Opinion issued December 22, 2011.

In The
Court of Appeals
For The
First District of Texas

NO. 01-11-00047-CV

FOODTOWN, GERLAND'S FOOD FAIR, INC., GERLAND'S CORPORATION, AND GERLAND'S REALTY, INC., Appellants
V.
EVA TANGUMA, INDIVIDUALLY AND AS NEXT FRIEND OF ALBERT TANGUMA, Appellee

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On Appeal from County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 905,713

MEMORANDUM OPINION

Eva Tanguma sued Foodtown individually and on behalf of her son, Albert Tanguma, alleging Foodtown's negligence proximately caused a hand injury to Albert when his hand was caught in a conveyor belt during a trip to the grocery store. A jury found that Foodtown and Albert were both negligent, attributing

sixty percent fault in the incident to Foodtown and forty percent to Albert. The jury awarded Mrs. Tanguma damages for Albert's medical expenses, and it awarded Albert damages for past and future physical impairment. Foodtown appeals, contending that the evidence is legally insufficient to support the jury's verdict because the Tangumas did not secure jury findings against Foodtown for a premises defect, and the jury heard no evidence that Foodtown had engaged in any negligent activity. The jury heard evidence about a defect in the condition of the conveyor belt, but the record reveals no evidence of any negligent act by a Foodtown employee. Because the jury's findings address only the latter theory, we reverse and render.

Background

In October 2005, Eva Tanguma and her son Albert, then thirteen, went to Foodtown to buy groceries. Foodtown was especially busy that day, so Albert decided to leave his mother's chosen check-out lane and to wait for her by the adjoining check-out lane, which was closed. Albert waited for his mother near the vacant register's bagging area and drank a soda.

When Albert placed his soda on the vacant register counter, the conveyor belt suddenly turned on. It caught Albert's right hand and crushed his hand between the belt and the metal plate covering the pulley mechanism. Albert yelled

and his mother ran to the register. While Mrs. Tanguma searched for the stop button, an employee intervened and stopped the belt.

Albert's hand was swollen and bruised after the incident. Mrs. Tanguma took her son to a doctor the following day. X-rays revealed no bone damage. The doctor prescribed physical therapy to treat the stiffness in Albert's hand. When Albert's condition did not improve, Albert's mother insisted that her son receive an MRI. The MRI revealed no damage to Albert's hand. Mrs. Tanguma stated that, although physical therapy has helped her son, Albert's hand still bothers him because "when the weather changes, he can tell. It hurts him if it's cold or humid or if it's going to rain." The jury saw Albert's medical records and proof of the medical expenses incurred in the treatment of his hand.

At trial, the parties disputed the events that led to Albert's injury. Foodtown's witnesses explained that its cashiers operated the conveyor belt by pressing a recessed button at the base of the register. According to Foodtown, Albert was leaning over the register and accidentally hit the button. Albert, in turn, denied playing with the belt and testified that he did not know how the belt turned on. Mrs. Tanguma likewise testified that Albert played no part in turning on the conveyor belt.

After the close of evidence, the trial court gave the jury a simple negligence instruction: "Did the negligence, if any, of the persons named below, proximately

cause the occurrence in question?" The jury found that both Foodtown and Albert were negligent. It attributed sixty percent of fault for the accident to Foodtown and forty percent fault to Albert. The jury awarded damages for Albert's past medical expenses and for his past and future physical impairment. Foodtown moved for judgment notwithstanding the verdict and for new trial, contending that the evidence was legally insufficient to support the jury's verdict. The trial court denied the motions and rendered judgment on the verdict.

Evidentiary Sufficiency

Foodtown contends that the trial court erred in entering judgment on a negligent-activity theory because there was no evidence or factually insufficient evidence to submit this claim to the jury.

A. Standard of review

To demonstrate legal insufficiency on appeal, a litigant that did not bear the burden of proof at trial must show that there is no evidence to support the contested finding. *Croucher v. Croucher*, 660 S.W.2d 55, 58 (Tex. 1983); *Heritage Hous. Dev., Inc. v. Carr*, 199 S.W.3d 560, 565 (Tex. App.—Houston [1st Dist.] 2006, no pet.). 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 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. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). A reviewing court must view the evidence in a light most favorable to the verdict, indulging every reasonable inference that supports it, but the court may not disregard evidence that allows only one inference. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). "The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *Id.* at 827.

In reviewing a factual sufficiency challenge, we consider and weigh all of the evidence supporting and contradicting the challenged finding and set aside the finding only if the evidence is so weak as to make the finding clearly wrong and manifestly unjust. *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *see Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 445 (Tex. 1989).

