In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00039-CV

TAMMY PRESLEY, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF KEVIN LEE PRESLEY, Appellant

V.

GULF STATES UTILITIES COMPANY AND ENTERGY GULF STATES, INC., Appellee

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On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-180,784

MEMORANDUM OPINION

This is an appeal from a summary judgment in favor of Gulf States Utilities Company, and Entergy Gulf States, Inc. Appellant argues that Chapter 752 of the Texas Health & Safety Code does not bar plaintiff from recovering against the utility company for its negligence. We affirm the judgment of the trial court.

BACKGROUND

Appellant, Tammy Presley brought the underlying wrongful death suit against Gulf States Utilities Company and Entergy Gulf States, Inc. ("Entergy") after her husband, Kevin Presley ("Presley") was electrocuted. At the time of his accident, Presley was working for Jackey Derryberry, the owner of Fairway Construction. Fairway Construction is a business that engages in hauling dirt. Presley began working for Derryberry on a Wednesday morning, three days before the accident.[1] While working for Derryberry, Presley drove Derryberry's 1988 Mack dump truck. On Presley's first day, Derryberry took the first two loads of dirt so he could show Presley how he wanted the truck shifted and then rode with Presley for several loads thereafter. According to Derryberry, Presley was a "great driver" and "knew what he was doing."

On the day of the accident, Derryberry and Presley were digging a lake and hauling the dirt down the road to build a pad for a barn. Derryberry had some other lease trucks working that day and sent them back to the pit to start on a second job, but kept Presley with him. While at the work site with Derryberry, Presley raised the bed of the truck to dump and Derryberry noticed that a pin had come out of the tailgate latch on the passenger side of the truck. According to Derryberry, the pin had not been missing the day before. Derryberry told Presley, there was a '"tailgate latch hanging on this side, but it's fine.'"

[1] Entergy conceded for purposes of appeal that Presley was an employee of Derryberry at the time of his accident.

Derryberry then told Presley, '"[w]e're at the pit. We're going right across the street. I'll call Jody. He'll load you in the front anyway. And I want to finish this job so we don't have to work Sunday.'" According to Derryberry, Presley said, '"Okay.'" Presley asked Derryberry if there was an auto parts store nearby, and Derryberry told Presley there was but they didn't carry that particular pin and to just go back to the "pit" and Derryberry would handle the repair on Monday. After Derryberry sent Presley back to the pit to help the other workers finish the second job, Derryberry stayed at the original work site to finish up there.

Instead of going to the pit, Presley stopped at the NAPA auto parts store. Presley presumably raised the bed of the dump truck in the store's parking lot to better access the tailgate latch. The raised bed of the dump truck he was operating made contact with the power line, and Presley was electrocuted. It is undisputed that Presley's electrocution resulted from a contact between the raised bed of the dump truck and the power line. It is also undisputed that the power line was carrying 34,000 volts of electricity if measured between conductors and 19,000 volts if measured to ground.

During his deposition, Derryberry explained that the NAPA store was on the way back to the pit. Derryberry did not ask Presley to stop at the NAPA auto parts store and did not know that Presley was going to the NAPA store. According to Derryberry, the dump truck bed did not need to be raised to look at the remaining pin or to pull out the remaining pin. Derryberry did not know why Presley raised the bed of the dump truck but

theorized that he had done so because "if you raise the bed, it's easier to get to that pin." Presley never made it into the auto parts store. Derryberry further stated that the dump truck has a cab guard that restricts the view above the bed and to the rear of the truck.

Tammy Presley filed a wrongful death suit in which she asserted that Entergy was negligent in failing to: maintain the power line at a sufficient height so as not to pose a danger, respond to prior complaints regarding the need to raise the power line, implement and follow policies and procedures for responding to requests to raise a power line, maintain the power line in accordance with Federal and State statutory guidelines and industry standards, warn Presley of the dangerous condition, take reasonable precautions, perform reasonable inspections and for violating the Electrical National Safety Code. Entergy filed a motion for summary judgment asserting that pursuant to Chapter 752 of the Health and Safety Code, Presley owed Entergy indemnity for damages associated with the incident and therefore, was precluded from recovering under the asserted causes of action. The trial court granted Entergy's motion for summary judgment and this appeal followed.

