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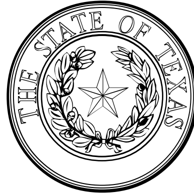

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-24-00629-CV

COLLINGWOOD USA, INC. AND
COLLINGWOOD BROOKSHIRE USA, INC., Appellants
V.
MORGAN STANLEY & CO., LLC, Appellee

On Appeal from the 116th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-19-19958

MEMORANDUM OPINION

Before Justices Goldstein, Breedlove, and Kennedy
Opinion by Justice Breedlove

Appellants Collingwood USA, Inc. and Collingwood Brookshire USA, Inc., (together, Collingwood) challenge the trial court's December 15, 2020 Order Granting Defendant Morgan Stanley & Co., LLC's Tex. R. Civ. P. Rule 91a Motion to Dismiss (the Order), which dismissed with prejudice all of Collingwood's claims against appellee Morgan Stanley & Co., LLC. In four appellate issues, Collingwood contends that the trial court erred: by determining that Collingwood's claims had no basis in law; by determining those claims had no basis in fact; by denying

Collingwood's motion for reconsideration of the dismissal; and by awarding Morgan Stanley attorney's fees and costs.

We affirm the trial court's Order.

Background

Collingwood's lawsuit arises out of a contractual relationship with Ahmad Atwan, who was also an employee of Morgan Stanley during the relevant time. Atwan pursued an independent business venture through an entity named Source Rock, L.L.C., whereby he proposed to advise investors of opportunities in the oil and gas industry.[1] Source Rock contracted with Enrique Razon, Jr., the owner of the appellant Collingwood entities. Razon later assigned the contract to Collingwood.

According to Collingwood's live pleading, the contract made Atwan responsible for "deal sourcing, deal valuation, due diligence (including technical, commercial, and management due diligence), deal coordination, deal staffing and 'working with Source Rock's proprietary network of industry experts to evaluate and execute deals.'" In return, Collingwood paid Atwan "Deal Fees" based upon the size of acquisitions Atwan recommended to Razon; Collingwood also made monthly payments to Atwan for his services. Collingwood alleges that over the four years it worked with Atwan, it invested more than $250 million in acquisitions recommended by Atwan and his associates. According to Collingwood: "Each of

[1] The record does not include Atwan's title or position in Source Rock, but it reflects that he was authorized to sign a contract binding Source Rock.

the investments have been proven to be investments that Collingwood should not have invested in, at least for the value paid, if there had been true due diligence" performed by Atwan. Collingwood—to whom Razon had assigned the contract—sued Atwan, accusing him of breaching their contract and of betraying his common law and statutory duties. Over the duration of the litigation below, Collingwood added multiple individual and corporate defendants that had allegedly worked in combination with Atwan and harmed Collingwood.

Collingwood also sued Morgan Stanley, contending that it was responsible as Atwan's employer for the damages Collingwood suffered at Atwan's hands. The pleading at issue contains a single paragraph under the heading "FACTS" that purports to identify Collingwood's factual bases for suing Morgan Stanley:

> All of Atwan's actions complained of herein were performed while he was an employee and representative of Morgan Stanley. Atwan was and is listed as a Managing Director of Morgan Stanley. Because of his authority with Morgan Stanley, he had authority to bind Morgan Stanley. Further, Morgan Stanley is a "control person" under the Texas Securities Act as it relates to Atwan and is liable to the same extent [as] if it were the seller, buyer or issuer because Morgan Stanley knew or, in the exercise of reasonable care would have known, of the existence of the facts alleged herein against Atwan. Alternatively, Morgan Stanley failed to have proper procedures and policies in place to supervise its employees to prevent the actions taken by Atwan and such failure constitutes negligent supervision.

Legally, Collingwood alleged that Morgan Stanley was directly responsible for negligently supervising Atwan and for violating the Texas Securities Act; it also alleged that Morgan Stanley was indirectly responsible for all of Atwan's conduct based on theories of vicarious liability.

Morgan Stanley filed a Rule 91a motion to dismiss all of Collingwood's causes of action, and the trial court granted the motion in its entirety. The trial court awarded Morgan Stanley attorney's fees and costs, and it denied Collingwood's motion for reconsideration of the dismissal. These orders remained interlocutory until Collingwood's claims against the remaining defendants were resolved. On appeal, Collingwood challenges the trial court's rulings on the motion to dismiss, on its motion for reconsideration, and on Morgan Stanley's request for attorney's fees and costs. We address these rulings in turn.

