Affirmed and Memorandum Opinion filed December 7, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00711-CV

GLYNIS BLAINE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MICHAEL BLAINE, DECENDENT AND AS GUARDIAN AND REPRESENTATIVE OF ERICA I. BLAINE AND NATIONAL FIRE OF HARTFORD, Appellants

V.

NATIONAL-OILWELL, L.P., FORMERLY KNOWN AS NATIONAL-OILWELL, INC; NATIONAL-OILWELL; AND NATIONAL-OILWELL VARCO, L.P., Appellees

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2008-62187A

MEMORANDUM OPINION

In this wrongful-death action, the trial court granted summary judgment in favor of defendants/appellees National-Oilwell, L.P. f/k/a National Oilwell, Inc., National-Oilwell, and National-Oilwell Varco, L.P. (collectively "NOV") against plaintiff/appellant Glynis Blaine, individually, as representative of the estate of Michael Blaine, deceased, and as guardian and representative of Erica Blaine ("Mrs. Blaine") and

intervenor/appellant National Fire of Hartford. The appellants challenge the trial court's order granting summary judgment in favor of the appellees on various grounds. We affirm.

I

NOV provides products and services for the oil and gas industry. On October 17, 2006, NOV was in the process of manufacturing a mobile oil and gas drilling and workover rig. As part of the process, NOV hired Stoehr Wire Rope of Texas to spool wire rope onto the rig's sand drum. Stoehr sent its employee, branch manager Michael Blaine ("Blaine"), to perform this task.

That same day, at about 11:00 a.m., the spooling of the wire rope from Blaine's truck to the rig began. Neal Lee, an NOV employee, operated the sand drum's throttle to make the drum rotate which, in turn, spooled the rope. After the first layer and most of the second layer were complete, Blaine complained that something might be wrong with the sand line and ordered that the spooling operation stop. After an NOV employee went to the top of the derrick to confirm that the sand line was feeding properly from Blaine's truck, the spooling resumed.[1] Blaine subsequently leaned over and reached into the drum. According to uncontroverted testimony, the wire rope subsequently caught Blaine at the wrist and pulled him into the drum, killing him.

On January 29, 2007, Mrs. Blaine filed suit against NOV in Harris County alleging causes of action for negligence, gross negligence, respondeat-superior liability, negligent entrustment, negligent hiring, training, and retention, and premises liability. On March 14, 2007, National Fire intervened in the suit and asserted its subrogation rights as the insurer of Blaine's employer for its payment of medical and wage benefits to Mrs. Blaine. On May 14, 2007, NOV filed its answer and motion to transfer venue to Gray County. Mrs. Blaine opposed NOV's motion to transfer, and the trial court subsequently denied NOV's motion.

[1] The terms "wire rope," "wire line," and "sand line" are synonymous.

On August 8, 2008, NOV moved for summary judgment on all of Mrs. Blaine's and National Fire's claims. The trial court heard the motion on October 10 and granted it on October 13. But between the hearing and the court's ruling, Mrs. Blaine filed a notice of nonsuit of her claims.

Days before the statute of limitations was set to expire on her claims, Mrs. Blaine re-filed suit against NOV and others in Gray County and Harris County.[2] On November 14, 2008, Mrs. Blaine served NOV with the petition in the Harris County suit; on November 17, 2008, she nonsuited the Gray County suit. In January 2009, National Fire nonsuited its claims in the first Harris County suit and then intervened in the second Harris County suit. On January 22, 2009, NOV again moved for summary judgment on all of Mrs. Blaine's and National Fire's claims. On May 1, 2009, the trial court granted NOV's motion. The court later severed the claims against NOV from those against the other defendants.[3] This appeal followed.

II

Standard of Review

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). NOV's motion for summary judgment is a hybrid traditional and no-evidence motion. *See* Tex. R. Civ. P. 166a(c), (i). We therefore apply the established standards of review for each. *See Brockert v. Wyeth Pharms., Inc.*, 287 S.W.3d 760, 764 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

The party moving for a traditional summary judgment bears the burden to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004); Tex. R. Civ. P. 166a(c). A genuine issue of material fact exists if more than a scintilla of

[2] Mrs. Blaine added a cause of action for products liability in the second suit.

