MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Clinten Stuteville,
Appellant-Plaintiff,

v.

Jerry Adams and Jan D. Adams,
Appellees-Defendants

March 31, 2021

Court of Appeals Case No. 20A-CT-1827

Appeal from the Warrick Superior Court

The Honorable Amy Steinkamp Miskimen, Judge

Trial Court Cause No. 87D02-1805-CT-780

Crone, Judge.

Case Summary

[1] Clinten Stuteville's foot was injured while he was helping his friend Jerry Adams (Jerry) unload metal from a trailer at a farm owned by Jerry's ex-wife

Jan D. Adams (Jan). He filed a negligence action against Jerry and Jan, claiming that Jan was vicariously liable for Jerry's negligent acts. Jan sought and was granted summary judgment, and Stuteville now appeals. We affirm.

Facts and Procedural History

[2] Jan and Jerry were married for approximately fourteen years and divorced in 2005. Around the end of 2010, Jerry moved back in with Jan, and the two attempted a reconciliation. In 2013, Jan purchased a fifty-acre farm (the Farm), with the hope of eventually building a home on the property. The structures on the Farm include two empty hog barns, an equipment shed with a tractor, a pole barn, a couple grain bins, and two unusable silos. Ten to fifteen acres of the Farm are tillable. Because of Jerry's background and connections, he made recommendations to Jan regarding lessees for farming and grain storage. Jan executed leases with two different farming groups for use of the grain bins and fields. She ultimately decided not to build a home on the Farm and instead, in late 2014, purchased a home just up the road from her previous residence. Jerry helped her remodel her new home. Jerry and Jan never co-owned the Farm or Jan's home. Jan rarely used or visited the Farm, particularly after she decided not to build a home there. Jerry enjoyed fishing, hiking, hunting, bush-hogging, and doing projects there. When the two broke up again in the early part of 2016, Jan allowed Jerry to take possessions to the Farm.

[3] Meanwhile, Stuteville and Jerry had been friends for about ten years. During that time, Stuteville had very little interaction with Jan, and he assumed that Jan and Jerry were still married. On June 6, 2016, he called Jerry to "shoot the

breeze." Appellant's App. Vol. 2 at 55-56. Jerry was at the Farm, and he asked Stuteville if he would be willing to help him unload some metal items from his trailer. Stuteville agreed and came to the Farm. In an interrogatory response, Stuteville described the ensuing accident as follows:[1]

> Stuteville and Jerry each drank a beer and talked for approximately an hour prior to unloading the aforementioned trailer. Jerry asked Stuteville to help him unload a large steel "cat walk" from his trailer. This "cat walk" was in large pieces. Jerry would secure a chain around each piece and this chain was attached to an "outrigger". This outrigger was a long structure that extended out from the tractor Jerry was using. After the chain was secured to a piece of catwalk, Jerry would use the tractor to lift and move the piece. Jerry asked Stuteville to guide the piece manually to ensure that it did not collide with the front of the tractor. For the last piece of catwalk, Jerry secured the chain around it, returned to the tractor and lifted the piece out of the trailer. While Stuteville was guiding the piece, the chain slipped off the outrigger causing the piece of steel catwalk to fall upon Stuteville's foot. Stuteville immediately felt excruciating pain. Jerry got off of the tractor and helped Stuteville to sit down. Stuteville removed his boot while Jerry tried to find ice. All Jerry could find was a cold popsicle that he gave to Stuteville. Within approximately ten minutes, it became clear that the injury was quite severe and Jerry drove Stuteville to St. Vincent Warrick Hospital in Boonville, IN.

Id. at 56. Stuteville suffered displaced fractures of two of his toes and idiopathic aseptic necrosis of his right foot. *Id*. at 57.

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[1] We have used Jerry's and Stuteville's names to replace other designations.