STANDARD OF REVIEW

We review the trial court's grant of Entergy's motion for summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). To prevail on a traditional motion for summary judgment, the movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005).

We must determine whether Entergy carried its burden to establish that there existed no genuine issue of material fact. *Shah v. Moss*, 67 S.W.3d 836, 842 (Tex. 2001). In making this determination, we assume all evidence favorable to the nonmovant is true, and indulge every reasonable inference in the nonmovant's favor. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004).

DISCUSSION

Chapter 752 of the Texas Health and Safety Code regulates the performance of activities near power lines. *See* Tex. Health & Safety Code Ann. §§ 752.001-.008 (West 2010). The statutes require anyone who conducts an activity within six feet of a high voltage power line to notify the operator of the line in advance to make arrangements for safety precautions. *Id*. §§ 752.003, 752.004. Specifically, section 752.003 provides in pertinent part:

> (a) A person, firm, corporation, or association responsible for temporary work or a temporary activity or function closer to a high voltage overhead line than the distance prescribed by this chapter must notify the operator of the line at least 48 hours before the work begins.
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> (b) A person, firm, corporation, or association may not begin the work, activity, or function under this section until the person, firm, corporation, or association responsible for the work, activity, or function and the owner or operator, or both, of the high voltage overhead line have negotiated a satisfactory mutual arrangement to provide temporary de-energization and grounding, temporary relocation or raising of the line, or temporary mechanical barriers to separate and prevent contact between the line and the material or equipment or the person performing the work, activity, or function.

> (c) The person, firm, corporation, or association responsible for the work, activity, or function shall pay the operator of the high voltage overhead line the actual expense incurred by the operator in providing the clearance prescribed in the agreement. The operator may require payment in advance and is not required to provide the clearance until the person, firm, corporation, or association responsible for the work, activity, or function makes the payment.

Id. § 752.003(a)-(c). The statute defines a "high voltage" line as "more than 600 volts measured between conductors or between a conductor and the ground." *Id*. § 752.001(1). Additionally, the statute expressly restricts a "person, firm, corporation, or association" who fails to comply with section 752.003, from performing an activity near the power line. *See id*. § 752.004. Section 752.004 provides:

> (a) Unless a person, firm, corporation, or association effectively guards against danger by contact with the line as prescribed by Section 752.003, the person, firm, corporation, or association, either individually or through an agent or employee, may not perform a function or activity on land, a building, a highway, or other premises if at any time it is possible that the person performing the function or activity may:
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> (1) move or be placed within six feet of a high voltage overhead line while performing the function or activity; or
>
> (2) bring any part of a tool, equipment, machine, or material within six feet of a high voltage overhead line while performing the function or activity.
>
> (b) A person, firm, corporation, or association may not require an employee to perform a function or activity prohibited by Subsection (a).

Id. § 752.004. If a violation of Chapter 752 results in physical or electrical contact with a high voltage power line the person or entity that committed the violation is liable to the

owner for "damages to the facilities and for all liability that the owner or operator incurs[.]" *Id*. § 752.008.

Texas courts have held that summary judgment precluding recovery against an owner or operator of a power line is proper against a person who violates Chapter 752 and is liable to the owner or operator pursuant to the indemnity provision in section 752.008. *See Trail v. Friedrich*, 77 S.W.3d 508, 513-14 (Tex. App.—Houston [1st Dist.] 2002, pet. denied); *Chavez v. City of San Antonio ex rel. City Public Serv. of San Antonio Bd.*, 21 S.W.3d 435, 437, 440 (Tex. App.—San Antonio 2000, pet. denied); *see also Wolfenberger v. Houston Lighting & Power Co.*, 73 S.W.3d 444, 447 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (recognizing that the doctrine of circular indemnity precludes a plaintiff who violates the Act's restrictions on activities around a power line from recovering against the power line's owner or operator because the plaintiff would have to pay his own damages). Appellant argues that Presley is not a person "responsible for temporary work or a temporary activity" under section 752.003(a) and, therefore, is not barred from recovery by the indemnity provision. In determining whether a person or entity is responsible for work under section 752.003, Texas courts look at whether the person or entity has some degree of control over the details of the work being performed. *See Trail*, 77 S.W.3d at 512-13; *Chavez*, 21 S.W.3d at 439; *McCaughtry v. Barwood Homes Ass'n*, 981 S.W.2d 325, 334-35 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Espinoza v. Hicks*, 984 S.W.2d 274, 276-77 (Tex. App.—El Paso 1998, no pet.); *see also Hullum v.*

