# NO. 12-08-00315-CV

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

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| ***DOMINGA PALOMINO MENDOZA, INDIVIDUALLY, AND AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF SAMUEL HERNANDEZ, DECEASED, APPELLANT*** | *§* | ***APPEAL FROM THE 7TH*** |
| ***V.*** | *§* | ***JUDICIAL DISTRICT COURT*** |
| ***HARVEY F. CLINGFOST, III d/b/a SWAN CYCLE PARK, INC., HARVEY F. CLINGFOST, JR. d/b/a SWAN CYCLE PARK, INC., PATRICIA E. CLINGFOST d/b/a SWAN CYCLE PARK, INC. AND SWAN CYCLE PARK, INC. d/b/a SWAN RACEWAY PARK, APPELLEES*** | *§* | ***SMITH COUNTY, TEXAS*** |

***MEMORANDUM OPINION***

Dominga Palomino Mendoza, individually and as the personal representative of the estate of Samuel Hernandez, deceased, appeals the trial court's summary judgment entered in favor of Harvey F. Clingfost, III d/b/a Swan Cycle Park, Inc., Harvey F. Clingfost, Jr. d/b/a Swan Cycle Park, Inc., Patricia E. Clingfost d/b/a Swan Cycle Park, Inc., and Swan Cycle Park, Inc. d/b/a Swan Raceway Park. Mendoza raises two issues on appeal. We affirm.

## BACKGROUND

Swan Cycle Raceway Park is a motocross race track located near Tyler, Texas. Swan Cycle Park, Inc. ("Swan") is owned by Harvey F. "Trey" Clingfost, III and his parents, Harvey F. Clingfost, Jr. and Patricia E. Clingfost. Trey resides at the track and is more involved than his parents in its daily operations. Trey's parents reside in the Houston area, but assist him on race

days and, from time to time, perform various jobs at the track. Swan leases the track from Trey and relies upon day laborers to handle the remainder of the many tasks necessary to operate and maintain the facility.

Mendoza's adult son, Hernandez, was a day laborer in Tyler, Texas. Hernandez often worked for Swan, but also worked on other jobs for other entities. Swan attempted to hire Hernandez when it had work for him. When the work was complete, Hernandez would find work with others. Hernandez was paid by the day at a rate determined by Swan. Hernandez's pay depended on the nature of the work he performed and the amount of time required for him to complete the job.

On July 19, 2006, Swan hired Hernandez to gather tires used as boundary markers on the race track, paint them, and return them to the track. Trey picked up Hernandez that morning and took him to the track. Trey, who spoke very little Spanish, told Hernandez, who spoke very little English, what tasks were required of him that day. Thereafter, Trey went to his office located in his house at the track to do paperwork.

Hernandez used a five wheel John Deere AMT utility vehicle ("AMT") and a trailer to gather the tires. Swan owned the AMT. Trey owned the trailer. Trey did not specifically tell Hernandez to use the AMT and trailer, but he assumed that Hernandez would use them. Hernandez loaded approximately sixteen tires onto the trailer and drove the AMT with the attached trailer across the track to the barn where he would paint the tires. As Hernandez was driving along a portion of the track, he lost control of the AMT, which flipped and landed on top of him. By the time he was found, Hernandez had died from his injuries.

Mendoza brought the instant suit on her own behalf as a wrongful death beneficiary and on behalf of Hernandez's estate for the injuries he sustained before he died. She sued Swan for its actions related to Hernandez's injuries and death. She sued the Clingfosts and sought to pierce the corporate veil of Swan. As the trial date approached, Swan and the Clingfosts filed a combined traditional and no evidence motion for summary judgment in which they alleged that (1) Mendoza's claims were subject to Chapter 95 of the Texas Civil Practice and Remedies Code, which concerns a

property owner's liability for acts of an independent contractor,[1] (collectively, the "statute") and (2) Swan and the Clingfosts were entitled to judgment as a matter of law because Mendoza could not satisfy the requirements of the statute. Mendoza responded that the statute did not apply to her claims and, alternatively, that a fact issue existed preventing summary judgment. The trial court ultimately granted both Swan and the Clingfosts' traditional and no evidence motions for summary judgment and entered a judgment that Mendoza take nothing. This appeal followed.

## SUMMARY JUDGMENT

In her second issue, Mendoza complains that the trial court erred by granting summary judgment in favor of Swan and the Clingfosts.

