Affirmed and Memorandum Opinion filed August 9, 2011.

In The

Fourteenth Court of Appeals

NO. 14-10-00817-CV

IDRIS HUSAIN AND ZENAB HUSAIN, Appellants

V.

RUSSELL A. PETRUCCIANI AND SPECTRUM CONSTRUCTION SERVICES, INC., Appellees

On Appeal from the 190th District Court
Harris County, Texas
Trial Court Cause No. 2009-59769

MEMORANDUM OPINION

In this personal injury case, appellants Idris and Zenab Husain challenge the trial court's summary judgment in favor of appellees Russell A. Petrucciani and Spectrum Construction Services, Inc ("Spectrum"). In three issues, they assert that fact issues preclude summary judgment and that the trial court erred in excluding part of their summary-judgment evidence. We affirm.

BACKGROUND

Russell A. Petrucciani used his 2008 Ford F-150 pick-up truck as a company vehicle for Spectrum. On the morning of February 17, 2009, while on his way to work,

Petrucciani stopped at a dry cleaning establishment located on FM 1960 in the Spring, Texas area. He parked directly in front of the business, left the keys in the ignition and the vehicle running, and went inside the dry cleaners.[1] While inside waiting for service, Petrucciani looked out the front window and saw a thief sitting in the driver's seat of his pick-up truck. Petrucciani immediately returned to his truck, opened the door, and tried to remove the thief. After a struggle, the thief shifted the truck into reverse and accelerated through the parking lot. Petrucciani hung onto the truck between the open driver's side door and the frame of truck.

The thief then struck a parked car in the parking lot. Petrucciani fell to the ground, severely injured. The thief sped from the parking lot in Petrucciani's truck onto FM 1960. Less than a minute later, the thief struck the Husains' vehicle with Petrucciani's truck.

In September 2009, the Husains filed suit against Petrucciani and Spectrum. They alleged that Petrucciani was negligent both by leaving his vehicle in a manner in which it could be entered and operated by another person and by engaging in a physical altercation with the thief.[2] They asserted that Spectrum was vicariously liable for Petrucciani's negligence because the incident occurred during the course and scope of his employment. They sought recovery for personal injury and property damage resulting from the car wreck. In March 2010, Petrucciani and Spectrum moved for a traditional summary judgment, contending, as is relevant here, that (a) Petrucciani was not negligent; (b) the intervening criminal act—the theft of Petrucciani's truck—was a superseding cause of the Husains' damages; and (c) neither the theft of Petrucciani's truck, nor the thief's reckless and negligent operation of the truck after the theft, was foreseeable.

[1] In his deposition testimony attached to his motion for summary judgment, Petrucciani stated that although he could not say "beyond a reasonable doubt that he had locked the truck, he believed that he had done so. The pick-up truck was equipped with a locking keypad on the outside of the door.

[2] The Husains added this second allegation of negligence by filing an amended petition shortly after Petrucciani and Spectrum filed their summary-judgment motion.

The Husains responded to the motion and attached summary-judgment evidence to their response. This evidence included voluminous paperwork obtained by the Husains from the Harris County Sheriff's Office produced pursuant to a public information request for the following:

> [C]opies of selected crime statistics 2008, 2009 for that area generally defined by Tomball Parkway/Hwy 290 to the west, FM 2920 to the north, Kuykendahl Road to the east, and Sam Houston Tollway (Beltway 8) to the south, including any patrol beat or patrol district contained within or partially within such area: 1) All calls for service, or records of any activity by any member of your department, or response or appearance of any member of your department for any complaint relating to or of auto theft, attempted auto theft, unauthorized use of motor vehicle, burglary of motor vehicle, vandalism of a motor vehicle, and/or criminal mischief relating to a motor vehicle w/in any patrol district, patrol beat contained wholly or partially w/in [the area as defined above]; 2) All 911 records, dispatch slip(s), dispatch log reports, and/or any publicly releasable section or portions of any case reports files, calls for service or reports or documents of any sort wherein RUSSELL A. PETRUCCIANI . . . is identified as either complainant, witness, or suspect, or in any other capacity at any time w/in the 10 years prior to the date of this request, at any location w/in your jurisdiction[.]

(the "public information request documents"). An affidavit from Bernard Ash (the "Ash affidavit") was also attached to the Husains' response. The trial court sustained Petrucciani's and Spectrum's objection to this evidence and granted final summary judgment in their favor on June 2, 2010.

