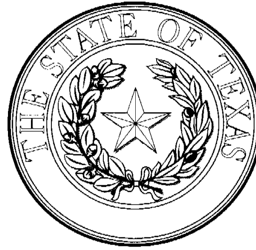
Opinion issued November 9, 2021



In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00209-CV

MARY REDMOND AS REPRESENTATIVE OF THE ESTATE OF EVELYN FAYE BROWN, CORTNEY S. HILL INDIVIDUALLY AND AS NEXT FRIEND OF DEVON MARTIN, AND MARANTZ BRANDON PAYNE INDIVIDUALLY AND AS NEXT FRIEND OF JAMAIYA BROWN, Appellants

V.

FRED CLASEN, INDIVIDUALLY & D/B/A WEST END AUTO SALES, AND FRANCES CARDENAS GARZA, Appellees

---

On Appeal from the 458th District Court
Fort Bend County, Texas
Trial Court Case No. 17-DCV-241174A

MEMORANDUM OPINION

Appellants sued appellees Fred Clasen and Frances Cardenas Garza, along with Stephen Alan Cook, for damages arising from a fatal drunk-driving accident. The trial court granted summary judgment for Clasen and Garza and severed those claims from the main action against Cook, rendering final, appealable judgments for Clasen and Garza. In three issues, appellants challenge both summary judgments. We affirm.

BACKGROUND

Frances Cardenas Garza consigned her car to West End Auto Sales. Fred Clasen, the owner and sole proprietor of West End Auto Sales, then sold the car to Stephen Alan Cook in March of 2016. Cook was driving the car while intoxicated on October 15, 2016, when he caused a fatal car accident that killed Evelyn Faye Brown and severely injured Cortney Hill and two children. The license plate on Cook's car at the time of the accident was a temporary, unexpired "authorized agent" paper license plate issued by West End Auto Sales.

Cortney Hill, on behalf of herself and one of the children injured in the accident, along with representatives of the estate of Evelyn Faye Brown and of the other child injured in the accident—collectively, the appellants—sued Cook, Clasen, and Garza for negligence, negligence per se, and negligent entrustment. Both Clasen and Garza moved for summary judgment, claiming they did not own or have any

control over the car driven by Cook. Both Clasen and Garza relied on two affidavits: Cook's affidavit stating he bought the car from West End Auto Sales and Clasen's affidavit stating he sold the car to Cook and no longer owned the car.

Several months after the motions for summary judgment and one week before the hearing, appellants filed an amended petition adding no new causes of action but new theories of liability: agency and apparent agency. In response, Clasen submitted a supplemental affidavit stating Cook was not an employee of West End Auto Sales, Clasen had never authorized Cook to act on his behalf, and his only relationship with Cook was that of buyer–seller. Following a hearing on the summary-judgment motions, the trial court granted both motions and later severed Clasen and Garza from the remaining action against Cook, establishing final judgments for Clasen and Garza. Appellants now appeal the granting of summary judgment.

STANDARD OF REVIEW

We review a trial court's summary judgment de novo. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). To prevail on a traditional motion for summary judgment, the movant must show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Id.*; TEX. R. CIV. P. 166a(c). If the movant carries this burden, the burden then shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan*, 555 S.W.3d at 84. We must credit evidence favoring the nonmovant, indulging every reasonable inference

and resolving all doubts in his or her favor. *Id.* 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. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam). If the trial court does not state the grounds upon which it grants summary judgment, an appellate court will affirm the judgment if any of the grounds set forth by the movant are meritorious. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam).

DISCUSSION

Appellants raise three issues on appeal: (1) whether the trial court erred in granting summary judgment on grounds not stated in the motions for summary judgment; (2) whether the trial court erred in granting summary judgment in favor of Clasen and Garza regarding the car's ownership; and (3) whether Clasen's affidavit was competent summary-judgment evidence.

Clasen's affidavit was competent summary-judgment evidence

To support his motion for summary judgment, Clasen attached a notarized affidavit stating Garza consigned the car to him, he then sold it to Cook, and he did not own and was not operating the car at the time of the accident. Garza also relied on Clasen's affidavit in her motion for summary judgment. Appellants objected to this evidence as contradictory, inconsistent, and misleading. Without ruling on the objection, the trial court granted summary judgment for Clasen and Garza.

