In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-11-00385-CV

ERMA GONZALES RAMIREZ, INDIVIDUALLY, AND AS REPRESENTATIVE OF THE ESTATE OF RAYMOND RAMIREZ, DECEASED, ET AL, JANIE CROSBY, SAMUEL LEE JACKSON, INDIVIDUALLY A/N/F OF T.C.J., A MINOR CHILD AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF REXEE JO JACKSON, DECEASED, APPELLANTS

V.

ROBERT GARCIA AND CUAHUTEMOC ("TIM") GONZALEZ, APPELLEES

On Appeal from the 154th District Court
Lamb County, Texas
Trial Court No. 17,796, Honorable Felix Klein, Presiding

January 20, 2016

MEMORANDUM OPINION ON REMAND

Before QUINN, C.J., and CAMPBELL and HANCOCK JJ.

On remand from the Texas Supreme Court, this cause comes to this Court for consideration of one issue: whether the trial court properly granted appellee Cuahutemoc ("Tim") Gonzalez's no-evidence summary judgment motion on the issue of common-law negligent hiring of an independent contractor. On appeal, Samuel Lee Jackson, in his individual and both representative capacities, contends that he brought

forth sufficient evidence to defeat Gonzalez's no-evidence motion for summary judgment. Gonzalez contends that Jackson failed to do so. We will affirm the trial court's summary judgment in favor of Gonzalez.

Factual and Procedural History

The cause arises from a tragic accident on October 5, 2009, involving a truck filled with silage driven by Raymond Ramirez. When a tire in poor condition blew out on that truck, it collided with a vehicle driven by Tammy Jackson and carrying her daughter, Rexee Jo. Ramirez, Tammy, and Rexee Jo were killed in the collision.

We outline the facts and parties involved leading up to the accident. Gonzalez is the owner and sole proprietor of Gonzalez Farms, an entity engaged in the custom harvesting business. In this particular instance, Gonzalez contracted with Chester Farms to harvest silage. The verbal agreement between Chester Farms and Gonzalez included the task of hauling the harvested silage from the Chester Farms field to the Littlefield Feedyard. Chester Farms agreed to pay Gonzalez $6.00 for each ton harvested and delivered to the feedyard and eighteen cents per mile for the hauling.

Gonzalez owned and utilized his own harvesting equipment and used his three eighteen-wheeler trucks for hauling. When it became clear that Gonzalez would need more equipment and drivers to haul the volume of silage harvested at the Chester Farms site, he engaged the services of 3R/Garcia Trucking, owned by Robert Garcia. Beginning in mid-September, Garcia and two other drivers arrived at the Chester Farms site in three seemingly well-maintained eighteen-wheeler trucks and carried on the business of hauling silage per the agreement between Gonzalez and 3R/Garcia. After a

brief weather-related delay of about two and one-half days, harvesting and hauling operations resumed at Chester Farms on October 5, 2009, when 3R/Garcia arrived at the Chester Farms job site with its three usual drivers and three usual trucks. However, also arriving that day for 3R/Garcia was a fourth truck, a 1980 International tandem truck belonging to Garcia and driven by a fourth driver, Ramirez. The truck was loaded with silage and was en route to the feedyard when the tire blew out causing the truck to careen headlong into oncoming traffic where it collided with the Jacksons' vehicle.

On original submission, this Court concluded that the trial court had erred by granting appellee Gonzalez's no-evidence motion for summary judgment in that there was sufficient evidence to raise fact issues on the matters challenged. *Ramirez v. Garcia*, 413 S.W.3d 134 (Tex. App.—Amarillo 2013), *rev'd sub nom*, *Gonzalez v. Ramirez*, 463 S.W.3d 499, 508 & n.24 (Tex. 2015) (per curiam). The Texas Supreme Court disagreed, reversed our judgment, and remanded the cause for our consideration of one issue that had been originally raised in the alternative: common-law negligent hiring of an independent contractor, as raised by appellant Jackson against Gonzalez. *See Gonzalez*, 463 S.W.3d at 508 & n.24.

Standard of Review

In the trial court, both Jackson and Gonzalez filed motions for summary judgment. Jackson filed a hybrid motion for summary judgment and Gonzalez filed both traditional and no-evidence motions for summary judgment. In his no-evidence motion, Gonzalez challenged Jackson's evidence in support of his negligent hiring cause of action on the following bases: (1) there was no evidence that Gonzalez breached a duty

in hiring 3R/Garcia, and (2) there was no evidence that Gonzalez knew or should have known that 3R/Garcia was incompetent. The trial court granted Gonzalez's no-evidence motion, concluded that it was unnecessary to rule on his traditional motion, and denied Jackson's motion. So, Jackson's issue relating to the negligent hiring of an independent contractor comes to us in the same procedural posture as did the previous issues. That is, faced with competing motions, the trial court granted Gonzalez's no-evidence summary judgment motion on the issues.