[4] In May 2018, Stuteville filed a negligence action against Jerry and Jan. At all times during the proceedings below, Jerry's whereabouts were unknown, and service of process was not accomplished. With respect to Jan, Stuteville based his complaint for damages on premises liability and vicarious liability. In July 2018, Jan propounded interrogatories, which went unanswered for four months. Stuteville filed his responses in November 2018. In January 2020, Jan filed a motion for summary judgment. Stuteville filed a memorandum in opposition, to which he attached an affidavit executed by himself. Jan filed a motion to strike Stuteville's affidavit, claiming that it included inadmissible hearsay and statements directly contradicting his prior sworn interrogatory responses. The trial court denied her motion, and she renewed it during the September 2020 summary judgment hearing. Also during the hearing, Stuteville indicated that he was no longer proceeding on the premises liability claim but was limiting his action to vicarious liability. Without ruling on Jan's renewed motion to strike, the trial court granted summary judgment in favor of Jan and entered final judgment pursuant to Indiana Trial Rule 54(B). Stuteville now appeals. Additional facts will be provided as necessary.

Discussion and Decision

[5] Stuteville contends that the trial court erred in granting Jan's motion for summary judgment. We review a court's ruling on a summary judgment motion de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). In conducting our review, we consider only those matters that were designated to the trial court during the summary

judgment stage. *Biedron v. Anonymous Physician 1*, 106 N.E.3d 1079, 1089 (Ind. Ct. App. 2018), *trans. denied* (2019).

[6] Summary judgment is appropriate if the designated evidence shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Hughley*, 15 N.E.3d at 1003; Ind. Trial Rule 56(C). The moving party bears the onerous burden of affirmatively negating an opponent's claim. *Hughley*, 15 N.E.3d at 1003. Then, if "the moving party satisfies this burden through evidence designated to the trial court, the non-moving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial." *Biedron*, 106 N.E.3d at 1089 (quoting *Broadbent v. Fifth Third Bank*, 59 N.E.3d 305, 311 (Ind. Ct. App. 2016), *trans. denied*).

[7] In determining whether issues of material fact exist, we neither reweigh evidence nor judge witness credibility. *Peterson v. Ponda*, 893 N.E.2d 1100, 1104 (Ind. Ct. App. 2008), *trans. denied* (2009). Rather, we must accept as true those facts established by the designated evidence favoring the nonmoving party. *Brill v. Regent Commc'ns, Inc.*, 12 N.E.3d 299, 309 (Ind. Ct. App. 2014), *trans. denied*. "Any doubt as to any facts or inferences to be drawn therefrom must be resolved in favor of the non-moving party." *Goodwin v. Yeakle's Sports Bar & Grill, Inc.*, 62 N.E.3d 384, 386 (Ind. 2016). The party that lost in the trial court bears the burden of persuading us that the trial court erred. *Biedron*, 106 N.E.3d at 1089. We may affirm based on any theory supported by the designated evidence. *Cincinnati Ins. Co. v. Davis*, 860 N.E.2d 915, 922 (Ind. Ct. App. 2007).

Section 1 – Jan neither manifested consent for Jerry to act as her agent nor exerted control over Jerry's actions in chaining and unloading the metal at the Farm.

[8] Stuteville asserts that Jerry was acting within the scope of his authority as an agent for Jan when he negligently chained and unloaded the metal that struck and injured Stuteville's foot. Ordinarily, the question of whether an agency relationship exists is a question of fact, but where the evidence is undisputed, summary judgment may be appropriate in an agency case. *Douglas v. Monroe*, 743 N.E.2d 1181, 1187 (Ind. Ct. App. 2001).

[9] "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Yost v. Wabash College*, 3 N.E.3d 509, 518-19 (Ind. 2014) (quoting Restatement (Third) of Agency § 1.01 (2006)). Thus, an agency requires the following: "(1) a manifestation of consent by the principal; (2) acceptance of authority by the agent; and (3) control exerted by the principal over the agent." *Indy Auto Man, LLC v. Keown & Kratz, LLC*, 114 N.E.3d 32, 35 (Ind. Ct. App. 2018), *trans. denied* (2019). If an agency relationship is found to exist, the principal may be held vicariously liable for the wrongful acts of the agent committed within the scope of the agency relationship. *Yost*, 3 N.E.3d at 519.

