

CAUSE NO. CC-21-00138-E

JOSE REFUGIO TAPIA-SILVA,
PLAINTIFF

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IN THE COUNTY COURT

VS.

AT LAW NO. ____

PERFORMANCE SPRAY FOAM, INC.,
DEFENDANT

DALLAS COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES, Jose Refugio Tapia-Silva (hereinafter referred to as by name or as “Plaintiff”), complaining of and against Performance Spray Foam, Inc., (hereinafter referred to as by name or as “Defendant”), and for cause will show unto this honorable Court the following:

I.
DISCOVERY CONTROL PLAN

1. Plaintiff’s claims are to be controlled by Discovery Plan III, pursuant to Tex. R. Civ. P. 190.4.

II.
RELIEF

2. Plaintiff seeks monetary relief in excess of \$250,000, but under \$1,000,000.00.

III.
JURISDICTION AND VENUE

3. The amount in controversy far exceeds this Court’s minimum jurisdictional amount.

4. All or a substantial part of the acts or omissions giving rise to this claim occurred in Dallas County; therefore, venue is proper in Dallas County pursuant to C.P.R.C. § 15.002(a)(1).

IV.
JURY DEMAND

5. Plaintiff respectfully requests that a jury be convened to try the factual issues of this case.

V.
PARTIES

6. Plaintiff is a resident of Dallas County, Texas.

7. Defendant Performance Spray Foam, Inc. (hereafter “Defendant Performance Spray”) is a Texas company who may be served through its registered agent, Alanea R. Mleczko, located at 5216 Bear Valley Drive, McKinney, Texas 75071. **Issuance of citation is requested at this time.**

8. Whenever in this petition it is alleged that a Defendant committed any act or omission, it is meant that the Defendant’s officers, directors, vice-principals, agents, servants, and/or employees committed such act or omission and that, at the time such act or omission was committed, it was done with the full authorization, ratification, or approval of that Defendant or was done in the routine and normal course and scope of employment of that Defendant’s officers, directors, vice-principals, agents, servants, and/or employees. Accordingly, Defendant had actual knowledge of all adverse actions and conduct against Plaintiff through Defendant’s respective officers, directors, vice-principals, agents, servants, and/or employees.

VI.
CAUSE OF ACTION

9. Plaintiff Tapia-Silva will show the Court that, on or about April 15, 2020, under all relevant times, Plaintiff was under the direction and in furtherance of his work for the benefit and under the control of Defendant Performance Spray when Plaintiff suffered on the job injuries. Plaintiff was working at 10228 Woodford Drive, Dallas, Texas 75229, hereinafter “job site,” in the construction of a residential building requiring certain tools and instrumentalities to perform the work in a safe manner. Plaintiff is an electrician and was installing electrical wires in the attic when he

unknowingly stepped on an attic access hole that had been covered with a piece of plastic causing Plaintiff to fall about 10 feet unto the cement floor and suffer injuries. The Defendant knew the Plaintiff needed these tools to perform his job in a safe manner, but nevertheless failed to provide them to Plaintiff which resulted in the incident made basis of this suit. At all relevant times, Plaintiff was a business invitee, independent contractor, and/or worker of Defendant.

10. As a direct and proximate result of the above acts and/or omissions, singularly and/or combined, Plaintiff sustained painful injuries and has had to endure suffering, mental anguish, and emotional pain as a consequence of his inability to work and provide for himself.

11. Defendant breached its non-delegable duty to make the Plaintiff's work area safe and did not make an adequate effort protect Plaintiff at the time of the incident. Further, Defendant owed an additional duty to warn and prepare its business invitee, independent contractor, and/or worker for any hazards associated with their work and failed. It was the Defendant's negligence and gross negligence that proximately caused Plaintiff's injuries and damages.

VII.
NEGLIGENCE OF DEFENDANT

12. Defendant's acts or omissions constituted negligence and/or gross negligence in following acts of negligence, to wit:

- a. In failing to take measures to reasonably necessary to protect its business invitees, independent contractors, and/or workers, including Plaintiff, from an unsafe condition;
- b. In acting with disregard for the safety and welfare of their business invitees, independent contractors, and/or workers, specifically including Plaintiff;
- c. In failing to maintain a safe work environment and supervise business invitees, independent contractors, and/or workers;
- d. In failing to establish and/or implement a safety program for their business invitees, independent contractors, and/or workers as required by Texas Labor Code Annotated § 411.001, *et seq.*;

- e. In failing to use due care to avoid injury to Plaintiff;
- f. In failing to provide adequate supervision to Plaintiff;
- g. In failing to provide its business invitees, independent contractors, and/or workers, including Plaintiff, with reasonably protective safety equipment and/or clothing; and
- h. In failing to act as a reasonably prudent person and/or employer would have done under the same or similar circumstances.

