Affirmed and Memorandum Opinion filed December 21, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00841-CV

LEE WEBESTER, Appellant

V.

GSE LINING TECHNOLOGY LLC, Appellee

On Appeal from the 234th District Court
Harris County, Texas
Trial Court Cause No. 2013-68929

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

Appellant Lee Webester challenges the trial court's order granting summary judgment on his claims for premises liability and gross negligence. Webester sustained an injury while working as a temporary employee assigned to appellee GSE Lining Technology, LLC.[1] GSE moved for summary judgment on all claims,

[1] Appellee states in its brief that it changed its name to, and is now known as, GSE Environmental, LLC.

asserting, among other things, that the claims were barred by the exclusive remedy provision of the Texas Workers' Compensation Act ("TWCA"). Because GSE established as a matter of law that it was Webester's employer within the meaning of the TWCA at the time of the injury and that GSE was a subscriber to workers' compensation insurance, we affirm the trial court's summary judgment.

BACKGROUND

Webester worked for Aerotek, Inc., a temporary staffing company, in the area of electrical maintenance and repair. Aerotek sources, recruits, screens, and assigns temporary employees to its various clients. One of its clients is GSE, a lining manufacturing company with a plant located in Houston.

GSE and Aerotek operated under a Temporary Staffing Service Agreement. The Temporary Staffing Service Agreement expressly provided that temporary employees assigned by Aerotek to GSE would perform services for GSE "under the direction, supervision, and control of GSE." The agreement also provided that Aerotek would require its employees to acknowledge in writing that Aerotek and GSE were to be considered co-employers for purposes of the workers' compensation laws, and workers' compensation benefits under Aerotek's policy would be the sole and exclusive remedy for damages resulting from bodily injury. The policies and procedures statement signed by Webester contained these acknowledgements. The statement provided the following in pertinent part:

> . . . . I further understand and agree that, for Workers' Compensation purposes only, I will be considered an employee of Aerotek's client, and that workers' compensation benefits are my exclusive remedy with respect to any injury I incur while on assignment.

The statement further provided that Webester would hereby "WAIVE AND FOREVER RELEASE ANY RIGHTS [WEBESTER] MIGHT HAVE to make claims or bring suit against the Client of Aerotek for damages based upon injuries

which are covered under such Workers' Compensation statutes."

Aerotek sent Webester to interview with GSE supervisor Jerry Clark for work in the maintenance department at the GSE plant. During the interview Clark took Webester to the maintenance shop, where he tested Webester on his "knowledge in the electrical field" and asked Webester to draw a schematic. GSE then accepted Webester as a temporary employee for work in its maintenance department. Clark provided some initial instruction regarding the maintenance shop to Webester and had plans to train Webester on an extruder, though that did not ultimately happen.

The maintenance department at GSE was in charge of repairing the equipment used in manufacturing the liners. Webester testified that his job was to repair any electronic issues. Webester received his assignments on a daily basis from either GSE supervisor Jerry Clark or, if Clark was not there, a GSE lead man or maintenance manager. On one occasion, the plant manager also asked Webester to create a maintenance protocol for a large transmission. Webester was assigned a tool box from GSE, in which he stored his own tools. Webester believed that he was the only person in the maintenance department who could perform control-circuitry repairs.

When not working on electronic-related projects, Webester performed general housekeeping duties in the maintenance shop, such as cleaning the area and power washing tar off concrete.[2] Webester received his work schedule from GSE and was paid on an hourly basis. GSE required Webester to sign in and out, including lunch breaks, using a GSE time sheet each day. At the end of the week, GSE supervisors reviewed the time sheets, signed off on the hours worked, then submitted the time sheets to Aerotek. GSE paid Aerotek for the hours worked by temporary employees

[2] Webester voiced his displeasure to Aerotek when he was assigned to clean the tar as he did not believe that was part of his job description.

such as Webester, and then Aerotek, in turn, paid the employees based on the hours reported and approved. It is undisputed that Aerotek did not have any supervisors on site and did not provide any instructions to or supervision of Webester with regard to his work assignments at GSE.[3]

