Dissenting opinion issued August 11, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00492-CV

THOMAS FARRAR, Appellant

V.

SABINE MANAGEMENT CORPORATION A/K/A SABINE PROPERTIES MANAGEMENT, INC. AND NORTHWEST BUILDING, LTD., Appellees

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2006-14247

DISSENTING OPINION

As a matter of law, the natural accumulation of ice or mud does not create an unreasonable risk of harm. *See, e.g.*, *Scott & White Mem'l Hosp. v. Fair*, 310 S.W.3d 411, 419 (Tex. 2010); *M.O. Dental Lab v. Rape*, 139 S.W.3d 671, 676

(Tex. 2004) (per curiam); *Johnson County Sheriff's Posse, Inc. v. Endsley*, 926 S.W.2d 284, 287 (Tex. 1996); *Brownsville Navigation Dist. v. Izaguirre*, 829 S.W.2d 159, 160–61 (Tex. 1992). The same rule applies to the naturally occurring condition at issue in this case, a surface made wet by rain. No evidence has been produced to show that the wheelchair ramp where appellant Thomas Farrar fell was slippery for any reason other than the natural occurrence of rain. Accordingly, I would affirm the judgment of the trial court because the evidence is insufficient to create a genuine issue of material fact as to whether an unreasonably dangerous condition existed on the premises. TEX. R. CIV. P. 166a(i); *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 556 (Tex. 2002); *Seideneck v. Cal Bayreuther Associates*, 451 S.W.2d 752, 754–55 (Tex. 1970).

In support of his allegation that the slippery painted surface of the wheelchair ramp constituted an unreasonably dangerous condition, Farrar presented evidence that the surface of the ramp was painted three weeks before he fell on it. The surface of the ramp was not tested while wet, and agents of Sabine and Northwest agreed that it should have been so tested. Farrar testified that shortly after his fall, the property manager of the premises told him that a man checking fire alarms earlier on the same day slipped on the ramp. This evidence did not indicate that the ramp was wet at the time of the prior slip, why the man slipped, or that the man fell or suffered any injury. Farrar also presented evidence

that he was wearing special-issue postal shoes to help prevent slips and falls. He alleges that when he stepped on the painted surface of the ramp, his feet slipped out from under him, resulting in his injury.

A condition poses an unreasonable risk of harm when there is a "sufficient probability of a harmful event occurring that a reasonably prudent person would have foreseen it or some similar event as likely to happen." *Brown*, 80 S.W.3d at 556; *Seideneck*, 451 S.W.2d at 754. In this context, "foreseeability does not require that the exact sequence of events that produced an injury be foreseeable." *Brown*, 80 S.W.3d at 556. "Instead, only the general danger must be foreseeable." *Id.*

To defeat Sabine and Northwest's no-evidence motion for summary judgment, Farrar was required to produce evidence raising a fact issue as to the existence of an unreasonably dangerous condition. TEX. R. CIV. P. 166a(i). "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." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362–63 (1960)); *see*

also Serv. Corp. Int'l v. Guerra, No. 09-0941, 54 Tex. Sup. Ct. J. 1191, 2011 WL 2420208, at *3 (Tex. June 17, 2011) (quoting *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)). To be more than a scintilla, the evidence must rise "to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). However, "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, such evidence is in legal effect no evidence, and it will not support a verdict or judgment." *Seideneck*, 451 S.W.2d at 755 (citing *Joske v. Irvine*, 91 Tex. 574, 44 S.W. 1059 (1898)); *see also Guerra*, 2011 WL 2420208, at *3.

As explained below, none of the evidence produced by Farrar creates anything more than suspicion that the painted surface of the wheelchair ramp was an unreasonably dangerous condition.

1. *Creation of condition*. Farrar identifies the fact that Sabine and Northwest created the condition of a freshly painted surface on the wheelchair ramp as an important consideration in determining whether there was an unreasonably dangerous condition on the premises. Certainly the fact that the owner and occupier of the building were responsible for the painting of the ramp is relevant to their actual or imputed knowledge of the condition. But the mere fact

that Sabine and Northwest controlled the painting of the wheelchair ramp is not probative as to the likelihood that a pedestrian might have been injured when the wheelchair ramp inevitably became wet from rain. *See Brown*, 80 S.W.3d at 556.

Likewise, none of Farrar's evidence about how the wheelchair ramp was painted tends to show that a dangerous condition resulted. Farrar contends that Sabine and Northwest used "a paint that enhanced the normally occurring slipperiness of rain water on a concrete surface," but he produced no evidence of this. The evidence showed only that the "safety paint" used to paint the ramp was purchased from a hardware store, and that employees at the hardware store suggested that sand or gravel should be mixed with the paint to create traction and prevent slipping. The evidence showed that sand was mixed in the paint before it was used to paint the ramp. No evidence was presented of the amount of sand used, or to show that it was an insufficient amount of sand to make the paint safe for its intended use. No evidence was presented to show the properties of the paint used on the wheelchair ramp, either with or without the sand, to demonstrate that the paint did or did not enhance "the normally occurring slipperiness of rain water on a concrete surface." No evidence was presented to show any standard for measuring the surface traction of a wheelchair ramp to determine, based on the incline of the ramp, whether it is safe for pedestrian traffic, nor was any evidence presented to show how the surface traction and incline of the ramp in question

compared to any such standard. *Cf. Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161, 162 (Tex. 2007) (per curiam) (plaintiff's expert evaluated risk of harm arising from pedestrian ramp by reference to the Texas Accessibility Standards, http://www.tdlr.state.tx.us/AB/tas/abtas.htm, and the American Society for Testing and Materials's *Standard Practice for Safe Walking Surfaces*). *See generally* GARY M. BAKKEN ET AL., SLIPS, TRIPS, MISSTEPS AND THEIR CONSEQUENCES 13–32 (2d ed. 2007). No evidence was shown of the coefficient of friction between the painted wheelchair ramp surface and Farrar's shoes. *See* BAKKEN ET AL., *supra*, at 13–32. In short, the evidence of the mere fact that the wheelchair ramp was recently painted was completely inadequate to demonstrate that an unreasonably dangerous condition resulted from the work. *See, e.g.*, *Seideneck*, 451 S.W.2d at 755 ("[W]hen 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, such evidence is in legal effect no evidence, and it will not support a verdict or judgment").

