Opinion issued August 10, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00367-CV

ANGELIA HILL, Appellant

V.

SONIC MOMENTUM JVP, LP D/B/A LAND ROVER OF SOUTHWEST HOUSTON, Appellee

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Case No. 2018-10941

MEMORANDUM OPINION

Appellant, Angelia Hill, challenges the trial court's rendition of summary judgment in favor of appellee, Sonic Momentum JVP, LP, doing business as Land

Rover of Southwest Houston ("Momentum"),[1] in Hill's suit against Momentum for breach of contract, breach of warranty, and violations of the Texas Deceptive Trade Practices Act ("DTPA"). In four issues, Hill contends that the trial court erred in granting Momentum summary judgment.

We affirm.

Background

In her original petition, Hill alleged that she bought a "2014 Range Rover Evoque from [Momentum] in February 2014" with "an extended service warranty of 100,000 miles" and she complied with "the vehicle service requirements of the extended service warranty." In November 2016, when the car's odometer read 56,105 miles, Hill brought the car to Momentum's service department because it "registered a low coolant level." Momentum's service department "topped of[f] the coolant level[,] . . . performed a multi-point inspection," and informed Hill "that no further services were needed."

In October 2017, Hill returned to Momentum's service department because the car "was running sluggish" and "the check engine light was illuminating." The

[1] Hill sued "Momentum Motor Cars, Ltd. d/b/a Land Rover of Southwest Houston." In its answer, Momentum identifies itself as "Sonic Momentum JVP, LP d/b/a Land Rover Southwest Houston," as does the trial court in its judgment. Our style is in accord with the trial court's judgment. *See Owens v. Handyside*, 478 S.W.3d 172, 175 n.1 (Tex. App.—Houston [1st Dist.] 2015, pet denied) (clarifying style of case); *Strobel v. Marlow*, 341 S.W.3d 470, 471 n.1 (Tex. App.—Dallas 2011, no pet.).

"service department recommended a new engine, injector seal, coolant and oil." Hill asked Momentum to "repair the vehicle pursuant to the terms of the extended warranty," but "[Momentum] refused." Hill brought claims against Momentum for breach of contract and breach of warranty, asserting that Momentum failed to perform its contractual obligations and failed to perform services in a good and workmanlike manner. Hill sought damages and attorney's fees.

Momentum answered, generally denying the allegations in Hill's petition and asserting certain defenses. It also filed special exceptions challenging Hill's pleading but did not seek a ruling on the special exceptions. And it moved to designate Jaguar Land Rover North America ("JLRNA") as a responsible third party but did not seek a ruling on that motion either.

On February 27, 2020, Momentum filed a combined no-evidence and matter-of-law summary-judgment motion on Hill's breach-of-contract and breach-of-warranty claims. Momentum asserted that there was no evidence that (1) Momentum "warranted [Hill's car]"; (2) Momentum "failed to honor any warranty on [Hill's car]"; (3) Momentum "failed to perform any services in a good and workmanlike manner"; and (4) any failure by Momentum to "perform services in a good and workmanlike manner" "caused the engine to fail or [Hill's] warranty claim to be rejected." And it asserted that Hill had "no evidence as to the standard of care" applicable to Momentum, arguing that "[b]ecause the proper functions of a

service operation at a franchised automobile dealership" are not "within the knowledge of an average layperson, expert testimony is required to establish both the standard of care and breach" of that standard of care. And Hill had no "expert testimony or other proof" that Momentum's conduct caused the failure of her car's engine. Momentum also argued that it was entitled to judgment as a matter of law on Hill's breach-of-contract and breach-of-warranty claims because it "did not issue a warranty to [Hill] on [her car]"; it "did not breach any warranty on [Hill's car] because it did not make the decision to deny warranty coverage for the engine replacement"; and it "met the applicable standard of care in servicing [Hill's car]."

Momentum attached to its summary-judgment motion excerpts from Hill's deposition, in which she acknowledged that, prior to her October 2017 visit to Momentum's service department, she had driven her car 18,000 miles without an oil change or a visit to the service department, and she agreed that it was not Momentum's fault that she failed to change her oil during that period.[2] Momentum also provided the affidavit of its Service Director, Charles "Brent" Koenig (the "Koenig affidavit"), in which Koenig stated that "[t]he manufacturer's recommended oil change interval is 10,000 miles" and "Momentum does not warrant vehicles." He explained that JLRNA, the manufacturer, provides "a [four]-year or

[2] Hill alleged, and in its appellee's brief, Momentum does not dispute, that the car's low-oil indicator light was not functional during this period.

