IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

JANICE DEAN, *Plaintiff*, v. TYSON FOODS, INC., *Defendant*.	§ § § § § § § § §	CIVIL ACTION NO. 9:21-CV-00005 JUDGE MICHAEL J. TRUNCALE

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

Before the Court are Plaintiff Janice Dean's No Evidence Motion for Summary Judgment and Traditional Motion for Summary Judgment, [Dkt. 32], and Defendant Tyson Foods, Inc.'s Motion for Summary Judgment and Brief in Support. [Dkt. 33]. These dueling Motions were both filed on February 15, 2022. [Dkts. 32, 33]. For the reasons below, Plaintiff's Motion, [Dkt. 32], is **DENIED** in **PART** and **GRANTED** in **PART**; Defendant's Motion, [Dkt. 33], is **DENIED**.

I. BACKGROUND

Plaintiff Janice Dean worked "on the line" at a poultry processing plant in Panola County operated by Defendant Tyson Foods, Inc. [Dkt. 2 at 2]. Dean alleges that "Tyson's failure to provide a safe workplace led to [her] sustaining a range of injuries from nerve pain, neck pain, pains throughout her arms and legs, and migraines." *Id.* at 3. Accordingly, she brought this action.

Dean first worked at the Tyson plant in 2005 for six or seven months, until she lost her transportation in a car accident and could no longer get to work. [Dkt. 33-1 at 7:7–17]. She testified that she did not sustain any injuries working before the car accident. [Dkt. 33-1 at 7:18–19]. She also testified that she was sufficiently trained during her initial employment at Tyson. [Dkt. 33-1 at 12:25–13:1] ("I'm saying I felt like I was trained properly when I first started working there.").

In 2018, Dean returned to work at the Tyson plant. She alleges that she "was forced to endure intolerable working conditions" such as standing for eight hours at a time on mats that were "too thin, constantly wet, and rarely replaced," thus providing "little if any protection" from the hard concrete floors. [Dkt. 2 at 2]. Dean does not recall receiving any training upon her return. But when asked if she still remembered how to do her job Dean responded: "Just like riding a bike." [Dkt. 33-1 at 13:6–8]. While "[n]othing changed as far as processing the chicken," since she last worked at the plant, Dean claims that employees with more experience—like herself—are expected to do more than other team members. [Dkt. 33-1 at 11:12–14:16].

Now, Dean alleges that she sustained injuries due to the training, assistance, and equipment she received or failed to receive. [Dkt. 2 at 4–5]. Dean sues Tyson for negligence, gross negligence, and premises liability. [Dkt. 2 at 5–6].

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, "[s]ummary judgment is proper when the pleadings and evidence demonstrate that no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." *DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005) (internal citations omitted); Fed. R. Civ. P 56(c). An issue is material if its resolution could affect the outcome of the action. *DIRECTV*, 420 F.3d at 536 (internal quotations omitted). A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* All reasonable inferences must be drawn in favor of the nonmoving party. *Smith v. Amedisys, Inc.*, 298 F.3d 434, 440 (5th Cir. 2002). There is no genuine issue of material fact if, when the evidence is viewed in the light most favorable to the nonmoving party, no reasonable trier of fact could find for the nonmoving party. *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263–64 (5th Cir. 1991) (internal citations omitted).

Where the dispositive issue is one on which the nonmoving party will bear the burden of persuasion at trial, the moving party may satisfy its burden of production by either (1) submitting affirmative evidence that negates an essential element of the nonmovant's claim, or (2) demonstrating there is no evidence in the record to establish an essential element of the nonmovant's claim. *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987) (internal citations omitted).

If, under the first option, the nonmoving party cannot point to evidence sufficient to dispute the movant's contention that there are no disputed facts, the moving party is entitled to summary judgment as a matter of law. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89 (1980); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249–50 (1986). Under the second option, the nonmoving party may defeat the motion by pointing to "supporting evidence already in the record that was overlooked or ignored by the moving party." *Celotex Corp. v. Catrett*, 477 U.S. 317, 332–33 (1986) (Brennan, J., dissenting).