Appellants now appeal the granting of summary judgment based on this evidence—essentially, they argue the affidavit was incompetent summary-judgment evidence and should have been excluded.

1. Applicable Law

To constitute proper summary-judgment evidence, an affidavit must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant's competency. TEX. R. CIV. P. 166a(f). An affidavit of an interested party may serve as competent summary-judgment evidence if the affidavit is "clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c). Minor inconsistencies like typographical errors or incorrect dates that do not raise a fact question will not render an affidavit insufficient. *See Hernandez v. Lukefahr*, 879 S.W.2d 137, 143 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Hunte v. Hinkley*, 731 S.W.2d 570, 571 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Instead, the rule's requirement that the affidavit be free from contradictions and inconsistences prohibits the affiant from "stating equivocating positions which do not serve to clarify the pertinent issues in the case." *Hernandez*, 879 S.W.2d at 143. An affidavit is capable of being "readily controverted" when the testimony "can be effectively countered by opposing evidence." *Casso v. Brand*, 776 S.W.2d 551,

558 (Tex. 1989). If the credibility of the affiant is likely to be a dispositive factor in resolving the case, then summary judgment is not appropriate. *Id.*

An appellate court treats objections to defects in the form or substance of an affidavit differently for the purpose of preserving error. *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.). A party must object to a defect in the form of an affidavit and secure a ruling from the trial court on the objection to preserve the error on appeal or else the objection is waived. TEX. R. CIV. P. 166a(f); *see Grand Prairie Indep. Sch. Dist. v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990) (per curiam). Defects in form include statements of an interested witness that are not clear, positive and direct, or free from contradiction. *UT Health Sci. Ctr.–Houston v. Carver*, No. 01-16-01010-CV, 2018 WL 1473897, at *5 (Tex. App.—Houston [1st Dist.] Mar. 27, 2018, no pet.) (mem. op.). However, a party never waives an objection to a defect in the substance of an affidavit and may raise the issue for the first time on appeal. *See Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.—Houston [1st Dist.] 1998, no pet.). Defects in substance include statements that are conclusory or irrelevant. *Carver*, 2018 WL 1473897, at *5.

2. Analysis

Appellants claim that Clasen's original affidavit stating he sold the car to Cook is insufficient summary-judgment evidence because it is not clear, positive, or

direct and because it is contradictory, inconsistent, and controverted. Clasen argues, in response, that appellants' objections are all to the form of the affidavit, and, because appellants did not secure a trial court ruling on their objection, the objection is waived on appeal. We agree that appellants' objections are all to the form of the affidavit and so are waived on appeal. *See Carver*, 2018 WL 1473897, at *5; *Vaughan*, 792 S.W.2d at 945. Even if we were to consider appellants' objections, we would conclude they are without merit.

Appellants argue the affidavit is contradictory, inconsistent, and misleading because Clasen did not acknowledge that the license plate on the car was a temporary, "authorized agent" paper license plate issued by West End Auto Sales. However, failure to acknowledge a fact does not make the affidavit contradictory or inconsistent; Clasen affirmatively stated that he sold the car to Cook and he was not driving at the time of the accident without "stating equivocating positions." *See Hernandez*, 879 S.W.2d at 143. Appellants were free to present evidence controverting those facts; they did not. Appellants also claim the affidavit is inconsistent because Clasen stated the car was on consignment from Garza; that statement, however, is completely consistent with each party's claim of how West End Auto Sales acquired the car.

Similarly, although appellants argue that Clasen's affidavit is controverted, they presented no evidence to controvert the material facts stated in the affidavit.

Indeed, their argument that the affidavit is controverted implies the affidavit met at least one of the requirements for competency: the affidavit is capable of being readily controverted. *See* TEX. R. CIV. P. 166a(c).

Appellants' objections, though waived, were without merit anyway. Therefore, we conclude Clasen offered competent summary-judgment evidence, and the trial court did not err in granting summary judgment on that basis over appellants' objections.

Appellants' third point of error is overruled.

Summary judgment for Clasen and Garza was proper

Appellants next argue the trial court erred in granting summary judgment for Clasen and Garza because there were genuine issues of material fact as to ownership and control of the car involved in the accident. Appellants claim that Clasen and Garza owned the car Cook was driving when the accident occurred and seek to hold them liable for negligent entrustment on that basis. Appellants rely on two facts to support their claim: at the time of the accident, the car's certificate of title had not been transferred to Cook, and the car had a temporary, "authorized agent" paper license plate issued by West End Auto Sales. Clasen and Garza argue these facts are immaterial to ownership and control; it is undisputed that Cook bought the car months before the accident occurred and took sole possession of it.

