Reversed and Rendered in part; Remanded in part and Opinion Filed May 2, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00714-CV

GLENN MCCAIN, INDIVIDUALLY AND AS NEXT FRIEND OF D.M., Appellant
V.
PROMISE HOUSE, INC. AND ARCH INSURANCE COMPANY, Appellees

On Appeal from the 162nd Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-14-13980

MEMORANDUM OPINION

Before Justices Bridges, Fillmore, and Stoddart
Opinion by Justice Bridges

Glenn McCain, individually and as next friend of D.M., appeals the trial court's summary judgment in favor of Promise House, Inc. and Arch Insurance Company. In two issues, McCain argues the trial court erred in granting summary judgment for Promise House and Arch and denying summary judgment in favor of McCain. We reverse the trial court's judgment, render judgment that McCain recover against both Promise House and Arch under the $400,000 settlement agreement, and remand this case to the trial court so that the settlement agreement can be approved by the guardian ad litem and for further proceedings consistent with this opinion.

In December 2014, McCain sued Promise House alleging claims of negligence, negligent hiring, negligent supervision, negligent training, negligence per se, and breach of fiduciary duty. McCain alleged his eleven-year-old son, D.M., was physically and sexually abused by an "older

male individual" while D.M. was a resident of Promise House, a residential social services care facility.

Prior to the McCain lawsuit, in January 2013, Promise House obtained a commercial general liability insurance policy from Arch. The policy contained a "sexual or physical abuse liability endorsement" providing the following:

> [Arch] will pay those sums that [Promise House] becomes legally obligated to pay as "damages" because of "bodily injury" or "personal and advertising injury" to which this policy applies arising out of "sexual or physical abuse."
>
> [Arch] will have the right and duty to defend [Promise House] against any "suit" seeking those "damages." However, [Arch] will have no duty to defend [Promise House] against any "suit" seeking "damages" for "bodily injury" or "personal and advertising injury" to which this insurance does not apply. [Arch] may, at our discretion, investigate any act of "sexual or physical abuse" and settle any claim or "suit" that may result.

After McCain filed the underlying lawsuit, Promise House filed a claim under the policy requesting that Arch provide it with a defense. Arch retained counsel to represent Promise House, and counsel filed an answer on behalf of Promise House on December 15, 2014.

On January 14, 2015, counsel for Promise House sent a letter to McCain's counsel pursuant to Rule 11 of the rules of civil procedure. The letter provided as follows:

> Pursuant to discussions today, please allow this correspondence to serve as a Rule 11 Agreement wherein [McCain has] agreed to settle and release any and all claims, or potential claims, against [Promise House] for a total of Four Hundred Thousand and 00/100 Dollars ($400,000). This is a full and final release of all claims which were brought or could have been brought related to the incident at issue. This settlement will be memorialized in a final settlement agreement. As previously discussed, the parties have further agreed they will file for the appointment of a guardian ad litem.
>
> Please confirm this agreement by signing below. Thank you for your immediate attention to this matter.

The Rule 11 agreement was already signed by counsel for Promise House, and McCain's counsel signed the agreement upon receipt and returned it. On January 29, 2015, another attorney at the firm representing Promise House informed a mediator involved in the case that the matter had

"settled per a Rule 11 Agreement and we have a Court appointed Guardian Ad Litem to review the proposed settlement," and mediation would not be necessary.

On March 2, 2015, counsel for Promise House emailed McCain's counsel the following:

> As we discussed, our client has placed us on notice that Promise House, Inc. objects to the proposed settlement of this matter, and does not and will not consent to the occurrence of same. Further, we have been advised by Promise House, Inc. that counsel . . . should immediately inform the Plaintiff's counsel that the conditional settlement offer is withdrawn because a condition precedent to the occurrence of the putative settlement – signature of a formal agreement by Promise House, Inc., – will not occur, and that there will be no settlement because Promise House, Inc. has not provided its consent to the same, which it believes is a requirement to any settlement by the insurer.

