

AFFIRMED; Opinion Filed July 18, 2016.



**In The
Court of Appeals
Fifth District of Texas at Dallas**

No. 05-15-00129-CV

**MARY FRANCES HUGHES, INDIVIDUALLY AND ON BEHALF OF HUGHES
FAMILY FUNERAL HOME, INC., AND CROWN HILL MEMORIAL PARK AND
MAUSOLEUM, INC., Appellant**

V.

**RHONDA HUGHES MONTEE, JAMES MONTEE, HUGHES FAMILY FUNERAL
HOME, INC., AND CROWN HILL MEMORIAL PARK AND MAUSOLEUM, INC.,
Appellees**

**On Appeal from the 160th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-12-02620**

MEMORANDUM OPINION

Before Justices Evans, Schenck, and Richter¹
Opinion by Justice Richter

Appellant Mary Francis Hughes, individually and on behalf of Hughes Family Funeral Home, Inc. (HFFH) and Crown Hill Memorial Park and Mausoleum, Inc. (Crown Hill) challenges the trial court's order granting summary judgment in favor of appellees Rhonda Hughes Montee, James Montee, HFFH, and Crown Hill. In three issues, Hughes challenges the order dismissing her individual claims for fraud and violations of the Texas Theft Liability Act, and her derivative claim for breach of fiduciary duty. We affirm the trial court's order.

¹ The Hon. Martin Richter, Justice, Court of Appeals, Fifth District of Texas at Dallas, Retired, sitting by assignment.

Background

The Hughes family owned and operated funeral homes and related businesses in the Dallas area for many years. Ronald Hughes, Sr. operated the business until he resigned in the mid-1990s. His wife, appellant Mary Frances Hughes (Hughes) had never participated in running the family business, so it was sold, and the real property was leased to a large funeral-home chain, Loewen Corporation. In 1995, on her husband's advice, Hughes gave a general power of attorney to the couple's daughter, Rhonda Hughes Montee (Rhonda). From that point forward, Rhonda—with help from her husband, James Montee (James)—oversaw Hughes's interests. In 2003, Rhonda re-acquired the family's assets from Loewen and received a payment from Loewen for \$2,236,000. Rhonda and James then formed HFFH and Crown Royal; Hughes was the sole shareholder. The Montees managed the business until 2011.

This lawsuit is based on Hughes's claims that Rhonda and Jim misused her power of attorney, harming both Hughes and the family corporations through their conduct. Hughes alleged, among other transgressions, that the Montees:

- approached her in 2009 and told her she needed to sign a document or she “would lose her companies to the government;” the document turned out to be a transfer to the Montees of sixty percent of Hughes's stock in the family corporations;
- converted a \$1 million note payable to Hughes to equity in HFFH, claiming the accounting change was required by the Texas Banking Commission;
- failed to disclose they had re-acquired the family's assets from Loewen in 2003, and received the payment from Loewen for \$2,236,000; the payment was made to Hughes, but the Montees kept the money in an account held solely in their names;
- controlled all of Hughes's finances, paying her an allowance of only \$500 a week;
- misappropriated Hughes's or the corporations' funds for their own use: paying for children's cars and college, building a “massive home,” making repairs, and buying personal furniture; and
- failed to pay taxes for a number of years, forcing Hughes to sell off a parcel of real property to pay the Internal Revenue Service.

In 2011, Hughes revoked her power of attorney. Shortly afterward, according to Hughes, the Montees began to shut down the family businesses. Hughes sued the Montees, HFFH, and Crown Hill, on her own behalf and derivatively, as a shareholder of the corporations. She pleaded individual claims for breach of fiduciary duty against Rhonda based on the power of attorney, violation of the Texas Theft Liability Act by Rhonda, and common law fraud (including fraud in the inducement as to the stock transfer) by Rhonda and James. She pleaded derivative claims for minority shareholder oppression and breach of fiduciary duty against Rhonda and James. Hughes sought damages, including punitive damages, an equitable forfeiture, an accounting, and a constructive trust.