If the nonmoving party can meet its burden under either of these scenarios, the burden shifts back to the movant to demonstrate the nonmovant's inadequacies. *Id.* If the movant meets this burden, "the burden of production shifts [back] to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers, (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e), or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f)." *Celotex*, 477 U.S. at 333 n.3. "Summary judgment should be granted if the nonmoving party fails to respond in one or more of these ways, or if, after the nonmoving party responds, the court determines that the moving party has met its ultimate burden of persuading the court that there is no genuine issue of

material fact for trial." *Parekh v. Argonautica Shipping Invests. B.V.*, No. CV 16-13731, 2018 WL 295498, at *3 (E.D. La. Jan. 4, 2018) (quoting *Celotex*, 477 U.S. at 333 n.3).

III. DISCUSSION

A. Plaintiff Janice Dean's Motion for Summary Judgment

Dean's Motion asks this Court to find: (1) that Tyson, a nonsubscriber of workers' compensation insurance, is precluded from claiming contributory negligence as a defense, and (2) that there is no evidence supporting Tyson's numerous other defenses. [Dkt. 32].

1. Contributory Negligence

Section 406.033(a)(1) of the Texas Labor Code states:

> In an action against an employer by or on behalf of an employee who is not covered by workers' compensation insurance obtained in the manner authorized by Section 406.003 to recover damages for personal injuries or death sustained by an employee in the course and scope of the employment, it is not a defense that: (1) the employee was guilty of contributory negligence . . . .

Tex. Lab. Code 406.033(a). Tyson admits that it was a nonsubscriber of workers' compensation insurance during Dean's employment. [Dkt. 5 at 2]. Therefore, Tyson is statutorily precluded from claiming contributory negligence as a defense. Tyson does not contest this. [Dkt. 56 at 4]. Accordingly, the Court **GRANTS** summary judgment in Dean's favor on this discrete issue.

2. Other Defenses

Dean employs a Texas-style "no-evidence" motion against Tyson's remaining affirmative defenses; however, federal procedural rules govern summary judgment motions in federal courts. Therefore, the Court's analysis "proceeds as it must, under the federal summary judgment standard." *Taylor v. Dolgencorp of Texas, Inc.*, No. 6:18-CV-00179-ADA, 2020 WL 1902540, at *2 (W.D. Tex. Jan. 7, 2020); *see, e.g.*, *BB Energy LP v. Devon Energy Prod. Co. LP*, No. 3:07-CV-0723-O, 2008 WL 2164583, at *12 (N.D. Tex. May 23, 2008) ("A no-evidence motion for

summary judgment, however, is a pleading that may be filed in state court, but not federal court."); *Cardner v. Home Depot U.S.A., Inc.*, 561 F. Supp. 2d 640, 643 (E.D. Tex. 2006) (applying the federal standard).

In federal court, when the nonmovant has the burden of proof at trial, the moving party may shift the summary judgment burden to the nonmovant by alleging that the nonmovant failed to establish an element essential of its case. *See, e.g., Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 644 (5th Cir. 1999). Dean asserts that the burden of proof regarding *all* of Tyson's remaining defenses lies on Tyson, the nonmovant. This is not the case. The Court now takes each defense in turn.

a. Failure to Mitigate

"[A] failure to mitigate damages in a personal injury case is not an affirmative defense." *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 448 (Tex. 1967). This is because damages caused by the injured person's failure to treat his injuries as a reasonable person under the same or similar circumstances are "ultimately not proximately caused by the wrongdoer's acts or omissions, but by the injured person's own subsequent negligence, and are thus not recoverable from the wrongdoer." *Id.* at 449. But the original wrongdoer is still liable for the damages proximately caused by his wrongful or negligent acts: "the failure of the injured person to care for and treat his injuries as a reasonable prudent person would under the same or similar circumstances will not defeat in whole or in part the cause of action for damages thus proximately caused." *Id.* at 448.

