Affirmed in Part; Reversed and Remanded in Part; and Opinion filed December 7, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00832-CV

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ANTONIA BELASCO, JENARO BELASCO, WENDY BELASCO, JULIA BELASCO, VINSENTO V. BELASCO, ESTABAN VELASCO, IGNACIO VELASCO, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF YSIDRO BELASCO, AND LIONEL ROGER, SR., Appellants

V.

PENNCO, INC., Appellee

On Appeal from the 9th Judicial District Court
Waller County, Texas
Trial Court Cause No. 97-08-14,317-A

O P I N I O N

Appellants, Antonia Belasco, Jenaro Belasco, Wendy Belasco, Julia Belasco, Vinsento V. Belasco, Esteban Velasco, Ignacio Belasco (individually and as the executor of the estate of Ysidro Belasco), and Lionel Rogers, Sr., appeal an order granting a no- evidence summary judgment in favor of appellee, Pennco, Inc. ("Pennco"). In four points of error, appellants assert the trial court erred in granting Pennco's motion for summary judgment on their claims

of nuisance, trespass, negligence, negligence per se, and gross negligence. We affirm in part and reverse and remand in part.

Pennco produces ferrous sulfate, a non-toxic liquid, at its manufacturing plant in Brookshire. Ferrous sulfate is used by municipalities for odor and corrosion control in waste water collection systems and sewage plants. It is manufactured by combining carbon steel with sulfuric acid and water.

The Belasco family resides near the manufacturing site, and Lionel Rogers, Sr. occasionally cuts grass in a field behind the facility. Appellants allege they have repeatedly detected noxious odors emanating from the plant and have suffered various injuries and ill-health due to chemical agents released during the manufacturing process. Appellants assert that signs of contamination by Pennco's chemical releases are obvious. The trial court disagreed, and granted Pennco's no-evidence motion for summary judgment.

In a no-evidence motion for summary judgment the movant must specify the element(s) of the nonmovant's cause of action for which there is allegedly no evidence. *See* TEX. R. CIV. P. 166a(i). The burden then shifts to the nonmovant to produce more than a scintilla of evidence supporting the challenged element(s). *See id*. If the nonmovant is unable to provide sufficient evidence, the trial court must grant the motion. *See id*. When reviewing the grant of a no-evidence summary judgment, we must consider the evidence in the light most favorable to the nonmovant, disregarding all contrary evidence and inferences. *See Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.1997). A trial court cannot grant a no-evidence summary judgment if the respondent brings forth more than a scintilla of proof to raise a genuine issue of material fact. *See* TEX. R. CIV. P. 166a(i); *Grant v. Joe Myers Toyota, Inc.*, 11 S.W.3d 419, 422 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Proof so weak that it only creates mere surmise or suspicion of a fact is less than a scintilla. *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). On the other hand, when the proof "rises to a level that would enable reasonable and fair-minded people to differ in their

conclusions," the respondent has provided more than a scintilla of proof and survives summary judgment. *See Havner*, 953 S.W.2d at 711.

In their first point of error, appellants contend that the trial court erred in granting summary judgment for Pennco on appellants' cause of action for nuisance. A nuisance is a condition which substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it. *See Loyd v. Eco Resources, Inc.*, 956 S.W.2d 110, 125 (Tex. App.—Houston [14th Dist.] 1997, no writ). It occurs in one of three ways: by (1) physical harm to property, such as by encroachment of a damaging substance or by the property's destruction; (2) physical harm to a person on his property, such as by an assault on his senses or by personal injury; and (3) emotional harm to a person from the deprivation of the enjoyment of his property, such as by fear, apprehension, offense, or loss of peace of mind. *See Maranatha Temple v. Enterprise Prods*, 893 S.W.2d 92, 99 (Tex. App.—Houston [1st Dist] 1994, writ denied). Certainly, pollution of the atmosphere with noxious or offensive odors, gases or vapors may become a nuisance if it causes material discomfort and annoyance to those residing in the vicinity, or injures their health or property. *See Gulf Oil Corp. v. Vestal*, 231 S.W.2d 523, 525 (Tex. Civ. App.—Fort Worth 1950), aff'd, 235 S.W.2d 440 (Tex. 1951).

Appellants claim Pennco's plant is the source of offensive odors and offer their own affidavits to support the claim in which they assert they were periodically subjected to noxious odors emanating from Pennco's property. Although somewhat conclusory in their assertion that Pennco was the source of these odors, appellants also offered several investigatory reports filed by the Texas Natural Resource Conservation Commission ("TNRCC"). In all of these reports, the TNRCC investigator uniformly reports he was unable to detect any odor along the perimeter of Pennco's property. In one report, however, the investigator noted that a Pennco supervisor told him that fumes sometimes travel beyond the property lines when the reactors are in operation. We find the combination of appellants' affidavits and the reported Pennco

admission to TNRCC constitute more than a scintilla of proof to create a fact issue regarding appellants' nuisance claim. Appellants' first point of error is sustained.

