Opinion issued August 15, 2017

In The

Court of Appeals

For The

First District of Texas

NO. 01-15-00988-CV

GILBERT REYNA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JUAN GILBERTO REYNA, AND MARCIA REYNA, INDIVIDUALLY, Appellants

V.

ACADEMY LTD. D/B/A ACADEMY SPORTS AND OUTDOORS, LYNETTE METZGAR, AND JEREMIAH METZGAR, Appellees

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On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2013-31174

MEMORANDUM OPINION

Appellants, Gilbert Reyna, individually and as personal representative of the Estate of Juan Gilberto Reyna, and Marcia Reyna, individually, challenge the trial

court's summary judgment in favor of appellee, Academy Ltd., doing business as Academy Sports and Outdoors ("Academy"), on the Reynas' claims against Academy for negligence per se, negligence, and gross negligence. The Reynas also challenge the trial court's dismissal of their negligence claims against appellees, Lynette Metzgar and Jeremiah Metzgar. In five issues, the Reynas contend that the trial court erred in granting summary judgment and dismissing their claims.

We affirm.

Background

Weeks after Lynette Metzgar, accompanied by her boyfriend, Yusef Villanueva, went into an Academy sporting goods store and purchased a "Mossberg Maverick shotgun," Villanueva shot his seventeen-year-old friend, Juan Gilberto Reyna (the "decedent"), with the shotgun, killing him. A jury convicted Villanueva of criminally negligent homicide.[1]

In their third amended petition, the Reynas alleged that Academy's sale of the shotgun to Lynette constituted negligence per se because it "violated applicable State and Federal Laws" prohibiting a federally licensed firearms dealer from selling a firearm to a person whom the dealer knows, or has reasonable cause to believe, is a statutorily prohibited buyer. Academy acted negligently because it knew, or should

[1] *State v. Yusef E. Villanueva*, No. 1371618 (185th Dist. Ct., Harris Cty., Tex., Aug. 23, 2013).

have known, that Lynette's purchase of the shotgun was a "straw sale,"[2] i.e., she actually bought the shotgun on behalf of Villanueva. Also, Academy negligently failed to request a background check on Villanueva because he accompanied Lynette at the time of the purchase and could not have legally purchased a firearm for himself. And the Reynas alleged that Academy's conduct constituted gross negligence because it acted with conscious indifference to the decedent's safety. They asserted that Academy's acts and omissions constituted a proximate cause of the shooting death of the decedent, and they sought damages in the amount of $5,000,000.00.

Academy filed a combined no-evidence and matter-of-law summary-judgment motion, asserting that there is no evidence that it had breached any duty or proximately caused the alleged injuries. In regard to the Reynas' claim of negligence per se, Academy asserted that there is no evidence that it violated the applicable statutory requirements governing firearm sales.[3] Lynette, at the time of the sale, completed a United States Department of Justice, Bureau of Alcohol, Tobacco, Firearms and Explosives, Firearms Transaction Record ("Form 4473")[4]

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[2] A "straw sale" is a sale in which a party falsely claims to be the actual buyer, when, in fact, they are purchasing a firearm on behalf of another party. *Abramski v. U.S.*, 134 S. Ct. 2259, 2263 (2014).

[3] *See* 18 U.S.C. §§ 921–31.

[4] *See Abramski*, 134 S. Ct. at 2264.

application, in which she swore to Academy and the federal government that she was the ultimate purchaser of the firearm. She also swore in her deposition that she had purchased the firearm with her own money and for her own use. And there is no evidence that she was untruthful. In regard to the Reynas' common-law negligence claims, Academy asserted that there is no evidence that it knew or should have known that Lynette, at the time of the sale, was purchasing the shotgun on behalf of Villanueva. Further, there is no evidence that Academy could have foreseen that Villanueva would "point the firearm at someone else and pull the trigger."

Academy next argued that it was entitled to judgment as a matter of law on the Reynas' negligence claims because the evidence conclusively establishes that it had no duty to deny the sale to Lynette. Even if the sale were a straw sale, Academy had no duty to recognize it as such based on Villanueva's mere presence at the time of Lynette's purchase. And even had Academy run a background check on Villanueva, it would have revealed nothing that would have prevented the sale because, at the time of the sale, Villanueva was legally eligible to purchase a firearm.[5]

Academy attached to its summary-judgment motion the affidavit of its Director of Compliance, Perry Davis. Davis testified that sales associate David

[5] *See* 18 U.S.C. 922(d); TEX. PENAL CODE ANN. § 46.06 (Vernon 2016).