Dean bears the burden of establishing all elements of her negligence claim. If Dean fails to do so, her claim fails. By asserting failure to mitigate, Tyson questions whether Dean established that Tyson proximately caused all or a portion of her injuries. While Tyson is free to introduce

evidence to rebut elements of Dean's claim, electing to do so does not transform Dean's burden of establishing the elements of her claim into Tyson's burden to disprove them. Dean's motion for summary judgment regarding failure to mitigate is **DENIED**.

b. Offsets

"The right of offset is an affirmative defense. The burden of pleading offset and proving the facts necessary to support it are on the party making the assertion." *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 936 (Tex. 1980); *see also Giles v. Gen. Elec. Co.*, 245 F.3d 474, 494 n.36 (5th Cir. 2001) ("[A]n offset indeed is an affirmative defense.").

In the event that an adverse judgment is rendered against Tyson, Tyson requests "all available credits and/or offsets" provided by Texas law. [Dkt. 20 at 10]. Dean requests summary judgment on this matter, claiming that "[t]here is no evidence to show what damages would be offset or why." [Dkt. 32 at 4]. The Court disagrees. Tyson has produced billing records showing that it has paid money on Dean's behalf through its self-funded group health insurance plan. [Dkt. 56-1 at 146–76]. Therefore, a genuine issue of material fact on this matter exists.[1] Dean's motion for summary judgment regarding offsets is **DENIED**.

c. Expenses Paid or Incurred

Dean requests summary judgment on Tyson's assertion that "[Dean's] recovery of medical or health care expenses be limited to the amount actually paid or incurred by or incurred on the behalf of [Dean]," [Dkt. 20 at 11], because she claims that "[t]here is no evidence that [she] did not pay or incur the expenses that she claims relate[] to this case." [Dkt. 32 at 4]. But again, it is

[1] Because Dean did not raise the collateral source rule in her Motion for Summary Judgment [Dkt. 32] the Court does not address whether it applies to payments from Tyson's group health insurance plan. "The collateral source rule is a substantive rule of law that bars a tortfeasor from reducing the quantum of damages owed to a plaintiff by the amount of recovery the plaintiff receives from other sources of compensation that are independent of (or collateral to) the tortfeasor." *Davis v. Odeco*, 18 F.3d 1237, 1243 (5th Cir. 1994).

Dean's burden to prove damages—it is not Tyson's burden to *disprove* damages. She may not impermissibly shift this burden.

Moreover, "[u]nder Texas law, a party seeking to recover its past medical expenses must prove that the amounts paid or incurred are reasonable." *In re Allstate Indem. Co.*, 622 S.W.3d 870, 876 (Tex. 2021) (citing *Dall. Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1956)); *see also* Tex. Civ. Prac. & Rem. Code § 41.0105 (limiting recovery of incurred medical expenses to the amount "actually paid or incurred by or on behalf of the claimant"). Tyson has produced affidavits establishing a genuine issue of material fact as to its allegation that Dean was not charged a reasonable amount. *E.g.*, [Dkt. 56-1 at 183–86]. Dean's motion for summary judgment regarding expenses paid or incurred is **DENIED**.

d. Pre-Existing Injuries

Tyson does not bear the burden of proving that Dean's damages are the result of pre-existing injuries. *See Hearn v. Kroger Tex., L.P*, No. 3:21-CV-1648-D, 2022 WL 2533408, at *5 (N.D. Tex. July 7, 2022) (Fitzwater, J.) ("It is [the plaintiff]—not [the defendant]—who bears the burden to show that his damages were caused by [the defendant's] negligence and not his pre-existing condition."); *Greene v. W&W Energy Servs., Inc.*, No. 4:19-CV-4343, 2021 WL 5155670, at *2 (S.D. Tex. May 10, 2021) ("Accordingly, 'pre-existing/subsequent injury' is not an affirmative defense, but rather it is the plaintiff's burden to show that the defendant's conduct caused the injuries about which she complains."). Even though Tyson does not bear this burden, Tyson has still produced sufficient evidence to create a genuine issue of material fact that Dean's injuries are the result of preexisting conditions. For example, Dean has a history of back pain, *e.g.*, [Dkt. 56-1 at 32], and imaging records note that her spinal conditions are degenerative. *Id.* at 42. Dean's motion for summary judgment regarding pre-existing conditions is **DENIED**.

