

CONDITIONALLY GRANT and Opinion Filed April 7, 2021



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-20-00814-CV

**IN RE CHRIS KILMER AND
DEL RIO CONSTRUCTION SERVICES, Relators**

**Original Proceeding from the 354th District Court
Hunt County, Texas
Trial Court Cause No. 85062**

MEMORANDUM OPINION

Before Justices Osborne, Reichek, and Smith
Opinion by Justice Reichek

Before the Court is relators' petition for writ of mandamus seeking relief from the trial court's order granting Plaintiff's Hybrid Motion to Strike and No-Evidence Motion for Summary Judgment on Defendants' Designation of a Responsible Third-Party and Intervenor Indemnity Insurance Company of North America's Motion to Strike Defendants' Responsible Third Party Designation. For the reasons set out below, we conditionally grant the writ.

BACKGROUND

This personal injury case arose when the plaintiff, Brandon Stephens, fell from scaffolding while installing audio/visual equipment at a church. At the time of

the accident, Stephens was employed by Electro Acoustics & Video, Inc. Relator Del Rio Construction Services was the general contractor for the work being performed at the church, and relator Chris Kilmer was the construction site manager for Del Rio.

To install the audio/visual equipment, Stephens was required to access the ceiling above the stage area of the church. The scissor lift provided by Electro Acoustics could not be moved onto the stage, so Stephens used scaffolding that had been erected by Del Rio. Stephens modified the scaffolding from two to three tiers to reach the ceiling area. As he climbed the modified scaffolding, the scaffolding tipped over, causing him to fall and sustain severe injuries. Stephens filed this suit against relators asserting claims for negligence, gross negligence, premises liability, and negligent undertaking.

A little over a year after the lawsuit was filed, relators sought leave to designate Electro Acoustics as a responsible third party. Stephens later filed a motion to strike relators' third-party designation together with a no-evidence motion for summary judgment on the designation issue. Indemnity Insurance Company of North America ("IICNA"), Electro Acoustics's worker's compensation carrier, intervened in the suit, joined Stephens's motion, and filed its own motion to strike the third-party designation.

Stephens's motion quoted deposition testimony given by Kilmer in which he stated that Del Rio was in control of the scaffolding and that he had no complaints

about any safety issues relating to Stephens or Electro Acoustics. Stephens contended this testimony contradicted the core of relators' argument that Electro Acoustics could be held responsible. Stephens further argued that relators' designation depended almost entirely on Electro Acoustics's role as Stephens's employer which, by itself, fell short of the standard for third-party designation set by Texas Civil Practice and Remedies Code § 33.004(1). IICNA asserted that relators had insufficient evidence to raise a fact issue regarding Electro Acoustics's responsibility and, relying on *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 203 (Tex. 2015), asserted that Electro Acoustics, as the employer, was not Stephens's "insurer" and had no duty to warn him of commonly known hazards. Finally, IICNA argued that Electro Acoustics had no duty to provide equipment or assistance that was unnecessary to the job's safe performance.

In response to the motions, relators argued that Electro Acoustics breached duties it owed to Stephens to properly train and supervise him, provide him with a safe work environment, and provide him with the proper equipment to safely perform his job. Relators submitted evidence they contended demonstrated:

- (1) Stephens was employed by Electro Acoustics, and his injury was within the course and scope of his employment;
- (2) Electro Acoustics was not a subcontractor of relators;
- (3) Electro Acoustics was responsible for installing audio equipment in the church at heights up to and including the ceiling;

(4) Electro Acoustics provided a scissor lift for use on the project, but the lift could not be used in the stage area where Stephens was working because it could not climb the stairs to the finished stage;

(5) Electro Acoustics did not require employees to wear safety-harnesses when working at heights, did not provide Stephens with a harness, and Stephens was not wearing a harness at the time he fell;

(6) Electro Acoustics did not provide any scaffolding safety training to Stephens;

(7) The scaffolding, as assembled by relators was two levels prior to Stephens's use;

(8) Stephens built the third level of the scaffolding from materials he found on site; and

(9) Stephens was working alone when he fell and he could not recall if any of relator's employees were in the sanctuary when he fell.

Following a hearing, the trial court granted Stephens's and IICNA's motions to strike Electro Acoustics as a responsible third party.