Abeles, who sold the firearm to Lynette, had previously completed a Firearms Sales Certification program, which included training in the laws applicable to straw sales. Davis explained that prior to selling a firearm, an Academy sales associate is required to obtain a completed Form 4473 from the prospective purchaser and then check the purchaser's background through the National Instant Criminal Background Check System ("NICS"). On November 13, 2012, Lynette, prior to her purchase of a Mossberg Maverick shotgun from Academy, completed a Form 4473. Abeles then checked Lynette's background, receiving a "Proceed" instruction from NICS. Davis noted that Academy is not authorized to run a background check on an individual who is not identified as a purchaser on a Form 4473 and doing so would "subject Academy to federal sanctions, including the potential loss of its ability to use the NICS system."

Academy also attached to its motion the affidavit of sales associate Abeles, who testified that before he sold the firearm to Lynette, he directed her to complete a Form 4473. After verifying that her answers to the questions on the form indicated that she was eligible to purchase a firearm, he ran a background check on her through NICS, receiving a "Proceed" instruction. Abeles explained that he would not have completed the sale had Lynette, or anyone accompanying her, done anything to make him suspect that she was purchasing the firearm on behalf of anyone else or was

lying on any portion of the form. Academy also attached to its motion a copy of the Form 4473 completed by Lynette and NICS's authorization to "Proceed."

Academy further attached to its summary-judgment motion excerpts from Lynette's deposition, and it directed the trial court to her testimony that she had purchased the shotgun for herself. She testified that when she went into the Academy store, she told an associate at the sales counter that she "wanted to get a shotgun" to go to a shooting range, and she pointed out the specific shotgun that she wanted. The sales associate handed it to her to inspect, and Villanueva agreed that it was a good choice. After completing the paperwork, Lynette used her own money to pay approximately $200 for the shotgun. And she noted that had Villanueva wanted a firearm, he could have purchased one for himself.

In their response to Academy's summary-judgment motion, the Reynas argued that Academy acted negligently because it failed to recognize that its sale of a shotgun to Lynette was actually a straw sale for the benefit of Villanueva. They further argued that "any reasonable person would have seen and known that it was a straw sale" because Lynette was a "tiny female" and Villanueva, who accompanied her to make the purchase, was a "gang member." The Reynas, without directing the trial court to any specific facts or testimony, attached to their response a copy of Lynette's completed Form 4473; a photograph of the shotgun and a printout of its specifications; a copy of the trial court's judgment of conviction against Villanueva

for the offense of criminally negligent homicide; copies of Villanueva's juvenile record and passport; the affidavit of Gilbert Reyna, father of the decedent; excerpts from Lynette's deposition; and excerpts of the transcripts from Villanueva's trial, including testimony by Lynette; Villanueva; Patricia Pavon, Villanueva's mother; Lizie Reyna, sister of the decedent; J'Lann Walker, a friend of the decedent; Micheba Smith, a friend of the decedent; and Benjamin Luce, an officer at the scene of the homicide.

In its reply, Academy asserted that if, as a federal firearms licensee ("FFL"), it knew, or reasonably should have known, that Lynette was attempting to perpetrate a straw sale when purchasing the shotgun, then it had a duty to deny the sale. However, there is no evidence that Lynette purchased the shotgun on Villanueva's behalf, or with his money, both of which were required to transform the otherwise legal sale into a straw transaction. Further, even if Lynette had purchased the firearm on Villanueva's behalf, there is no evidence that Academy knew, or should have known, that she was not the true purchaser based solely on her small stature and Villanueva's mere presence during the sale. Academy noted that the Reynas did not point to anything that either Lynette or Villanueva said or did during the sale that should have led Academy to doubt Lynette's veracity. Academy also objected to the majority of the Reynas' summary-judgment evidence on the ground that it constituted unauthenticated testimony and was, thus, inadmissible.

The trial court granted Academy's no-evidence and matter-of-law summary-judgment motion and dismissed the Reynas' claims against it. Subsequently, the trial court, for want of prosecution, dismissed the Reynas' negligence claims against Lynette and Jeremiah Metzgar,[6] resulting in a final judgment in the case.