B. Premises liability or negligent activity?

A premises owner "may be liable for two types of negligence in failing to keep the premises safe: that arising from an activity on the premises, and that arising from a premises defect." *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997) (citing *Redinger v. Living, Inc.*, 689 S.W.2d 415, 417 (Tex. 1985)); *see Coastal Marine Serv. of Tex. v. Lawrence*, 988 S.W.2d 223, 225 (Tex. 1999). "[N]egligent activity encompasses a malfeasance theory based on

affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010); *see In re Tex. Dep't of Transp.*, 218 S.W.3d 74, 77 (Tex. 2007); *State v. Shumake*, 199 S.W.3d 279, 284 (Tex. 2006); *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 753 (Tex. 1998); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992); *see also Kroger Co. v. Persley*, 261 S.W.3d 316, 319 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (cautioning that trial court should not submit negligent activity claim to jury unless evidence shows that injury was caused by or was contemporaneous result of negligent activity itself rather than condition created by negligent activity, and that if injury was caused by condition created by activity rather than activity itself, plaintiff is limited to premises defect theory of liability). The Supreme Court of Texas consistently has rejected attempts to blur the distinctions between these two types of claims. *Shumake*, 199 S.W.3d at 284.

The Tangumas elected to pursue recovery under a negligent activity theory, and, in keeping with that theory, the trial court instructed the jury on simple negligence. Foodtown contends that the judgment must be reversed because there is no evidence to support a finding that Foodtown engaged in any negligent conduct that caused Albert's injury. Foodtown maintains that the Tangumas'

claims rest solely on a premises defect theory. The Tangumas respond that evidence that the conveyor belt turned on is enough to support a negligent activity theory.

Dallas Market Center Development Co. v. Liedeker, 958 S.W.2d 382 (Tex. 1997), is instructive on this issue. In a hotel owned by Dallas Market Center (DMC), the timing device on a freight elevator automatically lowered the entry gate twenty-one seconds after it opened. *Id.* at 383. When the elevator was originally installed, it had sounded a warning bell when the gate was about to lower. *Id.* But, after the noise annoyed hotel guests, the bell was muffled. *Id.* Liedeker, a florist, was loading plants onto the elevator as the gate began to lower. *Id.* The gate struck her head and injured her neck. *Id.*

The trial court in *Liedeker* submitted the case to the jury under a negligent activity theory. *Id.* The Supreme Court reversed on an unrelated charge error, but, noting the possibility that the case would be retried, also addressed DMC's contention that the case should have been submitted under a premises defect theory rather than a negligent activity theory. *Id.* at 385. The Court agreed with DMC, observing that "Liedeker claims that her injury was caused by the condition of DMC's elevator, not by any conduct of DMC at the time of her injury." *Id.*

Like the moving conveyor belt here, the moving gate in *Liedeker* was the immediate cause of the plaintiff's injury. In each case, though, the motion was not

caused by the premises owner's affirmative, contemporaneous act, but by an allegedly defective condition on the premises. In *Liedeker*, the muting of the warning bell was the condition that caused the injury. Here, the plaintiffs pointed to the accessibility of the conveyor belt's on/off switch.

We agree with Foodtown that no evidence supports a finding that its negligent activity caused Albert's injury. The simple negligence question set forth in the charge could have supported the judgment under that theory, but it "cannot support a recovery in a premises defect case." *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 529 (Tex. 1997). To prevail under a premises defect theory, the plaintiff must prove (1) that the owner had actual or constructive knowledge of some condition on the premises, (2) the condition posed an unreasonable risk of harm, (3) the owner did not exercise reasonable care to reduce or eliminate the risk, and (4) the owner's failure to use such care proximately caused the plaintiff's injuries. *Keetch*, 845 S.W.2d at 264 (citing *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983)). The Tangumas, as plaintiffs, bore the burden to present evidence and secure findings on these elements. *See Olivo*, 952 S.W.2d at 529–30 (reversing and rendering because plaintiff failed to secure findings on essential elements of premises liability claim and elements were not "necessarily referable" under Rule 279 to elements

submitted). Because they did not, we hold that the trial court erred in entering judgment in their favor.

Conclusion

We hold that the evidence is legally insufficient to support the judgment on the Tanguma's negligence claim. We therefore reverse and render judgment that they take nothing.

Jane Bland
Justice

Panel consists of Chief Justice Radack and Justices Bland and Huddle.