NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0376

RONALD BRANSTETTER

VERSUS

ADAM C. RIVES, TRAVIS J. BEAL, MILLENIUM AUTOMOTIVE GROUP D/B/A MILLENIUM AUTO SALES, FORD MOTOR COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, PROGRESSIVE SECURITY INSURANCE COMPANY, ABC INSURANCE COMPANY, DEF INSURANCE COMPANY AND GHI INSURANCE COMPANY

Judgment rendered DEC 14 2016

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C569246

The Honorable Todd Hernandez, Judge Presiding

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

HOLDRIDGE, J.

Plaintiff-appellant, Ronald Branstetter, appeals a summary judgment granted in favor of defendant-appellee, Millenium Automotive Group, LLC d/b/a Millenium Auto Sales ("Millenium"), that dismissed plaintiff's claims against Millenium with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiff filed suit against Millenium seeking damages for personal injuries he sustained on Airline Highway in Baton Rouge on October 27, 2007, while riding his motorcycle. According to the petition, the accident occurred when defendant, Travis J. Beal, was test-driving a 1988 Ford Bronco for possible purchase with another defendant, Adam Rives, a guest passenger. The petition states that Rives put the transmission into "four-wheel drive 'on the fly,'" causing Beal to lose control of the Bronco and forcing three motorcyclists, including plaintiff, off the highway to avoid a collision. Plaintiff alleged that the accident was caused by the negligence of defendants Beal and Rives. He also alleged that, at the time of the accident, Millenium (a used car dealer) owned the Bronco and that Rives was employed by Millenium and was acting in the course and scope of his employment, thereby giving rise to the vicarious liability of Millenium for Rives' negligence.[1]

Millenium filed a motion for summary judgment seeking dismissal of all claims against it with prejudice. In support of its motion, Millenium attached the plaintiff's petition and excerpts from Rives' deposition. Rives testified that he owned the Bronco at the time of the accident and was riding as a passenger with

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[1] Also named as defendants were Ford Motor Company, manufacturer of the Bronco; Liberty Mutual Insurance Company, Rives' insurer; Progressive Security Insurance Company, plaintiff's uninsured/underinsured motorist insurer; and State Farm Mutual Automobile Insurance Company, Beal's insurer. Gemini Insurance Company, Millenium's insurer, also intervened in the suit. These parties and defendant Beal have been dismissed from the suit through settlements and summary judgments. The only remaining defendants are Rives and Millenium.

someone who was test-driving the vehicle. Rives did not transfer ownership of the Bronco to Millenium, and he had no ownership interest in Millenium. According to Rives' deposition testimony, there was no written agreement with Millenium as to commission for the vehicle's sale. Moreover, Rives did not sign a consignment agreement with anyone at Millenium stating that Millennium would sell the Bronco for him and receive payment. He testified that he was not an employee of Millennium on the date of the accident and he did not list Millennium as an employer on his work history for another job.

In opposition to the motion for summary judgment, plaintiff submitted additional excerpts from Rives' deposition. Rives testified that Eric Anders, the owner of Millenium, had worked for his father for many years and also employed his brother as a salesperson for four years. In September or October of 2007, he asked Anders if he could put the Bronco on Millenium's lot, which was in a busy area. Rives had modified the Bronco and thought it would sell better if prospective purchasers could see it as opposed to simply reading a newspaper ad. According to Rives, this was the first time he stored a vehicle at Millenium. Rives wanted Anders to sell the Bronco for him at whatever price Anders could get. When asked how much Rives would give Anders for the Bronco's sale, Rives replied, "There was never anything set in stone that we had talked about. Generally like 10 percent of whatever he sold it for...." However, after further questioning he stated, "But it was just kind of a general understanding with these kind of situations that that's the ballpark, I guess." His understanding was that if someone had an interest in the Bronco, that person could test-drive the vehicle with a Millenium salesperson. Rives said that on one occasion Anders drove the Bronco to get gas so some customers could test-drive it.

