Opinion issued June 13, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-01005-CV

HENRY RAWSON JR. AND SUSAN RAWSON, Appellants

V.

OXEA CORPORATION, DASHIELL CORPORATION, AND MUNDY MAINTENANCE AND SERVICES LLC, Appellees

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On Appeal from the 190th District Court
Harris County, Texas
Trial Court Case No. 2015-07842

OPINION DISSENTING FROM DENIAL OF EN BANC RECONSIDERATION

You can be a millionaire . . . and never pay taxes! You say[,] "Steve . . . how can I be a millionaire . . . and never pay taxes?" First[,] . . . get a million dollars. Now . . . you say, "Steve . . . what do I say to the tax man when he comes to my door and says, 'You . . . have never paid taxes'?" Two simple words. Two simple words in the

> English language: "***I forgot!***" How many times do we let ourselves get into terrible situations because we don't say[,] "***I forgot***"?[1]

Appellants, Henry Rawson Jr. and Susan Rawson (collectively, the "Rawsons"), challenge the trial court's summary judgment order in favor of appellee, Oxea Corporation ("Oxea"), in their suit for negligence and gross negligence after Henry sustained severe injuries while working on Oxea's property. Because the panel errs in holding that Oxea "disproved the actual-knowledge element of the exception to Chapter 95's liability protection as a matter of law"[2] and the Rawsons "failed to offer sufficient evidence to raise a genuine issue of material fact on the[] issue[]," I respectfully dissent from the Court's order denying en banc reconsideration in this case. *See* TEX. R. APP. P. 41.2.

Background

Oxea owns a chemical plant in Baytown, Texas. It also owns an electrical substation across the road that supplies power to the plant. The substation has two

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1 Transcript of Steve Martin's Monologue, SATURDAY NIGHT LIVE TRANSCRIPTS, http://snltranscripts.jt.org/77/77imono.phtml (last visited June 13, 2017) (emphasis added).

2 *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003(2) (Vernon 2011) ("A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property, including personal injury, death, or property damage arising from the failure to prove a safe workplace unless . . . (2) the property owner had ***actual knowledge*** of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn." (emphasis added)).

transformers: Transformer One and Transformer Two. Each transformer supplies electricity to different parts of the plant. On June 9, 2012, a raccoon entered the substation and caused an electrical short, which shut off power to part of the plant and damaged two insulators in the substation.

Oxea dispatched Alvin Kocurek, a journeyman electrician, to address the power outage. He had worked at the plant for thirty-seven years and was the "point person" for the substation.

Since acquiring the substation, Oxea had used a contractor, Dashiell Corporation, and its subsidiary, Dacon Corporation ("Dacon"), to work on the high-voltage equipment. After Oxea contacted Dacon about the power outage, it dispatched Henry, a high-voltage lineman employed by Dacon, to replace the insulators in the substation.

Notably, before Henry could safely replace the insulators in the substation, the substation needed to be "isolated." Isolation is necessary to eliminate a phenomenon called "backfeed," which occurs when electricity flows in the direction opposite its usual course. Here, there was a danger that electricity would backfeed from the plant into the substation where Henry was to replace the insulators. According to Kocurek, backfeed is "an important safety issue" and that is why "isolating" the substation "correctly" was of the utmost importance.

To isolate the substation, Kocurek had to open switches on the lines running into it from the plant. When the switches are open, the lines running from the plant into the substation cannot conduct electricity, and the area where Henry was to work could not be energized with electricity. However, when the switches are closed, the lines can conduct electricity and backfeed can occur.

As part of Oxea's isolation process, Kocurek prepared a hand-written procedure designed to isolate Henry's work area and prevent it from becoming energized at the time that the insulators were being replaced. In doing so, Kocurek reviewed the plant's "one-line diagram," showing all the electrical circuits coming to and going from the different apparatuses in the plant. However, while engaging in the isolation process, Kocurek "forgot" to open the two switches that would impact the area where Henry was working. Those forgotten switches are located on pole tops inside of Oxea's plant, about 1,000 feet away from the insulators and out of the sight of anyone working in the substation, including Henry.

Kocurek alone had the responsibility to ensure that the switches were open on the day that Henry was injured. Prior to that day, Kocurek had known that the switches needed to be open in order to prevent backfeed, and he, in the past, had opened the forgotten switches for that exact purpose. On the day that Henry was to replace the insulators, however, Kocurek did not tell Henry about the risk of backfeed which Kocurek knew was a danger. Kocurek's failure to open the

forgotten switches on the day that Henry was injured resulted in backfeed and allowed electricity to flow from the plant into the substation while Henry was working. As a result, Henry suffered severe injuries. Kocurek's explanation for his failure to open the switches was simply that he "forgot."

