Affirmed and Opinion filed January 18, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-99-01329-CV

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THE ESTATE OF STEPHEN HARDIN: JOYCE DANIELLE HARDIN AS REPRESENTATIVE OF THE ESTATE OF STEPHEN HARDIN, JOYCE DANIELLE HARDIN INDIVIDUALLY AND AS NEXT FRIEND OF GARY HARDIN, TINA REILLY, SHELBY HARDIN, WILLIAM HARDIN AND CAROLYN HARDIN, Appellants

V.

FAMILIA/EL DORADO, INC. D/B/A EL DORADO MOBILE HOME PARK COMMUNITY, Appellee

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On Appeal from Probate Court No. 2
Harris County, Texas
Trial Court Cause No. 301,608-402

O P I N I O N

Stephen Hardin, a wrecker driver, was shot to death while attempting to tow a vehicle. The vehicle, belonging to Barry Crawford, was parked in a disputed space at El Dorado Mobile Home Park. On appeal, we determine whether the landlord, Familia/El Dorado., Inc., stated to be responsible for the property dispute, is liable in negligence for Hardin's demise. We hold it is not and thus affirm.

Background

Barry Crawford, a firefighter, was a tenant at El Dorado Mobile Home Park for over three years, beginning February 1, 1995. Crawford claimed that from the time he moved in, he paid extra money for a second parking space and that appellee was aware of his claim to the property. However, sometime after that, appellee verbally notified Crawford, asserting that he was parking his vehicle and storing property in a space not included in his lease. Appellee also sent Crawford three notices to that effect. One notice, sent in January 1997, stated in part:

> I'm writing you, Mr. Crawford, in response to our conversation about the warning letters. I have checked the records to see if there was anything in your file to confirm your statement that [management] said 14207 Pine was part of your lot and that you paid additional rent for the lot.
>
> I'm unable to find anything in the file to support your claim. If you have anything in writing or some kind of written documentation, I would be most glad to see it. As you have not maintained the lot at 14207, I assume you just plan to use the lot without paying rent for it. Since there is no demand at this point for the lot, I'm willing to give you extra time to get your items off the lot within a reasonable time.

Nothing in the record shows Crawford provided written evidence of his right to the disputed piece of realty. According to the uncontroverted evidence, Crawford was never anything but cordial and polite during this dispute. Crawford also sought out the advice of a lawyer regarding his rights. On two occasions, Crawford even helped appellee's maintenance man remove some of his own property from the disputed area. Additionally, the record shows a maintenance man informed Crawford that Crawford's vehicle was going to be towed and that Crawford exhibited no untoward reaction in response.

In early 1998, appellee rented to the Rodriguez family the adjoining lot, including the disputed parking space. On the day in question, April 17, 1998, someone in the Rodriguez family called for a wrecker. Shortly thereafter, the wrecker driver Hardin arrived and began preparations to tow Crawford's vehicle. Crawford exited his home with an unloaded .22 rifle, ordering Hardin not to tow his vehicle. Hardin continued. The two men exchanged words, then blows. Crawford retreated and loaded a single round. Hardin grabbed a shovel and came after Crawford. Crawford raised his gun and fired.

Appellants filed suit against appellee claiming, among other things, appellee was negligent for

placing Hardin "in a zone of danger" with Crawford because it knew Crawford claimed a right to park in the area it had leased to another tenant and that he would "hotly contest"any attempt to tow the vehicle. Appellee moved for summary judgment, which the trial court granted in full.

Standard of Review

Summary judgment is proper when a movant establishes that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). A defendant is entitled to summary judgment if they conclusively negate at least one essential element of each of the plaintiff's causes of action. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). However, we make every reasonable inference in favor of the nonmovant and resolve any doubts in its favor. *Randall's Food Mkts., Inc.*, 891 S.W.2d at 644. If the movant establishes a right to summary judgment, the non-movant must produce summary judgment proof showing the existence of an issue of material fact to preclude summary judgement. *See Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 907 (Tex. 1982); *Cummings v. HCA Health Servs. of Texas*, 799 S.W.2d 403, 405 (Tex. App.–Houston [14th Dist.] 1990, no writ).

