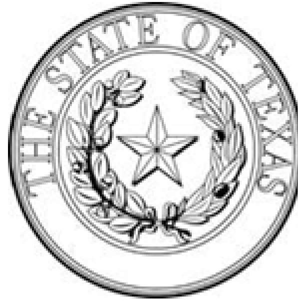
Affirmed in Part, Reversed in Part, Remanded, and Majority and Concurring Opinions filed March 29, 2016.



In The

Fourteenth Court of Appeals

NO. 14-14-00604-CV

BRIDGESTONE LAKES COMMUNITY IMPROVEMENT ASSOCIATION, INC., Appellant

V.

BRIDGESTONE LAKES DEVELOPMENT COMPANY, INC., AND ROBERT A. HUDSON, CLAUDIA J. HUDSON AND TIFFANY A. ROATH, INDIVIDUALLY, Appellees

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On Appeal from the 152nd District Court
Harris County, Texas
Trial Court Cause No. 2011-53723

CONCURRING OPINION

In 1993, the Supreme Court of Texas held that an appellate court may not affirm a summary judgment on a ground not expressly stated in the summary-judgment motion. If a summary-judgment ground is broad enough to encompass a claim pleaded after the motion was filed, an appellate court may affirm a summary

judgment based on this ground without violating this rule. In 2011, the Supreme Court of Texas created three exceptions to its 1993 holding, so in cases that fall within one of these exceptions, appellate courts now may affirm a summary judgment on a ground not expressly stated in the motion.

In today's case, the plaintiff pleaded the new claims addressed under the first appellate issue after the defendants filed their first summary-judgment motion. None of the grounds in that motion are broad enough to encompass the new claims, nor does this case fall within one of the exceptions to the general rule that an appellate court may not affirm a summary judgment on a ground not expressly stated in the summary-judgment motion. For this reason, it is right to sustain the first issue.

The *Stiles* Rule

Before the 1978 amendments to Texas Rule of Evidence 166a(c), the Supreme Court of Texas held that an appellate court could affirm a summary judgment on grounds not stated in the summary-judgment motion granted by the trial court. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). When the high court decided those cases, Rule 166a(c) did not expressly limit the trial court to consideration of the issues raised by the parties. *Id*. Based on language added to Rule 166a(c) in the 1971 and 1978 amendments to the rule, the *Stiles* court held that an appellate court may not affirm a summary judgment on a ground not expressly stated in the summary-judgment motion. *Id*.; *Horizon Offshore Contractors, Inc. v. Aon Risk Servs. of Texas, Inc.*, 283 S.W.3d 53, 66 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). The *Stiles* court did not identify any exceptions to this rule. *See Stiles*, 867 S.W.2d at 26.

This court has concluded that if a ground stated in a summary-judgment motion is broad enough to encompass a claim pleaded after the motion was filed, an appellate court may affirm a summary judgment based on this ground without

violating the *Stiles* rule. *See Lively v. Henderson*, No. 14-05-01229-CV, 2007 WL 3342031, at *5 (Tex. App.—Houston [14th Dist.] Nov. 13, 2007, pet. denied) (mem. op.). This analysis does not involve an exception to the *Stiles* rule because the appellate court affirms the summary judgment based on a ground expressly stated in the summary-judgment motion. *See id*.

The *Magee* Exceptions to the *Stiles* Rule

In *G&H Towing Company v. Magee*, the plaintiffs asserted that G&H Towing was vicariously liable for vehicle owner's alleged negligent entrustment of a vehicle to the driver ("Vicarious Liability Claim"). 347 S.W.3d 293, 295 (Tex. 2011) (per curiam). G&H Towing moved for summary judgment, challenging certain of the plaintiffs' claims, but no ground stated in the summary-judgment motion was broad enough to encompass the plaintiffs' claims based on vicarious liability for the vehicle owner's alleged negligent entrustment. *See id*. at 295–96. The trial court granted summary judgment as to all of the plaintiffs' claims against G&H Towing. *See id*. The vehicle owner moved for summary judgment as to the claims against him, including the negligent-entrustment claim. *See id*. The trial court granted summary judgment as to all of the plaintiffs' claims against G&H Towing. *See id*.