ANALYSIS

A. Standard of Review for Summary Judgments

We review a trial court's summary judgment *de novo*. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference, and we resolve any doubts in the nonmovant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985). Where, as here, the trial court grants the judgment without

specifying the grounds, we affirm the summary judgment if any of the grounds presented are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872–73 (Tex. 2000).

A traditional summary judgment is proper when the defendant either negates at least one element of each of the plaintiff's theories of recovery or pleads and conclusively establishes each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Cullins v. Foster*, 171 S.W.3d 521, 530 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). When the defendant has carried its summary judgment burden, the burden shifts to the nonmovant to raise a material fact issue precluding summary judgment. *Va. Indonesia Co. v. Harris Cnty. Appraisal Dist.*, 910 S.W.2d 905, 907 (Tex. 1995).

B. The Husains' Negligence Cause of Action

In their first issue, the Husains challenge the trial court's summary judgment on the basis that they raised a fact issue on their negligence claim, thereby precluding summary judgment. To prevail on a cause of action for negligence, a plaintiff must establish that (1) the defendant owed him a legal duty, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's injuries. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009). The components of proximate cause are cause in fact and foreseeability. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). These elements cannot be established by mere conjecture, guess, or speculation. *Id.*

The parties agree that the outcome of this case turns on the issue of foreseeability. To establish foreseeability, a plaintiff must prove that a person of ordinary intelligence should have anticipated the danger created by the negligent act or omission. *Id.* at 478. The danger of injury is foreseeable if its "general character . . . might reasonably have been anticipated." *Id.* The question of foreseeability and proximate cause generally involves a practical inquiry based on "common experience applied to human conduct."

Id. It asks whether the injury "might reasonably have been contemplated" as a result of the defendant's conduct. *Id.* Foreseeability requires more than retrospectively theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury. *Id.*

C. No Fact Issue Exists on the Element of Proximate Cause

The Husains argue that, even if the objected-to summary-judgment evidence was properly excluded, fact issues still remain on their negligence claim, precluding summary judgment. Within this issue, they contend first that Petrucciani's and Spectrum's summary-judgment motion did not address their live pleading. They assert that Petrucciani and Spectrum sought summary judgment only on the ground that the act of leaving a vehicle running while unattended is not, as a matter of law, negligence. They argue that the motion does not address their amended petition, in which they alleged that Petrucciani was additionally negligent by pursuing the thief and causing an altercation with him.

In their motion for summary judgment, Petrucciani and Spectrum set out the elements of a negligence claim and focused on the proximate causation element of a negligence cause of action. Specifically, they asserted, among other grounds, that the theft of Petrucciani's truck and the thief's reckless and negligent operation of the vehicle after the theft were not foreseeable. The specifics of Petrucciani's and Spectrum's alleged negligent acts are not germane to the issue of foreseeability because they alleged that the unforeseeable theft of the vehicle effectively "broke" any causation chain that may have linked Petrucciani to the Husains' damages. Therefore, Petrucciani's and Spectrum's failure to address the alleged additional act of negligence does not affect the appropriateness of the summary judgment.

Texas courts are split on the issue of a defendant's liability for injury to a third party following the theft of the vehicle.[3] Ordinarily, the criminal act of someone other than the defendant is a superseding cause of resulting harm to a third party, even though the defendant's conduct afforded an opportunity for someone else to commit the crime. Restatement (Second) of Torts § 448 (1965). If, however, the defendant realized or should have realized the likelihood of such an opportunity and the resulting crime, he may be liable. *Id.*; *see Nixon*, 690 S.W.2d at 549–50. Foreseeability is the controlling issue.

But to constitute proximate cause in these circumstances, proof of the owner's conduct must be accompanied by evidence that, because of the facts and circumstances surrounding the location and the conduct, a reasonable, prudent person would not have acted as the owner did and could have reasonably foreseen that the car might be stolen and that some damage might result. *See Finnigan v. Blanco County*, 670 S.W.2d 313, 317–18 (Tex. App.—Austin 1984, no writ); *Bicknell v. Lloyd*, 635 S.W.2d 150 (Tex. App.—Houston [1st Dist.] 1982, no writ). For example, in *Finnigan v. Blanco County*, a deputy left his car open with the motor running parked about five feet away from a ten-

