Reversed and Rendered in Part, Affirmed in Part, Opinion of May 13, 1999, withdrawn and substituted with Opinion filed October 14, 1999.

In The

Fourteenth Court of Appeals

NO. 14-97-01402-CV

CHEMICALS INCORPORATED, Appellant

V.

RANDALL HOLLAND AND THERESA K. HOLLAND, Appellee

On Appeal from the 344th District Court
Chambers County, Texas
Trial Court Cause No. 15921

O P I N I O N

Appellees, Randall Holland (Holland) and Theresa K. Holland (collectively, the Hollands), sued appellant, Chemicals Incorporated, for negligence and wrongful termination under the Labor Code. *See* TEX. LAB. CODE ANN. § 451.001(Vernon 1996). A jury found for the Hollands on both claims. In four points of error, Chemicals Incorporated contends there was no evidence that (1) it was a subscriber to the Texas Workers' Compensation Act, (2) Chemicals Incorporated discharged Holland, (3) Chemicals Incorporated discharged Holland for hiring an attorney, and (4) its negligence, if any, caused Holland's injury. We reverse and render in part and affirm in part.

Background

Randall Holland, an employee of Chemicals Incorporated, injured his back while removing a wheel assembly. Chemicals Incorporated did not provide worker's compensation insurance coverage, and Holland threatened to hire an attorney to determine his rights. A personnel director told him that if he did so, he could consider himself terminated. Holland retained an attorney, called back the following day, and the director asked, "Do you think you can come back and start suing everybody, and then just kinda walk back in?"

Standard of Review

In reviewing a no evidence point of error, we review all the record evidence in the light most favorable to the party in whose favor a verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in that party's favor. *See Merrill Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997), *cert. denied*, 118 S. Ct. 1799 (1998). We sustain a no evidence point if (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact. *See id.* In evaluating legal sufficiency, we determine whether the proffered evidence as a whole rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *See Mobil Oil Co. v. Ellender*, 968 S.W.2d 917, 922 (Tex. 1998).

Point of Error One

In its first point of error, Chemicals Incorporated contends the trial court erred in entering judgment against it for wrongful discharge under the Texas Workers' Compensation Act because there is no evidence it provided workers' compensation insurance coverage.

The Workers' Compensation Act prohibits "a person" from discriminating against an employee because the employee hired an attorney to represent him in a workers' compensation claim. *See* TEX. LAB. CODE ANN. § 451.001. "Person" is not defined in the Workers' Compensation Act; however, a person cannot discriminate against an employee unless the person is an employer. *See Texas Mexican*

Ry. Co. v. Bouchet, 963 S.W.2d 52, 56 (Tex. 1998) (overruling previous law allowing non-subscriber liability under section 451.001); *Stewart v. Littlefield*, 982 S.W.2d 133, 137 (Tex. App.–Houston [1st Dist.] 1998, no pet.); *Stoker v. Furr's Inc.*, 813 S.W.2d 719, 723 (Tex. App.–El Paso 1991, writ denied). "Employer" is defined in the Labor Code as "a person who makes a contract for hire, employs one or more employees, *and has workers' compensation insurance coverage*." TEX. LAB. CODE ANN. § 401.011 (18) (emphasis added). Thus, a person under section 451.001 must be an employer with workers' compensation coverage. The Hollands had the burden of proof to establish that Chemicals Incorporated was a person. *See id.* at § 451.002. They admit that Chemicals Incorporated does not fall within that definition. Consequently, there is a complete absence of a vital fact.

The Hollands contend the holding in *Bouchet* represents a change in the law. At the time of trial, two courts of appeals had held that a wrongful termination claim could be brought against a non-subscribing employer. *See Texas Health Enters, Inc. v. Kirkgard*, 882 S.W.2d 630, 633 (Tex. App.–Beaumont 1994, writ denied); *Hodge v. BSB Inv., Inc.*, 783 S.W.2d 310, 313 (Tex. App.–Dallas 1990, writ denied). Moreover, although the Supreme Court did not decide the issue until *Bouchet*, it had previously cited *Hodge* and intimated its approval of the holding. *See Gunn Chevrolet, Inc. v. Hinerman*, 898 S.W.2d 817, 819 (Tex. 1995) ("We have assumed, because we need not decide in this case, that employees of nonsubscribers are protected by section 451.001."). The Hollands claim Chemicals Incorporated cannot benefit from the change in the law announced in *Bouchet* because it did not argue at trial that section 451.001 is inapplicable to non-subscribers. *See General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 921 (Tex.), *cert. dism'd*, 510 U.S. 985 (1993) (holding that the defendant was required to object to jury questions concerning damages in order to receive the benefit of a change in the law); *Whole Foods Market Southwest v. Tijerina*, 979 S.W.2d 768, 773 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (holding that the defendant could not benefit from the change in the law announced in *Bouchet* because it had failed to raise this issue to the trial court).