e. Statute of Limitations

There is a genuine issue of material fact as to whether Dean's claims are barred by the statute of limitations. *See infra* Section B(1). Dean's motion for summary judgment regarding Tyson's statute of limitations defense is **DENIED**.

f. New and Independent Cause

Tyson does not bear the burden of proving that Dean's injuries are the result of a new and independent cause; Dean bears the burden of proving that Tyson caused her injuries. Nonetheless, Tyson points to medical records indicating that Dean suffered at least one fall after her alleged injury. [Dkt. 56-1 at 131]. Her surgery recommendation came after she took "a few falls." *Id.* These falls might have caused "irritation of her cervical and lumbar area." *Id.* This establishes a genuine issue of material fact as to the cause of Dean's injuries. Dean's motion for summary judgment regarding Tyson's new and independent cause defense is **DENIED**.

g. Net Loss After Reduction for Income Tax

Dean represents that she is not seeking lost wages and loss of future earning capacity. [Dkt. 32 at 5]. This defense is **MOOT**.

h. Exemplary Damages

Tyson requests limitations on punitive damages. Dean argues that Tyson has not produced evidence to support limiting any punitive damages awarded or barring punitive damages as unconstitutional. [Dkt. 32 at 5]. Dean, not Tyson, bears the burden of proving exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(b). Dean may not impermissibly shift this burden to Tyson. *Id.* Dean's motion for summary judgment regarding exemplary damages is **DENIED**.

B. Defendant Tyson's Motion for Summary Judgment

Tyson contends that it is entitled to summary judgment on: (1) all of Dean's claims because they are barred by the statute of limitations; (2) Dean's negligence claims; (3) Dean's premises liability claims; and (4) Dean's exemplary damages claim. [Dkt. 33].

1. Statute of Limitations

Because Dean cites 1998[2] and 2005 as years when she was injured, Tyson contends that her claims exceed the statute of limitations. [Dkt. 33 at 22]. But Dean distinguishes her current injuries from her older maladies. When asked if she "ha[d] this pain between 2005 and between 2019," Dean responded: "Not this—no, not *this* pain." [Dkt. 57-2 at 14:2–4] (emphasis added). This is sufficient to survive Tyson's Motion. Tyson's motion for summary judgment regarding statute of limitations is **DENIED**.

2. Negligence

Tyson argues that Dean cannot establish the essential elements of her negligence claim. To establish negligence, Dean must prove that: (1) Tyson had a legal duty, (2) Tyson breached that duty, and (3) damages proximately resulted from that breach. *See Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (per curiam) (citing *Werner v. Colwell*, 909 S.W.2d 866, 869 (Tex. 1995)). "Whether a duty exists is a threshold inquiry and a question of law; liability cannot be imposed if no duty exists." *Id.* (citing *Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998)).

a. Duty

"Although an employer is not an insurer of his employees' safety at work, an employer does have a duty to use ordinary care in providing a safe work place." *Werner*, 909 S.W.2d at 869. "This duty includes an obligation to provide adequate help under the circumstances for the

[2] Dean contends that any claim she made that she was injured in 1998 was a typographical error. [Dkt. 57 at 11].

performance of required work." *Id.* But the law does not impose a duty to "warn of hazards that are commonly known to or already appreciated by the employee . . . ." *Kroger Co.*, 197 S.W.3d at 794–95. Nor does it impose a duty to "provide equipment or assistance that is unnecessary to the job's safe performance." *Id.* Moreover, "when an employee's injury results from performing the same character of work that employees in that position have always done, an employer is not liable if there is no evidence that the work is unusually precarious." *Id.* at 795.

First, Tyson argues that it did not have a duty to provide Dean with additional assistance because Dean was performing her normal and customary job duties, and that there is no evidence that the work is unusually precarious. [Dkt. 33 at 10]. The Court disagrees. Dean's expert, Dr. Morrissey, provides that:

> Since the early 1980's there has been study and documentation of the very high rates of acute and cumulative trauma injuries to workers in the poultry industry along with publication of guides for the identification and reduction of general safety and health hazards along with ergonomics risk factors . . . These studies find that the poultry industry has one of the highest overall rates of accidents and injuries and injuries related to cumulative trauma disorders of the back, neck, torso, shoulder and hands of all studied occupations. And, within the poultry industry itself, tasks with repetitive, strenuous hand movements and load handling, sustained awkward postures have injury rates to the hands (primarily carpal tunnel syndrome) and other parts of the body that are much higher than other jobs in the poultry industry jobs without these conditions.

