**Affirmed; Opinion Filed June 22, 2016.**

**In The**
# Court of Appeals
# Fifth District of Texas at Dallas

**No. 05-15-00678-CV**

**BRENDA PETERSON, INDIVIDUALLY AND AS NEXT FRIEND OF B.Q.P., A MINOR AND AS ADMINISTRATOR OF THE ESTATE OF JAMES Q. PETERSON, DECEASED, AND GARY PETERSON, Appellants**
**V.**
**FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY, Appellee**

**On Appeal from the 116th Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DC-14-05243**

## MEMORANDUM OPINION

Before Justices Lang, Brown, and Whitehill
Opinion by Justice Lang

Brenda and Gary Peterson, appellants, sued Farmers Texas County Mutual Insurance Company, appellee, for breach of contract, promissory estoppel, negligent misrepresentation, and "breach of bailment obligation/negligence." The trial court granted summary judgment for appellee. Appellants raise two issues: (1) The trial court erred in dismissing appellants' action because appellants have not alleged a cause of action for "spoliation"; instead, the lawsuit seeks a recovery on account of Farmers' failure to honor its agreement and promise to preserve material evidence at Appellants' request; and (2) the trial court erred by granting the motion for summary judgment because appellants' claims are not released by a settlement agreement in a separate lawsuit. We affirm the judgment of the trial court.

## I. FACTUAL AND PROCEDURAL CONTEXT

On January 20, 2010, James Peterson died while a passenger in a 2007 GMC Sierra driven by Seth Dozier. The vehicle crashed into a tree, Peterson's passenger airbag failed to deploy, and his seatbelt failed to restrain him. Dozier was insured by Farmers Texas County Mutual Insurance Company ("Farmers").

On February 10, 2010, counsel for appellants wrote a letter to Farmers requesting that Farmers "preserve" the 2007 GMC Sierra that was involved in the accident. That letter stated, in pertinent part:

> Please be advised that I have been retained to represent the interests of the above names claimants [sic] regarding an automobile collision involving Mr. Seth Dwayne Dozier, a driver insured by Farmers Insurance Company, whose negligence caused the death of Mr. James Quail Peterson on January 20, 2010.
>
> You are notified and requested to preserve all evidence, including but not limited to:
>
> 1. the 2007 GMC Sierra 1500 owned by Mr. Dozier which was involved in the collision;
> 2. all physical evidence or tangible things recovered at the scene of the collision, from the interior or exterior of the vehicle, or from any driver or witness
>
> . . .
>
> Under the doctrine of spoliation of evidence, I am requesting that you preserve all of the above items. . . .
>
> Although this case is not yet in litigation I do not want to be faced with a situation where six months down the road Farmers Insurance Company and/or its insured claims that they destroyed the items requested to be preserved under the explanation that it is not its or his normal practice to keep such information.

Farmers responded by letter to appellants' counsel on February 11, 2010, stating, in pertinent part:

> In response to your letter dated February 10th, 2010. [sic] We are placing the vehicle in question on hold at IAA-Dallas South, 200 Mars Road Wilmer TX 75172, and phone number (972) 525-6401 under stock number 6483313.
>
> Please advise when you will be inspecting the vehicle and I will call to allow inspection.

Appellants sued Dozier and Farmers.[1] However, all parties settled that suit pursuant to a document titled "Settlement Agreement and Release." The settlement agreement was structured with recitals A through C stated at the beginning, and the release provision followed later in the document. Those recitals are as follows:

> A. Releasor alleges injury and damages resulting from an accident which occurred on or about January 20, 2010 in Somervell County, Texas, as more particularly escribed in Plaintiff's Petition on file in Cause Number C10125; *Gary Peterson, Brenda Peterson, Individually and as Next Friend of BrookLynn Quail Peterson, a Minor v. Seth Dwayne Dozier*, in the 294th District Court of Somervell County, Texas.
>
> B. Insurer is the liability insurer of the Releasee, and as such, would be obligated to pay any judgment obtained against Releasee which is covered by its policy with Releasee.
>
> C. The parties desire to enter into this Settlement Agreement in order to provide for certain payments in full settlement and discharge of all claims which have or might be made, by reason of the incident described in Recital A above upon the terms and conditions as set forth below.