[3] Stoehr, Certex, USA, Inc., Wire Rope Corporation of America, Inc., and OEM Fabricators, Inc., were also named as defendants in the suit.

evidence establishing the existence of the challenged element is produced. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). A no-evidence summary judgment will be granted when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003).

In reviewing the granting of either type of summary-judgment motion, we indulge every reasonable inference from the evidence in favor of the non-movant, resolve any doubts arising from the evidence in its favor, and take as true all evidence favorable to it. *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 263 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When a summary judgment does not specify the grounds upon which the trial court ruled, as here, we must affirm it if any of the summary-judgment grounds on which judgment could be based is meritorious. *See Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

Analysis

In ten issues, Mrs. Blaine challenges the summary judgment granted on her claims of (1) negligence, (2) respondeat-superior liability, (3) negligent hiring, retention, and training, and (4) premises liability.[4] In addition to adopting Mrs. Blaine's issues, National Fire also argues on appeal that the filing of Mrs. Blaine's suit tolled limitations for its intervention in the suit.[5]

[4] Mrs. Blaine does not appeal the summary judgment granted on her claims of negligent entrustment and products liability.

[5] National Fire did not bring a claim for negligent hiring, retention, and training and, therefore, cannot appeal from the summary judgment granted on this cause of action.

A

Negligence and Premises Liability

In issues five and seven, Mrs. Blaine and National Fire ("the appellants") contend that the trial court erred in granting summary judgment on their negligence claims because there is more than a scintilla of evidence and, at a minimum, a fact issue exists regarding whether (1) NOV owed a duty to Blaine and (2) NOV's negligence, or that of one of its employees, caused Blaine's death. In issues nine and ten, the appellants assert that the trial court erred in granting summary judgment on their premises-liability claim because, at a minimum, a fact issue exists regarding whether (1) a pre-existing defect existed before Blaine arrived on NOV's premises and (2) the defect caused Blaine's death.

The appellants allege three factual bases for NOV's tort liability: (1) Lee was running the sand line too fast at the time of the accident; (2) the guard gate NOV provided, which was only eighteen inches high, should have been forty inches high; and (3) the floor plate on which Blaine was standing at the time of the accident was not properly secured. These acts or omissions, the appellants claim, constitute negligence in NOV's failure to take various precautions to ensure the safety of Blaine's work as well as a breach of a duty to remedy a premises defect about which NOV knew or should have known. Therefore, we analyze the appellants' negligence and premise-liability claims together.

The three essential elements of a negligence cause of action are (1) the existence of a legal duty, (2) a breach of that duty, and (3) damages proximately caused by the breach. *See D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002). Premises liability is a special form of negligence where the duty owed by a premises owner to a person entering on the owner's land depends upon the status of the person at the time the incident occurred. *See Western Invests., Inc. v. Urena*, 162 S.W.3d 547, 550–51 (Tex.

2005). It is undisputed that Stoehr, Blaine's employer, contracted with NOV to spool wire rope onto the rig in question.

Under Texas law, the duties owed by premises owners and general contractors to employees of independent contractors are generally the same. *Shell Oil Co. v. Khan*, 138 S.W.3d 288, 291 (Tex. 2004). The nature of that duty turns on whether the injury arose from activities or a premises defect. *See id.* With respect to activities, a premises owner who retains a right to control an independent contractor's work may be liable for negligence in the exercise of that control. *See id.* at 292. Premises defects are divided into two categories: (1) those existing when an independent contractor enters the premises and (2) those created by the independent contractor's work. *See Dow Chem. Co. v. Bright*, 89 S.W.3d 602, 606 (Tex. 2002). With respect to pre-existing defects, an owner has a duty to inspect the premises and warn of defects the owner knows or should have known about. *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997). With respect to defects arising later, an owner has no duty unless it retains a right to control the work that created the defect. *See Bright*, 89 S.W.3d at 606.

Thus, negligence and premises liability involve closely related yet distinct duty analyses. *Urena*, 162 S.W.3d at 550. However, we need not examine these distinctions to resolve this case because recovery under either cause of action is foreclosed in the absence of evidence that NOV's acts or omissions proximately caused Blaine's death.