50,000-mile New Vehicle Limited Warranty" and although Momentum sells "third-party products, including extended warranty products, under which a third party warrants the vehicle beyond JLRNA's warranty," "Momentum's records reflect that [Hill] did not purchase any warranty product other than a product relating to protection of [her car's] windshield and tires." Koenig also stated that "the engine to [Hill's car] was replaced under warranty in 2014 at approximately 28,528 miles." And Momentum changed the oil in Hill's car "in December 2015 at the 40,856-mile mark." In October 2017, Hill brought her car to "Momentum['s service department] at the 74,442-mile mark with an indication of no oil," and the car "was found to need a new engine."

After Momentum filed its summary-judgment motion, Hill filed her first supplemental petition,[3] in which she alleged that she brought her car to Momentum to have the engine repaired, but "[Momentum] did not perform the requested repairs and . . . subsequently refused to honor the extended warranty." And she asserted that she "is a consumer, as a matter of law, and has the requisite standing to be entitled to an award of treble damages, for which she now sues" under the DTPA.[4]

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[3] *See* TEX. R. CIV. P. 69; *J.M. Huber Corp. v. Santa Fe Energy Res., Inc.*, 871 S.W.2d 842, 844 (Tex. App.—Houston [14th Dist.] 1994, writ. denied) (distinguishing supplemental petition from amended petition).

[4] *See* TEX. BUS. & COM. CODE ANN. §§ 17.01–.955. Texas Business and Commerce Code section 17.50(b)(1) provides that the trier of fact may award no more than three times the amount of economic damages if it finds that the defendant knowingly committed the unlawful conduct. *See id.* § 17.50(b)(1).

In her response to Momentum's summary-judgment motion, Hill argued that a fact issue existed about whether Momentum "performed the required maintenance or repairs" because Momentum's work orders documenting her car's maintenance, which were attached to Koenig's affidavit, showed that her car was checked for oil leaks but did not show that the oil level was checked. Hill asserted that the work orders raise a fact issue as to "the existence of a contract between the [Hill] and [Momentum]" and whether it was breached. And she pointed out that nothing in Momentum's summary-judgment motion addressed the DTPA claim alleged in her first supplemental petition. But Hill did not provide the opinion of any expert with her response.[5]

The trial court, without specifying the grounds, granted Momentum summary judgment on Hill's claims and ordered that Hill "take nothing" on her claims against Momentum. In its order granting Momentum's summary-judgment motion, the trial court recited that it had "review[ed] the motion, the summary judgment proof as it relate[d] to the traditional grounds contained in the motion only, and any response and argument of counsel." The parties agree that the trial court's judgment disposed of the breach-of-contract and breach-of-warranty claims alleged in Hill's original petition and the DTPA claim raised in her supplemental petition.

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[5] Hill attached various other exhibits to her response.

Standard of Review

We review a trial court's decision to grant 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). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Knott*, 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's 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).

A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request for summary judgment as a matter of law. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004). When a party has sought summary judgment on both grounds and the trial court's order does not specify its reasons for granting summary judgment, typically, we first review the propriety of the summary judgment under the no-evidence standard. *See B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 260–61 (Tex. 2020); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *see also* TEX. R. CIV. P. 166a(i). If we conclude that the trial court did not err in granting summary judgment

under the no-evidence standard, we need not reach the issue of whether the trial court erred in granting summary judgment as a matter of law. *See Ford Motor Co.*, 135 S.W.3d at 600.

To prevail on a no-evidence summary-judgment motion, the movant must establish that there is no evidence to support an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. A no-evidence summary judgment may not be granted if the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ford Motor Co.*, 135 S.W.3d at 600. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997) (internal quotations omitted). The trial court must grant a no-evidence summary-judgment motion if the movant asserts that there is no evidence of one or more specified elements of the non-movant's claim on which the non-movant would

have the burden of proof at trial and the non-movant fails to file a timely response or fails to produce summary-judgment evidence raising a genuine issue of material fact on each challenged element. *See* TEX. R. CIV. P. 166a(i); *Lockett v. HB Zachry Co.*, 285 S.W.3d 63, 67 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

No-Evidence Summary Judgment

In her first issue, Hill argues that the trial court erred in granting Momentum summary judgment on her breach-of-contract and breach-of-warranty claims because "genuine issues of material fact exist that preclude" summary judgment. In her third issue, Hill argues that the trial court erred in granting Momentum summary judgment on her DTPA claim because it was not specifically challenged in Momentum's summary-judgment motion. We address these issues together.

Summary judgments "may only be granted upon grounds expressly asserted in the summary[-]judgment motion." *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011). Because Momentum's summary-judgment motion did not assert that it was entitled to summary judgment on Hill's DTPA claim and did not expressly include any summary-judgment grounds attacking Hill's DTPA claim, the trial court erred in granting Momentum summary judgment on that claim. *See id.* But, "[a]lthough a trial court errs in granting a summary judgment on a cause of action not expressly presented by written motion, . . . the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the

case."[6] *Id.* at 297–98. Thus, if Hill's DTPA claim also fails for one of the reasons asserted in Momentum's summary-judgment motion related to Hill's breach-of-contract and breach-of-warranty claims, the trial court's error in granting Momentum summary judgment on the DTPA claim is harmless and not a basis for reversal. *See* TEX. R. APP. P. 44.1(a).

