Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-17-00833-CV

Bradford **COOPER**,
Appellant

v.

M.N. GUMBERT CORPORATION d/b/a S.O.T. Abrasives & Equipment, Gumbert M.N. Corporation, S.O.T. Abrasives, S.O.T. Abrasives, a Division of M.N. Gumbert Corporation, and Sandpaper of Texas, Abrasives and Equipment, a Division of M.N. Gumbert Corporation,
Appellees

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2017CI22048
Honorable Stephani A. Walsh, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Karen Angelini, Justice
Luz Elena D. Chapa, Justice
Irene Rios, Justice

Delivered and Filed: September 19, 2018

AFFIRMED

Bradford Cooper appeals from the trial court's order granting the traditional and no-evidence motion for summary judgment filed by M.N. Gumbert Corporation d/b/a S.O.T. Abrasives & Equipment, Gumbert M.N. Corporation, S.O.T. Abrasives, S.O.T. Abrasives a Division of M.N. Gumbert Corporation, and Sandpaper of Texas, Abrasives and Equipment, a Division of M.N. Gumbert Corporation (collectively, "SOT"). Because we conclude Cooper failed

to present evidence showing SOT owed a legal duty to provide him medical care, and under the undisputed facts of this case no such duty arose, we affirm the trial court's order.

BACKGROUND

Cooper sued SOT for failing to provide Cooper medical care when Cooper began experiencing symptoms of a stroke while at work. In his petition, Cooper alleged that at about 9:00 a.m. on November 12, 2013, while at work he began experiencing right-sided weakness, right arm pain, and profuse sweating. Cooper alleged that although he was obviously in need of medical care, his employer, SOT,[1] sent him home rather than taking him to a doctor or the nearest emergency room. Cooper alleged that by failing to provide Cooper necessary medical care, SOT failed to provide a safe place to work, and this failure amounted to negligence and gross negligence and proximately caused him the injuries he sustained as a result of the stroke.

SOT filed a joint traditional and no-evidence motion for summary judgment. In its traditional motion for summary judgment, SOT asserted the evidence established: Cooper was not incapacitated nor did SOT know he might have been incapacitated; SOT had no duty as an employer to force Cooper to seek or accept medical treatment for a non-work-related illness; SOT did not take affirmative control over Cooper's conduct; SOT's actions did not increase the risk of injury to Cooper; SOT's actions did not cause the damages that Cooper seeks; Cooper's damages were caused by his own negligent conduct; and SOT did not act with gross negligence. In its no-evidence motion for summary judgment, SOT asserted Cooper could not produce evidence raising a genuine issue of material fact on all elements of his causes of action. Specifically, SOT asserted Cooper could produce no-evidence of incapacity, duty, affirmative control, causation, or gross negligence.

[1] M.N. Gumbert Corporation d/b/a S.O.T. Abrasives & Equipment is the specific company of which Cooper was an employee. The other appellees are affiliated companies.

Cooper filed a response and a supplemental response to SOT's motion for traditional and no-evidence summary judgment. On November 1, 2017, the trial court signed an order granting SOT's joint motion for traditional and no-evidence summary judgment in its entirety.[2] This appeal followed.

STANDARD OF REVIEW

We review a summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 579 (Tex. 2017).

"After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i). If the nonmovant brings forward more than a scintilla of probative evidence that raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009); *see* TEX. R. CIV. P. 166a(i). "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). "[M]ore than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Id*. at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

[2] Cooper also filed suit against Dr. Michael McFarland, the first medical professional to see Cooper after Cooper began experiencing symptoms. After the trial court granted SOT's motion for summary judgment, the trial court signed an order severing Cooper's claims against SOT so that the order granting SOT's motion for summary judgment would become final and appealable.

"A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law." *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015); *see also* TEX. R. CIV. P. 166a(c). A movant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment. *Frost Nat. Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). "Once the movant establishes its right to summary judgment as a matter of law, the burden shifts to the nonmovant to present evidence raising a fact issue to defeat the motion for summary judgment." *Briggs v. Toyota Mfg. of Texas*, 337 S.W.3d 275, 282 (Tex. App.—San Antonio 2010, no pet.).