A little over two weeks after starting at GSE, Webester suffered an injury while working. The GSE maintenance team lead on duty that day assigned Webester to assist with removing a broken sump pump. The pump was used to load and unload silos containing plastic pellets used to manufacture the liners. Webester, along with the GSE team lead and another GSE employee, worked to remove the bolts that hold the pump in place. Another GSE employee operated a forklift to remove the pump once the bolts were removed. Webester explained that when he removed the last bolt, the pump "snatched up," and he was hit on his back by either the forklift arm or the pump. The hit knocked him to the ground and fractured two ribs, bruised his chest, and sprained his thoracic region.

As noted above, the policies and procedures statement Webester signed with Aerotek stated that an injured employee would contact Aerotek if injured. Webester thus attempted to report his injury to Aerotek that day, but could not reach his contact. He returned to work at GSE the following day and was then able to report the injury to his contact at Aerotek. Later that afternoon, the Aerotek representative informed Webester that he had been laid off because things were slow at GSE.

Aerotek filed the necessary paper work with its workers' compensation carrier and, after a contested hearing, Webester received benefits under Aerotek's workers' compensation policy. Webester then filed the underlying lawsuit against GSE, asserting claims for negligence and gross negligence. The claims were based on

[3] Webester stated that Aerotek simply told him "to assist with" whatever was needed.

theories of premises liability and "business invitee liability." Webester alleged that GSE had a duty to provide a safe work environment and it breached that duty by creating an unreasonably dangerous condition, failing to reduce or eliminate the dangerous condition, and failing to properly train its employees. Webester sought, among other damages, lost wages, punitive or exemplary damages, and attorneys' fees.

GSE filed a hybrid traditional and no-evidence motion for summary judgment on all claims asserted by Webester. GSE moved for traditional summary judgment on the grounds that Webester's claims were barred by the release contained in the Aerotek policies and procedures statement quoted above, and by the exclusive remedy provision contained in the TWCA. GSE also moved for traditional summary judgment on Webester's claims for lost wages and attorneys' fees, arguing these items are not compensable as a matter of law. Finally, GSE moved for no-evidence summary judgment on grounds that there was no evidence to support Webester's claims for negligence (based on premises liability), gross negligence, or punitive damages.

The trial court granted summary judgment on all claims asserted by Webester without specifying the grounds. Webester filed the instant appeal challenging the trial court's summary judgment.

ANALYSIS

Webester challenges the trial court's summary judgment in four issues. Webester first argues that the trial court erred in granting summary judgment on the basis of the release contained in the policies and procedures statement because it is unconscionable and does not meet the requirements of the express negligence doctrine. Second, he argues the trial court erred in granting summary judgment based on the exclusive remedy provision of the TWCA, claiming he was not an employee

of GSE, was not working in furtherance of the day-to-day activities of GSE, and GSE did not control the details of his work. Third, Webester contends there was sufficient evidence to support his claims for gross negligence and punitive damages. Fourth, Webester argues he presented sufficient evidence to proceed on his negligence (premises liability) claim. Because we hold the summary judgment evidence conclusively established the applicability of the exclusive-remedy provision to all claims asserted by Webester, we dispose of this appeal based on the second issue, and need not address the other issues.[4]

A. Standards of review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We consider the evidence in the light most favorable to the non-movant and indulge reasonable inferences and resolve all doubts in its favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *Wyly v. Integrity Ins. Sols.*, 502 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "We credit evidence favorable to the non-movant if reasonable fact finders could and disregard contrary evidence unless reasonable fact finders could not." *Wyly*, 502 S.W.3d at 904.