Skyhook Corp., 753 F.2d 1334, 1337-338 (5th Cir. 1985).

In *Trail v. Friedrich*, Trail, an independent painting contractor, was hired by a feed store owner to paint the roof of the store. 77 S.W.3d at 509. At the request of the store owner, Trail visited the property and walked around the building to determine the size and condition of the roof and prepare an estimate for the job. *Id.* The store owner did not accompany Trail to the store to observe the roof. *Id.* Trail returned to the store owner and negotiated a price for the job. *Id.* Trail told the store owner he needed to paint the roof after business hours so overspray would not damage any vehicles. *Id.* The owner then telephoned an employee at the store and instructed him to close early so that Trail could begin painting the roof. *Id.* As the store employee was leaving the premises, Trail asked the employee whether he could drop leaves and limbs down by the side of the building, to which the employee responded, "Fine." *Id.* After blowing off leaves and trimming some tree limbs, Trail began painting the roof with a metal spray gun that had a four-foot aluminum wand. *Id.* Trail was injured when the aluminum wand came into contact with an overhead power line. *Id.* Trail sued the City and the store owner for negligence. *Id.* at 510. The trial court granted summary judgment in favor of both defendants. *Id.* at 509.

On appeal, Trail argued there was a fact issue regarding who was the person responsible for the work as contemplated by Chapter 752. *Id.* The trial court found significant that the store owner did not retain any right to direct the details of the work

being performed by Trail on the premises. *Id*. at 513. The court noted that Trail went to the job site to inspect the premises before agreeing to do the work and supplied his own equipment. *Id*. The court further noted that the store owner was never at the job site during the time that Trail was working. *Id*. Trail testified that he was the person in charge of the work. *Id.* Under these circumstances, the court held that Trail was the person responsible for the work as contemplated in Chapter 752. *Id*.

Likewise, in *Espinoza v. Hicks*, a farm worker, Espinoza, who was electrocuted while employed by an independent contractor to harvest cotton for Hicks, brought an action against Hicks alleging failure to comply with Chapter 752. 984 S.W.2d at 275. The trial court granted summary judgment in favor of Hicks. *Id.* On appeal, the appellant argued a fact issue existed regarding whether Hicks was the person responsible for the cotton harvesting activity which led to his electrocution. *Id*. at 276. It was undisputed that Hicks owned the land and the equipment being used to harvest the cotton. *Id*. Hicks asserted that he had no right to control the details of the harvest and, therefore, could not be the person responsible for the work under chapter 752. *Id.* The court concluded that Hicks established as a matter of law that he was not the responsible party under the statute and affirmed summary judgment in his favor. *Id*. at 277. In contrast, in *McCaughtry v. Barwood*, the Fourteenth Court of Appeals determined a fact issue existed as to whether Barwood, the owner and operator of a clubhouse, swimming pool, and tennis court, was the party responsible for work being performed by a contractor's employees

where Barwood owned the property, closed down some of the common areas for the work to be performed, and had representatives at the work site on occasion to observe the work being performed by the contractor's workers. 981 S.W.2d at 327, 335.

The summary judgment record in the present case established that Derryberry had no control over the details of the temporary work or activity being performed by Presley at the time of his accident. Derryberry did not instruct Presley to replace the pin missing from the tailgate latch. Derryberry did not know that Presley was going to the NAPA auto parts store or that he was going to attempt to replace the missing pin. In fact, Derryberry told Presley not to worry about the missing pin and instead, to go to the pit to help the other workers finish another job. When Presley stopped at the NAPA store, it was contrary to Derryberry's instructions. Derryberry did not know why Presley raised the bed of the dump truck and could only speculate as to what Presley was doing at the time of his accident. Under these facts, Presley was the only person with any control over or knowledge of the details of the temporary work being performed at the time of the accident.

