Opinion issued December 21, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00605-CV

WILLIAM COSTLEY, Appellant

V.

LANDRY'S INC., Appellee

On Appeal from County Court at Law No. 1
Galveston County, Texas
Trial Court Case No. CV-0072069

MEMORANDUM OPINION

William Costley sued Landry's Inc. for injuries sustained during a visit to perform maintenance on an air conditioning unit. He asserted a premises liability claim. Landry's filed a traditional and no-evidence motion for summary judgment, which the trial court granted. In two issues on appeal, Costley argues that Chapter

95 of the Texas Civil Practice and Remedies Code does not preclude his claim and that he presented sufficient evidence for each element of his premises liability claim.

We affirm.

Background

On May 17, 2012, Mr. Costley, an independent contractor employed by Dustless Air Filter, was sent to the Aquarium, a seafood restaurant located in Kemah, Texas. The Aquarium is owned and operated by Landry's. When Costley arrived at the Aquarium, the manager showed him the ladder and overhead hatch, which Costley used to access the air conditioners located on the roof.

After he replaced the filters for the air conditioners, Costley opened the hatch and proceeded to step down the ladder to exit the roof. As he was closing it, the hatch door slammed shut on his right hand. Costley jerked back, losing his balance on the ladder. Attempting to regain his balance, Costley grabbed the ladder. However, when he grabbed the ladder, it detached from the wall and Costley fell approximately ten to twelve feet. After the fall, Mr. Costley went to a nearby hospital emergency room, where he was diagnosed with multiple injuries.

Costley filed suit. Landry's later filed a motion for summary judgment. In it, Landry's argued that the record conclusively showed that Costley could not meet his burden of proof for the prerequisites for liability under Chapter 95 of the Texas Civil

Practice and Remedies Code and that Costley had no evidence to support the necessary elements for premises liability.

Costley responded to the motion for summary judgment. For the no-evidence point, Costley attached evidence that he argued supported each element of his premises liability claim. Costley's evidence included the deposition testimony of Josh Hairgrove, Landry's designated representative, and Russ Evleston, Costley's expert.

Hairgrove testified that he had worked at the restaurant in question since the beginning of 2012. He testified that, in the time he had worked at the store, he had been up and down the ladder and used the hatch many times. Hairgrove said he never had any trouble with either the ladder or the hatch. He also testified that he did not know of anyone else being injured or otherwise experiencing trouble with the hatch.

Elveston examined the premises after the injury had occurred. He testified that the ladder had not been securely attached. Elveston also testified that, at the time he examined the premises, he saw no evidence that the ladder had been attached to the structural steel near the top of the ladder. He conceded, however, that it could have been attached to other structural components.

Regarding the hatch, Evleston testified that there was a hazard to closing the hatch. His proof for this was that, when he investigated the hatch for the lawsuit, he

used the hatch. He testified that, when he closed the hatch, "at a certain point the weight shifts and it becomes the full weight of the hatch coming down. . . . [B]ecause the position of the anchor points for the lever was halfway down the hatch, it was virtually impossible for me to control the rate of descent." He testified that the hatch "fell with unexpected force and speed."

The trial court granted the motion for summary judgment.

Premises Liability

In his second issue, Costley argues that he presented sufficient evidence for each element of his premises liability claim.

A. Standard of Review

The summary-judgment movant must conclusively establish its right to judgment as a matter of law. *See MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). Because summary judgment is a question of law, we review a trial court's summary judgment decision de novo. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

After an adequate time for discovery, the party without the burden of proof may move for a no-evidence summary judgment on the basis that there is no evidence to support an essential element of the non-moving party's claim. TEX. R. CIV. P. 166a(i); *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). Summary judgment must be granted unless the non-movant produces competent summary

judgment evidence raising a genuine issue of material fact on the challenged elements. TEX. R. CIV. P. 166a(i); *Hamilton*, 249 S.W.3d at 426. A non-moving party is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." TEX. R. CIV. P. 166a (Notes & Comments 1997).

A no-evidence summary judgment motion is essentially a motion for a pretrial directed verdict. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). Accordingly, we apply the same legal-sufficiency standard of review that we apply when reviewing a directed verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). Applying that standard, a no-evidence point will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *see also City of Keller*, 168 S.W.3d at 810.