To prevail on a traditional motion for summary judgment, the movant must establish that no genuine issue of material fact exists such that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Fielding*, 289 S.W.3d at 848. When a defendant moves for summary judgment on an affirmative defense, the

[4] This court must address only those issues raised and necessary to final disposition of the appeal. *See* Tex. R. App. P. 47.1 ("The court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal."); *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and no cents in U.S. Currency ($90,235)*, 390 S.W.3d 289, 294 (Tex. 2013) ("It was not necessary for the court of appeals to address Bueno's third ground after it affirmed the summary judgment based on his second ground.").

defendant must prove conclusively the elements of that defense, leaving no issues of material fact. *Pustejovsky v. Rapid-Am. Corp.*, 35 S.W.3d 643, 646 (Tex. 2000); *Sharp v. Kroger Tex. L.P.*, 500 S.W.3d 117, 119 (Tex. App.—Houston [14th Dist.] 2016, no pet.). The evidence raises an issue of fact only if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Sharp*, 500 S.W.3d at 119.

B. Application of the TWCA Exclusive-Remedy Provision to Webester's Claims

The TWCA states that benefits provided under workers' compensation insurance are the exclusive remedy for an employee injured on the job. *See Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012). Section 408.001 of the Act, entitled "Exclusive Remedy; Exemplary Damages," provides the following:

> Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage or a legal beneficiary against the employer or an agent or employee of the employer for the death of or a work-related injury sustained by the employee.

Tex. Lab. Code § 408.001(a).[5] To be entitled to summary judgment based on the exclusive-remedy provision, GSE had to conclusively establish that: (1) it was Webester's employer at the time of the injury; and (2) it was a workers' compensation subscriber. *See Casados*, 358 S.W.3d at 243.

1. *Was GSE Webester's employer at the time of the injury?*

Under the TWCA, "[e]mployer means, unless otherwise specified, a person who makes a contract of hire, employs one or more employees, and has workers'

[5] A statutory exception to the exclusive-remedy provision exists if an employee's death is caused by an intentional act or omission or by gross negligence. Tex. Lab. Code § 408.001(b); *Casados*, 358 S.W.3d at 241. As Webester's injury was not fatal, this exception is not at issue.

compensation insurance coverage. The term includes a governmental entity that self-insures, either individually or collectively." Tex. Lab. Code § 401.011(18). In cases like this one, where an employee is provided to a client company by a temporary-staffing company, employees may have more than one employer within the meaning of the TWCA, and both employers may assert the exclusive-remedy provision as a bar to an injured employee's claims.[6] *See, e.g.*, *Casados*, 358 S.W.3d at 242; *Western Steel Co. v. Altenburg*, 206 S.W.3d 121, 123 (Tex. 2006) (per curiam); *Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 476 (Tex. 2005); *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 144 (Tex. 2003); *see also City of Bellaire v. Johnson*, 400 S.W.3d 922, 924 (Tex. 2013) (per curiam) (applying exclusive-remedy provision to employee placed at job by staffing company when client-employer had workers compensation coverage). A key question is whether the injured worker is also considered an employee of the client company at the time of the injury under the definition of employee provided in the TWCA. *See Garza*, 161 S.W.3d at 476 ("To fully answer the question of who is an employer and who is that employer's employee, we must look elsewhere in the Act.").

The TWCA defines an employee as a "person in the service of another under a contract for hire, whether express or implied, or oral or written" and includes a person, other than an independent contractor, "who is engaged in construction, remodeling, or repair work for the employer at the premises of the employer." Tex. Lab. Code § 401.012(a), (b)(2). In reviewing the definition of "employee" under the TWCA, the court in *Garza* noted that "[t]here is no indication from the legislative history of this definition that the Legislature intended to dispense with traditional notions of what it means to be 'in the service of another.'" *Garza*, 161 S.W.3d at

[6] As noted above, the Temporary Staffing Service Agreement expressly provided that Aerotek and GSE would be considered, for workers' compensation purposes only, co-employers of the employees assigned to GSE. Webester acknowledged this co-employer status in writing.

476. Thus, when determining whether a temporary employee provided by a staffing company is also an employee of the client company, the court in *Garza* explained that courts look to "traditional indicia, such as the exercise of actual control over the details of the work that gave rise to the injury." *Garza*, 161 S.W.3d at 477; *cf. Phillips v. Am. Elastomer Prods., L.L.C.*, 316 S.W.3d 181, 187 (Tex. App.—Houston [14th Dist.] 2010, pet. denied) ("When there is a question as to whether one is an 'employer' under the TWCA, Texas courts turn to the borrowed servant doctrine.").

