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ROUND TWO: CAN YOU BRING A DEFENDANT BACK INTO A LAWSUIT?

The Eighth Court of Appeals of Texas recently reviewed a writ of mandamus where the following issue was posed: If a defendant was successfully dismissed from a lawsuit because of a Motion for Summary Judgment, can another defendant bring them back into the lawsuit as a responsible third party if there has been no change in the evidence that the trial court already reviewed? In *In re El Apple, Inc.*, the Court of Appeals held that a party cannot do this. In *El Apple, Inc No. 08–11–00259–CV*, 2012 WL 561035 (Tex. App.—El Paso February 22, 2012, orig. proceeding).

THE TRIAL COURT

Edmund Forester sued several entities, including El Apple, Inc, a restaurant chain, and the El Paso Electric Company for injuries sustained when he fell after stepping onto a concrete platform covering an underground transformer box. In the original case, El Paso Electric Company filed a successful Motion for Summary Judgment arguing that (1) El Paso Electric Company's alleged status as an easement holder had not been properly raised in the trial court, (2) Forester was not an invitee on the premises, and (3) there was no-evidence to support Forester's gross negligence claim against El Paso Electric Company. El Paso Electric Company was dismissed from the lawsuit.

After El Paso Electric Company was dismissed from the lawsuit, El Apple, Inc. requested leave in the trial court to designate El Paso Electric Company as a responsible third party. El Apple, Inc. argued (1) that El Paso Electric Company owned the transformer box and (2) that the responsibility for the alleged defect in the box cover had not been adjudicated at summary judgment.

The trial court granted the motion to designate El Paso Electric Company as a responsible third party. In response, Forester filed a motion to strike the designation on the basis that the El Paso Electric Company's summary judgment precluded the designation and that El Apple, Inc. could not "re-litigate" El Paso Electric Company's responsibility. The trial court entered an order striking the designation of El Paso Electric as a responsible third party and El Apple, Inc. filed its *writ of mandamus*.

THE COURT OF APPEALS

When, as in this case, the trial court grants the request for leave and designates a responsible third party, the basis for striking the designation is statutorily limited pursuant to the Texas Civil Practices and Remedies Code. After adequate time for discovery, a party may move to strike the designation on the grounds that there is no evidence that the designated person is responsible for a portion of the claimant's alleged injury or damages. The trial court has no discretion but to grant the motion to strike unless a defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility.

According to the Court of Appeals, in light of the applicable statutory standard, the Court held that the trial court's ruling could only have resulted from the trial court's conclusion that El Apple, Inc. failed to produce sufficient evidence to raise a genuine issue of fact regarding El Paso Electric Company's alleged responsibility for Forester's injuries.

Therefore, the remaining issue is whether the evidence submitted in support of the designation was sufficient to avoid the motion to strike. In order to show that the El Paso Electric Company was responsible, El Apple, Inc. submitted Forester's Responses to Request for Admissions where Foster admitted that he was hurt because of the actions of El Paso Electric and expert testimony from Dr. Gamse, an expert that alleged that El Paso Electric Company was responsible for the allegedly faulty condition of the transformer box lid and Forester's injuries. The problem with this evidence is that it is the same evidence that the trial court reviewed with the Motion for Summary Judgment where El Paso Electric Company was dismissed from this case.

In effect, El Apple, Inc. asked the Court of Appeals to reconsider the evidence available at summary judgment and determine that the same evidence found not to raise a genuine issue of material fact for purposes of summary judgment now somehow raises a genuine issue of fact sufficient to support the designation of a party dismissed from the case as a responsible third party. The Court of Appeals declined to do so and found that the trial court did not abuse its discretion by striking the responsible third party designation.

TIPS AND TAKE AWAYS

1. The turning point for the Court of Appeals seemed to be the fact that there was no change in the evidence. When the trial court originally dismissed the El Paso Electric Company, the Court reviewed the motion and the evidence presented. When El Apple, Inc. tried to bring them back in to the lawsuit, the Court found that there was no change to the original evidence presented and reviewed by the trial court. Therefore, if a party wants to bring a defendant back into the lawsuit as a responsible third party, then the party will need to show that there has been a significant change in the evidence that directly relates to the party that you want to bring back into the lawsuit; and
2. It is important that you have evidence to show what the responsible third party actually did something wrong. In order to trump a plaintiff's motion to strike a designation, you need to have a genuine issue to show the Court that there is arguably evidence to show the responsible third party's fault or responsibility for the incident.



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