### Standard of Review

The movant for traditional summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); ***Nixon v. Mr. Prop. Mgmt. Co.***, 690 S.W.2d 546, 548 (Tex. 1985). The movant must either negate at least one essential element of the nonmovant's cause of action or prove all essential elements of an affirmative defense. *See* ***Randall's Food Mkts., Inc. v. Johnson***, 891 S.W.2d 640, 644 (Tex. 1995). Once the movant has established a right to summary judgment, the nonmovant has the burden to respond to the motion for summary judgment and present to the trial court any issues that would preclude summary judgment. *See* ***City of Houston v. Clear Creek Basin Auth.***, 589 S.W.2d 671, 678-79 (Tex. 1979).

We review de novo the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the movant. *See* ***Sudan v. Sudan***, 199 S.W.3d 291, 292 (Tex. 2006); ***KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.***, 988 S.W.2d 746, 748 (Tex. 1999). All theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. *See* TEX. R. CIV. P. 166a(c). If the trial court's order does not specify the grounds on which it granted summary judgment, we affirm the trial court's ruling if any of the theories advanced in the motion is meritorious. ***State Farm Fire & Cas.***

[1] *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 95.001–.004 (Vernon 2005).

***Co. v. S.S.***, 858 S.W.2d 374, 380 (Tex. 1993).

When, as here, a party moves for both a traditional and a no evidence summary judgment, generally, we first review the trial court's summary judgment under the no evidence standards of rule 166a(i). ***Ridgway***, 135 S.W.3d at 600. If the no evidence summary judgment was properly granted, we do not reach arguments made in support of the traditional motion for summary judgment. *See* ***id***. at 602. Of course, this rule does not apply unless the same issue was raised in both motions. *See* ***Dunn v. Clairmont Tyler, L.P.***, 271 S.W.3d 867, 870 (Tex. App.–Tyler 2008, no pet.).

## OBJECTIONS TO EVIDENTIARY RULINGS AND APPLICABILITY OF THE STATUTE

As part of her second issue, Mendoza contends that the trial court erroneously overruled her objections to the evidence attached to Swan and the Clingfosts' traditional motion for summary judgment. Mendoza objected to Swan and the Clingfosts' failure to specifically identify the portions of the exhibits that supported their arguments. She also objected to the affidavit of Harvey Clingfost because the affidavit was not signed and notarized. However, based on our review of the record, it is apparent that Mendoza failed to obtain the trial court's rulings on these objections. *See* TEX. R. APP. P. 33.1(a)(2). Therefore, since each of these objections pertain to form, Mendoza waived the objections by failing to obtain rulings from the trial court. *See* ***id.***; ***Stewart v. Sanmina Tex. L.P.***, 156 S.W.3d 198, 207 (Tex. App.–Dallas 2005, no pet.).

We next consider whether the statute applies to Mendoza's suit.[2] As it pertains to the case at hand, the statute applies when a claim is made against a property owner for personal injury to or death of a contractor that arises from the condition or use of an improvement to real property where the contractor constructs, repairs, renovates, or modifies the improvement. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.002 (Vernon 2005). Mendoza argues that several of the elements set forth in section 95.002 are not present. Specifically, Mendoza claims that the statute does not apply because (1) three of the defendants were not owners of the property, (2) the owner of the property was sued under the theory that the owner was the alter ego of Swan, (3) the property was not used primarily for

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[2] This issue was raised as part of Swan and the Clingfosts' traditional motion for summary judgment. Because Swan and the Clingfosts had the burden of proof on this issue, it was not included in their no evidence motion. Therefore, we will address the Swan and the Clingfosts' traditional motion for summary judgment first. *See* ***Dunn***, 271 S.W.3d at 870.

commercial purposes, (4) this was not a construction project, (5) Hernandez's death was not caused by a condition or use of an improvement to real property that he was constructing, and (6) Hernandez was an employee rather than an independent contractor. We address each of Mendoza's arguments in turn.