Standard of Review

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). In conducting our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Valence Operating*, 164 S.W.3d at 661; *Provident Life & Accident Ins*., 128 S.W.3d at 215. If a trial court grants summary judgment without specifying the grounds for granting the motion, we must uphold the trial court's judgment if any of the asserted grounds are meritorious. *Beverick v. Koch Power, Inc*., 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

A party seeking summary judgment may combine in a single motion a request for summary judgment under the no-evidence standard with a request for summary

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[6] Although the Reynas, in their fourth issue in this appeal, challenge the trial court's dismissal for want of prosecution, the details of these claims are not pertinent to this appeal.

judgment as a matter of law. *Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004). When a party has sought summary judgment on both grounds and the trial court's order does not specify its reasons for granting summary judgment, we first review the propriety of the summary judgment under the no-evidence standard. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *see also* TEX. R. CIV. P. 166a(i). If we conclude that the trial court did not err in granting summary judgment under the no-evidence standard, we need not reach the issue of whether the trial court erred in granting summary judgment as a matter of law. *See Ford Motor Co.*, 135 S.W.3d at 600.

To prevail on a no-evidence summary-judgment motion, the movant must establish that there is no evidence to support an essential element of the non-movant's claim on which the non-movant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Hahn v. Love*, 321 S.W.3d 517, 523–24 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The burden then shifts to the non-movant to present evidence raising a genuine issue of material fact as to each of the elements challenged in the motion. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006); *Hahn*, 321 S.W.3d at 524. A no-evidence summary-judgment may not be granted if the non-movant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ridgway*, 135 S.W.3d at 600. More than a scintilla of evidence exists when the evidence "rises

to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997).

In a matter-of-law summary-judgment motion, the movant has the burden to show that no genuine issue of material fact exists and the trial court should grant judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp*., 988 S.W.2d 746, 748 (Tex. 1999). When a defendant moves for a matter-of-law summary judgment, it must either: (1) disprove at least one essential element of the plaintiff's cause of action, or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *See Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Lujan v. Navistar Fin. Corp*., 433 S.W.3d 699, 704 (Tex. App.–Houston [1st Dist.] 2014, no pet.). Once the movant meets its burden, the burden shifts to the non-movant to raise a genuine issue of material fact precluding summary judgment. *See Siegler*, 899 S.W.2d at 197; *Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

Summary Judgment

In their first, second, third, and fifth issues, the Reynas argue that the trial court erred in granting Academy's no-evidence summary-judgment motion on their negligence per se, negligence, and gross negligence claims because they presented more than a scintilla of evidence on each of the challenged elements of each of their claims. *See* TEX. R. APP. P. 166a(i). The Reynas further argue that the trial court erred in granting Academy's matter-of-law summary-judgment motion on each of their negligence claims because Academy did not conclusively establish its right to judgment as a matter of law. *See* TEX. R. APP. P. 166a(c).

Negligence per se[7]

The Reynas assert that Academy did not comply with the statutory requirements for selling a firearm and its failure to comply constituted negligence per se. *See* 18 U.S.C. §§ 921–31. They further assert that, pursuant to title 18, Academy, as a seller of firearms, had a duty to obtain a completed Form 4473 from a purchaser, with a correct and verified identification in Section A before consummating the sale. *See id*. Moreover, Academy "was prohibited from selling the shotgun to [Lynette] because it knew or should have known" that she was buying

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[7] Negligence per se is not "separate and independent from a common-law negligence cause of action," but is "merely one method of proving" negligence. *See Zavala v. Trujillo*, 883 S.W.2d 242, 246 (Tex. App.—El Paso 1994, writ denied); *see also Murray v. O & A Express, Inc*., 630 S.W.2d 633, 636 (Tex. 1982).

the shotgun for Villanueva. Moreover, Academy should have known that Lynette was a "straw purchaser" because she is a "young woman with a petite stature," asked to purchase a "large shotgun," and was accompanied by Villanueva, who selected the shotgun that she purchased. The Reynas note that Academy "made no inquiries at all," including whether Villanueva "intended to possess or use the gun or if he was the true purchaser." And they assert that Academy's breach of its duty was a proximate cause of their damages.

