NO. 12-16-00155-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

GARY RAMSEY AND SANDRA RAMSEY, APPELLANTS	***§***	***APPEAL FROM THE 392ND***
	§	***JUDICIAL DISTRICT COURT***
V.		
CATERPILLAR INC., APPELLEE	***§***	***HENDERSON COUNTY, TEXAS***

MEMORANDUM OPINION

Gary Ramsey and Sandra Ramsey appeal the trial court's summary judgment granted against them and in favor of Caterpillar, Inc. They present three issues on appeal. We affirm.

BACKGROUND

In January 2012, Gary was employed at JC's Tire Shop in Payne Springs, Texas. He was instructed to complete a tire change on a 120H Motor Grader manufactured and sold by Caterpillar. According to Gary, he was asked to assist with inflating a flat tire on the Motor Grader, which was equipped with a multi-piece rim/wheel assembly. He had never worked on a multi-piece rim. Gary attempted to inflate the tire prior to installing the necessary lock ring, and the assembly "explosively separated." Gary alleges that he suffered a traumatic brain injury as a result of the explosion.

Subsequently, the Ramseys sued Caterpillar for negligence, gross negligence, strict liability design defect, and strict liability marketing defect. Sandra also asserted derivative claims against Caterpillar. Caterpillar moved for summary judgment on both traditional and no evidence grounds. It also moved to strike portions of the summary judgment evidence attached to the Ramseys' responses. The trial court sustained Caterpillar's objections and, after a hearing, granted summary judgment in favor of Caterpillar. This appeal followed.

MOTION FOR SUMMARY JUDGMENT

The Ramseys present three issues challenging the trial court's summary judgment ruling. First, they contend the trial court abused its discretion by sustaining Caterpillar's objections to the summary judgment evidence. Second, they maintain that they presented sufficient evidence to overcome Caterpillar's no-evidence summary judgment on marketing defect and design defect claims. Third, they urge that Caterpillar did not conclusively establish its affirmative defense that it was a non-manufacturing seller.

Standard of Review

When, as in this case, a party moves for both a traditional and no evidence summary judgment, we first review the trial court's summary judgment under the no evidence standards of Rule 166a(i). ***Ford Motor Co. v. Ridgway,*** 135 S.W.3d 598, 600 (Tex. 2004). If the no evidence motion was properly granted, we do not reach the arguments made in the traditional motion. *See* ***id***. at 602. This rule applies when the same issues were raised in both the traditional and no evidence grounds. ***Dunn v. Clairmont Tyler, L.P.***, 271 S.W.3d 867, 870 (Tex. App.—Tyler 2008, no pet.). Accordingly, we first review the Ramseys' challenge to Caterpillar's no evidence motion for summary judgment.

After an adequate time for discovery has passed, a party without the burden of proof at trial may move for summary judgment on the ground that the nonmoving party lacks supporting evidence for one or more essential elements of its claims. *See* TEX. R. CIV. P. 166a(i). Once a no evidence motion has been filed in accordance with Rule 166a(i), the burden shifts to the nonmovant to bring forth evidence that raises a fact issue on the challenged evidence. *See* ***Ridgway,*** 135 S.W.3d at 600. We review a no evidence motion for summary judgment under the same legal sufficiency standards as a directed verdict. ***King Ranch, Inc. v. Chapman***, 118 S.W.3d 742, 750-51 (Tex. 2003). A no evidence motion is properly granted if the nonmovant fails to bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. ***Id.*** at 751. If the evidence supporting a finding rises to a level that would enable reasonable, fair minded persons to differ in their conclusions, then more than a scintilla of evidence exists. ***Id.*** Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of a fact, and the legal effect is that there is no evidence. ***Id.***

In determining whether an appellant has raised more than a scintilla of evidence regarding the grounds on which a no evidence motion for summary judgment was based, we are limited to the summary judgment proof produced in the response. ***DeGrate v. Exec. Imprints, Inc.***, 261 S.W.3d 402, 408 (Tex. App.—Tyler 2008, no pet.). We review the record de novo and in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *See* ***Sudan v. Sudan***, 199 S.W.3d 291, 292 (Tex. 2006). All theories in support of or in opposition to a motion for summary judgment must be presented in writing to the trial court. *See* TEX. R. CIV. P. 166a(c). If the trial court's order does not specify the grounds on which it granted summary judgment, we affirm the trial court's ruling if any theory advanced in the motion is meritorious. ***State Farm Fire & Cas. Co. v. S.S.***, 858 S.W.2d 374, 380 (Tex. 1993).