To determine whether there is a fact issue in a motion for summary judgment, we review the evidence in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Fielding*, 289 S.W.3d at 848 (citing

City of Keller, 168 S.W.3d at 827). We indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

B. Analysis

Costley alleges that his injuries stemmed from two defects in the premises: the hatch to the roof suddenly closing on his hand and the ladder detaching from the wall. Landry's argues there is no evidence that they knew or should have known of any defects with the hatch or the ladder. "Under premises-liability principles, a property owner generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances." *Occidental Chem. Corp. v. Jenkins*, 478 S.W.3d 640, 644 (Tex. 2016). The elements for a premises liability claim are

> (1) the property owner had actual or constructive knowledge of the condition causing the injury; (2) the condition posed an unreasonable risk of harm; (3) the property owner failed to take reasonable care to reduce or eliminate the risk; and (4) the property owner's failure to use reasonable care to reduce or eliminate the risk was the proximate cause of injuries to the invitee.

Henkel v. Norman, 441 S.W.3d 249, 251–52 (Tex. 2014).

"Actual knowledge is what a person actually knows as distinguished from constructive or imputed knowledge; that is, what a person after a reasonable inspection ought to know or have reason to know." *Hall v. Sonic Drive-In of*

Angleton, Inc., 177 S.W.3d 636, 645 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

For the ladder, evidence from Landry's indicates none of its employees were aware of any problems with the ladder. Costley's expert, Elveston, testified that the ladder was not securely attached, but did not testify that the improper or failed attachment was obviously noticeable before the incident. Elveston also testified that he saw no evidence that the ladder had been attached to the structural steel near the top of the ladder, but conceded it could have been attached to other structural components.

For the hatch, Hairgrove testified that he had used the hatch many times in the months he worked there before the incident and that he had never had any trouble with the hatch. He also testified that he did not know of anyone else being injured or otherwise experiencing trouble with the hatch. *See Zook v. Brookshire Grocery Co.*, 302 S.W.3d 452, 455 (Tex. App.—Dallas 2009, no pet.) (considering lack of reports of previous injuries for whether owner knew or should of known of dangerous condition).

To counter this, Costley points to the testimony of Elveston. Evleston testified that there was a hazard to closing the hatch. His proof for this was that, when he investigated the hatch for the lawsuit, he used the hatch. He testified that, when he closed the hatch, "at a certain point the weight shifts and it becomes the full weight

of the hatch coming down. . . . [B]ecause the position of the anchor points for the lever was halfway down the hatch, it was virtually impossible for me to control the rate of descent." He testified that the hatch "fell with unexpected force and speed."

Elveston's testimony only describes his personal experience with the hatch, an experience that took place after the incident and resulting litigation. Nothing in his testimony establishes that Landry's knew or should have known—at any time before the incident—that the hatch posed an unreasonable risk of harm.

We note that, at trial and on appeal, Costley suggests the hatch weighs 40 pounds. We find no evidence attached to the summary judgment motions, however, that establishes the weight of the hatch. Nor do we find any instance of Landry's conceding its weight. To the contrary, Hairgrove's testimony indicates he did not believe it weighed 40 pounds. To the degree, then, that Costley relies on the weight of the hatch to establish its dangerousness, the evidence does not establish this allegation.

Costley also emphasizes that any risk associated with closing the hatch could have been eliminated by installing an inexpensive "closing cylinder or similar safety device." Hairgrove testified he was not familiar with a closing cylinder and did not have reason to believe one needed to be installed on the hatch. Even if Hairgrove had known about the alleged benefits of the closing cylinder, however, "[e]vidence that an owner or occupier knew of a safer, feasible alternative design, without more,

is not evidence that the owner knew or should have known that a condition on its premises created an unreasonable risk of harm." *CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 102 (Tex. 2000).

We hold that Costley failed to present more than a scintilla of evidence establishing that Landry's knew or should have known that the hatch posed an unreasonable risk of harm. We overrule Costley's second issue.[1]

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Higley, Massengale, and Lloyd.

[1] Because a determination that Costley failed to raise a fact issue on the element of knowledge for premises liability fully supports the trial court's judgment, we do not need to reach Costley's first issue, challenging whether his claim is precluded under Chapter 95 of the Texas Civil Practice and Remedies Code. *See* TEX. R. APP. P. 47.1.