Affirmed and Memorandum Opinion filed May 5, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00121-CV

STEPHANIE ONYENEKWE NWOKENAKA, AS GUARDIAN FOR MINOR CHILDREN OF BLAISE NWOKENAKA (DECEDENT), AND PORSCHE NWOKENAKA, Appellants

V.

GREATER HOUSTON TRANSPORTATION COMPANY, Appellee

On Appeal from the 281st District Court
Harris County, Texas
Trial Court Cause No. 2011-45226

M E M O R A N D U M O P I N I O N

Appellants Stephanie Onyenekwe Nwokenaka, as Guardian for Minor Children of Blaise Nwokenaka (Decedent), and Porsche Nwokenaka[1] appeal the

[1] Appellants' names appear in various forms and spellings throughout the documents, pleadings, and briefing on appeal. We use appellants' names as they appeared in the trial court's final judgment.

trial court's summary judgment in favor of appellee Greater Houston Transportation Company. We affirm.

BACKGROUND

Blaise Nwokenaka operated a taxi as an independent contractor for Greater Houston, which does business as Yellow Cab. Nwokenaka was shot and killed by two individuals he picked up in his taxi.

Nwokenaka's heirs — appellants in this appeal — contend that three days before Nwokenaka was killed, another Greater Houston driver was robbed after picking up passengers from approximately the same location where Nwokenaka picked up the individuals who killed him. After the robbery, the driver allegedly called Greater Houston dispatch and advised the dispatcher of the robbery. Greater Houston allegedly did not send out any alert of the robbery to other cab drivers or contact the police regarding the incident.

The day after the robbery and two days before Nwokenaka's murder, a former Greater Houston independent contractor who was driving his roommate's taxi received a notification from Greater Houston dispatch for a fare pickup at approximately the same location as the earlier robbery. The dead body of that driver, Mohammed Elsayed, was found later that day.[2] Greater Houston was notified of the murder by police after Elsayed's body was found, but again Greater Houston allegedly failed to notify other drivers of the crime.

Appellants sued Yellow Cab/Taxis Fiesta Cares. After learning that Yellow Cab/Taxis Fiesta Cares is a non-profit organization with no connection to Nwokenaka, appellants added Greater Houston as a defendant.

[2] Chaz Omar Blackshear and Danielle Rene Hudson were later convicted of the murders of Nwokenaka and Elsayed.

In the underlying suit, appellants asserted wrongful death and survival claims against Greater Houston and Yellow Cab/Taxis Fiesta Cares. Appellants contended that Greater Houston and Yellow Cab/Taxis Fiesta Cares were negligent and grossly negligent because they had actual knowledge of a dangerous work environment and failed to warn Nwokenaka of the danger. Specifically, appellants maintained that the defendants had knowledge that a murder and a robbery had been committed in the days preceding Nwokenaka's murder after fares were picked up near the intersection of Whittington and Dairy Ashford, and that the defendants nevertheless failed to warn Nwokenaka when they dispatched him to that location.

Greater Houston and Yellow Cab/Taxis Fiesta Cares filed a "Joint Traditional and No-Evidence Motion for Summary Judgment" in July 2014 ("First Motion"). Appellants amended their claims months later to include a negligent-training-and-supervision claim contending that Greater Houston and Yellow Cab/Taxis Fiesta Cares failed to properly train and supervise their dispatchers and other employees.

The trial court signed an order granting the First Motion as to all claims against Yellow Cab/Taxis Fiesta Cares,[3] and as to appellants' survival and negligence claims against Greater Houston. The trial court denied the First Motion as it concerned appellants' gross negligence claim against Greater Houston. The trial court explicitly did not address the negligent-training-and-supervision claim because it was asserted after the motion for summary judgment was filed.

Greater Houston filed a "First Amended Second Traditional and No-Evidence Motion for Summary Judgment" on December 22, 2014 ("Second

[3] Appellants do not challenge on appeal the dismissal of their claims against Yellow Cab/Taxis Fiesta Cares.

Motion"). The trial court signed a final judgment on January 16, 2015, granting the Second Motion and dismissing all of appellants' claims against Greater Houston. This appeal ensued.

STANDARD OF REVIEW

We review the grant of summary judgment *de novo*. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015). When reviewing a summary judgment, we examine the record in the light most favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Traditional summary judgment is proper if the defendant (1) disproves at least one element of each of the plaintiff's claims, or (2) establishes all elements of an affirmative defense to each claim. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Forrest Lake Townhouse Ass'n v. Martin*, No. 01-14-00281-CV, 2015 WL 452307, at *1 (Tex. App.—Houston [1st Dist.] Jan. 27, 2015, no pet.) (mem. op.). In reviewing a no-evidence summary judgment, we ascertain whether the nonmovant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206-08 (Tex. 2002).