That being so, we are called on to "review the summary judgment evidence presented by both sides, determine all questions presented, and render the judgment the trial court should have rendered." *Seabright Ins. Co. v. Lopez*, 465 S.W.3d 637, 641–42 (Tex. 2015). A no-evidence motion for summary judgment is essentially a motion for a pretrial directed verdict. *See* TEX. R. CIV. P. 166a(i); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750–51 (Tex. 2003). After an adequate time for discovery, a party without the burden of proof may, without presenting evidence, seek summary judgment on the ground that there is no evidence to support one or more essential elements of the non-movant's claim or defense. TEX. R. CIV. P. 166a(i).

Because a no-evidence summary judgment is essentially a pretrial directed verdict, we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Chapman*, 118 S.W.3d at 750–51. So, when called on to review a no-evidence summary judgment, we review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless

reasonable jurors could not. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005), and *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002)).

A no-evidence summary judgment is improper if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact on a challenged element. TEX. R. CIV. P. 166a(i); *see Forbes Inc. v. Granada Biosciences, Inc.*, 124 S.W.3d 167, 172 (Tex. 2003); *Chapman*, 118 S.W.3d at 751. "When the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Jelinek v. Casas*, 328 S.W.3d 526, 532 (Tex. 2010) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). Put another way, a no-evidence point will be sustained when "(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Chapman*, 118 S.W.3d at 751 (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). More than a scintilla of evidence exists if it would allow reasonable and fair-minded people to differ in their conclusions. *Forbes Inc.*, 124 S.W.3d at 172 (citing *Chapman*, 118 S.W.3d at 751, and *Havner*, 953 S.W.2d at 711).

Applicable Law: Negligent Hiring of Independent Contractor

We begin with the general rule that an employer of an independent contractor does not have a duty to see that the independent contractor performs the work in a non-negligent manner. *See Jones v. Sw. Newspapers Corp.*, 694 S.W.2d 455, 457 (Tex. App.—Amarillo 1985, no writ) (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415, 418 (Tex. 1985)). It follows, then, that, generally, the employer is not liable for the negligent acts of the independent contractor's subcontractors or servants committed in the prosecution of the work. *Id.* at 457–58 (citing *Moore v. Roberts*, 93 S.W.2d 236, 239 (Tex. Civ. App.—Texarkana 1936, writ ref'd)). Yet, a long-recognized, related rule is that an employer does have a duty to use ordinary care in employing an independent contractor, and if he knowingly employs a negligent contractor, whose negligence in performing the contract injures a third party, he may be liable. *Id.* at 458. This rule prevails so that one who hires an independent contractor cannot relieve himself of liability by contracting with one who is known to negligently perform the work. *See id.*

Texas recognizes a cause of action for the negligent hiring of an independent contractor. *Mireles v. Ashley*, 201 S.W.3d 779, 782 (Tex. App.—Amarillo 2006, no pet.) (citing *Wasson v. Stracener*, 786 S.W.2d 414, 422 (Tex. App.—Texarkana 1990, writ denied)). A person who hires an independent contractor may be held responsible for the contractor's negligent acts if (1) the employer knew or should have known that the contractor was incompetent and (2) a third person was injured because of the contractor's incompetence. *Id.*

A person employing an independent contractor is required to use ordinary care in hiring the contractor. *See McClure v. Denham*, 162 S.W.3d 346, 354 (Tex. App.—Fort Worth 2005, no pet.); *Ross v. Tex. One P'ship*, 796 S.W.2d 206, 216 (Tex. App.—Dallas 1990), *writ denied*, 806 S.W.2d 222 (Tex. 1991) (per curiam); *Jones*, 694 S.W.2d at 458. An employer must use ordinary care so as not to employ or retain an independent contractor it knew or should have known was either personally or through the employment of substitutes by the contractor, negligent in performing the contract. *See Jones*, 694 S.W.2d at 458. One factor courts have looked to in determining whether an employer was negligent in hiring an independent contractor is whether the employer conducted an inquiry into the contractor's qualifications before hiring the contractor. *King v. Assocs. Commercial Corp.*, 744 S.W.2d 209, 213 (Tex. App.—Texarkana 1987, writ denied) (per curiam). If the performance of the contract requires the independent contractor to drive a vehicle, the person employing the independent contractor is required to investigate the independent contractor's competency to drive. *See Mireles*, 201 S.W.3d at 782; *Wasson*, 786 S.W.2d at 422; *Webb v. Justice Life Ins. Co.*, 563 S.W.2d 347, 349 (Tex. Civ. App.—Dallas 1978, no writ).

