Affirmed and Opinion filed April 5, 2001.

In The

Fourteenth Court of Appeals

———————————

NO. 14-99-01086-CV

———————————

JOHN A. STURM, Appellant

V.

PHIL ARMS MINISTRIES, INC. D/B/A THE HOUSTON CHURCH AND WORSHIP CENTER, Appellee

---

On Appeal from the 113th District Court
Harris County, Texas
Trial Court Cause No. 98-40225

O P I N I O N

This is a premises liability negligence case in which the appellant, John A. Sturm, claims the trial court erred in entering summary judgment for appellee, Phil Arms Ministries, Inc., doing business as "The Houston Church and Worship Center." We affirm.

I. FACTUAL BACKGROUND

John Sturm attended the Houston Church and Worship Center. When the church pastor made a plea to parishioners to assist with repair projects around the church, Sturm, a carpenter

who owned his own construction and repair company, volunteered his services. The operations manager for the church gave Sturm three projects to complete in the ladies' restroom: (1) repair a cracked wall; (2) repair a partition separating two toilets; and (3) repair a sink counter top that dipped down on its right side. While repairing the counter top, a large mirror hanging above the counter top detached from the wall and fell onto Sturm. The mirror shattered and severely cut Sturm's leg.

II. PROCEDURAL BACKGROUND

Sturm filed suit against the church alleging that the mirror was defectively attached to the wall and that the church caused Sturm's injuries by (1) negligently failing to provide a safe and adequate workplace for interior repairs ancillary to the mirror; (2) failing to inspect the mirror, attachments, and wall securing the mirror; (3) failing to inspect, discover, and repair the defectively secured mirror; (4) failing to properly maintain the areas where Sturm made repairs, specifically, the area around the mirror; and (5) failing to warn Sturm of these unsafe conditions. The church moved for summary judgment, arguing it was entitled to judgment as a matter of law because Sturm was a licensee and the church did not breach the applicable duty of care, i.e., cause his injuries by "willful, wanton or grossly negligent conduct." Alternatively, the church argued that even if Sturm were an invitee instead of a licensee, his suit failed as a matter of law because the church did not know about the "dangerous conditions" and because the "condition" of the premises was not unreasonably dangerous. Sturm filed a response to the summary judgment motion. The trial court entered summary judgment for the church. Sturm then filed a motion for new trial. The court denied the motion, and this appeal ensued.

III. ISSUES PRESENTED FOR REVIEW

In three points of error, Sturm asserts the trial court erred in: (1) considering improper summary judgment evidence; (2) granting the church's motion for summary judgment; and (3) denying Sturm's motion for a new trial.

IV. SUMMARY JUDGMENT STANDARD OF REVIEW

A summary judgment functions to eliminate patently unmeritorious claims or untenable defenses. *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). The standards for reviewing a summary judgment are well-established:

> (1) The movant has the burden to show absence of genuine issues of material fact and to show entitlement to judgment as a matter of law;
>
> (2) In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and
>
> (3) Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in his favor.

Nixon v. Prop. Mgm't Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

We affirm a summary judgment only if the summary judgment record establishes the right to summary judgment as a matter of law. *Gibbs v. Gen. Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). A defendant may obtain summary judgment by negating at least one element of the plaintiff's cause of action. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996).

V. EVIDENTIARY OBJECTIONS

Before we apply the summary judgment standard of review, we must address Sturm's assertion that the trial court erred in granting the church's motion for summary judgment because the summary judgment evidence was improper. Specifically, Sturm complains about: (1) his own statement to an insurance adjuster; (2) an affidavit from the church operations manager, Frank Dvorak; and (3) an affidavit from the church pastor, Phil Arms.

The standards for admissibility of evidence in a summary judgment proceeding mirror those applicable to a regular trial. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam). Evidentiary rulings are "'committed to the trial court's sound discretion.'"

Owens-Corning Fiberglass Corp. v. Malone, 972 S.W.2d 35, 43 (Tex. 1998) (quoting *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995)). We review a trial court's rulings concerning the admission of summary judgment evidence for an abuse of discretion. *Wolfe v. C.S.P.H., Inc.*, 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.). A trial court abuses its discretion if it acts without regard to guiding rules or principles. *Owens-Corning*, 972 S.W.2d at 43.