1. Applicable Law

To establish a claim for negligent entrustment, a plaintiff must show: (1) entrustment of a car by the owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; (4) that the driver was negligent on the occasion in question; and (5) that the driver's negligence proximately caused the accident. *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595, 596 (Tex. 1987); *Mayes*, 236 S.W.3d at 758.

The first element of negligent entrustment requires either ownership or control of the car. *See De Blanc ex rel. Estates of De Blanc v. Jensen*, 59 S.W.3d 373, 375–76 (Tex. App.—Houston [1st Dist.] 2001, no pet.). Ownership of a car, based on established facts, is a conclusion of law. *Hudson Buick, Pontiac, GMC Truck Co. v. Gooch*, 7 S.W.3d 191, 195 (Tex. App.—Tyler 1999, pet. denied). The name on a car's certificate of title may raise a presumption of ownership but is not conclusive. *Vibbert v. PAR, Inc.*, 224 S.W.3d 317, 321 (Tex. App.—El Paso 2006, no pet.). When a car is sold, the Certificate of Title Act requires the car's owner to transfer the certificate of title to the buyer. TEX. TRANSP. CODE § 501.071. The Act declares void any sale made in violation of its provisions, but the sale of a car without the transfer of a certificate of title is still valid "as between the parties" to determine ownership, despite noncompliance with the Act. *Rush v. Smitherman*, 294 S.W.2d 873, 877 (Tex. App.—San Antonio 1956, writ ref'd); *Najarian v. David Taylor*

Cadillac, 705 S.W.2d 809, 811 (Tex. App.—Houston [1st Dist.] 1986, no writ); *see* TEX. TRANSP. CODE § 501.073. The buyer is the equitable owner of the car in that circumstance, even though the seller retains "naked legal title." *See Rush*, 294 S.W.2d at 876–77.

A non-owner may still be liable under a negligent-entrustment theory if the non-owner has the right to control the car. *De Blanc*, 59 S.W.3d at 376. When a car's owner sells the car, he relinquishes control of the car, and once the sale agreement is reached—even if the certificate of title has not yet been transferred or the sale price has not been paid in full—only the buyer has the sole and complete right to control the car. *See Rush*, 294 S.W.2d at 875; *Gulf Ins. Co. v. Bobo*, 595 S.W.2d 847, 848 (Tex. 1980) ("[A]fter an agreement [of sale] is reached and delivery [of the vehicle] is made, the buyer, and not the seller, has control over the vehicle.").

2. Analysis

Here, the relevant facts are undisputed: Clasen sold the car to Cook, Cook took possession and control of the car, and the certificate of title had not been transferred to Cook. Even though title was not transferred to Cook, the sale was still valid between Clasen and Cook, and Cook became the owner of the car. *See Rush*, 294 S.W.2d at 877; *Najarian*, 705 S.W.2d at 811. Clasen and Cook disagree as to why title was not transferred, but regardless of the reason, after the sale and delivery of the car, Clasen as the seller and Garza as the consigner did not own and had no

right to possess or control the car. *See Rush*, 294 S.W.2d at 875; *Bobo*, 595 S.W.2d at 848. Appellants have offered no evidence to the contrary; they have not provided any evidence that the sale was invalid or that Clasen or Garza retained any right of possession or control of the car.

Appellants point to the temporary, "authorized agent" paper license plate issued by West End Auto Sales as evidence that Cook was driving the car under Clasen's authority and control. Clasen, in his supplemental affidavit, stated that he had no relationship with Cook other than that of buyer–seller and that Cook had never been Clasen's employee or otherwise authorized to act on Clasen's behalf. Appellants argue that because the temporary license plate expires every 60 days, Cook must have been returning to Clasen every 60 days to receive a new license plate and so he must have been driving the car under Clasen's authority and control. Appellants offered no evidence, apart from the temporary license plate itself, to support this theory. Even assuming that appellants' theory is true and Cook returned to Clasen every 60 days for a new temporary license plate, that fact does not raise the inference that Clasen owned the car or exercised a superior right of control to the car over Cook—the buyer—after the sale. *See De Blanc*, 59 S.W.3d at 376 (explaining that to hold non-owner liable for negligent entrustment, non-owner must possess *superior* right of control over person to whom it was entrusted). The temporary license plate by itself does not raise a genuine issue of fact that could

enable reasonable jurors to differ in their conclusions regarding ownership and control of the car, in light of all of the summary-judgment evidence establishing that Clasen sold the car to Cook. *See Mayes*, 236 S.W.3d at 755.

