Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-19-00132-CV

WE DELIVER, INC. d/b/a Wok This Way,
Appellant

v.

Edwin **CALDERON**,
Appellee

From the 285th Judicial District Court, Bexar County, Texas
Trial Court No. 2015CI16309
Honorable Barbara Nellermoe, Judge Presiding

Opinion by: Irene Rios, Justice

Sitting: Luz Elena D. Chapa, Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 22, 2020

AFFIRMED

In this premises liability case, We Deliver, Inc. d/b/a Wok This Way ("Wok") appeals from a judgment requiring it to pay damages to its former employee, Edwin Calderon, for injuries sustained when he slipped and fell at work. We affirm.

BACKGROUND

Wok employed Calderon as a cook at its restaurant. While at work, Calderon slipped and fell on a wet floor. The floor was wet because another employee was cleaning it with a brush and

water.[1] Calderon walked on the wet floor to get soup from the cooler to prepare a customer's order. The only way for Calderon to get to the cooler was to walk on the wet floor. Calderon, who was wearing special non-slip shoes, walked slowly because he saw the water on the floor. Despite these precautions, Calderon slipped on the wet floor and fell.

As soon as he fell, Calderon felt pain in his head and neck. He told his manager about the incident before finishing his shift that night. The next day, Calderon felt pain in his head, neck, left arm, and right leg. He was unable to walk. A friend took him to the hospital for medical treatment. X-rays and MRIs showed Calderon was suffering from a chest sprain, a neck sprain, and a contusion. A doctor prescribed pain medication for these injuries. Over the next week, Calderon felt pain in his back and he was unable to work because of this pain. Calderon sought medical treatment from another doctor. Several months after the incident, Calderon was still receiving treatment for back pain. Calderon's medical treatment included physical therapy and injections. The injections helped alleviate Calderon's back pain.

Calderon sued Wok, alleging claims for negligent activity and premises liability.[2] Wok moved for summary judgment on both claims. The trial court granted Wok's summary judgment on the negligent activity claim and dismissed this claim with prejudice. The trial court held a bench trial on the premises liability claim. At the end of the trial, the trial court rendered judgment in favor of Calderon and awarded him $103,429.94 in damages. This amount included $73,429.94 for past medical expenses; $12,000.00 for pain and suffering; $12,000.00 for physical impairment; and $6,000.00 for mental anguish. Wok appealed.

[1]Evidence showed that Wok's employees cleaned the restaurant every night and they sometimes started mopping the floor before the restaurant closed. Calderon fell at 9:30 p.m., a half hour before closing time.

[2]Wok was a worker's compensation nonsubscriber.

EXISTENCE OF A DUTY

In a premises liability case, a defendant may be liable to the plaintiff only if it owes him a legal duty. *General Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008). The existence of a duty is a question of law for the court to decide based on the facts and circumstances of the case. *Id*.; *Golden Spread Council, Inc. No. 562 of Boy Scouts of Am. v. Akins*, 926 S.W.2d 287, 289 (Tex. 1996). Wok's first, second, and third issues challenge the existence of a legal duty in this case.

"Texas employers have a duty to exercise reasonable care to provide their employees with a safe place to work." *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 198 (Tex. 2015). The Texas Supreme Court has confirmed that "generally, an employer has the same premises-liability duty to its employees as other landowners have to invitees on their premises." *See id.* at 201-02. "Like all others who own or operate land, employers generally may fulfill their premises-liability duties to [their employees] either by eliminating any unreasonably dangerous condition or by adequately warning of the risks." *Id*. at 198.

Furthermore, consistent with the rule for other landowners and their invitees, "an employer generally does not have a duty to warn or protect its employees from unreasonably dangerous premises conditions that are open and obvious or known to the employee." *Id*. Nevertheless, the Texas Supreme Court has noted that in some situations an otherwise adequate warning or the employee's knowledge of the danger is not sufficient to discharge the employer's duty. *Id*. at 204. For this reason, the supreme court has recognized two exceptions to the general rule that no duty exists when conditions are open and obvious or known to the employee. *Id*.

