Opinion issued March 31, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00731-CV

ELIZABETH KILPATRICK, Appellant

V.

SANTIAGO VASQUEZ AND VICTOR MARTINEZ, Appellees

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Case No. 2006–76122

MEMORANDUM OPINION

This is a personal injury case arising from an automobile accident. On appeal, plaintiff/appellant, Elizabeth Kilpatrick, contends in three issues that the trial court erred when it rendered summary judgment in favor of defendants/appellees, Santiago Vasquez and Victor Martinez.

We affirm.

Factual & Procedural Background

On February 16, 2006, Elizabeth Kilpatrick was driving her car on Interstate 45 when she saw a ladder in the middle of the road. To avoid hitting the ladder, Kilpatrick stopped on the freeway. While she was stopped, Kilpatrick was rear-ended by Victor Martinez, who was driving a van owned by Santiago Vasquez. It was later determined that the ladder belonged to Sonitrol of Houston, Inc.

On November 29, 2006, Kilpatrick sued Vasquez for negligently entrusting the van to Martinez. She sued Sonitrol for general negligence alleging that it failed to properly secure its ladder.

On July 17, 2008, Vasquez filed a no-evidence and traditional motion for summary judgment. Among the grounds asserted, Vasquez contended that Kilpatrick could present no evidence showing that Martinez was an incompetent or reckless driver, an essential element of a negligent entrustment claim. Vasquez also offered a copy of the police report, which indicated that Martinez had a valid driver's license. Vasquez argued that, under Texas law, a person holding a valid driver's license is presumed to be a competent driver. Vasquez asserted that he had no duty to inquire into Marinez's driving history.

In her response, filed on August 29, 2008, Kilpatrick retorted that Vasquez had a duty to inquire into Martinez's driving history. Kilpatrick also pointed out

that Martinez was 22 years old at the time of the accident. She claimed, "[C]ommon sense and statistics reveal that younger drivers are known to be involved in more motor vehicle accidents."

Kilpatrick attached an excerpt from Vasquez's deposition to her response. She pointed to Vasquez's testimony in which he stated that, before the accident, he had never permitted Martinez to drive his van, even though he and Martinez are related to one another and had worked together for several years. She noted that Vasquez testified that he had permitted other family members to drive his van but not Martinez. Kilpatrick posited that such testimony indicated that Vasquez should have taken steps to determine Martinez's driving abilities before allowing him to drive the van.

On September 8, 2008, Kilpatrick filed her third amended petition in which she named Martinez as a defendant for the first time. She alleged that Martinez was negligent in operating the van when he hit her vehicle on the freeway.

On October 24, 2008, the trial court granted Vasquez's motion for summary judgment. The court signed an order indicating that Kilpatrick should take nothing from Vasquez.[1]

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[1] Kilpatrick filed an interlocutory appeal of the order, which this Court dismissed for lack of jurisdiction on February 19, 2009. *See Kilpatrick v. Vasquez*, No. 01-08-00945-CV, 2009 WL 417918 (Tex. App.—Houston [1st Dist.] Feb. 19, 2009, no pet.) (mem. op.).

On November 5, 2008, Martinez filed a motion for summary judgment. Martinez pointed out that Kilpatrick's personal injury claims were governed by a two-year limitations period. The accident had occurred on February 16, 2006, and Kilpatrick had not joined Martinez until September 8, 2008. As a result, Martinez argued that Kilpatrick's claims against him were barred by limitations.

Kilpatrick responded to Martinez's motion for summary judgment by asserting that the limitations period should be equitably tolled. She claimed that Vasquez had led her to believe that he was the responsible party. Kilpatrick alleged that Vasquez did not assert that Martinez was the responsible party until after limitations had run. Kilpatrick also asserted that Martinez had not been misled, disadvantaged, or prejudiced by her failure to name him as a defendant because he had actual knowledge of the lawsuit.

Kilpatrick filed her fifth amended petition on November 23, 2008. Even though the trial court had already granted summary judgment in favor of Vasquez, Kilpatrick re-asserted her earlier claim against him for negligent entrustment and added a new negligence claim against Vasquez based on respondeat superior. Kilpatrick alleged that Martinez was Vasquez's employee and had been acting in the scope of his employment at the time of the accident.