[3] *See, e.g.*, *Story Servs., Inc. v. Ramirez*, 863 S.W.2d 491, 496–98 (Tex. App.—El Paso 1993, writ denied) (finding sufficient evidence for negligence but not for proximate cause); *Stephens v. Crowder Invs., Inc.*, 841 S.W.2d 947, 948–49 (Tex. App.—Waco 1992, no writ) (remanding case to the trial court to review the foreseeability of a funeral home's vehicle stolen by a 12-year-old, with the keys left in the ignition, in light of no evidence of the level of crime in the area); *Simmons v. Flores*, 838 S.W.2d 287, 288–89 (Tex. App.—Texarkana 1992, writ denied) (finding no foreseeability even though the keys had been left in the car in front of a laundry facility); *Finnigan v. Blanco County*, 670 S.W.2d 313, 317–18 (Tex. App.—Austin 1984, no writ) (finding fact issue regarding whether the escape of a prisoner and subsequent injury of a third party in an automobile accident was foreseeable where an officer parked his running patrol car in the "yard" where an inmate could simply get in and drive away); *Batko v. Mecca Invs. Co.*, 642 S.W.2d 41, 42–43 (Tex. App.—Eastland 1982, no writ) (affirming liability against the defendant where his inebriated passenger, with a history of playing practical jokes, was left unattended in a running vehicle and subsequently caused damage); *Bicknell v. Lloyd*, 635 S.W.2d 150, 151–52 (Tex. App.—Houston [1st Dist.] 1982, no writ) (finding the risk of injury foreseeable to an owner, who left the keys in his three wheeler despite previous occasions where youths would go for joy rides); *McKinney v. Chambers*, 347 S.W.2d 30, 31–32 (Tex. Civ. App.—Texarkana 1961, no writ) (finding as a matter of law, that an owner could not have reasonably foreseen the theft and subsequent injury to a third party even though he left the keys in an unattended vehicle); *Parker & Parker Constr. Co. v. Morris*, 346 S.W.2d 922, 923–26 (Tex. Civ. App.—El Paso 1961, writ. ref'd n.r.e.).

foot chain link fence with barbed wire on top, enclosing an area to which the deputy knew a prisoner had access at that time. *Finnigan*, 670 S.W.2d at 317. The Third Court of Appeals determined that the summary judgment evidence raised a fact issue regarding foreseeability, concluding that: "An open and running car is likely to be a very attractive means of effectuating one's escape. Once the prisoner entered the car, it may very well be foreseeable that a high-speed chase would ensue, with high risks of injury to other motorists." *Id.* Similarly, in *Bicknell v. Lloyd*, the First Court of Appeals concluded that the owner of an electric cart could have reasonably foreseen that his cart might be used without his permission and that someone might be injured when he left the keys in the ignition because at least one child in the area had taken the cart without his permission on several previous occasions. *Bicknell*, 635 S.W.2d at 152. Furthermore, the owner testified that "whenever the cart was being operated, children would crowd onto it, wanting a ride." *Id.* For these reasons, the First Court determined that the trial court did not err in submitting a liability question to the jury. *Id.* at 151–52.

Certain evidence may justify a finding of negligence and foreseeability when the act causing harm is a third party's criminal act. This evidence generally involves a crime venue in a high-crime public place, or the site of thefts or similar crimes in the past, or a place relatively unprotected and susceptible to criminal acts. *See, e.g.*, *Nixon*, 690 S.W.2d at 550; *Simmons v. Flores*, 838 S.W.2d 287, 288–89 (Tex. App.—Texarkana 1992, writ denied). We may not speculate about whether these conditions existed. *Simmons*, 838 S.W.2d at 289. They must be established by evidence. *Id.* Only then will a fact finder be justified in finding that harm was foreseeable and that the act of the thief was not such an intervening cause as would defeat reasonable foreseeability. *Id.*

Here, there is no summary-judgment evidence of any of these foreseeability facts. Petrucciani stated in his deposition that he saw no one outside when he entered the dry cleaning establishment. He further explained that he had been going to this particular dry cleaning location once or twice a week since 1995, and he had no knowledge of any

crimes occurring in the parking lot. Finally, although Petrucciani admitted that he had had a vehicle stolen from him in the past, that theft occurred at a work-site many years before the theft here.

In sum, we conclude that it was not reasonably foreseeable that a thief would steal Petrucciani's vehicle, injure him during an altercation, speed away from the parking lot, and run into the Husains' vehicle. Although someone viewing the facts of this case in retrospect might theorize the unique sequence of events that caused the Husains' injuries and property damage, foreseeability is not judged in hindsight. *See Doe*, 907 S.W.2d at 478. Accordingly, the trial court did not err in granting summary judgment on the ground that the car wreck that caused the Husains' injuries and damages was not foreseeable. We overrule the Husains' first issue.

