Affirmed and Memorandum Opinion filed July 1, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00652-CV

PACKARD TRANSPORT, INC. AND PACKARD LOGISTICS, INC., Appellants

V.

MICHAEL W. DUNKERLY, INDIVIDUALLY AND D/B/A CHECKMATE PRIORITY EXPRESS, A/K/A TOP PRIORITY EXPRESS, AND PRIORITY EXPRESS, INC., Appellees

On Appeal from the 80th District Court
Harris County, Texas
Trial Court Cause No. 2005-17693

M E M O R A N D U M O P I N I O N

This is a suit on a promissory note. Appellants, Packard Transport, Inc. and Packard Logistics, Inc. (collectively "Packard"), filed suit against appellees, Michael W. Dunkerly, Individually ("Dunkerly) and d/b/a/ Checkmate Priority Express, a/k/a/ Top Priority Express ("Top Priority"), and Priority Express, Inc. ("Priority Express, Inc."), alleging that they were jointly and severally liable for the balance on a promissory note. After a bench trial, the trial court rendered judgment in favor of Packard against Priority Express, Inc. for the balance due on the promissory note but rendered judgment that

Packard take nothing against Dunkerly. Packard now appeals from the take nothing judgment in favor of Dunkerly. We affirm.

I. BACKGROUND

Packard was in the freight transport business and often contracted with various shippers to transport freight. In 1998, Packard entered into an agency agreement with "Top Priority Express." Dunkerly signed the agreement on behalf of Top Priority Express, indicating that he was the owner of the company. At the time, Dunkerly was the vice president of a corporation, *Priority Express, Inc.*; he also conducted business under an assumed name, *Top Priority Express*. The agency agreement with Packard did not reflect whether Top Priority Express was the corporation (Priority Express, Inc.) or Dunkerly's business under his assumed name (Top Priority Express). Under the agency agreement, Top Priority Express agreed to solicit, pick up, dispatch, and document freight transports. In return, Packard agreed to collect payment from the original shippers and pay Top Priority Express a weekly commission on each completed transport.

After executing the agency agreement, Dennis Hockabout, an employee of Top Priority Express, engaged in certain fraudulent acts. Responsible for transporting various loads, Hockabout forged mileage computations and freight delivery orders. For a short period of time thereafter, Packard did not verify the delivery orders and did not collect payment in advance from the shippers on the freight transports. Accordingly, Packard paid Top Priority Express unearned commissions based on Hockabout's forged delivery orders and mileage computations. When Packard subsequently attempted to collect payment on the fraudulent transports, the shippers refused to pay either because the mileage computation was inaccurate, the delivery was never made, or the load never existed. Thereafter, Packard filed suit to recover the unearned commissions.

A. 2001 Lawsuit and Promissory Note

In 2001, Packard filed suit against Dunkerly d/b/a Checkmate a/k/a Top Priority Express to recoup the commissions paid on the fraudulent transports. Ultimately, the 2001 lawsuit was settled; part of the settlement included Packard's accepting a promissory note in the amount of $33,000.00. The payor of the note was identified as "Top Priority Express, Inc.," and the note was signed by Dunkerly. He signed in the following manner:

> /s/ *Michael Dunkerly, Vice-president* (handwritten)
> Michael Dunkerly (typewritten), *Vice-president*
> *of Priority Express, Inc.* (handwritten)

The note was executed in 2003, and the relevant terms provided that the payor would pay $1,000 a month to Packard until the $33,000.00 balance was paid. Thirteen payments were made before there was a default on the note; the last two payments were returned for insufficient funds. Packard filed a second lawsuit, now seeking to collect the unpaid balance on the promissory note.