*Property Ownership*

A "property owner" is a person or entity that owns real property primarily used for commercial or business purposes. TEX. CIV. PRAC. & REM. CODE ANN. § 95.001(3) (Vernon 2005). Ownership of a leasehold interest in real property satisfies this definition. *See* ***Painter v. Momentum Energy Corp.***, 271 S.W.3d 388, 397 (Tex. App.–El Paso 2008, pet. denied) (owner of leasehold interest entitled to protection of the statute); *see also* ***State v. Fiesta Mart, Inc.***, 233 S.W.3d 50, 54 (Tex. App.–Houston [14th Dist.] 2007, pet. denied) (lessee is property owner). Swan leased the track from Trey. Therefore, Swan satisfies the definition of a property owner under the statute.

*Alter Ego Theory*

Mendoza sought to have the Clingfosts held personally liable under the corporate alter ego theory. Consequently, the Clingfosts' liability, if any, is solely derived from Swan's liability. *See* ***Seidler v. Morgan***, 277 S.W.3d 549, 557-58 (Tex. App.–Texarkana 2009, pet. denied). Mendoza argues that his bringing suit against the Clingfosts as the alter ego of Swan removes them from the governance of the statute. However, Mendoza cites no authority in support of this proposition, nor are we aware of the existence of any such authority.

To the contrary, under Mendoza's theory of liability, Swan is the same as the Clingfosts, i.e. the Clingfosts step into the shoes of Swan. Thus, for the purposes of Mendoza's claims, since Swan held an ownership interest in the property, the Clingfosts also held an ownership interest in the property. *See, e.g.,* ***Murray v. O&A Express, Inc.***, 630 S.W.2d 633, 636 (Tex. 1982) (plaintiff's petition defines issues in the lawsuit).

*Commercial Use of the Property*

The evidence also indicates that the property was used for business purposes at all times. Trey resided on the property in a house with a home office very near the track. Nonetheless, it is undisputed that Hernandez was injured on the track. The record further reflects that Swan leased the track for business purposes. Thus, we conclude that the primary purpose of the property involved in

this case was commercial or business.

*Construction Project*

Mendoza argues that this case does not involve a construction project and Hernandez's death was not caused by a condition or use of an improvement to real property that he was constructing. The crux of the issue is whether the motocross track with tires outlining the boundaries constitutes an improvement under the statute. An improvement includes all additions to land other than trade fixtures that can be removed without injury to the property. ***Sonnier v. Chisholm-Ryder Co.***, 909 S.W.2d 475, 479 (Tex. 1995). An "improvement" has also been defined as

> [a] valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development such as a street, sidewalk, sewer utilities, etc.

BLACK'S LAW DICTIONARY 757 (6th ed. 1990).

The summary judgment evidence indicates that Swan owned a racing and race training facility, a central feature of which was the motocross track comprising hills for jumps and tire stacks to delineate boundaries. The record further reflects that the motocross track was a permanent structure and was intended to enhance the value of the property. Thus, we conclude that the motocross track in the instant case constitutes an improvement.

Furthermore, even though the record indicates that Hernandez was working on the tires at the track rather than the track itself, Hernandez's work satisfies the statute's requirement that the claim arise from the contractor's constructing, repairing, renovating, or modifying the improvement. The evidence indicates that Hernandez was hired to take the tires off the track, paint them, and reposition them on the track. Because the tires were part of the boundary of the track, Hernandez was repairing, renovating, or modifying the improvement when he had his accident. *See* ***Francis v. Coastal Oil & Gas Corp.***, 130 S.W.3d 76, 85 (Tex. App.–Houston [1st Dist.] 2003, no pet.) (cleaning of coil tubing of well qualifies as either repair or renovation of well).

*Employee versus Independent Contractor*

Finally, Mendoza argues that Hernandez was an employee rather than an independent

contractor. To determine whether Hernandez was an employee or an independent contractor, we examine whether Swan had "the right to control the progress, details, and methods of operations" of his work. ***Limestone Products Distrib. v. McNamara***, 71 S.W.3d 308, 312 (Tex. 2002). A worker is an employee if the employer controls the means and details of accomplishing the work. *See* ***id.*** To determine the existence of a right to control, we examine the following factors: (1) the independent nature of the worker's business; (2) the worker's obligation to furnish necessary tools, supplies, and materials to perform the job; (3) the worker's right to control the progress of the work except the final results; (4) the time for which the worker is employed; and (5) the method of payment, whether by unit of time or by the job. ***Id***.