Discussion[1]

We first observe that part of appellants' claim is that appellee was negligent in attempting to solve the dispute with Crawford by having his vehicle towed. However, appellants point to no evidence in the record showing appellee made the request to have Crawford's vehicle towed. Rather, they only cite bare allegations in their petition. Appellants' pleadings are not evidence. *See Laidlaw Waste Sys. (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). In fact, the record is contrary to appellants' allegations in that the testimony at Crawford's criminal trial revealed that the Rodriguezes called for the wrecker. As such, there is no competent summary judgment proof that appellee requested Hardin to tow

[1] Appellee argues this is a premises liability case, not a negligent activity case, and that appellants failed to raise this matter in the trial court, thus it is waived. Because we affirm the trial court's judgment on the merits, we need not determine these issues.

Crawford's vehicle.[2] Therefore, we only review appellee's conduct in leasing the disputed space to the Rodriguez family at a time when it was aware Crawford was claiming rights to it.

Negligence consists of three essential elements: (1) a legal duty owed by one person to another; (2) breach of that duty; and (3) damages proximately resulting from that breach. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 311 (Tex. 1987). To defeat a claim of negligence by summary judgment, a defendant must disprove at least one of these essential elements as a matter of law. *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991).

Proximate cause consists of two elements: cause in fact and foreseeability. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995). These elements cannot be established by mere conjecture, guess, or speculation. *Id*. Cause in fact is not shown if the defendant's negligence did no more than furnish a condition which made the injury possible. *Id*. Nor is it sufficient that the harm would not have occurred had the defendant not been negligent; the negligence must be a substantial factor in causing the plaintiff's injury. *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991).

Foreseeability requires that a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission. *See Boys Clubs*, 907 S.W.2d at 478. The question of foreseeability, and proximate cause generally, involves a practical inquiry based on "common experience applied to human conduct." *Id*. It asks whether the injury "might reasonably have been contemplated" as a result of the defendant's conduct. *Id*. Foreseeability requires more than someone, viewing the facts in retrospect, theorizing an extraordinary sequence of events whereby the defendant's conduct brings about the injury. *Id*.

In this case, the negligence alleged against appellee was its leasing property to the Rodriguezes while Crawford also claimed rights to it as lessee. Appellants claim this scenario was "inherently dangerous." We disagree. Viewing the facts in the light most favorable to the appellants, and assuming appellee improperly leased the disputed space to another tenant, we find that appellee's conduct was not

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[2] Appellee apprized appellants of this in its supplement to its motion for summary judgment over a year ago, yet appellants continue to make this factual assertion to this court without any evidentiary support.

the proximate cause of Hardin's death. This was a property dispute over a parking spot, one that had existed for at least two years and had historically been handled cordially and civilly. There was nothing in the record that gave appellee even the slightest hint that Crawford might become violent or that he had an aggressive nature of any kind. To the contrary, everything Crawford did indicated he would handle the matter through ordinary and peaceful means. From the undisputed record, it even appears that Crawford had to some extent acquiesced in the property dispute by helping remove his own property without complaint. In sum, there was nothing in the record to indicate that it was foreseeable to appellee that leasing the property to the Rodriguezes created any danger to a person such as Hardin. *Accord Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998) (to foresee criminal conduct, there must be evidence that other crimes have occurred). We hold, then, that Crawford's violence could not have reasonably been contemplated, thus was not foreseeable as a matter of law. *See Boys Clubs*, 907 S.W.2d at 477-78. Appellee has conclusively negated proximate cause, an essential element of appellants' claim. *See Grinnell*, 951 S.W.2d at 425. The trial court properly granted appellee's summary judgment motion. We thus overrule appellants' issues.

The judgment of the trial court is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed January 18, 2001.

Panel consists of Justices Wittig, Frost, and Amidei.[3]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[3] Former Justice Maurice E. Amidei sitting by assignment.