One of these exceptions, the necessary-use exception, is relevant to the present case. The necessary-use exception arises "when the [employee] necessarily must use the unreasonably dangerous premises, and despite the [employee's] awareness and appreciation of the dangers, the [employee] is incapable of taking precautions that will adequately reduce the risk." *Id*. The

necessary-use exception applies when the facts demonstrate that (1) it was necessary for an employee to use the unreasonably dangerous premises, and (2) the employer should have anticipated that the employee was unable to avoid the unreasonable risks despite the employee's awareness of them. *Id.* at 207. Under the necessary-use exception, an employer has a "duty to make its premises safe when, despite an awareness of the risks, it is necessary that the [employee] use the dangerous premises and the [employer] should have anticipated that the [employee] is unable to take measures to avoid the risk." *Id*. at 208. When the necessary-use exception applies, the obviousness of the danger or the employee's awareness of the risk does not relieve an employer's duty to make the premises reasonably safe. *Id*. at 204.

The leading case on the necessary-use exception is *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978). *See Kroger*, 465 S.W.3d at 207-08 (declining to overrule *Parker* and recognizing the case as an example of the necessary-use exception). In *Parker*, the plaintiff, an invitee, fell while descending a dark stairway in an apartment complex. *Id*. at 513. Located in a common foyer, the stairway was the only way for the plaintiff to leave a second-floor apartment. *See id*. at 514-15. The light fixtures in the stairway were on an automatic timer controlled by the apartment complex and set to come on after total darkness. *Id*. at 514. The plaintiff knew the stairway was dark. *Id*. Even though the plaintiff descended the stairway cautiously and attempted to light the way with a flashlight, she nevertheless fell on one of the steps and was injured. *Id*. The trial court rendered judgment in favor of the plaintiff, but the appellate court reversed, concluding the apartment complex did not owe the plaintiff a duty. *Id*. at 513, 515-16. The Texas Supreme Court reversed the judgment of the court of appeals and affirmed the trial court's judgment in favor of the plaintiff. *Id*. at 521. In holding that the apartment complex owed the plaintiff a duty, the supreme court explained that a landowner's warning or an invitee's knowledge of a dangerous condition does not always prevent an invitee's recovery. *Id*. at 515. The supreme court also stated:

"Where, for example, the entrance to an apartment house is dangerously defective, and there is no other available entrance, [an invitee] may be expected to use it notwithstanding any warning, or even his own knowledge of the danger." *Id*.

In its first issue, Wok argues the trial court's judgment must be reversed because it owed Calderon no duty under Texas law. According to Wok, it owed Calderon no duty because the evidence showed that the wet floor was open and obvious and Calderon understood and fully appreciated the risk of walking on the floor while it was wet.

At trial, Calderon testified that he knew the floor leading to the cooler was wet before he walked on it. However, Calderon also testified that walking on the wet floor was the only way for him to get to the cooler to obtain the soup he needed to prepare a customer's order. Specifically, on cross-examination, Calderon testified:

> Counsel: Now, when you were walking from the kitchen station, prep station to the cooler to get the soup, there was a second way that you could have gone, correct?
>
> Calderon: No.
>
> Counsel: Isn't there an opening between the wall and the food prep where you could have walked to the expedite station to go around?
>
> Calderon: No. That was the only door to the cooler.
>
> Counsel: I'm not asking you if that was [the] only door to the cooler, I'm saying that the path you walked, you could have walked a different path around the expedite station, correct?
>
> Calderon: No.

In the present case, the facts and circumstances demonstrate that it was necessary for Calderon to use the wet floor leading to the cooler and that Wok should have anticipated that Calderon was unable to avoid it. Therefore, we conclude that Wok owed Calderon a duty under the necessary-use exception. *See Kroger*, 465 S.W.3d at 207-08; *Parker*, 565 S.W.2d at 518.