"Negligence per se is a tort concept whereby a legislatively imposed standard of conduct is adopted by the civil courts as defining the conduct of a reasonably prudent person." *Air Prod. & Chems., Inc. v. Odfjell Seachem A/S*, 305 S.W.3d 87, 93–94 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (quoting *Carter v. William Sommerville & Son, Inc*., 584 S.W.2d 274, 278 (Tex. 1979)). In such cases, a factfinder is "not asked to judge whether or not the defendant acted as a reasonably prudent person would have acted under the same or similar circumstances" because "the statute itself states what a reasonably prudent person would have done." *Id.* Rather, the factfinder merely decides whether the tortfeasor committed the act proscribed by the statute and if the act proximately caused injury. *Id.*

The duties pertaining to the sale of a firearm are regulated by the Gun Control Act of 1968, as amended by the Brady Handgun Violence Prevention Act of 1993 ("Brady Act"). *See* 18 U.S.C. §§ 921–31 (including shotguns). "Before a federally

licensed firearms dealer may sell a [firearm], the would-be purchaser must provide certain personal information, show photo identification, and pass a background check." *Abramski v. United States*, 134 S. Ct. 2259, 2262–63 (2014). Pursuant to section 922, "certain classes of people—felons, drug addicts, and the mentally ill, to list a few—may not purchase or possess any firearm." *Id.* at 2263. Section 922(d) "forbids a licensed dealer from selling a gun to anyone it knows, or has reasonable cause to believe, is a prohibited buyer." *Id.* A violation of section 922 "may constitute a basis for a claim of negligence per se." *Peek v. Oshman's Sporting Goods, Inc.*, 768 S.W.2d 841, 843 n.1, 844 (Tex. App.—San Antonio 1989, writ denied) ("Unexcused violation of a statute setting an applicable standard of care constitutes negligence as a matter of law if the statute is designed to prevent an injury to that class of persons to which the injured party belongs.").

Section 922 establishes a detailed scheme to enable a dealer to verify, at the point of sale, whether a potential buyer may lawfully own a gun. *Abramski*, 134 S. Ct. at 2263. Before completing a sale, the dealer must "verif[y] the identity of the transferee by examining a valid identification document" bearing a photograph, procure the buyer's name, age, and place of residence, and submit that information to NICS to determine whether the potential purchaser is for any reason disqualified from owning a firearm. *Id.* (citing 18 U.S.C. §§ 922(b)(5), 922(t)(1)(A)–(C)). The statute further requires that the dealer keep certain records to enable federal

authorities both to enforce the law's verification measures and trace firearms used in crimes. *Id.* A dealer must maintain the buyer's identifying information in its permanent files. *Id.* (citing § 922(b)(5)).

To implement the statutory requirements, the Bureau of Alcohol, Tobacco, Firearms and Explosives developed Form 4473 for gun sales. *Id.* at 2264. The form, to be completed by the buyer, requests her identifying information and asks about the applicability of any of a series of factors disqualifying a person from gun ownership, i.e., felony convictions. *Id.*; *see also* 18 U.S.C. § 922(s)(3). Form 4473, in question 11.a., asks: "Are you the actual transferee/buyer of the firearm(s) listed on this form? Warning: You are not the actual buyer if you are acquiring the firearm(s) on behalf of another person. If you are not the actual buyer, the dealer cannot transfer the firearm(s) to you." *Abramski*, 134 S. Ct. at 2264. The instructions provide:

> For purposes of this form, you are the actual transferee/buyer if you are purchasing the firearm for yourself or otherwise acquiring the firearm for yourself . . . . You are also the actual transferee/buyer if you are legitimately purchasing the firearm as a gift for a third party. ACTUAL TRANSFEREE/BUYER EXAMPLES: Mr. Smith asks Mr. Jones to purchase a firearm for Mr. Smith. Mr. Smith gives Mr. Jones the money for the firearm. Mr. Jones is NOT THE ACTUAL TRANSFEREE/BUYER of the firearm and must answer "NO" to question 11.a.