In their amended petition, the Rawsons brought claims for negligence and gross negligence, alleging that Oxea owed Henry a duty of care and that duty had been breached. Further, the Rawsons alleged that Oxea committed various acts and omissions which proximately caused the injuries sustained by Henry. In particular, the Rawsons alleged that Oxea knew of backfeed, backfeed posed an unreasonable risk of harm to Henry, Oxea did not exercise reasonable care to reduce or eliminate the risk, and Oxea's failure to use reasonable care proximately caused Henry's injuries.

Oxea moved for summary judgment on the Rawsons' negligence claims, arguing that it was entitled to judgment as a matter of law because Texas Civil Practice and Remedies Code Chapter 95 "preclude[s]" the Rawsons' claims.[3] Oxea argued that Chapter 95 applies to the Rawsons' claims because the evidence conclusively proves that "Henry was injured while employed by a contractor or subcontractor to repair, renovate[,] or modify an improvement to real property owned and used for a business purpose by Oxea" and "the Rawson[s'] claims are for

[3] *See id.* §§ 95.001–.004 (Vernon 2011).

negligence based on a condition or use of the improvement." Further, Oxea asserted that the evidence "conclusively negates" the requirement that Oxea have "actual knowledge of th[e] danger" that injured Henry.

In their response, the Rawsons argued that their claims are not governed by Chapter 95, and, alternatively, if Chapter 95 does apply, then the evidence raises a genuine issue of material fact as to whether Oxea "had actual knowledge of the danger or condition [that] result[ed] in" Henry's injury.[4] Specifically, the Rawsons pointed to Kocurek's deposition testimony in which he explained that he, a journeyman electrician, has worked at Oxea's plant for thirty-seven years and he is in charge of the substation. In order for Henry to replace the insulators, as he had been contracted to do, Kocurek needed to isolate Henry's work area. Kocurek was aware of backfeed and the need to isolate Henry's work area correctly in order to prevent backfeed. Further, Kocurek knew of the potential for backfeed and that backfeed is a dangerous condition. And he was supposed to open the two pertinent switches on the pole tops inside of Oxea's plant to prevent backfeed, but failed to do so because he "forgot." Notably, Kocurek had, in the past, opened the two forgotten switches in order to prevent backfeed, and he failed to tell Henry about the risk of backfeed before Henry began his work replacing the insulators.

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4 *See id.* § 95.003(2).

After a hearing on Oxea's motion, the trial court granted Oxea summary judgment and dismissed the Rawsons' claims against Oxea with prejudice.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). To prevail on a summary-judgment motion, a movant has the burden of establishing that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex.1995). When a defendant moves for summary judgment, it must either (1) disprove at least one essential element of the plaintiffs' cause of action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiffs' cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). Once the movant meets its burden, the burden shifts to the non-movants to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movants will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d

546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movants and any doubts must be resolved in their favor. *Id.* at 549. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

Summary Judgment

In their first and second issues, the Rawsons argue that the trial court erred in granting Oxea summary judgment on their negligence claims because "there is a fact issue as to whether Oxea had actual knowledge of the 'danger or condition.'" *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003(2) (Vernon 2011).

Chapter 95 of the Texas Civil Practice & Remedies Code governs a property owner's liability for acts of an independent contractor. TEX. CIV. PRAC. & REM. CODE ANN. § 95.001–.004 (Vernon 2011) (titled, "Property Owner's Liability for Acts of Independent Contractors and Amount of Recovery"); *Vanderbeek v. San Jacinto Methodist Hosp.*, 246 S.W.3d 346, 350 (Tex. App.—Houston [14th Dist.] 2008, no pet.). And it applies to a claim:

> (1) against a property owner, contractor, or subcontractor for personal injury, death, or property damage to an owner, a contractor, or a subcontractor or an employee of a contractor or subcontractor; and

> (2) that arises from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement.

TEX. CIV. PRAC. & REM. CODE ANN. § 95.002. Further, when Chapter 95 applies, section 95.003 confers liability protection to property owners as follows:

> A property owner is not liable for personal injury, death, or property damage to a contractor, subcontractor, or an employee of a contractor or subcontractor who constructs, repairs, renovates, or modifies an improvement to real property including personal injury, death, or property damage arising from the failure to provide a safe workplace unless:
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> (1) the property owner exercises or retains some control over the manner in which the work is performed, other than the right to order the work to start or stop or to inspect progress or receive reports; and
>
> (2) the property owner had actual knowledge of the danger or condition resulting in the personal injury, death, or property damage and failed to adequately warn.

