NUMBER 13-19-00355-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI - EDINBURG

JOVITA ROSAS, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF MIGUEL ANGEL ROSAS, **Appellant,**

v.

SERGIO VELA, ACME TRUCK LINE, INC., AND BMD4, LLC D/B/A BLAKE FULENWIDER CHRYSLER DODGE JEEP, LTD., **Appellees.**

On appeal from the 156th District Court of Bee County, Texas.

MEMORANDUM OPINION

Before Justices Hinojosa, Perkes, and Tijerina
Memorandum Opinion by Justice Hinojosa

Appellant Jovita Rosas, individually and as representative of the estate of Miguel Angel Rosas (Rosas), appeals the trial court's summary judgment dismissing her

personal injury suit against appellees Sergio Vela; Acme Truck Line, Inc. (Acme); and BMD4, LLC d/b/a Blake Fulenwider Chrysler Dodge Jeep, Ltd. (Fulenwider). In two issues, Rosas argues that: (1) the trial court erred in granting Acme and Vela's joint motion for summary judgment because Rosas did not receive notice of the submission date; and (2) the trial court erred in granting Fulenwider's motion for summary judgment because there are genuine issues of material fact as to each element of Rosas's claims. We affirm.

I. BACKGROUND

On February 5, 2014, Juan Martinez, Jr., a former automotive technician for Fulenwider, took a vehicle from the Fulenwider car dealership lot located in Beeville, Texas. Later that day, Martinez attempted to pass a vehicle on Highway 181 in Bee County when his vehicle collided with the left axle of a tractor trailer owned by Acme and driven by its employee, Vela. Martinez's vehicle then collided head on with a vehicle occupied by Miguel Rosas. Miguel died as a result of the accident.

Rosas filed suit against Vela, Acme, and Fulenwider. Rosas claimed that Fulenwider and Acme were vicariously liable for the negligence of Martinez and Vela, respectively, because they were acting in the course and scope of their employment at the time of the collision. Rosas also claimed that Fulenwider and Acme were directly liable for negligent entrustment and that Fulenwider was directly liable for negligent hiring and retention. Finally, Rosas claimed that Acme and Fulenwider were strictly liable because they were the registered owners of the vehicles involved in the collision.

Acme and Vela filed a joint traditional motion for summary judgment arguing that

"[a]s part of their . . . settlement in a prior suit, [Rosas] expressly agreed, in writing, that [Martinez] was the sole cause of the accident and [Rosas's] damages." Acme and Vela argued that under the doctrine of quasi estoppel, Rosas could not claim otherwise in the present case. Acme and Vela attached to their motion a default judgment and settlement agreement pertaining to a separate lawsuit filed by Rosas against Martinez and Miguel's employer. In the settlement agreement, Rosas "represent[ed] that the negligence of Martinez was the sole cause of the Accident and [Rosas's] claimed damages[.]" Rosas did not file a response to Acme and Vela's motion for summary judgment.

Fulenwider filed a traditional motion for summary judgment arguing that the evidence negated an essential element of Rosas's direct liability claims for the following reasons: (1) Martinez was intoxicated at the time of the accident; (2) Martinez was not in the course and scope of employment at the time of the accident; (3) Texas law does not impose strict liability for owners of vehicles involved in an accident; (4) Martinez was not Fulenwider's employee at the time of the accident; and (5) Rosas admitted in a separate lawsuit that Martinez was the sole cause of the accident.

Fulenwider filed a separate "Traditional Motion for Summary Judgment as to Vicarious Liability" arguing that its evidence negated an essential element of Rosas's vicarious liability claim for the following reasons: (1) Martinez was not an employee of Fulenwider at the time of the accident; (2) Martinez's actions were not in furtherance of Fulenwider's business nor was he under any authority granted by Fulenwider; and (3) Fulenwider did not know or have reason to know Martinez to be an unlicensed, incompetent, or reckless driver.

Fulenwider attached the following evidence to its motions: a copy of the accident report; the default judgment against Martinez; the settlement agreement; the affidavit of Ramiro Garcia, Fulenwider's service director; and reports of background checks conducted by Fulenwider showing that Martinez had a clean criminal and driving history when he was hired.