Citing our decision in *Ringo v. Gulf States Utils. Co.*, 569 S.W.2d 31, 34 (Tex. App.—Beaumont 1978, writ ref'd n.r.e.), appellant argues that the obligation to comply with section 752.003 is that of a plaintiff's employer "and not of the plaintiff, the individual workman." Specifically, appellant argues that Presley was not obligated to comply with the statute because he had no authority to act for Derryberry or Fairway Construction in

negotiating with Entergy and no authority to bind Derryberry in an agreement to pay expenses related to the safety precautions mandated by section 752.003. *See* Tex. Health & Safety Code Ann. § 752.003. Appellant contends that under our holding in *Ringo* an employee acting in the course and scope of his employment at the time of his accident cannot be the person responsible for the work under Chapter 752. We disagree.

Ringo involved the predecessor to Chapter 752. In *Ringo*, the plaintiff, a sixteen year-old boy, was injured while working for Sparks Industrial Service, Inc. ("Sparks"). 569 S.W.2d at 32. On the day of the accident, Ringo was cleaning and painting railroad cars for his employer, Sparks. *Id*. Ringo lifted an aluminum ladder into the opening at the top of a railroad car and the ladder came into contact with an uninsulated electrical wire owned by Gulf States. *Id*. After Ringo filed suit, Gulf States filed a third party action against Sparks and a cross claim against Ringo. *Id*. The trial court granted Gulf States's motion for summary judgment and Ringo appealed. *Id.*

Gulf States argued that Ringo was precluded from recovery under the predecessor statute to section 752.003.[2] *Id*. at 33. In reversing the summary judgment granted in

[2] Section 6 of article 1436c at issue in *Ringo*, was codified in the Texas Health and Safety Code in a virtually non-substantive revision. *See* Tex. Health & Safety Code Ann. § 752.003. Section 6 provided in pertinent part:

> When any person, firm, or corporation desires to temporarily carry on any function, activity, work, or operation in closer proximity to any high voltage overhead line than permitted by this Act, the person or persons responsible for the work to be done shall promptly notify the operator of the

favor of Gulf States, we concluded that the obligation or duty provided for in article 1436c, section 6 of the Revised Civil Statutes applied specifically to "the person, firm, or corporation desiring to temporarily carry on any function, activity, work, or operation in closer proximity to any high voltage overhead line than permitted" by the statute. *Id*. at 34. We further concluded that the obligation to comply with the statute was clearly "that of plaintiff's employer, Sparks, and not the plaintiff, the individual workman." *Id*. We acknowledged that the plaintiff in *Ringo* was unable to comply with the statute because he was unable to act for Sparks in negotiating with Gulf States or to bind Sparks in an agreement to pay expenses related to safety precautions mandated by the Act. *Id.*; *see also* Tex. Health & Safety Code Ann. § 752.003. We concluded under those circumstances a violation of the statute could "only be committed by [the employer], and not this plaintiff." *Id*.

Appellant's reliance on *Ringo* is misplaced. *Ringo* should not be read to hold that

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> high voltage line. The work shall be performed only after satisfactory mutual arrangements have been negotiated between the owner or the operator of the lines or both and the person or persons responsible for the work to be done for temporary mechanical barriers separating and preventing contact between material, equipment, or persons and high voltage electric lines, temporary de-energization and grounding, or temporary relocation or raising of the lines. The actual expense incurred by any operator of high voltage lines in providing clearances as above set out shall be paid by the person or persons responsible for the work to be done in the vicinity thereof and the operator of the lines may require such payment in advance[.]