1. No Evidence of Causation

Proximate cause requires both cause in fact and foreseeability. *See id.* at 551. "These elements cannot be established by mere conjecture, guess, or speculation." *Id.* (quoting *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995)). The test for cause in fact is whether the act or omission was a substantial factor in causing the injury without which the harm would not have occurred. *Id.* If the defendant's negligence merely furnished a condition that made the injuries possible, there

can be no cause in fact. *See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004).

The appellants contend that NOV owed Blaine a duty (1) to control the speed at which the sand line drum was rotating; (2) to provide a forty-inch guard gate; and (3) to properly secure the plate upon which Blaine was standing. They further argue that NOV breached each of these duties and that these breaches caused Blaine's death. In support of their contentions, the appellants rely on the testimony of expert witnesses Dewey Smith and John Sexton.

Expert testimony must provide an adequate factual basis for the expert's conclusions. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009).[6] A conclusory opinion is one that does not provide the underlying facts to support the conclusion. *CA Partners v. Spears*, 274 S.W.3d 51, 63 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Conclusory statements in an affidavit unsupported by facts are insufficient to defeat summary judgment. *Id.* With these principles in mind, we examine the experts' testimony below.

a. Smith Affidavit

In his affidavit, Smith stated, in relevant part, as follows:

> NOV installed a goat gate guard in front of the sand line reel which was insufficient to protect Michael Blaine from falling into the sand line drum. NOV had made a conscious decision to lower the goat gate from a 40 inch height to an 18 inch height at the time of this incident. This reduced height was too low to prevent Mr. Blaine from toppling over the guard and into danger. This was, in my opinion, a contributing factor to the cause of this accident and Michael Blaine's death.

[6] NOV objected to the conclusory nature of Smith's testimony in the trial court, but the court granted its summary-judgment motion without ruling on its objections. Nevertheless, an objection that a statement is conclusory in nature is an objection to a substantive defect and may be raised for the first time on appeal. *See Pico v. Capriccio Italian Rest., Inc.*, 209 S.W.3d 902, 909 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (stating appellee's objections that witness statements were conclusory were objections to substantive defects and, thus, appellee did not waive them by failing to obtain ruling and could raise them on appeal).

NOV also had actual knowledge of the dangers and hazardous condition of running the sand line drum at too fast of a pace. In my opinion, NOV failed to run the sand line drum at a slow enough speed as to not endanger the life of Michael Blaine. Neil [sic] Lee knew, as testified to by Nick Dyer, that he had a tendency to run the sand line drum at too fast of a pace, particularly while spooling the sand line.

NOV also knew through Neil [sic] Lee and Spencer Neff that the drive shaft guard plate should have been properly bolted down and secured to the floor. This caused a hidden dangerous condition on the rig in that Michael Blaine was forced to stand on this floor plate which was improperly secured by only two bolts instead of four bolts to the floor at the time of the accident. This was, more likely than not, a contributing factor to Michael Blaine's falling into the sand line drum and his untimely death.

According to witness Spencer Neff, the drive shaft guard floor plate was not properly bolted down or secured. This situation created a dangerous condition because Mr. Blaine was standing on the guard trying to perform his work. In addition, no one warned Mr. Blaine of the dangerous condition or made him aware of the fact that the floor plate was not properly bolted down.

Further, the goat gate guard also presented an [sic] dangerous condition in the fact that the goat gate guard was approximately 18 inches high which was inadequate to protect employees from falling into the rotating sand line . . . . This goat gate was inadequate to protect Mr. Blaine from being pulled into the sand line drum at the time of the incident which was also a producing cause of Michael Blaine's untimely death.

NOV, through their employee, Neil [sic] Lee, was operating and rotating the sand line drum at a dangerous and excessive speed, considering the circumstances. . . . Mr. Adamson also stated that it was running pretty good at least a quarter to one half throttle per Micah Adamson's testimony in his deposition on page 59. In addition, Marland Miller testified that "if it was going so fast that he could jerk him (Blaine) in and pull him under, the rig was turned up too fast." (Miller Deposition pg. 232)

I agree with Mr. Miller. Based upon all evidence and my education and experience in the field it is my opinion that the sand line drum was being run too fast and thus caused Michael Blaine's untimely death. Further, this is also based on the testimony of Nick Dyer who previously provided an affidavit in this case.

