Appellees' Motion for Rehearing Overruled; Concurring and Dissenting Opinions on Second Motion for Rehearing filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-00077-CV

AMERICAN INDUSTRIES LIFE INSURANCE CO., Appellant

V.

JOSE RUVALCABA and MARIBEL RUVALCABA, Individually and as Next Friends of JOHNATHAN RUVALCABA, a Minor, Appellees

---

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 97-08897

CONCURRING OPINION ON SECOND MOTION FOR REHEARING

The circumstances in which a possessor of land can be liable for injury resulting from a dangerous condition on the land vary according to whether liability is asserted against the possessor in its capacity as possessor or, if applicable, as lessor. *Compare* RESTATEMENT (SECOND) OF TORTS §§ 342 and 343 (1965) (liability of possessor to licensees and invitees, respectively), *with id.* § 360 (liability of possessor, who leases part but retains control over part which the lessee is entitled to use, to lessee and others lawfully on the land with the

consent of the lessee). In this case, the trial court's findings of fact and conclusions of law contain liability findings and conclusions against American Industries based on its capacity as owner, *i.e.*, possessor of the office building. It does not contain any findings or conclusions against American Industries in its capacity as a lessor apart from those that are common to liability in its capacity as a possessor.

The judges on this panel are in agreement that the trial court's judgment cannot be affirmed based on liability against American Industries in its capacity as a mere possessor, *i.e.*, non-lessor, of the property because the evidence did not show that Johnathan was an invitee or that American Industries had actual knowledge of the dangerous condition, as required to impose liability in favor of a licensee. The disagreement arises among us concerning whether liability can be imposed against American Industries in its capacity as a lessor. In this regard, the former majority (now plurality) and dissenting opinions differ as to whether: (1) lessor liability applies to office buildings, as contrasted from other commercial properties, such as apartments and retail stores; and (2) whether the elements of lessor liability that were not included in the trial court's findings and conclusions were nevertheless supported by the evidence. Although I agree with the dissent's affirmative determinations on these two issues, I do not agree with it that lessor liability can be imposed on American Industries in this case based on a presumed finding of omitted elements.

A judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment. TEX. R. CIV. P. 299. Importantly, however, "[t]he rule that supplemental findings necessary to support the judgment are presumed, has no application when the findings and conclusions disclose the basis therefor, and that the court did not find such necessary supplemental facts,"[1] *i.e.*, the findings and conclusions show that no other

---

[1] *Burford v. Pounders*, 145 Tex. 460, 199 S.W.2d 141, 145 (1947).

findings were needed.[2] In other words, where "the trial-court judgment rests upon the specific grounds set out in the findings of fact and conclusions of law that accompany the judgment, we are not permitted to assume omitted findings or conclusions necessary to any other grounds for the judgment." *Leonard v. Askew*, 731 S.W.2d 124, 132 (Tex. App.—Austin 1987, writ ref'd n.r.e.).[3]

In this case, the trial court's findings and conclusions clearly disclose that liability was sought and found against American Industries solely on the basis of its capacity as possessor of the property, not its capacity as lessor (or otherwise). Therefore, the fact that the evidence might have also supported the remaining elements of lessor liability if it had been asserted or that the findings made on possessor liability happen to overlap with some of those needed for lessor liability does not authorize us to impose liability based on presumed omitted elements of lessor liability where the findings and conclusions disclose that the trial court instead imposed liability exclusively on possessor liability and thus neither needed, found, nor omitted any additional findings on the remaining elements of lessor liability. Accordingly, I concur in the overruling of appellees' second motion for rehearing.

/s/ Richard H. Edelman
Justice

Opinions on Second Motion for Rehearing filed January 10, 2002.

Panel consists of Justices Anderson, Fowler, and Edelman. (Edelman, J. concurring and Fowler, J. dissenting.)

Publish — TEX. R. APP. P. 47.3(b).

---

2 *See generally* Frank W. Elliott, *Nonjury Trial*, *in* 4 TEXAS CIVIL PRACTICE § 20.13 n.95 (1992 ed.).

3 *See E. F. Hutton & Co. v. Fox*, 518 S.W.2d 849, 856 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) ("no additional finding can be presumed because, as the court's conclusions of law show, the judgment is based on the findings recited."). Thus, rule 299 supplies omitted findings on the theory of recovery submitted, it does not supply additional findings on other, unsubmitted theories in order to overcome a lack of evidence to support the theory submitted.

Appellees' Motion for Rehearing Overruled; Concurring and Dissenting Opinions on Second Motion for Rehearing filed January 10, 2002.