Appellants cite *Dean v. Lowery* for the proposition that a sale violating the Certificate of Title Act creates a fact issue regarding ownership, precluding summary judgment. 952 S.W.2d 637 (Tex. App.—Beaumont 1997, pet. denied) (per curiam). In *Dean*, a father financed a truck for his son's use and then attempted to transfer the truck to his son through a bill of sale, instead of transferring title as required by the Act. *Id.* at 639–40. The certificate of title and note financing the truck remained in the father's name. *Id.* The court found the summary-judgment evidence—the affidavits of the father and son—to be "ambiguous and legally inconclusive" evidence, and so the court determined ownership of the truck was a fact issue for a jury. *Id.* at 640–41. The facts in *Dean*, however, are readily distinguishable from the undisputed facts in the present case. Here, Clasen and Cook agreed on the sale of the car through an arms-length transaction, and Cook took possession of the car and began making monthly payments to Clasen. Where there are no disputed facts regarding the sale transaction, the issue of ownership is a question of law. *See Gooch*, 7 S.W.3d at 195.

Because the facts are undisputed that Clasen sold the car to Cook and Cook became the sole owner of the car with the exclusive right of possession and control,

Clasen and Garza met their summary-judgment burden to show that no genuine issue of material fact existed. *See* TEX. R. CIV. P. 166a(c); *Lujan*, 555 S.W.3d at 84. The burden then shifted to appellants to raise a genuine issue of material fact as to ownership or control of the car, which they failed to do. Therefore, the trial court did not err in granting summary judgment for Clasen and Garza on the issue of ownership.

Appellants' second point of error is overruled.

Summary-judgment motions sufficiently addressed agency and apparent agency

Having determined that Clasen and Garza offered competent summary-judgment evidence and were entitled to summary judgment on the issue of ownership of the car, we turn finally to appellants' contention that the trial court erred in granting summary judgment for Clasen and Garza on grounds not specified in their respective motions. After Clasen and Garza moved for summary judgment, appellants filed a third amended petition adding allegations of vicarious liability through agency and apparent agency. At the summary-judgment hearing seven days later, the trial court granted both Clasen's and Garza's summary-judgment motions.

1. Applicable Law

Generally, summary judgment may only be granted on grounds expressly stated in the summary-judgment motion. TEX. R. CIV. P. 166a(c); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam). To grant summary

judgment on a claim not addressed in the summary-judgment motion, then, "as a general rule," is reversible error. *G & H Towing Co.*, 347 S.W.3d at 297. However, a limited exception to this general rule may apply when: (1) the movant has conclusively proved or disproved a matter that would also preclude the unaddressed claim as a matter of law; or (2) the unaddressed claim is derivative of the addressed claim. *Wilson v. Davis*, 305 S.W.3d 57, 73 (Tex. App.—Houston [1st Dist.] 2009, no pet.). There must be a "very tight fit" between what was proved or disproved in the motion and what elements the unaddressed claim required. *Id.*

An agent is a person authorized to transact business for a principal; the agent acts on behalf of the principal and subject to the principal's control. *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 782–83 (Tex. App.—Houston [1st Dist.] 2011, no pet.). Authorization to act and control of the action are the two essential elements of agency. *Id.* Texas law does not presume agency; a party alleging the existence of an agency relationship has the burden of proving it. *IRA Res., Inc. v. Griego*, 221 S.W.3d 592, 597 (Tex. 2007) (per curiam). Where a principal–agent relationship exists, the doctrine of vicarious liability makes the principal liable for his agent's conduct, based on the principal's right to control the agent's actions. *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 686 (Tex. 2007).