Applicable Law

To prevail on a design defect claim, a plaintiff must establish that (1) a safer alternative design existed, and (2) the design defect was a producing cause of the personal injury for which the claimant seeks recovery. TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(a) (West 2017). "Safer alternative design" means a product design other than the one actually used that in reasonable probability (1) would have prevented or significantly reduced the risk of the claimant's personal injury without substantially impairing the product's utility, and (2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge. ***Id.*** § 82.005(b). Generally, these requirements necessitate competent expert testimony and objective proof that a defect caused the injury. ***Nissan Motor Co. Ltd. v. Armstrong***, 145 S.W.3d 131, 137 (Tex. 2004). Conclusory statements by an expert are not competent evidence and are insufficient to support or defeat summary judgment. ***Wadewitz v. Montgomery***, 951 S.W.2d 464, 466 (Tex. 1997)

To succeed on a marketing defect claim, a plaintiff must prove that the defendant knew or should have known of a potential risk of harm presented by the product, but marketed it without adequately warning of the danger or providing instructions for its safe use. *See* ***Bristol–Myers Co. v. Gonzales***, 561 S.W.2d 801, 804 (Tex. 1978); ***Ethicon Endo–Surgery, Inc. v. Meyer***, 249 S.W.3d 513, 516 (Tex. App.—Fort Worth 2007, no pet.). The plaintiff must present evidence that (1) a risk of harm is inherent in the product or may arise from the intended or reasonably

anticipated use of the product, (2) the product supplier actually knew or should have reasonably foreseen the risk of harm at the time the product was marketed, (3) the product possessed a marketing defect, (4) the absence of the warning or instructions rendered the product unreasonably dangerous to the ultimate user or consumer of the product, and (5) the failure to warn or instruct constituted a causative nexus in the product user's injury. ***DeGrate***, 261 S.W.3d at 411.

To prove causation in a marketing defect case, a plaintiff is aided by a presumption that proper warnings would have been followed if they had been provided. ***Stewart v. Transit Mix Concrete & Materials Co.***, 988 S.W.2d 252, 256 (Tex. App.—Texarkana 1998, pet. denied). However, the presumption's application differs depending on whether the case concerns the complete lack of a warning or the lack of an adequate warning. ***Id.*** In the case of no warning, it is presumed that proper warnings would have been heeded. ***Id.*** However, no presumption arises that a plaintiff would have followed a better warning when he did not read the warning given, which if heeded would have prevented his injuries. ***Id.*** If following the warning and instructions actually provided would have prevented the injury despite the warning's inadequacy, the deficiency could not be the cause of any injury. ***Id.*** In such a case, the plaintiff does not have a cause of action for failure to warn because there is no causation. ***Id.***

Analysis

As part of its no evidence motion, Caterpillar alleged that it was entitled to judgment as a matter of law on the design defect claim because the Ramseys presented no evidence of a safer alternative design. The Ramseys argue that the single-piece rim assembly was a safer alternative design. They urge that the fact that Caterpillar manufactures the Motor Grader to include a single-piece rim assembly demonstrates that it is a safer alternative. However, Caterpillar contends that the multi-piece rim assembly possesses a utility that the single-piece rim does not. Specifically, the multi-piece rim allows a service mechanic to service, mount, and dismount a tire without removing the entire wheel assembly. This allows personnel to service the tires in the field and reduces the downtime of the machine.