Rosas filed a response to Fulenwider's motions for summary judgment, arguing that there was a fact issue as to each essential element of her claims. Rosas attached to her response the following evidence: the official accident report; a police incident report; the deposition of Erik Stewart, Fulenwider's general manager; the written statement of Garcia; transcripts of oral statements provided by Stewart and Garcia; and Garcia's affidavit testimony.

In his affidavit, Garcia testified that Fulenwider terminated Martinez on February 4, 2014, the day before the collision. Stewart stated the same in his deposition testimony, elaborating that Martinez was terminated for tardiness and performance issues. Stewart testified that the day following Martinez's termination, a customer arrived at the dealership and informed Stewart that the customer's vehicle, which he had traded in to Fulenwider, was involved in an accident. Stewart testified that the vehicle was still at the dealership but that its license plates were stolen. Stewart had his staff do an inventory of their vehicles, and he learned that a separate vehicle was missing. Stewart instructed the inventory manager to report the vehicle stolen. Stewart testified that the stolen vehicle was previously located in the sales lot and that he would have had to give someone permission to remove the vehicle. Stewart later discovered that the missing vehicle was

involved in the accident in question.

Garcia explained in a written statement that he terminated Martinez on the morning of February 4 because he arrived late to work that day and had previously arrived late or failed to show up on multiple occasions. Shortly thereafter, a state trooper arrived to speak with Martinez because Martinez had abandoned his vehicle the prior day after colliding with a guardrail. After the trooper left, Martinez packed his personal belongings. According to Garcia, Martinez remained at the dealership until around 2:00 or 3:00 p.m. when he left in the vehicle of another service technician. Garcia learned the next day that Martinez was involved in the collision that resulted in Miguel's death.

In the default judgment against Martinez that was attached to Fulenwider's motion for summary judgment, the trial court made the following findings:

> On or about February 5, 2014, [Martinez], while intoxicated, was attempting to overtake and pass another vehicle in a no passing zone, and was traveling at a high rate of speed, on the wrong side of the road on State Highway 181. [Martinez] attempted this maneuver directly in front of oncoming traffic. [Martinez] struck an 18 wheeler, spun out, and then slammed in to [Miguel's] vehicle, which was lawfully traveling behind the 18 wheeler. The force of the collision was so violent that it caused [Miguel's] vehicle to roll over. [Miguel] died as a result of the severe personal injuries sustained in this accident. This accident was entirely preventable, and there is no evidence or other legal basis for a finding of comparative negligence on the part of [Miguel].

The trial court granted each defendant's motion for summary judgment and entered judgment that Rosas take nothing on her claims. Rosas now appeals.

II. ACME & VELA

In her first issue, Rosas argues that she did not receive notice of the submission date for Acme and Vela's joint motion for summary judgment, and, therefore, the trial

court erred by failing to grant Rosas leave to file a late response.

A. Applicable Law

A nonmovant is entitled to twenty-one days' notice of the hearing or submission date on a motion for summary judgment, counting from the date the motion and notice of hearing were served. TEX. R. CIV. P. 166a(c). The nonmovant must file its response and opposing affidavits not later than seven days before the submission date. *Id*. Notice of hearing for submission of a summary judgment motion is mandatory and essential to due process. *See Martin v. Martin, Martin & Richards, Inc*., 989 S.W.2d 357, 359 (Tex. 1998) (per curiam); *Ready v. Alpha Building Corp*., 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.). "The reason that notice of hearing or submission of the motion is mandatory is because the hearing date determines the time for response to the motion." *Martin*, 989 S.W.2d at 359. A trial court should grant a motion for leave to file a late summary-judgment response if the non-movant shows (1) good cause and (2) no undue prejudice. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam); *Tex. Dep't of Aging & Disability Serv's v. Mersch*, 418 S.W.3d 736, 740 (Tex. App.—Houston [1st Dist.] 2013, no pet.).

B. Analysis

Rosas takes conflicting positions on appeal. First, she maintains that she did not know that Acme and Vela's motion for summary judgment was set for submission until after receipt of the trial court's summary judgment order. Rosas then inexplicably argues that the trial court erred by failing to grant her leave to file a late summary judgment response. As we explain below, Rosas is unable to demonstrate error because the record

shows timely notice of the submission date, and Rosas never sought leave to file a late response to Acme and Vela's joint motion for summary judgment. Rosas's contrary contentions are either waived or unpreserved.

