NUMBER 13-15-00138-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

JOHN HUBBARD, **Appellant,**

v.

JACKSON NATIONAL LIFE INSURANCE COMPANY AND JACKSON NATIONAL LIFE DISTRIBUTORS LLC, **Appellees.**

On appeal from the 105th District Court of Nueces County, Texas.

MEMORANDUM OPINION

Before Justices Rodriguez, Contreras, and Longoria
Memorandum Opinion by Justice Contreras

In this case concerning the alleged fraudulent sale of a life insurance annuity, appellant John Hubbard challenges the trial court's summary judgment dismissing claims he made against appellees Jackson National Life Insurance Company ("JNL") and

Jackson National Life Distributors LLC ("JNL Distributors").[1] We affirm.

I. BACKGROUND

On March 31, 2009, Hubbard purchased a $1 million JNL variable annuity contract[2] from William Erik Byrne. According to Hubbard's live petition, Byrne held himself out to be a licensed insurance and securities broker. Hubbard contends that Byrne represented to him that JNL's variable annuity contracts did not provide guaranteed returns, but that Byrne himself "would make and manage the investments held by any variable annuity contract purchased by Hubbard, which would produce a much greater annual return than 5% on the principal."

Hubbard later discovered that the contract was not earning a greater than 5% return on his investment. Instead, his June 2010 statement from JNL stated that the annuity had decreased in value to $911,081.68. Further, the statement listed CUE Financial Group ("CUE") as the broker and Patrick Douglas Way as Hubbard's representative, though Hubbard had no knowledge of CUE or Way. Hubbard also allegedly learned that Byrne's representations that he was a licensed broker, and that JNL's annuity contracts do not provide guaranteed returns, were false.

Subsequently, on various occasions, Byrne directed trades under the annuity

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[1] JNL is a life insurance and annuity company headquartered in Michigan. JNL Distributors is a subsidiary of JNL that sells annuity contracts to consumers, and is registered as a securities broker. For ease of reference, we will refer to both appellees collectively as "JNL."

[2] A variable annuity is

> a type of annuity contract that allows for the accumulation of capital on a tax-deferred basis. As opposed to a fixed annuity that offers a guaranteed interest rate and a minimum payment at annuitization, variable annuities offer investors the opportunity to generate higher rates of returns by investing in equity and bond subaccounts. If a variable annuity is annuitized for income, the income payments can vary based on the performance of the subaccounts.

Variable Annuity, INVESTOPEDIA, http://www.investopedia.com/terms/v/variableannuity.asp (last visited January 13, 2017).

contract by calling JNL's trading desk and falsely identifying himself as Hubbard.

Hubbard filed suit against Byrne, JNL, CUE, and Foothill Securities, Inc. ("Foothill"),[3] alleging various causes of action. Specifically as to JNL, Hubbard asserted that, under the doctrines of respondeat superior and vicarious liability, JNL is jointly and severally liable for fraud and violations of securities and insurance statutes committed by Byrne and Way. *See* TEX. INS. CODE ANN. §§ 541.051, 541.057 (West, Westlaw through 2015 R.S.); TEX. REV. CIV. STAT. ANN. art. 581-33-1 (West, Westlaw through 2015 R.S.). Hubbard further asserted that JNL was negligent and committed breach of contract. Specifically, he alleged that JNL had a duty under a negligence theory and under the contract "to implement and execute security procedures that were reasonably designed and calculated to avert or reduce the risk of trading in the accounts of its customers by unauthorized persons" but that, "[i]n failing and neglecting to design and/or implement and/or execute adequate security procedures, Hubbard was unreasonably exposed to the risk that an unauthorized person, such as Byrne, could and would direct [JNL] to execute trades on Hubbard's behalf that were not authorized by Hubbard." Hubbard sought actual damages of over $300,000 representing "trading losses" as well as exemplary damages and attorney's fees.

JNL moved for summary judgment on November 21, 2013, arguing in part that it is not vicariously liable for Byrne's conduct because Byrne lacked actual or apparent authority to act on its behalf. The motion alleged that, though all of Hubbard's claims are based on oral representations by Byrne, "Byrne was not authorized to sell JNL products,

[3] The record reflects that, at the time Byrne sold the annuity to Hubbard, Way was acting as CUE's representative, but that he later became a representative of Foothill.

did not have any agreement with JNL, was not an agent of JNL, and was not affiliated with JNL in any manner." The motion also alleged that JNL is not vicariously liable for Way's conduct because his acts were "outside the course and scope of his agency authority." Evidence attached to JNL's motion included excerpts of sworn deposition testimony from Hubbard, Byrne, and Way. The testimony showed that, after meeting with Hubbard, Byrne completed the annuity application and gave it to Hubbard to sign. Hubbard signed it, and Byrne then sent the completed application to Way, who signed it and submitted it to JNL. Way testified that he never met Hubbard, never spoke to Hubbard, and never personally reviewed Hubbard's financials prior to submitting the application.