[10] The undisputed designated evidence shows as follows. Jan initially purchased the Farm as a place to potentially build a new home. Jerry was living with her

at the time and enjoyed engaging in outdoor activities at the Farm, but he was not a co-owner of the Farm. After Jan made the decision not to build a house on the Farm, she seldom went there and turned her attention to remodeling her new home. Appellant's App. Vol. 2 at 88. Jan and Jerry broke up in 2016, and though they were not on good terms at that time, Jan allowed Jerry to store his belongings at the Farm and use it for the activities he enjoyed. She did not know where Jerry actually resided and described her contact with him as only "off and on," noting that he was very difficult to reach. *Id*. at 82, 84, 103. Jan explained that she does "not really" have anyone designated to watch the Farm for her but that it is her understanding that Jerry "still hangs around up there some." *Id*. at 82, 111. When asked whether Jerry managed the Farm or did anything to improve it, she answered, "I wouldn't call it managing" and "I don't know that he was improving the property." *Id*. at 88, 115.

[11] With respect to the June 2016 incident and ensuing lawsuit, Jan testified that she was "taken aback" when she received the summons and asked Jerry about it. *Id*. at 101. When asked if she knew what Jerry and Stuteville had been doing at the Farm on the day of the incident, she said, "I don't know what he was doing." *Id*. at 108. She did not even know that he and Stuteville were at the Farm that day. She described Jerry as a "hoarder" and "scrapper" who sometimes collects and sells items and who starts projects that rarely "come to fruition." *Id*. at 108, 120-21. When asked whether she knew about the construction of a catwalk on the Farm, she replied, "What is a catwalk?" *Id*. at 106. After an explanation was provided, she said, "I would have no idea where

that would even go. There's not two buildings close enough to put a catwalk in between." *Id*. With respect to Stuteville, she said that if she had known that he was at the Farm with Jerry, she "would not have liked it, and [Jerry] absolutely knew how I felt about [Stuteville]." *Id*. at 118-19.

[12] In short, the undisputed evidence shows that even though Jan consented to Jerry doing the activities he enjoyed at the Farm, she did not control or even know what those activities were. *See id*. (Jan's testimony: "I can't control Jerry. I don't control him[.]"). She did not consent to or even know that he intended to build a catwalk, and she certainly did not control Jerry's manner of attaching the chain or unloading the metal at the Farm. As a matter of law, Jerry was not acting as Jan's agent within the scope of his authority when he attached the chain and maneuvered the tractor in such a way that the chain slipped off the metal piece that injured Stuteville's foot. As a matter of law, Jan is not vicariously liable under any actual agency.

Section 2 – Jan made no manifestation that would have instilled in Stuteville a reasonable belief that Jerry was acting as her (apparent) agent when he chained and unloaded the metal items at the Farm.

[13] In the alternative, Stuteville alleges that Jan is vicariously liable based on apparent authority/agency. "Indiana recognizes an agency relationship implied from the actions and circumstances of the parties." *Marshall v. Erie Ins. Exchange*, 930 N.E.2d 628, 630 (Ind. Ct. App. 2010), *opinion on reh'g*. "Apparent authority is the authority that a third person reasonably believes an

agent to possess because of some manifestation from the agent's principal." *Indy Auto Man*, 114 N.E.3d at 35.