The Motion to Dismiss

Texas Rule of Civil Procedure 91a provides that a party may move to dismiss a cause of action on the grounds that it has no basis in law or fact. TEX. R. CIV. P. 91a.1. The rule sets forth the fundamental standards we are to apply in this case: "A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them, do not entitle the claimant to the relief sought," and it has no basis in fact "if no reasonable person could believe the facts pleaded." *Id.*

Application of the Rule

We have acknowledged that Rule 91a "provides a harsh remedy and should be strictly construed." *Davis v. Homeowners of Am. Ins. Co.*, 700 S.W.3d 837, 842 (Tex. App.—Dallas 2023, no pet.). We are mindful that Rule 91a is not a substitute for a summary judgment motion: we may not consider evidence in ruling on the

motion, and we must decide the motion based solely on the pleading of a challenged cause of action. TEX. R. CIV. P. 91a.6.[2]

A rule 91a motion to dismiss must "identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both." TEX. R. CIV. P. 91a.2. We have applied a fair-notice pleading standard to determine whether the allegations in a pleading are sufficient to survive a motion to dismiss. *See Thomas v. 462 Thomas Fam. Props., LP*, 559 S.W.3d 634, 639 (Tex. App.—Dallas 2018, pet. denied). The Texas Supreme Court has recently addressed the application of this fair-notice standard in the context of a Rule 91a motion to dismiss:

> These allegations must satisfy our notice-pleading rules, which "require pleadings to not only give notice 'of the claim and the relief sought' but also of the essential factual allegations." . . . "As we have explained many times, a 'cause of action' means the 'fact or facts entitling one to institute and maintain an action, which must be alleged and proved in order to obtain relief.'" . . . It is not enough for the plaintiff to provide fair notice of the *claims* alleged because "[t]he pleading of a legal theory, without more, does not provide notice of the facts that could be pleaded to support that theory." . . . The plaintiff must plead "the essential factual allegations supporting those claims," which must be sufficient to support a judgment if ultimately proven.

In re First Rsrv. Mgmt., L.P., 671 S.W.3d 653, 661–62 (Tex. 2023) (orig. proceeding) (citations omitted). Accordingly, the fact that a plaintiff pleads legally cognizable *claims* is necessary, but not sufficient, for fair-notice pleading. *See id.*

[2] A court may consider pleading exhibits permitted by Rule 59, but no such exhibits are in the record.

Likewise, threadbare recitations of the elements of such claims, without factual allegations sufficient to support a judgment if proven, cannot be sufficient to survive a motion to dismiss. *See id.*; *see also City of Houston v. State Farm Mut. Auto. Ins. Co.*, 712 S.W.3d 707, 715 (Tex. App.—Houston [14th Dist.] 2025, no pet.) ("Additionally, threadbare recitations of the elements of a cause of action, supported by mere conclusory statements, do not suffice to overcome a Rule 91a motion to dismiss.") (citing *First Rsrv. Mgmt*, 671 S.W.3d. at 661–62).

In its first issue, Collingwood argues that each of its claims against Morgan Stanley has a basis in law as required by the rule. We review de novo the trial court's Order dismissing each cause of action. *Bethel v. Quilling, Selander, Lownds, Winslett & Moser, P.C.*, 595 S.W.3d 651, 654 (Tex. 2020).

<u>Negligent Supervision</u>

Negligent supervision is a direct tort urged against an employer for the employer's own conduct; like any negligence action, it requires a duty, breach, and damages proximately caused by that breach. *See Wansey v. Hole*, 379 S.W.3d 246, 248 (Tex. 2012) (per curiam). In this case, Collingwood's pleading of the tort stated:

> As Atwan's employer and with knowledge that Atwan was making contact with potential investors, Morgan Stanley owed Collingwood a legal duty to supervise Atwan to ensure that Atwan was not committing the types of acts complained of herein. Morgan Stanley breached that duty and Morgan Stanley's breach caused Collingwood injury.

In support of this claim, Collingwood alleged that "Morgan Stanley failed to have proper procedures and policies in place to supervise its employees to prevent the

actions taken by Atwan and such failure constitutes negligent supervision." Morgan Stanley moved to dismiss the cause of action, alleging it had no basis in law because: (1) Morgan Stanley had no duty to Collingwood in the absence of a physical injury; (2) the claim was barred by the economic loss rule; and (3) Collingwood had failed to plead all elements of the claim. Our analysis of this cause of action involves the interplay between the first two of these grounds.

Morgan Stanley argues that this claim lacks a basis in law because an employer's duty to supervise its employees extends only to preventing its employee from causing physical injury, and Collingwood has alleged no physical injury. We have held that a negligent supervision claim requires evidence of physical injury. In *Clark v. PFPP Ltd. P'ship d/b/a Planet Dodge*, 455 S.W.3d 283, 285 (Tex. App.—Dallas 2015, no pet.), the plaintiff, Jana Clark, paid Manuel Santoy $22,000 for a truck that turned out to be stolen from the dealership, Planet Dodge. Clark sued Planet Dodge to recover the $22,000, alleging that one or more of its employees had been involved in the truck's theft. *Id.* She alleged that Planet Dodge's negligence in hiring, supervising, or retaining its employees had caused her harm. *Id.* Planet Dodge moved for summary judgment, arguing that Clark had suffered no physical injury, causing her negligent hiring, supervision, and retention claims to fail as a matter of law. *Id.* at 286. In response, Clark admitted that she had not suffered physical harm, but she contended that "she was required to show only an actionable tort by an

employee of Planet Dodge which caused a legal injury." *Id.* The trial court granted the summary judgment motion, and Clark appealed.