The next day, McCain's counsel filed the Rule 11 agreement with the trial court. The day after that, McCain filed an amended petition asserting breach of contract claims against Promise House and Arch. Specifically, McCain alleged Promise House breached the Rule 11 agreement and caused $400,000 in damages to McCain. McCain sought a court order requiring Promise House to deposit $400,000 into the registry of the court for the guardian ad litem to consider for approval on behalf of D.M. As to Arch, McCain alleged Arch's "refusal to tender the amount on behalf of its insured Promise House constitutes a breach of the Rule 11 Settlement Agreement and the insurance policy between Promise House and Arch which has caused damages to [McCain] in the amount of $400,000."

On May 13, 2015, McCain filed a traditional motion for summary judgment against Arch. McCain alleged the Rule 11 agreement constituted a settlement agreement that "contain[ed] all the essential terms and [was] binding and enforceable as a matter of law." Moreover, McCain alleged, Arch had a contractual obligation under the insurance policy to pay the settlement proceeds approved by Arch and agreed to by McCain and Promise House in the Rule 11 agreement. The motion characterized Arch's "refusal to pay the $400,00.00 settlement amount set forth in the Rule 11 settlement agreement" as a breach of its duty under the insurance policy. In support of the

motion, McCain attached the Rule 11 agreement, copies of certain pleadings in the case, Arch's response to McCain's request for disclosure, and the affidavit of McCain's attorney.

The affidavit stated McCain's attorney received "the Rule 11 Settlement Agreement" from counsel for Promise House on January 14, 2015. The rule 11 agreement was signed by counsel for Promise House, and McCain's attorney signed it and returned it. On January 29, 2015, McCain's attorney received a letter from counsel for Promise House stating "This matter has settled per a Rule 11 Agreement and we have a Court appointed Guardian Ad Litem to review the proposed settlement." On March 2, 2015, counsel for Promise House sent an email stating, among other things, that the "conditional settlement offer" was withdrawn, and Promise House did not consent to the "proposed settlement." On October 19, 2015, the trial court denied McCain's motion for summary judgment against Arch.

On November 6, 2015, Promise House filed a motion for partial summary judgment seeking to have McCain's breach of contract claims against Promise House dismissed. The motion was based on the grounds that (1) Promise House's lawyer was not authorized to agree to a settlement or bind Promise House to a settlement agreement, and he signed the Rule 11 agreement without Promise House's knowledge, consent, authorization, or approval; (2) the Rule 11 agreement was "merely an agreement to agree to a settlement in the future, not an agreement to settle"; and (3) the Rule 11 agreement was unenforceable because of its vagueness and the lack of essential terms. The motion was supported by the affidavit of Promise House's president, Dr. Ashley Lind, who stated Promise House did not consent to a settlement of this case or any of the claims in this case.

On December 18, 2015, McCain filed a traditional motion for summary judgment against Promise House seeking to enforce the Rule 11 agreement. McCain argued (1) Rule 11 agreements may be signed by counsel, and the signature of the individual parties to the suit is not required; (2)

an insurance contract may provide an insurer an absolute right to settle claims; and (3) an insurer has a duty to accept a demand within policy limits if an ordinarily prudent person managing his own business would have accepted the offer. McCain argued that, in this case, Arch provided Promise House a defense pursuant to an insurance policy, Arch had a right to settle the case, Promise House's attorney retained by Arch drafted and executed the Rule 11 settlement agreement, Arch agreed that a $400,000 settlement was reasonable, and the Rule 11 agreement contained all essential terms. Therefore, McCain argued, summary judgment on his breach of contract claim against Promise House was proper.

On February 1, 2016, the trial court granted Promise House's motion for partial summary judgment and dismissed McCain's breach of contract claims against Promise House. On February 9, 2016, the trial court denied McCain's motion for summary judgment against Promise House. On March 2, 2016, Arch filed a traditional and no-evidence motion for summary judgment against McCain asserting that McCain did not have standing to assert a breach of contract claim against Arch because McCain was neither a party nor a third-party beneficiary of any contract with Arch. On March 21, 2016, the trial court granted Arch's traditional and no-evidence motion for summary judgment and dismissed McCain's claims against Arch. On June 13, 2016, the trial court entered its final judgment ordering that McCain take nothing on his claims against Promise House and Arch. This appeal followed.