Id. (quoting Form 4473). The prospective buyer then must sign a certification declaring that her answers are "true, correct and complete" and she "understand[s]

that making any false . . . statement" respecting the transaction is a crime "punishable as a felony under Federal law." *Id.* Further, sections 922(a)(6) and 924(a)(1)(A) criminalize the making of false statements to obtain a firearm. *Id.* Together, these provisions are "designed to ensure that the dealer can rely on the truthfulness of the buyer's disclosures in carrying out its obligations." *Id.*

Here, Academy, in its summary-judgment motion, asserted that it complied with all of the applicable statutory verification duties of a federally licensed firearm dealer and there is no evidence of a statutory violation. *See* 18 U.S.C. § 922; TEX. R. APP. P. 166a(i); *Air Prod. & Chems., Inc.*, 305 S.W.3d at 93–94. Academy also directed the trial court to the specific portions of its summary-judgment evidence supporting its assertions. Academy's sales associate, Abeles, testified that, before he sold the firearm at issue to Lynette, he directed her to complete a Form 4473. Lynette's completed Form 4473 reflects that, in question 11.a., she answered "Yes," indicating that she was the actual buyer of the firearm listed on the form. She also signed the form, certifying the accuracy of her answers. After verifying that Lynette's answers to the questions on the form indicated that she was eligible to purchase a firearm, Academy performed a check of Lynette's background through NICS, receiving a "Proceed" response. *See* 28 C.F.R. § 25.6(c)(iv)(A) ("Proceed" response means "no disqualifying information was found"). Abeles then completed the sale of the shotgun to Lynette.

The Reynas, in their response to Academy's summary-judgment motion, argued that Academy "violate[d] Title 18 of the U.S. Code" because it "made a fake straw sale purchase to a tiny female named [Lynette] when the gun was really for her . . . boyfriend [Villanueva], [who] was with her when they bought [the shotgun]." The Reynas asserted that a genuine issue of material fact exists based on "an affidavit, discovery and documentary evidence, referenced in an appendix . . . , filed with this response and incorporated by such reference for all purposes as if recited verbatim herein. EXHIBITS (1–19)." They did not identify any specific facts within their evidence to establish that Academy committed an act proscribed by section 922. *See* 18 U.S.C. § 922; *Abramski*, 134 S. Ct. at 2262–63; *see also Air Prod. & Chems., Inc.*, 305 S.W.3d at 93–94 (focus on whether tortfeasor committed act proscribed by statute).

"In determining whether a respondent to a no-evidence motion for summary judgment has produced sufficient evidence to raise a genuine issue of material fact, courts are not required to search the record without guidance." *Aleman v. Ben E. Keith Co.*, 227 S.W.3d 304, 309 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *see City of Hous. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677–78 (Tex. 1979) (appellate court not free to search entire record). Simply attaching documents and depositions to a summary-judgment response and referencing them only generally is not sufficient; a party must specifically identify the supporting proof on file that

it seeks to have considered and point out where in the documents the issues set forth in the response are raised. *See Guthrie v. Suiter*, 934 S.W.2d 820, 826 (Tex. App.—Houston [1st Dist.] 1996, no writ); *see also Rogers v. Ricane Enters., Inc*., 772 S.W.2d 76, 81 (Tex. 1989) (general assertions genuine issues of material fact exist inadequate to raise fact issue); *Shelton v. Sargent*, 144 S.W.3d 113, 120 (Tex. App.—Fort Worth 2004, pet. denied) (trial court not required to search file for evidence raising genuine issue of material fact where non-movants did not cite, quote, or otherwise point out testimony relied upon to create fact issue).

Moreover, the Reynas, have, neither in the trial court below nor on appeal, identified any evidence that Academy knew, or from which it should have known, that Lynette, at the time of the sale, was acting as a straw purchaser on behalf of Villanueva. They do not point to evidence of any disqualifying disclosures by Lynette on Form 4473 or any suspicious conduct, by either Lynette or Villanueva, during Academy's sale of the shotgun to Lynette that gave rise to a statutory violation by Academy. The Reynas also do not cite any authority to support their assertion on appeal that a "young woman with a petite stature" attempting to purchase a "large shotgun" is an inherently suspicious circumstance. They merely assert that the evidence demonstrates that Academy had a duty to inquire about the "true purchaser" of the firearm because Lynette was at the firearm sales counter with her "tattooed boyfriend, who [was] dressed like a gangster, and who select[ed] the

gun, hand[ed] it to her, and [told] her to buy [it]." However, the Reynas have not directed the trial court or this Court to any evidence that Villanueva actually selected the shotgun, handed it to Lynette, and told her to buy it, let alone that Academy was aware of any such facts.