In The

Fourteenth Court of Appeals

NO. 14-99-00077-CV

AMERICAN INDUSTRIES LIFE INSURANCE CO., Appellant

V.

JOSE RUVALCABA AND MARIBEL RUVALCABA, INDIVIDUALLY AND AS NEXT FRIENDS OF JOHNATHAN RUVALCABA, A MINOR, Appellees

---

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 97-08897

D I S S E N T I N G O P I N I O N
O N S E C O N D M O T I O N F O R R E H E A R I N G

On the basis of the second motion for rehearing filed by appellee, Ruvalcaba, I withdraw my prior concurrence of September 20, 2001, and respectfully dissent from the majority opinion of this panel.

Summary of Reason for Dissent

The facts of the case are well developed in the majority opinion so I will not repeat them here except where I disagree with the majority's recitation of them. But, having said

this, I want to set out at the beginning of my dissent the five factual conclusions that are paramount to my dissent. First, three year old Johnathan Ruvalcaba was severely injured on a visit to the building American Industries owned. Second, evidence in the record shows that Johnathan and his mother were welcome guests of the security company for which Johnathan's father worked. Third, American Industries leased part of the building to the security company. Fourth, American Industries retained control of the stairs where Johnathan fell. Finally, expert testimony showed that these stairs were the worst violation of the applicable codes that the expert had seen, that they should have been condemned, and that the property manager should have known (even though he said he did not know) that these stairs were dangerous. As I explain below, these five facts alone support the trial court's imposition of liability.

Standard of Review

In every appeal, the standard of review is of paramount importance; in many, if not most, cases, it controls the outcome of the appeal. It is so in this case.

We are reviewing findings made by a trial judge at the conclusion of a bench trial. As the majority noted, the trial court's findings of fact have the same force and dignity as a jury verdict. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991). When we are reviewing a no evidence challenge, we are to disregard all evidence and reasonable inferences to the contrary. *Texarkana Memorial Hosp., Inc. v. Murdock*, 946 S.W.2d 836, 838 (Tex. 1997). In addition, however, as we stated in *Vickery v. Commission for Lawyer Discipline*, when an attack is made upon a judgment, whether directly or collaterally, all presumptions consonant with reason are indulged to uphold the binding effect of such a judgment. *Vickery*, 5 S.W.3d 241, 252 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). In a case tried to a court without a jury in which the court enters findings of fact and conclusions of law, the reviewing court will indulge every reasonable presumption in favor of the findings and judgment of the trial court, and no presumption will be indulged against the validity of the judgment. *Id.*

> When a court makes findings of fact, but inadvertently omits an essential element of a ground of recovery . . . , the presumption of validity will supply the omitted element by implication. However, if the record demonstrates the trial judge deliberately omitted the element, the presumption is refuted and the element cannot logically be supplied by implication. Thus, when an essential element in support of the trial court's judgment is omitted from the court's findings, an issue is presented as to whether or not the omission was deliberate or inadvertent.
>
> If a ground of recovery or defense is *entirely* omitted, i.e., if the trial court omits every element of the particular ground of recovery . . . , this is some evidence the court did not rely on the ground . . . in reaching its decision. In such case, the omission is deemed to be deliberate; "[t]he judgment may not be supported upon appeal by a presumed finding upon any ground of recovery . . . , no element of which has been included in the findings of fact . . . ."
>
> However, where the court specifically finds one or more elements of a ground of recovery . . . . this fact constitutes some evidence the court relied upon the ground . . . . in reaching its decision. In such case, the omission of some of the elements of a ground of recovery . . . is deemed to be inadvertent. Thus, *"when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment."*

Vickery v. Commission for Lawyer Discipline, 5 S.W.3d 241, 252-253 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) [citations omitted]; TEX. R. CIV. P. 299.

The extent of § 360 of the Restatement (Second) of Torts

Having set forth the standard of review, I turn to what I consider to be the flaws in the majority opinion; they are both legal and factual. The first, and most major flaw is the majority's decision as to the breadth of the scope of § 360. Stating that it can find no case law applying § 360 to an office building, the majority concludes that § 360 may not be applied to an office building. The majority is reading § 360 too narrowly. In fact, we need look no further than § 360 itself to find our answer.

> § 360. Parts of Land Retained in Lessor's Control Which Lessee is Entitled to Use.

> A possessor of land who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe.

RESTATEMENT (SECOND) OF TORTS § 360. Although one might read this section and be uncertain of its breadth, the comment and illustrations make it clear how broadly the drafters wanted it to be.