In two issues, McCain argues the trial court erred in granting summary judgment in favor of Promise House and Arch. Specifically, McCain argues Promise House, pursuant to the insurance policy, gave Arch the absolute right to settle all claims, and Arch, through its assigned defense counsel, authorized and approved a settlement with McCain that bound Arch to pay the settlement.

We review the trial court's decision to grant summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). Although the denial of summary judgment is normally not appealable, we may review such a denial when both parties moved for summary judgment and the trial court granted one and denied the other. *Id.* We review the summary judgment evidence presented by each party, determine all questions presented, and render judgment as the trial court should have rendered. *Id.*

A party seeking a no-evidence summary judgment must assert that no evidence exists as to one or more of the essential elements of the nonmovant's claim on which the nonmovant would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i); *Henning v. OneWest Bank FSB*, 405 S.W.3d 950, 957 (Tex. App.—Dallas 2013, no pet.). "The motion must state the elements as to which there is no evidence." TEX. R. CIV. P. 166a(i); *Henning*, 405 S.W.3d at 957. Once the movant specifies the elements on which there is no evidence, the burden shifts to the nonmovant to raise a fact issue on the challenged elements. *See* TEX. R. CIV. P. 166a(i); *Henning*, 405 S.W.3d at 957; *see also S.W. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). We review a no-evidence motion for summary judgment under the same legal sufficiency standard used to review a directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003); *Flood v. Katz*, 294 S.W.3d 756, 762 (Tex. App.—Dallas 2009, pet. denied). Our inquiry focuses on whether the nonmovant produced more than a scintilla of probative evidence to raise a fact issue on the challenged elements. *See King Ranch*, 118 S.W.3d at 751; *Flood*, 294 S.W.3d at 762. Evidence is no more than a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *King Ranch*, 118 S.W.3d at 751. If a no-evidence motion for summary judgment and a traditional motion for summary judgment are filed which respectively asserts the plaintiff has no evidence of an element of its claim and alternatively asserts that the movant has conclusively

negated that same element of the claim, we address the no-evidence motion for summary judgment first. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

To prevail on a traditional summary judgment motion, a movant has the burden of proving that he is entitled to judgment as a matter of law and that there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cunningham v. Tarski*, 365 S.W.3d 179, 185-86 (Tex. App.—Dallas 2012, pet. denied). When a defendant moves for summary judgment, he must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of an affirmative defense, thereby defeating the plaintiff's cause of action. *Cunningham*, 365 S.W.3d at 186. In determining whether there is a genuine fact issue precluding summary judgment, evidence favorable to the nonmovant is taken as true and the reviewing court makes all reasonable inferences and resolves all doubts in the nonmovant's favor. *Id.*; *Nixon v. Mr. Prop. Mgmt. Co., Inc.*, 690 S.W.2d 546, 548–49 (Tex. 1985). A matter is conclusively established if reasonable minds cannot differ as to the conclusion to be drawn from the evidence. *Cunningham*, 365 S.W.3d at 186; *see also City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). Once a movant conclusively establishes an affirmative defense, the burden of production shifts to the nonmovant to present summary judgment evidence that raises a fact issue on at least one element of the movant's affirmative defense or an exception or defense to that affirmative defense. *Cunningham*, 365 S.W.3d at 186. Where, as here, the trial court's order granting summary judgment does not specify the grounds relied upon, we must affirm the summary judgment if any of the summary judgment grounds are meritorious. *Id.*

