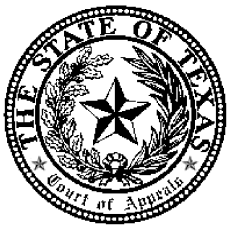
Affirmed and Opinion filed October 25, 2001.



In The

Fourteenth Court of Appeals

NO. 14-01-00155-CV

HENRY JEFFERSON and RUTH JEFFERSON, Appellants

V.

RELIANT ENERGY, f/k/a, HOUSTON LIGHTING & POWER, Appellee

On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 00CV0191

O P I N I O N

Henry and Ruth Jefferson appeal from an adverse summary judgment. The Jeffersons, who sued Reliant Energy for personal injuries, contend the trial court erred (1) in excluding certain summary judgment proof, and (2) in granting Reliant's motion for summary judgment. We affirm.

The summary judgment proof shows that on March 5, 1998, Reliant was attempting to put in a service line to a residential customer. During the course of the installation, a

secondary line broke and fell to the ground. A Reliant employee then turned off the power at the transformer until repairs could be made.

Ruth Jefferson, who lived across the alleyway in a nearby home, initially claimed she was sitting in her dining room when she heard a noise, saw a white streak of light that hit her in the face, and felt an electrical shock. She later altered her account of the incident and said she was standing in the kitchen with her left arm on a microwave oven, looking out the window, when she saw the streak of light and was shocked. In any event, she roused her sleeping husband, went outside, and told the Reliant crew she had been hit in the face by a bolt of electricity; however, she had no visible injuries.

Reliant filed both a "no-evidence" and "traditional" motion for summary judgment. Reliant argued that Ruth Jefferson's assertion defies the laws of physics. The weather on the day of the accident was clear, dry, and sunny. The distance between the severed line and the rear of the Jeffersons' home was at least forty feet. The "white streak" of electricity that allegedly hit Ruth Jefferson in the face would have had to cross an alley, a metal fence, a small backyard, and penetrate the interior of her home. Thus, in its no-evidence motion, Reliant alleged the Jeffersons could produce no evidence of causation or gross negligence. In its traditional motion for summary judgment, Reliant argued that under Mrs. Jefferson's version of the facts any injury was so unforeseeable that Reliant had no duty to protect against it. In a related argument, Reliant claimed that because of the unforeseeability that electricity would defy the laws of nature, there was no proximate cause between its alleged negligence and the alleged injury.

The Jeffersons relied, in part, on the affidavit of Ruth Jefferson to rebut Reliant's summary judgment motions. One of the affidavits contains the following account of the incident:

> On March 5, 1998, a power line in the alleyway behind my home broke. When it happened, I heard a loud pop and saw a streak of light come into my home and strike me on the right side of my face and shoulder. I felt numbness on the right side

> of my face and found it very difficult to catch my breath. I received burns on my face and shoulder. I told my husband and we went outside and I saw two Reliant Energy employees in the alleyway and the broken power line. One of the employees was running through the alleyway with a long pole in his hands. After talking briefly with the employees, my husband took me to the UTMB hospital where I stayed for two days.
>
> Dr. Wong has performed two surgeries to my right eye lid and I have received physical therapy for my right shoulder. *I was diagnosed by Dr. Firoozeh Sahebkar with status post electric shock from a power line*.

(emphasis added). Reliant objected to Mrs. Jefferson's statements regarding Dr. Sahebkar's alleged diagnosis as inadmissible hearsay. The trial court sustained the objection. The Jeffersons contend in their first issue for review that the trial court erred in sustaining the objection.

Statements made by the patient to the physician for purposes of medical diagnosis or treatment fall within an exception to the general hearsay rule. TEX. R. EVID. 803(4). Moreover, medical records may be offered in evidence under the exception for business records. *Glenn v. C & G Elec., Inc.*, 977 S.W.2d 686, 689 (Tex. App.—Fort Worth 1998, pet. denied). However, where, as here, a layperson testifies regarding what he or she was told by a physician, such testimony is inadmissible hearsay if offered to prove the truth of the matters asserted. *Tilotta v. Goodall*, 752 S.W.2d 160, 163 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Accordingly, the trial court did not err in sustaining Reliant's objection to the testimony. Appellant's first issue for review is overruled.

The Jeffersons also offered medical records as summary judgment proof. The records were offered, however, without the benefit of a sponsoring witness or records custodian. Reliant's hearsay objection to the records was sustained. In their second issue for review, the Jeffersons contend the trial court erred in this ruling because they eventually submitted an affidavit from the records custodian.