Appellees filed a no-evidence motion for summary judgment (the Motion), challenging elements of each of Hughes's claims. Hughes filed a response to the Motion (the Response), which included her own affidavit and its attachments.² The trial court ultimately granted the Motion on all grounds except the individual (as opposed to the derivative) breach of fiduciary duty claim.

The individual breach of fiduciary duty claim proceeded to trial. The jury found liability but zero damages. The trial court signed a take nothing judgment to that effect. Hughes has not appealed the judgment on that claim and has not brought forward a reporter's record from the trial.

Hughes does appeal the trial court's order granting summary judgment on three of her claims: fraud, theft, and breach of fiduciary duty to the corporations.³

² Hughes filed a "supplemental" response simultaneously with the Response, attaching portions of Rhonda's testimony from an earlier temporary injunction hearing. However, Hughes makes no reference to the testimony in her Response or in her brief in this Court.

³ Hughes's brief does not challenge in any way the trial court's dismissal of her claim for minority shareholder oppression. We note that the supreme court has declined to recognize a common law claim for minority shareholder oppression in closely held corporations. See *Ritchie v. Rupe*, 443 S.W.3d 856, 888 (Tex. 2014) ("[W]e cannot adopt a common-law rule that requires directors to act in the best interests of each individual shareholder at the expense of the corporation.").

The No-Evidence Summary Judgment Motion

We apply well-known standards in our review of a no-evidence summary judgment motion. *See Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). We employ the same legal sufficiency standard used to review a directed verdict. *Id.* at 310; *see also* TEX. R. CIV. P. 166a(i). To defeat a no-evidence summary judgment, the nonmovant is required to produce evidence that raises a genuine issue of material fact on each challenged element of its claim. *Gish*, 286 S.W.3d at 310; *see also* TEX. R. CIV. P. 166a(i). We consider the evidence in the light most favorable to the nonmovant. *Smith v. O'Donnell*, 288 S.W.3d 417, 424 (Tex. 2009). If the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact, a no-evidence summary judgment must fail. *Id.* Within these standards, we review the summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010).

Summary Judgment Evidence

Hughes's Response to the Motion was supported by her affidavit and attachments, which included the power of attorney and a number of documents produced by appellees during discovery. Appellees objected to the affidavit on a number of grounds, contending: the affidavit as a whole was not based on personal knowledge; Hughes was not competent to testify to the matters related in the affidavit; Hughes failed to attach documents referenced in the affidavit; Hughes failed to identify the documents attached in response to appropriate discovery requests; the affidavit failed to meet the standards set for an interested witness by rule 166a of the rules of civil procedure; the affidavit includes some twenty-six conclusory statements that lack factual and documentary support; and the affidavit contains three statements that constitute hearsay. It is undisputed that appellees failed to obtain rulings on their objections. That failure has led to disputes on appeal as to which of the objections were waived (i.e., objections as to form) and

which, if any, survived for consideration on appeal (i.e., objections as to substance). *See, e.g., Hydrosience Techs., Inc. v. Hydrosience, Inc.*, 401 S.W.3d 783, 793 (Tex. App.—Dallas 2013, pet. denied) (“Formal defects may be waived by failure to object, and if waived, the evidence is considered. . . . Substantive defects are never waived because the evidence is incompetent and cannot be considered under any circumstances.”). Especially with reference to objections citing lack of personal knowledge, we have acknowledged that such distinctions are not always immediately apparent:

Whether a complaint about lack of personal knowledge is a defect of form or substance is not as clear. *Compare S & I Mgmt., Inc. v. Choi*, 331 S.W.3d 849, 855 (Tex. App.—Dallas 2011, no pet.) (concluding such a complaint concerns a defect in form) with *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 375 (Tex. App.—Dallas 2011, no pet.) (concluding such a complaint is a defect in substance).

