TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-21-00521-CV

Terrance Joseph Burns, Appellant

v.

Ryan Schobel, Appellee

FROM THE 419TH DISTRICT COURT OF TRAVIS COUNTY
NO. D-1-GN-19-008081, HONORABLE MARIA CANTÚ HEXSEL, JUDGE PRESIDING

MEMORANDUM OPINION

Terrance Joseph Burns appeals the district court's final order granting summary judgment in favor of Ryan Schobel in Burns's premises-liability suit seeking damages for personal injuries sustained in a fall while walking on outdoor steps at Schobel's rental house on Lake Travis. Burns contends that the district court erred by granting summary judgment because the "necessary use" exception—which he expressly presented for the first time during his argument at the summary-judgment hearing—"creates at least a fact issue to support his premises liability claim." We will affirm the district court's order.

BACKGROUND

Burns testified in his deposition that he was injured while staying at Schobel's property with his family and some family friends in August 2019, during his son's 21st birthday. This was their second stay, as they had rented the property for spring break in March 2019.

Burns recalled using a boat from his boat club at Rough Hollow during the spring-break stay but denied using a dock at the rental property.

On the day of his injury, Burns, his wife, and a couple of their friends went to the Rough Hollow boat-club marina and got a boat for a morning cruise. While on the cruise, Burns decided to go to a grocery store for dinner items. The boat pulled up to a dock at the rental property, and Burns stepped off the boat onto the dock. From the dock, Burns walked up a metal staircase. When he reached the top of the metal staircase, Burns saw that he was about to encounter some stone stairs without handrails. He proceeded up the stone stairs. Toward the top, he heard a noise on the lake—like someone "calling for someone"—that caused him to turn, look back, and step off the side of the stairs.[1] A photograph in the record shows the approximate location of his fall:

[1] Burns disputes entries in his medical records on the date of the injury stating that he had been drinking alcohol earlier that day, that he had an odor of alcohol on his breath, and that "[h]is family went out on the lake, and while he was waving to them, he accidentally fell down the steps."

District-court proceedings

Burns initially sued Schobel and VRBO Holdings, Inc., contending that the stairs were unreasonably dangerous because they lacked a handrail.[2] After Burns nonsuited VRBO, Schobel moved for summary judgment, relying on Burns's deposition testimony and discovery responses and the above photograph of the stone stairs as evidence. Schobel, who purchased the rental property in 2014, contended that he "owed no duty for the purposes of premises liability" because the lack of a handrail was an objectively open-and-obvious condition. Schobel also contended that because Burns "already knew about the [lack of a] rail," Schobel had no duty to warn about a risk known to Burns.

Burns filed a response addressing the elements of his premises-liability claim. Additionally, Burns challenged the contention that the lack of a handrail was an open-and-obvious condition, relying on his deposition testimony and that of his engineering expert Jason English. Schobel then filed objections to Burns's summary-judgment evidence.

The district court considered Schobel's summary-judgment motion and evidentiary objections at a hearing convened July 21, 2021, which was not transcribed. *See Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 291 n.141 (Tex. 2004) (noting that creation of reporter's record is "neither necessary nor appropriate to purposes of" summary-judgment hearing). During the hearing, Burns presented a new argument that the necessary-use exception created a fact issue on his premises-liability claim. Schobel objected to that new

[2] Burns pleaded claims for negligence, gross negligence, and premises liability but assigns error only to the district court's summary judgment on the premises-liability claim. Thus, we confine our review to that claim. *See El Paso Healthcare Sys. v. Murphy*, 518 S.W.3d 412, 420 (Tex. 2017) ("It is axiomatic that an appellate court cannot reverse a trial court's judgment absent properly assigned error" (quoting *Pat Baker Co. v. Wilson*, 971 S.W.2d 447, 450 (Tex. 1998))).

argument during the hearing and memorialized his objections in a post-hearing filing the next day. In that filing, out of "an abundance of caution" and "subject to and without waiving" his preceding written objections, Schobel briefed the inapplicability of the necessary-use exception.