We find the aforementioned cases to be distinguishable. In both *De La Lastra* and *Tijerina*, the parties sought a reversal on the naked allegation that there had been a change in the law. Here, the Hollands admitted in their petition that Chemicals Incorporated "elected not to subscribe" to Worker's Compensation Insurance. Thus, Chemicals Incorporated was not required to allege, plead, or prove its

status as a non-subscriber. *See Texas Dept. of Corrections v. Herring*, 513 S.W.2d 6, 9 (Tex. 1974) (recognizing that a party may plead himself out of court by pleading facts which affirmatively negate his cause of action); *Lyons v. Linsey Morden Claims Management, Inc.*, 985 S.W.2d 86, 92 (Tex. App.–El Paso 1998, rev. denied) (judicial admissions are assertions of fact, not pleaded in the alternative, in the live pleadings of a party). Further, Chemicals Incorporated alleged in its motion for judgment notwithstanding the verdict that the Hollands had offered no evidence to show that Mr. Holland had been "discharged for hiring a lawyer in violation of the Texas Labor Code." One element of a wrongful termination claim under section 451.001 of the Labor Code is that the employer be a subscriber of Worker's Compensation Insurance.

A party may raise a "no evidence" point before the trial court through: (1) a motion for instructed verdict; (2) an objection to the submission of the issue to the jury; (3) a motion to disregard the jury's answer; (4) a motion for judgment non obstante veredicto; or (5) a motion for new trial specifically raising the complaint. *See Cecil v. Smith*, 804 S.W.2d 509, 510-11 (Tex. 1991); *One Call Sys., Inc. v. Houston Lighting & Power*, 936 S.W.2d 673, 675 (Tex. App.–Houston [14th Dist.] 1996, writ denied); *Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc.*, 927 S.W.2d 146, 149 (Tex. App.–Corpus Christi 1996, no writ). Here, the claim made by Chemicals Incorporated in its motion for judgment notwithstanding the verdict incorporated the contention it now makes on appeal, *i.e.*, that where the evidence shows the defendant/employer is a non-subscriber, the evidence is necessarily insufficient to support a claim of wrongful termination under the Labor Code. *See Rocky Mountain Helicopters, Inc. v. Lubbock County Hosp. Dist.*, 987 S.W.2d 50, 52 (Tex. 1998) (where defendant argued in the trial court that there was no evidence to support the jury's finding of an implied warranty, he necessarily preserved his complaint on appeal that there was no evidence to support the plaintiff's Deceptive Trade Practices claim).

Judicial economy mandates greater specificity where a proper objection could have prevented the error by provoking a cure. *See Wilgus v. Bond*, 730 S.W.2d 670, 672 (Tex. 1987) (the purpose of Rule 274 is to afford trial courts an opportunity to correct errors in the charge); *Carr v. Weiss*, 984 S.W.2d 753, 766 (Tex. App.–Amarillo 1999, pet. denied) (the purpose of requiring a specific objection is to afford the trial court an opportunity to correct the error); *Greater Houston Transp. Co. v.*

Zrubeck, 850 S.W.2d 579, 586 (Tex. App.–Corpus Christi 1993, writ denied) (the timeliness of certain objections is determined by whether they are made at a time when it is still feasible to correct the error being complained of). Here, the error was not susceptible to correction or remedy. The undisputed facts, as set forth in the Hollands petition, demonstrate the impossibility of their claim. The Hollands carried the burden of proof, and no amount of notice could have rectified the error presented here.