Vasquez filed a "motion to dismiss" on February 24, 2009. In the motion, Vasquez asserted that Kilpatrick was not entitled to assert her new claim against

him based on respondeat superior. Vasquez pointed out that summary judgment had been rendered in his favor on October 24, 2008. He asserted that, as a result, Kilpatrick was precluded from asserting new claims against him, such as those raised in Kilpatrick's fifth amended petition filed on November 23, 2008.

On May 7, 2009, the trial court signed an order, which provided, "While the Court believes Vasquez has previously been dismissed form this case, the Court having considered the Motion [to dismiss] finds that it should be granted." The order continues, "It is, therefore, ORDERED, that all new claims, if any, asserted against Vasquez in any pleading filed by Plaintiff after October 24, 2008 are dismissed with prejudice." Also, on May 7, 2009, the trial court signed an order granting Martinez's motion for summary judgment and ordering that Kilpatrick take nothing from Martinez. Because the trial court had earlier signed an "Order of Non-suit with Prejudice" with regard to Kilpatrick's claims against Sonitrol, all claims between the parties were resolved at that point.

This appeal followed. In three issues, Kilpatrick contends that the trial court erred in granting Vasquez's and Martinez's motions for summary judgment and erred in granting Vasquez's motion to dismiss.

Vasquez's Summary Judgment

In her first issue, Kilpatrick contends that the trial court erred in granting summary judgment in favor of Vasquez.

A. Standard of Review: No-Evidence Motion for Summary Judgment[2]

We review summary judgments de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). After an adequate time for discovery, the party without the burden of proof may move for a no-evidence summary judgment on the basis that there is no evidence to support an essential element of the non-moving party's claim. TEX. R. CIV. P. 166a(i); *see Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008). Summary judgment must be granted unless the non-movant produces competent summary judgment evidence raising a genuine issue of material fact on the challenged elements. TEX. R. CIV. P. 166a(i); *Hamilton*, 249 S.W.3d at 426. A non-moving party is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." TEX. R. CIV. P. 166a (Notes & Comments 1997).

A no-evidence summary judgment motion is essentially a motion for a pretrial directed verdict. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581–82

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[2] As mentioned, Vasquez moved for both a traditional and no-evidence motion for summary judgment. When a party moves for both types of summary judgment, we first review the trial court's judgment under the no-evidence standard. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). If a non-movant failed to produce evidence to defeat the no-evidence motion for summary judgment, then we need not analyze whether the movant's summary judgment proof satisfied the less stringent "traditional" burden. *Id*. In addition, when, as here, the order granting summary judgment does not specify the grounds for the trial court's ruling, we must affirm the summary judgment if any of the theories presented to the trial court, and preserved for appellate review, are meritorious. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003).

(Tex. 2006). Accordingly, we apply the same legal-sufficiency standard of review that we apply when reviewing a directed verdict. *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005). Applying that standard, a no-evidence point will be sustained when (1) there is a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence conclusively establishes the opposite of a vital fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *see City of Keller*, 168 S.W.3d at 810.

We review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton*, 249 S.W.3d at 426 (citing *City of Keller*, 168 S.W.3d at 822). In so doing, we view the summary judgment evidence in the light most favorable to the party against whom summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See Mack Trucks*, 206 S.W.3d at 582; *City of Keller*, 168 S.W.3d at 822.

B. Analysis: No Evidence to Support Knowledge Element

At the time Vasquez filed his motion for summary judgment, Kilpatrick had asserted only a claim for negligent entrustment against him. The parties agree that

a plaintiff must prove the following elements to establish negligent entrustment of an automobile: (1) the owner entrusted the automobile, (2) to a person who was an incompetent or reckless driver, (3) who the owner knew or should have known was incompetent or reckless, (4) the driver was negligent, and (5) the driver's negligence proximately caused the accident and the plaintiff's injuries. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 758 (Tex. 2007).