D. Standard of Review for Exclusion of Evidence

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam). A trial court abuses its discretion if it acts arbitrarily or unreasonably or without reference to any guiding rules and principles. *Bowie Mem'l Hosp. v. Wright*, 79 S.W.3d 48, 52 (Tex. 2002) (per curiam) (citing *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985)). We may not reverse the trial court simply because we disagree with its decision; rather, we must reverse only if the trial court acted in an arbitrary or unreasonable manner. *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 226 (Tex. 1991) (citing *Downer*, 701 S.W.2d at 242).

E. Exclusion of the Ash Affidavit

In their second issue, the Husains assert that the trial court abused its discretion in excluding the Ash affidavit from the summary-judgment evidence and that this error probably caused rendition of an improper judgment. Expert testimony must provide an adequate factual basis for the expert's conclusions. *See City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). A conclusory opinion is one that does not provide the

underlying facts to support the conclusion. *CA Partners v. Spears*, 274 S.W.3d 51, 63 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Conclusory statements in an affidavit unsupported by facts are insufficient to defeat summary judgment. *Id.* .

First, we note that there are several erroneous factual statements in the Ash affidavit. For example, Ash states that Petrucciani left the vehicle unlocked. This factual conclusion directly contradicts the evidence in this case: as noted above, Petrucciani testified that, to his knowledge, the doors of his truck were locked. Furthermore, Ash posits several unsupported factual statements with regard to the subjective motivation of the thief.

Ash's affidavit also contains a number of legal conclusions unsupported by a factual basis. For example, in the affidavit, Ash states that the thief's criminal act was the "reasonably foreseeable result of Russell Petrucciani's negligent action." He further states that Petrucciani's attempt to remove the thief from the vehicle was "a cause of [the thief]'s erratic flight" and that it "is widely known and accepted by law enforcement and or civilians that persons who are the subjects of forcible actions to detain such as [the thief] will flee with reckless abandon with no regard to the safety of others." Finally, he concludes that Petrucciani's "handling of this incident was a failure to act with ordinary care." Ash draws legal conclusions regarding Petrucciani's liability without supporting his conclusions with reference to any analysis or supporting evidence. To support or defeat summary judgment, an affidavit must state facts and cannot merely recite legal conclusions. *See McIntyre v. Ramirez*, 109 S.W.3d 741, 749–50 (Tex. 2003) (citing *Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam)). Such unsupported conclusory statements are not credible and are not susceptible to being readily controverted; conclusory statements by an expert witness will not support or defeat a summary judgment. *See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2003); *Ryland Grp.*, 924 S.W.2d at 122.

Finally, we note that in their appellate brief, the Husains cite authority for the argument that "[a]n investigating officer may properly testify as to causation." This argument is irrelevant, given that Ash did not serve as an investigating officer in this case. Accordingly, for the foregoing reasons, the trial court did not abuse its discretion in excluding this affidavit from consideration as summary-judgment evidence. We overrule the Husains' second issue.

E. Exclusion of the Public Information Request Documents

In their third issue, the Husains contend that the trial court abused its discretion in striking the public information request documents from the summary-judgment evidence. In support of their summary judgment response, the Husains offered the public information request documents, which contained several hundred pages of computer printouts with calls for service to the Harris County Sheriff's Office.

The Husains acknowledge that the public information request information does not contain certified copies of this information. Under the Texas Rules of Evidence, "public records" may be self-authenticating, if presented in the form of a certified copy or if accompanied by an affidavit made by a custodian of the records. Tex. R. Evid. 902(4), (10). But these documents were not properly authenticated under this rule because the documents are neither certified copies nor were they accompanied by an affidavit made by the custodian of the records.[4] As such, the trial court did not abuse its discretion in excluding the public information request documents from the summary-judgment record. We overrule the Husains' third issue.

[4] On appeal, the Husains assert that these documents "became business records" when they were sent to their attorney's office, thereby making them an exception to the hearsay rules. This argument appears to be an unusually liberal interpretation of the Texas Rules of Evidence. If the proffered interpretation of the evidence rules were used, every otherwise inadmissible hearsay document would be deemed admissible based on the mere fact that it was received in an attorney's office and the attorney, as the "custodian of records," provided an accompanying affidavit.

CONCLUSION

Having overruled all three of the Husains' issues, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Boyce and McCally.