In regard to the Reynas' argument that Academy committed a statutory violation because it failed to also run a background check on Villanueva, a federally licensed firearms dealer "may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act" and is "strictly prohibited from initiating a NICS background check for any other purpose." *See* 28 C.F.R. § 25.6(a). Thus, as Davis testified, because Villanueva did not apply to purchase a firearm from Academy, it was prohibited from running a background check on him. *See id*.

We conclude that the Reynas, in their summary-judgment response, did not present more than a scintilla of probative evidence to raise a genuine issue of material fact that Academy committed an act proscribed by statute. *See Air Prod. & Chems., Inc.*, 305 S.W.3d at 93–94. Accordingly, we hold that the trial court did not err in granting Academy summary judgment on the Reynas' claim of negligence per se.

Negligence

The Reynas next argue that Academy had a common-law duty[8] to refrain from selling a firearm to Lynette because she was acting as a straw purchaser for Villanueva. They assert that Academy's breach of its duty was a proximate cause of their damages.

To prevail on a negligence claim, a plaintiff must prove the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. *D. Hous., Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002); *Aleman*, 227 S.W.3d at 310. Whether a duty exists is a question of law for the court to decide from the facts surrounding the occurrence at issue. *E.I. DuPont de Nemours & Co. v. Roye*, 447 S.W.3d 48, 58 (Tex. App.—Houston [14th Dist.] 2014, pet. dism'd).

Academy, in its no-evidence summary-judgment motion, asserted that there is no evidence that it breached any duty related to the sale of the shotgun to Lynette or proximately caused the Reynas' damages. *See* TEX. R. APP. P. 166a(i).

The Reynas, in their summary-judgment response, argued that Academy breached its duty to identify the true purchaser of the firearm at issue because it

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[8] *See Wal-Mart Stores, Inc. v. Tamez*, 960 S.W.2d 125, 130 (Tex. App.—Corpus Christi 1997, pet. denied) ("Our finding that Wal-Mart did not violate 18 U.S.C. § 922(b)(1) does not end our inquiry. Appellees contend that, in addition to its duties under the Federal Gun Control Act, Wal-Mart also had a common-law duty to refrain from selling ammunition intended for handgun use to a buyer who by reason of his youth or inexperience was foreseeably likely to use it in a negligent or careless manner.") The duty of reasonable care required under a given set of facts may be based on common law principles, or the appropriate standard of conduct may be determined by statute. *Id.* at 128 (citing *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985)).

failed to recognize that Lynette, at the time of the sale, was "lying on the details of the sale" and actually purchasing the shotgun on behalf of Villanueva. They asserted that a genuine issue of material fact existed based on "an affidavit, discovery and documentary evidence, referenced in an appendix . . . , filed with this response and incorporated by such reference for all purposes as if recited verbatim herein. EXHIBITS (1–19)." They did not identify any specific facts within their evidence to support their assertions. Again, "[i]n determining whether a respondent to a no-evidence motion for summary judgment has produced sufficient evidence to raise a genuine issue of material fact, courts are not required to search the record without guidance." *Aleman*, 227 S.W.3d at 309; *Blake v. Intco Invs. of Tex., Inc*., 123 S.W.3d 521, 525 (Tex. App.—San Antonio 2003, no pet.) ("An appellant has a duty to show that the record supports [his] contentions.").

On appeal, the Reynas make factual allegations that are more specific than those that they offered to the trial court. *See Lewis v. Family Dollar*, *Inc*., No. 01-10-00472-CV, 2011 WL 346290, at *3 (Tex. App.—Houston [1st Dist.] Feb. 3, 2011, no pet.) (mem. op.). Again, however, they do not cite any authority to support their assertion that the mere facts that a prospective purchaser of a "large" firearm may be young, female, or petite should cause Academy to suspect that a straw sale is taking place. In regard to their assertion that Academy had a duty to request a background check on Villanueva to "verify that this was not a 'straw purchase' for

someone unable to legally obtain a weapon," even were Academy not statutorily prohibited, as discussed above, from obtaining a background check on Villanueva because he did not apply to make a firearm purchase, a background check would not have "verified" whether a straw sale was taking place. The Reynas do not explain how Villanueva's mere presence with Lynette at the Academy store during the sale, or even his having advised Lynette on choosing a firearm, without more, gave rise to any reason for Academy to suspect a straw sale. We note that Abeles testified that had Lynette, or anyone who accompanied her, done anything to make him suspect that she was not being truthful on any portion of the form, she was purchasing the firearm on behalf of someone else, or she, or anyone accompanying her, posed a danger to others, he would not have consummated the sale.

