**In The**

# *Court of Appeals*

## *Ninth District of Texas at Beaumont*

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**NO. 09-09-00094-CV**

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**TIMOTHY AARON SEGURA AND LISA ANN SEGURA, Appellants**

**V.**

**THE GOODYEAR TIRE & RUBBER COMPANY, Appellee**

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**On Appeal from the 172nd District Court**
**Jefferson County, Texas**
**Trial Cause No. E-179,451**

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## MEMORANDUM OPINION

Timothy Aaron Segura and Lisa Ann Segura appeal a summary judgment granted in favor of Goodyear Tire & Rubber Company. Because under the circumstances Goodyear owed no legal duty, we affirm the summary judgment.

Goodyear purchased a conveyor for use in the Beaumont, Texas, Goodyear plant. Goodyear sold the Wingtack Unit of the plant, including the affixed conveyor, to Sartomer Company, Inc. The accident happened approximately a year after the sale. Plaintiffs allege

the conveyor started unexpectedly while Timothy Segura stood on it, and he sustained serious injuries.

Timothy and his wife, Lisa, sued Goodyear, an employee of Goodyear, the conveyor's manufacturer, and a supplier of parts for the conveyor. The other defendants were dismissed or nonsuited and are not parties to this appeal. Plaintiffs claim Goodyear was negligent in failing to maintain and repair the conveyor and in failing to warn about the dangers of the conveyor. They maintain Goodyear modified the function of the conveyor. According to the appellants, Goodyear knew the conveyor could start without warning and, prior to selling the Wingtack Unit to Sartomer, Goodyear unsuccessfully attempted to remedy the problem.

Goodyear moved for summary judgment under Texas Rule of Civil Procedure 166a(c), and moved for a no-evidence summary judgment under Texas Rule of Civil Procedure 166a(i). The trial court granted the motions.

In one issue, appellants argue that the trial court erred by granting the motions. They assert Goodyear created a dangerous condition, and Goodyear owed a duty under the negligent undertaking theory outlined in *Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2000). Goodyear maintains it owed no legal duty, because Sartomer, Segura's employer and the owner of the conveyor, knew about the condition of the conveyor and the risks associated with its condition.

A defendant cannot be held liable for negligence unless the defendant breached a legal

duty. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Whether a legal duty exists is a question of law. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

Generally, prior owners of property owe no legal duty to keep a property safe after transferring the property to a new owner. *Lefmark Mgmt. Co. v. Old,* 946 S.W.2d 52, 53-54 (Tex. 1997). Under certain circumstances, however, one may owe a duty even if not in control of the property at the time of the injury. *Id.* at 54. A party who agrees to make safe a known dangerous condition of real property owes a duty of due care. *City of Denton v. Van Page*, 701 S.W.2d 831, 835 (Tex. 1986). A party who creates a dangerous condition may also owe that duty. *Id.*

In reliance on *Torrington*, appellants argue a defendant is subject to liability if the defendant (1) undertakes to perform services that it knew or should have known were necessary for a plaintiff's protection, (2) fails to exercise reasonable care in performing those services, and (3) others rely on the defendant's performance, or the defendant's performance increases a plaintiff's risk of harm. *See Torrington Co.,* 46 S.W.3d at 839. Appellants maintain Goodyear modified the conveyor to protect the workers, failed to exercise reasonable care care in modifying it, knew that the workers relied on Goodyear's performance, and the modification increased the risk of harm.

*Torrington* is a product liability case. *See id.* at 835. Even if Goodyear were

somehow considered a product manufacturer of the conveyor, there is no evidence Goodyear undertook to perform services after the conveyor left its control. Furthermore, Goodyear did not agree to make safe any condition of the affixed conveyor when the Wingtack Unit was sold. *See City of Denton,* 701 S.W.2d at 835.

Goodyear argued in its motion for summary judgment that after the property was transferred to Sartomer, Goodyear's liability for any injuries on the property ceased. *See Lefmark Mgmt. Co.,* 946 S.W.2d at 53-54. According to Goodyear, the only exception to the general rule of non-liability of a prior owner is provided for in section 353 of the Restatement (Second) of Torts, as follows:[1]

> (1) A vendor of land who conceals or fails to disclose to his vendee any condition, whether natural or artificial, which involves unreasonable risk to persons on the land, is subject to liability to the vendee and others upon the land with the consent of the vendee or his subvendee for physical harm caused by the condition after the vendee has taken possession, if
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> (a) the vendee does not know or have reason to know of the condition or the risk involved, and
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> (b) the vendor knows or has reason to know of the condition, and realizes or should realize the risk involved, and has reason to believe that the vendee will not discover the condition or realize the risk.
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> (2) If the vendor actively conceals the condition, the liability stated in Subsection (1) continues until the vendee discovers it and has reasonable opportunity to take effective precautions against it. Otherwise the liability continues only until the vendee has had reasonable opportunity to discover the

[1]In *Lefmark Managment Company v. Old*, 946 S.W.2d 52, 54 (Tex. 1997), the Supreme Court noted that it has not adopted section 353, even though the section has been cited by and relied upon by several courts of appeals.

condition and to take such precautions.

RESTATEMENT (SECOND) OF TORTS § 353 (1965). Essentially, Goodyear argues that when a dangerous condition exists at the time the vendor transfers possession of the property, the vendor is not liable unless the plaintiff demonstrates the vendor failed to disclose the existence of the condition, and there is no reason that the vendee would otherwise know of the condition or the risk involved. *See id.*; *see also Hicks v. Humble Oil & Ref. Co.*, 970 S.W.2d 90, 93 (Tex. App.--Houston[14th Dist.] 1998, pet. denied); *Roberts v. Friendswood Dev. Co.*, 886 S.W.2d 363, 367-68 (Tex. App.--Houston[1st Dist.] 1994, writ denied).

Implicit in section 353 is the principle of law that generally one need not warn others about a risk that is as well known to them as it is to him. *See, e.g., Delhi-Taylor Oil Corp. v. Henry,* 416 S.W.2d 390, 392, 394 (Tex. 1967); *Kan. City S. R.R. Co. v. Guillory,* 376 S.W.2d 72, 75 (Tex. Civ. App.--Beaumont 1964, writ ref'd n.r.e.). The record reflects that the information concerning the condition of the conveyor prior to the transfer of the Wingtack Unit went with the employees to Sartomer. *See Kelly v. LIN Tel. of Tex.*, 27 S.W.3d 564, 572 (Tex. App.--Eastland 2000, pet. denied); *Luna v. H & A Invs.*, 900 S.W.2d 735, 738 (Tex. App.--Corpus Christi 1994, no writ). In response to the no-evidence motion, appellants failed to present competent summary judgment evidence that Sartomer lacked knowledge of the modifications made to the conveyor. *See Hicks*, 970 S.W.2d at 93. Appellants presented no evidence that Goodyear concealed or failed to disclose the condition

of the conveyor or the risks associated with it. The Goodyear employees that serviced and worked with the conveyor at Goodyear were employees of Sartomer at the time of the accident; Sartomer knew what Goodyear knew. Under the circumstances, Goodyear owed no legal duty to make safe or warn about a condition or risk known to Sartomer. Appellants' issue is overruled. The judgment is affirmed.

AFFIRMED.

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DAVID GAULTNEY
Justice

Submitted on January 14, 2010
Opinion Delivered March 18, 2010

Before McKeithen, C.J., Gaultney and Kreger, JJ.