13. As a direct and proximate result of these and other acts and omissions, whether taken singularly or in any combination, Plaintiff became injured while under the control and maintenance of Defendant. Defendant and their respective agents, servants, and employees also were negligent by failing to follow the minimum industry standards in one or more of the following, specifically including, but not limited to, the following:

- a. In failing to instruct its business invitees, independent contractors, and/or workers in the recognition and avoidance of unsafe conditions and the regulations applicable to the work environment to control or eliminate any hazards or other exposure to injury, as required by 29 C.F.R. § 1926.21(b)(2);
- b. In failing to require its business invitees, independent contractors, and/or workers to wear the appropriate protection when exposed to hazardous conditions, as required by 29 C.F.R. § 1910.138(a);
- c. In failing to provide its business invitees, independent contractors, and/or workers with the appropriate protection relative to the tasks to be performed, the conditions present, the duration of use, and the hazards and potential hazards, as required by 29 C.F.R. § 1910.138(b);
- d. In failing to initiate and maintain a safety program, which provides for frequent and regular inspections of the job site, materials, and equipment used there to be made by a competent person to address potential safety and health hazards, as required by 29 C.F.R. § 1926.20(b)(1) and (2); and
- e. In failing to comply with the applicable OSHA standards and thereby ignoring the cumulative wisdom of the construction industry on which work conditions or procedures are unsafe.

14. The acts and omissions listed above demonstrate Defendant's reckless disregard for the safety of their business invitees, independent contractors, and/or workers. Furthermore, it is Plaintiff's belief that Defendant at all relevant times knew Plaintiff in fact had not been properly trained and/or equipped, but instructed Plaintiff to start working, nonetheless. Therefore, the conduct of Defendant solely and proximately caused the occurrence that made the basis of this cause and Plaintiff's injuries and damages.

VIII.
VICARIOUS LIABILITY

15. At the time of the incident described above, Plaintiff was a business invitee, independent contractor, and/or worker for Defendant. Defendant's reckless disregard for the Plaintiff's welfare and safety, and Defendant's failure to comply with safety procedures caused Plaintiff's injuries. As a result, Defendant is vicariously liable under the doctrine under the doctrine of *respondeat superior*.

IX.
PREMISES LIABILITY

16. Plaintiff alleges, in the alternative, that Defendant was the owner and/or in possession of the premises where Plaintiff's incident forming the basis of this cause occurred. Plaintiff entered Defendant's premises with Defendant's knowledge and for their mutual benefit. Specifically, Plaintiff was a business invitee, independent contractor, and/or worker, acting reasonably, on the job site belonging to Defendant. The conduct of Defendant, by failing to keep a safe area for its employees, independent contractors, and/or business invitees on its premises, was the proximate cause of Plaintiff's damages in the following acts of negligence, to wit:

- a. In failing to timely inspect the premise in order to discover any dangerous conditions;

- b. In failing to timely observe and inspect the premises in order to correct any unsafe practice or condition and thereby protect its business invitees, independent contractors, and/or workers, such as Plaintiff;
- c. In failing to provide a safe area for its business invitees, independent contractors, and/or workers in order to avoid injuries;
- d. In failing to provide all appropriate equipment which is standard and to take other reasonably necessary measures to help ensure that Plaintiff, and other business invitees, independent contractors, and/or workers, would not experience any foreseeable injuries on the premises;
- e. In failing to take any steps to ensure a safe environment and/or safe conditions for business invitees, independent contractors, and/or workers, on the premises, such as Plaintiff;
- f. In failing to suspend operations on the premises until the hazardous condition no longer existed;
- g. In failing to ensure compliance with the safety policies and procedure, if any; and
- h. In failing to timely observe and inspect the work-related project in order to correct any unsafe practice or condition and thereby protect its business invitees, independent contractors, and/or workers, such as Plaintiff.