Among his no-evidence challenges, Vasquez asserted that there was no evidence to show that he knew or should have known that Martinez was an incompetent or reckless driver. In her appellate brief, Kilpatrick contends that Vasquez should have known that Marinez was an incompetent driver because he had previously received two speeding tickets. To support this assertion, Kilpatrick has attached an excerpt from Martinez's deposition in which he admitted that he had previously received two speeding tickets. Kilpatrick, however, did not attach the deposition excerpt to her response to Vasquez's motion for summary judgment. As a result, the deposition testimony did not satisfy Kilpatrick's summary-judgment burden to produce competent summary judgment evidence raising a genuine issue of material fact on the challenged element. *See* TEX. R. CIV. P. 166a(i); *Hamilton*, 249 S.W.3d at 426. Moreover, we cannot consider evidence that is only attached to briefs. *See Reeves v. Houston Lighting & Power Co*., 4 S.W.3d 374, 378 (Tex. App.—Houston [1st Dist.] 1999, pet. denied).

Kilpatrick also relies on the deposition testimony of Vasquez, which Kilpatrick offered in response to the no-evidence motion for summary judgment. She points out that Vasquez testified that he had never allowed Martinez to drive his van before the accident, even though he had known and worked with Martinez for several years. She also points to Vasquez's testimony that he had allowed other family members to drive his van but not Martinez, who is the nephew of Vasquez's wife.

Kilpatrick appears to rely on the testimony for the proposition that Vasquez had a duty to inquire into Martinez's driving history before permitting him to drive the van. Kilpatrick also asserts that Vasquez should have inquired into Martinez's driving history given Martinez's youth and given that Martinez planned to drive the van in a major metropolitan area. Kilpatrick's arguments, however, do not find support in the case law. To the contrary, courts have concluded that evidence of a driver's youth or inexperience, without more, does not permit an inference that the driver lacked judgment or perception or was otherwise an incompetent driver. *See Robson v. Gilbreath*, 267 S.W.3d 401, 405 (Tex. App.—Austin 2008, pet. denied); *see also Aboushadid v. Ward*, No. 07-05-00140-CV, 2007 WL 397117, *4–5, (Tex. App.—Amarillo Feb. 5, 2007, no pet.) (holding that evidence of 16-year-old driver's inexperience does not permit inference that she lacked judgment or perception or was otherwise an incompetent driver to support negligent

entrustment claim against her parents). Additionally, courts have concluded that an owner of a vehicle does not have an affirmative duty to investigate the background of a driver before permitting him to drive the vehicle, when, as in this case, the record shows and it is undisputed, that the driver had a valid driver's license. *See, e.g., Batte v. Hendricks*, 137 S.W.3d 790, 791 (Tex. App.—Dallas 2004, pet. denied); *Avalos v. Brown Auto. Ctr., Inc*., 63 S.W.3d 42, 49 (Tex. App.—San Antonio 2001, no pet.); *Bartley v. Budget Rent-A-Car Corp*., 919 S.W.2d 747, 752 (Tex. App.—Amarillo 1996, writ denied).

We conclude that Kilpatrick did not meet her summary-judgment burden to produce competent evidence to raise a genuine issue of material fact regarding whether Vasquez knew or should have known Martinez was an incompetent or reckless driver. *See* TEX. R. CIV. P. 166a(i). We hold that the trial court did not err in granting Vasquez's motion for summary judgment.

We overrule Kilpatrick's first issue.

Martinez's Motion for Summary Judgment

In her second issue, Kilpatrick asserts that the trial court erred by granting Martinez's traditional summary judgment motion because he failed to prove, as a matter of law, that limitations barred Kilpatrick's negligence claim against him.

A. Legal Principles: Traditional Summary Judgment and Limitations

A party moving for "traditional" summary judgment must prove (1) there is no genuine issue as to any material fact and (2) it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004). In our review, we take the nonmovant's competent evidence as true, indulge every reasonable inference in favor of the nonmovant, and resolve all doubts in favor of the nonmovant. *Yancy v. United Surgical Partners Int'l, Inc*., 236 S.W.3d 778, 782 (Tex. 2007).

A defendant seeking summary judgment based on an affirmative defense must establish all elements of the affirmative defense as a matter of law. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991). The statute of limitations is an affirmative defense. *See* TEX. R. CIV. P. 94. If the movant conclusively establishes that the action is barred by limitations, the non-movant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp*., 988 S.W.2d 746, 748 (Tex. 1999).