Hubbard filed a response arguing in part that "[w]hen Way was selling JNL's annuity insurance policies for [CUE], he was acting on behalf of his principal, [CUE], and on behalf of JNL, whether those sales were made directly by Way or by Byrne acting on Way's behalf" and that "[CUE] and JNL are both liable for the consequences of those sales, irrespective of whether [CUE] or JNL knew of the fraud or benefited from it."

After a hearing on the motions, Hubbard filed an amended petition adding a claim under the federal Securities Act of 1933. *See* 15 U.S.C.A. § 77q (West, Westlaw through P.L. 114-254). JNL then filed a second summary judgment motion addressing the newly-raised claim.

The trial court granted both summary judgment motions filed by JNL as well as a summary judgment motion separately filed by CUE and Foothill.[4] Hubbard then filed the

[4] According to the summary judgment order, the trial court had previously rendered an "Agreed Amended Judgment" against Byrne awarding Hubbard $350,000 in damages and reasonable attorney's fees of $75,000. The summary judgment order states that it incorporates the judgment against Byrne and is final for purposes of appeal. Byrne is not a party to this appeal.

instant appeal. In September 2015, after he filed his appellate brief, Hubbard reached a settlement agreement with CUE and Foothill. Therefore, at Hubbard's request, we severed and dismissed his appeal against those parties. *Hubbard v. CUE Fin. Group, Inc.*, No. 13-15-00406-CV, 2015 WL 5626231, at *1 (Tex. App.—Corpus Christi Sept. 17, 2015, no pet.) (mem. op.); *see* TEX. R. APP. P. 42.1(a).

II. DISCUSSION

Hubbard raises five issues on appeal, the first three of which concern only Foothill and are now moot. *See Hubbard*, 2015 WL 5626231, at *1. By his remaining two issues, Hubbard argues that the trial court erred by rendering summary judgment in favor of JNL.

A. Standard of Review

We review summary judgments de novo. *Neely v. Wilson*, 418 S.W.3d 52, 59 (Tex. 2013). In doing so, we view the evidence "in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not." *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009); *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

A party moving for traditional[5] summary judgment has the burden to show that no genuine issue of material fact exists and that the movant is entitled to judgment as a

[5] JNL's motion does not explicitly state that it was brought on traditional grounds, but it cites Texas Rule of Civil Procedure 166a(c), which governs traditional motions for summary judgment. *See* TEX. R. CIV. P. 166a(c). Moreover, the motion neither cites rule of civil procedure 166a(i) nor specifies which elements of Hubbard's causes of action, if any, lack evidentiary support. *Cf.* TEX. R. CIV. P. 166a(i) (stating that a no-evidence motion for summary judgment "must state the elements as to which there is no evidence"). Therefore, we construe the motion as asserting traditional grounds for summary judgment only. *See Richard v. Reynolds Metal Co.*, 108 S.W.3d 908, 911 (Tex. App.—Corpus Christi 2003, no pet.) (noting that, when it is not readily apparent that summary judgment is sought on no-evidence grounds, "the court should presume that it is filed under the traditional summary judgment rule and analyze it according to those well-recognized standards"); *cf. Binur v. Jacobo*, 135 S.W.3d 646, 650–51 (Tex. 2004) (holding that a party may file a combined traditional and no-evidence motion for summary judgment and the fact that evidence

matter of law. TEX. R. APP. P. 166a(c); *Neely*, 418 S.W.3d at 59. The movant meets that standard if, in light of all of the evidence presented, reasonable and fair-minded jurors could not differ in their conclusions. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007).

B. Vicarious Claims

In its summary judgment motion, JNL argued in part that it is entitled to judgment as a matter of law because neither Byrne nor Way were acting as its agents. By his first issue, Hubbard claims that the trial court erred if it granted the summary judgment motion on this basis.

An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority). *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). Absent actual or apparent authority, an agent cannot bind a principal. *Jarvis v. K & E Re One, LLC*, 390 S.W.3d 631, 639 (Tex. App.—Dallas 2012, no pet.).

Actual authority is authority a principal (1) intentionally confers upon on the agent, (2) intentionally allows the agent to believe he possesses, or (3) by want of due care allows the agent to believe he possesses. *Id*. at 639–40. Actual authority is created by the principal's written or spoken words or conduct communicated to the agent. *Id*. at 640.

