Cause No. 2005-01510

AMY DEWEERD	§	IN THE DISTRICT COURT
	§	
	§	
v.	§	OF HARRIS COUNTY, TEXAS
	§	
	§	
MOTIVA ENTERPRISES LLC, ET AL.	§	164TH JUDICIAL DISTRICT

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Texas Rule of Civil Procedure 166a(i), Defendants Shell Oil Company, Motiva Enterprises, LLC, and Saudi Refining Inc. (collectively referred to as "Shell" and "Defendants") submit this Motion for Summary Judgment with respect to the claims and allegations asserted by Plaintiff Amy DeWeerd ("Plaintiff") in her First Amended Petition, respectfully showing as follows:

I. Introduction.

Plaintiff is a former customer at a Shell gas station located at 1101 Kingwood Drive, Kingwood, Texas (the "Station"). Plaintiff blames Shell for injuries she allegedly suffered while pumping gasoline at the Station and claims that Shell is liable for negligence and gross negligence. Plaintiff also brings a breach of implied warranty and DTPA claim. However, as explained in greater detail below, Plaintiff's claims are entirely unsupported by any evidence, and therefore, pursuant to Texas Rule of Civil Procedure 166a(i), Shell is entitled to summary judgment with respect to these claims.

II. Facts.

Plaintiff claims that, on March 11, 2003, she suffered injuries as a result of being exposed to gasoline from a self-serve gasoline pump at the Station. Shell denies that it is responsible for Plaintiff's alleged injury.

Plaintiff has propounded Interrogatories, Requests for Production, and Disclosures to Shell. In addition, both parties have taken depositions in this matter.

III. Standard of Review.

When adequate time for discovery has passed and a plaintiff has no evidence to support one or more essential elements of a claim, the defendant is entitled to summary judgment with respect to that claim. *See* TEX. R. CIV. P. 166a(i). When evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is, in legal effect, "no evidence." *See Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). Adequate time for discovery has passed, in that the events giving rise to Plaintiff's claims occurred over two years ago and the case has been on file for almost a year. Therefore, Plaintiff has had sufficient time to discover facts to support her allegations.

IV. Argument and Authorities.

A. Plaintiff Has No Evidence to Prove Her Negligence Claim

To establish that Shell was negligent, Plaintiff must be able to prove (i) that Shell had actual or constructive knowledge of a condition at the Station (ii) that posed an unreasonable risk of harm, (iii) that Shell failed to exercise reasonable care to reduce or eliminate the risk of harm, and (iv) that Shell thereby proximately caused Plaintiff's alleged injury. *See CMH Homes, Inc. v. Daenen*, 15 S.W.3d 97, 101 (Tex. 2000) (stating the essential elements of proof that a business invitee must show to state a negligence claim against a property owner).

i. Actual Or Constructive Knowledge

Plaintiff has no evidence to prove that Shell had actual or constructive knowledge of any dangerous condition at the Station. Therefore Plaintiff's negligence claim fails as a matter of law and should be dismissed. *See* TEX. R. CIV. P. 166a(i).

ii. An Unreasonable Risk Of Harm

Plaintiff has no evidence to prove that a condition at the Station posed an unreasonable risk of harm. Therefore, on this basis as well, Plaintiff's negligence claim fails as a matter of law and should be dismissed. *See* TEX. R. CIV. P. 166a(i).

iii. Failure To Exercise Reasonable Care

Plaintiff has no evidence to prove that Shell failed to exercise reasonable care. Accordingly, for this additional reason, Plaintiff's negligence claim fails as a matter of law and should be dismissed. *See* TEX. R. CIV. P. 166a(i).

iv. Proximate Cause

In addition to the matters discussed above, Plaintiff must also be able to prove that Shell's conduct was the proximate cause of Plaintiff's alleged injury. "Proximate cause" comprises two components – "cause in fact" and "foreseeability." *See Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) ("The components of proximate cause are cause in fact and foreseeability."). Cause in fact and foreseeability cannot be established by mere conjecture, guess, or speculation. *See id.* Plaintiff has no evidence to prove (i) that any conduct attributable to Shell was the cause in fact of Plaintiff's alleged injuries or (ii) that any alleged injury to Plaintiff was foreseeable to Shell. Thus, Plaintiff's negligence claim fails as a matter of law and should be dismissed. *See* TEX. R. CIV. P. 166a(i).

