COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00045-CV

DANIEL W. NICHOLSON, JOSEPH R. NICHOLSON, AND VICKIE M. MARTINEZ — APPELLANTS

V.

XTO ENERGY, INC. — APPELLEE

FROM THE 352ND DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 352-278084-15

MEMORANDUM OPINION[1]

Pro se Appellants Daniel W. Nicholson, Joseph R. Nicholson, and Vickie M. Martinez appeal from the trial court's grant of summary judgment in favor of Appellee XTO Energy, Inc. We will affirm.

[1]*See* Tex. R. App. P. 47.4.

Appellants sued XTO for negligence, gross negligence, negligence per se, private nuisance, and trespass to real property, alleging that XTO's natural gas activities near their mother's residence caused her death. XTO later filed a combined no-evidence and traditional motion for summary judgment. The no-evidence motion challenged each element of Appellants' claims, and the traditional motion argued that all of Appellants' claims were barred by limitations and that Appellants lacked standing and capacity to assert survival claims. Appellants attached no evidence to their response and directed the trial court to their pleadings. The trial court granted XTO's motion and signed a final judgment that Appellants take nothing on their claims. The trial court also denied Appellants' motion for new trial, which argued that good cause for a new trial existed because Appellants had been unable to obtain counsel and were pro se.[2]

Appellants argue in their only issue that the trial court erred by granting XTO summary judgment. After an adequate time for discovery, the party without the burden of proof may, without presenting evidence, move for summary judgment on the ground that there is no evidence to support an essential element of the nonmovant's claim or defense. Tex. R. Civ. P. 166a(i). The trial court must grant the motion unless the nonmovant produces summary judgment

[2]Insofar as Appellants complain that the trial court did not give a reason for denying the motion for new trial, it was not required to do so. *See Banco Popular N. Am. v. Am. Fund US Investments LP*, No. 05-14-00368-CV, 2015 WL 1756107, at *1 (Tex. App.—Dallas Apr. 17, 2015, pet. denied) (mem. op.).

evidence that raises a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i) & cmt.; *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008).

XTO's no-evidence motion for summary judgment shifted the burden to Appellants to produce evidence raising a genuine issue of material fact as to each challenged element, but the only evidence that Appellants attached to their response was a list of people "likely to have direct knowledge for discovery purposes/testimony," which was no evidence of any element challenged by XTO. Appellants direct us to their first amended petition and the documents attached thereto, arguing that they "have much more than a scintilla of evidence to support the challenged elements of their various causes of action," but pleadings and their unverified attachments or exhibits do not constitute summary-judgment proof.[3] *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Heirs of Del Real v. Eason*, 374 S.W.3d 483, 488 (Tex. App.—Eastland 2012, no pet.) ("Unverified documents attached to pleadings are not proper summary judgment evidence."). Appellants direct us to a number of reports and other documents that are contained in their Appendix, but those documents are also not properly before us because they are either the same documents that were attached to Appellants' first amended petition or they are not otherwise part of the record. *See Hogg v. Lynch, Chappell & Alsup, P.C.*, 480 S.W.3d 767, 773 (Tex. App.—El Paso 2015, no pet.) ("Documents attached

[3]Appellants also offer no argument or explanation as to how the documents raised a fact issue on any of the elements challenged by XTO.

to a brief as an exhibit or appendix, but not appearing in the appellate record, cannot be considered on appellate review.").

The trial court properly granted XTO's no-evidence motion for summary judgment because Appellants failed to produce evidence raising a genuine issue of material fact. *See* Tex. R. Civ. P. 166a(i); *see also Melton v. Wells Fargo Bank, N.A.*, No. 02-11-00512-CV, 2012 WL 2923298, at *1 (Tex. App.—Fort Worth July 19, 2012, no pet.) (mem. op.) (holding same); *Wass v. Farmers Tex. Cty. Mut. Ins. Co.*, Nos. 02-05-00036-CV, 02-05-00124-CV, 2006 WL 1281037, at *2 (Tex. App.—Fort Worth May 11, 2006, no pet.) (mem. op.) (same); *Watson v. Frost Nat'l Bank*, 139 S.W.3d 118, 119 (Tex. App.—Texarkana 2004, no pet.) (same). As summary judgment was proper on no-evidence grounds, we need not additionally consider whether summary judgment was also proper on traditional grounds. *See* Tex. R. App. P. 47.1. We overrule Appellants' issue and affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: WALKER, MEIER, and GABRIEL, JJ.

DELIVERED: November 10, 2016