In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00407-CV

BOBBY D. HAWES, APPELLANT

V.

LINK MINISTRIES, INC., APPELLEE

On Appeal from the 237th District Court
Lubbock County, Texas
Trial Court No. 2017-526,603, Honorable Les Hatch, Presiding

August 14, 2020

CONCURRING OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

"For want of a nail,"[1] an old best describing this appeal and the consequences it created.

Bobby D. Hawes ends his appellate brief with "Appellant raised issues of fact on all elements of his cause of action." To that I say, "Oh, no you di-int!" Hawes never filed a response to the hybrid motion for summary judgment of Link Ministries, Inc. Having

[1] Meaning that seemingly unimportant acts or omissions have serious and unforeseen consequences.

never filed a response, he hardly "raised issues of fact on all elements of his cause of action." The question, though, is whether he remains entitled to reversal due to the existence of a genuine issue of material fact created by the evidence Link attached to its hybrid motion. Justice Pirtle said yes. Justice Parker said no. I vote to reverse for the reasons stated below.

Several preliminary matters merit attention. First, I agree with Justice Parker's general propositions that 1) the rules of Civil Procedure require the trial court to grant a no-evidence summary judgment unless the non-movant produces summary judgment evidence raising a genuine issue of material fact; 2) it is inappropriate for a court to *sua sponte* create arguments filling a void left by a non-movant which result in the denial of a no-evidence motion; and, 3) the court has no duty to raise arguments or peruse the summary judgment evidentiary record where the non-movant did neither. So too do I favor her position about limiting review to evidence tending to create a material issue of fact to only the matter offered by the non-movant responding to a no-evidence motion for summary judgment. Yet, because the record indicates that the trial court considered all the evidence in deciding to grant summary judgment, I feel obligated to consider it, too, given Supreme Court precedent.

Secondly, Justice Pirtle's observation about not "turning a blind eye" also fits into my analysis. So too does it tend to comport with the Supreme Court authority to which I just alluded.

Third, it is not new to our jurisprudence that allegations in a pleading or evidence appended to a motion for summary judgment may adversely affect the litigant averring or appending it. *See H2O Sols., Ltd. v. PM Realty Grp., LP*, 438 S.W.3d 606, 616–17 (Tex.

App.—Houston [1st Dist.] 2014, pet. denied) (stating that "[a] party may, however, plead itself out of court when it pleads facts that affirmatively negate its cause of action"); *Noons v. Arabghani*, No. 13-03-628-CV, 2005 Tex. App. LEXIS 6941, at *16–17 (Tex. App.—Corpus Christi Aug. 25, 2005, pet. denied) (mem. op.) (stating that, "[w]hile a movant's exhibit can support a motion for summary judgment, it may also create a fact question, as in the present case"). Nor is it strange to be told that procedural rules may be tweaked when their application, as written, arrives at a result which "was not 'absolutely necessary' under the facts." *Verburgt v. Dorner*, 959 S.W.2d 615, 616–17 (Tex. 1997) (implying a timely motion for an extension of time when an appellant filed a belated bond to perfect appeal despite the absence of such an implication in the appellate rule itself).

Fourth, the standard of review applicable to a no-evidence motion for summary judgment is that used when assessing the legitimacy of a directed verdict. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Dimock Operating Co. v. Sutherland Energy Co., LLC*, No. 07-16-00230-CV, 2018 Tex. App. LEXIS 2865, at *15 (Tex. App.—Amarillo Apr. 24, 2018, pet. denied) (mem. op.). In describing the standard, "we must consider ***all*** the evidence in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not." *Tunnell v. Gary W. Compton & Loretta Compton Tr.*, No. 07-16-00406-CV, 2018 Tex. App. LEXIS 3940, at *3 (Tex. App.—Amarillo May 31, 2018, pet. denied) (mem. op.) (emphasis added); *accord Carr v. Guy's Plumbing*, No. 07-05-0443-CV, 2007 Tex. App. LEXIS 1793, at *5–6 (Tex. App.—Amarillo Mar. 8, 2007, no pet.) (mem. op.) (stating the

same). Missing from that standard is the directive to consider only evidence proffered by one party or the other.[2]

Next, our own Supreme Court said that "if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered ***unless*** it creates a fact question." *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004) (emphasis added); *accord Dyer v. Accredited Home Lenders, Inc*., No. 02-11-00046-CV, 2012 Tex. App. LEXIS 877, at *7–8 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (mem. op.) (so acknowledging and also noting that, under normal circumstances, no evidence is attached and none is required). Admittedly, *Binur* does not address the specific topic undergoing debate here. But, it surely does not suggest to me that the trial court ***must only*** consider evidence proffered by the non-movant when assessing the existence of a fact question. If the contrary were true, then saying "unless it creates a fact question" means nothing. Indeed, I can only wonder how a court could heed *Binur* and determine whether the evidence attached by the movant "creates a question of fact" if it must only consider evidence proffered by the non-movant.[3] That *Binur* implies evidence from a

[2] Indeed, to the contrary, this Court has held that, "[i]n determining whether there is a fact issue for the jury, the court must consider all of the evidence presented during the trial, including that which was presented after the defendant's motion for instructed verdict at the conclusion of the plaintiff's case, and *if* the evidence from *all* sources is sufficient to raise a fact issue, the movant cannot contend that the trial court should have sustained his motion." *Hamill v. Brashear*, 513 S.W.2d 602, 609 (Tex. Civ. App.—Amarillo 1974, writ ref'd n.r.e.).