The trial court severed its summary-judgment orders in favor of G&H Towing and for the vehicle owner into two separate cases to make them final, and the plaintiffs appealed each summary judgment. *See id*. The court of appeals concluded that the trial court properly granted summary judgment in favor of the vehicle owner, but held the trial court reversibly erred in granting G&H Towing's motion as to the Vicarious Liability Claim because no ground in G&H Towing's motion encompassed this claim. *See id*. The Supreme Court of Texas concluded that although a trial court errs in granting summary judgment on a claim not addressed by any summary-judgment ground, this error is harmless when the unaddressed

claim "is precluded as a matter of law by other grounds raised in the case." *Id*. at 298. The *Magee* court held that the trial court erred in granting summary judgment as to the Vicarious Liability Claim but that this error was harmless because "[t]he undisputed facts and [the vehicle owner's] final judgment establish that [the vehicle owner] did not negligently entrust his vehicle" and that "G & H therefore cannot have vicarious liability for negligent entrustment because its agent did not commit the tort." *Id*. at 298.

The *Magee* court created an exception to the *Stiles* rule in situations in which the unaddressed claim "is precluded as a matter of law by other grounds raised in the case." *Id*. at 298; *Continental Cas. Co. v. Am. Safety Cas. Ins. Co.*, 365 S.W.3d 165, 173 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (reciting this exception from *Magee*). To fall within this exception the other ground need not be raised by the movant in whose favor summary judgment was granted. *See Magee*, 347 S.W.3d at 297–98.

Our court has determined that the *Magee* court also articulated two other exceptions to the *Stiles* rule, apparently by judicial dictum. *See Continental Cas. Co.*, 365 S.W.3d at 173. According to our precedent, these exceptions apply: "(1) when the movant has conclusively proved or disproved a matter that would also preclude the unaddressed claim as a matter of law and (2) when the unaddressed claim is derivative of the addressed claim and the movant proved its entitlement to summary judgment on the addressed claim." *Id*.

Application of the *Stiles* Rule and the *Magee* Exceptions to Today's Case

After the defendants filed their first summary-judgment motion, the Bridgestone Lakes Community Improvement Association (the "Association") filed its Third Amended Petition, in which it added claims based on variations in the slope of the water detention pond, allegedly in violation of a requirement in the plans of a

uniform 3:1 slope along all sides (collectively the "Variable Slope Claims"). None of the grounds in that motion are broad enough to encompass the Variable Slope Claims; therefore, the trial court reversibly erred in granting summary judgment as to these claims unless one of the *Magee* exceptions applies. *See Magee*, 347 S.W.3d at 297–98; *Stiles*, 867 S.W.2d at 26; *Continental Cas. Co.*, 365 S.W.3d at 173; *Lively*, 2007 WL 3342031, at *5.

The trial court did not grant summary judgment as to other claims whose dismissal would bar recovery by the Association under the Variable Slope Claims. The record does not reflect that the Variable Slope Claims are claims "precluded as a matter of law by other grounds raised in the case." *Magee*, 347 S.W.3d at 298. The defendants have not conclusively proved or disproved a matter that also would preclude the Variable Slope Claims as a matter of law. And, the Variable Slope Claims are not derivative of the claims addressed in the defendants' motions. Because this case does not fall within any of the *Magee* exceptions to the *Stiles* rule, the court is correct to sustain the first issue. *See Magee*, 347 S.W.3d at 297–98; *Stiles*, 867 S.W.2d at 26; *Continental Cas. Co.*, 365 S.W.3d at 173; *Lively*, 2007 WL 3342031, at *5.

In concluding that the trial court reversibly erred in granting summary judgment on the Variable Slope Claims, the majority relies upon the following statement from this court's opinion in *Espeche v. Ritzell*: "when a plaintiff, in her amended petition, asserts a new cause of action based on facts not alleged in the original petition, a court cannot say the defendant's motion for summary judgment contemplated and embraced the additional claim in the amended petition." 123 S.W.3d 657, 664 (Tex. App.—Houston [14th Dist.] 2003, pet. denied). This statement was not necessary to the *Espeche* court's conclusion that the summary-judgment motion was not sufficiently broad to encompass the later-filed bill of

review. *See id*. at 664–65. This court has cited this part of the *Espeche* opinion for the rule that, if a ground stated in a summary-judgment motion is broad enough to encompass a claim pleaded after the motion was filed, an appellate court may affirm a summary judgment based on this ground without violating the *Stiles* rule. *See Methodist Hosp. v. Zurich Am. Ins. Co.*, 329 S.W.3d 510, 515 n.4 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Lively*, 2007 WL 3342031, at *5. Though the majority concludes that the first *Magee* exception does not apply to today's case, the majority does not address the second or the third *Magee* exceptions. *See ante* 6–7. For these reasons, I concur in the court's judgment, but I respectfully decline to join the majority opinion.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Christopher and Donovan. (Christopher, J., majority).