On the day of the accident, Rives was dropping off flyers at Millenium explaining the modifications to the Bronco. Anders had called Rives because he did not know the details about the modifications to be able to inform prospective customers. The Bronco had been on Millenium's lot for a couple of weeks and some people had stopped to see the vehicle. Beal called Rives to ask about the Bronco and Rives told Beal to come to the lot so he could show him the vehicle. Rives was not sure if Anders had the title to the Bronco or if it was at Rives' home. When asked what his understanding of "consignment" was, Rives stated, "[M]y understanding of the term would be, a paper trail that says--that you've signed saying that, you know, you're going to have--I guess it's documentation, to me, would be a consignment deal, you know, which, of course, is not the case."

Millenium filed a reply memorandum to which it attached additional excerpts from Rives' deposition; those excerpts were some of the same excerpts plaintiff attached to his opposition memorandum discussed above.

Following a hearing, the trial court granted Millenium's motion for summary judgment and dismissed plaintiff's claims against it with prejudice.[2] The judgment states that Rives was not an employee of Millenium at the time of the accident; therefore, Millenium cannot be vicariously liable for his negligence, if any. The judgment also states that Millenium did not own the vehicle being test-driven. Plaintiff devolutively appealed the judgment, arguing that the trial court erred in determining that Rives was not an employee of Millenium for which it was vicariously liable and in determining that Millenium did not own the vehicle.

[2] The trial court designated the summary judgment as final for purposes of immediate appeal in accordance with La. C.C.P. art. 1915(B)(1). However, we observe that the judgment appealed is a final judgment in its own right pursuant to La. C.C.P. art. 1915(A)(1).

STANDARD OF REVIEW

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. A summary judgment is appealed de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, *i.e.,* whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. Samaha v. Rau, 2007-1726 (La. 2/26/08), 977 So.2d 880, 882-83; see Adams v. Arceneaux, 2000-1440 (La. App. 1 Cir. 6/22/01), 809 So.2d 190, 193-94.

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, admitted for purposes of the summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).[3] On a motion for summary judgment, the burden of proof is on the mover. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be negated. Cason v. Saniford, 2013-1825 (La. App. 1 Cir. 6/6/14), 148 So.3d 8, 11, writ denied, 2014-1431 (La. 10/24/14), 151 So.3d 602. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Id. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary

[3] The motion for summary judgment was filed on May 19, 2015 and the judgment was signed on November 18, 2015. Louisiana Code of Civil Procedure article 966 was amended by 2015 La. Acts 422, § 1; however, the new version of article 966 does not apply to this case as the amendment did not become effective until January 1, 2016. Accordingly, we apply the prior version of Article 966 to the instant matter.

burden of proof at trial. Id. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. C.C.P. art. 966(C)(2); Cason, 148 So.3d at 11.

DISCUSSION

Plaintiff alleged in his petition that, at the time of the accident, Millenium owned the Bronco and that Rives was employed by Millennium and was acting in the course and scope of his employment, thereby giving rise to the vicarious liability of Millenium for Rives' negligence. Ordinarily, an owner of a vehicle is not personally liable for damages which occur while another is operating the vehicle, and exceptions to this occur only when the driver is on a mission for the owner of the vehicle, when the driver is an agent or employee of the owner, or when the owner is negligent in entrusting the vehicle to an incompetent driver. Stokes v. Stewart, 99-0878 (La. App. 1 Cir. 12/22/00), 774 So.2d 1215, 1218. See also Toups v. Dantin, 2014-1754 (La. App. 1 Cir. 8/3/15), 181 So.3d 33, 37, rev'd on other grounds, 2015-1635 (La. 11/6/15), 182 So.3d 36.

Vicarious Liability

In his first assignment of error, plaintiff contends that the trial court erred in finding that Rives was not an employee of Millenium. Plaintiff claims that there are genuine issues of material fact as to whether Rives was an employee of Millenium.