[3] https://www.66batmania.com/guides/riddles/.

movant may create a question of fact if the trial court happens to see it also nullifies the proposition that such evidence may be barred from the court's consideration under the standard of review. *See Merriman*, 407 S.W.3d at 248 (stating that a no-evidence challenge will be sustained when, *inter alia*, the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact).

On the other hand, I too recognize the directive from the same court obligating us to consider the no-evidence summary judgment motion first when a movant files a combined traditional and no-evidence motion in one document. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). Arguably, focusing on the no-evidence aspect of the hybrid motion first may lead some to infer that courts should ignore what the movant may have said or attempted to prove via the traditional aspect. Yet, quite recent precedent from the Supreme Court renders suspect such an inference. In discussing its precedent, the court said "[t]hough many courts of appeals follow our example in *Ridgway*—as do we—that holding does not compel trial courts to consider no-evidence motions first."[4] *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 260–61 (Tex. 2020). That certainly frees a trial court to peruse all the summary judgment evidence before turning to the no-evidence motion. Being free to so peruse the record brings the court closer to the admonition in *Binur*, especially when the trial court is presented with a hybrid motion wherein the elements of a cause of action being attacked are virtually the same under both aspects of the motion (as they are here). For instance, if element X undergoes attack via both the traditional and no-evidence avenue and in

[4] "Ain't that a kick in the head?" given all our own opinions wherein we followed precedent and obligingly considered the no-evidence aspect first. DEAN MARTIN, *Ain't That a Kick in the Head?* (Capitol Records 1960) (music by Jimmy Van Heusen and lyrics by Sammy Cahn).

pursuing the traditional avenue first the court encounters evidence pertinent to element X, must it ignore that evidence upon journeying down the no-evidence path? *Binur* would seem to answer that in the negative. Indeed, one could interpret *Binur* as a play on the allusion to throwing a skunk into the jury box. Once smelled, it cannot be forgotten. While the trial court need not initially smell the odor emitted by evidence creating an issue of fact under *Binur*, once smelled, it is difficult to forget when it comes time to consider the no-evidence aspect.

But, other comments in *Steak N Shake* ultimately tilt me in the direction I go. Though not directly on point, they provide compelling guidance. In *Steak N Shake*, the Court dealt with a hybrid motion and had to answer the question of "whether the trial court considered her [i.e., the non-movant's] untimely response in granting summary judgment in Steak N Shake's favor." *Id.* at 259. Because the response was untimely, it need not have been considered. But was it, nonetheless? In answering, the high court first noted 1) the applicable standard of review, 2) the non-movant's burden to present evidence creating an issue of fact in response to a Rule 166a(i) motion, and 3) the duty to grant the motion if the non-movant failed to carry its burden. *Id.* But, ultimately, it concluded that the trial court's own conduct dictated the answer to the question. That is, all depended upon whether an examination of the record disclosed affirmative indication that the trial court not only permitted but also considered the belated response. *Id.* at 259–60 (stating that "while a 'silent record' on appeal supports the presumption 'that the trial court did not grant leave,' courts should examine whether the record 'affirmatively indicates' the late-filed response was 'accepted or considered'"). It then turned to the indicia which may so indicate. They included comments in a separate order or an oral ruling memorialized in

the reporter's record. *Id.* Another source is the recitals found in the trial court's judgment. *Id.* at 261. As it said, "a court's recital that it generally considered 'evidence'—especially when one party objected to the timeliness of all of the opposing party's evidence—overcomes the presumption that the court did not consider it." *Id.* And, in the trial court's summary judgment lay the unconditioned recital that "it had considered 'the pleadings, evidence, and arguments of counsel.'" *Id.* at 262. Because that affirmatively indicated the trial court had considered the response, the intermediate appellate court was to do so as well, according to the Supreme Court. *Id.*

With *H2O Solutions*, *Noons*, *Verburgt*, *Merriman*, *Dimock*, *Tunnel*, *Binur*, and *Steak N Shake* in mind, I begin to ponder. What if, in a hybrid motion in a premises liability case, the movant said something like: Though Y hired X to build a building on Y's property, X has no evidence that he was invited on Y's property for Y's benefit? If that somewhat simplistic statement were made, could I or any other judge reasonably ignore the inherent admission therein which contradicts the underlying proposition? My interpretation of *Binur* and *Noons* leads me to answer "no." Arguably the admission could be likened to evidence provided by the movant and subject to being disregarded per *Binur*. Yet, it also creates, at the very least, a fact issue regarding whether X was present on the land for the mutual benefit of X and Y; that triggers the "unless it creates a fact issue" clause of *Binur.* In returning to my musings, I then ask myself, per *Steak N Shake*, "Must I indisputably consider it because the trial court did?" That would entail musing about the summary judgment record and recitals. If the judgment contained recitals similar to those in *Steak N Shake*, I then would have to infer that the lower court did consider "all the evidence" in reaching its decision. That in turn would obligate me to

consider it as well, per *Steak N Shake*. And, most interestingly, I also would be doing the exact thing required of me by *Merriman* and *Dimock*; I would be considering *all* the evidence.

