous/hazardous conditions existing on the premises; and (d) failing to warn business invitees of potentially dangerous/hazardous conditions existing on the premises. *See* ¶ 6 of Plaintiffs' Original Complaint.

In their Complaint, Plaintiffs allege that as Gloria Lange was leaving the restaurant owned by Texas Roadhouse, she stepped on discarded peanut shells lying on the floor, causing her feet to slip out from under her. She alleges this fall resulted in serious injuries and damages. *See* ¶ 5 of Plaintiffs' Original Complaint. Because Plaintiffs cannot raise a material issue of fact as to any of their claims, Defendant, Texas Roadhouse, is entitled to summary judgment as a matter of law.

To recover under a negligence theory in a slip and fall case, a Plaintiff must prove that she was injured by, or as a contemporaneous result of, a negligent activity, rather than by a condition created by a negligent activity. Keetch v. Kroger Co., 845 S.W. 2d 262, 264 (Tex. 1992). Further, Plaintiff's injury must be directly related to an ongoing activity. Allen v. Allbright, 43 S.W. 3d 643, 649 (Tex. App. Texarkana 2001). If the Plaintiff's injury was caused by a condition created by an activity rather than the activity itself, then the Plaintiff is limited to a premises liability theory of recovery. Pifer v. Muse, 984 S.W. 2d 739, 742 (Tex. App. Texarkana 1998).

Although Plaintiffs have alleged negligence in their complaint, the injury claimed by Plaintiff, Gloria Lange, was the result of an alleged condition created by an activity. Specifically, Mrs. Lange claims that her injuries were caused when she slipped on peanut shells, an alleged condition created by customers purportedly discarding the peanut shells on the floor of the restaurant. Therefore, Plaintiffs are limited to a premises liability theory of recovery.

Under Texas premises liability law, a business owner owes its invitees a duty to exercise reasonable care. Threlkeld v. Total Petroleum, Inc., 211 F.3d 887, 892 (5th Cir. 2000). In order to recover under the theory of premises liability against a business

owner, Plaintiff must plead and prove:

> (1) the owner had actual or constructive knowledge of some condition on the premises;
>
> (2) the condition posed an unreasonable risk of harm (one in which there is such a sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen. Seideneck v. Cal Bayreuther Assocs., 451 S.W. 2d 752, 754 (Tex. 1970));
>
> (3) the owner failed to exercise reasonable care to reduce or eliminate the risk of harm; and
>
> (4) the owner's failure to use care proximately caused the Plaintiff's injuries.

CMH Homes, Inc. v. Daenen, 15 S.W. 3d 97, 99 (Tex. 2000); Nat'l Convenience Stores, Inc. v. Arrington, 896 S.W. 2d 312, 313 (Tex. App. Houston [1st dist.]1995).

The premises owner is not obligated to ensure the safety of its invitees, nor is the premises owner strictly liable for an invitees' injuries. Wal-mart Stores, Inc. v. Gonzales, 968 S.W. 2d 934, 936 (Tex 1998).

Plaintiff cannot establish that Defendant created or maintained some condition on the premises that involved an unreasonable risk of harm, or that Defendant failed to exercise reasonable care to reduce or eliminate the alleged risk of harm, proximately causing Plaintiff's injuries.

1. Plaintiff can not establish that a condition on the premises caused Plaintiff's purported fall.

Plaintiffs are unable to identify any dangerous condition in the Defendant's restaurant which caused Mrs. Lange's alleged fall and subsequent injuries. Specifically, neither Gloria Lange nor Don Lange is able to testify that there were peanut shells where

Mrs. Lange fell, or that peanut shells caused her fall as they alleged in their complaint.

In her deposition, Mrs. Lange testified as follows:

Q. Okay. Was there any foreign material, whether it be peanut shells or peanuts or anything else, on the floor leading up to the area where you fell?

A. I have no idea.

Q. After you fell, did you see any type of contaminant on the floor in the area where you were?

A. No. I think I fell flat on my back, and I hit my head. I didn't remember too much of anything.

Q. Describe what you think caused you to slip and fall on the day of this accident.

A. I have no idea.

See Excerpt of the Deposition of Gloria Lange, attached hereto as Exhibit "A" and incorporated herein by reference, Page 62, Lines 23-25, Page 63, Lines 1-14, and Page 78, Lines 2-4.

Don Lange also testified in his deposition that he didn't notice anything on the floor near the area where Mrs. Lange fell that would have caused her to fall. *See* Excerpts from the Deposition of Don Lange, attached hereto as Exhibit "B," and incorporated herein by reference, Page 21, Lines 4-11.

Further, neither Plaintiffs' daughter, Sandra Lange, nor her son-in-law, Charles Fisher, who were with Plaintiffs at the restaurant owned by Texas Roadhouse at the time of the incident in question, can testify that Mrs. Lange slipped on discarded peanut shells as alleged by Plaintiffs.