> **Comment:**
>
> a. *Effect of Lessee's knowledge of dangerous condition.* The rule stated in this Section applies to subject the lessor to liability to third persons entering the land, irrespective of whether the lessee knows or does not know of the dangerous condition. The lessee may, for example, know that the common entrance to the apartment or *office* which he has leased has become dangerous. . . . .
>
> **Illustration:**
>
> 1. *A leases an office in an office building to B, an attorney.* C, a client of B, and D, coming to pay B a social visit are injured by the fall of the elevator while on their way up to B's office. B knows that the elevator is in dangerous condition because of A's negligence in failing to warn C or D. A is subject to liability to both C and D.

RESTATEMENT (SECOND) OF TORTS § 360 cmt. a, illus. 1 (1965). By its very language and illustration, § 360 applies to office buildings. Consequently, regardless of whether other cases have held that § 360 applies to office buildings, clearly it does.

Reasonable inferences from the evidence

Having concluded that §360 applies, the next question is whether the evidence or fact findings support its application. Again, I respectfully disagree with the majority and conclude that the evidence does support its application. I will review each element separately.

1. Was Johnathan on a legitimate visit to the building?

Unquestionably, the trial court found that Johnathan was on a legitimate visit to the building. She found that he was a business invitee. But, additionally, there are inferences we can make from the record that Johnathan was at least a guest. To begin with, Johnathan was with his mother meeting his father for lunch. His mother had been to the office and to the building lobby before on several occasions to have lunch with his father. We can make a reasonable inference from this testimony that Johnathan and his mother were welcome in the building at least to meet his father in his company's office. Moreover, no testimony reveals that they were unwelcome. Although Johnathan and his mother did not stay in the office after they arrived, they left only because Mr. Ruvalcaba was having a conversation with his employer and was not quite ready to leave.

2. Did American Industries Lease part of the building to the security company?

The next factual issue important to liability is whether the evidence showed that American Industries leased part of the building to the security company. The majority found against the Ruvalcabas on this issue. However, the reasonable inference from the record is that American Industries did lease to this company.

The vice-president of real estate of American Industries, Mr. Baker, testified that his family owned the stock of American Industries, which owned the building where Johnathan was injured. In fact, Mr. Baker officed in the building and frequently used the stairs. He also testified that he was responsible for "manag[ing] real estate which involve[d] various details of *leasing to tenants, handling* complaints, *tenant complaints*, doing *tenant dunnings* and such." Apparently, Mr. Baker's job responsibilities dealt solely with tenants of American

Industries's buildings. In short, there is no question that American Industries owned the building or that it leased space in its various office buildings.

Additionally, the only reasonable inference from the record is that American Industries leased space to the security company. When Mr. Ruvalcaba testified about Johnathan's fall, he spoke of Maricio, the owner of the security business he worked for; he also made it clear that Maricio was not the owner of the building. Clearly the security company was a separate company from American Industries. And, since part of American Industries' business was leasing office space to third parties, the only reasonable inference is that it leased space from American Industries.

3. Did American Industries retain control over these stairs?

The next factual issue over which I disagree with the majority is whether the evidence shows that American Industries retained control over these stairs. The unquestionable inference to make from the testimony is that it did retain control. Once again, the proof comes from the vice president of American Industries. He was asked many questions about these stairs, including whether he thought they were safe and whether they had passed any inspections by city inspectors. One of the questions asked of him was, "Have you ever had any other complaints besides this one that someone was injured on your stairways?" His answer was "No"; he did not claim that the company was not responsible for the stairs or that he was not the appropriate person to receive complaints about stairs. In addition, the evidence clearly showed that these stairs were not within the sole control of the security company for Baker testified that he frequently used them. More importantly, Baker acknowledged that, after this accident, his company added balusters to the stairs so that the stairs would comply with the Houston building code. Again, the only reasonable inference to make from this evidence is that American Industries – not Mr. Ruvalcaba's employer – retained control of these stairs.

D. Could American Industries, in the exercise of reasonable care, have made the condition safe?

The final element of §360 that needed to have been proved at trial is that American Industries, had it exercised reasonable care, could have discovered the dangerous condition posed by these stairs and could have made them safe. Most recently the Supreme Court has stated the rule in this way: "A landowner owes invitees[1] a duty to exercise ordinary care to protect them from not only risks of which the landowner was actually aware, but also those risks of which the owner should be aware after reasonable inspection." *Motel 6 G.P., Inc. v. Lopez*, 929 S.W.2d 1, 3 (Tex. 1996).

