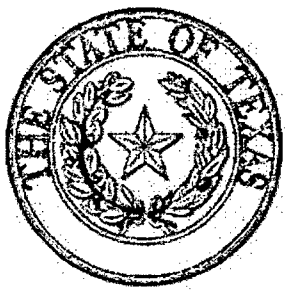
FILE COPY

RE: Case No. 18-0220 DATE: 10/19/2018
COA #: 14-16-00684-CV TC#: 2014-54920A
STYLE: FRANKLIN v. AM. ELEVATOR INSPECTIONS INC.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

DISTRICT CLERK HARRIS COUNTY
HARRIS COUNTY CIVIL COURTHOUSE
P.O. BOX 4651
HOUSTON, TX 77210
* DELIVERED VIA E-MAIL *

Affirmed and Majority and Dissenting Opinions filed December 21, 2017.



In The

Fourteenth Court of Appeals

NO. 14-16-00684-CV

CLEVELAND FRANKLIN, Appellant

V.

AMERICAN ELEVATOR INSPECTIONS, INC., Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Cause No. 2014-54920A

MAJORITY OPINION

Appellant Cleveland Franklin became trapped inside his residential elevator when it malfunctioned. Without a phone in the elevator or another way of calling for help, he beat his way out with his fists, sustaining injuries. He sued various parties for negligence, including appellee American Elevator Inspections, Inc., who inspected the elevator after it was installed by another company. The trial court granted summary judgment to American Elevator, and Franklin appeals. We

conclude the trial court did not err in granting American Elevator's traditional motion for summary judgment because Franklin's evidence failed to raise a fact issue regarding whether the elevator lacked a phone at the time of the inspection. We therefore affirm.

BACKGROUND

In September 2012, Franklin's residential elevator malfunctioned, trapping him between the first and second floors. Without a phone in the elevator or another way of calling for help, he beat the door with his fists to escape. After beating the door for two to three hours, Franklin was able to push open the door so that he could squeeze through and climb out onto the second floor landing. He sustained injuries from striking the door.

The elevator was installed by Tejas Elevator Company in 2010, before Franklin bought the house. In early December 2010, American Elevator witnessed the residential elevator acceptance inspection.[1] According to the inspection report, the elevator was in compliance with all applicable City of Houston codes and standards, which required that a telephone be installed in the elevator. Franklin bought the house after the inspection and began living there sometime in 2011.

After the incident, Franklin sued American Elevator and others for negligence. American Elevator filed both no-evidence and traditional motions for summary judgment. Among other grounds, American Elevator argued in its traditional motion that it did not breach its duty in inspecting the elevator. American Elevator submitted an affidavit from the employee who witnessed the inspection,

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[1] Tex. Health & Safety Code Ann. § 754.011(1) (West 2017) ("'Acceptance inspection" means an inspection performed at the completion of the initial installation or alteration of equipment and in accordance with the applicable [American Society of Mechanical Engineers] Code A17.1."). All elevators require an acceptance inspection before being placed into service. *See* ASME Code A17.1, Rule 8.10.4.1 (2004).

Mitchell Osina. Osina testified that there was a standard hand-held, hard-wired telephone sitting on the floor of the elevator cab at the time of inspection. According to Osina, this telephone dialed properly and met the City of Houston requirements.

American Elevator's evidence also included an expert affidavit and report from an engineer, Patrick McPartland, who spoke with Osina and examined the elevator and the control room after the incident. McPartland explained in his affidavit and report that there were several pairs of telephone wires in the elevator control room, with one pair stripped as if it had been removed from terminals. McPartland stated in his report that wires from the elevator terminated inside the control room in two screw terminals, and that the unused wires were long enough to reach these terminals. McPartland concluded from these facts that the telephone on the floor of the elevator during the inspection had been removed.

Franklin's response to American Elevator's traditional motion for summary judgment included testimony by deposition and affidavit from Franklin and by affidavit from Beau Harmer. Franklin testified that he visited the house before and after the inspection and did not observe any telephone in the elevator. Harmer testified in his affidavit that he installed a speaker phone in the wall of the elevator after the incident. According to Harmer, this was a new phone installation because he had to cut open the wall to install the phone. He also stated that the telephone wires did not run all the way into the elevator prior to his installation, and he had to run the wires through the panels in the elevator.

The trial court granted American Elevator summary judgment on both no-evidence and traditional grounds. The trial court also granted American Elevator's unopposed motion to sever, making the trial court's orders granting summary judgment final and appealable. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). This appeal followed.