In its second issue, Wok argues it owed Calderon no duty because the necessary-use exception does not apply in the context of the employer-employee relationship. We disagree. In *Kroger*, the Texas Supreme Court repeatedly stated that employers owe employees the same duties that other premises owners owe to invitees. *See Kroger*, 465 S.W.3d at 201-02 ("We first clarify and confirm that, generally, an employer has the same premises-liability duty to its employees as other landowners have to invitees on their premises."). Wok further argues it owed Calderon no duty because "an employee's actions while employed can never [] be 'necessary,' only voluntary." Again, we disagree. In *Kroger*, the Texas Supreme Court confirmed that the necessary-use exception applies in the employer-employee context. *Id*. at 213 (clarifying "the general rule that an employer or landowner owes no duty to protect or warn an employee or invitee against unreasonably dangerous premises conditions that are open and obvious or otherwise known to the employee or invitee," but also recognizing that the necessary-use exception "preserve[s] that duty under limited circumstances.").

In its third issue, Wok argues it did not owe Calderon a duty because he "was engaging in an activity" in which all cooks "regularly engage." To support this argument, Wok directs our attention to *Kroger*. *See id*. at 214 (discussing cases holding that when an employee's injury results from performing the same type of work that employees in that position have always performed, an employer is not liable unless the evidence shows the work is unusually precarious.). But Wok's argument ignores the necessary-use exception and its unmistakable application in this case. *See id*. at 207 (providing that the necessary-use exception applies when the facts show (1) it was necessary for an employee to use the unreasonably dangerous premises, and (2) the employer should have anticipated that the employee was unable to avoid the unreasonable risks despite the employee's awareness of them). Therefore, we reject Wok's argument.

Finally, Wok argues that the existence of a duty conflicts with public policy. However, in *Kroger*, the Texas Supreme Court thoroughly analyzed the public policy considerations relevant to this area of the law. *Id*. at 201-06, 214. Having applied the law as articulated in *Kroger*, we reject Wok's argument.

We conclude that Wok owed Calderon a duty under the necessary-use exception. Therefore, we overrule Wok's first, second, and third issues.

TESTIMONY REGARDING MEDICAL DIAGNOSIS

In its fourth issue, Wok argues the trial court abused its discretion by admitting Calderon's testimony regarding his medical diagnosis.

The Texas Rules of Appellate Procedure require an appellant's brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(i). To comply with Rule 38.1(i), an appellant's brief must provide a discussion of the facts and the legal authority supporting the appellant's argument. *Day v. Fed'n of State Med. Bds. of the United States, Inc.*, 579 S.W.3d 810, 826 (Tex. App.—San Antonio 2019, pet. denied). An appellant's brief must provide argument and analysis showing that the record and the law support its contentions. *Id*. Without the required analysis and citation to legal authority, an appellant's brief presents nothing for appellate review. *Id.*

Because Wok's briefing on this issue cites no legal authority, it presents nothing for our review. *See id*.; TEX. R. APP. P. 38.1(i). We overrule Wok's fourth issue.

PAST MEDICAL EXPENSES

In its fifth issue, Wok challenges the award of $73,429.94 in damages for Calderon's past medical expenses, arguing "no evidence [] support[ed] the judgment awarding medical bills/costs to Calderon." Wok argues the evidence was legally insufficient to support the damages for past medical expenses because (1) the trial court did not admit Calderon's medical billing records into

evidence, and (2) Calderon presented no evidence "demonstrat[ing] a clear connection between the injury and the damages sustained."

We may sustain a legal sufficiency challenge only if the record reveals one of the following: (1) a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of the vital fact. *City of Keller v. Wilson*, 168 S.W.3d 802, 810 (Tex. 2005). In conducting a legal sufficiency review, we consider the evidence in the light most favorable to the judgment and we indulge every reasonable inference in support of the judgment. *Id*. at 822.

We first address Wok's argument that no evidence supported the damages for past medical expenses because Calderon's medical billing records were not admitted into evidence at trial. In response to this argument, Calderon asserts the trial court "pre-admitted" his medical billing records at a pretrial hearing.