In most instances, a decision of the Supreme Court is to be retroactive in its operation. *See Tarango v. Liberty Mut. Fire Ins. Co.*, 823 S.W.2d 717, 718 (Tex. App.–El Paso 1992, no writ). The written objection made by Chemicals Incorporated could undoubtedly have been more specific. However, in light of the Hollands' judicial admissions and the irreparable nature of the error, we find the objection to be at least minimally sufficient to preserve the "no evidence" point for our review.[1]

Accordingly, we sustain Chemicals Incorporated's first point of error. Because our resolution of point of error one is dispositive of points of error two and three, we reverse and render judgment for Chemicals Incorporated on Holland's wrongful termination claim.

Point of Error Four

In its fourth point of error, Chemicals Incorporated argues there was no evidence that its negligence caused Holland's injury. Specifically, it challenges the evidence establishing foreseeability. To establish negligence, a plaintiff must establish a duty, breach of that duty, and damages proximately caused by the breach. *See Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex.), *cert. denied*, 119 S. Ct. 546 (1998). Proximate cause consists of cause in fact and foreseeability. *See Browning-Ferris, Inc. v. Hobson*, 967 S.W.2d 543, 545 (Tex. App.–Houston [14th Dist.] 1998, pet. denied). Foreseeability requires that "a person of ordinary intelligence should have anticipated the danger created by a negligent act or omission." *See Samco Properties, Inc. v. Cheatham*, 977 S.W.2d 469, 477 (Tex. App.–Houston [14th Dist.] 1998, pet. denied).

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[1] In *Story Services, Inc. v. Ramirez*, 863 S.W.2d 491, 505 (Tex. App.–El Paso 1993, writ denied) and *First American Title Co. v. Prata*, 783 S.W.2d 697, 702 n.1 (Tex. App.–El Paso 1989, writ denied), the Eighth Court of Appeals has advanced the theory that there are no longer any procedural prerequisites to raising a 'no evidence' point for the first time on appeal. Because we find Chemicals Incorporated preserved its no evidence point for review, we need not reach this issue.

Holland testified he felt he could not do the requested job safely. He knew the job would be hard on him and that the tires were heavy. He forewarned Chemicals Incorporated that he needed more equipment to perform the job safely. Holland's previous employers had provided these tools. Holland had only completed one similar job during his employment with Chemicals Incorporated, a year prior to the event in question. However, with twelve to fifteen years of experience, Holland was Chemicals Incorporated's most experienced mechanic. Holland thought he could handle the job, and he had previously been trained in removing and replacing wheel assemblies. He changed such wheels more than twenty times during his career. He had never been injured removing or replacing these wheels, including the one time he previously performed the job for Chemicals Incorporated.

Considering all the evidence and inferences deducible from the evidence, we find there is more than a scintilla of evidence that a person of ordinary intelligence should have anticipated the danger to Holland. Chemicals Incorporated argues, however, that this injury was not foreseeable to it because it was not foreseeable to Holland. *See, e.g., J. Weingarten v. Sandefer*, 490 S.W.2d 941, 945 (Tex. Civ. App.–Beaumont 1973, writ ref'd n.r.e.). Its reliance on this line of cases is misplaced, however, as there is more than a scintilla of evidence that the injury was foreseeable to Holland as well as a person of ordinary intelligence.

Chemicals Incorporated also argues that an injury is not foreseeable to it if the employee previously performed the task without incident; however, this general rule is true only if the job itself is not unusual or does not pose a threat of injury. *See Werner v. Colwell*, 909 S.W.2d. 866, 869 (Tex. 1995). The evidence establishes that Holland only performed the task for Chemicals Incorporated on one other occasion; therefore, the job itself was unusual.[2]

Because we find legally sufficient evidence of foreseeability, we overrule Chemicals Incorporated's fourth point of error. We affirm the trial court's judgment as to Holland's negligence claim and reverse and render as to his wrongful termination claim.

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[2] The cases Holland cites as support involved employees who had performed the task for their employer on more than one previous occasion. *See, e.g., Werner*, 909 S.W.2d at 869 (noting the plaintiff performed the task occasionally); *J. Weingarten*, 490 S.W.2d at 946 (noting the employee performed the task many times within three years).

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 14, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

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