Our analysis in *Clark* proceeded from a statement of the economic loss rule, "a doctrine that limits the recovery of purely economic damages in an action for negligence." *Id.* at 287 (citing *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 235 (Tex. 2014) ("In actions for unintentional torts, the common law has long restricted recovery of purely economic damages unaccompanied by injury to the plaintiff or his property[.]")). We stated that Texas courts have applied the rule in cases involving failure to perform a contract. *Id*. at 288 (citing *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 418 (Tex. 2011)).[3] We concluded that the only injury Clark alleged as a result of Planet Dodge's negligent conduct was her loss of $22,000, the purely economic harm she suffered when Santoy breached the contract. *Id.* at 289. Therefore, the economic loss rule barred Clark from recovering that loss from Planet Dodge based on a negligent hiring, supervision, and retention claim. *Id.* at 290. Ultimately, we affirmed the trial court's judgment "on the ground Clark [had] not suffered a physical injury from [Planet Dodge's] alleged negligent hiring, supervision, and retention of its employees." *Id.*

[3] Collingwood argues that Morgan Stanley, as a stranger to its contract with Atwan, should not be permitted to rely on the rule, but we applied the rule in *Clark* to limit recovery against Planet Dodge, who was likewise a stranger to Clark's contract with Santoy.

We called the inability to demonstrate physical harm "the essence of the economic loss rule." *Id.* at 287, n.3.

Collingwood concedes, as it must, that in *Clark* we "did uphold an order granting summary judgment of a negligent supervision claim where the plaintiff failed to show physical injury." But it contends that we did not hold in that case that physical injury is an element of the claim. We disagree. The employer's duty—unquestionably an element of the claim for negligent supervision—extends only as far as preventing an employee from causing physical harm to a third party. In the absence of physical harm, the claim fails as a matter of law. *See id.* at 290.

Collingwood also argues that none of the cases Morgan Stanley relies upon involved a Rule 91a motion to dismiss. Instead, each of those plaintiffs had the opportunity to conduct discovery and to present evidence on the issue of duty rather than suffering dismissal of their claims based on pleadings alone. However, our resolution of this issue does not depend upon the existence or nature of Morgan Stanley's policies on supervision of its employees—it depends upon the nature of Collingwood's purported injury. Collingwood needed no discovery to know whether it had incurred some form of physical injury; indeed, during argument, Collingwood's counsel stipulated that this is not a physical injury case. Thus, discovery or lack of discovery is not relevant to our analysis.

Both parties have acknowledged that the Texas Supreme Court has not spoken specifically to the elements of a negligent supervision claim. However, our sister

courts that have addressed the issue have required a physical injury for a successful negligent supervision claim. *See, e.g.*, *Moore Freight Servs., Inc. v. Munoz*, 545 S.W.3d 85, 98 (Tex. App.—El Paso 2017, pet. denied); *Jackson v. NAACP Hou. Branch*, No. 14-15-00507-CV, 2016 WL 4922453, at *11–12 (Tex. App—Houston [14th Dist.] Sept. 15, 2016, pet. denied) (mem. op.); *Wrenn v. G.A.T.X. Logistics, Inc.,* 73 S.W.3d 489, 496 (Tex. App.—Fort Worth 2002, no pet.); *Sibley v. Kaiser Found. Health Plan of Tex*., 998 S.W.2d 399, 403 (Tex. App.—Texarkana 1999, no pet.).[4] In the absence of guidance from the supreme court, we follow our own mandatory precedent, and the persuasive precedent of our sister courts, and hold that an employer's duty in a negligent supervision case extends only to the prevention of physical injury by its employee. Absent such an injury, the claim fails as a matter of law. Accordingly, when we take Collingwood's allegations—and inferences reasonably drawn from them—as true, it is not entitled to the relief it seeks for this claim, and the claim has no basis in law. TEX. R. CIV. P. 91a.1. We affirm the trial court's dismissal of Collingwood's negligent supervision cause of action.

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[4] Collingwood has not cited—and we have not located—caselaw opining that physical injury is *not* required in a negligent supervision case. It has cited opinions in which plaintiffs claim only economic loss or financial injury and the authoring court "takes no issue" with the nature of the injury or damages claimed. *See, e.g.*, *Envtl. Procs., Inc. v. Guidry*, 282 S.W.3d 602 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *W. Reserve Life Assur. Co. of Ohio v. Graben*, 233 S.W.3d 360 (Tex. App.—Fort Worth 2007, no pet). There is no indication in the cases relied on by Collingswood that a physical-harm requirement was ever raised by the parties.