Here, Hernandez was hired to do a specific job—paint the tires that served as the track boundary. The methods by which he accomplished this task were left to his discretion. The evidence indicates that Swan provided the necessary tools, but that Hernandez retained the right to control the progress of the work, except for the final result. The record further reflects that upon the completion of the job, Hernandez would be paid in cash at an amount determined by Swan Cycle. Moreover, the summary judgment evidence indicates that Hernandez's pay changed depending on the nature of the work that he was doing and that Hernandez did not complete a W-2 wage and tax statement in which he named Swan as his employer. Finally, the record reflects that Hernandez worked odd jobs for other entities. If he was available and Swan had work for him to do, he would do it. But if he was working for someone else, he would not do work for Swan; there was no consequence for his refusal to perform work for Swan. Examining each of the aforementioned factors, we agree with the implied finding of the trial court that Mendoza was an independent contractor. Furthermore, after considering Mendoza's arguments to the contrary, we conclude that the statute applies.

## EXISTENCE OF A FACT ISSUE

Having determined that the statute applies, we next consider whether Mendoza raised the existence of a fact issue. A plaintiff meets the requirements of the statute by showing (1) the property owner exercised or retained some control over the manner in which the work was performed, and (2) the property owner had actual knowledge of the danger or condition resulting in

the injury and failed to adequately warn. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003. These are two independent and necessary conditions to the imposition of liability. *See* ***Dyall v. Simpson Pasadena Paper Co.***, 152 S.W.3d 688, 699 (Tex. App.–Houston [14th Dist.] 2004, pet. denied); *see also* ***Vanderbeek v. San Jacinto Methodist Hosp.***, 246 S.W.3d 346, 352 (Tex. App.–Houston [14th Dist.] 2008, no pet.) (holding that control and actual knowledge are necessary elements to impose liability). The owner may be aware of the danger but exercise no control, or he may exercise control and have no actual knowledge of the danger; in either instance, the owner is statutorily shielded from liability. ***Dyall***, 152 S.W.3d at 699. Control can be either contractual or actual. ***Vanderbeek***, 246 S.W.3d at 352. Because there was no contract, we focus solely on actual control. ***Id***. Actual control is the control over the manner in which the work is performed. ***Id***.

In their traditional motion for summary judgment, Swan and the Clingfosts argued that because the statute applies, Mendoza was required to demonstrate that Swan (1) exercised and retained some control over the manner in which Hernandez performed the work, other than the right to order the work to start or stop or to inspect progress or receive reports and (2) had actual knowledge of the danger or condition resulting in the personal injury and death of Hernandez and failed to adequately warn. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003. Mendoza demonstrated through Trey's deposition testimony that Trey briefly discussed the tasks Hernandez was hired to complete and left the key in the AMT so that Hernandez could use it. However, Mendoza presented no evidence that Trey or anyone else on behalf of Swan directed Hernandez how to accomplish the task for which he had been hired. The only fact that might be reasonably inferred from the evidence is that Hernandez himself decided to use the John Deere with the trailer. Mendoza presented no evidence that Swan or Trey instructed Mendoza to use the AMT or suggested that he do so. Moreover, there is no evidence in the summary judgment record that Swan or any of the Clingfosts exercised or retained control over the manner in which Hernandez completed the task for which he was hired. Rather, the timing, sequence, and manner of Hernandez's work was determined by Hernandez, and Mendoza presented no evidence that would allow a reasonable juror to find otherwise. As such, we hold that the trial court properly granted Swan City Park and the Clingfosts' traditional motion for summary judgment on the issue of control.

Mendoza's second issue is overruled in part.[3]

## CONCLUSION

We have held that the trial court properly granted Swan and the Clingfosts' traditional motion for summary judgment on the issue of control. Accordingly, we overruled Mendoza's second issue in part. Because Mendoza cannot prevail on her claim without establishing the element of control, we ***affirm*** the trial court's judgment. Mendoza's first issue and the remainder of her second issue are not necessary to the disposition of this appeal. Therefore, we do not address them. *See* TEX. R. APP. P. 47.1.

**BRIAN HOYLE**
Justice

Opinion delivered January 29, 2010.
*Panel consisted of Worthen, C.J., Griffith, J., and Hoyle, J.*

(PUBLISH)

[3] In her first issue, Mendoza contends that the trial court erred in excluding evidence comprising records from an OSHA investigation file. Because we conclude that Swan and the Clingfosts were entitled to judgment as a matter of law even if these investigation records had been considered, we do not reach Mendoza's first issue. *See* TEX. R. APP. P. 47.1.