Affirmed and Opinion Filed March 24, 2026

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-25-00239-CV

GERARD "GARY" A. BORN, Appellant
V.
JOSEPH R. FIELDER AND LAUREN E. FIELDER, Appellees

On Appeal from the 382nd Judicial District Court
Rockwall County, Texas
Trial Court Cause No. 1-24-0458

MEMORANDUM OPINION

Before Justices Goldstein, Barbare, and Lee
Opinion by Justice Goldstein

Gerard "Gary" A. Born appeals the trial court's final judgment granting Joseph R. Fielder and Lauren E. Fielder's motion for summary judgment ordering that Born take nothing on his premises liability claims against the Fielders. In two issues, Born argues the condition on the premises was not open and obvious, and he presented sufficient evidence of his premises liability claim. We affirm the trial court's judgment.

In March 2024, Born filed his original petition asserting the following facts. The Fielder's listed a residence in Rockwall, Texas, for sale in 2022. On April 24, 2022, Born "viewed and inspected" the property for the purpose of possibly

purchasing the property. Born "eventually found himself in the backyard and headed towards the back driveway and garage" of the property. Born "exited the backyard through a gate" and, as he did, he fell down three "steep, unmarked stone steps and severely injured his body, including his wrist," which "required multiple surgeries." The backyard of the property was "at a significantly higher elevation than the back driveway of Property, and there were no warning signs, indications, or statements made by [the Fielders] to caution or advise [Born] of the sudden elevation change and the steep stone steps."

Born asserted a claim of premises liability alleging the Fielders "knew or reasonably should have known" that a condition on the property "posed an unreasonable risk of harm to invitees," including Born. Born claimed the Fielders breached their duty of ordinary care by failing to adequately warn Born of the "unreasonable dangerous condition"; failing to make the condition reasonably safe, and/or creating a dangerous condition on the property. Born also asserted a negligence claim alleging the injuries and damages he sustained were proximately caused by the negligence of the Fielders in failing to warn of the dangerous condition; failing to repair, remove, and/or block the dangerous condition; failing to inspect for dangerous conditions on the property, and/or creating a dangerous condition on the property.

In April 2024, the Fielders filed their original answer containing a general denial. In November 2024, the Fielders filed a no-evidence and traditional motion

for summary judgment.[1] The motion asserted there was no evidence of a condition on the property that posed an unreasonable risk of harm to invitees or evidence of the Fielders' knowledge of a condition that posed an unreasonable risk of harm to invitees. The motion further contended summary judgment was proper under the traditional standard because the undisputed evidence showed that no condition on the Fielders' property posed an unreasonable risk of harm to invitees, much less an extreme degree of risk.

Among other things, the motion argued Born's claims arose "solely from a condition of the premises—the backyard stairs" and therefore constituted a premises liability claim based on the Fielders' failure to reasonably make the property safe. The motion alleged the stairs at issue were open and obvious and "a landowner generally has no duty to warn of hazards that are open and obvious or known to the invitee," quoting *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193, 204 (Tex. 2015). The motion asserted the stairs were clearly visible when leaving the backyard via the backyard gate, there was "over a foot of space before the first stair dropped off to the second stair, and the gate must have been fully open when the fall occurred because Born did not allege that he contacted the gate during his fall. Citing to photographs of the gate attached as exhibits to the motion, the motion stated that,

[1] The motion for summary judgment was presented as both a no-evidence and traditional motion, and it set out the standards for both. Because of our conclusion that the trial court correctly granted the no-evidence motion for summary judgment, we do not further address the traditional motion for summary judgment.

"due to the size of the gate," Born would have had to contact the gate during his fall "unless it was fully open."

The motion relied on a Texas case that held that "stairs, even stairs painted black or dimly lit stairs, are open and obvious conditions," citing *Pena v. Harp Holdings, LLC*, No. 07-20-00131-CV, 2021 WL 4207000, at *8 (Tex. App.—Amarillo Sep. 16, 2021, no pet.) (mem. op.) (staircase, painted black, constituted an open and obvious condition of the property). The motion also cited to the following authorities: *Stirrup v. Anschutz Texas, LP*, No. 05-17-00613-CV, 2018 WL 3616880, at *13 (Tex. App.—Dallas July 30, 2018, no pet.) (dimly lit theater staircase was open and obvious condition of the premises); *Banks v. C. R. Anthony Co.*, 293 S.W.2d 858, 859 (Tex. Civ. App.—Eastland 1956, writ ref'd n.r.e.) ("There was no debris on the stairs. There was nothing unusual about the steps. The condition of the steps was open and obvious to anyone using them."). Because the stairs were an open and obvious condition of the premises, the motion argued, Born "reasonably should have been aware of the set of three stairs leading out of the backyard," and the Fielders had no duty to warn Born of the stairs.