[Dkt. 57-1 at 10]. This evidence must be viewed in the light most favorable to the non-movant, Dean. While her injury allegedly results from performing the same character of work that employees in her position have always done, they have not always done it without high injury rates. *See id.* Therefore, the Court rejects Tyson's claim that there is no evidence that Dean's work is unusually precarious.

Tyson next argues that "[a] finding of no duty to assist is appropriate especially where there is no evidence that additional equipment or assistance were needed to perform the job safely." [Dkt. 33 at 12]. But again, this is disputed by Dr. Morrissey's report: "Documents concerning ergonomics and injuries in the poultry industry and from Tyson Foods also describe effective interventions to prevent or minimize the probability of these injuries to workers in the poultry industry: Interventions were not in place in the Tyson Foods Carthage TX poultry plant where Ms. Dean worked." [Dkt. 57-1 at 18].

Finally, Tyson argues that that it did not have a duty to provide Dean additional training because "an employer has no duty to train an employee about a job function that is not specialized." [Dkt. 33 at 13]. Tyson cites two cases to support this claim; however, they are both distinguishable from this case. In *Kroger Co. v. Elwood*, the plaintiff—a Kroger grocery store clerk—was injured when a customer shut her car door on the plaintiff's hand while he was transferring groceries into her car. 197 S.W.3d at 794. The plaintiff had "placed one hand in the vehicle's doorjamb, and one foot on the cart, to keep the cart from rolling down a slope in Kroger's parking lot." *Id.* The Texas Supreme Court rendered judgment for Kroger, holding that "Kroger had no duty to warn [the plaintiff] of a danger known to all and no obligation to dissuade an employee from using a vehicle doorjamb for leverage." *Id.* at 795. In *Aleman*, the plaintiff—a truck driver for a restaurant supplies distributor—was unloading merchandise with a dolly when he slipped on the wet floor of the trailer. *Aleman v. Ben E. Keith Co.*, 227 S.W.3d 304, 313 (Tex. App.—Houston [1st Dist.] 2007, no pet.). The court found that the defendant did not have a duty to warn of this hazard, noting that the "danger associated with water on a floor is commonly known and obvious to anyone." *Id.* at

313.[3] While working the line at the Tyson plant may not be a complex job, it is not "unspecialized" in the same sense as loading groceries into a car or rolling a dolly off a trailer.

b. Breach

Tyson contends that even if it owed Dean the alleged duties, summary judgment is warranted because: (1) it did not fail to provide Dean with necessary assistance; and (2) it did not fail to sufficiently train Dean. To substantiate its first basis, Tyson points to training materials directing employees to request sharper tools if theirs become dull to dispute Dean's claim that she could have been provided sharper tools. [Dkt. 33 at 16]. This is just one instance Dean alleges that she did not receive sufficient assistance, however. Tyson also claims that other employees were available to help Dean, had she requested help. But Dean testified in her deposition that when she sought assistance she was told "to get used to the work." [Dkts. 57 at 6; 57-2 at 8:4–5]. Therefore, genuine issues of material fact still exist regarding whether Tyson failed to provide Dean with necessary assistance.

As evidence that Tyson sufficiently trained Dean, Tyson points to Dean's testimony that she was trained when she worked at Tyson in 2005 and that she remembered how to do the job when she returned in 2018, "[j]ust like riding a bike." [Dkts. 33 at 17; 33-1 at 12:23–14:16]. But there's a difference between knowing how to pedal a bike and knowing how to ride it safely. Dr. Morrissey included in his report that:

> Her training and job descriptions from Tyson did not provide her with useable training or understanding of cumulative trauma disorders and their risk factors and the early signs and symptoms of their development, what was a repetitive task, proper hand and body postures to minimize the potential for development of cumulative

[3] It is also worth noting that the *Aleman* court granted a no-evidence summary judgment for the employer-defendant on its claims because the plaintiff did not provide evidence that the employer owed alleged duties—not because the employer did not owe a duty as a matter of law. 227 S.W.3d at 312–313. Therefore, those analyses are not relevant to this case.

