Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00560-CV

ROCHAN TURNER, Appellant

V.

LEFT GATE PROPERTY HOLDINGS, LLC D/B/A TEXAS DIRECT AUTO AND MCCALL-SB, INC. D/B/A ADVANTAGE BMW OF CLEAR LAKE, Appellees

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On Appeal from the 333rd District Court
Harris County, Texas
Trial Court Case No. 2016-51144

MEMORANDUM OPINION

This is an appeal from a take-nothing final summary judgment rendered against appellant Rochan Turner in his suit for damages caused by a vehicle fire. Turner sued appellees Left Gate Property Holdings, LLC d/b/a Texas Direct Auto

("Texas Direct") and McCall-SB, Inc. d/b/a Advantage BMW of Clear Lake ("Advantage") arguing that their negligence caused the fire in his car. The trial court granted appellees' no-evidence summary-judgment motions. Below and on appeal, Turner argues that the doctrine of res ipsa loquitur applies and defeats appellees' summary judgment.

Because Turner did not demonstrate the applicability of res ipsa loquitur or otherwise present evidence in response to the appellees' no-evidence motions for summary judgment, we affirm the judgment of the trial court.

Background

Turner purchased a used BMW from Texas Direct. According to Turner, a week after he bought the car, the injector coils malfunctioned. He returned to Texas Direct, which repaired or replaced two injector coils. Two weeks later, the injector coils again malfunctioned. Turner brought the car to Advantage for additional coil repairs. Turner alleged that "[n]o other party performed any maintenance or repair work" while he owned it.

While Turner was driving the car, he noticed a spark. He tried to stomp it out with his foot, but flames erupted from under the hood. He "was unable to escape the burning vehicle before suffering serious burns on his face, neck, arms, hands, and left leg." He spent nearly a month in the hospital, recovering from his injuries.

Turner sued Texas Direct and Advantage, seeking actual and exemplary damages for negligence and gross negligence. He alleged that Texas Direct sold him the car in an unsafe condition and that Advantage made repairs and returned the car to him in an unsafe condition. He pleaded "res ipsa loquitur," alleging that the vehicle fire "would not have occurred without negligence," and the conditions that caused his injuries and damages "were never within the control of any party other than Texas Direct and Advantage" from the time he purchased the car until the fire.

Advantage and Texas Direct filed no-evidence motions for summary judgment challenging negligence (duty, breach, and causation), as well as gross negligence. The trial court granted summary judgment in favor of appellees, and Turner appealed.

Analysis

In a single issue, Turner argues that the trial court erred by granting appellees' take-nothing summary judgment because he presented evidence of negligence through the doctrine of res ipsa loquitur. We disagree.

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When the trial court does not specify the grounds on which it granted a summary judgment, we must uphold the trial court's judgment if any of the grounds properly presented are meritorious. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

To prevail on a no-evidence motion for summary judgment, the movant must establish that there is no evidence to support an essential 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); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to each of the elements specified in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

In their no-evidence motions for summary judgment, Texas Direct and Advantage asserted that there was no evidence of duty, breach, or causation. Turner responded that the doctrine of res ipsa loquitur applied to defeat these no-evidence motions.

Res ipsa loquitur is Latin for "the thing speaks for itself." *Marathon Oil Co. v. Sterner*, 632 S.W.2d 571, 573 (Tex. 1982). To establish a claim by res ipsa loquitur, a plaintiff must prove (1) an accident of this character does not ordinarily occur in the absence of negligence and (2) the instrument that caused the accident was under the exclusive management and control of the defendant. *Id*.; *Gaulding v. Celotex Corp.*, 772 S.W.2d 66, 68 (Tex. 1989); *Sanders v. Naes Cent., Inc.*, 498 S.W.3d 256, 258 (Tex. App.—Houston [1st Dist.] 2016, no pet.). "The first factor is necessary to support the inference of negligence and the second factor is necessary to support the inference that the defendant was the negligent party." *Mobil Chem.*

Co. v. Bell, 517 S.W.2d 245, 251 (Tex. 1974). Both factors must be present for the factfinder to infer that the defendant was negligent. *See Bond v. Otis Elevator Co.*, 388 S.W.2d 681, 686 (Tex. 1965); *Sanders*, 498 S.W.3d at 258.

"Inherent in the latter factor is the requirement that the defendant be proved to have some causal connection with the plaintiff's injury." *Gaulding*, 772 S.W.2d at 68. Res ipsa loquitor may apply when multiple defendants have "joint control of the instrumentality causing the injury," but the doctrine "is not available to fix responsibility when any one of multiple defendants, wholly independent of each other, might have been responsible for the injury." *Esco Oil & Gas, Inc. v. Sooner Pipe & Supply Corp.*, 962 S.W.2d 193, 195 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

Turner's summary judgment evidence does not support the application of res ipsa loquitur. In response to the no-evidence motion for summary judgment, Turner produced invoices from Texas Direct and Advantage as well as his affidavit. But none of this evidence shows (or even suggests) that the instrumentality that caused the fire was under the sole control of either defendant or that they had joint control over any such instrumentality.

To begin, the invoices showed what repairs were recommended and made, but they do not suggest that either defendant made faulty repairs or acted negligently.

And they shed no light on whether any instrumentality repaired by either defendant caused the fire.

So too with Turner's affidavit. In it, Turner averred that he purchased the car from Texas Direct in January 2014, and, shortly thereafter, he returned to Texas Direct for repairs, including replacement of some components of two injector coils. He further asserted that, about two months later, he took the car to Advantage for a service, and Advantage replaced two other injectors—different parts than those replaced by Texas Direct. Turner stated that an Advantage "representative" told him that "leaking fuel injectors are a fire hazard." He also described the fire, in which he saw flames "coming from under the hood" before the car was "engulfed in flames."

None of this shows that the fire was caused by any instrumentality within the exclusive control of either defendant or within their joint control. Construed in the light most favorable to Turner, his summary judgment evidence showed that Texas Direct and Advantage serviced parts of car and that a representative of Advantage informed Turner that faulty injector coils could cause a fire. But no evidence connects any work performed by Texas Direct or Advantage to the fire. And no evidence shows that Texas Direct and Advantage had joint control of the instrumentality that caused the injury or that either had sole control of that instrumentality. As such, res ipsa loquitur does not apply. *See Esco Oil & Gas*, 962 S.W.2d at 195 ("[T]he doctrine of res ipsa loquitur does not apply when one of

multiple defendants may be responsible for the injury, independent of the other defendants."); *see also Marathon Oil*, 632 S.W.2d at 574 (Because there were two possible defendants, either of which could have been separately negligent in performing its own duty, the doctrine of res ipsa loquitur was not applicable); *Sanders*, 498 S.W.3d at 260 ("Because the elevator's failure could have been caused by negligent manufacture and/or installation, which are duties owed by other parties who are not vicariously liable for Amtech, res ipsa loquitur is not applicable.").

Conclusion

We affirm the judgment of the trial court.

Jennifer Caughey
Justice

Panel consists of Chief Justice Radack and Justices Brown and Caughey.