Acme and Vela filed their joint motion for summary judgment on December 20, 2018. The trial court issued a notice of setting on January 2, 2019, which advised the parties of a January 31 submission date for the motion for summary judgment. The notice indicates that it was served on all parties. On February 1, Acme and Vela filed a notice with the court advising that Rosas did not timely file a response to their summary judgment motion. This notice contains a certificate of service indicating that it was served on all parties. The trial court did not grant Acme and Vela's motion for summary judgment until April 15, 2019. Rosas filed a motion for new trial claiming that she did not receive notice of the submission date. However, she did not set the motion for a hearing, and it was overruled by operation of law.

The record establishes that the trial court issued a timely notice of the submission date, that Rosas was later apprised of her failure to file a response, and that the trial court did not rule on the motion for summary judgment until seventy-three days after Rosas was advised of this failure. At no time did Rosas file a motion for leave to file a late response. Rosas does not argue on appeal that the trial court's notice was inadequate, and she provides no argument or authority to support her contention that the trial court erred in granting summary judgment under these facts. Therefore, any such contention is waived because it is inadequately briefed. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations

to authorities and to the record."); *Valadez v. Avitia*, 238 S.W.3d 843, 845 (Tex. App.—El Paso 2007, no pet.) (explaining that an appellate court has no duty to perform an independent review of the record and applicable law to determine whether there was error because in doing so the court would be abandoning its role as neutral adjudicators).

With respect to Rosas's bare assertion that she did not receive the notice, Rosas failed to preserve error because she did not request a hearing on her motion for new trial. *See* TEX. R. APP. P. 33.1(b); *see also Tyhan, Inc. v. Cintas Corp. No. 2*, No. 01-18-00027-CV, 2018 WL 5539419, at *1 (Tex. App.—Houston [1st Dist.] Oct. 30, 2018, no pet.) (mem. op.) (explaining that if a party seeks a new trial on a ground for which evidence must be heard by trial court, the party must obtain a hearing on its new-trial motion to preserve error). Finally, by failing to request leave to file a late response, Rosas has not preserved error in this regard. *See* TEX. R. APP. P. 33.1(a). Having concluded that each of Rosas's contentions are either waived or unpreserved, we overrule her first issue.

III. FULENWIDER

In her second issue, Rosas argues the trial court erred in granting Fulenwider's motion for summary judgment because there are genuine issues of material fact as to each element of her causes of action.

A. Standard of Review

We review a trial court's summary judgment de novo. *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015); *City of San Antonio v. Greater San Antonio Builders Ass'n*, 419 S.W.3d 597, 600 (Tex. App.—San Antonio 2013, pet. denied). We take all the evidence favorable to the nonmovant as true, and we indulge

every reasonable inference and resolve any doubts in favor of the nonmovant. *BCCA Appeal Grp., Inc. v. City of Houston*, 496 S.W.3d 1, 6 (Tex. 2016); *Katy Venture*, 469 S.W.3d at 163; *Greater San Antonio*, 419 S.W.3d at 600.

Traditional summary judgment is proper only when the movant establishes there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *BCCA*, 496 S.W.3d at 6; *Greater San Antonio*, 419 S.W.3d at 600–01. The movant can satisfy this burden by conclusively negating at least one essential element of the plaintiff's claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010). If the movant satisfies this burden, then the burden shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). On the other hand, if the movant fails to satisfy its initial burden, then the burden does not shift, and the nonmovant need not present any evidence to avoid summary judgment. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014).

"A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). "[M]ore than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Id*. at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). But when the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, it is considered no evidence. *Id*.

B. Analysis

Rosas argues that there are genuine issues of material fact concerning the essential elements of her direct negligence and vicarious liability claims.[1] We will address each claim in turn.

