In the
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-23-00060-CV

KATHERINE TOOLE BELL, INDIVIDUALLY, AND KATHERINE TOOLE BELL ON BEHALF OF THE ESTATE OF JO ANN TOOLE, DECEASED, Appellants

V.

SHARON CAIN AND MICHAEL CAIN, Appellees

On Appeal from the 71st District Court
Harrison County, Texas
Trial Court No. 21-0198

Before Stevens, C.J., van Cleef and Rambin, JJ.
Memorandum Opinion by Justice van Cleef

MEMORANDUM OPINION

Sharon Cain was driving her typical route to work when she struck an oak tree that fell across the roadway after a windstorm. She was injured as a result of the collision. She filed a negligence action against the tree's owner, Katherine Toole Bell, both individually and as the executrix of her mother's estate. Cain's husband, Michael, also asserted a derivative claim for loss of consortium. Bell filed traditional and no-evidence motions for summary judgment, arguing in part that she owed no duty to inspect the property for possible dangers to travelers, including Cain. After a hearing, the trial court denied Bell's motions; however, the trial court granted Bell permission to seek an interlocutory appeal, and this Court granted her petition for permission to appeal the trial court's summary judgment order. Our order granting Bell's petition for permission to appeal identified the controlling question of law as follows:

> Whether Defendant Katherine Toole Bell, individually or as executor of the estate of Jo Ann Toole, deceased, as a rural landowner, owed a legal duty to Sharon Cain as a traveler on an adjacent public highway to inspect her land to identify any dangers, such as a tree that was susceptible to being uprooted and falling from Bell's property onto the highway.

In this interlocutory appeal, Bell contends that the trial court erred by denying her motions for summary judgment because she owed no legal duty to Cain.

Because we find that Bell owed no legal duty to Cain, we reverse the trial court's order denying Bell's motions for summary judgment and render a judgment that the Cains take nothing.

I. Factual and Procedural Background

The background facts are not in dispute. Among other tracts, Toole owned a 148-acre tract of land in rural Harrison County, Texas. In 2017, Toole appointed her daughter, Bell, as her attorney-in-fact to manage her affairs. Toole died in Marshall, Texas, on December 18, 2018. Pursuant to Toole's last will and testament, an undivided interest in all real property that she owned immediately vested in her devisees, one of whom was Bell. *See* TEX. EST. CODE ANN. § 101.001(a)(1). One of the properties inherited by Bell was the 148-acre tract at issue, part of which is adjacent to FM Highway 9 in Harrison County, Texas. Bell was named the independent executrix of Toole's estate.[1]

Shortly before dawn on April 25, 2019, Cain was driving her 2016 Ford Explorer South on FM Highway 9 adjacent to the 148-acre tract. Cain was familiar with that area, as it was near her home and part of her regular route to work in Shreveport. Earlier that night, a large oak tree that was situated on the adjacent 148-acre tract owned by Bell was uprooted and blown over by a windstorm, fell across the roadway, and blocked both the southbound and northbound lanes of FM Highway 9. The vehicle traveling in front of Cain struck the oak tree and spun off into the ditch, while Cain, unable to stop, also collided with the tree seconds later, resulting in her injuries.

Cain filed a negligence action[2] against Bell, individually, and on behalf of the estate of Toole, deceased, and against Panola-Harrison Electric Cooperative (PHEC). Cain alleged that

[1]The will was admitted to probate on August 28, 2019.

[2]To the extent that Cain raised claims for public nuisance, the Texas Supreme Court has held that "nuisance is . . . not a cause of action in and of itself." *Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 591 (Tex.

Bell and Toole breached a duty to inspect the property to ensure that it was safe for travelers on the adjacent roadway.