On September 16, 2021, the district court signed a final order granting Schobel summary judgment. In its order, the district court states that it considered the motion, the response, the reply, Schobel's evidentiary objections, and his post-hearing filing. The district court sustained Schobel's objections to Burns's medical bills but overruled Schobel's objections to portions of Burns's affidavit and portions of English's deposition and its attachments. Burns appeals.

DISCUSSION

Burns contends that the district court erred by granting summary judgment because there is a fact issue under the necessary-use exception to support his premises-liability claim. We review the order granting summary judgment de novo, viewing the evidence in a light favorable to Burns. *See SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 566 (Tex. 2022). To prevail on his motion, Schobel had to prove that there was no genuine issue of material fact, entitling him to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Barfield*, 642 S.W.3d at 566.

A premises-liability claim requires proof from the plaintiff that: (1) a condition of the premises created an unreasonable risk of harm to the invitee; (2) the owner knew or reasonably should have known of the condition; (3) the owner failed to exercise ordinary care to protect the invitee from danger; and (4) the owner's failure was a proximate cause of injury to the invitee. *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 883 (Tex.

2009). However, "[w]hen the danger is open and obvious, the property owner generally has no obligation to warn of the danger or make the premises safe, as a matter of law." *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 788 (Tex. 2021); *see Elephant Ins. Co. v. Kenyon*, 644 S.W.3d 137, 150 (Tex. 2022) ("Time and again we have declined to impose a duty to warn about open and obvious conditions, even when the actor has control over the premises or the injured party."). In cases involving open-and-obvious conditions, "an invitee exercising ordinary care would have 'knowledge and full appreciation of the nature and extent of danger.'" *Barfield*, 642 S.W.3d at 563.

Schobel's summary-judgment motion contended that he owed no duty to protect or warn Burns about the lack of a handrail, which was an open-and-obvious condition. He further contended that because Burns "already knew about the [lack of a] rail," there was no duty to warn about a risk known to Burns. On appeal, Burns abandons his arguments disputing that the lack of a handrail was an open-and-obvious condition. He contends only that Schobel's summary-judgment arguments "are defeated by the necessary use exception."

Necessary-Use Exception

"The necessary-use exception 'recognizes a landowner's duty to make its premises safe when, despite [the invitee's] awareness of the risks, it is necessary that the invitee use the dangerous premises and the landowner should have anticipated that the invitee is unable to take measures to avoid the risk.'" *Barfield*, 642 S.W.3d at 568 (quoting *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 208 (Tex. 2015)).[3] But as noted, Burns's response to the summary-

[3] Although *Barfield* involves a contractor's injury claim under Chapter 95 of the Texas Civil Practice and Remedies Code, the Texas Supreme Court's discussion of the necessary-use exception is consistent with the application of that exception to premises-liability claims

judgment motion did not expressly present the necessary-use exception. The first time he did so was during the summary-judgment hearing, when he contended that the necessary-use exception created a fact issue on his premises-liability claim.

Burns posits that the summary-judgment evidence referenced in his written response to rebut Schobel's open-and-obvious argument provided "fair notice" that he was asserting the necessary-use exception. We disagree. The substance of his response to this argument was that the lack of a handrail was not an open-and-obvious condition that "through the exercise of reasonable care, [he] ought to have noticed." Burns's response pointed to: (1) building-code provisions;[4] (2) his assumption "that a handrail would be there during this portion of the staircase since it was present for 80% of the rest of the path up and down from the lake to the home"; and (3) his assertion that he did not "recognize this portion as dangerous implicitly because most of the path down to the lake has handrails." As support for his assumption that a handrail would be there and his assertion that he did not recognize a danger without one, Burns referred to excerpts of his deposition testimony stating that he did not give much thought or consideration to a handrail:

> Well, I don't know that I even considered it. I just knew I needed to get from point A to point B, and that was the only option. . . . So, I didn't give much thought to—that, oh, this has a handrail and—and all. It just—you know, it's kind of—it's just a routine thing that you do, you know. I don't—I don't—you know, I mean, I don't think I stopped and gave much thought to, oh, this is a different type of stairs. I need to—I just—just went up, you know.