In December 2024, Born filed a response to the Fielder's motion asserting that, among other things, that the "concealed stairs" were not open and obvious but were "hidden, creating an unreasonable risk." Incorporated into the response were photographs of the property's backyard and the gate from the perspectives of the backyard and the driveway. Among the exhibits attached to the response was the

deposition testimony of Joseph Fielder in which he stated that there had "never been any injury" on the property "other than this one."

In January 2025, the trial court signed an order granting "defendants' traditional and no-evidence motion for summary judgment without specifying on which provision it relied. In February 2025, the trial court signed a final judgment providing that the Fielders were "entitled to summary judgment" and ordering that Born take nothing on his claims against the Fielders. This appeal followed.

In his first issue, Born argues that the "concealed stairs" leading from the backyard to the driveway of the Fielders' property were not open and obvious as a matter of law.

We review the trial court's decision to grant summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). If a motion for summary judgment contains both a no-evidence motion for summary judgment and a traditional motion for summary judgment respectively asserting that the plaintiff has no evidence of an element of its claim and, alternatively, that the movant has conclusively negated that same element of the claim, we address the no-evidence motion for summary judgment first. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

A party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P.

166a(i); *Henning v. OneWest Bank FSB*, 405 S.W.3d 950, 957 (Tex. App.—Dallas 2013, no pet.). "The motion must state the elements as to which there is no evidence." TEX. R. CIV. P. 166a(i); *Henning*, 405 S.W.3d at 957. Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to raise a fact issue on the challenged elements. *See* TEX. R. CIV. P. 166a(i); *Henning*, 405 S.W.3d at 957; *see also S.W. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

We review a no-evidence motion for summary judgment under the same legal sufficiency standard used to review a directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003); *Flood v. Katz*, 294 S.W.3d 756, 762 (Tex. App.—Dallas 2009, pet. denied). Our inquiry focuses on whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the challenged elements. *See King Ranch*, 118 S.W.3d at 751; *Flood*, 294 S.W.3d at 762. Evidence is no more than a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *King Ranch*, 118 S.W.3d at 751.

Generally, a premises owner owes an invitee a duty to make safe or warn against concealed, unreasonably dangerous conditions of which the premises owner is or should be aware and the invitee is not. *Austin*, 465 S.W.3d at 203. But if a hazard is open and obvious, then the invitee is charged with awareness of the danger, and the premises owner "has no obligation to warn . . . or make the premises safe, as

a matter of law." *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 788 (Tex. 2021).

The Texas Supreme Court has "declined to impose a duty for premises conditions that are open and obvious, regardless of whether such conditions are artificial or naturally occurring." *4Front Engineered Sols., Inc. v. Rosales*, 505 S.W.3d 905, 912 (Tex. 2016). In *4Front*, the plaintiff was injured on defendant's premises when an electrician hired by defendant to repair a sign drove the scissor lift in which plaintiff was riding off the sidewalk, causing the lift to topple and injure plaintiff. *See id.* at 906-07. The Texas Supreme Court declined to impose a duty for premises conditions that were open and obvious "even if the sidewalk's edge was dangerous and did proximately cause the accident." *Id.* at 912.

A danger is open and obvious if a reasonably prudent invitee would have known and appreciated the nature and extent of the danger under similar circumstances. *Los Compadres Pescadores*, 622 S.W.3d at 788. This is a case-specific, objective test that is based on the totality of the circumstances, and it is a question of law. *Id.* at 788–89; *see Culotta v. DoubleTree Hotels LLC*, No. 01-18-00267-CV, 2019 WL 2588103, at *3 (Tex. App.—Houston [1st Dist.] June 25, 2019, pet. denied) (mem. op.) (noting that both duty and the open-and-obvious doctrine are questions of law).

Here, Born presented photographs of the backyard and the gate in support of his argument that the stairs were not open and obvious. However, our review of the

photographs and the record lead us to conclude that Born presented no evidence to raise a fact issue. *See King Ranch*, 118 S.W.3d at 751; *Flood*, 294 S.W.3d at 762. The photographs show an ordinary gate in an ordinary wooden privacy fence. The three steps leading down to the driveway appear in good condition, and the record contains Joseph Fielder's deposition testimony that no other injuries had occurred on the stairs or anywhere else on the property other than Born's injuries. Because Born failed to carry his burden of producing some evidence to raise a genuine issue of material fact that the presence of the stairs was not open and obvious, we conclude that the trial court did not err by granting the no-evidence motion for summary judgment filed by the Fielders. *See* TEX. R. CIV. P. 166a(i); *Henning*, 405 S.W.3d at 957. We overrule Born's first issue. Because of our disposition of Born's first issue, we need not address Born's second issue in which he asserts he presented sufficient evidence of his premises liability claim.

We affirm the trial court's judgment.

/Bonnie Goldstein/
BONNIE LEE GOLDSTEIN
JUSTICE