In Cain's discovery responses, she alleged that "[t]he tree in question . . . became uprooted due to the pruning of the tree branches on only one side of the tree causing the oak tree on . . . Toole's property to lean towards and over the Highway 9." Cain alleged that "[PHEC] cut and pruned the tree in a negligent manner, causing the tree to lean over FM Highway 9." The petition alleged that the tree had leaned toward and over the road for many years before the accident and that Bell had a duty to inspect her premises and vegetation to ensure tree(s) were not in decay and unevenly balanced due to excessive pruning, but because Bell had failed "to inspect and maintain the premises – the foreseeable risk that the oak tree posed to motorists along FM Highway 9 went willingly ignored." Cain contended that Bell's "failure to inspect the trees and vegetation for decay and harm was the contemporaneous activity that led to the tree falling."

PHEC moved for summary judgment on the basis that it owed no duty to Cain. The trial court granted PHEC's motion. The trial court subsequently severed Cain's claims against PHEC, and that matter is not before this Court.

Bell also filed a motion for summary judgment and a no-evidence motion for summary judgment, arguing, in pertinent part, that she, as a rural landowner, did not owe Cain a duty. Bell

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2016); *see also Bolton v. Fisher*, 528 S.W.3d 770, 778 (Tex. App.—Texarkana 2017, pet. denied) ("nuisance is not a cause of action"). To the extent that Cain raised claims for gross negligence, gross negligence and negligence are not separable causes of action, because an action for gross negligence includes and presumes the elements of negligence. *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 126 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). In this factual context, there can be no viable claim for gross negligence because we find that Bell had no duty to Cain.

directed the court's attention to the fact that Cain had failed to produce any evidence that Bell or her late mother were ever provided any notice regarding any problems with the tree. Cain's expert arborist, Charles Sadler, testified via affidavit that the tree was "quite large and established" and that a "tremendous amount of force" would have been required to "force[] [it] over." After a hearing, the trial court denied Bell's motion.

Bell filed a motion to reconsider its ruling because PHEC was the only party alleged to have created the dangerous condition—pruning the tree—and that the intervening grant of PHEC's motion dismissed all the claims against that party. During the hearing on the motion for reconsideration, Cain admitted that there was no evidence that PHEC had ever touched the tree, and she also conceded that there was no evidence that Bell or her "predecessors in interest" ever had any notice of any problem with the tree that fell. At the conclusion of the hearing, the trial court denied the motion to reconsider.

On July 18, 2023, the trial court signed an amended order denying Bell's motion for summary judgment and granted permission for Bell to seek an immediate interlocutory appeal pursuant to Section 51.014(d) of the Texas Civil Practice and Remedies Code. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (Supp.). This Court granted Bell's petition for permissive interlocutory appeal.

II. Bell Did Not Owe Cain a Duty

In her sole point of error, Bell contends that the trial court erred by denying her motion for summary judgment because she owed no duty to Cain.

A. Generally, No Duty is Owed to Parties Injured Off Premises

"The threshold inquiry in a negligence case is whether the defendant owes a legal duty to the plaintiff." *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The "defendant in a premises [liability action] is liable only to the extent it owes the plaintiff a legal duty." *Hyde v. Hoerauf*, 337 S.W.3d 431, 435 (Tex. App.—Texarkana 2011, no pet.) (quoting *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008)). If the defendant does not owe the plaintiff a duty, "then no legal liability for a premises liability claim can [exist]." *Dukes v. Philip Johnson/Alan Ritchie Architects, P.C.*, 252 S.W.3d 586, 592 (Tex. App.—Fort Worth 2008, pet. denied); *see Strunk v. Belt Line Rd. Realty Co.*, 225 S.W.3d 91, 99 (Tex. App.—El Paso 2005, no pet.). "The existence of duty is a question of law for the [trial] court to decide from the facts surrounding the occurrence in question." *Centeq Realty, Inc.*, 899 S.W.2d at 197. When the existence of a legal duty is called into question, the reviewing court performs a de novo review to determine from the facts of the case if a duty arose. *See In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994); *City of McAllen v. De La Garza*, 898 S.W.2d 809, 810 (Tex. 1995).

