Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00301-CV

Penny **BARKER**, Individually and as Executor and
Beneficiary of the Estate of Carole Ann Wickizer,
Appellants

v.

MASON BANCSHARES, INC.,
Appellee

From the 452nd District Court, Mason County, Texas
Trial Court No. 185831A
Honorable Robert Rey Hofmann, Judge Presiding

Opinion by: Liza A. Rodriguez, Justice

Sitting: Rebeca C. Martinez, Chief Justice
Irene Rios, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: July 14, 2021

REVERSED AND REMANDED

Penny Barker, Individually and as Executor and Beneficiary of the Estate of Carole Ann Wickizer, appeals a final summary judgment rendered in favor of Mason Bancshares, Inc. on Barker's negligent hiring claim. Because the summary judgment motion was predicated on a deemed, merits-preclusive admission and Mason Bancshares did not satisfy its burden of proof, we reverse the trial court's judgment and remand for further proceedings.

BACKGROUND

According to Barker's pleadings in the trial court, Barker is the daughter of Carole Wickizer and the sister of Pamela Rauen; Pamela Rauen is the mother of Priscilla Lowery. Barker alleged that on or about March 30, 2017, Priscilla and Pamela "orchestrated a scheme to convert monies from Mrs. Wickizer by forcing her to execute the Statutory Durable Power of Attorney." Barker further alleged, "At the time Mrs. Wickizer executed [the Power of Attorney], she was 89 years old and had been diagnosed with dementia for approximately a decade. Within three months, Mrs. Wickizer passed."

Barker later amended her pleadings to add Mason Bancshares and one of its employees as defendants. Barker alleged several claims, including a wrongful hiring claim, against Mason Bancshares arising out of the handling of Wickizer's accounts by its employee. After filing an answer generally denying Barker's allegations, Mason Bancshares filed a traditional motion for summary judgment.

As to Barker's negligent hiring claim, Mason Bancshares's summary judgment motion argued that Barker failed to timely respond to Mason Bancshares's discovery requests, including requests for admissions. Among Mason Bancshares's requests for admissions, Mason Bancshares asked Barker to admit it owed her no duty as to the negligent hiring claim. With its motion, Mason Bancshares attached an affidavit establishing it had timely sent its requests for admissions and never received a response.

Mason Bancshares filed its summary judgment motion on January 31, 2020. Barker did not file a summary judgment response. Instead, on May 1, 2020, Barker filed a motion to substitute counsel, to withdraw deemed admissions, and for a continuance of the summary judgment hearing. Barker admitted to not timely responding to Mason Bancshares's requests for admission, but asserted good cause existed to withdraw the deemed admissions. The motion generally alleged the

failure to timely respond was due to "mistake," but Barker provided no evidence to substantiate the allegation.

After Mason Bancshares filed objections to the motion, the trial court denied Barker's motion to withdraw the deemed admissions and motion for continuance. The trial court granted Barker's motion to substitute counsel, granted Mason Bancshares's motion for summary judgment, and rendered a partial summary judgment that Barker would take nothing on her claims against Mason Bancshares. Upon Mason Bancshares's unopposed motion, the trial court severed all claims against Mason Bancshares into a separate cause, making the summary judgment final and appealable. Barker filed a timely notice of appeal.

MOTION FOR SUMMARY JUDGMENT

On appeal, Barker argues the trial court erred by granting Mason Bancshares's motion for summary judgment. "We review an order granting summary judgment de novo." *AEP Tex. Cent. Co. v. Arredondo*, 612 S.W.3d 289, 293 (Tex. 2020). For a traditional motion for summary judgment, the movant must show "that no genuine issue of material fact exists" and that the movant "is entitled to judgment as a matter of law." *Id.* "In the context of a defendant moving for summary judgment on a plaintiff's cause of action, the movant's burden is to conclusively negate at least one of the essential elements of that cause of action." *Townsend v. Hindes*, 619 S.W.3d 763, 768 (Tex. App.—San Antonio 2020, no pet.). When, as here, "a party fails to file a response to a motion for summary judgment, the only ground for reversal he may assert on appeal is the legal sufficiency of the motion for summary judgment and the supporting proof." *Gilchrist v. Bandera Elec. Co-op.*, 966 S.W.2d 716, 718 (Tex. App.—San Antonio 1998, no pet.).

