Affirmed and Opinion Filed August 16, 2022

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-21-00283-CV

KENDRICK PENRICE, Appellant
V.
STORAGE AND PROCESSORS, INC., Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2019-61865A

MEMORANDUM OPINION

Before Justices Myers, Osborne, and Nowell
Opinion by Justice Nowell

Kendrick Penrice sued Storage and Processors, Inc. and others for negligence. Storage and Processors filed a hybrid no-evidence and traditional motion for summary judgment, which the trial court granted. The trial court then granted a motion to sever, and the judgment became final. In this appeal, Penrice argues the trial court erred by granting summary judgment. We affirm the trial court's judgment.[1]

[1] Pursuant to its docket equalization authority, the Supreme Court of Texas transferred the appeal from the Court of Appeals for the First District of Texas to this Court. *See* TEX. GOV'T CODE § 73.001 (authorizing transfer of cases).

A. Factual Background

Storage and Processors provides custom alterations to steel coil according to customers' requests. JB Smooth Trucking Company contracted with Penrice, a commercial truck driver with more than 15 years' experience, to transport custom coil. Penrice had previously been trained to secure and haul coils, and he had hauled loads of coiled steel at least ten times without injury.

On the day of the incident, Storage and Processors loaded the steel coil on to Penrice's truck. Penrice alleged he cut his arm while independently securing the load to his truck. Penrice testified the coils usually have plastic or cardboard covers on them, but the roll he picked up at Storage and Processors did not. He did not ask that a cover be added nor did he inform JB Smooth that he was not comfortable working with the coil. According to an affidavit from a Storage & Processors's employee, "[i]t is standard practice in the industry to not to [sic] wrap this type of material in plastic."

B. Standard of Review

We review a trial court's grant of summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When reviewing a summary judgment, we must (1) take as true all evidence favorable to the nonmovant and (2) indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). When multiple grounds for summary judgment are raised and the trial court does not specify the

ground or grounds relied upon for its ruling, the appellate court will affirm the summary judgment if any of the grounds advanced in the motion are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Knott*, 128 S.W.3d at 831. For a defendant to prevail on a traditional motion for summary judgment, he must either disprove at least one element of the plaintiff's claim as a matter of law, or conclusively establish all elements of an affirmative defense. *Id.*

In a no-evidence motion for summary judgment, the movant asserts that there is no evidence to support an element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015). The trial court must grant the motion unless the nonmovant raises a genuine issue of material fact on each challenged element. *Bradshaw*, 457 S.W.3d at 79.

C. Negligence Law

A plaintiff asserting a negligence action must prove that: (1) the defendant owed a legal duty to the plaintiff; (2) the defendant breached that duty; and (3) the breach proximately caused damages to the plaintiff. *See Elephant Ins. Co., LLC v. Kenyon*, 644 S.W.3d 137, 144 (Tex. 2022). The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Id.*

at 145. "As a general rule, one who employs an independent contractor has no duty to ensure that the contractor safely performs its work." *Doe v. YUM! Brands, Inc*., 639 S.W.3d 214, 232 (Tex. App.—Houston [1st Dist.] 2021, no pet.) (quoting *JLB Builders, L.L.C. v. Hernandez*, 622 S.W.3d 860, 864–65 (Tex. 2021)). "Because an independent contractor has sole control over the means and methods of the work to be accomplished," the entity that hires or enters an agreement with the independent contractor is generally not liable vicariously for the tort or negligence of the contractor. *Id.* (citing *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998) (citations omitted)). An exception to this rule arises when the contracting entity "retains some control over the manner in which the contractor performs the work that causes the damage." *Id.* (citing *Hernandez*, 622 S.W.3d at 865).

D. Analysis

Storage and Processors argues it did not owe a duty to Penrice. We agree. JB Smooth hired Penrice; Storage and Processors did not. Additionally, even if Storage and Processors had hired Penrice, Penrice was an independent contractor. Applying the general rule, Storage and Processors would not have owed a duty to Penrice as an independent contractor. *See id.* The exception to the rule would not apply in this instance as the evidence shows Penrice was responsible for securing the load independently and Storage and Processors did not retain control over the manner in which he performed the work that allegedly caused the injury. *See id.* Accordingly,

the trial court did not err by concluding Storage and Processors did not owe a duty to Penrice.

Penrice argues Storage and Processors owed a duty to him because it created a dangerous condition when it cut the steel and recoiled it but left the edges uncovered. In making this argument, Penrice employs language relevant to a premises-liability claim. *See Watanabe v. Summit Path Partners, LLC*, No. 01-19-00302-CV, 2021 WL 3501542, at *8 (Tex. App.—Houston [1st Dist.] Aug. 10, 2021, no pet.) (mem. op.). Premises liability is a separate and distinct theory of recovery, which requires a plaintiff to prove different, albeit similar, elements to secure a judgment in his favor. *See Torres v. Pasadena Ref. Sys., Inc*., No. 01-18-00638-CV, 2022 WL 1467374, at *6 (Tex. App.—Houston [1st Dist.] May 10, 2022, no pet. h.) (mem. op.) (citing *United Scaffolding, Inc. v. Levine*, 537 S.W.3d 463, 471 (Tex. 2017)). Penrice did not assert a premises-liability claim; he asserted a negligence claim. Accordingly, his argument based on premises-liability law is unavailing.

E. Conclusion

Because Storage and Processors did not owe a duty to Penrice, the trial court did not err by granting its motion for summary judgment. We affirm the trial court's judgment.

/Erin A. Nowell//
ERIN A. NOWELL
JUSTICE

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Court of Appeals
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JUDGMENT

KENDRICK PENRICE, Appellant	On Appeal from the 281st District Court, Harris County, Texas
No. 05-21-00283-CV V.	Trial Court Cause No. 2019-61865A.
STORAGE AND PROCESSORS, INC., Appellee	Opinion delivered by Justice Nowell. Justices Myers and Osborne participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that each party bear its own costs of this appeal.

Judgment entered this 11th day of August 2022.