All this leads me to conclude the following. A reviewing court is not restricted to considering ***only*** evidence proffered by the non-movant when assessing the validity of a no-evidence motion. At the very least, if the record 1) contains pertinent evidence and 2) affirmatively indicates that the trial court considered it in rendering its decision, the reviewing court must also consider it, irrespective of its source.[5] I leave for another day the question of whether the same would be true if the trial court did not affirmatively indicate it considered all the evidence otherwise before it. I need go no further at this juncture.[6] Yet, it would seem odd to say that the reviewing court may ignore it when the standard of review is akin to that of a directed verdict and in reviewing a directed verdict we must consider "all" the evidence irrespective of source. That said, I turn to the case at hand.

[5] In deciding this, I acknowledge Link's reference to our decision in *Billington v. Lamberson*, 190 S.W.3d 115 (Tex. App.—Amarillo 2005, no pet.). It is true that a summary judgment must stand or fall on the grounds stated in the motion or response thereto. *Id.* at 117. Yet, the failure to file a response does not *ipso facto* mean the movant wins by default. This is so for the non-movant may still question the legal sufficiency of the grounds presented by the movant. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 512 (Tex. 2014). The ground presented in a no-evidence motion is that "there is no-evidence supporting 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). Thus, asserting on appeal that there is evidence supporting an essential element or defense equates attacking the legal sufficiency of the ground urged by the movant. As Justice David Evans noted in his dissent in *B.C. v. Steak N Shake Operations, Inc.*, 532 S.W.3d 547 (Tex. App.—Dallas 2017), *rev'd*, 598 S.W.3d 256 (2020), the legal sufficiency of a no-evidence motion may be challenged on appeal for the first time. *Id.* at 554 (Evans, J., dissenting op.) (quoting *Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280 (Tex. App.—Dallas 2013, pet. denied) (en banc)). So, a non-movant may argue that there was evidence before the trial court creating a question of fact and pretermitting summary judgment. *Id.*

[6] Indeed, I am troubled going this far. Not because of any belief of being wrong but, rather, of my hesitance to construct arguments for a litigant who said nothing.

Link filed its hybrid motion, and Hawes said nothing in response to either aspect. Nevertheless, in prefacing the no-evidence aspect of the motion, Link averred: "Not only does the summary judgment evidence conclusively establish that Defendant Link . . . is entitled to summary judgment, but Plaintiff has no evidence to show otherwise." I find it difficult to pass over the implicit allusion within that statement to the evidence Link offered to prove its entitlement to summary judgment. Link may not have recited the evidence in the passage, but it certainly interjected its weight and effect into the no-evidence fray. Next, I see where the trial court did not specify the particular reason why it granted summary judgment. Nonetheless, in reaching that decision, it did so after "having considered said Motion, any response timely filed thereto, the evidence, the arguments of counsel, the pleadings and official records on file in this cause and the authorities presented." Taking that ***unconditioned*** recital at face value, per *Steak N Shake*, leads me to conclude that the trial court considered all the evidence before it in reaching its decision, and so too must I in gauging the legitimacy of the summary judgment.

More importantly, there is mention of the following in Link's motion. Hawes was asked, via deposition, if he had been on the roof at an earlier time and before falling. He replied:

> Actually I was when we put the skylights on. There was a cable up there that was in the way when we were putting the skylights in, and in order to get the boom in there, and I got up there and walked across it and took wrenches and took the cable off. So, yes. I had forgotten . . . but I had been on that part of the roof.

Coupled with that reference was citation to the deposition and page wherein Hawes so answered. That deposition also accompanied the summary judgment motion. Reading the passage and undertaking reasonable inferences from it in a light most favorable to

the non-movant, as we must, I interpret the testimony as illustrating that Hawes was on the property for the benefit of Link. Simply put, the former did periodic construction work for the latter. Doing such work is some evidence of Hawes's status as an invitee. *See Smith v. Henger*, 226 S.W.2d 425, 431 (Tex. 1950) (stating that law places upon the owner or occupant of land the duty to use reasonable care to make and keep the premises safe for those invited to use the premises for business purposes and included within that class are the employees of contractors performing construction or other work on the premises). Other evidence indicates that Hawes was told by Link or its representative to return to the property to remove matter he had left there in exchange for doing work or as part of his work for Link. This, at the very least, raises a genuine issue of material fact about Hawe's status as an invitee. There being a question of fact on Hawes's status, the record negated Link's proposition that he was licensee, at best, and it owed duties only due a licensee.

In sum, I too vote to reverse the final summary judgment due to the presence of a fact issue. Given the three opinions upon the issue about considering a movant's evidence in a no-evidence motion for summary judgment setting, I would invite the Supreme Court to resolve all debate.

Brian Quinn
Chief Justice