Texas Securities Act [5]

A "certificate or instrument representing an interest in or under an oil, gas, or mining lease, fee, or title" is a security within the meaning of the Texas Securities Act. TEX. REV. CIV. STAT. ANN. art. 581–4(a)(1)(M). Collingwood pleaded a claim against Atwan under Section 33 of the Act, alleging that he engaged in fraudulent practices while serving as an oil and gas investment adviser to Collingwood. *See id.* art. 581-33.[6] The pleading alleged that Atwan made materially false and misleading sales presentations to Collingwood, by failing to tell Collingwood that he was "acting as an agent/broker on both sides of the transaction, earning a fee from the sellers to sell the securities as well as from Collingwood for performing the due diligence and analysis regarding the securities." The pleading includes pages of factual allegations describing Atwan's and his colleagues' "double-dipping" and their making unauthorized and undisclosed payments in a series of transactions, including a Joint Participation Agreement in Texas and a Participation Agreement

[5] Effective January 1, 2022, the Texas Securities Act was codified in Title 12 of the Texas Government Code. TEX. GOV'T CODE ANN. §§ 4001.001–4008.105. During the events that form the bases of this appeal, the provisions at issue were found in the Texas Revised Civil Statutes. Although the codification was not intended to change substantive provisions of the Act, both parties cite the uncodified statutes. For ease of reference to the briefing, we cite to the uncodified statutes as well.

[6] Section 33 stated in relevant part:

> A person who offers or sells a security (whether or not the security or transaction is exempt under Section 5 or 6 of this Act) by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, is liable to the person buying the security from him, who may sue either at law or in equity for rescission, or for damages if the buyer no longer owns the security.

TEX. REV. CIV. STAT. ANN. art. 581-33(2).

in Kentucky and West Virginia. Collingwood does not, within these pages, identify any action taken by Morgan Stanley related to either the allegedly tainted transactions or the sales presentations. Collingwood alleges this Section 33 "primary liability" only against Atwan, not against Morgan Stanley.[7]

Collingwood's securities action against Morgan Stanley alleges "secondary liability," which derives from the liability for another person's securities violation. *See Sterling Tr. Co. v. Adderley*, 168 S.W.3d 835, 839 (Tex. 2005). Collingwood specifically pleaded that Morgan Stanley was liable pursuant to Section 33F(1) of the Act.[8] Under this provision, secondary liability attaches to a "control person," *i.e.*, "[a] person who directly or indirectly controls a seller, buyer, or issuer of a security." *Adderley*, 168 S.W.3d at 839 (citing art. 581–33F(1)). The comment attached to Section 33(F) explained:

> Control is used in the same broad sense as in federal securities law. *See* SEC Securities Act Rule 405(f), 17 C.F.R. § 230.405(f)[:] "control . . . means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

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[7] The pleading appears to allege primary liability against Morgan Stanley as well, but in this Court Collingwood clarifies that it urges the allegation only as to Atwan.

[8] This provision stated:

> A person who directly or indirectly controls a seller, buyer, or issuer of a security is liable under Section 33A, 33B, or 33C jointly and severally with the seller, buyer, or issuer, and to the same extent as if he were the seller, buyer, or issuer, unless the controlling person sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist.

TEX. REV. CIV. STAT. ANN. art. 581–33F(1).

TEX. REV. CIV. STAT. ANN. art. 581–33F comment. A control person is jointly and severally liable with the primary violator to the same extent as if it were the primary violator. *Id.* art. 581–33F(1).

Collingwood's legal pleading stated:

> Morgan Stanley is liable to Collingwood pursuant to Section 33F(1) of the Texas Securities Act and is jointly and severally liable for the actions of Atwan. Morgan Stanley had the actual power or influence of Atwan and had the power to control or influence the specific transactions or activity described herein that gave rise to the underlying violation and therefore is liable to Collingwood under the Texas Security Act.

This paragraph identified the statutory basis of Collingwood's claim as control-person liability pursuant to Section 33F(1), and it set forth the two elements to be proved: (1) control over the corporation or person in general, and (2) the power to control the specific transaction or activity on which the primary violation is based. *See Barnes v. SWS Fin. Servs., Inc.*, 97 S.W.3d 759, 764 (Tex. App.—Dallas 2003, no pet.).

As we discussed above, merely identifying a claim or its elements is insufficient to survive a Rule 91a motion to dismiss; notice pleading requires factual allegations that would be sufficient, if proved, to support a judgment. *First Rsrv. Mgmt*, 671 S.W.3d at 662–63. Here, Collingwood pleaded that Atwan was employed by Morgan Stanley as a Managing Director. "[I]t is a well-established principle that 'status alone does not automatically cause defendants to be deemed control persons under the statute.'" *Davis v. MSR Holdings, LLC*, No. 01-22-00451-CV, 2024 WL

3237623, at *16 (Tex. App.—Houston [1st Dist.] June 28, 2024, pet. denied) (mem. op.); *see also In re Enron Corp. Sec., Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 595 (S.D. Tex. 2002) (plaintiff must allege some facts beyond defendant's position or title that show defendant had actual power or control over controlled person).