Analysis

What was required of Gonzalez

With the applicable law in mind, we see that Gonzalez had the duty to use ordinary care so as not to employ or retain an independent contractor he knew or should have known was negligent in performing the contract. *See McClure*, 162 S.W.3d

at 354; *Jones*, 694 S.W.2d at 458. The record before us reveals no evidence that Gonzalez breached that duty.

Gonzalez observed 3R/Garcia's trucks the day he hired 3R/Garcia and noted that 3R/Garcia's trucks that day appeared to be "really nice, up to date, 18 wheelers." At the time Gonzalez hired 3R/Garcia, Gonzalez had heard of the company and knew it was hauling silage at another farm. Approximately four days after hiring 3R/Garcia, Gonzalez spoke with a friendly competitor in the harvesting business about his experience working with 3R/Garcia, and that competitor responded that the company was "good" and "dependable." The harvesting and hauling of the silage then continued without incident for approximately three weeks, until October 5, 2009, the day of the collision, when Ramirez and the tandem truck first arrived at the Chester Farms job site.

The record reveals nothing that would or should have led Gonzalez to know that 3R/Garcia was an incompetent or unfit independent contractor. There is no more than a mere scintilla of evidence that, at the time Gonzalez engaged the services of 3R/Garcia, Gonzalez knew or should have known that 3R/Garcia was incompetent to perform the assigned job. *See Chapman*, 118 S.W.3d at 751. The record does not show that Gonzalez failed to discharge his duty of ordinary care when he hired 3R/Garcia as an independent contractor to haul silage.

Even if it could be said that Gonzalez should have inquired further into the company's drivers' qualifications at the time he hired 3R/Garcia, we could not say that Ramirez's status as unlicensed to operate a commercial vehicle would have been readily discoverable by Gonzalez considering that Ramirez was not a usual driver for

3R/Garcia and had not previously worked at the Chester Farms site until the day of the accident. Nothing from the record before us would have suggested to Gonzalez, at the time Gonzalez hired 3R/Garcia, that 3R/Garcia was unfit. That said, even if Gonzalez did fail to fulfill his duty of ordinary care by failing to check on the qualifications of 3R/Garcia's drivers at the time he hired 3R/Garcia, we cannot say that such is evidence that his failure is the proximate cause of Jackson's damages.

What was not required of Gonzalez

We reiterate two general rules: (1) an employer of an independent contractor does not have a duty to see that the independent contractor performs the work in a non-negligent manner, and (2) the employer is not liable for the negligent acts of the independent contractor's subcontractors or servants committed in the prosecution of the work. *See Jones*, 694 S.W.2d at 457–58.

As evidence of Gonzalez's breach of the duty of ordinary care, Jackson cites the following items: (1) Gonzalez's failure to inspect the tandem truck driven by Ramirez on the day of the fatal collision, (2) Gonzalez's failure to inquire into the competence and qualification of 3R/Garcia's drivers, (3) Gonzalez's direction to Garcia to utilize the tandem truck that was involved in the accident based on the sandy soil conditions at the job site. We address these items in turn.

First, citing federal motor carrier safety regulations, Jackson maintains that Gonzalez breached the duty of ordinary care by failing to inspect the tandem truck Ramirez was driving the day of the accident and by failing to ensure that 3R/Garcia's drivers all had commercial drivers' licenses. Evidence cited by Jackson that Gonzalez

failed to more thoroughly inspect and approve 3R/Garcia's trucks and failed to inquire into and verify whether 3R/Garcia hired safe and qualified drivers in a manner consistent with certain motor carrier regulations is not evidence that Gonzalez breached a duty imposed on him. As the Texas Supreme Court has determined, on these facts, Gonzalez stood in the role of a shipper rather than a motor carrier, upon whom those regulatory burdens may have been imposed. *See Gonzalez*, 463 S.W.3d at 505–06. Thus, Gonzalez was not required to qualify 3R/Garcia's drivers or inspect its trucks. *See id.* (observing that it "makes no sense to burden Gonzalez with the many [regulatory] duties already placed on Garcia"). Absent any statutory or regulatory duty to inspect the trucks used in performance of the job, "[r]easonable diligence" would not require Gonzalez to see that Garcia had a new truck, nor to have made an examination to determine if the tires or other mechanical elements were in proper mechanical condition, and to see that they remained in such condition throughout the performance of the contract. *See Moore*, 93 S.W.2d at 239.[1] Such evidence does not serve to raise a fact issue regarding negligent hiring.