B. Kilpatrick's Negligence Claim is Time-Barred

A two-year statute of limitations applies to Kilpatrick's personal injury claims. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a) (Vernon Supp. 2010). In his motion for summary judgment, Martinez asserted (1) the car accident

forming the basis of Kilpatrick's personal injury claims occurred on February 16, 2006 and (2) Martinez was not joined as a defendant until September 8, 2008, more than two and one-half years after Kilpatrick's cause of action accrued. The record supports this, and Kilpatrick does not dispute that she first jointed Martinez over two years after the accident.

Instead, in her brief, Kilpatrick intimates that when she sued Vasquez, she mistakenly sued the "wrong" party and should be permitted to correct the mistake. Kilpatrick asserts that Martinez would not be disadvantaged or prejudiced by permitting her to proceed with her claim against him. She contends that Martinez was aware of her suit against Vasquez, which she asserts was timely filed. In substance, Kilpatrick's argument is one for equitable tolling of the limitations period.

Courts have applied equitable tolling when the plaintiff sues the wrong defendant, does not name the proper defendant until after limitations expires, and a "special relationship" exists between the defendants, such that the added defendant "was aware of the facts, not misled, and not disadvantaged in preparing a defense." *Bilinsco Inc. v. Harris Cnty. Appraisal Dist.*, 321 S.W.3d 648, 654 (Tex. App.—Houston [1st Dist.] 2010, no pet.) (citing *Walls v. Travis Cnty.*, 958 S.W.2d 944, 946 (Tex. App.—Austin 1998, pet. denied)). In support of her position, Kilpatrick cites *Cummings v. HCA Health Services of Texas, Inc.*, 799 S.W.2d 403 (Tex.

App.—Houston [14th Dist.] 1990, no writ). *Cummings* is a misidentification case in which the plaintiff mistakenly sued a business entity with a name similar to that of the correct entity, which was not timely sued. *Id.* at 406. *Cummings* stands for the proposition that a court may toll limitations in a misidentification case when there are two separate, but related, business entities that use a similar trade name, and the correct entity had notice of the suit and was not misled or disadvantaged by the plaintiff's failure to timely join it. *Id.* at 406–07; *see also Flour Bluff Indep. Sch. Dist. v. Bass*, 133 S.W.3d 272, 274 (Tex. 2004).

We begin by noting this is not a misidentification case. Here, Kilpatrick does not explain why there would have been any confusion between Vasquez and Martinez. They do not have similar names nor was there confusion regarding who was operating the van at the time of the accident. Kilpatrick sued Vasquez for alleged negligent entrustment of the van to Martinez; she sued Martinez for his alleged negligent operation of the van. Kilpatrick also made no showing to support her claim in the trial court that she had somehow been misled by the defendants into believing that only Vasquez was a responsible party.

In any event, this Court has previously held that the equitable tolling rule applied in certain misidentification cases involving related business entities does not extend to the alleged misidentification of individual defendants. *See Fleener v. Williams*, 62 S.W.3d 284, 286–87 (Tex. App.—Houston [1st Dist.] 2001, no pet.);

see also Eggl v. Arien, 209 S.W.3d 318, 319 (Tex. App.—Dallas 2006, pet. denied) (holding equitable tolling doctrine not available when plaintiff misidentified driver of car as Nazir Arien and failed to join the appropriate party, Nazir's son Sheltzad Arien, until after limitation period expired).

We conclude Martinez met his summary-judgment burden to conclusively show that Kilpatrick's negligence claim was barred by limitations.[3] *See* TEX. R. CIV. P. 166a(c). Kilpatrick did not adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. Thus, we hold that the trial court did not err in granting Martinez's motion for summary judgment.

We overrule Kilpatrick's second issue.