In assessing actual control, courts look to whether: (1) at the time of the injury the worker was working on the client company's premises; (2) the work was in furtherance of the client company's day-to-day business; and (3) the details of the work that caused the injury were specifically directed by the client company. *See Garza*, 161 S.W.3d at 477. When these three factors exist, a general employee meets the definition of an employee of the client company under section 401.012(a) of the TWCA. *See id.* Webester does not dispute that the injury occurred on the GSE plant premises, and the summary-judgment evidence does not raise a fact issue on this point. We thus turn to whether GSE conclusively established that the work Webester performed was in furtherance of GSE's day-to-day business, and that GSE controlled the details of the work that caused the injury.

a. *In furtherance of the day-to-day business of GSE*

GSE is in the business of manufacturing plastic liners. The manufacturing process includes use of machines that require maintenance, and GSE has a maintenance department in charge of maintaining and repairing the machines. Webester was assigned to work in the maintenance department led by GSE supervisor Clark. At his deposition, Webester described the assignments he was given by either Clark or the GSE team lead as part of his work in the maintenance department and acknowledged that he was there to handle repairs with electrical

issues. Webester also acknowledged that GSE had maintenance employees so that they could repair and perform maintenance on GSE's equipment.

Webester argues on appeal that he was not working in the furtherance of GSE's day-to-day business because Webester did not take part in the actual manufacturing process, but he was rather an electrician assigned to repair the manufacturing equipment. We disagree. GSE's manufacturing process undoubtedly involves manufacturing equipment that Webester was assigned to help maintain and repair. At the time of his injury, Webester was helping to remove a sump pump, which Webester conceded GSE used to load and unload the silos containing the plastic pellets for manufacturing the liners. Repairing a machine used in the manufacturing process is in furtherance of GSE's day-to-day business. *See Wells v. Lumbermen's Reciprocal Ass'n*, 6 S.W.2d 346, 347-48 (Tex. Comm'n App. 1928) (holding repairs to machinery used in operating plant were essential and necessary to operation of business and thus were within usual course of business for purposes of workers' compensation claim). GSE conclusively established the second element under *Garza*—that Webester's work was in furtherance of GSE's day-to-day business.

b. *Control of the details of Webester's work that caused the injury*

GSE also established that it controlled the details of the work that caused Webester's injury. Under the right-of-control test, courts must determine which party controlled the details of the work given to the employee. *See Phillips*, 316 S.W.3d at 187 ("Under the right-of-control test, an injured worker is held to be the employee of the employer who had the right of control over the details of the work at the time of the injury."). The party who controlled the details of the work is an employer under the TWCA entitled to the protection of the exclusive-remedy provision. *See id.*

The type of control typically exercised by an employer includes determining when and where to begin and stop work, the regularity of hours, the amount of time spent on particular aspects of work, the tools and appliances used to perform the work, and the physical method or manner of accomplishing the end result. *Id.* In addition, when a contract expressing the right of control exists, courts consider the contract as one factor in determining the right-of-control question and look to whether evidence in the record shows to the contrary. *See Mosqueda v. G&H Diversified Mfg., Inc.*, 223 S.W.3d 571, 579 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (noting contract provision on control is a factor and no evidence contradicted contractual provision). The contract between GSE and Aerotek expressly provides that "[t]he services to be performed by employees provided by [Aerotek] will be performed under the direction, supervision, and control of GSE." Thus, we look to whether any evidence in the record contradicts this contractual provision. *See id.* at 580.

GSE set Webester's schedule, including lunch breaks, and required Webester to sign in and out on GSE time sheets. GSE supervisors signed the time sheets. GSE trained Webester with regard to the maintenance department, and Webester was paid on an hourly basis. These factors all indicate that GSE was Webester's employer for purposes of the TWCA.

