Opinion issued June 4, 2020

In The

Court of Appeals

For The

First District of Texas

NO. 01-19-00147-CV

LIENS SEGURA-ROMERO, Appellant

V.

DANIEL CASTINEIRA, Appellee

On Appeal from County Civil Court at Law No. 3
Harris County, Texas
Trial Court Case No. 1100030-101

MEMORANDUM OPINION

Appellant Liens Segura-Romero sued appellee Daniel Castineira for negligence arising from a motor-vehicle accident. The trial court granted a no-evidence summary judgment in Castineira's favor. On appeal, Segura-Romero raises four issues, challenging the summary judgment. She contends that the trial

court abused its discretion in denying her request to supplement her summary-judgment evidence two days before the summary-judgment motion was set for submission, and she asserts that she offered more than a scintilla of evidence to raise a material fact for each challenged element of her negligence claim. Because we conclude that Segura-Romero did not offer evidence raising a genuine issue of material fact as to whether Castineira breached a legal duty to her, we affirm the summary judgment.

Background

On July 3, 2016, Segura-Romero was a passenger in a car driven by Castineira when the car was hit by a vehicle driven by Rubel Cienfuegos. Segura-Romero filed suit against Cienfuegos and Castineira.[1] She stated that, at the time of the accident, Castineira's car was "traveling southbound in a private parking lot," and Cienfuegos's vehicle was "traveling west." She alleged that "Cienfuegos failed to yield the right-of-way causing a collision with Defendant Castineira."

Segura-Romero asserted that Cienfuegos and Castineira were liable based on negligence. Among her allegations, she claimed that, at the time of the accident, Cienfuegos had failed "to yield right-of-way" and that Cienfuegos and Castineira each had failed to keep a proper lookout. Segura-Romero also sued based on negligence per se, alleging the defendants had violated provisions of the Texas

[1] Rubel Cienfuegos is not a party to this appeal.

Transportation Code. Segura-Romero claimed that Cienfuegos's and Castineira's negligent conduct had caused her bodily injury. She requested damages for past and future medical expenses, mental anguish, and pain and suffering.

Castineira answered the suit, generally denying Segura-Romero's claims. He also asserted that "the collision was unavoidable." The record does not reflect that Cienfuegos answered the suit.

After Segura-Romero and Castineira conducted written discovery, Castineira filed a no-evidence motion for summary judgment. He asserted that Segura-Romero could offer no evidence for the elements of her negligence claim. Specifically, he asserted there was no evidence showing that (1) he owed Segura-Romero a duty, (2) he had breached a duty to her, (3) his conduct proximately caused her injuries, or (4) she had suffered damages. Regarding Segura-Romero's negligence per se claim, Castineira asserted that there is no evidence that he violated the Texas Transportation Code provisions cited by Segura-Romero.

Castineira attached Segura-Romero's verified interrogatory responses to his motion. He quoted one of Segura-Romero's responses in which she described the car accident as follows:

> We [Segura-Romero and Castineira] were in the parking lot going to the ATM. We had stopped to take a telephone call that [Castineira] had gotten. We parked in a parking spot to finish the telephone call. [Castineira] finished the call and suddenly and without warning we were hit by the white pickup truck [driven by Rubel Cienfuegos]. [Cienfuegos] said he didn't see us, but there was no car in the parking

> lot other than one black car and the car that I was a passenger in which was bright red. I saw the other driver right when he was hitting us.

Segura-Romero filed a response to Castineira's no-evidence motion for summary judgment. As evidence countering the motion, Segura-Romero offered only Castineira's verified interrogatory responses. Segura-Romero focused on one interrogatory response in which Castineira described the accident and acknowledged that he was driving when the accident occurred. She asserted that Castineira's acknowledgment that he was driving at the time of the accident, alone, was sufficient "to rais[e] a fact issue as to whether he was driving with sufficient care." In his reply to Segura-Romero's response, Castineira asserted that Segura-Romero had offered no evidence of any of the challenged elements of her negligence claims, including the element of damages.