1. Negligent Entrustment

To establish liability under a negligent entrustment theory, Rosas must establish that: (1) Fulenwider entrusted the vehicle to Martinez; (2) Martinez was an unlicensed, incompetent, or reckless driver; (3) at the time of the entrustment, Fulenwider knew or should have known that Martinez was an unlicensed, incompetent, or reckless driver; (4) Martinez was negligent on the occasion in question; and (5) Martinez's negligence proximately caused the accident. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 758 (Tex. 2007) (per curiam).

In its summary judgment motion, Fulenwider challenged elements one through three. In support, Fulenwider presented evidence that Martinez, who was no longer employed by Fulenwider, stole the vehicle in question; Martinez was a licensed driver; and Fulenwider performed a driving background test which yielded no concerning results. In response, Rosas relied on evidence that Fulenwider's service technicians had access to the keys of vehicles being serviced and that technicians would sometimes borrow vehicles from the service department. Rosas failed to present any evidence that Martinez had permission to use any Fulenwider vehicle following his termination. Rather, Rosas's response focused on discrepancies in the record concerning the calendar date of

[1] Rosas does not challenge the dismissal of her strict liability claim on appeal.

Martinez's termination, which Rosas maintained created a fact issue as to whether Martinez was employed on the day of the accident.

In his written statement, Garcia states that Martinez arrived late to work on "Tuesday, February 7, 2014."[2] But later in the statement Garcia explains that this event occurred on February 4, 2014, and that he informed Martinez he was being terminated that same day. Garcia provides a detailed sequence of the events in this statement which clearly place Martinez's termination and his theft of the Fulenwider vehicle as occurring prior to the fatal accident. Every account in the summary judgment record is consistent in this regard. We do not believe that Garcia's single reference to "Tuesday, February 7, 2014" constitutes evidence that would enable reasonable and fair-minded people to differ as to their conclusion regarding the timing of Martinez's termination relative to the accident. *See Ridgway*, 135 S.W.3d. at 601. We conclude that this evidence is so weak as to do no more than create a mere surmise or suspicion as to whether Martinez was still employed. *See id*. Further, there is no evidence that Fulenwider entrusted the vehicle to Martinez. Rather, it is undisputed that Martinez did not have permission to take the vehicle from the sales lot and that Fulenwider reported the vehicle stolen upon learning that it was missing.

We conclude that the summary judgment evidence conclusively negates an essential element of Rosas's negligent entrustment claim—that Fulenwider entrusted the vehicle to Martinez. *See Fernandez*, 315 S.W.3d at 508. Rosas did not present any

[2] We take judicial notice that February 7, 2014, fell on Friday, while February 4, 2014 fell on Tuesday. *See* TEX. R. EVID. 201; *Sanders v. Constr. Equity, Inc.*, 42 S.W.3d 364, 367 (Tex. App.—Beaumont 2001, pet. denied).

evidence that that would create a fact issue regarding this element. *See Lujan*, 555 S.W.3d at 84. Therefore, the trial court did not err in granting summary judgment as to this claim. *See* TEX. R. CIV. P. 166a(c); *BCCA*, 496 S.W.3d at 6.

2. Negligent Hiring and Retention

An employer owes a duty to the general public to ascertain the qualifications and competence of the employees it hires, especially when the employees are engaged in occupations that require skill or experience and that could be hazardous to the safety of others. *Dangerfield v. Ormsby*, 264 S.W.3d 904, 912 (Tex. App.—Fort Worth 2008, no pet.). To prevail on a cause of action for negligent hiring and retention, a plaintiff must prove: (1) the employer owed the plaintiff a duty to hire, supervise, train, or retain competent employees; (2) the employer breached that duty; (3) the employee committed a tort; and (4) the employer's breach and the employee's tort proximately caused the plaintiff's injury. *See THI of Tex. at Lubbock I, LLC v. Perea*¸ 329 S.W.3d 548, 573 (Tex. App.—Amarillo 2010, pet. denied); *EMI Music Mex., S.A. de C.V. v. Rodriguez*, 97 S.W.3d 847, 858 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.); *see also Endeavor Energy Res., L.P. v. Cuevas*, 593 S.W.3d 307, 311 (Tex. 2019). An employer is not liable for negligent hiring or retention when there is nothing in the employee's background that would cause a reasonable employer not to hire or retain the employee. *Fifth Club, Inc. v. Ramirez,* 196 S.W.3d 788, 796 (Tex. 2006); *Ormsby*, 264 S.W.3d at 912.