A. Sturm's Statement

Sturm asserts the church improperly included, as summary judgment evidence, a recorded statement he gave in January 1997, to a State Farm Insurance claims adjuster. In his response to the church's summary judgment motion, Sturm objected to his statement to the adjuster as: (1) not produced for inspection and copying as requested; (2) inadmissible under Texas Rule of Civil Procedure 193.2; and (3) "incomplete, irrational, and incoherent" when compared to his deposition taken in March 1999, because he made the statement to State Farm while under medication.

Under Rule 38.1(h) of the Texas Rules of Appellate Procedure, every appellant's brief must contain a clear, concise argument in support of its contentions, including appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(h). By raising an issue and failing to present any supporting argument or authority, the party waives appellate review of the issue. *See id*.

Sturm's appellate brief asserts that his statement was inadmissible under Texas Rule of Civil Procedure 193.2. That rule deals with objections to written discovery requested of a party, *not* objections to inclusion of a statement as part of another party's summary judgment proof. *See* TEX. R. CIV. P. 193.2(a) ("A party must make any objection to written discovery in writing—either in the response or in a separate document—within the time for response. The party must state specifically the legal or factual basis for the objection and the extent to

which the party is refusing to comply with the request."). Sturm claims that because his statement to the insurance adjuster was not produced for copying and inspection as requested, it is not admissible in the summary judgment proceeding. However, Sturm provides no citation to any part of the record demonstrating that he made such a request. Moreover, he presents no argument in support of this point. Therefore, Sturm has waived appellate review of these complaints by failing to properly brief them. *See* TEX. R. APP. P. 38.1(h); *Hou-Tex*, 26 S.W.3d at 112.

Finally, the record shows that Sturm objected to the church's use of his statement because the statement was "incomplete, irrational and incoherent compared to his deposition testimony." As with his other complaints, Sturm failed to provide any citation to the record or to authorities to support this claimed error. Therefore, it, too, is waived. *See* TEX. R. APP. P. 38.1(h).

B. Dvorak Affidavit

Sturm argues that statements in the Dvorak affidavit were conclusory, self-serving, "based only on the best of . . . [Dvorak's] knowledge and belief," that no record of inspection was produced, and that the Dvorak affidavit, therefore, could not constitute summary judgment evidence.[1]

The first statement of which Sturm complains declares "that the premises and area at issue were not dangerous." Sturm asserts that because the church provided no inspection record, this statement is conclusory and, therefore, not regarded as summary judgment proof under Rule 166a(c). The second statement of which Sturm complains provides "[t]hat the accident would not of [sic] happened but for the manner in which [Sturm] attempted the

[1] Sturm also complains that "Defendant's affidavits were conclusory and recited factual conclusions that were not supported by any documentation produced in discovery or attached to affidavits to sustain conclusory facts which could have been easily controverted." Specifically, Sturm complains that the affidavits "alluded to inspections but without any documentation of such inspections of the premises actually inspected."

repairs." Sturm asserts that this statement is also conclusory and that no expert testimony was offered to refute facts provided in Sturm's deposition or to explain how the repairs were done, how they should have been done, what Sturm did to cause the mirror to fall, and whether the mirror was properly fastened.

"A conclusory statement is one that does not provide the underlying facts to support the conclusion. Conclusory statements in affidavits are not proper as summary judgment proof if there are no facts to support the conclusions." *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex. App.—Houston [1st Dist.] 1997, no writ) (citing *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996)). Conclusory statements without factual support are neither credible nor susceptible to being readily controverted. *Id.*; TEX. R. CIV. P. 166a(c). However, the prohibition of "conclusory" evidence does not mean that logical conclusions based on stated underlying facts is improper. *Rizkallah*, 952 S.W.2d at 587.