17. In the alternative, it is Plaintiff's belief that Defendant at all relevant times had care and control of the premises for safety and security purposes but failed to keep him safe. The work site on the premises presented a dangerous condition which posed an unreasonable risk of harm to business invitees, independent contractors, and/or workers, including Plaintiff. Defendant knew or reasonably should have known of the dangerous condition. Defendant had a duty to use ordinary care to ensure that the premises did not present a danger to Plaintiff. This duty includes the duty to inspect and the duty to warn or to cure. Defendant breached the duty of ordinary care, by proof of Plaintiff injuries, prior to instructing Plaintiff to work. Defendant further failed to warn Plaintiff of the dangerous conditions of the site. Defendant's breach of duty proximately caused Plaintiff's injuries and damages complained of herein.

X.
DAMAGES

18. As a direct and proximate result of the negligent conduct of Defendant, Plaintiff suffered severe injuries. Consequently, Plaintiff required immediate and lasting medical attention, and has been subjected to extensive therapy and in all reasonable medical probability, will require surgery in the future. In addition, since the incident, Plaintiff has suffered from severe pain and suffering never experienced prior to the accident.

19. Moreover, as a consequence Defendant's negligent acts and/or omissions, Plaintiff suffered physical impairment, permanent disfigurement, lost wages, loss of earning capacity, as well as severe physical and mental pain, suffering, and mental anguish. In all reasonable probability, Plaintiff will continue to suffer in this manner for a long time into the future, if not for the balance of his natural life.

20. Solely as a result of the injury, Plaintiff required surgery and has incurred reasonable and customary doctors', pharmacy, and medical expenses for necessary medical treatment. There is more than reasonable probability that Plaintiff will incur additional reasonable expenses for necessary medical care and attention in the future. By reason of the foregoing injury and damages, Plaintiff sustained damages far in excess of the minimum jurisdictional limits of the Court.

XI.
EXEMPLARY DAMAGES

21. Defendant's conduct entitles Plaintiff to recover exemplary damages under section 41.003 of the Texas Civil Practice and Remedies Code. Plaintiff seeks recovery of exemplary damages for harm that was the direct result of Defendant's gross negligence. Defendant's acts and omissions involved an extreme degree of risk, considering the probability and magnitude of potential harm to others, such as Plaintiff. Defendant had actual, subjective awareness of the risks involved, but

nevertheless preceded with wanton disregard and conscious indifference for the rights, safety, and welfare of others. As such, Plaintiff requests the trier of fact to punish and deter Defendant, and others like them, from such conduct in the future. Plaintiff, therefore, seeks damages in an amount to be determined by the trier of fact, commensurate with:

- a. the nature of the wrong committed by Defendant;
- b. the character of Defendant's course of conduct;
- c. the degree of culpability of the wrongdoer herein;
- d. the helpless and dependent nature of the victim in this case; and
- e. the severity, frequency, degree, and extent that Defendant such conducts.

XII.
NOTICE OF USE OF DOCUMENTS

22. Pursuant to Texas Rules of Civil Procedure 166a(d) and 193.7, Plaintiff hereby gives notice to Defendant that he intends to use all discovery products, responses, and documents exchanged and produced between the parties as summary judgment evidence, in any pretrial proceeding, and/or at trial in this cause.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully prays that the Defendant be cited to appear and answer herein, and that upon a final verdict, Plaintiff be awarded judgment against the Defendant including but not limited to the following legal damages:

- a. Actual medical bills in an amount exceeding but not limited to the medical price for Plaintiff, all of which are necessary and reasonable for these types of services;
- b. Future medical care expenses in an amount found to be reasonable and just by the trier of fact;
- c. Monetary damages for past and future physical pain and suffering and mental anguish found to be reasonable and just by the trier of fact;

- d. Monetary damages for past and future physical impairment as found to be reasonable and just by the trier of fact;
- e. Monetary damages for past and future permanent disfigurement in an amount to be determined by the trier of fact;
- f. Monetary damages for lost wages incurred for and past and future loss of earning capacity, in an amount to be determined by the trier of fact;
- g. Exemplary and punitive damages, as found to be reasonable by the trier of fact;
- h. Pre and post judgment interest at the maximum legal rate;
- i. Costs of Court; and
- j. Such other and further relief, at law or in equity, to which Plaintiff may be justly entitled.

Respectfully Submitted,

LAW OFFICES OF DOMINGO A. GARCIA, P.C.

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