Vicarious liability in Louisiana is based on La. C.C. art. 2320, which states, in pertinent part, "Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed." Under this article, liability extends only to the employee's tortious conduct that is within the course and scope of the employment. See Whetstone v. Dixon, 616 So.2d 764, 770 (La. App. 1 Cir.), writs denied, 623

So.2d 1333 (La. 1993). A servant is one employed to perform services in the affairs of another and who is subject to the other's control or right of control with respect to the physical conduct in the performance of the services. Cason, 148 So.3d at 11; Whetstone, 616 So.2d at 770. In contrast, a non-servant agent contributes to the master's business, but is not such a part of his master's business that his physical acts and the time to be devoted to the business are subject to control. Cason, 148 So.3d at 11-12; Whetstone, 616 So.2d at 770. Factors to be considered in determining whether a master-servant relationship exists include compensation, status within the organization, performance of a specific mission, intensity of the relationship, control, the role of the organization in conferring authority and exercising control, and direct benefit to the association. Cason, 148 So. 3d at 12; Whetstone, 616 So.2d at 770.

After examining the factual allegations concerning plaintiff's claims and considering the factors set forth in Cason and Whetstone, Millenium demonstrated an absence of support for the existence of a master-servant relationship. Rives' deposition testimony was that he was not an employee of Millenium, and the excerpts plaintiff submitted did not show that he would be able to satisfy his evidentiary burden of showing a master-servant relationship at trial. Those deposition excerpts did not show that Millenium had any right to control Rives or that Millenium paid Rives for any services. Instead, the excerpts showed that Rives intended to pay Millenium an amount for allowing him to show the Bronco on Millenium's lot. After our de novo review of the record, we agree with the trial court that plaintiff failed to produce factual support sufficient to establish that Rives was Millenium's employee. Therefore, there is no genuine issue of fact as to Millenium's lack of vicarious liability for plaintiff's claims based on an employer-employee relationship.

Mandate or agency

In his first assignment of error, plaintiff alternatively contends that Millenium is liable for plaintiff's injuries caused by the acts of its alleged agent, Rives, acting within the scope of his authority, express or apparent.[4] Plaintiff relies on La. C.C. art. 2989, which states, "A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal." Plaintiff asserts that agency is a contract between the principal and the agent created either expressly or by implication, relying on AAA Tire & Export, Inc. v. Big Chief Truck Lines, Inc., 385 So.2d 426, 429 (La. App. 1 Cir. 1980). Plaintiff additionally avers that a mandatary's power or authority is composed of his actual authority, express or implied, together with the apparent authority that the principal has vested in him by his conduct, citing Boulos v. Morrison, 503 So.2d 1, 3 (La. 1987). According to plaintiff, Rives could bind Millenium under the doctrine of apparent authority. Plaintiff relies upon Tedesco v. Gentry Development, Inc., 540 So.2d 960, 963 (La. 1989), wherein the supreme court explained:

> Apparent authority is a doctrine by which an agent is empowered to bind his principal in a transaction with a third person when the principal made a manifestation to the third person, or to the community of which the third person is a member, that the agent is authorized to engage in the particular transaction, although the principal has not actually delegated this authority to the agent.

Plaintiff also relies on La. C.C. art. 3021, which states, "One who causes a third person to believe that another person is his mandatary is bound to the third person who in good faith contracts with the putative mandatary."

A principal is not liable for the torts of a non-servant mandatary. Joseph v. Dickerson, 99-1046 (La. 1/19/00), 754 So. 2d 912, 917; Rowell v. Carter Mobile

[4] We note that plaintiff did not plead this theory of liability in his petition, but Millenium did not object when plaintiff raised in it his opposition to the summary judgment motion.

Homes, Inc., 500 So.2d 748, 751 (La. 1987); Blanchard v. Ogima, 253 La. 34, 215 So.2d 902, 906 (1968); Brumfield v. Gafford, 99-1712 (La. App. 1 Cir. 9/22/00), 768 So.2d 223, 227. However, in Independent Fire Ins. Co. v. Able Moving & Storage Co., Inc., 94-1892 (La. 2/20/95), 650 So.2d 750, 752,[5] the court held that the general rule stated in Rowell does not apply when third parties act to their detriment on the basis of an agent's apparent authority. The court explained that when a principal clothes another with the apparent authority to act for it, the principal is liable for the delictual acts of that other where the victim has relied to his detriment on that apparent authority. Id. A person must have changed his position because of his belief as to the responsible party. Id. The burden of proving apparent authority is on the party relying on the mandate. Boulos, 503 So.2d at 3.