McKinney Ave. Props. No. 2, Ltd. v. Branch Bank & Trust Co., No. 05-14-00206-CV, 2015 WL 3549877, at *8 (Tex. App.—Dallas June 5, 2015, no pet.).

However, in this appeal, we need not parse form-versus-substance arguments. Indeed, we need not rule on any evidentiary objections. Even if we assume for purposes of this appeal that all of appellees’ objections were either overruled or waived—that is, if we treat all of Hughes’s affidavit testimony and exhibits as admissible summary judgment evidence—we would conclude Hughes has failed to produce evidence sufficient to raise a material issue of fact on at least one of the identified elements of each claim challenged by appellants.

Individual Claim for Fraud

In her first issue, Hughes challenges the trial court’s summary judgment on her claim for fraud. The Motion alleged Hughes could produce no evidence of “when [Rhonda and James] made the [false] representation, that [Rhonda and James] knew it was false or made it recklessly, as a positive assertion, and without knowledge of its truth; and, the representation caused [Hughes] injury.” Hughes’s Response identified two instances during which the Montees

purportedly defrauded her. Our focus is upon the challenged element of injury to Hughes caused by an alleged misrepresentation.

The first purportedly fraudulent transaction was the Montees' purchase of sixty percent of Hughes's stock for \$6000 after representing to Hughes that she would lose the businesses to the federal government if she did not sell the shares on those terms. Hughes's live pleading alleged that the stock sale caused her to be "damaged in the amount of the loss in value of her shares of stock as well as the other benefits of corporate ownership." But Hughes's summary judgment evidence does not establish any actual value for the shares of her stock at the time of the sale or at any other time. Her Response alleged that \$6000 was "a ridiculously small sum to pay for two corporations," but she offers no evidence of the value of the corporations. And as to her purported loss of "the other benefits of corporate ownership," again, the summary judgment record is devoid of evidence of the nature—let alone the value—of any such benefits.

The second purportedly fraudulent transaction was the accounting conversion of a \$1 million note payable to Hughes to corporate equity. The Response contends this change "caused [Hughes] to lose the right to collect \$1 million." However, Hughes has offered no summary judgment evidence that she had the right to collect a million dollars from the corporation. She has not produced a promissory note or other instrument evidencing such a right. Nor has she produced any records showing that the economic result of the corporation's increased capital was worth less to her personally than the note payable had been worth.

We conclude Hughes failed to satisfy her burden to come forward with summary judgment evidence proving the Montees' purportedly false statements caused her injury. *See Burt v. Harwell*, 369 S.W.3d 623, 625 (Tex. App.—Dallas 2012, no pet.) (non-movant's failure to point out any evidence supporting claim is sufficient on its own to support trial court's

granting of no-evidence motion). The trial court did not err by granting summary judgment in favor of the Montees on Hughes's claim for fraud. We overrule Hughes's first issue.

Individual Claim for Violations of the Texas Theft Liability Act

In her second issue, Hughes challenges the trial court's summary judgment on her claim for violations of the Texas Theft Liability Act (the Act). The Motion asserted Hughes had no evidence that "[Rhonda] unlawfully appropriated, secured, or stole [Hughes's] property or services; the unlawful taking was made with intent to deprive [Hughes] of the property; [or Hughes] sustained damages as a result of theft." Hughes's Response identified six separate transactions in which Rhonda purportedly committed theft of Hughes's property. On appeal, Hughes relies on four of the six transactions to establish that she brought forward sufficient evidence of theft to survive summary judgment. The Act defines "theft" to mean "unlawfully appropriating property or unlawfully obtaining services" as described by the penal code. TEX. CIV. PRAC. & REM. CODE ANN. § 134.002(1) (West Supp. 2015). Our focus on this claim is on the challenged element of an unlawful appropriation.