The Reynas also assert that the evidence demonstrates that Lynette did purchase the shotgun on behalf of someone else because Villanueva's mother, Pavon, testified that Lynette purchased the gun for Villanueva. Even taking this evidence as true, the Reynas do not direct us to any evidence that Academy, at the time that it sold the shotgun to Lynette, knew, or should have known this to be true.

Having viewed the evidence attached to the summary-judgment motion and the Reynas' response in the light most favorable to the Reynas, crediting evidence favorable to them if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not, we conclude that they did not present more than

a scintilla of probative evidence to raise a genuine issue of material fact regarding the element of breach of duty in support of their negligence claim against Academy. *See Ridgway*, 135 S.W.3d at 600; *Havner*, 953 S.W.2d at 711. Accordingly, we hold that the trial court did not err in granting Academy summary judgment on the Reynas' negligence claim.

Because the Reynas failed to establish the breach of a legal duty, we do not reach their assertions that the summary-judgment evidence established the existence of genuine issues of material fact regarding proximate cause. *See Van Horn v. Chambers*, 970 S.W.2d 542, 544 (Tex. 1998) (where no duty established, negligent liability need not be addressed).

Gross Negligence

The Reynas' claim for gross negligence is based on their underlying claim for negligence. Because they failed to establish the breach of a legal duty, we do not reach their assertions that the summary-judgment evidence established genuine issues of material fact exist regarding their gross-negligence claim. *See Wortham v. Dow Chem. Co*., 179 S.W.3d 189, 201–02 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (where negligence claim fails, gross-negligence claim also fails because finding of ordinary negligence prerequisite to finding of gross negligence); *Shell Oil Co. v. Humphrey*, 880 S.W.2d 170, 174 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (negligence prerequisite for finding of gross negligence).

We overrule the Reynas' first, second, third, and fifth issues.

Dismissal[9]

In their fourth issue, the Reynas contend that the trial court, after granting Academy summary judgment and dismissing their claims against it, erred in dismissing for want of prosecution the Reynas' suit against the remaining parties.

The record shows that the Reynas, through their five amended petitions, sued various iterations of Yusef Villanueva, Patricia Pavon, Jose F. Villanueva, Academy, David Abeles, Lynette Metzgar, and Jeremiah Metzgar. On December 5, 2013, the trial court dismissed, with prejudice by agreed order, the Reynas' claims against Yusef Villanueva, Patricia Pavon, and Jose F. Villanueva. On September 15, 2014, the trial court signed the instant summary judgment, dismissing the Reynas' claims against Academy. On March 9, 2015, the trial court dismissed, with prejudice, the Reynas' claims against Abeles. And the trial court, in its September 4, 2015 final order, dismissed for want of prosecution[10] the Reynas' claims against

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[9] Although the Reynas, in their notice of appeal, expressly appealed from the trial court's prior partial summary judgment and not its final dismissal, the rules do not require them to list in their notice of appeal every ruling that they may wish to challenge on appeal. *See Vazquez v. Vazquez*, 292 S.W.3d 80, 82–83 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (issues on appeal not limited by "gratuitously listing only some of those issues in . . . notice of appeal").

[10] Because a partial summary judgment that a trial court does not vacate, as here, is made final and appealable upon the signing of a dismissal for want of prosecution, we review the merits of the trial court's grant of summary judgment. *See Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 656 (Tex. 1998).

the parties remaining in the suit, Lynette Metzgar and Jeremiah Metzgar, noting that there had been a settlement.

The Reynas, in their brief, challenge the trial court's September 4, 2015 order on the ground that it erroneously recites that a settlement took place. The Reynas do not, however, provide any argument, substantive analysis, or citations to authority to support their contention. An appellant's brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record. TEX. R. APP. P. 38.1(i). A failure to provide substantive analysis of an issue or cite appropriate authority waives the complaint. *Id.*; *Cervantes-Peterson v. Tex. Dep't of Family & Protective Servs.*, 221 S.W.3d 244, 255 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *see also Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) ("Rule 38 requires [an appellant] to provide us with such discussion of the facts and the authorities relied upon . . . to maintain the point at issue.").

We hold that the Reynas have waived their fourth issue.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Higley, and Massengale.