> and acute trauma disorders and what were proper manual materials handling methods and postures for the various tasks she actually did.

[Dkt. 57-1 at 3]. Additionally, when asked in her deposition what Tyson should have done differently, Dean stated:

> They could have retrained me. They could have showed me an easier way of doing things instead of just putting me on the line because I already knew how. You know, there's different ways they truss birds now. I had to use the old way because that was the way that I knew how.

[Dkt. 33-1 at 15:3–10]. Viewing this evidence in the light most favorable to Dean, there is a genuine issue of material fact as to whether Tyson sufficiently trained her.

c. Proximate Cause

"Proximate cause comprises of two elements: cause in fact and foreseeability." *Excel Corp. v. Apodaca*, 81 S.W.3d 817, 820 (Tex. 2002). Foreseeability requires that "a person of ordinary intelligence would have anticipated the danger his or her negligence creates." *Id.* Cause in fact—that is, the "but-for cause"—requires that "the act or omission was a substantial factor in causing the injury 'without which the harm would not have occurred.'" *Id.* (quoting *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995)). "A finding of a cause in fact cannot be supported by 'mere conjecture, guess or speculation' . . . but may be based on either direct or circumstantial evidence." *Id.* Moreover, "where there is no medical testimony linking the alleged negligence to the injury, a claimant must provide probative evidence, through expert testimony, connecting the injury to the alleged negligence." *Leitch v. Hornsby*, 935 S.W.2d 114, 119 (Tex. 1996).

Tyson disputes that Dean establishes either causation element. Tyson contends that Dean fails to establish "cause in fact" because she has not provided expert testimony linking Tyson's

omission or failure to her injury. [Dkt. 33 at 20]. But this is not true. Dr. Morrissey, stated in his report:

> Documents concerning ergonomics and injuries in the poultry industry and from Tyson foods . . . describe effective interventions to prevent or minimize the probability of these injuries to workers in the poultry industry: Interventions were not in place in the Tyson Foods Carthage TX poultry plant where Ms. Dean worked. . . . With this broad, long standing recognition of the known ergonomics risk factors and high rates of injuries in poultry processing, Tyson Foods knew, or should have known of these hazards in their Carthage TX chicken plant. However, they chose to disregard this information and warnings allowing hazardous working conditions to be present in their Carthage TX chicken plant.

[Dkt. 57-1 at 17]. Dr. Morrissey ultimately concluded that "Ms. Dean's injuries are more likely than not, from an ergonomics and epidemiological perspective, the result of her work at Tyson Foods Chicken Plant in Carthage, TX." *Id.* Additionally, Dr. Morrissey's assertion that there is "long standing recognition of the known ergonomic risk factors and high rates of injuries in poultry processing," *id.*, establishes a genuine issue of material fact as to whether a person with ordinary intelligence in Tyson's position would have anticipated the danger. *See Excel Corp.*, 81 S.W.3d at 820. Therefore, summary judgment on Dean's negligence claim is **DENIED**.

3. Premises Liability

"A plaintiff may not pursue both a negligent-activity and a premises-liability theory of recovery for a single injury that is based on a premises condition unless there is some ongoing activity that caused the plaintiff's injury in addition to the premises condition." *Ovalle v. United Rentals North America, Inc.*, No. 21-11076, 2022 WL 4009181, at *2 (5th Cir. Sept. 2, 2022) (citing *Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992)). "Recovery on a negligent activity theory requires that the person have been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity." *Keetch*, 845 S.W.2d at 264. For example,

the plaintiff in *Keetch* allegedly slipped and fell in a Kroger floral department because a product sprayed on the leaves collected on the floor, creating a slick spot. *Id.* at 263. The plaintiff sought to hold Kroger liable under both a premises-liability theory and a negligent-activity theory, but the trial court only submitted the case to the jury on the premises-liability theory. *Id.* at 264. The Supreme Court of Texas affirmed this decision, reasoning that "[the plaintiff] may have been injured by a condition created by the spraying but she was not injured by the activity of the spraying." *Id.* Therefore, it did not matter whether the defendant negligently sprayed the leaves. *Id.*