. . . .

> In my opinion, this accident could have been avoided had NOV, the controlling employer, complied with industry standards, trained their employees, and operated the rig at a safe speed. The factors in conjunction or individually were a proximate cause of the untimely death of Michael Blaine.

(i) Speed of Sand Line Drum

Smith's opinion that the speed of the sand line drum caused Blaine's death is conclusory and unsupported by the facts for several reasons. First, although Smith asserts that "NOV failed to run the sand line drum at a slow enough speed as to not endanger the life of Michael Blaine," he provides no evidence of the actual speed of the sand line drum or the factors for determining what constitutes a safe speed. *See, e.g.*, *Texas Dep't of Transp. v. Martinez*, 2006 WL 1406571, at *7 (Tex. App.—San Antonio May 24, 2006, pet. denied) (mem. op., not designated for publication) (concluding expert testimony regarding allegedly unsafe degree of differing friction on road was mere speculation absent supporting evidence of what ranges of friction were dangerous or not dangerous). In fact, the only evidence in the record regarding the actual speed at which the drum was set at the time of the accident is Lee's testimony that the drum was in first gear, "just above idle." Further, Smith provides no analysis as to whether a slower speed would have prevented or lessened Blaine's injuries. *See Goss v. Kellogg Brown & Root, Inc.*, 232 S.W.3d 816, 819–20 (Tex. App.—Houston [14th Dist.] 2007 pet. denied) (concluding expert opinion relating to tank safety system was no evidence of causation because expert failed to establish whether alternative design would have actually prevented injuries at issue); *Price v. Ford*, 104 S.W.3d 331, 333 (Tex. App.—Dallas 2003, pet. denied) (finding expert testimony that failed to establish that earlier intervention by security guards would have actually prevented some of injuries at issue was legally insufficient to prove proximate cause).

Second, the witness testimony upon which Smith bases his opinion regarding the speed of the drum does not provide an adequate factual basis for the opinion. In his affidavit, Smith relies on the testimony of NOV employees Micah Adamson and Marland Miller, and former Certex/Stoehr employee Nick Dyer. Smith asserts that the drum "was running pretty good at least a quarter to one half throttle per Micah Adamson's testimony in his deposition on page 59." However, Mrs. Blaine omitted page fifty-nine from the portion of Adamson's deposition she included in the summary-judgment record, and the portion of the deposition included in the record contains no such statement.

Smith also relies on Miller's testimony that "if it was going so fast that he could jerk him [Blaine] in and pull him under, the rig was turned up too fast." However, Miller was not present at the time of the accident and is, therefore, not competent to testify as a fact witness regarding the speed of the drum at the time of the accident. *See* Tex. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Moreover, Miller's testimony—that if Blaine was pulled in, the drum must have been going too fast—amounts to no more than conjecture. *See Bd. of Trustees of Fire & Police Retiree Health Fund v. Towers, Perrin, Forster & Crosby, Inc*., 191 S.W.3d 185, 193 (Tex. App.—San Antonio 2005, pet. denied) ("Rule 701's requirement that the [lay witness's] testimony be based on the witness's perception presumes the witness observed or experienced the underlying facts, thus meeting the personal-knowledge requirement of [R]ule 602.") (citations omitted).

Smith's opinion is also based upon the testimony of Nick Dyer, a former Certex/Stoehr employee, who had assisted Blaine with spooling jobs for NOV on numerous occasions before the accident. In his affidavit, Dyer testified that "Neil [sic] Lee, an employee of NOV[,] was known as an operator who operated the rig at high speed and at times in a dangerous manner. . . . Many times I was instructed by my employer, Certex, to be very careful around Neil [sic] Lee because he operated the rig

including the sand line drum at high speeds." Like Miller, Dyer was not present on the day in question and has no knowledge as to the circumstances surrounding the accident. Thus, he is not competent to testify regarding the speed of the drum at the time of the accident. *See* Tex. R. Evid. 602; *see also Bd. of Trustees of Fire & Police Retiree Health Fund*, 191 S.W.3d at 193.