Thus, the question in this case is whether American Industries was exercising ordinary care to protect its tenants from risks it reasonably should have discovered. Here, one might even ask if American Industries performed a reasonable inspection. *Id*. It is not a subjective standard, but an objective standard, so the issue is not resolved by the claim of American Industries' vice president in charge of its real estate holdings, Ross Baker, that he didn't think the stairs were dangerous. *Id.* Nor is the issue whether any person – land owner or not – would have known of the dangerous condition; rather, we consider whether a reasonable landlord exercising ordinary care could have known of the danger.[2] Specifically, we consider whether American Industries, as a landlord owing a duty to protect its tenants and their guests, exercised ordinary care to make the stairs safe.

On this question, there are findings by the trial court and direct testimony. In two findings, the court found that American Industries knew about the condition, that the

---

[1] For purposes of § 360, Johnathan and his mother are owed the same duty as a landlord would owe an invitee.

[2] Unlike a slip and fall case, where any adult knows that grapes are slippery on a floor, or that a soapy shower stall floor can cause someone to fall (e.g., *Motel 6 G.P., Inc.*, 929 S.W.2d at 3), not everyone knows the safety issues regarding stairs. Someone who owns an office building with stairs must have more knowledge than the average person on the street, or the owner must be willing to hire someone who knows about safety issues. He must act as any ordinarily prudent office building owner would act to avoid a dangerous condition. Put simply, he must perform a reasonable inspection of the stairs.

condition posed an unreasonable risk of harm, and that American Industries did not exercise reasonable care to reduce or eliminate the risk. The evidence supports these findings.

The Ruvalcaba's expert testified that the stairs were "inconsistent with and in violation of every city, state and federal promulgation of law related to stairs." In his opinion, "any professional engineer or architect who visited this particular stair would have been in the same amount of awe of faults and failures, extreme faults and failures and violations of the code that [he] was. . . ." The stairs violated the American Disabilities Act; the standards adopted by the American National Standards Institute (which, according to the expert, forms the basis of the Occupational Health and Safety Act); the Architectural Barriers Act adopted by the Texas state legislature; and the Uniform Building Code adopted by the City of Houston. As the expert testified, "[i]n all my 42 years of being a licensed architect, I do not believe I have seen a stair as flagrantly in violation of so many codes. It's so dangerous it should have been condemned."[3]

In contrast, the vice president in charge of American Industries' real estate holdings, Baker, disclaimed any knowledge of the stairs' deficiencies. Significantly, American Industries owned four buildings in which it leased space to tenants, and Baker devoted all of his time to dealing with the tenants in the company's four buildings. Baker also managed several other office buildings for other companies. Despite his responsibilities, Baker claimed that he was not involved with any trade groups pertaining to real estate management, he did not receive any trade journals on managing buildings, and he had not attended any seminars on safety or management of buildings. In addition, he testified that in the ten years

---

[3] Apparently relying on this sort of testimony that the stairs were a blatant violation of the codes, American Industries argues that Johnathan should not recover because the defect in the stairs was open and obvious. The vice president testified that he did not think the stairs were dangerous and that the only reason the company made the changes to the stairs was so that they would comply with the codes, not because he thought they would be safer. American Industries cannot benefit from arguing both sides of the argument. It cannot say on the one hand that the stairs were not dangerous, but say on the other hand that Johnathan should not recover because the dangerous condition was open and obvious.

American Industries had owned this building, not once had it hired a safety engineer to review the building.

In stark contrast, the Ruvalcaba's expert testified that a company doing business in a reasonably prudent manner examines a building on purchase to assess safety issues and code violations, and there are many professional safety engineers who will perform annual or bi-annual examinations of corporate properties to "keep the corporation aware of high-risk hazards to the tenants and invitee public." These safety engineers market their services to corporations. The expert, upon learning that Baker did not attend safety seminars, had not read the code, and had not hired a safety engineer, said that he was "shocked at [Baker's] indifference and his blatancy to be indifferent to public life safety in his buildings."

What is striking from the record is not necessarily Baker's complete lack of knowledge of any code relevant to his building, but his complete indifference to safety. Here is a man, as the expert put it, who is blatantly indifferent to safety. Based on his testimony, one might even say he was defiantly indifferent to safety.