Accordingly, Tyson contends that Dean's negligence and premises-liability claims are mutually exclusive, and that summary judgment on the premises-liability claims is proper because Dean alleges a negligent contemporaneous activity. [Dkt. 33 at 23–24]. The Court disagrees. As noted above, a single injury can give rise to both negligence and premises-liability claims—the two are not necessarily mutually exclusive. *See Ovalle*, 2022 WL 4009181, at *2. Tyson's argument also misinterprets *Keetch*. In *Keetch*, the Court permitted only the premises-liability claim because *only* a condition on the premises caused the injury. 845 S.W.2d at 264. Because a contemporaneous activity did not cause the injury, the plaintiff could not bring a negligence claim. *Id. Keetch* does not hold that the existence of a negligent contemporaneous activity precludes recovery for an otherwise valid premises-liability claim. Dean alleges that both negligent contemporaneous activities and conditions on the premises caused her injuries.[4] Because her negligence and premises-liability claims are not predicated on the same conduct, they are not mutually exclusive. Summary judgment on the premises-liability claims is **DENIED**.

[4] For example, Dean alleges that Tyson "fail[ed] to maintain the floor in a reasonably safe condition," which is a condition on the premises. *See* [Dkt. 2 at 6]. But she also alleges that Tyson "failed to hire competent employees" and "failed to provide rules and regulations for the safety of employees, and to warn them, under certain conditions, as to the hazards of their positions or employment." *Id.* at 5. These are allegations of contemporaneous activities.

4. Exemplary Damages

Exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from fraud, malice, or gross negligence. Tex. Civ. Prac. & Rem. Code § 41.003(a). Dean alleges that Tyson's conduct constituted gross negligence. [Dkt. 2 at 8].

Gross negligence requires two components: (1) "viewed objectively from the actor's standpoint, the act or omission complained of must involve an extreme degree of risk; considering the probability and magnitude of the potential harm to others"; and (2) "the actor must have actual, subjective awareness of the risk involved, but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others." *Lee Lewis Const., Inc. v. Harrison*, 70 S.W.3d 778, 785 (Tex. 2001). "Under the objective component, 'extreme risk' is not a remote possibility or even a high probability of minor harm, but rather the likelihood of the plaintiff's serious injury." *U-Haul Intern., Inc. v. Waldrip*, 380 S.W.3d 118, 137 (Tex. 2012). "The subjective prong, in turn, requires that the defendant knew about the risk, but that the defendant's acts or omissions demonstrated indifference to the consequences of its acts." *Id.*

Tyson contends that it is entitled summary judgment on Plaintiffs claim for exemplary damages because Dean "is unable to show any evidence" that Tyson "engaged in any acts or omissions that involved an extreme degree of risk" or that Tyson "acted with awareness of any such purported risk." [Dkt. 33 at 27]. The Court disagrees. Dr. Morrissey's previously discussed report establishes a genuine issue of material fact here.[5] Summary judgment on Dean's claim for exemplary damages is **DENIED**.

[5] *E.g.*, [Dkt. 57-1 at 17] ("With this broad, long standing recognition of the known ergonomics risk factors and high rates of injuries in poultry processing, Tyson Foods knew, or should have known of these hazards in their Carthage TX chicken plant. However, they chose to disregard this information and warnings allowing hazardous working conditions to be present in their Carthage TX chicken plant.").

IV. CONCLUSION

For all reasons forgoing, Plaintiff Janice Dean's Motion for Summary Judgment is **GRANTED** in **PART** and **DENIED** in **PART**. [Dkt. 32]. It is **GRANTED** as to Tyson's contributory liability defense. It is **DENIED** as **MOOT** as to Tyson's net loss after reduction for income tax defense. It is **DENIED** as to everything else.

Defendant Tyson Foods, Inc.'s Motion for Summary Judgment is **DENIED**. [Dkt. 33].

SIGNED this 27th day of September, 2022.

Michael J. Truncale
United States District Judge