Relators then filed a motion for reconsideration attaching expert reports they contended were "new evidence" supporting the designation of Electro Acoustics. Stephens responded that the expert reports were dated before relators' initial response to the motions to strike and that relators had made a strategic decision to withhold the reports. Stephens further contended that relators were essentially arguing they had not had sufficient time for discovery when they responded to the motions, a contention raised too late in a motion for reconsideration. Finally, Stephens objected that the new evidence was not properly authenticated, not based on personal knowledge, and was conclusory. IICNA joined Stephens's response and

filed its own, echoing Stephens’s arguments and asserting objections to relators’ new evidence.

The trial court denied relators’ motion for reconsideration. In this original proceeding, relators challenge both the trial court’s order striking the third-party designation and its denial of their motion for reconsideration.

Standard of Review

Mandamus provides the appropriate remedy when a court erroneously strikes a designated responsible third party. *In re Molina*, 575 S.W.3d 76, 79 (Tex. App.—Dallas 2019, orig. proceeding) (citing *In re Coppola*, 535 S.W.3d 506, 509–10 (Tex. 2017) (orig. proceeding) (per curiam)) (erroneously granting motion to strike responsible third party skews proceedings, potentially affects litigation’s outcome, and compromises the defense in ways unlikely to be apparent in appellate record, rendering appellate remedy inadequate). We review a trial court’s ruling on a motion to strike a responsible third party designation de novo. *Id.* at 80.

Discussion

Chapter 33 of the Civil Practice and Remedies Code allows a tort defendant to designate a person as a “responsible third party” for the purpose of submitting that party to the trier of fact as a potential cause of the plaintiff’s injuries. TEX. CIV. PRAC. & REM. CODE § 33.004(a); *Molina*, 575 S.W.3d at 79. A responsible third party is defined as any person “who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought.” CIV. PRAC.

& REM. CODE § 33.011(6). Once a third party has been designated, and after an adequate time for discovery has passed, a party may move to strike the designation on the ground that there is no evidence the designated person is responsible for any part of the plaintiff's alleged damages. *Molina*, 575 S.W.3d at 80. The court must grant the motion to strike unless the defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated third party's responsibility for the plaintiff's injury or damage. CIV. PRAC. & REM. CODE § 33.004(l). A party has produced sufficient evidence to support submission of a question to the jury when it provides more than a scintilla of evidence of potential responsibility for the claimed injury. *Gregory v. Chohan*, 615 S.W.3d 277, 298 (Tex. App.—Dallas 2020, no pet. h.). Although a defendant must produce evidence of responsibility, it need not demonstrate the third party's liability. *Galbraith Eng'g Consultants, Inc. v. Pochuha*, 290 S.W.3d 863, 868 (Tex. 2009). A responsible third party's defenses to liability have no bearing on whether they are properly designated as potentially responsible. *Id.* at 868–69.

Here, relators' designation of Electro Acoustics was based on their assertion that the company had breached various duties it owed to Stephens and these breaches were a proximate cause of Stephens's injuries. "To support a finding that a third party was responsible based on negligence, a defendant must produce evidence of a legal duty owed to the claimant by the third party, a breach of that duty, and damages to the claimant proximately caused by the breach of the duty." *In re Transit Mix*

Concrete & Materials Co., No. 12-13-00364-CV, 2014 WL 1922724, at *4 (Tex. App.—Tyler May 14, 2014) (orig. proceeding) (mem. op.).

Stephens and IICNA contend that relators failed to establish that Electro Acoustics owed a duty to Stephens that would support its designation as a responsible third party in this case. Relying on *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006), Stephens and IICNA contend that employers are not insurers of their employees' safety, have no duty to warn of commonly known hazards, and have no liability for an injury resulting from the performance of the same character of work usually done unless the work is unusually precarious. What they fail to address, however, is Electro Acoustics's nondelegable duty as Stephens's employer to furnish him with reasonably safe equipment with which to perform his work. See TEX. LABOR CODE § 411.103; *Austin*, 465 S.W.3d at 216; *In re Macy's Tex. Inc.*, 291 S.W.3d 418, 420 (Tex. 2009) (orig. proceeding); *Advance Tire & Wheels, LLC v. Enshikar*, 527 S.W.3d 476, 480 (Tex. App.—Houston [1st Dist.] 2017, no pet). Relators provided evidence that Stephens was required by Electro Acoustics to perform installation work on the ceiling above the stage of the church. Relators also provided evidence that Electro Acoustics did not provide Stephens with any instrumentality capable of reaching the ceiling or any safety equipment to be used when working in high areas.