An objection that an affidavit is conclusory is an objection to the substance of the affidavit and may be raised for the first time on appeal. *Hou-Tex, Inc. v. Landmark*, 26 S.W.3d at 112 (citing *Rizkallah*, 952 S.W.2d at 587)). Thus, Sturm need not have asserted this objection or obtained a ruling on it to raise it on appeal. *See id.*

To support a motion for summary judgment, an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f). The statement regarding dangerousness was based on Dvorak's personal knowledge and derived from his work as operations manager of the church. Moreover, Dvorak's affidavit provided the underlying factual basis for the assertion that the mirror area was not dangerous. The Dvorak affidavit states:

> Within my position as Operations Manager for the Church, I would be notified of any accidents occurring on the Church premises, as well as dangerous conditions on the premises of the Church. I also routinely inspected the Church

> premises seeking to identify any dangerous conditions or anything on the property of the Church which could potentially hurt someone on the Church property. I did this routinely during my tenure as Operations Manager for the Church. I know of no accidents, other than the one subject of this suit where anyone ever got injured on the Church property. There have never been any accidents similar to this one subject of this suit, or for that matter any accidents where someone got injured in the bathroom where this accident occurred, nor have there ever been any accidents on the Church property because of any falling mirrors.

Dvorak's statement that the area was not dangerous is a logical conclusion based upon the facts stated in the affidavit, i.e., that as operations manager he routinely inspected the church premises specifically to identify potentially dangerous conditions and that he was not aware of anyone ever being hurt on the church property. Thus, Dvorak's statement that the area was not dangerous is proper summary judgment evidence.

Similarly, Dvorak's statement that the accident would not have occurred but for Sturm's actions is not conclusory. In support of this statement, Dvorak cited to the fact that Sturm was banging on the counter top from underneath in his attempt to make the repairs. It is logical to conclude that banging on the underside of a counter top would have the effect of moving the counter top upwards, causing it to hit the mirror located directly above it. The underlying facts set forth in Dvorak's affidavit support his conclusion.

We find the statements in Dvorak's affidavit, which form the basis of Sturm's complaints, were not conclusory.

C. Defendants' Affidavits

Sturm also asserts that the affidavits of pastor Arms and Dvorak alluded to inspections that were not supported by documentation, produced through discovery, or attached to affidavits, and that these conclusory statements, therefore, "do not establish summary

judgment" under Texas Rules of Civil Procedure 166a(c) and 166a(f).

Rule 166a(f) requires that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith." TEX. R. CIV. P. 166a(f). However, Dvorak's affidavit refers only to an *inspection*, not an *inspection report*. Because Dvorak's affidavit referred to no document, no document needed to be attached to the affidavit. Moreover, even if documentation had been required for the Dvorak affidavit, Sturm would have waived any complaint based on his failure to obtain a ruling necessary to preserve the issue for appellate review. Although Sturm objected to the lack of documentation in his response to the church's motion for summary judgment, he failed to obtain a ruling on his objection and failed to object to the trial court's failure to rule. Consequently, he failed to preserve his complaint for this court's review. *See* TEX. R. APP. P. 33.1.

Sturm also argues that Pastor Arms' affidavit testimony as an "interested witness" does not comply with Texas Rule of Civil Procedure 166a(c). The rule states, in pertinent part:

> A summary judgment may be based on uncontroverted testimonial evidence of an interested witness . . . if the evidence is *clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted*.

TEX. R. CIV. P. 166a(c) (emphasis added). Pastor Arms stated in his affidavit:

> Since I founded this Church, I have personal knowledge of any and all accidents, injuries, complaints of injuries, and claims of injury where any person was or allegedly was injured on the premises of our Church and property. Based upon my personal knowledge, I know that no individual has ever been injured in any of the restrooms on our property because of a falling mirror, or has otherwise ever been injured in any manner because of anything to do with the mirrors on the property of the Church.
>
> Prior to the date of the accident subject of this suit, no person, individual, governmental entity, or company of any kind has ever advised me or to my knowledge any employee or representative of the Church that any mirror within our Church property was in any manner improperly installed, dangerous, or

> posed any type of risk to any individual. I also have personal knowledge that no mirror within the Church property, including the particular mirror and restroom subject of this suit, has ever come loose, was not properly supported, or has fallen, or injured any individual on our Church property before the accident subject of this suit happened.
>
> If I would have perceived some type of danger to Mr. John Sturm prior to him doing the repair work he did, I would have advised him of this danger or in some manner corrected the dangerous condition prior to him beginning his work in the ladies [sic] restroom subject of this suit.
>
> Prior to the accident subject of this suit, all of the Church property is routinely inspected and observed by employees and representatives of the Church, cleaning crews, maintenance men, members of the Church, and volunteers. I have personal knowledge that no person has ever advised me prior to the date of this accident that they believed, observed, or any manner informed/communicated to me that the mirror subject of this suit was dangerous, could fall, or was improperly installed.