Apparent authority is based on estoppel, arising "either from a principal knowingly permitting an agent to hold [himself] out as having authority or by a principal's actions which lack such ordinary care as to clothe an agent with the indicia of authority, thus

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is attached to a motion "does not foreclose a party from also asserting that there is no evidence with regard to a particular element").

leading a reasonably prudent person to believe that the agent has the authority [he] purports to exercise." *Gaines*, 235 S.W.3d at 182 (citing *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 948 (Tex. 1998)). The principal's full knowledge of all material facts is essential to establish a claim of apparent authority based on estoppel. *Id*. (citing *Rourke v. Garza*, 530 S.W.2d 794, 803 (Tex. 1975)). In determining whether apparent authority exists, only the conduct of the principal is relevant. *Id*. (citing *NationsBank, N.A. v. Dilling*, 922 S.W.2d 950, 953 (Tex. 1996) (per curiam)). The standard is that of a reasonably prudent person, using diligence and discretion to ascertain the agent's authority. *Id*. at 183 (citing *Chastain v. Cooper & Reed*, 152 Tex. 322, 257 S.W.2d 422, 427 (1953)). Thus, to determine an agent's apparent authority we examine the conduct of the principal and the reasonableness of the third party's assumptions about authority. *Id*. Apparent authority is limited to the scope of responsibility that is apparently authorized. *Id*. at 185 n.3 (citing *First Valley Bank of Los Fresnos v. Martin*, 144 S.W.3d 466, 471 (Tex. 2004); *Tex. Midland R.R. v. Monroe*, 216 S.W. 388, 388 (Tex. 1919) (noting general rule that principal will not be charged with liability to a third person for the acts of the agent outside the scope of his delegated authority)).[6]

The parties agree that, at all relevant times, CUE had actual authority to sell JNL products and Way was acting as a representative of CUE. The question is whether Byrne was acting as JNL's agent when he made the alleged misrepresentations to Hubbard, or

[6] Though Hubbard pleaded the doctrine of respondeat superior, that does not apply with respect to JNL because it is undisputed that neither Byrne nor Way were JNL's employees. *See Graham Land & Cattle Co. v. Indep. Bankers Bank*, 205 S.W.3d 21, 32 (Tex. App.—Corpus Christi 2006, no pet.) ("Under Texas law, employers may be held liable for negligent acts by their employees under a theory of respondeat superior only if the employee's actions are in the course and scope of their employment.").

whether Way was acting as an JNL's agent when and if he authorized Byrne to make such representations.

On appeal, Hubbard contends that "JNL offers no argument or evidence that would show Way cannot use agents to accomplish his agency, i.e., to sell JNL insurance products." On the other hand, JNL asserts that "actual authority is negated because Byrne and Way admit that Byrne did not have authority to sell JNL's products" and "apparent authority is negated because Hubbard never communicated with JNL, and therefore, JNL could not have done anything that would have [led] Hubbard to believe that it had clothed Byrne with authority to act on its behalf."

We agree with JNL. Byrne stated in deposition testimony that he and Way both knew that Byrne could not sell JNL products, including the product sold to Hubbard.[7] Way testified that JNL did not authorize him to delegate Byrne to "discuss" JNL products with potential clients, and that he did not tell JNL that Byrne was "discussing" JNL products with potential clients. He stated that he knew JNL would not have authorized Byrne to do that.[8] The testimony of Byrne and Way established that Byrne did not have actual

[7] The record reflects that, at the time of the sale to Hubbard, Byrne was subject to an Agreed Cease and Desist Order issued by the Texas State Securities Board stating that Byrne had previously violated various provisions of the Texas Securities Act, and generally prohibiting Byrne from acting as a securities dealer or agent, or as an investment advisor.

[8] Way testified as follows:

Q [JNL] never authorized you to have Mr. Byrne out there discussing [JNL] products, did they?

A No.

Q And you didn't ever tell [JNL] that Mr. Byrne was out discussing [JNL] products to potential clients?

A No.

Q And you knew [JNL] wouldn't have authorized Mr. Byrne to do that?

A Yes.

Q Yes, you knew that?

authority to act on behalf of JNL, and Way did not have actual authority from JNL to allow Byrne to sell JNL products. *See Jarvis*, 390 S.W.3d at 639–40.