Section 33F required Collingwood to plead sufficiently Morgan Stanley's general control over the corporation (Source Rock) or person (Atwan). *See Barnes*, 97 S.W.3d at 764. Collingwood did not allege that Morgan Stanley had the power to direct the management or policies of Source Rock in its dealings with Collingwood, whether by equitable ownership, through a contractual relationship, or otherwise. *See* TEX. REV. CIV. STAT. ANN. art. 581–33F comment. Nor did Collingwood plead factual allegations suggesting Morgan Stanley had the power to direct Atwan's conduct outside of his employment in any way. In the absence of such factual allegations, pleading that Morgan Stanley is "a control person" is merely a legal accusation and is insufficient to survive the motion to dismiss. *See First Rsrv. Mgmt*, 671 S.W.3d at 663 ("Plaintiffs' third amended petition makes many *legal accusations* but no *factual allegations* to show a cause of action with a basis in law against First Reserve for TPC's conduct. The MDL court should have granted First Reserve's motion to dismiss.").

Similarly, Collingwood has not sufficiently pleaded that Morgan Stanley had the power to control the specific transactions or activities on which Atwan's primary

violation is based. *See Barnes*, 97 S.W.3d at 764. Here, Collingwood relies on its pleading that "Morgan Stanley knew or, in the exercise of reasonable care would have known, of the existence of the facts alleged herein against Atwan." Again, Collingwood has pleaded no factual allegation that would support this legal conclusion. "Unadorned recitals of the elements of a cause of action, supported by mere conclusory statements, fail to sufficiently allege a cause of action under the fair-notice and Rule 91a standards." *Fiamma Statler, LP v. Challis*, No. 02-18-00374-CV, 2020 WL 6334470, at *12 (Tex. App.—Fort Worth Oct. 29, 2020, pet. denied) (mem. op.) (pleading's basic recitation that party "had knowledge of the [defendant's] breach" is nothing more than conclusory restatement of legal element of claim with no supporting factual allegation); *see also Moody v. Greer, Herz & Adams LLP*, No. 01-21-00575-CV, 2023 WL 2697889, at *11 (Tex. App.—Houston [1st Dist.] Mar. 30, 2023, pet. denied) (mem. op.) (claim has no basis in law where pleading alleges "knowledge" or "knowing participation" in purely conclusory terms without supporting factual allegations). In the absence of any factual allegations of Morgan Stanley's power to direct the specific breaching and tortious conduct alleged against Atwan and Source Rock, Collingwood's derivative securities claim has no basis in law. *See* TEX. R. CIV. P. 91a.1; *First Rsrv. Mgmt.*, 671 S.W.3d at 661–62.

We affirm the trial court's dismissal of Collingwood's cause of action under the Texas Security Act.

Vicarious Liability Theories

Along with allegations of Morgan Stanley's direct liability, Collingwood also pleaded that Morgan Stanley was vicariously liable "for the damages sustained as a result of Atwan's conduct under the common law princip[les] of agency, respondeat superior and vice principal liability."[9] Collingwood's assertion of these theories ultimately rested on the undisputed fact that Atwan was employed by Morgan Stanley during the time period in which he purportedly breached contractual, common law, and statutory duties to Collingwood. In its motion to dismiss, Morgan Stanley argued that all three theories failed as a matter of law because Collingwood failed to plead factual allegations that were sufficient, if ultimately proven, to support liability under its theories. We agree.

At the outset, we address Collingwood's complaints that involve the very nature of vicarious liability. Common law provides a limited number of exceptions to the settled general rule that a person has no duty to control another's conduct. *See Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). A theory of vicarious liability provides that "liability for one person's fault may be imputed to another who is himself entirely without fault solely because of the relationship between them." *Painter v. Amerimex Drilling I, Ltd.*, 561 S.W.3d 125, 130 (Tex. 2018)

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[9] Through these theories, Collingwood purported to plead Morgan Stanley's liability for every claim made against Atwan, *i.e.*, breach of contract, negligence, breach of fiduciary duty, fraud/fraud by non-disclosure, fraud in real estate transaction, negligent misrepresentation, breach of good faith and fair dealing, Texas Securities Act liability, and aiding and abetting.

(quoting *St. Joseph Hosp. v. Wolff*, 94 S.W.3d 513, 540 (Tex. 2002) (plurality op.)). For example, an employer is vicariously liable for its employee's conduct if the conduct constituted negligence and it was committed within the course and scope of his employment. *Id.* at 131. A determination of vicarious liability, thus, requires two prongs or inquiries: (1) was there tortious conduct by the direct actor, and (2) is there a common law theory that imputes the tortfeasor's liability to another.