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generally. *See SandRidge Energy, Inc. v. Barfield*, 642 S.W.3d 560, 568 (Tex. 2022) (citing *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 208 (Tex. 2015), which involved non-statutory claim).

[4] The summary-judgment evidence indicates that the house on the rental property was built in 1983 but the date that the stone stairs were constructed is unknown.

Mere reference to this summary-judgment evidence was insufficient to expressly present the necessary-use exception. "[I]ssues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence." *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). "A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived." *D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009); *see* Tex. R. Civ. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.").

Burns fails to offer precedential authority showing otherwise. He cites a case in which the Texas Supreme Court affirmed summary judgment on a plaintiff's "aiding and abetting" claim because it was not preserved, rejecting the plaintiff's argument that its pleadings provided "fair notice" to the defendant. *See First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 225 (Tex. 2017) (noting that plaintiff's allegation that one defendant knowingly participated in another defendant's breach of fiduciary duty did not provide sufficient information that plaintiff was asserting aiding-and-abetting claim). Burns also relies on a non-precedential case in which the proper defendant was misidentified and moved for summary judgment on limitations, but the plaintiff's summary-judgment response presented allegations that the movant "did not rebut" indicating that the defendants were all essentially the same, thereby supporting the plaintiff's arguments on alter ego and relation-back for tolling of limitations. *See Lim v. Curtis John Hall, D.C., P.C.*, No. 03-96-00530-CV, 1997 Tex. App. LEXIS 3467, at *11 (Tex. App.—Austin July 3, 1997, no pet.) (per curiam) (not designated for

publication).[5] Burns's written summary-judgment response contains no unrebutted allegations indicating that *despite his awareness* of the risk from the lack of a handrail, it was necessary that he use the dangerous premises, as required for the necessary-use exception. *See Barfield*, 642 S.W.3d at 568; *Kroger*, 465 S.W.3d at 208. By contrast, the summary-judgment evidence referenced in Burns's written summary-judgment response shows that Burns expressly *denied his awareness* of the risk posed by the lack of a handrail.

The record reflects that Burns did not expressly present the necessary-use exception in response to Schobel's motion for summary judgment. And because the necessary-use exception was not preserved below, we cannot consider it as grounds for reversal on appeal. *See* Tex. R. Civ. P. 166a(c); Tex. R. App. P. 33.1(a); *Bell v. XTC Cabaret (Dall.), Inc*., No. 05-21-00294-CV, 2022 Tex. App. LEXIS 3029, at *8-9 (Tex. App.—Dallas May 5, 2022, no pet.) (mem. op.) (refusing to consider applicability of legal exception that plaintiff failed to expressly present to trial court in response to defendant's summary-judgment motion); *see also McConnell*, 858 S.W.2d at 341.

We conclude that Schobel showed his entitlement to summary judgment by establishing that no genuine issue of material fact existed as to the open-and-obvious condition of the lack of a handrail, which was the only complained-of condition on the premises. We further conclude that Burns failed to expressly present the necessary-use exception in his written response to Schobel's summary-judgment motion. Accordingly, we overrule both of Burns's appellate issues.

[5] *See* Tex. R. App. P. 47.7 (providing that opinions in civil cases designated "do not publish" by courts of appeals before January 1, 2003, "have no precedential value but may be cited with the notation, '(not designated for publication)'").

CONCLUSION

We affirm the district court's order.

Darlene Byrne, Chief Justice

Before Chief Justice Byrne, Justices Kelly and Smith

Affirmed

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