A defendant's "possession and control" of the property on which the plaintiff is injured "generally must be shown as a prerequisite to liability." *City of Denton v. Page*, 701 S.W.2d 831, 835 (Tex. 1986); *see Hirabayashi v. N. Main Bar-B-Q, Inc.*, 977 S.W.2d 704, 706 (Tex. App.—Fort Worth 1998, pet. denied); 59 TEX. JUR. 3D *Premises Liability* § 12 (West, Westlaw through Mar. 6, 2024) (duty of premises owner arises from control of the premises). "[T]o prevail on a premises liability claim a plaintiff must prove that the defendant possessed—that is, owned, occupied, or controlled—the premises where injury occurred." *Wilson v. Tex. Parks &*

Wildlife Dep't, 8 S.W.3d 634, 635 (Tex. 1999) (per curiam). The "control must relate to the condition or activity that caused the injury." *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 528 (Tex. 1997); *see Mayer v. Willowbrook Plaza Ltd. P'ship*, 278 S.W.3d 901, 909 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

B. Bell Owed No Duty to Ensure the Safety of Travelers on the Adjacent Roadway

Generally, "a property owner or occupier owes no duty to make an adjoining public road safe or to warn [travelers thereon] of [any] potential danger in the roadway." *HNMC, Inc. v. Chan*, No. 22-0053, 2024 WL 202323, at *9 (Tex. Jan. 19, 2024). The Texas Supreme Court recently held that "courts should not attempt to craft case-specific duties when recognized duty rules apply to the factual situation at hand." *Id.* at *1.

The general rule that a property owner owes no duty to ensure the safety of travelers on an adjacent roadway contemplates the factual situation in this case. Cain was driving on the roadway and struck a tree that was blown onto the roadway by a windstorm the night before. As stated by the Texas Supreme Court, "[N]o one would think that a land possessor did have a duty of care to others for conditions not caused by the possessor on public highways and streets adjacent to the possessor's land." *Id.* at *5 (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 54 cmt. d (AM. L. INST. 2012)).

However, there are at least four classes of cases in which the Texas Supreme Court has recognized that a defendant can owe a duty on premises it does not own or occupy. The parties dispute whether the facts here fall within any of these classes.

C. Four Classes of Cases Finding that a Landowner Has a Duty to Someone Injured Off Premises

1. Generally

The parties have identified four classes of cases in which a landowner has a duty to someone injured off premises.

First, a person who expressly or impliedly agrees or contracts to make safe a known, dangerous condition of real property may be held liable for the failure to remedy the condition. *See Wilson*, 8 S.W.3d at 635.

Second, a person who created the dangerous condition may be liable even if they do not control the premises when the injury occurred because a property owner may have a duty to avoid jeopardizing or endangering the safety of travelers on an adjacent roadway. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981).

Third, a lessee who assumes actual control over a portion of adjacent property not included in a lease also assumes legal responsibility for that adjacent portion. *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 324 (Tex. 1993).

"Fourth, where an obscured danger exists on land directly appurtenant to the land owned or occupied" and near "where invitees enter and exit the landowner's or occupier's property, the owner or occupier owes a duty to those invitees entering and exiting to warn of the danger." *Hirabayashi*, 977 S.W.2d at 707; *see Renfro Drug Co. v. Lewis*, 235 S.W.2d 609, 615 (Tex. 1950).

The parties raise the applicability of only the second class of cases, so we need not address the remaining three classes.

2. The Second Class of Cases, the *Kraus* Duty Rule

The duty of an "owner or occupant of premises abutting a highway" is to refrain from "jeopardiz[ing] or endanger[ing] the safety of persons using the highway as a means of passage or travel." *Kraus*, 616 S.W.2d at 910. This *Kraus* duty rule, as explained by the Texas Supreme Court, "sounds in premises liability and has a long history." *HNMC, Inc.*, 2024 WL 202323, at *5 (citing *Atchison v. Tex. & Pac. Ry. Co.*, 186 S.W.2d 228, 229 (Tex. 1945)).