Collingwood first challenges the applicability of Rule 91a to its agency, respondeat superior, and vice-principal liability theories. It contends that Rule 91a permits dismissal only of "causes of action" and that these theories are not independent causes of action. According to the Texas Supreme Court, a cause of action "is simply 'a factual situation that entitles one person to obtain a remedy.'" *Agar Corp., Inc. v. Electro Cirs. Int'l, LLC*, 580 S.W.3d 136, 141 (Tex. 2019) (citing *Cause of Action*, BLACK'S LAW DICTIONARY (10th ed. 2014)). As we discussed above, a theory of imputed liability is necessary to the second prong of vicarious liability. That theory is the part of a factual situation that permits a remedy against a party who did not commit the underlying unlawful act. *See id.* (addressing conspiracy as vicarious liability theory allowing remedy against co-conspirator). Accordingly, "it is not inconsistent to say civil conspiracy is a vicarious liability theory while also recognizing that it is a kind of cause of action." *Id.* The court explained this understanding of vicarious liability while stressing that no one "would take this usage to mean vicarious liability is an independent cause of action." *Id.*

(citing *Crooks v. Moses*, 138 S.W.3d 629, 637 (Tex. App.—Dallas 2004, no pet.) (explaining that vicarious liability is not an *independent* cause of action)). The *Agar Corp.* court continued, "[l]ikewise, characterizing civil conspiracy as a cause of action does not mean it is an independent tort." *Id.* For the same reason, Collingwood's theories of agency, respondeat superior, and vice principal liability—while not independent torts—are vicarious liability theories *and* causes of action; they represent part of the factual situation that could permit a remedy against Morgan Stanley, who did not commit the underlying unlawful acts of Atwan. *See id.* We conclude the trial court did not err by treating the vicarious liability theories as causes of action for Rule 91a purposes.

Collingwood also argues that the court should have denied Morgan Stanley's motion on the vicarious liability theories because Morgan Stanley did not attack what we have called the first vicarious liability prong or inquiry, *i.e.*, Collingwood's pleading of the underlying causes of action it lodged against Atwan. Morgan Stanley's motion instead challenged the second inquiry, *i.e.*, whether Collingwood had alleged facts sufficient to establish imputed liability if ultimately proven. *See id.* To prevail on a vicarious liability claim at trial, Collingwood would have to prove both prongs. But for Rule 91a purposes, a cause of action would have no basis in law if Collingwood failed sufficiently to plead either prong. Stated differently, even if we presume all of Collingwood's allegations against Atwan are true, Collingwood could prevail against Morgan Stanley only if it has sufficiently pleaded a theory

imputing liability from Atwan to Morgan Stanley. And again, to determine the sufficiency of those pleadings, we ask whether Collingwood pleaded "the essential factual allegations" supporting its theories, which must be sufficient to support a judgment if ultimately proven. *First Rsrv. Mgmt.*, 671 S.W.3d at 661–62.

Agency

The law does not presume agency. *Buchoz v. Klein*, 184 S.W.2d 271, 271 (Tex. 1944). A principal will be vicariously liable for the acts of one acting as its agent only when the agent has actual or apparent authority to perform those acts or when the principal ratifies those acts. *Suzlon Energy Ltd. v. Trinity Structural Towers, Inc.*, 436 S.W.3d 835, 841 (Tex. App.—Dallas 2014, no pet.). "An agent's authority to act on behalf of a principal depends on some communication by the principal either to the agent (actual or express authority) or to the third party (apparent or implied authority)." *Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007).

In this case, Collingwood has made no allegation that Morgan Stanley expressly granted actual authority to Atwan. Accordingly, the pleading is not sufficient to invoke that first theory of agency.

As to apparent authority, Collingwood pleaded that:

> Morgan Stanley held Atwan out as having authority, knowingly permitted Atwan to hold himself out as having authority or acted with such lack of ordinary care as to clothe Atwan as an agent with the indicia of authority. Morgan Stanley's conduct (or lack thereof) caused Collingwood to believe that Atwan had the authority to act on Morgan Stanley's behalf and Collingwood relied upon Atwan's authority in placing trust and confidence in the due diligence and advice given by

> Atwan as described herein. As such, Morgan Stanley is responsible for the actions of Atwan.

To "hold Atwan out" as having authority or to "clothe Atwan" with indicia of authority, Morgan Stanley would have to have performed some act. The law of agency is very clear: the existence of apparent authority depends solely on conduct by the principal. *Gaines*, 235 S.W.3d at 182 (when making that determination, only the conduct of the principal is relevant). Here, Collingwood has alleged no facts identifying acts by Morgan Stanley—other than employing Atwan—that held Atwan out or clothed him with authority.[10] Indeed, Collingwood's pleaded allegations, including those we quote here, indicate that it was Atwan who prompted Collingwood's reliance based on his own statements of his experience and authority:

- "Atwan held himself out to Razon as being a Morgan Stanley executive who could bring large, profitable oil and gas deals to companies that Razon owned or had an interest in (directly or indirectly), such as Collingwood."

- "Atwan represented himself as an expert in the oil and gas industry and capable of providing expert due diligence and opinions regarding oil and gas transactions brought Razon or his companies, including Collingwood."

- "At all times during Atwan's relationship with Razon and/or Collingwood, Atwan was employed by and representative of Morgan Stanley and, as such, Collingwood relied upon Atwan's representations of expertise."

- "[Source Rock's proprietary network of industry experts] was described by Atwan as the network of industry experts used by his employer, Morgan Stanley."