The release provision of the settlement agreement states, in pertinent part:

> In consideration of the payments called for herein, the Releasor hereby completely releases and forever discharges Releasee, the Insurer, and their past, present and future officers, directors, stockholders, attorneys, agents, servants, representative, [sic] employees, subsidiaries, affiliates, partners, predecessors and successor in interest, and assigns and all other persons, firms or corporations with whom any of the former have been, are now, or may hereafter be affiliated, of and from any and all past, present, or future claims, demands, obligations, actions, causes of action, wrongful death claims, rights, damages, costs, losses of services, expenses and recovery and whether for compensatory or punitive damages, which the Releasor now has, or which may hereafter accrue or otherwise be acquired, or which are the subject of or may in any way grow out of the incident described in Recital A above, including, without limitation, any and all known or unknown claims for bodily and personal injuries to Releasor and to the minor, or any future wrongful death claim of Releasor's representatives or heirs, which have resulted or may result from the alleged acts or omissions of the Releasee. This Release, on the part of the Releasor, shall be a fully binding and complete settlement between the Releasor, the Releasee and the Insurer, their assigns and successors, save only the executory provisions of this Settlement Agreement and Release.

At the request of the parties, on January 12, 2011, the trial court signed a final judgment implementing the parties' settlement agreement. Then, on or about April 19, 2011, Farmers

[1] The record does not reflect on what date this lawsuit was filed or what causes of action appellants' asserted against Dozier and Farmers.

informed counsel for appellants that it no longer possessed Dozier's vehicle, and that the vehicle had been "parted out" and sold in 2010.[2] As a result, the vehicle no longer contained the "vent data recorder" or airbags, and the seatbelts had been "cut and/or tampered with."

On January 10, 2012, appellants sued General Motors LLC, Takata Corporation, TK Holdings, Inc., and James Woods Motors, Inc. alleging causes of action for products liability and negligence. That lawsuit settled. According to appellants, "the settlement was at a reduced value" because "the vehicle lacked data and parts that were vital to the prosecution of appellants' claims." Then, on May 16, 2014, appellants sued Farmers asserting claims for breach of contract, promissory estoppel, negligent misrepresentation, and "breach of bailment obligation/negligence," contending that "Farmers failed to exercise ordinary care and thus breached the standard of care owed by an insurance company with regard to maintaining and preserving the Sierra and instead allowing it to be sold for parts." On March 12, 2015, Farmers filed a traditional motion for summary judgment asserting "each of Plaintiffs' causes of action are barred pursuant to the Settlement Agreement and Release signed in 2011 wherein Plaintiffs released any and all claims and causes of action against Farmers and its Insured in exchange for payment of $25,000." The trial court granted summary judgment for Farmers. Appellants timely appealed.

## II. STANDARD OF REVIEW

We review rendition of a summary judgment de novo. *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). In reviewing a traditional summary judgment in favor of a defendant, "we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense." *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.). A matter is conclusively

[2] The record does not reflect what prompted Farmers to divulge this information to appellants' counsel.

proved if "ordinary minds could not differ as to the conclusion to be drawn from the evidence." *Estate of Hendler*, 316 S.W.3d 703, 707 (Tex. App.—Dallas 2010, no pet.).

The interpretation of an unambiguous contract is a question of law this Court reviews de novo. *See MCI Telecommunications Corp. v. Texas Utilities. Elec. Co.*, 995 S.W.2d 647, 650 (Tex. 1999).

## III. SCOPE OF THE SETTLEMENT AGREEMENT'S RELEASE

We address appellant's second issue first, which asserts "the trial court erred by granting the motion for summary judgment because appellants' claims are not covered by the Dozier Settlement Agreement."

### A. Applicable Law

Contract law applies to settlement agreements. *Stevens v. Snyder*, 874 S.W.2d 241, 243 (Tex. App.—Dallas 1994, writ denied). "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (citing *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980)). Courts should examine the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless. *Id.* (citing *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (1951)). No provision taken alone will be given controlling effect; rather, all the provisions must be considered with reference to the whole instrument. *Id.* (citing *Myers v. Gulf Coast Minerals Management Corp.*, 361 S.W.2d 193, 196 (Tex. 1962)). A reasonable interpretation of an agreement "will be preferred to one which is unreasonable." *Westwind Expl., Inc v. Homestate Sav. Ass'n*, 696 S.W.2d 378, 382 (Tex. 1985) (internal quotation omitted).

The question of whether a contract is ambiguous is one of law for the court. *Coker v. Coker*, 650 S.W.2d 391, 394 (Tex. 1983). A contract is not ambiguous if the contract's language

can be given a certain or definite meaning. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 806 (Tex. 2012). On the other hand, a contract is ambiguous when the rules of contract interpretation leave it genuinely uncertain which of two reasonable meanings is the proper meaning. *R & P Ent.*, 596 S.W.2d at 518; *see also Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). Not every difference in the interpretation of a contract amounts to an ambiguity. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). When a potential ambiguity arises, deciding whether the language is ambiguous is an issue of contract construction. *Candlelight Hills Civic Ass'n, Inc. v. Goodwin*, 763 S.W.2d 474, 477 (Tex. App—Houston [14th Dist.] 1988, writ denied).

