Affirmed and Opinion Filed April 14, 2017

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00165-CV

JOSE JAIMES, Appellant
V.
MARCO LOZANO D/B/A AMERICAN WASTE DISPOSAL, Appellee

On Appeal from the 192nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-07575

MEMORANDUM OPINION

Before Chief Justice Wright, Justice Lang-Miers, and Justice Myers
Opinion by Justice Lang-Miers

Jose Jaimes sued his employer, Logan and Son Used Tire Service, Inc., and American Waste Disposal for injuries he sustained when a tire he had been working on exploded. Jaimes settled with Logan and Son. He alleged claims against AWD for negligence and premises liability, and the trial court granted AWD's no-evidence motion for summary judgment. On appeal, Jaimes argues that the trial court erred by granting AWD's motion. We affirm.

BACKGROUND

Logan and Son is in the business of buying, selling, and repairing used commercial truck tires and scrapping tires for the State. AWD regularly brought in its garbage trucks for tire repairs. Jaimes worked at Logan and Son for eight years. For the first four of those years he

picked up used tires and brought them back to the shop for either repair and sale or disposal. For the last four years, he repaired flats.

One day an AWD driver drove a garbage truck to Logan and Son to have a flat repaired. The truck had four front and four back tires; the flat tire was one of the inside tires. Jaimes said he knew which tire needed to be repaired because it was flat when the truck came into the shop. Melvin Logan, the manager of Logan and Son, instructed Jaimes to "patch it up." After Jaimes patched the tire, he put the tire on the rim and added 90 pounds of pressure. About eight minutes later, as he was preparing to put the tire back on the garbage truck, he "turned around to get the tire [and he] heard something almost like fabric breaking apart. And [he] knew something was going to happen." The tire exploded. Jaimes put his face inside the rim of the tire just before the explosion because he "wasn't going to have time to run." The explosion knocked him unconscious and severely injured his hand.

Jaimes sued AWD, the customer, for negligence and premises liability alleging AWD "was negligent in providing defective materials," that AWD "knew or should have known of the dangerous condition the defective materials posed," and AWD "failed to exercise ordinary care and did not make an adequate effort to protect [him] at the time of the incident." AWD moved for no-evidence summary judgment on the grounds that there was no evidence of any relationship between AWD and Jaimes giving rise to a legal duty; no evidence AWD owned, operated, or controlled the premises where Jaimes was injured; and no evidence AWD committed any negligent acts or omissions that proximately caused Jaimes's injuries. In response to the motion, Jaimes asserted that AWD was vicariously liable for the actions of its independent contractor, Logan and Son, because AWD retained some control over the manner in which Jaimes performed the work. He also argued that when a party "negligently creates a dangerous

situation, it then becomes his duty to do something about it."[1] And he asserted AWD was liable under sections 388 and 392 of the Restatement (Second) of Torts, which he contends imposed a duty to warn "of the condition of the flat tire on [AWD's] garbage truck before [Jaimes] started working with that tire." To support his response, Jaimes attached as evidence excerpts from the deposition of the owner of Logan and Son, pictures of his injuries, excerpts from his own deposition, the affidavit of AWD's owner, and discovery responses. The trial court granted AWD's motion and rendered judgment dismissing Jaimes's claims with prejudice.

On appeal, Jaimes argues that the trial court erred by granting AWD's motion because he raised a genuine issue of material fact as to each element of his negligence and premises liability claims.

STANDARD OF REVIEW

We review the grant of a no-evidence summary judgment by determining whether the nonmovant produced evidence raising a fact issue on the material questions presented. *See* TEX. R. CIV. P. 166a(i); *Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 375 (Tex. App.—Dallas 2009, pet. denied). In our review, we consider the evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). If the nonmovant's evidence would allow reasonable and fair-minded people to differ in their conclusions regarding the challenged elements, the no-evidence summary judgment was improper. *Tex. Integrated Conveyor Sys.*, 300 S.W.3d at 375–76.

[1] Jaimes stipulated that he was not asserting a products liability claim against AWD.

DISCUSSION

Negligence Claim

To establish negligence, a plaintiff must show that the defendant owed the plaintiff a legal duty, the defendant breached that duty, and the breach proximately caused the plaintiff's damages. *Gharda USA, Inc. v. Control Solutions, Inc.*, 464 S.W.3d 338, 352 (Tex. 2015). Whether AWD owed a legal duty to Jaimes is a question of law. *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). Jaimes argues that AWD owed him a legal duty under several theories: (1) liability for negligent acts of an independent contractor, (2) negligent activity, and (3) supplying chattel for use.

(1) Liability for Negligent Acts of Independent Contractor

Jaimes argues that AWD is liable for his injuries because Logan and Son was AWD's independent contractor, and he worked for Logan and Son. Jaimes appears to *assume* that Logan and Son was AWD's independent contractor; he does not offer any evidence or argument to support this theory. But there is no evidence giving rise to an independent contractor relationship between AWD and Logan and Son. The evidence showed that AWD was simply a customer who did not have a right to control any aspect of Logan and Son's work. *See Newspapers, Inc. v. Love*, 380 S.W.2d 582, 586 (Tex. 1964) (stating right to control details of work determines liability). When Jaimes was asked at his deposition what he was claiming AWD did to cause his injuries, he said, "they brought the truck." We conclude that this evidence does not raise a genuine issue of material fact that Logan and Son was the independent contractor of AWD or that AWD owed a legal duty to Jaimes under this theory of liability.