Apparent agency—also called ostensible agency, apparent authority, and agency by estoppel—is based on the concept of estoppel and imposes liability when the principal's conduct should equitably prevent him from denying the existence of an agency relationship. *Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 & n.2 (Tex. 1998). Apparent agency, as an estoppel theory, "operates much like an affirmative defense" in that the party asserting it has the burden of raising a fact issue as to each element: (1) the principal, by his conduct; (2) caused the party to reasonably believe that the putative agent was the principal's agent; and (3) that the party justifiably relied on the appearance of agency. *Fagerberg v. Steve Madden, Ltd.*, No. 03-13-00286-CV, 2015 WL 4076978, at *2 (Tex. App.—Austin July 3, 2015, pet. denied) (mem. op.).

2. Analysis

Appellants contend that the trial court erred in granting summary judgment on their agency and apparent agency theories of liability because appellants only stated these theories in their third amended petition, which was filed after Clasen and Garza filed their motions for summary judgment. Clasen's and Garza's motions for summary judgment could not have addressed these new, distinct theories of liability, appellants argue.

These theories, however, were not new. Agency and apparent agency are not separate causes of action; they are theories of vicarious liability through which a

principal may be held liable for an agent's negligence. *See Sampson*, 969 S.W.2d at 947–48. Because neither Clasen nor Garza was driving the car at the time of the accident, the appellants had been trying to hold them vicariously liable for Cook's negligence from the inception of the lawsuit; appellants only expressly stated these particular vicarious liability theories in their third amended petition.

Both Clasen and Garza moved for summary judgment on the broader theory of not having ownership of or control over the car, and they both also responded to the agency issue in their replies to appellants' response to their summary-judgment motions. Both Clasen and Garza asserted there was no principal–agent relationship between themselves and Cook. Clasen and Garza provided summary-judgment evidence, through Clasen's original and supplemental affidavits, establishing that they had no ownership of or control over the car and that Cook was not their agent or employee nor had he ever been authorized to act on their behalf.

As for agency, Clasen's and Garza's summary-judgment evidence established that Cook was not their agent as a matter of law by disproving the "essential elements" of the claim: authorization to act and control over the action. *See Reliant Energy*, 336 S.W.3d at 783. To the extent the elements of agency were unaddressed in the motions for summary judgment, Clasen and Garza conclusively disproved the issues of authority and control that also preclude the unaddressed claim of agency as a matter of law. *See Wilson*, 305 S.W.3d at 73.

As for apparent agency, which "operates much like an affirmative defense," after Clasen's and Garza's showing that Cook was not their agent or employee, appellants had the burden of raising a fact issue as to each element of apparent agency. *See Fagerberg*, 2015 WL 4076978, at *2, *7. This they failed to do. Appellants relied solely on the temporary, "authorized agent" paper license plate to establish apparent agency. Even if the temporary license plate raised a fact issue as to the first two elements of apparent agency—that West End Auto Sales by its own conduct caused the appellants to reasonably believe that Cook was an agent of West End Auto Sales—the appellants did not present any evidence of the third element, that they justifiably relied on the appearance of agency. *See id.* at *2. Clasen and Garza conclusively disproved that Cook was authorized to act as their agent, and appellants failed to raise a fact issue on what was essentially their estoppel defense to prevent Clasen and Garza from denying an agency relationship. Therefore, to the extent apparent agency was unaddressed in the motions for summary judgment, Clasen and Garza conclusively disproved the issue of an agency relationship and are not estopped from denying that relationship, precluding the unaddressed claim of apparent agency as a matter of law. *See Wilson*, 305 S.W.3d at 73.

Because Clasen and Garza conclusively proved they had no agency relationship with Cook, the trial court's granting of summary judgment on grounds not stated in the summary-judgment motions, to the extent those grounds were

unaddressed, falls within the limited exception to the general rule. *See id.* at 73. The trial court did not err in granting summary judgment for Clasen and Garza.

Finally, appellants argue that because Clasen's supplemental affidavit disclaiming an agency relationship was filed late—the day before the summary-judgment hearing—the trial court should not have considered it. However, a trial court may accept late-filed summary-judgment evidence "as long as he affirmatively indicates in the record that he accepted or considered it," which the trial court did here. *See Stephens v. Dolcefino*, 126 S.W.3d 120, 133 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

Appellants' first point of error is overruled.

CONCLUSION

We affirm the trial court's judgment.

Gordon Goodman
Justice

Panel consists of Justices Goodman, Landau, and Countiss.