Hughes's first allegation of theft involves the purchase of sixty percent of her stock for \$6000, which we discussed above. But the undisputed evidence is that Hughes voluntarily signed an agreement, selling the shares to the Montees for that amount. A voluntary transfer cannot be theft under the Act. *See Beardmore v. Jacobsen*, 131 F. Supp. 3d 656, 669 (S.D. Tex. 2015) ("pitch deck" voluntarily transferred by way of an email was not taken without consent so Act did not apply). Hughes's second allegation of theft involves the accounting reclassification of her note payable, which we also discussed above. Here, Hughes's own summary judgment

testimony concedes the reclassification was approved by the corporation's Board of Directors. Such an approval negates any unlawful appropriation by Rhonda.⁴

Hughes's third allegation of theft complains of Rhonda's personal receipt of a series of checks made out to Rhonda for rent on properties owned by Hughes. Copies of the front of the checks are attached to Hughes's affidavit as Exhibit 5. They do establish that Rhonda was accepting rent payments in her own name. However, the power of attorney expressly gave Rhonda the power "[t]o . . . collect, receive and hold and possess . . . checks . . . which now are or hereafter shall be or become due, owing, payable or belonging to [Hughes]." And although the exhibit does not establish where Rhonda subsequently deposited the checks, the power of attorney expressly allowed her "[t]o deposit any monies which may come to [Rhonda under the power of attorney] with any bank or banker or other person either in [Hughes's] or [Rhonda's] own name." We conclude Rhonda was authorized to collect the rents on Hughes's behalf and to deposit the checks for Hughes. *See Wilcots v. Wiggins*, 306 S.W.3d 947, 951 (Tex. App.—Dallas 2010, no pet.) (holder of power of attorney was authorized to negotiate funds on behalf of principal so bank not liable for holder's withdrawal of funds). Accordingly, Rhonda's collection and deposit of the checks as not an unlawful appropriation of Hughes's property.⁵

Finally, Hughes alleges theft under the Act by referencing a receipt for furniture purchased by Rhonda in 2005. Hughes's Response, her affidavit, and her brief in this Court all make the same averment:

Rhonda paid for furniture from Weirs Furniture which went to her home as none of the furniture matches [sic] this description is at Hughes Family Furniture Homes, Inc. or Crown Hill.

⁴ Our opinion is limited to the lawfulness of the transfers in these two transactions. To the extent Hughes complained the circumstances of the transfers violated Rhonda's fiduciary obligations to Hughes, those complaints were decided below by the jury, and Hughes has not complained of the jury's verdict in this Court.

⁵ Again, if Rhonda's collection or deposit of the funds somehow violated her fiduciary duties to Hughes, that conduct was relevant to the breach of fiduciary duty claim tried by the jury. The power of attorney gave her the right to collect the rents and deposit the funds under Hughes's or her own name.

Again, Hughes's power of attorney gave Rhonda broad powers, including the power "[t]o . . . purchase . . . any real or personal property whatsoever . . . on such terms and conditions and under such covenants as [Rhonda] shall deem proper." Hughes's speculation that Rhonda purchased the furniture for her own home is not evidence of theft. Nor is the fact that the furniture was not found in the corporate buildings some ten years after it was purchased. Rhonda was authorized by the power of attorney to purchase the furniture in 2005.

We conclude Hughes did not carry her burden to come forward with summary judgment evidence of the element of unlawful appropriation. The trial court did not err in granting the Motion on Hughes's claim for violations of the Act. We overrule Hughes's second issue.

Derivative Claim for Breach of Fiduciary Duty

In her third issue, Hughes challenges the trial court's summary judgment on her derivative claim for breach of fiduciary duty. The Motion contended that Hughes had no evidence of "breach of a fiduciary duty; and injury to [Hughes] or benefit to [Rhonda]." Hughes' pleading of this claim, and her Response to the Motion, are identical. The documents allege:

[The Montees'] actions, as set forth above, constitute a breach of their fiduciary duties to the corporations. The complete shutdown of the businesses, mismanagement, self-dealing and outright looting of the corporate accounts violates [the Montees'] duties of care and loyalty to the corporations they manage for the shareholders.