(2) Negligent Activity

Jaimes also contends that AWD is liable under a negligent activity theory. A "negligent activity" theory of liability asserts that the danger arose from the contemporaneous use of the

product, that is, by the activity itself and not by some condition the activity created. *See 4Front Engineered Solutions, Inc. v. Rosales*, 505 S.W.3d 905, 912 (Tex. 2016) (explaining difference between negligent activity and premises liability); *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992) ("Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity."). Jaimes contends that AWD is liable under this theory because the "'activities were actively ongoing at the time of' his on-the-job injury and that those 'negligent actions or omissions . . . proximately' caused or at least contributed to his injuries." But even if reaching for the tire to mount it on the truck constituted negligent activity, which we do not decide, there is no evidence AWD was involved in that activity so as to make it liable for Jaimes's injuries.

Jaimes argues that this case is similar to the facts in *Alamo Lumber Co. v. Pena*, 972 S.W.2d 800 (Tex. App.—Corpus Christi 1998, pet. denied), and controls the outcome here. We disagree.

Tomas Pena owned a tire service and went to Alamo's ready-mix concrete plant to repair a tire on a concrete truck. *Id*. at 802. He repaired the tire and was inflating it when the tire exploded and injured him. *Id*. He sued Alamo and the jury found in his favor. *Id*. at 803. One of the issues on appeal was whether Pena's failure to submit a premises liability claim invalidated his recovery for general negligence. *Id*. The court of appeals said no. *Id*. at 804. The court said the danger to Pena "was directly attributable to the contemporaneous activity of Alamo" because Alamo did not warn Pena the truck had been driven between 75 and 100 miles while the tire was flat, causing a dangerous situation. *Id*. In other words, the court said there was evidence Alamo engaged in negligent activity to support Pena's negligence claim. *Id*. at 804–05.

But none of the facts present in *Pena* are present here. The evidence showed that AWD did not call Jaimes out to AWD's plant to repair the tire, but drove the truck with the flat tire to

Logan and Son; Jaimes knew the tire had been driven flat because he could see the tire was flat when the truck came into the shop; and there is no evidence that AWD was engaged in a "contemporaneous use" when the tire exploded. We conclude that Jaimes did not raise a genuine issue of material fact on the negligent activity theory of liability.

(3) Supplying Chattel for Use

Jaimes also contends that AWD is liable pursuant to sections 388 and 392 of the Restatement (Second) of Torts for supplying chattel for use that AWD knew was likely to be dangerous. *See* RESTATEMENT (SECOND) OF TORTS §§ 388 ("Chattel Known to be Dangerous for Intended Use"), 392 ("Chattel Dangerous for Intended Use") (Am. Law Inst. 1965). He argues "there is a reasonable question whether [AWD] 'supplied' the flat tire 'for "use"' and/or at least handling by [Jaimes] and/or other workers at Logan [and Son] . . . ." Again, we disagree.

AWD took the tire to Logan and Son for repair because the tire was flat and could not be used. This is not the type of "use" contemplated by these sections of the Restatement. *See Bustamante v. Gonzalez*, No. 04-09-00481-CV, 2010 WL 2298841, at *3–4 (Tex. App.—San Antonio June 9, 2010, pet. denied) (mem. op.) (owner of tractor not liable to tractor repair contractor for injuries when tractor struck contractor, because tractor not furnished for use); *see also* RESTATEMENT (SECOND) OF TORTS §§ 388 (and cases cited therein), 392 cmts. a, d (discussing liability of person who supplies chattel for "use" by others in which he has business interest and explaining meaning of "use"). But even if AWD's act of bringing a tire in for repair could constitute a "use," Jaimes's admission that he knew the tire was flat would be fatal to his claim. *See id.* § 388 cmt. k (no duty to inform of chattel's dangerous character if "a mere casual looking over will disclose" the condition). We conclude that Jaimes did not produce evidence raising a genuine issue of material fact as to this theory of liability.

Premises Liability Claim

Jaimes also sued AWD for premises liability. A claim for premises liability is asserted against the owner or occupier of a premises. *Keetch*, 845 S.W.2d at 264 (stating elements of premises liability claim as, among others, "[a]ctual or constructive knowledge of some condition on the premises by the owner/operator" and "the owner/operator did not exercise reasonable care to reduce or eliminate the risk"). As in any other negligence claim, a defendant in a premises liability claim "is liable only to the extent it owes the plaintiff a legal duty." *Gen. Elec. Co. v. Moritz*, 257 S.W.3d 211, 217 (Tex. 2008).

Jaimes's summary-judgment evidence showed that AWD is neither the owner nor occupier of Logan and Son's premises, nor is it Jaimes's employer. Consequently, AWD did not owe a duty to Jaimes under a premises liability theory. *Id.* (if defendant neither owns nor occupies premises, no duty under premises liability theory). Jaimes argues that AWD "owned, possessed, or controlled the tire which exploded and severely injured him." But he cites no authority that a tire is a "premises" for purposes of a premises liability claim. Nor does he provide authority that a customer of a premises owner may be sued under a premises liability theory. *See Keetch*, 845 S.W.2d at 264 (stating elements of premises liability claim). We conclude that Jaimes did not produce evidence raising a genuine issue of material fact as to his claim against AWD for premises liability.

CONCLUSION

We resolve Jaimes's issues against him. We affirm the trial court's judgment.

/Elizabeth Lang-Miers/
ELIZABETH LANG-MIERS
JUSTICE

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JUDGMENT

JOSE JAIMES, Appellant

No. 05-16-00165-CV V.

MARCO LOZANO D/B/A AMERICAN WASTE DISPOSAL, Appellee

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Trial Court Cause No. DC-13-07575.
Opinion delivered by Justice Lang-Miers.
Chief Justice Wright and Justice Myers participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee Marco Lozano d/b/a American Waste Disposal recover its costs of this appeal from appellant Jose Jaimes.

Judgment entered April 14, 2017.