"When a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious." *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000). "[I]f a no-evidence motion for summary judgment and a traditional motion for summary judgment are filed which respectively asserts the plaintiff has no evidence of an element of its claim and alternatively asserts that the movant has conclusively negated that same element of the claim, we address the no-evidence motion for summary judgment first." *Williams v. Parker*, 472 S.W.3d 467, 469–70 (Tex. App.—Waco 2015, no pet.). If, however, the traditional motion for summary judgment challenges a cause of action for a reason independent of and unrelated to an element challenged in the no-evidence motion, we first review the independent argument raised in the traditional motion for summary judgment because it would be unnecessary to address whether a plaintiff met his burden as to the no-evidence challenge if the cause of action is barred as a matter of law. *See Lotito v. Knife River Corp.-S.*, 391 S.W.3d 226, 227 n.2 (Tex. App.—Waco 2012, no pet.).[3]

[3] *See also Avery v. Guadalupe Cty. Appraisal Dist.*, No. 04-16-00572-CV, 2017 WL 1337640, at *3 (Tex. App.—San Antonio Apr. 12, 2017, pet. denied) (mem. op.) (addressing first arguments raised in the traditional motion for

In this case, all of the grounds on which SOT moved for traditional summary judgment relate to elements of Cooper's pleaded claims of negligence and gross negligence—elements on which SOT also moved for no-evidence summary judgment. Thus, we will discuss each of the challenged elements in turn; we will first assess whether Cooper presented evidence raising a genuine issue of material fact, and then, if so, whether the evidence presented by SOT nonetheless conclusively established it was entitled to summary judgment. *See Williams*, 472 S.W.3d at 469–70.

LEGAL DUTY OF AN EMPLOYER TO PROVIDE MEDICAL CARE

SOT asserted in its no-evidence motion for summary judgment that SOT owed Cooper a legal duty only if Cooper was incapacitated, SOT knew Cooper was incapacitated, and SOT exercised affirmative control over Cooper. SOT asserted there was no evidence of any of those three components to the duty analysis. In its traditional motion for summary judgment, SOT asserted that under the facts of this case, SOT did not owe a legal duty to provide Cooper medical care. Cooper contends on appeal SOT owed him a legal duty to provide him medical care under the facts of this case.

"It is axiomatic that a legal duty must exist before a defendant may be held liable in negligence." *Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 720 (Tex. 1995). "[A] mere bystander who did not create the dangerous situation is not required to become the good Samaritan and prevent injury to others." *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 353 (Tex. 1995) (quoting *Buchanan v. Rose*, 159 S.W.2d 109, 110 (1942)). Texas law recognizes, however, that an employer owes its employees certain non-delegable duties, including "to provide them a safe place to work, safe equipment to work with, and warn them of potential hazards." *Gen. Elec. Co. v.*

summary judgment because the traditional motion asserted grounds different from the grounds asserted in the no-evidence motion).

Moritz, 257 S.W.3d 211, 215 (Tex. 2008). The parties dispute the extent to which, in addition to the aforementioned duties, an employer owes its employee a duty to provide medical care when the employee becomes ill while at work.

SOT argues Texas law does not require employers to affirmatively provide medical care to their employees. However, Texas courts have recognized that, under certain circumstances, an employer may have a duty to affirmatively provide medical care to an employee who suffers an illness or injury while at work and to act reasonably when doing so. *See Welch v. AABTEL, Inc.*, No. 03-14-00102-CV, 2015 WL 4196520, at *1 (Tex. App.—Austin July 8, 2015, no pet.) (mem. op.); *Atchison, T. & S.F. Ry. Co. v. Hix*, 291 S.W. 281, 285 (Tex. Civ. App.—El Paso 1926, no writ); *Baker v. Adkins*, 278 S.W. 272, 275 (Tex. Civ. App.—San Antonio 1925, writ ref'd n.r.e.).