In their second point of error, appellants contend the trial court erred in granting summary judgment for Pennco on their claim of trespass. Trespass of real property requires a showing of an unauthorized physical entry onto plaintiff's property by some person or some thing. *See Railroad Comm'n v. Manziel*, 361 S.W.2d 560, 567 (Tex. 1962). Every trespass upon the land of another constitutes a trespass irrespective of whether damage is done to the property. *See Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 827 (Tex. 1997). To support their claim, the affidavits of the Belasco family assert they saw a plume of brownish-yellow steam rising from Pennco's plant and moving towards their property. However, none of the Belasco affidavits state the plume ever moved outside of the boundaries of Pennco's property. Without some evidence of a chemical pollutant, produced by Pennco, invading the Belasco's property, there is no evidence to support appellants' trespass claim. Appellants' second point of error is overruled.

In points of error three and four, appellants contend the trial court erred in granting Pennco's motion for summary judgment on appellants' claims of negligence, negligence per se, and gross negligence. Appellants' negligence, negligence per se, and gross negligence claims must necessarily be predicated upon appellants' ability to show: (1) that Pennco owed a duty to appellants; (2) Pennco breached that duty; (3) appellants were injured or damaged; and (4) Pennco's conduct was the proximate cause of appellants' injuries or damages. *See Colvin v. Red Steel Co.*, 682 S.W.2d 243, 245 (Tex. 1984). Appellants rely upon their own affidavits and the affidavit of a former Pennco employee to establish that Pennco contaminated adjacent property with chemicals that had an adverse effect upon their health. While ferrous sulfate is a non-toxic substance, the record demonstrates that significant amounts of hydrogen and a small amount of sulfuric acid vapor, as well as an offensive odor, are byproducts of the manufacturing process. Appellants do not specifically identify the toxic agent allegedly

responsible for their injuries, but they did submit a toxicologist's report on the harmful consequences of inhaling sulfuric acid vapors. The report, however, simply discusses the potential harm to humans caused by chronic exposure to sulfuric acid vapors and postulates that *if* Pennco is releasing sufficient quantities of sulfuric acid fumes it *might* cause acute respiratory irritation.

We find no evidence in the summary judgment record that sulfuric acid vapors escaped beyond the perimeter of Pennco's property. While a Pennco supervisor admitted to a TNRCC investigator that fumes sometimes travel beyond the property lines, this does not establish that toxic contaminants traveled beyond the borders of the Pennco property. The Belascos' property was approximately three-quarters of a mile from Pennco's plant. The plume, sometimes visible above the plant, was composed primarily of steam. Although it is apparently malodorous, ferrous sulfate is non-toxic. Likewise, hydrogen is also non-toxic. While sulfuric acid is an irritant, there is no evidence that sulfuric acid vapors extended to appellants' property.

Members of the Belasco family offered identical affidavits in which they each claimed that unspecified and unidentified chemical releases from Pennco's facility had deprived them of the use and enjoyment of their property. The Belascos also state that these "releases" caused them physical injury and illness. These bald assertions, however, are not substantiated by expert testimony or supported by any empirical data. The only medical evidence offered by appellants was Ysidro Belasco's death summary, prepared by Dr. Mark Bing, the Belascos' physician. Dr. Bing attributes Ysidro's death to myocardial infarction and states that Ysidro was a diabetic whose respiratory failure was caused by hemophilus influenzae growing in his spitum.

Lionel Rogers, Sr., in his affidavit, contends he was hospitalized for two weeks as a direct result of his exposure to chemicals emanating from the Pennco facility. Mr. Rogers, however, fails to identify his illness and offers no evidence to support his conclusion that it

was caused by exposure to toxic chemicals. It is fundamental that a plaintiff in a toxic tort case must (1) establish levels of exposure that are dangerous to humans generally and (2) prove he was injured by such a level of exposure. *See Austin v. Kerr-McGee Refining Corp.*, 25 S.W.3d 280, 292 (Tex. App.—Texarkana 2000, no pet. h.). The record contains no evidence that establishes Pennco exposed appellants to any toxic substance. Furthermore, appellants offer no evidence establishing that they were exposed to a toxic substance irrespective of the source. Moreover, plaintiffs, in a toxic tort case, are required to offer evidence negating other plausible causes of their injuries or damages with reasonable certainty. *See Havner*, 953 S.W.2d at 720. The record contains no evidence negating other possible causes of their injuries. In fact, the TNRCC investigatory reports, submitted as evidence by appellants, support Pennco's assertion that there are other plausible sources for the chemical odor and fumes that are the foundation of all of appellants' claims. Appellants' third and fourth points of error are overruled.

Accordingly, that portion of the trial court's judgment relating to appellants' nuisance claim is severed from the cause of action and reversed and remanded to the trial court. In all other respects, the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed December 7, 2000.
Panel consists of Chief Justice Murphy and Justices Amidei and Hudson.
Do Not Publish — TEX. R. APP. P. 47.3(b).