As Gonzalez emphasizes, it was 3R/Garcia, not Gonzalez, that hired Ramirez, and it was 3R/Garcia that was responsible for the inspections, maintenance, and

[1] Studying a similar situation and analyzing *Moore*, the Dallas Court of Appeals observed the following:

> [In *Moore*,] [t]he employer's duty of care was held sufficiently discharged by an inquiry as to whether the contractor was competent to perform the contract and was held not to include a particular inquiry as to whether a driver employed by the contractor had a chauffeur's license or whether the brakes of the truck were kept in good working order. The [*Moore*] court said that the contractor's negligence in these respects would not establish that he was not a competent contractor. The rationale of the opinion appears to be that since the employer used sufficient diligence to determine that the contractor was generally competent to perform the work he was employed to do, the employer had no responsibility for incidental matters within the contractor's exclusive control.

Webb, 563 S.W.2d at 349 (discussing *Moore*, 93 S.W.2d at 238–39).

insurance on its trucks. "[W]hen the negligence arises out of the activity being performed under the contract, the duty to see that work is performed in a safe manner 'is that of the independent contractor' and not that of the party who hired the independent contractor." *Motloch v. Albuquerque Tortilla Co.*, 454 S.W.3d 30, 33 (Tex. App.—Eastland 2014, no pet.) (mem. op.) (citing *Redinger*, 689 S.W.2d at 418); *see also Castillo v. Gulf Coast Livestock Mkt., LLC*, 392 S.W.3d 299, 308 (Tex. App.—San Antonio 2012, no pet.) (observing that a similar relationship between the general contractor and independent contractor's employee was simply "too attenuated to support a claim for negligent hiring").

As we have noted, even if it could be said that Gonzalez should have inquired further into the 3R/Garcia's drivers' qualifications at the time he hired 3R/Garcia, we see no evidence that would have alerted Gonzalez at that time that 3R/Garcia was incompetent or unfit to perform the job. *See Fifth Club, Inc. v. Ramirez*, 196 S.W.3d 788, 796 (Tex. 2006) (noting that "even if [the club] had investigated [the independent-contractor security guard] before hiring him, nothing would have been found that would cause a reasonable employer to not hire [him]"). According to the record, Ramirez, whose qualification and incompetence is the focus, was not working as a driver for 3R/Garcia at Chester Farms until the day of the accident.

As to subsequent developments after the time Gonzalez hired 3R/Garcia, we note that our inquiry is temporally limited; that is, the test and Gonzalez's duty is to determine whether the independent contractor is competent to perform the job *at the time of hire*. *See id.* Gonzalez's duty does not extend to impose on him an ongoing duty to inquire into the competency of the independent contractor to perform its work.

See Motloch, 454 S.W.3d at 33 (rejecting contention that company that hired independent contractor distributing service had an ongoing duty to "assess the [independent contractor's] drivers delivering its product" and "to adopt and enforce policies with respect to its drivers' qualifications").

Finally, as to evidence that Gonzalez directed Garcia to use the tandem truck involved in the collision, the Texas Supreme Court has outlined the proper impact of this evidence: "Even with every reasonable inference in favor of [appellants], all this evidence shows is that . . . Gonzalez suggested but did not require that Garcia bring tandem trucks in light of the conditions at Chester Farms, and that Gonzalez did not request any particular truck but rather suggested a particular type of truck based on the conditions at the loading site." *See Gonzalez*, 463 S.W.3d at 507 (observing also, in footnote 22, that "it was the condition of the tire, not the type of truck, that caused the accident"). Such evidence fails to raise a fact issue and will not serve to defeat Gonzalez's no-evidence motion for summary judgment on any issue related to a common-law negligent hiring cause of action. *See Chapman*, 118 S.W.3d at 751.

Jackson presented no more than a scintilla of evidence that Gonzalez breached his duty to use ordinary care when he hired 3R/Garcia. *See id.* Consequently, Jackson has failed to meet his burden of producing summary judgment evidence raising a genuine issue of material fact. We, therefore, conclude the trial court did not err in granting Gonzalez's no-evidence motion for summary judgment on the negligent hiring claim.

Conclusion

Having overruled the sole issue presented on remand, we affirm the trial court's judgment. *See* TEX. R. APP. P. 43.2(a).

Mackey K. Hancock
Justice