B. Plaintiff Has No Evidence to Prove Her Gross Negligence Claim

In addition to her negligence claim, Plaintiff also claims gross negligence. To establish a gross negligence claim, a plaintiff must be able to prove the elements of negligence, plus two additional elements – (i) when viewed objectively from the defendant's standpoint, the alleged act or omission involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (ii) the defendant had actual, subjective awareness of the risk involved, but nevertheless proceeded in conscious indifference to the rights, safety, or welfare of others. *See Mobile Oil Corp. v. Ellender*, 968 S.W.2d 917, 921 (Tex. 1998) ("Evidence of simple negligence is not enough to prove either the objective or subjective elements of gross negligence.").

As stated previously, Plaintiff does not have any evidence to prove any of the elements of negligence. Therefore, as a matter of law, her gross negligence claims fail. *See* TEX. R. CIV. P. 166a(i).

In addition, Plaintiff does not have any evidence to prove that, when viewed objectively from Shell's standpoint, any alleged act or omission involved an extreme degree of risk. Further, Plaintiff has no evidence that Shell had actual, subjective awareness of any alleged risk involved, but nevertheless proceeded in conscious indifference to the rights, safety or welfare of others. Accordingly, Plaintiff's gross negligence claim fails and should be dismissed. *See* TEX. R. CIV. P. 166a(i).

C. Plaintiff Has No Evidence to Prove Her Breach of Warranty and DTPA Claims

In addition to her negligence and gross negligence claims, Plaintiff also claims a breach of implied warranty and DTPA violation. To recover under the DTPA on a breach of warranty, a plaintiff must show (1) consumer status, (2) existence of the warranty, (3) breach of the

warranty, and (4) the breach was a producing cause of damages. *Johnston v. McKinney American, Inc.*, 9 S.W.3d 271, 276 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). The DTPA does not create warranties; rather, they must be established independently of the act. *McDade v. Texas Commerce Bank, Nat'l Ass'n*, 822 S.W.2d 713, 718 (Tex. App.—Houston [1st Dist.] 1991, writ denied). Plaintiff has no evidence to establish any of these elements.

In addition, plaintiff can present no evidence that Shell breached either the implied warranty of fitness for a particular purpose or merchantability. She must establish the elements of each of these in order to sustain her causes of action for breach, which she cannot do. To establish a breach of the implied warranty of merchantability, Plaintiff must show the existence of the warranty, that the warranty was breached, and that the breach of the warranty was the proximate cause of the loss sustained. TEX. BUS. & COM. CODE ANN. § 2.314, UCC Comment 13.

Likewise in order to establish a breach of the warranty of fitness for a particular purpose, Plaintiff must establish (1) the goods were purchased for a particular purpose, 2) the seller knew of or had reason to know of that purpose at the time of the sale, 3) the seller knew or had reason to know that the buyer was relying on the seller's skill and judgment in selecting and furnishing the goods, and 4) the goods were not suitable for the particular purpose. TEX. BUS. & COM. CODE ANN. § 2.315.

Plaintiff has no evidence to establish any of the elements necessary for either a breach of the implied warranty of merchantability or fitness for a particular purpose. As such, summary judgment should be granted on both of her warranty claims as well as her DTPA claim.

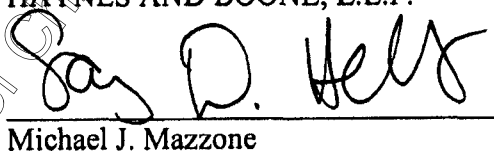
V. Conclusion.

As set forth above, Plaintiff has no evidence to prove any of the essential elements of her claims. Therefore, pursuant to Texas Rule of Civil Procedure 166a(i), no genuine issue of material fact exists as to any of these claims, and Shell is entitled to summary judgment with respect to each of these claims. *See* TEX. R. CIV. P. 166a(i). As such, Plaintiff's negligence, gross negligence, DTPA, and warranty claims should be dismissed.

Wherefore, premises considered, Shell respectfully request that summary judgment be granted, that all costs be taxed against Plaintiff, and that Defendants be granted all other relief, at law or in equity, to which they may be justly entitled.

Respectfully submitted,

HAYNES AND BOONE, L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that on this ___ day of November, 2006, a true and correct copy of Defendants' Motion for Summary Judgment and Notice of Submission were served via hand delivery and facsimile on:

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