Affirmed and Opinion filed February 14, 2002.

In The

Fourteenth Court of Appeals

NO. 14-01-00065-CV

JOHN ROBERTS, II, Appellant

V.

W-W TRAILER MANUFACTURERS, INC., Appellee

On Appeal from the 239th District Court
Brazoria County, Texas
Trial Court Cause No. 6240-JG98-3

O P I N I O N

Appellant, John Roberts, II ("Roberts"), appeals the entry of summary judgment in favor of appellee W–W Trailer Manufacturers, Inc. ("W–W"). We affirm.

Factual and Procedural Background

On July 23, 1997, Roberts' son, John Roberts, III, died when he was overcome by carbon monoxide fumes while riding in a modified gooseneck cargo trailer owned by Freddie Carrol McGee ("McGee"). McGee purchased the cargo trailer from W-W, the manufacturer. McGee then modified the trailer by installing an interior partition to create

a "sleep compartment." Once the partition was installed, the only access to the sleep compartment was via an exterior side door installed by W–W prior to McGee's purchase. McGee also added an air conditioning unit on the trailer's roof and a gasoline powered generator in the rear of the trailer to provide power for the air conditioner. The decedent was riding in the "sleep compartment" when he was overcome by fumes emitted by the gasoline powered generator.

Roberts brought suit against a multitude of defendants on a variety of grounds. Against W–W, Roberts' claim sounded in both negligence and strict liability. Regarding the latter, Roberts alleged the trailer was defective and unreasonably dangerous for failure to adequately warn of the dangers in (1) customizing the trailer, (2) operating a gasoline powered generator in the trailer, (3) transporting individuals inside the trailer, and (4) allowing individuals to be locked inside the trailer.[1] Similarly, Roberts alleged W–W was negligent in placing the trailer "on the market without adequate warning of the dangers of customizing the trailer and enclosing and operating a gasoline powered generator in same," and in failing to warn "of the dangers of allowing individuals to be locked in and passengers to travel in the [t]railer." After allowing time for discovery, W–W moved for both

[1] The pertinent portion of Roberts' Fourth Amended Original Petition alleged:

> The [t]railer was defective and unsafe for its intended purposes at the time it left the control of W–W. The [t]railer was defective and unreasonably dangerous because 1) there was no warning and/or inadequate warning to apprise Freddie McGee and/or Decedent of the inherent dangers in customizing the trailer, 2) enclosing and operating a gasoline powered generator in same, 3) there was no warning and/or inadequate warning that the transporting of individuals inside the trailer was inappropriate, and 4) W–W failed to warn of the dangers of allowing people to be locked inside of the [t]railer. W–W had a duty to warn Freddie McGee that the [t]railer was not to be used to haul passengers while being operated on Texas highways. The side door in the [t]railer, designed primarily for human ingress and egress, invited Freddie McGee to convert the [t]railer to include a sleep/storage compartment, lock individuals in the [t]railer without any means of exiting the [t]railer and to haul passengers in the [t]railer while being towed. W–W should have posted some type of warning on or around the side door mandating against locking individuals in and/or passenger travel in the [t]railer.

traditional and no-evidence summary judgment, asserting that: (1) the trailer was not defective or unreasonably dangerous; (2) it had no duty to warn of the dangers alleged by Roberts; and, (3) even if it had such a duty to warn, any failure to satisfy that duty was not the producing cause of the death of John Roberts, III. The trial court granted both motions for summary judgment, and, after severance, this appeal ensued.

Roberts asserts four points of error on appeal. His primary complaint, however, is that the trial court erred in granting summary judgment because genuine issues of material fact exist as to whether: (1) W–W was strictly liable because of defects in both the design and marketing of the trailer, and (2) W–W was negligent in designing the trailer with a door that could not be opened from the inside and in marketing the trailer without adequate warning of either the dangers of customization or carrying passengers. In addition, Roberts avers the trial court erred in granting summary judgment because W–W's summary judgment proof was defective and the motion insufficiently stated the grounds therefor.