ANALYSIS

Franklin contends that American Elevator is not entitled to either no-evidence or traditional summary judgment. Franklin argues, among other things, that there are genuine issues of material fact as to each element of his negligence claim. American Elevator argues, among other things, that Franklin did not raise a fact issue as to whether American Elevator breached its duty in inspecting the elevator, and that even if it did breach its duty, American Elevator's conduct was not the proximate cause of Franklin's injuries. We first consider whether Franklin raised a genuine issue of material fact that American Elevator breached its duty in inspecting the elevator. We conclude Franklin's summary judgment evidence did not raise a fact issue on the element of breach. Because this issue is dispositive, we do not address Franklin's other issues.

I. The trial court did not err in granting American Elevator's traditional motion for summary judgment.

A. Standard of review and applicable law

We review the trial court's grant of summary judgment de novo. *See, e.g.*, *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). We consider all of the summary judgment evidence in the light most favorable to the nonmovant, crediting evidence favorable to the nonmovant if a reasonable factfinder could and disregarding contrary evidence unless a reasonable factfinder could not. *See Mack Trucks, Inc. v. Tamez,* 206 S.W.3d 572, 582 (Tex. 2006). When a party moves for summary judgment on both traditional and no-evidence grounds, we ordinarily address the no-evidence grounds first. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If the trial court grants summary judgment without specifying the grounds, we affirm the judgment if any of the grounds presented are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

In a no-evidence motion for summary judgment, the movant represents that there is no evidence of one or more essential elements of the claims for which the nonmovant bears the burden of proof at trial. Tex. R. Civ. P. 166a(i). The burden then shifts to the nonmovant to present evidence raising a genuine issue of material fact as to the elements specified in the motion. *Tamez*, 206 S.W.3d at 582.

To prevail on a traditional motion for summary judgment, the movant must establish there is no genuine issue of material fact and it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c). If the movant establishes its entitlement to judgment, then the burden shifts to the nonmovant to disprove or raise a genuine issue of material fact sufficient to defeat summary judgment. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). Evidence raises a genuine issue of material fact if reasonable and fair-minded jurors could differ in their conclusions in light of all the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). When the movant is a defendant, a trial court should grant summary judgment if the defendant negates at least one element of each of the plaintiff's causes of action. *Clark v. ConocoPhillips Co.*, 465 S.W.3d 720, 724 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

The elements of negligence are a legal duty, breach of that duty, and damages proximately caused by the breach. *IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004). We need not address the different theories of negligence that might apply in this case because our opinion focuses on the element of breach, which is an element of all potentially applicable theories.[2]

[2] Given the facts alleged, possible negligence theories could include negligent undertaking, premises liability, and negligence per se. The parties address negligent undertaking in their briefs on appeal, but they do not address whether it is the only applicable theory. Additionally, the briefs address whether premises liability is a theory in the case, but Franklin made clear to the trial court

See Tamez, 206 S.W.3d at 582 (noting either producing or proximate cause was an element of each theory of negligence alleged in the case).

Residential elevators must comply with standards set out in the American Society of Mechanical Engineers (ASME) Safety Code A17.1. Tex. Health & Safety Code Ann. § 754.0141(a) (West 2017). After the installation is complete, the elevator must be inspected by a registered inspector. *Id.* Rule 5.3.1.19 of the ASME Code A17.1 provides that "[a] telephone connected to a central telephone exchange shall be installed in the car and an emergency signaling device operable from inside the car and audible outside the hoistway shall be provided."

B. Franklin failed to raise a genuine issue of material fact that there was not a phone in the elevator at the time of inspection.

Assuming, without deciding, that the trial court erred in granting American Elevator's no-evidence motion for summary judgment, we conclude it did not err in granting the traditional motion. American Elevator's motion and accompanying evidence conclusively establish that it did not breach its duty in inspecting the elevator installed by Tejas Elevator Company. Osina stated in his affidavit that he witnessed the inspection and that there was a standard hard-wired, hand-held telephone on the floor of the elevator, which "complied with the applicable ASME A17.1 standard."

This evidence was corroborated by McPartland, American Elevator's expert, who spoke with Osina and conducted a site visit. As noted above, McPartland testified that in the control room for the elevator there were several pairs of telephone wires, one pair of which was stripped as if it had been removed from terminals.

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he was not asserting a theory of premises liability. Negligence per se was brought up in the parties' summary judgment motions and responses, but American Elevator pointed out that Franklin did not plead negligence per se.

McPartland also stated that wires from the elevator terminated inside the control room in two screw terminals and that the stripped wires were long enough to reach these terminals. Based on the available information, McPartland opined that the hard-wired telephone that was on the floor during the inspection was removed thereafter. McPartland concluded that American Elevator properly witnessed the inspection and complied with rule 5.3.1.19 of the ASME A17.1 Code.