(ii) Height of Guard Gate

Smith's opinion also fails to provide an adequate factual basis for his conclusion that the eighteen-inch guard gate caused or contributed to Blaine's accident.[7] Further, we find no evidence in the record that a forty-inch guard gate had any probability of preventing the accident—this is especially significant in light of the uncontroverted evidence that Blaine was pulled into the drum by the wire line. *See Goss*, 232 S.W.3d at 819–20; *Price*, 104 S.W.3d at 333.[8] The evidence also shows that when a forty-inch guard gate was used in the past, Blaine removed it to do his work. In the absence of any underlying facts to support his opinion that the guard gate was a producing cause of the accident, Smith's statements are merely conclusory and insufficient to defeat summary judgment. *See Spears*, 274 S.W.3d at 63.

(iii) Floor Plate

Smith's opinion likewise fails to provide any underlying facts to support his conclusion that the allegedly unsecured floor plate "was, more likely than not, a

[7] We note that although Smith initially opines that Blaine fell into the sand line drum, he later states that the guard gate was inadequate to protect Blaine from being *pulled* into the drum. The speculative nature of Smith's causation conclusion is underscored by his account of the events in which he states, "At this point, the sand line drum began turning at a very fast rate and Michael Blaine *somehow* became entangled in the wire cable in the sand line drum and died" (emphasis added).

[8] According to Lee and Adamson's testimony, the wire rope caught Blaine at the wrist and he was pulled into the drum. The appellants, however, contend that Blaine fell into the drum. In support of their contention, the appellants cite only to the factual background section of Mrs. Blaine's response to NOV's summary-judgment motion. The page cited in the response, however, does not cite to any evidence. Pleadings are ordinarily not considered competent summary-judgment evidence. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). Thus, the appellants' reliance on Mrs. Blaine's summary-judgment response as evidence is misplaced.

contributing factor to Michael Blaine's falling into the sand line drum and his untimely death." There is no evidence in the record that the plate beneath Blaine's feet moved or that Blaine otherwise lost his balance and fell into the drum. To the contrary, Adamson, who was watching Blaine during the operation and could see his feet, testified that the plate did not shift beneath Blaine's feet nor did Blaine slip; rather, he was caught at the wrist by the cable line. Smith's opinion fails to provide an adequate factual basis to support his conclusion that the allegedly unsecured floor plate contributed to Blaine's accident and, thus, is insufficient to defeat summary judgment. *See Spears*, 274 S.W.3d at 63.

b. Sexton Affidavit

In his affidavit, Sexton states as follows:

> Based on the background information and depositions reviewed, the below-listed conditions, activities and/or worker knowledge appear significant in evaluating the incident
>
> . . . .
>
> One NOV employee (Adolfo Ortego) [sic] stated that the accident occurred because Mr. Neil [sic] was running the drum too fast.
>
> . . . .
>
> The guardrail protecting workers on the rig from falling into the sand drum had been reduced in size from the 40 inch height on previous rigs to the 18 inch high goat gate used on the rig involved in this incident. The 18 inch height would not protect a worker in the area of the sand drum and would likely be a tripping and/or falling hazard.
>
> The plate covering the torque shaft on which Mr. Blaine would have been standing while assisting in the spooling of the sand drum had not been secured. Apparently no one examined this plate following the incident to determine its stability and evaluate the extent of the tripping hazard that this equipment created.
>
> . . . .

> Additionally, based on the items discussed in this report, my evaluation of available material and my education, background and experience, it is my opinion that the incident and the fatal injuries to Mr. Blaine were the result of working in a hazardous environment. NOV exercised control over the equipment incorporated into the rig and the activities leading to and including the spooling of the sand line. These included the following:
>
> . . . .
>
> - NOV provided an 18 inch portable guard rather than the usual 40 inch high railing guard called for in industry standards and government regulations. The purpose of this guard was to protect workers from falling into the sand drum area.
>
> . . . .
>
> - Although the NOV supervisor had been informed that the plate over the torque shaft, which Mr. Blaine would have to step on, had not been completely bolted down, no actions were taken to ensure that it was properly secured.
>
> In summary, this fatal accident would have been avoided had NOV, the controlling employer, complied with accepted industry standards and government regulations. The actions and inactions by NOV which are listed above singularly or together caused the injuries and death to Michael Blaine.