An insurer which, under the terms of its policy, assumes control of a claim, investigates the claim and hires an attorney to defend the insured, becomes the agent of the insured and the attorney becomes the sub-agent of the insured. *Ranger Cty. Mut. Ins. Co. v. Guin*, 723 S.W.2d 656, 659 (Tex. 1987). An insurer is held to that degree of care and diligence which an ordinary

prudent person would exercise in the management of his own business. *Id.* If an insurer refuses an offer of settlement when it appears that an ordinary prudent person in the insured's situation would have settled, the insurer may be held liable for damages. *Id.*

When the language of an insurance contract unambiguously vests the insurer with an absolute right to settle third-party claims in its own discretion and without the insured's consent, we will not engraft any consent requirement onto the contract. *See Dear v. Scottsdale Ins. Co.*, 947 S.W.2d 908, 913-14 (Tex. App.—Dallas 1997, writ denied), *disapproved of on other grounds*, *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 122 (Tex. 2001). Courts will not rewrite the language of the parties' unambiguous contract. *Dear*, 947 S.W.2d at 914 (citing *Bair v. Voelker Realty Co.*, 589 S.W.2d 867, 869 (Tex. Civ. App.—Dallas 1979, no writ)). In *Dear*, a panel of this Court concluded that, by purchasing an insurance policy that did not provide him the right to veto settlement of third-party claims, Dear gave up the right to complain that any settlement the insurer entered somehow damaged him. *Id.* Because the appellant did not choose to purchase a "consent clause" policy, a panel of this Court declined to rewrite the policy to provide a provision for which the appellant did not bargain. *Id.*

A settlement agreement satisfies the requirements of Rule 11 if it is (1) in writing, (2) signed, and (3) filed with the court or entered in open court prior to a party seeking enforcement. TEX. R. CIV. P. 11; *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995); *Staley v. Herblin*, 188 S.W.3d 334, 336 (Tex. App.—Dallas 2006, pet. denied). It is not required that all of the terms of a settlement agreement be contained within a single document to comply with rule 11. *Staley*, 188 S.W.3d at 336; *see Padilla*, 907 S.W.2d at 461–62. Courts construe Rule 11 settlement agreements just as they would any contract. *MKM Eng'rs, Inc. v. Guzder*, 476 S.W.3d 770, 778 (Tex. App. —Houston [14th Dist.] 2015, no pet.); *see Padilla*, 907 S.W.2d at 460–61. The intent of the parties to be bound is an essential element of an enforceable contract. *MKM Eng'rs*, 476 S.W.3d at 778;

s*ee also Foreca, S.A. v. GRD Dev. Co.*, 758 S.W.2d 744, 746 (Tex. 1988). A Rule 11 settlement agreement also must contain all the essential terms of the settlement. *Padilla*, 907 S.W.2d at 460; *MKM Eng'rs*, 476 S.W.3d at 778. Essential or material terms of a Rule 11 settlement agreement include payment terms and release of claims. *MKM Eng'rs*, 476 S.W.3d at 778; s*ee Padilla*, 907 S.W.2d at 460–61. Essential terms are those terms that the parties "would reasonably regard as vitally important elements of their bargain." *MKM Eng'rs*, 476 S.W.3d at 778; *Potcinske v. McDonald Prop. Invs., Ltd.*, 245 S.W.3d 526, 531 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Agreements to enter into future contracts are enforceable if they contain all material terms. *McCalla v. Baker's Campground, Inc.*, 416 S.W.3d 416, 418 (Tex. 2013) (per curiam); *MKM Eng'rs*, 476 S.W.3d at 778. Thus, a binding settlement may exist when parties agree upon some terms, understanding them to be an agreement, and leave other terms to be made later. *MKM Eng'rs*, 476 S.W.3d at 778. A settlement agreement containing all necessary terms is enforceable as a matter of law. *McCalla*, 416 S.W.3d at 416; *MKM Eng'rs*, 476 S.W.3d at 778.