In *Hix*, the court held that when a railroad employee who was injured while the train was moving "was found upon the track in his helpless mangled condition, it became [the employer's] duty to provide emergency medical and surgical attention in an effort to save his life." *Hix*, 291 S.W. at 285. In *Baker*, a surviving spouse sued her deceased husband's employer, alleging the employer negligently failed to care for her husband who became ill with smallpox while on a job site. *Baker*, 278 S.W. at 273. This court held: "If the master cannot without incurring liability wantonly, recklessly or negligently inflict harm on the servant while in the performance of his duty and when he is able to look out for himself, neither should he be allowed to wantonly or negligently abandon him to suffer or die when he is helpless and dependent, merely because he has been injured." *Id.* at 275 (quoting *Troutman's Adm'x v. Louisville & N.R. Co.*, 179 Ky. 145, 200 S.W. 488, 491 (1918)). This court further held, "[i]t was undoubtedly the duty of the [employer] under the circumstances to make a reasonable effort to see that proper attention was given to deceased, either by notifying the county authorities of the necessities of the case, notifying the wife, or assuming the care of the man." *Id.*

In *Welch*, an employee who suffered a stroke while at work sued his employer for negligently failing to provide him medical care. *Welch*, 2015 WL 4196520, at *1. There, Welch, the employee, was "[a]t all relevant times . . . conscious, lucid, had his normal cognitive functions, and was physically able to work and to summon emergency care." *Id.* The court noted that "courts have held that the employer has a duty to provide emergency medical or surgical aid when the employee sustains serious injury in the course of employment that renders him helpless and incapable of aiding himself and there is an immediate and urgent need for medical and surgical attention to save his life." *Id.* at *2. However, the court declined to accept Welch's argument "that Texas law should be expanded to hold that an employer or co-employee/supervisor should be required to provide an employee medical care for an ordinary disease of life, even when the employee is not rendered helpless or incapable of helping himself." *Id.*

Thus, the aforementioned caselaw demonstrates an employer has a duty to affirmatively provide medical care and assistance to an employee when the employee is incapable of helping himself and has an immediate and urgent need for medical assistance. *See Welch*, 2015 WL 4196520, at *2; *Hix*, 291 S.W. at 285; *Baker*, 278 S.W. at 275. However, in the absence of circumstances showing an employee is in a state of helplessness with an immediate and urgent need for medical assistance, and in the absence of a statutory or contractual obligation to provide medical assistance, an employer has no general duty to provide medical assistance to an employee who becomes ill while at work. *See Hix*, 291 S.W. at 284; *Baker*, 278 S.W. at 275.

In this case, the undisputed summary judgment evidence shows that on November 12, 2013, Cooper arrived to work at 8:00 a.m. Around 8:20 a.m. or 8:30 a.m., Cooper began to complain about experiencing pain in his right arm and shoulder and was momentarily unable to verbally respond to a co-worker's question. Around 9:30 a.m., Cooper left the office to go see his doctor, and Cooper arrived at his doctor's clinic around 10:15 a.m. Cooper did not present any

evidence that at the time he left work to go see his doctor, he was in a state of helplessness or dependency or was incapable of helping himself. Moreover, the undisputed evidence shows he was not in a state of helplessness. Regardless of what may or may not have been said between Cooper and his supervisor during the time he was at work that morning,[4] the undisputed evidence shows that, although Cooper had begun experiencing pain in his right arm and shoulder and for a moment was unable to verbally communicate with an co-worker, he was well enough to leave his office, located in San Antonio, at around 9:30 a.m. and drive to his doctor's office, located in Jourdanton, Texas, where he arrived around 10:15 a.m.

Like the Austin Court of Appeals in *Welch*, we decline to accept Cooper's invitation to expand employers' legal obligations to employees by holding that an employer has a duty to affirmatively provide medical care to an employee under facts such as these, where the employee "is not rendered helpless or incapable of helping himself." *See Welch*, 2015 WL 4196520, at *2.

