Affirmed and Memorandum Opinion filed July 21, 2016.

In The

Fourteenth Court of Appeals

NO. 14-15-00328-CV

PATRICIA GONZALEZ, Appellant

V.

NESTOR VILLAFANA AND RAMON WALLE, Appellees

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 1024769-101

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

In this personal-injury case, appellant Patricia Gonzalez brought suit against appellees Ramon Walle and Nestor Villafana for damages she sustained in an automobile collision with a vehicle operated by Villafana and owned by Walle. In one issue, Gonzalez contends that the trial court erred in granting Walle's motion for summary judgment on her negligent-entrustment claim. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

One afternoon, Ramon Walle visited his friend Ricardo at Ricardo's tire shop. Walle wanted to discuss buying some adjacent land from Ricardo so that Walle could relocate his muffler business. Nestor Villafana was also at the tire shop that day. Villafana was a friend of Ricardo's that Walle had met a few months before.

Walle had been at the tire shop for about thirty minutes when his wife called to let him know a customer was waiting for him at the muffler shop. As Walle was preparing to leave, Villafana asked Walle if he would drive him to the muffler shop because there was a taquería nearby and Villafana was hungry. Walle agreed. When they arrived at the muffler shop, both men exited the vehicle, and Walle assumed Villafana was going to get something to eat. Walle testified that he left his keys in the ignition. About thirty minutes later, a friend of Walle's named Daniel called to tell him that Walle's vehicle had been involved in an accident. When he arrived at the scene, Walle found Villafana there with Walle's truck. According to Walle, he had no knowledge that his vehicle was missing until after the accident.

Gonzalez, the driver of the other automobile involved in the collision, sued Villafana for negligence and Walle for negligent entrustment. Walle filed a no-evidence motion for summary judgment. Four-and-a-half months later, before the trial court ruled on his no-evidence motion, Walle filed a traditional summary judgment motion. The trial court ultimately signed an "Order on Defendant's Motion for Summary Judgment." The trial court then severed Gonzalez's claims against Walle from her remaining claims against Villafana, thus making the summary judgment final for purposes of this appeal.

ISSUES AND ANALYSIS

In her sole issue on appeal, Gonzalez contends that the trial court erred in granting Walle's motion for summary judgment. Walle filed both a traditional and a no-evidence motion for summary judgment. While both motions were pending, Gonzalez filed "Plaintiff's Response to Defendant's Motion for Summary Judgment," which makes no mention of Walle's no-evidence motion but does refer to Walle's motion as a "Traditional Summary Judgment Motion." Further, the standard of review cited by Gonzalez discusses the movant's burden in a traditional summary-judgment proceeding. In her proposed order denying the motion to which she was responding, Gonzalez referred to the motion as Walle's "Motion for Summary Judgment."

The trial court used Gonzalez's proposed order, styled "Order on Defendant's Motion for Summary Judgment," to grant Walle's motion. The court altered Gonzalez's proposed order, stating that "Defendant Ramon Walle's Motion for Summary Judgment is ~~DENIED~~ Granted." Because the trial court signed the proposed order submitted by Gonzalez, which was attached to her response challenging only the traditional motion, we conclude that the trial court granted only Walle's traditional motion. *See Rosemond v. Al-Lahiq*, 331 S.W.3d 764, 766–67 (Tex. 2011) (per curiam) (relying on fact that trial court signed proposed order submitted with one of the defendant's motions to conclude that only that motion had been granted). We next discuss the merits of Walle's motion for traditional summary judgment.

Standard of Review

To prevail on a traditional motion for summary judgment, a movant must establish that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop.*

Mgmt. Co., 690 S.W.2d 546, 548 (Tex. 1985). If a movant conclusively negates at least one of the essential elements of each of the plaintiff's claims, or conclusively establishes all the elements of an affirmative defense, he is entitled to summary judgment. *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). In deciding whether the summary judgment record establishes the absence of a genuine issue of material fact, we view as true all evidence favorable to the non-movant and indulge every reasonable inference, and resolve all doubts, in the non-movant's favor. *Nixon*, 690 S.W.2d at 548–49.

Negligent-Entrustment Claim

To establish negligent entrustment of an automobile, a plaintiff must show the following: (1) entrustment of a vehicle by the owner, (2) to an unlicensed, incompetent, or reckless driver, (3) whom, at the time of entrustment, the owner knew or should have known was an unlicensed, incompetent, or reckless driver; (4) the driver was negligent on the occasion in question; and (5) the driver's negligence proximately caused the accident. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 758 (Tex. 2007); *Russell v. Ramirez*, 949 S.W.2d 480, 489 (Tex. App.—Houston [14th Dist.] 1997, no pet.). After reviewing the record, we conclude that Gonzalez has failed to present more than a scintilla of evidence that Walle entrusted his vehicle to Villafana.

Walle's traditional motion argued that his deposition testimony conclusively negated the first element—whether Walle entrusted his vehicle to Villafana. In his deposition, Walle stated that the only reason he brought Villafana to his shop was "because of the food." Walle testified that after they arrived at the shop, they both exited the vehicle. Walle stated that he then went directly into his shop, and he expected that Villafana would go next door to the taquería. Furthermore, Walle testified that Villafana had never used his truck before the day of the accident.