Standards of Review

A traditional motion for summary judgment is properly granted when the movant establishes that there are no genuine issues of material fact to be decided and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Holmstrom v. Lee*, 26 S.W.3d 526, 530 (Tex. App.—Austin 2000, no pet.). A defendant seeking summary judgment must negate as a matter of law at least one element of each of the plaintiff's theories of recovery or plead and prove as a matter of law each element of an affirmative defense. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). If the defendant establishes a right to summary judgment, the burden shifts to the plaintiff to present evidence raising a fact issue. *Id.*

A party may also move for a "no-evidence" summary judgment. TEX. R. CIV. P. 166a(I). Such a motion asserts there is no evidence of one or more essential elements of claims upon which the opposing party would have the burden of proof at trial. *Id.*;

McCombs v. Children's Med. Ctr., 1 S.W.3d 256, 258 (Tex. App.—Texarkana 1999, no pet.). Unlike a movant for a traditional summary judgment, a movant for a no-evidence summary judgment does not bear the burden of establishing a right to judgment by proving each claim or defense. *Holmstrom*, 26 S.W.3d at 530. A no-evidence summary judgment is essentially a pretrial directed verdict, to which we apply the same legal sufficiency standard of review. *Id.*; *Moore v. KMart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied). A no-evidence summary judgment is properly granted if the non-movant fails to produce more than a scintilla of probative evidence raising a genuine issue of fact as to an essential element of a claim on which the non-movant would have the burden of proof at trial. TEX. R. CIV. P. 166a(I); *Holmstrom*, 26 S.W.3d at 530.

In reviewing the grant of summary judgment, we view the evidence in the light most favorable to the non-movant and make every reasonable inference and resolve all doubts in favor of the non-movant. *See Centeq Realty*, 899 S.W.2d at 197; *Robins v. Kroger Co.*, 982 S.W.2d 156, 159 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). When the trial court grants one party's motion for summary judgment and denies the other, we review both motions and if we find the trial court erred, we will reverse and render the judgment the trial court should have rendered. *See Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999); *Holmstrom*, 26 S.W.3d at 530.

Products Liability

Texas has adopted the theory of strict products liability expressed in section 402A of the Restatement (Second) of Torts. *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 381 (Tex. 1995) ; *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 792 (Tex. 1967). "The law of products liability does not guarantee that a product will be risk free, since most products have some risk associated with their use." *Caterpillar*, 911 S.W.2d at 381. Rather, the Restatement imposes liability only for products sold "in a defective condition unreasonably dangerous to the user or consumer." RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

A product may be unreasonably dangerous because of a defect in manufacturing, design, or marketing.[2] *Caterpillar*, 911 S.W.2d at 382; *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 387 (Tex. 1991).

a. Design Defect

A design defect occurs when a product complies with all design specifications, but the design configuration is itself unreasonably dangerous in that the risks of harm associated with its intended and reasonably foreseeable uses outweigh its utility. *USX Corp. v. Salinas*, 818 S.W.2d 473, 482 n.8 (Tex. App.—San Antonio 1991, writ denied) (citing E. CARSTARPHEN, *Product Defects*, in 2 TEXAS TORTS AND REMEDIES § 41.02[2] (1991)). Roberts contends that genuine issues of material fact exist as to whether W–W defectively designed the trailer with a door that could not be opened from the inside. An allegation raising this design defect contention is not contained in Roberts' pleadings, however, and thus cannot be considered for the first time on appeal. *State of Cal. Dep't of Mental Hygiene v. Bank of S.W. Nat'l Ass'n*, 163 Tex. 314, 354 S.W.2d 576, 581 (1982); *Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 872 n.14 (Tex. App.—San Antonio 1997, no writ); *Chan v. An-Loc Restaurant*, 641 S.W.2d 617, 621 (Tex. App.—Houston [14th Dist.] 1982, no writ).

b. Marketing Defect

A marketing defect occurs when a defendant knows or should know of a potential risk of harm presented by the product but markets it without adequately warning of the

[2] We note at the outset that Roberts does not bring a strict products liability claim for a manufacturing defect, in that no allegation has been made that the trailer failed to conform to the design standards and blueprints of W–W. *See USX Corp. v. Salinas*, 818 S.W.2d 473, 482 n.8 (Tex. App.—San Antonio 1991, writ denied) (citing E. CARSTARPHEN, *Product Defects*, in 2 TEXAS TORTS AND REMEDIES § 41.02[2] (1991), for the proposition that "[a] manufacturing defect exists when a product does not conform to the design standards and blueprints of the manufacturer and the flaw makes the product more dangerous and therefore unfit for its intended or reasonably foreseeable uses").

danger or providing instructions for safe use. *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978); *Jobe v. Penske Truck Leasing Corp.*, 882 S.W.2d 447, 450 (Tex. App.—Dallas 1994, no writ); *USX Corp.*, 818 S.W.2d at 482. Liability will attach if the lack of adequate warnings or instructions renders an otherwise adequate product unreasonably dangerous. *Caterpillar*, 911 S.W.2d at 382. Roberts thus complains the trial court erred in granting summary judgment for W–W because genuine issues of material fact exist as to whether the manufacturer provided adequate warning of the dangers inherent in (1) customizing the trailer, (2) operating a gasoline powered generator in the trailer, (3) transporting individuals inside the trailer, and (4) allowing individuals to be locked inside the trailer.