Objections to an "interested witness" affidavit are objections to defects of form and require that the complaining party object and obtain a ruling by the trial court to preserve the issue for appellate review. *Ahumada v. Dow Chem. Co.*, 992 S.W.2d 555, 562 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Although Sturm objected to this purported defect, he failed to obtain a ruling on his objection. Thus, Sturm waived any "interested witness" objection to Pastor Arms' affidavit. *See* TEX. R. APP. P. 33.1(a)(2)(B). Moreover, even if Sturm had not waived this error, his objection would have no merit because the affidavit was, in fact, "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." *See* TEX. R. CIV. P. 166a(c).

Appellant's first point of error is overruled.

VI. SUMMARY JUDGMENT AND INVITEE/LICENSEE CLASSIFICATION

In his second point of error, Sturm argues the trial court erred in granting summary judgment for the church on his negligence claim because the church (1) failed to show the

absence of a material fact as to whether Sturm was a licensee,[2] as urged by the church, or an invitee,[3] as urged by Sturm, and (2) failed to show the absence of a material fact as to whether the church breached the duty of care owed to an invitee. Because the church did not base its motion for summary judgment on an affirmative defense, to prevail the church had to negate at least one element of Sturm's negligence claim. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). If Sturm was an invitee, he would have a lower burden of proof than if he were a licensee. *See Palais Royal, Inc. v. Gunnels*, 837, 842 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd by agr.) (noting that a licensee requires a higher burden of proof, requiring actual knowledge rather than constructive knowledge, which is required for an invitee). Assuming without deciding that Sturm was an invitee, and that he had the lower burden of proof, we address only Sturm's second argument that there was a fact question as to whether the church breached the duty owed to an invitee.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if: (1) the landowner has actual or constructive knowledge of some condition on the premises; (2) the condition posed an unreasonable risk of harm; (3) the landowner did not exercise reasonable care to reduce or eliminate the risk; and (4) the landowner's failure to use such care proximately caused the claimant's injury. *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 295 (Tex. 1983).

Even assuming Sturm was an invitee, as he argues, the affidavits of Pastor Arms and

---

[2] A "licensee" is a person who is privileged to enter or remain on land only by virtue of the possessor's consent, thus entering with permission of the landowner but doing so for his own convenience or on business for someone other than the owner. *Knorpp v. Hale*, 981 S.W.2d 469, 471 (Tex. App.—Texarkana 1998, no pet.). An owner owes to the licensee a duty to not injure him or her by willful, wanton or grossly negligent conduct, and to use ordinary care to either warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not *Id.*

[3] An "invitee" is a person who enters the premises of another in answer to an express or implied invitation from the owner or occupier for their mutual benefit. *McCaughtry v. Barwood Homes Ass'n*, 981 S.W.2d 325, 329 (Tex. App.— Houston [14th Dist.] 1998, pet. denied).

Dvorak, coupled with Sturm's statement to State Farm, amply demonstrate that the church neither knew nor should have known about the condition of the mirror. Thus, the church effectively negated the breach element of Sturm's premises liability action, thereby entitling it to summary judgment. Because we find that the church did not breach a duty of care owed to Sturm, we need not determine Sturm's status as invitee or licensee.

Appellant's second point of error is overruled.

VII. MOTION FOR NEW TRIAL

In his third and final point of error, Sturm asserts the trial court erred in denying his motion for new trial because the motion for summary judgment did not establish absence of a genuine issue of material fact, and the church, therefore, was not entitled to judgment as a matter of law. The appellant's "brief must contain 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). Because Sturm provided no citations to the record and no argument to support this point of error, this point is waived.

The judgment of the trial court is affirmed.

/s/ Kem Thompson Frost
Justice

Judgment rendered and Opinion filed April 5, 2001.

Panel consists of Justices Yates, Wittig, and Frost.

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