In support of his argument that employers owe a duty to affirmatively provide medical care to an employee who becomes ill while at work, Cooper cites to the admiralty and maritime doctrine of "maintenance and cure," which "provides that a seaman who is injured or becomes ill while in the service of a ship is entitled to food and lodging ("maintenance") and medical services ("cure") from the shipowner." *Corpus Christi Day Cruise, LLC v. Christus Spohn Health Sys. Corp.*, 398 S.W.3d 303, 308 (Tex. App.—Corpus Christi-Edinburg 2012, pet. denied). This doctrine, however, has been applied in the context of admiralty and maritime law only, and the policies underpinning this doctrine generally do not apply to employers at large where employees, although

[4] Cooper's supervisor, Roger Contreras, testified in a deposition that although Contreras offered to either call Cooper an ambulance or drive Cooper to a medical clinic across the street from the office, a hospital, or Cooper's personal doctor, Cooper refused all of Contreras's offers, stating he did not want to incur any medical bills. Cooper argues Contreras, as an employee of SOT, is an interested witness and that it should be up to the factfinder to judge the credibility of Contreras's testimony that Cooper refused Contreras's offers to take him to the hospital or call him an ambulance.

ill, are able to seek medical services for themselves. *See Vaughan v. Atkinson*, 369 U.S. 527, 531, (1962) (observing the policies underlying the doctrine of maintenance and cure are: "the protection of seamen, who, as a class, are poor, friendless and improvident, from the hazards of illness and abandonment while ill in foreign ports; the inducement to masters and owners to protect the safety and health of seamen while in service; and maintenance of a merchant marine for the commercial service and maritime defense of the nation by inducing men to accept employment in an arduous and perilous service" (quoting *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938))). No Texas court has extended the doctrine of maintenance and cure to circumstances arising outside the context of admiralty and maritime law, and we decline to do so here.

Cooper also argues SOT is liable in this case because SOT negligently undertook a duty to provide medical assistance to Cooper. "[T]o establish a claim for a negligent undertaking, a plaintiff must show (1) the defendant undertook to perform services that it knew or should have known were necessary for the plaintiff's protection, (2) the defendant failed to exercise reasonable care in performing those services, and either (3) the plaintiff relied upon the defendant's performance, or (4) the defendant's performance increased the plaintiff's risk of harm." *Midwest Employers Cas. Co. ex rel. English v. Harpole*, 293 S.W.3d 770, 778 (Tex. App.—San Antonio 2009, no pet.) (quoting *Pugh v. Gen. Terrazzo Supplies, Inc.*, 243 S.W.3d 84, 94–95 (Tex. App.—Houston [1st Dist.] 2007, pet. denied)). However, Cooper did not allege in his petition that SOT undertook to provide medical services to Cooper, and the summary judgment record is devoid of any evidence suggesting SOT undertook to provide Cooper medical services.

Accordingly, we conclude Cooper failed to present evidence showing SOT owed a legal duty to provide medical care to Cooper. Furthermore, we conclude the undisputed evidence presented by SOT establishes SOT did not have a legal duty to provide medical care to Cooper under the facts of this case. Because the existence of a legal duty is a necessary element to both

Cooper's claims for negligence and gross negligence, the trial court did not err by granting summary judgment for SOT and adjudging that Cooper take nothing by his suit against SOT. *See City of Waco v. Kirwan*, 298 S.W.3d 618, 623 (Tex. 2009) ("As with negligence actions . . . a defendant may be liable for gross negligence only to the extent that it owed the plaintiff a legal duty.").

Because the lack of evidence showing SOT owed a legal duty to provide medical care to Cooper supports the trial court's order granting summary judgment in favor of SOT, it is unnecessary to discuss the other issues raised by the parties on appeal.[5] *See* TEX. R. APP. P. 47.1.

CONCLUSION

For the foregoing reasons, we affirm the trial court's order granting SOT's joint motion for traditional and no-evidence summary judgment.

Irene Rios, Justice

[5] In addition to his contention that SOT owed him a legal duty to provide him medical care, Cooper also contends on appeal that fact issues exist as to whether SOT breached its duty, a person with diminished capacity should be held to a lower standard of care, summary judgment should not be granted based on the testimony of interested witnesses, and fact issues exist as to whether SOT's conduct amounted to gross negligence. In response, SOT contends on appeal that Cooper failed to challenge on appeal all grounds on which SOT moved for summary judgment, the only evidence in support of causation was filed with an untimely supplemental response which the trial court erroneously allowed Cooper to file and which due to other deficiencies amounts to no evidence, Cooper's complaint that Cooper's co-worker and supervisor are interested witnesses amounted to an objection as to their testimony's admissibility for which Cooper failed to obtain a ruling from the trial court, and there exists no evidence of gross negligence.