The facts alleged in this case are similar to those presented in *Advance Tire*. See *Advance Tire*, 527 S.W.3d at 478–79. In *Advance Tire*, an employee of a tire

shop was injured when a tire exploded while it was being inflated. *Id.* Although tires being inflated were supposed to be locked into the inflator, the tire with which the plaintiff was working was too large to fit, requiring him to hold it upright while another employee inflated it. *Id.* at 479. The plaintiff asserted that the tire shop should have had a cage for securing tires so that its employees would not have to hold them during inflation. *Id.* In concluding the evidence showed the tire shop breached its duty to provide its employee with a safe workplace, the court noted “the great weight of authority acknowledges an employer’s nondelegable duty to provide the equipment necessary for an employee to safely perform his work.” *Id.* at 482. Any attempt to excuse this duty based on the employee’s knowledge that the tools available were insufficient “would be inconsistent with the law’s characterization of the employer’s duty as ‘nondelegable.’” *Id.*

As in *Advance Tire*, Electro Acoustics owed Stephens a nondelegable duty to provide him with a safe workplace, including the necessary equipment to safely perform his job. Because relators provided evidence that Electro Acoustics required Stephens to work in a high area and failed to provide him with a workable scissor lift, sufficiently safe scaffolding, and/or a safety harness to accomplish this work, we conclude relators provided more than a scintilla of evidence to show a duty owed by Electro Acoustics to Stephens and a breach of that duty.

Stephens and IICNA further assert relators failed to demonstrate causation. They rely on the fact that Stephens chose to use Del Rio’s scaffolding because it was

already in place on the stage. This argument ignores Stephens's testimony that the reason he did not use the scissor lift provided by Electro Acoustics was because the lift could not access the stage area. Had the equipment Electro Acoustics provided Stephens been suitable for the job, he would not have needed to modify or use relators' scaffolding.

An act or omission is a proximate cause if it is a cause in fact of the harm and the injury was foreseeable. *Advance Tire*, 527 S.W.3d at 483. Cause in fact requires proof that the act or omission was a substantial factor in bringing about the harm. *Id.* An injury is foreseeable if a person of ordinary intelligence should have anticipated the danger posed by the act or omission. *Id.* To proximately cause an injury, an actor need not be the last cause, nor commit the act immediately preceding the injury. *Chohan*, 615 S.W.3d at 295. Furthermore, there can be more than one proximate cause of an injury. *Id.*

Based on the evidence produced by relators, a jury could infer that Stephens modified and used Del Rio's scaffolding solely because Electro Acoustics failed to provide him with the necessary equipment to safely perform his work. Accordingly, a jury could conclude Electro Acoustics's omission was a substantial factor in bringing about Stephens's injuries. *See Advance Tire*, 527 S.W.3d at 483–84. Furthermore, a jury could reasonably conclude that a person of ordinary intelligence could appreciate the danger of requiring an employee to work in high spaces without providing the equipment required to reach and work in the area safely. *Id.*

We conclude relators provided more than a scintilla of evidence that Electro Acoustics was potentially responsible for Stephens’s injuries so as to support their designation of Electro Acoustics as a responsible third party. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004) (“We have repeatedly held that more than a scintilla of evidence exists if the evidence ‘rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.’”); *Molina*, 575 S.W.3d at 81 (“Whether conduct amounts to negligence is generally a question for the factfinder.”). Because we conclude the trial court erred in striking relators’ designation of Electro Acoustics, we need not address whether the trial court abused its discretion in denying relators’ motion for rehearing.

We conditionally grant mandamus relief and order the trial court to vacate its order granting Plaintiff’s Hybrid Motion to Strike and No-Evidence Motion for Summary Judgment on Defendants’ Designation of a Responsible Third-Party and Intervenor Indemnity Insurance Company of North America’s Motion to Strike Defendants’ Responsible Third Party Designation. The writ will issue only if the trial court fails to comply.

/Amanda L. Reichek/
AMANDA L. REICHEK
JUSTICE

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