> Q. Did you ever walk up the stairs in the past ten years?
> A. Oh, sure.
> Q As a real estate manager experienced in real estate, did you believe that those stairwells were safe?
> A. Oh, clearly, for anybody, yes clearly.
> Q. You didn't feel it was unsafe that there weren't many upright balusters?
> A. No.
> Q. Are you familiar with building codes in the city of Houston now as regards to handrails on stairways?
> A. Yes.
> Q. And what do they require as far as upright balusters?
> A. Specifically there is one section that talks about a sphere no larger than four-inch – four inches can pass between the bars.
> Q. And do you know why they enacted that? Any idea?
> A. Not specifically.
> Q. Are you aware through your experience as real estate – in real estate management of there being a problem with small children falling underneath handrails, or even between upright balusters of stairs?

A. I can't imagine the occurrence.

* * *

Q Any of your brother or sisters have – have children of their own?
A. Yes.
Q. Okay. You ever hear about the terrible twos?
A. Yeah. That's a terminology.
Q. Did you ever see that firsthand?
A. Yeah. I guess children do act up.

* * *

Q. Do you believe that your stairways are safer now than they were prior to when you welded the upright balusters in?
A. Not really. However, there is the matter of the law.
Q. And a prudent property owner complies with the building codes in the state and the city, correct?
A. Yes.
Q. Prudent property owner keeps themselves abreast of that and doesn't wait for a citation or an order from the city to make a change, would you agree with that?
A. Oh, yes.

* * *

Q. Do you think it's prudent for someone who manages real estate to belong to trade groups in order to get further educated on the - - the area of management of real estate?
A. No.
Q. Don't feel any need to subscribe to any trade journals to sort of keep on the cutting edge or what's happening in the - - in the management of real estate?
A. No.

In spite of Baker's denials, the clear testimony of the Ruvalcaba's expert was that an owner of office buildings who does not have knowledge of buildings himself hires someone who has that knowledge. Common sense would even support such a concept. And the testimony was also that any safety engineer or other person knowledgeable in the area, would have recognized the danger inherent in these stairs. In other words, if American Industries and Baker had been interested in learning whether there were any safety issues in their building, they would have learned about the hazardous condition. However, clearly, safety issues were not at the forefront or even in the background. Instead, Baker, whose sole job

is to manage American Industries' properties, purposefully did not try to learn anything about safety in his buildings, and instead relied only on his own subjective thoughts about the stairs.

Under § 360, Baker was not necessarily required to know the code, although there is much testimony that he should have known about the code. Nor was he required to have as much knowledge as the experts. But, clearly, he was required to have enough knowledge so that he could protect his tenants and their guests from dangerous conditions. He was responsible for performing a reasonable inspection.[4] The Ruvalcaba's expert testified that there were ways to obtain the knowledge to learn about safety issues or to hire an engineer to perform an inspection for him. Yet, Baker did not avail himself of any of them. He relied instead on his own subjective belief. This was not enough.

In short, here we have a land owner that deliberately buried its head in the sand, and, in the ten years it owned this building, made no attempt to learn anything about the building's relative safety. There can be no question that such conduct violates § 360 and liabilities imposed by the Texas supreme court in *Parker*.

Moreover, there is no question that the record contains evidence to show that American Industries did not exercise reasonable care to discover the dangerous condition, that it could have learned about the condition but did not, and that it could have easily fixed the condition (since it did so after the accident) but did not.

---

[4] In response to this statement, American Industries will point to the fact that, at one point, City of Houston inspectors inspected the building; however, on this no evidence appeal, we are to look only at the evidence in support of the trial court's judgment.

E. Summary I would hold that sufficient evidence supports the application of § 360.[5] Moreover, since the trial court explicitly made two findings necessary to a judgment based on § 360, I would hold that the remaining findings are presumed.

/s/ Wanda McKee Fowler
Justice

Opinions on Second Motion for Rehearing filed January 10, 2002.

Panel consists of Justices Anderson, Fowler, and Edelman. (Edelman, J. concurring and Fowler, J. dissenting.)

Publish — TEX. R. APP. P. 47.3(b).

---

[5] Much was made in the majority opinion that Johnathan was not a licensee. But, according to § 360, as long as Johnathan was at least a guest, it doesn't matter how he was classified:

> c. A lessor may be liable to an invitee or even to a licensee of the lessee, although neither he nor the lessee would be liable under the same circumstances to their own invitees or licensees. The privilege of the visitor is not based, as is that of the lessor's own invitee or licensee, upon the consent given upon the occasion of the particular visit, but upon the fact that he is entitled to enter by the right of the lessee, who is entitled under his lease to use the part of the land within the control of the lessor not only for himself, but also for the purpose of receiving any persons whom he chooses to admit. This fact is to be taken into account in determining whether the lessor should anticipate harm to the visitor. RESTATEMENT (SECOND) OF TORTS § 360 cmt. c (1965).