The record indicates that the Ramseys presented no evidence that the single-piece rim significantly reduces the risk of explosive separation without compromising utility. According to Caterpillar's summary judgment evidence, the single-piece rim has the same risk of separation as the multi-piece rim, and the frequency of separation is not significantly reduced in cases

involving single-piece rims. Furthermore, the single-piece rim cannot be serviced and maintained in the field to the same degree as the multi-piece rim. The Ramseys did not present evidence demonstrating otherwise. As a result, the Ramseys presented no evidence of a safer alternative design, and the trial court did not err in granting summary judgment on the design defect claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 82.005(b); ***Champion v. Great Dane Ltd. P'ship***, 286 S.W.3d 533, 541-42 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

Caterpillar also moved for no evidence summary judgment on the Ramseys' marketing defect claim because there was no evidence of an inadequate warning. According to the Ramseys, the multi-piece rim assembly's warning was inadequate because: (1) it was located inside the cab of the Motor Grader, (2) it merely told the user to read the safety manual, and (3) neither Gary nor the other mechanics saw the warning in the cab of the Motor Grader.

The Ramseys' argument that the warning could have been more prominent does not prove that the warning was not *sufficiently* prominent. ***General Motors Corp. v. Saenz***, 873 S.W.2d 353, 360 (Tex. 1993). In situations when instructions or warnings pertinent to the proper operation, mounting, maintenance, and repair of the product may be necessary, expert testimony is required. *See* ***Goodyear Tire & Rubber Co. v. Rios***, 143 S.W.3d 107, 117-18 (Tex. App.—San Antonio 2004, pet. denied); ***Saenz***, 873 S.W.2d at 360-61. Without the benefit of expert testimony, a jury cannot determine which warnings and instructions should be included in an adequate warning. ***Rios***, 143 S.W.3d at 118; *see* TEX. R. EVID. 702. In this case, the trial court ruled that the Ramseys' expert was not qualified to testify regarding the "color, position, [and] notice" of the warning. Essentially, the Ramseys' expert was disqualified from testifying regarding the adequacy of the notice on the Motor Grader, and the Ramseys do not challenge the trial court's ruling on appeal. Absent expert testimony, the Ramseys have no evidence that the Motor Grader's warning was inadequate and, consequently, there is no evidence of a marketing defect. *See* ***DeGrate***, 261 S.W.3d at 411-12.

Nor did the Ramseys present evidence that the alleged failure to warn caused Gary's injuries. The evidence shows that the Motor Grader warning advised of the danger of explosion. The tire itself had the following warning: "Serious injury may result from explosion of tire rim assembly due to improper mounting procedure. Only specially trained persons should mount tires." This warning expressly advises of the risk of explosive separation if the proper procedures are not followed. Had this warning been heeded and the proper mounting technique

been followed, Gary's injuries would have been avoided. *See* ***Stewart***, 988 S.W.2d at 256. Therefore, the Ramseys failed to present evidence that the lack of an adequate warning caused Gary's injuries, and the trial court properly granted no evidence summary judgment on their marketing defect claim. *See* ***Saenz***, 873 S.W.2d at 360; ***Stewart***, 988 S.W.2d at 256; *see also* ***Tidwell v. Terex Corp.***, No. 01-10-01119-CV, 2012 WL 3776027, at *9 (Tex. App.—Houston [1st Dist.] Aug. 30, 2012, no pet.) (mem. op.).

Because the Ramseys failed to raise a genuine issue of material fact in response to Caterpillar's no evidence motion for summary judgment, the trial court did not err by granting summary judgment in favor of Caterpillar. *See* ***Ridgway***, 135 S.W.3d at 600; *see also* ***Chapman***, 118 S.W.3d at 750-51. Accordingly, we overrule the Ramseys' second issue and need not address their remaining issues. *See* TEX. R. APP. P. 47.1.

DISPOSITION

Having overruled the Ramseys' second issue, we ***affirm*** the trial court's judgment.

BRIAN HOYLE
Justice

Opinion delivered April 19, 2017.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

APRIL 19, 2017

NO. 12-16-00155-CV

GARY RAMSEY AND SANDRA RAMSEY,
Appellant
V.
CATERPILLAR INC.,
Appellee

Appeal from the 392nd District Court
of Henderson County, Texas (Tr.Ct.No. 2013B-0254)

THIS CAUSE came to be heard on the oral arguments, appellate record and briefs filed herein, and the same being considered, it is the opinion of this court that there was no error in the judgment.

It is therefore ORDERED, ADJUDGED and DECREED that the judgment of the court below **be in all things affirmed**, and that this decision be certified to the court below for observance.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.