(i) Speed of Sand Line Drum

The only evidence Sexton offers as a basis for his opinion that the speed of the drum caused the accident is Adolfo Ortega's purported statement that "the accident occurred because Mr. Neil [sic] was running the drum too fast." However, this statement appears nowhere in the summary-judgment record.[9] Further, as with Smith's opinion, Sexton's affidavit provides no evidence of the actual speed of the sand line drum, the

[9] We note that, in his deposition, Miller testified that Ortega told him at one point that Lee "was running too fast." To the extent that this is the statement to which Sexton refers in his affidavit, the statement is not evidence of the *cause* of the accident; rather it is only evidence of Ortega's opinion regarding the speed of the drum.

factors for determining what constitutes a safe speed, *see, e.g., Martinez*, 2006 WL 1406571, at *7, or any analysis regarding whether a slower speed would have prevented or lessened Blaine's injuries, *see Goss*, 232 S.W.3d at 819–20. Sexton's opinion that the speed of the drum caused the accident is not supported by any actual evidence. *See Houston Cab Co. v. Fields*, 249 S.W.3d 741, 749–50 (Tex. App.—Beaumont 2008, no pet.) (finding expert opinion too conclusory where assumptions underlying expert's opinion were unsupported by actual evidence).

(ii) Height of Guard Gate

Sexton's opinion also does not provide any underlying facts to support his conclusion that the lower guard gate contributed to Blaine's accident. *See Fields*, 249 S.W.3d at 749–50 (concluding where assumptions underlying expert's opinion vary materially from undisputed facts, opinion is too conclusory to be given probative value). Further, Sexton states that the eighteen-inch guard gate was insufficient to protect a worker from falling into the drum and would likely pose a tripping hazard. However, there is no evidence that Blaine fell into the drum or tripped over the guard gate; rather, the uncontroverted evidence shows that Blaine was pulled into the drum when he became caught at the wrist. Moreover, Sexton offers no facts showing that a forty-inch high gate had any probability of preventing the accident or lessening Blaine's injuries. *See Goss*, 232 S.W.3d at 819–20; *Price*, 104 S.W.3d at 333. As such, Sexton's opinion is conclusory and is no evidence of causation.

(iii) Floor Plate

Similarly, Sexton's conclusion that the allegedly unsecured floor plate contributed to Blaine's accident is unsupported by any underlying facts. *See Fields*, 249 S.W.3d at 749–50. Even assuming that the platform was not properly secured, as the appellants allege, there is no evidence that it caused or contributed to the accident, or that a properly secured floor plate would have altered the outcome. *See Goss*, 232 S.W.3d at 819–20; *Price*, 104 S.W.3d at 333. Further, although Sexton opines that no one examined the

plate following the incident to determine the extent to which it posed a tripping hazard, there is no evidence suggesting that Blaine tripped on the plate. Consequently, his opinion is conclusory and insufficient to defeat summary judgment. *See Spears*, 274 S.W.3d at 63.[10]

In summary, even assuming NOV owed Blaine a duty to control the speed at which the sand line drum was rotating, provide a forty-inch guard gate, and properly secure the floor plate upon which Blaine was standing, and further assuming that NOV breached these duties, the appellants presented no evidence that these acts or omissions were a substantial factor in causing the tragic accident here. *See Urena*, 162 S.W.3d at 551 (noting cause in fact requires act or omission to be substantial factor in causing injury without which harm would not have occurred). We overrule issues five, seven, nine, and ten.