In this case, assuming for the purposes of this appeal that apparent authority applies,[6] plaintiff presented no evidence to establish that he or the community of which he was a member (the public) relied on any representations to their detriment that Rives was Millenium's agent. Plaintiff has not demonstrated that the court erred in finding that he could not satisfy his evidentiary burden of proof

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[5] In Able, 650 So.2d at 751, the plaintiff was lead to believe through an advertisement designed and purchased by a national moving company, along with several other representations, that when she called a certain phone number she would be hiring the national moving company and not a local moving company. Based on these beliefs, she hired the movers. Id. When the local moving company negligently started a fire in her home and denied it was the cause, the national moving company was liable because it affirmatively created the misimpression that plaintiff was dealing with it. Id. at 753.

[6] We note the Third Circuit's comment in Holloway v. Shelter Mut. Ins. Co., 2003-896 (La. App. 3 Cir. 12/10/03), 861 So.2d 763, 769-70, writ denied, 2004-0087 (La. 3/19/04), 869 So.2d 854, that the concept of agency as discussed in Independent Fire predates the 1997 revision to Title XV concerning mandate in the Civil Code. Comment (a) to La. C.C. art. 2986 states that the common law term "agency" was not used in the revision to prevent confusion with the common-law institution of agency. See J-W Power Co. v. State ex rel. Dept. of Revenue & Taxation, 2010-1598 (La. 3/15/11), 59 So.3d 1234, 1241 n.10.

at trial regarding Rives' alleged vicarious liability as a Millenium employee or its agent. Therefore, plaintiff's first assignment of error has no merit.

Ownership

In his second assignment of error, plaintiff contends that the trial court erred in ruling that Millenium did not own the Bronco. Plaintiff argues that Millenium owned the vehicle through a consignment agreement. Citing C.V. Hill & Co. v. Interstate Elec. Co. of Shreveport, 196 So. 396, 399 (La. App. 2 Cir. 1940), he asserts that under "consignment for sale," title to the goods remains in the consignor, but whether the consignee is considered a buyer or agent depends on the intention of the parties and the real nature of the transaction, rather than the language the parties used. Plaintiff specifically relies on the following language:

> Where the transaction is such that the consignee acquires complete dominion over the goods with the right to sell them on such terms and conditions as he may see fit, and is bound to pay consignor a stipulated price therefor, it amounts to a 'sale and delivery' which passes the title to the consignee. . . .

Id., quoting Corpus Juris Secundum, Volume 55, Sections 592, 593.

Millenium responds by stating that plaintiff's consignment argument ignores the facts and Louisiana law regarding transfer of ownership. The sale of a motor vehicle is governed by Civil Code articles on the sale of movables. Biggs v. Prewitt, 95-0315 (La. App. 1 Cir. 10/6/95), 669 So.2d 441, 443, writ denied, 96-1035 (La. 5/31/96), 674 So.2d 264. The transfer of ownership of property takes place as soon as there is agreement on the thing and the price, even though the thing is not delivered or the price paid. La. C.C. art. 2456.

Assuming solely for the purposes of this assignment of error that the consignment law plaintiff relies on is applicable in this case, plaintiff failed to show that he could meet his burden of proving that Rives and Millenium had a consignment agreement. Plaintiff did not demonstrate that Millenium had

complete control over the Bronco and that Rives was bound to pay Millenium a stipulated price. Rives' testimony was equivocal as to how much Millenium would be compensated when the vehicle was sold. At the time of the accident, Rives was in possession of the title of the vehicle, held himself out as owner of the vehicle, and had failed to enter into any verbal or written agreement of consignment with Millenium. Neither through the law of assignment nor the sale of movables had the title of Rives' vehicle transferred to Millenium. Plaintiff's second assignment of error has no merit.

CONCLUSION

Accordingly, since the record demonstrates that there are no genuine issues of material fact and that Millenium is entitled to judgment as a matter of law, the summary judgment was properly granted. Therefore, we affirm the November 18, 2015 judgment of the trial court. All costs of this appeal are to be borne by plaintiff-appellant, Ronald Branstetter.

AFFIRMED.