On appeal, Gonzalez argues that the following is "ample evidence" of [Walle's] negligence":

1. It was not the habit or practice of Walle to leave his keys in the ignition of his Ford Ranger;
2. Villafana was traveling with Walle with the intention of going to a restaurant to eat; and
3. Walle left the keys in his ignition "moments" before the collision occurred.[1]

Gonzalez asks this Court to infer that because Walle admitted in his responses to Request for Admissions that it was not his habit to leave his keys in the ignition, and he knew that Villafana wanted to get something to eat, he therefore impliedly consented to Villafana's use of his vehicle by leaving his keys in the ignition on the date in question.[2] However, the First Court of Appeals has twice rejected a similar argument. *See Soodeen v. Rychel*, 802 S.W.2d 361, 363–64 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (no implied permission where driver used spare key hidden in glove compartment); *Bowie v. Broussard*, No. 01-04-00941-CV, 2006 WL 727718, at *2–3 (Tex. App.—Houston [1st Dist.] Mar. 23, 2006, no pet.) (mem. op.) (no implied permission where driver used broken key found in vehicle). The *Soodeen* court noted that "[t]he mere existence of a hidden key in an automobile does not constitute unspoken or implied consent that either friends or strangers have permission to use it." *Soodeen*, 802 S.W.2d at 364. We conclude that the same is true of keys left in the ignition. That Villafana used Walle's key to

[1] Gonzalez also asserts that "the record is clear that Walle was unreasonable in his actions . . . [because] Villifana [sic] did not have a valid driver['s] license." However, Gonzalez points to nothing in the record that would support this assertion, much less any evidence demonstrating that Walle knew Villafana was unlicensed.

[2] Walle testified that "[Villafana] wanted to eat and there was a taquería over there. And I thought that [Villafana] was going to eat over there. And so, we went over there. And then I left my keys inside of my truck because I had a client waiting for me at the shop."

operate the vehicle, without more, does not mean that Walle impliedly consented to Villafana's use of the vehicle. *See id.*

Walle presented an even stronger case for summary judgment than the defendants in *Soodeen* and *Bowie*, because Walle and Villafana had even less of a relationship than the parties in either case. *See Soodeen*, 802 S.W.2d at 363 (holding that no genuine issue of material fact existed as to entrustment, despite the fact that owner socialized with driver in the year preceding the accident and had visited her at her apartment approximately twenty times); *Bowie*, 2006 WL 727718, at *2–3 (concluding that no fact issue as to entrustment existed, notwithstanding evidence that: (1) owner and driver were friends and next-door neighbors; (2) driver had access to owner's vehicle, which was parked in their joint backyard; and (3) driver had ridden in owner's vehicle several times and had driven the car on one occasion with permission). Furthermore, Villafana had never previously driven Walle's vehicle. Walle testified that he had only met Villafana two or three months prior through his friend, Ricardo. As the *Soodeen* court noted:

> Past socializing between persons is not the equivalent of one of them automatically consenting to allow the other to drive his car. A's unlocking his automobile for the stated purpose of allowing a friend, B, to sit in it until A returns, is more indicative of an agreement that A will chauffeur B upon his return rather than that A consents for B to drive the car in A's absence.

Id. at 363–64. We conclude that the trial court did not err in granting Walle's motion for traditional summary judgment.

Gonzalez argues that the trial court "set a new standard" requiring a defendant to "freely admit and acknowledge entrusting his or her vehicle to a negligent driver, in order to be held liable for negligent entrustment." Gonzalez claims that to hold no genuine issue of material fact existed as to entrustment

would "effectively mean[] that implied consent is but a legal fallacy." Gonzalez further contends that such a holding would require a defendant to "admit negligent entrustment" or require a plaintiff to prove "the defendant did then and there intentionally and knowingly allow an unlicensed or incompetent driver to operate his vehicle."

We reject Gonzalez's contention. Gonzalez ignores Texas case law holding that entrustment may be demonstrated by either direct or circumstantial evidence and without an admission from the defendant. *See, e.g.*, *Soodeen*, 802 S.W.2d at 364 (noting it is possible to prove a person's consent to another's operation of his vehicle through circumstantial evidence); *Drooker v. Saeilo Motors*, 756 S.W.2d 394, 399 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (reversing summary judgment as to some defendants and holding that material fact existed as to whether appellees entrusted vehicle to driver where testimony indicated that driver had driven appellees' vehicles on many occasions with knowledge and consent of other employees); *see also Dao v. Garcia*, 486 S.W.3d 618, 625 (Tex. App.—Dallas, pet. filed) (trial testimony from driver and a third person regarding frequency of driver's use of the vehicle was some evidence that owner entrusted vehicle to driver, despite owner's testimony that she only permitted driver to use her car for "a specific task during work" and that he did not have permission to take the vehicle "whenever he wanted"); *Jamar v. Patterson*, 910 S.W.2d 118, 121–22 (Tex. App.—Houston [14th Dist.] 1995, writ denied) (trial testimony of driver and owner of vehicle concerning entrustment was conflicting, and court concluded that driver's testimony that owner had given her express and implied permission constituted some evidence supporting element of entrustment).

Contrary to Gonzalez's argument, none of the defendants in *Drooker*, *Dao*, or *Jamar* admitted entrusting their vehicles to the respective drivers, but the courts

still found some evidence of entrustment through conflicting testimony or a history of operating the owner's vehicle. Gonzalez, however, provided "no more than a surmise or suspicion" from which to infer that Walle gave Villafana permission to drive his vehicle. *See Soodeen*, 802 S.W.2d at 363.

On this record, we cannot say that the trial court erred in granting Walle's traditional motion for summary judgment. Accordingly, we overrule Gonzalez's issue.

CONCLUSION

We affirm the judgment of the trial court.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Boyce and Wise.