[10] Mere employment is not sufficient to establish agency. *See, e.g.*, *Ames v. Great S. Bank*, 672 S.W.2d 447, 450 (Tex. 1984) (in absence of pattern of conduct by employer, no reasonable bank using due diligence would believe employee had authority to deal with employer's personal bank account).

- "Based upon Atwan's representations, the Broker and Due Diligence Agreement and Atwan's status and apparent authority as a Morgan Stanley executive, Collingwood placed its trust and confidence in Atwan and believed that Atwan was acting in its best interest and solely on its behalf."

We conclude that Collingwood has failed to allege facts that could, if proven, establish Atwan was acting with either actual or apparent authority from Morgan Stanley. As a result, Collingwood has failed to plead a cause of action for vicarious liability based on agency that would impute Atwan's liability to Morgan Stanley. The agency cause of action has no basis in law, and the trial court did not err in dismissing it.

Respondeat Superior

Collingwood also contends that Morgan Stanley is responsible for Atwan's conduct pursuant to the common law theory of respondeat superior, which holds an entity vicariously liable for its employee's actions taken within the course and scope of his employment. *Los Compadres Pescadores, L.L.C. v. Valdez*, 622 S.W.3d 771, 779 (Tex. 2021). To trigger an employer's liability, the tortious act must fall within the scope of the employee's general authority, be in furtherance of the employer's business, and be taken for the accomplishment of the object for which the employee was hired. *Minyard Food Stores, Inc. v. Goodman*, 80 S.W.3d 573, 577 (Tex. 2002). The employer is not responsible for conduct taken when an employee deviates from the performance of his duties for his own purposes. *Id.*

Collingwood pleaded:

> Collingwood was injured as result of one or more torts committed by Atwan. Atwan was an employee of Morgan Stanley. The tort was committed while Atwan was acting within the course and scope of his employment. As such, Morgan Stanley is responsible for the actions of Atwan.

Morgan Stanley does not dispute that Atwan was its employee during the relevant time. But its motion to dismiss challenged Collingwood's pleading of all three *Minyard Food Stores* criteria for establishing course and scope of employment, arguing that Atwan did not have Morgan Stanley's general authority, that Atwan was not acting for the benefit of Morgan Stanley or in furtherance of its business, and that Atwan was not acting for the purpose for which he was hired by Morgan Stanley.

For purposes of this opinion, we focus upon the requirement that Collingwood plead factual allegations that would, if proven, establish Atwan was acting for the benefit of Morgan Stanley and in furtherance of its business. The foundation of Atwan's conduct at issue here, whether tortious or not, was the Source Rock–Razon contract. Morgan Stanley was not a party to that contract and was not mentioned in the contract in any way. Accordingly, it could not have been a direct or indirect beneficiary of that agreement. *See, e.g., First Bank v. Brumitt*, 519 S.W.3d 95, 103 (Tex. 2017) (contract must include "clear and unequivocal" expression of intent to benefit third party). Nor does Collingwood allege that Morgan Stanley was paid or received some business-related benefit from Atwan's activities through some

noncontractual arrangement. Instead, Collingwood alleges throughout its pleading that it was Atwan who benefitted—contractually and noncontractually—from his acts.

Taking as true all of Collingwood's allegations and the reasonable inferences therefrom, we conclude Collingwood did not plead factual allegations that, if proven, would support a finding that Atwan was acting in the course and scope of his employment with Morgan Stanley in his relationship with Collingwood. The respondeat superior theory of vicarious liability has no basis in law; the trial court did not err in dismissing it.

Vice-Principal Liability

Finally, Collingwood contends that Morgan Stanley is vicariously liable for Atwan's actions because, it alleges, Atwan was a vice-principal of the company. "A vice-principal represents the corporation in its corporate capacity, and includes persons who have authority to employ, direct, and discharge servants of the master, and those to whom a master has confided the management of the whole or a department or division of his business." *Bennett v. Reynolds*, 315 S.W.3d 867, 883 (Tex. 2010) (quoting *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605, 618 (Tex. 1999)).

Collingwood's pleading of this theory essentially mirrors the *Bennett* definition:

> Atwan is Managing Director of Morgan Stanley. Atwan committed torts and executed a contract that he later breached as described herein. Morgan Stanley is a corporation and Atwan was one of the following:

> (a) a corporate officer of Morgan Stanley, (b) a person with the authority to employ, direct and discharge Morgan Stanley employees, (c) or a person who Morgan Stanley delegated the management of part of its business. Atwan's actions regarding his breaches of contract and the torts he committed while "advising" Collingwood regarding investment decisions are directly related to the business of Morgan Stanley and the role Atwan held as Managing Director of Morgan Stanley. As such, Morgan Stanley is responsible for the actions of Atwan.

In its motion to dismiss, Morgan Stanley argued that the pleading "is devoid of any factual assertion showing Atwan's allegedly wrongful and/or tortious performance of the Source Rock Agreement was in any way related to Morgan Stanley's business or his role as Managing Director of Morgan Stanley."