The Jeffersons filed an amended response to Reliant's motion for summary judgment on December 27, 2000; the medical records at issue were attached as an exhibit. Reliant filed its objection to the medical records two days later on December 29, 2000. The Jeffersons responded with a "supplemental" exhibit filed on January 4, 2001, which contained the necessary "business records" affidavit of the medical records custodian. The trial court sustained Reliant's objection and granted its motion for summary judgment on January 5, 2001.

Rule 166a(c) provides that the nonmovant may file affidavits no later than seven days prior to the summary judgment hearing. TEX. R. CIV. P. 166a(c). In order for an affidavit to be considered when filing within seven days, the adverse party must obtain leave of court. *Id*. It is not an abuse of discretion for the trial court to refuse to consider untimely affidavits opposing a motion for summary judgment. *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 486 (Tex. App.—Dallas 1995, writ denied); *Bell v. Moores*, 832 S.W.2d 749, 755 (Tex. App.—Houston [14th Dist.] 1992, writ denied). Because there is no indication in the record that the Jeffersons sought or obtained leave to file affidavits beyond the prescribed deadlines, we presume the court did not grant such leave. Moreover, we find no abuse of discretion in its failure to do so. Accordingly, appellants' second issue for review is overruled.

In their final issue for review, the Jeffersons claim the trial court erred in granting Reliant's motion for summary judgment. We review the granting of Reliant's no-evidence and traditional motions for summary judgment under different standards.

A no-evidence summary judgment is essentially the same as a pretrial directed verdict; thus, we apply the same legal sufficiency standard in reviewing both. *Bush v. FFP Operating Partners*, 994 S.W.2d 190, 195 (Tex. App.—Amarillo 1999, pet. denied). Accordingly, the proper inquiry is whether the non-movant produced any probative evidence to raise a material fact issue. In answering this query, we consider all the evidence in the light most favorable to the party against whom the summary judgment was rendered and disregard all contrary evidence and inferences. *Id*. More than a scintilla of evidence exists when the evidence rises

to a level such that reasonable and fair-minded people could differ in their conclusions. *Id*. Alternatively, less than a scintilla of evidence exists when the evidence does no more than create a mere suspicion of a fact. *Kindred v. ConChem, Inc.*, 650 S.W.2d 61, 63 (Tex.1983). If the non-movant presents more than a scintilla of probative evidence to raise a genuine material fact issue, summary judgment would be improper. *Id*.

In a traditional motion for summary judgment, the movant has the burden of showing there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. In deciding whether there is a disputed material fact, we take as true all evidence favorable to the nonmovant and indulge every reasonable inference in his favor. *El Paso County v. Ontiveros*, 36 S.W.3d 711, 714 (Tex. App.—El Paso 2001, no pet. h.).

Here, Reliant argued in its no-evidence motion for summary judgment that the Jeffersons had no evidence of causation. In its traditional motion for summary judgment, Reliant asserted there was no genuine issue of material fact regarding the unforseeability of the type of injury alleged by Mrs. Jefferson. In an effort to establish causation, the Jeffersons requested leave for a late designation of an expert witness who provided an affidavit alleging that Reliant was responsible for Ruth Jefferson's alleged shock. Reliant offered an affidavit from its own expert witness who stated that the voltage in the broken service wire was no more than 240 volts. Because the insulating value of air is 15,000 volts per inch, Reliant's expert witness said several million volts would have been required to arc across the Jeffersons' back yard into their home.

The trial court denied the Jeffersons' requested leave to designate an expert; thus, the affidavit of the Jeffersons' expert witness is not part of the summary judgment proof. Accordingly, the only summary judgment evidence is from Reliant's expert who stated that it was "physically and scientifically impossible for electricity to arc from the severed secondary power line into Mrs. Jefferson's house." Because the Jeffersons failed to show Reliant's actions were responsible for Mrs. Jefferson's alleged injury, the trial court did not err in granting Reliant's no-evidence motion for summary judgment. Moreover, because the

only summary judgment proof indicates Mrs. Jefferson could not have been shocked by the severed secondary line, the trial court did not err in granting Reliant's traditional motion for summary judgment.

Appellants' third issue for review is overruled, and the judgment of the trial court is affirmed.

/s/ J. Harvey Hudson
Justice

Judgment rendered and Opinion filed October 25, 2001.
Panel consists of Justices Anderson, Hudson, and Frost.
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