Motion to Dismiss Claim Added After Summary Judgment

In her third issue, Kilpatrick challenges the trial court's decision to grant the motion to dismiss filed by Vasquez. As discussed, Vasquez filed a "motion to dismiss" on February 24, 2009, arguing that Kilpatrick was not entitled to assert a new negligence claim against him in her fifth amended petition filed on November

[3] In their brief, Vasquez and Martinez point out that on April 10, 2008, the trial court signed an order granting Sonitrol's request to designate Martinez as a responsible third party pursuant to Civil Practice and Remedies Code section 33.004(a). *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(a) (Vernon 2008). If a person is designated under section 33.004 as a responsible third party, a claimant is not barred by limitations from seeking to join that person provided that the claimant joins the person not later than 60 days following the designation. *See id.* at § 33.004(e). Vasquez and Martinez point out that Kilpatrick had until June 10, 2008 to join Martinez under this rule. Kilpatrick did not join Martinez until September 8, 2008.

28, 2008. Vasquez pointed out that, at the time, he had already obtained summary judgment against Kilpatrick on October 24, 2008. He asserted that the rendition of summary judgment in his favor precluded Kilpatrick from asserting any new claims against him.

The trial court granted the motion to dismiss in an order providing, "While the Court believes Vasquez has previously been dismissed form this case, the Court having considered the Motion [to dismiss] finds that it should be granted." The trial court ordered, "It is, therefore, ORDERED, that all new claims, if any, asserted against Vasquez in any pleading filed by Plaintiff after October 24, 2008 are dismissed with prejudice."

The pivotal question is whether Kilpatrick was entitled to assert a new claim against Vasquez in her fifth amended petition given that Vasquez had already obtained summary judgment against her. We agree with Vasquez that she could not.

Kilpatrick asserted a negligence claim against Vasquez based on respondeat superior only in her fifth amended petition. Before that time, the only claim that Kilpatrick had asserted against Vasquez was for negligent entrustment. Vasquez had obtained summary judgment against Kilpatrick based on the negligent entrustment claim on October 28, 2008. Kilpatrick's fifth amended petition was

filed on November 28, 2008, after the trial court had already granted Vasquez's motion for summary judgment.[4]

Rule of Civil Procedure 166a(c) provides that a summary judgment shall be rendered on the "pleadings . . . on file at the time of the hearing, or filed thereafter and before judgment with permission of the court . . . ." TEX. R. CIV. P. 166a(c); *see also Automaker, Inc. v. C.C.R.T. Co*., 976 S.W.2d 744, 745 (Tex. App.-—Houston [1st Dist.] 1998, no pet.). To file an amended pleading after the summary-judgment hearing, a non-movant must secure the trial court's permission. TEX. R. CIV. P. 166a(c); *see also Automaker*, 976 S.W.2d at 745. A trial court cannot grant a motion to amend the pleadings once the court renders judgment. *Automaker*, 976 S.W.2d at 746.

Here, Kilpatrick filed her fifth amended petition after the trial court had granted Vasquez's motion for summary judgment. Her negligence claim based on respondeat superior was not on file at the time of the summary judgment hearing and was not filed thereafter "before judgment with permission of the court." *See* Tex. R. Civ. P. 166a(c). Rather, Kilpatrick filed her fifth amended petition after

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[4] Kilpatrick asserts that she had also asserted a general negligence claim against Vasquez before the trial court granted summary judgment in Vasquez's favor. She contends that Vasquez's motion for summary judgment did not address the general negligence claim. However, a review of the record shows that Kilpatrick had filed only a negligent entrustment claim against Vasquez prior to the trial court's granting of summary in favor of Vasquez. She had not filed a general negligence claim.

the trial court had signed the order granting Vasquez's take-nothing summary judgment. Accordingly, we conclude that the trial court did not err in granting Vasquez's motion to dismiss. *See Prater v. State Farm Lloyds*, 217 S.W.3d 739, 741 (Tex. App.—Dallas 2007, no pet.) (holding that trial court properly considered amended petition "a nullity" because it was filed after trial court had signed order granting take-nothing summary judgment in defendant's favor); *Denman v. Citgo Pipeline Co*., 123 S.W.3d 728, 735 (Tex. App.—Texarkana 2003, no pet.) (refusing to consider claims raised in petition filed after summary judgment granted).

We overrule Kilpatrick's third issue.

Conclusion

We affirm the judgment of the trial court.

Laura Carter Higley
Justice

Panel consists of Justices Jennings, Higley, and Brown.