As a general rule, actions taken by a vice-principal of a corporation may be deemed to be the acts of the corporation itself with regard to his actions taken in the workplace. *Id.* at 884. However, the corporation will not be liable "if the vice-principal's misconduct occurred while he was acting in a personal capacity unrelated to his authority as a corporate vice-principal." *Id.* at 884–85. We have stated that for a vice-principal's tortious acts to be attributed to a corporation, the acts must be "referable to the corporation's business." *Apple Tree Café Touring, Inc. v. Levantino*, No. 05-16-01380-CV, 2017 WL 3304641, at *9 (Tex. App.—Dallas Aug. 3, 2017, pet. denied) (mem. op.).

Here, Collingwood has not alleged any facts suggesting that Atwan's conduct in transactions involving Collingwood was related to the business of Morgan Stanley in any manner. Indeed, as we discussed above, Collingwood's factual allegations

stress that Atwan's actions during the relationship with Collingwood were undertaken for his personal benefit.

While Atwan's title suggests that he held a significant position in Morgan Stanley's business structure, Collingwood has failed to allege facts that, if proved, would establish that Atwan's actions in relation to Collingwood were referable either to the business of Morgan Stanley or to his position within Morgan Stanley. We conclude that this cause of action has no basis in law, and the trial court did not err by dismissing it.

We conclude that each cause of action pleaded against Morgan Stanley lacked a basis in law under Rule 91a. Accordingly, the trial court correctly granted Morgan Stanley's motion to dismiss. We overrule Collingwood's first appellate issue.[11]

Motion for Reconsideration

In its third issue, Collingwood argues that the trial court erred by denying its Motion for Reconsideration of Morgan Stanley's Motion to Dismiss. The motion incorporated all of Collingwood's original arguments made in response to the dismissal motion, and contended that the trial court had applied a "no-evidence standard" rather than the appropriate no-basis-in-fact-or-law standard mandated by Rule 91a. Collingwood accused Morgan Stanley of making "unsupported, conclusory factual allegations and obvious attempts to shift an evidentiary burden to

[11] Given our resolution of Collingwood's first issue on the absence of a basis in law, we need not address its second issue on appeal contending that all of its causes of action had a basis in fact.

[Collingwood]" when it had not had the opportunity to obtain controverting evidence through discovery.

To underscore that complaint, Collingwood pointed the trial court to an email it had received in discovery after Morgan Stanley's dismissal from the lawsuit. Collingwood alleged the email "show[ed] Morgan Stanley knew of Defendant Atwan's scheme" before the suit was filed and gave its "seeming agreement to its Managing Director's arrangement." The email at issue was a response to one from the Chairman and CEO of Reliant Energy, Inc. concerning Atwan's efforts to set up a meeting between him and Razon. Collingwood attached the email, which included the following statement:

> As we discussed yesterday, I will lead this effort with Ricky through a vehicle I've established separate from Morgan Stanley (and that they're fine with as it doesn't conflict).

According to Collingwood, this email "[n]ot only [shows] evidence, should the Court desire it, of Morgan Stanley's knowledge of Defendant Atwan's scheme, it calls into question the conclusory factual representations Morgan Stanley made to this Court in consideration of Morgan Stanley's Motion to Dismiss. As a result, Plaintiffs should be entitled to reasonable discovery regarding" a long list of issues related to its claims. The motion made no reference to Rule 91a's mandate that evidence could not be considered. The trial court denied the motion.

We review the trial court's denial of a motion for reconsideration for an abuse of discretion. *Henry v. Halliburton Energy Servs., Inc.*, 100 S.W.3d 505, 510 (Tex.

App.—Dallas 2003, pet. denied). On appeal, Collingwood does move its evidentiary argument to a footnote, but there asserts: "Although evidence cannot be considered in determining a Rule 91a motion, in light of the trial court's granting the motion based on a no-evidence standard, it is noteworthy that the motion for reconsideration was based in part on evidence supporting Collingwood's allegations." We disapprove of this effort to bootstrap prohibited evidence via reconsideration.

The trial court properly refused to consider the email evidence. We discern no abuse of discretion in its denial of the motion for reconsideration. We overrule Collingwood's third issue.

Attorney's Fees and Costs

In its fourth issue, Collingwood asks us to reverse the trial court's order awarding Morgan Stanley $12,500 in attorney's fees and costs. Rule 91a provides that "the court may award the prevailing party on the motion all costs and reasonable and necessary attorney fees incurred with respect to the challenged cause of action in the trial court." TEX. R. CIV. P. 91a.7. Collingwood argues only that, based on the arguments in its preceding three issues, Morgan Stanley should not be considered the prevailing party under Rule 91a. We have affirmed the trial court's Order dismissing each of Collingwood's causes of action, confirming that Morgan Stanley was the prevailing party on the motion to dismiss. Accordingly, we deny Collingwood's fourth issue and affirm the trial court's award of attorney's fees and costs.

Conclusion

We overrule Collingswood’s issues on appeal and affirm the trial court’s December 15, 2020 Order.

/Maricela M. Breedlove/
MARICELA M. BREEDLOVE
JUSTICE