ANALYSIS

In three issues, appellants contend that the trial court's grant of Greater Houston's traditional and no-evidence motion for summary judgment was erroneous because (1) the judgment was granted in part based on a release that was not sufficiently conspicuous to satisfy the fair notice doctrine; (2) the judgment disposed of appellants' gross negligence claim, even though the pre-injury release did not mention gross negligence; and (3) appellants produced more than a scintilla of evidence on every element of their claims. Appellants challenge the trial court's

granting of the Second Motion and the trial court's granting of the First Motion as to their claims against Greater Houston.

We need not decide whether the negligence release language was sufficiently conspicuous or whether appellants' gross-negligence claim was foreclosed by the release because appellants have not demonstrated that they brought forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to each claim.

In *Enterprise Leasing Co. v. Barrios*, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam), the Supreme Court of Texas stated that an appellant "bears the burden to bring forward the record of the summary judgment evidence" to provide appellate courts with a basis to review the appellant's claim of harmful error. Relying on *Enterprise*, this court previously has stated:

> [I]f a party wishes to successfully appeal a grant of summary judgment, he must include more than those documents the court clerk is required to include—he must include all 'pertinent' documents the trial court considered in granting the motion. Otherwise, on appeal, the appellant would be unable to demonstrate that a genuine issue of material fact existed that precluded summary judgment in favor of the movant.

Mallios v. Standard Ins. Co., 237 S.W.3d 778, 783 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also* Tex. R. App. P. 34.5(a)(1) (requiring that appellate record contain copies of "all *pleadings* on which the trial was held") (emphasis added). If a summary-judgment response or summary-judgment evidence considered by the trial court is not included in the appellate record, an appellate court may presume that the omitted response or evidence supports the trial court's judgment. *Pitsenbarger v. Cytec Indus., Inc.*, No. 14-10-00474-CV, 2011 WL 1312274, at *2-3 (Tex. App.—Houston [14th Dist.] Apr. 7, 2011, no pet.) (mem. op.). Taking this action is warranted if the appellant has not requested

under Texas Rule of Appellate Procedure 34.5(b) that the trial court clerk include the items in the clerk's record. *See* Tex. R. App. P. 34.5 (a), (b); *Mallios*, 237 S.W.3d at 783 (emphasizing that the appellant never requested that the clerk's record include any of the summary-judgment motions or summary-judgment responses pertinent to the rulings that appellant challenged on appeal).

Our record on appeal contains the First Motion and the Second Motion as well as appellants' response to the Second Motion. The record does not contain appellants' response to the First Motion or any evidence appellants may have filed in response to that motion. In its order granting the First Motion in part, the trial court stated that there was a response to the First Motion. The district court clerk certified that the clerk's record contains all proceedings directed by counsel or Rule 34 to be included in the clerk's record. One of the items required by Rule 34 is any request for preparation of the clerk's record. *See* Tex. R. App. P. 34.5 (a). The clerk's record does not contain any request by appellants for the preparation of a clerk's record. Therefore, the record reflects that appellants did not request that the clerk's record contain their response to the First Motion. We presume that appellants' response to the First Motion and any evidence attached thereto support the trial court's granting in part of the First Motion. *See Pitsenbarger*, 2011 WL 1312274, at *2-3; *Mallios*, 237 S.W.3d at 783. Based on this presumption, we conclude that the trial court did not err in granting in part the First Motion.

Regarding the Second Motion, appellants filed a response in which they stated that "Plaintiffs incorporate by reference into this response, for all purposes as summary judgment evidence, all exhibits attached to and presented in Plaintiffs' Response to Defendants Greater Houston Transportation Company's First Amended Second Traditional and No Evidence Motion for Summary Judgment." The response to which appellants referred was their response to the Second

Motion, the same document in which this statement was contained. The only summary-judgment evidence to which appellants pointed was evidence purportedly attached to this response, which appellants identified and described in a list of evidence.

The record, however, reflects that no summary-judgment evidence was attached to appellants' response to the Second Motion. In the Second Motion, Greater Houston asserted that there was no evidence of various essential elements of each of appellants' remaining claims. Greater Houston also attached summary-judgment evidence to the motion and asserted grounds seeking a traditional summary judgment. Greater Houston's evidence did not raise a genuine issue of material fact precluding summary judgment as to any of appellants' claims. Appellants filed no evidence with their response, and the only evidence to which appellants referred in the response was evidence that purportedly was attached to the response. We conclude that the trial court did not err in granting the Second Motion. *See, e.g., Adair v. Veritas DGC Land, Inc.*, No. 14-06-00254-CV, 2007 WL 2790362, at *5 (Tex. App.—Houston [14th Dist.] Sept. 27, 2007, pet. denied) (mem. op.) (plaintiffs failed to create a fact issue where plaintiffs' response to no-evidence motion for summary judgment contained no evidence).

Even assuming appellants intended to cite to evidence attached to their response to the First Motion, our record includes neither appellants' response to the First Motion nor any evidence appellants may have filed in response to that motion, as discussed above. Therefore, for the same reasons discussed in regard to the First Motion, we nevertheless would conclude that the trial court did not err in granting the Second Motion. Accordingly, we overrule appellants' issues on appeal.

CONCLUSION

Having overruled appellants' issues on appeal, we affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.