In *Kraus*, the travelers on a roadway were injured when a masonry wall fell into the roadway. *Kraus*, 616 S.W.2d at 909. The property owner had been demolishing a larger structure and had prior notice that the wall was leaning and that it presented a danger to the roadway. *Id.* at 910. The court held that the property owner had a duty of care to the travelers when he caused the dangerous condition and had actual knowledge of the dangerous condition on his premises that threatened the travelers on the roadway. *Id.* at 910–11.

This *Kraus* duty rule only applies when the defendant created or permitted to remain "an excavation or other artificial condition so near an existing highway that [the owner or occupier] realize[d] or should [have] realize[d] that it involve[d] an unreasonable risk to others . . . traveling on the highway." *HNMC, Inc.*, 2024 WL 202323, at *5 (alteration in original). This class of cases applies only when the person who owns, possesses, or controls the property "knows or should know [the condition is] unreasonably dangerous." *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 368 cmt. h. (AM. L. INST. 1965)). This Court noted that the *Kraus* duty rule, which Cain alleges applies in this case, "has been limited to cases where [a defendant property owner] negligently releases" a dangerous agency upon the highway.

Hyde, 337 S.W.3d at 437 n.13; *Naumann v. Windsor Gypsum, Inc.*, 749 S.W.2d 189, 191 (Tex. App.—San Antonio 1988, writ denied).

3. Caselaw Analysis

Cain contends that this case most closely mirrors the facts of *Felts v. Bluebonnet Electric Co-op*, where a motorist was injured while driving "in Bastrop County when a dead tree fell on their car." *Felts v. Bluebonnet Elect. Co-op, Inc.*, 972 S.W.2d 166, 167 (Tex. App.—Austin 1998, no pet.). The plaintiff sued the utility company, rather than the landowner. The utility company, Bluebonnet, filed for summary judgment, arguing and showing through evidence that it did not own, occupy, or have within its easement the area where the tree was located, but rather the property adjacent to the roadway. *Id.* at 168. The trial court granted the motion. The court in *Bluebonnet* mentioned that the only other way to attach liability to the utility company would be by showing that the "party affirmatively create[d] a dangerous condition" but noted that such a duty was not pled "in [the] petition or in [the] response to [the utility company's] motion for summary judgment"; therefore, the plaintiff was unable to raise such a claim as "grounds for reversing the summary judgment" decision. *Id.* at 170 n.2. The Austin court, citing Section 363 of the Restatement (Second) of Torts, noted that, "[e]ven assuming that in some sense Bluebonnet 'occupied' the area on which the tree stood, it is questionable whether it would have the duty to inspect and maintain the area" because, while landowners in urban areas have a duty to inspect and remove trees that might fall onto a roadway, courts have been reluctant to impose such a duty in rural areas. *Id.* at 169 n.1. We decline to impose such a duty on rural landowners.

In *Jones v. Wright*, the plaintiffs' minor child died when he was struck by a truck while crossing the road after visiting the defendant's property to observe Christmas lights. *Jones v. Wright*, 667 S.W.3d 444, 446–47, 450 (Tex. App.—Beaumont 2023, no pet.). The Beaumont court acknowledged that, "[o]rdinarily, a person who does not own, [control, or] occupy . . . [the] real property [where the injury occurred] cannot be held liable for [the] dangerous condition thereon." *Id.* at 450. The court held that the defendant landowner owed no duty to protect the minor child from injury because he did not own the roadway where the injury occurred and did not control the truck that struck the child. *Id.* Because there was no duty, the court held that the burden then shifted to the plaintiffs to show that one of the four exceptions to the general no-duty rule applied. *Id.* at 451.

The plaintiffs in *Jones*, like the plaintiffs in this case, argued that the second class of cases applied to impose a duty because the defendant "created a dangerous condition [on the roadway] by releasing a crowd onto the roadway." *Id.* at 449. However, the court of appeals rejected the argument, finding no evidence that the defendant "'released' a crowd or that a crowd killed [plaintiffs' son]." *Id.* at 450.