Barker's issues on appeal are limited solely to her negligent hiring claim.[1] "To establish a claim for negligent hiring . . . a plaintiff must prove the following elements: (1) a duty to hire . . . competent employees; (2) an employer's breach of the duty; and (3) the employer's breach of the duty proximately caused the damages sued for." *THI of Tex. at Lubbock I, LLC v. Perea*, 329 S.W.3d 548, 573 (Tex. App.—Amarillo 2010, pet. denied). As to Barker's negligent hiring claim, Mason Bancshares's summary judgment motion challenged only the duty element. The sole evidentiary basis for Mason Bancshares's challenge to the duty element was Barker's deemed admission that Mason Bancshares never owed her any duty to hire competent employees. We therefore confine our review to whether this deemed admission was legally sufficient to conclusively establish the absence of a duty. *See Hardaway v. Nixon*, 544 S.W.3d 402, 412 (Tex. App.—San Antonio 2017, pet. denied) (stating our review is limited to the grounds expressly set out in a summary judgment motion).[2]

DEEMED ADMISSIONS

"Deemed admissions are competent summary judgment evidence." *Willowbrook Foods, Inc. v. Grinnell Corp.*, 147 S.W.3d 492, 502 (Tex. App.—San Antonio 2004, pet. denied). "A request for admission may ask a party to admit or deny an issue of fact or a mixed issue of fact and law, but not a purely legal issue." *Fort Bend Cent. Appraisal Dist. v. Hines Wholesale Nurseries*, 844 S.W.2d 857, 858 (Tex. App.—Texarkana 1992, writ denied). "If a response is not timely served, the request is considered admitted without the necessity of a court order." TEX. R. CIV. P. 198.2(c). "Any matter established by way of a request for admissions is conclusively established

[1] We therefore do not consider the trial court's summary judgment as to Barker's other claims against Mason Bancshares, and we do not disturb those parts of the final summary judgment. *See* TEX. R. APP. P. 47.1.

[2] In its brief, Mason Bancshares cites pleading deficiencies and asserts facts to show it owed no duty to Barker. However, because the summary judgment motion was based solely on the deemed admission, our review is limited to the sufficiency of the deemed admission. *See id.*

as to the party making the admission, unless on motion, it is withdrawn or amended with the permission of the court." *Willowbrook Foods*, 147 S.W.3d at 502–03.

Barker argues the trial court erred by denying her motion to withdraw her deemed admission that Mason Bancshares owed no duty as to her negligent hiring claim. "We review a trial court's decision to permit or deny withdrawal of deemed admissions for an abuse of discretion." *Time Warner, Inc. v. Gonzalez*, 441 S.W.3d 661, 665 (Tex. App.—San Antonio 2014, pet. denied). A trial court abuses its discretion when it acts arbitrarily, unreasonably, or without reference to guiding rules or principles. *Id.* "A trial court has discretion to permit a party to withdraw an admission if: (a) the party shows good cause for the withdrawal; (b) the court finds that the other party will not be unduly prejudiced; and (c) presentation of the lawsuit's merits is served by the withdrawal." *Id.* at 664.

"Ordinarily, the burden of showing good cause and no undue prejudice lies with the party seeking withdrawal of deemed admissions." *Id.* at 666. But when, as here, the request for admissions would preclude the presentation of the merits at trial, the trial court must allow their withdrawal unless the party relying on the deemed admission shows the other party acted with flagrant bad faith or callous disregard of the rules. *Id.* When a party moving for summary judgment based on a deemed, merits-preclusive admission opposes the withdrawal of the admission, the evidentiary burden shifts to the summary judgment movant. *See id.*

Although Barker generally alleged "mistake" without any supporting facts or evidence, the trial court treated the deemed admission as merits preclusive by rendering summary judgment based on the deemed admission alone. Thus, when Mason Bancshares filed objections to Barker's motion to withdraw the deemed admissions, the burden shifted to Mason Bancshares to show Barker acted with flagrant bad faith or callous disregard of the rules governing requests for admissions. *See id.* In objecting to Barker's motion to withdraw her deemed admissions, Mason

Bancshares presented no evidence showing why Barker failed to timely respond to the request for admission, and "allegations are not evidence." *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016). The evidence attached to Mason Bancshares's motion for summary judgment merely showed Barker did not timely respond to the request for admissions, but did not show flagrant bad faith or callous disregard of the rules.