While the employee need not be acting in the scope of his employment to impose liability on the employer, the theory of negligent hiring and retention does require that a plaintiff's harm be the result of the employment. *Fernea v. Merrill Lynch Pierce Fenner &*

Smith, Inc., 559 S.W.3d 537, 548 (Tex. App.—Austin 2011) *judgm't withdrawn, appeal dism'd*, No. 03-09-00566-CV, 2014 WL 5801862 (Tex. App.—Austin Nov. 5, 2014, no pet.) (mem. op.); *Houser v. Smith*, 968 S.W.2d 542, 544 (Tex. App.—Austin 1998, no pet.); *Dieter v. Baker Serv. Tools*, 739 S.W.2d 405, 408 (Tex. App.—Corpus Christi–Edinburg 1987, writ denied); *see also Narnia Investments, Ltd. v. Harvestons Sec., Inc.*, No. 14-10-00244-CV, 2011 WL 3447611, at *5 (Tex. App.—Houston [14th Dist.] Aug. 9, 2011, no pet.) (mem. op.). In other words, the employer-employee relationship may create a duty to a third party only if the third party's harm is brought about by reason of the employment and is, in some manner, job-related. *Fernea*, 559 S.W.3d at 548. If such a nexus was not required, "an employer would essentially be an insurer of the safety of every person who happens to come into contact with his employee simply because of his status as an employee." *Dieter*, 739 S.W.2d at 408. The nexus requirement is, at its core, one of foreseeability, and foreseeability is an essential component of both proximate cause and duty. *Fernea*, 559 S.W.3d at 548; *see Mellon Mortg. Co. v. Holder*, 5 S.W.3d 654, 659 (Tex. 1999).

In its motion for summary judgment, Fulenwider argued that Rosas could not establish the essential elements of her negligent hiring and retention claims because Martinez was not employed by Fulenwider at the time of the accident. Fulenwider further argued that there was nothing in Martinez's background would give it reason not to hire or retain Martinez. We have previously concluded that the evidence establishes that Fulenwider terminated Martinez the day before the accident and that Martinez did not have permission to drive Fulenwider's vehicles. Nevertheless, Rosas argues that

"Martinez was still under the control of [Fulenwider] even after he was allegedly fired on February 4, 2014." In support of this argument, Rosas cites evidence that Martinez took his time to collect his personal belongings after he was terminated in the morning and did not leave the premises until as late as 3:00 p.m. Rosas asserts that, during this time, Martinez potentially had access to the keys of Fulenwider vehicles which were kept in an unlocked box. Assuming *arguendo* that Fulenwider had a duty to supervise Martinez while he remained on the premises following his termination, this duty was certainly extinguished by the time the fatal accident occurred the following day when Martinez was travelling on a public highway in a stolen vehicle. We conclude that Fulenwider's evidence conclusively negates any connection between Rosas's injury and Martinez's employment. Without evidence of this nexus, Rosas is unable to establish that her injuries were a foreseeable result of Fulenwider's negligent hiring or retention, an essential component for both the duty and causation elements of Rosas's claim. *See Fernea*, 559 S.W.3d at 548.

Further, with respect to Rosas's apparent claim that Fulenwider negligently failed to safeguard the keys to its vehicles, we note that Rosas did not plead this negligence theory.[3] A defendant is not required to show that the plaintiff cannot succeed on any theory conceivable in order to obtain summary judgment; a defendant is only required to

[3] Usually, the criminal conduct of a third party is a superseding cause relieving the negligent actor from liability. *Amaya v. Potter*, 94 S.W.3d 856, 864 (Tex. App.—Eastland 2002, pet. denied); *see Williamson v. Wayne Strand Pontiac–GMC, Inc*., 658 S.W.2d 263 (Tex. App.—Corpus Christi–Edinburg 1983, writ ref'd n.r.e.) (affirming judgment notwithstanding the verdict because the defendant's act of leaving the key in the ignition of a vehicle which was stolen was not a proximate cause of the plaintiff's injuries). However, the tortfeasor's negligence will not be excused where the criminal conduct is a foreseeable result of such negligence. *Amaya*, 94 S.W.3d at 864.