Absent a finding of ambiguity, a court must interpret the meaning and intent of a contract from the four corners of the document without the aid of extrinsic evidence. *Westchester Fire Ins. Co.*, 31 S.W.3d at 658. Terms in the contract will be given their ordinary meaning unless the contract shows "the words were meant in a technical or different sense." *Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 385 (Tex. App.—Fort Worth 2009, no pet.).

"The recitals portion of a contract is a preliminary statement explaining the reasons for entering the contract, or the background of the transaction." *Mikob Properties, Inc. v. Joachim*, 468 S.W.3d 587, 597 n.4 (Tex. App.—Dallas 2015, pet. denied). "Recitals do not control over operative phrases unless there is an ambiguity." *Id.* "While we do not read the recitals as controlling, they are part of our consideration of the agreement in its entirety." *Id.*

**B. Application of Law to the Facts**

Appellants assert:

> The [settlement agreement] does not contemplate releasing Farmers from undetermined and uncertain future liability related to a promise it made not to release and preserve the subject vehicle. In fact, such future liability is specifically limited to future claims arising from the incident described in Recital A. The Dozier Settlement Agreement specifically states that it includes a release for all

> known or unknown claims for bodily and personal injuries or wrongful death claims.

Also, appellants argue the scope of the release provision is limited by Recital C, because "[t]he plain language in Recital C confirms the scope of the release as all claims 'which have or might be made, by reason of the incident described in Recital A.'"

Farmers responds that, "appellants' interpretation ignores the release provision's own scope defining language. The release provision itself releases claims 'which are the subject of or may in any way grow out of the incident described in Recital A above.' Recital A describes only one incident–the accident."

We agree with Farmers. While the release provision does identify "claims for bodily and personal injuries or wrongful death claims" as being among those claims released, the release provision explicitly states as follows that its scope is not limited to such claims:

> [T]he Releasor hereby completely releases and forever discharges Releasee, the Insurer, . . . from any and all past, present, or future claims, demands, obligations, actions, causes of action, wrongful death claims, rights, damages, costs, losses of services, expenses and recovery and whether for compensatory or punitive damages, which the Releasor now has, or which may hereafter accrue or otherwise be acquired, or which are the subject of or may in any way grow out of the incident described in Recital A above, including, *without limitation*, any and all known or unknown claims for bodily and personal injuries to Releasor and to the minor, or any future wrongful death claim of Releasor's representatives or heirs, which have resulted or may result from the alleged acts or omissions of the Releasee. (emphasis added).

Further, the release provision does not refer to or incorporate Recital C described above.

Appellants also assert in their second issue that the trial court erred in granting summary judgment for Farmers because the release provision is ambiguous as a matter of law. This ambiguity, they contend, creates a fact issue as to the parties' intent at the time of contracting. Specifically, appellants argue, without elaboration, "[i]f, in fact, the trial court questioned the scope of the release in the Dozier Settlement Agreement, it should have at least recognized there was more than one interpretation and declared the Dozier Settlement agreement ambiguous as a

matter of law." Appellants have not cited, nor have we found, anything in the record that indicates "the trial court questioned the scope of the release." A release provision is ambiguous if we are unable to give that provision "a certain or definite meaning." *See El Paso Field Servs., L.P.*, 389 S.W.3d at 806. As described above, we have concluded the release provision has a "definite meaning." Thus, we cannot conclude the release provision is ambiguous. *Id.*

We decide this issue against appellants. Accordingly, we need not decide address appellants' first issue.

## IV. CONCLUSION

The judgment of the trial court is affirmed.

/Douglas S. Lang/
DOUGLAS S. LANG
JUSTICE

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# Court of Appeals
# Fifth District of Texas at Dallas

## JUDGMENT

BRENDA PETERSON, INDIVIDUALLY AND AS NEXT FRIEND OF B.Q.P., A MINOR AND AS ADMINISTRATOR OF THE ESTATE OF JAMES Q. PETERSON, DECEASED, AND GARY PETERSON, Appellants

No. 05-15-00678-CV V.

FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY, Appellee

On Appeal from the 116th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-14-05243.
Opinion delivered by Justice Lang. Justices Brown and Whitehill participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee FARMERS TEXAS COUNTY MUTUAL INSURANCE COMPANY recover its costs of this appeal from appellants BRENDA PETERSON, INDIVIDUALLY AND AS NEXT FRIEND OF B.Q.P., A MINOR AND AS ADMINISTRATOR OF THE ESTATE OF JAMES Q. PETERSON, DECEASED, AND GARY PETERSON.

Judgment entered this 22nd day of June, 2016.