Causation is an essential element of causes of action for breach of contract, breach of warranty, and DTPA violations—all of which Hill alleged against Momentum. *See Casa Del Mar Ass'n v. Gossen Livingston Assocs., Inc.*, 434 S.W.3d 211, 221 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *see, e.g.*, *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006) (holding breach-of-warranty claims require proof of causation-in-fact); *S. Elec. Servs. Inc. v. City of Houston*, 355 S.W.3d 319, 323–24 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (discussing elements of breach-of-contract claim and stating that "the absence of a causal connection between the alleged breach and the damages sought will preclude recovery"); *see also* TEX. BUS. & COM. CODE ANN. § 17.50(a)

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[6] "The harmless error rule states that, before reversing a judgment because of an error of law, the reviewing court must find that the error amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause 'the rendition of an improper judgment,' or that the error 'probably prevented the appellant from properly presenting the case [on appeal].'" *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (alteration in original) (quoting TEX. R. APP. P. 44.1(a)).

(allowing recovery under DTPA where violation constitutes "a producing cause" of damages).

In its summary-judgment motion, Momentum argued that because "the proper functions of a service operation at a franchised automobile dealership are not something within the knowledge of an average layperson," Hill was required to adduce expert testimony to establish the applicable standard of care, whether Momentum's conduct fell below the applicable standard of care, and a causal link between such conduct and the damage to her car's engine or the rejection of her warranty claim. Whether expert testimony is required to prove a particular issue is a question of law that we review de novo. *Mack Trucks*, 206 S.W.3d at 579; *FFE Transp. Servs., Inc. v. Fulgham*, 154 S.W.3d 84, 89 (Tex. 2004). In determining whether expert testimony is required, we consider whether the conduct at issue involves the use of techniques unfamiliar to the ordinary person. *Mack Trucks*, 206 S.W.3d at 583.

In similar circumstances involving mechanical maintenance, the Texas Supreme Court and this Court have both held that expert testimony was required to prove that a breach of the applicable standard of care caused the plaintiff's injury. *See FFE Transp. Servs.*, 154 S.W.3d at 91 (expert testimony was necessary to establish standard of care for connecting refrigerated trailers to tractors and for frequency and type of inspection and maintenance of such connectors in suit for

injuries caused when truck separated from tractor); *Simmons v. Briggs Equip. Tr.*, 221 S.W.3d 109, 114–15 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (holding expert testimony required to establish whether condition, if any, of hydraulic hose in rail-car mover should have been detected or repaired before fire as part of obligation to provide "operational maintenance" and whether defendant actually did or failed to do anything to cause fire); *see also Nissan Motor Co. Ltd. v. Armstrong*, 145 S.W.3d 131, 137 (Tex. 2004) (observing Texas courts "have consistently required competent expert testimony and objective proof that a defect caused" unintended acceleration of car). Consistent with these cases, we conclude that expert testimony was required to raise a fact issue as to whether Momentum breached its standard of care and caused the engine of Hill's car to fail and JLRNA to deny Hill's warranty claim. Because Hill did not respond to Momentum's no-evidence summary-judgment motion with expert testimony establishing the applicable standard of care, its breach, and a causal link between the breach and Hill's injuries, we hold that the trial court properly granted Momentum's no-evidence summary-judgment motion on her of breach-of-contract and breach-of-warranty claims. *See* TEX. R. CIV. P. 166a(i). For the same reason, we also hold that the trial court's error in granting Momentum summary judgment on Hill's DTPA claim is harmless. *See* TEX. R. APP. P. 44.1(a); *Magee*, 347 S.W.3d 293, 297–98.

We overrule Hill's first and third issues.

In her second issue, Hill argues that the trial court erred in granting Momentum summary judgment because the Koenig affidavit, which Momentum attached to its summary-judgment motion, was not admissible, competent summary-judgment evidence and could not support summary judgment. In her fourth issue, Hill argues that the trial court erred in granting Momentum summary judgment because Momentum's motion to designate JLRNA as a responsible third party is a judicial admission by Momentum about JLRNA that raised a fact issue precluding summary judgment.[7] Because we have upheld the trial court's granting of summary judgment on no-evidence grounds, we need not address these remaining issues. *See Ford Motor Co.*, 135 S.W.3d at 600 (if no-evidence summary judgment was properly granted, reviewing court need not reach matter-of-law summary-judgment grounds); *see also* TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Landau and Countiss.

[7] We note that Hill did not raise her fourth issue in her summary–judgment response and thus may not have preserved it for appellate review. *See* TEX. R. APP. P. 33.1(a).