Franklin's evidence did not raise a fact issue that American Elevator breached its duty in inspecting the elevator. Franklin testified only that he did not observe a telephone in the elevator before or after the inspection. Franklin acknowledged that he was not present during the inspection, and American Elevator's duty was limited to inspecting the elevator for a working phone on that day. Our record contains no evidence that American Elevator had an obligation to verify that the phone was installed in a particular manner or ensure that it was not removed thereafter—as McPartland concluded it was. Franklin conceded that the builder had purchased a phone for the elevator and that he saw it in the house in a box.

Harmer installed a wall-mounted speakerphone in the elevator, and he testified by affidavit that no phone had previously been installed there "because the wall of the elevator did not have any cut-out space for a telephone install." This evidence does not raise a factual dispute as to whether there was a standard, hand-held telephone sitting on the floor of the elevator at the time of inspection. Further, Harmer's testimony that there were no wires running all the way into the elevator is consistent with McPartland's testimony that one pair of wires in the control room was stripped but not attached to the terminals.

Our dissenting colleague contends that the lack of a cut-out in the elevator wall shows there was no phone on the floor during the inspection, opining that "the telephone wires had to come through the wall." *Post*, at 2. But neither Harmer nor

any other witness testified that telephone wires can only enter an elevator cab through a wall.

Having considered Franklin's summary judgment evidence in the light most favorable to him, we conclude it does not contradict American Elevator's evidence that there was a working phone on the floor of the elevator during the inspection. We therefore hold Franklin failed to raise a genuine issue of material fact that American Elevator breached its duty in inspecting the elevator. We affirm the trial court's grant of American Elevator's traditional motion for summary judgment.

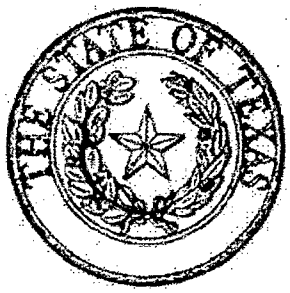
CONCLUSION

Having overruled Franklin's issue challenging the trial court's grant of American Elevator's traditional motion for summary judgment, we affirm the trial court's judgment.

/s/ J. Brett Busby
Justice

Panel consists of Justices Christopher, Busby, and Jewell (Christopher, J., dissenting).

Affirmed and Majority and Dissenting Opinions filed December 21, 2017.



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DISSENTING OPINION

Franklin's summary-judgment response raised a fact issue as to whether the elevator lacked a phone at the time of the inspection. Because the majority erroneously concludes otherwise, I respectfully dissent.

The majority discounts Franklin's testimony because Franklin was not present at the time of the inspection. Franklin testified that he observed the elevator before and after the inspection and that it did not have a phone. This is circumstantial evidence that there was no phone in the elevator at the time of the inspection. *See*

City of Houston v. Leach, 819 S.W.2d 185, 190–91 (Tex. App.—Houston [14th Dist.] 1991, no writ) ("Evidence which tends to prove or disprove a fact that is of consequence to the case is relevant. Facts existing both before and after an event in controversy are relevant to establishing the cause of that event."); *Kroger Co. v. Milanes*, 474 S.W.3d 321, 342 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

The majority also discounts the affidavit of Harmer, the technician who actually installed a phone in the elevator after the accident. Harmer testified that his phone installation was "a new installation and not a replacement"; that he had "to cut open the wall of the elevator to install the telephone and run the wires through the panels in the elevator"; and that a phone could not have been installed prior to his own installation "because the wall of the elevator did not have any cut-out space for a telephone install, and the telephone wires were not run all the way into the elevator for a telephone installation."

The majority says Harmer's testimony does not contradict the possibility of a working phone on the floor of the elevator. But how could a phone line come through the walls of the elevator without a cut out of some sort? Even if the phone was on the floor of the elevator, the telephone wires had to come through the wall.

The majority relies on the opinion of McPartland which in turn relies on the testimony of Osina. McPartland's opinion that Osina properly witnessed the inspection is based on the contested fact as to whether or not a working phone was in the elevator. His inspection did not independently verify the presence of a working phone on the date of inspection. Nor does his opinion state that the wires that he saw in the control room for the elevator were capable of reaching the floor of the elevator. He states, "I noticed several pairs of telephone wires with one pair of wires stripped as if they had been removed from terminals."

I would hold that Franklin raised a fact issue on whether the elevator lacked a phone at the time of the inspection and, therefore, I respectfully dissent.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Busby, and Jewell. (Busby, J., majority).