2. ***Failure to test.*** Farrar also relies on Sabine's and Northwest's admitted failure to test the wheelchair ramp under wet conditions. If there were a dangerous condition on the premises, evidence of a failure to test a painted surface created by the owner and occupier of the property would be relevant to the question of whether ordinary care had been exercised to reduce or eliminate the

risk of harm. But the failure to test is not itself evidence that the condition was dangerous. *See id*.

3. ***Prior incident.*** Evidence of a similar injury or complaint attributable to the same condition is probative on the question of whether the condition posed an unreasonable risk of harm. *See id*. at 754; *Hall v. Sonic Drive-In of Angleton, Inc.*, 177 S.W.3d 636, 646 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). However, in this case, the only evidence of a similar injury or complaint is Farrar's own testimony that Marshall told him that a man checking the building's fire alarm system had also slipped on the ramp earlier the same morning. The panel majority's misleading reference to "two complaints that the wheelchair ramp was slippery when wet" includes Farrar's own complaint and erroneously suggests that the first complaint attributed a slip to a wet or slippery ramp when the evidence showed no such thing.

Apart from being potentially hearsay (the evidence does not indicate whether Marshall was speaking based on her personal knowledge, or in her capacity as an agent of Sabine, or whether she was simply repeating a statement by the fire-alarm tester), the evidence was inadequate to demonstrate a sufficiently similar injury or complaint. The evidence did not indicate that the earlier incident involved a fall, that the wheelchair ramp was wet at the time, or that the other man attributed his slip to the surface being slippery due to rain or some other reason.

See Seideneck, 451 S.W.2d at 754 ("evidence of other falls attributable to the same condition . . . would be probative"); *Hall*, 177 S.W.3d at 646. This weak evidence of one prior slip under unknown conditions was therefore inadequate to raise a genuine issue of material fact as to the existence of an unreasonably dangerous condition. *See Seideneck*, 451 S.W.2d at 755.

4. ***Fact of plaintiff's own fall.*** Farrar relies upon the evidence of his own fall, the manner in which he fell, and the fact that he wore shoes designed to prevent falls as evidence that the wheelchair ramp was unreasonably dangerous. However, the mere fact that a person slips is not, by itself, proof of an unreasonably dangerous premises condition. "[T]he fact an accident happens is no evidence that there was an unreasonable risk of such an occurrence . . . ." *Thoreson v. Thompson*, 431 S.W.2d 341, 344 (Tex. 1968); *see also Dickson v. J. Weingarten, Inc.*, 498 S.W.2d 388, 389 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ); *H.E.B. Food Stores, Inc. v. Flores*, 661 S.W.2d 297, 300 (Tex. App.—Corpus Christi 1983, writ dism'd); *Ogueri v. Texas S. Univ.*, No. 01-10-00228-CV, 2011 WL 1233568, at *5 n.4 (Tex. App.—Houston [1st Dist.] Mar. 31, 2011, no pet.) (mem. op.) (citing *Eubanks v. Pappas Restaurants, Inc.*, 212 S.W.3d 838, 840–41 (Tex. App.—Houston [1st Dist.] 2006, no pet.)) ("The mere fact that [plaintiff] slipped does not, by itself, prove that the condition of the floor posed a foreseeable, unreasonable risk of harm."); *Smylie v. First Interstate Bank, Tex.*,

No. 14-99-00713-CV, 2000 WL 1707308, at *2 (Tex. App.—Houston [14th Dist.] Nov. 16, 2000, no pet.). Farrar likewise presented no evidence to demonstrate that either the manner of his fall or the fact that he fell while wearing postal shoes was indicative of an unreasonably slippery surface. Accordingly, none of this evidence raises a fact issue as to the dangerousness of the ramp's surface.

5. ***Subsequent remedial measures*****.** Finally, Farrar also submitted, and he relies upon, evidence of subsequent remedial measures undertaken with respect to the wheelchair ramp after his injury. This evidence is not admissible for the purpose of demonstrating the liability of Sabine and Northwest, *see* TEX. R. EVID. 407(a), and accordingly it should not be given any weight in our no-evidence review. *See, e.g.*, *Havner*, 953 S.W.2d at 711 (a "no evidence point will be sustained when . . . the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact"); *Guerra*, 2011 WL 2420208, at *3.

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In sum, the evidence presented by Farrar does not amount to any more than a scintilla of evidence that the painted wheelchair ramp was unreasonably slippery or otherwise constituted an unreasonably dangerous condition. Because Farrar failed to satisfy his burden to come forward with summary judgment evidence raising a

genuine issue of material fact as to this element of his claim, no-evidence summary judgment was properly granted. For that reason, I respectfully dissent.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.

Justice Massengale, dissenting.