Act of March 25, 1971, 62nd Leg., R.S., ch. 41, § 6, 1971 Tex. Gen. Laws 76, 77, *repealed by* Act of May 18, 1989, 71st Leg., R.S., ch. 678, § 13, 1989 Tex. Gen. Laws 2230, 3165.

an employee can never be a person responsible under section 752.003. In *Ringo*, the plaintiff's employer, Sparks, was the entity that desired to temporarily carry on the work that was being performed in proximity to the power line. Significantly, Ringo, a sixteen year-old boy, was working at the direction of Sparks when he was injured. Sparks had at least some control over the details regarding the work being performed by Ringo on the railroad cars. Our holding in *Ringo* is in line with other Texas cases determining when a party is a person responsible for work under the Act.

Appellant argues that it was the Legislature's intent for Chapter 752 to apply to employers. When interpreting a statute we try to give effect to the Legislature's intent. *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999). However, in construing a statute, we must first look to the plain language of the statute. *Id*. This is because we interpret statutes under the assumption that the Legislature tries to say what it means, therefore, the plain language of the statute is "the surest guide to legislative intent." *Id*. at 866. If the statute is unambiguous, we must adopt an interpretation supported by "the plain meaning of the provision's words and terms." *Id*. at 865. When we stray from a statute's plain language, we risk encroaching upon the power of the Legislature. *Id*. at 866.

By its plain language, Chapter 752 does not exempt employees from indemnity for failure to comply with section 752.003. Section 752.002 expressly exempts certain employees and activities from compliance with the provisions of the Act. Tex. Health &

Safety Code Ann. § 752.002. For example, section 752.002 provides that Chapter 752 does not apply to employees of an electric company performing maintenance on a power line. *Id*. § 752.002(a), (b)(1). However, section 752.002 does not exempt all employees working in the course and scope of employment at the time of their injury. *See id*. § 752.002. Moreover, section 752.004 prevents a "person, firm, corporation, or association, either individually or through an agent or employee" from performing a function or activity within six feet of a power line where a "person, firm, corporation, or association" has not complied with section 752.003. *Id*. § 752.004(a). Section 752.004 further provides that a person, firm, corporation, or association may not require an employee to perform a function or activity prohibited by section 752.004(a). *Id*. § 752.004(b). Finally, section 752.007 provides that an "employee of a person, firm, corporation, or association" may be subject to criminal penalty for violating Chapter 752. *Id*. § 752.007.

It is clear that the Legislature was mindful of the potential impact of the employer/employee relationship when it enacted Chapter 752. Significantly, however, the Legislature did not exclude employees from the Act's application, other than as set forth in section 752.002. We find appellant's argument that the Legislature did not intend Chapter 752 to apply to employees unpersuasive. The statute is unambiguous. Where statutory text is clear, the text of the statute is determinative of the Legislature's intent. *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex. 2009). We also are unpersuaded by appellant's argument that legislative history establishes that chapter 752 was not

intended to preclude a claim against a power company that is negligent. We find the statements made in conjunction with an unsuccessful attempt to amend the original statute, and relied upon by appellant herein, irrelevant to our analysis. *See id*. at 442-43 (recognizing that legislative intent cannot be discerned from legislative history apparent from bills that failed to pass); *see also In re Doe*, 19 S.W.3d 346, 352 (Tex. 2000) (concluding that courts construing statutory language should give little weight to post-enactment statements made by legislators).

To the extent our decision in *Ringo* is cited for the contention that the provisions of Chapter 752 may not be applied to bar an employee injured during the course and scope of his employment from recovery, we disapprove of such reading. Assuming, without deciding, that Presley was acting in the course and scope of his employment at the time of his injury, the record establishes that he was not acting at the direction, and was in fact acting against the direction, given by his employer. Only Presley controlled the details of his activities at the time of his accident, and only Presley could have complied with the Act by not performing the activity which resulted in his electrocution or by performing it a sufficient distance from the power line. Derryberry, on the other hand, could not have complied with the Act because he was unaware that Presley would be going to the NAPA store or otherwise engaging in the activity that led to his injury. Based on the record before us, we find that Entergy established as a matter of law that Presley was the person

responsible for the temporary activity under section 752.003 and the statute's application to the underlying lawsuit. We affirm the judgment of the trial court.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on September 9, 2010
Opinion Delivered October 28, 2010

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