B. The Underlying Lawsuit

In 2005, Packard filed suit against: (1) Dunkerly, individually; (2) Dunkerly under his assumed name, Top Priority; and (3) the corporation, Priority Express, Inc. Packard alleged that all three defendants were liable on the 2003 note. Packard's suit was tried to the court, during which the parties agreed that the payor had defaulted on the note and Priority Express, Inc. was liable for the unpaid balance. However, the parties contested Dunkerly's personal liability on the note. Packard argued that Dunkerly was personally liable because the 2001 lawsuit did not name Priority Express, Inc. as a defendant: Dunkerly, under his assumed names, was the only named defendant. According to Packard, because Dunkerly was the only named defendant in the 2001 lawsuit—out of which the note arose—Dunkerly was personally liable on the note.

In contrast, Dunkerly argued that he was not personally liable on the note because: (1) Priority Express, Inc. was the maker of the note; (2) Dunkerly signed as the vice-president of Priority Express, Inc.; and (3) there was no indication on the note that Dunkerly intended to be personally liable. Ultimately, the trial court rendered judgment in favor of Packard against Priority Express, Inc. for the balance due on the promissory note. The trial court further rendered judgment that Packard take nothing against Dunkerly. Packard now appeals from the take nothing judgment in favor of Dunkerly.

C. Appellate Arguments

In seven related arguments, Packard contends that the trial court erred in rendering its take nothing judgment in favor of Dunkerly. Packard claims that Dunkerly is personally liable on the note based on the following arguments: (1) the original contract is unambiguous; (2) the promissory note, as typewritten, is unambiguous; (3) the first lawsuit correctly identified Dunkerly by his assumed name Top Priority Express; (4) the promissory note was delivered as part of the settlement of the first lawsuit; (5) Dunkerly made 13 payments on the note; (6) the alleged scrivener's error—Inc.—on the note did not render the note ambiguous; and (7) the signature, indicating Dunkerly was the vice-president of the payor—does not render the note ambiguous. We construe Packard's arguments as a challenge to the legal and factual sufficiency of the evidence to support the trial court's take nothing judgment against Dunkerly.

II. STANDARD OF REVIEW

In conducting a legal sufficiency review of the evidence, a court must consider all of the evidence in the light most favorable to the verdict and indulge every reasonable inference that would support it. *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex.

2007); *City of Keller*, 168 S.W.3d at 802, 827. We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of 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 establishes conclusively the opposite of a vital fact. *City of Keller*, 168 S.W.3d at 810 (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence Points of Error,"* 38 Tex. L Rev. 361, 362–63 (1960)); *O and B Farms, Inc. v. Black*, 300 S.W.3d 418, 420 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and a new trial ordered. *See Dow Chemical Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Thomas v. Uzoka*, 290 S.W.3d 437, 452 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). In an appeal from a bench trial, we do not invade the fact-finding role of the trial court, which alone determines the credibility of witnesses, the weight to give their testimony, and whether to accept or reject all or any part of that testimony. *See Thomas*, 290 S.W.3d at 452–53.

III. PERSONAL LIABILITY ON PROMISSORY NOTE

To prove that the defendant is the maker of a note, the plaintiff must prove that the defendant's signature appears on the note or that a representative of the defendant signed the note on the defendant's behalf. *Suttles v. Thomas Bearden Co.*, 152 S.W.3d 607, 611 (Tex. App.—Houston [1st Dist.] 2004, no pet.). Even if it is shown that a defendant signed as the maker of a note, the defendant is not liable on the note if the signature was made in a representative capacity. *See id.*; *Mestco Distributs., Inc. v. Stamps*, 824 S.W.2d 678, 680 (Tex. App.—Houston [14th Dist.] 1992, no pet.) (under previous

representative liability statute, "a signature is established as being in a representative capacity if it has the name of an organization proceeded or followed by an authorized individual's name and office"); *see also* Tex. Bus. & Com. Code Ann. § 3.402(b) (Vernon 2002).[1] Under section 3.402, a signatory signing in a representative capacity is not personally liable as a matter of law. *Suttles*, 152 S.W.3d at 611 ("[I]f Business and Commerce Code, subsection 3.402(b)(1) applies to a note, the signatory is not liable as a matter of law."). Section 3.402 provides in relevant part:

> (b) If a representative signs the name of the representative to an instrument and the signature is an authorized signature of the represented person, the following rules apply:
>
> > (1) If the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument, the representative is not liable on the instrument.