[10] It is worth noting that both Smith and Sexton's conclusions regarding causation are made in the disjunctive. Both experts recite a lengthy list of workplace conditions, actions, or inactions and conclude that these factors "in conjunction or individually" or "singularly or together" caused Blaine's death. Smith and Sexton's testimony identifying numerous potential causes of Blaine's accident without excluding any of them constitutes no evidence that these factors caused the accident. *See Wal-Mart Stores, Inc. v. Merrell*, 313 S.W.3d 837, 840 (Tex. 2010) ("An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory."); *see also Emmett Props., Inc. v. Halliburton Energy Svcs., Inc.*, 167 S.W.3d 365, 374 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (finding expert's opinion that discharge of hazardous chemicals on defendants' property had caused contamination of plaintiffs' properties to be mere speculation where expert failed to rule out alternative sources for assumed contamination); *Martinez v. City of San Antonio*, 40 S.W.3d 587, 595 (Tex. App.—San Antonio 2001, pet. denied) (holding plaintiffs' expert testimony constituted no evidence defendant caused plaintiffs' injuries because expert failed to rule out alternative sources of lead contamination in arriving at lead calculation); *Hess v. McLean Feedyard, Inc.*, 59 S.W.3d 679, 687 (Tex. App.—Amarillo 2000, pet. denied) ("[A]n expert should carefully consider and rule out alternative causes, and the failure to rule out other causes results in speculation and conjecture and amounts to no evidence of causation."); *Mitchell Energy Corp. v. Bartlett*, 958 S.W.2d 430, 448 (Tex. App.—Fort Worth 1997, pet. denied) ("[The expert's] failure to rule out other causes of the presence of hydrogen sulfide in appellees' water renders his opinion 'little more than speculation.'") (citation omitted).

B

Respondeat-Superior Liability and Negligent Hiring, Training, and Retention

In issues six and eight, the appellants contend that the trial court erred in granting summary judgment because there is more than a scintilla of evidence and, at a minimum, a fact issue exists regarding whether (1) an NOV employee was negligent, thereby giving rise to respondeat-superior liability, and (2) NOV negligently hired, retained, or trained its employees.

Under the doctrine of respondeat superior, an employer may be held vicariously liable when the negligence of its employee, acting in the scope of his employment, is the proximate cause of another's injury. *See DeWitt v. Harris Co.*, 904 S.W.2d 650, 654 (Tex. 1995); *CoTemp, Inc. v. Houston West Corp*., 222 S.W.3d 487, 492 n.4 (Tex. App.—Houston [14th Dist.] 2007, no pet.). To hold an employer liable for tortious actions of its employees, a claimant must prove the following: (1) an agency relationship existed between the employee (the tortfeasor) and the employer; (2) the employee committed a tort; and (3) the tort was in the course and scope of the employee's authority. *See Zarzana v. Ashley*, 218 S.W.3d 152, 159 (Tex. App.—Houston [14th Dist.] 2007, pet. struck).

By contrast, a claim of negligent hiring, training, and retention is based on an employer's direct negligence, rather than the employer's vicarious liability for the torts of its employees. *CoTemp*, 222 S.W.3d at 492 n.4. Under the tort of negligent hiring, training, and retention, an employer who negligently hires an incompetent or unfit individual may be directly liable to a third party whose injury was proximately caused by the employee's negligent or intentional act. *See id*. at 492. Thus, to maintain claims of respondeat superior and negligent hiring, training, and retention, a plaintiff must establish a negligent act or omission on the part of the employee. *See id.* at 492 & n.4.

Here, appellants assert that Lee "operated the rig in a negligent manner" by running the sand line too fast. They also contend that Lee was negligent by failing to

"inspect the premises where Mr. Blaine would be working." In particular, they claim that Lee failed to determine whether the guard gate was high enough and the floor plate was properly secured. However, as discussed above, there is no evidence that any of these alleged acts or omissions proximately caused Blaine's accident. In the absence of any evidence of causation, we conclude that the trial court did not err in granting summary judgment on the appellants' claims for respondeat superior and negligent hiring, training, and retention. We overrule issues six and eight.[11]

* * *

We affirm the judgment of the trial court.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Sullivan, and Christopher (Sullivan, J., not participating).

[11] In issue one, the appellants challenge, in general, the trial court's order granting summary judgment on their claims. In issues two, three, and four, the appellants set forth several arguments as to why their claims are not barred by the statute of limitations. In its eleventh issue, National Fire contends that the timely filing of suit by Mrs. Blaine, along with her due diligence in serving NOV, preserved limitations for National Fire's intervention in the action. However, we need not address these issues because they are unnecessary to the final disposition of this appeal. *See* Tex. R. App. P. 47.1 (requiring appellate court opinions to be as brief as practicable but to address every issue raised and necessary to final disposition of appeal).