The shutdown of the businesses without board approval is indicative of [the Montees'] failure to abide by their most basic fiduciary duties. As a result, the corporations have suffered damages including but not limited to the assets lost to theft and mismanagement, lost profits, diminution in value, and loss of good will.

Once again, our focus is on evidence of injury, although for this claim the question is whether Hughes produced evidence of injury to the corporations based on the purported breach of fiduciary duty by officers Rhonda and James.

Hughes's affidavit does not identify any injury to the corporations. The recital above pleads four categories of injuries: (1) assets lost to theft and mismanagement, (2) lost profits, (3) diminution in value, and (4) loss of good will. However, Hughes's summary judgment evidence contains no evidence of lost corporate assets.⁶ As to lost profits or diminution in value of the company, Hughes has not offered evidence of the profits earned by the businesses at any time, or the value of the corporations (or of shares of their stock) at any time. In the absence of that evidence, we cannot determine that profits or value of the corporations have decreased because of any conduct of the Montees. Likewise, the summary judgment record contains no evidence of any type or level of good will the businesses enjoyed. Hughes's allegations, in the absence of supporting evidence, cannot defeat the Motion.

In her brief, Hughes compiles a number of her complaints against Rhonda and James and appears to offer them as support for the breach of fiduciary duty element challenged by the Motion. We need not address whether the various expenditures listed (cars, insurance, repairs, furniture, salary) or the instances of conduct described (largely related to the closing down of the business) violated the Montees' fiduciary duties to the corporations: none of the allegations are accompanied by evidence of how and how much the corporations were injured by the particular spending at issue or the actions taken. Indeed, the summary judgment evidence does not include any documentation of the "shutdown of the businesses," so it is impossible to discern whether such an action was economically harmful or beneficial to the corporations and their shareholders. Hughes's failure to identify evidence of corporate injury, rather than reciting mere allegations of harm, is sufficient to support granting of the Motion on this claim. *See Burt*, 369 S.W.3d at 625.

⁶ The single exception could be the sale of real property to satisfy the IRS assessment based on Rhonda's failure to pay taxes from 1996–2010. However Hughes offers no evidence to establish that what was "lost" in the sale of the real property was greater than what was "saved" during those years in unpaid taxes and having the use of that money over time.

We conclude Hughes failed to carry her burden to bring forward evidence of any injury suffered by purported violations of the Montees' breach of fiduciary duties to HFFH and Crown Hill. The trial court did not err in granting the Motion on Hughes's derivative claim. We overrule Hughes's third issue.

Conclusion

We have decided each of Hughes's issues against her. We affirm the trial court's summary judgment order.

/Martin Richter/
MARTIN RICHTER
JUSTICE, ASSIGNED

150129F.P05



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

MARY FRANCES HUGHES,
INDIVIDUALLY AND ON BEHALF OF
HUGHES FAMILY FUNERAL HOME,
INC. AND CROWN HILL MEMORIAL
PARK AND MAUSOLEUM, INC.,
Appellant

On Appeal from the 160th Judicial District
Court, Dallas County, Texas
Trial Court Cause No. DC-12-02620.
Opinion delivered by Justice Richter,
Justices Evans and Schenck participating.

No. 05-15-00129-CV V.

RHONDA HUGHES MONTEE, JAMES
MONTEE, HUGHES FAMILY FUNERAL
HOME, INC. AND CROWN HILL
MEMORIAL PARK AND MAUSOLEUM,
INC., Appellees

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellees Rhonda Hughes Montee, James Montee, Hughes Family Funeral Home, Inc., and Crown Hill Memorial Park and Mausoleum, Inc. recover their costs of this appeal from appellant Mary Frances Hughes, Individually and on behalf of Hughes Family Funeral Home, Inc. and Crown Hill Memorial Park and Mausoleum, Inc..

Judgment entered this 18th day of July, 2016.