Tex. Bus. & Com. Code Ann. § 3.402(b). Accordingly, section 3.402 applies in the instant case if Dunkerly's signature was authorized and the signature unambiguously shows that it was made on behalf of Top Priority Express, Inc. *See id.* Packard primarily disputes whether the signature unambiguously shows that it was made on behalf of Top Priority Express, Inc. In addressing this issue, we look only to the "form of the

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[1] In 1995, the Texas Legislature revised the representative liability statute. The previous statute, covered under section 3.403 of the Business and Commerce Code, provided in relevant part:

> (b) An authorized representative who signs his own name to an instrument
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> > (1) is personally obligated if the instrument neither names the person represented nor shows that the representative signed in a representative capacity;
> >
> > (2) except as otherwise established between the immediate parties, is personally obligated if the instrument names the person represented but does not show that the representative signed in a representative capacity, or if the instrument does not name the person represented but does show that the representative signed in a representative capacity.
>
> (c) Except as otherwise established the name of an organization preceded or followed by the name and office of an authorized individual is a signature made in a representative capacity.

Act of September 1, 1967, 60th Leg., R.S., ch. 785, § 3.403, 1967 Tex. Gen. Laws 2343, 2423 (amended 1995) (current version at Tex. Bus. & Com. Code Ann. § 3.402 (Vernon 2002)).

signature" to insure that the signature unambiguously shows representative capacity. *Suttles*, 152 S.W.3d at 612–13; *see also* Tex. Bus. & Com. Code Ann. § 3.402(b).

In this case, Dunkerly signed in the promissory note in the following manner:

/s/ *Michael Dunkerly, Vice-president* (handwritten)
Michael Dunkerly (typewritten), *Vice-president*
of Priority Express, Inc. (handwritten)

The note shows that Dunkerly was identified in the signature block of the instrument. Additionally, in handwritten text, the signature block identified Dunkerly as vice-president of Priority Express, Inc. and Dunkerly wrote next to his signature "Vice-president." Looking only to the form of the signature, we conclude that the identification of Dunkerly within the note's signature block was sufficient "identification" under section 3.402(b)(1). The form of the signature unambiguously identifies Dunkerly as the corporation's authorized representative, and the form of the signature block unambiguously shows Dunkerly's signature was made on behalf of Priority Express, Inc. Accordingly, as a matter of law, Dunkerly was not personally liable on the promissory note. *See Suttles*, 152 S.W.3d at 611; *see also* Tex. Bus. & Com. Code Ann. § 3.402(b).

Moreover, we reject Packard's argument that the facts surrounding the 2001 lawsuit and Dunkerly's payments on the note prove Dunkerly's personal liability on the note. As explained above, we look only to the form of the signature in determining representative capacity. *Suttles*, 152 S.W.3d at 612–13; *see also* Tex. Bus. & Com. Code Ann. § 3.402(b). Because the form of the signature unambiguously shows that Dunkerly signed in a representative capacity, we reject Packard's argument. We also reject Packard's argument that the suffix, Inc., after Priority Express in the signature block on the note is a scrivener's error. A scrivener's error is an error resulting from a minor mistake or inadvertence, especially in writing. *See* Black's Law Dictionary 582 (8th ed. 2004). Here, Packard agrees that the note is unambiguous, and there is nothing in the signature block or note to suggest that the Inc. suffix is a scrivener's error. In fact, the first paragraph of the note identifies the payor as "Top Priority Express, ***Inc.***"

We hold, as a matter of law, that Dunkerly's signature on the note did not make him personally or individually liable pursuant to section 3.402. Therefore, we overrule Packard's arguments and affirm the trial court's taking nothing judgment against Dunkerly.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges and Justices Anderson and Christopher.