meet the plaintiff's case as pleaded. *Via Net v. TIG Ins.*, 211 S.W.3d 310, 313 (Tex. 2006) (per curiam). In other words, a defendant is not required to guess what unpleaded claims might apply and negate them. *Id*. Accordingly, we do not consider this negligence theory in reviewing the propriety of the trial court's summary judgment.[4] *See id*; *SmithKline Beecham Corp. v. Doe*, 903 S.W.2d 347, 355 (Tex. 1995); *see also Jones v. Wal–Mart Stores, Inc.*, 893 S.W.2d 144, 147–48 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that evidence relating to an unpleaded cause of action will not defeat summary judgment).

Finally, we note that Fulenwider presented evidence that it performed a background check for Martinez prior to his employment, which showed no criminal background or driving infractions. There is no evidence that Fulenwider was aware of any concerning behavior by Martinez prior to his termination that would indicate he was incompetent in a manner that would endanger third parties. Rosas cites evidence of Martinez's actions following his termination. However, this evidence is immaterial to Rosas's claims, which necessarily depend on behavior that would have informed Fulenwider's decision to hire or retain Martinez. We conclude that Fulenwider's evidence conclusively negates the breach element of Rosas's negligent hiring and retention claim. *See Ramirez,* 196 S.W.3d at 796.

Fulenwider presented evidence conclusively negating the duty, breach, and causation elements of Rosas's negligent hiring and retention claims. *See Fernandez*, 315

[4] We note that if a defendant responds on the merits to a claim asserted for the first time in the plaintiff's summary judgment response, the claim is tried by consent. *Via Net v. TIG Ins. Co*., 211 S.W.3d 310, 313 (Tex. 2006) (per curiam). The record does not support trial by consent in this case.

S.W.3d at 508. Because Rosas did not present any evidence that that would create a fact issue regarding these elements, *see Lujan*, 555 S.W.3d at 84, the trial court did not err in granting summary judgment as to these claims. *See* TEX. R. CIV. P. 166a(c); *BCCA*, 496 S.W.3d at 6.

3. Vicarious Liability

To prove an employer's vicarious liability for a worker's negligence, the plaintiff must show that, at the time of the negligent conduct, the worker (1) was an employee and (2) was acting in the course and scope of his employment. *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 131 (Tex. 2018). "The course-and-scope inquiry under step two involves an objective analysis, hinging on whether the employee was performing the tasks generally assigned to him in furtherance of the employer's business." *Id*. at 138. The employee must be acting with the employer's authority and for the employer's benefit. *Id*. at 138–39. An employee is generally not acting withing the scope of his employment when traveling to and from work. *Id*. at 139.

Like its arguments pertaining to Rosas's other causes of actions, Fulenwider contended in the trial court that it was entitled to summary judgment because Martinez was not its employee at the time of the accident. Fulenwider further argued that Martinez was not acting in furtherance of Fulenwider's business. We have already concluded that the evidence establishes that Martinez was not Fulenwider's employee at the time of the accident. This fact conclusively negates an essential element of Rosas's vicarious liability claim—the employer-employee relationship. *See Fernandez*, 315 S.W.3d at 508. Even if Martinez was still Fulenwider's employee at the time of the accident, the evidence

conclusively establishes that Martinez was not performing any tasks generally assigned to him and that he was not acting with Fulenwider's authority or within the scope of his employment. Therefore, the evidence also negates the second element of Rosas's various liability claims—that Martinez was acting in the course and scope of employment.

Because Rosas did not present any evidence that that would create a fact issue on either essential element, *see Lujan*, 555 S.W.3d at 84, the trial court did not err in granting summary judgment as to this claim. *See* TEX. R. CIV. P. 166a(c); *BCCA*, 496 S.W.3d at 6.

4. Summary

Having concluded that the trial court did not err in granting summary judgment as to each of Rosas's claims against Fulenwider, we overrule Rosas's second issue.

IV. CONCLUSION

We affirm the trial court's judgment. We dismiss all pending motions as moot.

LETICIA HINOJOSA
Justice

Delivered and filed the
27th day of August, 2020.