The evidence further also established that Byrne and Way lacked apparent authority to act on behalf of JNL. Hubbard testified that he knew Byrne was not employed by JNL, but was rather an independent agent that sold products from a variety of insurance companies. Hubbard stated unequivocally that he did not base his investment decision on any written materials or other communications provided by JNL or by anyone who purported to be acting on JNL's behalf.[9] He further appeared to state that he understood at the time that Byrne was not guaranteeing that his management would result in a certain rate of return.[10] This testimony establishes that a reasonably prudent person in Hubbard's position would not have believed that Byrne had JNL's authority to make

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A I mean that is correct.

[9] Hubbard testified as follows:

Q Your entire lawsuit is based upon the alleged misrepresentations that Mr. Byrne told you orally; correct?

A That is correct.

Q It's not based on anything that [JNL] gave you in writing or any statement by any person who purported to be acting on behalf of [JNL] at any time like back at the home office, anything like that?

A That is correct.

[10] Hubbard testified as follows:

Q And [Byrne] persuaded you with his salesmanship that he was going to, through . . . the management of your money do better than the other guaranteed returns that were available?

A That's what I was le[]d to believe.

Q And now, when he's selling to you he didn't ever guarant[ee] he was going to exceed those guaranteed returns. That's what he was promising you he could do with his skills?

Q That's what he indicated to me.

Q Okay. You understood at the time it wasn't a guarant[ee]?

A That I understand.

representations regarding its products. *See NationsBank, N.A.*, 922 S.W.2d at 953 (noting that the defendant "cannot be held vicariously liable for [the putative agent]'s fraud on a theory of apparent authority because it established that it never took any action that would lead a reasonably prudent person to conclude that it had authorized [the putative agent] to make representations" regarding the investment at issue).[11]

For the foregoing reasons, JNL established as a matter of law that it is not vicariously liable for the acts of Byrne and Way as alleged in Hubbard's live petition. In response to JNL's motion and the evidence attached thereto, Hubbard did not produce any evidence that would create a fact issue. *See* TEX. R. CIV. P. 166a(c). Summary judgment was therefore proper on Hubbard's claims of vicarious liability, including the fraud and statutory claims.[12] We overrule Hubbard's first issue.

C. Direct Claims

Hubbard also made separate claims against JNL that were not based on vicarious liability. Specifically, he alleged in his live petition that JNL was directly negligent and breached the annuity contract by "failing to design and/or implement and/or execute adequate security procedures," resulting in Hubbard being "unreasonably exposed to the

[11] Hubbard additionally contends on appeal that JNL is not entitled to summary judgment because "equity acts where benefits are retained"—that is, he argues that JNL essentially ratified Byrne's and Way's actions by "retaining whatever benefit flows from having sold Hubbard a million-dollar annuity." *See Land Title Co. of Dallas, Inc. v. F. M. Stigler, Inc.*, 609 S.W.2d 754, 756 (Tex. 1980) ("Ratification may occur when a principal, though he had no knowledge originally of the unauthorized act of his agent, retains the benefits of the transaction after acquiring full knowledge."). However, Hubbard did not make this argument in his written response to the summary judgment motion. Accordingly, it is waived. *See* TEX. R. CIV. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.").

[12] Hubbard claims on appeal that JNL's summary judgment motion failed to specifically address the claims he made under section 541.051 of the insurance code. However, the motion alleged generally that Hubbard's vicarious liability claims fail because of the lack of an agency relationship, and the section 541.051 claim was based solely on vicarious liability. Accordingly, summary judgment on that claim was supported by the motion.

risk that an unauthorized person, such as Byrne, could and would direct [JNL] to execute trades on Hubbard's behalf that were not authorized by Hubbard." Hubbard addresses these claims by part of his second issue.[13]

We find that summary judgment was also proper on the direct claims. As noted, in deposition testimony attached to JNL's summary judgment motion, Hubbard testified repeatedly that his lawsuit is entirely based on the alleged oral misrepresentations made by Byrne. In response to the summary judgment motion, Hubbard did not produce any evidence disputing this. *See* TEX. R. CIV. P. 166a(c). Hubbard therefore has waived or abandoned any claims related to allegedly unauthorized trades made by Byrne, including the direct claims against JNL.[14] We overrule Hubbard's second issue.

III. CONCLUSION

The trial court's judgment is affirmed.

DORI CONTRERAS
Justice

Delivered and filed the
23rd day of February, 2017.

[13] The remainder of Hubbard's second issue provides various reasons other than the existence of an agency relationship for why summary judgment was improper on the vicarious liability claims. We need not address these arguments because of our conclusion with respect to Hubbard's first issue. *See* TEX. R. APP. P. 47.1.

[14] JNL argues on appeal that it did not breach any duty because "[t]he undisputed evidence established that JNL . . . required the last four digits of Hubbard's social security number, address, and policy number" before allowing the trades. However, the record contains no such evidence.