Two days before Castineira's motion for summary judgment was set for submission, Segura-Romero filed a "Motion for Consideration of Untimely Response, Supplemental Response and Surreply." The motion stated that, after receiving Castineira's reply, Segura-Romero's attorney "realized they had inadvertently failed to respond to [Castineira's] assertion [in the no-evidence motion for summary judgment] that there was no evidence of damages suffered by [Segura-Romero]."

Segura-Romero requested that she be allowed to supplement her summary-judgment response to offer evidence of her damages. As damages evidence, Segura-Romero attached copies of her medical records, reflecting medical treatment she obtained for the injuries she allegedly suffered in the car accident and the cost of the treatment.

The trial court granted Castineira's no-evidence motion for summary judgment on the same day it was submitted, but the trial court did not rule on Segura-Romero's motion to supplement her response with evidence of her damages. The trial court's order did not specify the basis on which it granted summary judgment.

Segura-Romero filed a motion to reconsider the trial court's order granting summary judgment. She asserted that she had offered evidence to support the negligence elements of duty, breach of duty, and causation. She also asserted that the trial court should have granted her motion requesting permission to supplement her summary-judgment response with late-filed evidence of her damages. The trial court denied Segura-Romero's motion for reconsideration.

Castineira filed a motion to sever Segura-Romero's claims against him from her claims against Cienfuegos. The trial court granted the motion, and Segura-Romero's claims against Castineira were severed into a new, separate cause,

making the summary judgment in Castineira's favor final and appealable.[2] *See Harris Cty. Flood Control Dist. v. Adam*, 66 S.W.3d 265, 266 (Tex. 2001) (holding judgment in severed cause disposing of all claims between parties to appeal was final and appealable).

Summary Judgment

On appeal, Segura-Romero raises four issues in which she challenges the trial court's no-evidence summary judgment as to her general negligence claim against Castineira.[3]

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[2] In a footnote, Segura-Romero questions whether the summary judgment became final when the severance order was signed. The trial court indicated at the hearing on the severance motion that it would specify the grounds on which it had granted summary judgment if the parties provided it with information to assist it in recalling the grounds on which it had made the ruling. Although her filings are not contained in the record, Segura-Romero states that, after she provided the trial court with what it had requested, the court did not specify the grounds on which it had granted summary judgment. She now questions whether the summary judgment is final because the trial court did not specify the reasons for granting summary judgment even though she provided the court with what it had requested to make the determination. As a rule, severance of an interlocutory judgment into a separate action makes it final, unless the severance order indicates further proceedings are to be conducted in the severed action. *See Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 63 S.W.3d 795, 795 (Tex. 2001) (holding severed action remained interlocutory because severance order stated action would "proceed as such to final judgment or other disposition"). Here, the severance order does not indicate that further proceedings are to be conducted in the severed action. Therefore, the summary judgment was made final by the severance order. *See id.*

[3] As mentioned, Segura-Romero sued Castineira for general negligence and negligence per se. *See Thomas v. Uzoka*, 290 S.W.3d 437, 445 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (citing *Zavala v. Trujillo*, 883 S.W.2d 242, 246 (Tex. App.—El Paso 1994, writ denied) (recognizing that "[n]egligence per se

A. Standard of Review

We review a trial court's ruling on a summary judgment motion de novo. *City of Richardson v. Oncor Elec. Delivery Co.*, 539 S.W.3d 252, 258 (Tex. 2018). After adequate time for discovery has passed, a party may move for summary judgment on the basis that there is no evidence of one or more essential elements of a claim on which the adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). Once the motion is filed, the burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact on each of the challenged elements. *See id.*; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

A genuine issue of material fact exists if the evidence rises to a level that enables reasonable and fair-minded people to differ in their conclusions. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). Evidence does not create a fact issue when it is so weak as to do no more than create a mere surmise or suspicion that the fact exists. *Id*. In our review, we

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is not a separate cause of action that exists independently of a common-law negligence cause of action. Rather, negligence per se is merely one method of proving a breach of duty, a requisite element of any negligence cause of action.")). Castineira challenged both negligence theories in his no-evidence motion for summary judgment. On appeal, Segura-Romero does not challenge the summary judgment with respect to her claims based on negligence per se. *See Maldonado v. Sumeer Homes, Inc*., No. 05-12-01599-CV, 2015 WL 3866561, at *2 (Tex. App.—Dallas June 23, 2015, no pet.) (mem. op.) (affirming claims based on negligence per se because appellant did not challenge summary judgment on those claims on appeal).

take as true all evidence favorable to the non-movant, indulge every reasonable inference in favor of the non-movant, and resolve any doubts in the non-movant's favor. *Id.* at 219.

B. Analysis

To prevail on a negligence cause of action, a plaintiff must prove (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that duty, and (3) the breach proximately caused the plaintiff's injuries. *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). In her fourth issue, Segura-Romero asserts that the summary-judgment evidence raises issues of material fact regarding the challenged elements of duty, breach of duty, and proximate causation. Segura-Romero contends that (1) Castineira, as the driver of the car in which she was a passenger, owed her the duty to maintain a proper lookout, (2) he breached that duty at the time of the collision, and (3) Castineira's negligence caused her injuries, which allegedly resulted from the collision. Because it is dispositive of the appeal, we first address whether the evidence relied on by Segura-Romero raises a genuine issue of material fact as to whether Castineira breached his legal duty to Castineira by failing to keep a proper lookout.

In response to the motion for summary judgment, Segura-Romero offered Castineira's verified interrogatory responses as evidence. Segura-Romero

specifically relies on the following interrogatory response in which Castineira described the auto accidence:

> I entered the parking lot on the southwest corner of Highway 6 and Loch Katrine. As I pulled into the parking lot[,] I received a cell phone call. I stopped in a parking space, placed my car in park, and took the call. Once I was off the call, I put my car in drive and as I pulled forward, maybe a foot or so, cautiously, and the collision happened.

Segura-Romero also cites her own interrogatory responses, which Castineira attached to his no-evidence motion for summary judgment. *See Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004) (determining that evidence attached to no-evidence motion for summary judgment can be considered only if it creates fact question). Specifically, Segura-Romero points to her description of the accident in which she stated that there was only one other car in the parking lot at the time of the accident.

On appeal, Segura-Romero asserts that the evidence she cites "is properly seen as evidence that [Castineira] breached his duty to [her] by failing to keep a proper lookout, which would have required him to carefully scan the immediate area to avoid pulling forward into the path of an oncoming vehicle." She argues that, "[b]ased on this evidence, the finder of fact could legitimately conclude that, had [Castineira] exercised sufficient care in keeping a proper lookout, he might have avoided the accident by not pulling forward." However, even when the statements are examined in the light most favorable to Segura-Romero, the total

weight of the evidence does no more than create a suspicion that Castineira breached a duty to Segura-Romero by not keeping a proper lookout.

A driver has a general duty to exercise the ordinary care a reasonably prudent person would exercise under the same circumstances to avoid a foreseeable risk of harm to others. *Ciguero v. Lara*, 455 S.W.3d 744, 748 (Tex. App.—El Paso 2015, no pet.) (citing *Williamson Co. v. Voss*, 284 S.W.3d 897, 902 (Tex. App.—Austin 2009, no pet.)). This includes the general duty to keep a proper lookout. *Montes v. Pendergrass*, 61 S.W.3d 505, 509 (Tex. App.—San Antonio 2001, no pet.). "The duty to keep a proper lookout encompasses the duty to observe, in a careful and intelligent manner, traffic and the general situation in the vicinity, including speed and proximity of other vehicles as well as rules of the road and common experience." *Carney v. Roberts Inv. Co., Inc.*, 837 S.W.2d 206, 210 (Tex. App.—Tyler 1992, writ denied). Here, Segura-Romero failed to offer basic evidence that would be needed by a fact finder to assess whether Castineira was keeping a proper lookout at the time of the collision.

The evidence shows only that Castineira's car moved forward one foot from a parking space, Cienfuegos's truck hit Castineira's car, and there was a third car somewhere in the parking lot. But this evidence alone does not give rise to a reasonable inference that Castineira did not keep a proper lookout at the time of the accident. *Babiy v. Kelley*, No. 05-17-01122-CV, 2019 WL 1198392, at *6 (Tex.

App.—Dallas Mar. 14, 2019, no pet.) (mem. op.) (recognizing that "the mere fact that [car] accident occurred" is not evidence of failure to keep proper lookout).

The evidence shows that the collision occurred after Castineira pulled forward, but Segura-Romero points to no evidence indicating Cienfuegos hit Castineira because he drove into Cienfuegos's "path," as Segura-Romero claims on appeal. Segura-Romero presented no evidence regarding the location, proximity, or positioning of Castineira's and Cienfuegos's vehicles in relation to one another immediately before and at the time of the collision. And no evidence indicates the position of the third vehicle. Nor does the evidence show how Cienfuegos was driving. No evidence indicates whether Cienfuegos was traveling in a designated travel lane in the parking lot or whether he was cutting through empty parking spaces when he hit Castineira's car. At least some evidence regarding Cienfuegos's conduct and location at the time of the collision needed to be offered to evaluate whether Castineira breached his duty to Segura-Romero. *See Turner v. Cruz*, No. 04-10-00313-CV, 2010 WL 5545392, at *4 (Tex. App.—San Antonio Dec. 29, 2010, no pet.) (mem. op.) (holding that "mere fact that Cruz saw Gray swerve into Cruz's lane of traffic but was not able to stop in time to avoid a collision is simply no evidence that Cruz breached any duty to Turner").

In short, Segura-Romero's evidence has too many gaps regarding how the collision occurred. Without basic information about the accident, it would not be

possible for a fact finder to conclude that Castineira breached his duty to keep a proper lookout. *See Rodriguez v. Panther Expedited Servs., Inc*., No. 04-17-00291-CV, 2018 WL 3622066, at *10 (Tex. App.—San Antonio, July 31, 2018, pet. denied) (mem. op.) (upholding no-evidence summary judgment based on breach of duty element in case where plaintiff was injured when forklift he was driving fell off truck because plaintiff's evidence showed "merely" that truck had moved and plaintiff had fallen; plaintiff did not offer evidence showing how accident occurred); *Vicknair v. Peters*, No. 12–13–00034–CV, 2014 WL 357082, at *3–*4, (Tex. App.—Tyler Jan. 31, 2014, no pet.) (mem. op.) (affirming no-evidence motion for summary judgment on ground that plaintiff offered no evidence of breach of duty to keep proper lookout in auto-pedestrian accident).

Viewing the evidence in the light most favorable to Segura-Romero, and indulging every reasonable inference in her favor, we conclude that the evidence relied on by Segura-Romero is so weak as to do no more than create a mere surmise or suspicion that Castineira breached his legal duty to her. Therefore, the trial court properly granted Castineira's no-evidence motion for summary judgment on Segura-Romero's negligence claims against him.

We overrule Segura-Romero's fourth issue as it relates to the element of breach of duty. Because we have concluded that Segura-Romero presented no evidence that Castineira breached a legal duty to her, we need not address the other

aspects of Segura-Romero's fourth issue or her first three issues in which she contends that the trial court should have permitted her to supplement her summary-judgment response with late-filed evidence regarding her damages. *See* TEX. R. APP. P. 47.1.

Conclusion

We affirm the judgment of the trial court.

Richard Hightower
Justice

Panel consists of Justices Keyes, Lloyd, and Hightower.