The provision of assignments to Webester also indicates that GSE was his employer for purposes of the TWCA. With regard to his assignments, Webester performed a variety of tasks, some of which involved electrical aspects and some of which did not. The record is undisputed that only GSE employees gave Webester assignments. At his deposition, Webester testified as follows:

> Q: Okay. But in terms of what repair work you did each day, that came from either Jerry Clark, the lead man or the maintenance

manager, correct?

A: Yes.

* * *

Q: And it sounds like you also — there were times when you were asked to do some housekeeping, correct?

A: That was the maintenance shop, and I didn't have a problem with that. I didn't have a problem with that because of the condition which the maintenance shop was, which wasn't even safe there, safe for the employees to walk around in. I wasn't asked; I did that voluntarily.

Q: But there were occasions where you were asked to clean other areas, correct?

A: Right. And I called [Aerotek representative Nelson] and told him about my dissatisfaction.

Q: But you were being asked to do so by someone at GSE, correct?

A: Yes.

Webester confirmed in his deposition that GSE supervisor Clark or other GSE employees gave him his day-to-day work and that his work there included setting up a phasing system to alert when a motor was about to burn out and writing up a preventive maintenance program. On another occasion, Webester was asked to clean muck off a concrete floor. His instructions in terms of what to do within his work shift came from GSE employees, and no Aerotek employees gave him directions as to what to do within his shift at GSE.[7]

Webester testified that he was injured while removing a bolt from the sump pump. Webester stated as follows:

[7] In fact, Aerotek representative Nelson confirmed that Aerotek did not maintain supervisors at the site because day-to-day supervision of the employees was GSE's responsibility under the Temporary Staffing Service Agreement.

Q: Who assigned you to work outside in the rain, removing a pump?

A: First of all, I guess it was an assignment, but I said assignment. But I was asked — Jerry — I mean, Tom [GSE lead man on duty] asked me to come outside to assist to remove the pump.

* * *

Q: . . . How do you know that you're going to remove the bolts from this pump?

A: That's the only way we could take the pump off.

Q: Okay. So you know that just as part of your experience, right?

A: Yes. Yeah.

Q: But Tom is the one that told you this is what you needed to help do, right?

A: Yes, uh-huh.

These undisputed facts comport with the traditional indicia of an employee relationship and satisfy the right-to-control test. *See Phillips*, 316 S.W.3d at 188; *see also City of Bellaire*, 400 S.W.3d at 923 (holding city that set employee's work schedule, gave him his assignments, and supervised his work as a matter of law controlled the details of work and was employer); *Garza*, 161 S.W.3d at 477 (holding client company controlled details of work when, at time of injury, employee was responding to direct instructions from supervisor of client-company).

Webester argues that GSE did not control the details of his work because his assignment related to electronics, he believed he was the only one with knowledge of control circuitry, and he used his own tools. Webester cites our decision in *Ellwood Texas Forge Corp. v. Jones*, in which we held that a premises owner did not become the employer of an electrician injured while working for an independent contractor on an air conditioner repair project. 214 S.W.3d 693, 700 (Tex. App.—

Houston [14th Dist.] 2007, pet. denied). We find *Ellwood Texas Forge* distinguishable.

In *Ellwood Texas Forge*, the plaintiff was part of a crew working for an independent contractor hired to replace an air conditioner at Ellwood's plant. *Id.* at 695-96. While working to replace the unit, the plaintiff fell and was injured. *Id.* at 696. A jury found that Ellwood retained or exercised control over the manner in which the air conditioner installation was performed, as required to impose liability under Chapter 95 of the Texas Civil Practice and Remedies Code. *Id.* at 697. After reviewing cases addressing the control necessary under Chapter 95, we held the facts did not amount to sufficient control. *Id.* at 703. We determined that sufficient control does not exist simply because a premises owner has a safety system that would allow it to start or stop the work of the independent contractor that the owner deems unsafe. *Id.* at 702. The evidence showed that the premises owner did not control the details of the work performed by the plaintiff where, once the plaintiff received his assignment, the details were left to his discretion, judgment, and control. *Id.* at 704.