In *Atchison v. Texas & Pacific Railway*, the railroad company started a grass fire on its right of way, which was next to the road, and the smoke from the fire drifted across the adjacent roadway, causing an accident. *Atchison v. Tex. & Pac. Ry.*, 186 S.W.2d 228, 229 (Tex. 1945). In its decision finding that the railroad had a duty to travelers on the road, the Texas Supreme Court stated, "The smoke was more than a mere condition unconnected with the act of the third party. It was an active agency produced by the respondent's negligence." *Id.* at 232. Similarly,

in *Skelly Oil Co. v. Johnston*, the defendant's oil and gas business had cooling towers that blew water onto the adjacent roadway, causing a motorist to crash. *Skelly Oil Co. v. Johnston*, 151 S.W.2d 863, 865 (Tex. App.—Amarillo 1941, writ ref'd).

In all of those cases, the property owners or occupiers were engaged in commercial activities[3] and were held to have knowledge of the danger because they created or released the danger that caused the injury on the adjacent roadway.

The facts of this case are distinguishable. There is no allegation or evidence that Bell or her predecessors in interest caused the tree to fall into the roadway, released a dangerous agency onto the roadway, or otherwise committed a negligent act. *See Hirabayashi*, 977 S.W.2d at 707 ("dangerous condition" class of cases did not apply because there was no proof the property owner released a dangerous agency onto the roadway); *Guereque v. Thompson*, 953 S.W.2d 458, 468 (Tex. App.—El Paso 1997, writ denied) (no duty was found because the allegedly dangerous "fence did not cause the [child's] death," rather "child drowned in [a] canal . . . sixty feet beyond the fence"); *Dixon v. Houston Raceway Park, Inc.*, 874 S.W.2d 760, 763 (Tex. App.—Houston

[3]Cain also argues that, if the tree's condition is considered natural, the Restatement (Third) of Torts establishes a duty of reasonable care on Bell and Toole because the 148-acre tract is commercial property. Section 54(b) of the Restatement (Third) of Torts states:

> (b) For natural conditions on land that pose a risk of physical harm to persons or property not on the land, the possessor of the land
>
> (1) has a duty of reasonable care if the land is commercial; otherwise
>
> (2) has a duty of reasonable care only if the possessor knows of the risk or if the risk is obvious.

RESTATEMENT (THIRD) OF TORTS § 54(b) cmt. (AM. L. INST. 2012). "Commercial" is defined as "[o]f, relating to, or involving the buying and selling of goods; mercantile . . . [r]esulting or accruing from commerce or exchange[;] . . . [e]mployed in trade; engaged in commerce[;] . . . [o]f, relating to, or involving the ability of a product or business to make a profit." *Commercial*, BLACK'S LAW DICTIONARY (11th ed. 2019). We render no opinion as to whether the property was commercial property.

[1st Dist.] 1994, no pet.) (because the defendant "did not release any dangerous agency onto the highway," no duty was found where driver was killed in a collision as vehicle attempted to turn into defendant's premises).

Cain also cites to *Hamric*, where a man was killed in an automobile collision at a highway intersection where tall grass and weeds had grown to obscure his vision of the intersection, and his widow brought an action against a railway company, a telephone company, and the State Department of Highways and Public Transportation. *Hamric v. Kansas City S. Ry. Co.*, 718 S.W.2d 916, 918–19 (Tex. App.—Beaumont 1986, writ ref'd n.r.e.). The trial court granted summary judgment in favor of the defendants, finding no duty, but the court of appeals reversed, finding that (1) the Department of Transportation owed a preexisting statutory duty of care, (2) the evidence presented a factual issue as to whether the railway and telephone companies breached their duty of care by failing to cut the vegetation, precluding summary judgment, and (3) the evidence presented a factual issue as to whether the Department breached its preexisting statutory duty of maintaining the highway by failing to cut the vegetation, precluding summary judgment. *Id.* at 918–20. The court of appeals noted that, under Section 368 of the Restatement (Second) of Torts, it is enough to subject the possessor of the land adjacent to a highway to liability, but only when that possessor knows, or should know, that the condition of his land has become unreasonably dangerous.