Sandra Lange offered the following deposition testimony:

Q. Do you have any idea why Mrs. Lange fell?
A. No, I don't.
Q. Do you know, again, what caused your mother to fall that night?
A. Do I know?
Q. Yes.
A. Honestly, one hundred percent sure what she fell on, no, I do not.
Q. And you didn't see anything on the floor?
A. I did not notice anything on the floor.

See Excerpts of Deposition of Sandra Lange, attached hereto as Exhibit "C," and incorporated herein by reference, Page 8, Lines 12-14, Page 11, Lines 23-25, Page 12, Lines 10-14, and Page 25, Lines 10-19.

Charles Fisher, likewise, testified in his deposition that he did not notice anything on the floor where Mrs. Lange fell and that he did not know what caused her to fall. *See* Excerpts of the Deposition of Charles Fisher, attached hereto as Exhibit "D," and incorporated herein by reference, Page 10, Lines 22-25 and Page 11, Lines 1-2, 5, 15-18.

Moreover, two disinterested witnesses who saw Mrs. Lange fall testified that they did not see peanut shells in the area where Mrs. Lange fell. Linda Jones, an eyewitness to the fall, testified in her deposition that she didn't see anything on the floor that caused Mrs. Lange to fall. *See* Excerpts of the Deposition of Linda Jones, attached hereto, as Exhibit "E," and incorporated herein by reference, Page 12, Lines 9-11. Further, Ms. Jones testified that it did not appear that Mrs. Lange slipped on a peanut shell. *See* Exhibit "E," Page 12, Lines12-14 and Page 13, Lines 6-8. Indeed, Ms. Jones testified that she did not see any peanut shells in the area where Mrs. Lange fell. *See* Exhibit "E," Page 12, Lines 18-21, Page 24, Line 25, and Page 25, Line 1 and Lines 17-18. *See also* Affidavit of Linda Jones, attached hereto as Exhibit "F," and incorporated herein by reference.

The other disinterested eyewitness, Ronnie Howell, testified in his deposition as follows:

> Q. Was there anything on the floor that caused Mrs. Lange to fall?
>
> A. I didn't see anything that caused the floor to be—it appeared that her right leg just gave out from under her when she fell.
>
> Q. Okay. Did it appear to you, based upon your observation, that Mrs. Lange slipped on anything?
>
> A. No, ma'am.
>
> Q. Did it appear to you, based upon your observation of Mrs. Lange and the floor, that she slipped on a peanut shell?
>
> A. No, ma'am.

See Excerpts of the Deposition of Ronnie Howell, attached hereto as Exhibit "G," and incorporated herein by reference, Page 12, Lines 16-25 and Page 13, Lines 1-9.

Mr. Howell also signed an Affidavit, which is attached hereto as Exhibit "H" and incorporated herein by reference, which states:

> 3. I observed Ms. Lange as she fell and it appeared to me that her right leg gave out from under her.
>
> 4. It did not appear that Ms. Lange slipped on a peanut shell or any other foreign substance.

The evidence establishes that there were no discarded peanut shells in the area where Plaintiff alleged she fell, causing Plaintiff to slip and fall, and therefore, there is no genuine issue of material fact as to this element of Plaintiff's cause of action.

2. <u>There is no duty to warn of open, obvious, and unconcealed conditions.</u>

Though the Plaintiffs cannot establish that discarded peanut shells were present or that any alleged peanut shells caused Mrs. Lange's purported fall and subsequent injuries,

should the Court find that a question of fact exists as to whether discarded peanut shells caused Plaintiff to fall, which Defendant does not admit and expressly denies, Defendant asserts that such peanut shells, if any, were an open, obvious and unconcealed condition.

A property owner has a duty to inspect the premises and warn of dangerous conditions that are not open and obvious, the existence of which the owner knows or should have known. Coastal Marine Serv. of Texas, Inc. v. Lawrence, 988 S.W.2d 223, 225 (Tex. 1999). This duty includes warning invitees of known hidden dangers that present an unreasonable risk of harm. Lefmark Mgmt. Co. v. Old, 946 S.W.2d 52, 53 (Tex. 1997). There is no duty to warn in a premises liability case if the alleged condition was not a concealed hazard, but was open and obvious. Durbin v. Culberson County, 132 S.W.3d 650 (Tex. App. El Paso 2004). Any claim that a dangerous condition existed due to the presence of discarded peanut shells is invalid as a matter of law, because the premises owner has no duty to warn invitees of unconcealed conditions. *See* Johnson v. Lone Star Steakhouse & Saloon of Kentucky, Inc., 997 S.W.2d 490 (Ky. App. 1999) (Peanut shells on restaurant's floor, if a hazard, constituted an open and obvious condition, and thus the restaurant which provided peanuts to patrons was not liable for patron's slip and fall injuries).