[14] As part of this analysis, we address Jan's request that Stuteville's affidavit be stricken or disregarded as hearsay and as a last-minute effort to create an issue of material fact by including statements that conflict with his prior sworn statements. "Inadmissible hearsay contained in an affidavit may not be considered in ruling on a summary judgment motion." *Breining v. Harkness*, 872 N.E.2d 155, 158 (Ind. Ct. App. 2007), *trans. denied* (2008); *see also Holmes v. Nat'l Collegiate Student Loan Trust*, 94 N.E.3d 722, 725 (Ind. Ct. App. 2018) (explaining Trial Rule 56(E)'s instruction to disregard inadmissible information in affidavits when ruling on summary judgment motions). Moreover, "[a] party cannot create an issue of material fact for summary judgment purposes by contradicting a prior sworn statement." *Chance v. State Auto Ins. Cos.*, 684 N.E.2d 569, 571 (Ind. Ct. App. 1997); *see also Gaboury v. Ireland Rd. Grace Brethren, Inc.*, 446 N.E.2d 1310, 1314 (Ind. 1983) (reasoning that "[i]f a party … could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."). Because we review summary judgments de novo, we disregard the statements in Stuteville's affidavit that are based on hearsay, e.g., Jerry's intended use of the metal for a catwalk was "not for … personal use and not for "'scrapping' or 'junk.'" Appellant's App. Vol. 2 at 127. Moreover, to the extent that some of the statements allegedly conflict or are inconsistent with Stuteville's prior sworn

interrogatory responses, we find that they do not create an issue of fact sufficient to avert summary judgment, as discussed below.

[15] Stuteville claims that even if Jan and Jerry were not in an actual agency relationship, he reasonably believed that Jerry was acting on Jan's behalf in chaining and unloading the metal at the Farm. "To find that a person had apparent authority to act for the principal, it is essential that there be some form of communication, direct or indirect, by the *principal*, which instills a *reasonable* belief in the mind of the third party." *Indy Auto Man*, 114 N.E.3d at 35 (emphases added).[2] In other words, the communication must originate in the principal and not the agent, and it must have been made to the third party in such a way that it instilled in that third party not merely a belief (that the principal authorized the purported agent to undertake the act) but a belief that is reasonable.

[16] The record is devoid of evidence that Jan communicated with Stuteville that she had given Jerry the authority to chain and unload metal items to build a catwalk on the Farm. Jan testified that Jerry introduced her to Stuteville in 2010 or 2011, and that shortly thereafter, they went out for dinner with Stuteville and his wife. Jan did not like Stuteville and told Jerry that she did not

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[2] To the extent that Stuteville emphasizes his belief about the status of Jerry and Jan's living arrangements and marital relationship on the date of the incident, we note that the parties' marital status and a third party's belief about that status does not create an actual or apparent agency. *See Nwannunu v. Weichman & Assocs., P.C.*, 770 N.E.2d 871, 878 (Ind. Ct. App. 2002) (explaining that "the relationship of husband and wife does not itself create agency," but rather must be discerned from acts and conduct).

want him around her or the children. Jerry continued to be friends with Stuteville, but Jan ceased interacting with him. Jan did not purchase the Farm until 2013. Stuteville himself characterized his relationship with Jan as "only acquainted." Appellant's App. Vol. 2 at 55 (response to Interrogatory No. 9). Jan testified that she did not know that Jerry and Stuteville were even at the Farm on June 6, 2016, let alone what they were doing there. She did not even know what a catwalk was, let alone authorize its construction. Throughout the proceedings below, Jerry's whereabouts were unknown, and any information that he communicated to Stuteville, whether it concerned his intended use for the metal or the nature of his relationship with Jan, was hearsay and was insufficient as a matter of law to create an apparent agency. In short, any belief that Stuteville had concerning Jerry's authority to chain and unload the metal to build a catwalk did not emanate from any communication from Jan, the only one whose communication can serve as the basis for an apparent agency. Thus, as a matter of law, Stuteville cannot avail himself of vicarious liability based on apparent agency. Accordingly, we affirm the trial court's grant of summary judgment.

[17] Affirmed.

Riley, J., and Mathias, J., concur.