Id. § 95.003.

Oxea had the burden of establishing Chapter 95's applicability to the Rawsons' claims. *See Cox v. Air Liquide Am., LP*, 498 sw3d 686, 689 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (citing *Rueda v. Paschal*, 178 S.W.3d 107, 111 (Tex. App.—Houston [1st Dist.] 2005, no pet.)). And once Oxea met its burden of establishing Chapter 95's application, then the burden shifted to the Rawsons to raise a fact issue on the requirements of Section 95.003, including actual knowledge, in order to trigger the exception to the liability protections afforded to property owners

under Chapter 95. *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 568 (Tex. 2016) (citing *Vanderbeek*, 246 S.W.3d at 352–53 (once defendant proves applicability of Chapter 95, burden shifts to plaintiff to fulfill requirements of section 95.003)); *Rueda*, 178 S.W.3d at 111.

Here, the evidence presented by the Rawsons in response to Oxea's summary-judgment motion shows that Kocurek, a journeyman electrician, had worked at Oxea's plant for thirty-seven years. After a raccoon entered Oxea's substation, causing an electrical short and damaging two insulators in the substation, Dacon, a contractor or subcontractor of Oxea, sent Henry to replace the insulators. Because Kocurek knew of backfeed and the danger that it posed, Kocurek attempted to isolate the substation in order to prevent backfeed while Henry worked. Despite Kocurek's isolation efforts, however, he "forgot," i.e., neglected, to open two switches on the lines running from the plant into the substation. The switches are on pole tops inside of Oxea's plant, about 1,000 feet away from the insulators on which Henry was to work, and opening them would have prevented the backfeed of electricity from the plant into the substation where Henry was working. Only Oxea employees knew of the switches, and Kocurek admitted that it was his responsibility to open them. Kocurek had, in the past, opened the switches in order to prevent backfeed. And had he done so on the day that Henry was replacing the insulators, Henry would not have been injured. The only reason that Kocurek failed to open

the switches was that he "forgot." Further, he did not tell Henry about the backfeed or about the forgotten switches 1,000 feet away that needed to be opened.

As previously noted, when deciding whether there is a disputed issue of material fact that precludes summary judgment, evidence favorable to the non-movants must be taken as true. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Nixon*, 690 S.W.2d at 548–49. And every reasonable inference must be indulged in favor of the non-movants, with any doubts to be resolved in their favor. *Randall's Food Mkts.*, 891 S.W.2d at 644; *Nixon*, 690 S.W.2d at 549. Given the above evidence, I would hold that the Rawsons have raised a genuine issue of material fact as to whether Oxea had "actual knowledge of the danger or condition" that resulted in Henry's injuries and the trial court erred in granting Oxea summary judgment on the Rawsons' negligence claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 95.003(2).

The fact that Kocurek "forgot" to open the two pertinent switches, situated on pole tops inside of Oxea's plant, on the lines running from the plant into the substation, does not conclusively negate Oxea's actual knowledge of the dangerous condition of backfeed. Kocurek's use of the words "I forgot" does not, as suggested by Steve Martin, absolve Oxea of liability. Rather, the fact that Kocurek "forgot" to open the switches to stop the flow of electricity from the plant to the substation, by definition, establishes his negligence.

The panel's conclusion to the contrary should be corrected by this Court or by our high court. *See* TEX. R. APP. P. 41.2(c) ("[E]xtraordinary circumstances require en banc consideration."); TEX. GOV'T CODE ANN. § 22.001(a)(6) (Vernon 2004) ("The supreme court has appellate jurisdiction . . . when . . . an error of law has been committed by the court of appeals, and that error is of such importance to the jurisprudence of the state that . . . it requires correction . . . .").

Terry Jennings
Justice

Panel Consists of Chief Justice Radack and Justices Higley and Huddle.

En banc reconsideration was requested. *See* TEX. R. APP. P. 49.7.

A majority of the justices of the Court voted to deny the motion for en banc reconsideration.

The en banc court consists of Chief Justice Radack and Justices Jennings, Keyes, Higley, Bland, Massengale, Brown, Huddle, and Lloyd.

Justice Jennings, dissenting from the denial of en banc reconsideration with separate opinion.

Justice Bland, dissenting from the denial of en banc reconsideration without opinion.

Justice Lloyd, dissenting from the denial of en banc reconsideration without opinion.