There is no similar evidence in this case with regard to the repair work that Webester performed at GSE. Webester was not placed at GSE for a specific project as part of an independent repair company. He was placed in the maintenance department to perform, and did perform, a variety of tasks, some of which were electrical and some of which were not. At the time he was injured, Webester was removing bolts from a sump pump for repair. The evidence is undisputed that, at the time of his injury, Webester was working under the supervision and instruction of the GSE lead man. GSE thus controlled the details of Webester's work for purposes of the workers' compensation statute. *See Garza*, 161 S.W.3d at 477 (holding client-company was deemed to be employer under workers' compensation because, at time of injury, worker was specifically directed by client-company employee).

We also conclude that Webester's use of his own tools is insufficient to raise a fact issue regarding the right to control in this case. The worker's obligation to furnish necessary tools, supplies, and materials to perform the job is one factor in the independent-contractor analysis. *See Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (per curiam); *see also Ellwood Tex. Forge*, 214 S.W.3d at 704. But there is no evidence in the record that GSE *required* Webester to use his own tools—only that Webester did so. Webester testified that GSE provided a tool box for him to use in which he stored his tools. Webester's use of his own tools does not rebut GSE's evidence establishing it controlled the details of Webester's work at the time he was injured. *See Phillips*, 316 S.W.3d at 188 (rejecting mere use of own tools as sufficient to raise fact issue).

The summary-judgment record conclusively establishes that GSE was Webester's employer for purposes of the TWCA at the time of his injury. There is no evidence contradicting the contractual provision stating that the services of temporary employees like Webester would be performed under the direction, supervision, and control of GSE. *See Mosqueda*, 223 S.W.3d at 580. We now turn to consider whether GSE conclusively established that it was a workers' compensation subscriber.

2. *Was GSE a workers' compensation subscriber?*

As part of its summary judgment evidence, GSE attached the affidavit of Edward Zimmel, its Vice President of Engineering, and a copy of the information page of its workers' compensation insurance policy for the relevant time frame. This proof is sufficient to establish that GSE was a workers' compensation insurance subscriber. *See Martinez v. H.B. Zachry Co.*, 976 S.W.2d 746, 748 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding affidavit by claims manager swearing document attached to affidavit was true and correct copy of information page of

workers' compensation policy for its employees was sufficient); *see also Price v. Uni-Form Components Co.*, No. 14-11-00902-CV, 2012 WL 2929493, at *4 (Tex. App.—Houston [14th Dist.] July 19, 2012, no pet.) (mem. op.) (same).

Webester does not dispute that GSE was a workers' compensation insurance subscriber at the time of his accident. Instead, Webester points to language in the Temporary Staffing Service Agreement stating that employees assigned to GSE remain employees of Aerotek and shall not be entitled to participate in any GSE employment benefit plans, "including, but not limited to pension, 401(k), profit sharing, retirement, deferred compensation, welfare, insurance, disability, bonus, vacation pay, severance pay, and other similar plans, programs, and agreement...." Webester argues that the evidence places his employment status with GSE in dispute. But the language in the Temporary Staffing Service Agreement does not refute the undisputed evidence that GSE was a subscriber to workers' compensation insurance. It does not state that temporary employees like Webester would not be covered under GSE's workers' compensation plan. And it could not do so. *See Casados*, 358 S.W.3d at 243 (explaining employers cannot split workforce by choosing workers' compensation coverage for some but not all employees, absent limited statutory or common-law exceptions not applicable to facts in case); *see also Johnson*, 400 S.W.3d at 923 ("An employee cannot argue that his subscriber-employer has done what the law prohibits; rather, the employee is covered as a matter of law, and any dispute by the carrier over whether it agreed to provide such coverage under the policy's terms is with the employer."). The summary-judgment record conclusively establishes that GSE was a workers' compensation subscriber.

CONCLUSION

The trial court properly determined that the exclusive-remedy provision of the TWCA bars all of Webester's claims against GSE as a matter of law. GSE

established that it was Webester's employer for purposes of the TWCA at the time of the injury and that GSE maintained workers' compensation insurance. We overrule Webester's second issue and affirm the trial court's summary judgment.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby.