

Delcid v. JC Towing & Recovery, Inc.

Decided Nov 14, 2019

NO. 01-18-00743-CV

11-14-2019

EDILBERTO VASQUEZ DELCID, Appellant v. JC TOWING & RECOVERY, INC. AND JULIAN CARMONA, Appellee

Peter Kelly Justice

**On Appeal from the 152nd District Court Harris County, Texas
Trial Court Case No. 2016-41368**

MEMORANDUM OPINION

Edilberto Vasquez Delcid ("Vasquez") sued JC Towing & Recovery, Inc. and Julian Carmona alleging strict liability under the Texas Vehicle Towing and Booting Act, as well as conspiracy and negligence claims. He
2 alleged that he was assaulted while waiting for a ride after his vehicle was towed. The trial court *2 granted a no-evidence summary judgment, which Vasquez challenges in his sole issue on appeal.

We reverse and remand to the trial court.

Background

Vasquez was at an apartment complex where JC Towing, which is owned by Julian Carmona, had a contract to tow improperly parked cars. When he realized his vehicle had been towed, he alerted the management office. While he was waiting for a ride, he was assaulted and robbed by people he did not know. He was treated at an emergency room. Later, he retrieved his vehicle. JC Towing did not charge him for towing or storage of his vehicle.

Vasquez sued the apartment complex, the apartment management company, JC Towing, and Carmona. He alleged strict liability under the Texas Vehicle Towing and Booting Act, asserting that the parking signs at the apartment complex did not comply with Chapter 2308. *See* TEX. OCC. CODE §§ 2308.001-.505. He alleged that the signs on the property did not comply with the requirements of Chapter 2308. In the alternative he alleged conspiracy and premises liability claims and that JC Towing was negligent in towing his vehicle. He
3 alleged "damages related to court costs, medical expenses, pain, suffering, mental anguish, bodily injuries, exemplary damages, pre-judgment interest, post-judgment interest, *3 physical impairment, disfigurement, and special damages." He also sought "all statutory damages pursuant to the [Texas Occupations Code section 2308.404](#)."

JC Towing and Carmona filed no-evidence motions for summary judgment asserting that there was no evidence of: (1) foreseeability of criminal activity (premises liability claim); (2) duty (premises liability claim); (3) causation (premises liability claim); (4) violation of [TEX. OCC. CODE §2308.404](#) or Subchapter G of Chapter 2308 of the Occupations Code (strict liability claim); and (5) causation (strict liability claim).

Vasquez responded with summary judgment evidence that consisted of: (1) a towing agreement between the apartment complex and JC Towing; (2) responses to requests for disclosures; (3) a transcript of Carmona's deposition; and (4) a printout from a website that Vasquez characterized as excerpts from the Texas Administrative Code. In his deposition, Carmona testified that Vasquez's car was towed because it was parked in a residents-only parking spot and did not have a resident parking permit. He also testified that he returned Vasquez's car at no cost out of sympathy for what had happened to him. During his deposition, Carmona was shown photographs showing signs present in the apartment complex parking lot. Carmona could not confirm that they were the same signs that were present on August 13, 2015, when Vasquez's vehicle was towed. He
4 agreed that there was no sign on the space where Vasquez had parked indicating that he was not permitted *4 to park there. Carmona also denied that the assault and robbery was in any way related to the towing of Vasquez's car.

JC Towing and Carmona objected to the towing agreement, the disclosures, and website printout on grounds of hearsay and authentication. They also argued that Vasquez had failed to provide any evidence of foreseeability or causation. In addition, they provided an affidavit from Carmona averring that JC Towing was "properly permitted and licensed," and "in substantial compliance with the Towing and Booting Act," that the signs complied with the law, and that the tow of Vasquez's vehicle was "lawful." Vasquez objected to Carmona's affidavit as conclusory.

The trial court granted the no-evidence motion for summary judgment filed by JC Towing and Carmona. The trial court later entered an order of dismissal for want of prosecution resolving the remainder the of the case.

Vasquez appealed.

Analysis

Vasquez raises one issue on appeal, arguing that the trial court erred by granting the no-evidence motion for summary judgment.

I. Standards of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, [164 S.W.3d 656](#), [661](#) (Tex. 2005); *Provident Life & Accident Ins. *5 Co. v. Knott*, [128 S.W.3d 211](#), [215](#) (Tex. 2003). In conducting our review, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating*, [164 S.W.3d at 661](#); *Knott*, [128 S.W.3d at 215](#).

After an adequate time for discovery, 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\(i\)](#); see *LMB, Ltd. v. Moreno*, [201 S.W.3d 686](#), [688](#) (Tex. 2006). "The motion must state the elements as to which there is no evidence." [TEX. R. CIV. P. 166a\(i\)](#). To defeat a no-evidence motion, the nonmovant must produce at least a scintilla of evidence raising a genuine issue of material fact as to the challenged elements. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, [520 S.W.3d 39](#), [45](#) (Tex. 2017). On appeal, we view the evidence in the light most favorable to the nonmovant, disregarding all contrary evidence and inferences. *King Ranch, Inc. v. Chapman*, [118 S.W.3d 742](#), [751](#) (Tex. 2003). "More than a

scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 376 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

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II. Statutory Strict Liability Claim

On appeal, Vasquez challenges only the trial court's take-nothing summary judgment as to his strict liability claim under the Texas Vehicle Towing and Booting Act, which statute establishes a private right of action for a vehicle owner when the towing company has violated the Act.

§ 2308.404 Civil Liability of Towing Company, Booting Company, or Parking Facility Owner for Violation of Chapter

(a) A towing company, booting company, or parking facility owner who violates this chapter is liable to the owner or operator of the vehicle that is the subject of the violation for:

(1) damages arising from the removal, storage, or booting of the vehicle; and

(2) towing, storage, or booting fees assessed in connection with the vehicle's removal, storage, or booting.

(b) A vehicle's owner or operator is not required to prove negligence of a parking facility owner, towing company, or booting company to recover under Subsection (a).

(c) A towing company, booting company, or parking facility owner who intentionally, knowingly, or recklessly violates this chapter is liable to the owner or operator of the vehicle that is the subject of the violation for \$1,000 plus three times the amount of fees assessed in the vehicle's removal, towing, storage, or booting.

TEX. OCC. CODE § 2308.404.

7 In the no-evidence motion for summary judgment, JC Towing and Carmona stated the elements of Vasquez's claims as to which they asserted there was no *7 evidence. See *TEX. R. CIV. P. 166a(i)*. Regarding the strict liability claim, they alleged that there was no evidence that (1) they violated [section 2308.404](#) or subchapter G of the Texas Occupations Code, and (2) any alleged statutory violation "caused or was a substantial factor in bringing about the injury and without which no injury would have occurred."

A. Evidence of a statutory violation

Vasquez argues that JC Towing had no insurance on the date of the tow, see *TEX. OCC. CODE § 2308.110* (Financial Responsibility), and its signs did not comply with the statute. See *id.* §§ 2308.301-.305. The holder of a towing permit must maintain liability insurance for each tow truck, and a permit holder who performs nonconsent towing must maintain \$300,000 of liability insurance per tow truck and \$50,000 of cargo insurance. See *id.* §§ 2308.104, [2308.110\(a\)](#). Vasquez's summary judgment evidence as to insurance consisted of disclosures from JC Trucking and Carmona's deposition testimony.

Upon request, a party must disclose "any indemnity and insuring agreements" [TEX. R. CIV. P. 194](#), "under which any person may be liable to satisfy part or all of a judgment rendered in the action or to indemnify or reimburse for payments made to satisfy the judgment." [TEX. R. CIV. P. 192.3](#). In response to a request for disclosure, JC Trucking indicated that there were no such agreements. In his deposition, Carmona testified that
8 if JC Trucking had no insurance, it should *8 not be operating tow trucks. But he did not agree that JC Trucking lacked insurance on the day Vasquez's car was towed.

Vasquez argues that this is conclusive proof that JC Trucking "had no insurance on the day of the tow in this case." Appellant's Br. 10. We disagree that this proof is conclusive; however, viewing the evidence in the light most favorable to Vasquez, we conclude that reasonable and fair-minded people could infer from the disclosure that JC Towing had violated the provisions of the Act. *See King Ranch*, [118 S.W.3d at 751](#).

Vasquez also argues that he produced more than a scintilla of evidence that JC Towing's signs did not comply with the statutory requirement that a "bright red international towing symbol, which is a solid silhouette of a tow truck towing a vehicle on a generally rectangular white background" must appear on the uppermost portion of a sign or a separate sign placed immediately above the sign." [TEX. OCC. CODE § 2308.302](#). Vasquez argues that JC Towing's signs had words above the international towing symbol. To support his argument, Vasquez provided photographs that were attached as exhibits to Carmona's deposition. Carmona was unable to say whether that sign was posted on the day Vasquez's vehicle was towed. Vasquez also came forward with evidence of complaints and threatened enforcement action against JC Towing relating to the noncompliance of
9 similar parking signs at other nearby apartment complexes in the months after *9 Vasquez's car was towed. Carmona testified that the signs were changed frequently in response to changes in the law, and JC Towing once sought and acted on advice from an enforcement official regarding creation of compliant parking lot signs. Considering this evidence, we conclude that reasonable and fair-minded people could infer that the noncompliant signs were used before JC Towing received advice from the enforcement officer, including when Vasquez's car was towed.

B. Causation

In the no-evidence motion for summary judgment, JC Towing asserted that Vasquez has no evidence to demonstrate causation, i.e., that the statutory violation alleged caused or was a substantial factor in causing the alleged injuries. Vasquez argues that is an improper causation standard in this strict liability cause of action. We agree.

A plaintiff suing under chapter 2308 need not prove negligence. [TEX. OCC. CODE § 2308.404\(b\)](#). Rather, he must prove (1) the towing company violated a provision of the chapter, (2) he suffered damages arising from the removal, storage, or booting of the vehicle, and (3) he incurred towing, storage, or booting fees assessed in connection with the vehicle's removal, storage, or booting. *Id.* § 2308.404(a). The requirement to prove damages "arising from" the "removal, storage, or booting of the vehicle," is an element of causation. *See id.* But
10 the *10 plaintiff need not prove that the alleged statutory violation caused his damages. *Cf. PHI v. Tex. Juvenile Justice Dept.*, [No. 18-0099, 2019 WL 1873431, at *3](#) (Tex. Apr. 26, 2019) (construing the Tort Claims Act waiver of immunity when property damage "arises from the operation or use of a motor-driven vehicle" to require a nexus between the injury and the use of a motor-driven vehicle; stating that the nexus requires more than actual cause and less than probable cause); *Pinto Tech. Ventures, L.P. v. Sheldon*, [526 S.W.3d 428, 438](#) (2017) (discussing causation standard in regard to "any dispute arising out of language in forum-selection clause).

In the no-evidence motion for summary judgment, JC Towing and Carmona did not assert that Vasquez had no evidence that he suffered damages "arising from the removal, storage, or booting of the vehicle." Instead they asserted that Vasquez had no evidence that JC Towing's statutory violations caused his damages. The no-evidence summary judgment movant is required to "state the elements as to which there is no evidence." [TEX. R. CIV. P. 166a\(i\)](#). Like "fair notice pleading," the purpose of this requirement is to define the issues for summary judgment and enable the opposing party to challenge the motion. *Timpte Indus., Inc. v. Gish*, [286 S.W.3d 306, 311](#) (Tex. 2009). JC Towing and Carmona challenged a causation element that is not part of this
11 statutory claim, but they failed to challenge the *11 appropriate causation element. We agree that Vasquez did not produce any evidence of causation; however, in this case, he was not required to do so. *See id.*

* * *

We conclude that JC Towing was not entitled to summary judgment because Vasquez came forward with more than a scintilla of evidence as to the challenged element of a statutory violation and he was not required to respond to the incorrect causation challenge raised by JC Towing. We sustain the sole issue.

Conclusion

We reverse the trial court's judgment, and we remand the case to the trial court.

Peter Kelly

Justice Panel consists of Justices Kelly, Hightower, and Countiss.