A manufacturer may be held liable for foreseeable misuse of its product. *Coleman v. Cintas Sales Corp.*, 40 S.W.3d 544, 550 (Tex. App.—San Antonio 2001, pet. denied) (noting that "[w]here the product is not defective if used as intended, a foreseeable misuse may still give rise to a duty to warn"). A product supplier is not, however, liable for a failure to warn of dangers that were unforeseeable at the time the product was marketed. Roberts was required, therefore, to show that W–W "*knew* or *should have known* of the risks *at the time of marketing*." *USX Corp.*, 818 S.W.2d at 484 (citing *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985); W. POWERS, TEXAS PRODUCTS LIABILITY LAW § 5.047 (1991)) (emphasis in original).

A claimant may prove a product supplier's knowledge of the foreseeability of the risk of harm to product users through, among other things, (1) evidence of similar accidents or other complaints, (2) presentation of post-accident warnings, (3) presentation of recall letters, (4) evidence of governmental standards, (5) expert testimony, lay testimony, or documentary evidence to show information about risks available to a defendant, and (6) reliance on evidentiary presumptions. *Clark Equip. Co. v. Pitney*, 923 S.W.2d 117, 126 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (citing *USX Corp.*, 818 S.W.2d at 484). In the instant case, Roberts proffers only the unsupported assertion that "[i]t is very

common for purchasers of trailers to convert such trailers to include sleep and/or storage compartments." The record is bereft of any evidence that W–W knew or should have known at the time of sale to McGee of the dangers of customizing the cargo trailer for human habitation or transport. Accordingly, summary judgment was properly granted on this ground.

Negligence

In addition to his strict liability contentions, Roberts avers that summary judgment should not have been granted because genuine issues of material fact exist as to whether W–W was negligent in (1) designing the trailer with a door that could not be opened from the inside, and (2) in marketing the trailer without adequate warning of either the dangers of customization or carrying passengers.

A negligence cause of action requires a legal duty, breach of that duty, and damages proximately resulting from that breach. *Van Horn v. Chambers*, 970 S.W.2d 542, 543 (Tex. 1998); *Allen v. W.A. Virnau & Sons, Inc.*, 28 S.W.3d 226, 233 (Tex. App.—Beaumont 2000, pet. denied). In the instant case, however, the record contains no summary judgment proof that W–W owed a duty either to alter the trailer's door design or to issue warnings identifying the hazards of modifying the trailer and hauling passengers. Thus, because Roberts has not submitted even a scintilla of evidence in support of his negligence claims, we conclude the trial court did not err in granting summary judgment on this ground.

Summary Judgment Proof

Finally, Roberts complains that summary judgment should not have been granted because W–W's summary judgment proof was defective. Specifically, Roberts asserts that "the answers to the deposition questions relied upon by W–W in its motion were in response to leading questions, not supported by any evidence, hearsay, conclusory, and [W–W's] evidence, as a whole, was insufficient to support summary judgment." Moreover, Roberts

claims W–W's motion for summary judgment "insufficiently stated the grounds for the motion." Because Roberts has failed to adequately brief this point of error, he has waived appellate consideration. *See* TEX. R. APP. P. 38.1(h).

Under Texas Rule of Appellate Procedure 38.1(h), Roberts must, through his brief, provide "a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record." TEX. R. APP. P. 38.1(h). In the instant case, however, Roberts provided only the bare assertions recounted above; he neither provided arguments in their support nor favored us with citations to the record. As a result of such inadequate briefing, his objections are waived. *See id.*; *McIntyre v. Wilson*, 50 S.W.3d 674, 682 (Tex. App.—Dallas 2001, pet. denied); *Sisters of Charity of the Incarnate Word v. Gobert*, 992 S.W.2d 25, 31 (Tex. App.—Houston [1st Dist.] 1997, no pet.); *Warehouse Partners v. Gardner*, 910 S.W.2d 19, 26 (Tex. App.—Dallas 1995, writ denied).

Conclusion

We overrule Roberts' points of error and affirm the trial court's entry of summary judgment in favor of W–W.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed February 14, 2002.
Panel consists of Justices Anderson, Hudson, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).