However, because the defendants had a preexisting statutory duty to maintain the property adjacent to the roadway, *Hamric* was governed by the first class of cases—one who undertakes to make a premises safe for others—rather than the second class of cases, which is at

issue here where no such statutory duty exists. Here, even if the pruning of the tree rendered it an artificial condition,[4] Bell had no duty to Cain because there is no evidence that she knew or should have known of the danger posed by the tree, as there is also no allegation or evidence that she or Toole, her predecessor in interest, visited the property or were otherwise put on notice of the danger posed by the tree prior to it falling into the roadway.[5] Therefore, under the facts of this case, the second class of cases does not apply to impose on Bell or Toole a duty to inspect the property.

D. We Do Not Apply the *Phillips* Factors

If no duty is found, Cain urges this Court to apply the factors listed in *Greater Houston Transportation Co. v. Phillips* in order to determine whether a fact-specific duty exists in this case. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). However, the Texas Supreme Court recently held that, when existing duty or no-duty rules apply to the factual circumstances of a given case, it is error to apply the *Phillips* factors to create a case-specific

[4]We render no opinion as to whether the pruning of the tree rendered it an artificial condition.

[5]Cain also cites to *Avery v. Alexander*, where a tree situated on a property owned by a church fell onto the roof of the neighbor's business during Hurricane Rita despite the church being given notice on several occasions that the tree posed a dangerous condition. *Avery v. Alexander*, No. 09-08-00078-CV, 2008 WL 6740797, at *1 (Tex. App.—Beaumont, Aug. 27, 2009, pet. denied) (mem. op.). The evidence established that the church, pastor, and its members were aware that the tree was dead or dying and that the pastor had been told by Avery and others that he "needed 'to do something about that tree'" as limbs had fallen onto Avery's house in the past. *Id*. The case was argued under the first class of cases referenced in this opinion, "[o]ne who agrees to make safe a known dangerous condition of real property." *Jones v. Wright*, 667 S.W.3d 444, 453 (Tex. App.—Beaumont 2023, no pet.) (alteration in original) (quoting *Avery*, 2008 WL 6750797, at *5). The trial court granted summary judgment, finding that the defendant "'voluntarily undertook to remedy the dangerous condition presented by the tree[]' and admitted he should have had the tree taken down before the hurricane" that blew the tree onto the neighbor's house. *Id*. (alteration in original) (quoting *Avery*, 2008 WL 6750797, at *5). However, the court of appeals in *Avery* reversed because the defendants had never sought summary judgment against the plaintiffs' assumed duty exception theory of liability (one of the four recognized exceptions to the no-duty rule). *Avery*, 2008 WL 6750797, at *1. The facts of *Avery* are distinguishable from the facts of the present case because the defendants in *Avery* had actual knowledge that the tree posed a danger to the neighbor's property, and they agreed that it needed to be removed, neither of which is present here.

new duty. *HNMC, Inc.*, 2024 WL 202323, at *3–4. Here, the general no-duty rule governs the facts of the case; therefore, we do not apply the *Phillips* factors.

III. Conclusion

It is not within this Court's authority to create a new duty requiring rural landowners to inspect their lands for trees that might fall. Further, the cases cited by Cain do not support the conclusion that such a duty already exists. Accordingly, we sustain Bell's sole point of error, and we must reverse the trial court's denial of Bell's no-evidence motion for summary judgment.

We render a judgment that the appellees take nothing by their petition.

Charles van Cleef
Justice

Date Submitted: February 7, 2024
Date Decided: March 21, 2024