Mason Bancshares failed to meet its burden to show flagrant bad faith or callous disregard of the rules. The guiding rules and principles governing deemed admissions therefore required the trial court to permit Barker to withdraw her deemed admissions. *See Time Warner*, 441 S.W.3d at 665. Because the trial court did not permit Barker to withdraw her deemed admissions, the trial court acted without reference to guiding rules and principles. We therefore hold the trial court abused its discretion by denying Barker's motion to withdraw her deemed admissions. *See id.* Without the deemed admission, and without any other summary judgment evidence on the duty element of Barker's negligent hiring claim, the summary judgment evidence was legally insufficient to conclusively establish Mason Bancshares owed no duty to Barker as to her negligent hiring claim. The trial court therefore erred by granting summary judgment.

ATTORNEY AUTHORITY

Mason Bancshares argues the trial court did not abuse its discretion because the attorney who filed Barker's motion to substitute counsel, to withdraw admissions, and for continuance was not actually Barker's lawyer. Texas Rule of Civil Procedure 12 "allows a party to argue before the trial court that a suit is being prosecuted or defended without authority." *In re Guardianship of Benavides*, 403 S.W.3d 370, 373 (Tex. App.—San Antonio 2013, pet. denied). "When a party files a rule 12 motion to show authority, the challenged attorney must appear before the trial court to show his authority to act on behalf of his client." *Id.* "The motion may be heard and determined at any time before the parties have announced ready for trial." *Id.* "At the hearing on the motion, the

burden of proof is on the challenged attorney to show his authority to prosecute or defend the suit." *Id.*

In the trial court, in the severed case, Mason Bancshares did not file a motion to show authority. Because Mason Bancshares did not challenge the authority of Barker's lawyer, Barker's lawyer had no burden to show his authority to prosecute the suit on Barker's behalf. On appeal, Mason Bancshares argues for the first time that Barker's lawyer lacked authority. Mason Bancshares cites to a transcript of a hearing in the original case after this case between Barker and Mason Bancshares was severed into its own cause. The hearing in the original case was on a motion for summary judgment filed by Mason Bancshares's employee. At that hearing, Barker testified she never consented to representation by the lawyer who filed the motion to substitute counsel, to withdraw deemed admissions, and for continuance.

In our record, at the summary judgment hearing, Barker's lawyer stated Barker "has hired me to represent her and, you know, no longer wants [her former counsel] to represent her, so I've substituted in for him in that regards." Mason Bancshares relies on a transcript from a hearing in a different case in the trial court, but "[a] party does not have any right to use an appellate record in one case to compensate for a deficient record in another case even though an appellate court does have the authority (but rarely does) to take judicial notice of its own records." *In re Bayview Loan Servicing, LLC*, No. 06-17-00048-CV, 2017 WL 1424812, at *1 n.1 (Tex. App.—Texarkana Apr. 19, 2017, orig. proceeding) (mem. op.) (citation omitted). And even if we considered the summary judgment hearing from the original case, the trial court ruled that the lawyer who filed the motion to withdraw admissions was Barker's attorney of record and was the only attorney authorized to represent her. The issue of attorney authority does not affect our disposition of this appeal.

CONCLUSION

"Requests for admission are intended to simplify trials by addressing uncontroverted matters or evidentiary ones like the authenticity or admissibility of documents," and are not intended to be "traps for the unwary" to preclude the presentation of the merits. *Time Warner*, 441 S.W.3d at 665. When Mason Bancshares sought to use a request for admission to preclude the presentation of the merits, and objected to Barker's motion to withdraw her deemed admissions, it assumed the burden to show a flagrant bad faith or callous disregard of the rules. Because Mason Bancshares failed to meet this burden, summary judgment on the deemed admission was improper. We therefore reverse the trial court's summary judgment on Barker's negligent hiring claim and remand the case for further proceedings.

Liza A. Rodriguez, Justice