A written settlement agreement may be enforced even though one party withdraws consent before judgment is rendered on the agreement. *Mantas v. Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996). But, where consent has been withdrawn, a court may not render judgment on the settlement agreement, but may enforce it only as a written contract. *Mantas*, 925 S.W.2d at 658; *Staley*, 188 S.W.3d at 336. Accordingly, the party seeking enforcement must pursue a separate breach of contract claim which is subject to the normal rules of pleading and proof. *Mantas*, 925 S.W.2d at 658; *Staley*, 188 S.W.3d at 336. Where fact issues are raised or consent has been withdrawn, the only method available for enforcing a settlement agreement is through summary judgment or trial. *Staley*, 188 S.W.3d at 336; *see Mantas*, 925 S.W.2d at 658–59. A claim to enforce a disputed settlement agreement should be raised through an amended pleading or counterclaim asserting breach of contract. *Padilla*, 907 S.W.2d at 462; *Staley*, 188 S.W.3d at 336.

Here, the insurance policy between Arch and Promise House gave Arch the right, at its discretion, to "investigate any act of 'sexual or physical abuse' and settle any claim or 'suit' that may result." After McCain filed the underlying lawsuit, Promise House filed a claim under the policy requesting that Arch provide it with a defense. Arch retained counsel to represent Promise House; thus, Arch became Promise House's agent, and the attorney became Promise House's sub-agent. *Ranger*, 723 S.W.2d at 659. Further, the policy did not provide Promise House the right to object to any settlement. By purchasing a policy that did not provide Promise House the right to veto settlement of third-party claims, Promise House gave up the right to complain that any settlement Arch entered somehow damaged Promise House. *Dear*, 947 S.W.2d at 914.

Counsel for Promise House drafted, signed, and sent a letter to McCain's counsel. Pursuant to an earlier discussion, the letter served as a Rule 11 agreement wherein McCain agreed to settle and release any and all claims against Promise House in exchange for a payment of $400,000. Although the letter stated it would be memorialized in a final settlement agreement, it clearly stated the intent of the parties to be bound to a payment of $400,000 in exchange for settlement of all McCain's claims against Promise House. *See MKM Eng'rs*, 476 S.W.3d at 778. The Rule 11 agreement was in writing, signed, and was filed with the court before McCain sought to enforce it; therefore, it satisfied the requirements of rule 11. *See* TEX. R. CIV. P. 11. After Promise House objected to the settlement, McCain filed the Rule 11 agreement with the trial court and amended his petition asserting breach of contract claims against Promise House and Arch. In addition, McCain filed a traditional motion for summary judgment against both Arch and Promise House seeking to enforce the Rule 11 agreement as a binding settlement agreement. We conclude the trial court erred in granting summary judgment in favor of Promise House and Arch and denying McCain's traditional motions for summary judgment against Arch and Promise House seeking to

recover $400,000 under the Rule 11 agreement. *See Nixon*, 690 S.W.2d at 548–49. We sustain McCain's first and second issues.

Accordingly, we reverse the trial court's judgment and render judgment that McCain recover against both Promise House and Arch under the $400,000 settlement agreement. *See Tex. Mun. Power Agency*, 253 S.W.3d at 192. We remand this case to the trial court so that the settlement agreement can be approved by the guardian ad litem and for further proceedings consistent with this opinion.

/David L. Bridges/
DAVID L. BRIDGES
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

GLENN MCCAIN, INDIVIDUALLY AND AS NEXT FRIEND OF D.M., Appellant

No. 05-16-00714-CV V.

PROMISE HOUSE, INC. AND ARCH INSURANCE COMPANY, Appellees

On Appeal from the 162nd Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-13980.
Opinion delivered by Justice Bridges.
Justices Fillmore and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and judgment is **RENDERED** that Glenn McCain, individually and as next friend of D.M., recover against both Promise House, Inc. and Arch Insurance Company under the parties' $400,000 settlement agreement. This case is **REMANDED** to the trial court so that the settlement agreement can be approved by the guardian ad litem and for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Glenn McCain, individually and as next friend of D.M., recover his costs of this appeal from appellees Promise House, Inc. and Arch Insurance Company.

Judgment entered May 2, 2018.