Common sense dictates that no warning is necessary for an open and obvious condition. Peanut shells, if any, on the floor, which Defendant does not admit and expressly denies, would be an open, obvious and unconcealed condition, and therefore, Defendant did not owe Plaintiff a duty to warn.

3. Defendant's alleged failure to warn did not cause Plaintiff's alleged fall.

An owner or occupier of a premises can discharge his duty to an invitee to

exercise reasonable care to reduce or eliminate an alleged risk either by warning of an alleged dangerous condition or making the alleged condition reasonably safe. City of San Antonio v. Rodriquez, 931 S.W.2d 535, 536 (Tex. 1996). The Texas Supreme Court held the duty of a premises owner to an invitee is to exercise ordinary care to protect the invitee from danger and that the owner can provide the required protection by either warning the plaintiff or making the premises reasonably safe. State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996).

A premises owner owes no duty to warn an invitee of a danger previously known to said invitee. *See* Durbin v. Culberson County, 132 S.W.3d 650 (Tex.App-El Paso 2004). An essential element of Plaintiff's cause of action against this Defendant, as with any premises liability action, is that Defendant's alleged breach of duty was a "cause in fact" of her injury. *See* Lincoln Property Co. v. DeShazo, 4 S.W.3d 55, 61 (Tex. App.-Fort Worth 1999, *pet. denied*). Proximate cause consists of two elements: cause in fact and foreseeability. Farley v. M M Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975); Summers v. Fort Crockett Hotel, Ltd., 902 S.W.2d 20, 25 (Tex. App.-Houston [1st Dist.] 1995, *writ denied*). Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury, which would not otherwise have occurred. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995). Stated another way, it is the Plaintiff's burden to establish that "but for" the lack of a warning of a dangerous condition, her accident would not have happened.

Plaintiff complains that she slipped and fell on discarded peanut shells. However, Gloria Lange's testimony revealed that she was aware of peanut shells on the floor due to prior visits to Defendant's restaurant, thereby eliminating Defendant of any duty to warn.

In her deposition, Mrs. Lange testified as follows:

Q. Had you ever eaten at that restaurant before?
A. Yes.
Q. On how many occasions?
A. Once or twice.
A. I don't like the floor.
Q. I'm sorry?
A. I don't like that stuff on the floor.
Q. Okay. What are you talking about on the floor?
A. Peanut shells.
Q. Okay.
A. Peanuts.
Q. Well, when did you see peanuts on the floor?
A. All the time. When you first walk in the door, when you see the waiting room, it's full of peanuts.

See Exhibit "A," Page 44, Lines 6-9 and 25, Page 45, Lines 1-2 and 24-25, Page 46, Lines, 1-2, and Page 58, Lines 15-17.

Defendant is entitled to summary judgment because it is undisputed that Plaintiff was aware of the presence of peanut shells on the floor of the premises in question. Therefore, any alleged failure to warn Plaintiff about this purported "condition" could not have been a cause in fact of her alleged fall as a matter of law because a warning would not have given Plaintiff any information that she did not already possess, and the alleged fall would still have occurred.

D. Conclusion

The summary judgment evidence provided by Defendant and attached hereto clearly show that Plaintiffs cannot offer a scintilla of proof that Defendant was negligent as alleged in their Original Complaint. There is no evidence that Mrs. Lange slipped and fell on discarded peanut shells on the floor. Neither Plaintiffs, nor their family members who were dining with them can provide evidence that Mrs. Lange slipped on discarded

peanut shells. Further, two disinterested eyewitnesses testified in their deposition that they did not see any discarded peanut shells (or any other foreign substance) in the area where Mrs. Lange fell.

Had discarded peanut shells been in the area where Mrs. Lange's fall, which is not admitted and is expressly denied, the shells would have been an open, obvious and unconcealed condition known to the Plaintiffs due to their prior visits to Defendant restaurant. This open and obvious condition known to the Plaintiff relieved Defendant of any duty to warn.

There is no genuine issue of material fact as evidenced by the attached summary judgment evidence which negates the existence of one or more material elements of Plaintiffs' complaint. Therefore, Defendant is entitled to judgment as a matter of law.

WHEREFORE, PREMISES CONSIDERED, Defendant, Texas Roadhouse of Texarkana, Ltd. asks this Court to Grant this Motion for Summary Judgment and render a final summary judgment granting Defendant all relief requested in this Motion and for all other and further relief to which it may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing **Defendant, Texas Roadhouse of Texarkana, Ltd.'s Motion for Summary Judgment, Statement of Material Facts, and Brief in Support of Motion for Summary Judgment** has been served on all counsel of record via:

_____	Hand Delivery
_____	Regular Mail
_____	Certified Mail – Return Receipt Requested
_____	Facsimile
_____	Overnight Mail
_____	Federal Express
___X___	E-File

on this the 22nd day of April, 2008.

/s/Lisa R. Crittenden
LISA R. CRITTENDEN