"The burden is on the appellant to see that a sufficient record is presented to show error requiring reversal." *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990). "[W]hen a record is incomplete (and the rules on partial records do not apply—which they do not), we must presume that the missing portion of the record supports the factual determinations made by the fact-finder." *Palla v. Bio-One, Inc.*, 424 S.W.3d 722, 727-28 (Tex. App.—Dallas 2014, no pet.) (quoting *In re Estate of Arrendell*, 213 S.W.3d 496, 503 (Tex. App.—Texarkana 2006, no pet.)). If an appellate court is unable to review the entire relevant record, it cannot determine if the trial court erred. *Christiansen*, 782 S.W.2d at 843. When an appellant does not provide an appellate record sufficient to show error, an appellate court must presume the medical billing records presented were sufficient to support the trial court's judgment. *See Willms v. Am. Tire Co., Inc*., 190 S.W.3d 796, 803 (Tex. App.—Dallas 2006, pet. denied).

The reporter's record filed in this case is limited. It does not include a record of any pretrial hearings, only a record of the trial.[3] Without a record of the pretrial hearings, we cannot tell whether or not the medical records were pre-admitted into evidence as Calderon asserts. Under these circumstances, we must presume the missing portions of the record show that Calderon's medical billing records were admitted into evidence. *See Christiansen*, 782 S.W.2d at 843; *Palla*, 424 S.W.3d at 727; *Willms*, 190 S.W.3d at 803. Additionally, we must presume the evidence presented was sufficient to support the trial court's judgment. *Willms*, 190 S.W.3d at 803.

We next address Wok's argument that the evidence was legally insufficient to support the damages for past medical expenses because Calderon did not "demonstrate a clear connection between the injury and the damages sustained." Wok cites a single case to support this argument, *Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996). In *Leitch*, an employee filed a negligence claim against his employer, alleging he was injured at work while lifting a cable reel. *Id*. at 116. At trial, the employee argued that his employer was negligent in failing to provide him lifting equipment. *Id*. at 119. A jury found in favor of the employee and the trial court rendered judgment on the verdict. *Id*. at 116. The court of appeals affirmed. *Id*. However, the Texas Supreme Court reversed the judgment because no evidence connected the employee's injury to the employer's failure to provide lifting equipment. *Id*. at 119-20.

We fail to see how *Leitch* applies to the present case. Calderon's case did not proceed to trial on a negligence theory alleging a failure to provide equipment; instead, it proceeded to trial on a premises liability theory. At trial, the undisputed evidence showed that Calderon slipped and fell on a wet floor while at work. Therefore, unlike the plaintiff in *Leitch*, Calderon was not

[3]The index in the reporter's record states that two exhibits, "Plaintiff's Ex. 1–Trial Notebook and Medical Records" and "Defendant's Ex. 1–Video," were "[n]ot marked or admitted on the record."

required to present evidence connecting his injury to his employer's failure to provide equipment. We overrule Wok's fifth issue.

FAILURE TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW

In its sixth issue, Wok argues the trial court erred in failing to file findings of fact and conclusions of law. Wok timely filed both a request for findings of fact and conclusions of law and a notice of past due findings of fact and conclusions of law, but the trial court did not file findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296, 297.

A trial court's failure to file findings of fact and conclusions of law in response to a timely request is presumed to be harmful error, unless the record affirmatively shows the appellant suffered no harm. *Ad Villarai, LLC v. Pak*, 519 S.W.3d 132, 135 (Tex. 2017). "When only a single ground of recovery or a single defense is presented to the trial court, the record shows the appellant has suffered no harm because [it] is not forced to guess the reasons for the trial court's judgment." *Mora v. Mora*, No. 04-17-00428-CV, 2018 WL 4903079, at *4 (Tex. App.—San Antonio Oct. 10, 2018, pet. denied); *see Willms*, 190 S.W.3d at 802-03 (holding trial court's failure to file findings of fact and conclusions of law was not harmful when only one ground of recovery existed).

Here, Wok did not have to guess the reason for the trial court's ruling. The case was tried on a single claim, a premises liability claim, and only two witnesses testified, Calderon and Wok's corporate representative. To the extent their testimony conflicted, the trial court obviously believed Calderon and disbelieved the corporate representative. The record affirmatively shows that Wok was not harmed by the absence of findings of fact and conclusions of law. *See Ad Villarai*, 519 S.W.3d at 135; *Mora*, 2018 WL 4903079, at *4; *Willms*, 190 S.W.3d at 802-03. We overrule Wok's sixth issue.

CONCLUSION

The trial court's judgment is affirmed.

Irene Rios, Justice